STB FINANCE DOCKET NO. 33388 (SUB-NO. 91)

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
(GENERAL OVERSIGHT)

Decision No. 6

Decided December 12, 2001

The Board addresses the progress reports and comments filed in the second annual round of the Conrail General oversight proceeding.

BY THE BOARD:

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. 89*), *aff'd sub nom. Erie-Niagara Rail Steering Committee v. S.T.B.*, 247 F.3d 437 (2d Cir. 2001).[1] 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 numbered decisions referred to in this manner were issued in the main proceeding, STB Finance Docket No. 33388.

mitigating conditions,[2] passenger operations, and regional rail passenger operations. *Id.* at 366.

First Annual Oversight. On February 9, 2000,[3] 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 Conrail 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.[4] 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. *Id.* at 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. *Oversight Decision No. 5,* 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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[2] CSX and NS must continue to file quarterly environmental status reports for the duration of our oversight period.

[3] *CSX Corp. et al. — Control — Conrail Inc. et al. — General Oversight,* 4 S.T.B. 491 (2000) and published at 65 Fed. Reg. 7414 (2000) (*Oversight Decision No. 1*). All numbered Oversight Decisions referred to in this decision also were issued in STB Finance Docket No. 33388 (Sub-No. 91).

[4] *See Oversight Decision No. 5* (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-6) 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-8).

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 the 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.

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 performance on both railroads has improved. Second, Amtrak discusses capital improvements to NS' Shellpot Connection in Wilmington, DE, that may become necessary if NS' traffic increases as projected in its transaction operating plan. Amtrak therefore supports NS' 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 3. 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 on intermodal traffic to and from the New Jersey yards across the George Washington Bridge could be improved, however, by having the carriers collect data for Sunday and Thursday, rather than Wednesday. NYCEDC asserts that a larger volume of intermodal trains are unloaded on Sunday and Thursday each week and that those 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 modestly 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.

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 to attempt to increase business in Maryland, to keep the Port of Baltimore competitive, and to work with Maryland commuter agencies, while honoring all 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.[5] Moreover, as we stated in *Oversight Decision No. 5*, slip op. at 24:

> MDOT * * * is not correct in its assessment that the operating plans filed by CSX and NS were 'commitments' to achieve proposed service and infrastructure improvements within 3 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 in and of themselves for relief 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 specifics and asks 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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[5] MDOT acknowledges, for example, that the on-time performance of Maryland's commuter rail service (MARC) over CSX's lines 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 the 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 the systems of both carriers via NYS&W,[6] 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 that 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 shippers, commodities 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 Stout electric generating plant near Indianapolis. The Stout plant is directly served only by the Indiana Rail Road Company (INRD), an 89% CSX-owned shortline 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 Stout 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

[6] NYS&W connects to NS via the Passaic Junction off the Southern Tier on the Conrail lines allocated for use by NS, and to CSX via a connection that was built from Bergen to Little Ferry.

alternative of ISRR-Conrail-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 rail 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 Conrail transaction in 1998.

In the proposed division of Conrail's assets, the Conrail 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 Conrail, be preserved.[7] Accordingly, we required that CSX afford either NS or ISRR trackage rights over the nearby former Conrail 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 interchange traffic with ISRR at a point along the former Conrail 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, 388, ¶ 23. We denied subsequent requests by IP&L and ISRR that we further condition the Conrail transaction to enable ISRR to serve Stout in single-line service.[8]

In this round of oversight, IP&L (without ISRR) again seeks ISRR single-line service to Stout from the relevant southern Indiana origins. 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.[9] IP&L compared the NS-ISRR contract offer to certain former Conrail common carriage tariff rates (available from some, but

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[7] Unlike Stout, we found that the transaction would not create any new market power 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 makes a token request here for further relief at Perry K, the utility has presented no evidence or argument concerning the situation at that plant and thus has provided no reason for us to reopen and alter our previous decision as to Perry K.

[8] *See CSX Corp. et al.— Control — Conrail Inc. et al.*, 4 S.T.B. 25 (1999) Decision No. 115, at 28-29; *CSX Corp. et al. — Control — Conrail Inc. et al.*, 4 S. T. B. 101 (1999) Decision No. 125, at 105, *aff'd sub nom. Erie-Niagara Rail Steering Committee v. STB*, 247 F.3d 437, 446 (2d Cir. 2001); *CSX Corp. et al. — Control — Conrail Inc. et al. General Oversight*, 5 S.T.B. 343 (2000,) Oversight Decision No. 3, *summarily aff'd sub nom. IP&L v. STB*, No. 01-1005 (D.C. Cir. July 26, 2001).

