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December 15, 1997

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
ATTN: STB Finance Docket 33388
1925 K Street, N.W.
Washington, D.C. 20423-0001

SUB 35

Re: Finance Docket No. 33388, 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

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding, please find the original and twenty-five (25) copies of the **"Comments of the State of New York on the Responsive Application of New York State Electric and Gas Corporation" (NYS-18)**. In accordance with the Board's prior order, we have enclosed a Wordperfect 5.1 diskette containing this filing.

We have included an extra copy of the filing. Kindly indicate receipt by time-stamping the copy and returning it with our messenger.

Sincerely,

Kelvin J. Dowd
An Attorney for
the State of New York

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Enclosures

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NYS-18

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC. AND NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION	Finance Docket No. 33388 (Sub No. 35)

COMMENTS OF THE STATE OF NEW YORK ON THE RESPONSIVE APPLICATION OF NEW YORK STATE ELECTRIC AND GAS CORPORATION

THE STATE OF NEW YORK BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION

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NYS-18

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC. AND NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION	Finance Docket No. 33388 (Sub No. 35)

**COMMENTS OF THE STATE OF NEW YORK
ON THE RESPONSIVE APPLICATION OF
NEW YORK STATE ELECTRIC AND GAS CORPORATION**

The State of New York, acting by and through its Department of Transportation ("New York"), in accordance with the procedural schedule set forth in Decision No. 12 served July 23, 1997, hereby submits its Comments on the Responsive Application filed by New York State Electric and Gas Corporation ("NYSEG") on October 21, 1997 (NYSEG-14).

As further explained below, New York strongly supports NYSEG's Responsive Application, and urges that it be granted.

IDENTITY AND INTEREST

New York is a sovereign state, and a full party of record to the proceeding which embraces the captioned sub-docket. The New York State Department of Transportation is the executive department charged with responsibility for the supervision and administration of State policies and interests with respect to rail transportation through, within or affecting New York.

Among New York's major transportation policy objectives is the promotion of reasonably priced, efficient rail service for the transportation of coal to electric utilities within the State. In New York, as elsewhere, transportation charges represent a significant share of the delivered cost of fuel to coal-fired generating stations, a cost which is borne by the utility ratepayers in their monthly electric bills. Higher energy costs adversely impact the State's economic health at all levels, not the least of which is that occupied by citizens living on fixed incomes and/or limited means.

As described below, NYSEG's Responsive Application identifies specific, adverse impacts on rail rates, service efficiencies and costs vis-a-vis coal deliveries to NYSEG's facilities that are likely to result from the division of Conrail[1] proposed by CSX and NS. New York thus has a direct and substantial interest in the relief requested in NYSEG-14.

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[1]As used herein, "Conrail" refers to Conrail, Inc. and Consolidated Rail Corporation. "CSX" refers to CSX Corporation and CSX Transportation Inc. "NS" refers to Norfolk Southern Corporation and Norfolk Southern Railway Corporation.

THE NYSEG RESPONSIVE APPLICATION

NYSEG is the largest single rail customer (in terms of annual volume) in New York State, transporting some 3,000,000± tons of coal annually to four (4) different generating stations. Approximately 1,700,000 tons move to the Kintigh Station at West Somerset, NY, north of Buffalo. The balance of 1,300,000 tons is split among NYSEG's Greenridge Station at Dresden (north of Corning); its Milliken Station at Ludlowville (north of Ithaca); and its Goudey Station near Binghamton. See NYSEG-14 at 6. At present, all four (4) stations receive single-line service from Conrail from mine origins in Ohio, Pennsylvania and West Virginia. Id., Map 1. Under the transaction proposed in the Primary Application, however, CSX would become the sole delivery carrier for Kintigh, while NS would assume control over the lines serving Greenridge, Milliken and Goudey. Id., Map 2.

Though captive to Conrail at all four (4) stations, NYSEG explains in its Responsive Application that it has been able to steer this captivity to form a commercial alliance with Conrail and NYSEG's principal coal supplier, toward the goal of maximizing operating efficiency and flexibility. Id. at 26; V.S. Mulligan at 47. According to NYSEG, the benefits of this alliance include:

- the ability to optimize use of the three (3) coal car trainsets owned by NYSEG's Class III rail carrier subsidiary (NYSEG-14 at 16);
- flexibility to divert loaded trains from Milliken to Kintigh and vice versa, in response to exigencies (id.);

- flexibility to re-arrange coal loading schedules on short notice to balance shipments to various stations (id. at 18); and

- expedited rail car repair and maintenance, to minimize out-of-service time and associated costs (id.).

