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October 21, 1997

ENTERED
Office of the Secretary
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Via Hand Delivery
Honorable Vernon A. Williams
Office of the Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: STB Finance Docket No. 33388, CSX Corporation, et al., Norfolk Southern Corporation, et al.—Control and Operating Leases/Agreements—Conrail, Inc., et al.

Dear Secretary Williams:

Please find enclosed for filing in the above-reference proceeding an original and 25 copies of the Redacted (to be filed in the public record) Comments, Evidence and Request for Conditions of Erie-Niagara Rail Steering Committee, which has been designated as ENRS-7.

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Respectfully submitted,

John K. Maser III
Frederic L. Wood
Karyn A. Booth

Attorneys for
Erie-Niagara Rail Steering Committee

Enclosures
4898-020

cc: All Parties on the Highly Confidential Restricted Service List

182936

ENRS-7

PUBLIC / REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

COMMENTS, EVIDENCE AND REQUEST FOR CONDITIONS

OF

ERIE-NIAGARA RAIL STEERING COMMITTEE

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DATE: OCTOBER 21, 1997

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PART A

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COMMENTS, EVIDENCE AND REQUEST FOR CONDITIONS

OF

ERIE-NIAGARA RAIL STEERING COMMITTEE

The Erie-Niagara Rail Steering Committee ("Erie-Niagara") hereby files its Comments, Evidence and Request for Conditions in this proceeding concerning the joint application of CSX Corporation and CSX Transportation ("CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS") for authorization to acquire, divide, and operate the assets of Conrail Inc. and Consolidated Rail Corporation ("Conrail") (collectively "Applicants").

I. INTRODUCTION AND SUMMARY OF RELIEF REQUESTED

Erie-Niagara is an ad-hoc committee that was created subsequent to the filing of the joint application of Applicants to represent and protect the interests of businesses located in the New York State counties of Erie, Niagara, and Northern Chautauqua that will be impacted by this proceeding. The membership of Erie-Niagara is comprised of railroad shippers, economic and industrial development organizations, public transportation representatives, and county representatives.

Throughout their joint application and the course of this proceeding, the Applicants have characterized their proposal to acquire and divide Conrail as "unprecedented," as "the most pro-competitive," and as a transaction which will yield "enormous public benefits." In addition, the Applicants, particularly NS, have asserted that a major goal of the proposed transaction is to restore balanced competition among railroads "in major markets" in the northeast, comparable to that which was proposed in the Final System Plan developed by the United States Railway Association ("USRA") in 1975.

While the Applicants' statements may hold true for certain selected regions in the Northeast presently served by Conrail, they do not and cannot serve to describe the railroad service that will result in the Niagara Frontier area, a large and very significant market encompassing the New York State counties of Erie, Niagara and Northern Chautauqua, should the transaction as currently proposed be approved by the Surface Transportation Board ("STB" or "Board").[1] As demonstrated by this filing, the proposed division of Conrail will <u>not</u> result in increased competition and enormous public benefits to shippers located in the Niagara Frontier area but instead will cause them direct competitive harm.

Under the proposed transaction, businesses located in the Niagara Frontier

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1 The geographic boundaries of the Niagara Frontier area are described in the Verified Statement of Gerald W. Fauth III, attached hereto as Exhibit B-1, at 58.

area that are dependent upon rail service will generally have access to only a single rail carrier, either CSX or NS. In contrast, the Applicants have proposed to create so-called "Shared Assets Areas" in three other significant markets in the northeast, in which CSX and NS will both obtain access to *all* rail served businesses formerly served by Conrail. The proposed Shared Assets Areas are: (1) Detroit, Michigan, (2) Southern New Jersey/Philadelphia, and (3) Northern New Jersey. As shown in this submission, many businesses located in the Niagara Frontier region compete directly with companies located in the Shared Assets Areas. As further shown, because the businesses located in the Shared Assets Areas will obtain head-to-head rail competition between CSX and NS under the proposal, which expectedly would result in lower transportation rates and costs for such businesses, the competing businesses in the Niagara Frontier that will be solely served by either CSX or NS will be adversely impacted, as a direct result of the proposed transaction. A detailed analysis of the economic and competitive consequences of the proposed transaction has also revealed that the transaction is likely to result in higher transportation rates and charges and a reduction in the benefits of transportation efficiencies in the Niagara Frontier region. As further expressed in the verified statements from economic development organizations, rail shippers, and county representatives in the Niagara Frontier region, collectively, these consequences will have a substantial adverse impact upon the ability of the region to maintain existing plants and facilities and to attract new industries to locate in the area.

Accordingly, Erie-Niagara respectfully requests the Board, pursuant to its authority under 49 U.S.C. § 11324, to impose conditions governing the transaction, that will protect shippers located in the Niagara Frontier area from competitive harm arising directly from the proposal and that will make the transaction consistent with the public interest by truly restoring balanced competition in the Niagara Frontier, a major market in the northeast. The conditions specifically requested by Erie-Niagara are more fully described below.

A. Outline of This Submission

Erie-Niagara's Comments, Evidence and Request for Conditions consists of a single volume comprised of four parts:

1. Part A contains Erie-Niagara's Comments and formal Request for Conditions, including legal argument in support thereof.

2. Part B contains Verified Statements and accompanying exhibits filed in support of Erie-Niagara's Comments, Evidence and Request for Conditions. These Verified Statements include:

- Gerald W. Fauth III, G.W. Fauth & Associates, Inc.
- Ronald W. Coan, Executive Director, Erie County Industrial Development Agency
- Sean J. O'Connor, Chairman, Niagara County Legislature
- Donald H. Burdick, Administrative Director, County of Chautauqua Industrial Development Agency and Director of the Chautauqua County Department of Economic Development
- Stanley J. Keysa, Deputy Commissioner, Planning and Economic Development for the County of Erie
- Andrew J. Rudnick, President and Chief Executive Officer of the Greater Buffalo Partnership
- Scott J. Whitbeck, Executive Director, Niagara Business Alliance, Incorporated
- Warren J. Patterson, Transportation Planner, Buffalo Flour Mill, General Mills Operations, Inc.
- James H. Bonnie, Manager, Fuel Procurement, Transportation and Contract Administration for Niagara Mohawk Power Corporation
- Gary P. Edwards, Supervisor of Railroad Operations for Somerset Railroad Corporation
- William J. Derocher, Director, Logistics and Purchasing, Olin Chlor-Alkali

Products

- Monte P. Riefler, President, Riefler-Sheehan Group, LLC and Executive Vice President, Research and Development, Riefler Concrete Products LLC

- Kevin N. O'Gorman, MD, CEO, Buffalo Southern Railroad, Inc.

3. Part C contains letters filed in support of the Comments, Evidence and Request for Conditions sought by Erie-Niagara. These support letters have been submitted by:

- United States Congressmen Jack Quinn, 30th District, New York and John J. LaFalce, 29th District, New York.

- Members of the Western New York Delegation of the State Legislature

- Dennis T. Gorski, County Executive, County of Erie

- Anthony M. Masiello, Mayor of the City of Buffalo

- Thomas DeSantis, Senior Planner, Planning Development, Department of Community Development, Division of Planning & Economic Development, City of Niagara Falls, New York

- Richard T. Swist, NFTPCC Chairman, Niagara Frontier Transportation Committee

- Michael R. Cooley, Manufacturing Manager, FMC Corporation, Agricultural Products Group

- Peter DelGobbo, Transportation Manager of Agway, Inc.

- James M. Bangle, Transportation Manager, Dunlop Tire Corporation

- Robert L. Evans, Corporate Manager, Rail Transportation, OxyChem

- James S. Koch, Chief Executive Officer, Cliffstar Corporation

- Raymond J. Stoos, Vice President, Sales, Sonwil Distribution Center, Inc.

- Fred W. Finger, Port Director, Gateway Trade Center, Inc.

- William Foote, Manager, Manufacturing Services, Carbide/Graphite Group, Inc.

- Scott A. Schultz, Rail Operations Manager, Lackawanna Products Corporation
- Joseph S. Laraiso, Executive Vice President, Buffalo Crushed Stone, Inc.
- Eugene W. Bailen, President, The Red Wing Company, Inc.
- John H. Bolender, General Manager, Jamestown Container Companies
- David J. Monte Verde, President, Genesee Valley Transportation Company, Inc.

4. Part D contains various exhibits to Erie-Niagara's Comments, Evidence and Request for Conditions, including excerpts from deposition transcripts related to this proceeding.

B. Relief Requested

To prevent the adverse competitive impacts that would otherwise occur to rail shippers located in the Niagara Frontier area and to the region as a whole, Erie-Niagara requests the following relief:

1. Creation of the Niagara Frontier Shared Assets Area

Approval of the joint acquisition of control of Conrail by NS and CSX should be conditioned on the creation by Applicants of another shared assets area -- the Niagara Frontier Shared Assets Area -- that would include all of Erie and Niagara counties and the northern portion of Chautauqua County in New York State. All current and future customers that are or will be served by the Conrail lines involved in this proceeding within the limits of the Niagara Frontier Shared Assets Area would be able to receive direct and equal access to rail service from both CSX and NS. As in the other proposed shared assets areas, Conrail, as the designated shared assets area operator, should retain ownership of all current Conrail lines, yards, facilities and other equipment and property currently located within those limits necessary to permit it to carry out its required functions as a shared assets operator.

Approval of the acquisition should also be conditioned on the establishment within the Niagara Frontier Shared Assets Area of reciprocal switching arrangements for all current and future customers that are or will be served by the Conrail lines involved in this proceeding, that would extend to carriers other than NS or CSX. This will allow rail carriers serving the area, such as Canadian National, the Canadian Pacific Rail System, and existing short-line operators to also provide competitive service to current Conrail customers. Reciprocal switching services should be made available at the reasonable charge of $156 per car, subject to appropriate adjustment, as discussed below.

2. Reciprocal Grant of Terminal Trackage Rights

In the alternative, if a shared assets area is not created, approval of the joint acquisition of Conrail should be conditioned on the reciprocal grant of terminal trackage rights by CSX and NS within the same geographic area described above. Ownership of the Conrail assets in the area would be divided as proposed by the Applicants. This would allow all current and future customers located in the proposed boundaries of the Niagara Frontier Shared Assets Area to receive rail service directly from both CSX and NS. Compensation relating to such grant of trackage rights should be established at the reasonable level of $0.29 per car mile (which is the same level of compensation proposed by the Applicants for other proposed trackage rights arrangements).

3. Reciprocal Switching for All Current and Future Customers Located On Conrail Rail Lines

If neither of the above alternatives is established, approval of the joint acquisition of Conrail should be conditioned on the establishment by CSX and NS of reciprocal switching to all current and future customers that are or will be served by the Conrail lines in this proceeding. Reciprocal switching would be provided by

CSX and NS separately on their portions of the Conrail assets allocated to each of them within the Niagara Frontier area. Service would be provided by CSX or NS, as the case may be, at the reasonable per car charge of $156 for the account of all rail carriers which currently have access to the area and that wish to provide service to customers located at points that would otherwise be served only by either CSX or NS.

II. DESCRIPTION OF THE NIAGARA FRONTIER REGION

A. Characteristics of Erie, Niagara and Northern Chautauqua Counties

As noted above, for the purposes of this filing with the Board, the Niagara Frontier region is defined as all of Erie and Niagara Counties, New York and the northwest portion of Chautauqua County, New York. Fauth V.S. at 54.

1. Erie County

Erie County is located in western New York State at the eastern end of Lake Erie, at the head of the Niagara River. The county shares its northwestern border with Canada and is home to a highly trafficked international crossing. In 1990, Erie County's population was estimated to be 965,000, which is a decline of more than 13% from 1,113,491 counted in the 1970 U.S. Census. Keysa V.S. at 3. Population increases, however, are predicted to occur from the present to the year 2020. Coan V.S. at 5. The largest municipality in Erie County is the city of Buffalo, which is the second largest city in New York State. *Id.* Like Erie County, the city of Buffalo has experienced a decline in population. Between 1970 and 1990, the city has lost 29% of its population. *Id.* at 6.

Historically a center of steel production, Erie County has suffered a dramatic decline in its manufacturing base. Coan V.S. at 6. Since 1976, the manufacturing sector has decreased by 33.1%, and job creation and expansion has primarily been in the service sector. *Id.* Erie County, however, is undertaking efforts to attract new manufacturing business to the area. *Id.* Despite the down-turn in manufacturing, the automotive, chemical and medical related industries remain integral components of the county's economy. *Id.* Many of these industries are dependent on rail service. Other cities in the County with heavy rail development include the City of Lackawanna, the Town of Cheektowaga, and the Town of Tonawanda. Keysa at 3. Of the 44 local municipalities, 42 had rail service at some point in their history. *Id.* One lost access in 1917, but five have lost access to rail since 1976, the year Conrail was created. *Id.* In addition, Erie County's strategic location on the Canadian border has established the region's role as a trade corridor between the United States and Canada. Coan V.S. at 6. The Buffalo/Niagara Falls area experienced a 38% growth in exports in 1994, second only to Detroit in foreign trade expansion. *Id.*

2. Niagara County

Niagara County is located to the north of Erie County. It is bordered on its west by the Niagara River and on its north by Lake Ontario. Niagara County is comprised of 20 municipalities in a 530 square mile area. O'Connor at 1. It has a current population of more than 220,000 persons, which is a decrease of 6.3% since 1970. Keysa V.S. at 3. The largest municipalities in Niagara County are Niagara Falls, Lockport, and North Tonawanda. There are currently some 80 major businesses in Niagara County that rely upon rail shipping. O'Connor at 1. A number of chemical companies, Delphi/Thermal Systems, a supplier for General Motors, and a coal-powered generating station owned by New York State Electric and Gas are all businesses located in Niagara County that are dependent upon rail service. *Id.*

3. Northern Chautauqua County

Northern Chautauqua County is located on the southern shore of Lake Erie in the western portion of New York State. For the purpose of this proceeding, Northern Chautauqua County is comprised of the municipalities of Westfield, Dunkirk and Fredonia and all localities north thereof to the county line, including Silver Creek. Dunkirk, which is the largest community in all of Chautauqua County, has a population of about 15,000. (Source: Northern Chautauqua Chamber of Commerce). Dunkirk is approximately 45 miles southwest of Buffalo. Fredonia and Silver Creek are home to 10,400 and 3,000 persons respectively. *Id.* Major industries in the area include food processors, such as The Red Wing Co., Inc. and Cliffstar Corporation, Ralston Purina Co., a pet foods manufacturer, Fieldbrook Farms ice cream plant, and Niagara Mohawk Power Corporation's Dunkirk Generation Station. Burdick V.S. at 4. These businesses all rely upon rail service to ship raw materials and finished goods and to receive products and supplies.

B. Description of the Rail Transportation Market and Facilities In the Niagara Frontier Region

The Niagara Frontier is a major railroad market. In 1995, railroad movements to and from the region generated nearly in annual freight charges. Fauth V.S. at 4. The Niagara Frontier is also a highly profitable market. Rail traffic in this region yielded an average revenue-to-variable cost ratio (R/VC) of . Fauth V.S. at 4.

Conrail dominates the Niagara Frontier market, which is a major source of revenue for the railroad. In 1995, Conrail single-line traffic in the region accounted for nearly in total freight charges. Fauth V.S. at 4. Conrail also participated in interchange traffic in the area as the origin or destination carrier which generated total freight charges of . *Id.* Traffic to or from Canada and other areas which is interchanged in the Niagara Frontier area and that involved Conrail resulted in, at least, an additional in freight charges. *Id.*

Although NS has some physical access to the Niagara Frontier market, Conrail controls the major revenue stations. Fauth V.S. at 4. In 1995, Conrail originated and terminated the substantial majority of all Niagara Frontier rail traffic. Conrail origin traffic generated a total of in freight charges or percent of the total charges resulting from this traffic, compared tc percent originated by other carriers. Fauth V.S. at 17. The two major commodities originating in the Niagara Frontier are Transportation Equipment (STCC 37) and Chemicals (STCC 28) traffic. *Id.* at 17. These commodities generated and in freight charges in 1995, respectively. Conrail originated the majority of this traffic. Fauth V.S. at 18-19.

Conrail destination traffic in the Niagara Frontier area generated a total of in freight charges or percent of the total charges on this traffic, compared to percent of the freight charges obtained by other carriers on terminating traffic. *Id.* at 21. Deliveries of coal (STCC 11) represent the largest commodity group of traffic terminating in the Niagara Frontier area. *Id.* at 22. In 1995, coal accounted for in freight charges which is greater than the level of freight charges generated for the next three main commodities terminating in the region combined. *Id.* Conrail captures practically all of the coal traffic terminating in the Niagara Frontier. *Id.* at 23. The next major commodity movement for terminating traffic is finished motor vehicles (STCC 37), followed by slabs or sheets of iron or steel (STCC 33). *Id.* at 22.

The Niagara Frontier is a major gateway for traffic to and from Canada.[2] The rail market for this traffic is significant and growing. Fauth V.S. at 28. The total freight charges generated from rail traffic involving Canada were more than billion in 1995. *Id.* It is estimated that, at that time, at least carloads of Canadian traffic moved through Buffalo, which generated in total

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[2] Movements between Canada and the Niagara Frontier are facilitated by the Suspension Bridge in Niagara Falls, New York, owned by the Canadian Pacific Railway Company, and by the International Bridge in Buffalo, New York, owned by the Canadian National Railway.

freight charges. *Id.* at 26. A substantial portion of this traffic, , moved in interchange service with Conrail. *Id.* Only a limited amount of this traffic moved to destinations in the Niagara Frontier area. *Id.*

While other carriers such as the Canadian Pacific Railway Company ("CP") and its subsidiary Delaware and Hudson, Canadian National Railway ("CN"), and several short lines are able to access the Niagara Frontier market, these carriers are denied direct access to Conrail's revenue stations. Fauth V.S. at 5. As discussed below, even where Conrail stations are "open" to reciprocal switching for the account of other carriers, extremely high switching charges in effect eliminate any potential competition. *Id* at 27-28. For example, the current reciprocal switching charge that applies in most cases to Conrail revenue stations in the Niagara Frontier area is $450.00 per car, this figure substantially exceeds NS's current switching charge for most railroads in the area of $156 per cae. *Id.*

Conrail's railroad network in the Niagara Frontier region is expansive and services one of the highest railroad traffic volumes on the Conrail system. Fauth V.S. at 13. The current Conrail system in the Niagara Frontier was created from the rail lines previously owned by Penn Central Transportation Company, the Lehigh Valley Railroad Company, and the Erie Lackawanna Railroad Company. While several of the lines owned by Conrail's predecessors were consolidated, abandoned or sold to shortlines, numerous rail lines, alternate routes, and large rail yard properties presently exist in the region. Fauth V.S. at 13. Conrail's Frontier Yard, which is one of the largest rail yards in the United States, is located in the Niagara Frontier area. *Id.* Conrail also owns six other rail yards in the area. Fauth V.S. at 12. Railroad capacity in the region is abundant. *Id.* at 13.

III. THE BOARD HAS BROAD AUTHORITY UNDER THE INTERSTATE COMMERCE ACT TO IMPOSE CONDITIONS UPON A RAILROAD ACQUISITION TRANSACTION IN ORDER TO ALLEVIATE ANTICOMPETITIVE EFFECTS ARISING FROM THE PROPOSED TRANSACTION

A. The Statutory Standard and Other Factors to be Considered by the Board

Under the Interstate Commerce Act, as amended, specifically 49 U.S.C. §§ 11323 and 11324, the proposed transaction of CSX and NS to acquire and divide the assets of Conrail must be approved by the Board before the transaction can become effective. The Board shall approve the proposed transaction if it finds the transaction is "consistent with the public interest." 49 U.S.C. § 11324(c). The statute requires the Board, in its evaluation of an application for the joint acquisition and control by Class I railroads of another Class I railroad, to consider at least the following five factors:

(1) the effect of the proposed transaction on the adequacy of transportation to the public;

(2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction;

(3) the total fixed charges that result from the proposed transaction;

(4) the interest of rail carrier employees affected by the proposed transaction; and

(5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.

In analyzing factor number (5), regarding competitive effects on competition among rail carriers, "[the Board does] not limit [its] consideration of competition to rail carriers alone, but examine[s] the total transportation market(s)." *Union Pacific Corporation, et al. — Control and Merger — Southern Pacific Rail Corporation, et al.*, Finance Docket No. 32760, slip op. at 53 (1996) ("*UP/SP*").

In evaluating railroad merger and control transactions, the Board is also guided by the rail transportation policy codified at 49 U.S.C. § 10101. 49 C.F.R. § 1180.1(b); *UP/SP* at 56. This policy, which was added to the Interstate Commerce Act by the Staggers Rail Act of 1980 (Pub. L. 96-448, 94 Stat. 1931), emphasizes that, where possible, competition among rail carriers, rather than government regulation, should govern the railroad industry. The rail transportation policy specifically requires the Board in its administration of the Act: "to allow, to the maximum extent possible, *competition* and the demand for service to establish reasonable rates for transportation by rail" (49 U.S.C. § 10101(1)); "to ensure the development and continuation of a sound rail transportation system *with effective competition among rail carriers* and with other modes, to meet the needs of the public . . ." (49 U.S.C. § 10101(4); and ". . . to ensure *effective competition and coordination among and between rail carriers* . . ." (49 U.S.C. § 10101(5)) (emphasis added). These considerations would appear to be particularly critical in railroad merger and control proceedings, where the competitive balance among railroads and the level of rail transportation service to shippers and the public are implicated.

The Board is also required by *Mclean Trucking Co. v. United States,* 321 U.S. 67, 87-88 (1944) and the *Northern Lines Merger Cases,* 396 U.S. 491, 510-513 (1970), to weigh the policy of the antitrust laws disfavoring diminution in competition resulting from a proposed merger against the overall transportation policy favoring improvements in efficiencies. The Supreme Court has recognized that the antitrust laws give "understandable content to the broad statutory concept of the 'public interest.' " *FMC v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 338, 244 (1968). Even if a particular transaction would not violate the antitrust laws, the Board has the discretion to disapprove it. *Burlington Northern Inc. et al. — Control and Merger — Santa Fe Pacific Corp. et al.* , Finance Docket No. 32549, slip op. at 53 (1995) ("*BN/SF*").

The Board's Policy Statement regarding major railroad control transactions further defines the public interest standard by setting forth a balancing test to be performed by the Board. *See* 49 C.F.R. 1180 .. The Policy Statement provides that the Board "weighs the potential benefits to Applicants and the public against the potential harm to the public." 49 C.F.R. § 1180.1(c). Where potential harm to the public is identified by the Board, it "will consider whether the benefits claimed by Applicants could be realized by means other than the proposed consolidation that would result in less potential harm to the public." *Id.* Thus, the Board is not constrained by the precise proposal presented to it by the Applicants in a railroad control proceeding involving Class I rail carriers but may consider and adopt an alternative proposal if by doing so the public interest would be better served.

In evaluating whether a particular acquisition proposal is in the public interest, a primary concern of the Board is to determine whether competitive harm would result from the transaction. Traditionally, the Board and its predecessor, the Interstate Commerce Commission ("ICC"), have sought to identify "what competitive harm is directly and causally related to the merger" as distinguished from competitive disadvantages that existed prior to the proposed transaction. UP/SP at 56; *BN/SF* at 54. Also, the Board's Policy Statement specifically refers to a reduction or "lessening of competition" that would arise when two carriers consolidate, as the kind of harm that would be contrary to the public interest.[3] 49 C.F.R. § 1180.1(c)(2)(i). The law, however, is clear that the Board is not constrained by statements of policy. *See generally, American Bus Ass'n v. United States,* 627 F.2d 525 (D.C. Cir. 1980); *Community Nutrition Inst. v. Young,* 818 F.2d 943 (D.C. Cir. 1987). The courts have characterized general statements of policy in the following manner:

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[3] The Board's Policy Statement also refers to harm to essential services as being contrary to the public interest. 49 C.F.R. § 1180.1(c)(2)(ii).

> A general statement of policy . . . does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future. [citation omitted].

American Bus Ass'n, 627 F.2d at 529. A policy statement, unlike a rule or regulation promulgated by the agency, "leaves the agency and its decision-makers free to exercise discretion." *Troy Corporation v. Browner*, 120 F.3d 277, 287 (D.C. Cir. 1997). Thus, statements of policy do not bind an agency to a particular analysis or result and an agency may take action that is different from a prior position expressed or based upon a general statement of policy.

Accordingly, in evaluating the public interest in the context of a railroad acquisition proceeding, the Board is not restricted to considering *only* whether there will be a "lessening of competition" but may consider whether other kinds of competitive harm or disadvantages that would be harmful to the public interest would result from the proposed transaction. The instant application, which does not involve a consolidation of only two carriers, as contemplated in the Board's Policy Statement but, as described by the Applicants, involves a "unique" proposal between three railroads that seeks to advance and restore competition in the Northeast, would clearly justify and warrant the taking of a non-traditional approach by the Board in evaluating the public interest in this case.

B. The Board's Broad Conditioning Power

Where the Board determines that the public interest would not be served by a particular railroad acquisition proposal it may seek to alleviate the harm that would result from the proposed transaction by exercising its conditioning power arising under the Act. *See*, 49 U.S.C. § 11324. The Board's authority to condition its approval of a consolidation transaction, in order to ameliorate potential anticompetitive effects of a proposed transaction, is not narrow or limited but is, in the agency's own words, broad. 49 C.F.R. § 1180.1(d); *UP/SP*, slip op. at 62; *Union Pacific Corporation, et al. — Control — Missouri Pacific Corporation, et al.*, 366 I.C.C. 462, 502 (1982) (*"UP/MP")*. Indeed, in describing its obligations in railroad merger proceedings subsequent to passage of the Staggers Act, the ICC stated, ". . . we must take even greater care to identify harmful competitive effects and to mitigate those effects where possible." *UP/MP*, 366 I.C.C. at 502.

Where a transaction is found to have anticompetitive consequences, the agency has observed that conditions generally will be imposed where certain criteria are met. *BN/SF* at 55; *Union Pacific Corporation, et al. — Control — Missouri-Kansas-Texas R.R. Co. et al.*, 4 I.C.C. 2d 409, 437 (1988) *("UP/MKT"); UP/MP*, 366 I.C.C. at 563-64. Specifically, the agency has determined that "if a transaction threatens harm to the public interest, then public interest conditions should be imposed if they are operationally feasible, ameliorate or eliminate the harm threatened by the transaction, and they are of greater benefit to the public than they are detrimental to the transaction." *UP/MP*, 366 I.C.C. at 564. The agency has further determined that a condition must address the adverse effects of the transaction and must be narrowly tailored to remedy those effects. *BN/SF* at 56. The agency, however, has unusually not been willing to "impose conditions 'to ameliorate long-standing problems which were not created by the merger,' " or to "impose conditions that 'are in no way related either directly or indirectly to the involved merger.'" *BN/SF* at 56; citing, *Burlington Northern, Inc. — Control and Merger — St. Louis-San Francisco Ry. Co.*, 360 I.C.C. at 952.

The evidence presented by Erie-Niagara establishes that the Niagara Frontier region is entitled to relief from the Board under the Board's traditional analysis of railroad consolidations because the proposed transaction would be the direct cause of competitive harm to the area. In addition, the unique nature of the instant proposal, which the Applicants proclaim will restore balanced competition to major markets in the Northeast, further justifies the Board in analyzing this case, and the public interest, in a non-traditional manner and in imposing conditions that will truly restore competition to all major markets in the Northeast, including the Niagara Frontier region.

IV. THE EVIDENCE CLEARLY ESTABLISHES THAT THE NIAGARA FRONTIER AREA WILL SUFFER SUBSTANTIAL COMPETITIVE HARM AS A DIRECT RESULT OF THE PROPOSED TRANSACTION

Under the proposed transaction, CSX will replace Conrail as the dominant carrier in the Niagara Frontier. CSX will control the vast majority of freight stations in the area, the major rail yards, and most interchanges with other rail carriers. *See* Vol. 8B, Transaction Agreement, Attachment II to Schedule 1 (Conrail System Map). NS would obtain limited physical access to the South Buffalo area under the proposal by virtue of the proposed allocation to NS of Conrail's existing Southern Tier route. *Id.* But even where NS does enter the Niagara Frontier market, competition between NS and CSX is practically non-existent, since direct physical access to shipper facilities would be limited to either CSX or NS, and reciprocal switching in that area presently is either not available or is offered at levels that effectively prohibit this form of competition. Fauth V.S. at 27-29. It is also proposed that NS would receive trackage rights from Buffalo to Niagara Falls, New York, by obtaining rights on Conrail's Belt Line Branch and Niagara Branch to Suspension Bridge. But these trackage rights are only *overhead in nature* and are for the limited purpose of allowing NS to interchange traffic with Canadian carriers at Suspension Bridge. Vol. 8B at 111. The grant of overhead trackage rights will prohibit NS from serving local customers and, thus, will fail to establish any competitive rail access in the Niagara Frontier region.[4] Consequently, under the

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4 NS is also obtaining rights to access certain yard tracks at Seneca Yard in Buffalo, which yard is allocated to

proposed transaction, the Niagara Frontier market will remain largely captive to CSX, and to a lesser extent, NS.

A. The Establishment By the Applicants of Shared Assets Areas in Detroit, North Jersey, and South Jersey/Philadelphia Will Cause Competitive Harm to the Niagara Frontier Area

In contrast to the Niagara Frontier market, the Applicants intend to create shared assets areas in the major metropolitan areas of Detroit, North Jersey, and South Jersey/Philadelphia. In the shared assets areas, both CSX and NS will obtain the right physically to operate over and use all existing Conrail tracks and facilities. Thus, all shipper facilities located within those designated regions will obtain head-to-head rail competition between CSX and NS. The Applicants' proposal, however, ignores the competitive harm that will result to the Niagara Frontier region, which would become the only remaining major market served by Conrail in the northeast that would have received competitive rail under the USRA Final System Plan and that under the Applicants' proposal be subject to rail service from only a single carrier, either CSX or NS. As explained below and in the numerous verified statements accompanying this submission, the harm to the Niagara Frontier that would result from this transaction would be direct and substantial, and must be addressed by the Board.