[9] The contract offers have been filed under seal and are extremely sensitive. Indeed, neither CSX nor NS knows what rates the other has bid for this coal traffic; only their outside attorneys and outside expert witnesses are privy to this information, subject to a protective order that, among other things, precludes them from using it for anything other than for the purposes 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.

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-ISRR 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 transaction to raise rates or reduce service (or both) relative to pre-merger levels, and to do so profitably. *See, 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. *Id.* 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.[10] The IP&L conditions were designed to preserve the competition produced by that threat. Now, faced with the availability of NS/ISRR joint-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 IP&L not been

[10] As CSX points out, prior to the 1996 INRD-IP&L contract, "large quantities" of coal were delivered to Stout via the alternative three-carrier routing. CSX-5, Vol. I, at 17 & n.15, 34.

harmed by this result, it is a clear indication that the conditions are working to constrain INRD in precisely the way we intended.[11]

IP&L, however, points to our statement in *CSX Corp. et al.— Control — Conrail Inc. et al.*, 3 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, 5 (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-ISRR joint-line service to Stout (Milepost 6) was not operationally feasible and thus would preclude NS-ISRR service from replicating the prior ISRR-Conrail-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. 115* 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

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[11] IP&L's contention (IP&L Response, at 4 n.4) that the contract terms INRD offered were less favorable than those under the 1996 contract because they were only for a portion of the utility's Stout traffic is misleading. As CSX explains, INRD initially made a contract proposal for all of IP&L's coal requirements at Stout with terms at least as good as the previous contract, assuming that IP&L would make a traffic commitment to INRD similar to that in the 1996 contract. It was IP&L's unwillingness to commit to INRD service at the previous traffic level that prompted INRD to make a counter-proposal using the same rates, but at the lower traffic level requested by the utility. INRD stated that it was prepared to negotiate rates for additional volumes on an annual basis. CSX-6, Vol. II, at 16-17.

IP&L's argument (IP&L Response, at 4 n.4) that INRD's new "Express Service" is not comparable to the service under the 1996 contract — because it would require IP&L to share in the additional expenditures required to construct some needed track — is also without 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 to it in having to furnish fewer train sets due to the more efficient use of IP&L's privately owned railcars in the new service. CSX-6, Vol. I, at 14-15.

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

IP&L merger conditions also misses the mark.[12] IP&L Response, at 2-3. The question here is not whether INRD and Conrail were effective competitors for IP&L 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 Stout, our conditions effectively do so.

Finally, it would be inappropriate to compare the NS-ISRR contract offer with the former Conrail common carriage rates adopted by CSX, as IP&L urges. Rail contracting — and the rates underlying it — offer 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 carriage. The fact that IP&L has now twice chosen to enter into a long-term coal transportation contract with INRD, rather than use available common carriage rates and service, underscores both the fact that IP&L prefers contract carriage service that is more tailored to its own service needs and the invalidity of comparing rates for these two different forms of rail service.[13]

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[12] Under § 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, nontransitory 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 can." *CF Industries, Inc. v. STB*, 255 F.3d 816, 823 & n.13 (D.C. Cir. 2001), *aff'g sub nom. CF Industries, Inc. v. Koch Pipeline Co., L.P.*, 4 S.T.B. 637 (2000) (***Koch***). If, along with other indicia, this test were to establish that two firms compete in the relevant product market, DOJ would then consider whether a proposed merger of the competitors would violate the antitrust laws.

Contrary to IP&L's assertions (IP&L Response, at 3; *see also* IP&L letter, July 30, 2001), our analysis in ***Koch*** has no bearing on this case. ***Koch*** involved the question of whether an increase in pipeline rates was reasonable. We employed the DOJ guidelines as one element in making the threshold assessment of Koch's market power, to determine if we should examine the reasonableness of the challenged rate increase. The court affirmed our use of this test in these limited circumstances. Here, IP&L does not challenge the reasonableness of INRD's rates. And, as we have explained, the issue of whether our merger conditions are effective does not turn on the comparative levels of the NS-ISRR and INRD offers, 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.

