CSX/NS-176

PUBLIC—~~REDACTED~~

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

184826

RAILROAD CONTROL APPLICATION

APPLICANTS' REBUTTAL
VOLUME 1 OF 3
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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

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RESPONSIVE APPLICATION -- ANN ARBOR ACQUISITION CORPORATION, D/B/A ANN ARBOR RAILROAD

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* The Rebuttal Verified Statement of Gordon C. Rausser and Robin A. Cantor is submitted solely on behalf of Norfolk Southern, not on behalf of the Applicants jointly.

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CONFIDENTIALITY CONVENTIONS

This document contains three classifications of material: highly confidential, confidential, and public. All highly confidential material appears between sets of three brackets in the highly confidential version. In the confidential and public versions, highly confidential material has been redacted, but the three brackets remain to identify the existence of this material.

Similarly, all confidential information appears between sets of two brackets in the highly confidential and confidential versions. In the public version, confidential material has been redacted, but the two brackets remain to identify the existence of this confidential material.

The following example helps illustrate what each volume will look like to the reader:

HIGHLY CONFIDENTIAL

The X railroad carries [[100]] tons of traffic from State A to State B each year. The traffic accounts for [[[$25 million]]] in annual revenue.

CONFIDENTIAL

The X railroad carries [[100]] tons of traffic from State A to State B each year. The traffic accounts for [[[ ]]] in annual revenue.

PUBLIC

The X railroad carries [[ ]] tons of traffic from State A to State B each year. The traffic accounts for [[[ ]]] in annual revenue.

TABLE OF ABBREVIATIONS

Applicants	CSX and NS
AEP	American Electric Power Service Corporation
ARU	Allied Rail Unions
ACE, et al.	Atlantic City Electric Company and Indianapolis Power and Light
BNSF	Burlington Northern Railroad Company and Santa Fe Pacific Corporation
BOCT or B&OCT	Baltimore and Ohio Chicago Terminal Railroad Company
B&P	Buffalo & Pittsburgh
CG&C	Citizens Gas & Coke Utility
CMA	Chemical Manufacturers Association
CofI	City of Indianapolis
Conrail	CRR, CRC, and, where the context indicates, their subsidiaries
CPTA	U.S. Clay Producers Traffic Association, Inc.
CRC	Consolidated Rail Corporation
CRR	Conrail, Inc.
CSX	CSXC, CSXT, and, where the context indicates, their subsidiaries
CSXC	CSX Corporation
CSXT	CSX Transportation, Inc.
ENRS	Erie-Niagara Rail Steering Committee
FI	The Fertilizer Institute
GTC	Genessee Transportation Council
IORY	Indiana & Ohio Railway
IP&L	Indianapolis Power & Light Company
ISRR	Indiana Southern Railroad

LDRT	Lakefrant Dock and Railroad Terminal Company
NITL	National Industrial Transportation League
NS	NSC, NSR, and, where the context indicates, their subsidiaries
NSC	Norfolk Southern Corporation
NSR	Norfolk Southern Railway Company
NYC	New York Central Lines LLC
OAG	Ohio Attorney General
PRR	Pennsylvania Lines LLC
SPI	Society for the Plastics Industry, Inc.
TCU	Transportation-Communications International Union
TTD	Transportation Trades Department, AFL-CIO
TMAG	Toledo Metropolitan Area Council of Governments
UP/SP	Union Pacific Railroad Company and Southern Pacific Rail Corporation
W&LE	Wheeling & Lake Erie

TABLE OF SHORT CITATION FORMS

BN/Frisco	Burlington Northern, Inc. Inc. - Control & Merger - St. Louis-San Francisco Ry., 360 I.C.C. 784 (1980), aff'd sub nom. Missouri-Kansas-Texas R.R. v. United States, 632 F.2d 392 (5th Cir. 1980), cert. Denied, 451 U.S. 1017 (1981)
BN/Santa Fe	Finance Docket No. 32549, Burlington Northern, Inc., & Burlington Northern R.R. - Control & Merger - Santa Fe Pacific Corp. & Atchison, Topeka & Santa Fe Ry., Decision served Aug. 23, 1995
CP/D&H	Canadian Pacific Ltd. - Purchase & Trackage Rights - Delaware & Hudson Ry., 7 I.C.C. 2d 95 (1990)
CSX	CSX Corp. - Control - Chessie System, Inc., & Seaboard Coast Line Industries, Inc., 363 I.C.C. 518 (1980), aff'd sub nom. Brotherhood of Maintenance of Way Employees v. ICC, 698 F.2d 315 (7th Cir. 1983)
DT&I Rulemaking	Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceedings, 366 I.C.C. 112 (1982), rev'd sub nom. Detroit, Toledo & Ironton R.R. v. United States, 725 F.2d 47 (6th Cir. 1984)
Grainbelt	Grainbelt Corp. v. STB, 109 F.3d 794 (D.C. Cir. 1997).
Guilford/B&M Remand	Guilford Transportation Industries, Inc. - Control - Boston & Maine Corp., 5 I.C.C.2d 202 (1988)
Guilford/D&H	Guilford Transportation Industries, Inc. - Control - Delaware & Hudson Ry., 366 I.C.C. 396 (1982), aff'd in part & remanded in part on other grounds sub nom. Central Vermont Ry. v. ICC, 711 F.2d 311 (D.C. Cir. 1983)
Mendocino Coast	Mendocino Coast Railway, Inc. - Lease and Operate -- California Western Railway, 360 I.C.C. 653 (1980).
N&W/Mendocino	Norfolk & Western Ry. - Trackage Rights - Burlington Northern R.R., 354 I.C.C. 605 (1978), modified, Mendocino Coast Ry. - Lease & Operate - California Western R.R., 360 I.C.C. 653 (1980), aff'd

	sub nom. RLEA v. ICC, 675 F.2d 1248 (D.C. Cir. 1982)
New York Dock	New York Dock Railway -- Control -- Brooklyn Eastern Terminal, 360 I.C.C. 60, aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).
Norfolk and Western	Norfolk and Western Railway Company - Trackage Right -- Burlington Northern, Inc., 354 I.C.C. 605 (1978), as modified by Mendocino Coast Railway, Inc. -- Lease or Operate -- California Railway, Inc., -- 360 I.C.C. 653 (1980).
NS	Norfolk Southern Corp. - Control - Norfolk & Western Ry. & Southern Ry., 366 I.C.C. 171 (1982)
Oregon Short Line	Oregon Short Line Railroad -- Abandonment -- Gooshen, 360 I.C.C. 91 (1979).
SFSP	Santa Fe Southern Pacific Corp. - Control - Southern Pacific Transportation Corp., 2 I.C.C. 2d 709 (1986
Soo/Milwaukee I	Chicago, Milwaukee, St. Paul & Pacific R.R. - Reorganization - Acquisition By Grand Trunk Corp., 2 I.C.C.2d 161 (1984)
Soo/Milwaukee II	Chicago, Milwaukee, St. Paul & Pacific R.R. - Reorganization - Acquisition By Grand Trunk Corp., 2 I.C.C.2d 427 (1985), appeal dismissed sub nom. In re Chicago, Milwaukee, St. Paul & Pacific R.R., 799 F.2d 317 (7th Cir. 1986), cert. denied, 481 U.S. 1068 (1987)
Southern/Central of Georgia	Southern Ry. - Control - Central of Georgia Ry., 317 I.C.C. 557 (1962), aff'd sub nom. Railway Labor Executives' Ass'n v. United States, 266 F.2d 521 (E.D. Va.) (three-judge court) vacated & remanded, 379 U.S. 199 (1964)
SP/DRGW	Rio Grande Industries, Inc., SPTC Holding, Inc. & Denver & Rio Grande Western R.R. - Control - Southern Pacific Transportation Co., 4 I.C.C.2d 834 (1988)
SP/Tucumcari	St. Louis Southwestern Ry. - Purchase (Portion) - William M. Gibbons, Trustee of Property of Chicago, Rock Island & Pacific R.R., 363 I.C.C. 320 (1980)

SSW Compensation	St. Louis Southwestern Ry. - Trackage Rights Over Missouri Pacific R.R. - Kansas City to St. Louis, 1 I.C.C.2d 776 (1984), 4 I.C.C.2d 668 (1987), 5 I.C.C.2d 525 (1989), 8 I.C.C.2d 80 (1991), 8 I.C.C.2d 213 (1991), aff'd mem., No. 88-1186 (Oct. 30, 1992), cert. denied, 508 U.S. 951 (1993)
UP/CNW	Finance Docket No. 32133, Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. - Control - Chicago & North Western Transportation Co. & Chicago & North Western Ry., Decision served Mar. 7, 1995
UP/MKT	Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. - Control - Missouri-Kansas-Texas R.R., 4 I.C.C.2d 409 (1988), petition for review dismissed sub nom., Railway Labor Executives Ass. v. ICC, 883 F.2d 1079 (D.C. Cir. 1989)
UP/MP/WP	Union Pacific Corp., Pacific Rail System, Inc., & Union Pacific R.R. - Control - Missouri Pacific Corp. & Missouri Pacific R.R., 366 I.C.C. 459 (1982), aff'd in part & remanded in part sub nom. Southern Pacific Transportation Co. v. ICC, 736 F.2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985)
UP/SP	Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSC Corp., and the Denver and Rio Grande Western Railroad Company, Decision No. 44, Finance Docket No. 32760 (1996).
WC/FRVR/GBW	Wisconsin Central Transportation Co. - Continuance in Control - Fox Valley & Western, Ltd., 9 I.C.C.2d 233 (1992), 9 I.C.C.2d 730 (1993)
Western Resources	Western Resources, Inc. v. STB, 109 F.3d 782 (D.C. Cir. 1997)

APPLICANTS' REBUTTAL

CSX Corporation ("CSXC"), CSX Transportation, Inc. ("CSXT"),[1] Norfolk Southern Corporation ("NSC") and Norfolk Southern Railway Company ("NSR"), and Conrail Inc. ("CRR") and Consolidated Rail Corporation ("CRC"), collectively, "Applicants," hereby submit their reply to the filings made by various parties on October 21, 1997, as well as late filings accepted by the Board. This submission, titled for simplicity "Applicants' Rebuttal," actually encompasses (a) Applicants' response to inconsistent and responsive applications, (b) Applicants' response to comments, protests, requested conditions, and other oppositions, and (c) Applicants' rebuttal in support of the primary application and the related applications.[2]

The submission is in three volumes. This volume, Volume 1, is a narrative that reviews the applicable law and discusses the issues raised by the October 21 filings, referring to the rebuttal testimony pertinent to each issue.[3] Volume 2, which is in two parts, contains

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[1] CSXC and CSXT are referred to collectively (and sometimes, where the context indicates, with their subsidiaries) as "CSX", NSC and NSR are referred to collectively (and sometimes, where the context indicates, with their subsidiaries) as "NS", and CRR and CRC are referred to collectively (and, sometimes, where the context indicates, with their subsidiaries) as "Conrail". Tables of abbreviations and short case citation forms follow the Table of Contents.

[2] Appendix D to this Volume 1 sets forth CSXT's response to a request from the City of Georgetown, Illinois for the issuance of a Certificate or Notice of Interim Trail Use with respect to a related abandonment authorization sought in STB No. AB-167 (Sub-No. 1181X) and STB No. AB-55 (Sub-No. 551X).

[3] While this is a joint Rebuttal, the descriptions and other materials in it concerning the operation by CSX and NS of their respective systems, including the present Conrail routes and other assets to be operated by them as a result of the Transaction, have been independently developed, unless otherwise noted. While Conrail is a signatory to, and joins in this Rebuttal, by doing so it does not necessarily represent that it subscribes to, or agrees

(continued..)

statements of Applicants' officers and of expert witnesses, regarding competition, operating and labor issues, the public benefits of the transaction, and other issues. Volume 3, in four parts, is an Appendix containing deposition excerpts, responses to discovery requests and other ancillary materials.

INTRODUCTION AND SUMMARY

The question before the Board in this proceeding is whether the transaction as proposed by Applicants (the "Transaction") is consistent with the public interest. As demonstrated in the Application and this Rebuttal, the Transaction is clearly in the public interest and should be approved without conditions that would prevent Applicants from achieving the substantial public and private benefits demonstrated in this proceeding.

The Transaction is unique -- indeed, historic -- in the breadth of the benefits it will create. Unlike prior railroad combinations, the Transaction does not present a significant threat to competition. To the contrary, the Transaction is the most pro-competitive transaction ever brought before the Board or its predecessor. The Transaction will enable the Applicants to compete more effectively with trucks, which are the dominant mode of freight transportation in the East. The allocation of Conrail's lines and assets for operation between CSX and NS will introduce rail competition into large portions of the East for the first time since prior to Conrail's creation. The public will benefit from the creation of two

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[3](...continued)
with, all of the language or the other materials prepared by or for the other Applicants herein.

strong balanced rail networks of broad geographic scope that will extend their history of vigorous competition to important industrial and commercial centers currently served by only one major railroad.

In addition, the integration of Conrail's lines into the existing CSX and NS networks will create new single-line service for shippers throughout the Eastern United States. This will lead to improved service, reduced transit times, new commercial opportunities, significant investment in infrastructure, and economic growth. Other benefits include greater intermodal competition, improved equipment utilization, reduced general and administrative costs, increased operating efficiencies, improved safety, and gains for the environment.

As discussed in Section IV below, in those very few instances where the Transaction would unavoidably have resulted in loss of competitive rail alternatives to particular shippers or shortline railroads, CSX and NS have crafted effective arrangements to ensure the preservation of competitive rail alternatives. CSX and NS's efforts to foster cooperative relationships with shippers and other railroads have not, however, been limited to those few instances of adverse competitive impacts. Rather, in numerous cases where there was no threat of competitive harm, CSX and NS have affirmatively sought opportunities to enter into positive and mutually beneficial agreements with other railroads, shippers and state governmental authorities to further enhance the many benefits of this Transaction. These agreements and, in particular, the agreement with the National Industrial Transportation League ("NITL") are described in greater detail in Section II below.

Notwithstanding these efforts, over 160 parties have filed responsive applications, comments, protests and requests for conditions in this proceeding. The issues raised in those

filings fall into two principal categories. The first category consists of requests for conditions that relate to the structure and terms of the Transaction as proposed by Applicants. The second -- and more significant -- category consists of requests for conditions that relate to the efficient and safe implementation of the Transaction.

This Rebuttal will demonstrate that the requests for conditions relating to the structure and terms of the Transaction are completely unwarranted under established Board standards for granting conditions and should be rejected. Most of the commentors in this category do not even attempt, and none succeeds, in impeaching the overall benefits of the Transaction. Indeed, many acknowledge the significant benefits of the Transaction in general, while focusing on isolated concerns of limited scope peculiar to the particular commentor. A great number of the commentors in this first category complain not that they are affirmatively harmed by the Transaction, but that they are not accorded the same new advantages as others. Others complain about pre-existing conditions that are unrelated to the Transaction. Some seek special or local advantage in contravention of the historic role of the Board and its predecessors in protecting the national transportation network from impositions of local or special interests. Still other commentors brazenly attempt to use the Transaction to have the Board modify its existing regime of rate regulation, a matter that is clearly outside the scope of this proceeding. We will demonstrate in this Rebuttal that none of these requests meets the Board's established standards for the imposition of conditions. Little more need be said of them here.

With respect to the second, more important, set of issues -- relating to safety and implementation of the Transaction -- more should be said at this time. These are serious

comments. Applicants recognize that the smooth and safe implementation of the Transaction is of paramount importance. Applicants appreciate that problems in the West following the UP/SP merger have heightened concerns about the efficiency and safety of the implementation of this Transaction, and take seriously their obligation to their customers and the public to ensure smooth and safe implementation. The events in the West have prompted Applicants to redouble their efforts to ensure a safe and seamless transition in this case. CSX and NS are proud of their safety and service records and will under no circumstance compromise safety or service as they integrate Conrail's lines into their respective operations.

CSX and NS also take seriously the operational challenges of integrating Conrail's lines and assets into their respective existing networks, and the smooth operation of the "continuing Conrail" in the Shared Assets Areas. It is for this reason that CSX and NS have each been engaged since well before the Application was filed in careful, methodical planning to ensure safe and efficient integration of Conrail's lines into their respective systems. CSX and NS have described their implementation plans for the New Jersey Shared Assets Area in the operating plan for that Shared Assets Area filed with the Board on October 29, 1997. CSX/NS-119. They have also described their respective safety integration plans in filings made with the Board on December 3, 1997. In addition, the rebuttal verified statements of Michael J. Ward, Executive Vice President-Finance and Chief Financial Officer of CSXT, and Nancy Fleischman, Vice President of NS, explain in detail the steps that CSX and NS have already taken and plan to take to ensure a seamless transition that preserves and enhances quality service and safety. Applicants are committed

to working diligently with the Board, the FRA, Conrail employees, customers, and the communities they serve to ensure successful implementation.

