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February 23, 1998

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HAND DELIVERY

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

SUB 75

RE: STB 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 please find the original and 25 copies of the Brief of New England Central Railroad, Inc. Also enclosed is a 3.5 inch diskette containing the filing in WordPerfect 5.2.

Please time and date stamp the extra copy of the filing and return it with our messenger.

If you have any questions, please contact me.

Respectfully,

Karl Morell

Karl Morell
Attorney for:
NEW ENGLAND CENTRAL RAILROAD, INC.

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NECR-9

BEFORE THE

SURFACE TRANSPORTATION BOARD

STB 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

STB FINANCE DOCKET NO. 33388 (SUB-NO. 75)

NEW ENGLAND CENTRAL RAILROAD, INC.
--TRACKAGE RIGHTS--
CSX TRANSPORTATION, INC.

BRIEF OF NEW ENGLAND CENTRAL RAILROAD, INC.

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Dated: February 23, 1998

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NEW ENGLAND CENTRAL RAILROAD, INC.
--TRACKAGE RIGHTS--
CSX TRANSPORTATION, INC.

BRIEF OF
NEW ENGLAND CENTRAL RAILROAD, INC.

New England Central Railroad, Inc. ("NECR"), pursuant to Decision No. 12 in this proceeding and the Surface Transportation Board's ("STB" or "Board") Railroad Consolidation Procedures at 49 C.F.R. Part 1180, hereby submits its brief in support of NECR's Responsive Application. NECR respectfully submits that the Railroad Control Application ("Control Application") filed by CSX Corporation ("CSXC"), CSX Transportation, Inc. ("CSXT"), Norfolk Southern Corporation ("NSC"), Norfolk Southern Railway Company ("NSR"), Conrail

Inc. ("CRR"), and Consolidated Rail Corporation ("CRC")[1] (collectively referred to as the "Primary Applicants") should be denied unless the condition requested by NECR is approved.

SUMMARY OF ARGUMENTS

In its Responsive Application and Rebuttal filing, NECR demonstrated that the Primary Transaction, if approved without appropriate conditions, would eliminate essential services on the NECR rail system and significantly reduce competition in the New England area. Other parties participating in these proceedings echo these same concerns. NECR is not seeking to derail the Primary Transaction, rather it simply seeks the imposition of a modest condition that would have the dual beneficial effect of preserving essential services and ameliorating certain anticompetitive effects of the Primary Transaction in the New England region. CSXT, the carrier that stands to gain a stranglehold on the New England region, has to date steadfastly rejected efforts to accommodate the legitimate concerns in the New England area.

NECR stands to lose approximately $8 million, or nearly half of its annual gross revenues, as a result of traffic diversions to CSXT and NSR. Revenue losses of anywhere near this magnitude would have a dramatic and likely fatal impact on NECR. As a result, many NECR local shippers will lose essential rail service for which they have no feasible transportation alternative. In addition, Amtrak service over NECR's system will be jeopardized and other shortlines in New England that connect with NECR, as well as the shippers on those shortlines, will be harmed.

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[1] CSXC and CSXT are referred to collectively as CSX. NSC and NSR are referred to collectively as NS. CRR and CRC are referred to collectively as Conrail. In their Railroad Control Application filed on June 23, 1997, Primary Applicants seek Board approval for: (1) the acquisition by CSX and NS of control of Conrail; and (2) the division of the assets of Conrail by and between CSX and NS (hereinafter referred to as the "Primary Transaction").

Primary Applicants' response to NECR's evidence has been one of denial. They dispute NECR's diversion analysis and on rebuttal disavow their own study which projected traffic diversion for the NECR of $1.6 million annually. NECR's evidence conclusively demonstrates that it is Primary Applicants' diversion study, and not NECR's, that is fatally flawed as it pertains to NECR. Primary Applicants also allege that NECR provides no essential services. Yet their own evidence points to rail-dependent shippers on the NECR. The essential services performed by NECR are further confirmed by the State of Vermont which is deeply concerned over the prospect of losing critical rail freight and passenger service as a result of traffic diversions from NECR.

NECR's evidence also demonstrates that the Primary Transaction, if approved without appropriate conditions, will significantly reduce competition in the New England area. Snippers in New England that will be captive to CSXT will be competitively disadvantaged vis-à-vis their competitors in the nearby areas that are being opened to rail competition. New England shippers will also lose their current option of forwarding their traffic via CRC to either CSXT or NSR. CSXT, which will be a significantly more dominant carrier than CRC is today, will have the ability and strong economic motive to favor its own routes and disadvantage routings to the NSR.

Many other parties have similarly concluded that the Primary Transaction will have severe anticompetitive consequences for shippers and shortlines in New England. The Coalition of Northeastern Governors and the States of Connecticut, Rhode Island, Maine and New York, as well as other shortlines and shippers, have expressed their concerns over the loss of competition east of the Hudson River and seek competitive access by a neutral carrier to the New England market.

The trackage rights requested by NECR are uniquely designed to rectify both the loss of essential services in New England and the competitive harm that region will incur as a result of the Primary Transaction.

BACKGROUND

NECR is a Class III rail carrier operating over approximately 343 miles of line between East Alburg, Vermont and New London, Connecticut. NECR has 104 employees, 20 locomotives and a small fleet of railcars. NECR connects with the Canadian National Railway Company (CN) at East Alburg, Vermont; Vermont Railway, Inc., at Burlington, Vermont; Washington County Railroad Corp., at Montpelier Jct., Vermont; the Guilford Rail System at White River Jct., and Brattleboro, Vermont; Green Mountain Railroad Corp., at Bellows Falls, Vermont; Claremont Concord Railroad Corp., at Claremont Jct., New Hampshire; CRC and Massachusetts Central Railroad Corp., at Palmer, Massachusetts; and the Providence and Worcester Railroad Company at London, Connecticut. Carlstrom V.S. at 2, NECR-4.

NECR began operations in February 1995 and has grown at a steady rate of about 10 percent a year. NECR operates with two-man crews and has made numerous operational changes that have improved its operating efficiency. By increasing carloadings and reducing operating expenses, NECR reduced its operating ratio from 80 percent in 1996, to about 76 percent in 1997. *Id.* at 2-3, 5.

