BACKGROUND

In 1998, we approved the acquisition of control of Conrail, Inc. and Consolidated Rail Corporation (Conrail), and the division of that carrier's assets, by (1) CSX Corporation (CSXC) and CSX Transportation, Inc. (CSXT) (collectively CSX), and (2) Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSR) (collectively NS). See CSX Corp. et al.—Control—Conrail Inc. et al.; 3 S.T.B. 196 (1998) (Decision No. 39), aff'd sub nom. Erie-Niagara Rail. Steering Committee v. S.T.B., 247 F.3d 417 (2d Cir. 2001). Among other conditions, we imposed a 5-year general oversight condition to assess applicants' progress with implementation of the Conrail transaction and the workings of the various conditions we had imposed. We specifically retained jurisdiction to impose additional conditions or take other action as necessary to address harms that otherwise could result from the transaction. We also indicated that we would continue to monitor environmental

1 All subsequent decision references are to this manner were issued in the main proceeding, STB Finance Docket No. 33388.

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mitigating conditions; passenger operations, and regional rail passenger operations. \(\text{Id.} \div 366.\)

First Annual Oversight. On February 9, 2000, \(\text{we} \) instituted this general oversight proceeding and required CSX and NS to file their first annual progress reports by June 1, 2000. We also invited interested persons to comment on both the status of the Consent transaction and the effects of the various conditions we imposed. In response to the carriers' first progress reports, comments were filed by approximately 35 parties, including shippers, railroads, passenger authorities and interests, industrial and regional development organizations, and Federal, state, and local interests. After reviewing the reports and comments, we found that CSX and NS had substantially resolved their service problems, that the conditions we imposed were working as intended, and that no problems related to increased market power had been demonstrated. We also found that, while negotiations to resolve various environmental issues continue, CSX and NS had made significant progress in implementing various environmental conditions and settlement agreements. \(\text{Id.} \div 11.\)

Second Annual Oversight. We continued this general oversight proceeding by requiring CSX and NS to file their second annual progress reports by June 1, 2001, and by giving interested parties the opportunity to file comments by July 16, 2001, and replies by August 6, 2001. \(\text{Oversight Decision No. 3. Slip op. at 33.}\)

In this decision, we have considered the issues raised in the following pleadings: the CSX-4 progress report and CSX-5 reply comments filed by CSX; the NS-5 progress report and NS-6 reply comments filed by NS; the DOT-3 comments and DOT-4 reply comments filed by the United States Department of Transportation (DOT); the NRPC-3 comments filed by the National Railroad Passenger Corporation (Amtrak); the NYC-3 comments filed by the New York City Economic Development Corporation (NYCEDC); the MD-3 comments filed by the State of Maryland through its Department of Transportation (MDOT); the undesignated comments filed by the City of Cleveland, Ohio: the RWCs-2

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1 CSX and NS must continue to file quarterly environmental data reports for the duration of our oversight period.
3 See Oversight Decision No. 3 (STB served Feb. 1, 2001), slip op. at 10-11.
comments filed by Resources Warehousing & Consolidation Services, Inc. (RWCS); the undesignated comments filed by Indianapolis Power & Light Company (IP&L), the IP&L letter filed July 30, 2001, the IP&L motion to file a reply together with the reply filed August 22, 2001, the NS-7 reply filed by NS in opposition to the IP&L motion, and other related filings. In order to ensure a complete record, we grant IP&L’s August 22, 2001, motion and accept for filing as part of the record: IP&L’s August 22, 2001, reply comments; CSX’s reply comments (CSX-4) filed September 11, 2001; CSX’s letter filed October 22, 2001 (CSX-7 letter); IP&L’s letter filed October 24, 2001; and CSX’s letter filed October 31, 2001 (CSX-4).

DISCUSSIONS AND CONCLUSIONS

Most of the problems that were noted in our previous round of oversight related to the service problems associated with the implementation of this transaction. In this second year, as correctly pointed out by DOT (whose comments were limited to a brief reply assessing the comments of other parties), no party has continued to complain about ongoing transaction-related service disruptions. In response to the June 1, 2001, progress reports filed respectively by CSX and NS (Appendix A contains summaries of the progress reports), we received comments from seven other parties (Appendix B contains summaries of the comments). Five of these parties are governmental entities: DOT, Amtrak, MDOT, City of Cleveland, and NYCEDC. The other two parties are private-sector entities: RWCS (an intermodal marketing company providing container yard and warehousing services for international ocean carriers in North Bergen, NJ), and IP&L (the only shipper to file comments). None of these parties has demonstrated that competition has been impaired by the transaction. Only IP&L has even made such an allegation, but as discussed in detail below, that allegation is unwarranted. Not all local and environmental issues engendered by the transaction have been totally resolved, but the comments make clear that both CSX and NS are continuing to negotiate solutions, that progress is being made, and that no issue requires our intervention now. Although we are pleased with the progress made in implementing this transaction over the past year, we will continue our operational monitoring and our oversight of competitive and environmental developments to ensure that these favorable trends continue. A discussion of issues raised in the individual comments follows.

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An Amtrak. In its NRPC-3 comments, Amtrak expresses two concerns. First, it notes that the on-time performance for Amtrak trains on certain CSX and NS routes has been lower than the on-time performance on Conrail's lines before the Conrail acquisition. Amtrak states, however, that it has been able to work cooperatively with both carriers and that its performance on both railroads has improved. Second, Amtrak discusses capital improvements to NS's Shellpot Connection in Wilmington, DE, that may become necessary if NS' traffic increases as projected in its transaction operating plan. Amtrak therefore supports NS's efforts to secure public funding for the restoration of the Shellpot Connection. Amtrak states that this investment would not be a benefit to Amtrak itself, but rather to freight shippers in Delaware that would benefit from the improved access to the Port of Wilmington and other Wilmington-area facilities that would result from this project.

CSX and NS each reply that they will continue to work cooperatively with Amtrak with respect to on-time performance and other issues. NS also confirms that the additional traffic NS anticipated has not yet materialized, that there has thus been no need to restore the Shellpot Connection, and that NS is seeking public funding for the restoration of the Shellpot Connection. Amtrak seeks no relief from us.

NYCEDC. NYCEDC states that it is "gratified by the efforts that CSX and Canadian Pacific have made to enhance service in the City." NYC-3 at 5. DOT also commends the parties for their good faith efforts and encourages them to continue to explore potential solutions to their concerns. We agree.

NYCEDC asserts that applicants' reporting of intermodal traffic to and from the New Jersey port across the George Washington Bridge could be improved, however, by having the carriers collect data for Sunday and Tuesday, rather than Wednesday. NYCEDC asserts that a larger volume of intermodal trains are unloaded on Sunday and Thursday each week and that these days would give a more accurate picture of the traffic.

CSX replies that it is not true that there is more intermodal traffic on Sunday than on Wednesday, noting that Sunday traffic is typically very light. Further, while Thursday may be a slightly heavier traffic day than Wednesday, CSX states that it is also collecting data for Friday, a much heavier traffic day, so that data for Thursday is unnecessary. CSX and NS each note that the purpose of the study is to compare traffic before and after the transaction, and that shifting days of the study after baseline data has already been collected would defeat the purpose of the study. We agree and will not adopt NYCEDC's suggestion in this regard.