Applicants note, however, that while the problems that have occurred in the West provide an important reminder of the need for deliberate and careful planning for successful implementation, there are significant differences between the UP/SP merger and the proposed Transaction. Among those differences is that Conrail, unlike SP at the time of the UP/SP merger, is financially sound and has a strong safety record in its own right. CSX and NS also both have better safety records than did UP and SP at the time of the merger. Moreover, unlike UP/SP, CSX and NS plan to retain almost all Conrail field managers and employees. The present Transaction does not involve a rationalization of parallel routes with abandonments and major reductions of operating personnel, but rather extends the systems, and expands the operating forces, of both CSX and NS. Accordingly, the continuity and experience that will be critical to a smooth and safe transition will be retained. In addition, CSX and NS will have completed by "Day 1" substantial capital investments that will enhance their systems and ensure that they are prepared to handle the new Conrail traffic efficiently. Thus, there is no reason to assume, and no record evidence to suggest, that the problems that arose in the UP/SP merger will be duplicated in this Transaction.

It should be emphasized, however, that all of Applicants' careful planning will be for naught if conditions are imposed that would interfere with the smooth implementation of Applicants' operating plans. These operating plans have been carefully developed to maximize efficiency in the integration of Conrail's routes, assets and human resources into the existing networks of CSX and NS. The imposition of conditions that would change the

fundamental assumptions of the operating plans would adversely affect both implementation and the public benefits that are expected to flow from it. Applicants propose to proceed with implementation at a deliberate -- but brisk -- pace so that customers, employees, investors and communities can begin to realize the full public benefits of the Transaction. Applicants have committed in their agreement with NITL that the implementation process will involve open communication with the shipping community, so that shippers will be kept apprised of the status of implementation and will have a forum where they can address with Applicants their transportation requirements related to the Transaction.

In sum, the significant public benefits of the Transaction provide ample reason for the Board to approve the proposed Transaction, subject only to conditions related to reasonable Board oversight during the implementation process.

STATEMENT OF FACTS

By application filed June 23, 1997, CSX and NS, together with Conrail, sought authorization under 49 U.S.C. §§ 11323-25 for the Transaction, defined as the acquisition of control of Conrail by CSX and NS and the allocation of the use and operation of Conrail's assets between them.[1]

The Transaction involves the joint acquisition by CSX and NS of control of Conrail, the allocation between them of the use and operation of Conrail's assets, and the creation of two efficient expanded rail networks that will compete with one another throughout the eastern United States.

Initially, CSX and Conrail entered into an agreement on October 14, 1996 that provided for the acquisition of control of Conrail by CSX alone through a tender offer and subsequent merger. CSX/NS-25, Vol. 8A at 1. Following a competing tender offer by NS (see CSX/NS-24, Vol. 7D) and discussions among the three companies, CSX and NS entered into a letter agreement on April 8, 1997 (CSX/NS-25, Vol. 8A at 350) that provided for the joint acquisition by CSX and NS of CRR's remaining outstanding common stock.

On June 2, 1997, CSX and NS completed that acquisition. CSX/NS-25, Vol. 8A at 437. CRR is now an indirect wholly-owned subsidiary of CSX and NS. Through a series of agreements, CSX and NS each holds a 50% voting interest in CRR. CSX holds a 42% equity interest, and NS holds a 58% equity interest. All of the CRR common stock is held indirectly for the benefit of CSX and NS and has been placed in a voting trust (the "CSX/NS Voting Trust") to avoid unauthorized control pending Board approval of the Application. See CSX/NS-25, Vol. 8A at 323.

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[1] Certain other relief was requested. See "Prayer for Relief," CSX/NS-18, Vol. 1 at 101-105.

Another agreement between CSX, NS and Conrail, dated as of June 10, 1997 (the "Transaction Agreement"), governs the allocation of the operation and use of Conrail's assets. CSX/NS-25, Vol. 8B. To effect that allocation, CRC will form two new wholly-owned subsidiaries, New York Central Lines LLC ("NYC") and Pennsylvania Lines LLC ("PRR"). Following Board authorization of the proposed transaction, CRC will contribute and transfer to its NYC and PRR subsidiaries certain CRC assets, including lines currently operated by CRC. The contribution of assets to NYC and PRR will allocate Conrail's principal routes in a manner that enables both CSX and NS to offer single-line service to the Northeast.

CSXT and NYC will enter into an operating agreement pursuant to which CSXT will operate the assets allocated to NYC. CSX/NS-25, Vol. 8B at 122. Similarly, NSR and PRR will enter into an operating agreement under which NSR will operate the assets allocated to PRR. CSX/NS-25, Vol. 8B at 160.

In addition to the allocation of Conrail's assets, the Transaction provides for CRC to retain certain assets that CRR, CRC or their subsidiaries (other than NYC and PRR) will operate in three Shared Assets Areas -- North Jersey, South Jersey/Philadelphia, and Detroit -- for the benefit of CSX and NS. CSXT and NSR will enter into a Shared Assets Area Operating Agreement with CRC in connection with each of the Shared Assets Areas, and CRC will grant to CSXT and NSR the right to operate their respective trains, with their own crews and equipment and at their own expense, over any tracks included in the Shared Assets Areas. CSX/NS-25, Vol. 8C at 57, 97, 137. CSXT and NSR will each have exclusive and independent authority to establish all rates, charges, service terms, routes, and

divisions, and to collect all freight revenues, relating to freight traffic transported for its account within the Shared Assets Areas.

Although not Shared Assets Areas, certain other areas are subject to special arrangements that provide for sharing of routes or facilities by CSX and NS. These areas include the former Monongahela Railway and Conrail's Ashtabula Harbor dock facilities. See CSX/NS-25, Vol. 8C at 177, 715.

By thus allocating and sharing the assets of Conrail, the Transaction will dramatically reconfigure the railroad industry in the Eastern United States. It will create vigorous rail competition in large portions of the Mid-Atlantic and Northeastern regions previously served only by Conrail. The substitution of CSX and NS for Conrail also will create numerous new single-line routes between the Northeast and the Southeast and the Northeast and the Midwest, resulting in improved transit times, greater reliability of on-time delivery, increased safety and other service and efficiency gains.

The Applicants filed their Primary Application on June 23, 1997. CSX/NS-18 at 25. Supplements were filed at various times thereafter, as promised in the Primary Application, at the request of the Board, or otherwise. See CSX/NS-33 (Supplemental Statements of Shippers, Public Officials and Others in Support of the Transaction); CSX/NS-35 (Errata to Primary Application); CSX/NS-119 (CSX/NS Operating Plan for the North Jersey Shared Assets Area and Supporting Statement); Safety Integration Plan of CSX Corporation and CSX Transportation, Inc. (December 3, 1997); Norfolk Southern's Safety Integration Plan (December 3, 1997); and CSX/NS Safety Integration Plan for Conrail Shared Assets Operations (December 3, 1997). The depositions of 38 of Applicants'

witnesses were taken in the period from August to October 1997 and Applicants responded to over 100 sets of interrogatories and/or document production requests.

On October 21, 1997, over 160 responses of various sorts (comments, protests, requests for conditions and responsive applications) were submitted to the Board. The Board thereafter accepted for filing 15 responsive applications,[2] identified below by name of Applicant and subdocket number (see Decision No. 54):

Responsive Applicant	Subdocket No.
New York State Electric and Gas Corporation	Sub-No. 35
Elgin, Joliet & Eastern Railway Company, Transtar, Inc., and I & M Rail Link, LLC	Sub-No. 36
Livonia, Avon & Lakeville Railroad Corporation	Sub-No. 39
Wisconsin Central Ltd.	Sub-No. 59
Bessemer and Lake Erie Railroad Company	Sub-No. 61
Illinois Central Railroad Company	Sub-No. 62
R.J. Corman Railroad Company/ Western Ohio Line	Sub-No. 63
State of New York, by and through its Department of Transportation, and the New York City Economic Development Corporation	Sub-No. 69

[2] A sixteenth responsive application, filed on behalf of Belvidere & Delaware River Railway and the Black River & Western Railroad, was accepted but later withdrawn by the responsive applicants. BDRV-8.

New England Central Railroad, Inc.	Sub-No. 75
Indiana Southern Railroad, Inc.	Sub-No. 76
Indiana & Ohio Railway Company	Sub-No. 77
Ann Arbor Acquisition Corporation, D/B/A Ann Arbor Railroad	Sub-No. 78
Wheeling & Lake Erie Railway Company	Sub-No. 80
Canadian National Railway Company and Grand Trunk Western Railroad Incorporated	Sub-No. 81
Grand Trunk Western Railroad Incorporated -- Construction and Operation Exemption -- Connecting Tracks at Trenton, MI	Sub-No. 83

I. THIS TRANSACTION, UNIQUE IN THE HISTORY OF RAIL COMBINATIONS, WILL DRAMATICALLY INCREASE COMPETITION, IMPROVE RAIL SERVICE, AND RESULT IN ENORMOUS PUBLIC BENEFITS.

This Transaction will reconfigure the railroad industry in the eastern United States bringing substantial benefits to shippers as well as the parties to the Transaction. By allocating the use and operation of Conrail's lines and other assets between them, CSX and NS will realize not only the benefits commonly associated with rail combinations, but also will introduce new rail competition into large portions of the Northeast for the first time since before the creation of Conrail. Cost reduction, as well as better and more efficient rail service, will position CSX and NS to divert substantial freight traffic from the East's congested highways, thereby conferring additional benefits on the public at large.

In total, the Transaction will generate nearly $1 billion annually in quantifiable public benefits, CSX/NS-18, Vol. 1 at 16, as well as significant unquantified benefits, most notably those benefits resulting from introducing rail competition into areas previously rail-served only by Conrail. Moreover, industries in regions in which this new competition will be introduced -- those regions encompassed by the Shared Assets Areas of North Jersey, South Jersey/Philadelphia and Detroit, as well as mines in the area served by the former Monongahela Railway -- are significant users of rail transportation. Most significantly, there is no serious contention that the Transaction will not result in the enormous public benefits demonstrated in the Application.

A. The Transaction Introduces Dual Rail Rail Service to Substantial Portions of the Eastern United States Previously Served By Only A Single Class I Rail Carrier.

This Transaction is unprecedented in bringing about a dramatic increase competition between railroads, as well as in strengthening competition by rail vis-a-vis trucks. Conrail is presently the only Class I U.S. rail carrier in the Northeast section of the country. Shippers in that area lack the competitive and service benefits that come from having two strong rail networks serving them. For a substantial portion of the Northeast, CSX and NS are introducing dual rail service for the first time since before the creation of Conrail. The establishment of the Shared Assets Areas of North Jersey, South Jersey/Philadelphia and Detroit will bring rail shippers in those areas the benefits of head-to-head competition by rail carriers of comparable scope, geographic coverage, and scale. Similar benefits will result from the restoration of rail competition to shippers served by the former Monongahela Railway. Shippers of lake cargo coal will also benefit from the enhanced service options afforded by joint use of the Ashtabula, Ohio harbor facilities by CSX and NS.

The STB has recognized that CSX and NS compete vigorously in their overlapping service areas. UP/SP at 118. Now, thousands of additional shippers will receive the benefit of their vigorous competition.

Notably, parties such as the Department of Justice and the NITL have commented favorably on the creation of new competition resulting from the Transaction. The Department of Justice acknowledges that

> "the proposed transaction would create new rail competition, most notably in major markets in New York, New Jersey, and Philadelphia."

DOJ-1 at 3. Similarly, the NITL states,

> "Unlike past mergers, this transaction promises to result in increased competition in certain areas of the country, and [the NITL] applaud[s] these procompetitive features of the transaction."

NITL-7 at 11.

The substantial competitive benefits of the Transaction are essentially uncontested. We address in Section XXI, infra, the claim of certain commentors that implementation problems might delay the realization of these benefits. These commentors do not question the procompetitive benefits of the Transaction. The only other significant comments regarding the competitive benefits of the Transaction come from parties who seek to reap additional benefits from the Transaction. These comments which seek expanded shared asset areas or other means by which parties can reap the competitive benefits of the Transaction that are to be realized by others (see Section VIII, infra) are powerful evidence that market participants believe that the projected benefits by Applicants are real and substantial.

B. Shippers Throughout the Eastern United States Will Realize the Benefits of Dramatically Improved Rail Networks With New, More Extensive Single-Line Routings That Will Compete More Effectively With Motor Carriers.

The Transaction will not only increase competition, but also markedly improve rail service by creating new single-line service. The expansion of CSX's and NS' rail networks into Conrail's service territory will result in two strong balanced rail systems serving major ports, gateways, and commercial areas in the eastern United States. At the present time,

CSX and NS depend heavily on interchanging traffic with Conrail to reach many mid-Atlantic and Northeastern markets. Through the operation and use of Conrail's lines, CSX and NS will operate numerous new single-line routes between the Northeast and the Southeast and the Northeast and the Midwest.

Single-line rail service is generally more timely, reliable, and cost-effective than joint-line service. The elimination of scheduling and coordination problems involved in interchange allows goods to reach their destination hours or days sooner, permitting shippers, in turn, to reduce their inventory carrying costs. The efficiencies inherent in this new single-line service will attract increased rail traffic volumes, enabling CSX and NS to assemble larger blocks of cars as they make up trains. The enhanced blocking opportunities will allow traffic to bypass congested terminals, and thereby reduce terminal delays.

C. The Transaction Will Result in Substantial Quantified Net Public Benefits.

In addition to the obviously significant public benefits that will result from the introduction of dual service and the creation of new single line service, the Transaction will generate nearly $1 billion in quantifiable public benefits. See CSX/NS-18, Vol. 1 at 16. See also id., CSX summary of Benefits Exhibit at 123; NS Summary of Benefits Exhibit at 125; Ingram VS at 592-95 and CSX/NS-19, Kalt VS at 51-56.

The quantifiable public benefits of the Transaction will derive from operating expense reductions for CSX and NS, shipper logistics savings, and reduced road damage. Other public benefits that Applicants have quantified but not expressed in dollars include the diversion of significant volumes of freight traffic from congested highways and reduced fuel consumption and air pollution. Diesel fuel consumption resulting from CSX

and NS truck-to-rail diversions will be reduced by about 120,000,000 gallons annually. CSX/NS-23, Vol. 6A, Environmental Report at 71. Total air pollutant emissions will be reduced by thousands of tons annually. Id. at 72. Given the substantial quantified and unquantified benefits of the Transaction, net public benefits are likely to exceed $1 billion.

II. THE TRANSACTION HAS WIDESPREAD SUPPORT FROM SHIPPERS AND GOVERNMENTAL ENTITIES.

The breadth of public support for the Transaction is remarkable. Applicants filed with their Application over 2,700 support letters, including letters from over 2,200 shippers, over 350 public officials, and over 80 other railroads, probably the strongest showing of support ever presented in a rail control application.[1] In addition, since the filing of the Application, numerous other parties have separately filed letters of support with the Board.

The overwhelming support for the Transaction from shippers, public officials and other railroads demonstrates the enormous public benefits of the Transaction. It also reflects the diligent efforts of CSX and NS to enter into agreements with public agencies, shippers and other railroads to further improve efficiency and service, and to address safety and passenger concerns. These agreements, reached through voluntary negotiations among the parties, provide significant benefits both to the parties and to the public. Chief among these is the settlement that CSX and NS announced on December 11, 1997, with the National Industrial Transportation League ("NITL"), a major shipper organization. The settlement covers a broad range of issues raised by NITL and other parties, although NITL has retained the right to pursue "post-implementation" rate conditions. The NITL agreement represents fair and reasonable accommodations that will yield significant benefits for the shipper community and the public. The terms of the settlement are described in greater detail in Section II.B., infra. The Settlement Agreement itself is Appendix B to this Volume 1. While we do not provide in this Rebuttal a list of agreements with other shippers or shipper

[1] These numbers include letters in Applicant's supplemental filing in August 1997 of Volumes 4F and 4G to the Application.

interests, a list of the railroads with whom either CSX or NS have entered into agreements in connection with the Transaction is provided in the following chart:

CSX and NS Agreements with Railroads

- Black River and Western Railroad/Belvedere and Delaware River Railroad
- Buffalo & Pittsburgh Railroad and its affiliates, Allegheny & Eastern Railroad, Rochester & Southern Railroad and Pittsburgh & Shawmut Railroad (all subsidiaries of Genesee & Wyoming, Inc.)
- Canadian National Railway
- Canadian Pacific Railway
- Chicago, SouthShore & South Bend Railroad
- Central Railroad of Indiana
- Central Railroad of Indianapolis
- Eastern Shore Railroad
- Illinois Central Railroad
- Iowa Interstate Railroad
- Louisville & Indiana Railroad
- Maryland and Delaware Railroad
- Massachusetts Central Railroad
- Michigan Southern Railroad
- Nittany and Bald Eagle Railroad and its affiliates, the North Shore Railroad, the Shamolin Valley Railroad, and the Union County Industrial Railroad
- Providence & Worcester Railroad

In addition to the eight states that had supported the Transaction at the time of the Application, CSX or NS have received letters of support from the following additional states.

