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July 16, 1997

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
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 -- Transfer of Railroad Line by Norfolk Southern Railway Company to CSX Transportation, Inc.

Dear Secretary Williams:

Enclosed you will find an original and 25 copies of the Notice of Appearance of Elgin, Joliet & Eastern Railway Company and Bessemer and Lake Erie Railroad Company. Also enclosed is a 3.5 inch diskette containing the filing in WordPerfect 5.1.

Please contact the undersigned if you have any questions regarding this matter.

Respectfully submitted,

Edward J. Fishman

Enclosures

cc: All Parties on Certificate of Service

180651

EJE-1
BLE-1

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 --
TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN RAILWAY COMPANY TO CSX TRANSPORTATION, INC.

NOTICE OF APPEARANCE OF
ELGIN, JOLIET & EASTERN RAILWAY COMPANY AND
BESSEMER AND LAKE ERIE RAILROAD COMPANY

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Dated: July 16, 1997

BEFORE THE
SURFACE TRANSPORTATION BOARD

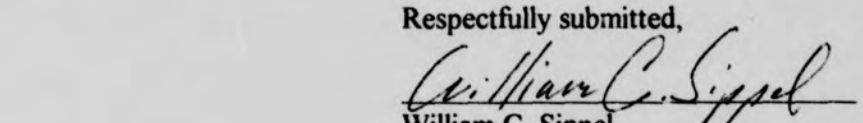
Finance Docket No. 33388

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 --
TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN RAILWAY COMPANY TO CSX TRANSPORTATION, INC.

NOTICE OF APPEARANCE OF
ELGIN, JOLIET & EASTERN RAILWAY COMPANY AND
BESSEMER AND LAKE ERIE RAILROAD COMPANY

Please enter the appearance in this proceeding of the below-named attorneys on behalf of Elgin, Joliet & Eastern Railway Company ("EJ&E") and Bessemer and Lake Erie Railroad Company ("B&LE") to participate in this proceeding as parties of record. Accordingly, please place the named attorneys, at the address provided, on the service list to receive all pleadings and decisions in this proceeding.

Respectfully submitted,



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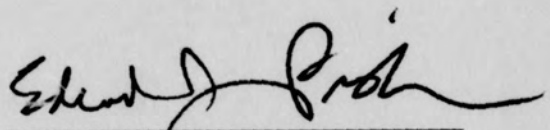

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July 15, 1997

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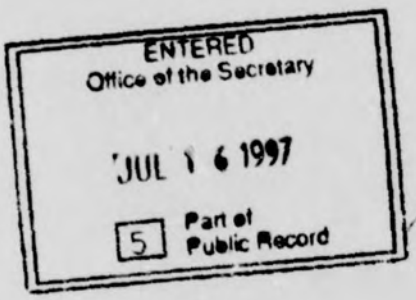
Re: CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation FD 33388

Dear Secretary Williams:

Enclosed is Conrail's Reply To Motion To Compel of Atlantic City Electric Company, Delmarva Power & Light Company, and The Ohio Valley Coal Company.



Respectfully submitted,

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cc: Restricted Service List
Hon. Jacob Leventhal

CR-3

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

CONRAIL'S REPLY TO MOTION TO COMPEL OF ATLANTIC CITY ELECTRIC COMPANY, DELMARVA POWER & LIGHT COMPANY, AND THE OHIO VALLEY COAL COMPANY

Pursuant to Discovery Guidelines ¶ 18, Conrail Inc. and Consolidated Rail Corporation (collectively "Conrail") oppose the motion to compel filed by Atlantic City Electric Company, et al. ("ACE" or "movants") (ACE, et al. -5) ("Motion") concerning two of ACE's document requests.

INTRODUCTION AND SUMMARY

Movants seek to justify their request for discovery of all documents concerning 20 years of coal bids by indicating that they wish to press a coal rate case (or cases), for which this is not the proper forum.

Movants also say they seek to challenge the STB's settled "one-lump" principle explaining why vertical integration involving a rail carrier having a monopoly at origin or destination will be unlikely to have anticompetitive effects: because the monopoly carrier will presumably have priced the

service to obtain as much profit as it can while the traffic still moves. If that is not the case, the best evidence of it would come from movants themselves.

Even if movants needed the requested data to prove their theory (which they do not), movants' theory of relevance does not withstand analysis, because two of them (ACE and Ohio Valley) are not even in the situation that the "one-lump" principle addresses. The third, Delmarva, proffers some unspecified evidence, that even it terms "unique," for the proposition that the theory applies to its case. If it has such evidence, it does not need the discovery it seeks here.

Finally, even if Delmarva overcame all or the other hurdles to discovery, it cannot give any reason for discovery against Conrail, which has never been engaged in a merger and will not be doing any of the future pricing that concerns Delmarva.

In sum, movants have offered no substantial basis for undertaking the extraordinarily broad, burdensome and intrusive discovery they seek as a predicate for attacking settled principles. Nor does the case law applying those principles provide a basis for such discovery, which was not even at issue there.

The very first paragraph of the Discovery Guidelines -- which movants fail to mention -- states: "In consideration of the expedited procedural schedule governing this proceeding, all discovery requests must be tailored to be consistent with the

procedural schedule adopted in this proceeding." Yet movants' requests in issue impose extraordinarily broad, burdensome demands that have virtually no limits and are not tailored as required by the guidelines.[1] In addition to making properly tailored document requests and interrogatories, movants will be able to cross-examine every one of applicants' 42 witnesses on deposition, including a number who addressed coal marketing.

RELEVANCE

Movants seek virtually every document relating to every coal bid covering Conrail's shipments of coal in unit trains or carloads for more than 20 years. The rationales offered for imposing this burden on Conrail to find and produce such documentation -- much of it highly confidential -- are contradictory and therefore unclear. First, the letter from movants' counsel to the ALJ makes a telling concession that what movants really seek to do is to litigate over applicants' "coal rates" (Letter at 1). However, the Board has a well-known regulatory system in place to address claims of unreasonable coal

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[1]Conrail served a five-day objection in accordance with the Guidelines (¶ 16) (as to only two of the many discovery requests served thus far) because it could see no coherent theory of relevance to these sweeping requests, and hence no way that the requests could sensibly be responded to only partially. That is not to say, however, that Conrail was thereby declaring that, if faced with a properly tailored request based on a plausible rationale, Conrail would nevertheless refuse to produce "even a single document" concerning its bids for coal shipments, as movants assert (Motion at 4). In discussions before movants filed their motion, counsel for Conrail indicated that Conrail might be willing to respond to a limited request, but counsel for movants said he could not limit the request to anything other than all the documents movants requested.

rates,[2] and movants have not suggested that it has been or will be pre-empted by this merger proceeding. To the extent they seek information to present rate cases, they are in the wrong proceeding.

Second, movants' motion indicates that they seek to overturn the settled legal and economic premise for assessing the competitive impact of transactions in which one of two competing rail carriers serving the origin merges with the single carrier serving the destination, the so-called "one-lump" principle. See Western Resources, Inc. v. STB, 109 F.3d 782, 787-93 (D.C. Cir. 1997). Yet movants seek to impose the discovery burdens at issue without any logical let alone compelling showing or reason to believe that, unlike cases where others have tried, the massive discovery they seek will yield evidence warranting the Board not to apply its settled principles -- with respect to discovery, maximum rates for coal, or competitive analysis of mergers.

As to Conrail's pricing, the basic issue posed in applying the "one-lump" principle is whether Conrail has been using its position as the sole-serving rail carrier to gain all the profit it can from serving the movants. That question can only be answered by the movants themselves. Because the question is not whether Conrail abused its market position by charging too much, but whether it misjudged movants' elasticity of demand by charging too little -- such that NS or CSX could (if the proposed merger is approved) raise its rates to movants. Would movants'

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[2] Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520 (1985).

coal have been shipped if Conrail's price had been higher?[3] Movants are in the best position of anyone to know and show whether that has been the case, and they do not need discovery (let along the stunningly burdensome discovery they seek from Conrail) to do so. If they cannot make that showing from their own experience and data, then they have no substantial basis for demonstrating that the Board should be concerned about the possible effects of the transaction on future coal prices. Movants have made no such showing. Thus, they have no basis for imposing the extraordinary discovery they seek.

Even if movants' had offered to show that their rates were at risk of further increases after this transaction, the motion should be denied as to ACE and Ohio Valley. Movants contend that they need this enormous document production to challenge the accepted law concerning the lack of an anticompetitive effect on a shipper when a monopoly rail carrier serving it at origin or destination merges with one of two carriers serving the other segment of its shipments (Motion at 10-16, citing Western Resources). In fact, ACE will not be in that situation. It is served now by Conrail and will be served post-approval by NS and CSX. Similarly, the utilities served by

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[3]If movants do not have the evidence that should be in their own hands to demonstrate the premise for their stated concern -- that Conrail has not been getting all possible profit out of its bottleneck position in serving them -- they are in no position -- indeed, have no standing -- to try to develop their barren theory by fishing in Conrail's files concerning other shippers.

Ohio Valley will be served on an interline basis by CSX at origin and NS at destination.

Only Delmarva is even in a position to be affected by or to challenge the "one-lump" principle. Yet it has not offered any substantial basis for doing so, beyond what it acknowledges may be some undescribed "unique" anecdotal circumstances (Motion at 9). It surely cannot justify wholesale discovery of all other shippers' files, or even for years earlier than the base year of 1995 as to Delmarva itself.