The record in this case plainly shows that the Niagara Frontier is a major economic region that generates substantial rail traffic and revenues. *See* Vol. 2A, Kalt V.S. at 14 (showing Buffalo in the top 10 largest markets for Conrail traffic, ranking ahead of Detroit); Kalt V.S. at 63 (showing Buffalo in the top 10 largest New York BEA Routes). The prominence of the Niagara Frontier as an industrial base in the northeast with a substantial rail freight market is also confirmed by the analysis of Mr. Fauth which shows that 1995 annual freight charges for the Niagara Frontier

CSX. These rights are for the limited purpose of improving an existing interchange between NS and the South Buffalo Railroad. Vol. 8B at 117.

region were in excess of million. Fauth V.S. at 4. That traffic is also very profitable. As noted, the Niagara Frontier is one of the highest railroad traffic volume areas on the Conrail system. *Id.* at 13. Moreover, in discussing the issue of major markets in the northeast, David R. Goode, President and CEO of NS, expressly stated at his deposition in this proceeding that, "I would regard Buffalo as a major market." Goode Dep. at 73, Exh. D-1. The Applicants' proposal, which prevents this major economic region from receiving rail carrier competition, while affording such competition to almost every other major market in the northeast, is contrary to the public interest and must not be allowed to stand. Burdick V.S. at 5; Whitbeck V.S. at 2.

In addition, as shown by Mr. Fauth, the rail transportation characteristics in the Niagara Frontier region, based upon Conrail's traffic base, are similar in certain important respects to the designated shared assets areas of Detroit, North Jersey, and South Jersey/Philadelphia. Fauth V.S. at 35-45. For example, a comparison of Conrail Motor Vehicle Parts traffic (STCC 37-14) in Detroit and the Niagara Frontier shows that Conrail originated carloads in the Niagara Frontier and carloads in Detroit, resulting in revenues of more than , respectively. Fauth V.S. at 39, Table 10. Comparisons of freight charges arising from overall Conrail direct and interline traffic between the Niagara Frontier and the Philadelphia area also reveal significant similarities. Fauth V.S. at 42, Table 11 (showing Conrail freight charges for direct movements at

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With respect to certain key rail traffic, the Niagara Frontier market is substantially larger than that of the designated shared assets areas. The Applicants have referred to the Northern New Jersey area as Conrail's "Chemical Coast." However, in 1995, Conrail originated only of chemical traffic (STCC 28) in that area compared to in the Niagara Frontier. Fauth V.S. at 41. Also, coal deliveries to the Niagara Frontier generated in freight charges as opposed to in the Philadelphia area. Id. at 45. Conrail's total origin market in the Philadelphia area generated compared to in the Niagara Frontier. Id. at 43. There simply is no compelling justification for failing to afford shippers in the Niagara Frontier region with competitive rail service, when such competition will be afforded to these other comparable, and in some cases, less significant markets in the northeast.

Many of the industries located in the Niagara Frontier directly compete with industries located in Detroit, North Jersey, and South Jersey/Philadelphia. The lack of dual carrier access in the Niagara Frontier while such access is provided to these other areas will have a particularly negative effect on shippers of transportation equipment (STCC 37), chemicals and allied products (STCC 28), and coal (STCC 11). With respect to transportation equipment, NS and CSX will be able to compete on equal terms for this traffic in the Detroit Shared Assets Area. This competition can be expected to reduce the rate levels for this traffic in Detroit. Fauth V.S. at 46-47. In contrast, freight charges in the Niagara Frontier for this traffic, which would be captive to a single rail carrier, would remain the same and be subjected to rate increases. *Id.* In an example provided by Mr. Fauth, Detroit rate levels would likely be reduced to a competitive . *Id.* In contrast, Niagara Frontier rates would be expected to remain at an artificially high level. A rate reduction of this magnitude in Detroit would result in rates for this traffic of approximately per car compared to per car for Niagara Frontier shippers. Fauth V.S. at 47. This dramatic distinction between the delivered cost of Motor Vehicle Parts to Detroit versus the Niagara Frontier area would have a severe adverse impact on facilities in the Niagara Frontier region. Coan V.S. at 12-14. The distinct difference in transportation costs could very likely result in the transfer of production from plants in the Niagara Frontier to plants in Detroit. *Id.*; Fauth V.S.

at 47. As this commodity represents the largest traffic base in the Niagara Frontier, the ultimate effect on the area's economy as a whole would be substantial. Coan V.S. at 11, 13.

With respect to chemicals traffic, the Niagara Frontier presently generates the greatest level of freight charges on Conrail origin traffic than any of the other proposed shared assets areas. In fact, the Niagara Frontier area generates freight charges that are greater than the freight charges combined for the three proposed shared assets areas . Fauth V.S. at 48. The R/VC ratio on chemicals traffic in the Niagara Frontier is percent, which is similar to that of the three shared assets areas, in which the R/VC on this traffic is currently . However, this high R/VC ratio which exists in each of the localities will likely drop significantly in those areas that become a shared assets area, as transportation rates in those areas drop from the injection of competition. Fauth V.S. at 49. The lower freight costs for chemical production facilities in the shared assets areas will place chemical companies in the Niagara Frontier region at a significant competitive disadvantage. Derocher V.S. at 2. These companies in the Niagara Frontier will not be able to effectively compete with those companies that will receive competitive transportation in the shared assets areas. Coan V.S. at 9-11; O'Connor V.S. at 1.

In addition, utilities in the Niagara Frontier area will be competitively harmed. Although the utilities in the Niagara Frontier that obtain coal from mines in the Monongahela region may receive origin competition, CSX will control the destination. Thus, at best coal movements originated by NS will be subject to high reciprocal switching charges, similar to those that are in effect today under Conrail. Fauth V.S. at 50. In fact, utilities in the Niagara Frontier are closed to reciprocal switching or severely limited today. Tariff CR-8001-D, Item 17185. Conrail's current charges in the Niagara Frontier equate to $450 per car, which effectively eliminates alternative rail service from another carrier. Fauth V.S. at 27. There also are no significant, economically viable transportation alternatives for coal moving to plants in the Niagara Frontier area. Bonnie V.S. at 3-10; Edwards V.S. at 7. As captive shippers, utilities in the Niagara Frontier, such as Niagara Mohawk Power Corporation ("Niagara Mohawk") and New York State Electric and Gas ("NYSEG"), can expect rate increases in the future, while their competitors in the shared assets areas will obtain rate reductions. Fauth V.S. at 51. As a result, the Niagara Frontier utilities will be less able effectively to compete in the power generation market. This, in turn, may lead to higher utility costs in the region which will discourage new industries from locating in the Niagara Frontier. Coan V.S. at 10-11; Burdick V.S. at 3-5; Edwards V.S. at 9.

B. The Proposed Transaction Will Result in Lost Efficiencies and Minimal Benefits in the Niagara Frontier Area

A substantial portion of Conrail service in the Niagara Frontier is direct or single-line. In single-line service, Conrail services the origin and the destination point. In 1995, Conrail transported carloads of traffic in single-line service where the origin or destination point involved the Niagara Frontier. Fauth V.S. at 29. This traffic generated in freight charges for Conrail and equated to percent of the total Conrail market in the area. *Id.* Conrail interline traffic in the Niagara Frontier during this time period equated to percent. *Id.* at 31, Table 6.

Throughout their Application, CSX and NS tout repeatedly the dramatic increase in single-line service that will result from the transaction and praise the public benefits that will arise therefrom. See, Vol. 1, at 3, 12, 16, and 18; Vol. 1, Snow V.S. at 306-07 and 311-14; Vol. 1, Goode V.S. at 335; Vol. 1, Tobias V.S. at 478-79; Vol. 1, Wolf V.S. at 527; Vol. 1, Ingram V.S. at 592; Vol 2A, Kalt V.S. at 31-33; Vol. 2A, Anderson V.S. at 281; Vol. 2A, Sharp V.S. at 352-53; and Vol. 2A, Hawk V.S. at 393. However, the Niagara Frontier will not reap such public benefits. Keysa V.S. at 3-5, 12-14; Swist V.S. at 2.

Under the proposed transaction, CSX will be assigned the vast majority of Conrail stations in the Niagara Frontier. However, the Conrail destinations for traffic originating in the Niagara Frontier and the Conrail origins for traffic destined to that area will be split between CSX and NS. As a consequence, the proposal will result in a significant decrease in single-line service, and a corresponding increase in interchange service, involving the Niagara Frontier area. As shown by Mr. Fauth's analysis, after the transaction, CSX joint-line traffic in the Niagara Frontier will be significantly higher than that of Conrail, percent versus percent, respectively. Fauth V.S. at 31, Table 6. Similarly, CSX single-line traffic will be significantly less than Conrail direct traffic today, percent versus percent. *Id.* Based upon the Applicants' *own* assessments, interchange traffic is less efficient and results in higher costs. See also, Fauth V.S. at 33. This, of course, can be expected to lead to higher transportation charges in the area. One significant rail shipper that will be particularly impacted by the loss of single line service is NYSEG, whose Kintigh Plant is located in Niagara County. NYSEG's Kintigh Plant is a coal fired facility that requires a high volume, steady stream of coal to operate efficiently and to meet the high service demand of the area. Edwards V.S. at 8. The Kintigh Plant burns approximately 1.7 million tons of coal each year. *Id.* NYSEG currently enjoys the competitive benefits of single-line Conrail service. However, under the proposed transaction these benefits will be lost and the Kintigh Station will be subject to interline service between CSX and NS. *Id.* at 9. This impact of the proposed transaction poses a serious threat to the future competitiveness of NYSEG, which can expect to suffer lost efficiencies and cost increases due to the loss of single-line service.

Accordingly, the reduction in single-line service to the Niagara Frontier area would have a direct adverse impact and would not serve the interest of rail shippers in the Niagara Frontier or the public interest at large. Coan V.S. at 3-5.

The Niagara Frontier region would also not obtain meaningful benefits as a result of the transaction. In 1995, only about in freight charges involved Conrail/CSX movements that would become single-line movements under the proposed transaction. Fauth V.S. at 33. Moreover, if the transaction is approved, of the Conrail single-line traffic will involve movements to or from "open" stations, which could be served by CSX or NS. Fauth V.S. at 32. However, because Niagara Frontier shippers will remain captive to CSX, CSX will be able to effectively preclude the potential benefits of this competition. *Id.*

C. The Proposed Transaction Will Result in Higher Transportation Rates and Charges In the Niagara Frontier Region

1. The Substantial Acquisition Premium Paid For Conrail Will Result in Higher Transportation Rates in the Niagara Frontier

As discussed above, Niagara Frontier shippers will largely remain captive to either CSX, which will be the dominant carrier in the area, or NS. Both carriers, however, will be subject to competitive pressures in the major service areas of Detroit, North Jersey, and South Jersey/Philadelphia, due to the creation of shared assets areas, which should lead to rate reductions in these areas. At the same time, CSX and NS will be required to pay for their substantial shares of acquisition premium paid for Conrail.

NS and CSX have agreed to pay $9.985 billion to purchase Conrail. According to the Application, the shareholders' equity in or networth of Conrail as of December 31, 1995 was $3.169 billion. Vol. I, Exh. 16, Appdx. C at 3 and Appdx. G at 10. By this measure, NS and CSX have paid a premium over net book value of $6.726 billion. In addition, both CSX and NS have engaged the accounting firm of Price Waterhouse to prepare a final valuation of Conrail's assets for entry into their account at the time of the transaction's closing. Wolf Dep. at 23-24, Exh. D-2. To date, the final valuation has not been completed. However, both CSX and NS used a preliminary valuation for Conrail assets from Price Waterhouse of $16.243 billion. Wolf Dep. at 24-26, Exh. D-2. This far exceeds the net book value of Conrail's assets as reported to the SEC for 1995 which showed a value of $6.693 billion. Thus, under the preliminary valuation of Conrail's assets determined by Price Waterhouse, the market value of Conrail exceeds the book value by an estimated $9.553 billion dollars. In order to account for the value of the assets being purchased at "market value" as determined by Price Waterhouse, the carriers are deducting $6.693 billion of net book value from the market value. Whitehurst Dep., Ex. 1 at 1, Exh. D-3. The resulting figure ($9.550 billion) has been divided by the 58%/42% share allocated to the two railroads, with the NS allocation being $4.059 billion, after certain necessary adjustment. *Id.* Moreover, since the actual purchase price exceeds the Price Waterhouse valuation, NS and CSX will allocate $550 million and $449 million to "goodwill," which is simply an accounting convention used to account for purchase prices in excess of actual value of assets acquired. Wolf Dep. at 29, Exh. D-2; Whitehurst Dep. Ex. 1, Exh. D-3. The cost of "goodwill" will be amortized over 40 years as an annual charge to expenses, with the annual cost at $12.0 million for CSX and a similar amount for NS. Whitehurst Dep., Ex. 1, Exh. D-3.

In order to finance its share of the Conrail acquisition, CSX has issued $4.277 billion of new debt. Vol. 1, Exhibit 16 at 133; Whitehurst Dep., Ex. 1 at 2, Exh. D-3. Even with debt repayments, CSX will incur $290 million in additional interest costs during the first year after consummation, declining slowly to $228 million following the third year. Vol. 1, Exhibit 17 at 147, 150. Similarly, NS has issued $5.928 billion in new debt in order to finance its share of the transaction. *Id.* at 171. Allowing for expected debt repayments, NS will incur an additional interest expense of $393 million in the first year after consummation, with that expense declining slowly to $306 million following the third year. *Id.* at 178, 181.

Compounding the financial burden that results from this acquisition is the downward pressure on certain rates that the Applicants expect to occur as a result of the injection of new rail-to-rail competition in certain geographic areas. NS has included in its calculation of the statement of benefits from the proposed acquisition a downward adjustment of its normal year revenues of $82 million, which is stated to be the result of new rail competition as a result of the transaction. Vol. 1 at 594; Vol. 2B, Ingram V.S. at 66. In addition, NS witness Seale has admitted that more current estimates of the amount of such downward pressure on rates are double the figure in the Application, "in the range of $160 million." Seale Dep. at 68, Exh. D-4. Unlike NS, CSX has apparently not included in any of its financial projections any estimate of revenue loss from new rail-to-rail competition introduced into the Conrail service area. However, CSX witnesses have admitted that there will be pressure to reduce rates in the newly-competitive geographic areas. CSX witness Anderson, for example, indicated the following in his deposition:

> Q. Do you believe that there is likely to be rate compression, if you will accept the use of that term, post-transaction?
>
> A. I believe in different markets there will be different competitive dynamics that we had before the transaction. My experience is that competitive dynamics influence prices and, therefore, it would be unlikely that all prices would remain exactly the same after as before.
>
> Q. So, in a gross sense, would you agree with me that more competition tends to put pressure to lower prices?
>
> A. Yes, I would agree.
>
> Q. And you believe that there's going to be more competition post-transaction in the Northeastern United States?
>
> A. I do.

Anderson Dep. at 50-51, Exh. D-5. Given the fact that rate compression is likely to occur in CSX's service area, it is logical to believe that the amount of rate compression to be experienced by CSX will be comparable to the amount of rate compression to which NS has admitted.

As a result of these and other factors, NS and CSX expect to suffer net losses as a result of the acquisition in the first two years following the transaction, and expect to increase net income by only $86 million in a "Normal Year" following the transaction. Vol. 1, Exhibit No. 16, Appendix D at 7-10 and Appendix H at 1-4.

The simple facts are that the costs of this transaction are massive. NS and CSX claim that efficiency gains and growth will help defray these costs. However, there are legitimate concerns on the part of captive shippers that CSX and NS will raise their transportation rates -- substantially -- in order to pay for the tremendous acquisition premium. The temptation for such rate increases will be exacerbated, and a virtual certainty, should the Applicants' projections on growth and efficiency gains not be accurate. As stated by Mr. Fauth, referring to CSX as "an advocate of differential pricing, its captive shippers, such as those in the Niagara Frontier area, are likely to face rate increases in the near future." Fauth V.S. at 53.

2. Reciprocal Switching

Another element of competitive harm occurring as a result of this transaction is the elimination of reciprocal switching that occurred when Conrail made wholesale cancellations of reciprocal switching services in the Niagara Frontier area. Fauth V.S. at 29. As the Board's policy statement explicitly acknowledges, any elimination of the only remaining rail competitor by a transaction is a significant element of competitive harm that must be addressed. 49 C.F.R. §1180.1(c)(2)(i). Specifically, the Board has come to focus in recent cases on the so-called "2-to-1" shippers. In *UP/SP,* the Board focused primarily on the need to prevent loss of competition at points where the available rail competitive alternatives would be reduced from two to one. *See UP/SP* at 98-103.

In that proceeding the Board accepted and imposed as part of a condition a general definition of a "2-to-1 shipper" or a "2-to-1 customer" as one "presently served by both UP and SP and no other railroad." *UP/SP* at 57, n.71 (referring to definition in BNSF agreement, section 8i). For purposes of this proceeding, the term "presently served" would have be determined in relation to the time the Applicants began negotiating their merger agreement.

There are indications on the record that NS and CSX began negotiating between themselves and with Conrail as early as 1994. McClellan Dep. at 24, Exh. D-6. In 1995, CSX and NS had agreed between themselves on a division of Conrail and a price they would pay for Conrail. This agreement was not implemented because Conrail wished to remain independent at that time. *Id.* at 26, Exh. D-6. Nonetheless, it is apparent that serious negotiations were well underway, perhaps as early as 1994, for the joint acquisition of Conrail. Therefore, 1995 should be the operative date for determining when a possible 2-to-1 customer was "presently served" under the broad definition adopted in *UP/SP*.

During the course of the *UP/SP* proceedings, a clarification of the definition of a 2-to-1 shipper was agreed to by applicants and the Chemical Manufacturers Association ("CMA"), which stated that:

> BN/Santa Fe has the right to serve all shippers that were open to both UP and SP, whether via direct service or via reciprocal switching, joint facility or other arrangements, and no other railroad when the BN/Santa Fe Settlement Agreement was signed, regardless of how long ago a shipper may have shipped, or whether a shipper ever shipped, any traffic via either UP or SP.[5]

It is obvious that the cancellation by Conrail of reciprocal switching for customers in Niagara Falls and Buffalo in 1996 occurred after an agreement had been reached on the acquisition and division of Conrail. Therefore, shippers that

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5 UP/SP-230 at 20-21 and attached CMA Settlement Agreement at 4. Virtually identical language was later included in a supplemental agreement dated June 27, 1996, between UP/SP and BN/Santa Fe. UP/SP-266. The supplemental agreement was imposed as a condition by the STB. Decision at 12, n. 15 and 231.

were deprived of reciprocal switching service by these actions are entitled to restoration of such reciprocal switching service so that they are not competitively harmed as a result of this transaction. The establishment of reciprocal switching services for all present and future Conrail customers throughout the Niagara Frontier would ensure that such harm would be removed.

3. Other 2-to-1 Situations

Based on documents produced in discovery, there appear to be some additional 2-to-1 situations in the Niagara Frontier area that would be resolved by the relief requested by Erie-Niagara. The Niagara Frontier Food Terminal ("NFFT") is a facility which can be jointly served today by NS and Conrail under agreements going back many years. *See* CR 11 CO 000141-000146. The NFFT is located on a Conrail line that is being allocated exclusively to NS. Vol. 8B at 100, Transaction Agreement Att. I and Att. II. *See also* CSX 21 CO 006696-006699. Therefore, this is a 2-to-1 point to which CSX or another rail carrier should be provided access in order to prevent competitive harm as a result of the transaction.

Similarly, CSX has trackage rights under an agreement with Conrail over the former Buffalo Creek Railroad lines in order to reach customers on the waterfront area of Buffalo. These trackage rights were conveyed to CSX as part of the Final System Plan. *See* CR 11 P 000505-000522. This is a line that is to be allocated to CSX. Vol. 8B at 95, Transaction Agreement Att. I and Att. II. *See also* CSX 21 CO 006696-006699. Again, this is an area of the Niagara Frontier region that should be protected from competitive harm by ensuring that NS has access to the customers on this line so that they will continue to have the same competitive alternatives they have today.

V. THE EVIDENCE ALSO SHOWS THAT THE PROPOSED TRANSACTION IS INCONSISTENT WITH THE PUBLIC INTEREST BECAUSE IT FAILS TO PROVIDE BALANCED COMPETITION IN THE NIAGARA FRONTIER AREA

The Board has an obligation to consider whether the transaction proposed by the Applicants is "consistent with the public interest." 49 U.S.C. § 11324(c).[6] As discussed above, by applying the current policy statement on railroad consolidation procedures, the Board and the ICC have evaluated the public interest by balancing the public benefits of the transaction against the need to prevent harm to competition and to prevent the loss of essential rail services. 49 C.F.R. §1180.1(c). But the Board needs to recognize, just as the ICC did, that a policy statement is not a binding norm and that parties to a particular proceeding must have and do have "the opportunity to challenge the policy through appropriate evidence or argument." *Railroad Consolidation Procedures*, 359 I.C.C. 195, 196 (1978).

The Board's current policy statement contemplates a fairly narrow set of considerations for use in evaluating the potential benefits of a proposed transaction.[7] It is clear that this evaluation of potential benefits focuses almost exclusively on the efficiency gains to be achieved by consolidating rail systems. This set of potential benefit considerations was appropriate when, as the ICC recognized over 15 years ago when it first adopted this policy, the national policy was "to rationalize the Nation's rail facilities and reduce excess capacity." *Railroad*

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6 As the Board recognized recently: "The Act's single and essential standard of approval is that the [Board] find the [transaction] to be 'consistent with the public interest.'" *UP/SP* at 98, quoting from *Missouri-Kansas-Texas R. Co. v. United States*, 632 F.2d 392, 395 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981).

7 The policy statement currently says that the potential benefits to be considered are:

> Both the consolidated carrier and the public can benefit from a consolidation if the result is a financially sound competitor better able to provide adequate service on demand. This beneficial result can occur if the consolidated carrier is able to realize operating efficiencies and increased marketing opportunities. Since consolidations can lead to a reduction in redundant facilities and thereby to an increase in traffic density on underused lines, operating efficiencies may be realized. Furthermore, consolidations are the only feasible way for rail carriers to enter many new markets other than by contractual arrangement, such as for joint use of rail facilities or run-through trains. In some markets where there is sufficient existing rail capacity the construction of new rail line is prohibitively expensive and does not represent a feasible means of entry into the market.

49 C.F.R. § 1180.1(c)(1).

Consolidation Procedures, General Policy Statement, 363 I.C.C. 241 (1980) and 363 I.C.C. 784 (1981). Now that the railroad industry has entered a period when there are few opportunities for further rationalization, and little, if any excess capacity, a narrow focus only on efficiency benefits is no longer appropriate.[8]

The transaction in this proceeding thus marks the end of an era in railroad merger proceedings. Nearly all of the opportunities for efficiency gains through rationalization of rail properties and reducing excess capacity have been realized, at least in terms of the consolidation of major systems. The very nature of this transaction demonstrates the truth of this observation. Unlike virtually every other major rail merger in the last 20 years, if not the last 100 years, this transaction does not involve the consolidation of two or more rail systems with the primary purpose of realizing efficiency gains at the cost of a certain amount of reduction in competition. Instead, it involves the joint acquisition by two financially strong and efficient rail systems of the properties of a third, in order to divide (instead of consolidate) those properties, with the primary purpose of creating new and enhanced competition where none now exists.

The applicants themselves recognize this to be the case at the outset:

> This Application presents a unique, pro-competitive proposal to reconfigure the railroad industry in the eastern United States. If approved [the proposal] will yield enormous public benefits, *the greatest of these being increased competition ....*"

Vol. 1 at 2 (emphasis added). The Applicants' witnesses emphasize over and over in their statements that this transaction will be restoring and increasing rail-to-rail competition in the northeast. *See, e.g.*, Snow V.S. at 3, 5-6, 12-14; Goode V.S. at 1-2, 9-11.

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8 Even when evaluating the public benefits of this narrow set of efficiency considerations, the Board has recognized that the likelihood of these efficiency gains providing any benefit to the public, by being passed on as reduced rates or improved service, would "in varying degrees *depend[] on competitive conditions.*" *UP/SP* at 99. In other words, if competitive forces are not present in the marketplace to drive rail carriers to share the efficiency gains achieved in a consolidation with their customers, there will be little if any *public benefit*, as distinct from the private benefits to the carriers involved. *Id.*

In light of this dramatic new departure in the nature of the transaction presented to the Board for approval, it is not only appropriate, but necessary, for the Board to modify the factors it considers in evaluating the potential benefits of this transaction. At least for this transaction, the Board should not consider primarily the potential benefits of operating and economic efficiencies that may or may not become public benefits. Instead, its primary consideration should be whether the transaction offers public benefits in the form of increased rail competition.

Indeed, NS issued in October of last year and distributed publicly a set of Principles of Balanced Competition that requires just such a shift in emphasis for the Board's evaluation. Goode Dep., Ex. 1, Exh. D-1. As summarized by NS, these principles are:

1. Competition requires rail systems of comparable size and scope.
2. The largest markets must be served by (at least) two large railroads.
3. Owned routes are essential to competition.
4. Competition depends on effective terminal access.
5. Competition is not free.

The principles and their application are further elaborated and explained in a letter from NS to shippers on October 29, 1996, which offered them as the basis for developing "the fundamentals of competition in reality and not just in name." *Id.*

Both NS and CSX support these principles of balanced competition. Snow V.S. at 8 and Goode Dep. at 38, Exh. D-1. In fact, NS Chairman Goode stated that the implementation of these principles would be in the public interest.[9] In view of the Applicants' advocacy and commitment to these principles, they should be utilized by the Board as part of the policy consideration that it applies in evaluating whether this transaction, as proposed, is in the public interest.

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9 Q. ... Would it be fair to say that Norfolk Southern would believe that the implementation of these principles would be in the public interest?

A. Yes, that would be fair.
Goode Dep. at 72-73.

When this transaction is evaluated in light of the public interest considerations that the applicants themselves regard as relevant, this transaction satisfies most of them. However, in one significant respect, this transaction does not satisfy one of the most important of the five principles, the one that requires that the largest markets have service by (at least) two railroads. One of the largest markets served and dominated by the Conrail system today is the Niagara Frontier area. It is also one of the largest markets that will not be receiving the public benefit of enhanced and restored rail competition. In short, the principles of balanced competition are not being applied to the Niagara Frontier region.

The October 29, 1996, letter provided a detailed explanation as to the reasons why access to the largest markets is an essential element of the implementation of the principles of balanced competition. As NS concluded:

> Competitive rail service is relevant to growth and development. We have an economy and a rail system grounded on the reality that competition works better than monopoly.

Goode Dep., Ex. 1., Exh. D-1 (emphasis in original). That is clearly a relevant consideration in the Niagara Frontier, a once thriving market area that, like the port of New York discussed in the NS letter, has struggled for two decades with the effects of the "Conrail monopoly epoch." *Id.*

Clearly, the identification of the largest markets that CSX and NS should both have access to is a critical part of the implementation of this principle. Elsewhere in these comments and the numerous supporting statements, evidence is marshalled that plainly demonstrates that the Niagara Frontier area is a large market by any measure. Mr. Goode for NS has already recognized that this area, which includes the second largest city in New York (Keysa V.S. at 3) is a major market. Goode Dep. at 76-77, Exh. D-1.

In addition to those facts, however, consideration must be given by the Board to an additional important element to assist it in determining the major markets that should be served by two major railroads under the proper implementation of the principles of balanced competition supported by the Applicants. As stated in the NS letter, when determining which areas should be considered major markets:

> [W]e are willing to look at New York and we are willing to look at the major markets defined by the Department of Transportation in 1974 in the process which led to the creation of Conrail.

Id. The process referred to there, of course, was the process which led to the creation of Conrail from the most important rail lines owned by the several northeastern rail carriers that entered bankruptcy reorganization in the early to mid-1970's. That process clearly identified the Niagara Frontier area as a major market that needed to have competitive rail service from at least two major rail systems. A brief review of the structure and results of that process, and the history of the creation of Conrail, will clearly demonstrate that the Niagara Frontier area should now have two major rail carriers providing service to all shippers and receivers in the area.

The USRA was created by Congress with the task of restructuring the northeastern rail system, as well as a number of other related functions. Title II, Regional Rail Reorganization Act of 1973 (3-R Act), 45 U.S.C. §§ 701-729. In directing the USRA to create a restructured northeastern rail network, Congress charged it with several major goals. The two most important, at the time, given the circumstances then prevailing, were obviously: "(1) the creation ...of a financially self-sustaining rail ... service system in the region; [and] (2) the establishment and maintenance of a rail service system adequate to meet the rail transportation needs and service requirements of the region." Section 206(a), 3-R Act, 45 U.S.C. § 716(a) and Senate Rep. No. 601, 93d Cong. 1st Sess. (Dec. 3, 1973), *as reprinted in* 1973 U.S.C.C.A.N. 3242, 3266.

There were, however, other important goals. One of those goals was: "(5) the retention and promotion of competition in the provision of rail and other transportation services in the region." Sec. 206(a)(5), 3-R Act, 45 U.S.C. § 716(a)(5). In the course of developing the Final System Plan ("FSP") under the 3-R Act, the USRA placed great emphasis on this goal. As USRA stated in the FSP:[10]

> The preservation of competition required specific steps either to bring other carriers into the area or to create two carriers out of the bankrupt railroads to provide that level of competition.

Vol. 1 FSP Forward at 1. This approach by USRA to restructuring the Northeastern rail industry was based on its analysis of the proper approach to a competitive railroad industry structure contained in its Preliminary System Plan ("PSP"). That analysis concluded:

> In general, two railroad firms in a large freight market will produce a "workable" level of intramodal competition.
> ***
> The general policy adopted by USRA is that effective competition must be provided in key markets including markets presently dominated by bankrupt carriers.

Vol. 1 PSP at 109, 110.