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Maryland. Although MDOT suggests that CSX and NS have not met all of their commitments made to the State in the course of this proceeding, it does not provide any details as to how the carriers may have fallen short. NS responds that it has generally met its commitments in attempts to increase business in Maryland, keep the Port of Baltimore competitive, and to work with Maryland commuter agencies, while noting that of Conrail's operating agreements. While NS concedes that certain infrastructure improvements discussed in the operating plan have not been implemented, the carrier submits that improving clearances on those portions of Amtrak's Northeast Corridor controlled by NS will be almost 10 times more costly than contemplated due to the need for higher-than-standard clearances, and that lighter-than-anticipated freight traffic over the route does not justify that level of investment. NS states that it has joined Maryland in supporting efforts to obtain Federal funds to do a comprehensive study to determine the costs for the project.

MDOT does not seek our intervention with regard to any particular issue; it merely wants us to require NS and CSX to honor commitments they have made to the State. At this point, however, it is unclear that NS or CSX have fallen short on any commitments. Moreover, as we stated in Oversight Decision No. 5, slip op. at 24:

MDOT ** is not correct in its assertion that the operating plans filed by CSX and NS were "commitments" to achieve proposed service and infrastructure improvements within 5 years after the implementation date that must be enforced without variation. The plans ** are applicants' best projections regarding what traffic they believe they can profitably serve. Those operating plans do not provide a basis for and of themselves for oversight at this time.

The reasons given by NS for not making certain infrastructure investments, due to higher-than-expected costs and lower-than-expected traffic, appear compelling. Nevertheless, we will continue to monitor the overall situation, and will take any appropriate action to enforce the conditions that we imposed in approving this transaction.

Cleveland. Cleveland asserts that CSX is not in compliance with the June 4, 1998 settlement agreement reached with the City, although the City provides no specific supports for no particular relief now because it is still negotiating a solution to its differences with CSX. CSX responds that it believes that it is in

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1 MDOT acknowledges, for example, that "the on-time performance of Maryland's commuter rail service (MARC) over CSX's line has improved, and that the working relationship between CSX and MARC has been good."
compliance with the settlement agreement, but that it is continuing to negotiate with the City to resolve implementation issues. These issues clearly do not require any action by us now, and we will revisit them if circumstances require us to do so.

RWCS. RWCS operates a small private intermodal terminal in North Bergen, NJ, on the New York, Susquehanna & Western Railroad ("NYS&W") and provides container yard, warehousing, consolidation, and other intermodal services for international ocean carriers. In Decision No. 89, we noted that RWCS was exclusively served by the NYS&W, which is owned by the Delaware Otsego Corporation. During the course of our approval proceeding, RWCS had asked that it be afforded "equal access" to CSX and NS, and applicants replied that RWCS would be able to connect with both carriers. In Oversight Decision No. 5, we found that RWCS does have access to some systems of both carriers via NYS&W, but that shippers using RWCS' services have simply preferred to use NS rather than CSX. Accordingly, we found that no relief was required.

RWCS now complains that CSX has refused RWCS' request to quote a general rate that could be used by any shipper using RWCS' services regardless of the commodity and the origin and destination. CSX has no such obligation either under our merger conditions or under the statute. First, RWCS is not a shipper, so CSX has no obligation to quote any rate to it. Moreover, when CSX does quote a rate to shippers who use RWCS' services, it is statutorily entitled to do so in the manner it chooses as long as it does not violate any provision of the Act. 49 U.S.C. § 10701(c). Most carriers tailor their rates to the particular shipper, commodity and routes they are serving, just as CSX has done here. Accordingly, we see no basis upon which to grant RWCS' request for relief.

IP&L. Most of the issues raised by IP&L relate to the conditions that we imposed to protect competition at its Stoue electric generating plant near Indianapolis. The Stoue plant is directly served only by the Indiana Rail Road Company (INRD), an 89%-CSX-owned subsidiary that transports coal to IP&L in single-line service from origins in southern Indiana. To stave off an IP&L build-out that would connect the Stoue plant to a nearby Conrail line and threaten INRD's continued participation in IP&L's coal traffic, INRD had provided favorable switching charges under which Conrail and another local shortline carrier, the Indiana Southern Railroad (ISRR), could offer IP&L the

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1 NYS&W connects to NS via the Passaic interconnection at the Conrail line through Burlington, through a conversation that was built from that at Latta to Little Ferry.
alternative of ISRR-Consol-INRD service from southern Indiana. Prior to 1996, IP&L shipped coal to Stout using both service alternatives. In 1996, however, IP&L entertained contract offers and entered into a coal transportation contract with INRD to move almost all of Stout’s southern Indiana coal requirements in INRD single-line service. This arrangement continued during our consideration and subsequent authorization of the Consol transaction in 1996.

In the proposed division of Consol’s assets, the Consol lines near IP&L were assigned to CSX. Because CSX also controlled INRD, we were concerned that the competitive alternatives that had been available to IP&L, based upon a credible build-out threat to Consol, be preserved. Accordingly, we required that CSX afford either NS or ISRR trackage rights over the nearby former Consol line to serve Stout via a build-out to that line, should one be constructed. We also required that NS be afforded trackage rights over INRD and the right to inter-barge traffic with ISRR at a point along the former Consol lines, so that IP&L could choose to have Stout served directly through NS-ISRR joint service.

Decision No. 89, 3 S.T.B. at 319-20, 188, ¶ 23. We denied subsequent requests by IP&L and ISRR that we further condition the Consol transaction to enable ISRR to serve Stout in single-line service.

In this round of negotiations, IP&L (without ISRR) again seeks ISRR single-line service to Stout from the relevant southern Indiana origin. With the 1996 IP&L-INRD contract set to expire, IP&L recently entertained new contract proposals, and INRD and NS (together with ISRR) each made initial confidential contract rate offers. IP&L compared the NS-ISRR contract offer to certain former Consol common carriage tariff rates (available from some, but

1. Unlike Stout, we found that the transaction would not create any new market threat at IP&L’s nearby Perry-K plant and thus Perry-K did not qualify for any remedial conditions. Decision No. 89, 3 S.T.B. at 319. Although IP&L made a similar request here for further relief at Perry-K, utility has presented no evidence or argument concerning the situation at the plant and thus has provided no reason for us to re-open and alter our previous decision as to Perry-K.

2. See CSX Corp. et al. — Control — Consol Inc. et al., 45 S.T.B. 23 (1999) Decision No. 115, at 26-29; CSX Corp. et al. — Control — Consol Inc. et al., 45 S.T.B. 101 (1999) Decision No. 125, at 105, aff’d sub nom. Erie-Niagara Rail Shipping Committee v. SRR, 247 F.3d 437, 446 (2d Cir. 2001); CSX Corp. et al. — Control — Consol Inc. et al. General Oversight, 5 S.T.B. 34 (2006) Order/Decisions No. 3, summary of 100023 (N.D. Ohio, May 4, 2001). The contract rate offers have been filed under seal and are very sensitive. Indeed, neither CSX nor NS knows who made the other has bid for this traffic; only their inside attorneys and outside experts witness any verity to this information, which is non-competitive in order that, among other things, precludes them from using it for anything other than the purpose of this case. Thus, while we have examined all of their confidential evidence in detail, our references to the contract offers will necessarily be general.

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not all, of the relevant southern Indiana coal origins that have been adopted by CSX. IP&L then advised NS/ISRR that, unless those carriers could match the common carriage rates, they should not bother to respond.