Movants err in suggesting that the court's decision in Western Resources sanctions the vast fishing expedition they wish to undertake. It did not involve discovery at all. Nor did it hold that a shipper could not try to make its case with evidence it had concerning itself or particular shippers. It merely upheld the STB's conclusion that the particular evidence proffered there had been answered by the applicants and did not provide a basis for questioning the "one-lump" principle. Id. at 790-93.

ERRONEOUS PREMISES AS TO RELEVANCE

The motion is also based on erroneous assumptions about the positions of Conrail and the other parties concerning the relevance of other pending discovery of movants which is said to be a premise for this coal bid discovery. Thus, movants assert that applicants "conceded" the relevance of interrogatories 1-6, because they have not filed a five-day objection (Motion at 5, 14), which the Guidelines required only if they had concluded

they would be producing no documents or information at all (¶ 16). In fact, while it will be providing a partial response, Conrail will be vigorously objecting to the relevance of those requests as framed. Movants also assert that Conrail (and CSX) voiced no objection to Document Request 3, seeking 100% traffic tapes for 20 years (Motion at 15-16, 18). Again, while making a partial response, Conrail will be strongly objecting to some or all of this request. Thus, it may be premature to try to resolve this motion before applicants have made the responses due July 18.

CONRAIL

Movants' case for the extraordinary amount of discovery they seek is particularly weak as to Conrail. First, movants' rationale for going back to 1978 is that they seek evidence that prior mergers involving applicants have had an anticompetitive effect on their shippers (Motion at 17-18) -- a proposition that will be exceedingly difficult to test from such historically dated evidence.[4] Conrail has not been involved in any mergers. Thus, there is no basis for discovery to Conrail beyond the base year.

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[4]Movants' justification for seeking discovery back to 1978 ignores the significant regulatory changes that make much of that history essentially irrelevant. Thus, prior to the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980), rates were set in rate bureaus and bilateral contracts were unlawful. See H. Rep. No. 96-1430 at 98-101, 113-14. In response to that Act the ICC has also changed its approach to regulation of coal rates. Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520 (1985). Thus, the further back before the base year one goes the less relevant pricing history is likely to be.

Second, the proper focus of the analysis must be on the likely pricing practices and policies of CSX and NS, who will be setting the prices affecting movants in the future if the transaction is approved. Conrail's past pricing practices may have historical interest, but are not sufficiently relevant to warrant the extensive, burdensome discovery movants seek.

BURDEN

Coal constitutes one of Conrail's most important categories of business and the request covers huge numbers of Conrail's coal shipments for 20 years. Currently, Conrail's coal marketing group includes four managers and 12 analysts/account executives, each of whom has substantial current files; current coal contracts are kept in separate, extensive files. These files include hundreds of contracts and thousands of documents relating to them. not only bids and related documents, but other documents relating to matters other than bids, such as day-to-day service issues. Some expired or superseded contracts and documents relating to them are also kept. Conrail estimates that there are literally thousands of files possibly containing responsive documents that would require searching.

CONFIDENTIALITY

Much of the documentation covered by movants' request will include highly confidential information about particular other shippers, who have not consented to disclosure of that information. Such information is protected not only by

confidentiality provisions in agreements between the utility shipper and the railroad, but also by statute. 49 U.S.C. § 11904. There is a serious question now pending before the Board as to whether the Board or an ALJ can sanction production of such documents, even under a stringent protective order. Grain Land Coop. v. Canadian Pac. Ltd., Docket No. 41687, served June 9, 1997, appeal pending. While redaction of the shipper's identity may sometimes permit production, that is not likely to be possible as to the type of documents sought here, and would in any event greatly add to the time and burden of production.

CONCLUSION

The motion to compel responses to ACE, et al., should be denied.

Respectfully submitted,

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Counsel for Conrail Inc. and
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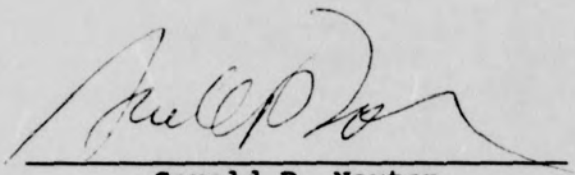
July 15, 1997

CERTIFICATE OF SERVICE

I, Gerald P. Norton, certify that, on this 15th day of July, 1997, I caused a copy of the foregoing document to be served by hand and/or facsimile on Michael F. McBride, counsel for Atlantic City Electric Company, Delmarva Power & Light Company, and The Ohio Valley Coal Company, at LeBoeuf, Lamb, Greene & MacRae L.L.P., 1875 Connecticut Avenue, N.W., Washington, D.C. 20009, and by first class mail, postage prepaid, or by a more expeditious manner of delivery on all parties appearing on the restricted service list established pursuant to paragraph 3 of the Discovery Guidelines in Finance Docket No. 33388, and on

Hon. Jacob Leventhal
Administrative Law Judge
Federal Energy Regulatory Commission
888 First Street, N.W.
Washington, D.C. 20426



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July 15, 1997

VIA FACSIMILE

The Honorable Jacob Leventhal
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: Norfolk Southern's Response to ACE et al.-5
STB Finance Docket 33388

Dear Judge Leventhal:

Enclosed please find Norfolk Southern's Response to Atlantic City Electric Company, Delmarva Power & Light Company and The Ohio Valley Coal Company's Motion to Compel Discovery ("ACE et al.-5").

Thank you.

Respectfully submitted,

Richard A. Allen

Richard A. Allen

cc: Vernon A. Williams, Secretary
Surface Transportation Board (w/encl.)

Persons on the Restricted Service List (w/encl.)

NS-8

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
--CONTROL AND OPERATING LEASES/AGREEMENTS--
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

STB FINANCE DOCKET NO. 33388

NORFOLK SOUTHERN'S RESPONSE TO ATLANTIC CITY ELECTRIC COMPANY, DELMARVA POWER & LIGHT COMPANY AND THE OHIO VALLEY COAL COMPANY'S MOTION TO COMPEL DISCOVERY

NS[1/] hereby replies in opposition to the motion to compel responses to discovery filed on July 14, 1997 (ACE, et al.-5) by Atlantic City Electric Company, Delmarva Power & Light Company and The Ohio Valley Coal Company ("ACE, et al."). The motion of ACE, et al. seeks to compel responses to extraordinarily broad and burdensome requests for documents which ACE, et al. say they want in an effort to disprove basic economic propositions that the STB, the ICC and the courts have endorsed and applied in all railroad consolidations in recent years. The motion to compel is completely unjustified and should be denied.

In support thereof NS states as follows:

1/ "NS" refers collectively to Norfolk Southern Corporation and Norfolk Southern Railway Company.

I. ACE ET AL. MISSTATE NS'S POSITION.

It is important to make clear at the outset that ACE, et al. have entirely misstated NS's position when they assert (ACE, et al. -5 at 4) that "Applicants are unwilling to provide even a single document relating to their bids to transport coal . . . and . . . Norfolk Southern is unwilling to provide any documents concerning its traffic." Contrary to ACE, et al., NS's objections to certain of ACE, et al.'s extremely broad document requests (sought to establish economic theories that have been squarely and repeatedly rejected) does not mean that NS is unwilling to provide any documents within the universe of documents requested that would be relevant to issues that might genuinely be in the case.

The document requests to which NS objects do not simply seek documents relating to the coal traffic of ACE, et al. or to bids by NS or the other Applicants for such traffic. Instead, Document Requests No. 1 and 2 seek "all documents . . . concerning bids for the carriage of coal by unit train or trainload movement, to every destination served by Norfolk Southern at which 100,000 tons or more of coal was consumed," and they seek all such documents and related documents for a 19-year period, 1978 through 1997 (emphasis supplied).[2/] Similarly, Document Request No. 3 seeks NS's "100% traffic tapes for the years 1978 through second quarter 1997."

NS would likely have no objection to a request for documents concerning bids for coal traffic to or from the locations of ACE, et al., at least if the requesters provided a reasonable argument for the relevancy of bids and placed reasonable limits on the time period

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[2/] This request requires NS to review documents relating to the several hundred NS coal-receiving customers, some of whom receive less than 100,000 tons annually.

covered by the request. Similarly, although the traffic studies and market impact analyses submitted by NS in the primary application are based on 1995 traffic information reflected in the STB's waybill sample and not upon 100% traffic tapes, NS would certainly consider a request for NS's 100% traffic tapes for 1995, the year which the Board has approved as the base year for the application. See CSX/NS-Conrail, Finance Docket No. 33388, Decision No. 2, served April 21, 1997, at 2. But the document requests to which NS objects are not reasonably confined to the traffic of concern to ACE, et al. or to traffic that moved in the year that the Board has declared to be the base year for purposes of assessing the application. Instead, they are a virtually limitless demand for information going back 19 years.

II. LIBERAL DISCOVERY RULES ARE NOT AN EXCUSE FOR ABUSE.

In support of their requests, ACE, et al. invoke the general principle that the scope of discovery is broad and should be liberally allowed. ACE, et al.-5 at 6-8. This general principle, however, is not a license for litigants to impose unreasonable and extremely burdensome demands on other parties in pursuit of the most tenuous claims. As the Supreme Court aptly stated in another case involving complex regulatory issues:

> The potential for abuse of the liberal discovery provisions of the federal rules may likewise exist in this type of case to a greater extent than in other litigation. . . . To the extent [the discovery] process produces relevant evidence which is useful in determining the merits of the claims asserted by the parties, it bears the imprimatur of the Federal Rules of Civil Procedure and of the many cases liberally interpreting them. But to the extent that it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975).

