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NOTICE OF INTENT TO PARTICIPATE IN PROCEEDING DUE

S.T.B. 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

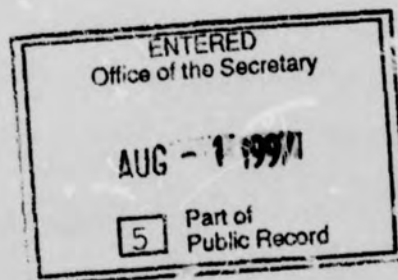
This is Notice of Intent to Participate in proceeding due
for Surface Transportation Board Finance Docket Number 33388
for myself individually and for and on behalf of the
interests of the individuals and membership of Brotherhood
of Locomotive Engineers Division 227, Chartered and located
at Gouverneur, New York and Pulaski, New York with offices
located at 48398 Old Goose Bay Road, P.O. Box 908, Redwood,
New York 13679 and Meeting Place at Potsdam, New York and
Watertown, New York and be recognized as a **"PARTY OF RECORD"**
in any and all proceedings.

Dated: July 28, 1997

At: PO Box, 48398 Old Goose Bay Road
Redwood, New York 13679

Yours, etc., etc., etc.

Angelo J. Chick, Jr.
Angelo J. Chick, Jr.
Local Chairman
Brotherhood of Locomotive
Engineers Division 227



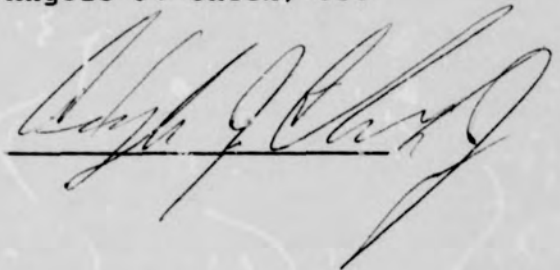
AFFIDAVIT OF SERVICE BY MAIL

State of New York, County of Jefferson, United States of
America

I Angelo J. Chick, Jr., being sworn says: I am over the age of 21; I reside in the County of Jefferson, State of New York, United States of America. On this 26th day of August 1997 I served the attached **NOTICE OF INTENT TO PARTICIPATE IN PROCEEDING DUE**, Dennis G. Lyons, Esq., Arnold & Porter, 555 12th Street, N.W., Washington, D.C. 20004-1202; Richard A. Allen, Esq., Zuckert Scoutt & Rasenberger, L.L.P., 600, 888 Seventeenth Street, N.W., Washington, DC 20006-3939; and Paul A. Cunningham, Esq., Harkins Cunningham, Suite 600, 1300 Nineteenth Street, N.W., Washington, DC 20036, by depositing a true copy of same enclosed in a post paid wrapper in an official depository under the exclusive care and custody of the U.S. Postal Service within the State of New York, United States of America.

Angelo J. Chick, Jr.

Subscribed and Sworn
to before me this 28th
day of July, 1997



Concetta Lincoln
NOTARY PUBLIC

CONCETTA LINCOLN
NOTARY PUBLIC STATE OF NEW YORK
REGISTRATION NO. 01LI4629796
QUALIFIED IN JEFFERSON COUNTY
COMMISSION EXPIRES 04/30/98

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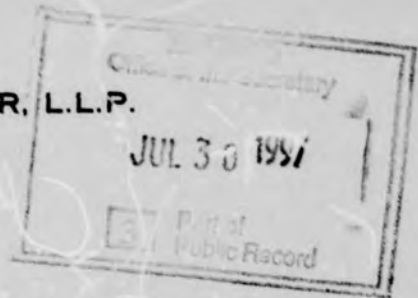
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LAW OFFICES

ZUCKERT, SCOUTT & RASENBERGER, L.L.P.

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WASHINGTON, D.C. 20006-3939
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RICHARD A. ALLEN

July 29, 1997

Via Hand Delivery

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

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180835

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

Dear Secretary Williams:

Enclosed for filing is an original and twenty five copies of
NS-10, Reply of Norfolk Southern Corporation and Norfolk Southern
Railway Company in Opposition to Potomac Electric Power Company's
Petition to Modify Protective Order in Finance Docket No. 33388.
Also enclosed is a 3 1/2" computer disk containing the filing in
Wordperfect 5.1 format, which is capable of being read by
Wordperfect for Windows 7.0.

Should you have any questions regarding this, please call.

Sincerely,

Richard A. Allen
Richard A. Allen

Enclosure



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

**REPLY OF NORFOLK SOUTHERN
CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY
IN OPPOSITION TO POTOMAC ELECTRIC POWER COMPANY'S
PETITION TO MODIFY PROTECTIVE ORDER IN FINANCE DOCKET NO. 33388**

Norfolk Southern Corporation and Norfolk Southern Railway Company
(hereinafter referred to collectively as "NS") hereby submit their response in opposition to the
Petition of Potomac Electric Power Company ("PEPCO"), filed on July 24, 1997, requesting
the Board to modify the Protective Order entered in this consolidation case in Decision No. 1,
served on April 16, 1997, as amended in Decision No. 4, served on May 2, 1997.^{1/}
PEPCO's Petition seeks to undermine the integrity of the discovery process in the
consolidation case through the use of Confidential and Highly Confidential information,
produced to PEPCO's counsel under the terms of the Conrail consolidation proceeding

^{1/} Although PEPCO filed its request in both the Conrail consolidation proceeding
(Finance Docket No. 33388) and in the PEPCO rate proceeding (Docket No. 41989, Potomac
Electric Power Company v. CSX Transportation, Inc.), NS is filing this response only in the
Conrail consolidation proceeding. NS is not a party to the PEPCO rate proceeding.

Protective Order, for wholly unrelated purposes. NS urges the Board in the strongest possible terms to reject PEPCO's efforts to capitalize on its access to such information in connection with its participation in the Conrail consolidation proceedings by using it to the utility's advantage in unrelated rate litigation, litigation to which NS is not even a party.

ARGUMENT

NS is not a party to Docket No. 41989, Potomac Electric Power Company v. CSX Transportation, Inc., and it therefore leaves to CSX any specific rebuttal of PEPCO's claims about the import and significance to the PEPCO rate case of the data and information which PEPCO's Petition seeks. Instead, NS desires to make just three basic points about PEPCO's Petition.

First, Applicants have produced a wealth of extremely sensitive commercial information under the strictures of the Protective Order entered in the Conrail consolidation case. They have done so with the expectation that the Protective Order would be honored and that the Board would not sanction the use of their confidential information for purposes unrelated to the Conrail consolidation case.

Second, allowing a party to use confidential information obtained through discovery in one proceeding in another unrelated proceeding would seriously undermine the ability of the Board and its administrative law judges to control Board proceedings and to control the discovery process. Discovery in Board proceedings, as in court proceedings, is necessarily subject to rules and schedules establishing the times within which discovery demands must be served and responded to and otherwise establishing what may be discovered and how. Proceedings would not be manageable otherwise. Allowing what PEPCO desires

would largely nullify such rules and procedures and make it difficult, if not impossible, for the Board and its administrative law judges to control discovery. In PEPCO's case, for example, NS understands that the time for both parties to seek discovery is over, and PEPCO is thus effectively seeking additional discovery in that case beyond the time prescribed. Furthermore, suppose CSX had an objection to a particular discovery request as it related to one proceeding but not the other one. Could it refuse to comply with the request altogether? Which administrative law judge would rule on the objection? These and other difficulties should make it clear, NS submits, that PEPCO's approach would seriously compromise the manageability of Board proceedings.

Third, by filing its Petition not only in the railroad consolidation docket but also in the docket for its rate case, PEPCO has already violated the terms of the Protective Order. The Board should not countenance PEPCO's litigation tactics by now granting the improperly filed Petition.

The Protective Order in Docket No. 33388 states unambiguously: "Designated Material may not be used for any purposes other than these Proceedings [i.e., the Control Proceedings], including without limitation any business, commercial, strategic, or competitive purpose." (Protective Order, ¶10.) The Order also states that "All parties must comply with all of the provisions of this Protective Order unless the Board or an administrative law judge . . . determines that good cause has been shown warranting suspension of any of the provisions herein." (Protective Order, ¶17.) Taken together, these provisions clearly specify that no Confidential or Highly Confidential information produced in the Control Proceedings can be used for any other purpose without the prior approval of the Board. Nonetheless, in the face of that requirement, PEPCO wilfully elected to file its Petition, including separate versions of

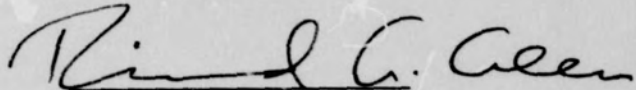
its "Highly Confidential Appendix", in both the railroad consolidation proceedings and in an unrelated proceeding.

Accordingly, Pepco has managed to put before the Board simultaneously Highly Confidential information from both the Conrail consolidation proceeding and from the PEPCO rate case. In other words, through the artifice of sealed filings in both dockets, PEPCO has managed to do already that for which its Petition seeks authorization -- namely to use Highly Confidential information of NS, CSX and Conrail produced under terms of the Protective Order in Docket No. 33388 for purposes of PEPCO's rate case against CSX in Docket No. 41989.

CONCLUSION

The Board should deny PEPCO's Petition.

Respectfully submitted.



Richard A. Allen

John V. Edwards

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(202) 371-7400

Counsel for Norfolk Southern
Corporation and Norfolk Southern
Railway Company

DATED: July 29, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 1997, I have caused to be served the foregoing NS-10, Reply of Norfolk Southern Corporation and Norfolk Southern Railway Company in Opposition to Potomac Electric Power Company's Petition to Modify Protective Order in Finance Docket No. 33388, by facsimile upon the following counsel for PEPCO in Docket No. 41989:

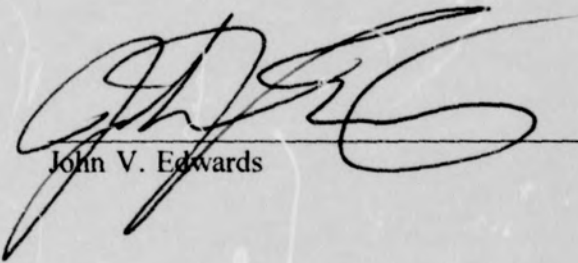
C. Michael Loftus
Christopher A. Mills
Andrew B. Kolesar III
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

by hand delivery on the following:

The Honorable Jacob Leventhal
Administrative Law Judge
Federal Energy Commission
Office of Hearings
825 North Capitol Street, N.E.
Washington, D.C. 20426

and by regular mail upon all other parties in Finance Docket No. 33388.

