STB FD-33388 6-12-00 C 30985

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SERVICE DATE - JUNE 12, 2000

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

Decision No. 158

Decided: June 9, 2000

Environmental Condition No. 11 of Appendix Q of Decision No. 89[1] (Decision No. 89, slip op. at 401-02), requires Applicants, with the concurrence of the responsible local governments, to mitigate train wayside noise (locomotive engine and wheel/rail noise) at noise-sensitive receptor locations on certain rail line segments. Environmental Condition No. 11 further provides that: "Applicants shall certify compliance with this condition within 2 years of the effective date of the Board's final decision. This condition shall not apply to those communities that have executed Negotiated Agreements with Applicants that satisfy the communities' environmental concerns."

On April 12, 2000, CSX provided us with a copy of a Negotiated Agreement between CSX and the City of Cuyahoga Heights, OH, dated March 8, 2000, and accepted by the City of Cuyahoga Heights on March 17, 2000. According to CSX, this Negotiated Agreement effectuates the Board's preference for privately negotiated solutions stated in Decision No. 89, slip op. at 153. CSX requests that Environmental Condition No. 11 be amended to reflect the parties' Negotiated Agreement by deleting the City of Cuyahoga Heights from the Mayfield, OH to Marcy, OH line segment (C-072), and that the Negotiated Agreement between CSX and the City of Cuyahoga Heights be added to the CSX Subsection of Environmental Condition No. 51 of Appendix Q in Decision No. 89, which requires CSX to comply with the terms of all Negotiated Agreements developed with states, local communities, and other entities regarding environmental issues associated with the Conrail transaction. See Decision No. 89, slip op. at 420-21. The City of Cuyahoga Heights concurs with the request.

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[1] In Decision No. 89, served July 23, 1998, we approved, subject to certain conditions, including environmental mitigation conditions, the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (collectively, Conrail) and the division of Conrail's assets by CSX Corporation and CSX Transportation, Inc. (collectively, CSX), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, NS). CSX and NS are referred to as Applicants.

In view of the Negotiated Agreement between CSX and the City of Cuyahoga Heights, we will: (1) add the Negotiated Agreement to Environmental Condition No. 51 of Appendix Q of Decision No. 89, and (2) amend Environmental Condition No. 11 of Appendix Q of Decision No. 89 to delete the City of Cuyahoga Heights because the noise mitigation for that community has been superseded by the CSX/City of Cuyahoga Heights Negotiated Agreement.

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

It is ordered:

1. This proceeding is reopened.

2. In accordance with the Negotiated Agreement between CSX and the City of Cuyahoga Heights, OH, executed on March 17, 2000, the following is added to the CSX Subsection of Environmental Condition No. 51 of Appendix Q of Decision No. 89:

31. City of Cuyahoga Heights, Ohio, dated March 17, 2000.

3. In addition, Environmental Condition No. 11 of Appendix Q of Decision No. 89 is amended to delete the noise mitigation applicable to the City of Cuyahoga Heights, OH, because it has been superseded by the Negotiated Agreement.

4. This decision is effective on the date of service.

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

Vernon A. Williams

Vernon A. Williams
Secretary

PAUL E CRAWFORD
MASSACHUSETTS CENTRAL RAILROAD CORPORATION
TWO WILBRAHAM STREET
PALMER MA 01069 US

JAMES E HOWARD
90 CANAL STREET
BOSTON MA 02114 US

JOHN D CIRAME, ASSISTANT SECRETARY
COMMONWEALTH OF MASS. EXEC. OFFICE OF TRANSPT
10 PARK PLAZA ROOM 3170
BOSTON MA 02116-3969 US

HON. EDWARD M KENNEDY
UNITES STATES SENATE
2400 JOHN F KENNEDY FEDERAL BLDG
BOSTON MA 02203 US

WILLIAM D ANKNER PHD
R I DEPT OF TRANSPORTATION
TWO CAPITOL HILL
PROVIDENCE RI 02903 US

JOHN R NADOLNY
14 AVIATION AVENUE
PORTSMOUTH NH 03801 US

ROBERT D ELDER
MAINE DEPARTMENT OF TRANSPORTATION
16 STATE HOUSE STATION
AUGUSTA ME 04333-0016 US

KAREN E SONGHURST
STATE OF VERMONT
133 STATE STREET
MONTPELLIER VT 05633-5001 US

JAMES F SULLIVAN
CT DEPT OF TRANSPORTATION
P O BOX 317546
2800 BERLIN TURNPIKE
NEWINGTON CT 06131 US

EDWARD J RODRIGUEZ
HOUSATONIC RAILROAD
P O BOX 687
8 DAVIS ROAD WEST
OLD LYME CT 06371 US

RICHARD C CARPENTER
SOUTHWESTERN REGIONAL PLANNING AGENCY
1 SELLECK STREET SUITE 210
EAST NORWALK CT 06855 US

MICHAEL E STRICKLAND
NYK LINE (NORTH AMERICA) INC, SENIOR VICE PRE
300 LIGHTING WAY
SECAUCUS NJ 07094-1588 US

J WILLIAM VAN DYKE
NJ TRANSPORTATION PLANNING AUTHORITY
ONE NEWARK CENTER 17TH FLOOR
NEWARK NJ 07102 US

EDWARD LLOYD
RUTGERS ENVIRONMENTAL LAW CLINIC
15 WASHINGTON STREET
NEWARK NJ 07102 US

HONORABLE ROBERT G. TORRICELLI
UNITED STATES SENATE
1 RIVER FRONT PLAZA, 3RD FLOOR
NEWARK NJ 07102 US

PHILIP SIDO
UNION CAMP CORPORATION
1600 VALLEY ROAD
WAYNE NJ 07470 US

MARTIN T DURKIN ESQ
DURKIN & BOGGIA ESQS
PO BOX 378
71 MT VERNON STREET
RIDGEFIELD PARK NJ 07660 US

CRAIG CURRY
CONSOLIDATED RAIL CORPORATION
1000 HOWARD BOULEVARD
MOUNT LAUREL NJ 08054 US

TIMOTHY G CHELIUS
18 N EAST AVENUE
VINELAND NJ 08360 US

LAWRENCE PEPPER, JR
GRUCCIO PEPPER
817 EAST LANDS AVE
VINELAND NJ 08360 US

JOHN F. MCHUGH
MCHUGH & SHERMAN
20 EXCHANGE PLACE 51ST FLOOR
NEW YORK NY 10005 US

ANTHONY BOTTALICO
UTU
420 LEXINGTON AVENUE ROOM 458-460
NEW YORK NY 10017 US

WALTER E ZULLIG JR
METRO-NORTH COMMUTER RAILROAD COMPANY
347 MADISON AVE
NEW YORK NY 10017-3706 US

ANTHONY P. SEMANCIK
347 MADISON AVENUE
NEW YORK NY 10017-3706 US

JAMES W HARRIS
THE METROPOLITIAN PLANNING ORGANIZATION
1 WORLD TRADE CENTER STE 82 EAST
NEW YORK NY 10048-0043 US

HUGH H. WELSH
LAW DEPT., SUITE 67E
ONE WORLD TRADE CENTER
NEW YORK NY 10048-0202 US

R. LAWRENCE MCCAFFREY, JR.
NEW YORK & ATLANTIC RAILWAY
405 LEXINGTON AVENUE 50TH FLOOR
NEW YORK NY 10174 US

SAMUEL J NASCA
UTU STATE LEGISLATIVE DIRECTOR
35 FULLER ROAD SUITE 205
ALBANY NY 12205 US

DANIEL B. WALSH
BUSINESS COUNCIL OF NEW YORK STATE, INC.
152 WASHINGTON AVENUE
ALBANY NY 12210 US

DIANE SEITZ
CENTRAL HUDSON GAS & ELECTRIC CORP
284 SOUTH AVENUE
POUGHKEEPSIE NY 12601 US

IRWIN L. DAVIS
1900 STATE TOWER BLDG.
SYRACUSE NY 13202 US

ANGELO J CHICK JR, LOCAL CHAIRMAN
P O BOX 908
48398 OLD GOOSE BAY ROAD
REDWOOD NY 13679 US

GARY EDWARDS
SOMERSET RAILROAD
7725 LAKE ROAD
BARKER NY 14012 US

SHEILA MECK HYDE
CITY HALL
342 CENTRAL AVENUE
DUNKIRK NY 14048 US

IRVING J RUBIN
P O BOX 243
YOUNGSTOWN NY 14174 US

JOHN F COLLINS
COLLINS ,COLLINS, & KANTOR PC
267 NORTH STREET
BUFFALO NY 14201 US

R W GODWIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
810 ABBOTT ROAD SUITE 200
BUFFALO NY 14220 US

ERNEST J IERARDI
NIXON HARGRAVE DEVANS DOYLE LLP
PO BOX 1051
CLINTON SQUARE
ROCHESTER NY 14603-1051 US

H DOUGLAS MIDKIFF
GENESEE TRANSPORTATION COUNCIL
65 WEST BROAD ST STE 101
ROCHESTER NY 14614-2210 US

JEANNE WALDOCK
107 GRANT COURT
ORLEAN NY 14760 US

DAVID W. DONLEY
3361 STAFFORD ST
PITTSBURGH PA 15204-1441 US

JOHN A VUONO
VUONO & GRAY
2310 GRANT BUILDING
PITTSBURGH PA 15219 US

HENRY M. WICK, JR.
WICK STREIFF ET AL
1450 TWO CHATHAM CENTER
PITTSBURGH PA 15219-3427 US

R J HENEFELD
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

M E PETRUCCELLI
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

RICHARD R WILSON
1126 EIGHT AV STE 403
ALTOONA PA 16602 US

D W DUNLEVY
STATE LEGISLATIVE DIRECTOR UTU
230 STATE STREET PA AFL-CIO BLDG 2ND FLOOR
HARRISBURG PA 17101 US

KURT W CARR
BUREAU FOR HISTORIC PRESERVATION
P O BOX 1026
HARRISBURG PA 17108-1026 US

HONORABLE THOMAS J RIDGE
GOVERNOR, COMMONWEALTH OF PENNSYLVANIA
225 MAIN CAPITOL BUILDING
HARRISBURG PA 17120 US

KRISTOPHER MICHAEL KLEMICK
RR#3 BOX 101-15
JERSEY SHORE PA 17740-9309 US

BELNAP FREEMAN
BELKNAP FREEMAN
119 HICKORY LANE
ROSEMONT PA 19010 US

JOHN J GROCKI
GRA INC
115 WEST AV ONE JENKINTOWN STA
JENKINTOWN PA 19046 US

HARRY C BARBIN
BARBIN LAUFFER & O'CONNELL
608 HUNTINGDON PIKE
ROCKLEDGE PA 19046 US

JONATHAN M BRODER
CONSOLIDATED RAIL CORP
PO BOX 41416
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

G CRAIG SCHELTER
PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATI
2600 CENTRE SQUARE WEST 500 MARKET ST
PHILADELPHIA PA 19102 US

JOHN J EHLINGER JR
OBERMAYER REBMANN MAXWELL & HIPPEL
1617 JOHN F. KENNEDY BLVD ONE PENN CENTER-19T
PHILADELPHIA PA 19103-1895 US

DAVID BERGER
BERGER AND MONTAGUE, P. C.
1622 LOCUST ST
PHILADELPHIA PA 19103-6305 US

JOHN J COSCIA, EXECUTIVE DIRECTOR
DELAWARE VALLEY REGIONAL PLANNING COMMISSION
111 SOUTH INDEPENDENCE MALL EAST
PHILADELPHIA PA 19106 US

JOHN K. LEARY, GENERAL MANAGER
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTH
1234 MARKET STREET 5TH FLOOR
PHILADELPHIA PA 19107-3780 US

ERIC M HOCKY
GOLLATZ GRIFFIN & EWING
P O BOX 796
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

HON JOSEPH R BIDEN, JR.
UNITED STATES SENATE
844 KING STREET
WILMINGTON DE 19801 US

J E THOMAS
HERCULES INCORPORATED
1313 NORTH MARKET STREET
WILMINGTON DE 19894 US

E C WRIGHT
DUPONT LOGISTICS - GLOBAL SERVICES BUSINESS
1007 MARKET, DUPONT BLDG 3100
WILMINGTON DE 19898 US

FREDERICK H SCHRANCK
PO BOX 778
DOVER DE 19903 US

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

MARTIN W BERCOVICI
KELLER & HECKMAN, LLP
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

PETER A GILBERTSON
REGIONAL RRS OF AMERICA
122 C ST NW STE 850
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

DREW A HARKER
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

PAUL REISTRUP
CSX TRANSPORTATION INC
1331 PENNSYLVANIA NW STE 500
WASH DC 20004 US

GEORGE W MAYO JR
HOGAN & HARTSON L L P
555 THIRTEENTH STREET NW COLUMBIA SQUARE
WASHINGTON DC 20004-1109 US

DENNIS G LYONS
ARNOLD & PORTER
555 TWELFTH STREET NW, STE 940
WASHINGTON DC 20004-1206 US

DANIEL DUFF
AMERICAN PUBLIC TRANSPORTATION ASSOCIATION
1201 NEW YORK AV NW, STE 400
WASHINGTON DC 20005 US

ALICE C SAYLOR
AMERICAN SHORT LINE & REGIONAL RAILROAD ASSO
1120 G STREET NW SUITE 520
WASHINGTON DC 20005 US

KARL MORELL
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

CLARK EVANS DOWNS
JONES DAY REAVIS & POGUE
1450 G STREET NW
WASHINGTON DC 20005-2088 US

PAUL H LAMBOLEY
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005-3324 US

JAMES HOWARD
COALITION OF NORTHEASTERN GOVERNORS
400 NORTH CAPITOL STREET, SUITE 382
WASHINGTON DC 20001 US

DONALD F GRIFFIN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G STREET NE STE 460
WASHINGTON DC 20002 US

J MICHAEL HEMMER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20004 US

ERIC VON SALZEN
HOGAN & HARTSON
555 THIRTEENTH STREET N W
WASHINGTON DC 20004-1109 US

MARY GABRIELLE SPRAGUE
ARNOLD & PORTER
555 TWELTH STREET NW
WASHINGTON DC 20004-1202 US

LOUIS E GITOMER
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

PAUL M LAURENZA
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

L JOHN OSBORN
SONNENSCHEIN NATH & ROSENTHAL
1301 K STREET NW STE 600 EAST
WASH DC 20005 US

BRUNO MAESTRI
NORFOLK SOUTHERN CORPORATION
1500 K STREET SUITE 375
WASHINGTON DC 20005 US

WILLIAM A MULLINS
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005-3314 US

KEVIN M SHEYS
OPPENHEIMER WOLFF & DONNELLY LLP
1350 EYE STREET NW SUITE 200
WASHINGTON DC 20005-3324 US

NEAL R GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AV NW
WASHINGTON DC 20005-3701 US

JAMES R WEISS
PRESTON GATES ELLIS ET AL
1735 NEW YORK AVENUE NW SUITE 500
WASHINGTON DC 20006 US

CONSTANCE A SADLER
SIDLEY & AUSTIN
1722 EYE STREET NW
WASHINGTON DC 20006 US

ANDREW R. PLUMP
ZUCKERT, SCOUTT & RASENBERGER. LLP
888 17TH ST., NW, STE. 600
WASHINGTON DC 20006 US

RICHARD A ALLEN
ZUCKERT SCOUTT & RASENBERGER L L P
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3309 US

CHARLES A SPITULNIK
HOPKINS & SUTTER
888 SIXTEENTH ST NW
WASH DC 20006-4103 US

CHRISTOPHER C O'HARA
BRICKFIELD BURCHETTE & RITTS PC
1025 THOMAS JEFFERSON ST NW EIGHTH FLOOR
WASHINGTON DC 20007 US

PAUL M DONOVAN
LAROE WINN MOERMAN & DONOVAN
3900 HIGHWOOD COURT NW
WASHINGTON DC 20007 US

JOHN H BROADLEY
JOHN H BROADLEY & ASSOCIATES P C
1054 31ST STREET NW 2ND FLOOR
WASHINGTON DC 20007 US

MICHAEL F MCBRIDE
LEBOEUF LAMB GREENE & MACRAE
1875 CONNECTICUT AVENUE NW
WASHINGTON DC 20009-5728 US

HAROLD P QUINN JR
NATIONAL MINING ASSOCIATON
1130 17TH STREET NW
WASHINGTON DC 20036 US

WILLIAM W MILLAR
AMERICAN PUBLIC TRANSIT ASSOCIATION
1201 NEW YORK AVE., NW
WASHINGTON DC 20005-6141 US

SCOTT M ZIMMERMAN
ZUCKERT SCOUTT & RASENBERGER L L P
888 SEVENTEENTH STREET NW
WASHINGTON DC 20006 US

ROBERT P VOM EIGEN
HOPKINS & SUTTER
888 16TH STREET N W STE 700
WASHINGTON DC 20006 US

ERIKA Z JONES
MAYER BROWN & PLATT
1909 K STREET, NW
WASHINGTON DC 20006-1101 US

JOHN V EDWARDS, ESQ
ZUCKERT SCOUTT ET AL
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

SHERRI LEHMAN DIRECTOR OF CONGRESSIONAL AFFAI
CORN REFINERS ASSOC
1701 PA AV NW
WASH DC 20006-5805 US

DAVID K MONROE
GALLAND KHARASCH GREENBERT FELLMAN & SWIRSKY
1054 THIRTY FIRST STREET NW STE 200
WASHINGTON DC 20007 US

ROBERT G SZABO
1050 THOMAS JEFFERSON STREET NW SIXTH FLOOR
WASHINGTON DC 20007 US

EDWARD D GREENBERG
GALLAND, KHARASCH, GREENBERG, FELLMAN & SWIRS
1054 THIRTY-FIRST STREET NW, STE 200
WASHINGTON DC 20007-4492 US

STEPHEN H BROWN
VORYS SATER SEYMOUR AND PEASE
1828 L STREET N W
WASHINGTON DC 20036 US

HELEN M. COUSINEAU
CARLOS RODRIGUEZ & ASSOCIATES
1710 RHODE ISLAND AVENUE, NW
WASHINGTON DC 20036 US

PAUL D COLEMAN
HOPPEL MAYER & COLEMAN
1000 CONNECTICUT AVENUE NW SUITE 400
WASHINGTON DC 20036 US

JOHN D HEFFNER
REA CROSS & AUCHINCLOSS
1707 L STREET, NW, STE 570
WASHINGTON DC 20036 US

GORDON P MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

PETER A GREENE
THOMPSON HINE FLORY
1920 N STREET N W SUITE 800
WASHINGTON DC 20036 US

DAVID H COBURN
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE NW
WASHINGTON DC 20036 US

KELVIN J DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

RICHARD S EDELMAN
O'DONNELL SCHWARTZ & ANDERSON PC
1900 L STREET NW SUITE 707
WASHINGTON DC 20036 US

EDWARD WYTKIND EXECUTIVE DIRECTOR
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO
1025 CONNECTICUT AVE NW SUITE 1005
WASHINGTON DC 20036 US

CHRISTOPHER A MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

ROBERT A WIMBISH ESQ
REA CROSS & AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

KARYN A BOOTH
THOMPHON HINE & FLORY LLP
1920 N STREET, NW & FLORY LLP
WASHINGTON DC 20036 US

KEITH G O'BRIEN
REA CROSS AND AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

FRITZ R KAHN
1920 N STREET NW 8TH FLOOR
WASHINGTON DC 20036-1601 US

FREDERIC L WOOD
THOMPSON HINE & FLORY LLP
1920 N STREET
WASHINGTON DC 20036-1601 US

ROSE-MICHELE WEINRYB
WEINER BRODSKY SIDMAN & KIDER
1300 19TH STREET NW 5TH FLOOR
WASHINGTON DC 20036-1609 US

MARK H SIDMAN
WEINER BRODSKY SIDMAN & KIDER P C
1300 19TH STREET NW 5TH FLOOR
WASHINGTON DC 20036-1609 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

SAMUEL M SIPE JR
STEPTOE & JOHNSON LLP
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND & CLAYMAN, PC
1625 MASSACHUSETTS AVE., NW. STE 700
WASHINGTON DC 20036-2243 US

DEBRA L WILLEN
GUERRIERI EDMOND & CLAYMAN PC
1625 MASSACHUSETTS AVENUE, N.W., STE 700
WASHINGTON DC 20036-2243 US

DONALD G AVERY
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036-3003 US

L PAT WYNNS
1050 - 17TH STREET N W SUITE 210
WASHINGTON DC 20036-5503 US

ANDREW P GOLDSTEIN
MCCARTHY, SWEENEY & HARKAWAY P.C.
2175 K STREET, NW SUITE 600
WASHINGTON DC 20037 US

JOHN M CUTLER JR
MCCARTHY SWEENEY HARKAWAY PC
2175 K STREET, NW
WASHINGTON DC 20037 US

STEVEN J KALISH
MCCARTHY SWEENEY & HARKAWAY P C
2175 K STREET NW SUITE 600
WASHINGTON DC 20037 US

DANIEL J SWEENEY
MCCARTHY SWEENEY & HARKAWAY P C
2175 K STREET NW SUITE 600
WASHINGTON DC 20037 US

JOHN L OBERDORFER
PATTON BOGGS LLP
2550 M ST NW
WASHINGTON DC 20037-1301 US

SCOTT N STONE
PATTON BOGGS L L P
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

KEITH A KLINDWORTH
U S DEPT OF AGRICULTURE
P O BOX 96456
WASHINGTON DC 20090 US

MICHAEL V DUNN
USDA
PO BOX 96456 RM 4006-SOUTH BLDG
WASH DC 20090-6456 US

EILEEN S STOMMES
U S DEPARTMENT OF AGRICULTURE
P O BOX 96456 ROOM 4006-SOUTH BUILDING
WASHINGTON DC 20090-6456 US

JUDGE JACOB LEVENTHAL, OFFICE OF HEARINGS
FEDERAL ENERGY REGULATORY COMMISSION
888 - 1ST ST, N.E. STE 11F
WASHINGTON DC 20426 US

RICHARD E SANDERSON
OFFICE OF FEDERAL ACTIVITIES
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HON CHARLES SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON DANIEL PATRICK MOYNIHAN
UNITED STATES SENATE
WASINGTON DC 20510 US

HON JOHN BREAUX
UNITED STATER SENATE
WASHINGTON DC 20510 US

HON CHARLES E SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. BARBARA A. MIKULSKI
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE BOB GRAHAM
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHARLES ROBB
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH BIDEN, JR.
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH I LIEBERMAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON WILLIAM V. ROTH JR
U S SENATE
WASHINGTON DC 20510-0001 US

HON. JOHN W. WARNER
US SENATE
WASHINGTON DC 20510-0001 US

HON CHRISTOPHER J DODD
UNITED STATES SENATE
WASH DC 20510-0702 US

HONORABLE DANIEL P. MOYNIHAN
UNITED STATE SENATE
WASHINGTON DC 20510-0903 US

HONORABLE CONNIE MACK
UNITED STATES SENATE
WASHINGTON DC 20510-0904 US

HONORABLE J ROBERT KERREY
UNITED STATES SENATE
WASHIGTON DC 20510-2704 US

HON MIKE DEWINE
UNITED STATES SENATE
WASHINGTON DC 20510-3503 US

HON ARLEN SPECTER
UNITED STATES SENATE
WASHINGTON DC 20510-3802 US

HON RICK SANTORUM
UNITED STATES SENATE
WASHINGTON DC 20510-3804 US

HONORABLE JOHN H. CHAFEE
UNITED STATES SENATE
WASHINGTON DC 20510-3902 US

HON JACK REED
U S SENATE
WASHINGTON DC 20510-3903 US

HONORABLE ROBERT BYRD
UNITED STATES SENATE
WASHINGTON DC 20510-6025 US

HONORABLE JOHN J LAFALCE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. BUD SHUSTER
ATTN: MIKE RICK
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NANCY JOHNSON
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAM GEJDENSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. TOM BLILEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB CLEMENT
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JAMES L. OBERSTAR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JOHN J. DUNCAN
U S HOUSE OF REPRESENTATIVESS
WASHINGTON DC 20515 US

HONORABLE PAUL E. GILLMOR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MIKE DOYLE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN D. DINGELL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BENJAMIN A. GILMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM O. LIPINSKI
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETER J. VISCLOSKY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM J. COYNE
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MAJOR R. OWENS
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JAMES TRAFICANT JR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ROBERT MENENDEZ
U S HOUSE OF REPRESENTATIVES
WASH DC 20515 US

HON MARCY KAPTUR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK MASCARA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL FORBES
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ELIOT L ENGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON GARY ACKERMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JERROLD NADLER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ROBERT W. NEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB WEYGAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TED STRICKLAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON DENNIS J KUCINICH
UNITED STATES HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HON NYDIA M VELAZQUEZ
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ED TOWNS
U. S. HOUSE OR REPRESENTATIVES
WASHINGTON DC 20515 US

HON LOUISE M SLAUGHTER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHRISTOPHER SHAYS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHARLES RANGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL MCNULTY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAMES MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CAROLYN B MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NITA LOWEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MAURICE HINCHEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON BOB WISE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON THOMAS C SAWYER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHIP PICKERING
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JESSE L. JACKSON, JR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LUIS GUTIERREZ
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DANNY K DAVIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON RALPH REGULA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON SHERROD BROWN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ED BRYANT
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. STEVE LATOURETTE
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAXBY CHAMBLISS,
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TILLIE K FOWLER
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ROD R BLAGOJEVICH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTO DC 20515-1305 US

HON JULIA CARSON
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1410 US

HONORABLE JAMES A. BARCIA
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2205 US

HON JACK QUINN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3230 US

HONORABLE RICHARD BURR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3305 US

HONORABLE TOM DAVIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4611 US

HONORABLE BOBBY L. RUSH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-9997 US

MICHAEL P HARMONIS
DEPARTMENT OF JUSTICE
325 SEVENTH STREET, NW
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
US DEPARTMENT OF TRANSPORTATION
400 SEVENTH STREET SW ROOM 4102 C-30
WASHINGTON DC 20590 US

JOSEPH R POMPONIO
FEDERAL RAILROAD ADMIN
1120 VERMONT AVE NW RCC-20
WASHINGTON DC 20590 US

JOLENE MOLITORIS, ADMN.
FEDERAL RAILROAD ADMNS.
400 7TH STREET SW
WASHINGTON DC 20590 US

DAVID G ABRAHAM
SUITE 400W
7315 WISCONSIN AVENUE
BETHESDA MD 20814 US

MITCHELL M KRAUS
TRANSPORTATION COMMUNICATIONS INTERNATIONAL U
3 RESEARCH PLACE
ROCKVILLE MD 20850-3279 US

JOHN M ROBINSON
9616 OLD SPRING ROAD
KENSINGTON MD 20895-3124 US

WILLIAM W WHITEHURST JR
W W WHITEHURST & ASSOCIATES INC
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030-1711 US

JOHN HOY
P O BOX 117
GLEN BURNIE MD 21060 US

ROBERT J WILL
UNITED TRANSPORTATION UNION
4134 GRAVE RUN RD
MANCHESTER MD 21102 US

JOHN F WING CHAIRMAN
CITIZENS ADVISORY COMMITTEE
601 NORTH HOWARD STREET
BALTIMOTE MD 21201 US

LINDA A JANEY J D
MARYLAND OFFICE OF PLANNING
301 WEST PRESTON STREET
BALTIMORE MD 21201-2365 US

DON E SANCHEZ
CHESAPEAKE SPECIALTY PRODUCTS INC
5055 NORTH POINT BOULEVARD
BALTIMORE MD 21219 US

CHARLES M CHADWICK
MARYLAND MIDLAND RAILWAY INC
P O BOX 1000
UNION BRIDGE MD 21791 US

HENRY E. SEATON
7700 LEESBURG PIKE, STE 201
FALLS CHURCH VA 22043 US

PETER Q NYCE JR
U S DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

THOMAS E SCHICK
CHEMICAL MANUF ASSOC
1300 WILSON BOULEVARD
ARLINGTON VA 22209 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

JENNIFER BRAUN
JACKSON & JESSUP
P O BOX 1240
3426 NORTH WASHINGTON BOULEVARD
ARLINGTON VA 22210 US

KENNETH E SIEGEL
AMERICAN TRUCKING ASSOC INC
2200 MILL ROAD
ALEXANDRIA VA 22314-4677 US

HONORABLE GEORGE ALLEN
GOVERNOR, COMMONWEALTH OF VIRGINIA
STATE CAPITOL
RICHMOND VA 23219 US

DAVID A SHELTON
NORFOLK SOUTHERN
THREE COMMERCIAL PLACE
NORFOLK VA 23510 US

GEORGE A ASPATORE
NORFOLK SOUTHERN CORP
THREE COMMEMERCIAL PLACE
NORFOLK VA 23510 US

L P KING JR
GENERAL CHAIRPERSON UTU
145 CAMPBELL AVE SW STE 207
ROANOKE VA 24011 US

VAUGHN R GROVES
PITTSTON COAL COMPANY
PO BOX 5100
LEBANON VA 24266 US

R K SARGENT
GENERAL CHAIRPERSON UTU
1319 CHESTNUT STREET
KENOVA WV 25530 US

FRANK N JORGENSEN
THE ELK RIVER RAILROAD INC
P O BOX 460
SUMMERSVILLE WV 26651 US

E NORRIS TOLSON
NC DEPT OF TRANSPORTATION
P O BOX 25201
1 S. WILINGTON STREET
RALEIGH NC 27611 US

HONORABLE DAVID M BEASLEY
GOVERNOR
P. O. BOX 11369
COLUMBIA SC 29211 US

FRANCIS G MCKENNA
ANDERSON & PENDLETON
206 N WASHINGTON STREET SUITE 330
ALEXANDRIA VA 22314 US

ROBERT E MARTINEZ
VA SECRETARY OF TRANSPORTAITON
P. O. BOX 1475
RICHMOND VA 23218 US

JOHN W SNOW
CHAIRMAN PRESIDENT AND CHIEF EXECTIVE OFFICER
P O BOX 85629
RICHMOND VA 23285-5629 US

PARKERSON B MAQUILLING
NORFOLK SOUTHERN CORPORATION
THREE COMMERCIAL PLACE, LAW DEPT
NORFOLK VA 23510 US

JAMES A HIXON
SENIOR VICE PRESIDDENT EMPLOYEE RELATIONS NOR
THREE COMMERCIAL PLACE
NORFFFOLK VA 23510-2191 US

HONORABLE JOHN WARNER
UNITED STATES SENATE
235 FEDERAL BUILDING
ABINGDON VA 24210-0887 US

TERRELL ELLIS
CAEZWV
P O BOX 176
CLAY WV 25043 US

WILLIAM T BRIGHT
P O BOX 149
200 GREENBRIER ROAD
SUMMERSVILLE WV 26651 US

SCOTT M SAYLOR
NORTH CAROLINA RAILROAD COMPANY
3200 ATLANTIC AV STE 110
RALIEGH NC 27604-1640 US

J R BARBEE
GENERAL CHAIRPERSON UTU
441 N LOUISIANA AVE STE Q
ASHEVILLE NC 28806-3791 US

J RANDALL EVANS
500 WATER STREET (J150)
JACKSONVILLE FL 32202 US

FRED R BIRKHOLZ
CSX TRANSPORTATION LAW DEPT - J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

ROBERT V ALLEN
CSX TRANSPORTATION
500 WATER STREET J305
JACKSONVILLE FL 32202 US

T J STEPHENSON
CSX TRANSPORTATION INC
500 WATER STREET (J407)
JACKSONVILLE FL 32202 US

CARL A GERHARDSTEIN
CSX TRANSPORTATION RISK MGMT
500 WATER STREET-J275
JACKSONVILLE FL 32202 US

DANFORD L PRICE
500 WATER STREET
JACKSONVILLE FL 32202 US

BOB HAULTER
CSX TRANSPORTATION INC
500 WATER STREET (J120)
JACKSONVILLE FL 32202 US

PAUL R. HITCHCOCK
CSX TRANSPORTATION LAW DEPARTMENT
500 WATER STREET SC J-150
JACKSONVILLE FL 32202 US

JOHN W. HUMES, JR.
CSX TRANSPORTATION
SPEED CODE J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

CHARLES M ROSENBERGER
CSX TRANSPORTATION
500 WATER STREET - J150
JACKSONVILLE FL 32202 US

J L RODGERS
GENERAL CHAIRMAN UTU
480 OSCEOLA AVENUE
JACKSONVILLE FL 32250 US

J T REED
GENERAL CHAIRPERSON UTU
7785 BAYMEADOWS WAY STE 109
JACKSONVILLE FL 32256 US

PHILLIP L BELL
ERIE LACKAWANNA RAILROAD CO
PO BOX 1482
TALLAHASSEE FL 32302 US

JAMES L BELCHER
EASTMAN CHEMICAL COMPANY
PO BOX 431
KINGSPORT TN 37662 US

WILLIAM L OSTEEN
ASSOCIATE GENERAL COUNSEL TVA
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE KIRK FORDICE, GOVERNOR
STATE OF MISSISSIPPI
P O BOX 139
JACKSON MS 39205 US

HONORABLE PAUL E. PATTON
GOVERNOR
700 CAPITOL AVENUE, STE. 100
FRANKFORT KY 40601 US

F R PICKELL
GENERAL CHAIRPERSON UTU
6797 NORTH HIGH ST STE 108
WORTHINGTON OH 43085 US

THOMAS M O'LEARY
OHIO RAIL DEVELOPMENT COMMISSION
50 W BROAD STREET 15TH FLOOR
COLUMBUS OH 43215 US

HONORABLE DEBORAH PRYCE
U. S. HOUSE OF REPRESENTATIVES
500 SOUTH FRONT STREET, ROOM 1130
COLUMBUS OH 43215 US

DOREEN C JOHNSON, CHIEF ANTITRUST SECTION
OHIO ATTY GENERAL OFFICE
140 EAST TOWN STREET, FIRST FLOOR
COLUMBUS OH 43215-6001 US

JAMES R JACOBS
JACOBS INDUSTRIES
2 QUARRY LANE
STONY RIDGE OH 43463 US

DAVID CHAPMAN
LAFARGE LIME OHIO INC
P O BOX 128
659 ANDERSON ROAD
WOODVILLE OH 43469-0128 US

ROBERT J COOPER
GENERAL CHAIRPERSON UTU
1238 CASS ROAD
MAUMEE OH 43537 US

ROBERT E GREENLESE
TOLEDO-LUCAS COUNTY PORT AUTHORITY
1 MARITIME PLAZA SUITE 700
TOLEDO OH 43604 US

ROBERT E MURRAY
OHIO VALLEY COAL CO
56854 PLEASANT RIDGE ROAD
ALLEDONIA OH 43902 US

RON MARQUARDT
LOCAL UNION 1810 UMWA
R D #2
RAYLAND OH 43943 US

CLARENCE TURNQUIST
INTERNATIONAL LONGSHOREMEN S ASSOCIATION
C/O 2125 TRYON ROAD
ASHTABULA OH 44004 US

MAYOR VINCENT M URBIN
150 AVON BELDEN RD
AVON LAKE OH 44012 US

CHARLES S HESSE
CHARLES HESSE ASSOCIATES
7777 BAINBRIDGE ROAD
CHAGRIN FALLS OH 44023-2124 US

BARBARA O'KEEFE
VILLAGE OF WELLINGTON
115 WILLARD MEMORIAL SQ
WELLINGTON OH 44090 US

COLETTA MCNAMEE SR
CUDELL IMPROVEMENT INC
11500 FRANKLIN BLVD STE 104
CLEVELAND OH 44102 US

ANITA R BRINDZA
THE ONE FIFTEEN HUNDRED BUILDING
11500 FRANKLIN BLVD SUITE 104
CLEVELAND OH 44102 US

DANIEL R ELLIOTT III
ASST GENERAL COUNSEL UNITED TRANSPORTATION UN
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

C L LITTLE
INTERNATIONAL PRESIDENT UTU
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CLINTON J MILLER III
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CLARENCE MONIN INTERNATIONAL PRES
BROTHERHOOD OF LOCOMTIVE ENGINEERS MEZZANINE
1370 ONTARIO STREET
CLEVELAND OH 44113 US

CHRISTOPHER C MCCRACKEN
ULMER & BERNE LLP
1300 EAST NINTH STREET SUITE 900
CLEVELAND OH 44114 US

DAVID ROLOFF
GOLDSTEIN & ROLOFF
526 SUPERIOR AVENUE EAST SUITE 1440
CLEVELAND OH 44114 US

INAJO DAVIS CHAPPELL
ASHTA CHEMICALS INC
1300 EAST NINETH STREET SUITE 900
CLEVELAND OH 44114-1538 US

C D WINEBRENNER
GENERAL CHAIRPERSON UTU
27801 EUCLID AVENUE RM 200
EUCLID OH 44132 US

CHARLES ZUMKEHR
ROETZEL & ANDRESS CO LPA
75 EAST MARKET STREET
AKRON OH 44308 US

SYLVIA R. CHINN-LEVY
NEFCO
969 COPLEY ROAD
AKRON OH 44320 US

CHARLES E ALLENBAUGH JR
EAST OHIO STONE COMPANY
2000 W BESSON ST
ALLIANCE OH 44601 US

RANDALL C. HUNT
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO.
P O BOX 36963
4775 MUNSON ST NW
CANTON OH 44735-6963 US

D G STRUNK JR
GENERAL CHAIRPERSON UTU
817 KILBOURNE STREET
BELLEVUE OH 44811 US

R A GRICE
GENERAL CHAIRPERSON UTU
817 KILBOURNE ST
BELLEVUE OH 44811-9431 US

RICHARD E KERTH
CHAMPION INTERNATIONAL CORPORATION
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

FAY D DUPUIS
CITY OF CINCINNATI
801 PLUM STREET
CINCINNATI OH 45202 US

ROBERT EDWARDS
EASTERN TRANSPORT AND LOGISTICS
1109 LANETTE DRIVE
CINCINNATI OH 45230 US

THOMAS R RYDMAN PRESIDENT
INDIAN CREEK RAILROAD COMPANY
3905 W 600 NORTH
ANDERSON IN 46011 US

F RONALDS WALKER
CITIZENS GAS & COKE UTILITY
2020 N MERIDIAN STREET
INDIANAPOLIS IN 46202-1393 US

MICHAEL P MAXWELL JR
MCHALE, COOK & WELCH
320 N MERIDIAN ST 1100 CHAMBER OF COMMERCE BL
INDIANAPOLIS IN 46204 US

J PATRICK LATZ
HEAVY LIFT CARGO SYSTEM
PO BOX 51451
INDIANAPOLIS IN 46251-0451 US

MICHAEL CONNELLY
CITY OF EAST CHICAGO
4525 INDIANAPOLIS BLVD
EAST CHICAGO IN 46312 US

HAMILTON L CARMOUCHE, CORPORATION COUNSEL
CITY OF GARY
401 BROADWAY 4TH FLOOR
GARY IN 46402 US

HONORABLE PETER J. VISCLOSKY
U. S. HOUSE OF REPRESENTATIVES
215 WEST 35TH AVENUE
GARY IN 46408 US

CARL FELLER
DEKALB AGRA INC
P. O. BOX 127
4743 COUNTY ROAD 28
WATERLOO IN 46793-0127 US

CHRISTOPHER J BURGER, PRESIDENT
CENTRAL RAILROAD COMPANY OF INDIANAPOLIS
PO BOX 554
KOKOMO IN 46903-0554 US

WILLIAM A BON, GENERAL COUNSEL
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
26555 EVERGREEN ROAD SUITE 200
SOUTHFIELD MI 48076 US

NICOLE HARVEY
THE DOW CHEMICAL COMPANY
2020 DOW CENTER
MIDLAND MI 48674 US

JAMES E SHEPHERD
TUSCOLA & SAGINAW BAY
PO BOX 550
OWOSSO MI 48867-0550 US

LARRY B KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

HON JOHN ENGLER
OFFICE OF THE GOVERNOR
P O BOX 30013
LANSING MI 48933 US

T SCOTT BANNISTER
T SCOTT BANNISTER AND ASSOCIATES
1300 DES MOINES BLDG 405 SIXTH AVENUE
DES MOINES IA 50309 US

BYRON D OLSEN
FELHABER LARSON FENLON & VOGT PA
601 SECOND AVENUE SOUTH SUITE 4200
MINNEAPOLIS MN 55401-4302 US

LEO J WASESCHA
GOLD MEDAL DIVISON - GENERAL MILLS OPERATION
P O BOX 1113
NUMBER ONE GENERAL MILLS BULEVARD
MINNEAPOLIS MN 55440 US

GERALD J. VINCI
PRAIRIE GROUP
P. O.BOX 1123
7601 WEST 79TH STREET
BRIDGEVIEW IL 60455 US

RICHARD A GAVRIL
16700 GENTRY LANE NO 104
TINLEY PARK IL 60477 US

EDWARD WASHINGTON, II
CHIEF, PUBLIC UTILITIES BUREAU, ILL ATTORNEY
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

CHRISTINE H. ROSSO
IL ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FLOOR
CHICAGO IL 60601 US

THOMAS J LITWILER
FLETCHER & SIPPEL LLC
180 NORTH STETSON AVENUE SUITE 3125 TWO PRUDE
CHICAGO IL 60601-6721 US

WILLIAM C SIPPEL
FLETCHER & SIPPEL LLC
180 N STETSON AVE SUITE 3125
CHICAGO IL 60601-6721 US

SANDRA J DEARDEN
MDCO TRANSPORTATION MANAGEMENT LTD
166 WEST WASHINGTON SUITE 700
CHICAGO IL 60602 US

RICHARD F. FRIEDMAN, ESQ
EARL L NEAL & ASSOCIATES
111 WEST WASHINGTON STREET, STE 1700
CHICAGO IL 60602-2766 US

EDWARD C MCCARTHY
INLAND STEEL INDUSTRIES INC
30 WEST MONROE STREET
CHICAGO IL 60603 US

ROGER A SERPE
INDIANA HARBOR BELT RAILROAD COMPANY
111 WEST JACKSON BOULEVARD, STE 2215
CHICAGO IL 60604 US

SHELDON A ZABEL
SCHIFF HARDIN & WAITE
7200 SEARS TOWER
CHICAGO IL 60606 US

THOMAS F MCFARLAND JR
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE SUITE 1330
CHICAGO IL 60606-2902 US

MYLES L TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

CHARLES D BOLAM
UNITED TRANSPORTATION UNION
1400-20TH STREET
GRANITE CITY IL 62040 US

SCOTT A RONEY
ARCHER DANIELS MIDLAND COMPANY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

MERRILL L TRAVIS
ILLINOIS DEPT OF TRANSPORTATION
2300 S DIRKSEN PARKWAY RM 302
SPRINGFIELD IL 62764 US

IAN MUIR
BUNGE CORPORATION
P O BOX 28500
ST LOUIS MO 63146 US

JOHN JAY ROSACKER
KS DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

MR GEORGE VAN HAVER
2340 SOUTH 35TH STREET
OMAHA NE 68105 US

HENRY T DART
PLAINTIFF MANGEMENT COMMITTEE
609 EAST GIBSON STREET
COVINGTON LA 70433 US

MIKE SPAHIS
FINA OIL & CHEMICAL CO
6000 LEGACY DRIVE
PLANO TX 75024-3601 US

DENNIS A. GUTH
WEST LAKE GROUP
2801 POST OAK BLVD
HOUSTON TX 77056 US

DAVID L HALL
COMMONWEALTH CONSULTING ASSOCIATES
13103 FM 1960 WEST SUITE 204
HOUSTON TX 77065-4069 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
P O BOX 2583
1221 MCKINNEY STREET SUITE 1600
HOUSTON TX 77252-2583 US

STEVE M COULTER
EXXON COMPANY USA
PO BOX 3272
HOUSTON TX 77253-3272 US

MONTY L PARKER SR
CMC STEEL GROUP
P O BOX 911
SEGUIN TX 78156-0911 US

BRAD F HUSTON
CYPRUS AMAX COAL SALES CORP
9100 E MINERAL CIR
MILFORD CO 80112-3401 US

STEPHEN M UTHOFF
CONIGLIO & UTHOFF
60 ELM AVENUE, CONIGLIO PROFESSIONAL BLDG
LONG BEACH CA 90802-4910 US

RICHARD WELSH
NARPO
50-505 GRAND TRAVERSE
LA QUINTA CA 92253 US

JOHN D FITZGERALD
UTU, GENERAL CHAIRPERSON
400 E EVERGREEN BLVD STE 217
VANCOUVER WA 98660-3264 US

Records: 360

STB FD 33388 6-25-99 C 30332

30332
SEC

SERVICE DATE - JUNE 25, 1999

SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423

June 18, 1999

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

NOTICE

A court action, entitled as shown below, was instituted on or about June 16, 1999, involving Decision Nos. 89, 96 and 125 in the above-entitled proceeding:

No. 99-1231

Indianapolis Power & Light Company

v.

Surface Transportation Board

United States of America

before the

United States Court of Appeals for the District of Columbia Circuit

Vernon A. Williams

VERNON A. WILLIAMS
Secretary

SERVICE LIST FOR: 22-jun-1999 STB FD 33388 0 CSX CORPORATION AND CSX TRANSPORTATI

STEPHEN M FONTAINE
MASSACHUSETTS CENTRAL RAILROAD CORPORATION
ONE WILBRAHAM STREET
PALMER MA 01069 US

JAMES E HOWARD
90 CANAL STREET
BOSTON MA 02114 US

HON. EDWARD M KENNEDY
UNITES STATES SENATE
2400 JOHN F KENNEDY FEDERAL BLDG
BOSTON MA 02203 US

JOHN R NADOLNY
14 AVIATION AVENUE
PORTSMOUTH NH 03801 US

KAREN E SONGHURST
STATE OF VERMONT
133 STATE STREET
MONTPELLIER VT 05633-5001 US

EDWARD J RODRIGUEZ
P.O. BOX 298
67 MAIN STREET
CENTERBROOK CT 06409 US

MICHAEL E STRICKLAND
NYK LINE (NORTH AMERICA) INC, SENIOR VICE PRE
300 LIGHTING WAY
SECAUCUS NJ 07094-1588 US

J WILLIAM VAN DYKE
NJ TRANSPORTATION PLANNING AUTHORITY
ONE NEWARK CENTER 17TH FLOOR
NEWARK NJ 07102 US

PHILIP SIDO
UNION CAMP CORPORATION
1600 VALLEY ROAD
WAYNE NJ 07470 US

TIMOTHY G CHELIUS
18 N EAST AVENUE
VINELAND NJ 08360 US

JOHN F. MCHUGH
MCHUGH & SHERMAN
20 EXCHANGE PLACE 51ST FLOOR
NEW YORK NY 10005 US

RICHARD B. KENNELLY, JR
CONSERVATION LAW FOUNDATION
62 SUMMER STREET
BOSTON MA 02110 US

JOHN D CIRAME, ASSISTANT SECRETARY
COMMONWEALTH OF MASS. EXEC. OFFICE OF TRANSPT
10 PARK PLAZA ROOM 3170
BOSTON MA 02116-3969 US

WILLIAM D ANKNER PHD
R I DEPT OF TRANSPORTATION
TWO CAPITOL HILL
PROVIDENCE RI 02903 US

ROBERT D ELDER
MAINE DEPARTMENT OF TRANSPORTATION
16 STATE HOUSE STATION
AUGUSTA ME 04333 US

JAMES F SULLIVAN
CT DEPT OF TRANSPORTATION
P O BOX 317546
2800 BERLIN TURNPIKE
NEWINGTON CT 06131 US

RICHARD C CARPENTER
SOUTHWESTERN REGIONAL PLANNING AGENCY
1 SELLECK STREET SUITE 210
EAST NORWALK CT 06855 US

HONORABLE ROBERT G. TORRICELLI
UNITED STATES SENATE
1 RIVER FRONT PLAZA, 3RD FLOOR
NEWARK NJ 07102 US

EDWARD LLOYD
RUTGERS ENVIRONMENTAL LAW CLINIC
15 WASHINGTON STREET
NEWARK NJ 07102 US

MARTIN T DURKIN ESQ
DURKIN & BOGGIA ESQS
PO BOX 378
71 MT VERNON STREET
RIDGEFIELD PARK NJ 07660 US

LAWRENCE PEPPER, JR
GRUCCIO PEPPER
817 EAST LANDS AVE
VINELAND NJ 08360 US

ANTHONY BOTTALICO
UTU
420 LEXINGTON AVENUE ROOM 458-460
NEW YORK NY 10017 US

WALTER E ZULLIG JR
METRO-NORTH COMMUTER RAILROAD COMPANY
347 MADISON AVE
NEW YORK NY 10017-3706 US

ANTHONY P. SEMANCIK
347 MADISON AVENUE
NEW YORK NY 10017-3706 US

JAMES W HARRIS
THE METROPOLITIAN PLANNING ORGANIZATION
1 WORLD TRADE CENTER STE 82 EAST
NEW YORK NY 10048-0043 US

HUGH H. WELSH
LAW DEPT., SUITE 6'E
ONE WORLD TRADE CENTER
NEW YORK NY 10048-0202 US

R. LAWRENCE MCCAFFREY, JR.
NEW YORK & ATLANTIC RAILWAY
405 LEXINGTON AVENUE 50TH FLOOR
NEW YORK NY 10174 US

SAMUEL J NASCA
UTU STATE LEGISLATIVE DIRECTOR
35 FULLER ROAD SUITE 205
ALBANY NY 12205 US

DANIEL B. WALSH
BUSINESS COUNCIL OF NEW YORK STATE, INC.
152 WASHINGTON AVENUE
ALBANY NY 12210 US

DIANE SEITZ
CENTRAL HUDSON GAS & ELECTRIC CORP
284 SOUTH AVENUE
POUGHKEEPSIE NY 12601 US

IRWIN L. DAVIS
1900 STATE TOWER BLDG.
SYRACUSE NY 13202 US

ANGELO J CHICK JR, LOCAL CHAIRMAN
P O BOX 908
48398 OLD GOOSE BAY ROAD
REDWOOD NY 13679 US

GARY EDWARDS
SOMERSET RAILROAD
7725 LAKE ROAD
BARKER NY 14012 US

SHEILA MECK HYDE
CITY HALL
342 CENTRAL AVENUE
DUNKIRK NY 14048 US

IRVING J RUBIN
P O BOX 243
YOUNGSTOWN NY 14174 US

JOHN F COLLINS
COLLINS ,COLLINS, & KANTOR PC
267 NORTH STREET
BUFFALO NY 14201 US

R W GODWIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
810 ABBOTT ROAD SUITE 200
BUFFALO NY 14220 US

ERNEST J IERARDI
NIXON HARGRAVE DEVANS DOYLE LLP
PO BOX 1051
CLINTON SQUARE
ROCHESTER NY 14603-1051 US

H DOUGLAS MIDKIFF
GENESEE TRANSPORTATION COUNCIL
65 WEST BROAD ST STE 101
ROCHESTER NY 14614-2210 US

JEANNE WALDOCK
107 GRANT COURT
ORLEAN NY 14760 US

DAVID W. DONLEY
3361 STAFFORD ST
PITTSBURGH PA 15204-1441 US

HENRY M. WICK, JR.
WICK, STREIFF, ET AL
1450 TWO CHATHAM CENTER
PITTSBURGH PA 15219 US

JOHN A. VUONO
VUONO & GRAY
2310 GRANT BUILDING
PITTSBURGH PA 15219 US

R J HENEFELD
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

M E PETRUCCELLI
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

RICHARD R WILSON
1126 EIGHT AV STE 403
ALTOONA PA 16602 US

D W DUNLEVY
STATE LEGISLATIVE DIRECTOR UTU
230 STATE STREET, PA AFL-CIO BLDG 2ND FLOOR
HARRISBURG PA 17101 US

KURT W CARR
BUREAU FOR HISTORIC PRESERVATION
P O BOX 1026
HARRISBURG PA 17108-1026 US

HONORABLE THOMAS J RIDGE
GOVERNOR, COMMONWEALTH OF PENNSYLVANIA
225 MAIN CAPITOL BUILDING
HARRISBURG PA 17120 US

KRISTOPHER MICHAEL KLEMICK
RR#3 BOX 101-15
JERSEY SHORE PA 17740-9309 US

BELNAP FREEMAN
BELKNAP FREEMAN
119 HICKORY LANE
ROSEMONT PA 19010 US

D J O'CONNELL
GENERAL CHAIRPERSON UTU
410 LANCASTER AVE STE 5
HAVERFORD PA 19041 US

JOHN J GROCKI
GRA INC
115 WEST AV ONE JENKINTOWN STA
JENKINTOWN PA 19046 US

HARRY C BARBIN
BARBIN LAUFFER & O'CONNELL
608 HUNTINGDON PIKE
ROCKLEDGE PA 19046 US

JONATHAN M BRODER
CONSOLIDATED RAIL CORP
PO BOX 41416
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

G CRAIG SCHELTER
PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATI
2600 CENTRE SQUARE WEST 500 MARKET ST
PHILADELPHIA PA 19102 US

WILLIAM R THOMPSON
CITY OF PHILADELPHIA LAW DEPT
1600 ARCH ST 10TH FLOOR
PHILADELPH PA 19103 US

JOHN J EHLINGER JR
OBERMAYER REBMANN MAXWELL & HIPPEL
1617 JOHN F. KENNEDY BLVD ONE PENN CENTER-19T
PHILADELPHIA PA 19103-1895 US

DAVID BERGER
BERGER AND MONTAGUE, P. C.
1622 LOCUST ST
PHILADELPHIA PA 19103-6305 US

JOHN J COSCIA, EXECUTIVE DIRECTOR
DELAWARE VALLEY REGIONAL PLANNING COMMISSION
111 SOUTH INDEPENDENCE MALL EAST
PHILADELPHIA PA 19106 US

JOHN K. LEARY, GENERAL MANAGER
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTH
1234 MARKET STREET 5TH FLOOR
PHILADELPHIA PA 19107-3780 US

ERIC M HOCKY
GOLLATZ GRIFFIN EWING
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

HON JOSEPH R BIDEN, JR.
UNITED STATES SENATE
844 KING STREET
WILMINGTON DE 19801 US

J E THOMAS
HERCULES INCORPORATED
1313 NORTH MARKET STREET
WILMINGTON DE 19894 US

E C WRIGHT
RAIL TRANSPORTATION PROCUREMENT MANAGER
1007 MARKET STREET DUPONT BLDG 3100
WILMINGTON DE 19898 US

FREDERICK H SCHRANCK
PO BOX 778
DOVER DE 19903 US

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

MARTIN W BERCOVICI
KELLER & HECKMAN, LLP
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

DREW A HARKER
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

GEORGE W MAYO JR
HOGAN & HARTSON L L P
555 THIRTEENTH STREET NW COLUMBIA SQUARE
WASHINGTON DC 20004-1109 US

KEVIN M SHEYS
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

ROSE-MICHELE WEINRYB
WEINER BRODSKY SIDMAN & KIDER
1350 NEW YORK AVENUE NW
WASHINGTON DC 20005 US

DANIEL DUFF
AMERICAN PUBLIC TRANSIT ASSOCIATION
1201 NEW YORK AV NW
WASHINGTON DC 20005 US

L JOHN OSBORN
SONNENSCHEIN NATH & ROSENTHAL
1301 K STREET NW STE 600 EAST
WASH DC 20005 US

KARL MORELL
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

EDWARD WYTKIND EXECUTIVE DIRECTOR
1025 CONNECTICUT AVE NW SUITE 1005
WASHINGTON DC 20005 US

PETER A GILBERTSON
REGIONAL RRS OF AMERICA
122 C ST NW STE 850
WASHINGTON DC 20001 US

JAMES HOWARD
COALITION OF NORTHEASTERN GOVERNORS
400 NORTH CAPITOL STREET, SUITE 382
WASHINGTON DC 20001 US

DONALD F GRIFFIN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G STREET NE STE 460
WASHINGTON DC 20002 US

DENNIS G LYONS
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

MARY GABRIELLE SPRAGUE
ARNOLD & PORTER
555 TWELTH STREET NW
WASHINGTON DC 20004-1202 US

BRUNO MAESTRI
NORFOLK SOUTHERN CORPORATION
1500 K STREET SUITE 375
WASHINGTON DC 20005 US

PAUL M LAURENZA
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

LOUIS E GITOMER
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

JOHN H BROADLEY
JENNER & BLOCK
601 13TH ST NW 12TH FL
WASHINGTON DC 20005 US

ALICE C SAYLOR
THE AMERICAN SHORT LINE RAILROAD ASSOCIATION
1120 G STREET, N. W., SUITE 520
WASHINGTON DC 20005 US

CLARK EVANS DOWNS
JONES DAY REAVIS & POGUE
1450 G STREET NW
WASHINGTON DC 20005-2088 US

WILLIAM A MULLINS
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005-3314 US

PAUL H LAMBOLEY
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005-3324 US

FRITZ R KAHN
1100 NEW YORK AVENUE NW SUITE 750 WEST
WASHINGTON DC 20005-3934 US

JEFFREY O MORENO
DONELAN CLEARY WOOD MASER
1100 NEW YORK AVENUE N W, SUITE 750
WASHINGTON DC 20005-3934 US

KARYN A BOOTH
DONELAN, CLEARY, WOOD & MASER, P.C.
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

FREDERIC L WOOD
DONELAN CLEARY WOOD & MASER P C
1100 NEW YORK AVENUE NW SUITE 750
WASHINGTON DC 20005-3934 US

JOHN K MASER III
DONELAN CLEARY WOOD & MASER P C
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

MARK H SIDMAN
WEINER BRODSKY,SIDMAN & KIDER
1350 NEW YORK AVE., NW., STE. 800
WASHINGTON DC 20005-4797 US

WILLIAM W MILLAR
AMERICAN PUBLIC TRANSIT ASSOCIATION
1201 NEW YORK AVE., NW
WASHINGTON DC 20005-6141 US

ANDREW P GOLDSTEIN
MCCARTHY SWEENEY HARKAWAY, PC
1750 PENNSYLVANIA AVE NW, STE 1105
WASHINGTON DC 20006 US

ROBERT P VOM EIGEN
HOPKINS AND SUTTER
888 16TH STREET N W STE 700
WASHINGTON DC 20006 US

ANDREW R. PLUMP
ZUCKERT, SCOUTT & RASENBERGER. LLP
888 17TH ST., NW, STE. 600
WASHINGTON DC 20006 US

SCOTT M ZIMMERMAN
ZUCKERT SCOUTT & RASENBERGER L L P
888 SEVENTEENTH STREET NW
WASHINGTON DC 20006 US

JAMES R WEISS
PRESTON GATES ELLIS ET AL
1735 NEW YORK AVENUE NW SUITE 500
WASHINGTON DC 20006 US

DANIEL J SWEENEY
MCCARTHY SWEENEY & HARKAWAY P C
1750 PENNSYLVANIA AVE NW STE 1105
WASHINGTON DC 20006 US

ERIKA Z JONES
MAYER BROWN & PLATT
1909 K STREET, NW
WASHINGTON DC 20006-1101 US

RICHARD A ALLEN
ZUCKERT SCOUT RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

JOHN V EDWARDS, ESQ
ZUCKERT SCOUTT ET AL
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

CHARLES A SPITULNIK
HOPKINS & SUTTER
888 SIXTEENTH ST NW
WASH DC 20006-4103 US

STEVEN J KALISH
MCARTHY SWEENEY & HARKAWAY
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006-4502 US

SHERRI LEHMAN DIRECTOR OF CONGRESSIONAL AFFAI
CORN REFINERS ASSOC
1701 PA AV NW
WASH DC 20006-5805 US

ROBERT G. SZABO
V.NESS FELDMAN
1050 THO JEFFERSON STREET,NW
WASHINGTON DC 20007 US

DAVID K MONROE
GALLAND, KHARASCH, GREENBERT, FELLMAN & SWIRS
1054 THIRTY-FIRST STREET NW, STE 200
WASHINGTON DC 20007 US

EDWARD D GREENBERG
GALLAND, KHARASCH, GREENBERT, FELLMAN & SWIRS
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

PAUL M DONOVAN
LAROE, WINN, MOERMAN & DONOVAN
3506 IDAHO AVE NW
WASHINGTON DC 20016 US

GORDON P MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

KELVIN J DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

HAROLD P QUINN, JR
NATIONAL MINING ASSOCIATON
1130 17TH STREET NW
WASHINGTON DC 20036 US

KEITH G O'BRIEN
REA CROSS AND AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

ROBERT A WIMBISH ESQ
REA CROSS & AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

JOHN M CUTLER JR
MCCARTHY SWEENEY HARKAWAY PC
1750 PENNSYLVANIA AVE N W SUITE 1105
WASHINGTON DC 20036 US

SAMUEL M SIPE JR
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

CHRISTOPHER C O'HARA
BRICKFIELD BURCHETTE & RITTS PC
1025 THOMAS JEFFERSON ST NW EIGHTH FLOOR
WASHINGTON DC 20007 US

MICHAEL F MCBRIDE
LEBOEUF LAMB GREENE & MACRAE
1875 CONNECTICUT AVENUE NW
WASHINGTON DC 20009-5728 US

JOHN D HEFFNER
REA CROSS & AUCHINCLOSS
1707 L STREET, NW, STE 570
WASHINGTON DC 20036 US

DAVID H COBURN
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE NW
WASHINGTON DC 20036 US

HELEN M. COUSINEAU
CARLOS RODRIGUEZ & ASSOCIATES
1710 RHODE ISLAND AVENUE, NW
WASHINGTON DC 20036 US

STEPHEN H BROWN
VORYS SATER SEYMOUR AND PEASE
1828 L STREET N W
WASHINGTON DC 20036 US

CHRISTOPHER A MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

RICHARD S EDELMAN
O'DONNELL SCHWARTZ & ANDERSON PC
1900 L STREET NW SUITE 707
WASHINGTON DC 20036 US

PETER A GREENE
THOMPSON HINE FLORY
1920 N STREET N W, SUITE 800
WASHINGTON DC 20036 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND & CLAYMAN, PC
1625 MASSACHUSETTS AVE., NW. STE 700
WASHINGTON DC 20036-2243 US

DEBRA L WILLEN
GUERRIERI EDMOND & CLAYMAN PC
1625 MASSACHUSETTS AVENUE, N.W., STE 700
WASHINGTON DC 20036-2243 US

DONALD G AVERY
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036-3003 US

WILLIAM L SLOVER
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036-3003 US

L PAT WYNNS
SUITE 210
1050 - 17TH STREET N W
WASHINGTON DC 20036-5503 US

JOHN L OBERDORFER
PATTON BOGGS LLP
2550 M ST NW
WASHINGTON DC 20037-1301 US

SCOTT N STONE
PATTON BOGGS L L P
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

ARVID E ROACH II
COVINGTON & BURLING
PO BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 S

KEITH A KLINDWORTH
U S DEPT OF AGRICULTURE
P O BOX 96456
WASHINGTON DC 20090 US

EILEEN S STOMMES
P O BOX 96456
ROOM 4006-SOUTH BUILDING
WASHINGTON DC 20090-6456 US

JUDGE JACOB LEVENTHAL, OFFICE OF HEARINGS
FEDERAL ENERGY REGULATORY COMMISSION
888 - 1ST ST, N.E. STE 11F
WASHINGTON DC 20426 US