In order to implement this model of workable rail competition, the Final System Plan issued by USRA on July 26, 1975, included a preferred option that would have provided competition in the Niagara Frontier area between two major rail systems. Under the FSP's preferred option, all of the lines of the Erie-Lackawanna ("EL") system east of Sterling, Ohio (near Akron) would have been conveyed to the Chessie System, predecessor of CSX (and now one of the applicants in this proceeding). The EL had a number of lines, branches, yards and other facilities throughout the Niagara Frontier area, extending from Niagara Falls/Suspension Bridge and Lockport on the north to the southern part of

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10 In view of the importance of the USRA Final System Plan in evaluating whether the proposed transaction is consistent with the public interest, it is requested that the Board take official notice of the contents of the Final System Plan, in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. § 556(e). Administrative agencies likes the Board have great latitude in taking official notice of facts, particularly those that are contained in reports prepared by other governmental entities such as USRA. *Castillo-Villagra v. INS*, 972 F.2d 1017, 1026-31 (9th Cir. 1992) and *McLeod v. INS*, 802 F.2d 89, 93-94 (3d. Cir. 1986).

Buffalo.[11] EL had extensive access to customers in the Niagara Frontier area, either over its own lines, over the lines of the switching carriers it owned, or via reciprocal switching rights available from other carriers.[12]

The purpose of this proposed conveyance of the EL lines in the Niagara Frontier area to Chessie System was part of an overall effort by USRA to fulfill the mandate of the 3-R Act to preserve competition in the Northeast while assuring the financial viability of the new operators in the region. Most of the lines of the bankrupt carriers in the Northeast would be transferred to Conrail in order to provide it with the traffic base necessary to survive and prosper. On the other hand, Chessie would have received not only the EL lines just described, but would also have received the Reading system lines (and other lines) giving it access to Philadelphia, PA, Wilmington, DE, Southern New Jersey and Northern New Jersey. In the Niagara Frontier region, all of the lines of the Penn Central and the Lehigh Valley would have been assigned to Conrail. Vol. 1 FSP at 14.

As the USRA plainly stated, the purpose of this division was to allow Chessie System, as a financially strong competitor for Conrail, the ability to provide competitive rail service throughout the Northeast:

> The Association believes that the indicated industry structure recommendations offer the best approach to reversing the financial plight of the Region's rail industry, *while ensuring adequate competition.* The Plan contemplates ultimate restoration of the Region's rail system to efficiency levels enjoyed by most railroads in the country. It can also serve as the basis for further evolutionary changes in the regional rail system as may required.

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11 EL had an ownership interest in the Niagara Junction Railroad, a switching carrier which provided EL with access to a number of major industrial facilities located in the Niagara Falls area. *Niagara Jct. Ry. Co. Control,* 267 I.C.C. 649 (1947). EL also jointly owned and operated (with Lehigh Valley) the Buffalo Creek Railroad, a terminal switching carrier serving the lakefront area of Buffalo and other nearby areas. *Incentive Per Diem Charges — 1968 (Lessees Buffalo Creek),* 361 I.C.C. 939, 940 (1979). This line would have been used to provide trackage rights to Chessie under the preferred option. Vol. 1 FSP at 283.

12 The scope of EL's lines and operations in the Niagara Frontier area at the time the FSP was issued can be readily seen by reference to Exh. D-7, a reproduction of the zone map for the Niagara Frontier area prepared by the U.S. Department of Transportation. The FSP included a detailed listing of EL line segments that would have been conveyed to Chessie System. It includes a number of main line segments, branch lines and related properties in the Niagara Frontier area. Vol. 1 FSP at 308-309.

> This basic structure will offer competition between at least two railroads in major markets of the Region, supplemented by the services of smaller railroads.

Vol. I FSP at 3 (emphasis added).

Although Chessie System had reached agreement with USRA on a price and terms for acquiring the designated assets (Vol. 1 FSP at 14), Chessie ultimately did not complete the proposed transaction. Vol. 1, Hoppe V.S. at 16. The EL lines in the Niagara Frontier area were therefore all transferred to Conrail in accordance with the alternative designation in the FSP. Vol 1 FSP at 28, 320-321.[13]

The Applicants contend that the proposed transaction they have presented for approval will meet the objectives of the FSP that were not achieved. Vol 1., Snow V.S. at 3, 6-7, 12-14; Hoppe V.S. at 18-19; McClellan V.S. at 50. However, Applicants' witnesses have also acknowledged that the FSP would have transferred the Erie-Lackawanna lines in the Niagara Frontier area to Chessie. Goode Dep. at 77-78, Exh. D-1; Snow Dep. at 209, Exh. D-8; McClellan Dep. at 20-21, Exh. D-6. The Applicants provide no explanation for their failure to include the Niagara Frontier area among the other major markets that are receiving a restoration of the balanced two-carrier competition.

The Board, however, is not limited to approving the private bargain presented by the Applicants. Charged with the statutory duty of determining whether the proposed transaction is in the public interest, the Board must consider, in light of the Applicants' own principles of balanced competition, whether to condition the proposed transaction in order to provide two-carrier access throughout the Niagara Frontier area. This was clearly a major objective of the federal government's efforts to restructure the northeastern railroads. Ironically,

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13 The USRA tried to introduce some competitive options into the Niagara Frontier area by conveying to the D&H trackage rights from Binghamton, NY to Buffalo over the EL line conveyed to Conrail. D&H had a constant struggle with CR over the scope of those rights, including the scope of its right to serve local customers in the Niagara Frontier area. *See, e.g., Consolidated Rail Corp. v. Dicello,* 121 Bankr. 406, 1990 U.S. Dist. LEXIS 15068 (Spec. 1 . 1990).

those efforts were frustrated by the inability of the predecessor of one of the Applicants to obtain satisfactory terms and conditions for entry into that major market. When another opportunity was presented to the Applicants to overcome that deficiency, they failed to seize it. The Board should not allow another opportunity to pass by the Niagara Frontier area again.

VI. THE BOARD MUST GRANT ERIE-NIAGARA'S REQUEST FOR CONDITIONS TO PREVENT THE ANTICOMPETITIVE EFFECTS OF THE PROPOSED TRANSACTION AND TO SERVE THE PUBLIC INTEREST

A. The Establishment of a Shared Assets Area in the Niagara Frontier Area Would Eliminate Harm to the Region and Would Serve the Public Interest

As noted above, the Board maintains broad authority to impose conditions upon a transaction involving the acquisition of a Class I railroad by one or more other Class I carriers, in order to ensure that the public interest is not harmed by the proposal. The harm identified above to the Niagara Frontier area, a significant economic market in the Northeast, is substantial and must be addressed by the Board in order to protect the interests of that region and the public interest at large. In order to alleviate the harmful effects of the CSX/NS proposal that will result to the Niagara Frontier Area, Erie-Niagara respectfully urges the Board to require the establishment by the Applicants of the Niagara Frontier Shared Assets Area. As a part of this condition, the Board should require the establishment of reciprocal switching arrangements for all current and future customers that are or will be served by the Conrail lines involved in this proceeding, that would extend to carriers other than NS or CSX, that connect with the Conrail lines in the Niagara Frontier Shared Assets Area.

1. The Establishment of the Niagara Frontier Shared Assets Area Satisfies the Board's Criteria for Imposing Conditions

A requirement by the Board that the Applicants create another Shared Assets Area in the Niagara Frontier would undeniably satisfy each of the Board's established criteria for imposing conditions. Namely, such relief would (1) ameliorate or eliminate the harm threatened by the transaction; (2) be operationally feasible; and (3) be of greater benefit to the public than detrimental to the transaction. *UP/MP*, 366 I.C.C. at 564.

The establishment of a Niagara Frontier Shared Assets Area would clearly eliminate the significant competitive harm to the Niagara Frontier region that would be caused by the CSX/NS proposal. Under the Shared Assets approach, both CSX and NS would be permitted to serve shipper facilities located within the designated shared assets area, thereby creating effective head-to-head rail competition within the area. Businesses within the Niagara Frontier region would not likely be subject to increases in transportation rates and charges, which would result under the CSX/NS proposal, but could expect to obtain rate reductions as a result of the two carrier competition. Businesses within the area, and the area as a whole, would not be competitively disadvantaged with respect to the locations of Detroit, the Philadelphia area, and North Jersey, which would receive dual access for the first time under the proposal, but could compete with such regions on equal footing. Customers and market-share of rail shippers in the Niagara Frontier would not be lost but could be expected to increase under true rail competition. Moreover, the benefits of single-line service would not be eliminated in many instances, as would be the case under the Applicants' proposal, but would be expanded.

As testified by Mr. Fauth, who has personally inspected and observed rail operations in the Niagara Frontier area, the creation of the new Shared Assets Area would also be operationally feasible. The rail facilities in the region are extensive and capacity is abundant. Fauth V.S. at 13. One of the largest rail yards in the nation, Frontier Yard, is located in the Niagara Frontier area. According to Mr. Fauth, "there are no operational or capacity constraints that would prohibit the establishment of a Niagara Frontier SAA." Fauth V.S. at 56. Erie-Niagara proposes that the Niagara Frontier Shared Assets Area be operated under the same conditions as proposed by the Applicants for the other shared assets areas. Thus, Conrail would handle much of the local operations in the area. According to Mr. Fauth, having Conrail remain the primary operator in the Niagara Frontier Shared Assets Area would cause little, if any, operational difficulties. *Id.*

The Applicants' own proposals regarding the Detroit, South Jersey/Philadelphia, and North Jersey Shared Assets Areas also show that the creation of the Niagara Frontier Shared Assets Area would not create operational difficulties for the carriers. Under the transaction, Conrail, CSX and NS have or will enter into Shared Assets Operating Agreements. These Agreements were submitted with the Application as Exhibits G, H, I to the Transaction Agreement included in Volume 8B. Under the Agreements, Conrail will own, operate, maintain, and oversee the areas for the benefit of CSX and NS. Vol. I, at 45. Conrail will also control the dispatching and movement of trains in the areas. *Id.* at 46. Because Conrail is currently the dominant carrier operating in the Niagara Frontier region, a continuing role as operator of a shared assets area in that location could be expected to result in smooth operations. Moreover, the three proposed Shared Assets Area operating agreements for the three major metropolitan areas of Detroit, North Jersey/Philadelphia, and South Jersey are virtually identical. While at first glance the operating agreements may appear complex due to their length and numerous provisions, only three subsections included in the agreements vary from one agreement to the other. These subsections are 3(c), 3(i), and 6(j), which pertain to the grant of rights for operations over certain tracks owned by CSX and NS in the area, dispatching, and capital improvements. Based upon the fact that only minor variations exist under each of the shared assets operating agreements, there is no compelling basis why another such operating agreement could not be created by the Applicants for the Niagara Frontier region, subject to any reasonable and necessary fine tuning desired by the Applicants. Through train generations could be accomplished, for example, as proposed by the Applicants for the Niagara Frontier area.

It is also indisputable that the creation of head-to-head rail competition throughout the Niagara Frontier area, which would result from the establishment of a shared assets area, will provide greater benefits to the public than harm to the Applicants. The Applicants' own submission and evidence plainly establish that the shared assets concept is a pro-competitive measure that will yield "enormous public benefits." *See generally*, Vol. 2B, Harris V.S. and Vol. 2A, Kalt V.S. NS' witness Mr. Harris, an economic consultant, found that "[c]ompetition between Norfolk Southern and CSX for moving on the Shared Assets Areas should provide shippers with superior price and quality choices." Vol. 2B, Harris V.S. at 18. Mr. Harris further concluded that "[c]ompetition between two railroads will result in cost savings and efficiencies being passed to customers in the form of lower rates and better service." Harris V.S. at 9. CSX's witness, Mr. Kalt, identifies several important public interest benefits that can be expected to arise from new competition, including improved transportation service, faster and more reliable single-line service, and enhanced fleet utilization. Kalt V.S. 27-34.

These substantial public benefits which would result from the creation of a Niagara Frontier Shared Assets Area outweigh any detriment to the Applicants. As discussed above, the creation of a Niagara Frontier Shared Assets Area would not cause operational difficulties. In addition, any reductions in the Applicants' anticipated revenues to be achieved from the proposed transaction that might occur due to the insertion of competition in the Niagara Frontier area could be expected to be recouped over time based upon the Applicants' own evidence which establishes that the creation of competition will cause existing industries to expand production in competitive areas and cause new industries to locate facilities in dual access regions. Mr. John Anderson, Executive Vice-President, Sales and Marketing for CSX stated in his testimony that:

> Customers who are contemplating the construction of new facilities have great competitive leverage in deciding where to site their new facilities. In this connection, I expect that the dual presence of CSX and Norfolk Southern in areas that were previously served only by Conrail will stimulate economic growth as businesses choose to locate their facilities in commercial areas where they will have access to two carriers. Facilities located in the shared assets area will establish the competitive baseline for commercial transactions involving the commodities that they produce or consume.

Vol. 2A, Anderson V.S. at 14. Thus, the creation of a Niagara Frontier Shared Assets Area could be expected to increase rail shipping in the region over time, resulting in increased revenues and opportunities for CSX and NS.

2. <u>The Niagara Frontier Area Satisfies the Elements Utilized by the Applicants In Creating the Shared Assets Areas</u>

In addition to satisfying the Board's conditioning criteria, the creation of another shared assets area in the Niagara Frontier would satisfy the elements generally applied by the Applicants in creating the Detroit, North Jersey, South Jersey/Philadelphia Shared Assets Areas. In responding to discovery propounded by Erie-Niagara, the Applicants stated that "CSX and NS did not apply any specific criteria in determining . . . [the] Shared Assets Areas." CSX/NS-61, Applicants Responses to Interrogatory No. 1 of Erie-Niagara, Exh. D-9. However, at the deposition of CSX's witness William Hart, Vice President of Corporate Development for CSX, Mr. Hart identified certain elements that were considered and applied by the Applicants in determining the various shared assets areas. For example, with respect to the creation of the Northern New Jersey Shared Assets Area, the elements Mr. Hart identified were essentially as follows:

(1) Prior to the creation of Conrail, the area had been served by two

or more carriers;

(2) The creation of Conrail by the federal government from bankrupt northeastern rail carriers resulted in a virtual monopoly in the area;

(3) That monopoly carrier, Conrail, had integrated the rail properties in the area;

(4) As a result of the proposed transaction, both CSX and NS will have new access to the area, and a division of the properties was not easy; and

(5) The area was a major market that was attractive to both parties.

Hart Dep. at 77-78, Exh. D-10.

The Niagara Frontier region satisfies each of these five elements. It is beyond dispute that, prior to the creation of Conrail, competition between a number of rail carriers in the Niagara Frontier was abundant. Fauth V.S. at 8-9; Keysa V.S. at 6-10. It was only subsequent to the federal government's creation of Conrail that rail service in the Niagara Frontier region became subject to a virtual Conrail monopoly. Fauth V.S. at 10. It is also certain that Conrail has integrated rail properties in the region, by consolidating stations, facilities and operations. Fauth V.S. at 9. In addition, under the proposed transaction, both CSX and NS will obtain new access to the Niagara Frontier, although CSX will be the dominant carrier, and freight stations in the area will be served by either CSX or NS. Vol. 8B, Transaction Agreement, Schedule 1, Attachment II. Finally, as shown above, the record is clear that Buffalo is a major market that would be attractive to both CSX and NS. This fact was expressly acknowledged by David R. Goode, Chairman and CEO of NS. Goode Dep. at 73, Exh. D-1. Other evidence also establishes this fact. *See also,* Fauth V.S. at 4 (showing 1995 annual freight charges for the region in excess of $475 million); Vol. 2A, Kalt V.S. at 14 (showing Buffalo in the top 10 largest markets for Conrail traffic, ranking ahead of Detroit).

Establishing competition in the large and profitable Niagara Frontier region also correlates to the NS established principle of balanced competition, which requires that "the largest markets have service by two railroads." This principle, among others, was reduced to writing and forwarded to thousands of rail shippers in October of 1996. Exh. D-1. NS remains committed to this principle today, and expressly agreed that the implementation of such principle would serve the public interest. Goode Dep. at 72-73, Exh. D-1.

Accordingly, under the Applicants' own reasoning and considerations, the Niagara Frontier region should be designated as a shared assets area and the Board should condition its approval of the CSX and NS proposal by requiring the creation by Applicants of the Niagara Frontier Shared Assets Area.

B. In the Alternative, the Board Should Require CSX and NS to Grant Each Other Reciprocal Terminal Trackage Rights in the Niagara Frontier Region

In the alternative, if a shared assets area is not created, approval of the joint acquisition of Conrail should be conditioned on the reciprocal grant of terminal trackage rights by CSX and NS within in the same geographic area that would comprise the proposed Niagara Frontier Shared Assets Area. While Erie-Niagara strongly believes that the public interest would be best served by the creation of a shared assets area, the evidence also justifies this alternative form of relief. In requiring CSX and NS to award each other terminal trackage rights in the Niagara Frontier area, ownership of the Conrail assets in the area would be divided as proposed by the Applicants. The trackage rights condition should be structured to allow all current and future customers located on the Conrail lines in the Niagara Frontier to receive rail service directly from both CSX and NS. In addition, compensation relating to such grant of trackage rights should be established at the reasonable level of $.0.29 per car mile (which is the same level of compensation proposed by the Applicants for other proposed trackage rights arrangements). Fauth V.S. at 59.

Reciprocal terminal trackage rights would alleviate the substantial competitive harm that will result in the Niagara Frontier area, were the transaction to be approved as proposed. In addition, it would truly restore balanced competition to the major markets in the northeast, as contemplated by the preferred option of the Final System Plan, which was an important component to the proposed transaction. As both CSX and NS would have access to the Niagara Frontier under the proposed transaction, and rail yards, facilities, and capacity in the area are substantial, there would not be operational difficulties if this condition were to be imposed on the Applicants. Moreover, the injection of competition into the Niagara Frontier would result in substantial benefits to the public interest that would outweigh any detriment to the Applicants. By providing for competition in this major rail service area, economic growth rather than deterioration would be the end result.

C. As a Third Alternative, the Board Should Require the Applicants to Establish Open Reciprocal Switching in the Niagara Frontier Region

As a third alternative request for relief, Erie-Niagara asks that if neither of the previous conditions are imposed by the Board that approval of the joint acquisition of Conrail should be conditioned on the establishment by CSX and NS of reciprocal switching to all customers that are currently served by Conrail and to future customers that locate on the Conrail lines in the Niagara Frontier Shared Asset Area. Under this condition, reciprocal switching would be provided by CSX and NS separately on their portions of the Conrail assets allocated to each of them within the Niagara Frontier area. Compensation for the reciprocal switching service provided by CSX or NS, as the case may be, should be set by the Board at the reasonable per car charge of $156.00. It is proposed that the reciprocal switching service and reasonable charge would be open to all rail carriers that currently have access to the area and that wish to provide service to customers located at points that would otherwise be served by either CSX or NS.

For each of the same reasons expressed above, the imposition of this condition on the proposed transaction would serve the public interest and would satisfy the established criteria of the Board for imposing conditions in a control proceeding involving Class I rail carriers.

Respectfully submitted,

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Attorneys for
Eric-Niagara Rail Steering Committe

Dated: October 21, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a copy of the foregoing COMMENTS, EVIDENCE AND REQUEST FOR CONDITIONS OF ERIE-NIAGARA RAIL STEERING COMMITTEE by first class mail, postage prepaid, on all parties of record in this proceeding this 21st day of October, 1997.

Karyn A. Booth

Karyn A. Booth

PART B

VERIFIED STATEMENTS

BEFORE

THE

SURFACE TRANSPORTATION BOARD

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

VERIFIED STATEMENT

OF

GERALD W. FAUTH III

ON BEHALF

OF

ERIE - NIAGARA RAIL STEERING COMMITTEE

DATED: OCTOBER 21, 1997

TABLE OF CONTENTS

Section I

INTRODUCTION

My name is Gerald W. Fauth III. I am President of G. W. Fauth & Associates, Inc. (**GWF**), a consulting firm specializing in economic, regulatory and legislative issues involving transportation. Our offices are located at 116 South Royal Street, Alexandria, Virginia 22314. I have testified in numerous proceedings before the Surface Transportation Board (**STB**) and its predecessor, the Interstate Commerce Commission (**ICC**). A detailed statement of my background and qualifications is attached hereto as **Appendix A.**

I have been asked by the Erie-Niagara Rail Steering Committee (**ENRS**) to review and analyze the Railroad Control Application and other documents and information submitted in and/or related to 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. CSX Corporation (**CSX**), Norfolk Southern Corporation (**NS**), and Conrail Inc (**CR** or **Conrail**) (collectively the **Applicants**) are seeking regulatory approval from the STB for CSX's and NS's proposed acquisition and division of the railroad and other assets owned and controlled by Conrail.

ENRS is an ad-hoc coalition of various railroad shippers, economic development representatives, public transportation representatives, and county representatives in the "**Niagara Frontier**" area, which, for the purposes of this statement, includes all of Erie and Niagara Counties, New York and the north-west portion of Chautauqua County, New York. The specific railroad freight stations included in the Niagara Frontier area are listed in **Exhibit GWF-1**. ENRS is concerned about the impact that the proposed transaction will have on railroad traffic and operations in and around the Niagara Frontier area.

In connection with this proceeding, I have reviewed the Applicants' Railroad Control Application, numerous supporting workpapers, various responses to discovery, and certain deposition material. I have also reviewed the United States Railway Association's (**USRA**) Final System Plan (**FSP**), which resulted in the creation of Conrail in 1976. I have also visited the Niagara Frontier area on three separate occasions and inspected the majority of the railroad facilities and observed various railroad operations in the area. In addition, I have reviewed and analyzed thousands of computerized records extracted from the STB's 1995 Costed Waybill Sample and from various traffic tapes submitted by the Applicants relating to railroad traffic and operations in the Niagara Frontier area.

Consequently, I understand the complex issues involved in this proceeding and the railroad market and operation in the Niagara Frontier area. Based on my review and analysis, I have determined that:

Executive Summary

- The Niagara Frontier area is a large, profitable and generally captive railroad market, which is currently dominated by Conrail and will be dominated by CSX if the proposed transaction is approved.

- The proposed allocation of Conrail's assets by the Applicants does not create or restore "balanced competition" in the Niagara Frontier area as envisioned by USRA's FSP or by NS's Principles of Balanced Competition.

- Railroad freight rates in the Niagara Frontier area are likely to increase as a result of: reduced economies associated with the loss of single-line service; increased market share; the recovery costs associated with the substantial acquisition premium paid by CSX and NS for Conrail; and other factors.

- At the same time, railroad freight rates associated with products from similar and competing areas, i.e., Detroit, New Jersey and Philadelphia, will decrease as a result of the arbitrary injection of head-to-head competition in these competing areas.

- Consequently, railroad shippers in the Niagara Frontier area are likely to experience substantial competitive harm if the proposed transaction is approved, as is, which could result in the transfer of production and jobs from the Niagara Frontier area to these competitive areas.

- In order to alleviate this very real potential for competitive harm, the STB should approve the application with a condition that requires the Applicants to establish the Niagara Frontier area as a "**Shared Assets Area**" (**SAA**), with terms and conditions similar to the SAA's that the Applicants have established in other areas: **Detroit**, **Northern New Jersey**; and **Southern New Jersey / Philadelphia**. In addition, the STB should require the Applicants to open all Conrail stations in the Niagara Frontier SAA to reciprocal switching and to establish reasonable reciprocal switching charges, which would allow the existing carriers in the Niagara Frontier area to compete with CSX and NS. In the alternative, the STB should require CSX and NS to grant each other terminal trackage rights over the Conrail lines in the Niagara Frontier area that each will be acquiring and to establish a reasonable level of charges.

Section II

SUMMARY OF FINDINGS

The following points summarize my findings:

- The Niagara Frontier is a large railroad market. In 1995, railroad movements originating from and/or terminating in the Niagara Frontier area generated over **$475 million** in annual freight charges.

- The Niagara Frontier is a profitable railroad market. The average revenue-to-variable cost (**R/VC**) ratio for Conrail's local market in the Niagara Frontier area is , which exceeds the STB's jurisdictional threshold of 180 percent.

- The Niagara Frontier railroad market is a major revenue center for Conrail. In 1995, Conrail-direct movements, i.e., railroad movements in which Conrail serves as both the origin and destination carrier, from and/or to the Niagara Frontier area generated nearly in total freight charges.

- In addition, Conrail is involved as the origin or destination carrier in interchange movements with other carriers that generated a total of in total railroad freight charges. Conrail also is involved in movements from and to Canada and other areas which are interchanged in the Niagara Frontier area and which generated over in freight charges.

- Conrail dominates the local Niagara Frontier railroad market. The only other major carrier with access to the area is NS. However, Conrail controls the major revenue stations. For example, Conrail originated in profitable chemical traffic compared to only by NS.

- In the total Niagara Frontier area, Conrail originated of the freight charges in 1995 compared to only by other carriers. Conrail also terminated the majority of the traffic in the Niagara Frontier area. Conrail terminated of the freight charges compared to by other carriers.

- The Niagara Frontier area is served by other carriers such as: NS, Canadian Pacific Railway Company (**CP**) and its subsidiary Delaware and Hudson (**DH**); Canadian National Railway (**CN**); and several shortlines. However, these other carriers lack direct access to Conrail's revenue stations. A limited number of these stations remain "open" to reciprocal switching, but the extremely high reciprocal switching charges effectively eliminate any potential competition.

- In most cases, the current reciprocal switching charge accessed by Conrail is **$450.00 per car**. This rate greatly exceeds NS's currently reciprocal switching charge of **$156.00 per car** for carriers other than Conrail and CSX in the Niagara Frontier area. Conrail's charge is also 3 times higher than the **$150.00 per car** charge imposed as a condition by the STB in the recently approved merger between Union Pacific Corporation (**UP**) and Southern Pacific Rail Corporation (**SP**). In addition, in 1996, Conrail cancelled the reciprocal switching charges for a significant number of customers in the Niagara Frontier area.

- The Applicants maintain that the proposed transaction accomplishes a goal that the USRA "was unable to accomplish during the 1970's – balanced competition in the regions of the East currently served by the Conrail monopoly." (V.S. of Charles W. Hoppe, Volume 1, pages 345 and 346). However, under the USRA's FSP, the Niagara Frontier area would have had balanced competition, as a result of the proposed transfer of the Erie Lackawanna Railroad Company (**EL**) lines to CSX's predecessor. The proposed transaction does not provide or restore balanced competition in the Niagara Frontier area.

- The proposed allocation of Conrail's other freight stations between CSX and NS will eliminate the existing economies of single line service for many Niagara Frontier shippers. For example, of the total in Conrail-direct freight charges will involve interchanges with CSX and NS. With the added interchange and handling costs, the rates on this traffic are likely to increase.

- If the transaction is approved, of the Conrail-direct market will involve movements to or from "Open" stations, which can be served by CSX or NS. Since Niagara Frontier area shippers will remain captive to CSX, they will not be able to enjoy the potential benefits of this competition.

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- The potential benefits associated with the proposed transaction would be minimal for Niagara Frontier shippers. In 1995, less than in freight charges involved Conrail-CSX movements that would become single-line movements under the proposed transaction.

- If the proposed transaction is approved, the remaining captive railroad shippers, such as most of the shippers in the Niagara Frontier area, will also face rate increases as CSX and NS attempt to recover the substantial merger premium paid for Conrail, which exceeds **$6 billion**.

- The Applicants have proposed the establishment of selected areas of head-to-head competition. However, they have ignored the potential competitive ramifications that this new competition will have on other Conrail markets. In fact, the proposed establishment of these selected areas of competition could result in substantial competitive harm to many shippers in the Niagara Frontier area.

- There are no operational or capacity constraints that would prohibit the establishment of a Niagara Frontier SAA. In fact, the establishment of a Niagara Frontier SAA should result in improved operations and service.

- There is ample railroad capacity in the Niagara Frontier area. Conrail's lines in the Niagara Frontier area were once owned by three of its predecessors: Penn Central Transportation Company (**PC**), the Lehigh Valley Railroad Company (**LV**), and EL. Even after some consolidation and abandonments, Conrail still has numerous rail lines, alternate routes and several large rail yards in the Niagara Frontier area. In fact, Conrail's Frontier Yard is one of the largest railroad yards in the United States.

- The Applicants maintain that the "Chemical Coast" in northern New Jersey will obtain head-to-head competition and new single-line routes to markets in the Southeast, Midwest and Gulf regions. However, the freight charges generated from Conrail's chemical traffic from stations in the Niagara Frontier area were over 2 ½ times greater than the total freight charges on chemical traffic from Conrail's Chemical Coast, i.e., versus

- The Niagara Frontier area and railroad market are similar in many respects to the Detroit area and railroad market: the cities are located on the opposite ends on Lake Erie; both serve as major gateways for traffic from and to Canada; the majority of the traffic originating from both areas falls under Standard Transportation Commodity Code (**STCC**) 37, Transportation Equipment; and one of the largest terminating commodities in both areas is STCC 11, Coal.

- There is a significant difference between the Niagara Frontier and Detroit areas – Detroit's local market is currently served by six (**6**) major carriers. Therefore, Conrail's market share in Detroit is whereas, only two (**2**) major carriers serve the local Niagara Frontier market and Conrail dominates the market.

- In 1995, Conrail participated in movements from or to the Niagara Frontier area which generated in freight charges compared to associated with movements from or to the proposed Detroit SAA. Moreover, Conrail originated of the freight charges from the Niagara Frontier area compared to only originated by Conrail in the Detroit SAA.

- The Niagara Frontier railroad market is also similar in many respects to the Southern New Jersey / Philadelphia railroad market: the total railroad markets are approximately the same size (**$474 million** versus **$499 million**); the Conrail-direct service markets are comparable in size and market share (and versus and); and Conrail dominates both areas. However, one of the other Applicants also provides service to these areas, i.e., NS serves the Niagara Frontier area ( ) and CSX serves the Southern New Jersey / Philadelphia area ( ).