July 29, 1997



John V. Edwards

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HARKINS CUNNINGHAM

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JUL 29, 1997

By Hand Delivery

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
Mercury Building
1925 K Street, N.W.
Washington, D.C. 20423-0001



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

Dear Secretary Williams:

Enclosed for filing please find an original and 25 copies of the Reply of Consolidated Rail Corporation To PEPCO's Petition To Modify Protective Order (CR-6). Also enclosed is a diskette containing the text of this document in WordPerfect 5.1 format.

Respectfully submitted,

Paul A. Cunningham
Paul A. Cunningham

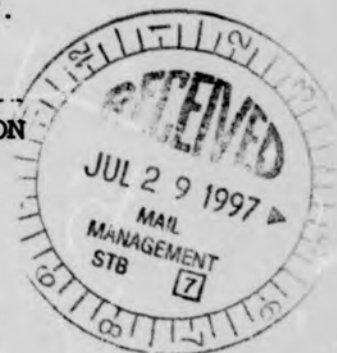
Counsel for Conrail Inc. and
Consolidated Rail Corporation

cc: All Parties of Record
The Honorable Jacob Leventhal

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



REPLY OF CONSOLIDATED RAIL CORPORATION TO
PETITION OF POTOMAC ELECTRIC POWER COMPANY
TO MODIFY PROTECTIVE ORDER

Consolidated Rail Corporation ("Conrail") strongly opposes the petition filed on July 24, 1997, by Potomac Electric Power Company ("PEPCO") to modify the protective order in the Conrail control proceeding. PEPCO seeks permission for its attorneys and consultants in another proceeding -- Docket No. 41989, Potomac Electric Power Co. v. CSX Transportation, Inc. -- to use certain highly confidential information that Conrail provided in the control proceeding in reliance upon the Board's protective order. Conrail's opposition is rooted in its concerns about the fundamental integrity of the Board's protective orders and the potentially severe adverse effects of parties misusing control proceedings to engage in otherwise impermissible efforts to receive highly confidential data.

Protective orders serve an important beneficial purpose in Board proceedings. They provide appropriate protection for

the legitimate interests of formal parties to a proceeding, as well as those of third parties requested or required to provide confidential information or documents. The protection they afford provides a positive incentive for parties to respond favorably to requests for evidence that might otherwise be resisted, and also encourages parties to make more specific and forthcoming voluntary submissions.

Given their role and purpose, it is important that protective orders be -- and be perceived to be -- reliable. Therefore, if they are to be subject to revision to permit uses or disclosures that are prohibited or not allowed by their terms, there should be a strong presumption against such modifications. The Board should require a compelling showing of extraordinary circumstances sufficient to constitute good cause.

This is particularly true of the Board's consideration of a request to modify the protective order in a control proceeding, where substantial amounts of the most highly confidential commercial information are required to be made available to interested parties, a large number of parties is involved, and the potential for abuse is great. Mere convenience of the requesting party is not enough. Absent the most stringent standard for modifying a protective order to permit a party to use highly confidential information in an unrelated case, current

and potential parties in unrelated cases would be sorely tempted to seek otherwise unauthorized use of the document depository¹

Here, PEPCO's counsel and consultants wish to obtain, among other things, access to Conrail's highly confidential 1995 traffic tape data. PEPCO gives no reason why it could not have sought that data in the discovery proceedings in its rate case. Had it done so, Conrail would have had the opportunity to respond. Conrail is not a party to PEPCO's rate case, and the Board does not require a third party to produce highly confidential information without good cause. The bar should be set even higher for a belated effort to misuse the document depository in a control proceeding to gain access to that information.

PEPCO does not and cannot claim any compelling need arising from Mr. Listwak's general confirmation that the Waybill Sample data relied on by PEPCO overstates the actual contract revenues earned by Conrail on its single-line coal traffic moving from Monongahela origins to Baltimore. PEPCO's counsel and consultants certainly knew that revenues shown on the Waybill

¹ PEPCO's request and the facts of this case raise a particular concern, i.e., the need for special stringency in adhering to protective orders covering highly confidential information made available to counsel and consultants for shippers who are often involved not only in multiple Board proceedings involving railroads but also in contract negotiations with railroads. By virtue of their participation in a variety of proceedings, such counsel and consultants can amass a unique storehouse of highly confidential information. The temptations to use such information obtained in one proceeding in another situation in which it might be deemed relevant are obvious and substantial, which is yet another reason for the Board to be vigilant in maintaining the integrity of its protective orders.

Sample for Conrail contract coal traffic were inaccurate, yet they chose to use them anyway. They cannot use their own failure of proof -- which they do not deny -- as a bootstrap for misusing highly confidential data from an unrelated proceeding.

PEPCO's actions in fact raise substantial questions whether PEPCO, through its counsel and consultants, has already breached the terms of the protective order governing this proceeding, in at least two respects. First, the order provides that information designated highly confidential "may not be disclosed in any way, directly or indirectly" (§ 8). Yet, according to PEPCO's petition, its counsel and consultants have publicly stated that certain highly confidential CSX projections in the control proceeding "are different from, and materially higher than," certain projections CSX has made in the rate case (Pet. at 7). While they may not have disclosed the precise numbers, that characterization can itself be deemed a significant disclosure of information covered by the protective order.

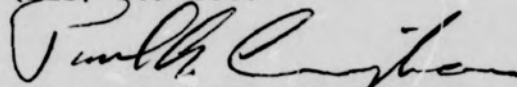
In addition, the order bars use of protected information "for any purpose other than these Proceedings" (§ 10). Yet, PEPCO's counsel and consultants have already used the information provided by the parties in the control proceeding for purposes other than that proceeding, i.e., in filings made in or in aid of the PEPCO rate proceeding.²

² Even if these uses and disclosures of highly confidential information of CSX, NS and Conrail do not themselves violate the protective order, they raise a serious question by reason of the willingness of PEPCO's counsel and consultants to make such use and disclosure unilaterally and publicly.

PEPCO's petition should be firmly denied. PEPCO has not shown any cause, much less good cause, for relieving it of the legitimate strictures of the protective order. If anything, PEPCO's actions warrant an admonition about the need for parties to adhere strictly to the terms of the Board's protective orders.

Respectfully submitted,

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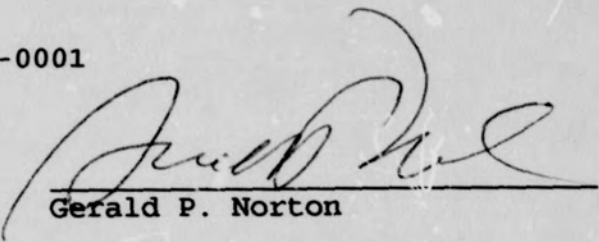
Dated: July 29, 1997

willingness of PEPCO's counsel and consultants to make such use and disclosure unilaterally and publicly.

CERTIFICATE OF SERVICE

I hereby certify that I have, this 29th day of July, 1997, caused the foregoing Reply of Conrail Inc. and Consolidated Rail Corporation to PEPCO's Petition to Modify Protective Order (CR-6) to be served on all parties who have entered an appearance in Finance Docket No. 33388 by sending a copy by first-class mail, postage prepaid, and by hand delivery on the parties listed below:

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
Mercury Building
1925 K Street, N.W.
Washington, D.C. 20423-0001



Gerald P. Norton

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7-29-97

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BEFORE THE
SURFACE TRANSPORTATION BOARD

180838

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

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DOCKET NO. 41989

POTOMAC ELECTRIC POWER COMPANY, *Complainant*,

v.

CSX TRANSPORTATION, INC., *Defendant*.

ENTERED
Office of the Secretary

JUL 30 1997

Part of
Public Record

**REPLY OF CSX CORPORATION AND CSX TRANSPORTATION, INC.
TO POTOMAC ELECTRIC POWER COMPANY'S PETITION TO
MODIFY PROTECTIVE ORDER IN FINANCE DOCKET NO. 33388**

NON-CONFIDENTIAL VERSION:
FILED IN PUBLIC DOCKET

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*Attorneys for CSX Transportation, Inc.
in Docket No. 41989*

DATED: July 29, 1997



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

DOCKET NO. 41989
POTOMAC ELECTRIC POWER COMPANY, *Complainant*,
v.
CSX TRANSPORTATION, INC., *Defendant*.

**REPLY OF CSX CORPORATION AND CSX TRANSPORTATION, INC.
TO POTOMAC ELECTRIC POWER COMPANY'S PETITION TO
MODIFY PROTECTIVE ORDER IN FINANCE DOCKET NO. 33388**

Pursuant to 49 C.F.R. § 1104.13(a), CSX Corporation ("CSX") and CSX Transportation, Inc. ("CSXT") (jointly, "CSX") hereby reply to the July 24, 1997 petition (PEPC-3) ("Petition") of Potomac Electric Power Company ("PEPCC") seeking an order modifying the Protective Order served April 16, 1997 in Finance Docket No. 33388 (the "Control Proceeding") in order to permit PEPCC to utilize certain confidential and highly confidential information governed by that Protective Order in connection with PEPCC's upcoming rebuttal testimony in Docket No. 41989 (the "Rate Case"). For the reasons explained below, PEPCC's Petition is entirely devoid of merit and should be denied.¹

¹ CSXT concurs with PEPCC's suggestion (Petition at 1-2 n.1) that its Petition should be decided in the first instance by the full Board.