State Governmental Entities

- State of Maryland
- Commonwealth of Massachusetts
- State of Michigan
- Commonwealth of Pennsylvania
- Commonwealth of Virginia
- West Virginia

In addition, a national coalition of nearly 500 public interest groups, companies and highway safety organizations, known as Transportation Advocates for Competition (TRAC), supports the Transaction. Members of TRAC include the American Automobile Association, the National Audobon Society, the International Trade Council, American Honda Motor Co., the Illinois Transportation Association and numerous chambers of commerce and industrial development organizations from states and counties throughout the Midwest, South and East.

A. There is Unpredecented Support for the Transaction and Minimal Opposition.

1. There Is Unprecedented Shipper Support for the Transaction.

Shippers throughout the entire United States, representing a wide range of industries and commodities, have submitted letters supporting the Transaction. These shipper support letters testify to the enormous benefits of the transaction, including greater single-line service between Northeastern and Southeastern and Midwestern points, more reliable service

improved equipment availability and utilization, and greater competition with truck traffic. While space limitations prevent quotation from even a significant fraction of those letters, illustrative samples follow.

> We believe that the division of Conrail's assets would produce better service, better equipment utilization and more competitive rates. With the enhanced CSX and NS systems, we expect more efficient reliable service. We also expect that with the increased number of origins/destinations able to be reached in single-line service, we are more likely to increase our presence in the market using rail than we can today.
>
> Riverside Materials, Inc.
> Philadelphia, PA

> The proposed transaction would increase rail business for the combined system that would be good for all of the shippers who rely on rail. Further, trucks dominate the nation's freight market, especially in the East. Because the new systems would create greater efficiency, it would lead to more freight traffic on the rails diverted from truck promoting more long term capital investment and ensuring that rail service would grow into the future.
>
> Athenia Mason Supply, Inc.
> Clifton, NJ

> Joint line rail service into the Northeast has not allowed full access to markets that could be valuable to us. We support approval of the transaction which will allow Norfolk Southern and CSX to acquire Conrail and divide the assets. We would welcome the benefit of increased market access from single line rail transportation that will provide us an additional customer base previously unattainable.
>
> Phoenix Enterprises, Inc.
> Bluefield, WV

In addition, a number of the shippers and shipper interests who made October 21 filings expressed support for the Transaction, including the American Soybean Association, Bethlehem Steel Corporation, Cargill Inc. and Weirton Steel Corporation.

2. Governmental Entities Echo the Positive Reaction of Shippers to the Transaction.

The over 350 public officials and governmental entities whose letters of support were filed with the Application include the Governors of Alabama, Kentucky, Tennessee, and Virginia, as well as state legislators and agencies from Alabama, Florida, Georgia, Illinois, Indiana, Kentucky, Maryland, Michigan, Mississippi, Ohio, South Carolina, Tennessee, Virginia and West Virginia. Subsequent to the filing of the Application, additional letters of support from public officials and governmental entities have been separately filed with the Board, including by the Governors of Pennsylvania, Maryland, Massachusetts, Michigan and West Virginia.

The letter of Governor Engler of Michigan could well have been summarizing the views of the numerous governmental entities supporting the Transaction. He states,

> This restructuring of the railroad system in the eastern United States will result in a more efficient transportation system with balanced competition between two strong carriers.

The comments of Governor James of Alabama are typical. He states,

> Alabama's industrial, business and agricultural interests must have access to reliable rail transportation, and the proposed transaction will enable them to receive more competitive rail service and provide them with single line access to many more customers and suppliers. I am confident that the enhanced transportation service resulting from the proposed transaction will generate significant new business and industrial growth in Alabama. Such growth is crucial to us because it creates new jobs for Alabama residents.

Similarly, the Commonwealth of Pennsylvania, Governor Ridge and the Pennsylvania Department of Transportation state,

> Pennsylvania believes that the proposed transaction will significantly benefit the Commonwealth and its citizens. Benefits include

(1) increased competition between NS and CSX in the Philadelphia/South Jersey Shared Assets Area and in the Monongahela coal fields, (2) competition between NS and motor carriers for business throughout much of Pennsylvania and competition between CSX and NS for intermodal traffic in portions of eastern Pennsylvania, (3) the presence of two carriers in southwestern and southeastern Pennsylvania competing for traffic to and from the South, (4) construction, expansion or upgrading of repair shops, intermodal facilities, yards, dispatching offices, and an automotive loading and unloading facility, among other facilities, (5) new and more frequent service, (6) industrial development assistance from Applicants, (7) new access by the CP Rail system to Harrisburg, and (8) reduced truck traffic on Pennsylvania's highways as a result of greater rail penetration into the intermodal market.

3. Opposition to the Transaction Is Limited.

Not only is the breadth of support for the Transaction remarkable, the lack of opposition from a number of important interests is also significant. For example, while certain shortline railroads have requested specific conditions to address isolated issues, no major railroad has opposed the Transaction. To the contrary, since the Application was filed, letters of support have been received from Union Pacific, Canadian Pacific Canadian National, Chicago SouthShore, Louisville & Indiana, Providence & Worcester, Iowa Interstate, Genesse & Wyoming, Maryland & Delaware, Black River & Western and Belvedere & Delaware River Valley. These letters of support are in addition to the over 80 letters of support received from railroads prior to the filing of the Application.

Notably, neither the Department of Justice ("DOJ") nor the Department of Transportation ("DOT") has opposed the Transaction. While the Department of Justice has raised concerns regarding three isolated situations, the Department of Justice acknowledges that the proposed transaction would create new rail competition. DOJ-1 at 3. Similarly, while the Department of Transportation lists in passing a number of areas, including

competitive impacts, that it suggests require close examination by the Board (DOT-3 at 6-7), it does not take a position on those issues, limiting its comments to concerns relating to safety and implementation.[2]

Significantly, as noted in Section I above, even among those parties that have voiced certain concerns about the Transaction, a significant majority of those parties acknowledge that the Transaction will bring substantial competitive benefits. The Coalition of Northeastern Governors, for example, states:

> CSX and NS are proposing the restoration of head-to-head rail competition in certain areas, including portions of the Northeast, where Conrail now enjoys a monopoly. This factor makes this transaction different than any other Class I rail merger in the recent past or perhaps ever. In prior transactions, the principal competitive issue has been the reduction of rail options for shippers from three railroads to two or from two railroads to one. NS and CSX have also attempted to provide access for one another if the transaction would reduce an area's options from two carriers to one.

CNEG-5 at 6.

Furthermore, no party has successfully refuted Applicants' estimates of the public and private benefits set forth in the Statements of Benefits and the Pro Forma Financial Statements in the Application. While certain parties make statements questioning the benefits of the transaction, they provide no analysis or evidence to impeach the projections presented by Applicants. For example, the ARU asserts that the Applicants' projections of public benefits "are pure speculation" and "may not come to fruition." ARU-23 at 55. Yet, like

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[2] As discussed below in Section XVII, Applicants believe that the specific situations noted by DOT have been or are being addressed. The DOJ comments were based on an incomplete understanding of the facts which, when analyzed in context, demonstrate the absence of any substantial competitive concerns. See Section IV, infra.

others making assertions of this kind, the ARU makes no effort to offer any analysis or evidence in support, despite the fact that the bases for Applicants' estimates of benefits have been documented and available for scrutiny through workpapers, written discovery and oral depositions.

In sum, the enormous public benefits of the Transaction are widely acknowledged, and have not been effectively refuted. While certain parties have raised concerns regarding isolated situations, they are generally quite limited in scope. As will be demonstrated in this Rebuttal, the concerns raised often have no relationship whatsoever to any "harm" created as a result of the Transaction or, if they do relate in some way to a consequence of the Transaction, they have been adequately addressed.

B. The NITL Settlement Resolves Substantial Issues and Benefits Shippers.

On December 11, 1997, CSX and NS reached a major settlement with the NITL, the largest trade association of shippers in the United States, broadly representative of a wide spectrum of rail users. A copy of the NITL Settlement is set forth in Appendix B to this Volume 1.

Applicants view the NITL Settlement as an important step reflecting the NITL's recognition of the essential desirability and public benefits of the Transaction. They also view it as resolving certain issues of NITL's concern as to the efficient, careful and safe implementation of the Transaction and various commercial and operational concerns of members of the NITL.

Applicants recognize that the terms of the NITL Settlement extend beyond traditional conditions that have been imposed by the STB and ICC in prior consolidation

proceedings. Applicants believe, as the Board and the ICC have frequently stated, that whenever possible, disputes should be resolved by negotiated settlement between affected parties rather than imposed by government decree. In recognition of shippers' concerns created by the rail situation in the West, Applicants entered into an Agreement that addressed those concerns, including "non-traditional" ones, without delaying the transaction and the benefits that flow from it.

The NITL Settlement provides additional benefits to shippers by preserving interchanges and reciprocal switching arrangements, reducing many switching charges, and providing efficient joint line service to Conrail shippers affected by the allocation of Conrail lines between the two carriers. The benefits of the Settlement are not restricted to NITL members and apply to all shippers meeting its terms.

The Settlement resolves most of the issues and requests for conditions submitted to the Board by the NITL in its comments of October 21, 1997.

The settlement provides for procedural and substantive terms in three broad areas:

a. Implementation and oversight in the phase prior to the operation of Conrail's routes separately by CSX and NS;

b. Implementation and oversight thereafter; and

c. Commercial and operational issues, such as interline service, gateways, reciprocal switching, transportation contracts and switching rates.

The Settlement preserves the benefits of the Transaction to the public, while providing a carefully-crafted further assurance of efficient implementation of the Transaction.

1. Implementation and Oversight Prior to the Separate Operation of Conrail's Routes.

a. Consultation with Shipper Representatives. The settlement provides that by February 1, 1998, CSX and NS will create a "Conrail Transaction Council" consisting of representatives of the railroads, NITL, and other organizations adhering to the terms of the agreement or representing affected rail users. The Council will function as a forum for constructive dialog. The railroads are to discuss the implementation process with the Council, which may suggest mechanisms to address any perceived obstacles to the effective and efficient implementation of the Transaction. The Council is not intended to supplant STB oversight of the implementation, which is discussed further in Item 2, below.

b. Additional Plans for the Shared Assets Areas. By February 1, 1998, the railroads will provide to the Council a summary description of how operations will be conducted in each of the three Shared Assets Areas, North Jersey, South Jersey/Philadelphia and Detroit. The summaries will focus on the function and interrelationship of the two railroads, dispatching controls and the effects on individual shippers in these areas with respect to concerns such as car ordering, car supply and car location.

c. Preparation for Separate Operations. The NITL Settlement provides that prior to the start of separate operations over the Conrail lines, CSX and NS will: advise the STB that (1) management information systems are in place designed to manage operations on the former Conrail system within the Shared Assets Areas and at interchanges between the CSX/Conrail and NS/Conrail systems, including car tracing capabilities; and (2) they have obtained all necessary labor implementing agreements. If

either CSX or NS requests the Board to take steps to initiate labor implementing agreements prior to the Control Date, the NITL will support that request. CSX and NS will, consistent with safe and efficient operation, implement their separate operations of the Conrail routes as soon as possible after the control of Conrail has been authorized.

2. Implementation and Oversight After the Commencement of Separate Operations of the Conrail Routes.

a. Board Oversight --Development of Measurable Standards. The NITL Settlement proposes that the Board require oversight over the implementation of the Transaction for a three-year period. This is without prejudice to the authority of the Board to effect continuing oversight thereafter. As part of the oversight, the parties suggest that the Board require quarterly reports from CSX and NS and an opportunity for commenting by all interested shippers. CSX, NS and the Council have agreed jointly to develop and recommend to the Board objective, measurable standards to be used in the quarterly reports, with the baseline to be the standards of Conrail as it currently exists.

b. Conrail Rail Transportation Contracts. Conrail rail transportation contracts, will be allocated in accordance with Section 2.2(c) of the Transaction Agreement. See Section IX. Shippers that could have had their contracts allocated for performance to either of the two carriers under Section 2.2(c), and who are dissatisfied with the service they are receiving from the carrier to which their contract's performance is allocated, are provided a further option. Those shippers may at any time after six months' experience submit to arbitration on an expedited basis the issue whether there is just cause for the transfer of responsibility for service to the other carrier.

3. Other Commercial and Operational Provisions.

a. Interline Service. Because of the allocation of Conrail's routes, a number of shippers who currently have single-line service from Conrail on certain moves will no longer have single-line service. Those shippers who had contracts with Conrail are protected in their contract rights by Section 2.2(c) of the Transaction Agreement, or they may rely on special rights afforded to "single-line to joint-line" shippers. Shippers who have shipped at least 50 cars on an annual basis on the routes in question, if they request, may require CSX and NS to maintain the existing Conrail rates (subject to RCAF-U increases) and to work with the shippers to provide fair and reasonable joint-line service, for a period of three years. An arbitration procedure is established by the NITL Settlement in the case of disputes as to the routing or interchange points for these shippers.

b. Gateways, Switching, Switching Rates. CSX and NS anticipate that all major interchanges with other carriers will remain open as long as they are economically efficient. Any point at which Conrail now provides reciprocal switching will be kept open to reciprocal switching for at least ten years after the commencement of separate operations of the Conrail routes. For the first five years, reciprocal switching charges between CSX and NS at the points just mentioned will not exceed $250 per car, subject to annual RCAF-U adjustment. At other points, or with carriers other than CSX and NS, switching charges for that period will not exceed the existing switching rates, subject to RCAF-U adjustment or, in cases where there are settlements between either CSX or NS on the one hand and other carriers on the other, the amount prescribed in that settlement, but not to exceed the current charge subject to such RCAF-U adjustment.

the one hand and other carriers on the other, the amount prescribed in that settlement, but not to exceed the current charge subject to such RCAF-U adjustment.

c. Facilities within the Shared Assets Areas. During the term of the operating agreements for the Shared Assets Areas, any new or existing facility within the areas (other than an "Operator Facility" as defined in those operating agreements) shall be open to both CSX and NS, to the extent and as provided in those agreements. The agreements are designed, in general, to provide access by both CSX and NS to existing or new shipper-owned facilities; to give CSX and NS the opportunity to invest in joint facilities in the areas; and to permit each of them separately to develop for its own use facilities that it will own or control in the area, such as transloading facilities or ramps for automotive traffic.

* * * * *

The NITL Settlement does not dispose of all issues that have been raised by NITL and it leaves the NITL free to pursue, before the Board, its request for certain post-implementation rate conditions. However, CSX and NS contend, and will continue to contend, that these conditions should not be imposed for the reasons specified elsewhere in this Rebuttal. See Sections VII and XVI, as well as Appendix B, infra.

All other issues between the NITL and CSX and NS relating to the Application are resolved by the Settlement.

The text of the Settlement Agreement and the NITL press release announcing it are presented as Appendix B to Volume 1. The terms of the NITL Settlement govern in case of any conflict with the summary description furnished above.

III. THE TRANSACTION IS STRONGLY IN THE PUBLIC INTEREST AND SHOULD BE APPROVED.

As amply demonstrated in the Application and the materials submitted with this Rebuttal, the Transaction is strongly in the public interest and should be approved. Each of the factors articulated in 49 U.S.C. § 11324(b) is consistent with this conclusion. Once the Transaction is found to be consistent with the public interest, the Board need not, and indeed cannot, do more. Contrary to the wishes of various parties to this proceeding, once the Board finds the Transaction to be consistent with the public interest, the Board must approve it. If the Board is to impose conditions on its approval, conditions must be limited to only those necessary to ensure that the Transaction is consistent with the public interest. The contention of various labor interests that the Board must find a "transportation imperative" before approving the transaction is erroneous and should be rejected.

A. The Board's Role is Limited to Determining Whether the Transaction is Consistent With the Public Interest.

The governing standard for this proceeding is set forth at 49 U.S.C. § 11324(c), which provides that

> "[t]he Board shall approve and authorize a transaction under this section when it finds the transaction **is consistent with the public interest**."

(emphasis supplied). This statute embodies a national policy strongly favoring rail consolidations.

In enacting the predecessor provision to Section 11324(b), Congress expressly stated its intent to "encourage mergers, consolidations, and joint use of facilities that tend to rationalize and improve the Nation's rail system,"[1] and it is against this backdrop that the

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[1] UP/MP/WP, at 484 (quoting S. Rep. No. 94-499, 94th Cong., 1st Sess. 20 (1975)). See (continued...)

public interest test has been applied in prior control proceedings and is to be applied by the Board in this proceeding. As the Board and the ICC have repeatedly recognized, the gains in operating efficiency and marketing capability realized through railroad consolidations make new, better competitors that can better provide quality service on demand. E.g., UP/SP at 108; BN/Santa Fe at 54; UP/CNW at 56; SP/DRGW at 854; UP/MKT at 428; UP/MP/WP at 486; NS at 192.

Contrary to the suggestion of certain parties, there is no role for the Board to attempt to make the Transaction somehow "better" or to modify the Transaction to confer benefits on parties that, while not harmed by the Transaction, claim not to benefit from it either. See, e.g., Sections IV and XVI.