[13] Moreover, as CSX points out, there have been no movements to Stout under the common carriage rates since CSX adopted them, and practically none when the rates were Conrail's. CSX-5, Vol. I, at 30-31 & n.31. Also, the rates apply at the stated, non-escalated levels only for a limited period of time and only to two of the four southern Indiana coal mines for which NS-ISRR made a contract offer. NS-6, at 9, CSX-5, Vol. I., at 29. And, as NS emphasizes, its contract proposals were "largely driven by the revenue needs of ISRR," as that carrier had communicated them to NS, because ISRR would provide most of the haul. NS-6, at 9.

In sum, we measure the effectiveness of our IP&L merger conditions by comparing the pre-transaction and post-transaction rate 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. 89*, 3 S.T.B. 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 proceeding will be conducted in mid-2002, in accordance with the schedule indicated in the ordering paragraphs below. We anticipate that, following a review of the reports, comments, and replies filed in 2002, we will issue another decision concerning oversight issues. We reserve the right, however, to alter the filing schedule and/or to 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, NYCEDC, 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 Clyburn, and Commissioner Burkes.

APPENDIX A
THE PROGRESS REPORTS

The CSX-4 Progress Report. In its second progress report, CSX maintains that it has made significant progress in implementing the Conrail transaction 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 order mileage and train delay due to crew or locomotive unavailability are at historic lows. CSX states that safety throughout its system has improved. According to CSX, FRA reportable personal injuries in its system have declined from a weekly rate of 17.9 in 2000 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 an 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 products to new customers in the southern and southeastern states, whereas prior to the Conrail transaction such purchases were far less common. Conversely, CSX states that shippers in its pre-transaction territory are taking advantage of new marketing opportunities by shipping to customers in former Conrail areas.

More route options and flexibility, CSX maintains, have benefitted automotive customers by reducing empty miles and empty-car days. In addition, CSX states that it has initiated a joint line service with Union Pacific Railroad Company (UP), marketed under the "Express Lane" name, 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 Selkirk, NY, where the traffic is promptly forwarded to the Hunts Point 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 perishables 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 newsprint 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 benefitted from its single-line pricing and reliable service.

CSX reports that its financial results improved during the second half of 2000. After having an operating ratio for the first and second quarter of 91.1% and 91.4% 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 $7,243 million with an operating income of $712.8 million, yielding an operating ratio of 90.2% 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 $23 million in the third quarter of 2000 on year-over-year comparison, from $185 million in 1999 to $163 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 $205 million from $197 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.

The NS-5 Progress Report. NS states that increased fuel costs and the general economic slowdown have forced it in the past year to take a number of major actions, including reducing its dividend (by 70 percent) for the first time, cutting its management work force by nearly 25%, and initiating a number of other restructuring steps. Despite these challenges, NS maintains that its implementation of the Conrail transaction has continued to proceed satisfactorily during the second oversight year. According to NS, service on its portion of the Conrail system has improved steadily, it continues to make substantial capital investments in the Conrail system, and safety remains a priority as reflected in NS' receipt, in May 2001, of a twelfth consecutive E.H. Harriman Gold Medal.

Because of increased single line service, operating efficiencies, and business opportunities created by the transaction, NS reports new or improved marketing developments. Among these NS gains are new grain traffic between pre-transaction NS origins and destinations in former Conrail areas, including New York, Pennsylvania, New Jersey and the Delmarva Peninsula; single-line movements of paper between Southeastern paper mills and Northeastern receivers; direct shipments of auto parts from former Conrail-served suppliers to Southeastern plants. In addition, NS indicates that it now moves 3,000 new carloads of pig iron per year as a result of establishing a rail-barge transfer facility at a former Conrail location and that, due to the current tight supply of coal, a number of utilities are taking advantage of new sources of coal in the former Conrail territory.

The carrier also claims that the Conrail transaction has increased rail-to-rail competition, with rail customers reaping the benefits of enhanced competition. According to NS, reduced revenues resulting from increased competition, large capital expenditures in recent years, and negative economic conditions have created financial challenges. Although NS recognizes that it needs to do more to cut costs and increase revenues before all of the anticipated benefits of the Conrail transaction are realized, it contends that its initial implementation difficulties have been overcome.

APPENDIX B: ARGUMENTS OF THE PARTIES

U. S. Department Of Transportation. In its DOT-3 comments, DOT indicates that it intends to file a more substantive review after examining the submissions of others. With respect to safety, DOT reports that the Federal Railroad Administration's fourth and final report on the implementation of the Safety Integration Plans "will confirm that the operations of the Applicants have stabilized from a safety perspective, and that they have successfully completed the safe integration of Conrail." DOT-3 at 3.