INTRODUCTION

PEPCO's Petition constitutes an improper (but largely consummated) effort to abuse the protective conditions that the Board imposed to safeguard Applicants' confidential information in the Control Proceeding, and to circumvent the Board's discovery limitations in the Rate Case. In both respects, PEPCO's Petition would prejudice CSXT's rights, as well as the commercial interests of Norfolk Southern ("NS") and Conrail, which are mere bystanders to the Rate Case.

As the Board is aware, a major issue in the Rate Case is whether PEPCO should be permitted to include in its stand-alone cost ("SAC") traffic group a substantial volume of coal traffic that historically moved in single-line service over Conrail's lines between mine origins on the former Monongahela Railway ("MGA") and the Consol Coal Pier at Baltimore. PEPCO assumed, without any supporting testimony, that this traffic would somehow be diverted to a three-carrier interline route involving Conrail, the stand-alone railroad and CSXT. In its recently filed reply evidence, CSXT disputed PEPCO's proposed inclusion of the MGA-origin Conrail traffic on numerous legal and factual grounds. Among other things, CSXT showed that PEPCO's assumption that the MGA-origin Baltimore coal traffic would be diverted from single-line Conrail service to a cumbersome three-carrier interline route involving the stand-alone railroad was infeasible and unsupported for a variety of commercial and operating reasons.

In making these arguments, CSXT expressly noted that its traffic studies in the Control Proceeding had estimated that, as a result of the new CSXT single-line service from

MGA origins that would be made possible by the proposed Conrail acquisition, CSXT would inherit (or attract to its single-line route to Baltimore) slightly more than one-half of the "base year" 1995 coal traffic that Conrail moved over its lines between MGA-origins and the Consol Pier. CSXT explained, however, that these acquisition-related changes in CSXT's traffic levels did not support the commercial feasibility of PEPCO's SAC traffic assumptions because CSXT would be able to serve this MGA-origin coal traffic (which CSXT has not been able to attract to its *existing* two-carrier interline route with Conrail) precisely because of the new *single-line* service it will be able to offer if the proposed acquisition is approved -- single-line service that, by definition, PEPCO's stand-alone railroad could not offer given the SAC network configuration selected by PEPCO.

Thus, CSXT has *already* addressed in the Rate Case why the Control Application's assumptions regarding future routing of MGA-origin coal traffic to Baltimore have no bearing on the Rate Case and why, far from supporting PEPCO, they actually support CSXT's exclusion of the MGA-origin traffic from the SAC analysis. In any event, PEPCO simply does not need access to confidential information in the Control Proceeding in order to use in the Rate Case the fact that CSXT estimates it will attract a substantial volume of MGA-origin coal if the Control Application is granted. The results of CSXT's traffic studies are a matter of public record in the Control Proceeding, and CSXT has already referred to them in its reply submission in the Rate Case.

In light of these facts, the Board should look past the rhetoric contained in PEPCO's Petition and focus on the specific confidential information that PEPCO requests permission to import from the Control Proceeding. PEPCO apparently seeks the right to use

two types of confidential information: (1) *forecasted* (Year 2000) export coal and MGA-origin coal traffic volumes and revenues for CSX and NS resulting from the proposed Conrail acquisition; and (2) *actual* 1995 export coal and MGA-origin coal traffic volumes and revenues for CSX, NS and Conrail. Neither request is appropriate.

Contrary to PEPCO's claims, the traffic and revenue forecasts in the Control Proceeding are neither inconsistent with nor even relevant to the issue of traffic and revenue projections in the Rate Case. Following accepted SAC procedures, CSXT's testimony in the Rate Case (like that of PEPCO) determined "base year" (1996) traffic volumes and revenues of the stand-alone railroad based on actual historic data, and then estimated future volumes and revenues for each of the 20 years included in the Discounted Cash Flow ("DCF") analysis (1997-2016) by applying projected rates of annual changes in traffic levels and revenues over that long-term period. These projections are designed to reflect anticipated future changes in economic growth, inflation and other economic and market conditions, not the impacts of the proposed Conrail acquisition. Nothing in CSXT's traffic studies in the Control Proceeding is inconsistent with CSXT's Rate Case projections. Those traffic studies are designed to assess anticipated changes in CSXT's traffic and revenues resulting *solely* from the proposed Conrail acquisition, holding constant changes in the kind of economic conditions that CSXT's Rate Case projections are designed to capture and reflect. Comparing the two sets of "projections," as PEPCO tries to do, is therefore a meaningless "apples and oranges" comparison that proves nothing.

The tonnage and revenue "projections" that PEPCO cites from CSXT's testimony in the Control Proceeding are not even projections in the sense used in the Rate

Case. PEPCO purports to demonstrate that CSXT's "projections" in the Control Proceeding vastly exceed its projections in the Rate Case, but PEPCO is able to come up with its desired results only by mis-assigning to the "5th Year" category the *base year* MGA-origin coal traffic and revenues that CSXT expects to obtain as a result of the Conrail transaction (as well as a small amount of other anticipated coal traffic that would not even move to Baltimore at all). Not surprisingly, this gerrymandered analysis appears to show that CSXT is projecting huge rates of increase in its export coal traffic volumes -- over [Redacted] percent a year according to PEPCO -- and associated revenues. That these results are entirely contrived should be apparent from the fact that the claimed rates of traffic and revenue growth which PEPCO attributes to CSXT greatly exceed not only CSXT's projections in the Rate Case but PEPCO's own proposed projections at well.

Upon careful examination, all that PEPCO's comparison of "projections" proves is that CSXT anticipates attracting 4.8 million tons of MGA-origin coal traffic upon approval of the proposed Conrail acquisition. No one disputes this fact, which is a matter of public record, and PEPCO obviously does not need access to confidential information to cite it in the Rate Case.

PEPCO's request for access to *actual* CSXT, NS and Conrail traffic and revenue data for the year 1995, although discussed only fleetingly in the Petition, is far more serious. As the Board knows, such shipper-specific traffic and revenue data are highly sensitive from a commercial and competitive standpoint. To the extent PEPCO seeks access to CSXT's traffic and revenue data, the request is puzzling because PEPCO already received access to CSXT's 100 percent traffic tapes during discovery in the Rate Case. PEPCO's

request for NS data makes no sense either, because PEPCO did not even attempt to include NS traffic in its SAC analysis (and surely cannot do so now), and such data are therefore irrelevant. As PEPCO has offered not a word of explanation why it needs or wants these very sensitive data, its request should be rejected.

CSXT submits that PEPCO's Petition is in reality an artfully disguised attempt to gain access to actual *Conrail* traffic and revenue data, particularly with respect to the MGA-origin traffic that PEPCO seeks to include in its SAC analysis. This effort, however, would improperly circumvent the discovery rules governing the Rate Case. As CSXT explained in its Rate Case reply submission, PEPCO could have used available discovery procedures (including third-party discovery) in the Rate Case to seek accurate and reliable data concerning the traffic it proposes to include in its SAC analysis, and to shoulder its burden of proving the validity of its SAC traffic selection. Had PEPCO invoked these procedures in a timely manner, CSXT could have been able to secure access to any such *Conrail* traffic data used by PEPCO in its SAC testimony (data CSXT does not possess) and, more importantly, would have had an opportunity to respond to such testimony in its reply submission. PEPCO's attempt now to obtain from the record of the Control Proceeding and use in the Rate Case data that it could have sought during discovery in the Rate Case -- long *after* the discovery cut-off date in the Rate Case and *after* CSXT has submitted its one and only scheduled evidentiary submission on SAC issues -- would violate the discovery schedule in the Rate Case and deny CSXT a fair opportunity to respond to PEPCO's SAC testimony.

There is thus no conceivable basis for PEPCO's assertions that the requested confidential data in the Control Proceeding are relevant to the issues in the Rate Case or

properly needed by PEPCO in preparing its planned rebuttal testimony. More generally, however, the Board should strongly discourage the kind of tactic PEPCO has employed here, in which PEPCO has *already* technically violated the Protective Order.² As the Board knows, major rail consolidation proceedings necessarily entail the use of large amounts of highly confidential and detailed railroad data. The railroads are willing to make these materials available to qualified parties during discovery only in reliance on the promise that the confidential information will be used solely in connection with the proceeding in which it is produced and strictly in accordance with the Protective Order restrictions. The integrity of this process, and the very efficacy of Protective Orders generally, would be seriously undermined if the Board were to allow parties such as PEPCO to abuse their restricted access to confidential data in one proceeding to obtain collateral (and, in this case, otherwise unavailable) discovery of information for use in another, wholly unrelated proceeding.

Moreover, allowing confidential Control Proceeding discovery to be used in another case would invite parties that have unrelated disputes with CSX, NS or Conrail to seek discovery in the Control Proceeding in the hope of being able to use it elsewhere. That would not only be unfair, but would place additional and completely unwarranted burdens on the

² The Confidentiality Undertakings that PEPCO representatives executed in accordance with the April 16, 1997 Protective Order prohibit the use of confidential or highly confidential information for any purpose other than in connection with the Control Proceeding. Even though PEPCO filed in the Rate Case a redacted copy of its Petition omitting references to the specific Control Proceeding confidential information it wants to use, the simultaneous filings in both proceedings have effectively placed the protected information before the Board in both cases. For this reason, PEPCO's Petition in practical effect has already accomplished, in violation of the Protective Order, the result for which its Petition seeks authorization.

limited resources of the Administrative Law Judge assigned to manage Control Proceeding discovery and on the Board itself.

BACKGROUND

PEPCO's Petition characterizes, and purports to compare, relatively technical and arcane aspects of CSXT's testimony in the Control Proceeding and the Rate Case. Because these unrelated proceedings involve different evidentiary records governed by separate protective orders, and are likely assigned to different Board staff personnel for review and handling, it may be helpful to begin this reply with a summary of the pertinent testimony in both proceedings.

