SURFACE TRANSPORTATION BOARD REPORTS

STB EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

Decided September 25, 2000

AGENCY: Surface Transportation Board
ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Surface Transportation Board (Board) seeks public comment on proposed modifications to its regulations at 49 CFR Part 1180 governing proposals for major rail consolidations. These proposed new rules would substantially increase the burden on applicants to demonstrate that a proposed transaction is in the public interest, requiring them, among other things, to demonstrate that the transaction would enhance competition as an offset to negative impacts resulting from service disruptions and competitive harms likely to be caused by the merger.

DATES: Comments are due on November 17, 2000. Replies are due on December 18, 2000. Rebuttal submissions are due on January 11, 2001.

ADDRESSES: An original and 25 copies of all paper documents filed in this proceeding must refer to STB Ex Parte No. 582 (Sub-No. 1) and must be sent to: Surface Transportation Board, Office of the Secretary, Case Control Unit, Attn: STB Ex Parte No. 582 (Sub-No. 1), 1925 K Street, N.W., Washington, DC 20423-0001. In addition to submitting an original and 25 copies of all paper documents, parties must submit to the Board, on 3.5-inch IBM-compatible floppy diskettes (in, or convertible by and into, WordPerfect 9.0 format), an electronic copy of each such paper document. Any party may seek a waiver from the electronic submission requirement.[1]

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[1] Documents transmitted by facsimile (FAX) or electronic mail (e-mail) will not be accepted.

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 565-1613. [TDD for the hearing impaired: 1-800-877-8339.]

SUPPLEMENTARY INFORMATION:

TABLE OF CONTENTS

BACKGROUND 7

OVERVIEW 8

PROPOSED REVISIONS TO § 1180.1 General policy statement 10
§ 1180.1(a): General 10
§ 1180.1(b): Consolidation criteria 11
§ 1180.1(c): Public interest considerations 12
§ 1180.1(c)(1): Potential benefits 13
§ 1180.1(c)(2): Potential harm 14
(i) Reduction of competition 14
(ii) Harm to essential services 14
(iii) Transitional service problems 14
(iv) Enhanced competition 14
§ 1180.1(d): Conditions 15
§ 1180.1(e): Labor protection 16
§ 1180.1(f): Environment and safety 17
§ 1180.1(g): Oversight 18
§ 1180.1(h): Service assurance and operational monitoring 18
§ 1180.1(i): Cumulative impacts and crossover effects 20
§ 1180.1(j): Inclusion of other carriers 20
§ 1180.1(k): Transnational issues 20
§ 1180.1(l): National defense 21
§ 1180.1(m): Public participation 21

PROPOSED TECHNICAL and INFORMATIONAL REVISIONS 21
§ 1180.0 Scope and purpose. 22

§ 1180.3 Definitions. 22
§ 1180.3(a): Applicant 22
§ 1180.3(b): Applicant carriers 23

§ 1180.4 Procedures. 23
§ 1180.4(a)(1): General 23
§ 1180.4(a)(4): Service Lists 24
§ 1180.4(b)(4): Prefiling notification 24
(i) A proposed procedural schedule 24
(ii) A proposed draft protective order 24
(iii) A statement of waybill availability for major transactions 24
(iv) A proposed voting trust 24
§ 1180.4(c)(6): Application format 26

§ 1180.4(d): Responsive applications 26
§ 1180.4(e): Evidentiary proceeding 26
§ 1180.4(e)(2). The evidentiary proceeding 26
§ 1180.4(e)(3). A final decision 26
§ 1180.4(f): Waiver or clarification. 27

§ 1180.6 Supporting information. 27
§ 1180.6(b)(1): Form 10-K (exhibit 6) 27
§ 1180.6(b)(2): Form S-4 (exhibit 7) 27
§ 1180.6(b)(3): Change in control (exhibit 8) 27
§ 1180.6(b)(4): Annual reports (exhibit 9) 28
§ 1180.6(b)(6): Corporate chart (exhibit 11) 28
§ 1180.6(b)(8): Intercorporate or financial relationships 29
§ 1180.6(b)(9): Employee impact exhibit 29
§ 1180.6(b)(10): Conditions to mitigate and offset merger harms 30
§ 1180.6(b)(11): Calculating public benefits 30
§ 1180.6(b)(12): Downstream merger applications 31
§ 1180.6(b)(13): Purpose of the proposed transaction 31

§ 1180.7 Market analyses. 31
§ 1180.7(a): For major and significant transactions 31
§ 1180.7(b): For major transactions 32
§ 1180.7(c): For significant transactions 33

§ 1180.8 Operational data. 33
§ 1180.8(a): For major transactions 33
(1) Safety integration plan 34
(2) Blocked crossings 34
Renumbering of existing § 1180.8(a) and (b) 34

§ 1180.10 Service assurance plans. 34
For major transactions 34
(a) Integration of operations. 34
(b) Coordination of freight and passenger operations 35
(c) Yard and terminal operations 35
(d) Infrastructure improvements 35
(e) Information technology systems 35
(f) Customer service 35
(g) Labor 35
(h) Training 35
(i) Contingency plans for merger-related service disruptions 35
(j) Timetable 36

§ 1180.11 Additional information needs for transnational mergers. 36

REQUEST FOR COMMENTS, REPLIES, AND REBUTTAL. 36

FILING INSTRUCTIONS 37
Paper copies; electronic copies 37
Document scanning 37
Fax and e-mail not accepted 38
Board releases available via the internet 38

VICE CHAIRMAN BURKES, Commenting 38

COMMISSIONER CLYBURN, Commenting 40

INTRODUCTION TO APPENDICES 52

APPENDIX A: Abbreviations 58

APPENDIX B: Short Form Citations 64

APPENDIX C: Class I Railroads and Related Interests 66
Association of American Railroads 66
National Railway Labor Conference 68
Burlington Northern and Santa Fe 70
Canadian National 78
Canadian Pacific 89
CSX 94
Kansas City Southern 100
Norfolk Southern 106
Union Pacific 116

APPENDIX D: Regional and Shortline Railroads 121
American Short Line and Regional Railroad Association 121
Cedar Rapids and Iowa City Ry. Co. 123
Chillicothe-Brunswick Rail Authority 123
Dakota, Minnesota & Eastern Railroad Corporation 125
Eastern Shore Railroad 126
Farmrail System 126
Finger Lakes Railway 129
Housatonic Railroad Company 132
Iowa Traction Railroad Company 133
Keokuk Junction Railway 134
Montana Rail Link, I&M Rail Link, and Southern Railway of B.C. 135
Texas Mexican Railway Company 136
Wisconsin Central System 137

Appendix E: Passenger Railroads and Related Interests 140
National Railroad Passenger Corporation 140
American Public Transportation Association 143
Southern California Regional Rail Authority 143
Regional Transportation Authority of Northeast Illinois (METRA) 144
NJ Transit 145

APPENDIX F: Rail Labor Interests 146
Rail Labor Division of the Transportation Trades Department AFL-CIO 146
Allied Rail Unions (BRS, IBB, NCFO, SMW, AND TWU) 151
Brotherhood of Maintenance of Way Employes 151
TCU, IBEW, ATDD, and IAM 151
Transport Workers Union of America 152
United Transportation Union 153
John D. Fitzgerald 154

APPENDIX G: Federal Agencies 155
U.S. Department of Agriculture 155
U.S. Department of Defense 157
U.S. Department of Transportation 159

APPENDIX H: Regional and Local Interests 169
California Public Utilities Commission 169
Iowa Department of Transportation 170
Kansas Agencies 170
Maryland 172
New York 175
North Dakota 177
Ohio Rail Development Commission 179
Oklahoma Department of Transportation 181
Virginia 183
City of Cleveland 184
Colorado Rail Competition Coalition 186
Buffalo Niagara Partnership 186
Greater Houston Partnership 186

APPENDIX I: Port Interests 187
The American Association of Port Authorities 187
The Washington State Ports Group (Ports of Seattle, Tacoma, and Everett) 189
The Port of Portland, Oregon 191
The Port of Corpus Christi Authority of Nueces County, TX 192
The Port of Houston Authority 192
The Port Authority of New York and New Jersey 193

APPENDIX J: Members of Congress 195
U.S. Representative John J. LaFalce 195
U.S. Representative Jerrold Nadler 196
U.S. Representative Jack Quinn 197

APPENDIX K: NITL, CURE, & ARC 198
National Industrial Transportation League 198
Consumers United for Rail Equity 201
Alliance for Rail Competition 202

APPENDIX L: Coal Interests 204
The Subscribing Coal Shippers Group 204
The Certain Coal Shippers Group 207
The Western Coal Transportation Association 210
The Eastern Coal Transportation Association 212
The Committee to Improve American Coal Transportation 213
Edison Electric Institute 218
Alliant Energy Corporation 220
Ameren Services Company 222
Central and South West Services 223
Consumers Energy Company 223
Intermountain Power Agency 224
Oklahoma Gas & Electric Company 225
The PPL Companies (PPL Utilities and PPL Montana) 226
Salt River Project Agricultural Improvement and Power District 229
Western Resources, Inc. 231

APPENDIX M: Chemicals, Plastics, and Related Interests 232
Chemical Manufacturers Association and American Plastics Council 232
Society of the Plastics Industry 235
BASF Corporation, the Oxy Companies, and Williams Energy Services 237
Dow Chemical Company 240
E. I. Du Pont De Nemours and Company 243
PPG Industries 245
Procter & Gamble 245
Shell Oil Company and Shell Chemical Company 247

APPENDIX N: Agricultural Interests 248
American Farm Bureau Federation 248
The Fertilizer Institute 251
National Grain and Feed Association 252
The Wheat, Barley & Grains Commissions Group 255
AG Processing Inc. 256
Bunge Corporation 257
Farmers Elevators Company 258
IMC Global Inc. 258

APPENDIX O: Minerals and Related Interests 260
National Mining Association 260
Glass Producers Transportation Council 261
U.S. Clay Producers Traffic Association 262
Bentonite Performance Minerals 263
Wyandot Dolomite, Inc. 263

APPENDIX P: Forest Products, Lumber, and Paper Interests 264
American Forest & Paper Association 264
Northwest Forestry Association 265
Empire Wholesale Lumber Co. 265
Mckinley Paper Company 267

Seneca Sawmill Company 267
Weyerhaeuser Company 268

APPENDIX Q: Automobile Manufacturers 269
Alliance of Automobile Manufacturers 269
General Motors Corporation 271
Toyota Logistics Services 271

APPENDIX R: Canadian Shipper Interests 272
Canadian Pulp and Paper Association; Western Canadian Shippers' Coalition 272
Council of Forest Industries 273
Canadian Resource Shippers Corporation 273

APPENDIX S: Transportation Intermediaries 275
Transportation Intermediaries Association 275
Crossroad Carriers Intermodal Co. 277
Transition Corporation 278
Twin Modal, Inc. 279

APPENDIX T: Miscellaneous Parties 279
Enron Corporation 279
Heppner Iron & Metal Company 281
Mayo Foundation D/B/A Mayo Clinic 281
North America Freight Car Association 281

BY THE BOARD:

BACKGROUND

By decision served March 17, 2000, in STB Ex Parte No. 582,[2] we announced that our current railroad merger regulations at 49 CFR Part 1180, Subpart A (49 CFR 1180.0 — 1180.9), are not adequate to address future major rail merger proposals that, if approved, would likely result in the creation of two North American transcontinental railroads. Shortly thereafter, we instituted a 15-month, 3-stage rulemaking proceeding to develop new, more up-to-date, merger regulations.[3]

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[2] *Public Views on Major Rail Consolidations*, 4 S.T.B. 546 (2000).

[3] Unless otherwise specified: all references in this decision to provisions of the United States Code are to the provisions of Title 49; and all references in this decision to provisions of the Code of Federal Regulations are likewise to the provisions of Title 49.

In an advance notice of proposed rulemaking (ANPR),[4] we sought comments and detailed proposals on a wide range of merger-related issues, including, but not limited to: competitive issues; downstream effects; the important role of smaller railroads in the rail network; service performance; the types of benefits to be considered in the balancing test, and how we should monitor those benefits; how we should view alternatives to mergers; employee issues (including "cram down"); and the international trade and foreign control issues that could be raised by future merger proposals.[5]

We have received comments from a wide range of parties:[6] Class I railroads and related interests (*see* Appendix C); regional and shortline railroads and related interests (*see* Appendix D); passenger railroads and related interests (*see* Appendix E); rail labor interests (*see* Appendix F); federal agencies (*see* Appendix G); regional and local interests (*see* Appendix H); port interests (*see* Appendix I); members of Congress (*see* Appendix J); NITL, CURE, & ARC (*see* Appendix K); coal interests (*see* Appendix L); chemicals, plastics, and related interests (*see* Appendix M); agricultural interests (*see* Appendix N); minerals and related interests (*see* Appendix O); forest products, lumber, and paper interests (*see* Appendix P); automobile manufacturers (*see* Appendix Q); Canadian shipper interests (*see* Appendix R); transportation intermediaries (*see* Appendix S); and miscellaneous parties (*see* Appendix T).

OVERVIEW

The ANPR reflected many of the broad-based concerns about our rail merger policy that were presented to us at our hearing in Ex Parte No. 582. In particular, the parties were deeply concerned about the declining number of Class I railroads and the transitional service problems that have accompanied recent major rail consolidations. We have received comments from over 100 parties in this proceeding, reflecting the wide-ranging views of railroads, shippers, rail labor, federal agencies, members of Congress, and others. As shown in the detailed summary of the comments attached to this notice, there has been much

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[4] *Major Rail Consolidation Procedures*, 4 S.T.B. 570 (2000); published at 67 Fed. Reg. 18,021 (2000).

[5] We also indicated, in the ANPR, that we intended to propose necessary technical updates or corrections to the merger rules at the notice of proposed rulemaking (NPR) stage, and we invited commenters to identify, and to offer textual suggestions for modifying, existing provisions within 49 CFR Part 1180 that are out-of-date or otherwise in need of correction.

[6] Abbreviations used in this decision are listed in Appendix A. Short case citation forms used in this decision can be found in Appendix B.

hard work and careful thought by the parties. Their comments have been very helpful to us in formulating guidelines covering the content of future applications, public participation in the process, and how we should assess future proposals. The centerpiece of our proposed rules is a new merger policy statement. We are now proposing what we believe would provide an appropriate framework for considering future major railroad merger proposals.

The existing policy statement (49 CFR 1180.1) (established in 1979, and modified in 1981), which has guided the review by us and by the Interstate Commerce Commission (ICC) of all rail merger proposals for more than 20 years, is decidedly pro-merger. It was predicated upon the notion that there was a pressing need for the nation's rail carriers to reorganize their operations on a more economically efficient and sustainable basis. Twenty years ago, railroad rates of return were at record lows and many major rail carriers were either in or near bankruptcy. Railroads desperately needed to reduce excess capacity and increase the efficiency of their operations.

Our proposed revisions to the § 1180.1 policy statement represent a paradigm shift in our review of major mergers. Through mergers and other activities, railroads have now reduced most or all of their excess capacity, and have greatly improved the efficiency of their operations. The last round of consolidations resulted in significant transitional service problems, which could recur with future mergers. Thus, at this point, we believe that it is appropriate to require merger applicants to bear a heavier burden to show that a major merger proposal is in the public interest. Therefore, reflective of the record we have accumulated, the significant changes that have taken place in the rail industry, and the merger-related service problems that have been experienced, we are proposing important changes in the policy and procedures governing our assessment of major rail merger applications.

The comments we have received are extremely diverse, and include both very general and quite specific proposals, as outlined in the attached appendices. BNSF, CN and AAR argued essentially that we should maintain the status quo with minor revisions. Other Class I railroads have suggested various revisions that, although moderate, would definitely raise the bar for merger approval. All of the railroads, including the Class II and III railroads, cautioned that we should not do anything to undermine the financial integrity of the rail system.

Some shippers and shipper organizations urged that we should restructure the entire rail industry to introduce railroad competition everywhere, regardless of whether we do so in the context of merger regulation or not. Other shippers and shipper organizations argued that we should make a broad scheme of "open access" a quid pro quo for any future merger approvals. Some shippers, who supported the subsequently withdrawn BNSF/CN merger proposal, urged that we not make any changes in our rules that might jeopardize that transaction. Many shippers, shortline railroads, and others focused on avoiding a recurrence of the major service disruptions that accompanied the implementation of several recent mergers that we approved.

Rail labor parties expressed concern about issues such as modification of collective bargaining agreements, loss of jobs, and the need to relocate to retain a job. Many parties, including several government agencies and rail labor, expressed concern about various implications of international mergers. Several parties, including local communities and rail labor, commented about safety and environmental issues. Many parties commented about the interrelatedness of the various components of the rail transportation network and the downstream effects of any major merger upon the ultimate structure of the industry.

In formulating our proposed merger policy and rules, we have borrowed from or been guided by many of the proposals put forth in the record. The proposed new rules, including a new rail merger policy statement, are set forth in italics below, followed by a narrative discussing each of the changes that we propose. Those existing rules not cited in this document would remain unchanged.

PROPOSED REVISIONS TO § 1180.1 General policy statement for merger or control of at least two Class I railroads.

Proposed § 1180.1(a): General. To meet the needs of the public and the national defense, the Surface Transportation Board seeks to ensure balanced and sustainable competition in the railroad industry. The Board recognizes that the railroad industry (including Class II and III carriers) is a network of competing and complementary components, which in turn is part of a broader transportation infrastructure that also embraces the nation's highways, waterways, ports, and airports. The Board welcomes private sector initiatives that enhance the capabilities and the competitiveness of this transportation infrastructure. Although mergers of Class I railroads may advance our nation's economic growth and competitiveness through the provision of more efficient and responsive transportation, the Board does not favor consolidations that reduce the railroad and other transportation alternatives available to shippers unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved. Such public benefits include improved service, enhanced competition, and greater economic efficiency. The Board also will look with disfavor on consolidations under which the controlling entity does not assume full responsibility for carrying out the controlled carrier's common carrier obligation to provide adequate service upon reasonable demand.

The existing merger policy statement set forth in our current rules at § 1180.1 was unequivocally geared towards assisting railroads in rationalizing the nation's rail system and eliminating excess capacity. In contrast, our proposed revision to the rules would recognize that this process has now largely been completed, and that the efficiencies and service improvements to be realized from further downsizing of rail route systems are limited. While the existing policy statement focuses on greater economic efficiency and improved service as the most likely and significant public interest benefits, our proposed statement adds and highlights enhanced competition as an important public interest benefit, recognizing that, with only a few Class I carriers remaining, a transaction involving two Class I rail carriers will affect the entire transportation system, including highways, waterways, ports, and airports. Thus, before we approve any major transaction — which in turn may, and likely will, result in responsive merger proposals by other Class I carriers — we must be confident that at the end of the day a balanced and sustainable rail transportation system is in place. This also means that any companies that result from an additional (perhaps final) round of consolidations must be able to compete effectively and deliver necessary services, now and into the future. Finally, any entity seeking control, whether by a transaction subject to our jurisdiction or not, must assume full responsibility for carrying out the controlled carrier's common carrier obligation, and we will exercise our authority to the fullest extent to ensure compliance.

Proposed § 1180.1(b): Consolidation criteria. The Board's consideration of the merger or control of at least two Class I railroads is governed by the public interest criteria prescribed in 49 U.S.C. 11324 and the rail transportation policy set forth in 49 U.S.C. 10101. In determining the public interest, the Board must consider the various goals of effective competition, carrier safety and efficiency, adequate service for shippers, environmental safeguards, and fair working conditions for employees. The Board must ensure that any approved transaction will promote a competitive, efficient, and reliable national rail system.

This rule in our existing policy statement merely recites the statutory criteria. Our proposed language emphasizes that the Board must balance various, sometimes conflicting, goals in determining the public interest under our governing statute. While we have always used a balancing test, we are changing how we would weigh these goals and are adding new elements to the mix. We would upgrade the importance of competition. We would recognize that redundant capacity is no longer the issue it once was, and that improved carrier efficiency would not have the overriding priority in our balancing that it had before. We would give greater attention to the potential for transitional service harms. And we would place greater emphasis on the role of railroads (including Class II and III carriers) in the broader transportation infrastructure.

Proposed § 1180.1(c): Public interest considerations. The Board believes that mergers serve the public interest only when substantial and demonstrable gains in important public benefits—such as improved service, enhanced competition, and greater economic efficiency—outweigh any anticompetitive effects, potential service disruptions, or other merger-related harms. Although the Board cannot rule out the possibility that further consolidation of the few remaining Class I carriers could result in efficiency gains and improved service, the Board believes additional consolidation in the industry is also likely to result in a number of anticompetitive effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately. Additional consolidations could also result in service disruptions during the system integration period. To maintain a balance in favor of the public interest, merger applications must include provisions for enhanced competition. Unless merger applications are so framed, approval of proposed combinations where both carriers are financially sound will likely cause the Board to make broad use of the powers available to it in 49 U.S.C. 11324(c) to condition its approval to preserve and enhance competition. When evaluating the public interest, the Board will also consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation. The Board believes that other private sector initiatives, such as joint marketing agreements and interline partnerships, can produce many of the efficiencies of a merger while risking less potential harm to the public.

We propose to revise this rule to give specific recognition to various new factors in our balancing test, to clarify that certain factors may be weighed differently, and to require applicants to incorporate proposals for enhanced competition to maintain a balance in favor of the public interest.

Our recent experience has shown that, even with substantial advance planning, implementing large rail mergers may cause substantial service disruptions that delay or outweigh expected efficiency gains that should flow to the public. Under our proposed rule, these potential harms would be included in our balancing test. Moreover, we recognize that certain efficiency benefits of mergers may take several years to be realized by the carrier, and in some cases somewhat longer to flow through to the shipping public. Gains that can be experienced only over time would accordingly be given somewhat less weight, using a current value approach. We would also give increased consideration to the extent to which various claimed merger benefits can be achieved through cooperative agreements among carriers short of a merger. Given the size of the transactions with which we may be faced, and the dangers involved should these transactions fail, we would give increased scrutiny to claimed merger benefits.

Our proposed rule also recognizes that it is increasingly difficult to remedy certain competitive harms directly and proportionately. For example, we recognize that shippers who are served by a single rail carrier nevertheless benefit from having another carrier nearby. They may benefit through geographic competition, through the possibility of constructing (or threatening to construct) a connection to a second carrier, or by transloading freight by truck to a second carrier. Although we have imposed conditions specifically addressing concerns raised by the loss of such competitive constraints in prior mergers, this process may become increasingly difficult as the number of independent major railroads decreases, and the next available rail option moves farther away.

Because of the increased likelihood of transitional service problems and the difficulty of crafting appropriate conditions to mitigate competitive harm, our proposed rule requires applicants to provide a plan for enhancing competition. This new competition need not be directed to remedying specific competitive or other harms that are threatened by the merger. Competition can be enhanced in many ways and we do not want to limit the approaches that could be proposed to enhance competition here. The focus of such a plan for enhancing competition could be placed on enhancing intramodal, or rail-to-rail, competition, for example, the granting of trackage rights, the establishment of shared or joint access areas, the removal of "paper" and "steel" barriers, and other techniques that would preserve and enhance railroad competition. We would emphasize that, because competitive gains can be realized immediately, they would be given substantial weight as merger benefits and are likely to be extremely important to us in determining whether to approve a particular application.

Proposed § 1180.1(c)(1): Potential benefits. By eliminating transaction cost barriers between firms, increasing the productivity of investment, and enabling carriers to lower costs through economies of scale, scope, and density, mergers can generate important public benefits such as improved service, enhanced competition, and greater economic efficiency. A merger can strengthen a carrier's finances and operations. To the extent that a merged carrier continues to operate in a competitive environment, its new efficiencies will be shared with shippers and consumers. Both the public and the consolidated carrier can benefit if the carrier is able to increase its marketing opportunities and provide better service. A merger transaction can also improve existing competition or provide new competitive opportunities, and such enhanced competition will be given substantial weight in our analysis. Applicants shall make a good faith effort to calculate the net public benefits their merger will generate, and the Board will carefully evaluate such evidence. To ensure that applicants have no incentive to exaggerate these projected benefits to the public, the Board expects applicants to propose additional measures that the Board might take if the anticipated public benefits fail to materialize in a timely manner.

We propose in this rule to give increased emphasis to the public benefits that flow from enhanced competition, while at the same time cautioning applicants not to exaggerate their benefit projections. To ensure that applicants are careful in the presentation of public benefits, we would require them to suggest additional measures that we could take if those benefits are not realized within a reasonable time. Many of the benefits claimed by applicants in recent mergers have been delayed by transitional service problems. This has frustrated both the Board and the shipping community. And the potential efficiency benefits of future large rail mergers will be more limited than in the past. While we believe that overall post-merger service is improving and the significant gains initially promised by past applicants will eventually be achieved, the Board would take particular care to scrutinize future claims of merger benefits and associated timeframes to ensure that they are well-documented and reasonable projections.

Proposed § 1180.1(c)(2): Potential harm. The Board recognizes that consolidation can impose costs as well as benefits. It can reduce competition both directly and indirectly in particular markets, including product markets and geographic markets. Consolidation can also threaten essential services and the reliability of the rail network. In analyzing these impacts we must consider, but are not limited by, the policies embodied in the antitrust laws.

(i) Reduction of competition. Although in specific markets railroads operate in a highly competitive environment with vigorous intermodal competition from motor and water carriers, mergers can deprive shippers of effective options. Intramodal competition is reduced when two carriers serving the same origins and destinations merge. Competition in product and geographic markets can also be eliminated or reduced by end-to-end mergers. Any railroad combination entails a risk that the merged carrier will acquire and exploit increased market power. Applicants shall propose remedies to mitigate and offset competitive harms. Applicants shall also explain how they would at a minimum preserve competitive options such as those involving the use of major existing gateways, build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

(ii) Harm to essential services. The Board must ensure that essential freight, passenger, and commuter rail services are preserved. An existing service is essential if there is sufficient public need for the service and adequate alternative transportation is not available. The Board's focus is on the ability of the nation's transportation infrastructure to continue to provide and support essential services. Mergers should strengthen, not undermine, the ability of the rail network to advance the nation's economic growth and competitiveness, both domestically and internationally. The Board will consider whether projected shifts in traffic patterns could undermine the ability of the various network links (including Class II and Class III rail carriers and ports) to sustain essential services.

(iii) Transitional service problems. Experience shows that significant service problems can arise during the transitional period when merging firms integrate their operations, even after applicants take extraordinary steps to avoid such disruptions. Because service disruptions harm the public, the Board, in its determination of the public interest, will weigh the likelihood of transitional service problems. In addition, under paragraph (h) of this section, the Board will require applicants to provide a detailed service assurance plan. Applicants also should explain how they will cooperate with other carriers in overcoming natural disasters or other serious service problems during the transitional period and afterwards.

(iv) Enhanced competition. To offset harms that would not otherwise be mitigated, applicants shall explain how the transaction and conditions they propose will enhance competition.

In our proposed revisions to these rules, we highlight a new category of possible merger harm — transitional service problems — which we would scrutinize carefully. In this regard, applicants would be required to explain how they would cooperate with other carriers in overcoming natural disasters or other serious service problems during the transitional period and afterwards. Any further decrease in the number of major independent railroads from which to obtain emergency assistance would make this kind of cooperation increasingly important. With regard to the "harm to essential services" criterion, we have now broadened our prior focus on the rail network to incorporate the entire transportation infrastructure, and have given increased emphasis to the role of smaller carriers and ports as vital links in the transportation system.

We also would specifically require applicants to present an effective plan to keep open major existing gateways, and to preserve opportunities for separately challengeable segment rates to be used in conjunction with contract rates in bottleneck situations.[7] Most inefficient gateways have now been either closed or move only minimal traffic. Thus, we think that it is appropriate to reassure the shipping public that at a minimum major existing gateways would be kept open in future mergers. Further, we believe that it is appropriate to protect the ability of shippers to use a transportation contract obtained to a junction point to obtain a challengeable rate quote for transportation service provided beyond the junction point.

Proposed § 1180.1(d): Conditions. The Board has broad authority under 49 U.S.C. 11324(c) to impose conditions on consolidations, including divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities. The Board will condition the approval of Class I combinations to mitigate or offset harm to the public interest, and will carefully consider conditions proposed by applicants in this regard. The Board will impose conditions that are operationally feasible and produce net public benefits so as not to undermine or defeat beneficial transactions by creating unreasonable operating, financial, or other problems for the combined carrier. Conditions are generally not appropriate to compensate parties who may be disadvantaged by increased competition. In this regard, the Board expects that any merger of Class I carriers will create some anticompetitive effects that are difficult to mitigate through appropriate conditions, and that transitional service disruptions may temporarily negate any shipper benefits. Therefore, to offset these harms, applicants will be required to propose conditions that will not simply preserve but also enhance competition. The Board seeks to enhance competition in ways that strengthen and sustain the rail network as a whole (including that portion of the network operated by Class II and III carriers).

Whereas the existing rule focuses narrowly on harm to competition and essential services, our proposed rule reflects a willingness to use our conditioning power to mitigate or offset all types of threatened merger harms to the public interest. It also reflects the recent statutory clarification that the Board has the authority to require divestiture of parallel tracks or grant trackage rights or other

[7] For movements from A to C, where only one railroad serves a segment from A to B, but more than one serves from B to C, the A to B segment is referred to as a "bottleneck."

access rights under terms that ensure that effective competition is maintained. At this stage in the evolution of the nation's rail system, particularly given that the need for restructuring in general is much less compelling than it was in 1980, we are focused on imposing sufficient conditions as appropriate to ensure that a transaction is truly in the public interest, as newly defined in our proposed policy statement. Once the public interest standard has been met, it would be improper for us to impose additional conditions that, if put into effect, would in essence represent a complete overhaul of the existing regulatory framework. While the Board welcomes merger applications that propose to enhance competition by expanding access for shippers and Class II and III carriers, for example, we do not believe that it is appropriate for us in the first instance to attempt to use our broad conditioning powers to impose through merger approvals a broad program of open access that would go beyond the public interest balancing in our proposed merger policy statement and would otherwise be contrary to our statute and the policies that it embodies. Such a fundamental shift in policy is better left to Congress.[8]

Proposed § 1180.1(e): Labor protection. The Board is required to provide adequate protection to the rail employees of applicants who are affected by a consolidation. The Board supports early notice and consultation between management and the various unions, leading to negotiated implementing agreements, which the Board strongly favors. Otherwise, the Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction. The Board will review negotiated agreements to assure fair and equitable treatment of all affected employees. Absent a negotiated agreement, the Board will provide for protection at the level mandated by law (49 U.S.C. 11326(a)), and if unusual circumstances are shown, more stringent protection will be provided to ensure that employees have a fair and equitable arrangement.

This proposed rule, which revises our existing rule at § 1180.1(f), reflects our continued emphasis on negotiation, without direct Board involvement, between the unions and railroad management to resolve merger implementation issues. A recent agreement between the United Transportation Union and the major railroads governing their approach to implementing all major rail consolidation transactions, including the handling of existing collective bargaining agreements, indicates that such negotiations can be a win-win situation, with both sides gaining value through an agreement. The Board is aware of other efforts at the highest levels to arrive at similar agreements

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[8] We are also proposing deletion of § 1180.1(d)(2), an obsolete provision revoking certain conditions imposed in past mergers.

involving other crafts, and is quite interested in the resolution of those initiatives before issuing our final rail merger policy and rules. We continue to encourage such private-sector agreements, both on an overall basis and in the context of implementing agreements geared to a particular merger.

In this regard, we have proposals before us, which we are seriously considering, for new rules to govern contentious issues, such as the need for employees to relocate in order to retain their jobs. To obviate the need for such a regulatory solution, which could very well be inferior to a solution that the parties could agree upon, we urge the major railroads and their unions to negotiate broad-based agreements about issues of contention in this area and to report back to us with their results as soon as possible.

Proposed § 1180.1(f): Environment and safety. (1) We encourage negotiated agreements between railroad-applicants and affected communities, including groups of neighborhood communities and other entities such as state and local agencies. Agreements of this nature can be extremely helpful and effective in addressing local and regional environmental and safety concerns, including the sharing of costs associated with mitigating merger-related environmental impacts.

(2) Applicants will be required to work with the Federal Railroad Administration, on a case-by-case basis, to formulate Safety Integration Plans to ensure that safe operations are maintained throughout the merger implementation process. Applicants will also be required to submit evidence about potentially blocked grade crossings as a result of merger-related traffic increases.

Given the important need to address merger-related environmental concerns, we propose adding this new rule to our policy statement. We continue to believe that there is no need to amend our environmental rules at 49 CFR Part 1105 because they are not specific to mergers.[9] Nevertheless, we do think that it is appropriate here to emphasize the important role of negotiated agreements in merger proceedings. Generally, these privately negotiated solutions between an applicant railroad and some or all of the communities along particular rail corridors or other appropriate entities are more effective, and in some cases, more far-reaching than any environmental mitigation measures that we could impose unilaterally. We would continue to impose these negotiated agreements as conditions to approved mergers.

In recent major rail mergers, we have required applicants to work with the Federal Railroad Administration (FRA) to formulate safety integration plans.

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[9] Our current environmental rules permit us to respond to the types of issues and concerns raised by the public. Our rules implementing the National Environmental Policy Act are broadly designed and can be applied to any rail-related actions that come before the Board, including rail mergers. They give us the flexibility to require an Environmental Impact Statement or other documentation and analysis as may be required in a particular merger case.

We have also instituted a joint rulemaking with FRA in which our two agencies, working together, have proposed regulations to ensure adequate and coordinated consideration of safety integration issues in railroad merger cases.[10] We have already solicited and received comments in that proceeding, and a joint hearing has been held by the two agencies. FRA awaits final review by the Office of Management and Budget regarding FRA's role in the process. Until the joint rulemaking is complete, we will continue to address these safety integration issues on a case-by-case basis.

Proposed § 1180.1(g): Oversight. As a condition to its approval of any major transaction, the Board will establish a formal oversight process. For at least the first 5 years following approval, applicants will be required to present evidence to the Board, on no less than an annual basis, to show that the merger conditions imposed by the Board are working as intended, that the applicants are adhering to the various representations they made on the record during the course of their merger proceeding, that no unforeseen harms have arisen that would require the Board to alter existing merger conditions or impose new ones, and that the merger benefit projections accepted by the Board are being realized in a timely fashion. Parties will be given the opportunity to comment on applicants' submissions, and applicants will be given the opportunity to reply to the parties' comments. During the oversight period, the Board will retain jurisdiction to impose any additional conditions it determines are necessary to remedy or offset unforeseen adverse consequences of the underlying transaction.

To codify current practice, we propose adding this new rule to our policy statement. We have found a formal annual oversight process to be a useful mechanism for identifying and resolving unforeseen competitive, environmental,[11] and other problems that can arise following major rail consolidations. As is the case today, parties would retain the opportunity to petition the Board for immediate relief if they believe that is necessary.

Proposed § 1180.1(h): Service assurance and operational monitoring. (1) Good service is of vital importance to shippers. Accordingly, applicants must file, with the initial application and operating plan, a service assurance plan, identifying the precise steps to be taken to ensure

[10] *See Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, Acquisitions of Control and Start Up Operations; and Procedures for Surface Transportation Board Consideration of Safety Integration Plans in Cases Involving Railroad Consolidations, Mergers and Acquisitions of Control*, STB Ex Parte No. 574, FRA Docket No. SIP-1, Notice No. 1 (Joint Notice of Proposed Rulemaking (STB served Dec. 24, 1998, and published at 63 Fed. Reg. 72,225 (1998)).

[11] In past mergers, we have imposed environmental conditions allowing communities or other interested parties to seek redress if there is a material post-merger change in the facts or circumstances upon which we relied in imposing specific environmental conditions. We will continue to impose such conditions where appropriate.

continuation of adequate service and to provide for improved service. This plan must include the specific information set forth at § 1180.10 on how shippers and connecting railroads (including Class II and III carriers) across the new system will be affected and benefitted by the proposed consolidation. As part of this plan, the Board will require applicants to establish contingency plans that would be available to address the negative impacts if projected service levels do not materialize in a timely fashion.

(2) The Board will conduct extensive post-approval operational monitoring to help ensure that service levels after a merger are reasonable and adequate.

(3) We will require applicants to establish problem resolution teams and specific procedures for problem resolution to ensure that post-merger service problems, related claims issues, and other matters are promptly addressed. Also, we would envision the establishment of a Service Council made up of shippers, railroads, and other interested parties to provide an ongoing forum for the discussion of implementation issues.

Given the importance of good service to shippers and the Board, we propose adding this new rule. The service assurance plan accompanying each major consolidation application should provide certain essential information. Specifically, this plan must include information about proposed integration of the operations of the merging carriers; training; information technology systems; customer service; coordination of freight and passenger operations; how yard and terminal operations would be managed; contingency plans for service disruptions; how changes or increases in traffic levels would be accommodated by the combined system; and identification of potential areas of temporary or longer-term service degradation, and appropriate mitigation.

In addition, shippers and Class II and III railroads have indicated a need for more specific service assurances, which applicants can provide, and in this regard we expect applicants to engage in good faith negotiations with shippers and connecting carriers. The extent to which applicants are successful in such negotiations would be an important consideration in our determination as part of the balancing process of the likelihood of merger-related service harm and the possible need for mitigation.

Monitoring of previous transactions has proved vital to identifying and correcting operating deficiencies during implementation. Mechanisms for resolving problems that arise in implementation are equally important. The Service Council format that applicant carriers and shipper groups have established through negotiation has proven extremely useful in past mergers, and we believe that it is appropriate for us to support the continuation of those informal private-sector processes here. The Board also plans to continue its own informal process for handling complaints, which has provided shippers, small railroads, rail passengers, and railroad employees with immediate access to our problem resolution resources.

Proposed § 1180.1(i): Cumulative impacts and crossover effects. Because there are so few remaining Class I carriers and the railroad industry constitutes a network of competing and complementary components, the Board cannot evaluate the merits of a major transaction in isolation — the Board must also consider the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination. The Board expects applicants to anticipate with as much certainty as possible what additional Class I merger applications are likely to be filed in response to their own application and explain how these applications, taken together, could affect the eventual structure of the industry and the public interest. When calculating the likely public benefits that their merger will generate, applicants are to measure these benefits in light of the anticipated downstream mergers. Applicants will be expected to discuss whether and how the type or extent of any conditions imposed on their proposed merger would have to be altered, or any new conditions imposed, following approval by us of any future consolidation(s).

Our existing rule at § 1180.1(g) states that we will not attempt to assess the effect of potential or hypothetical combinations or transactions. This approach was taken to curb speculation and keep the record in merger proceedings manageable. Given the relatively small number of remaining Class I carriers, however, we have reached the point where there is a limited range of responsive proposals that could be triggered by any particular transaction. Moreover, as we have noted, from this point on any proposed major transaction would have a significant effect on the structure of the entire industry. Accordingly, we believe it is appropriate for us to consider reasonable arguments about likely future transactions and about the future structure of the industry.

Proposed § 1180.1(j): Inclusion of other carriers. The Board will consider requiring inclusion of another carrier as a condition to approval only where there is no other reasonable alternative for providing essential services, the facilities fit operationally into the new system, and inclusion can be accomplished without endangering the operational or financial success of the new company.

This rule would carry forward our existing provision at § 1180.1(e) concerning requests for inclusion. We believe that it is appropriate to continue to view inclusion of non-applicant carriers as a matter of last resort, especially given the small number of remaining Class I carriers.

Proposed § 1180.1(k): Transnational issues. (1) Future merger applications may present novel and significant transnational issues. In cases involving major Canadian and Mexican railroads, applicants must submit "full system" competitive analyses and operating plans — incorporating their operations in Canada or Mexico — from which we can determine the competitive, service, employee, safety, and environmental impacts of the prospective operations within the United States. With respect to rail safety in the United States, applicants must explain how cooperation with the Federal Railroad Administration will be maintained without regard to the national origins of merger applicants. When an application would result in foreign control of a Class I railroad, applicants must assess the likelihood that commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations and be detrimental to the interests of the United States rail network, and applicants must address how any ownership restrictions imposed by foreign governments should affect our public interest assessment.

(2) The Board will consult with relevant officials as appropriate to ensure that any conditions it imposes on a transaction are consistent with the North American Free Trade Agreement and other pertinent international agreements to which the United States is a party. In addition, the Board will cooperate with those Canadian and Mexican agencies charged with approval and oversight of a proposed transnational railroad combination.

Future mergers are likely to raise novel transnational issues, possibly implicating the North American Free Trade Agreement and requiring substantial cooperation with Canadian or Mexican regulatory authorities. We propose adding this new rule to enable the Board to gather the information needed to assess fully and properly merger proposals involving major Canadian and Mexican railroads.

Proposed § 1180.1(l): National defense. Rail mergers must not detract from the ability of the United States military to rely on rail transportation to meet the nation's defense needs. Applicants must discuss and assess the national defense ramifications of their proposed merger.

Because national defense issues may become particularly important in mergers that involve extensive rail systems or that may result in the control of a United States railroad by a foreign entity, we propose adding this new rule.

Proposed § 1180.1(m): Public participation. To ensure a fully developed record on the effects of a proposed railroad consolidation, the Board encourages public participation from federal, state, and local government departments and agencies; affected shippers, carriers, and rail labor; and other interested parties.

This rule would carry forward our existing provision at § 1180.1(h), which encourages public participation in our merger proceedings, except that it now specifically references rail labor. Input from federal, state, and local governments; affected shippers, carriers, and rail labor; and other parties continues to be of crucial importance in making our public interest determinations.

PROPOSED TECHNICAL and INFORMATIONAL REVISIONS.

We are proposing a number of technical revisions to our merger regulations. For the most part, these revisions are intended to codify current practice and/or to conform our regulations to the waivers and clarifications that we have routinely granted in recent merger proceedings. We also include language, where appropriate, reflecting changes in the supporting information requirements to carry out the proposed revisions to the merger policy statement at § 1180.1, discussed above.

§ 1180.0 Scope and purpose.

Proposed § 1180.0: Scope and purpose. The regulations in this subpart set out the information to be filed and the procedures to be followed in control, merger, acquisition, lease, trackage rights, and any other consolidation transaction involving more than one railroad that is initiated under 49 U.S.C. 11323. Section 1180.2 separates these transactions into four types: *Major, significant, minor*, and *exempt.* The informational requirements for these types of transactions differ. Before an application is filed, the designation of type of transaction may be clarified or certain of the information required may be waived upon petition to the Board. This procedure is explained in § 1180.4. The required contents of an application are set out in §§ 1180.6 (general information supporting the transaction), 1180.7 (competitive and market information), 1180.8 (operational information), 1180.9 (financial data), 1180.10 (service assurance plans), and 1180.11 (additional information needs for transnational mergers). A *major* application must contain the information required in §§ 1180.6(a), 1180.6(b), 1180.7(a), 1180.7(b), 1180.8(a), 1180.8(b), 1180.9, 1180.10, and 1180.11. A *significant* application must contain the information required in §§ 1180.6(a), 1180.6(c), 1180.7(a), 1180.7(c), and 1180.8(b). A *minor* application must contain the information required in §§ 1180.6(a) and 1180.8(c). Procedures (including time limits, filing requirements, participation requirements, and other matters) are contained in § 1180.4. All applications must comply with the Board's Rules of General Applicability, 49 CFR Parts 1100 through 1129, unless otherwise specified. These regulations may be cited as the Railroad Consolidation Procedures.

We are proposing conforming changes to this section to reflect changes proposed for the informational requirements. We also propose to delete what appear to be obsolete references to Index I and Index II.

§ 1180.3 Definitions.

Proposed § 1180.3(a): Applicant. The term *applicant* means the parties initiating a transaction, but does not include a wholly owned direct or indirect subsidiary of an applicant if that subsidiary is not a rail carrier. Parties who are considered applicants, but for whom the information normally required of an applicant need *not* be submitted, are:

(1) in *minor* trackage rights applications, the transferor and

(2) in responsive applications, a primary applicant.

Under the existing rules, "[t]he parties initiating a transaction" has generally been thought to include not only the ultimate railroad holding company and its Class I railroad subsidiary (*e.g.*, Union Pacific Corporation and Union Pacific Railroad Company) but also wholly owned "shell company" subsidiaries (which have often been set up in connection with merger transactions) and wholly owned intermediate holding companies (which have often existed in connection with Class I railroads). Because we typically have found that there is no particular reason to treat either a wholly owned shell company subsidiary or a wholly owned intermediate holding company as an applicant, our waiver decisions in past proceedings reflect a recognition that the current § 1180.3(a) definition is simply too broad. We therefore propose to exclude from "applicant" status any non-rail subsidiaries.

Proposed § 1180.3(b): Applicant carriers. The term *applicant carriers* means: any applicant that is a rail carrier; any rail carrier operating in the United States, Canada, and/or Mexico in which an applicant holds a controlling interest; and all other rail carriers involved in the transaction. This does not include carriers who are involved only by virtue of an existing trackage rights agreement with applicants.

Under the existing definition, the term "all carriers related to the applicant" has included not only rail carriers that are related to applicants and subject to our jurisdiction but also three additional categories of carriers: rail carriers that are not subject to our jurisdiction; rail carriers that are subject to our jurisdiction but with respect to which the related applicant does not hold a controlling interest; and non-rail carriers. Our waiver decisions in past proceedings have recognized that this definition is too broad.

We therefore propose to exclude from "applicant carrier" status: (i) rail carriers with respect to which the related applicant does not hold a controlling interest; and (ii) non-rail carriers.[12] As for rail carriers that are not subject to our jurisdiction, our waiver decisions issued in the *CSX/NS/CR* and *CN/IC* proceedings indicated that the rail carriers contemplated by this phrase were rail carriers related to an applicant but located entirely in foreign countries. *See CSX/NS/CR (Dec. No. 7)*, slip op. at 6 n.11; *CN/IC (Dec. No. 4)*, slip op. at 4 n.7. We granted the waivers sought in those proceedings for certain Canadian rail carriers because we saw no need for their financial and other data. *See CSX/NS/CR (Dec. No. 7)*, slip op. at 6; *CN/IC (Dec. No. 4)*, slip op. at 5. We are not inclined to take a similar approach with respect to transnational mergers that may come before us in the future.

§ 1180.4 Procedures.

Proposed § 1180.4(a)(1): General. (1) The original and 25 copies of all documents shall be filed in *major* proceedings. The original and 10 copies shall be filed in *significant* and *minor* proceedings.

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[12] Although we propose to exclude from "applicant carrier" status rail carriers in which the applicant does not hold a controlling interest and non-rail carriers, those excluded carriers may need to be identified either in the corporate chart required by § 1180.6(b)(6), or in the statement of direct or indirect intercorporate or financial relationships required by § 1180.6(b)(8).

We propose to revise § 1180.4(a)(1) to reflect current practice as respects the number of copies required in major merger proceedings. Although § 1180.4(a)(1) currently calls for 20 copies in such proceedings, our most recent decisions have called for 25, because the additional copies have served to facilitate immediate internal distribution of filings for handling by Board personnel whose input is essential to prompt disposition of the many matters raised in connection with major railroad merger proceedings.

Proposed Deletion of § 1180.4(a)(4): Service Lists. We propose to delete § 1180.4(a)(4), which provides deadlines for the issuance of service lists. While service lists will still have to be issued, we think that, as with all matters connected with procedural schedules, this timing question is best handled on a case-by-case basis.[13]

Proposed § 1180.4(b)(4): Prefiling notification. When filing the notice of intent required by paragraph (b)(1) of this section, applicants also must file:

(i) A proposed procedural schedule. In any proceeding involving either a major transaction or a significant transaction, the Board will publish a *Federal Register* notice soliciting comments on the proposed procedural schedule, and will, after review of any comments filed in response, issue a procedural schedule governing the course of the proceeding.

(ii) A proposed draft protective order. The Board will issue, in each proceeding in which such an order is requested, an appropriate protective order.

(iii) A statement of waybill availability for major transactions. Applicants must indicate, as soon as practicable after the issuance of a protective order, that they will make their 100% traffic tapes available (subject to the terms of the protective order) to any interested party on written request. The applicants may require that, if the requesting party is itself a railroad, applicants will make their 100% traffic tapes available to that party only if it agrees, in its written request, to make its own 100% traffic tapes available to applicants (subject to the terms of the protective order) when it receives access to applicants' tapes.

(iv) A proposed voting trust. In each proceeding involving a major transaction, applicants contemplating the use of a voting trust must inform the Board as to how the trust would insulate them from an unlawful control violation and as to why their proposed use of the trust, in the context of their impending control application, would be consistent with the public interest. Following a brief period of public comment and replies by applicants, the Board will issue a decision determining whether applicants may establish and use the trust.

We propose adding these new prefiling requirements to § 1180.4(b) to replace the existing rules in § 1180.4(d)(1)-(3), which, as currently written, set forth a procedural schedule for the filing of pleadings by parties other than the primary applicants and which have not actually been followed for many years.

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[13] Our § 1180.4(d) "procedural schedule" proposal is discussed below.

In recent cases, procedural schedules have been established on a case-by-case basis tailored to what is suited to the full and fair development of the record for that particular proposal. *See New Procedures in Rail Acquisitions, Mergers and Consolidations*, Ex Parte No. 282 (Sub-No. 19), slip op. at 2 (STB served Nov. 24, 1999).

We propose to codify our present practice for establishing a customized procedural schedule by requiring merger applicants to file a proposed procedural schedule when they file their notice of intent. We anticipate that, in each proceeding involving either a major transaction or a significant transaction: the proposed procedural schedule would be published in the *Federal Register*, comments would be solicited, and a final procedural schedule would then be adopted.

To codify our present practice for establishing a protective order, we propose adding a new rule requiring that applicants include a proposed draft protective order with their notice of intent. There is no compelling reason to include in our regulations a standard protective order because our current procedures are adequate.

We also propose adding a new rule requiring that applicants contemplating a major transaction make their 100% traffic tapes available to interested parties as soon as practicable after the filing of the notice of intent. Early access to this critical traffic data would aid interested parties in the preparation of their own submissions but (unlike broad pre-application discovery, which we are not proposing) would not impede the prospective applicants in the preparation of their application. Our proposal contemplates that, if the party seeking the applicants' 100% traffic tapes is itself a railroad, it would have to provide applicants with reciprocal access to its own 100% traffic tapes.

Additionally, we are proposing this new rule to address the use of voting trusts. The Board, like the ICC before it, has permitted by rule the use of voting trusts during the pendency of control applications, so long as the trust would not result in unlawful control. 49 CFR Part 1013. To facilitate this process, the Secretary of the Board has issued informal, non-binding, staff letters giving an opinion as to whether use of the voting trust would result in unauthorized control. Here, we are proposing a more formal and open process for applicants in major rail consolidations by requiring them to demonstrate in a public filing that their contemplated use of the trust would not result in unlawful control and would be consistent with the public interest. The rules governing the use of voting trusts in all other control transactions that come before us would remain unchanged.

Proposed § 1180.4(c)(6): Application format. (vi) The information and data required of any applicant may be consolidated with the information and data required of the affiliated applicant carriers.

We propose adding to the rule at § 1180.4(c)(6) a new clause (vi) to codify our practice in past waiver decisions of authorizing the filing of consolidated information and data pertaining to each applicant, and the rail subsidiaries it controls.[14]

Proposed § 1180.4(d): Responsive applications.

(2) An inconsistent application will be classified as a major, significant, or minor transaction as provided for in § 1180.2(a) through (c). The fee for an inconsistent application will be the fee for the type of transaction involved. See 49 CFR 1002.2(f)(38) through (41). The fee for any other type of responsive application is the fee for the particular type of proceeding set forth in 49 CFR 1002.2(f).

(3) Each responsive application filed and accepted for consideration will automatically be consolidated with the primary application for consideration.

As discussed earlier, we propose new requirements at § 1180.4(b)(4) to replace § 1180.4(d)(1)-(3), which currently set forth a procedural schedule for the filing of pleadings by parties other than the primary applicants and which have not actually been followed for many years. Here, we propose retaining the non-scheduling portion of the rules at § 1180.4(d)(4) with regard to responsive applications.

Proposed § 1180.4(e): Evidentiary proceeding.

§ 1180.4(e)(2). The evidentiary proceeding will be completed: (i) Within 1 year (after the primary application is accepted) for a *major* transaction; (ii) Within 180 days for a *significant* transaction; and (iii) Within 105 days for a *minor* transaction.

§ 1180.4(e)(3). A final decision on the primary application and on all consolidated cases will be issued: (i) Within 90 days (after the conclusion of the evidentiary proceeding) for a *major* transaction; (ii) Within 90 days for a *significant* transaction; and (iii) Within 45 days for a *minor* transaction.

§ 1180.4(e)(2) and (3) currently track the pre-1996 statutory timeframes contained in the predecessor to what is now 49 U.S.C. 11325. We propose to revise § 1180.4(e)(2) and (3) to track the statutory timeframes now contained in 49 U.S.C. 11325.

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[14] For example, Applicant X submits information and data pertaining to X and the rail subsidiaries that X controls on a consolidated basis. Applicant Y submits information and data pertaining to Y and the rail subsidiaries that Y controls on a consolidated basis.

Proposed § 1180.4(f): Waiver or clarification.

§ 1180.4(f)(2) Except as otherwise provided in the procedural schedule adopted by the Board in any particular proceeding, petitions for waiver or clarification must be filed at least 45 days before the application is filed.

§ 1180.4(f)(2) currently provides that, with one specified exception, petitions for waiver or clarification must be filed at least 45 days before the application is filed. We propose to revise § 1180.4(f)(2) to conform to our proposed revision of § 1180.4(d).

§ 1180.6 Supporting information.

Proposed § 1180.6(b)(1): Form 10-K (exhibit 6). Submit: the most recent filing with the Securities and Exchange Commission (SEC) under 17 CFR 249.310 if made within the year prior to the filing of the application by each applicant or by any entity that is in control of an applicant. These shall not be incorporated by reference, and shall be updated with any Form 10-K subsequently filed with the SEC over the duration of the proceeding.

Although most Class I railroads are wholly owned subsidiaries of noncarrier holding companies, § 1180.6(b)(1) currently requires the submission, in major merger proceedings, of the *applicant carriers'* most recently filed Form 10-K. We propose to revise § 1180.6(b)(1), consistent with our recent waiver decisions, to substitute the Form 10-K of the controlling, noncarrier entity where the applicant carrier does not currently file a Form 10-K with the SEC.

Proposed § 1180.6(b)(2): Form S-4 (exhibit 7). Submit: the most recent filing with the SEC under 17 CFR 239.25 if made within the year prior to the filing of the application by each applicant or by any entity that is in control of an applicant. These shall not be incorporated by reference, and shall be updated with any Form S-4 subsequently filed with the SEC over the duration of the proceeding.

§ 1180.6(b)(2) must be revised for two reasons. First, Form S-14, which is currently cited in § 1180.6(b)(2), has been replaced by Form S-4. Second, although most Class I railroads are wholly owned subsidiaries of noncarrier holding companies, § 1180.6(b)(2) currently requires the submission, in major merger proceedings, of the *applicant carriers'* most recently filed Form S-14. Our proposed revisions to § 1180.6(b)(2) are consistent with our recent waiver decisions.

Proposed § 1180.6(b)(3): Change in control (exhibit 8). If an applicant carrier submits an annual report Form R-1, indicate any change in ownership or control of that applicant carrier not indicated in its most recent Form R-1, and provide a list of the principal six officers of that applicant carrier and of any related applicant, and also of their majority-owned rail carrier subsidiaries. If any applicant carrier does not submit an annual report Form R-1, list all officers of that applicant carrier, and identify the person(s) or entity/entities in control of that applicant carrier and all owners of 10% or more of the equity of that applicant carrier.

§ 1180.6(b)(3) currently requires major merger applicants to "[i]ndicate any change in ownership, control, or officers not indicated in the most recent annual report Form R-1." There are two problems here: (1) although most Class I railroads have hundreds of officer positions that might fall within the scope of the "change in officers" requirement, the compilation of such a list would be burdensome to applicants and of little, if any, value to the Board and the public; and (2) because only Class I railroads now submit Form R-1, it is not clear what is required with respect to Class II and III rail carriers that qualify as applicant carriers. We therefore propose to revise the existing rule to be consistent with our recent waiver decisions.

Proposed § 1180.6(b)(4): Annual reports (exhibit 9). Submit: the two most recent annual reports to stockholders by each applicant, or by any entity that is in control of an applicant, made within 2 years of the date of filing of the application. These shall not be incorporated by reference, and shall be updated with any annual or quarterly report to stockholders issued over the duration of the proceeding.

§ 1180.6(b)(4) currently requires the submission, in major merger proceedings, of the *applicant carriers'* two most recent annual reports; however, most Class I railroads are wholly owned subsidiaries of noncarrier holding companies and do not make separate annual reports to their stockholders. We therefore propose to revise § 1180.6(b)(4) to be consistent with our recent waiver decisions.

Proposed § 1180.6(b)(6): Corporate chart (exhibit 11). Submit a corporate chart indicating all relationships between applicant carriers and all affiliates and subsidiaries and also companies controlling applicant carriers directly, indirectly or through another entity (with each chart indicating the percentage ownership of every company on the chart by any other company on the chart). For each company: include a statement indicating whether that company is a noncarrier or a carrier; and identify every officer and/or director of that company who is also an officer and/or director of any other company that is part of a different corporate family, which includes a rail carrier. Such information may be referenced through notes to the chart.

The "corporate chart" provision must be revised because the requirement of a statement indicating all common officers and directors sweeps too broadly; the only disclosure that is really needed in this context concerns individuals who hold officer and/or director positions in more than one corporate family. We therefore propose to revise our rule to permit major merger applicants to disregard common officers and/or directors within a single corporate family, and to report only those instances in which two or more companies from different corporate families share officers and/or directors.

Proposed § 1180.6(b)(8): Intercorporate or financial relationships. Indicate whether there are any direct or indirect intercorporate or financial relationships at the time the application is filed, not disclosed elsewhere in the application, through holding companies, ownership of securities, or otherwise, in which applicants or their affiliates own or control more than 5% of the stock of a non-affiliated carrier, including those relationships in which a group affiliated with applicants owns more than 5% of the stock of such a carrier. Indicate the nature and extent of such relationships, if they exist, and, if an applicant owns securities of a carrier subject to 49 U.S.C. Subtitle IV, provide the carrier's name, a description of securities, the par value of each class of securities held, and the applicant's percentage of total ownership. For purposes of this paragraph (b)(8), "affiliates" has the same meaning as "affiliated companies" in Definition 5 of the Uniform System of Accounts (49 CFR part 1201, subpart A).

Our current rule requires major merger applicants to disclose all intercorporate or financial relationships between applicant carriers and persons affiliated with applicant carriers, on the one hand, and, on the other hand, other carriers or persons affiliated with such other carriers. Recent waiver decisions, however, have established that the only disclosure that is really needed in this context is of "significant" intercorporate or financial relationships, *i.e.,* relationships involving ownership by applicants and/or their affiliates of more than 5% of a non-affiliated carrier's stock, including those relationships in which a group affiliated with applicants owns more than 5% of a non-affiliated carrier's stock. We therefore propose to revise our rule to conform to the waiver decisions issued in recent proceedings, and (in accordance with those decisions) we propose to switch the focus of this provision from "applicant carriers" to "applicants."

Proposed § 1180.6(b)(9): Employee impact exhibit. The effect of the proposed transaction upon applicant carriers' employees (by class or craft), the geographic points where the impacts will occur, the time frame of the impacts (for at least 3 years after consolidation), and whether any employee protection agreements have been reached. This information (except with respect to employee protection agreements) may be set forth in the following format:

EFFECTS ON APPLICANT CARRIERS' EMPLOYEES

Current Location	*Classification*	*Jobs Transferred to*	*Jobs Abolished*	*Jobs Created*	*Year*

We are proposing no changes to § 1180.6(a)(2)(v), which would continue to apply to major, significant, and minor applications, but are proposing a new § 1180.6(b)(9), which would apply only to major transaction applications. For major merger transactions, we have considered three suggested revisions of the existing § 1180.6(a)(2)(v) "employee impact exhibit" requirement. First, we are declining to narrow its scope to the effects of the proposed transaction upon applicant carriers' employees *in the United States*. Rather, any major transnational merger that may come before us in the future will be such as to require knowledge, on our part, of the effects of the proposed transaction upon all applicant carriers' employees, regardless of whether they are located in Canada, Mexico, or elsewhere. Second, we do not believe it appropriate to amend our rule as requested by carrier interests to attempt to specify a single set of classes or crafts of employees to be covered by the required employee impact exhibit because past decisions have not established, in this respect, the necessary uniformity. Third, we believe, however, that our rule should be revised to specify the format of the required employee impact exhibit. Past decisions have established, in this respect, the necessary uniformity.[15]

Proposed § 1180.6(b)(10): Conditions to mitigate and offset merger harms. Applicants are expected to propose measures to mitigate and offset merger harms. These conditions should not simply preserve, but also enhance, competition.

(i) Applicants must explain how they will preserve competitive options for shippers and for Class II and III rail carriers. At a minimum, applicants must explain how they will preserve the use of major gateways, the potential for build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

(ii) Applicants must explain how the transaction and conditions they propose will enhance competition and improve service.

We propose adding this new rule to implement our proposed new policy statement at § 1180.1, which would require applicants in major merger transactions to propose conditions that would preserve shippers' existing competitive options, and to propose additional conditions or other means to affirmatively enhance competition and improve services that would offset anticompetitive effects, transitional service problems, and other merger-related harms.

*Proposed § 1180.6(b)(11): Calculating public benefits***.** Applicants must enumerate and, where possible, quantify the net public benefits their merger will generate (if approved). In making this estimate, applicants should identify the benefits arising from service improvements, enhanced competition, cost savings, and other merger-related public interest benefits. Applicants must also identify, discuss, and, where possible, quantify the likely negative effects approval will entail, such as losses of competition, potential for service disruption, and other merger-related harms. In

[15] We note that the "Jobs Transferred To" column will capture, among other things, anticipated cross-border transfers.

addition, applicants must suggest additional measures that the Board might take if the anticipated public benefits identified by applicants fail to materialize in a timely manner.

We propose adding this new rule for major transactions to reflect our proposed new policy statement at § 1180.1. Because the Board must weigh the application's effect on the public interest, it is important that we carefully calculate the net public benefits a merger would generate, and, to do so, the applicants must provide detailed and accurate data.

Proposed § 1180.6(b)(12): Downstream merger applications. (i) Applicants should anticipate what additional Class I merger applications are likely to be filed in response to their own application and explain how, taken together, these applications could affect the eventual structure of the industry and the public interest.

(ii) Applicants are expected to discuss whether and how the type or extent of any conditions imposed on their proposed merger would have to be altered, or any new conditions imposed, should the Board approve additional future rail mergers.

(iii) In calculating the public benefits arising from their merger, applicants should measure them in light of the anticipated downstream merger applications.

By proposing this new rule for major transactions, the Board is discarding its "one case at a time" policy. We expect applicants to identify the likely strategic responses of other Class I carriers and anticipate how, taken together, these applications would affect the structure of the industry and the public interest.

Proposed § 1180.6(b)(13): Purpose of the proposed transaction. The purpose sought to be accomplished by the proposed transaction, *e.g.*, improving service, enhancing competition, strengthening the nation's transportation infrastructure, creating operating economies, and ensuring financial viability.

Consistent with the goals of our policy statement, we propose to revise this rule so that the list of merger-related accomplishments for major transactions would stress enhancing competition and strengthening transportation infrastructure, as well as improving service. The proposed provision would also look to applicants for evidence demonstrating their financial viability.

§ 1180.7 Market analyses.

Proposed § 1180.7(a): For *majo*r and *significant* transactions, applicants shall submit impact analyses (exhibit 12) that describe the impacts of the proposed transaction — both adverse and beneficial — on inter- and intramodal competition with respect to freight surface transportation in the regions affected by the transaction and on the provision of essential services by applicants and other carriers. An impact analysis should include underlying data, a study on the implications of those data, and a description of the resulting likely effects of the transaction on transportation alternatives available to the shipping public. Each aspect of the analysis should specifically address significant impacts as they relate to the applicable statutory criteria (49 U.S.C. 11324(b) or (d)), essential services, and competition. Applicants must identify and address relevant markets and issues, and provide additional information as requested by the Board on markets and issues that warrant further study. Applicants (and any other party submitting analyses) must demonstrate both the relevance of the markets and issues analyzed and the validity of the methodology. All underlying assumptions must be clearly stated. Analyses should reflect the consolidated company's marketing plan and existing and potential competitive alternatives (inter- as well as intramodal). They can address: city pairs, interregional movements, movements through a point, or other factors; a particular commodity, group of commodities, or other commodity factor that will be significantly affected by the transaction; or other effects of the transaction (such as on a particular type of service offered).

Proposed § 1180.7(b): For *majo*r transactions, applicants shall submit "full system" impact analyses (incorporating any operations in Canada or Mexico) from which they must demonstrate the impacts of the transaction — both adverse and beneficial — on competition within regions of the United States and this nation as a whole (including inter- and intramodal competition, product competition, and geographic competition) and the provision of essential services (including freight, passenger, and commuter) by applicants and other network links (including Class II and Class III rail carriers and ports). Applicants' impact analyses must at least provide the following types of information:

(1) The anticipated effects of the transaction on traffic patterns, market concentrations, and/or transportation alternatives available to the shipping public. Consistent with § 1180.6(b)(10), these must incorporate a detailed examination of the ways in which the transaction would enhance competition and of the specific measures proposed by applicants to preserve existing levels of competition and essential services;

(2) Actual and projected market shares of originated and terminated traffic by railroad for each major point on the combined system before and after the proposed transaction. Applicants may define points as individual stations or as larger areas (such as Bureau of Economic Analysis statistical areas or U.S. Department of Agriculture Crop Reporting Districts) as relevant and indicate the extent of switching access and availability of terminal belt railroads. Applicants should list points where the number of serving railroads would drop from two to one and from three to two, respectively, as a result of the proposed transaction (both before and after applying proposed remedies for competitive harm);

(3) Actual and projected market shares of revenues and traffic volumes before and after the proposed transaction for major interregional or corridor flows by major commodity group. Origin/destination areas should be defined at relevant levels of aggregation for the commodity group in question. The data should be broken down by mode and (for the railroad portion) by single-line and interline routings (showing gateways used). Applicants should explain relevant differences in the effectiveness of competing routings (with respect, *e.g.*, to transit time, terrain, track conditions, and capacity);

(4) For each major commodity group, an analysis of traffic flows indicating patterns of geographic competition or product competition across different railroad systems, showing actual and projected revenues and traffic volumes before and after the proposed transaction;

(5) Maps and other graphic displays where helpful in illustrating the analyses in this section;

(6) An explicit delineation of the projected impacts of the transaction on the ability of various network links (including Class II and Class III rail carriers and ports) to participate in the competitive process and to sustain essential services; and

(7) Supporting data for the analyses in this section, such as the basis for projections of changes in traffic patterns, including shipper surveys and econometric or other statistical analyses. If not made part of the application, applicants shall make these data available in a repository for inspection

by other parties or otherwise supply these data on request, for example, electronically. Access to confidential information will be subject to protective order. For information drawn from publicly available published sources, detailed citations will suffice.

Proposed § 1180.7(c): For *significant* transactions, specific regulations on impact analyses are not provided so that the parties will have the greatest leeway to develop the best evidence on the impacts of each individual transaction. As a general guideline, applicants shall provide supporting data that may (but need not) include: current and projected traffic flows; data underlying sales forecasts or marketing goals; interchange data; market share analysis; and/or shipper surveys. *It is important to note that these types of studies are neither limiting nor all inclusive.* The parties must provide supporting data, but are free to choose the type(s) and format. If not made part of the application, applicants shall make these data available in a repository for inspection by other parties or otherwise supply these data on request, for example, electronically. Access to confidential information will be subject to protective order. For information drawn from publicly available published sources, detailed citations will suffice.

This section would replace § 1180.7, encompassing market analyses in major and significant transactions. For major transactions, we propose revising this rule to reflect our concern that applicants' impact analyses should reflect the entire North American rail system. Transnational applicants would be required to provide the Board with information on their Canadian and Mexican operations and marketing plans so that we can fully determine the effects of the application on competition and the provision of essential services within the United States.

We further propose to revise this rule to set minimum requirements to replace the discretionary guidelines that have been in use for market analyses in major transactions. These would ensure that applicants supply the types of information that we have found most helpful in assessing harm to competition or to essential services in previous major merger transactions. We would explicitly require data shedding light on how the proposed transaction would affect geographic competition and product competition, as well as on how the transaction would affect market concentration for major origin and destination points and for major corridors on the applicants' combined system.

Finally, consistent with the requirement in our proposed policy statement that applicants in major rail mergers put forward concrete plans to enhance competition, we would require here that these impact analyses incorporate a detailed examination of the ways in which the transaction would enhance competition. We would also require that applicants set out the specific measures they propose to preserve existing levels of competition and essential services.

For significant transactions, we are proposing no changes to the information requirements or impact analyses.

§ 1180.8 Operational data.

Proposed § 1180.8(a): For major transactions applicants must submit a "full system" operating plan – incorporating any prospective operations in Canada and Mexico – from which they must demonstrate how the proposed transaction will affect operations within regions of the United States and this nation as a whole.

(1) Safety integration plan. Applicants must submit a safety integration plan.

(2) Blocked crossings. Applicants must indicate what measures they plan to take to address potentially blocked grade crossings as a result of merger-related changes in operations or increases in rail traffic.

We propose to add this new rule setting forth some additional informational requirements on applicants in major transactions. In cases of major transactions, the Board would require "full system" operating plans that document how the application would affect all operations, including those in Canada and Mexico. The Board needs these data to determine how operational changes in foreign nations are likely to affect the United States rail network. In addition, consistent with our recent practice, the Board would require applicants to consult with FRA and file a safety integration plan. Also, because blocked railroad crossings have become an increasing concern to communities, applicants would be required to indicate what measures they plan to take to avoid blocking grade crossings that might otherwise result from merger-related changes in operations or increases in rail traffic.

Proposed Renumbering of existing § 1180.8(a) and (b). As a result of the proposed insertion of new § 1180.8(a), which would be applicable to major transactions, we propose to renumber the existing rules published at § 1180.8(a) and § 1180.8(b) as new § 1180.8(b) and new § 1180.8(c), respectively. New § 1180.8(b) would set out operational data requirements for major and significant transactions. New § 1180.8(c) would set out operational data requirements for minor transactions.

Proposed § 1180.10 Service assurance plans.

For *major* transactions: service assurance plan. Applicants shall submit a service assurance plan, which, in concert with the operating plan requirements, will identify the precise steps to be taken by applicants to ensure that projected service levels are attainable and that key elements of the operating plan will improve service. The plan shall describe with reasonable precision how operating plan efficiencies will translate into present and future benefits for the shipping public. The plan must also describe any potential area of service degradation that might result due to operational changes. The plan must encompass:

(a) Integration of operations. Based on the operating plan, and using benchmarks for the year immediately preceding the filing date of the application, applicants must describe how the transaction will result in improved service levels and must identify potential instances where service may be degraded. While precise in nature, this description is expected to be a route level review rather than a shipper-by-shipper review. Nonetheless, the plan should be sufficient for individual shippers to evaluate the projected improvements and respond to the potential areas of service degradation for their customary traffic routings. The plan should inform Class II and III railroads and other connecting railroads of the operational changes that may have an impact on their operations, including operations involving major gateways.

(b) Coordination of freight and passenger operations. If Amtrak or commuter services are operated over the lines of the applicant carriers, applicants must describe definitively how they will continue to operate these lines to fulfill existing performance agreements for those services. Whether or not the passenger services operated are over lines of the applicants, applicants must establish operating protocols that ensure effective communications with Amtrak and/or regional rail passenger operators in order to minimize any potential transaction-related negative impacts.

(c) Yard and terminal operations. The operational fluidity of yards and terminals is key to the successful implementation of a transaction and effective service to shippers. Applicants must describe how the operations of principal classification yards and major terminals will be changed or revised and how these revisions will affect service to customers. As part of this analysis, applicants must furnish dwell time information for one year prior to the transaction for each facility described above, and estimate what the expected dwell time will be after the revised operations are implemented. Also required will be a discussion of on-time performance for the principal yards and terminals in the same terms as required for dwell time.

(d) Infrastructure improvements. Applicants must identify potential infrastructure impediments (using volume/capacity line and terminal forecasts), formulate solutions to those impediments, and develop timeframes for resolution. Applicants must also develop a capital improvement plan (to support the operating plan) for timely funding and completing the improvements critical to transition of operations. They should also describe improvements related to future growth, and indicate the relationship of the improvements to service delivery.

(e) Information technology systems. Because the accurate and timely integration of applicants' information systems are vitally important to service delivery, applicants must identify the process to be used for systems integration and training of involved personnel. This must include identification of the principal operations-related systems, operating areas affected, implementation schedules, the realtime operations data used to test the systems, and pre-implementation training requirements needed to achieve completion dates. If such systems will not be integrated and on line prior to implementation of the transaction, applicants must describe the interim systems to be used and how those systems will assure service delivery.

(f) Customer service. To achieve and maintain customer confidence in the transaction and to ensure the successful integration and consolidation of existing customer service functions, applicants must identify their plans for the staffing and training of personnel within or supporting the customer service centers. This discussion must include specific information on the planned steps to familiarize customers with any new processes and procedures that they may encounter in using the consolidated systems and/or changes in contact locations or telephone numbers.

(g) Labor. Applicants must furnish a plan for reaching necessary labor implementing agreements. Applicants must also provide evidence that sufficient qualified employees to effect implementation will be available at the proper locations prior to the transaction.

(h) Training. Applicants must establish a plan to provide necessary training to employees involved with operations, train and engine service, operating rules, dispatching, payroll and timekeeping, field data entry, safety and hazardous material compliance, and contractor support functions (*i.e.*, crew van service), as well as to other employees in functions that will be affected by the transaction.

(i) Contingency plans for merger-related service disruptions. In order to address potential disruptions of service that may occur, applicants must establish contingency plans. Those plans, based upon available resources and traffic flows and density, must identify potential areas of disruption and the risk of occurrence. Applicants must provide evidence that contingency plans are in place to minimize negative service impacts and promptly restore service.

(j) Timetable. Applicants must identify all major functional or system changes/consolidations that will occur and the time line for successful completion.

We propose adding this new section to our rules to reflect the new service assurance plan called for under our proposed new rule at § 1180.1(h) regarding service assurance and operational monitoring.

Proposed § 1180.11 Additional information needs for transnational mergers.

(a) Applicants must explain how cooperation with the Federal Railroad Administration will be maintained without regard to the national origins of merger applicants.

(b) Applicants must assess the likelihood that commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations, and be detrimental to the interests of the United States, and discuss any ownership restrictions imposed on them by foreign governments.

(c) Applicants must discuss and assess the national defense ramifications of the proposed merger.

We propose adding this new section to our rules, as the emergence of multi-national, transcontinental railroads poses new challenges for consideration.

REQUEST FOR COMMENTS, REPLIES, AND REBUTTAL.

We invite comments, replies, and/or rebuttal on all aspects of the proposed regulations, including impacts on small entities and effects on either the quality of the human environment or the conservation of energy resources.

Comments due. Comments are due on November 17, 2000. Each party submitting comments to the Board must also serve a copy of its comments on each person indicated on the service list previously issued in STB Ex Parte No. 582 (Sub-No. 1).

Replies due. Replies are due on December 18, 2000. Each party submitting a reply to the Board must also serve a copy of its reply on each person indicated on the service list previously issued in STB Ex Parte No. 582 (Sub-No. 1).

Rebuttal due. Rebuttal submissions are due on January 11, 2001. Each party submitting rebuttal to the Board must also serve a copy of its rebuttal on each person indicated on the service list previously issued in STB Ex Parte No. 582 (Sub-No. 1).

Final stage of this proceeding. After considering the comments due on November 17, 2000, the replies due on December 18, 2000, and the rebuttal due on January 11, 2001, we will issue final rules by June 11, 2001.

Small entities. The Board certifies that the proposed revisions to our regulations, if adopted, will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq*.). These rules have created additional filing requirements only for Class I applicants, which are very large rail carriers. At the same time we have given increased weight to issues and concerns of smaller railroads and shippers, a change that should benefit these small entities.

The Board nevertheless seeks public input on whether the proposed revisions to our regulations would have significant economic impacts on a substantial number of small entities. If submissions made by the parties to this proceeding provide information that there would be significant economic impacts on a substantial number of small entities, the Board will prepare a regulatory flexibility analysis at the final rule stage.

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

FILING INSTRUCTIONS

Paper copies; electronic copies. Each person filing comments, a reply, and/or rebuttal must file with the Board an original and 25 paper copies of: the comments (these must be filed with the Board and served on all parties by November 17, 2000); the reply (these must be filed with the Board and served on all parties by December 18, 2000); and the rebuttal (these must be filed with the Board and served on all parties by January 11, 2001). Each such person must also submit, in addition to an original and 25 copies of all paper documents filed with the Board, an electronic copy of the document. The electronic copy should be on a 3.5-inch IBM-compatible floppy diskette, and should be in, or convertible by and into, WordPerfect 9.0. Any person may seek a waiver from the electronic submission requirement.

Document scanning. The Board intends to make available to the public all filings submitted in this proceeding by publishing an image of each on the Board's website at "WWW.STB.DOT.GOV" under the "Filings" link. To ensure that the highest quality image is captured during the scanning process, the following filing instructions apply in this proceeding: participants shall submit comments, replies, and/or rebuttal in accordance with existing rules, which require that all filings be clear and legible; on opaque, unglazed, durable paper not exceeding 8.5 by 11 inches; and able to be reproduced by photography. We also will require that only white paper be used; that printing appear on only one side of a page; that parties not employ color printing, but use only black or dark blue ink; and that all pages of filings, including cover letters and any attachments, be paginated continuously. The original document must be submitted unbound and without tabs to reduce possible damage to the document during removal of fasteners and to facilitate the use of a high-speed mechanism for automated scanning. Multi-page documents may be clipped with a removable clip or other similar device. All filings, including oversize or other non-scannable items, will be available at the Board's Docket Room.

Fax and e-mail not accepted. The Board will not accept facsimile submissions in this proceeding because of the additional administrative burden required to process such submissions. The Board will not accept e-mail submissions in this or any other proceeding because we have not developed policies, procedures, or standards for accepting documents in that format.

Board releases available via the internet. Decisions and notices of the Board, including this NPR, are available on the Board's website at "WWW.STB.DOT.GOV."

VICE CHAIRMAN BURKES, Commenting:

The Notice of Proposed Rulemaking issued today is the culmination of the hard work and effort of our staff, which reviewed over one hundred well-articulated comments by a wide range of interested parties with diverse views. We appreciate the hard work of the Board's staff and the parties who commented for their input and interest in this important rulemaking.

One thing is clear from the comments that we received in this proceeding and our public hearing last March - our merger policy and rules, which were promulgated nearly 20 years ago, need to be revisited and updated. Our current policy set forth in 49 CFR § 1180.1 encourages mergers. For example, the first sentence states that the Board "encourages private industry initiative that leads to the rationalization of the nation's rail facilities and reduction of its excess capacity." The changes proposed in the NPR correctly shift the focus away from encouraging mergers to encouraging the enhancement of competition.

I applaud the proposed change in emphasis from promoting mergers to encouraging the enhancement of competition. In my view, this change is long overdue. The proposed new merger policy statement and rules are a good start, but may need to be refined and require additional clarification. For example, the proposed language states that "merger applications must include provisions for enhanced competition." Competition can be enhanced in many ways. We should not limit the approaches that could be proposed. However, I question whether or not the proposed changes adequately place the focus on the enhancement of intramodal, or rail-to-rail, competition because this is generally what is lost in railroad mergers. I hope the parties will comment on whether the proposed language provides the Board with needed flexibility or whether more specific language is required in our final rules.

Another change that is long overdue is the move away from the "one case at a time" policy to one that focuses on the "downstream effects." The proposed § 1180.1(i): Cumulative impacts and crossover effects and § 1180.6(b)(12): Downstream merger applications, address this policy change. Obviously, future mergers should not be viewed in a vacuum. However, requiring future merger applicants to "discuss whether and how the type or extent of any conditions imposed on their proposed merger would have to be altered, or any new conditions imposed, should the Board approve additional future rail mergers" may result in too many layers of speculation. I hope that parties will thoroughly address the proposed new downstream requirements in their comments.

In addition to looking at possible future "downstream effects," I believe that the applicants should address what impacts, if any, the proposed merger would have on conditions imposed by the Board in previously approved mergers that were employed to preserve or enhance competition, *e.g.*, the shared asset areas established in the Conrail proceeding, the trackage rights BNSF received in the UP/SP merger and other conditions that were established to preserve or enhance competition. In other words, we should also look "upstream" as well as "downstream." I believe that we need to look at the whole picture and not, with blinders on, look just forward.

The Conrail transaction and the UP/SP merger demonstrated the importance of the integration of railroad operations and the adequacy of railroad service and many parties raised these issues in their comments. I hope that the proposed requirement for future applicants to submit Service Assurance Plans will help reduce or eliminate such future merger-related service disruptions. I look forward to the comments concerning this new requirement.

As previously stated, the proposed changes to our railroad merger policy and rules set forth herein represent our first attempt to change these policies and rules in nearly 20 years. It is important to remember that these are "proposed" changes. In the coming months, we will receive three additional rounds of comments from interested parties. These comments will be important, as they will help us refine the proposed changes to our railroad merger policy and rules.

I urge all interested parties to carefully review these proposed changes and to actively participate in the upcoming comment period.

COMMISSIONER CLYBURN, Commenting:

The proposed rules enumerated here are a sincere effort to update our existing merger review process to reflect the current state of the rail industry. They represent a large amount of staff and Board time, and stem from a thorough review of the more than 100 pleadings submitted to the Board.

While this first draft may be relatively broad, it represents a specific change in focus from our existing rules. The Board, through these proposed rules, recognizes a paradigm shift from the need to rationalize the nation's rail facilities and reduce excess capacity to the need for enhancing as well as preserving competition. We are asking merging partners to look beyond their own application to consider what possibly may result from their proposal. At this juncture, a new merger process must prompt future proposals to more closely align the projected benefits with the benefits actually realized immediately after consummation. I look forward to receiving the submissions in our next round of comments as the Board, of course, can alter or modify these draft rules before the formal rules are promulgated.

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Authority. 49 U.S.C. 721 and 11323-11325.

List of Subjects:
49 CFR Part 1180

Administrative practice and procedure, Bankruptcy, Railroads, Reporting and recordkeeping requirements.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn. Vice Chairman Burkes and Commissioner Clyburn commented with separate expressions.

Appendix

For the reasons set forth in the preamble, Title 49, Subtitle B, Chapter X, Part 1180 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1180--RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION PROJECT, TRACKAGE RIGHTS, AND LEASE PROCEDURES

1. The authority citation for part 1180 continues to read as follows:

Authority: 5 U.S.C. 553 and 559; 11 U.S.C. 1172; 49 U.S.C. 721, 10502, 11323-11325.

2. Section 1180.0 is proposed to be revised to read as follows:

§ 1180.0 Scope and purpose.

The regulations in this subpart set out the information to be filed and the procedures to be followed in control, merger, acquisition, lease, trackage rights, and any other consolidation transaction involving more than one railroad that is initiated under 49 U.S.C. 11323. Section 1180.2 separates these transactions into four types: *Major, significant, minor*, and *exempt*. The informational requirements for these types of transactions differ. Before an application is filed, the designation of type of transaction may be clarified or certain of the information required may be waived upon petition to the Board. This procedure is explained in § 1180.4. The required contents of an application are set out in §§ 1180.6 (general information supporting the transaction), 1180.7 (competitive and market information), 1180.8 (operational information), 1180.9 (financial data), 1180.10 (service assurance plans), and 1180.11 (additional information needs for transnational mergers). A *major* application must contain the information required in §§ 1180.6(a), 1180.6(b), 1180.7(a), 1180.7(b), 1180.8(a), 1180.8(b), 1180.9, 1180.10, and 1180.11. A *significant* application must contain the information required in §§ 1180.6(a), 1180.6(c), 1180.7(a), 1180.7(c), and 1180.8(b). A *minor* application must contain the information required in §§ 1180.6(a) and 1180.8(c). Procedures (including time limits, filing requirements, participation requirements, and other matters) are contained in § 1180.4. All applications must comply with the Board's Rules of General Applicability, 49 CFR parts 1100 through 1129, unless otherwise specified. These regulations may be cited as the Railroad Consolidation Procedures.

3. Section 1180.1 is proposed to be revised to read as follows:

§ 1180.1 General policy statement for merger or control of at least two Class I railroads.

(a) *General.* To meet the needs of the public and the national defense, the Surface Transportation Board seeks to ensure balanced and sustainable competition in the railroad industry. The Board recognizes that the railroad industry (including Class II and III carriers) is a network of competing and complementary components, which in turn is part of a broader transportation infrastructure that also embraces the nation's highways, waterways, ports, and airports. The Board welcomes private sector initiatives that enhance the capabilities and the competitiveness of this transportation infrastructure. Although mergers of Class I railroads may advance our nation's economic growth and competitiveness through the provision of more efficient and responsive transportation, the Board does not favor consolidations that reduce the railroad and other transportation alternatives available to shippers unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved. Such public benefits include improved service, enhanced competition, and greater economic efficiency. The Board also will look with disfavor on consolidations under which the controlling entity does not assume full responsibility for carrying out the controlled carrier's common carrier obligation to provide adequate service upon reasonable demand.

(b) *Consolidation criteria*. The Board's consideration of the merger or control of at least two Class I railroads is governed by the public interest criteria prescribed in 49 U.S.C. 11324 and the rail transportation policy set forth in 49 U.S.C. 10101. In determining the public interest, the Board must consider the various goals of effective competition, carrier safety and efficiency, adequate service for shippers, environmental safeguards, and fair working conditions for employees. The

Board must ensure that any approved transaction will promote a competitive, efficient, and reliable national rail system.

(c) *Public interest considerations*. The Board believes that mergers serve the public interest only when substantial and demonstrable gains in important public benefits — such as improved service, enhanced competition, and greater economic efficiency — outweigh any anticompetitive effects, potential service disruptions, or other merger-related harms. Although the Board cannot rule out the possibility that further consolidation of the few remaining Class I carriers could result in efficiency gains and improved service, the Board believes additional consolidation in the industry is also likely to result in a number of anticompetitive effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately. Additional consolidations could also result in service disruptions during the system integration period. To maintain a balance in favor of the public interest, merger applications must include provisions for enhanced competition. Unless merger applications are so framed, approval of proposed combinations where both carriers are financially sound will likely cause the Board to make broad use of the powers available to it in 49 U.S.C. 11324(c) to condition its approval to preserve and enhance competition. When evaluating the public interest, the Board will also consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation. The Board believes that other private sector initiatives, such as joint marketing agreements and interline partnerships, can produce many of the efficiencies of a merger while risking less potential harm to the public.

(1) *Potential benefits*. By eliminating transaction cost barriers between firms, increasing the productivity of investment, and enabling carriers to lower costs through economies of scale, scope, and density, mergers can generate important public benefits such as improved service, enhanced competition, and greater economic efficiency. A merger can strengthen a carrier's finances and operations. To the extent that a merged carrier continues to operate in a competitive environment, its new efficiencies will be shared with shippers and consumers. Both the public and the consolidated carrier can benefit if the carrier is able to increase its marketing opportunities and provide better service. A merger transaction can also improve existing competition or provide new competitive opportunities, and such enhanced competition will be given substantial weight in our analysis. Applicants shall make a good faith effort to calculate the net public benefits their merger will generate, and the Board will carefully evaluate such evidence. To ensure that applicants have no incentive to exaggerate these projected benefits to the public, the Board expects applicants to propose additional measures that the Board might take if the anticipated public benefits fail to materialize in a timely manner.

(2) *Potential harm*. The Board recognizes that consolidation can impose costs as well as benefits. It can reduce competition both directly and indirectly in particular markets, including product markets and geographic markets. Consolidation can also threaten essential services and the reliability of the rail network. In analyzing these impacts we must consider, but are not limited by, the policies embodied in the antitrust laws.

(i) *Reduction of competition*. Although in specific markets railroads operate in a highly competitive environment with vigorous intermodal competition from motor and water carriers, mergers can deprive shippers of effective options. Intramodal competition is reduced when two carriers serving the same origins and destinations merge. Competition in product and geographic markets can also be eliminated or reduced by end-to-end mergers. Any railroad combination entails a risk that the merged carrier will acquire and exploit increased market power. Applicants shall propose remedies to mitigate and offset competitive harms. Applicants shall also explain how they would at a minimum preserve competitive options such as those involving the use of major existing gateways, build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

(ii) *Harm to essential services*. The Board must ensure that essential freight, passenger, and commuter rail services are preserved. An existing service is essential if there is sufficient public need for the service and adequate alternative transportation is not available. The Board's focus is on the ability of the nation's transportation infrastructure to continue to provide and support essential services. Mergers should strengthen, not undermine, the ability of the rail network to advance the nation's economic growth and competitiveness, both domestically and internationally. The Board will consider whether projected shifts in traffic patterns could undermine the ability of the various network links (including Class II and Class III rail carriers and ports) to sustain essential services.

(iii) *Transitional service problems*. Experience shows that significant service problems can arise during the transitional period when merging firms integrate their operations, even after applicants take extraordinary steps to avoid such disruptions. Because service disruptions harm the public, the Board, in its determination of the public interest, will weigh the likelihood of transitional service problems. In addition, under paragraph (h) of this section, the Board will require applicants to provide a detailed service assurance plan. Applicants also should explain how they will cooperate with other carriers in overcoming natural disasters or other serious service problems during the transitional period and afterwards.

(*iv) Enhanced competition*. To offset harms that would not otherwise be mitigated, applicants shall explain how the transaction and conditions they propose will enhance competition.

(d) *Conditions*. The Board has broad authority under 49 U.S.C. 11324(c) to impose conditions on consolidations, including divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities. The Board will condition the approval of Class I combinations to mitigate or offset harm to the public interest, and will carefully consider conditions proposed by applicants in this regard. The Board will impose conditions that are operationally feasible and produce net public benefits so as not to undermine or defeat beneficial transactions by creating unreasonable operating, financial, or other problems for the combined carrier. Conditions are generally not appropriate to compensate parties who may be disadvantaged by increased competition. In this regard, the Board expects that any merger of Class I carriers will create some anticompetitive effects that are difficult to mitigate through appropriate conditions, and that transitional service disruptions may temporarily negate any shipper benefits. Therefore, to offset these harms, applicants will be required to propose conditions that will not simply preserve but also enhance competition. The Board seeks to enhance competition in ways that strengthen and sustain the rail network as a whole (including that portion of the network operated by Class II and III carriers).

(e) *Labor protection*. The Board is required to provide adequate protection to the rail employees of applicants who are affected by a consolidation. The Board supports early notice and consultation between management and the various unions, leading to negotiated implementing agreements, which the Board strongly favors. Otherwise, the Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction. The Board will review negotiated agreements to assure fair and equitable treatment of all affected employees. Absent a negotiated agreement, the Board will provide for protection at the level mandated by law (49 U.S.C. 11326(a)), and if unusual circumstances are shown, more stringent protection will be provided to ensure that employees have a fair and equitable arrangement.

(f) *Environment and safety*. (1) We encourage negotiated agreements between railroad-applicants and affected communities, including groups of neighborhood communities and other entities such as state and local agencies. Agreements of this nature can be extremely helpful and effective in addressing local and regional environmental and safety concerns, including the sharing of costs associated with mitigating merger-related environmental impacts.

(2) Applicants will be required to work with the Federal Railroad Administration, on a case-by-case basis, to formulate Safety Integration Plans to ensure that safe operations are maintained throughout the merger implementation process. Applicants will also be required to submit evidence about potentially blocked grade crossings as a result of merger-related traffic increases.

(g) *Oversight*. As a condition to its approval of any major transaction, the Board will establish a formal oversight process. For at least the first 5 years following approval, applicants will be required to present evidence to the Board, on no less than an annual basis, to show that the merger conditions imposed by the Board are working as intended, that the applicants are adhering to the various representations they made on the record during the course of their merger proceeding, that no unforeseen harms have arisen that would require the Board to alter existing merger conditions or impose new ones, and that the merger benefit projections accepted by the Board are being realized in a timely fashion. Parties will be given the opportunity to comment on applicants' submissions, and applicants will be given the opportunity to reply to the parties' comments. During the oversight period, the Board will retain jurisdiction to impose any additional conditions it determines are necessary to remedy or offset unforeseen adverse consequences of the underlying transaction.

(h) *Service assurance and operational monitoring.* (1) Good service is of vital importance to shippers. Accordingly, applicants must file, with the initial application and operating plan, a service assurance plan, identifying the precise steps to be taken to ensure continuation of adequate service and to provide for improved service. This plan must include the specific information set forth at § 1180.10 on how shippers and connecting railroads (including Class II and III carriers) across the new system will be affected and benefitted by the proposed consolidation. As part of this plan, the Board will require applicants to establish contingency plans that would be available to address the negative impacts if projected service levels do not materialize in a timely fashion.

(2) The Board will conduct extensive post-approval operational monitoring to help ensure that service levels after a merger are reasonable and adequate.

(3) We will require applicants to establish problem resolution teams and specific procedures for problem resolution to ensure that post-merger service problems, related claims issues, and other matters are promptly addressed. Also, we would envision the establishment of a Service Council made up of shippers, railroads, and other interested parties to provide an ongoing forum for the discussion of implementation issues.

(i) *Cumulative impacts and crossover effects*. Because there are so few remaining Class I carriers and the railroad industry constitutes a network of competing and complementary components, the Board cannot evaluate the merits of a major transaction in isolation — the Board must also consider the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination. The Board expects applicants to anticipate with as much certainty as possible what additional Class I merger applications are likely to be filed in response to their own application and explain how these applications, taken together, could affect the eventual structure of the industry and the public interest. When calculating the likely public benefits that their merger will generate, applicants are to measure these benefits in light of the anticipated downstream mergers. Applicants will be expected to discuss whether and how the type or extent of any conditions imposed on their proposed merger would have to be altered, or any new conditions imposed, following approval by us of any future consolidation(s).

(j) *Inclusion of other carriers*. The Board will consider requiring inclusion of another carrier as a condition to approval only where there is no other reasonable alternative for providing essential services, the facilities fit operationally into the new system, and inclusion can be accomplished without endangering the operational or financial success of the new company.

(k) *Transnational issues*. (1) Future merger applications may present novel and significant transnational issues. In cases involving major Canadian and Mexican railroads, applicants must submit "full system" competitive analyses and operating plans — incorporating their operations in

Canada or Mexico — from which we can determine the competitive, service, employee, safety, and environmental impacts of the prospective operations within the United States. With respect to rail safety in the United States, applicants must explain how cooperation with the Federal Railroad Administration will be maintained without regard to the national origins of merger applicants. When an application would result in foreign control of a Class I railroad, applicants must assess the likelihood that commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations and be detrimental to the interests of the United States rail network, and applicants must address how any ownership restrictions imposed by foreign governments should affect our public interest assessment.

(2) The Board will consult with relevant officials as appropriate to ensure that any conditions it imposes on a transaction are consistent with the North American Free Trade Agreement and other pertinent international agreements to which the United States is a party. In addition, the Board will cooperate with those Canadian and Mexican agencies charged with approval and oversight of a proposed transnational railroad combination.

(l) *National defense*. Rail mergers must not detract from the ability of the United States military to rely on rail transportation to meet the nation's defense needs. Applicants must discuss and assess the national defense ramifications of their proposed merger.

(m) *Public participation*. To ensure a fully developed record on the effects of a proposed railroad consolidation, the Board encourages public participation from federal, state, and local government departments and agencies; affected shippers, carriers, and rail labor; and other interested parties.

4. Section 1180.3 is proposed to be amended by revising paragraphs (a) and (b) to read as follows:

§ 1180.3 Definitions.

(a) *Applicant*. The term *applicant* means the parties initiating a transaction, but does not include a wholly owned direct or indirect subsidiary of an applicant if that subsidiary is not a rail carrier. Parties who are considered applicants, but for whom the information normally required of an applicant need *not* be submitted, are:

(1) in *minor* trackage rights applications, the transferor and

(2) in responsive applications, a primary applicant.

(b) *Applicant carriers*. The term *applicant carriers* means: any applicant that is a rail carrier; any rail carrier operating in the United States, Canada, and/or Mexico in which an applicant holds a controlling interest; and all other rail carriers involved in the transaction. This does not include carriers who are involved only by virtue of an existing trackage rights agreement with applicants.

* * * * *

5. Section 1180.4 is proposed to be amended by revising paragraph (a)(1) to read as follows, by removing paragraph (a)(4), by adding new paragraphs (b)(4) and (c)(6)(vi) to read as follows, and by revising paragraphs (d), (e)(2), (e)(3), and (f)(2) to read as follows:

§ 1180.4 Procedures.

(a) * * * (1) The original and 25 copies of all documents shall be filed in *majo*r proceedings. The original and 10 copies shall be filed in *significant* and *minor* proceedings.

* * *

(4) [Removed]

(b) * * *

(4) When filing the notice of intent required by paragraph (b)(1) of this section, applicants also must file:

(i) *A proposed procedural schedule*. In any proceeding involving either a major transaction or a significant transaction, the Board will publish a *Federal Register* notice soliciting comments on the proposed procedural schedule, and will, after review of any comments filed in response, issue a procedural schedule governing the course of the proceeding.

(ii) *A proposed draft protective order*. The Board will issue, in each proceeding in which such an order is requested, an appropriate protective order.

(iii) *A statement of waybill availability for major transactions*. Applicants must indicate, as soon as practicable after the issuance of a protective order, that they will make their 100% traffic tapes available (subject to the terms of the protective order) to any interested party on written request. The applicants may require that, if the requesting party is itself a railroad, applicants will make their 100% traffic tapes available to that party only if it agrees, in its written request, to make its own 100% traffic tapes available to applicants (subject to the terms of the protective order) when it receives access to applicants' tapes.

(iv) *A proposed voting trust*. In each proceeding involving a major transaction, applicants contemplating the use of a voting trust must inform the Board as to how the trust would insulate them from an unlawful control violation and as to why their proposed use of the trust, in the context of their impending control application, would be consistent with the public interest. Following a brief period of public comment and replies by applicants, the Board will issue a decision determining whether applicants may establish and use the trust.

(c) * * *

(6) * * *

(vi) The information and data required of any applicant may be consolidated with the information and data required of the affiliated applicant carriers.

(d) *Responsive applications*. (1) No responsive applications shall be permitted to minor transactions.

(2) An inconsistent application will be classified as a major, significant, or minor transaction as provided for in § 1180.2(a) through (c). The fee for an inconsistent application will be the fee for the type of transaction involved. See 49 CFR 1002.2(f)(38) through (41). The fee for any other type of responsive application is the fee for the particular type of proceeding set forth in 49 CFR 1002.2(f).

(3) Each responsive application filed and accepted for consideration will automatically be consolidated with the primary application for consideration.