IP&L reasons that NS/ISRR’s failure to respond establishes conclusively that NS/ISRR is unable to offer a service to Stout that is competitive with INRD’s (whose lower contract rate offer IP&L has now accepted); that the conditions that we imposed are therefore not working as intended; and that this claimed deficiency should be remedied by affording IP&L direct ISRR service to Stout over the CSX and INRD lines. We disagree. After reviewing the record, we conclude that competition at Stout remains just as strong as it was before the Conrail transaction (when INRD was also the successful bidder for this traffic), that our conditions are therefore functioning as intended; and that no further relief is required.

IP&L’s contention that we must measure the effectiveness of the IP&L conditions by the competitiveness of the NS-ER contract offer, rather than by the contract terms offered by INRD, is wrong. We impose conditions when we conclude that merging parties could gain sufficient market power through the transition to raise rates or reduce service (or both) relative to pre-merger levels, and to do so profitably. 32c, e.g., Union Pacific/Southern Pacific Merger, 3 S.T.B. 1030, 1046 (1998) (citation omitted). Accordingly, in judging the effectiveness of our merger conditions, we look at whether a merging carrier—or, as here, a carrier (INRD) controlled by the merging carrier (CSX)—is responding to the competitive constraints that we imposed, not whether the competing carrier (here, NS-ISRR), increases its market share above pre-merger levels. 32d at 1045.

Here, as IP&L conceded during the merger proceeding, the primary cause of competitive pressure at Stout was the threat of a feasible build-out to Conrail. Decision No. 89, 3 S.T.B. at 319. It was that threat which, prior to the Conrail transaction, had prompted INRD to provide favorable switching terms that allowed for alternative ISRR-Conrail-INRD service to Stout, id., and subsequently to offer contract rates attractive enough to gain virtually all of Stout’s southern Indiana coal traffic despite that alternative. 32e The IP&L conditions were designed to preserve the competition produced by that threat. Now, faced with the availability of NS/ISRR point-line service, INRD has offered IP&L contract rates and terms as good as, if not better than, those under its previous contract. CSX-5, Vol. II, at 1, 21-25. Not only has INRD not been

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* At CSX points out, prior to the 1996 INRD-IP&L contract, “large quantities” of coal were delivered to Stout via the alternative third-carrier routing. CSX-5, Vol. I, at 17 & n.54.
harmed by this result, it is a clear indication that the conditions are working to constrain INRD in precisely the way we intended.\footnote{IP&L, however, points out in its statement in CSX Corp. et al. — Control — Connell Inc. et al., 5 S.T.B. 764 (1998) Decision No. 96 at 777, that we had acted to ensure “efficient and competitive service” to the Stout plant, and argues that we meant for IP&L to receive “competitive” contract terms — i.e., terms close to those of INRD. IP&L Comments, at 1, 2 (emphasis added in comments). IP&L, Response, at 6. But our discussion there related to IP&L’s concern that the interchange point that we had provided for NS-ISR joint-line service to Stout (Milepost 6) was not operationally feasible and thus would preclude NS-ISR service from repackaging the prior ISRR-Connell-INRD service. Decision No. 96 at 777. In response to those concerns, we directed CSX, NS, and IP&L to negotiate a satisfactory alternative, and the parties subsequently agreed to substitute Crawford Yard as an interchange point, as IP&L had urged. Decision No. 113 at 28-29. We expressed no intention to depart from the way that we have always tested the effectiveness of our merger conditions. Similarly, IP&L’s reliance on the Horizontal Merger Guidelines of the United States Department of Justice (DOJ) to establish the ineffectiveness of the \footnote{IP&L’s contention (IP&L, Response, at 9 n. 14) that the contract terms INRD offered were less favorable than those under the ISRR contract because they were only for a portion of the utility’s Stout traffic is misleading. As CSX explains, INRD initially made a common proposal for all of IP&L’s coal shipments at Stouts with some conditions stipulated in the previous contract, assuming that IP&L would make traffic commitments to INRD similar to those in the ISRR contract. It was IP&L’s unwillingness to commit to INRD as at the previous traffic level that prompted INRD to make a counter-proposal using the same rates but at the lower traffic level stipulated by the utility. INRD stated that it was prepared to negotiate terms for additional volumes on an annual basis. CSX-6, Vol. II, at 6-17.} IP&L’s argument (IP&L, Response, at 9 n. 14) that INRD’s new “Express Service” is not comparable to the services under the ISRR contract — because it would require IP&L to bear some of the additional expenses required to construct a new needed track — lacks merit. INRD has agreed to pay in advance all costs for the infrastructure improvements, with IP&L subsequently paying only a small per-ton contribution toward those costs. Moreover, IP&L did not take into account the savings it or in having to furnish fewer units due to the more efficient use of IP&L’s privately owned facilities in the new service. CSX-6, Vol. I, at 16-15.

Lastly, IP&L suggests that NS will be unable to compete with INRD because of incompatible ISRR work costs. IP&L, Response, at 2. (NS’s work rules, however, are exactly the same as those that Connell had, and IP&L has not identified any specific work-rule incompatibility, or any other service difficulty not previously experienced, that would impede NS in offering an operationally competitive joint service with ISRR here.)

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IP&L merger conditions also raises the mark.\textsuperscript{11} IP&L’s Response, at 2-3. The question here is not whether INRD and Conrail were effective competitors for IP&L’s coal before the Conrail transaction—the question that the DOJ guidelines were designed to answer. Rather, the question here is whether, after having authorized the transaction and having acted to preserve the level of competition that previously existed at Soo, our conditions effectively do so.

Finally, it would be inappropriate to compare the NS-ISRR contract offer with the former Conrail common carrier rates adopted by CSX, as IP&L urges. Rail contracting—and the rates underlying it—are a level of dedicated service, predictability, and stability that is essential to high-volume coal shippers and that may not always be available in common carrier service. The fact that IP&L has now twice aborted to enter into a long-term coal transportation contract with INRD, rather than use available common carrier rates and service, underscores both the fact that IP&L prefers contract carrier service that is more tailored to its own service needs and the invalidity of comparing rates for these two different forms of rail service.\textsuperscript{11}

\textsuperscript{11} Under § 1.1.1 of the guidelines, DOJ defines the scope of a relevant product market by examining whether a firm could profitably sustain a small, but significant, non-transitory price increase (5%).recognizing "that although a firm in a competitive market cannot raise its prices without a net loss of revenue, a firm with market power will." (F. Industries, Inc. v. STB, 219 F.3d 816, 823 & n.13 (D. Cir. 2000), aff’d sub nom. CS Industries, Inc. v. Koch Pipeline Co., et al. 4 S.T.B. 617 (2001) (Koch). Thus, along with other indicia, this test was to establish that two firms compete in the output and product market. DOJ would then consider whether a proposed merger of the competitors would violate the antitrust laws.

Concerning IP&L’s assertion that, see also IP&L’s letter, July 30, 2001, our analysis is Koch does not bear on this case. Koch involved the question of whether an iron ore carrier service was reasonable. We employed the DOJ guidelines as one element in making the threshold assessment of Koch’s market power, to determine whether we should examine the reasonableness of the challenged rate increase. The court affirmed our use of the test in this limited circumstance. Here, DOJ does not challenge the reasonableness of NS’s rates. And, as we have explained, the issue of whether IP&L’s merger conditions are effective does not turn on the comparative levels of the NS-ISRR and NS-INRD offer, but only on whether NS ISRR’s availability in the market has placed a competitive constraint on INRD similar to the constraint that existed prior to the Conrail transaction.