In its reply comments (DOT-4), DOT states that, because no party has complained about merger-related service disruptions, applicants apparently have overcome their initial operating difficulties and are providing rail service at levels that are at least acceptable to most of their shippers. DOT notes that no party that it is aware of has claimed that the transaction has resulted in reduced competition or that environmental or community impacts that have not been adequately addressed by the carriers. However, because the Conrail transaction has wrought such fundamental changes, DOT asserts that the Board should clearly indicate its intention to continue to monitor the transaction and to invite submissions from affected parties.

According to DOT, the issue that has attracted the most attention concerns NS' statements with respect to Conrail facilities it acquired in Hollidaysburg, PA. Although DOT offered no comment on that particular subject, it generally addressed the import of written representations made on the record by merger applicants and other parties.

With respect to the comments of Indianapolis Power & Light Company (IP&L), DOT indicates that the Board in *Decision No. 89* found that the underlying transaction threatened IP&L with a loss of competition and therefore imposed a two-fold remedy: preservation of a build-out option and access by NS over the lines of a subsidiary of CSX. While noting that IP&L now avers in its

comments that the latter remedy is not effective, DOT states that it supported only the preservation of the build-out option for IP&L. *See* Brief of DOT, filed February 23, 1998, at 32. DOT states that, as a consequence, it offers no comment on the efficacy of the other remedy sought by IP&L.

With respect 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 revitalization 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 commends 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 CSX and NS routes has remained below Conrail'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' operating plan projected increased freight operations through Wilmington, DE, and expressed the intention to restore a former Conrail bypass around Wilmington known as the Shellpot Connection in order to accommodate this expected traffic increase. Amtrak notes, however, that the additional traffic NS anticipated has not yet materialized, so there is no current need to restore the Shellpot Connection. If NS' plans to increase freight traffic through Wilmington come to fruition, Amtrak states that restoration of that connection will be necessary. While the restoration of the Shellpot Connection would not benefit Amtrak, freight shippers in Delaware would benefit from the improved access 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 Shellpot Connection, and Amtrak supports NS' efforts.

CSX-5 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-6 reply. NS states that Amtrak's comments express no complaints but merely comment on two matters: on-time performance and restoration of the Shellpot 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 Shellpot Connection, and that NS is seeking public funding in for the restoration of the connection.

State Of Maryland. In its MD-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

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 Agreements with the State."

CSX-5 reply. CSX indicates that, while MDOT reports "clear progress" has been made in the CSX-MARC working relationship and concurs 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 seek 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.

NS-6 reply. According to NS, the 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 Agreements with the State."

NS believes it is generally in compliance with its agreement with Maryland. According to NS, its agreement with Maryland covers four areas: First, it recites that NS' operating plan would include various infrastructure investments and service improvements that will benefit the State of Maryland, to be implemented "as soon as practicable within the three-year planning horizon of the Operating Plan." 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 providing rail 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, that NS will inherit after STB approval."

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 Maersk/Sealand, 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 (CTN) and other Maryland shortline railroads concerning proposals that would enhance operations, improve customer service, be beneficial to the railroads involved, and not be inconsistent with NS' labor agreements or employee relations." Soon after the Split Date, NS states that it joined with Canton Railroad and several others to reconfigure track and operations in the Canton area of Baltimore and that this effort resulted in substantial benefits to all involved, some far in excess of that originally contemplated.

NS also asserts that it worked hard to increase its business in Maryland. As an example, NS notes that it grew its intermodal business in Maryland by over 14% on an annual basis between the Split Date and June 2001, partly as a result of introducing a new Baltimore-Detroit intermodal service and a new Baltimore-West Coast run-through intermodal service with The Burlington Northern and Santa Fe Railway Company. In addition, NS indicates that it worked with the State with regard to economic development and preserving rail infrastructure through regular meetings between its marketing, industrial development and strategic planning personnel and State and Port of Baltimore officials to discuss issues related to expanded business opportunities in Maryland.

When a dilapidated but critical branch line on the Eastern Shore of Maryland was threatened with abandonment, NS states that it worked with the State and area businesses to save the line from abandonment.