RICHARD E SANDERSON
OFFICE OF FEDERAL ACTIVITIES
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HON. BARBARA A. MIKULSKI
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH BIDEN, JR.
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH I LIEBERMAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON CHARLES E SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON DANIEL PATRICK MOYNIHAN
UNITED STATES SENATE
WASINGTON DC 20510 US

BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON CHARLES SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE BOB GRAHAM
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHARLES ROBB
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON WILLIAM V. ROTH JR
U S SENATE
WASHINGTON DC 20510-0001 US

HON. JOHN W. WARNER
US SENATE
WASHINGTON DC 20510-0001 US

HON CHRISTOPHER J DODD
UNITED STATES SENATE
WASH DC 20510-0702 US

HONORABLE DANIEL P. MOYNIHAN
UNITED STATE SENATE
WASHINGTON DC 20510-0903 US

HONORABLE CONNIE MACK
UNITED STATES SENATE
WASHINGTON DC 20510-0904 US

HONORABLE JOHN BREAUX
UNITED STATES SENATE
WASHINGTON DC 20510-1803 US

HONORABLE J ROBERT KERREY
UNITED STATES SENATE
WASHIGTON DC 20510-2704 US

HON MIKE DEWINE
UNITED STATES SENATE
WASHINGTON DC 20510-3503 US

HON ARLEN SPECTER
UNITED STATES SENATE
WASHINGTON DC 20510-3802 US

HON RICK SANTORUM
UNITED STATES SENATE
WASHINGTON DC 20510-3804 US

HONORABLE JOHN H. CHAFEE
UNITED STATES SENATE
WASHINGTON DC 20510-3902 US

HON JACK REED
U S SENATE
WASHINGTON DC 20510-3903 US

HONORABLE ROBERT BYRD
UNITED STATES SENATE
WASHINGTON DC 20510-6025 US

HONORABLE JOHN J LAFALCE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHIP PICKERING
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JESSE L. JACKSON, JR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LUIS GUTIERREZ
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DANNY K DAVIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON RALPH REGULA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON SHERROD BROWN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NYDIA M VELAZQUEZ
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ED TOWNS
U. S. HOUSE OR REPRESENTATIVES
WASHINGTON DC 20515 US

HON LOUISE M SLAUGHTER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHRISTOPHER SHAYS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHARLES RANGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL MCNULTY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAMES MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CAROLYN B MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NITA LOWEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MAURICE HINCHEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL FORBES
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ELIOT L ENGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON GARY ACKERMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JERROLD NADLER
U S HOUSE OF REPRESENTATIVES
WASH DC 20515 US

HONORABLE ROBERT W. NEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB WEYGAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TED STRICKLAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON DENNIS J KUCINICH
UNITED STATES HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ED BRYANT
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. STEVE LATOURETTE
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAXBY CHAMBLISS,
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TILLIE K FOWLER
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK MASCARA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ROBERT MENENDEZ
U S HOUSE OF REPRESENTATIVES
WASH DC 20515 US

HON MARCY KAPTUR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JAMES TRAFICANT JR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON BOB WISE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JOHN J. DUNCAN
U S HOUSE OF REPRESENTATIVESS
WASHINGTON DC 20515 US

HONORABLE PAUL E. GILLMOR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JAMES L. OBERSTAR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM O. LIPINSKI
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB CLEMENT
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. THOMAS C SAWYER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. TOM BLILEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETER J. VISCLOSKY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MIKE DOYLE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN D. DINGELL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BENJAMIN A. GILMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAM GEJDENSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM J. COYNE
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MAJOR R. OWENS
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NANCY JOHNSON
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. BUD SHUSTER
ATTN: MIKE RICK
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ROD R BLAGOJEVICH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTO DC 20515-1305 US

HON JULIA CARSON
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1410 US

HONORABLE JAMES A. BARCIA
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2205 US

JAMES L OBERSTAR
RANKING DEMOCRATIC MEMBER COMMITTEE ON TRANSP
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3222 US

HON JACK QUINN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3230 US

HONORABLE RICHARD BURR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3305 US

HONORABLE TOM DAVIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4611 US

HONORABLE BOBBY L. RUSH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-9997 US

MICHAEL P HARMONIS
DEPARTMENT OF JUSTICE
325 SEVENTH STREET, NW
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
US DEPARTMENT OF TRANSPORTATION
400 SEVENTH STREET SW, ROOM 4102 C-30
WASHINGTON DC 20590 US

JOSEPH R. POMPONIO
FEDERAL RAILROAD ADMIN.
400 7TH ST SW RCC-20
WASHINGTON DC 20590 US

JOLENE MOLITORIS, ADMN.
FEDERAL RAILROAD ADMNS.
400 7TH STREET SW
WASHINGTON DC 20590 US

DAVID G ABRAHAM
SUITE 400W
7315 WISCONSIN AVENUE
BETHESDA MD 20814 US

MITCHELL M. KRAUS
TRANSPORTATION -COMMUNICATIONS INTERNATIONAL
3 RESEARCH PLACE
ROCKVILLE MD 20850 US

JOHN M ROBINSON
9616 OLD SPRING ROAD
KENSINGTON MD 20895-3124 US

WILLIAM W WHITEHURST JR
W W WHITEHURST & ASSOCIATES INC
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030-1711 US

JOHN HOY
P O BOX 117
GLEN BURNIE MD 21060 US

ROBERT J WILL
UNITED TRANSPORTATION UNION
4134 GRAVE RUN RD
MANCHESTER MD 21102 US

JOHN F WING CHAIRMAN
CITIZENS ADVISORY COMMITTEE
601 NORTH HOWARD STREET
BALTIMOTE MD 21201 US

LINDA A JANEY J D
MARYLAND OFFICE OF PLANNING
301 WEST PRESTON STREET
BALTIMORE MD 21201-2365 US

CHARLES M CHADWICK
MARYLAND MIDLAND RAILWAY INC
P O BOX 1000
UNION BRIDGE MD 21791 US

GARRET G SMITH
MOBIL OIL CORPORATION
3225 GALLOWS RD RM 8A903
FAIRFAX VA 22037-0001 US

HENRY E. SEATON
7700 LEESBURG PIKE, STE 201
FALLS CHURCH VA 22043 US

PETER Q NYCE JR
U S DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

GERALD W FAUTH III
G W FAUTH & ASSOCIATES INC
116 SOUTH ROYAL STREET
ALEXANDERIA VA 22314 US

KENNETH E SIEGEL
AMERICAN TRUCKING ASSOC INC
2200 MILL ROAD
ALEXANDRIA VA 22314-4677 US

HONORABLE GEORGE ALLEN
GOVERNOR, COMMONWEALTH OF VIRGINIA
STATE CAPITOL
RICHMOND VA 23219 US

L P KING JR
GENERAL CHAIRPERSON UTU
145 CAMPBELL AVE SW STE 207
ROANOKE VA 24011 US

VAUGHN R GROVES
PITTSTON COAL COMPANY
PO BOX 5100
LEBANON VA 24266 US

R K SARGENT
GENERAL CHAIRPERSON UTU
1319 CHESTNUT STREET
KENOVA WV 25530 US

FRANK N JORGENSEN
THE ELK RIVER RAILROAD INC
P O BOX 460
SUMMERSVILLE WV 26651 US

E NORRIS TOLSON
NC DEPT OF TRANSPORTATION
P O BOX 25201
1 S. WILINGTON STREET
RALEIGH NC 27611 US

HONORABLE DAVID M BEASLEY
GOVERNOR
P. O. BOX 11369
COLUMBIA SC 29211 US

CHARLES M ROSENBERGER
CSX TRANSPORTATION
500 WATER STREET - J150
JACKSONVILLE FL 32202 US

JENNIFER BRAUN
JACKSON & JESSUP
P O BOX 1240
3426 NORTH WASHINGTON BOULEVARD
ARLINGTON VA 22210 US

FRANCIS G MCKENNA
ANDERSON & PENDLETON
206 N WASHINGTON STREET SUITE 330
ALEXANDRIA VA 22314 US

ROBERT E MARTINEZ
VA SECRETARY OF TRANSPORTAITON
P. O. BOX 1475
RICHMOND VA 23218 US

GEORGE A ASPATORE
NORFOLK SOUTHERN CORP
THREE COMMEMERCIAL PLACE
NORFOLK VA 23510 US

HONORABLE JOHN WARNER
UNITED STATES SENATE
235 FEDERAL BUILDING
ABINGDON VA 24210-0887 US

TERRELL ELLIS
CAEZWV
P O BOX 176
CLAY WV 25043 US

WILLIAM T BRIGHT
P O BOX 149
200 GREENBRIER ROAD
SUMMERSVILLE WV 26651 US

SCOTT M SAYLOR
NORTH CAROLINA RAILROAD COMPANY
3200 ATLANTIC AV STE 110
RALIEGH NC 27604-1640 US

J R BARBEE
GENERAL CHAIRPERSON UTU
441 N LOUISIANA AVE STE Q
ASHEVILLE NC 28806-3791 US

PAUL R. HITCHCOCK
CSX TRANSPORTATION LAW DEPARTMENT
500 WATER STREET SC J-150
JACKSONVILLE FL 32202 US

DANFORD L PRICE
500 WATER STREET
JACKSONVILLE FL 32202 US

BOB HAULTER
CSX TRANSPORTATION INC
500 WATER STREET (J215)
JACKSONVILLE FL 32202 US

FRED R BIRKHOLZ
CSX TRANSPORTATION LAW DEPT - J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

ROBERT V ALLEN
CSX TRANSPORTATION
500 WATER STREET J305
JACKSONVILLE FL 32202 US

J RANDALL EVANS
500 WATER STREET (J150)
JACKSONVILLE FL 32202 US

JOHN W. HUMES, JR.
CSX TRANSPORTATION
SPEED CODE J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

J L RODGERS
GENERAL CHAIRMAN UTU
480 OSCEOLA AVENUE
JACKSONVILLE FL 32250 US

J T REED
GENERAL CHAIRPERSON UTU
7785 BAYMEADOWS WAY STE 109
JACKSONVILLE FL 32256 US

PHILLIP L BELL
ERIE LACKAWANNA RAILROAD CO
PO BOX 1482
TALLAHASSEE FL 32302 US

JAMES L BELCHER
EASTMAN CHEMICAL COMPANY
PO BOX 4[illegible]
KINGSPORT TN 37662 US

WILLIAM L OSTEEN
ASSOCIATE GENERAL COUNSEL TVA
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE KIRK FORDICE, GOVERNOR
STATE OF MISSISSIPPI
P O BOX 139
JACKSON MS 39205 US

HONORABLE PAUL E. PATTON
GOVERNOR
700 CAPITOL AVENUE, STE. 100
FRANKFORT KY 40601 US

WILLIAM P HERNAN JR GENERAL CHAIRMAN
P O BOX 180
HILLIARD OH 43026 US

F R PICKELL
GENERAL CHAIRPERSON UTU
6797 NORTH HIGH ST STE 108
WORTHINGTON OH 43085 US

THOMAS M O'LEARY
OHIO RAIL DEVELOPMENT COMMISSION
50 W BROAD STREET 15TH FLOOR
COLUMBUS OH 43215 US

HONORABLE DEBORAH PRYCE
U. S. HOUSE OF REPRESENTATIVES
500 SOUTH FRONT STREET, ROOM 1130
COLUMBUS OH 43215 US

DOREEN C JOHNSON, CHIEF ANTITRUST SECTION
OHIO ATTY GENERAL OFFICE
140 EAST TOWN STREET, FIRST FLOOR
COLUMBUS OH 43215-6001 US

JAMES R JACOBS
JACOBS INDUSTRIES
2 QUARRY LANE
STONY RIDGE OH 43463 US

DAVID CHAPMAN
LAFARGE LIME OHIO INC
P O BOX 128
659 ANDERSON ROAD
WOODVILLE OH 43469-0128 US

ROBERT J COOPER
GENERAL CHAIRPERSON UTU
1238 CASS ROAD
MAUMEE OH 43537 US

ROBERT E GREENLESE
TOLEDO-LUCAS COUNTY PORT AUTHORITY
1 MARITIME PLAZA SUITE 700
TOLEDO OH 43604 US

DAVID DYSARD
TMACOG
PO BOX 9508
300 CENTRAL UNION PLAZA
TOLEDO OH 43697-9508 US

ROBERT E MURRAY
OHIO VALLEY COAL CO
56854 PLEASANT RIDGE ROAD
ALLEDONIA OH 43902 US

MAYOR VINCENT M URBIN
150 AVON BELDEN RD
AVON LAKE OH 44012 US

BARBARA O'KEEFE
VILLAGE OF WELLINGTON
115 WILLARD MEMORIAL SQ
WELLINGTON OH 44090 US

ANITA R BRINDZA
THE ONE FIFTEEN HUNDRED BUILDING
11500 FRANKLIN BLVD SUITE 104
CLEVELAND OH 44102 US

CLINTON J MILLER III GENERAL COUNSEL
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

C V MONIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1370 ONTARIO STREET
CLEVELAND OH 44113 US

DAVID ROLOFF
GOLDSTEIN & ROLOFF
526 SUPERIOR AVENUE EAST SUITE 1440
CLEVELAND OH 44114 US

DAVID J MATTY
CITY OF ROCKY RIVER
21012 HILLIARD ROAD
ROCKY RIVER OH 44116-3398 US

C D WINEBRENNER
GENERAL CHAIRPERSON UTU
27801 EUCLID AV RM 200
EUCLID OH 44132 US

CHARLES ZUMKEHR
ROETZEL & ANDRESS CO LPA
75 EAST MARKET STREET
AKRON OH 44308 US

CHARLES E ALLENBAUGH JR
EAST OHIO STONE COMPANY
2000 W BESSON ST
ALLIANCE OH 44601 US

RON MARQUARDT
LOCAL UNION 1810 UMWA
R D #2
RAYLAND OH 43943 US

CHARLES S HESSE
CHARLES HESSE ASSOCIATES
7777 BAINBRIDGE ROAD
CHAGRIN FALLS OH 44023-2124 US

COLETTA MCNAMEE SR
CUDELL IMPROVEMENT INC
11500 FRANKLIN BLVD STE 104
CLEVELAND OH 44102 US

C L LITTLE
UNITED TRANSPORTATION UNION
14600 DETROIT AVE
CLEVELAND OH 44107 US

DANIEL R ELLIOTT III
ASST GENERAL COUNSEL UNITED TRANSPORTATION UN
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CHRISTOPHER C MCCRACKEN
ULMER & BERNE LLP
1300 EAST NINTH STREET SUITE 900
CLEVELAND OH 44114 US

INAJO DAVIS CHAPPELL
ASHTA CHEMICALS INC
1300 EAST NINETH STREET SUITE 900
CLEVELAND OH 44114-1538 US

MICHAEL J GARRIGAN
BP CHEMICALS INC
4440 WARRENSVILLE CTR RD
CLEVELAND OH 44128 US

GARY A EBERT
CITY OF BAY VILLAGE
350 DOVER CENTER ROAD
BAY VILLAGE OH 44140 US

SYLVIA R. CHINN-LEVY
NEFCO
969 COPLEY ROAD
AKRON OH 44320 US

RANDALL C. HUNT
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO.
P O BOX 36963
4775 MUNSON ST NW
CANTON OH 44735-6963 US

D G STRUNK JR
GENERAL CHAIRPERSON UTU
817 KILBOURNE STREET
BELLEVUE OH 44811 US

R A GRICE
GENERAL CHAIRPERSON UTU
817 KILBOURNE ST
BELLEVUE OH 44811-9431 US

RICHARD E KERTH
CHAMPION INTERNATIONAL CORPORATION
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

BRAD F HUSTON
CYPRUS AMAX COAL SALES CORP
400 TECHNECENTER DRIVE STE 320
MILFORD OH 45150 US

FAY D DUPUIS
CITY OF CINCINNATI
801 PLUM STREET
CINCINNATI OH 45202 US

ROBERT EDWARDS
EASTERN TRANSPORT AND LOGISTICS
1109 LANETTE DRIVE
CINCINNATI OH 45230 US

THOMAS R RYDMAN PRESIDENT
INDIAN CREEK RAILROAD COMPANY
3905 W 600 NORTH
ANDERSON IN 46011 US

F RONALDS WALKER
CITIZENS GAS & COKE UTILITY
2020 N MERIDIAN STREET
INDIANAPOLIS IN 46202-1393 US

MICHAEL P MAXWELL JR
MCHALE, COOK & WELCH
320 N MERIDIAN ST 1100 CHAMBER OF COMMERCE BL
INDIANAPOLIS IN 46204 US

J PATRICK LATZ
HEAVY LIFT CARGO SYSTEM
PO BOX 51451
INDIANAPOLIS IN 46251-0451 US

MICHAEL CONNELLY
CITY OF EAST CHICAGO
4525 INDIANAPOLIS BLVD
EAST CHICAGO IN 46312 US

HAMILTON L CARMOUCHE, CORPORATION COUNSEL
CITY OF GARY
401 BROADWAY 4TH FLOOR
GARY IN 46402 US

HONORABLE PETER J. VISCLOSKY
U. S. HOUSE OF REPRESENTATIVES
215 WEST 35TH AVENUE
GARY IN 46408 US

CARL FELLER
DEKALB AGRA INC
P. O. BOX 127
4743 COUNTY ROAD 28
WATERLOO IN 46793-0127 US

CHRISTOPHER J BURGER, PRESIDENT
CENTRAL RAILROAD COMPANY OF INDIANAPOLIS
PO BOX 554
KOKOMO IN 46903-0554 US

WILLIAM A BON, GENERAL COUNSEL
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
26555 EVERGREEN ROAD SUITE 200
SOUTHFIELD MI 48076 US

NICOLE HARVEY
THE DOW CHEMICAL COMPANY
2020 DOW CENTER
MIDLAND MI 48674 US

JAMES E SHEPHERD
TUSCOLA & SAGINAW BAY
PO BOX 550
OWOSSO MI 48867-0550 US

LARRY B KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

HON JOHN ENGLER
OFFICE OF THE GOVERNOR
P O BOX 30013
LANSING MI 48933 US

T SCOTT BANNISTER
T SCOTT BANNISTER AND ASSOCIATES
1300 DES MOINES BLDG 405 SIXTH AVENUE
DES MOINES IA 50309 US

BYRON D OLSEN
FELHABER LARSON FENLON & VOGT PA
601 SECOND AVENUE SOUTH SUITE 4200
MINNEAPOLIS MN 55401-4302 US

LEO J WASESCHA
GOLD MEDAL DIVISON - GENERAL MILLS OPERATION
P O BOX 1113
NUMBER ONE GENERAL MILLS BULEVARD
MINNEAPOLIS MN 55440 US

THOMAS R BOBAK
313 RIVER OAKS DRIVE
CALUMET CITY IL 60409 US

GERALD J. VINCI
PRAIRIE GROUP
P. O.BOX 1123
7601 WEST 79TH STREET
BRIDGEVIEW IL 60455 US

RICHARD A GAVRIL
16700 GENTRY LANE NO 104
TINLEY PARK IL 60477 US

EDWARD WASHINGTON, II
CHIEF, PUBLIC UTILITIES BUREAU, ILL ATTORNEY
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

CHRISTINE H. ROSSO
IL ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FLOOR
CHICAGO IL 60601 US

THOMAS J LITWILER
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE 45TH FLOOR
CHICAGO IL 60601 US

WILLIAM C SIPPEL
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE TWO PRUDENTIAL PLAZA 45TH F
CHICAGO IL 60601-6710 US

RICHARD F. FRIEDMAN, ESQ
EARL L NEAL & ASSOCIATES
111 WEST WASHINGTON STREET, STE 1700
CHICAGO IL 60602-2766 US

EDWARD C MCCARTHY
INLAND STEEL INDUSTRIES INC
30 WEST MONROE STREET
CHICAGO IL 60603 US

ROGER A SERPE
175 WEST JACKSON BOULEVARD SUITE 1460
CHICAGO IL 60604 US

SANDRA J. DEARDEN
MDCO CONSULTANTS, INC.
407 SOUTH DEARBORN, SUITE 1260
CHICAGO IL 60605 US

SHELDON A ZABEL
SCHIFF HARDIN & WAITE
7200 SEARS TOWER
CHICAGO IL 60606 US

THOMAS F MCFARLAND JR
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE, SUITE 1330
CHICAGO IL 60606-3101 US

MYLES L TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

CHARLES D BOLAM
UNITED TRANSPORTATION UNION
1400-20TH STREET
GRANITE CITY IL 62040 US

SCOTT A RONEY
ARCHER DANIELS MIDLAND COMPANY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

MERRILL L TRAVIS
ILLINOIS DEPT OF TRANSPORTATION
2300 S DIRKSEN PARKWAY RM 302
SPRINGFIELD IL 62764 US

IAN MUIR
BUNGE CORPORATION
P O BOX 28500
ST LOUIS MO 63146 US

JOHN JAY ROSACKER
KS DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

HENRY T DART
PLAINTIFF MANGEMENT COMMITTEE
3748 NORTH CAUSEWAY BLVD SUITE 301
METAIRIE LA 70002 US

MIKE SPAHIS
FINA OIL & CHEMICAL CO.
6000 LEGACY DRIVE
PLANO, TX 75024-3601 US

DENNIS A. GUTH
WEST LAKE GROUP
2801 POST OAK BLVD
HOUSTON TX 77056 US

DAVID L HALL
COMMONWEALTH CONSULTING ASSOCIATES
13103 FM 1960 WEST SUITE 204
HOUSTON TX 77065-4069 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
P O BOX 2583
1221 MCKINNEY STREET SUITE 1600
HOUSTON TX 77252-2583 US

STEVE M COULTER
EXXON COMPANY USA
PO BOX 3272
HOUSTON TX 77253-3272 US

MONTY L PARKER
CMC STEEL GROUP
P O BOX 911
SEGUIN TX 78156 US

STEPHEN M UTHOFF
CONIGLIO & UTHOFF
60 ELM AVENUE, CONIGLIO PROFESSIONAL BLDG
LONG BEACH CA 90802-4910 US

RICHARD WELSH
NARPO
50-505 GRAND TRAVERSE
LA QUINTA CA 92253 US

JOHN D FITZGERALD
UTU, GENERAL CHAIRPERSON
400 E EVERGREEN BLVD STE 217
VANCOUVER WA 98660-3264 US

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SERVICE DATE - JUNE 16, 1999

This decision will be included in the STB bound volumes of printed reports at a later date

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

Decision No. 129

Decided: June 15, 1999

In Decision No. 89, served July 23, 1998, we required applicants[1] to complete any negotiations with the State of Ohio (by and through the Ohio Attorney General, the Ohio Rail Development Commission, and the Public Utilities Commission of Ohio) regarding highway/rail at-grade crossing improvements within 120 days of the effective date of our decision (by December 20, 1998). See Decision No. 89, Environmental Condition 8(B) set out at Appendix Q, slip op. at 399. CSX and the State of Ohio have filed several requests for extension of time to comply with Environmental Condition 8(B), and the Board subsequently granted the requests. See Decision No. 108, slip op. at 2 (directing applicants to complete such negotiations by February 18, 1999); Decision No. 116, slip op. at 2 (directing applicants to complete such negotiations by April 5, 1999);[2] and Decision No. 120, slip op. at 2 (directing applicants to complete such negotiations by June 1, 1999).

On May 27, 1999, CSX submitted to us a Railroad Corridor Agreement (Agreement), dated May 17, 1999, entered into by CSX, the Public Utilities Commission of Ohio (PUCO), and the Ohio Rail Development Commission (ORDC), regarding highway/rail at-grade crossing improvements in Ohio. CSX explains that: (1) the submission of the Agreement satisfies the requirement of

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[1] CSX Corporation, CSX Transportation, Inc., and their wholly owned subsidiaries, and also Consolidated Rail Corporation's wholly owned New York Central Lines LLC subsidiary, are referred to collectively as CSX. Norfolk Southern Corporation and Norfolk Southern Railway Company and their wholly owned subsidiaries, and also Consolidated Rail Corporation's wholly owned Pennsylvania Lines LLC subsidiary are referred to collectively as NS. Conrail Inc. and Consolidated Rail Corporation, and also their wholly owned subsidiaries other than New York Central Lines LLC and Pennsylvania Lines LLC, are referred to collectively as Conrail or CR. CSX, NS, and Conrail are referred to collectively as applicants.

[2] As noted in Decision No. 116, slip op. at 1, the State of Ohio parties have advised that comprehensive corridor arrangements have already been concluded with NS.

Environmental Condition 8(B) of Decision No. 89, Appendix Q, slip op. at 399; and (2) the Agreement is intended to supersede Environmental Condition 8(A) with respect to the 20 highway/rail at-grade crossings located in the State of Ohio which are listed under "CSX" in Environmental Condition 8(A) of Decision No. 89, Appendix Q, slip op. at 395-96.

With respect to the Agreement, CSX advises that:

(1) as stated in Exhibit 3 to the Agreement, the warning system devices specified in Environmental Condition 8(A) had already been installed at eight crossings prior to execution of the Agreement. The crossings are: 518382H (LaRue), 155755Y (Deshler), 518488D (New London),[3] 155794P (Tontogany), 155804T (Haskins), 155814Y (Perrysburg), 155818B (Perrysburg), and 155838M (Rossford);

(2) the Agreement provides that seven crossings listed in Environmental Condition 8(A) shall be upgraded to flashing lights and gates, which meets or exceeds the specifications for these crossings in Environmental Condition 8(A). The crossings are: 155760V (Deshler), 228774H (Fostoria), 228780L (Fostoria), 155789T (Weston), 155812K (Perrysburg), 155819H (Perrysburg), and 155839U (Rossford);

(3) the Agreement provides that four crossings listed in Environmental Condition 8(A) shall be evaluated for closure. The crossings are: 155798S (Tontogany), 155799Y (Tontogany), 155820C (Perrysburg), and 155840N (Rossford). Section I(A) of the Agreement indicates that the closure process shall include local community participation. If any of these crossings is not closed, PUCO/ORDC will evaluate the crossing to determine if lights and gates should be installed, except that the parties have agreed that crossing 155798S in Tontogany will be upgraded to flashing lights and gates if it is not closed, and CSX will participate in funding installation or closure under the terms of the Agreement;

(4) the Agreement provides that one crossing listed in Environmental Condition 8(A) that is presently equipped with flashing lights and gates (155821J Perrysburg) shall be evaluated to determine whether further upgrade is warranted. Environmental Condition 8(A) specifies upgrade to "4-Quadrant Gates, or Alternative Mitigation such as Median Barriers."
As explained in Section I(B) of the Agreement, because these devices are not currently used in Ohio, further evaluation is required, and the Agreement provides that CSX will assist PUCO/ORDC and the local community in the evaluation; and

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[3] CSX advises that the Townline Road crossing in New London was erroneously identified as crossing 514488D in Environmental Condition 8(A).

(5) the Agreement provides for the upgrade of warning system devices or for evaluation for closure at 33 crossings in addition to the 20 crossings listed in Environmental Condition 8(A).

In light of the Agreement, CSX, PUCO, and ORDC request that the 20 CSX crossings in Ohio be deleted from Environmental Condition 8(A), and that Environmental Condition 51 be amended by adding the Railroad Corridor Agreement to the list of Negotiated Agreements entered into by CSX.

The requests will be granted. Accordingly, we will: (1) add the Railroad Corridor Agreement to Environmental Condition 51 of Appendix Q of Decision No. 89; and (2) delete the 20 CSX crossings in Ohio from Environmental Condition 8(A) of Appendix Q of Decision No. 89, because that particular condition has been superseded by the parties' Railroad Corridor Agreement.

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

It is ordered:

1. This proceeding is reopened.

2. In accordance with the Railroad Corridor Agreement among CSX, PUCO, and ORDC, executed on May 17, 1999, the following is added to the CSX Subsection of Environmental Condition 51 of Appendix Q of Decision No. 89:

> **14. The Public Utilities Commission of Ohio and the Ohio Rail Development Commission, "Railroad Corridor Agreement," dated May 17, 1999.**

3. In addition, Environmental Condition 8(A) of Appendix Q of Decision No. 89 is amended to delete the 20 CSX crossings in Ohio.

4. This decision shall be effective on the date of service.

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

Vernon A. Williams

Vernon A. Williams
Secretary

STEPHEN M FONTAINE
MASSACHUSETTS CENTRAL RAILROAD CORPORATION
ONE WILBRAHAM STREET
PALMER MA 01069 US

RICHARD B. KENNELLY, JR
CONSERVATION LAW FOUNDATION
62 SUMMER STREET
BOSTON MA 02110 US

JAMES E HOWARD
90 CANAL STREET
BOSTON MA 02114 US

JOHN D CIRAME, ASSISTANT SECRETARY
COMMONWEALTH OF MASS. EXEC. OFFICE OF TRANSPT
10 PARK PLAZA ROOM 3170
BOSTON MA 02116-3969 US

HON. EDWARD M KENNEDY
UNITES STATES SENATE
2400 JOHN F KENNEDY FEDERAL BLDG
BOSTON MA 02203 US

WILLIAM D ANKNER PHD
R I DEPT OF TRANSPORTATION
TWO CAPITOL HILL
PROVIDENCE RI 02903 US

JOHN R NADOLNY
14 AVIATION AVENUE
PORTSMOUTH NH 03801 US

ROBERT D ELDER
MAINE DEPARTMENT OF TRANSPORTATION
16 STATE HOUSE STATION
AUGUSTA ME 04333 US

KAREN E SONGHURST
STATE OF VERMONT
133 STATE STREET
MONTPELLIER VT 05633-5001 US

JAMES F SULLIVAN
CT DEPT OF TRANSPORTATION
P O BOX 317546
2800 BERLIN TURNPIKE
NEWINGTON CT 06131 US

EDWARD J RODRIGUEZ
P.O. BOX 298
67 MAIN STREET
CENTERBROOK CT 06409 US

RICHARD C CARPENTER
SOUTHWESTERN REGIONAL PLANNING AGENCY
1 SELLECK STREET SUITE 210
EAST NORWALK CT 06855 US

MICHAEL E STRICKLAND
NYK LINE (NORTH AMERICA) INC, SENIOR VICE PRE
300 LIGHTING WAY
SECAUCUS NJ 07094-1588 US

HONORABLE ROBERT G. TORRICELLI
UNITED STATES SENATE
1 RIVER FRONT PLAZA, 3RD FLOOR
NEWARK NJ 07102 US

J WILLIAM VAN DYKE
NJ TRANSPORTATION PLANNING AUTHORITY
ONE NEWARK CENTER 17TH FLOOR
NEWARK NJ 07102 US

EDWARD LLOYD
RUTGERS ENVIRONMENTAL LAW CLINIC
15 WASHINGTON STREET
NEWARK NJ 07102 US

PHILIP SIDO
UNION CAMP CORPORATION
1600 VALLEY ROAD
WAYNE NJ 07470 US

MARTIN T DURKIN ESQ
DURKIN & BOGGIA ESQS
PO BOX 378
71 MT VERNON STREET
RIDGEFIELD PARK NJ 07660 US

CRAIG CURRY
1000 HOWARD BOULEVARD
MOUNT LAUREL NJ 08054 US

TIMOTHY G CHELIUS
18 N EAST AVENUE
VINELAND NJ 08360 US

LAWRENCE PEPPER, JR
GRUCCIO PEPPER
817 EAST LANDS AVE
VINELAND NJ 08360 US

JOHN F. MCHUGH
MCHUGH & SHERMAN
20 EXCHANGE PLACE 51ST FLOOR
NEW YORK NY 10005 US

ANTHONY BOTTALICO
UTU
420 LEXINGTON AVENUE ROOM 458-460
NEW YORK NY 10017 US

ANTHONY P. SEMANCIK
347 MADISON AVENUE
NEW YORK NY 10017-3706 US

HUGH H. WELSH
LAW DEPT., SUITE 67E
ONE WORLD TRADE CENTER
NEW YORK NY 10048-0202 US

SAMUEL J NASCA
UTU STATE LEGISLATIVE DIRECTOR
35 FULLER ROAD SUITE 205
ALBANY NY 12205 US

DIANE SEITZ
CENTRAL HUDSON GAS & ELECTRIC CORP
284 SOUTH AVENUE
POUGHKEEPSIE NY 12601 US

ANGELO J CHICK JR, LOCAL CHAIRMAN
P O BOX 908
48398 OLD GOOSE BAY ROAD
REDWOOD NY 13679 US

SHEILA MECK HYDE
CITY HALL
342 CENTRAL AVENUE
DUNKIRK NY 14048 US

JOHN F COLLINS
COLLINS ,COLLINS, & KANTOR PC
267 NORTH STREET
BUFFALO NY 14201 US

ERNEST J IERARDI
NIXON HARGRAVE DEVANS DOYLE LLP
PO BOX 1051
CLINTON SQUARE
ROCHESTER NY 14603-1051 US

JEANNE WALDOCK
107 GRANT COURT
ORLEAN NY 14760 US

HENRY M. WICK, JR.
WICK, STREIFF, ET AL
1450 TWO CHATHAM CENTER
PITTSBURGH PA 15219 US

WALTER E ZULLIG JR
METRO-NORTH COMMUTER RAILROAD COMPANY
347 MADISON AVE
NEW YORK NY 10017-3706 US

JAMES W HARRIS
THE METROPOLITIAN PLANNING ORGANIZATION
1 WORLD TRADE CENTER STE 82 EAST
NEW YORK NY 10048-0043 US

R. LAWRENCE MCCAFFREY, JR.
NEW YORK & ATLANTIC RAILWAY
405 LEXINGTON AVENUE 50TH FLOOR
NEW YORK NY 10174 US

DANIEL B. WALSH
BUSINESS COUNCIL OF NEW YORK STATE,INC.
152 WASHINGTON AVENUE
ALBANY NY 12210 US

IRWIN L. DAVIS
1900 STATE TOWER BLDG.
SYRACUSE NY 13202 US

GARY EDWARDS
SOMERSET RAILROAD
7725 LAKE ROAD
BARKER NY 14012 US

IRVING J RUBIN
P O BOX 243
YOUNGSTOWN NY 14174 US

R W GODWIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
810 ABBOTT ROAD SUITE 200
BUFFALO NY 14220 US

H DOUGLAS MIDKIFF
GENESEE TRANSPORTATION COUNCIL
65 WEST BROAD ST STE 101
ROCHESTER NY 14614-2210 US

DAVID W. DONLEY
3361 STAFFORD ST
PITTSBURGH PA 15204-1441 US

JOHN A. VUONO
VUONO & GRAY
2310 GRANT BUILDING
PITTSBURGH PA 15219 US

R J HENEFELD
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

M E PETRUCCELLI
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

RICHARD R WILSON
1126 EIGHT AV STE 403
ALTOONA PA 16602 US

D W DUNLEVY
STATE LEGISLATIVE DIRECTOR UTU
230 STATE STREET, PA AFL-CIO BLDG 2ND FLOOR
HARRISBURG PA 17101 US

KURT W CARR
BUREAU FOR HISTORIC PRESERVATION
P O BOX 1026
HARRISBURG PA 17108-1026 US

HONORABLE THOMAS J RIDGE
GOVERNOR, COMMONWEALTH OF PENNSYLVANIA
225 MAIN CAPITOL BUILDING
HARRISBURG PA 17120 US

KRISTOPHER MICHAEL KLEMICK
RR#3 BOX 101-15
JERSEY SHORE PA 17740-9309 US

BELNAP FREEMAN
BELKNAP FREEMAN
119 HICKORY LANE
ROSEMONT PA 19010 US

D J O'CONNELL
GENERAL CHAIRPERSON UTU
410 LANCASTER AVE STE 5
HAVERFORD PA 19041 US

JOHN J GROCKI
GRA INC
115 WEST AV ONE JENKINTOWN STA
JENKINTOWN PA 19046 US

HARRY C BARBIN
BARBIN LAUFFER & O'CONNELL
608 HUNTINGDON PIKE
ROCKLEDGE PA 19046 US

JONATHAN M BRODER
CONSOLIDATED RAIL CORP
PO BOX 41416
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

G CRAIG SCHELTER
PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATI
2600 CENTRE SQUARE WEST 500 MARKET ST
PHILADELPHIA PA 19102 US

WILLIAM R THOMPSON
CITY OF PHILADELPHIA LAW DEPT
1600 ARCH ST 10TH FLOOR
PHILADELPH PA 19103 US

JOHN J EHLINGER JR
OBERMAYER REBMANN MAXWELL & HIPPEL
1617 JOHN F. KENNEDY BLVD ONE PENN CENTER-19T
PHILADELPHIA PA 19103-1895 US

DAVID BERGER
BERGER AND MONTAGUE, P. C.
1622 LOCUST ST
PHILADELPHIA PA 19103-6305 US

JOHN J COSCIA, EXECUTIVE DIRECTOR
DELAWARE VALLEY REGIONAL PLANNING COMMISSION
111 SOUTH INDEPENDENCE MALL EAST
PHILADELPHIA PA 19106 US

JOHN K. LEARY, GENERAL MANAGER
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTH
1234 MARKET STREET 5TH FLOOR
PHILADELPHIA PA 19107-3780 US

CHERYL ANNE COOK
SENIOR GENERAL ATTORNEY CONRAIL
1138 SIX PENN CENTER
PHILADELPHIA PA 19146 US

ERIC M HOCKY
GOLLATZ GRIFFIN EWING
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

HON JOSEPH R BIDEN, JR.
UNITED STATES SENATE
844 KING STREET
WILMINGTON DE 19801 US

J E THOMAS
HERCULES INCORPORATED
1313 NORTH MARKET STREET
WILMINGTON DE 19894 US

E C WRIGHT
RAIL TRANSPORTATION PROCUREMENT MANAGER
1007 MARKET STREET DUPONT BLDG 3100
WILMINGTON DE 19898 US

FREDERICK H SCHRANCK
PO BOX 778
DOVER DE 19903 US

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

PETER A GILBERTSON
REGIONAL RRS OF AMERICA
122 C ST NW STE 850
WASHINGTON DC 20001 US

MARTIN W BERCOVICI
KELLER & HECKMAN, LLP
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

JAMES HOWARD
COALITION OF NORTHEASTERN GOVERNORS
400 NORTH CAPITOL STREET, SUITE 382
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

DONALD F GRIFFIN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G STREET NE STE 460
WASHINGTON DC 20002 US

DREW A HARKER
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

DENNIS G LYONS
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

GEORGE W MAYO JR
HOGAN & HARTSON L L P
555 THIRTEENTH STREET NW COLUMBIA SQUARE
WASHINGTON DC 20004-1109 US

MARY GABRIELLE SPRAGUE
ARNOLD & PORTER
555 TWELTH STREET NW
WASHINGTON DC 20004-1202 US

KEVIN M SHEYS
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

BRUNO MAESTRI
NORFOLK SOUTHERN CORPORATION
1500 K STREET SUITE 375
WASHINGTON DC 20005 US

EDWARD J FISHMAN
OPPENHEIMER WOLFF & DONNELLY
1350 EYE STREET, N.W.
WASHINGTON DC 20005 US

ROSE-MICHELE WEINRYB
WEINER BRODSKY SIDMAN & KIDER
1350 NEW YORK AVENUE NW
WASHINGTON DC 20005 US

PAUL M LAURENZA
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

DANIEL DUFF
AMERICAN PUBLIC TRANSIT ASSOCIATION
1201 NEW YORK AV NW
WASHINGTON DC 20005 US

LOUIS E GITOMER
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

L JOHN OSBORN
SONNENSCHEIN NATH & ROSENTHAL
1301 K STREET NW STE 600 EAST
WASH DC 20005 US

JOHN H BROADLEY
JENNER & BLOCK
601 13TH ST NW 12TH FL
WASHINGTON DC 20005 US

KARL MORELL
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

ALICE C SAYLOR
THE AMERICAN SHORT LINE RAILROAD ASSOCIATION
1120 G STREET, N. W., SUITE 520
WASHINGTON DC 20005 US

EDWARD WYTKIND EXECUTIVE DIRECTOR
1025 CONNECTICUT AVE NW SUITE 1005
WASHINGTON DC 20005 US

CLARK EVANS DOWNS
JONES DAY REAVIS & POGUE
1450 G STREET NW
WASHINGTON DC 20005-2088 US

WILLIAM A MULLINS
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005-3314 US

PAUL H LAMBOLEY
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005-3324 US

FRITZ R KAHN
1100 NEW YORK AVENUE NW SUITE 750 WEST
WASHINGTON DC 20005-3934 US

JEFFREY O MORENO
DONELAN CLEARY WOOD MASER
1100 NEW YORK AVENUE N W, SUITE 750
WASHINGTON DC 20005-3934 US

KARYN A BOOTH
DONELAN, CLEARY, WOOD & MASER, P.C.
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

FREDERIC L WOOD
DONELAN CLEARY WOOD & MASER P C
1100 NEW YORK AVENUE NW SUITE 750
WASHINGTON DC 20005-3934 US

JOHN K MASER III
DONELAN CLEARY WOOD & MASER P C
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

MARK H SIDMAN
WEINER BRODSKY,SIDMAN & KIDER
1350 NEW YORK AVE., NW., STE. 800
WASHINGTON DC 20005-4797 US

WILLIAM W MILLAR
AMERICAN PUBLIC TRANSIT ASSOCIATION
1201 NEW YORK AVE., NW
WASHINGTON DC 20005-6141 US

ANDREW P GOLDSTEIN
MCCARTHY SWEENEY HARKAWAY, PC
1750 PENNSYLVANIA AVE NW, STE 1105
WASHINGTON DC 20006 US

ROBERT P VOM EIGEN
HOPKINS AND SUTTER
888 16TH STREET N W STE 700
WASHINGTON DC 20006 US

ANDREW R. PLUMP
ZUCKERT, SCOUTT & RASENBERGER. LLP
888 17TH ST., NW, STE. 600
WASHINGTON DC 20006 US

SCOTT M ZIMMERMAN
ZUCKERT SCOUTT & RASENBERGER L L P
888 SEVENTEENTH STREET NW
WASHINGTON DC 20006 US

JAMES R WEISS
PRESTON GATES ELLIS ET AL
1735 NEW YORK AVENUE NW SUITE 500
WASHINGTON DC 20006 US

DANIEL J SWEENEY
MCCARTHY SWEENEY & HARKAWAY P C
1750 PENNSYLVANIA AVE NW STE 1105
WASHINGTON DC 20006 US

ERIKA Z JONES
MAYER BROWN & PLATT
1909 K STREET, NW
WASHINGTON DC 20006-1101 US

RICHARD A ALLEN
ZUCKERT SCOUT RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

JOHN V EDWARDS, ESQ
ZUCKERT SCOUTT ET AL
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

CHARLES A SPITULNIK
HOPKINS & SUTTER
888 SIXTEENTH ST NW
WASH DC 20006-4103 US

STEVEN J KALISH
MCARTHY SWEENEY & HARKAWAY
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006-4502 US

ROBERT G. SZABO
V.NESS FELDMAN
1050 THO JEFFERSON STREET,NW
WASHINGTON DC 20007 US

CHRISTOPHER C O'HARA
BRICKFIELD BURCHETTE & RITTS PC
1025 THOMAS JEFFERSON ST NW EIGHTH FLOOR
WASHINGTON DC 20007 US

MICHAEL F MCBRIDE
LEBOEUF LAMB GREENE & MACRAE
1875 CONNECTICUT AVENUE NW
WASHINGTON DC 20009-5728 US

JOHN D HEFFNER
REA CROSS & AUCHINCLOSS
1707 L STREET, NW, STE 570
WASHINGTON DC 20036 US

DAVID H COBURN
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE NW
WASHINGTON DC 20036 US

HELEN M. COUSINEAU
CARLOS RODRIGUEZ & ASSOCIATES
1710 RHODE ISLAND AVENUE, NW
WASHINGTON DC 20036 US

STEPHEN H BROWN
VORYS SATER SEYMOUR AND PEASE
1828 L STREET N W
WASHINGTON DC 20036 US

CHRISTOPHER A MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

RICHARD S EDELMAN
O'DONNELL SCHWARTZ & ANDERSON PC
1900 L STREET NW SUITE 707
WASHINGTON DC 20036 US

PETER A GREENE
THOMPSON HINE FLORY
1920 N STREET N W, SUITE 800
WASHINGTON DC 20036 US

SHERRI LEHMAN DIRECTOR OF CONGRESSIONAL AFFAI
CORN REFINERS ASSOC
1701 PA AV NW
WASH DC 20006-5805 US

DAVID K MONROE
GALLAND, KHARASCH, GREENBERT, FELLMAN & SWIRS
1054 THIRTY-FIRST STREET NW, STE 200
WASHINGTON DC 20007 US

EDWARD D GREENBERG
GALLAND, KHARASCH, GREENBERT, FELLMAN & SWIRS
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

PAUL M DONOVAN
LAROE, WINN, MOERMAN & DONOVAN
3506 IDAHO AVE NW
WASHINGTON DC 20016 US

GORDON P MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

KELVIN J DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

HAROLD P QUINN, JR
NATIONAL MINING ASSOCIATON
1130 17TH STREET NW
WASHINGTON DC 20036 US

KEITH G O'BRIEN
REA CROSS AND AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

ROBERT A WIMBISH ESQ
REA CROSS & AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

JOHN M CUTLER JR
MCCARTHY SWEENEY HARKAWAY PC
1750 PENNSYLVANIA AVE N W SUITE 1105
WASHINGTON DC 20036 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

SAMUEL M SIPE JR
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND & CLAYMAN, PC
1625 MASSACHUSETTS AVE., NW. STE 700
WASHINGTON DC 20036-2243 US

DEBRA L WILLEN
GUERRIERI EDMOND & CLAYMAN PC
1625 MASSACHUSETTS AVENUE, N.W., STE 700
WASHINGTON DC 20036-2243 US

DONALD G AVERY
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036-3003 US

WILLIAM L SLOVER
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036-3003 US

L PAT WYNNS
SUITE 210
1050 - 17TH STREET N W
WASHINGTON DC 20036-5503 US

JOHN L OBERDORFER
PATTON BOGGS LLP
2550 M ST NW
WASHINGTON DC 20037-1301 US

SCOTT N STONE
PATTON BOGGS L L P
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

ARVID E ROACH II
COVINGTON & BURLING
PO BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

KEITH A KLINDWORTH
U S DEPT OF AGRICULTURE
P O BOX 96456
WASHINGTON DC 20090 US

EILEEN S STOMMES
P O BOX 96456
ROOM 4006-SOUTH BUILDING
WASHINGTON DC 20090-6456 US

JUDGE JACOB LEVENTHAL, OFFICE OF HEARINGS
FEDERAL ENERGY REGULATORY COMMISSION
888 - 1ST ST, N.E. STE 11F
WASHINGTON DC 20426 US

RICHARD E SANDERSON
OFFICE OF FEDERAL ACTIVITIES
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HON. BARBARA A. MIKULSKI
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH BIDEN, JR.
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH I LIEBERMAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON CHARLES E SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON DANIEL PATRICK MOYNIHAN
UNITED STATES SENATE
WASINGTON DC 20510 US

BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE BOB GRAHAM
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON WILLIAM V. ROTH JR
U S SENATE
WASHINGTON DC 20510-0001 US

HON CHRISTOPHER J DODD
UNITED STATES SENATE
WASH DC 20510-0702 US

HONORABLE CONNIE MACK
UNITED STATES SENATE
WASHINGTON DC 20510-0904 US

HONORABLE J ROBERT KERREY
UNITED STATES SENATE
WASHIGTON DC 20510-2704 US

HON ARLEN SPECTER
UNITED STATES SENATE
WASHINGTON DC 20510-3802 US

HONORABLE JOHN H. CHAFEE
UNITED STATES SENATE
WASHINGTON DC 20510-3902 US

HONORABLE ROBERT BYRD
UNITED STATES SENATE
WASHINGTON DC 20510-6025 US

HONORABLE CHIP PICKERING
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LUIS GUTIERREZ
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHARLES SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHARLES ROBB
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOHN W. WARNER
US SENATE
WASHINGTON DC 20510-0001 US

HONORABLE DANIEL P. MOYNIHAN
UNITED STATE SENATE
WASHINGTON DC 20510-0903 US

HONORABLE JOHN BREAUX
UNITED STATES SENATE
WASHINGTON DC 20510-1803 US

HON MIKE DEWINE
UNITED STATES SENATE
WASHINGTON DC 20510-3503 US

HON RICK SANTORUM
UNITED STATES SENATE
WASHINGTON DC 20510-3804 US

HON JACK REED
U S SENATE
WASHINGTON DC 20510-3903 US

HONORABLE JOHN J LAFALCE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JESSE L. JACKSON, JR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DANNY K DAVIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON RALPH REGULA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON SHERROD BROWN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NYDIA M VELAZQUEZ
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ED TOWNS
U. S. HOUSE OR REPRESENTATIVES
WASHINGTON DC 20515 US

HON LOUISE M SLAUGHTER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHRISTOPHER SHAYS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHARLES RANGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL MCNULTY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAMES MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CAROLYN B MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NITA LOWEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MAURICE HINCHEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL FORBES
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ELIOT L ENGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON GARY ACKERMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JERROLD NADLER
U S HOUSE OF REPRESENTATIVES
WASH DC 20515 US

HONORABLE ROBERT W. NEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB WEYGAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TED STRICKLAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON DENNIS J KUCINICH
UNITED STATES HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ED BRYANT
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. STEVE LATOURETTE
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAXBY CHAMBLISS,
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TILLIE K FOWLER
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK MASCARA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ROBERT MENENDEZ
U S HOUSE OF REPRESENTATIVES
WASH DC 20515 US

HON MARCY KAPTUR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JAMES TRAFICANT JR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON BOB WISE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JOHN J. DUNCAN
U S HOUSE OF REPRESENTATIVESS
WASHINGTON DC 20515 US

HONORABLE PAUL E. GILLMOR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JAMES L. OBERSTAR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM O. LIPINSKI
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB CLEMENT
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. THOMAS C SAWYER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. TOM BLILEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETER J. VISCLOSKY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MIKE DOYLE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN D. DINGELL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BENJAMIN A. GILMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAM GEJDENSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM J. COYNE
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MAJOR R. OWENS
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NANCY JOHNSON
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. BUD SHUSTER
ATTN: MIKE RICK
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ROD R BLAGOJEVICH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTO DC 20515-1305 US

HON JULIA CARSON
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1410 US

HONORABLE JAMES A. BARCIA
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2205 US

JAMES L OBERSTAR
RANKING DEMOCRATIC MEMBER COMMITTEE ON TRANSP
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3222 US

HON JACK QUINN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3230 US

HONORABLE RICHARD BURR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3305 US

HONORABLE TOM DAVIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4611 US

HONORABLE BOBBY L. RUSH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-9997 US

MICHAEL P HARMONIS
DEPARTMENT OF JUSTICE
325 SEVENTH STREET, NW
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
US DEPARTMENT OF TRANSPORTATION
400 SEVENTH STREET SW, ROOM 4102 C-30
WASHINGTON DC 20590 US

JOSEPH R. POMPONIO
FEDERAL RAILROAD ADMIN.
400 7TH ST SW RCC-20
WASHINGTON DC 20590 US

JOLENE MOLITORIS, ADMN.
FEDERAL RAILROAD ADMNS.
400 7TH STREET SW
WASHINGTON DC 20590 US

DAVID G ABRAHAM
SUITE 400W
7315 WISCONSIN AVENUE
BETHESDA MD 20814 US

MITCHELL M. KRAUS
TRANSPORTATION -COMMUNICATIONS INTERNATIONAL
3 RESEARCH PLACE
ROCKVILLE MD 20850 US

JOHN M ROBINSON
9616 OLD SPRING ROAD
KENSINGTON MD 20895-3124 US

WILLIAM W WHITEHURST JR
W W WHITEHURST & ASSOCIATES INC
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030-1711 US

JOHN HOY
P O BOX 117
GLEN BURNIE MD 21060 US

ROBERT J WILL
UNITED TRANSPORTATION UNION
4134 GRAVE RUN RD
MANCHESTER MD 21102 US

JOHN F WING CHAIRMAN
CITIZENS ADVISORY COMMITTEE
601 NORTH HOWARD STREET
BALTIMOTE MD 21201 US

LINDA A JANEY J D
MARYLAND OFFICE OF PLANNING
301 WEST PRESTON STREET
BALTIMORE MD 21201-2365 US

CHARLES M CHADWICK
MARYLAND MIDLAND RAILWAY INC
P O BOX 1000
UNION BRIDGE MD 21791 US

GARRET G SMITH
MOBIL OIL CORPORATION
3225 GALLOWS RD RM 8A903
FAIRFAX VA 22037-0001 US

PETER Q NYCE JR
U S DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

JENNIFER BRAUN
JACKSON & JESSUP
P O BOX 1240
3426 NORTH WASHINGTON BOULEVARD
ARLINGTON VA 22210 US

FRANCIS G MCKENNA
ANDERSON & PENDLETON
206 N WASHINGTON STREET SUITE 330
ALEXANDRIA VA 22314 US

ROBERT E MARTINEZ
VA SECRETARY OF TRANSPORTAITON
P. O. BOX 1475
RICHMOND VA 23218 US

GEORGE A ASPATORE
NORFOLK SOUTHERN CORP
THREE COMMEMERCIAL PLACE
NORFOLK VA 23510 US

HONORABLE JOHN WARNER
UNITED STATES SENATE
235 FEDERAL BUILDING
ABINGDON VA 24210-0887 US

TERRELL ELLIS
CAEZWV
P O BOX 176
CLAY WV 25043 US

WILLIAM T BRIGHT
P O BOX 149
200 GREENBRIER ROAD
SUMMERSVILLE WV 26651 US

SCOTT M SAYLOR
NORTH CAROLINA RAILROAD COMPANY
3200 ATLANTIC AV STE 110
RALIEGH NC 27604-1640 US

J R BARBEE
GENERAL CHAIRPERSON UTU
441 N LOUISIANA AVE STE Q
ASHVILLE NC 28806-3791 US

HENRY E. SEATON
7700 LEESBURG PIKE, STE 201
FALLS CHURCH VA 22043 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

GERALD W FAUTH III
G W FAUTH & ASSOCIATES INC
116 SOUTH ROYAL STREET
ALEXANDERIA VA 22314 US

KENNETH E SIEGEL
AMERICAN TRUCKING ASSOC INC
2200 MILL ROAD
ALEXANDRIA VA 22314-4677 US

HONORABLE GEORGE ALLEN
GOVERNOR, COMMONWEALTH OF VIRGINIA
STATE CAPITOL
RICHMOND VA 23219 US

L P KING JR
GENERAL CHAIRPERSON UTU
145 CAMPBELL AVE SW STE 207
ROANOKE VA 24011 US

VAUGHN R GROVES
PITTSTON COAL COMPANY
PO BOX 5100
LEBANON VA 24266 US

R K SARGENT
GENERAL CHAIRPERSON UTU
1319 CHESTNUT STREET
KENOVA WV 25530 US

FRANK N JORGENSEN
THE ELK RIVER RAILROAD INC
P O BOX 460
SUMMERSVILLE WV 26651 US

E NORRIS TOLSON
NC DEPT OF TRANSPORTATION
P O BOX 25201
1 S. WILINGTON STREET
RALEIGH NC 27611 US

HONORABLE DAVID M BEASLEY
GOVERNOR
P. O. BOX 11369
COLUMBIA SC 29211 US

PAUL R. HITCHCOCK
CSX TRANSPORTATION LAW DEPARTMENT
500 WATER STREET SC J-150
JACKSONVILLE FL 32202 US

CHARLES M ROSENBERGER
CSX TRANSPORTATION
500 WATER STREET - J150
JACKSONVILLE FL 32202 US

DANFORD L PRICE
500 WATER STREET
JACKSONVILLE FL 32202 US

BOB HAULTER
CSX TRANSPORTATION INC
500 WATER STREET (J215)
JACKSONVILLE FL 32202 US

FRED R BIRKHOLZ
CSX TRANSPORTATION LAW DEPT - J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

ROBERT V ALLEN
CSX TRANSPORTATION
500 WATER STREET J305
JACKSONVILLE FL 32202 US

J RANDALL EVANS
500 WATER STREET (J150)
JACKSONVILLE FL 32202 US

JOHN W. HUMES, JR.
CSX TRANSPORTATION
SPEED CODE J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

J L RODGERS
GENERAL CHAIRMAN UTU
480 OSCEOLA AVENUE
JACKSONVILLE FL 32250 US

J T REED
GENERAL CHAIRPERSON UTU
7785 BAYMEADOWS WAY STE 109
JACKSONVILLE FL 32256 US

PHILLIP L BELL
ERIE LACKAWANNA RAILROAD CO
PO BOX 1482
TALLAHASSEE FL 32302 US

JAMES L BELCHER
EASTMAN CHEMICAL COMPANY
PO BOX 431
KINGSPORT TN 37662 US

WILLIAM L OSTEEN
ASSOCIATE GENERAL COUNSEL TVA
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE KIRK FORDICE, GOVERNOR
STATE OF MISSISSIPPI
P O BOX 139
JACKSON MS 39205 US

HONORABLE PAUL E. PATTON
GOVERNOR
700 CAPITOL AVENUE, STE. 100
FRANKFORT KY 40601 US

WILLIAM P HERNAN JR GENERAL CHAIRMAN
P O BOX 180
HILLIARD OH 43026 US

F R PICKELL
GENERAL CHAIRPERSON UTU
6797 NORTH HIGH ST STE 108
WORTHINGTON OH 43085 US

THOMAS M O'LEARY
OHIO RAIL DEVELOPMENT COMMISSION
50 W BROAD STREET 15TH FLOOR
COLUMBUS OH 43215 US

HONORABLE DEBORAH PRYCE
U. S. HOUSE OF REPRESENTATIVES
500 SOUTH FRONT STREET, ROOM 1130
COLUMBUS OH 43215 US

DOREEN C JOHNSON, CHIEF ANTITRUST SECTION
OHIO ATTY GENERAL OFFICE
140 EAST TOWN STREET, FIRST FLOOR
COLUMBUS OH 43215-6001 US

JAMES R JACOBS
JACOBS INDUSTRIES
2 QUARRY LANE
STONY RIDGE OH 43463 US

DAVID CHAPMAN
LAFARGE LIME OHIO INC
P O BOX 128
659 ANDERSON ROAD
WOODVILLE OH 43469-0128 US

ROBERT J COOPER
GENERAL CHAIRPERSON UTU
1238 CASS ROAD
MAUMEE OH 43537 US

DAVID DYSARD
TMACOG
PO BOX 9508
300 CENTRAL UNION PLAZA
TOLEDO OH 43697-9508 US

RON MARQUARDT
LOCAL UNION 1810 UMWA
R D #2
RAYLAND OH 43943 US

CHARLES S HESSE
CHARLES HESSE ASSOCIATES
7777 BAINBRIDGE ROAD
CHAGRIN FALLS OH 44023-2124 US

COLETTA MCNAMEE SR
CUDELL IMPROVEMENT INC
11500 FRANKLIN BLVD STE 104
CLEVELAND OH 44102 US

C L LITTLE
UNITED TRANSPORTATION UNION
14600 DETROIT AVE
CLEVELAND OH 44107 US

DANIEL R ELLIOTT III
ASST GENERAL COUNSEL UNITED TRANSPORTATION UN
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CHRISTOPHER C MCCRACKEN
ULMER & BERNE LLP
1300 EAST NINTH STREET SUITE 900
CLEVELAND OH 44114 US

INAJO DAVIS CHAPPELL
ASHTA CHEMICALS INC
1300 EAST NINETH STREET SUITE 900
CLEVELAND OH 44114-1538 US

MICHAEL J GARRIGAN
BP CHEMICALS INC
4440 WARRENSVILLE CTR RD
CLEVELAND OH 44128 US

GARY A EBERT
CITY OF BAY VILLAGE
350 DOVER CENTER ROAD
BAY VILLAGE OH 44140 US

ROBERT E GREENLESE
TOLEDO-LUCAS COUNTY PORT AUTHORITY
1 MARITIME PLAZA SUITE 700
TOLEDO OH 43604 US

ROBERT E MURRAY
OHIO VALLEY COAL CO
56854 PLEASANT RIDGE ROAD
ALLEDONIA OH 43902 US

MAYOR VINCENT M URBIN
150 AVON BELDEN RD
AVON LAKE OH 44012 US

BARBARA O'KEEFE
VILLAGE OF WELLINGTON
115 WILLARD MEMORIAL SQ
WELLINGTON OH 44090 US

ANITA R BRINDZA
THE ONE FIFTEEN HUNDRED BUILDING
11500 FRANKLIN BLVD SUITE 104
CLEVELAND OH 44102 US

CLINTON J MILLER III GENERAL COUNSEL
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

C V MONIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1370 ONTARIO STREET
CLEVELAND OH 44113 US

DAVID ROLOFF
GOLDSTEIN & ROLOFF
526 SUPERIOR AVENUE EAST SUITE 1440
CLEVELAND OH 44114 US

DAVID J MATTY
CITY OF ROCKY RIVER
21012 HILLIARD ROAD
ROCKY RIVER OH 44116-3398 US

C D WINEBRENNER
GENERAL CHAIRPERSON UTU
27801 EUCLID AV RM 200
EUCLID OH 44132 US

CHARLES ZUMKEHR
ROETZEL & ANDRESS CO LPA
75 EAST MARKET STREET
AKRON OH 44308 US

SYLVIA R. CHINN-LEVY
NEFCO
969 COPLEY ROAD
AKRON OH 44320 US

CHARLES E ALLENBAUGH JR
EAST OHIO STONE COMPANY
2000 W BESSON ST
ALLIANCE OH 44601 US

RANDALL C. HUNT
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO.
P O BOX 36963
4775 MUNSON ST NW
CANTON OH 44735-6963 US

D G STRUNK JR
GENERAL CHAIRPERSON UTU
817 KILBOURNE STREET
BELLEVUE OH 44811 US

R A GRICE
GENERAL CHAIRPERSON UTU
817 KILBOURNE ST
BELLEVUE OH 44811-9431 US

RICHARD E KERTH
CHAMPION INTERNATIONAL CORPORATION
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

BRAD F HUSTON
CYPRUS AMAX COAL SALES CORP
400 TECHNECENTER DRIVE STE 320
MILFORD OH 45150 US

FAY D DUPUIS
CITY OF CINCINNATI
801 PLUM STREET
CINCINNATI OH 45202 US

ROBERT EDWARDS
EASTERN TRANSPORT AND LOGISTICS
1109 LANETTE DRIVE
CINCINNATI OH 45230 US

THOMAS R RYDMAN PRESIDENT
INDIAN CREEK RAILROAD COMPANY
3905 W 600 NORTH
ANDERSON IN 46011 US

F RONALDS WALKER
CITIZENS GAS & COKE UTILITY
2020 N MERIDIAN STREET
INDIANAPOLIS IN 46202-1393 US

MICHAEL P MAXWELL JR
MCHALE, COOK & WELCH
320 N MERIDIAN ST 1100 CHAMBER OF COMMERCE BL
INDIANAPOLIS IN 46204 US

J PATRICK LATZ
HEAVY LIFT CARGO SYSTEM
PO BOX 51451
INDIANAPOLIS IN 46251-0451 US

MICHAEL CONNELLY
CITY OF EAST CHICAGO
4525 INDIANAPOLIS BLVD
EAST CHICAGO IN 46312 US

HAMILTON L CARMOUCHE, CORPORATION COUNSEL
CITY OF GARY
401 BROADWAY 4TH FLOOR
GARY IN 46402 US

HONORABLE PETER J. VISCLOSKY
U. S. HOUSE OF REPRESENTATIVES
215 WEST 35TH AVENUE
GARY IN 46408 US

CARL FELLER
DEKALB AGRA INC
P. O. BOX 127
4743 COUNTY ROAD 28
WATERLOO IN 46793-0127 US

CHRISTOPHER J BURGER, PRESIDENT
CENTRAL RAILROAD COMPANY OF INDIANAPOLIS
PO BOX 554
KOKOMO IN 46903-0554 US

WILLIAM A BON, GENERAL COUNSEL
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
26555 EVERGREEN ROAD SUITE 200
SOUTHFIELD MI 48076 US

NICOLE HARVEY
THE DOW CHEMICAL COMPANY
2020 DOW CENTER
MIDLAND MI 48674 US

JAMES E SHEPHERD
TUSCOLA & SAGINAW BAY
PO BOX 550
OWOSSO MI 48867-0550 US

LARRY B KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

HON JOHN ENGLER
OFFICE OF THE GOVERNOR
P O BOX 30013
LANSING MI 48933 US

T SCOTT BANNISTER
T SCOTT BANNISTER AND ASSOCIATES
1300 DES MOINES BLDG 405 SIXTH AVENUE
DES MOINES IA 50309 US

BYRON D OLSEN
FELHABER LARSON FENLON & VOGT PA
601 SECOND AVENUE SOUTH SUITE 4200
MINNEAPOLIS MN 55401-4302 US

LEO J WASESCHA
GOLD MEDAL DIVISON - GENERAL MILLS OPERATION
P O BOX 1113
NUMBER ONE GENERAL MILLS BULEVARD
MINNEAPOLIS MN 55440 US

THOMAS R BOBAK
313 RIVER OAKS DRIVE
CALUMET CITY IL 60409 US

GERALD J. VINCI
PRAIRIE GROUP
P. O.BOX 1123
7601 WEST 79TH STREET
BRIDGEVIEW IL 60455 US

RICHARD A GAVRIL
16700 GENTRY LANE NO 104
TINLEY PARK IL 60477 US

EDWARD WASHINGTON, II
CHIEF, PUBLIC UTILITIES BUREAU, ILL ATTORNEY
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

CHRISTINE H. ROSSO
IL ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FLOOR
CHICAGO IL 60601 US

THOMAS J LITWILER
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE 45TH FLOOR
CHICAGO IL 60601 US

WILLIAM C SIPPEL
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE TWO PRUDENTIAL PLAZA 45TH F
CHICAGO IL 60601-6710 US

RICHARD F. FRIEDMAN, ESQ
EARL L NEAL & ASSOCIATES
111 WEST WASHINGTON STREET, STE 1700
CHICAGO IL 60602-2766 US

EDWARD C MCCARTHY
INLAND STEEL INDUSTRIES INC
30 WEST MONROE STREET
CHICAGO IL 60603 US

ROGER A SERPE
175 WEST JACKSON BOULEVARD SUITE 1460
CHICAGO IL 60604 US

SANDRA J. DEARDEN
MDCO CONSULTANTS, INC.
407 SOUTH DEARBORN, SUITE 1260
CHICAGO IL 60605 US

SHELDON A ZABEL
SCHIFF HARDIN & WAITE
7200 SEARS TOWER
CHICAGO IL 60606 US

THOMAS F MCFARLAND JR
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE, SUITE 1330
CHICAGO IL 60606-3101 US

MYLES L TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

CHARLES D BOLAM
UNITED TRANSPORTATION UNION
1400-20TH STREET
GRANITE CITY IL 62040 US

SCOTT A RONEY
ARCHER DANIELS MIDLAND COMPANY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

MERRILL L TRAVIS
ILLINOIS DEPT OF TRANSPORTATION
2300 S DIRKSEN PARKWAY RM 302
SPRINGFIELD IL 62764 US

IAN MUIR
BUNGE CORPORATION
P O BOX 28500
ST LOUIS MO 63146 US

JOHN JAY ROSACKER
KS DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

MIKE SPAHIS
FINA OIL & CHEMICAL CO.
6000 LEGACY DRIVE
PLANO, TX 75024-3601 US

DAVID L HALL
COMMONWEALTH CONSULTING ASSOCIATES
13103 FM 1960 WEST SUITE 204
HOUSTON TX 77065-4069 US

STEVE M COULTER
EXXON COMPANY USA
PO BOX 3272
HOUSTON TX 77253-3272 US

STEPHEN M UTHOFF
CONIGLIO & UTHOFF
60 ELM AVENUE, CONIGLIO PROFESSIONAL BLDG
LONG BEACH CA 90802-4910 US

JOHN D FITZGERALD
UTU, GENERAL CHAIRPERSON
400 E EVERGREEN BLVD STE 217
VANCOUVER WA 98660-3264 US

HENRY T DART
PLAINTIFF MANGEMENT COMMITTEE
3748 NORTH CAUSEWAY BLVD SUITE 301
METAIRIE LA 70002 US

DENNIS A. GUTH
WEST LAKE GROUP
2801 POST OAK BLVD
HOUSTON TX 77056 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
P O BOX 2583
1221 MCKINNEY STREET SUITE 1600
HOUSTON TX 77252-2583 US

MONTY L PARKER
CMC STEEL GROUP
P O BOX 911
SEGUIN TX 78156 US

RICHARD WELSH
NARPO
50-505 GRAND TRAVERSE
LA QUINTA CA 92253 US

Records: 363

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SERVICE DATE - MAY 31, 2000

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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

Decision No. 157

Decided: May 24, 2000

Environmental Condition No. 8(A) of Appendix Q of Decision No. 89[1] (Decision No. 89, slip op. at 393-94), requires Applicants, in order to address potential safety impacts at highway/rail at-grade crossings, to upgrade existing warning devices at 86 public highway/rail at-grade crossings as listed in the decision. As pertinent here, NS is required to install "4-Quadrant Gates, or Alternative Mitigation such as Median Barriers" at the at-grade crossing located at York Road/SR 74, in Cumberland County, Mechanicsburg, PA. See Decision No. 89, slip op. at 398. Alternatively, as provided in Environmental Condition No. 8(A), NS may satisfy this requirement by entering into a negotiated agreement with the affected local jurisdiction and the state department of transportation to provide for alternative safety improvements in the vicinity of the identified highway/rail at-grade crossing that achieve at least an equivalent level of safety enhancement. Environmental Condition No. 8(A) requires compliance with this provision within 2 years of the effective date of Decision No. 89, or by August 22, 2000.