(e) * * *

(2) The evidentiary proceeding will be completed:

(i) Within 1 year (after the primary application is accepted) for a *major* transaction;

(ii) Within 180 days for a *significant* transaction; and

(iii) Within 105 days for a *minor* transaction.

(3) A final decision on the primary application and on all consolidated cases will be issued:

(i) Within 90 days (after the conclusion of the evidentiary proceeding) for a *major* transaction;

(ii) Within 90 days for a *significant* transaction; and

(iii) Within 45 days for a *minor* transaction.

*   *   *

(f)   *   *   *

(2) Except as otherwise provided in the procedural schedule adopted by the Board in any particular proceeding, petitions for waiver or clarification must be filed at least 45 days before the application is filed.

*   *   *   *   *

6. Section 1180.6 is proposed to be amended by revising paragraphs (b)(1), (b)(2), (b)(3), (b)(4), (b)(6), and (b)(8) to read as follows, and by adding new paragraphs (b)(9), (b)(10), (b)(11), (b)(12), and (b)(13) to read as follows:

§ 1180.6 Supporting information.

*   *   *   *   *

(b)   *   *   *

(1) *Form 10-K (exhibit 6)*. Submit: the most recent filing with the Securities and Exchange Commission (SEC) under 17 CFR 249.310 if made within the year prior to the filing of the application by each applicant or by any entity that is in control of an applicant. These shall not be incorporated by reference, and shall be updated with any Form 10-K subsequently filed with the SEC over the duration of the proceeding.

(2) *Form S-4 (exhibit 7).* Submit: the most recent filing with the SEC under 17 CFR 239.25 if made within the year prior to the filing of the application by each applicant or by any entity that is in control of an applicant. These shall not be incorporated by reference, and shall be updated with any Form S-4 subsequently filed with the SEC over the duration of the proceeding.

(3) *Change in control (exhibit 8).* If an applicant carrier submits an annual report Form R-1, indicate any change in ownership or control of that applicant carrier not indicated in its most recent Form R-1, and provide a list of the principal six officers of that applicant carrier and of any related applicant, and also of their majority-owned rail carrier subsidiaries. If any applicant carrier does not submit an annual report Form R-1, list all officers of that applicant carrier, and identify the person(s) or entity/entities in control of that applicant carrier and all owners of 10% or more of the equity of that applicant carrier.

(4) *Annual reports (exhibit 9).* Submit: the two most recent annual reports to stockholders by each applicant, or by any entity that is in control of an applicant, made within 2 years of the date of filing of the application. These shall not be incorporated by reference, and shall be updated with any annual or quarterly report to stockholders issued over the duration of the proceeding.

*   *   *

(6) *Corporate chart (exhibit 11)*. Submit a corporate chart indicating all relationships between applicant carriers and all affiliates and subsidiaries and also companies controlling applicant carriers directly, indirectly or through another entity (with each chart indicating the percentage ownership of every company on the chart by any other company on the chart). For each company: include a

statement indicating whether that company is a noncarrier or a carrier; and identify every officer and/or director of that company who is also an officer and/or director of any other company that is part of a different corporate family, which includes a rail carrier. Such information may be referenced through notes to the chart.

* * *

(8) *Intercorporate or financial relationships*. Indicate whether there are any direct or indirect intercorporate or financial relationships at the time the application is filed, not disclosed elsewhere in the application, through holding companies, ownership of securities, or otherwise, in which applicants or their affiliates own or control more than 5% of the stock of a non-affiliated carrier, including those relationships in which a group affiliated with applicants owns more than 5% of the stock of such a carrier. Indicate the nature and extent of such relationships, if they exist, and, if an applicant owns securities of a carrier subject to 49 U.S.C. Subtitle IV, provide the carrier's name, a description of securities, the par value of each class of securities held, and the applicant's percentage of total ownership. For purposes of this paragraph (b)(8), "affiliates" has the same meaning as "affiliated companies" in Definition 5 of the Uniform System of Accounts (49 CFR part 1201, subpart A).

(9) *Employee impact exhibit.* The effect of the proposed transaction upon applicant carriers' employees (by class or craft), the geographic points where the impacts will occur, the time frame of the impacts (for at least 3 years after consolidation), and whether any employee protection agreements have been reached. This information (except with respect to employee protection agreements) may be set forth in the following format:

EFFECTS ON APPLICANT CARRIERS' EMPLOYEES

Current Location	*Classification*	*Jobs Transferred to*	*Jobs Abolished*	*Jobs Created*	*Year*

(10) *Conditions to mitigate and offset merger harms*. Applicants are expected to propose measures to mitigate and offset merger harms. These conditions should not simply preserve, but also enhance, competition.

(i) Applicants must explain how they will preserve competitive options for shippers and for Class II and III rail carriers. At a minimum, applicants must explain how they will preserve the use of major gateways, the potential for build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

(ii) Applicants must explain how the transaction and conditions they propose will enhance competition and improve service.

(11) *Calculating public benefits*. Applicants must enumerate and, where possible, quantify the net public benefits their merger will generate (if approved). In making this estimate, applicants should identify the benefits arising from service improvements, enhanced competition, cost savings, and other merger-related public interest benefits. Applicants must also identify, discuss, and, where possible, quantify the likely negative effects approval will entail, such as losses of competition, potential for service disruption, and other merger-related harms. In addition, applicants must suggest additional measures that the Board might take if the anticipated public benefits identified by applicants fail to materialize in a timely manner.

(12) *Downstream merger applications*. (i) Applicants should anticipate what additional Class I merger applications are likely to be filed in response to their own application and explain how, taken together, these applications could affect the eventual structure of the industry and the public interest.

(ii) Applicants are expected to discuss whether and how the type or extent of any conditions imposed on their proposed merger would have to be altered, or any new conditions imposed, should the Board approve additional future rail mergers.

(iii) In calculating the public benefits arising from their merger, applicants should measure them in light of the anticipated downstream merger applications.

(13) *Purpose of the proposed transaction*. The purpose sought to be accomplished by the proposed transaction, *e.g.*, improving service, enhancing competition, strengthening the nation's transportation infrastructure, creating operating economies, and ensuring financial viability.

* * * * *

7. Section 1180.7 is proposed to be revised to read as follows:

§ 1180.7 Market analyses.

(a) For *major* and *significant* transactions, applicants shall submit impact analyses (exhibit 12) that describe the impacts of the proposed transaction — both adverse and beneficial — on inter- and intramodal competition with respect to freight surface transportation in the regions affected by the transaction and on the provision of essential services by applicants and other carriers. An impact analysis should include underlying data, a study on the implications of those data, and a description of the resulting likely effects of the transaction on transportation alternatives available to the shipping public. Each aspect of the analysis should specifically address significant impacts as they relate to the applicable statutory criteria (49 U.S.C. 11324(b) or (d)), essential services, and competition. Applicants must identify and address relevant markets and issues, and provide additional information as requested by the Board on markets and issues that warrant further study. Applicants (and any other party submitting analyses) must demonstrate both the relevance of the markets and issues analyzed and the validity of the methodology. All underlying assumptions must be clearly stated. Analyses should reflect the consolidated company's marketing plan and existing and potential competitive alternatives (inter- as well as intramodal). They can address: city pairs, interregional movements, movements through a point, or other factors; a particular commodity, group of commodities, or other commodity factor that will be significantly affected by the transaction; or other effects of the transaction (such as on a particular type of service offered).

(b) For *major* transactions, applicants shall submit "full system" impact analyses (incorporating any operations in Canada or Mexico) from which they must demonstrate the impacts of the transaction — both adverse and beneficial — on competition within regions of the United States and this nation as a whole (including inter- and intramodal competition, product competition, and geographic competition) and the provision of essential services (including freight, passenger, and commuter) by applicants and other network links (including Class II and Class III rail carriers and ports). Applicants' impact analyses must at least provide the following types of information:

(1) The anticipated effects of the transaction on traffic patterns, market concentrations, and/or transportation alternatives available to the shipping public. Consistent with § 1180.6(b)(10), these must incorporate a detailed examination of the ways in which the transaction would enhance competition and of the specific measures proposed by applicants to preserve existing levels of competition and essential services;

(2) Actual and projected market shares of originated and terminated traffic by railroad for each major point on the combined system before and after the proposed transaction. Applicants may

define points as individual stations or as larger areas (such as Bureau of Economic Analysis statistical areas or U.S. Department of Agriculture Crop Reporting Districts) as relevant and indicate the extent of switching access and availability of terminal belt railroads. Applicants should list points where the number of serving railroads would drop from two to one and from three to two, respectively, as a result of the proposed transaction (both before and after applying proposed remedies for competitive harm);

(3) Actual and projected market shares of revenues and traffic volumes before and after the proposed transaction for major interregional or corridor flows by major commodity group. Origin/destination areas should be defined at relevant levels of aggregation for the commodity group in question. The data should be broken down by mode and (for the railroad portion) by single-line and interline routings (showing gateways used). Applicants should explain relevant differences in the effectiveness of competing routings (with respect, *e.g.*, to transit time, terrain, track conditions, and capacity);

(4) For each major commodity group, an analysis of traffic flows indicating patterns of geographic competition or product competition across different railroad systems, showing actual and projected revenues and traffic volumes before and after the proposed transaction;

(5) Maps and other graphic displays where helpful in illustrating the analyses in this section;

(6) An explicit delineation of the projected impacts of the transaction on the ability of various network links (including Class II and Class III rail carriers and ports) to participate in the competitive process and to sustain essential services; and

(7) Supporting data for the analyses in this section, such as the basis for projections of changes in traffic patterns, including shipper surveys and econometric or other statistical analyses. If not made part of the application, applicants shall make these data available in a repository for inspection by other parties or otherwise supply these data on request, for example, electronically. Access to confidential information will be subject to protective order. For information drawn from publicly available published sources, detailed citations will suffice.

(c) For *significant* transactions, specific regulations on impact analyses are not provided so that the parties will have the greatest leeway to develop the best evidence on the impacts of each individual transaction. As a general guideline, applicants shall provide supporting data that may (but need not) include: current and projected traffic flows; data underlying sales forecasts or marketing goals; interchange data; market share analysis; and/or shipper surveys. *It is important to note that these types of studies are neither limiting nor all inclusive*. The parties must provide supporting data, but are free to choose the type(s) and format. If not made part of the application, applicants shall make these data available in a repository for inspection by other parties or otherwise supply these data on request, for example, electronically. Access to confidential information will be subject to protective order. For information drawn from publicly available published sources, detailed citations will suffice.

8. Section 1180.8 is proposed to be amended by redesignating paragraphs (a) and (b) as paragraphs (b) and (c), respectively, and by adding a new paragraph (a) to read as follows:

§ 1180.8 Operational data.

(a) For *major* transactions applicants must submit a “full system” operating plan – incorporating any prospective operations in Canada and Mexico – from which they must demonstrate how the proposed transaction will affect operations within regions of the United States and this nation as a whole.

(1) *Safety integration plan*. Applicants must submit a safety integration plan.

(2) *Blocked crossings*. Applicants must indicate what measures they plan to take to address potentially blocked grade crossings as a result of merger-related changes in operations or increases in rail traffic.

* * * * *

9. A new § 1180.10 is proposed to be added to read as follows:

§ 1180.10 Service assurance plans.

For *major* transactions: *service assurance plan*. Applicants shall submit a service assurance plan, which, in concert with the operating plan requirements, will identify the precise steps to be taken by applicants to ensure that projected service levels are attainable and that key elements of the operating plan will improve service. The plan shall describe with reasonable precision how operating plan efficiencies will translate into present and future benefits for the shipping public. The plan must also describe any potential area of service degradation that might result due to operational changes. The plan must encompass:

(a) *Integration of operations*. Based on the operating plan, and using benchmarks for the year immediately preceding the filing date of the application, applicants must describe how the transaction will result in improved service levels and must identify potential instances where service may be degraded. While precise in nature, this description is expected to be a route level review rather than a shipper-by-shipper review. Nonetheless, the plan should be sufficient for individual shippers to evaluate the projected improvements and respond to the potential areas of service degradation for their customary traffic routings. The plan should inform Class II and III railroads and other connecting railroads of the operational changes that may have an impact on their operations, including operations involving major gateways.

(b) *Coordination of freight and passenger operations*. If Amtrak or commuter services are operated over the lines of the applicant carriers, applicants must describe definitively how they will continue to operate these lines to fulfill existing performance agreements for those services. Whether or not the passenger services operated are over lines of the applicants, applicants must establish operating protocols that ensure effective communications with Amtrak and/or regional rail passenger operators in order to minimize any potential transaction-related negative impacts.

(c) *Yard and terminal operations*. The operational fluidity of yards and terminals is key to the successful implementation of a transaction and effective service to shippers. Applicants must describe how the operations of principal classification yards and major terminals will be changed or revised and how these revisions will affect service to customers. As part of this analysis, applicants must furnish dwell time information for one year prior to the transaction for each facility described above, and estimate what the expected dwell time will be after the revised operations are implemented. Also required will be a discussion of on-time performance for the principal yards and terminals in the same terms as required for dwell time.

(d) *Infrastructure improvements*. Applicants must identify potential infrastructure impediments (using volume/capacity line and terminal forecasts), formulate solutions to those impediments, and develop timeframes for resolution. Applicants must also develop a capital improvement plan (to support the operating plan) for timely funding and completing the improvements critical to transition of operations. They should also describe improvements related to future growth, and indicate the relationship of the improvements to service delivery.

(e) *Information technology systems*. Because the accurate and timely integration of applicants' information systems are vitally important to service delivery, applicants must identify the process to be used for systems integration and training of involved personnel. This must include identification of the principal operations-related systems, operating areas affected, implementation schedules, the realtime operations data used to test the systems, and pre-implementation training requirements needed to achieve completion dates. If such systems will not be integrated and on line prior to implementation of the transaction, applicants must describe the interim systems to be used and how those systems will assure service delivery.

(f) *Customer service*. To achieve and maintain customer confidence in the transaction and to ensure the successful integration and consolidation of existing customer service functions, applicants must identify their plans for the staffing and training of personnel within or supporting the customer service centers. This discussion must include specific information on the planned steps to familiarize customers with any new processes and procedures that they may encounter in using the consolidated systems and/or changes in contact locations or telephone numbers.

(g) *Labor.* Applicants must furnish a plan for reaching necessary labor implementing agreements. Applicants must also provide evidence that sufficient qualified employees to effect implementation will be available at the proper locations prior to the transaction.

(h) *Training.* Applicants must establish a plan to provide necessary training to employees involved with operations, train and engine service, operating rules, dispatching, payroll and timekeeping, field data entry, safety and hazardous material compliance, and contractor support functions (*i.e.*, crew van service), as well as to other employees in functions that will be affected by the transaction.

(i) *Contingency plans for merger-related service disruptions*. In order to address potential disruptions of service that may occur, applicants must establish contingency plans. Those plans, based upon available resources and traffic flows and density, must identify potential areas of disruption and the risk of occurrence. Applicants must provide evidence that contingency plans are in place to minimize negative service impacts and promptly restore service.

(j) *Timetable*. Applicants must identify all major functional or system changes/consolidations that will occur and the time line for successful completion.

10. A new § 1180.11 is proposed to be added to read as follows:

§ 1180.11 Additional information needs for transnational mergers.

(a) Applicants must explain how cooperation with the Federal Railroad Administration will be maintained without regard to the national origins of merger applicants.

(b) Applicants must assess the likelihood that commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations, and be detrimental to the interests of the United States, and discuss any ownership restrictions imposed on them by foreign governments.

(c) Applicants must discuss and assess the national defense ramifications of the proposed merger.

INTRODUCTION TO APPENDICES

(A) *Abbreviations*. Abbreviations used in this decision are listed in Appendix A.

(B) *"Short form" citations*. Short case citation forms used in this decision can be found in Appendix B.

(C) *Class I Railroads And Related Interests*. We have summarized, in Appendix C,[16] the submissions of the Association of American Railroads (AAR),[17] the National Railway Labor Conference (NRLC),[18] The Burlington Northern and Santa Fe Railway Company (BNSF), Canadian National Railway Company (CNR), Grand Trunk Western Railroad Incorporated (GTW), Illinois Central Railroad Company (IC),[19] Canadian Pacific Railway Company (CPR), Soo Line Railroad Company (Soo), Delaware and Hudson Railway Company, Inc. (DHRC), St. Lawrence and Hudson Railway Company Limited (St.L&H),[20] CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT),[21] The Kansas City Southern Railway Company (KCS), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR),[22] Union Pacific Corporation (UPC), and Union Pacific Railroad Company (UPRR).[23]

(D) *Regional And Shortline Railroads And Related Interests*. We have summarized, in Appendix D, the submissions of the American Short Line and Regional Railroad Association (ASLRRA),[24] Cedar Rapids and Iowa City Ry. Co. (CR&IC), Chillicothe-Brunswick Rail Authority (CBRA),[25] Dakota, Minnesota & Eastern Railroad Corporation (DM&E), Eastern Shore Railroad, Inc. (ESHR), Farmrail System, Inc. (FMRS),[26] Finger Lakes Railway Corp. (FGLK),[27] Housatonic Railroad Company, Inc. (HRC), Iowa Traction Railroad Company (IATR), Keokuk Junction Railway Co. (KJRY), Montana Rail Link, Inc. (MRL), I&M Rail Link, LLC (I&M), Southern Railway of British Columbia (SRY),[28] Texas Mexican Railway Company (Tex Mex), Wisconsin Central Ltd. (WCL), Fox Valley & Western Ltd. (FV&W), Sault Ste. Marie Bridge Company (SSMB), Wisconsin Chicago Link Ltd. (WCLL), and Algoma Central Railway, Inc. (ACRI).[29]

(E) *Passenger Railroads And Related Interests*. We have summarized, in Appendix E, the submissions of the National Railroad Passenger Corporation (Amtrak), the American Public

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[16] The request for waiver of the electronic submission requirement with respect to the two-volume "Joint Compendium of Prior Railroad Submissions on Forced Access and Bottleneck Rate Issues" jointly filed by CSX, NS, and UP is granted. So ordered.

[17] AAR represents the interests of the nation's major freight railroads.

[18] NRLC, an association of 54 railroads (including all of the Class I railroads): filed its comments on behalf of its member railroads and the National Carriers' Conference Committee (NCCC, which represents railroads in national multi-employer collective bargaining); and filed its reply on behalf of its member railroads (except CN) and NCCC.

[19] Affiliated entities CNR, GTW, and IC (referred to collectively as CN) filed jointly.

[20] Affiliated entities CPR, SOO, DHRC, and St.L&H (referred to collectively as CP) filed jointly.

[21] Affiliated entities CSXC and CSXT (referred to collectively as CSX) filed jointly.

[22] Affiliated entities NSC and NSR (referred to collectively as NS) filed jointly.

[23] Affiliated entities UPC and UPRR (referred to collectively as UP) filed jointly.

[24] ASLRRA's 418 members are shortline and regional railroads.

[25] CBRA and the Green Hills Regional Planning Commission (GHRPC) filed jointly.

[26] FMRS is a holding company for two wholly owned Class III railroads: FarmrailCorporation (FMRC) and Grainbelt Corporation (GNBC). FMRS has, in addition to its 100% ownership interests in FMRC and GNBC, a partial ownership interest in Finger Lakes Railway Corp. (FGLK).

[27] FMRS and FGLK filed separately.

[28] Affiliated entities MRL, I&M, and SRY filed jointly.

[29] Affiliated entities WCL, FV&W, SSMB, WCLL, and ACRI (referred to collectively as Wisconsin Central System or WCS) filed jointly.

Transportation Association (APTA),[30] the Southern California Regional Rail Authority (SCRRA),[31] the Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois d/b/a Metra (Metra), and NJ Transit (NJT).

(F) *Rail Labor Interests*. We have summarized, in Appendix F, the submissions of the Rail Labor Division of the Transportation Trades Department AFL-CIO (RLD),[32] the Brotherhood of Railroad Signalmen (BRS), the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBB), the National Council of Firemen and Oilers/SEIU (NCFO), the Sheet Metal Workers International Association (SMW), the Transport Workers Union of America (TWU),[33] the Brotherhood of Maintenance of Way Employes (BMWE), the Transportation•Communications International Union (TCU), the International Brotherhood of Electrical Workers (IBEW), the American Train Dispatchers Department-BLE (ATDD), the International Association of Machinists and Aerospace Workers (IAM),[34] the United Transportation Union (UTU), and John D. Fitzgerald.[35]

(G) *Federal Agencies.* We have summarized, in Appendix G, the submissions of the U.S. Department of Agriculture (USDA), the U.S. Department of Defense (DOD),[36] and the U.S. Department of Transportation (DOT).

(H) *Regional And Local Interests*. We have summarized, in Appendix H, the submissions of the California Public Utilities Commission (CPUC), the Iowa Department of Transportation (IDOT), the Kansas Department of Transportation (KDOT), the Kansas Corporation Commission (KCC), the Kansas Office of the Attorney General (KOAG),[37] the State of Maryland (Maryland), the State of New York acting by and through the New York State Department of Transportation (New York), the North Dakota Public Service Commission (NDPSC), the North Dakota Grain Dealers

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[30] APTA's 1,300+ members include commuter railroads and rail transit systems.

[31] SCRRA's five members are the Los Angeles County Metropolitan Transportation Authority, the Orange County Transportation Authority, the Riverside County Transportation Commission, the San Bernardino Associated Governments, and the Ventura County Transportation Commission.

[32] RLD's affiliated organizations are the American Train Dispatchers Department-BLE (ATDD), the Brotherhood of Locomotive Engineers (BLE), the Brotherhood of Maintenance of Way Employes (BMWE), the Brotherhood of Railroad Signalmen (BRS), the Hotel Employees and Restaurant Employees Union (HERE), the International Association of Machinists and Aerospace Workers (IAM), the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBB), the International Brotherhood of Electrical Workers (IBEW), the Service Employees International Union (SEIU), the Sheet Metal Workers International Association (SMW), the Transportation•Communications International Union (TCU), and the Transport Workers Union of America (TWU). BRS, IBB, SMW, and TWU also joined in the Allied Rail Unions (ARU) filing; TCU, IBEW, ATDD, and IAM also filed a separate joint submission; BMWE also filed separately; and TWU also filed separately.

[33] BRS, IBB, NCFO, SMW, and TWU (referred to collectively as the Allied Rail Unions or ARU) filed jointly. TWU also filed separately.

[34] TCU, IBEW, ATDD, and IAM filed jointly.

[35] Mr. Fitzgerald, General Chairman for UTU on lines of BNSF, filed for and on behalf of UTU — General Committee of Adjustment (GO-386).

[36] DOD's comments were submitted by the Military Traffic Management Command Transportation Engineering Agency (MTMCTEA), which is responsible for the management and execution of DOD's Railroads for National Defense Program.

[37] KDOT, KCC, and KOAG (referred to collectively as the Kansas Agencies) filed jointly.

Association (NDGDA),[38] the North Dakota Wheat Commission (NDWC), the North Dakota Barley Council (NDBC),[39] the Ohio Rail Development Commission (ORDC), the Oklahoma Department of Transportation (ODOT), the Commonwealth of Virginia (Virginia), the City of Cleveland, OH (Cleveland), the Colorado Rail Competition Coalition (CRCC),[40] the Buffalo Niagara Partnership (BNP),[41] and the Greater Houston Partnership (GHP).[42]

(I) *Port Interests.* We have summarized, in Appendix I, the submissions of the American Association of Port Authorities (AAPA),[43] the Port of Seattle, WA, the Port of Tacoma, WA, the Port of Everett, WA,[44] the Port of Portland, OR (POPO), the Port of Corpus Christi Authority of Nueces County, TX (POCCA), the Port of Houston Authority (POHA), and the Port Authority of New York and New Jersey (PANYNJ).

(J) *Members Of Congress.* We have summarizd, in Appendix J, the submissions of U.S. Representatives John J. LaFalce, Jerrold Nadler, and Jack Quinn.

(K) *NITL, CURE, & ARC.* We have summarized, in Appendix K, the submissions of the National Industrial Transportation League (NITL),[45] Consumers United for Rail Equity (CURE),[46] and the Alliance for Rail Competition (ARC).

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[38] NDGDA's members include more than 90% of North Dakota's 450 grain elevators.

[39] NDWC and NDBC were created to develop and service markets for wheat, durum, and barley grown in North Dakota. NDPSC, NDGDA, NDWC, and NDBC (referred to collectively as North Dakota) filed jointly.

[40] CRCC's members are the Colorado Association of Wheat Growers, the Colorado Corn Growers Association, the Colorado Farm Bureau, Public Service Company of Colorado (which also joined in the filing of the Certain Coal Shippers group), and RAG American Coal Sales Company (which also joined in the filing of the Eastern Coal Transportation Association).

[41] BNP's members are 3,500 employers located in Western New York and Southern Ontario.

[42] GHP's 2,400 members are located in the Houston region.

[43] AAPA, an association of public port authorities in the United States, Canada, Latin America, and the Caribbean, filed on behalf of its United States delegation.

[44] The Ports of Seattle, Tacoma, and Everett (referred to collectively as the Washington State Ports or WSP) filed jointly.

[45] NITL's 600+ members conduct industrial and/or commercial enterprises throughout the United States and internationally.

[46] The members of CURE are Algona Municipal Utilities (AMU), American Electric Power Service Corporation (AEPSC), American Public Power Association (APPA), Arizona Electric Power Cooperative (AEPC), Arkansas Electric Cooperative Corporation (AECC), Buckeye Power, Inc. (BPI), Camelot Coal Company (CCC), Carolina Power and Light Company (CP&L), Consumers Energy Company (CEC), Dairyland Power Cooperative (DPC), Edison Electric Institute (EEI), Empire District Electric Company (EDEC), Entergy Services, Inc. (Entergy), Ethyl Corporation (Ethyl), Exelon Corporation (Exelon), Kansas City Power & Light Company (KCP&L), Minnesota Power (Minnesota Power), Municipal Electric Systems of Oklahoma (MESOO), National Rural Electric Cooperative Association (NRECA), Nebraska Public Power District (NPPD), The Ohio Valley Coal Company (TOVCC), Potomac Electric Power Company (PEPCO), Shawnee Coal Company (Shawnee), Southern Indiana Gas and Electric Company (SIG&E), Sunoco, Inc. (Sunoco), Western Fuel Association (WFA), and Wisconsin Power and Light Company (WP&L).

(L) *Coal Interests*. We have summarized, in Appendix L, the submissions of the Subscribing Coal Shippers group (referred to as SCS),[47] the Certain Coal Shippers group (referred to as CCS),[48] the Western Coal Transportation Association (WCTA),[49] the Eastern Coal Transportation Association (ECTA),[50] the Committee to Improve American Coal Transportation (referred to as IMPACT),[51] Edison Electric Institute (EEI),[52] Alliant Energy Corporation (AEC), Ameren Services Company (Ameren), Central and South West Services, Inc. (C&SWS), Consumers Energy Company (CEC),[53] Intermountain Power Agency (IPA), Oklahoma Gas & Electric Company (OG&E),[54] PPL Electric Utilities Corporation (PPL Utilities), PPL Montana LLC (PPL Montana),[55] Salt River Project Agricultural Improvement and Power District (SRPAI&PD), and Western Resources, Inc. (WRI).[56]

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[47] The 12 members of the SCS group (three national associations and nine individual power providers) are Western Coal Traffic League (WCTL), American Public Power Association (APPA, which is also a member of CURE), National Rural Electric Cooperative Association (NRECA, which is also a member of CURE), Alliant Energy Corporation (AEC, which also filed separately), Central and South West Services, Inc. (C&SWS, which also filed separately), City of Grand Island, NE (Grand Island), City Utilities of Springfield, MO (CU), Lafayette Utilities System (LUS), Northern States Power Company (NSPC), Platte River Power Authority (PRPA), Salt River Project Agricultural Improvement and Power District (SRPAI&PD, which also filed separately), and Texas Municipal Power Agency (TMPA).

[48] The members of the CCS group are Otter Tail Power Company (OTP), Public Service Company of Colorado (PSCo, which is also a member of the Colorado Rail Competition Coalition), Southwestern Public Service Company (SPS), TUCO INC. (TUCO), Tucson Electric Power Company (TEP), and Western Resources, Inc. (WRI, which also filed separately).

[49] WCTA's 95 members are coal producers, coal consumers, and/or rail product and rail service providers.

[50] The members of ECTA are American Electric Power Service Corporation (AEPSC, which is also a member of CURE), Arch Coal Sales, Inc. (Arch), Carolina Power & Light Company (CP&L, which is also a member of CURE), Consol Energy (Consol), David Joseph Co. (DJC), Detroit Edison Company (DEC), Duke Energy (Duke), First Energy (First Energy), Oglethorpe Power Corp. (OPC), Peabody Coal Sales Company (Peabody), Potomac Electric Power Company (PEPCO, which is also a member of CURE), RAG American Coal Sales Company (RAG, which is also a member of the Colorado Rail Competition Coalition), Southern Company Services, Inc. (SCSI), and St. Johns River Power Park (SJRPP).

[51] The members of the IMPACT group are Arkansas Electric Cooperative Corporation (AECC, which is also a member of CURE), Edison Mission Energy Company (EMEC), Midwest Generation, LLC (MG), and UtiliCorp United (UCU).

[52] EEI, a member of CURE, is the association of the investor-owned electric utility industry.

[53] CEC is also a member of CURE.

[54] OG&E's comments were filed under its trade name, OG&E Electric Services.

[55] Affiliated entities PPL Utilities and PPL Montana (referred to collectively as PPL) filed jointly.

[56] By pleading filed August 21, 2000,(the pleading is designated AECC-1, and is docketed both in STB Ex Parte No. 582 (Sub-No. 1) and also in STB Finance Docket No. 32760 (Sub-No. 21)), Arkansas Electric Cooperative Corporation (AECC, a member of CURE and the IMPACT group) has submitted comments that (it claims) are "relevant to the general issues being addressed"

(continued...)

(M) *Chemicals, Plastics, And Related Interests*. We have summarized, in Appendix M, the submissions of the Chemical Manufacturers Association (CMA),[57] the American Plastics Council (APC),[58] The Society of the Plastics Industry, Inc. (SPI),[59] BASF Corporation (BASF), the Dow Chemical Company (Dow), E. I. Du Pont de Nemours and Company (DuPont), Occidental Chemical Corporation (OxyChem), OxyVinyls, LP (OxyVinyls),[60] PPG Industries, Inc. (PPG), The Procter & Gamble Company (P&G), Shell Oil Company (SOC), Shell Chemical Company (SCC),[61] and Williams Energy Services (Williams).

(N) *Agricultural Interests*. We have summarized, in Appendix N, the submissions of the American Farm Bureau Federation (AFBF),[62] The Fertilizer Institute (TFI),[63] National Grain and Feed Association (NGFA),[64] Montana Wheat & Barley Committee (MW&BC), Colorado Wheat Administrative Committee (CWAC), Idaho Barley Commission (IBC), Idaho Wheat Commission (IWC), Oregon Grains Commission (OGC), Nebraska Wheat Board (NWB), South Dakota Wheat Commission (SDWC), Washington Barley Commission (WBC),[65] Ag Processing Inc. (AGP), Bunge Corporation (Bunge), Farmers Elevators Company (FEC), and IMC Global Inc. (IMC Global).

(O) *Minerals And Related Interests*. We have summarized, in Appendix O, the submissions of the National Mining Association (NMA),[66] the Glass Producers Transportation Council (GPTC),[67] the U.S. Clay Producers Traffic Association, Inc. (USCPTA),[68] Bentonite Performance Minerals (BPM), and Wyandot Dolomite, Inc. (WDI).

(P) *Forest Products, Lumber, And Paper Interests*. We have summarized, in Appendix P, the submissions of the American Forest & Paper Association (AF&PA),[69] the Northwest Forestry

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[56](...continued)
in the STB Ex Parte No. 582 (Sub-No. 1) rulemaking proceeding. Because the AECC-1 pleading is, as respects the rulemaking proceeding, extremely late filed (the record in the rulemaking proceeding closed more than 10 weeks prior to August 21st), AECC's request, *see* AECC-1 at 1 n.1, that the AECC-1 pleading be considered in the rulemaking proceeding is denied. So ordered.

[57] CMA is now known as the American Chemistry Council (ACC). *See* ACC's "notice of intent to participate" filed June 12, 2000, in STB Finance Docket No. 33388 (Sub-No. 91). For ease of reference, however, we shall refer to this organization, in this decision, as CMA.

[58] CMA (a trade association representing manufacturers of industrial chemicals) and APC (a trade association representing resin producers) filed jointly.

[59] SPI is the national trade association of the plastics industry.

[60] OxyChem and OxyVinyls (referred to collectively as the Oxy Companies or Oxy) filed jointly.

[61] SOC and SCC (referred to collectively as Shell) filed jointly.

[62] AFBF is a national association of farmers and ranchers.

[63] TFI is the national trade association of the fertilizer industry.

[64] NGFA, a trade association, represents 1,000+ grain, feed, processing, and grain-related companies.

[65] MW&BC, CWAC, IBC, IWC, OGC, NWB, SDWC, and WBC (referred to collectively as the Wheat, Barley & Grains Commissions or WB&GC) filed jointly.

[66] NMA, a trade association, represents the interests of the mining industry.

[67] GPTC, a trade association, represents domestic glass producers and their major suppliers of raw materials.

[68] USCPTA represents clay producers.

[69] AF&PA is the national trade association of the forest products and paper industry.

Association (NFA),[70] Empire Wholesale Lumber Co. (Empire), McKinley Paper Company (MPC), Seneca Sawmill Company (Seneca), and Weyerhaeuser Company (Weyerhaeuser).

(Q) *Automobile Manufacturers*. We have summarized, in Appendix Q, the submissions of the Alliance of Automobile Manufacturers (AAM),[71] General Motors Corporation (GMC), and Toyota Logistics Services, Inc. (TLS).

(R) *Canadian Shipper Interests*. We have summarized, in Appendix R, the submissions of the Canadian Pulp and Paper Association (CPPA),[72] Western Canadian Shippers' Coalition (WCSC),[73] the Council of Forest Industries (COFI),[74] and Canadian Resource Shippers Corporation (CRSC).[75]

(S) *Transportation Intermediaries*. We have summarized, in Appendix S, the submissions of the Transportation Intermediaries Association (TIA),[76] CrossRoad Carriers Intermodal Co. (CRCIC), Transition Corporation (TC), and Twin Modal, Inc. (TMI).

(T) *Miscellaneous Parties*. We have summarized, in Appendix T, the submissions of Enron Corporation (Enron), Heppner Iron & Metal Company (Heppner), Mayo Foundation d/b/a Mayo Clinic (Mayo), and North America Freight Car Association (NAFCA).[77]

APPENDIX A: ABBREVIATIONS

AAM	Alliance of Automobile Manufacturers
AAPA	American Association of Port Authorities
AAR	Association of American Railroads
ACC	American Chemistry Council
ACRI	Algoma Central Railway, Inc.
ADR	alternative dispute resolution
AEC	Alliant Energy Corporation
AECC	Arkansas Electric Cooperative Corporation

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[70] NFA represents 60+ forest product manufacturers and landowners in Washington and Oregon.

[71] AAM's members are BMW Group, DaimlerChrysler Corporation, Fiat Auto, Ford Motor Company, General Motors Corporation, Isuzu Motors America, Inc., Mazda North American Operations, Mitsubishi Motor Sales of America, Inc., Nissan North America, Inc., Porsche Cars North America, Inc., Toyota Motor North America, Inc., Volkswagen of America, Inc., and Volvo Cars of North America, Inc.

[72] CPPA represents companies that produce most of the pulp, paper, and paperboard manufactured in Canada.

[73] WCSC's members ship Western Canadian natural resource-based products such as coal, sulphur, chemicals, oil seed products, and forest products.

[74] COFI is a forest industry trade association that represents 100+ companies that operate in British Columbia.

[75] CRSC is a Canadian federal company incorporated for the purpose of facilitating rail-to-rail competition and assisting resource industries in their transportation endeavors.

[76] TIA's members include intermodal marketing companies (IMCs), property brokers, international forwarders, non-vessel operating ocean common carriers (NVOCCs), domestic freight forwarders, air forwarders, perishable commodity brokers, and logistics management companies.

[77] NAFCA's 20+ members manufacture, own, lease, or operate private rail freight cars.

AEPC . . . . Arizona Electric Power Cooperative
AEPSC . . . . American Electric Power Service Corporation
AFBF . . . . American Farm Bureau Federation
AFL-CIO . . . . American Federation of Labor and Congress of Industrial Organizations
AF&PA . . . . American Forest & Paper Association
AGP . . . . Ag Processing Inc.
Ameren . . . . Ameren Services Company
Amtrak . . . . National Railroad Passenger Corporation
AMU . . . . Algona Municipal Utilities
ANPR . . . . advance notice of proposed rulemaking
APC . . . . American Plastics Council
APPA . . . . American Public Power Association
APTA . . . . American Public Transportation Association
ARC . . . . Alliance for Rail Competition
Arch . . . . Arch Coal Sales, Inc.
ARU . . . . Allied Rail Unions (BRS, IBB, NCFO, SMW, and TWU)
ASLRRA . . . . American Short Line and Regional Railroad Association
ATDD . . . . American Train Dispatchers Department-BLE
BASF . . . . BASF Corporation
BLE . . . . Brotherhood of Locomotive Engineers
BMWE . . . . Brotherhood of Maintenance of Way Employes
BN . . . . Burlington Northern Inc. and Burlington Northern Railroad Company
BNP . . . . Buffalo Niagara Partnership
BNSF . . . . The Burlington Northern and Santa Fe Railway Company
Board . . . . Surface Transportation Board
BPI . . . . Buckeye Power, Inc.
BPM . . . . Bentonite Performance Minerals
BRS . . . . Brotherhood of Railroad Signalmen
Bunge . . . . Bunge Corporation
CBA . . . . collective bargaining agreement
CBRA . . . . Chillicothe-Brunswick Rail Authority
CCC . . . . Camelot Coal Company
CCS . . . . Certain Coal Shippers group
CEC . . . . Consumers Energy Company
CFR . . . . Code of Federal Regulations
CLR . . . . competitive line rate
CMA . . . . Chemical Manufacturers Association
CN . . . . Canadian National (CNR, GTW, and IC)
CNR . . . . Canadian National Railway Company
CNW . . . . Chicago and North Western Transportation Company and Chicago and North Western Railway Company
COFI . . . . Council of Forest Industries
Conrail . . . . Conrail Inc. and Consolidated Rail Corporation
Consol . . . . Consol Energy
CP . . . . Canadian Pacific (CPR, Soo, DHRC, and St.L&H)
CPPA . . . . Canadian Pulp and Paper Association
CPR . . . . Canadian Pacific Railway Company
CPUC . . . . California Public Utilities Commission
CP&L . . . . Carolina Power and Light Company

CR	Conrail Inc. and Consolidated Rail Corporation
CRCC	Colorado Rail Competition Coalition
CRCIC	CrossRoad Carriers Intermodal Co.
CRSC	Canadian Resource Shippers Corporation
CR&IC	Cedar Rapids and Iowa City Ry. Co.
CSX	CSXC and CSXT
CSXC	CSX Corporation
CSXT	CSX Transportation, Inc.
CU	City Utilities of Springfield, MO
CURE	Consumers United for Rail Equity
CWAC	Colorado Wheat Administrative Committee
C&SWS	Central and South West Services, Inc.
dBA	decibel
DEC	Detroit Edison Company
DHRC	Delaware and Hudson Railway Company, Inc.
DJC	David Joseph Co.
DM&E	Dakota, Minnesota & Eastern Railroad Corporation
DOD	U.S. Department of Defense
DOJ	U.S. Department of Justice
DOT	U.S. Department of Transportation
Dow	Dow Chemical Company
DPC	Dairyland Power Cooperative
DT&I	Detroit, Toledo & Ironton Railroad Company
Duke	Duke Energy
DuPont	E. I. Du Pont de Nemours and Company
ECTA	Eastern Coal Transportation Association
EDEC	Empire District Electric Company
EEI	Edison Electric Institute
EMEC	Edison Mission Energy Company
Empire	Empire Wholesale Lumber Co.
Enron	Enron Corporation
Entergy	Entergy Services, Inc.
ERTA	Emergency Railroad Transportation Act of 1933
ESHR	Eastern Shore Railroad, Inc.
Ethyl	Ethyl Corporation
Exelon	Exelon Corporation
FAX	facsimile
FEC	Farmers Elevators Company
FERC	Federal Energy Regulatory Commission
FGLK	Finger Lakes Railway Corp.
FMRC	Farmrail Corporation
FMRS	Farmrail System, Inc.
FOA	final offer arbitration
FR	*Federal Register*
FRA	Federal Railroad Administration
FTC	Federal Trade Commission
FV&W	Fox Valley & Western Ltd.
GHP	Greater Houston Partnership
GHRPC	Green Hills Regional Planning Commission

GMC . . . . General Motors Corporation
GNBC . . . . Grainbelt Corporation
GPTC . . . . Glass Producers Transportation Council
GTW . . . . Grand Trunk Western Railroad Incorporated
Heppner . . . . Heppner Iron & Metal Company
HERE . . . . Hotel Employees and Restaurant Employees Union
HRC . . . . Housatonic Railroad Company, Inc.
IAM . . . . International Association of Machinists and Aerospace Workers
IATR . . . . Iowa Traction Railroad Company
IBB . . . . International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
IBC . . . . Idaho Barley Commission
IBEW . . . . International Brotherhood of Electrical Workers
IC . . . . Illinois Central Railroad Company
ICA . . . . Interstate Commerce Act
ICC . . . . Interstate Commerce Commission
ICCTA . . . . ICC Termination Act of 1995
IDOT . . . . Iowa Department of Transportation
IMC . . . . intermodal marketing company
IMC Global . . . . IMC Global Inc.
IMPACT . . . . Committee to Improve American Coal Transportation
IPA . . . . Intermountain Power Agency
IT . . . . information technology
IWC . . . . Idaho Wheat Commission
I&M . . . . I&M Rail Link, LLC
Kansas Agencies . . . KDOT, KCC, and KOAG
KCC . . . . Kansas Corporation Commission
KCP&L . . . . Kansas City Power & Light Company
KCS . . . . The Kansas City Southern Railway Company
KCSI . . . . Kansas City Southern Industries
KDOT . . . . Kansas Department of Transportation
KJRY . . . . Keokuk Junction Railway Co.
KOAG . . . . Kansas Office of the Attorney General
L_{dn} . . . . nighttime noise level
LUS . . . . Lafayette Utilities System
Mayo . . . . Mayo Foundation d/b/a Mayo Clinic
MDA . . . . monthly displacement allowance
MESOO . . . . Municipal Electric Systems of Oklahoma
Metra . . . . Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois d/b/a Metra
MG . . . . Midwest Generation, LLC
MIP . . . . merger implementation plan
MOU . . . . Memorandum of Understanding
MPC . . . . McKinley Paper Company
MRL . . . . Montana Rail Link, Inc.
MTA . . . . Mass Transit Administration of Maryland
MTMCTEA . . . . . . Military Traffic Management Command Transportation Engineering Agency
MTS . . . . marine transportation system

MW&BC	Montana Wheat & Barley Committee
NAFCA	North America Freight Car Association
NAFTA	North American Free Trade Agreement
NCCC	National Carriers' Conference Committee
NCFO	National Council of Firemen and Oilers/SEIU
NDBC	North Dakota Barley Council
NDGDA	North Dakota Grain Dealers Association
NDPSC	North Dakota Public Service Commission
NDWC	North Dakota Wheat Commission
NEPA	National Environmental Policy Act
NFA	Northwest Forestry Association
NGFA	National Grain and Feed Association
NITL	National Industrial Transportation League
NJT	NJ Transit
NMA	National Mining Association
North Dakota	NDPSC, NDGDA, NDWC, and NDBC
NPPD	Nebraska Public Power District
NPR	notice of proposed rulemaking
NRECA	National Rural Electric Cooperative Association
NRLC	National Railway Labor Conference
NS	Norfolk Southern (NSC and NSR)
NSC	Norfolk Southern Corporation
NSPC	Northern States Power Company
NSR	Norfolk Southern Railway Company
NVOCC	non-vessel operating ocean common carrier
NWB	Nebraska Wheat Board
ODOT	Oklahoma Department of Transportation
OGC	Oregon Grains Commission
OG&E	Oklahoma Gas & Electric Company
OPC	Oglethorpe Power Corp.
ORDC	Ohio Rail Development Commission
OTP	Otter Tail Power Company
Oxy	OxyChem and OxyVinyls (the Oxy Companies)
OxyChem	Occidental Chemical Corporation
OxyVinyls	OxyVinyls, LP
PANYNJ	Port Authority of New York and New Jersey
PDF	portable document format
Peabody	Peabody Coal Sales Company
PEPCO	Potomac Electric Power Company
POCCA	Port of Corpus Christi Authority of Nueces County, TX
POHA	Port of Houston Authority
POPO	Port of Portland, OR
PPG	PPG Industries, Inc.
PPL	PPL Utilities and PPL Montana
PPL Montana	PPL Montana LLC
PPL Utilities	PPL Electric Utilities Corporation
PRB	Powder River Basin
PRPA	Platte River Power Authority
PSA	purchase of service agreement

PSCo . . . . Public Service Company of Colorado
P&G . . . . The Procter & Gamble Company
RAG . . . . RAG American Coal Sales Company
RCAF . . . . Rail Cost Adjustment Factor
RIA . . . . the 1998 AAR/ASLRRA "Railroad Industry Agreement"
RLA . . . . Railway Labor Act
RLD . . . . Rail Labor Division of the Transportation Trades Department AFL-CIO
RTC . . . . railroad transportation contract
SCC . . . . Shell Chemical Company
SCRRA . . . . Southern California Regional Rail Authority
SCS . . . . Subscribing Coal Shippers group
SCSI . . . . Southern Company Services, Inc.
SDWC . . . . South Dakota Wheat Commission
SEIU . . . . Service Employees International Union
Seneca . . . . Seneca Sawmill Company
SF . . . . Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company
Shawnee . . . . Shawnee Coal Company
Shell . . . . SOC and SCC
SIG&E . . . . Southern Indiana Gas and Electric Company
SIP . . . . Safety Integration Plan
SJRPP . . . . St. Johns River Power Park
SMW . . . . Sheet Metal Workers International Association
SOC . . . . Shell Oil Company
Soo . . . . Soo Line Railroad Company
SP . . . . Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company
SPI . . . . The Society of the Plastics Industry, Inc.
SPS . . . . Southwestern Public Service Company
SRPAI&PD . . . . Salt River Project Agricultural Improvement and Power District
SRY . . . . Southern Railway of British Columbia
SSMB . . . . Sault Ste. Marie Bridge Company
STB . . . . Surface Transportation Board
STRACNET . . . . . . Strategic Rail Corridor Network
St.L&H . . . . St. Lawrence and Hudson Railway Company Limited
Sunoco . . . . Sunoco, Inc.
TC . . . . Transition Corporation
TCU . . . . Transportation•Communications International Union
TEP . . . . Tucson Electric Power Company
Tex Mex . . . . Texas Mexican Railway Company
TFI . . . . The Fertilizer Institute
TFM . . . . Transportación Ferroviaria Mexicana, S.A. de C.V.
TIA . . . . Transportation Intermediaries Association
TLS . . . . Toyota Logistics Services, Inc.
TMI . . . . Twin Modal, Inc.
TMM . . . . Transportación Maritima Mexicana
TMPA . . . . Texas Municipal Power Agency
TOVCC . . . . The Ohio Valley Coal Company

TPA	test period average
TP&W	Toledo, Peoria & Western Railway
TSP	transitional service plan
TTD-TMU	track train dynamics/train make-up
TUCO	TUCO INC.
TWU	Transport Workers Union of America
UCU	UtiliCorp United
UP	Union Pacific (UPC and UPRR)
UPC	Union Pacific Corporation
UPRR	Union Pacific Railroad Company
URC	Utah Railway Company
USCPTA	U.S. Clay Producers Traffic Association, Inc.
USDA	U.S. Department of Agriculture
USOA	Uniform System of Accounts
UTU	United Transportation Union
WBC	Washington Barley Commission
WB&GC	Wheat, Barley & Grains Commissions (MW&BC, CWAC, IBC, IWC, OGC, NWB, SDWC, and WBC)
WCL	Wisconsin Central Ltd.
WCLL	Wisconsin Chicago Link Ltd.
WCS	Wisconsin Central System (WCL, FV&W, SSMB, WCLL, and ACRI)
WCSC	Western Canadian Shippers' Coalition
WCTA	Western Coal Transportation Association
WCTL	Western Coal Traffic League
WDI	Wyandot Dolomite, Inc.
Weyerhaeuser	Weyerhaeuser Company
WFA	Western Fuel Association
Williams	Williams Energy Services
WJPA	Washington Job Protection Agreement of 1936
WP	WordPerfect
WP&L	Wisconsin Power and Light Company
WRI	Western Resources, Inc.
WSP	Washington State Ports (Ports of Seattle, Tacoma, and Everett)
WTO	World Trade Organization

APPENDIX B: "SHORT FORM" CITATIONS

ANPR	*Major Rail Consolidation Procedures*, 4 S.T.B. 570 (2000) published at 67 Fed. Reg. 18,021 (2000)
BN/SF proceeding	*Burlington Northern Inc. and Burlington Northern Railroad Company — Control and Merger — Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company*, Finance Docket No. 32549
Bottleneck rules	*Central Power and Light Company v. Southern Pacific Transportation Company*, 1 S.T.B. 1059 (1996) and 2 S.T.B. 251 (1997)

BNSF/CN proceeding	*Canadian National Railway Company, Grand Trunk Western Railroad Incorporated, Illinois Central Railroad Company, Burlington Northern Santa Fe Corporation, and The Burlington Northern and Santa Fe Railway Company — Common Control*, STB Finance Docket No. 33842
CN/IC proceeding	*Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated — Control — Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central and Pacific Railroad Company, and Cedar River Railroad Company*, STB Finance Docket No. 33556
CN/IC (Dec. No. 4)	*Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated — Control — Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central and Pacific Railroad Company, and Cedar River Railroad Company*, STB Finance Docket No. 33556, Decision No. 4 (STB served June 23, 1998)
CSX/NS/CR proceeding . .	*CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation,* STB Finance Docket No. 33388
CSX/NS/CR (Dec. No. 7) .	*CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388, Decision No. 7 (STB served May 30, 1997)
DT&I conditions	*Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 492-93 (1950)
Lace Curtain	*Chicago & North Western Tptn. Co. — Abandonment*, 3 I.C.C.2d 729 (1987)
New York Dock	*New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979)
SIPs rulemaking	*Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, Acquisitions of Control, and Start Up Operations; and Procedures for Surface Transportation Board Consideration of Safety Integration Plans in Cases Involving Railroad Consolidations, Mergers, and Acquisitions of Control*, STB Ex Parte No. 574, FRA Docket No. SIP-1, Notice No. 1 (Joint Notice of Proposed Rulemaking (STB served Dec. 24, 1998, and published at 63 Fed. Reg. 72,225 (1998))

UP/CNW proceeding . . . . *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company — Control — Chicago and North Western Transportation Company and Chicago and North Western Railway Company*, Finance Docket No. 32133

UP/SP proceeding . . . . *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company — Control and Merger — Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company*, Finance Docket No. 32760

APPENDIX C: CLASS I RAILROADS AND RELATED INTERESTS

ASSOCIATION OF AMERICAN RAILROADS. AAR insists that it is vitally important that any changes in rail merger policy not have the effect of undermining the pricing freedoms and other reforms of the Staggers Rail Act of 1980. AAR also insists that we should distinguish between the direct effects of rail mergers (which, AAR believes, are the legitimate subject of rail merger policy) and the day-to-day conduct of rail commerce and operations (which, AAR contends, is not). We must be vigilant, AAR warns, not to transform an inquiry into rail merger policy into a broad effort to reregulate the rail industry.

(1) AAR maintains that the pricing freedoms and other reforms of Staggers have been critical to the health of the railroad industry.

AAR contends: that, prior to 1980, railroads were subject to a regulatory regime that made it difficult to adjust joint rates and routes, to construct new lines, and to abandon existing unprofitable lines; that, by the late 1970s, this regulatory regime had brought the industry to the brink of disaster; that the enactment of Staggers and the implementation of market-based regulation turned the industry around; that the post-1980 resurgence of a private-enterprise railroad industry was attributable in critical part to the recognition that railroads operate in a largely competitive market, and that they must have the flexibility to price their services and manage their operations in the same manner as their non-regulated competitors; and that the pricing freedom of Staggers, which gave rail management the tools to grapple with the daunting challenges of railroad economics, was critical to the survival of the industry.

The economics of railroading, AAR insists, must not be forgotten. AAR contends: that railroading is an extraordinarily capital-intensive industry that requires four to five times as much capital spending per dollar of revenue as the average for all manufacturing industries; that heavy, up-front capital costs must be incurred to create the rail infrastructure and to maintain and improve it; and that, therefore, the incremental or variable costs of moving any particular piece of traffic (*e.g.*, the costs of labor, fuel, and rolling stock) are typically much lower than the average or "fully allocated" costs associated with that traffic, including rail infrastructure costs and other fixed and common costs. AAR further contends: that, because railroads face strong competition from other railroads and other modes of transportation (particularly trucks) for most of their traffic, they cannot charge every customer the price reflecting the fully allocated cost of a particular movement; that, on many movements, the prices railroads can charge and still attract the business allow for very limited contribution to the fixed and common costs of the network; and that, if the railroad network is to survive, traffic that makes a below-average contribution to fixed and common costs must be offset by traffic that makes a significantly greater contribution to those costs. AAR adds: that railroads are characterized by significant economies of density; that, therefore, average costs per unit of traffic handled over a segment of the rail infrastructure decrease as more units of traffic are added to that segment, up to the point at which additional rail capacity is required to handle additional traffic; and that it is thus considerably easier to recover the costs associated with high density segments of the rail infrastructure than those associated with low density segments.

The economics of railroading, AAR argues, make it imperative that railroads be permitted to price their services in response to demand. AAR contends, in particular: (i) that railroads must have the flexibility to charge shippers with relatively inelastic demand (*e.g.*, shippers with few competitive alternatives) rates that exceed average or fully allocated cost to offset the rates paid by other shippers that are below average or fully allocated costs; and (ii) that railroads must also be able to charge shippers with relatively elastic demand (*e.g.*, those that have more competitive alternatives) rates low enough to induce them to move their traffic by rail. The ability to price differentially, AAR maintains, is critical to the viability of the railroad industry.

Staggers, AAR notes, introduced, in addition to pricing freedom, other market-based reforms as well. AAR contends that Staggers: allowed railroads to abandon unprofitable lines and to dispose of other non-productive assets; eliminated the mandatory maintenance of inefficient interchanges, routes, and joint-line rates; and prompted the adoption of market-based regulatory principles to protect the interests of captive shippers, such as those embodied in our *Coal Rate Guidelines*. Staggers, AAR insists, allowed the railroads to rationalize their networks, to improve their revenues through differential pricing, and to secure capital to maintain and upgrade their physical plants and to invest in productivity, service, and safety improvements. AAR adds that, although the railroad industry has still not achieved the level of profitability necessary to ensure its long-term viability, the regulatory scheme implemented under Staggers has served the public interest well, benefiting not only the railroads themselves but also consumers of rail services.

(2) AAR maintains that new infrastructure spending is critical to further improvements in service and productivity.

AAR contends: that the dramatic increases in productivity achieved after Staggers will be difficult to replicate in the future, because the easiest means for increasing productivity (*e.g.*, shedding unproductive assets and reducing labor costs) have already been implemented; that further improvements in railroad productivity will depend in part on the ability of the railroads to make future investments in the railroad infrastructure; and that, although the railroads are reinvesting most of their available cash flow in infrastructure, they continue to rely heavily on outside sources of capital to fund necessary improvements to roadways and structures, to operating and communications equipment, and to repair and maintenance.[78]

(3) AAR maintains that new regulatory burdens imposed through the merger review process would weaken the railroads, discourage needed investment, and undermine service.

AAR contends: that using this proceeding as a vehicle for expanding competitive access, imposing permanent access for post-merger service shortfalls, or imposing other regulatory burdens would be contrary to the letter and spirit of Staggers; and that such regulatory measures would also be counterproductive because they would decrease the railroads' ability and incentive to make the investments necessary to provide the level of service shippers demand. And, AAR adds: we should guard against efforts to use this proceeding as a forum for promoting changes in regulatory philosophy (*e.g.*, a liberalized approach to reciprocal switching) that could become a bellwether for reregulation outside of the merger context; and we should not ignore the adverse effects that renewed regulation would have on the railroads' financial health and their ability to provide adequate service.

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[78] AAR suggests that it would be appropriate to require merger applicants to demonstrate that they have the financial capacity to make the infrastructure investments necessary to avoid merger-related service disruptions.

NATIONAL RAILWAY LABOR CONFERENCE. NRLC contends: that we should not address the labor issues described in the ANPR; that we should not intrude on negotiations between Rail Labor and management regarding these issues; and that, if we do address the labor issues described in the ANPR, we should reject the various proposals that have been made by Rail Labor.

Preservation of the fundamental bargain. NRLC maintains that, since 1936, the effects of rail consolidations on employees have been the subject of a fundamental bargain: on the one hand, railroads may obtain collective bargaining agreement (CBA) modifications necessary to implement consolidations that serve the public interest; and, on the other hand, employees adversely affected by such consolidations will receive generous protective allowances and other benefits. This fundamental bargain, NRLC contends, was agreed to by Rail Labor in 1936, was enacted into law in 1940, has been ratified time and again by Congress, the courts, the ICC, and the Board, and, since 1979, has been incorporated into the *New York Dock* conditions that apply to major rail consolidations; it is now well settled, NRLC insists, that, in major rail consolidations subject to the *New York Dock* conditions, 49 U.S.C. 11321(a) and 49 U.S.C. 11326(a) are independent and coextensive sources of authority for the Board and its delegated arbitrators to modify CBAs when necessary to implement consolidations; Rail Labor's arguments that CBAs cannot be modified under the *New York Dock* conditions, NRLC notes, have consistently been rejected; and in view of the 1995 reenactment of the existing statutory regime, NRLC adds, we lack the legal power to undo the fundamental bargain struck in 1936, that is now incorporated into the *New York Dock* conditions adopted in 1979.[79]

NRLC notes, however, that, because the carriers are committed to preserving and enhancing cooperation with Rail Labor, NCCC (which represents the carriers in national multi-employer collective bargaining) late last year initiated negotiations with the unions to find a common basis for a new agreement that would address the unions' concerns while preserving the carriers' essential right to obtain modifications of CBAs necessary to implement transactions without resort to the protracted procedures of the RLA. NRLC indicates that the NCCC has already reached an agreement with UTU (the largest rail union), and is engaged in negotiations with the other unions in hopes of reaching similar agreements with them. NRLC indicates that the NCCC/UTU agreement provides, among other things, that, when workforces subject to differing CBAs are consolidated, the union will have, at least in certain instances, the right to select the single CBA that will apply to the consolidated work force.[80] NRLC adds that, although the NCCC will not accept agreements that would impede the carriers' ability to implement consolidations, the carriers have every incentive to reach agreements with all the unions, because (NRLC concedes) stability in labor relations is essential to the orderly implementation of consolidations.

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[79] The history cited by NRLC includes the Transportation Act of 1920, the Railway Labor Act of 1926 (RLA), the Emergency Railroad Transportation Act of 1933 (ERTA), the Washington Job Protection Agreement of 1936 (WJPA), the Transportation Act of 1940, the *New Orleans* conditions (adopted in 1952), the *New York Dock* conditions (adopted in 1979), and the ICC Termination Act of 1995 (ICCTA).

[80] *See* NRLC's comments filed May 16, 2000, Exhibit D (Exhibit D contains the text of the NCCC/UTU agreement). NRLC adds that, although the NCCC/UTU agreement confers upon the union, in certain instances, the right to select the single CBA that will apply to a consolidated work force, the NCCC/UTU agreement generally preserves the well-settled principle that the CBA at the receiving location applies to transferred employees and work.

Power to modify CBAs is essential. NRLC contends that elimination of the power to modify CBAs that stand in the way of implementation of consolidations would impair the ability of carriers to provide the public transportation benefits that are the whole purpose and goal of rail mergers. NRLC argues that virtually all rail consolidations: require modification of collectively bargained seniority districts and rosters to combine the consolidated carriers' employees in each craft; also require modification of other collectively bargained seniority, scope, and work jurisdiction rules to ensure that employees can be deployed where they are needed in consolidated operations; and also require still other modifications as well (NRLC notes, by way of example, that, when jobs from two consolidated carriers are combined in a centralized operation or at a centralized facility, it would effectively frustrate the centralization if the CBAs from each involved carrier continued to apply). NRLC warns that, if §§ 11321(a) and 11326(a) could not be used to modify CBAs under the expeditious *New York Dock* procedures, carriers would have to seek modifications under the RLA's "almost interminable" collective bargaining procedures, which do not provide for compulsory arbitration but which do leave the unions free to strike if RLA procedures are exhausted without reaching agreement. It would defeat the public transportation benefits of consolidations, NRLC insists, if CBAs could trump the authority to implement approved consolidations.[81]

Benefits provided for by the protective conditions. NRLC, although conceding that rail consolidations may have some adverse effects on some employees, insists that the benefits employees receive as part of the fundamental bargain underlying the present regime more than compensate for any such adverse consequences. There is, NRLC contends, no justification for extending the six-year protective period or otherwise increasing labor protection in any way.

(1) *Job Loss; Protective Period*. NRLC argues: that, although some jobs may be abolished as a result of rail consolidations, the great decline in rail employment in the past 25 years has had many other far more significant causes; that, in any event, loss of employment is not unique to consolidations in the rail industry (as opposed to consolidations in other industries); that, in other industries, employees do not receive benefits even remotely comparable to those provided for in the *New York Dock* conditions; that, although some companies in other industries may grant severance pay to employees rendered surplus by a consolidation, six years of continued pay and benefits is unheard of; and that, even if there were some justification for treating rail employees more favorably than those in other industries, there is certainly no justification for increasing the gap by extending the protective period under the *New York Dock* conditions.

(2) *Compensation Reduction; Protective Period*. NRLC argues: that, although rail consolidations may in certain instances reduce employee wages and benefits to a limited extent, displacement of employees to lower-paying jobs is not a unique feature of rail consolidations; that, rather, what is unique to the rail industry is six years of pay at pre-displacement levels; and that, therefore, concerns respecting post-merger wages and benefits do not warrant any extension of the protective period.

(3) *Employee Relocation; Dismissal Benefits*. NRLC concedes that rail consolidations may lead to facility and operational centralizations that require some employees to relocate. NRLC

[81] NRLC adds that, because the 1936 WJPA procedures did not include binding arbitration on an expedited schedule, relegating implementation of consolidations to the 1936 WJPA procedures would have essentially the same effect as relegating them to RLA collective bargaining procedures: it would frustrate the implementation of consolidations and prevent realization of many of their public transportation benefits. NRLC further adds that the DOT-proposed "refinement" of the "necessity" standard for CBA modifications under §§ 11321(a) and 11326(a) would have a similar effect.

contends, however: that the transfer of work and employees is necessary to permit almost any consolidation of the functions of two railroads; that, in any event, relocations are not unique to rail consolidations; and that, although there are inconveniences associated with relocation, hundreds of thousands of workers in all sectors of the economy relocate every year, and there is no reason why rail employees, who have uniquely generous relocation benefits, should be exempt. It is well settled, NRLC maintains, that the *New York Dock* conditions impose an obligation on employees to accept relocation as a predicate to eligibility for protective benefits.

(4) *Traveling Distances*. NRLC contends, with respect to maintenance-of-way employees and locomotive engineers: that traveling away from home is in the nature of their jobs; and that, although consolidations may require some employees to travel farther from home, they are already entitled to ample compensation for that under the national BMWE and BLE CBAs.

(5) *Test Period Averages*. It is well settled, NRLC argues, that *New York Dock* does not require that employees be provided with their test period averages (TPAs) before it has been established that they are displaced. The carriers, NRLC therefore insists, should not be required to provide employees with their TPAs when a consolidation is implemented.

BURLINGTON NORTHERN AND SANTA FE. BNSF contends that, in the railroad industry, mergers have been and continue to be an important means for improving service, increasing efficiency, freeing assets for more productive uses, obtaining the capital necessary to build and maintain the required infrastructure, and providing the industry with a stronger financial foundation. BNSF claims, in particular: that the elimination of excess capacity and rationalization of the rail network is only one of several factors that can be considered in the public interest balancing process; that the public interest benefits of mergers also include improved service for shippers, more efficient use of the Nation's resources, financially healthy railroads, and an improved environment; that railroads continue to have "excess capacity" (*i.e.*, underutilized assets) in some areas;[82] and that mergers can enable railroads to address this issue by building traffic and density over those assets through business provided by new market opportunities and service offerings, by redeploying the assets to better use in other locations, or by allowing retirement of unneeded assets. And, BNSF adds, any policy barring further mergers in the railroad industry or creating a presumption against such mergers would be contrary to Congressional mandates, the foundations of modern competition and antitrust theory, and actual experience in the railroad industry and other regulated network industries. BNSF therefore contends that we should continue to implement the terms and intent of our governing statutes by remaining receptive to proposed mergers that are shown to maintain competition, to preserve or enhance service to shippers, and to produce other public benefits.[83]

The case-by-case approach. BNSF contends: that, in the merger context, our existing case-by-case process has worked well; and that, because so many of the issues raised by proposed railroad mergers are fact-specific, consideration of the issues raised by railroad mergers in a case-by-case context will produce a better result than consideration of these issues in a more abstract rulemaking context. BNSF further contends that even if it were true that a BNSF/CN combination would lead

[82] BNSF notes, in this regard, that it currently has over 500 locomotives and 25,000 freight cars in storage.

[83] BNSF's request that we include in the record in this proceeding two items from other proceedings (the statement of Robert D. Krebs made March 7, 2000, at the hearing in the STB Ex Parte No. 582 proceeding, and the quarterly progress report of BNSF filed January 18, 2000, in the Finance Docket No. 32760 proceeding) is granted. So ordered.

inevitably to two transcontinental railroads, this rulemaking proceeding is not the appropriate vehicle to debate the wisdom of such a result; whether each of the several mergers that would be required to produce two transcontinental railroads is in the public interest, BNSF insists, can only be determined through the case-by-case review of specific merger proposals, if and as they are filed.

Matters of industry-wide concern but not merger-related. BNSF contends that, if we conclude that certain issues of general concern to the industry (*e.g.*, new approaches to previously resolved competitive issues) require changes in existing policy, we should not adopt rules that contemplate using individual merger proceedings as the vehicle for imposing upon merging railroads alone any new approaches that we may adopt. Issues not directly related to mergers, BNSF argues, should be addressed separately from merger issues, and changes in the Board's policies, if any, should be applied to all carriers uniformly and without bias against future merger partners. It would be, BNSF adds, particularly inappropriate and contrary to our statutory mandates to impose such burdens only on merging railroads if the result were to discourage, or to create *de facto* barriers to, further mergers.

Expedited action requested: this proceeding. BNSF insists that our merger rules do not require significant revision, and that we can and should act expeditiously with respect to any rules that do need to be revised. BNSF therefore contends that, to the extent we decide to proceed with a rulemaking on merger-related issues rather than establish new merger policies on a case-by-case basis, we should issue final rules in this proceeding by December 5, 2000.

Expedited action requested: merger proceedings. BNSF contends that, to ensure that shippers, the public, and railroads receive the benefits of mergers as quickly as possible, we should expedite our review of merger and control proceedings. Our regulations, BNSF insists, should be amended to provide that a final decision in any merger or control proceeding will be issued within one year of the initial prefiling notification.

Downstream effects; the "one case at a time" rule. BNSF contends that, if we eliminate the "one case at a time" rule, it will be necessary to limit the downstream effects that merger applicants will be required to address. BNSF contends, in essence, that merger applicants should be required to address downstream effects that are in some fashion concrete, and not those that are entirely speculative and hypothetical. (1) BNSF contends, in particular, that merger applicants should be required to address: the potential effects of the merger on the operations of others, limited to the "export" by the merged railroads of service problems to other railroads; and the effects of the merger on operations at interchanges and in shared facilities, such as yards and terminals.[84] (2) BNSF contends that, although we should consider the cumulative competitive and service effects of contemporaneous or nearly contemporaneous merger applications, merger applicants should not be required: (i) to speculate on all the potential responses of other railroads to the proposed merger; and (ii) to analyze all such speculative possibilities. (3) BNSF adds, however, that merger applicants should be required to supplement the merger application if, by the date on which intervenor testimony is due, another combination has been announced and definitive merger documents have

[84] BNSF insists that the potential loss of business by competitors of the merger applicants should be a cognizable downstream effect only if, as under current policy, it threatens essential services to shippers.

been publicly filed with the SEC.[85] The supplement contemplated by BNSF would specifically address: (a) whether any new competitive problems would be created by the two mergers; and (b) whether any new service problems might result.[86]

Maintaining safe operations. BNSF contends that the case-by-case Safety Integration Plan (SIP) process has worked well and should be continued.

Safeguarding rail service. BNSF believes that, in the merger context: shippers and connecting carriers are entitled to know that service will be maintained post-merger; and the public is entitled to know whether the merging railroads can make the timely investments in infrastructure that are required to implement the merger.

(1) *Service integration plan*. BNSF contends that any merger application should include a detailed service integration plan, setting forth the merging railroads' plans to integrate their operations without adverse effects on rail shippers or the operations of connecting carriers, including mechanisms for responding to any service problems that may arise unexpectedly in isolated locations. BNSF insists, however, that, because implementation issues will vary from merger to merger, the specific content of the service integration plan should not be established by regulation.

(2) *Service guarantees*. BNSF contends: that any merger application should contain reasonable assurances that the quality of service will be maintained for affected shippers; that these service assurances, which should include standards for measuring performance, could take a variety of forms;[87] that these service assurances, although designed by the merger applicants, would be subject to review by the Board, which would determine whether these assurances were adequate; and that, if the merger is approved, these service assurances (which BNSF refers to as a "program of service guarantees") would be included as a condition to the merger and remain in effect for a term of two years. BNSF adds: that the Board should not attempt to dictate by regulation the form of such guarantees, but should leave these matters to private negotiations (BNSF notes that the types and levels of service assurances, including any remedies, would need to reflect the service being provided and the specific service needs of individual shippers);[88] that, however, the Board would have to determine whether such guarantees were likely to be effective and in the public interest; and that, if the merged railroad has completed two years of post-merger service without significant

[85] BNSF believes that the public filing of definitive merger documents with the SEC is an appropriate "trigger" that would assure parties that the proposal is real and that would allow the original merger applicants to obtain adequate information on the proposed structure and plans of the new merger applicants.

[86] BNSF insists, however, that we should not, under any circumstances, cure any problems created by the second-filed merger application by imposing conditions on the first-filed merger application.

[87] BNSF indicates, apparently by way of example, that service assurances could be incorporated in private contracts with individual shippers, could be backed by financial incentives, could include remedies (including alternate access, when necessary), and could contain private enforcement mechanisms (*e.g.*, mediation and arbitration).

[88] BNSF urges us to reject proposals that would establish specific standards for damages or that would override contractual provisions freely negotiated by the parties. BNSF insists that, in a regulatory structure dominated by private contracts, we cannot, in essence, rewrite only one provision of extremely complicated business transactions.

merger-related disruptions, it would be appropriate to conclude that any future service problems were not merger-related.[89]

(3) *Service to small shippers*. BNSF insists that issues of particular interest to small shippers (*e.g.*, concerns respecting the practices of Class I railroads, including the use of heavier equipment and the imposition of minimum length/volumes for shipments) will arise whether or not there are further mergers in the industry. BNSF therefore contends that these problems should be addressed on an industry-wide basis.

(4) *Financial viability*. BNSF contends that merger applicants should be required: (i) to file evidence that addresses the ability of the merged railroad to obtain the capital necessary to implement fully the filed service integration plan and to produce the service benefits of the combination; (ii) to demonstrate that their existing or planned capacity will be adequate to handle the additional traffic the merging railroads intend to attract; and (iii) to address whether adequate capital will be available even if the merged railroad does not meet, in full, its *pro forma* financial targets.

(5) *Five-year oversight period*. BNSF contends that the current practice of establishing a 5-year oversight period for the merger of Class I railroads should be codified in our regulations.

Promoting and enhancing competition. BNSF contends that merger applicants should not be required to demonstrate that the merger will "enhance" competition; sound public policy, BNSF insists, requires that the test remain the "preservation" of competition. Rejection of a merger because it fails to "enhance" competition, BNSF argues, would deny the Nation the public benefits attainable only by common control, and would be contrary to the intent of Congress.

(1) *Maintain open gateways*. BNSF contends that merger applicants should be required to include in their application specific proposals to maintain, both physically and economically, existing gateways with railroads not involved in the merger, provided that such gateways (i) are major gateways (major gateways, as BNSF uses the term, are gateways that accommodated significant pre-merger traffic flows) and (ii) are directly affected by the merger. BNSF further contends, however, that we should not adopt regulations that dictate the details of the open gateway commitment that merging carriers would have to undertake; gateway maintenance, BNSF claims, involves both operational and economic issues that would be best resolved by specific carrier-developed proposals, tailored to the circumstances of the merging railroads and their shippers, and submitted to the Board as part of a complete application.[90]

(2) *Terminal switching*. BNSF contends: that the question of expanding access in terminal areas is not logically limited to mergers; and that mergers do not generally introduce new harms in terminal areas. BNSF therefore concludes that, if we decide that our terminal switching rules should be changed, we should conduct a separate rulemaking on an industry-wide basis, so that shippers are not denied opportunities, and railroads burdened, solely because of the order in which mergers are proposed.[91]

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[89] BNSF indicates that, although customers of shortline railroads should be included in the merging railroads' service guarantees, these guarantees can be extended only so far as the merging railroads control the service. Service guarantees, BNSF argues, should be directed at providing compensation only for those customers who purchase service from merging carriers.

[90] Rigid guidelines, BNSF suggests, would recreate the problems that attended the gateway-preserving DT&I conditions of years past.

[91] BNSF insists, however, that open access could threaten the ability of the rail industry to finance infrastructure and service improvements.

(3) *Merger applicants to offer contracts for the competitive portion of joint-line routes*. BNSF contends that any issue respecting a merged railroad's obligation to bid on traffic terminating on another railroad's bottleneck segment should be addressed, if at all, only on an industry-wide basis. BNSF adds that, in any event, the decisions on what business to pursue, and what terms should be offered to obtain that business, should be left to the markets to determine.

(4) *Bottleneck rate relief: in general*. BNSF contends that a requirement that merger applicants "provide a new through route at a reasonable interchange point whenever they control a bottleneck segment and the shipper has entered into a contract with another carrier for the competitive segment" would force merging carriers to surrender the protection currently afforded by the statute, which (BNSF claims) provides that, when the carrier can offer an origin-to-destination service option, the reasonableness of a rate will be judged only on the basis of the through rate quoted for an origin-to-destination move. BNSF opposes any dilution of this statutory protection, which (BNSF believes) is well-grounded in railroad economics and well supported by the industry's need to retain opportunities to earn adequate revenues. And, BNSF adds, if we intend to review the "bottleneck" decisions, we should conduct any such review on an industry-wide basis. There is, BNSF insists, no good policy reason to limit any retrenchment of bottleneck policy to merging carriers only.

(5) *Bottleneck rate relief: contract exception*. BNSF concedes, however, that there is one merger-related bottleneck matter that warrants attention. BNSF indicates that, where one of the merging carriers controls a bottleneck segment pre-merger, but where a pre-merger shipment could not travel in a through move from origin to destination on the bottleneck carrier, the "contract exception" requires the bottleneck carrier to defend the reasonableness of the rate on the bottleneck segment alone if the shipper can obtain a negotiated contract for the remaining portion of the move, even if the "bottleneck" carrier (with the participation of another carrier) is willing to offer a joint-line rate that covers the entire move, origin-to-destination. BNSF notes that, because a merger may allow the merged carrier to offer new single-line origin-to-destination service for a movement that previously had to move in an interline movement, the merger could have the effect of depriving shippers of the availability of the "contract exception" to assess the reasonableness of only the bottleneck portion of the rate. BNSF therefore indicates that it does not object to shippers being able to obtain Board review of the reasonableness of the rate for the pre-merger "bottleneck" segment of a move, even when the merger creates a new origin-to-destination routing option on the merged carrier.

(6) *One-Lump Theory*. BNSF contends: that the "one-lump" theory, which has been extensively litigated in past merger cases, is based on sound economics; that there is no reason for reconsidering or reversing this theory at this time; and that, if we wish to revisit this theory, we should do so in individual merger proceedings, where opponents of the theory could attempt to demonstrate, based on a factual record, that application of the theory to their circumstances is inappropriate because it would result in actual competitive harm to them.

Shortline and regional railroad issues. BNSF insists: that issues of broad concern to shortline and regional railroads as a class (*e.g.*, issues concerning paper barriers, steel barriers, and car supply) are not merger-related and should therefore be addressed on an industry-wide basis; and that issues relating to specific contracts between Class I railroads and their tributary shortlines, including contractual obligations for deferred compensation, marketing arrangements, paper barriers, car supply and other issues, should be left to case-by-case discussion between the contracting parties.[92]

Employee issues. BNSF contends that, although merging railroads should be encouraged to negotiate labor issues directly with the unions that represent affected employees, the Board does not have the authority to eliminate the contract override provision of the statute. And, BNSF adds, there is no sound policy reason to extend the *New York Dock* protective period or to expand, in any other fashion, the *New York Dock* benefits package; railroad employees adversely affected by a merger, BNSF insists, already receive generous protections.

3-to-2 situations. BNSF contends that our general approach to this issue is correct; no one, BNSF insists, has demonstrated that the 3-to-2 issue should be revisited. And, BNSF adds, because 3-to-2 questions, whether with respect to particular shippers or with respect to particular corridors, tend to be fact-specific, questions whether any particular 3-to-2 situations would result in an actual loss of competitive pressure are best addressed in a specific factual context.

2-to-1 situations. BNSF contends that any merger application should contain a commitment to remedy any resulting 2-to-1 situations.

Merger-related public interest benefits. BNSF contends that existing policy with respect to public interest benefits is correct and does not require revision. Existing processes, BNSF claims, are adequate to enable merger applicants' claims respecting synergies and other public interest benefits to be tested; our post-merger monitoring efforts, BNSF adds, should remain focused on service issues (the focus, BNSF insists, should not be shifted to ensuring that projected benefits are actually realized);[93] and, BNSF contends, because experience has demonstrated that there are practical and legal limits on marketing alliances and cooperative arrangements, and because experience has further demonstrated that these alliances and arrangements tend to succeed, if at all, only on a narrowly focused, specific and short-term basis, merger applicants should not be required to demonstrate that projected benefits of the merger could not be achieved short of merger.[94]

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[92] BNSF adds: that the imposition of conditions requiring, for example, the removal of paper barriers with respect to shortlines would unfairly burden merging railroads with a loss of revenue that would threaten the viability of many transactions; and that the retroactive imposition of such conditions on existing mergers would raise similar problems, and would also raise significant legal questions.

[93] BNSF claims that it would not be practically feasible to undo a merger if projected benefits were not precisely realized.

[94] It is, BNSF insists, highly unlikely that rational business enterprises have left unclaimed savings and benefits that are easily achievable through cooperative efforts. BNSF further contends: that operating alliances and cooperative ventures (which, BNSF notes, lack the incentive and authority to enforce decisions that apply on a systemwide basis) simply cannot take the place of mergers; that the benefits of joint purchasing efforts without common control have been overstated (the synergies available through the rationalization of product specifications, BNSF argues, often can be achieved only when the cooperating entities are forced to adopt common standards that may not be the first choice, or in the specific best interest, of all of the cooperating entities); that mergers provide much stronger incentives to achieve improvements in service and asset utilization; that mergers, by way of illustration, enable cost reductions (*e.g.*, staff rationalizations) that cannot be (continued...)

*Merger-related passenger issue*s. BNSF contends that the effects of mergers on passenger rail service should be addressed both in the merger applicants' operating plan and in their service integration plan.

Environmental issues. BNSF contends that all merger-related environmental effects should be addressed as part of the environmental analysis of the merger application.

Cross-border issues. (1) BNSF contends that, in the case of a cross-border merger, the Federal Railroad Administration (FRA) would retain its full authority vis-à-vis safety. No one, BNSF adds, has suggested that FRA should not, for example, count hours of service in Canada when determining whether employees working a cross-border move are in compliance with FRA rules.

(2) BNSF contends that, in time of war, the President would have, under existing U.S. law, broad authority to review, suspend, or prohibit acquisitions of a U.S. person by a foreign person where the foreign person might take action that might threaten to impair national security. And, BNSF adds, all facilities and equipment located in the United States would remain subject to the national emergency powers granted by statute.

(3) BNSF contends that it is, at this time, entirely hypothetical whether foreign control of railroads could lead to traffic shifts that would have significant adverse financial effects on U.S. ports and waterway systems. BNSF further contends: that this hypothetical concern ignores the larger issues that drive trade flows, including the preferences of shippers and consumers, the availability of water transportation internationally, and the effect of port and ship charges on traffic patterns; that any effort by a combined cross-border railroad to direct traffic on the basis of national goals, rather than the economic interests of the railroad itself, would violate the duties owed by the railroad's Board of Directors to the shareholders; that any effort by the Canadian government to require that a cross-border railroad favor Canadian ports would violate the North American Free Trade Agreement (NAFTA) and would raise issues under the rules of the World Trade Organization (WTO); and that the ability of a merged railroad, in derogation of its obligations to shareholders, to favor Canadian grain and lumber producers vis-à-vis U.S. grain and lumber producers would be significantly constrained by international trade patterns, producer and consumer interests, the common carrier obligations of rail carriers, and international law.[95]

(4) BNSF indicates that some parties, most prominently DOT, have expressed cross-border concerns for which (BNSF maintains) the best answer would be a more organized presentation. BNSF therefore contends that merger applicants should address these issues as part of an integrated operating plan and also should address the specific legal issues raised by DOT as they apply to any given transaction.

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[94](...continued)
achieved otherwise; that, to the extent alliances involve coordinated operations, they will raise many of the same implementation issues and operational risks as actual mergers; and that the argument that the Board should favor alliances over mergers presupposes that the Board should make decisions about the preferred organization of business enterprises. And, BNSF notes, railroad mergers are not entirely like mergers in other industries, because the nature of a network industry with high fixed costs and low variable costs raises unique issues.

[95] BNSF adds that transportation policy should remain neutral with respect to cross-border trade disputes.

Technical revisions. BNSF has proposed a number of technical revisions to our regulations that (it indicates) are intended to codify long-standing practices regarding waivers and clarifications.

(1) *Definition of applicant*. BNSF proposes that § 1180.3(a) be revised to read: "*Applicant* means the parties initiating a transaction. Parties who are considered applicants, but for whom the information normally required of an applicant need not be submitted, are (1) in minor trackage rights applications, the transferor, (2) in responsive applications, a primary applicant, and (3) holding companies that do not conduct rail operations in their own names."

(2) *Definition of applicant carriers*. BNSF proposes that § 1180.3(b) be revised to read: "*Applicant carriers* means the applicant, all Board-regulated carriers related to the applicant in which the applicant holds a direct or indirect interest greater than 50 percent, and all other carriers directly involved in the transaction. This does not include carriers who are involved in an existing trackage rights agreement with applicants."

(3) *Consolidation of information*. BNSF proposes that § 1180.4(c)(6) be amended by adding a new clause (vi) to read: "Except for the information required by § 1180.6(b)(8), the data and information required of applicant carriers may be consolidated with the information and data pertaining to the applicants."

(4) *Schedule*. BNSF proposes that the timetables set forth in § 1180.4 be revised to reflect the one-year deadline urged by BNSF for Board action. BNSF adds that the intermediate deadlines would be best established on a case-by-case basis, reflecting the issues raised in each proceeding.

(5) *Employee information*. BNSF proposes that § 1180.6(a)(2)(v) be amended to read: "Describe by employee class or craft, the effect of the proposed transaction upon applicant carriers' employees, the geographic points where the impact will occur, the time frame of the impact (for at least 3 years after consolidation), and whether any employee protection agreements have been reached. The applicant may select the classes or crafts to be used in providing such descriptions of employee impact and the format to be used in presenting the required employee impact data."

(6) *Major transactions: periodic reports*. BNSF proposes that § 1180.6(b)(1) be revised to read: "Periodic Reports (exhibit 6). Submit applicant carriers' two most recent annual reports to shareholders and two most recent annual reports and any subsequent semi-annual, quarterly or current reports (including any amendments thereto), if any, that have been publicly filed with the Securities and Exchange Commission (SEC). These documents shall not be incorporated by reference, and shall be updated with any such annual, semi-annual, or quarterly reports or current reports subsequently publicly filed with the SEC over the duration of the proceeding."

(7) *Major transactions: transactional disclosures*. BNSF proposes that § 1180.6(b)(2) be revised to read: "Transactional Disclosures (exhibit 7). Submit all registration statements, prospectuses, proxy statements, tender offer statements or exchange offer statements, if any, relating to the major transaction that have been publicly filed with the SEC under the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934, as amended, by the applicant carriers. These documents shall not be incorporated by reference, and shall be updated with any such registration statements, prospectuses, proxy statements, tender offer statements or exchange offer statements subsequently filed with the SEC over the duration of the proceeding."

(8) *Major transactions: change in control*. BNSF proposes that § 1180.6(b)(3) be revised to read: "Change in control (exhibit 8). Provide a list of the principal six officers of the applicants and their majority owned rail carrier subsidiaries in the United States."

(9) *Major transactions: annual reports*. BNSF proposes that § 1180.6(b)(4) be deleted (BNSF would shift the annual report requirement to revised § 1180.6(b)(1)).

(10) *Major transactions: corporate chart*. BNSF proposes that § 1180.6(b)(6) be revised to read: "Corporate chart (exhibit 11). Submit a corporate chart indicating all common officers and directors only where individuals hold officer or director positions in more than one corporate family. Each chart shall indicate the percentage ownership of every company on the chart by any other

company on the chart. For each company include a statement indicating (i) any common officers or directors for every entity on the chart (with reference to the Board decision by docket number and date authorizing the holding of such positions, or an explanation of why such authorization was not required) and (ii) whether each company is a non-carrier or carrier (by railroad, motor, or water, including the number of any Board certificate or permit, and the docket number of any proceeding pending before the Board). Such information may be referenced through notes to the chart."

(11) *Major transactions: intercorporate relationships*. BNSF proposes that § 1180.6(b)(8) be revised to read: "Indicate whether there are any intercorporate relationships in which applicants or their affiliates own more than 5 percent of a non-affiliated carrier's stock. Indicate the nature and extent of such relationships, if they exist, and, if an applicant carrier owns securities of a carrier subject to 49 U.S.C. Subtitle IV, provide the carrier's name, a description of securities, par value of each class of securities held, and the applicant carriers' percentage of total ownership."

CANADIAN NATIONAL. CN insists that general industry policy matters should be pursued, if at all, outside the context of this proceeding. Such general industry policy matters include, in CN's view, the following: the issues, information and analyses that should be brought to bear on the question whether an industry structure consisting of two East-West U.S. transcontinental railroads would be consistent with the public interest; whether the Board should mandate physical access to bottlenecks or otherwise regulate bottleneck rates; and whether the Board should restructure relationships between shortlines and major railroads. CN recommends that such industry-wide policy matters be handled, if at all, in separate proceedings. CN further recommends that we conclude any such separate proceedings within six months of May 16, 2000.[96]

Transcontinental rail duopoly informational proceeding. CN contends that, because the "transcontinental rail duopoly" question is a matter of general policy about industry structure, we should consider initiating immediately an expedited informational proceeding for the purpose of hearing views and enriching our understanding and that of all railroads and their constituencies with respect to an industry structure consisting of two East-West U.S. transcontinental railroads. Comments could be invited, CN suggests, on a range of issues, such as the kinds of efficiencies that a transcontinental railroad could bring, the existing or potential demand for the services it would provide, the bearing of globalization and international trade, ways of identifying relevant markets for competition analysis, the significance of the vigorous competition in two-railroad markets that exists today, the framework for analyzing possible effects on incentives or ability to exercise market power, labor issues, issues of managerial control, and the risks of failure of one of two systems. CN indicates that the informational proceeding it contemplates would not be designed to generate rules or guidelines, but would inform all concerned parties of the issues, information, and analysis that could be brought to bear if and when the Board is presented with a specific proposal for a merger between a U.S. Western and Eastern railroad.

Case-by-case approach. CN concedes, in essence, that at least some of the matters that are being addressed in this rulemaking proceeding are merger-related. CN contends, however, that such matters would be better developed in the context of individual merger proceedings. CN further contends that, if we do adopt any changes in this rulemaking proceeding, we should, at the very least, maintain the non-binding approach of the Merger Policy Guidelines, so that parties would

[96] CN also recommends that we conclude the present rulemaking proceeding within six months of May 16, 2000.

continue to be allowed to challenge, through appropriate evidence or argument in individual cases, the policies embraced in the § 1180.1 general policy statement. The economy, CN insists, is so dynamic, and the facts of each proposed transaction are so particular, that it would be unwise to take any other approach. And, CN adds, consideration of whether an industry structure consisting of two U.S. East-West transcontinental railroads would be consistent with the public interest should ultimately occur in the process of reviewing any individual transactions that give rise to that issue.

Beneficial impacts of end-to-end mergers. CN argues that end-to-end mergers can improve profitability by enhancing the service provided to customers, can increase effective capacity without additional investment, and can make investments in additional infrastructure economic that would not be economic absent the increased volumes resulting from the merger. CN further argues that "system rationalization" is broader than downsizing, is still ongoing and always will be as traffic patterns and technologies change, and is a feature not only of parallel mergers but also of end-to-end mergers (end-to-end mergers, CN notes, can bring scale-economies and route optimization, as well as increased equipment utilization through seasonal complementarities, increased backhaul and triangulation, and reduced cycle times). Past mergers, CN notes, have reduced inefficiencies associated with redundant facilities, in some instances by eliminating them, and, in others, by making them productive in new ways (for example, by directional running on parallel track and by yard specialization). Rationalization, CN insists, has to do with making assets more productive, which may not depend on downsizing assets but on changing how they are used. CN adds that, because our cases have established that we will not approve major mergers that would have substantial unremedied anticompetitive effects (*i.e.*, because, in the merger context, our cases have taken "market power" off the table), it is reasonable to presume that any future merger proposals will be motivated by opportunities for increased efficiency and output.

Future mergers, CN further contends, may well reduce the risk of railroad failure insofar as they enable the new railroad systems to diversify their production portfolio, thereby reducing their reliance on a single (or smaller) set of industries. The added scope that future mergers may provide, CN argues, may make the railroads better able to survive a significant transitory downturn in a given industry, and may increase their ability to reconfigure their networks in response to the longer term loss of business due to increased competition through the global economy, or in response to changing trade patterns that present new opportunities for rail transportation.

Overall policy. CN contends that we might wish to clarify the first two sentences of § 1180.1(a) to read: "The Surface Transportation Board encourages private industry initiatives that would increase the efficiency of the North American rail network. One means of accomplishing greater efficiencies is rail consolidation." CN further contends, in essence, that this clarification embraces two basic principles: (1) that a rail merger must be judged by its direct effects, and our conditioning power can only be used with respect to the direct effects of that merger; and (2) that policies for the industry as a whole must be implemented on an industry-wide basis, outside of the merger context. CN adds that we should not propose guidelines that would make mergers an occasion for access or other bottleneck regulation unrelated to any reductions in competition caused by the merger. Such access in any form, CN warns, would necessarily reduce railroad revenues and, during the transition, create tremendous uncertainty that could increase railroads' costs of capital.

Safeguarding rail service. CN suggests that, to provide further assurance that a merged railroad will be managed efficiently and effectively, we might require that merger applicants: (a) file a service integration plan (CN indicates that such a plan should, among other things, be dynamic in nature and outline the applicants' staged approach and contingency plans for implementation); (b) demonstrate their financial viability and their ability to provide needed infrastructure, to respond to service problems, to avoid adverse impact on the merged railroad's cost of capital, and to proceed with measured implementation, not rushed by financial pressures; (c) disclose the extent to which any applicant may be suffering from service problems associated with a previous merger; (d) compare and contrast the proposed transaction with prior consolidations that have been associated with major service problems; (e) outline any plans for terminating, reassigning, or making other material changes in personnel; and (f) in order to protect against the risk that problems might develop, demonstrate a commitment to provide appropriate service guarantees for the crucial first years of implementation.

(1) *Service integration plan*. The service integration plan contemplated by CN would describe the means by which applicants will implement the transaction without major service disruptions, and would include: the management, equipment, and technology resources that applicants will apply to implementation; plans for handling service at points that are common to the applicants; plans for handling service with other railroads at specific common points and major interchanges; measurement and publication of overall system performance during the implementation period, which (CN indicates) would generally be considered to be the first 24 months following consummation of the transaction;[97] a general approach to early detection and recovery from any service problems that may arise, recognizing (CN adds) that solutions to service contingencies cannot be fully developed in advance of the contingency; and any features of the system, such as routing or terminal flexibility, that would be expected to help avoid or mitigate unexpected service problems.

(2) *Service guarantees*. CN contends: that, in general, to ensure the devotion by merging railroads of additional resources to resolve transitional service difficulties, the merging railroads should be required to bear some, though not necessarily all, of the "external" costs that asset combinations and system rationalizations may impose on shippers; that service guarantees would help to "internalize" the cost externalities that have sometimes been imposed on shippers as part of the merger implementation process; and that, with service guarantees, the merging railroads would have the incentive to account for the burdens of service difficulties on shippers and, therefore, to act to offset these through improved merger implementation. CN adds: that a "one size fits all" service guarantee would not be appropriate; that it would be better if the railroads and their shippers could agree on the performance standards and financial incentives that would be part of any service guarantees; and that, if railroads and shippers fail to reach agreements, we would have to select from among a number of possible mechanisms for addressing possible future service difficulties.[98]

Downstream transactions; the "one case at a time" rule. CN contends, in essence, that the § 1180.1(g) "one case at a time" rule allows consideration of the *downstream effects* that should be considered in merger proceedings and bars consideration only of those *downstream transactions* that should not. The "one case at a time" rule, CN therefore insists, should be kept intact.

(1) *Downstream effects*. CN contends that § 1180.1(g) allows consideration of the downstream effects that should be considered in merger proceedings. CN indicates, in particular

[97] Experience, CN contends, has shown that, if severe merger-related service disruptions are going to occur, they are most likely to do so during the first 24 months following consummation.

[98] CN suggests as one approach a service guaranty entailing in general a base-line pre-transaction service level, criteria for measuring post-transaction performance, defined categories and causes of service failure, specification of movements covered (*e.g.*, those on the lines of or within the control of the combining carriers), and a set of defined contractual remedies (*e.g.*, rebates, discounts, relief from volume commitments, and access to alternative carriers).

(and by way of example), that § 1180.1(g) allows us to consider whether the pending transaction: will have impacts on the essential services provided by other existing railroads; and will have adverse operational impacts on the operations conducted by other existing railroads.

(2) *Downstream transactions: in general*. CN contends that, as a general matter: consideration of downstream transactions would jeopardize our ability to meet the statutory deadlines applicable to the pending transaction; and the benefits of expanded review of downstream transactions would not outweigh the costs. It would therefore be, CN claims, inappropriate to adopt a guideline that generally opened control proceedings to evidence relating to downstream transactions.[99]

CN claims that a situation in which consideration of downstream transactions would change what would otherwise be approval to disapproval under the public interest standard would be the exception and not the rule. CN adds, in essence: that if a merger, by ratcheting up competition through improved service and other efficiencies, causes other railroads to merge in order to develop new efficiencies of their own, that downstream transaction would be a pro-competitive outcome that we should welcome; and that if a merger, by creating a "competitive imbalance," causes other railroads to merge in order to right that imbalance, that downstream transaction would itself merit approval. And, CN suggests, disapproval of a merger that might, by creating a "competitive imbalance," trigger another merger designed to right the imbalance, would be at odds with the fundamental structure of our statute, which (CN maintains) requires the Board to approve a transaction that is consistent with the public interest, and which leaves "restructuring" to the initiative of private industry.

CN further contends that the costs of expanding control proceedings to encompass downstream transactions would be tremendous. And that would be true, CN adds, whether consideration were limited to announced downstream transactions or extended to transactions that have not been announced. Either approach, CN argues, would vastly increase the complexity of already complex Board proceedings; each control proceeding, CN warns, could become a litigation about multiple transactions. And the difficulties, CN adds, would be even worse if consideration extended beyond announced transactions to hypothetical transactions; litigation and discovery, CN claims, would then extend to the most sensitive strategic matters, and might cause problems at the SEC under the securities laws.

(3) *Downstream transactions: comparative analysis*. CN contends that consideration of downstream transactions would turn a control proceeding into a comparative proceeding in which the Board would attempt to determine not only whether the pending transaction is consistent with the public interest, but whether it is the best transaction from among all possible permutations. Such a role, CN insists, would be beyond the Board's authority and would be unworkable.

(4) *Limited class of downstream transactions*. CN contends that, if we are determined to take downstream transactions into consideration, we should consider only those downstream transactions: (i) that can be shown to be downstream "effects" of the pending transaction (*i.e.*, that can be shown to have been caused by the pending transaction); and (ii) that have been "announced" (by an SEC filing of a definitive merger agreement) by no later than some early stage of the proceeding involving the pending transaction. CN adds that, if we pursue this option: we should require the definitive merger agreement in the downstream transaction to be contingent on approval of the pending transaction; we should require the parties to the downstream transaction to establish that their transaction is in fact a consequence of the transaction under review, such that they would abandon

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[99] CN concedes that, although § 1180.1(g) generally bars consideration of downstream transactions, § 1180.1(g) does not deny us the power to decide to accept evidence of downstream transactions based on considerations specific to a particular case.

their transaction if, for any reason, the transaction under review were not consummated; and we should require the parties to the downstream transaction to establish their bona fide intent to present an application to the Board and to consummate their transaction if approved with acceptable conditions, if the pending transaction is consummated.

(5) *Waiver: announced downstream transactions*. CN suggests that, if we are determined to consider downstream transactions, we might amend our regulations to allow for waiver of § 1180.1(g) when there is strong reason to believe that the probative value of evidence relating to announced downstream transactions that would result from the pending transaction would outweigh the increased complexity and delay of the control proceeding that would be the necessary consequence of the introduction of such evidence.

(6) *Waiver: persons other than applicants*. CN further suggests that, if we are determined to consider downstream transactions, we might amend our regulations so that persons other than the merger applicants could petition for waiver. CN adds, however, that such other persons should be required to state in their petition their intention to participate in the proceeding and to offer evidence relating to downstream transactions. CN contends that a broadened waiver approach would give the Board an opportunity to craft an order tailored to the circumstances and the nature of the case, with due regard for the manageability of proceedings and the relevant statutory deadlines.