There are approximately 75 active rail customers located on the NECR. It currently operates 12 trains daily and handles approximately 34,000 carloads a year. Gross revenues for 1997 were projected at $16.8 million. While NECR enjoys a diverse commodity base, nearly 50 percent of its traffic consists of forest products moving mainly to distribution centers. These distribution centers, in turn, serve customers in nearby states by truck. Approximately 25 percent of NECR's traffic consists of bridge traffic handled between the connecting shortlines and Class I railroads that use NECR as a bridge carrier. *Id.* at 3-4.

The lifeblood of the NECR system is its connections with other rail carriers. These connections are also beneficial to the other shortlines in the region and customers located on those carriers' lines. The NECR connects with seven shortlines in New England and it works with them on a daily basis to jointly market their respective rail systems. Because of NECR's competitive connections, bridge traffic represents its best growth potential. NECR has also been able to increase traffic moving to the distribution centers because of its competitive connections. *Id.* at 4-5.

The vast majority of NECR's on-line customers are captive to the NECR and have no other direct rail service options. For example, there are a number of distribution centers located on the NECR in Vermont, Massachusetts and Connecticut which receive forest products by rail from as far away as western Canada and the northwestern region of the United States. *Id.* at 4.

TRACKAGE RIGHTS REQUESTED BY NECR

In its Responsive Application, NECR requested the Board to condition the approval of the Primary Transaction by granting NECR limited trackage rights[2] between Palmer, Massachusetts and the New Jersey/New York Shared Assets Area as follows:

1. <u>Palmer - West Springfield</u>
   Between Palmer, Massachusetts and West Springfield, Massachusetts over the rail line currently owned and operated by CRC and to be acquired and operated by CSXT.

2. <u>West Springfield - Albany</u>
   Between West Springfield, Massachusetts and Albany,[3] New York over the rail line currently owned and operated by CRC and to be acquired and operated by CSXT.

3. <u>Albany - New Jersey/New York Shared Assets Area</u>
   Between Albany, New York and the New Jersey/New York Shared Assets Area[4] over the rail line located on the west side of the Hudson River currently owned and operated by CRC and to be acquired and operated by CSXT.

GOVERNING LEGAL STANDARD

Under 49 U.S.C. § 11324 (c), the Board shall approve a transaction when it finds the transaction consistent with the public interest.[5] In applying the statutory "public interest" standard, the Board must balance the benefits applicants and the public will derive from the

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[2] The term "limited" trackage rights includes the right to interchange with all carriers at all junctions on the lines. Specifically, NECR seeks to connect with the Connecticut Southern Railroad, Inc., at West Springfield, Massachusetts, and with the Housatonic Railroad Company, Inc., at Pittsfield, Massachusetts.

[3] The requested right to serve Albany includes the right to serve Albany, Selkirk and Mechanicville, New York for the purpose of interchange with connection carriers. The Delaware and Hudson Railway Company, Inc. ("D&H"), the Guilford Rail System ("Guilford"), and NSR (through a proposed haulage arrangement with the D&H) have interchange facilities at those locations.

[4] If NECR's condition is granted, NECR will negotiate with Primary Applicants as to the precise yard or yards in the New Jersey/New York Shared Assets Area that can be used by NECR to interchange traffic.

[5] The "single and essential standard of approval is that the (Board) find the (transaction) to be consistent with the public interest." *Missouri-Kansas-Texas R. Co. v. United States*, 632 F. 2d 392, 395 (5th Cir. 1980), *cert denied*, 451 U.S. 1017 (1981).

transaction against the potential competitive harm. Finance Docket No. 32760, *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL CORP., and the Denver and Rio Grande Western Railroad Company,* Decision No. 44 (slip op. at 98-99, served August 12, 1996) *("UP/SP").*[6]

In determining whether a proposed transaction involving two or more Class I railroads is consistent with the public interest, the Board is directed to consider, at a minimum, the following five factors:

> (1) the effect of the proposed transaction on the adequacy of transportation to the public;
>
> (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction;
>
> (3) the total fixed charges that result from the proposed transaction;
>
> (4) the interest of rail carrier employees affected by the proposed transaction; and
>
> (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.[7]

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[6] The Board's general policy statement on rail consolidations provides, in pertinent part, that:

> In determining whether a transaction is in the public interest, the (Board) performs a balancing test. It weighs the potential benefits to applicants and the public against the potential harm to the public.

49 C. F. R. § 1180.1 (c).

[7] Subsection (5) was added by the Staggers Rail Act of 1980 (Public Law 96-448) and was amended by the ICC Termination Act of 1995 (Public Law 104-88) to require the Board to consider adverse impacts upon competition "in the national rail system". This subsection was originally enacted to statutorily obligate the Board's predecessor to analyze the loss of rail competition in relevant regional markets. As explained by the sponsor of the subsection:

> I am offering an amendment...to specifically direct the Interstate Commerce Commission to consider the question of rail competition whenever making a determination of a railroad

49 U.S.C. § 11324 (b).

The first and last of these factors are relevant to NECR's Responsive Application.

Section 11324 (b)(1) requires the Board to examine the public benefits that will result from the transaction. The Board has defined public benefits "as efficiency gains such as cost reductions, cost savings, and service improvements...(that) in varying degrees...are passed on to most shippers as reduced rates and/or improved services." *UP/SP* at 99. Benefits that accrue to the applicants as a result of increased market power, however, "are exclusively private benefits that detract from any public benefits associated with a control transaction." *Id.*

Section 11324 (b)(5) requires the Board to assess the effects of the transaction on competition. The Staggers Act increased the need for more careful scrutiny of anticompetitive effects of merger transactions. As the Board's predecessor noted:

> The new (Rail Transportation Policy) favoring increased reliance on competition to regulate activities will govern the environment in which the new system will operate. The ability of the railroads to take various actions free of regulatory restraints will make it easier to exert or abuse market power gained as a result of consolidation. For these reasons we must take even greater care to identify harmful competitive effects and to mitigate those effects where possible.

Union Pacific - Control - Missouri Pacific; Western Pacific, 366 I.C.C. 459, 502 (1982) (*"UP/MP/WP"*).

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merger transaction.

The escalation of rail mergers now taking place in the industry is causing concern among our Nation's farmers and ranchers was well as other shippers. The Interstate Commerce Commission is facing decision on several mergers that would have the effect of eliminating or nearly eliminating rail competition within entire sections of the country. I think it is important, therefore, that the ICC consider the question of competition as a regular part of the process of evaluating whether to allow mergers.