The STB and its predecessor, the Interstate Commerce Commission (ICC), have recognized this potential for abuse of the discovery rules, and they have not hesitated to bar or limit far reaching discovery demands in very similar circumstances. Recently, for example, the Board denied the discovery requests of two shippers in a coal rate case for the internal costing systems of the defendant railroads. The Board observed that the need to complete such cases within 16 months "requires limits on what ordinarily would be broad discovery," and it concluded that the railroads' own costing systems "do not appear to be necessary for an evaluation of" the cost issues in the case. STB Docket No. 41989, Potomac Electric Power Company v. CSX Transportation, Inc., 1997 STB LEXIS 121, *4, served May 27, 1997. Similarly, in another rate reasonableness case, the ICC observed that it would "not sanction fishing expeditions for all of a carrier's movements." Westinghouse Electric Corp. v. Alton & S. Ry. et al., 1 I.C.C.2d 182, 184 (1984).

The same considerations apply in this case and the same conclusions are warranted with regard to the document requests at issue. Under the Board's procedural schedule, this case must be completed in less than 12 months from the filing of the primary application, and the desire of ACE, et al. to disprove firmly established economic propositions does not justify conscripting large numbers of other people to spend weeks of their time searching through 19 years of files to that end.

III. THE REQUESTED DOCUMENTS ARE NOT REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE.

There is no merit to ACE, et al.'s contention that the requested documents are

discoverable because they might disprove the "one lump" theory adopted and applied by the Board and the ICC in railroad consolidation cases. The theory merely establishes a presumption, and the Board's and the court's articulation of that theory provides parties like ACE, et al. ample opportunity to show that the presumption does not apply to their particular circumstances. But ACE, et al. are not seeking information regarding their particular circumstances and movements that might be relevant to overcoming the presumption as to them. Instead, they are seeking information as to all coal shippers in order to disprove the validity of the theory itself and the presumption embodied in it. For this there is no warrant.

Few economic principles relevant to railroad consolidations have become more firmly settled than what has come to be termed the "one lump" theory. It has been endorsed and applied by the ICC and the STB in every railroad consolidation in recent years,[3] and was

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[3] STB Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company - Control and Merger - Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Decision No. 44, served August 12, 1996, slip op. at 191 (denying all relief requested by International Paper Company which had argued, in part, that the one lump theory did not apply to certain movements); ICC Finance Docket No. 32549, Burlington Northern Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, ("BNSF"), Decision No. 42, served November 16, 1995, 1995 ICC LEXIS 291 *6-*7 (affirming in relevant part Decision No. 38); BNSF, Decision No. 38, served August 23, 1995, slip op. at 70-79 (citing and discussing CSX Corp. - Control - American Commercial Lines, Inc., 2 I.C.C.2d 490, 572-73 (1984); Norfolk Southern Corp. - Control - North American Van Lines, Inc., 1 I.C.C.2d 842 (1985); CSX Corp. - Control - Chessie and Seaboard C.L.I., 363 I.C.C. 518, 567-573 (1980); Union Pacific - Control - Missouri Pacific; Western Pacific, 366 I.C.C. 462, 533-546 (1982); Chicago, Milwaukee, St. Paul and Pacific Railroad Company -- Reorganization -- Acquisition by Grand Truck Corporation, 2 I.C.C.2d 427, 454-456 (1985); ICC Finance Docket No. 32133, Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company - Control - Chicago and North Western Transportation Company and Chicago and North Western Railway Company, served March 7, 1995, slip op. at 87-89; Union Pacific Corp., et al. - Control - Missouri-Kansas-Texas

squarely approved by the United States Court of Appeals for the District of Columbia Circuit in affirming the ICC's decision approving the merger of the Burlington Northern and Santa Fe Railroads. Western Resources, Inc. v. Surface Transportation Board, 109 F.3d 782 (D.C. Cir. 1997). In all of these cases, the ICC, the STB and the courts have rejected arguments and evidence proffered against the theory.

Despite the views of ACE, et al. and their consultants to the contrary, the basic proposition underlying the theory is straightforward and unexceptionable. It is simply this: that railroads (like any enterprise) will tend (i.e., may be presumed) to attempt to derive maximum advantage from circumstances in which they are the only railroad serving a location. The theory does not say that railroads will always do so. It recognizes that there may be particular circumstances causing railroads not to do so (and thereby permitting the shipper at the location to benefit from competition between downstream carriers. It merely presumes that, in normal circumstances, railroads will seek to maximize their economic advantages. As the ICC stated in BNSF, a shipper may rebut that presumption by showing that two circumstances exist:

> First, it must show that, prior to the merger, the benefits of origin competition flowed through to the utility and were not captured by the destination monopoly carrier. Second, if it is established the benefits of origin competition are in fact passed on to the utility, there must be an additional showing that such a competitive flow-through will be significantly curtailed by the merger.

ICC Finance Docket No. 32549, Burlington Northern Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and The Atchison, Topeka

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Company, et al., 4 I.C.C.2d 409, 476 (1988)).

and Santa Fe Railway Company, Decision No. 38, served August 23, 1995, slip op. at 71. See also, Western Resources, 109 F.3d at 787-88.

ACE et al. freely acknowledge that Document Requests Nos. 1, 2 and 3 are not intended to adduce evidence that the one lump theory's presumption does not apply in their particular circumstances,[4] but is instead intended to adduce evidence that the theory itself and its presumption is not valid (and thus, presumably, to try to show that railroads do not generally try to maximize their economic advantages). The mere fact that ACE, et al. may wish to adduce evidence in an effort to disprove the theory and its presumption, however, does not entitle them to impose burdensome discovery demands on other parties to that end. Parties cannot burden administrative proceedings by endlessly relitigating established propositions.

Furthermore, ACE, et al. are wrong in contending that the STB, and the Court in Western Resources, have precluded them from attempting to rebut the presumption in their particular circumstances. (Motion to Compel at 12-13). In that case, the ICC and the Court merely concluded that the particular shippers in that case had not done so with the evidence they adduced there. There is nothing in the ICC or courts' decisions suggesting that other parties have no reasonable opportunity to rebut the presumption in their cases.

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[4] To the extent ACE et al. wish to try to show that the presumption does not apply to their particular circumstances (as Delmarva Power & Light hints at page 9 of the Motion to compel with its reference to unspecified "reasons perhaps unique to Delmarva"), they are free to do so, and Applicants will address any such contentions when and if they are made. ACE et al. are also entitled to discover evidence that would be relevant to any such contentions.

IV. THE BURDENS OF PRODUCTION ARE UNREASONABLE AND FAR OUTWEIGH THE MARGINAL USEFULNESS OF THE REQUESTED INFORMATION.

The Surface Transportation Board and its predecessor have recognized that discovery should not be permitted when the burden of producing the requested material outweighs the marginal benefit of the material to the requesting party. See, e.g., The Bridgeport and Port Jefferson Steamboat Co., Extension -- Connecticut and New York Points (New York, NY), No. W-271 (Sub-No. 4) 1987 ICC LEXIS 489 at *7-*8 (January 5, 1987) ("Even in an 'age of discovery run riot,' we are not required to allow a 'dragnet, expensive exercise of discovery' upon demand. . . . Here, the burden of production of the requested material on applicant would be great and the benefit to be derived from ordering production is doubtful. The motion to compel will be denied."). Cf. CSX/NS-Conrail, Finance Docket No. 33388, Decision No. 7, served May 30, 1997, slip op. at 10-11 (granting Applicants' request to provide only an abbreviated listing of Applicants' officers otherwise required to be provided under the Board's regulations, as providing a complete list would be burdensome and of little or no value).

Courts, too, have recognized this principle in applying Rule 26 of the Federal Rules of Civil Procedure. See, e.g., Aramburu v. The Boeing Co., 885 F. Supp. 1434, 1444-1445 (D. Kan. 1995) (sustaining objection to document production because the limited value of the requested material was disproportionate to the substantial burden of producing it). Moreover, it is well established that limiting discovery is appropriate when the requesting party's needs can be met by more convenient, less burdensome, or less expensive means. See Fed. R. Civ. P. 26(b)(1); Leyh v. Modicon, Inc., 881 F. Supp. 420, 424 (S.D. Ind.

1995) (the federal rules "give the federal courts ample power and flexibility to prevent or restrict discovery that is obtainable from some other source that is more convenient, less burdensome, or less expensive, or where the burden or expense of the proposed discovery outweighs its likely benefits"); Public Service Enterprise Group Inc. v. Philadelphia Electric Co., 130 F.R.D. 543, 551 (D.N.J. 1990) (criticizing the defendant's "blunderbuss discovery demands" which do not recognize that a "substantial core" of information is already available).

The volume of documents conceivably encompassed by ACE, et al.'s Document Requests 1 and 2 is simply enormous -- over 90 file cabinets -- which could take over 800 man-hours to review for responsiveness alone. These documents are technical in nature, and any reviewing process would require the participation of NS coal marketing personnel who are otherwise fully occupied in running the railroad. As to Document Request No. 3, gathering responsive information could take over 1,000 man-hours.