By letter received May 15, 2000, NS has requested a 1-year extension of the deadline provided for in Environmental Condition No. 8(A), until August 22, 2001. NS states that it has been informed by the Pennsylvania Department of Transportation (PennDOT) that the

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[1] In Decision No. 89, served July 23, 1998, we approved, subject to certain conditions, including environmental mitigation conditions, the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (collectively, Conrail) and the division of Conrail's assets by CSX Corporation and CSX Transportation, Inc. (collectively, CSX), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, NS). CSX and NS are referred to as Applicants.

Commonwealth recommends that alternative mitigation other than either 4-quadrant gates or median barriers be installed at the York Road/SR 74 at-grade crossing.[2]

NS states that it is seeking an extension of the August 22, 2000 deadline so that the Commonwealth, the PPUC, and NS can continue their consideration of the preferred alternative safety enhancements for the York Road/SR 74 grade crossing.

The request for a 1-year extension to August 22, 2001, is reasonable. The revised deadline will therefore be adopted.

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

It is ordered:

1. The compliance deadline for NS in Environmental Condition No. 8(A) of Appendix Q of Decision No. 89 with respect to the York Road/SR 74 grade crossing in Cumberland County, Mechanicsburg, PA, is extended 1 year until August 22, 2001.

2. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams

Vernon A. Williams
Secretary

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[2] NS enclosed a copy of a letter dated May 11, 2000, from Larry M. King, PennDOT Deputy Secretary for Planning, stating that PennDOT has determined that the road configuration at the York Road/SR 74 grade crossing is not conducive to either 4-quadrant gates or median barriers. Mr. King advises that the accident history for this grade crossing indicates that all of the train accidents were secondary, caused by previous accidents — vehicles losing control or struck by other vehicles leaving the roadway prior to the crossing and being lodged onto the tracks before the train accidents took place. In his letter, Mr. King further states that the Pennsylvania Public Utilities Commission (PPUC) must undertake a formal review of the issues, and then issue its findings and an order. PennDOT supports an extension of time by the Board to allow the PPUC time to complete its review.

PAUL E CRAWFORD
MASSACHUSETTS CENTRAL RAILROAD CORPORATION
TWO WILBRAHAM STREET
PALMER MA 01069 US

JAMES E HOWARD
90 CANAL STREET
BOSTON MA 02114 US

JOHN D CIRAME, ASSISTANT SECRETARY
COMMONWEALTH OF MASS. EXEC. OFFICE OF TRANSPT
10 PARK PLAZA ROOM 3170
BOSTON MA 02116-3969 US

HON. EDWARD M KENNEDY
UNITES STATES SENATE
2400 JOHN F KENNEDY FEDERAL BLDG
BOSTON MA 02203 US

WILLIAM D ANKNER PHD
R I DEPT OF TRANSPORTATION
TWO CAPITOL HILL
PROVIDENCE RI 02903 US

JOHN R NADOLNY
14 AVIATION AVENUE
PORTSMOUTH NH 03801 US

ROBERT D ELDER
MAINE DEPARTMENT OF TRANSPORTATION
16 STATE HOUSE STATION
AUGUSTA ME 04333-0016 US

KAREN E SONGHURST
STATE OF VERMONT
133 STATE STREET
MONTPELLIER VT 05633-5001 US

JAMES F SULLIVAN
CT DEPT OF TRANSPORTATION
P O BOX 317546
2800 BERLIN TURNPIKE
NEWINGTON CT 06131 US

EDWARD J RODRIGUEZ
HOUSATONIC RAILROAD
P O BOX 687
8 DAVIS ROAD WEST
OLD LYME CT 06371 US

RICHARD C CARPENTER
SOUTHWESTERN REGIONAL PLANNING AGENCY
1 SELLECK STREET SUITE 210
EAST NORWALK CT 06855 US

MICHAEL E STRICKLAND
NYK LINE (NORTH AMERICA) INC, SENIOR VICE PRE
300 LIGHTING WAY
SECAUCUS NJ 07094-1588 US

J WILLIAM VAN DYKE
NJ TRANSPORTATION PLANNING AUTHORITY
ONE NEWARK CENTER 17TH FLOOR
NEWARK NJ 07102 US

EDWARD LLOYD
RUTGERS ENVIRONMENTAL LAW CLINIC
15 WASHINGTON STREET
NEWARK NJ 07102 US

HONORABLE ROBERT G. TORRICELLI
UNITED STATES SENATE
1 RIVER FRONT PLAZA, 3RD FLOOR
NEWARK NJ 07102 US

PHILIP SIDO
UNION CAMP CORPORATION
1600 VALLEY ROAD
WAYNE NJ 07470 US

MARTIN T DURKIN ESQ
DURKIN & BOGGIA ESQS
PO BOX 378
71 MT VERNON STREET
RIDGEFIELD PARK NJ 07660 US

CRAIG CURRY
CONSOLIDATED RAIL CORPORATION
1000 HOWARD BOULEVARD
MOUNT LAUREL NJ 08054 US

TIMOTHY G CHELIUS
18 N EAST AVENUE
VINELAND NJ 08360 US

LAWRENCE PEPPER, JR
GRUCCIO PEPPER
817 EAST LANDS AVE
VINELAND NJ 08360 US

JOHN F. MCHUGH
MCHUGH & SHERMAN
20 EXCHANGE PLACE 51ST FLOOR
NEW YORK NY 10005 US

ANTHONY BOTTALICO
UTU
420 LEXINGTON AVENUE ROOM 458-460
NEW YORK NY 10017 US

WALTER E ZULLIG JR
METRO-NORTH COMMUTER RAILROAD COMPANY
347 MADISON AVE
NEW YORK NY 10017-3706 US

ANTHONY P. SEMANCIK
347 MADISON AVENUE
NEW YORK NY 10017-3706 US

JAMES W HARRIS
THE METROPOLITIAN PLANNING ORGANIZATION
1 WORLD TRADE CENTER STE 82 EAST
NEW YORK NY 10048-0043 US

HUGH H. WELSH
LAW DEPT., SUITE 67E
ONE WORLD TRADE CENTER
NEW YORK NY 10048-0202 US

R. LAWRENCE MCCAFFREY, JR.
NEW YORK & ATLANTIC RAILWAY
405 LEXINGTON AVENUE 50TH FLOOR
NEW YORK NY 10174 US

SAMUEL J NASCA
UTU STATE LEGISLATIVE DIRECTOR
35 FULLER ROAD SUITE 205
ALBANY NY 12205 US

DANIEL B. WALSH
BUSINESS COUNCIL OF NEW YORK STATE,INC.
152 WASHINGTON AVENUE
ALBANY NY 12210 US

DIANE SEITZ
CENTRAL HUDSON GAS & ELECTRIC CORP
284 SOUTH AVENUE
POUGHKEEPSIE NY 12601 US

IRWIN L. DAVIS
1900 STATE TOWER BLDG.
SYRACUSE NY 13202 US

ANGELO J CHICK JR, LOCAL CHAIRMAN
P O BOX 908
48398 OLD GOOSE BAY ROAD
REDWOOD NY 13679 US

GARY EDWARDS
SOMERSET RAILROAD
7725 LAKE ROAD
BARKER NY 14012 US

SHEILA MECK HYDE
CITY HALL
342 CENTRAL AVENUE
DUNKIRK NY 14048 US

IRVING J RUBIN
P O BOX 243
YOUNGSTOWN NY 14174 US

JOHN F COLLINS
COLLINS ,COLLINS, & KANTOR PC
267 NORTH STREET
BUFFALO NY 14201 US

R W GODWIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
810 ABBOTT ROAD SUITE 200
BUFFALO NY 14220 US

ERNEST J IERARDI
NIXON HARGRAVE DEVANS DOYLE LLP
PO BOX 1051
CLINTON SQUARE
ROCHESTER NY 14603-1051 US

H DOUGLAS MIDKIFF
GENESEE TRANSPORTATION COUNCIL
65 WEST BROAD ST STE 101
ROCHESTER NY 14614-2210 US

JEANNE WALDOCK
107 GRANT COURT
ORLEAN NY 14760 US

DAVID W. DONLEY
3361 STAFFORD ST
PITTSBURGH PA 15204-1441 US

JOHN A VUONO
VUONO & GRAY
2310 GRANT BUILDING
PITTSBURGH PA 15219 US

HENRY M. WICK, JR.
WICK STREIFF ET AL
1450 TWO CHATHAM CENTER
PITTSBURGH PA 15219-3427 US

R J HENEFELD
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

M E PETRUCCELLI
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

RICHARD R WILSON
1126 EIGHT AV STE 403
ALTOONA PA 16602 US

D W DUNLEVY
STATE LEGISLATIVE DIRECTOR UTU
230 STATE STREET PA AFL-CIO BLDG 2ND FLOOR
HARRISBURG PA 17101 US

KURT W CARR
BUREAU FOR HISTORIC PRESERVATION
P O BOX 1026
HARRISBURG PA 17108-1026 US

HONORABLE THOMAS J RIDGE
GOVERNOR, COMMONWEALTH OF PENNSYLVANIA
225 MAIN CAPITOL BUILDING
HARRISBURG PA 17120 US

KRISTOPHER MICHAEL KLEMICK
RR#3 BOX 101-15
JERSEY SHORE PA 17740-9309 US

BELNAP FREEMAN
BELKNAP FREEMAN
119 HICKORY LANE
ROSEMONT PA 19010 US

JOHN J GROCKI
GRA INC
115 WEST AV ONE JENKINTOWN STA
JENKINTOWN PA 19046 US

HARRY C BARBIN
BARBIN LAUFFER & O'CONNELL
608 HUNTINGDON PIKE
ROCKLEDGE PA 19046 US

JONATHAN M BRODER
CONSOLIDATED RAIL CORP
PO BOX 41416
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

G CRAIG SCHELTER
PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATI
2600 CENTRE SQUARE WEST 500 MARKET ST
PHILADELPHIA PA 19102 US

JOHN J EHLINGER JR
OBERMAYER REBMANN MAXWELL & HIPPEL
1617 JOHN F. KENNEDY BLVD ONE PENN CENTER-19T
PHILADELPHIA PA 19103-1895 US

DAVID BERGER
BERGER AND MONTAGUE, P. C.
1622 LOCUST ST
PHILADELPHIA PA 19103-6305 US

JOHN J COSCIA, EXECUTIVE DIRECTOR
DELAWARE VALLEY REGIONAL PLANNING COMMISSION
111 SOUTH INDEPENDENCE MALL EAST
PHILADELPHIA PA 19106 US

JOHN K. LEARY, GENERAL MANAGER
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTH
1234 MARKET STREET 5TH FLOOR
PHILADELPHIA PA 19107-3780 US

ERIC M HOCKY
GOLLATZ GRIFFIN & EWING
P O BOX 796
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

HON JOSEPH R BIDEN, JR.
UNITED STATES SENATE
844 KING STREET
WILMINGTON DE 19801 US

J E THOMAS
HERCULES INCORPORATED
1313 NORTH MARKET STREET
WILMINGTON DE 19894 US

E C WRIGHT
DUPONT LOGISTICS - GLOBAL SERVICES BUSINESS
1007 MARKET, DUPONT BLDG 3100
WILMINGTON DE 19898 US

FREDERICK H SCHRANCK
PO BOX 778
DOVER DE 19903 US

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

MARTIN N BERCOVICI
KELLER & HECKMAN, LLP
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

PETER A GILBERTSON
REGIONAL RRS OF AMERICA
122 C ST NW STE 850
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

DREW A HARKER
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

PAUL REISTRUP
CSX TRANSPORTATION INC
1331 PENNSYLVANIA NW STE 500
WASH DC 20004 US

GEORGE W MAYO JR
HOGAN & HARTSON L L P
555 THIRTEENTH STREET NW COLUMBIA SQUARE
WASHINGTON DC 20004-1109 US

DENNIS G LYONS
ARNOLD & PORTER
555 TWELFTH STREET NW, STE 940
WASHINGTON DC 20004-1206 US

DANIEL DUFF
AMERICAN PUBLIC TRANSPORTATION ASSOCIATION
1201 NEW YORK AV NW, STE 400
WASHINGTON DC 20005 US

KEVIN M SHEYS
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET NW SUITE 200
WASHINGTON DC 20005 US

KARL MORELL
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

BRUNO MAESTRI
NORFOLK SOUTHERN CORPORATION
1500 K STREET SUITE 375
WASHINGTON DC 20005 US

WILLIAM A MULLINS
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005-3314 US

JAMES HOWARD
COALITION OF NORTHEASTERN GOVERNORS
400 NORTH CAPITOL STREET, SUITE 382
WASHINGTON DC 20001 US

DONALD F GRIFFIN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G STREET NE STE 460
WASHINGTON DC 20002 US

J MICHAEL HEMMER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20004 US

ERIC VON SALZEN
HOGAN & HARTSON
555 THIRTEENTH STREET N W
WASHINGTON DC 20004-1109 US

MARY GABRIELLE SPRAGUE
ARNOLD & PORTER
555 TWELTH STREET NW
WASHINGTON DC 20004-1202 US

LOUIS E GITOMER
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

PAUL M LAURENZA
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

L JOHN OSBORN
SONNENSCHEIN NATH & ROSENTHAL
1301 K STREET NW STE 600 EAST
WASH DC 20005 US

ALICE C SAYLOR
AMERICAN SHORT LINE & REGIONAL RAILROAD ASSO
1120 G STREET NW SUITE 520
WASHINGTON DC 20005 US

CLARK EVANS DOWNS
JONES DAY REAVIS & POGUE
1450 G STREET NW
WASHINGTON DC 20005-2088 US

PAUL H LAMBOLEY
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005-3324 US

NEAL R GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AV NW
WASHINGTON DC 20005-3701 US

MARK H SIDMAN
WEINER BRODSKY,SIDMAN & KIDER
1350 NEW YORK AVE., NW., STE. 800
WASHINGTON DC 20005-4797 US

WILLIAM W MILLAR
AMERICAN PUBLIC TRANSIT ASSOCIATION
1201 NEW YORK AVE., NW
WASHINGTON DC 20005-6141 US

JAMES R WEISS
PRESTON GATES ELLIS ET AL
1735 NEW YORK AVENUE NW SUITE 500
WASHINGTON DC 20006 US

SCOTT M ZIMMERMAN
ZUCKERT SCOUTT & RASENBERGER L L P
888 SEVENTEENTH STREET NW
WASHINGTON DC 20006 US

CONSTANCE A SADLER
SIDLEY & AUSTIN
1722 EYE STREET NW
WASHINGTON DC 20006 US

ROBERT P VOM EIGEN
HOPKINS & SUTTER
888 16TH STREET N W STE 700
WASHINGTON DC 20006 US

ANDREW R. PLUMP
ZUCKERT, SCOUTT & RASENBERGER. LLP
888 17TH ST., NW, STE. 600
WASHINGTON DC 20006 US

ERIKA Z JONES
MAYER BROWN & PLATT
1909 K STREET, NW
WASHINGTON DC 20006-1101 US

RICHARD A ALLEN
ZUCKERT SCOUTT & RASENBERGER L L P
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3309 US

JOHN V EDWARDS, ESQ
ZUCKERT SCOUTT ET AL
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

CHARLES A SPITULNIK
HOPKINS & SUTTER
888 SIXTEENTH ST NW
WASH DC 20006-4103 US

SHERRI LEHMAN DIRECTOR OF CONGRESSIONAL AFFAI
CORN REFINERS ASSOC
1701 PA AV NW
WASH DC 20006-5805 US

CHRISTOPHER C O'HARA
BRICKFIELD BURCHETTE & RITTS PC
1025 THOMAS JEFFERSON ST NW EIGHTH FLOOR
WASHINGTON DC 20007 US

DAVID K MONROE
GALLAND KHARASCH GREENBERT FELLMAN & SWIRSKY
1054 THIRTY FIRST STREET NW STE 200
WASHINGTON DC 20007 US

PAUL M DONOVAN
LAROE WINN MOERMAN & DONOVAN
3900 HIGHWOOD COURT NW
WASHINGTON DC 20007 US

ROBERT G SZABO
1050 THOMAS JEFFERSON STREET NW SIXTH FLOOR
WASHINGTON DC 20007 US

JOHN H BROADLEY
JOHN H BROADLEY & ASSOCIATES P C
1054 31ST STREET NW 2ND FLOOR
WASHINGTON DC 20007 US

EDWARD D GREENBERG
GALLAND, KHARASCH, GREENBERG, FELLMAN & SWIRS
1054 THIRTY-FIRST STREET NW, STE 200
WASHINGTON DC 20007-4492 US

MICHAEL F MCBRIDE
LEBOEUF LAMB GREENE & MACRAE
1875 CONNECTICUT AVENUE NW
WASHINGTON DC 20009-5728 US

STEPHEN H BROWN
VORYS SATER SEYMOUR AND PEASE
1828 L STREET N W
WASHINGTON DC 20036 US

HAROLD P QUINN JR
NATIONAL MINING ASSOCIATON
1130 17TH STREET NW
WASHINGTON DC 20036 US

PAUL D COLEMAN
HOPPEL MAYER & COLEMAN
1000 CONNECTICUT AVENUE NW SUITE 400
WASHINGTON DC 20036 US

JOHN D HEFFNER
REA CROSS & AUCHINCLOSS
1707 L STREET, NW, STE 570
WASHINGTON DC 20036 US

PETER A GREENE
THOMPSON HINE FLORY
1920 N STREET N W SUITE 800
WASHINGTON DC 20036 US

KELVIN J DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

EDWARD WYTKIND EXECUTIVE DIRECTOR
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO
1025 CONNECTICUT AVE NW SUITE 1005
WASHINGTON DC 20036 US

ROBERT A WIMBISH ESQ
REA CROSS & AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

KEITH G O'BRIEN
REA CROSS AND AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

FRITZ R KAHN
1920 N STREET NW 8TH FLOOR
WASHINGTON DC 20036-1601 US

ROSE-MICHELE WEINRYB
WEINER BRODSKY SIDMAN & KIDER
1300 - 19TH STREET, NW, 5TH FLOOR
WASHINGTON DC 20036-1609 US

SAMUEL M SIPE JR
STEPTOE & JOHNSON LLP
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

DEBRA L WILLEN
GUERRIERI EDMOND & CLAYMAN PC
1625 MASSACHUSETTS AVENUE, N.W., STE 700
WASHINGTON DC 20036-2243 US

HELEN M. COUSINEAU
CARLOS RODRIGUEZ & ASSOCIATES
1710 RHODE ISLAND AVENUE, NW
WASHINGTON DC 20036 US

GORDON P MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

DAVID H COBURN
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE NW
WASHINGTON DC 20036 US

RICHARD S EDELMAN
O'DONNELL SCHWARTZ & ANDERSON PC
1900 L STREET NW SUITE 707
WASHINGTON DC 20036 US

CHRISTOPHER A MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

KARYN A BOOTH
THOMPHON HINE & FLORY LLP
1920 N STREET NW & FLORY LLP
WASHINGTON DC 20036 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

FREDERIC L WOOD
THOMPSON HINE & FLORY LLP
1920 N STREET
WASHINGTON DC 20036-1601 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND & CLAYMAN, PC
1625 MASSACHUSETTS AVE., NW. STE 700
WASHINGTON DC 20036-2243 US

DONALD G AVERY
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036-3003 US

L PAT WYNNS
1050 - 17TH STREET N W SUITE 210
WASHINGTON DC 20036-5503 US

ANDREW P GOLDSTEIN
MCCARTHY, SWEENEY & HARKAWAY P.C.
2175 K STREET, NW SUITE 600
WASHINGTON DC 20037 US

JOHN M CUTLER JR
MCCARTHY SWEENEY HARKAWAY PC
2175 K STREET, NW
WASHINGTON DC 20037 US

STEVEN J KALISH
MCCARTHY SWEENEY & HARKAWAY P C
2175 K STREET NW SUITE 600
WASHINGTON DC 20037 US

DANIEL J SWEENEY
MCCARTHY SWEENEY & HARKAWAY P C
2175 K STREET NW SUITE 600
WASHINGTON DC 20037 US

JOHN L OBERDORFER
PATTON BOGGS LLP
2550 M ST NW
WASHINGTON DC 20037-1301 US

SCOTT N STONE
PATTON BOGGS L L P
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

KEITH A KLINDWORTH
U S DEPT OF AGRICULTURE
P O BOX 96456
WASHINGTON DC 20090 US

MICHAEL V DUNN
USDA
PO BOX 96456 RM 4006-SOUTH BLDG
WASH DC 20090-6456 US

EILEEN S STOMMES
U S DEPARTMENT OF AGRICULTURE
P O BOX 96456 ROOM 4006-SOUTH BUILDING
WASHINGTON DC 20090-6456 US

JUDGE JACOB LEVENTHAL, OFFICE OF HEARINGS
FEDERAL ENERGY REGULATORY COMMISSION
888 - 1ST ST, N.E. STE 11F
WASHINGTON DC 20426 US

RICHARD E SANDERSON
OFFICE OF FEDERAL ACTIVITIES
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HON CHARLES SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON DANIEL PATRICK MOYNIHAN
UNITED STATES SENATE
WASINGTON DC 20510 US

HON JOHN BREAUX
UNITED STATER SENATE
WASHINGTON DC 20510 US

HON CHARLES E SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. BARBARA A. MIKULSKI
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE BOB GRAHAM
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHARLES ROBB
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH BIDEN, JR.
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH I LIEBERMAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON WILLIAM V. ROTH JR
U S SENATE
WASHINGTON DC 20510-0001 US

HON. JOHN W. WARNER
US SENATE
WASHINGTON DC 20510-0001 US

HON CHRISTOPHER J DODD
UNITED STATES SENATE
WASH DC 20510-0702 US

HONORABLE DANIEL P. MOYNIHAN
UNITED STATE SENATE
WASHINGTON DC 20510-0903 US

HONORABLE CONNIE MACK
UNITED STATES SENATE
WASHINGTON DC 20510-0904 US

HONORABLE J ROBERT KERREY
UNITED STATES SENATE
WASHIGTON DC 20510-2704 US

HON MIKE DEWINE
UNITED STATES SENATE
WASHINGTON DC 20510-3503 US

HON ARLEN SPECTER
UNITED STATES SENATE
WASHINGTON DC 20510-3802 US

HON RICK SANTORUM
UNITED STATES SENATE
WASHINGTON DC 20510-3804 US

HONORABLE JOHN H. CHAFEE
UNITED STATES SENATE
WASHINGTON DC 20510-3902 US

HON JACK REED
U S SENATE
WASHINGTON DC 20510-3903 US

HONORABLE ROBERT BYRD
UNITED STATES SENATE
WASHINGTON DC 20510-6025 US

HONORABLE JOHN J LAFALCE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. BUD SHUSTER
ATTN: MIKE RICK
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NANCY JOHNSON
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAM GEJDENSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. TOM BLILEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB CLEMENT
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JAMES L. OBERSTAR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JOHN J. DUNCAN
U S HOUSE OF REPRESENTATIVESS
WASHINGTON DC 20515 US

HONORABLE PAUL E. GILLMOR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MIKE DOYLE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN D. DINGELL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BENJAMIN A. GILMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM O. LIPINSKI
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETER J. VISCLOSKY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM J. COYNE
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MAJOR R. OWENS
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JAMES TRAFICANT JR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ROBERT MENENDEZ
U S HOUSE OF REPRESENTATIVES
WASH DC 20515 US

HON MARCY KAPTUR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK MASCARA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL FORBES
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ELIOT L ENGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON GARY ACKERMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JERROLD NADLER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ROBERT W. NEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB WEYGAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TED STRICKLAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON DENNIS J KUCINICH
UNITED STATES HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HON NYDIA M VELAZQUEZ
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ED TOWNS
U. S. HOUSE OR REPRESENTATIVES
WASHINGTON DC 20515 US

HON LOUISE M SLAUGHTER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHRISTOPHER SHAYS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHARLES RANGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL MCNULTY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAMES MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CAROLYN B MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NITA LOWEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MAURICE HINCHEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHIP PICKERING
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JESSE L. JACKSON, JR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LUIS GUTIERREZ
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DANNY K DAVIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON RALPH REGULA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON SHERROD BROWN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ED BRYANT
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. STEVE LATOURETTE
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON BOB WISE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON THOMAS C SAWYER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAXBY CHAMBLISS,
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TILLIE K FOWLER
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ROD R BLAGOJEVICH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTO DC 20515-1305 US

HON JULIA CARSON
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1410 US

HONORABLE JAMES A. BARCIA
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2205 US

HON JACK QUINN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3230 US

HONORABLE RICHARD BURR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3305 US

HONORABLE TOM DAVIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4611 US

HONORABLE BOBBY L. RUSH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-9997 US

MICHAEL P HARMONIS
DEPARTMENT OF JUSTICE
325 SEVENTH STREET, NW
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
US DEPARTMENT OF TRANSPORTATION
400 SEVENTH STREET SW ROOM 4102 C-30
WASHINGTON DC 20590 US

JOSEPH R POMPONIO
FEDERAL RAILROAD ADMIN
1120 VERMONT AVE NW RCC-20
WASHINGTON DC 20590 US

JOLENE MOLITORIS, ADMN.
FEDERAL RAILROAD ADMNS.
400 7TH STREET SW
WASHINGTON DC 20590 US

DAVID G ABRAHAM
SUITE 400W
7315 WISCONSIN AVENUE
BETHESDA MD 20814 US

MITCHELL M KRAUS
TRANSPORTATION COMMUNICATIONS INTERNATIONAL U
3 RESEARCH PLACE
ROCKVILLE MD 20850-3279 US

JOHN M ROBINSON
9616 OLD SPRING ROAD
KENSINGTON MD 20895-3124 US

WILLIAM W WHITEHURST JR
W W WHITEHURST & ASSOCIATES INC
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030-1711 US

JOHN HOY
P O BOX 117
GLEN BURNIE MD 21060 US

ROBERT J WILL
UNITED TRANSPORTATION UNION
4134 GRAVE RUN RD
MANCHESTER MD 21102 US

JOHN F WING CHAIRMAN
CITIZENS ADVISORY COMMITTEE
601 NORTH HOWARD STREET
BALTIMOTE MD 21201 US

LINDA A JANEY J D
MARYLAND OFFICE OF PLANNING
301 WEST PRESTON STREET
BALTIMORE MD 21201-2365 US

DON E SANCHEZ
CHESAPEAKE SPECIALTY PRODUCTS INC
5055 NORTH POINT BOULEVARD
BALTIMORE MD 21219 US

CHARLES M CHADWICK
MARYLAND MIDLAND RAILWAY INC
P O BOX 1000
UNION BRIDGE MD 21791 US

HENRY E. SEATON
7700 LEESBURG PIKE, STE 201
FALLS CHURCH VA 22043 US

PETER Q NYCE JR
U S DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

THOMAS E SCHICK
CHEMICAL MANUF ASSOC
1300 WILSON BOULEVARD
ARLINGTON VA 22209 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

JENNIFER BRAUN
JACKSON & JESSUP
P O BOX 1240
3426 NORTH WASHINGTON BOULEVARD
ARLINGTON VA 22210 US

KENNETH E SIEGEL
AMERICAN TRUCKING ASSOC INC
2200 MILL ROAD
ALEXANDRIA VA 22314-4677 US

HONORABLE GEORGE ALLEN
GOVERNOR, COMMONWEALTH OF VIRGINIA
STATE CAPITOL
RICHMOND VA 23219 US

DAVID A SHELTON
NORFOLK SOUTHERN
THREE COMMERCIAL PLACE
NORFOLK VA 23510 US

JAMES A HIXON
SENIOR VICE PRESIDDENT EMPLOYEE RELATIONS NOR
THREE COMMERCIAL PLACE
NORFFFOLK VA 23510-2191 US

HONORABLE JOHN WARNER
UNITED STATES SENATE
235 FEDERAL BUILDING
ABINGDON VA 24210-0887 US

TERRELL ELLIS
CAEZWV
P O BOX 176
CLAY WV 25043 US

WILLIAM T BRIGHT
P O BOX 149
200 GREENBRIER ROAD
SUMMERSVILLE WV 26651 US

SCOTT M SAYLOR
NORTH CAROLINA RAILROAD COMPANY
3200 ATLANTIC AV STE 110
RALIEGH NC 27604-1640 US

J R BARBEE
GENERAL CHAIRPERSON UTU
441 N LOUISIANA AVE STE Q
ASHEVILLE NC 28806-3791 US

J RANDALL EVANS
500 WATER STREET (J150)
JACKSONVILLE FL 32202 US

FRANCIS G MCKENNA
ANDERSON & PENDLETON
206 N WASHINGTON STREET SUITE 330
ALEXANDRIA VA 22314 US

ROBERT E MARTINEZ
VA SECRETARY OF TRANSPORTAITON
P. O. BOX 1475
RICHMOND VA 23218 US

JOHN W SNOW
CHAIRMAN PRESIDENT AND CHIEF EXECTIVE OFFICER
P O BOX 85629
RICHMOND VA 23285-5629 US

GEORGE A ASPATORE
NORFOLK SOUTHERN CORP
THREE COMMEMERCIAL PLACE
NORFOLK VA 23510 US

L P KING JR
GENERAL CHAIRPERSON UTU
145 CAMPBELL AVE SW STE 207
ROANOKE VA 24011 US

VAUGHN R GROVES
PITTSTON COAL COMPANY
PO BOX 5100
LEBANON VA 24266 US

R K SARGENT
GENERAL CHAIRPERSON UTU
1319 CHESTNUT STREET
KENOVA WV 25530 US

FRANK N JORGENSEN
THE ELK RIVER RAILROAD INC
P O BOX 460
SUMMERSVILLE WV 26651 US

E NORRIS TOLSON
NC DEPT OF TRANSPORTATION
P O BOX 25201
1 S. WILINGTON STREET
RALEIGH NC 27611 US

HONORABLE DAVID M BEASLEY
GOVERNOR
P. O. BOX 11369
COLUMBIA SC 29211 US

FRED R BIRKHOLZ
CSX TRANSPORTATION LAW DEPT - J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

ROBERT V ALLEN
CSX TRANSPORTATION
500 WATER STREET J305
JACKSONVILLE FL 32202 US

T J STEPHENSON
CSX TRANSPORTATION INC
500 WATER STREET (J407)
JACKSONVILLE FL 32202 US

CARL A GERHARDSTEIN
CSX TRANSPORTATION RISK MGMT
500 WATER STREET-J275
JACKSONVILLE FL 32202 US

DANFORD L PRICE
500 WATER STREET
JACKSONVILLE FL 32202 US

BOB HAULTER
CSX TRANSPORTATION INC
500 WATER STREET (J120)
JACKSONVILLE FL 32202 US

PAUL R. HITCHCOCK
CSX TRANSPORTATION LAW DEPARTMENT
500 WATER STREET SC J-150
JACKSONVILLE FL 32202 US

JOHN W. HUMES, JR.
CSX TRANSPORTATION
SPEED CODE J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

CHARLES M ROSENBERGER
CSX TRANSPORTATION
500 WATER STREET - J150
JACKSONVILLE FL 32202 US

J L RODGERS
GENERAL CHAIRMAN UTU
480 OSCEOLA AVENUE
JACKSONVILLE FL 32250 US

J T REED
GENERAL CHAIRPERSON UTU
7785 BAYMEADOWS WAY STE 109
JACKSONVILLE FL 32256 US

PHILLIP L BELL
ERIE LACKAWANNA RAILROAD CO
PO BOX 1482
TALLAHASSEE FL 32302 US

JAMES L BELCHER
EASTMAN CHEMICAL COMPANY
PO BOX 431
KINGSPORT TN 37662 US

WILLIAM L OSTEEN
ASSOCIATE GENERAL COUNSEL TVA
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE KIRK FORDICE, GOVERNOR
STATE OF MISSISSIPPI
P O BOX 139
JACKSON MS 39205 US

HONORABLE PAUL E. PATTON
GOVERNOR
700 CAPITOL AVENUE, STE. 100
FRANKFORT KY 40601 US

F R PICKELL
GENERAL CHAIRPERSON UTU
6797 NORTH HIGH ST STE 108
WORTHINGTON OH 43085 US

THOMAS M O'LEARY
OHIO RAIL DEVELOPMENT COMMISSION
50 W BROAD STREET 15TH FLOOR
COLUMBUS OH 43215 US

HONORABLE DEBORAH PRYCE
U. S. HOUSE OF REPRESENTATIVES
500 SOUTH FRONT STREET, ROOM 1130
COLUMBUS OH 43215 US

DOREEN C JOHNSON, CHIEF ANTITRUST SECTION
OHIO ATTY GENERAL OFFICE
140 EAST TOWN STREET, FIRST FLOOR
COLUMBUS OH 43215-6001 US

JAMES R JACOBS
JACOBS INDUSTRIES
2 QUARRY LANE
STONY RIDGE OH 43463 US

DAVID CHAPMAN
LAFARGE LIME OHIO INC
P O BOX 1[illegible]
659 ANDERSON ROAD
WOODVILLE OH 43469-0128 US

ROBERT J COOPER
GENERAL CHAIRPERSON UTU
1238 CASS ROAD
MAUMEE OH 43537 US

ROBERT E GREENLESE
TOLEDO-LUCAS COUNTY PORT AUTHORITY
1 MARITIME PLAZA SUITE 700
TOLEDO OH 43604 US

ROBERT E MURRAY
OHIO VALLEY COAL CO
56854 PLEASANT RIDGE ROAD
ALLEDONIA OH 43902 US

RON MARQUARDT
LOCAL UNION 1810 UMWA
R D #2
RAYLAND OH 43943 US

CLARENCE TURNQUIST
INTERNATIONAL LONGSHOREMEN S ASSOCIATION
C/O 2125 TRYON ROAD
ASHTABULA OH 44004 US

MAYOR VINCENT M URBIN
150 AVON BELDEN RD
AVON LAKE OH 44012 US

CHARLES S HESSE
CHARLES HESSE ASSOCIATES
7777 BAINBRIDGE ROAD
CHAGRIN FALLS OH 44023-2124 US

BARBARA O'KEEFE
VILLAGE OF WELLINGTON
115 WILLARD MEMORIAL SQ
WELLINGTON OH 44090 US

COLETTA MCNAMEE SR
CUDELL IMPROVEMENT INC
11500 FRANKLIN BLVD STE 104
CLEVELAND OH 44102 US

ANITA R BRINDZA
THE ONE FIFTEEN HUNDRED BUILDING
11500 FRANKLIN BLVD SUITE 104
CLEVELAND OH 44102 US

DANIEL R ELLIOTT III
ASST GENERAL COUNSEL UNITED TRANSPORTATION UN
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

C L LITTLE
INTERNATIONAL PRESIDENT UTU
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CLINTON J MILLER III
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CLARENCE MONIN INTERNATIONAL PRES
BROTHERHOOD OF LOCOMTIVE ENGINEERS MEZZANINE
1370 ONTARIO STREET
CLEVELAND OH 44113 US

CHRISTOPHER C MCCRACKEN
ULMER & BERNE LLP
1300 EAST NINTH STREET SUITE 900
CLEVELAND OH 44114 US

DAVID ROLOFF
GOLDSTEIN & ROLOFF
526 SUPERIOR AVENUE EAST SUITE 1440
CLEVELAND OH 44114 US

INAJO DAVIS CHAPPELL
ASHTA CHEMICALS INC
1300 EAST NINETH STREET SUITE 900
CLEVELAND OH 44114-1538 US

C D WINEBRENNER
GENERAL CHAIRPERSON UTU
27801 EUCLID AVENUE RM 200
EUCLID OH 44132 US

CHARLES ZUMKEHR
ROETZEL & ANDRESS CO LPA
75 EAST MARKET STREET
AKRON OH 44308 US

SYLVIA R. CHINN-LEVY
NEFCO
969 COPLEY ROAD
AKRON OH 44320 US

CHARLES E ALLENBAUGH JR
EAST OHIO STONE COMPANY
2000 W BESSON ST
ALLIANCE OH 44601 US

RANDALL C. HUNT
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO.
P O BOX 36963
4775 MUNSON ST NW
CANTON OH 44735-6963 US

D G STRUNK JR
GENERAL CHAIRPERSON UTU
817 KILBOURNE STREET
BELLEVUE OH 44811 US

R A GRICE
GENERAL CHAIRPERSON UTU
817 KILBOURNE ST
BELLEVUE OH 44811-9431 US

FAY D DUPUIS
CITY OF CINCINNATI
801 PLUM STREET
CINCINNATI OH 45202 US

THOMAS R RYDMAN PRESIDENT
INDIAN CREEK RAILROAD COMPANY
3905 W 600 NORTH
ANDERSON IN 46011 US

MICHAEL P MAXWELL JR
MCHALE, COOK & WELCH
320 N MERIDIAN ST 1100 CHAMBER OF COMMERCE BL
INDIANAPOLIS IN 46204 US

MICHAEL CONNELLY
CITY OF EAST CHICAGO
4525 INDIANAPOLIS BLVD
EAST CHICAGO IN 46312 US

HONORABLE PETER J. VISCLOSKY
U. S. HOUSE OF REPRESENTATIVES
215 WEST 35TH AVENUE
GARY IN 46408 US

CHRISTOPHER J BURGER, PRESIDENT
CENTRAL RAILROAD COMPANY OF INDIANAPOLIS
PO BOX 554
KOKOMO IN 46903-0554 US

NICOLE HARVEY
THE DOW CHEMICAL COMPANY
2020 DOW CENTER
MIDLAND MI 48674 US

LARRY B KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

T SCOTT BANNISTER
T SCOTT BANNISTER AND ASSOCIATES
1300 DES MOINES BLDG 405 SIXTH AVENUE
DES MOINES IA 50309 US

LEO J WASESCHA
GOLD MEDAL DIVISON - GENERAL MILLS OPERATION
P O BOX 1113
NUMBER ONE GENERAL MILLS BULEVARD
MINNEAPOLIS MN 55440 US

RICHARD E KERTH
CHAMPION INTERNATIONAL CORPORATION
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

ROBERT EDWARDS
EASTERN TRANSPORT AND LOGISTICS
1109 LANETTE DRIVE
CINCINNATI OH 45230 US

F RONALDS WALKER
CITIZENS GAS & COKE UTILITY
2020 N MERIDIAN STREET
INDIANAPOLIS IN 46202-1393 US

J PATRICK LATZ
HEAVY LIFT CARGO SYSTEM
PO BOX 51451
INDIANAPOLIS IN 46251-0451 US

HAMILTON L CARMOUCHE, CORPORATION COUNSEL
CITY OF GARY
401 BROADWAY 4TH FLOOR
GARY IN 46402 US

CARL FELLER
DEKALB AGRA INC
P. O. BOX 127
4743 COUNTY ROAD 28
WATERLOO IN 46793-0127 US

WILLIAM A BON, GENERAL COUNSEL
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
26555 EVERGREEN ROAD SUITE 200
SOUTHFIELD MI 48076 US

JAMES E SHEPHERD
TUSCOLA & SAGINAW BAY
PO BOX 550
OWOSSO MI 48867-0550 US

HON JOHN ENGLER
OFFICE OF THE GOVERNOR
P O BOX 30013
LANSING MI 48933 US

BYRON D OLSEN
FELHABER LARSON FENLON & VOGT PA
601 SECOND AVENUE SOUTH SUITE 4200
MINNEAPOLIS MN 55401-4302 US

GERALD J. VINCI
PRAIRIE GROUP
P. O.BOX 1123
7601 WEST 79TH STREET
BRIDGEVIEW IL 60455 US

RICHARD A GAVRIL
16700 GENTRY LANE NO 104
TINLEY PARK IL 60477 US

CHRISTINE H. ROSSO
IL ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FLOOR
CHICAGO IL 60601 US

WILLIAM C SIPPEL
FLETCHER & SIPPEL LLC
180 N STETSON AVE SUITE 3125
CHICAGO IL 60601-6721 US

RICHARD F. FRIEDMAN, ESQ
EARL L NEAL & ASSOCIATES
111 WEST WASHINGTON STREET, STE 1700
CHICAGO IL 60602-2766 US

ROGER A SERPE
175 WEST JACKSON BOULEVARD SUITE 1460
CHICAGO IL 60604 US

THOMAS F MCFARLAND JR
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE SUITE 1330
CHICAGO IL 60606-2902 US

CHARLES D BOLAM
UNITED TRANSPORTATION UNION
1400-20TH STREET
GRANITE CITY IL 62040 US

MERRILL L TRAVIS
ILLINOIS DEPT OF TRANSPORTATION
2300 S DIRKSEN PARKWAY RM 302
SPRINGFIELD IL 62764 US

JOHN JAY ROSACKER
KS DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

HENRY T DART
PLAINTIFF MANGEMENT COMMITTEE
609 EAST GIBSON STREET
COVINGTON LA 70433 US

DENNIS A. GUTH
WEST LAKE GROUP
2801 POST OAK BLVD
HOUSTON TX 77056 US

EDWARD WASHINGTON, II
CHIEF, PUBLIC UTILITIES BUREAU, ILL ATTORNEY
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

THOMAS J LITWILER
FLETCHER & SIPPEL LLC
180 NORTH STETSON AVENUE SUITE 3125 TWO PRUDE
CHICAGO IL 60601-6721 US

SANDRA J DEARDEN
MDCO TRANSPORTATION MANAGEMENT LTD
166 WEST WASHINGTON SUITE 700
CHICAGO IL 60602 US

EDWARD C MCCARTHY
INLAND STEEL INDUSTRIES INC
30 WEST MONROE STREET
CHICAGO IL 60603 US

SHELDON A ZABEL
SCHIFF HARDIN & WAITE
7200 SEARS TOWER
CHICAGO IL 60606 US

MYLES L TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

SCOTT A RONEY
ARCHER DANIELS MIDLAND COMPANY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

IAN MUIR
BUNGE CORPORATION
P O BOX 28500
ST LOUIS MO 63146 US

MR GEORGE VAN HAVER
2340 SOUTH 35TH STREET
OMAHA NE 68105 US

MIKE SPAHIS
FINA OIL & CHEMICAL CO
6000 LEGACY DRIVE
PLANO TX 75024-3601 US

DAVID L HALL
COMMONWEALTH CONSULTING ASSOCIATES
13103 FM 1960 WEST SUITE 204
HOUSTON TX 77065-4069 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
P O BOX 2583
1221 MCKINNEY STREET SUITE 1600
HOUSTON TX 77252-2583 US

STEVE M COULTER
EXXON COMPANY USA
PO BOX 3272
HOUSTON TX 77253-3272 US

MONTY L PARKER SR
CMC STEEL GROUP
P O BOX 911
SEGUIN TX 78156-0911 US

BRAD F HUSTON
CYPRUS AMAX COAL SALES CORP
9100 E MINERAL CIR
MILFORD CO 80112-3401 US

STEPHEN M UTHOFF
CONIGLIO & UTHOFF
60 ELM AVENUE, CONIGLIO PROFESSIONAL BLDG
LONG BEACH CA 90802-4910 US

RICHARD WELSH
NARPO
50-505 GRAND TRAVERSE
LA QUINTA CA 92253 US

JOHN D FITZGERALD
UTU, GENERAL CHAIRPERSON
400 E EVERGREEN BLVD STE 217
VANCOUVER WA 98660-3264 US

Records: 359

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SERVICE DATE - MAY 31, 2000

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

Decision No. 156

Decided: May 24, 2000

Environmental Condition No. 8(A) of Appendix Q of Decision No. 89[1] (Decision No. 89, slip op. at 393-94), requires Applicants, in order to address potential safety impacts at highway/rail at-grade crossings, to upgrade existing warning devices at 86 public highway/rail at-grade crossings as listed in the decision. As pertinent here, NS is required to install "Flashing Lights" at the at-grade crossing at Lucas Road in Springfield Township, Erie County, Erie, PA. See Decision No. 89, slip op. at 398. Alternatively, as provided in Environmental Condition No. 8(A), NS may satisfy this requirement by entering into a negotiated agreement with the affected local jurisdiction and the state department of transportation to provide for alternative safety improvements in the vicinity of the identified highway/rail at-grade crossing that achieve at least an equivalent level of safety enhancement. Environmental Condition No. 8(A) requires compliance with this provision within 2 years of the effective date of Decision No. 89, or by August 22, 2000.

By letter received May 1, 2000, NS has requested a 1-year extension of the deadline provided for in Environmental Condition No. 8(A), until August 22, 2001. NS states that it has recently been informed by the Pennsylvania Department of Transportation (PennDOT) that the Commonwealth supports further investigation of the Lucas Road grade crossing as a candidate

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[1] In Decision No. 89, served July 23, 1998, we approved, subject to certain conditions, including environmental mitigation conditions, the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (collectively, Conrail) and the division of Conrail's assets by CSX Corporation and CSX Transportation, Inc. (collectively, CSX), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, NS). CSX and NS are referred to as Applicants.

for closure.[2] NS further states that PennDOT has indicated that it will work with Springfield Township to assess this at-grade crossing, and that an extension of time would be beneficial to resolve relevant issues.

NS advises that it is seeking an extension of time for 1 year in which to complete a negotiated agreement with Springfield Township and PennDOT because the precise schedule for completion of the PennDOT investigation of the Lucas Road grade crossing and resolution of the closure issue with Springfield Township is uncertain.

The request for a 1-year extension to August 22, 2001, is reasonable. The revised deadline will therefore be adopted.

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

It is ordered:

1. The compliance deadline for NS in Environmental Condition No. 8(A) of Appendix Q of Decision No. 89 with respect to the Lucas Road grade crossing in Springfield Township, Erie County, Erie, PA, is extended 1 year until August 22, 2001.

2. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

[2] NS enclosed a copy of a letter dated April 27, 2000, from Dean A. Schreiber, P.E., Director, Bureau of Design of PennDOT, supporting an extension of time for compliance by NS with Environmental Condition No. 8(A), with respect to the Lucas Road grade crossing.

SERVICE LIST FOR: 23-may-2000 STB FD 33388 0 CSX CORPORATION AND CSX TRANSPORTATI

PAUL E CRAWFORD
MASSACHUSETTS CENTRAL RAILROAD CORPORATION
TWO WILBRAHAM STREET
PALMER MA 01069 US

JAMES E HOWARD
90 CANAL STREET
BOSTON MA 02114 US

JOHN D CIRAME, ASSISTANT SECRETARY
COMMONWEALTH OF MASS. EXEC. OFFICE OF TRANSPT
10 PARK PLAZA ROOM 3170
BOSTON MA 02116-3969 US

HON. EDWARD M KENNEDY
UNITES STATES SENATE
2400 JOHN F KENNEDY FEDERAL BLDG
BOSTON MA 02203 US

WILLIAM D ANKNER PHD
R I DEPT OF TRANSPORTATION
TWO CAPITOL HILL
PROVIDENCE RI 02903 US

JOHN R NADOLNY
14 AVIATION AVENUE
PORTSMOUTH NH 03801 US

ROBERT D ELDER
MAINE DEPARTMENT OF TRANSPORTATION
16 STATE HOUSE STATION
AUGUSTA ME 04333-0016 US

KAREN E SONGHURST
STATE OF VERMONT
133 STATE STREET
MONTPELLIER VT 05633-5001 US

JAMES F SULLIVAN
CT DEPT OF TRANSPORTATION
P O BOX 317546
2800 BERLIN TURNPIKE
NEWINGTON CT 06131 US

EDWARD J RODRIGUEZ
HOUSATONIC RAILROAD
P O BOX 687
8 DAVIS ROAD WEST
OLD LYME CT 06371 US

RICHARD C CARPENTER
SOUTHWESTERN REGIONAL PLANNING AGENCY
1 SELLECK STREET SUITE 210
EAST NORWALK CT 06855 US

MICHAEL E STRICKLAND
NYK LINE (NORTH AMERICA) INC, SENIOR VICE PRE
300 LIGHTING WAY
SECAUCUS NJ 07094-1588 US

J WILLIAM VAN DYKE
NJ TRANSPORTATION PLANNING AUTHORITY
ONE NEWARK CENTER 17TH FLOOR
NEWARK NJ 07102 US

EDWARD LLOYD
RUTGERS ENVIRONMENTAL LAW CLINIC
15 WASHINGTON STREET
NEWARK NJ 07102 US

HONORABLE ROBERT G. TORRICELLI
UNITED STATES SENATE
1 RIVER FRONT PLAZA, 3RD FLOOR
NEWARK NJ 07102 US

PHILIP SIDO
UNION CAMP CORPORATION
1600 VALLEY ROAD
WAYNE NJ 07470 US

MARTIN T DURKIN ESQ
DURKIN & BOGGIA ESQS
PO BOX 378
71 MT VERNON STREET
RIDGEFIELD PARK NJ 07660 US

CRAIG CURRY
CONSOLIDATED RAIL CORPORATION
1000 HOWARD BOULEVARD
MOUNT LAUREL NJ 08054 US

TIMOTHY G CHELIUS
18 N EAST AVENUE
VINELAND NJ 08360 US

LAWRENCE PEPPER, JR
GRUCCIO PEPPER
817 EAST LANDS AVE
VINELAND NJ 08360 US

JOHN F. MCHUGH
MCHUGH & SHERMAN
20 EXCHANGE PLACE 51ST FLOOR
NEW YORK NY 10005 US

ANTHONY BOTTALICO
UTU
420 LEXINGTON AVENUE ROOM 458-460
NEW YORK NY 10017 US

WALTER E ZULLIG JR
METRO-NORTH COMMUTER RAILROAD COMPANY
347 MADISON AVE
NEW YORK NY 10017-3706 US

ANTHONY P. SEMANCIK
347 MADISON AVENUE
NEW YORK NY 10017-3706 US

JAMES W HARRIS
THE METROPOLITIAN PLANNING ORGANIZATION
1 WORLD TRADE CENTER STE 82 EAST
NEW YORK NY 10048-0043 US

HUGH H. WELSH
LAW DEPT., SUITE 67E
ONE WORLD TRADE CENTER
NEW YORK NY 10048-0202 US

R. LAWRENCE MCCAFFREY, JR.
NEW YORK & ATLANTIC RAILWAY
405 LEXINGTON AVENUE 50TH FLOOR
NEW YORK NY 10174 US

SAMUEL J NASCA
UTU STATE LEGISLATIVE DIRECTOR
35 FULLER ROAD SUITE 205
ALBANY NY 12205 US

DANIEL B. WALSH
BUSINESS COUNCIL OF NEW YORK STATE,INC.
152 WASHINGTON AVENUE
ALBANY NY 12210 US

DIANE SEITZ
CENTRAL HUDSON GAS & ELECTRIC CORP
284 SOUTH AVENUE
POUGHKEEPSIE NY 12601 US

IRWIN L. DAVIS
1900 STATE TOWER BLDG.
SYRACUSE NY 13202 US

ANGELO J CHICK JR, LOCAL CHAIRMAN
P O BOX 908
48398 OLD GOOSE BAY ROAD
REDWOOD NY 13679 US

GARY EDWARDS
SOMERSET RAILROAD
7725 LAKE ROAD
BARKER NY 14012 US

SHEILA MECK HYDE
CITY HALL
342 CENTRAL AVENUE
DUNKIRK NY 14048 US

IRVING J RUBIN
P O BOX 243
YOUNGSTOWN NY 14174 US

JOHN F COLLINS
COLLINS ,COLLINS, & KANTOR PC
267 NORTH STREET
BUFFALO NY 14201 US

R W GODWIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
810 ABBOTT ROAD SUITE 200
BUFFALO NY 14220 US

ERNEST J IERARDI
NIXON HARGRAVE DEVANS DOYLE LLP
PO BOX 1051
CLINTON SQUARE
ROCHESTER NY 14603-1051 US

H DOUGLAS MIDKIFF
GENESEE TRANSPORTATION COUNCIL
65 WEST BROAD ST STE 101
ROCHESTER NY 14614-2210 US

JEANNE WALDOCK
107 GRANT COURT
ORLEAN NY 14760 US

DAVID W. DONLEY
3361 STAFFORD ST
PITTSBURGH PA 15204-1441 US

JOHN A VUONO
VUONO & GRAY
2310 GRANT BUILDING
PITTSBURGH PA 15219 US

HENRY M. WICK, JR.
WICK STREIFF ET AL
1450 TWO CHATHAM CENTER
PITTSBURGH PA 15219-3427 US

R J HENEFELD
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

M E PETRUCCELLI
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

D W DUNLEVY
STATE LEGISLATIVE DIRECTOR UTU
230 STATE STREET PA AFL-CIO BLDG 2ND FLOOR
HARRISBURG PA 17101 US

HONORABLE THOMAS J RIDGE
GOVERNOR, COMMONWEALTH OF PENNSYLVANIA
225 MAIN CAPITOL BUILDING
HARRISBURG PA 17120 US

BELNAP FREEMAN
BELKNAP FREEMAN
119 HICKORY LANE
ROSEMONT PA 19010 US

HARRY C BARBIN
BARBIN LAUFFER & O'CONNELL
608 HUNTINGDON PIKE
ROCKLEDGE PA 19046 US

G CRAIG SCHELTER
PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATI
2600 CENTRE SQUARE WEST 500 MARKET ST
PHILADELPHIA PA 19102 US

DAVID BERGER
BERGER AND MONTAGUE, P. C.
1622 LOCUST ST
PHILADELPHIA PA 19103-6305 US

JOHN K. LEARY, GENERAL MANAGER
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTH
1234 MARKET STREET 5TH FLOOR
PHILADELPHIA PA 19107-3780 US

HON JOSEPH R BIDEN, JR.
UNITED STATES SENATE
844 KING STREET
WILMINGTON DE 19801 US

E C WRIGHT
DUPONT LOGISTICS - GLOBAL SERVICES BUSINESS
1007 MARKET, DUPONT BLDG 3100
WILMINGTON DE 19898 US

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

RICHARD R WILSON
1126 EIGHT AV STE 403
ALTOONA PA 16602 US

KURT W CARR
BUREAU FOR HISTORIC PRESERVATION
P O BOX 1026
HARRISBURG PA 17108-1026 US

KRISTOPHER MICHAEL KLEMICK
RR#3 BOX 101-15
JERSEY SHORE PA 17740-9309 US

JOHN J GROCKI
GRA INC
115 WEST AV ONE JENKINTOWN STA
JENKINTOWN PA 19046 US

JONATHAN M BRODER
CONSOLIDATED RAIL CORP
PO BOX 41416
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

JOHN J EHLINGER JR
OBERMAYER REBMANN MAXWELL & HIPPEL
1617 JOHN F. KENNEDY BLVD ONE PENN CENTER-19T
PHILADELPHIA PA 19103-1895 US

JOHN J COSCIA, EXECUTIVE DIRECTOR
DELAWARE VALLEY REGIONAL PLANNING COMMISSION
111 SOUTH INDEPENDENCE MALL EAST
PHILADELPHIA PA 19106 US

ERIC M HOCKY
GOLLATZ GRIFFIN & EWING
P O BOX 796
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

J E THOMAS
HERCULES INCORPORATED
1313 NORTH MARKET STREET
WILMINGTON DE 19894 US

FREDERICK H SCHRANCK
PO BOX 778
DOVER DE 19903 US

MARTIN W BERCOVICI
KELLER & HECKMAN, LLP
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

PETER A GILBERTSON
REGIONAL RRS OF AMERICA
122 C ST NW STE 850
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

DREW A HARKER
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

PAUL REISTRUP
CSX TRANSPORTATION INC
1331 PENNSYLVANIA NW STE 500
WASH DC 20004 US

GEORGE W MAYO JR
HOGAN & HARTSON L L P
555 THIRTEENTH STREET NW COLUMBIA SQUARE
WASHINGTON DC 20004-1109 US

DENNIS G LYONS
ARNOLD & PORTER
555 TWELFTH STREET NW, STE 940
WASHINGTON DC 20004-1206 US

DANIEL DUFF
AMERICAN PUBLIC TRANSPORTATION ASSOCIATION
1201 NEW YORK AV NW, STE 400
WASHINGTON DC 20005 US

KEVIN M SHEYS
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET NW SUITE 200
WASHINGTON DC 20005 US

KARL MORELL
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

BRUNO MAESTRI
NORFOLK SOUTHERN CORPORATION
1500 K STREET SUITE 375
WASHINGTON DC 20005 US

WILLIAM A MULLINS
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005-3314 US