- The average R/VC ratio for the Conrail market in the Niagara Frontier area, i.e., **percent**, is higher than the ratios for the Conrail markets in the proposed SAA's, i.e., Detroit **percent**; Southern New Jersey / Philadelphia **percent**; and Northern New Jersey - **percent**. This indicates that the Niagara Frontier area is a captive market and more captive than the proposed SAA markets.

Section III

NIAGARA FRONTIER RAILROAD HISTORY

There is a long history of transportation competition in the Niagara Frontier area, which perhaps started in 1825 with the opening of the Erie Canal and ended in 1976 with the formation of Conrail. This history is described in more detail in the Verified Statement of Stanley J. Keysa, Deputy Commissioner for Planning and Economic Development for the County of Erie, New York.

Conrail came into existence pursuant to provisions of the Regional Rail Reorganization Act of 1973 and based on the USRA's FSP. Conrail was created by combining the PC, EL, LV, the Reading Railway System (**RDG**) and the Central of New Jersey (**CNJ**). It commenced operations on April 1, 1976.

Three of Conrail's predecessors, PC, EL and LV, served the Niagara Frontier area. Norfolk & Western Railway Company (**NW**), Baltimore & Ohio Railroad (**BO**) and Chessie System (**CO**), via Canada, also served the Niagara Frontier area. In addition, the CP and CN connected with these lines at Suspension Bridge and International Bridge. Thus, prior to the creation of Conrail, the Niagara Frontier area was served by six (**6**) Class I carriers (PC, EL, LV, NW, BO and CO), in addition to the two Canadian railroads, which have interchanges in the Niagara Frontier area.

The creation of Conrail eliminated the PC, EL and LV and consolidated their stations, facilities and operations in the Niagara Frontier area. The USRA provided DH with limited interchange rights in the Niagara Frontier area via the EL line from Binghamton, New York. However, DH has essentially no direct access to most shippers in the Niagara Frontier area, except through very limited reciprocal switching rights discussed herein.

Since the creation of Conrail, BO and CO merged and CP assumed control of DH. In addition, CSX sold the BO line, which provided its primary access to Buffalo, to the Buffalo and Pittsburgh Railroad (**BPRR**). Therefore, Conrail and NS currently provide the primary Class I railroad service to the Niagara Frontier area, with Conrail in control of the majority of the market.

In short, since 1976, Class I railroad service in the Niagara Frontier area has dropped from six (**6**) (PC, EL, LV, NW, BO and CO) to effectively two (**2**) (CR and NS), with one (**1**) (CR) controlling the market. Consequently, within a relatively short period of time, the railroad competition that existed in the Niagara Frontier area for over one hundred years has been essentially eliminated.

The USRA recognized this problem and sought to maintain railroad competition in the Niagara Frontier area. Under the USRA's preferred option, the EL's stations and facilities in the Niagara Frontier area would have been sold to CSX's predecessor, CO. However, CO did not participate because of an inability to modify the existing labor agreements. As a result, a "Unified" or "Big" Conrail was created with "an almost complete Conrail monopoly" in the northeast. (V.S. of Charles W. Hoppe, Volume 1, pages 357).

The Applicants maintain that the proposed transaction accomplishes a goal that the USRA "was unable to accomplish during the 1970's – balanced competition in the regions of the East currently served by the Conrail monopoly." (V.S. of Charles W. Hoppe, Volume 1, pages 345 and 346). The proposed transaction creates some competition in the east via the SAA's in New Jersey and in the Philadelphia area. However, it fails to address the Conrail monopoly in the Niagara Frontier area, which, like those areas, would not have been a monopoly under the preferred option set forth in USRA's FSP.

Section IV

NIAGARA FRONTIER RAILROAD OPERATIONS

In connection with this proceeding, I have traveled to the Niagara Frontier area on three occasions. During the period August 24, 1997 through August 27, 1997, I undertook an extensive review and/or inspection of most of the major railroad facilities in the Niagara Frontier area. I was also able to observe various railroad operations in Niagara Frontier area.

I began these visits, inspections and/or observations with several evaluation points in mind: operational changes proposed by CSX and NS in the Niagara Frontier area; current and proposed transportation options which may be available to shippers in the Niagara Frontier area (i.e., railroad, water and truck options); potential benefits and/or problems that may be associated with the establishment of a "SAA" in the Niagara Frontier area; and other factors, such as the weather, which could impact transportation services in the Niagara Frontier area.

Specifically, I inspected and/or observed railroad facilities and/or operations in and around the following locations:

- Conrail's Frontier Yard;
- Conrail's Niagara Yard;
- Conrail's Kenmore Yard;
- Conrail's Seneca Yard;
- Conrail's Ohio Street Yard;
- Conrail's Harriet Yard;
- Conrail's BG&E Yard;
- Conrail's Compromise Branch;
- CP draw, a draw bridge which crosses the Buffalo River;
- Niagara Mohawk Power Corp. (**NIMO**) Huntley generating station;
- NIMO's Dunkirk generating station;
- U.S. Army Corps of Engineers' Black Rock Lock;
- CN's International Bridge;
- CP's Suspension Bridge;
- CP's SK Yard;
- SB, BPRR and BSOR yards south of CP Draw;
- NS's Buffalo Junction Yard;
- BLE's Conneaut, Ohio Harbor transloading facility;
- Conrail's Ashtabula, Ohio transloading facility; and
- Other railroad operations in the Niagara Frontier area.

My observations and traffic analyses indicate that Conrail dominates the large and profitable Niagara Frontier area railroad market.

The majority of Conrail's operations in the Niagara Frontier area will be taken over by CSX. Under the proposed transaction, NS will be provided improved access to CSX's Seneca Yard and an additional connection via overhead trackage rights to an interchange with CP at Suspension Bridge. CN has also obtained unspecified "new arrangements" in Buffalo from CSX. However, NS's improved access and CN's "new arrangements" are unlikely to have any impact on local traffic in the Niagara Frontier area, i.e., traffic originated or terminated in the Niagara Frontier area. For most Niagara Frontier shippers, CSX will simply replace Conrail as the dominant carrier in the Niagara Frontier area.

The Niagara Frontier area is one of the highest railroad traffic volume areas on the Conrail system. In addition to the large local market, a substantial amount of overhead traffic moves through the area. However, there is ample railroad capacity in the Niagara Frontier area. Conrail's lines in the Niagara Frontier area were once owned by three of its predecessors, i.e., PC, LV and EL. Since the creation of Conrail, certain lines have been abandoned or sold to shortlines and other facilities have been consolidated. However, Conrail still has numerous rail lines, alternate routes and several large rail yard properties in the Niagara Frontier area. In fact, Conrail's Frontier Yard is one of the largest railroad yards in the United States.

Currently, CSX maintains a very limited presence in the area. In fact, most of CSX's traffic from and to the area is handled via agreements with BPRR and CN. If the proposed transaction is approved, however, CSX's market share will be larger than Conrail's current market share in the Niagara Frontier area (versus).

Section V

NIAGARA FRONTIER RAILROAD MARKET

I have undertaken an extensive review of the railroad traffic in the Niagara Frontier area. This section describes my analysis and the results.

A. Traffic Analysis

My analysis was primarily based on the 1995 Costed Waybill Sample, which was developed and provided by the STB. I have reviewed this data on an individual movement basis. I have also made certain comparisons based on this data with data contained in the Applicants' 100 percent traffic tapes. Since the 1995 Costed Waybill Sample is based on sample, there are cases in which the results may overstate or understate rates and/or tonnage, however, it is appropriate and acceptable for the purposes of this proceeding.

There are cases in which adjustments are obvious and could be made. For example, the 1995 Costed Waybill Sample includes records of STCC 11-212-90, Bituminous Coal for Fuel or Steam, movements from Buffalo. There are no coal mines currently in operation in the Niagara Frontier area. These records apparently reflect movements that were interchanged in Buffalo, but miscoded with Buffalo as the origin.

In order to avoid making selective adjustments, which could distort the results, and in order to present "apples to apples" comparisons, I have made no special adjustments to this data, such as those made by NS's Witness John H. Williams who made "selective adjustments to increase Conrail's tonnage by commodity . . ." (Railroad Control Application, Volume 2B, page 75)

P. Origin Traffic

The following table summarizes the characteristics of the 1995 railroad traffic originating in the Niagara Frontier area:

Table 1

Summary of 1995 Niagara Frontier Origin Traffic

Item	Conrail	Total
Total Railroad Freight Charges		$ 220,002,346
Total Carloads		144,281
Total Tons		7,480,717
Average Rate Per Ton		$29.41
Total Variable Cost		$127,696,776
Average Variable Cost Per Ton		$17.07
Average Revenue/Cost Ratio		172.28%

As can be seen, Conrail originated rail carloads that generated a total , in railroad freight charges, which equates to of the total compared to only by other carriers. The majority of this originating traffic falls into two STCC groups: Transportation Equipment (**STCC 37**) and Chemicals and Allied Products (**STCC 28**). The 1995 freight charges generated by individual commodities contained within STCC 37 and STCC 28 were and respectively. The following table lists the ten (**10**) largest individual commodity movements originating from the Niagara Frontier area in terms of total freight charges:

Table 2

Ten Largest Commodities
Moving By Railroad From Niagara Frontier

STCC	Description	Amount
37-149-95	Automobile Parts in Mixed Loads	
28-122-20	Sodium, Caustic Liquid	
28-126-15	Chlorine Gas Liquefied	
11-212-90	Bituminous Coal, For Fuel/Steam	
37-111-20	Motor Vehicles, Passenger, SU	
37-149-93	Automobile Parts, NEC, Iron or Steel	
29-914-25	Coke, Direct Product of Coal	
37-144-20	Internal Combustion Engines, Auto	
37-112-15	Motor Vehicles, Freight	
28-193-15	Sulphuric Acid or Oil of Vitriol	
Total of Ten Largest Commodities		**$146,931,917**
Percent of Total From Niagara Frontier		**66.79%**

As can be seen, in 1995, railroad movements of STCC 37-149-95 and STCC 37-149-93 from the Niagara Frontier area generated over in railroad freight charges. These two individual commodities are under the broader four-digit STCC 37-14, Motor Vehicle Parts or Accessories. The total freight charges for all STCC 37-14 commodities from the Niagara Frontier area was in 1995 out of the total for all STCC 37 commodities.

The STCC 37 traffic from the Niagara Frontier area moves to numerous destinations in twenty states and Canada. The average haul is 681.1 miles. The largest destinations in terms of total carloads were: Ohio ( ); Maryland ( ); Ontario ( ); Georgia (; and Illinois ( ).

Conrail originates the majority of the STCC 37 traffic in the Niagara Frontier area. In 1995, Conrail originated carloads of STCC 37 traffic from the Niagara Frontier area, which generated in total freight charges. Conrail-direct movements accounted for in freight charges. NS originated carloads of STCC 37 traffic, which generated in freight charges. The vast majority of NS's traffic, i.e., carloads, moved to destinations served by NS.

It should be noted that Conrail controls approximately one-third of the total STCC 37-14 railroad transportation market in the United States. In 1995, Conrail's freight charges from STCC 37-14 equated to compared to $701,568,231 for all Class I railroads. In fact, Conrail's share of this market is greater than CSX's and NS's combined.

The second largest group of railroad traffic originating within the Niagara Frontier area is STCC 28, Chemicals or Allied Products. The total 1995 STCC 28 freight charges from the Niagara Frontier area were . As can be seen from Table 2, the major STCC 28 commodities are: STCC 28-122-20, Sodium, Caustic Liquid ( ); STCC-126-15, Chlorine Gas Liquid ( ), and STCC 28-193-15, Sulphuric Acid or Oil of Vitrol ( ). Other significant STCC 28 commodities are: STCC 28-199-01, Metallic Sodium ( ) and STCC 28-125-34, Potassium Chloride ( ). These five commodities represent 91.5 percent of the total STCC 28 railroad freight charges.

Conrail originated the vast majority of this traffic. The total 1995 freight charges of STCC 28 traffic originated by Conrail from the Niagara Frontier area were , of which moved Conrail-direct. The characteristics of this traffic are reflected in the following table:

Table 3

Summary of Conrail's 1995 STCC 28
Railroad Traffic from the Niagara Frontier Area

Item	**Amount**
Conrail-Direct Freight Charges Conrail-CSX Freight Charges Conrail-NS Freight Charges Conrail-UPSP Freight Charges Conrail-BNSF Freight Charges Conrail-Other Freight Charges Railroad Freight Charges from Conrail Origins	
Average Line-Haul Miles	
Total Carloads	
Total Tons	
Average Rate Per Ton	
Total Variable Cost	
Average Variable Cost Per Ton	
Average Revenue/Cost Ratio	

As can be seen from Table 3, Conrail has a large market share of this STCC 28 Niagara Frontier railroad traffic and can extract R/VC ratios, which, on average, exceed the STB's jurisdictional threshold. In fact, the Niagara Frontier area is the largest STCC 28 production and distribution area served by Conrail.

C. Destination Traffic

The following table summarizes the characteristics of the 1995 railroad traffic terminating in the Niagara Frontier area:

Table 4

Summary of 1995 Niagara Frontier Destination Traffic

Item	Conrail	Total
Total Railroad Freight Charges		$ 256,098,952
Total Carloads		153,693
Total Tons		11,392,158
Average Rate Per Ton		$ 22.48
Total Variable Cost		$ 130,291,866
Average Variable Cost Per Ton		$11.44
Average Revenue/Cost Ratio		196.56 %

As can be seen, Conrail also terminated the majority of the traffic in the Niagara Frontier area. Conrail terminated of the freight charges compared to for other carriers.

The largest destination commodity group is STCC 11, Coal, which accounts for a total of in railroad freight charges. In fact, the total STCC 11 freight charges are greater than the next three largest commodity groups combined. The ten **(10)** largest individual commodity movements in terms of total freight charges were:

Table 5

Ten Largest Commodities
Moving By Railroad To Niagara Frontier

STCC	Description	Amount
11-212-90	Bituminous Coal For Fuel or Steam	
11-212-10	Bituminous Coal for Met. Or Coking	
37-111-20	Motor Vehicles (Auto), Passenger, SU	
33-121-50	Breakdowns, Slab or Sheet Bars, Iron or Steel	
37-112-15	Motor Vehicles (Automobiles) Freight, SU	
46-111-10	All Freight Rate Shipments, NEC or TOFC	
01-137-10	Wheat	
24-211-84	Lumber or Timber, Rough or Dressed, Dried	
28-193-15	Sulphuric Acid or Oil of Vitriol	
26-311-17	Pulpboard or Fibreboard, Paper or Pulp	
Total of Ten Largest Commodities Percent of Total to Niagara Frontier		**$186,833,744 72.95%**

As can be seen, the two STCC 11 commodities, i.e., STCC 11-212-90 and 11-212-10 are the two largest commodities moving to the Niagara Frontier area. The STCC 11-212-90 traffic primarily moves to the three coal-fired electric generating stations in the Niagara Frontier area: NIMO's Huntley and Dunkirk generating stations and NYSEG's Kintigh station. The STCC 11-212-10 traffic primarily moves to coking facilities near Lackawanna and Harriet, New York.

These generating stations are all sole-served by Conrail, therefore, Conrail dominates this profitable market. In fact, Conrail terminates 100 percent of the coal to these stations. It should be noted that NIMO's Huntley and Dunkirk stations have received coal via rail-water movement through BLE's Conneaut, Ohio transloading facility. However, this option is limited based on numerous factors, which I have addressed in more detail in my Verified Statement submitted on behalf of NIMO in this proceeding.

The majority of this utility coal traffic moves via Conrail-Direct from "Pittsburgh Seam" or Monongahela (**MGA**) mines located in Pennsylvania and West Virginia. Conrail is the only carrier that currently serves the MGA mines. According to Conrail workpapers submitted in this proceeding, this traffic has doubled since 1990 and now provides 10 percent of Conrail's total revenues and two-thirds of Conrail's coal revenues.

The majority of these MGA mines will have joint NS/CSX access under the proposed transaction. However, CSX will control the destinations in the Niagara Frontier area. Therefore, movement via NS would most likely involve a high reciprocal switching charge, similar to that which is in effect today.

The STCC 11-212-10 traffic primarily moves to Bethlehem Steel's coking facility in Lackawanna, New York. Bethlehem is served by SB, which interchanges with NS and Conrail in Buffalo. Tonawanda Coke's facility near Harriet, New York is served by Conrail. Conrail terminates approximately percent of the total STCC 11-212-10 freight charges to the Niagara Frontier area.

The next largest commodity movement to the Niagara Frontier area is STCC 37-11 or finished motor vehicles, i.e. STCC 37-111-20 ( ) and STCC 37-112-15 ( ). The majority of this traffic moves via NS and DH and is not handled by Conrail. In fact, our analysis indicates that Conrail terminated only out of a total of the STCC 37 carloads. A substantial amount of this traffic originates in Canada.

D. **Canadian Traffic**

The Niagara Frontier is a major gateway for traffic from and to Canada. Although a majority of this international traffic does not move by rail, the rail market is significant and growing as a result of the North American Free Trade Agreement (**NAFTA**). My analysis indicates the total 1995 railroad freight charges from Canada to the U.S. exceeded $2.5 billion.

Movements to and from the Niagara Frontier area are via CP's Suspension Bridge in Niagara Falls, New York and CN's International Bridge. The CP can interchange with CN, Conrail and its U.S. subsidiary, DH, in Niagara Falls. Under the proposed transaction, NS will obtain overhead trackage rights on Conrail's Belt Line Branch and Niagara Branch to connect with CP at Suspension Bridge. CN also has a bridge and interchange at Niagara Falls. However, the majority of its traffic moves over International Bridge. CN can interchange with Conrail and NS. It can also interchange with BPRR via Conrail's Frontier Yard.

Until early 1996, CSX had access to the Niagara Frontier area via trackage rights through southern Ontario. The extent of CSX's current rights to the Niagara Frontier area is unknown at this time. CN has also obtained unspecified "new arrangements" in Buffalo from CSX.

The STB's Costed Waybill Sample is developed based on shipment data reported by the terminating U.S. carrier. The Canadian railroads, i.e., CP and CN, do not report data to the STB, however, their U.S. subsidiaries, GTW, SOO and DH, do report traffic data. Consequently, the majority of the Canadian traffic data included in Costed Waybill Sample relates to shipments from Canada and terminating in the U.S. In addition, there is a substantial amount of Canadian traffic, which is coded CN or CP direct. Therefore, the traffic volumes through this important international gateway cannot be accurately and easily determined.

Notwithstanding these data limitations, I was able to identify a substantial amount of railroad traffic from Canada that moves via the Niagara Frontier gateways. Specifically, I have determined that at least carloads moved via Buffalo in 1995. This traffic generated in total railroad freight charges, of which moved in interchange service with Conrail. Depending on the destination, it appears that NS will be able to compete for a portion of this traffic.

It should be noted, however, that only a limited amount of this traffic, , moved to destinations in the Niagara Frontier area. Conrail's high reciprocal switching charges are apparently one reason for this limited amount of traffic from Canada to the Niagara Frontier area.

E. <u>Conrail's Reciprocal Switching Charges</u>

Historically, the Niagara Frontier has been an area that had many industries and customers that were open to reciprocal switching, a fact that is recognized by the Applicants (W. M. Hart Deposition at 166-167). In recent years, however, Conrail has established a very high level of charges and, in fact, has terminated these rights at numerous locations in the Niagara Frontier area that had been historically open to reciprocal switching.

In the Buffalo switching district, which includes points such as Lackawanna, Cheektowaga, DePew, West Seneca, and Harriet, Conrail's current reciprocal switching charge is **$450.00 per car**. This charge has escalated from a level of $390.00 per car that was established October 1, 1990 and has been as high as $466.00 per car. At other points in the Niagara Frontier area, such as Dunkirk, North Tonawanda and Niagara Falls, Conrail's reciprocal switching charges have been set at a similarly high level of $390.00 per car. In addition, Conrail and DH have a separate charge established under a 1983 agreement, which was produced in discovery, under which DH is provided limited reciprocal switching. (See Conrail Tariff CR-8001-D and CR 11 P 000215-000220). Currently, these charges are and per car, respectively (see CR 11 HC 000102-000104).

Conrail's reciprocal switching charges are high by many standards. By comparison, NS, which is the only other U.S. Class I carrier that presently directly serves any points in the Niagara Frontier area, generally maintains a reciprocal switching charge of **$156.00 per car**. However, apparently in response to the high reciprocal switching charges maintained by Conrail in the Niagara Frontier area, NS has established charges for reciprocal switching to or from Conrail that match the levels established by Conrail, i.e., Conrail established a charge of $390.00 per car on October 1, 1990 and NS, on January 1, 1991, increased its charges with Conrail to the same level. NS has maintained a reciprocal switching charge for service to or from CSX at $250.00 per car. (see Tariff NS 8001, Item 1400)

I believe that the $156.00 per car charge generally established by NS in the Buffalo area would be a reasonable charge for reciprocal switching service to shippers and receivers located on the Conrail lines in the Niagara Frontier area. In the recent UP/SP merger proceeding, UP's settlement agreement with Chemical Manufacturer's Association (**CMA**), which was approved by the STB, reduced SP's $495.00 per car reciprocal switching charge to $150.00 per car, subject to adjustment equal to 50 percent of any change in the Rail Cost Adjustment Factor (**RCAF**), unadjusted for productivity. Therefore, I believe that a reciprocal switching charge at the NS's $156.00 per car level would be reasonable and appropriate for the Niagara Frontier area.

In addition to establishing very high charges for reciprocal switching service, Conrail has further limited reciprocal switching as a competitive alternative that was available to shippers and receivers in the Niagara Frontier area. On November 15, 1996, just a month after announcing its agreement to merge with CSX on October 16, 1996, Conrail put into effect wholesale cancellations of reciprocal switching for 89 customers, all located in the Buffalo switching district. Also in 1996, Conrail terminated the availability of reciprocal switching at Niagara Falls, except for the very limited opportunity for shippers in Niagara Falls to obtain reciprocal switching on movements to or from the DH.

F. <u>Post Transaction Analysis</u>

In 1995, carloads originated from the Niagara Frontier area and moved in Conrail-direct service, i.e., shipped to destinations also served by Conrail. This traffic generated in railroad freight charges. In addition, Conrail moved carloads from various origins to destinations within the Niagara Frontier area in direct service, which generated in railroad freight charges. Therefore, freight charges associated with Conrail-direct traffic from or to the Niagara Frontier area ( ) accounted for approximately of the Conrail's total originating and terminating market.

In addition, Conrail was the originating or terminating carrier for movements that generated in freight charges, of which Conrail would have received a division of the revenue. However, CSX and NS, representing and in freight charges, are not Conrail's major interchange carriers.

Under the proposed transaction, CSX will be assigned the vast majority of the Conrail stations in the Niagara Frontier area. However, the Conrail destinations for traffic from the Niagara Frontier area and the Conrail origins for the traffic to the Niagara Frontier will be split or shared between CSX and NS. My analysis of this market prior to and after the proposed transaction is summarized in the following table:

Table 6

Post Transaction Analysis

Item	Freight Charges	Percent
Prior to the Transaction		
Conrail – Direct		
Conrail – CSX		
Conrail – NS		
Conrail – Other		
Conrail – Interline		
Total Conrail Market		
After the Transaction		
BPRR – CSX		
CSX – CSX		
CSX – CSX (Old CR)		
CSX – Open (CSX/NS)		
CSX – Direct		
CSX – NS		
CSX – NS (Old CR)		
CSX – Other		
CSX – Interline		
CSX – Unknown (Old CR)		
Total CSX Market		

The proposed allocation of Conrail's other freight stations between CSX and NS will eliminate the existing economies of single line service for many Niagara Frontier shippers. For example, of the total . in Conrail-direct freight charges will involve interchanges with CSX and NS. Therefore, for many Conrail shippers in the Niagara Frontier area, the proposed transaction will significantly reduce single line service and, thus, increase interline movements, which are less efficient and have higher costs and will ultimately lead to higher rates.

If the transaction is approved, of the Conrail-direct market will involve movements to or from "Open" stations, which can be served by CSX or NS. Since Niagara Frontier area shippers will remain captive to CSX, however, they will not be able enjoy the potential benefits of this competition.

The potential benefits associated with the proposed transaction would be minimal for Niagara Frontier shippers. In 1995, less than in freight charges involved Conrail-CSX movements that would become single-line movements under the proposed transaction.

As can be seen, if the transcation is approved, CSX will have a larger market share than Conrail had prior to the transaction (. versus .). However, the percentage of total freight charges associated with direct service will drop from . to .

The Applicants tout the benefits of new single line service. There will be certain single-line service benefits created for the traffic that has historically moved in interchange service via CSX – Conrail. However, this involves a very limited amount of traffic, i.e. in total railroad freight charges. There may also be certain benefits associated with the movements to and from the Niagara Frontier area that moved via CSX and BPRR. However, with a total of only in freight charges, the benefits would be limited.

Therefore, for many Conrail shippers in the Niagara Frontier area, the proposed transaction will significantly reduce single line service and increase interline service, with a loss of efficiency, carrying higher costs, and ultimately, higher rates.

Section VI

SAA RAILROAD MARKETS

In addition to the development of analyses relating to railroad movements in the Niagara Frontier area, I have developed various analyses from the 1995 Costed Waybill Sample relating to Conrail's traffic and other railroad traffic from and to the proposed Detroit SAA, Northern New Jersey SAA and Southern New Jersey/ Philadelphia SAA. This section describes and compares Conrail's railroad market in these areas.

It should be noted that the Applicants have also proposed joint access to the coal mines located in Pennsylvania and West Virginia in the area formerly served by the MGA and the Ashtabula, Ohio transloading facility, which was also served by Conrail. Conrail's traffic from the MGA and via Ashtabula and the impact on railroad movement to the Niagara Frontier area is discussed in more detail in my Verified Statement submitted on behalf of NIMO.

A. Market Comparison

A comparison of these railroad markets is attached hereto as **Exhibit GWF-2**. This comparison was developed based on summary of records originating and/or terminating in these areas. The Conrail railroad stations included in these SAA's are listed in **Exhibit GWF-3**. These lists were prepared from a review of the Applicants' workpapers (NS-19-HC-00171 through NS-19-HC-00200). The following table lists and compares the total freight charges originated and terminated by Conrail from and/or to stations in the Niagara Frontier area with stations within the proposed SAA areas:

Table 7

Comparison of Railroad Markets

Item	Northern New Jersey	S. New Jersey/ Philadelphia	Detroit	Niagara Frontier
CR Freight Stations				
Route Miles	273	362	74	123
CR Direct Freight Charges CR Interline Freight Charges Total CR Origin Freight Charges				
Other Freight Charges				
Total Freight Charges				
CR Freight Charges / Station				
CR Market Share				
CR Average R/VC				
Other Average R/VC				

It should be noted that I have employed the same railroad market comparison method employed by NS's Witness Barry C. Harris, i.e., railroad freight charges for originating and terminating traffic. The following table compares my results with the results from Mr. Harris' analysis:

Table 8

Comparison of Market Analyses

Item	BCH Analysis	GWF Analysis
N. NJ SAA		
Conrail Freight Charges	$ 983,132,299	
Total Freight Charges	$1,013,478,174	$ 807,381,850
Conrail Market Share	97.01 %	
S. NJ / PHIL SAA		
Conrail Freight Charges	$ 337,425,649	
Total Freight Charges	$ 523,859,399	$499,176,157
Conrail Market Share	64.41 %	
DETROIT SAA		
Conrail Freight Charges	-----	
Total Freight Charges	-----	$ 615,974,657
Conrail Market Share	-----	
NIAGARA FRONTIER		
Conrail Freight Charges	-----	
Total Freight Charges	-----	$ 476,101,298
Conrail Market Share	-----	

As can be seen, Witness Harris did not prepare an analysis of the Detroit SAA, which is a rather blatant omission. However, the reason is apparent based on Conrail's low market share in the Detroit SAA, i.e., . Of course, Witness Harris did analyze other Conrail monopoly areas, such as the Niagara Frontier area.

B. <u>Detroit</u>

As can be seen, the Detroit SAA total railroad market is larger than the Niagara Frontier market ($616 million versus $476 million). However, in terms of the Conrail railroad market (which is at issue in this proceeding), the Niagara Frontier area is substantially larger than the Conrail market in the Detroit SAA ($ versus). Therefore, Conrail's market share in the Detroit area is only . This is a result of the substantial intra-modal competition that already exists in Detroit. The following table shows market breakdown in terms of the total 1995 railroad freight charges from and to the Detroit SAA:

Table 9

1995 Freight Charges From and To the Detroit SAA

Item	Amount	Percent
Conrail		
NS		
CN-GTW		
CSX		
BNSF		
CP		
Other		
Total		**100.00 %**

As can be seen, Conrail competes with five other major carriers in the area, i.e., NS, CN, CSX, BNSF and CP. Under the proposed transaction, NS and CSX will divide Conrail's market share and, thus, the two carriers will control of the market. However, CN, BNSF and CP will remain major competitors in the market. In contrast, one carrier, CSX, will control the railroad market in the Niagara Frontier area with only one other major carrier, NS, in the area.

The major commodity originated by Conrail in the Detroit SAA is STCC 37, Transportation Equipment. In 1995, Conrail originated carloads of STCC 37 traffic, which generated in total railroad freight charges. The majority of this STCC 37 traffic (' in total freight charges) is classified under STCC 37-14, Motor Vehicle Parts.

As previously stated, Conrail originates the majority of the STCC 37 traffic in the Niagara Frontier area. In 1995, Conrail originated carloads of STCC 37 traffic from the Niagara Frontier area, which generated in total freight charges. Therefore, the Conrail STCC 37 market in the Niagara Frontier area is smaller than Conrail's Detroit SAA STCC 37 market, however, the STCC 37-14 markets are more comparable, which is illustrated by the following table:

Table 10

Comparison of Conrail's STCC 37-14
1995 Railroad Traffic from the
Niagara Frontier Area with Traffic from the Detroit SAA

Item	Niagara Frontier	Detroit SAA
Conrail Origin Carloads		
Conrail Origin Freight Charges		
Conrail Origin Average Haul		

It should be noted that CSX, although already a competitor in the Detroit area, does not have a significant share of the STCC 37-14 market in Detroit. My analysis indicates that CSX originates only of the STCC 37-14 freight charges in the Detroit SAA, whereas, Conrail has a share, NS has a share, and other carriers a share. Since Conrail has a significant market share and CSX does not compete in this market, the proposed establishment of a SAA in the Detroit area should result in lower freight charges for Conrail STCC 37-14 shippers in the Detroit area.