Even if the one lump theory was open to attempted refutation, much of the information and documents sought by ACE, et al. would be of negligible probative value. First, it is difficult to see how what railroads had bid for particular movements would help prove or disprove the theory. Furthermore, the significance of what railroads have bid for different movements over the past 19 years would be affected by the numerous regulatory changes since 1978 affecting the regulatory environment in which railroad operates, including the passage of the Staggers Act in 1980 and the development of the coal rate guidelines.

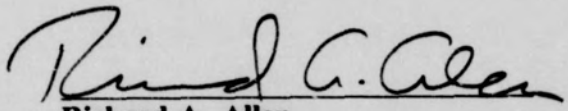
ACE, et al.'s offer to rummage through NS' files is clearly unacceptable. These files almost certainly contain information not responsive to the requests, not relevant to the

proceeding or protected by privileges. These files further contain highly sensitive shipper information which NS has an obligation to protect under 49 U.S.C. § 11904 (prohibiting the disclosure of certain information to a person other than the shipper or consignee without the consent of the shipper or consignee). See, e.g., STB Docket No. 41687, Grain Land Coop v. Canadian Pacific Limited and Soo Line Railroad Company d/b/a/ CP Rail System, served June 9, 1997 (Leventhal, J.), holding that neither the Board nor the Administrative Law Judge has the jurisdiction to require that information protected by Section 11904 to be released.

CONCLUSION

The motion of ACE et al. to compel responses to discovery should be denied.

Respectfully submitted,



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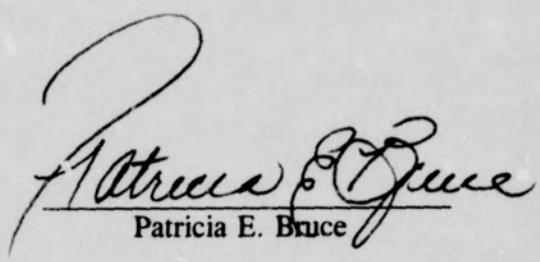
July 15, 1997

CERTIFICATE OF SERVICE

I, Patricia E. Bruce, certify that on July 15, 1997 I caused to be served by facsimile service, a true and correct copy of the foregoing NS-8, Norfolk Southern's Reply to Atlantic City Electric Company, Delmarva Power & Light Company and The Ohio Valley Coal Company's Motion to Compel Discovery (ACE, et al.-5), on all parties that have submitted to the Applicants a Request to be Placed on the Restricted Service List in STB Finance Docket No. 33388 and by facsimile 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



Patricia E. Bruce

Dated: July 15, 1997

STB FD 33388 7-15-97 D 180633

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July 15, 1997

VIA HAND DELIVERY

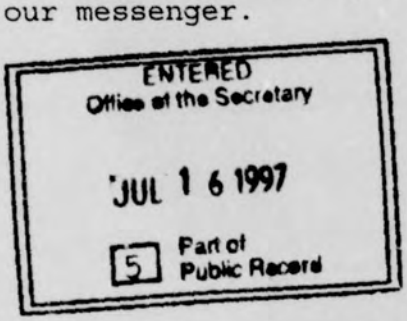
Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Seventh Floor
Washington, D.C. 20423-0001

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 are the original and 25 copies of CSX's Response in Opposition to the Motion of Atlantic City Electric Company, et al. to Compel Responses to Discovery for filing in the above-referenced proceeding. Also enclosed is a 3.5" diskette containing the document in WordPerfect format.

Please date stamp and return the enclosed copy via our messenger.



Very truly yours

Drew A. Harker

Drew A. Harker

Counsel for CSX Corporation
and CSX Transportation, Inc.

Enclosures
cc (w/Enclosure): Restricted Service List

ARNOLD & PORTER
555 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004-1202
(202) 942-5000
FACSIMILE (202) 942-5999

NEW YORK
DENVER
LOS ANGELES
LONDON

DREW A. HARKER
(202) 942-5022

July 15, 1997

VIA FACSIMILE AND HAND DELIVERY

The Honorable Jacob Leventhal
Presiding Administrative Law Judge
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: STB Finance Docket No. 33388

Dear Judge Leventhal:

Pursuant to Paragraph 18 of the Discovery Guidelines adopted in Decision No. 10 on June 26, 1997, enclosed please find CSX's Response in Opposition to the Motion of Atlantic City Electric Company, et al. to Compel Responses to Discovery.

Please let the undersigned know if Your Honor has any questions.

Respectfully,

Drew A. Harker

Drew A. Harker

Counsel for CSX Corporation
and CSX Transportation, Inc.

Enclosure

cc (w/enclosures): Restricted Service List
Vernon A. Williams, Secretary
Surface Transportation Board

CSX-10

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC. AND
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
--CONTROL AND OPERATING LEASES/AGREEMENTS--
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

CSX'S RESPONSE IN OPPOSITION TO THE MOTION OF ATLANTIC CITY ELECTRIC COMPANY, DELMARVA POWER AND LIGHT, AND THE OHIO VALLEY COAL COMPANY TO COMPEL RESPONSES TO DISCOVERY (AEP, ET AL. - 5)

Pursuant to Paragraph 18 of the Discovery Guidelines adopted in Decision No. 10 on June 26, 1997, CSX[1] hereby responds in opposition to the Motion of Atlantic City Electric Company, Delmarva Power & Light, and The Ohio Valley Coal Company to Compel Responses to Discovery (AEP, et al. - 5, served on July 14, 1997).

Movants have failed to articulate a reasonable basis as to why they are entitled to the massively burdensome discovery requested (requiring the production of virtually every document and file contained in the files of CSX's coal department regarding bids and rates for a twenty-year period). Rather than seeking discovery relevant to this control proceeding, Movants are seeking documents that are not relevant to the buden that

[1] "CSX" refers collectively to CSX Corporation and CSX Transportation, Inc.

they must meet to obtain a protective condition under settled law.

I. THE DISCOVERY SOUGHT IN MOVANTS' MOTION TO COMPEL IS MASSIVELY BURDENSOME

Movant's request for documents is extraordinarily broad. Movants request literally every document relating to CSX's movement or potential movement of coal over almost the last twenty years. First, Movants seek "all documents, in the department(s) of CSX responsible for marketing coal, concerning bids for the carriage of coal by unit train or trainload movement, to every destination served by CSX at which 100,000 tons or more of coal was consumed, for the years 1978-97." Atlantic City Electric Company, et al.'s First Set of Interrogatories and First Set of Requests for Production of Documents to CSX, at 7 (emphasis added). Second, beyond the actual bids themselves spanning the last two decades, Movants also seek "all files, of the department(s) responsible for establishing or negotiating rates for the carriage of coal, that relate to the bid documents [requested above]." Id. (emphasis added).

As stated in CSX's Initial Objections to Atlantic City Electric Company, Delmarva Power & Light Company and The Ohio Valley Coal Company's First Set of Interrogatories and First Set of Requests for Production of Documents (CSX-9, served on July 11, 1997), the discovery sought by Movants is unduly burdensome and would require the production of virtually every document in

CSX's files relating to bids for the movement of coal, the single largest commodity carried by CSX, over a twenty year period. The discovery request would require the production of hundreds of thousands of potentially responsive pages from various CSX sites, the production of which might not even be possible in for the entire time requested. In short, the discovery requests go far beyond "fishing"; they are "an effort 'to drain the pond and collect the fish at the bottom.'" Amcast Indus. Corp. v. Detrex Corp., 138 F.R.D. 115, 121 (N.D. Ind. 1991) (quoting In Re IBM, 77 F.R.D. 39, 41-42 (N.D. Cal. 1977)).

Movants respond that CSX's concerns "are easily answered" (Motion to Compel, at 18) by offering to travel to Applicants' offices and examine the files in person.[2] As an initial matter, the suggestion that the burden associated with producing every document relating to every bid for every movement of coal for a twenty year period is somehow lessened by having counsel for Movants on-site simply misses the mark. As Movants know, the burden is not in the photocopying, it is in the locating, identifying and reviewing for privilege all potentially

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[2] Movants also suggest that the Applicants, upon being served with such a broad and burdensome request, were in some way obligated to contact Movants' counsel to discuss the matter prior to filing their objections. See Motion at 5. Movants do not provide any basis for such an obligation. To the contrary, the Discovery Guidelines clearly place the burden on Movants and other parties seeking discovery to "tailor[] [discovery requests] to be consistent with the procedural schedule adopted in the proceeding." Discovery Guidelines, ¶ 1. Further, the Guidelines obligated Applicants to expeditiously state their objections, which they did.

responsive documents at the various locations at which CSX maintains such documents.

Additionally, 49 U.S.C. § 11904 (U.S.C.A. 1997) prohibits CSX from disclosing certain information about the property tendered or delivered to it for transportation, or about the contents of a transportation contract, that may be used to the detriment of the shipper or consignee. In Grain Land Coop v. Canadian Pac., Ltd.,[3] the Presiding Administrative Law Judge held, in response to a motion to compel discovery, that § 11904 prohibited the disclosure by Canadian Pacific of shipper-specific information and required that shipper and consignee names be redacted before production. Thus, § 11904 places the additional burden on CSX to redact shipper and consignee names on each and every page of the potentially hundreds of thousands of pages produced. Movants' offer to perform on-site inspection in no way lessens this burden.