\textsuperscript{12} Moreover, as CSX points out, there had been no movement to limit the common carrier rates since CSX adopted them, and particularly since when we were Conrail’s, CSRA, Vol. I, at 30-31 & n.31. Also, the rates apply at the notified, non-cancelable levels only for a limited period of time and only to the two of the final anthracite coal mines for which NS ISRR made a contract offer. NS, at 9, CSX, Vol. I, at 29. And, to NS emphasis, in its contract proposals were "largely driven by the revenue needs of ISRR," as the carrier had communicated them to NS, because ISRR would provide most of the coal. NS, at 9.
In sum, we measure the effectiveness of our IP&L merger conditions by comparing the pre-transaction and post-transaction rates and service terms available to IP&L from INRD. Before the Conrail transaction, the availability of ISRR-Conrail-INRD service prompted INRD to offer contract terms for its single-line service attractive enough for IP&L to award. INRD almost all of its Stout coal traffic. The availability, through our conditions, of substituted NS-ISRR service has prompted a similar post-merger response by INRD, under similar if not better terms, during the recent contract bidding round. As such, the IP&L conditions have clearly replicated, and continue to preserve, the "pre-transaction market conditions" faced by IP&L, as we intended, Decision No. 49, 3 S.T.D. at 320, and IP&L’s request for further relief will therefore be denied.

THE CONTINUATION OF GENERAL OVERSIGHT

The third annual round of the Conrail general oversight proceedings will be conducted in mid-2002, in accordance with the schedule indicated in the preceding paragraphs above. We anticipate that, following a review of the reports, comments, and replies filled in 2002, we will issue another decision concerning oversight issues. We reserve the right, however, to alter the filing schedule and/or modify the reporting requirements, if (and to the extent that) circumstances warrant.

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

It is ordered:
1. The requests for relief by IP&L, NYCDRC, and RWCS are denied.
2. CSX and NS must file progress reports by June 3, 2002, and must make their 100% traffic waybill tapes available to interested persons by June 17, 2002.
3. Comments of interested parties concerning oversight will be due on July 17, 2002.
4. Replies will be due on August 7, 2002.
5. CSX and NS must continue to file quarterly environmental status reports for the duration of our oversight period.
6. This decision is effective on December 13, 2001, the date of service.

By the Board, Chairman Morgan, Vice Chairman Clyboum, and Commissioner Burkes.

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The CSX 2004 Progress Report. In its second progress report, CSX maintains that it has made significant progress in implementing the Central Transcon in three main aspects: operations, marketing, and financial results. Regarding operations, CSX states that its rail network is presently operating at or near its best levels of performance. CSX indicates that its system terminal dwell (at slightly above 24 hours) is at the lowest level since 1996, that road velocity (at more than 21 miles per hour) is at its highest, and that slow yard mileage and train delay due to crew or locomotive unavailability are at historic lows. CSX notes that safety throughout its system has improved. According to CSX, FRA reportable personal injuries in its system have declined from weekly rates of 17.9 in 2006 to about 15 per week currently and, similarly, FRA reportable train accidents have declined to about 5.5 per week compared to 8 per week in 2000.

Despite overall slowdown in the nation's economy, CSX reports significant growth in expanding its traffic base. CSX claims that its single-system service has enabled coal producers in the Monongahela, PA coal fields to market their product to new customers in the southern and southeastern states, where prior to the CSX connection such purchases were far less common. Conversely, CSX states that through its pre-transaction activity it is taking advantage of new marketing opportunities by shipping to customers in southern coal areas.

More载荷 options and flexibility, CSX states, have benefited automotive customers by reducing empty miles and empty-cost days. In addition, CSX states that it has initiated a joint-line service with Union Pacific Railroad Company (UP), marketed under the "Express Lane" brand, where shipments of West Coast fruit and vegetables are originated by UP, handed off to CSX at Chicago, and run through using UP power to Chicago, IL, where the traffic is promptly unloaded to the Houston market in New York City. According to CSX, this coordinated operation, featuring seamless service and guaranteed transit times, has reduced transit times by half and doubled CSX's rail traffic in the Northeast. With its integration of Conrail's operations, CSX now states that it has direct connections with Canadian National (CN) and the Guilford System, which are ideal for bringing Maine and Eastern Canadian woodpulp into the Midwest and Southeast. CSX also reports that, despite a depressed market for certain chemical products and a difficult winter in upstate New York, Niagara Falls shippers have benefited from its single-line pricing and reliable service.

CSX reports that its financial results improved during the second half of 2000. After having in operating ratio in the first and second quarter of 93.1% and 94.4% respectively, CSX states that its operating ratio improved to 89.4% and 88.7% in the third and fourth quarter respectively. Revenue for the full year of 2000 was $7.261 million with an operating income of $712.8 million, yielding an operating ratio of 96.2% for the year. Even though the railroad's operations had improved in the third quarter, CSX indicates that the financial impact lagged behind and it was not until the fourth quarter that year-over-year comparison showed financial improvements. According to CSX, its operating income declined 52% in the third quarter of 2000 on a year-over-year comparison, from $1.85 million in 1999 to $1.62 million in 2000. In the fourth quarter, operational improvements translated into modest financial recovery for CSX. CSX's operating income for the fourth quarter improved slightly to $275 million from $273 million in 1999, an improvement of $8 million. This positive financial trend, according to CSX, has continued in 2001. Despite increased fuel costs and a slowing economy, CSX recorded an operating income of $182 million in the first quarter of 2001 compared to $160 million in 2000, a 13.75% year-over-year improvement. CSX expects this trend to continue during the rest of the year.
A new plan to increase rail traffic in the Chesapeake region is expected to benefit businesses and the environment.

The plan aims to

- Increase rail traffic in the region
- Improve environmental conditions
- Create job opportunities

The plan is expected to be implemented in phases, with the first phase focusing on increasing rail traffic by 10% in the first year and a steady increase in subsequent years.

The plan is expected to create jobs in the region and improve the environmental conditions by reducing traffic congestion and air pollution.

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U.S. Department of Transportation: The plan is expected to improve the overall efficiency of rail traffic in the region.

The Department of Transportation has approved the plan and has allocated funds to support its implementation.

The plan is expected to create job opportunities in the region and improve the environmental conditions by reducing traffic congestion and air pollution.

APPENDIX B: ARGUMENTS OF THE PARTIES

III. Department Of Transportation: The plan is expected to improve the overall efficiency of rail traffic in the region.

The Department of Transportation has approved the plan and has allocated funds to support its implementation.

The plan is expected to create job opportunities in the region and improve the environmental conditions by reducing traffic congestion and air pollution.

SS. T.D.
comments that the latter remedy is not effective. DOT states that it supported only the provision of the build-out option for IPRK. See Brief of DOT, filed February 23, 1998, at 11. DOT states that, as a consequence, it offers no comment on the efficacy of the other remedy sought by IPRK.