NS reports that certain infrastructure investments 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 20'2" double stack intermodal service between Baltimore and Harrisburg, PA; (2) rail infrastructure improvements in the city of Baltimore (an expanded intermodal facility; a new RoadRailer facility; and a new automotive distribution facility); and (3) new services to and from those facilities. NS states that it has discussed these projects on numerous occasions 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 cost of clearing the NEC double-stack route and the development of markets that would justify the required investment. While NS' operating plan contemplated the standard 20'2" double stack clearances, Amtrak has informed NS that it will require 21'6" clearances, largely because of the proximity of overhead electric wires needed to power passenger trains. Nearly 30 clearance projects would be required between Baltimore and Perryville, MD, alone under the 21'6" standard. NS also states that, although clearance projects often can be most economically accomplished by lowering the track under a clearance obstacle, construction is much more difficult in high-speed passenger territory, such as the NEC, because the track has to be maintained for speeds exceeding 125 mph and undercutting is more time consuming and expensive. NS states that it has informed Maryland officials that it will work with the State on this project but that, given the large unanticipated cost, NS is not in a position to shoulder the entire financial burden. NS states that Maryland officials agree with it that there needs to be more cost information and details and 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 that 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 expresses its view that CSX is not in compliance with the terms of CSX's June 4, 1998, settlement agreement with Cleveland, but seeks no 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 resolved at this time.

CSX-6 reply. CSX disagrees with Cleveland's comments seeking no relief from the Board but asserting that CSX is not in compliance with the terms of the June 4, 1998 Settlement Agreement with Cleveland. According to CSX, it has fulfilled, or is in the process of timely fulfilling, all of the commitments it made in its settlement agreement with Cleveland. CSX states that Cleveland has expressed its preference for continued discussions and that it will continue to work cooperatively with Cleveland to implement fully its June 4, 1998, Settlement Agreement, which the Board imposed as a condition in *Decision No. 89.* CSX understands that if all implementation issues are not resolved through these negotiations, Cleveland may, at some time in the future, present specific issues to the Board for its resolution. If and when that occurs, CSX states that it will address any such unresolved issues.

New York Economic Development Corporation (NYCEDC). According to NYCEDC, applicants' reporting about intermodal traffic to and from the New Jersey yards across the George Washington Bridge could be improved by changing the days of the week the surveys are taken.

Specifically, NYCEDC 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 larger volume of intermodal trains are unloaded on those days.

In its NYC-3 comments, NYCEDC seeks to clarify that, contrary to CSX's claim in its report, no action of NYCEDC or any other city agency prevented CSX from bidding on a contract to operate the transload facility at 65th Street Yard in Brooklyn. NYCEDC maintains that CSX made a deliberate choice not to bid on the right to operate the facility and that, as a public agency, NYCEDC had no choice but to award it to one of the several other entities that did participate. NYCEDC also notes 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 NYCEDC believes that more could be done by both CSX and CP to fulfill their promises to the city, it appreciates their efforts to enhance rail freight service and looks forward to working with both carriers to increase rail competition and reduce truck traffic in the city.

CSX-5 reply. CSX contends that NYCEDC's proposal to change the day the truck 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 modestly heavier traffic day than Wednesday, it also conducts surveys on Friday, a day with generally heavier traffic volumes than either Wednesday or Thursday. CSX argues that, changing the surveyed days in midstream, as NYCEDC 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 George Washington Bridge traffic by indicating intermodal traffic origins, destinations, and routings. CSX states that the Board can make that assessment just as well with traffic surveyed on Wednesdays and Fridays as it could with traffic surveyed on any other days of the week.

NS-6 reply. Because most of NYCEDC's comments pertain to CSX, NS states that it will not comment on them. As regards NYCEDC's suggestion that NS and CSX change the days of the week on which they perform their surveys of the origins and destinations of trucks using the railroads' intermodal terminals in New Jersey, NS contends that, because the purpose of the surveys is to determine whether the Conrail transaction has resulted in a change in the level of truck traffic over the George Washington Bridge, changing the day of the surveys would seem to work against that purpose.

Resources Warehousing & Consolidation Services, Inc. (RWCS). In its RWCS-2 comments, RWCS renews its complaint, made in the first general oversight proceeding, that it does not have access to competitive intermodal service from CSX because CSX refuses to quote rates to and from its North Bergen, NJ facility. RWCS indicates that, since the first general oversight 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 route via CSX, or even to choose between CSX and NS. RWCS maintains that the fact that CSX, on one occasion, offered a RWCS shipper a specific rate quote for traffic ultimately lost to NS, does not justify CSX's subsequent refusal to provide rate quotes for service to RWCS' 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

service for RWCS' customers. While carriers may prefer shipper-carrier arrangements, RWCS argues that intermodal service traditionally includes wholesale arrangements with third parties or terminal operators such as RWCS. RWCS maintains that intermodal service, although long deregulated by exemption, remains a matter for the Board's attention in the context of this post-merger oversight proceeding.