Such massively burdensome discovery is beyond the scope of the Discovery Guidelines and should not be permitted.

II. THE DOCUMENT REQUESTS FAR EXCEED THE SCOPE OF RELEVANT DISCOVERY

Not only should the requested discovery be rejected because it will be unduly burdensome to locate and produce, it also should be rejected because it far exceeds the bounds of appropriate discovery. Movants go to great lengths to describe

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[3] Finance Docket No. 41687, Decided June 5, 1997.

the basis by which the Board may grant protective conditions to protect against anticompetitive consequences of a rail merger. See Motion at 8-9. CSX does not dispute that the Board has the authority to condition its approval of a rail merger to protect against proven anticompetitive consequences, but it only does so with respect to particularized evidence establishing that a specific party will suffer a proven competitive harm directly related to the transaction. Union Pacific Corp. -- Control -- Missouri K.T.R.R., 4 I.C.C.2d 409, 436 (1988) (UP/MKT), petition for review dismissed, 883 F.2d 1079 (1989), modified, 992 F.2d 742 (D.C. Cir. 1991). The requests are not tailored to this standard.

A. Movants Have Failed to Provide An Adequate Basis for Their Unprecedented Requests

The Motion reveals that the discovery is being sought in an apparent effort to relitigate the Commission's one-lump theory. See Motion to Compel at 11-13; Affidavit of Thomas D. Crowley at 2-3; Joint Affidavit of Alfred E. Kahn and Frederick C. Dunbar at 2-3. However, the one-lump theory has been "consistently applied" to railroad transportation, and its applicability to this case is clear. See Western Resources, Inc. v. STB, 109 F.3d 782, 787 (D.C. Cir. 1997).

Briefly, the Commission has relied on the one-lump theory in holding that competition is not reduced by a combination of a carrier holding a monopoly over one leg of a joint movement and a carrier that participates in another leg of that movement. See Id. at 786-87.

Consistent with widely accepted economic theory that posits that vertical combinations are pro-competitive unless shown otherwise, the ICC long held that when a shipper is served by a single destination carrier, and that carrier can originate service from either of two origin carriers, the combination of one of the origin carriers with the destination carrier does not normally increase the market power to which the utility is subject because the destination carrier is already in a position to maximize its "one-lump" of profit.[4] Thus, the theory holds that there is no basis to conclude that the end-user will be harmed by such an acquisition or merger because the destination carrier is already in a position to capture the entire monopoly rent. Western Resources, 109 F.3d at 787 (citing Philip Areeda & Donald F. Turner, 3 Antitrust Law ¶ 725b, at 199 (1978)).

The ICC, which has consistently applied the one-lump theory in rail cases, relied on it to reject requests for protective conditions in the merger of the Burlington Northern Railroad and The Atchison, Topeka and Santa Fe Railway Company. See BN/Santa Fe at 70-79. The D.C. Circuit upheld the reliance on the one-lump theory to reject such claims of vertical foreclosure, both from a general standpoint and as to party-specific arguments. See Western Resources, 109 F.3d at 788-93.

---

[4] See Burlington Northern Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (Aug. 23, 1995) at 71 (BN/Santa Fe); Union Pacific Corp. et al. -- Control -- Missouri Pacific Corp. et al., 366 I.C.C. 459, 538 (1982).

Thus, the short answer to Movants' request for virtually all of CSX's coal pricing files over a twenty year period is that the validity and applicability of the one-lump theory has already been litigated and determined; imposing a massive document production burden on CSX on the ground that Movants are not satisfied with the current state of the law is plainly unwarranted.

Movants do not tell what it is they are looking for; this is a classic fishing expedition. In arguing that they need hundreds of thousands of documents pertaining to coal traffic bids unrelated to bids on Movants' own traffic, Movants fail to identify any theory that would provide a plausible explanation as to why a destination carrier would pass through the benefits of origin competition to the utility, or any categories of evidence that would show that such benefits were passed on. As the D.C. Circuit concluded in Western Resources, "[a]n intrinsic difficulty with [any] attempt to rebut the one-lump theory is the conspicuous absence of any supporting theory." 109 F.3d at 790. In rejecting the arguments of utilities in Western Resources, the Court did not license the Movants to ignore the bounds of reasonable discovery.

B. No Showing Has Been Made That the Requested Documents Are Relevant to Rebut the One-Lump Theory

While the one-lump theory is well-established, so too is the proposition that it may be rebutted in any particular circumstance by a particularized, two-part showing made by a

specific utility. The utility must show first, "that, prior to the merger the benefits of origin competition flowed through to the utility and were not captured by the destination monopoly carrier. Second, if it is established that the benefits of origin competition are in fact passed on to the utility, there must be an additional showing that such a competitive flow-through will be significantly curtailed by the merger." Western Resources, 109 F.3d at 788; UP/MKT, 4 I.C.C.2d at 476. Any such showing in rebuttal of the applicability of the one-lump theory, however, is necessarily confined to a specific utility's situation. Indeed, when the Board imposes conditions in merger and acquisition proceedings, it does so based on its assessment of a particular shipper's factual situation and on the basis of its determination of whether or not a condition is warranted to ameliorate some specific competitive harm that may result from the transaction. See Union Pacific Corp. et al. -- Control -- Missouri Pacific Corp. et al., 366 I.C.C. 459, 564-65, aff'd in part and remanded in part, 736 F.2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985), modified, 11 I.C.C.2d 668 (1987).

Nothing in Commission or Board precedent, and certainly nothing in the Western Resources decision, suggest that a utility is now entitled to undertake an open-ended review of virtually all coal marketing documents, involving mines whose coal it has never burnt and coal shipped to other utilities, in order to demonstrate that it may be entitled to relief from the one-lump theory. Indeed, nothing in the precedents relevant to some other

utility form a relevant part of the two-part showing that a utility seeking relief must make in order to demonstrate that the one-lump theory does not apply. To the contrary, the precedents show just the opposite. The burden is on the "specific utility" claiming that the one-lump theory should not apply to show that it is entitled to relief based on its own competitive experience. See UP/MKT, at 476; Chicago, Milwaukee, St. Paul & Pac. R.R. -- Reorganization -- Acquisition by Grand Trunk Corp., 2 I.C.C.2d 427, 455 (1985), appeal dismissed, 799 F.2d 317 (7th Cir. 1986), cert. denied, 481 U.S. 1068 (1989).

For example, Delmarva Power & Light Company, may be entitled to bid and related documents relevant to its own situation, but bid and all related documents prepared by CSX for some other utility within the past 19 years (e.g., a utility located hundreds of miles from Delaware and served by a different combination of railroads) are not even remotely relevant to the showing that Delmarva must make to overcome the one-lump theory. Indeed, if Delmarva were to succeed in showing that the one-lump theory was not applicable to some of CSX's coal traffic, but could not sustain its two-part burden of showing inapplicability to its own traffic, it would not be entitled to relief. See, e.g., UP/MKT, 4 I.C.C.2d at 476-77.

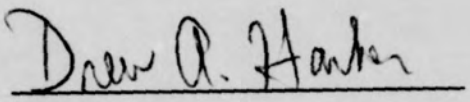
CSX would thus not necessarily object to a more appropriately constrained document request focused on the bid documents relative to the shipments of the particular Movant utilities, although of course Movants already have documents

relative to the bids they received. However, it bears note that Movant Atlantic City Electric Company, now served at destination by Conrail only, would be served by two railroads at destination if the Board approves the acquisition (because it is in an area designated to be jointly served by CSX and NS) and thus it is obvious that it could not sustain any argument in favor of a protective condition. Further, Movant Ohio Valley Coal Company is not a freight payor at all -- it operates a coal mine that serves a utility that has not propounded any discovery.

CONCLUSION

For all of the above-stated reasons, the Motion to Compel should be denied.

Respectfully submitted,



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One James Center
901 East Cary Street
Richmond, VA 23219-4030
(804) 775-1130

Counsel for CSX Corporation and CSX Transportation, Inc.

July 15, 1997

CERTIFICATE OF SERVICE

I, Chris P. Datz, certify that on July 15, 1997 I caused to be served by facsimile service a true and correct copy of the foregoing CSX-10, CSX's Response in Opposition to the Motion of Atlantic City Electric Company, Delmarva Power & Light Company and the Ohio Valley Coal Company's Motion to Compel Discovery (AEP - 5), on all parties that have submitted to the Applicants a Request to be Placed on the Restricted Service List in STB Finance No. 33388 and by hand delivery on the following:

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

Office of the Secretary
Case Control Unit
Attn: STB Finance Docket 33388
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Chris P. Datz

July 15, 1997

STB FD . 33388 7-14-97 D . 180623

180623

1234 Market Street, 5th Floor
Philadelphia, PA 19107-3780
(215) 580-7318

Southeastern Pennsylvania Transportation Authority
Safety • Service • Continuous Improvement

VIA UNITED STATES
EXPRESS MAIL

July 11, 1997

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20423

RE: **Surface Transportation Board**
Finance Docket 33388

Dear Mr. Williams:

Enclosed, please find an original and twenty-five (25) copies of this letter which will serve as the formal filing by Southeastern Pennsylvania Transportation Authority, commonly known as "SEPTA", in the above-captioned case.