(7) *Prima facie case*. CN contends that, if we are determined to consider downstream transactions, we should make plain that evidence concerning such transactions is not a required part of applicants' prima facie case. CN insists that the parties to the downstream transaction or other persons should have the burden of coming forward in the first instance and offering reasons why the downstream transaction means that the transaction under review is not in the public interest. At that stage, CN adds, the downstream issues would be in play and the parties could develop the record accordingly.

Maintaining safe operations. CN indicates that, based on its experience with the benefits and flexibility of the SIP process (in the context of the CN/IC transaction) and the fact that the pending SIPs rulemaking has already gone through several stages, it agrees that there is no need for a further rulemaking proceeding with respect to safety matters.

Promoting and enhancing competition; "*access*"*issues*. CN argues that the "access" proposals advanced by various parties for "enhancing" competition largely involve either forced physical access to bottlenecks through trackage rights or switching, or mechanisms that would result in the regulation of bottleneck rates. CN contends that we neither should nor can use our merger conditioning power to increase competition. CN further contends: that access issues are (with one exception) industry-wide issues, unrelated to particular transactions; and that, if we believe that the time has come to conduct a general inquiry into whether and when to mandate access, we should open a separate docket for that purpose and invite comments on the merits of access for the entire industry, outside of the merger context.

(1) *Bottleneck rules; contract exception*. CN concedes that bottleneck rates present a merger-specific issue in one instance, *i.e*., where the shipper prior to the merger would have been entitled to regulation of a bottleneck rate under the "contract exception" to the general rule that a carrier that offers single-line service or participates in a joint rate between an origin and destination may not be required to quote a separate rate for the bottleneck segment. A merger, CN notes, could, by creating a new single-line route, remove this regulatory option for the shipper. CN therefore indicates that it would not oppose a Board policy to apply the contract exception post-merger in circumstances where it would have been available pre-merger.

(2) *Separate inquiry on access*. CN contends that, aside from the question of post-merger application of the contract exception, a separate inquiry with respect to access is the proper course

for at least four reasons. (a) CN contends that, because we do not allow mergers to create bottlenecks, the merits of access are unrelated to mergers. Access issues, CN insists, are industry issues, and should be treated as such. (b) CN contends that use of the conditioning power to increase competition would likely exceed our conditioning authority. Our authority to impose conditions, CN notes, is bounded by the public interest standard that governs the transaction; and, CN adds, a merger that creates no bottlenecks and that is otherwise consistent with the public interest does not become inconsistent with the public interest merely on account of a lack of access. (c) CN contends that use of the conditioning power to achieve access would entail "major restructuring" that could have "significant unforeseen consequences," not only with respect to revenue adequacy but also with respect to the very size, configuration, and service-mix of the national network. (d) CN contends that, if access were to become a cost of merging (and an opportunity presented by merging if the standard access condition required reciprocity on the part of any railroad using the condition), decisions about mergers would no longer turn on the intrinsic benefits and costs that result from the merger itself. Access, CN claims, would become a separate calculus, which would distort capital markets and impair efficiency by deterring otherwise profitable mergers or causing otherwise unprofitable mergers.

(3) *Open gateways*. CN contends that merger applicants should be required to propose some form of commitment to the maintenance of open gateways. CN further contends, however, that we should not attempt to prescribe precisely how merging railroads are to maintain gateways; any such prescriptive requirements, CN warns, would have effects similar to those caused by the *DT&I* conditions, which (CN explains) took away merger efficiencies and forced inefficient routings. CN adds that, although the open gateway issue is merger-related (the supposed merger-related danger, CN indicates, is vertical foreclosure of efficient routings), the fact of the matter is there is no evidence that there have been inefficient routings following any of the major end-to-end mergers of the past 20 years. Merged railroads, CN argues, have strong post-merger incentives to use the most efficient routes, including interline routes where the merged railroad's single-line route is less efficient (*i.e.*, has higher variable costs).

Shortline and regional railroad issues. CN contends that our merger policies should not seek to enhance the position of shortlines in comparison with their pre-merger situation; such issues as "paper barriers," "steel barriers," pricing issues, and equipment supply, are not, CN insists, properly a part of merger policy. CN concedes, however, that provisions in individual line sale and lease agreements between Class I railroads and smaller carriers can be regarded as merger-related where a proposed Class I merger might otherwise result in loss of competition or essential service. CN adds that, in any event: its proposals for service integration plans and for service guarantees to shippers, which are intended to reduce the likelihood of merger-related service disruptions, address merger-related shortline concerns;[100] and its proposal for maintenance of existing significant gateways also addresses merger-related shortline concerns.[101]

Employee issues. CN contends that, in view of its belief that future rail mergers should generally be "win/win" for all rail constituencies, it agreed, in the context of the BNSF/CN merger

[100] There is, CN insists, no need to require merging carriers to separately indemnify shortline railroads for any possible merger-related service disruptions.

[101] CN adds that AAR and ASLRRA are currently engaged in an effort to resolve intra-industry issues. CN urges that we not supersede by regulation these private negotiations, which may yet (CN claims) facilitate an understanding of how the railroad industry as a whole can best accommodate the interests of both large and small carriers in the event of future Class I mergers.

it formerly advocated, that it would negotiate with each union the solution to the CBA override issue. CN insists, however, that, because we must adhere to statutory limits on our authority, we can neither eliminate the statutory override by rule nor condition merger approval on waiver. CN maintains that, if we were to conclude that statutory override should be eliminated, we should convey that recommendation to Congress; and CN adds that it is favorably disposed in principle to legislation that would eliminate the statutory override. With respect to *New York Dock* protections (which, CN notes, are more beneficial to employees than the separation packages applied to hourly workers in non-railroad private industry), CN insists that any claims that such protections should be enhanced are best made and evaluated with respect to a specific transaction. CN adds that we should not adopt across-the-board proposals that would either change the content of existing labor protective conditions or require that negotiations be completed before consummation of a transaction.

3-to-2 issues. CN contends that 3-to-2 issues, whether with respect to particular shippers or with respect to particular corridors, should be left to case-by-case determination. The case-by-case approach we have applied in the past, CN argues: combines actual experience and economic logic; is consistent with such key indicators of strong competition as the dramatically falling prices and increasing output of the rail industry; has proven accurate, both with respect to UP/BNSF competition in the West and with respect to CSX/NS competition in the East; and is flexible enough to take account of any factors that may bear on the likelihood of a reduction in competition from a 3-to-2 change.

Merger-related public interest benefits. (1) *Means short of merger*. CN contends that merger applicants should not be required to show that synergies or other public interest benefits attributed to the merger could not be achieved by means short of merger, through (for example) marketing alliances or cooperative operating practices. CN argues: that parties opposing a merger are free to offer evidence to draw into question the "transaction-relatedness" or "merger-dependency" of various claimed public benefits; that the Board has traditionally evaluated such evidence while avoiding close second-guessing of business judgments, management initiatives, and shareholder votes; and that, as a practical matter, shifting the burden or otherwise changing the standards with respect to transaction-relatedness would, for the vast majority of public benefits, simply prolong and complicate the way to an almost inevitable conclusion that the benefits are indeed not likely to occur without the merger. CN claims that, if profit-seeking railroads were able to realize by means of short of merger greater efficiencies than they have already realized by means short of merger, they would have done so on their own; there is no reason, CN remarks, why they would have left money on the table.

(2) *Reduction in the number of Class I railroads*. CN insists that the reduction in the number of Class I railroads provides no basis for a new approach to the transaction-relatedness issue. CN claims that, despite the reduction, improved service between independent end-to-end railroads remains essentially what it has always been, an arm's-length relationship that will endure only so long as each railroad perceives the arrangement to be in its self-interest. There are, CN argues, many reasons why independently managed end-to-end railroads do not realize all of the potential efficiencies and service benefits that could be realized through management in a common economic interest: independently managed railroads, CN notes, may have different incentives, different sets of opportunities and opportunity costs, different business philosophies, different corridor and commodity goals, different ways of measuring and assigning costs and determining contribution (profit), and different revenue potential on routes where one railroad would have a short haul, not to mention a mutual disinclination to develop service on routes where both would have a short haul but where the combined route would be profitable for a single railroad. And, CN adds, even if

railroads can overcome these differences in particular situations, the transactions costs can be high. These and other related factors, CN maintains, have not been changed by the reduction in the total number of Class I railroads.

(3) *The development of information technology*. CN insists too that the development of information technology (IT) provides no basis for a new approach to the transaction-relatedness issue. IT, CN concedes, can facilitate cooperation. But IT of itself, CN adds, does not resolve most of the barriers that stand in the way of fully realizing efficiencies and shipper benefits across independent end-to-end networks. IT, CN notes, cannot compel independent railroads to agree.

(4) *Post-transaction monitoring of public benefits*. CN insists that, if we approve a merger, we should not engage in post-transaction monitoring on a benefit-by-benefit basis. CN contends: that a merger may well be consistent with the public interest regardless of the extent of its public benefits; that, in any event, in light of the Board's unwillingness to allow a merger with unremedied public costs, and in light of the proven effectiveness of the Board's standard types of conditions, a general rule for post-transaction monitoring of public benefits would serve no purpose; and that, furthermore, turning applicants' good-faith estimates of public benefits into benefit-by-benefit "guarantees" would needlessly chill beneficial transactions. Monitoring, CN further contends, would require railroad managements to explain to the Board when changing conditions made it preferable to pursue efficiencies, investments, or service enhancements other than those described in the application, and would involve the Board in second-guessing market analyses and business judgments. And, CN adds, it is not at all evident what an appropriate remedy would be if we were to conclude that the merged railroad was not satisfactorily realizing projected benefits.

Cross-border issues. (1) *Safety issues*. CN contends that, as respects the United States and Canada, the long history of cross-border ownership and operation demonstrates that there can be no legitimate concern that cross-border ownership may have an adverse impact on safety. Neither the U.S. operations of Canadian-owned railroads nor the Canadian operations of U.S.-owned railroads, CN claims, have given rise to safety problems; railroads with U.S./Canadian cross-border operations, CN adds, observe all applicable laws on both sides of the border; and rail operations in the U.S., CN asserts, are subject to the jurisdiction of the FRA no matter who owns the railroad. And, CN adds, further regulatory action with regard to cross-border safety regulations, should there be any need for it, is best undertaken directly by FRA and not secondhand through our merger procedures.

(2) *National security: in general*. CN contends that, as respects the United States and Canada, there is no reason to believe that cross-border ownership will have an adverse impact on national security. CN argues: that U.S. defense operations have not heretofore been adversely impacted by control of U.S. railroads by corporations incorporated in Canada; that, in any event, Canada is a major partner with the U.S. in defense agreements and operations; that, furthermore, all of the normal economic incentives regarding the provision of service, and all of the service obligations that attend a railroad operating in the U.S., would apply to DOD as a shipper;[102] that, in addition, railroad boards of directors are bound by fiduciary obligations that would be violated if they were to attempt to subsume economic incentives and behavior to a national political agenda; that, as a practical matter, any such violation could not remain undetected and would engender the most serious government-to-government responses; and that existing law gives the President the power to suspend any foreign acquisition of a U.S. railroad when national security could be threatened or impaired. And, CN adds, potential concerns regarding "foreign control" by CN are

[102] CN notes that, for transportation purposes, DOD is a shipper, as are the industries that supply DOD.

particularly misplaced, because CN, though it is a Canadian corporation, is 80%-owned by U.S. stockholders.

(3) *National security: rail line abandonments*. CN notes that, if it is true that there is little more to be accomplished in the way of shedding unproductive assets, future mergers are unlikely to include substantial abandonment proposals. And, CN adds, if and when railroads do propose abandonments, we can certainly take defense concerns into account under the "public convenience and necessity" standard of 49 U.S.C. 10903.

(4) *NAFTA implications: in general*. CN contends: that special rules for transactions involving Canadian companies would raise serious issues under NAFTA, and would implicate a reciprocal agreement that generally affords Canadian investors and investments "treatment no less favorable than that [the U.S.] accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments;" that, furthermore, the establishment of special rules that would hinder or impede the ability of Canadian railroads to merge with U.S. railroads would be contrary to the NAFTA goal of "facilitat[ing] the cross border movement of goods and services" and cross-border investment between the U.S. and Canada; and that, even in individual merger proceedings, we should be wary of requests for protections that, individually or cumulatively, could undermine the U.S. commitment to liberal trade policies across North America. CN argues that, absent the most compelling and specific showings in the context of a particular transaction, such matters should be considered the responsibility of the federal departments and agencies whose primary missions are foreign policy and international trade.

(5) *NAFTA implications: citizenship/residence requirements.* CN contends that, under NAFTA, Canada is allowed to continue, with respect to railroads, its various legal requirements concerning the nationality or residence of the persons who may sit on a railroad's board of directors. And, CN adds, a Canadian residency requirement for a majority of directors would not result in "predominant foreign control" in any event, provided that (as would presently be the case with a BNSF/CN merger, CN claims) the directors were elected by predominantly U.S. shareholders.

(6) *Grain and lumber*. CN contends that long-standing cross-border issues respecting grain and lumber are not related to past or future mergers and cannot legitimately be resolved in the course of a merger proceeding. Such issues, CN insists, are best left to international trade dispute mechanisms.

(7) *Ports*. With respect to the concern that a cross-border merger might result in traffic shifts that could have significant adverse impacts on certain U.S. ports and waterway systems, CN contends: that any such shifts would reflect market forces such as route efficiencies and shipper preferences; that, furthermore, such shifts would reflect changes in the flow of international trade, and would therefore be better left to the process established by international trade agreements such as NAFTA; and that, in any event, any traffic shifts that could have significant adverse impacts on certain U.S. ports and waterway systems would really be no different from similar such traffic shifts that might result from wholly-U.S. transactions.

(8) *Environmental issues*. CN contends that application of the National Environmental Policy Act (NEPA) to environmental impacts in Canada would be at odds with the strong presumption against extraterritorial application of statutes. CN further contends that application of Executive Order No. 12114 to environmental impacts in Canada would be at odds with the logic of E.O. No. 12114 itself; a U.S./Canadian rail merger, CN insists, would involve neither the "global commons" outside the jurisdiction of any nation, nor a foreign nation not otherwise involved in the action at issue, nor the transfer to a foreign nation of radioactive or toxic substances.

Technical revisions. CN has submitted a number of technical changes that (it claims) would bring our regulations into line with our actual information needs.

(1) *Definition of applicant*. CN proposes that § 1180.3(a) be amended by adding this sentence at the end thereof: "The term 'applicant' does not include a wholly owned direct or indirect subsidiary of an applicant, if that subsidiary is not a rail carrier." CN indicates that, with this addition, neither wholly owned shell company subsidiaries (which are often set up in connection with merger transactions) nor wholly owned intermediate holding companies (which exist with respect to several Class I railroads) would be embraced by the § 1180.3(a) definition of "applicant." CN claims that, in general, wholly owned shell company subsidiaries and wholly owned intermediate holding companies have no interests or volition independent of those of their parents and thus cannot meaningfully be considered to be among the "parties initiating a transaction" as that term is used in § 1180.3(a). There is, CN insists, no benefit to the Board, other parties to the proceeding, or the public from characterizing these entities as "applicants" for purposes of the Rail Consolidation Procedures.

(2) *Definition of applicant carriers*. CN proposes that § 1180.3(b) be revised to read: "*Applicant carriers*. All applicants that are rail carriers, and all rail carriers regulated by the Board under 49 U.S.C. § 10501 in which any applicant holds a direct or indirect ownership interest greater than 50%." CN contends that there is no need for a rail control application to contain detailed corporate information about non-rail carriers. Nor, CN further contends, is there any need for a rail control application to contain detailed corporate information about carriers that have no operations in the United States and over which we have no jurisdiction.

(3) *Employee information*. CN proposes that § 1180.6(a)(2)(v) be revised to read: "The effect of the proposed transaction upon applicant carriers' employees in the United States (by class or craft or non-agreement status), the geographic points where the impact will occur, the time frame of the impact (for at least 3 years after consolidation), and whether any employee protection agreements have been reached. This requirement is satisfied if the application includes a list of all employee protection agreements, and if all other information required is set forth in a chart in substantially the following format:

EFFECTS ON APPLICANT CARRIERS' EMPLOYEES

Current Location	*Classification*	*Jobs Transferred to*	*Jobs Abolished*	*Jobs Created*	*Year*"

The most prominent feature of the revision proposed by CN is the addition of the words "in the United States." CN contends: that, because our statutory obligations vis-à-vis rail carrier employees extend only to employees in the United States, we are neither required nor permitted to impose conditions in a rail control proceeding for the protection of the interests of employees outside the United States; and that, because we have no authority to impose conditions protecting employees outside the United States, there is little purpose to requiring applicants to include detailed information about labor impacts abroad.

(4) *Major transactions: periodic reports*. CN proposes that the heading and first sentence of § 1180.6(b)(1) be revised to read: "Form 10-K (exhibit 6). Submit (i) the most recent filing with the Securities and Exchange Commission (SEC) under 17 CFR 249.310 by each applicant, if made within the year prior to the filing of the application, and (ii) the most recent filing with the SEC under 17 CFR 249.310 by any entity that is in control of an applicant, if made within the year prior to the filing of the application." CN notes that, with respect to a rail carrier that is a wholly owned subsidiary of a noncarrier holding company, § 1180.6(b)(1), read literally, now requires submission

of a Form 10-K that may have been filed before the railroad set up a holding company structure, but does not now require submission of the holding company's current Form 10-K.

(5) *Major transactions: transactional disclosures*. CN proposes that the heading and first sentence of § 1180.6(b)(2) be revised to read: "Form S-4 (exhibit 7). Submit the most recent filing with the SEC made under 17 CFR 236.25 by each applicant, and by each entity controlling any applicant, with respect to any security related to the transaction that is the subject of the application." CN further proposes that the second sentence of § 1180.6(b)(2) be revised by striking out "Form S-14" and by inserting "Form S-4" in lieu thereof. CN indicates that Form S-14, which is cited in the current version of § 1180.6(b)(2), has been replaced by Form S-4, which is described in the SEC's rules at 17 CFR 236.25. CN further indicates that, with respect to a rail carrier that is a wholly owned subsidiary of a noncarrier holding company, § 1180.6(b)(2), read literally, now requires submission of a registration statement that may have been filed before the railroad set up a holding company structure, but does not now require submission of the holding company's current registration statement. The proposed revisions, CN claims, would correct these problems, and (CN adds) would also limit the requirement of § 1180.6(b)(2) to registration statements issued in connection with the subject transaction. This limitation, CN indicates, would ensure that, if a transaction would not require issuance of new securities, the applicants would not be obligated to submit a Form S-4 that might have been filed earlier in some other context, and that would be irrelevant to the transaction before the Board.

(6) *Major transactions: change in control*. CN proposes that § 1180.6(b)(3) be revised to read: "Change in control (exhibit 8). Indicate any change in ownership, control, or officers of any applicant carrier not indicated in the most recent annual report Form R-1. If any applicant carrier does not submit a Form R-1, then (i) list all officers of the applicant carrier, and (ii) identify (A) the person(s) or entity/entities in control of the applicant carrier, or (B) all owners of 10% or more of the equity of the applicant carrier." CN indicates that, because only Class I rail carriers now submit Form R-1, it is not clear what the present version of § 1180.6(b)(3) requires with respect to Class II and III rail carriers that qualify as applicant carriers under our rules.

(7) *Major transactions: annual reports*. CN proposes that the heading and first sentence of § 1180.6(b)(4) be revised to read: "Annual reports (exhibit 9). Submit (i) the two most recent annual reports issued by each applicant to its stockholders, if issued within the three years prior to the filing of the application, and (ii) the two most recent annual reports issued by each entity that is in control of an applicant, if made within the three years prior to the filing of the application." CN indicates that, with respect to a rail carrier that is a wholly owned subsidiary of a noncarrier holding company, § 1180.6(b)(4), read literally, now requires submission of annual reports that may have been filed before the railroad set up a holding company structure, but does not now require submission of the holding company's most recent annual reports.

(8) *Major transactions: corporate chart*. CN proposes that the second sentence of § 1180.6(b)(6) be revised to read: "Identify each company on the chart that is a rail carrier subject to the jurisdiction of the Board under 49 U.S.C. 10501. Identify any officers or directors common to any two or more such rail carriers, other than rail carriers operated under common control or management under circumstances defined in 49 CFR 1185.5." CN indicates that the effect of this revision would be to permit applicants to disregard common officers and directors within a single corporate family, and to report only those instances in which two or more railroads from different corporate families share officers or directors.

(9) *Major transactions: intercorporate relationships*. CN proposes that the first sentence of § 1180.6(b)(8) be revised to read: "Indicate whether there are any direct or indirect intercorporate or financial relationships at the time the application is filed, not disclosed elsewhere in the application, through holding companies, ownership of securities, or otherwise, in which applicants or their affiliates own or control more than 5% of the stock of a non-affiliated rail carrier regulated

by the Board, including those relationships in which a group affiliated with applicants owns more than 5% of the stock of such a rail carrier. (For purposes of this paragraph, 'affiliates' has the same meaning as 'affiliated companies' in Definition 5(b) of the Uniform System of Accounts, 49 CFR Part 1201, Subpart A.)"[103] CN indicates that the effect of this revision would be to allow applicants to disregard *de minimis* intercorporate or financial relationships between applicant carriers and carriers in other corporate families.

(10) *Major transactions: financial information*. CN proposes that the introductory clause of § 1180.9 be revised to read: "For *major* transactions, the application shall contain *pro forma* financial statements showing the effects of the transaction. Notwithstanding any other provision of this section 1180.9, applicants may prepare the *pro forma* financial statements on a consolidated basis if that method of presentation is reasonably appropriate to portray the financial effects of the transaction on the railroads that are the subject of the transaction." CN indicates that the effect of this revision would be to allow applicants to submit financial *pro formas* on a consolidated basis where appropriate to effective portrayal of the financial consequences of the transaction on the railroads involved.

CANADIAN PACIFIC. CP agrees that it is appropriate to reevaluate our merger regulations to take account of fundamental changes that have occurred over the past two decades in the structure of the North American rail industry and the business environment in which railroads and their customers operate. CP insists, however, that this rulemaking proceeding must be confined to the standards that should govern future rail mergers; this proceeding, CP believes, should not be used to effect major changes in the overall scheme of rail regulation. Nor, CP adds, is there any sound basis for instituting new rulemaking proceedings for the purpose of undertaking a broad reevaluation of our policies with respect to rail competition; those policies, CP argues, have been addressed at length in other recent proceedings.

The North American rail market. (1) *Challenges confronted*. The several North American Class I railroads, CP argues, confront a range of challenges: they must develop a total network capable of delivering reliable, on-time service on a consistent basis; they must improve operations in terminal areas and create additional capacity to handle future growth in rail traffic; they must deploy improved information systems to support their operations, and, to compete successfully for modal-competitive traffic, they must find new ways to reduce their costs; and they must respond to the needs of their customers with new supply chain and logistics services that make rail more attractive than alternative modes of transportation.

(2) *Further coordination needed*. CP contends that, because the North American rail system remains an interdependent network, further coordination among the remaining Class I carriers will be needed to meet the challenges that all confront. CP adds: that the geographic balance resulting from the last round of rail mergers, and the corresponding reduction in the number of major industry players, provides an opportunity for Class I railroads to pursue strategic partnerships or similar cooperative ventures to achieve synergies in areas such as administration, procurement, and equipment sharing; and that such arrangements might also provide a vehicle for terminal improvement projects, investments in technology solutions, and the development of new e-business

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[103] The Uniform System of Accounts (USOA) provides that the term "affiliated companies" means "companies or persons that directly, or indirectly through one or more intermediaries control, or are controlled by, or are under common control with, the accounting carrier." The USOA further provides that the term "control" means "the possession directly or indirectly, of the power to direct or cause the direction of the management and policies of a company."

applications that would enhance the quality of rail service and open new markets to carriers and shippers.

(3) *Regulatory environment*. CP argues: that, in order for cooperative ventures to be successful, participating carriers may be required to make substantial joint investments, to establish new jointly-owned entities, or even to exchange equity in existing companies; that uncertainty regarding potential regulatory obstacles to such ventures will create a strong disincentive for carriers to pursue them; and that the prospect that such arrangements might be delayed by extended regulatory scrutiny, or even disallowed after a large investment of time and resources has occurred, may lead carriers to forsake creative forms of cooperation and pursue formal mergers instead. CP therefore contends that we should undertake to promote an environment that encourages carriers to innovate by means short of merger.

(4) *Policy statement; declaratory orders; regulatory barriers*. CP contends that we should articulate a policy that looks favorably upon creative strategic partnerships among connecting carriers. CP further contends that we should establish a process under which carriers can obtain, on an expedited (and, to the degree permissible under our governing statute, confidential) determination as to whether such transactions require regulatory approval under the carrier control or pooling provisions of ICCTA. And, CP adds, we should consider measures to reduce regulatory barriers to innovative strategic initiatives.

Downstream effects; the "one case at a time" rule. CP contends that the elimination of the "one case at a time" rule should be implemented in two ways. (1) CP contends that, in rendering our decision on a pending consolidation application, we should consider issues raised by interested parties regarding potential cumulative or crossover impacts of any responsive transactions that actually materialize during the course of the first proceeding. CP adds that, in appropriate circumstances, we might consolidate the proceedings on both applications in order to facilitate such an analysis. (2) CP contends that, if an interested party raises a substantial issue concerning potential cumulative or crossover effects of a hypothetical responsive transaction between non-applicant carriers, we might elect to reserve jurisdiction, as part of our oversight of the first transaction, to consider such impacts if and when the second transaction actually occurs. Applicants in the first proceeding, CP notes, would be on notice that, if adverse cumulative impacts were to arise as a result of the second transaction, we might decide to impose additional conditions on the first transaction to ameliorate such adverse effects. This approach, CP argues, would allow us to protect against potentially harmful cumulative impacts of multiple consolidation transactions without basing our decision in the first proceeding upon hypothesis or speculation.

Rail service issues. (1) *Merger implementation plan*. CP contends that future merger applicants should be required to present a detailed Merger Implementation Plan (MIP) that would, at a minimum, address three implementation-related subjects. (a) CP indicates that the MIP should describe the specific manner (and timing) in which applicants propose to make changes in organization structure, train and terminal operations, and staffing levels, and should detail the steps that applicants plan to take to integrate critical systems such as IT platforms and customer service. (b) CP indicates that the MIP: should identify those areas in which the most significant changes will occur, as well as the locations (*e.g.*, busy terminal areas) at which the risk of temporary service disruption is greatest; and, for each such "hot spot" or significant planned operational change, should include a contingency plan dealing with possible service failures. (c) CP indicates that the MIP should identify specific service criteria (*e.g.*, average terminal dwell time, average train velocity, average number of cars on-line and/or average time from car order until car placement) through which it would be possible to gauge the level of service quality on applicants' lines both pre-merger and post-merger.[104]

(2) *Service guarantees; remedies for service failures*. CP contends that applicants should be invited to offer, as part of the MIP, voluntary remedies for service disruptions resulting from the proposed merger. CP adds that, when considering a future merger application, we should consider any service "guarantees" offered by applicants, as well as the availability and likely effectiveness of any remedies applicants offer to shippers and connecting shortlines for merger-related service failures. CP insists, however, that adoption of new post-merger service remedies that would be supervised by the Board, such as mandatory arbitration of carrier-shipper service disputes and an expedited procedure for filing "service complaints" with the Board, would be counterproductive. Mandatory arbitration or complaint procedures, CP claims, would encourage shippers and shortlines to litigate, rather than pursue informal solutions to, post-merger service problems; a proliferation of formal complaint proceedings, CP argues, would divert railroad management attention and resources from the critical task of restoring an acceptable level of service; and indemnification or other mandatory financial penalties, CP warns, would drain the merged carrier of needed revenue, hindering its ability to make the investments necessary to deliver quality service in the longer term. CP also contends that, because our regulations (§§ 1146.1 and 1147.1) already provide procedures by which shippers may obtain temporary alternative rail service in the event of substantial service disruptions, it is not necessary to adopt, in this proceeding, additional access regulations to address service issues.

(3) *Post-merger oversight*. CP contends that the current practice of imposing a five-year oversight condition in major consolidation cases should be formally adopted as a regulation. Such oversight, CP argues: will afford the Board (and interested parties) an opportunity to address significant service and competitive issues that may arise post-consummation; and will present a forum for the consideration of cumulative impacts or crossover effects generated by a subsequent merger transaction.

(4) *Oversight of implementation*. CP contends that, in order to assure that merging carriers implement their transaction as promised, we should monitor the implementation process as part of our post-merger oversight. CP adds that, during the oversight period: the merged carrier should be required to submit regular reports containing information and data sufficient to demonstrate that it is performing in accordance with the operating plan and the MIP filed as part of the application; and, if the merged carrier is experiencing service disruptions or other unanticipated problems in implementing the transaction, it should be required to submit evidence describing its efforts to resolve such problems and a timetable for achieving such resolution.

Competition issues. CP contends that a fundamental revision of our approach to competitive issues in rail merger cases would not be in the public interest. (1) CP contends that imposition of conditions unrelated to a merger's impact, upon a transaction otherwise consistent with the public

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[104] CP insists, however, that carriers should not be required to create and maintain data bases of uniform statistics by which their "base line" and post-merger service performance might be measured. CP explains that, because the critical implementation issues are likely to differ in each future merger case depending upon a variety of factors (including the number of points at which applicants' lines meet, the pre-merger compatibility of applicants' operations and systems, the volume of traffic applicants propose to reroute and/or divert from other carriers, the extent of changes in day-to-day operations required to implement the merger, and the capacity of applicants' pre-merger infrastructure), no single set of performance statistics will accurately measure the "success" of all future mergers.

interest, would be at odds with the Congressional policy that privately-initiated transactions should be approved so long as they are consistent with the public interest. (2) CP contends that it would be extremely difficult to establish a workable standard for determining when competition-enhancing conditions should be imposed and when they should not. (3) CP contends that use of the merger process to provide relief to "captive" rail shippers (via mandatory switching or other forms of forced access) would favor shippers located on the lines of a carrier involved in a merger transaction, at the expense of competing shippers served by non-applicant carriers. (4) CP contends that use of the conditioning authority to open up exclusively-served shippers to alternative rail carriers would deprive the merging carriers of the traffic density and revenues needed to sustain profitable operations and to justify the investments necessary to meet the future needs of their customers.

3-to-2 issues. CP advocates retention of the case-by-case approach to evaluating 3-to-2 markets; the question whether the presence of two rail competitors adequately constrains the potential exercise of post-merger market power, CP argues, is highly fact-specific. CP therefore contends that we should continue to examine the particular competitive circumstances affecting markets in which a proposed consolidation would reduce the number of rail competitors from three to two, and should impose conditions where appropriate to assure vigorous post-merger competition in those markets. CP adds that a 3-to-2 reduction in the number of competitors as a result of the acquisition of a shortline carrier by a Class I carrier would not appear to warrant the imposition of a condition to preserve a third option unless it were shown that the shortline occupied a unique competitive role that ought to be maintained.

Open gateways. CP contends that, although merging railroads have economic incentives to utilize more-efficient joint-line routings rather than less-efficient single-line routings, we should retain flexibility to consider meritorious requests for gateway protection on a case-by-case basis. CP indicates, by way of example, that, if an east-west transcontinental merger threatened to result in the closure of a major Mississippi River gateway by the applicants, we could utilize our conditioning authority to prevent such an anticompetitive result. CP adds, however, that we should exercise our authority only where necessary to preserve efficient gateways over which significant traffic volumes moved pre-merger, and not to mandate a proliferation of inefficient or "paper" gateways.

Mandatory switching; competitive access. CP insists that we should reject any blanket proposal to require merging carriers in all instances to provide reciprocal switching arrangements to all exclusively served shippers in or adjacent to terminal areas, regardless of whether the proposed merger would otherwise cause a loss of competition at that location. The § 1144.5 competitive access standards, CP insists, reflect the policies set by Congress for railroad access and switching agreements, and provide shippers reasonable competitive access where needed without unnecessarily compromising railroad revenue adequacy.

Bottleneck rates. CP indicates that it would not oppose a "grandfather" condition intended to protect the rights of a shipper that was entitled, pre-merger, to request a separate "bottleneck" rate quotation under the "contract exception." The condition contemplated by CP would apply when, prior to a merger, a shipper had obtained a contract rate for the competitive portion of a movement, and therefore was entitled to request a separate "bottleneck" rate quotation for the remainder of the movement.

Measuring public interest benefits. (1) *Evaluation of public benefits*. CP contends that we should "raise the evidentiary bar" relating to the evaluation of public benefits. CP argues that, in past merger proceedings, the applicants' claimed public benefits have often been supported by little more than self-serving, conclusory rhetoric, and their calculations of the economic value of claimed public benefits have not been subjected to careful scrutiny. Our regulations, CP maintains, should be revised to require future applicants to describe the claimed benefits of their transaction in greater detail, and to support the measurement of those benefits with more extensive data. Only "demonstrable" benefits, CP argues, should be accorded weight when conducting the 49 U.S.C. 11324 balancing test. And, CP adds, we should not credit merger applicants with public benefits arising out of "garden variety" commercial and operating arrangements that are commonly entered into by non-affiliated carriers.

(2) *New categories of benefits*. CP contends that we should broaden our evaluation of merger benefits to take into account new categories of benefits likely to result from innovations in the way railroads conduct business in the "new economy." CP contends, in particular, that, in addition to the "conventional" benefits associated with past mergers (*e.g.*, new single-line service, improved equipment utilization, and reduced transit times), we should consider benefits derived from enhanced business processes, new supply chain and logistics services, and new e-business applications. In today's business environment, CP argues, such innovations may be of equal or greater value to shippers than improvements in train service.

(3) *Means short of merger*. CP contends that we should not adopt a policy that disfavors further consolidation, or that requires Class I carriers to pursue strategic alliances as a prerequisite to seeking authorization for a formal merger. Railroads, CP insists, should be free to make the strategic determination whether to pursue efficiencies and to develop new service offerings either by formal merger or by contractual arrangements short of merger; what may be best for carriers in one set of circumstances, CP argues, may not work for carriers facing different circumstances. CP indicates that, although cooperative ventures may enable railroads to achieve operating synergies, cost reductions, and improved service and commercial reach, it can be both difficult and time-consuming to achieve broad-based strategic agreements. Barriers to success, CP explains, may result from: differences in the participating carriers' assessment of the relative costs, benefits, and risks of the proposed venture; disagreement regarding how to allocate benefits; differences in the prospective partners' management styles and corporate cultures; differences in the capital available to (and the competing capital requirements faced by) each party; and the impact of other initiatives that each party may be pursuing independently.

Labor issues. CP indicates that, as respects labor issues, it agrees generally with the arguments made by NRLC.

Cross-border issues. CP contends that the increasing economic integration of the United States, Canada, and Mexico, and the corresponding growth in cross-border freight traffic, have created a greater demand for a coordinated "North American" rail network; that, to meet the present and future needs of the shipping public, U.S. and Canadian railroads[105] have no choice but to cooperate, whether by formal merger or by strategic partnerships short of merger; that our regulations should not interfere with this process either by prohibiting or discouraging transactions pursuant to which a Canadian carrier might obtain control of a U.S. railroad, or by discriminating in any manner against non-U.S. applicants; and that a policy that imposed unique burdens on Canadian applicants, or that "disfavored" the acquisition of control of a U.S. railroad by a Canadian

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[105] CP notes that, although it is a "Canadian" railroad, the majority of the shares of its parent (Canadian Pacific Limited) are owned by U.S. stockholders.

carrier, would violate NAFTA.[106] CP further contends that both CP and CN have always complied with the laws of the United States in operating their respective U.S. properties, and that this experience, over more than 100 years of railroad history (including several periods of war), refutes the notion that either CP or CN would flout U.S. law, or undermine U.S. national security, if they were to acquire additional U.S. rail properties. CP adds: that our regulations should recognize the reality of a "North American" rail system that includes the Canadian and Mexican railroads, as well as those located within the United States; that proponents of a cross-border transaction should be required to submit "full system" operating plans and competitive impact analyses reflecting operations both within and outside the United States; and that our conditioning power should be used wherever necessary to remedy anticompetitive impacts of a proposed merger on cross-border shippers, even if the relief required involves trackage located in a foreign country.[107]

CSX. CSX contends: that, in due course, certain transcontinental mergers,[108] properly designed, conditioned, and implemented, could promote the public interest (principally, CSX indicates, by allowing expanded single-line service to the shipping public, and by yielding significant cost reductions to the merged railroad); that, however, the Board must play a critical role in ensuring that these mergers, if and when they occur, will create efficiencies benefiting shippers and, indeed, the entire economy of North America; and that, in particular, we will have to carefully review and monitor operational implementation so as to assure shippers that overall service enhancement will be maximized and that merger-related short-term service disruptions will be minimized.

Scope of proceeding; dangers of re-regulation. CSX contends that this proceeding must focus on issues that are pertinent to prospective rail mergers, and should not focus on re-regulatory schemes that will have the effect of transferring revenues from the railroad industry to shippers. Class I railroad mergers, CSX argues, should not be the occasion for destabilizing the economics of railroading or undoing the reforms of the past 20 years. CSX insists that the existing balance, between private property ownership with its incentives for capital investment, on the one hand, and, on the other hand, the limited regulation evidenced in the Staggers Act, must not be changed. It is,

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[106] With respect to one potential "discrimination" issue, CP advises: that a provision of Canadian law applicable only to Canadian National prohibits any investor from owning more than 15% of CN's outstanding stock; that this provision cannot be modified or waived without Canadian government action; and that, although this provision does not on its face discriminate against U.S. investors, it does effectively block an unwelcome takeover of CN by a U.S. railroad. The implications of this provision for the U.S. public interest is, CP believes, an issue best addressed in any future consolidation proceeding in which CN may be an applicant.

[107] CP insists, however, that we should not extend our environmental regulations to cover all points in Canada. CP explains: that, unlike the competitive and service impacts of a merger, the environmental impacts of a merger (such as increased noise and grade crossing issues) are generally local in nature; and that, because such environmental impacts occurring at local points in Canada do not significantly affect the U.S. public interest, they should be left to local regulation by Canadian authorities.

[108] As CSX uses the term, a "transcontinental" merger is a merger that would create or augment a system of rail carriers serving both the East and West coasts of the North American continent, including as "coasts" major inland water accesses to the Atlantic and Pacific Oceans such as Chesapeake Bay, San Francisco Bay, and the St. Lawrence River.

CSX warns, paramount that we not adopt a regulatory regime that would usurp the market mechanism in determining the appropriate allocation of resources.

Competitive issues. CSX contends that we should continue to utilize the existing analytical framework in analyzing the competitive effects of mergers; our current policies, CSX maintains, have been largely effective in maintaining competition without unduly restricting otherwise efficient mergers. CSX contends, in particular, that we should continue to utilize the existing analytical framework with respect to "bottlenecks,"[109] the "one lump" doctrine,[110] and 3-to-2 situations. And, CSX adds, we should not risk discouraging beneficial mergers by insisting on competition "enhancing" conditions to address problems not caused by the proposed transaction;[111] the opening of new switching, the termination of switching, and the reduction of switching rates, CSX argues, should be left to private negotiation, and to the enforcement of the Board's existing powers, in a non-merger setting. CSX warns that the imposition of open access, except in remediation of specific competitive problems, would result in a further erosion of the railroads' persistently inadequate earnings, the deterioration of the rail network, and the undermining of service quality and service provision.

Means short of merger. CSX contends that it is unlikely that any future major merger will be approved for the primary purpose of reducing excess capacity and eliminating duplicative facilities; any future major merger, CSX insists, will be approved only if it is primarily for the purpose of providing expanded, efficient single-line service. CSX further contends that, to reflect this new reality, the practical focus of examination by the Board must shift. The Board, CSX insists: must look more carefully at alternatives to mergers, such as marketing alliances, run-through trains, line swaps, pre-blocking, integration of facilities or functions, and other joint ventures and initiatives; must be willing to authorize such alternatives readily where they are subject to the Board's jurisdiction; and must examine the benefits of proposed mergers more critically to determine whether the same benefits could be obtained as a practical matter without a full merger.

Downstream effects. CSX contends that, as respects transcontinental mergers, the § 1180.1(g) "one case at a time" rule should be abolished; because any future Class I merger will largely determine the final structure of the North American rail system, the downstream, follow-on effects of any major rail merger on other possible combinations, CSX believes, have become an appropriate subject for Board examination. CSX further contends: that the "one case at a time" rule was instituted in order to speed up merger proceedings; that, however, in light of our demonstrated ability to complete such proceedings within the 49 U.S.C. 11325 deadlines, the rule is no longer required; and that, although the proposal of any transcontinental merger is likely to cause other major Class I carriers to investigate combinations, there will be, as a practical matter, only a limited

[109] CSX indicates that, although the "contract exception" should be preserved in the merger context, it should be preserved only for the life of the contract, and perhaps also for some limited further period of time. CSX explains: that, so long as there is a contract on the non-bottleneck segment, maximum rate regulation is applicable to the bottleneck segment; that such contracts, however, are not "forever;" and that, once the term of the contract has ended, the contract should be treated as history.

[110] The one-lump doctrine, CSX maintains, is well grounded in economic theory.

[111] CSX warns that "rate protection" conditions would bring back the "bad old days" of old-fashioned rate regulation of the railroads, would interfere with the law of supply and demand, and would inhibit flexible pricing.

number of possible "downstream" combinations. CSX adds: that, in evaluating any Class I combination, we should consider the impact of the combination on other proposed mergers, and the effect of the various transactions as a whole; that, when necessary in the public interest, we should condition approval of a Class I combination on contingencies with respect to other proposed transactions; that we should implement rules for procedural and substantive consolidation of "reasonably contemporaneous" applications; and that, where follow-up transactions are likely, we should take action as necessary to achieve a view of the "whole picture."

Merger implementation. CSX believes that, to prevent unnecessary merger-related service interruptions, we should require major merger applicants to file detailed plans respecting integration issues, fixed facility capacity issues, rolling stock capacity issues, and rolling stock supply issues. CSX has in mind: that these plans would be subject to comments and counter-evidence by interested parties; that a section of the Board's staff specializing in operational matters, which would be assisted by consultants retained at applicants' expense, would examine the plans in an interactive process with applicants; and that, although post-merger deviation from the plans would be permitted (in order to maintain managerial flexibility to adapt to changing conditions in the market and otherwise), explanatory reports would be made as to such deviations in the post-effective-date monitoring process. (1) *Integration Plan*. CSX proposes that applicants be required to file an Integration Plan describing how every function of the combining systems will be integrated, identifying potential service disruptions, and articulating how they will be minimized. CSX indicates: that the Integration Plan, which would be subject to interactive examination by the Board's staff and consultants, would be coordinated with the Safety Integration Plan (SIP) and would complement the post-authorization monitoring of the transaction; and that the objective measurements described in the Integration Plan would be included in the monitoring conditions.

The Integration Plan contemplated by CSX would include at least the following: (a) a statement as to whether the integration of the two systems is to be effected in one step or in several phases; (b) a description of the activities that will characterize each phase of the integration (*e.g.*, the integration of particular functions or routes, the rerouting of particular commodity movements, and specific capital improvements); (c) objective measurements that the applicants will use to determine when they are ready to effect each successive phase of the implementation; (d) a schedule reflecting target dates for each phase of the integration and a critical path analysis identifying each preliminary step that must be taken prior to each phase and the interdependencies between the steps in the critical path; (e) a list of the potential "choke points" in applicants' systems during the integration and a description of objective measurements that would signal potential problems at the choke points; (f) contingency plans that applicants propose to deploy if congestion or other difficulties occur at the choke points, the triggers for the deployment of the contingency plans, and the effects of such deployment on their network and the networks of other rail carriers; (g) a plan for integrating the applicants' information systems, identifying the major systems to be integrated, assessing the extent to which those systems are compatible, and describing any interim measures for managing information prior to full integration; and (h) a discussion of any transfers, hires, reductions, or other changes to be made with respect to the applicants' labor forces and the phases of the integration during which these changes will occur.

(2) *Capacity Plan*. CSX proposes that applicants be required to file a Capacity Plan addressing both fixed facility capacity and rolling stock capacity. CSX indicates that the Capacity Plans would be coordinated with the Integration Plan to ensure that there will be adequate facilities to accommodate shifting traffic patterns throughout the various phases of the integration. The Capacity Plan contemplated by CSX would include: (a) an analysis of the capacity of the combined system (*i.e.*, the ability of the system to accommodate train movements and the presence of stationary rolling stock); (b) an analysis of the capacity needed to effect the proposed Operating Plan

and the capital budget and schedule for providing any necessary additional capacity; (c) proposed capital improvements, including double (or triple) tracking and/or increased sidings, and new yards, terminals, and other facilities; and (d) an analysis of the capability of the combined system (*i.e.*, the ability of the system to move rolling stock) as measured by objective standards, such as dwell time and/or average velocity.

(3) *Rolling Stock Supply Plan*. CSX proposes that applicants be required to file a Rolling Stock Supply Plan addressing both service issues and the proper level and deployment of rolling stock capital assets. CSX indicates that the Rolling Stock Supply Plan would be coordinated with the Integration Plan to ensure that the rolling stock will be adequate to accommodate shifting traffic patterns throughout the various phases of the integration.

(4) *Railroad/shipper forum*. CSX agrees that we should require the merging railroads to establish a forum (CSX has in mind the Conrail Transaction Council) in which the integration process can be constructively discussed.

Adjustment of freight claims. (1) *Regulatory involvement in adjustment of freight claims*. CSX insists that the adjustment of freight claims generated by merger-related service disruptions is best left to established mechanisms, *i.e.*, courts of general jurisdiction, railroad tariffs, railroad transportation contracts (RTCs), and commercial insurance. CSX contends that, if we were to act as a freight claims adjuster (*i.e.*, if we were to impose a system of pecuniary awards, and take on the burden of making awards to shippers after merger-related service disruptions have occurred), our attention and resources would be diverted away from our primary task of ensuring that combinations do not cause unnecessary service disruptions in the first place. CSX further contends that it is unlikely that the Board, acting in an entirely new role outside its traditional field of expertise, would significantly improve dispute resolution as respects freight claims. And, CSX warns, no railroad is so well capitalized that it can afford to offer all of its customers a "business interruption" insurance policy that would cover the full extent of the customers' commercial expectation interests.

(2) *Small shippers*. CSX suggests that, for small shippers with less access to traditional dispute resolution mechanisms for resolving service failures, we should consider establishing a system of non-binding mediation services, to be provided by a panel of outside mediators. CSX indicates: that its mediation proposal is pointed toward consensual commercial settlements, not litigation, and would preserve shippers' legal rights while respecting private agreements; that participation in the CSX-proposed "field mediation system" would be optional on the part of the shipper but compulsory on the part of the carriers; that such a system could facilitate resolution of merger-related service concerns of small shippers by affording a basis for an equitable resolution in appropriate commercial terms without subjecting small shippers to the expenses of litigation; and that our staff could be assigned a monitoring role with respect to the mediations.

(3) *Rail transportation contracts*. CSX contends that an escape provision should be provided for shippers having RTCs, permitting them to terminate, at their request, their RTCs where service problems have been serious and protracted. This proposal, CSX indicates, reflects its agreement that, when service problems have been serious and protracted, the general interests of the rail network would be best served if shippers were free to make other arrangements for the movement of their freight.

Gateway preservation. CSX contends that, because transcontinental combinations (including Class I North-South combinations) may involve possible loss of competition (*i.e.*, the loss of an alternative service route) at the traditional major transcontinental East-West gateways (along the Mississippi River and at Chicago) and at the major North-South gateways, it will be necessary to impose appropriate conditions to preserve, at least for a transitional period, the established East-West and North-South gateways. CSX has in mind that, under the conditions we would impose:

the gateways to be kept open would be few in number; the movements to be kept open would be movements that afforded both the originating and terminating carriers suitable long-hauls and that were heavily used in the period prior to the filing of the notice of intent; at most, the ordinary statutory maximum rate regulation provisions would apply; and there would be no anticompetitive equalization of rates or service.

Cross-border issues. CSX argues: that the laws, regulations, and national interests of Canada and Mexico may differ from those of the United States; that the differences may have important practical implications to the operation of a cross-border combination; and that we should therefore require merger applications to include certain information regarding pertinent cross-border issues.[112]

(1) *Material to be included*. CSX contends that, to ensure that potential cross-border issues are appropriately and adequately considered in the merger review process, each application involving a United States carrier and a non-U.S.-based carrier should be required to include: (a) a description of the activities and plans of the combined railroads, both before and after the transaction, in the same breadth and depth as if they were all conducted within the United States, including the information required by the Integration Plan, the Capacity Plan, and the Rolling Stock Supply Plan; (b) a description of the regulatory, legal, or customary railroad restrictions in another country pertinent to the subjects treated in the application and to the transaction and the operation of the combined system and the impacts that these will have on operations in the United States; (c) a statement as to whether all necessary foreign country approvals for the transaction have been received and, if not, how the Board can make the findings necessary to approve the transaction before the terms of such approvals are known; (d) a discussion of car supply and the principles that would be applied if another country's regulatory requirements with respect to car supply were to conflict with contractual or regulatory car supply requirements applicable to shippers in the United States; (e) a description of other potential conflicts between the two regulatory systems and the manner in which the applicants propose to resolve any such conflicts; (f) a description of any legal requirements of any foreign country or authority, or any agreement involved in the transaction, concerning the nationality or residence of the persons who may be directors, officers, or employees of the combined entity, or of any entity controlling the combined entity;[113] and (g) a description of any legal requirements of any foreign country or authority relating to the potential environmental impacts of the transaction.

(2) *Environmental issues*. CSX warns that future mergers involving non-U.S.-based carriers may result in significant environmental impacts outside the United States.[114] CSX contends: that, under NEPA and E.O. 12114, we may have certain obligations vis-à-vis such environmental

[112] There is, CSX insists, no reason for the Board to defer to any other agency of the U.S. Government with respect to any matters likely to arise in connection with cross-border rail mergers. NAFTA, CSX explains, does not assign responsibility for cross-border matters like the ones at issue here to any particular government agencies, such as foreign policy or international trade agencies, and it does not require any special deference to those agencies in such matters. And, CSX adds, NAFTA's investment rules require only that we treat Canadian investors and investments at least as well as U.S. investments and investors are treated.

[113] CSX adds that we should look with disfavor upon provisions of this sort, particularly if they create, impose, or continue foreign control (not based on stock ownership by foreign entities) of rail carriers having their principal operations within the United States.

[114] Past mergers, CSX insists, have not raised the potential for *significant* environmental impacts outside the United States.

impacts; that, to determine the scope of such obligations, we will have to acquire complete information about proposed operational changes, and their potential for environmental impacts; and that, although merger applicants have generally been required to submit detailed information with respect to domestic lines (*e.g.*, information on the grade crossing warning systems at highway/rail at-grade crossings where rail traffic increases are projected), the scope of the information to be required with respect to foreign lines will have to be determined on a case-by-case basis, taking into account the operational changes projected in the complete system Operating Plan and the required description of the foreign regulations applicable to potential environmental impacts.

Shortline issues. (1) *In general*. CSX insists that we must not, in connection with a Class I merger, disturb the terms of prior private transactions that resulted in the creation of shortlines. CSX explains: that many shortlines are spin-offs from larger railroads; that the prices paid by the purchasers reflected the value of the entire bundle of rights and restrictions that accompanied the assets transferred; and that, if we were to diminish or expand (in connection with a subsequent combination involving the transferor) any of the restrictions placed on the marketing or operations of a shortline as part of the bargain that created it, the likely result would be to discourage the formation of new shortlines in the future. And, CSX adds, granting broadened access rights to shortlines would further complicate merger integration planning by introducing additional variables.

(2) *Paper barriers*. CSX, which notes that a condition preventing the enlargement of "paper barriers" was appropriately imposed on the CSX/NS/CR transaction, contends that there should be no occasion in any future merger transaction to cause a release or alteration of the geographic coverage of any such agreement.

(3) *Car supply and other operational matters*. CSX contends that, as regards car supply and other operational matters, merger applicants should be required to confer with each of their shortline connections during the period between the filing of the notice of intent and the filing of the merger application.

Labor issues. (1) *CBA modifications*. CSX contends that we should retain our *New York Dock* procedures regarding post-merger CBA modifications. CSX argues: that the *New York Dock* CBA modification procedures are a fair and necessary means to achieve the public interest benefits of approved transactions; that, if the efficiencies made possible by mergers are to be realized, carriers must be able to consolidate the employees and operations of different railroads, and must be able to place employees on a common seniority roster under a common set of work rules; and that, if there were no *New York Dock* procedures, the virtually endless RLA dispute resolution process would make it impossible to achieve the efficiencies made possible by mergers. And, CSX adds, CBA changes cannot be accomplished under WJPA either; the WJPA arbitration process, CSX insists, is inadequate, because it has no mechanism for assuring a timely resolution.

(2) *Benefits*. CSX contends that we should not expand the "already generous" *New York Dock* protections afforded employees adversely affected by mergers. The current "virtually unparalleled" protections, CSX insists, are already a significant burden on the competitiveness of railroads. Any expansion of these protections, CSX warns, would further reduce the pool of funds available for necessary capital projects or improvements in service.

(3) *Consultation*. CSX contends that, in view of the contributions of labor to the successful implementation of approved transactions, we should continue to promote discourse and cooperation between labor and management throughout the consolidation process.

Policy statement revision. CSX contends that our § 1180.1 "general policy statement" should be revised to reflect current realities. The most prominent revisions suggested by CSX make reference to the service disruptions that have attended implementation of recent mergers, and acknowledge that future mergers are likely to be transcontinental in scope.

Summary dismissal of merger application. CSX contends that our regulations should be amended to confirm our power to summarily dismiss a merger application. The amendment proposed by CSX provides for summary dismissal, without prejudice to later resubmission, upon a finding "that due to temporary conditions in the industry or other similar factors, it would not be consistent with the public interest for the transaction to be considered or approved at the present time."

Ownership and directorships of terminal carriers. CSX contends that, unless specific competition issues are presented, there is no reason to require merging Class I carriers to allow a smaller carrier to take an ownership interest in, and/or to select members of the Board of Directors of, a terminal switching carrier operating in a terminal area accessed both by two or more of the merging carriers and by the smaller carrier.

Disclosure of settlement terms. CSX suggests that, with respect to merger proceedings, we might require that, where the parties to a settlement agreement do not intend to submit it as part of the public record, the parties must nevertheless report to the Board the fact of such settlement agreement and the date thereof, and must identify the parties thereto.

Technical revisions. (1) *Definition of applicant carriers*. CSX argues: that the § 1180.3(b) revisions proposed by BNSF and CN would include, as "applicant carriers," all more-than-50%-owned rail carriers regulated by the Board; that, however, these revisions would effectively exclude, from the "applicant carriers" definition, rail carriers that operate entirely outside the United States (such rail carriers, CSX notes, are not Board-regulated); and that, in fact, these revisions would effectively exclude, from the "applicant carriers" definition, a rail carrier operating entirely in Canada that is a part (even the major part) of a system that is an applicant carrier in the transaction. CSX adds that, because any such rail carrier should be treated as an applicant carrier, the revisions proposed by BNSF and CN should be modified. CSX suggests, in particular, that, if § 1180.3(b) is to be revised, it should include, as "applicant carriers," all more-than-50%-owned rail carriers "operating in the United States, Canada or Mexico."

(2) *Voting trusts*. CSX maintains that we should not revise our 49 CFR Part 1013 voting trust regulations. Cases involving a voting trust, CSX contends, are, by definition, cases in which a stockholder action (either a response to a tender offer or a vote on authorizing a merger) must be carried out quickly; the Part 1013 voting trust regulations, CSX further contends, have the advantage of working well within the time limits under the Williams Act and its implementing regulations for tender offers, and within the usual processing time for merger proxy statements; and, CSX adds, the Part 1013 voting trust regulations also have the advantage of keeping the Board uncommitted to the transaction.

KANSAS CITY SOUTHERN. KCS contends that, to modernize our merger regulations, to prevent further service and competitive problems, and to promote a balance between the needs of shippers and railroads, we should require all future merger applicants: (a) to fully disclose and analyze all potential merger impacts; and (b) to justify any merger impacts that may hinder or otherwise limit competition and investment.

3-to-2 issues; means short of merger. KCS contends that, in general, the public interest requires the preservation of all pre-merger rail service options available at or in any terminal, facility, station, or origin/destination (O/D) corridor.[115] (1) *Existing policy*. KCS contends that our existing policy, as established in connection with the BN/SF, UP/SP, and CSX/NS/CR transactions, is "two is enough." KCS explains that, although we claim to assess 3-to-2 situations on a case-by-case basis, our decisions have established what amounts to a "presumption" against imposing conditions to remedy the competitive effects of a 3-to-2 reduction in competitive options.

(2) *Transcontinental duopoly: prospects*. KCS warns that, if our "two is enough" policy remains intact, the existing Class I railroads will inevitably merge into two transcontinental systems. History, KCS insists, teaches that railroads will not let their competitors become measurably larger than themselves without obtaining equalization through their own responsive combinations; it is thought, KCS explains, that comparable size is needed to maintain leverage on issues such as rate divisions, and to replace gateways lost when a friendly connection is swallowed up by a competitor.

(3) *Transcontinental duopoly: adverse impacts*. KCS fears that the inevitable transcontinental rail duopoly will have a number of adverse impacts: intramodal competition will become less vigorous; tacit collusion within the industry will become less difficult; rail prices will increase; service quality will be diminished; the bargaining leverage of individual shippers will be reduced; the influence that shortline and regional railroads currently have on rail prices and services will be thwarted; and the two transcontinental railroads themselves may suffer diseconomies of scale (the "machine," KCS suggests, may be beyond the capabilities of its operators).

(4) *Reregulation*. Reregulation, KCS warns, will be the transcontinental rail duopoly's ultimate adverse impact. KCS explains: that the "competitive access" remedies (*i.e.*, bottleneck relief and/or mandatory switching) that we might impose would generate contrived competition, not natural competition; that such remedies would, among other things, leave regional railroads at the mercy of the two transcontinental duopolists (the duopolists, KCS warns, would reach into the regional railroads' markets, and, by means of their much broader market coverage, take traffic from the regionals to such an extent as to drive these smaller carriers out of existence); that, despite the competitive access remedies, competition and investment would be stifled; and that, in the end, the two major railroads would be perceived as so destructive to competition and the needs of rail customers that the railroad industry would likely be reregulated. And reregulation, KCS adds, would be disastrous not only for the railroads but also for the rail shippers of North America and the entire North American economy.

(5) *Proposed new policy*. KCS contends that, with the purpose of preserving competition and discouraging the creation of a transcontinental rail duopoly, we should adopt a regulation to this effect: "It is in the public interest to preserve the number of independent rail carriers serving any terminal, facility, station, or O/D corridor. Accordingly, any major rail merger application shall include a detailed plan to ensure that there is no reduction in the number of independent carriers serving any terminal, facility, station, or O/D corridor or set forth facts showing that there is a substantial public interest justification for reducing the number of independent carriers. To the extent the application does not include such a detailed plan and unless there are substantial public interest justifications for not doing so, the Board will, upon request, impose conditions to preserve the number of independent carriers serving such a terminal, facility, station, or O/D corridor."

(6) *Proposed new policy: its impact*. KCS insists that, although the policy it has proposed will establish a presumption in favor of preserving competition, the policy will not necessarily guarantee that there will be no reduction in intramodal competition in future mergers. KCS explains that, because its policy would establish a rebuttable presumption, merger applicants would be able

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[115] Although KCS's focus is on 3-to-2 situations, its arguments are also applicable to 5-to-4 and 4-to-3 situations.

to argue that a requested condition should not be imposed (although, KCS adds, they would have to present evidence of substantial public interest reasons for not imposing the condition).

(7) *Means short of merger*. KCS insists that the policy it has proposed will not stifle the development of further rail efficiencies, because (KCS claims) such efficiencies can be achieved short of merger through alliances, marketing agreements, joint dispatching arrangements, and other forms of voluntary coordination. KCS contends: that joint dispatching arrangements can enable railroads to achieve a greater coordination of train movement through congested terminals; that voluntary coordination agreements and marketing alliances can enable railroads to extend their market reach and utilize the resources of other railroads to improve customer service and provide stronger competitive options; and that "alliances" can even enable railroads to provide "single-line" service. KCS, citing its own experience, claims that the CN/IC/KCS Alliance (which was entered into in connection with the CN/IC merger) has established a major third option for traffic moving between Canada and Mexico, and between the Midwest and Southwest and to points in between. The CN/IC/KCS Alliance, KCS insists, proves that single-line efficiencies can be achieved without merging and without reducing competition.

Restrictions placed on post-1994 merger conditions. KCS contends that, in order to promote and enhance competition, our review of future merger applications should include a reassessment of restrictions placed on conditions imposed in any post-1994 major merger proceeding.[116] Such restrictions, KCS insists, may no longer be in the public interest. (1) *The problem*. KCS contends that many conditions imposed in connection with prior mergers were crafted under a very narrow public interest standard and therefore contain restrictions that impede effective competition. KCS indicates, by way of example, that many trackage rights conditions imposed in connection with prior mergers contain "overhead" service restrictions (which prohibit service to shippers located at intermediate points on the trackage rights line) and/or "traffic" restrictions (which either prohibit the movement of certain types of commodities or prevent the movement of traffic between certain O/D pairs). And, KCS adds (by way of further example), many trackage rights conditions imposed in connection with prior mergers are "restricted" by excessive trackage rights fees (which, KCS claims, render the trackage rights useless). Restrictions of these sorts, KCS contends, do not "promote and enhance" competition.

(2) *The proposal*. KCS contends that, in order to promote and enhance competition, we should require major merger applicants to include in their applications: (a) a list of all conditions granted to third parties (shippers, receivers, and non-applicant carriers) in post-1994 major merger proceedings involving the applicants or their predecessors; (b) an analysis of the continued validity of, or necessity for, any restrictions (*e.g.*, commodity restrictions, geographical restrictions, and/or operational restrictions) contained in the prior conditions; and (c) an assessment of whether the prior conditions could be modified in such a way as to promote and enhance competition, and whether the restrictions remain consistent with evolving notions of the public interest. KCS further contends that, if the modification or removal of any restriction contained in a prior condition would enhance competition or improve service to shippers, we should require that the restriction be modified or eliminated, unless there are substantial public interest reasons why the restriction should not be modified or eliminated.

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[116] The post-1994 major merger proceedings KCS has in mind are the UP/CNW, BN/SF, UP/SP, CSX/NS/CR, and CN/IC proceedings. These are the only proceedings in which a major merger was "approved after January 1, 1995."

(3) *Justification*. KCS contends that it is inappropriate to continue to shackle railroads with outmoded and obsolete restrictions. Restrictions placed on prior conditions, KCS argues, should be eliminated once they cease to serve the "public interest" as currently understood. And, KCS adds, its proposal would allow the Board to use its conditioning authority to promote, rather than merely to preserve, competition.

(4) *Tex Mex trackage rights*. KCS indicates that its proposal reflects its interest in eliminating a restriction we imposed on certain trackage rights granted to Tex Mex in connection with the UP/SP merger. The Tex Mex trackage rights, KCS notes: extend over UP/SP lines via Houston between Robstown/Corpus Christi (on Tex Mex's Laredo-Robstown-Corpus Christi line) and Beaumont (the point of connection with KCS); are, however, restricted to overhead traffic having a prior or subsequent movement on the Laredo-Robstown-Corpus Christi line; and, therefore, cannot be used to provide a Tex Mex-KCS routing for traffic moving between Houston, on the one hand, and, on the other hand, points accessed by KCS. KCS further notes that, in any future merger proceeding involving UP as an applicant, the KCS proposal would require a presumption in favor of removal of the Tex Mex restriction. KCS adds, however, that, because this would be a rebuttable presumption, the restriction would remain in effect if UP could establish that retention of the restriction was in the public interest.

The "one case at a time" rule. KCS agrees that the § 1180.1(g) "one case at a time" rule should be eliminated. The rule, KCS claims, imposes an artificial limitation on the legitimate scope of our inquiry into the public interest implications of the pending transaction.

Preservation of benefits secured by prior mergers. KCS contends that, in addition to reviewing the downstream effects of a merger, we should also review, with particular reference to benefits secured by prior mergers, the "cumulative impacts and crossover effects" of the new merger. KCS contends, in particular: that, in reviewing a merger application, we should set as a minimum threshold the preservation of benefits conferred during the course of prior mergers; and that any merger that hampers benefits achieved in a prior merger must either be denied outright or conditioned to preserve the benefits of the prior merger. Compelling merger applicants to justify the impact their merger will have on the benefits gained through their past mergers, KCS argues, will ensure that our efforts in preserving the public interest will not be mooted by subsequent proceedings.[117] (1) *The proposal*. KCS contends that we should adopt a regulation to this effect: "In every merger application constituting a major transaction under 49 CFR 1180.2, the applicants shall bear the burden of establishing that the proposed transaction will not have any adverse cumulative impacts or crossover effects on the benefits realized in prior merger proceedings involving any of the applicants, whether realized through conditions imposed by the Board on prior transactions, or through private agreements entered to further the benefits provided by the merger. To the extent that the applicants do not carry their burden of proof, the Board shall either deny authorization of the merger or condition its approval to protect and preserve all benefits realized in prior merger proceedings."

(2) *Justification*. KCS insists that the justification for its proposal is quite simple: an applicant, KCS believes, should not be allowed to secure the Board's merger authority by trumpeting the benefits to be conferred in a merger, only to trample on those benefits in a subsequent merger.

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[117] KCS indicates that the "benefits" it has in mind are all the benefits (*i.e.*, "public benefits" *and* "private benefits") that were claimed and relied upon in connection with the prior merger, and that resulted from either an imposed condition, or a private settlement agreement, or the nature of the transaction itself.

KCS insists that, if mergers are to produce the benefits claimed by their proponents (such as single-line service, reduced transit times, increased access, and improved market reach), those benefits cannot be expediently forgotten in the quest for another merger.

(3) *CN/KCS Access Agreement*. KCS indicates that its proposal reflects its interest in preserving certain benefits secured by two agreements (the CN/IC/KCS Alliance Agreement and the CN/KCS Access Agreement) that were entered into in connection with the CN/IC merger. Both agreements, KCS claims, benefit the public interest. KCS indicates, with specific reference to the Access Agreement's Geismar provisions, that, under the KCS proposal, CN (if it were to pursue a BNSF/CN merger): would be required to explain whether a BNSF/CN merger would modify or impact KCS's Geismar rights (by effecting a change in service schedules, crew assignments, rates, *etc.*); and, if a BNSF/CN merger would impact KCS's Geismar rights, would be required to propose mitigation to offset that impact.

Disclosure of settlement agreements. KCS contends: that current Board policy does not require submission to the Board of settlement agreements entered into in connection with major consolidation proceedings; that, in practice, applicants submit only those agreements that they believe are essential to getting Board approval for their transaction; and that, when (as has often been the case) such agreements are submitted at a late stage in the proceeding, the agreement cannot effectively be analyzed in terms of the impacts it may have on the proposed merger. Settlements in major merger cases, KCS argues, may affect the public interest; each "hidden" settlement, KCS notes, may have any of a variety of impacts (traffic impacts, operational impacts, environmental impacts, labor impacts, and safety impacts); and it is in the public interest, KCS concludes, to provide an opportunity for the public to review and analyze the impact of agreements negotiated during the course of, and in connection with, merger proceedings.

KCS therefore recommends that we amend our regulations to provide: that applicants in major consolidation proceedings must submit to the Board, as soon as practicable and subject to applicable protective orders, a copy of any settlement agreement[118] entered into in connection with the transaction and an analysis of any impacts the agreement will have on the transaction; that all other parties will have, with respect to that agreement, 30 days to conduct discovery, to file evidence, and to submit comments and requests for conditions;[119] and that, if appropriate, our final decision in the proceeding will address the impacts of such agreement. This proposal, KCS insists, is procedural in nature; it does not require that we approve or disapprove settlements or incorporate them into our decision; it is, rather, merely a record-building measure that will enable the Board to make a more fully-informed decision on the impact of major transactions.[120]

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[118] KCS notes that its proposal requires disclosure of the agreement, not of the details of the negotiations in which the agreement was created.

[119] KCS has in mind that, if applicants file a settlement agreement less than 30 days prior to the date set for the Board's voting conference, such filing would be treated as a petition to modify the procedural schedule to allow 30 days for discovery, evidence, and comment on the agreement.

[120] KCS notes that its proposal would apply to settlement agreements whether they were jurisdictional (*e.g.*, an agreement that provided for trackage rights) or non-jurisdictional (*e.g.*, an agreement that provided for haulage rights). KCS insists that, although a jurisdictional agreement cannot be entirely shielded from our review, the public interest would be better served if we were to review any such agreement in the context of the merger proceeding and not in the context of a separate exemption proceeding. KCS argues, in essence, that, as a practical matter, the public (continued...)

Competitive access; reciprocal switching. KCS opposes adoption of a broad rule mandating reciprocal switching. Drastic measures tipping the balance dramatically in favor of creating new competition, KCS warns, would be extremely harmful to the rail industry. KCS proposes, instead: that we require merger applicants to disclose all stations, facilities, or terminals that were closed to reciprocal switching by any applicant at any time during the 24-month period prior to the filing of the notice of intent; and that we adopt a rebuttable presumption favoring resumption of reciprocal switching at such stations, facilities, or terminals, upon request of any affected party. The presumption, KCS adds, would be rebuttable; an applicant could overcome the presumption by showing that the public interest supports keeping the station, facility, or terminal closed.

Proposal to revise "major" transaction category. KCS contends: that there are today seven "Class I" railroads (UP, BNSF, CSX, NS, CN, CP, and KCS); that, however, each of the "Big Six" (UP, BNSF, CSX, NS, CN, and CP) is substantially larger than the seventh (KCS);[121] and that, as a practical matter, the concerns respecting transcontinental mergers that prompted this proceeding are directed at mergers involving two or more of the Big Six and are not directed at mergers involving KCS (because, KCS explains, a merger involving only KCS and one of the Big Six would not be "transcontinental" under any definition). KCS further contends, in essence, that § 1180.2(a), which defines a "major" transaction as a control or merger involving two or more Class I railroads, should be revised to reflect the reality that a merger involving only KCS and one other Class I railroad would not have "transcontinental" implications. (1) *The KCS proposal*. KCS proposes that § 1180.2(a) be revised to read as follows: "A major transaction is a control or merger involving two or more class I railroads where at least one of the railroads involved in the transaction had gross U.S. railroad operating revenues of $1 billion in the last calendar year. However, in the event a control or merger transaction involves only two Class I railroads or two Class I railroads and one or more Class II railroads and one of the Class I railroads involved in the merger or control has gross U.S. railroad operating revenues of less than $1 billion in the last calendar year, the transaction shall be treated as a significant transaction, and is exempt from the application of 49 U.S.C. 11324(b) (but is subject to 49 U.S.C. 11324(d)) pursuant to the authority of 49 U.S.C. 10502, unless such Class I railroad objects to the proposed merger or control, in which case the merger or control shall be treated as a major transaction."

(2) *The KCS proposal: how it would work*. KCS indicates that, under the revised definition it has proposed: a control or merger involving two or more of the Big Six would be treated as a major transaction;[122] a control or merger involving only KCS and one of the Big Six would be treated as a "significant" (*i.e.*, non-major) transaction if KCS consented to the proposed control or merger); and a control or merger involving only KCS and one of the Big Six would be treated as a major transaction if KCS objected to the proposed control or merger.

(3) *The KCS proposal: justification*. KCS contends that the elective treatment of a potential merger involving only KCS and one of the Big Six (significant if KCS approves, major if KCS objects) is justified by economic realities. KCS argues: that, due to KCS's limited market reach,

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[120](...continued)
interest implications of an agreement vis-à-vis the merger can only be explored in detail in the context of the merger proceeding.

[121] KCS indicates that, as compared to CP (the smallest of the Big Six in terms of operating revenues and track miles): KCS's operating revenues are less than 22% of CP's operating revenues; and KCS's track miles are less than 26% of CP's track miles.

[122] KCS indicates that, in 1999, the operating revenues of each of the Big Six were substantially more than $1 billion.

a "friendly" merger of KCS and one of the Big Six would not raise the same competitive issues, nor require the same depth of review, as a merger of any two of the Big Six; but that, because KCS can compete (on a limited basis, in select markets) with the Big Six, it is critical that any attempt to control KCS against its corporate will must be met with the highest level of scrutiny, to ensure that competition, safety, and service do not suffer. KCS notes, in particular, that, in view of the serious operational problems that have attended many recent "friendly" mergers, there is a possibility that even more problematic situations might arise in the wake of a "hostile" merger.

(4) *The KCS proposal: potential impact*. KCS acknowledges that it is currently the only Class I railroad that would be impacted by its proposed revision of § 1180.2(a). KCS adds, however, that its proposed revision would also apply to any other railroad that, although not now a Class I, is a Class I at the time of a future merger. KCS adds, in particular, that there are now three Class II railroads (Wisconsin Central Ltd., Montana Rail Link, Inc., and Florida East Coast Railway Company) that may soon attain Class I status.

Shortline issues. KCS contends: that a great number of shortlines were "spun off" from their Class I parents under arrangements that involved "paper barriers" and/or "steel barriers;"[123] that these barriers effectively prevent a shortline from interchanging traffic with any carrier other than its Class I parent; that, by restricting the shortline's routing alternatives, these barriers limit the shortline's ability to obtain suitable revenue divisions; and that, as a practical matter, these barriers are endangering the ability of the Nation's shortlines to provide cost-effective service. And, KCS adds, the adverse effects of these barriers are often exacerbated by Class I rail mergers.

KCS therefore contends that we should require major merger applicants: (a) to submit a list of all provisions contained in any agreements between any applicant and any Class II or Class III carrier having a direct physical connection to one of the applicants which in any way limit the ability of such Class II or Class III carrier to interchange or connect with any non-applicant carrier; (b) to discuss the underlying rationale of each such provision, and to explain how the transaction will impact the operation of the provision; (c) to discuss whether the provision should be removed; and (d) to analyze how removal of the provision would impact the proposed transaction. KCS further contends that we should amend our regulations to provide that, upon request of any party, we "will review such provisions and determine whether the public interest requires modifying or eliminating that provision to facilitate the ability of such a Class II or Class III carrier to interchange with, connect with, or otherwise conduct business with any other carrier."

KCS argues that, under its proposal, we would be able: to conduct a more complete overview of the barriers issue; to assess that issue in the light of the changing competitive landscape; and to determine whether the merger applicants' barriers are consistent with the public interest in light of merger-caused changes in competitive circumstances. It is in the public interest, KCS claims, to provide shippers and receivers located on shortline railroads with viable, competitive access to multiple trunk line carriers.

NORFOLK SOUTHERN. NS agrees that our merger regulations should be reassessed in light of the changing structure of the North American rail system and the prospect of a final round of major consolidations.

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[123] A paper barrier, as KCS uses the term, is a contractual provision that restricts the shortline's ability to interchange freight with carriers other than the Class I parent. A steel barrier, as KCS uses the term, exists where the Class I parent has retained a section of track principally to prevent direct physical interchange by the shortline and another carrier.

Scope of proceeding; fundamental rail economics. This proceeding, NS argues, concerns mergers, and must not be used as a vehicle for effectuating fundamental changes in the economic regulation of railroad rates and services. Such fundamental changes, NS adds, would go well beyond the subject of railroad mergers and their effects, and would implicate broader policy issues that are more appropriately addressed, if at all, by Congress.

Sound public policy, NS contends, must be consistent with the fundamental realities of railroad economics: that the railroad industry is a network industry, with fixed routes, large sunk investments in plant and facilities, and a significant proportion of fixed and common costs (including capital costs); that, in order to spread those fixed and common costs over as many units of traffic as possible, and in order to achieve economies of scale, scope, and density, railroads must strive to increase traffic density over particular lines, to extend the length of their hauls, and to reduce the large costs and service problems associated with inter-carrier switching and interchanges; that, because their large investments in infrastructure make exit from a market impractical in the short run, railroads, when faced with direct competition, have no choice but to lower their prices toward variable or incremental cost, even though such prices prevent recovery of the costs (and therefore prevent the replacement) of the infrastructure needed for continued rail service; and that, in order to maximize traffic densities and permit recovery of fixed and common costs, railroads must be permitted to price their services differentially (*i.e.*, must be permitted to charge proportionally higher rates to shippers with fewer competitive options and proportionally lower rates to shippers with more competitive options).

NS insists that the various "forced access" proposals that would "promote" or "enhance" rail-to-rail competition[124] fly in the face of the fundamental economic principles governing the railroad industry. NS contends that these proposals, if applied to any significant body of rail freight traffic: would undermine the railroads' ability to achieve the traffic densities and scope of services needed for efficient, viable operations; would undermine their ability to price their services differentially; would undermine their ability to make the capital investments in physical infrastructure that are essential to maintaining and improving rail service for all shippers; and, ultimately, by undermining long-term adequate service and the ability to invest, would produce a sort of competition that would be unsustainable in the long run. And, NS adds, "forced access" measures, if applied at all, would almost certainly have to be applied across the board; there is, NS warns, no principled limiting factor by which we could impose an open access condition for the benefit of some shippers and not others.[125]

Format of merger regulations. Our revised merger regulations, NS contends: should include an updated policy statement describing the relevant policies and decisional criteria that we will consider in reviewing specific merger proposals; but should not include rigid requirements and rules

[124] Under these "forced access" proposals, NS notes, participants in a major merger would be required: to maintain open gateways (either at all pre-merger interchange points or at all operationally feasible pre-merger interchange points); to provide reciprocal switching for shippers located in or near terminal areas; to establish on demand separately challengeable common carrier rates over "bottleneck" segments; to enter into contracts that would enable shippers to demand "bottleneck" rates from other railroads; and/or to grant trackage rights to exclusively served shippers in end-to-end mergers.

[125] NS suggests that, if railroads are to be made subject to an open access regime that neither compensates them adequately for their assets nor permits them to earn sufficient revenues to recover their costs, railroads should also be granted the right to exit markets freely if they cannot sustain continued operations.

that would preclude evidentiary consideration in individual cases. We must, NS believes, strive to maintain a balance between: (i) the formulation of new merger policies that apply prospectively and provide clear guidance to railroads and other parties; and (ii) the preservation of the ability to resolve disputed issues through individual case-by-case adjudication based on a concrete evidentiary record.

Raising the bar; marketplace reaction. NS contends that, given the recent changes in the structure of the rail industry (*i.e.*, the establishment of the balance resulting from the BN/SF, UP/SP, and CSX/NS/CR transactions), given too the service disruptions associated with recent major rail consolidations, and given also that the benefits to be produced by future mergers may not be as clear or as readily achievable as those of the mergers of the past two decades,[126] it may be appropriate to articulate a higher threshold for approval of future major rail mergers. NS therefore suggests that we "raise the bar" for approval of future major rail consolidation proposals by revising the § 1180.1 general policy statement to provide that a proposed combination will be approved only when the applicants can persuasively demonstrate that the proposed transaction will generate net public benefits that are tangible, significant, and likely. And, NS adds, because the primary public benefits of future major rail consolidations are more likely to involve improvements in the level and scope of services offered to shippers than more conventional operating cost efficiencies, we could appropriately give more weight in future cases to marketplace reaction to a proposed combination (including the general reaction of the shipper community to a proposed transaction) and somewhat less weight to the applicant carriers' testimony about claimed merger-related cost efficiencies and other quantifiable savings.[127]

Merger-related benefits; means short of merger. (1) *In general*. NS argues that, with one exception, we should not significantly change the manner in which claimed merger-related public benefits are evaluated. NS contends: that estimates of merger-related public benefits necessarily involve predictions about the future effects of an often complex transaction; that railroads do not function in a static environment, but are affected, often in significant and unanticipated ways, by dynamic business and market conditions unrelated to a particular merger transaction; and that it necessarily follows that no merger applicant can possibly guarantee that the synergies and benefits it expects to achieve from a proposed merger will be achieved in precisely the same manner, to the same extent, and under the same timing as described in the application. NS further contends that any requirement that merger applicants achieve precisely those public benefits cited in their application would deny applicants the flexibility to respond to market changes. And, NS adds, it

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[126] NS insists, however, that future mergers might well yield significant public benefits, particularly in the form of cost reductions (especially involving overhead and other non-operating functions), extension of single-line service and elimination of costly and time-consuming traffic interchanges, more efficient traffic routing, greater financial strength and ability to generate the capital needed to maintain and expand costly infrastructure, and improved ability to compete with other railroads and other transportation modes.

[127] NS insists, however, that it would be a serious mistake to presume that further major rail consolidations will not be in the public interest. Additional rail consolidations, NS argues, may well yield significant public benefits in the form of improved ability to compete with other railroads and other transportation modes, extension of single-line service, more efficient traffic routings, enhanced financial strength, and cost reductions (especially of administrative and overhead costs).

is highly uncertain what, if anything, we could or should do about any identified deficiencies in the applicants' achievement of the projected benefits of an already consummated transaction.[128]

(2) *Exception: means short of merger*. NS recommends, however, that we make one change in the way the claimed public benefits of a proposed major rail consolidation are evaluated. NS maintains, in essence, that, whereas future mergers are likely to raise a host of significant issues relating to competition, service, safety, and other matters, the current balanced structure of the rail industry may make it possible for the major rail systems to achieve through inter-carrier marketing agreements, alliances, and other coordinations short of formal merger at least some of the benefits that previously may have been attributed to mergers and therefore considered as public benefits in the merger review process. NS therefore contends that we should revise the § 1180.1 general policy statement to make clear that, in conducting a public-interest analysis, we will not consider as a merger-related public benefit any claimed synergies or other benefits that could reasonably be achieved by the parties without a formal merger or consolidation.[129]

Rail service. (1) *Service improvement as a public interest factor*. NS contends that our revised merger policy should identify as a primary public interest consideration the anticipated effects of the transaction on the adequacy of transportation service to the public. NS argues: that merger proponents should be required to demonstrate that their proposed combination will materially improve rail service as a whole; that claimed merger-related service improvements should be predicated on identifiable structural changes made possible by the consolidation (such as expansion of single-line service, infrastructure and capacity investment, internal re-routing of traffic, and similar effects); and that anticipated service improvements should not support approval of a proposed combination if they simply reflect the efforts of the applicants to do a better job running their freight operations or involve changes in business practices that could be implemented without the proposed merger. NS cautions, however, that, in assessing the service impacts of a proposed consolidation, we should focus on systemwide effects as a whole, and not solely on the impacts of the transaction on particular shippers; a proposed combination that would benefit most shippers, NS insists, should not be disapproved simply because it might harm a few.

(2) *Service Integration or Merger Implementation Plan*. NS recommends that we require merger applicants to include in their application a service integration or merger implementation plan, which would outline applicants' plans for implementing the proposed transaction, describe the steps to be taken to minimize the potential service disruptions associated with the merger implementation process, and outline, to the extent possible, the measures applicants will take to prevent and, if necessary, to remedy any such service problems. NS adds that the service integration or merger implementation plan it has in mind would serve as a guide to implementation rather than as a set of binding requirements; it would be, NS insists, subject to appropriate change in light of the actual course of merger implementation. And, NS adds, this plan, and the commitments

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[128] NS suggests, however, that we should conduct post-merger monitoring of the applicants' achievement of claimed public benefits. Such monitoring, NS claims, might assist us in making more reliable judgments in subsequent cases about the kinds of claimed merger benefits likely to be achieved.

[129] NS insists that, although § 1180.1(c) already contains a "least restrictive alternatives" standard, NS's proposed revision would represent a change in emphasis.

applicants are willing to make to prevent and remedy merger-related service disruptions, should be accorded substantial weight in our public interest determination.[130]

(3) *Information technology systems*. NS contends that, given the key role that integration of information technologies plays in successful merger implementation, we should require major rail consolidation applicants to submit (as part of the Operating Plan or merger implementation plan) a description of their plans for integrating the IT systems of the combining railroads.

(4) *Remedies for merger-related service disruptions*. NS, though it concedes that advance planning cannot guarantee that mergers will be implemented smoothly, nevertheless insists that we should not craft a new system of remedies to deal with merger-related service disruptions.[131] (a) NS contends that we should not impose monetary penalties for merger-related service deficiencies. NS argues: that the marketplace is the best guarantor of adequate service (railroads, NS maintains, have ample economic incentives to do everything reasonably necessary to implement rail mergers in a manner that avoids any significant service disruptions); that shippers aggrieved by serious service deficiencies already have a right to obtain monetary relief to compensate for direct injuries to their shipments resulting from delay; and that RTCs may also provide for additional remedies, such as liquidated damages or premium transportation costs. And, NS adds, it would not be practical to require railroads to compensate shippers for all direct and indirect injuries suffered as a result of merger-related service failures; current rate levels, NS insists, simply do not reflect the costs of potential liability for consequential and special damages. (b) NS contends that we should not adopt a rule automatically granting an alternative rail carrier the right to serve a shipper that has experienced a significant disruption of service as a result of a major rail merger. NS argues: that granting another carrier access to serve a particular shipper whose service has been disrupted may often aggravate, rather than relieve, the service problems; and that, in any event, our regulations (§§ 1146.1 and 1147.1) already provide for such relief, on a temporary basis, when access by an alternative rail carrier can effectively ameliorate a serious service interruption. (c) NS contends that we should not require railroads to submit service disputes to binding arbitration, with appellate review by the Board. NS argues: that an arbitration mechanism would do little to remedy serious merger-related service problems; that existing procedures, including civil remedies, are sufficient to address shipper service claims; and that shippers desiring an arbitral forum should seek to negotiate RTCs providing for such a remedy.

Promoting adequate infrastructure and capacity. NS believes that the policy of promoting adequate rail infrastructure and capacity should be reflected in our merger regulations. NS contends, in particular: (1) that we should consider as a significant factor in our public interest determination the impact of a proposed major rail consolidation on the preservation and expansion of core rail infrastructure and capacity; (2) that we should require merger applicants to include in their

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[130] As respects the quantitative service performance measures (*i.e.*, the "metrics") that would accompany a service integration or merger implementation plan, NS insists that we should not prescribe detailed rules specifying the type of metrics to be used, but, rather, should allow interested parties to work through the data issues and develop appropriate accommodations in individual cases. NS notes, among other things, that a requirement for the submission of shipment-specific transit time, cycle time, or other service performance measures would raise serious confidentiality and competitive issues; the routine disclosure of such information, NS claims, would permit shippers to obtain commercially sensitive data about their direct competitors.

[131] NS indicates, however, that it would not object to a rule requiring merging railroads to respond to shipper service claims on an expedited basis.

application a capital budget or infrastructure assessment plan that assesses the applicant railroads' existing infrastructure and capacity needs, identifies additional investments and capacity that may be needed to accommodate projected post-merger traffic volumes, explains how anticipated capital investment requirements will be funded, and describes whether and how the proposed consolidation would facilitate such infrastructure investment;[132] (3) that we should consider as an important factor in deciding whether to impose a particular condition the likely impacts of that condition on adequate infrastructure and capacity; and (4) that we should require the parties requesting imposition of a condition to submit evidence assessing the likely impact of the condition on the applicant carriers' ability and incentive to maintain adequate rail infrastructure and capacity.

Competitive issues: in general. (1) *Overall policy*. NS contends that merger review should continue to be focused on the preservation of pre-merger rail-to-rail competition. Conditions, NS insists, should be imposed only to ameliorate merger-related reductions in such competition.

(2) *2-to-1 issues*. NS contends that the § 1180.1 general policy statement should require that, absent unusual circumstances, a major rail consolidation proposal must include voluntary arrangements (subject to Board prescription of reasonable terms in the event of disagreement) for trackage rights, reciprocal switching, or other appropriate access by an independent carrier to replicate two-carrier rail service for those individual shipper facilities whose direct rail alternatives would be reduced from two to one as a result of the proposed transaction. NS further contends: that such a remedy should be required whenever it is practicable; and that applicants should be required to identify affected 2-to-1 shippers and to attempt to devise an appropriate plan to remedy merger-related competitive harm to these shippers.

(3) *3-to-2 issues*. NS believes that 3-to-2 issues should be left to case-by-case examination based on the individual circumstances of each case. NS contends: that two-carrier rail service will normally preserve effective, robust competition; that, in any event, few rail markets can support viable three-carrier rail service; and that, in the relatively few situations where three-carrier service remains, the issue whether a merger-related reduction from three to two direct serving rail carriers causes harm to competition is likely to turn on issues best left for case-by-case adjudication (*i.e.*, the character of the particular services involved and the condition of the serving railroads).

(4) *The "one lump" theory*. NS insists that the "one lump" theory is correct and should be continued. NS contends: that when a shipper is exclusively served by one railroad, the shipper will not suffer a reduction in competition for its traffic if the serving railroad merges with one of several connecting railroads; that, therefore, there is no merger-related justification for granting another railroad trackage rights access to that shipper; and that, in any event (*i.e.*, even if there were a merger-related loss of competitive options), the grant of trackage rights access would go far beyond simply restoring pre-merger competitive options. NS adds: that the "one lump" theory does not foreclose all opportunity for relief to an exclusively served shipper that claims that the merger of its serving railroad with a connecting carrier would cause competitive harm; that, rather, the theory erects only a presumption, rebuttable in individual cases, that such end-to-end mergers do not harm competition; and that shippers have, in each individual case, the opportunity to demonstrate that the application of the theory in that case would not be appropriate.[133]

[132] NS contemplates that, if post-merger circumstances changed, the merged railroad could modify, without Board approval, the plan for infrastructure investment and capacity expansion that had been included in the application.

[133] NS adds that, as a practical matter, its gateway preservation proposal (discussed below) would address many of the situations covered by the "one-lump" theory.

Competitive issues: gateways. (1) *Shipper concerns*. Our precedents, NS insists, have established that vertical (*i.e.*, end-to-end) rail mergers do not reduce competition through the foreclosure of independent connections; a railroad, NS argues, has no incentive to favor an extended single-line route created by an end-to-end merger over a more efficient joint-line route. NS acknowledges, however, that, precedents notwithstanding, various shipper interests have expressed concerns about the potential effects of end-to-end mergers in closing efficient gateways and requiring shippers to utilize a merged system's long-haul single-line routes in preference to efficient interline routes. The expressed concern, NS adds, has sometimes been that an end-to-end merger would extend a "bottleneck" segment.

(2) *NS's gateway preservation proposal*. NS suggests that, given the current structure of the railroad industry, these concerns have assumed such significance that, precedents notwithstanding, we should include in our revised merger policy statement a provision to preserve, for solely-served interline rail shippers that today have rail alternatives for a portion of their freight movements, the post-merger availability of "truly important, major, operationally feasible, and efficient" pre-merger gateways that have actually handled the interchange of significant amounts of traffic. NS argues that the gateway protection it contemplates would preserve pre-merger competitive routing options and would prevent the merger from extending the scope of any "bottlenecks."

(3) *The specifics of NS's proposal: the gateways preserved; the shippers protected; certain traffic excluded*. (a) NS indicates that the gateways it would preserve would be: Chicago, Kansas City, St. Louis, Memphis, and New Orleans (for east-west U.S. transcontinental mergers); and comparable major gateways (for other mergers). (b) NS indicates that the gateway protection it contemplates would be afforded only to individual shippers that are exclusively served at origin or destination by an applicant, and that prior to the merger: could complete their shipment only through an interchange at a gateway served by another applicant and at least one other independent railroad; and actually used the covered gateway for a significant volume of traffic. (c) NS indicates that, because its gateway protection proposal is intended to prevent merger-related reductions in competition, the gateway protection it contemplates would not extend to exempt traffic (such as intermodal and automotive traffic) that, by definition, is subject to effective competition.

(4) *The specifics of NS's proposal: how it would work*. NS indicates that it would implement its gateway protection proposal by requiring major merger applicants to establish, upon reasonable request by eligible solely-served rail shippers, a common carrier or contract rate to apply to the movement of the shipper's traffic over the merged carriers' lines to/from a covered gateway for use in conjunction with another railroad not involved in the merger. NS further indicates that, if the affected shipper were dissatisfied with the rate offered by the merged system, the shipper could bring a complaint seeking prescription of a reasonable rate to apply to the movement.[134]

(5) *The danger to avoid*. NS warns that, in view of the history of the now discredited *DT&I* conditions, any measure to protect efficient gateways must take care to insure that it does not result in a requirement that every pre-merger interchange point, regardless of the level of actual use and regardless too of relative efficiency, be kept "commercially" open and frozen for all time. That, NS advises, would simply handcuff the railroads in modifying their traffic routing practices to take account of market conditions, and, perversely, would hamper rate and service competition between alternative single-line and joint-line routes.

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[134] NS contends that, because (under NS's proposal) the merged railroad would be required to establish a rate applicable to the movement of the shipper's traffic to/from a covered gateway even if the shipper has not first secured a contract from a carrier serving the non-bottleneck segment, NS's proposal would expand, in some respects, the bottleneck "contract" exception.

Downstream effects. NS agrees that the § 1180.1(g) "one case at a time" rule should be eliminated, and that, in all future major merger proceedings, we should examine the likely "downstream" and "cross-over" effects of a proposed transaction. And, NS adds: applicants should be required generally to address possible downstream impacts of their proposed transaction, including possible downstream transactions; parties claiming that a particular proposed consolidation will have adverse downstream impacts should be required to come forward with evidence identifying and supporting those claims; and, if such evidence is produced, applicants should be required to address those issues.

Maintaining safe operations. NS contends that, until the pending SIPs rulemaking is completed, safety issues (and the preparation of SIPs) should be handled on a case-by-case basis.

Shortline and regional railroad issues. NS acknowledges that, in assessing the effects of a proposed major rail consolidation, we should consider potential adverse impacts of the transaction on smaller rail carriers. NS insists, however that proposals directed to pricing and car supply guarantees, a right to compensation for service failures, and/or the elimination of "paper barriers" that restrict the interchange of traffic with other railroads, should not be adopted; these proposals, NS claims, concern longstanding commercial disputes that have little or nothing to do with the actual effects of rail mergers. NS contends, in particular, that, in general, the suggestion that major rail consolidation applicants be required to eliminate "paper barriers" is nothing more than an attempt to nullify contractual commitments that the smaller carriers voluntarily assumed when they purchased their lines from the larger railroads, and to impose this result for reasons having nothing to do with the actual effects of particular proposed rail mergers. And, NS adds, the forced abrogation of "paper barriers" would ultimately discourage otherwise beneficial future line sale transactions that would result in the formation of new Class II and Class III carriers.[135]

Employee issues. (1) *CBA modifications*. NS insists that we cannot require railroads to agree to forgo use of ICA-based mechanisms for modifying CBAs. NS contends: that the "self-executing" 49 U.S.C. 11321(a) immunity provision exempts railroads from CBA terms otherwise enforceable under the RLA, as necessary to implementation of Board-authorized transactions; that the CBA override procedures provided by *New York Dock* have long since been approved by the federal courts; and that, as a matter of law, the Board could no more deny railroads their statutory exemption from the RLA and CBAs in all future railroad consolidation transactions than it could withdraw antitrust immunity for those transactions. NS adds that, as a practical matter, the elimination of Board-administered procedures for effecting necessary CBA changes would all but ban further transactions; the *New York Dock* procedures (set out in Article I, § 4), NS advises, make possible CBA changes that cannot be achieved, except perhaps at a prohibitive price, in RLA collective bargaining.

NS notes too that the Class I railroads have already reached a voluntary agreement with UTU for resolving future disputes over proposals to modify CBAs in connection with the implementation of major rail consolidation transactions. NS indicates that the NCCC/UTU agreement provides that the parties will seek congressional action to codify the terms to which they have agreed (but that the terms will not be prescribed as a condition imposed and administered by the Board). NS further indicates that the NCCC/UTU agreement, which (NS claims) preserves the *New York Dock* dispute

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[135] NS concedes, however, that limited merger-related relief would be warranted if the effect of a proposed rail merger would be to expand the reach of a "paper barrier" restriction on a short-line railroad's traffic interchanges.

resolution mechanism while addressing any supposed concern that this mechanism could be used to override CBAs that are considered favorable to employees, provides, among other things: that a single CBA will be applied to consolidated operations; that necessary modifications of seniority arrangements and other rules will be made; and, when work is consolidated or coordinated, that the union(s) representing the affected employees will select the applicable CBA (from among the applicable pre-transaction CBAs), or, failing agreement, that the CBA "most beneficial to the employees" will be prescribed in arbitration under the Article I, § 4 procedures. NS adds: that the NCCC/UTU agreement may well serve as the model for other private agreements and/or legislation covering railroad employees represented by other organizations; and that, in the meantime, we should defer consideration in order to permit private negotiations and/or congressional action to drive any changes in our longstanding policies and procedures in this area.

(*2) New York Dock benefits*. NS insists that there is no justification for expanding the benefits provided by the *New York Dock* conditions, either by lengthening the protective period to 10 years or by permitting employees to collect monetary benefits without relocating with their work. With respect to the 6-to-10 proposal, NS contends: that the six-year protective period has been the standard for major rail transactions for more than two decades; that, in 1995, Congress reaffirmed the appropriateness of *New York Dock* benefits (including the six-year period) for Class I transactions; that, in any event, *New York Dock* benefits are far more generous than benefits received by employees in other industries; and that adding four years to the standard protective period would substantially increase railroads' protective costs while serving no legitimate public policy interest. NS further contends that the fact that BNSF and CN voluntarily committed to a 6-to-10 enhancement in connection with the proposed BNSF/CN transaction does not furnish any legitimate ground for subjecting all railroads in all future transactions to the same commitment.

(3) *Test Period Averages*. NS contends: that TPA data are used in measuring the amount of a displacement allowance to which a "displaced employee" is entitled; that an employee is deemed to be a "displaced employee" only if he has been placed in a "worse position" (*i.e.*, a position that pays a lower wage rate); and that an employee is not deemed to be a "displaced employee" simply because his aggregate earnings in a given month happen to be lower than his average pre-transaction compensation. NS contends, in essence, that two determinations must be made, and must be made in this order: (1) a "threshold determination" whether the employee is entitled to "displaced employee" status; and, if so, then (2) a follow-up determination respecting the amount of the employee's displacement allowance. NS further contends, in essence, that the threshold determination does not depend upon TPA data; such data, NS insists, are neither sufficient nor necessary for making that determination. And, NS claims, the proposal to require the railroads to provide employees with their TPAs when a consolidation is implemented has nothing to do with the "displaced employee" determination as such; rather, NS contends, this proposal is intended to assist Rail Labor's efforts to "meld" the "displaced employee" determination and the "amount of the displacement allowance" determination. NS therefore insists that we should continue to adhere to the rule that an employee is not entitled to TPA data prior to a determination that he is a "displaced employee" within the meaning of the *New York Dock* conditions.

(4) *Selecting the applicable CBA*. NS insists that we should not adopt any proposal that would modify *New York Dock* to permit the union to select the applicable CBA whenever work is transferred from one location to another; that proposal, NS warns, would make every merger-related transfer of work an opportunity for the union to change the existing CBA at the receiving location (and perhaps on the entire receiving seniority district or even the entire receiving railroad), regardless of the relative sizes or scopes of the operations at the transferor and receiving locations. NS would prefer, rather, that we adhere to established *New York Dock* practice, which (NS advises) provides that the CBA of the "controlling carrier" (*i.e.*, the CBA in effect at the receiving location)

is the CBA that will ordinarily apply to work transferred from one location on a consolidated rail system to another.