With regard to the comments of New York City Economic Development Corporation (NYCEDC), DOT indicates that NYCEDC reports that CSX and NS have provided helpful information during the past 12 months that CSX has made certain misstatements concerning regulation of rail service in and around New York City, and that NYCEDC continues to work with CSX and the Canadian Pacific Railway Company (CP) to make progress on this subject. According to DOT, it is gratified that there is apparent progress on this difficult problem and DOT comments the parties for their good faith efforts and encourages them to continue to explore potential solutions to their concerns.

National Railroad Passenger Corporation (Amtrak). In its NRPC-3 comments, Amtrak expresses two concerns. First, it notes that applicants' on-time performance on certain in CSX and NS routes has remained below CSX's performance during the year preceding the implementation of the Conrail acquisition. Amtrak states, however, that NS and CSX have continued to work cooperatively to address the on-time performance problems that remain and that performance on both railroads has improved.

Second, Amtrak notes that NS's operating plan projected increased in-eff orations through Wilmington, DE, and expressed its intention to reorganize the Corr al Route around Wilmington known as the Sheehan Connection in order to accommodate the intended traffic increase. Amtrak notes, however, that the additional traffic NS anticipated has not yet materialized, so there is no current need to restore the Sheehan Connection. NS intends to increase freight traffic through Wilmington come to fruition. Amtrak states that reorganization of that connection will be necessary. While the restoration of the Sheehan Connection would not benefit Amtrak, freight shippers in Delaware would benefit from the improved service to the Port of Wilmington and other Wilmington area facilities that would result from this project. Amtrak understands that NS is seeking public funding to cover costs associated with the restoration of the Sheehan Connection, and Amtrak supports NS efforts.

CSX's reply. In its reply, CSX states that it will continue to work cooperatively with Amtrak with respect to on-time performance and other issues.

NS's reply. NS states that Amtrak's comments express no complaints but merely comment on two matters: on-time performance and restoration of the Sheehan Connection in Wilmington, DE. In its reply, NS states that it will continue to work cooperatively with Amtrak to address on-time performance issues and that it understands that Amtrak will recommend that the Board's on-time reporting requirements be suspended as to NS. NS also confirms that Amtrak correctly noted that the additional traffic NS anticipated has not yet materialized, that there has thus been no need to restore the Sheehan Connection, and that NS is seeking public funding in line with the restoration of the connection.

State of Maryland. In its MR-3 comments, MDOT asserts that NS and CSX have not fulfilled all of the undertakings set forth in letter agreements with each carrier dated September 24, 1997. MDOT, however, agrees that CSX has made clear progress with its working relationship with MARC, the state's passenger rail service. MDOT notes that MARC's on-time performance has improved, that MDOT has agreed to contribute a substantial amount of capital to the two lines MARC and CSX share, and that it hopes that its investment will improve CSX's ability to comply with its commitments to MARC. Without providing specific details or recommendations, MDOT

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states that the Board "should hold the Applicants accountable for the promises they made and require them to explain the progress they are making on the initiatives to which they agreed in the September 24, 1997 Letter Agreement with the State."

CSX's reply: CSX indicates that, while MDOT reports "clear progress" has been made in the CSX-MARC working relationship and cooperates with CSX's positive report on MARC in its second oversight report, the State also admonishes CSX and NS to fulfill the commitments they made in 1997, but does not ask Board intervention with respect to any particular issue. CSX states that it will continue to work with the MDOT with respect to the ongoing implementation of its 1997 settlement, as well as with regard to other transportation issues of interest to MDOT and CSX as they arise.

NY-NJ reply: According to NS, the State of Maryland asserts that NS and CSX have not fulfilled all of the undertakings set forth in letter agreements with each carrier dated September 24, 1997. Although Maryland does not specify in which respects it believes NS and CSX have not fulfilled the agreements, NS indicates that the State asks the Board to require the carriers "to explain the progress they are making on the initiatives to which they agreed in the September 24, 1997 Letter Agreement with the State."

NS replies it is generally in compliance with its agreement with Maryland. According to NS, its agreement with Maryland covers four areas: First, it notes that NS' operating plan would include various infrastructure improvements and service improvements that will benefit the State of Maryland. It is expected that these improvements will help the State with its mission to improve the Port's competitive position. Second, it provides that NS will work with Maryland and the Port of Baltimore to keep the Port competitive. Third, it provides that NS will work to increase its business in Maryland as the best assurance of providingrail employment in the State of Maryland. Fourth, it provides that NS "will work with Maryland commuter agencies to accommodate current services and honor all operating agreements, including those with MTA, but NS will not seek approval for disclosure of such agreements."

NS states that it has worked with Maryland and the Port of Baltimore to keep the Port competitive. When the Port was a candidate to become the hub port for Mat-Sov/Seaboard, NS indicates that it agreed to specific marketing and operating conditions designed to make the Port attractive and that, at the State's request, NS also agreed to grant CSX access to a key NS service area in order to improve the Port's chances. While the Port was ultimately not successful, NS states that it worked hard to help the State in its efforts.

The agreement also provides that NS would "enter into discussions with the Canton Railroad Company (CTR) and other Maryland commuter authorities on enhancing service, improving passenger service, and developing other railroad-related initiatives." NS also notes that it has "continue discussions with the Canton Railroad Company and any other commuter authorities to enhance the Port's competitive position and to develop the Port's role in the State's economic development." NS also notes that it worked hard to increase its business in Maryland. As an example, NS notes that it increased its revenue in Maryland by over 14% on an annual basis between the Split Date and June 30, 2001, partly as a result of introducing a new Baltimore/Detroit intermodal service and a new Baltimore/West Coast intermodal service with the Burlington Northern and Santa Fe Railway Company. In addition, NS indicates that it worked with the State of Maryland to develop a transportation plan for the Port which is designed to enhance the Port's competitiveness and to encourage economic development in the region. NS also notes that it worked with the State of Maryland to develop a transportation plan for the Port which is designed to enhance the Port's competitiveness and to encourage economic development in the region.
When a disparate but critical band line on the Eastern Shore of Maryland was threatened with abandonment, NS states that it worked with the states and area businesses to save the line from abandonment.

NS reports that certain improvements and service improvements discussed in its operating plan that would benefit Maryland have not yet been implemented, namely: (1) improving clearances on Amtrak's Northeast Corridor route to enable NS to provide 202 double stack intermodal service between Baltimore and Harrisburg, PA; (2) rail infrastructure improvements in the city of Baltimore (an expanded intermodal facility, a new Railroad Station, and a new automotive distribution facility); and (3) new services to and from these facilities. NS states that it has discussed these projects with numerous localities with Maryland officials and has explained the problems associated with them. NS explains that the two principal issues related to accomplishing these projects are the much higher than anticipated costs of clearing the NEC double stack route and the development of markets that would justify the required investment. While NS's operating plan anticipated the standard 202 double stack clearance, Amtrak has informed NS that it will require 210' clearance, largely because of the proximity of overhead electric wires needed to power passenger trains. Nearly 30 clearances would be required between Baltimore and Perryville, MD, alone under the 210' standard. NS also states that, although Amtrak projects other clearances economically accomplished by lowering the track under a structure, obtaining such a clearance, in the case of Amtrak's project, is much more difficult. NS's answer to the NEC's problem is to clear the right-of-way and substantially more time consuming and expensive. NS states that if it has informed Maryland officials that it will work with the state on this project but that, given the large uncompensated cost, NS is not in a position to shoulder the entire financial burden. NS states that Maryland officials agree with it that there would be more cost information and details that it has joined with Maryland to support efforts by Senator Mikulski to obtain federal funds to do a comprehensive study to determine the costs for the project. NS also reports to CSX, Amtrak and five mid-Atlantic states, including Maryland, are participating with it in a study to develop a short-term rail investment program for the mid-Atlantic transportation corridor that will eliminate choke points and increase rail freight capacity.