SEPTA hereby requests that it be made a party to the above-captioned proceeding and that it receive all past, present and future filings that are before the Surface Transportation Board in this proceeding.

Kindly direct your mail to:

John K. Leary
General Manager
Southeastern Pennsylvania
Transportation Authority
1234 Market Street
10th Floor
Philadelphia, PA 19107-3780

A Certificate of Service as required by the Board's rules is attached to this letter.

Please date stamp and send the extra copy of this letter back in the stamped envelope enclosed herein.

If you have any questions, feel free to telephone me at (215) 580-7318.

Respectfully yours,

Eugene N. Cipriani

Eugene N. Cipriani
Assistant Deputy Counsel

ENC/lr

cc: Administrative Law Judge
Jacob Leventhal
Dennis G. Lyons, Esq.
Richard A. Allen, Esq.
Paul A. Cunningham, Esq.

John K. Leary Jr. - General Manager, SEPTA
Bernard Cohen - Assistant General Manager - Strategic Planning, SEPTA
G. Roger Bowers - General Counsel, SEPTA

ecipri\STBFiling.ltr

BEFORE THE

SURFACE TRANSPORTATION BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of July, 1997 served a true and correct copy of the foregoing letter by United States Postal Service Express Mail on:

Administrative Law Judge
Jacob Leventhal
Federal Energy Regulatory Commission
888 First Street, N.E.
Suite 11F
Washington, D.C. 20426

Dennis G. Lyons, Esq.
Arnold & Porter
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Richard A. Allen, Esq.
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Eugene N. Cipriani

Eugene N. Cipriani
Assistant Deputy Counsel
Southeastern Pennsylvania
Transportation Authority
PA I.D. No. 26143

ecipr\stbcerts.711

STB FD 33388 7-14-97 D[illegible] 180618

180618

CYPRUS AMAX
Coal Sales Corporation

400 TechneCenter Drive, Ste. 320
Milford, Ohio 45150
Phone: (513) 576-4192
Fax: (513) 831-1801

Brad F. Huston
Manager - Logistics

July 11, 1997

BY OVERNIGHT MAIL

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

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

Dear Secretary Williams:

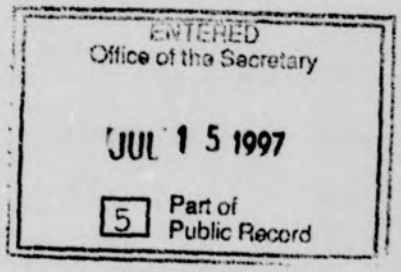
Enclosed is our Notice of Intent to Participate giving notice that we intend to participate actively as a party of record in the oversight providing instituted in Docket No. 33388.

Enclosed is an original and 25 copies of this Notice.

Very truly yours,

Brad F. Huston

cc: All Parties of Record



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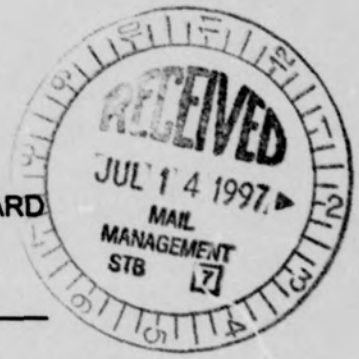

BEFORE THE

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

NOTICE OF INTENT TO PARTICIPATE

Cyprus Amax Coal Sales Corporation hereby gives notice that it intends to participate actively as a party of record (POR) in the oversight providing instituted in Finance Docket No. 33388. An original and 25 copies of this Notice is being sent to the Office of the Secretary.

Respectfully submitted,

Brad F. Huston, Manager - Logistics
Cyprus Amax Coal Sales Corporation
400 TechneCenter Drive, Suite 320
Milford, Ohio 45150

Dated: July 11, 1997

E:\DOCUMENT\BH\LETTER\CSXINTEN.WPD

Certificate of Service

I hereby certify that I have on this, the 11th day of July, 1997, caused to be mailed upon all parties a copy of the foregoing Notice of Intent to Participate by first-class mail, postage prepaid.

Brad F. Huston

PARTIES OF RECORD INCLUDE

Judge Jacob Leventhal
Federal Energy Regulatory Commission
888 First Street Northeast
Suite 11F
Washington, DC 20426

Mr. Richard A. Allen
Zuckert, Scoutt & Rasenberger, L.L.P.
888 Seventeenth Street, N. W.
Suite 600
Washington, DC

Mr. Dennis G. Lyons
Arnold & Porter
555 12th Street, N.W.
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Mr. Paul Cunningham
Harkins Cunningham
1300 Nineteenth Street, N.W.
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180617

GUERRIERI, EDMOND & CLAYMAN, P.C.
1331 F STREET, N.W.
WASHINGTON, D.C. 20004

(202) 624-7400
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JOSEPH GUERRIERI, JR.
N A. EDMOND
ROBERT S. CLAYMAN
DEBRA L. WILLEN
JEFFREY A. BARTOS
AMYBETH GARCIA-BOKOR
ELISE B. SCHLACKMAN

D

July 11, 1997

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

Re: Finance Docket No. 33388, CSX Corporation, et. al., Norfolk Southern Corp., et. al.--Railroad Control Application--Conrail Inc., et. al.

Dear Secretary Williams:

The United Railway Supervisors Association ("URSA"), through its undersigned counsel, hereby files notice of its intent to participate in the above-referenced case as a party of record. Service of all documents upon the URSA may be made to the undersigned counsel and to William P. Hernan, Jr., who previously entered an appearance.

Thank you for your attention to this matter.

Sincerely,

Patrick R. Plummer

Debra L. Willen
Patrick R. Plummer
GUERRIERI, EDMOND & CLAYMAN, P.C.

cc: William P. Hernan, Jr.
P.O. Box 180
Hilliard, OH 43026-0180

CERTIFICATE OF SERVICE

I hereby certify that copies of the URSA's notice of intent to participate were served by first class-mail, postage prepaid, upon applicants' representatives, listed bellow, this 11th day of July, 1997.

James C. Bishop, Jr.
William C. Woolridge
J. Gary Lane
James L. Howe, III
Robert J. Cooney
George A. Aspatore
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Norfolk, Virginia 23510-9241

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Constance L Abrams
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Peter J. Shudtz
CSX Corporation
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P. Michael Giftos
Paul R. Hitchcock
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

The Honorable Jacob Leventhal
Federal Energy Regulatory Comm'n
888 First Street, N.E.
Suite 11F
Washington, D.C. 20426
Attn: STB Finance Docket 33388

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Consolidated Rail Corporation
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2001 Market Street
Philadelphia, PA 19103

Patrick R. Plummer

180615

Before The
SURFACE TRANSPORTATION BOARD
Washington, D.C.

Finance Docket No. 33388

CSX Corporation and CSX Transportation Inc.
Norfolk Southern Corporation and
Norfolk Southern Railway Company
Control and Operating Leases/Agreement
Conrail, Inc. and Consolidated Rail Corporation
to CSX Transportation Inc.

D

NOTICE OF INTENT TO PARTICIPATE

Please enter the appearance of the undersigned on behalf of The Indian Creek Railroad Company, Anderson, Indiana, acting on behalf of the rail carrier, which intends to participate and become a party of record in this proceeding. Pursuant to 49 C.F.R. § 1104.12, service of all documents filed in this proceeding should be made upon the undersigned.

Dated: June 24, 1997

Respectfully submitted

Thomas R. Rydman

Mr. Thomas R. Rydman, President
INDIAN CREEK RAILROAD COMPANY
3905 W. 600 North
Anderson, IN 46011-9238

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 1997, a copy of the foregoing Indian Creek Railroad Company's Notice Of Intent To Participate was served by first-class, U.S. mail, postage prepaid upon the following:

James C. Bishop, Jr.
William C. Wooldridge
James L. Howe, III
Robert J. Cooney
George A. Aspatore
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-9241

Richard A. Allen, Esquire
James A. Calderwood
Andrew R. Plump
John V. Edwards
Zuckert, Scoutt &
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Indian Creek RR Co.
Thomas R. Hyslop

Notary Phyllis C. Wise

PHYLLIS C WISE
NOTARY PUBLIC STATE OF INDIANA
MADISON COUNTY
MY COMMISSION EXP. SEPT 11 1998

Ohio Rail Development Commission

50 West Broad Street, Suite 1510 • Columbus, Ohio 43215 • 614.644.0306 phone • 614.728.4520 fax

July 7, 1997

Office of the Secretary
Case Control Branch
ATTN: STB Finance Docket No. 33388
Surface Transportation Board
1925 K Street, N.W., Washington, D.C. 20423-0001

180610

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

The Ohio Rail Development Commission (ORDC) requests to be on the service list for all information impacting Ohio, including Petitions for Exemption, Sub- NO. 1, Sub-No. 3, Sub-No. 4, and Sub-No. 7.

180613 180614 180611 180612

Twenty-five copies of this request and a formatted diskette in WordPerfect 6.1 accompany this letter. You may serve us at the following address:

Thomas M. O'Leary, Executive Director
Ohio Rail Development Commission
50 W. Broad Street, 15th Floor
Columbus, OH 43215.

If you have any questions you may contact me or Lou Jannazo at 614-644-0306. Thank you very much.