Conrail's destination market in the Detroit SAA is approximately one-half the size of Conrail's destination market in the Niagara Frontier area (versus). Like the Niagara Frontier area, one of Conrail's largest individual railroad commodity movement terminating in the Detroit SAA is STCC 11-212-90, Bituminous Coal for Fuel or Steam Purposes. In the Detroit area, however, CN is a major coal destination carrier, whereas, the coal-fired generating stations in the Niagara Frontier area are sole-served by Conrail. My analysis indicates that CN's GTW subsidiary terminated tons in 1995 compared to for Conrail. The majority of this GTW coal originated on CSX and was handled in interchange service from Toledo, Ohio. Thus, the coal shippers in the Detroit area will receive the added benefits of single line service and enhanced competition.

C. Northern New Jersey

The proposed Northern New Jersey SAA is substantially larger than the Detroit and South New Jersey / Philadelphia SAA's. In 1995, Conrail's total freight charges originating from or terminating to this area were and Conrail's market share was . Although Conrail dominates this market, it is, nevertheless, a competitive market. The majority of the traffic in the Northern New Jersey SAA is intermodal container traffic, which is generally considered competitive traffic. This traffic competes with trucks and with traffic via other east coast ports, e.g., Philadelphia, Baltimore, Wilmington, Hampton Roads, Jacksonville, etc. This is indicated by the extremely low average R/VC ratio of for Conrail's Northern New Jersey SAA traffic. Consequently, the competitive situation in the Northern New Jersey area is different than other monopoly areas served by Conrail.

It should be noted that the Applicants describe the Northern New Jersey area as Conrail's "Chemical Coast" and tout the benefits that chemical shippers in this area will receive from the proposed transaction. However, the 1995 Costed Waybill Sample indicates that Conrail originated only in STCC 28, Chemicals and Allied Products, railroad freight charges from the Northern New Jersey SAA, which is substantially lower than the originated by Conrail in the Niagara Frontier area.

D. Southern New Jersey / Philadelphia

The Southern New Jersey / Philadelphia SAA is similar in many respects to the Niagara Frontier area. This is illustrated in the following table:

Table 11

Comparison of the Niagara Frontier Area and Southern New Jersey / Philadelphia SAA Railroad Markets

Item	S. New Jersey / Philadelphia	Niagara Frontier
Conrail Direct Freight Charges		
Conrail Direct R/VC Ratio		
Conrail Direct Percent		
Conrail Interline Freight Charges		
Conrail Interline R/VC Ratio		
Conrail Interline Percent		
Other Freight Charges		
Other R/VC Ratio		
Other Percent		
Total Freight Charges	$ 499,176,157	$ 476,101,298
Average R/VC Ratio	158.18 %	184.54 %

As can be seen, the markets are approximately the same size in terms of total railroad freight charges from and to these areas ($476 million versus $499 million). Conrail's direct service markets are also comparable with total freight charges totaling and . and R/VC ratios of . and . for Niagara Frontier and Southern New Jersey / Philadelphia, respectively. Conrail dominates both service areas, however, CSX originated and/or terminated . nillion in freight charges in the Southern New Jersey / Philadelphia area, whereas, NS has a similar presence in the Niagara Frontier area with a total of in freight charges.

Conrail's origin railroad market in the Southern New Jersey / Philadelphia SAA is smaller (versus) and more diverse than the Niagara Frontier area, as well as, the other SAA's. In 1995, the largest Conrail origins commodities in terms of railroad freight charges were: STCC 29, Petroleum or Coal Products - ; STCC 28, Chemicals and Allied Products - ; and STCC 37, Transportation Equipment - . As previously stated, Conrail's STCC 28 and STCC 37 markets in the Niagara Frontier area are also the largest commodity markets in that area. However, the Niagara Frontier markets are larger and more concentrated.

Conrail's destination railroad market in the Southern New Jersey / Philadelphia SAA ( ) is larger than both the Detroit SAA destination market ( ) and the Niagara Frontier destination market ( ). The largest destination commodities are: STCC 28, Chemicals and Allied Products - , STCC 11, Coal - ; STCC 33, Primary Metal Products - ; STCC 20, Food or Kindred Products – .

It is interesting to note that Conrail's STCC 28 origin market in the Niagara Frontier area and Conrail's STCC 28 destination market in the Southern New Jersey / Philadelphia area are approximately the same size (versus . Indeed, in 1995, movements in direct Conrail service from the Niagara Frontier area to Southern New Jersey / Philadelphia SAA generated in freight charges for Conrail. However, the majority of the freight charges ( ) were generated by railroad movements to this area from the Texas and Louisiana. If the transaction is approved, the STCC 28 traffic from the Niagara Frontier area will continue to have a geographic advantage. However, these movements will move from the Niagara Frontier area via CSX, whereas, movements from Texas and Louisiana will have the benefit of head-to-head competition at the origin, between UPSP and BNSF, and at the destination, between CSX and NS.

Coal movements to the Southern New Jersey / Philadelphia area generated in freight charges compared to for coal movements to the Niagara Frontier area. There are four coal fired electric generating stations in the Southern New Jersey / Philadelphia area: Atlantic City Electric's Deepwater and England plants; Philadelphia Electric's Eddystone plant; and the City of Vineland's Howard M. Down plant. As indicated in my Verified Statement submitted in the proceeding on behalf of NIMO, these plants, which will receive head-to-head competition, directly compete with the coal fired stations in the Niagara Frontier area, which will be dominated by CSX.

Although the railroad markets are similar, the Southern New Jersey / Philadelphia area will have head-to-head competition, whereas, the Niagara Frontier area will be dominated by CSX. It should be noted the average R/VC ratio for the Niagara Frontier area, at percent, exceeds the STB's jurisdictional threshold and is likely to increase, whereas, the average R/VC ratio for the Southern New Jersey / Philadelphia area is only percent and likely to decrease.

Section VII

COMPETITIVE HARM

The Applicants have proposed the establishment of selected areas of head-to-head competition. However, they have ignored the potential competitive ramifications that this new competition will have on other Conrail markets. In fact, the proposed establishment of these selected areas of competition could result in substantial competitive harm to the captive shippers in the Niagara Frontier area.

A. STCC 37 – Transportation Equipment

Under the proposed transaction, NS and CSX will be able to compete for STCC 37-14 traffic from the Detroit SAA under equal terms. The injection of competition into the Detroit SAA should result in the reduction of the STCC 37-14 rate levels. Freight charges for STCC 37-14 shippers from the Niagara Frontier area, however, would remain the same and be subjected to rate increases.

For example, a rate that generates a R/VC of 150 percent generally covers a railroad's full cost and an adequate return on investment. If the rates for the STCC 37-14 traffic from Detroit SAA were reduced to a 150 percent competitive rate level, STCC 37-14 plants in the Niagara Frontier area would be faced with a clear competitive disadvantage: the total STCC 37-14 freight charges from the Detroit SAA would be reduced from to , whereas, the total freight charges from the Niagara Frontier plants would remain at and be subjected to rate increases. In terms of rates, STCC 37-14 rates would equate to per car compared to for Niagara Frontier shippers.

This is an obvious area of potential competitive harm. The establishment of the Detroit SAA, without similar competitive conditions in the Niagara Frontier area, would, in all likelihood, reduce the delivered cost of Motor Vehicle Parts or Accessories from the Detroit SAA and result in the transfer of production from plants in the Niagara Frontier to plants in the Detroit SAA. Since STCC 37 represents the largest group of railroad traffic in the Niagara Frontier area, this potential transfer of production could have a detrimental impact on the economy in the Niagara Frontier area.

B. STCC 28 – Chemicals and Allied Products

The following table compares the total freight charges from Conrail's STCC 28 origins in the Niagara Frontier area with freight charges generated by traffic from: the Detroit SAA; the Northern New Jersey SAA; the Southern New Jersey / Philadelphia SAA; and all other Conrail STCC 28 origins:

Table 12

STCC 28 Freight Charges From Conrail Origins

Item	Amount
Niagara Frontier Area	
Niagara Frontier R/VC Ratio	
Detroit SAA	
NNJ SAA	
SNJ/PHIL SAA	
Total From Proposed SAA Areas	
SAA R/VC Ratio	
Illinois	
Delaware	
Ohio	
West Virginia	
Pennsylvania (Other)	
New York (Other)	
Indiana	
Massachusetts	
Maryland	
Quebec	
Missouri	
All Other Conrail Origins	
Total Other Conrail Origins	
Other Conrail Origins R/VC Ratio	
Total Freight Charges From Conrail Origins	

As can be seen, the freight charges associated with Conrail's STCC 28 traffic from the Niagara Frontier area are greater than the STCC 28 freight charges from Conrail origins in the three proposed SAA combined (versus   ) and greater than STCC 28 traffic originated by Conrail from other areas.

The Niagara Frontier STCC 28 market is also profitable with a R/VC ratio of   . This is approximately the same ratio of the STCC 28 market from the three SAA's, i.e.,   With new competition for Conrail's STCC 28 traffic in the SAA's, this ratio will presumably drop. The rates and R/VC ratio from the other non-SAA areas are already lower than the rates and ratios for STCC 28 traffic originated by Conrail in the Niagara Frontier area. For example, STCC 28 traffic originating from Conrail origins in Illinois generates   in freight charges and has an average R/VC ratio of only   . Therefore, the STCC 28 production facilities in the Niagara Frontier area will be at a competitive disadvantage.

In addition, Niagara Frontier STCC 28 shippers could be hurt in terms of shipments to the large STCC 28 destination market in the Southern New Jersey / Philadelphia SAA. If the transaction is approved, the STCC 28 traffic from the Niagara Frontier area will move via CSX, whereas, movements from Texas and Louisiana will have the benefit of head-to-head competition at the origin, between UPSP and BNSF, and at the destination, between CSX and NS.

C. **STCC 11 – Coal**

The majority of the utility coal traffic to the Niagara Frontier area moves via Conrail-direct from "Pittsburgh Seam" or MGA mines located in Pennsylvania and West Virginia. Conrail is the only carrier that currently serves the MGA mines. This traffic has doubled since 1990 and now provides 10 percent of Conrail's total revenues and two-thirds of Conrail's coal revenues. The majority of these MGA mines will have joint NS/CSX access under the proposed transaction. However, CSX will control the destinations in the Niagara Frontier area Therefore, coal movements via NS can be expected to involve a high reciprocal switching charge similar to Conrail's current charge. Conrail's current charge would equate to $4.50 per ton based on a load of 100 tons per car.

There are no economically viable transportation alternatives for coal moving to the plants in the Niagara Frontier area. On paper, NIMO's two generating stations in the Niagara Frontier area will have access to the NS via the joint access agreement at Ashtabula Harbor in connection with a rail-water movement. However, there are several factors that significantly restrict such movements. These restrictions are addressed in my Verified Statement submitted on behalf of NIMO.

As captive shippers, utilities in the Niagara Frontier area, i.e., NYSEG and NIMO, can expect rate increases in the future. While NYSEG's and NIMO's freight rates increase, several of their competitors will obtain rate reductions as a result of head-to-head competition created by the establishment of the proposed SAA's.

Specifically, the following six plants will be served by both CSX and NS: Detroit Edison's (**DE**) Trenton and River Rouge Plants; Atlantic City Electric's (**ACE**) Deepwater and England plants; Philadelphia Electric's (**PE**) Eddystone plant; and the City of Vineland's Howard M. Down plant. Ontario Hydro should also benefit from the conditions joint access provision for Ashtabula that was proposed by the railroads. Without protective conditions, NIMO's and NYSEG's rates will increase as a result of being captive to CSX, whereas, DE's freight rates will decrease as it enjoys the benefits of new competition at Trenton and River Rouge. This is discussed in more detail in my Verified Statement submitted on behalf of NIMO.

D. Increased Interchange Service

The proposed allocation of Conrail's other freight stations between CSX and NS will eliminate the existing economies of single line service for many Niagara Frontier shippers. For example, of the total in Conrail-direct freight charges will involve interchanges with CSX and NS. Therefore, for many Conrail shippers in the Niagara Frontier area, the proposed transaction will significantly reduce single line service and, thus, increase interline movements, which are less efficient and have higher costs and will ultimately lead to higher rates.

E. Limited Benefits

If the transaction is approved, of the . Conrail-direct market will involve movements to or from "Open" stations, which can be served by CSX or NS. Since Niagara Frontier area shippers will remain captive to CSX, however, they will not be able to enjoy the potential benefits of this competition. In fact, the potential benefits associated with the proposed transaction would be minimal for Niagara Frontier shippers. In 1995, less than in freight charges involved Conrail-CSX movements that would become single–line movements under the proposed transaction.

F. Acquisition Premium

If the proposed transaction is approved, railroad shippers in the Niagara Frontier area will continue to operate in a market that is dominated by a single carrier, i.e. CSX. At the same time, CSX will face competitive pressure from NS to reduce rates in other major service areas, such as the Detroit, New Jersey and Philadelphia areas. At the same time, CSX will have to pay for its share of the acquisition premium paid for Conrail, which exceeds **$6 billion**. As CSX is an advocate of differential pricing, its captive shippers, such as those in the Niagara Frontier area, are likely to face rate increases in the near future.

Section VIII

PROPOSED NIAGARA FRONTIER SAA

As indicated herein, the proposed transaction is likely to result in substantial competitive harm to the Niagara Frontier area. The STB should impose conditions in order to alleviate this very real potential for competitive harm. Specifically, approval of the joint acquisition and control of Conrail by NS and CSX should be conditioned on the creation by the Applicants of another SAA, i.e., the "Niagara Frontier Shared Assets Area." The creation of a Niagara Frontier SAA is completely supported and justified by the characteristics of the market and the traffic comparisons and analyses described and set forth herein.

A. Geographic Limits

The geographic limits of the Niagara Frontier SAA should include all of Conrail's lines and assets in Erie and Niagara Counties, and in the northern portion of Chautauqua County in New York State on Conrail's Chicago line as far as Control Point 58 (**CP 58**) near Westfield, New York. By including the line to CP 58, an existing interchange track between NS and Conrail could be utilized and avoid a complicated interchange in Dunkirk. (see CSX 21 CO 005369 – 005371).

B. Ownership

As in the other proposed SAA's, a restructured "Conrail" will serve as the designated SAA operator. This SAA operator should retain ownership of all current Conrail lines, yards, facilities and other equipment and property currently located within the Niagara Frontier area SAA.

C. Service and Operations

By creating a Niagara Frontier SAA, all current Conrail customers within the limits of the area would receive access from both CSX and NS and thus receive the competitive benefits that the proposed transaction should provide to them. Such rail service could be provided directly by either CSX or NS, or by the SAA operator on the behalf of CSX or NS. The operational aspects of the Niagara Frontier SAA should be identical to those proposed for the other areas and allow CSX and NS to make use of the SAA on an impartial basis, while preserving their competitive identities. Adjustments could be made to the basic SAA structure as necessary to recognize specific operational requirements in the area for through train operations.

D. Operational / Capacity Constraints

Based on the current service difficulties in Texas and Louisiana associated with the recently approved UPSP merger, the STB should consider the potential impact of the proposed transaction on railroad service and operations. However, there are no operational or capacity constraints that would prohibit the establishment of a Niagara Frontier SAA.

In its proposed Operating Plan, NS references the "congestion problem" that presently exists at **CP Draw**, which is the point where two draw bridges cross the Buffalo River, and indicates that it "will build connections at two points (one on the Southern Tier Route and one on Conrail's Buffalo-Harrisburg route) that will provide an alternate route around the "CP Draw"." CSX's Operating Plan indicates that a shift in traffic flows by NS will result in "additional capacity at Frontier Yard," which should alleviate the congestion problem at CP Draw. CP Draw is in a key location. Conrail's through traffic to and from the west travels over the CP Draw. Conrail, NS and the shortlines serving Buffalo, i.e., Buffalo and Pittsburgh Railroad (**BPRR**), Buffalo and Southern Railroad (**BSOR**) and South Buffalo Railroad (**SB**), cross the bridge at CP Draw for classification or interchange at either the Conrail's Frontier Yard or NS's Buffalo Junction Yard. However, NS's plans to reroute traffic from this area via planned new connections should eliminate the potential bottleneck at CP Draw.

In addition, there is an underutilized alternative route over the Buffalo River known as the "**Compromise Branch.**" This is a difficult connection for the shortlines and is a circuitous route for traffic to and from the Frontier Yard. Therefore, it is rarely used and the vast majority of the traffic moves via the CP Draw. However, it would appear to be a viable routing alternative. Consequently, there are no operational or capacity constraints that would prohibit the establishment of a Niagara Frontier SAA.

Under the SAA proposals set forth in this proceeding, an independent operator, i.e., a restructured Conrail, would handle the operations in the SAA areas. Since a single jointly-owned entity would remain the primary operator in the Niagara Frontier SAA, there should be little, if any, operational difficulties. The difference will be that this operator will no longer be a monopolist with little or no incentive to improve service, but effectively the independent agent for the two competitors, i.e., CSX and NS.

If the proposed transaction is approved, however, CSX would take over most of Conrail's railroad operations in the Niagara Frontier area. In Texas and Louisiana, the new monopoly carrier, UPSP, is turning to competition to solve its service problems. In fact, there are current service problems with the monopoly carrier in the Niagara Frontier area, i.e., Conrail.

Over 800 loaded carloads are originated or terminated in the Niagara Frontier area per day. In addition, hundreds of carloads are interchanged in the Niagara Frontier area per day. Head-to-head railroad competition, via the establishment of Niagara Frontier SAA with reasonable reciprocal switching charges, would ensure good and reliable service for Niagara Frontier shippers, and avoid the problems associated with services from an inefficient and unresponsive monopoly carrier.

E. Open and Reasonable Reciprocal Switching

Approval of the proposed transaction should also be conditioned on the establishment within the Niagara Frontier SAA of reciprocal switching arrangements both for all current Conrail customers and for all future customers located on former Conrail lines in the Niagara Frontier SAA. This will allow other rail carriers serving the area, such as CN, CP and the existing shortline operators in the area to also provide competitive service to current Conrail customers. Reciprocal switching services should be made available with a reasonable level of charges, such as NS's \$156.00 per car charge or the \$150.00 per car charge approved by the STB in the UPSP merger proceeding. This additional condition would help restore the competitive balance between the Niagara Frontier area and the Detroit area, which is served by six major carriers.

F. **Alternative Conditions**

In the alternative, if a Niagara Frontier SAA is not created, approval of the joint acquisition of Conrail should be conditioned on the reciprocal grant of terminal trackage rights to each other by CSX and NS within the same geographic area described above. Ownership and operation of the Conrail assets in the area would be divided as proposed by the Applicants. However, all current Conrail customers could receive rail service directly from both CSX and NS. Alternatively, a reasonable trackage rights charge, i.e., $0.29 per car mile, should be required. This is the same level set forth by the Applicants in this proceeding in other proposed trackage rights arrangements. (See, e.g., Application Volume 8B, at 255, 625)

If neither of the above alternatives are established, approval of the proposed transaction should be conditioned on the establishment by CSX and NS of reciprocal switching service to all customers currently served by Conrail and future customers located on Conrail lines in the Niagara Frontier SAA. Reciprocal switching would be provided by CSX and NS separately on their portions of the Conrail assets allocated to each of them within the area described above. Services would be provided by CSX or NS, as the case may be, at reasonable charges for the account of all rail carriers which currently have access to the area and wish to provide service to customers located at points that would otherwise be served only by either CSX or NS.

Section IX

CONCLUSION

The Niagara Frontier area is a large, profitable and generally captive railroad market, which is currently dominated by Conrail and will be dominated by CSX if the proposed transaction is approved. The proposed allocation of Conrail's assets by the Applicants does not create or restore "balanced competition" in the Niagara Frontier area as envisioned by USRA's FSP or by NS's Principles of Balanced Competition.

Railroad freight rates in the Niagara Frontier area are likely to increase as a result of: reduced economies associated with the loss of single-line service; increased market share; the recovery costs associated with the substantial acquisition premium paid by CSX and NS for Conrail; and other factors. At the same time, railroad freight rates associated with products from similar and competing areas, i.e., Detroit, New Jersey and Philadelphia, will decrease as a result of the arbitrary injection of head-to-head competition in these competing areas.

Consequently, railroad shippers in the Niagara Frontier area are likely to experience substantial competitive harm if the proposed transaction is approved, as is, which could result in the transfer of production and jobs from the Niagara Frontier area to these competitive areas.

In order to alleviate this very real potential for competitive harm, the STB should approve the application with a condition that requires the Applicants to establish the Niagara Frontier area as a "Shared Assets Area," with terms and conditions similar to the SAA's that the Applicants have established in other areas: Detroit, Northern New Jersey; and Southern New Jersey / Philadelphia. In addition, the STB should require the Applicants to open all Conrail stations in the Niagara Frontier SAA to reciprocal switching and to establish reasonable reciprocal switching charges, which would allow the existing carriers in the Niagara Frontier area to compete with CSX and NS.

In the alternative, the STB should require either: (1) CSX and NS to grant each other terminal trackage rights over the Conrail lines in the Niagara Frontier area that each will be acquiring and to establish a reasonable level of charges for the use of such rights; or (2) CSX and NS to provide reciprocal switching services to all current and future customers on the Conrail line in the area, again at reasonable charges.

Alexandria, Virginia: ss

Gerald W. Fauth III, being duly sworn, deposes and says that he has read the foregoing document and attachments thereto and knows the contents thereof, and that all matters and things set forth therein are true.

Gerald W. Fauth III

Subscribed and sworn to before me this 20th day of October, 1997.

Notary Public

My Commission expires on 8-31-99.

STATEMENT OF QUALIFICATIONS
OF
GERALD W. FAUTH III

My name is Gerald W. Fauth III. I am a transportation consultant specializing in economic, regulatory and legislative issues involving transportation. I am President of the firm of G. W. Fauth & Associates, Inc. (**GWF**), an economic consulting firm with offices at 116 South Royal Street, Alexandria, Virginia 22314. My part-time affiliation with GWF began in 1972. I have been employed on a full-time basis by GWF since May, 1978.

GWF, and its predecessor company, Williams and Fauth, has been in the transportation consulting business for the past forty (**40**) years. GWF provides assistance to a wide-variety and number of clients, primarily freight shippers, in various inter and intra-modal transportation projects relating to railroads, motor carriers and barge companies. These projects have involved the areas of:

- Rate Structure Economic Evaluations
- Transportation Regulations and Legislation
- Transportation Costing
- Contract and Tariff Rate Negotiations
- Transportation Mergers and Acquisitions
- Traffic Analyses and Distribution Studies
- Transportation Operations
- International Shipping Issues
- Engineering Studies
- Transportation Property Appraisals and
- Other Transportation Problems

During my affiliation with GWF, I have been directly involved with every major project and litigation. I have assisted numerous clients in transportation freight rate structure economic evaluations and in direct negotiations with transportation companies. My knowledge and understanding of carriers' variable costs and operations have been a great value to shippers in negotiations with carriers for contract rates. This is particularly important in high-volume bulk-commodity movements such as coal. chemicals, agricultural products and other bulk commodities.

In recent years, U.S. railroads have abandoned or sold a substantial number of low-volume branch lines. I have assisted numerous clients in cases involving abandonments and line acquisitions concerning revenue and cost issues, as well as, valuation issues involving railroad equipment, property and right-of-way lines.

I have personally conducted numerous on-site inspections of railroad switching operations which were used to develop the costs associated with railroad operations. I have conducted numerous time-motion studies of motor carrier loading facilities that were used in developing the handling cost associated with the service. Therefore, I am familiar with transportation operations.

It is often necessary to litigate disputes between parties. Therefore, I have been called upon as expert witness in numerous litigations before the Interstate Commerce Commission (**ICC**), the Surface Transportation Board (**STB**), courts and other regulatory agencies. I have prepared and submitted both written and oral testimony. A list of several of these proceedings follows this narrative.

Many of these projects and litigations have involved the development of railroad cost analyses based on the application of Uniform Railroad Costing System or its predecessor, Rail Form A. I have been actively involved in the regulatory process which led to the development of URCS and submitted testimony in ICC Ex Parte No. (Sub-No. 1), Adoption of the Uniform Railroad Costing System as a General Purpose Costing System for all Regulatory Costing Purposes.

I have also developed numerous traffic and market analyses based on the Costed Waybill Sample. For example, I submitted testimony and presented evidence based on analyses developed from the Costed Waybill Sample in STB Finance Docket No. 32760, Union Pacific Corp., et al. -- Control and Merger -- Southern Pacific Rail Corp., et al.

In 1980, the railroads were substantially deregulated by the passage of the Stagger Rail Act of 1980. In 1995, another railroad deregulation effort culminated with the passage of the ICC Termination Act of 1995, which, effective January 1, 1996, eliminated the ICC and established the STB. I was actively involved in monitoring and tracking these bills for several associations and companies. Therefore, I am familiar with the legislative history of the existing laws and regulations impacting railroads.

I am a 1978 graduate of Hampden-Sydney College of Virginia with a Bachelor of Arts degree. My major areas of concentration were in the departments of history and government. My senior thesis dealt with the History of Railroad Regulation. I am a 1974 graduate of St. Stephen's School in Alexandria, Virginia.

I am a member of the Association for Transportation Law, Logistics and Policy and the Transportation Research Forum. I am also a candidate member of the American Society of Appraisers.