B. All Five Statutory Factors Demonstrate That the Transaction Is Consistent With the Public Interest.

To determine whether the Transaction is consistent with the public interest, the Board must weigh five factors:

> "(1) the effect of the proposed transaction on the adequacy of transportation to the public;
>
> (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction;
>
> (3) the total fixed charges that result from the proposed transaction;
>
> (4) the interest of carrier employees affected by the proposed transaction; and

†(...continued)
also, e.g., SP/Tucumcari, at 340 ("The 4R Act urges us to encourage mergers, consolidations and joint use of facilities that tend to rationalize and improve the overall quality and financial strength of the Nation's rail system, while also directing us to foster competition among rail and other carriers.").

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

49 U.S.C. § 11324(b). Analysis of each factor in the context of this Transaction supports the conclusion that the Transaction is consistent with the public interest.

1. The Adequacy of Transportation to the Public Will Be Enhanced.

The primary application and verified statements in support of it set forth a persuasive demonstration that the effect of the Transaction on the adequacy of transportation is overwhelmingly positive. See CSX/NS-18, Volume 1 at 22-24 and verified statements cited therein. The Transaction will result in more single-line service, new and improved routes, more reliable service, improved equipment utilization and availability, reduced terminal delay, savings from facility consolidation and lower overheads, and increased capital investment.

Commentors do not contest the dramatic improvements in rail transportation alternatives afforded by the Transaction. Certain shippers ignore the overall public interest and complain that their individual situations are worsened. As set forth in Sections IV and XVI, infra, the Board should ignore the requests for conditions in the filings of these commentors on the grounds that they either seek to deprive others of the substantial benefits of the Transaction or obtain for themselves an impermissible advantage in their position relative to the status quo ante.

Other shippers anticipate that the Transaction will dramatically improve transportation alternatives but, given problems recently encountered by western rail carriers, seek conditions to ensure implementation of the Transaction so that those benefits are

realized at the earliest opportunity. As set forth in Section XXI, infra, conditions regarding implementation and oversight should be limited because, if not limited, they would not contribute positively to the realization of public benefits from the Transaction and could seriously harm the public interest.

2. No Other Rail Carriers Seek Inclusion in the Transaction.

The Board need not consider the second of the five factors as no petition for inclusion has been filed in this proceeding.[2]

3. Increases in Total Fixed Charges Are Readily Absorbed by CSX and NS.

Debt financings effected in connection with the acquisition by CSX and NS of CRR's common stock will add to their fixed charges. However, as reflected in the consolidated pro forma financial statements of CSX and of NS provided as Exhibits 16, 17, and 18 (Appendices C, D, and E, with respect to CSX, and Appendices G, H and I, with respect to NS) of Volume 1 of the Application, CSXC and NSC will have no difficulty absorbing these additional fixed charges. The Transaction is expected to be accretive to both CSX and NS shareholders within three years.

While certain parties have urged the Board to depart from its precedent and regulations regarding accounting for the acquisition, no party to this proceeding has challenged the pro formas or otherwise attacked the Transaction based on the effect of

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[2] The W&LE filed a responsive application seeking a variety of conditions as an alternative to seeking inclusion. W&LE-4. Although the W&LE also sought that provision be made for an inclusion proceeding in the event that W&LE fails during a post-merger oversight period, the Board did not treat W&LE's filing as an inclusion petition. See Decision No. 54.

increased total fixed charges caused by the Transaction. See Section VII and Appendix A, infra. In addition, within three years of the integration, CSX and NS expect to make substantial one-time capital investments totaling $1.2 billion to enable them to realize the substantial public benefits delineated in the application. This investment is over and above what CSX, NS, and Conrail would spend over a normal three-year horizon. Neither CSX nor NS will have difficulty in financing these capital expenditures, as demonstrated in the pro forma financial statements provided in Exhibits 16, 17, and 18 (Appendices C, D and E, with respect to CSX, and Appendices G, H and I, with respect to NS) in Volume 1 of the Application. Again, no party to this proceeding has challenged these pro formas.

4. Carrier Employee Interests Are Benefited by the Proposed Transaction.

Applicants anticipate that the Board will impose its standard labor protective conditions: the New York Dock conditions on all aspects of the Primary Application, except that the Norfolk and Western conditions, as modified by Mendocino Coast, will be imposed on related authorizations of trackage rights; the Oregon Short Line conditions on related abandonment authorizations; the Mendocino Coast conditions on the operation by CSXT and NSR of track leases with other rail carriers to which Conrail is a party; and no protective conditions will be imposed on the related construction of certain new connections and other rail lines by CSXT or NSR. As to employment, as opposed to protection and compensation, in the long term the Applicants believe this transaction will provide opportunities for rail transportation growth, and therefore, new jobs. By expanding their market reach and by becoming more competitive with trucks, CSX and NS will increase their earnings and cash from operations, which will create the capital needed for future growth and increased jobs.

5. The Transaction Increases Competition in Many Parts of the United States and Has No Adverse Effects on Competition Elsewhere.

Section I, infra, already detailed the tremendous increase in competition that will result from the Transaction. The benefits of increased competition are so dramatic and so novel in the context of rail combinations that it may be overlooked that the Transaction achieves these benefits without any reduction in competition elsewhere. Section IV demonstrates that the Transaction, as proposed, cures all 2-to-1 situations thereby eliminating any possible loss in competition from the combination of rival rail carriers. Section V demonstrates that no party has met its burden of proof to rebut the one lump hypothesis and establish that the Transaction reduces competition by virtue of its vertical effects (i.e., the combination of an upstream or downstream rail monopolist with a carrier facing competition along another portion of the movement). In short, competition is increased at many points in the CSX and NS systems but not decreased anywhere. There is a significant net increase in competition as a result of the Transaction.

C. The Board's Power to Impose Conditions Should Only Be Used to Remedy A Reduction In Competition and Then Only When Alternative Measures Are Not Available.

Since the only cognizable harms claimed by any party to this proceeding purport to be harms resulting from a reduction in competition, the Board's conditioning power should also be limited to remedying actual reductions in competition.

The Board's policy with respect to the imposition of conditions is clear and has been consistently applied by the Board and the ICC for many years. A clear articulation of

that policy is contained in the ICC's 1995 decision approving the BN/Santa Fe merger, where the ICC stated:

> Section 11344(C) gives us broad authority to impose conditions governing railroad consolidations. We have previously noted, however, that, because conditions generally tend to reduce the benefits of a consolidation, they will be imposed only where certain criteria are met. UP/MKT, 4 I.C.C.2d at 437.
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> Criteria for imposing conditions to remedy anticompetitive effects were set out in our UP/MP/WP decision, 366 I.C.C. at 562-565. There, we stated that we will not impose conditions unless we find that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market), and that the conditions will ameliorate or eliminate the harmful effects, will be operationally feasible, and will produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits produced by the merger. We are also disinclined to impose conditions that would broadly restructure the competitive balance among railroads with unpredictable effects. See, e.g., Santa Fe Southern Pacific Corp. -- Control -- SPT Co., 2 I.C.C.2d 709, 827 (1986), 3 I.C.C.2d 926, 928 (1987) (SF/SP); and UP/MKT, 4 I.C.C.2d at 437. To be granted, a condition must first address an effect of the transaction. We will not impose conditions "to ameliorate long-standing problems which were not created by the merger," nor will we impose conditions that "are in no way related either directly or indirectly to the involved merger," BN/Frisco, 360 I.C.C. at 952 (footnote omitted); see also UP/CNW, slip op. at 97.
>
> While showing that a condition addresses adverse effects of the transaction is necessary to gain our approval, it is by no means sufficient. The condition must also be narrowly tailored to remedy those effects. We will not impose a condition that would put its proponent in a better position than it occupied before the consolidation. See UP/CNW, slip op. at 97; Milwaukee -- Reorganization -- Acquisition by GTC, 2 I.C.C.2d 427, 455 (1985) (Soo/Milwaukee II). If, for example, the harm to be remedied consists of the loss of a rail option, any conditions should be confined to restoring that option rather than creating new ones. See Soo/Milwaukee II, 2 I.C.C.2d at 455; UP/MP/WP, 366 I.C.C. at 564. Moreover, conditions are not warranted to offset revenue losses by competitors. BN/Frisco, 360 I.C.C. at 951.

BN/SF at 55-56. See also, UP/SP at 144. In Decision No. 40 in the present case, the Board pointedly admonished parties intending to file responsive and/or inconsistent applications

seeking conditions to address the "specific criteria" set forth in prior cases for the imposition of conditions.

As stated and applied in BN/SF and other cases, the Board will not invoke its conditioning power where (1) no causal connection links the merger and the alleged competitive harm, (2) the proposed condition is not narrowly tailored to remedy the alleged harm, (3) alternative remedies are available, (4) the proposed condition would improve the proponent's position, or (5) the requested condition would serve to adjust the competitive balance among shippers. We address each of these briefly below as they relate to the Transaction.

1. Condition Must Remedy An Effect of the Transaction.

Conditions may not be imposed where no causal nexus links the alleged harm and the proposed condition. For example, preexisting conditions, such as "1-to-1" situations, where shippers were served by a single railroad before the transaction and would remain so after the Transaction, fail this causal nexus test.[3] This shipper does not lose any rail transportation alternative previously available to it. Because the Transaction will not eliminate rail competition that did not exist at 1-to-1 points, it will not cause competitive harm to a shipper located at such a point.

Illustrating this reasoning, the ICC in the BN/SF proceeding declined to grant any conditions to benefit Montana's mining, lumber, and agriculture industries, which contended that they were totally dependent on rail transportation and served only by BN. The Montana

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[3] Grainbelt, 109 F.3d at 797 (ICC does not "impose conditions merely to rectify pre-existing problems").

Wheat and Barley Committee requested a rate cap on wheat and barley movements and an indexing system that would afford Montana shippers identical treatment to shippers in Nebraska, where rail-to-rail competition allegedly existed. BN/SF at 38-39. The ICC rejected these conditions, reasoning that competitive alternatives to Montana shippers were not changed by the merger. BN/SF at 98; see also BN/SF at 100 (American Maize); UP/SP at 183 (Magma Copper and Yolo Shortline); UP/SP at 191 (U.S. Gypsum).

An important application of this no-causation rule involves the Board's presumption, subject to rebuttal, that the merger of a bottleneck carrier (*i.e.*, a single railroad transporting freight from an interchange point to a destination) with one of several competing origin carriers would not increase the monopoly power of the bottleneck carrier and thus would not inflict any competitive harm on shippers served by that carrier. Western Resources, Inc. v. STB, 109 F.3d 782, 788, 793 (D.C. Cir. 1997); BN/SF at 70. As demonstrated in Section V below, no party has rebutted this "one lump" hypothesis and there is no reason for the Board to depart from established precedent in this case.

2. Conditions Must Be Narrowly Tailored.

Conditions should be imposed on transactions only to the extent necessary to alleviate or eliminate competitive harm flowing from the Transaction. Conditions should not be imposed to remedy perceived wrongs that existed before the Transaction, to "remedy" perceived disadvantages that do not involve loss of competition, nor to effect sweeping changes in the structure or practices of the railroad industry. As the Board stated in UP/SP at 157-58 in rejecting conditions requiring divestiture at certain lines. "[W]e will not impose conditions that will restructure the competitive balance among railroads with unpredictable

effects . . ." For those reasons, the Board noted that conditions requiring divestiture of lines would rarely be appropriate. "Divestiture in the rail industry, with its network economies, is a requirement, to be imposed only under extreme conditions, when no other less intrusive remedy would suffice." UP/SP at 157. In this transaction, as discussed below, there are few requests for divestiture of rail lines, and these should be rejected as unwarranted and wholly disproportionate to the claimed harm.

Similarly, ambitious proposals in UP/SP for creating open junction and other open access arrangements were rejected. Not only were such arrangements unnecessary (given the pro-competitive measures required by the amended and modified BN/SF Agreement), but they also would not restore competition destroyed by the merger but rather "would create new rail competition far beyond that which exists today." UP/SP at 197, 191. As demonstrated in Section VIII, infra, these arrangements are also unnecessary in the present proceeding.

3. Conditions Are Not Appropriate If Alternative Remedies Exist.

Whenever alternative processes, whether statutory or contractual, are available to obtain the desired relief, conditions are inappropriate. In the BN/SF decision, for example, the ICC turned aside passenger rail authorities' complaints that the merger would increase traffic over existing rail lines.

In addition to noting that the merger itself would not cause any additional traffic increases,[4] the ICC stated that "Amtrak already has remedies under its court-enforceable

[4] In this regard, the ICC remarked that "[i]ncreased traffic over existing rail lines, the (continued...)

contracts and under the Rail Passenger Service Act (RPSA) concerning on-time performance and other service issues." The contracts impose penalties on rail carriers for untimely performance, and provisions of the RPSA accord Amtrak trains preference over freight traffic. BN/SF at 97; see also BN/SF at 98 (Southern California Regional Rail Authority). By the same reasoning, conditions requested by various passenger interests should be denied. See Section XII, infra.

4. A Condition May Not Improve the Proponent's Position.

Beyond repairing competitive harm caused by the Transaction, conditions should not afford any party an advantage over its position prior to the Transaction. There is no exception to this rule based on advantage that might be received by other parties. Kansas City Southern Ry. Co. v. United States, 346 F. Supp. 1211, 1213, 1215 (W.D. Mo. 1972), aff'd mem., 409 U.S. 1094 (1973).

Illustrating this rule, relief for Dow Chemical Company, which complained that the UP/SP merger would terminate Dow's build-out/build-in option to SP was narrowly crafted. Although the Board preserved Dow's option to connect with an independent Class I carrier, it denied the request to move the build-out point closer to Dow because to do so "would greatly improve, rather than preserve, the pre-merger build-out/build-in status quo." UP/SP at 188.

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[4](...continued)
essence of Amtrak's concerns, is a normal occurrence, with or without a merger." BN/SF at 97.

Numerous parties to this proceeding ignore this rule and instead request conditions that dramatically improve their position relative to the pre-Transaction status quo. The Board should resist these entreaties.

5. Conditions May Not Be Imposed to Change the Competitive Balance Among Shippers.

The conditioning power, properly used, serves to eliminate or alleviate the competitive harm caused by a railroad merger. Akin to the maxim that the antitrust laws are designed to protect competition and not competitors, see FTC v. Brown Shoe, 384 U.S. 316 (1966), conditions are not to be used to adjust the relative competitive position of shippers within the markets in which they compete.

In the BN/SF proceeding, for example, Bunge Corporation, a soybean processor, complained that two of its competitors would obtain new access to SP under the terms of the SP settlement agreement. By contrast, one of Bunge's facilities depended entirely on SF for rail movement of outbound freight. Bunge therefore sought a condition that would grant SP stop-off privileges at this processing facility. BN/SF at 39. While recognizing that "the SP settlement agreement, by providing increased rail options for Bunge's competitors but not for Bunge, may work to Bunge's disadvantage," the ICC rejected Bunge's proposed condition because the conditioning power is not typically used "to preserve the competitive balance among the industries served by rail carriers." BN/SF at 99; see also UP/SP at 47-48, 81, 183 (Montana shippers); UP/SP at 190 (Formosa Plastics).

A legion of shippers who are parties to this proceeding seek to gain an advantage relative to their rivals. Most often, these shippers claim that they failed to gain some benefit from the Transaction received by other shippers. But their "harm" is not from a reduction in

competition but rather from an increase in competition that results from rival shippers receiving greater benefits. Their competitive options have not been diminished. The Board, consistent with its precedent, should not accede to the wishes of these shippers to be given some Board-conferred advantage or some Board-conferred levelling of the playfield to offset advantages conferred on others. It is beyond the scope of the Board's authority or sound public policy in a free market economy to attempt to equalize the transportation alternatives of all shippers.

D. Rail Labor Unions Erroneously Suggest That the Board Should Approve A Merger Only If It Solves "Transportation Imperative" Problems.

Despite the clear language of the statute, certain rail labor unions are attempting to engraft an additional and unauthorized condition on regulatory approval, i.e., that the Transaction satisfy an "adequate" or "compelling" transportation need of the public. Specifically, the group of labor unions commonly known as the Allied Rail Unions (ARU)[5] avers "that Conrail currently provides more than adequate service and is not faced with likely service problems in the future" (ARU-23 at 54) and that therefore "there is no need for this Transaction for adequate public transportation" (ARU-23 at 55). In a similar vein, the unions comprising the Transportation Trades Department, AFL-CIO (TTD)[6] assert "that

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[5] ARU's constituent labor unions are American Train Dispatchers Department/BLE; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; International Brotherhood of Boilermakers & Blacksmiths; International Brotherhood of Electrical Workers; The National Conference of Firemen & Oilers/SEIU; Sheet Metal Workers International Association; and Transport Workers Union of America.

[6] The 13 member unions of the TTD's Rail Labor Division are American Train Dispatchers (continued...)

neither CSX, NS, or Conrail have stated any compelling reason why this transaction needs to occur" and that "none of these carriers can claim to be on the brink of bankruptcy and there is no competitive imperative that makes dismemberment of Conrail necessary or inevitable." TTD-2 at 2. The Transportation-Communications International Union (TCU) adds that Conrail is "a healthy and profitable railroad." TCU-6 at 2.