Respectfully,

Thomas M. O'Leary
Executive Director

TMO/LJ/LN
enclosures

Certificate of Service

I, Thomas M. O'Leary, hereby certify that the following persons were served the attached letter by first class mail:

Administrative Law Judge Jacob Leventhal
Federal Energy Regulatory Commission
888 First St., N.E. Suite 11F
Washington, D.C. 20426

Richard A. Allen, Esq.
Zuckert Scoutt & Rasenberger, LLP
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Washington, D.C. 20006-3939

Dennis G. Lyons, Esq.
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Thomas M. O'Leary, Executive Director

STB FD 33388 5-16-97 D 179758

179758

NEW YORK METROPOLITAN TRANSPORTATION COUNCIL

D

179758

Filed
5-16-97

James W. Harris, P.E.
Director

May 9, 1997

Ms. Linda Morgan, Chairperson
Surface Transportation Board
12th Street and Constitution Ave. N.W.
Washington, DC 20423

Dear Ms. Morgan:

We understand that the CSX Corporation and Norfolk Southern have petitioned the Surface Transportation Board to provide an expedited 255 day review process for the Conrail Acquisition proposal expected to be submitted shortly. This letter is to inform you that the New York Metropolitan Transportation Council does **not** support the expedited 255 day procedural schedule (as in Federal Register Doc. 97-10337).

The acquisition of Conrail is a significant opportunity for improving the rail competitiveness in the New York metropolitan region. Therefore, careful review and analysis are mandatory. In order to develop the regional position that will benefit the regional and the national economy, in-depth discussions with stakeholders are required.

To assure that the rail competitiveness in the region will be achieved, we urge you to maintain the 365-day schedule that was originally proposed by the Surface Transportation Board.

Thank you for your consideration.

Sincerely,

James W. Harris

James W. Harris, P.E.
Executive Director

Filed

CA/JWH/vg-s

pc: A. Borenstein, J. E. Bergman, C. Adidjaja, NYMTC

James W. Harris, P.E.
Director

STB FINANCE DOCKET NO. 33388

The attached letter was sent to the following:

25 copies
Office of the Secretary
Case Control Unit
Attn: STB Finance Docket No. 33388
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0111

1 copy
Administrative Law Judge Jacob Leventhal
Federal Energy Regulatory Commission
888 First Street, N.E. - Suite 11F
Washington, DC 20426

1 copy
Dennis G. Lyons, Esq.
Arnold & Porter
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1 copy
Richard A. Allen, Esq.
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STB FD 33388 5-1-97 D 179562

179562

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CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III

May 1, 1997

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Unit
ATTN: STB Finance Docket 33388
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 in response to Decision No. 2 in the above-referenced proceeding are an original and 25 copies of the Comments of Centerior Energy Corporation on Proposed Procedural Schedule (CEC-01). Also enclosed is a diskette containing the text of this filing in WordPerfect 5.1 format.

An additional copy of this pleading is also enclosed. Kindly indicate receipt and filing by time-stamping this extra copy and returning it with our messenger.

Thank you for your attention to this matter.

Sincerely,

C. Michael Loftus

C. Michael Loftus
An Attorney for Centerior Energy Corporation

Enclosures

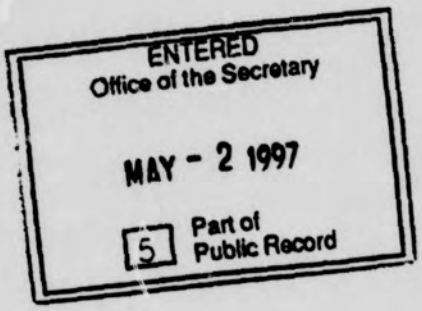
179562

CEC-01

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC. AND NORFOLK SOUTHERN RAILWAY COMPANY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL AND CONSOLIDATED RAIL CORPORATION -- TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN RAILWAY COMPANY TO CSX TRANSPORTATION, INC.	Finance Docket No. 33388

COMMENTS OF
CENTERIOR ENERGY CORPORATION
ON PROPOSED PROCEDURAL SCHEDULE



CENTERIOR ENERGY CORPORATION

By: Mary E. O'Reilly
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Slover & Loftus
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Attorneys and Practitioners

Dated: May 1, 1997

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC. AND NORFOLK SOUTHERN RAILWAY COMPANY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL AND CONSOLIDATED RAIL CORPORATION -- TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN RAILWAY COMPANY TO CSX TRANSPORTATION, INC.	Finance Docket No. 33388

COMMENTS OF
CENTERIOR ENERGY CORPORATION
ON PROPOSED PROCEDURAL SCHEDULE

Centerior Energy Corporation ("CEC") hereby submits these Comments in response to the procedural schedule proposed by CSX and NS[1] to govern the Board's consideration of the Applicants' forthcoming control application. The Board invited comments on the proposed schedule in its Decision No. 2, served April 21, 1997.

As explained below, CEC requests that the Board modify the Applicants' proposed schedule to (1) allow additional time for the filing of responses to and rebuttal in support of responsive and inconsistent applications; (2) allow additional time for Board consideration of the primary application; and (3) require

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[1] "CSX" includes CSX Corporation and CSX Transportation Inc. "NS" includes Norfolk Southern Corporation and Norfolk Southern Railway Company. As used herein, "Conrail" includes Conrail Inc., and Consolidated Rail Corporation. CSX and NS are referred to collectively as "Applicants."

CSX and NS to file a single brief not to exceed fifty (50) pages in length. CEC's proposed schedule revisions better balance the Applicants' desire for expedited consideration of their proposed transaction, and non-Applicant participants' interests in a fair opportunity to be heard and to have their comments and/or requests for conditions considered by the Board. Further, CEC's proposed revisions fully comply with the requirements of 49 U.S.C. §11325(b).

In support hereof, CEC states as follows:

I

IDENTITY AND INTEREST

CEC is a corporation controlling The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("TECO"). CEI and TECO are electric utilities serving approximately one million residential, industrial, and commercial customers throughout northern Ohio. Both use coal to fuel many of their generation facilities, and depend on rail transportation to deliver this coal from mines in the eastern United States. CEI's and TECO's coal-fired power plants are served by NS and Conrail. CSXT has also been involved in coal movements from CSXT coal origins.

As a current and prospective customer of these rail carriers, CEC has a direct and substantial interest in this proceeding. Applicants' proposed transaction will dramatically affect the operations and financial status of the railroads

involved, and will likely impact the rail service available to CEC as well.

CEC intends to actively monitor developments in this proceeding, and to participate formally in future phases as its interests dictate. As a result, CEC has a significant stake in the adoption of a procedural schedule that protects the participation rights of affected shippers, and other commenters supporting conditions that ameliorate the proposed transaction's anti-competitive impacts.

CEC respectfully requests that the Board enter it as a party of record in this proceeding, and that the Board add to the service list the names of CEC's representatives, in order that they receive copies of all comments, other filings, orders and decisions.

II

THE SCHEDULE PROPOSED BY THE APPLICANTS IS INADEQUATE TO PROTECT NON-APPLICANTS' DUE PROCESS RIGHTS, AND SHOULD BE CHANGED

Barely four (4) months ago, after CSX announced an intent to seek Board approval for the acquisition of Conrail in its entirety, the Board determined that a 365-day procedural schedule was necessary to "ensure that all parties are accorded due process and [to allow the Board to] consider fully all of the

issues in this proceeding."[2] The instant proceeding presents the Board and the affected public with a complex and unprecedented proposal for the division of Conrail between CSX and NS, under a plan that they alone negotiated in complete secrecy. While publicly available details remain incomplete, the plan appears to involve an interlocking combination of stock acquisitions, asset purchases, leases, operating agreements, and joint service arrangements. CEC submits that at a minimum, this proceeding should be handled on the same basic timetable as that prescribed for the more straightforward acquisition proposed in F.D. No. 33220.

Though the Applicants claim otherwise,[3] their plan for the division of Conrail raises a number of significant legal and rail regulatory policy issues properly cognizable under 49 U.S.C. §11323, et seq. Inter alia, they include:

- whether the Applicants' overall division of Conrail assets is the most efficient and consistent with the public interest;
- whether and to what extent conditions can be crafted that would protect captive shippers from bearing the burden of the $4 billion+ premium that the Applicants propose to pay for Conrail, as a consequence of their extended tender offer battle; and
- whether the Applicants' plans for "joint access" to key terminal areas, such as Detroit, Toledo and New York/New Jersey,

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[2] F.D. No. 33220, supra, Decision served January 30, 1997, at 4.

[3] See, Petition to Establish Procedural Schedule, April 11, 1997 ("Petition"), at 4.

actually will result in bona fide transportation competition for shippers served by and through those terminals.

To properly analyze and consider these and other equally important questions that will be raised by the Applicants' plan, interested parties must have adequate time to prepare their comments -- both in response to the primary application and any responsive or inconsistent applications -- and the Board, in turn, must have adequate time to consider all parties' submissions in rendering its decision. In at least two (2) significant respects, however, the schedule proposed by the Applicants fails this test.