126 Cong. Rec. H8604 (September 9, 1980); Remarks of Congressman Panetta.

The Board considers two types of potential harm that may result from a proposed consolidation transaction: reduction of competition and harm to essential services. 49 C.F.R. § 1180.1 (c) (2).

The Board is concerned not only with the possible "elimination" of competition by consolidations, but also with any significant "lessening" or "reduction" in competition. *Railroad Consolidation Procedures*, 363 I.C.C. 784, 786-87 (1981). "Competitive harm results from a merger to the extent the merging parties gain sufficient market power to raise rates or reduce service (or both), and to do so profitably, relative to premerger levels." *UP/SP* at 100. Whenever possible, the Board attempts to ameliorate competitive harm by imposing conditions on the approval of the transaction. *Id.*

In determining whether a proposed transaction will result in competitive harm, the Board looks to the affected market. The affected market has two dimensions: product and geographic. *Rio Grand Industries, et al. - Control - SPT Co., et al.*, 4 I. C. C. 2d 834, 885 (1988) ("*RGI/SPT*"). The product sold by railroads is the transportation of freight. *Id.* at 886; *Rio Grande Ind., Inc. -- Pur. & Track. -- Soo Line R. Co.*, 6 I. C. C. 2d 854, 878 (1990) ("*RGI/SOO*"). The Board considers alternative rail service and, where relevant, intermodal options. *RGI/SOO* at 886-87; *Union Pacific Corp. et al. - Cont. - MO-KS-TX CO. et al.*, 4 I. C. C. 2d 409, 433-35 (1988) ("*UP/MKT*"). In past merger cases, neither the Board nor its predecessor has applied a fixed definition of the relevant market. Instead, they have examined the specific circumstances in each case to determine if the relevant market should be confined to rail transportation or enlarged to include other transportation modes. *See* Finance Docket No. 32133, *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific*

Railroad Company -- Control -- Chicago and North Western Transportation Company and Chicago and North Western Railway Company, Decision No. 25 (slip op. 57, served March 7, 1995); *UP/MKT* at 433-34.

The area in which providers of a particular product operate is the relevant geographic market. The area may be as small as a city or as large as the entire country. *RGI/SPT* at 887. The Board's predecessor noted that " the distinctions between product and geographic markets are not as clear in transportation as they are in other industries, for carriers, in particular railroads, effectively sell their geography." *UP/MP/WP* at 505, n 28. Accordingly, the determinations of the relevant product market and the relevant geographic market in a particular case will necessarily be interrelated. The Board's predecessor has analyzed traffic flows between city pairs, as well as traffic flows in rail corridors, and at specific points in the area in which the merging rail carriers operate. *UP/MKT* at 437.

The Board also considers whether a proposed transaction affects essential services. The Board's focus is on the preservation of essential services and not on the survival of any particular carrier. 49 C.F.R. § 1180.1 (c) (2) (ii). *See alsoUP/MKT* at 431. The Board uses a two-step analysis in determining whether a proposed transaction will harm essential services. *UP/MP/WP* at 546. First, the Board considers whether any affected carrier faces financial losses on a particular line that would reduce its operational viability. *See Guilford Transportation - Control - B&M, et al.*, 5 I. C. C. 2d 202, 215 (1988). Second, the Board considers whether the rail line suffering the losses provides essential service. *UP/MP/WP* at 546. A service is considered essential "if there is a sufficient public need for the service and adequate alternative transportation is not available." 49 C.F.R. § 1180.1 (c) (2) (ii).

The Board has broad authority to impose conditions on its approval of a consolidation transaction in order to ensure that the public interest standard is met. 49 U.S.C. § 11324 (c). *UP/MP/WP* at 562. In determining whether conditions are warranted, the Board's "overriding concern is the public interest." *Id.* The Board can impose conditions to remedy new problems created by the transaction or preexisting problems that will be exacerbated by the transaction.

Public interest conditions will be imposed to ameliorate anticompetitive consequences of a proposed transaction if the conditions: (i) are operationally feasible; (ii) ameliorate or eliminate the harm threatened by the transaction; and (iii) are of greater benefit to the public than they are detrimental to the transaction. *UP/MP/WP* at 564.

A condition to protect a carrier when the transaction affects essential service on the carrier's rail lines is imposed upon a showing that the condition: (i) is related to the impact of the consolidation; (ii) is designed to enable shippers to receive adequate service; (iii) would not pose unreasonable operating or other problems for the consolidated carrier; and (iv) would not frustrate the ability of the consolidated carrier to obtain the anticipated public benefits. 49 C.F.R. § 1180.1 (d) (1).

THE TRACKAGE RIGHTS REQUESTED BY NECR SHOULD BE GRANTED

Approval of the Primary Transaction, without appropriate conditions, will cause a loss of essential services on the NECR rail system and significantly reduce competition for rail shippers and shortlines in New England. The condition requested by NECR is uniquely designed to ameliorate both of these competitive harms: NECR will be able to preserve service to its on-line customers that are dependent on rail service and remedy the loss of competition in New England.

Furthermore, the trackage rights NECR requests meet the Board's criteria for imposing conditions to preserve essential services and to protect the public from competitive harm.

THE PRIMARY TRANSACTION WILL LIKELY BE FATAL TO NECR AND DEPRIVE ITS ON-LINE SHIPPERS OF ESSENTIAL RAIL SERVICES

NECR stands to lose $8 million in annual gross revenues if the Primary Transaction is approved without the condition requested by NECR. The loss of nearly half of its revenues would have a drastic and likely fatal effect on NECR. NECR would be forced dramatically to reduce costs by curtailing service and maintenance over its entire system and increasing rates for its remaining shippers. These cost-saving measures will undoubtedly lead to further traffic losses, forcing NECR to take even more drastic steps to stop the hemorrhaging losses. If NECR is unable to survive, many of its shippers would lose essential rail service because they have no economic transportation alternatives. NECR's financial losses would also jeopardize Amtrak's passenger service between New London, Connecticut, and the Canadian border and significantly impact the shortlines that connect with NECR and those shortlines' customers.