JAMES HOWARD
COALITION OF NORTHEASTERN GOVERNORS
400 NORTH CAPITOL STREET, SUITE 382
WASHINGTON DC 20001 US

DONALD F GRIFFIN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G STREET NE STE 460
WASHINGTON DC 20002 US

J MICHAEL HEMMER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20004 US

ERIC VON SALZEN
HOGAN & HARTSON
555 THIRTEENTH STREET N W
WASHINGTON DC 20004-1109 US

MARY GABRIELLE SPRAGUE
ARNOLD & PORTER
555 TWELTH STREET NW
WASHINGTON DC 20004-1202 US

LOUIS E GITOMER
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

PAUL M LAURENZA
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

L JOHN OSBORN
SONNENSCHEIN NATH & ROSENTHAL
1301 K STREET NW STE 600 EAST
WASH DC 20005 US

ALICE C SAYLOR
AMERICAN SHORT LINE & REGIONAL RAILROAD ASSO
1120 G STREET NW SUITE 520
WASHINGTON DC 20005 US

CLARK EVANS DOWNS
JONES DAY REAVIS & POGUE
1450 G STREET NW
WASHINGTON DC 20005-2088 US

PAUL H LAMBOLEY
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005-3324 US

NEAL R GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AV NW
WASHINGTON DC 20005-3701 US

MARK H SIDMAN
WEINER BRODSKY,SIDMAN & KIDER
1350 NEW YORK AVE., NW., STE. 800
WASHINGTON DC 20005-4797 US

WILLIAM W MILLAR
AMERICAN PUBLIC TRANSIT ASSOCIATION
1201 NEW YORK AVE., NW
WASHINGTON DC 20005-6141 US

JAMES R WEISS
PRESTON GATES ELLIS ET AL
1735 NEW YORK AVENUE NW SUITE 500
WASHINGTON DC 20006 US

SCOTT M ZIMMERMAN
ZUCKERT SCOUTT & RASENBERGER L L P
888 SEVENTEENTH STREET NW
WASHINGTON DC 20006 US

CONSTANCE A SADLER
SIDLEY & AUSTIN
1722 EYE STREET NW
WASHINGTON DC 20006 US

ROBERT P VOM EIGEN
HOPKINS & SUTTER
888 16TH STREET N W STE 700
WASHINGTON DC 20006 US

ANDREW R. PLUMP
ZUCKERT, SCOUTT & RASENBERGER. LLP
888 17TH ST., NW, STE. 600
WASHINGTON DC 20006 US

ERIKA Z JONES
MAYER BROWN & PLATT
1909 K STREET, NW
WASHINGTON DC 20006-1101 US

RICHARD A ALLEN
ZUCKERT SCOUTT & RASENBERGER L L P
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3309 US

JOHN V EDWARDS, ESQ
ZUCKERT SCOUTT ET AL
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

CHARLES A SPITULNIK
HOPKINS & SUTTER
888 SIXTEENTH ST NW
WASH DC 20006-4103 US

SHERRI LEHMAN DIRECTOR OF CONGRESSIONAL AFFAI
CORN REFINERS ASSOC
1701 PA AV NW
WASH DC 20006-5805 US

CHRISTOPHER C O'HARA
BRICKFIELD BURCHETTE & RITTS PC
1025 THOMAS JEFFERSON ST NW EIGHTH FLOOR
WASHINGTON DC 20007 US

DAVID K MONROE
GALLAND KHARASCH GREENBERT FELLMAN & SWIRSKY
1054 THIRTY FIRST STREET NW STE 200
WASHINGTON DC 20007 US

PAUL M DONOVAN
LAROE WINN MOERMAN & DONOVAN
3900 HIGHWOOD COURT NW
WASHINGTON DC 20007 US

ROBERT G SZABO
1050 THOMAS JEFFERSON STREET NW SIXTH FLOOR
WASHINGTON DC 20007 US

JOHN H BROADLEY
JOHN H BROADLEY & ASSOCIATES P C
1054 31ST STREET NW 2ND FLOOR
WASHINGTON DC 20007 US

EDWARD D GREENBERG
GALLAND, KHARASCH, GREENBERG, FELLMAN & SWIRS
1054 THIRTY-FIRST STREET NW, STE 200
WASHINGTON DC 20007-4492 US

MICHAEL F MCBRIDE
LEBOEUF LAMB GREENE & MACRAE
1875 CONNECTICUT AVENUE NW
WASHINGTON DC 20009-5728 US

STEPHEN H BROWN
VORYS SATER SEYMOUR AND PEASE
1828 L STREET N W
WASHINGTON DC 20036 US

HAROLD P QUINN JR
NATIONAL MINING ASSOCIATON
1130 17TH STREET NW
WASHINGTON DC 20036 US

PAUL D COLEMAN
HOPPEL MAYER & COLEMAN
1000 CONNECTICUT AVENUE NW SUITE 400
WASHINGTON DC 20036 US

JOHN D HEFFNER
REA CROSS & AUCHINCLOSS
1707 L STREET, NW, STE 570
WASHINGTON DC 20036 US

PETER A GREENE
THOMPSON HINE FLORY
1920 N STREET N W SUITE 800
WASHINGTON DC 20036 US

KELVIN J DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

EDWARD WYTKIND EXECUTIVE DIRECTOR
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO
1025 CONNECTICUT AVE NW SUITE 1005
WASHINGTON DC 20036 US

ROBERT A WIMBISH ESQ
REA CROSS & AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

KEITH G O'BRIEN
REA CROSS AND AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

FRITZ R KAHN
1920 N STREET NW 8TH FLOOR
WASHINGTON DC 20036-1601 US

ROSE-MICHELE WEINRYB
WEINER BRODSKY SIDMAN & KIDER
1300 - 19TH STREET, NW, 5TH FLOOR
WASHINGTON DC 20036-1609 US

SAMUEL M SIPE JR
STEPTOE & JOHNSON LLP
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

DEBRA L WILLEN
GUERRIERI EDMOND & CLAYMAN PC
1625 MASSACHUSETTS AVENUE, N.W., STE 700
WASHINGTON DC 20036-2243 US

HELEN M. COUSINEAU
CARLOS RODRIGUEZ & ASSOCIATES
1710 RHODE ISLAND AVENUE, NW
WASHINGTON DC 20036 US

GORDON P MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

DAVID H COBURN
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE NW
WASHINGTON DC 20036 US

RICHARD S EDELMAN
O'DONNELL SCHWARTZ & ANDERSON PC
1900 L STREET NW SUITE 707
WASHINGTON DC 20036 US

CHRISTOPHER A MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

KARYN A BOOTH
THOMPHON HINE & FLORY LLP
1920 N STREET, NW & FLORY LLP
WASHINGTON DC 20036 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

FREDERIC L WOOD
THOMPSON HINE & FLORY LLP
1920 N STREET
WASHINGTON DC 20036-1601 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND & CLAYMAN, PC
1625 MASSACHUSETTS AVE., NW. STE 700
WASHINGTON DC 20036-2243 US

DONALD G AVERY
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036-3003 US

L PAT WYNNS
1050 - 17TH STREET N W SUITE 210
WASHINGTON DC 20036-5503 US

ANDREW P GOLDSTEIN
MCCARTHY, SWEENEY & HARKAWAY P.C.
2175 K STREET, NW SUITE 600
WASHINGTON DC 20037 US

JOHN M CUTLER JR
MCCARTHY SWEENEY HARKAWAY PC
2175 K STREET, NW
WASHINGTON DC 20037 US

STEVEN J KALISH
MCCARTHY SWEENEY & HARKAWAY P C
2175 K STREET NW SUITE 600
WASHINGTON DC 20037 US

DANIEL J SWEENEY
MCCARTHY SWEENEY & HARKAWAY P C
2175 K STREET NW SUITE 600
WASHINGTON DC 20037 US

JOHN L OBERDORFER
PATTON BOGGS LLP
2550 M ST NW
WASHINGTON DC 20037-1301 US

SCOTT N STONE
PATTON BOGGS L L P
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

KEITH A KLINDWORTH
U S DEPT OF AGRICULTURE
P O BOX 96456
WASHINGTON DC 20090 US

MICHAEL V DUNN
USDA
PO BOX 96456 RM 4006-SOUTH BLDG
WASH DC 20090-6456 US

EILEEN S STOMMES
U S DEPARTMENT OF AGRICULTURE
P O BOX 96456 ROOM 4006-SOUTH BUILDING
WASHINGTON DC 20090-6456 US

JUDGE JACOB LEVENTHAL, OFFICE OF HEARINGS
FEDERAL ENERGY REGULATORY COMMISSION
888 - 1ST ST, N.E. STE 11F
WASHINGTON DC 20426 US

RICHARD E SANDERSON
OFFICE OF FEDERAL ACTIVITIES
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HON CHARLES SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON DANIEL PATRICK MOYNIHAN
UNITED STATES SENATE
WASINGTON DC 20510 US

HON JOHN BREAUX
UNITED STATER SENATE
WASHINGTON DC 20510 US

HON CHARLES E SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. BARBARA A. MIKULSKI
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE BOB GRAHAM
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHARLES ROBB
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH BIDEN, JR.
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH I LIEBERMAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON WILLIAM V. ROTH JR
U S SENATE
WASHINGTON DC 20510-0001 US

HON. JOHN W. WARNER
US SENATE
WASHINGTON DC 20510-0001 US

HON CHRISTOPHER J DODD
UNITED STATES SENATE
WASH DC 20510-0702 US

HONORABLE DANIEL P. MOYNIHAN
UNITED STATE SENATE
WASHINGTON DC 20510-0903 US

HONORABLE CONNIE MACK
UNITED STATES SENATE
WASHINGTON DC 20510-0904 US

HONORABLE J ROBERT KERREY
UNITED STATES SENATE
WASHIGTON DC 20510-2704 US

HON MIKE DEWINE
UNITED STATES SENATE
WASHINGTON DC 20510-3503 US

HON ARLEN SPECTER
UNITED STATES SENATE
WASHINGTON DC 20510-3802 US

HON RICK SANTORUM
UNITED STATES SENATE
WASHINGTON DC 20510-3804 US

HONORABLE JOHN H. CHAFEE
UNITED STATES SENATE
WASHINGTON DC 20510-3902 US

HON JACK REED
U S SENATE
WASHINGTON DC 20510-3903 US

HONORABLE ROBERT BYRD
UNITED STATES SENATE
WASHINGTON DC 20510-6025 US

HONORABLE JOHN J LAFALCE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. BUD SHUSTER
ATTN: MIKE RICK
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NANCY JOHNSON
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAM GEJDENSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. TOM BLILEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB CLEMENT
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JAMES L. OBERSTAR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JOHN J. DUNCAN
U S HOUSE OF REPRESENTATIVESS
WASHINGTON DC 20515 US

HONORABLE PAUL E. GILLMOR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MIKE DOYLE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN D. DINGELL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BENJAMIN A. GILMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM O. LIPINSKI
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETER J. VISCLOSKY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM J. COYNE
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MAJOR R. OWENS
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JAMES TRAFICANT JR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ROBERT MENENDEZ
U S HOUSE OF REPRESENTATIVES
WASH DC 20515 US

HON MARCY KAPTUR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK MASCARA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL FORBES
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ELIOT L ENGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON GARY ACKERMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JERROLD NADLER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ROBERT W. NEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB WEYGAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TED STRICKLAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON DENNIS J KUCINICH
UNITED STATES HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HON NYDIA M VELAZQUEZ
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ED TOWNS
U. S. HOUSE OR REPRESENTATIVES
WASHINGTON DC 20515 US

HON LOUISE M SLAUGHTER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHRISTOPHER SHAYS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHARLES RANGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL MCNULTY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAMES MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CAROLYN B MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NITA LOWEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MAURICE HINCHEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHIP PICKERING
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JESSE L. JACKSON, JR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LUIS GUTIERREZ
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DANNY K DAVIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON RALPH REGULA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON SHERROD BROWN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ED BRYANT
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. STEVE LATOURETTE
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON BOB WISE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON THOMAS C SAWYER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAXBY CHAMBLISS,
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TILLIE K FOWLER
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ROD R BLAGOJEVICH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTO DC 20515-1305 US

HON JULIA CARSON
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1410 US

HONORABLE JAMES A. BARCIA
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2205 US

HON JACK QUINN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3230 US

HONORABLE RICHARD BURR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3305 US

HONORABLE TOM DAVIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4611 US

HONORABLE BOBBY L. RUSH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-9997 US

MICHAEL P HARMONIS
DEPARTMENT OF JUSTICE
325 SEVENTH STREET, NW
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
US DEPARTMENT OF TRANSPORTATION
400 SEVENTH STREET SW ROOM 4102 C-30
WASHINGTON DC 20590 US

JOSEPH R POMPONIO
FEDERAL RAILROAD ADMIN
1120 VERMONT AVE NW RCC-20
WASHINGTON DC 20590 US

JOLENE MOLITORIS, ADMN.
FEDERAL RAILROAD ADMNS.
400 7TH STREET SW
WASHINGTON DC 20590 US

DAVID G ABRAHAM
SUITE 400W
7315 WISCONSIN AVENUE
BETHESDA MD 20814 US

MITCHELL M KRAUS
TRANSPORTATION COMMUNICATIONS INTERNATIONAL U
3 RESEARCH PLACE
ROCKVILLE MD 20850-3279 US

JOHN M ROBINSON
9616 OLD SPRING ROAD
KENSINGTON MD 20895-3124 US

WILLIAM W WHITEHURST JR
W W WHITEHURST & ASSOCIATES INC
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030-1711 US

JOHN HOY
P O BOX 117
GLEN BURNIE MD 21060 US

ROBERT J WILL
UNITED TRANSPORTATION UNION
4134 GRAVE RUN RD
MANCHESTER MD 21102 US

JOHN F WING CHAIRMAN
CITIZENS ADVISORY COMMITTEE
601 NORTH HOWARD STREET
BALTIMOTE MD 21201 US

LINDA A JANEY J D
MARYLAND OFFICE OF PLANNING
301 WEST PRESTON STREET
BALTIMORE MD 21201-2365 US

DON E SANCHEZ
CHESAPEAKE SPECIALTY PRODUCTS INC
5055 NORTH POINT BOULEVARD
BALTIMORE MD 21219 US

CHARLES M CHADWICK
MARYLAND MIDLAND RAILWAY INC
P O BOX 1000
UNION BRIDGE MD 21791 US

HENRY E. SEATON
7700 LEESBURG PIKE, STE 201
FALLS CHURCH VA 22043 US

PETER Q NYCE JR
U S DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

THOMAS E SCHICK
CHEMICAL MANUF ASSOC
1300 WILSON BOULEVARD
ARLINGTON VA 22209 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

JENNIFER BRAUN
JACKSON & JESSUP
P O BOX 1240
3426 NORTH WASHINGTON BOULEVARD
ARLINGTON VA 22210 US

FRANCIS G MCKENNA
ANDERSON & PENDLETON
206 N WASHINGTON STREET SUITE 330
ALEXANDRIA VA 22314 US

KENNETH E SIEGEL
AMERICAN TRUCKING ASSOC INC
2200 MILL ROAD
ALEXANDRIA VA 22314-4677 US

ROBERT E MARTINEZ
VA SECRETARY OF TRANSPORTAITON
P. O. BOX 1475
RICHMOND VA 23218 US

HONORABLE GEORGE ALLEN
GOVERNOR, COMMONWEALTH OF VIRGINIA
STATE CAPITOL
RICHMOND VA 23219 US

JOHN W SNOW
CHAIRMAN PRESIDENT AND CHIEF EXECTIVE OFFICER
P O BOX 85629
RICHMOND VA 23285-5629 US

DAVID A SHELTON
NORFOLK SOUTHERN
THREE COMMERCIAL PLACE
NORFOLK VA 23510 US

GEORGE A ASPATORE
NORFOLK SOUTHERN CORP
THREE COMMEMERCIAL PLACE
NORFOLK VA 23510 US

JAMES A HIXON
SENIOR VICE PRESIDDENT EMPLOYEE RELATIONS NOR
THREE COMMERCIAL PLACE
NORFFFOLK VA 23510-2191 US

L P KING JR
GENERAL CHAIRPERSON UTU
145 CAMPBELL AVE SW STE 207
ROANOKE VA 24011 US

HONORABLE JOHN WARNER
UNITED STATES SENATE
235 FEDERAL BUILDING
ABINGDON VA 24210-0887 US

VAUGHN R GROVES
PITTSTON COAL COMPANY
PO BOX 5100
LEBANON VA 24266 US

TERRELL ELLIS
CAEZWV
P O BOX 176
CLAY WV 25043 US

R K SARGENT
GENERAL CHAIRPERSON UTU
1319 CHESTNUT STREET
KENOVA WV 25530 US

WILLIAM T BRIGHT
P O BOX 149
200 GREENBRIER ROAD
SUMMERSVILLE WV 26651 US

FRANK N JORGENSEN
THE ELK RIVER RAILROAD INC
P O BOX 460
SUMMERSVILLE WV 26651 US

SCOTT M SAYLOR
NORTH CAROLINA RAILROAD COMPANY
3200 ATLANTIC AV STE 110
RALIEGH NC 27604-1640 US

E NORRIS TOLSON
NC DEPT OF TRANSPORTATION
P O BOX 25201
1 S. WILINGTON STREET
RALEIGH NC 27611 US

J R BARBEE
GENERAL CHAIRPERSON UTU
441 N LOUISIANA AVE STE Q
ASHEVILLE NC 28806-3791 US

HONORABLE DAVID M BEASLEY
GOVERNOR
P. O. BOX 11369
COLUMBIA SC 29211 US

J RANDALL EVANS
500 WATER STREET (J150)
JACKSONVILLE FL 32202 US

FRED R BIRKHOLZ
CSX TRANSPORTATION LAW DEPT - J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

ROBERT V ALLEN
CSX TRANSPORTATION
500 WATER STREET J305
JACKSONVILLE FL 32202 US

T J STEPHENSON
CSX TRANSPORTATION INC
500 WATER STREET (J407)
JACKSONVILLE FL 32202 US

CARL A GERHARDSTEIN
CSX TRANSPORTATION RISK MGMT
500 WATER STREET-J275
JACKSONVILLE FL 32202 US

DANFORD L PRICE
500 WATER STREET
JACKSONVILLE FL 32202 US

BOB HAULTER
CSX TRANSPORTATION INC
500 WATER STREET (J120)
JACKSONVILLE FL 32202 US

PAUL R. HITCHCOCK
CSX TRANSPORTATION LAW DEPARTMENT
500 WATER STREET SC J-150
JACKSONVILLE FL 32202 US

JOHN W. HUMES, JR.
CSX TRANSPORTATION
SPEED CODE J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

CHARLES M ROSENBERGER
CSX TRANSPORTATION
500 WATER STREET - J150
JACKSONVILLE FL 32202 US

J L RODGERS
GENERAL CHAIRMAN UTU
480 OSCEOLA AVENUE
JACKSONVILLE FL 32250 US

J T REED
GENERAL CHAIRPERSON UTU
7785 BAYMEADOWS WAY STE 109
JACKSONVILLE FL 32256 US

PHILLIP L BELL
ERIE LACKAWANNA RAILROAD CO
PO BOX 1482
TALLAHASSEE FL 32302 US

JAMES L BELCHER
EASTMAN CHEMICAL COMPANY
PO BOX 431
KINGSPORT TN 37662 US

WILLIAM L OSTEEN
ASSOCIATE GENERAL COUNSEL TVA
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE KIRK FORDICE, GOVERNOR
STATE OF MISSISSIPPI
P O BOX 139
JACKSON MS 39205 US

HONORABLE PAUL E. PATTON
GOVERNOR
700 CAPITOL AVENUE, STE. 100
FRANKFORT KY 40601 US

F R PICKELL
GENERAL CHAIRPERSON UTU
6797 NORTH HIGH ST STE 108
WORTHINGTON OH 43085 US

THOMAS M O'LEARY
OHIO RAIL DEVELOPMENT COMMISSION
50 W BROAD STREET 15TH FLOOR
COLUMBUS OH 43215 US

HONORABLE DEBORAH PRYCE
U. S. HOUSE OF REPRESENTATIVES
500 SOUTH FRONT STREET, ROOM 1130
COLUMBUS OH 43215 US

DOREEN C JOHNSON, CHIEF ANTITRUST SECTION
OHIO ATTY GENERAL OFFICE
140 EAST TOWN STREET, FIRST FLOOR
COLUMBUS OH 43215-6001 US

JAMES R JACOBS
JACOBS INDUSTRIES
2 QUARRY LANE
STONY RIDGE OH 43463 US

DAVID CHAPMAN
LAFARGE LIME OHIO INC
P O BOX 128
659 ANDERSON ROAD
WOODVILLE OH 43469-0128 US

ROBERT J COOPER
GENERAL CHAIRPERSON UTU
1238 CASS ROAD
MAUMEE OH 43537 US

ROBERT E GREENLESE
TOLEDO-LUCAS COUNTY PORT AUTHORITY
1 MARITIME PLAZA SUITE 700
TOLEDO OH 43604 US

RON MARQUARDT
LOCAL UNION 1810 UMWA
R D #2
RAYLAND OH 43943 US

MAYOR VINCENT M URBIN
150 AVON BELDEN RD
AVON LAKE OH 44012 US

BARBARA O'KEEFE
VILLAGE OF WELLINGTON
115 WILLARD MEMORIAL SQ
WELLINGTON OH 44090 US

ANITA R BRINDZA
THE ONE FIFTEEN HUNDRED BUILDING
11500 FRANKLIN BLVD SUITE 104
CLEVELAND OH 44102 US

C L LITTLE
INTERNATIONAL PRESIDENT UTU
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CLARENCE MONIN INTERNATIONAL PRES
BROTHERHOOD OF LOCOMTIVE ENGINEERS MEZZANINE
1370 ONTARIO STREET
CLEVELAND OH 44113 US

DAVID ROLOFF
GOLDSTEIN & ROLOFF
526 SUPERIOR AVENUE EAST SUITE 1440
CLEVELAND OH 44114 US

C D WINEBRENNER
GENERAL CHAIRPERSON UTU
27801 EUCLID AVENUE RM 200
EUCLID OH 44132 US

SYLVIA R. CHINN-LEVY
NEFCO
969 COPLEY ROAD
AKRON OH 44320 US

RANDALL C. HUNT
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO.
P O BOX 36963
4775 MUNSON ST NW
CANTON OH 44735-6963 US

ROBERT E MURRAY
OHIO VALLEY COAL CO
56854 PLEASANT RIDGE ROAD
ALLEDONIA OH 43902 US

CLARENCE TURNQUIST
INTERNATIONAL LONGSHOREMEN S ASSOCIATION
C/O 2125 TRYON ROAD
ASHTABULA OH 44004 US

CHARLES S HESSE
CHARLES HESSE ASSOCIATES
7777 BAINBRIDGE ROAD
CHAGRIN FALLS OH 44023-2124 US

COLETTA MCNAMEE SR
CUDELL IMPROVEMENT INC
11500 FRANKLIN BLVD STE 104
CLEVELAND OH 44102 US

DANIEL R ELLIOTT III
ASST GENERAL COUNSEL UNITED TRANSPORTATION UN
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CLINTON J MILLER III
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CHRISTOPHER C MCCRACKEN
ULMER & BERNE LLP
1300 EAST NINTH STREET SUITE 900
CLEVELAND OH 44114 US

INAJO DAVIS CHAPPELL
ASHTA CHEMICALS INC
1300 EAST NINETH STREET SUITE 900
CLEVELAND OH 44114-1538 US

CHARLES ZUMKEHR
ROETZEL & ANDRESS CO LPA
75 EAST MARKET STREET
AKRON OH 44308 US

CHARLES E ALLENBAUGH JR
EAST OHIO STONE COMPANY
2000 W BESSON ST
ALLIANCE OH 44601 US

D G STRUNK JR
GENERAL CHAIRPERSON UTU
817 KILBOURNE STREET
BELLEVUE OH 44811 US

R A GRICE
GENERAL CHAIRPERSON 'TU
817 KILBOURNE ST
BELLEVUE OH 44811-9431 US

RICHARD E KERTH
CHAMPION INTERNATIONAL CORPORATION
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

FAY D DUPUIS
CITY OF CINCINNATI
801 PLUM STREET
CINCINNATI OH 45202 US

ROBERT EDWARDS
EASTERN TRANSPORT AND LOGISTICS
1109 LANETTE DRIVE
CINCINNATI OH 45230 US

THOMAS R RYDMAN PRESIDENT
INDIAN CREEK RAILROAD COMPANY
3905 W 600 NORTH
ANDERSON IN 46011 US

F RONALDS WALKER
CITIZENS GAS & COKE UTILITY
2020 N MERIDIAN STREET
INDIANAPOLIS IN 46202-1393 US

MICHAEL P MAXWELL JR
MCHALE, COOK & WELCH
320 N MERIDIAN ST 1100 CHAMBER OF COMMERCE BL
INDIANAPOLIS IN 46204 US

J PATRICK LATZ
HEAVY LIFT CARGO SYSTEM
PO BOX 51451
INDIANAPOLIS IN 46251-0451 US

MICHAEL CONNELLY
CITY OF EAST CHICAGO
4525 INDIANAPOLIS BLVD
EAST CHICAGO IN 46312 US

HAMILTON L CARMOUCHE, CORPORATION COUNSEL
CITY OF GARY
401 BROADWAY 4TH FLOOR
GARY IN 46402 US

HONORABLE PETER J. VISCLOSKY
U. S. HOUSE OF REPRESENTATIVES
215 WEST 35TH AVENUE
GARY IN 46408 US

CARL FELLER
DEKALB AGRA INC
P. O. BOX 127
4743 COUNTY ROAD 28
WATERLOO IN 46793-0127 US

CHRISTOPHER J BURGER, PRESIDENT
CENTRAL RAILROAD COMPANY OF INDIANAPOLIS
PO BOX 554
KOKOMO IN 46903-0554 US

WILLIAM A BON, GENERAL COUNSEL
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
26555 EVERGREEN ROAD SUITE 200
SOUTHFIELD MI 48076 US

NICOLE HARVEY
THE DOW CHEMICAL COMPANY
2020 DOW CENTER
MIDLAND MI 48674 US

JAMES E SHEPHERD
TUSCOLA & SAGINAW BAY
PO BOX 550
OWOSSO MI 48867-0550 US

LARRY B KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

HON JOHN ENGLER
OFFICE OF THE GOVERNOR
P O BOX 30013
LANSING MI 48933 US

T SCOTT BANNISTER
T SCOTT BANNISTER AND ASSOCIATES
1300 DES MOINES BLDG 405 SIXTH AVENUE
DES MOINES IA 50309 US

BYRON D OLSEN
FELHABER LARSON FENLON & VOGT PA
601 SECOND AVENUE SOUTH SUITE 4200
MINNEAPOLIS MN 55401-4302 US

LEO J WASESCHA
GOLD MEDAL DIVISON - GENERAL MILLS OPERATION
P O BOX 1113
NUMBER ONE GENERAL MILLS BULEVARD
MINNEAPOLIS MN 55440 US

GERALD J. VINCI
PRAIRIE GROUP
P. O.BOX 1123
7601 WEST 79TH STREET
BRIDGEVIEW IL 60455 US

RICHARD A GAVRIL
16700 GENTRY LANE NO 104
TINLEY PARK IL 60477 US

CHRISTINE H. ROSSO
IL ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FLOOR
CHICAGO IL 60601 US

WILLIAM C SIPPEL
FLETCHER & SIPPEL LLC
180 N STETSON AVE SUITE 3125
CHICAGO IL 60601-6721 US

RICHARD F. FRIEDMAN, ESQ
EARL L NEAL & ASSOCIATES
111 WEST WASHINGTON STREET, STE 1700
CHICAGO IL 60602-2766 US

ROGER A SERPE
175 WEST JACKSON BOULEVARD SUITE 1460
CHICAGO IL 60604 US

THOMAS F MCFARLAND JR
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE SUITE 1330
CHICAGO IL 60606-2902 US

CHARLES D BOLAM
UNITED TRANSPORTATION UNION
1400-20TH STREET
GRANITE CITY IL 62040 US

MERRILL L TRAVIS
ILLINOIS DEPT OF TRANSPORTATION
2300 S DIRKSEN PARKWAY RM 302
SPRINGFIELD IL 62764 US

JOHN JAY ROSACKER
KS DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

HENRY T DART
PLAINTIFF MANGEMENT COMMITTEE
609 EAST GIBSON STREET
COVINGTON LA 70433 US

DENNIS A. GUTH
WEST LAKE GROUP
2801 POST OAK BLVD
HOUSTON TX 77056 US

EDWARD WASHINGTON, II
CHIEF, PUBLIC UTILITIES BUREAU, ILL ATTORNEY
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

THOMAS J LITWILER
FLETCHER & SIPPEL LLC
180 NORTH STETSON AVENUE SUITE 3125 TWO PRUDE
CHICAGO IL 60601-6721 US

SANDRA J DEARDEN
MDCO TRANSPORTATION MANAGEMENT LTD
166 WEST WASHINGTON SUITE 700
CHICAGO IL 60602 US

EDWARD C MCCARTHY
INLAND STEEL INDUSTRIES INC
30 WEST MONROE STREET
CHICAGO IL 60603 US

SHELDON A ZABEL
SCHIFF HARDIN & WAITE
7200 SEARS TOWER
CHICAGO IL 60606 US

MYLES L TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

SCOTT A RONEY
ARCHER DANIELS MIDLAND COMPANY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

IAN MUIR
BUNGE CORPORATION
P O BOX 28500
ST LOUIS MO 63146 US

MR GEORGE VAN HAVER
2340 SOUTH 35TH STREET
OMAHA NE 68105 US

MIKE SPAHIS
FINA OIL & CHEMICAL CO
6000 LEGACY DRIVE
PLANO TX 75024-3601 US

DAVID L HALL
COMMONWEALTH CONSULTING ASSOCIATES
13103 FM 1960 WEST SUITE 204
HOUSTON TX 77065-4069 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
P O BOX 2583
1221 MCKINNEY STREET SUITE 1600
HOUSTON TX 77252-2583 US

STEVE M COULTER
EXXON COMPANY USA
PO BOX 3272
HOUSTON TX 77253-3272 US

MONTY L PARKER SR
CMC STEEL GROUP
P O BOX 911
SEGUIN TX 78156-0911 US

BRAD F HUSTON
CYPRUS AMAX COAL SALES CORP
9100 E MINERAL CIR
MILFORD CO 80112-3401 US

STEPHEN M UTHOFF
CONIGLIO & UTHOFF
60 ELM AVENUE, CONIGLIO PROFESSIONAL BLDG
LONG BEACH CA 90802-4910 US

RICHARD WELSH
NARPO
50-505 GRAND TRAVERSE
LA QUINTA CA 92253 US

JOHN D FITZGERALD
UTU, GENERAL CHAIRPERSON
400 E EVERGREEN BLVD STE 217
VANCOUVER WA 98660-3264 US

Records: 359

STB FD-33388 5-31-00 C 31044

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SERVICE DATE - MAY 31, 2000

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

Decision No. 155

Decided: May 24, 2000

Environmental Condition No. 8(A) of Appendix Q of Decision No. 89[1] (Decision No. 89, slip op. at 393-94), requires Applicants, in order to address potential safety impacts at highway/rail at-grade crossings, to upgrade existing warning devices at 86 public highway/rail at-grade crossings as listed in the decision. As pertinent here, NS is required to install "Flashing Lights" at the at-grade crossing at Guilford Springs Road, located in Guilford Township, Franklin County, Guilford Springs, PA. See Decision No. 89, slip op. at 398. Alternatively, as provided in Environmental Condition No. 8(A), NS may satisfy this requirement by entering into a negotiated agreement with the affected local jurisdiction and the state department of transportation to provide for alternative safety improvements in the vicinity of the identified highway/rail at-grade crossing that achieve at least an equivalent level of safety enhancement. Environmental Condition No. 8(A) requires compliance with this provision within 2 years of the effective date of Decision No. 89, or by August 22, 2000.

By letter received April 28, 2000, NS has advised the Board that it has recently been apprised by the Guilford Township Supervisors that Guilford Township intends within a year to relocate Guilford Springs Road, including the existing grade crossing.[2] NS advises that, when the new road and grade crossing have been completed, NS will work with the Guilford Township Supervisors and the Pennsylvania Department of Transportation to install flashing lights at the

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[1] In Decision No. 89, served July 23, 1998, we approved, subject to certain conditions, including environmental mitigation conditions, the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (collectively, Conrail) and the division of Conrail's assets by CSX Corporation and CSX Transportation, Inc. (collectively, CSX), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, NS). CSX and NS are referred to as Applicants.

[2] NS enclosed a copy of a letter dated February 23, 2000, from Gregory L. Cook, Chairman of the Guilford Township Supervisors advising of the relocation and requesting NS to seek a 1-year extension of the compliance deadline.

relocated Guilford Springs Road grade crossing. NS states that it is seeking an extension of time for 1 year in which to install flashing lights at the Guilford Springs Road grade crossing, with that date based on the expected completed construction of the relocated road and grade crossing by February 23, 2001. Should construction of the relocated road and grade crossing not be completed by February 23, 2001, NS seeks an extension until 6 months after completion of such construction to install flashing lights at the relocated Guilford Springs Road grade crossing.

The extension requests are reasonable, and the revised deadline will therefore be adopted.

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

It is ordered:

1. The compliance deadline for NS in Environmental Condition No. 8(A) of Appendix Q of Decision No. 89 with respect to the Guilford Springs Road grade crossing in Guilford Township, Franklin County, Guilford Springs, PA, is extended until August 22, 2001, or until 6 months following completion of the construction of the relocated Guilford Springs Road and the NS grade crossing, if the construction is not completed by February 23, 2001.

2. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams

Vernon A. Williams
Secretary

SERVICE LIST FOR: 23-may-2000 STB FD 33388 0 CSX CORPORATION AND CSX TRANSPORTATI

PAUL E CRAWFORD
MASSACHUSETTS CENTRAL RAILROAD CORPORATION
TWO WILBRAHAM STREET
PALMER MA 01069 US

JAMES E HOWARD
90 CANAL STREET
BOSTON MA 02114 US

JOHN D CIRAME, ASSISTANT SECRETARY
COMMONWEALTH OF MASS. EXEC. OFFICE OF TRANSPT
10 PARK PLAZA ROOM 3170
BOSTON MA 02116-3969 US

HON. EDWARD M KENNEDY
UNITES STATES SENATE
2400 JOHN F KENNEDY FEDERAL BLDG
BOSTON MA 02203 US

WILLIAM D ANKNER PHD
R I DEPT OF TRANSPORTATION
TWO CAPITOL HILL
PROVIDENCE RI 02903 US

JOHN R NADOLNY
14 AVIATION AVENUE
PORTSMOUTH NH 03801 US

ROBERT D ELDER
MAINE DEPARTMENT OF TRANSPORTATION
16 STATE HOUSE STATION
AUGUSTA ME 04333-0016 US

KAREN E SONGHURST
STATE OF VERMONT
133 STATE STREET
MONTPELLIER VT 05633-5001 US

JAMES F SULLIVAN
CT DEPT OF TRANSPORTATION
P O BOX 317546
2800 BERLIN TURNPIKE
NEWINGTON CT 06131 US

EDWARD J RODRIGUEZ
HOUSATONIC RAILROAD
P O BOX 687
8 DAVIS ROAD WEST
OLD LYME CT 06371 US

RICHARD C CARPENTER
SOUTHWESTERN REGIONAL PLANNING AGENCY
1 SELLECK STREET SUITE 210
EAST NORWALK CT 06855 US

MICHAEL E STRICKLAND
NYK LINE (NORTH AMERICA) INC, SENIOR VICE PRE
300 LIGHTING WAY
SECAUCUS NJ 07094-1588 US

J WILLIAM VAN DYKE
NJ TRANSPORTATION PLANNING AUTHORITY
ONE NEWARK CENTER 17TH FLOOR
NEWARK NJ 07102 US

EDWARD LLOYD
RUTGERS ENVIRONMENTAL LAW CLINIC
15 WASHINGTON STREET
NEWARK NJ 07102 US

HONORABLE ROBERT G. TORRICELLI
UNITED STATES SENATE
1 RIVER FRONT PLAZA, 3RD FLOOR
NEWARK NJ 07102 US

PHILIP SIDO
UNION CAMP CORPORATION
1600 VALLEY ROAD
WAYNE NJ 07470 US

MARTIN T DURKIN ESQ
DURKIN & BOGGIA ESQS
PO BOX 378
71 MT VERNON STREET
RIDGEFIELD PARK NJ 07660 US

CRAIG CURRY
CONSOLIDATED RAIL CORPORATION
1000 HOWARD BOULEVARD
MOUNT LAUREL NJ 08054 US

TIMOTHY G CHELIUS
18 N EAST AVENUE
VINELAND NJ 08360 US

LAWRENCE PEPPER, JR
GRUCCIO PEPPER
817 EAST LANDS AVE
VINELAND NJ 08360 US

JOHN F. MCHUGH
MCHUGH & SHERMAN
20 EXCHANGE PLACE 51ST FLOOR
NEW YORK NY 10005 US

ANTHONY BOTTALICO
UTU
420 LEXINGTON AVENUE ROOM 458-460
NEW YORK NY 10017 US

WALTER E ZULLIG JR
NETRO-NORTH COMMUTER RAILROAD COMPANY
347 MADISON AVE
NEW YORK NY 10017-3706 US

ANTHONY P. SEMANCIK
347 MADISON AVENUE
NEW YORK NY 10017-3706 US

JAMES W HARRIS
THE METROPOLITIAN PLANNING ORGANIZATION
1 WORLD TRADE CENTER STE 82 EAST
NEW YORK NY 10048-0043 US

HUGH H. WELSH
LAW DEPT., SUITE 67E
ONE WORLD TRADE CENTER
NEW YORK NY 10048-0202 US

R. LAWRENCE MCCAFFREY, JR.
NEW YORK & ATLANTIC RAILWAY
405 LEXINGTON AVENUE 50TH FLOOR
NEW YORK NY 10174 US

SAMUEL J NASCA
UTU STATE LEGISLATIVE DIRECTOR
35 FULLER ROAD SUITE 205
ALBANY NY 12205 US

DANIEL B. WALSH
BUSINESS COUNCIL OF NEW YORK STATE,INC.
152 WASHINGTON AVENUE
ALBANY NY 12210 US

DIANE SEITZ
CENTRAL HUDSON GAS & ELECTRIC CORP
284 SOUTH AVENUE
POUGHKEEPSIE NY 12601 US

IRWIN L. DAVIS
1900 STATE TOWER BLDG.
SYRACUSE NY 13202 US

ANGELO J CHICK JR, LOCAL CHAIRMAN
P O BOX 908
48398 OLD GOOSE BAY ROAD
REDWOOD NY 13679 US

GARY EDWARDS
SOMERSET RAILROAD
7725 LAKE ROAD
BARKER NY 14012 US

SHEILA MECK HYDE
CITY HALL
342 CENTRAL AVENUE
DUNKIRK NY 14048 US

IRVING J RUBIN
P O BOX 243
YOUNGSTOWN NY 14174 US

JOHN F COLLINS
COLLINS ,COLLINS, & KANTOR PC
267 NORTH STREET
BUFFALO NY 14201 US

R W GODWIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
810 ABBOTT ROAD SUITE 200
BUFFALO NY 14220 US

ERNEST J IERARDI
NIXON HARGRAVE DEVANS DOYLE LLP
PO BOX 1051
CLINTON SQUARE
ROCHESTER NY 14603-1051 US

H DOUGLAS MIDKIFF
GENESEE TRANSPORTATION COUNCIL
65 WEST BROAD ST STE 101
ROCHESTER NY 14614-2210 US

JEANNE WALDOCK
107 GRANT COURT
ORLEAN NY 14760 US

DAVID W. DONLEY
3361 STAFFORD ST
PITTSBURGH PA 15204-1441 US

JOHN A VUONO
VUONO & GRAY
2310 GRANT BUILDING
PITTSBURGH PA 15219 US

HENRY M. WICK, JR.
WICK STREIFF ET AL
1450 TWO CHATHAM CENTER
PITTSBURGH PA 15219-3427 US

R J HENEFELD
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

M E PETRUCCELLI
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

D W DUNLEVY
STATE LEGISLATIVE DIRECTOR UTU
230 STATE STREET PA AFL-CIO BLDG 2ND FLOOR
HARRISBURG PA 17101 US

HONORABLE THOMAS J RIDGE
GOVERNOR, COMMONWEALTH OF PENNSYLVANIA
225 MAIN CAPITOL BUILDING
HARRISBURG PA 17120 US

BELNAP FREEMAN
BELKNAP FREEMAN
119 HICKORY LANE
ROSEMONT PA 19010 US

HARRY C BARBIN
BARBIN LAUFFER & O'CONNELL
608 HUNTINGDON PIKE
ROCKLEDGE PA 19046 US

G CRAIG SCHELTER
PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATI
2600 CENTRE SQUARE WEST 500 MARKET ST
PHILADELPHIA PA 19102 US

DAVID BERGER
BERGER AND MONTAGUE, P. C.
1622 LOCUST ST
PHILADELPHIA PA 19103-6305 US

JOHN K. LEARY, GENERAL MANAGER
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTH
1234 MARKET STREET 5TH FLOOR
PHILADELPHIA PA 19107-3780 US

HON JOSEPH R BIDEN, JR.
UNITED STATES SENATE
844 KING STREET
WILMINGTON DE 19801 US

E C WRIGHT
DUPONT LOGISTICS - GLOBAL SERVICES BUSINESS
1007 MARKET, DUPONT BLDG 3100
WILMINGTON DE 19898 US

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

RICHARD R WILSON
1126 EIGHT AV STE 403
ALTOONA PA 16602 US

KURT W CARR
BUREAU FOR HISTORIC PRESERVATION
P O BOX 1026
HARRISBURG PA 17108-1026 US

KRISTOPHER MICHAEL KLEMICK
RR#3 BOX 101-15
JERSEY SHORE PA 17740-9309 US

JOHN J GROCKI
GRA INC
115 WEST AV ONE JENKINTOWN STA
JENKINTOWN PA 19046 US

JONATHAN M BRODER
CONSOLIDATED RAIL CORP
PO BOX 41416
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

JOHN J EHLINGER JR
OBERMAYER REBMANN MAXWELL & HIPPEL
1617 JOHN F. KENNEDY BLVD ONE PENN CENTER-19T
PHILADELPHIA PA 19103-1895 US

JOHN J COSCIA, EXECUTIVE DIRECTOR
DELAWARE VALLEY REGIONAL PLANNING COMMISSION
111 SOUTH INDEPENDENCE MALL EAST
PHILADELPHIA PA 19106 US

ERIC M HOCKY
GOLLATZ GRIFFIN & EWING
P O BOX 796
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

J E THOMAS
HERCULES INCORPORATED
1313 NORTH MARKET STREET
WILMINGTON DE 19894 US

FREDERICK H SCHRANCK
PO BOX 778
DOVER DE 19903 US

MARTIN W BERCOVICI
KELLER & HECKMAN, LLP
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

PETER A GILBERTSON
REGIONAL RRS OF AMERICA
122 C ST NW STE 850
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

DREW A HARKER
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

PAUL REISTRUP
CSX TRANSPORTATION INC
1331 PENNSYLVANIA NW STE 500
WASH DC 20004 US

GEORGE W MAYO JR
HOGAN & HARTSON L L P
555 THIRTEENTH STREET NW COLUMBIA SQUARE
WASHINGTON DC 20004-1109 US

DENNIS G LYONS
ARNOLD & PORTER
555 TWELFTH STREET NW, STE 940
WASHINGTON DC 20004-1206 US

DANIEL DUFF
AMERICAN PUBLIC TRANSPORTATION ASSOCIATION
1201 NEW YORK AV NW, STE 400
WASHINGTON DC 20005 US

KEVIN M SHEYS
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET NW SUITE 200
WASHINGTON DC 20005 US

KARL MORELL
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

BRUNO MAESTRI
NORFOLK SOUTHERN CORPORATION
1500 K STREET SUITE 375
WASHINGTON DC 20005 US

WILLIAM A MULLINS
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005-3314 US

JAMES HOWARD
COALITION OF NORTHEASTERN GOVERNORS
400 NORTH CAPITOL STREET, SUITE 382
WASHINGTON DC 20001 US

DONALD F GRIFFIN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G STREET NE STE 460
WASHINGTON DC 20002 US

J MICHAEL HEMMER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20004 US

ERIC VON SALZEN
HOGAN & HARTSON
555 THIRTEENTH STREET N W
WASHINGTON DC 20004-1109 US

MARY GABRIELLE SPRAGUE
ARNOLD & PORTER
555 TWELTH STREET NW
WASHINGTON DC 20004-1202 US

LOUIS E GITOMER
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

PAUL M LAURENZA
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

L JOHN OSBORN
SONNENSCHEIN NATH & ROSENTHAL
1301 K STREET NW STE 600 EAST
WASH DC 20005 US

ALICE C SAYLOR
AMERICAN SHORT LINE & REGIONAL RAILROAD ASSO
1120 G STREET NW SUITE 520
WASHINGTON DC 20005 US

CLARK EVANS DOWNS
JONES DAY REAVIS & POGUE
1450 G STREET NW
WASHINGTON DC 20005-2088 US

PAUL H LAMBOLEY
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005-3324 US

NEAL R GROSS
GOURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AV NW
WASHINGTON DC 20005-3701 US

MARK H SIDMAN
WEINER BRODSKY,SIDMAN & KIDER
1350 NEW YORK AVE., NW., STE. 800
WASHINGTON DC 20005-4797 US

WILLIAM W MILLAR
AMERICAN PUBLIC TRANSIT ASSOCIATION
1201 NEW YORK AVE., NW
WASHINGTON DC 20005-6141 US

JAMES R WEISS
PRESTON GATES ELLIS ET AL
1735 NEW YORK AVENUE NW SUITE 500
WASHINGTON DC 20006 US

SCOTT M ZIMMERMAN
ZUCKERT SCOUTT & RASENBERGER L L P
888 SEVENTEENTH STREET NW
WASHINGTON DC 20006 US

CONSTANCE A SADLER
SIDLEY & AUSTIN
1722 EYE STREET NW
WASHINGTON DC 20006 US

ROBERT P VOM EIGEN
HOPKINS & SUTTER
888 16TH STREET N W STE 700
WASHINGTON DC 20006 US

ANDREW R. PLUMP
ZUCKERT, SCOUTT & RASENBERGER. LLP
888 17TH ST., NW, STE. 600
WASHINGTON DC 20006 US

ERIKA Z JONES
MAYER BROWN & PLATT
1909 K STREET, NW
WASHINGTON DC 20006-1101 US

RICHARD A ALLEN
ZUCKERT SCOUTT & RASENBERGER L L P
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3309 US

JOHN V EDWARDS, ESQ
ZUCKERT SCOUTT ET AL
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

CHARLES A SPITULNIK
HOPKINS & SUTTER
888 SIXTEENTH ST NW
WASH DC 20006-4103 US

SHERRI LEHMAN DIRECTOR OF CONGRESSIONAL AFFAI
CORN REFINERS ASSOC
1701 PA AV NW
WASH DC 20006-5805 US

CHRISTOPHER C O'HARA
BRICKFIELD BURCHETTE & RITTS PC
1025 THOMAS JEFFERSON ST NW EIGHTH FLOOR
WASHINGTON DC 20007 US

DAVID K MONROE
GALLAND KHARASCH GREENBERT FELLMAN & SWIRSKY
1054 THIRTY FIRST STREET NW STE 200
WASHINGTON DC 20007 US

PAUL M DONOVAN
LAROE WINN MOERMAN & DONOVAN
3900 HIGHWOOD COURT NW
WASHINGTON DC 20007 US

ROBERT G SZABO
1050 THOMAS JEFFERSON STREET NW SIXTH FLOOR
WASHINGTON DC 20007 US

JOHN H BROADLEY
JOHN H BROADLEY & ASSOCIATES P C
1054 31ST STREET NW 2ND FLOOR
WASHINGTON DC 20007 US

EDWARD D GREENBERG
GALLAND, KHARASCH, GREENBERG, FELLMAN & SWIRS
1054 THIRTY-FIRST STREET NW, STE 200
WASHINGTON DC 20007-4492 US

MICHAEL F MCBRIDE
LEBOEUF LAMB GREENE & MACRAE
1875 CONNECTICUT AVENUE NW
WASHINGTON DC 20009-5728 US

STEPHEN H BROWN
VORYS SATER SEYMOUR AND PEASE
1828 L STREET N W
WASHINGTON DC 20036 US

HAROLD P QUINN JR
NATIONAL MINING ASSOCIATON
1130 17TH STREET NW
WASHINGTON DC 20036 US

PAUL D COLEMAN
HOPPEL MAYER & COLEMAN
1000 CONNECTICUT AVENUE NW SUITE 400
WASHINGTON DC 20036 US

JOHN D HEFFNER
REA CROSS & AUCHINCLOSS
1707 L STREET, NW, STE 570
WASHINGTON DC 20036 US

PETER A GREENE
THOMPSON HINE FLORY
1920 N STREET N W SUITE 800
WASHINGTON DC 20036 US

KELVIN J DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

EDWARD WYTKIND EXECUTIVE DIRECTOR
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO
1025 CONNECTICUT AVE NW SUITE 1005
WASHINGTON DC 20036 US

ROBERT A WIMBISH ESQ
REA CROSS & AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

KEITH G O'BRIEN
REA CROSS AND AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

FRITZ R KAHN
1920 N STREET NW 8TH FLOOR
WASHINGTON DC 20036-1601 US

ROSE-MICHELE WEINRYB
WEINER BRODSKY SIDMAN & KIDER
1300 - 19TH STREET, NW, 5TH FLOOR
WASHINGTON DC 20036-1609 US

SAMUEL M SIPE JR
STEPTOE & JOHNSON LLP
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

DEBRA L WILLEN
GUERRIERI EDMOND & CLAYMAN PC
1625 MASSACHUSETTS AVENUE, N.W., STE 700
WASHINGTON DC 20036-2243 US

HELEN M. COUSINEAU
CARLOS RODRIGUEZ & ASSOCIATES
1710 RHODE ISLAND AVENUE, NW
WASHINGTON DC 20036 US

GORDON P MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

DAVID H COBURN
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE NW
WASHINGTON DC 20036 US

RICHARD S EDELMAN
O'DONNELL SCHWARTZ & ANDERSON PC
1900 L STREET NW SUITE 707
WASHINGTON DC 20036 US

CHRISTOPHER A MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

KARYN A BOOTH
THOMPHON HINE & FLORY LLP
1920 N STREET, NW & FLORY LLP
WASHINGTON DC 20036 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

FREDERIC L WOOD
THOMPSON HINE & FLORY LLP
1920 N STREET
WASHINGTON DC 20036-1601 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND & CLAYMAN, PC
1625 MASSACHUSETTS AVE., NW. STE 700
WASHINGTON DC 20036-2243 US

DONALD G AVERY
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036-3003 US

L PAT WYNNS
1050 - 17TH STREET N W SUITE 210
WASHINGTON DC 20036-5503 US

ANDREW P GOLDSTEIN
MCCARTHY, SWEENEY & HARKAWAY P.C.
2175 K STREET, NW SUITE 600
WASHINGTON DC 20037 US

JOHN M CUTLER JR
MCCARTHY SWEENEY HARKAWAY PC
2175 K STREET, NW
WASHINGTON DC 20037 US

STEVEN J KALISH
MCCARTHY SWEENEY & HARKAWAY P C
2175 K STREET NW SUITE 600
WASHINGTON DC 20037 US

DANIEL J SWEENEY
MCCARTHY SWEENEY & HARKAWAY P C
2175 K STREET NW SUITE 600
WASHINGTON DC 20037 US

JOHN L OBERDORFER
PATTON BOGGS LLP
2550 M ST NW
WASHINGTON DC 20037-1301 US

SCOTT N STONE
PATTON BOGGS L L P
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

KEITH A KLINDWORTH
U S DEPT OF AGRICULTURE
P O BOX 96456
WASHINGTON DC 20090 US

MICHAEL V DUNN
USDA
PO BOX 96456 RM 4006-SOUTH BLDG
WASH DC 20090-6456 US

EILEEN S STOMMES
U S DEPARTMENT OF AGRICULTURE
P O BOX 96456 ROOM 4006-SOUTH BUILDING
WASHINGTON DC 20090-6456 US

JUDGE JACOB LEVENTHAL, OFFICE OF HEARINGS
FEDERAL ENERGY REGULATORY COMMISSION
888 - 1ST ST, N.E. STE 11F
WASHINGTON DC 20426 US

RICHARD E SANDERSON
OFFICE OF FEDERAL ACTIVITIES
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HON CHARLES SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON DANIEL PATRICK MOYNIHAN
UNITED STATES SENATE
WASINGTON DC 20510 US

HON JOHN BREAUX
UNITED STATER SENATE
WASHINGTON DC 20510 US

HON CHARLES E SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. BARBARA A. MIKULSKI
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE BOB GRAHAM
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHARLES ROBB
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH BIDEN, JR.
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH I LIEBERMAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON WILLIAM V. ROTH JR
U S SENATE
WASHINGTON DC 20510-0001 US

HON. JOHN W. WARNER
US SENATE
WASHINGTON DC 20510-0001 US

HON CHRISTOPHER J DODD
UNITED STATES SENATE
WASH DC 20510-0702 US

HONORABLE DANIEL P. MOYNIHAN
UNITED STATE SENATE
WASHINGTON DC 20510-0903 US

HONORABLE CONNIE MACK
UNITED STATES SENATE
WASHINGTON DC 20510-0904 US

HONORABLE J ROBERT KERREY
UNITED STATES SENATE
WASHIGTON DC 20510-2704 US

HON MIKE DEWINE
UNITED STATES SENATE
WASHINGTON DC 20510-3503 US

HON ARLEN SPECTER
UNITED STATES SENATE
WASHINGTON DC 20510-3802 US

HON RICK SANTORUM
UNITED STATES SENATE
WASHINGTON DC 20510-3804 US

HONORABLE JOHN H. CHAFEE
UNITED STATES SENATE
WASHINGTON DC 20510-3902 US

HON JACK REED
U S SENATE
WASHINGTON DC 20510-3903 US

HONORABLE ROBERT BYRD
UNITED STATES SENATE
WASHINGTON DC 20510-6025 US

HONORABLE JOHN J LAFALCE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. BUD SHUSTER
ATTN: MIKE RICK
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NANCY JOHNSON
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAM GEJDENSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. TOM BLILEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB CLEMENT
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JAMES L. OBERSTAR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JOHN J. DUNCAN
U S HOUSE OF REPRESENTATIVESS
WASHINGTON DC 20515 US

HONORABLE PAUL E. GILLMOR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MIKE DOYLE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN D. DINGELL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BENJAMIN A. GILMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM O. LIPINSKI
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETER J. VISCLOSKY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM J. COYNE
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MAJOR R. OWENS
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JAMES TRAFICANT JR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ROBERT MENENDEZ
U S HOUSE OF REPRESENTATIVES
WASH DC 20515 US

HON MARCY KAPTUR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK MASCARA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL FORBES
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ELIOT L ENGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON GARY ACKERMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JERROLD NADLER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ROBERT W. NEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB WEYGAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TED STRICKLAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON DENNIS J KUCINICH
UNITED STATES HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HON NYDIA M VELAZQUEZ
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ED TOWNS
U. S. HOUSE OR REPRESENTATIVES
WASHINGTON DC 20515 US

HON LOUISE M SLAUGHTER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHRISTOPHER SHAYS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHARLES RANGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL MCNULTY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAMES MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CAROLYN B MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NITA LOWEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MAURICE HINCHEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHIP PICKERING
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JESSE L. JACKSON, JR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LUIS GUTIERREZ
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DANNY K DAVIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON RALPH REGULA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON SHERROD BROWN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ED BRYANT
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. STEVE LATOURETTE
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON BOB WISE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON THOMAS C SAWYER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAXBY CHAMBLISS,
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TILLIE K FOWLER
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ROD R BLAGOJEVICH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTO DC 20515-1305 US

HON JULIA CARSON
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1410 US

HONORABLE JAMES A. BARCIA
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2205 US

HON JACK QUINN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3230 US

HONORABLE RICHARD BURR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3305 US

HONORABLE TOM DAVIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4611 US

HONORABLE BOBBY L. RUSH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-9997 US

MICHAEL P HARMONIS
DEPARTMENT OF JUSTICE
325 SEVENTH STREET, NW
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
US DEPARTMENT OF TRANSPORTATION
400 SEVENTH STREET SW ROOM 4102 C-30
WASHINGTON DC 20590 US

JOSEPH R POMPONIO
FEDERAL RAILROAD ADMIN
1120 VERMONT AVE NW RCC-20
WASHINGTON DC 20590 US

JOLENE MOLITORIS, ADMN.
FEDERAL RAILROAD ADMNS.
400 7TH STREET SW
WASHINGTON DC 20590 US

DAVID G ABRAHAM
SUITE 400W
7315 WISCONSIN AVENUE
BETHESDA MD 20814 US

MITCHELL M KRAUS
TRANSPORTATION COMMUNICATIONS INTERNATIONAL U
3 RESEARCH PLACE
ROCKVILLE MD 20850-3279 US

JOHN M ROBINSON
9616 OLD SPRING ROAD
KENSINGTON MD 20895-3124 US

WILLIAM W WHITEHURST JR
W W WHITEHURST & ASSOCIATES INC
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030-1711 US

JOHN HOY
P O BOX 117
GLEN BURNIE MD 21060 US

ROBERT J WILL
UNITED TRANSPORTATION UNION
4134 GRAVE RUN RD
MANCHESTER MD 21102 US

JOHN F WING CHAIRMAN
CITIZENS ADVISORY COMMITTEE
601 NORTH HOWARD STREET
BALTIMOTE MD 21201 US

LINDA A JANEY J D
MARYLAND OFFICE OF PLANNING
301 WEST PRESTON STREET
BALTIMORE MD 21201-2365 US

DON E SANCHEZ
CHESAPEAKE SPECIALTY PRODUCTS INC
5055 NORTH POINT BOULEVARD
BALTIMORE MD 21219 US

CHARLES M CHADWICK
MARYLAND MIDLAND RAILWAY INC
P O BOX 1000
UNION BRIDGE MD 21791 US

HENRY E. SEATON
7700 LEESBURG PIKE, STE 201
FALLS CHURCH VA 22043 US

PETER Q NYCE JR
U S DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

THOMAS E SCHICK
CHEMICAL MANUF ASSOC
1300 WILSON BOULEVARD
ARLINGTON VA 22209 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

JENNIFER BRAUN
JACKSON & JESSUP
P O BOX 1240
3426 NORTH WASHINGTON BOULEVARD
ARLINGTON VA 22210 US

FRANCIS G MCKENNA
ANDERSON & PENDLETON
206 N WASHINGTON STREET SUITE 330
ALEXANDRIA VA 22314 US

KENNETH E SIEGEL
AMERICAN TRUCKING ASSOC INC
2200 MILL ROAD
ALEXANDRIA VA 22314-4677 US

ROBERT E MARTINEZ
VA SECRETARY OF TRANSPORTAITON
P. O. BOX 1475
RICHMOND VA 23218 US

HONORABLE GEORGE ALLEN
GOVERNOR, COMMONWEALTH OF VIRGINIA
STATE CAPITOL
RICHMOND VA 23219 US

JOHN W SNOW
CHAIRMAN PRESIDENT AND CHIEF EXECTIVE OFFICER
P O BOX 85629
RICHMOND VA 23285-5629 US

DAVID A SHELTON
NORFOLK SOUTHERN
THREE COMMERCIAL PLACE
NORFOLK VA 23510 US

GEORGE A ASPATORE
NORFOLK SOUTHERN CORP
THREE COMMEMERCIAL PLACE
NORFOLK VA 23510 US

JAMES A HIXON
SENIOR VICE PRESIDDENT EMPLOYEE RELATIONS NOR
THREE COMMERCIAL PLACE
NORFFFOLK VA 23510-2191 US

L P KING JR
GENERAL CHAIRPERSON UTU
145 CAMPBELL AVE SW STE 207
ROANOKE VA 24011 US

HONORABLE JOHN WARNER
UNITED STATES SENATE
235 FEDERAL BUILDING
ABINGDON VA 24210-0887 US

VAUGHN R GROVES
PITTSTON COAL COMPANY
PO BOX 5100
LEBANON VA 24266 US

TERRELL ELLIS
CAEZWV
P O BOX 176
CLAY WV 25043 US

R K SARGENT
GENERAL CHAIRPERSON UTU
1319 CHESTNUT STREET
KENOVA WV 25530 US

WILLIAM T BRIGHT
P O BOX 149
200 GREENBRIER ROAD
SUMMERSVILLE WV 26651 US

FRANK N JORGENSEN
THE ELK RIVER RAILROAD INC
P O BOX 460
SUMMERSVILLE WV 26651 US

SCOTT M SAYLOR
NORTH CAROLINA RAILROAD COMPANY
3200 ATLANTIC AV STE 110
RALIEGH NC 27604-1640 US

E NORRIS TOLSON
NC DEPT OF TRANSPORTATION
P O BOX 25201
1 S. WILINGTON STREET
RALEIGH NC 27611 US

J R BARBEE
GENERAL CHAIRPERSON UTU
441 N LOUISIANA AVE STE Q
ASHEVILLE NC 28806-3791 US

HONORABLE DAVID M BEASLEY
GOVERNOR
P. O. BOX 11369
COLUMBIA SC 29211 US

J RANDALL EVANS
500 WATER STREET (J150)
JACKSONVILLE FL 32202 US

FRED R BIRKHOLZ
CSX TRANSPORTATION LAW DEPT - J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

ROBERT V ALLEN
CSX TRANSPORTATION
500 WATER STREET J305
JACKSONVILLE FL 32202 US

T J STEPHENSON
CSX TRANSPORTATION INC
500 WATER STREET (J407)
JACKSONVILLE FL 32202 US

CARL A GERHARDSTEIN
CSX TRANSPORTATION RISK MGMT
500 WATER STREET-J275
JACKSONVILLE FL 32202 US

DANFORD L PRICE
500 WATER STREET
JACKSONVILLE FL 32202 US

BOB HAULTER
CSX TRANSPORTATION INC
500 WATER STREET (J120)
JACKSONVILLE FL 32202 US

PAUL R. HITCHCOCK
CSX TRANSPORTATION LAW DEPARTMENT
500 WATER STREET SC J-150
JACKSONVILLE FL 32202 US

JOHN W. HUMES, JR.
CSX TRANSPORTATION
SPEED CODE J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

CHARLES M ROSENBERGER
CSX TRANSPORTATION
500 WATER STREET - J150
JACKSONVILLE FL 32202 US

J L RODGERS
GENERAL CHAIRMAN UTU
480 OSCEOLA AVENUE
JACKSONVILLE FL 32250 US

J T REED
GENERAL CHAIRPERSON UTU
7785 BAYMEADOWS WAY STE 109
JACKSONVILLE FL 32256 US

PHILLIP L BELL
ERIE LACKAWANNA RAILROAD CO
PO BOX 1482
TALLAHASSEE FL 32302 US

JAMES L BELCHER
EASTMAN CHEMICAL COMPANY
PO BOX 431
KINGSPORT TN 37662 US

WILLIAM L OSTEEN
ASSOCIATE GENERAL COUNSEL TVA
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE KIRK FORDICE, GOVERNOR
STATE OF MISSISSIPPI
P O BOX 139
JACKSON MS 39205 US