City of Cleveland, Ohio. Cleveland represents its view that CSX is in non-compliance with the terms of CSX's June 1, 1998 settlement agreement with Cleveland, but seeks specific relief from the Board. Cleveland indicates that it is currently in negotiations with CSX to resolve issues related to the agreement, but that all issues have not been addressed at this time.

CSX argues that CSX has completed its obligations under the agreement, but that CSX has not met all the requirements of the agreement. CSX contends that it has met all the requirements of the agreement, and that any issues that remain are the result of CSX's efforts to comply with the terms of the agreement.

New York Economic Development Corporation (NYEDC). According to NYEDC, CSX is still in non-compliance with its obligations under the June 1, 1998 Settlement Agreement with Cleveland, and that the effort to comply with the terms of the agreement is ongoing. NYEDC contends that CSX is in violation of the terms of the agreement, and that it is not in compliance with the terms of the agreement. NYEDC contends that CSX is in violation of the terms of the agreement, and that it is not in compliance with the terms of the agreement.

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Specifically, NVECD believes that surveys are being taken on Wednesdays and that surveys taken on Sunday and Thursday, rather than on Wednesday, would yield a more accurate picture of the traffic volumes since it understands that a large volume of intermodal trains are unloaded on those days.

In its NYC-3 comments, NVECD wrote to clarify that, contrary to CSX’s claim in its report, no action of NVECD or any other agency prevented CSX from bidding on a contract to operate the transitload facility at 66th Street Yard in Brooklyn. NVECD maintains that CSX made a deliberate choice not to bid on the right to operate the facility and that, as a public agency, NVECD had no choice but to award it to one of the several other entities that did participate.

NVECD also noted that, while CSX stated that freight railroads were expected to bear the entire cost of a possible tunnel under the New York Harbor, a final determination as to the source of funding for that project has not been made. Although NVECD believes that more could be done by both CSX and CP to utilize their properties to the extent it appears their efforts are enhanced rail freight service and look forward to working with both carriers to increase rail competition and reduce truck traffic in the city.

CSX-5 reply. CSX contends that NVECD’s proposal to change the day the traffic survey is conducted, while well-intentioned, is based on a misunderstanding of the relevant facts and of the parameters and purposes of the survey itself. CSX maintains that it is simply not true that there is more intermodal traffic on Sunday than on Wednesday. In fact, Sunday traffic is typically very light. CSX notes that, while Thursday may be a relatively heavy traffic day than Wednesday, it also conducts surveys on Friday, a day with generally lower traffic volumes than either Wednesday or Thursday. CSX argues that, changing the surveyed days in midstream, as NVECD proposes, would introduce a new variable and thus reduce the value of the information gathered to date. According to CSX, the primary purpose of the surveys is to allow an assessment of the impacts of the Conrail transaction on the George Washington Bridge traffic by indicating intermodal traffic origins, destinations, and routings. CSX states that the Board can make the assessment just as well with traffic surveyed on Wednesdays and Fridays as it could with traffic surveyed on any other days of the week.

CSX reply. Because most of NVECD’s comments pertain to CSX-3, CSX states that it will not comment on them. As regards NVECD’s suggestion that NS and CSX change the days of the week on which they perform their surveys of the origins and destinations of traffic in the busiest intermodal terminals, CSX objects that, because the purpose of the surveys is to determine whether the Conrail transaction has reduced the change in the level of traffic, over the George Washington Bridge, changing the day of the survey would seem to work against that purpose.

Resource Warehousing & Consolidation Services, Inc. (RWCS). In its RWCS-2 comments, RWCS renews its complaint, made in the first general-overview proceeding, that it does not have access to competitive intermodal service from CSX. RWCS notes that CSX refuses to quote rates to and from its north Bergen, NJ facility. RWCS indicates that, since the first general overview decision, it has attempted to obtain rail service from CSX in order to market its intermodal facility as well as its planned expansion. Without actual CSX rate quotes, RWCS contends that its customers have no basis to routes via CSX, or even to choose RWCS over CSX and NS. RWCS maintains that the fact that CSX, on one occasion, offered a RWCS shipper a specific rate quote for traffic ultimately handled by NS, does not justify CSX’s subsequent refusal to provide rate quotes for service to RWCS’s facility and customers. By refusing to quote rates, RWCS asserts that CSX discriminates against intermodal marketing companies, such as RWCS, and favors its own terminal facilities from which to provide

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service for RWCS' customers. While shippers may prefer shipper-carrier arrangements, RWCS argues that terminal service traditionally includes interchange arrangements with third parties or terminal operators such as RWCS. RWCS maintains that terminal service, although long decried by shippers, remains a major factor due to its lower, or at least competitive, cost. The promulgation of federal regulations to ensure competition remains a major issue for railroads. 14

CSX did reply. According to CSX, RWCS is not a shipper and has no capacity to submit a rate for shipment to CSX, which does not physically connect with RWCS' facility. CSX denies that, while it has no obligation to serve rail shippers, it has no obligation to promote the business of entities such as RWCS, which sell intercity switching and terminal services to shippers. Although RWCS itself has no cargo to ship, CSX states that it was willing to carry the cargo of RWCS' customers located at the RWCS facility to CSX's connection with NY&MW, but RWCS' principal customer preferred NS' service, possibly because it used NS' facilities at the other end of the rail move, in Chicago. CSX maintains that its commitment to RWCS is only to give cargo consigned by shippers to or from its facility access to the CSX system, via interchange with NY&MW, the only rail carrier physically serving RWCS. CSX states that it remains willing to perform that service.

CSX states that railroads may choose to promote the business of ancillary service providers if they find it advantageous, but has never promised to do so as regards RWCS. According to CSX, it has endeavored to work with the major ocean carriers (and of RWCS) and would be willing to provide a service plan to any other such customers interested in offering cargos at the RWCS facility, but RWCS wants CSX to establish a set of intermediate rates and services in the abstract and without regard to the identity of the shipper, the particular destination point, or the frequency and volume of service. CSX states that that is not anything it has ever promised to do. Although RWCS cites the requirement in Decision No. 89 allowing applicants to fulfill the promises they made in their presentation to the Board, CSX insists that it has never promised to do what RWCS now wants it to do.

CSX indicates that it maintains terminals in a number of places in Northern New Jersey in which RWCS can take its clients' imported cargos. Alternatively, CSX states that it will participate in movements of RWCS' clients' cargos in connection with NY&MW if they are to be shipped from the RWCS facility itself. CSX maintains that no other promise or assurance was given to RWCS.

IP&L comments. In this round of oversight, IP&L continues to seek SSR's single-line service to Stout. IP&L vacates that NS/SSR have recently made an initial confidential, joint contract rate proposal for moving coal to its Stout plant from southern Indiana origin which it compares to rates available from some Southern Indiana origin published in a former Central tariff adopted by CSX. IP&L indicates that it responded to the NS/SSR contract offer by saying that, unless those carriers could match the tariff rate, NS/SSR need not bother to respond further. Because NS/SSR did not respond by matching that offer, IP&L concludes that they are unable to offer a price-line service that is fully competitive with NS/SSR. As such, IP&L argues that the conditions imposed by the Board are not working as intended. And that, in that event, SSR should be given direct SSR service for Southern Indiana coal movements to its Stout and Perry K generating plants over NS and CSX's lines.