Cross-border issues. (1) *In general*. NS contends that, in general, the various cross-border matters that would be raised with respect to any U.S./Canadian rail merger (including such matters as the extra-territorial application of U.S. rail safety rules, potential merger-related shifts of traffic from U.S. to Canadian ports, and national security and defense-readiness issues) should be dealt with on a case-by-case basis.

(2) *Full-system impact analyses*. NS contends that, in view of the interdependent nature of freight rail operations and the inevitable effects that a major rail consolidation transaction involving either CN or CP would have on rail transportation services and operations in the United States, our regulations should require the applicants in every major rail consolidation proceeding to submit an Operating Plan and other merger-impact analyses that address the entirety of the applicants' combined rail systems, including operations and impacts that occur outside the United States. Such "full-system" impact analyses are necessary, NS insists, if we are to have an adequate basis for assessing the full impacts of a proposed major rail consolidation on the public interest of the United States.

Environmental issues. NS agrees that the scope of this rulemaking should not extend to environmental regulations and procedures. And, NS adds, the suggestions made by DOT for Board regulation of grade-crossing traffic movements and crossing closures would require micro-management of freight traffic flows by the Board, but without the critical benefit of the knowledge of daily changes in traffic conditions available only in the field. A more complex, restrictive regulatory regimen, NS warns, cannot solve the operations issues that sometimes result in blocked crossings; the best way to address such problems when they occur, NS believes, is to engage in cooperative discussions with the affected community to determine the cause for the blockage and the most effective solutions.

Technical revisions. NS has proposed a number of technical revisions that (it indicates) are, for the most part, intended to conform our regulations to the waivers and clarifications that we have routinely granted in recent rail consolidation proceedings. (1) *Definition of applicant*. NS proposes that the § 1180.3(a) definition of "applicant" be revised to exclude non-operating affiliates of the parties initiating a proposed transaction and entities created solely for purposes of effecting the proposed transaction.

(2) *Definition of applicant carriers*. NS proposes that the § 1180.3(b) definition of "applicant carriers" be revised to exclude non-rail carriers related to the applicants as well as all rail carriers in which either set of applicants holds a direct or indirect interest of 50% or less.

(3) *Consolidation of information*. NS proposes that our regulations be revised to permit applicant carriers to submit financial data on a consolidated basis when they report data on that basis in the regular course of business.

(4) *Employee information*. NS proposes that § 1180.6(a)(2)(v) be revised to specify: the class or crafts of employees to be covered by the required employee impact exhibit; and the format of such exhibit.

(5) *Major transactions: periodic reports; transactional disclosures; annual reports*. NS proposes that § 1180.6(b)(1), (2), and (4) be revised to provide that applicants: need not submit SEC Form S-14s, SEC Form 10-Ks, or annual reports for applicant carriers that do not submit such reports on a regular basis; but must submit other reports (such as proxy statements or tender offer materials) submitted to the SEC (or similar non-U.S. government authorities) in connection with the proposed transaction.

(6) *Major transactions: change in control*. NS proposes that § 1180.6(b)(3) be revised by substituting, for the list of changes in officers not indicated on a carrier's most recent Annual Report Form R-1, a list of the principal six officers of the operating applicants.

(7) *Major transactions: corporate chart*. NS proposes that § 1180.6(b)(6) be revised to require submission of a corporate chart that lists only directors and officers that are common to (i) both of the two applicant railroads or (ii) either applicant railroad and another rail carrier outside applicant railroads' systems.

(8) *Major transactions: intercorporate relationships*. NS proposes that § 1180.6(b)(8) be revised to require identification of only significant intercorporate or financial interests involving ownership by the applicants or their affiliates of more than 5% of a non-affiliated rail carrier's stock.

(9) *Major transactions: procedural schedule*. NS proposes that we include in our merger regulations a one-year "default" procedural schedule that will govern all future major rail consolidation proceedings unless revised in particular cases for good cause.

(10) *Major transactions: production of applicants' traffic data*. NS notes that most merger applicants in recent years have developed their merger-impact analyses not on the basis of the Waybill Sample data maintained by the Board but, rather, on the basis of the 100% traffic tapes maintained by the applicant carriers; but that, whereas the Waybill Sample data are available to applicants and other parties alike well before the filing of a major rail consolidation application, non-applicants generally have not been able to obtain access to the applicants' internal traffic data until after the filing of the application. NS therefore contends that, given the critical importance of actual traffic data in performing sound merger-impact analyses, and given too the time-intensive nature of such analyses, we should adopt a rule requiring prospective major rail consolidation applicants to make their 100% traffic tapes available to qualified parties (subject to an appropriate protective order) as soon as practicable after the filing of a notice of intent to file a major rail consolidation application. Such pre-application access to critical traffic data, NS believes, would minimize pressures to extend the procedural schedule and would enable parties to prepare better merger-impact testimony.

(11) *Major transactions: protective order*. NS contends that, to save time and money for all concerned, we should include in our merger regulations a standard protective order with provisions similar (except in one respect) to those contained in the protective orders adopted in recent major rail consolidation proceedings. NS further contends, however: that most recent protective orders have established a two-tier scheme of confidentiality protection, in which proprietary or commercially sensitive business information designated "highly confidential" by the producing party could be disclosed only to and used only by outside counsel or outside consultants to the receiving party; that, unfortunately, the "highly confidential" designation has often been abused by producing parties; and that, on account of such abuse, in-house counsel for recipient parties have been foreclosed from active involvement in and supervision of outside counsel with respect to the consolidation proceeding. NS therefore proposes that we include in the standard protective order a provision that would require (or that we otherwise amend our merger regulations to provide) that in-house counsel must be granted access to "highly confidential" discovery materials unless their employment duties include commercial decisionmaking on matters related to pricing and marketing of rail services.

UNION PACIFIC. UP, which questions whether additional Class I mergers will ever be in the public interest, insists that we should evaluate the impact of and the need for any additional such mergers on the assumption that any such merger will be part of an "end game" that will result in transcontinental mergers and leave North America with only two major railroads. UP further contends that we should condition any mergers we approve in a manner that protects the public interest and shipper interests under a two-railroad industry structure.

Dangers of regulatory restructuring. UP warns that "forced access" and "bottleneck" rate proposals, which (UP claims) would result in artificial competition based on artificially low compensation for use of rail facilities, would be economically disastrous for the railroads. UP contends, in particular, that these proposals: would undermine the ability to engage in demand-based or differential pricing (without which, UP maintains, railroads would be unable to cover their large fixed costs); would, by fragmenting traffic flows, prevent railroads from achieving economies of density; and would, ultimately, result in degraded service.

Scope of new regulations. (1) *Applicants vs. non-applicants*. UP contends that, in the merger context, we cannot impose conditions on non-applicant railroads. UP argues, among other things: that 49 U.S.C. 11324 does not authorize the imposition of conditions on non-applicants; and that the Takings Clause bars the imposition of economically harmful conditions on third parties who are not themselves applying for public benefits. UP notes, however, that, if a carrier extends its system as a result of a grant of trackage rights imposed as a condition on a merger or as part of a settlement agreement entered into in connection with a merger, and thereby creates a new "bottleneck" or extends an existing "bottleneck," the merger rules governing "bottleneck" rates ought to apply (because, UP advises, the extended "bottleneck" is a direct effect of the transaction in which the benefiting carrier participates).

(2) *Retroactivity*. Our new merger regulations, UP insists, cannot apply retroactively to prior mergers. UP argues, in essence, that, although we have the authority to impose oversight requirements that allow us to modify previously imposed conditions in order to facilitate the achievement of the purposes those conditions were intended to achieve, we do not have the authority to reach back to a prior merger and "re-condition" it based on a new set of substantive standards.

(3) *All Class I carriers*. UP contends that our merger regulations should apply equally to all future mergers among Class I railroads. There is, UP insists, no basis for concluding "ex ante" that a merger proposal involving any two of the remaining Class I railroads would avoid the fundamental concerns that gave rise to this proceeding. And, UP adds, if applicants can show that, due to the nature of their transaction, specific requirements of the major merger rules should not apply to their proposal, they can seek a waiver of those regulations under § 1180.4(f).

Downstream effects. UP contends that, because any combination among the six largest remaining railroads in North America might well represent the start of the "end game" in rail consolidations, we should consider, before approving any additional Class I merger, whether the "end game" would be in the public interest. UP therefore proposes that the § 1180.1(g) "one case at a time" rule be revised to provide: (1) that major merger applicants must include in their application an evaluation of the effects on competition and the public interest of combining all Class I railroads in the United States and Canada into two North American Class I railroads;[136] and (2) that the Board may, either on request or on its own motion, consolidate for hearing and decision (a) any major merger application filed before the date set for the filing of inconsistent applications in another major merger proceeding, and (b) the major merger application previously filed in the other proceeding.

Maintaining safe operations. UP believes that current safety requirements in connection with Class I mergers adequately protect the public interest.

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[136] UP indicates that one effect that applicants would have to address would be the risk of re-regulation.

Safeguarding rail service. (1) *Implementation plan*. UP contends that applicants should be required to include in their application a detailed implementation plan explaining how the consolidated entity will perform all of the important actions necessary to implement the consolidation and how it will provide adequate capacity for post-consolidation service. The implementation plan contemplated by UP: would include its major underlying assumptions; would describe anticipated labor agreement consolidations, computer-system integration, significant personnel reductions, major reroutes and extended hauls, capacity expansions and track upgrades, acquisition of locomotives and freight cars, and facility consolidations and expansions; would set forth the schedule on which public benefits will be achieved; would identify critical time periods during which service might be affected by major changes, such as computer-system integration; and, for each major change, would describe contingency plans and procedures to recover from any service problems that might arise.

(2) *Remedies for merger-related service deterioration*. UP argues that we should establish a remedy mechanism that would apply in the event of significant merger-related service deterioration and that would include an expedited procedure for customers to obtain either temporary substitute service or recovery of substitute transportation costs.[137]

UP indicates that the remedy mechanism it contemplates would have to be based on quantifiable and detailed performance data that would measure railroad performance in a way that was meaningful to individual shippers. UP contends, in particular, that applicants should be required: to create and maintain, for the base year used in the application and for the entire merger implementation period, databases showing both on-line transit times and on-line cycle times for individual shipments, as well as the extent of variability in each measurement; and to make these databases available to affected shippers or Class III rail carriers that have a legitimate need for the information in order to demonstrate service deterioration.[138]

The remedy mechanism contemplated by UP would be in place for the 5-year period commencing on the effective date of the decision approving the merger, and would work as follows: (1) if a shipper or Class III railroad (hereinafter referred to as the complainant) that had shipped more than 100 cars over 12 months in a corridor could show that a "Service Measurement" for its traffic had deteriorated by an average of more than 50% from pre-merger levels for more than 60 consecutive days, it could demand that the merged carrier cure service within 60 days; (2) if the merged carrier was unable to restore service to the 50% level by the end of the 60-day cure period, the complainant could file a service complaint with the Board, provided that the complainant could show that the merged carrier's service as measured by any of the Service Measurements had deteriorated by an average of more than 50% from the base period for 120 or more consecutive days, that the complainant had cooperated with the merged carrier in efforts to restore service, and that the complainant had incurred increased transportation costs as a result of the deteriorated service; and (3) if the complainant made the required showing, then, unless the merged carrier could establish within 10 days either that the service decline was attributable to factors other than merger

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[137] UP warns that a requirement that railroads compensate for all costs, including business losses, would result in a level of liability far in excess of that contemplated by ordinary contract law.

[138] UP adds that performance measurements for car supply should also be developed, if certain problems connected therewith can be solved. The problems noted by UP are these: (1) UP indicates that during car shortages, when the parties most require accurate data, some shippers, to protect their minimum requirements, order more cars than they need, thereby distorting the railroad's performance; and (2) UP indicates that a railroad's ability to satisfy a car order depends on how far in advance the shipper orders the car.

implementation or that the complainant had not reasonably cooperated with remediation efforts, the Board could, within 30 days after the complaint was filed, grant a remedy.

The remedy mechanism contemplated by UP would allow the Board to choose between two remedies: (i) temporary access by reciprocal switching or trackage rights (including, if necessary, temporary trackage rights over other carriers) to the complainant's facility, if that access would result in improved service to the shipper and would not adversely affect service to other shippers or further degrade the operations of the merged carrier; and (ii) reimbursement of incremental transportation costs that could not reasonably be mitigated and that were incurred by the complainant or, if complainant was a Class III railroad, by shippers located on that railroad.

Promoting and enhancing competition. (1) *In general*. UP contends that our merger conditioning power should be used to address the effects of a merger, not to alter the competitive structure of the rail industry.

(2) *Gateways and bottlenecks*. UP believes that, if the railroad industry is to be restructured into two transcontinental systems, we must act to keep traditional gateways open. UP therefore proposes that our rules should be modified to require that, where neither merging carrier could have handled on a pre-merger single-line basis a shipper's traffic from/to an exclusively served facility (other than an automotive distribution ramp, an intermodal facility, or a transload facility) but two of the merging carriers could have handled the traffic from/to that facility on a pre-merger interline basis, the merged carrier must make available upon request a separately challengeable bottleneck rate between the facility and either the predominant pre-merger gateway for the traffic from/to that facility (if a single gateway was accessed prior to the merger by the merging carriers and a non-merging carrier) or the principal, geographically proximate gateway that serves as the alternative for the merging carriers' gateway (if, prior to the merger, one gateway was accessed by the merging carriers but another gateway was accessed both by a non-merging carrier and also by the merging carrier that accessed the shipper facility). This condition, UP indicates, would preserve the shipper's pre-merger routing options and would allow the shipper to challenge the reasonableness of the bottleneck rate (although, UP notes, market dominance determinations would be based on the entire movement from origin to destination, not on the movement over the bottleneck segment only). And, UP adds, this condition would actually go somewhat beyond merely preserving the exclusively served shipper's routing options (because, UP claims, in some cases, as where the traffic moves pre-merger under joint or proportional rates, the reasonableness of the pre-merger rate over the bottleneck segment would not be separately challengeable).

Shortline and regional railroad issues. UP insists that, in general, shortline and regional railroad issues are not merger-related. As respects "paper barriers" in particular, UP contends: that, except where a merger renders a shortline captive or creates or extends a paper barrier, there is no link between the merger and the paper barrier; that the underlying contractual obligations did not arise from mergers and generally are unaffected by mergers; and that issues respecting such obligations can be addressed in individual merger cases on a case-by-case basis. And, UP adds: issues relating to such contractual provisions are the subject of the 1998 AAR/ASLRRA "Railroad Industry Agreement" (RIA) which, UP notes, commits the Class I railroads to waive interchange limitations for new traffic and to consider the renegotiation of any sale or lease agreement that includes contractual limits on interchange as long as the smaller railroad compensates the Class I carrier for lost traffic; and further discussions between AAR and ASLRRA are underway concerning potential modifications to the RIA to address lingering concerns of some ASLRRA members.

Employee issues. UP indicates that it supports the positions taken and the arguments made by NRLC.

3-to-2 issues. UP contends that we should evaluate on a case-by-case basis all claims that a proposed transaction will adversely affect competition by reducing the number of rail carrier alternatives serving an individual shipping point, an O/D corridor, or some other properly-defined transportation market. There should be, UP insists, no hard-and-fast assumption that anti-competitive effects arise only when the number of rail carrier alternatives drops from two to one.

Merger-related public interest benefits; means short of merger. UP contends that recent changes in the structure of Class I railroads, advances in technology, and various innovations in cooperative relationships among rail carriers have made it much more likely that categories of public benefits historically associated with railroad combinations can be achieved via other means, including: alliances among connecting carriers; industry initiatives such as AAR's "Interline Service Management" program; operational coordinations such as the efforts currently underway to streamline operations in the Chicago terminal; service initiatives such as the recently announced NS/BNSF transcontinental intermodal trains; and potentially revolutionary changes in railroading as a result of "business-to-business" e-commerce. Mergers, UP insists, should not be credited with benefits that are practicably achievable through other means. UP therefore contends that we should revise our merger regulations to provide: that we will treat as public benefits only those benefits that can practicably be achieved only through mergers; and that we will consider whether, as a result of the applicants' pursuit of the proposed transaction, any improvements in cost, efficiency, service, competitiveness, or other benefits that would likely be achieved without the transaction would be reduced or lost.

Cross-border issues. (1) *Full-system analyses*. UP maintains that we should explicitly acknowledge the extensive relationships among all aspects of the North American rail network by requiring, in the case of a proposed combination involving a carrier within the Board's jurisdiction that has foreign operations, that applicants must submit with their application the same information for the foreign service as would be required if the participating carriers operated wholly within the United States. We cannot effectively evaluate whether a proposed Class I combination is in the national public interest, UP insists, unless we can evaluate all aspects of a transaction that affect the United States. UP therefore contends that applicants should be required: to submit a systemwide operating plan and a systemwide implementation plan; to address all the competitive effects of their proposed combination, including effects that might seemingly involve competition outside the United States; and to address the potential effects on U.S. rail service and viability of public policies in the foreign jurisdiction (UP, which claims that Canadian authorities recently ordered CN and CP to reduce grain rates by 18%, insists that a reduction of this sort, if applied to all traffic, could impair the viability of the Canadian portion of a combined rail system).

(2) *Extraterritorial conditions*. UP contends that we should revise our regulations to clarify that, in major merger transactions involving carriers with foreign operations, we will impose conditions to ameliorate potential adverse effects arising outside the United States. UP adds that, if necessary to make such conditions enforceable, we could require applicants to consent to Board jurisdiction with respect to disputes concerning such conditions.

Technical revisions. (1) *Protective order*. UP agrees that there has been some abuse of confidentiality designations under our protective orders. UP contends: that analysis of the operating, competitive, and other effects of proposed mergers or requests for conditions should not be the sole province of outside consultants; that, except insofar as information is of the utmost competitive sensitivity (*e.g.*, the confidential terms of shipper contracts, internal strategic planning documents, and rates), the "Highly Confidential" designation should not be used to bar disclosure of information to party employees who have agreed, by executing the standard "Confidential" undertaking, to be bound by a protective order; but that, unfortunately, participants in merger proceedings have, by excessive use of the "Highly Confidential" designation, sometimes unnecessarily restricted access to information that is vital to evaluating the effects of a proposed transaction. UP therefore suggests that we should take this opportunity to establish more appropriate parameters for the use of the "Highly Confidential" designation.

(2) *Voting trusts*. UP maintains that we should not revise our 49 CFR Part 1013 voting trust regulations. We already have, UP contends, the ability to review a proposed voting trust arrangement to ensure that it will protect the independence of the carrier whose stock is held in the trust; and, UP adds, if we were to determine that a particular voting trust arrangement would preclude meaningful review of the underlying transaction, we could disapprove the voting trust. UP further contends that, because a non-railroad pursuing the acquisition of a railroad can complete the acquisition without Board approval, any limitation on the use of voting trusts would uniquely handicap railroads in the market for corporate control of other railroads.

APPENDIX D: REGIONAL AND SHORTLINE RAILROADS

AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION. ASLRRA contends: that shortline and regional railroads[139] are an important and growing component of the railroad industry; that, today, shortlines and regionals operate 29% of the American railroad industry's route mileage (approximately 50,000 miles of track) and account for 9% of the rail industry's freight revenue and 11% of railroad employment; and that shortlines and regionals have been, and will continue to be, deeply affected by the ongoing restructuring of the North American railroad industry. ASLRRA further contends: that Class I mergers have gone too far; that the competitive balance within the industry has been fundamentally changed; and that too many routing, ratemaking, and service options have been eliminated. Henceforth, ASLRRA insists, the focus of our merger regulations should be on improving service to customers. Preserving viable options within the rail industry, ASLRRA maintains, is imperative to enhance service, sustain competition, allow choices for shippers, and avoid reregulation.

Bill of Rights. ASLRRA, which insists that the preservation of the important procompetitive role played by shortlines and regionals should be an important aspect of our merger policies, advocates a "Bill of Rights" that would grant shortlines and regionals four rights that (ASLRRA claims) are essential to protect their continued viability as part of the rail network: a right to compensation for service failures; a right to interchange and routing freedom; a right to competitive and nondiscriminatory pricing; and a right to fair and nondiscriminatory car supply.[140] ASLRRA contends that, with respect to every future Class I merger transaction, conditions protecting these rights should be imposed automatically, unless the Class I applicants are able to demonstrate that imposition of one or more of these conditions would pose unreasonable operating or other problems for the consolidated carrier and would substantially frustrate the ability of the consolidated carrier to obtain the anticipated public benefits. ASLRRA further contends that, as respects any issues that

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[139] ASLRRA refers to shortlines and regionals as Class III railroads and Class II railroads, (more or less) respectively. ASLRRA also refers to shortlines and regionals collectively as "small" railroads.

[140] ASLRRA notes that its Bill of Rights involves topics that are part of the 1998 AAR/ASLRRA RIA. The RIA, ASLRRA advises, is a good idea, but it needs to be taken further and given more teeth.

may arise in individual cases regarding the workings of these conditions, we should establish an expedited and cost-effective remedy procedure that would be initiated by a complaint filed with the Board by a connecting shortline or regional railroad.

Right #1: compensation for service failures. ASLRRA contends: that the service disruptions which have occurred in connection with recent Class I mergers, and which (ASLRRA claims) have been due at least in part to ineffective planning and poor execution of the merger transactions,[141] have had negative consequences for many shortlines and regionals; that the difficulties small railroads have faced when service disruptions have occurred have often been made worse by unavailability of Class I operating and marketing personnel (personnel cuts in the name of efficiency, ASLRRA notes, seem inevitably to follow merger approval); and that, on account of these post-merger disruptions, many small railroads have experienced severe revenue erosion due to the inability of their Class I connections to handle normal business levels. ASLRRA therefore insists that no future Class I merger or acquisition transaction should be approved without iron-clad guarantees that shortline and regional railroads will receive prompt compensating payment from the Class I to make up for revenue losses directly caused by service or operating deficiencies related to the transaction. And, ASLRRA adds, when a Class I cannot provide an acceptable level of service post-transaction, small railroads should be allowed to perform additional services as necessary to provide acceptable service to shippers.[142]

Right #2: interchange and routing freedom. ASLRRA contends that, over the past 20 years, rail routing options have been minimized, as many viable alternative routes have been eliminated either by physical removal or by economic disadvantage. ASLRRA further contends that the industry is now paying the price for the actions of the past; the gateway closings, the pricing policies, the "de-marketing" of certain traffic, and the "paper barrier" restrictions in line sale agreements, ASLRRA maintains, have eliminated so many previously viable alternative routes that, today, there is often literally nowhere to go when rail lines become clogged. ASLRRA therefore insists: that no future Class I merger or consolidation transaction should be approved without a requirement that all contractual barriers that prohibit or disadvantage full interchange rights, competitive routes, and/or rates must be immediately removed, and none imposed in the future;[143] that, at junctions and in terminal areas, small railroads should have the right to interchange with all Class I carriers as well as with each other without being disadvantaged in any way in terms of

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[141] ASLRRA concedes that some service problems have been related to traffic growth, capacity constraints, and inadequate infrastructure within the railroad industry.

[142] ASLRRA further contends that connecting small railroads should be involved in the merging carriers' pre-merger implementation planning. The merging Class I railroads, ASLRRA argues, should be required to brief all connecting shortlines and regionals; this sort of dialogue at the local level, ASLRRA maintains, could help avoid at least some of the service problems that have plagued recent mergers.

[143] ASLRRA concedes that every "paper barrier" was agreed to by a buyer as part of a negotiated contractual line sale agreement, and formed part of the basis for the sale price. ASLRRA insists, however, that, circumstances have changed considerably since the mid-1980s and early 1990s when many of these line sales took place: considerable time has passed (*i.e.*, the selling Class I has had quite a few years to enjoy the restricted competitive options for the spun-off line that were the benefit of its bargain with the buyer); and, as that time has passed, the world has changed (*i.e.*, the Class I mergers of the past several years have changed the competitive landscape to the point that artificial restrictions are no longer tolerable).

operations or pricing; and that gateways, through routes, and joint rates should be preserved as long as they are reasonably efficient, or allowed to be re-established if previously eliminated.

Right #3: competitive and nondiscriminatory pricing. ASLRRA contends that, in many instances, Class I railroads have discriminated against shippers located on a Class I's shortline connections vis-à-vis shippers located on the Class I itself. ASLRRA further contends: that small railroads must be able to quote competitive rates for their shippers, and must not be artificially prevented from doing so; that Class I pricing should be market-based; that, as respects Class I pricing, capital and operating cost differences are valid only if they are real; that Class I pricing should not disadvantage a customer located on a small railroad for that reason alone; and that, with respect to Class I discounts applicable to western grain movements, when a connecting shortline assembles a unit train from multiple loading points, the refusal of a Class I to make available to that shortline a discount otherwise available to Class I shippers is a discriminatory anticompetitive practice (provided, ASLRRA adds, that the shortline is willing to absorb the extra switching required to assemble the unit train). ASLRRA therefore insists: that, after a merger or consolidation, the merging carriers should be required to quote through rates in conjunction with connecting railroads, or, alternatively, proportional rates on the Class I segment of a route that will enable the small railroad to quote a competitive rate for the entire movement; that we should expressly prohibit discrimination against customers located on small railroads as a condition of any Class I transaction, and provide a user-friendly remedy at the Board for small railroads with complaints; and that, from now on, no Class I merger or acquisition transaction should be approved without an express requirement that rates and pricing for small railroads will be competitive and nondiscriminatory.

Right #4: fair and nondiscriminatory car supply. ASLRRA contends: that an adequate and suitable car supply is a fundamental requirement to do business as a railroad; that small railroads cannot succeed without fair access to needed equipment from their Class I partners; that, although many small railroads own or lease a substantial amount of equipment, they must also depend on their Class I connection(s) to do their share in supplying cars; that the obligations of a Class I connection must necessarily include the payment of fair amounts of car hire, and a commitment (binding even in times of shortage) to make equipment available for loading equitably; that, when equipment shortages occur, available cars should be furnished on a proportional basis among Class I and shortline shippers; and that the Class I should be liable for the small railroad's lost earnings when this standard is not met. ASLRRA therefore insists that, from now on, no Class I merger or consolidation transaction should be approved without a requirement that connecting small railroads will be treated in a fair and nondiscriminatory fashion with regard to car supply and car compensation.

Other conforming changes. In addition to amendments that would implement its Bill of Rights, ASLRRA has proposed a number of conforming amendments to our regulations. The most prominent such amendment would require major merger applications to include a discussion of the effect of the proposed transaction upon the Class II and Class III carriers with which the Class I applicants connect.

CEDAR RAPIDS AND IOWA CITY RY. CO. CR&IC, a Class III shortline that operates 52 miles of railroad in Iowa, connects with UP and IC (CN), and also connects, via a haulage agreement with IC, with most other major railroads in Chicago. CR&IC agrees that shortlines have an important role to play in preserving and promoting competition.

CHILLICOTHE-BRUNSWICK RAIL AUTHORITY. The jointly filed comments of the Chillicothe-Brunswick Rail Authority and the Green Hills Regional Planning Commission represent the perspectives of, respectively, a rural shortline and a rural development and planning organization.

Chillicothe-Brunswick Rail Authority. CBRA, a shortline serving rural Missouri communities abandoned by Class I railroads in the 1980s, maintains that the Class I mergers of the past two decades have worked to the detriment of rural shortlines and rural shippers. CBRA, which connects with BNSF, NS, and I&M, contends in particular: that the interests of the large Class I carriers and the interests of their connecting shortlines are often divergent (CBRA notes that a traffic increase of a car or two a week might not interest a Class I carrier, yet would be extremely important to a shortline like CBRA); that there is a perceived tendency for Class I carriers to adopt pricing strategies for grain that discriminate against their connecting shortlines and the shortlines' on-line customers; that a certain merger-related "rationalization" by BNSF of "parallel" lines once operated by BNSF's predecessors will, if it occurs, work a hardship on CBRA; that a merger of BNSF and NS might well negate the need for the southernmost 16 miles of CBRA's track; and that the reconstruction by UP of a 13-mile Rock Island track segment, which (CBRA indicates) will realign certain I&M/UP traffic flows, may, as a practical matter, result in the elimination of CBRA's I&M interchange.

Green Hills Regional Planning Commission. GHRPC, an 11-county rural development and planning organization serving north central Missouri, contends: that access to railroad service is an important industrial and community development component; that the gradual growth in industry at Chillicothe, MO, has been attributable to the presence of a shortline providing customized rail switching services and having access to competitive Class I connections; and that future Class I mergers threaten the loss of transport competition, the loss of interchange points, and greater isolation of rural communities and agribusinesses, and, in consequence, more freight moving on an inadequate rural highway network with greater cost to customers and less energy efficiency. The loss of rail service through merger-related line consolidations, GHRPC warns, can make rural communities less attractive for industrial and agribusiness development.

Relief sought. (1) CBRA and GHRPC contend that the Board should take a more active role in hearing cases that come before it relating to complaints of shippers and shortlines concerning such matters as pricing, car availability, service reliability, transit times, and access to interchange points. (2) CBRA and GHRPC contend that, in cases where rural regions lose rail service due to merger-related line consolidations, the Board should be given the authority to require the merged Class I *either* to grant trackage rights over a line to a shortline or regional carrier *or* to sell the line to a unit of local or state government which could in turn lease the line to a shortline or regional carrier, so as to protect the interests of the public at costs that can be reasonably borne by the affected unit of local or state government, or by a shippers association or a shortline or regional carrier. (3) CBRA and GHRPC contend that a transcontinental railroad is not necessary to protect the public interest, nor to provide efficient rail services. Operating agreements between eastern carriers and western carriers to provide "seamless" service, CBRA and GHRPC insist, can accomplish the same results while preserving competition in the Midwest and other geographic areas of territorial overlap. (4) CBRA and GHRPC contend that the Board needs to be more proactive in promoting rail freight and in encouraging public investments in railroad properties so as to divert tonnage off of the highways and onto the railroads. CBRA and GHRPC insist that, on account of the disproportionately large public subsidy being provided de facto to the trucking industry, there are now too many trucks on the road, which (CBRA and GHRPC maintain) results in a serious deterioration of both the highway system and the railroad system.

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION. DM&E, a 1,121-mile regional railroad that operates in Wyoming, South Dakota, Minnesota, Iowa, and Nebraska, and that currently has pending before the Board an application to construct and operate a line into the Powder River Basin, contends: that the "steel barriers" that have accompanied Class I rail consolidations and the "paper barriers" that have accompanied many Class I "spin off" line sales have significantly restricted competition within the railroad industry; that, on account of these barriers, it is today far more difficult than it was in years past for Class II and III railroads to network their systems in order to gain access to key markets beyond their immediate reach; that, therefore, a goal of future mergers should be to preserve and restore competition wherever possible, by allowing Class II and III railroads to gain competitive access to major markets; and that new competitive opportunities can be created by imposing on merging Class I railroads modest connectivity requirements, which (DM&E explains) will allow Class II and III railroads to form a series of networks that will benefit shippers around the country. DM&E, which notes that its Powder River Basin construction project may not be viable unless this proceeding results in a clear indication that the competitive opportunities and incentives that exist on the east end of DM&E's line today will be maintained in any future mergers, asks, in particular, that we take six actions that (it claims) will allow hundreds of shortline and regional railroads throughout the country to provide more effective and competitive services to their customers.

Action #1. DM&E contends that we should rewrite the general policy statement to reflect the intense concentration that exists in the railroad industry today, the cumulative impacts such concentration has had and will continue to have in reducing competitive options for regional and shortline railroads, and the need to increase connectivity opportunities wherever reasonably possible in order to promote more effective competition.

Action #2. DM&E contends that we should develop substantive criteria so that individual railroads (and an arbitrator, if necessary) can determine whether their respective impacts warrant relief. DM&E further contends, in this regard: that interconnectivity with and between regional and shortline railroads through the elimination of paper and steel barriers within the control of the merger applicants should be encouraged; that any such barrier should be removed wherever a claimant can establish (a) that the barrier threatens a present or reasonably foreseeable diminution of competitive alternatives for claimant's customers, and (b) that elimination of such barrier would alleviate the harm to its customers and/or promote new opportunities for its existing or prospective customers; and that merger applicants should be required to make reasonable concessions in order to maintain and wherever feasible expand competition beyond what is available in the market pre-merger, unless it is unreasonable to do so. And, DM&E adds, any railroad that can demonstrate that a proposed merger is likely to materially harm its opportunity to maintain or pursue competitive options should qualify for relief, even if that railroad does not have a physical connection with a merger applicant; realistically achievable prospective connections, DM&E insists, must be considered; and the test, DM&E argues, should be whether the proposed merger could reasonably be expected to limit either current competition or reasonably foreseeable competition.

Action #3. DM&E contends that we should clarify that, to maintain and promote competition, we intend to take, in megamerger cases, a more aggressive posture in eliminating both paper barriers and steel barriers. As respects paper barriers, DM&E contends: that every paper barrier serves a blatantly anticompetitive purpose which harms the public by limiting public shipping opportunities; that, therefore, we should impose a condition eliminating all paper barriers of merger applicants across the board; and that, if we decline to adopt such a condition, we should, at the very least, impose a condition under which a paper barrier would be eliminated in any situation in which the merger would change the ground rules upon which the original deal was structured (*i.e.*, in any situation in which the merger would negatively impact the smaller railroad in a manner not contemplated when the original contract was entered into). As respects steel barriers, DM&E

contends that, when necessary to maintain and promote competition, remedies intended to eliminate steel barriers (principally trackage rights, haulage agreements, and divestiture), subject to commercial terms and service standards that will enable the smaller railroad to compete effectively, should be imposed more liberally than in past cases, provided (DM&E notes) that such remedies can be imposed without seriously undermining the benefits of the new merged entity. And, DM&E adds, as respects competitive harms that cannot be effectively mitigated, the parties and/or arbitrator should be encouraged to consider some offsetting relief which, though it may correct a competitive problem not directly created by the merger, will offset problems that are created by the merger but that cannot be completely mitigated through conditions.

Action #4. DM&E contends that we should establish definitive procedural timetables for the parties (a) to trigger discussions (through voluntary negotiations or through arbitration) and (b) to formulate an effective mitigation proposal for the consideration of the Board in connection with the merger application.

Action #5. DM&E contends that we should establish a "non-binding arbitration" Alternative Dispute Resolution (ADR) mechanism to encourage privately negotiated solutions. Under the ADR mechanism contemplated by DM&E: first, the arbitrator would determine whether the third party railroad had a prima facie claim for relief; then, if the arbitrator determined that the third party railroad had a prima facie claim for relief, the arbitrator could order the parties to negotiate; and finally, if negotiations failed, the arbitrator could hear the substantive arguments of both sides both as to the extent of harm caused by the merger and the reasonableness of the relief proposed by each party, and could make recommendations to the Board. DM&E further contends: that the parties should bear the cost of arbitration, as allocated by the arbitrator; and that, in allocating costs, the arbitrator should take into consideration the reasonableness of the parties in private negotiations.

Action #6. DM&E contends that we should standardize our merger oversight arrangements. All future merger cases, DM&E insists, should include an effective (and standard) oversight and enforcement period.

EASTERN SHORE RAILROAD. ESHR, a class III shortline that operates a 63-mile line of railroad between Pocomoke City, MD, and Cape Charles, VA: connects at Pocomoke City with NS's (formerly Conrail's) Delmarva Peninsula mainline; operates, between Cape Charles and the Norfolk area, a 26-mile railroad car float service; and connects, in the Norfolk area, with NS and CSX. ESHR, which contends that it can provide a direct North-South routing free of the clearance restrictions that hamper operations on NS's and CSX's other North-South routes along the Eastern Seaboard, indicates that it agrees that shortlines such as ESHR have an important role to play in relieving Class I railroad congestion and in preserving and promoting competition. ESHR further indicates that it endorses the ASLRRA Bill of Rights.

FARMRAIL SYSTEM. FMRS, a holding company with two wholly owned Class III subsidiaries that operate 354 miles of track in Western Oklahoma, believes that we should adopt regulations that will increase the public benefits of a proposed transaction by promoting as well as preserving competition, and by allowing the service being provided by shortline railroads over light-density lines in rural areas to be more competitive. Shortlines, FMRS insists, play a special role;[144] they are, FMRS concedes, railroads, but they are not truly competitors of their Class I connections; the role they play, FMRS maintains, is much closer to that of a shipper (*i.e.*, they collect traffic and deliver it to their trunk line connections in aggregated form, providing valuable marketing and

[144] FMRS refers to all Class II and Class III railroads as "shortlines."

switching services in the process). And, FMRS contends, we should stimulate competition by requiring merging Class I carriers: to eliminate "paper barriers" restricting competition; to provide shortlines with competitive (nondiscriminatory) pricing and car supply; and to allow shortline connections to perform the switching and gathering services they were intended to provide.

General observations. FMRS contends: that the railroad industry needs operating discipline and capacity restoration, not more end-to-end Class I mergers; that the Board should help rail management shift the emphasis in future mergers from increased size and increased market dominance to internal system growth; that, to elevate service standards and to open up truck-sensitive markets, there must be more competition, not less; that the increased competition that is needed should also be extended outward from the "Big Four" to the "Little 500;" and that the smaller railroads now in existence must be strengthened in order to stabilize the entire railway network, to keep outlying shippers and communities competitive in their markets, and to defuse political concern about further contraction of the national rail infrastructure. FMRS further contends that, at least in the Western United States, rural America's rail gathering system is at risk; the rate and service practices of the Western Class I carriers, FMRS argues, threaten to decouple many light-density branch lines on the fringe of the national system from the more heavily traveled long-distance routes.

Shortline grievances. FMRS claims that, in agricultural regions such as Western Oklahoma, country grain elevators see the "handwriting on the wall" from the two remaining Western Class I railroads: reduced levels of interchange service; growing use of jumbo freight cars that are too heavy for track designed decades ago; phasing out of tariffs covering less than 100-car unit-train shipments; opposition to assembling unit trains from multiple origins; rate differentials between captive stations and those where rail competition exists; "out-of-the-market" pricing of traffic to destinations unfavorable to the trunk line; and a history of unreliable and seemingly arbitrary car supply. FMRS warns that many small granger railroads established in lieu of physical abandonment are being commercially abandoned by their supposed megarailroad "partners."

(1) *Service deficiencies*. FMRS contends: that the emphasis of the Class I railroads has been on maximizing single-line hauls, running long trains, minimizing crew starts, eliminating standby power, and avoiding intermediate switching wherever possible; that, under these parameters, carload service has suffered, especially in light-density territories; and that, although there has been some movement toward formal interline service agreements between the Class I railroads and the shortlines, these understandings are unlikely to prove effective without meaningful financial penalties for non-performance.

(2) *Discriminatory pricing*. FMRS contends: that, despite agreed-upon per car "allowances" or "divisions," shortlines are frequently pressured by their connecting trunk line to accept a reduced revenue share in order to generate new interline business; that a major competitive problem for shortlines is the widespread practice of "add-on" pricing by the controlling Class I ratemaker;[145] and that, as respects grain in particular, the Class I railroads commonly discriminate against shortline stations in favor of their own origins. Shortlines, FMRS insists, need either competitive, nondiscriminatory rates (determined on the same basis as the rates available at nearby Class I stations) or freedom from the paper barriers that prevent them from offering competitive alternatives.

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[145] The "add-on" pricing referenced by FMRS occurs when the Class I railroad, when setting rates on interline movements, adds all or part of the shortline's revenue allowance to the Class I's "costs" to the junction. This practice, FMRS claims, ignores the savings from the sale of the branch line to a carrier with lower costs.

(3) *Competitive blocks*. FMRS contends: that many shortlines that acquired branch lines from the Western Class I railroads granted pricing authority to the seller and accepted a "competitive block" in return for a representation that the shortline's customers would be provided with "competitive prices;" that the block typically takes the form of a restriction on physical access or a prohibitive financial penalty for interchanging traffic with a competitor of the seller; and that, as a practical matter, the barriers imposed on Class I spinoffs, in addition to restricting routing options, also result in higher rates for shortline customers than for comparable shippers on the Class I railroads, especially those with access to more than one carrier. Removal of competitive blocks, FMRS argues, would stimulate traffic growth for the entire industry. And, FMRS adds, another practice that should be discouraged is Class I refusal to allow a shortline over which it has ratemaking authority to make a rate for business that is either new or that the Class I cannot reasonably handle with another Class I or with a non-contiguous shortline.

(4) *Routing options*. FMRS contends that routing flexibility is a function of pricing policy as well as of the railroad map; grain movements in particular, FMRS claims, are affected by deliberate premium pricing of certain business that is intended to force traffic to the merged Class I's most economically lucrative routes.

(5) *Pricing policy*. FMRS contends: that shipper choice of volumes in which to trade is being reduced by the gradual disappearance of less-than-trainload rates for grain and concurrent prohibitions or restrictions on co-loading and multiple-switching to assemble unit trains; that, for example, many rates in Western Oklahoma are not differentiated to reflect operating economics (singles, FMRS claims, are often priced the same as a 110-car unit train); that the incentives offered by the Western Class I railroads to promote construction of 100-plus-car unit-train loading facilities are threatening the viability of grain-hauling shortlines; and that, in addition, shippers with short spurs that are physically or financially unable to become unit-train loaders are suffering severe rate penalties even though the serving shortline is willing to perform extra work at its expense to deliver a unit train to the connecting Class I within the historically permitted loading time. FMRS further contends that, although a shortline's function is analogous to that of a shipper doing its own in-plant switching, the Class I tariffs have effectively negated the service capabilities that give shortlines a distinct competitive advantage; the Class I, FMRS insists, should not care how a block of traffic to the same destination is assembled.

(6) *New-generation equipment*. FMRS contends that the introduction of 286,000-pound loaded railcars poses a particular threat to small railroads serving rural territories, where much of the existing infrastructure was designed for shorter trains and far less taxing weights than are the rule today. FMRS further contends: that the economic benefit of oversize cars with about 10% greater capacity accrues entirely to the major railroads and is detrimental to their shortline connections, which have no leverage to reach a workable accommodation; and that unilateral imposition of a new equipment standard will further disadvantage the small carriers and their shippers. The problem, FMRS adds, can be addressed in only three ways: (a) accept further loss of lines that are incompatible with the new standard and shift their traffic to the highways; (b) rebuild substandard track and bridgework to accommodate the growing fleet of oversize cars; or (c) avoid major capital outlays for infrastructure and obsolescence of existing serviceable cars by utilizing rates to perpetuate present technology on rural branches.

(7) *Car supply*. FMRS contends: that equipment availability is a critical element of competition for most shortlines; that, however, some Class I railroads will not permit a connecting shortline to acquire its own freight cars and insist upon the exclusive right to supply rolling stock at their discretion; and that, under car-hire deprescription, shortlines are, as a practical matter, precluded from purchasing equipment for the needs of their shippers without assurances that it can be utilized continuously.

(8) *Public investment*. FMRS contends that, although the State of Oklahoma has invested more than $43 million in preserving and rehabilitating trackage deemed essential to Oklahoma's transportation infrastructure, this investment does not seem to play any part in the thinking of the Western Class I railroads as to competitive rates and service.

Relief requested: in general. FMRS contends that our merger regulations should be amended to reflect these realities: (1) that, because the principal benefits of consolidation can be achieved short of merger, there is no need for an end-to-end merger to accomplish the goal of an efficient North American rail system; (2) that the East-West duopoly should be maintained and at least minimal competition should be extended over a broader geographic scope; (3) that, because current service reliability should be a precondition to any further mergers, the "Big Four" must demonstrate an ability to manage existing operations to the general satisfaction of the shipper community; (4) that attention must be refocused from maximizing length of haul to using an improved cost structure to capture truck-sensitive traffic; (5) that, with greater equity in service, pricing, and car supply, shortlines can be the vehicle for broadening competition to the fringes of the network; and (6) that a workable mechanism for shippers and railroads to redress fairness issues arising from market dominance should be established as an alternative to reregulation or pursuit of antitrust remedies.

Relief requested: specifics. FMRS contends that we should impose in all major merger proceedings conditions under which the applicants would be required: (a) to terminate immediately all competitive blocks as they relate to new traffic (traffic not currently moving by rail) and all competitive blocks that are more than seven years old, and to terminate all other competitive blocks on their seventh anniversary; (b) to grant all shortlines haulage or trackage rights, at commercially reasonable rates, to the nearest interchange with another Class I carrier, not to exceed 100 miles and without application of any competitive blocks; (c) to permit two shortlines to make rates with each other if their junctions with the applicants are between Class I terminals or otherwise within 300 miles;[146] (d) to allow connecting shortlines to make rates for new interline business from origins or to destinations within 300 rail miles of the short-line interchange;[147] and (e) to reimburse shortlines for demonstrable damages, such as lost revenues and increased car hire, that result from service failures as measured by the service levels set forth in the application or under any private interchange service agreements between the parties. FMRS further contends that we should also impose, in all major merger proceedings, conditions providing that applicants, in exercising any ratemaking authority: (f) shall establish rates at shortline points consistent with their rate scheme for stations in the same gathering area for the same commodity; and (g) shall not publish tariffs that effectively deprive shippers of service benefits offered by connecting shortlines, including multiple switches and co-loading. And, FMRS adds, we should further amend our merger regulations: (h) to clarify that, in general, shortlines will be treated as shippers and not as competitors of the applicants; and (i) to establish an expeditious appeal process for determination of alleged violations of merger conditions.

FINGER LAKES RAILWAY. FGLK, a Class III shortline that operates on 154 miles of track in New York and that connects with CSX and NS, insists that the shape and future of North

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[146] FMRS contemplates that applicants would be required to handle the intermediate switch by haulage, or to grant trackage rights, at commercially reasonable rates.

[147] FMRS contemplates that applicants would be required to provide commercially reasonable revenue requirements on a freight-all-kinds basis for the involved traffic.

American railroading should be determined in a free and open marketplace. FGLK adds: that mergers should be structured not only to preserve competition but also to promote it; and that, instead of adopting new fixed conditions, we should instead require realistic, specific disclosures by merger applicants as to how they will handle the various relevant issues.

Merger Review Team. FGLK contends that our review of a merger application would be enhanced by the creation of a "Merger Review Team" made up of railroad experts (who would be appointed by the Board but paid by applicants) and "stakeholder" representatives (who would represent the interests of the various "stakeholders," including shippers, shortline railroads, regional railroads, and governments). The Merger Review Team contemplated by FGLK: would be formed at the time of the filing of the notice of intent; would perform an on-site "due diligence" of the applicants' merger plan; and would, within 180 days of the filing of the application, make a report as to the ability of applicants to implement their merger plan.

Promoting competition. FGLK contends that the various procompetitive remedies suggested in ANPR should not automatically be imposed as conditions, but, rather, should be imposed as conditions only after a review of all the steps taken by applicants to enhance competition.

Information requirements. FGLK contends that, although our current regulations require that a merger application contain a significant amount of information, the format of a merger application tends to be such that much of the required information is difficult to decipher and/or to locate. FGLK therefore suggests that, in order to ensure that all relevant issues are addressed by applicants in a useful way, we should set forth specific issues that should be addressed in separate easily identified sections. FGLK further suggests that these specific issues should include the various proposals set out in the ANPR.

Price competition and competitive harm. FGLK contends that, in the merger context, we should rely, to a large extent, on carrier and shipper practices to determine whether fair competition exits. There has been, FGLK maintains, too much focus on the 180% R/VC threshold; the real concern, FGLK insists, should be competitive nondiscriminatory pricing. FGLK further contends that, if a carrier is offering prices and services in the market, and refuses to offer the same price under the same conditions to other market participants (shippers, shortlines, *etc.*), those parties should have standing to seek an administrative remedy.

Gateways, switching, and routing alternatives. FGLK contends that we should require merger applicants to address, in their application, questions respecting expanded competitive access alternatives. FGLK further contends that we could ensure that a shipper has a second viable rail alternative for the routing of its freight by requiring a merger applicant to allow the shipper to connect to a competing carrier at a logical location at a price comparable to what is customarily charged for the same commodity and distance elsewhere on the merger applicant's system.

3-to-2 issues. FGLK contends that, although 3-to-2 issues are not likely to be a major issue in many sections of the country because of the Class I consolidation that has already taken place, we should examine any 3-to-2 situations to assess how active the competition has been and whether the non-merging carrier has been an active participant in the market.

Downstream effects. FGLK contends that downstream effects, including the likely response of other carriers, should be given due consideration. FGLK further contends: that merger applicants should be required to quantify the benefits of their proposed combination and to analyze how such benefits may be affected by likely subsequent responses; and that public comments on anticipated downstream effects should be encouraged.

Safeguarding rail service. FGLK contends that, because the maintenance of service quality is of extreme importance and also because "you cannot improve what you cannot measure," merger applicants should be required to identify mean pre-merger and proposed mean post-merger transit times on a major city basis (including connecting shortlines), individually by traffic sectors (intermodal, merchandise, and unit train rail car business). FGLK further contends that applicants' proposed operating plans should be closely examined by the Merger Review Team, which (FGLK indicates) would be expected to assess, among other things: the ability of applicants to implement the proposed service plan; the adequacy of infrastructure to support the operating plan; line capacity issues and constraints; train dispatching issues and constraints; placement of appropriate managerial staff to support the operating plan; quality and quantity of train crews to support the operating plan; understanding of applicant personnel of operating plan implementation, down to the trainmaster level of supervision; adequacy and reliability of electronic data and computer systems required to support the operating plan; adequacy of equipment supply to support the anticipated volumes of business; the financial ability of applicants to support any changes required in the operating plan; and reliability of the proposed "backup" plan if systems begin to fail.

ASLRRA's Bill of Rights. FGLK supports the "Bill of Rights" advocated by ASLRRA.
(1) *Right to compensation for service failures*. FGLK contends that, in the event of post-merger service failures, an adversely affected shortline should be entitled to recover both the carload revenue it has lost on account of the Class I's service failures and also the additional car hire costs it has incurred on account of the Class I's service failures.

(2) *Right to interchange and routing freedom*. FGLK contends that paper and steel barriers should be removed as a condition of a Class I merger. FGLK explains: that, after a Class I merger, the original motivations of the pre-merger barrier-imposing Class I in protecting its business interests will disappear as the global playing field is enlarged; that, furthermore, the merger will enable the newly merged Class I to exercise even more market power than before; and that, therefore, the newly merged Class I should have sufficient pricing and service leverage to entice customers located on the shortline to use the Class I's services without having to rely on artificial barriers.

(3) *Right to competitive and nondiscriminatory pricing*. FGLK contends that, if a Class I carrier is offering prices and services in the market and refuses to offer the same price under the same conditions to other market participants, a shortline should have standing to seek an administrative remedy. FGLK further contends: that the Merger Review Team should also review the general pricing and commercial practices to be employed by the newly merged carrier vis-à-vis shortlines; that one matter of particular concern is "Rule 11" or differential pricing, when the Class I declines to absorb all or part of a shortline's charges and either forces a shortline to add on a charge to the price at interchange or requires publication of a higher through rate with the shortline; that this is especially troubling when the terminated price at a Class I location is the same as the delivery price for movement beyond the interchange point to a shortline (because, FGLK explains, in this situation the shortline's Rule 11 price becomes an "up-charge" to the rate, which discourages customers from using the shortline). And, FGLK adds, a further concern for shortlines in future merger cases is the potential for discriminatory pricing between "286" and "263" cars; such discriminatory pricing, FGLK warns, could be prejudicial to shortline customers.

(4) *Right to fair and nondiscriminatory car supply*. FGLK contends that merger applicants should be required to discuss whether they have an adequate car supply available to handle projected business volumes, how car utilization will be improved post-merger, and how they propose to improve material handling. Car supply, FGLK argues, is an important issue with shortline and

regional railroads that depend on a cost-effective and adequate supply of freight car equipment. FGLK further contends: that the Merger Review Team should be directed to examine applicants' equipment allocation practices to ensure that the merged company will distribute railroad-supplied equipment fairly and equitably among all parties; that carriers and shippers should be encouraged to collaborate in an effort to stimulate increased efficiency through the bi-directional use of shipper-supplied cars; that applicants should be required to describe, in their application, opportunities for such movements; that the Board should review certain AAR Car Service Assessment Orders, which (FGLK claims) require cars to be returned empty to the loading point and thereby discourage loaded bi-directional use of equipment; and that, if a Class I carrier cannot deliver an adequate supply of equipment, the shortline should be free to develop its own source of equipment.

Merger-related public benefits. FGLK contends that merger applicants should be required to detail the public benefits that will accrue from the merger. FGLK further contends that, in order to facilitate review by interested parties, merger applicants should be required to submit an appendix listing the claimed public benefits.

Cross-border issues. FGLK contends that we should be more active in developing the criteria for cross-border mergers through dialogue with the appropriate authorities in Canada and Mexico.

Future need for capital. FGLK contends: that, although railroads have been engaged in "managed decline" and cost reduction for many years, the future will require business growth; that such growth, which will require significant amounts of investment capital, will necessarily involve the reinstallation of much of the infrastructure that was dismantled in the 1970s and 1980s; that, therefore, merger applicants should be required to disclose in their application their plans for improving their facilities and making the infrastructure improvements needed to grow their business; and that the Board, in reviewing merger applications, must ensure that applicants are looking towards long-term growth and will provide the infrastructure needed to support that growth.

Property tax issues. FGLK maintains that we should review the investment plans set out in merger applications to ascertain that state property taxes have been taken into account. FGLK contends, in particular, that tax schemes vary greatly from state to state, and can have a substantial impact on proposed capital plans; a tax policy that places significantly disproportionate assessments on rail property as compared to other businesses in a community, FGLK argues, can have a devastating impact; and, FGLK adds, a tax policy that can shape a merger so as to promote inefficient or ineffective investment, and more circuitous routing of freight, should be a particular concern to the Board. FGLK further contends: that we should consider tax policy as it affects railroad merger proposals and the railroad industry in general; and that we should also consider the overall impact of inequitable taxation as it relates to the railroad industry's ability to earn its cost of capital.

HOUSATONIC RAILROAD COMPANY. HRC, a Class III railroad operating in Connecticut, Massachusetts, and New York, believes that we should reexamine the essential role that shortlines[148] play in the transportation network. The relationship between Class I railroads and shortline railroads is complicated and in some ways contradictory, HRC contends, because, whereas Class I railroads are both "Network Service Providers" providing long-haul service and "Local Service Providers"

[148] HRC refers to Class II and Class III railroads as "shortlines."

providing local service, shortlines are Local Service Providers only. HRC further contends: that, although some shortlines handle local traffic (*i.e.*, traffic that both originates and also terminates on the shortline) and/or interchange with other shortlines, most shortlines interchange the bulk of their traffic with Class I railroads; that, as respects those shortlines that have only one Class I connection, the monopoly power that can be exerted by that Class I connection is significant; that, unfortunately, that Class I, as a Local Service Provider, is often a competitor of the shortline for the same business; and that, as both a competitor of the shortline and its only access to the general transportation network, the Class I can engage in significant anticompetitive conduct to the significant disadvantage of the shortline and its customers.

HRC insists that, given the peculiar and conflicting aspects of the Class I/shortline relationship, we should develop policies to ensure, for shortlines and their customers, a fair, efficient, and nondiscriminatory transportation system. These policies, HRC contends, should be designed to ensure: that shortlines can provide their customers with seamless service[149] and nondiscriminatory, competitive access; and that Class I railroads do not use their monopoly power as Network Service Providers to compete unfairly with shortlines or to discriminate against shortlines with respect to rates or service. And, HRC adds: a major rail consolidation procedure presents a unique opportunity to extend competitive access beyond that which was available prior to the transaction; and, in view of the concentration of market power that now exists in the railroad industry, we would be entirely justified in taking appropriate measures to promote and expand competition.

The policies contemplated by HRC involve a "separation" of the "network service" and "local service" functions of the Class I railroads. HRC contends: that the competitive balance it seeks can best be achieved by requiring the Class I railroads to price Network Services and Local Services separately and by prohibiting them from using their network monopolies to extract monopoly profits; that, in particular, the Class I railroads should be required to provide wholesale network services to shortline railroads at prices that reflect the marginal cost of providing the service plus a reasonable return to the Class I; and that the Class I railroads should not be allowed to manipulate the pricing of overhead services between a shortline and another carrier either to disadvantage one route as compared to another or to profit from the Local Services provided by the shortline. And, HRC emphasizes, although it contemplates a "separation" of a Class I's Network Services and Local Services, it does not contemplate an actual "divestiture" by the Class I of Local Service or local lines.[150]

IOWA TRACTION RAILROAD COMPANY. IATR, a Class III shortline that operates on 10.4 miles of track in Iowa and that connects with UP and I&M, contends that a shortline with pre-merger access to two rail connections can be adversely impacted by a merger either directly or indirectly: directly, if the merger involves the two connections; and indirectly, if the merger, although it does not involve the two connections, prompts the two connections to engage in a coordinated action of their own.[151] Either kind of impact, IATR warns, may erode the shortline's traffic base and threaten its continued existence. IATR insists that, to protect the interests of

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[149] HRC indicates that a "seamless" system is one in which traffic is routed from origin to destination by the most efficient means, with intermediate carriers being essentially invisible to the shipper.

[150] HRC adds, however, that the regulatory structure should continue to encourage *voluntary* divestitures by Class I railroads to Class II and Class III operators.

[151] IATR indicates that, in response to the proposed BNSF/CN merger, UP indicated an intention to acquire a significant stock ownership interest in I&M.

shortlines when their viability would be threatened directly by a merger, we should use our conditioning power (particularly as respects divestiture and trackage rights) aggressively to ensure that shortlines retain competitive connections to at least two independent rail carriers. And, IATR adds, if a proposed merger would not have a direct effect on a shortline, but a likely downstream effect would be the destruction of the shortline's financial viability, that downstream effect should militate against approval of the merger.

IATR further contends: that, because shortlines have been substantially harmed by the anticompetitive behavior of the Class I rail carriers, Class I merger applicants should be required to submit plans (based on ASLRRA's "Bill of Rights") for promoting the viability of existing regional and shortline railroads; that, because much of the current anticompetitive behavior of the Class I rail carriers was made possible by past mergers, our merger regulations should be amended to allow affected parties to easily and inexpensively reopen prior merger proceedings to redress such wrongs; that our regulations should be amended to provide for remedies when a merger would lead to abandonment of excess rail lines; that, for affected shippers, the remedy should be based on what would be required to provide equivalent service (*e.g.*, increased cost of trucking, transloading costs, and excess inventory costs); and that, where the abandonment would drive a single interconnecting shortline out of business, the remedy should consider loss of employment in the area, the shortline's lost profits, and the loss of economic development potential for affected communities.

KEOKUK JUNCTION RAILWAY. KJRY is a Class III shortline that operates 38 miles of track in Iowa and Illinois and that connects with BNSF and the Toledo, Peoria & Western Railway (TP&W).

Downstream effects. KJRY agrees that, given the current level of concentration in the industry, consideration of the "downstream effects" of a merger transaction is necessary. KJRY adds, however, that we should look at more than just the possible strategic responses by other Class I railroads; the downstream effects that should be considered, KJRY insists, are the downstream effects on all non-applicant railroads, particularly including Class III railroads.

Safeguarding rail service. KJRY contends: that it is important to safeguard rail service to small shippers and shortlines; that, in this respect, small shippers and shortlines should be viewed with the same focus; and that Class I trends towards bigger cars, longer trains, and more volume have the same harmful effect on small shippers and shortlines alike, and put small shippers, shortlines, and even whole geographic regions at an economic disadvantage. KJRY further contends that Class I rules that prohibit shortlines from pooling shippers' cars to meet Class I volume demands are clearly against the public interest.

Promoting and enhancing competition. KJRY contends: that our merger regulations must allow for the protection of shortline and regional carriers from arbitrary re-routes, predatory pricing, unreasonable practices, service bundling, and other Class I monopolistic practices; that, given the potential for abuse inherent in Class I control of tracks and terminal facilities, it may be necessary, in many cases, to mandate the sale of such facilities to shortline and/or regional carriers, or third-party independent entities, while allowing the merged Class I trackage rights to maintain the single-line benefits of the merger; and that, because exclusively-served shippers can be harmed by mergers in a number of ways (including fewer routing options beyond their serving carrier and increased market dominance by their serving carrier), the "one lump" theory should be revised. And, KJRY adds, enhancing competition through trackage and/or haulage rights would be helpful, although such rights would have to be closely supervised to prevent the kind of abuses by the owning carriers that have led, in the past, to disuse of such rights.

Shortline and regional railroad issues. KJRY endorses, as a first step, the "Bill of Rights" advocated by ASLRRA. KJRY adds, however, that it is worthless to eliminate "paper barriers" so that shortlines can interchange with all connecting carriers if there are no other connecting carriers to connect with.

3-to-2 issues. KJRY agrees that we should give greater weight to arguments of competitive harm in situations where the number of rail carrier alternatives would be reduced by merger from three to two. There must be, KJRY contends, at least three competitors to give effective competition a fighting chance; when there are only two competitors in a market, KJRY maintains, they tend, in perfectly legal and non-collusive ways, to split the business.

Merger-related public interest benefits. KJRY agrees that there should be, in any future Class I merger proceeding, intense scrutiny of claimed merger-related public interest benefits. KJRY contends: that mergers offer few, if any, public benefits; that (by way of example), although the applicants in the most recent round of Class I mergers promised to pass on to shippers the benefits flowing from increased operating efficiencies, they have instead been imposing freight rate increases on their shippers; and that such cost savings as the Class I carriers have been able to achieve have actually come from layoffs and employee buyouts. KJRY adds that, although we should not engage in day-to-day oversight of railroad management, there must be, in this respect, some accountability, an expedited and economical procedure for redress, and a real (not just a theoretical) possibility of remedial action.

MONTANA RAIL LINK, I&M RAIL LINK, AND SOUTHERN RAILWAY OF B.C. MRL, I&M, and SRY, which are regional railroads that interchange most of their traffic with their Class I connections,[152] contend that, for MRL and I&M, and also for other railroads that, like MRL and I&M, were created in the 1980s and 1990s: the dependence on interline moves in conjunction with a Class I connection reflects the fact that these railroads were once part of, and were acquired from, the Class I connection; and the pattern of dependence on Class I connections is underscored by the fact that the Class I connections very often built into their spin-off transactions "paper barriers" that effectively ensure that interline traffic will continue to flow via the Class I as it did historically, albeit on an interline basis. MRL, I&M, and SRY further contend: that, in some cases, the economic future of a small railroad is even more closely tied to its Class I connection by virtue of a "marketing agreement" that gives the Class I the exclusive right to market and price traffic that will be handled on an interline basis between the Class I and the small railroad; that, under these arrangements, the parties agree upon the per carload allowance that the small railroad will receive for each carload of interline traffic handled; and that the small railroad has no power whatsoever to influence the prices and/or service terms quoted by the Class I's marketing department to customers for the interline moves. MRL, I&M, and SRY insist that the combination of paper barriers and marketing agreements very often puts the fate of small railroads and their shippers squarely in the hands of the small railroad's Class I connection.

Problems posed by mergers. MRL, I&M, and SRY contend that the "efficiencies" achieved by creating megarailroads come with a considerable cost that (they claim) is incurred by third parties

[152] MRL, a Class II railroad that connects with BNSF, operates in Montana, Washington, and Idaho. I&M, a Class II railroad that connects with Soo (CP), operates in Iowa, Illinois, Minnesota, Missouri, Wisconsin, and Kansas. SRY, which connects with BNSF, CN, and UP, operates in British Columbia.

(small railroads, shippers located on branch lines, shippers of carload traffic, and communities) as the megarailroads deploy limited resources in a manner that favors high contribution traffic (*e.g.*, single-line long-haul unit trains) over carload traffic gathered by connecting small railroads. MRL, I&M, and SRY explain that Class I mergers, by providing incentives to the merged carrier to deploy capital, personnel, equipment, and energy in a manner calculated to increase opportunities for single-line moves and longer hauls, necessarily lead the merged carrier to reduce its commitment of capital, personnel, equipment, and energy to interline moves and shorter hauls. (1) MRL, I&M, and SRY contend that, as Class I resources are moved to single-line opportunities and away from interline opportunities, the interline service on which the small railroad depends will suffer: equipment availability will decline; frequency of service will decline; and the vigor of marketing efforts will decline. (2) MRL, I&M, and SRY contend: that, following a merger, the merged entity is likely to close certain gateways in order to force traffic away from other railroads and onto the merged carrier's system; that, by way of example, a three-carrier move (shortline-connecting Class I-remote Class I) over an efficient routing may be eliminated when the merged carrier closes the gateway to the remote Class I in order to favor a less efficient but longer haul route over the merged carrier; and that, alternatively, where a shortline participates in a move via a specific gateway with a Class I that subsequently merges with another Class I that serves that gateway, the shortline will be unable to get a competitive rate in which it is able to participate. (3) MRL, I&M, and SRY contend that the emphasis on long-haul, single-block traffic will have a self-fulfilling tendency to undermine interline traffic handled between shortlines and merging Class I railroads. MRL, I&M, and SRY note: that most shortlines do not have a traffic base that consists primarily of unit trains; that, instead, most shortlines must build trains with the traffic of multiple customers, which requires considerably more handling than unit trains; and that a post-merger Class I may well be willing to forgo this traffic in the name of efficiency.

Relief sought. MRL, I&M, and SRY contend that, in considering merger applications, we should weigh the third party costs of achieving efficiencies and offset such costs against any claimed public benefits based on seamless service. MRL, I&M, and SRY further contend that, in order to establish an evidentiary record upon which we can determine whether a Class I merger will adversely affect the public interest by causing rail service to be curtailed or eliminated in markets served by connecting Class II and Class III carriers, Class I merger applications should be required to identify: (i) the effect that the merger will have on the applicants' Class II and Class III connections; (ii) the paper barriers and marketing arrangements in place with the applicants' Class II and Class III connections; and (iii) the steps, if any, that will be taken to ensure that service levels to and competitive rates for customers served by the applicants' Class II and Class III connections do not suffer as a result of the merger. MRL, I&M, and SRY further contend that we should adopt the proposals advocated by ASLRRA.

TEXAS MEXICAN RAILWAY COMPANY. Tex Mex[153] is a regional railroad that operates over its own 157-mile Laredo-Robstown-Corpus Christi line and that also operates some 400 miles of trackage rights over UP's Corpus Christi-Houston-Beaumont lines. Tex Mex, which connects

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[153] Tex Mex is a wholly owned subsidiary of Mexrail, Inc., which is itself owned 51% by Transportación Maritima Mexicana (TMM, a Mexican company) and 49% by Kansas City Southern Industries (KCSI, the corporate parent of KCS).

with Transportación Ferroviaria Mexicana, S.A. de C.V. (TFM) at Laredo[154] and with KCS at Beaumont, contends that it provides a critical bridge between TFM in Mexico and KCS in the central United States; these three carriers, Tex Mex argues, together form a major, vitally important north-south rail corridor facilitating trade and commerce between Mexico and the United States through the Laredo gateway.

Tex Mex indicates that its interest in this proceeding reflects the long-term importance of the cross-border issues mentioned in the ANPR. Tex Mex contends: that, as respects railroads, the United States has long rejected restrictions on ownership or other impediments to transactions and the flow of capital based on citizenship and nationality; that, from the very beginning, Tex Mex and other U.S. railroads have been owned or controlled by Mexican and Canadian entities; that the complete freedom of cross-border ownership and flow of capital has caused no discernible problem over the last century; that, rather, the freedom of cross-border ownership and flow of capital in the rail industry has encouraged cross-border joint ventures between U.S. and non-U.S. transportation companies; and that the spirit of free trade that has always marked U.S. policies as respects railroads was greatly reinforced by NAFTA. Tex Mex further contends that the continued growth of cross-border rail traffic and the continued development of the North American rail system will be promoted by maintaining the long-standing freedom of cross-border ownership and flow of capital for railroads operating in the United States.

Tex Mex therefore contends that we should propose no changes in our merger regulations that would impose special burdens or requirements on 49 U.S.C. 11323 transactions that involve a non-U.S. entity. Any such changes, Tex Mex maintains: would be contrary to the laws and policies of the United States governing railroads; would be contrary as well to the spirit of NAFTA; and would impair rather than promote the development of an integrated North American railroad system and the growth of cross-border rail traffic.

Tex Mex concedes that, when considering a rail consolidation involving non-U.S. railroads or entities, it may be reasonable to consider Mexican or Canadian laws, and/or the proposed operations of applicants in Mexico or Canada, but only (Tex Mex insists) to the extent that such laws and/or such operations could be expected to have direct effects in the United States. Tex Mex indicates, by way of example, that we could appropriately consider any aspect of Mexican or Canadian law that would create a risk to railroad safety or railroad competition or service in the United States. Tex Mex insists, however, that there would be no legitimate reason to consider, for example, whether, because of Mexican or Canadian laws or practices or because of the way a proposed transaction is structured, a particular consolidation might cause congestion, or reduce competition, or harm the environment, in Mexico City or Edmonton. Those issues, Tex Mex argues, are for Mexican and Canadian authorities, not U.S. authorities, to consider. Tex Mex insists that requiring merger applicants to address those issues would impose substantial burdens but would serve no legitimate purpose; the only purpose served thereby, Tex Mex claims, would be to make transactions involving non-U.S. entities more difficult than transactions involving only U.S. entities. And, Tex Mex adds, any such requirements would also intrude on the sovereignty of Mexico and Canada and on the jurisdiction of their transportation, environmental, and other agencies.

WISCONSIN CENTRAL SYSTEM. WCS, which operates a 2,855-mile regional rail network in Wisconsin, Michigan, Illinois, Minnesota, and Ontario,[155] notes that it, like several hundred other

[154] TFM, a Mexican railroad that operates Mexico's Northeast rail region, is owned by TMM, KCSI, and the Mexican government.

[155] WCS consists of three Class II railroads, one Class III railroad, and one Canadian railroad.

railroads, is a "feeder line" to Class I railroads and will continue to be a feeder line to Class I railroads even if the six biggest Class I railroads merge into two North American transcontinentals.

Overview. WCS claims that, from its "feeder line" perspective, what really matters is not the creation of two transcontinentals. What really matters, WCS argues, is the continued existence of the national rail network as a viable, privately-owned, competitive option, not only for shippers located on the two transcontinentals but also for shippers located on the feeder lines, and not only for shippers of bulk commodities but also for shippers of general freight. WCS contends that we must move from a "micro" view of a rail industry that may be evolving into two transcontinentals with numerous feeder lines, to a "macro" view of rail as part of a national and international transportation market; and, WCS adds, we must not forget that our merger policy must achieve the goal of coordinating a North American network of rail lines that competes with a publicly-subsidized network of major highways.

The Chicago terminal. WCS's "macro" view is focused on the Chicago terminal. WCS contends: that Chicago is a major hub, in one way or another, for every Class I, and is the interchange point for a number of regionals and shortlines; that, however, Chicago, which suffers from aging infrastructure, lack of attention from public funding sources, and the failure of the industry to work together to assure that rail can compete effectively against trucks, is sensitive to the slightest operational breakdown; and that, although the industry has attempted to address these problems through a senior-level Planning Group focused on long-term infrastructure issues and a permanently staffed Coordination Office focused on day-to-day operations, the truth of the matter is that some of the challenges that Chicago faces might be better met if there were fewer Class I players. WCS further contends that our merger regulations should attempt to ensure that, as the megarailroads continue to focus their marketing efforts on high-volume long-distance shippers, rail service will continue to be available to shippers who are not high-volume and long-distance.

Scope of coverage of new merger regulations. WCS indicates that, although merger policies specifically addressed to possible combinations among the six biggest Class I railroads are one thing, merger policies that apply indiscriminately across the board to all major mergers are something else. WCS notes in this regard that, although a merger involving either KCS or WCS (if WCS were to achieve Class I status) would be a major merger (assuming, of course, that such merger involved two or more Class I railroads), there is an enormous difference in size between the six biggest Class I railroads, on the one hand, and KCS and any other railroad likely to attain Class I status in the near future, on the other hand. WCS therefore contends that, to ensure that our revised merger regulations apply only to mergers involving the six biggest Class I railroads, we should either raise the Class I revenue threshold or narrow the scope of the major merger definition.

Rail service. WCS insists that we must act to preserve and enhance efficient operations, including efficient interchanges, in major terminal areas. WCS contends, with specific reference to the Chicago terminal: that, like several regionals and shortlines, WCS is largely dependent on other line-haul carriers and on the two local switching carriers for the handling and interchange of its Chicago interline traffic; that, even without service disruptions, future mergers may make access to Chicago terminal interchange services increasingly more difficult for WCS; and that these difficulties will reflect the self-interest of the line-haul carriers on which WCS must depend and will also reflect the fact that WCS has no ownership interest in the two local switching carriers. And, WCS adds, the problems it faces in Chicago are not unique to Chicago; after the next round of mergers, WCS explains, nearly every terminal switching carrier in the United States will be owned by the same two megarailroads; and, WCS notes, these two megarailroads will have different incentives than the smaller railroads that will have to rely on the terminal switching carriers to stay linked to the rail network.

WCS therefore contends that our new merger regulations should provide for a broad examination of terminal and interchange issues (not just how the merging carriers will operate within a given terminal, but how other carriers in the terminal will be affected and how all interchange traffic in the terminal, especially that from/to smaller railroads, will be handled). WCS further contends that, where necessary to assure and promote efficient operations and continued access by smaller railroads to the national rail system, we should be willing to realign and refine ownership and operating interests in the terminal (without, WCS adds, rigid adherence to the principle that merger conditions can never result in a better situation than existed previously).

Shortline and regional railroad issues. WCS contends: that the rail market that regionals and shortlines serve is interline, single-carload, and short-haul; that, however, the prime market that the transcontinentals will serve will be single-line, bulk/intermodal, and long-haul; and that, therefore, the kind of interline service (*i.e.*, carload and short-haul) that smaller railroads will most urgently need from the transcontinentals will be the very service they will be least interested in providing. WCS argues that our new merger regulations should recognize this dynamic, and should create mechanisms by which, through haulage, pricing, or operating rights, smaller railroads can effectively serve their local markets and, thus, remain a viable component of the national rail system.

Competition. WCS warns that new merger standards that focus on the enhancement and not merely the preservation of competition will alter the fundamental economics of the industry; and, WCS adds, the specific changes that such new standards generate, if applied not only to megarailroads but also to regional and shortline railroads, could have a devastating effect on the regionals and shortlines. WCS contends that issues respecting gateways, bottlenecks, the "one lump" theory, and 3-to-2 situations should be handled on a case-by-case basis. WCS further contends that the economic analysis applied to such issues should take into consideration, on a market-by-market basis and not on a shipper-by-shipper basis, the effects of product, geographic, and intermodal competition.

Downstream effects. WCS contends, in essence, that, although it has long been understood that the North American rail system will ultimately consist of a few transcontinental railroads, any analysis of the downstream effects of a pending transaction would rest entirely on speculation. WCS adds, however, that it would not object to rules that would allow us to consider two or more merger applications at the same time, provided that any later-filed applications were filed soon enough to allow us to render a decision on the first application in a timely manner.

Cross-border issues. WCS, which notes that its parent company has extensive foreign rail interests,[156] contends: that there is nothing inherently problematic with foreign investment in U.S. railroads or with U.S. investment in foreign railroads; that every railroad, whether owned by foreign interests or not, is subject to the laws and regulations of the nation in which it operates; that, in particular, every railroad operating in the United States, whether owned by foreign interests or not, is subject to the jurisdiction of the Board and the FRA, the common carrier obligation and antidiscrimination prohibitions of the Interstate Commerce Act, and the authority of the U.S. government to use U.S. assets in time of war; that, as in the past, any cross-border issues that arise

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[156] WCS's parent company, Wisconsin Central Transportation Corporation, has rail interests in New Zealand, Australia, and Great Britain.

in the merger context can be adequately dealt with on a case-by-case basis; that, therefore, there is no reason to revise our merger regulations to address cross-border issues; and that, in view of the movement toward seamless North American trade introduced by NAFTA as well as the many other efforts by the United States to encourage cross-border investment, we should be wary of proposals that would put barriers in the path of cross-border investment. And, WCS adds with reference to the fear that a U.S./Canadian cross-border transaction might enhance efficient routings via Canadian ports, diversion impacts and "preservation of essential services" issues can be handled just as effectively whether traffic is potentially diverted to ports in Canada or ports in the United States.

APPENDIX E: PASSENGER RAILROADS AND RELATED INTERESTS

NATIONAL RAILROAD PASSENGER CORPORATION. Amtrak notes: that, except for the Boston-to-Washington Northeast Corridor and several shorter lines, its route system is comprised of trackage owned by freight railroads; that, although it operates its own trains over the lines owned by freight railroads and employs its own operating crews, it depends upon the freight railroads to maintain the tracks, to dispatch its trains, and to ensure that its trains arrive at their destinations on time; and that the implementation of recent rail mergers has had a significant adverse impact on the on-time performance of Amtrak's trains, which has negatively affected Amtrak's ridership and increased its operating losses. Amtrak believes that the service problems that have accompanied recent mergers have had three primary causes: (i) insufficient rail system capacity, particularly in and near freight yards and terminal areas; (ii) the magnitude of merger-related operational changes; and (iii) in some cases, premature implementation of mergers.[157] Amtrak therefore insists that additional steps must be taken to ensure that the service problems that accompanied the implementation of recent mergers do not accompany the implementation of the even more complex mergers that may occur in the future.

Merger implementation plans. Amtrak contends that, in order to ensure that the infrastructure necessary to accommodate a proposed merger is in place and in a state of good repair before merger-related operational changes occur, merger applicants should be required to submit a Merger Implementation Plan (MIP). The MIP contemplated by Amtrak: (a) would detail the manner in which applicants intend to implement the transaction, the anticipated timing of key implementation steps (*e.g.*, computer system cutovers and major operating changes), and the contingency plans that have been developed to address any problems that may occur; (b) would identify all rail lines and terminal facilities that applicants' operating plan projects will experience significant increases in freight traffic volume[158] and also all rail lines and facilities already experiencing capacity problems on which there will be any increase in traffic; (c) would describe, with respect to each such line or facility, the results of operational simulations and other capacity studies that have been conducted to analyze merger-related impacts; (d) would detail the infrastructure improvements or other actions

[157] Amtrak claims that certain recent rail mergers were implemented too quickly, before technology systems were ready and before key infrastructure had been installed or brought to a state of good repair.

[158] Amtrak indicates: that, in determining what constitutes a "significant" increase in freight traffic volume for MIP purposes, we should take into account present capacity constraints on rail lines and in terminal facilities; and that, for rail line segments, the appropriate threshold should be a projected increase of four or more freight trains per day.

that will be taken prior to merger implementation in order to avoid capacity and congestion problems; and (e) would address the steps that will be taken to ensure that rail lines and terminal facilities impacted by the merger will be in a state of good repair before implementation.

Conditions. Amtrak believes: that the focus in rail merger proceedings should be on the transaction that is before the Board and on the reasonably foreseeable "downstream" effects of that transaction; and that we should not impose conditions to address pre-existing concerns that are neither created nor exacerbated by a proposed merger. Amtrak indicates that it is particularly concerned by conditions that could result in significant or difficult-to-predict changes in railroad operating patterns on rail lines over which and in terminal areas in which Amtrak trains operate. Amtrak insists that proponents of conditions that can be expected to lead to changes in rail operations should be required to demonstrate that those changes will not create or exacerbate capacity problems.

Criteria for approving mergers. Amtrak contends that future rail mergers will be in the public interest only if they will clearly improve rail service for both freight and passenger rail users. Amtrak further contends that, because one of the most important predicates to improving rail service is adequate capital investment, we should give increased consideration to the effect that a proposed transaction will have upon rail infrastructure requirements. Amtrak recommends, in particular, that we should: assess whether a proposed merger will alleviate or exacerbate capital investment needs on capacity-constrained rail lines and in congested terminal areas; and give greater weight to the probable impact of the proposed transaction upon the applicants' financial position and their ability to fund necessary capital investments.

Information in merger applications regarding rail passenger service. Amtrak contends that our new regulations should provide that, for each line listed in the MIP on which passenger service is operated, the applicants must: provide data regarding passenger train on-time performance and delays due to freight train interference or less than clear signals, during the year preceding the filing of the application; and describe what actions they will take (*e.g.*, installation of additional track capacity, monitoring/oversight, and additional communications to dispatchers regarding passenger train priorities and avoidance of passenger train delays) to ensure that passenger train service will not be adversely impacted by, or during implementation of, the proposed transaction.

Criteria for imposing conditions. Amtrak contends that, as respects the criteria for imposing conditions upon merger transactions, our regulations should be revised in three respects. (1) Amtrak contends that we should clarify that we will use our conditioning authority to ameliorate potential adverse impacts of proposed mergers upon the quality of rail freight and passenger service. (2) Amtrak contends that our new regulations should reflect the criteria for imposing conditions that we have articulated in recent merger decisions. Amtrak indicates, in particular, that the new regulations: should specify that we will impose conditions to remedy merger-related harms even in situations where it is impractical to devise conditions that are strictly limited to the harm to be addressed; and should also reflect our policy of imposing conditions to remedy harms that, although not caused by a merger, will be exacerbated by it. (3) Amtrak contends that our new regulations: should incorporate the long-standing requirement that conditions must be operationally feasible; and should require proponents of conditions to demonstrate that they are unlikely to have adverse or unpredictable impacts upon the operation of rail freight or passenger service.

Public interest considerations. Amtrak recommends that our regulations should be revised to provide that, in determining whether a transaction is consistent with the public interest, we will consider the likely impact of the merger upon: safety; rail system capacity needs and enhancements; the reliability and transit/travel time of rail freight and passenger services; the financial condition of the applicant carriers, and their ability to fund necessary capital investments; the ability of the applicants to compete for traffic moving via other modes; and innovations and improvements in railroad operations (*e.g.*, joint dispatching in terminal areas). Amtrak also recommends that, in assessing these issues, we should consider, among other things: (a) the applicants' "track record" in implementing prior mergers, and in fulfilling commitments made and realizing public benefits projected in prior merger proceedings; (b) the applicants' willingness to embrace measurable performance criteria, and to negotiate meaningful service guarantees with freight and passenger users of their lines; and (c) commitments made by the applicants, such as promised investments in rail system infrastructure, that will improve capacity and enhance service. Amtrak further recommends that our revised regulations should state that we will find mergers to be in the public interest only if it appears probable that they will result in improved rail freight and passenger service.

Adequacy of transportation service. Amtrak recommends that our regulations should be modified to provide that, in assessing a proposed merger's impact upon the adequacy of transportation service, one of the principal considerations will be the merger's effect upon "service quality for shippers of freight and rail passengers."

Encouragement of negotiated agreements. Amtrak recommends that the long-standing policy of encouraging settlement agreements in merger proceedings should be incorporated in our regulations.

Compensation for merger-related service problems. Amtrak contends that, if we decide to require applicants in future rail mergers to pay damages to, or to reimburse additional costs incurred by, parties harmed by service problems associated with merger implementation, we should extend to Amtrak the same economic remedies that we provide to users of rail freight services. Amtrak argues that a regulatory scheme that required railroads to compensate freight shippers for merger-related service problems, but that did not provide similar relief to Amtrak, would encourage railroads to favor freight shippers over Amtrak passenger trains in service recovery efforts and would therefore contravene the statutory policy that requires railroads to give Amtrak's trains preference over freight trains.[159]

Modification of standard protective order to give in-house counsel access to "highly confidential" documents. Amtrak contends that, except in unusual cases, the standard protective orders issued in rail merger proceedings should be revised to allow in-house attorneys to have access to documents and information designated "highly confidential." Amtrak argues: that parties to administrative proceedings have the right to select their attorneys; that many participants in rail merger proceedings choose, for any number of reasons (cost, special expertise, *etc.*), to be

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[159] Amtrak adds, however, that there is no need to extend to Amtrak any remedies relating to access to alternative rail lines and facilities. Amtrak indicates: that it already has such remedies under 49 U.S.C. 24308(b), which (Amtrak notes) requires the Board to issue emergency service orders to facilitate operations by Amtrak; and that, in most cases, the rerouting of passenger trains would not be a practical solution to rail line congestion problems because it would require the suspension of service to intermediate points along the trains' normal routes.

represented exclusively by in-house counsel; and that the current practice places parties such as Amtrak, who rely heavily or entirely on in-house counsel in merger proceedings, at a clear disadvantage vis-à-vis parties (*e.g.*, applicants) represented by outside law firms.

AMERICAN PUBLIC TRANSPORTATION ASSOCIATION. APTA contends: that we should recognize that the rail passenger industry has a critical relationship with the rail freight industry;[160] that commuter operations should be viewed as "essential rail service" that should not suffer any merger-related deterioration in safety or reliability; and that we should fully consider the potential impacts of mergers on passenger operations as well as on freight operations. (1) APTA contends that we should carefully consider the impacts of mergers on existing and future passenger rail services as a key factor in our determination on the merger itself. APTA believes that any adverse impacts to passenger rail operations should be weighed, as a public policy issue, in the decision as to whether or not to approve any merger.[161] (2) APTA contends that, if any existing or future passenger rail operations will be adversely affected by a merger, we should consider ways to mitigate the impacts of the merger by granting additional access rights in the relevant corridor or by granting rights to prospective new services.[162] (3) APTA contends that we should maintain a strong post-merger oversight role to protect the interests of rail passengers.[163] (4) APTA contends that merger applicants should be required to undertake pre-filing consultations with local rail passenger authorities that operate trains on shared right-of-way.[164]

SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY. SCRRA, which operates the Southern California "Metrolink" commuter rail service on tracks owned by its members[165] and on tracks owned by BNSF and UP, insists that the Board's current merger policy and procedural rules

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[160] APTA notes that passenger rail operations are often conducted over lines owned by freight railroads.

[161] APTA maintains that experience has shown that mergers can disrupt commuter operations in ways never previously contemplated (*e.g.*, transfer of dispatching to distant centralized dispatch centers, and hiring of management personnel not familiar with a particular commuter operation). Personnel changes, APTA adds, are of particular concern where the freight carrier provides commuter services on behalf of the commuter authority through purchase of service agreements (PSAs). APTA insists that, particularly in the context of a PSA relationship, management transition plans of the merging freight carriers must ensure sufficient training and orientation of new managers before placing them in control of operations in a commuter district.

[162] APTA argues: that the state-law eminent domain powers of passenger rail agencies do not reach property owned by interstate freight railroads; that, therefore, a passenger rail agency cannot challenge a freight railroad's denial of access to a rail line right-of-way; and that, as a practical matter, the freight railroad therefore has the upper hand in disputes respecting the conditions under which the passenger rail agency can use the right-of-way. And, APTA adds, as difficult as it is under normal circumstances for passenger rail agencies to negotiate the rail access agreements they need to serve the public, the continual downsizing of the core system by the freight railroads only adds to the difficulties.

[163] The UP/SP and CSX/NS/CR experiences, APTA insists, demonstrate the need for enhanced regulatory protection to safeguard passengers from the chaos that often accompanies the merging parties' attempts to integrate two or more companies.

[164] Such pre-filing consultation, APTA suggests, would permit the commuter authority to provide reactions and/or to offer resources to solve potential issues.

[165] Amtrak also operates on tracks owned or operated by SCRRA's members.

do not provide sufficient protection for the interests of that segment of the public that relies on commuter rail service as a viable transportation alternative. SCRRA cites, in this regard, its experience following the UP/SP merger. The Los Angeles Basin, SCRRA indicates, was one of the areas hardest hit by the service disruptions that followed that merger, and Metrolink passengers suffered frequent and prolonged delays to trains. SCRRA believes that better information during the merger planning and application process, and specific recognition of the need for protection of the interests of commuter rail operators, would have enhanced SCRRA's ability to address the issues that arose during the difficult period following the UP-SP merger.

SCRRA has therefore proposed certain changes that (it claims) would enhance our ability to protect the interests of the members of the public who rely on commuter rail service. (1) SCRRA contends that the General Policy Statement should be amended to provide: that if a transaction threatens adverse impacts on commuter or other passenger rail service, it will be weighed as adverse to the public interest and may be remedied through the imposition of conditions on the Board's approval; and that changes that reduce impediments to such service will be counted as a favorable factor in the public interest analysis. (2) SCRRA contends the procedural rules should be amended to require that applicants must consult, prior to the submission of the application, with local commuter authorities to review the preliminary conclusions concerning the impacts or absence of impacts on commuter or other passenger service. This, SCRRA adds, should include determining the instructions required for smooth transition of personnel responsible for understanding dispatching protocols and for handling the dispatching of commuter trains when the freight railroad has control of dispatching on the line. Requiring applicant carriers to engage in this kind of dialogue before finalization of the operating plan, SCRRA argues, will avoid, to the extent possible, the need for commuter authorities to intervene as adversaries once the application is filed. (3) SCRRA contends that post-merger remedies and dispute resolution procedures, short of formal petitions to reopen, should be established to address service problems that were not anticipated in advance of approval or that arise despite applicants' assurances to the contrary.

REGIONAL TRANSPORTATION AUTHORITY OF NORTHEAST ILLINOIS (METRA). Metra, the commuter rail authority serving the Chicago metropolitan area, notes that efficient and precise coordination of its services with those of the freight railroads with which it shares operating corridors, joint facilities, and junctions is absolutely essential. Metra contends: that mergers can disrupt the status quo in ways not contemplated when contracts were negotiated; that service problems attributable to consolidation of dispatching operations in distant centralized dispatch centers are common in the merger context; and that service problems attributable to changes in management personnel have also occurred with some frequency.[166] Metra therefore recommends that we make several adjustments in our merger regulations.

General policy statement. Metra contends that the General Policy Statement should be amended to provide: that if a transaction threatens adverse impacts on commuter or other passenger rail service, those impacts will be weighed as adverse to the public interest and may be remedied through the imposition of conditions on the Board's approval; and that transaction-related changes

[166] Metra advises that personnel changes are of even greater concern where the freight carrier provides commuter services on behalf of the commuter authority through purchase of service agreements (PSAs). Metra insists that, particularly where a PSA relationship exists, management transition plans of the merging freight carriers must ensure sufficient training and orientation of new managers prior to placing them in control of operations in a commuter district.

that reduce impediments to such service will be counted as a favorable factor in the public interest analysis. Commuter operations, Metra argues, should be viewed as "essential rail service" that should not suffer any deterioration in safety or reliability.

Pre-filing consultation. Metra contends that our procedural rules should be amended to require that, during the period between the pre-filing notification and the filing of the application, applicants must consult with local commuter rail authorities that operate trains on shared right-of-way or at junctions with a party to the transaction to review the preliminary results of the traffic analysis and the preliminary operating plan being devised for the terminal area where the commuter authority operates. Metra adds: that any contemplated systemwide changes, such as a reorganization or consolidation of dispatching centers, should be reviewed with the commuter authority; and that, if changes in the supervisory personnel within the transportation departments of the consolidating carriers are possible, the applicants should at this stage agree to prepare and review with commuter authorities a transition plan that insures that supervisors experienced with specific commuter operations remain in control pending the training and orientation of their replacements (this, Metra suggests, should be a formal requirement where an applicant maintains a PSA arrangement with a commuter authority).[167]

Post-approval monitoring and remedies. Metra contends that the practice of establishing a five-year monitoring period, during which safety and general service integration, environmental remediation, and compliance with other remedial conditions can be scrutinized in annual oversight proceedings, should be continued. Metra further contends that post-merger remedies and dispute resolution procedures, short of formal petitions to reopen, must be established to address service problems that were not anticipated in advance of approval or that arise notwithstanding applicants' assurances to the contrary. Metra adds: that there should be an efficient remedial process that can address service disruptions or shortcomings not anticipated at the time of approval; that arbitration, with *Lace Curtain*-type review by the Board, would be effective for addressing disputes over the meaning of representations made by applicants or conditions imposed by the Board in specific factual contexts; that the Board's emergency service order jurisdiction and its 49 CFR Part 1146 procedures provide ways to arrive at short-term solutions for disruptions affecting commuter operations; and that, if new or supplemental conditions need to be imposed, the Board's oversight proceeding would be the appropriate forum.

NJ TRANSIT. (1) NJT recommends that we incorporate into the merger process a more thorough analysis of impacts of the merger on existing and proposed rail passenger projects. Our regulations, NJT contends: should require extensive coordination with affected passenger rail operators both before and during the development of operating plans; and, with respect to the service integration planning process, should require joint planning efforts on rail corridors that are shared by freight and passenger services (in order to ensure that common planning horizons are used and that both parties can coordinate their investments). (2) NJT supports the goal of enhanced competition but, citing the CSX/NS/CR experience, claims that enhanced competition can sometimes lead to congestion. Very thorough service integration plans will be required, NJT advises, to ensure that adequate capacity is provided to handle the newly competitive freight traffic. (3) NJT contends that assets that cannot be equitably divided between carriers might best be

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[167] Metra indicates that the concept behind the pre-filing consultation proposal is to permit the commuter authority to provide reactions or to offer resources to solve potential issues before the cement dries on the applicants' plans.

assigned to a stand-alone, accountable carrier (*i.e.*, an independent railroad) as opposed to the "shared asset organization" used in connection with the CSX/NS/CR transaction.

APPENDIX F: RAIL LABOR INTERESTS

RAIL LABOR DIVISION OF THE TRANSPORTATION TRADES DEPARTMENT AFL-CIO (ATDD, BLE, BMWE, BRS, HERE, IAM, IBB, IBEW, SEIU, SMW, TCU, AND TWU). RLD agrees that we should reconsider and revise our rail merger regulations. It has been clear for some time, RLD argues, that the current regulations favor applicant carriers and their parent corporations, and undervalue the concerns of other parties such as rail employees, communities, and shippers. Transactions effected under the current regulations, RLD adds, have been especially devastating to railroad workers.

Downstream effects. RLD agrees that we should analyze the likely "downstream effects" of proposed transactions, and, in particular, should consider likely reactive transactions. RLD explains that, if we wish to truly assess the impact of a consolidation on employees, communities, shippers, and the general public, we must consider likely follow-on consolidations and their effects.

Assessment of public benefits and monitoring. RLD contends that, in too many past merger transactions, the public transportation effects have been negative, not positive, and the only "benefits" have been private benefits to the carriers in the form of reduced labor costs through layoffs and cramdown of changes in negotiated agreements. RLD indicates that, given this background, it supports an express requirement for monitoring and post-consummation assessment of transactions. RLD adds, however, that post-consummation assessment is not enough. RLD, citing the UP/SP and CSX/NS/CR experiences, explains that, too often, merger applicants have offered, and we have accepted at face value, speculative, general, and pro forma assertions of public transportation benefits such as realization of "synergies" and "efficiencies" and reduced transit times. RLD contends that, henceforth: we should not simply accept facile assertions of public transportation benefits from applicants; that, instead, we should require applicants to support their claims with evidence, and not just with the opinions of their own managers and their "hired gun" experts; that, in particular, we should require applicants to provide some substantiation for their claims (*e.g.*, prior experience, operational studies, pilot programs, customer surveys, or other objective analyses); and that, in addition, we should require applicants to provide their own internal reviews of possible reasons why alleged benefits might not be realized along with their reasons for concluding that the positive scenario is more likely than the negative or status quo scenario. And, RLD adds, we should impose on applicants an express burden of proof to show by "clear and convincing evidence" that the projected benefits are likely to be realized.

Safe operations. (1) RLD, citing the UP/SP and CSX/NS/CR experiences in particular, contends that we should indicate in our merger regulations that "unsafe operation of rail service" is a potential merger-related public harm. A deterioration in safety, RLD argues, is a potential consequence of rail mergers that we should not ignore. (2) RLD further contends that the safety problems that have arisen after recent major consolidations have involved not only the integration of formerly separate properties but also the ability and willingness of the post-transaction entities to perform necessary maintenance work on track, signal systems, locomotives, and rail cars. RLD argues: that, following past transactions, carriers have been pressured by the financial markets to produce immediate savings, and to react to plunges in their stock prices, by cutting costs; that carriers have responded to this pressure by laying off employees responsible for track, signal, and equipment maintenance and repair; and that the carriers' tracks and their equipment have deteriorated as a result. RLD contends that, to ensure that the post-transaction carrier will have the financial ability to continue to maintain safe operations, we should require applicants to include, in their initial filings, a "safety inventory" that (as contemplated by RLD) would describe the pre-transaction condition of the equipment, signal system(s), and trackage of the carriers involved, and would also explain the manner in which the applicants would ensure continued safe operations.

Cramdown. RLD, which cites (though to different effect) much the same history cited by NRLC, insists that, prior to the enactment of the Staggers Act, the ICC never asserted "cramdown" power.[168] Cramdown, RLD argues, is a post-1980 development, that the ICC adopted shortly after it adopted the rail merger regulations now codified at 49 CFR Part 1180. RLD contends: that the railroads have used cramdown aggressively to make wholesale changes in CBAs in the guise of obtaining unquantifiable and illusory "public transportation benefits" flowing from mergers; that the reaction of Rail Labor has been condemnation of the carriers for engaging in cramdown and skepticism towards the fairness of the ICC/STB; that Congress also has an ongoing interest in cramdown; and that the use of cramdown to compel changes in CBAs outside the procedures of the RLA or agreements negotiated thereunder remains a potent source of instability in railroad labor relations. RLD argues that, to eliminate this major source of friction in railroad labor relations, there must be a change in our policy respecting cramdown.

RLD asks, in particular, that we expressly renounce the necessity for the use of cramdown in fashioning implementing agreements providing for the selection of forces and assignment of employees arising from railroad mergers. RLD explains that times have changed; the "public transportation benefits" or "efficiencies" that allegedly required the use of cramdown have been obtained (RLD claims); and it is therefore (RLD insists) no longer necessary to cramdown changes in CBA provisions. We should, RLD therefore contends, do as the ICC (RLD claims) did in the 1940-1980 "40-year era of labor peace," *i.e.*: (1) respect the private agreements reached by the railroads and the unions representing their employees regarding rates of pay, rules, and working conditions; (2) require the parties to resort to existing agreements and/or traditional collective bargaining for post-merger selections of forces and assignments of employees;[169] and (3) then apply the substantive protections of our employee protective conditions for the benefit of employees adversely affected by such rearrangements. The Board, RLD insists, should remove itself from the labor relations business and focus solely on the administration of the substantive benefits provided in the employee protective conditions it is required to impose on its approval of a merger. Adoption of this policy, RLD claims, would encourage labor peace and would restore railroad employees' confidence in the Board as an "honest broker" in merger cases.

RLD therefore asks that we add the following language to our merger regulations: "The Board finds that it is not necessary to override, modify or abrogate collective bargaining agreements to carry out an approved transaction; instead the Board expects rail carriers to effect merger-related force rearrangements under existing agreements or under agreements negotiated by the carrier and the representatives of its employees for the specific transaction. No arbitrator acting under authority granted by the Board shall have the right to override, modify or abrogate a collective bargaining agreement unless otherwise permitted by an existing collective bargaining agreement." RLD

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[168] RLD defines "cramdown" as the ability of arbitrators acting under authority delegated by the Board, or the Board itself, to override, modify, or abrogate agreements made under the Railway Labor Act.