The rail labor unions have not identified any authority for the novel proposition that the Board may approve a merger only if it fulfills an adequate or compelling public transportation need. Nor can they. Because Congress has clearly spoken that the Board must approve a transaction that comports with the public interest, the Board must decline the invitation of the rail labor unions to change by administrative fiat the standard for approval established by statute.[7]

In any event, the Transaction, as noted above, provides important public transportation benefits, particularly in the Northeast. Where Conrail presently is the only Class I rail carrier in the Northeast, the Transaction will reintroduce rail competition.[8] The

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[6](...continued)
Department/BLE; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Hotel Employees and Restaurant Employees Union; International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Blacksmiths Forgers and Helpers; International Brotherhood of Electrical Workers; The National Conference of Firemen & Oilers/SEIU; Sheet Metal Workers International Association; Transportation-Communications International Union; Transport Workers Union of America; and United Transportation Union.

[7] See, e.g., King v. St. Vincent's Hosp., 502 U.S. 215, 218-21 (1991) (rejecting lower courts' engrafting reasonable duration qualification onto statute providing reemployment rights to reservists called to active duty, where statute contained no such express qualification).

[8] ARU's unsupported contention that the Transaction "significantly lessens competition by eliminating a competitor from the Northeast . . ." (ARU-23 at 68) is plainly wrong.

creation of many new single-line routings also will invigorate competition for freight movements with the trucking industry. The Transaction therefore readily and substantially advances important transportation needs of the public.

CONDITIONS AFFECTING THE TERMS AND STRUCTURE OF THE TRANSACTION

As noted in the Introduction and Summary, the comments, protests and requests for conditions received in this proceeding fall into two general cat egories: (1) those that affect the terms and structure of the Transaction; and (2) those that relate to implementation and safety concerns. The first category will be addressed in Sections IV to XX below, while the second category will be addressed in Section XXI below. As demonstrated below, those comments and requests for conditions in the first category -- relating to the terms and structure of the Transaction -- are unwarranted under established Board standards and should be rejected.

IV. CLAIMS THAT COMPETITION WILL BE REDUCED FROM TWO RAIL CARRIERS TO ONE AT CERTAIN LOCATIONS ARE UNFOUNDED AND DO NOT WARRANT THE IMPOSITION OF CONDITIONS.

In structuring the Transaction, CSX and NS ensured that all shippers that today have two railroad service options will continue to be served by two railroads after the division of Conrail. See CSX/NS-18, Vol. 1, McClellan VS at 545-49; CSX/NS-19, Vol. 2A, Hart VS at 146-49. The initial allocation of the operation and use of Conrail's assets produced very few 2-to-1 situations. Id. Consistent with the Board's precedent, CSX and NS entered into various agreements that will eliminate all 2-to-1 situations. Two-to-one situations were defined as situations in which (1) the only two railroad lines which physically enter a facility are under separate ownership prior to the Transaction but would be under common ownership or usage after the Transaction or (2) the facility is physically served by one railroad and has a switch service option with a second rail carrier through reciprocal switching, trackage or haulage rights prior to the Transaction that will be lost after the Transaction as a result of common ownership or usage of the track serving the facility and the reciprocal switching, trackage or haulage rights. See CSX/NS-19, Vol. 2A, Hart VS at 146.

Various parties have raised a variety of novel arguments seeking to be classified as 2-to-1 situations. These arguments are unfounded and should be rejected. In some cases the parties' true intentions, as revealed by the relief sought, are quite transparent and have nothing to do with the preservation of competition. In other cases, the parties' intentions are more carefully disguised. There is, however, one common denominator to these claims. In all cases the parties seeking 2-to-1 status are not seeking to remedy competitive harm caused

by the Transaction[1]. Rather, they seek to better their position relative to the status quo ante. Under well established Board precedent (see Section III, supra), these claims for relief should be rejected.

To facilitate the Board's review of these claims for relief we consider as a group the claims of various Indianapolis interests first (Section IV.A.) before considering as a separate group various Buffalo interests (Section IV.B.) and various Toledo interests (Section IV.C.). Remaining 2-to-1 claims are treated in Section IV.D.

A. All 2-to-1 Situations in Indianapolis Were Resolved By The Transaction as Proposed in the Application.

The City of Indianapolis ("CI"), Indianapolis Power & Light Company ("IP&L"), Indiana Southern Railroad ("ISRR"), Shell Oil Company ("SOC"), Citizens Gas & Coke Utility ("CG&C") and the Department of Justice ("DOJ")[2] each claim that 2-to-1 situations remain in Indianapolis. These claims are unfounded, and should be rejected.

At best, the claims of the Indianapolis Interests are mistaken because they are based on a misunderstanding of the current competitive situation in Indianapolis. As explained in more detail below, and in the verified statements of Thomas G. Hoback, Thomas E. Kuhn, John W. Orrison, and Gerald E. Vaninetti, the Transaction, as proposed, will at least replicate current competitive conditions in Indianapolis and in some cases improve them.

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[1] One exception is the Niagara Frontier Food Terminal, which was recently identified as a 2-to-1 situation and is addressed herein. See Section IV.B.4.

[2] See CI-6, IP & L-3, I&RR-4, SOC-3 and DOJ-1. The comments and supporting evidence of CG&C are not numbered but are referenced as "CG&C at _____." CI, IP&L, ISRR, CG&C, and DOJ are referred to collectively as the "Indianapolis Interests."

A more objective reading and franker evaluation of the claims of the Indianapolis Interests is that they are overreaching. To confirm this, the Board need only consider the unsupported requests for relief. CI requests that all Indianapolis customers to be served by CSX after the Transaction be regarded as 2-to-1 customers, regardless of the number of rail carrier options they had before or after the Transaction. CI-6 at 15. CI also seeks two carrier direct service for Indianapolis customers even though it is undisputed that, prior to the Transaction, Indianapolis customers had direct access to only a single rail carrier. Id. IP&L echoes the CI request for relief, albeit in different language, when it seeks to have Indianapolis declared a shared assets area. IP&L-3 at 37. IP&L goes even further than CI and requests that "CSX be required to give NS access on a nondiscriminatory basis over one of its lines from St. Louis or Chicago to Indianapolis so that NS can compete effectively with CSX for probable western coal movements to Indianapolis" even though there is no argument that this Transaction has any effect on the unlikely possibility of western coal movements to Indianapolis. Id. at 39-40. See Vaninetti RVS at 15-20. In the spirit of searching for the proverbial free lunch, ISRR seeks trackage rights over several tracks formerly operated by Conrail despite the fact that the Transaction will have no effect on the customers located along those tracks. ISRR-4 at 2-3. CG&C seeks re-regulation of freight rates for at least 20 years, albeit only for Indianapolis. CG&C at 6.

None of the concerns advanced by the Indianapolis Interests are worthy of the Board's consideration. Their requests for conditions should be denied.

1. Current Competitive Conditions in Indianapolis Involve One Carrier with Direct Access and One Carrier with Access Through A Combination of Trackage Rights and Other Operating Agreements.

The fundamental flaw underlying the claims of the Indianapolis Interests is the failure to understand or admit the nature of current competitive conditions in Indianapolis. For example, SOC requests that Indianapolis be declared "open", conveniently ignoring that Indianapolis is not "open" today. SOC-3, Hall VS at 16.

Although the Indianapolis interests complain that their post-transaction rail service options will be limited to direct service from one rail carrier with a second rail carrier serving them through a combination of trackage and switching rights, that is exactly what they have today.

Today the vast majority of all shippers in the Indianapolis area are directly served by only a single Class I railroad, Conrail.[3] Conrail's Indianapolis Belt Running Track (commonly referred to as the "Belt") is a 13.5 mile line in a horseshoe or belt configuration around the east, south, and west sides of the City of Indianapolis, generally between North Indianapolis and Brightwood, Indiana. See CSX 31 P 000254 (included in Volume 3 hereto). Conrail operates the Belt and is the sole rail carrier serving industries located on the Belt.[4]

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[3] See generally Orrison RVS at 180-82. CSX's B&O line reaches just beyond Indianapolis State Street Yard from Cincinnati and points east. CSX also owns a small piece of industrial track extending from the former Union Railway tracks to the near west side of Indianapolis. CSX uses this track to serve some customers directly. The INRD, an 89% CSX-owned subsidiary, reaches only as far as the connection at milepost 5.3 on the Belt near Raymond Street from the South.

[4] Conrail does not own the Belt, but operates it pursuant to a 999-year lease to the Indianapolis Union Railway, a former Penn Central subsidiary whose properties were conveyed to Conrail.

Today CSX and the Indiana Railroad ("INRD") traffic can reach Belt customers on y through Conrail switching services, which are offered at Conrail's standard reciprocal switch rate (generally $390 per car). See id.; Agreement of August 22, 1996 Between Consolidated Rail Corporation and the Indiana Rail Road Company (included in Volume 3 hereto).[5] Running horizontally through the middle of the Belt is the former Indianapolis Union Railway Company track ("Union Track"), a 1.1 mile track in the center of Indianapolis that is now owned and operated by Conrail. See CSX 31 P 000205 (included in Volume 3 hereto).

CSX service in Indianapolis generally requires not only Conrail switching services but also use of trackage rights over Conrail tracks and CSX pays Conrail a separate fee for each service. All CSX trains destined for Indianapolis are taken into State Street Yard. To reach the State Street Yard from the west, CSX relies on trackage rights over Conrail's Crawfordsville-Indianapolis line and Conrail's Union Track line. CSX pays Conrail a trackage rights fee of 31¢ per car mile for use of the 45.8 mile Crawfordsville-Indianapolis line and $15,000 per year for use of the 1.1 mile Union Track. Both of these trackage rights fees are adjusted annually based on published rail cost indices and are in addition to CSX's operating costs. CSX 31 P 000177; CSX 31 P 000205 (included in Volume 3 hereto). CSX's trackage rights over both the Crawfordsville line and the Union Track are overhead trackage rights. CSX is limited to bridge freight traffic and is precluded from local service, switching or storage of cars, or making or breaking trains. CSX 31 P 000177 at 000181, 000185 (included in Volume 3 hereto). To reach State Street Yard from the east, CSX uses

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[5] The switch agreement with respect to the Belt extends to future as well as current Belt customers.

its own track, the former B&O line, and bears all of the ownership and operating costs associated with that line. At State Street Yard, Conrail picks up CSX cars for delivery to former Belt customers and CSX customers located on Conrail who are open to reciprocal switch. Conrail charges CSX its standard reciprocal switch rate -- $390 per loaded car -- to perform this switch.[6]

2. The Transaction Will Replicate and in Some Cases Improve Competitive Conditions in Indianapolis.

The Transaction at a minimum replicates the existing competitive scenario -- no Indianapolis shipper will have reduced competitive alternatives. But the Transaction also does much more in that it brings significant improvements for some shippers. CSX will assume the competitive position currently held by Conrail. Consequently, CSX will operate the former Belt and the former Union Track. As Conrail does for CSX today, CSX will switch NS traffic destined for current and future Indianapolis customers located on the Belt and to remaining two-to-one customers located on former Conrail lines off the Belt. But in an improvement relative to the status quo, CSX will do so at a cost-based fee.

NS will essentially assume CSX's present position in Indianapolis. To reach Indianapolis from the west, NS will have trackage rights over CSX allocated lines from Lafayette, IN to Hawthorne Yard at 29¢ per car mile. From the east, NS will have trackage rights over CSX allocated lines from Muncie, IN to Hawthorne Yard at the same 29¢ per car mile.

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[6] See CSX 31 P 000254. There is an exception for the CG&C facility located on the Belt. CSX 31 P 000255 (included in Volume 3 hereto).

NS's 29¢ per car mile trackage rights fee is less than the 31¢ per car mile fee currently charged to CSX. Moreover the 29¢ per car mile fee to be charged to NS is lower than the 32.5¢ per car mile trackage rights charge that would be determined had the parties applied the Board's SSW Compensation principles to CSX-Conrail 1995 fully allocated below the wheel URCS costs. See Whitehurst RVS at 35. The Board need not consider the 16.11¢ per car mile fee proposed by IP&L witness Thomas D. Crowley. IP&L-3, Crowley VS at 18-19. Despite the Board's recent rejection of his methodology (UP/SP at 141; BN/SF at n.122), Mr. Crowley again attempts to base his calculations on variable rather than total cost. See Crowley Dep. at 23-24; Whitehurst RVS at 35-36. Crowley's analysis should again be rejected. He also excludes from his analysis certain cost components that proper analysis applying the Board's precedent would include. Whitehurst RVS at 36. These errors and omissions are no surprise once it is understood that Mr. Crowley admitted in his deposition that he did not review the Board's precedents and does not appear to understand them, but nevertheless regards them as wrongly decided. Whitehurst RVS, Exhibit WWW-10 (Crowley Dep. at 13-21).

NS will access customers located on the Belt via a CSX switch -- just as CSX does today with a Conrail switch. Moreover, NS will be able to serve the General Motors metal fabrication plant, one of the largest rail shippers in Indianapolis and one that CSX cannot serve today. See CSX/NS-25, Vol. 8A at 377.

Instead of being switched at State Street Yard, NS traffic will be switched at Hawthorne Yard, a larger and more flexible facility. NS will have sufficient tracks at Hawthorne Yard for the arrival, departure and make up of trains and will have reasonable

access to and from designated tracks. CSX/NS-25, Vol. 8A, at 369; CSX/NS-25, Vol. 8B at 118. Moreover, NS will have the advantage of being able to interchange directly with the INRD at Hawthorne Yard.

The standard $390 per car switch charged by Conrail to CSX and the INRD will be replaced by a cost-based switching charge to serve all current and future Belt customers, as well as 2-to-1 customers in the Indianapolis area not located on the Belt. See CSX/NS-25, Vol. 8C at 501-25.

3. Conditions Sought By IP&L and DOJ With Respect to Indianapolis Are Unnecessary and Should Be Rejected.

Under existing arrangements, IP&L's Perry K Plant is rail served directly only by Conrail. IP&L's Stout plant is rail served directly only by INRD. Conrail is able to supply coal to Stout (in a joint line movement with ISRR) but only by utilizing INRD switch services as provided [[[[7]

]]] Contrary to the assertion of DOJ witness Woodward,[8] there is no reciprocal switching agreement that allows Conrail to serve Stout. See Hoback RVS at 2; DOJ-1, Woodward VS at 8. Indeed in his deposition Dr. Woodward conceded that he had

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[7] Conrail and IP&L entered into a rail transportation contract [[[

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[8] See DOJ-1, Woodward VS at 8.

not reviewed the relevant agreements or bothered to even discuss the issue with either representatives of Conrail or INRD. Woodward Dep. at 11-14 Nor, as IP&L contends,[9] does a published reciprocal switching charge cover INRD's switch of Conrail traffic to the Stout plant. See Hoback RVS at 2.

Competitive conditions at IP&L's two facilities will not be diminished as a result of the Transaction. Perry K, which currently is rail served solely by Conrail, will gain two carrier access, one direct (CSX) and one through a cost-based switch (NS). [[[

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To do more would give IP&L rights it does not have today. Even this much is unnecessary given the substantial competition that truck movements provide at Stout. See Hoback RVS at 3-5; Vaninetti RVS at 5-8. Because Stout is only 90-100 miles from

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[9] See IPL-3, Weaver VS at 8.

[10] [[[

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numerous coal mines, Stout has the ability to meet its coal needs by truck, as IP&L has threatened to do in the past. Indeed, the favorable terms (from IP&L's perspective) in the current agreement between IP&L and INRD are a result of the threat posed by truck competition. See Hoback RVS at 3-5.

Each of the conditions sought by IP&L is overbroad.[11] But as demonstrated above, this premise is clearly false. Summarized below are the reasons why IP&L's proposed conditions are overly broad.

The principal relief sought by IP&L is that all of Indianapolis be declared a shared assets area with equal sharing of all track, as well as Avon and Hawthorne Yards. IP&L-3 at 37. Alternatively, IP&L in two different ways requests that NS have direct access to all local Indianapolis local shippers (especially IP&L's Perry K and Stout facilities) and all shortlines serving Indianapolis. Id. at 38. Perhaps realizing the futility of these requests, IP&L tries a different tack and requests that NS be charged a trackage rights fee at CSX's costs or a switching fee (also at cost), but not both. Id.

Each of these requests is excessive. There is no evidence that any Indianapolis shippers, much less all Indianapolis shippers, will be harmed by the Transaction. IP&L is clearly seeking two-carrier direct access -- something it doesn't have today and therefore is not losing as a result of the Transaction.

There is no reason to consider IP&L's proposed build-out condition as suggested by IP&L and DOJ, id. at 38; DOJ-1, Woodward VS at 24, because trucks will continue to

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[11] IP&L's request relating to labor implementation agreements and detailed operating plans (IP&L-3 at 39) are addressed in Section XXI, infra.

provide vigorous competition for rail service to Stout. Hoback RVS at 3-5; Vaninetti RVS at 5-8.