HONORABLE PAUL E. PATTON
GOVERNOR
700 CAPITOL AVENUE, STE. 100
FRANKFORT KY 40601 US

F R PICKELL
GENERAL CHAIRPERSON UTU
6797 NORTH HIGH ST STE 108
WORTHINGTON OH 43085 US

THOMAS M O'LEARY
OHIO RAIL DEVELOPMENT COMMISSION
50 W BROAD STREET 15TH FLOOR
COLUMBUS OH 43215 US

HONORABLE DEBORAH PRYCE
U. S. HOUSE OF REPRESENTATIVES
500 SOUTH FRONT STREET, ROOM 1130
COLUMBUS OH 43215 US

DOREEN C JOHNSON, CHIEF ANTITRUST SECTION
OHIO ATTY GENERAL OFFICE
140 EAST TOWN STREET, FIRST FLOOR
COLUMBUS OH 43215-6001 US

JAMES R JACOBS
JACOBS INDUSTRIES
2 QUARRY LANE
STONY RIDGE OH 43463 US

DAVID CHAPMAN
LAFARGE LIME OHIO INC
P O BOX 128
659 ANDERSON ROAD
WOODVILLE OH 43469-0128 US

ROBERT J COOPER
GENERAL CHAIRPERSON UTU
1238 CASS ROAD
MAUMEE OH 43537 US

ROBERT E GREENLESE
TOLEDO-LUCAS COUNTY PORT AUTHORITY
1 MARITIME PLAZA SUITE 700
TOLEDO OH 43604 US

RON MARQUARDT
LOCAL UNION 1810 UMWA
R D #2
RAYLAND OH 43943 US

MAYOR VINCENT M URBIN
150 AVON BELDEN RD
AVON LAKE OH 44012 US

BARBARA O'KEEFE
VILLAGE OF WELLINGTON
115 WILLARD MEMORIAL SQ
WELLINGTON OH 44090 US

ANITA R BRINDZA
THE ONE FIFTEEN HUNDRED BUILDING
11500 FRANKLIN BLVD SUITE 104
CLEVELAND OH 44102 US

C L LITTLE
INTERNATIONAL PRESIDENT UTU
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CLARENCE MONIN INTERNATIONAL PRES
BROTHERHOOD OF LOCOMTIVE ENGINEERS MEZZANINE
1370 ONTARIO STREET
CLEVELAND OH 44113 US

DAVID ROLOFF
GOLDSTEIN & ROLOFF
526 SUPERIOR AVENUE EAST SUITE 1440
CLEVELAND OH 44114 US

C D WINEBRENNER
GENERAL CHAIRPERSON UTU
27801 EUCLID AVENUE RM 200
EUCLID OH 44132 US

SYLVIA R. CHINN-LEVY
NEFCO
969 COPLEY ROAD
AKRON OH 44320 US

RANDALL C. HUNT
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO.
P O BOX 36963
4775 MUNSON ST NW
CANTON OH 44735-6963 US

ROBERT E MURRAY
OHIO VALLEY COAL CO
56854 PLEASANT RIDGE ROAD
ALLEDONIA OH 43902 US

CLARENCE TURNQUIST
INTERNATIONAL LONGSHOREMEN S ASSOCIATION
C/O 2125 TRYON ROAD
ASHTABULA OH 44004 US

CHARLES S HESSE
CHARLES HESSE ASSOCIATES
7777 BAINBRIDGE ROAD
CHAGRIN FALLS OH 44023-2124 US

COLETTA MCNAMEE SR
CUDELL IMPROVEMENT INC
11500 FRANKLIN BLVD STE 104
CLEVELAND OH 44102 US

DANIEL R ELLIOTT III
ASST GENERAL COUNSEL UNITED TRANSPORTATION UN
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CLINTON J MILLER III
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CHRISTOPHER C MCCRACKEN
ULMER & BERNE LLP
1300 EAST NINTH STREET SUITE 900
CLEVELAND OH 44114 US

INAJO DAVIS CHAPPELL
ASHTA CHEMICALS INC
1300 EAST NINETH STREET SUITE 900
CLEVELAND OH 44114-1538 US

CHARLES ZUMKEHR
ROETZEL & ANDRESS CO LPA
75 EAST MARKET STREET
AKRON OH 44308 US

CHARLES E ALLENBAUGH JR
EAST OHIO STONE COMPANY
2000 W BESSON ST
ALLIANCE OH 44601 US

D G STRUNK JR
GENERAL CHAIRPERSON UTU
817 KILBOURNE STREET
BELLEVUE OH 44811 US

R A GRICE
GENERAL CHAIRPERSON UTU
817 KILBOURNE ST
BELLEVUE OH 44811-9431 US

RICHARD E KERTH
CHAMPION INTERNATIONAL CORPORATION
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

FAY D DUPUIS
CITY OF CINCINNATI
801 PLUM STREET
CINCINNATI OH 45202 US

ROBERT EDWARDS
EASTERN TRANSPORT AND LOGISTICS
1109 LANETTE DRIVE
CINCINNATI OH 45230 US

THOMAS R LYDMAN PRESIDENT
INDIAN CREEK RAILROAD COMPANY
3905 W 600 NORTH
ANDERSON IN 46011 US

F RONALDS WALKER
CITIZENS GAS & COKE UTILITY
2020 N MERIDIAN STREET
INDIANAPOLIS IN 46202-1393 US

MICHAEL P MAXWELL JR
MCHALE, COOK & WELCH
320 N MERIDIAN ST 1100 CHAMBER OF COMMERCE BL
INDIANAPOLIS IN 46204 US

J PATRICK LATZ
HEAVY LIFT CARGO SYSTEM
PO BOX 51451
INDIANAPOLIS IN 46251-0451 US

MICHAEL CONNELLY
CITY OF EAST CHICAGO
4525 INDIANAPOLIS BLVD
EAST CHICAGO IN 46312 US

HAMILTON L CARMOUCHE, CORPORATION COUNSEL
CITY OF GARY
401 BROADWAY 4TH FLOOR
GARY IN 46402 US

HONORABLE PETER J. VISCLOSKY
U. S. HOUSE OF REPRESENTATIVES
215 WEST 35TH AVENUE
GARY IN 46408 US

CARL FELLER
DEKALB AGRA INC
P. O. BOX 127
4743 COUNTY ROAD 28
WATERLOO IN 46793-0127 US

CHRISTOPHER J BURGER, PRESIDENT
CENTRAL RAILROAD COMPANY OF INDIANAPOLIS
PO BOX 554
KOKOMO IN 46903-0554 US

WILLIAM A BON, GENERAL COUNSEL
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
26555 EVERGREEN ROAD SUITE 200
SOUTHFIELD MI 48076 US

NICOLE HARVEY
THE DOW CHEMICAL COMPANY
2020 DOW CENTER
MIDLAND MI 48674 US

JAMES E SHEPHERD
TUSCOLA & SAGINAW BAY
PO BOX 550
OWOSSO MI 48867-0550 US

LARRY B KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

HON JOHN ENGLER
OFFICE OF THE GOVERNOR
P O BOX 30013
LANSING MI 48933 US

T SCOTT BANNISTER
T SCOTT BANNISTER AND ASSOCIATES
1300 DES MOINES BLDG 405 SIXTH AVENUE
DES MOINES IA 50309 US

BYRON D OLSEN
FELHABER LARSON FENLON & VOGT PA
601 SECOND AVENUE SOUTH SUITE 4200
MINNEAPOLIS MN 55401-4302 US

LEO J WASESCHA
GOLD MEDAL DIVISON - GENERAL MILLS OPERATION
P O BOX 1113
NUMBER ONE GENERAL MILLS BULEVARD
MINNEAPOLIS MN 55440 US

GERALD J. VINCI
PRAIRIE GROUP
P. O.BOX 1123
7601 WEST 79TH STREET
BRIDGEVIEW IL 60455 US

RICHARD A GAVRIL
16700 GENTRY LANE NO 104
TINLEY PARK IL 60477 US

CHRISTINE H. ROSSO
IL ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FLOOR
CHICAGO IL 60601 US

WILLIAM C SIPPEL
FLETCHER & SIPPEL LLC
180 N STETSON AVE SUITE 3125
CHICAGO IL 60601-6721 US

RICHARD F. FRIEDMAN, ESQ
EARL L NEAL & ASSOCIATES
111 WEST WASHINGTON STREET, STE 1700
CHICAGO IL 60602-2766 US

ROGER A SERPE
175 WEST JACKSON BOULEVARD SUITE 1460
CHICAGO IL 60604 US

THOMAS F MCFARLAND JR
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE SUITE 1330
CHICAGO IL 60606-2902 US

CHARLES D BOLAM
UNITED TRANSPORTATION UNION
1400-20TH STREET
GRANITE CITY IL 62040 US

MERRILL L TRAVIS
ILLINOIS DEPT OF TRANSPORTATION
2300 S DIRKSEN PARKWAY RM 302
SPRINGFIELD IL 62764 US

JOHN JAY ROSACKER
KS DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

HENRY T DART
PLAINTIFF MANGEMENT COMMITTEE
609 EAST GIBSON STREET
COVINGTON LA 70433 US

DENNIS A. GUTH
WEST LAKE GROUP
2801 POST OAK BLVD
HOUSTON TX 77056 US

EDWARD WASHINGTON, II
CHIEF, PUBLIC UTILITIES BUREAU, ILL ATTORNEY
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

THOMAS J LITWILER
FLETCHER & SIPPEL LLC
180 NORTH STETSON AVENUE SUITE 3125 TWO PRUDE
CHICAGO IL 60601-6721 US

SANDRA J DEARDEN
MDCO TRANSPORTATION MANAGEMENT LTD
166 WEST WASHINGTON SUITE 700
CHICAGO IL 60602 US

EDWARD C MCCARTHY
INLAND STEEL INDUSTRIES INC
30 WEST MONROE STREET
CHICAGO IL 60603 US

SHELDON A ZABEL
SCHIFF HARDIN & WAITE
7200 SEARS TOWER
CHICAGO IL 60606 US

MYLES L TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

SCOTT A RONEY
ARCHER DANIELS MIDLAND COMPANY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

IAN MUIR
BUNGE CORPORATION
P O BOX 28500
ST LOUIS MO 63146 US

MR GEORGE VAN HAVER
2340 SOUTH 35TH STREET
OMAHA NE 68105 US

MIKE SPAHIS
FINA OIL & CHEMICAL CO
6000 LEGACY DRIVE
PLANO TX 75024-3601 US

DAVID L HALL
COMMONWEALTH CONSULTING ASSOCIATES
13103 FM 1960 WEST SUITE 204
HOUSTON TX 77065-4069 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
P O BOX 2583
1221 MCKINNEY STREET SUITE 1600
HOUSTON TX 77252-2583 US

STEVE M COULTER
EXXON COMPANY USA
PO BOX 3272
HOUSTON TX 77253-3272 US

MONTY L PARKER SR
CMC STEEL GROUP
P O BOX 911
SEGUIN TX 78156-0911 US

BRAD F HUSTON
CYPRUS AMAX COAL SALES CORP
9100 E MINERAL CIR
MILFORD CO 80112 3401 US

STEPHEN M UTHOFF
CONIGLIO & UTHOFF
60 ELM AVENUE, CONIGLIO PROFESSIONAL BLDG
LONG BEACH CA 90802-4910 US

RICHARD WELSH
NARPO
50-505 GRAND TRAVERSE
LA QUINTA CA 92253 US

JOHN D FITZGERALD
UTU, GENERAL CHAIRPERSON
400 E EVERGREEN BLVD STE 217
VANCOUVER WA 98660-3264 US

Records: 359

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SERVICE DATE - MAY 31, 2000

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

Decision No. 154

Decided: May 24, 2000

Environmental Condition No. 8(A) of Appendix Q of Decision No. 89[1] (Decision No. 89, slip op. at 393-94), requires Applicants, in order to address potential safety impacts at highway/rail at-grade crossings, to upgrade existing warning devices at 86 public highway/rail at-grade crossings as listed in the decision. As pertinent here, NS is required to install "4-Quadrant Gates Quadrant Gates, or Alternative Mitigation such as Median Barriers" at the at-grade crossing located at SR 7, FRA ID 468599F, in Clarke County, Berryville, VA. See Decision No. 89, slip op. at 399. Alternatively, as provided in Environmental Condition No. 8(A), NS may satisfy this requirement by entering into a negotiated agreement with the affected local jurisdiction and the state department of transportation to provide for alternative safety improvements in the vicinity of the identified highway/rail at-grade crossing that achieve at least an equivalent level of safety enhancement. Environmental Condition No. 8(A) requires compliance with this provision within 2 years of the effective date of Decision No. 89, or by August 22, 2000.

By letter received April 20, 2000, NS has requested a 1-year extension of the deadline provided for in Environmental Condition No. 8(A), until August 22, 2001. NS states that it has been engaged in discussions with the Virginia Department of Rail and Public Transportation (VADRPT), concerning the Commonwealth's preferences with respect to the safety enhancement

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[1] In Decision No. 89, served July 23, 1998, we approved, subject to certain conditions, including environmental mitigation conditions, the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (collectively, Conrail) and the division of Conrail's assets by CSX Corporation and CSX Transportation, Inc. (collectively, CSX), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, NS). CSX and NS are referred to as Applicants.

for this grade crossing.[2] According to NS, it has been informed by the VADRPT that the SR 7 grade crossing in Berryville is not conducive to the installation and operation of either 4-quadrant gates or median barriers, due to the physical layout of the grade crossing, and that an alternative package of grade crossing safety enhancements is presently under consideration by the VADRPT.

NS states that it is seeking an extension of the August 22, 2000 deadline so that the Commonwealth and NS can continue their consideration of the preferred alternative safety enhancements for the SR 7 grade crossing.

The request for a 1-year extension to August 22, 2001, is reasonable. The revised deadline will therefore be adopted.

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

It is ordered:

1. The compliance deadline for NS in Environmental Condition No. 8(A) of Appendix Q of Decision No. 89 with respect to the SR 7 grade crossing in Clarke County, Berryville, VA, is extended 1 year until August 22, 2001.

2. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams

Vernon A. Williams
Secretary

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[2] NS enclosed a copy of a letter dated April 19, 2000, from Joseph E. Ketron, Transportation Engineer Senior, VADRPT, requesting NS to seek an extension of time of the compliance deadline for the SR 7 grade crossing.

PAUL E CRAWFORD
MASSACHUSETTS CENTRAL RAILROAD CORPORATION
TWO WILBRAHAM STREET
PALMER MA 01069 US

JAMES E HOWARD
90 CANAL STREET
BOSTON MA 02114 US

JOHN D CIRAME, ASSISTANT SECRETARY
COMMONWEALTH OF MASS. EXEC. OFFICE OF TRANSPT
10 PARK PLAZA ROOM 3170
BOSTON MA 02116-3969 US

HON. EDWARD M KENNEDY
UNITES STATES SENATE
2400 JOHN F KENNEDY FEDERAL BLDG
BOSTON MA 02203 US

WILLIAM D ANKNER PHD
R I DEPT OF TRANSPORTATION
TWO CAPITOL HILL
PROVIDENCE RI 02903 US

JOHN R NADOLNY
14 AVIATION AVENUE
PORTSMOUTH NH 03801 US

ROBERT D ELDER
MAINE DEPARTMENT OF TRANSPORTATION
16 STATE HOUSE STATION
AUGUSTA ME 04333-0016 US

KAREN E SONGHURST
STATE OF VERMONT
133 STATE STREET
MONTPELLIER VT 05633-5001 US

JAMES F SULLIVAN
CT DEPT OF TRANSPORTATION
P O BOX 317546
2800 BERLIN TURNPIKE
NEWINGTON CT 06131 US

EDWARD J RODRIGUEZ
HOUSATONIC RAILROAD
P O BOX 687
8 DAVIS ROAD WEST
OLD LYME CT 06371 US

RICHARD C CARPENTER
SOUTHWESTERN REGIONAL PLANNING AGENCY
1 SELLECK STREET SUITE 210
EAST NORWALK CT 06855 US

MICHAEL E STRICKLAND
NYK LINE (NORTH AMERICA) INC, SENIOR VICE PRE
300 LIGHTING WAY
SECAUCUS NJ 07094-1588 US

J WILLIAM VAN DYKE
NJ TRANSPORTATION PLANNING AUTHORITY
ONE NEWARK CENTER 17TH FLOOR
NEWARK NJ 07102 US

EDWARD LLOYD
RUTGERS ENVIRONMENTAL LAW CLINIC
15 WASHINGTON STREET
NEWARK NJ 07102 US

HONORABLE ROBERT G. TORRICELLI
UNITED STATES SENATE
1 RIVER FRONT PLAZA, 3RD FLOOR
NEWARK NJ 07102 US

PHILIP SIDO
UNION CAMP CORPORATION
1600 VALLEY ROAD
WAYNE NJ 07470 US

MARTIN T DURKIN ESQ
DURKIN & BOGGIA ESQS
PO BOX 378
71 MT VERNON STREET
RIDGEFIELD PARK NJ 07660 US

CRAIG CURRY
CONSOLIDATED RAIL CORPORATION
1000 HOWARD BOULEVARD
MOUNT LAUREL NJ 08054 US

TIMOTHY G CHELIUS
18 N EAST AVENUE
VINELAND NJ 08360 US

LAWRENCE PEPPER, JR
GRUCCIO PEPPER
817 EAST LANDS AVE
VINELAND NJ 08360 US

JOHN F. MCHUGH
MCHUGH & SHERMAN
20 EXCHANGE PLACE 51ST FLOOR
NEW YORK NY 10005 US

ANTHONY BOTTALICO
UTU
420 LEXINGTON AVENUE ROOM 458-460
NEW YORK NY 10017 US

WALTER E ZULLIG JR
METRO-NORTH COMMUTER RAILROAD COMPANY
347 MADISON AVE
NEW YORK NY 10017-3706 US

ANTHONY P. SEMANCIK
347 MADISON AVENUE
NEW YORK NY 10017-3706 US

JAMES W HARRIS
THE METROPOLITIAN PLANNING ORGANIZATION
1 WORLD TRADE CENTER STE 82 EAST
NEW YORK NY 10048-0043 US

HUGH H. WELSH
LAW DEPT., SUITE 67E
ONE WORLD TRADE CENTER
NEW YORK NY 10048-0202 US

R. LAWRENCE MCCAFFREY, JR.
NEW YORK & ATLANTIC RAILWAY
405 LEXINGTON AVENUE 50TH FLOOR
NEW YORK NY 10174 US

SAMUEL J NASCA
UTU STATE LEGISLATIVE DIRECTOR
35 FULLER ROAD SUITE 205
ALBANY NY 12205 US

DANIEL B. WALSH
BUSINESS COUNCIL OF NEW YORK STATE,INC.
152 WASHINGTON AVENUE
ALBANY NY 12210 US

DIANE SEITZ
CENTRAL HUDSON GAS & ELECTRIC CORP
284 SOUTH AVENUE
POUGHKEEPSIE NY 12601 US

IRWIN L. DAVIS
1900 STATE TOWER BLDG.
SYRACUSE NY 13202 US

ANGELO J CHICK JR, LOCAL CHAIRMAN
P O BOX 908
48398 OLD GOOSE BAY ROAD
REDWOOD NY 13679 US

GARY EDWARDS
SOMERSET RAILROAD
7725 LAKE ROAD
BARKER NY 14012 US

SHEILA MECK HYDE
CITY HALL
342 CENTRAL AVENUE
DUNKIRK NY 14048 US

IRVING J RUBIN
P O BOX 243
YOUNGSTOWN NY 14174 US

JOHN F COLLINS
COLLINS ,COLLINS, & KANTOR PC
267 NORTH STREET
BUFFALO NY 14201 US

R W GODWIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
810 ABBOTT ROAD SUITE 200
BUFFALO NY 14220 US

ERNEST J IERARDI
NIXON HARGRAVE DEVANS DOYLE LLP
PO BOX 1051
CLINTON SQUARE
ROCHESTER NY 14603-1051 US

H DOUGLAS MIDKIFF
GENESEE TRANSPORTATION COUNCIL
65 WEST BROAD ST STE 101
ROCHESTER NY 14614-2210 US

JEANNE WALDOCK
107 GRANT COURT
ORLEAN NY 14760 US

DAVID W. DONLEY
3361 STAFFORD ST
PITTSBURGH PA 15204-1441 US

JOHN A VUONO
VUONO & GRAY
2310 GRANT BUILDING
PITTSBURGH PA 15219 US

HENRY M. WICK, JR.
WICK STREIFF ET AL
1450 TWO CHATHAM CENTER
PITTSBURGH PA 15219-3427 US

R J HENEFELD
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

M E PETRUCCELLI
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

RICHARD R WILSON
1126 EIGHT AV STE 403
ALTOONA PA 16602 US

D W DUNLEVY
STATE LEGISLATIVE DIRECTOR UTU
230 STATE STREET PA AFL-CIO BLDG 2ND FLOOR
HARRISBURG PA 17101 US

KURT W CARR
BUREAU FOR HISTORIC PRESERVATION
P O BOX 1026
HARRISBURG PA 17108-1026 US

HONORABLE THOMAS J RIDGE
GOVERNOR, COMMONWEALTH OF PENNSYLVANIA
225 MAIN CAPITOL BUILDING
HARRISBURG PA 17120 US

KRISTOPHER MICHAEL KLEMICK
RR#3 BOX 101-15
JERSEY SHORE PA 17740-9309 US

BELNAP FREEMAN
BELKNAP FREEMAN
119 HICKORY LANE
ROSEMONT PA 19010 US

JOHN J GROCKI
GRA INC
115 WEST AV ONE JENKINTOWN STA
JENKINTOWN PA 19046 US

HARRY C BARBIN
BARBIN LAUFFER & O'CONNELL
608 HUNTINGDON PIKE
ROCKLEDGE PA 19046 US

JONATHAN M BRODER
CONSOLIDATED RAIL CORP
PO BOX 41416
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

G CRAIG SCHELTER
PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATI
2600 CENTRE SQUARE WEST 500 MARKET ST
PHILADELPHIA PA 19102 US

JOHN J EHLINGER JR
OBERMAYER REBMANN MAXWELL & HIPPEL
1617 JOHN F. KENNEDY BLVD ONE PENN CENTER-19T
PHILADELPHIA PA 19103-1895 US

DAVID BERGER
BERGER AND MONTAGUE, P. C.
1622 LOCUST ST
PHILADELPHIA PA 19103-6305 US

JOHN J COSCIA, EXECUTIVE DIRECTOR
DELAWARE VALLEY REGIONAL PLANNING COMMISSION
111 SOUTH INDEPENDENCE MALL EAST
PHILADELPHIA PA 19106 US

JOHN K. LEARY, GENERAL MANAGER
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTH
1234 MARKET STREET 5TH FLOOR
PHILADELPHIA PA 19107-3780 US

ERIC M HOCKY
GOLLATZ GRIFFIN & EWING
P O BOX 796
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

HON JOSEPH R BIDEN, JR.
UNITED STATES SENATE
844 KING STREET
WILMINGTON DE 19801 US

J E THOMAS
HERCULES INCORPORATED
1313 NORTH MARKET STREET
WILMINGTON DE 19894 US

E C WRIGHT
DUPONT LOGISTICS - GLOBAL SERVICES BUSINESS
1007 MARKET, DUPONT BLDG 3100
WILMINGTON DE 19898 US

FREDERICK H SCHRANCK
PO BOX 778
DOVER DE 19903 US

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

MARTIN W BERCOVICI
KELLER & HECKMAN, LLP
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

PETER A GILBERTSON
REGIONAL RRS OF AMERICA
122 C ST NW STE 850
WASHINGTON DC 20001 US

JAMES HOWARD
COALITION OF NORTHEASTERN GOVERNORS
400 NORTH CAPITOL STREET, SUITE 382
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

DONALD F GRIFFIN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G STREET NE STE 460
WASHINGTON DC 20002 US

DREW A HARKER
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

J MICHAEL HEMMER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20004 US

PAUL REISTRUP
CSX TRANSPORTATION INC
1331 PENNSYLVANIA NW STE 500
WASH DC 20004 US

ERIC VON SALZEN
HOGAN & HARTSON
555 THIRTEENTH STREET N W
WASHINGTON DC 20004-1109 US

GEORGE W MAYO JR
HOGAN & HARTSON L L P
555 THIRTEENTH STREET NW COLUMBIA SQUARE
WASHINGTON DC 20004-1109 US

MARY GABRIELLE SPRAGUE
ARNOLD & PORTER
555 TWELTH STREET NW
WASHINGTON DC 20004-1202 US

DENNIS G LYONS
ARNOLD & PORTER
555 TWELFTH STREET NW, STE 940
WASHINGTON DC 20004-1206 US

LOUIS E GITOMER
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

DANIEL DUFF
AMERICAN PUBLIC TRANSPORTATION ASSOCIATION
1201 NEW YORK AV NW, STE 400
WASHINGTON DC 20005 US

PAUL M LAURENZA
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

KEVIN M SHEYS
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET NW SUITE 200
WASHINGTON DC 20005 US

L JOHN OSBORN
SONNENSCHEIN NATH & ROSENTHAL
1301 K STREET NW STE 600 EAST
WASH DC 20005 US

KARL MORELL
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

ALICE C SAYLOR
AMERICAN SHORT LINE & REGIONAL RAILROAD ASSO
1120 G STREET NW SUITE 520
WASHINGTON DC 20005 US

BRUNO MAESTRI
NORFOLK SOUTHERN CORPORATION
1500 K STREET SUITE 375
WASHINGTON DC 20005 US

CLARK EVANS DOWNS
JONES DAY REAVIS & POGUE
1450 G STREET NW
WASHINGTON DC 20005-2088 US

WILLIAM A MULLINS
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005-3314 US

PAUL H LAMBOLEY
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005-3324 US

NEAL R GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AV NW
WASHINGTON DC 20005-3701 US

MARK H SIDMAN
WEINER BRODSKY,SIDMAN & KIDER
1350 NEW YORK AVE., NW., STE. 800
WASHINGTON DC 20005-4797 US

WILLIAM W MILLAR
AMERICAN PUBLIC TRANSIT ASSOCIATION
1201 NEW YORK AVE., NW
WASHINGTON DC 20005-6141 US

JAMES R WEISS
PRESTON GATES ELLIS ET AL
1735 NEW YORK AVENUE NW SUITE 500
WASHINGTON DC 20006 US

SCOTT M ZIMMERMAN
ZUCKERT SCOUTT & RASENBERGER L L P
888 SEVENTEENTH STREET NW
WASHINGTON DC 20006 US

CONSTANCE A SADLER
SIDLEY & AUSTIN
1722 EYE STREET NW
WASHINGTON DC 20006 US

ROBERT P VOM EIGEN
HOPKINS & SUTTER
888 16TH STREET N W STE 700
WASHINGTON DC 20006 US

ANDREW R. PLUMP
ZUCKERT, SCOUTT & RASENBERGER. LLP
888 17TH ST., NW, STE. 600
WASHINGTON DC 20006 US

ERIKA Z JONES
MAYER BROWN & PLATT
1909 K STREET, NW
WASHINGTON DC 20006-1101 US

RICHARD A ALLEN
ZUCKERT SCOUTT & RASENBERGER L L P
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3309 US

JOHN V EDWARDS, ESQ
ZUCKERT SCOUTT ET AL
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

CHARLES A SPITULNIK
HOPKINS & SUTTER
888 SIXTEENTH ST NW
WASH DC 20006-4103 US

SHERRI LEHMAN DIRECTOR OF CONGRESSIONAL AFFAI
CORN REFINERS ASSOC
1701 PA AV NW
WASH DC 20006-5805 US

CHRISTOPHER C O'HARA
BRICKFIELD BURCHETTE & RITTS PC
1025 THOMAS JEFFERSON ST NW EIGHTH FLOOR
WASHINGTON DC 20007 US

DAVID K MONROE
GALLAND KHARASCH GREENBERT FELLMAN & SWIRSKY
1054 THIRTY FIRST STREET NW STE 200
WASHINGTON DC 20007 US

PAUL M DONOVAN
LAROE WINN MOERMAN & DONOVAN
3900 HIGHWOOD COURT NW
WASHINGTON DC 20007 US

ROBERT G SZABO
1050 THOMAS JEFFERSON STREET NW SIXTH FLOOR
WASHINGTON DC 20007 US

JOHN H BROADLEY
JOHN H BROADLEY & ASSOCIATES P C
1054 31ST STREET NW 2ND FLOOR
WASHINGTON DC 20007 US

EDWARD D GREENBERG
GALLAND, KHARASCH, GREENBERG, FELLMAN & SWIRS
1054 THIRTY-FIRST STREET NW, STE 200
WASHINGTON DC 20007-4492 US

MICHAEL F MCBRIDE
LEBOEUF LAMB GREENE & MACRAE
1875 CONNECTICUT AVENUE NW
WASHINGTON DC 20009-5728 US

STEPHEN H BROWN
VORYS SATER SEYMOUR AND PEASE
1828 L STREET N W
WASHINGTON DC 20036 US

HAROLD P QUINN JR
NATIONAL MINING ASSOCIATON
1130 17TH STREET NW
WASHINGTON DC 20036 US

PAUL D COLEMAN
HOPPEL MAYER & COLEMAN
1000 CONNECTICUT AVENUE NW SUITE 400
WASHINGTON DC 20036 US

HELEN M. COUSINEAU
CARLOS RODRIGUEZ & ASSOCIATES
1710 RHODE ISLAND AVENUE, NW
WASHINGTON DC 20036 US

JOHN D HEFFNER
REA CROSS & AUCHINCLOSS
1707 L STREET, NW, STE 570
WASHINGTON DC 20036 US

GORDON P MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

PETER A GREENE
THOMPSON HINE FLORY
1920 N STREET N W SUITE 800
WASHINGTON DC 20036 US

DAVID H COBURN
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE NW
WASHINGTON DC 20036 US

KELVIN J DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

RICHARD S EDELMAN
O'DONNELL SCHWARTZ & ANDERSON PC
1900 L STREET NW SUITE 707
WASHINGTON DC 20036 US

EDWARD WYTKIND EXECUTIVE DIRECTOR
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO
1025 CONNECTICUT AVE NW SUITE 1005
WASHINGTON DC 20036 US

CHRISTOPHER A MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

ROBERT A WIMBISH ESQ
REA CROSS & AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

KARYN A BOOTH
THOMPHON HINE & FLORY LLP
1920 N STREET, NW & FLORY LLP
WASHINGTON DC 20036 US

KEITH G O'BRIEN
REA CROSS AND AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

FRITZ R KAHN
1920 N STREET NW 8TH FLOOR
WASHINGTON DC 20036-1601 US

FREDERIC L WOOD
THOMPSON HINE & FLORY LLP
1920 N STREET
WASHINGTON DC 20036-1601 US

ROSE-MICHELE WEINRYB
WEINER BRODSKY SIDMAN & KIDER
1300 - 19TH STREET, NW, 5TH FLOOR
WASHINGTON DC 20036-1609 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

SAMUEL M SIPE JR
STEPTOE & JOHNSON LLP
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND & CLAYMAN, PC
1625 MASSACHUSETTS AVE., NW. STE 700
WASHINGTON DC 20036-2243 US

DEBRA L WILLEN
GUERRIERI EDMOND & CLAYMAN PC
1625 MASSACHUSETTS AVENUE, N.W., STE 700
WASHINGTON DC 20036-2243 US

DONALD G AVERY
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036-3003 US

L PAT WYNNS
1050 - 17TH STREET N W SUITE 210
WASHINGTON DC 20036-5503 US

ANDREW P GOLDSTEIN
MCCARTHY, SWEENEY & HARKAWAY P.C.
2175 K STREET, NW SUITE 600
WASHINGTON DC 20037 US

JOHN M CUTLER JR
MCCARTHY SWEENEY HARKAWAY PC
2175 K STREET, NW
WASHINGTON DC 20037 US

STEVEN J KALISH
MCCARTHY SWEENEY & HARKAWAY P C
2175 K STREET NW SUITE 600
WASHINGTON DC 20037 US

DANIEL J SWEENEY
MCCARTHY SWEENEY & HARKAWAY P C
2175 K STREET NW SUITE 600
WASHINGTON DC 20037 US

JOHN L OBERDORFER
PATTON BOGGS LLP
2550 M ST NW
WASHINGTON DC 20037-1301 US

SCOTT N STONE
PATTON BOGGS L L P
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

KEITH A KLINDWORTH
U S DEPT OF AGRICULTURE
P O BOX 96456
WASHINGTON DC 20090 US

MICHAEL V DUNN
USDA
PO BOX 96456 RM 4006-SOUTH BLDG
WASH DC 20090-6456 US

EILEEN S STOMMES
U S DEPARTMENT OF AGRICULTURE
P O BOX 96456 ROOM 4006-SOUTH BUILDING
WASHINGTON DC 20090-6456 US

JUDGE JACOB LEVENTHAL, OFFICE OF HEARINGS
FEDERAL ENERGY REGULATORY COMMISSION
888 - 1ST ST, N.E. STE 11F
WASHINGTON DC 20426 US

RICHARD E SANDERSON
OFFICE OF FEDERAL ACTIVITIES
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HON CHARLES SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON DANIEL PATRICK MOYNIHAN
UNITED STATES SENATE
WASINGTON DC 20510 US

HON JOHN BREAUX
UNITED STATER SENATE
WASHINGTON DC 20510 US

HON CHARLES E SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. BARBARA A. MIKULSKI
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE BOB GRAHAM
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHARLES ROBB
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH BIDEN, JR.
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH I LIEBERMAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON WILLIAM V. ROTH JR
U S SENATE
WASHINGTON DC 20510-0001 US

HON. JOHN W. WARNER
US SENATE
WASHINGTON DC 20510-0001 US

HON CHRISTOPHER J DODD
UNITED STATES SENATE
WASH DC 20510-0702 US

HONORABLE DANIEL P. MOYNIHAN
UNITED STATE SENATE
WASHINGTON DC 20510-0903 US

HONORABLE CONNIE MACK
UNITED STATES SENATE
WASHINGTON DC 20510-0904 US

HONORABLE J ROBERT KERREY
UNITED STATES SENATE
WASHIGTON DC 20510-2704 US

HON MIKE DEWINE
UNITED STATES SENATE
WASHINGTON DC 20510-3503 US

HON ARLEN SPECTER
UNITED STATES SENATE
WASHINGTON DC 20510-3802 US

HON RICK SANTORUM
UNITED STATES SENATE
WASHINGTON DC 20510-3804 US

HONORABLE JOHN H. CHAFEE
UNITED STATES SENATE
WASHINGTON DC 20510-3902 US

HON JACK REED
U S SENATE
WASHINGTON DC 20510-3903 US

HONORABLE ROBERT BYRD
UNITED STATES SENATE
WASHINGTON DC 20510-6025 US

HONORABLE JOHN J LAFALCE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. BUD SHUSTER
ATTN: MIKE RICK
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NANCY JOHNSON
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAM GEJDENSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. TOM BLILEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB CLEMENT
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JAMES L. OBERSTAR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JOHN J. DUNCAN
U S HOUSE OF REPRESENTATIVESS
WASHINGTON DC 20515 US

HONORABLE PAUL E. GILLMOR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MIKE DOYLE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN D. DINGELL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BENJAMIN A. GILMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM O. LIPINSKI
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETER J. VISCLOSKY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM J. COYNE
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MAJOR R. OWENS
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JAMES TRAFICANT JR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ROBERT MENENDEZ
U S HOUSE OF REPRESENTATIVES
WASH DC 20515 US

HON MARCY KAPTUR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK MASCARA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL FORBES
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ELIOT L ENGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON GARY ACKERMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JERROLD NADLER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ROBERT W. NEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB WEYGAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TED STRICKLAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON DENNIS J KUCINICH
UNITED STATES HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HON NYDIA M VELAZQUEZ
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ED TOWNS
U. S. HOUSE OR REPRESENTATIVES
WASHINGTON DC 20515 US

HON LOUISE M SLAUGHTER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHRISTOPHER SHAYS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHARLES RANGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL MCNULTY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAMES MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CAROLYN B MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NITA LOWEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MAURICE HINCHEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHIP PICKERING
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JESSE L. JACKSON, JR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LUIS GUTIERREZ
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DANNY K DAVIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON RALPH REGULA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON SHERROD BROWN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ED BRYANT
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. STEVE LATOURETTE
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON BOB WISE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON THOMAS C SAWYER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAXBY CHAMBLISS,
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TILLIE K FOWLER
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ROD R BLAGOJEVICH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTO DC 20515-1305 US

HON JULIA CARSON
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1410 US

HONORABLE JAMES A. BARCIA
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2205 US

HON JACK QUINN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3230 US

HONORABLE RICHARD BURR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3305 US

HONORABLE TOM DAVIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4611 US

HONORABLE BOBBY L. RUSH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-9997 US

MICHAEL P HARMONIS
DEPARTMENT OF JUSTICE
325 SEVENTH STREET, NW
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
US DEPARTMENT OF TRANSPORTATION
400 SEVENTH STREET SW ROOM 4102 C-30
WASHINGTON DC 20590 US

JOSEPH R POMPONIO
FEDERAL RAILROAD ADMIN
1120 VERMONT AVE NW RCC-20
WASHINGTON DC 20590 US

JOLENE MOLITORIS, ADMN.
FEDERAL RAILROAD ADMNS.
400 7TH STREET SW
WASHINGTON DC 20590 US

DAVID G ABRAHAM
SUITE 400W
7315 WISCONSIN AVENUE
BETHESDA MD 20814 US

MITCHELL M KRAUS
TRANSPORTATION COMMUNICATIONS INTERNATIONAL U
3 RESEARCH PLACE
ROCKVILLE MD 20850-3279 US

JOHN M ROBINSON
9616 OLD SPRING ROAD
KENSINGTON MD 20895-3124 US

WILLIAM W WHITEHURST JR
W W WHITEHURST & ASSOCIATES INC
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030-1711 US

JOHN HOY
P O BOX 117
GLEN BURNIE MD 21060 US

ROBERT J WILL
UNITED TRANSPORTATION UNION
4134 GRAVE RUN RD
MANCHESTER MD 21102 US

JOHN F WING CHAIRMAN
CITIZENS ADVISORY COMMITTEE
601 NORTH HOWARD STREET
BALTIMOTE MD 21201 US

LINDA A JANEY J D
MARYLAND OFFICE OF PLANNING
301 WEST PRESTON STREET
BALTIMORE MD 21201-2365 US

DON E SANCHEZ
CHESAPEAKE SPECIALTY PRODUCTS INC
5055 NORTH POINT BOULEVARD
BALTIMORE MD 21219 US

CHARLES M CHADWICK
MARYLAND MIDLAND RAILWAY INC
P O BOX 1000
UNION BRIDGE MD 21791 US

HENRY E. SEATON
7700 LEESBURG PIKE, STE 201
FALLS CHURCH VA 22043 US

PETER Q NYCE JR
U S DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

THOMAS E SCHICK
CHEMICAL MANUF ASSOC
1300 WILSON BOULEVARD
ARLINGTON VA 22209 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

JENNIFER BRAUN
JACKSON & JESSUP
P O BOX 1240
3426 NORTH WASHINGTON BOULEVARD
ARLINGTON VA 22210 US

FRANCIS G MCKENNA
ANDERSON & PENDLETON
206 N WASHINGTON STREET SUITE 330
ALEXANDRIA VA 22314 US

KENNETH E SIEGEL
AMERICAN TRUCKING ASSOC INC
2200 MILL ROAD
ALEXANDRIA VA 22314-4677 US

ROBERT E MARTINEZ
VA SECRETARY OF TRANSPORTAITON
P. O. BOX 1475
RICHMOND VA 23218 US

HONORABLE GEORGE ALLEN
GOVERNOR, COMMONWEALTH OF VIRGINIA
STATE CAPITOL
RICHMOND VA 23219 US

JOHN W SNOW
CHAIRMAN PRESIDENT AND CHIEF EXECTIVE OFFICER
P O BOX 85629
RICHMOND VA 23285-5629 US

DAVID A SHELTON
NORFOLK SOUTHERN
THREE COMMERCIAL PLACE
NORFOLK VA 23510 US

GEORGE A ASPATORE
NORFOLK SOUTHERN CORP
THREE COMMEMERCIAL PLACE
NORFOLK VA 23510 US

JAMES A HIXON
SENIOR VICE PRESIDDENT EMPLOYEE RELATIONS NOR
THREE COMMERCIAL PLACE
NORFFFOLK VA 23510-2191 US

L P KING JR
GENERAL CHAIRPERSON UTU
145 CAMPBELL AVE SW STE 207
ROANOKE VA 24011 US

HONORABLE JOHN WARNER
UNITED STATES SENATE
235 FEDERAL BUILDING
ABINGDON VA 24210-0887 US

VAUGHN R GROVES
PITTSTON COAL COMPANY
PO BOX 5100
LEBANON VA 24266 US

TERRELL ELLIS
CAEZWV
P O BOX 176
CLAY WV 25043 US

R K SARGENT
GENERAL CHAIRPERSON UTU
1319 CHESTNUT STREET
KENOVA WV 25530 US

WILLIAM T BRIGHT
P O BOX 149
200 GREENBRIER ROAD
SUMMERSVILLE WV 26651 US

FRANK N JORGENSEN
THE ELK RIVER RAILROAD INC
P O BOX 460
SUMMERSVILLE WV 26651 US

SCOTT M SAYLOR
NORTH CAROLINA RAILROAD COMPANY
3200 ATLANTIC AV STE 110
RALIEGH NC 27604-1640 US

E NORRIS TOLSON
NC DEPT OF TRANSPORTATION
P O BOX 25201
1 S. WILINGTON STREET
RALEIGH NC 27611 US

J R BARBEE
GENERAL CHAIRPERSON UTU
441 N LOUISIANA AVE STE Q
ASHEVILLE NC 28806-3791 US

HONORABLE DAVID M BEASLEY
GOVERNOR
P. O. BOX 11369
COLUMBIA SC 29211 US

J RANDALL EVANS
500 WATER STREET (J150)
JACKSONVILLE FL 32202 US

FRED R BIRKHOLZ
CSX TRANSPORTATION LAW DEPT - J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

ROBERT V ALLEN
CSX TRANSPORTATION
500 WATER STREET J305
JACKSONVILLE FL 32202 US

T J STEPHENSON
CSX TRANSPORTATION INC
500 WATER STREET (J407)
JACKSONVILLE FL 32202 US

CARL A GERHARDSTEIN
CSX TRANSPORTATION RISK MGMT
500 WATER STREET-J275
JACKSONVILLE FL 32202 US

DANFORD L PRICE
500 WATER STREET
JACKSONVILLE FL 32202 US

BOB HAULTER
CSX TRANSPORTATION INC
500 WATER STREET (J120)
JACKSONVILLE FL 32202 US

PAUL R. HITCHCOCK
CSX TRANSPORTATION LAW DEPARTMENT
500 WATER STREET SC J-150
JACKSONVILLE FL 32202 US

JOHN W. HUMES, JR.
CSX TRANSPORTATION
SPEED CODE J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

CHARLES M ROSENBERGER
CSX TRANSPORTATION
500 WATER STREET - J150
JACKSONVILLE FL 32202 US

J L RODGERS
GENERAL CHAIRMAN UTU
480 OSCEOLA AVENUE
JACKSONVILLE FL 32250 US

J T REED
GENERAL CHAIRPERSON UTU
7785 BAYMEADOWS WAY STE 109
JACKSONVILLE FL 32256 US

PHILLIP L BELL
ERIE LACKAWANNA RAILROAD CO
PO BOX 1482
TALLAHASSEE FL 32302 US

JAMES L BELCHER
EASTMAN CHEMICAL COMPANY
PO BOX 431
KINGSPORT TN 37662 US

WILLIAM L OSTEEN
ASSOCIATE GENERAL COUNSEL TVA
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE KIRK FORDICE, GOVERNOR
STATE OF MISSISSIPPI
P O BOX 139
JACKSON MS 39205 US

HONORABLE PAUL E. PATTON
GOVERNOR
700 CAPITOL AVENUE, STE. 100
FRANKFORT KY 40601 US

F R PICKELL
GENERAL CHAIRPERSON UTU
6797 NORTH HIGH ST STE 103
WORTHINGTON OH 43085 US

THOMAS M O'LEARY
OHIO RAIL DEVELOPMENT COMMISSION
50 W BROAD STREET 15TH FLOOR
COLUMBUS OH 43215 US

HONORABLE DEBORAH PRYCE
U. S. HOUSE OF REPRESENTATIVES
500 SOUTH FRONT STREET, ROOM 1130
COLUMBUS OH 43215 US

DOREEN C JOHNSON, CHIEF ANTITRUST SECTION
OHIO ATTY GENERAL OFFICE
140 EAST TOWN STREET, FIRST FLOOR
COLUMBUS OH 43215-6001 US

JAMES R JACOBS
JACOBS INDUSTRIES
2 QUARRY LANE
STONY RIDGE OH 43463 US

DAVID CHAPMAN
LAFARGE LIME OHIO INC
P O BOX 128
659 ANDERSON ROAD
WOODVILLE OH 43469-0128 US

ROBERT J COOPER
GENERAL CHAIRPERSON UTU
1238 CASS ROAD
MAUMEE OH 43537 US

ROBERT E GREENLESE
TOLEDO-LUCAS COUNTY PORT AUTHORITY
1 MARITIME PLAZA SUITE 700
TOLEDO OH 43604 US

RON MARQUARDT
LOCAL UNION 1810 UMWA
R D #2
RAYLAND OH 43943 US

MAYOR VINCENT M URBIN
150 AVON BELDEN RD
AVON LAKE OH 44012 US

BARBARA O'KEEFE
VILLAGE OF WELLINGTON
115 WILLARD MEMORIAL SQ
WELLINGTON OH 44090 US

ANITA R BRINDZA
THE ONE FIFTEEN HUNDRED BUILDING
11500 FRANKLIN BLVD SUITE 104
CLEVELAND OH 44102 US

C L LITTLE
INTERNATIONAL PRESIDENT UTU
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CLARENCE MONIN INTERNATIONAL PRES
BROTHERHOOD OF LOCOMTIVE ENGINEERS MEZZANINE
1370 ONTARIO STREET
CLEVELAND OH 44113 US

DAVID ROLOFF
GOLDSTEIN & ROLOFF
526 SUPERIOR AVENUE EAST SUITE 1440
CLEVELAND OH 44114 US

C D WINEBRENNER
GENERAL CHAIRPERSON UTU
27801 EUCLID AVENUE RM 200
EUCLID OH 44132 US

SYLVIA R. CHINN-LEVY
NEFCO
969 COPLEY ROAD
AKRON OH 44320 US

RANDALL C. HUNT
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO.
P O BOX 36963
4775 MUNSON ST NW
CANTON OH 44735-6963 US

ROBERT E MURRAY
OHIO VALLEY COAL CO
56854 PLEASANT RIDGE ROAD
ALLEDONIA OH 43902 US

CLARENCE TURNQUIST
INTERNATIONAL LONGSHOREMEN S ASSOCIATION
C/O 2125 TRYON ROAD
ASHTABULA OH 44004 US

CHARLES S HESSE
CHARLES HESSE ASSOCIATES
7777 BAINBRIDGE ROAD
CHAGRIN FALLS OH 44023-2124 US

COLETTA MCNAMEE SR
CUDELL IMPROVEMENT INC
11500 FRANKLIN BLVD STE 104
CLEVELAND OH 44102 US

DANIEL R ELLIOTT III
ASST GENERAL COUNSEL UNITED TRANSPORTATION UN
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CLINTON J MILLER III
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CHRISTOPHER C MCCRACKEN
ULMER & BERNE LLP
1300 EAST NINTH STREET SUITE 900
CLEVELAND OH 44114 US

INAJO DAVIS CHAPPELL
ASHTA CHEMICALS INC
1300 EAST NINETH STREET SUITE 900
CLEVELAND OH 44114-1538 US

CHARLES ZUMKEHR
ROETZEL & ANDRESS CO LPA
75 EAST MARKET STREET
AKRON OH 44308 US

CHARLES E ALLENBAUGH JR
EAST OHIO STONE COMPANY
2000 W BESSON ST
ALLIANCE OH 44601 US

D G STRUNK JR
GENERAL CHAIRPERSON UTU
817 KILBOURNE STREET
BELLEVUE OH 44811 US

R A GRICE
GENERAL CHAIRPERSON UTU
817 KILBOURNE ST
BELLEVUE OH 44811-9431 US

RICHARD E KERTH
CHAMPION INTERNATIONAL CORPORATION
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

FAY D DUPUIS
CITY OF CINCINNATI
801 PLUM STREET
CINCINNATI OH 45202 US

ROBERT EDWARDS
EASTERN TRANSPORT AND LOGISTICS
1109 LANETTE DRIVE
CINCINNATI OH 45230 US

THOMAS R RYDMAN PRESIDENT
INDIAN CREEK RAILROAD COMPANY
5905 W 600 NORTH
ANDERSON IN 46011 US

F RONALDS WALKER
CITIZENS GAS & COKE UTILITY
2020 N MERIDIAN STREET
INDIANAPOLIS IN 46202-1393 US

MICHAEL P MAXWELL JR
MCHALE, COOK & WELCH
320 N MERIDIAN ST 1100 CHAMBER OF COMMERCE BL
INDIANAPOLIS IN 46204 US

J PATRICK LATZ
HEAVY LIFT CARGO SYSTEM
PO BOX 51451
INDIANAPOLIS IN 46251-0451 US

MICHAEL CONNELLY
CITY OF EAST CHICAGO
4525 INDIANAPOLIS BLVD
EAST CHICAGO IN 46312 US

HAMILTON L CARMOUCHE, CORPORATION COUNSEL
CITY OF GARY
401 BROADWAY 4TH FLOOR
GARY IN 46402 US

HONORABLE PETER J. VISCLOSKY
U. S. HOUSE OF REPRESENTATIVES
215 WEST 35TH AVENUE
GARY IN 46408 US

CARL FELLER
DEKALB AGRA INC
P. O. BOX 127
4743 COUNTY ROAD 28
WATERLOO IN 46793-0127 US

CHRISTOPHER J BURGER, PRESIDENT
CENTRAL RAILROAD COMPANY OF INDIANAPOLIS
PO BOX 554
KOKOMO IN 46903-0554 US

WILLIAM A BON, GENERAL COUNSEL
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
26555 EVERGREEN ROAD SUITE 200
SOUTHFIELD MI 48076 US

NICOLE HARVEY
THE DOW CHEMICAL COMPANY
2020 DOW CENTER
MIDLAND MI 48674 US

JAMES E SHEPHERD
TUSCOLA & SAGINAW BAY
PO BOX 550
OWOSSO MI 48867-0550 US

LARRY B KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

HON JOHN ENGLER
OFFICE OF THE GOVERNOR
P O BOX 30013
LANSING MI 48933 US

T SCOTT BANNISTER
T SCOTT BANNISTER AND ASSOCIATES
1300 DES MOINES BLDG 405 SIXTH AVENUE
DES MOINES IA 50309 US

BYRON D OLSEN
FELHABER LARSON FENLON & VOGT PA
601 SECOND AVENUE SOUTH SUITE 4200
MINNEAPOLIS MN 55401-4302 US

LEO J WASESCHA
GOLD MEDAL DIVISON - GENERAL MILLS OPERATION
P O BOX 1113
NUMBER ONE GENERAL MILLS BULEVARD
MINNEAPOLIS MN 55440 US

GERALD J. VINCI
PRAIRIE GROUP
P. O.BOX 1123
7601 WEST 79TH STREET
BRIDGEVIEW IL 60455 US

RICHARD A GAVRIL
16700 GENTRY LANE NO 104
TINLEY PARK IL 60477 US

CHRISTINE H. ROSSO
IL ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FLOOR
CHICAGO IL 60601 US

WILLIAM C SIPPEL
FLETCHER & SIPPEL LLC
180 N STETSON AVE SUITE 3125
CHICAGO IL 60601-6721 US

RICHARD F. FRIEDMAN, ESQ
EARL L NEAL & ASSOCIATES
111 WEST WASHINGTON STREET, STE 1700
CHICAGO IL 60602-2766 US

ROGER A SERPE
175 WEST JACKSON BOULEVARD SUITE 1460
CHICAGO IL 60604 US

THOMAS F MCFARLAND JR
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE SUITE 1330
CHICAGO IL 60606-2902 US

CHARLES D BOLAM
UNITED TRANSPORTATION UNION
1400-20TH STREET
GRANITE CITY IL 62040 US

MERRILL L TRAVIS
ILLINOIS DEPT OF TRANSPORTATION
2300 S DIRKSEN PARKWAY RM 302
SPRINGFIELD IL 62764 US

JOHN JAY ROSACKER
KS DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

HENRY T DART
PLAINTIFF MANGEMENT COMMITTEE
609 EAST GIBSON STREET
COVINGTON LA 70433 US

DENNIS A. GUTH
WEST LAKE GROUP
2801 POST OAK BLVD
HOUSTON TX 77056 US

EDWARD WASHINGTON, II
CHIEF, PUBLIC UTILITIES BUREAU, ILL ATTORNEY
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

THOMAS J LITWILER
FLETCHER & SIPPEL LLC
180 NORTH STETSON AVENUE SUITE 3125 TWO PRUDE
CHICAGO IL 60601-6721 US

SANDRA J DEARDEN
MDCO TRANSPORTATION MANAGEMENT LTD
166 WEST WASHINGTON SUITE 700
CHICAGO IL 60602 US

EDWARD C MCCARTHY
INLAND STEEL INDUSTRIES INC
30 WEST MONROE STREET
CHICAGO IL 60603 US

SHELDON A ZABEL
SCHIFF HARDIN & WAITE
7200 SEARS TOWER
CHICAGO IL 60606 US

MYLES L TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

SCOTT A RONEY
ARCHER DANIELS MIDLAND COMPANY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

IAN MUIR
BUNGE CORPORATION
P O BOX 28500
ST LOUIS MO 63146 US

MR GEORGE VAN HAVER
2340 SOUTH 35TH STREET
OMAHA NE 68105 US

MIKE SPAHIS
FINA OIL & CHEMICAL CO
6000 LEGACY DRIVE
PLANO TX 75024-3601 US

DAVID L HALL
COMMONWEALTH CONSULTING ASSOCIATES
13103 FM 1960 WEST SUITE 204
HOUSTON TX 77065-4069 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
P O BOX 2583
1221 MCKINNEY STREET SUITE 1600
HOUSTON TX 77252-2583 US

STEVE M COULTER
EXXON COMPANY USA
PO BOX 3272
HOUSTON TX 77253-3272 US

MONTY L PARKER SR
CMC STEEL GROUP
P O BOX 911
SEGUIN TX 78156-0911 US

BRAD F HUSTON
CYPRUS AMAX COAL SALES CORP
9100 E MINERAL CIR
MILFORD CO 80112-3401 US

STEPHEN M UTHOFF
CONIGLIO & UTHOFF
60 ELM AVENUE, CONIGLIO PROFESSIONAL BLDG
LONG BEACH CA 90802-4910 US

RICHARD WELSH
NARPO
50-505 GRAND TRAVERSE
LA QUINTA CA 92253 US

JOHN D FITZGERALD
UTU, GENERAL CHAIRPERSON
400 E EVERGREEN BLVD STE 217
VANCOUVER WA 98660-3264 US

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SERVICE DATE - MAY 31, 2000

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

Decision No. 153

Decided: May 24, 2000

Environmental Condition No. 8(A) of Appendix Q of Decision No. 89[1] (Decision No. 89, slip op. at 393-94), requires Applicants, in order to address potential safety impacts at highway/rail at-grade crossings, to upgrade existing warning devices at 86 public highway/rail at-grade crossings as listed in the decision. As pertinent here, NS is required to install "Flashing Lights" at the at-grade crossing at Loomis Street in Chautauqua County, Ripley, NY. See Decision No. 89, slip op. at 398. Alternatively, as provided in Environmental Condition No. 8(A), NS may satisfy this requirement by entering into a negotiated agreement with the affected local jurisdiction and the state department of transportation to provide for alternative safety improvements in the vicinity of the identified highway/rail at-grade crossing that achieve at least an equivalent level of safety enhancement. Environmental Condition No. 8(A) requires compliance with this provision within 2 years of the effective date of Decision No. 89, or by August 22, 2000.

By letter received April 20, 2000, NS has requested a 1-year extension of the deadline provided for in Environmental Condition No. 8(A), until August 22, 2001. According to NS, it has recently been apprised by the New York Department of Transportation (NYDOT) that, following public input from the citizens of Ripley and state evaluation of the Loomis Street at-grade crossing, the preferred alternative is to close this crossing. NS further states that NYDOT has asked NS to refrain from installing any improvements at this grade crossing while it makes the necessary preparations to issue a closure order. NS advises that NYDOT is planning a Regulatory Hearing seeking to close and remove the affected Loomis Street grade crossing on the NS rail line and that, following the hearing, the state expects that a decision and order to

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[1] In Decision No. 89, served July 23, 1998, we approved, subject to certain conditions, including environmental mitigation conditions, the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (collectively, Conrail) and the division of Conrail's assets by CSX Corporation and CSX Transportation, Inc. (collectively, CSX), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, NS). CSX and NS are referred to as Applicants.

close the Loomis Street grade crossing will be issued.[2] NS states that, because the precise schedule for the NYDOT issuance of such an order is uncertain, it is seeking the 1-year extension of time to complete a negotiated agreement with the Town of Ripley and NYDOT which will provide for the grade crossing as an alternative to the installation of flashing lights.

The request for a 1-year extension to August 22, 2001, is reasonable. The revised deadline will therefore be adopted.

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

It is ordered:

1. The compliance deadline for NS in Environmental Condition No. 8(A) of Appendix Q of Decision No. 89 with respect to the Loomis Street grade crossing in Chautauqua County, Ripley, NY, is extended 1 year until August 22, 2001.

2. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams

Vernon A. Williams
Secretary

[2] NS enclosed a copy of a letter dated December 15, 1999, from Clarence W. Scott, Director, Intermodal Projects, NYDOT, concerning the Regulatory Hearing.