In the Control Application, Primary Applicants estimate that CSXT and NSR would divert $1.6 million in revenues annually from NECR if the Primary Transaction is consummated. *See* CSX/NS-18 at 82. In its Responsive Application and Rebuttal filing, NECR demonstrated that Primary Applicants' diversion analysis is flawed and significantly underprojected that actual traffic losses for the NECR. *See* Carlstrom V.S. at 4-5, NECR-4; Carlstrom R.V.S. at 2-4 and Sullivan R.V.S. at 2-5, NECR-8.

Mr. Carlstrom performed a traffic study of the likely impacts of the Primary Transaction on NECR's traffic and revenues. At the time NECR's Responsive Application was filed, he estimated that NECR's gross revenues for 1997 would be $16.8 million. Based on NECR's then just completed 1998 business plan, Mr. Carlstrom conducted a shipper-by-shipper analysis of all traffic handled by NECR that would likely be diverted as a result of the Primary Transaction. Mr. Carlstrom concluded that almost $8 million in gross revenues, or nearly 50 percent of NECR's total revenues, is subject to diversion. A summary of the divertible traffic from Mr. Carlstrom's study, including the shipper, the commodity handled, the rate per car received by NECR, and the total projected carloads and revenues for 1998, is set forth at CSX/NS-177 Vol. 2B at HC-364.

Based on these estimated revenue losses, Mr. Carlstrom conducted a financial analysis of the impact of the Primary Transaction on NECR. He concluded that NECR could not withstand anywhere near these losses and that NECR would immediately have to undertake drastic cost-cutting measures. In order to initially survive, Mr. Carlstrom estimated that NECR would need to offset nearly $7 million of these losses by reducing costs and increasing rates on the remaining traffic. In his view, however, any service reductions and rate increases of this magnitude would have a downward spiraling effect, producing additional traffic losses and forcing even more drastic cost-cutting measures ultimately forcing NECR and its rail-dependent customers out of business altogether.[8]

Mr. Carlstrom's concern over the downward spiraling effect of the projected traffic losses is confirmed extensively in economic literature and recognized by the Board's predecessor. It is

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[8] The rail system NECR acquired in 1995 had been unprofitable for many years. Between 1984 and 1993, NECR's predecessor reported positive income in only one year and accumulated a total of $17 million in operating losses. Finance Docket No. 32432, *New England Central Railroad, Inc. -- Acquisition and Operation Exemption -- Lines Between East Alburgh, VT and New London, CT* (not printed) slip op. at 15, served December 9, 1994 ("*New England Central*").

almost universally accepted that the rail industry exhibits substantial economies of density.[9] Consequently, as a railroad's traffic volume declines, its unit cost increases. Economies of density arise, in part, from the fact that railroads have relatively high fixed costs. As these costs are spread over a declining amount of traffic, the unit cost of providing service increases. While unit variable cost generally varies inversely with traffic volumes, the changes are not necessarily immediate or proportional with changes in traffic volume. The NECR is essentially a single north-south rail line with both termini critical to its survival. A significant amount of NECR's traffic moves over virtually the entire system. NECR, therefore, cannot abandon any discrete section of its mainline without financially jeopardizing the remaining system. Consequently, NECR would still have to run trains with two-man crews over its entire system, only with less cars per train. The major cost savings NECR could immediately achieve, such as eliminating all maintenance expenditures, would ultimately be counterproductive. Moreover, NECR's major expense, paying principal and interest on the $39 million acquisition cost[10] of the rail system in 1995, cannot be avoided.

The $8 million revenue losses projected by Mr. Carlstrom are a result of direct traffic diversions from NECR to CSXT and NSR. The offsetting measures NECR would be forced to take would produce further traffic losses. As NECR's unit cost increases, it would no longer be competitive for traffic that can move by truck. With the loss of the truck competitive traffic, NECR's unit cost would further increase. Ultimately, the combination of forced service

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[9] *Coal Rate Guidelines - Nationwide,* 1 I.C.C. 2d 520, 531 (1985); Ernst R. Berndt, Ann F. Friedlaender, Judy-Er Wang Chiang, and Christopher A. Vellturo, *Cost Effects of Mergers and Deregulation in the U.S. Rail Industry,* 4 The Journal of Productivity Analysis 127 (1993); A. Barbera, C.M. Grimm, K.A. Philli[illegible] nd L.J. Selzer, *Railroad Cost Structure-Revisited,* Journal of the Transportation Research Forum, Vol. 28, No. [illegible] (1987).

[10] *See New England Central* at 5.

reductions and increased rates would render NECR's remaining rail-dependent customers non-competitive and force them out of business.

Primary Applicants' main response to NECR's "loss of essential services" showing is to dispute Mr. Carlstrom's diversion analysis. CSX/NS-176 at 377-79[11]. In fact, in their Rebuttal, Primary Applicants contend that their own $1.6 million estimate may be overstated because of assumptions used in their underlying study. *Id.* at 378. In their Rebuttal Verified Statements, Messrs. Carlstrom and Sullivan respond to Primary Applicants' criticisms and demonstrate that it is Primary Applicants' diversion study, and not NECR's, that is fatally flawed as it pertains to NECR.

Mechanical diversion studies, such as those performed by Primary Applicants, have inherent limitations that could not possibly identify most of the traffic NECR stands to lose.[12] The default assumption in Primary Applicants' study was that any railroad serving a station assigned to a six-digit standard point location code ("SPLC") has access to all shippers and consignees assigned to that SPLC. CSX/NS-19 at 158. In other words, Primary Applicants' study would only capture traffic moving to SPLC's jointly served by NECR and either CSXT or

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[11] Primary Applicants' Witness, Mr. Rosen, complains that he was unable to substantiate the projected traffic losses because NECR allegedly did not provide Primary Applicants all of the traffic and revenue information requested in discovery. As Mr. Carlstrom explained, however, NECR produced over 800 pages of documents. The documents included, among other detailed traffic and financial information, income and expense statements showing carloads and revenues for 1995, 1996 and the first ten months of 1997; NECR's 1996 business plan showing carloads and revenues for each of NECR's customers by commodity that year. Carlstrom R.V.S. at 2-3, NECR-8.

[12] The Vice President of Corporate Development of CSXT acknowledged the limitations of Primary Applicants' diversion analysis with respect to small carriers such as NECR:

> As the Board knows, there are inherent limitations in using the waybill sample when assessing the diversion impacts of a transaction on small carriers. This limitation is a "small numbers" problem. Depending how many and which records are captured in the waybill sample, the diversion impacts predicted by the ALK diversion model can be significantly overstated or understated.