NYSEG's evidence also shows that despite its captivity to Conrail, it has meaningful bargaining leverage due to the fact that NYSEG's annual coal shipments comprise some 6% of Conrail's total coal traffic. NYSEG has exploited this leverage to negotiate favorable rail rates and service contract terms. Id. at 27; V.S. Mulligan at 52.

The picture changes considerably, however, when the Applicants' plan for Conrail is overlaid on NYSEG's coal transportation circumstances. According to NYSEG's evidence, the division of Conrail's lines serving the NYSEG plants between CSX and NS will undermine its established Conrail alliance, reduce efficiencies significantly, and increase NYSEG's overall delivered fuel costs. Specifically, NYSEG's Responsive Application shows that absent conditions, the CSX-NS plan for Conrail would:

- increase NYSEG's annual rail car costs by over $4 million, due to transit delays caused by the need to interchange diverted trains between CSX and NS (NYSEG-14 at 16);

- either limit the number of coal sources available to supply the Kintigh Station to those served by CSX, or increase the rates and service-related costs, due to the need to interline shipments from NS-served origins (id. at 17);

- limit NYSEG's ability to re-arrange loading schedules, as CSX and NS logically will favor their own originated traffic (id. at 18); and

- increase repair and maintenance costs for the 260 rail cars in service to Kintigh, due to the need to interchange cars between CSX and NS to reach the repair facility located on lines to be controlled by NS (id.).

NYSEG also points to increased inefficiencies resulting from inadequate yard space, increased reliance on trackage rights to serve its facilities, and prospective congestion and delays on the Youngstown-Ashtabula, OH line to be assigned to NS. The upshot of all this is higher operating costs, higher equipment costs, and increased coal inventory costs. Id. at 20-25; V.S. Edwards at 90-97.

Finally, NYSEG addresses the dramatic difference between the relative importance of its coal volumes to Conrail, on the one hand, and CSX and NS on the other. Rather than representing 6% of its transporter's coal business, after the transaction NYSEG would account for less than 1% of the coal traffic handled by CSX and NS, respectively. NYSEG-14 at 27. The predictable result would be a loss of negotiating leverage and a concomitant increase in rail rates, a fact confirmed by the Applicants' own witnesses. See id. at 30.

To remediate the adverse impacts of the Applicants' Conrail division plan on its coal transportation options and costs, NYSEG requests the imposition of conditions designed to replicate the status quo, whereunder Conrail serves all four (4)

NYSEG stations via single line routings. NYSEG petitions in the alternative, either for trackage rights in favor of NS or a neutral third party to enable it to serve the Kintigh Station; or for similar rights in CSX's favor to enable it to reach the Greenridge, Milliken and Goudey Stations. The first alternative, which clearly is the more limited and narrowly focused of the two (2), is described by NYSEG as follows:

> on behalf of Norfolk Southern Railway Company,[2] or a third party carrier suitable to NYSEG,[3] trackage rights over the lines from Buffalo, NY to NYSEG's Kintigh Station specifically, from the Niagara Branch MP 19.0 (CP-21) to the Tuscarora Wye, for approximately 4,200 feet, to Lockport Branch MP 69.6 (CP-69) to connection with Somerset Railroad Corporation at Lockport Branch MP 58.8 (CP-59). A total distance of approximately 11.2 miles.
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> [2] If exercised by NS, modification of NS's trackage rights contained in the Primary Application over New York Central LLC ("NYC") and CSX, Inc., as shown on pages 220-252 and 329-335 of Volume 8B of the Primary Application, would also be required to eliminate any restrictions contained therein that would prevent transportation to NYSEG's Kintigh Station including, but not confined to, limitations against interchanging with, or operating over, property of Somerset Railroad Corporation.
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> [3] [footnote omitted]

See NYSEG-14 at 4.