A. The CSX/NS/Conrail Control Proceeding

On June 23, 1997, CSX, NS and Conrail filed their joint Application seeking authorization of the proposed acquisition of control and division of Conrail by CSX and NS. In accordance with the Board's Rail Consolidation Procedures (49 C.F.R. § 1180.7), the Application included traffic studies designed to assess the likely impact of the proposed transaction on the Applicant carriers' traffic levels and revenues. Generally speaking, these traffic studies involved determination of traffic volumes and revenues for a "base year" (1995) using actual, historic data and assuming the division of Conrail's 1995 traffic between CSX and NS based on the Conrail lines assigned to each under the proposed transaction. The traffic studies then estimated for a "forecast" year (assumed to be the third year following consummation of the proposed transaction, or 2000) the additional -- or "incremental" -- traffic and

associated revenues each Applicant carrier would attract solely as a result of the proposed transaction, holding constant other changes in economic and market conditions.³

Under the terms of the proposed Conrail acquisition, CSX and NS would have full, equal and joint rights to provide direct, single-line service from the MGA mine origins today exclusively served by Conrail. In its traffic studies, CSX projected that, as a result of its proposed new single-line service from MGA-origin mines, approximately 4.8 million tons of "base year" MGA-origin Conrail coal traffic moving to Baltimore would be routed over CSXT's new single-line route rather than over the alternative Conrail route allocated to NS. This 4.8 million tons of traffic represent a little more than one-half of the "base year" MGA-origin coal traffic moving to Baltimore.⁴

The CSXT marketing personnel who performed CSX's traffic studies did not have access to Conrail's actual revenues or rate levels for this coal traffic. Accordingly, these personnel estimated the revenues associated with this "base year" MGA-origin Baltimore coal traffic on the basis of their independent judgment regarding likely rate levels from each MGA origin. CSXT's marketing personnel assumed rates for this traffic ranging from \$[Redacted]

³ See, e.g., F.D. No. 33388, Application, Vol. 2A at 154-239 (V.S. Rosen), 375-78 (V.S. Sharp).

⁴ See F.D. No. 33388, Application, Vol. 2A at 378 (V.S. Sharp). The MGA-origin Baltimore coal traffic assigned to CSX post-acquisition appears in the Application as the export coal "Base" tonnage of 4.8 million tons. *Id.* A copy of witness Sharp's summary table depicting these forecasted coal volumes and revenues is included as Attachment A hereto.

to \$[Redacted] per ton depending on the particular MGA origin, or total revenues that translate into an average through rate of \$9.06 per ton.⁵

In addition to determining the "base year" tonnages and revenues CSX expects to garner as a result of the proposed Conrail acquisition, CSX estimated "incremental" export coal traffic it expected to generate by Year 2000 due to the proposed transaction. On the basis of customer survey responses, CSX's marketing personnel determined that CSX could generate an additional volume of 666,000 tons of export coal traffic by 2000. All of this "incremental" export coal traffic is projected to move to Newport News, Virginia (the Dominion Terminal Associates export facility), and 400,000 tons of this traffic are projected to come from MGA mine origins. CSX projects this additional traffic not because of changes in market conditions, but because of the single-line service it will be able to offer shippers from MGA origins, and the resulting ability to blend MGA-origin coals with C&O-origin coals for export through Newport News. As in the case of the existing Conrail MGA-origin traffic expected to be served by CSX post-acquisition, CSX's marketing personnel estimated potential revenues associated with the incremental traffic. The estimated revenues for the projected 400,000 tons of MGA-origin "incremental" coal traffic were based on an assumed current-period rate of \$[Redacted] per ton.⁶

⁵ See F.D. No. 33388, Application, Vol. 2A at 375-78 (V.S. Sharp). The estimated revenues for movements from each MGA mine origin are listed in witness Klick's electronic workpapers (GRSTCOAL.WK4), which were designated highly confidential under the Protective Order.

⁶ See F.D. No. 33388, Application, Vol. 2A at 364, 378 (V.S. Sharp).

B. The PEPCO Rate Case

PEPCO's complaint in the Rate Case challenges the reasonableness of the common carrier rates applicable to CSXT's single-line transportation of coal between several West Virginia mine origins and PEPCO's electric generating station located at Dickerson, Maryland. In accordance with the recently adopted expedited procedures for stand-alone cost rate cases,⁷ the Board established an accelerated schedule for discovery (with a cut-off date of March 19, 1997) and submission of evidence. PEPCO filed multiple discovery requests seeking voluminous traffic, revenue and cost data from CSXT. Although the Board's rules authorize parties to seek third-party discovery, PEPCO at no time attempted to avail itself of that opportunity.

In opening stand-alone cost evidence filed May 5, 1997, PEPCO proposed a stand-alone railroad (called the Dickerson Railroad or "DRR") that would replicate approximately 360 miles of CSXT's rail system in West Virginia and western Maryland necessary to link seven West Virginia mine origins and the Dickerson station. The DRR would also replicate CSXT's line segment that connects with Conrail at Rivesville, West Virginia. The stand-alone railroad's lines would extend no further east than Brunswick, Maryland.

PEPCO proposed that, in addition to serving the issue coal traffic moving to the Dickerson station the stand-alone railroad would participate on an interline (largely overhead)

⁷ STB Ex Parte No. 527, *Expedited Procedures for Processing Rail Rate Reasonableness, Exemption & Revocation Proceedings* (served October 1, 1996, November 6, 1996 & November 15, 1996) ("*Expedited Procedures*").

basis in virtually all of the coal and other freight traffic moving over the replicated CSXT lines. In addition, in a radical departure from all prior SAC cases, PEPCO announced in its opening filing that the stand-alone railroad would also serve, on an interline basis, approximately nine million tons of coal traffic that originated at Conrail-served MGA-origin mines and moved in single-line *Conrail* service to the Consol Pier at Baltimore. In the real world, this traffic (which accounts for more than a third of the DRR's assumed coal traffic and revenues) never touched CSXT's lines, much less the lines included in the stand-alone network. Without any supporting evidence, PEPCO declared that this traffic would be diverted from Conrail's existing single-line route to a three-carrier interline route involving Conrail origination and movement to Rivesville, interchange to the DRR for movement to Brunswick, and a further interchange to CSXT for final delivery at Baltimore.

Rather than seek during discovery production of Conrail's actual tonnages and revenues for this MGA-origin coal traffic, PEPCO developed its traffic and revenue estimates from information reported in the 1995 Costed Waybill Sample, access to which PEPCO obtained from the Board without notice to CSXT or Conrail. Based on this information, PEPCO estimated that the "base year" average through revenue associated with the MGA-origin traffic would be \$[Redacted] per ton, and that the stand-alone railroad would earn an \$[Redacted] per ton division of such revenue on the basis of a simple mileage prorate of the assumed through revenues.⁸

⁸ See No. 41989, Opening V.S. Crowley at 10-12 & Exhibit TDC-3; Crowley Workpapers at 744. Conrail's through revenues per ton reported in the Waybill Sample were designated highly confidential under the Rate Case Protective Order. This information has
(continued...)

Following the normal practice in SAC cases, PEPCO developed annual estimates of the stand-alone railroad's traffic volumes and revenues for each of the 20 years (1997-2016) included in the DCF model by taking actual "base year" 1996 figures derived from CSXT's traffic tapes (and from the 1995 Waybill Sample data for the MGA-origin traffic), and applying to those figures assumed projected rates of annual change in future tonnage levels and revenues. For export coal traffic, PEPCO assumed that the stand-alone railroad's proposed 1996 traffic volumes would grow at a compound annual rate of [Redacted] percent, based on a short-term economic forecast prepared for CSXT by an outside forecasting firm. PEPCO assumed that the stand-alone railroad's "base year" coal revenues would grow at annual rates ranging from [Redacted] percent to [Redacted] percent, based on an arbitrary arithmetical manipulation of the rate escalation provisions of a selected handful of CSXT rail transportation contracts produced during discovery.⁹

CSXT's reply evidence, filed July 11, 1997, took issue with PEPCO's traffic and revenue assumptions, both for the "base year" and for the projected future traffic volumes and revenues of the stand-alone railroad. CSXT challenged PEPCO's proposed inclusion of the MGA-origin Conrail traffic in its stand-alone traffic group on a variety of legal and factual grounds. Among other things, CSXT explained that PEPCO had submitted *no* testimony

⁸(...continued)

been redacted from copies of this reply reviewed by in-house CSXT personnel and other CSXT representatives not qualified to receive highly confidential information under the Rate Case Protective Order. Note that the Waybill Sample reported revenues per ton are significantly greater than the revenues CSXT marketing personnel independently estimated in connection with the traffic studies in the Control Proceeding.

⁹ See Docket No. 41989, Opening V.S. Crowley at 14-15 & Exhibit TDC-5.

supporting its assumption that this traffic could be diverted (without any rate reductions) from single-line Conrail service to a three-carrier interline route involving the stand-alone railroad. CSXT presented testimony from CSXT and Conrail coal marketing officials that the proposed diversion was infeasible, and highly unlikely to occur, for a host of commercial and operating reasons including the inherent superiority of single-line service over three-carrier interline service and grade-related operating impediments that would limit train sizes on the DRR's segment between Rivesville and Cumberland, Maryland.¹⁰

In addition, CSXT's reply evidence challenged the validity of PEPCO's assumptions regarding the revenues potentially associated with the proposed diversion of MGA-origin Conrail coal traffic. CSXT witnesses explained that, because of the "masking" of confidential contract revenues and contractually authorized refund, rebate and similar payments to shippers not reflected on railroad waybill accounting records, the Conrail through revenues reported in the Waybill Sample and relied on by PEPCO were very likely overstated by a significant, but unquantifiable, amount. CSXT did not (and does not now) have access to Conrail's actual revenues for these movements (nor did CSXT's in-house personnel have access to the Waybill Sample revenues).¹¹ CSXT submitted a verified statement from a

¹⁰ See Docket No. 41989, Reply Statement at 20-24; Reply V.S. Bowen at 14-22; Reply V.S. Listwak at 4-9; Reply V.S. Klick/Baranowski at 25-29.