CSX/NS-19 at 150.

NSR post-Transaction. Their study also assumes that the traffic moved or will move over a CRC route. *Id.* at 160-61. Yet, most of the traffic that NECR identified as divertible moves by rail to distribution centers on the NECR for ultimate delivery by truck to SPLC's that CSXT and NSR will gain access to as a result of the Primary Transaction. CRC does not participate in most of the traffic NECR deems divertible. Since this traffic is transloaded on the NECR, and since NECR does not serve the ultimate destination, Primary Applicants' study could not possibly have identified this traffic as divertible.

The traffic captured in Mr. Carlstrom's diversion study consists of lumber and forest products currently handled by NECR. About 50 percent of NECR's carloads are forest products moving primarily to customers that utilize warehouse/transload operations on the NECR where the products are temporarily stored for further movement by truck. These distribution centers serve markets throughout the northeast. CSXT and NSR currently serve producers of forest products in the southeast United States. Post-Transaction, CSXT and NSR will be able to use their significantly enhanced market power to the northeast to displace forest products currently moving via the NECR.

According to Mr. Sullivan, NECR traffic moving to two of its customers in Belchertown, Massachusetts, is highly susceptible to immediate diversion by Primary Applicants. Both of these customers receive over 1,100 carloads annually of southern yellow pine lumber originating on CSXT and NSR lines in the Southeast. Post-Transaction, CSXT and NSR will be able to provide single-line service to the northeast markets served by these companies. This will enable CSXT and NSR to attract this business through new facilities established on their lines by offering lower freight prices or price incentives. Sullivan R.V.S. at 2-3, NECR-8.

A significant portion of NECR's forest product traffic originates in western Canada and the northwest region of the United States and moves in joint-line or multi-line rail service to distribution centers on the NECR. Post-Transaction, these distribution centers will no longer be able to compete with transload facilities on CSXT's and NSR's nearby lines, which will enjoy single-line rail service from the Southeast. In addition, CSXT and NSR have recently negotiated agreements with CN and CP Rail System ("CP") which will enable CSXT and NSR to redirect traffic moving to or over the NECR. For example, the CP line between Rouses Point and Albany, New York, operates in direct competition with the NECR system. The agreement between CP and NSR reportedly provides CP access to the New Jersey/New York Shared Assets Area and will increase the likelihood of NECR losing forest product traffic originating in Canada.[13] This traffic could also not have been captured in Primary Applicants' diversion study since the arrangements with the Canadian carriers were not reached until after the study was prepared. In light of these recent arrangements, NECR's own traffic diversion study may be understated.

A limited amount of the forest product traffic handled by NECR is ultimately consumed in New England. Even this traffic is subject to diversion. The distribution centers on CSXT's and NSR's nearby lines would be able to penetrate the New England market just as NECR's customers currently penetrate markets throughout the northeast. The distribution centers on the NECR, however, will be at a distinct disadvantage because their competitors will enjoy single-

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[13] The CP press release announcing the settlement stated that "railway customers located in New Jersey, the Buffalo/Niagara area, the greater Philadelphia area and those located in a number of other smaller geographic areas in the Northeast will receive effective commercial access to and from (CP) markets.... The CSX settlement also provides shippers in the New York City and Long Island areas with effective access to the (CP) for movement of traffic currently handled by trucks" CP Press Release dated October 21, 1997.

line rail service from many locations as opposed to joint-line CSXT-NECR or CN-NECR service. As explained by Mr. Sullivan, transload operations tend to handle products from a broad range of market origins. As a result, CSXT and NSR can use low single-line pricing from the Southeast as leverage to divert NECR's Canadian traffic to a consolidation point served by CSXT or NSR.

NECR's diversion analysis is essentially confirmed by Primary Applicants' own testimony in these proceedings. For example, Mr. Kalt testified that as a result of the Primary Transaction "paper producers in the Southeast will have access to new markets for their paper products...." CSX/NS-19 at 42. Mr. Rosen projected that CSXT will gain $111,456,000 in revenues from increased pulp and paper traffic and $41,536,000 in revenues from increased lumber and wood products traffic as a result of the Primary Transaction. *Id.* at 175. Mr. Anderson, in claiming that the Primary Transaction will result in a more efficient CSXT rail network, noted that CSXT's current "dependence on interline service seriously curtails, and in some cases even precludes, (CSXT's) ability to link together important market segments...." He explained that the "[n]ew single-line service and more efficient routes will mean better service for existing customers and will enable (CSXT) to attract new customers...and give (CSXT) customers access to new markets." After noting that "the most prominent network efficiency is the creation of new single-line routes between points in the Northeast...and points in the South", Mr. Anderson stated that "[s]ingle-line access to New Jersey, New York and New England will facilitate the efficient movement of some of (CSXT's) most important commodity flows to and from the South, including...lumber (and) paper products...." *Id.* at 279-82.

If NECR is forced to significantly reduce service or go out of business altogether, most of its customers would lose essential rail service. As explained by Mr. Carlstrom, "[t]he vast majority of (NECR's) on-line customers are captive to NECR and have no other direct rail service options. While (NECR's) main competition is trucks, motor carrier service would not be a practical or economic long-term transportation service alternative for most of (NECR's) customers." Carlstrom V.S., at 4, NECR-4. In addition to its forest product traffic, NECR handles a diverse range of commodities such as coal, cement, corn, grain products, limestone, concrete, and railway equipment, many of which are not economically or efficiently handled by truck over considerable distances.

While Primary Applicants at one point allege that NECR does not provide essential services, at another point they directly support NECR's very claims. In attempting to demonstrate that NECR could not profitably abandon any of its main line, a point which NECR does not dispute, Primary Applicants identify two of NECR's largest rail-dependent customers. Located at the southernmost point of the NECR rail system are Phelps Dodge, which receives shipments of copper, and AES Thames Co., which ships flyash from its cogeneration facility. CSX/NS-177 at 325. Neither of these customers has alternative rail service and their traffic cannot economically be handled by trucks, a fact which Primary Applicants do not dispute.