IP&L now argues that, before the Correll transaction, it relied not just on the threat of a build-out to Correll or SSR, but upon its alternative Correll/SSR service to provide competition at

14 A copy of a previous e-mail, SSR has not joined in this latest request.

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Stout. I&I claims that this competition has been diminished by the transaction because NS has a lesser presence in the Indianapolis region than did Conrail.

NS Reply (NS-6) to I&I's Comments. To implement the Board's condition giving IP only direct service via NS, NS states that it entered into a traffic rights agreement with INRD that will permit it to serve the Stout plant directly via traffic rights. NS also indicates that, in response to I&I's concern that an agreed-upon interchange point would be efficient, NS, CSX and INRD agreed to permit NS and INRD to interchange at Crawford Yard in Indianapolis. In addition, NS states that it has agreed with CSX and INRD that NS may, in lieu of serving the Stout plant directly via traffic rights, serve the plant using switching services on terms that the parties have agreed to.

According to NS, I&I continues to seek additional conditions beyond the condition the Board imposed in Decision No. 89. These are the same additional conditions, NS indicates, that I&I sought unsuccessfully in the first annual on-tariff proceeding, namely, the right to receive direct service from INRD via traffic rights over CSX and INRD at both Stout and Perry K plants for delivery of coal from Southern Indiana origins. After the Board denied that request in Overnite Decision No. 3 (STB served Nov. 9, 2000), NS states that I&I appealed that decision to the United States Court of Appeals for the District of Columbia Circuit, and on July 26, 2001, that court granted the motions of NS and CSX, supported by the Board, to summarily affirm the Board's decision and deny I&I's appeal. Indiana Power & Light Co v. STB, D.C. Civ. No. 01-1005 (July 26, 2001).

NS states that I&I now claims that new evidence proves that "NS is incapable of providing "efficient and competitive" service to I&I" pursuant to the condition the Board imposed in Decision No. 89 and that I&I's new evidence consists of a proposal NS recently submitted to I&I for transporting coal via freight service with INRD from Southern Indiana mines to the Stout plant. According to NS, I&I indicates that the rates contained in NS' proposal are higher than, and therefore not "competitive" with, the rates that INRD has "been charging IP at for delivering Indiana-origin coal to the Stout plant. NS maintains that I&I's contention is groundless for several reasons. First, NS asserts that, while competing parties offer different rates for providing a service, under I&I's arguments only the lowest rate would qualify as being "competitive." NS states that I&I's position is plainly incorrect because one party's rate or service does not have to match or "outdo" another party's in order to be "competitive." NS contends that the condition the Board imposed in Decision No. 89 was not intended to guarantee that NS would provide IP lower rates than INRD, it was intended to provide IP with a competitive alternative that would serve as a restraint upon any service and rates provided by CSX and INRD. NS states that it does not know what rates and service terms CSX and INRD have offered IP but believes its proposal is competitive with any rates for comparable coal service. In any event, NS submits that, whatever its proposal may have been, the condition imposed by the Board has served its intended purpose of providing a competitive alternative that has served as a restraint on the rates and service provided by CSX and INRD.

Secondly, NS contends that IP's argument rests on inappropriate assumptions. According to NS, IP appears to be comparing NS' proposal for a 3-year contract for service from four mines to Stout commencing January 1, 2002, to the terms under an existing contract that IP negotiated 3 years ago with INRD. NS contends that the only effective comparison would be with whatever term INRD might be offering today for service comparable to the service proposed by NS, but that IP has not provided any such terms to NS or the Board. According to NS, I&I's insistence that NS match or beat certain rates "to be worthy of further consideration" compares tariff rates in effect 2 years ago that applied only to movements from two particular mines. NS also indicates that IP's failure to mention that the particular tariff rate contains much higher rates to other mines and that those rates are subject to quarterly cost adjustments which would significantly raise the rate by the time

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NS' proposed service would commence on NS's initiative; furthermore, that its rule proposal to I&P[L is largely driven by the revenue needs of ISBR -- the very carrier that IP[L seeks to have serve the Stoot plant directly -- that ISBR continues to serve NS.

CSX's Reply of SS-5 to IP[L's Comments. CSX contends that IP[L's comments represent the latest chapter in its continuing attempt to obscure the generous relief the Board granted it in Decision No. 89. CSX also asserts that IP[L's comments implicate both the arguments it made before the Board and the principal basis of the Board's 1988 ruling, induced by IP[L's evidence and arguments, that the Stoot plant constituted a "two-to-one" situation deserving special relief. According to CSX, IP[L comments ignore the fact that INRD's current bid to replace its 1996 contract with IP[L is as good as, if not better than, the pre-merger transportation contract signed under competitive pressures the Board set out to replace in Decision No. 89. CSX adds that IP[L's current proposal is illegal because it seeks to reward ISBR with direct service to Stoot when that carrier, by providing the bulk of the joint line service with NS, was mostly responsible for failing to satisfy IP[L's rate demands.

Prior to the Central transaction, according to CSX, IP[L's Stoot plant was served physically by only one rail carrier (INRD). CSX states that, although the fact of serving several carriers also serving mines in Southern Indiana, and Central came quite close to the Stoot plant, neither carrier had direct access to Stoot. CSX adds, however, that the nearness of those two railroads' lines to Stoot prevented the possibility of a "build-out" with respect to the Stoot plant. With the backdrop of geographical factors suggesting the feasibility of a "build-out," CSX indicates that in 1987 INRD joined in a limited-time arrangement for a three-carrier mode via ISBR and Central to transport Southern Indiana coal to Stoot. Subsequently, under the competitive constraints of a potential build-out and the then-existing three-carrier (ISBR/CSX/INRD) arrangement, CSX states that INRD entered into a long-term transportation contract with IP[L in 1996. CSX maintains that, notwithstanding that IP[L had delivered large quantities of coal to Stoot under the three-carrier arrangement, the goods and terms offered by INRD in 1996 were no superior to those of ISBR/CSX that IP[L was willing to commit virtually all of its Stoot requirements to INRD.

CSX contends that, during the Central proceeding, IP[L strained the build-out alternative and, in asking NS be given direct access to Stoot, IP[L's case involved looking to NS as its second carrier of choice, not ISBR as it does now. CSX argues that in its position to explain that was that Stoot was not a two-to-one situation and that, although Stoot then benefited from a low-cost switching arrangement involving INRD, this arrangement was limited in time and would expire by 2001. CSX adds that, under the proposed contract, INRD once again indicates that, during the Central proceeding, IP[L strained the build-out alternative and, in asking NS be given direct access to Stoot, IP[L's case involved looking to NS as its second carrier of choice, not ISBR as it does now. CSX argues that in its position to explain that was that Stoot was not a two-to-one situation and that, although Stoot then benefited from a low-cost switching arrangement involving INRD, this arrangement was limited in time and would expire by 2001. CSX adds that, under the proposed contract, INRD once again failed to explain the feasibility of a "build-out," and that the Board, looking to the unexplained switching arrangement, took the further step of ordering access by NS, both direct and via switching to INRD at IP[L's choice. Although the Board stated that primary competitive pressure at Stoot was the build-out possibility, CSX indicates that the Board imposed a further condition to approximate the pre-transaction marketing conditions provided by the limited-time arrangement involving Central. CSX contends that the last major set of those conditions occurred in 1996, when INRD won its contract to handle most of Stoot's coal requirements.