In any event, there is no evidence that IP&L would have ever followed through with their newly proposed build out option. Further, IP&L witness Weaver admitted that during his tenure at IP&L, the company had never studied, prior to this Transaction, the possibility of a build out from the Stout plant. Weaver Dep., Dec. 8, 1997 at 43-44; see also IP&L-4 at 20-22. IP&L's own study demonstrates that the proposed build out would require significant structural and environmental uncertainties. See IP&L1-HC0001 (included in Volume 3 hereto). Finally, as confirmed in the rebuttal verified statement of Thomas E. Kuhn, the location, environmental impact, and operating constraints associated with IP&L's recently claimed build out option demonstrate its infeasibility. See generally Kuhn RVS.

No additional Board oversight of switching services, switching charges or western interchanges is required. See IP&L at 39. All these matters fall within the ambit of the Board's regulatory authority outside this Transaction. Furthermore, the Transaction Agreement between CSX and NS already provides for cost-based switching to all 2-to-1 shippers. Neither the Board nor shippers need audit switching charges. Since the Transaction is not alleged to have any effect on western interchanges, there is no need for relief relating to these points.

The final relief sought by IP&L bears even less relationship to the Transaction than those noted above. IP&L seeks the Board to compel the two large western rail carriers, Union Pacific and BNSF, to participate in nondiscriminatory through rates or, in the alternative, to force CSX to give NS access on a nondiscriminatory basis over a CSX line

from St. Louis or Chicago to Indianapolis. Id. at 39-40. IP&L claims that this relief is needed so that NS can compete effectively with CSX for what IP&L alleges as "probable western coal movements to Indianapolis." Id. at 40. An independent study confirms that IP&L is unlikely to purchase western coal during Phase II of the Clean Air Act Amendments. See Vaninetti RVS at 15-20. No support is offered for this assertion and none can be offered. Presently NS operates three lines out of St. Louis, CSX operates one line, and Conrail operates a fourth. After the transaction NS will operate the same three lines. There is no reduction in NS options at St. Louis. More significantly, prior to the Transaction only one carrier could offer meaningful single line service from St. Louis to Indianapolis customers. CSX could offer single line service from St. Louis to Indianapolis State Street Yard but only through a circuitous backhaul via Cincinnati.[12] After the Transaction, single line service from St. Louis to Indianapolis customers will be offered by CSX, and NS will be able to offer single line service from St. Louis or Kansas City to Indianapolis Hawthorne Yard utilizing CSX trackage rights from Lafayette, IN to Hawthorne Yard.[13] The post-Transaction NS routing to St. Louis or Kansas City will be far less circuitous than the pre-Transaction CSX routing. In addition, CSX cost-based switching will offer an alternative likely to be at a lower cost than current Conrail switching at $390 per car.

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[12] Service by CSX to Indianapolis customers also requires Conrail switching service at $390 per car.

[13] Service to Indianapolis customers will be available through a CSX cost-based switching service.

Far from diminishing competition, the Transaction will increase competition. Neither IP&L nor any other Indianapolis shipper is made worse off in its options to reach St. Louis. IP&L is merely using this proceeding as a blatant attempt to improve its position, a tactic that should not be countenanced.

The condition proposed by DOJ to give NS the right to connect with the Indiana Southern at Indianapolis (DOJ-1, Woodward VS at 24) should be rejected as overly broad.[14] DOJ offers no suggestion as to where NS would make this connection or what the duration might be. Indeed, as demonstrated at the deposition of DOJ witness Woodward, DOJ has not developed a sufficient understanding of current arrangements at Indianapolis to be in a position to recommend effective conditions even if there was a remaining competitive problem, which there is not.

4. Conditions Sought By The City of Indianapolis Are Unnecessary And Should Be Rejected.

Conditions sought by CI in many respects parallel the conditions sought by IP&L.[15] Compare CI-6 at 14-16 with IP&L-3 at 37-40. For the reasons stated above conditions of the type suggested in paragraphs 1-6 and 8-10 of CI's Summary of Requested Conditions are unnecessary.

Applicants have provided for continued dual access for all shippers in Indianapolis that are presently dual rail served by Conrail and CSX. After the consummation of the

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[14] NS already connects with ISRR at Oakland City, IN.

[15] We treat here only conditions related to 2-to-1s and the trackage rights and switching agreements between CSX and NS. Conditions relating to generally applicable switching charges and Board oversight are treated in Sections XI and XXI, infra.

transaction each shipper that presently has access to both CSX and to Conrail will have access to both CSX and to NS. Generally, the Applicants' plan provides for CSX to step into the shoes of Conrail as the primary operator of the rail lines in Indianapolis. NS will step into CSX's shoes and provide a competitive alternative via cost based switch access. CI expressed some confusion over the number of 2-to-1 situations in Indianapolis that would be covered these arrangements. CI-6 at 5-6. Due to an oversight, the Applicants' included an incomplete list in the proposed agreement granting NS trackage rights over the former IBRT line, which included only thirty (30) of the shippers who will have access to NS service via cost-based switch. CSX/NS-25, Vol.8C at 525. This list actually includes sixty-six (66) shippers and covers all shippers in the Indianapolis area that now have access to both CSX and Conrail.[16]

CI has also asked that NS have access via switching to all customers who may locate in the future on the former Belt line. The Board's precedents do not extend to future customers. This outcome is perfectly sensible in that a future customer, by definition has a choice of location, and therefore can receive the benefits of rail competition as it negotiates among different locations served by different rail carriers each seeking additional business along its track. CI offers no reason to depart from this approach.

CI also offers three requests for conditions unlike the conditions sought by IP&L. One condition is to release all Indianapolis customers from provisions of their contracts that would preclude or penalize them from rebidding traffic to NS after consummation at the

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[16] A copy of Exhibit 1 listing all 66 shippers is included in Volume 3.

Transaction. CI-6 at 13-14. Given the absence of any competitive harm to Indianapolis shippers, there is no reason for the Board to order this condition.

At a minimum the condition is overly broad in that there is no showing that Indianapolis shippers will be harmed by the Transaction. To impose this condition would create a windfall for Indianapolis shippers and disrupt the economic bargain struck between CSX and NS in arriving at the Transaction. Where no competitive harm is found to exist, costs should not be imposed on Applicants. Furthermore, even if there was competitive harm, it does not derive from pre-existing contracts. See Section IX, infra.

CI also seeks a variety of conditions seeking further specification of the agreements between CSX and NS. CI-6 at 9-10. The Board should reject these requests to interfere with bona fide privately negotiated settlements. There is no suggestion that NS needs the protection suggested by CI. Moreover, to revise the agreements between CSX and NS in the manner suggested by CI would improve rather than replicate the status quo and is therefore unnecessary.

The remaining CI proposed condition not already addressed is the proposal that CSX be required to provide haulage for NS to Chicago. CI-6 at 16.[17] No basis is offered for this condition. No facts are offered which support any claim that the Transaction lessens competitive rail alternatives between Indianapolis and Chicago. CSX and Conrail currently provide single line service from Chicago to Indianapolis. To do so, CSX requires trackage rights on Conrail from Crawfordsville, IN to Indianapolis, State Street Yard and Conrail

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[17] CI-6, Hall VS at 6 suggests that this haulage condition be limited to "traffic moving in connection with "2-to-1" customers or originating/terminating on shortlines connecting with NS at Indianapolis." This statement, too, is devoid of factual support.

switching service (at $390 per car) from State Street Yard to the customer. After the Transaction, CSX will offer direct single line service to Chicago to all Indianapolis customers without relying on trackage rights or switching services from another carrier. NS will assume CSX's current position and provide single line service from Chicago to Indianapolis utilizing trackage rights over CSX from Muncie, IN to Indianapolis Hawthorne Yard and cost-based CSX switching service from Hawthorne Yard to the customer. Competitive rail alternatives between Chicago and Indianapolis will be improved by the Transaction and no further conditions are required.

5. Conditions Sought by ISSR Are Unnecessary and Should be Rejected.

Like the similar claims of other Indianapolis Interests, the claims of ISRR fail for lack of proof. ISRR claims that if granted access, it can provide a competitive alternative to CSX, but no such alternative is needed, since NS will already provide rail competition to CSX. Nevertheless, ISRR seeks trackage rights over CSX lines to IP&L's Perry K and Stout facilities. In addition ISRR seeks trackage rights between (1) Indianapolis and Shelbyville, (2) Indianapolis and Crawfordsville, and (3) Indianapolis and Muncie. ISRR-4 at 5, 7-9; Neumann VS at 4-5. These rights would increase the size of ISRR by a whopping 71.5%. ISRR-4 at 14

For the reasons noted above, no conditions need be imposed with respect to the Perry K and Stout plants of IP&L. Both Perry K and Stout will be better off after the Transaction than before. Trackage rights directly to either of these facilities are not justified or within the scope of the Board's precedential authority as it would improve IP&L's position relative to the status quo. Nor are conditions required between Indianapolis and Shelbyville,

Indianapolis and Crawfordsville, or Indianapolis and Muncie to remedy 2-to-1 situations or other alleged anticompetitive effects of the Transaction.[18] The Transaction has no effect in these corridors and neither ISRR nor its witness, Mr. Neumann, contend otherwise. Conditions clearly are not required.

B. There Are No Unresolved 2-to-1 Situations at Buffalo.

Various Buffalo interests, under the auspices of the Erie-Niagara Rail Steering Committee ("ENRS") request that the Board either (1) establish a Shared Assets Area in the Niagara Frontier region; or (2) require a reciprocal grant of terminal trackage rights throughout the Niagara Frontier region; or (3) require the establishment of CSX and NS reciprocal switching for all current and future customers on the Conrail lines in the Niagara Frontier region. ENRS-6 at 6-8. ENRS argues that such relief is required due to various competitive harms it alleges will be caused by the Transaction. Included in ENRS' list of harms are four situations in which ENRS claims the Transaction will create 2-to-1 shippers. Id. at 28-30. In all situations, except that relating to the Niagara Frontier Food Terminal ("NFFT"), ENRS is basing its claim on an outdated understanding of the facts. Since the filing of the Primary Application, CSX and NS have recognized that the NFFT is a bona fide 2-to-1, and as described below, CSX and NS will ensure continued two carrier access to the NFFT. The Transaction, therefore, will have no adverse impact on the competitive rail alternatives available to Buffalo shippers. In fact, competitive conditions should improve. Jenkins RVS at 17.

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[18] To the extent that ISRR seeks conditions to ameliorate the loss of essential service on the ISRR rail system, its concerns are addressed in Section XIII, infra.

1. Cancellation of Buffalo Switching.

ENRS claims that the November 1996 termination of 89 Buffalo area shippers from Conrail's reciprocal switching tariff constitutes a Transaction Related loss of dual rail service to the area. ENRS-6 at 29. Though Conrail did cancel reciprocal switching to certain shippers from its tariff, (a) it did so only as a general "housekeeping" measure to remove inactive customers and (b) it was not related to the proposed Transaction. Conrail did not generally cancel reciprocal switching access to CSX for customers in the Buffalo area.[19] In fact, Conrail's present tariff shows that as of August 18, 1997 shippers in the Buffalo area presently have access to Conrail and CSX via reciprocal switching.[20] Moreover, these customers will continue to have dual access after the transaction is consummated because all currently available reciprocal switching will continue. See Section XI, infra. Not only will these customers have access to NS via reciprocal switch, but they will also have access to the Buffalo and Pittsburgh Railroad and to Canadian National Railway also via reciprocal switch.

As explained in the Rebuttal Verified Statement of A.J. McGee, the 89 shippers referenced by the ENRS filing were removed from Conrail's tariff in November 1996 as part of a routine "housekeeping" project that began in the Spring of 1996. The goal of the review was to remove shippers which had gone out of business, or moved to a different location from the tariff. No complaints have been received to date from any of these 89 shippers. If

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[19] Conrail Tariff, 8001-D, 1.C 108-112, October 24, 1996 (included in Vol. 3).

[20] Conrail Tariff, 8001-D, p. 108-112-A August 18, 1997 (included in Vol. 3).

it were brought to Conrail's attention that a still existing shipper was terminated in error, Conrail would restore such a shipper to the tariff. McGee RVS at 2-3.

2. Cancellation of Niagara Falls Switching.

ENRS claims that on April 1, 1996 Conrail cancelled reciprocal switching access to CSX for shippers in the Niagara Falls area and asserts that this caused a Transaction-related loss of two carrier access. ENRS asserts that, while these shippers had access to both CSX and Conrail prior to April of 1996 when the cancellation took place, they will only have access to CSX after the consummation of the transaction. ENRS-6 at 29-30. Though Conrail did add a note in its switch tariff on April 1, 1996 stating that reciprocal switching between CR and CSXT would no longer be available for Niagara Falls customers, this cancellation was not related to the Transaction. The record is plain that there was no contract between CSX and Conrail with respect to the events leading up to the October 14, 1996 merger agreement until after the Board's August 1996 decision in UP/SP.

In any event, by adding the note on April 1, 1996, Conrail was clarifying its tariff to reflect the fact that Conrail discontinued switching CSX traffic at Niagara Falls in December of 1995. McGee RVS at 4. Presently, Conrail is the only carrier with direct access to Niagara Falls shippers. Several years ago, CSX served Niagara shippers via trackage rights over CN lines through Canada. Conrail provided switching for CSX at Suspension Bridge to and from shippers in Niagara. In December of 1995, however, CSX negotiated a contract with CN pursuant to which CN carries CSX traffic over CN lines as CSX's agent. Since 1995, CSX has not used its trackage rights over CN. Until

December 9, 1997, CN carried this CSX traffic across the International Bridge at Fort Erie, through Buffalo and into Conrail's Frontier Yard. Conrail then transported this CSX traffic to and from the Frontier Yard as part of the line haul. McGee RVS at 3-4. Thus, no 2-to-1 relief is justified due to Conrail's April 1, 1996 tariff notation because the loss of reciprocal switch access to CSX actually occurred in December of 1995, and was entirely unrelated to the Transaction. McGee RVS at 4.

Effective December 9, 1997, [[

[21]

]] In either case, however, Conrail will pick up the traffic and take it to Niagara Falls as part of the line-haul movement.

Thus, the transaction does not have any impact on the competitive situation in Niagara Falls. Niagara Falls shippers' loss of access to CSX in 1995, as reflected in the Conrail tariff in April 1996, was entirely unrelated to the transaction. Since 1995, shippers in Niagara Falls have had access to Conrail as well as access to the CP/D&H. ENRS-6, Fauth VS at 29; McGee RVS at 4. After the transaction, CSX will replace Conrail as the primary carrier in Niagara Falls and access to the CP/D&H will be unchanged.

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[21] [[ ]]

3. Shippers Near Buffalo Waterfront.

ENRS claims that customers on the waterfront area of Buffalo require 2-to-1 relief because they will lose their access to both Conrail and CSX when CSX takes over the operation of Conrail's Buffalo waterfront area lines as a result of the Transaction. ENRS-6 at 30. ENRS relies on a February 1, 1980 agreement, pursuant to which Conrail granted CSX's predecessor, the Chesapeake & Ohio Railway Company ("C&O"), trackage rights over the former Buffalo Creek Railroad line which serves the waterfront between Howard Street and Michigan Avenue.[22] CSX's predecessor, the Baltimore and Ohio Railway Company ("B&O), also had trackage rights, pursuant to a separate agreement, over this same line.[23]

In 1988, as part of a deal in which CSX's predecessor sold all of its rail property in the Buffalo area to the Buffalo & Pittsburgh Railroad ("B&P"), CSX's predecessor assigned the B&O trackage rights over the former Buffalo Creek line to B&P, and CSX's predecessor ceased serving the Buffalo waterfront.[24] Though CSX retained the right to operate over the Buffalo Creek line pursuant to the C&O/Conrail agreement, CSX has not had access to, and has not served shippers on the Buffalo waterfront since it sold its property to the B&P in 1988. However, whether CSX presently has access to the Buffalo waterfront is irrelevant, because after the consummation of the transaction, shippers in the waterfront area will continue have access to two carriers -- CSX, as Conrail's replacement, and the

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[22] CR 11 P 000505-522 (included in Vol. 3).

[23] Agreement, February 1, 1980 (included in Vol. 3).

[24] Assignment, dated July 18, 1988 (included in Vol. 3).

Buffalo & Pittsburgh Railroad. Thus, the shippers in the Buffalo waterfront area do not require a 2-to-1 remedy.

4. Niagara Frontier Food Terminal ("NFFT").

ENRS claims that the NFFT is a 2-to-1 situation. ENRS-6 at 30. Since the filing of the Primary Application, CSX and NS have ascertained that the NFFT is, indeed, a 2-to-1 point. NFFT is currently served by both Conrail and NS, and, pursuant to the Application as originally submitted, NS would have, after acquiring Conrail's line, become the only carrier to serve the terminal. As such, CSX and NS have agreed to implement for NFFT an agreement to resolve the 2-to-1 situation created at NFFT.[25]

C. The Toledo Dock Area Is Not a 2-to-1 Situation.

AK Steel (AKSC-6 at 11), Toledo-Lucas County Port Authority (TLCPA-4 at 7), Ohio Attorney General (OAG-4 at 15), Toledo Metropolitan Area Council of Governments (TMAC-1 at 2) and the Wheeling and Lake Erie (W&LE-4, Wait VS at 8)[26] all claim that relief is necessary to preserve two carrier access to the Toledo Docks. The Toledo Interests' claims, however, are based on a misinterpretation of the Transaction Agreement. As Section 2.2(e), Exhibit C-1 and Exhibit PP of the Transaction Agreement provide, and as CSX's witness William Hart confirmed in his deposition (Hart Dep., Sept. 24, 1997 at 197-198), both NS and CSX will have access to the Toledo Dock facilities after the

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[25] Switching Agreement Niagara Frontier Food Terminal Buffalo, New York (included as Appendix C to Vol. 1).