The "essential services" performed by NECR is further confirmed by the State of Vermont ("Vermont") in its filing (VT-5) supporting the Responsive Application of NECR. Vermont explains that, for more than a decade, it has been involved in preserving rail freight and passenger service along the rail line that now constitutes the NECR system. Vermont specifically points out that NECR's projected financial losses transcend the immediate pecuniary interests of NECR and its employees and implicate the following broader public interest concerns:

> (1) the possibility that NECR may no longer be able to make available to Amtrak at reasonable cost FRA class 3 track between Palmer, MA and St. Albans, VT for passenger train service; (2) the possibility that NECR may no longer be able to provide interchange access to Vermont short line railroads at Bellows Falls, Montpelier Junction and Burlington, VT; (3) increased highway maintenance costs to Vermont should NECR rail freight traffic be diverted to the Vermont highways (Interstates 91 and 89) that parallel much of the NECR main line; and (4) erosion of the competitive position of Vermont businesses that would lose access to quality rail freight service should NECR fail.

VT-5 at 3.

In elaborating on these concerns, Vermont Witness Karen E. Songhurst, the Transportation Rail Program Administrator for Vermont, explains that NECR could not continue to make class 3 track available to Amtrak at present rates if NECR experienced a significant erosion of its freight traffic base as a result of the Primary Transaction. She also expresses concern for the Vermont shortlines that would lose their current access via NECR to the national rail network. For example, the Washington County Railroad's ("WCR") sole connection is with the NECR. The major customer of the WCR is the Bombardier rail passenger car assembly plant in Barre, Vermont, a rail-dependent company that is a significant source of manufacturing employment in central Vermont. Songhurst V.S. at 3-4, VT-5. Ms. Songhurst concludes by noting the risks to Vermont businesses from a loss of NECR rail service:

> Because of Vermont's geographical position in the northeastern corner of the United States, transportation costs are more burdensome to many Vermont businesses than to competitors in more central locations. Historically, Vermont rail users have benefited from the fact that NECR and its predecessors were largely supported by traffic moving between Canada and points in southern New England and the Mid-Atlantic states. If, as Mr. Carlstrom predicts, a significant amount of this traffic is lost to

> NECR as the result of the Primary (Transaction), NECR may be unable to sustain the critical mass of traffic necessary to support its operations through Vermont. The loss of rail freight service along this corridor would be harmful to the public interest not only because of the diversion of truck traffic to the highway system...but also because many Vermont businesses would lose access to the competitive rail freight service enjoyed by their competitors in other parts of the nation.

Id. at 5.

NECR is aware that in the past decade and a half the Board and its predecessor have focused on the preservation of essential services and not on the survival of carriers. Even though NECR believes that it has fully met the Board's "essential service" standard, NECR nevertheless urges the Board to give heightened attention to the plight of small railroads in the current environment. Given the ever diminishing number of Class I railroads and the concentration of market power, in NECR's view it is incumbent on the Board to broaden its analytical perspective to consider the survival of small carriers, as well as the survival of the shippers that rely on their service. It is well established that an agency "faced with new developments or in reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice." *American Trucking Ass'ns v. Atchison Topeka & Santa Fe Ry*, 387 U.S. 397, 416 (1967).

THE PRIMARY TRANSACTION WILL REDUCE COMPETITION IN NEW ENGLAND

Primary Applicants claim that the Primary Transaction will erase the commercial boundary line separating CRC from the rest of the rail network and establish competitive rail service to many areas in the northeast. The New England area, however, has either been forgotten by Primary Applicants or unilaterally excluded to the competitive disadvantage of shippers and shortlines in this region. While Primary Applicants may have erased some commercial boundary lines, they have erected a new competitive wall along the Hudson River, separating customers in New England from the rest of the northeast.

New England today is served by only one Class I railroad: CRC. On Rebuttal, Primary Applicants contend that the Primary Transaction will not disadvantage shippers or shortlines in New England because CSXT is simply stepping into the shoes of CRC and thus maintaining the status quo. The substitution of CSXT for CRC, however, will competitively disadvantage shippers and shortlines in the New England area in at least two fundamental respects. First, shippers captive to CRC in New England will be competitively disadvantaged vis-à-vis their competitors located in areas that will be opened to rail competition. Primary Applicants readily admit and frequently tout the fact that shippers gaining new rail competition will benefit from reduced rates and improved service. Second, CSXT will be a much larger and eminently more dominant carrier than CRC is today. For shippers in New England that currently have the option of forwarding their traffic to either the CSXT or NSR rail system, CRC offers a neutral or indifferent gateway service. These shippers today are able to bargain with CSXT and NSR for better rate and service options. If the Primary Transaction is approved without appropriate conditions, CSXT will have a strong economic incentive to favor its own routes by raising rates or reducing service for any traffic moving to the NSR destinations.

The condition sought by NECR would go a long way to resolving the economic disadvantages New England shippers and shortlines would suffer under the Primary Transaction. The requested trackage rights would enable NECR to offer New England shippers and shortlines alternative access to Class I carriers in the Albany area and in the New Jersey/New York Shared Assets Area.

Other parties to these proceedings have confirmed that the Primary Transaction will significantly reduce competition in the New England area. For example, the Coalition of Northeastern Governors ("CNEG") urges the Board to impose appropriate conditions to preserve competition in New England. CNEG notes that the Primary Transaction will not simply result in the replacement of one Class I carrier with another in New England because CSXT "is a much stronger entity than (CRC) in every respect. To the extent that relative economic strength and leverage between a rail carrier and its customers is a factor in dictating the quality of service and level of rates, (CSXT) will be a much more formidable participant than (CRC)." CNEG-5 at 12-13. CNEG is also concerned that shippers in non-competitive areas such as New England "will be handicapped in their attempts to compete with shippers in the competitive areas." *Id.* at 11. CNEG notes that CSXT will have no effective competition in New England and that "the economics of the marketplace suggest that (CSXT) will be able to preserve or increase its margins in order to offset the lower profitability of traffic in the competitive areas." *Id.*

The State of Connecticut echoes these same concerns:

> [A]pproval of the Primary Application in an unconditional form will place Connecticut, and other New England states, at a competitive disadvantage.
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> **********
>
> The Hudson River appears to have become a natural border between competitive and non-competitive rail service regions....
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> **********
>
> It is not unlikely that (CSXT's) monopoly in the New England markets could result in a disproportionate increase (in rates) in ... New England to offset competitive (rates) that (CSXT) will be compelled to offer in regions where direct competition with (NSR) exists.