[169] RLD adds that, because all unions and all Class I carriers are today signatories to the WJPA, the default mechanism could be Sections 4 and 5 of the WJPA.

contends, in essence, that there is no need to override, modify, or abrogate CBAs to carry out approved transactions because (in RLD's view) the mechanisms of the WJPA provide all the legitimate authority the carriers need to carry out such transactions.

Transfers/Relocations. RLD indicates that, under the current interpretation of *New York Dock*, employees who decline an opportunity to follow their work are not eligible to receive either a dismissal allowance or severance benefits, and must instead opt for furloughed status without *New York Dock* protection. RLD claims that, on account of this interpretation of *New York Dock*, the major mergers of the past 20 or so years (RLD cites the UP/SP and CSX/NS/CR transactions in particular) have imposed substantial hardships on affected employees, hardships that (RLD insists) *New York Dock* was clearly inadequate to address. This was particularly true, RLD adds, in those instances in which the affected employee's family was either unable or unwilling to relocate with the work, requiring the employee to choose between his/her family or preserving what were often decades of seniority on the railroad. These hardships, RLD contends, have resulted in senior employees simply quitting, divorces, and broken families, and, in some cases, even worse consequences; the requirement to follow one's work, RLD argues, has led to major, and in some cases, tragic disruptions in the lives of employees affected by past mergers. In many cases, RLD adds, the employees affected by past mergers held upwards of 20 or 25 years of seniority on the railroad and were 50 years of age or older, making it far more difficult for the employee to simply resign and give up his/her seniority and the various benefits (Railroad Retirement credits, health and welfare benefits, *etc.*) attendant thereto.

And, RLD warns, the hardships that will be caused by future mergers will be, in some respects, even worse. RLD explains that, given the limited number of Class I railroads left in the United States, any future mergers will, of necessity, result in transcontinental systems, stretching the ties that bind employees to their families all the more. The ICC's formulation of the *New York Dock* conditions, RLD argues, never contemplated employee impacts on this scale. RLD concludes that, given these realities, the *New York Dock* conditions can no longer be regarded as a "fair arrangement" for the protection of employees.

RLD therefore contends that a substantial expansion of the *New York Dock* benefit arrangement is now required.[170] RLD contends, in particular, that we should impose employee protective conditions that will remove the obligation of an employee whose work has been transferred to follow that work, and that will provide an employee whose work has been transferred the option of: (1) receiving the equivalent of a *New York Dock* dismissal allowance until such time as that employee has sufficient service credits and is of sufficient age to take an unreduced Railroad Retirement annuity (or for a period not exceeding the employee's seniority on the railroad prior to becoming a "dismissed employee"); or (2) receiving a separation allowance based upon the WJPA formula. RLD indicates that, under the employee protective conditions it contemplates: to preserve entitlement to these benefits, employees would be required to take any vacant position for which they were qualified and to which their seniority would entitle them within 30 miles of their former work location; and employees who could hold a position at their home location would not be eligible for these benefits, although (RLD adds) employees exercising seniority at their home location would be entitled to a displacement allowance.

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[170] RLD, noting that NRLC has argued that the *New York Dock* conditions are already superior to the protections available to employees in other industries, responds that what constitutes a "fair arrangement" must be determined in light of the history of the rail industry, not that of other industries in which mergers are subject to antitrust scrutiny and are not exempt from all other laws.

RLD further contends that simply giving employees the option of taking a separation allowance instead of following their work would fall short of doing these employees justice, because (RLD explains) older employees are far less likely to be able to find new jobs offering pay comparable to their railroad pay. And, RLD adds, the mere option of a separation allowance does not answer important concerns about preserving the employee's entitlement to Railroad Retirement benefits, health insurance, *etc.*; RLD is concerned that senior employees who do not want to risk destroying their families by following their work would risk losing their investment in Railroad Retirement and other benefits if a separation allowance were the only alternative.

Test Period Averages. RLD contends: that a "displaced employee" (*i.e.*, an employee who, as a result of a transaction, has been placed in a worse position with respect to compensation and rules governing working conditions) is entitled to a monthly displacement allowance (MDA) equal to the difference between the monthly compensation received in the position in which retained and the average monthly compensation received in the position from which displaced; that, in calculating the average monthly compensation received in the position from which displaced, it is necessary first to calculate "average monthly compensation" and "average monthly time paid for" in the "test period" (*i.e.*, the last 12 months in which the employee performed services immediately preceding the date of displacement); that average monthly compensation and average monthly time paid for in the test period are determined by dividing separately by 12 the total compensation received by the employee and the total time for which he/she was paid during the test period; and that the baseline from which actual earnings are deducted in calculating an MDA is referred to as the "test period average" (TPA). RLD further contends: that neither the calculation of a TPA, nor the furnishing of a TPA to an employee, constitutes a determination that a transaction-related adverse effect has occurred; that, similarly, neither such calculation nor such furnishing constitutes "pre-certification" of an adverse effect; but that, rather, furnishing the TPA to the employee (a) merely provides the means for the employee to quantify the severity of the adverse effect for a given month, and (b) enables the employee to fulfill his/her obligation to work the highest-rated position available to that employee in the normal exercise of seniority.

The problem here, from RLD's perspective, is that (according to RLD) many railroads maintain that they are not required to furnish TPA data until such time as an arbitrator has found that an employee has suffered an adverse effect as the result of a merger-related transaction. RLD argues that the absence of a requirement to automatically furnish TPA data serves as an inducement to the railroad to evade its obligation to provide protection; the potential for costly arbitrations, RLD adds, has a chilling effect on employees in their pursuit of their legal rights. RLD explains that, if an employee does not have access to his/her TPA data, that employee faces a daunting challenge in proving that he/she has met the *New York Dock* criteria for being awarded an MDA. RLD further explains: that, under recent decisions, the employee must establish a nexus between a merger-related transaction and the adverse impact; that the employee may also be required to demonstrate that he/she is working the highest-rated position allowed by the normal exercise of his/her seniority, or risk having his/her TPA offset by that position; and that all this must be accomplished in a setting where the carrier, not the employee, is in possession of the critical data. The ability of an employee to put forward a claim for an MDA, RLD insists, would be enhanced by requiring carriers to provide TPAs. RLD believes, in essence, that, given the level of computer technology utilized in railroad payroll departments, employees should not be compelled to calculate "average monthly compensation" and "average monthly time paid for" by hand, based on the pay stubs for the preceding 12 months.

RLD further contends: that the underlying principle of *New York Dock* (that displaced employees adversely affected by merger-related transactions are entitled to an MDA to compensate for the adverse effect) is betrayed when a railroad can rely upon its data monopoly to deny an otherwise qualifying employee the full measure of his/her MDA; that it makes no economic sense for these issues to be discovered and adjudicated in the context of an arbitral process, when the uncomplicated step of automatic furnishing of TPA data can serve the same end; and that a requirement for railroads to automatically provide employees with their TPA data would provide for greater efficiency and economy, because it would reduce or eliminate certain disputes (disputes concerning whether the carrier's TPA data is correct, and disputes concerning whether the displaced employee is occupying the highest-rated position that the normal exercise of seniority allows) arising from the application of *New York Dock*. RLD concedes, however, that another kind of dispute arising under *New York Dock* (disputes concerning the existence of a causal connection between a merger-related transaction and the adverse effect) would not be disturbed by requiring railroads to automatically provide employees with their TPA data.

RLD therefore contends that we should revise *New York Dock* by "clarify[ing]" that "test period average monthly earnings and time paid for shall be provided to an employee by the carrier upon the request of the employee."

Shortline and regional railroads. RLD maintains that, after years of singing the praises of the marketplace, complaining about restrictions imposed by government regulation, and advocating the supposed benefits of shortline and regional railroading, the shortlines and the regionals and some of their customers as well have begun to advocate government subsidies for, and new legislation and regulation to protect, the shortlines and the regionals. RLD indicates that it strongly opposes the requests for regulatory relief that the shortlines and the regionals have made. RLD further indicates that it also strongly opposes any governmental assistance for shortline and regional railroads.

RLD claims, in essence, that, for the past 20 years, Rail Labor has argued: that the transactions that created most of today's shortlines and regionals were not genuine transactions; that the spinoff lines would not really be independent of the Class I sellers but would simply feed traffic thereto; that, for all practical purposes, the spinoff lines would continue to be parts of the systems of the Class I sellers but with fewer employees working at lower pay rates under inferior terms and conditions of employment; that, in many cases, there were powerful financial inducement and penalty provisions in the Class I-new carrier deals, intended to ensure that the supposedly independent new carrier would necessarily feed traffic only to the Class I from which it had purchased its lines; that, in most instances, the new carrier's supposedly lower operating costs reflected nothing more than its ability to reduce labor costs by cutting employment and pay and abrogating standard national CBAs; and that, in many instances, the new carrier was undercapitalized and had insufficient equipment (or poor quality equipment) and/or inadequate physical plant. RLD further claims that, time and again, the new carriers as well as many of the shippers served by such new carriers denied all of Rail Labor's charges, and insisted that the new carriers were sufficiently independent and properly capitalized, and had adequate facilities and equipment to handle all funding and operational concerns.

RLD contends, in essence, that, given this background, we should do nothing to relieve the shortlines and the regionals from the foreseeable consequences of their own acts. RLD contends, in particular, that the shortlines and the regionals have no right to complain now about inadequate car supply and the adequacy of their lines; nor, RLD adds, do such carriers have any right to complain now that the contracts they entered into (*i.e.*, the paper barriers and steel barriers they agreed to) when they purchased their lines make it impossible for them to interchange traffic with any Class I other than the Class I that sold them their lines. RLD believes that, given the claims heretofore made by the shortlines and the regionals, and given too their original devotion to market principles, their present pleas for regulatory relief should be denied. RLD insists that such carriers should be held to their past representations, and should be forced to deal with the vagaries of the marketplace just as they forced railroad workers to deal with the vagaries of the marketplace.

Cross-border issues. (1) *Cross-border transfers of work*. RLD contends that the § 1180.6(a)(2)(v) "employee impact exhibit" requirement, which now requires applicants to indicate "the geographic points where the impact will occur," should be revised to require applicants to indicate "the geographic points where the impact will occur (including the transfer of work, if any, from one country to another)." RLD explains: that we have the authority to consider whether wholesale work transfers out of the United States are appropriate as part of a transaction; and that, by adding this specific category of information to § 1180.6(a)(2)(v), we would ensure that potential cross-border transfers of work are put on the table up front.

(2) *Safety implications of cross-border operations*. RLD contends that § 1180.6(a)(2) should be further revised by requiring merger applicants to address "the effect of the proposed transaction upon the application of U.S. safety laws and regulations to the applicants' operations." RLD explains that the acquisition of an American railroad by a Canadian railroad raises numerous operational safety concerns. RLD asks, by way of example: How is the federal government to assure safety in train dispatching operations that control rail traffic in the United States when such operations are situated in Canada? How is compliance with U.S. regulations to be assured on Canadian locomotives and cars that cross the border and run on tracks in this country? Will territories or districts that traverse borders be created such that workers in both countries will be subjected to potentially conflicting laws and regulations? RLD contends that, by requiring merger applicants to address "the effect of the proposed transaction upon the application of U.S. safety laws and regulations to the applicants' operations," we would be acknowledging that the application of U.S. safety laws and regulations is an important public policy matter that we must consider.

ALLIED RAIL UNIONS (BRS, IBB, NCFO, SMW, AND TWU). ARU indicates that the five ARU unions join in, and adopt as their own, the comments filed by RLD.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES. BMWE indicates that it adopts and supports the comments filed by RLD.

TCU, IBEW, ATDD, and IAM. TCU, IBEW, ATDD, and IAM, which have joined in and fully endorse the comments filed by RLD, have offered supplemental comments of their own on the issue of "cram down."[171]

TCU, IBEW, ATDD, and IAM indicate that they fully support the views expressed by RLD, which (they note) would have us abandon "cram down" entirely and would require carriers to rely on the WJPA and other CBAs as the sole basis for modification of existing agreements.

The TCU/IBEW/ATDD/IAM contingent "cram down" proposal. TCU, IBEW, ATDD, and IAM further indicate, however, that, if we are unwilling to abandon "cram down" entirely, we should, at the very least, limit its use. TCU, IBEW, ATDD, and IAM have therefore submitted, to this end, a proposal that to some extent is patterned upon, and to some extent differs from, the recently negotiated NCCC/UTU agreement.[172]

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[171] TCU, IBEW, ATDD, and IAM use "cram down" as a shorthand means of referring to post-merger changes in CBAs under the auspices of 49 U.S.C. 11321(a) and/or 11326, and/or Article I, Section 4 of the *New York Dock* conditions.

[172] TCU, IBEW, ATDD, and IAM indicate that their proposal is not intended to apply to implementing agreements already in place, whether reached through negotiations or arbitration.

TCU, IBEW, ATDD, and IAM concede, in essence, that carriers may have interests in operating "consolidated" or "coordinated" facilities under a uniform CBA,[173] and that, in certain instances, it may be necessary to use "cram down" to achieve that uniform CBA. TCU, IBEW, ATDD, and IAM insist, however, that carriers should not be allowed to use "cram down" as a means of selectively eliminating those CBAs and/or CBA provisions that are most beneficial to employees. TCU, IBEW, ATDD, and IAM therefore contend that, when work subject to a consolidation or coordination is covered by two or more CBAs, the union should have the first shot at selecting the surviving CBA. TCU, IBEW, ATDD, and IAM further contend that, if the union fails to select a single CBA, the single CBA should be chosen by an arbitrator, who (they add) should be required to select the CBA most beneficial to the employees involved as to rates of pay, rules, and working conditions. And TCU, IBEW, ATDD, and IAM further contend that the carrier should be allowed to take the matter to arbitration only if: (1) the CBAs selected by two or more unions create significant inefficiencies in the manner in which they interrelate (if, for example, the CBAs selected by two unions give each union exclusive jurisdiction over the same type of work); or (2) the work jurisdiction rules in the selected CBA do not permit employees to perform work throughout the consolidated or coordinated territory.

TCU, IBEW, ATDD, and IAM further contend that the union should also have the first shot at devising the "integration plan" that will govern the integration of seniority rosters involved in a consolidation or coordination. TCU, IBEW, ATDD, and IAM insist that the carrier should be allowed to take this matter to arbitration only if the carrier can show, by clear and convincing evidence, that the integration plan drawn up by the union: (1) would violate the law or present the carrier with undue legal exposure; (2) would be unduly administratively burdensome, impractical, or costly; or (3) would create a significant impediment to carrying out the consolidation or coordination.

TCU, IBEW, ATDD, and IAM contend that their proposal: would strengthen employee protections against the loss of collectively bargained benefits; would nonetheless allow the carriers to achieve CBA uniformity, and would also allow the carriers to continue to use "cram down" when truly necessary; and would largely remove the Board from regulating labor relations. TCU, IBEW, ATDD, and IAM indicate that their proposal is premised on the § 11321(a) "necessity" predicate, which (as they describe it) provides that "cram down" authority: can be used only if necessary to obtain public transportation benefits from the underlying transaction; can be used only where clearly necessary to make the merged entity operate efficiently as a unified system rather than as two separate entities; and cannot be used merely to transfer wealth from the employees to the employer. TCU, IBEW, ATDD, and IAM contend that their proposal permits the carrier to obtain those efficiencies arguably necessary to attain public transportation benefits by permitting it to operate under a single CBA at a location where work has been consolidated or coordinated. TCU, IBEW, ATDD, and IAM further contend that their proposal, by allowing the union(s) to select the applicable CBA, prevents the carrier from using the transactional authority granted by the Board to gain economic benefit at the expense of the employees by selecting the inferior CBA.

TRANSPORT WORKERS UNION OF AMERICA. TWU, which has joined in and fully endorses the comments filed by RLD, has offered supplemental comments of its own on the "cram down" issue.

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[173] TCU, IBEW, ATDD, and IAM define "consolidation or coordination" as an operational change necessary to unify, consolidate, merge, or pool, in whole or in part, the facilities or any of the operations or services previously performed by two or more rail carriers.

The RLD "cram down" proposal. TWU contends that we should adopt the "cram down" proposal advocated by RLD.

The TCU/IBEW/ATDD/IAM "cram down" proposal. TWU contends that, if we reject the RLD proposal and adopt instead the TCU/IBEW/ATDD/IAM proposal or something similar thereto, we should make certain critical adjustments to the TCU/IBEW/ATDD/IAM proposal. (1) TWU contends that we should make clear that the unions to be included in the procedure should include all unions that have members in a given class or craft on either of the carriers which are parties to a transaction. (2) TWU contends that we should make clear that the procedures and conditions outlined in the TCU/IBEW/ATDD/IAM proposal will be triggered not by the merged carrier effecting an operational change, but rather by its making a decision to effect such a change, and then, if the union(s) involved are unwilling to proceed to choose an agreement immediately, by its making a showing to the Board that the change being effected requires that only one agreement prevail at the affected facility. (3) TWU contends that we should make clear that once the carrier makes such a showing to the Board, the Board will invoke the procedures outlined in the TCU/IBEW/ATDD/IAM proposal. (4) TWU contends that we should make clear that neither the Board nor a carrier can have any involvement with a union decision as to which CBA should prevail at a given facility, unless a union party to the arbitration requests testimony from the carrier. (5) TWU contends that we should include, in any rule embracing the basic concepts outlined in the TCU/IBEW/ATDD/IAM proposal, provisions setting out time deadlines for the various procedures involved. (6) TWU contends that we should make clear that, whenever an arbitrator must choose among multiple CBAs, the arbitrator: must choose the CBA that is most beneficial to the employees involved as to rates of pay, rules, and working conditions, including crew consist agreements and the protection of seniority rights; and cannot give any weight to the circumstance of how many employees at the facility in question were previously covered by one CBA and how many were covered by the other.

UNITED TRANSPORTATION UNION. UTU, the largest rail labor organization in the United States, indicates that, on account of past mergers, its members have lost jobs and collective bargaining rights, and have had to face dangers arising from added safety problems.

The "cram down" issue. UTU indicates: that the NCCC/UTU agreement, which was reached by bargaining under the Railway Labor Act, addresses the "cram down" issue to the satisfaction of UTU; that the parties to the NCCC/UTU agreement intend that the terms thereof will be prescribed by statute in the future, and will not be imposed and administered by the Board; and that said parties agree that the NCCC/UTU agreement is not itself subject to the § 11321(a) exemption provision. UTU further indicates that the NCCC/UTU agreement removes the labor relations issue of post-merger CBA changes from the control of the Board, and frees the Board to administer transportation issues and to get out of the labor relations business. UTU emphasizes that it prefers its collective bargaining approach to the "cram down" issue, through the NCCC/UTU agreement, to any effort by the Board to address that issue.

Reregulation and open access. UTU insists that reregulation is not the solution to the railroad industry's problems. UTU explains: that reregulation would hurt the railroads' abilities to invest in infrastructure and to continue the provision of present services; that reregulation would only result in the loss of income to railroads and degradation of service to shippers; that the loss of income to rail carriers would eliminate future growth and cut back on present services; and that, with reregulation, railroads would be forced to discontinue carload business and large parts of intermodal business, and would be compelled to defer maintenance. And, UTU adds, open access on rail lines would create safety, job security, and collective bargaining issues for UTU and its members.

Cross-border issues. UTU indicates that, due to problems with extraterritorial application of U.S. laws in Canada, UTU has concerns about cross-border issues that may arise from the control of a large U.S. railroad by a Canadian railroad. UTU further indicates that its greatest concern is the safety of its members, because the Hours of Service Act and other safety laws are not applicable in Canada. And, UTU adds, it is also concerned that Canadian railroads may not have sufficient interest in maintenance of the United States rail system.

JOHN D. FITZGERALD. Mr. Fitzgerald insists that our major merger regulations are not in need of substantial revision.

Arrangement of our regulations. Mr. Fitzgerald contends that certain of the public's difficulties with our handling of mergers reflect the fact that many regulations that deal with mergers are not located in 49 CFR Part 1180 but, rather, are located elsewhere in the Code of Federal Regulations.

The "one case at a time" rule. Mr. Fitzgerald, who believes that the ban against consideration of cumulative impacts and crossover effects was never appropriate, agrees that the "one case at a time" rule should be eliminated.

End-to-end vs. parallel mergers. Mr. Fitzgerald contends that there should be no preference for "end-to-end" mergers as opposed to "parallel" mergers. There can be, Mr. Fitzgerald insists, serious anticompetitive consequences either way.

Policies vs. rules. Mr. Fitzgerald contends that the NPR should make perfectly clear whether we are proposing a policy change or a rule change, or whether both are involved and to what extent. A policy pronouncement, Mr. Fitzgerald argues, is of little or no precedential value, is not binding, and is subject to very limited judicial review; a rule or regulation, Mr. Fitzgerald adds, is binding and is subject to more stringent judicial review.

Public hearings. Mr. Fitzgerald contends that the lack of public hearings, particularly in the field as in merger proceedings conducted many years ago, tends to undermine public confidence in the agency. Mr. Fitzgerald adds that when there were public hearings in merger cases, potential problems were discovered and analyzed; railroad employees, Mr. Fitzgerald maintains, frequently appeared at local hearings and contributed to the evidentiary process, particularly regarding operating matters.

Secrecy. Mr. Fitzgerald claims that, unlike the practice in years gone by, current practice in merger proceedings allows much, if not most, of the critical evidence to be placed under seal. Mr. Fitzgerald contends that, in this situation, the important part of the proceeding has a limited audience, and the scope of analysis by the public, and by all parties, is highly circumscribed.

Diskette requirements. Mr. Fitzgerald, who opposes what he regards as the "special" diskette requirement applicable in merger proceedings, insists that, because the Board's website recently discontinued posting filings in the WP format and began posting in the PDF format, there is no longer any basis for subjecting employees and their organizations to a mandatory diskette requirement for their submissions.

APPENDIX G: FEDERAL AGENCIES

U.S. DEPARTMENT OF AGRICULTURE. USDA contends: that an adequate and efficient rail infrastructure is essential for the marketing of U.S. agricultural products;[174] that recent major rail consolidations have resulted in service disruptions that have created particular hardships on agricultural producers, shippers, and communities; and that, in general, past railroad mergers have often resulted in Class I railroads refusing to quote tariffs for shorter hauls, denying service to carload shippers, closing gateways, denying competitive access, and canceling joint-line rates. The current regulations governing major railroad consolidations, USDA believes: are inadequate to protect agricultural producers, shippers, rural communities, and the public interest should any of the Class I railroads consolidate further; and do not provide adequately for the possible merger of U.S. and Canadian railroads.

Downstream effects. USDA contends: that every major rail consolidation should be examined for both long-term and short-term consequences on the rail industry itself and on the rail industry's role in the national transportation systems of the 21st century; and that our merger regulations should place more importance upon the effects a merger would have upon the entire transportation system rather than upon the merged entity itself, and should incorporate the possible downstream and crossover effects of all future major railroad mergers upon the railroad industry, other railroads, and other transportation modes, and also upon shippers and communities. The railroad industry, USDA explains, is a network industry (*i.e.*, although firms in the railroad industry compete with each other, they must also rely upon each other for cooperation and access to the rail network). And, USDA adds, recent experience demonstrates that, in the railroad industry, one merger tends to lead to another.

Safeguarding rail service. (1) USDA notes that, as major railroad consolidations have increased in size and complexity, the potential for widespread service problems has increased substantially, the costs to shippers and other railroads due to such service problems have increased markedly, and the service problems that have occurred have lasted longer. USDA contends that we should institute a rebuttable presumption against future major railroad mergers unless the merging railroads: come up with a plan that mitigates any adverse consequences of the merger upon shippers and other railroads; prove the existence of merger-related benefits; and demonstrate that those benefits cannot be achieved by other means short of merger. (2) USDA believes that, if merging railroads were required to reimburse shippers and other railroads for losses due to merger-related service disruptions, the merging railroads would have a greater incentive to achieve a more efficient and cost-effective allocation of the resources used in implementation planning (and USDA also believes that, as between a market-based mechanism of this sort and a regulatory mechanism that required the submission of more detailed service implementation plans, the market-based mechanism would be more likely to achieve the desired result). USDA therefore suggests that we should require railroads involved in major consolidations to indemnify shippers and other railroads (during the merger implementation period) for costs incurred due to merger-related service interruptions. And, USDA adds, we should require binding arbitration of all claims which the consolidated railroad disputes. (3) USDA notes: that the consolidation of the industry has resulted

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[174] Rail and barge, USDA notes, are the only cost-efficient transportation modes for hauling bulk commodities long distances. And, USDA adds, given the configuration of the inland waterway system, much grain must move by rail or not at all.

in the abandonment of many lines; that the industry is now operating at or near capacity on many of its main lines; and that many rail yards are operating at or beyond capacity and are badly in need of modernization. USDA therefore suggests that we should continue to consider, in the merger approval process, the ability of the merged firm to make the necessary infrastructure improvements.

Promoting and enhancing competition. (1) USDA warns: that, although most shippers are already subject to a Class I rail duopoly (either the BNSF/UP duopoly in the West or the CSX/NS duopoly in the East), the creation of a single transcontinental Class I rail duopoly would reduce "inter-railroad" (*i.e.*, railroad-to-railroad) competition and shippers' routing options; that, in the future, the two transcontinental Class I rail duopolists may interact with just a "wink and a nod" to "manage" the markets; and that, because of prohibitive entry barriers, the contestability of rail markets (which, USDA notes, is the key to providing the competition necessary for the success of railroad deregulation) is extremely limited. USDA believes: that, due to increased concentration in the Class I rail sector, as well as the greatly improved financial condition of the railroad industry, we should rethink the criteria by which major rail consolidations are judged so that the public interest will be protected and enhanced; that, in formulating new regulations governing major rail consolidations, we should place much more weight on achieving competition; and that, rather than just preserving competition, we should use enhancement of competition as a deciding factor. USDA therefore contends: that, before approving any future major railroad consolidations, we should require the merging railroads to offer specific proposals to enhance competition and to mitigate any adverse competitive consequences of the consolidation upon shippers; and that we should use our conditioning powers aggressively to impose any other conditions necessary to preserve competition. (2) USDA maintains that end-to-end mergers allow the vertical foreclosure of markets through the denial of competitive access by the elimination or cancellation of joint-line rates, through routes, and reciprocal switching agreements, as well as the closing of gateways. USDA therefore suggests that, in approving further major railroad mergers we should require the merging railroads: to keep all existing gateways open; to open those gateways previously closed, should shippers so request; and to remedy any reductions in route or service options.

Shortline and regional railroad issues. USDA contends that, because significant quantities of grain and food products originate or terminate on shortline and regional railroads and because diversions of this freight to truck greatly damage the rural road infrastructure,[175] we should carefully analyze the impacts of future major rail consolidations upon shortline and regional railroads. The viability of smaller railroads, USDA notes, is vital to the grain gathering process.

Merger-related public interest benefits. USDA recommends that we examine more closely merger applicants' estimates of synergies and other public interest benefits when balancing the benefits of proposed major railroad mergers against societal costs. Large railroad mergers, USDA explains, are very complex undertakings that involve the coordination of traffic across thousands of origin-destination pairs and the integration of complex IT systems, and that often involve major shifts in traffic patterns.

Cross-border issues. (1) USDA contends that, in evaluating a U.S./Canadian rail merger, we should: review the differences in the commercial, regulatory, and trade environments that exist in

[175] The roads in many rural agricultural production regions, USDA notes, were not designed for heavy truck traffic.

the U.S. and Canada;[176] consider the effects that the different commercial and regulatory regimes may have upon cross-border trade;[177] determine whether national advantages may be conferred by the merger; and incorporate conditions so that shippers in both countries will be assured of equal access to rail transportation. (2) USDA contends that, when considering major transnational rail mergers or combinations, we should analyze the effect of the Canadian government's jurisdiction on the rail operations of the resulting railroad and the influence of state trading enterprises, particularly as respects the distribution of railcar capacity among U.S. and Canadian agricultural shippers. A transnational merger, USDA believes, must be conditioned to ensure equal and fair treatment for shippers in both countries.[178]

U.S. DEPARTMENT OF DEFENSE. DOD contends that our regulations should be revised to help ensure that National Defense issues receive appropriate consideration during the merger evaluation process. The ability to rapidly deploy military forces by rail, DOD insists, must be preserved.

Downstream effects. DOD advocates the elimination of the "one case at a time rule." DOD, which notes that the accomplishment of its mission requires assistance from all the Class I carriers and from several shortline and regional railroads as well, recommends that Class I mergers be evaluated for their competitive, financial, and operational impact on other Class I carriers, larger regional railroads, and shortlines serving critical DOD installations.[179]

Maintaining safe operations. DOD, which agrees that safety should be evaluated on a "case by case" basis, recommends that we consider whether the merging carriers have allowed sufficient funding under conservative estimates to pay for the requirements contained in their SIPs.

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[176] USDA notes, in particular, that, although the U.S. grain merchandising system is relatively free of government involvement, the Canadian grain merchandising system is not (a hallmark of the Canadian system, USDA indicates, is the Canadian Wheat Board, a centralized, government-sponsored state trading enterprise). And, USDA adds, the Canadian rail regulatory regime differs dramatically from the U.S. rail regulatory regime, especially as respects export wheat movements (Canadian rail rates, USDA indicates, are capped at a certain percentage above cost, which means that Canadian rail rates for export grain movements are substantially lower than U.S. rail rates for similar movements over comparable distances).

[177] USDA indicates that, on account of differences in the U.S. and Canadian grain merchandising and transportation systems, Canadian grain producers are believed to have an advantage over U.S. grain producers, even in the United States.

[178] USDA is concerned that, if a U.S./Canadian railroad were controlled by Canadian interests, railcar supply between the two countries could be unfairly administered to the disadvantage of U.S. producers and shippers (USDA notes, in particular, that railcar allocation in Canada is controlled by the Canadian Wheat Board, not by the railroad). USDA adds that it is also concerned that the profits earned on U.S. rail lines could be invested to improve Canadian rail lines rather than U.S. rail lines.

[179] DOD indicates that the network of rail corridors most important to DOD is known as the Strategic Rail Corridor Network (STRACNET). DOD advises that this network, which is the minimum integrated and inter-connected rail corridor network essential to meeting National Defense rail transportation needs, consists of some 38,000 miles of main lines and connectors.

Safeguarding rail service. DOD, which notes that quality rail service is critical for the efficient deployment of military forces, contends: that we should include criteria requiring the merging carriers to establish benchmarks for delivery schedules; that these benchmarks should be prioritized (*i.e.*, should reflect different levels of on-time performance based upon the price or urgency of the service); and that the merging carriers should be required to substantiate how these benchmarks will be met or exceeded, and should also be required to specify the penalties they will accept if the benchmarks are not attained. DOD adds that it is very concerned about post-merger abandonments.

Promoting and enhancing competition. DOD contends that competition would be enhanced if a merger plan were to include shared access for new rail markets to/from DOD shipping points (provided, DOD adds, that the shared access included an appropriate contribution towards infrastructure maintenance).

Shortline and regional railroad issues. DOD, noting that 30 defense installations are served by shortline and regional railroads, contends that merging carriers should be required to evaluate the impact of their transaction on the continued viability of these shortlines and regional lines.

Employee issues. (i) DOD believes that we should review the issue of availability of employees for service. DOD suggests, by way of example, that we should consider whether a movement of maintenance work across international borders could be justified in light of the potential degradation of the available resources to maintain the equipment fleet within the United States. (ii) DOD contends: that the Railway Labor Act provides some predictability with respect to labor contracts; that, in particular, labor contracts administered under the RLA do not expire, and the parties to such contracts are subject to negotiation, mediation, arbitration, and recommendation by a Presidential Emergency Board, as well as Congressional action; that this arrangement often results in settlements that are satisfactory to the parties and beneficial to the economy; but that, if trains or equipment were dispatched outside of the U.S., the employees performing the work would not be subject to the jurisdiction of the RLA. DOD therefore insists that we should require the merging carriers to explain how they expect to mitigate the exposure of the U.S. rail system to service disruption arising from labor activities not subject to the RLA. (iii) DOD also recommends that, in considering an international merger, we should consider requiring the carriers to explain their plans for the administration of their predecessors' labor agreements.

Merger-related public interest benefits. DOD contends that, when merging carriers claim that the public interest will be advanced by new single-line service options, the merging carriers should be required to substantiate the expected improvements in service time and shipping rates associated with their scenarios. And, DOD adds, the public interest might be served if the Board retained post-merger oversight to ensure that the merged carrier follows through on its service claims.

Cross-border issues. DOD indicates that, in addition to DOD-unique concerns relating to foreign ownership or control of a U.S. rail carrier, DOD shares the concerns voiced by others regarding the effect such ownership or control may have on the maintenance and safety of U.S. rail lines. DOD contends: that the degree to which the prospective owning or controlling foreign entity may be amenable to effective regulation by FRA should be a key consideration; that we should also consider the effect of differing labeling, security, environmental, safety, labor, and other standards (and these differences, DOD notes, might be exacerbated by language differences); and that we should further consider the likelihood that traffic may be shifted from U.S. to foreign ports (a significant shift in traffic, DOD argues, could threaten the economic health of U.S. ports and thereby impact the ability of those ports to meet National Defense needs).

National Defense issues. DOD contends: that we should consider the National Defense impact of a proposed merger in determining whether the merger should be approved; and that we should approve a proposed merger only upon a determination that the merger would not degrade the carrier's ability and willingness to contribute to defense objectives and readiness. DOD indicates that specific factors to be considered should include, but not be limited to, the following: (1) the impact of the merger on maintenance to STRACNET lines under the control of the merging carriers; (2) the impact of the merger on traffic levels over STRACNET lines under the control of the merging carriers; (3) the specific plans for prioritization of DOD freight in the event of a war or other contingency; (4) the agreements in place, if any, between DOD and the merging carriers, addressing the provision of rail services to DOD in times of war or other contingency, and the impact the merger would have on those agreements;[180] (5) plans, procedures and/or agreements in place to ensure that routes, locomotives, rolling stock, and other equipment essential to the National Defense will be operated and adequately maintained after the merger; (6) the degree to which DOD traffic will be routed, as a result of the merger, over foreign rail lines, and the likelihood of assured access to such rail lines in time of war or other contingency; and (7) in the event the merged carrier is owned or controlled by a foreign entity, the ability of that entity to sell its ownership or controlling interest to a third party without further regulatory review and approval.[181]

U.S. DEPARTMENT OF TRANSPORTATION. DOT believes that the prospect of more consolidations in the next few years makes it imperative that we ensure that the standards by which we judge mergers will continue to protect and enhance the public interest. DOT adds that, although it cannot predict whether the creation of two major transcontinental carriers would be good or bad for the transportation system and the country, the potential risks and uncertainties of a two-railroad industry structure mandate that any merger from now on must undergo much more intensive scrutiny.[182]

Merger-related safety issues. DOT notes: that, in the CSX/NS/CR and CN/IC proceedings, we required the merger applicants to work with the Federal Railroad Administration (FRA) to formulate Safety Integration Plans (SIPs) to ensure that safe operations would be maintained throughout the entire period of merger implementation; that the SIP Guidelines issued by FRA require merger applicants to describe in detail how the railroad will operate safely once the acquisition is complete, how elements of the acquired/merged properties will be integrated, efforts made to comply with applicable regulations, proposed allocation of resources (capital, facilities, technology, and personnel), and the schedule for implementing plans; and that, although the SIP requirement was implemented with respect to each of the CSX/NS/CR and CN/IC transactions through a case-specific Board/FRA Memorandum of Understanding (MOU), a joint rulemaking to

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[180] DOD contends that we should consider whether the merging carriers have established, or are willing to establish, agreements with DOD designed to ensure that their rail services and equipment are available for the movement of DOD equipment and material in time of war or other contingency.

[181] DOD is concerned that an acceptable foreign owner might sell its interests to a foreign owner that is unacceptable, for financial, National Defense, or other reasons.

[182] DOT advises that, because neither the market nor the railroad industry can stand still, we should conclude this proceeding rapidly, even before our self-imposed 15-months deadline.

formalize the process with respect to future transactions is now in progress. DOT contends: that SIPs are presently being used very effectively in the safety-related oversight of the CSX/NS/CR and CN/IC transactions; that the flexibility of the SIP process allows procedures to be refined based on experience; and that the flexible, transaction-specific SIP approach should be allowed to continue with respect to any new major rail mergers.

Merger-related service standards. DOT contends that the experience of recent years has demonstrated that updated merger rules are needed to address service standards during the critical post-merger transition period. DOT has therefore submitted proposals that (it claims) will provide the Board with tools to monitor post-merger service, will provide shippers reasonable safeguards against harm from major service failures during the post-merger transition period, will encourage sound planning, and will hold merger applicants responsible for any service-related promises they voluntarily make.

(1) *Service and performance statistics*. DOT contends that a prerequisite to any regulatory strategy for addressing post-merger service disruptions is a "base case" set of service and performance measures. DOT therefore suggests: that applicants should be required to provide base line data for at least the 12-month period prior to the filing of a merger application; that the reporting requirements imposed in connection with the UP/SP and CSX/NS/CR transactions would form the starting point for developing the types of base period statistics that should be required; that we should also seek guidance from shippers on the type of base line data that shippers would find most useful; and that, in general, the required metrics should quantify operational performance and capture meaningful service measures, which may include cycle times, origin-destination transit times, or percentage of on-time shipments.

(2) *Post-merger service councils*. DOT contends that a "service council" patterned upon the Conrail Transaction Council should be made a standard part of all future mergers. It is helpful, DOT insists, to have a working group of interested private parties and government agencies meet regularly with the merged carrier for frank and open problem identification and for the development of mutually agreeable steps to resolve service or other problems that might arise. DOT adds, however, that a service council would be in addition to, and would not be a substitute for, regulatory oversight.

(3) *Transitional service plans*. DOT believes that, in view of the service problems that have followed recent mergers (including congestion, poor car tracing, and irregular service), and taking into consideration the probable causes thereof (such as understaffing, IT deficiencies, bottlenecks, and equipment shortages), a transitional service plan (TSP) would be a beneficial planning tool to ensure completeness and logical sequencing in the steps necessary to coordinate the post-merger delivery of rail service over the consolidated network. The TSP contemplated by DOT would be a SIP-like version of a standard operating plan; the main difference would be that a TSP, unlike a standard operating plan, would focus on the transition period following the consolidation. DOT adds: that the utility of the TSP would be a function of the effort that goes into its development, constructive suggestions from commentators, the follow-through or execution of the plan, and a feedback mechanism (*e.g.*, a service council) to monitor whether the plan is on course and meeting intermediate targets; and that, although we would not necessarily be expected to pass judgment on the TSP, public airing of the TSP might uncover nuances that were more apparent to shippers than to the railroads themselves and provide an opportunity for adjustment.

(4) *Contingency plans for service breakdowns*. Recent experience, DOT argues, suggests that even a detailed TSP may not suffice to avoid extensive post-merger difficulties. DOT therefore recommends that we require merger applicants to submit, as part of the merger application process, contingency plans for service breakdowns. DOT concedes that not every contingency can be planned for and that there are substantial practical problems with guaranteeing that additional

resources will be available on short notice to maintain certain levels of service. DOT insists, however, that, within limits, and in concert with other service performance safeguards, contingency plans would help minimize post-merger service disruptions. The contingency plans contemplated by DOT: would apply to key corridors and yards where there were anticipated to be significant post-merger changes in operations or in traffic volumes; would cover such matters as staffing, equipment, access to other railroads, or grants of trackage rights to other railroads; and would be activated if post-merger service measures indicated declining service levels.

(5) *Service guarantees*. DOT contends that we should encourage applicants and either shippers or shipper groups to enter into contractual agreements that guarantee minimum levels of service during the post-merger transition period. DOT contemplates that, if applicants failed to provide the minimum levels of service they had guaranteed, adversely affected shippers would be entitled to compensation (which, DOT adds, would be specified in the service guarantee, and which could be in the form of access to alternative transportation service, rate discounts, or recovery of losses). Minimum service guarantees, DOT argues, would restrain overly optimistic service projections by merger applicants, and would penalize the applicants (and not the shippers) if the promised service levels were not met. DOT adds that an arbitration mechanism along the lines of the one provided by 49 CFR Part 1108 would be an appropriate means for resolving disputes respecting service guarantees.[183]

(6) *Staged implementation*. DOT contends that a staged (or sequential) implementation of a merger transaction might enable the merging carriers to avoid, or at least to minimize, the kinds of service failures that have occurred in connection with the implementation of recent transactions. DOT contemplates: that the requirement for staged implementation would be imposed in connection with transactions in which the applicants intend to move rapidly to full integration, where the size and complexity of the merger carries the risk of transitional service-related problems;[184] that, although it would be impossible to design a staged implementation plan that would fit all consolidation cases, the Board could put the burden on the applicants to develop a staged implementation plan with target dates for review by the Board; and that applicants would have to demonstrate to the Board that they had successfully integrated administrative and support functions such as IT systems, billing, customer service, and crew calling before they would be permitted to integrate dispatching, power distribution, or operations.

(7) *Review of prior merger service records*. DOT contends that, because a carrier's past post-merger service performance is a relevant indicator of its future post-merger service performance, we should examine in depth the past post-merger experience of applicants with regard to service issues, and should consider whether past post-merger service problems continue to be a problem or are likely to recur. DOT adds that applicants should be required: to demonstrate, with respect to their past mergers, that safety and service measures are stable and at least equal to, if not better than, pre-merger levels; and to explain, with respect to any past failures to maintain

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[183] DOT adds that, although we should not require railroads to offer service guarantees, we should take into account any reluctance by applicants to offer service commitments and meaningful dispute resolution systems when we evaluate the benefits and risks of a merger. DOT also adds: that it does not believe that we should directly regulate service levels; and that, although it believes that we should establish a process that will allow applicants and affected parties to decide on mechanisms to resolve service disputes in an expeditious and efficient manner, it does not believe that we should be directly involved in adjudicating individual disputes.

[184] DOT adds that staged implementation subject to regulatory oversight would be necessary only with respect to those transactions in which applicants intended to integrate operations within the first three post-approval years.

pre-merger service levels, the specific actions taken and procedures instituted to prevent a repetition of such past failures.

Merger-related competition issues. DOT indicates that its analysis of merger-related competition issues has focused primarily on the probable joining of the major Western and Eastern railroads in end-to-end mergers spanning the Midwest gateways.

(1) *Maintaining open gateways*. DOT contends: that rail mergers benefit society primarily by allowing the merging carriers to realize economies of scale, density, and scope; that, however, few if any such economies can be realized from end-to-end mergers; and that, for this reason, the maintenance or enhancement of the existing joint-line alternatives for movements via the Midwest gateways, which would provide shippers valuable leverage in negotiating rates and service with both the merged carriers and the carriers participating in a joint-line movement, would not come at the expense of important merger-related economies. DOT notes, however: that requiring the merged carrier to maintain open gateways might unduly penalize this carrier if competing carriers serving the gateway were not required to meet the same standard; that, in particular, the merged carrier would be subject to joint-line competition from the non-included carriers but could be prevented from competing for joint-line movements originated/terminated by those competing carriers; and that, for this reason, it might be better to require all carriers serving the gateway to maintain open gateways. DOT adds: that the merged railroad has an incentive to price a movement to/from a gateway (if one is offered at all) at a rate that makes a joint-line option economically unattractive relative to the rate for the through movement offered by the merged railroad; that, therefore, this issue must be addressed if open gateways are to be maintained, and we must assure that the rate to/from the gateway is set to maintain or enhance productive efficiency; and that the present arrangements for rate/revenue divisions for joint-line movements over the gateways could be considered as benchmarks for setting such rates.[185]

(2) *Open switching to exclusively-served shippers in terminal areas*. DOT contends that railroads should be required to offer open or reciprocal switching in all terminal areas;[186] open switching, DOT insists, would allow affected shippers to benefit from product and/or geographic competition. DOT insists that, although a reciprocal switching requirement in the merger context would only help those shippers served by the merger applicants, such a requirement would still serve to mitigate a merger-related loss of product or geographic competition. DOT adds, however, that, if such a requirement is to be effective, switching fees will have to be set at levels that encourage competition, maintain efficient routings, and adequately reimburse the carrier physically performing the switching service.

(3) *Expanding competitive options by amending the procedures for bottleneck relief*. (i) DOT contends that, when a railroad not party to the merger is the bottleneck carrier, we do not have the authority to require the merger applicants to offer contracts to shippers over the competitive segment of the route. DOT concedes that a "contract" requirement (*i.e.*, a requirement that the merger applicants offer contracts over the competitive segment) would enhance competition by increasing rate and route options; such a requirement, DOT notes, would allow the shipper to demand a rate over the bottleneck segment, which rate could then be challenged under the standard rate

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[185] DOT adds that, if we require gateways to remain open, we should not limit such open routings to shippers with a history of prior use. Conditions, DOT argues, should be designed so that they can be implemented easily, without prolonged litigation to determine if parties are eligible to take advantage of them.

[186] DOT notes, in this regard, that terminal areas generally include ports.

reasonableness tests. DOT insists, however, that, although the law allows railroads to offer contracts, the law does not compel them to do so. *See* 49 U.S.C. 10709. And, DOT adds, requiring that a contract be offered is no guarantee that the contract will be acceptable, either in terms of rates or service, to the shipper. (ii) DOT contends that, when a merger applicant is the bottleneck carrier, we should require the merger applicants to offer rates over the bottleneck segment to reasonable interchange points, where the shipper already has a contract with a carrier on the competitive segment. DOT maintains that, for a shipper that has already secured such a contract, a "rate to the interchange" requirement would streamline the current two-step process (a proceeding to establish access, followed by a proceeding to challenge the rate) by eliminating the first step, which would thus allow the shipper to seek rate relief immediately.

(4) *"3-to-2" issue*. DOT contends that the 3-to-2 issue is essentially moot at this point, since few or no major routes are today served by three railroads. DOT notes, however, that there may be a number of points that continue to be served by three carriers. DOT believes that such situations should be addressed on a case-by-case basis to determine if there would be competitive harm if the number of serving carriers were reduced from three to two.[187]

Merger-related financial issues. DOT contends that we should erect safeguards to ensure the accuracy of the pro forma data filed by merger applicants, and should develop and apply rigorous analytical methodologies that will assess the financial condition of the merged entity if traffic and revenues fail to meet projections. DOT suggests, in particular, that, with respect to each proposed merger, we should conduct a sensitivity analysis to allow for a better understanding of the various possible financial outcomes and the probabilities associated with those outcomes. This analysis, DOT adds: should cover the transition period, considering possible traffic losses and concomitant financial penalties for poor service; should consider the impact on rates to shippers, as well as the merged carrier's ability to make the capital investment required to ensure service improvements; and should indicate the effect on fixed charge coverage and other financial benchmarks in order to understand the financial "safety" margin (the merged carrier's ability to meet its financial obligations) that would enable the carrier to remain viable through difficult economic times. And, DOT further adds, we should also conduct a cash flow analysis to determine the degree of shortfall from projections that could be sustained and still provide sufficient "contribution" for the merged carrier to cover debt service requirements and fund needed capital investments.

Merger-related passenger rail issues. DOT advises: that Amtrak, to meet its mandated goal of financial self-sufficiency by 2003, has embarked on an aggressive plan to increase its passenger service and to expand its express freight service; that, in order to implement this plan, Amtrak must be able to offer reliable service; that, however, Amtrak, which (except in the Northeast Corridor) operates over the tracks of the Class I freight carriers, has suffered significantly from the service disruptions and congestion-related delays that have plagued implementation of recent mergers; and that, for these reasons, the issue of possible delays due to merger transition problems is a particularly important one for Amtrak. DOT further advises that commuter rail operators: share Amtrak's concern with delays; and also have capacity issues, because corridor-specific post-merger freight

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[187] DOT indicates that, although it believes that we should always be ready to reexamine our past merger decisions to provide necessary remedies for unforeseen problems, we should be cautious in examining proposals that would restore once-existing but now defunct three-railroad competition, and: should examine such proposals on a case-by-case basis only; and should place the burden of proof on the complainant or moving party to establish that the remaining two serving railroads fail to provide adequate competition.

traffic increases may interfere with either existing or proposed commuter rail operations. DOT contends that, to address these concerns, we should require merger applicants to include in their TSPs the specific steps they will take to avoid disruption of passenger rail operations. DOT indicates that, as respects passenger rail operations, the TSPs: could address capacity on certain corridors; could consider contingency plans to ensure smooth passenger operations during transition; could take account of current service levels, noting those where current performance is inadequate; and could provide for appropriate penalties for post-merger disruptions.

Merger-related shortline and regional railroad issues. DOT believes that certain issues respecting shortline and regional railroads should be addressed in this proceeding.

(1) *Service*. DOT recommends that we consider requiring Class I railroads, as part of any merger application, to establish and provide service benchmarks and negotiated service guarantees for the Class II and Class III railroads with which they connect. These service guarantees, DOT adds, could include compensation for small carriers if the merging carriers fail to meet agreed-upon service levels and could also include provisions for access to other connecting railroads in the event of post-merger service disruptions.

(2) *Interchange and routing*. DOT contends that, although "paper barriers" should be included in merger review, we should remove such barriers only to address specific merger issues, or, on a temporary basis, to resolve implementation problems. DOT adds that removal of paper barriers could be a form of negotiated compensation for small carriers if operational difficulties arise during merger integration.

(3) *Competitive and nondiscriminatory pricing*. DOT notes that claims have been made that the Class I railroads price-discriminate between customers on small railroads and customers located on Class I lines, giving Class I customers favorable prices. DOT contends, however, that these claims, which (DOT indicates) focus principally on rates for grain movements in the West, have more do with disputes over pre-existing rates than with the rules to be utilized in judging railroad mergers. DOT believes that, unless a link can be made between such rate problems and a merger, there is no reason for considering such claims in this proceeding.

(4) *Nondiscriminatory car supply*. DOT notes that claims have been made that Class I railroads have discriminated against their Class II/III connections with regard to car supply, especially during car shortage periods. DOT contends that, although car discrimination issues are generally not merger-related, they may be merger-related if car discrimination occurs in the context of merger implementation. DOT therefore suggests that car supply issues could be accommodated in the development of service benchmarks and negotiated service guarantees between Class I railroads and small carriers.

(5) *Coordinated merger implementation*. DOT suggests that Class I merger transitions might go smoother if connecting Class II and Class III carriers were included in service integration planning.

Merger-related labor issues. DOT contends that, in the merger context, we must consider, not only the operating and capital improvement plans of the merging railroads, but also whether the employees who will be responsible for carrying out these plans support or oppose the merger, and the reasons behind that support or opposition. Fixed facilities, equipment, and IT systems, DOT notes, cannot deliver service; it is, DOT adds, the employees who will ultimately bear responsibility for delivering service safely, reliably, and on-time.

(1) *The use of "cram down" authority*. The time has come, DOT insists, to end "cram down," *i.e.*, the use by the railroads of the 49 U.S.C. 11321 immunity provision and/or *New York Dock* (Article I, § 4) to "cram down" CBA changes that they have not been able to obtain through

negotiations under the RLA.[188] The rationale for cram down, DOT argues, has long since vanished: with only two major railroads in the West and two in the East, there are no longer overlapping groups of employees performing the same function; redundant assets such as excess track, terminals, maintenance facilities, and general offices have already been rationalized; and the employees needed to staff excess facilities have already left the industry. DOT advises that, in the light of present realities, legislation has been proposed that would end "cram down" and ensure that CBAs will only be changed through RLA procedures. DOT further advises that, in this proceeding (because the proposed legislation has not yet been enacted), we should either (i) declare that our 49 U.S.C. 11321 authority will no longer be used in the labor context, or (ii) at the very least, raise the threshold for use of cram down by revising the definition of when it is "necessary" to make changes to CBAs and also by limiting the scope of the circumstances when cram down could be invoked to the initial consolidation, as opposed to changes made at a later date. DOT suggests, in particular: that we should refine the concept of "necessary" CBA changes to limited situations that would not arise except for the immediate merger transaction; that the test would not only be whether there is an efficiency gain to be realized, but whether the proposed change is so intrinsically related to the merger that the dispute would not arise outside the context of the immediate consolidation; that, by way of illustration, a change would be necessary, and therefore the *New York Dock* arbitration remedy would be retained, when the parties were unable to agree on how to integrate overlapping seniority districts; and that, where a case could be made that the merger could not be a merger in reality if pre-merger CBAs were perpetuated, the employees (not the merged carrier) would be allowed to select the surviving CBA.

(2) *Relocation rules and test period earnings*. (I) *New York Dock*, DOT notes, provides that, although employees who lose their jobs are entitled to six-year income protection, employees whose positions are moved to distant locations must either "follow their work" or forfeit their *New York Dock* benefits. DOT insists that this distinction, although it may have made sense in the context of regional mergers, makes no sense in the context of continent-spanning mergers. DOT therefore recommends that we provide employees who must relocate or lose income protection benefits the option of electing a separation allowance or some other benefit alternative. (ii) DOT contends that records of test period earnings should be readily available to all employees of merged carriers. An employee, DOT contends, should be entitled to request a printed document that shows the calculation of test period earnings on a periodic basis. Current technology, DOT claims, would seem to make this a minimal burden on the carrier, while providing employees critical information regarding their *New York Dock* income guarantees.

(3) *Pre-merger completion of implementing agreements*. DOT contends that, because the early completion of implementing agreements might reduce transition-related service problems, we should routinely require the pre-merger completion of implementing agreements.

(4) *Cross-border work transfers*. DOT contends that, before approving a trans-national merger, we should require applicants to reveal their cross-border work-transfer intentions.

Merger-related environmental/community impact issues. DOT, which believes that environmental issues should be considered in this proceeding, claims that the UP/SP and CSX/NS/CR transactions have demonstrated that our current procedures do not address many of the adverse community and environmental impacts of a consolidation.

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[188] DOT uses the term "cram down" to refer to modifications to CBAs, the substitution of one CBA for another, and/or the transfer of employees from a location covered by a CBA to a location not covered by a CBA, where the modification, substitution, and/or transfer is implemented under the authority of 49 U.S.C. 11321 and/or *New York Dock* (Article I, § 4).

(1) *Partnerships and corridor approaches*. DOT recognizes what recent proceedings have demonstrated: that merger-related environmental impacts are often diffuse (increased highway traffic delay and increased train noise, DOT notes, are the usual impacts); that the costs of complete mitigation can be large (overpasses, improved crossing protection, and sound walls, DOT notes, are the most often-requested mitigation measures); that the benefits accruing from any particular mitigation measure may be limited (population density, by way of example, may be such that very few people will actually benefit from the construction of any particular overpass); and that complete mitigation may generate negative environmental impacts of its own (in densely developed areas, DOT notes, it may be difficult to implement grade separation without negative impacts on the community). DOT, apparently believing that past experience has not been entirely satisfactory, urges that we consider new approaches that may be more effective in addressing merger-related environmental problems and that may also work to resolve existing problems. DOT contends, in particular, that we should: explore options to address merger-related environmental impacts in areas that, while not meeting the thresholds for mitigation, still suffer in ways that are significant to the community;[189] and explore options to encourage the railroads to develop solutions with communities and states that focus on traffic "corridors" rather than on individual crossings or similarly delineated areas.[190]

(2) *New infrastructure projects*. DOT contends that we should consider requiring the merger application and the attendant environmental review to cover, not only construction projects needed to implement the merger, but also construction projects needed to meet rail traffic growth projections and to provide quality service. This requirement, DOT claims, would help ensure that we take into account the infrastructure required to implement the merger. And, DOT adds, specific identification of the facilities needed for growth or traffic shifts would promote a more realistic assessment of potential claims of public benefits from traffic diversion, would encourage a more realistic quantification of merger benefits, and would dovetail with any transitional service plan requirements.

(3) *Community congestion*. DOT notes that, following several recent mergers, there have been repeated complaints concerning parked trains blocking grade crossings, causing traffic delays, and potentially interfering with emergency response vehicles. DOT therefore contends that we should consider requiring railroads to identify plans to avoid blocking grade crossings with parked trains. These plans, DOT indicates, could include identifying additional sidings required, crew change points, and other actions or construction needed, and could be part of both a long-term implementa-

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[189] For "typical" impacts, such as delay and safety risk at crossings or noise impacts from additional trains, DOT contemplates a "partnership" approach under which: railroads would be expected to contribute at least the cost of the minimum level of mitigation ordered by the Board; railroad contributions above that level would reflect the benefits from closing grade crossings and other factors they deem important; and communities would contribute based on benefits derived from eliminating existing problems (*e.g.*, grade crossing delays and whistle noise). DOT adds that we should also consider how to address the concerns of poorer and smaller communities that might have difficulty providing the local contribution.

[190] Under the corridor approach contemplated by DOT, several communities and the state might agree to a program that, for example, could include upgrading some crossings and closing others, and could perhaps include a grade separation that would allow a whistle ban. A corridor approach, DOT claims, would allow every community the opportunity to secure some assistance in mitigating problems (the present approach, DOT suggests, limits assistance to those communities affected by problems that are severe enough to require the railroad to fund the entire improvement).

tion plan and a short-term contingency plan. DOT adds: that this would further encourage railroads to work with communities to close crossings that are inconsistent with smooth operations; that the process could bring railroads and communities together in a more open way to select, finance, and construct mitigation measures; but that, because it may be difficult to identify problem areas before the merger, there may be a need to require additional remedies after the merger has been implemented.

Merger-related international issues. DOT believes that certain concerns warrant special attention in considering major international rail combinations. And, DOT adds, reducing the uncertainties, and thus the risks, of international rail systems will demand an exacting examination of the consequences of such transactions.

(1) *Safety*. (i) DOT asks that we declare, with respect to SIPs: that there must be total cooperation with FRA by merger applicants, no matter their national origins; and that what is under consideration are all the impacts of a transaction on the U.S., and not just its U.S. segments. (ii) DOT indicates that FRA is working on a rulemaking that will address the extent of compliance with U.S. safety rules, and the consequent ability of FRA to enforce those standards, with respect to train dispatchers based in a foreign country who dispatch trains operating in the U.S.[191]

(2) *National favoritism*. DOT contends that international rail consolidations will raise concerns that important commercial decisions involving the merged railroad could conceivably be based upon national, rather than economic, considerations. DOT has identified several forms of this concern: a concern that an international carrier might take action adverse to U.S. interests (DOT notes, by way of example, that there might be an effort to influence routing of rail traffic to/from foreign ports at the expense of U.S. ports); a concern that foreign law might have, at least indirectly, an adverse effect on U.S. interests (DOT notes, by way of example, that the Canadian Wheat Board, a governmental entity, controls a large supply of rail cars that it uses for the benefit of Canadian agricultural producers); and a concern that, in various circumstances, international carriers might be subject to pressure from competing groups of shippers in different countries (DOT notes, apparently by way of example, that the recent post-merger service breakdowns in the U.S. have affected rail traffic moving to/from Canada, and even intra-Canadian traffic).

(3) *Corporate control*. DOT contends that international consolidations may involve issues respecting the impact of foreign law in the area of corporate structure and management. (i) DOT indicates that Canadian law appears to provide: that a majority of the boards of directors of both CN and CP must be Canadian citizens or permanent residents; that CN's corporate headquarters must be in Montreal; and that no individual or entity may own 15% or more of CN. Legal provisions that tie corporate control to nationality or citizenship, DOT suggests, may also raise the question of reciprocity. (ii) DOT indicates that, in Mexico: control of the rail infrastructure has been separated from the right to operate over that infrastructure; the infrastructure remains under the control of the Mexican government; the right to operate over portions of that infrastructure, however, has been sold to independent entities; that, by law, those entities must remain under the control (51%) of Mexican nationals; and that major U.S. railroads have purchased minority stakes in these operating concessions. (iii) DOT adds that contract terms that require disputes with U.S. parties to be resolved according to foreign law may be problematic in the absence of arm's-length transactions involving parties of roughly equivalent bargaining positions.

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[191] DOT notes, by way of example, that FRA requires random drug and alcohol testing (which Canadian law does not permit that government to impose), and that FRA more strictly limits the hours dispatchers can work.

(4) *National defense*. DOT notes that international transactions may implicate national defense interests by allowing an international carrier to control vital portions of the U.S. rail infrastructure and to make routing decisions that may impact the capabilities of U.S. ports.

(5) *Consultations with foreign agencies*. DOT contends that, when considering an international transaction, we should engage in consultations with the pertinent foreign agencies charged with oversight, in whole or in part, of that transaction. Such consultations, DOT suggests: would minimize the possibility of misunderstandings respecting foreign law; and would provide information to decisionmakers of each agency on the status and prospects of other reviews of the same transaction.

Merger-related public benefit issues. DOT contends: that we should consider requiring the merging carriers to more rigorously identify the public benefits they believe will result from their merger;[192] that the carriers should be required to provide well-supported estimates of the benefits they anticipate and the steps they propose to achieve them, and some guidance as to when these benefits will accrue to the public; that we should consider providing guidance on how to better define and quantify public benefits; that merger oversight should include an assessment of whether the identified benefits have been achieved, and, if not, whether the railroad has made the promised efforts necessary to achieve them; and that railroads should be held to their representations on public benefits, the same as their other representations.

The "one case at a time" approach. DOT contends that we should abandon the "one case at a time" approach and should consider the "downstream" effects that a consolidation will have on an already concentrated industry. DOT adds: that particular attention should be paid to the impact on "orphan" railroads (*i.e.*, railroads left without suitable partners) and the shippers served by such railroads; that mergers that are proposed within a reasonable time period of each other should be combined and assessed together; that merger applicants should be encouraged to explain why their particular combination either offers benefits that would not be generated by a merger of either with a different partner or poses fewer risks than another combination; that we should not be reluctant to revisit conditions imposed in a prior merger decision, if a subsequent consolidation renders them ineffective; and that we may wish to impose an indefinite oversight period on approved combinations, to make it easier to gather evidence in this area.

Matters not merger-related. DOT contends that we should reject options covering issues that would address matters that are not merger-related.[193]

Acquisition premium; implementation costs. (i) DOT contends that, because the record in this proceeding is not sufficiently developed to allow us to make a judgment as to the proper definition of "acquisition premium," or as to the best way to prevent a pass-through of such amounts, we

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[192] DOT indicates that these benefits could include benefits to shippers (such as lower rates, single-line service or better routes) or benefits to communities (such as reduced truck or train traffic). Additional areas of public benefit that might be considered, DOT adds, include safety benefits and additional access for passenger trains.

[193] DOT suggests, however, that matters not merger-related could be reviewed outside the instant proceeding. DOT indicates, in particular, that far-reaching industry-wide competitive access issues should be resolved in a separate rulemaking, or by statute, after a full debate about the implications for rail costs, rates, and service.

should explore this issue further in a separate proceeding. (ii) DOT contends that we should reassess how carriers account for unanticipated and significant merger implementation costs. DOT further contends that we should ensure that such costs are not incorporated into the Uniform Rail Cost System, to become part of the base by which rates are determined.

APPENDIX H: REGIONAL AND LOCAL INTERESTS

CALIFORNIA PUBLIC UTILITIES COMMISSION. CPUC contends that, to assure rail safety and service adequacy, merger applicants should be required to file a Safety Integration Plan and a Service Integration Plan.

Safety Integration Plan. CPUC contends that, in every merger proceeding, applicants should be required to file a Safety Integration Plan. CPUC further contends that, to make this plan more effective, these elements should be included: review of current FRA accident/incident history records; review of proposed operating rule consolidations/changes, particularly those involving track train dynamics/train make-up (TTD-TMU) procedures; review of the combined employee rule/safety procedures training; review of the combined training program for locomotive engineers; review of the combined training modules for all crafts; 2-5 year review of FRA compliance and enforcement action(s) involving Track, Motive Power and Equipment, Signal and Train Control, Operating Practices, and Hazardous Materials; review of emergency response and preparedness plans; proposed safety operating structure and realignment, including proposals for any significant changes in methods of train operations, proposals for any changes or relocation of train dispatching operations, and proposals for any changes or relocations in key headquarters and regional management positions; and review of applicants' development of Positive Train Separation. And, CPUC adds, if the accident rate of either applicant is above the industry average or otherwise determined to be unacceptable, approval of the merger should be withheld until applicants demonstrate that their safety performance can be returned to acceptable levels.

Service Integration Plan. CPUC contends that, to prevent the kinds of service problems that have occurred in connection with recent mergers, applicants should be required to prepare a Service Integration Plan showing how the operations of each applicant will be combined so that service levels will be maintained or improved. CPUC adds: that the plan should include contingencies describing steps (*e.g.*, agreements to reroute traffic, mutual aid agreements, joint dispatch, and access rights) that applicants would take if service disruptions or congestion were to develop; and that performance standards should be set to establish benchmarks to determine whether service quality may be deteriorating. The service performance standards contemplated by CPUC would include: transit times of trains between terminals and time to transport railcars from the carrier's terminal to shipper facilities; percentage of shipper and shortline orders for railcars filled by the merged carrier; car utilization rates that will result from combining administration of the railcar fleets; list of gateways that the merged carrier will keep open to allow shippers to route cars on other railroads; time involved in the interchange of railcars from/to the merged carrier's lines; plans to improve the efficiency of rail yards and resulting reduction in time required to move railcars through terminals; plans to improve existing track structure to allow for greater train speeds; and plans for increasing the capacity of high volume routes to reduce congestion at peak shipping periods or for future traffic growth.

Escrow account; additional penalties. CPUC further contends that, to hold applicants accountable to their Service Integration Plan, we should establish and administer an escrow account funded by the merged carrier that would allow aggrieved shippers to obtain damages in the event the merged carrier fails to meet its performance standards. And, CPUC adds, additional penalties should also be set if the merged carrier attempts to improve service by compromising safety (*e.g.*, by overworking train crews or operating trains at unsafe speeds).

IOWA DEPARTMENT OF TRANSPORTATION. IDOT maintains that, as market power becomes concentrated in fewer hands, our emphasis should shift from the rationalization of the nation's rail facilities and the reduction of excess capacity to a balanced oversight that will result in a healthy rail transportation industry offering a competitively-priced service to its common-carrier customers.

Branch line problems. IDOT contends: that many Iowa branch lines need capital funding assistance for upgrading to handle heavier cars; that, without this capital investment, the future of the branch line system (in Iowa and elsewhere) is in serious jeopardy; that, however, the concentration of the rail industry into larger, fewer railroads forces the branch line investment to compete with many other main line capital investments on the larger railroad; that, in fact, branch line investment often does not meet the "return on investment" rates required by the large railroads to maintain their shareholder value; and that this decisionmaking process, removed from the control of the state, the region, and even the country, erodes local control by rail users and the state over the future of the rail transportation system on which they depend. And, IDOT, warns, additional mergers will exacerbate this erosion.

Recommendations. IDOT contends: that we should consider adding emphasis to provisions in our rules that deal with the oversight of past and future consolidation actions; that we should develop a standard monitoring and reporting process to review the progress of the merger in achieving the estimated benefits and impacts on service to shippers; that, under our authority to reopen cases where new circumstances have arisen or new evidence has been filed, we should monitor the progress of railroads in assuring the benefits put forward in justification of consolidation; that, to effectively implement this oversight, we should make access to the regulatory process easy and affordable to all rail customers, including shippers and railroads, and also including federal, state, and local governments; and that we should also add provisions for active review of the relationships between Class I and connecting shortline and regional railroads to ensure that the system, as a whole, operates in a competitive and efficient manner.

THE KANSAS AGENCIES. The Kansas Agencies, which have particular concerns with respect to the rail service needed to transport the agricultural products produced by Kansas farmers as well as the coal burned by Kansas utilities, warn that, as the Class I railroads continue to build into massive transcontinental units: matters of local concern are being left by the wayside; intrastate transport of agricultural products is being gradually dismissed and is offered no competitive rail alternatives; captive coal-fired facilities are suffering poor service and lack of competition; and shortline railroads have been prevented from making up the difference.

Protecting agricultural and utility interests. (1) *Grain interests*. The Kansas Agencies contend that rail shipment of grain (including wheat, corn, sorghum, and soybeans) is frequently more efficient, economically and operationally, for Kansas producers. The Kansas Agencies further contend, however, that rail is a rapidly decreasing option for such producers, because the Class I railroads do not like to take on short-distance intrastate grain shipments and also because the shortline railroads have been hindered by various "creative barriers" to competition. And, the Kansas Agencies add: agricultural producers have been impacted by the trend toward "identity preservation" (producers, to meet the quality demands of the end-user and to meet certain demands that have arisen in the context of the biotechnology debate, must "segregate" their products based on various criteria); however, with the increasing Class I emphasis on speed of loading and quantity of shipment, the demands of "identity preservation" may not be met by the Class I railroads; and, in consequence, the Kansas agricultural community may be faced with lost markets.

(2) *Coal interests*. The Kansas Agencies contend: that over 70% of the electric power generated in Kansas comes from coal-fired power plants; that the coal burned at these plants is transported inbound by rail; and that these plants are captive customers of the rail industry. Kansas coal-burning utilities, the Kansas Agencies assert, were negatively impacted, economically and operationally, by the BN/SF and UP/SP mergers; such negative impacts, the Kansas Agencies claim, included massive service disruptions, non-communication due to railroad organizational restructuring, economic losses, and strained business relationships. And, the Kansas Agencies add, it is possible that continued mergers may result in continued problems for Kansas coal-burning utilities.

(3) *State participation in merger proceedings*. The Kansas Agencies contend: that a regulation guiding state participation in rail merger proceedings would be helpful; that such a regulation could specify that states or specific state agencies should be made active parties to the merger proceedings, and should be served with the pre-merger notice as well as the merger application; and that states would then have more than adequate notice in order to properly prepare a reasoned position to present in the proceeding.

(4) *Attention to unique local concerns*. The Kansas Agencies contend that, although agricultural and coal concerns have similar interests throughout the United States, those interests are not exactly identical from one region to another. The concerns peculiar to Kansas grain and coal shippers vis-à-vis grain and coal shippers located elsewhere in the United States, the Kansas Agencies add, cannot necessarily be adequately addressed by a nationwide policy in a merger decision. The adoption of a regulation articulating that significant weight will be given to local opinion and that conditions can be imposed to meet specific local concerns, the Kansas Agencies maintain, would provide notice to the rail industry that local voices will be heard and given due weight.

(5) *Recommended merger standards*. The Kansas Agencies recommend the following merger standards: (a) Rail customers should not pay for merger premiums paid by acquiring railroads or other entities, nor should such premiums be included in the calculations of revenue adequacy. (b) More pre-merger financial scrutiny regarding the impact of a proposed merger on the financial health of the resulting entity should be required. Greater emphasis should be placed on determining whether applicants' traffic growth claims are realistic. (c) Efforts by railroads to gain further efficiencies or add capacity that promotes growth for U.S. agriculture should be supported. The impacts on shortline and regional railroads of such efforts by Class I railroads should be carefully analyzed. (d) It may be appropriate to establish, in lieu of the current policy of preserving pre-merger competition and service levels, a new policy of enhancing pre-merger competition and service levels. (e) Conditions that at least preserve competition should be imposed on Class I mergers. Such conditions should include: conditions to keep all existing gateways open, both physically and economically; conditions to guarantee reciprocal switching at competitive rate levels; and conditions to remedy any merger-related reductions in route or service options (*e.g.*, if the merger results in the creation of a "bottleneck," one necessary condition would require the merged railroad to quote rail users a separately challengeable rate to a competing carrier under all

circumstances).[194] (f) Railroads should provide market-based compensation to rail users damaged by merger-related service disruptions. Pre-merger promises or guarantees should be in writing and contain objective and enforceable standards.[195]

National policy concerns. (1) *Intermodal competition*. The Kansas Agencies contend that any approval of further rail mergers should include an analysis of whether changes in national transportation policy are necessary to ensure or enhance intermodal competition. The Kansas Agencies contend, in particular, that there may be a need to reform the Jones Act, which (the Kansas Agencies claim) effectively eliminates the use of deepwater self-propelled vessels for transportation of grain and other agricultural products between U.S. ports. The problem here, the Kansas Agencies add, is particularly apparent in connection with transnational mergers because, whereas a Canadian shipper located at or near a Great Lakes port could use any available ocean vessel to ship through the Great Lakes to any U.S. port, a U.S. shipper located at or near a Great Lakes port would be precluded by the Jones Act from using foreign vessels for a shipment to another U.S. port.

(2) *Foreign government involvement*. The Kansas Agencies contend that, if confronted with a transnational merger, we should consider: whether the merger could allow a foreign government to control the U.S. rail operations of the merged carrier; whether the merger, by allowing such control, would effect a delegation of our regulatory duties to the foreign government; whether we have, under our statute, the authority to delegate, to a foreign government, any part of our regulatory duties; and, as a practical matter, what effects such foreign control might be expected to have, particularly as respects equipment distribution and service allocation.

Concerns of shortline railroads. The Kansas Agencies, which support ASLRRA's Bill of Rights, contend: that shortlines operate 45% of the total rail mileage in Kansas; that, however, shortlines can "co-load" grain at multiple stations in one part of Kansas but not in another; that reduction or elimination of shortline service can be expected to cause lower farm incomes, higher highway maintenance costs, and further erosion of the rural Kansas lifestyle; that adverse effects on shortlines can also result in total dependence on inefficient, unreliable. and expensive rail service for coal shipments to utility facilities; and that, with continued mergers, Kansas shortlines and their shippers will suffer from discriminatory pricing and car supply, and also restricted interchange and routing freedom. The Kansas Agencies further contend that these matters, which (the Kansas Agencies insist) are prima facie evidence that the Class I railroads are anticompetitive in their grain and coal transportation operations, should be addressed in our merger regulations.

MARYLAND. Maryland contends that certain problems it has experienced following the CSX/NS/CR transaction have demonstrated that, if we are to guard the interests of all elements of the shipping and commuting public, the information requirements and remedies set forth in our merger regulations must be expanded and clarified.

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[194] The Kansas Agencies add that, concurrent with the changes to the rail merger regulations, we may wish to consider revisions to our "Bottleneck" rules.

[195] The Kansas Agencies add: that, for agricultural rail users in particular, the NGFA Arbitration System could be utilized for fair, prompt, and cost-efficient resolution of merger-related disputes; and that a similar arbitration system could be implemented for use by coal shippers and receivers.

Commuter rail operations. Maryland, through its Mass Transit Administration (MTA), operates the MARC commuter rail service: between Baltimore, MD, and Washington, DC, over two lines (Amtrak's Penn Line and CSX's Camden Line); and between Martinsburg, WV, and Washington, DC (over CSX's Brunswick Line). Maryland indicates that, in connection with the CSX/NS/CR transaction, MARC has experienced first hand (particularly on the Camden Line) the adverse impacts that can be visited upon a commuter rail carrier when a merger produces increased traffic on the lines of the freight railroad with which it shares operations. And, Maryland notes, MARC experienced these adverse impacts even though CSX promised that MARC operations would not be affected, and reached an agreement with Maryland's Governor that promised to protect MARC service under existing agreements.

Maryland argues that MARC's experience demonstrates that our merger regulations must be amended to protect the public interest. (1) Maryland contends that the § 1180.1 policy statement should be amended to make explicit that if a transaction threatens adverse impacts on commuter or other passenger rail service, it will be weighed as adverse to the public interest and may be remedied through the imposition of conditions (and, conversely, that changes that reduce impediments to such service will be counted as a favorable factor in the public interest analysis). (2) Maryland contends that the merger regulations should be amended to require applicants to consult, prior to the submission of the application, with local commuter authorities to review the preliminary conclusions concerning impacts on commuter or other passenger service so that a dialogue can occur prior to finalization of the operating plan to avoid, to the extent possible, the need for commuter authorities to intervene as adversaries once the application is filed. (3) Maryland contends that post-merger remedies and dispute resolution procedures, short of formal petitions to reopen, should be established to address service problems that were not anticipated in advance of the merger or that arise despite applicants' assurances to the contrary.

Port of Baltimore. (1) *Shared Use Area*. Maryland contends: that the Port of Baltimore, like most ports, includes a web of rail lines of more than one railroad; that, although some piers and some shipper and warehouse facilities at the Port of Baltimore enjoy direct service from more than one railroad, others receive direct service from one railroad only; and that, at the Port of Baltimore and indeed at most ports, there is not sufficient land to permit a railroad that does not already serve a particular facility to build a track into it. Maryland therefore contends that, to reduce congestion, enhance competition, and avoid monopolization at a port facility as a result of a merger, we should consider adding to our rules a requirement that, at any port where service by two railroads exists but does not extend to all facilities at that port, and where a merger transaction will have an impact on the port and we believe that competition should be enhanced, the railroads serving that port must create a Shared Use Area, which would be operated by a neutral entity for the benefit of all railroads that reach the port (either on proprietary lines or via trackage rights, and whether those rights are created in or predate the merger). Maryland adds: that the Shared Use operator would have the ability to reach any pier, warehouse, or other facility within the port area; and that in any such Shared Use Area, absent an agreement by the railroads as to appropriate compensation, we would impose a compensatory trackage rights, switching, or other access fee, as well as the fees to be paid to the neutral operator.

(2) *Diversions of international traffic*. Maryland contends that, because the multiple viable U.S. port facilities that now exist on both coasts and on the Great Lakes are essential for U.S. commercial interests and also for U.S. national defense, our regulations should treat diversions of international traffic from U.S. ports to ports in other countries as reductions in the public benefits of a proposed transaction.

Changes in train operations. (1) *Merger problems*. Maryland contends: that, prior to the CSX/NS/CR transaction, CSX ran trains on its lines through Maryland that, for the most part, did not exceed 6,000 feet in length; that, however, when Conrail officials joined the CSX operating department, train lengths on CSX lines in Maryland began to increase (the pre-transaction Conrail, Maryland notes, often ran trains that were up to 9,000 feet in length); that this increase caused difficulties, because sidings, lead-in tracks, and other facilities on the CSX lines had been built to accommodate shorter trains; and that the lack of facilities to hold the longer trains has caused many problems for shippers, shortlines, and commuters (including congestion, delays, blocked crossings, and reductions in service reliability). Maryland further contends: that communities in Maryland are seeing post-CSX/NS/CR transaction increases in train frequencies that are increasing noise pollution from the trains themselves as well as from crossing protection devices; that, in many situations, increased traffic volumes are causing the railroads to hold trains in towns or on lines where neighbors are facing new noise and exhaust pollution impacts; but that, because these various problems were not predicted in the CSX/NS/CR applicants' operating plan and environmental documentation, no remediation efforts have been made.

(2) *Revised regulations (train length)*. Maryland contends that our merger regulations should be revised to require merger applicants to describe each applicant's current train operating guidelines or practices regarding train length, and also to describe any changes that will be made thereto either to enable the merged railroad to handle increased traffic volumes or to allow the merged railroad to improve efficiency. Maryland further contends that our merger regulations should be revised to require merger applicants that project increased train lengths to report on their plans for making the various changes that will have to be made to allow the merged railroad to handle the longer trains (*e.g.*, plans for increasing lengths of sidings, plans for adjusting signal systems to account for the longer trains, and plans for avoiding blocked crossings at any location where increasing the amount of time the crossing is blocked will have an adverse effect on public safety or on commercial interests).

(3) *Revised regulations (environmental and other remediation)*. Maryland contends that our regulations should be revised to recognize our authority to require the merging railroads to make the capital improvements needed to address operating impacts from post-merger changes, including but not limited to siding extensions or other new construction, signal changes, or any other facility improvements that will reduce the adverse impacts of operating changes on the public safety and on the reliability of service to the public. And, Maryland adds, this authority to order capital improvements to remediate the effects of a transaction should extend to post-consummation effects that were not anticipated at the time the application was prepared.

Shortline operations. Maryland contends that the rights articulated in the "Bill of Rights" advocated by ASLRRA should be included in our merger regulations in order to preserve and protect the public's interest in the continued growth and vitality of the shortline segment of the railroad industry.

Open access. Maryland, although taking no position at this time on the requests for open access at all locations that have been made by various parties, contends: that there is reason to question whether requiring a showing of anticompetitive behavior on the part of a railroad that has sole access to a shipper in a particular location should be the *sine qua non* of a determination of whether to mandate access by another railroad; that growing complaints from shippers around the country who now have service from only one railroad suggest that diminishing service quality at such locations results too frequently when there is no direct rail service competitive option; that, at these locations, the single serving railroad is not taking any action to preclude competition, it is simply taking advantage of its monopoly power; and that, all things considered, we should undertake an inquiry into solutions to the problems experienced by shippers at locations with only one serving railroad. And, Maryland adds, we should, in undertaking this inquiry, attempt to balance: (a) the need for competitive rail service alternatives in order to maintain quality of service by a railroad that already serves a shipper or a port facility; and (b) the need to ensure that the railroad whose assets are to be used by another railroad receives appropriate compensation for the use of its assets.

NEW YORK. New York contends that the challenges that any new merger or consolidation proposals would pose for states, shippers, smaller railroads, and other constituencies compel the adoption of new guidelines intended to protect and promote the public interest in efficient, economic, and competitive railroad transportation.

Promoting and enhancing railroad competition. New York insists that, given the current degree of market power concentration characterizing the major railroad network, we should look for opportunities to promote and expand rail-to-rail competition through the exercise of our merger conditioning authority. New York contends, in particular, that an instructive starting point for a revision of our merger review policies vis-à-vis the promotion of new competition should be the East-of-the-Hudson condition we imposed in connection with the CSX/NS/CR transaction. New York adds that, using the East-of-the-Hudson condition as a model, our new guidelines should provide that, upon a showing by an affected shipper, community, or other constituent that a measure of effective rail competition that once existed no longer exists, we should impose a condition that will reopen the area in question to competitive rail service, either through trackage rights in favor of a connecting carrier (including a shortline) or, depending upon the location and available rail infrastructure, through haulage or reciprocal switching on reasonable, nondiscriminatory terms.

Coordination of freight operations and passenger operations. New York indicates that it respects the view that rail safety issues raised by a prospective merger or other consolidation are best addressed on a case-by-case basis in the context of environmental impact review and a Safety Integration Plan. New York contends, however, that more will be required to protect its interests in passenger rail operations; freight carriers' adherence to state policies regarding the development and expansion of commuter and inter-city passenger service, New York indicates, are not generally considered to be among the rail safety issues raised by a proposed merger. New York further contends that, although it is prepared to make the investments necessary to pursue its commitments to passenger rail technology, its efforts in this field can only succeed with the assistance of agencies such as the Board, which have plenary authority over the freight railroads that often share facilities with commuter and passenger operations. New York therefore asks: that we require merger applicants to address future coordination of freight operations with commuter and inter-city passenger service; and that we re-affirm our commitment to use our merger conditioning authority to protect publicly-supported passenger rail interests.

Rail service quality; service implementation plans. (1) *The plan*. New York agrees that a greater emphasis on before-the-fact controls designed to avoid post-merger service disruptions and deteriorated service quality should be a central component of any new rail merger policy guidelines. New York contends: that merger applicants should be required to file formal rail service impact or implementation plans; and that, if the plan is approved by the Board, its specific elements (including representations as to intended service levels, routes, equipment, and resource allocations, *etc.*) should be imposed as conditions, which (New York adds) would be enforceable by agency order through subsequent, post-transaction oversight proceedings.

(2) *Smaller shippers and branch line communities*. New York contends that, because rural areas and branch line shippers and terminals are most at risk of resource rationing and service

curtailments when capacity gets tight, applicants should be required to address, in their service implementation plans, the provisions to be made for preserving a full range of service options for smaller shippers and branch line communities, both under optimum post-merger conditions and in the event that unforeseen, though not unforeseeable, transition difficulties stretch capacity and constrain resources. And, New York adds, the adequacy of existing infrastructure and applicants' plans for the design and financing of infrastructure expansions, if necessary to maintain pre-merger service levels, should also be mandatory components of the analysis.

(3) *Safeguarding quality of service*. New York contends that our new guidelines should also require merger applicants to submit evidence of the steps they will take and of the resources they will commit to safeguard the quality of their service, including train frequencies, transit times, railcar and locomotive supplies, enhanced use of information technology (particularly in communications with shortline connections), yard schedules, mine or terminal permit systems, and claims resolution.

Shortline and regional railroads. The public benefits of a vibrant and efficient national network of shortlines and regional railroads, New York contends, are universally acknowledged. New York further contends, however: that, in many instances, shortlines remain dependent on the Class I carriers for access to yards, interchange tracks, and line-haul connections; that, where the Class I carriers impose restrictions on this access (particularly access to alternate railroads and routes), shipper choices are curtailed and the shortlines' growth and revenue opportunities are artificially constrained; and that, likewise, where the quality of service or adequacy of equipment supply offered by the Class I carriers deteriorates, or where single-line connections become three-carrier hauls as shortlines try to maintain routing options, traffic previously handled by the shortlines diverts to motor carriage, often permanently, with a concomitant, negative impact on the shortlines' financial health.

New York therefore contends that we should adopt guidelines to protect the interests of shortlines and regional railroads affected by proposed mergers. New York contends, in particular, that, in the case of an artificial interchange barrier that prevents a shortline from establishing a direct connection with a neighboring carrier, we should establish a presumption in favor of the removal of any such barrier to which a merger applicant is a party, as a condition of approval of the merger. The condition, New York adds, should be imposed at the request of the affected shortline or one of its customers, and the presumption should be rebuttable only by proof either that the barrier serves a procompetitive purpose or that the barrier is part of a legitimate, alternative financing arrangement that only assures the Class I carrier the actual value of the lines leased or acquired by the shortline.

Merger benefits: more scrutiny; new protections. (1) *Heightened scrutiny*. Recent mergers, New York claims, have had dramatic consequences for shippers and affected communities: service deterioration; rising costs; threatened losses of service to marginal areas; neglect of markets not considered critical to the carriers' core business; and a rationing of limited capacity. New York insists that, in view of this background, our new merger regulations must require a more critical and skeptical scrutiny of applicants' claims of merger benefits.

(2) *Protections for shippers and communities*. New York further contends that our merger regulations should provide protections for shippers and communities from the economic burdens associated with the recovery of acquisition premiums or higher rail operating costs resulting from the carriers' failure to realize efficiencies or other claimed merger benefits. The importance of this reform is underscored, New York adds, by the recent holding that, as presently structured and interpreted, standard railroad accounting rules allow carriers to treat the costs of merger-related service crises as ordinary expenses, which (New York adds) presumably can be reflected and recovered through rate increases on captive traffic.

(3) *Recommended regulations*. New York contends that our new merger regulations should include at least the following: (a) Applicants should be required to address foreseeable contingencies in their proposed operating plans, and to disclose the margins of error (if any) incorporated in any estimates of costs or savings. (b) Our consideration of the impact of a transaction on the carriers' fixed charges should include a specific analysis of the carriers' ability to attract adequate capital to upgrade or expand infrastructure to cope with traffic increases or service problems. (c) Specific conditions should be adopted to preclude carriers from transferring the burdens of merger-related cost overruns or acquisition premiums to shippers or public agencies by including such costs in the carriers' standard accounts used for regulatory purposes. (d) Representations in merger-related operating plans should be reviewed under a reasonableness standard, and then imposed as enforceable conditions (if the merger is approved).

Staffing and analytical resources. New York maintains that we must ensure that we have the staffing and analytical resources necessary to effectively administer our new guidelines and the public protections that properly should be among the core features of the new guidelines.

NORTH DAKOTA. North Dakota contends that this proceeding is extremely important to North Dakota agricultural interests, including its grain elevator industry, its economy, and individual farmers throughout North Dakota. Without the ability to move agricultural products to distant markets at reasonable and competitive rates, North Dakota notes, the vast production capabilities of North Dakota's farms lose all or part of their value.

Downstream effects. North Dakota agrees that future merger applications should be reviewed with an eye towards the merger's long-term ramifications. The field of "players" in the rail industry, North Dakota contends, has been reduced to such a small number that the actions of one cannot help but affect all the others.

Service disruptions. North Dakota contends that the likely magnitude of future mergers, and the potential for impacts that will not be localized or regionalized, makes it imperative that merger-precipitated service disruptions not be allowed to occur again. North Dakota further contends that: merger proposals should specify the measurement methods for determining service levels and should include ironclad guarantees that service will not worsen; detailed merger implementation plans should be required of applicants and should be thoroughly reviewed; sufficient nonperformance penalties and enforcement mechanisms should be put in place; and the Board should provide an oversight process during the merger implementation period, and should include affected shippers in that process.

Impacts of expanded monopoly power. North Dakota contends that, since 1980, the two Class I railroads that serve North Dakota (BNSF and CP) have used rail monopoly power[196] to compel shippers to customize their operations to suit railroad wants and needs. North Dakota indicates, in particular: that the railroads' demands for larger and larger consignments and shorter and shorter loading times have forced grain elevators to expand, either on their own or via consolidation; that, however, every time required shipment sizes have been increased, more grain elevators have been forced out of business; that the greater emphasis on higher volume crops and shipment sizes has also meant less emphasis on lower volume crops and shipment sizes (even

[196] North Dakota indicates that, although both BNSF and CP serve shippers in North Dakota, very few North Dakota shippers have access to both BNSF and CP.

though, North Dakota notes, these specialty crops and niche markets may be the most profitable for growers); that, because so many grain elevators have been forced out of business, farmers have had to haul their grain farther to access the nearest grain elevator; that, as haul lengths have increased, so have truck sizes; and that the impact of this truck traffic on light density local roads and state highways has been immense. What has happened, North Dakota argues, is that the railroads have used their market power to shift the cost of their infrastructure from themselves to the elevator industry, farmers, local communities, and the public sector.

North Dakota therefore contends that, before more mergers are allowed to take place, safeguards must be established to ensure that ever-larger railroads will not be able to use their increasing economic power to further restructure the grain industry to their advantage.

Promoting and Enhancing Competition. North Dakota contends that we should commit to making the promotion and enhancement of competition a high priority in all future merger cases, and should adopt all reasonable conditions to that end. North Dakota argues: that future mergers will greatly enhance railroad market power to the detriment of the shipping community; that, therefore, we must act to offset this monopoly power with mechanisms that create shipper choices and force railroads to aggressively compete for shipper business rather than dictating prices and shipping requirements; and that, where effective competition cannot be provided, shippers must be given reasonable, accessible, and affordable means to obtain relief from abuse. North Dakota adds, in particular: that all existing rail gateways should be kept open, both physically and economically; that reciprocal switching at competitive rate levels should be guaranteed; and that the creation of new bottlenecks should be avoided by requiring the merged railroad to quote rail users a separately challengeable rate to a competing carrier.

Continuation of vital shortline/regional rail service. North Dakota warns that, in certain cases, Class I carriers may believe that some of the shortlines and regionals that were created in the past 20 years have outlived their usefulness. North Dakota contends, in particular: that some shortlines and regionals, though created to forestall abandonment, have proved to be aggressive service providers; that, however, subsequent abandonments and mergers may have made these lines less important to their original Class I owners; that, if these lines cease to exist, the lack of other transportation alternatives will simply cause the traffic now handled by these lines to gravitate to the Class I's main lines; and that this occurrence will be further aggravated by the transition to larger cars and longer trains. North Dakota therefore insists that future merger proposals should include an enforceable plan to maintain the service options now provided by shortline and regional railroads. The service provided by these lines, North Dakota argues, should not be subject to destruction at the hands of the market power that will be created by future mergers.

Cross-border issues. (1) *The basic problem*. North Dakota warns that the creation of a transnational U.S./Canadian railroad might have negative impacts on North Dakota farmers, because (North Dakota notes), in the worldwide markets for spring wheat, durum wheat, and barley, farmers in North Dakota compete with farmers in Manitoba, Saskatchewan, and Alberta.

(2) *A problem with rates*. North Dakota contends that, even at the present time, the difference in Canadian and U.S. regulatory structures (*i.e.*, the difference between the system controlled by the Canadian Wheat Board north of the border and the system of free grain markets south of the border) works to the disadvantage of North Dakota farmers. North Dakota contends, in particular, that a problem exists because, whereas in Canada the government (*i.e.*, the Canadian Wheat Board) takes an aggressive role in controlling rail rates, in the United States the railroads have a much freer hand. North Dakota further contends, by way of an example (an example that illustrates the apparent influence of the Canadian Wheat Board), that it costs 18 cents more per bushel to ship grain by rail

to Minneapolis from a station in northwestern North Dakota (just south of the border) than from a similarly situated station in Canada (just north of the border), even though both stations are served by the same railroad. And, North Dakota adds, farmers in North Dakota cannot take advantage of the lower Canadian rate because they are prevented from hauling their grain into Canada.

(3) *A potential problem with car supply*. North Dakota notes that a railroad operating on both sides of the U.S.-Canada border would be able to shift its car supply for a commodity like grain, which (North Dakota indicates) has seasonality. North Dakota further notes, however, that such flexibility would no doubt lead to debate over which side was getting its "fair" share. And, North Dakota adds, there is reason to fear that the Canadian Wheat Board might use its leverage over a transnational Canadian railroad to affect car supply to the disadvantage of U.S. shippers.

(4) *Proposal*. North Dakota therefore insists that, if we are to approve further mergers that involve railroads operating across international borders, we must first put in place safeguards to protect U.S. farmers from manipulation and trade distortion. An assumption that U.S. authority oversees operations in the U.S. while Canadian authority oversees operations in Canada, North Dakota argues, is not sufficient when actions on one side of the border can affect shippers on the other side. North Dakota contends, in particular, that we should adopt a rule to the effect that, if a merger results in cross-border rail operations and shippers are confronted with rate differentials that put them in an uncompetitive situation, they will be guaranteed rates that are no higher than those offered at comparable shipping points located across the border.

Employee protection. North Dakota contends that extreme care must be taken when consideration is given to establishing new or expanded labor protection rules, because the cost of such protections (North Dakota argues) is ultimately borne, at least in part, by shippers and the public. And, North Dakota adds, the creation of many of the shortline and regional railroads that exist today would have been seriously curtailed had six years of labor benefits been required.

OHIO RAIL DEVELOPMENT COMMISSION. ORDC contends that we should adopt new rules to enhance America's transportation competition so that American industry can better compete in the world market; the time has come, ORDC argues, to require merging railroads to demonstrate how rail-to-rail competition will be enhanced by their transaction. ORDC further contends that we should work with the states to improve the accountability of the railroads for actions they take in their own self-interest.

Competition and access. ORDC contends that we should conduct an investigation to determine how rail competitive forces work in the real world. ORDC further contends that we should consider how transportation costs and service accessibility impact the ability of American businesses to compete in the world market.

(1) *3-to-2 issues*. ORDC disagrees with past practice respecting 3-to-2 issues; the notion that a 3-to-2 reduction in rail options has no impact on competition, ORDC contends, defies common sense, conventional wisdom, and common practice. ORDC adds: that American businesses must compete in the world economy; that transportation is a key asset in this regard; and that, although most American businesses might be on a relatively even playing field with each other if there were only two giant Class I railroads, that does not necessarily mean that they would be on a level playing field with the rest of world. ORDC therefore argues that, when considering whether 3-to-2 reductions have an impact on rail shippers, we should consider the loss of a competitive edge on a global basis.

(2) *Enhanced access*. ORDC contends that we should enhance competition by incorporating enhanced access into the merger approval process. ORDC notes, by way of example, that allowing

an additional railroad to serve a port solely served by one of the merging railroads would make the port more competitive.

(3) *Bottlenecks; reciprocal switching; gateways*. ORDC contends: that we should require joint-line rates in "bottleneck" situations; that we should require reasonable reciprocal switching rates in terminal areas and wherever else such rates are feasible; and that we should require the maintenance of existing gateways that might otherwise disappear due to a railroad merger. And, ORDC adds, it supports the concept of the "Bill of Rights" advocated by ASLRRA.

Possible new procedures/railroad accountability. (1) *The problem*. ORDC, citing its experiences in the CSX/NS/CR proceeding, contends: that our merger procedures force a party like ORDC either to negotiate arrangements with the merger applicants or to seek relief from the Board; that, however, because a party like ORDC does not know what relief the Board might award, the negotiating process inevitably has a "river boat gambler" flavor; and that, in addition, the lack of certainty respecting the Board forces a party like ORDC to rely on a bevy of highly paid experts and attorneys to help the party decide whether it should settle with the applicants or, instead, should seek relief at the Board.

(2) *A partial solution: mediation*. ORDC contends that, in the CSX/NS/CR proceeding, many of its issues, and particularly its less controversial issues, could have been resolved in mediation if there had been a readily accessible mediation process sponsored by the Board. ORDC indicates that the non-binding mediation process it envisions would be a voluntary process in which Administrative Law Judges or Board mediators would clearly relate, to both parties, how precedents apply to current situations and how any new rules work. ORDC further indicates that the presence of an unbiased mediator would tend to keep order, dispel uninformed beliefs about what relief might be available through the Board, and encourage both sides to take reasonable positions in the hope of reaching a solution without costly litigation. And, ORDC adds, small communities, small railroads, and small shippers (which, ORDC claims, lack the financial wherewithal to take on the railroads or to participate effectively before the Board) would most benefit from mediation or other alternative dispute resolution procedures.

(3) *Another partial solution: arbitration*. ORDC further contends that we should also provide for binding arbitration for some disputes. Arbitration, ORDC contends, is especially useful in situations involving the finding of fact. ORDC adds that states, communities, shippers, shortlines, and rail labor should have the choice as to whether to arbitrate or not, but that the merging railroads should not be able to force these other parties into binding arbitration.

(4) *Railroad accountability*. ORDC advocates an increased accountability of railroads in the merger process in three areas. (a) ORDC urges the creation of a process in which the Board can assess whether the benefits promised by railroads in a merger have actually occurred. And, ORDC adds: railroads seeking to merge should be required to demonstrate where rate reductions will occur, and (after the merger is implemented) should be required to demonstrate, within a five-year timeframe, that they have met their projections; and a merged railroad should not be allowed to participate in any other merger proceeding until such time as the Board determines that the projected benefits of the last merger have been achieved. (b) ORDC urges the creation of alternative dispute resolution procedures to allow communities, shippers, and shortline and regional railroads to be compensated for losses caused by the inability of the merged railroad to provide effective service after a merger is implemented. (c) ORDC, which believes that a merged railroad's ability to deliver the benefits it has promised are directly related to how the merged railroad treats rail labor, urges that we carefully evaluate the impacts of a proposed merger on rail labor before and after it takes place. And, ORDC adds, it supports rail labor's efforts to prevent "cram downs."

Increased state role. (1) *In general*. ORDC believes that, because we may never receive the funding needed to provide new services such as mediation and other alternative dispute resolution procedures, we should look to the states to augment our resources. ORDC contends, in particular, that "forward looking" states might be willing to spend funds that would otherwise be spent in expensive litigation, to pay for part of the costs of mediators or arbitrators selected and trained by the Board. And, ORDC adds, such state adjuncts could be used for more than merely merger issues; they could also, ORDC claims, prove invaluable for ongoing issues between railroads and shippers, shortlines, and governments.