SERVICE LIST FOR: 23-may-2000 STB FD 33388 0 CSX CORPORATION AND CSX TRANSPORTATI

PAUL E CRAWFORD
MASSACHUSETTS CENTRAL RAILROAD CORPORATION
TWO WILBRAHAM STREET
PALMER MA 01069 US

JAMES E HOWARD
90 CANAL STREET
BOSTON MA 02114 US

JOHN D CIRAME, ASSISTANT SECRETARY
COMMONWEALTH OF MASS. EXEC. OFFICE OF TRANSPT
10 PARK PLAZA ROOM 3170
BOSTON MA 02116-3969 US

HON. EDWARD M KENNEDY
UNITES STATES SENATE
2400 JOHN F KENNEDY FEDERAL BLDG
BOSTON MA 02203 US

WILLIAM D ANKNER PHD
R I DEPT OF TRANSPORTATION
TWO CAPITOL HILL
PROVIDENCE RI 02903 US

JOHN R NADOLNY
14 AVIATION AVENUE
PORTSMOUTH NH 03801 US

ROBERT D ELDER
MAINE DEPARTMENT OF TRANSPORTATION
16 STATE HOUSE STATION
AUGUSTA ME 04333-0016 US

KAREN E SONGHURST
STATE OF VERMONT
133 STATE STREET
MONTPELLIER VT 05633-5001 US

JAMES F SULLIVAN
CT DEPT OF TRANSPORTATION
P O BOX 317546
2800 BERLIN TURNPIKE
NEWINGTON CT 06131 US

EDWARD J RODRIGUEZ
HOUSATONIC RAILROAD
P O BOX 687
8 DAVIS ROAD WEST
OLD LYME CT 06371 US

RICHARD C CARPENTER
SOUTHWESTERN REGIONAL PLANNING AGENCY
1 SELLECK STREET SUITE 210
EAST NORWALK CT 06855 US

MICHAEL E STRICKLAND
NYK LINE (NORTH AMERICA) INC, SENIOR VICE PRE
300 LIGHTING WAY
SECAUCUS NJ 07094-1588 US

J WILLIAM VAN DYKE
NJ TRANSPORTATION PLANNING AUTHORITY
ONE NEWARK CENTER 17TH FLOOR
NEWARK NJ 07102 US

EDWARD LLOYD
RUTGERS ENVIRONMENTAL LAW CLINIC
15 WASHINGTON STREET
NEWARK NJ 07102 US

HONORABLE ROBERT G. TORRICELLI
UNITED STATES SENATE
1 RIVER FRONT PLAZA, 3RD FLOOR
NEWARK NJ 07102 US

PHILIP SIDO
UNION CAMP CORPORATION
1600 VALLEY ROAD
WAYNE NJ 07470 US

MARTIN T DURKIN ESQ
DURKIN & BOGGIA ESQS
PO BOX 378
71 MT VERNON STREET
RIDGEFIELD PARK NJ 07660 US

CRAIG CURRY
CONSOLIDATED RAIL CORPORATION
1000 HOWARD BOULEVARD
MOUNT LAUREL NJ 08054 US

TIMOTHY G CHELIUS
18 N EAST AVENUE
VINELAND NJ 08360 US

LAWRENCE PEPPER, JR
GRUCCIO PEPPER
817 EAST LANDS AVE
VINELAND NJ 08360 US

JOHN F. MCHUGH
MCHUGH & SHERMAN
20 EXCHANGE PLACE 51ST FLOOR
NEW YORK NY 10005 US

ANTHONY BOTTALICO
UTU
420 LEXINGTON AVENUE ROOM 458-460
NEW YORK NY 10017 US

WALTER E ZULLIG JR
METRO-NORTH COMMUTER RAILROAD COMPANY
347 MADISON AVE
NEW YORK NY 10017-3706 US

ANTHONY P. SEMANCIK
347 MADISON AVENUE
NEW YORK NY 10017-3706 US

JAMES W HARRIS
THE METROPOLITIAN PLANNING ORGANIZATION
1 WORLD TRADE CENTER STE 82 EAST
NEW YORK NY 10048-0043 US

HUGH H. WELSH
LAW DEPT., SUITE 67E
ONE WORLD TRADE CENTER
NEW YORK NY 10048-0202 US

R. LAWRENCE MCCAFFREY, JR.
NEW YORK & ATLANTIC RAILWAY
405 LEXINGTON AVENUE 50TH FLOOR
NEW YORK NY 10174 US

SAMUEL J NASCA
UTU STATE LEGISLATIVE DIRECTOR
35 FULLER ROAD SUITE 205
ALBANY NY 12205 US

DANIEL B. WALSH
BUSINESS COUNCIL OF NEW YORK STATE, INC.
152 WASHINGTON AVENUE
ALBANY NY 12210 US

DIANE SEITZ
CENTRAL HUDSON GAS & ELECTRIC CORP
284 SOUTH AVENUE
POUGHKEEPSIE NY 12601 US

IRWIN L. DAVIS
1900 STATE TOWER BLDG.
SYRACUSE NY 13202 US

ANGELO J CHICK JR, LOCAL CHAIRMAN
P O BOX 908
48398 OLD GOOSE BAY ROAD
REDWOOD NY 13679 US

GARY EDWARDS
SOMERSET RAILROAD
7725 LAKE ROAD
BARKER NY 14012 US

SHEILA MECK HYDE
CITY HALL
342 CENTRAL AVENUE
DUNKIRK NY 14048 US

IRVING J RUBIN
P O BOX 243
YOUNGSTOWN NY 14174 US

JOHN F COLLINS
COLLINS ,COLLINS, & KANTOR PC
267 NORTH STREET
BUFFALO NY 14201 US

R W GODWIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
810 ABBOTT ROAD SUITE 200
BUFFALO NY 14220 US

ERNEST J IERARDI
NIXON HARGRAVE DEVANS DOYLE LLP
PO BOX 1051
CLINTON SQUARE
ROCHESTER NY 14603-1051 US

H DOUGLAS MIDKIFF
GENESEE TRANSPORTATION COUNCIL
65 WEST BROAD ST STE 101
ROCHESTER NY 14614-2210 US

JEANNE WALDOCK
107 GRANT COURT
ORLEAN NY 14760 US

DAVID W. DONLEY
3361 STAFFORD ST
PITTSBURGH PA 15204-1441 US

JOHN A VUONO
VUONO & GRAY
2310 GRANT BUILDING
PITTSBURGH PA 15219 US

HENRY M. WICK, JR.
WICK STREIFF ET AL
1450 TWO CHATHAM CENTER
PITTSBURGH PA 15219-3427 US

R J HENEFELD
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

M E PETRUCCELLI
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 152 2 US

RICHARD R WILSON
1126 EIGHT AV STE 403
ALTOONA PA 16602 US

D W DUNLEVY
STATE LEGISLATIVE DIRECTOR UTU
230 STATE STREET PA AFL-CIO BLDG 2ND FLOOR
HARRISBURG PA 17101 US

KURT W CARR
BUREAU FOR HISTORIC PRESERVATION
P O BOX 1026
HARRISBURG PA 17108-1026 US

HONORABLE THOMAS J RIDGE
GOVERNOR, COMMONWEALTH OF PENNSYLVANIA
225 MAIN CAPITOL BUILDING
HARRISBURG PA 17120 US

KRISTOPHER MICHAEL KLEMICK
RR#3 BOX 101-15
JERSEY SHORE PA 17740-9309 US

BELNAP FREEMAN
BELKNAP FREEMAN
119 HICKORY LANE
ROSEMONT PA 19010 US

JOHN J GROCKI
GRA INC
115 WEST AV ONE JENKINTOWN STA
JENKINTOWN PA 19046 US

HARRY C BARBIN
BARBIN LAUFFER & O'CONNELL
608 HUNTINGDON PIKE
ROCKLEDGE PA 19046 US

JONATHAN M BRODER
CONSOLIDATED RAIL CORP
PO BOX 41416
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

G CRAIG SCHELTER
PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATI
2600 CENTRE SQUARE WEST 500 MARKET ST
PHILADELPHIA PA 19102 US

JOHN J EHLINGER JR
OBERMAYER REBMANN MAXWELL & HIPPEL
1617 JOHN F. KENNEDY BLVD ONE PENN CENTER-19T
PHILADELPHIA PA 19103-1895 US

DAVID BERGER
BERGER AND MONTAGUE, P. C.
1622 LOCUST ST
PHILADELPHIA PA 19103-6305 US

JOHN J COSCIA, EXECUTIVE DIRECTOR
DELAWARE VALLEY REGIONAL PLANNING COMMISSION
111 SOUTH INDEPENDENCE MALL EAST
PHILADELPHIA PA 19106 US

JOHN K. LEARY, GENERAL MANAGER
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTH
1234 MARKET STREET 5TH FLOOR
PHILADELPHIA PA 19107-3780 US

ERIC M HOCKY
GOLLATZ GRIFFIN & EWING
P O BOX 796
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

HON JOSEPH R BIDEN, JR.
UNITED STATES SENATE
844 KING STREET
WILMINGTON DE 19801 US

J E THOMAS
HERCULES INCORPORATED
1313 NORTH MARKET STREET
WILMINGTON DE 19894 US

E C WRIGHT
DUPONT LOGISTICS - GLOBAL SERVICES BUSINESS
1007 MARKET, DUPONT BLDG 3100
WILMINGTON DE 19898 US

FREDERICK H SCHRANCK
PO BOX 778
DOVER DE 19903 US

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

MARTIN W BERCOVICI
KELLER & HECKMAN, LLP
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

PETER A GILBERTSON
REGIONAL RRS OF AMERICA
122 C ST NW STE 850
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

DREW A HARKER
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

PAUL REISTRUP
CSX TRANSPORTATION INC
1331 PENNSYLVANIA NW STE 500
WASH DC 20004 US

GEORGE W MAYO JR
HOGAN & HARTSON L L P
555 THIRTEENTH STREET NW COLUMBIA SQUARE
WASHINGTON DC 20004-1109 US

DENNIS G LYONS
ARNOLD & PORTER
555 TWELFTH STREET NW, STE 940
WASHINGTON DC 20004-1206 US

DANIEL DUFF
AMERICAN PUBLIC TRANSPORTATION ASSOCIATION
1201 NEW YORK AV NW, STE 400
WASHINGTON DC 20005 US

KEVIN M SHEYS
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET NW SUITE 200
WASHINGTON DC 20005 US

KARL MORELL
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

BRUNO MAESTRI
NORFOLK SOUTHERN CORPORATION
1500 K STREET SUITE 375
WASHINGTON DC 20005 US

WILLIAM A MULLINS
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005-3314 US

JAMES HOWARD
COALITION OF NORTHEASTERN GOVERNORS
400 NORTH CAPITOL STREET, SUITE 382
WASHINGTON DC 20001 US

DONALD F GRIFFIN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G STREET NE STE 460
WASHINGTON DC 20002 US

J MICHAEL HEMMER
COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20004 US

ERIC VON SALZEN
HOGAN & HARTSON
555 THIRTEENTH STREET N W
WASHINGTON DC 20004-1109 US

MARY GABRIELLE SPRAGUE
ARNOLD & PORTER
555 TWELTH STREET NW
WASHINGTON DC 20004-1202 US

LOUIS E GITOMER
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

PAUL M LAURENZA
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

L JOHN OSBORN
SONNENSCHEIN NATH & ROSENTHAL
1301 K STREET NW STE 600 EAST
WASH DC 20005 US

ALICE C SAYLOR
AMERICAN SHORT LINE & REGIONAL RAILROAD ASSO
1120 G STREET NW SUITE 520
WASHINGTON DC 20005 US

CLARK EVANS DOWNS
JONES DAY REAVIS & POGUE
1450 G STREET NW
WASHINGTON DC 20005-2088 US

PAUL H LAMBOLEY
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005-3324 US

NEAL R GROSS
GOURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AV NW
WASHINGTON DC 20005-3701 US

WILLIAM W MILLAR
AMERICAN PUBLIC TRANSIT ASSOCIATION
1201 NEW YORK AVE., NW
WASHINGTON DC 20005-6141 US

SCOTT M ZIMMERMAN
ZUCKERT SCOUTT & RASENBERGER L L P
888 SEVENTEENTH STREET NW
WASHINGTON DC 20006 US

ROBERT P VOM EIGEN
HOPKINS & SUTTER
888 16TH STREET N W STE 700
WASHINGTON DC 20006 US

ERIKA Z JONES
MAYER BROWN & PLATT
1909 K STREET, NW
WASHINGTON DC 20006-1101 US

JOHN V EDWARDS, ESQ
ZUCKERT SCOUTT ET AL
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

SHERRI LEHMAN DIRECTOR OF CONGRESSIONAL AFFAI
CORN REFINERS ASSOC
1701 PA AV NW
WASH DC 20006-5805 US

DAVID K MONROE
GALLAND KHARASCH GREENBERT FELLMAN & SWIRSKY
1054 THIRTY FIRST STREET NW STE 200
WASHINGTON DC 20007 US

ROBERT G SZABO
1050 THOMAS JEFFERSON STREET NW SIXTH FLOOR
WASHINGTON DC 20007 US

EDWARD D GREENBERG
GALLAND, KHARASCH, GREENBERG, FELLMAN & SWIRS
1054 THIRTY-FIRST STREET NW, STE 200
WASHINGTON DC 20007-4492 US

STEPHEN H BROWN
VORYS SATER SEYMOUR AND PEASE
1828 L STREET N W
WASHINGTON DC 20036 US

MARK H SIDMAN
WEINER BRODSKY,SIDMAN & KIDER
1350 NEW YORK AVE., NW., STE. 800
WASHINGTON DC 20005-4797 US

JAMES R WEISS
PRESTON GATES ELLIS ET AL
1735 NEW YORK AVENUE NW SUITE 500
WASHINGTON DC 20006 US

CONSTANCE A SADLER
SIDLEY & AUSTIN
1722 EYE STREET NW
WASHINGTON DC 20006 US

ANDREW R. PLUMP
ZUCKERT, SCOUTT & RASENBERGER. LLP
888 17TH ST., NW, STE. 600
WASHINGTON DC 20006 US

RICHARD A ALLEN
ZUCKERT SCOUTT & RASENBERGER L L P
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3309 US

CHARLES A SPITULNIK
HOPKINS & SUTTER
888 SIXTEENTH ST NW
WASH DC 20006-4103 US

CHRISTOPHER C O'HARA
BRICKFIELD BURCHETTE & RITTS PC
1025 THOMAS JEFFERSON ST NW EIGHTH FLOOR
WASHINGTON DC 20007 US

PAUL M DONOVAN
LAROE WINN MOERMAN & DONOVAN
3900 HIGHWOOD COURT NW
WASHINGTON DC 20007 US

JOHN H BROADLEY
JOHN H BROADLEY & ASSOCIATES P C
1054 31ST STREET NW 2ND FLOOR
WASHINGTON DC 20007 US

MICHAEL F MCBRIDE
LEBOEUF LAMB GREENE & MACRAE
1875 CONNECTICUT AVENUE NW
WASHINGTON DC 20009-5728 US

HAROLD P QUINN JR
NATIONAL MINING ASSOCIATON
1130 17TH STREET NW
WASHINGTON DC 20036 US

PAUL D COLEMAN
HOPPEL MAYER & COLEMAN
1000 CONNECTICUT AVENUE NW SUITE 400
WASHINGTON DC 20036 US

HELEN M. COUSINEAU
CARLOS RODRIGUEZ & ASSOCIATES
1710 RHODE ISLAND AVENUE, NW
WASHINGTON DC 20036 US

JOHN D HEFFNER
REA CROSS & AUCHINCLOSS
1707 L STREET, NW, STE 570
WASHINGTON DC 20036 US

GORDON P MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

PETER A GREENE
THOMPSON HINE FLORY
1920 N STREET N W SUITE 800
WASHINGTON DC 20036 US

DAVID H COBURN
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE NW
WASHINGTON DC 20036 US

KELVIN J DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

RICHARD S EDELMAN
O'DONNELL SCHWARTZ & ANDERSON PC
1900 L STREET NW SUITE 707
WASHINGTON DC 20036 US

EDWARD WYTKIND EXECUTIVE DIRECTOR
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO
1025 CONNECTICUT AVE NW SUITE 1005
WASHINGTON DC 20036 US

CHRISTOPHER A MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

ROBERT A WIMBISH ESQ
REA CROSS & AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

KARYN A BOOTH
THOMPHON HINE & FLORY LLP
1920 N STREET, NW & FLORY LLP
WASHINGTON DC 20036 US

KEITH G O'BRIEN
REA CROSS AND AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

FRITZ R KAHN
1920 N STREET NW 8TH FLOOR
WASHINGTON DC 20036-1601 US

FREDERIC L WOOD
THOMPSON HINE & FLORY LLP
1920 N STREET
WASHINGTON DC 20036-1601 US

ROSE-MICHELE WEINRYB
WEINER BRODSKY SIDMAN & KIDER
1300 - 19TH STREET, NW, 5TH FLOOR
WASHINGTON DC 20036-1609 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

SAMUEL M SIPE JR
STEPTOE & JOHNSON LLP
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND & CLAYMAN, PC
1625 MASSACHUSETTS AVE., NW. STE 700
WASHINGTON DC 20036-2243 US

DEBRA L WILLEN
GUERRIERI EDMOND & CLAYMAN PC
1625 MASSACHUSETTS AVENUE, N.W., STE 700
WASHINGTON DC 20036-2243 US

DONALD G AVERY
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036-3003 US

L PAT WYNNS
1050 - 17TH STREET N W SUITE 210
WASHINGTON DC 20036-5503 US

ANDREW P GOLDSTEIN
MCCARTHY, SWEENEY & HARKAWAY P.C.
2175 K STREET, NW SUITE 600
WASHINGTON DC 20037 US

JOHN M CUTLER JR
MCCARTHY SWEENEY HARKAWAY PC
2175 K STREET, NW
WASHINGTON DC 20037 US

STEVEN J KALISH
MCCARTHY SWEENEY & HARKAWAY P C
2175 K STREET NW SUITE 600
WASHINGTON DC 20037 US

DANIEL J SWEENEY
MCCARTHY SWEENEY & HARKAWAY P C
2175 K STREET NW SUITE 600
WASHINGTON DC 20037 US

JOHN L OBERDORFER
PATTON BOGGS LLP
2550 M ST NW
WASHINGTON DC 20037-1301 US

SCOTT N STONE
PATTON BOGGS L L P
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

KEITH A KLINDWORTH
U S DEPT OF AGRICULTURE
P O BOX 96456
WASHINGTON DC 20090 US

MICHAEL V DUNN
USDA
PO BOX 96456 RM 4006-SOUTH BLDG
WASH DC 20090-6456 US

EILEEN S STOMMES
U S DEPARTMENT OF AGRICULTURE
P O BOX 96456 ROOM 4006-SOUTH BUILDING
WASHINGTON DC 20090-6456 US

JUDGE JACOB LEVENTHAL, OFFICE OF HEARINGS
FEDERAL ENERGY REGULATORY COMMISSION
888 - 1ST ST, N.E. STE 11F
WASHINGTON DC 20426 US

RICHARD E SANDERSON
OFFICE OF FEDERAL ACTIVITIES
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HON CHARLES SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON DANIEL PATRICK MOYNIHAN
UNITED STATES SENATE
WASINGTON DC 20510 US

HON JOHN BREAUX
UNITED STATER SENATE
WASHINGTON DC 20510 US

HON CHARLES E SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. BARBARA A. MIKULSKI
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE BOB GRAHAM
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHARLES ROBB
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH BIDEN, JR.
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH I LIEBERMAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON WILLIAM V. ROTH JR
U S SENATE
WASHINGTON DC 20510-0001 US

HON. JOHN W. WARNER
US SENATE
WASHINGTON DC 20510-0001 US

HON CHRISTOPHER J DODD
UNITED STATES SENATE
WASH DC 20510-0702 US

HONORABLE DANIEL P. MOYNIHAN
UNITED STATE SENATE
WASHINGTON DC 20510-0903 US

HONORABLE CONNIE MACK
UNITED STATES SENATE
WASHINGTON DC 20510-0904 US

HONORABLE J ROBERT KERREY
UNITED STATES SENATE
WASHIGTON DC 20510-2704 US

HON MIKE DEWINE
UNITED STATES SENATE
WASHINGTON DC 20510-3503 US

HON ARLEN SPECTER
UNITED STATES SENATE
WASHINGTON DC 20510-3802 US

HON RICK SANTORUM
UNITED STATES SENATE
WASHINGTON DC 20510-3804 US

HONORABLE JOHN H. CHAFEE
UNITED STATES SENATE
WASHINGTON DC 20510-3902 US

HON JACK REED
U S SENATE
WASHINGTON DC 20510-3903 US

HONORABLE ROBERT BYRD
UNITED STATES SENATE
WASHINGTON DC 20510-6025 US

HONORABLE JOHN J LAFALCE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. BUD SHUSTER
ATTN: MIKE RICK
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NANCY JOHNSON
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAM GEJDENSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. TOM BLILEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB CLEMENT
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JAMES L. OBERSTAR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JOHN J. DUNCAN
U S HOUSE OF REPRESENTATIVESS
WASHINGTON DC 20515 US

HONORABLE PAUL E. GILLMOR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MIKE DOYLE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN D. DINGELL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BENJAMIN A. GILMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM O. LIPINSKI
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETER J. VISCLOSKY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM J. COYNE
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MAJOR R. OWENS
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JAMES TRAFICANT JR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ROBERT MENENDEZ
U S HOUSE OF REPRESENTATIVES
WASH DC 20515 US

HON MARCY KAPTUR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK MASCARA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL FORBES
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ELIOT L ENGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON GARY ACKERMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JERROLD NADLER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ROBERT W. NEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB WEYGAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TED STRICKLAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON DENNIS J KUCINICH
UNITED STATES HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HON NYDIA M VELAZQUEZ
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ED TOWNS
U. S. HOUSE OR REPRESENTATIVES
WASHINGTON DC 20515 US

HON LOUISE M SLAUGHTER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHRISTOPHER SHAYS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHARLES RANGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL MCNULTY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAMES MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CAROLYN B MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NITA LOWEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MAURICE HINCHEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHIP PICKERING
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JESSE L. JACKSON, JR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LUIS GUTIERREZ
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DANNY K DAVIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON RALPH REGULA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON SHERROD BROWN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ED BRYANT
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. STEVE LATOURETTE
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON BOB WISE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON THOMAS C SAWYER
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAXBY CHAMBLISS,
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TILLIE K FOWLER
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ROD R BLAGOJEVICH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTO DC 20515-1305 US

HON JULIA CARSON
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1410 US

HONORABLE JAMES A. BARCIA
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2205 US

HON JACK QUINN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3230 US

HONORABLE RICHARD BURR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3305 US

HONORABLE TOM DAVIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4611 US

HONORABLE BOBBY L. RUSH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-9997 US

MICHAEL P HARMONIS
DEPARTMENT OF JUSTICE
325 SEVENTH STREET, NW
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
US DEPARTMENT OF TRANSPORTATION
400 SEVENTH STREET SW ROOM 4102 C-30
WASHINGTON DC 20590 US

JOSEPH R POMPONIO
FEDERAL RAILROAD ADMIN
1120 VERMONT AVE NW RCC-20
WASHINGTON DC 20590 US

JOLENE MOLITORIS, ADMN.
FEDERAL RAILROAD ADMNS.
400 7TH STREET SW
WASHINGTON DC 20590 US

DAVID G ABRAHAM
SUITE 400W
7315 WISCONSIN AVENUE
BETHESDA MD 20814 US

MITCHELL M KRAUS
TRANSPORTATION COMMUNICATIONS INTERNATIONAL U
3 RESEARCH PLACE
ROCKVILLE MD 20850-3279 US

JOHN M ROBINSON
9616 OLD SPRING ROAD
KENSINGTON MD 20895-3124 US

WILLIAM W WHITEHURST JR
W W WHITEHURST & ASSOCIATES INC
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030-1711 US

JOHN HOY
P O BOX 117
GLEN BURNIE MD 21060 US

ROBERT J WILL
UNITED TRANSPORTATION UNION
4134 GRAVE RUN RD
MANCHESTER MD 21102 US

JOHN F WING CHAIRMAN
CITIZENS ADVISORY COMMITTEE
601 NORTH HOWARD STREET
BALTIMOTE MD 21201 US

LINDA A JANEY J D
MARYLAND OFFICE OF PLANNING
301 WEST PRESTON STREET
BALTIMORE MD 21201-2365 US

DON E SANCHEZ
CHESAPEAKE SPECIALTY PRODUCTS INC
5055 NORTH POINT BOULEVARD
BALTIMORE MD 21219 US

CHARLES M CHADWICK
MARYLAND MIDLAND RAILWAY INC
P O BOX 1000
UNION BRIDGE MD 21791 US

HENRY E. SEATON
7700 LEESBURG PIKE, STE 201
FALLS CHURCH VA 22043 US

PETER Q NYCE JR
U S DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

THOMAS E SCHICK
CHEMICAL MANUF ASSOC
1300 WILSON BOULEVARD
ARLINGTON VA 22209 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

JENNIFER BRAUN
JACKSON & JESSUP
P O BOX 1240
3426 NORTH WASHINGTON BOULEVARD
ARLINGTON VA 22210 US

FRANCIS G MCKENNA
ANDERSON & PENDLETON
206 N WASHINGTON STREET SUITE 330
ALEXANDRIA VA 22314 US

KENNETH E SIEGEL
AMERICAN TRUCKING ASSOC INC
2200 MILL ROAD
ALEXANDRIA VA 22314-4677 US

ROBERT E MARTINEZ
VA SECRETARY OF TRANSPORTAITON
P. O. BOX 1475
RICHMOND VA 23218 US

HONORABLE GEORGE ALLEN
GOVERNOR, COMMONWEALTH OF VIRGINIA
STATE CAPITOL
RICHMOND VA 23219 US

JOHN W SNOW
CHAIRMAN PRESIDENT AND CHIEF EXECTIVE OFFICER
P O BOX 85629
RICHMOND VA 23285-5629 US

DAVID A SHELTON
NORFOLK SOUTHERN
THREE COMMERCIAL PLACE
NORFOLK VA 23510 US

GEORGE A ASPATORE
NORFOLK SOUTHERN CORP
THREE COMMEMERCIAL PLACE
NORFOLK VA 23510 US

JAMES A HIXON
SENIOR VICE PRESIDDENT EMPLOYEE RELATIONS NOR
THREE COMMERCIAL PLACE
NORFFFOLK VA 23510-2191 US

L P KING JR
GENERAL CHAIRPERSON UTU
145 CAMPBELL AVE SW STE 207
ROANOKE VA 24011 US

HONORABLE JOHN WARNER
UNITED STATES SENATE
235 FEDERAL BUILDING
ABINGDON VA 24210-0887 US

VAUGHN R GROVES
PITTSTON COAL COMPANY
PO BOX 5100
LEBANON VA 24266 US

TERRELL ELLIS
CAEZWV
P O BOX 176
CLAY WV 25043 US

R K SARGENT
GENERAL CHAIRPERSON UTU
1319 CHESTNUT STREET
KENOVA WV 25530 US

WILLIAM T BRIGHT
P O BOX 149
200 GREENBRIER ROAD
SUMMERSVILLE WV 26651 US

FRANK N JORGENSEN
THE ELK RIVER RAILROAD INC
P O BOX 460
SUMMERSVILLE WV 26651 US

SCOTT M SAYLOR
NORTH CAROLINA RAILROAD COMPANY
3200 ATLANTIC AV STE 110
RALIEGH NC 27604-1640 US

E NORRIS TOLSON
NC DEPT OF TRANSPORTATION
P O BOX 25201
1 S. WILINGTON STREET
RALEIGH NC 27611 US

J R BARBEE
GENERAL CHAIRPERSON UTU
441 N LOUISIANA AVE STE Q
ASHEVILLE NC 28806-3791 US

HONORABLE DAVID M BEASLEY
GOVERNOR
P. O. BOX 11369
COLUMBIA SC 29211 US

J RANDALL EVANS
500 WATER STREET (J150)
JACKSONVILLE FL 32202 US

FRED R BIRKHOLZ
CSX TRANSPORTATION LAW DEPT - J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

ROBERT V ALLEN
CSX TRANSPORTATION
500 WATER STREET J305
JACKSONVILLE FL 32202 US

T J STEPHENSON
CSX TRANSPORTATION INC
500 WATER STREET (J407)
JACKSONVILLE FL 32202 US

CARL A GERHARDSTEIN
CSX TRANSPORTATION RISK MGMT
500 WATER STREET-J275
JACKSONVILLE FL 32202 US

DANFORD L PRICE
500 WATER STREET
JACKSONVILLE FL 32202 US

BOB HAULTER
CSX TRANSPORTATION INC
500 WATER STREET (J120)
JACKSONVILLE FL 32202 US

PAUL R. HITCHCOCK
CSX TRANSPORTATION LAW DEPARTMENT
500 WATER STREET SC J-150
JACKSONVILLE FL 32202 US

JOHN W. HUMES, JR.
CSX TRANSPORTATION
SPEED CODE J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

CHARLES M ROSENBERGER
CSX TRANSPORTATION
500 WATER STREET - J150
JACKSONVILLE FL 32202 US

J L RODGERS
GENERAL CHAIRMAN UTU
480 OSCEOLA AVENUE
JACKSONVILLE FL 32250 US

J T REED
GENERAL CHAIRPERSON UTU
7785 BAYMEADOWS WAY STE 109
JACKSONVILLE FL 32256 US

PHILLIP L BELL
ERIE LACKAWANNA RAILROAD CO
PO BOX 1482
TALLAHASSEE FL 32302 US

JAMES L BELCHER
EASTMAN CHEMICAL COMPANY
PO BOX 431
KINGSPORT TN 37662 US

WILLIAM L OSTEEN
ASSOCIATE GENERAL COUNSEL TVA
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE KIRK FORDICE, GOVERNOR
STATE OF MISSISSIPPI
P O BOX 139
JACKSON MS 39205 US

HONORABLE PAUL E. PATTON
GOVERNOR
700 CAPITOL AVENUE, STE. 100
FRANKFORT KY 40601 US

F R PICKELL
GENERAL CHAIRPERSON UTU
6797 NORTH HIGH ST STE 108
WORTHINGTON OH 43085 US

THOMAS M O'LEARY
OHIO RAIL DEVELOPMENT COMMISSION
50 W BROAD STREET 15TH FLOOR
COLUMBUS OH 43215 US

HONORABLE DEBORAH PRYCE
U. S. HOUSE OF REPRESENTATIVES
500 SOUTH FRONT STREET, ROOM 1130
COLUMBUS OH 43215 US

DOREEN C JOHNSON, CHIEF ANTITRUST SECTION
OHIO ATTY GENERAL OFFICE
140 EAST TOWN STREET, FIRST FLOOR
COLUMBUS OH 43215-6001 US

JAMES R JACOBS
JACOBS INDUSTRIES
2 QUARRY LANE
STONY RIDGE OH 43463 US

DAVID CHAPMAN
LAFARGE LIME OHIO INC
P O BOX 128
659 ANDERSON ROAD
WOODVILLE OH 43469-0128 US

ROBERT J COOPER
GENERAL CHAIRPERSON UTU
1238 CASS ROAD
MAUMEE OH 43537 US

ROBERT E GREENLESE
TOLEDO-LUCAS COUNTY PORT AUTHORITY
1 MARITIME PLAZA SUITE 700
TOLEDO OH 43604 US

RON MARQUARDT
LOCAL UNION 1810 UMWA
R D #2
RAYLAND OH 43943 US

MAYOR VINCENT M URBIN
150 AVON BELDEN RD
AVON LAKE OH 44012 US

BARBARA O'KEEFE
VILLAGE OF WELLINGTON
115 WILLARD MEMORIAL SQ
WELLINGTON OH 44090 US

ANITA R BRINDZA
THE ONE FIFTEEN HUNDRED BUILDING
11500 FRANKLIN BLVD SUITE 104
CLEVELAND OH 44102 US

C L LITTLE
INTERNATIONAL PRESIDENT UTU
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CLARENCE MONIN INTERNATIONAL PRES
BROTHERHOOD OF LOCOMTIVE ENGINEERS MEZZANINE
1370 ONTARIO STREET
CLEVELAND OH 44113 US

DAVID ROLOFF
GOLDSTEIN & ROLOFF
526 SUPERIOR AVENUE EAST SUITE 1440
CLEVELAND OH 44114 US

C D WINEBRENNER
GENERAL CHAIRPERSON UTU
27801 EUCLID AVENUE RM 200
EUCLID OH 44132 US

SYLVIA R. CHINN-LEVY
NEFCO
969 COPLEY ROAD
AKRON OH 44320 US

RANDALL C. HUNT
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO.
P O BOX 36963
4775 MUNSON ST NW
CANTON OH 44735-6963 US

ROBERT E MURRAY
OHIO VALLEY COAL CO
56854 PLEASANT RIDGE ROAD
ALLEDONIA OH 43902 US

CLARENCE TURNQUIST
INTERNATIONAL LONGSHOREMEN S ASSOCIATION
C/O 2125 TRYON ROAD
ASHTABULA OH 44004 US

CHARLES S HESSE
CHARLES HESSE ASSOCIATES
7777 BAINBRIDGE ROAD
CHAGRIN FALLS OH 44023-2124 US

COLETTA MCNAMEE SR
CUDELL IMPROVEMENT INC
11500 FRANKLIN BLVD STE 104
CLEVELAND OH 44102 US

DANIEL R ELLIOTT III
ASST GENERAL COUNSEL UNITED TRANSPORTATION UN
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CLINTON J MILLER III
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CHRISTOPHER C MCCRACKEN
ULMER & BERNE LLP
1300 EAST NINTH STREET SUITE 900
CLEVELAND OH 44114 US

INAJO DAVIS CHAPPELL
ASHTA CHEMICALS INC
1300 EAST NINETH STREET SUITE 900
CLEVELAND OH 44114-1538 US

CHARLES ZUMKEHR
ROETZEL & ANDRESS CO LPA
75 EAST MARKET STREET
AKRON OH 44308 US

CHARLES E ALLENBAUGH JR
EAST OHIO STONE COMPANY
2000 W BESSON ST
ALLIANCE OH 44601 US

D G STRUNK JR
GENERAL CHAIRPERSON UTU
817 KILBOURNE STREET
BELLEVUE OH 44811 US

R A GRICE
GENERAL CHAIRPERSON UTU
817 KILBOURNE ST
BELLEVUE OH 44811-9431 US

FAY D DUPUIS
CITY OF CINCINNATI
801 PLUM STREET
CINCINNATI OH 45202 US

THOMAS R RYDMAN PRESIDENT
INDIAN CREEK RAILROAD COMPANY
3905 W 600 NORTH
ANDERSON IN 46011 US

MICHAEL P MAXWELL JR
MCHALE, COOK & WELCH
320 N MERIDIAN ST 1100 CHAMBER OF COMMERCE BL
INDIANAPOLIS IN 46204 US

MICHAEL CONNELLY
CITY OF EAST CHICAGO
4525 INDIANAPOLIS BLVD
EAST CHICAGO IN 46312 US

HONORABLE PETER J. VISCLOSKY
U. S. HOUSE OF REPRESENTATIVES
215 WEST 25TH AVENUE
GARY IN 46408 US

CHRISTOPHER J BURGER, PRESIDENT
CENTRAL RAILROAD COMPANY OF INDIANAPOLIS
PO BOX 554
KOKOMO IN 46903-0554 US

NICOLE HARVEY
THE DOW CHEMICAL COMPANY
2020 DOW CENTER
MIDLAND MI 48674 US

LARRY B KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

T SCOTT BANNISTER
T SCOTT BANNISTER AND ASSOCIATES
1300 DES MOINES BLDG 405 SIXTH AVENUE
DES MOINES IA 50309 US

LEO J WASESCHA
GOLD MEDAL DIVISON - GENERAL MILLS OPERATION
P O BOX 1113
NUMBER ONE GENERAL MILLS BULEVARD
MINNEAPOLIS MN 55440 US

RICHARD E KERTH
CHAMPION INTERNATIONAL CORPORATION
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

ROBERT EDWARDS
EASTERN TRANSPORT AND LOGISTICS
1109 LANETTE DRIVE
CINCINNATI OH 45230 US

F RONALDS WALKER
CITIZENS GAS & COKE UTILITY
2020 N MERIDIAN STREET
INDIANAPOLIS IN 46202-1393 US

J PATRICK LATZ
HEAVY LIFT CARGO SYSTEM
PO BOX 51451
INDIANAPOLIS IN 46251-0451 US

HAMILTON L CARMOUCHE, CORPORATION COUNSEL
CITY OF GARY
401 BROADWAY 4TH FLOOR
GARY IN 46402 US

CARL FELLER
DEKALB AGRA INC
P. O. BOX 127
4743 COUNTY ROAD 28
WATERLOO IN 46793-0127 US

WILLIAM A BON, GENERAL COUNSEL
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
26555 EVERGREEN ROAD SUITE 200
SOUTHFIELD MI 48076 US

JAMES E SHEPHERD
TUSCOLA & SAGINAW BAY
PO BOX 550
OWOSSO MI 48867-0550 US

HON JOHN ENGLER
OFFICE OF THE GOVERNOR
P O BOX 30013
LANSING MI 48933 US

BYRON D OLSEN
FELHABER LARSON FENLON & VOGT PA
601 SECOND AVENUE SOUTH SUITE 4200
MINNEAPOLIS MN 55401-4302 US

GERALD J. VINCI
PRAIRIE GROUP
P. O.BOX 1123
7601 WEST 79TH STREET
BRIDGEVIEW IL 60455 US

RICHARD A GAVRIL
16700 GENTRY LANE NO 104
TINLEY PARK IL 60477 US

CHRISTINE H. ROSSO
IL ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FLOOR
CHICAGO IL 60601 US

WILLIAM C SIPPEL
FLETCHER & SIPPEL LLC
180 N STETSON AVE SUITE 3125
CHICAGO IL 60601-6721 US

RICHARD F. FRIEDMAN, ESQ
EARL L NEAL & ASSOCIATES
111 WEST WASHINGTON STREET, STE 1700
CHICAGO IL 60602-2766 US

ROGER A SERPE
175 WEST JACKSON BOULEVARD SUITE 1460
CHICAGO IL 60604 US

THOMAS F MCFARLAND JR
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE SUITE 1330
CHICAGO IL 60606-2902 US

CHARLES D BOLAM
UNITED TRANSPORTATION UNION
1400-20TH STREET
GRANITE CITY IL 62040 US

MERRILL L TRAVIS
ILLINOIS DEPT OF TRANSPORTATION
2300 S DIRKSEN PARKWAY RM 302
SPRINGFIELD IL 62764 US

JOHN JAY ROSACKER
KS DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

HENRY T DART
PLAINTIFF MANGEMENT COMMITTEE
609 EAST GIBSON STREET
COVINGTON LA 70433 US

DENNIS A. GUTH
WEST LAKE GROUP
2801 POST OAK BLVD
HOUSTON TX 77056 US

EDWARD WASHINGTON, II
CHIEF, PUBLIC UTILITIES BUREAU, ILL ATTORNEY
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

THOMAS J LITWILER
FLETCHER & SIPPEL LLC
180 NORTH STETSON AVENUE SUITE 3125 TWO PRUDE
CHICAGO IL 60601-6721 US

SANDRA J DEARDEN
MDCO TRANSPORTATION MANAGEMENT LTD
166 WEST WASHINGTON SUITE 700
CHICAGO IL 60602 US

EDWARD C MCCARTHY
INLAND STEEL INDUSTRIES INC
30 WEST MONROE STREET
CHICAGO IL 60603 US

SHELDON A ZABEL
SCHIFF HARDIN & WAITE
7200 SEARS TOWER
CHICAGO IL 60606 US

MYLES L TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

SCOTT A RONEY
ARCHER DANIELS MIDLAND COMPANY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

IAN MUIR
BUNGE CORPORATION
P O BOX 28500
ST LOUIS MO 63146 US

MR GEORGE VAN HAVER
2340 SOUTH 35TH STREET
OMAHA NE 68105 US

MIKE SPAHIS
FINA OIL & CHEMICAL CO
6000 LEGACY DRIVE
PLANO TX 75024-3601 US

DAVID L HALL
COMMONWEALTH CONSULTING ASSOCIATES
13103 FM 1960 WEST SUITE 204
HOUSTON TX 77065-4069 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
P O BOX 2583
1221 MCKINNEY STREET SUITE 1600
HOUSTON TX 77252-2583 US

STEVE M COULTER
EXXON COMPANY USA
PO BOX 3272
HOUSTON TX 77253-3272 US

MONTY L PARKER SR
CMC STEEL GROUP
P O BOX 911
SEGUIN TX 78156-0911 US

BRAD F HUSTON
CYPRUS AMAX COAL SALES CORP
9100 E MINERAL CIR
MILFORD CO 80112-3401 US

STEPHEN M UTHOFF
CONIGLIO & UTHOFF
60 ELM AVENUE, CONIGLIO PROFESSIONAL BLDG
LONG BEACH CA 90802-4910 US

RICHARD WELSH
NARPO
50-505 GRAND TRAVERSE
LA QUINTA CA 92253 US

JOHN D FITZGERALD
UTU, GENERAL CHAIRPERSON
400 E EVERGREEN BLVD STE 217
VANCOUVER WA 98660-3264 US

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30630 SERVICE DATE - LATE RELEASE NOVEMBER 19, 1999

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. 69)

RESPONSIVE APPLICATION — STATE OF NEW YORK, BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION, AND THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

Decision No. 134

Decided: November 18, 1999

This decision dismisses, at the parties' request, a petition asking that the Board revisit the conditions granting trackage rights that permit Canadian Pacific Railway Company and its affiliates (collectively, CP) to operate over certain lines now owned by CSX Corporation and CSX Transportation, Inc. (collectively, CSX), in order to serve shippers in the New York City area. The decision relates to the conditions that the Board imposed in approving the "CSX/NS/Conrail" transaction in its Decision No. 89, served July 23, 1998.[1]

In 1998, the Board approved a proposal under which the rail assets of Conrail were taken over by CSX and NS. The original proposal that the private parties negotiated among themselves divided Conrail's assets in a way that enhanced competition in several respects. Additionally, in approving the transaction, the Board imposed conditions that mitigated potential competitive harm and provided other public benefits.

One of these conditions made possible new competitive service for many New York City shippers and receivers that could formerly receive rail service only from Conrail. To permit that new competitive service, the Board granted CP trackage rights over the lines of CSX from Albany, NY, to Oak Point Yard in Bronx, NY. These Board-imposed trackage rights made competitive rail service available to these shippers for the first time since the creation of Conrail more than two decades ago. To ensure that its conditions did not contribute to an unsafe, inefficient, or operationally infeasible railroad operating environment in the congested New York City area, the

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[1] The parties to that transaction were CSX; Norfolk Southern Corporation and Norfolk Southern Railway Company, and their wholly owned subsidiaries (collectively, NS); and Conrail Inc. and Consolidated Rail Corporation, and their wholly owned subsidiaries (collectively, Conrail).

Board required CP to serve its new shippers through a cost-based switching service performed by CSX into and out of Oak Point Yard, rather than having CP itself also operate trains throughout this area.

A dispute subsequently arose over two issues: whether the conditions should be construed as permitting CP to handle traffic to or from Harlem River Yard directly, and whether the cost-based switching service that CSX was required to provide for CP at Oak Point Yard be construed as including certain traffic that moves through a CSX transload facility. After CP brought the matter to the Board for resolution, however, the parties indicated that they were engaging in negotiations in an effort to resolve the issues privately, and asked that Board action be withheld to permit them to pursue negotiations. In a joint motion filed by CP and CSX on November 4, 1999, the parties indicated that they had in fact resolved their differences privately, and requested dismissal of CP's petition without prejudice. The motion will be granted and the petition will be dismissed.

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

It is ordered:

1. The joint motion is granted and CP's petition is dismissed without prejudice.

2. This decision is effective on the date of service.

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

Vernon A. Williams

Vernon A. Williams
Secretary

STEPHEN M FONTAINE
MASSACHUSETTS CENTRAL RAILROAD CORPORATION
ONE WILBRAHAM STREET
PALMER MA 01069 US

JAMES E HOWARD
90 CANAL STREET
BOSTON MA 02114 US

JOHN D CIRAME, ASSISTANT SECRETARY
COMMONWEALTH OF MASS. EXEC. OFFICE OF TRANSPT
10 PARK PLAZA ROOM 3170
BOSTON MA 02116-3969 US

HON. EDWARD M KENNEDY
UNITES STATES SENATE
2400 JOHN F KENNEDY FEDERAL BLDG
BOSTON MA 02203 US

WILLIAM D ANKNER PHD
R I DEPT OF TRANSPORTATION
TWO CAPITOL HILL
PROVIDENCE RI 02903 US

JOHN R NADOLNY
14 AVIATION AVENUE
PORTSMOUTH NH 03801 US

ROBERT D ELDER
MAINE DEPARTMENT OF TRANSPORTATION
16 STATE HOUSE STATION
AUGUSTA ME 04333 US

KAREN E SONGHURST
STATE OF VERMONT
133 STATE STREET
MONTPELLIER VT 05633-5001 US

JAMES F SULLIVAN
CT DEPT OF TRANSPORTATION
P O BOX 317546
2800 BERLIN TURNPIKE
NEWINGTON CT 06131 US

EDWARD J RODRIGUEZ
P.O. BOX 298
67 MAIN STREET
CENTERBROOK CT 06409 US

RICHARD C CARPENTER
SOUTHWESTERN REGIONAL PLANNING AGENCY
1 SELLECK STREET SUITE 210
EAST NORWALK CT 06855 US

MICHAEL E STRICKLAND
NYK LINE (NORTH AMERICA) INC, SENIOR VICE PRE
300 LIGHTING WAY
SECAUCUS NJ 07094-1588 US

J WILLIAM VAN DYKE
NJ TRANSPORTATION PLANNING AUTHORITY
ONE NEWARK CENTER 17TH FLOOR
NEWARK NJ 07102 US

EDWARD LLOYD
RUTGERS ENVIRONMENTAL LAW CLINIC
15 WASHINGTON STREET
NEWARK NJ 07102 US

HONORABLE ROBERT G. TORRICELLI
UNITED STATES SENATE
1 RIVER FRONT PLAZA, 3RD FLOOR
NEWARK NJ 07102 US

PHILIP SIDO
UNION CAMP CORPORATION
1600 VALLEY ROAD
WAYNE NJ 07470 US

MARTIN T DURKIN ESQ
DURKIN & BOGGIA ESQS
PO BOX 378
71 MT VERNON STREET
RIDGEFIELD PARK NJ 07660 US

CRAIG CURRY
1000 HOWARD BOULEVARD
MOUNT LAUREL NJ 08054 US

TIMOTHY G CHELIUS
18 N EAST AVENUE
VINELAND NJ 08360 US

LAWRENCE PEPPER, JR
GRUCCIO PEPPER
817 EAST LANDS AVE
VINELAND NJ 08360 US

JOHN F. MCHUGH
MCHUGH & SHERMAN
20 EXCHANGE PLACE 51ST FLOOR
NEW YORK NY 10005 US

ANTHONY BOTTALICO
UTU
420 LEXINGTON AVENUE ROOM 458-460
NEW YORK NY 10017 US

WALTER E ZULLIG JR
METRO-NORTH COMMUTER RAILROAD COMPANY
347 MADISON AVE
NEW YORK NY 10017-3706 US

ANTHONY P. SEMANCIK
347 MADISON AVENUE
NEW YORK NY 10017-3706 US

JAMES W HARRIS
THE METROPOLITIAN PLANNING ORGANIZATION
1 WORLD TRADE CENTER STE 82 EAST
NEW YORK NY 10048-0043 US

HUGH H. WELSH
LAW DEPT., SUITE 67E
ONE WORLD TRADE CENTER
NEW YORK NY 10048-0202 US

R. LAWRENCE MCCAFFREY, JR.
NEW YORK & ATLANTIC RAILWAY
405 LEXINGTON AVENUE 50TH FLOOR
NEW YORK NY 10174 US

SAMUEL J NASCA
UTU STATE LEGISLATIVE DIRECTOR
35 FULLER ROAD SUITE 205
ALBANY NY 12205 US

DANIEL B. WALSH
BUSINESS COUNCIL OF NEW YORK STATE,INC.
152 WASHINGTON AVENUE
ALBANY NY 12210 US

DIANE SEITZ
CENTRAL HUDSON GAS & ELECTRIC CORP
284 SOUTH AVENUE
POUGHKEEPSIE NY 12601 US

IRWIN L. DAVIS
1900 STATE TOWER BLDG.
SYRACUSE NY 13202 US

ANGELO J CHICK JR, LOCAL CHAIRMAN
P O BOX 908
48398 OLD GOOSE BAY ROAD
REDWOOD NY 13679 US

GARY EDWARDS
SOMERSET RAILROAD
7725 LAKE ROAD
BARKER NY 14012 US

SHEILA MECK HYDE
CITY HALL
342 CENTRAL AVENUE
DUNKIRK NY 14048 US

IRVING J RUBIN
P O BOX 243
YOUNGSTOWN NY 14174 US

JOHN F COLLINS
COLLINS ,COLLINS, & KANTOR PC
267 NORTH STREET
BUFFALO NY 14201 US

R W GODWIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
810 ABBOTT ROAD SUITE 200
BUFFALO NY 14220 US

ERNEST J IERARDI
NIXON HARGRAVE DEVANS DOYLE LLP
PO BOX 1051
CLINTON SQUARE
ROCHESTER NY 14603-1051 US

H DOUGLAS MIDKIFF
GENESEE TRANSPORTATION COUNCIL
65 WEST BROAD ST STE 101
ROCHESTER NY 14614-2210 US

JEANNE WALDOCK
107 GRANT COURT
ORLEAN NY 14760 US

DAVID W. DONLEY
3361 STAFFORD ST
PITTSBURGH PA 15204-1441 US

HENRY M. WICK, JR.
WICK, STREIFF, ET AL
1450 TWO CHATHAM CENTER
PITTSBURGH PA 15219 US

JOHN A. VUONO
VUONO & GRAY
2310 GRANT BUILDING
PITTSBURGH PA 15219 US

R J HENEFELD
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

M E PETRUCCELLI
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

D W DUNLEVY
STATE LEGISLATIVE DIRECTOR UTU
230 STATE STREET, PA AFL-CIO BLDG 2ND FLOOR
HARRISBURG PA 17101 US

HONORABLE THOMAS J RIDGE
GOVERNOR, COMMONWEALTH OF PENNSYLVANIA
225 MAIN CAPITOL BUILDING
HARRISBURG PA 17120 US

BELNAP FREEMAN
BELKNAP FREEMAN
119 HICKORY LANE
ROSEMONT PA 19010 US

JOHN J GROCKI
GRA INC
115 WEST AV ONE JENKINTOWN STA
JENKINTOWN PA 19046 US

JONATHAN M BRODER
CONSOLIDATED RAIL CORP
PO BOX 41416
2001 MARKET STREET 16-A
PHILADELPHIA PA 19101-1416 US

WILLIAM R THOMPSON
CITY OF PHILADELPHIA LAW DEPT
1600 ARCH ST 10TH FLOOR
PHILADELPH PA 19103 US

DAVID BERGER
BERGER AND MONTAGUE, P. C.
1622 LOCUST ST
PHILADELPHIA PA 19103-6305 US

JOHN K. LEARY, GENERAL MANAGER
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTH
1234 MARKET STREET 5TH FLOOR
PHILADELPHIA PA 19107-3780 US

HON JOSEPH R BIDEN, JR.
UNITED STATES SENATE
844 KING STREET
WILMINGTON DE 19801 US

E C WRIGHT
RAIL TRANSPORTATION PROCUREMENT MANAGER
1007 MARKET STREET DUPONT BLDG 3100
WILMINGTON DE 19898 US

RICHARD R WILSON
1126 EIGHT AV STE 403
ALTOONA PA 16602 US

KURT W CARR
BUREAU FOR HISTORIC PRESERVATION
P O BOX 1026
HARRISBURG PA 17108-1026 US

KRISTOPHER MICHAEL KLEMICK
RR#3 BOX 101-15
JERSEY SHORE PA 17740-9309 US

D J O'CONNELL
GENERAL CHAIRPERSON UTU
410 LANCASTER AVE STE 5
HAVERFORD PA 19041 US

HARRY C BARBIN
BARBIN LAUFFER & O'CONNELL
608 HUNTINGDON PIKE
ROCKLEDGE PA 19046 US

G CRAIG SCHELTER
PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATI
2600 CENTRE SQUARE WEST 500 MARKET ST
PHILADELPHIA PA 19102 US

JOHN J EHLINGER JR
OBERMAYER REBMANN MAXWELL & HIPPEL
1617 JOHN F. KENNEDY BLVD ONE PENN CENTER-19T
PHILADELPHIA PA 19103-1895 US

JOHN J COSCIA, EXECUTIVE DIRECTOR
DELAWARE VALLEY REGIONAL PLANNING COMMISSION
111 SOUTH INDEPENDENCE MALL EAST
PHILADELPHIA PA 19106 US

ERIC M HOCKY
GOLLATZ GRIFFIN EWING
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

J E THOMAS
HERCULES INCORPORATED
1313 NORTH MARKET STREET
WILMINGTON DE 19894 US

FREDERICK H SCHRANCK
PO BOX 778
DOVER DE 19903 US

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

MARTIN W BERCOVICI
KELLER & HECKMAN, LLP
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

PETER A GILBERTSON
REGIONAL RRS OF AMERICA
122 C ST NW STE 850
WASHINGTON DC 20001 US

JAMES HOWARD
COALITION OF NORTHEASTERN GOVERNORS
400 NORTH CAPITOL STREET, SUITE 382
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

DONALD F GRIFFIN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G STREET NE STE 460
WASHINGTON DC 20002 US

DREW A HARKER
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

DENNIS G LYONS
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

PAUL REISTRUP
CSX TRANSPORTATION INC
1331 PENNSYLVANIA NW STE 500
WASH DC 20004 US

ERIC VON SALZEN
HOGAN & HARTSON
555 THIRTEENTH STREET N W
WASHINGTON DC 20004-1109 US

GEORGE W MAYO JR
HOGAN & HARTSON L L P
555 THIRTEENTH STREET NW COLUMBIA SQUARE
WASHINGTON DC 20004-1109 US

MARY GABRIELLE SPRAGUE
ARNOLD & PORTER
555 TWELTH STREET NW
WASHINGTON DC 20004-1202 US

KEVIN M SHEYS
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

L JOHN OSBORN
SONNENSCHEIN NATH & ROSENTHAL
1301 K STREET NW STE 600 EAST
WASH DC 20005 US

JOHN H BROADLEY
JENNER & BLOCK
601 13TH ST NW 12TH FL
WASHINGTON DC 20005 US

KARL MORELL
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

ALICE C TAYLOR
THE AMERICAN SHORT LINE RAILROAD ASSOCIATION
1120 G STREET, N. W., SUITE 520
WASHINGTON DC 20005 US

EDWARD WYTKIND EXECUTIVE DIRECTOR
1025 CONNECTICUT AVE NW SUITE 1005
WASHINGTON DC 20005 US

BRUNO MAESTRI
NORFOLK SOUTHERN CORPORATION
1500 K STREET SUITE 375
WASHINGTON DC 20005 US

LOUIS E GITOMER
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

ROSE-MICHELE WEINRYB
WEINER BRODSKY SIDMAN & KIDER
1350 NEW YORK AVENUE NW
WASHINGTON DC 20005 US

PAUL M LAURENZA
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

DANIEL DUFF
AMERICAN PUBLIC TRANSIT ASSOCIATION
1201 NEW YORK AV NW
WASHINGTON DC 20005 US

WILLIAM A MULLINS
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005-3314 US

FRITZ R KAHN
1100 NEW YORK AVENUE NW SUITE 750 WEST
WASHINGTON DC 20005-3934 US

KARYN A BOOTH
DONELAN, CLEARY, WOOD & MASER, P.C.
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

JOHN K MASER III
DONELAN CLEARY WOOD & MASER P C
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

WILLIAM W MILLAR
AMERICAN PUBLIC TRANSIT ASSOCIATION
1201 NEW YORK AVE., NW
WASHINGTON DC 20005-6141 US

JAMES R WEISS
PRESTON GATES ELLIS ET AL
1735 NEW YORK AVENUE NW SUITE 500
WASHINGTON DC 20006 US

SCOTT M ZIMMERMAN
ZUCKERT SCOUTT & RASENBERGER L L P
888 SEVENTEENTH STREET NW
WASHINGTON DC 20006 US

ANDREW R. PLUMP
ZUCKERT, SCOUTT & RASENBERGER. LLP
888 17TH ST., NW, STE. 600
WASHINGTON DC 20006 US

RICHARD A ALLEN
ZUCKERT SCOUT RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

CHARLES A SPITULNIK
HOPKINS & SUTTER
888 SIXTEENTH ST NW
WASH DC 20006-4103 US

CLARK EVANS DOWNS
JONES DAY REAVIS & POGUE
1450 G STREET NW
WASHINGTON DC 20005-2088 US

PAUL H LAMBOLEY
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005-3324 US

JEFFREY O MORENO
DONELAN CLEARY WOOD MASER
1100 NEW YORK AVENUE N W, SUITE 750
WASHINGTON DC 20005-3934 US

FREDERIC L WOOD
DONELAN CLEARY WOOD & MASER P C
1100 NEW YORK AVENUE NW SUITE 750
WASHINGTON DC 20005-3934 US

MARK H SIDMAN
WEINER BRODSKY,SIDMAN & KIDER
1350 NEW YORK AVE., NW., STE. 800
WASHINGTON DC 20005-4797 US

ANDREW P GOLDSTEIN
MCCARTHY SWEENEY HARKAWAY, PC
1750 PENNSYLVANIA AVE NW, STE 1105
WASHINGTON DC 20006 US

DANIEL J SWEENEY
MCCARTHY SWEENEY & HARKAWAY P C
1750 PENNSYLVANIA AVE NW STE 1105
WASHINGTON DC 20006 US

ROBERT P VOM EIGEN
HOPKINS AND SUTTER
888 16TH STREET N W STE 700
WASHINGTON DC 20006 US

ERIKA Z JONES
MAYER BROWN & PLATT
1909 K STREET, NW
WASHINGTON DC 20006-1101 US

JOHN V EDWARDS, ESQ
ZUCKERT SCOUTT ET AL
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

STEVEN J KALISH
MCARTHY SWEENEY & HARKAWAY
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006-4502 US

SHERRI LEHMAN DIRECTOR OF CONGRESSIONAL AFFAI
CORN REFINERS ASSOC
1701 PA AV NW
WASH DC 20006-5805 US

DAVID K MONROE
GALLAND, KHARASCH, GREENBERT, FELLMAN & SWIRS
1054 THIRTY-FIRST STREET NW, STE 200
WASHINGTON DC 20007 US

EDWARD D GREENBERG
GALLAND, KHARASCH, GREENBERT, FELLMAN & SWIRS
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

PAUL M DONOVAN
LAROE, WINN, MOERMAN & DONOVAN
3506 IDAHO AVE NW
WASHINGTON DC 20016 US

HELEN M. COUSINEAU
CARLOS RODRIGUEZ & ASSOCIATES
1710 RHODE ISLAND AVENUE, NW
WASHINGTON DC 20036 US

PETER PFOHL
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

GORDON P MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

KELVIN J DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

CHRISTOPHER A MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

RICHARD S EDELMAN
O'DONNELL SCHWARTZ & ANDERSON PC
1900 L STREET NW SUITE 707
WASHINGTON DC 20036 US

PETER A GREENE
THOMPSON HINE FLORY
1920 N STREET N W, SUITE 800
WASHINGTON DC 20036 US

CHRISTOPHER C O'HARA
BRICKFIELD BURCHETTE & RITTS PC
1025 THOMAS JEFFERSON ST NW EIGHTH FLOOR
WASHINGTON DC 20007 US

ROBERT G. SZABO
V.NESS FELDMAN
1050 THO JEFFERSON STREET,NW
WASHINGTON DC 20007 US

MICHAEL F MCBRIDE
LEBOEUF LAMB GREENE & MACRAE
1875 CONNECTICUT AVENUE NW
WASHINGTON DC 20009-5728 US

STEPHEN H BROWN
VORYS SATER SEYMOUR AND PEASE
1828 L STREET N W
WASHINGTON DC 20036 US

HAROLD P QUINN, JR
NATIONAL MINING ASSOCIATON
1130 17TH STREET NW
WASHINGTON DC 20036 US

JOHN D HEFFNER
REA CROSS & AUCHINCLOSS
1707 L STREET, NW, STE 570
WASHINGTON DC 20036 US

DAVID H COBURN
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE NW
WASHINGTON DC 20036 US

KEITH G O'BRIEN
REA CROSS AND AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

ROBERT A WIMBISH ESQ
REA CROSS & AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

JOHN M CUTLER JR
MCCARTHY SWEENEY HARKAWAY PC
1750 PENNSYLVANIA AVE N W SUITE 1105
WASHINGTON DC 20036 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

SAMUEL M SIPE JR
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND & CLAYMAN, PC
1625 MASSACHUSETTS AVE., NW. STE 700
WASHINGTON DC 20036-2243 US

DEBRA L WILLEN
GUERRIERI EDMOND & CLAYMAN PC
1625 MASSACHUSETTS AVENUE, N.W., STE 700
WASHINGTON DC 20036-2243 US

DONALD G AVERY
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036-3003 US

WILLIAM L SLOVER
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036-3003 US

L PAT WYNNS
SUITE 210
1050 - 17TH STREET N W
WASHINGTON DC 20036-5503 US

JOHN L OBERDORFER
PATTON BOGGS LLP
2550 M ST NW
WASHINGTON DC 20037-1301 US

SCOTT N STONE
PATTON BOGGS L L P
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

ARVID E ROACH II
COVINGTON & BURLING
PO BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

KEITH A KLINDWORTH
U S DEPT OF AGRICULTURE
P O BOX 96456
WASHINGTON DC 20090 US

EILEEN S STOMMES
U S DEPARTMENT OF AGRICULTURE
P O BOX 96456 ROOM 4006-SOUTH BUILDING
WASHINGTON DC 20090-6456 US

JUDGE JACOB LEVENTHAL, OFFICE OF HEARINGS
FEDERAL ENERGY REGULATORY COMMISSION
888 - 1ST ST, N.E. STE 11F
WASHINGTON DC 20426 US

RICHARD E SANDERSON
OFFICE OF FEDERAL ACTIVITIES
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HON CHARLES SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON CHARLES E SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON DANIEL PATRICK MOYNIHAN
UNITED STATES SENATE
WASINGTON DC 20510 US

HON. BARBARA A. MIKULSKI
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH BIDEN, JR.
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH I LIEBERMAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE BOB GRAHAM
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHARLES ROBB
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON WILLIAM V. ROTH JR
U S SENATE
WASHINGTON DC 20510-0001 US

HON. JOHN W. WARNER
US SENATE
WASHINGTON DC 20510-0001 US

HON CHRISTOPHER J DODD
UNITED STATES SENATE
WASH DC 20510-0702 US

HONORABLE DANIEL P. MOYNIHAN
UNITED STATE SENATE
WASHINGTON DC 20510-0903 US

HONORABLE CONNIE MACK
UNITED STATES SENATE
WASHINGTON DC 20510-0904 US

HONORABLE JOHN BREAUX
UNITED STATES SENATE
WASHINGTON DC 20510-1803 US

HONORABLE J ROBERT KERREY
UNITED STATES SENATE
WASHIGTON DC 20510-2704 US

HON MIKE DEWINE
UNITED STATES SENATE
WASHINGTON DC 20510-3503 US

HON ARLEN SPECTER
UNITED STATES SENATE
WASHINGTON DC 20510-3802 US

HON RICK SANTORUM
UNITED STATES SENATE
WASHINGTON DC 20510-3804 US

HONORABLE JOHN H. CHAFEE
UNITED STATES SENATE
WASHINGTON DC 20510-3902 US

HON JACK REED
U S SENATE
WASHINGTON DC 20510-3903 US

HONORABLE ROBERT BYRD
UNITED STATES SENATE
WASHINGTON DC 20510-6025 US

HONORABLE JOHN J LAFALCE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON BOB WISE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JOHN J. DUNCAN
U S HOUSE OF REPRESENTATIVESS
WASHINGTON DC 20515 US

HONORABLE PAUL E. GILLMOR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JAMES L. OBERSTAR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM O. LIPINSKI
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB CLEMENT
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. THOMAS C SAWYER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETER J. VISCLOSKY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN D. DINGELL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAM GEJDENSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MAJOR R. OWENS
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. BUD SHUSTER
ATTN: MIKE RICK
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MARCY KAPTUR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ELIOT L ENGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JERROLD NADLER
U S HOUSE OF REPRESENTATIVES
WASH DC 20515 US

HONORABLE BOB WEYGAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON DENNIS J KUCINICH
UNITED STATES HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HON. TOM BLILEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MIKE DOYLE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BENJAMIN A. GILMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM J. COYNE
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NANCY JOHNSON
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JAMES TRAFICANT JR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK MASCARA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON GARY ACKERMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ROBERT W. NEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TED STRICKLAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ED BRYANT
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NYDIA M VELAZQUEZ
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ED TOWNS
U. S. HOUSE OR REPRESENTATIVES
WASHINGTON DC 20515 US

HON LOUISE M SLAUGHTER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHRISTOPHER SHAYS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHARLES RANGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL MCNULTY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAMES MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CAROLYN B MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NITA LOWEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MAURICE HINCHEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL FORBES
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHIP PICKERING
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JESSE L. JACKSON, JR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LUIS GUTIERREZ
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DANNY K DAVIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON RALPH REGULA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON SHERROD BROWN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. STEVE LATOURETTE
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAXBY CHAMBLISS,
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TILLIE K FOWLER
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ROBERT MENENDEZ
U S HOUSE OF REPRESENTATIVES
WASH DC 20515 US

HONORABLE ROD R BLAGOJEVICH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTO DC 20515-1305 US

HON JULIA CARSON
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-1410 US

HONORABLE JAMES A. BARCIA
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2205 US

JAMES L OBERSTAR
RANKING DEMOCRATIC MEMBER COMMITTEE ON TRANSP
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3222 US

HON JACK QUINN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3230 US

HONORABLE RICHARD BURR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3305 US

HONORABLE TOM DAVIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4611 US

HONORABLE BOBBY L. RUSH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-9997 US

MICHAEL P HARMONIS
DEPARTMENT OF JUSTICE
325 SEVENTH STREET, NW
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
US DEPARTMENT OF TRANSPORTATION
400 SEVENTH STREET SW, ROOM 4102 C-30
WASHINGTON DC 20590 US