Comments and Request for Conditions of Connecticut Department of Transportation, dated October 17, 1997, at 1-2.

The State of Rhode Island seeks the imposition of conditions to remedy the competitive imbalance that the Primary Transaction will produce for shippers in New England. Rhode Island maintains that New England shippers and the public interest will suffer from the lack of competition that the nearby areas will enjoy and urges the Board to take corrective actions:

> ...the application before the Board offers no compelling basis for the selective restoration of two rail carrier competition to certain markets and the continuation of the monopoly in other markets. We believe that the determination of the public interest in this matter is better served by the STB, a government agency appointed by elected officials, than two private companies whose main concern in this transaction is the assurance of their own maximum profitability.

Comments and Request for Conditions by the Rhode Island Department of Transportation, dated October 21, 1997, at sheet 4.

Like other New England states, the State of Maine is concerned that the proposed carve-up of CRC will lead to increased transportation rates in New England in general and in Maine in particular. To remedy this threatened harm, the State of Maine seeks common access by a neutral carrier to the New England market. Comments, Protests and Request for Conditions by State of Maine Department of Transportation, dated October 20, 1997.

The State of New York concurs in NECR's evaluation of the adverse competitive impacts of the Primary Transaction east of the Hudson River and specifically supports NECR's Responsive Application. *See* NYS-19. In its Comments, New York explained how the Primary Applicants' plan to allow rail competition to develop west of the Hudson River, while leaving areas east of the River beholden to CSXT, would place shippers and receivers in those areas at a severe competitive disadvantage vis-à-vis their west side counterparts. *See* NYS-10, Argument at 13-20. While the focus of New York is on the eastern areas of that State, and NECR's focus is on New England in general, New York and NECR share a commonality of interests: extending similar benefits of intramodal rail competition to shippers and shortlines east of the Hudson River that CSXT and NSR propose to confer on shippers west of the Hudson River. To that end, NECR also supports the Joint Responsive Application (NYS-11/NYC-10) of New York. *See* NECR-7.

The Housatonic Railroad Company, I· c. ("HRRC"), also supports NECR's Responsive Application because of its concern over the loss of CRC as a neutral gateway carrier and expected harm to HRRC and others as a result of the competitive wall Primary Applicants have erected at the Hudson River. As HRRC explains:

> Currently, (CRC) serves as a neutral intermediate carrier between HRRC and other class 1 rail carriers...and to regional carriers.... If the Transaction is approved as proposed by Applicants, (CSXT) will replace (CRC), and HRRC will interchange its interline traffic with (CSXT).... However, (CSXT) will no longer serve as a neutral intermediate carrier since it directly competes with (NSR) and other carriers.... (CSXT) will naturally favor traffic movements to and from (CSXT) stations over traffic movements to stations of other carriers. As a result, HRRC and its shippers will be harmed by a reduction in competitive alternatives.

HRRC-12 at 4-5.

As the above summary of evidence demonstrates, shippers in New England have enjoyed a competitive equilibrium with competitors west of the Hudson River for rail access via CRC to other railroad junctions for traffic moving throughout the country. As a result of Primary Applicants' private agreement, serious competitive imbalances will be created. Shippers west of the Hudson in the shared assets areas will gain rail competition, whereas shippers east of the

Hudson will be captive to a more dominant Class I carrier. The shippers gaining new competition will benefit from reduced rates and improved service. In order to offset the revenues lost to competition in the shared assets areas, CSXT will undoubtedly raise rates for shippers in captive areas such as New England.

In the recent past, the Board and its predecessor have declined to impose conditions to protect shippers who will be disadvantaged because their competitors will achieve gains as a result of a merger. In Primary Applicants' own words, however, this Transaction is "unique in the history of rail combinations" by introducing "new rail competition into large portions of the Northeast...." CSX/NS-176 at 13. It is because of the uniqueness of this Transaction that NECR urges the Board to revisit its policy of not protecting shippers that will be disadvantaged vis-à-vis their competitors. In past merger cases, the competitive disparities created by the merger were isolated and relatively minor. Here, however, the competitive disparities are significant in effect and broad in scope. The entire New England region will witness a decline in rail competition while the areas immediately to the west will enjoy head-to-head competition from two major rail carriers. In past cases, the shipper versus shipper disparities were generally inadvertent consequences of the merger of two carriers. Here, the disparities arise as a result of two carriers privately deciding on carving up a third carrier and, in the process, choosing among themselves which markets they will serve. Moreover, CRC was formed by the government and granted a monopoly in order to assist CRC's profitability. Given the unique history of CRC, private parties should not be able to carve up CRC markets without heightened government oversight.

THE REQUESTED TRACKAGE RIGHTS MEET ALL OF THE BOARD'S CONDITIONING CRITERIA

The trackage rights NECR seeks are uniquely designed to ameliorate both the harm to essential services and the reduction of competition that will be caused by the Primary Transaction in New England. If granted, the requested trackage rights would possibly enable NECR to attract new bridge traffic and offset some of the losses NECR will experience from the traffic diversions to CSXT and NSR. The added revenues would enable NECR to continue providing its customers and connecting shortlines efficient and economical rail service. At the same time, the requested trackage rights would remedy the loss of rail competition in New England.[14]

As previously noted, the Board has broad authority to impose conditions. The Board has an affirmative duty to impose such conditions as are necessary to insure that a transaction before it is in the public interest. *See Atlantic Coast Line R. Co. v. United States,* 48 F.2d 239, 244 (W.D.S.C. 4th Cir. 1931), *aff'd,* 284 U.S. 288 (1932). The Board "is not intended to be a passive arbiter but the 'guardian of the general public interest,' with a duty to see that this interest is at all times effectively protected." *Lamoille Valley R.R. v. ICC,* 711 F.2d 295, 322 n. 55 (D.C. Cir. 1983).

NECR's requested trackage rights satisfy each of the criteria for imposing a public interest condition and a condition designed to preserve essential services. As demonstrated above, the Primary Transaction will have anticompetitive consequences and threatens harm to

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[14] In an attempt to disparage NECR's requested condition, Primary Applicants note that the length of the trackage rights is 256 miles and claim that NECR is seeking to expand its operations by 75 percent. CSX/NS-176 at 155. NECR is not seeking to expand its network, it is simply attempting to preserve its current system. The requested trackage rights are overhead in nature and will not allow NECR to serve any local shippers on the CSXT line. NECR is only seeking access to other rail connections to preserve essential services and competition.

the public interest in New England. Consequently, the imposition of public interest conditions is warranted.