Selected Testimony

- STB Finance Docket No. 32760, Union Pacific Corp., et al. -- Control and Merger -- Southern Pacific Rail Corp., et al.
- ICC Finance Docket No. 31608, PSI Energy, Inc. - Feeder Line Development - Norfolk Southern Corporation Line Between Cynthiana and Carol, Indiana
- ICC Finance Docket No. 31012, Cheney Railroad Company, Inc., Feeder Line Acquisition - CSX Transportation, Inc. Line Between Greens and Ivalee, Alabama
- STB Ex Parte No. 542, Regulations Governing Fees For Services Performed in Connection With Licensing and Related Services - 1996 Update
- ICC Ex Parte No. 431 (Sub-No. 1), Adoption of the Uniform Railroad Costing System as a General Purpose Costing System for all Regulatory Costing Purposes
- ICC/STB Ex Parte No. 347 (Sub-No. 2), Rate Guidelines -- Non-Coal Proceedings
- ICC Ex Parte No. 346 (Sub-No.24), Rail General Exemption Authority - Miscellaneous Manufactured Commodities
- ICC Ex Parte No. 328, Investigation of Tank Car Allowance System
- ICC Ex Parte No. 290 (Sub-No. 2), Railroad Cost Recovery Procedures
- ICC Ex Parte No. 246 (Sub-No. 10), Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services - 1992 Update
- ICC Docket No. 40107, General Electric Company v. The Atchison, Topeka and Santa Fe Railway Company, et. al.
- ICC Docket No. 40073, South-West Railroad Car Parts Company v. Missouri Pacific Railroad Company
- ICC Docket No. 38279S, The Detroit Edison Company v. Consolidated Rail Corporation, et. al.
- ICC Docket No. 37931S, Metropolitan Edison Company v. Consolidated Rail Corporation
- ICC Docket No. AB-167 (Sub-No. 1125), Consolidated Rail Corporation -- Abandonment -- Between Warsaw and Valparaiso, in Kosciusko, Marshall, Starke, La Porte and Porter Counties, IN
- ICC Docket No. AB-55 (Sub-No. 402), CSX Transportation, Inc. - Abandonment - Between Woodlawn and Walmar in Jefferson, Washington, Clinton and St. Clair Counties, Illinois

LISTING OF CONRAIL STATIONS IN THE NIAGARA FRONTIER AREA

STATION	STATE	SPLC
Middleport	NY	185128
Lockport	NY	185130
Gasport	NY	185144
Niagara Falls	NY	185180
Suspension Bridge	NY	185183
North Tonawanda	NY	185190
Buffalo Flexi	NY	185320
Buffalo Trail	NY	185321
Harriet	NY	185329
Lancaster	NY	185365
Cheektowaga	NY	185371
Depew	NY	185375
Seneca	NY	185383
West Seneca	NY	185390
Ebenezer	NY	185391
Buffalo	NY	185400
Buffalo Black	NY	185406
Dunkirk	NY	189521
Fredonia	NY	189531

LISTING OF ALL STATIONS IN THE NIAGARA FRONTIER AREA

STATION	COUNTY	SPLC
BUFFALO FLEXI	ERIE	185320
BUFFALO TRAIL	ERIE	185321
HARRIET	ERIE	185329
BOWMANSVILLE	ERIE	185362
LANCASTER	ERIE	185365
CHEEKTOWAGA	ERIE	185371
DEPEW	ERIE	185375
SENECA	ERIE	185383
WEST SENECA	ERIE	185390
EBENEZER	ERIE	185391
GARDENVILLE	ERIE	185394
BUFFALO	ERIE	185400
BUFFALO	ERIE	185405
BUFFALO BLACK	ERIE	185406
SENECA	ERIE	185417
SPRING BROOK	ERIE	185506
EAST AURORA	ERIE	185512
HOLLAND	ERIE	185545
CHAFFEE	ERIE	185573
WEST SOMERSET	NIAGARA	185113
MIDDLEPORT	NIAGARA	185128
LOCKPORT JCT	NIAGARA	185129
LOCKPORT	NIAGARA	185130
CAMBRIA	NIAGARA	185142
GASPORT	NIAGARA	185144
SANBORN	NIAGARA	185166
BELLAIRCRAFT	NIAGARA	185167
ECHOTA	NIAGARA	185172
NIAGARA FALLS	NIAGARA	185180
SUSPENSION BRIDGE	NIAGARA	185183
NORTH TONAWANDA	NIAGARA	185190
SILVER CREEK	CHAUTAUQUA	189506
DUNKIRK	CHAUTAUQUA	189521
FREDONIA	CHAUTAUQUA	189531
WESTFIELD	CHAUTAUQUA	189558

COMPARISON OF CONRAIL'S NIAGARA FRONTIER MARKET WITH CONRAIL'S MARKETS IN THE PROPOSED SHARED ASSETS AREAS

ITEM (1)	ORIGIN RR (2)	DEST. RR (3)	MILES (4)	CARS (5)	TONS (6)	FREIGHT CHARGES (7)	PERCENT (8)	RATE / CAR (9)	RATE / TON (10)	VARIABLE COST (11)	V.C. / CAR (12)	V.C./ TON (13)	R/VC (14)
NIAGARA FRONTIER AREA													
NIAGARA FRONTIER O & D	CR-DIRECT												
NIAGARA FRONTIER O & D	CR INTERLINE												
NIAGARA FRONTIER O & D	CR TOTAL												
NIAGARA FRONTIER O & D	OTHER												
NIAGARA FRONTIER O & D	TOTAL		524.3	297,974	18,872,875	476,101,298	100.00%	1,597.79	25.23	257,988,669	865.81	13.67	184.54%
DETROIT SAA													
DETROIT SAA O & D	CR-DIRECT												
DETROIT SAA O & D	CR INTERLINE												
DETROIT SAA O & D	CR TOTAL												
DETROIT SAA O & D	OTHER												
DETROIT SAA O & D	TOTAL		598.0	552,775	19,930,010	615,974,657	100.00%	1,114.33	30.91	472,429,273	854.65	23.70	130.38%
SOUTHERN NEW JERSEY / PHILADELPHIA SAA													
SNJ/PHIL TOTAL O&D	CR-DIRECT												
SNJ/PHIL TOTAL O&D	CR-INTERLINE												
SNJ/PHIL TOTAL O&D	CR-TOTAL												
SNJ/PHIL TOTAL O&D	OTHER												
SNJ/PHIL TOTAL O&D	TOTAL		698.4	315,234	17,080,699	499,176,157	100.00%	1,583.51	29.22	315,575,872	1,001.08	18.48	158.18%
NORTHERN NEW JERSEY SAA													
NNJ SAA TOTAL O & D	CR-DIRECT												
NNJ SAA TOTAL O & D	CR INTERLINE												
NNJ SAA TOTAL O & D	CR TOTAL												
NNJ SAA TOTAL O & D	OTHER												
NNJ SAA TOTAL O & D	TOTAL		1,105.4	699,310	16,847,179	807,381,850	100.00%	1,154.54	47.92	676,855,541	970.75	40.29	118.93%

Exhibit GWF-2
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STB FD 33388 10-21-97 D 182936 3/6

COMPARISON OF CONRAIL'S NIAGARA FRONTIER MARKET WITH CONRAIL'S MARKETS IN THE PROPOSED SHARED ASSETS AREAS

ITEM (1)	ORIGIN RR (2)	DEST. RR (3)	MILES (4)	CARS (5)	TONS (6)	FREIGHT CHARGES (7)	PERCENT (8)	RATE / CAR (9)	RATE / TON (10)	VARIABLE COST (11)	V.C. / CAR (12)	V.C./ TON (13)	R/VC (14)
NIAGARA FRONTIER AREA													
NIAGARA FRONTIER ORIGIN	CR	CR											
NIAGARA FRONTIER ORIGIN	CR	OTHER											
NIAGARA FRONTIER ORIGIN	CR	ALL											
NIAGARA FRONTIER ORIGIN	NS	NS											
NIAGARA FRONTIER ORIGIN	NS	OTHER											
NIAGARA FRONTIER ORIGIN	NS	ALL											
NIAGARA FRONTIER ORIGIN	CP-DH	CP-DH											
NIAGARA FRONTIER ORIGIN	CP-DH	OTHER											
NIAGARA FRONTIER ORIGIN	CP-DH	ALL											
NIAGARA FRONTIER ORIGIN	OTHER	OTHER											
NIAGARA FRONTIER ORIGIN	TOTAL		502.5	144,281	7,480,717	220,002,346	100.00%	1,524.82	29.41	127,696,803	885.06	17.07	172.28%
NIAGARA FRONTIER DESTINATION	CR	CR											
NIAGARA FRONTIER DESTINATION	OTHER	CR											
NIAGARA FRONTIER DESTINATION	ALL	CR											
NIAGARA FRONTIER DESTINATION	NS	NS											
NIAGARA FRONTIER DESTINATION	OTHER	NS											
NIAGARA FRONTIER DESTINATION	ALL	NS											
NIAGARA FRONTIER DESTINATION	CP-DH	CP-DH											
NIAGARA FRONTIER DESTINATION	OTHER	CP-DH											
NIAGARA FRONTIER DESTINATION	ALL	CP-DH											
NIAGARA FRONTIER DESTINATION	OTHER	OTHER											
NIAGARA FRONTIER DESTINATION	TOTAL		538.6	153,693	11,392,158	256,098,952	100.00%	1,666.30	22.48	130,291,866	847.74	11.44	196.56%
NIAGARA FRONTIER O & D	CR-DIRECT												
NIAGARA FRONTIER O & D	CR INTERLINE												
NIAGARA FRONTIER O & D	CR TOTAL												
NIAGARA FRONTIER O & D	NS-DIRECT												
NIAGARA FRONTIER O & D	NS INTERLINE												
NIAGARA FRONTIER O & D	NS TOTAL												
NIAGARA FRONTIER O & D	CP-DH-DIRECT												
NIAGARA FRONTIER O & D	CP-DH INTERLINE												
NIAGARA FRONTIER O & D	CP-DH TOTAL												
NIAGARA FRONTIER O & D	OTHER												
NIAGARA FRONTIER O & D	TOTAL		524.3	297,974	18,872,875	476,101,298	100.00%	1,597.79	25.23	257,988,669	865.81	13.67	184.54%

Exhibit GWF-2
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COMPARISON OF CONRAIL'S NIAGARA FRONTIER MARKET WITH CONRAIL'S MARKETS IN THE PROPOSED SHARED ASSETS AREAS

DETROIT SAA

ITEM (1)	ORIGIN RR (2)	DEST. RR (3)	MILES (4)	CARS (5)	TONS (6)	FREIGHT CHARGES (7)	PERCENT (8)	RATE / CAR (9)	RATE / TON (10)	VARIABLE COST (11)	V.C. / CAR (12)	V.C./ TON (13)	R/VC (14)
DETROIT SAA ORIGIN	CR	CR											
DETROIT SAA ORIGIN	CR	OTHER											
DETROIT SAA ORIGIN	CR	TOTAL											
DETROIT SAA ORIGIN	NS	NS											
DETROIT SAA ORIGIN	NS	OTHER											
DETROIT SAA ORIGIN	NS	TOTAL											
DETROIT SAA ORIGIN	CSX	CSX											
DETROIT SAA ORIGIN	CSX	OTHER											
DETROIT SAA ORIGIN	CSX	TOTAL											
DETROIT SAA ORIGIN	GTW	GTW											
DETROIT SAA ORIGIN	GTW	OTHER											
DETROIT SAA ORIGIN	GTW	TOTAL											
DETROIT SAA ORIGIN	BNSF	BNSF											
DETROIT SAA ORIGIN	BNSF	OTHER											
DETROIT SAA ORIGIN	BNSF	TOTAL											
DETROIT SAA ORIGIN	OTHER	OTHER											
DETROIT SAA ORIGIN	TOTAL		638.6	277,029	8,429,683	365,864,967	100.00%	1,320.67	43.40	257,463,789	929.37	30.54	142.10%
DETROIT SAA DESTINATION	CR	CR											
DETROIT SAA DESTINATION	OTHER	CR											
DETROIT SAA DESTINATION	ALL	CR											
DETROIT SAA DESTINATION	NS	NS											
DETROIT SAA DESTINATION	OTHER	NS											
DETROIT SAA DESTINATION	ALL	NS											
DETROIT SAA DESTINATION	CSX	CSX											
DETROIT SAA DESTINATION	OTHER	CSX											
DETROIT SAA DESTINATION	ALL	CSX											
DETROIT SAA DESTINATION	GTW	GTW											
DETROIT SAA DESTINATION	OTHER	GTW											
DETROIT SAA DESTINATION	ALL	GTW											
DETROIT SAA DESTINATION	BNSF	BNSF											
DETROIT SAA DESTINATION	CP	CP											
DETROIT SAA DESTINATION	OTHER	OTHER											
DETROIT SAA DESTINATION	TOTAL		568.2	275,746	11,500,327	250,109,690	100.00%	907.03	21.75	214,965,484	779.58	18.69	116.35%

Exhibit GWF-2
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COMPARISON OF CONRAIL'S NIAGARA FRONTIER MARKET WITH CONRAIL'S MARKETS IN THE PROPOSED SHARED ASSETS AREAS

ITEM (1)	ORIGIN RR (2)	DEST. RR (3)	MILES (4)	CARS (5)	TONS (6)	FREIGHT CHARGES (7)	PERCENT (8)	RATE / CAR (9)	RATE / TON (10)	VARIABLE COST (11)	V.C. / CAR (12)	V.C./ TON (13)	R/VC (14)
DETROIT SAA (Continued)													
DETROIT SAA O & D	CR-DIRECT												
DETROIT SAA O & D	CR-INTERLINE												
DETROIT SAA O & D	CR-TOTAL												
DETROIT SAA O & D	NS-DIRECT												
DETROIT SAA O & D	NS-INTERLINE												
DETROIT SAA O & D	NS-TOTAL												
DETROIT SAA O & D	CSX-DIRECT												
DETROIT SAA O & D	CSX-INTERLINE												
DETROIT SAA O & D	CSX-TOTAL												
DETROIT SAA O & D	GTW-DIRECT												
DETROIT SAA O & D	GTW-INTERLINE												
DETROIT SAA O & D	GTW-TOTAL												
DETROIT SAA O & D	BNSF-DIRECT												
DETROIT SAA O & D	BNSF-INTERLINE												
DETROIT SAA O & D	BNSF-TOTAL												
DETROIT SAA O & D	CP-DIRECT												
DETROIT SAA O & D	OTHER												
DETROIT SAA O & D	TOTAL		598.0	552,775	19,930,010	615,974,657	100.00%	1,114.33	30.91	472,429,273	854.65	23.70	130.38%

Exhibit GWF-2
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COMPARISON OF CONRAIL'S NIAGARA FRONTIER MARKET WITH CONRAIL'S MARKETS IN THE PROPOSED SHARED ASSETS AREAS

SOUTHERN NEW JERSEY / PHILADELPHIA SAA

ITEM (1)	ORIGIN RR (2)	DEST. RR (3)	MILES (4)	CARS (5)	TONS (6)	FREIGHT CHARGES (7)	PERCENT (8)	RATE / CAR (9)	RATE / TON (10)	VARIABLE COST (11)	V.C. / CAR (12)	V.C./ TON (13)	R/VC (14)
SNJ/PHIL ORIGIN	CR	CR											
SNJ/PHIL ORIGIN	CR	OTHER											
SNJ/PHIL ORIGIN	CR	ALL											
SNJ/PHIL ORIGIN	CSX	CSX											
SNJ/PHIL ORIGIN	CSX	OTHER											
SNJ/PHIL ORIGIN	CSX	ALL											
SNJ/PHIL ORIGIN	OTHER	OTHER											
SNJ/PHIL ORIGIN	TOTAL		519.4	135,857	7,193,698	168,846,141	100.00%	1,242.82	23.47	106,454,591	783.58	14.80	158.61%
SNJ/PHIL DESTINATION	CR	CR											
SNJ/PHIL DESTINATION	OTHER	CR											
SNJ/PHIL DESTINATION	ALL	CR											
SNJ/PHIL DESTINATION	CSX	CSX											
SNJ/PHIL DESTINATION	OTHER	CSX											
SNJ/PHIL DESTINATION	ALL	CSX											
SNJ/PHIL DESTINATION	OTHER	OTHER											
SNJ/PHIL DESTINATION	TOTAL		828.7	179,377	9,887,001	330,330,016	100.00%	1,841.54	33.41	209,121,281	1,165.82	21.15	157.96%
SNJ/PHIL TOTAL O&D	CR-DIRECT												
SNJ/PHIL TOTAL O&D	CR-INTERLINE												
SNJ/PHIL TOTAL O&D	CR-TOTAL												
SNJ/PHIL TOTAL O&D	CSX-DIRECT												
SNJ/PHIL TOTAL O&D	CSX-INTERLINE												
SNJ/PHIL TOTAL O&D	CSX-TOTAL												
SNJ/PHIL TOTAL O&D	OTHER-TOTAL												
SNJ/PHIL TOTAL O&D	TOTAL		698.4	315,234	17,080,699	499,176,157	100.00%	1,583.51	29.22	315,575,872	1,001.08	18.48	158.18%

Exhibit GWF-2
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COMPARISON OF CONRAIL'S NIAGARA FRONTIER MARKET WITH CONRAIL'S MARKETS IN THE PROPOSED SHARED ASSETS AREAS

ITEM (1)	ORIGIN RR (2)	DEST. RR (3)	MILES (4)	CARS (5)	TONS (6)	FREIGHT CHARGES (7)	PERCENT (8)	RATE / CAR (9)	RATE / TON (10)	VARIABLE COST (11)	V.C. / CAR (12)	V.C./ TON (13)	R/VC (14)
NORTHERN NEW JERSEY SAA													
NNJ SAA ORIGIIN	CR	CR											
NNJ SAA ORIGIIN	CR	OTHER											
NNJ SAA ORIGIIN	CR	ALL											
NNJ SAA ORIGIIN	OTHER	OTHER											
NNJ SAA ORIGIIN	TOTAL		1,112.9	221,424	4,525,180	203,695,452	100.00%	919.93	45.01	189,833,713	857.33	41.95	107.30%
NNJ SAA DESTINATION	CR	CR											
NNJ SAA DESTINATION	OTHER	CR											
NNJ SAA DESTINATION	ALL	CR											
NNJ SAA DESTINATION	OTHER	OTHER											
NNJ SAA DESTINATION	TOTAL		1,102.7	477,886	12,321,999	603,686,398	100.00%	1,263.24	48.99	489,021,828	1,023.30	39.69	123.45%
NNJ SAA TOTAL O & D	CR-DIRECT												
NNJ SAA TOTAL O & D	CR INTERLINE												
NNJ SAA TOTAL O & D	CR TOTAL												
NNJ SAA TOTAL O & D	OTHER												
NNJ SAA TOTAL O & D	TOTAL		1,105.4	699,310	16,847,179	807,381,850	100.00%	1,[illegible]54.5[illegible]	47.92	678,855,541	9[illegible]0.75	40.29	118.93%

Exhibit GWF-2
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LISTING OF CONRAIL STATIONS IN THE DETROIT SHARED ASSETS AREA

STATION	STATE	SPLC
	MI	
	MI	
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* Source: NS-19-HC-00178-00179

LISTING OF CONRAIL STATIONS IN THE SOUTHERN NEW JERSEY / PHILADELPHIA SHARED ASSETS AREA

STATION	STATE	SPLC
	NJ	
	NJ	
	NJ	
	NJ	
	NJ	
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* Source: NS-19-HC-00179-00183, 00191-00199

LISTING OF CONRAIL STATIONS IN THE NORTHERN NEW JERSEY SHARED ASSETS AREA

STATION	STATE	SPLC
	NJ	
	NJ	
	NJ	
	NJ	
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* Source: NS-19-HC-00179-00183

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

VERIFIED STATEMENT OF
RONALD W. COAN

I. INTRODUCTION

My name is Ronald W. Coan and I am the executive director of the Erie County Industrial Development Agency (ECIDA). My business address is Liberty Building, Suite 300, 424 Main Street, Buffalo, New York 14202. I have been employed with the Agency as Executive Director since 1990.

The Agency deals specifically with companies and businesses that are located within Erie County, which is located in the northwest corner of New York State. The City of Buffalo, population 330,000 -- the second largest city in the state, is within Erie County. The county's western boundary is Lake Erie.

The Agency is a quasi-public corporate group made up of the Erie County Industrial Development Agency, the Industrial Land Development Corporation, the Erie County Advanced Training Center, and the Buffalo & Erie County Regional Development Corporation. The missions of these agencies are to generate maximum public and private investment, promote job creation and business retention and tax base stabilization for Buffalo and Erie County, New York. Since 1990, the Agency has focused on expansion of local business through several innovative loan programs, development of a 500 acre industrial park, numerous economic development projects including the development of the Advanced Training Center and, first in the nation, Export and Exim City/State finance and insurance programs. ECIDA's direct lending programs have assisted almost 300 companies to date.

As executive director, I report to a nineteen-member board of directors which includes the County Executive, the Mayor of Buffalo and a cross section of elected and appointed officials, labor leaders and industrialists.

Prior to joining the ECIDA, I served as the Economic Development Coordinator/Deputy Commissioner for the Erie County Department of Environment and Planning. I was responsible for the development, administration and coordination of the principal county economic development projects, contracts and relationships.

In 1979, I came to Buffalo as Chairman of the Department of Urban Studies and Public Administration at Canisus College. Prior to that, I served as Director of the Public Administration Program at Northeastern Missouri State and as Assistant to the City Manager in Kirkville, Missouri. I also served as a private consultant specializing in housing, neighborhood revitalization, budgets and teambuilding.

In addition, I am active on the board of many local civic and cultural organizations including: Buffalo Economic Development Corporation; Buffalo and Erie County Private Industry Council (Vice Chairman); NYS Economic Development Council (Vice Chairman); Erie County Human Resources Corporation (Treasurer); the Western New York Technology Development Corporation; and the Center for Competitiveness of the Niagara Region.

In the past, I have served on the Executive Committee of the Greater Buffalo Convention and Visitor's Bureau; World University Games; Convention Center; Downtown Development, Inc.; Economic Development Coordinating Council; Horizons Waterfront Commission; Western New York Canada Council; Tralfamadore Jazz Institute; Lackawanna Economic Development Zone; and Metro Buffalo Alliance.

I graduated from Salem State College in 1969; received an M.A. degree from Kent State University in 1971; and, a Ph.D. in Political Science and Public Administration from Miami University of Oxford, Ohio in 1976.

The ECIDA has been involved with various transportation issues affecting the Western New York business community for the past 17 years. In addition, the Agency is responsible for the administration of two shortline railroads that were taken over by the County of Erie as a result of the Erie-Lackawanna Railroad bankruptcy. Since the takeover of the shortlines in 1980, the two rail lines have increased their freight traffic from 250 cars per year to approximately 2,000 cars per year. The two rail lines operate without any direct subsidy.

It became apparent after analyzing the proposed Conrail acquisition that the CSX/Norfolk Southern proposed plan for the Buffalo/Niagara area would adversely affect the future of many industries in the immediate and surrounding areas that utilize rail as a major mode of transporting and receiving products, and, thus, would harm economic stability and development in the region.

Consequently, this Agency took the initiative and established the Erie-Niagara Rail Steering Committee that is made up of various major shippers, economic development representatives, public transportation representatives, as well as representatives from the New York State counties of Erie, Niagara, and Northern Chautauqua. I will generally refer to the Erie, Niagara, and Northern Chautauqua region as the "Niagara Frontier." In addition, I have attached the member listing of the Erie-Niagara Rail Steering Committee to this verified statement.

The Committee's main purpose is to act as an ad-hoc rail oversight group specifically in relation to the proposed Conrail acquisition. The Committee is responsible for analyzing the transaction, including the economic and competitive impacts of the proposal, through hired consultants, managing the regional response to the rail acquisition, raising funds to ensure that the region is properly represented, and seeking appropriate remedies from the Surface Transportation Board to alleviate potential anticompetitive effects that would result from the proposal.

The purpose of my Verified Statement is to illustrate how the breakup of Conrail may be the most important single "macro" economic issue in the Niagara Frontier area. Presently, the majority of shippers in the region that rely upon rail transportation only have access to Conrail. Due to the lack of rail transportation alternatives, these shippers are subject to a monopolistic pricing structure that discourages and can prohibit intensive use of rail service. The chemical and grain industries, utility companies, automotive and agricultural industries that are highly dependent upon rail service are especially disadvantaged by the current situation. Under the proposed plan submitted by Norfolk Southern and CSX, which has been alleged to be pro-competitive, shippers in the Niagara Frontier at best can expect nothing more than a continuation of unreasonably high transportation and switching rates and poor customer service, since the majority of such shippers will continue to be captive to a single railroad for transportation service. Indeed, with the proposed creation by CSX and Norfolk Southern of Shared Assets Areas in Detroit, the Philadelphia area, and Northern New Jersey, which are regions that directly compete with the Niagara Frontier, the proposal will cause direct competitive harm to the Niagara Frontier and will seriously hamper economic development in the region.

II. DESCRIPTION OF ERIE COUNTY

I will provide an overview of the characteristics of Erie County. General descriptions of the characteristics of Niagara and Northern Chautauqua Counties are provided in the statements of Sean J. O'Connor, Chairman of the Niagara County Legislature, and Donald H. Burdick, Director of the Chautauqua County Department of Economic Development, respectively. The verified statement of Stanley J. Keysa, Esquire, Deputy Commissioner for Planning and Economic Development for the County of Erie, also provides additional county information and statistics.

Erie County is located in the western portion of New York State along the shores of Lake Erie. The county shares its northwestern border with Canada and is home to a highly trafficked international crossing. According to the 1990 U.S. Census, the population of Erie County is 968,532 and has been steadily decreasing since 1970. The total percent change of the county's population for this period was –13.01%. Population forecasts assert this trend will reverse itself with slight population increases predicted for the county throughout the remainder of the decade and into the next century.

Population Projections for Erie County

YEAR	2000	2010	2020
ERIE CTY.	987,749	992,900	1,039,000

Source: Niagara Frontier Transportation Committee

The largest municipality in Erie County is the city of Buffalo, presently the second largest city in New York State. Formerly a major industrial and shipping center, the city has experienced population decline similar to the county. The net loss of population between 1970 and 1990 was 134,657 for a percent change of -29%.

Historically a center of steel production, Erie County has suffered a dramatic decline in its manufacturing base. Since 1976, the manufacturing sector has decreased by 33.1%, and job creation and expansion has primarily been limited to the lower paying service sector. The following table traces the historical growth and decline of employment by sector in Erie County since 1976. Despite this decline in the manufacturing sector, the automotive, chemical and medical related industries remain integral components of the county's economy. Erie County's strategic location on the Canadian border has established the region's role as a trade corridor between the United States and Canada. Erie County hopes to recapture revenue lost in manufacturing by capitalizing on record levels of trade between the two nations. The Buffalo – Niagara Falls area experienced a 38 percent growth in exports in 1994, second only to Detroit in foreign trade expansion.

Employment in Erie County 1976-1994

	Manufacturing	Service	Trans./ Utility	Construction	Wh. Trade
1976	103,884	71,384	19,510	13,317	
1978	107,171	78,614	21,935	14,863	
1980	107,593	85,411	20,698	13,950	23,462
1982	90,111	86,000	19,117	12,140	23,578
1984	78,064	94,975	19,155	12,213	23,349
1986	79,167	106,287	18,312	13,001	24,789
1988	79,999	110,851	20,112	13,965	24,733
1990	77,565	139,110	21,591	16,689	24,994
1992	69,961	139,726	21,376	16,016	25,125
1994	69,589	145,199	21,625	13,894	25,363
% Decline/Growth-1976-1994	-33.10%	103.40%	10.80%	4.30%	8.10%

Source: County Business Patterns

Unemployment rates in Erie County, as throughout the nation, are at ten-year lows. These figures may be deceiving as economic indicators due to the region's transition from a manufacturing based to a service based economy. The higher paying opportunities of the manufacturing period were replaced by less lucrative alternatives in the service sector. As seen in the table, the service industry, which employed twice as many people in Erie County as manufacturing in 1992, paid a comparable aggregate payroll total.

Unemployment Figures for Erie County

YEAR	%
1976	10.8
1978	8.0
1980	9.5
1982	12.2
1984	8.7
1986	7.3
1988	5.0
1990	4.9
1992	7.1
1994	6.5
1996	5.2

Annual Payroll Revenue by Sector and County (in $1,000s) *

Erie County	Manufacturing	Service	Trans./Utility	Construction	Wh.Trade
1976	1,574,798	573,631	286,768	242,702	
1980	2,024,357	810,553	409,092	295,234	386,594
1984	1,958,165	1,189,206	456,883	296,608	496,349
1988	2,259,932	1,719,888	543,910	343,532	587,299
1992	2,282,952	2,781,647	643,516	483,881	676,216

*** figures not in constant dollars**
Source: County Business Patterns

The economic climate of Erie County is slowly improving but remains tentative. Any further impairment in the area's competitive position could devastate the region's economy. The failure of CSX and NS to provide for competitive rail service in the Niagara Frontier, while affording dual rail service to regions that compete with Buffalo in industrial development would be a disaster for the region. The expense of rail transportation plays an integral role in the future vitality of this community and it is imperative that concessions be made to bring parity to shippers located in the Niagara Frontier area.

III. THE PROPOSED ACQUISITION OF CONRAIL WILL CAUSE COMPETITIVE HARM TO RAIL SHIPPERS AND WILL HINDER ECONOMIC DEVELOPMENT IN THE NIAGARA FRONTIER REGION

A. The Creation of Shared Assets Areas in Detroit, Philadelphia/South Jersey, and North Jersey Will Adversely Impact Niagara Frontier Shippers

A result of the proposed acquisition of Conrail will be that major industries located in the Niagara Frontier area will have access to only a single rail carrier, either CSX or NS, with CSX being the primary carrier in the region. The industries most affected include chemical and/or allied products companies, automobile parts companies, primary metals products companies, food products companies, utility companies and coke operation companies, and agricultural products companies. Many of these local companies are in direct competition with similar industries in the Detroit, Northern New Jersey, and South Jersey/Philadelphia areas that are proposed to receive dual rail service as a result of the Conrail transaction. The majority of the companies in each of the proposed shared assets areas, like the Niagara Frontier shippers, currently have access to only a single rail carrier. Thus, as a direct result of the proposed

Conrail acquisition, shippers in the shared assets areas will be competitively advantaged, while shippers in the Niagara Frontier area will be competitively disadvantaged. As explained in the accompanying Verified Statement of Gerald W. Fauth III (hereafter "Fauth V.S."), dual rail service can be expected to result in lower transportation rates, improved customer service, and lower switching charges, among other benefits. In contrast, the Niagara Frontier area can expect the proposal to result in higher transportation rates and charges due to a decrease in single line railroad service, increased market share by CSX, and the carriers' need to recover costs associated with the substantial acquisition premium paid for Conrail. Fauth V.S. at 3-7.

1. Coal

Utility costs are and will continue to be an important factor in attracting and retaining industries in the Niagara Frontier region. With the cost of electricity in the Niagara Frontier area already 40 – 50% above the national average,[1] all cost components of electric rates become important in maintaining or hindering our competitive position. Under the proposed transaction, utilities such as Detroit Edison in Michigan, Atlantic Electric in New Jersey, and Philadelphia Electric in Pennsylvania will obtain dual carrier access.[2] I am told that these companies compete with the coal-fired generation facilities of Niagara Mohawk Power Corporation and New York State Electric & Gas in Western New York, which will have access only to a single rail carrier for coal deliveries under the current proposal. The utilities in the shared assets areas can expect to obtain lower transportation rates as a result of the head-to-head rail competition they

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1 *Is the Power Authority Necessary?; Utilities Want Authority Stripped of Assets,* Buffalo News, Aug. 10, 1997, at 13A; D. Troester, *New Power Authority Head Has High-Energy Agenda,* Business First of Buffalo, Sept. 22, 1997, at 8.

2 See, Sansom V.S., Vol. 2A, at 322.

will receive; whereas the utilities in the Niagara Frontier will be subjected to cost increases. Thus, the proposal places the Niagara Frontier utility generators at a clear competitive disadvantage.

2. Chemicals

The Niagara Frontier is also a major transportation market for chemical products. Under the proposed merger, this important chemical traffic would be allocated almost exclusively to CSX. Chemical products companies concentrated in the Detroit, North Jersey and South Jersey/Philadelphia area will obtain rail-to-rail competition under the proposal, which will disadvantage chemical companies in the Niagara Frontier. This competitive disadvantage could very well cause chemical companies in the Niagara Frontier region to lose market share due to transportation pricing, which would have further negative repercussions on the area's economy.

3. Automotive

Further, it is my general understanding that the auto industry has diversified over the past 10 years, actually creating competition among and between the divisions of larger corporations. Consequently, auto parts operations in the Erie/Niagara area, which generate a major proportion of the area's rail freight traffic, are often in direct competition with their sister divisions located in or near the Detroit area. Rail costs within the Detroit area, however, are likely to be lower than in the Niagara Frontier area due to the proposed establishment of a designated shared assets area in Detroit and the resulting rail-to-rail competition in that area. If the NS/CSX proposal were to be approved as is, production of auto parts and accessories could be transferred to competitive plants in the Detroit Shared Assets Area. Since this category of traffic is the largest group in the Niagara Frontier area, the results of this transaction could severely impact the economy of the region.

4. International Trade

The Niagara Frontier region is a key national player in US-Canadian trade. US-Canadian trade is the largest bilateral trading relationship in the world. Trade between the US and Canada totaled $272 billion in 1995.[3] Seventy percent of the US-Canadian trade crosses one of the 62 highway and rail crossings along the eastern border, which extends from the Atlantic westward to Michigan and Ontario.[4] Truck continues to be the dominant transportation mode for US-Canadian trade. In 1995, trucks accounted for 67% of the US-Canadian trade versus 28% for rail. However, it is my understanding that the rail traffic is also significant. The Niagara Frontier region and the Detroit area are two of the key international rail crossing sites in the Northeast.