JOSEPH R. POMPONIO
FEDERAL RAILROAD ADMIN.
400 7TH ST SW RCC-20
WASHINGTON DC 20590 US

JOLENE MOLITORIS, ADMN.
FEDERAL RAILROAD ADMNS.
400 7TH STREET SW
WASHINGTON DC 20590 US

DAVID G ABRAHAM
SUITE 400W
7315 WISCONSIN AVENUE
BETHESDA MD 20814 US

MITCHELL M. KRAUS
TRANSPORTATION -COMMUNICATIONS INTERNATIONAL
3 RESEARCH PLACE
ROCKVILLE MD 20850 US

JOHN M ROBINSON
9616 OLD SPRING ROAD
KENSINGTON MD 20895-3124 US

WILLIAM W WHITEHURST JR
W W WHITEHURST & ASSOCIATES INC
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030-1711 US

JOHN HOY
P O BOX 117
GLEN BURNIE MD 21060 US

ROBERT J WILL
UNITED TRANSPORTATION UNION
4134 GRAVE RUN RD
MANCHESTER MD 21102 US

JOHN F WING CHAIRMAN
CITIZENS ADVISORY COMMITTEE
601 NORTH HOWARD STREET
BALTIMOTE MD 21201 US

LINDA A JANEY J D
MARYLAND OFFICE OF PLANNING
301 WEST PRESTON STREET
BALTIMORE MD 21201-2365 US

CHARLES M CHADWICK
MARYLAND MIDLAND RAILWAY INC
P O BOX 1000
UNION BRIDGE MD 21791 US

GARRET G SMITH
MOBIL OIL CORPORATION
3225 GALLOWS RD RM 8A903
FAIRFAX VA 22037-0001 US

HENRY E. SEATON
7700 LEESBURG PIKE, STE 201
FALLS CHURCH VA 22043 US

PETER Q NYCE JR
U S DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

FRANCIS G MCKENNA
ANDERSON & PENDLETON
206 N WASHINGTON STREET SUITE 330
ALEXANDRIA VA 22314 US

ROBERT E MARTINEZ
VA SECRETARY OF TRANSPORTAITON
P. O. BOX 1475
RICHMOND VA 23218 US

DAVID A SHELTON
THREE COMMERCIAL PLACE
NORFOLK VA 23510 US

L P KING JR
GENERAL CHAIRPERSON UTU
145 CAMPBELL AVE SW STE 207
ROANOKE VA 24011 US

VAUGHN R GROVES
PITTSTON COAL COMPANY
PO BOX 5100
LEBANON VA 24266 US

R K SARGENT
GENERAL CHAIRPERSON UTU
1319 CHESTNUT STREET
KENOVA WV 25530 US

FRANK N JORGENSEN
THE ELK RIVER RAILROAD INC
P O BOX 460
SUMMERSVILLE WV 26651 US

E NORRIS TOLSON
NC DEPT OF TRANSPORTATION
P O BOX 25201
1 S. WILINGTON STREET
RALEIGH NC 27611 US

HONORABLE DAVID M BEASLEY
GOVERNOR
P. O. BOX 11369
COLUMBIA SC 29211 US

THOMAS E SCHICK
CHEMICAL MANUF ASSOC
1300 WILSON BOULEVARD
ARLINGTON VA 22209 US

JENNIFER BRAUN
JACKSON & JESSUP
P O BOX 1240
3426 NORTH WASHINGTON BOULEVARD
ARLINGTON VA 22210 US

KENNETH E SIEGEL
AMERICAN TRUCKING ASSOC INC
2200 MILL ROAD
ALEXANDRIA VA 22314-4677 US

HONORABLE GEORGE ALLEN
GOVERNOR, COMMONWEALTH OF VIRGINIA
STATE CAPITOL
RICHMOND VA 23219 US

GEORGE A ASPATORE
NORFOLK SOUTHERN CORP
THREE COMMEMERCIAL PLACE
NORFOLK VA 23510 US

HONORABLE JOHN WARNER
UNITED STATES SENATE
235 FEDERAL BUILDING
ABINGDON VA 24210-0887 US

TERRELL ELLIS
CAEZWV
P O BOX 176
CLAY WV 25043 US

WILLIAM T BRIGHT
P O BOX 149
200 GREENBRIER ROAD
SUMMERSVILLE WV 26651 US

SCOTT M SAYLOR
NORTH CAROLINA RAILROAD COMPANY
3200 ATLANTIC AV STE 110
RALIEGH NC 27604-1640 US

J R BARBEE
GENERAL CHAIRPERSON UTU
441 N LOUISIANA AVE STE Q
ASHEVILLE NC 28806-3791 US

J RANDALL EVANS
500 WATER STREET (J150)
JACKSONVILLE FL 32202 US

ROBERT V ALLEN
CSX TRANSPORTATION
500 WATER STREET J305
JACKSONVILLE FL 32202 US

DANFORD L PRICE
500 WATER STREET
JACKSONVILLE FL 32202 US

PAUL R. HITCHCOCK
CSX TRANSPORTATION LAW DEPARTMENT
500 WATER STREET SC J-150
JACKSONVILLE FL 32202 US

JOHN W. HUMES, JR.
CSX TRANSPORTATION
SPEED CODE J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

J T REED
GENERAL CHAIRPERSON UTU
7785 BAYMEADOWS WAY STE 109
JACKSONVILLE FL 32256 US

JAMES L BELCHER
EASTMAN CHEMICAL COMPANY
PO BOX 431
KINGSPORT TN 37662 US

HONORABLE KIRK FORDICE, GOVERNOR
STATE OF MISSISSIPPI
P O BOX 139
JACKSON MS 39205 US

WILLIAM P HERNAN JR GENERAL CHAIRMAN
5234 JASMINE LANE
HILLIARD OH 43026-9656 US

THOMAS M O'LEARY
OHIO RAIL DEVELOPMENT COMMISSION
50 W BROAD STREET 15TH FLOOR
COLUMBUS OH 43215 US

DOREEN C JOHNSON, CHIEF ANTITRUST SECTION
OHIO ATTY GENERAL OFFICE
140 EAST TOWN STREET, FIRST FLOOR
COLUMBUS OH 43215-6001 US

DAVID CHAPMAN
LAFARGE LIME OHIO INC
P O BOX 128
659 ANDERSON ROAD
WOODVILLE OH 43469-0128 US

BOB HAULTER
CSX TRANSPORTATION INC
500 WATER STREET (J215)
JACKSONVILLE FL 32202 US

FRED R BIRKHOLZ
CSX TRANSPORTATION LAW DEPT - J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

CHARLES M ROSENBERGER
CSX TRANSPORTATION
500 WATER STREET - J150
JACKSONVILLE FL 32202 US

J L RODGERS
GENERAL CHAIRMAN UTU
480 OSCEOLA AVENUE
JACKSONVILLE FL 32250 US

PHILLIP L BELL
ERIE LACKAWANNA RAILROAD CO
PO BOX 1482
TALLAHASSEE FL 32302 US

WILLIAM L OSTEEN
ASSOCIATE GENERAL COUNSEL TVA
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE PAUL E. PATTON
GOVERNOR
700 CAPITOL AVENUE, STE. 100
FRANKFORT KY 40601 US

F R PICKELL
GENERAL CHAIRPERSON UTU
6797 NORTH HIGH ST STE 108
WORTHINGTON OH 43085 US

HONORABLE DEBORAH PRYCE
U. S. HOUSE OF REPRESENTATIVES
500 SOUTH FRONT STREET, ROOM 1130
COLUMBUS OH 43215 US

JAMES R JACOBS
JACOBS INDUSTRIES
2 QUARRY LANE
STONY RIDGE OH 43463 US

ROBERT J COOPER
GENERAL CHAIRPERSON UTU
1238 CASS ROAD
MAUMEE OH 43537 US

ROBERT E GREENLESE
TOLEDO-LUCAS COUNTY PORT AUTHORITY
1 MARITIME PLAZA SUITE 700
TOLEDO OH 43604 US

ROBERT E MURRAY
OHIO VALLEY COAL CO
56854 PLEASANT RIDGE ROAD
ALLEDONIA OH 43902 US

MAYOR VINCENT M URBIN
150 AVON BELDEN RD
AVON LAKE OH 44012 US

BARBARA O'KEEFE
VILLAGE OF WELLINGTON
115 WILLARD MEMORIAL SQ
WELLINGTON OH 44090 US

ANITA R BRINDZA
THE ONE FIFTEEN HUNDRED BUILDING
11500 FRANKLIN BLVD SUITE 104
CLEVELAND OH 44102 US

C L LITTLE
INTERNATIONAL PRESIDENT UTU
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CLARENCE MONIN INTERNATIONAL PRES
BROTHERHOOD OF LOCOMTIVE ENGINEERS MEZZANINE
1370 ONTARIO STREET
CLEVELAND OH 44113 US

DAVID ROLOFF
GOLDSTEIN & ROLOFF
526 SUPERIOR AVENUE EAST SUITE 1440
CLEVELAND OH 44114 US

DAVID J MATTY
CITY OF ROCKY RIVER
21012 HILLIARD ROAD
ROCKY RIVER OH 44116-3398 US

C D WINEBRENNER
GENERAL CHAIRPERSON UTU
27801 EUCLID AVENUE RM 200
EUCLID OH 44132 US

CHARLES ZUMKEHR
ROETZEL & ANDRESS CO LPA
75 EAST MARKET STREET
AKRON OH 44308 US

DAVID DYSARD
TMACOG
PO BOX 9508
300 CENTRAL UNION PLAZA
TOLEDO OH 43697-9508 US

RON MARQUARDT
LOCAL UNION 1810 UMWA
R D #2
RAYLAND OH 43943 US

CHARLES S HESSE
CHARLES HESSE ASSOCIATES
7777 BAINBRIDGE ROAD
CHAGRIN FALLS OH 44023-2124 US

COLETTA MCNAMEE SR
CUDELL IMPROVEMENT INC
11500 FRANKLIN BLVD STE 104
CLEVELAND OH 44102 US

DANIEL R ELLIOTT III
ASST GENERAL COUNSEL UNITED TRANSPORTATION UN
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CLINTON J MILLER III GENERAL COUNSEL
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CHRISTOPHER C MCCRACKEN
ULMER & BERNE LLP
1300 EAST NINTH STREET SUITE 900
CLEVELAND OH 44114 US

INAJO DAVIS CHAPPELL
ASHTA CHEMICALS INC
1300 EAST NINETH STREET SUITE 900
CLEVELAND OH 44114-1538 US

MICHAEL J GARRIGAN
BP CHEMICALS INC
4440 WARRENSVILLE CTR RD
CLEVELAND OH 44128 US

GARY A EBERT
CITY OF BAY VILLAGE
350 DOVER CENTER ROAD
BAY VILLAGE OH 44140 US

SYLVIA R. CHINN-LEVY
NEFCO
969 COPLEY ROAD
AKRON OH 44320 US

CHARLES E ALLENBAUGH JR
EAST OHIO STONE COMPANY
2000 W BESSON ST
ALLIANCE OH 44601 US

D G STRUNK JR
GENERAL CHAIRPERSON UTU
817 KILBOURNE STREET
BELLEVUE OH 44811 US

RICHARD E KERTH
CHAMPION INTERNATIONAL CORPORATION
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

ROBERT EDWARDS
EASTERN TRANSPORT AND LOGISTICS
1109 LANETTE DRIVE
CINCINNATI OH 45230 US

F RONALDS WALKER
CITIZENS GAS & COKE UTILITY
2020 N MERIDIAN STREET
INDIANAPOLIS IN 46202-1393 US

J PATRICK LATZ
HEAVY LIFT CARGO SYSTEM
PO BOX 51451
INDIANAPOLIS IN 46251-0451 US

HAMILTON L CARMOUCHE, CORPORATION COUNSEL
CITY OF GARY
401 BROADWAY 4TH FLOOR
GARY IN 46402 US

CARL FELLER
DEKALB AGRA INC
P. O. BOX 127
4743 COUNTY ROAD 28
WATERLOO IN 46793-0127 US

WILLIAM A BON, GENERAL COUNSEL
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
26555 EVERGREEN ROAD SUITE 200
SOUTHFIELD MI 48076 US

JAMES E SHEPHERD
TUSCOLA & SAGINAW BAY
PO BOX 550
OWOSSO MI 48867-0550 US

HON JOHN ENGLER
OFFICE OF THE GOVERNOR
P O BOX 30013
LANSING MI 48933 US

RANDALL C. HUNT
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO.
P O BOX 36963
4775 MUNSON ST NW
CANTON OH 44735-6963 US

R A GRICE
GENERAL CHAIRPERSON UTU
817 KILBOURNE ST
BELLEVUE OH 44811-9431 US

FAY D DUPUIS
CITY OF CINCINNATI
801 PLUM STREET
CINCINNATI OH 45202 US

THOMAS R RYDMAN PRESIDENT
INDIAN CREEK RAILROAD COMPANY
3905 W 600 NORTH
ANDERSON IN 46011 US

MICHAEL P MAXWELL JR
MCHALE, COOK & WELCH
320 N MERIDIAN ST 1100 CHAMBER OF COMMERCE BL
INDIANAPOLIS IN 46204 US

MICHAEL CONNELLY
CITY OF EAST CHICAGO
4525 INDIANAPOLIS BLVD
EAST CHICAGO IN 46312 US

HONORABLE PETER J. VISCLOSKY
U. S. HOUSE OF REPRESENTATIVES
215 WEST 35TH AVENUE
GARY IN 46408 US

CHRISTOPHER J BURGER, PRESIDENT
CENTRAL RAILROAD COMPANY OF INDIANAPOLIS
PO BOX 554
KOKOMO IN 46903-0554 US

NICOLE HARVEY
THE DOW CHEMICAL COMPANY
2020 DOW CENTER
MIDLAND MI 48674 US

LARRY B KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

T SCOTT BANNISTER
T SCOTT BANNISTER AND ASSOCIATES
1300 DES MOINES BLDG 405 SIXTH AVENUE
DES MOINES IA 50309 US

BYRON D OLSEN
FELHABER LARSON FENLON & VOGT PA
601 SECOND AVENUE SOUTH SUITE 4200
MINNEAPOLIS MN 55401-4302 US

GERALD J. VINCI
PRAIRIE GROUP
P. O.BOX 1123
7601 WEST 79TH STREET
BRIDGEVIEW IL 60455 US

EDWARD WASHINGTON, II
CHIEF, PUBLIC UTILITIES BUREAU, ILL ATTORNEY
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

THOMAS J LITWILER
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE 45TH FLOOR
CHICAGO IL 60601 US

RICHARD F. FRIEDMAN, ESQ
EARL L NEAL & ASSOCIATES
111 WEST WASHINGTON STREET, STE 1700
CHICAGO IL 60602-2766 US

ROGER A SERPE
175 WEST JACKSON BOULEVARD SUITE 1460
CHICAGO IL 60604 US

SHELDON A ZABEL
SCHIFF HARDIN & WAITE
7200 SEARS TOWER
CHICAGO IL 60606 US

MYLES L TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

SCOTT A RONEY
ARCHER DANIELS MIDLAND COMPANY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

IAN MUIR
BUNGE CORPORATION
P O BOX 28500
ST LOUIS MO 63146 US

HENRY T DART
PLAINTIFF MANGEMENT COMMITTEE
3748 NORTH CAUSEWAY BLVD SUITE 301
METAIRIE LA 70002 US

LEO J WASESCHA
GOLD MEDAL DIVISON - GENERAL MILLS OPERATION
P O BOX 1113
NUMBER ONE GENERAL MILLS BULEVARD
MINNEAPOLIS MN 5544[illegible] US

RICHARD A GAVRIL
16700 GENTRY LANE NO 104
TINLEY PARK IL 60477 US

CHRISTINE H. ROSSO
IL ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FLOOR
CHICAGO IL 60601 US

WILLIAM C SIPPEL
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE TWO PRUDENTIAL PLAZA 45TH F
CHICAGO IL 60601-6710 US

EDWARD C MCCARTHY
INLAND STEEL INDUSTRIES INC
30 WEST MONROE STREET
CHICAGO IL 60603 US

SANDRA J. DEARDEN
MDCO CONSULTANTS, INC.
407 SOUTH DEARBORN, SUITE 1260
CHICAGO IL 60605 US

THOMAS F MCFARLAND JR
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE, SUITE 1330
CHICAGO IL 60606-3101 US

CHARLES D BOLAM
UNITED TRANSPORTATION UNION
1400-20TH STREET
GRANITE CITY IL 62040 US

MERRILL L TRAVIS
ILLINOIS DEPT OF TRANSPORTATION
2300 S DIRKSEN PARKWAY RM 302
SPRINGFIELD IL 62764 US

JOHN JAY ROSACKER
KS DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

MIKE SPAHIS
FINA OIL & CHEMICAL CO.
6000 LEGACY DRIVE
PLANO, TX 75024-3601 US

DENNIS A. GUTH
WEST LAKE GROUP
2801 POST OAK BLVD
HOUSTON TX 77056 US

DAVID L HALL
COMMONWEALTH CONSULTING ASSOCIATES
13103 FM 1960 WEST SUITE 204
HOUSTON TX 77065-4069 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
P O BOX 2583
1221 MCKINNEY STREET SUITE 1600
HOUSTON TX 77252-2583 US

STEVE M COULTER
EXXON COMPANY USA
PO BOX 3272
HOUSTON TX 77253-3272 US

MONTY L PARKER
CMC STEEL GROUP
P O BOX 911
SEGUIN TX 78156 US

BRAD F HUSTON
CYPRUS AMAX COAL SALES CORP
9100 E MINERAL CIR
MILFORD CO 80112-3401 US

STEPHEN M UTHOFF
CONIGLIO & UTHOFF
60 ELM AVENUE, CONIGLIO PROFESSIONAL BLDG
LONG BEACH CA 90802-4910 US

RICHARD WELSH
NARPO
50-505 GRAND TRAVERSE
LA QUINTA CA 92253 US

JOHN D FITZGERALD
UTU, GENERAL CHAIRPERSON
400 E EVERGREEN BLVD STE 217
VANCOUVER WA 98660-3264 US

Records: 361

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SERVICE DATE - MAY 28, 1999

This decision will be included in the bound volumes
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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

Decision No. 128

Decided: May 26, 1999

In Decision No. 89, served July 23, 1998, we required applicants[1] to complete and certify compliance with certain environmental conditions within 6 months of the effective date of the decision (by February 22, 1999). CSX and NS have filed several requests for extension of time to file these certifications. As pertinent here, pursuant to the request of CSX filed February 19, 1999, for a 3-month extension of time to allow for further analysis and consultation recommended by the Ohio Department of Transportation (ODOT), by decision served February 25, 1999 (Decision No. 117), the Board extended the due date until May 22, 1999, for compliance with Environmental Condition 29(A). Environmental Condition 29(A) requires CSX to "install warning signs with a flashing hazard light to notify motorists in advance that they are approaching the highway/rail at-grade crossing at U.S. Route 24." See Decision No. 89, slip op. at 410.

On May 18, 1999, CSX advised us that CSX and ODOT have agreed to three steps to be undertaken at the crossing in lieu of the installation directed in Environmental Condition 29(A). CSX provides an ODOT letter dated April 29, 1999, setting out the three steps, and CSX's letter of acceptance dated May 12, 1999. CSX states that both parties request that: (1) the parties' letters be treated as a Negotiated Agreement; (2) the Negotiated Agreement supersede Environmental Condition 29(A); and (3) Environmental Condition 51 be amended by adding the Negotiated Agreement to the list of Negotiating Agreements entered into by CSX.

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[1] CSX Corporation, CSX Transportation, Inc., and their wholly owned subsidiaries, and also Consolidated Rail Corporation's wholly owned New York Central Lines LLC subsidiary, are referred to collectively as CSX. Norfolk Southern Corporation and Norfolk Southern Railway Company and their wholly owned subsidiaries, and also Consolidated Rail Corporation's wholly owned Pennsylvania Lines LLC subsidiary, are referred to collectively as NS. Conrail Inc. and Consolidated Rail Corporation, and also their wholly owned subsidiaries other than New York Central Lines LLC and Pennsylvania Lines LLC, are referred to collectively as Conrail or CR. CSX, NS, and Conrail are referred to collectively as applicants.

The requests will be granted. Accordingly, we will: (1) treat the parties' letters as a Negotiated Agreement; (2) add the Negotiated Agreement to Environmental Condition 51 of Appendix Q of Decision No. 89; and (3) delete Environmental Condition 29(A) of Appendix Q of Decision No. 89, which has been superseded by the parties' agreement.

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

It is ordered:

1. This proceeding is reopened.

2. The ODOT letter dated April 29, 1999, and CSX's letter of acceptance dated May 12, 1999, are treated as a Negotiated Agreement.

3. The following is added to the CSX Subsection of Environmental Condition 51 of Appendix Q of Decision No. 89:

> **13. Ohio Department of Transportation, by letters dated April 29, 1999, and May 12, 1999.**

In addition, Environmental Condition 29(A) of Appendix Q of Decision No. 89 is deleted because it has been superseded by the parties' agreement.

4. This decision shall be effective on the date of service.

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

Vernon A. Williams

Vernon A. Williams
Secretary

STEPHEN M FONTAINE
MASSACHUSETTS CENTRAL RAILROAD CORPORATION
ONE WILBRAHAM STREET
PALMER MA 01069 US

RICHARD B. KENNELLY, JR
CONSERVATION LAW FOUNDATION
62 SUMMER STREET
BOSTON MA 02110 US

JAMES E HOWARD
90 CANAL STREET
BOSTON MA 02114 US

JOHN D CIRAME, ASSISTANT SECRETARY
COMMONWEALTH OF MASS. EXEC. OFFICE OF TRANSPT
10 PARK PLAZA ROOM 3170
BOSTON MA 02116-3969 US

HON. EDWARD M KENNEDY
UNITES STATES SENATE
2400 JOHN F KENNEDY FEDERAL BLDG
BOSTON MA 02203 US

WILLIAM D ANKNER PHD
R I DEPT OF TRANSPORTATION
TWO CAPITOL HILL
PROVIDENCE RI 02903 US

JOHN R NADOLNY
14 AVIATION AVENUE
PORTSMOUTH NH 03801 US

ROBERT D ELDER
MAINE DEPARTMENT OF TRANSPORTATION
16 STATE HOUSE STATION
AUGUSTA ME 04333 US

KAREN E SONGHURST
STATE OF VERMONT
133 STATE STREET
MONTPELLIER VT 05633-5001 US

JAMES F SULLIVAN
CT DEPT OF TRANSPORTATION
P O BOX 317546
2800 BERLIN TURNPIKE
NEWINGTON CT 06131 US

EDWARD J RODRIGUEZ
P.O. BOX 298
67 MAIN STREET
CENTERBROOK CT 06409 US

RICHARD C CARPENTER
SOUTHWESTERN REGIONAL PLANNING AGENCY
1 SELLECK STREET SUITE 210
EAST NORWALK CT 06855 US

MICHAEL E STRICKLAND
NYK LINE (NORTH AMERICA) INC, SENIOR VICE PRE
300 LIGHTING WAY
SECAUCUS NJ 07094-1588 US

HONORABLE ROBERT G. TORRICELLI
UNITED STATES SENATE
1 RIVER FRONT PLAZA, 3RD FLOOR
NEWARK NJ 07102 US

J WILLIAM VAN DYKE
NJ TRANSPORTATION PLANNING AUTHORITY
ONE NEWARK CENTER 17TH FLOOR
NEWARK NJ 07102 US

EDWARD LLOYD
RUTGERS ENVIRONMENTAL LAW CLINIC
15 WASHINGTON STREET
NEWARK NJ 07102 US

PHILIP SIDO
UNION CAMP CORPORATION
1600 VALLEY ROAD
WAYNE NJ 07470 US

MARTIN T DURKIN ESQ
DURKIN & BOGGIA ESQS
PO BOX 378
71 MT VERNON STREET
RIDGEFIELD PARK NJ 07660 US

CRAIG CURRY
1000 HOWARD BOULEVARD
MOUNT LAUREL NJ 08054 US

TIMOTHY G CHELIUS
18 N EAST AVENUE
VINELAND NJ 08360 US

LAWRENCE PEPPER, JR
GRUCCIO PEPPER
817 EAST LANDS AVE
VINELAND NJ 08360 US

JOHN F. MCHUGH
MCHUGH & SHERMAN
20 EXCHANGE PLACE 51ST FLOOR
NEW YORK NY 10005 US

ANTHONY BOTTALICO
UTU
420 LEXINGTON AVENUE ROOM 458-460
NEW YORK NY 10017 US

ANTHONY P. SEMANCIK
347 MADISON AVENUE
NEW YORK NY 10017-3706 US

HUGH H. WELSH
LAW DEPT., SUITE 67E
ONE WORLD TRADE CENTER
NEW YORK NY 10048-0202 US

SAMUEL J NASCA
UTU STATE LEGISLATIVE DIRECTOR
35 FULLER ROAD SUITE 205
ALBANY NY 12205 US

DIANE SEITZ
CENTRAL HUDSON GAS & ELECTRIC CORP
284 SOUTH AVENUE
POUGHKEEPSIE NY 12601 US

ANGELO J CHICK JR, LOCAL CHAIRMAN
P O BOX 908
48398 OLD GOOSE BAY ROAD
REDWOOD NY 13679 US

SHEILA MECK HYDE
CITY HALL
342 CENTRAL AVENUE
DUNKIRK NY 14048 US

JOHN F COLLINS
COLLINS ,COLLINS, & KANTOR PC
267 NORTH STREET
BUFFALO NY 14201 US

ERNEST J IERARDI
NIXON HARGRAVE DEVANS DOYLE LLP
PO BOX 1051
CLINTON SQUARE
ROCHESTER NY 14603-1051 US

JEANNE WALDOCK
107 GRANT COURT
ORLEAN NY 14760 US

HENRY M. WICK, JR.
WICK, STREIFF, ET AL
1450 TWO CHATHAM CENTER
PITTSBURGH PA 15219 US

WALTER E ZULLIG JR
METRO-NORTH COMMUTER RAILROAD COMPANY
347 MADISON AVE
NEW YORK NY 10017-3706 US

JAMES W HARRIS
THE METROPOLITIAN PLANNING ORGANIZATION
1 WORLD TRADE CENTER STE 82 EAST
NEW YORK NY 10048-0043 US

R. LAWRENCE MCCAFFREY, JR.
NEW YORK & ATLANTIC RAILWAY
405 LEXINGTON AVENUE 50TH FLOOR
NEW YORK NY 10174 US

DANIEL B. WALSH
BUSINESS COUNCIL OF NEW YORK STATE,INC.
152 WASHINGTON AVENUE
ALBANY NY 12210 US

IRWIN L. DAVIS
1900 STATE TOWER BLDG.
SYRACUSE NY 13202 US

GARY EDWARDS
SOMERSET RAILROAD
7725 LAKE ROAD
BARKER NY 14012 US

IRVING J RUBIN
P O BOX 243
YOUNGSTOWN NY 14174 US

R W GODWIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
810 ABBOTT ROAD SUITE 200
BUFFALO NY 14220 US

H DOUGLAS MIDKIFF
GENESEE TRANSPORTATION COUNCIL
65 WEST BROAD ST STE 101
ROCHESTER NY 14614-2210 US

DAVID W. DONLEY
3361 STAFFORD ST
PITTSBURGH PA 15204-1441 US

JOHN A. VUONO
VUONO & GRAY
2310 GRANT BUILDING
PITTSBURGH PA 15219 US

R J HENEFELD
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

M E PETRUCCELLI
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

RICHARD R WILSON
1126 EIGHT AV STE 403
ALTOONA PA 16602 US

D W DUNLEVY
STATE LEGISLATIVE DIRECTOR UTU
230 STATE STREET, PA AFL-CIO BLDG 2ND FLOOR
HARRISBURG PA 17101 US

KURT W CARR
BUREAU FOR HISTORIC PRESERVATION
P O BOX 1026
HARRISBURG PA 17108-1026 US

HONORABLE THOMAS J RIDGE
GOVERNOR, COMMONWEALTH OF PENNSYLVANIA
225 MAIN CAPITOL BUILDING
HARRISBURG PA 17120 US

KRISTOPHER MICHAEL KLEMICK
RR#3 BOX 101-15
JERSEY SHORE PA 17740-9309 US

BELNAP FREEMAN
BELKNAP FREEMAN
119 HICKORY LANE
ROSEMONT PA 19010 US

D J O'CONNELL
GENERAL CHAIRPERSON UTU
410 LANCASTER AVE STE 5
HAVERFORD PA 19041 US

JOHN J GROCKI
GRA INC
115 WEST AV ONE JENKINTOWN STA
JENKINTOWN PA 19046 US

HARRY C BARBIN
BARBIN LAUFFER & O'CONNELL
608 HUNTINGDON PIKE
ROCKLEDGE PA 19046 US

G CRAIG SCHELTER
PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATI
2600 CENTRE SQUARE WEST 500 MARKET ST
PHILADELPHIA PA 19102 US

WILLIAM R THOMPSON
CITY OF PHILADELPHIA LAW DEPT
1600 ARCH ST 10TH FLOOR
PHILADELPH PA 19103 US

JOHN J EHLINGER JR
OBERMAYER REBMANN MAXWELL & HIPPEL
1617 JOHN F. KENNEDY BLVD ONE PENN CENTER-19T
PHILADELPHIA PA 19103-1895 US

DAVID BERGER
BERGER AND MONTAGUE, P. C.
1622 LOCUST ST
PHILADELPHIA PA 19103-6305 US

JOHN J COSCIA, EXECUTIVE DIRECTOR
DELAWARE VALLEY REGIONAL PLANNING COMMISSION
111 SOUTH INDEPENDENCE MALL EAST
PHILADELPHIA PA 19106 US

JOHN K. LEARY, GENERAL MANAGER
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTH
1234 MARKET STREET 5TH FLOOR
PHILADELPHIA PA 19107-3780 US

CHERYL ANNE COOK
SENIOR GENERAL ATTORNEY
1138 SIX PENN CENTER
PHILADELPHIA PA 19146 US

ERIC M HOCKY
GOLLATZ GRIFFIN EWING
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

HON JOSEPH R BIDEN, JR.
UNITED STATES SENATE
844 KING STREET
WILMINGTON DE 19801 US

J E THOMAS
HERCULES INCORPORATED
1313 NORTH MARKET STREET
WILMINGTON DE 19894 US

E C WRIGHT
RAIL TRANSPORTATION PROCUREMENT MANAGER
1007 MARKET STREET DUPONT BLDG 3100
WILMINGTON DE 19898 US

FREDERICK H SCHRANCK
PO BOX 778
DOVER DE 19903 US

JAMES HOWARD
COALITION OF NORTHEASTERN GOVERNORS
400 NORTH CAPITOL STREET, SUITE 382
WASHINGTON DC 20001 US

MARTIN W BERCOVICI
KELLER & HECKMAN, LLP
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

DONALD F GRIFFIN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G STREET NE STE 460
WASHINGTON DC 20002 US

DENNIS G LYONS
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

GEORGE W MAYO JR
HOGAN & HARTSON L L P
555 THIRTEENTH STREET NW COLUMBIA SQUARE
WASHINGTON DC 20004-1109 US

KEVIN M SHEYS
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

ROSE-MICHELE WEINRYB
WEINER BRODSKY SIDMAN & KIDER
1350 NEW YORK AVENUE NW
WASHINGTON DC 20005 US

DANIEL DUFF
AMERICAN PUBLIC TRANSIT ASSOCIATION
1201 NEW YORK AV NW
WASHINGTON DC 20005 US

L JOHN OSBORN
SONNENSCHEIN NATH & ROSENTHAL
1301 K STREET NW STE 600 EAST
WASH DC 20005 US

KARL MORELL
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

PETER A GILBERTSON
REGIONAL RRS OF AMERICA
122 C ST NW STE 850
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

PAUL A CUNNINGHAM
HARKINS CUNNINGHAM
801 PENNSYLVANIA AVENUE, NW STE 600
WASHINGTON DC 20004 US

DREW A HARKER
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

MARY GABRIELLE SPRAGUE
ARNOLD & PORTER
555 TWELTH STREET NW
WASHINGTON DC 20004-1202 US

BRUNO MAESTRI
NORFOLK SOUTHERN CORPORATION
1500 K STREET SUITE 375
WASHINGTON DC 20005 US

PAUL M LAURENZA
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

LOUIS E GITOMER
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

JOHN H BROADLEY
JENNER & BLOCK
601 13TH ST NW 12TH FL
WASHINGTON DC 20005 US

ALICE C SAYLOR
THE AMERICAN SHORT LINE RAILROAD ASSOCIATION
1120 G STREET, N. W., SUITE 520
WASHINGTON DC 20005 US

EDWARD WYTKIND EXECUTIVE DIRECTOR
1025 CONNECTICUT AVE NW SUITE 1005
WASHINGTON DC 20005 US

WILLIAM A MULLINS
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005-3314 US

FRITZ R KAHN
1100 NEW YORK AVENUE NW SUITE 750 WEST
WASHINGTON DC 20005-3934 US

KARYN A BOOTH
DONELAN, CLEARY, WOOD & MASER, P.C.
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

JOHN K MASER III
DONELAN CLEARY WOOD & MASER P C
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

WILLIAM W MILLAR
AMERICAN PUBLIC TRANSIT ASSOCIATION
1201 NEW YORK AVE., NW
WASHINGTON DC 20005-6141 US

ROBERT P VOM EIGEN
HOPKINS AND SUTTER
888 16TH STREET N W STE 700
WASHINGTON DC 20006 US

SCOTT M ZIMMERMAN
ZUCKERT SCOUTT & RASENBERGER L L P
888 SEVENTEENTH STREET NW
WASHINGTON DC 20006 US

DANIEL J SWEENEY
MCCARTHY SWEENEY & HARKAWAY P C
1750 PENNSYLVANIA AVE NW STE 1105
WASHINGTON DC 20006 US

RICHARD A ALLEN
ZUCKERT SCOUT RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

CHARLES A SPITULNIK
HOPKINS & SUTTER
888 SIXTEENTH ST NW
WASH DC 20006-4103 US

CLARK EVANS DOWNS
JONES DAY REAVIS & POGUE
1450 G STREET NW
WASHINGTON DC 20005-2088 US

PAUL H LAMBOLEY
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005-3324 US

JEFFREY O MORENO
DONELAN CLEARY WOOD MASER
1100 NEW YORK AVENUE N W, SUITE 750
WASHINGTON DC 20005-3934 US

FREDERIC L WOOD
DONELAN CLEARY WOOD & MASER P C
1100 NEW YORK AVENUE NW SUITE 750
WASHINGTON DC 20005-3934 US

MARK H SIDMAN
WEINER BRODSKY,SIDMAN & KIDER
1350 NEW YORK AVE., NW., STE. 800
WASHINGTON DC 20005-4797 US

ANDREW P GOLDSTEIN
MCCARTHY SWEENEY HARKAWAY, PC
1750 PENNSYLVANIA AVE NW, STE 1105
WASHINGTON DC 20006 US

ANDREW R. PLUMP
ZUCKERT, SCOUTT & RASENBERGER. LLP
888 17TH ST., NW, STE. 600
WASHINGTON DC 20006 US

JAMES R WEISS
PRESTON GATES ELLIS ET AL
1735 NEW YORK AVENUE NW SUITE 500
WASHINGTON DC 20006 US

ERIKA Z JONES
MAYER BROWN & PLATT
1909 K STREET, NW
WASHINGTON DC 20006-1101 US

JOHN V EDWARDS, ESQ
ZUCKERT SCOUTT ET AL
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

STEVEN J KALISH
MCARTHY SWEENEY & HARKAWAY
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006-4502 US

SHERRI LEHMAN DIRECTOR OF CONGRESSIONAL AFFAI
CORN REFINERS ASSOC
1701 PA AV NW
WASH DC 20006-5805 US

DAVID K MONROE
GALLAND, KHARASCH, GREENBERT, FELLMAN & SWIRS
1054 THIRTY-FIRST STREET NW, STE 200
WASHINGTON DC 20007 US

EDWARD D GREENBERG
GALLAND, KHARASCH, GREENBERT, FELLMAN & SWIRS
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

PAUL M DONOVAN
LAROE, WINN, MOERMAN & DONOVAN
3506 IDAHO AVE NW
WASHINGTON DC 20016 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

KELVIN J DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

HAROLD P QUINN, JR
NATIONAL MINING ASSOCIATON
1130 17TH STREET NW
WASHINGTON DC 20036 US

KEITH G O'BRIEN
REA CROSS AND AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

ROBERT A WIMBISH ESQ
REA CROSS & AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

GORDON P MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

JOHN M CUTLER JR
MCCARTHY SWEENEY HARKAWAY PC
1750 PENNSYLVANIA AVE N W SUITE 1105
WASHINGTON DC 20036 US

ROBERT G. SZABO
V.NESS FELDMAN
1050 THO JEFFERSON STREET,NW
WASHINGTON DC 20007 US

CHRISTOPHER C O'HARA
BRICKFIELD BURCHETTE & RITTS PC
1025 THOMAS JEFFERSON ST NW EIGHTH FLOOR
WASHINGTON DC 20007 US

MICHAEL F MCBRIDE
LEBOEUF LAMB GREENE & MACRAE
1875 CONNECTICUT AVENUE NW
WASHINGTON DC 20009-5728 US

JOHN D HEFFNER
REA CROSS & AUCHINCLOSS
1707 L STREET, NW, STE 570
WASHINGTON DC 20036 US

DAVID H COBURN
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE NW
WASHINGTON DC 20036 US

HELEN M. COUSINEAU
CARLOS RODRIGUEZ & ASSOCIATES
1710 RHODE ISLAND AVENUE, NW
WASHINGTON DC 20036 US

STEPHEN H BROWN
VORYS SATER SEYMOUR AND PEASE
1828 L STREET N W
WASHINGTON DC 20036 US

CHRISTOPHER A MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

RICHARD S EDELMAN
O'DONNELL SCHWARTZ & ANDERSON PC
1900 L STREET NW SUITE 707
WASHINGTON DC 20036 US

PETER A GREENE
THOMPSON HINE FLORY
1920 N STREET N W, SUITE 800
WASHINGTON DC 20036 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

SAMUEL M SIPE JR
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND & CLAYMAN, PC
1625 MASSACHUSETTS AVE., NW. STE 700
WASHINGTON DC 20036-2243 US

DEBRA L WILLEN
GUERRIERI EDMOND & CLAYMAN PC
1625 MASSACHUSETTS AVENUE, N.W., STE 700
WASHINGTON DC 20036-2243 US

DONALD G AVERY
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036-3003 US

WILLIAM L SLOVER
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036-3003 US

L PAT WYNNS
SUITE 210
1050 - 17TH STREET N W
WASHINGTON DC 20036-5503 US

EDWARD J FISHMAN
OPPENHEIMER WOLFF & DONNELLY
1020 NINETEENTH STREET NW SUITE 400
WASHINGTON DC 20036-6105 US

JOHN L OBERDORFER
PATTON BOGGS LLP
2550 M ST NW
WASHINGTON DC 20037-1301 US

SCOTT N STONE
PATTON BOGGS L L P
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

ARVID E ROACH II
COVINGTON & BURLING
PO BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

KEITH A KLINDWORTH
U S DEPT OF AGRICULTURE
P O BOX 96456
WASHINGTON DC 20090 US

EILEEN S STOMMES
P O BOX 96456
ROOM 4006-SOUTH BUILDING
WASHINGTON DC 20090-6456 US

JUDGE JACOB LEVENTHAL, OFFICE OF HEARINGS
FEDERAL ENERGY REGULATORY COMMISSION
888 - 1ST ST, N.E. STE 11F
WASHINGTON DC 20426 US

RICHARD E SANDERSON
OFFICE OF FEDERAL ACTIVITIES
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HON. BARBARA A. MIKULSKI
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH BIDEN, JR.
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH I LIEBERMAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON CHARLES E SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON DANIEL PATRICK MOYNIHAN
UNITED STATES SENATE
WASINGTON DC 20510 US

BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE BOB GRAHAM
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON WILLIAM V. ROTH JR
U S SENATE
WASHINGTON DC 20510-0001 US

HON CHRISTOPHER J DODD
UNITED STATES SENATE
WASH DC 20510-0702 US

HONORABLE CONNIE MACK
UNITED STATES SENATE
WASHINGTON DC 20510-0904 US

HONORABLE J ROBERT KERREY
UNITED STATES SENATE
WASHIGTON DC 20510-2704 US

HON ARLEN SPECTER
UNITED STATES SENATE
WASHINGTON DC 20510-3802 US

HONORABLE JOHN H. CHAFEE
UNITED STATES SENATE
WASHINGTON DC 20510-3902 US

HONORABLE ROBERT BYRD
UNITED STATES SENATE
WASHINGTON DC 20510-6025 US

HONORABLE CHIP PICKERING
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LUIS GUTIERREZ
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHARLES SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHARLES ROBB
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOHN W. WARNER
US SENATE
WASHINGTON DC 20510-0001 US

HONORABLE DANIEL P. MOYNIHAN
UNITED STATE SENATE
WASHINGTON DC 20510-0903 US

HONORABLE JOHN BREAUX
UNITED STATES SENATE
WASHINGTON DC 20510-1803 US

HON MIKE DEWINE
UNITED STATES SENATE
WASHINGTON DC 20510-3503 US

HON RICK SANTORUM
UNITED STATES SENATE
WASHINGTON DC 20510-3804 US

HON JACK REED
U S SENATE
WASHINGTON DC 20510-3903 US

HONORABLE JOHN J LAFALCE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JESSE L. JACKSON, JR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DANNY K DAVIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON RALPH REGULA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON SHERROD BROWN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NYDIA M VELAZQUEZ
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ED TOWNS
U. S. HOUSE OR REPRESENTATIVES
WASHINGTON DC 20515 US

HON LOUISE M SLAUGHTER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHRISTOPHER SHAYS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHARLES RANGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL MCNULTY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAMES MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CAROLYN B MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NITA LOWEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MAURICE HINCHEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL FORBES
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ELIOT L ENGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON GARY ACKERMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JERROLD NADLER
U S HOUSE OF REPRESENTATIVES
WASH DC 20515 US

HONORABLE ROBERT W. NEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB WEYGAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TED STRICKLAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON DENNIS J KUCINICH
UNITED STATES HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ED BRYANT
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. STEVE LATOURETTE
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAXBY CHAMBLISS,
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TILLIE K FOWLER
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK MASCARA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ROBERT MENENDEZ
U S HOUSE OF REPRESENTATIVES
WASH DC 20515 US

HON MARCY KAPTUR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JAMES TRAFICANT JR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON BOB WISE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JOHN J. DUNCAN
U S HOUSE OF REPRESENTATIVESS
WASHINGTON DC 20515 US

HONORABLE PAUL E. GILLMOR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JAMES L. OBERSTAR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM O. LIPINSKI
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB CLEMENT
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. THOMAS C SAWYER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. TOM BLILEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETER J. VISCLOSKY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MIKE DOYLE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN D. DINGELL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BENJAMIN A. GILMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAM GEJDENSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM J. COYNE
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MAJOR R. OWENS
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NANCY JOHNSON
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. BUD SHUSTER
ATTN: MIKE RICK
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAMES A. BARCIA
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2205 US

HON JACK QUINN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3230 US

HONORABLE TOM DAVIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4611 US

MICHAEL P HARMONIS
DEPARTMENT OF JUSTICE
325 SEVENTH STREET, NW
WASHINGTON DC 20530 US

JOSEPH R. POMPONIO
FEDERAL RAILROAD ADMIN.
400 7TH ST SW RCC-20
WASHINGTON DC 20590 US

DAVID G ABRAHAM
SUITE 400W
7315 WISCONSIN AVENUE
BETHESDA MD 20814 US

JOHN M ROBINSON
9616 OLD SPRING ROAD
KENSINGTON MD 20895-3124 US

JOHN HOY
P O BOX 117
GLEN BURNIE MD 21060 US

JOHN F WING CHAIRMAN
CITIZENS ADVISORY COMMITTEE
601 NORTH HOWARD STREET
BALTIMOTE MD 21201 US

CHARLES M CHADWICK
MARYLAND MIDLAND RAILWAY INC
P O BOX 1000
UNION BRIDGE MD 21791 US

HONORABLE ROD R BLAGOJEVICH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTO DC 20515-1305 US

JAMES L OBERSTAR
RANKING DEMOCRATIC MEMBER COMMITTEE ON TRANSP
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3222 US

HONORABLE RICHARD BURR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3305 US

HONORABLE BOBBY L. RUSH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-9997 US

PAUL SAMUEL SMITH
US DEPARTMENT OF TRANSPORTATION
400 SEVENTH STREET SW, ROOM 4102 C-30
WASHINGTON DC 20590 US

JOLENE MOLITORIS, ADMN.
FEDERAL RAILROAD ADMNS.
400 7TH STREET SW
WASHINGTON DC 20590 US

MITCHELL M. KRAUS
TRANSPORTATION -COMMUNICATIONS INTERNATIONAL
3 RESEARCH PLACE
ROCKVILLE MD 20850 US

WILLIAM W WHITEHURST JR
W W WHITEHURST & ASSOCIATES INC
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030-1711 US

ROBERT J WILL
UNITED TRANSPORTATION UNION
4134 GRAVE RUN RD
MANCHESTER MD 21102 US

LINDA A JANEY J D
MARYLAND OFFICE OF PLANNING
301 WEST PRESTON STREET
BALTIMORE MD 21201-2365 US

GARRET G SMITH
MOBIL OIL CORPORATION
3225 GALLOWS RD RM 8A903
FAIRFAX VA 22037-0001 US

HENRY E. SEATON
7700 LEESBURG PIKE, STE 201
FALLS CHURCH VA 22043 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

GERALD W FAUTH III
G W FAUTH & ASSOCIATES INC
116 SOUTH ROYAL STREET
ALEXANDERIA VA 22314 US

KENNETH E SIEGEL
AMERICAN TRUCKING ASSOC INC
2200 MILL ROAD
ALEXANDRIA VA 22314-4677 US

HONORABLE GEORGE ALLEN
GOVERNOR, COMMONWEALTH OF VIRGINIA
STATE CAPITOL
RICHMOND VA 23219 US

L P KING JR
GENERAL CHAIRPERSON UTU
145 CAMPBELL AVE SW STE 207
ROANOKE VA 24011 US

VAUGHN R GROVES
PITTSTON COAL COMPANY
PO BOX 5100
LEBANON VA 24266 US

R K SARGENT
GENERAL CHAIRPERSON UTU
1319 CHESTNUT STREET
KENOVA WV 25530 US

FRANK N JORGENSEN
THE ELK RIVER RAILROAD INC
P O BOX 460
SUMMERSVILLE WV 26651 US

E NORRIS TOLSON
NC DEPT OF TRANSPORTATION
P O BOX 25201
1 S. WILINGTON STREET
RALEIGH NC 27611 US

PAUL R. HITCHCOCK
CSX TRANSPORTATION LAW DEPARTMENT
500 WATER STREET SC J-150
JACKSONVILLE FL 32202 US

PETER Q NYCE JR
U S DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

JENNIFER BRAUN
JACKSON & JESSUP
P O BOX 1240
3426 NORTH WASHINGTON BOULEVARD
ARLINGTON VA 22210 US

FRANCIS G MCKENNA
ANDERSON & PENDLETON
206 N WASHINGTON STREET SUITE 330
ALEXANDRIA VA 22314 US

ROBERT E MARTINEZ
VA SECRETARY OF TRANSPORTAITON
P. O. BOX 1475
RICHMOND VA 23218 US

GEORGE A ASPATORE
NORFOLK SOUTHERN CORP
THREE COMMEMERCIAL PLACE
NORFOLK VA 23510 US

HONORABLE JOHN WARNER
UNITED STATES SENATE
235 FEDERAL BUILDING
ABINGDON VA 24210-0887 US

TERRELL ELLIS
CAEZWV
P O BOX 176
CLAY WV 25043 US

WILLIAM T BRIGHT
P O BOX 149
200 GREENBRIER ROAD
SUMMERSVILLE WV 26651 US

SCOTT M SAYLOR
NORTH CAROLINA RAILROAD COMPANY
3200 ATLANTIC AV STE 110
RALIEGH NC 27604-1640 US

HONORABLE DAVID M BEASLEY
GOVERNOR
P. O. BOX 11369
COLUMBIA SC 29211 US

CHARLES M ROSENBERGER
CSX TRANSPORTATION
500 WATER STREET - J150
JACKSONVILLE FL 32202 US

BOB HAULTER
CSX TRANSPORTATION INC
500 WATER STREET (J215)
JACKSONVILLE FL 32202 US

ROBERT V ALLEN
CSX TRANSPORTATION
500 WATER STREET J305
JACKSONVILLE FL 32202 US

JOHN W. HUMES, JR.
CSX TRANSPORTATION
SPEED CODE J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

J T REED
GENERAL CHAIRPERSON UTU
7785 BAYMEADOWS WAY STE 109
JACKSONVILLE FL 32256 US

JAMES L BELCHER
EASTMAN CHEMICAL COMPANY
PO BOX 431
KINGSPORT TN 37662 US

J R BARBEE
GENERAL CHAIRPERSON UTU
P.O. BOX 9599
KNOXVILLE TN 37940 US

HONORABLE PAUL E. PATTON
GOVERNOR
700 CAPITOL AVENUE, STE. 100
FRANKFORT KY 40601 US

F R PICKELL
GENERAL CHAIRPERSON UTU
6797 NORTH HIGH ST STE 108
WORTHINGTON OH 43085 US

HONORABLE DEBORAH PRYCE
U. S. HOUSE OF REPRESENTATIVES
500 SOUTH FRONT STREET, ROOM 1130
COLUMBUS OH 43215 US

JAMES R JACOBS
JACOBS INDUSTRIES
2 QUARRY LANE
STONY RIDGE OH 43463 US

ROBERT J COOPER
GENERAL CHAIRPERSON UTU
1238 CASS ROAD
MAUMEE OH 43537 US

FRED R BIRKHOLZ
CSX TRANSPORTATION LAW DEPT - J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

J RANDALL EVANS
500 WATER STREET (J150)
JACKSONVILLE FL 32202 US

J L RODGERS
GENERAL CHAIRMAN UTU
480 OSCEOLA AVENUE
JACKSONVILLE FL 32250 US

PHILLIP L BELL
ERIE LACKAWANNA RAILROAD CO
PO BOX 1482
TALLAHASSEE FL 32302 US

WILLIAM L OSTEEN
ASSOCIATE GENERAL COUNSEL TVA
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

HONORABLE KIRK FORDICE, GOVERNOR
STATE OF MISSISSIPPI
P O BOX 139
JACKSON MS 39205 US

WILLIAM P HERNAN JR GENERAL CHAIRMAN
P O BOX 180
HILLIARD OH 43026 US

THOMAS M O'LEARY
OHIO RAIL DEVELOPMENT COMMISSION
50 W BROAD STREET 15TH FLOOR
COLUMBUS OH 43215 US

DOREEN C JOHNSON, CHIEF ANTITRUST SECTION
OHIO ATTY GENERAL OFFICE
140 EAST TOWN STREET, FIRST FLOOR
COLUMBUS OH 43215-6001 US

DAVID CHAPMAN
LAFARGE LIME OHIO INC
P O BOX 128
659 ANDERSON ROAD
WOODVILLE OH 43469-0128 US

ROBERT E GREENLESE
TOLEDO-LUCAS COUNTY PORT AUTHORITY
1 MARITIME PLAZA SUITE 700
TOLEDO OH 43604 US

DAVID DYSARD
TMACOG
PO BOX 9508
300 CENTRAL UNION PLAZA
TOLEDO OH 43697-9508 US

MAYOR VINCENT M URBIN
150 AVON BELDEN RD
AVON LAKE OH 44012 US

BARBARA O'KEEFE
VILLAGE OF WELLINGTON
115 WILLARD MEMORIAL SQ
WELLINGTON OH 44090 US

ANITA R BRINDZA
THE ONE FIFTEEN HUNDRED BUILDING
11500 FRANKLIN BLVD SUITE 104
CLEVELAND OH 44102 US

CLINTON J MILLER III GENERAL COUNSEL
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

C V MONIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1370 ONTARIO STREET
CLEVELAND OH 44113 US

DAVID ROLOFF
GOLDSTEIN & ROLOFF
526 SUPERIOR AVENUE EAST SUITE 1440
CLEVELAND OH 44114 US

DAVID J MATTY
CITY OF ROCKY RIVER
21012 HILLIARD ROAD
ROCKY RIVER OH 44116-3398 US

C D WINEBRENNER
GENERAL CHAIRPERSON UTU
27801 EUCLID AV RM 200
EUCLID OH 44132 US

CHARLES ZUMKEHR
ROETZEL & ANDRESS CO LPA
75 EAST MARKET STREET
AKRON OH 44308 US

CHARLES E ALLENBAUGH JR
EAST OHIO STONE COMPANY
2000 W BESSON ST
ALLIANCE OH 44601 US

RON MARQUARDT
LOCAL UNION 1810 UMWA
R D #2
RAYLAND OH 43943 US

CHARLES S HESSE
CHARLES HESSE ASSOCIATES
7777 BAINBRIDGE ROAD
CHAGRIN FALLS OH 44023-2124 US

COLETTA MCNAMEE SR
CUDELL IMPROVEMENT INC
11500 FRANKLIN BLVD STE 104
CLEVELAND OH 44102 US

C L LITTLE
UNITED TRANSPORTATION UNION
14600 DETROIT AVE
CLEVELAND OH 44107 US

DANIEL R ELLIOTT III
ASST GENERAL COUNSEL UNITED TRANSPORTATION UN
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CHRISTOPHER C MCCRACKEN
ULMER & BERNE LLP
1300 EAST NINTH STREET SUITE 900
CLEVELAND OH 44114 US

INAJO DAVIS CHAPPELL
ASHTA CHEMICALS INC
1300 EAST NINETH STREET SUITE 900
CLEVELAND OH 44114-1538 US

MICHAEL J GARRIGAN
BP CHEMICALS INC
4440 WARRENSVILLE CTR RD
CLEVELAND OH 44128 US

GARY A EBERT
CITY OF BAY VILLAGE
350 DOVER CENTER ROAD
BAY VILLAGE OH 44140 US

SYLVIA R. CHINN-LEVY
NEFCO
969 COPLEY ROAD
AKRON OH 44320 US

RANDALL C. HUNT
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO.
P O BOX 36963
4775 MUNSON ST NW
CANTON OH 44735-6963 US

D G STRUNK JR
GENERAL CHAIRPERSON UTU
817 KILBOURNE STREET
BELLEVUE OH 44811 US

R A GRICE
GENERAL CHAIRPERSON UTU
817 KILBOURNE ST
BELLEVUE OH 44811-9431 US

RICHARD E KERTH
CHAMPION INTERNATIONAL CORPORATION
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

BRAD F HUSTON
CYPRUS AMAX COAL SALES CORP
400 TECHNECENTER DRIVE STE 320
MILFORD OH 45150 US

FAY D DUPUIS
CITY OF CINCINNATI
801 PLUM STREET
CINCINNATI OH 45202 US

ROBERT EDWARDS
EASTERN TRANSPORT AND LOGISTICS
1109 LANETTE DRIVE
CINCINNATI OH 45230 US

THOMAS R RYDMAN PRESIDENT
INDIAN CREEK RAILROAD COMPANY
3905 W 600 NORTH
ANDERSON IN 46011 US

F RONALDS WALKER
CITIZENS GAS & COKE UTILITY
2020 N MERIDIAN STREET
INDIANAPOLIS IN 46202-1393 US

MICHAEL P MAXWELL JR
MCHALE, COOK & WELCH
320 N MERIDIAN ST 1100 CHAMBER OF COMMERCE BL
INDIANAPOLIS IN 46204 US

J PATRICK LATZ
HEAVY LIFT CARGO SYSTEM
PO BOX 51451
INDIANAPOLIS IN 46251-0451 US

MICHAEL CONNELLY
CITY OF EAST CHICAGO
4525 INDIANAPOLIS BLVD
EAST CHICAGO IN 46312 US

HAMILTON L CARMOUCHE, CORPORATION COUNSEL
CITY OF GARY
401 BROADWAY 4TH FLOOR
GARY IN 46402 US

HONORABLE PETER J. VISCLOSKY
U. S. HOUSE OF REPRESENTATIVES
215 WEST 35TH AVENUE
GARY IN 46408 US

CARL FELLER
DEKALB AGRA INC
P. O. BOX 127
4743 COUNTY ROAD 28
WATERLOO IN 46793-0127 US

CHRISTOPHER J BURGER, PRESIDENT
CENTRAL RAILROAD COMPANY OF INDIANAPOLIS
PO BOX 554
KOKOMO IN 46903-0554 US

WILLIAM A BON, GENERAL COUNSEL
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
26555 EVERGREEN ROAD SUITE 200
SOUTHFIELD MI 48076 US

NICOLE HARVEY
THE DOW CHEMICAL COMPANY
2020 DOW CENTER
MIDLAND MI 48674 US

JAMES E SHEPHERD
TUSCOLA & SAGINAW BAY
PO BOX 550
OWOSSO MI 48867-0550 US

LARRY B KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

HON JOHN ENGLER
OFFICE OF THE GOVERNOR
P O BOX 30013
LANSING MI 48933 US

T SCOTT BANNISTER
T SCOTT BANNISTER AND ASSOCIATES
1300 DES MOINES BLDG 405 SIXTH AVENUE
DES MOINES IA 50309 US

BYRON D OLSEN
FELHABER LARSON FENLON & VOGT PA
601 SECOND AVENUE SOUTH SUITE 4200
MINNEAPOLIS MN 55401-4302 US

LEO J WASESCHA
GOLD MEDAL DIVISON - GENERAL MILLS OPERATION
P O BOX 1113
NUMBER ONE GENERAL MILLS BULEVARD
MINNEAPOLIS MN 55440 US

THOMAS R BOBAK
313 RIVER OAKS DRIVE
CALUMET CITY IL 60409 US

GERALD J. VINCI
PRAIRIE GROUP
P. O.BOX 1123
7601.WEST 79TH STREET
BRIDGEVIEW IL 60455 US

RICHARD A GAVRIL
16700 GENTRY LANE NO 104
TINLEY PARK IL 60477 US

EDWARD WASHINGTON, II
CHIEF, PUBLIC UTILITIES BUREAU, ILL ATTORNEY
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

CHRISTINE H. ROSSO
IL ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FLOOR
CHICAGO IL 60601 US

THOMAS J LITWILER
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE 45TH FLOOR
CHICAGO IL 60601 US

WILLIAM C SIPPEL
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE TWO PRUDENTIAL PLAZA 45TH F
CHICAGO IL 60601-6710 US

RICHARD F. FRIEDMAN, ESQ
EARL L NEAL & ASSOCIATES
111 WEST WASHINGTON STREET, STE 1700
CHICAGO IL 60602-2766 US

EDWARD C MCCARTHY
INLAND STEEL INDUSTRIES INC
30 WEST MONROE STREET
CHICAGO IL 60603 US

ROGER A SERPE
175 WEST JACKSON BOULEVARD SUITE 1460
CHICAGO IL 60604 US

SANDRA J. DEARDEN
MDCO CONSULTANTS, INC.
407 SOUTH DEARBORN, SUITE 1260
CHICAGO IL 60605 US

SHELDON A ZABEL
SCHIFF HARDIN & WAITE
7200 SEARS TOWER
CHICAGO IL 60606 US

THOMAS F MCFARLAND JR
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE, SUITE 1330
CHICAGO IL 60606-3101 US

MYLES L TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

CHARLES D BOLAM
UNITED TRANSPORTATION UNION
1400-20TH STREET
GRANITE CITY IL 62040 US

SCOTT A RONEY
ARCHER DANIELS MIDLAND COMPANY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

MERRILL L TRAVIS
ILLINOIS DEPT OF TRANSPORTATION
2300 S DIRKSEN PARKWAY RM 302
SPRINGFIELD IL 62764 US

IAN MUIR
BUNGE CORPORATION
P O BOX 28500
ST LOUIS MO 63146 US

JOHN JAY ROSACKER
KS DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

HENRY T DART
PLAINTIFF MANGEMENT COMMITTEE
3748 NORTH CAUSEWAY BLVD SUITE 301
METAIRIE LA 70002 US

MIKE SPAHIS
FINA OIL & CHEMICAL CO.
6000 LEGACY DRIVE
PLANO, TX 75024-3601 US

DENNIS A. GUTH
WEST LAKE GROUP
2801 POST OAK BLVD
HOUSTON TX 77056 US

DAVID L HALL
COMMONWEALTH CONSULTING ASSOCIATES
13103 FM 1960 WEST SUITE 204
HOUSTON TX 77065-4069 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
P O BOX 2583
1221 MCKINNEY STREET SUITE 1600
HOUSTON TX 77252-2583 US

STEVE M COULTER
EXXON COMPANY USA
PO BOX 3272
HOUSTON TX 77253-3272 US

MONTY L PARKER
CMC STEEL GROUP
P O BOX 911
SEGUIN TX 78156 US

STEPHEN M UTHOFF
CONIGLIO & UTHOFF
60 ELM AVENUE, CONIGLIO PROFESSIONAL BLDG
LONG BEACH CA 90802-4910 US

RICHARD WELSH
NARPO
50-505 GRAND TRAVERSE
LA QUINTA CA 92253 US

JOHN D FITZGERALD
UTU, GENERAL CHAIRPERSON
400 E EVERGREEN BLVD STE 217
VANCOUVER WA 98660-3264 US

Records: 360

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EB

SERVICE DATE - MAY 20, 1999

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CSX CORPORATION AND CSX TRANSPORTATION, INC.,
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— CONTROL AND OPERATING LEASES/AGREEMENTS —
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

Decision No. 124

Decided: May 18, 1999

This decision addresses a petition filed February 1, 1999, by Occidental Chemical Corporation (OxyChem) for oversight and modification of a remedial condition that we previously imposed in this consolidation proceeding. On February 22, 1999, CSX Corporation and CSX Transportation, Inc. (CSX)[1] replied. On March 3, 1999, OxyChem filed a petition for leave to file a reply to the CSX response. CSX replied to that petition on March 10, 1999.[2]

BACKGROUND

In Decision No. 89, we approved, subject to certain conditions, the acquisition of control of Conrail, and the division of its assets, by CSX and NS.[3] OxyChem seeks modification of a condition that we imposed to benefit certain Niagara Falls shippers that we based largely on evidence

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[1] CSX Corporation and CSX Transportation, Inc., and their wholly owned subsidiaries, and also Consolidated Rail Corporation's wholly owned New York Central Lines LLC subsidiary, are referred to collectively as CSX; Norfolk Southern Corporation and Norfolk Southern Railway Company and their wholly owned subsidiaries, and also Consolidated Rail Corporation's wholly owned Pennsylvania Lines LLC subsidiary, are referred to collectively as NS; Conrail Inc. and Consolidated Rail Corporation, and also their wholly owned subsidiaries other than New York Central Lines LLC and Pennsylvania Lines LLC, are referred to collectively as Conrail or CR; and CSX, NS, and Conrail are referred to collectively as applicants.

[2] In view of CSX's lack of opposition to OxyChem's petition for leave to file, and so that we can resolve the issues raised here on a more complete factual record, we will accept OxyChem's reply.

[3] Acquisition of control of Conrail was effected by CSX and NS on August 22, 1998. CSX and NS have indicated that Conrail's assets will be divided on June 1, 1999 (Day One).

submitted by the Erie Niagara Rail Steering Committee (ENRSC), an ad hoc committee representing various interests in the "Niagara Frontier" region, including OxyChem.[4] In Decision No. 89, we explained that the NITL agreement[5] was very procompetitive in that it mitigates the market power that NS and CSX will inherit from Conrail. Slip op. at 87. Our Niagara Falls condition extends the $250 limit on reciprocal switching charges embodied in the NITL agreement[6] "to certain points in the Niagara Falls area for traffic using International Bridge and Suspension Bridge, for which Conrail recently replaced its switching charges with so-called 'line haul' charges." Slip op. at 178, ordering paragraph 37.[7] We explained that this condition "will bring the compensation under the procompetitive and beneficial terms of the NITL agreement." Slip op. at 87.

OxyChem's Contentions. OxyChem's concerns relate to rail service at its Niagara Falls, NY plant. This plant produces chlorine, caustic soda, and other products, and ships about 10,000 carloads annually. It is now served directly only by Conrail over a line that is to be assigned to CSX.

OxyChem contends that, until recently, Conrail permitted unrestricted reciprocal switching at Niagara Falls to and from certain shippers, including OxyChem, for the account of CSX at a rate of $390 per car. OxyChem argues that this reciprocal switching gave it access to CSX competition for traffic originating at Niagara Falls and destined to Eastern and Midwestern points open both to Conrail and to CSX.[8] OxyChem notes that Conrail canceled this switching on April 1, 1996, and

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[4] Although OxyChem also participated as an individual party to the proceeding, the pleading that it filed in its own name did not mention the reciprocal switching cancellation issue.