In its Responsive Application, NECR demonstrated that the requested trackage rights are operationally feasible. In their Rebuttal filing, Primary Applicants raise three insignificant operational concerns. First, they contend that NECR has failed to identify where in the New Jersey/New York Shared Assets Area NECR would operate and what yards NECR would use. CSX/NS-177 at 526. As explained by Mr. Carlstrom, NECR believes it would be best to negotiate these matters with CSXT and NSR rather than having NECR insist on the use of certain lines and facilities that may impede their operations. Also, at the time NECR's Responsive Application was filed, Primary Applicants were still developing their operating plan for this area. Carlstrom R.V.S. at 8, NECR-8.

Second, Primary Applicants attempt to portray NECR as a hillbilly railroad operating in rural areas of New England and not adequately sophisticated to operate over a high-speed line handling both passenger and freight trains. They claim that if the trackage rights are granted, NECR crews would require training in operating rules, and physical characteristics and complicated communications and that NECR locomotives would need Cab signals. CSX/NS-177 at 56. Mr. Carlstrom addresses each of these concerns by demonstrating that NECR is fully capable and qualified to operate over high-speed rail lines as well as lines traveled by passenger trains. He points out that NECR's main line is rated at the FRA class 3 level and can accommodate train speeds of up to 60 m.p.h., and handles as many passenger trains as does the line over which NECR seeks trackage rights. He also explains that all of the employees of NECR's affiliate, CSO, have already been qualified to operate over CRC rail lines and all CSO locomotives are specially equipped with Cab signals, as are many locomotives in New England. Carlstrom R.V.S. at 8, NECR-8.

Third, Primary Applicants are concerned that NECR's proposed interchanges would create substantial interference with CSXT's through traffic. CSX/NS-177 at 56-7. According to Mr. Carlstrom, NECR's proposed interchanges with CSO and HRRC would be conducted the same way as performed today by CRC and, therefore, should result in no additional interference or delays for CSXT. The interchanges in Albany would occur in the existing yards of the connecting carriers and would have little, if any, impact on CSXT operations. Carlstrom R.V.S. at 8-9, NECR-8.

NECR proposes to operate no more that two trains a day, one each way, over the rail line between Palmer and northern New Jersey. CSXT should easily be able to accommodate these limited overhead movements. Other than expressing some minor operational concerns, Primary Applicants have submitted no evidence suggesting that NECR's limited trackage rights would pose any realistic operating problems.

NECR's requested trackage rights are designed to ameliorate some of the competitive harm threatened by the Primary Transaction in New England. By gaining access to Class I carriers in the Albany and New Jersey/New York Shared Assets Area, NECR would be able to offer shippers and shortlines in New England a joint- or multi-line service option to CSXT's single-line service and thereby act as a restraint on CSXT rate increases and/or service deficiencies in the New England area. NECR would be able to increase the competitive options otherwise available to these shippers and shortlines by offering a direct, efficient and competitive alternative to CSXT.

Finally, NECR's requested trackage rights are in the public interest and would not be detrimental to the Primary Transaction. Insofar as the New England region is concerned, the Board's balancing test is quite simple. Primary Applicants have demonstrated few, if any, public benefits of the Primary Transaction in the New England region.[15] Not only are there no public benefits for shippers in New England, the Primary Transaction, if unconditionally approved, would have substantial public detriments to New England shippers in the form of reduced rail competition. On the other hand, the general public in New England would derive significant benefits from the trackage rights NECR seeks through the preservation of rail competition in the region. At the same time, the condition would not detract in any material respect from the public benefits the Primary Applicants expect to achieve from the Primary Transaction. Primary Applicants claim public benefits of nearly $1 billion per year. *See* CSX/NS-18 at 2. NECR estimates that it would generate up to $7 million in annual revenues from the trackage rights operations, which is less than the revenues NECR expects to lose to CSXT and NSR as a result of traffic diversions. Most of these new revenues would be generated from overhead traffic originating in Canada and moving to or through New York.

The criteria for imposing "essential service" conditions, as set forth at 49 C.F.R. § 1180.1 (d) (1), have already largely been covered. First, the requested trackage rights are directly related to NECR's projected financial losses and the resulting loss of essential services on the NECR rail system. NECR projects annual revenue losses of nearly $8 million as result of traffic diversions

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[15] The only alleged benefit to New England Primary Applicants are able to point to is an agreement between CSXT and the Providence and Worchester Railroad, which is not part of the record. *See* CSX/NS-176 at 154. Moreover, CSXT claims that because it will become the only Class I railroad in New England, it "will have every incentive to cultivate the New England market by providing quality service at reasonable rates." *Id.* at 155. CSXT's argument is illogical and stands the entire notion of competition on its head.

to CSXT and NSR. With the requested trackage rights, NECR would gain access to new markets and possibly attract up to $7 million in new revenues from overhead traffic. These anticipated revenue gains are simply an estimate and there are no guarantees that NECR would be able to attract anywhere near this level of traffic. Nevertheless, the trackage rights would provide NECR the opportunity to earn additional revenues to offset some of its losses and thereby be able to continue providing efficient and economical service to its shippers and connecting shortlines.

Second, the requested trackage rights are designed to enable NECR's rail-dependent shippers to receive adequate service. If NECR is able to attract anywhere near the hoped for volume of traffic, it will remain a viable carrier and will be able to continue serving its customers. Third, as explained above, the requested trackage rights are operationally feasible and would not pose any operating or other problems for the Primary Applicants. Fourth, as already demonstrated, the requested rights would not frustrate the ability of Primary Applicants to achieve their anticipated public benefits.

CONCLUSION

For the foregoing reasons, NECR respectfully urges the Board to condition the Primary Transaction by imposing the trackage rights sought by NECR.

Respectfully submitted,

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Dated: February 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 23d day of February, 1998, I caused a copy of the Brief of New England Central Railroad, Inc. (NECR-9) to be served on counsel for Primary Applicants by Hand Delivery and on Administrative Law Judge Jacob Leventhal and all other Parties of Record by first class mail, postage prepaid.

Karl Morell

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