[26] AK Steel, TLCPA, OAG, TMAG and W&LE will be referred to collectively as the "Toledo Interests."

consummation of the transaction. There will be no loss of competitive rail alternatives to the Toledo Docks and therefore no need for Board-imposed relief.

The "Toledo Docks" generally refers to the two major dock facilities near Toledo, OH -- Lakefront Dock, presently owned by Lakefront Dock and Railroad Terminal Company ("LDRT") (CR and CSX each own 50% of LDRT) and the Presque Isle Dock, presently operated by CSX and leased from Presque Isle's owner Toledo-Lucas County, OH.[27] CSX also owns 100% of the stock of the Toledo Ore Railroad Co. ("TORCO"),[28] which operates an iron ore facility, the TORCO Dock, on property leased from the LDRT.[29]

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[27] CSX/NS-18, Vol. 1 at 271. In 1964 TLCPA purchased Presque Isle from a predecessor of CSX but entered into a long-term lease with that CSX predecessor allowing it to use the facilities. Toledo Docks Operating Agreement at page 1 (included in Volume 3).

[28] CSX/NS-18, Vol. 1 at 273.

[29] [[
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[31] [[ ]]

[32]]]

Presently CSX operates the only rail line, the former Toledo Terminal line, connecting to the Toledo Docks lead tracks. Under the terms of 1932 agreements between predecessors of CSX and Conrail, however, Conrail has trackage rights over CSX's Toledo Terminal line which allow Conrail to connect with the Toledo Docks lead tracks at Ironville.[33] [[

[34]]]

What the Toledo Interests fail to recognize is that NS will obtain all trackage rights and operating rights currently held by Conrail on CSX that provide access to the Toledo Docks facilities.

1. Trackage Rights.

The Transaction Agreement includes a specific trackage rights agreement pursuant to which NS will receive Conrail's trackage rights over CSXT's former Toledo Terminal

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[33] Puller Service Agreement Between The Toledo Terminal Railroad Company and The New York Central Railroad Company, January 1, 1932; Puller Service Agreement Between The Toledo Terminal Railroad Company and The Pennsylvania Railroad Company, January 1, 1932; Supplemental Agreement Between the Toledo Terminal Railroad Company and the New York Central Railroad Company, November 1, 1945 (each included in Vol. 3).

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Railroad line.[35] AK Steel notes that this agreement provides NS with only bridge rights between the endpoints of this line, while the Toledo Docks lead tracks are located at a midpoint on the line. Pursuant to Schedule 4, Item 4(E)(11), and Exhibit PP to the Transaction Agreement, however, the Applicants will enter into further agreements to provide for NS to receive the remainder of the rights granted to Conrail under the 1932 trackage rights agreements for use of the Toledo Terminal line and the 1946 LDRT agreement for use of the Toledo Terminal lead tracks.[36]

2. Other Rights of Access.

Contrary to AK Steel's assertions, the various agreements pursuant to which Conrail has enjoyed equal access to the Toledo Docks facilities will survive the Transaction for the benefit of NS. Pursuant to Section 2.2(e) of the Transaction Agreement, the Applicants shall assign all yet unallocated Conrail contracts to either NYC, the assets of which will be operated by CSX, or PRR, the assets of which will be operated by NS. It is Applicants' intent that PRR will be assigned all of Conrail's rights under the Toledo Docks Operating Agreement and the TORCO Operating Agreement such that NS will have the same operating rights that Conrail presently has to operate the Toledo Docks. [[

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[35] Exhibit C-1 contains the Master Trackage Rights Agreement pursuant to which NSR will receive various rights over CSXT-controlled lines. The Form A - Trackage Rights Addendum containing the Toledo Terminal trackage rights can be found at page 489 of Vol. 8B of the Application, CSX/NS-25.

[36] Exhibit PP provides that all CR trackage rights over CSXT that have not been specifically assigned to PRR for operation by NS will be so assigned. CSX/NS-25, Vol. 8C at 793.

[37]]]

AK Steel argues that the planned transfer to NYC of CR's 50% ownership interest in the LDRT indicates that NS will have no role at the Toledo Docks. On the contrary, CSX ownership and use of the Toledo Docks facilities will not change the operational status quo. As described above, presently CSX and Conrail each have a 50% ownership interest in the Lakefront Dock, while CSX alone controls Presque Isle and TORCO. [[Pursuant to the Toledo Docks and TORCO Operating Agreements, however CSX operates the Lakefront, Presque Isle and TORCO facilities and allows Conrail an equal right of access. CSX has control over the management of the facilities and appoints all of the officers who serve as managers of the Toledo Docks, except the second highest ranking manager, who is appointed by Conrail.[38] Just as before the Transaction, it is the Toledo Docks and TORCO Operating Agreements, rather than the placement of ownership rights with NYC that will govern NS' access to the Toledo Docks. As described above, PRR will succeed to Conrail's rights under the operating agreements, including, among others, the right to appoint a representative to the Toledo Docks Management.]]

Thus, the Toledo Docks is not a 2-to-1 point because the competitive picture for rail service to the Toledo Docks will be unchanged by the Transaction. As such, there is no

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reason for the Board to grant any of the conditions relating to the Toledo Docks proposed by the Toledo Interests, AK Steel, TLCPA, OAG, TMAG and W&LE.

D. Other 2-to-1 Claims Are Unfounded.

1. AEP's Cardinal Plant.

To the extent that AEP's filing can be read to claim that its Cardinal Plant is a 2-to-1 situation, it is discussed in Section XIV, infra.

2. Ann Arbor Railroad.

To the extent that Ann Arbor Railroad's filing can be read to claim that it is adversely affected by a 2-to-1 situation, it is discussed in Section XIII, infra.

3. ASHTA Chemicals Inc. (ASHTA).

ASHTA requests the establishment of a reciprocal switching arrangement or other competitive access remedy in the West Yard area of Ashtabula, OH. ASHT-11 at 1. There is no need for the Board to grant any competitive remedy to ASHTA, however, because ASHTA will not suffer any competitive harm. ASHTA, located in Ashtabula, OH, presently ships all of its product that travels by rail out of West Yard on Conrail. Conrail carries ASHTA's shipments to Buffalo where they are then routed to final destinations such as Texas, Georgia, North Carolina and Alabama. As a result of the transaction, CSX will replace Conrail and will continue to ship ASHTA's products via Buffalo. ASHT-11 at 4-5.

ASHTA will suffer no competitive harm requiring Board remedy because, as ASHTA admits, "[n]othing], then, will have changed for ASHTA," it is presently a captive shipper and will remain a captive shipper after the consummation of the Proposed Transaction. ASHT-11 at 6. The Board and it's predecessor has consistently refrained from

imposing conditions that would improve a shipper's competitive position.[39] ASHTA's request to have access to NS in addition to CSX is a request to improve ASHTA's competitive position vis a vis the status quo and, as such, should be rejected.

4. Genesee Transportation Council (GTC).

GTC requests conditions based on its assertion that Rochester would become a 2-to-1 point if the BPRR and ALY requested and received inclusion in the Proposed Transaction. GTC-2, Midkiff VS at 38-39. Neither of these two railroads, however, requested inclusion. BPRR-7/ALY-7/RSR-7/PSRR-4 at 2. Thus, GTC's concern need not be addressed by the Board. GTC's other comments are addressed in Section XIII, infra.

5. Indiana & Ohio Railway at Sidney, OH.

The Indiana & Ohio Railway (IORY) seeks trackage rights over several segments of track in Ohio. (See Section XIII.B.6 for a discussion of IORY's requests). One of these requests is based on IORY's assertion that the Applicants' plan to provide competition at Sidney, OH by granting NS trackage or haulage rights over CSX from Lima to Sidney fails to resolve the anticompetitive effects at Sidney. IORY argues that NS will not efficiently serve shippers at Sidney because it will only be able to reach them via a circuitous route.[40] Thus, IORY requests trackage rights over the 10-mile line from Sidney to Quincy to enable IORY to offer shippers in the Sidney area a competitive alternative to CSX. IORY-4 at 6-8.

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[39] UP/SP at 145 ("We will not ordinarily impose a condition that would put its proponent in a better position than it occupied before the consolidation.")

[40] The Ohio Attorney General's filing (OAG-4 at 11) also raises concerns regarding NS's trackage rights between Lima and Sidney. This section, in addressing IORY's concerns also addresses OAG's concerns.

The Board should not grant IORY's request because IORY is clearly attempting to improve its own situation. Though IORY claims that shippers in Sidney will be harmed, no shippers located in Sidney, OH have raised similar concerns or asked for relief. Indeed, NS will provide a competitive alternative to CSX for Sidney shippers. See Mohan RVS at 77. Moreover, granting IORY trackage rights between Sidney and Quincy would create significant operating problems for CSX and NS. See Section XIII.B.6. Nor is IORY claiming that the trackage rights it requests between Quincy and Sidney are needed to cure any competitive harm to IORY. Indeed, IORY sees Sidney as a market into which it would like to have access in order to enlarge its Ohio grain network. IORY-4 at 8.

The Ohio Attorney General (OAG-4 at 31-32) raises the concern that the Transaction may cause IORY to lose auto traffic and, thus, to abandon its line between Lima and Springfield. This abandonment, OAG asserts, would leave Liberty, Center, Delta, Honker and Quincy, OH as 2-to-1 situations. The OAG includes no support either for the alleged diversions or for its prediction that IORY may abandon its line. OAG provides no explanation as to why the towns of Liberty Center, Delta, Hamler and Quincy will be 2-to-1's when these towns are not even located on the Lima to Springfield segment. Furthermore, OAG suggests no specific remedies. It adds this argument as further support for IORY's filing. As discussed above and in Section XIII.B., IORY's requests should not be granted.

6. Joeseph Smith & Sons, Inc. (JSSI-5).

Joeseph Smith & Sons, Inc. ("JS&S") requests conditions based on the assertion that the while its Capitol Heights, Maryland facility presently has the potential to access at

least two carriers, after the consummation of the transaction it will lose such potential access. JSSI-5 at 7-8. As discussed in Section XVI.D, infra, the Board should not grant the conditions requested by JS&S because it will, have competitive access to both CSX and NS after the consummation of the transaction.

7. Congressman Dennis J. Kucinich -- Cleveland Area.

The filing submitted by Congressman Dennis J. Kucinich asserts that shippers along the Cleveland-Berea axis will have a limited choice of rail carriers as a result of the transaction because, though both CSX and NS will have access to the Cleveland-Berea axis, NS will divert its service in favor of the tracks it already owns along the Cleveland-Lorain-Vermillion route. Kucinich (unnumbered) at 19. Thus, Kucinich states that the Board should "reject the merger because it is anti-competitive" or "[establish] a neutral, independent, railroad operating entity." Id.

Congressman Kucinich's concerns regarding the Transaction's effect on Cleveland shippers' competitive choices are misplaced. Shippers located on Conrail today will be directly served by either NS or CSX according to the allocation of the line. Shippers who today are open to reciprocal switching will remain open; their competitive service options will be unchanged. Moreover, under the terms of the NITL Settlement, the charge for reciprocal switching will be reduced. Congressman Kucinich may have confused NS's plans for through train service and failed to note that local train service will be operated by NS to all shippers located on the Conrail lines allocated to NS. NS' operating plan demonstrates NS' intent to serve shippers on the Conrail lines it will operate in this area. CSX/NS-20,

Vol. 3B at 237-239. Thus, the Board should not grant the conditions requested by Congressman Kucinich.[41]

8. National Lime and Stone.

National Lime and Stone Company alleges that it's Carey, OH facility will suffer a loss of competitive access if the WLE does not survive the Proposed Transaction. NLS-2 at 5. National's requests for conditions related to this assertion should not be granted as discussed in Section XVI.C, infra.

9. Potomac Electric Power Company.

DOJ advances a novel argument in which it characterizes Potomac Electric Power Company ("PEPCO") as a 2-to-1 situation. Unfortunately for DOJ's arguments, PEPCO, which is the alleged victim in DOJ's theory and is also a party to this proceeding, does not see itself as a 2-to-1. Instead, PEPCO advances a different theory. Both the DOJ theory on the PEPCO theory are analyzed in Section XIV, infra.

10. PSI's Gibson Plant.

The Department of Justice comments on the competitive position of PSI's Gibson plant, located in Carol, Indiana. DOJ-1 at 9-10. The Department's economic witness asserts that the Gibson station has access to two rail carriers -- NS, and Conrail (via trackage rights over NS) -- and that, following the acquisition, the Gibson plant would become a 2-to-1 point because NS would obtain use of those Conrail trackage rights. DOJ-1, Woodward VS at 6-7, 14-15.

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[41] Congressman Kucinich's proposed remedy regarding the establishment of a neutral carrier in Northeastern Ohio is discussed in Section VIII, infra.

The Department's fundamental premise is wrong. The Gibson plant does not have two-carrier access today. The trackage rights that at one time permitted Conrail to deliver coal only from the Amax Wabash mine near Keensburg to the Gibson plant over NS were contractually canceled more than a year ago, on October 24, 1996, when NS accepted Conrail's August 29, 1996 proposal to terminate them. Conrail had concluded that the trackage rights were no longer necessary because it no longer was handling coal traffic from that mine to the Gibson plant, which had been the trackage rights' sole purpose. See Letter dated August 29, 1996 from R. Paul Carey, Conrail's General Manager-Contracts, to R.C. Churchill, III, NS' Director, Joint Facilities and Budget (Vol. 3); see also, Fox RVS at 9; Moon RVS at 9. Today, only NS has access to the Gibson plant. Moon RVS at 9. The plain fact, therefore, is that the Gibson plant simply is not a 2-to-1 point.[42]

Moreover, even aside from the determinative fact that Gibson does not have Conrail access today, even when Conrail operated its very restricted rights between the Keensburg mine and the Gibson plant, the situation was never conducive to two-railroad competition via trackage rights as normally understood, as John T. Moon, II points out in his Rebuttal Verified Statement, because Conrail had authority only to shuttle coal between the

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[42] Exhibit 1 to the primary application, Map A ("Lines of Applicant Carriers and Other Railroads Prior to the Transaction"), and the references to the subject trackage rights in the Transaction Agreement and elsewhere in the primary application (as noted in the Department's comments at p. 15 n.35), are not to the contrary. As John Moon explains in his Rebuttal Verified Statement, Map A shows the subject Conrail trackage rights because, although the rights had been contractually terminated, that termination had not yet been filed with the Board. Similarly, provisions were included in the Transaction Agreement and elsewhere in the primary application for the reversion of those rights from Conrail back to NS simply out of an abundance of caution, and to reflect in this proceeding what NS and Conrail in fact had done contractually long before the joint acquisition of control of Conrail by CSX and NS was even contemplated.

Keensburg mine and the plant, and that line segment was isolated from the rest of the Conrail system. See Moon RVS at 8-10.

The Department's comments with respect to Gibson therefore are without merit.

11. Reserve Iron & Metal.

The Wheeling & Lake Erie Railroad ("W&LE") requests that the W&LE be granted access to Reserve's Cleveland facility because the facility is a 2-to-1. WLE-4, Parsons VS at 14; Thompson VS at 9. The Institute of Scrap Recycling Industries, Inc. ("ISRI") supports the WL&E's request on behalf of Reserve Iron & Metal, L.P. (Reserve), one of ISRI's members. ISRI-6 at 21. Reserve's Cleveland facility presently is served by CSX and Conrail. Reserve asserts that, by the time of the ISRI filing on October 21, 1997, Reserve had not been able to confirm that NS would replace Conrail as Reserve's second carrier. ISRI-6, Bornancin at 1-2.

W&LE's and ISRI's/Reserve's requested conditions should be denied because the Primary Application clearly provides that Reserve's Cleveland facility will have access to both NS and CSX. Seale RVS at 5; Mohan RVS at 72. Thus, Reserve is not a 2-to-1 shipper and the Board need not grant relief.

V. CLAIMS THAT VERTICAL INTEGRATION RESULTING FROM THE TRANSACTION WILL LESSEN COMPETITION ARE CONTRARY TO ESTABLISHED ECONOMIC THEORY AND BOARD PRECEDENT AND WITHOUT EVIDENTIARY SUPPORT.