(2) *Environmental issues*. ORDC further contends that states could also play a larger role in environmental issues. ORDC contends, in particular, that, based on recent experience, Ohio can provide first-hand advice as to environmental and safety priorities and as to whether proposed mitigation will be adequate to achieve needed results. And, ORDC adds, the Board may be able to train and use state officials in the environmental area rather than spending Board funds on consultants who may not be as well versed in local issues as are state officials.

(3) *Grade separation prioritization*. ORDC contends that Ohio will soon offer what may be the best example of how to prioritize grade separation projects. ORDC contends, in particular, that, under Ohio's new $200 million grade separation program ($180 million in state and local funds matched by $20 million in railroad funds), ORDC will soon develop a prioritization process that will use the best available techniques to measure as objectively as possible when and where grade separations are most warranted.

OKLAHOMA DEPARTMENT OF TRANSPORTATION. ODOT contends that we should revise our merger guidelines by making them more procompetitive, more pro-shortline, and more pro-mass transit. ODOT, which particularly contends that our merger guidelines should be revised to protect the competitive position of Oklahoma's shortlines, urges changes to insure competitive pricing, nondiscriminatory car supply, elimination of barriers, and reimbursement for merger-related losses.

Pricing and related practices of Class I carriers. ODOT contends that Class I practices have been bad for small shippers, and have been particularly been for small shippers located in rural areas and accessed by shortlines. ODOT contends, in particular: that, for shippers that are captive to a Class I carrier (and especially for shippers located on shortlines that are captive, either operationally or contractually, to a Class I carrier), higher prices that do not reflect increased Class I operating costs are the norm; that, in addition, as the Class I carriers have grown larger, their pricing has changed to emphasize their longest hauls and to encourage grain shippers to invest in larger facilities that can handle 100-car unit trains; that, although few if any country elevators can handle even 26-car units at one time, there has been talk about eliminating the 26-car standard altogether; that, however, because of the relatively low volumes and space constraints of the country elevators, enlargement of facilities is usually not practicable; that, furthermore, even if facilities could be expanded, most shortline track infrastructure would not be able to handle 100-car trains; that, although ODOT has already invested heavily to preserve infrastructure,[197] it simply cannot afford to upgrade lines or loading facilities to handle the new longer trains; and that, furthermore, the infrastructure problems that already exist will only be exacerbated by the introduction of new heavier cars.

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[197] ODOT notes that it has already invested over $50 million in various rail lines throughout Oklahoma.

ODOT further contends: that shortlines have attempted to deal with these issues by providing multiple switches and co-loading between elevators to put together the size units (either 26, 54, or 100 cars) that the Class I carriers require, while at the same time making the better pricing available to their customers; but that, although this involves no increased handling cost to the Class I carriers (the Class I carriers, ODOT notes, still receive at the interchange a unit train bound for a single destination), the Class I carriers have exercised their retained pricing authority over their shortline spinoffs to limit the ability of the shortlines to co-load from different stations or to perform multiple switches. ODOT argues that, although these pricing practices may benefit the Class I carriers, they have hurt and will continue to hurt the shippers located on Oklahoma's shortlines.

ODOT therefore contends that smaller shippers should be given the opportunity to compete by receiving fair competitive pricing. Smaller shippers, ODOT argues, should not be priced out of the market just because they are small.[198]

Elimination of barriers. ODOT contends that, in examining rail mergers, we should examine competitive alternatives that are available to shippers, both before and after the transaction. And, ODOT adds, we should carefully consider whether the competitive alternatives presented by the applicants truly represent competitive options, or whether there are contractual or operating restrictions that prevent one of the options from being realized. (1) *The paper barrier problem*. ODOT contends that shortlines are often limited in their ability to route traffic over more than one connecting Class I by "paper barriers" imposed by the Class I that spun them off. ODOT further contends: that such barriers were originally designed to make the sale more attractive to the shortline buyer, while preserving the bulk of the revenue for the Class I seller and eliminating what was often costly branch line service; that, however, although the spinoff deals were premised on the economics, pricing, and service that existed at the time of the sale, all of these factors have since changed; and that, as time has passed, the Class I carriers have merged and grown larger, and have focused on longer hauls and larger trains, while the shortlines have been limited to the lines they bought and have been able to rely only on traffic growth. ODOT insists that the Class I sellers have already received, during the 5 to 10 years that many shortlines have been in existence, substantial value as a result of the barriers the Class I sellers imposed.

(2) *Rescission of paper barriers*. ODOT therefore contends that, in any new merger, the applicants should be required to rescind all paper barriers. This, ODOT claims, will result in additional competitive options for shippers located on shortlines and should stimulate both a growth in traffic and improved pricing.

(3) *Switching in terminal areas*. ODOT adds that it would support opening terminals by requiring merger applicants to provide switching, at an agreed-upon reasonable fee, to all exclusively-served shippers and shortlines located within or adjacent to terminal areas. ODOT adds that, if such a condition were imposed for the benefit of shortlines, it would have to be further conditioned on the elimination of contractual barriers that would frustrate use of the switching fee to connect with shippers or other carriers.

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[198] ODOT insists that, although problems respecting grain pricing and shortline access are "industry problems" to a certain extent, such problems, because they are exacerbated by mergers, must also be regarded as merger-related. ODOT contends, in this respect, that mergers, by making the Class I carriers ever larger, have given them more leverage vis-à-vis shippers and shortlines. As the Class I carriers have grown, ODOT adds, their power to dictate to their shippers and their shortline connections has grown with them.

3-to-2 issues. ODOT contends that, although three Class I carriers (UP, BNSF, and KCS) serve Oklahoma, there is no need to worry whether a 3-to-2 reduction should be addressed by the Board; there are no longer, ODOT notes, any locations in Oklahoma that have service from all three remaining Class I carriers.

Service-related shortline losses. ODOT contends that, given the sheer magnitude of current mergers, service problems will almost inevitably occur. ODOT adds that, when such problems occur, many shippers served by shortlines are forced to transload inbound traffic around the Class I "choke point" and/or to truck outbound traffic to another carrier or to a point beyond the choke point. ODOT notes, however, that, although these actions are alternatives for the shipper, they result in the traffic bypassing the shortline serving that shipper. And that shortline, ODOT points out, loses revenue it would otherwise have earned, even though it has not played any role in creating the service problem. ODOT therefore contends that our regulations should be modified to require applicants to pay shortlines for traffic lost on account of any service problems of applicants that result from the transaction.[199]

Cross-border issues. ODOT contends that cross-border competitive impacts must be addressed in future mergers. Mergers between U.S. and Canadian carriers, ODOT warns, could unfairly prejudice Oklahoma grain producers and the railroads that serve them.

Passenger service. ODOT contends that the public interest effects of a merger include the relationship of the merger applicants with mass transit for passengers (both local and intercity). ODOT, which notes that it was only last year that Amtrak finally began operations between Oklahoma City and Fort Worth (over lines of BNSF), and which further notes that it is currently working to extend intercity passenger service over other rail lines, indicates that, if passenger service is to succeed, the passenger service operators need the cooperation of the Class I railroads in establishing reasonable service windows, charges, and other terms. ODOT therefore insists that both the merger application and any Board order should ensure that the needed reasonable terms are established.

Equipment utilization. ODOT contends that, in any future merger proceeding, the applicants should not be permitted to claim merger benefits resulting from better equipment utilization unless they can demonstrate that their equipment is being utilized effectively prior to the merger.

VIRGINIA. Virginia, which supports the enhancement of competition, is concerned that future mergers may have a major impact on Virginia's railroads, its ports, its businesses, and its overall economy.

Ports and other publicly financed facilities. Virginia, which is concerned that future mergers may result in the diversion of traffic away from its ports, contends that our regulations should be amended: to ensure that a port with competitive rail service prior to a merger retains effective competitive service after the merger; and to prohibit railroads from granting one port undue and

[199] ODOT adds that, where service problems occur, shippers as well as shortlines deserve prompt reimbursement for service-related business losses. Our regulations, ODOT therefore contends, should establish both a right to damages and a mechanism for prompt resolution of service-related claims.

unreasonable preferential treatment. Virginia further contends that the § 1180.1 general policy statement should be amended to require consideration of the interests of ports.

Safety. Virginia contends that merger applicants should be required to identify anticipated changes in operations to the state agencies responsible for grade crossings, which (Virginia adds) will allow analysis of these changes to be incorporated in the planning processes of these agencies.

Rationalization. Virginia, which is concerned that future mergers may result in line abandonments, contends that the regulations concerning the sale of these lines to others should be retained.

Shortlines. Virginia contends that, although shortline concerns regarding compensation for revenue losses created by Class I service disruptions, noncompetitive and discriminatory rates and pricing, car supply and compensation, and competitive routes and interchanges have already been addressed to a certain extent, these concerns need to be addressed further. And, Virginia adds, traffic diversions should be discouraged; the practice of creating transloading facilities at the interchange to bypass a shortline, Virginia suggests, may not be in the public interest.

Operations. Virginia contends that, in future mergers, consideration should be given to the decentralization and sharing of dispatch functions.

Monitoring. Virginia contends that we should establish a standard term of post-merger monitoring. And, Virginia adds, it may be appropriate to require that benchmarks be included in the merger application.

Information. Virginia contends that anticipated diversions from major facilities such as ports should be provided to the state for its consideration and action.

General. Virginia contends that the process involving joint moves could be improved by giving railroads more flexibility (*e.g.*, by allowing a railroad to agree to absorb a lesser fee in one area in order to obtain another concession elsewhere).

CITY OF CLEVELAND. Cleveland, which indicates that its citizens have had extensive direct experience with the environmental impacts of the CSX/NS/CR transaction, contends that this experience has demonstrated that our existing regulations do not adequately address the environmental impacts of rail mergers on communities located adjacent to rail lines and rail facilities. Cleveland therefore contends that our regulations should be modified to require the complete consideration of all such impacts as part of the process for evaluating future major rail consolidations.

Impacts resulting from increased numbers of stopped and idling trains. Cleveland contends that, although our past practice has emphasized impacts (such as noise and disruptions) caused by moving trains, many of the post-merger problems that the citizens of Cleveland have experienced relate to stopped and idling trains. (1) *Noise*. Cleveland contends that our regulations do not adequately address the impacts caused by the noise generated by an idling train, as well as the crashing sounds of a train as it stops and starts. The rumble of idling trains over long periods of time, and the sharp, piercing noises caused by trains as they stop and start, can be, Cleveland insists, more disruptive to a community than the sound of a train quickly passing through. And, Cleveland adds, because our emphasis has been on moving trains, the impact on people residing near intermodal facilities, train yards, sidings, and repair facilities has not been properly studied.

(2) *Conversion of a secondary line to a main line*. Cleveland contends that, in connection with the CSX/NS/CR transaction, a secondary line in Cleveland was converted to a main line. The increased rail activity on this new main line, Cleveland indicates, has included a significant increase in the stopping, idling, and re-starting of trains. Cleveland claims that the noise mitigation studies for the neighborhoods adjoining this new main line were based upon a projected number of trains passing through at a given speed, and did not address, or propose mitigation for, the noise caused by the stopping and idling of trains.

(3) *Blocked at-grade crossings*. Cleveland contends that, in connection with the CSX/NS/CR transaction, the health and safety impacts caused by increased numbers of stopped trains and the resulting blockage of at-grade crossings throughout Cleveland were never adequately studied or addressed.

(4) *Pollution*. Cleveland contends that the impact of emissions from trains that sit and idle for hours, and even days, are not adequately studied under our existing regulations.

Impact of increased horn noise and train vibrations. Cleveland contends that, although our regulations require examination of increases in wheel rail noise resulting from major rail consolidations within areas exposed to a 70 dBA L_{dn}, horn noise and vibrations caused by passing trains are not adequately considered. Cleveland further contends: that unreasonable horn noise and train vibrations can be extremely annoying to citizens living in close proximity to a rail line; and that, although federal law mandates that horns sound when trains approach a crossing or when the crew observes someone or something on the tracks, there are no regulations concerning how loud or how long the horn should sound (such decisions, Cleveland advises, are left to the discretion of the crew; and some crews, Cleveland suggests, sound horns louder and/or longer than others). And, Cleveland adds, in addition to considering horn noise and vibrations for mitigation purposes, we should include areas exposed to a 65 dBA L_{dn} in future noise studies.

Inadequate property maintenance. Cleveland contends that basic quality of life issues such as the clean-up and maintenance of railroad property should be addressed in our regulations; it can be, Cleveland advises, extremely difficult for local communities to get railroads to remove debris and vegetation from railroad property. Cleveland contends, in particular, that merger applicants should be required to develop: a meaningful process for addressing complaints about the condition of railroad property; and a minimum maintenance plan for railroad property that adjoins residential neighborhoods.

Storage of materials. Cleveland contends that, prior to approving future major railroad consolidations, we should consider the issue of storage of materials (*e.g.*, rail ties) by railroads near residential neighborhoods. Cleveland notes, in this connection, that a Cleveland resident recently experienced an allergic reaction to the creosote-treated rail ties stored near her home.

Improved identification of sensitive receptors to be studied. Cleveland contends that, although (under our existing regulations) anticipated adverse impacts on sensitive receptors in a community resulting from a merger transaction are studied, the method employed to identify the receptors is inadequate. Cleveland contends, in particular, that, although receptors in a community are currently identified by means of aerial photographs within the 70 dBA L_{dn} contour, these photographs are difficult to interpret and often are missing pertinent information. Cleveland argues that our regulations should require field visits and updated mapping for the identification of sensitive receptors.

Compatible information systems between railroads. Cleveland contends that we should require compatible information systems between the parties to a major railroad consolidation. Cleveland indicates that, in connection with the CSX/NS/CR transaction, certain incompatibilities in the NS and Conrail information systems (the NS system, Cleveland advises, did not recognize Conrail's locomotive numbers) resulted in blocked at-grade crossings, stopped and idling trains throughout the region, and delayed shipments.

Consideration of all rail traffic. Cleveland contends that our regulations do not consider all rail traffic when analyzing the impact from a proposed consolidation; Amtrak trains and "light movement" rail traffic, Cleveland argues, are not considered. Cleveland insists, however, that the true impact of a proposed major railroad consolidation on a community can only be understood if all rail traffic is studied.

COLORADO RAIL COMPETITION COALITION. CRCC is concerned by what a new round of rail mergers would do to competition within the rail industry. The result of the limited Class I (BNSF *vs*. UP) competition that now exists in Colorado, CRCC claims, is that many Colorado shippers are captive to just one rail option, which (CRCC adds) subjects them to diminished service and reliability as well as increased costs. CRCC contends: that our merger regulations should promote and enhance, rather than merely preserve, competition; and that, in addition to considering new rules so that future mergers will not negatively affect shippers, we should also give full consideration to remedying current problems such as bottlenecks, "tie-in" agreements, and lack of competition in terminal areas (any rules that do not address current shipper problems, CRCC advises, will only delay needed remedies and further harm shippers). And, CRCC adds, we should review the competitive impact of any future rail mergers under the antitrust laws that are applicable to industries in which mergers are reviewed by the Department of Justice.

BUFFALO NIAGARA PARTNERSHIP. BNP, which indicates that its members have experienced first hand the service difficulties caused by the CSX/NS/CR transaction, contends, in essence, that this rulemaking proceeding does not address the current crisis facing BNP's members. BNP argues that, although there is merit to re-examining guidelines by which future merger applications are reviewed, the current crisis is related to previous mergers; and shippers, BNP adds, should not have to endure at least an additional 15 months of rail problems before we focus on relief efforts. BNP therefore requests that we consider, during the pendency of this rulemaking proceeding, any merger that may offer positive impacts to shippers through the promotion of rail competition, lower switching fees, and overall improved rail service.

GREATER HOUSTON PARTNERSHIP. GHP contends that our merger regulations should require that railroad competition be preserved where it exists and created where it does not. GHP further contends that our merger regulations should guarantee dependable service levels with sanctions for significant service failures.

Competition. GHP contends that, in the Houston area, shippers that have access to only one railroad pay substantially more for rail transportation than do shippers that have access to two railroads. GHP further contends, however, that even shippers that now have access to two railroads will be adversely impacted by future mergers, if any such merger involves *both* one of the two railroads with access to the shipper's Houston facilities *and* a "bottleneck" railroad with exclusive access to the origin or destination of the shipper's traffic; GHP insists that the existence of competitive routing options (between Houston and the bottleneck point) serves these shippers well in terms of rates, car supply, train schedules, and customer service. And, GHP adds, Houston shippers face a unique restriction on the competitive options that can be provided by Tex Mex, a railroad that accesses Houston but that (GHP notes) can handle only such traffic as has a prior or subsequent movement on Tex Mex's own Laredo-Robstown-Corpus Christi line.

GHP therefore recommends that merging railroads be required: (1) to permit competitive access (a) to all shippers located in a major terminal area by all railroads in that terminal area, and (b) to all shippers located within a pre-determined distance of a railroad interchange point; and (2) to maintain existing gateways and existing joint-line rate levels at those gateways, subject to an annual indexing administered by the Board. And, GHP adds, to prevent the unintended consequence of requiring one railroad to open its captive customers to competition without requiring its competitors to do the same, we should use our oversight authority to keep the merger proceeding open until the other railroads in the terminal area have a merger application before the Board, at which time (GHP suggests) we could impose the condition on all of the railroads simultaneously.

Service quality. GHP, which notes that service in the Houston region has suffered greatly in recent years, contends that the elimination of surplus capacity has left the railroad industry woefully unprepared for volume increases and/or service interruptions. And, GHP adds, railroads do not now have an incentive to invest adequately in infrastructure because there is currently no penalty for bad service; shippers that are captive to a single railroad, GHP observes, have no effective recourse if that railroad's service deteriorates. Competitive access, GHP concludes, is the solution to this problem; GHP claims that, if the customer has competitive choices, the likelihood of a severe service failure would be vastly reduced because the serving railroad would risk losing the business, and, more importantly, the customer could ship its traffic via a non-congested competitor. GHP further contends that, if we do not impose a competitive access solution, we should create a sanction for any railroad whose service failures cause financial harm to any customer above a pre-determined threshold. The sanction contemplated by GHP would require the non-performing railroad to immediately open that particular customer to competitive access, which (GHP claims) would allow captive shippers to enjoy the responsive service that comes when competition is present.

Port issues. GHP contends that we should require that all merging railroads maintain, as between different ports, a strict neutrality, which (GHP contemplates) would mean that railroads would not give routing, service, rate, or promotional preferences to one port over another. GHP further contends that we should establish an effective, neutral forum to adjudicate disputes between ports and railroads over this issue. GHP, which notes the substantial investments in port facilities that have been made by the citizens of Houston and Harris County and also by numerous industries located along the Houston Ship Channel, insists: that market forces should drive shippers' choices as to which ports they choose to use for their import and export movements; and that these market-based decisions should not be affected by artificial preferences granted by railroads to specific ports.

APPENDIX I: PORT INTERESTS

THE AMERICAN ASSOCIATION OF PORT AUTHORITIES. AAPA contends: that the U.S. marine transportation system (MTS, which consists of waterways and ports, and their intermodal connections) is of critical importance to U.S. commerce and international trade; that, if U.S. businesses are to remain competitive in the global marketplace, the MTS must be efficient and reliable; that, in this regard, ports are of great importance, because 95% of U.S. trade by volume moves through ports; and that international trade has been the impetus for enormous public investment in U.S. ports and related infrastructure, which (AAPA notes) has generated significant national economic benefits as well as benefits to local and regional economies. And, AAPA adds, the MTS has played, and can be expected to continue to play, a very critical role in terms of U.S. national defense. AAPA further contends: that the MTS is only as efficient as its narrowest, most congested point, which (AAPA notes) is often the landside connection; that, no matter how much ports invest or how productive ports make their facilities, the MTS cannot operate to maximum efficiency unless cargo can move quickly, and cost effectively, in and out of ports; that, in this respect, rail access is a key component; that, furthermore, ports, like shippers, derive great benefits from the competition resulting from access by multiple rail carriers; and that if a merger would result in reduced competition among rail carriers serving a port or reduce a port to a single provider, particularly a rail carrier that services a number of competing ports, rail service can be a "make or break" factor in determining whether a port can compete for cargo on the basis of price and service. And this, AAPA insists, is true whether those competing ports are in the United States or in Canada.

In general. AAPA agrees that the "one case at a time" rule should be eliminated, and that we should examine the possible downstream effects of all future major rail mergers, including the likely strategic responses by non-applicant carriers. AAPA, which believes that future merger considerations should place a greater focus on what is in the public interest, contends that our merger guidelines should be reviewed with the goals of: (1) enhancing, not just preserving, competition; (2) avoiding service degradation and disruptions; and (3) preserving financial viability within the industry. Any proposed merger, AAPA adds, should be assessed against the current reality of a highly concentrated industry.

Port-specific matters. AAPA contends that, with respect to such merger-related matters as service disruptions, the loss of adequate infrastructure and capacity, and competitive impacts, a port's interest in a proposed merger is similar to that of a shipper. AAPA notes, in particular, that a port, having invested a significant amount of state or local funds in capital-intensive, immobile facilities, can face (as a shipper can face) serious adverse effects from the reduced competition and/or service disruptions that can result from a rail merger. AAPA insists that, because U.S. ports are charged with protecting the public interest by creating jobs and promoting local and regional economies, the impact of a proposed merger on affected ports should be a key factor in our merger determinations. AAPA contends, in particular, that § 1180.1(b)(1) (which sets out the factors that must be considered in determining what is in the public interest in the rail merger context) should be amended to require consideration of "the interests of affected ports and the communities they serve." And, AAPA adds, our merger regulations should be further amended: to require that a port with competitive rail service prior to a merger will retain effective competitive service after a merger; and to prohibit railroads from granting one port undue or unreasonable preferential treatment over other ports.

Questions to be asked. AAPA argues that the following questions should be asked in any merger proceeding: (1) Will service levels actually improve? (2) Will U.S. ports be able to compete with Canadian ports as they currently do (both West Coast and East Coast)? (3) Will the merged railroad have the same incentive to invest in infrastructure for efficiencies and capacity enhancements? (4) Will cargo be diverted from one port to another based on differential pricing? (5) Have recent rail mergers resulted in the desired effect and created improved situations for shippers, ports, and others that rely on the railroads? (6) Should the applicants be required to provide detailed financial information to the Board prior to approval of any voting trust that would allow the consolidation to go forward to financial conclusion?

THE "WASHINGTON STATE PORTS" GROUP (PORTS OF SEATTLE, TACOMA, AND EVERETT). WSP urges us to ensure that the industry structure that emerges from the final round of rail mergers provides the amount and character of rail-to-rail competition that will: (a) place continuing pressure on each railroad to provide attractive service and pricing packages to its customers; and (b) force the industry as a whole to respond to changing circumstances promptly and efficiently. Any future major mergers in the railroad industry, WSP contends, should, to the extent practicable, be conditioned on the merging carriers providing to all shippers they access the competitive options that many shippers already have. WSP adds that the structure it contemplates for the rail industry is the structure that most American industry has had since the beginning, a structure (WSP claims) that is vigorously maintained through application of the antitrust laws. And, WSP further claims (citing recent experience in the telephone, natural gas, and electric power industries), the structure it contemplates for the rail industry is neither radical nor novel as respects network industries.

Supplementary guidelines to further the public interest. WSP has proposed a set of supplementary guidelines that (it claims) are intended to provide a framework that will lead to the imposition of conditions on transactions involving two or more Class I railroads that will move the railroad industry toward a more competitive structure if such transactions are implemented. The supplementary guidelines contemplated by WSP: would apply to transactions subject to our jurisdiction under 49 U.S.C. 11323 that involve two or more Class I carriers and that result in the acquisition or change of control over rail assets having a fair market value exceeding $100 million; would establish as "the policy of the Board" that any transaction subject to the supplementary guidelines "shall, to the maximum extent possible, promote rail-to-rail competition" within the United States and between the United States and adjacent foreign countries; and would implement this policy by establishing two conditions that any transaction subject to the supplementary guidelines would have to meet.

Condition #1: local structure/local competition. Condition #1, which relates to the local structure of the industry and which would promote shipper access to local carriers, would require each shipper located in a "Competitive Market Area" and served by a Class I applicant to have direct access to a "Competitive Carrier," either via a neutral terminal or shortline railroad, or via cost-based switching provided by the Class I applicant, or via trackage rights available to the Competitive Carrier at cost-based rates.[200] Condition #1 would further require each Class I applicant: to eliminate all "Paper Barriers" with shortline or regional railroads to which it is a party;[201] and to offer overhead trackage rights at cost-based rates to each "captive" shortline or regional railroad

[200] A "Competitive Market Area," as that term is used by WSP, means every point on each of the Class I applicants that is within 20 miles of an interchange with a Competitive Carrier, or such greater distance as the Board might specify in specific cases. A "Competitive Carrier," as that term is used by WSP, means a carrier that, either directly or through connections not involving one of the Class I applicants, has access to substantially all "Major Market Areas" served by the Class I applicants. A "Major Market Area," as that term is used by WSP, means any Standard Metropolitan Statistical Area in the United States and any comparable area in any adjacent foreign country, or any area designated by the Board in a specific case, in which the annual number of rail car originations plus rail car terminations exceeds either 50,000 or any smaller number established by the Board in a specific case.

[201] The term "Paper Barriers," as used by WSP, encompasses all provisions of an agreement, direct or indirect, that restrain the ability of the shortline or regional railroad to interchange with carriers other than the Class I applicants.

(*i.e.*, each such railroad whose only physical connection with the national rail system is via the Class I applicant).[202] And, WSP adds: we should undertake a separate proceeding to determine an appropriate methodology for establishing the compensatory switching rates required by Condition #1; and, although Condition #1 does not contemplate a reciprocal arrangement for local competition, we might wish to consider whether including such an arrangement using our other powers under the statute (WSP cites 49 U.S.C. 11102 in particular) might be in the public interest.

Condition #2: long-haul structure/long-haul competition. Condition #2, which relates to the national structure of the industry and which would promote competitive routes between "Major Market Areas" in the United States, would require each "Major Market Area" served by a Class I applicant to have service by a "Competitive Long-Haul Carrier." WSP indicates that Condition #2 reflects its belief that, although both UP and BNSF operate in the Puget Sound area, UP is not a fully "Competitive Long-Haul Carrier" as respects the intermodal corridor between the Puget Sound area and Chicago. Traffic in that corridor, WSP contends, is dominated by BNSF (and, WSP adds, UP provides no service at all to the Port of Everett).[203]

International aspects. WSP contends that North America is rapidly evolving into a single transportation market in which the ability of railroads to compete outside the borders of the United States can have a direct impact on the level of competition among rail carriers within the United States. WSP further contends that, in the merger context, our conditioning power, which does not reach outside the borders of the United States, must be used with neutrality and sensitivity. (1) *Neutrality*. WSP contends that our conditioning power must be applied evenhandedly to require all carriers participating in the United States rail market to compete on a level playing field. A foreign carrier that wishes to participate in the United States rail market, WSP insists, should not be allowed to frustrate our efforts to promote additional competition in that market by hiding behind its foreign status and/or any favorable arrangements it may have in a foreign country.[204]

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[202] The trackage rights contemplated by WSP: would extend from the physical connection between the Class I applicant and the shortline or regional railroad to the nearest physical connection between the Class I applicant and a "Competitive Long-Haul Carrier;" but, except as required by the Board in specific cases, would not have to be offered if the closest physical connection with a Competitive Long-Haul Carrier was more than 20 miles from the shortline's or regional's connection with the Class I applicant.

[203] A "Competitive Long-Haul Carrier," as that term is used by WSP, means a carrier that, from the Major Market Area in question, has, either directly or through connections that do not involve use of the Class I applicants, access to all other Major Market Areas that is "Substantially Equivalent" to the access enjoyed by the Class I applicants. WSP indicates that the factors taken into account in determining "Substantial Equivalence" would include: (a) the length of the route; (b) the ruling grades on the route; (c) the ownership of the route; (d) the physical condition of the route; (e) the capacity of the route and the possibilities and cost of expansion; (f) the number and cost of interchanges involved; and (g) any other factors that bear upon the cost and quality of service over the route.

[204] WSP contemplates that, in the context of a transnational merger, the supplementary guidelines it has proposed would, with one exception, apply to rail operations in an adjacent foreign country in the same manner as if those operations were conducted in the United States. The one exception noted by WSP involves a rebuttable presumption that, as respects points in Canada, compliance with the "interswitching" provisions of the Canada Transportation Act of 1996 satisfies

(continued...)

(2) *Sensitivity*. WSP contends that, as respects foreign activities affecting the United States rail market, we should exercise our conditioning power in a manner consistent with the requirements of the foreign jurisdiction, provided that this can be done without undermining our objectives for the United States rail market. WSP further contends that our conditioning power should not be used to correct conditions in a foreign market that do not prejudice U.S. shippers or U.S. railroads; it is not, WSP insists, our responsibility to promote the interests of foreign shippers, foreign ports, or foreign railroads, except insofar as necessary to provide a level playing field for rail-to-rail competition in the United States.[205]

Implementation of transactions. WSP, which notes that there have been difficulties in the implementation phase of several recent rail mergers, claims that there are two implementation problems that must be addressed. (1) *Cash transactions; voting trusts*. WSP, citing the CSX/NS/CR transaction in particular, contends that the "practice" of permitting a cash transaction to be closed into a voting trust pending final Board approval effectively precludes meaningful review of the transaction's financial aspects, because in such a situation (WSP claims) the imposition of conditions that would significantly affect the transaction's value to the applicants might well subject the applicants to irreparable financial harm. WSP insists that, to ensure that this situation does not occur in connection with future transactions, our regulations should be amended to provide that no transaction subject to the supplementary guidelines contemplated by WSP will be approved "where the transaction has been structured, directly or indirectly, to result in a payment of cash or assumption of debt by one or more of the involved Class I carriers, or by one or more of their affiliates, prior to approval of the transaction by the Board, where the combined cash payment and debt assumption exceeds $500 million, unless specifically authorized by the Board."

(2) *Operating plan review*. WSP contends that, in recent merger proceedings, there has been no detailed and effective critique, from the perspective of plan implementation, of the applicants' traffic projections, traffic flows, operating plans, and available assets. This situation, WSP insists, must be corrected. WSP therefore urges that applicants be required to submit to the Board and to serve on the parties to the proceeding, at the time of submission of the § 1180.8 operating plan, an analysis of that plan and a certification prepared by independent consultants acceptable to the Board. WSP contemplates that the independent consultants would certify that they had been given full access to all relevant data and that, in their professional opinion, and subject only to any specifically listed exceptions and qualifications, the applicants' projections of traffic volumes and traffic flows "are reasonable," and the operating plan and the assets available to the applicants "are adequate to serve the projected traffic volumes and traffic flows."[206]

THE PORT OF PORTLAND, OREGON. POPO, which supports the positions taken by AAPA, contends: that ports are tremendous economic generators and transportation enablers, with economic impacts reaching well beyond their local communities; that ports are, in fact, one of the

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[204](...continued)
Condition #1 of WSP's supplementary guidelines.

[205] WSP notes, in this respect, that, although the lack of rail competition that now exists at the Port of Halifax may disadvantage that port, it is questionable whether such lack of competition disadvantages any U.S. shipper and/or any U.S. railroad.

[206] WSP recognizes that applicants' plans with respect to merger implementation cannot be static; such plans, WSP notes, will evolve over time. WSP therefore suggests that it might make sense to require that the independent consultants render a supplementary opinion on applicants' final plans immediately prior to consummation.

essential elements connecting water, rail, and truck transportation in the movement of domestic, regional, national, and international commerce; and that, therefore, the effect on ports should be considered as a major factor in determining whether a consolidation of Class I railroads is in the public interest. Railroads, POPO insists, should not be permitted, as part of a major merger, to unilaterally and arbitrarily choose one port or range of ports over another, or to otherwise differentiate services to competing ports, without oversight from the Board to assure that rail service from/to ports is provided as required by public and private interests. POPO therefore asks that "the interests of the ports" be added as a separate criterion in § 1180.1. Only in this manner, POPO argues, will the issue of the impact on ports, and therefore on trade, be totally developed, which (POPO adds) will allow the Board to make a fully-informed decision as to the public benefits of a proposed consolidation.[207]

THE PORT OF CORPUS CHRISTI AUTHORITY OF NUECES COUNTY, TX. POCCA, which fully supports the recommendations made by AAPA, contends that, because ports play an essential role in our nation's economy, commerce, and defense, the micro- and macro-economic impact and effect of major rail mergers on ports must be given serious consideration in all major rail merger proceedings. POCCA asks, in particular, that "the interests of affected ports" be included as a new and separate criterion in § 1180.1(b)(1). Ports, POCCA insists, are not seeking special consideration; they seek, rather, only to be allowed to compete in serving domestic and international customers, enhancing the benefits for surrounding communities, and obtaining a return on the huge public and private investments that have been made in port facilities.[208]

THE PORT OF HOUSTON AUTHORITY. POHA, which agrees that the regulatory scheme crafted in the early 1980s must be revised to reflect current realities, warns that the intense concentration that exists in the railroad industry today, when combined with regulatory policies that support excessively high rates for shippers and plants captive to a single railroad, works to the long-term detriment of cities like Houston that depend on industrial activity for their economic vitality. A continuation of the prevailing railroad regulatory philosophy, POHA contends, will threaten the future growth of Houston by making it a less-attractive location for petrochemical production.

Railroad competition. POHA indicates that it is not uncomfortable with the prospect of having only two large nationwide railroads; two financially-strong nationwide rail systems, POHA contends, would have the financial strength to invest adequately in physical plant improvements and equipment, to provide quality service, and to weather the inevitable downturns in economic activity. POHA adds, however, that the benefits of a two-railroad system will not be available to many shippers unless effective competitive access to each of the remaining railroads is available to all shippers. It is, POHA contends, time for a fundamental policy change in the regulatory scheme regarding railroad competition, with the objective of assuring competitive rail options, at the point of origin and destination and also as respects routings,[209] for all shippers who use the U.S. railroad system. (1) *POHA's recommendations*. POHA therefore recommends that our revised merger regulations require that rail-to-rail competition must be preserved where it now exists, that rail-to-rail competition must be created where it does not now exist, and that competitive routes at

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[207] The Port of Portland is served by UP and BNSF.

[208] The Port of Corpus Christi is served by UP, BNSF, and Tex Mex.

[209] POHA warns that future rail mergers may, by extending existing bottlenecks, further diminish the competition now available to Houston-area shippers.

reasonable rates must be preserved. POHA also recommends that our revised merger regulations require merged railroads to permit competitive access to all shippers located on their lines in major terminal areas and also to all shippers located on their lines within a pre-determined distance from a railroad interchange point. POHA further recommends that our revised merger regulations require merged railroads to maintain existing gateways and existing joint-line rate levels at those gateways, subject to an annual indexing administered by the Board.

(2) *Implementation of POHA's recommendations*. POHA adds that it is aware that its recommendations, if implemented poorly, could discourage future mergers, because (POHA explains) a railroad would not be likely to enter into a merger if it were required, as a condition of the merger, to open its captive shippers to its competitors while the competitors, which would not themselves be merging, would not be required to open their captive shippers to competition. POHA suggests that there are a number of ways to solve this problem. (1) POHA contends that we could condition a merger on opening captive shippers to competition, but could withhold the effectiveness of that condition until subsequent downstream mergers occurred and the open access requirement could be applied to all railroads at the same time. POHA notes, however, that this approach would delay the day when shippers receive competitive choices. (2) POHA contends that we could establish a relatively short "open window" time frame in which railroads could propose mergers (all of which could be considered together), after which no merger applications would be accepted for an extended period of time, perhaps as much as 20 years. POHA indicates that this approach, which is apparently the approach it prefers, would prevent any railroad from being disadvantaged by having its merger proposal considered first.

(3) *Neutral switching railroad*. POHA contends that the best way to assure competitive access to shippers in a major terminal area would be a neutral switching railroad accountable to a board comprised of shippers located in that terminal area. POHA explains that, whereas both reciprocal switching and trackage rights have inherent risks of service discrimination against the railroad providing the competitive service, the neutral switching railroad contemplated by POHA, by its design and governance, would not have any incentive to discriminate against any of the line-haul railroads.

Port issues. POHA, which indicates that equity among ports is of particular importance, contends that shippers' choices as to which ports to use for their traffic should be driven by market forces, not by artificial preferences granted by railroad management to specific ports. POHA therefore recommends that our merger regulations be revised to require a merged railroad to maintain strict neutrality between the ports it serves, which (POHA explains) would mean that the merged railroad could not give routing, service, rate, or promotional preferences to one port over another. POHA further recommends that we require merger applicants to include in their merger application a comprehensive Ports Impact Statement and a Ports Service Plan. And, POHA adds, we should make implementation of the Ports Service Plan subject not only to our oversight but also to oversight by a Ports Review Board comprised of representatives of the ports in the merged railroad's service area.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY. PANYNJ contends that the major problem today with respect to rail service within the Port of New York/New Jersey is a lack of rail infrastructure.

General policy statement. PANYNJ contends that, because the railroad industry is now so highly concentrated, and because further rail consolidations may have the effect of limiting rail competition and reducing the adequacy of rail service, further rail consolidations should be favored only where the involved carriers can affirmatively demonstrate that the consolidation at issue will enhance competition and improve rail service. And, PANYNJ adds, the involved carriers should also be required to demonstrate that the anticipated competitive enhancements and improved service could not be accomplished by means other than the proposed consolidation.

Consolidation criteria. PANYNJ contends that explicit recognition should be accorded to the fact that the parties potentially affected by consolidations include communities, ports, and commuter rail service providers. PANYNJ further contends: that, in the concentrated rail industry that exists today, the loss of alternative routes, whether through parallel mergers or end-to-end mergers, involves substantial anticompetitive risks; and that, for this reason, any consolidation that reduces competitive alternatives must be viewed with suspicion even if it fits the classic definition of an end-to-end transaction. PANYNJ therefore recommends that § 1180.1(b)(1) be amended by adding thereto two additional criteria: (a) the effect on other entities, including communities, ports, and commuter railroads; and (b) whether the benefits claimed by proponents of the proposed consolidation could be achieved by means other than consolidation.

Public interest considerations. PANYNJ contends: that the consolidations that have occurred since Staggers, coupled with the other reforms introduced by Staggers, have improved the rail industry's financial health; that, however, these consolidations and other reforms have been accompanied by a drastic downsizing not only of rail infrastructure but also of the rail industry's relative economic importance; and that, in light of these realities, it is difficult to imagine the justification for further contraction of rail infrastructure through consolidations. PANYNJ therefore contends that § 1180.1(c) should be amended to reflect the fact that rail consolidations can no longer be presumed to be in the public interest; the public interest today, PANYNJ insists, is inextricably bound to the health of the entire rail system, not merely to the financial success of a carrier or a combination of carriers. And, PANYNJ adds, an amended § 1180.1(c) should further provide: that only those benefits of a consolidation that could not be accomplished by actions other than consolidation will be regarded as public benefits; that any consolidation that involves a reduction in rail competition and/or in the level and quality of rail services available to the public will be looked upon with disfavor; that any consolidation that reduces competitive alternatives, or that would permit the consolidating carriers to reduce those alternatives in the future, will be looked upon with disfavor; and that, to the extent that proponents of a consolidation seek to reduce costs by reducing capacity, they will be required to demonstrate that the reduction will not result in harm to essential rail services.

Downstream effects. PANYNJ contends that § 1180.1 should be revised to provide that, in any consolidation proceeding, the likely "downstream" effects of approval, including the likely responses of other rail carriers, will be considered. And, PANYNJ adds, we should further provide: that, insofar as such likely responses would potentially harm the public interest, that harm will be regarded as if it were a direct result of the proposed consolidation; and that our conditioning authority will be used to protect against public injury that will occur as a result of downstream effects.

Cross-examination; confidentiality designations. (1) PANYNJ, which claims that our deliberations in past proceedings have been hindered because no objective fact finder has been present during the development of the record, insists that, particularly with respect to disputed operating plans and "downstream effects," credibility is as much an issue in our consolidation proceedings as in every other form of judicial and administrative action. PANYNJ therefore contends that we should devote sufficient resources to consolidation proceedings to insure that the credibility of witnesses can be fairly tested. PANYNJ apparently contemplates that this testing would occur at hearings presided over by an Administrative Law Judge "or other qualified person." (2) PANYNJ, which claims that abuses of the "Confidential" and "Highly Confidential" designations have prevented the development of meaningful records in past proceedings, contends, in essence, that the use of these designations in future proceedings should be monitored more closely than has been the case in the past. PANYNJ apparently contemplates that this monitoring would be done, at least in the first instance, by an Administrative Law Judge.

Market analyses and operational data. PANYNJ contends that §§ 1180.7 and 1180.8 should be amended to provide that the information presented will be closely reviewed to ensure that it is consistent and credible. PANYNJ believes that, in the past, traffic projections have not always been matched against infrastructure limitations or other constraining conditions.

Voting trusts. PANYNJ, which believes that the acquisition costs incurred by CSX and NS in connection with the CSX/NS/CR transaction have left both CSX and NS too financially strapped to make the infrastructure investments necessary to provide adequate service to the public, contends that, as respects future transactions, our regulations should be revised to allow us to prevent financially imprudent transactions before they occur. PANYNJ contends, in particular, that § 1180.9 should be revised to require applicants to submit, prior to the approval of any voting trust that would allow the consolidation to go forward to financial conclusion, detailed financial information that demonstrates, with reasonable certainty, that the proposed transaction will not undermine the ability of the surviving carrier(s) to have or raise sufficient debt and capital to make necessary investments in ongoing rail operations.

APPENDIX J: MEMBERS OF CONGRESS

U.S. REPRESENTATIVE JOHN J. LAFALCE. Rep. LaFalce claims that, although Western New York (also referred to as the Niagara Frontier region) is one of the largest rail markets in the nation, its industrial base has been stifled by a lack of rail competition. Rep. LaFalce insists that it is time for a new federal emphasis on rail policy, and he further insists that, in considering any new rail merger, we should keep several standards in mind. He contends, in particular: (1) that, in an increasingly interdependent world in which domestic economic growth is tied to international trade, federal policy should promote efficiencies and growth in all sectors of the national economy;[210] (2) that, whenever possible, rail competition should be enhanced both to stimulate the national economy and also to position manufacturing sectors to compete effectively in the global marketplace;[211] (3) that, in order to encourage local economic development and to improve safety for local communities, railroads will have to make substantial and enforceable commitments to repair and develop the rail infrastructure;[212] (4) that intermodal expansion can reduce transportation

[210] This standard, Rep. LaFalce adds, is particularly important with respect to Western New York, which has seen its manufacturing base erode steadily since the 1960s.

[211] Rep. LaFalce claims that, in the context of the CSX/NS/CR transaction, this standard would have required that Western New York be made a "shared asset area."

[212] Rep. LaFalce claims that, on account of years of neglect by Conrail, there are now extensive deficiencies in the rail infrastructure in Western New York.

delays, decrease costs, protect the environment, and streamline manufacturing;[213] and (5) that rail service should be guaranteed, with automatic penalties for service failures.[214]

U.S. REPRESENTATIVE JERROLD NADLER. Rep. Nadler believes that serious consideration must be accorded to the prospect that only two major railroads will dominate the U.S. market, especially if one of those companies might be foreign-controlled. The Board, Rep. Nadler insists, must modify its regulations if the United States is to have an efficient rail system in the next century.[215]

Reductions of rail facilities. Rep. Nadler contends that we must cease considering further reductions of rail facilities as a potential benefit and instead view further reductions as a potential harm. Rep. Nadler argues: that the physical plant of the railway system has been trimmed to levels that deny it the ability to handle any significant increase in traffic;[216] that redundancy has been largely lost, making the system vulnerable to major disruptions; and that, in its current state, the nation's rail system could not withstand a natural or man-made disaster because few supporting parallel facilities remain and few of those remaining are in useable condition. Rep. Nadler adds that we should look at the possibility of requiring the restoration of track capacity where existing capacity is found to be inadequate to move freight in a manner consistent with national needs.

Independent review of analyses. Rep. Nadler contends that we should obtain an independent review of all financial and operational analyses submitted by merger applicants. These analyses must be reviewed, Rep. Nadler argues, because it is necessary to guarantee that the financial and capacity claims of merger applicants are reasonable; but, he adds, such reviews should be conducted by an independent consultant, because, Rep. Nadler claims, recent events have demonstrated that the Board, due to constrained staff resources, is not equipped to conduct such reviews on its own. Rep. Nadler suggests that the independent consultant would: determine whether the applicants will be able to operate efficiently; ascertain if the price paid for the acquisition is fair and affordable, and will leave the railroad with sufficient reserves to fund all necessary post-merger capacity-related improvements; and report on the compatibility of the information technology of the merged lines (*i.e.*, report whether such technology will be fully compatible by the start date of the merger). Rep. Nadler adds: that application fees should be increased to cover the increased costs of these independent audits; and that, to avoid conflicts of interest, any retained consultant must not have relationships that would compromise the consultant's objectivity.

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[213] Rep. LaFalce, noting that the Western New York/Southern Ontario region is becoming an intermodal center for distribution throughout North America, insists that the encouragement of intermodal investment, uniform standardization, and automation should be a federal priority.

[214] The CSX/NS/CR transaction, Rep. LaFalce claims, has been very disruptive to manufacturers in Western New York. And, Rep. LaFalce contends, if railroads can guarantee service or compensation for their large customers, we should administratively enforce such guarantees for all shippers.

[215] Rep. Nadler's motion to late file his comments is granted, and his comments are accepted for filing and made part of the record in this proceeding. So ordered.

[216] Rep. Nadler notes that, even where lines have not been eliminated entirely, they have often been single-tracked.

Data in set format. Rep. Nadler contends that, to facilitate an objective review of the data submitted in support of a merger application, we should design and establish a fixed format in which data that are required for mergers must be submitted. The varied presentation of data in past proceedings, Rep. Nadler claims, may have contributed to our inability to objectively analyze the potential outcome of past mergers.

Conditions to protect the public interest. Rep. Nadler contends that, to protect the public interest, we should impose conditions on merger applicants to prevent further erosion of the nation's rail system; it is not enough, Rep. Nadler insists, to impose conditions only when "essential services" are affected. Rep. Nadler argues: that, when major railroads are allowed to merge without restrictions that minimize adverse effects, the public suffers; that the nation as a whole is adversely affected as a greater number of shippers switch to trucks; and that conditions should be imposed even when alternative transportation is available, especially when the only transportation alternative is to move goods by truck.

Competition alone is not sufficient. Rep. Nadler contends that competition alone is not enough to guarantee an efficient national rail system. Competition between megacarriers, Rep. Nadler argues, will not be adequate protection for any but the largest shippers who have access to both carriers and enough traffic to be of interest to them. Rep. Nadler further contends: that we should take action to deal with environmental factors, particularly within urban areas suffering from severe pollution; that duplicate lines should not be under single management; that these situations should be altered even if the problem requires appending a line to a non-applicant; that missing links must be put in place even where an applicant does not own a logical link and the owner does not seek inclusion; that funds should be shifted to assure that track owners have the ability to maintain and improve service, particularly where a duplicate line or link must be given to a financially weak carrier to assure continued service; and that a major carrier should be required to subsidize a financially weak carrier if that is what is needed to maintain competition, redundancy, or access to a population center.

The "one case at a time" rule. Rep. Nadler contends that we should eliminate the "one case at a time" rule. Rep. Nadler argues: that applications should no longer be viewed in isolation; that, rather, each application should be viewed as a reshuffling of the entire national system; that the nation cannot afford the luxury of considering one merger at a time when reality dictates that one merger will likely lead to another; and that ownership of lines by an applicant should not restrict the Board's ability to realign assets to achieve competition, redundancy, and adequate service for all markets. And, Rep. Nadler adds, further consolidations should not occur until the nation has had an opportunity to review the consequences of previous mergers.

No "cram down." Rep. Nadler contends that we should prevent any effort by applicants to "cram down" labor conditions on rail employees after a merger is completed. The Board, Rep. Nadler insists, should allow modification of a collective bargaining agreement only if both labor and rail management agree.

U.S. REPRESENTATIVE JACK QUINN. Rep. Quinn contends that, when considering the merits of a proposed rail consolidation, we should emphasize increasing competition; increased competition, Rep. Quinn believes, will help to improve the health and viability of the North American railroad industry. Rep. Quinn further contends that, in general, we should: accord greater weight to increased rail competition; eliminate unreasonable barriers to competition; ensure reasonable rates in the absence of competition; and remove unnecessary regulatory barriers that impede the ability of rail shippers to obtain rate relief. Rep. Quinn adds that it is essential that any further railroad consolidation not result in additional congestion and disruption of rail service into and through the Buffalo, NY, area.

APPENDIX K: NITL, CURE, & ARC

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE. NITL contends that, in light of the changes that have occurred since the enactment of the Staggers Act in 1980, we should consider a range of changes to our policies and precedents. In the past 20 years, NITL notes, the rail industry has evolved from a system with numerous carriers to a system with only a very few large carriers. Indeed, NITL adds, there now exist two rail duopolies in the United States, one in the East and one in the West, each of which dominates the rail landscape in its respective region. ICC/STB merger policy, NITL believes, has not maintained the level of competition envisioned by the Staggers Act, but has taken (so NITL claims) a crabbed view of the kinds, extent, and forms of rail competition, and has chosen to maintain only certain types. NITL therefore suggests that we should become more sensitive to the multiple hues of competition, and act to ensure that those tones and tints are preserved. NITL urges, in particular, a wide range of revisions to our merger and other rules.[217]

The "one case at a time" rule. NITL contends that we should eliminate this rule. The "one case at a time" rule, NITL argues, may have made sense 20 years ago, when the rail industry was far less concentrated than it has since become. NITL notes, however, that, in the past 20 years, the rail industry has consolidated to such an extent that it is now relatively easy to determine the few strategic responses to any particular major rail merger. An analysis of "cumulative impacts and crossover effects" is necessary, NITL adds, to determine the full range of effects of a particular transaction.

The "one lump" theory. NITL argues: that the logic of the "one lump" theory is that a "segment monopoly" carrier has the wherewithal to "soak up" all the monopoly profits available on a route; that, however, this theory has never been validated by factual support; and that, as a factual matter, the theory clashes with the experiences reported by NITL members, who have negotiated with competitive "downstream" carriers prior to their merger with an "upstream" railroad, and who believe firmly that those negotiations resulted in real benefits to the shipper as compared to the shipper's position post-merger. NITL further argues that the logic of the "one lump" theory has been called into question by the recently adopted "contract exception" applicable to "bottleneck" cases, which (as interpreted by NITL) provides that, although a shipper generally has no right to challenge a "bottleneck" rate unless the shipper wins a competitive access case, the shipper does have a right to challenge a "bottleneck" rate if (a) the bottleneck carrier cannot serve both the origin and the destination, and (b) the shipper has secured a separately negotiated contract for the non-bottleneck segment of the route. NITL claims that the logic of the "contract exception" (*i.e.*, the notion that it may be to the shipper's advantage to negotiate a contract for the non-bottleneck segment) is at odds with the logic of the "one lump" theory (*i.e.*, the notion that the bottleneck carrier can "soak up" all the monopoly profits available on the route). And, NITL notes, following a vertical merger the ability of a shipper to utilize the contract exception will be completely lost (unless the shipper brings and wins a competitive access case), because, once the bottleneck carrier has merged with a

[217] NITL claims that, if we intend to provide for a truly competitive rail marketplace, we must act both within and outside our Part 1180 merger regulations.

"downstream" carrier, the contract exception, by its very terms, ceases to be applicable (provided, of course, that the merger allows the merged carrier to serve both the origin and the destination).[218]

NITL therefore contends that we should: (a) overrule the presumption created by the adoption of the "one lump" theory in past cases, and (by overruling that presumption) place the burden on applicant carriers in future cases to prove that a future end-to-end merger would not be harmful to vertical competition;[219] and (b) undertake a study of the downstream effects of prior rail mergers, and (by undertaking that study) generate a factual basis for evaluating the effects of future vertical mergers.[220]

Claimed benefits of future mergers. NITL contends that we should: (a) examine such claims more critically than we have in the past; and (b) require applicant carriers to include an analysis of the applicants' track record, by comparing the claimed benefits in each of the first five post-merger years following their immediate past mergers to the actual results in such years of those immediate past mergers.[221]

Reciprocal switching. NITL contends that, under the "competitive access" standards set forth at 49 CFR Part 1144, a shipper seeking reciprocal switching relief must present evidence on: (a) likely or actual antitrust-type competitive abuse, such as market foreclosure, price squeezes, refusal to deal, or monopolization or predation; (b) market dominance; (c) rate unreasonableness, including an inquiry into the carrier's costs and "Stand-Alone Cost" (SAC); (d) the nature of the carrier's operations in the area to establish that there is a terminal area; and/or (e) severe service failures coupled with a showing that the operations of the carrier against whom relief is sought will not be impaired. These standards, NITL maintains, present insuperable obstacles to a grant of reciprocal switching; the discovery requirements alone, NITL suggests, are daunting; and, NITL adds, because the agency has never granted a competitive access remedy in favor of a shipper, no shipper can be sure what, if any, evidence, would ever satisfy the standards. NITL insists that, as a practical matter, relief under our competitive access rules is unattainable. NITL therefore contends that we should change our Part 1144 rules to permit reciprocal switching within a specified distance of a terminal, with the fee for such switching to be determined by arbitration should the carrier and the shipper fail to agree. NITL insists that we clearly have the discretion, not only to make such a change as part of our conditioning authority for merging carriers, but also to make such a change with respect to reciprocal switching under our Part 1144 regulations.

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[218] NITL adds that the logic of a requirement that merger applicants keep gateways open (a requirement that NITL would have us impose) is also at odds with the logic of the "one lump" theory. Any such requirement, NITL contends, would presume: (i) that shippers benefit from pre-merger competition between downstream competing carriers; and (ii) that the merger of an upstream carrier and a downstream carrier will result in some competitive harm to the shipper. The "one lump" theory, NITL argues, presumes precisely the opposite.

[219] Applicant carriers, NITL notes, should be directed to submit actual evidence showing that, in past mergers, the price to "downstream" shippers has not been affected when the upstream and downstream competitors merged.

[220] There should presently be, NITL suggests, a very significant body of data reflecting the BN/SF, UP/SP, and CSX/NS/CR transactions that could be examined in quantifying the effects of prior mergers on downstream competition.

[221] NITL would limit the immediate past mergers that would have to be considered to those that took place within the last eight years.

Existing gateways. NITL insists that, in order to preserve even the existing level of competition in the routing of traffic, we should ensure that future mergers are not allowed to create new bottlenecks. NITL contends that, to this end, we should: (a) require future merging carriers to keep existing gateways "open" both physically and economically; and (b) guarantee that the shipper continues to be able to challenge the rate over the gateway if the rate exceeds a maximum reasonable level, or if the carrier takes anticompetitive action to close the gateway, or if the carrier takes otherwise unlawful action.

Bottleneck rules. NITL insists that, if competition is to be preserved, much less affirmatively enhanced, our bottleneck rules will have to be revised. NITL warns that any future vertical mergers will effectively nullify the "contract exception" now applicable to "bottleneck" cases, which applies only if the bottleneck carrier cannot serve both the origin and the destination. NITL concedes that, even after a future vertical merger, a shipper could still challenge a bottleneck rate by a carrier providing origin-to-destination service; but a shipper could make such a challenge, NITL notes, only in the extremely unlikely event that it could win a competitive access case. NITL therefore contends that we should: (a) revise our bottleneck rules to require merger applicants to offer, upon request, contracts for the competitive portion of joint-line routes when the joint-line partner has a bottleneck segment; (b) require merger applicants to provide new through routes at a reasonable interchange point when they control a bottleneck segment, and the shipper has entered into a contract with another carrier for the competitive segment; and (c) carefully examine whether other mechanisms are feasible for broadening the availability of rail competition.

Merger acquisition premiums. NITL insists that, if we are to maintain effective regulatory oversight over rail carriers through our rate reasonableness authority, we must insure that the variable costs attributable to rail carriers are not affected by the premiums paid by rail carriers for their rail mergers. NITL therefore contends that we should revise our approach regarding the treatment of "acquisition premiums" in rail mergers, and should not permit such premiums to be used in calculating variable costs for jurisdictional threshold purposes or for determining a rail carrier's revenue adequacy.

Rail service. NITL, though noting that its members have experienced significant service failures as a result of certain past rail mergers, suggests that the focus now should be on the future: how to measure service; how to prevent service failures; and how to ensure that service is restored and shippers are made whole as soon as possible. (a) NITL insists that the data now available regarding service is not adequate for determining the extent, location, and severity of service problems; better "baseline" data, NITL maintains, are needed. NITL therefore contends that we should revise our reporting requirements for merged carriers to better determine the level of rail service.[222] (b) NITL contends that we should require carriers in future merger proceedings to submit service plans that would detail the service improvements that the merging carriers expect from the transaction, and that would contain measurable parameters for determining whether the carriers have in fact met their service goals. These plans, NITL adds, should include transit times over major corridors, so that shippers potentially affected by the transaction can determine if the proposed

[222] NITL adds that the data being developed as a part of our oversight of the CSX/NS/CR transaction should be applied to all carriers and supplemented by information relating to the single most important indicator of acceptable service: the actual time taken to ship goods from origin to destination.

transaction will provide service benefits or not. And, NITL further adds, these plans should also detail the remedial steps that the carriers would take in the event that the transaction led to service disruptions. (c) NITL further contends that our evaluation of the likelihood of the claimed service improvements should be a factor in determining whether to approve a merger, and/or whether to impose conditions that would tend to assure that the promised service improvements are in fact delivered. And, NITL adds, applicants' willingness to guarantee a certain level of service and to provide expedited mechanisms to resolve service and claims disputes should be a factor in this evaluation.

Paper barriers. NITL insists that, although "paper barriers" that prevent a Class III railroad from interchanging with any carrier other than its Class I "parent" may have been justified in the past, the time has come to reevaluate the desirability of these restrictions in the world that exists today. NITL contends, in particular, that we should closely scrutinize whether any type of competitive barrier should be permitted in future transactions. NITL further contends, with respect to paper barriers created as a result of past transactions, that we should develop procedures that would allow us to evaluate, upon application in particular circumstances, whether the Class I carrier has already received the reasonable economic benefit of the competitive restriction, such that further continuation of that restriction would not be appropriate.

Safety Integration Plans. NITL contends that safety should remain a key issue in rail merger proceedings and in rail operations, and that safety concerns are best addressed on a case-by-case basis. NITL urges continued use of the Safety Integration Plan (SIP) process that has been used in recent years.

Cross-border mergers. NITL contends that, because the market reach of a merged U.S./Canadian carrier would be quite large, and because any U.S./Canadian merger could affect traffic flows of key commodities both across the border and within each country, any U.S./Canadian merger applicants should be required to submit a full system operating plan, including rail operations outside of the United States, as well as an analysis of the competitive impacts of the proposed transaction on both sides of and across the U.S./Canadian border. And, NITL adds, any U.S./Canadian merger applicants should be required to separate the transaction-related benefits and harms that will accrue in the United States from those that will accrue in Canada.

"3-to-2" Situations. NITL contends that, because few if any shippers now have three competitive rail options from origin to destination, a re-examination of our "3-to-2" policies would not now be meaningful.[223]

CONSUMERS UNITED FOR RAIL EQUITY. CURE, which advocates federal policies that will promote competition and increase efficiencies in the rail industry, insists that, given current trends in the rail industry, we must reach beyond our merger regulations and institute additional rulemakings to meet our statutory charge of promoting a national rail policy that will foster effective competition. (1) CURE contends that, for any rail merger in which the application is filed after January 2000, our merger regulations should provide: that merger applicants must demonstrate that an increase in competitive options will be available to shippers following the proposed merger; and

[223] NITL adds, however, that, because certain limited markets are still served by three carriers over particular routes, we should very carefully evaluate the competitive condition of the rail industry in those markets, to ensure that the intensity of competition is fully preserved.

that no merger will be approved (i) that reduces transportation alternatives available to any current railroad customers, or (ii) that fails to provide additional options and enhanced service for railroad customers. CURE further contends that we should evaluate any future Class I merger on the assumption that any such merger is part of an "end game" that will leave only two major railroads in North America. (2) CURE contends that we should adopt rules that will change our current bottleneck policy, remove the "monopoly abuse" test from competitive access determinations, and enhance the ability of regional and shortline railroads to evolve as effective competitors and providers of rail service. CURE contends, in particular: (a) that we should reverse our current policy regarding bottlenecks and adopt a new policy requiring each railroad to quote a rate between any two points on its system where traffic can originate or be interchanged; (b) that we should affirmatively grant the right of Class I and small railroads to interchange at terminal areas and interchange points without being disadvantaged in any way in terms of operations or pricing; and (c) that we should eliminate all "paper barriers" that arbitrarily restrict full interchange rights for Class II and III railroads. CURE further contends (d) that we should initiate a proceeding to identify and eliminate present policies that discriminate against shippers and regional and shortline railroads and that prevent rail transportation alternatives. (3) CURE contends that, where we lack statutory authority to institute a rule change, we should notify Congress of our lack of statutory authority. CURE further contends that, with respect to any proposal that was supported by substantial testimony in the STB Ex Parte No. 582 hearings but that we do not ultimately adopt, we should indicate, in our final decision in this proceeding, whether the requested change was rejected as a matter of policy or due to a lack of statutory authority.[224]

ALLIANCE FOR RAIL COMPETITION. ARC insists that we must revise our regulations and our regulatory approach in a general fashion, and not simply as respects mergers. There is, ARC claims, but one answer that will resolve the serious problems that already exist under the current configuration of both rail industry structure and the regulatory policies that govern that structure: comprehensive rail policy reform aimed at restoring competition among rail carriers.

ARC contends that sound public policy toward future railroad mergers should be based on these principles: (1) the principle that a viable freight railroad industry is in the public interest (ARC believes that freight railroads are national assets that can provide relatively low-cost, energy-efficient, and environmentally benign transportation service); (2) the principle that railroad viability can be enhanced with competition (ARC believes that the best means for ensuring the railroad industry's viability is to encourage carriers to compete among themselves, as well as with other modes of transportation);[225] (3) the principle that the net impact on customers should be the key

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[224] CURE adds that, to the extent this proceeding is limited in scope to merger rules, we should initiate a separate rulemaking to develop pro-competitive rules that will have industry-wide application.

[225] ARC notes but dismisses the argument that competition would effectively deprive the railroads of the returns upon which they depend to attract capital, to reinvest in their networks, and to maintain and improve service. ARC insists that, although this has often been claimed as an impact of introducing competition, it has never been demonstrated when applied to any network industry that has transitioned from a monopoly to a competitive industry. The competitive process itself, ARC claims, is the best means of achieving the needed balance between cost and quality of service. Increased competition among the nation's rail carriers, ARC insists, would actually result in a $500 million improvement in net rail profit by 2005, thus allowing the rail industry to sustain (continued...)

merger criterion (ARC believes that railroad mergers should not be approved if the prospective cost reductions are offset by adverse service and/or rate impacts on railroad customers due to a reduction of competition); (4) the principle that competitive access is the preferred protection for customers (ARC believes that competitive access is preferable to regulation because it motivates carriers to be responsive to customer needs); (5) the principle that railroad customers need safe harbor protection (ARC believes that, in the absence of effective railroad competition, economic regulation is necessary to ensure that service is adequate and freight rates are reasonable); (6) the principle that railroad mergers are not the only way to lower operating costs (ARC believes that railroads can reduce costs through traffic growth and a wide variety of managerial and technological means); (7) the principle that post-merger performance must be closely monitored (ARC believes that we should establish procedures to measure post-merger performance and should issue an annual report of our findings for 10 years); and (8) the principle that, where desirable, adjustments should be made (ARC believes that, when railroad mergers cause unanticipated adverse impacts on customers, or when competitive alternatives provided for in a merger proceeding do not work, the situation can be rectified post-merger by opening competitive access and/or making economic regulation more effective.[226]

ARC further contends, with respect to our rail regulatory structure in general: (1) that we should make policy revisions that would provide realistic means of regulatory relief for rail customers that do not have the benefit of railroad competition;[227] (2) that we should change the revenue-adequacy criterion to a simply measure of "allowable return on equity," similar to that used in the public utility industry; (3) that we should undertake efforts to eliminate paper and steel barriers to competition between Class I carriers and shortline and regional railroad operators;[228] (4) that we should adopt appropriate rules to ensure that railroad market power cannot be used to determine the fate of railroad customers;[229] (5) that we should recommend legislative amendments that would permit further reliance on competition in the rail policy arena;[230] (6) that we should work with rail customers and Congress to develop and enact into law an appropriate method for providing protections for small captive railroad customers; and (7) that we should adopt an approach to rail policy as something that must evolve as the industry evolves.

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[225](...continued)
the gains made since the enactment of Staggers in 1980.

[226] ARC insists that merging railroads should be held responsible for the consequences of their post-merger service failures, and that regulators should be prepared to impose any of a broad range of sanctions — including fines, financial awards to customers, access, and even divestiture of certain lines — as appropriate given the nature and extent of the service failure.

[227] ARC suggests that these policy revisions might include the development of a final offer arbitration system, similar to that used in Canada, to provide an efficient and cost-effective alternative to costly, lengthy regulatory proceedings.

[228] A steel barrier, as ARC uses the term, exists when a Class I railroad removes a small portion of track to physically prevent movement of cars from the spun-off Class III's tracks to the tracks of a competitor of the Class I "parent."

[229] ARC contends, in this regard, that railroad market power is today so strong that railroads can arbitrarily pick and choose among certain categories of intermodal marketing companies (IMCs), and can thereby determine winners and losers within that customer group.

[230] ARC suggests, in particular, that we should support legislative changes respecting bottleneck situations and terminal area access.

Pro-competitive reform principles. Various parties, including ARC, have indicated that they support a package of principles (the so-called "principles for reform of merger proceedings and related regulation") intended to guide us in the development of improved policies and procedures.[231] These are the principles: (1) Stronger action must be taken to hold merging railroads accountable for their promises of improved service and more efficient operations. (2) The severe service problems that have resulted from past railroad mergers must be prevented and/or mitigated through effective remedies, including performance guarantees, compensation, and access to other railroads. (3) Current regulatory policies, including the bottleneck decision, the "one-lump" theory, and the "2-to-1" rule, have failed to prevent the reduction of competition among major railroads, which now enjoy unprecedented market power. (4) The regulatory policies of the past, which we (it is said) have recognized as inadequate and which even many railroads (it is added) are now recognizing as flawed, should be replaced by new policies aimed at promoting competition. (5) Access remedies such as trackage rights and switching on fair and economic terms should be more readily available, whether or not there are future mergers. (6) Contractual and operational barriers to competition from smaller railroads should be eliminated or reduced, whether or not there are future mergers. (7) Gateways for all major routings should remain open on reasonable terms. (8) Adverse impacts of rail consolidations on the safety of rail operations and on the interests of rail labor should be mitigated. (9) Cross-border mergers should not interfere with effective regulation and the enhancement of competition. (10) Railroad mergers can no longer be considered in isolation.

APPENDIX L: COAL INTERESTS

THE "SUBSCRIBING COAL SHIPPERS" GROUP. SCS contends: that, since 1995, the Class I railroads have engaged in a series of mergers that have been, for the most part, disastrous for their customers and themselves; that the carriers have been unable to maintain adequate service as their systems have become clogged; that the congestion has substantially increased the cost of service for those goods the carriers have been able to move; that the increase in the cost of service has been exacerbated by the write-up of the book value of the assets the carriers acquired through their consolidations; that reduction of congestion has entailed increased capital and operating expenses, creating pressures for higher rates; that capital (both financial and intellectual) that could have gone to maintaining and expanding infrastructure and service has instead been diverted to paying merger premiums and employee buyouts; and that productivity growth has plummeted, so much so that there is now a significant prospect that the RCAF productivity adjustment could turn negative. And, SCS adds, much of the cost and other burden has fallen on shippers, particularly captive shippers, who have received poor and/or inadequate service based on inflated costs.

SCS insists that it is time to adopt a new approach to mergers. SCS claims: that, in order to provide shippers with better service, the rail industry needs competition, not protection; that competition will induce the railroads to deliver improved service efficiently, which (SCS believes) is the key to the industry's recovery and future growth; and that mergers may provide an opportunity to enhance competitive rail service, but only if the Board engages in a pro-active and procompetitive role. SCS therefore proposes that we adopt merger rules: that require merging carriers to make shippers financially whole for merger-caused service disruptions; that require merging carriers to open their rail lines to increased rail competition; and that prevent merging carriers from passing

[231] The reform principles have also been supported by PPL, CMA, APC, SPI, Dow, WB&GC, IMC Global, and AF&PA.

through to shippers cost increases the carriers sustain either as a result of merger-caused service disruptions or as a result of asset write-ups caused by acquisition premium payments.

Service issues. SCS contends that, because rail is the dominant means of transporting utilities' coal, its members have suffered greatly as a consequence of merger-caused service problems; the merger-related gridlock in coal transportation service that has occurred in recent years, SCS claims, has been devastating for utility coal shippers that need a constant supply of coal in order to run their coal-fired electric generating facilities. SCS further contends that, as a practical matter, merger-related service problems have often compelled its members to procure alternate electricity supplies, even though (SCS notes) there have invariably been huge cost penalties (*e.g.*, the difference between the cost of coal-fired generation and the cost of substitute generation or purchased power). SCS therefore asks that we amend our merger rules by requiring merging carriers to make every shipper "financially whole for any injuries the shipper incurs as a result of post-consolidation service problems." The compensation scheme contemplated by SCS: would apply to all major consolidation transactions approved on or after January 1, 1996;[232] would require the merged carrier either to pay a claim or to reject the claim within 14 days of the receipt thereof; would, in the case of a rejected claim, allow the shipper to institute an administrative proceeding to obtain payment; and would require the Board to complete any such proceeding within 180 days after the filing of the request for relief. The compensation scheme contemplated by SCS would also preclude the merged carrier from raising as a defense that its liability to any shipper is limited by the terms of any contract or other arrangement with the shipper.

Competition issues. SCS, which is concerned with and frustrated by the merger-generated concentration of market power and the current lack of competition in the railroad industry, insists that any new rail mergers, which (SCS notes) will create even more concentration in the rail industry, must come with three kinds of relief intended to enhance competition: access relief, which (SCS indicates) would promote competition by giving shippers the opportunity to obtain access to a second carrier where such access is physically practicable; bottleneck rate relief, which (SCS indicates) would promote competition by requiring consolidated carriers to provide transportation rates over bottleneck route segments;[233] and "paper barriers" relief, which (SCS indicates) would promote competition by eliminating restrictions that prevent shortline railroads from providing competitive interchanges with major rail carriers.[234] And, SCS adds, it disagrees with the railroad industry's argument that any procompetitive relief will financially devastate the industry;

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[232] SCS insists that its compensation scheme must apply to the UP/SP and CSX/NS/CR transactions; issues concerning damage recoveries, SCS explains, remain outstanding as a result of these transactions.

[233] SCS notes that the ANPR suggests that merger applicants might be required to offer, on request, contracts for the competitive portion of joint-line routes when the joint-line partner has a bottleneck segment. This proposal, SCS insists, would not remedy the "contract first" problem. SCS claims that experience with Powder River Basin coal movements has taught that, because the competitive-segment carrier will not offer a competitive contract proposal "on the come," the only way to make bottleneck relief work is to permit the shipper to obtain (and litigate, if necessary) a bottleneck rate first, before it negotiates a contract with a competitive-segment carrier.

[234] SCS defines "paper barriers" as the terms in agreements between (i) Class I railroads and (ii) Class II or Class III railroads (both of which are referred to by SCS as "shortlines") or noncarriers which impair or penalize the shortline's freedom to interchange traffic with carriers with which the shortline can physically connect.

experience, SCS claims, has shown that increases in competition in the rail industry in the limited areas where it has occurred have greatly increased the industry's financial bottom line. (1) *Access relief*. SCS contends that we should condition every major rail consolidation transaction by allowing "any person, including an affected shipper, [to] request the consolidated carrier(s) to allow a second carrier to use its or their facilities to provide competitive rail service." The access relief contemplated by SCS: would allow the carrier 90 days to respond to the request; would, if the carrier denies the request, allow the requesting person to seek relief in an administrative proceeding; would, in the case of such a proceeding, result in an order requiring "railroad facilities owned by the involved rail carrier to be used by another rail carrier if the Board finds that use will not substantially impair the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business;" and would, if such an order were issued, require that the owning carrier be compensated "for the use of the facilities on a usage basis based upon a sharing of the total costs incurred."

(2) *Bottleneck rate relief*. SCS contends that we should condition every major rail consolidation transaction by requiring that the consolidated rail carrier(s) must, upon the request of a shipper, "establish a rate for transportation and provide service requested by the shipper between any two points on the system of that carrier where traffic originates, terminates, or may reasonably be interchanged." The bottleneck rate relief contemplated by SCS would require the carrier to establish a rate and provide service upon request and would allow the shipper to challenge the reasonableness of such rate, without regard to (a) whether the rate is for only part of a movement between an origin and a destination, (b) whether the shipper has made arrangements for transportation for any other part of that movement, or (c) whether the shipper currently has a contract with any rail carrier for part or all of its transportation needs over the route of movement.

(3) *"Paper barriers" relief*. SCS contends that we should condition every major rail consolidation transaction by allowing "any person (including an affected shipper)" to request that the consolidated carrier remove one or more paper barriers. The paper barriers relief contemplated by SCS: would require the carrier to respond within 30 days; would, if the carrier does not grant the request, allow the requesting person to seek relief in an administrative proceeding; and would, in the case of such a proceeding, result in an order directing the consolidated carrier to remove the paper barrier, "unless the carrier can demonstrate that retention of the paper barrier is in the public interest." The paper barriers relief proposal contemplated by SCS further provides that, in making a public interest finding, we would be guided: (1) by the principle that paper barriers to interchange are inherently anticompetitive, and are unreasonable unless they are necessary to the achievement of a public benefit that outweighs the harm they cause to competition, and then only if they are no broader or more restrictive than necessary to achieve that benefit; and (2) by the rebuttable presumption that a paper barrier is unreasonable insofar as it (i) lasts longer than five years from the date of the agreement containing the paper barrier, or (ii) includes any financial penalty on a shortline that is triggered by the interchange of traffic with another carrier, or (iii) includes credits for traffic interchanged with a carrier against a rental or sale price that reflects a return of more than the railroad industry's cost of capital on the fair market value of the properties sold or leased.

Regulatory cost relief. SCS contends that shippers should not be required to shoulder the costs associated with merger-related service failures and the premium prices paid for rail acquisitions; a consolidated carrier, SCS insists, should not be allowed to pass through increased costs in the form of service disruption costs and purchase premiums to shippers via the inclusion of these costs in the Board's General Purpose Costing Systems (*e.g.*, the Uniform Railroad Costing System) and in its calculation of the RCAF. SCS therefore asks that we impose on every major rail consolidation transaction approved on or after January 1, 1996, a condition providing that, "[i]n any proceeding at the Board involving development or use of a consolidated carrier's costs for providing rail transportation service, costs associated with rail service problems, or purchase premiums paid for a carrier's assets,[235] shall be excluded from the carrier's cost of service under the Board's General Purpose Costing Systems."

Downstream effects. SCS agrees that we should consider downstream effects of a proposed transaction, including the likely strategic responses to that transaction by non-applicant railroads. Consideration of such effects, SCS argues, is particularly important in light of the national rail duopoly threat hanging over the rail industry.

3-to-2 situations; the "one lump" theory. SCS contends that we should look at 3-to-2 issues and one-lump issues on a case-by-case basis, without application of any presumptions that work to the disfavor of shippers seeking relief in cases raising these issues. SCS argues that, with respect to such matters, the merits of each situation should be carefully reviewed based upon the facts presented and the relief requested.

THE "CERTAIN COAL SHIPPERS" GROUP. CCS contends: that, over the past decade, the railroad industry has consolidated, and, as the industry has consolidated, rail service has deteriorated; that the deterioration of rail service is rooted in the diminishment of competition between the major Class I railroads; and that the cause-and-effect relationship between the lack of meaningful competition between the major railroads and the deterioration of the service provided by these railroads is particularly evident in the coal transportation segment of the railroad industry, and especially in the transportation of coal from western coal mines to electric generating plants in the western and midwestern United States. CCS therefore insists that we should change our regulations and policies in such a way as to facilitate improved *service* in the railroad industry by enhancing meaningful *competition* between the major Class I railroads.

Enhancing, not merely preserving, competition. CCS contends that we should review our regulations and policies in order to enhance, and not merely attempt to preserve, rail competition. CCS argues: that, as the railroad industry has become more consolidated, competition and service levels have generally decreased; that this demonstrates that the overall standard applied in prior rail mergers (*i.e.*, attempting to preserve pre-merger competitive levels) has been insufficient; that, therefore, the time has come to revise rail merger policy with an eye toward affirmatively enhancing, rather than simply preserving, competition; that the national rail system and the service provided over it will only improve if the few remaining railroads have incentives to make the investments and innovative changes that best arise out of an industry where the players are driven by competition; and that competition will spawn innovation and market-based actions on the part of the industry to improve rail service and the industry as a whole. CCS adds, however, that, in the western United States, where a rail duopoly already exits for coal transportation, such measures should apply to both BNSF and UP, and not just to the railroad that next decides to merge with another carrier.

Scope of this proceeding. CCS insists that the "rules" that must be revised go beyond the regulations promulgated specifically for rail mergers; we must, CCS believes, conduct a broad review of all rules and regulations related to rates and service for the purpose of establishing whether such rules and regulations will facilitate improved rail service and meaningful competition as the railroad industry continues to consolidate. CCS contends, in particular, that we must review the

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[235] SCS defines "purchase premium" as the difference between net book value and purchase price.

regulations at 49 CFR Part 1144 (intramodal rail competition), part 1146 (expedited relief for service emergencies), and Part 1147 (temporary relief under 49 U.S.C. 10705 and 11102 for service inadequacies), and also our so-called bottleneck "rules" (adopted in adjudication). Enhanced railroad competition, CCS warns, cannot be realized if procompetitive regulations are adopted for limited application in the merger context only. The result of such limited application, CCS claims, would be an unbalanced rail industry, where the merged railroad would be required to provide rates and service its competitors did not have to provide. And, CCS adds, failure to revise the rules and regulations cited by CCS in addition to the rules and regulations applicable in the merger context will provide a disincentive for railroads to merge at all.

Bottleneck rules. CCS contends that we should adopt regulations that require merger applicants to provide rates and service terms upon request over all bottleneck segments of track in cases where: (1) the merging railroad combines with a bottleneck railroad, thereby acquiring the full routing from an origin to a destination; and (2) there is an existing bottleneck on either of the merger applicants' systems where there is a current interchange between the merging carriers. (1) *The "one lump theory" and the contract exception*. CCS contends that we should resolve what CCS claims is an inconsistency between the "one lump" theory that has been used to deny relief to captive shippers in the rail merger context and the "contract exception" to the bottleneck rules. CCS argues that, in prior mergers (CCS cites BN/SF and UP/SP in particular) involving common control of a competitive origin carrier (*e.g.*, BN) and a bottleneck destination carrier (*e.g.*, Santa Fe), shippers served exclusively by the bottleneck destination carrier have been denied relief on the ground that the shipper would be no differently situated post-merger than it was pre-merger, because (it has been said) there is only one "lump" of profit to be had on the overall movement, and the monopoly destination carrier would absorb the lion's share of that profit regardless of whether or not it merged with an upstream carrier. CCS further argues, however, that, in the bottleneck context, we have ruled that, if a coal shipper is able to obtain a contract for the movement of its coal by a non-bottleneck carrier from a different mine origin than that served by the incumbent carrier, we will prescribe a maximum reasonable rate over just the bottleneck portion of the movement. This prescription, CCS claims, effectively prohibits the bottleneck carrier from, as the "one lump theory" assumes, "soaking up" all the profit remaining on the overall movement after the non-bottleneck carriers compete for that portion of the movement. CCS concludes that, if we were to continue to adhere to the "one lump" theory in the rail merger context, the "contract exception" would cease to be available to the captive shipper to the extent a merger results in the railroad with the bottleneck serving the same origin as a potential competitor over the non-bottleneck segment.

(2) *The contract exception*. CCS contends that we should strengthen the ability of coal shippers to achieve the intended benefits of the "contract exception" to the bottleneck rules by (i) eliminating the "same origin" restriction, and (ii) requiring merging carriers to provide separately challengeable rates over bottleneck segments even if no contract exists for the non-bottleneck segment. CCS claims that the "same origin" restriction (*i.e.*, the rule that a railroad need not provide a rate over a bottleneck segment if the bottleneck railroad and the non-bottleneck railroad that wishes to contract with the shipper for service over the non-bottleneck segment serve the same origin) discourages most shippers of western coal from even attempting to obtain a contract for service over non-bottleneck segments. The reason, CCS insists, is simple: because many western mines, particularly mines in the Wyoming PRB, are served by both UP and BNSF, a request that a bottleneck rate be prescribed will not even be entertained until a coal shipper has successfully prosecuted a competitive access case.

(3) *Refusal to compete*. CCS contends that, because neither UP nor BNSF has actively sought to enter into competitively-priced contracts for transportation over non-bottleneck segments where the other railroad holds a monopoly over a bottleneck segment, we should require railroads to

provide rates over bottleneck segments of track even if no contract is present for transportation above or below the bottleneck. The absence of competitively priced contracts for non-bottleneck segments, CCS insists, demonstrates that the procompetitive goals of the "contract exception" will only be reached if the bottleneck carriers are required to provide the rate first.

Merger-related service failures. CCS contends: that most coal-fired generating facilities can normally withstand not more than 30-45 days of deteriorated service before their coal inventories are depleted; that, in the event of such deterioration, it is not enough for service levels to be restored to prior levels; that, rather, in such situations service must be restored to a greater level to enable the utility to build inventories back up to levels that provide adequate insurance that electric power will be supplied to customers in the event of future rail service deterioration; that, however, our present merger policy and regulations permit a certain level of service deterioration after a merger before we will act, and (CCS claims) we have to date afforded railroads a substantial degree of deference in their representations regarding their ability to return service levels to pre-merger levels; and that this policy unfairly places on the shoulders of rail customers a large amount of the risk that merging railroads cannot effectively implement their merger. Our policies and regulations, CCS insists, must be changed to require more scrutiny of representations regarding service made by merger applicants, and less deference to merging railroads regarding rail service issues post-merger. We should, CCS believes, adopt and implement a policy of aggressively requiring the railroad industry to quickly *improve* overall service levels as the industry becomes more consolidated. (1) *Informational requirements*. CCS contends that we should require a merging railroad to specify: (a) service levels that will exist post-merger; and (b) actions that will be taken if service levels deteriorate. CCS insists that the extensive service failures that have occurred in the past, coupled with the size of the stakes in the event a subsequent merger results in widespread service failures, makes it entirely appropriate to adopt regulations that require merging carriers to specify in the merger application what service levels are expected to exist on the merged carrier, and to state what actions the merging railroads will take if service levels deteriorate.

(2) *Penalties for service failures*. CCS contends that our regulations should permit penalties to be assessed against merging railroads for measurable reductions in rail service post-merger; and, CCS adds, in light of the past failures of merging railroads to accurately predict when service problems will cease, we should not refrain from penalizing merging railroads based on their unsupported representations that service levels will soon return to normal. CCS insists that, if we determine that we cannot, or do not desire to, preside over service-related damage claims, we should nevertheless adopt rules or merger conditions that: (1) require the consolidated railroad to supply detailed service-related data to the Board and also to rail customers; and (2) provide an expedited mechanism, such as binding arbitration, by which service-related damage claims can be heard. And, CCS adds, we should clearly establish that the remedies available to rail shippers include being made whole for all direct and consequential damages, and also access to an alternative rail service provider via trackage rights until service is restored to adequate levels.

CCS further contends that, in addition to modifying the rules regarding service in the context of rail mergers, we should similarly amend our service rules at 49 CFR Parts 1146 and 1147. CCS claims, in particular, that, in order to advance a policy of improving rail service by enhancing competition and not tolerating any reductions in overall rail service as the industry continues to consolidate, we must amend 49 CFR Parts 1146 and 1147: (1) to permit relief for any measurable reduction in rail service; (2) to put the burden on the incumbent railroad to rebut a presumption that alternative service will not interfere with its operations; and (3) to impose penalties in the form of damages, including consequential damages, incurred as a result of service deterioration.

Reciprocal switching and terminal trackage rights. CCS contends that we should: permit reciprocal switching and trackage rights from terminal points to facilities physically connected to only one major railroad; and adopt a presumption in rail merger cases in favor of reciprocal switching at a single rate in a terminal, and a reasonable distance beyond the terminal, for all connecting carriers. And, CCS adds, we should set switching rates at levels that enhance the competitive options available to shippers while covering the railroads' costs.

CCS further contends that we should also amend the 49 CFR Part 1144 competitive access regulations by easing the criteria for a shipper to receive reciprocal switching and/or terminal trackage rights to a captive facility from interchanges within a reasonable distance from terminal areas served by the railroad and another carrier with the ability to provide rail service to the captive facility. And, CCS adds: we should overrule the "competitive abuse" standard for relief; we should adopt instead a "public interest" standard; and we should eliminate the requirement that there be an anticompetitive act before prescription can occur.

Shortline, regional, and smaller Class I railroads. CCS contends that we should act to ensure the viability and independence of shortline, regional, and smaller Class I carriers as competitive alternatives to major Class I railroads for coal transportation. CCS contends, in particular, that we should: (1) eliminate non-competitive "paper barriers" erected by major Class I railroads as part of the sale of a particular rail line as an outgrowth of a merger; (2) closely scrutinize the operating plans of merger applicants for evidence of intent to close interchanges and connections with shortlines for anticompetitive reasons; and (3) facilitate the use of smaller Class I railroads and regional railroads as alternatives to incumbents in the event of service disruptions, even if such service is over the track of the incumbent railroad.

THE WESTERN COAL TRANSPORTATION ASSOCIATION. WCTA contends that, due to mismanagement of and unexpected problems arising from rail merger implementation, the western coal industry faced a challenging two years from mid-year 1997 to mid-year 1999. WCTA further contends that, although rail service levels are currently satisfactory, the current state of affairs came only *after* coal shippers had suffered severe economic and operational harm due to unreliable rail service. And, WCTA notes, in addition to the significant additional operating costs that were incurred during the period of unsatisfactory service, coal shippers are still absorbing costs even today with several hundred million dollars of railcar assets procured as necessary during the period of poor cycle time performance sitting idle with little hope of economic return in the near future. WCTA insists that, given this background, we must condition future mergers to assure that implementation is in the public interest, that service is reliable, and that procompetitive access for shippers is enhanced.

Safeguarding rail service. (1) *Service integration plan*. WCTA contends that all future merger applicants must present a detailed service integration plan. WCTA further contends that this plan: must explain how the interface with Class I and shortline railroads will be achieved; must show the number of employees, locomotives, and rolling stock required for interchanges and service points to operate efficiently; must address customer communications requirements for scheduling, maintenance, and track outages, and notification of capacity constraints and derailments; and must have a well-documented and specific reference base service period. And, WCTA adds: the merger applicants must guarantee the baseline service level; if efficiency gains are claimed in the merger application, a specified percentage of that improvement must be added to the base level of guaranteed service; and the burden of proof to detail the levels of guaranteed service must be on the merger applicants.

(2) *Service metrics*. WCTA contends that merger applicants should be required to provide, periodically, service metrics to shippers.

(3) *Remedies*. WCTA contends that remedies for failure of service must be specific and effective. WCTA further contends: that remedies should include, but not be limited to, trackage rights from competing rail carriers, terminal or regional access, opening of gateways, contracted third party services, railcar supply, modified local operating agreements, joint operating agreements, overhead rights, reciprocal switching, and divestiture; that, if the shipper and the railroad agree, the remedy process could include mediation and arbitration; but that, if service is unsatisfactory despite the mediation or arbitration, or if there is a need for emergency relief, the shipper must have the right to seek relief in an administrative proceeding.

(4) *Oversight*. WCTA contends that we should assert oversight jurisdiction for five years to oversee implementation of the service integration plan and to remedy any unforeseen anticompetitive effects arising from the merger.

Promoting and enhancing competition. WCTA contends: that captive shippers must be protected from anticompetitive effects; that the burden of proof that a proposed merger is procompetitive must be on the merger applicants and should go beyond a showing of "no harm;" that the "one lump" theory should be abandoned, because (WCTA claims) it prevents evidence of economic harm from being properly considered; that the traditional remedies of trackage rights, reciprocal switching, gateway access, terminal access, joint use of assets, shared assets, and the like should continue to be imposed as required for equity or as a procompetitive measure; that gateways under the control of the merged entity should have both physical and economic access guaranteed; and that no new bottlenecks should be created by a merger. And, WCTA adds, all procompetitive conditions imposed on a merger must be subject to Board oversight for five years to assure proper implementation.

Shortline and regional railroad issues. WCTA contends that our merger policies should eliminate contractual barriers to interchange and switching, gateway access, supplying cars and power, proper communications, and cooperative operations.

Downstream effects. WCTA contends: that a proposed merger's specific effect on other carriers and customers or any contemporaneous rail carrier merger proposal should be reviewed as part of the merger proceeding; that the merger applicants should be required to present the case for the probable downstream results of the proposed merger, subject to rebuttal testimony from all parties; and that a reasonable investigation of the "end game" of consecutive mergers must be considered in a broad sense.

Antitrust considerations. WCTA contends that, although our jurisdiction over all aspects of merger proceedings including antitrust and anticompetitive arrangements should be continued, we should, in such proceedings, apply the body of antitrust law that has been developed by the courts and the Department of Justice and the Federal Trade Commission.

Future mergers. WCTA indicates that it will not support any future merger unless such merger: will be an end-to-end transaction with absolutely minimal 2-to-1 reductions in competitive access; will enhance competition; will not result in a diminution of service for shippers; and will not impose bottlenecks on shippers. WCTA concedes that such transactions will be rare and the burden of proof high. WCTA insists, however, that such an outcome would be preferable to the pervasive regulation arising from a transcontinental duopoly.

Means short of merger. WCTA contends that, because the results of a failed or unsatisfactory merger are very difficult to reverse, merger applicants should be required to show why joint marketing agreements and joint operating agreements between the merging parties would not be superior to, and more beneficial to the public interest than, an actual merger.

Excessive debt. WCTA contends that the economics of a proposed merger must be closely and critically examined. WCTA warns that a merged entity that has overstated the efficiencies to be gained will have too great an incentive to look to captive shippers to regain lost profit margins.

Retroactive application of new rules. WCTA contends that it may be prudent and in the public interest to revisit certain terms and conditions of past mergers that are still under Board oversight authority using the new rules and guidelines for mergers. This, WCTA claims, would provide a procedure to remove certain inequities, anticompetitive results, and specific breaches of guarantees to shippers.

THE EASTERN COAL TRANSPORTATION ASSOCIATION. ECTA asks that we ensure that future merger transactions are evaluated in a manner consistent with the public interest.

Downstream effects; the "one case at a time" rule. ECTA agrees that, given the state of the North American railroad industry and the recent post-merger rail disruptions experienced by merging eastern and western railroads, an individual railroad merger transaction can no longer be reviewed in a vacuum. ECTA contends that we should consider the downstream impacts of an individual merger and should focus on the transaction's likely effects on rail service.

Service Impact Statements. ECTA contends that the difficulties arising out of the CSX/NS/CR transaction accent the need for more vigorous before-the-fact service impact review mechanisms. Events have demonstrated, ECTA claims, that it does not suffice to rely exclusively on after-the-fact monitoring of service impacts arising from merger implementation. And, ECTA adds, experience has taught that the periodic reports required in connection with the CSX/NS/CR transaction, though helpful in identifying certain service issues, have not sufficed to address lingering and recurring problems in the areas of customer service and on-time performance. ECTA therefore insists that we must implement formal and systematic procedures for addressing post-transaction railroad service operations before-the-fact.

ECTA suggests that one vehicle for such review would be a requirement that railroad merger applicants file a detailed Service Impact Statement (SIS), which (ECTA indicates) would be similar in scope and detail to the environmental reports and safety integration plans that are currently required. ECTA contemplates that a SIS would be filed concurrently with the application, would be open to discovery and comment by opposing parties, would be subject to Board approval in final form, would be binding on the applicants insofar as affirmative steps or plans are included, and would be subject to enforcement through mandatory oversight. ECTA contends that, at a minimum, the following areas should be required to be addressed in the SIS: (1) scheduling, service request processing, data interchange functions, and shipment tracking; (2) systems for accessible and timely shipper information; (3) procedures to set, monitor, and meet service commitments and schedules; (4) allocation of human and equipment resources, and procedures for nondiscriminatory dispatch of resources, permits, *etc.*, during periods of constrained capacity; (5) transparent access to pricing information, railcar availability, planned track maintenance, and outages; and (6) systems for objective and timely investigation and resolution of service-related complaints and claims.

Promoting and enhancing competition. ECTA agrees that the time has come to place a greater emphasis on enhancing, rather than merely preserving, competition; the implementation of procompetitive policies, ECTA believes, will contribute to improved service levels. ECTA therefore contends that, at a minimum, we should require: open access within terminal areas; mandatory reciprocal switching at nondiscriminatory fees within districts that would be served by only one or two carriers post-merger; and the presumed qualification of bottleneck line segments created or acquired by merger for individual rate review and, if necessary, Board prescription. And, ECTA adds, in view of the recent consolidation of the railroad industry and the rationalization of lines caused by the railroads' systematic line abandonment policies, we should favorably consider new policies facilitating competition, where operationally feasible, to restore bona fide transportation alternatives to areas and customers that have been left without competitive service options.

Protecting shortline and regional railroad services. ECTA contends that, in order to make available the productive resources of shortline and regional railroads, we should revise our merger policies to eliminate contractual barriers to interchange ("paper barriers") that are not demonstrated to be reasonable, alternative financing mechanisms. ECTA further contends that we should also require merging carriers to establish enforceable systems of nondiscriminatory pricing and railcar supply allocation for connecting shortlines.

Protecting shippers from merger premiums and service failure costs. ECTA contends that we should adopt rules that prohibit inclusion of "acquisition premiums" or service-related operating cost increases in railroad cost accounts for regulatory purposes, and exclude as "special charges" operating cost increases that are the result of merger-related dislocations or inefficiencies.

DOJ/FTC Antitrust Analyses. ECTA contends that we should place greater emphasis on evaluating future mergers and consolidations using principles developed under the antitrust laws applicable to other industries. ECTA further contends that, if a violation of the antitrust laws would be triggered by a proposed railroad merger transaction, we should approve the application only with significant, procompetitive ameliorating conditions.

THE COMMITTEE TO IMPROVE AMERICAN COAL TRANSPORTATION. IMPACT believes that we should adopt procompetitive policies intended to enhance intramodal competition in the railroad industry. It is not enough, IMPACT insists, to adopt policies that will merely preserve the inadequate level of intramodal competition that exists today.

Enhanced intramodal rail competition. IMPACT contends that, if we adhere to our current policies on mergers among Class I railroads: there will soon be a transcontinental rail duopoly that will dictate rates and service terms for regional, national, and even international traffic flows; the essential benefits of competition, in the form of market-driven low rates and quality service to shippers, will not be realized;[236] and the public will demand that the industry be reregulated to prevent abuse of market power. IMPACT insists, however, that there is still time to prevent this

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[236] IMPACT insists that, for large, long-distance, and continuing shipments of coal to electric generating plants, there is no meaningful "intermodal" alternative. IMPACT insists, in particular, that, with rare exceptions, operators of coal-fired power plants must receive coal by rail. IMPACT adds, with particular reference to western coal, that, even if a power plant can receive coal by barge, it must still rely on one or the other of the two western railroads to move the coal from the mine to the barge; the western coal fields, IMPACT explains, are not located close to navigable waterways.

outcome; a regulated duopoly, IMPACT believes, is not yet inevitable. IMPACT contends, in particular, that we still have an opportunity to make the marketplace the primary regulator of the rail industry, and thereby fulfill the promise of the Staggers Act, by adjusting our merger policies with an eye to preserving and enhancing intramodal rail competition.

IMPACT insists that two railroads are not enough to ensure adequate intramodal competition; experience has demonstrated, IMPACT believes, that, with two railroads (BNSF and UP) now controlling western coal transportation, competition is not as vigorous as it was when there was a third western rail carrier (SP). IMPACT contends that, if continuing rail mergers are allowed to expand the western rail duopoly to the entire United States (and perhaps even to the entire North American continent), intramodal competition will be reduced even further; two railroads with a continent-wide rail duopoly, IMPACT maintains, are likely to compete even less vigorously than they do with a duopoly in a particular market. IMPACT, which notes that few railroad-dependent shippers are served by more than two independent Class I railroads, further contends: that the existing structure of the Class I railroad industry is already too concentrated; that mergers have already brought the railroad industry to the point that very small numbers of railroads exercise market power over major regional and national commodity flows, to the detriment of shippers and the economy as a whole; and that, given this reality, it will not be enough to adopt merger policies that merely preserve the status quo. IMPACT insists, rather, that we should seek to foster enhanced intramodal competition in the railroad industry and to increase the number of markets in which at least three railroads compete.

Service assurances. IMPACT believes that any future rail mergers must be accompanied by concrete and enforceable service assurances. IMPACT argues: that, notwithstanding the predictions of efficiencies and better service, service disruptions, ranging from significant to "meltdown," have followed most recent major rail mergers;[237] that these service disruptions, which have imposed enormous costs on shippers,[238] reflect the reality that each Class I railroad is a large and complex organization that functions as part of an even more complex network that includes other large railroads, regional railroads, shortline railroads, customers (which often supply equipment to carry their loads), other transportation modes, and so forth; and that, as the Class I railroads have grown ever larger through mergers, while downsizing supposedly excess facilities and personnel, integration has become ever more difficult. IMPACT further argues that the service breakdowns that have occurred in recent years suggest that the big Class I railroads may already be "too big" in an economic sense (*i.e.*, the service breakdowns suggest that the difficulties in management and control of these large enterprises may make them less efficient than they would be if they were smaller).

IMPACT therefore contends that we should take a much harder look at service issues in future mergers, and should require merger applicants, as a condition of merger approval, to provide specific and enforceable assurances against service disruptions. IMPACT further contends that these assurances should include damage recoveries and financial penalties to compensate customers if the merger results in service disruptions, and should also include back-up plans to allow independent carriers to provide service (including the right to operate over lines of the merged system, and the right to override paper barriers that restrict otherwise accessible shortlines). And, IMPACT adds, such replacement service should be available when a merged carrier is unable to restore its normal

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[237] IMPACT cites, in particular, the UP/CNW, BN/SF, UP/SP, and CSX/NS/CR transactions.

[238] IMPACT adds that, even though western rail service has been restored to normal levels, western coal shippers that had to acquire extra trainsets continue to bear the costs of merger-related service disruption.

service within a short period of time, and should not require the kind of lengthy administrative proceedings that occurred in connection with the UP/SP service meltdown.