¹¹ PEPCO's suggestion that the confidential Control Proceeding information it seeks permission to use in the Rate Case was available to CSXT prior to the filing of its reply evidence and could have been used by CSXT in its submission (Petition at 9) is therefore flatly erroneous in the case of the *actual* Conrail revenues for the MGA-origin coal traffic PEPCO seeks to include in the SAC traffic group. CSXT has never had access to such information for use in the Rate Case.

Conrail official, who testified that the Waybill Sample revenues were indeed significantly overstated, although he (and Conrail) declined for confidentiality reasons to furnish CSXT the actual revenues for this traffic. Relying on published trade press reports, CSXT witness Bowen testified that Conrail's revenues for the MGA-origin traffic could be as low as \$9-\$10 per ton -- far less than the revenues (\$[Redacted] per ton) included in PEPCO's stand-alone cost calculations.¹²

CSXT argued that PEPCO relied on the Waybill Sample revenues with full knowledge of the fact that they overstated actual revenues, and that PEPCO could have requested, but did not even attempt to secure, reliable and accurate revenue data from Conrail by means of third-party discovery.¹³ Having failed to avail itself of opportunities to obtain accurate and reliable revenue data and having chosen instead to rely on revenue data known to be overstated, CSXT argued, PEPCO's revenue assumptions were unsupported, and furnished no sound basis for including the MGA-origin Baltimore coal traffic in the SAC analysis.

With respect to divisions, CSXT argued that the stand-alone railroad could not be able to command a mileage-based division given its status as a mere bridge carrier in the proposed movement, particularly given Conrail's ability to route the traffic over its independent single-line route rather than participate in the proposed interline route on unfavorable divisions terms. Because of these and other deficiencies, CSXT argued that PEPCO had failed

¹² See Docket No. 41989, Reply Statement at 24-29; Reply V.S. Bowen at 22-31; Reply V.S. Listwak at 3, 10-11.

¹³ See Docket No. 41989, Reply Statement at 26-27 & n.11 (citing ICC Docket No. 37063, *Increased Rates on Coal, L&N RR, October 31, 1978* (served August 15, 1990) ("*L&N*").

to shoulder its burden of proof, and that the MGA-origin traffic should be excluded from the stand-alone traffic group. CSXT's SAC calculations entirely excluded this traffic.¹⁴

CSXT's reply filing in the Rate Case also alluded to the traffic studies contained in the Control Application. CSXT witness Bowen noted that CSXT's traffic study projected that approximately one-half of the Conrail MGA-origin coal traffic moving to Baltimore for export would, upon approval of the proposed acquisition, be routed via CSXT's new single-line route. CSXT further stated that this assumption of a future CSXT routing for MGA-origin coal traffic did not affect CSXT's position regarding the commercial infeasibility of PEPCO's diversion assumption because (1) CSXT expected that most of the MGA-origin coal traffic projected to move via CSXT to Baltimore would be routed via Brownsville Junction and McKeesport, thus bypassing much of the stand-alone railroad's route and, more importantly, (2) CSXT projected that it would be able to attract this traffic post-acquisition precisely because of its ability to provide genuine single-line service, something the stand-alone railroad obviously could not do with the cumbersome three-carrier interline route PEPCO proposed.¹⁵

Finally, CSXT's reply evidence also claimed on a variety of grounds that PEPCO's proposed traffic and revenue projections were overstated. In place of PEPCO's projections, CSXT relied on a long-term (20-year) forecast by the same outside forecasting firm that had prepared the short-term projections used by PEPCO. This long-term forecast projected that export coal volumes would increase at an average annual rate of [Redacted] per-

¹⁴ See No. 41989, Reply Statement at 27-29; Reply V.S. Bowen at 25-31; Reply V.S. Listwak at 9, 11-13.

¹⁵ See No. 41989, Reply Statement at 22-23 n.9; Reply V.S. Bowen at 17 n.9.

cent, somewhat lower than the [Redacted] percent rate used by PEPCO in its testimony. In place of PEPCO's proposed annual rates of revenue growth of [Redacted] to [Redacted] percent based on examination of a sample of CSXT coal transportation contracts, CSXT in its testimony relied on a recent government study projecting that coal transportation rates would *decrease* at about 0.90 percent per year over the next 20 years.¹⁶

PEPCO reacted to CSXT's reply evidence, and in particular to its challenge to PEPCO's proposed inclusion of the MGA-origin coal traffic in its SAC traffic group, by serving on CSXT a self-styled "workpaper" request, demanding immediate production of all of Conrail's confidential rail transportation contracts governing the MGA-origin Baltimore coal movements and copies of any divisions agreements between CSXT and Conrail relating to MGA-origin coal traffic. By letter dated July 18, 1997, CSXT opposed these demands. CSXT explained that PEPCO's requests did not seek production of genuine "workpapers," but instead a reopening of discovery to obtain and use on *rebuttal* material that PEPCO could have sought during discovery and should have introduced in its *opening* testimony, at which time CSXT would have had an opportunity to respond to it. CSXT expressed its readiness to reconsider PEPCO's belated document requests if PEPCO secured an order from the Board reopening discovery and adjusting the evidentiary schedule to afford CSXT a fair opportunity to submit evidence responding to any rebuttal testimony incorporating the new material. CSXT further explained that it had no ability to furnish PEPCO copies of confidential *Conrail*

¹⁶ See No. 41989, Reply Statement at 44-49; Reply V.S. Klick/Baranowski at 43-51; Reply V.S. Trumbull.

contracts, and attached a letter from Conrail counsel declining to make such contracts available to PEPCO without an affirmative discovery order.¹⁷

Although PEPCO complains mightily about CSXT's refusal to produce these mis-described "workpapers" (Petition at 5, 6 n.2), PEPCO has filed no motion in the Rate Case seeking to compel CSXT or Conrail to produce the materials PEPCO had belatedly sought from CSXT. Nor has PEPCO sought production of such materials in the Control Proceeding. Instead, PEPCO responded by filing the instant Petition, which seeks access to entirely different, but nonetheless confidential, information in the Control Proceeding.

ARGUMENT

PEPCO spices its Petition with sweeping assertions regarding CSXT's alleged refusal to furnish PEPCO (or the Board) with relevant information underlying its reply submission in the Rate Case. Petition at 2-3, 5-6. Apart from being entirely groundless (for the reasons explained in CSXT's July 18, 1997 response to PEPCO's "workpaper" request), these assertions are essentially beside the point because they have nothing to do with the specific data and information that PEPCO seeks permission to use from the Control Proceeding. The Board should focus on these specific requests.¹⁸

¹⁷ A copy of CSXT's July 18, 1997 letter response to PEPCO's request was filed with the Board under seal. That letter fully explains the basis for CSXT's position on this issue.

¹⁸ PEPCO asserts that CSXT's exclusion of the MGA-origin coal traffic in the Rate Case is somehow inconsistent with "publicly available" documents in the Control Proceeding showing that MGA-origin Baltimore coal traffic would move "over the exact route hypothesized by PEPCO for its stand-alone railroad." Petition at 7. This claim is both inaccurate and
(continued...)

PEPCO seeks modification of the Protective Order in the Control Proceeding to use in its Rate Case rebuttal two types of confidential information: (1) forecast year (2000) projections of tonnages and revenues for MGA-origin Baltimore coal traffic and export coal traffic generally, for both CSX and NS; and (2) actual "base year" (1995) tonnages and revenues for MGA-origin Baltimore coal traffic and export coal traffic generally, for CSX, NS and Conrail. Petition at 8. In support of this request, PEPCO argues that this information is directly relevant to and contradicts CSXT's reply testimony in the Rate Case, that case law supports PEPCO's request, and that neither CSXT nor the other Applicants in the Control Proceeding would be harmed by PEPCO's use of the requested confidential information.

As explained below, these claims are without merit. The specific confidential information PEPCO seeks to use from the Control Proceeding either is not relevant to any issue in the Rate Case or, in the case of actual traffic and revenue data, was available for

¹⁸(...continued)

irrelevant. It is inaccurate because there is no inconsistency in CSXT's statements in the two cases. As noted, CSXT's reply evidence in the Rate Case stated that (1) CSXT expected to move a substantial volume of MGA-origin coal traffic to Baltimore over CSXT's new single-line route following approval of the proposed Conrail acquisition and (2) "most of the eastbound coal traffic CSXT might originate at MGA origins would likely be routed north through Brownsville Junction and McKeesport, Pennsylvania, and then east through Cumberland" Docket No. 41989, Reply V.S. Bowen at 17 n.9; *see also* Reply Statement at 22-23 n.9. The Control Proceeding interrogatory response cited by PEPCO simply states (correctly) that CSXT is "considering" both the route via Rivesville (PEPCO's proposed routing for the stand-alone railroad) and the route via Brownsville Junction and McKeesport. Petition at 7 n.4. That CSXT is "considering" both routes is hardly inconsistent with CSXT's testimony in the Rate Case that "most" of the MGA-origin traffic "would likely" follow the latter route because of grade and other operating limitations. CSXT stands by the latter statements. In any event, PEPCO's claim is pointless because, as it readily admits, the documents supporting the alleged (but illusory) inconsistency in CSXT's statements are *in the public record*, and can be used in the Rate Case without Board permission.

PEPCO to pursue during the discovery phase of the Rate Case. Nothing in the requested confidential information contradicts CSXT's Rate Case testimony, and PEPCO has shown no justification for circumventing the discovery limitations in the Rate Case. The relevant case law supports denial of PEPCO's request. Contrary to PEPCO's claims, granting its request would indeed prejudice CSXT as well as NS and Conrail, and their rights and interests must be adequately protected if the Board were to grant PEPCO's Petition.

I. THE REQUESTED CONFIDENTIAL INFORMATION IS NEITHER RELEVANT TO NOR INCONSISTENT WITH CSXT'S RATE CASE TESTIMONY, AND GRANTING PEPCO'S REQUEST WOULD CIRCUMVENT THE BOARD'S DISCOVERY RULES.