[5] The NITL agreement is the settlement agreement that CSX and NS entered into with The National Industrial Transportation League (NITL). See Decision No. 89, slip op. at 248-52.

[6] Section III(B) of the NITL agreement provides that CSX or NS, as the case may be, will cause any point at which Conrail now provides reciprocal switching to be kept open to reciprocal switching for 10 years after Day One. See Decision No. 89, slip op. at 250. Section III(C) provides that, for 5 years after the Closing Date, reciprocal switch charges between CSX and NS at the points referred to in Section III(B) will not exceed $250 per car, subject to annual RCAF-U adjustment (the Rail Cost Adjustment Factor unadjusted for productivity is referred to as RCAF-U).

[7] Suspension Bridge crosses the Niagara River between Niagara Falls, ON, and Niagara Falls, NY. International Bridge crosses the Niagara River between Fort Erie, ON, and Buffalo, NY.

[8] OxyChem indicates that outbound traffic routed via CSX was switched from OxyChem's Niagara Falls plant to Buffalo by Conrail. It was then moved from Buffalo to New Castle, PA, by the Buffalo & Pittsburgh Railroad, Inc. (BPRR), to which CSX had sold certain Buffalo-area rail

(continued...)

that OxyChem's relevant contracts were amended accordingly.[9] OxyChem argues that Conrail canceled switching in anticipation of the consolidation transaction, and that OxyChem's Niagara Falls plant should thus be regarded as a 2-to-1 facility.

OxyChem further contends that, early in this proceeding, CSX acknowledged that OxyChem's Niagara Falls plant was entitled to 2-to-1 status. OxyChem relies upon a CSX letter dated May 30, 1997 (CSX's 5/30/97 Dunn letter). This letter, signed by CSX's Ronald A. Dunn and addressed to OxyChem's Robert L. Evans, reads in its entirety as follows:

> This letter serves as a revised response to your letter dated February 28, 1997 regarding the CSX/NS/CR acquisition. In acceptance of your request, Niagara Falls, NY will be treated as a 2 to 1 point under the terms of the acquisition. Access will be granted via Buffalo, NY for a $390/car charge. CSXT is glad we are able to afford OxyChem the competitive access at Niagara Falls you had in the past.
>
> With this new development, CSXT is hopeful to receive your support of the acquisition in the form of a verified statement. As I mentioned before, it is our desire to receive all support statements and letters by June 2, 1997. Thank you again and CSXT looks forward [to] growing our relationship with OxyChem well into the future.

OxyChem concedes that it did not provide a supporting letter for inclusion in the application as filed on June 23, 1997. On October 20, 1997, OxyChem did file a verified statement (OxyChem's 10/20/97 Orbegoso statement) generally supporting the application, but also asking for certain conditions to protect its interests or improve its situation.[10] Nevertheless, OxyChem claims that, acting in reliance on the representation contained in CSX's 5/30/97 Dunn letter, it did not request relief from us for the situation at Niagara Falls.

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[8](...continued)
assets in 1988. See Decision No. 89, slip op. at 306, n.507. Traffic was then moved to destination by CSX.

[9] OxyChem indicates that, effective April 1, 1996, each relevant OxyChem contract was amended, with OxyChem's consent, to show Conrail as a party to the contract providing the portion of the line-haul movement between Niagara Falls and the interchange with BPRR at Buffalo. Conrail's division of revenue on these moves remained at $390.

[10] This statement, submitted by OxyChem's Antonio G. Orbegoso and dated October 20, 1997, is discussed in Decision No. 89, slip op. at 278.

OxyChem now contends that, in September 1998, CSX advised OxyChem that, on and after Day One, Niagara Falls will not be treated as a 2-to-1 point (except for traffic subject to the Niagara Falls condition). OxyChem claims that CSX has thereby reneged on its general representation in the application that it would provide trackage or haulage rights to allow for alternative rail service to 2-to-1 facilities,[11] and on its specific representation in the Dunn letter that Niagara Falls would be treated as a 2-to-1 point.

OxyChem asks that we begin proceedings under our general oversight condition to establish that more than one rail carrier should have a right of access to and from OxyChem's Niagara Falls plant. Specifically, it argues that we should modify Decision No. 89's ordering paragraph 37, slip op. at 178, by removing the restriction that now limits its application to traffic "using International Bridge and Suspension Bridge."

DISCUSSION AND CONCLUSIONS

OxyChem's petition suggests several possible grounds for relief, none of which is convincing. OxyChem's basic request is that the Niagara Falls condition, which is restricted to traffic moving via the Niagara River bridges to and from points in the Niagara Falls area, should be expanded to cover all traffic moving to and from points in the Niagara Falls area for which Conrail replaced its switching charges with line-haul charges in 1996.[12] As explained below, OxyChem has not justified any relief.

As a threshold matter, we note that OxyChem's Niagara Falls condition expansion request is a very late-filed petition for reconsideration of Decision No. 89. OxyChem is asserting that we erred in restricting the benefits of the Niagara Falls condition to traffic moving via the two Niagara River bridges. Any request asserting such an error should have been filed by August 12, 1998. Although we sometimes excuse brief delays in seeking reconsideration, we note that OxyChem filed its petition almost 6 months after the 20-day deadline for filing a petition for reconsideration, and more

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[11] Decision No. 89, slip op. at 51: "In only a handful of instances, the restructuring would, unless conditioned, result in a reduction from two to one of carriers serving a particular location. Applicants have agreed, and we will ensure, that wherever that would happen, applicants will provide one another sufficient trackage rights at reasonable rates, together with any other conditions that might be called for, to remedy the situation."

[12] We are unable to determine from the record how much solely served CSX traffic this relief would open to NS, or even how much OxyChem traffic would be so affected.

than 3 months after the issuance of our final decision disposing of the timely filed reconsideration requests.[13] OxyChem has provided no explanation for this delay.

When we impose conditions, we weigh the burden the condition imposes on the application and on the public interest against the public benefit derived from the condition. Here, applicants have assessed the various conditions we imposed and have proceeded with — indeed, they are well into — implementation of this major transaction that we approved as furthering the public interest. Under those circumstances, and given its late participation, OxyChem would have to make a strong showing of competitive or other harm in order to obtain additional relief.

1. The Newly Presented Evidence. OxyChem argues that the current Niagara Falls condition is inadequate to protect Niagara Falls shippers such as itself. But OxyChem has made no credible assertion of new evidence and/or changed circumstances in support of this argument. Although OxyChem claims that we committed material error,[14] it does not urge that we erred in light of the record that was available to us when this condition was crafted and imposed. Rather, as detailed below, OxyChem argues that applicants misled us by not giving us the whole story, and that OxyChem should be permitted to supplement the record now. This newly presented evidence and argument — which should have been presented much earlier — does not justify a change in our condition.

OxyChem's argument that CSX failed to inform us fully and completely regarding the situation at Niagara Falls is unpersuasive. OxyChem claims that CSX is at fault because it failed to inform us that Conrail's 1996 cancellations involved more than just traffic moving over the Niagara River bridges. It claims that this failure of disclosure by CSX caused us to impose a narrower Niagara Falls condition than would otherwise have been the case. A close examination of the relevant pleadings does not support that argument.

The Niagara Falls switching cancellation issue was one of many issues raised by ENRSC in its October 21, 1997 pleading. See ENRS-6 at 28-30. ENRSC contended there that Conrail eliminated certain reciprocal switching arrangements in the Niagara Frontier area in contemplation

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[13] See Decision No. 96 (served October 19, 1998).

[14] OxyChem cannot assert new evidence, because OxyChem has known, for quite some time, every relevant fact, including the fact that its relevant Niagara Falls traffic is not routed via the Niagara River bridges. Nor can OxyChem assert changed circumstances; OxyChem's recital of the relevant facts makes it quite clear that circumstances have not changed since October 20, 1997, the date it filed its last pleading prior to our issuance of Decision No. 89.

of this transaction. This issue was thus addressed by applicants in their rebuttal statements,[15] in which they indicated that this cancellation was unrelated to the transaction, and merely reflected the fact that, after December 1995, there was no need for Conrail to provide switching for CSX. Applicants explained that CSX had previously served Niagara Falls shippers via trackage rights over CN[16] lines through Canada, with Conrail providing switching for CSX at Suspension Bridge to and from Niagara Falls shippers. In December 1995, CSX arranged for CN to haul CSX's traffic over CN's lines as CSX's agent. That traffic, when carried by CN, would apparently move either via Suspension Bridge or via International Bridge. Applicants noted that, since 1995, CSX had not used its trackage rights over CN. Applicants further indicated that Conrail discontinued switching for CSX traffic at Niagara Falls because "[n]o one performs switching for carriers that do not actually travel to the switch district." CSX/NS-177 at 353.

Although OxyChem is correct that applicants' rebuttal did not explain that the Niagara Falls reciprocal switching cancellation of April 1, 1996, applied both to traffic moving via the Niagara River bridges and also to other traffic, applicants' rebuttal, taken in context, was not intended to mislead the Board. Applicants were merely attempting to explain that the rationale for the cancellation was not Conrail's anticipation of this transaction,[17] and that it was not an attempt to avoid inclusion of this situation under the NITL agreement, which was not entered until December 1997. Applicants were under no obligation to discuss any other traffic.

More importantly, if ENRSC or OxyChem had regarded applicants' rebuttal submissions as misleading, incomplete, inaccurate, or otherwise contrary to their interests, they would have (and should have) said so in their briefs, or at the latest during the 20-day reconsideration period, but they did not. Although ENRSC did file a brief, and did specifically discuss the Niagara Falls switching cancellation issue (see ENRS-19 at 37), it made no suggestion that applicants' rebuttal submissions were misleading or inaccurate with regard to the scope of the Niagara Falls cancellations. ENRSC, like applicants, chose not to discuss in any detail the particular traffic that had been subject to the Niagara Falls reciprocal switching cancellation, and although OxyChem was a party, it chose not to file a brief.

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[15] CSX/NS-176 at 65-66, and CSX-177, Vol. 2A at 350-53 (R.V.S. McGee).

[16] Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated are referred to collectively as CN.

[17] Applicants' main point was that contractual arrangements leading up to an initial October 1996 merger agreement between CSX and Conrail were not made until August of that year, so that the April 1996 switching cancellations could not have been in anticipation of that agreement. We agree with that argument.

2. The Oversight Condition. OxyChem, noting that we imposed an oversight condition to provide a means for the imposition of additional conditions that might be necessary to address harms caused by the transaction, now argues that we should invoke our oversight authority to expand our Niagara Falls condition for its benefit.

Our oversight condition is not nearly as broad in scope as OxyChem imagines. It does not give all parties, in all circumstances, a second bite of the apple. The oversight condition was intended to permit us to determine whether the conditions that we have imposed are working as intended to ameliorate competitive or other harm, and whether any additional conditions are required to remedy such harm. Perhaps OxyChem could have gained inclusion in the procompetitive benefits of the Niagara Falls condition if it had participated earlier, or perhaps that condition, as expanded, would have been rejected as imposing too great a burden upon the applicants. At this point, however, OxyChem needs to show at least that it will be harmed by this transaction, a burden that it has not met.[18] We will not allow our oversight condition to be used as a vehicle for making late requests that should have been timely made and that do not address competitive or other harms that are the primary focus of our remedial conditions.

3. The 2-to-1 Issue. OxyChem also asks us to hold CSX to its obligation to provide trackage or haulage rights that would allow for alternative rail service to facilities that otherwise would be 2-to-1 points. But OxyChem's plant is not a 2-to-1 facility. This transaction simply substitutes CSX for Conrail as the sole rail carrier serving its plant. OxyChem's request rests entirely upon the assertion that the broader Niagara Falls reciprocal switching cancellation was done in anticipation of, and should be attributed to, the transaction. As already discussed, the record establishes quite clearly that this was not the case. OxyChem's anticipatory cancellation assertion is unsupported by any evidence of record.

4. The Dunn Letter. OxyChem also argues that CSX should be held to its specific representation in the Dunn letter that Niagara Falls would be treated as a 2-to-1 point. OxyChem relies upon a condition that we imposed in Decision No. 89 indicating that we would hold applicants to representations that they have made during the course of the proceeding. As the text of our decision makes clear, however, this only includes those representations that were made on the

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[18] Because there seems to be some misunderstanding on this point, we clarify that our imposition of the Niagara Falls condition was not based on any finding of transaction-related competitive harm, but on other, procompetitive considerations. ENRSC had asserted that the April 1996 replacement of switching with line haul charges in the Niagara Falls area was done in anticipation of Conrail's acquisition by CSX and NS, and thus should be viewed as transaction-related competitive harm. There was no need for us to rule on that allegation in Decision No. 89, because we determined that we would order relief for certain Niagara Falls shippers to improve competition, not to preserve it.

record.[19] The Dunn letter upon which OxyChem relies was never submitted to us, and never made a part of the record. As such, we did not rely upon it in deciding whether or not to grant the application or in deciding what conditions to impose. Because the Dunn letter was not part of the record, it is not subject to our condition.

When representations are not made on the record, there is no opportunity for us, with the assistance of the parties, to iron out any ambiguities they may involve before we reach a final decision on what conditions to impose. Here, we are presented with an exchange of letters, some of which OxyChem claims it did not receive, even though applicants aver that they were mailed. Not surprisingly, the crucial Dunn letter is ambiguous. We generally prefer not to have to resolve controversies about what parties intended in their off-the-record correspondence, but we will reluctantly do so here. Ultimately, OxyChem's request must be denied because we do not believe that the Dunn letter, read in its entirety and taken in context, was regarded at the time by either OxyChem or CSX as making the commitment that OxyChem now insists it does.

The Dunn letter does state that, "[i]n acceptance of your request [i.e., a request previously made by OxyChem's Mr. Evans], Niagara Falls, NY will be treated as a 2 to 1 point under the terms of the acquisition." This might be construed as a binding commitment that OxyChem was entitled to 2-to-1 status with all that entails if the letter had ended there. But the letter immediately goes on to state that "Access will be granted via Buffalo, NY for a $390/car charge" and that "CSXT is hopeful to receive your support of the acquisition in the form of a verified statement." This additional language suggests that the 2-to-1 "representation" is not a representation, but an offer to grant "access" at $390 per car, which OxyChem could have accepted by its unconditional support of the transaction, which it did not provide.[20]

An additional CSX letter dated June 30, 1997 (CSX's 6/30/97 Dunn letter) states, in pertinent part:

> Our offer for Niagara Falls is to provide linehaul service at $390 to NS at Buffalo. It is not reciprocal switching. Our share of any through rates established would be $390. The rate will be valid for 25 years, subject to escalation at RCAF.

That second letter by Mr. Dunn indicates that his earlier letter, taken in context, should be regarded as an offer for a particular type of access at a particular rate, not a representation or a unilateral commitment to accord OxyChem 2-to-1 status. And the context makes clear that this offer had not

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[19] Decision No. 89, slip op. at 21, n.36.

[20] OxyChem cites its 10/20/97 Orbegoso statement as the support it offered for the transaction. That statement, although it expressed general support for the transaction, also sought a variety of conditions.

yet been accepted. Although Dunn's second letter seems to resolve the ambiguity in CSX's favor, OxyChem insists that it never received it.[21]

We find another letter (OxyChem's 10/17/97 Evans letter), addressed to an ENRSC official, sufficient by itself to clarify the parties' intentions. This letter, which appears in the record as an attachment to ENRS-6 filed October 21, 1997,[22] states in pertinent part:

> Before CSX Transportation pulled out of the Niagara Falls area, I believe in 1996, and Conrail canceled the reciprocal switching charge with CSX at Niagara Falls, we had some competitive rail competition between major Class I carriers. It's time for the STB to restore rail competition for Niagara Falls, NY. Niagara Falls is only 27 rail miles from Buffalo. The STB could order that CSX provide a reasonable charge from Niagara Falls to Buffalo to be absorbed by NS, CN, [CP], and BPRR in their pricing. Those carriers should show as serving Niagara Falls under reciprocal switching arrangement so direct contracts can be negotiated with them without CSX concurrence, which would restrict pricing freedom. Another alternative would be trackage rights between Buffalo and Niagara Falls for NS or others.

The relief sought in the Evans letter is not the sort of relief that OxyChem (through ENRSC) would have been seeking at that stage of the proceeding had it actually believed that CSX had already promised that OxyChem's Niagara Falls plant would be accorded 2-to-1 status. The Evans letter says that the time has come to restore rail competition at Niagara Falls. That request is inconsistent with the notion that CSX had already promised to restore rail competition to OxyChem at Niagara Falls.

The Evans letter suggests that competition at Niagara Falls should be restored either by requiring CSX to establish reciprocal switching or by requiring CSX to grant trackage rights to one or more other carriers. OxyChem would not have sought that relief had it really believed that CSX had already committed to treating OxyChem's Niagara Falls plant as a 2-to-1 facility. OxyChem would have at least attempted to explain just why the relief it sought was justified, given CSX's commitment. The fact that OxyChem provided no such explanation, and did not even mention this

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[21] It is well settled that letters such as this one that are mailed in the ordinary course of business are presumed to have been received.

[22] See ENRS-6, Tab C (OxyChem's 10/17/97 Evans letter is one of several items appearing in Tab C). Although OxyChem's 10/20/97 Orbegoso statement was submitted into the record by OxyChem and was referenced in Decision No. 89 (see Decision No. 89, slip op. at 278), OxyChem's 10/17/97 Evans letter was submitted into the record by ENRSC and was not referenced in Decision No. 89.

supposed commitment, severely undercuts OxyChem's interpretation of the first Dunn letter as a binding unilateral commitment.

We therefore conclude that CSX's 5/30/97 Dunn letter must be regarded as stating an offer, not a representation.[23] And because this offer was never accepted by OxyChem's provision of unconditional support for the transaction, it never became binding on CSX.

5. Enforcement of the Existing Condition. OxyChem requests that CSX be required to implement the Niagara Falls condition with respect to OxyChem traffic moving to and from OxyChem's Niagara Falls plant over the Niagara River bridges (traffic, OxyChem notes, that is clearly within the scope of the Niagara Falls condition as imposed in Decision No. 89). CSX is obliged to implement the Niagara Falls condition with respect to all traffic that is subject to it. If it does not do so, we will take appropriate action to enforce our condition.

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

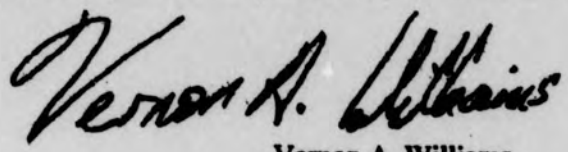
It is ordered:

1. OxyChem's reply is accepted for filing.

2. OxyChem's petition for additional relief is denied.

3. This decision is effective on the date of service.

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



Vernon A. Williams
Secretary

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[23] OxyChem claims that its 10/17/97 Evans letter "does nothing more than reiterate the hope and expectation that OxyChem will receive the 2-to-1 treatment that CSX had already represented that it would provide," see OxyChem's 3/3/99 reply at 4. A literal reading of OxyChem's 10/17/97 Evans letter does not support that interpretation.

STEPHEN M FONTAINE
MASSACHUSETTS CENTRAL RAILROAD CORPORATION
ONE WILBRAHAM STREET
PALMER MA 01069 US

JAMES E HOWARD
90 CANAL STREET
BOSTON MA 02114 US

HON. EDWARD M KENNEDY
UNITES STATES SENATE
2400 JOHN F KENNEDY FEDERAL BLDG
BOSTON MA 02203 US

JOHN R NADOLNY
14 AVIATION AVENUE
PORTSMOUTH NH 03801 US

KAREN E SONGHURST
STATE OF VERMONT
133 STATE STREET
MONTPELLIER VT 05633-5001 US

EDWARD J RODRIGUEZ
P.O. BOX 298
67 MAIN STREET
CENTERBROOK CT 06409 US

MICHAEL E STRICKLAND
NYK LINE (NORTH AMERICA) INC, SENIOR VICE PRE
300 LIGHTING WAY
SECAUCUS NJ 07094-1588 US

J WILLIAM VAN DYKE
NJ TRANSPORTATION PLANNING AUTHORITY
ONE NEWARK CENTER 17TH FLOOR
NEWARK NJ 07102 US

PHILIP SIDO
UNION CAMP CORPORATION
1600 VALLEY ROAD
WAYNE NJ 07470 US

TIMOTHY G CHELIUS
18 N EAST AVENUE
VINELAND NJ 08360 US

JOHN F. MCHUGH
MCHUGH & SHERMAN
20 EXCHANGE PLACE 51ST FLOOR
NEW YORK NY 10005 US

RICHARD B. KENNELLY, JR
CONSERVATION LAW FOUNDATION
62 SUMMER STREET
BOSTON MA 02110 US

JOHN D CIRAME, ASSISTANT SECRETARY
COMMONWEALTH OF MASS. EXEC. OFFICE OF TRANSP
10 PARK PLAZA ROOM 3170
BOSTON MA 02116-3969 US

WILLIAM D ANKNER PHD
R I DEPT OF TRANSPORTATION
TWO CAPITOL HILL
PROVIDENCE RI 02903 US

ROBERT D ELDER
MAINE DEPARTMENT OF TRANSPORTATION
16 STATE HOUSE STATION
AUGUSTA ME 04333 US

JAMES F SULLIVAN
CT DEPT OF TRANSPORTATION
P O BOX 317546
2800 BERLIN TURNPIKE
NEWINGTON CT 06131 US

RICHARD C CARPENTER
SOUTHWESTERN REGIONAL PLANNING AGENCY
1 SELLECK STREET SUITE 210
EAST NORWALK CT 06855 US

HONORABLE ROBERT G. TORRICELLI
UNITED STATES SENATE
1 RIVER FRONT PLAZA, 3RD FLOOR
NEWARK NJ 07102 US

EDWARD LLOYD
RUTGERS ENVIRONMENTAL LAW CLINIC
15 WASHINGTON STREET
NEWARK NJ 07102 US

MARTIN T DURKIN ESQ
DURKIN & BOGGIA ESQS
PO BOX 378
71 MT VERNON STREET
RIDGEFIELD PARK NJ 07660 US

LAWRENCE PEPPER, JR
GRUCCIO PEPPER
817 EAST LANDS AVE
VINELAND NJ 08360 US

ANTHONY BOTTALICO
UTU
420 LEXINGTON AVENUE ROOM 458-460
NEW YORK NY 10017 US

WALTER E ZULLIG JR
METRO-NORTH COMMUTER RAILROAD COMPANY
347 MADISON AVE
NEW YORK NY 10017-3706 US

ANTHONY P. SEMANCIK
347 MADISON AVENUE
NEW YORK NY 10017-3706 US

JAMES W HARRIS
THE METROPOLITIAN PLANNING ORGANIZATION
1 WORLD TRADE CENTER STE 82 EAST
NEW YORK NY 10048-0043 US

HUGH H. WELSH
LAW DEPT., SUITE 67E
ONE WORLD TRADE CENTER
NEW YORK NY 10048-0202 US

R. LAWRENCE MCCAFFREY, JR.
NEW YORK & ATLANTIC RAILWAY
405 LEXINGTON AVENUE 50TH FLOOR
NEW YORK NY 10174 US

SAMUEL J NASCA
UTU STATE LEGISLATIVE DIRECTOR
35 FULLER ROAD SUITE 205
ALBANY NY 12205 US

DANIEL B. WALSH
BUSINESS COUNCIL OF NEW YORK STATE, INC.
152 WASHINGTON AVENUE
ALBANY NY 12210 US

DIANE SEITZ
CENTRAL HUDSON GAS & ELECTRIC CORP
284 SOUTH AVENUE
POUGHKEEPSIE NY 12601 US

IRWIN L. DAVIS
1900 STATE TOWER BLDG.
SYRACUSE NY 13202 US

ANGELO J CHICK JR, LOCAL CHAIRMAN
P O BOX 908
48398 OLD GOOSE BAY ROAD
REDWOOD NY 13679 US

GARY EDWARDS
SOMERSET RAILROAD
7725 LAKE ROAD
BARKER NY 14012 US

SHEILA MECK HYDE
CITY HALL
342 CENTRAL AVENUE
DUNKIRK NY 14048 US

IRVING J RUBIN
P O BOX 243
YOUNGSTOWN NY 14174 US

JOHN F COLLINS
COLLINS ,COLLINS, & KANTOR PC
267 NORTH STREET
BUFFALO NY 14201 US

R W GODWIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
810 ABBOTT ROAD SUITE 200
BUFFALO NY 14220 US

ERNEST J IERARDI
NIXON HARGRAVE DEVANS DOYLE LLP
PO BOX 1051
CLINTON SQUARE
ROCHESTER NY 14603-1051 US

H DOUGLAS MIDKIFF
GENESEE TRANSPORTATION COUNCIL
65 WEST BROAD ST STE 101
ROCHESTER NY 14614-2210 US

JEANNE WALDOCK
107 GRANT COURT
ORLEAN NY 14760 US

DAVID W. DONLEY
3361 STAFFORD ST
PITTSBURGH PA 15204-1441 US

HENRY M. WICK, JR.
WICK, STREIFF, ET AL
1450 TWO CHATHAM CENTER
PITTSBURGH PA 15219 US

JOHN A. VUONO
VUONO & GRAY
2310 GRANT BUILDING
PITTSBURGH PA 15219 US

R J HENEFELD
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

M E PETRUCCELLI
PPG INDUSTRIES INC
ONE PPG PLACE
PITTSBURGH PA 15272 US

D W DUNLEVY
STATE LEGISLATIVE DIRECTOR UTU
230 STATE STREET, PA AFL-CIO BLDG 2ND FLOOR
HARRISBURG PA 17101 US

HONORABLE THOMAS J RIDGE
GOVERNOR, COMMONWEALTH OF PENNSYLVANIA
225 MAIN CAPITOL BUILDING
HARRISBURG PA 17120 US

BELNAP FREEMAN
BELKNAP FREEMAN
119 HICKORY LANE
ROSEMONT PA 19010 US

JOHN J GROCKI
GRA INC
115 WEST AV ONE JENKINTOWN STA
JENKINTOWN PA 19046 US

G CRAIG SCHELTER
PHILADELPHIA INDUSTRIAL DEVELOPMENT CORPORATI
2600 CENTRE SQUARE WEST 500 MARKET ST
PHILADELPHIA PA 19102 US

JOHN J EHLINGER JR
OBERMAYER REBMANN MAXWELL & HIPPEL
1617 JOHN F. KENNEDY BLVD ONE PENN CENTER-19T
PHILADELPHIA PA 19103-1895 US

JOHN J COSCIA, EXECUTIVE DIRECTOR
DELAWARE VALLEY REGIONAL PLANNING COMMISSION
111 SOUTH INDEPENDENCE MALL EAST
PHILADELPHIA PA 19106 US

CHERYL ANNE COOK
SENIOR GENERAL ATTORNEY
1138 SIX PENN CENTER
PHILADELPHIA PA 19146 US

HON JOSEPH R BIDEN, JR.
UNITED STATES SENATE
844 KING STREET
WILMINGTON DE 19801 US

E C WRIGHT
RAIL TRANSPORTATION PROCUREMENT MANAGER
1007 MARKET STREET DUPONT BLDG 3100
WILMINGTON DE 19898 US

RICHARD R WILSON
1126 EIGHT AV STE 403
ALTOONA PA 16602 US

KURT W CARR
BUREAU FOR HISTORIC PRESERVATION
P O BOX 1026
HARRISBURG PA 17108-1026 US

KRISTOPHER MICHAEL KLEMICK
RR#3 BOX 101-15
JERSEY SHORE PA 17740-9309 US

D J O'CONNELL
GENERAL CHAIRPERSON UTU
410 LANCASTER AVE STE 5
HAVERFORD PA 19041 US

HARRY C BARBIN
BARBIN LAUFFER & O'CONNELL
608 HUNTINGDON PIKE
ROCKLEDGE PA 19046 US

WILLIAM R THOMPSON
CITY OF PHILADELPHIA LAW DEPT
1600 ARCH ST 10TH FLOOR
PHILADELPH PA 19103 US

DAVID BERGER
BERGER AND MONTAGUE, P. C.
1622 LOCUST ST
PHILADELPHIA PA 19103-6305 US

JOHN K. LEARY, GENERAL MANAGER
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUT
1234 MARKET STREET 5TH FLOOR
PHILADELPHIA PA 19107-3780 US

ERIC M HOCKY
GOLLATZ GRIFFIN EWING
213 WEST MINER STREET
WEST CHESTER PA 19381-0796 US

J E THOMAS
HERCULES INCORPORATED
1313 NORTH MARKET STREET
WILMINGTON DE 19894 US

FREDERICK H SCHRANCK
PO BOX 778
DOVER DE 19903 US

STB FD 33288 5-20-99 C 30230

TERRENCE D JONES
KELLER & HECKMAN
1001 G ST NW STE 500 WEST
WASHINGTON DC 20001 US

JAMES HOWARD
COALITION OF NORTHEASTERN GOVERNORS
400 NORTH CAPITOL STREET, SUITE 382
WASHINGTON DC 20001 US

PETER A GILBERTSON
REGIONAL RRS OF AMERICA
122 C ST NW STE 850
WASHINGTON DC 20001 US

MARTIN W BERCOVICI
KELLER & HECKMAN, LLP
1001 G ST NW SUITE 500 WEST
WASHINGTON DC 20001 US

RICHARD G SLATTERY
AMTRAK
60 MASSACHUSETTS AVENUE N E
WASHINGTON DC 20002 US

DONALD F GRIFFIN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
10 G STREET NE STE 460
WASHINGTON DC 20002 US

PAUL A CUNNINGHAM
HARKINS CUNNINGHAM
801 PENNSYLVANIA AVENUE, NW STE 600
WASHINGTON DC 20004 US

DENNIS G LYONS
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

DREW A HARKER
ARNOLD & PORTER
555 TWELFTH STREET NW
WASHINGTON DC 20004 US

GEORGE W MAYO JR
HOGAN & HARTSON L L P
555 THIRTEENTH STREET NW COLUMBIA SQUARE
WASHINGTON DC 20004-1109 US

MARY GABRIELLE SPRAGUE
ARNOLD & PORTER
555 TWELTH STREET NW
WASHINGTON DC 20004-1202 US

KEVIN M SHEYS
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

BRUNO MAESTRI
NORFOLK SOUTHERN CORPORATION
1500 K STREET SUITE 375
WASHINGTON DC 20005 US

ROSE-MICHELE WEINRYB
WEINER BRODSKY SIDMAN & KIDER
1350 NEW YORK AVENUE NW
WASHINGTON DC 20005 US

PAUL M LAURENZA
OPPENHEIMER WOLFF & DONNELLY & BAYH LLP
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005 US

DANIEL DUFF
AMERICAN PUBLIC TRANSIT ASSOCIATION
1201 NEW YORK AV NW
WASHINGTON DC 20005 US

LOUIS E GITOMER
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

L JOHN OSBORN
SONNENSCHEIN NATH & ROSENTHAL
1301 K STREET NW STE 600 EAST
WASH DC 20005 US

JOHN H BROADLEY
JENNER & BLOCK
601 13TH ST NW 12TH FL
WASHINGTON DC 20005 US

KARL MORELL
BALL JANIK LLP
1455 F STREET NW SUITE 225
WASHINGTON DC 20005 US

ALICE C SAYLOR
THE AMERICAN SHORT LINE RAILROAD ASSOCIATION
1120 G STREET, N. W., SUITE 520
WASHINGTON DC 20005 US

EDWARD WYTKIND EXECUTIVE DIRECTOR
1025 CONNECTICUT AVE NW SUITE 1005
WASHINGTON DC 20005 US

CLARK EVANS DOWNS
JONES DAY REAVIS & POGUE
1450 G STREET NW
WASHINGTON DC 20005-2088 US

PAUL H LAMBOLEY
1350 EYE STREET, N.W., STE 200
WASHINGTON DC 20005-3324 US

JEFFREY O MORENO
DONELAN CLEARY WOOD MASER
1100 NEW YORK AVENUE N W, SUITE 750
WASHINGTON DC 20005-3934 US

FREDERIC L WOOD
DONELAN CLEARY WOOD & MASER P C
1100 NEW YORK AVENUE NW SUITE 750
WASHINGTON DC 20005-3934 US

MARK H SIDMAN
WEINER BRODSKY,SIDMAN & KIDER
1350 NEW YORK AVE., NW., STE. 800
WASHINGTON DC 20005-4797 US

ANDREW P GOLDSTEIN
MCCARTHY SWEENEY HARKAWAY, PC
1750 PENNSYLVANIA AVE NW, STE 1105
WASHINGTON DC 20006 US

ANDREW R. PLUMP
ZUCKERT, SCOUTT & RASENBERGER. LLP
888 17TH ST., NW, STE. 600
WASHINGTON DC 20006 US

JAMES R WEISS
PRESTON GATES ELLIS ET AL
1735 NEW YORK AVENUE NW SUITE 500
WASHINGTON DC 20006 US

ERIKA Z JONES
MAYER BROWN & PLATT
1909 K STREET, NW
WASHINGTON DC 20006-1101 US

JOHN V EDWARDS, ESQ
ZUCKERT SCOUTT ET AL
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

STEVEN J KALISH
MCARTHY SWEENEY & HARKAWAY
1750 PENNSYLVANIA AVE NW
WASHINGTON DC 20006-4502 US

WILLIAM A MULLINS
TROUTMAN SANDERS LLP
1300 I STREET NW SUITE 500 EAST
WASHINGTON DC 20005-3314 US

FRITZ R KAHN
1100 NEW YORK AVENUE NW SUITE 750 WEST
WASHINGTON DC 20005-3934 US

KARYN A BOOTH
DONELAN, CLEARY, WOOD & MASER, P.C.
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

JOHN K MASER III
DONELAN CLEARY WOOD & MASER P C
1100 NEW YORK AVE NW SUITE 750
WASHINGTON DC 20005-3934 US

WILLIAM W MILLAR
AMERICAN PUBLIC TRANSIT ASSOCIATION
1201 NEW YORK AVE., NW
WASHINGTON DC 20005-6141 US

ROBERT P VOM EIGEN
HOPKINS AND SUTTER
888 16TH STREET N W STE 700
WASHINGTON DC 20006 US

SCOTT M ZIMMERMAN
ZUCKERT SCOUTT & RASENBERGER L L P
888 SEVENTEENTH STREET NW
WASHINGTON DC 20006 US

DANIEL J SWEENEY
MCCARTHY SWEENEY & HARKAWAY P C
1750 PENNSYLVANIA AVE NW STE 1105
WASHINGTON DC 20006 US

RICHARD A ALLEN
ZUCKERT SCOUT RASENBERGER
888 17TH STREET N W STE 600
WASHINGTON DC 20006-3939 US

CHARLES A SPITULNIK
HOPKINS & SUTTER
888 SIXTEENTH ST NW
WASH DC 20006-4103 US

SHERRI LEHMAN DIRECTOR OF CONGRESSIONAL AFFA
CORN REFINERS ASSOC
1701 PA AV NW
WASH DC 20006-5805 US

ROBERT G. SZABO
V.NESS FELDMAN
1050 THO JEFFERSON STREET,NW
WASHINGTON DC 20007 US

CHRISTOPHER C O'HARA
BRICKFIELD BURCHETTE & RITTS PC
1025 THOMAS JEFFERSON ST NW EIGHTH FLOOR
WASHINGTON DC 20007 US

MICHAEL F MCBRIDE
LEBOEUF LAMB GREENE & MACRAE
1875 CONNECTICUT AVENUE NW
WASHINGTON DC 20009-5728 US

JOHN D HEFFNER
REA CROSS & AUCHINCLOSS
1707 L STREET, NW, STE 570
WASHINGTON DC 20036 US

DAVID H COBURN
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE NW
WASHINGTON DC 20036 US

HELEN M. COUSINEAU
CARLOS RODRIGUEZ & ASSOCIATES
1710 RHODE ISLAND AVENUE, NW
WASHINGTON DC 20036 US

STEPHEN H BROWN
VORYS SATER SEYMOUR AND PEASE
1828 L STREET N W
WASHINGTON DC 20036 US

CHRISTOPHE[illegible] MILLS
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036 US

RICHARD S EDELMAN
O'DONNELL SCHWARTZ & ANDERSON PC
1900 L STREET NW SUITE 707
WASHINGTON DC 20036 US

PETER A GREENE
THOMPSON HINE FLORY
1920 N STREET N W, SUITE 800
WASHINGTON DC 20036 US

TIMOTHY M WALSH
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

DAVID K MONROE
GALLAND, KHARASCH, GREENBERT, FELLMAN & SWIR
1054 THIRTY-FIRST STREET NW, STE 200
WASHINGTON DC 20007 US

EDWARD D GREENBERG
GALLAND, KHARASCH, GREENBERT, FELLMAN & SWIR
1054 THIRTY-FIRST STREET NW
WASHINGTON DC 20007-4492 US

PAUL M DONOVAN
LAROE, WINN, MOERMAN & DONOVAN
3506 IDAHO AVE NW
WASHINGTON DC 20016 US

WILLIAM G. MAHONEY
HIGHSAW, MAHONEY & CLARKE
1050 SEVENTEENTH STREET NW SUITE 210
WASHINGTON DC 20036 US

KELVIN J DOWD
SLOVER & LOFTUS
1224 17TH STREET N W
WASHINGTON DC 20036 US

HAROLD P QUINN, JR
NATIONAL MINING ASSOCIATON
1130 17TH STREET NW
WASHINGTON DC 20036 US

KEITH G O'BRIEN
REA CROSS AND AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

ROBERT A WIMBISH ESQ
REA CROSS & AUCHINCLOSS
1707 L STREET NW STE 570
WASHINGTON DC 20036 US

GORDON P MACDOUGALL
1025 CONNECTICUT AVE NW SUITE 410
WASHINGTON DC 20036 US

JOHN M CUTLER JR
MCCARTHY SWEENEY HARKAWAY PC
1750 PENNSYLVANIA AVE N W SUITE 1105
WASHINGTON DC 20036 US

SAMUEL M SIPE JR
STEPTOE & JOHNSON
1330 CONNECTICUT AVENUE N W
WASHINGTON DC 20036-1795 US

JOSEPH GUERRIERI, JR.
GUERRIERI, EDMOND & CLAYMAN, PC
1625 MASSACHUSETTS AVE., NW. STE 700
WASHINGTON DC 20036-2243 US

DEBRA L WILLEN
GUERRIERI EDMOND & CLAYMAN PC
1625 MASSACHUSETTS AVENUE, N.W., STE 700
WASHINGTON DC 20036-2243 US

DONALD G AVERY
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036-3003 US

WILLIAM L SLOVER
SLOVER & LOFTUS
1224 SEVENTEENTH STREET NW
WASHINGTON DC 20036-3003 US

L PAT WYNNS
SUITE 210
1050 - 17TH STREET N W
WASHINGTON DC 20036-5503 US

EDWARD J FISHMAN
OPPENHEIMER WOLFF & DONNELLY
1020 NINETEENTH STREET NW SUITE 400
WASHINGTON DC 20036-6105 US

JOHN L OBERDORFER
PATTON BOGGS LLP
2550 M ST NW
WASHINGTON DC 20037-1301 US

SCOTT N STONE
PATTON BOGGS L L P
2550 M STREET NW 7TH FLOOR
WASHINGTON DC 20037-1346 US

ARVID E ROACH II
COVINGTON & BURLING
PO BOX 7566
1201 PENNSYLVANIA AVE N W
WASHINGTON DC 20044-7566 US

KEITH A KLINDWORTH
U S DEPT OF AGRICULTURE
P O BOX 96456
WASHINGTON DC 20090 US

EILEEN S STOMMES
P O BOX 96456
ROOM 4006-SOUTH BUILDING
WASHINGTON DC 20090-6456 US

JUDGE JACOB LEVENTHAL, OFFICE OF HEARINGS
FEDERAL ENERGY REGULATORY COMMISSION
888 - 1ST ST, N.E. STE 11F
WASHINGTON DC 20426 US

RICHARD E SANDERSON
OFFICE OF FEDERAL ACTIVITIES
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460 US

HON. BARBARA A. MIKULSKI
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH BIDEN, JR.
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. JOSEPH I LIEBERMAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE RICHARD LUGAR
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON CHARLES E SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON DANIEL PATRICK MOYNIHAN
UNITED STATES SENATE
WASINGTON DC 20510 US

BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON BYRON L DORGAN
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON CHARLES SCHUMER
UNITED STATES SENATE
WASHINGTON DC 20510 US

HONORABLE BOB GRAHAM
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON. CHARLES ROBB
UNITED STATES SENATE
WASHINGTON DC 20510 US

HON WILLIAM V. ROTH JR
U S SENATE
WASHINGTON DC 20510-0001 US

HON. JOHN W. WARNER
US SENATE
WASHINGTON DC 20510-0001 US

HON CHRISTOPHER J DODD
UNITED STATES SENATE
WASH DC 20510-0702 US

HONORABLE DANIEL P. MOYNIHAN
UNITED STATE SENATE
WASHINGTON DC 20510-0903 US

HONORABLE CONNIE MACK
UNITED STATES SENATE
WASHINGTON DC 20510-0904 US

HONORABLE JOHN BREAUX
UNITED STATES SENATE
WASHINGTON DC 20510-1803 US

HONORABLE J ROBERT KERREY
UNITED STATES SENATE
WASHIGTON DC 20510-2704 US

HON MIKE DEWINE
UNITED STATES SENATE
WASHINGTON DC 20510-3503 US

HON ARLEN SPECTER
UNITED STATES SENATE
WASHINGTON DC 20510-3802 US

HON RICK SANTORUM
UNITED STATES SENATE
WASHINGTON DC 20510-3804 US

HONORABLE JOHN H. CHAFEE
UNITED STATES SENATE
WASHINGTON DC 20510-3902 US

HON JACK REED
U S SENATE
WASHINGTON DC 20510-3903 US

HONORABLE ROBERT BYRD
UNITED STATES SENATE
WASHINGTON DC 20510-6025 US

HONORABLE JOHN J LAFALCE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE CHIP PICKERING
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JESSE L. JACKSON, JR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE LUIS GUTIERREZ
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE DANNY K DAVIS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON RALPH REGULA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON SHERROD BROWN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NYDIA M VELAZQUEZ
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ED TOWNS
U. S. HOUSE OR REPRESENTATIVES
WASHINGTON DC 20515 US

HON LOUISE M SLAUGHTER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHRISTOPHER SHAYS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CHARLES RANGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL MCNULTY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JAMES MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON CAROLYN B MALONEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NITA LOWEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MAURICE HINCHEY
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON MICHAEL FORBES
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON ELIOT L ENGEL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON GARY ACKERMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JERROLD NADLER
U S HOUSE OF REPRESENTATIVES
WASH DC 20515 US

HONORABLE ROBERT W. NEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB WEYGAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TED STRICKLAND
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON DENNIS J KUCINICH
UNITED STATES HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ED BRYANT
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. STEVE LATOURETTE
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAXBY CHAMBLISS,
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE TILLIE K FOWLER
US HOUSE REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE FRANK MASCARA
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. ROBERT MENENDEZ
U S HOUSE OF REPRESENTATIVES
WASH DC 20515 US

HON MARCY KAPTUR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON JAMES TRAFICANT JR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON BOB WISE
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JOHN J. DUNCAN
U S HOUSE OF REPRESENTATIVESS
WASHINGTON DC 20515 US

HONORABLE PAUL E. GILLMOR
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. JAMES L. OBERSTAR
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM O. LIPINSKI
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BOB CLEMENT
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. THOMAS C SAWYER
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. TOM BLILEY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE PETER J. VISCLOSKY
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MIKE DOYLE
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE JOHN D. DINGELL
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE BENJAMIN A. GILMAN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE SAM GEJDENSON
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. WILLIAM J. COYNE
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE MAJOR R. OWENS
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON NANCY JOHNSON
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HON. BUD SHUSTER
ATTN: MIKE RICK
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515 US

HONORABLE ROD R BLAGOJEVICH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTC DC 20515-1305 US

HONORABLE JAMES A. BARCIA
US HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-2205 US

JAMES L OBERSTAR
RANKING DEMOCRATIC MEMBER COMMITTEE ON TRANSP
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3222 US.

HON JACK QUINN
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3230 US

HONORABLE RICHARD BURR
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-3305 US

HONORABLE TOM DAVIS
U S HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-4611 US

HONORABLE BOBBY L. RUSH
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC 20515-9997 US

MICHAEL P HARMONIS
DEPARTMENT OF JUSTICE
325 SEVENTH STREET, NW
WASHINGTON DC 20530 US

PAUL SAMUEL SMITH
US DEPARTMENT OF TRANSPORTATION
400 SEVENTH STREET SW, ROOM 4102 C-30
WASHINGTON DC 20590 US

JOSEPH R. POMPONIO
FEDERAL RAILROAD ADMIN.
400 7TH ST SW RCC-20
WASHINGTON DC 20590 US

JOLENE MOLITORIS, ADMN.
FEDERAL RAILROAD ADMNS.
400 7TH STREET SW
WASHINGTON DC 20590 US

DAVID G ABRAHAM
SUITE 400W
7315 WISCONSIN AVENUE
BETHESDA MD 20814 US

MITCHELL M. KRAUS
TRANSPORTATION -COMMUNICATIONS INTERNATIONAL
3 RESEARCH PLACE
ROCKVILLE MD 20850 US

JOHN M ROBINSON
9616 OLD SPRING ROAD
KENSINGTON MD 20895-3124 US

WILLIAM W WHITEHURST JR
W W WHITEHURST & ASSOCIATES INC
12421 HAPPY HOLLOW ROAD
COCKEYSVILLE MD 21030-1711 US

JOHN HOY
P O BOX 117
GLEN BURNIE MD 21060 US

ROBERT J WILL
UNITED TRANSPORTATION UNION
4134 GRAVE RUN RD
MANCHESTER MD 21102 US

JOHN F WING CHAIRMAN
CITIZENS ADVISORY COMMITTEE
601 NORTH HOWARD STREET
BALTIMOTE MD 21201 US

LINDA A JANEY J D
MARYLAND OFFICE OF PLANNING
301 WEST PRESTON STREET
BALTIMORE MD 21201-2365 US

CHARLES M CHADWICK
MARYLAND MIDLAND RAILWAY INC
P O BOX 1000
UNION BRIDGE MD 21791 US

GARRET G SMITH
MOBIL OIL CORPORATION
3225 GALLOWS RD RM 8A903
FAIRFAX VA 22037-0001 US

HENRY E. SEATON
7700 LEESBURG PIKE, STE 201
FALLS CHURCH VA 22043 US

PETER Q NYCE JR
U S DEPARTMENT OF THE ARMY
901 NORTH STUART STREET
ARLINGTON VA 22203 US

JENNIFER BRAUN
JACKSON & JESSUP
P O BOX 1240
3426 NORTH WASHINGTON BOULEVARD
ARLINGTON VA 22210 US

FRANCIS G MCKENNA
ANDERSON & PENDLETON
206 N WASHINGTON STREET SUITE 330
ALEXANDRIA VA 22314 US

ROBERT E MARTINEZ
VA SECRETARY OF TRANSPORTAITON
P. O. BOX 1475
RICHMOND VA 23218 US

GEORGE A ASPATORE
NORFOLK SOUTHERN CORP
THREE COMMEMERCIAL PLACE
NORFOLK VA 23510 US

HONORABLE JOHN WARNER
UNITED STATES SENATE
235 FEDERAL BUILDING
ABINGDON VA 24210-0887 US

TERRELL ELLIS
CAEZWV
P O BOX 176
CLAY WV 25043 US

WILLIAM T BRIGHT
P O BOX 149
200 GREENBRIER ROAD
SUMMERSVILLE WV 26651 US

SCOTT M SAYLOR
NORTH CAROLINA RAILROAD COMPANY
3200 ATLANTIC AV STE 110
RALIEGH NC 27604-1640 US

HONORABLE DAVID M BEASLEY
GOVERNOR
P. O. BOX 11369
COLUMBIA SC 29211 US

CHARLES M ROSENBERGER
CSX TRANSPORTATION
500 WATER STREET - J150
JACKSONVILLE FL 32202 US

WILLIAM P. JACKSON, JR.
JACKSON & JESSUP, P. C.
P O BOX 1240
3426 NORTH WASHINGTON BLVD
ARLINGTON VA 22210 US

GERALD W FAUTH III
G W FAUTH & ASSOCIATES INC
116 SOUTH ROYAL STREET
ALEXANDERIA VA 22314 US

KENNETH E SIEGEL
AMERICAN TRUCKING ASSOC INC
2200 MILL ROAD
ALEXANDRIA VA 22314-4677 US

HONORABLE GEORGE ALLEN
GOVERNOR, COMMONWEALTH OF VIRGINIA
STATE CAPITOL
RICHMOND VA 23219 US

L P KING JR
GENERAL CHAIRPERSON UTU
145 CAMPBELL AVE SW STE 207
ROANOKE VA 24011 US

VAUGHN R GROVES
PITTSTON COAL COMPANY
PO BOX 5100
LEBANON VA 24266 US

R K SARGENT
GENERAL CHAIRPERSON UTU
1319 CHESTNUT STREET
KENOVA WV 25530 US

FRANK N JORGENSEN
THE ELK RIVER RAILROAD INC
P O BOX 460
SUMMERSVILLE WV 26651 US

E NORRIS TOLSON
NC DEPT OF TRANSPORTATION
P O BOX 25201
1 S. WILINGTON STREET
RALEIGH NC 27611 US

PAUL R. HITCHCOCK
CSX TRANSPORTATION LAW DEPARTMENT
500 WATER STREET SC J-150
JACKSONVILLE FL 32202 US

BOB HAULTER
CSX TRANSPORTATION INC
500 WATER STREET (J215)
JACKSONVILLE FL 32202 US

FRED R BIRKHOLZ
CSX TRANSPORTATION LAW DEPT - J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

ROBERT V ALLEN
CSX TRANSPORTATION
500 WATER STREET J305
JACKSONVILLE FL 32202 US

J RANDALL EVANS
500 WATER STREET (J150)
JACKSONVILLE FL 32202 US

JOHN W. HUMES, JR.
CSX TRANSPORTATION
SPEED CODE J-150
500 WATER STREET
JACKSONVILLE FL 32202 US

J L RODGERS
GENERAL CHAIRMAN UTU
480 OSCEOLA AVENUE
JACKSONVILLE FL 32250 US

J T REED
GENERAL CHAIRPERSON UTU
7785 BAYMEADOWS WAY STE 109
JACKSONVILLE FL 32256 US

PHILLIP L BELL
ERIE LACKAWANNA RAILROAD CO
PO BOX 1482
TALLAHASSEE FL 32302 US

JAMES L BELCHER
EASTMAN CHEMICAL COMPANY
PO BOX 431
KINGSPORT TN 37662 US

WILLIAM L OSTEEN
ASSOCIATE GENERAL COUNSEL TVA
400 WEST SUMMIT HILL DRIVE
KNOXVILLE TN 37902 US

J R BARBEE
GENERAL CHAIRPERSON UTU
P.O. BOX 9599
KNOXVILLE TN 37940 US

HONORABLE KIRK FORDICE, GOVERNOR
STATE OF MISSISSIPPI
P O BOX 139
JACKSON MS 39205 US

HONORABLE PAUL E. PATTON
GOVERNOR
700 CAPITOL AVENUE, STE. 100
FRANKFORT KY 40601 US

WILLIAM P HERNAN JR GENERAL CHAIRMAN
P O BOX 180
HILLIARD OH 43026 US

F R PICKELL
GENERAL CHAIRPERSON UTU
6797 NORTH HIGH ST STE 108
WORTHINGTON OH 43085 US

THOMAS M O'LEARY
OHIO RAIL DEVELOPMENT COMMISSION
50 W BROAD STREET 15TH FLOOR
COLUMBUS OH 43215 US

HONORABLE DEBORAH PRYCE
U. S. HOUSE OF REPRESENTATIVES
500 SOUTH FRONT STREET, ROOM 1130
COLUMBUS OH 43215 US

DOREEN C JOHNSON, CHIEF ANTITRUST SECTION
OHIO ATTY GENERAL OFFICE
140 EAST TOWN STREET, FIRST FLOOR
COLUMBUS OH 43215-6001 US

JAMES R JACOBS
JACOBS INDUSTRIES
2 QUARRY LANE
STONY RIDGE OH 43463 US

DAVID CHAPMAN
LAFARGE LIME OHIO INC
P O BOX 128
659 ANDERSON ROAD
WOODVILLE OH 43469-0128 US

ROBERT J COOPER
GENERAL CHAIRPERSON UTU
1238 CASS ROAD
MAUMEE OH 43537 US

ROBERT E GREENLESE
TOLEDO-LUCAS COUNTY PORT AUTHORITY
1 MARITIME PLAZA SUITE 700
TOLEDO OH 43604 US

DAVID DYSARD
TMACOG
PO BOX 9508
300 CENTRAL UNION PLAZA
TOLEDO OH 43697-9508 US

RON MARQUARDT
LOCAL UNION 1810 UMWA
R D #2
RAYLAND OH 43943 US

CHARLES S HESSE
CHARLES HESSE ASSOCIATES
7777 BAINBRIDGE ROAD
CHAGRIN FALLS OH 44023-2124 US

COLETTA MCNAMEE SR
CUDELL IMPROVEMENT INC
11500 FRANKLIN BLVD STE 104
CLEVELAND OH 44102 US

C L LITTLE
UNITED TRANSPORTATION UNION
14600 DETROIT AVE
CLEVELAND OH 44107 US

DANIEL R ELLIOTT III
ASST GENERAL COUNSEL UNITED TRANSPORTATION UN
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

CHRISTOPHER C MCCRACKEN
ULMER & BERNE LLP
1300 EAST NINTH STREET SUITE 900
CLEVELAND OH 44114 US

INAJO DAVIS CHAPPELL
ASHTA CHEMICALS INC
1300 EAST NINETH STREET SUITE 900
CLEVELAND OH 44114-1538 US

MICHAEL J GARRIGAN
BP CHEMICALS INC
4440 WARRENSVILLE CTR RD
CLEVELAND OH 44128 US

GARY A EBERT
CITY OF BAY VILLAGE
350 DOVER CENTER ROAD
BAY VILLAGE OH 44140 US

SYLVIA R. CHINN-LEVY
NEFCO
969 COPLEY ROAD
AKRON OH 44320 US

RANDALL C. HUNT
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO.
P O BOX 36963
4775 MUNSON ST NW
CANTON OH 44735-6963 US

MAYOR VINCENT M URBIN
150 AVON BELDEN RD
AVON LAKE OH 44012 US

BARBARA O'KEEFE
VILLAGE OF WELLINGTON
115 WILLARD MEMORIAL SQ
WELLINGTON OH 44090 US

ANITA R BRINDZA
THE ONE FIFTEEN HUNDRED BUILDING
11500 FRANKLIN BLVD SUITE 104
CLEVELAND OH 44102 US

CLINTON J MILLER III GENERAL COUNSEL
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

C V MONIN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1370 ONTARIO STREET
CLEVELAND OH 44113 US

DAVID ROLOFF
GOLDSTEIN & ROLOFF
526 SUPERIOR AVENUE EAST SUITE 1440
CLEVELAND OH 44114 US

DAVID J MATTY
CITY OF ROCKY RIVER
21012 HILLIARD ROAD
ROCKY RIVER OH 44116-3398 US

C D WINEBRENNER
GENERAL CHAIRPERSON UTU
27801 EUCLID AV RM 200
EUCLID OH 44132 US

CHARLES ZUMKEHR
ROETZEL & ANDRESS CO LPA
75 EAST MARKET STREET
AKRON OH 44308 US

CHARLES E ALLENBAUGH JR
EAST OHIO STONE COMPANY
2000 W BESSON ST
ALLIANCE OH 44601 US

D G STRUNK JR
GENERAL CHAIRPERSON UTU
817 KILBOURNE STREET
BELLEVUE OH 44811 US

R A GRICE
GENERAL CHAIRPERSON UTU
817 KILBOURNE ST
BELLEVUE OH 44811-9431 US

BRAD F HUSTON
CYPRUS AMAX COAL SALES CORP
400 TECHNECENTER DRIVE STE 320
MILFORD OH 45150 US

ROBERT EDWARDS
EASTERN TRANSPORT AND LOGISTICS
1109 LANETTE DRIVE
CINCINNATI OH 45230 US

F RONALDS WALKER
CITIZENS GAS & COKE UTILITY
2020 N MERIDIAN STREET
INDIANAPOLIS IN 46202-1393 US

J PATRICK LATZ
HEAVY LIFT CARGO SYSTEM
PO BOX 51451
INDIANAPOLIS IN 46251-0451 US

HAMILTON L CARMOUCHE, CORPORATION COUNSEL
CITY OF GARY
401 BROADWAY 4TH FLOOR
GARY IN 46402 US

CARL FELLER
DEKALB AGRA INC
P. O. BOX 127
4743 COUNTY ROAD 28
WATERLOO IN 46793-0127 US

WILLIAM A BON, GENERAL COUNSEL
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
26555 EVERGREEN ROAD SUITE 200
SOUTHFIELD MI 48076 US

JAMES E SHEPHERD
TUSCOLA & SAGINAW BAY
PO BOX 550
OWOSSO MI 48867-0550 US

HON JOHN ENGLER
OFFICE OF THE GOVERNOR
P O BOX 30013
LANSING MI 48933 US

BYRON D OLSEN
FELHABER LARSON FENLON & VOGT PA
601 SECOND AVENUE SOUTH SUITE 4200
MINNEAPOLIS MN 55401-4302 US

RICHARD E KERTH
CHAMPION INTERNATIONAL CORPORATION
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

FAY D DUPUIS
CITY OF CINCINNATI
801 PLUM STREET
CINCINNATI OH 45202 US

THOMAS R RYDMAN PRESIDENT
INDIAN CREEK RAILROAD COMPANY
3905 W 600 NORTH
ANDERSON IN 46011 US

MICHAEL P MAXWELL JR
MCHALE, COOK & WELCH
320 N MERIDIAN ST 1100 CHAMBER OF COMMERCE BL
INDIANAPOLIS IN 46204 US

MICHAEL CONNELLY
CITY OF EAST CHICAGO
4525 INDIANAPOLIS BLVD
EAST CHICAGO IN 46312 US

HONORABLE PETER J. VISCLOSKY
U. S. HOUSE OF REPRESENTATIVES
215 WEST 35TH AVENUE
GARY IN 46408 US

CHRISTOPHER J BURGER, PRESIDENT
CENTRAL RAILROAD COMPANY OF INDIANAPOLIS
PO BOX 554
KOKOMO IN 46903-0554 US

NICOLE HARVEY
THE DOW CHEMICAL COMPANY
2020 DOW CENTER
MIDLAND MI 48674 US

LARRY B KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

T SCOTT BANNISTER
T SCOTT BANNISTER AND ASSOCIATES
1300 DES MOINES BLDG 405 SIXTH AVENUE
DES MOINES IA 50309 US

LEO J WASESCHA
GOLD MEDAL DIVISON - GENERAL MILLS OPERATION
P O BOX 1113
NUMBER ONE GENERAL MILLS BULEVARD
MINNEAPOLIS MN 55440 US

THOMAS R BOBAK
313 RIVER OAKS DRIVE
CALUMET CITY IL 60409 US

RICHARD A GAVRIL
16700 GENTRY LANE NO 104
TINLEY PARK IL 60477 US

CHRISTINE H. ROSSO
IL ASSISTANT ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FLOOR
CHICAGO IL 60601 US

WILLIAM C SIPPEL
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE TWO PRUDENTIAL PLAZA 45TH F
CHICAGO IL 60601-6710 US

EDWARD C MCCARTHY
INLAND STEEL INDUSTRIES INC
30 WEST MONROE STREET
CHICAGO IL 60603 US

SANDRA J. DEARDEN
MDCO CONSULTANTS, INC.
407 SOUTH DEARBORN, SUITE 1260
CHICAGO IL 60605 US

THOMAS F MCFARLAND JR
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE, SUITE 1330
CHICAGO IL 60606-3101 US

CHARLES D BOLAM
UNITED TRANSPORTATION UNION
1400-20TH STREET
GRANITE CITY IL 62040 US

MERRILL L TRAVIS
ILLINOIS DEPT OF TRANSPORTATION
2300 S DIRKSEN PARKWAY RM 302
SPRINGFIELD IL 62764 US

JOHN JAY ROSACKER
KS DEPT OF TRANSP
217 SE 4TH ST 2ND FLOOR
TOPEKA KS 66603 US

MIKE SPAHIS
FINA OIL & CHEMICAL CO.
6000 LEGACY DRIVE
PLANO, TX 75024-3601 US

GERALD J. VINCI
PRAIRIE GROUP
P. O.BOX 1123
7601 WEST 79TH STREET
BRIDGEVIEW IL 60455 US

EDWARD WASHINGTON, II
CHIEF, PUBLIC UTILITIES BUREAU, ILL ATTORNEY
100 W RANDOLPH ST - 12TH FLOOR
CHICAGO IL 60601 US

THOMAS J LITWILER
OPPENHEIMER WOLFF & DONNELLY
180 N STETSON AVE 45TH FLOOR
CHICAGO IL 60601 US

RICHARD F. FRIEDMAN, ESQ
EARL L NEAL & ASSOCIATES
111 WEST WASHINGTON STREET, STE 1700
CHICAGO IL 60602-2766 US

ROGER A SERPE
175 WEST JACKSON BOULEVARD SUITE 1460
CHICAGO IL 60604 US

SHELDON A ZABEL
SCHIFF HARDIN & WAITE
7200 SEARS TOWER
CHICAGO IL 60606 US

MYLES L TOBIN
ILLINOIS CENTRAL RAILROAD
455 NORTH CITYFRONT PLAZA DRIVE
CHICAGO IL 60611-5504 US

SCOTT A RONEY
ARCHER DANIELS MIDLAND COMPANY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

IAN MUIR
BUNGE CORPORATION
P O BOX 28500
ST LOUIS MO 63146 US

HENRY T DART
PLAINTIFF MANGEMENT COMMITTEE
3748 NORTH CAUSEWAY BLVD SUITE 301
METAIRIE LA 70002 US

DENNIS A. GUTH
WEST LAKE GROUP
2801 POST OAK BLVD
HOUSTON TX 77056 US

DAVID L HALL
COMMONWEALTH CONSULTING ASSOCIATES
13103 FM 1960 WEST SUITE 204
HOUSTON TX 77065-4069 US

STEVE M COULTER
EXXON COMPANY USA
PO BOX 3272
HOUSTON TX 77253-3272 US

STEPHEN M UTHOFF
CONIGLIO & UTHOFF
60 ELM AVENUE, CONIGLIO PROFESSIONAL BLDG
LONG BEACH CA 90802-4910 US

JOHN D FITZGERALD
UTU, GENERAL CHAIRPERSON
400 E EVERGREEN BLVD STE 217
VANCOUVER WA 98660-3264 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
P O BOX 2583
1221 MCKINNEY STREET SUITE 1600
HOUSTON TX 77252-2583 US

MONTY L PARKER
CMC STEEL GROUP
P O BOX 911
SEGUIN TX 78156 US

RICHARD WELSH
NARPO
50-505 GRAND TRAVERSE
LA QUINTA CA 92253 US

Records: 359