Downstream effects; the "one case at a time" approach. IMPACT contends that the "one case at a time" approach should be discarded; our review of any merger application, IMPACT insists, should take into account all downstream effects, and (IMPACT adds) the application itself should be required to address the competitive and public interest implications of such effects. IMPACT further contends that, in assessing any particular proposed major merger, we should consider, among other things, whether consummation of that merger would trigger responsive mergers by other Class I railroads. And, IMPACT adds (with particular reference to the proposal to introduce a third railroad into the Powder River Basin), the dynamic nature of transportation economics requires us to consider, with respect to each proposed merger, not only its effect on current competition and service but also the extent to which it may interfere with future improvements in competition and service.

A "cooling off" period between mergers. IMPACT contends that, to reduce the risks of both service disruptions and downstream merger effects, we should require a three-year "cooling off" period between major rail mergers. IMPACT contends, in particular, that we should adopt regulations under which we could refuse to consider any merger application involving Class I railroads that is filed within 36 months after the implementation of a previous merger of Class I railroads. (1) *Explanation*. IMPACT believes that a "cooling off" requirement would address merger-related service problems by providing a breathing spell for rail customers, and also for the railroad industry itself, to adjust to the new service and competitive realities created by one merger before having to address the next merger proposal. IMPACT further believes that a "cooling off" requirement would address the downstream merger effects problem in two ways. (1) IMPACT believes that, with a "cooling off" requirement, we would be in a better position to evaluate the competitive impact of the second merger, because the competitive relationships created by the first merger would at least have begun to emerge. (2) IMPACT also believes that, because the "cooling off" requirement it contemplates would allow other railroads to avoid the three-year "cooling off" period by filing "responsive" merger applications as part of the proceedings on the initial merger application, we would not have to speculate about what the downstream effects of the initial merger might be; rather, IMPACT claims, we would actually be able to consider the downstream responsive merger proposals, as well as the initial merger proposal that triggered them, in the same proceeding.

(2) *Exceptions*. The "cooling off" regulations contemplated by IMPACT: would allow merger applicants to seek a waiver that would allow them to file their application within the 36-month period; and would allow the Board to grant the sought waiver upon a finding that a "cooling off" period between mergers was not necessary in that particular case.

Encouraging construction of new rail facilities. IMPACT contends that, because the construction of a new rail line (either a "build out" line or a "build in" line) can enable a rail-dependent "captive" shipper to obtain improved service and enhanced competition, we should act to encourage the construction of new rail lines. (1) *In the merger context*. IMPACT contends that, in the merger context, we should treat potential build-in and build-out opportunities as "2-to-1" points. IMPACT further contends that we should expand the build-in/build-out remedy to "3-to-2" situations as well.

(2) *Beyond the merger context*. IMPACT contends that, to encourage the construction of new rail lines: we should expedite the environmental review that is typically required for major line construction proposals; and we should also adopt a general class exemption for the construction of

new rail lines. IMPACT claims: that, although having to file a request for exemption does not impose an insuperable burden, the absence of a specific exemption for new line construction implies a negative attitude towards such construction; that, due to the uncertainty as to how an exemption request would be treated, most major line construction proposals in the past have been submitted through a formal application; and that, in addition, the current procedures provide an opportunity for a railroad that opposes new competition to delay the construction and, thereby, further entrench its dominance in the market. IMPACT acknowledges that, even with a general class exemption, an opponent could file a petition to revoke; but IMPACT suggests, in essence, that, because the filing of such a petition would not stay the effectiveness of the exemption, construction could proceed while the petition was litigated.

3-to-2 issues; DOJ/FTC merger guidelines. IMPACT contends that, in the UP/SP and CSX/NS/CR proceedings, we adopted a policy that, because the existence of two railroads in a market, or even in a large portion of the United States, was enough to provide adequate intramodal competition, a 3-to-2 reduction in the number of rail competitors was no cause for concern and did not require a remedy through competition-restoring conditions. IMPACT maintains that this policy, which (IMPACT claims) has already led the rail industry to evolve into a "duo of duopolies," will, unless changed, inevitably result in a continental duopoly. IMPACT further maintains that the policy adopted in the UP/SP and CSX/NS/CR proceedings represented a break with past precedent on the 3-to-2 issue; in prior proceedings (IMPACT claims), the ICC, which (IMPACT insists) had taken a pragmatic, common-sense approach, had observed that, although a 3-to-2 reduction in intramodal competition provided less cause for concern than a 2-to-1 reduction, a 3-to-2 reduction was not necessarily benign and might cause competitive harm, and (if it did) would be a proper subject for a remedy through imposition of appropriate conditions. IMPACT believes that we should now reconsider our willingness to tolerate 3-to-2 reductions in the number of rail carriers serving particular markets; experience, IMPACT claims, demonstrates that, because three competitors generally compete more vigorously than do two, the loss of a third carrier can significantly degrade a rail-dependent shipper's competitive position. IMPACT claims, in particular, that the UP/SP merger, which eliminated SP as a possible competitor in the western coal transportation market, enhanced the market power of both UP and BNSF.

And, IMPACT warns, an expanded duopoly will make things even worse. IMPACT explains: that, at present, although two railroads dominate many markets, there are some markets where each railroad faces competition from a third railroad; that this competition lessens the incentives for the duopolists to embrace a "live and let live" approach toward each other; but that, if two railroads come to dominate a large region of the entire continent, there will be no meaningful third railroad competition anywhere. And, IMPACT adds (with reference to the proposal to build a new line into the Powder River Basin), expanding the geographic reach of the western duopoly will also eliminate the constraint of potential competition from a new entrant. IMPACT notes, in particular, that, if the two western railroads that control PRB coal were to merge with eastern and/or Canadian carriers, the loss of "friendly connections" for a potential new entrant into the PRB market would likely make it impossible for a third carrier to enter that market.

IMPACT therefore contends: that we should be reluctant to approve any merger that would reduce the number of independent rail competitors serving rail-dependent customers; and that, at a minimum, 3-to-2 reductions in rail competition should be presumed to have anticompetitive effects, and merger applicants should bear the burden of demonstrating that a reduction in the number of railroads in a particular market will not have anticompetitive effects. IMPACT further contends that we should assess proposed mergers in light of the DOJ/FTC merger guidelines, appropriately modified to address any particular considerations that may apply to the rail industry. One of the shortcomings of the current rail merger analysis process, IMPACT claims, has been the failure to account for losses of source competition and shipper leverage that have been caused by past mergers, which (IMPACT argues) will become an even more significant problem as rail industry concentration increases.

The "one lump" theory. IMPACT contends that, because the "one lump" theory (that a railroad with a monopoly over any portion of a route can extract the full "monopoly profit" for the entire route, so that the customer will be no worse off if a merger increases the railroad's monopoly to cover more or all of the route) fails to take account of important competitive realities, we should abandon our reliance on that theory as an irrefutable economic principle, and, instead, should consider, in the specific circumstances of each merger, the ways in which vertical integration may produce competitive harm for shippers. IMPACT further contends that any merger applicant that seeks to rely upon a "one lump" argument should be required to prove the applicability of that theory as a matter of fact.

Divestiture of lines as primary remedy for competitive harm. IMPACT believes that divestiture should be the primary remedy for any competitive problems created by a major rail merger. IMPACT argues that, in normal antitrust practice, if a merger will cause an unacceptable reduction in competition in certain markets, the antitrust agencies commonly require the merging companies to divest some of their assets in order to preserve competition in those markets. IMPACT insists that trackage rights and haulage rights, the two lesser remedies that have often been used in rail merger cases, have many shortcomings, and may not effectively replace the competition that is lost as a result of a merger. IMPACT explains: that trackage rights compensation is often set in a way that precludes replication of the competition that existed prior to the merger; and that, furthermore, because such trackage rights are often limited in scope as to the types of traffic that can be handled or the points that can be served, the grantee of the trackage rights will necessarily be a less effective competitor than was the railroad that owned the line before it was merged with its competitor. IMPACT argues: that, in imposing conditions on a merger, our objective should be to replace all the competition that the merger takes away; and that, if the lost competition was provided by a railroad that owned its own lines, such competition can best be replaced by an independent railroad that owns those lines.

IMPACT therefore contends that we should make greater use of divestiture of rail lines to an independent railroad as a remedy for anticompetitive merger effects, with trackage or haulage rights over the divested lines granted to the merged carrier if appropriate. And, IMPACT adds, whenever trackage or haulage rights are granted in connection with a merger (either to the merged carrier over lines divested to an independent railroad, or to an independent railroad over lines of the merged carrier), such rights should be structured to ensure that the recipient of the rights is able to compete effectively with the line owner. This means, IMPACT explains, that "full service" rights are to be preferred to overhead or other limited rights, and that compensation should be set at a level that will encourage effective competition.

Merger conditions to enhance, not merely to preserve, competition. IMPACT believes that the conditions imposed in past merger proceedings have not redressed all of the competitive injuries caused by past mergers. IMPACT explains: that we have insisted that conditions be imposed only to address specific, narrowly-defined competitive problems created by the proposed merger; that we have tended to scrutinize very strictly claims of competitive injury from proposed mergers, and to grant relief only when injury is most obvious; that we have tended to impose the most narrowly tailored merger conditions possible to remedy whatever competitive problems have been found to exist; that we have overlooked the more subtle competitive problems; and that we have similarly overlooked injuries to customers or industries that have not been able to participate effectively in our proceedings.

IMPACT therefore recommends that we reverse our presumptions with respect to conditions. IMPACT contends: that, if a proposed merger will materially increase concentration in a market (*e.g.*, if it will reduce the number of competing railroads in a market), the burden of proof should rest on the merger applicants to establish that all competitive harm from the merger can be eliminated through appropriate conditions; and that, where there is doubt about how extensive the conditions need to be to remedy threatened competitive harm, we should err on the side of greater protection of competition, rather than less.

And, IMPACT adds, we should abandon our practice of refusing to consider imposing reasonable conditions on a merger to *improve* competition. IMPACT believes that, so long as the conditions are not so extensive or intrusive as to vitiate the benefits of the merger to the applicants, we should use our conditioning power judiciously to move the rail industry towards effective intramodal competition.

EDISON ELECTRIC INSTITUTE. EEI contends that, in reviewing rail mergers, we should follow the approach that DOJ, FERC, and FTC take in reviewing similar transactions in other industries. Those agencies, EEI believes, review such transactions in a manner that increases competition while achieving the benefits of the proposed transaction.

Downstream effects; the "one case at a time" rule. EEI contends that the § 1180.1(g) "one case at a time" rule should be eliminated. EEI explains that, although such a rule may make sense for industries that have numerous competitors, it does not make sense where the "final restructuring" of an industry is clear.

Gateways. EEI contends that, whatever justification there might once have been for closing gateways, the service problems and lack of competition brought on by rail mergers counsel strongly against closure of any more gateways. And, EEI adds, we should consider opening certain gateways previously closed.

3-to-2 issues. EEI contends that 3-to-2 shippers (and not just 2-to-1 shippers) should get relief in rail merger proceedings. EEI further contends that we should make it clear that we will presume a 3-to-2 loss of competitors will entitle a shipper to relief, absent clear and convincing evidence to the contrary. EEI explains that there are still a number of 3-to-2 shippers for whom a consolidation could cause a loss of competition.

The "one lump" theory. EEI contends that the "one lump" theory should be treated as a theory that must be proved applicable rather than shown through facts to be inapplicable. EEI also contends that the "one lump" theory is applicable only if certain rigid conditions are met; and EEI insists that these conditions do not exist in the railroad industry, at least as now configured. EEI further contends that we should not view with disfavor evidence showing that the theory is inapplicable (*e.g.*, evidence that a prior merger of an origin carrier and a destination carrier into one of the applicant carriers caused rates to rise in comparison to similar rates, or evidence that the carriers seek to consolidate to acquire the information that would permit them to better exploit a captive shipper's captivity). And, EEI adds, we should reconsider the Kahn/Dunbar study that was presented in the CSX/NS/CR proceeding and that (EEI claims) demonstrates the inapplicability of the "one lump" theory.

Bottleneck rates. EEI contends that the single-line service capacity made possible by mergers is anticompetitive, because (EEI explains) the merged carrier typically will not quote rates to connecting carriers if the merged carrier can carry the shipper's goods from the same origin to the same destination. That, EEI insists, is anticompetitive, and (EEI argues) a requirement that consolidating carriers quote a "bottleneck" rate upon request would allow the shipper to challenge that "bottleneck" rate if need be, and to obtain competition in any event. And, EEI adds, this proposed rule would not necessarily require the Board to overturn its entire "bottleneck" series of decisions, although (EEI indicates) it would support that.

Switching in terminal areas. EEI contends that we should amend our merger policies to provide broad switching relief in terminal areas as a condition of mergers. EEI further contends: that we should adopt a presumption in favor of reciprocal switching at the same rate in a terminal area for all connecting carriers; and that, so long as the switching charge is adequate to compensate the track owner for its costs, there is no persuasive argument against establishment of a reasonable switching charge applicable to all shippers whose traffic is interchanged in that terminal. And, EEI adds, it may be appropriate to set the switching rate at a level above variable cost but below total cost if such is necessary to permit competition to continue or to increase to an appropriate level.

Acquisition premiums. EEI, which contends that it is never appropriate to subject customers to rate increases as a result of acquisition premiums, insists that there must be a presumption that any post-merger rate increase is due to acquisition premiums. And, EEI adds (citing the financial difficulties that have recently afflicted CSX and NS), railroads should not be encouraged to pay acquisition premiums for other railroads, on the understanding that the Board will not impose rate caps or other shipper protection remedies.

Service guarantees. EEI, which believes that service has gotten worse instead of better as a result of many recent mergers, insists that, if mergers are going to be pursued in the future, shippers should not continue to pay the price when promises come up short. EEI contends, in particular: that we should guarantee shippers that service will not get worse, or that the consolidating carriers will compensate shippers for their economic losses; that we should make clear that, although shippers will need to present evidence of their losses, relief will be provided if the evidence demonstrates the loss;[239] that we should hold railroads responsible for real damages, in dollars, and not just for replacement cars or make-up service; and that we should also provide injunctive relief in appropriate circumstances. EEI further contends that we should require the publication of meaningful service measures for individual shippers, such as elapsed transit times for coal unit train movements or other statistics that shippers rely on as their measure of service (EEI explains that "railroad-centered" statistics such as train velocities and terminal dwell times are meaningless to individual shippers).

"Paper" and "steel" barriers. EEI contends that, because paper and steel barriers prevent smaller carriers from competing against Class I carriers (and also prevent smaller carriers from providing needed service), we should adopt a presumption against any new paper or steel barriers, and should conclude that prior ones are presumptively contrary to public policy. And, EEI adds, we

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[239] EEI contends that we should establish clearly that the Board is, or is not, an appropriate forum for shipper claims respecting service failures. The issue, EEI argues, needs to be resolved one way or the other, so that litigation costs are not incurred over whether the Board is an appropriate forum.

should, in a consolidation proceeding, invite shippers or other interested parties to propose remedies for uncompetitive situations created by prior consolidation transactions.

Cross-border issues. EEI contends that there is no need for special rules addressing cross-border issues *per se*. The real question, EEI insists, is not the nationality of the owner; the real question, EEI explains, is whether, in any particular instance, foreign control could result in discrimination against U.S. shippers or ports, or harm to the public interest.

Enron's proposal for a secondary capacity market. EEI contends that we should solicit the views of other parties, especially the railroads, on Enron's proposal to create a secondary market in tradable capacity rights of railroads.

ALLIANT ENERGY CORPORATION. AEC, a member of the SCS group, filed separately both to amplify the broader context in which (AEC claims) our merger policy must be viewed, and also to address one specific competitive issue, the effect of mergers on railroad bottlenecks.

Context for a revised merger policy. AEC contends that we should craft merger regulations that will help to treat the causes of the railroads' inability to attract new freight traffic. AEC contends, in particular: that, during the past 20 years, the railroads have continued to lose markets to other forms of transportation and have failed to gain new markets; that, in general, the railroads have focused on industries that add little value to products prior to shipping, that do not require timeliness of delivery, and that also do not require delivery to geographically dispersed destinations; and that, as a consequence, growth in overall rail traffic volume has remained stagnant compared to other modes. AEC further contends: that railroad marketing strategy and our merger policy have been driven by the proposition that increasing efficiency (in the form of lower costs) will allow the railroads to increase profitability and improve service levels; that, however, in most markets where competition flourishes, profitability is not determined just by lowering costs but, rather, is derived from identifying the attributes of products and services that allow customers to create and capture value; and that, therefore, the railroads must be encouraged to identify those attributes more quickly and more accurately. The rail industry's commitment to a "one size fits all" strategy to reduce its costs, AEC claims, has been a major factor in the industry's inability to attract the new markets necessary to make effective use of the existing infrastructure.

AEC contends: that rail mergers have traditionally been viewed primarily as a means of reducing variable cost (and thereby increasing efficiency); that, however, it is unlikely that further mergers will create significant additional savings; and that, indeed, the write-ups in the value of the assets of recently-merged rail carriers resulting from acquisition premiums, and the increased costs resulting from post-merger service problems, confirm that the traditional model is no longer valid. There needs to be, AEC insists, more emphasis on increasing "throughput," and less emphasis on reducing (or consolidating control of) infrastructure. We can start to address these issues, AEC maintains, by revising our merger policy in ways that begin to inject more competition into the rail industry than presently exists. Competition, AEC adds, helps to encourage new ways of thinking and new ways of creating value for non-traditional (*i.e.*, new) rail customers. It is time, AEC insists, to start viewing rail mergers as opportunities for increasing competition.

Western railroad bottlenecks. AEC, a major consumer of low-sulfur "compliance" coal produced in the Powder River Basin (PRB), notes that, although most of the origin mines are served by two railroads (UP and BNSF), most of the destination power plants are served by only one (either UP or BNSF or another railroad). Each such power plant, AEC observes, is subject to a bottleneck, but (AEC insists) there are two kinds of bottlenecks: a two-carrier bottleneck exists where one carrier (*e.g.*, UP) serves both the origin and the destination, and another carrier (here, BNSF) can compete for a portion of the movement between the origin and an interchange point; and a three-carrier bottleneck exists where two carriers (here, UP and BNSF) serve an origin and can compete for movements to an interchange point with the third carrier that serves the destination.

Bottlenecks, AEC indicates, are of increasing concern to electric utilities that purchase PRB coal because of mergers involving BNSF and UP. AEC contends that, if one of the two origin carriers also serves a power plant as a bottleneck destination carrier, it can, under our bottleneck rules, foreclose competition from the other origin carrier. Mergers involving BNSF or UP, AEC insists, exacerbate the bottleneck problem because such mergers often result in replacing an independent or "neutral" destination bottleneck carrier with a carrier that also serves the origins (*i.e.*, mergers involving BNSF or UP exacerbate the bottleneck problem by converting three-carrier bottlenecks to two-carrier bottlenecks). Experience has taught, AEC maintains, that an independent destination carrier that does not serve the mine origins usually is indifferent to which of the two PRB-serving carriers originates the coal; and, AEC insists, although an independent destination bottleneck carrier is still able to price "above the market," the shipper is nevertheless able to take advantage of the competition between the non-bottleneck origin carriers.

AEC argues that, for two reasons, bottleneck rate relief is, as a practical matter, not available where a bottleneck destination carrier serves the competitive PRB origin: because our competitive access rules require the shipper to demonstrate anticompetitive conduct on the part of the bottleneck carrier (this cannot be done, AEC insists; no shipper, AEC argues, has *ever* secured competitive access relief); and also because our bottleneck rules require the shipper to first obtain a contract for transportation over the competitive portion of the route (this cannot be done either, AEC insists; the two PRB origin carriers, AEC argues, are adamantly opposed to bottleneck rate relief, and neither wants to open its captive utility coal customers to competition from the other).

AEC notes that the ANPR suggests: (1) that merger applicants be required to offer, on request, contracts for the competitive portion of joint-line routes when the joint-line partner has a bottleneck segment; and (2) that merger applicants be required to provide a new through route at a reasonable interchange point whenever they control a bottleneck segment and the shipper has entered into a contract with another carrier for the competitive segment.

AEC concedes that the second ANPR proposal, which would permit shippers who have entered into such contracts to seek bottleneck rate relief without having to file a competitive access complaint to obtain a routing order, apparently would resolve a significant impediment to bottleneck rate relief in the context of a merger involving one of the two PRB origin carriers and an independent or neutral destination carrier.

AEC claims, however, that the first ANPR proposal, although it purports to address shipper concerns that competitive-segment carriers may be unwilling to enter into contracts that would enable shippers to obtain bottleneck rate relief, is wholly inadequate. AEC insists that merely requiring merger applicants to offer contracts for the competitive portion of a movement involving a bottleneck line segment, without more, is not enough; the PRB origin carriers, AEC argues, have been unequivocal in expressing their distaste for bottleneck relief, and (AEC claims) they are unlikely to offer contract proposals on terms that will be acceptable to a shipper. The first ANPR proposal, AEC maintains, will be completely ineffective in the real world unless the Board gets involved in the minutiae of rail/shipper contracting by arbitrating contract terms. The only way to provide a meaningful bottleneck remedy, AEC insists, is to allow the shipper to obtain a bottleneck rate (and to seek bottleneck rate relief from the Board if necessary) *before* it enters into a contract with a competitive-segment carrier. Only then, AEC claims, will the shipper have a fighting chance of getting the competitive carrier to provide a competitive contract proposal.[240]

AMEREN SERVICES COMPANY. Ameren contends that we should pursue enhanced rail competition via the current rulemaking and in actual merger cases. And, Ameren adds, we should understand that more than two carriers are needed in order to achieve effective competition.

Promoting and enhancing competition. Ameren contends that a greater emphasis should be placed on enhancing, rather than simply preserving, competition; history, Ameren explains, teaches that attempts at merely preserving competition have actually resulted in a reduction in competition. Ameren further contends that we should seek to increase competition not only at 2-to-1 locations, but also at locations that enjoy competition through proportional rates on part of the joint-line movement. A merger, Ameren believes, should not result in a diminishing of competition on any portion of a shipper's route of movement.

Protecting shippers against diminished competition. Ameren agrees that 2-to-1 shippers should be protected against a merger-related loss of competitive options. Ameren insists, however, that we should protect every shipper against a merger-related loss of competitive options, even if such shipper is not, strictly speaking, a 2-to-1 shipper. Ameren's focus in this regard is on the impact that a BNSF/CN merger would have on one of its plants, which is exclusively served by CN (IC) but which receives PRB coal originated by BNSF and UP. Ameren explains: that the coal is routed either UP/CN via Tuscola or BNSF/CN via Centralia; that CN has, in either instance, a bottleneck; that, however, CN has established separate rates for the bottleneck portions; that, on account of such separate rates, Ameren has been able to establish individual proportional rate contracts with UP and BNSF to cover their respective portions of the move; and that Ameren has thereby benefitted from UP *vs.* BNSF origin competition. Ameren insists that, the "one lump" theory notwithstanding, a BNSF/CN merger would adversely impact Ameren by vertically integrating the bottleneck carrier (CN) with one of the origin carriers (BNSF). Ameren also argues that, in light of recent protections granted to shippers, including the "contract exception" to the bottleneck rules, approval of a BNSF/CN merger would require that Ameren be afforded competitive protection.

3-to-2 situations. Ameren, which uses PRB coal, contends that, although there is intense competition among PRB coal suppliers, there is only limited (BNSF *vs.* UP) competition among PRB coal transporters. Ameren argues: that it is in the national interest to enhance competition in transportation from the PRB; that added rail competition from the PRB will produce incentives for the railroads to improve service and to lower prices; and that the addition of a third carrier from the PRB will result in more effective competition. Ameren therefore asks that we give serious

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[240] The "contract-first" requirement should be eliminated altogether, AEC explains, because experience shows that duopolist rail carriers simply are unwilling to offer contracts for competitive-segment movements "on the come" (*i.e.*, in advance of completion of arrangements for movement over the bottleneck segment). AEC therefore contends that we should impose a condition eliminating altogether the "contract first" requirement whenever a merger would result in conversion of a three-carrier bottleneck into a two-carrier bottleneck. AEC claims that, with this change, the bottleneck problem would be resolved for most captive shippers presently served by an independent carrier, at least in the context of the Board's approval of future major rail consolidation transactions.

consideration to the "3-to-2" issue, particularly as concerns the addition of a third carrier to the PRB.

CENTRAL AND SOUTH WEST SERVICES. C&SWS, a member of the SCS group, filed separately to address a bottleneck problem involving a C&SWS affiliate that (C&SWS claims) would be exacerbated if KCS were to merge with either BNSF or UP.

C&SWS indicates that its affiliate's two power plants are served exclusively by KCS. C&SWS claims, however, that, despite the KCS bottleneck at destination, C&SWS has been able to take advantage of the BNSF *vs.* UP competition at the PRB origins to secure competitive freight rates for most of the distance between the PRB origins and the plants; and, C&SWS insists, it has been able to take advantage of the origin competition notwithstanding the destination bottleneck because KCS is unaffiliated with either BNSF or UP, and thus has been basically indifferent as to which one handles the portion of the movement between the PRB and Kansas City. A merger involving KCS and either BNSF or UP, C&SWS warns, would change this dynamic; neither BNSF/KCS nor UP/KCS, C&SWS explains, would be neutral as to which of the two PRB origin carriers gets the portion of the movements from the PRB origins to Kansas City. C&SWS contends that, under our bottleneck rules, the only way it could preserve the existing origin competition would be: (1) to obtain a contract with UP or BNSF (as the case might be) for the competitive portion of the movement; and (2) to obtain a routing order from the Board, which would require C&SWS to demonstrate anticompetitive conduct by BNSF or UP (as the case might be) under the competitive access rules. These requirements, C&SWS adds, would be very onerous, particularly given that BNSF and UP strongly oppose bottleneck relief and presently have little interest in "poaching" each other's captive coal customers.

C&SWS note that the ANPR purports to address the problem it will face in the event of either a BNSF/KCS merger or a UP/KCS merger. C&SWS insists, however, that the suggested remedy is inadequate. C&SWS insists that requiring a merger applicant to offer a contract for the competitive portion of a coal route before a shipper can obtain a bottleneck rate does not solve the problem, because the carrier would remain free to offer a high (non-competitive) rate or to impose other conditions (such as a requirement that the shipper agree to an unacceptably long contract term) that would make the "contract-first" remedy ineffective from a practical standpoint.

C&SWS contends that the only meaningful remedy is to require merger applicants to provide a bottleneck rate on request, without any preconditions. This, C&SWS explains: (a) would permit the shipper to finalize arrangements for transportation over the bottleneck segment before obtaining proposals for transportation over the non-bottleneck portion of the route; and (b) would provide the non-bottleneck carrier with an incentive to cooperate.

CONSUMERS ENERGY COMPANY. CEC contends that we should revise our rail merger guidelines to afford meaningful and effective access to our rate review and prescription authority to shippers dependent on rail service over "bottleneck" line segments, as a mandatory condition of approval of any new consolidations or other major transactions under 49 U.S.C. 11323 involving the carrier(s) that control the segments.

CEC's two exclusively served plants. CEC indicates that its principal focus concerns two of its plants. CEC explains: that each of these plants is exclusively served by a single railroad (one by CSX, one by CN); that, however, the portion of its coal that comes from western mines can be originated by two carriers (BNSF and UP); and that the BNSF *vs.* UP competition at the competitive origins has enabled CEC to secure lower delivered fuel costs at the captive destinations. CEC contends that, as respects either plant, a merger of the destination monopolist (CSX at one plant, CN at the other) with one of the origin competitors (BNSF and UP) likely would lead to a complete foreclosure of competition at the affected plant, because (CEC explains) the destination carrier would no longer be expected voluntarily to offer nondiscriminatory rates and delivery service in conjunction with all connecting roads.

"One lump" theory; bottleneck relief. CEC indicates that its experience in securing rates and service arrangements at its two exclusively served plants confirms the need to revisit the "one lump" theory; and CEC further indicates that it endorses the adoption of a new rule respecting rail bottlenecks. CEC insists, however, that the proposal outlined in the ANPR ("requiring merger applicants to offer, upon request, contracts for the competitive portion of joint-line routes") would not provide an effective solution. CEC explains: that the major rail carriers have made clear their opposition to any requirement that they establish separate rates for bottleneck segments, and have litigated against the "contract exception" to our current bottleneck rules; that merely directing merger applicants to offer contracts for the competitive portion before rates and delivery terms for the bottleneck segment were in place would not assure the shipper the benefits of actual competition, as there would be no guarantee that the rates and other terms reluctantly offered would reflect the market; and that, for bottleneck relief to be effective, the competitive contract must follow the establishment of rates for the captive portion of the move, not the other way around.

CEC therefore contends that we should condition approval of any new major rail consolidation on each involved carrier's agreement either: to grant unrestricted trackage rights over bottleneck segments to permit competitive service by an unaffiliated connecting carrier; or, where such relief would be impractical, to establish a common carrier rate between any two points on its system upon request by a shipper capable of tendering traffic under that rate. CEC further contends: that there should be no requirement that the shipper first arrange for transportation to or from the bottleneck segment; and that the reasonableness of the established bottleneck rate (should it be challenged by the shipper) should be determined without regard to whether or on what terms the shipper has made such arrangements.[241]

INTERMOUNTAIN POWER AGENCY. Experience teaches, IPA contends, that the "one lump" theory does not reflect economic reality. IPA explains: that, prior to the UP/SP merger, its power plant was exclusively served by UP; that, however, although its plant was exclusively served by UP, the mines that supply the coal were not served by UP at all; that, rather, these mines were served by SP and the Utah Railway Company (URC); and that, therefore, no railroad had, prior to the UP/SP merger, direct access both to the coal mine origins and also to the power plant destination. IPA further explains that the UP/SP merger effected a change in the pre-merger state of affairs; now, IPA notes, UP has direct access both to the coal mines origins (at least to some of them) and also to the power plant destination. IPA contends that the unpleasant reality of the current IPA/UP relationship proves that the assumptions underlying the "one lump" theory are not correct. UP's post-merger conduct, IPA insists, demonstrates that when a railroad has the ability to abuse its position in the market, it will do so. IPA explains: that UP has a chokehold over IPA's coal supply traffic and does not hide its disdain for attempts by IPA to loosen that hold or to ameliorate the exorbitantly high rates IPA now pays; and that, although URC is close by and is willing and able to handle some or all of IPA's shipments all the way to the plant rather than stopping at Provo (the URC/UP interchange point), UP remains unwilling to allow any access to its trackage for that purpose.

[241] CEC indicates that the bottleneck relief proposed by SCS would provide an appropriate measure of bottleneck relief.

IPA therefore contends that we should condition mergers in ways that will enhance competitive alternatives available to shippers. IPA further contends that we should revise our application of the "one lump" theory to mergers; IPA insists that, in circumstances like those confronting IPA, the public interest requires us to enhance competition at facilities that experience the kind of reduction in meaningful competitive alternatives that IPA experienced as a consequence of the UP/SP merger. IPA argues: that we should ensure the presence of effective rail competition in as many locations as possible; that we should protect the public interest by conditioning mergers in ways that will enhance competition; that, in particular, we should grant a second carrier access to solely-served points that experience a change in transportation alternatives due to the combination of a serving carrier with one of the competing connections; and that we should discard the rebuttable presumption that currently prevents shippers situated like IPA from obtaining relief from the monopolistic practices of a carrier that has the sole direct access to a particular facility.

OKLAHOMA GAS & ELECTRIC COMPANY. OG&E contends that we should adopt rules intended: to enhance, not merely to preserve, rail competition; and to ensure the improvement of post-merger rail service.

Scope of this proceeding. OG&E contends that enhanced railroad competition cannot be achieved simply by revising the regulations that are applicable specifically in the merger context. We must, OG&E insists, conduct a broad review of all of our rules related to rates and service, for the purpose of establishing whether they will facilitate improved rail service and meaningful competition as the railroad industry continues to consolidate. The rules and regulations that OG&E believes must be revised include the regulations at 49 CFR Part 1144 (intramodal rail competition), Part 1146 (expedited relief for service emergencies), and Part 1147 (temporary relief under 49 U.S.C. 10705 and 11102 for service inadequacies), and also our bottleneck rules. OG&E argues that a failure to revise these and other rules along with the rules applicable in the merger context would create an unbalanced rail industry and might actually provide a disincentive for railroads to merge at all.

Bottleneck rules. OG&E contends that we should require merger applicants to provide rates and service terms upon request over all "bottleneck" segments of track in cases where: (1) the merging railroad combines with a bottleneck railroad, thereby acquiring the full routing from an origin to a destination; and (2) there is an existing bottleneck on either of the merger applicants' systems where there is a current interchange between the merging carriers. OG&E further contends that we should require railroads to provide rates for bottleneck segments even if the bottleneck carrier and the non-bottleneck carrier serve the same origin (OG&E explains that, because many mines in the Wyoming Powder River Basin are served by both UP and BNSF, the "same origin" restriction discourages coal shippers from attempting to obtain a contract for service over non-bottleneck segments for combination with a bottleneck rate). And, OG&E adds, if we wish to enhance the competitive options of coal shippers as the rail industry continues to consolidate, we should reconsider our refusal to require railroads to provide rates over bottleneck segments of track even if a contract is not yet in place for transportation above or below the bottleneck.

Remedies for service failures. OG&E, which claims that recent mergers have frequently resulted in substantial reductions in post-merger rail service levels, contends: that most coal-fired generating facilities can normally withstand no more than 30-45 days of deteriorated service before their coal inventories are depleted; that, after such deterioration, it is not enough for service levels to be restored to prior levels; that, rather, post-deterioration service must be restored to a greater level to allow the building of inventories to levels that provide adequate insurance that electric power will continue to be supplied in the event of future rail service interruption; and that present policy, which does not provide timely relief to shippers, unfairly places a large amount of merger implementation risk on the shoulders of rail customers. OG&E contends, in particular, that we should: (1) require merging carriers to specify in the merger application what service levels are expected to exist on the merged carrier, and to state what actions the merging railroads will take if service levels deteriorate; (2) provide an expedited process for service complaint and resolution with penalties to the merging rail carriers for failure to remediate reduction in service to shippers in a timely manner; and (3) amend our regulations at 49 CFR Parts 1146 and 1147 (a) to permit relief for any measurable reduction in rail service, (b) to put the burden on the incumbent railroad to rebut a presumption that alternative service will not interfere with its operations, and (c) to impose penalties in the form of damages, including consequential damages, incurred as a result of the service deterioration.[242]

Reciprocal switching and trackage rights. OG&E contends that we should establish a presumption in rail merger cases in favor of reciprocal switching at a single rate in a terminal and a reasonable distance beyond the terminal for all connecting carriers. OG&E further contends that, in setting the level of the rate, we should give substantial consideration to switching rate levels that enhance the competitive options available to shippers while covering the railroads' costs. OG&E adds that agreements between railroads regarding the level of the charge should be accepted only if the agreed-upon level enhances the feasible options of rail shippers after the merger.

OG&E also contends that we should amend our regulations at 49 CFR part 1144 to ease the criteria for a shipper to receive reciprocal switching and/or terminal trackage rights to a captive facility from interchanges within a reasonable distance from terminal areas served by the railroad and another carrier with the ability to provide rail service to the captive facility. And, OG&E adds: we should overrule the old "competitive abuse" standard for competitive access relief, and should adopt instead a "public interest" standard; and we should eliminate the requirement that there be an anticompetitive act before prescription can occur.

THE PPL COMPANIES (PPL UTILITIES AND PPL MONTANA). PPL, which believes that past rail mergers have served to decrease competition, constrict shippers' service options, reduce service quality and reliability, and facilitate monopoly pricing, contends that we should act to create new competitive options for shippers.

Scope of this proceeding. PPL contends that, for several reasons, the initiatives suggested in the ANPR should be expanded to include both merger-related issues not cited in the ANPR and also issues that go beyond merger concerns. (1) PPL contends that the legitimacy of complaints about the status quo is not a function of whether they are, or are not, merger-related. PPL insists that, if shippers' problems would be made worse by further consolidations, they are germane to this proceeding. (2) PPL contends that such issues as the vulnerability of captive shippers to the

[242] OG&E adds that, if we determine that we cannot, or do not desire to, preside over service-related damage claims, we should nevertheless adopt rules or merger conditions that: (1) require the consolidated railroad to supply detailed service-related data to the Board and to rail customers; (2) provide an expedited mechanism, such as binding arbitration, by which service-related damage claims can be heard; and (3) establish that the remedies available to rail shippers include being made whole for all direct and consequential damages, and also access to an alternative rail service provider via trackage rights until service is restored to adequate levels.

extraction of unlawful prices, or to the foreclosure of access to competition, may be significant factors in the incentive of railroads to merge. PPL therefore insists that, to the extent that future mergers would be driven, at least in part, by the ease with which acquisition costs can be recovered from captive shippers, that incentive should be addressed here. (3) PPL contends that, if captive shipper remedies are improved vis-à-vis future merger partners but remain inadequate vis-à-vis existing railroads, the result could be discriminatory treatment based on the happenstance of whether a shipper is captive to a post-2001 or pre-2001 merged railroad. And, PPL adds, the first railroads to merge could be disadvantaged in comparison to their competitors.

Downstream effects. PPL contends that the § 1180.1(g) "one case at a time" rule should be amended to permit consideration, in all future merger proceedings involving a Class I railroad, of downstream effects.

Enforcement of rail service improvement promises; service guarantees. PPL contends that merger applicants' rail service improvement promises should be enforced. PPL adds: that service quality pre-merger and post-merger can be measured by collecting and comparing "before" and "after" data addressing such criteria as equipment supplies, time required to fill car or train orders, loading times, transit times, terminal congestion, unloading times, out-of-service equipment, cargo loss and damage levels, and other indicia of performance; that "before" data should go back several years, in order to prevent artificial post-merger service "improvements" as compared with poor service immediately prior to the merger; and that, as part of our post-merger oversight jurisdiction, the merged railroad should be required to file periodic reports on the quantity and quality of rail service. PPL also indicates that it supports the idea of service guarantees backed up by penalties for non-performance, although (PPL notes) the exact nature of those guarantees may have to be worked out on a case-by-case basis, inasmuch as different situations may call for different remedies. PPL further contends that the guiding principle for service guarantees should be that all shippers are entitled to be compensated for the failure of merging railroads to deliver the promised benefits and mitigation measures. And, PPL adds, only if such a principle is adopted will it make sense to allow major railroads to negotiate individualized service guarantees, because only then will shippers be in a position to obtain meaningful guarantees.

Testing merger benefit claims. PPL contends that, in view of the disappointing results of recent mergers, we should undertake to compare *actual* benefits and harms with *projected* benefits and harms. PPL further contends: that we should condition approval of further railroad consolidations on the *actual* realization of projected benefits and the *actual* avoidance of competitive harms; that we should require the merged railroad to bear the main burden of data production, since it will have the most complete information; that, whenever actual benefits, or measures to mitigate harms, fall short of meeting their goals, we should order remedial action by the merged railroad to enhance benefits or mitigate harm to competition; and that, to prevent merger applicants from gambling with captive shippers' money, we should, at a minimum, adopt a rebuttable presumption that the costs of remedial action to redress imbalances in benefits and costs are to be borne by railroads and their stockholders, and not by shippers. And, PPL adds, consideration should also be given to competitive remedies, such as trackage rights, to enhance benefits and mitigate harms.

Enhancing and promoting competition. PPL, which claims that the dominant trend of public policy with respect to regulated industries in the last two decades has been the growth of competition in place of pervasive rate and service regulation, insists that the most important step we can take in this proceeding is to adopt new approaches that serve to enhance and promote competition. It is not enough, PPL insists, to condition mergers only to preserve pre-existing competitive options and to mitigate merger-related competitive harm; rather, PPL argues, conditions should be adopted wherever they are justified. PPL notes that, now that operators of coal-fired electric generating facilities serve a more competitive market, excessive rail rates can mean lost sales, the closing of power plants, and even company failures. PPL adds: that, although it is not in the railroads' interest to jeopardize the survival of the electric power industry as a whole, railroads may be indifferent to, or in favor of, a restructuring of that industry, to suit their preferred routing patterns, train sizes, and delivery schedules; that, therefore, the reduction in railroad competition that has already taken place, through past consolidations and through barriers to effective competition by smaller railroads, is of grave concern; and that, unless this proceeding leads to significant reforms, further consolidations will only make things worse.

The "one lump" theory. PPL insists that the "one lump" theory, which (PPL claims) leads to an excessively narrow definition of competitive harm, should be abandoned. Denial of relief on "one lump" grounds, PPL explains (using a PRB scenario), is likely to lead to fewer coal choices, costlier or less suitable coal, and higher rail rates over the portion of the haul where there is today competition between UP and BNSF. The assumptions underlying the "one lump" theory, PPL argues, are not necessarily valid; a pre-merger destination monopolist, PPL explains (again using a PRB scenario), may not be extracting all monopoly rents, either because it does not know what the market will bear or because it fears retaliation from the competitive originating railroads if it were to maximize its profit on the haul. PPL contends that the "one lump" theory, objectionable as it is, is even more objectionable because it is used to deny shippers an effective voice in merger proceedings due to circumstances (*i.e.*, their captivity) for which there is no other effective remedy. PPL further contends: that preserving shipper captivity should not be a goal of regulatory policy in any context; that such a policy is particularly objectionable in the context of a major rail merger, where the Board's powers are at their height; and that, in the interest of enhancing a merger's benefits, we should use our merger approval authority to impose conditions that provide relief not otherwise available to captive shippers.

3-to-2 issues, and other procompetitive initiatives. PPL contends that, although 3-to-2 issues are less pressing today than in the past, we should no longer assume that 3-to-2 shippers suffer no merger-related loss of competition. PPL also contends that we should use our merger conditioning powers: to expand shipper access to intramodal rail competition; to preserve open gateways for all major routings; to create new gateways, and new through routes, wherever appropriate; and to ensure that the ability of the merged railroad to exploit bottlenecks is not enhanced. PPL further contends: that the merged railroad should not be allowed to preserve the appearance, but not the reality, of open gateways, through the simple expedient of switching charges that render the gateways useless; and that "terminal area" switching charges must be kept reasonable if mandatory switching is to be an effective remedy for increased market power and/or anticompetitive conduct.

Shortline and regional railroad issues. PPL contends that, as the number of Class I railroads decreases, it becomes imperative that we address the problem of contractual and other barriers to competition between Class I and smaller railroads. PPL explains: that rail-to-rail competition can be implemented with the least difficulty and the most effectiveness where the potential competitors are nearby; that shortlines are often operating close to shippers whom they cannot serve due to paper barriers; and that enhanced competition for many shippers will be difficult, if not impossible, without the participation of shortline and regional railroads, which (PPL claims) are today an underutilized asset, constrained as they are by anticompetitive provisions in line sale contracts and trackage rights agreements. PPL, which insists that the 1998 AAR/ASLRRA "Railroad Industry

Agreement" has proved to be inadequate to overcome Class I resistance to competition by the smaller roads, contends that we should, at a minimum, condition approval of further mergers involving Class I railroads upon such railroads' agreement to waive anticompetitive provisions in line sale and trackage rights agreements with shortline and regional railroads.

Recovery of merger costs from captive shippers. PPL insists that we should amend our merger regulations to prevent recovery of merger costs from captive shippers. PPL, which believes that reliance on captive customers as funders of last resort is a variation on the "too big to fail" problem, contends: that railroads should not be allowed to recover from captive shippers (via rate increases on captive traffic) the costs of implementing rail mergers, including the costs of corrective action when things go wrong; that all of the reforms under consideration in this proceeding will be undermined, if not vitiated entirely, if the costs of railroad errors of planning, judgment, and execution can simply be charged to captive shippers; that rail management, instead of being penalized for overpromising or underperforming, would be protected; and that rigorous post-merger scrutiny of the extent to which projections were accurate would be a sham. PPL further contends: that, when utilities obtain authorization from federal and state regulatory authorities to merge, care is taken to insure that the costs and risks are not borne by ratepayers; that rates are often frozen for many years, to ensure that the merger partners look only to the gains from their consolidation to cover its costs; that this system is fair and efficient, and has proved its worth in the utility field; and that we should propose such procedures for any future rail mergers.

Competitive access issues. PPL, which argues that more competition is desirable whether or not there are more mergers, believes that we should put the remaining Class I railroads on notice that they cannot rely on continued reluctance on our part to fully implement the trackage rights and reciprocal switching remedies of 49 U.S.C. 11102. PPL contends, in particular, that we should rule that competitive access remedies under 49 CFR part 1144, and our interpretation of 49 U.S.C. 11102, will no longer require a threshold showing of anticompetitive conduct by a railroad before relief can be ordered. PPL explains that this change is necessary both to help shippers that are currently remediless and also to prevent non-merging railroads from enjoying unfair advantages as compared with future merger applicants.

Reform principles. As noted in our summary of the ARC submission, PPL has expressed support for the "principles for reform of merger proceedings and related regulation."

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT. SRPAI&PD, a member of the SCS group, filed separately to discuss its experience in the wake of the BN/SF merger and to emphasize the need to require merging rail carriers to adhere to pre-merger service levels and to live up to their pre-merger promises with respect to post-merger service levels.

Problems associated with the BN/SF merger. SRPAI&PD indicates that most of the coal burned at its Arizona power plant, which prior to the BN/SF merger was served exclusively by Santa Fe, is produced at New Mexico mines that prior to the BN/SF merger were also served exclusively by Santa Fe. SRPAI&PD contends: that, prior to the BN/SF merger, SRPAI&PD generally received responsive, attentive service from Santa Fe from both an operational and a customer service standpoint; that once the merger occurred, however, SRPAI&PD became less important to the much larger BNSF than it had been to the much smaller Santa Fe; that BNSF appeared to be concerned primarily with its coal traffic from the Powder River Basin (which, SRPAI&PD notes, produces coal in far larger volumes than the New Mexico mines that supply SRPAI&PD's power plant) and with its intermodal traffic (much of which, SRPAI&PD notes, uses the same main line used by SRPAI&PD's coal trains); that, in the fall of 1995 (shortly after the merger), SRPAI&PD began to experience rail service problems, because (SRPAI&PD claims) BNSF was unable to provide adequate locomotives and train crews to move SRPAI&PD's coal trains on a regular and predictable basis; that, although BNSF's service gradually improved in 1996, SRPAI&PD's coal trains are still often delayed due to the increasingly heavy intermodal and other traffic that moves over the same main line used by SRPAI&PD's trains; and that SRPAI&PD no longer has the kind of regular, dependable service it had prior to the BN/SF merger, and rarely knows when (or if) a loaded train will arrive at its plant.

SRPAI&PD believes that the kinds of problems it experienced in the wake of the BN/SF merger will only get worse if another round of major rail consolidations occurs. Further consolidations in the North American railroad industry, SRPAI&PD warns, will significantly impair the rail service SRPAI&PD needs to assure a steady, dependable, and economically competitive supply of coal for the generation of electricity at its plant. The major Class I carriers, SRPAI&PD claims, have already become so big that many of their customers get lost in the shuffle; their market power, SRPAI&PD adds, is such that they can dictate service terms to most of their customers. The time has come, SRPAI&PD insists, for the Board to take meaningful steps to protect captive rail shippers from the potential harmful effects of future major rail consolidations.

Relief requested (the SCS proposal). SRPAI&PD agrees with SCS that our merger rules should be amended to require merging carriers to make every shipper "financially whole for any injuries the shipper incurs as a result of post-consolidation service problems." This proposal, SRPAI&PD insists, is one of the few realistic means of enforcing the representations that merging railroads commonly make concerning the benefits their proposed consolidation will have with respect to rail service. And, SRPAI&PD adds, this proposal would provide a strong incentive for the railroads to honor the statements made in their applications concerning the public benefits that will result from consolidation transactions.

Alternative relief requested (SRPAI&PD's alternative proposal). SRPAI&PD suggests that, if we are unwilling to adopt SCS's proposal respecting post-merger service failures, we should at least adopt an alternative proposal that (SRPAI&PD claims) would still provide merging railroads with a strong incentive to maintain pre-merger service levels and to honor their pre-merger representations concerning post-merger service levels. SRPAI&PD contends that, at a minimum, its alternative proposal is necessary to help assure that future major rail consolidations do not result in inadequate service to those members of the public who must ship by rail, and who would not otherwise have the ability to counter the market power (or indifference) of the few remaining Class I railroads.

SRPAI&PD's alternative proposal contains three elements: (1) Merger applicants will be required to provide service to their captive shippers for a period of three years following consummation of the transaction that is no worse than the level of service provided during the three-year period prior to consummation of the transaction. (2) If merger applicants make any representations in their application or in soliciting support for their proposal that the level of rail service to be provided post-transaction will be better than the level of service provided pre-transaction, the applicants will be required to honor such representations for a period of three years following consummation of the transaction. (3) A presumption will be established that any significant deterioration in service that occurs during the three-year post-transaction period resulted from the transaction. Unless the applicants can show that the deterioration was caused by the customer or by "force majeure" events, the Board will order the merger applicants to permit the shipper to obtain alternative rail service. Such alternative rail service may take one of the forms depending on the circumstances: bottleneck rate relief (without regard to whether the shipper has a contract covering all or any part of the transportation in issue) or trackage rights in favor of an alternative service provider up to a maximum distance of 100 miles.

WESTERN RESOURCES, INC. WRI, a member of the CCS group, filed separately to argue that, if competition is to be enhanced for *all* shippers, we must make some arrangement for the modification of long-term rail transportation contracts.

Consequences of BN/SF and UP/SP mergers. WRI, each one of whose coal-burning plants is exclusively served either by BNSF or by UP, contends that its operations have been negatively impacted, both economically and operationally, by the BN/SF and UP/SP mergers. WRI argues: that the railroad mergers that have occurred to date have produced a rail system where competition between major railroads has been reduced and rail service has become undependable; that the railroads have indicated that, to solve their problems, they intend to retrench, to restrict capacity, to concede business to other transportation modes, to move away from contract service, and to raise the rates of shippers who have no choice but to ship by rail; and that, given these realities, there is every reason to expect that future rail mergers will result in significant service disruptions and economic losses to rail customers. Things, WRI warns, will only get worse, unless we make the competition-enhancing changes to our merger rules advocated by CCS.

Long-term contracts. WRI contends that, in addition to making the changes advocated by CCS, we should include in our merger regulations provisions that expand upon our authority to modify, in merger proceedings, the terms of an existing contract between a rail customer and a railroad if all or part of the contract is contrary to the policy goal of affirmatively enhancing competition and improving post-merger rail service for all rail customers. WRI argues: that, because most coal is moved under rail transportation contracts, the advancement of the new procompetitive rail merger policy will be thwarted unless pre-merger rail transportation contracts are modified; that, under 49 U.S.C. 11321 and 11123, we have the authority to modify rail transportation contracts to the extent such modification is needed to carry out our merger policies regarding competition and service as applied to a particular merger transaction; and that this authority should be actively utilized to facilitate the enhancement of competitive alternatives and service for captive shippers in order to ensure that *all* captive shippers benefit from our new procompetitive policies.

WRI's concern is focused on captive coal shippers that have long-term coal transportation contracts. WRI contends: that these long-term captive shippers are the most harmed by the inability of railroads to implement mergers because they do not have alternatives to alleviate the significant adverse effects of service deterioration; that, furthermore, their contracts may not provide a means to recover the substantial economic damages caused by post-merger reductions in service or to seek alternative transportation services from other carriers; and that, therefore, the preclusion of a captive shipper with a long-term transportation contract from taking advantage of procompetitive changes made through this proceeding to our merger regulations until its contract expires would have significant adverse economic results. WRI indicates, by way of example, that the improvement of rail service to shippers utilizing the new rules might come at the expense of deteriorated service to captive shippers who, because their transportation is under contract, would not have the same recourse to the Board. WRI indicates, by way of further example, that a shipper that entered into a long-term high-priced contract because of the lack of competition to its plants would be unfairly forced to continue an arrangement negotiated under those conditions while other shippers received the benefits of rate reductions and productivity and efficiency gains, thus placing the shipper with a long-term contract at a significant competitive disadvantage through no fault of its own.

WRI therefore contends that, if we intend to enhance rail competition systemwide and to improve rail service for *all* rail shippers, we should, as part of the merger application review process, oversee the modification of contracts between a merging railroad and its rail customers to ensure that the service these customers receive is competitively priced and on a par with service provided to other rail shippers under our revised regulations. The modifications contemplated by WRI could include: (1) opening up all or part of the volume under a contract to competitive bids, combined with access to the facility by another rail carrier; (2) revision of contract rates to be commensurate with the service provided to the facility (*i.e.*, rate reductions as a penalty for degradation of post-merger service); (3) revision of contract service standards to be consistent with our new regulations; and (4) termination of contracts and substitution with prescribed rates for arrangements that are materially inconsistent with our new policies regarding competition and service and that place the shipper at an extreme competitive disadvantage in its particular industry.

APPENDIX M: CHEMICALS, PLASTICS, AND RELATED INTERESTS

CHEMICAL MANUFACTURERS ASSOCIATION AND AMERICAN PLASTICS COUNCIL. CMA and APC contend that we should use our merger conditioning power to promote the public interest by expanding the role of rail-to-rail competition.

Competitive impacts of future mergers. CMA and APC concede that past mergers have contributed to improved rail financial performance by allowing railroads to cut costs (*e.g.*, by consolidating overhead and management functions, and capturing other economies of scale) and by enabling railroads to expand certain markets (*e.g.*, by offering shorter routes and single system service). CMA and APC insist, however, that rail mergers have been a mixed blessing for shippers; CMA and APC claim, in particular, that captive shippers have often found that their rates were increasing while their choices of carriers and routings were decreasing. And, CMA and APC warn, any further rail mergers, even "end-to-end" mergers, will inevitably, by virtue of intractable mathematical realities, have serious anticompetitive consequences for shippers. CMA and APC explain: that any further merger in the U.S. rail industry would inevitably trigger a final round of mergers that would result in two giant transcontinental rail systems; and that the creation of a transcontinental rail duopoly would result in diminished rail choices for transcontinental traffic (*e.g.*, trans-Mississippi flows of chemicals and plastics traffic, especially between the Texas Gulf Coast and the Northeast).

Asserted flaw in changes suggested in ANPR. CMA and APC contend that, although the changes suggested in the ANPR are "positive," what CMA and APC regard as the "linchpin" of those changes (making it easier for shippers to challenge the reasonableness of bottleneck rates) would (CMA and APC claim) leave many shippers without effective recourse because of the expense of bringing reasonableness challenges in comparison to the potential rate savings on the traffic any one shipper has at issue.

The CMA/APC Access Condition. CMA and APC contend that, rather than adopting the changes suggested in the ANPR, we should adopt instead a condition (referred to as the "Access Condition") that would require merging carriers to provide captive (one-railroad) shippers on the merged system with access to at least one other rail carrier (referred to as the "Alternative Carrier"), by any of the means traditionally used to give such access (*e.g.*, reciprocal switching, terminal access, trackage rights, haulage rights, or joint access areas). CMA and APC acknowledge that the Access Condition, by providing access to all captive shippers (and not just to those whose captivity was created by the merger in question), would be unprecedented. CMA and APC contend, however: (1) that there are numerous more limited antecedents for competition-enhancing elements in mergers, including (among others) the Shared Assets Areas created in connection with the CSX/NS/CR transaction; (2) that, in any event, the Access Condition is a necessary counterbalance to the substantial and unique competitive harms that would result from any further merger, which (CMA and APC argue) would inevitably lead to the formation of two giant transcontinental rail systems; and (3) that, furthermore, the *actual* competition that would be provided under the Access Condition would roughly parallel the *simulated* competition that would be provided under the changes suggested in the ANPR, and would have the advantage of permitting actual competition, rather than regulatory simulation, to govern rates and service. CMA and APC emphasize that the Access Condition would leave to the free market, rather than to complicated and expensive litigation, the decision about when rates are sufficiently high and traffic sufficiently dense to induce competition. And, CMA and APC add, the Access Condition is no more revolutionary than the deregulatory steps taken in other formerly heavily regulated industries, including airlines, electric utilities, and telecommunications. (1) *Policy of the Staggers Act*. CMA and APC contend that, in accord with the policy of the Staggers Act, the Access Condition, by making all rail traffic potentially open to some form of rail competition, would allow effective competition, not regulation, to establish reasonable rates and service.

(2) *Access permissive not mandatory*. CMA and APC emphasize that, under the Access Condition, access would be permissive but not mandatory, *i.e.*, the Alternative Carrier would not be forced to enter a market against its own business judgment. CMA and APC note, by way of example, that the Alternative Carrier presumably would not enter a market via trackage rights unless it determined that it could aggregate sufficient traffic to make it worthwhile to run trains into the area, in light of both the operating costs of providing the train service and the concomitant investment in locomotives, crew hiring and training, establishment of crew bases, and marketing and customer support.

(3) *Economic efficiency*. CMA and APC contend that the Access Condition would promote economic efficiency, because (CMA and APC claim) the Access Condition would allow service to be provided by the carrier offering the most competitive combination of service and price to the shipper. And, CMA and APC explain, the more competitive carrier would tend to be the one able to provide the service most efficiently to the shipper, whether because of a more direct or efficient route structure, better management and operational efficiency, or technological innovation.

(4) *Dispatching issues*. CMA and APC insist that the dispatching issues created by the access condition would be manageable. CMA and APC explain: that experience has shown that trackage rights operations can be handled fairly and efficiently through joint dispatching centers and other means; that, given its potential for substantially increasing railroad capacity and profitability, improved dispatch coordination among railroads may be inevitable in any case; and that, as a practical matter, it is unlikely that there would be many areas in which more than one carrier would operate over trackage rights granted pursuant to the Access Condition (CMA and APC contend that, as a simple matter of geography, most trackage rights under the Access Condition, at least initially, would be used by one major Eastern carrier over the lines of the other major Eastern carrier, or by one major Western carrier over the lines of the other major Western carrier, with some limited penetration by Western carriers into the East and vice versa near the Mississippi River).

(5) *Financial impact on rail industry*. CMA and APC contend that the Access Condition would not bring financial ruin to the railroads, but, rather, would further revitalize the rail industry and give it new incentives to expand and develop new markets. CMA and APC explain: that enhanced competition is essential to maintain the vigor of the railroad industry as it expands its markets in intermodal and other business, including new business arising from Internet commerce and supply chain management; that, furthermore, enhanced competition is the best way to ensure

that railroads will make the right investments to pursue profitable markets; and that, as a practical matter, enhanced competition will not destroy the railroad industry's ability to engage in "differential pricing." Enhanced competition, CMA and APC believe, will further spur the trend of innovation and more emphasis on customer service begun by the Staggers Act, and ultimately will ensure the continued financial health of the rail industry.

(6) *Different kinds of duopoly*. CMA and APC concede that the Access Condition, which would provide no more than two-carrier competition, would, in a sense, offer a duopoly as a form of relief. CMA and APC contend, however: that, for a shipper which is captive to a single railroad, a duopoly is better than a monopoly; and that, in any event, there is arguably more likelihood of vigorous competitive behavior when an alternative carrier affirmatively decides to enter a market under the Access Condition, with a clear incentive to make its investment in the new service pay off, than there is when two entrenched duopolists have established a longstanding competitive modus vivendi.

(7) *Fairness to shippers*. CMA and APC contend that, as compared to the changes suggested in the ANPR, the Access Condition would be much fairer to shippers, because (CMA and APC explain) at present only very high-volume shippers find it worthwhile to bring rate reasonableness challenges, even when other, lower-volume shippers are located on the same high-density lines and would succeed in rate challenges if the costs of the litigation were justifiable in light of their individually modest traffic volumes.

(8) *Service disruptions*. CMA and APC, noting the service disruptions connected with the UP/SP and CSX/NS/CR transactions, argue that the Access Condition would permit alternative carriers to provide service relief on either a short-term or long-term basis without the need for elaborate proceedings and hearings concerning the necessity for emergency relief.

(9) *Compensation and dispute resolution*. CMA and APC contend that, under the Access Condition, there would be no need for case-by-case regulatory intervention. CMA and APC explain that, once the Board has established guidelines for fair compensation, access would be afforded under agreements negotiated bilaterally between the incumbent and alternative carrier, with disputes resolved by "final offer" arbitration.

(10) *International traffic*. CMA and APC indicate that the Access Condition is intended to apply to all traffic moving over systems whose merger is subject to review by the Board, including international traffic.

Comments on the ANPR suggestions. (1) *Downstream effects*. CMA and APC agree that a merger cannot be viewed in isolation from the transactions that the merger will likely trigger as a matter of strategic necessity.

(2) *Maintaining safe operations*. CMA and APC agree that the Safety Integration Plan process has worked well, and does not need to be revisited at this time. CMA and APC add, however, that, in future mergers, applicants should be required to submit additional information demonstrating the adequacy of projected budgets for maintenance of way, in addition to budgets for crew training, signal system integration, and other aspects of safe operations.

(3) *Safeguarding rail service*. CMA and APC contend that future merger applicants should be required to submit Service Integration Plans showing how the railroads' operations will be meshed both from an operating and a customer relations standpoint. CMA and APC further contend that oversight should automatically be established, as in the UP/SP and CSX/NS/CR cases, for five years, during which time regular reports should be filed concerning defined metrics such as transit times and other measures of performance that are meaningful both to shippers and to the Board.

(4) *Open gateways*. CMA and APC contend that, if the Access Condition is not adopted, a condition requiring that open gateways be maintained would be useful, particularly to ameliorate the unique harms to gateways that a transcontinental merger would likely produce.

(5) *Terminal switching*. CMA and APC contend that required switching, for an agreed-upon fee, for all exclusively served shippers within a terminal area (and not just traditional "2-to-1" shippers) would be a positive step. CMA and APC claim, however, that there is no reason in principle why shippers in terminal areas should be given a remedy while shippers on main lines are not.

(6) *Bottleneck rules*. CMA and APC indicate that, if the Access Condition is not adopted, they would endorse the proposed changes to the bottleneck rules. CMA and APC add, however, that the Access Condition would be preferable because (CMA and APC claim) it would provide actual competition rather than simulated competition, and would avoid reliance on complex and expensive litigation.

(7) *The "one lump" theory*. CMA and APC indicate that, if the Access Condition is not adopted, they would support revising the application of the "one lump" theory as suggested in the ANPR. CMA and APC add, however, that adoption of the Access Condition would obviate the need to revise the "one lump" theory, because (CMA and APC explain) the Access Condition would permit an alternative carrier to serve the shipper.

(8) *Shortline and regional railroad issues*. CMA and APC indicate that the Access Condition should apply to shippers on shortline and regional railroads as well. This means, CMA and APC explain, that, when the shortline or regional railroad connects with only one line-haul railroad (whether because of paper barriers or the simple lack of a physical connection to another railroad), and that line-haul railroad merges with another line-haul carrier, the shippers on the shortline or regional should have the ability to request service from a line-haul carrier that is independent of the merged system. And, CMA and APC add, this alternative line-haul service would also be of assistance to the shortline or regional railroad, which itself may be captive to the line-haul carrier and may suffer when the line-haul service or car supply are inadequate.

(9) *3-to-2 issues*. CMA and APC contend that, although 3-to-2 issues may still be relevant to a few shippers, the instances in which there are three rail competitors at a particular point are relatively rare, and it is even rarer that each of the three railroads has a route that is usable by the shipper. CMA and APC further contend that we should address through a rule the situation in which there are physically three or more carriers serving a point (*e.g.*, Chicago), but only two that effectively serve a particular route (because the others do not serve the corridor or provide only circuitous or indirect service). CMA and APC argue that, in such circumstances, the point should be treated as a 2-to-1 point despite the presence of the third carrier.

(10) *Cross-border issues*. CMA and APC contend that, with NAFTA trade growing and most industries competing on a global basis, we should review major rail consolidations on a comprehensive North American basis, and should examine all relevant issues that arguably have an effect on either U.S. traffic or Canadian (or Mexican) traffic that competes directly or indirectly with U.S. traffic. CMA and APC add that issues affecting U.S. traffic would include issues of resource allocation (*e.g.*, cars, locomotives, crews, and financial resources) as between U.S. and Mexican or Canadian operations. CMA and APC also request that we undertake an in-depth analysis of our overlapping jurisdictions with Canadian authorities with a goal of ensuring that rights of shippers (both U.S. shippers and Canadian shippers) shipping freight to and from Canada are not lost as a result of trans-border mergers.

Reform principles. As noted in our summary of the ARC submission, CMA and APC have expressed support for the "principles for reform of merger proceedings and related regulation."

SOCIETY OF THE PLASTICS INDUSTRY. SPI contends that we should move aggressively to reform our railroad consolidation procedures in particular and our rail regulatory policies in general. Our policies, SPI believes, are out of date, and have led to an inordinate concentration of economic power in a handful of railroads. The time has come, SPI maintains, to allow the free market dynamics of other network industries to finally begin applying to the railroad industry. And this proceeding, SPI adds, should be the first step in interjecting accountability and customer focus into the future consolidations of Class I railroads.

Preserving, promoting, and enhancing competition. (1) *Economic policy*. SPI, which believes that past merger decisions have taken an extremely narrow view as to whether a transaction may have an adverse effect upon competition,[243] contends that we should adhere to generally accepted economic policies and should recognize real-world competitive situations. SPI further contends that the statutory concept of protecting against "an adverse effect on competition" should be viewed literally, consistent with the merger policies followed by other government authorities, and not from a perspective that exalts economic theory over experience or that views the railroad industry as unique and therefore immune to the economic principles that apply to industry generally.

(2) *Relief for loss of competitive options*. SPI contends that we should provide remedial relief against the loss of downstream competition and also against the loss of an effective carrier in a multi-carrier market. As respects the loss of downstream competition, SPI contends that the merging carriers should be required to offer rates to the former junction point on a proportionate or a mileage basis to the rates being offered for through service. As to the loss of an effective carrier in a multi-carrier market, SPI contends: that, where a substitute carrier is available to serve the market, that carrier should be granted access via line divestiture or trackage rights, as most appropriate; and that, if no substitute carrier is available, a rate cap should be imposed on the merging carriers to limit rate increases over pre-merger levels to cost pass-throughs. And, SPI adds, for loss of product or geographic competition, the remedial effects of divestiture or trackage rights must be evaluated case-by-case.

(3) *Open gateways*. SPI contends that we should require merger applicants to maintain open gateways for all major routings. SPI further contends that, because gateways can be closed economically (through pricing decisions), increasing prices in a manner that discriminates against a particular gateway or routing should be prohibited as a merger condition.

(4) *Enhanced competition*. SPI, which endorses the concept that enhancement of competition is a public interest benefit, contends that one way to enhance competition would be to require merging railroads to provide bottleneck rates between captive points and the first junction in the direction of the other end of the movement. SPI further contends: that, as a condition of consolidation, merging carriers should be required to open captive points to downstream competition; and that we may wish to reexamine our "Bottleneck" policy from the standpoint of whether it should be applied generically.

Maintaining safe rail operations and safeguarding rail service. SPI insists that maintaining safe rail operations and safeguarding rail service from merger-related service disruptions are two sides of the same coin. Experience, SPI explains, teaches that integration problems lead to safety problems, and that derailments and accidents impede timely service. (1) *Safety Integration Plan; independent review*. SPI contends that we should require an independent review by an independent consultant of the safety integration plans filed by merger applicants. SPI further contends: that the independent consultant should review, among other things, the measures planned to be taken to

[243] SPI cites, in particular: the "one lump" theory; past treatment of 5-to-4, 4-to-3, and 3-to-2 reductions in competitive options; and the treatment of product and geographic competition in the merger context.

assure proper integration of the consolidating carriers; and that we should require the merger applicants to underwrite the cost of the independent review.

(2) *Service guarantees*. SPI contends that we should impose a condition on merging railroads that prohibits the carriers from increasing rates during, and for a subsequent period equivalent to, any merger-related service disruptions. SPI, citing the service problems that occurred in connection with the UP/CNW, BN/SF, UP/SP, and CSX/NS/CR transactions, insists that shippers should not have to pay for merger-related service integration problems. SPI adds: that, if merging carriers cannot at least maintain an equivalent level of service to pre-consolidation conditions, they should not be allowed to increase rates (including accessorial and other charges such as for track leases and terminal services) while service is degraded; and that merging carriers should not be allowed to foist their costs from their integration problems onto the shipper community immediately after service is stabilized. Rate stabilization, SPI maintains, should last at least as long as the service disruption to assure that shippers are not doubly penalized for the inability of the merging railroads to manage their integration process effectively.

(3) *Regional and shortline railroads*. SPI contends that we must assure that regional and shortline railroads are protected from adverse merger-related impacts.

Merger-related public interest benefits. SPI contends that merging carriers should be required to account (publicly) for their progress in achieving the benefits projected in the merger application. SPI further contends that merging carriers should be required to indicate (publicly) whether they are improving or even maintaining service. SPI contemplates that, if such accounts were required, conditions could be developed around the merger applicants' representations. SPI indicates, by way of example, that, had such an approach been in place at the time of the Conrail acquisition, CSX and NS would have been required to report on their progress in taking a million trucks off the highways, and that, in order to hold CSX and NS to their representation that the CSX/NS/CR transaction would not be paid for by shippers, we could have imposed a condition prohibiting rate increases other than those caused by increases in the cost of labor, fuel, and other operating expenses.

SPI further contends that, from a service standpoint, we should require consolidating railroads to publish "before and after" transit times for major corridors. SPI adds: that statistics such as terminal dwell time and average train running speed, while perhaps useful to identify trends and certain problem areas, are meaningless to the shipper community; that shippers want to know how long it takes for their freight to move from origin to destination, and the variability in that average transit time; and that, although shippers can and do compile this information on an individual basis, the Board also needs to know how the carriers are performing in providing service to their customers.

Reform principles. As noted in our summary of the ARC submission, SPI has expressed support for the "principles for reform of merger proceedings and related regulation."

BASF CORPORATION, THE OXY COMPANIES, AND WILLIAMS ENERGY SERVICES. BASF, Oxy, and Williams[244] believe that future railroad mergers should be considered in light of the short-term and long-term impact on rail shippers and the consuming public.

Downstream effects. BASF, Oxy, and Williams agree that, when evaluating future rail mergers, we must consider downstream effects, including the likely strategic responses of non-applicant carriers. BASF, Oxy, and Williams believe that we must anticipate: that any future

[244] BASF, Oxy, and Williams filed separately.

mergers will ultimately result in the creation of two transcontinental systems; and that any future mergers involving one of the two major Canadian railroads and one of the four major U.S. railroads will ultimately lead to the creation of two transcontinental and transnational systems.

Transcontinental rail duopoly. BASF, Oxy, and Williams believe that a rail duopoly would amount to a parallel monopoly. BASF, Oxy, and Williams insist: that rail *vs.* rail competition would be weak and generally unavailable, because each duopolist would have an interest in the survival of the other (because, they explain, each would realize that, if it were to drive the other from the market, the resultant monopoly would almost certainly become the focus of government attention); that, therefore, there would be very little rail-to-rail competition; and that, in any event, most shippers would have access to only one of the two systems. BASF, Oxy, and Williams contend that, if this is the future of the rail industry, we should anticipate that future and design a responsive plan now. BASF, Oxy, and Williams contend, in particular: that, in the short run, we should adopt policies that preserve whatever intramodal competition now exists, and should identify ways to protect shippers who lack access to such competition; and that, in the long run, we should consider whether it may be appropriate to modify structural arrangements within the railroad industry to allow new forms of competition to develop.

Substantive and procedural aspects. BASF, Oxy, and Williams contend that we should address both substantive and procedural aspects of the new merger guidelines. BASF, Oxy, and Williams explain that, because the new merger guidelines should be designed with a view toward both substantive equity and procedural equity, we should consider ways to improve upon the slow and unproductive course of well-intended but ultimately fruitless proceedings that have occasionally occurred in the past.

Protecting and expanding competition in the short run. BASF, Oxy, and Williams, which believe that the creation of a transcontinental rail duopoly would eliminate the little intramodal competition that many shippers enjoy today, contend that certain steps can be taken to preserve and even expand rail-to-rail competition. (1) *Trackage or haulage rights*. BASF, Oxy, and Williams contend that whatever competition now exists can be retained through the grant of trackage or haulage rights. BASF, Oxy, and Williams believe that any shipper now served by multiple railroads should have the right to have its traffic carried to a competing line by means of such rights.

(2) *Reciprocal switching*. BASF, Oxy, and Williams contend that the ability to reach competing lines could be enhanced further by a requirement for reciprocal switching for all shippers located within the switching limits of any local area served by two or more rail carriers. BASF, Oxy, and Williams note that this arrangement (which, they indicate, would be similar to the Canadian "interswitching" arrangement), would effectively open rail service within the local switching area to rail competition, regardless of the line on which any shipper is located.

(3) *Competitive Line Rates*. BASF, Oxy, and Williams contend that competition could be further promoted by adopting the Canadian "Competitive Line Rate" (CLR) arrangement. BASF, Oxy, and Williams contemplate: that any captive shipper sending traffic over a route that can be served by more than one railroad would be entitled to a rate from the captive (origin or destination) point to the nearest point of interchange with the alternate or connecting carrier; and that the shipper would first negotiate with the connecting carrier for the competitive portion of the movement.

"One lump" doctrine. BASF, Oxy, and Williams contend that the "one lump" doctrine represents a triumph of theory over evidence. BASF, Oxy, and Williams insist that experience teaches: that the leverage of the shipper is very closely linked to the availability of competition; that loss of competition at the origination point is an ongoing hindrance in seeking competitive rate and service agreements; and that the availability of competitive rail options greatly enhances the

likelihood of competitive rate and service agreements. BASF, Oxy, and Williams argue that the "one lump" doctrine should be discarded.

Open gateways. BASF, Oxy, and Williams contend that, as a condition of all future mergers (especially those resulting in transcontinental railroads), we should establish a mechanism that will set reasonable rates separately into and out of the major gateways (Chicago, St. Louis, Memphis, Kansas City, and New Orleans) when the railroads fail to allow for interchanges at these gateways. BASF, Oxy, and Williams explain that the creation of transcontinental railroads will sharply reduce or eliminate a rail shipper's ability to negotiate separate rates into and out of the major gateways.

Bottleneck pricing abuse. BASF, Oxy, and Williams contend that we must alter our practices to protect shippers from bottleneck pricing abuse. BASF, Oxy, and Williams explain: that, when a shipper's shipping points are captive to a single rail carrier, the forces of competition cannot exert effective constraint on the market power of the railroad; that, therefore, captive shippers have relatively little leverage on their rail carriers; and that, even if there are competitive routes, the dominant carrier is often able to impose unreasonable charges for the captive (*i.e.*, the bottleneck) portion of the movement. BASF, Oxy, and Williams therefore contend that we should modify our practices to allow shippers to challenge the reasonableness of the revenue recovery of the captive (*i.e.*, the bottleneck) portions of their movements. BASF, Oxy, and Williams contemplate that shippers should be entitled to separate, explicit rates for the captive portions of their movements, and that they should be permitted to challenge the reasonableness of those rates. BASF, Oxy, and Williams emphasize that a shipper should be able to challenge a bottleneck rate on its own merits; the bottleneck railroad, they add, should not be allowed to mask the bottleneck rate in the rates and charges for the other segments of the movement.

Pre-merger safeguards. BASF, Oxy, and Williams contend that certain procedures should be adopted to reduce or eliminate future merger-related service disruptions. (1) *Rail car tracing and identification*. BASF, Oxy, and Williams contend that we should require documented evidence that the systems of the merging railroads have successfully been merged in a simulation setting and also run simultaneously with the systems of the individual railroads.

(2) *Computer and data systems*. BASF, Oxy, and Williams contend that we should require more planning and testing before the "cut over." BASF, Oxy, and Williams believe that the integration of the different systems should be tested in a "real time" setting, using actual data reflecting the entire operations of the merged system. BASF, Oxy, and Williams explain that, when such tests have been conducted in the past, the volume of "through put" data has often been on a limited scale, and the full scale test has occurred during actual operations.

(3) *Establishment of operating benchmarks*. BASF, Oxy, and Williams contend: that we should establish appropriate operational benchmarks (such as train speed, cars in the system, dwell time, and car throughput); that the train speed and cars in the system data should be developed for major operating divisions of the system in addition to the system as a whole; that, in order to develop statistics that will give early indications of trouble spots within the merged system, benchmarks should be developed and established in a pre-merger environment; that the development of tonnage densities should be computed for all major traffic corridors; that the maximum density and the current density should be computed for all major corridors in order to assure that the capacity exists for future growth; that, in connection with tonnage density, data should be developed for the top ten commodities or commodity groups and the system as a whole for each of the merging railroads; that these data should illustrate the trends for these products over the last five years for which the data is available; and that these data should include the number of tons, loaded car miles, and the total ton-miles.

(4) *Procedural time frame*. BASF, Oxy, and Williams contend that the time frame for future mergers should allow sufficient time for the issuance and handling of a scoping order by the Board. BASF, Oxy, and Williams explain: that this order would consider addressing issues raised with the market analysis, operating plan, labor, traffic diversion study, and other aspects of preparation and testing by the railroads; that the merging railroads would then be given adequate time to respond to the questions raised by the Board or other parties to the proceeding; and that this could help identify and resolve issues when they are at the stage of potential problems, before they emerge as crises.

Oversight requirement. BASF, Oxy, and Williams contend that oversight procedures should be made a standard requirement for merger approval. BASF, Oxy, and Williams further contend that oversight, which (they believe) should continue for a period of five years beginning with the effective date of the merger approval, should be extended if post-merger conditions warrant an extension.

U.S./Canadian rail mergers. BASF, Oxy, and Williams contend that, as a condition of allowing the merger of Canadian and U.S. railroads, we should require that all financial and operating data be filed for the combined system on the basis currently required of U.S. railroads. BASF, Oxy, and Williams explain that having only the U.S. portions of the merged system file separate reports will not produce accurate costs that are representative of the combined operation.

Restructuring the railroad industry. (1) *Open access in other industries*. BASF, Oxy, and Williams contend that recent structural changes in the telecommunications, natural gas, and electric utility industries have brought competition into activities that for decades were considered the monopoly preserve of the incumbent providers. BASF, Oxy, and Williams further contend: that the prevailing principle in each of these restructurings has been open access; that the principle of open access requires the incumbent to permit unrelated and sometimes competing entities to use its line facilities; and that, although the incumbents in each case have regarded open access as an intrusion into their proprietary sphere, the incumbents (in addition to the consuming public) have ultimately benefitted from the restructuring.

(2) *Open access in the railroad industry*. BASF, Oxy, and Williams contend that we should consider the public interest benefits that might be derived by applying the principle of open access to the railroad industry. BASF, Oxy, and Williams explain: that, particularly if the industry shrinks to two major systems, the present structural model, whereby each railroad carries its own trains and its own traffic at its own rates, cannot be considered as economically efficient; that, possibly, the function of operating railroad tracks could be decoupled from that of operating railroad trains; and that, possibly, the rail lines could be considered analogous to the highway, waterway, or airport systems, whereby multiple competing users employ common rights-of-way which they collectively support. BASF, Oxy, and Williams add that, although they do not necessarily recommend that we directly address these structural problems in this proceeding, it might be appropriate, if we intend to allow future mergers to proceed, to serve notice on the railroad industry that we will consider major structural changes as part of our agenda during the coming years.

DOW CHEMICAL COMPANY. Dow, which indicates that it has been greatly impacted in mostly negative ways by consolidation in the North American rail industry, urges us to use the opportunity presented in this proceeding to give substantive meaning to the procompetitive mandates in the National Transportation Policy.

Bottlenecks and the "one lump" theory. Dow contends that much competition has been lost through prior mergers because, under the logic of the "one lump" theory, an extension of a bottleneck has been thought not to have an anticompetitive effect. Dow insists: that the applicability of the "one lump" theory to railroad mergers has not been supported by real shipper experience; and that, in fact, experience teaches that the extension of a bottleneck, as the result of a merger, reduces competition, and therefore has an adverse impact both on rates and on service. Dow adds that the "one lump" theory cannot be squared with the "contract exception" that applies in the bottleneck context; Dow explains that if there is indeed a benefit from downstream competition (and Dow insists that there is), then the merger of a bottleneck carrier with a downstream competitive segment carrier must have anticompetitive effects.

Dow therefore contends that we should abandon the "one lump" theory, and that, when bottlenecks are extended as the result of a merger, we should preserve the pre-merger interchange point and require the bottleneck carrier to provide a separately challengeable common carrier rate to that point. Dow further contends that we should also permit shippers to separately challenge bottleneck rates even when the bottleneck carrier serves both the origin and destination. Dow explains that, in most cases, the bottleneck carrier has not always served both points, but, rather, has acquired that ability through a series of prior mergers. This, Dow argues, represents a gradual, but significant, loss of competition over many years, which (Dow believes) we should rectify.

Scope of this proceeding. Dow contends that, in light of the extensive consolidation that has already occurred in the rail industry, we cannot promote competition simply by adopting new regulations that will be applicable only with respect to future mergers. Rather, Dow argues, the substantial competition that has already been lost must be replaced, and, to this end, we should adopt new procompetitive rules that will apply to the industry as a whole. Dow contends, in particular: that we should require carriers to maintain open gateways for all major routings; that we should require carriers to offer, upon request, contracts for the competitive portions of joint-line routes when the joint-line partner has a bottleneck segment; that we should require carriers to provide switching, at an agreed-upon fee, to all exclusively served shippers located within or adjacent to terminals; that we should adopt something in the nature of the Canadian competitive line rate (CLR) mechanism, which (Dow explains) permits a shipper located beyond a 30 km interswitching radius to apply to the regulatory agency to set a rate for traffic over the bottleneck railroad serving the shipper to an interchange point with another carrier; that we should also follow the Canadian practice of resolving CLR disputes through private binding arbitration; and that we should revise the 49 CFR Part 1144 reciprocal switching rules by eliminating the "competitive abuse" test and by establishing clear and definite procompetitive standards for obtaining reciprocal switching under 49 U.S.C. 11102.

Service and safety performance. Dow contends that enhanced competition will improve service and safety performance by allowing shippers to choose between carriers on those bases, which (Dow explains) will give the carriers a strong incentive (an incentive they do not currently have, Dow adds) to provide reliable, efficient, and safe rail service. Dow, which notes that safety and service go hand-in-hand (because, Dow explains, if a carrier is involved in an accident, the cargo will likely be damaged and will certainly be late), believes that competition will be a more effective catalyst for improved service than regulatory enforcement of service mandates.

Simplified and expedited rate reasonableness determinations. Dow contends that many of the procompetitive actions it has proposed will be of limited benefit if we do not streamline and expedite the process for resolving unreasonable rate complaints. Dow explains, by way of example, that the ability to separately challenge a bottleneck rate will not have a procompetitive impact unless a shipper can obtain a determination from the Board in a timely and inexpensive manner. And, Dow adds, the present arrangement poses great obstacles even to a large volume shipper such as Dow.

Dow explains: that, although it is a large volume shipper, its traffic is spread over more than 3000 origin-destination pairs and its traffic patterns are frequently changing; that to bring that many different rate complaints for only small amounts of money in each traffic lane is not cost justifiable; that, furthermore, by the time the Board issues a decision, traffic no longer may be moving over those lanes; and that this is why most rate complaints today are brought by unit-train shippers (that type of traffic, Dow suggests, presents sufficient economies of scope to economically justify a complaint).

Dow therefore contends that we should streamline and expedite our rate reasonableness determinations so that captive shippers like Dow can take advantage of the statutory protections against unreasonable rates. Dow contends, in particular: that we should establish the standards and procedures for resolving such disputes, but should allow those disputes to be resolved by binding arbitration; that we should require merging carriers to engage in mandatory arbitration of rate disputes; and that such arbitration should be binding and should have to be completed within a fixed time period, approximately 90 days.

Treatment of merger benefits. Dow, which claims that the benefit projections made by applicants in most prior merger proceedings have been grossly overstated, contends: that a merger is not in the public interest if merger costs exceed merger benefits; and that, if merger costs do exceed merger benefits, these costs may be recovered in higher rates charged to captive shippers. Dow urges us to adopt the policy that (Dow argues) has been adopted by the Federal Energy Regulatory Commission, which (Dow explains): has determined not to require estimates of amorphous net merger benefits and then to address whether applicants have adequately substantiated those benefits; but has chosen instead to focus on ratepayer protection, and has required merger applicants to propose ratepayer protection mechanisms to assure that customers are protected if the expected benefits do not materialize. Dow contends that the FERC solution, which requires applicants to bear the risk that the benefits of a merger will not materialize: recognizes the practical difficulties of measuring merger benefits; would reduce the importance of our review of projected merger benefits; and would minimize the risk to the public interest if the projected benefits were not realized.

Acquisition premiums. Dow contends that we should not allow “acquisition premiums” to affect the jurisdictional threshold and revenue adequacy determinations. Captive shippers, Dow argues, should not be exposed to the risk that their rates will increase if the merger benefits fall short of projections.

Safeguarding rail service. Dow indicates that, although it believes that the most effective way to safeguard rail service is to promote and enhance rail competition, it also recognizes that the present level of consolidation in the rail industry makes true competition difficult to achieve across the national rail network. Dow explains that, for this reason, it would support regulations to protect shippers and shortline railroads from the types of service disruptions that have been associated with recent mergers. (1) *Before the fact*. Dow contends that we should address the root causes of service disruptions before they occur. Dow contends, in particular, that, in view of the role the lack of adequate rail infrastructure has played in recent years, we should examine more critically whether a merged system will have the capacity and infrastructure to handle projected increases in traffic volumes and changes in traffic patterns.

(2) *After the fact*. Dow contends that, in the event service disruptions do occur, we should have procedures in place to assist all persons who suffer damages to recover their claims. Dow contends, in particular: that we should establish procedures for the expeditious binding arbitration of damage claims arising from merger-related service crises; that we should require merger

applicants to arbitrate service-related loss and damage claims (both common carriage and contract carriage claims), if the shipper elects to arbitrate; and that we should allow the shipper to retain the right to submit its claims to a court and not to an arbitrator. Dow adds: that, although the Board does not have jurisdiction to adjudicate loss and damage claims or contract disputes, the Board does have the authority (Dow cites 49 U.S.C. 11321) to impose an arbitration condition upon merger applicants; but that the Board should not place itself in a position to review the arbitration decisions, since that (Dow insists) could violate the jurisdictional allocations in the Carmack Amendment.

Downstream effects; the "one case at a time" rule. Dow agrees that we should eliminate the § 1180.1(g) "one case at a time" rule. Dow contends: that the rail industry has consolidated to a point where it no longer is burdensome to consider downstream effects; that there are, at this stage, only a few "strategic" responses to any rail merger, which substantially reduces the range of uncertainty that we must consider; and that a downstream analysis of the cumulative impacts and crossover effects of a proposed merger is necessary to determine all of the effects of the merger.

3-to-2 issues. Dow argues that "the horse is out of the barn" as respects 3-to-2 reductions in competitive options. There are, Dow explains, few if any 3-to-2 points in existence today.

Reform principles. As noted in our summary of the ARC submission, Dow has expressed support for the "principles for reform of merger proceedings and related regulation."

E. I. DU PONT DE NEMOURS AND COMPANY. DuPont, which believes that a competitive, privately owned, privately operated, market based, and financially sound transportation industry is the best way to achieve a safe, reliable, and efficient transportation system, contends that this proceeding represents an historic opportunity to reshape and reinvigorate the future of rail transportation in North America.

Flaws in implementation of Staggers Act. DuPont contends that the post-Staggers rationalization and concentration of the railroad industry has severely limited, if not altogether removed, competitive choices for most customers. DuPont further contends: that Staggers did not improve the competitive balance for most carload shippers; and that, in the decades since Staggers, rail service has continued to be disappointing for most shippers, and particularly so for carload shippers.

Downstream effects. DuPont contends that we should end the "one case at a time" approach, and should fully consider downstream effects, including possible competitive responses by the other Class I railroads. DuPont further contends that future mergers should always be conditioned in such a way that overall rail-to-rail competition is increased with a long-term goal of providing every rail customer with a choice of rail carriers.

Maintaining safe operations. DuPont, which believes that maintaining safety should be the primary goal in merger implementation, contends that the Safety Integration Plan (SIP) process, which (DuPont indicates) worked well during the CSX/NS/CR and CN/IC transactions, should be continued. DuPont notes, however, that it is concerned about a railroad's ability to provide an adequate flow of funds for infrastructure maintenance and asset renewal if its merger encounters continuing operating difficulties. DuPont adds: that such a situation currently exists in the East; and that this should be addressed in either the SIP or any future Service Integration Plan, and also in oversight.

Safeguarding rail service. (1) *Service Integration Plan*. DuPont contends that we should require that a Service Integration Plan, similar in concept to the SIP for Safety, be filed with each future application. Such a plan, DuPont contends, should include publicly visible pre-merger benchmarks and performance goals, timelines, and ongoing metrics based on customer oriented values, such as loaded/empty transit or cycle times for key traffic lanes and on-time performance. DuPont advises that the metrics required for the Conrail merger, while extensive and informative, were railroad operational measures and did not include pre-merger benchmarks.

(2) *Oversight*. DuPont contends that continuing Board oversight for at least five years should be mandatory because of the significant potential public impact of any future Class I merger. DuPont further contends that the oversight process should incorporate financial performance *vs.* forecasts included in the merger application, with particular attention to cash flow and capital spending to address concerns about infrastructure and asset maintenance. And, DuPont adds, oversight might also include appropriate fines or mandate investment if merger commitments are not met.

Promoting and enhancing competition; scope of this proceeding. DuPont agrees that we should emphasize enhancing rather than simply maintaining competition. DuPont contends, in particular, that we should: require that all major gateways remain open; open terminal areas to reciprocal switching, at agreed-upon switching fees for any customer within a reasonable distance (without any need to prove "anticompetitive conduct"); and require a railroad to offer, if requested, a contract for the competitive segment of a joint-line route where the joint-line partner has a bottleneck segment, and in turn require this partner to then provide a new through route. And, DuPont adds, to ensure that the playing field remains level, these changes should not be limited to specific future merger applicants, but, rather, should apply broadly to the entire railroad industry. DuPont further suggests that, if we believe that we lack the authority to apply remedies that increase competition where it does not already exist, we should submit to Congress specific proposals to expand our authority.

Shortline and regional railroad issues. (1) *Safety issues*. DuPont contends that Class I railroads must provide the safety and environmental stewardship to ensure that their spinoff shortlines are viable within their local communities. Safety oversight and ongoing training, DuPont adds, should be required of all major railroads that spin off small railroads that are essentially captive to them.

(2) *Competitive issues*. DuPont contends that shortline and regional railroads that are solely connected to a single rail line face the same problem as captive rail customers in that they cannot control their own destiny. DuPont further contends that paper barriers, which were established at the time of the shortline spinoff as a condition of sale, are not in the public interest and should, therefore, be eliminated. And, DuPont adds, steel trackage barriers that restrict shortline and regional access to a nearby second railroad within a terminal area are equally constraining to their viability.

3-to-2 issues. DuPont contends that very few potential 3-to-2 situations exist today. DuPont indicates that its major concern today is that most of its manufacturing sites are dependent on and captive to a single railroad.

Cross-border issues. DuPont contends that, for global companies like DuPont, North American borders must be transparent. DuPont further contends that the Board, as the major North American regulatory body, should routinely consult with its counterparts in Canada and Mexico on rail issues, and should take the lead in seeking uniform regulatory processes.

PPG INDUSTRIES. PPG contends that, in order to give rail shippers a choice in the marketplace, we should attempt to create rail-to-rail competition where no such competition exists today.

Downstream effects. PPG contends that we should place particular emphasis on the downstream effects of the very significant changes that have taken place in the rail industry over the last 10 years; in the current environment, PPG indicates, any further merger proceedings must responsibly consider the cumulative impacts on an increasingly fragile system. It is, PPG argues, evident that, if any further mergers in the North American railroad industry are permitted to take place, the limited number of other Class I railroads that remain can be expected to strategically respond to retain critical mass in a consolidating industry. And, PPG adds, it is concerned that there is an increasing probability of a resulting duopoly of major railroads with very significant negative potential impacts on the ability of shippers to obtain competitive rail service.

Maintaining safe operations. PPG agrees that we should continue to require merger applicants to submit, in consultation with the Federal Railroad Administration, an acceptable Safety Integration Plan.

Safeguarding rail service. PPG believes that current merger procedures do not require realistic and practical service safeguard action plans by merger applicants. PPG contends that we should require more detailed service integration plans, with enforceable and well-defined penalties, and with mandatory settlement rules for disputes resulting from post-merger service disruptions. And, PPG adds, the rules on restitution should be clear and mandatory, and should apply equally to all damaged parties.

Promoting and enhancing competition. PPG contends: that we should provide for the protection and enhancement of rail-to-rail competition in all rail merger proceedings; that we should not allow mergers to result in any degradation of competition; that we should make competitive access mandatory in all currently "captive" situations; that we should require competitive access for merger-related situations where shippers are likely to become "captive;" that we should require railroads to offer rates to rail users on their individual portions of routes where traffic is moved; and that, as a precondition to merger approval, we should require railroads to maintain open routings and access to all gateways at reasonable rate levels.

Shortline and regional railroads issues. PPG contends that, as a condition of merger approval, shortline and regional railroads must have guaranteed rights to interchange with any Class I railroad without restrictions. PPG further contends that "paper restrictions" that reduce or restrict competitive access should be removed.

Merger-related public interest benefits. PPG agrees that, in light of past experience, we should view alleged merger benefits with greater scrutiny.

Cross-border issues. PPG indicates that it is not concerned with the nationality of the owners of the railroads or the location of their corporate headquarters. What is critical, PPG contends, is that rail-to-rail competition be created or maintained and that users be provided with practical and viable competitive choices for rail service.

PROCTER & GAMBLE. P&G agrees that we should revisit our approach to competitive issues, service performance issues, and other general issues related to the current rail merger policy.

Promoting and enhancing competition. (1) *Preserving competition*. P&G contends that, with respect to any future rail mergers, we should act to preserve existing rail competition. And, P&G adds, current merger policy will have to be modified simply to preserve existing competition, because (P&G explains) the factors contributing to the erosion of competition in future mergers will expand from the common forms such as closed gateways, the reduction in the number of railroads available to a shipper's facility, and terminal area competition to more subtle forms such as discriminatory rates designed to divert traffic from competing railroads and rate increases on less-desirable/inefficient routings to discourage the use of these routings by shippers.

(2) *Enhancing competition*. P&G indicates that it supports any changes that will accomplish the goal of enhanced competition either in specific areas or across a broad portion of the rail system. P&G explains that, because the collective impact of mergers over the past 10 years has led to an overall reduction of rail competition for most shippers, a greater emphasis on enhancing competition would help offset this loss. P&G adds, however, that it believes that the probability of enhancing competition, as part of a process that allows additional mergers of Class I railroads, will be very low.

(3) *Specific proposals*. P&G contends: that merger applicants should be required to maintain open gateways for all major routings at reasonable rates; that merger applicants should be required to provide switching, at an agreed-upon fee, to all exclusively served shippers located within or adjacent to terminal areas; that carriers should be required to offer contracts for the competitive portion of joint-line routes when the joint-line partner has a bottleneck segment; and that carriers offering origin to destination service should be required to quote rates over bottlenecks at operating interchanges with other carriers. P&G further contends that we should gradually adopt for all carriers (and not just for merging carriers) "interswitching" provisions similar to those used in Canada.

3-to-2 issues. P&G contends that 3-to-2 issues and also 2-to-1 issues should be given increased attention in merger proceedings, and that greater weight should be given to arguments of competitive harm in those situations where the number of rail carrier alternatives within a corridor would be reduced by a merger from three to two or, worse yet, from two to one.

Downstream effects. P&G contends that, given that there are only six major Class I railroads remaining in North America, the elimination of the "one case at a time" rule would be an appropriate step to take at this time. P&G further contends that merger proceedings should include the examination of the likely "downstream" effects of a proposed transaction, including the likely strategic responses to that transaction by non-applicant railroads. And, P&G adds, if any of the strategic responses include more mergers, we should stop the merger proceedings until all of the proposed mergers can be reviewed against the merger policy as a package.

Safeguarding rail service. (1) *Specific conditions*. P&G, which believes that we must establish additional safeguards to ensure that future mergers do not cause the kinds of service disruptions that past mergers have caused, contends that we should impose a number of specific conditions. (a) P&G contends that we should require merging railroads to pay 100% of all premium freight expenses (usually trucking) and also 100% of any additional rail car lease expenses incurred by a shipper as a direct result of merger-caused service disruptions. (b) P&G contends that we should require that disputes relative to this requirement be submitted to arbitration. (c) P&G contends that, to minimize the financial harm done by merger-caused service disruptions, we should allow shippers to break any contracts with a merging railroad to switch to an alternate rail carrier. And, P&G adds, this action should be triggered by the shipper in response to any potential shutdown situations, as opposed to being a result of a specific period of poor service by the merging railroad.

(2) *Service metrics*. P&G contends that, for future mergers, the measures used to determine the extent of service disruptions should be changed as they apply to "safeguarding rail service" issues. P&G contends, in particular: that the evaluation of service should be done on a lane-by-lane basis as opposed to using systemwide averages; that total transit times (including switching and interchanging) should be measured for affected origin-destination pairs, and an increase of over 10% in transit times above pre-merger averages should be used as justification for shippers to use alternate modes of transportation to keep their businesses operational; and that a fleet assessment using these data should be the basis to justify the need for shippers to add rail cars to their fleets to compensate for poor service.

Merger-related public interest benefits. P&G, which believes that the claims of public interest benefits made in past merger proceedings were relatively general, difficult or impossible to measure, and not time-bounded, contends that claims of public interest benefits made in future merger proceedings should be rejected unless such claims are supported by data. Merger applicants, P&G insists, should be required to present an analysis of the current situation relative to the expected benefit, the plan to make the changes required to produce the benefit, how the benefit will be measured, and how these changes will contribute to closing the gap between the current situation and the expected future state.

Means short of merger. P&G contends that we should also require merger applicants to explain what prevents the projected benefits of the merger from being achieved by means short of merger. P&G indicates that concepts such as marketing alliances with other railroads, cooperative operating practices, and improved information systems should be addressed in this analysis.

SHELL OIL COMPANY AND SHELL CHEMICAL COMPANY. Shell, which claims that it has seen service deteriorate and rates increase as a result of the consolidation in the railroad industry that has occurred over the past six years, believes that the decrease in rail-to-rail competition engendered by the mergers of the 1990s has created a situation in which market forces are unable to constrain rates at reasonable levels. Shell, which also believes that increased competition (not increased regulation) is the answer to the problems that currently plague the railroad industry, contends that a prerequisite of the approval of another large rail consolidation should be structural changes that reduce the concentration of market power and increase competition for all affected rail shippers. Shell further contends, in particular, that we should: impose Canadian-style "interswitching" arrangements; require that all viable gateways remain open, both operationally and economically; and adopt effective processes that will allow captive shippers to successfully challenge unreasonable rates (the current rate reasonableness process, Shell insists, is ineffective and burdensome, and so costly as to be impractical in most situations). Shell argues: that increased competition will reinvigorate the North American railroad industry; that, as competition is injected in the place of the market concentration that now exists, there will be new services, better asset utilization, increased profits, and an increase in the investment capital flowing to the railroad industry; that a truly competitive market will resolve the infrastructure and capacity issues that now exist; and that enhanced competition in the railroad industry will enable the marketplace to operate in a manner that (through the gain or loss of traffic) will reward good business decisions and hold accountable those responsible for poorly executed transactions.