A. Forecast Year "Projected" Traffic Levels and Revenues

The first category of confidential information that PEPCO seeks permission to use in the Rate Case, and the only one which it really discusses in its Petition, involves the traffic studies underlying the Control Application's projection of forecasted changes in traffic levels and revenues as a direct result of the proposed Conrail acquisition. PEPCO contends that these "projections," insofar as they relate to MGA-origin Baltimore coal traffic and export coal traffic generally, are relevant to the Rate Case because they are inconsistent with -- and "materially higher than" -- the traffic and revenue projections contained in CSXT's SAC testimony in the Rate Case. Petition at 7-8 & Appendix.¹⁹

¹⁹ PEPCO also claims that the volume of MGA-origin Baltimore coal traffic that the Control Application projects to move over CSXT's new single-line route is greater than the amount referred to in CSXT's Rate Case testimony. Petition at 7-8. CSXT cannot understand
(continued...)

PEPCO's claims are both wrong and, in the main, thoroughly disingenuous.

The "projections" that PEPCO cites from the two proceedings are intended to measure entirely different things, and are not at all comparable. As explained previously, the projections of future traffic and revenues in the Rate Case (including the projections sponsored by PEPCO) are designed to estimate, over the 20-year future DCF period, the effects of general economic and business conditions (including traffic growth and inflation) on the "base year" estimates of the stand-alone railroad's traffic volumes and revenues. They are not intended to measure the impacts of the proposed Conrail acquisition. By contrast, the so-called "projections" from the Control Proceeding cited by PEPCO are intended to measure only the impact of the proposed acquisition of Conrail on CSXT's traffic levels and revenues and, consistent with this purpose, are designed to *exclude* the effects of general economic and business conditions unrelated to the transaction.

The two proceedings thus both involve "projections" in the sense of estimating future traffic volumes and revenues that would occur under certain identified assumptions, but

¹⁹(...continued)

the basis for this assertion. As noted, CSXT's traffic studies estimate that 4.8 million tons of "base year" (1995) MGA-origin Baltimore coal traffic would move over CSXT's new single-line route if the proposed transaction were approved. PEPCO's SAC evidence estimates, based on Waybill Sample data, that a total of [Redacted] tons of coal moved from MGA-origins to the Consol Pier in Baltimore during 1995. No. 41989, Opening V.S. Crowley, Exhibit TDC-3 at 2. Putting these two figures together, CSXT anticipates attracting about [Redacted] percent of the MGA-origin Baltimore coal traffic post-acquisition. In the Rate Case, CSXT's witness Bowen stated that the Application projected that CSXT would attract "a substantial portion (about half)" of this coal traffic. No. 41989, Reply V.S. Bowen at 17 n.9. Unless PEPCO sees some material difference between [Redacted] percent and "about half," its claim is a mystery. In any event, the Control Application speaks for itself, and its estimate of CSXT's future MGA-origin traffic is a matter of public record that PEPCO is free to use in the Rate Case.

those assumptions -- and the purposes of the projections -- are completely different. Each set of "projections" measures precisely what the other does not. For that reason, CSXT's "projections" in the two cases are not comparable to one another, and certainly are not inconsistent.

The absurdity of PEPCO's argument can be demonstrated by reference to its Highly Confidential Appendix, which includes a table purporting to compare CSXT's estimates in the two proceedings of "base year" (1995) export coal tonnages and revenues and "forecast year" (2000) future export coal tonnages and revenues. For ease of reference, PEPCO's table is reprinted below.

**PEPCO'S Comparison of CSXT's Projection of
Export Tonnage and Revenue in the NS/CSXT/Conrail
Merger Filing Versus the PEPCO Filing**

<u>Item</u>	<u>CSXT Evidence in "PEPCO"</u>		<u>CSXT Workpapers in "Merger"</u>	
	<u>Export Traffic Tons (1)</u>	<u>Export Revenue (2)</u>	<u>Export Traffic Tons (3)</u>	<u>Export Revenue (4)</u>
1. Base Year	[Redacted]	\$(Redacted)	[Redacted]	\$(Redacted)
2. 5th Year	[Redacted]	\$(Redacted)	[Redacted]	\$(Redacted)
3. Change Between Base and 5th Year	[Redacted]%	[Redacted]%	[Redacted]%	[Redacted]%
4. Annual Percent Change	[Redacted]%	[Redacted]%	[Redacted]%	[Redacted]%

PEPCO would have the Board believe from this comparison that CSXT is projecting annual growth rates in export coal tonnage exceeding [Redacted] percent in the

Control Proceeding, but [Redacted] percent in the Rate Case. When it is recalled that PEPCO itself assumed in its Rate Case evidence that the stand-alone railroad's export coal tonnages would increase at an average annual rate of [Redacted] percent,²⁰ the invalidity of PEPCO's comparison should be readily apparent.²¹ In fact, the comparison PEPCO presents in its Appendix is based on a gerrymandered manipulation of data that proves absolutely nothing.

Columns 1 and 2 in PEPCO's table simply reflect the "Base Year" (actually, the estimated 1997) export coal tonnages that would be handled by the stand-alone railroad, and the *actual* revenues associated with that traffic (adjusted to reflect contract refund payments to affected shippers). These figures *exclude* MGA-origin coal traffic because, as noted, CSXT's evidence shows the stand-alone railroad could not feasibly attract this traffic and it is properly excluded from SAC analysis as a matter of law. The "5th Year" tonnage and revenue figures merely reflect CSXT's estimates for the year 2000, developed by applying to the "base year" actual traffic volumes and revenues CSXT's projected annual rates of future change over the long-term DCF period. As a result, the "Annual Percent Change" figures in the table reflect the traffic and revenue projections used by CSXT in its SAC evidence.²² The purpose of these

²⁰ See No. 41989, Opening V.S. Crowley at 13.

²¹ If one applied PEPCO's claimed annual rate of traffic growth from Column 3 of its table to CSXT's "Base Year" export coal traffic tons over the entire 20-year DCF period at issue in the Rate Case, it would yield the patently ridiculous conclusion that CSXT's export coal volumes via Baltimore will increase from [Redacted] tons in 1995 to [Redacted] tons in the year 2014. Not even PEPCO contends that this kind of traffic growth is possible, but that is the logic of the conclusion it asks the Board to draw from its Confidential Appendix.

²² CSXT's reply evidence in the Rate Case estimated that the stand-alone railroad's export coal tonnages would increase at an average annual rate of [Redacted] percent, and its revenues
(continued...)

projections is to show not the impact of the proposed Conrail acquisition (which may or may not occur), but anticipated changes in the stand-alone railroad's long-term (*i.e.*, 20-year) future traffic volumes and revenues as a result of changes in economic and market conditions.

It is in Columns 3 and 4 of its table that PEPCO begins to introduce distortions. The "Base Year" tonnage and revenue figures represent CSXT's 1995 pre-acquisition export coal traffic through Baltimore. (The tonnages are greater than in Column 1 because PEPCO's stand-alone railroad would not serve all of CSXT's Baltimore export coal traffic.) The "5th Year" tonnage and revenue figures, which PEPCO then compares with the "Base Year" figures to generate what it claims are CSXT's supposed projections of enormous annual rates of traffic and revenue growth, simply reflect the "Base Year" pre-acquisition CSXT traffic *plus* an additional volume of 5.2 million tons. That additional 5.2 million tons comprise (1) the 4.8 million tons of Conrail's *base year* MGA-origin Baltimore coal traffic that CSXT expects to gain immediately upon approval of the proposed acquisition, and (2) 400,000 tons of the additional, "incremental" export coal traffic from MGA origins that CSXT's traffic studies projected it might generate by the Year 2000 as a result of the proposed acquisition.²³ The revenues associated with this additional 5.2 million tons do not reflect projected future

²²(...continued)

would decrease at an average annual rate of 0.90 percent. Docket No. 41989, Reply V.S. Klick/Baranowski at 43-51. The Annual Percent Change in Column 2 of PEPCO's table ([Redacted]%) reflects the combined result of CSXT's assumed projected *increase* in tonnages ([Redacted]%) and *decrease* in revenue levels (0.90%).

²³ See F.D. No. 33388, Application, Vol. 2A at 378 (V.S. Sharp).

increases in rate levels, but only CSXT's estimates of *current-period* rates associated with this traffic.

None of this 5.2 million tons of coal is properly assignable to the "5th Year" category for the purpose of calculating annual traffic and revenue growth in the Rate Case. As previously noted, the 400,000 tons of MGA-origin "incremental" coal traffic is not expected to be achieved until the fifth year, but *all* of this coal traffic is assumed to move to Newport News, *not* Baltimore, and thus has no relevance at all to PEPCO's analysis or its SAC case.²⁴ And the 4.8 million tons of MGA-origin Baltimore coal traffic represents *base year* volumes, not anticipated future traffic growth of the sort that is relevant to SAC projections. The inclusion of this traffic in CSXT's Control Proceeding traffic studies reflects nothing more than CSXT's expectation that it will inherit from Conrail this portion of its MGA-origin coal traffic -- a publicly available fact that CSXT does not dispute and specifically referred to in its reply testimony in the Rate Case.

Thus, PEPCO was able to come up with its claimed disparity in CSXT's traffic and revenue projections in the two cases only by mis-assigning to the "5th Year" category the *base year* MGA-origin coal traffic that CSXT expects to gain if the proposed Conrail acquisition is approved, and erroneously including 400,000 tons of "incremental" coal traffic that is not expected to be routed via Baltimore at all. Not surprisingly, this contrived manipulation of the data resulted in artificially high rates of projected traffic and revenue growth that, in fact,

²⁴ PEPCO cites the electronic workpaper (GRSTCOAL.WK4) that contains the details of this "incremental" traffic, including anticipated origins and destinations, but PEPCO apparently either did not carefully review the file or simply misread it.

have nothing whatsoever to do with anticipated *future* growth in tonnages and revenues potentially available to the stand-alone railroad.