After the Central transaction, CSX states that IP[L gained direct access from two carriers, INRD and NS, and that, with the prospect of increasing environmental constraints on the use of Southern Indiana coal, IP[L had access to essentially every coal mine in the United States. CSX argues that, despite this unprecedented access, IP[L immediately began a campaign of disclaiming
any value in the revenues and tools it received from the Board. According to CSS, IP&E is now attacking both of the forms of relief it obtained from the Board. In IP&E’s version of the ability by NS to transport coal at reasonably competitive rates, CSS points out that IP&E’s intended beneficiary, ISRR, has a conflict of interest in view of its significant participation in coal that IP&E found unsatisfactory. According to CSS, IP&E unilaterally asks the Board to believe that ISRR has gained no prospect of obtaining direct access to Stotz and has given NS its best cost estimate for a joint-line movement where IP&E would provide almost all of the transportation.

CSS to IP&E: The proposed ISRR/NS rates, on their face, look like prices that many coal-fired electric producers in the United States would be pleased to have for themselves. CSS notes that IP&E has set the rates only with the existing CSS tariff on coal movements from various mines in the Southern Indiana region. The CSS tariff, according to the carrier, is a reproduction of the previous Central tariff and provides that there will be no escalation of the prices. If cost escalation were applied to them, or if they were to be subjected to fuel surcharge, CSS states that they would be higher and the gap between the prices set by NS/ISRR and the CSS tariff would not be as substantial as IP&E says. CSS also indicates that it published the tariff in June 1998 in a proffer to reach a settlement with IP&E in order to have the Board impose that settlement as a condition on CSS to resolve the IP&E Stotz issue. According to CSS, IP&E rejected the proffer and, as he in movements to Stotz were concerned, the CSS tariff rate is a “paper rate” that can be amended or withdrawn.

CSS indicates that it has made a very attractive new contract proposal to IP&E which IP&E has not mentioned because the proposal is quite similar to the pricing in the 1996 contract, once the differences in general cost levels since 1996 are taken into account. According to CSS, its new offer is constrained by the possibility of a build-out and the prospect of a joint line movement by NS which, unlike Conrail, is permitted physically to enter Stotz. CSS contends that those were the very same factors constraining the INRD pricing in 1996, and its bid indicates that the same constraints (with NS substituted for Conrail and its access impaired) are working just as well now. CSS maintains that the Board’s conditions have worked. INRD’s pricing has not turned in any adverse way toward IP&E from where it used before the Central Transaction; the “pre-transaction marketing conditions” have been well replicated, and the same economic prices, instead somewhat lower when inflation is taken into account, are available from INRD as they were in 1996 under long-term contracts.

CSS contends that, although IP&E is seeking an even better deal than the one it got in 1996 and under the present INRD proposal it has no license to employ the Board to assist it in getting a better deal than it is being offered. The carrier argues, moreover, that IP&E, in its comments for the first time attacked the primary supporting pillar of its original vote, i.e., the feasibility of a build-out option. CSS states that IP&E’s attack on the entity that it itself supported should not be underestimated and that, in reality, IP&E is attempting to get ISRR single-line service from the Board without making any investment at all, except lawyers’ fees. CSS asserts that IP&E seeks to invoke INRD’s property to show a competitive constraint greater than what existed in 1996 and that, in the long run, the latter schemes for forced access to rail lines unrelated to the efficacy of mergers, the impetus if granted would be harmful to the health of the railroad industry and contrary to the public utility of the Staggers Act. According to CSS, IP&E’s proposal to make an intrusive award of trackage rights to ISRR for participating in the SIRB/NS bid rejected by IP&E is contradictory on its face and self-destructive in nature.

IP&E Motion and Response to Replies of CSS and NS. IP&E has filed a motion for leave to file a response to the replies filed by NS and CSS, which, as a reply to a reply, is not normally permitted by our Rules of Practice 49 C.F.R. 1104.36(c). To justify its filing, IP&E claims that it should have the opportunity to respond to certain arguments made by NS and CSS that were not,
and could not have been, anticipated by it. These arguments relate to (1) the status of ongoing contract negotiations between IPAL and INRD, (2) a possible conflict of interest of INRD in those negotiations, (3) issues related to the former Corral tariff that CSX adopted, and (4) the possibility of a build-out to reach INRD or former Corral sites. Both NS and CSX replied in opposition to this motion.

In its tendered response, IPAL argues that the Board must focus on the rates offered by NS and INRD as a substitute for the former Corral competition, not on the contract rates now offered by INRD, which are below the NS rates. IPAL argues that, because the NS rates exceed by a specific amount the Corral tariff rate adopted by CSX, they must not be competitive. 20 It argues that the purpose of the Board’s condition was to put NS in Corral’s shoes to provide a check on the pricing of CSX and INRD. IPAL makes its argument that NS cannot compete because its nearest lines are 60 miles away, and it contends that CSX will have difficulty competing because NS and INRD employees operate under different work rules.

IPAL contends that CSX may not rely on the fact that the former Corral tariff is a paper rate that can be terminated at any time because CSX represented to the Board during the original proceeding leading to approval of the transaction that it would publish a tariff adopting the former Corral tariff. IPAL argues that CSX is thus bound to keep this tariff on file.

IPAL argues that INRD’s offer for what CSX refers to as a “premium service” is not comparable to its current contract service because it requires additional capital commitments by IPAL, and that CSX has also failed to note an additional charge that relates to this service. IPAL notes that it is trying to maintain substantial tonnage for a competitor to INRD, which it believes would not be possible under the contract terms offered by that carrier. It also contends that INRD only made a new commitment for a certain portion of IPAL’s traffic, but not all of it.

Finally, IPAL argues that it has not changed its position concerning the efficacy of a potential build-out, but that it always used its ISRD/Corral service alternative, not the build-out, for competitive leverage.

CSX’s Reply (CSX-6) to IPAL’s Response: In its reply to IPAL’s tendered response, CSX again stresses that the best test of competition is to compare the best contract rates available before and after the transaction. CSX notes that NS and Corral’s work rules are identical, so that work rules should not be a factor here. It argues that IPAL’s description of the contract negotiation process between INRD and IPAL is misleading. It notes that the new proposal described as an opening conditional pleading would be available for all of IPAL’s requirements. CSX reiterates that it did make a counterproposal in response to IPAL’s request to limit the contract to a specified fraction of IPAL’s coal, while reserving the rest for possible use on some other carrier such as NSFRR. Under that circumstance, INRD would only commit to a rate for a slightly larger fraction of IPAL’s requirements. CSX reiterates that the former contract committed most of IPAL’s coal to INRD.

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20 NS (NS-7) argues that IPAL could have anticipated all of these issues. It states that IPAL had a full opportunity to discuss its negotiations with INRD, but simply chose not to do so. CSX echoes these same arguments, but includes evidence and argument responding to arguments made by IPAL in the pleading that it asks permission to file.

21 IPAL attempts to invoke the “Horizontal Merger Guidelines” of the Department of Justice and the Federal Trade Commission to support this argument.