COMMENTS OF
THE STATE OF NEW YORK

New York respectfully submits that NYSEG has demonstrated that absent appropriate conditions, the CSX-NS plan for the division of Conrail will have a significant, adverse impact on rail rates and service quality for the transportation of NYSEG's electric generation fuel. Moreover, this impact is unrelated to any legitimate, public benefit expected to result from the plan. New York therefore supports NYSEG's Responsive Application for pro-competitive, pro-efficiency trackage rights, and urges that it be granted.

A. The Applicants' Plan Will Result in Higher Rail Rates and Reduced Service Quality for NYSEG

All four (4) of NYSEG's plants depend on rail for coal transportation, and each of the four (4) would be served by a single rail carrier whether or not the transaction at issue is consummated. Nevertheless, the Applicants' plan poses a clear and direct threat of increased rate levels that is not present under the status quo.

As NYSEG explains in its Responsive Application, the total annual volume of coal moving to its generating stations represents some 6% of Conrail's system-wide coal traffic,[2] and is Conrail's single biggest account in the State of New York. While the negotiating leverage generated by this volume by no

[2] See NYSEG-14 at 27.

means would be unlimited, it is undeniably meaningful in the specific context of NYSEG's relationship with Conrail. See Prillaman Dep. Tr. at 58; Union Pacific Corp., Et Al. -- Control -- Chicago and North Western Transp. Co., Et Al., Decision served February 21, 1995 ("UP/CNW Merger") at 79. In stark contrast, however, the respective shares of NYSEG's tonnage that would be allocated to CSX and NS under their Conrail division plan represent less than 1% of each carrier's coal traffic base. Documents produced by CSX and NS in discovery strongly imply that such low volumes are not considered sufficiently valuable prizes to afford the shipper any appreciable bargaining power. See NYSEG-14 at 29. Moreover, NYSEG presents evidence specific to its own transportation circumstances supporting the conclusion that both CSX and NS plan to raise the rate levels for coal service to NYSEG's facilities, once their division plan is approved and NYSEG's current Conrail contracts expire. Id. at 30.

That NYSEG would control generating stations served by different (albeit dominant) railroads in this case would not present any meaningful constraint on the carriers' post-transaction pricing aspirations.[3] NYSEG's four (4) stations are all baseload facilities, and already operate at between 75 and 85 percent of their rated capacity. See NYSEG-14 at 31; V.S. Mulligan at 42-44. In such circumstances, any potential threat to reduce coal use to exert leverage against a transporter would

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[3]See CSX/NS-18, Application, V.S. Sansom, vol. 2A at 321.

ring hollow, as it could only be backed up by the non-rational displacement of coal-fired generation with higher cost, alternative energy. In analogous contexts, the Board has agreed that bona fide bargaining leverage cannot be manufactured from such an obviously empty threat to "back down" a baseload facility. See Docket No. 41191, West Texas Utilities Co. v. Burlington Northern Railroad Co., Decision served May 3, 1996 at 13-14, aff'd. sub nom. Burlington Northern Railroad Co. v. United States, 114 F3d 206 (D.C. Cir. 1997).

In addition to the palpable threat of increased rates, NYSEG's evidence persuasively demonstrates that the destruction of its Conrail alliance that inevitably will result from the Applicants' division plan will lead to a deterioration of service quality. See also pp. 4-6, supra. The Primary Application is replete with claims by CSX and NS that single line service is superior in quality and efficiency to joint or interline service.[4] As NYSEG explains, however, one consequence of the Applicants' plan will be to replace single line service (via Conrail) with interline movements at key points in the NYSEG fuel supply chain. See NYSEG-14 at 16-18. Adverse impacts will be felt by NYSEG in the form of higher railcar costs, train delays, reduced efficiency in car repair and maintenance, and an effective reduction in coal source options for the Kintigh Station. Id.

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[4]See CSX/NS-18, Application, vol. 1 at 12, 13, 16, 18, 22-23, 74-75, 83.

B. NYSEG's Responsive Application Meets the Governing Criteria for Trackage Rights Relief

In determining whether a transaction such as the proposed division of Conrail is consistent with the public interest and thus worthy of approval under 49 U.S.C. §11324(c), the Board must balance the transaction's perceived public benefits against the potential for public harm.[5] Such harm may arise, inter alia, when as a result of the transaction the involved parties "gain sufficient market power to raise rates or reduce service (or both), and to do so profitably, relative to premerger levels." BN/SF Merger at 54. Where the Board finds that a transaction which generally may be considered in the public interest nonetheless threatens specific public harm in identifiable circumstances or markets, the Board is empowered to impose conditions on its approval designed to ameliorate the adverse public impacts. 49 U.S.C. §11324(c).