CSX-6 reply. According to CSX, RWCS is not a shipper and has no cargo to submit for shipment to CSX, which does not physically connect with RWCS' facility. CSX contends that, while it has an obligation to serve rail shippers, it has no obligation to promote the business of entities such as RWCS, which sell ancillary warehousing and terminal services to shippers. Although RWCS itself has no cargo to ship, CSX states that it was very willing to carry the cargo of RWCS' customers tendered at the RWCS facility to CSX's connection with NYS&W, 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 NYS&W, 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 it has never promised to do so as regards RWCS. According to CSX, it has endeavored to work with the major ocean carrier client of RWCS and would be glad to provide a service plan to any other such customers interested in offering cargo at the RWCS facility, but RWCS wants CSX to establish a set of intermodal 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* requiring 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 to which RWCS can take its clients' intermodal cargo. Alternatively, CSX states that it will participate in movements of RWCS' clients' cargo in connection with NYS&W if they are to be shipped from the RWCS facility itself. CSX maintains that no other promises or assurances were given to RWCS.

IP&L comments. In this round of oversight, IP&L continues to seek ISRR single-line service to Stout.[14] IP&L indicates that NS/ISRR have recently made an initial, confidential, joint contract rate proposal for moving coal to its Stout plant from Southern Indiana origins which it compares to rates available from some Southern Indiana origins as published in a former Conrail tariff adopted by CSX. IP&L indicates that it responded to the NS/ISRR contract offer by saying that, unless those carriers could match the tariff rate, NS/ISRR need not bother to respond further. Because NS/ISRR did not respond by matching that offer, IP&L concludes that they are unable to offer a joint-line service that is fully competitive with INRD. As such, IP&L argues that the conditions imposed by the Board are not working as intended, and that, to remedy that deficiency, it should be given direct ISRR service for Southern Indiana coal movements to both its Stout and Perry K generating plants over NS' and CSX's lines.

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

[14] In contrast to previous efforts, ISRR has not joined in this latest request.

Stout. IP&L 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 IP&L's Comments. To implement the Board's condition giving IP&L direct service via NS, NS states that it entered into a trackage rights agreement with INRD that will permit it to serve the Stout plant directly via trackage rights. NS also indicates that, in response to IP&L's concerns that an agreed-upon interchange point would be efficient, NS, CSX and ISRR agreed to permit NS and ISRR 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 trackage rights, serve the plant using switching services on terms that the parties have agreed to. According to NS, IP&L continues to seek additional conditions beyond the condition the Board imposed in *Decision No. 89.* These are the same additional conditions, NS indicates, that IP&L sought unsuccessfully in the first annual oversight proceeding, namely, the right to receive direct service from ISRR (via trackage rights over CSX and INRD) at both IP&L Stout and Perry K plants for delivery of coal from Southern Indiana origins. After the Board denied that request in *Oversight Decision No. 3* (STB served Nov. 30, 2000), NS states that IP&L 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 IP&L's appeal. *Indianapolis Power & Light Co. v. STB*, D.C. Cir. No. 01-1005 (July 26, 2001).

NS states that IP&L now claims that new evidence proves "that NS is incapable of providing 'efficient and competitive' service to IP&L" pursuant to the condition the Board imposed in *Decision No. 89* and that IP&L's new evidence consists of a proposal NS recently submitted to IP&L to transport coal in joint-line service with ISRR from four Southern Indiana mines to the Stout plant. According to NS, IP&L contends that the rates contained in NS' proposal are higher than, and therefore not "competitive" with, the rates that INRD has been charging IP&L for delivering Indiana-origin coal to the Stout plant. NS maintains that IP&L's contention is groundless for several reasons. First, NS asserts that, when competing parties offer different rates for providing a service, under IP&L's arguments only the lowest rate could qualify as being "competitive." NS states that IP&L's position is plainly incorrect since one party's rate or service does not have to match or beat another party's in order to be "competitive." NS contends that the condition the Board imposed in *Decision No. 89* was not imposed to guarantee that NS would provide IP&L lower rates than INRD; it was imposed to provide IP&L with a competitive alternative that would serve as a restraint upon the 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&L, but it 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 function 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&L's arguments rest on inappropriate comparisons. According to NS, IP&L 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&L negotiated years ago with INRD. NS contends that the only relevant comparison would be with whatever terms INRD might be offering today for service comparable to the service proposed by NS, but that IP&L has not provided any such terms to NS or the Board. According to NS, IP&L'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&L failed to mention that this particular tariff contains much higher rates to other mines and that those rates are subject to quarterly cost adjustments which would significantly raise the rates by the time

NS' proposed service would commence. NS indicates, furthermore, that its rate proposal to IP&L is largely driven by the revenue needs of ISRR – the very carrier that IP&L seeks to have serve the Stout plant directly – that ISRR communicated to NS.