When PEPCO's gerrymandered comparisons are exposed, it becomes apparent that there is no inconsistency between CSXT's evidence in the two proceedings. All that PEPCO's comparison shows is that: (1) CSXT's Control Proceeding traffic studies project that CSXT will handle about half of Conrail's MGA-origin Baltimore coal traffic upon approval of the proposed acquisition, while CSXT's SAC evidence excluded all MGA-origin traffic from consideration; and (2) CSXT's evidence in the Rate Case projected somewhat lower rates of growth in export coal traffic levels and revenues than the rival projections put forward by PEPCO. Both of these issues are fully addressed by the evidence presented in the Rate Case, and PEPCO's bogus comparison of "projections" in the two proceedings adds nothing to the analysis except confusion and obfuscation.

If PEPCO truly desires to introduce in its Rate Case rebuttal the same kind of invalid comparisons that it has presented in its Highly Confidential Appendix, it does not need access to confidential information in the Control Proceeding in order to do so. The fact that CSXT projects it will be able to attract 4.8 million tons of "base year" MGA-origin Baltimore coal traffic on Day 1 of the proposed Conrail acquisition is fully documented in the publicly filed Application. And CSXT is willing to stipulate publicly that the 400,000 tons of "incremental" coal traffic cited by PEPCO is projected to move to Newport News, not Baltimore. With this public information, PEPCO will be able to include in its Rate Case rebuttal precisely the same arguments it has advanced here.

Apart from its erroneous assertion of claimed inconsistencies in CSXT's traffic and revenue projections in the two proceedings, PEPCO has offered no explanation for its request for permission to use confidential workpapers underlying *all* of the traffic and revenue forecasts of *both* CSXT and NS for *all* eastern export coal traffic. As noted, the projections in the Control Proceeding are designed to assess only transaction-related impacts on "base year" traffic and revenue levels, while the projections in the Rate Case are designed to estimate future traffic and revenue growth without regard to the proposed Conrail acquisition. The former are not even remotely relevant to the latter.²⁵ PEPCO's request for permission to use confidential information related to CSXT and NS forecasted future export coal and MGA-origin coal traffic should therefore be denied.

B. "Base Year" Actual Traffic Levels and Revenues

In addition to requesting access to the acquisition-related traffic and revenue forecasts of CSX and NS, PEPCO seeks permission to use from the Control Proceeding record highly confidential data reflecting *actual* historic "base year" (1995) traffic volumes and revenues for all MGA-origin Baltimore coal traffic and all eastern export coal traffic generally. PEPCO seeks this highly sensitive data for all three Applicant carriers. Petition at 8. Nowhere in its Petition does PEPCO offer to explain why these requested data are relevant or necessary to its rebuttal in the Rate Case, or even how PEPCO intends to use the data.

²⁵ NS's acquisition-related traffic and revenue projections are, if anything, even less relevant to the Rate Case, as PEPCO did not attempt to include NS traffic in its proposed stand-alone railroad traffic group, and surely could not attempt to do so for the first time on rebuttal. PEPCO has offered no explanation for its request for NS projection information.

PEPCO's silence on this issue would itself furnish ample ground for the Board to deny its request, but there are affirmative reasons for doing so as well.²⁶

The requested "base year" traffic and revenue data of CSXT and NS have no conceivable relevance to the Rate Case or to PEPCO's upcoming rebuttal filing. PEPCO does not need access to 1995 CSXT traffic and revenue data because it already possesses, as a result of discovery in the Rate Case, CSXT's 100 percent traffic and revenue tapes for the year 1996. Similarly, NS traffic and revenue data have no bearing on the Rate Case because PEPCO did not attempt to include NS traffic in its stand-alone shipper group, and clearly could not do so for the first time on rebuttal. For these reasons, PEPCO's request for actual 1995 traffic and revenue data for CSXT and NS should be rejected out of hand.

CSXT submits that PEPCO's Petition, and in particular its contrived comparison of CSXT's "projections" in the two proceedings, is in reality a carefully disguised attempt to secure discovery of *Conrail's* actual 1995 traffic and revenue data, primarily for the MGA-origin Baltimore coal movements PEPCO is seeking to include in its SAC traffic grouping in the Rate Case. As PEPCO itself notes, CSXT's recent reply evidence in the Rate Case challenged PEPCO's proposed inclusion of the MGA-origin traffic, in part on the ground that PEPCO had deliberately used unreliable and inaccurate data that significantly overstated the actual revenues Conrail earned from this traffic and had not even attempted to obtain accurate

²⁶ To the extent PEPCO seeks actual "base year" traffic and revenue data in order to calculate CSXT and NS "projections," its request should be denied for the reasons stated in the previous section.

revenue information during the discovery phase of the Rate Case. Petition at 5-6.²⁷ PEPCO's Petition constitutes an improper attempt belatedly to obtain discovery of Conrail's actual revenues.

The Board should firmly reject any such effort to circumvent the discovery rules and expedited procedural schedule in the Rate Case. As PEPCO and its counsel were well aware, the Board's rules authorize parties to request discovery from third parties.²⁸ In fact, PEPCO's counsel successfully invoked these rules in a prior rate case involving CSXT. *L&N, supra*. PEPCO (but not CSXT) thus had every opportunity during the discovery phase of the Rate Case to seek discovery of actual Conrail traffic and revenue data.²⁹ Having failed even to attempt to avail itself of that opportunity, PEPCO cannot properly do so now, long after the prescribed discovery cut-off date in the Rate Case and after CSXT has already submitted its one and only scheduled evidentiary submission on stand-alone cost issues.

²⁷ See No. 41989, Reply Statement at 24-29; Reply V.S. Bowen at 22-31; Reply V.S. Listwak at 3, 10-13.

²⁸ See 49 U.S.C. § 721(c); *L&N, supra* (granting in part complaining coal shipper's request for third-party discovery of traffic and revenue data from a non-defendant railroad); *Metropolitan Edison Co. v. Conrail*, 5 I.C.C.2d 385, 409 (1989) (confirming ICC's authority to grant third-party discovery in coal rate cases).

²⁹ Because initial designation of the SAC traffic group is the exclusive prerogative of the complaining shipper, only PEPCO could have known prior to the close of discovery and submission of opening evidence in the Rate Case that Conrail traffic and revenues might be relevant to the case. CSXT thus had no reason to seek discovery from Conrail during the period allowed for discovery. This is particularly so given that, prior to PEPCO's opening submission on May 5, 1997, no complaining shipper had ever even attempted to include non-defendant traffic in a stand-alone shipper group.

Allowing such tardy discovery, through the artifice of the requested modification of the Protective Order in the Control Proceeding, would be additionally improper because it would deprive CSXT of its right to respond to PEPCO's stand-alone cost evidence. If PEPCO had followed correct procedures by obtaining during the discovery phase the Conrail traffic and revenue data it now seeks permission to use and introducing such data in its opening SAC evidence, CSXT would have had a fair opportunity on reply to respond to PEPCO's use of the data and to correct any errors committed by PEPCO. CSXT would be denied this opportunity if PEPCO is permitted to obtain otherwise prohibited discovery now and to introduce the new material for the first time on rebuttal.

One example will illustrate CSXT's concerns. PEPCO no doubt seeks access to Conrail's actual 1995 traffic and revenue data for the MGA-origin Baltimore coal traffic in order to rebut CSXT's (correct) claim that the Waybill Sample revenue data previously relied on by PEPCO are significantly overstated. It is just as likely that, if successful in this regard, PEPCO would attempt on rebuttal to substitute for the Waybill Sample data it used on opening the actual revenues reported in Conrail's 1995 traffic and revenue tapes. But this would overlook the fact that the "actual" revenues reported in Conrail's traffic tapes, like those of other railroads (including CSXT), do *not* reflect contractually authorized refunds, rebates or similar payments to contract shippers.³⁰ To determine the correct actual revenues associated

³⁰ See No. 41939, Reply Statement at 25, 40-42; Reply V.S. Klick/Baranowski at 30-31, 36-37; Reply V.S. Bowen at 35-36; Reply V.S. Listwak at 10-11. See generally ICC Ex Parte No. 399, *Cost Recovery Percentage* (served November 1, 1993), at 2 ("[r]evenue in the waybill sample is overstated because the actual rates paid by shippers utilizing contracts are, in many instances, lower than the rates shown on the waybill"); *Modification to the General*

(continued...)

with the traffic included in the SAC analysis, the revenues reported in the waybill records must be reduced to reflect these payments, which are often substantial in the case of coal traffic. Indeed, a Conrail official testified in the Rate Case that the revenues for the MGA-origin coal traffic reported in the Waybill Sample are significantly overstated in large measure *because of* the existence of substantial contract refunds that are not reflected in the Waybill Sample data.³¹

PEPCO cannot be trusted to bring these deficiencies to the Board's attention on rebuttal. After all, in its opening evidence in the Rate Case, PEPCO made no attempt to adjust the revenues reported in CSXT's traffic tapes to take account of contract refund payments, even though CSXT had informed PEPCO during discovery that the traffic tapes did not reflect such payments and even though CSXT furnished PEPCO copies of the relevant coal transportation contracts and refund data. PEPCO simply ignored this relevant information. Indeed, PEPCO did not even attempt to adjust the SAC revenues to reflect substantial refunds that CSXT paid *to PEPCO* itself for coal shipments (included in the SAC traffic group) to certain PEPCO plants.³²

Similarly, if PEPCO were permitted to obtain and use on rebuttal in the Rate Case the actual Conrail traffic and revenue data it seeks permission to use from the Control Proceeding, CSXT would be afforded no opportunity to expose these kinds of errors. What is

³⁰(...continued)

Purpose Costing System -- GPCS, 5 I.C.C.2d 880, 889 n.16 (1989).

³¹ See No. 41989, Reply V.S. Listwak at 10-11.

³² See No. 41989, Reply Statement at 40-41; Reply V.S. Klick/Baranowski at 36-37; Reply V.S. Bowen at 35-36.

more, in the case of the contract refund payments, CSXT would be handicapped even if it were afforded a right to submit additional evidence responding to PEPCO's rebuttal. Like PEPCO, CSXT has no right of discovery against Conrail at this late stage, at least in the absence of a Board order reopening discovery in the Rate Case. CSXT thus would not have the tools to adjust the revenues in Conrail's traffic tapes to reflect contract refund payments to shippers.