The Board's authority to impose conditions is broad,[6] and the governing criteria rather well-established. Conditions will be prescribed where it is shown that (1) absent a condition,

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[5]See Finance Docket No. 32760, Union Pacific Corp., Union Pacific R.R. Co., and Missouri Pacific R.R. Corp. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and The Denver and Rio Grande Western R.R. Co., Decision served August 12, 1996 ("UP/SP Merger") at 98; Finance Docket No. 32549, Burlington Northern Inc.-- Control and Merger -- Santa Fe Pacific Corp., Decision served August 23, 1995 ("BN/SF Merger") at 50-51; Missouri-Kansas-Texas R.R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980).

[6]See UP/SP Merger at 144; BN/SF Merger at 55.

the proposed consolidation will produce effects harmful to the public interest; (2) an appropriate condition will ameliorate or eliminate those harmful effects; (3) the condition contemplated is operationally feasible; and (4) the condition will yield public benefits outweighing any reduction in the benefits flowing from the consolidation.[7] New York submits that all four (4) criteria are satisfied by NYSEG's Responsive Application.

The evidence demonstrates that if a division of Conrail is accomplished in the manner proposed by CSX and NS, NYSEG will experience both an increase in coal transportation costs and a reduction in service quality. These impacts -- recognized as contrary to the public interest standard of 49 U.S.C. §11323(c)[8] -- will result directly from the transaction and will not be ameliorated naturally through the maturation of other perceived public benefits.

The trackage rights conditions sought by NYSEG, however, will meaningfully redress the foregoing harms. The loss of bargaining leverage resulting from a split of NYSEG's coal volume between CSX and NS would be offset by new leverage arising from intramodal competition between the two (2) carriers, for at least 1,700,000 tons of NYSEG's annual shipments. Likewise, the adverse consequences for service quality would be ameliorated -- at least in part -- by the conditions' restoring same carrier service to all four (4) NYSEG stations. See NYSEG-14 at 7, 34.

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[7]UP/SP Merger at 144; BN/SF Merger at 55-56.

[8]See, e.g., BN/SF Merger at 54.

The trackage rights relief requested by NYSEG is operationally feasible. The Applicants themselves already propose to have NS exercise trackage rights over the line between Buffalo and Niagara, NY, which would be assigned to CSX. NYSEG's first alternative (NS trackage rights to the Kintigh Station) merely would extend these rights by 11.2 miles over a relatively light density line. The prevalence of trackage rights both within the Applicants' own transaction and proposed operating plan, and as a standard form of Board-prescribed conditions relief in rail consolidations,[9] persuasively argues for the feasibility of NYSEG's remedy.

Finally, the relief requested by NYSEG would in no way detract from the perceived public benefits of the subject transaction. NS trackage rights to Kintigh Station at most would place 1,700,000 tons of coal at risk of diversion, an infinitesimal share of CSX's overall coal traffic base. Even so, the ability to exploit market power over a destination to raise rates and/or reduce service is not a public benefit worthy of protection. See, e.g. UP/CNW Merger at 53. Likewise, inefficiencies and service quality reductions (the other impact that would be corrected by the conditions) are considered public harms to be avoided or remediated, not public benefits. Cf. BN/SF Merger at 54; 49 U.S.C. §11324(b)(1).

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[9] See, e.g. UP/SP Merger at 132-146; 49 C.F.R. Parts 1180.1(d), 1180.3.

CONCLUSION

For all the reasons set forth herein and in NYSEG-14, New York supports NYSEG's Responsive Application, and urges that it be granted.

Respectfully submitted,

THE STATE OF NEW YORK BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION

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Dated: December 15, 1997

CERTIFICATE OF SERVICE

I certify that I have this 15th day of December, 1997, served copies of the foregoing Comments of the State of New York on the Responsive Application of New York State Electric and Gas Corporation (NYS-18) to be served by hand upon:

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and upon all other parties of record in this proceeding by first class United States mail, postage prepaid.

Kelvin J. Dowd