CSX's Reply (CSX-5) to IP&L's Comments. CSX contends that IP&L's comments represent the latest chapter in its continuing attempt to enlarge the generous relief the Board granted it in *Decision No. 89.* CSX also asserts that IP&L's comments impeach both the arguments it made before the Board and the principal basis of the Board's 1998 finding, induced by IP&L's evidence and arguments, that the Stout 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 replicate in *Decision No. 89.* CSX adds that IP&L's current proposal is illogical because it seeks to reward ISRR with direct service to Stout 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 Conrail transaction, according to CSX, IP&L's Stout plant was served physically by only one rail carrier, INRD. CSX states that, although the lines of ISRR, another shortline also serving mines in Southern Indiana, and Conrail came quite close to the Stout plant, neither carrier had direct access to Stout. CSX adds, however, that the nearness of those two railroads' lines to Stout presented the possibility of a "build-out" with respect to the Stout 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 route via ISRR and Conrail to transport Southern Indiana coal to Stout. Subsequently, under the competitive constraints of a potential build-out and the then existing three-carrier (ISRR/Conrail/INRD) movement into Stout, CSX states that INRD entered into a long term transportation contract with IP&L in 1996. CSX maintains that, notwithstanding that ISRR had delivered large quantities of coal to Stout under the three-carrier arrangement, the price and terms offered by INRD in 1996 were so superior to those of ISRR/Conrail that IP&L was willing to commit virtually all of its Stout requirements to INRD.

CSX contends that, during the Conrail proceeding, IP&L stressed the build-out alternative and, in asking that NS be given direct access to Stout, IP&L's case involved looking to NS as its second carrier of choice, not ISRR as it does now. CSX states that its position in rebuttal was that Stout was not a two-to-one situation and that, although Stout then benefitted from a low-cost switching arrangement involving INRD, this arrangement was limited in time and would expire by 2001. CSX adds that, on brief, IP&L staunchly defended the build-out's feasibility, asserting that the build-out was feasible even at twice or three times the cost its witness had estimated. Given this evidence, CSX notes that the Board found the build-out feasible and granted the necessary contingent trackage rights to access such a build-out, either to the old Conrail line or to ISRR. According to CSX, it would have been reasonable and legally sufficient for the Board to have stopped there, but the Board, looking to the soon-to-expire switching arrangement, took the further step of ordering access by NS, both direct physical access and compulsory switching by INRD, at IP&L's choice. Although the Board stated that primary competitive pressure at Stout was the build-out possibility, CSX indicates that the Board imposed a further condition to approximate the pre-transaction marketing conditions provided by the time-limited arrangement involving Conrail. CSX contends that the last major test of those conditions occurred in 1996, when INRD won its contract to handle most of Stout's coal requirements.

After the Conrail 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 remedies and tools it received from the Board. According to CSX, IP&L is now attacking both of the forms of relief it obtained from the Board. In IP&L's criticism of the ability by NS to transport coal at reasonably competitive rates, CSX points out that IP&L's intended beneficiary ISRR has a conflict of interest in view of its significant participation in a bid that IP&L found unsatisfactory. According to CSX, IP&L unrealistically asks the Board to believe that ISRR has ignored its prospect of obtaining direct access to Stout and has given NS its best cost estimate for a joint-line movement where ISRR would provide almost all of the transportation.

CSX maintains that the proposed ISRR/NS rates, on their face, look like prices that most coal-fired electric producers in the United States would be pleased to have for themselves. CSX states that IP&L compares the rates only with the existing CSX tariff on coal movements from various mines in the Southern Indiana region. The CSX tariff, according to the carrier, is a republication of the previous Conrail 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 a fuel surcharge, CSX states that they would be higher and the gap between the prices bid by NS/ISRR and the CSX tariff would not be as substantial as IP&L says. CSX also indicates that it published the tariff in June 1998 as a proffer to reach a settlement with IP&L or to have the Board impose that settlement as a condition on CSX to resolve the IP&L Stout issues. According to CSX, IP&L rejected the proffer and, as far as movements to Stout are concerned, the CSX tariff rate is a "paper rate" that can be amended or withdrawn.