First, the Applicants' schedule allows only thirty (30) days for the filing of responses to inconsistent or responsive applications, and only fifteen (15) days for rebuttal in support of these applications. Experience in recent Class I rail merger proceedings has shown that responsive applications can be nearly as complex and voluminous as primary applications, requiring extensive review and analysis by affected, interested parties prior to comment.[4] The Board recognized this in F.D. No. 33220, prescribing sixty (60) and forty (40) days, respectively, for

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[4]Applicants suggest that significant responsive applications are not anticipated in this case. Petition, at 7. Applicants' expectations, however, cannot determine the schedule adopted by the Board. Even under Applicants' schedule, the existence and extent of responsive applications will not be known until 60 days after the primary application is filed. If any advance assumptions are to be made in this regard for scheduling purposes, prudence dictates that the Board assume there will be one or more responsive applicants whose proposals will merit serious and careful consideration.

comments on and rebuttal in support of responsive applications. Id., Decision served January 30, 1997, at 10. It should do likewise here.

Second, the Applicants propose that only forty (40) days elapse between the close of the record and the Board's voting conference (Petition, at 2), during which time the Board also is supposed to receive briefs and hear oral argument. In contrast, the schedule adopted in F.D. No. 33220 contemplated nearly twice as much time -- eighty-five (85) days. CEC believes that even three (3) months may be insufficient to allow a full and careful review of what undoubtedly will be an extensive and complex record. However, to suggest, as the Applicants do, that the task should be completed in forty (40) days is both unrealistic and improper as a matter of administrative due process.[5]

In their Petition, the Applicants claim that their truncated schedule is justified by (1) the substantial "up front" investments in Conrail stock that CSX and NS propose to make; (2) the purported, impending "benefits of increased competition" resulting from their plan; and (3) a claimed need for expedition to avert a "deterioration of Conrail service" pending Board consideration of the plan. Petition, at 6. However, none of

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[5]Adding 30 days to the period proposed by Applicants for comments on responsive applications, 25 days for rebuttal in support, and 45 days to the time allotted for Board deliberations produces an overall procedural length of 355 days, which is still expeditious by historic standards and four (4) months shorter than the maximum permitted under 49 U.S.C. §11325(b).

these arguments warrants the restriction of CEC's and other parties' participatory due process rights.

That CSX and NS apparently have elected to make a $10 billion investment without prior Board approval[6] should have no impact whatsoever on either the procedural schedule or the Board's substantive deliberations on the merits of the primary application. The Applicants' decision to pay Conrail stockholders for their shares before, rather than after, securing necessary federal regulatory approval to acquire control of Conrail is a purely voluntary action on their part. Nowhere in the statute, regulations or applicable case law precedents is such an action directed or encouraged. It would be a clear subversion of the administrative process if the fact that the Applicants voluntarily and unnecessarily have put investment dollars at risk in advance of this proceeding influences in any way the determinations of whether, when, or on what terms their plan for Conrail should be approved.

The Applicants' claim that a truncated schedule is needed to hasten the "benefits of increased competition" in the East assumes an ultimate fact not yet proven; i.e., that their plan to divide Conrail actually will increase rail competition significantly. Legitimate questions exist, for example, whether the Applicants' plans for "joint access" to various terminal

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[6] Petition, at 5.

areas[7] will lead to effective dual carrier service options for shippers using these terminals, or simply replace one market dominant carrier with another. Likewise, the Board must consider whether railroads who do not have a history of aggressively competing against one another in the transportation of coal[8] and who recently joined other Class I railroads in decrying the alleged dangers of increased rail competition,[9] will maintain a serious price and service rivalry in the face of a $4 billion+ investment premium recovery challenge. In any event, the competitive benefits claimed by the Applicants are not so self-evident that the Board need not allow reasonable time and opportunity for the presentation of alternate views.

Finally, the Applicants profess a concern that Conrail service may deteriorate due to "employment uncertainty among Conrail management," if their accelerated schedule is not adopted. The Applicants do not explain how this "employment uncertainty" is significantly different if a 255-day schedule as opposed to a 300 or 355-day schedule. Respectfully, CEC suggests that the Applicants themselves could better minimize any uncertainty among Conrail's management personnel by offering more

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[7]The details of these plans apparently will not be fully revealed until the primary application is filed.

[8]See, e.g., Coal Exporters Ass'n v. United States, 745 F.2d 76, 86-87, 90-91 (D.C. Cir. 1984).

[9]See Docket No. 41242, Central Power & Light Company v. Southern Pacific Transportation Company, Comments of the Association of American Railroads, dated October 15, 1996, at 36-46, 54-55.

information concerning staffing requirements, etc. in the event the Applicants' plan (or a reasonable variant) is approved. Nevertheless, given the size of the subject transaction, the multitude of affected markets, shippers and smaller rail carriers, and the myriad issues to be presented for resolution by the Board, the public interest in adequate procedural safeguards clearly outweighs the Applicants' loosely defined speculation about indirect, interim employee impacts.

III

THE APPLICANTS SHOULD BE CONSIDERED A SINGLE PARTY FOR BRIEFING PURPOSES

Prior precedent in the Class I railroad merger context confirms that applicants are treated as a single party for purposes of briefing.[10] While the complex plan for a privately-negotiated division of Conrail proposed by CSX and NS sets this case apart from recent mergers in many respects, their unified front as co-sponsors of the plan and co-Applicants warrants that they be treated the same as their counterparts in prior cases for briefing purposes. CSX and NS should be required to file a single brief, not to exceed fifty (50) pages in length.

The Applicants argue that it would be more orderly for them to file separate briefs, as their plan for the division of

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[10] See, e.g., F.D. No. 32760, Union Pacific Corporation, Et. Al. -- Control and Merger -- Southern Pacific Rail Corporation, Et Al., Applicants' Brief dated June 3, 1996.

Conrail also involves "separate, competing operating and marketing plans" for CSX and NS in the event that their plan is approved. Petition, at 8. Nowhere do the Applicants suggest, however, that their plan for Conrail is anything but a single, unified, all-or-nothing proposition. All indications are that planned asset acquisitions by one cannot and will not go forward absent Board approval of corresponding acquisitions by the other. Like other recent rail merger proposals, the CSX-NS plan is an integrated series of complex business transactions[11] that will be presented to the Board for approval as a whole. Though they are and are expected to remain separate companies, for purposes of this proceeding they speak with a single voice in support of a single proposal. In fairness to CEC and other, similarly-situated parties, they should do so in a single brief.

IV

CONCLUSION

For the reasons set forth herein, the Board should modify the procedural schedule proposed by the Applicants and published in Decision No. 2 to (1) extend by an additional thirty (30) days the deadline for filing responses to responsive and inconsistent applications; (2) extend by an additional twenty-

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[11]For example, merger applications often include multiple approval requests for related line sales, abandonments or trackage rights agreements. See, e.g. F.D. No. 32549, Burlington Northern Inc. and Burlington Northern Railroad Co. -- Control and Merger -- Santa Fe Pacific Corp., Et Al., Decision served August 23, 1995.

five (25) days the deadline for filing rebuttal in support of responsive and inconsistent applications; (3) extend by an additional forty-five (45) days the minimum interval between the filing of rebuttal in support of responsive and inconsistent applications and the scheduling of a Board voting conference with respect to the primary application; and (4) require the Applicants to file a single brief, not to exceed fifty (50) pages in length.

Respectfully submitted,

CENTERIOR ENERGY CORPORATION

By: Mary E. O'Reilly
Managing Attorney
Centerior Energy Corporation
6200 Oak Tree Boulevard
Independence, OH 44131

C. Michael Loftus

OF COUNSEL:

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Washington, D.C. 20036

Dated: May 1, 1997

Attorneys and Practitioners

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Comments were served this 1st day of May, 1997, by first class mail, postage pre-paid, upon:

The Honorable Jacob Leventhal
Federal Energy Regulatory Commission
888 First Street, N.E.
Suite 11F
Washington, D.C. 20426

Dennis G. Lyons, Esq.
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Jean M. Cunningham

STB FD 33388 4-29-97 D 179521

D 179521

NORTH CAROLINA RAILROAD COMPANY

3200 Atlantic Avenue
Suite 110
Raleigh, NC 27604
(919) 954-7601
Fax (919) 954-7099

Scott M. Saylor
Executive Vice President
and General Counsel

April 25, 1997

Honorable Vernon A. Williams
Secretary
U.S. Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

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

Dear Secretary Williams:

Enclosed for filing in the referenced proceeding is a notice of appearance by North Carolina Railroad Company.

By this letter, copies of which are being provided to counsel for the Applicants, we hereby request that Applicants serve us with any filings that they make with the Board in connection with this proceeding.

Respectfully,

North Carolina Railroad Company

By: Scott M. Saylor

cc: Counsel for Applicant as noted on certificate of service

BEFORE THE
U.S. SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION, NORFOLK SOUTHERN RAILWAY COMPANY
--CONTROL AND OPERATING LEASES/AGREEMENTS--
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

NOTICE OF APPEARANCE OF
NORTH CAROLINA RAILROAD COMPANY

Please enter the appearances in this proceeding of the below-named attorneys on behalf of North Carolina Railroad Company. North Carolina Railroad Company intends to participate in this proceeding as a party of record. Accordingly, please place the named attorneys, at the addresses p ovided, on the service list to receive all pleading and decisions in this proceeding.

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(919) 420-1700

Scott M. Saylor
North Carolina Railroad Company
3200 Atlantic Avenue, Suite 110
Raleigh, NC 27604-1640
(919) 954-7601

Attorneys for North Carolina Railroad Company

April 25, 1997

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Entry of Appearance were served by first-class mail, postage prepaid, this 25th day of April, 1997, upon the following:

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