APPENDIX N: AGRICULTURAL INTERESTS

AMERICAN FARM BUREAU FEDERATION. AFBF contends that, in recent years, American farmers and ranchers have grown increasingly concerned about poor railroad service, high rail freight rates, the increasing concentration of economic power in the rail industry, and the apparent unwillingness of the Class I railroads either to compete with one another or to permit regional and shortline railroads to facilitate competition.

Competition. AFBF contends that the policies of the past should be replaced by new policies aimed at promoting as well as preserving competition. (1) *Preservation of remaining competition*. AFBF claims that, although some of the consolidation that took place post-Staggers was necessary to ensure the health of the rail industry, consolidation has now gone so far that most rail customers, particularly those located in rural areas, no longer have access to competitive rail service. AFBF therefore recommends that we include more specific competitive conditions in future mergers, and that, where appropriate, we institute oversight proceedings with an eye to imposing such conditions on past mergers. Under the conditions contemplated by AFBF, a merged railroad would be required: to offer point-to-point rate quotes, even over origin or destination bottlenecks; to offer competitor railroads access over bottlenecks, provided that the competitor railroad pays reasonable compensation and that its operations do not unduly interfere with the merged railroad's operations; and, if requested by a shipper, to interchange freight with a competitor railroad, provided that such interchange does not unduly interfere with the merged railroad's operations.

(2) *Encouragement of new competition*. AFBF contends that we should examine changes in policy that will encourage new competition wherever possible. AFBF contends, in particular, that we should encourage the Class I railroads to seek competition with one another, and to be more competitive with other modes as well. And this, AFBF adds, will only be accomplished if the railroads are encouraged to recognize that their interest lies in serving more customers at lower unit cost.

(3) *Evaluation of future competition-reducing mergers*. AFBF contends that, whereas past mergers have been evaluated to determine whether consummation would improve the financial health of the involved railroads, future mergers should be evaluated to ascertain whether consummation will result in a loss of competitive options. AFBF insists that, if the seven Class I railroads now serving North America cannot generate sufficient traffic and revenue to be sufficiently profitable, the problem lies less with their prices or their excess and redundant capacity than with poor management and poor customer service.

(4) *Regional/shortline railroads; paper/steel barriers*. AFBF contends that, as respects the "paper" and "steel" barriers imposed on regionals and shortlines by Class I railroads, we should use our regulatory powers both to prevent the creation of new barriers and to secure the removal of old barriers. AFBF argues that these barriers, which (AFBF claims) prevent regionals and shortlines from providing competitive service, preserve as well as reflect the market power possessed by the Class I railroads, which (AFBF believes) have gained control of vast infrastructure resources through mergers of dubious wisdom. AFBF adds that, under the Sherman Antitrust Act, such barriers are illegal "tying arrangements."

(5) *Bottleneck rates; access in terminal areas*. AFBF contends that the "captive shipper" problem could be remedied by permitting shippers to demand "bottleneck" rates, which (AFBF adds) could be accomplished by requiring a railroad to provide a rate for service to the destination preferred by the shipper rather than that preferred by the railroad, even if the destination preferred by the shipper is a point (including an interchange point) accessed by a competitor. AFBF further contends that we should either: (a) require railroads to facilitate interchange of freight at the direction and preference of shippers so long as such interchange does not unduly hamper the

operation of the incumbent railroad; or (b) assist shippers in the formulation of any legislation needed to create such a requirement. And, AFBF adds, we should ensure that shippers have access to competitive rail options in terminal areas.

(6) *Origin/destination competition*. AFBF argues that, in view of the massive consolidation that has taken place in the past 20 years, it has become necessary for shippers to demand "bottleneck" rates and terminal area access, even though meaningful competition (AFBF believes) would be preferable. Our future policy, AFBF therefore contends, should encourage origin and destination competition wherever possible. The lack of competition at both ends of a movement, AFBF explains, effectively confers a monopoly on the carrier that is successful at obtaining a monopoly at either end of the movement.

Merger analyses. AFBF contends that certain criteria must be taken into consideration in analyzing any future mergers. (1) *Shipping rates*. AFBF contends that one criterion that must be considered in analyzing every future merger is the effect that the merger will have on shipping rates paid by customers/shippers due to reduced competition. It is because past mergers have reduced competitive options, AFBF argues, that captive shippers, and particularly captive agricultural shippers, now must pay such extraordinarily high rates. AFBF, which believes that all farmers should enjoy the benefits of competition, asks us to remember that, as respects agricultural products, every penny in shipping cost that results from a lack of meaningful competition is ultimately borne by farmers.

(2) *Market power*. AFBF contends that another criterion that must be considered in analyzing every future merger is the likelihood that the merger will result in significantly increased market power for the merged railroad. AFBF claims, in this respect, that the CSX/NS/CR transaction has not only removed one of the three pre-transaction rail competitors in the eastern United States; it has also, AFBF insists, made the administration of the resulting eastern rail duopoly more efficient (because, AFBF explains, the presence of only two competitors in a region facilitates uncoordinated collusion by allowing one competitor to simply observe and emulate the behavior of the other).

(3) *Anticompetitive or predatory pricing practices*. AFBF contends that a third criterion that must be considered in analyzing every future merger is the likelihood that the merger will increase the potential for anticompetitive or predatory pricing practices. AFBF, which claims that railroads have demonstrated a disturbing tendency to raise their freight rates even during periods of very low grain prices when very little grain is moving, insists that any merger that increases the potential for such anticompetitive behavior should not be allowed to occur. And, AFBF adds, if such a merger is allowed to occur, there must be more effective oversight than there has been in the past.

(4) *Competitive options*. AFBF contends that a fourth criterion that must be considered in analyzing every future merger is the effect that removal of a competitor from the marketplace will have on shippers on a regional as well as a national basis. The CN/IC merger, AFBF claims, effectively removed a conduit for corn shippers to move corn to barge terminals along the Mississippi River (because, AFBF explains, whereas IC regarded such movements as a core business, CN seems to have little interest in such movements); and this, AFBF adds, has forced farmers and other agricultural shippers to rely primarily on trucks to ship corn to barge terminals. AFBF maintains that, given national concerns about highway safety, highway congestion, and lagging infrastructure investment in rural areas, the public interest was not served by the CN/IC merger.

Merger-related public interest benefits. AFBF, which claims that each major rail merger in recent memory has been accompanied by extravagant claims of the benefits that will be enjoyed by shippers, stockholders, and the public, insists that it is arguable whether any of these parties have benefitted in the manner, or to the extent, anticipated. AFBF therefore suggests that, in the future, we should view such claims much more skeptically than they have been viewed in the past.

Service failures; service guarantees. AFBF contends that, in connection with future mergers, the kinds of service problems that have resulted from past mergers must be prevented and/or mitigated. (1) *Service Implementation Plans*. AFBF contends that merger applicants should be required to submit Service Implementation Plans, outlining how they intend to maintain service during the merger transition.

(2) *Compensation for losses*. AFBF contends that railroads should be held responsible for service failures, especially those caused by mergers. AFBF, which claims that railroads now enjoy the power to make or break many of their customers, insists that, at a minimum, a railroad should somehow be held financially responsible for the economic losses incurred by its customers when the railroad fails to provide adequate service. A service implementation plan with no penalty for non-compliance, AFBF insists, is nothing more that an empty promise.

Other matters. (1) *4-to-3, 3-to-2, and 2-to-1 issues*. AFBF contends that, as respects competitive options, a 4-to-3 or 3-to-2 reduction should be treated as seriously as a 2-to-1 reduction. For a potentially captive shipper, AFBF explains, any competition loss is a serious situation.

(2) *Abandonments*. AFBF contends that past mergers have led to the abandonment of rail lines throughout rural America. These abandonments, AFBF claims, have left many communities and elevator operators without rail service, and have strained the ability of states and communities to maintain highway infrastructure in rural areas.

(3) *Post-merger oversight*. AFBF, which believes that we did not impose appropriate corrective measures in connection with the service failures that accompanied the UP/SP merger, insists that, in the future, there must be vigorous post-merger oversight to prevent similar problems from occurring and to speed their correction.

(4) *Rate calculations*. AFBF, which maintains that our rate appeal process is an absurdly complex artifice that only the wealthiest shippers can afford to use, contends that we should eliminate regional rate discrimination among railroad customers by requiring that common carrier rates be based solely on weight and distance (the only factors, AFBF suggests, that reflect the amount of effort required for the railroad to service a customer). And, AFBF adds, we should either cap shipping rates for captive customers at 180% of variable cost, or provide a radically simplified rate appeal process in instances where such rates exceed 180% of variable cost.

(5) *Acquisition premiums*. AFBF contends that railroads should not be permitted to assess the costs of their acquisition premiums to their customers.

(6) *Customer service*. AFBF contends that we should make quality customer service a high priority as respects all of our considerations of relationships between Class I railroads, shippers, and regional and shortline railroads. AFBF, which claims that half of all agricultural production now moves via truck to final point of use or export, insists that, were it not for poor customer service and exorbitant rates, more such production would move by rail instead.

(7) *Capacity problems*. AFBF contends that, for reasons that mystify farmers and agricultural shippers, railroads seem to have chronic capacity problems for meeting the need for adequate rolling stock and motive power to move farm produce during harvest seasons. AFBF observes that, although grain harvests have occurred at roughly the same time in the Great Plains for 150 years, the railroads still seem unable to plan to serve this need.

(8) *Technological advances*. AFBF contends that railroads seem to be uninterested in deploying technology to improve efficiency and productivity. AFBF observes that, when hand-held Global Positioning System transceivers can be purchased from mail-order sporting goods catalogues

for less than $200, there is no reason why a railroad should be unable to tell a customer precisely where a shipment is.

(9) *Miscellaneous issues*. AFBF contends: that access remedies such as trackage rights and switching on fair and economic terms should be more readily available, whether or not there are future mergers; that gateways for all major routings should remain open on reasonable terms; and that cross-border mergers should not be allowed to interfere with effective regulation and the enhancement of competition.

THE FERTILIZER INSTITUTE. TFI agrees that our merger policies must be re-evaluated in the context of a substantially-concentrated rail industry.

Mandatory arbitration requirement. TFI contends that approval of any future merger should include a condition requiring the merging carriers to provide mandatory expedited arbitration to resolve rate, service, and other disputes. TFI argues: that the current mechanisms for resolving rate, service, and other disputes between shippers and carriers are seriously in need of reform;[245] that, whereas American business has moved toward private methods (such as mediation and arbitration) for quickly resolving commercial disputes, rail carriers have never generally consented to arbitration of rate and service disputes with shippers as a matter of right; and that, therefore, we should adopt rules requiring merging carriers, as a condition of their merger,[246] to offer arbitration of rate and service (and apparently other) disputes with shippers, at the option of the shipper, subject to strict time limits. Under the arbitration structure contemplated by TFI: we would decide principles of general significance; arbitrators would decide specific disputes, and would decide such disputes by applying our standards as substantive rules; and we would exercise general oversight through the use of an appeals process.

Terminal access through reciprocal switching. TFI, which believes that our policies with respect to rail carriers should give heightened emphasis to encouraging greater rail-to-rail competition, contends, in particular, that significantly-increased rail-to-rail competition should include the right to reciprocal switching within a specified distance of a terminal. TFI, which supports the approach suggested in the ANPR (requiring merger applicants to provide switching, at an agreed-upon fee, to all exclusively-served shippers located within or adjacent to terminal areas), insists that, in order to extend the benefits of competition to all shippers and not just to those located on the lines of merging carriers, this approach will have to be applied more broadly, and not just as a merger condition. TFI therefore contends that we should adopt rules of general applicability that would declare that reciprocal switching within a specified distance of a terminal presumptively is in the public interest and is necessary to provide competitive rail service. And, TFI adds, we should also adopt a rule that would define a "terminal" presumptively to exist within a specified distance of an interchange.

Competitive routings. TFI contends that our rules should be revised in order to preserve and increase competition in the rail marketplace in the routing of traffic. (1) *Preservation of existing gateways*. TFI contends that, in order to preserve even the existing level of rail competition, our

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[245] TFI indicates, by way of example, that, in an extremely fast-changing marketplace, it is simply unacceptable for a rate case to take, at minimum, 16 months.

[246] TFI argues that, although we lack jurisdiction to adjudicate loss and damage claims or contract disputes, we have the authority to impose a mandatory arbitration requirement as a merger condition.

merger rules must be revised to require any merging carriers to maintain "open" gateways. TFI indicates, by way of example: that, if a point is now served by both BNSF and UP, traffic moving from that point to a point exclusively served by CSX can now take advantage of BNSF *vs*. UP competition on the movement from the origin to the CSX interchange; but that, if UP were to merge with CSX, the BNSF *vs.* UP competition for the portion of the move from the origin to the interchange would be lost. And, TFI adds, to preserve the routing competition that still exists between the Class I carriers, we must preserve not only the physical ability to route traffic but the economic ability as well; routes, TFI insists, can be "closed" not only by restricting routing but also by pricing the traffic over the monopoly segment of the joint-line route to prevent diversion to the competitor at the gateway.

(2) *Revision of bottleneck rules*. TFI contends that, if competition is to be preserved, we will have to revise our bottleneck rules, which (TFI explains) now provide that, if the bottleneck carrier can provide origin to destination service, a shipper has no right to demand, and no right to challenge, any rate over a "bottleneck" unless the shipper brings and wins a competitive access case. TFI maintains that, if our current bottleneck rules are allowed to remain in effect, a shipper will have, after a future vertical merger, no right to route its traffic via currently-competitive routes, much less via routes now closed that could be competitive if the bottleneck rules were changed. TFI therefore supports all of the approaches suggested in the ANPR (requiring merger applicants to offer, upon request, contracts for the competitive portion of joint-line routes when the joint-line partner has a bottleneck segment; requiring merger applicants to provide a new through route at a reasonable interchange point whenever they control a bottleneck segment and the shipper has entered into a contract with another carrier for the competitive segment; revising the "one lump" theory in the merger context), and, in fact, believes that such approaches should be broadened to apply not just in merger settings but for all carriers. Application of such approaches, TFI claims, would go far not only to forestall additional losses of competition in future mergers but also to restore competition that has already been lost on account of past mergers.

NATIONAL GRAIN AND FEED ASSOCIATION. NGFA, which is deeply concerned about the future economic health of the entire rail industry, contends that, if future mergers are to go forward, they should proceed under rules reflecting the rail industry's contemporaneous state.

Downstream effects. NGFA, which believes that consideration of "downstream" effects is clearly appropriate in view of the statutory standards of 49 U.S.C. 11324, contends that, where a pending consolidation prompts a responsive consolidation by two or more other carriers, it almost certainly would be advisable to consider such responsive cases simultaneously to the extent compatible with the 49 U.S.C. 11325 timetable. NGFA adds, however, that, where a pending merger does not lead concurrently to a responsive transaction by two or more other carriers, it would be difficult, at least for shippers, to consider "downstream effects" in a vacuum. Clarification of our intentions in this respect, NGFA believes, would be helpful.

Maintaining safe operations. NGFA contends that safe rail operating conditions have significance in addition to the protection of human life and property; safe rail operating conditions, NGFA explains, may also affect rail service and performance, because lines permitted to fall into disrepair normally cause slower operating conditions. NGFA therefore contends that, as part of a post-merger service monitoring process, a merged carrier should be required to provide an inventory of pre-merger and post-merger track conditions and operating speeds, if we determine that such data would be productive, to serve as a barometer of whether there may be inattention to track maintenance as a result of other post-merger demands on the carrier.

Safeguarding rail service. (1) *Carrier liability*. NGFA contends that we should adopt rules that require the merged carrier to make full and timely compensation for any and all commercial losses (including special and consequential damages) suffered by its customers on account of merger-related service failures, including (but not limited to) losses connected with plant disruptions, processing or manufacturing slow-downs, curtailed shipments, interference with normal private car cycling, modal substitutions for clogged rail service, and contract defaults or contract penalties.

(2) *Post-merger monitoring; data collection*. NGFA contends that we should monitor all future major mergers for the purpose of holding carriers accountable economically for any damage suffered by their customers. NGFA further contends: that the monitoring process should last as long as there is evidence that the merger is affecting rail service adversely; and that the specific nature of the monitoring can be established either through a Board-approved transaction council/panel (similar to the Conrail Transaction Council) or through some other mechanism. And, NGFA adds, we should collect data (include cycle times and other meaningful shipment data on a corridor-by-corridor basis) that will ensure the enforceability of performance assurances made by carriers seeking to merge or combine operations.

(3) *Jurisdictional matters; practical matters*. NGFA claims that, although we may not have jurisdiction to make individual damage awards in all instances, and although we may not be equipped to undertake the wholesale resolution of individual shipper damage claims, we should nevertheless establish, under our merger conditioning authority, the appropriate ground rules for the resolution of commercial damage claims, specifically including the concept of full liability. NGFA adds that, once we have established the ground rules, and have assisted in their application through a monitoring process, we can defer the resolution of individual shipper claims to appropriate dispute resolution forums.

(4) *Arbitration*. NGFA contends that we should encourage the use of private-sector arbitration (such as that provided by the NGFA Arbitration System) to resolve disputes respecting shipper damage claims. NGFA maintains that, under our merger conditioning authority, we can require the merging carriers to agree to arbitration if requested to do so by a shipper claiming merger-related damages.

(5) *Service plans*. NGFA contends that we should more aggressively elicit post-merger service plans from the applicant carriers, and should step in to enforce adherence to those plans where they are being ignored post-merger without appropriate justification.

Promoting and enhancing competition. NGFA believes that it would be appropriate to take certain steps in order to enhance, and not merely to preserve, competition. (1) *Open gateways and market accessibility*. NGFA contends that we should require merging carriers to keep existing gateways open, and not only physically open but also economically open. NGFA further contends that conditions requiring the retention of existing gateways should be accompanied by provisions that bar the merged carrier from raising its rates over the gateway to any greater extent than the carrier has raised its systemwide actual (not just paper) rates for the same commodities moving in the same quantities.

(2) *Reciprocal switching*. NGFA contends that reciprocal switching is another area that should not be overlooked in future rail mergers. The appropriate approach to reciprocal switching, NGFA adds, is to require that such switching be provided at rates not to exceed 180% of variable costs, with the understanding that the carriers are free to establish lower rates if they wish.

(3) *Bottleneck rates*. NGFA contends that competitive options for shippers should also be protected by a requirement for rate quotations from/to an interchange point where the merger creates any new "bottleneck" situations. Each such quotation, NGFA further contends, should be subject to independent challenge if it meets the jurisdictional requirements for rate reasonableness

regulation. And, NGFA adds, a contract with a "non-bottleneck" carrier should not be a requirement for this relief where a bottleneck is a product of the merger.

Shortline and regional railroad issues. NGFA asks that we make every effort to examine thoroughly the impact any proposed merger may have on smaller, non-Class I railroads; these carriers, NGFA notes, provide extensive rural rail service, and their continued ability to remain competitive is a matter of great concern. NGFA adds that, although the goals of ASLRRA's "Bill of Rights" are in many respects similar to shipper aspirations, some NGFA members question whether a shortline has the same entitlement to car supply from a Class I railroad as do the Class I railroad's own customers.

Employee issues. NGFA takes no position on employee issues, as such. NGFA contends, however, that, if we require merger applicants to agree not to "cram down" post-merger changes in pre-merger CBAs, we should similarly require merger applicants to agree not to "cram down" post-merger changes in any pre-merger agreements they may have with shippers.

3-to-2 issues. NGFA contends that our rules should recognize 3-to-2 situations as involving potentially harmful reductions in competition; a railroad that acquires another railroad, NGFA explains, enhances its market power over its customers and enhances its ability to use that enhanced power to be more demanding in negotiations with its customers. NGFA argues that the premise that only a shipper reduced to single-carrier service by a merger is harmed by the merger erroneously assumes that all railroads are equal in market power. NGFA, which contends that this incorrect assumption should not be perpetuated, insists that, at the very least, we should require the merging railroads to assume the burden of proving that any market experiencing a 3-to-2 service reduction will not suffer any adverse competitive impacts.

Merger-related public interest benefits. NGFA, which agrees that we should be more skeptical of the public interest benefits claimed by merger applicants, maintains that we should require such applicants to specify clearly the respects in which the applicants believe the merger will lead to public interest benefits. And, NGFA adds: rail customers should not be required to bear the costs of the merger premiums paid for the acquired carrier; and such premiums should not be included in our revenue adequacy calculations. Excessive consolidation-related investments, NGFA insists, should be the responsibility of rail management, not rail customers.[247]

Cross-border issues. NGFA contends: that we should require applicants in cross-border consolidations to present detailed plans addressing car distribution, marketing, and route rationalization; and that we should retain the right to enforce any departure from those presentations through injunctive or similar means. And, NGFA adds, our merger rules should interdict carriers from applying foreign law to govern rail transportation in the United States.

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[247] NGFA further contends that we should require more pre-merger financial scrutiny regarding the impact of a proposed merger on the financial health of the resulting entity. And, NGFA adds, greater emphasis should be placed on determining whether the applicants' claims, if any, of traffic growth are realistic.

THE "WHEAT, BARLEY & GRAINS COMMISSIONS" GROUP (MW&BC, CWAC, IBC, IWC, OGC, NWB, SDWC, AND WBC). WB&GC believes that we should act decisively to ensure that enhancement of competition will be a key factor in all future mergers.

Past policies. WB&GC contends that the monopoly power that Western railroads can today exercise vis-à-vis WB&GC's constituents, not to mention the concentration that today exists throughout the United States railroad industry, reflects, in many cases, the merger policies that have been implemented over many years by this agency and its predecessor. WB&GC claims, in particular, that these past merger policies have not mandated that a minimum number of railroads serve each rail customer, and, by not imposing such a mandate, have allowed railroads to become completely dominant in large geographic areas. WB&GC further claims, in essence, that these past merger policies have not mandated the restoration of competition lost following certain mergers. WB&GC cites, in particular, the Northern Lines merger of 1970. WB&GC argues that, although the immediate result of the Northern Lines merger was two-carrier competition, the ultimate result (*i.e.*, the result following the collapse of the Milwaukee Road) was that BN (now BNSF) had achieved monopoly status throughout a wide geographic region extending from the Mississippi River to the Pacific Northwest. And, WB&GC adds, the ICC never sought to reintroduce the competition that had vanished with the collapse of the Milwaukee Road.

Present realities. WB&GC contends that, today, virtually the entire Western U.S. farm belt is captive. WB&GC further contends that farm producers now face the highest total freight costs ever, elimination of competitive rail, deterioration of service levels, shifts to highways that have proven devastating to highway infrastructure, and a regulatory scheme that will not protect them from rates as high as 300+% of variable cost. WB&GC adds that, although the railroads claim that rates have gone down, the railroads have not accounted for the shift of rail costs to rail customers; rail customers, WB&GC maintains, are required, in many industries, to own cars, to invest in their own fast-loading facilities, and to haul by truck to ever more distant terminals. And, WB&GC adds, the massive post-1970 abandonment of rail lines in the Western United States has effectively shifted much of the cost of transportation from the private sector (railroads) to the public sector (state, county, and local governments).

Comprehensive rail policy; other network industries. WB&GC contends that what is needed now is a comprehensive rail policy that promotes, and indeed requires, competition among the railroads. A strong argument, WB&GC insists, can be made that, to establish truly competitive service to all rail customers, there must be at least three equally strong carriers; the existence of only two equally strong railroads, WB&GC believes, often leads only to efficient collusion. WB&GC further contends that, in developing a comprehensive rail policy, we should look to the models developed in the network industries regulated by FCC and FERC, which (WB&GC claims) have fostered competition in network industries that were, at one time, monopoly-dominated.

*Recommendation*s. WB&GC, which insists that the maintenance and enhancement of rail-to-rail competition is critical to the survival of the 100,000 agricultural producers in the states it represents, has made a number of recommendations. (1) WB&GC contends that we should adopt a merger policy that does not allow any further lessening of rail-to-rail competition. (2) WB&GC contends that we should adopt a policy that, in all future rail mergers, all rail customers should have the right to rail-to-rail competition. (3) WB&GC contends that, for those rail customers that do not have rail-to-rail competition, we should adopt a responsible regulatory relief system. (4) WB&GC contends that we should adopt a procompetitive stance in every action and decision. (5) WB&GC contends that, if we believe that we lack the authority to adopt a procompetitive stance, we should immediately seek such authority from Congress. (6) WB&GC contends that we should work with captive rail customers to develop realistic, reasonable, and fair protection methods for small captive rail customers that today have no competitive rail choice. (7) WB&GC contends that, although preserving and fostering rail competition should be preferred to regulatory oversight, reasonable regulatory oversight must be economically available to rail captive customers in areas where rail competition is not possible. (8) WB&GC contends that rail mergers should be re-opened in the event rail competition is curtailed or lost, and that all rail mergers should be conditioned to enhance, and not just to maintain, competition. (9) WB&GC contends that options such as competitive access, bottleneck pricing, terminal access, reciprocal switching, joint running rights, elimination of paper and steel barriers and arbitration to maintain competition must be available to mitigate anticompetitive effects of mergers. (10) WB&GC contends that we should be more aggressive than we have been in preserving and promoting competitive options. (11) WB&GC contends that railroads should be held accountable financially for service failures resulting from a merger, and that customers should be compensated for economic losses suffered as a result of service diminishments. (12) WB&GC contends that we should support legislative proposals intended to promote competition in the railroad industry.[248]

AG PROCESSING INC. AGP asks that we recognize that mergers have had, and almost certainly will have in the future, serious anticompetitive effects on many rail users, primarily by foreclosing market access. AGP urges recognition that a competitive rail transportation system is important to the American economy, and that market foreclosures are not a proper consequence of rail mergers.

Present realities. AGP contends that railroad mergers over the past 20 years have conferred a huge degree of market power on the surviving railroads, particularly in the West where much of AGP's agricultural business takes place. AGP further contends that, although rail *rates* for agricultural commodities have been fluctuating, the *cost* of rail transportation for agricultural commodities has been increasing, if those costs are calculated by including (and AGP believes they should be calculated by including) not just the rate the shipper must pay to the railroad but also the investments the shipper must make in order to take advantage of that rate. AGP notes, in this respect, that, in order to take advantage of unit grain train rates, it has had to build additional track to accommodate the unit trains, and it has also had to make major changes to its elevators to comply with the rapid loading requirements that attach to these unit trains.

Competition. (1) *Gateways*. AGP contends that we should require that merged carriers keep all gateways open, presumably on a permanent basis but in no event for less than five years. AGP

[248] As noted in our summary of the ARC submission, WB&GC has also expressed support for the "principles for reform of merger proceedings and related regulation." And, WB&GC further contends, we should also: institute a rebuttable presumption against future major railroad mergers unless the merging railroads can prove mitigation of any adverse consequences of the merger upon rail customers; keep all rail gateways open and, at the request of a rail customer, open any previously closed gateways; compel, upon request from a rail customer, reasonable pricing over all 'bottleneck' segments; lift all "paper barriers" on shortline railroads; develop programs to enhance shortline railroad infrastructure; open up all terminals for full and complete access by affected rail customers; and, in the event a merged railroad cannot meet its estimates of synergies as stated in the application, mitigate damage to rail customers by introducing further competitive enhancements.

further contends that, to ensure that "open" gateways actually remain accessible economically, we should also require that the merged carrier agree to cap its rates over the gateways by not raising them annually to a greater extent than the RCAF index or its system-average actual rate increases for the same type of traffic, whichever is lower. AGP contemplates that, at the end of a five-year period, the carrier could request the Board to lift the rate cap, and shippers would have an opportunity to respond.

(2) *Bottleneck rates*. AGP contends that we should require merged carriers to quote rates on request to/from gateways for use beyond the gateways via other carriers. AGP further contends that these types of rate quotations should be available both where there is, and also where there is not, a rail contract for the traffic beyond the gateway. We must recognize, AGP insists, that, because mergers have eliminated so much competition, the railroads today have less incentive than in years past to enter into contracts. And, AGP adds, if we think it best not to require a merged carrier to quote "bottleneck" rates while its unmerged competitors are under no such requirement, we should at least condition each merger on a reservation of jurisdiction to impose gateway and other competitive conditions in the future if the merger is followed by a competitive merger.

(3) *Reciprocal switching and trackage rights*. AGP contends that to enhance, and not merely preserve, competition, we should require merging carriers to accept merger conditions that provide for reciprocal switching or trackage rights at appropriate points identified in each case. AGP further contends that any such conditions should reserve our power to prescribe trackage rights fees where fees are not agreed upon by the carriers and should also cap reciprocal switching rates at 180% of variable costs, subject (AGP adds) to the same type of modified condition proposed with respect to bottleneck rates (*i.e.*, a condition that would not subject a merged carrier to unilateral traffic loss but would instead reserve the Board's authority to impose trackage rights or reciprocal switching if justified in light of subsequent mergers).

(4) *New rail system*. AGP contends that, in any future merger, we should reserve the authority to entertain requests by third parties for compensated divestitures at a later date for the purpose of creating a new competitive rail system. AGP notes, by way of illustration, that a transcontinental railroad created by the merger of a Western railroad, an Eastern railroad, and a Canadian railroad will have multiple east-west routes; and AGP contemplates that, under our reserved authority, we could, if appropriate, order the divestiture of the lines needed to create an additional transcontinental railroad. AGP explains that the possibility of such a divestiture may in itself police the rail marketplace to act in a more competitive manner; and, AGP adds, if it does not, there will at least be a safety valve.

Service guarantees; dispute resolution. AGP contends that, if future mergers are approved, there must be stringent performance standards with realistic compensation to the shipping community for all merger-related costs. AGP contends, in particular, that the carriers should be required: to pay for alternative transportation costs due to transit time delays; to grant demurrage relief for the bunching of cars due to inconsistent service; to pay for the demurrage of export vessels while waiting for delayed shipments due to inadequate post-merger service; to cover the cost of additional private cars due to service delays; and to pay the cost of temporarily closing plants or changing production schedules when due to poor service. AGP further contends: that disputes involving disruptions should be resolved quickly using guidelines or rules to simplify the process of resolution, to the greatest extent possible; and that any disputes not resolved entirely by rules should be submitted to binding arbitration.

BUNGE CORPORATION. Bunge believes that we should condition Class I mergers so that the merged carriers cannot use their enhanced market power to curtail market access and marketing choices and to change normal market flows.

Closed gateways; market foreclosures. Bunge contends that past Class I mergers have brought about a dramatic loss of competitive routing alternatives, even as respects shippers that, prior to the merger, were exclusively served by one of the merger applicants. Bunge argues: that the railroad that was the sole serving carrier prior to a merger may not have had broad single-line coverage and therefore may have been willing to route in conjunction with all connecting lines; that, however, as a railroad gets larger, it becomes less willing to share its originations with other railroads; and that, therefore, the routing freedom that existed pre-merger tends to diminish post-merger. Experience, Bunge claims, teaches that, in the wake of a major rail merger, the surviving carrier will use its newfound market power in a manner that curtails market options and choices. Bunge therefore contends that, where a merged carrier had pre-merger competitive rates to/from a gateway, we should require the carrier to continue to offer access to/from off-line markets. Bunge further contends that such access should be either via trackage rights (where intramodal competition is feasible) or via rate restrictions (where intramodal competition is not feasible). And, Bunge adds, an appropriate rate restriction would prohibit the carrier from increasing its rates to/from competitive gateways beyond the percentage of the carrier's rate increases, if any, on the same commodities within its own system.

Multiple plants, on lines of two or more applicants. Bunge contends that a shipper with multiple plants, some of which are exclusively served by one merger applicant and some of which are exclusively served by another merger applicant, will be adversely impacted by a merger of the two applicants. In the wake of such a merger, Bunge observes, all of the shipper's plants will be exclusively served by a single railroad.

Realignment of markets. Bunge argues that a merger, and arrangements connected with a merger, can disadvantage a shipper by expanding the markets of a shipper's competitors while not expanding the markets of the shipper. Bunge notes, however (citing its own experience in the BN/SF merger), that our conditioning power has not heretofore been used to rectify competitive realignments of this sort. Bunge, which believes that our conditioning power should be used in this context, contends that we should declare market curtailments to be against merger policy in general. Bunge further contends that, where pre-merger marketing relationships are altered by post-merger rate reductions that are claimed to reflect merger-related factors, we should require the carrier to justify the reductions in terms of lower costs or other factors. And, Bunge adds, we should also require carriers to justify rate increases that alter or change market flows.

FARMERS ELEVATORS COMPANY. FEC, which has a 13-car country elevator on a Western Oklahoma line operated by FMRS's GNBC subsidiary, contends that GNBC's future prospects will be uncertain if GNBC continues to be hamstrung by BNSF's discriminatory rates and rules. FEC, which insists that it would rather load hoppers than trucks, claims that, even if its spur could hold more than 13 cars, it could not take advantage of BNSF's unit train rates without combining its loads with the loads from other elevators; and, FEC adds, BNSF has never allowed that to happen on the GNBC line on which FEC is located. FEC insists that railroad mergers should not be allowed to destroy small businesses and the way of life in Western Oklahoma.

IMC GLOBAL INC. IMC Global contends that we should adopt regulations that are designed to avoid the harmful cost increases and service deterioration that have resulted from recent mergers.

Downstream effects. IMC Global contends that we should take into account the probable downstream effects of proposed rail mergers.

Maintaining safe operations. IMC Global, which supports the concept of Safety Integration Plans (SIPs) throughout the implementation process of approved rail mergers, contends that our merger regulations should take into account what might happen if a bidding war results in payment of more than fair value for rail property (*e.g.*, guarantees against reducing track maintenance, guarantees against raising shippers' rates, *etc.*).

Safeguarding rail service. IMC Global contends that rail service should be required to *improve* as a result of a merger; it is not enough, IMC Global insists, to protect against post-merger service disruptions. IMC Global explains that, just as merger applicants benefit substantially from rail mergers, the quid pro quo for the shipping public must be improved rail service. And, IMC Global adds: merger applicants should be required to demonstrate the manner and extent to which rail service will be improved as a result of a proposed merger; there should be a meaningful and enforceable penalty if the predicted service improvement does not occur; and there must be performance measures by which pre-merger and post-merger service can be compared.

Promoting and enhancing competition. IMC Global contends that we should provide for increased and aggressive use of line divestitures and trackage rights for non-merging rail carriers as means of preserving and enhancing rail competition in conjunction with proposed rail mergers. IMC Global argues: that the physical presence of a second rail carrier at origin or destination is necessary to achieve effective rail competition; that rail rates are more reasonable and rail service is more efficient when an origin or destination is physically served by more than one rail carrier than when an origin or destination is captive to a single rail carrier; and that, because there is little or no rail-to-rail competition in duopoly markets, the harmful effects of absence of rail competition will continue and accelerate unless competition is preserved and enhanced by line divestitures and/or trackage rights in merger cases. And, IMC Global adds, because we have very narrowly construed our authority to grant competitive access relief in non-merger settings, we should make increased use of line divestitures and trackage rights to enhance rail competition in the merger context. (1) *Shared Assets Areas*. IMC Global strongly favors the "Shared Assets Area" concept. One of the most effective means of ensuring fair and effective rail competition in terminal areas, IMC Global argues, is a neutral switching carrier jointly owned by the line-haul competitors.

(2) *Maintaining open gateways*. IMC Global contends that we should ensure that gateways remain open on a long-term basis (*i.e.*, after expiration of rail contracts existing at the time of the merger).

(3) *Switching within or adjacent to terminal areas*. IMC Global, which believes that such switching would not be sufficient, insists that line divestitures or trackage rights are essential to enhance competition.

(4) *Contracts for bottleneck routes*. IMC Global, which believes that such contracts would not be sufficient, contends that it is essential to provide for the physical presence of a second major rail carrier to the maximum extent possible in order to ensure that there will be effective rail intramodal competition.

(5) *The "one lump" concept*. IMC Global favors the elimination of this concept and the maximum use of conditions to provide for the presence of a second rail carrier at exclusively-served origin or destination points.

Shortline and regional railroad issues. IMC Global favors treatment of shortline and regional railroads in rail merger cases in a manner that will enhance their ability to provide competitive rail service for shippers.

3-to-2 issues. IMC Global contends that our merger regulations should require replacement of lost rail competition when a merger otherwise would result in a 3-to-2 reduction in rail competitors.

Merger-related public interest benefits. IMC Global contends: that merger applicants should be held to their promise of improved rail service; that post-merger monitoring of rail service should be conducted; and that meaningful and easily enforceable penalties should be provided for failure of performance.

Reform principles. As noted in our summary of the ARC submission, IMC Global has expressed support for the "principles for reform of merger proceedings and related regulation."

APPENDIX O: MINERALS AND RELATED INTERESTS

NATIONAL MINING ASSOCIATION. NMA contends that the national railroad network must continue to be an effective source of competitive bulk commodity transportation services for distribution of coal, other mine products, and other heavy freight shipments. NMA insists that, because heavy bulk commodities are so dependent on rail transportation, the future of the national rail network has crucial implications with respect to both the economy and the security of the United States.

Producers as stakeholders in rail mergers. NMA contends that producers of "railroad commodities" are stakeholders in rail mergers and should therefore be assured the right to participate in merger proceedings. NMA concedes that "shippers" or "customers" or "purchasers of rail services" have the right to participate in merger proceedings. NMA insists, however, that, because producers of railroad commodities are "stakeholders" in rail mergers, any such producer (*e.g.*, an operator of a rail-served coal mine) should have the right to participate in a merger proceeding even if such producer is not, in a technical sense, a "shipper" or a "customer" or a "purchaser of rail services." All parties affected by the existence of a railroad's market power, NMA argues, should have, in the merger context, a right to be heard.

Performance standards. NMA contends that, because railroads now possess significant market dominance vis-à-vis essential rail traffic, and also because future mergers may increase the market dominance that already exists, we should establish performance standards to measure the quality of railroad services. NMA further contends: that performance standards focused on systemwide characteristics for all traffic (*e.g.*, average train speeds for all trains) do not meet the requirements of commodity producers originating freight shipments; that, rather, such requirements can only be met by commodity-specific performance standards focused on the quality of rail service provided for particular classes of rail freight; and that, therefore, we should establish performance standards categorized either by major rail commodities or by groups of rail commodities having similar rail-related characteristics. NMA explains that, from a mine operator's perspective, information on train operations must relate directly to performance of the railroad with respect to the service required and the ability of the mine operator to manage its mining, processing, and loadout operations in a cost-effective manner. NMA adds that our performance standards should focus on the timeliness and reliability of train arrivals not only at freight terminations (*e.g.*, power plants) but also at freight originations (*e.g.*, coal mines). NMA insists that our performance standards should take into account, among other things: the effectiveness of communications among train dispatch and control centers, train crews, local railroad units, and commodity producers and shippers; timeliness of notifications to commodity producers of incidents that delay trains arrivals; adequacy of locomotive power; availability of train crews; and the number and capacities of rail cars in the train sets sent to mines for loadout operations.[249]

Market dominance. NMA contends that we should act to ensure that future mergers do not eliminate intramodal competition and therefore increase railroad market dominance. NMA further contends that it is unclear whether our current regulatory practices would apply to rail operations involving inter-country railroads serving both intra-country and inter-country movements of commodities (*e.g.*, coal) with respect to which the railroads enjoy market dominance. NMA adds that the viability of implementing effective train dispatch, command, control, and communications systems to manage extensive train operations efficiently is also of concern. NMA therefore insists that, before we approve a merger that would result in a new super-mega-railroad, we should address three key concerns: (1) the protection afforded commodity producers and shippers subject to railroad market dominance; (2) situations where transportation competition would be diminished by a merger, which would require the imposition of conditions to preserve competition; and (3) determination of a floor in regard to railroad performance levels not to be diluted as a result of a merger, with that floor established by measurement of the quality of rail service prior to the merger, and with a substantive evaluation methodology for monitoring purposes after the merger is implemented. And, NMA adds, we should consider, in the transnational merger context, the interaction of railroad regulation in the United States and railroad regulation in Canada and Mexico.

GLASS PRODUCERS TRANSPORTATION COUNCIL. GPTC notes that, because the major raw materials used to manufacture glass (soda ash, sand, and limestone) move predominantly by rail due to their substantial weight, density, volume, and distance of transport, the American glass industry has a tremendous interest in the viability of the American railroad system.

Safeguarding rail service. GPTC, which insists that the service disruptions that followed the UP/SP and CSX/NS/CR transactions caused its members enormous harm, contends that we should: (1) adopt procedures that will require consolidating railroads to devise better merger implementation plans than have been devised in the past; and (2) adopt specific and mandatory monetary penalties, benchmarked against pre-merger service levels, that will be applicable if, despite the plans, service failures result from any future consolidations. GPTC, which indicates that many of its members have reported a refusal on the part of the carriers to make monetary adjustments for the extraordinary damage caused by their poor planning, lack of proper foresight, and negligence, argues that it is critical to hold future merger applicants economically responsible if they fail to provide adequate protections against merger-related service failures.

Promoting and enhancing rail competition. GPTC contends that, rather than simply trying to preserve competition, we should adopt a policy that calls for emphasizing and enhancing competition, both intermodal and intramodal. GPTC contends, in particular, that we should require future merger applicants to maintain open gateways for all routings, to provide switching at agreed-upon fees to all exclusively-served shippers located within or adjacent to terminal areas, to offer upon request contracts for the competitive portion of joint-line routes when the joint-line partner has

[249] NMA notes that, in December 1999, NMA and AAR entered into an agreement on coal transportation that places a priority on matters dealing with railroad services. NMA further notes that a Joint Coal Logistics Committee has been established pursuant to the NMA/AAR agreement to discuss, among other things, measuring the quality of railroad services.

a bottleneck segment, and to provide new through routes at reasonable interchange points. And, GPTC adds, we should also review and revise the "one lump" theory.

Merger-related public interest benefits; means short of merger. GPTC, which claims that past mergers have produced neither efficiencies nor other public interest benefits, contends that we should be, in the future, much more skeptical of carrier estimates regarding claimed merger-related efficiencies and other public interest benefits. GPTC further contends that merger applicants should be required to prove that less competitively restrictive alternatives to merger that would achieve the same efficiencies and benefits are not available. GPTC, which believes that we should not even consider "efficiency" in our merger analysis,[250] insists that, if we do decide to take efficiency into account in our merger analysis, we should also: monitor claimed efficiencies on a post-merger basis; require cost savings produced by efficiencies to be passed on to rail customers; and demand accountability of the carriers in the event that promised efficiencies are not achieved.

U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION. USCPTA, which indicates that its members have incurred substantial losses on account of the service disruptions that followed the UP/SP and CSX/NS/CR transactions,[251] contends that Class I railroads should be held fully accountable for their merger-related miscalculations, and, in particular, should be required to compensate shippers for damages caused by merger-related service disruptions. Service guarantees should be established, USCPTA insists, in recognition of the principle that where damage is caused by a carrier's miscalculations, the cost of that damage should be borne by the carrier and not by the shipper. And, USCPTA adds, if our regulations provide that railroads will be held fully accountable for damages caused by their miscalculations, the public will be protected because railroads will no longer enter into mergers lightly.[252] (1) USCPTA contends that we should require major merger applicants to present detailed proof of their ability to smoothly assimilate the merged lines without a deterioration in service as measured by transit times and terminal dwell times. (2) USCPTA contends that we should create an administrative procedure enabling shippers to claim and recover merger-related damages. USCPTA argues that, if shippers must resort to the courts to prosecute their service disruption damage claims, many meritorious claims will not be pursued due to the high cost and uncertainty of litigating transportation issues in the courts. USCPTA adds that, with an administrative damage recovery procedure, shippers would not be forced to use thousands of courts across the country, each with its own state law precedents, but could seek relief instead in a standardized administrative proceeding adjudicated by Administrative Law Judges familiar with concepts such as transit time, terminal dwell time, and car leasing arrangements. (3) USCPTA contends that, to ensure that the railroads do not shift the costs of merger miscalculations to shippers, we should impose a condition making the merged railroad liable for merger-related damages sustained by shippers (including costs attributable to delays, and also the costs incurred in securing alternative transportation). USCPTA further contends that we should re-examine our recent decision that (USCPTA claims) allows a merged railroad to treat service disruption costs as

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[250] GPTC believes that, in the horizontal merger context, efficiency should never be considered if the merger will result in a high concentration of product service within the relevant geographic market.

[251] USCPTA indicates that CSX and NS originate most of the clay produced by USCPTA's members.

[252] USCPTA insists that any new procedures should be applied retroactively to address problems arising from the recent major rail consolidations.

normal costs. USCPTA insists that, if a railroad (in this instance, UP) is to be held accountable for its mistakes, it should not be allowed to pass the costs of its mistakes on to shippers. (4) USCPTA contends that we should increase the procedural burden on Class I merger applicants by requiring the submission of: (a) detailed contingency plans examining the possibility of resulting service disruptions; and (b) impact statements projecting the costs of service disruptions that could be caused by a miscalculation. USCPTA believes that, by requiring railroads to develop this evidence, we would force them to take a good hard look at the possibility that their actions may cause serious harm.

BENTONITE PERFORMANCE MINERALS. BPM[253] contends that, in view of the size that BNSF, UP, CSX, and NS have already attained, any assessment of a future proposed merger should consider its "overall effect" on rail transportation and the national economy, and not just its effect on customers on the lines of the merger applicants. BPM further contends: that a merger of any two of BNSF, UP, CSX, and NS would have a damaging effect on competition; that a merger of one of these railroads, on the one hand, and, on the other hand, one of the two major Canadian railroads, would have a similarly damaging effect on competition; that the entity resulting from either kind of merger would have far too much market dominance vis-à-vis shippers and shortlines; and that, therefore, no such mergers should be allowed. And, BPM adds, we should not approve any rail merger that could threaten U.S. national defense, or that would allow an entity outside of the U.S. to control a U.S. carrier.

WYANDOT DOLOMITE, INC. WDI, which mines limestone at an Ohio quarry with access to one Class I railroad and one regional railroad, contends that the less than fully adequate rail service it was receiving prior to the CSX/NS/CR transaction became worse in the wake of that transaction. WDI further contends that the CSX/NS/CR transaction, which deprived WDI of its pre-transaction single-line service, resulted in the loss of almost 10% of WDI's business to a competitor that, unlike WDI, had post-transaction access to single-line service. And, WDI insists, the Class I railroads (including its own Class I railroad) have grown too large; a small shipper, WDI claims, can no longer resolve service problems on a one-to-one basis with its serving Class I; and the Board, WDI believes, lacks sufficient staff and resources to remedy the service problems experienced by small shippers.

WDI has advanced a number of proposals. (1) WDI contends that we should promote competitive rail service that is responsive to the needs of small shippers. (2) WDI contends that we should change our policy vis-à-vis 3-to-2 reductions in competitive options, and should insist, instead, on a searching analysis on an individual basis. Its own post-CSX/NS/CR experience demonstrates, WDI claims, that a 3-to-2 reduction has an adverse impact on rail service. WDI notes, in particular, that its regional railroad lacks the resources to act as an effective competitive spur to its Class I railroad. (3) WDI contends that, when considering any future merger proposals, we should carefully weigh the financial and service problems faced by regional and shortline carriers. The continued viability of these carriers, WDI argues, is of vital interest to shippers everywhere. (4) WDI, which believes that our current dispute resolution procedures are too costly and ponderous for small shippers, contends that an arbitration mechanism along the lines of the one provided by 49 CFR Part 1108 would be an appropriate means for resolving disputes affecting small shippers. WDI therefore suggests that we make the 49 CFR Part 1108 mechanism mandatory in as many instances as possible, and also expand the range of issues that are subject to resolution by arbitration. (5) WDI indicates that, because there is no substitute for viewing problems and issues

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[253] BPM mines bentonite clay at facilities in Wyoming, Iowa, and Missouri.

first hand, it supports efforts to provide the Board with sufficient staff and resources to investigate problems and to monitor the responsiveness of rail transportation service.

APPENDIX P: FOREST PRODUCTS, LUMBER, AND PAPER INTERESTS

AMERICAN FOREST & PAPER ASSOCIATION. AF&PA believes that we should act to promote competition in the American railroad industry.

Merger regulations should affirmatively enhance competition. AF&PA, which believes that vigorous competition (intermodal as well as intramodal) is necessary for a healthy rail system, is concerned that the evolving oligopolistic national rail structure will not sustain the low-cost transportation infrastructure that the forest products and paper industry needs to be globally competitive. AF&PA contends: that competition is the foundation for ensuring that the national economy remains healthy and competitive; that, without competition, the railroads have no incentive either to provide consistent service at low cost or to furnish adequate supplies of quality boxcar equipment; and that, therefore, the railroad industry, like all other industries, should be required to operate in compliance with the antitrust laws. AF&PA further contends that we should require railroads: (1) to maintain open gateways over major interchanges on all major routings; (2) to provide fee-for-service switching for all shippers located within or adjacent to terminal areas; (3) to offer, when requested, contracts for the competitive portion of joint-line routes when the joint-line partner has a bottleneck segment; (4) to provide through routes at reasonable interchange points whenever they control a bottleneck segment and the shipper has entered into a contract with another carrier for a competitive segment; and (5) to provide, to shippers exclusively served by a single railroad, trackage rights access to an additional railroad. AF&PA also contends that we should impose upon the railroads the requirements of the "Bill of Rights" advocated by ASLRRA.

Competition should regulate transportation markets. AF&PA contends that, to the maximum extent permissible under our statutory authority, we should reinforce the principle that competition should be the regulator of transportation markets. Our efforts, AF&PA insists, should be directed to finishing industry deregulation by opening up market-based competitive processes, rather than by creating new or added regulatory processes. (1) AF&PA contends that a shipper should have a real choice among rail service providers. Competitive access to an alternative rail carrier, where operationally safe and feasible, would, AF&PA maintains, actively stimulate competition. (2) AF&PA contends that shipper choice should be promoted through the adoption of terminal and reciprocal switching, using the Canadian interswitching approach as a model. (3) AF&PA contends that, because railroads focus on moving trains and do not focus on time-definite door-to-door services, "third party marketers" should be afforded an opportunity to develop such shipper-desired solutions. "Non-asset owning companies," AF&PA argues, would provide new services and would also give the railroads an incentive to develop such new services themselves. (4) AF&PA contends that we should support an alternative means of managing rail market behavior, by the creation of common access points to create competition. AF&PA adds that federal funding can be used to remove physical barriers in order to make alternative rail service accessible.

Reform principles. As noted in our summary of the ARC submission, AF&PA has expressed support for the "principles for reform of merger proceedings and related regulation."

NORTHWEST FORESTRY ASSOCIATION. NFA contends that, in evaluating any future merger proposal, we should consider the effect the proposed merger would have on service, competition, and market and trade neutrality.

Service disruptions; service guarantees. NFA, which indicates that the forest products industry cannot afford any more service disruptions like those experienced in the last round of major rail mergers, contends that we should adopt merger regulations that will allow us to ensure that shippers receive an acceptable level of service and a guarantee that includes a form of measurement and a remedy.

Competition. NFA, which is concerned that any additional mergers will lead to less competition among the railroads and will result in increased shipping rates, contends that we should adopt merger regulations that will ensure that any future changes in the North American railroad structure result in an increased level of competition among the railroads, not in oligopolistic situations that could negatively affect service levels and rates paid by shippers. And, NFA adds, we should adopt regulations that will allow us to promote and maintain competitive access to rail lines when considering the approval of a proposed merger.

Market and trade neutrality. NFA, which indicates that the highly competitive wood and paper products industry cannot afford to have market externalities such as a railroad merger affect the access to markets enjoyed by individual producers, contends that we should adopt merger regulations that will ensure that any changes in the North American railroad structure will be both market and trade neutral. And, NFA further contends, a merger that will benefit one set of producers over another should not be approved.

EMPIRE WHOLESALE LUMBER CO. Empire, a wholesale distributor of forest products produced in the United States and Canada, urges recognition of the reality that all transportation entities, railroads included, exist for the primary purpose of supporting the economic activities of the non-transportation sector of the economy. Empire has offered a number of proposals intended to ensure that railroad transportation will be conducted in a manner that does not inhibit growth of the general economy.

Customer rights; railroad profits. Empire contends that every customer of a Class I railroad must have the guaranteed right to receive, upon reasonable request, service equal to the service afforded that party's competition (and, Empire adds, if the "customer" is a shortline railroad, its competition may be the Class I itself). Empire also contends that every customer of a Class I railroad must have the guaranteed right to purchase service, upon reasonable request, at a rate predicated upon the cost of providing that service, not at a rate based on a "what the market will bear" principle. Empire further contends that a railroad should earn profit relatively equally from charges assessed to all customers predicated upon service provided, distance traveled, and risks assumed.

Performance measurements; national defense. Empire contends that rail performance must be measured to determine whether the railroads are performing in a manner that does not inhibit the growth of the general economy. Empire contends, in particular, that we should measure the pace at which materials flow between participants (*i.e.*, the fluidity and velocity of movements between producers and consumers). Empire further contends that each railroad's contribution to economic development or economic stagnation in the communities served by that railroad should be measured, and should be rewarded or punished as appropriate. And, Empire adds, we should not lose sight of the importance of having sufficient rail capacity to support the national defense.

Infrastructure nationalization; technological advances. Empire suggests that nationalization of the Class I rail infrastructure could both resolve rail financing problems and facilitate the introduction of technological advances. Empire suggests, in particular: that the right-of-way of Class I merger applicants could have substantial value as a component of a national "steel rail" "intelligent transport system" for toll-paying high-speed automobile and truck traffic; that new technologies might result in the development of individually-motivated and robotically-controlled railcars capable of achieving scheduled transit and consistent delivery; that the nationalization of the infrastructure, which would allow the development of the anticipated new technologies, could be facilitated by a merger condition requiring the merger applicants to sell their track to the government for 135% of net liquidated value; that the track, once owned by the government, could be retrofitted with the "intelligent transportation systems" needed to support toll-paying automobile, bus, and truck transit between major hubs; and that, with sufficient infrastructure improvements, future developments might allow an increase in the capacity of the rail network (Empire contemplates a situation in which rail freight operations would be conducted on an at-grade track while other traffic would be handled on a separate elevated monorail). And, Empire adds, competitive service could be established if part of the operating capacity of the track were leased to a consortium of shortlines.

Shortline and regional railroad issues. Shortline and regional railroads, Empire maintains, can provide significant additional capacity to circumvent congestion on Class I infrastructure. Shortlines and regionals, Empire further maintains, also represent the only viable way to promote true competition for communities and shippers locked into a duopoly structure. Empire therefore contends: that shortlines and regionals should be shielded from detrimental effects; that their competitive effect and economic viability should be enhanced by directed line sales; and that no paper or steel barriers should be allowed to stand, except those that provide the only means of ensuring safe operations. And, Empire adds, we should use directed service orders to make better use of some of the track owned and/or operated by shortlines and regionals (Empire suggests, in particular, the use of directed service orders to divert hazardous material shipments from intercity Class I track to rural shortline or regional track).

Employee issues. Empire, which believes that rail labor (whether union or non-union) deserves to be treated ethically, contends that all unionized employee issues should be resolved through the CBA process, and that non-union employee issues should be monitored to ensure compliance with federal law. Empire further contends that mergers that include an accommodation of non-union and union workforces should be monitored to ensure that all parties are treated fairly.

Merger-related public interest benefits. Empire contends that projected benefits advanced as a rationale for approval of a merger should be fit into a timeline by the merger applicants and should be monitored by the Board. Empire further contends that, if a merger is approved but projected benefits are not achieved in a timely fashion, we should issue directed line sale orders or directed service orders as necessary to ensure that the projected benefits are realized.

Cross-border issues. Empire is concerned that, on account of certain provisions of Canadian law respecting corporate headquarters and corporate boards, any U.S./Canadian railroad would have to be headquartered in Canada and a majority of the members of its board of directors would have to be Canadian citizens. Any such railroad, Empire warns, would be controlled from Canada, and

(Empire adds) its headquarters would be beyond the jurisdiction of this Board and all U.S. courts. Empire suggests that we should consider the establishment of rules similar to current Canadian law on control and record retention. Empire also suggests that, in light of the ongoing China/Taiwan dispute, we should consider what would happen if a U.S. Class I railroad were to fall under the control of a Chinese firm.

Lumber issues. Empire contends that railroad service and rate agreements (including volume discounts and other contractual devices) cause distortions in the marketing of lumber. Empire further contends that every policy or practice that distorts natural market competitive forces will result in advantages for some and disadvantages for others. And, Empire adds, in certain matters respecting lumber as well as grain, Canadian policies that conflict with U.S. law may result in preferential car supply and rate or service standards for Canadian companies that participate in the U.S. economy in direct competition with U.S. companies served by the same railroad.

MCKINLEY PAPER COMPANY. MPC, which operates, at a location in New Mexico, a recycled linerboard facility served exclusively by BNSF, contends that it has sustained economic harm on account of the lack of rail competition as respects traffic moving from/to its New Mexico facility. MPC indicates that, although it had hoped to route the vast majority of its traffic by rail, it has been unable to do so; MPC claims, rather, that the vast majority of its traffic now moves by truck, on account of BNSF's rate structure and BNSF's shortages of boxcars, power units, and crews. And, MPC adds, the lack of rail *vs.* rail competition has placed MPC at a competitive disadvantage vis-à-vis paper mills served by two railroads, each competing with the other in terms of rates and service. MPC, which believes that the introduction of a competitive option (UP) would work to its advantage, argues that our merger regulations should be amended to allow for the introduction of more open access competition into captive regions of the United States such as New Mexico.

SENECA SAWMILL COMPANY. Seneca, which ships a significant portion of its lumber by rail, maintains that the matters at issue in this proceeding are of critical importance to hundreds of companies across the United States.

Preserving and enhancing competition. Seneca, which maintains that competition is the cornerstone of increasing economic efficiency in the United States, contends that, if there are additional Class I consolidations, it will face a significant challenge in getting its product to a national market. Seneca further contends that, whether or not there are additional Class I consolidations, there should be open information on pricing and service levels between the railroads and their customers (*i.e.*, documents such as delivery agreements and contracts regarding rates should be made available to the public). Seneca adds that, although it does not object to individual contracts that reflect real efficiencies, such contracts should be made public, to let all manufacturers know what standards must be achieved to acquire the same advantage.

Minimum service levels. Seneca, which indicates that it would rather not endure a repetition of merger-related service problems, contends that, no matter the circumstances, it must be able to count on a consistent level of service and availability of equipment.

Cross-border issues. Seneca contends: that U.S. lumber markets are seriously affected by imported Canadian lumber; that reduced rail rates are one of the means by which Canada has subsidized Canadian wood products manufacturing facilities; and that, before we consider any merger that would allow a Canadian entity to own a U.S. rail line, a mechanism needs to be put in place to assure that subsidies of this nature do not exist.

WEYERHAEUSER COMPANY. Weyerhaeuser, a forest products company with facilities across North America, believes that we should adopt strong procompetitive merger rules to ensure that the railroad system in the United States remains the strongest in the world. It is time, Weyerhaeuser insists, to complete the work envisioned by the Staggers Act of 1980, to remove the remaining agency-created shackles of regulation, and to free the railroads to compete like any other industry in the United States.

Promoting and enhancing competition. Weyerhaeuser maintains that, although competition helped make the United States the global economic force it is today, our merger policies have allowed railroads to avoid competition, to become complacent and proprietary about captured traffic, and to ignore the efficiency gains offered by competitively driven innovation. Weyerhaeuser therefore contends that we must attempt to create legitimate and effective competition between railroads in the United States, not only between major locations (such as Chicago, Los Angeles, and New York) but also between smaller locations, and not only *between* locations but also *at* locations; the individual shipper at *each* location, Weyerhaeuser believes, must have competitive alternatives. Weyerhaeuser contends, in particular, that, to promote and enhance competition between railroads, we should adopt a regulatory framework similar to the one that currently exists in Canada, which (Weyerhaeuser advises) includes three major components: interswitching; running rights; and final offer arbitration. And, Weyerhaeuser adds, we should adopt rules that will preclude railroads from establishing further bottlenecks, and that will allow shippers to determine how their freight will be routed.

Interswitching. Weyerhaeuser contends that we should adopt the Canadian “interswitching” standards, which (Weyerhaeuser claims) will increase competition between railroads at a substantial number of locations throughout the United States. Weyerhaeuser has in mind that the interswitching costs would be established yearly by the Board and would be applied consistently across the United States, and that the interswitching zones would begin where competing lines intersect and would expand outward in mileage bands (which, Weyerhaeuser claims, would bring competition to many industries located outside of current terminal areas). Weyerhaeuser also has in mind that interswitching would apply only to Class I railroads, and not to regional or shortline railroads.

Running rights. Weyerhaeuser contends that we should authorize the operation of one railroad over the lines of another, in order to foster competition at locations beyond terminal areas or interswitching zones. Weyerhaeuser further contends that the current protracted process should be simplified to allow resolution within 90 days, and should be made effective by placing the burden of proof on the current operating line to justify its position.

Final offer arbitration. Weyerhaeuser contends that, as respects resolution of disputes between railroads and shippers, we should adopt the Canadian arbitration process, which (Weyerhaeuser indicates) envisions that a final decision will be issued by an arbitrator within 60 days. The process, Weyerhaeuser adds, is somewhat similar to baseball-style arbitration.

Routing protection. Weyerhaeuser contends that we should adopt Canadian practice as respects routing protection, under which (Weyerhaeuser indicates) it is the shipper, rather than the carrier, that has the right to determine how freight will be routed from origin to destination across multiple carriers. Weyerhaeuser insists that it lost competitive options on account of the

CSX/NS/CR transaction; Weyerhaeuser explains that options to route over previous gateways, while still available on paper, have all but been eliminated by a predatory pricing policy of the originating carrier; and Weyerhaeuser therefore contends that it is critical to effective competition to incorporate Canadian-style shipper routing power into any new merger rules that we adopt.

Shortline and regional railroad issues. Weyerhaeuser, which itself owns five Class III shortlines, contends that the innovation and entrepreneurial spirit of the shortlines established over the past two decades must be preserved and enhanced. A shortline, Weyerhaeuser maintains, should be accorded access to any Class I located within the interswitching zone centered upon its connection with its own Class I.

Merger-related public interest benefits. Weyerhaeuser contends that the most important public benefit of rail mergers is efficient use of the transportation infrastructure. The effective use of railroads to move goods across the country, Weyerhaeuser argues, will help reduce congestion, lower energy consumption, and lower pollution, and will result in the development of new solutions to the benefit of shippers and, ultimately, consumers.

Safeguarding rail service. Weyerhaeuser contends that we must insist that any future mergers have reasonable and realistic implementation plans to eliminate, as much as possible, the disruptions caused by the merger of two major systems. It is not impossible, Weyerhaeuser warns, that another round of merger-related service disruptions could trigger a national recession.

Cross-border issues. Weyerhaeuser contends that shippers on both sides of the U.S./Canadian border should have a common approach to dealing with railroads. Weyerhaeuser further contends that any analysis of a U.S./Canadian rail merger should include a complete review of the data on both sides of the border.

Downstream effects. Weyerhaeuser contends that, rather than viewing each future rail merger in isolation, we should view each future rail merger in the long term to determine its impact on shippers, railroads, rail employees, the national economy, and the public at large.

APPENDIX Q: AUTOMOBILE MANUFACTURERS

ALLIANCE OF AUTOMOBILE MANUFACTURERS. AAM, which insists that the automobile industry cannot wait years for post-consolidation dislocations to abate, contends that the failure of the railroad industry to deliver the benefits promised in connection with the most recent round of consolidations requires that any further consolidation be scrutinized carefully. AAM further contends that the railroad industry should be required to engage in a thorough discussion with the automobile industry and the other principal consumers of railroad transportation services, in an appropriate forum, to establish the standards of acceptable service as well as the means to ensure compliance with those standards through relevant measurement and reporting criteria. And, AAM adds, there should also be a related discussion regarding methods to ensure the maintenance or enhancement of competitive railroad service.

The "one case at a time" rule; downstream effects. AAM contends that, because further rail consolidations may have a detrimental effect upon competitive access and service levels, the "one case at a time" rule should be eliminated. AAM further contends that, in all future major rail consolidation proceedings, we should examine the likely "downstream" effects of the proposed transaction, including the likely strategic responses by non-applicant railroads. And, AAM adds, we should also examine the plans the applicant railroads have made to avoid the disruptions, delays, inefficiencies, and loss of access that have been the common experience of recent mergers.

Safety concerns. AAM indicates that it agrees, in general, that safety concerns may best be addressed on a case-by-case basis. AAM adds, however, that there is one safety concern that warrants our attention in this proceeding. AAM contends, in particular, that staffing levels of some merged railroads have been reduced to such an extent that sufficient numbers of trained staff have not been available to be called into service on short notice as needed. AAM further contends that, as a result, inadequately trained staff have been utilized in certain areas, which (AAM also contends) poses increased safety hazards not just for railroad employees but also for shipper employees who are required to work in these areas.

Quality and adequacy of rail service. AAM maintains that the declining quality and adequacy of railroad service resulting from the recent consolidations is of significant concern to the automobile industry. Experience, AAM claims, has proven time and again that the benefits promised in connection with prior mergers, to the extent such benefits have been forthcoming at all, have arrived only after extended and very costly disruptions. The common experience of the automobile industry following virtually all of the recent major rail transactions, AAM maintains, has been a history of disruptions, delays, inefficiencies, loss of access, and declining service. (1) *Inadequate data*. AAM contends that service data now available is often inadequate. AAM indicates, by way of example, that reports that Railroad X regularly delivers product between Point A and Point B in three days are meaningless when they fail to note that the product actually requires double that time for delivery because there is a shortage of equipment before the goods can be loaded, or because rail cars are regularly delayed at an embarkation point before departure, or because the goods sit in a yard at the destination point before actual delivery. Reporting, AAM insists, needs to be made more relevant, more accurate, and more comprehensive.

(2) *Expanded performance-level reporting system*. AAM contends that we should require the regular reporting and publication of comprehensive service performance data, which (AAM adds) should include, among other things, "Transit Times" and "Variability" for products and/or product categories delivered by railroads between various points. AAM contemplates: that "Transit Times" reports would measure actual transit times for products from pick-up point to destination point and would account for all of the various delays that occur in the process; and that "Variability" reports would measure the extent and frequency of late and early deliveries along particular routes.

(3) *Merger application*. AAM contends that merger applicants should be required to project the enhanced level of service they propose to achieve and to explain why such improvements cannot be achieved through some means other than the proposed transaction. AAM further contends that we should require merger applicants to submit such projections in a format and supported by data that could be correlated with the data being reported under the expanded performance-level reporting system advocated by AAM. And, AAM adds, if we were to continue tracking performance criteria after implementation of an approved transaction, we would have a further opportunity to encourage the railroads to fulfill the promises they had made.

Promoting and enhancing competition among railroads. AAM, which agrees that it is time to place a greater emphasis on enhancing, rather than simply preserving, competition, contends that, in considering any future transactions, we should ensure, to the maximum extent possible, that the interests of railroad consumers are preserved through the enhancement of competition. AAM, which claims that recent mergers have resulted in a loss of competitive access at certain facilities operated by a number of its members, further contends that we should require merger applicants to justify the loss of any such service and to explain why it is not possible to maintain continued competitive service through modification of the proposed transaction. AAM also contends that we should require merger applicants to furnish notice to affected entities in sufficient time to allow such entities a meaningful opportunity to address the matter at the Board.

3-to-2 issues. AAM contends that we should modify our rules to clearly establish that there will be no presumption in favor of approving a merger that will reduce the number of rail companies serving an area from three to two. AAM, which maintains that consumers benefit most where there is healthy competition between several suppliers, further contends that a 3-to-2 merger should be scrutinized as closely as a 2-to-1 merger.

Merger-related public interest benefits. AAM, which is particularly concerned that the many promises that preceded each of the recent consolidations, if they have been fulfilled at all, have not been fulfilled in a timely manner, contends that we should conduct post-merger monitoring to help ensure that projected benefits are actually achieved, and achieved at the time originally promised. AAM further contends that such monitoring should include periodic reviews in an appropriate public forum that will afford railroad consumers the opportunity to contribute to the discussion. AAM maintains that public review of railroad performance, in a venue where needed improvements and the means to achieve them can be the subject of discussion, may well provide the incentive for unilateral improvements by the railroads.

GENERAL MOTORS CORPORATION. GMC asks that we keep the competitive aspect of a merger in the forefront, demand proof of detailed planning from merging railroads, and consider on a case-by-case basis the possible effects of mergers.[254]

TOYOTA LOGISTICS SERVICES. TLS, which supports the positions taken by AAM, contends that, although all of the issues considered in this proceeding are important to the long-term health of the U.S. rail industry, the most critical challenge is the matter of enhancing competition. Enhanced competition, TLS insists, will result in lower rates, better service, and further innovation. And, TLS argues, vigorous competition will be "self-correcting," in that market and operating conditions, and not governmental authority, will determine rates, and railroads will quickly respond to service issues. TLS suggests that, in determining the means to be used to enhance competition in the rail industry, we might seek guidance in the experience of other industries (*e.g.*, telecommunications and utilities) that have faced a consolidation of market power in a limited number of participants. And, TLS adds, although the enhancement of competition in the rail industry may well require creative and possibly painful solutions, vigorous competition is the only effective way to serve the public interest and to ensure that the rail industry remains customer-focused, cost-competitive, and service-sensitive.

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[254] GMC's request for waiver of the electronic submission requirement with respect to its comments is granted. So ordered.

APPENDIX R: CANADIAN SHIPPER INTERESTS

CANADIAN PULP AND PAPER ASSOCIATION; WESTERN CANADIAN SHIPPERS' COALITION. CPPA and WCSC[255] believe that there is no substitute for actual railway competition manifested by a number of rail carriers vying for a healthy share of the rail transportation business. CPPA and WCSC also believe that our primary objective should be to promote a competitive railroad environment in North America.

Development of a full record. CPPA and WCSC contend that we should consider any major consolidation in its totality, and, where applicable, should require the production of all required filings (including supporting information, market analyses, operational data, and financial information) relating to foreign railroad operations as well as operations in the United States. CPPA and WCSC believe that, without a record encompassing foreign as well as U.S. rail operations, it will not be possible to determine the full effects of a proposed transaction.

Coordination and exchange of data with foreign authorities. CPPA and WCSC contend that, in the merger context, we should attempt to establish, with Canadian and Mexican authorities, a procedure that will us allow to coordinate and exchange data. An exchange of data with the applicable foreign authorities, CPPA and WCSC claim, would prove helpful in enabling us to more fully and appropriately consider the impact of a proposed major railroad transaction in its entirety. And, CPPA and WCSC add, all information obtained through this exchange process should become part of the public record.

The "one case at a time" rule; downstream effects. CPPA and WCSC agree that the "one case at a time" rule should be eliminated. It is, CPPA and WCSC maintain, essential that we examine in every major consolidation proceeding a proposed transaction's likely downstream effects, including the likely strategic response by non-applicant railroads.

Competition and service. CPPA and WCSC indicate that their predominant concern is for a competitive North American railroad system which will provide adequate service at reasonable rates. (1) *Rail duopoly*. CPPA and WCSC insist that Canadian experience with CN and CP has taught that, in the railroad industry, a duopoly is, in reality, a dual monopoly. The two Canadian duopolists, CPPA and WCSC contend, are able to frustrate competitive alternatives simply by declining to compete with each other. Two North American duopolists, CPPA and WCSC further contend, would have no incentive to operate differently than the two Canadian duopolists have operated in Canada; and, CPPA and WCSC warn, the result of a North American duopoly would be to curtail, and perhaps to eliminate, a shipper's access to the benefits of effective competition.

(2) *Competition*. CPPA and WCSC contend that we should be concerned with enhancing railroad competition rather than preserving the status quo. CPPA and WCSC further contend: that we should adopt a rebuttable presumption that a major rail consolidation will substantially reduce the transportation alternatives available to shippers; that we should exercise our merger conditioning powers to provide shippers with access to an additional carrier through trackage rights, switching at a prescribed fee, and maintenance of open gateways for all major routings; that we should also require that contracts be offered for the competitive portion of a joint-line route (when a joint-line partner has a bottleneck segment) and that new routes be established at reasonable interchange

[255] CPPA and WCSC filed separately.

points when a merger applicant controls a bottleneck segment and the shipper has entered into a contract with another carrier for a competitive segment; that we should abolish the "one lump" theory in the rail merger context; and that we should ensure that any shipper currently served by one Class I railroad will be given access to another railroad should a major rail consolidation be approved.

(3) *Service*. CPPA and WCSC contend that, because recent major rail consolidations have resulted in significant service disruptions with attendant loss and inconvenience to the North American shipping public, major rail consolidation applicants should be required to submit detailed service, integration, and implementation plans. And, CPPA and WCSC add, should there be a degradation of service levels, we should be authorized to assess appropriate penalties and to issue remedial orders on a summary basis.

COUNCIL OF FOREST INDUSTRIES. COFI indicates that its position is accurately set out in the submission filed by WCSC.

CANADIAN RESOURCE SHIPPERS CORPORATION. CRSC believes that future U.S./Canadian rail mergers will have impacts vis-à-vis rights provided for under Canadian law, including the right of Canadian shippers to obtain competitive rates for traffic destined to U.S. markets.

Canadian remedial legislation. CRSC indicates that, to counterbalance the market power of the two railroads (CN and CP) that comprise the Canadian transcontinental rail duopoly, the Canadian government, in 1988, enacted into law (now codified in the Canadian Transportation Act) two "competitive access" mechanisms ("extended interswitching" and "competitive line rates") and two "dispute resolution" mechanisms ("final offer arbitration" and "mediation"). (1) *Extended interswitching*. CRSC indicates that, under Canadian law, a local rail carrier is required to offer prescribed rates to move railcars to a connecting rail carrier at an interchange within 30 kilometers of the point of origin or destination of the traffic. CRSC contends that the extended interswitching mechanism has been effective for captive shippers located within 30 kilometers of a rail interchange point.

(2) *Competitive line rates*. CRSC indicates that, under Canadian law, a shipper located more than 30 kilometers from a rail interchange may ask the Canadian Transportation Agency to impose a competitive line rate (CLR) on the local carrier for the movement of the shipper's cargo from the point of loading to an interchange with a connecting rail carrier, provided that the shipper has first obtained a rate from the connecting carrier for transport from the interchange to the final destination. CRSC contends that, as a practical matter, the CLR mechanism has not been effective as respects Canadian domestic traffic, because (CRSC claims) CN and CP have declined to compete with each other through CLRs. CRSC further contends, however, that, as respects international traffic originated in Canada and terminated in the United States, the CLR mechanism has been effective (*i.e.*, has resulted in lower rates for traffic destined to U.S. markets), because (CRSC claims) U.S. railroads have been willing to use the CLR mechanism for competitive purposes. CRSC cites, as an example, an instance in which a Canadian shipper was able to secure a CLR for movement from a CP origin to a CP/BNSF interchange located on the U.S./Canadian border; the Canadian shipper, CRSC notes, was able to secure the CLR because it had first obtained a rate from BNSF for transport from the CP/BNSF interchange to the final BNSF destination.

(3) *Final offer arbitration*. CRSC indicates that, under Canadian law, a shipper may invoke final offer arbitration (FOA), a dispute resolution mechanism in which confidential offers of terms to settle the dispute are submitted to an arbitrator, who is required to choose one of the offers and is not allowed to develop any alternative compromise solution. The rationale for the FOA

mechanism, CRSC indicates, is the incentive it provides to the parties to make reasonable offers. CRSC contends that, in rate and service disputes between captive shippers, on the one hand, and, on the other hand, either CN or CP, the FOA mechanism has been, for captive shippers, an effective tool that has helped to level the playing field.

(4) *Mediation*. CRSC contends that, although Canadian law also provides for a mediation mechanism, this mechanism has been completely ineffective, because (CRSC claims) CN and CP have declined to use it.

(5) *International applicability*. CRSC indicates that the competitive access and dispute resolution mechanisms adopted in Canada in 1988 apply (in Canada) to international traffic handled between Canada and the United States.

Transnational mergers and the CLR mechanism. CRSC warns that a U.S./Canadian rail merger would have one clear anticompetitive effect: it would, CRSC insists, effectively eliminate the use of the CLR mechanism to achieve competitive rates for traffic moving to U.S. markets from Canadian points exclusively served by the Canadian merger partner. CRSC indicates, by way of illustration, that, for traffic originating at Canadian origins exclusively served by CN, a BNSF/CN merger would result in the loss of competitive points for the interchange of that traffic at the existing gateways where BNSF and CN currently connect.

Transnational mergers and the FOA mechanism. CRSC indicates that the Canadian Transportation Agency's jurisdiction to refer a matter for FOA is limited to rate and service issues within Canada. CRSC contends that it is important that competitive gateways continue to exist between Canadian and U.S. railroads so that shippers that originate international traffic may continue to have the ability to invoke the FOA mechanism to resolve disputes on rates and service issues to those points of connection. CRSC further contends that a U.S./Canadian rail merger (CRSC cites, as an example, a BNSF/CN merger) would diminish the number of competitive gateways available to shippers of international traffic from Canada to U.S. markets.[256]

Transnational mergers and a shipper's routing rights. CRSC indicates that, under Canadian law, Canadian shippers have a fundamental right to choose their own routings for the movement of their goods, and to choose which carrier or combination of carriers will carry those goods. CRSC indicates, by way of illustration, that, under Canadian law, a Canadian shipper has the right to specify, in a Bill of Lading,[257] that its traffic is to be carried by the originating carrier to an interchange point, and thence via a connecting carrier to destination. CRSC warns that a U.S./Canadian rail merger (CRSC cites, as an example, a BNSF/CN merger) would effectively eliminate the ability of shippers to seek competitive rates in this manner at points where the merger partners connect. The effect, CRSC adds, would be a loss of existing rail competition at those points for traffic destined to U.S. markets.

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[256] The tenor of CRSC's remarks suggest (although this is not entirely clear) that, under Canadian law, the FOA mechanism is not available with respect to an international movement handled by a single railroad from a Canadian origin to a U.S. destination.

[257] CRSC notes that this specification is usually done by reference to AAR Accounting Rule 11 for the movement beyond the interchange point. CRSC adds, however, that the existence of Rule 11 is not essential for that purpose.

Transnational mergers and Canadian law. CRSC contends that, in the past, the ICC, in making decisions involving Canadian railroads, has taken into account the differences between U.S. law and Canadian law. CRSC, which cites ICC decisions involving rate bureaus and antitrust immunity, claims that these decisions were consistent with the principle of comity of nations, which (CRSC claims) calls upon the courts of one jurisdiction to strive to give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect.

CRSC's requests as respects U.S./Canadian rail mergers. (1) *In general*. CRSC contends, with respect to a U.S./Canadian rail merger, that our merger regulations should require the merger applicants to provide evidence to demonstrate that the proposed merger will not lessen competition in respect of international rail traffic (*i.e.*, rail traffic that either originates in Canada and is destined to the United States, or that originates in the United States and is destined to Canada, or that originates and terminates in the United States but moves via a Canadian "bridge"). CRSC further contends, with respect to a U.S./Canadian rail merger, that our merger regulations should specify that our competitive analysis of such mergers will include formal consultation with the Canadian Minister of Transport and the Canadian Commissioner of Competition. Formal consultation, CRSC explains, will assist us in securing the information we will need to make an informed decision.

(2) *Open gateways*. CRSC contends that gateways between U.S. and Canadian railroads must be kept open in order to preserve existing competitive rates and rate remedies on traffic destined to U.S. markets. CRSC warns that, if the gateways between U.S. and Canadian railroads are eliminated (or become uncompetitive, even if they are not eliminated) due to a U.S./Canadian rail merger, existing competition will be foreclosed, and Canadian shippers of goods into U.S. markets will lose the ability to obtain competitive rates for the Canadian portion of international movements.

APPENDIX S: TRANSPORTATION INTERMEDIARIES

TRANSPORTATION INTERMEDIARIES ASSOCIATION. TIA contends that, given the reality of a substantially-consolidated rail industry, we must revise our rules both within the merger context and beyond the merger context.

Railroad monopsony power vis-à-vis IMCs. TIA contends that the Class I railroads have already achieved monopsony power vis-à-vis intermodal marketing companies. TIA explains: that IMCs consolidate shipments of goods moving to or from domestic and international points, and negotiate with railroads for the transportation of these goods by rail for one part of the intermodal move; that, although the freight shipped by IMCs is not captive to the railroads (because such freight can be transported either solely by truck or intermodally), the railroads, which buy IMC services, have become large enough and few enough in number to determine winners and losers in the IMC industry; and that, in fact, the railroads have used their monopsony power vis-à-vis IMCs to pick winners and losers, not on the basis of economic efficiency determined by the marketplace, but in accordance with the business priorities and goals of the railroads. TIA claims that the railroads have arbitrarily erected barriers against, and have selected among, certain categories of IMC providers, and have offered to sell rail services to one category and not to another. TIA claims, in particular, that BNSF, in 1998, unilaterally raised its annual "requirement" for buying from a particular IMC from $500,000 to $5 million, and that NS recently announced that it was unilaterally raising its annual "volume minimum" for IMCs from 250 units to 1,000. These unilateral railroad actions, TIA insists, favored large IMCs at the expense of smaller IMCs.

TIA contends that, in order to prevent or at least minimize the possibility that the railroads will exercise monopsony power vis-à-vis IMCs, we should act to intensify and broaden rail-to-rail competition as much as possible. Intensified and broadened competition, TIA explains, will minimize the likelihood of collusion between the few remaining carriers, will provide as much customer choice as is possible, and will encourage economic efficiency and fairness.

Scope of rule revisions. TIA contends that, if we intend to enhance and not merely preserve competition, we must act not only within but also outside the merger context. Revision of our merger rules alone, TIA insists, will not create a truly competitive rail marketplace.

Steps to preserve and increase rail competition. TIA contends that we should consider a variety of revisions to our merger and other rules in order to preserve and increase competition in the rail marketplace. (1) *"Unreasonable practices" jurisdiction*. TIA contends that we should review our "unreasonable practices" jurisdiction (TIA cites 49 U.S.C. 10702 and 10704) to prevent uneconomic practices by monopsonistic railroads. TIA argues: that, as railroads have merged, they have gotten so large and so few that the rules and practices that they employ can have a devastating impact on small entities such as IMCs; that, therefore, we should make clear, in the context of our revised merger regulations, that we will closely review the practices of merged carriers to be sure that they are not unreasonable; and that, in particular, we should review any "minimum volume" and other economic restrictions, such as contract minimums, bonding requirements, and equipment allocations, to ensure that such requirements do not unreasonably discriminate against smaller economic players. And, TIA adds, to forestall additional loss of competition and to expand the availability of competitive rail intermodal service to shippers, these reforms should be broadened to apply to all railroads, and not just in merger settings.

(2) *Preservation of existing gateways*. TIA contends that, in order to preserve even the existing level of competition in the routing of traffic, we must alter our merger rules to require merging carriers to maintain "open" gateways. And, TIA adds, to preserve the routing competition that now exists, we must preserve not only the physical ability to route traffic but the economic ability as well, because (TIA explains) routes can be "closed" not just by flatly restricting routing but also by pricing the traffic over the monopoly segment of the joint-line route to prevent diversion to the competitor at the gateway.

(3) *Revision of bottleneck rules*. TIA contends that, if we are to preserve (much less enhance) competition, we must review our bottleneck rules. TIA, which explains that a future vertical merger will deprive shippers of whatever rights they have had to route traffic over competing carriers (because the vertically-merging carriers will obtain the ability to provide origin-to-destination service to and from points served by each of them), supports the various approaches suggested in the ANPR (requiring merger applicants to offer, upon request, contracts for the competitive portion of joint-line routes when the joint-line partner has a bottleneck segment; requiring merger applicants to provide a new through route at a reasonable interchange point whenever they control a bottleneck segment and the shipper has entered into a contract with another carrier for the competitive segment; revising the "one lump" theory in the merger context). And, TIA adds, these approaches should be broadened to apply not just in merger settings but for all carriers.

(4) *Paper barriers*. TIA contends that, to preserve and enhance the present and potential rail competition that might be provided by non-Class I carriers, we must review our policy regarding the "paper barriers" that were created at the formation of many Class III carriers. TIA explains that, although paper barriers (which prevent a Class III carrier from interchanging with any carrier other than its "parent" carrier) may have played a role in encouraging the formation of Class III railroads, it is time to re-think such barriers from both an economic and a competitive perspective. TIA argues

that, from an economic perspective, we should evaluate, in a particular circumstance, whether the Class I carrier has already received the reasonable economic benefit of a paper barrier, which (TIA claims) would mean that continuation of that paper barrier would not be appropriate. TIA further argues that, from a competitive perspective, we should evaluate whether restrictions that may once have been relatively harmless (when there were many Class I carriers providing competitive service) have since become positively harmful (when there are only two Class I railroads that predominate in any particular geographic area).

CROSSROAD CARRIERS INTERMODAL CO. CRCIC contends that, too often, the Class I railroads have focused on large shippers to the disadvantage of small shippers. CRCIC warns that, in view of the market leverage the large Class I carriers now enjoy, they have the ability to put small shippers out of business.

Class I railroads and intermodal marketing companies. CRCIC contends that, although intermodal traffic is truck competitive, many IMCs must rely on the railroads as their primary means of transporting goods and, therefore, cannot just "walk away" and move their freight by truck. CRCIC further contends that, as a practical matter, many IMCs must rely on the railroads as respects the equipment needed to handle IMC freight (the trailers, the containers, the lift devices, the intermodal yard facilities, and the rail cars). CRCIC explains that, in this situation, the Class I railroads have a great deal of leverage in their relationships with their IMCs. CRCIC contends that the Class I railroads have used this leverage in a way that has hurt many small IMCs. CRCIC claims, in particular, that, a few years ago, BNSF unilaterally raised the required volume revenue level for its intermodal contract holders (from $500,000 a year to $5 million a year), the bonding requirement (from $100,000 to $250,000), and the shortfall penalty provision for loads not shipped (from $100 a unit to 25% of the actual revenue shortfall amount, which, CRCIC claims, amounts to approximately $325 a unit). CRCIC further claims that NS recently increased its volume contract requirement from 250 units a year to 1,000 units a year. These unilateral actions by BNSF and NS, CRCIC argues, have been very detrimental to small IMCs.

CRCIC contends, in essence, that, although the IMC industry is highly competitive, the Class I railroad industry is not. CRCIC argues that, if BNSF and NS operated in a highly competitive marketplace, each would have sustained a significant loss of market share, because, if the market were highly competitive, the small IMCs would have had the option of finding another rail competitor to handle their intermodal freight.

CRCIC believes that small-sized and medium-sized IMCs are, for small shippers, the gateway to the intermodal rail system. CRCIC contends that, as the railroads continue to gain critical mass through mergers and acquisitions, it is imperative that the shipping public's access to this competitive market be maintained and fostered. CRCIC argues that the "exorbitant" requirements "to play" imposed by BNSF and NS will ultimately give large shippers an unfair advantage over small shippers.

Proposals. CRCIC contends that, to protect small IMCs and the small shippers served by small IMCs, our regulations should ensure: that all present IMCs are "grandfathered;" that the policies of the Class I railroads do not stifle competition or eliminate competitors; that volume requirements, bond requirements, and shortfall provisions do not exceed those which were in effect on January 1, 1996; that we have the ability to review all Class I actions in order to promote competition; and that we can provide injunctive relief until harmful rail actions can be reviewed. CRCIC further contends that we should develop an efficient, cost-effective, and timely review and appeal process.

TRANSITION CORPORATION. TC, an agent for rail shippers and receivers, contends that shippers have sustained billions of dollars of losses on account of the problems caused by the BN/SF, UP/SP, and CSX/NS/CR transactions. TC further contends that, given this background, our merger rules should focus on holding railroads fully accountable both for the harmful consequences of their mergers and also for the representations they make to the Board in pursuit of their mergers.

Data to be included in the merger application. TC contends that our present rules, although they require the production of certain data, are nevertheless relatively general in their approach to merger analysis. Greater specificity, TC insists, is required in order to hold the merged carrier to a stricter level of accountability for both its representations and its post-merger behavior. TC contends, in particular, that merger applicants should be required to qualify and quantify the expected benefits and adverse impacts of the proposed merger on railroad customers (shippers and receivers), the merging railroads, other railroads, employees, and society in general.

Scrutiny by an independent panel of experts. TC contends that the data submitted by applicants should be scrutinized and, if need be, challenged by an independent panel of experts acting on behalf of the public. The independent panel contemplated by TC: would consist of economists, accountants, operating personnel, and attorneys, and possibly other experts as well; would be selected by the Board, but paid for by the merger applicants; would act in the nature of a public counsel; would be authorized to engage in discovery; and would be expected to make a critical analysis of the applicants' representations, presented in the form of a public report to the Board, in time for others to utilize the report in their evidentiary presentations.

Retained jurisdiction. TC contends that, in approving a merger, we should retain jurisdiction to revise the merger conditions as a remedial step if mismanagement of the merger leads to continuing service problems that deprive the public of the benefits promised by the application or if the merger proves to be a continuing source of economic injury to shippers.

Post-merger monitoring. TC contends that, in order to make accountability a reality, post-merger operations must be monitored. The post-merger monitoring contemplated by TC would focus on transit time for both loaded and empty moves, and would measure transit time by major commodity group, shipment size (*e.g.*, single cars, multiple cars, and trains), and either region or traffic corridor, aggregated within those groupings to avoid disclosure of individual shipper movements. The post-merger monitoring contemplated by TC: would assess the merged carrier's adherence to its merger commitments, including its commitments respecting service responsiveness, open routings, and similar matters; and would also assess the extent of service departures from pre-merger service levels and from representations made in the merger application. TC contends that, in connection with the post-merger monitoring process, we should make periodic findings, preferably on a quarterly basis, of service performance criteria that have fallen below either pre-merger levels or those post-merger service standards that the applicants have substituted for their pre-merger performance.

Monitoring mechanism. TC contends that the mechanism for monitoring post-merger service issues should be the independent panel established to analyze the merger application. TC argues that this panel should share authority to establish monitoring requirements and to evaluate monitoring information, and should submit to the Board periodic reports that will also be available for public inspection. TC contemplates that the Board would accept or reject the panel's conclusions on an expedited timetable.

Consequences. TC contends that, if the independent panel finds that there have been either merger-related service failures or defaults in other merger commitments, its findings should obviate the need for further evidentiary proceedings on the issue of culpability. TC further contends that the panel's findings should be available as a basis for whatever remedial action the Board might wish to take (*e.g.*, authorization of alternative competitive service) or for shipper damage claims. Shippers, TC insists, should have to establish only the extent of their individual merger-related damages in order to recover.

Measure of damages. TC contends that we should make it clear that the measure of damages for which carriers will be liable is one which extends to all consequences of carrier fault, such as business disruptions, production disruptions, equipment underutilization, and any other reasonably calculated consequence of the merger.

Choice of forum. TC contends that individual shipper recovery should be allowed to proceed either before the Board or in any other forum available (such as arbitration, if the shipper and the railroad have otherwise agreed to use that method of dispute resolution).

TWIN MODAL, INC. TMI, an IMC serving the freight transportation needs of small and medium sized shippers by combining rail intermodal and local trucking services in a seamless service package, contends that small-to-medium sized IMCs and the shippers they serve will continue to suffer tremendously if further railroad consolidation is allowed to occur without reasonable safeguards. (1) TMI contends that we should prohibit merging railroads from implementing policy changes or contract changes that force or effect a consolidation of IMC contract holders. (2) TMI contends that we should prohibit railroads from imposing any bonding requirement on any IMC that does not pose an unreasonably high credit risk. (3) TMI contends that we should require the railroads to reinstate the intermodal contract volume requirements and liquidated damages provisions that were in effect in 1996, just prior to the UP/SP merger. (4) TMI contends that we should require merging railroads to "grandfather" all existing pre-merger contracts. (5) TMI contends that we should review intermodal railroad contracts upon request and provide a timely and efficient appeal process at reasonable cost. TMI further contends that we should exercise injunctive relief to protect the IMC during the appeal process.

APPENDIX T: MISCELLANEOUS PARTIES

ENRON CORPORATION. Enron asks that we facilitate the development of a "secondary market" for rail transportation capacity. The secondary market contemplated by Enron would be established by railroads, shippers, and third parties, and would allow entities interested in moving freight by rail to secure transportation rights not only from the railroads themselves but also from shippers who hold "capacity" on the railroads. The railroads, Enron indicates, would continue to own and operate their physical rail networks, but would be accountable for establishing standardized contracts that would create shipper access to rail capacity at transparent, market-responsive prices, and that would be fully transferable from one shipper to another.

The secondary market envisioned by Enron would work in this fashion: (1) Railroads, shippers, and other interested parties would work with the Board to establish a standard "transferable capacity" contract with the following general features: prices would be established by market conditions; delivery services would be priced between major rail hubs; volume increments would be sufficiently large to create wholesale economics; performance commitments would be reinforced with liquidated damages; and delivery periods and timing would be designed to reflect operational challenges. (2) Railroads would convert existing contracts to transferable capacity contracts and would begin to sell new capacity contracts under prices and terms mutually agreeable to railroads and shippers. (3) All interested parties would be able to buy needed capacity or sell unneeded capacity. (4) Railroads would respond to market price signals by adding or redeploying network capacity subject to operational and contractual constraints. (5) Customers holding contracts would request specific service. At some pre-specified time interval (*e.g.*, 30 days prior to delivery), capacity markets would close for a given delivery period so that the railroads could schedule service. (6) Railroads would schedule trains to meet delivery requirements. (7) With respect to each particular contract, the railroad and the shipper would make a final cash settlement to account for basis differences in actual service and contracted capacity (movement to and from hubs, weight of train, *etc.*).

A secondary market for rail transportation capacity would be, Enron claims, beneficial in various ways. (1) A secondary market, Enron claims, would expand access to rail transportation by allowing interested entities to secure rail capacity from shippers and not just from the railroads themselves. (2) A secondary market, Enron claims, would make rail transportation more attractive to potential customers by allowing (i) the purchase of a particular "delivery path" with a defined delivery date, and (ii) the resale of unneeded capacity rights. (3) A secondary market, Enron claims, would allow market forces to identify where rail capacity is most valuable and where additional capital investment by the rail carrier is warranted. (4) A secondary market, Enron claims, would give railroads a strong incentive to improve the quality of their service to shippers and to find ways to make their operations more efficient (because shippers, Enron contends, would be willing to pay higher prices for higher quality service). (5) A secondary market, Enron claims, would give shippers greater flexibility in arranging for delivery of their goods (because, with capacity available by segment, a shipper would be able to piece together its own, tailor-made, delivery path, combining capacity segments acquired directly from the railroad and those acquired on the open market).[258]

Enron contends that the anticompetitive effects of rail consolidation activities could be mitigated by an expansion of consumer access to rail transportation through the operation of a secondary market for rail transportation capacity. Enron therefore recommends that we revise our Part 1180 regulations to require merger applicants to identify in their merger applications the steps they have taken to implement the type of secondary capacity market contemplated by Enron, or to demonstrate why they should not be made to implement such a secondary capacity market. The Board, Enron adds, would then consider applicants' implementation of a secondary capacity market (or failure to do so) in evaluating the effects of the proposed consolidation on competition, and would also consider comments from shippers and others who might argue that applicants should be required to implement a secondary capacity market as a condition of approval of the proposed consolidation.[259]

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[258] Enron refers to the piecing together of capacity segments as the creation of a "virtual" railroad.

[259] Enron insists that a secondary market of the kind it contemplates would not only enhance competition; it would also, Enron claims, enhance the profitability of the railroads and their ability (continued...)

HEPPNER IRON & METAL COMPANY. Heppner, a scrap metal processor located on a UP line, has two complaints respecting the rail service it has received in recent years. (1) Heppner, which claims that the service provided by UP following consummation of the UP/SP merger was inadequate, contends that rail shippers need a way to ensure that they can be made whole for inadequate rail service. Shippers, Heppner argues, need an inexpensive, easy-to-use remedy to resolve service complaints. Heppner therefore urges the adoption of arbitration procedures as a forum for hearing and resolving service complaints with the power to impose penalties for bad service. (2) Heppner claims that, with respect to destinations served by BNSF, UP (at least at times) has either refused to quote rates and routes involving BNSF or has quoted rates to BNSF points that were so high as to be noncompetitive. Heppner therefore urges us to enforce the obligation that railroads have to interchange traffic with their connections. We should work, Heppner contends, to ensure that shippers have the ability to move traffic to distant points in the most efficient and economical manner.

MAYO FOUNDATION D/B/A MAYO CLINIC. Mayo and its affiliates operate, in "pleasant, clean, peaceful" Rochester, MN, an integrated medical center that offers virtually every medical expertise, treatment, and diagnostic service. Mayo, which claims that a good measure of its success is attributable to Rochester's patient-friendly environment, is concerned by the prospect that 37 fast-moving, mile-long coal trains will thunder through the center of Rochester each day if the pending DM&E construction project is completed as planned. The environmental/safety mitigation measures we are likely to provide, Mayo fears, will not suffice to mitigate the harm that will surely befall Rochester. Mayo contends, in particular, that, in matters of this sort, we should look much more closely at the emergency service and safety ramifications. Mere seconds of delay in emergency response to a heart attack or serious accident, Mayo argues, can mean the difference between life and death. And, Mayo adds, no alleged economic benefit can outweigh the value of the life of a provider to his/her family or of a youngster just starting out on life's pathways. Furthermore, in view of the critical health and safety implications of major rail construction projects such as the DM&E proposal, Mayo urges: (1) that we expand the present proceeding to encompass policies and regulations concerning railroad construction projects under 49 U.S.C. 10901; and (2) that we expand the "safety integration plan" rulemaking to include construction proposals.

NORTH AMERICA FREIGHT CAR ASSOCIATION. NAFCA requests that any new rail merger rules contain provisions that make railroads completely liable for post-merger operating failures that negatively impact the value of private cars to those who lease, own, or otherwise operate those cars. NAFCA claims that, although the post-merger service problems that occurred in connection with the BN/SF, UP/SP, and CSX/NS/CR transactions negatively impacted the value of private cars and produced marked increases in the delivered cost of the goods moved in those cars, the railroads have generally refused to compensate those who lease, own, or otherwise operate the cars for the increased expenses resulting from diminished post-merger car utilization. NAFCA therefore urges that we incorporate into our merger rules a condition that would require railroads merging or consolidating with our approval to bear full responsibility for all commercial and cost

[259](...continued)
to attract capital.

consequences of the merger as it applies to private cars, including increased ownership or rental costs resulting from diminished car utilization. Under the condition contemplated by NAFCA, shippers: (i) would be required to establish, in the appropriate forum, the actual extent of the diminution experienced in car utilization and, therefore, in car value; and (ii) would be permitted to establish a prima facie case of loss based on average fleet performance data, subject to the right of the carrier to attempt to refute the use of average data with car-specific data.