As mentioned, the acquisition plan as proposed by CSX/NS will grant a Shared Assets Area to the Detroit region, providing Detroit shippers with multiple interchange options with carriers serving Canada. This would provide competitive rail service on both sides of the border in the Detroit region. The Niagara Frontier region is in competition with the Detroit region for international trade traffic and will be competitively disadvantaged by the CSX/NS proposal. The result of the proposed Conrail acquisition would be to favor Detroit as a rail-shipping center over the Niagara Frontier region, which would further harm the economic climate in the Niagara Frontier.

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3 *Trade and Traffic Across the Eastern US-Canada Border*, Parsons, Brinckerhoff, Quade & Douglas, Inc., May 2, 1997, at 1.

4 Id. at 5.

B. The Proposed Conrail Transaction Will Harm Economic Development in the Niagara Frontier Region

As noted above, the Niagara Frontier region has gone through enormous economic changes in the past three decades. The major economic engine of the past, heavy industrial, steel, and grain milling, have given way to an economy based on light industrial, high technology, and service sector business. Throughout this transition, economic development professionals have become very aware of the factors which businesses look at when deciding to locate or relocate from an area.

Experience has shown that quality of life, work force skills, access to capital, and location are all critical factors if and only if you are economically competitive as a region. Businesses will not locate or remain in a region if they cannot be economically competitive. Fixed operating costs, utility costs, and transportation costs are extremely important when companies look at their competitive picture. Companies' view fixed costs that are out of their direct control as extremely important when assessing competitive location alternatives.

As the nation's and the world's economies continue to evolve, access to transportation and the associated costs are critical considerations that industries look at in deciding where to locate new facilities. Where companies used to compete regionally, they are now competing nationally and globally. National and global competition means transporting goods and receiving goods from distant locations. This creates further regional pressure on local plants because they no longer compete only with sister plants in a region, but on a national and international level.

High rail freight costs can severely hamper a region's potential for growth and its ability to hold on to existing industries. Certain rail dependent industries will not and have not looked to locate in the Niagara Frontier due to the captive rail market and excessive costs. In fact, several industries have stated that unless the rail market becomes competitive, they will no longer be able to be profitable here in the region. Both General Mills and Ford have stated that local plants may not be awarded new business lines or expansions as a result of the current rail pricing structure. In fact if things do not change, both plants could be in jeopardy of being closed. The proposed CSX/NS acquisition will not improve but will hinder the region's ability to compete for economic development with neighboring economic regions. The acquisition brings little to the region in the hopes of establishing competitive rail service. Buffalo will remain a one-railroad town and already excessive freight rates will not be protected from increasing further and harming the region's competitive standing. In fact, the establishment of shared asset areas, which literally surround the Niagara Frontier region, will provide business another key reason not to locate or expand in our region. When companies look to expand or locate in our region and find local switching charges, which are 300% higher than charges in other areas, the decision which they will arrive at seems clear.

In the final analysis, if this acquisition is allowed to proceed as proposed, the Niagara region will be further competitively harmed, the Conrail freight rate legacy may only get worse, and local companies may be forced to close plants and lay off workers. The Niagara region is unique in that very few of our major employers are locally owned or controlled. Plant closing decisions are made in remote locations with one focus, the bottom line, and the bottom line is that this acquisition will competitively harm this region's ability to retain and attract business. The Board must take action to prevent this from happening.

ERIE/NIAGARA STEERING COMMITTEE MEMBER LISTING

Dr. Ron Coan
Erie County Industrial Development Agency
424 Main Street, Suite 300 - Liberty Building
Buffalo, NY 14202

Mr. James Bonnie
Niagara Mohawk
300 Erie Boulevard West
Syracuse, NY 13202

Mr. David Kinyon
Eastern Niagara Chamber of Commerce
151 West Genesee Street
Lockport, NY 14094

Dr. Andrew Rudnick
Greater Buffalo Partnership
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Mr. Warren Patterson
General Mills
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Mr. Dan Bicz
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620 Main Street
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Mr. Tim Trabold
Niagara Frontier
Transportation Council
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Mr. Donald Burdick
Chatauqua County Industrial Development Agency
200 Harris Street
Jamestown, NY 14701

Mr. Jim Lorenc
Occidental Chemical Corp.
Buffalo Avenue
Niagara Falls, NY 14303

I Ronald W. Coan, declare under penalty of perjury that the foregoing is true and correct and that I am qualified and authorized to file this verified statement on behalf of ECIDA. Executed on this 17 day of October, 1997.

Ronald W. Coan
(signature)

SEAN J. O'CONNOR
Chairman

THOMAS M. JACCARINO
Clerk
(716) 439-7000

**NIAGARA COUNTY
LEGISLATURE
COURTHOUSE
LOCKPORT, NEW YORK 14094-2740**

October 14, 1997

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

RE: STB Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/Agreements--Conrail, Inc. and Consolidated Rail Corporation

Dear Secretary Williams:

As Chairman of the Niagara County Legislature, I am providing this letter on behalf of the Niagara County Legislature in support of the efforts of the Erie-Niagara Rail Steering Committee in the Conrail acquisition matter.

We are very concerned about the impacts that the Conrail acquisition will have on the businesses and residents of Niagara County. Niagara County is comprised of 20 municipalities in a 530 square mile area with a population of 220,756 persons. There are currently some 80 major businesses in Niagara County that rely upon rail shipping for their economic viability and competitiveness. Conrail is the major provider of rail service in the County with major access to industrially zoned sites in the Cities of North Tonawanda, Lockport, and Niagara Falls, as well as in the Towns of Niagara, Cambria, Lockport, Royalton and Wheatfield.

Specifically, the Niagara Falls, New York, area is home to many chemical industries that are heavily dependent upon affordable transportation. Delphi/Harrison Thermal Systems, which is located in Lockport, New York, employs 6,800, supplying components for General Motors and the automotive industry. Delphi is the largest employer in Niagara County and Western New York. The County is concerned that Delphi would be adversely affected if they have to pay higher rail rates that impact their distribution of products to other parts of the United States and Canada.

Additionally, New York State Electric and Gas (NYSEG), which operates a coal powered generating station in Somerset, is heavily reliant on coal shipments from the southern United States. The plant currently employs 165 people and contributes over $14 million in taxes annually. Any increases in operating costs could result in higher electric rates being passed on to their residential and business customers.

The Niagara Frontier Region, including Niagara County, needs all of its competitive advantages to be able to sustain a reasonable level of economic activity to support its population.

Following trends of the last several decades, the population of Niagara County declined by 6,598 persons or 2.9% between 1990 and 1980. The 1990 County population figure of 220,756 persons represents a decline of 6.3% from the 1970 figure of 235,720. This decline in population mirrors the significant loss of industry in the County as shown on the attached Table 6. This table clearly depicts the serious magnitude of decline in industrial employment since 1980. The unemployment rate in Niagara County as reported in April 1997 was 6.1%, as compared with the national unemployment rate reported in April 1997, which was only 4.8% (Source: NYS Dept. of Labor). This difference is significant. Any further erosion of the industrial base in the County would result in additional loss of jobs and population across the Niagara Frontier Region.

We are urging the Surface Transportation Board to consider and address the potential adverse impacts that will result from the acquisition of Conrail by CSX and NS, including the lack of competitive rail service and higher transportation rates and charges. We further wish to fully reiterate our support for the efforts of the Erie-Niagara Rail Steering Committee.

As chairman of the Niagara County Legislature, I would be available to attend any public hearings to discuss this matter further.

Sincerely,

Sean O'Connor

Sean J. O'Connor
Chairman, Niagara County Legislature

SJO:dw

CC: Niagara County Legislators
Samuel M. Ferraro, Director, Planning, Development & Tourism
Dorson Wilson, Director, Public Works
Dr. Ron Coan, Executive Director, ECIDA
Scott Whitbeck, Niagara Business Alliance

TABLE 6

NIAGARA COUNTY PLANT CLOSINGS AND LAYOFFS

	1980 EMPLOYMENT	1989 EMPLOYMENT	LOSS	1997 EMPLOYMENT	LOSS
Airco	823	404	(419)	364-Carbide Graphite Group	(40)
Associated Transport	125	0	(125)	-	-
Bell Aerospace	1743	690	(1053)	49-Loral Defense Systems	(641)
Benman Oil Company	50	0	(50)	-	-
Booth Oil Company	20	0	(20)	-	-
Carborundum Corp.	4043	843	(3200)	258	(585)
Carborundum (Norton)	614	334	(280)	575	(+241)
Chisholm - Ryder	147	0	(147)	-	-
Columbus - McKinnon	25	0	(25)	-	-
Cornucipia	75	50	(25)	-	-
D&J Press Co.	30	0	(30)	-	-
Durez Plastic	600	371	(229)	0	(229)
FMC	168	130	(38)	130	(0)
General Abrasives	246	138	(108)	45-Treibacher Schleifmittel Corp.	(93)
Goodyear Rubber	372	313	(59)	126	(187)
Great Lakes Battery	15	0	(15)	-	-
Great Lakes Carbon	464	188	(276)	132	(56)
Guterl Steel	750	0	(750)	-	-
Harrison Radiator	8116	6650	(1446)	6800-Delphi	(+150)
Hooker/Oxy	2362	1798	(564)	946	(852)
Koppers	35	0	(35)	-	-
Lockport Felt	35	0	(35)	-	-
McAdam & Son	7	0	(7)	-	-
Nabisco	509	277	(232)	211	(66)
National Grinding Wheel	500	0	(500)	-	-
Niagara Molded Products (Prestolite)	219	121	(98)	99-Tulip Corp.	(22)
Nitec Paper	670	115	(555)	136	(+21)
Norton Laboratories	30	0	(30)	-	-
Noury/Akzo	150	125	(25)	100	(25)
Olin Corp.	372	233	(139)	182	(51)
Pontiac Firewood	25	0	(25)	-	-
River Rd. Lumber	25	0	(25)	-	-
Roblin Steel	200	0	(200)	-	-
SKW Alloys	288	229	(59)	35	(194)
Sterling Arms	35	0	(35)	-	-
Treck Industries	60	0	(60)	-	-
Union Carbide (Atchinson)	250	0	(250)	-	-
Union Carbide	450	18	(432)	0	(18)
Upson/Domtar	375	60	(315)	60	(60)
Western Block	66	2	(64)	0	2
TOTAL	25,089	13,089	11,980	10,248	3,119

SOURCE: Estimates from area Chambers of Commerce.

SUMMARY OF POPULATION CHARACTERISTICS
NIAGARA COUNTY Percentage of Change: 1980-1990
Niagara County Planning & Industrial Development Department

MUNICIPALITIES:	TOTAL POPULATION				WHITE				BLACK			
	1990	1980	Change	% Change	1990	1980	Change	% Change	1990	1980	Chang	% Change
TOWNS:												
Cambria	4,779	4,419	360	8.15%	4,740	4,375	365	8.34%	11	0	11	100.00%
Hartland	3,911	4,127	(216)	-5.23%	3,865	4,069	(204)	-5.01%	26	38	(12)	-31.58%
Lewiston	15,453	16,218	(765)	-4.72%	15,123	16,014	(891)	-5.56%	127	91	36	39.56%
Lockport	16,596	12,942	3,654	28.23%	15,998	12,569	3,429	27.28%	389	209	180	86.12%
Newfane	8,996	9,268	(272)	-2.93%	8,822	9,026	(204)	-2.26%	89	100	(11)	-11.00%
Niagara	9,880	9,648	232	2.40%	9,458	9,304	154	1.66%	250	206	44	21.36%
Pendleton	5,010	4,726	284	6.01%	4,973	4,680	293	6.26%	9	0	9	100.00%
Porter	7,110	7,233	(123)	-1.70%	7,012	7,129	(117)	-1.64%	15	30	(15)	-50.00%
Royalton	7,453	7,764	(311)	-4.01%	7,346	7,615	(269)	-3.53%	53	97	(44)	-45.36%
Somerset	2,655	2,680	(25)	-0.93%	2,600	2,630	(30)	-1.14%	26	40	(14)	-35.00%
Wheatfield	11,125	9,609	1,516	15.78%	11,016	9,519	1,497	15.73%	34	24	10	41.67%
Wilson	5,761	5,810	(49)	-0.84%	5,667	5,717	(50)	-0.87%	14	23	(9)	-39.13%
CITIES:												
Lockport	24,426	24,844	(418)	-1.68%	22,786	23,535	(749)	-3.18%	1,371	1,107	264	23.85%
Niagara Falls	61,840	71,384	(9,544)	-13.37%	50,828	61,086	(10,258)	-16.79%	9,634	9,079	555	6.11%
North Tonawanda	34,989	35,760	(771)	-2.16%	34,612	35,547	(935)	-2.63%	56	62	(6)	-9.68%
VILLAGES: *												
Barker	569	530	39	7.36%	559	508	51	10.04%	5	22	(17)	-77.27%
Middleport	1,876	1,995	(119)	-5.96%	1,842	1,969	(127)	-6.45%	9	0	9	100.00%
Lewiston	3,048	3,326	(278)	-8.36%	3,033	3,326	(293)	-8.81%	0	0	0	0.00%
Wilson	1,307	1,259	48	3.81%	1,299	1,242	57	4.59%	0	2	(2)	-100.00%
Youngstown	2,075	2,191	(116)	-5.29%	2,058	2,185	(127)	-5.81%	0	0	0	0.00%
TUSCARORA Nation	772	922	(150)	-16.27%	462	41	421	1026.83%	0	0	0	0.00%
TOTAL COUNTY	220,756	227,354	(6,598)	-2.90%	205,308	212,856	(7,548)	-3.55%	12,104	11,106	998	8.99%

* Villages are included in Town totals, and therefore are not added separately into Total County.

Sources: 1990 data from U.S. Census Bureau, through the New York State Data Center, "First PL 94-171 Subset", February 21, 1991
1980 data from U.S. Census Bureau, Summary Tape File 3

1990 CENSUS

Niagara County Planning and Industrial Development Department
Affiliate Data Center

County-80	227,354 *	
County-90	220,756 **	
Loss	(6,598)	-2.90%

	1980	1990	GAIN/ LOSS	%CHANGE
TOWNS:				
CAMBRIA	4,419	4,779	360	8.15%
HARTLAND	4,105	3,911	(194)	-4.73%
LEWISTON	16,219	15,453	(766)	-4.72%
LOCKPORT	12,942	16,596	3,654	28.23%
NEWFANE	9,268	8,996	(272)	-2.93%
NIAGARA	9,648	9,880	232	2.40%
PENDLETON	4,726	5,010	284	6.01%
PORTER	7,251	7,110	(141)	-1.94%
ROYALTON	7,765	7,453	(312)	-4.02%
SOMERSET	2,701	2,655	(46)	-1.70%
WHEATFIELD	9,609	11,125	1,516	15.78%
WILSON	5,792	5,761	(31)	-0.54%
CITIES:				
LOCKPORT(C)	24,844	24,426	(418)	-1.68%
NIAGARA FALLS	71,384	61,840	(9,544)	-13.37%
NO. TONAWANDA	35,760	34,989	(771)	-2.16%
VILLAGES: (Included in Towns Population above)				
BARKER	535	569	34	6.36%
LEWISTON	3,326	3,048	(278)	-8.36%
MIDDLEPORT	1,995	1,876	(119)	-5.96%
WILSON(V)	1,259	1,307	48	3.81%
YOUNGSTOWN	2,191	2,075	(116)	-5.29%
COUNTY: ***	226,433	219,984	(6,449)	-2.85%
THREE CITIES:	131,988	121,255	(10,733)	-8.13%
TOWNS:	94,445	98,729	4,284	4.54%

* included Tuscarora Nation: 921

** assumed Tuscarora Nation: 772

*** without Tuscarora Nation

Source: United States Census Bureau, January 1991

County of Chautauqua
Industrial Development Agency

CCIDA

BEFORE THE

SURFACE TRANSPORTATION BOARD

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

VERIFIED STATEMENT OF

DONALD H. BURDICK

I. INTRODUCTION

My name is Donald H. Burdick; I hold a dual appointment as the Administrative Director of the County of Chautauqua Industrial Development Agency (private corporation) and as the Director of the Chautauqua County Department of Economic Development (public entity). I hold both a Bachelors degree from Empire State College and a Masters degree from the State University of New York at Buffalo.

200 Harrison Street
Jamestown, NY 14701-6902
716/664-3262
FAX 716/664-4515

STAFF
Donald H. Burdick
Director
George E. Moore, Jr.
Ass't. Director
Gregory L. Peterson
Counsel

I have been employed by the Industrial Development Agency and the County of Chautauqua since January 1, 1994. My business address is 200 Harrison Street, Jamestown, New York 14701.

In my County position as the Director of Economic Development, I am appointed by the County Executive and confirmed by the County Legislature; I perform at the will of the County Executive. As the Administrative Director of the Industrial Development Agency, I am appointed by a separate, nine member Board of Directors and act at the will of these members. This Board of Directors is selected by the County Executive and confirmed by the County Legislature to four year terms of appointment.

In my current position, I am responsible for economic development activities and concerns within the county, this of course includes activities which occur outside of the county that impact our local businesses or business environment and would of course include rail service and railroad initiatives which support our county businesses. My agency has the authority to assist the growth and development of business by means of economic assistance to business. We control several revolving loan funds and have the ability to issue Industrial Development Bonds to finance projects. An important part of our work is to be an advocate for our businesses, helping them to prosper and to create jobs.

I joined the Industrial Development Agency following executive positions with Dunkirk Ice Cream Company, Dunkirk, NY.

While at Dunkirk, I held the position of Assistant to the President where I worked in the role of an administrative liaison with production operations and the Office of the President (1988-1993). My responsibilities included production planning and project management. I directed a taskforce to improve quality and production line inefficiencies; I also coordinated data collection and developed a strategy for labor contract negotiations with the Teamsters local and performed in the role as company spokesperson for the labor negotiations.

Chautauqua County is a rural county in Western New York State and is located on the southern shore of Lake Erie, approximately 45 miles southwest of Buffalo, New York, and 45 miles northeast of Erie, Pennsylvania. The county has a population of approximately 142,000 persons (1990), this is down from a population of 147,305 in 1970, a 3.5% decline in population in two decades. In 1997, over 57,300 persons were employed, on average, this nearly equals the employment levels two decades earlier in 1970. The population centers are Jamestown in the southern portion of the county and the Dunkirk-Fredonia communities in the northern portion of the county. During much of 1996 and throughout 1997, unemployment within the county has a reached a 30-year low with an unemployment rate of 4.8%.

A strength for the county is the diversity of our industrial base, which is divided between numerous food processors in the northern lake shore area, and metal, furniture/timber, and transportation related manufacturing industries in the southern portion of the county. Employment by business sector is as follows: Manufacturing (23%), Service (25%), Wholesale & Retail (23%), Government (18%), Fire (1%), other (10%).

The Lake Erie shoreline area boasts two mainline rail routes providing access to the mid-west and west from Buffalo and further east. At present Conrail and Norfolk-Southern operate these rail routes.

Businesses using rail for product or raw materials delivery in Northern Chautauqua County include: Niagara Mohawk's electrical power generating station at Dunkirk; Ralston Purina's animal food manufacturing and warehousing operation at Dunkirk; Red Wing Company's food processing plant in Dunkirk and Fredonia (500+ rail cars per year); Cliffstar Corporation's juice manufacturing plant in Dunkirk (400+ rail cars per year); and Fieldbrook Farms ice cream plant in Dunkirk (180+ rail cars per year).

As the Director of Economic Development for Chautauqua County, I am responsible for promoting the economic development of the county by providing technical assistance, advocacy and economic incentives to aid the growth and development of our businesses with the goal being job retention and job creation. I am also responsible for tourism, human resource development, marketing, and community development. As the Administrative Director of the Industrial Development Agency my duties include recommendations to the Board regarding the ability granted to the

Agency under New York State statute which gives the IDA authority to abate real property taxes and to finance industrial projects as a means to stimulate economic development.

The purpose of my verified statement in this proceeding is to set forth our concerns regarding the proposed acquisition of Conrail by CSX and Norfolk-Southern railroads. It is our belief that should the acquisition go forward as proposed that competitiveness in the Northern Chautauqua, Erie and Niagara counties will suffer. Northern Chautauqua County has joined with the Erie-Niagara Rail Steering Committee, an advocacy group, formed for the purpose of analyzing the proposed acquisition of Conrail and ensuring that the interest of our businesses are given consideration by urging the Surface Transportation Board to grant appropriate relief.

It is the goal of this group to seek more competitive rail service in the Western New York service area. We strongly support the efforts of the Erie-Niagara Rail Steering Committee and respectfully request the Surface Transportation Board to grant the relief requested by the committee.

I, Donald Burdick, declare under penalty of perjury that the foregoing is true and correct and that I am qualified and authorized to file this verified statement on behalf of the County of Chautauqua Industrial Development Agency. Executed on this 15th day of October, 1997.

Donald H. Burdick

Donald H. Burdick, Administrative Director
County of Chautauqua Industrial Development Agency

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

VERIFIED STATEMENT OF
STANLEY J. KEYSA, ESQ.

I. INTRODUCTION

My name is Stanley J. Keysa and I am the Deputy Commissioner for Planning and Economic Development for the County of Erie, a general purpose regional government located in the western portion of New York State serving 965,000 citizens resident in an area of 1200 square miles. My offices are located at 95 Franklin Street, Room 1062, Buffalo, New York 14202.

I have been employed by the County of Erie ("County") in various capacities since January, 1992. In my current position, I have responsibility for direction of County staff engaged in oversight of planning efforts in 44 municipal governments, administration of federal Community Development Block Grant funds, and promotion of activities to improve economic conditions within the County. My responsibilities extend to liaison between the County and a number of public benefit agencies, including the Erie County Industrial Development Agency ("ECIDA"), the Western New York International Trade Council, and the Greater Buffalo Convention and Visitors Bureau. I also have oversight responsibility for two short line railroads owned by the County which are leased to the ECIDA and operated by the Buffalo Southern Railroad ("BSR") or by the Depew, Lancaster and Western Railroad ("DLWR").

I received my BA degree in History from Canisius College in 1964 and an LLB degree from Cornell University Law School in 1967. I was admitted to the practice of law in New York State in 1967, and have engaged in the private practice of law, either full time or part time, for almost 30 years.

I entered active duty as a U.S. Army officer in February, 1968, receiving logistics training at Ft. Lee, Virginia, and then served with the 7th Transportation Command at Ft. Eustis, Virginia, where *inter alia* I occasionally inspected the Command's operating railroad. In 1969, I served in Vietnam with the 52nd and 39th Signal Battalions, with S-4 responsibility for operation of the battalion supply and maintenance systems, for movement of freight and personnel by helicopter, and for planning truck convoy operations. On my return in 1970, I served in the U.S. Army Reserve, commanding the 409th Personnel Service Company in 1971-72.

From 1971 through June 1975, I also served as Village Justice in Lancaster, New York. In 1975, I was elected as Supervisor (chief elected officer, treasurer, chief fiscal officer and *de facto* executive officer) of the Town of Lancaster, New York (population 30,000), serving in that capacity for sixteen years.

Incidental to that position, I chaired the Lancaster Industrial Development Agency (1976-91), assisting over 100 companies to locate or expand; chaired the Erie County Sewer District #4 Board of Managers (1976-91), building over $40 million in infrastructure; served as President of the New York State Association of Large Towns (1988-89); and as first President (1990-91) of NOREC, a consortium of 29 municipalities which successfully reduced solid waste disposal costs by designing and licensing construction of a materials recovery facility.

I have also served in each office of the Association of Erie County Governments, as a member and officer of the Erie and Niagara Counties Regional Planning Board, as a member of the resolutions committee of the New York State Association of Towns, as a member of the New York Governor's Task Force on Mandates, as a member of several business loan committees, as Vice President for Finance of the Buffalo and Erie County Regional Development Corporation, and as President of the Erie County Human Resource Corporation. These various positions have afforded me an excellent opportunity to study and become familiar with the regional economy of western New York State.

I presently chair the terminal switching area subcommittee of the Erie & Niagara Rail Steering Committee, an *ad hoc* group formed following public hearings by the ECIDA from shippers, business groups and government units located in Erie County, in Niagara County, and in the northern portion of Chautauqua Count (herein collectively referred to as the Niagara Frontier) to coordinate the activities of various shippers and public bodies in response to the proposed sale and division of assets of Conrail between CSX and Norfolk Southern. Revenue from origins and destinations of rail freight within this market area approached **one half billion dollars** in 1995, with about **three-fifths** being controlled by Conrail.

The purpose of this verified statement is to bring to the attention of the Surface Transportation Board those aspects of the proposed sale and division of Conrail which adversely impact the competitive position of shippers located within the Niagara Frontier, and the general economy of Erie County.

II. DESCRIPTION OF THE REGION'S CHARACTERISTICS.

The County of Erie is located in western New York State at the eastern end of Lake Erie, at the head of the Niagara River. Erie County has a population estimated at 965,000, which is a decline of more than 13% from 1,113,491 counted in the 1970 census. Of the 44 local general purpose governments within the County, the largest is the City of Buffalo, which is also the second-largest city in New York State. Other municipalities with heavy rail development include the City of Lackawanna, the Town of Cheektowaga, and the Town of Tonawanda. Of the 44 local municipalities, 42 had rail service at some point in their history. One lost access in 1917, but five have lost access to rail since 1976.

Niagara County is located to the north of Erie County, and is bordered on its west by the Niagara River and on its north by Lake Ontario. It has a current population of about 220,000, down 6.3% from its 1970 census count of 235,720. It has 20 general purpose local governments, of which the largest are the City of Niagara Falls, the City of Lockport and the City of North Tonawanda. All of these localities are served by Conrail, as are several smaller communities.

Northern Chautauqua County is herein meant to include the City of Dunkirk (population 13,989) and its neighbors along the southern shore of Lake Erie. Both Conrail and Norfolk Southern have rail lines that pass through Dunkirk. Dunkirk has seen a decline in manufacturing and loss of 17% of its population between the 1970 and 1990 censuses.

All three counties are characterized by older urban areas built around railroads, warehouses and heavy industry, with newer suburbs and rural areas in active agricultural use. Statistics for the Buffalo SMSA are limited to areas in Erie and Niagara counties, and do not include Dunkirk or other areas of Chautauqua County.

Early in the twentieth century, Buffalo was one of the great steel producing centers of the world, the grainmilling capital of North America, the second largest rail center in the nation and a major manufacturing center. Niagara Falls was and still is a major tourist draw, and a center for production of chemicals. Each has lost one third of the manufacturing jobs since 1976, attributable in part to the loss of competition in rail service and rise in transportation costs resulting from the creation of Conrail. (See Exhibit #1 on regional employment, 1976-94.) Dunkirk was famous for its Brooks Locomotive Company (later ALCO) and other smaller but heavy manufacturers.

In the twenty-one years since a number of independent railroads were merged by federal decree into Conrail, this region has seen the loss of all of its basic steel-making capacity, the loss of over 90% of its grainmilling capacity, an increase in its coal-fired electric rates from among the lowest in the country to among the highest, abandonment of many poorly-served but rail-oriented factories, and disinvestment in industries which benefit most from competitive rail access.

Despite the drastic loss of manufacturing jobs, the Buffalo-Niagara Falls SMSA remains dependent on the remaining manufacturing jobs to a greater extent than any other New York State areas except Rochester and Syracuse. (See Exhibit #2.) These graphs are somewhat deceptive in that they mask the transfer of what were traditionally counted as manufacturing jobs in a large, vertically and hortizonally integrated factory to the service sector when the same tasks were "out-sourced."

While other economic sectors have grown, it remains a primary goal of the political leadership of Erie County and the region to stabilize, protect, and promote growth in the manufacturing sector. This will require that "background" costs of doing business here, including transportation, must be returned to the competitive levels which predated the creation of the Conrail near-monopoly.

III. HISTORICAL DESCRIPTION OF THE TRANSPORTATION CHARACTERICTICS OF THE ERIE & NIAGARA RAIL REGION

It is appropriate to our discussion of how the acquisition of Conrail by CSX and NS impacts the Erie & Niagara Rail region that we briefly review how Buffalo came to be, and why it became what it is today.

Buffalo is not an old city by European standards, nor even by American standards. If we ignore the millennia of periodic occupation by native Americans - the "Indians" - the first European presence here was that in 1678 of a Frenchman, de la Salle, who built a sailing vessel on the upper Niagara River with which to explore the waterways of the interior of North America. He was forced to construct a new ship, because the great difference in elevation of Lake Erie over Lake Ontario (emphasized by the spectacle of Niagara Falls, a few miles north) made it impossible for his crew to sail directly from that lower lake.

For nearly two centuries, the principal route of trade would be waterborne. Sailing ships carried European manufactured goods across the Atlantic Ocean to Quebec or Montreal, whence French voyageurs in bate u continued the journey up the Saint Lawrence River and along the Ontario shore to Lewiston or Queenston on the lower Niagara. There, freight and passengers would be portaged over the great escarpment to the upper Niagara. The furs for which these goods were traded would be carried down the precipitous slope on the return trip. Near where the International Railroad Bridge now stands, a black rock jutting from the east bank of the river formed a natural harbor which fostered the growth of a small village whose residents engaged in what we would today call "intermodal" services.

The direction of travel by water changed with the opening in 1825 of the Erie Canal. This visionary public work focused trade of the developing American Midwest on the seaport at New York City. Buffalo benefitted as the place where immigrants and manufactured goods of the eastern seaboard and Europe were transferred from canal boats to the sail and steam boats on Lake Erie, or ferried across the Niagara River to the farmlands of southern Ontario. A horse-drawn railroad was constructed along the Niagara River in 1833 between Buffalo and the ferry landing at Black Rock, with a steam locomotive added in August, 1836. On the canal boats' return journey, grain, lumber and other products of the west were transloaded here for shipment east.

The wharfs which so bustled with activity during the summer months fell silent during the winter, when Lake Erie froze over and the canal was drained for repairs. By 1842, completion of the first railroad from Buffalo to Rochester permitted all-weather connections to the east. Ships remained cheaper for moving bulk commodities like grain. Thus, Buffalo became the natural place to store wheat, oats, and corn after the fall harvest, to be shipped east as needed to places like Boston, New York, Philadelphia and Baltimore. The world's first steam-powered elevator was built here in 1847.