CSX indicates that it has made a very attractive new contract proposal to IP&L which IP&L 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 CSX, 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 Stout. CSX 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 improved) are working just as well now. CSX maintains that: the Board's conditions have worked; INRD's pricing has not turned in any adverse way toward IP&L from where it stood before the Conrail Transaction; the "pre-transaction marketing conditions" have been well replicated; and the same economic prices, indeed somewhat lower when inflation is taken into account, are available from INRD as they were in 1996 under long-term contracts.

CSX contends that, although IP&L 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&L in its comments for the first time attacked the primary supporting pillar of its original case, i.e., the feasibility of a build-out option. CSX states that IP&L's attack on the remedy that it itself supported should not be countenanced and that, in reality, IP&L is attempting to get ISRR single-line service from the Board without making any investment at all, except for lawyers' fees. CSX asserts that IP&L seeks to invade INRD's property to obtain a competitive constraint greater than what existed in 1996 and that, in the long run, like other schemes for forced access to rail lines unrelated to the effects of mergers, the request if granted would be harmful to the health of the railroad industry and contrary to the philosophy of the Staggers Act. According to CSX, IP&L's proposal to make an intrusive award of trackage rights to ISRR for participating in the ISRR/NS bid rejected by IP&L is contradictory on its face and self-destructive opportunism.

IP&L Motion and Response to Replies of CSX and NS. IP&L has filed a motion for leave to file a response to the replies filed by NS and CSX, which, as a reply to a reply, is not normally permitted by our Rules of Practice. 49 CFR 1104.13(c). To justify its filing, IP&L claims that it should have the opportunity to respond to certain arguments made by NS and CSX that were not,

and could not have been, anticipated by it. These arguments relate to (1) the status of ongoing contract negotiations between IP&L and INRD; (2) a possible conflict of interest of ISRR in those negotiations; (3) issues related to the former Conrail tariff that CSX adopted; and (4) the feasibility of a build out to reach ISRR or former Conrail lines. Both NS and CSX replied in opposition to this motion.[15]

In its tendered response, IP&L argues that the Board must focus on the rates offered by NS and ISRR as a substitute for the former Conrail competition, not on the contract rates now offered by INRD, which it claims are irrelevant. IP&L argues that, because the NS rates exceed by a specific amount the Conrail tariff rate adopted by CSX, they must not be competitive.[16] It argues that the purpose of the Board's condition was to put NS into Conrail's shoes to provide a check on the pricing of CSX and INRD. IP&L renews its argument that NS cannot compete because its nearest lines are 60 miles away, and it contends that NS will have difficulty competing because NS and ISRR employees operate under different work rules.

IP&L contends that CSX may not rely on the fact that the former Conrail 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 Conrail tariff. IP&L argues that CSX is thus bound to keep this tariff on file.

IP&L argues that INRD's offer for what CSX refers to as "premium service" is not comparable to its current contract service because it requires additional capital commitments by IP&L, and that CSX has also failed to note an additional charge that relates to this service. IP&L 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 rate commitment for a certain portion of IP&L's traffic, but not all of it.

Finally, IP&L argues that it has not changed its position concerning the efficacy of a potential build out, but that it always used its ISRR/Conrail service alternative, not the build-out, for competitive leverage.

CSX's Reply (CSX-6) to IP&L's Response. In its reply to IP&L'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 Conrail's work rules are identical, so that work rules should not be a factor here. It argues that IP&L's description of the contract negotiation process between INRD and IP&L is misleading. It notes that the rate proposal described in its opening confidential pleading would be available for all of IP&L's requirements. CSX explains that it did make a counterproposal in response to IP&L's request to limit the contract to a specified fraction of IP&L's coal, while reserving the rest for possible movement by some other carrier such as NS/ISRR. Under that circumstance, INRD would only commit to a rate for a slightly larger fraction of IP&L's requirements. CSX reiterates that the former contract committed most of IP&L's coal to INRD.

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[15] NS (NS-7) argues that IP&L could have anticipated all of these issues. It states that IP&L 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 IP&L in the pleading that it asks permission to file.

[16] IP&L attempts to invoke the "Horizontal Merger Guidelines" of the Department of Justice and the Federal Trade Commission to support this argument.