PEPCO's Petition is fundamentally grounded on its assertions that (1) "the information PEPCO seeks to utilize from the Control Proceeding has only become available since the filing of the Control Application on June 23, 1997," and (2) "most of the information involved was available to CSXT prior to the filing of its Reply Evidence on July 11, 1997" and could have been used by CSXT. Petition at 9. As the prior discussion demonstrates, neither assertion is true with respect to the actual 1995 traffic and revenue data PEPCO now seeks permission to use. The data were potentially available to PEPCO through the normal discovery process in the Rate Case. And CSXT at the time of its reply filing did not possess, and today does not possess, the relevant Conrail traffic and revenue data for use in the Rate Case. This situation is entirely the product of PEPCO's presumably deliberate, if not strategic, decision not to seek discovery of accurate traffic and revenue data from Conrail but to rely instead on the inflated revenues reported in the Waybill Sample.

The Board should not relieve PEPCO of the consequences of its own litigation decisions, particularly when doing so would prejudice CSXT's right to a fair opportunity to respond to PEPCO's SAC evidence. PEPCO's request for permission to use actual "base year" traffic and revenue data of CSXT, NS and Conrail should therefore be denied.

II. NEITHER THE *L&N* DECISION NOR APPLICABLE CASE LAW SUPPORTS PEPCO'S REQUEST FOR MODIFICATION OF THE PROTECTIVE ORDER.

PEPCO cites but one solitary case (*L&N, supra*) in support of its request for modification of the Protective Order in the Control Proceeding. Petition at 9-10. Neither it, nor any other relevant case law, supports PEPCO's position.

In *L&N, supra*, a complaining coal shipper (represented by PEPCO's current counsel) submitted, in connection with a rate dispute involving CSXT, a formal petition for third-party discovery of movement-specific traffic and revenue data from NS, a non-party to the proceeding. The railroads opposed the request, largely on the ground that non-issue traffic of a non-defendant railroad is legally irrelevant to SAC analysis. Concluding that the third-party discovery request should be denied insofar as it would have required NS to produce data directly to the complaining shipper, former Chief ALJ Cross ruled that the shipper could make use of NS traffic and revenue data that were already in the possession of the shipper's cost consultant as a result of involvement in another coal rate case involving NS. Chief Judge Cross modified the protective order in the earlier proceeding to permit such use.³³

The *L&N* decision, which appears to be the only Board (or ICC) precedent on point, actually supports CSXT's position. The key fact is that the shipper in *L&N* invoked (in part successfully) this opportunity for third-party discovery in a timely manner during the prescribed discovery phase of the proceeding, at a point when the railroad would have had an

³³ Although the shipper in *L&N* secured the right to use such non-party traffic and revenue data, it ultimately elected not to include non-party traffic in its SAC testimony.

opportunity to respond to whatever testimony the shipper submitted using the information. That is a far cry from the situation here, where PEPCO is seeking modification of the Control Proceeding Protective Order to obtain discovery that would otherwise be unavailable in the Rate Case. Nothing in *L&N* suggests that parties in PEPCO's position can skirt the procedural schedule and discovery rules in this manner

Nor does applicable judicial precedent help PEPCO. Many courts have considered requests for modification of a protective order in one proceeding to permit parties to make use of discovery materials in another collateral proceeding. Although some courts have held that modification of a protective order for these purposes may be granted only in "extraordinary circumstances" and upon a showing of "compelling need,"³⁴ others have granted such modification under a more lenient standard, on the theory that relief from the protective order would eliminate duplicative discovery and make the judicial process more efficient.³⁵ Even the decisions following the more lenient standard have authorized modification of protective orders only when the requested material would otherwise be subject to discovery in the collateral proceeding, and granting modification would simply minimize

³⁴ See, e.g., *In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139, 147 (2d Cir.), cert. denied, 484 U.S. 953 (1987).

³⁵ See, e.g., *Beckman Industries, Inc. v. International Insurance Co.*, 966 F.2d 470 (10th Cir. 1992); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775 (1st Cir. 1988), cert. denied, 488 U.S. 1020 (1989); *Wilk v. American Medical Association*, 635 F.2d 1295 (7th Cir. 1980).

discovery costs. The courts have made clear that modification of a protective order is not proper when it is sought in order to avoid discovery limitations in the collateral proceeding.³⁶

These cases are in complete harmony with *L&N* in the sense that they authorize modification of a protective order in one proceeding to permit parties to use in another collateral proceeding confidential information that would be directly discoverable in any event. That, of course, is not the situation here. Discovery in the Rate Case closed months ago, and PEPCO's current request for permission to use confidential information from the Control Proceeding in its Rate Case rebuttal filing is nothing more than an attempted end-run around the discovery limitations that the Board recently imposed in order to expedite the processing and decision of SAC rate cases. *See Expedited Procedures, supra*. Applicable precedent does not support the relief PEPCO seeks.

III. IF THE BOARD GRANTS PEPCO'S PETITION, IT SHOULD PRESCRIBE CONDITIONS TO PROTECT THE CARRIERS' RIGHTS.

PEPCO blithely asserts that granting its Petition would not harm the Applicant carriers in the Control Proceeding or CSXT in the Rate Case. Petition at 3-4. This is plainly not so. Accordingly, the Board should deny the Petition outright. If it decides instead to grant

³⁶ See, e.g., *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1108 (11th Cir. 1996) (affirming district court order denying modification of protective order to permit use of material that otherwise would not be discoverable in collateral proceeding due to expiration of discovery cut-off); *United Nuclear Corp. v. Cranford Insurance Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990); *Wilk, supra*, 635 F.2d at 1300 ("a collateral litigant has no right to obtain discovery materials that are privileged or otherwise immune from eventual involuntary discovery in the collateral litigation").

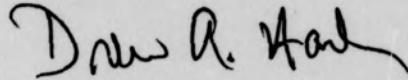
PEPCO's Petition in whole or in part, however, the Board at a minimum should impose additional safeguards to protect the railroads' legitimate interests.

The Board should describe with particularity precisely what confidential material from the Control Proceeding it may permit PEPCO to use in the Rate Case. Apart from the confidential information that PEPCO included in its Highly Confidential Appendix, PEPCO has furnished only the most general description of the confidential information it seeks permission to use in the Rate Case. Petition at 8. Given the large and expanding volume of highly sensitive data and information that have been and will continue to be generated in connection with the Control Proceeding, PEPCO should be permitted to use only the discrete information identified in its Petition and only to the extent specifically authorized by the Board. If necessary, PEPCO should be required to specify in detail the specific documents and data it seeks to use in the Rate Case.

CONCLUSION

For all of the foregoing reasons, PEPCO's Petition for modification of the Protective Order in Finance Docket No. 33388 should be denied.

Respectfully submitted,



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DATED: July 29, 1997

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

RAILROAD CONTROL APPLICATION

VOLUME 2A OF 8

CSX STATEMENTS CONCERNING
MARKET IMPACTS, COMPETITION AND SHIPPER BENEFITS
(EXHIBIT 12)

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SUMMARY OF CC&IO MARKET TRAFFIC STUDY DATA

MERGER BENEFITS DIFFERENCE BETWEEN AND 1995 AND 2000		TONS	CARLOADS	REVENUE
UTILITY-NORTH	BASE INCREMENTAL TOTAL	3,105,438 - 3,105,438	31,074 - 31,074	\$14,467,452 \$ 6,301,244 \$20,768,696
UTILITY- NORTHEAST	BASE INCREMENTAL TOTAL	9,575,424 147,920 9,723,344	97,266 1,410 98,745	\$135,355,050 \$9,121,058 \$144,476,108
UTILITY-SOUTH	BASE INCREMENTAL TOTAL	(600,000) 1,000,000 400,000	- 3,630 3,630	\$4,956 \$12,050,000 \$12,054,956
LAKE	BASE INCREMENTAL TOTAL	1,029,024 1,194,913 2,223,937	10,540 11,814 22,354	\$8,232,192 \$10,359,824 \$18,592,016
INDUSTRIAL	BASE INCREMENTAL TOTAL	1,232,318 - 1,232,318	12,736 - 12,736	\$17,861,285 - \$17,861,285
COGEN	BASE INCREMENTAL TOTAL	288,000 - 288,000	2,939 - 2,939	\$4,724,000 - \$4,724,000
EXPORT	BASE INCREMENTAL TOTAL	4,800,000 666,000 5,466,000	48,182 6,558 54,741	\$43,501,900 \$ 8,294,910 \$51,796,810
STEEL-MET COAL	BASE INCREMENTAL TOTAL	287,483 - 287,483	2,425 - 2,425	\$240,134 \$2,650,000 \$2,890,134
STEEL-COKE	BASE INCREMENTAL TOTAL	- 381,250 381,250	- 5,083 5,083	- \$4,664,063 \$4,664,063
STEEL-IRON ORE	BASE INCREMENTAL TOTAL	(372,910) 850,000 477,090	(3,729) 8,500 4,771	-\$2,740,889 \$4,706,500 \$1,965,612
ALK STUDY ADDITIONS	BASE INCREMENTAL TOTAL	1,279,314 - 1,279,314	14,757 - 14,757	\$6,890,470 -\$5,606,000 \$1,284,470
TOTAL CC&IO	BASE INCREMENTAL TOTAL	20,123,481 4,240,083 24,864,174	210,202 37,065 253,235	\$228,536,550 \$ 52,541,599 \$281,078,149

CERTIFICATE OF SERVICE

I, Drew A. Harker, hereby certify that redacted copies of the foregoing "REPLY OF CSX CORPORATION AND CSX TRANSPORTATION, INC. TO POTOMAC ELECTRIC POWER COMPANY'S PETITION TO MODIFY PROTECTIVE ORDER IN FINANCE DOCKET NO. 33388" were served this 29th day of July 1997 on all parties that have appeared in Finance Docket No. 33388, by first-class mail, postage prepaid, or by more expeditious means, as listed on the Service List.

Drew A. Harker

Drew A. Harker