Being bright entrepreneurs, the owners of these grain elevators realized that they could make even more money by milling grain here, shipping only the more valuable (and less bulky) flour. Great wealth was accumulated in those days. The wealth was reinvested in all manner of capitalist enterprises including ship building, express companies, more railroads, iron foundries, lumber milling and coal mines in Pennsylvania. It was logical that the first long distance transmission of electrical power (in November 1896) was from hydroturbine-driven dynamos at Niagara Falls to power a street trolley system in Buffalo. Both ends of the line were owned by men made wealthy by the grain trade. The Larkin Soap Company pioneered techniques of direct marketing and coupons, relying on the network of competing railroads at its doorstep to deliver its products and premiums such as furniture to customers around the nation.

The Niagara Frontier was truly well-served by rail a century ago, with more than twenty intercity rail lines radiating like interconnected spokes of a wheel. (see exhibit "3"). Abstracting from the writings of Rev. Edward T. Dunn, S.J. in *A History of Railroads in Western New York* (Buffalo, New York: The Heritage Press, 1996), these railroads were, in order of construction:

Buffalo & Black Rock (started 1833 as a horse-drawn railroad, converted to steam power in 1836 and extended to Niagara Falls; later part of the New York Central, now part of Conrail; proposed to go to CSX)

Attica & Buffalo (incorporated 1836, completed 1842 as part of the first east-west link to Albany; sold in 1852 to the Buffalo & New York City, later part of the Erie, now part of Conrail, with trackage rights held by CP; proposed to go to NS)

Buffalo & Rochester (completed 1853; later the New York Central mainline, now part of Conrail; proposed to go to CSX)

Lockport & Niagara Falls (incorporated 1834; later part of the New York Central, now largely abandoned; small remaining portion to go to CSX)

Rochester, Lockport & Niagara Falls (completed 1852, later part of the New York Central, now Conrail and Falls Road RR; portion to go to CSX)

Niagara Falls & Lake Ontario (completed 1854, later New York Central, largely abandoned, but with a small portion held by Conrail to go to CSX)

New York & Lake Erie (chartered 1832, completed between Hornell and Dunkirk in 1851; later part of the Erie; portion between Dunkirk and Salamanca not incorporated into Conrail; portion from Salamanca to Hornell to go to NS)

Buffalo & State Line (chartered 1849, completed 1851; later the Buffalo & Erie, then the Lake Shore & Michigan Southern, part of the New York Central mainline, now Conrail; proposed to go to CSX)

Suspension Bridge & Erie Junction (1871; part of Erie, largely abandoned; remaining portion held by Conrail to go to CSX)

Great Western (Canadian railroad incorporated 1845; connected Niagara Falls and Windsor Ontario in 1854; linked in 1855 to US side by Roebling's pioneering Suspension Bridge; later part of Michigan Central; now owned by the Canadian Pacific)

Canandaigua & Niagara Falls (completed 1853; later part of the New York Central, largely abandoned in 1976; Conrail remnants to go to CSX)

Buffalo Brantford & Goderich (Canadian railroad incorporated 1851; became Buffalo & Lake Huron, later part of Grand Truck; transferred traffic between Fort Erie and Buffalo by ferry, and by the International Bridge after 1873; line along north shore of Lake Erie to Fort Erie gone; balance owned by Canadian National)

Buffalo & Lockport (1853?; later part of New York Central, now part of Conrail, but largely out-of-service; property to go to CSX)

Buffalo Creek (organized 1869; Lehigh Valley became major stockholder in 1869; provided terminal railroad services to Buffalo area; bought by Conrail in 1978; remaining assets apparently to be divided between CSX and NS)

Erie International (1873; created as beltline to connect with the Grand Trunk Railway (now Canadian National) at International Bridge; Conrail abandoned most; remaining portions to go to CSX)

Junction Railroad (1872; New York Central beltline around Buffalo to connect with Grand Trunk (now CN) at International Bridge; now Conrail, to go to CSX)

Lockport & Buffalo (created in 1879 to provide competition to NYC monopoly at Lockport - dropped freight rates to Buffalo by 78%; later part of Erie, now part of Conrail, but largely out -of-service; to go to CSX)

Buffalo & Jamestown (organized 1872, completed 1874; later Buffalo & Southwestern Division of the Erie; owned partially by County of Erie and partially by Cattaraugus County IDA; BSR operates as shortline from Buffalo to Gowanda; NYLE operates as shortline from Gowanda south)

Canada Southern (1873; later part of the Michigan Central; with access by International Bridge at Buffalo; owned by CN)

Erie and Niagara (1873; Canadian line along the west shore of Niagara River with access by Michigan Central bridge at Niagara Falls; largely gone; owned by CN)

Canada Air Line (1873; Great Western to International Bridge; gone)

Buffalo New York & Philadelphia (completed to Olean in 1872, and to Emporium in 1873; became part of the Western New York & Pennsylvania, later part of the Pennsylvania, now Conrail; to go to Norfolk Southern)

Rome Watertown & Ogdensburg (completed to Niagara Falls in 1880; later part of New York Central; mostly abandoned, part was incorporated into the Somerset Railroad; usable stubs are owned by Conrail; to go to CSX)

Wabash (no tracks in Buffalo - by 1881 had running rights over the Great Western from Detroit to Buffalo)

Buffalo Corry & Pittsburgh (completed 1882; later the Buffalo Pittsburgh and Western, still later the Western New York & Pennsylvania, since dismantled)

New York, Chicago & St. Louis (aka "Nickel Plate"; organized 1881; completed 1882; owned by Norfolk & Western, operated by NS)

New York, Lackawanna & Western (incorporated 1880 as a subsidiary of the Delaware, Lackawanna & Western; extended into Buffalo in 1892 and built beltline around Buffalo to International Bridge in 1892; folded into the Erie Lackawnna in 1960's; largely dismantled in 1970's; Norfolk Southern has rebuilt the old DL&W yards in Sloan; County of Erie owns industrial stub operated by Depew, Lancaster & Western; connecting track owned by Conrail; to go to Norfolk Southern; beltline owned by Conrail has been dismantled)

Buffalo Rochester & Pittsburgh (organized 1881; completed to Buffalo 1883; later part of the B&O; then by CSX; now operated as CSX connection to Buffalo through Buffalo & Pittsburgh RR, a regional carrier; viability after Conrail sale in doubt)

Lehigh Valley (active in Buffalo as early as 1869, but ran its own line from Buffalo to Lancaster in 1884, extending eastward to Geneva in 1892; largely dismantled in 1977; property owned by Conrail; unknown who will receive)

New York West Shore & Buffalo (completed to Buffalo 1884; later part of New York Central; largely dismantled by Conrail; stubs to go to CSX)

Niagara Junction (established 1892 as a subsidiary of the Niagara Falls Power Co., electrified in 1913; Conrail portions to go to CSX)

Toronto Hamilton & Buffalo (1896; Canadian link to Toronto; owned by Canadian National)

Depew & Tonawanda (opened 1896; Lehigh Valley connection to Niagara Falls; now abandoned)

Buffalo Terminal Railway (1896; built to bypass congestion at CP Draw; Gardenville Yards and connection to former NYCRR mainline at Depew dismantled by Conrail; balance to go to NS)

South Buffalo (Incorporated 1899, completed 1902; an industrial terminal line serving Bethlehem Steel properties and Ford Stamping Plant; now owned by **Beth Intermodal**)

Buffalo & Susquehanna (completed to Buffalo in 1906; dismantled 1917)

Lehigh & Lake Erie (built 1907 to service ore docks at Tifft Farm; largely dismantled; remnants to go to CSX)

By 1901, Buffalo was one of the ten great cities of this young country, booming with more than 300,000 citizens, who celebrated by hosting the Pan-American Exposition. A year later, the world's largest steel mill would be built just south of the city's boundaries. Over the next two decades, eight automobile manufacturers would locate here, as would the Curtiss-Wright Aircraft and Motor Corporation, which built the world's largest aircraft factory between the beltlines on Elmwood Avenue in 1917. That same year, the Buffalo General Electric Company erected the world's largest coal-fired steam generating plant on the Niagara River.

By 1926, railroads themselves directly employed 21,832, or someone in 10.4% of all families on the Niagara Frontier, and probably indirectly provided employment enhancing services to five or six times that many homes.

All that has changed. As plants became bigger, or were consolidated with those of other cities, or as the heirs of capitalists chose to pursue their own interests, ownership passed from this city. Buffalo became a "branch office" city, its fortunes controlled by owners whose allegiance was elsewhere, managed by Wall Street managers whose primary focus was the "bottom line." When it came time to downsize, the aging factories of Buffalo topped the list of those to be closed. The railroads themselves were radically downsized. Today, about 2300 workers residing on the Niagara Frontier are employed by Class I carriers.

The opening of the St. Lawrence Seaway in the mid-1950's reduced Buffalo's role as transshipment point. Ocean-going freighters could now take on grain, ore or freight at Duluth, Detroit or Chicago and never even stop at Buffalo. The "Queen City of the Great Lakes" had lost her crown.

The closing of the Bethlehem and Republic steel mills in the mid-1970's sent further chills through a weakened local economy. In some families, three generations had worked in the same plant pouring molten iron, or shaping the steel to build the structures of our modern civilization. It was inconceivable that these plants would close, but they did.

Despite this downturn in manufacturing, there are bright spots. Workers on the Niagara Frontier make one-sixth of all automotive engines sold in North America. They shape sheet metal for Ford, and axles for GM, Ford and Mercedes. Niagara Falls plants are a major source of chemicals. This remains an industry center for heat exchange devices, for pet food, and for processed breakfast cereals. A closed Bethlehem bar, rod and wire mill has reopened. A dozen plants convert giant rolls of paper into corrugated boxes. All of these still need and use rail.

The departed heavy industry has left us with the highway, utility, educational and professional infrastructure with which to support new enterprises. We have a well-trained, motivated and productive workforce. . Telecommunications companies such as NYNEX (now Bell Atlantic) have provided the area with the fifth densest network of fiber optics in the world.

One area where there has not been similar reinvestment has been that of Conrail's railroad infrastructure. Conrail did spend money in Buffalo, but mostly to remove rail, for ease of its long distance operations. Not only did this not add particular benefit to area shippers, but Mike Brimmer, a former Conrail official now CSX Assistant Vice President for Planning, stated at a meeting in Congressman Quinn's Buffalo office on June 12, 1997 that Conrail's high interline switching charge in this area (averaging $459) was the result of factoring in the capital cost of *removing* rail in the Buffalo switching area. It is my understanding from others that Conrail's original interline charge in Buffalo was $25. As inflation since 1976 is approximately 340%, that would equate to a charge of about $85.00 today. Thus, Conrail's present charge is about **5.4 times the ate of inflation**.

On January 24, 1997 I forwarded to L ster M. Passa, Conrail Vice President for Logistics and Corporate Strategy, comments on behalf of the County of Erie regarding the impact of the then-proposed acquisition of Conrail by CSX. A copy of that letter (attached as Exhibit #4) was later shared with James L. Granum, Norfolk Southern Vice President for Public Affairs.

The subsequent bidding by Norfolk Southern which resulted in the joint CSX / Norfolk Southern filing which is the subject of this proceeding has changed some of the concerns, but not all. Shippers on the Niagara Frontier will generally not have access to more than a single carrier. By way of example, at Dunkirk the Niagara Mohawk generating station will only have connection to CSX, as will the Ralston Purina pet food plant, and other shippers. At Buffa o, CSX will be the only carrier available to General Mills, ADM and other grain mills, to Dunlop Tire, to Niagara Mohawk's Huntley Generating Station, to Dupont, to General Motors Powertrain Division, to American Axle & Manufacturing, and to Tonawanda Coke. At Niagara Falls, CSX will exclusively serve Occidental Chemical, Carborumdum, Dupont, Nabisco, and numerous other shippers.

At Lockport, the Somerset Railroad and the Falls Railroad will only have access to CSX, as will the Harrison-Delphi Division of General Motors. At Depew, DLWR will on'y have access to NS, as will Ebeneezer Rail Services in West Seneca, and Georgia Pacific in Hamburg. Ironically, interplant shipments between the General Mills grain mill on the waterfront and its inland warehouse in West Seneca will change from a single-line haul to an interline transfer.

I have the distinct impression that the two railroads look at what shippers they have "bought" to help them pay a premium or excessive price for Conrail which is widely reported to be at least $4 billion more that could be justified on the basis of value of assets and business. There remains a concern that the railroads will exercise hegemony over these "bought" shippers and subject them to excessive charges so as to pay the premium.

On various occasions, representatives of Norfolk Southern have deferred to CSX on the question of opening the Niagara Frontier to shared access, as is proposed in Detroit, in northern New Jersey, in Philadelphia and southern New Jersey, and in the Monogahela Valley. They stated that CSX would receive the bulk of shippers in the Buffalo area under the agreement, so that CSX was the key to restoring the competitive access lost with the creation of Conrail. Likewise, while they saw the potential benefit of restoring a terminal railroad (as the Buffalo Creek Railroad had been until purchased by Conrail in 1978), they directed us to officials at CSX.

Such efforts have been futile. After several letters from Erie County Executive Dennis Gorski and from Buffalo Mayor Anthony Masiello were ignored, CSX finally sent several representatives to a meeting hosted by Congressman Jack Quinn, at which they were briefed on our local concerns. The only issue which appears to have been addressed by CSX in the subsequent filing with the STB was provision for Norfolk Southern to have overhead trackage rights to connect with the Canadian Pacific at Niagara Falls. Such overhead rights do not create competition, as they prohibit direct access to shippers along the approved route.

In a recent meeting in Buffalo on October 2, 1997, John Q. Anderson, Vice President of CSX, tried to quell concerns of shippers by stating that they would not experience rates higher than they were already paying, nor have service poorer than they were already receiving for "about a year" until CSX "had a better feel for how this road operates." When asked, he declined to agree that the switching rates were too high, nor would he agree to reducing the rates, or to providing the Niagara Frontier with shared access.

The "stonewalling" by CSX and the subservient role adopted by Norfolk Southern relative to changing the plan as it impacts on the Niagara Frontier makes it imperative that the STB impose changes.

Finally, I want to note concern that the increased freight traffic on the rail lines in and out of Buffalo will interfer with Amtrak passenger trains running on the same lines. Over the past decade, Amtrak ridership has seen a strong resurgence. (See Exhibit #5) and it is the desire of the County of Erie that such use of rail be encouraged as an environmentally-friendly alternative to the continued increase in use of highways.

The Niagara Frontier is a major economic region which needs dual Class I rail service in order to comprete with other major markets in the Northeast and throughout North America. I strongly urge the Surface Transportation Board to grant the relief requested by the Erie & Niagara Rail Steering Committee.

I, **Stanley J. Keysa**, declare under penalty of perjury that the foregoing is true and correct and that I am qualified and authorized to file this verified statement on behalf of the County of Erie. Executed on this 14th day of October, 1997.

Stanley J. Keysa

(Exhibit #1, page 1)

Population by County

	1970	1980	1990	% decline of pop.
Erie	1,113,491	1,015,472	968,532	13%
Niagara	235,720	227,354	220,756	6.30%
Chautauqua	147,305	146,925	141,895	3.80%

Source: US Census

Population projections

	2010	2020
Erie	992,900	1,039,000
Niagara	232,900	239,000

Source: Niagara Frontier Transportation Comm. Study (Aug. '94)

Unemployment Rate by County, 1996-1976

	Erie	Niagara	Chautaqua
1976	10.8	10.8	9.8
1978	8	7.4	6.4
1980	9.5	10.7	7.9
1982	12.2	15.2	10.8
1984	8.7	10.1	7.8
1986	7.3	8.8	8
1988	5	6.4	5.1
1990	4.9	5.3	5.5
1992	7.1	8.2	8.3
1994	6.5	6.9	6.6
1996	5.2	6	5.9

Source: Bureau of Labor Statistics

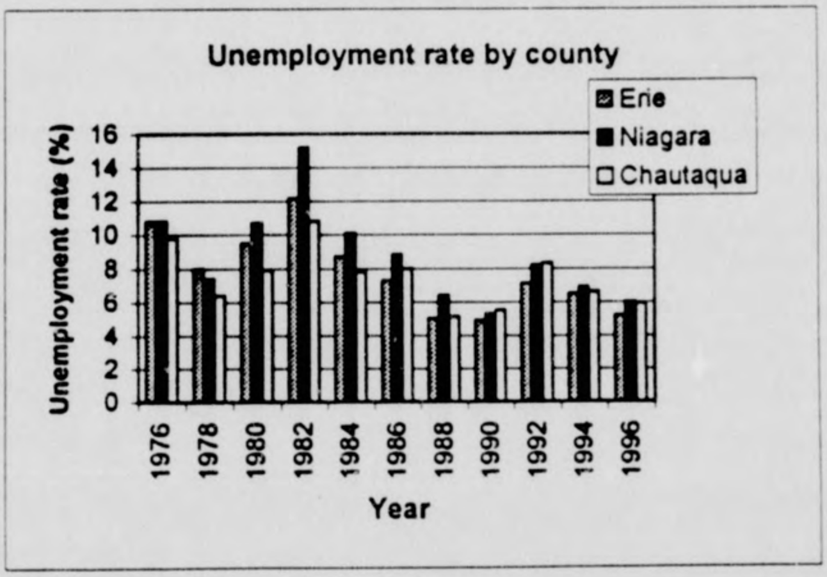

Exhibit #1, page 2

Employment in Erie County 1976-1994	Manufac	Service	Trans./Ut.	Construc.
1976	103,884	71,384	19,510	13,317
1978	107,171	78,614	21,935	14,863
1980	107,593	85,411	20,698	13,950
1982	90,111	86,000	19,117	12,140
1984	78,064	94,975	19,155	12,213
1986	79,167	106,287	18,312	13,001
1988	79,999	110,851	20,112	13,965
1990	77,565	139,110	21,591	16,689
1992	69,961	139,726	21,376	16,016
1994	69,589	145,199	21,625	13,894
% Decline/Growth 1976-1994	-33.10%	103.40%	10.80%	4.30%

County Business Patterns

Employment in Niagara County 1976-1994	Manufac	Service	Trans/Ut.	Construc.
1976	28,820	10,821	1,737	2,352
1978	33,549	12,712	2,250	2,591
1980	31,938	14,698	2,416	2,589
1982	26,893	14,435	2,362	1,986
1984	24,137	14,435	2,373	1,782
1986	23,741	16,212	2,659	2,347
1988	22,504	17,734	2,810	2,755
1990	22,031	19,465	3,416	3,295
1992	19,500	19,617	3,694	2,913
1994	19,319	19,093	3,463	2,338
% Decline/Growth 1976-1994	-33.90%	76.40%	99.30%	-0.50%

Source: County Business Patterns

Employment in Chautauqua Co. 1976-1994	Manufac	Service	Trans./Ut.	Construc.
1976	17,272	6,514	1,736	946
1978	17,277	7,401	1,817	1,138
1980	18,349	7,910	1,851	1,095
1982	15,969	8,848	1,780	895
1984	15,168	9,434	1,866	963
1986	14,680	10,488	1,905	1,124
1988	15,020	11,480	2,103	1,250
1990	16,491	12,501	2,358	1,478
1992	14,432	12,740	2,416	1,141
1994	14,775	14,201	2,327	1,167
% Decline/Growth 1976-1994	-14.45%	118%	34%	23.30%

Source: County Business Patterns

Exhibit 2, page 1

COUNTY OF ERIE
DEPARTMENT OF ENVIRONMENT AND PLANNING
OFFICE OF ECONOMIC DEVELOPMENT

* * * MEMORANDUM * * *

FROM: STANLEY J. KEYSA, ESQ. DATE: July 20th, 1995
Economic Development Coordinator

TO: RICHARD M. TOBE
Commissioner, Enivornment & Planning

RE: Employment differences in selected NYS labor areas

Review of the April 1995 data from the New York State Labor Department as to employment changes in various labor areas within the state suggested that there are regional differences which are often overlooked. Gary Simon has taken abstracted data and presented it in color graphics which emphasize the differences.

* * * *

The first presentation (vertical bar graphs) provides a side-by-side comparison of the specific segments of the labor force for the six areas (Albany-Schenectady-Troy; Buffalo-Niagara Falls; Nassau-Suffolk; New York City; Rochester; and Syracuse). Comparisons are by the respective percentages of the labor force, and do not portray total jobs.

The second presentation (which looks like a series of battle ribbons) visually allocates the segments within each labor force area

Finally, we have enclosed the spreadsheet of abstractions from which the graphics were produced.

I will not attempt to detail all of the differences, but it is interesting to note that employment in durable goods varies markedly. Rochester employs nearly twice the percentage in that segment as does Buffalo or Syracuse, and New York City is particularly weak. By contrast, New York has nearly twice the percentage employed in the finance, insurance and real estate segment, while the five others are roughly equal.

Could the low numbers of New York City voters employed in durable goods production underlie the political adversity to the promotional activities of industrial development agencies? And could the high percentage in Rochester reflect the more traditional method of classifying service-type employees (accounting, personnel specialists, lawyers, trainers, nurses, etc.) as manufacturing if they are employed by a large, integrated manufacturing concern?

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On the governmental side, state employees dominate Albany (as might be expected), which employs fewer workers on the local level. The five other labor areas employ nearly identical percentages at all three levels of government. The percentages are so close as to suggest that employment in the local governments are well matched to the burdens imposed by the forms of government prevalent in New York State (local critics not withstanding) and that meaningful reductions can only come by way of redefinition of the role of local government by state government.

For the nation's great marketplace, New York City is surprisingly weak in retail sales employment. It is stronger in the services segment. Could it be it has fewer "do-it-yourself" buffs, in part because of the lack of basements and garages in which to store tools? All other areas are roughly equal in these segments. Nassau-Suffolk is modestly (and unexpectedly) stronger in wholesale trade. New York leads in transportation and utility employment, as might be expected given the dependence on mass transit.

I am sure there are other conclusions to be drawn from the graphs. Your observations are welcomed!

cc: George Smyntek, NYS Dept of Labor
Dr. Henry Taylor, Jr.
Dr. Ron Coan
Deputy Commissioner Sharon West
Ken Swanekamp

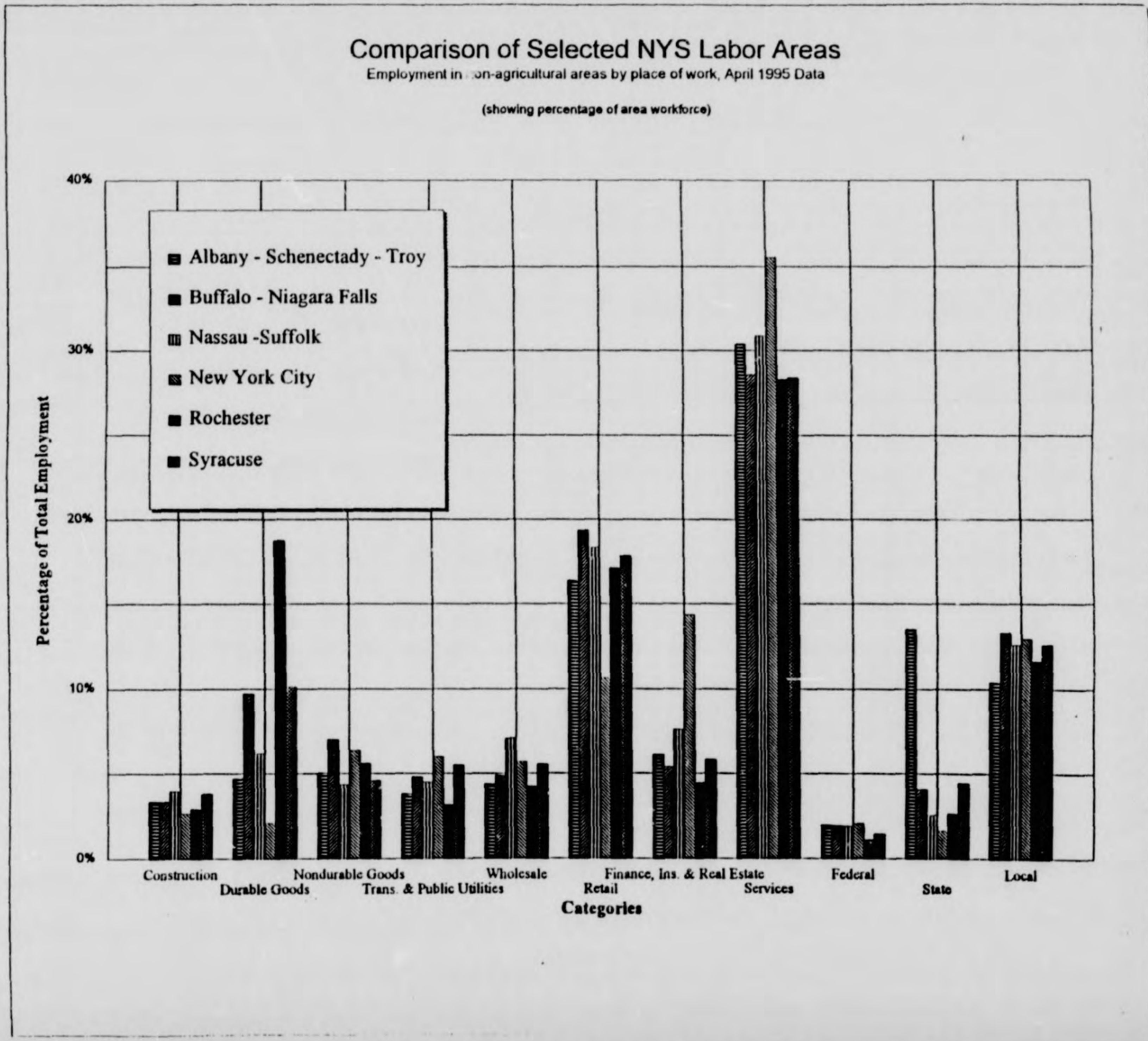
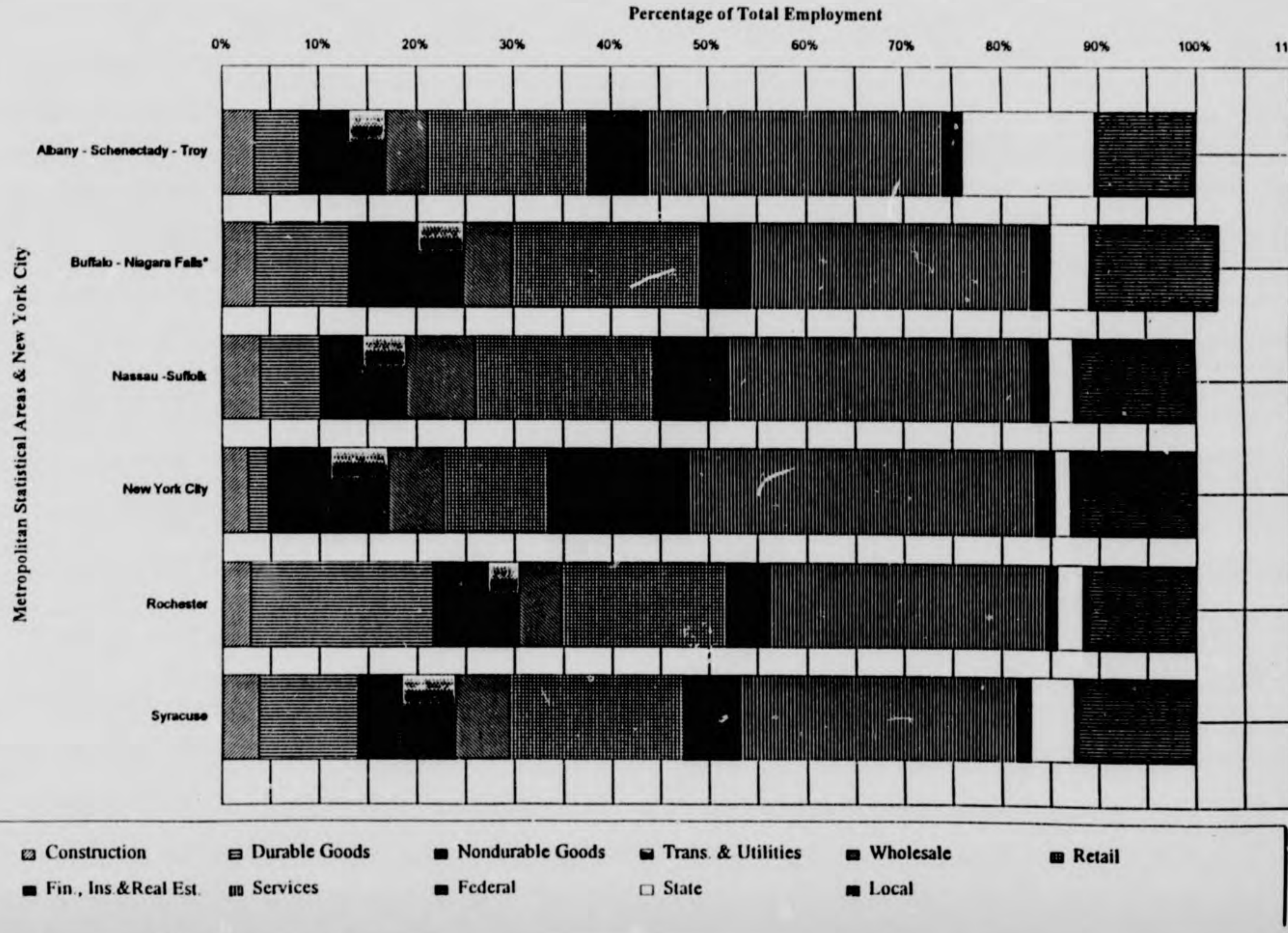


Exhibit 2 page 3

Comparison of Selected NYS Labor Areas

Employment in non-agricultural areas by place of work, April 1995 Data

(showing percentage of area workforce)
*Percentage totals slightly above 100% due to rounding.



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