Prior decisions of the Board and the ICC, supported by sound economic analysis, have consistently held that the vertical combination of rail carriers, one of whom is the sole provider of rail service to an origin or destination prior to the transaction, presumptively will not cause competitive harm to the shipper served. Various parties challenge this view and contend that the end-to-end or vertical combination of rail lines contemplated by the Transaction in this case will result in competitive harm. Most notably, Atlantic City Electric Company and Indianapolis Power & Light Company contend that the Board's well established rule is wrong, at least in the context of the rail industry.[1] ACE et al.-18 at 18. Other parties lament the loss of Conrail as a "neutral" connection, suggesting that CSX and NS will have an incentive to pursue long-haul routes post-Transaction and foreclose more efficient interline routes.[2]

The Board can and should readily dismiss these claims of competitive harm. The Board, its predecessor and reviewing courts have consistently rejected such claims in prior merger cases and the reasoning of those prior decisions applies here. More important, no party to this proceeding has come close to meeting the Board's clearly delineated test for

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[1] Orange and Rockland Utilities, Inc. also contends that it will be harmed by the vertical aspects of the Transaction, but it does not explicitly challenge the Board's "one lump" presumption. No other party explicitly raises this issue. Consumers Energy Company includes the same joint affidavit of Kahn and Dunbar as is found in ACE et al.-18 but does not make any arguments about vertical integration.

[2] See, e.g., NECR-4 at 7; Comments of American Short Line Railroad Association, (unnumbered) at 4; IC-5, Skelton VS at 6-7; CMA-10 at 26-27.

granting relief in situations involving alleged harm stemming from a vertical combination of rail lines.

A. No Party Has Met the Board's Test for Relief in Circumstances Involving the Alleged Loss of Origin Competition through Vertical Combination.

The Board and its predecessor have repeatedly been called upon in recent railroad merger cases to address claims of competitive harm stemming from an alleged loss of origin competition caused by the vertical combination of two rail lines. In rejecting such claims, the agency has relied upon the accepted economic proposition that there is only "one lump" of profit to be gained from the sale of an end-product or service. This proposition was succinctly summarized by the United States Court of Appeals for the District of Columbia Circuit in upholding the ICC's BN/Santa Fe merger decision:

> Because a monopolist at the end stage of production is in a position to capture that entire profit, integration backwards upstream, even when accompanied by monopolization of the earlier stages . . . normally does not enable it to raise the profit-maximizing price and thus inflicts no harm on the ultimate consumer.

Western Resources, Inc. v. STB, 109 F.3d at 787.

The ICC has found that this theory applies to situations where the sole rail carrier serving an electric utility at destination proposed to merge with one of two or more competing upstream origin carriers:

> A carrier with a destination monopoly will likely push the through rate as high as possible and keep the monopoly profits to itself by playing off competing connecting carriers against one another in setting divisions. That is, the through rate will be at the level maximizing net revenue for the traffic, subject to regulatory limits, and the destination carrier will establish favorable through service with the origin carrier willing to take

> the lowest division of the through rate for its segment of the movement. Although a destination carrier might not always be successful in executing this strategy, it will always have the incentive of profit-maximization to attempt to execute the strategy. Therefore, this rate strategy will be pursued and should succeed unless there are obstacles to its execution with respect to a specific movement.

BN/Santa Fe at 70-71, quoting UP/MP/WP, 366 I.C.C. at 538.

The agency presumes that the one-lump presumption applies to the factual circumstances raised in individual rail merger cases but does not treat it as an absolute bar to relief. BN/Santa Fe at 71; Western Resources, 109 F.3d at 787-88. "[T]o qualify for relief, we have required an affirmative showing that a specific utility was able to obtain real benefits from origin competition even though it was served exclusively by one carrier at the destination." BN/Santa Fe at 78. The specific test for rebutting the presumption sets out two conditions, both of which must be met for relief to be granted:

> The record must clearly show the following in order for a nonmerging carrier to qualify for a grant of trackage rights to a utility over the line of the destination monopoly carrier. 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 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.

UP/MKT, 4 I.C.C.2d at 476.

1. No Party Attempts to Satisfy the Test That Must Be Met for the Board to Remedy an Alleged Reduction in Origin Competition.

While various parties to this proceeding challenge the validity of the one-lump presumption, none even purports to present evidence that would satisfy the two-part test set

forth above. The Board should treat this failure of proof as dispositive and dismiss all claims for relief stemming from complaints about the vertical elements of the proposed transaction.

Atlantic City Electric Company and Indianapolis Power & Light Company. ACE and IP&L mount a quixotic attack on the Board's adherence to the one-lump presumption. They claim to "accept" the economic theory underlying the presumption but say that "they recognize it for what it is -- a theory only, not a fact -- so that the market power of the surviving railroads may be able to increase prices."[3] But ACE/IP&L make no attempt to identify specific, transaction-related competitive harm to them that would result from the vertical aspects of the proposed division of Conrail. Indeed, it is undisputed that ACE will benefit by gaining multiple competitive rail options by virtue of its inclusion in the South Jersey/Philadelphia shared assets area. ACE will not experience any adverse vertical effects of the transaction; instead, it will be the beneficiary of positive vertical effects (new extended single-line service) as well as new horizontal competition because CSX and NS will both serve it directly, whereas only Conrail serves it now. IP&L raises no vertical allegations. Its only specific complaints relate to alleged reductions in horizontal competition.[4]

Instead of presenting proof addressed to the Board's test, ACE/IP&L purport to refute the "predictions" of the one-lump presumption through the economic testimony of Drs. Kahn and Dunbar. This supposed refutation is based in part on statistical analyses of

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[3] ACE, et al.-18 at 22.

[4] As demonstrated in Section IV. A. 4., these complaints are without merit. See also Section XVI. C. 2.

Conrail's coal prices performed by Mr. Thomas Crowley. These analyses do not focus on particular bottleneck situations involving individual coal shippers as the Board's test requires. Instead, they are based on broad comparisons of Conrail's pricing of Monongahela origin coal movements following Conrail's acquisition of the MGA with Conrail's pricing of other coal traffic. ACE/IPL conclude "that the railroads surviving after this transaction will have the ability to increase prices" generally. Id. at 31. They therefore request "equal access" relief for any coal shippers who make an affirmative request for such relief. Id. at 49.[5]

The "equal access" relief sought by ACE/IP&L is unrelated to any allegation -- let alone any showing -- of specific transaction-related competitive harm. Indeed, the relief sought by ACE/IP&L demonstrates that their filing has nothing to do with this Transaction. ACE/IP&L are simply using this proceeding as an opportunity to reargue points previously argued to and properly rejected by the Board. They should be rejected again.

Orange and Rockland Utilities, Inc. Unlike the other commentors, Orange and Rockland, whose Lovett, NY plant is served solely by Conrail, claims that it has "been able to benefit from competition between NS and CSX to haul coal to the interchange points with Conrail."[6] But Orange and Rockland offers no proof at all of this alleged origin competition, nor does it offer any evidence that origin competition will be curtailed as a

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[5] ACE/IP&L further argue that CSX and NS will have the incentive to raise rates to recoup the so-called acquisition premium that they paid for Conrail. ACE/IP&L request that this supposed premium be excluded from CSX's and NS's accounts for purposes of making jurisdictional threshold and revenue adequacy calculations. Section XIV. C. 9.

[6] ORU-3, Bogin VS at 7.

result of the transaction. Thus, Orange and Rockland's vertical claims fail for lack of any serious effort to meet the Board's test for granting relief. See Section XIV. C. 7.

2. The Attacks on the One-Lump Presumption Set forth in the Testimony of Messrs. Kahn, Dunbar and Crowley Are Misguided and Do Not Support the Proposition that the Vertical Integration of Railroads Will Cause Competitive Harm.

As discussed above, the attacks on the one-lump presumption made by ACE/IP&L fail to address, let alone satisfy, the Board's test for relief. But even if those parties had stated a cognizable claim for relief, their requests for conditions would have to be denied because their economic arguments are invalid and their factual claims are erroneous. Drs. Kahn and Dunbar contend that "the circumstances in which the pure one-lump theory is likely to hold represent an 'extreme example'" of a theory that is unlikely to obtain in the real world. ACE et al.-18, Kahn/Dunbar VS at 7. They identify the following assumptions that are supposedly necessary for the "one-lump theory to hold":

-- there is no actual or potential alternative to the existing bottleneck, the entry or availability of which might be affected by the vertical integration or merger under consideration;

-- the bottleneck carrier has perfect information about the demand function of the shipper;

-- the bottleneck carrier has perfect information about the cost functions of competing carriers;

-- there is no uncertainty about future costs and prices;

-- different carriers have identical beliefs about the relevant regulatory constraints, and

-- revenue-sharing agreements do not preclude the bottleneck carrier from realizing the profit - maximizing monopoly profit.

Id. at 7-8.

Drs. Kahn and Dunbar have apparently overlooked the fact that similar arguments were made by coal shippers who challenged the ICC's use of the one-lump presumption in BN/Santa Fe. There, the ICC expressly rejected the argument that a similar set of assumptions or conditions must apply for the one lump presumption to remain valid:

> We do not think that the one lump theory requires the series of perfect conditions that the utilities claim must be present for the theory accurately to represent the coal transportation markets at issue here. Our focus here is properly on substantial harm to competition. Our experience has been that where a single rail carrier controls a destination segment, and no transportation alternatives are available, the shipper will be captive and the single rail carrier will be able to capture the preponderance of the economic profits. Conversely, when certain factors are present that limit a carrier's ability to take full advantage of a bottleneck, those factors will remain in place as effective safeguards after the merger. We have consistently adhered to these principles in assessing harm in merger cases and in making market dominance determinations in rate cases. The fact that a bottleneck carrier might not have sufficient information to execute a perfect price squeeze or to extract the last penny of economic profits does not mean that substantial benefits to shippers will be lost when the bottleneck carrier merges with a connecting carrier.

BN/Santa Fe at 74.

Applicants' economic expert, Professor Joseph P. Kalt, explains that as a matter or economics the assumptions specified by Kahn/Dunbar are not necessary for the one-lump result to apply:

> In the face of uncertainties such as those described by Kahn/Dunbar, a profit-seeking railroad makes the best, rational

> decision it can based on information about the shipper, the markets for the commodity shipped, carrier costs and regulatory constraints. The decision may not be identical to that which would occur in the presence of perfect information, but that does not invalidate the one-lump result. The presence of less-than-perfect information merely means that the railroad will sometimes make "errors" by establishing transportation rates above and below the levels at which they would be set in the presence of perfect information. . . The important point is that there is no reason to believe that the vertically integrated bottleneck carrier will make systematic errors. As in other markets, there is no reason to believe that less-than-perfect information will cause the profit-seeking railroad to behave in ways that lead to sustained, substantial and biased deviations from the one-lump result.

Kalt RVS at 29-30.

Drs. Kahn and Dunbar set forth four "testable hypotheses" that they contend flow from their assumptions set forth above.[7] The last three of these hypotheses are flawed

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[7] The "testable hypotheses" identified by Drs. Kahn and Dunbar are as follows:

- -- a merger that reduces or eliminates origin competition on certain routes should not tend to increase prices on those routes relative to other routes;
- -- on routes where there is a bottleneck at the destination but potential interline competition at origin, the bottleneck carrier should make the same "profit" regardless of whether it handles traffic for the whole route or for only the bottleneck portion;
- -- on such routes the competitive origin carrier should make zero profit;
- -- the existence or extent of origin competition should not tend to reduce prices for local service.

Id. at 10-11.

because they depend on Kahn/Dunbar's previously identified assumptions, which, as we explained, need not be true for the one-lump presumption to hold. Professor Kalt explains that "the last three of the four hypotheses should not be expected to hold in general and certainly not in the manner in which Kahn/Dunbar construct their empirical tests." Kalt RVS at 50. Dr. Kalt identifies in detail the flaws in the empirical tests related to these last three hypotheses and concludes that these tests provide "no useful information by which to evaluate the validity of the one-lump result or the impact of vertical integration." Kalt RVS at 52-53.

The one hypothesis set forth by Drs. Kahn and Dunbar that is suggested by the one-lump presumption is that "a merger that reduces or eliminates origin competition on certain routes should not tend to increase prices on those routes relative to other routes." This is the hypothesis that is supposedly tested by Mr. Crowley's analysis which compares Conrail's rates on former MGA coal movements with Conrail's rates on non-MGA coal movements. Mr. Crowley summarizes his MGA analysis as follows:

> Conrail purchased the Monongahela Railway Company ("MGA") in 1991. After that purchase, rail rates for coal originating at MGA origins for movement to Conrail destinations increased 6% over the 1991 through 1995 time period. Over the same time period (1991-1995), coal moving from non-MGA origins to Conrail destinations decreased 13%. This analysis shows that rail mergers place shippers at risk for rate increases[.][8]

ACE et al.-18, Crowley VS at 3. Crowley's MGA data are also used by Kahn/Dunbar who perform various regression analyses with those data.

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[8] Crowley's MGA analysis is relied upon by Kahn/Dunbar as support for the first of their four "testable hypotheses." ACE et al.-18, Kahn/Dunbar VS at 11.

Dr. Kalt's rebuttal verified statement contains a detailed critique of Mr. Crowley's MGA analysis. He identifies fundamental conceptual problems with the analysis and also identifies sampling and calculation methods that "produce spurious changes in calculated prices unrelated to any changes to the underlying rail rates." Kalt RVS at 42.

Dr. Kalt points to three fundamental conceptual problems with the MGA analysis:

> -- There is no "before" in the Crowley and Kahn/Dunbar "before and after" tests. Conrail already owned the MGA in 1991. Conrail had acquired ownership of all of the stock in the MGA in 1990. In most instances, economists consider complete ownership sufficient to provide the incentive to control the types of decisions, such as pricing, service quality, and interchanges, that control vertical rail relationships. . . .[T]he analyses performed by Crowley and Kahn/Dunbar cannot qualify as a test for price changes resulting from vertical integration.
>
> -- Crowley and Kahn/Dunbar fail to test the one-lump hypotheses. Specifically, they do not restrict themselves to looking at bottleneck destinations. Over 17% of the destinations examined are competitively served by another railroad.
>
> -- The MGA was the sole originating railroad providing service for most of the mines on its system. Thus, both before and after the acquisition of the MGA by Conrail, the origins on the MGA lacked origin rail competition. It is incorrect to treat the merger of the MGA with Conrail as reflecting the reductions in origin rail competition for the MGA mines.

Kalt RVS at 41-42.

The sampling and calculation errors contained in Mr. Crowley's MGA analysis result in a significant overstatement of the change in MGA coal rates during the 1991-1995 time period versus the change in non-MGA Conrail coal rates. Id. at 42-45. More important, Dr. Kalt explains that this rate comparison, even if correctly performed, says nothing meaningful about the one-lump presumption:

> Neither Crowley nor Kahn/Dunbar attempt to control for changes in the coal markets -- either in the producing regions, mines or from consumers of coal -- between 1991 and 1995. They are implicitly assuming that the net average effect of changes in the coal markets, as these changes affect the willingness to supply and purchase coal, are the same for MGA-originating mines as for all other mines in the U.S. -- from the Illinois and Powder River Basins and all others. . . . As none of these assumptions can simply be assumed and are unlikely to be true, their tests have no power to inform regarding the one-lump result.

Kalt RVS at 45.

Dr. Kalt explains that while the Crowley MGA analysis is uninformative on the issue it purports to examine, there are other straightforward explanations why MGA origin coal transportation rates were rising in a period when Conrail's rates on coal from other origins were falling. Dr. Kalt's analysis of the data shows a pattern whereby increases in coal transportation rates on coal from certain producing regions are correlated with increased production of that coal and decreases in rates on coal moving from other regions are correlated with decreased production. Kalt RVS at 47, Figure 7. This pattern of coal rate changes "reflects changes in the supply and demand for coal arising from the differentiation of coal across regions." Id. at 46-48. Dr. Kalt concludes that the increased demand for MGA coal in the early 1990's, driven in part by Amendments to the Clean Air

Act, is a far more plausible explanation for any Conrail rate increases on coal from MGA origins than Conrail's vertical acquisition of the MGA -- an acquisition which predated the first year in Mr. Crowley's study period. Id. at 49-50.

When all is said and done, ACE/IP&L are unable to make a dent in the one-lump theory, let alone refute it. The theory has widespread support among economists and consistently has been held to apply in the railroad merger context. Even Drs. Kahn and Dunbar are forced to concede that it "is a standard result in the economics of industrial organization" and that "[t]here is no dispute that the theory can provide useful guidance to public policy. . . ." ACE et al.-18, Kahn/Dunbar VS at 3, 6. Drs. Kahn and Dunbar do not articulate any countervailing theory or hypothesis as to why the vertical combination of rail carriers should result in an increase in market power. As the D.C. Circuit stated in its review of the ICC's BN/Santa Fe merger decision, "[i]t may not take a theory to beat a theory, but it helps. . . . Faced with a choice between a theory-less reading of the data and a reading that fitted together various complementary theories, the Commission understandably chose the latter." Western Resources, 109 F.3d at 790-91.

B. There Is No Reason to Believe that Competitive Harm Will Result from the Disappearance of Conrail as a "Neutral" Connecting Carrier.

A number of parties express concern that they will be disadvantaged from the loss of Conrail as a "neutral" connecting carrier on interline movements.[9] This concern involves "bottleneck" situations wherein Conrail, the bottleneck carrier, is currently able to interchange traffic with either CSX or NS. After the Transaction, either CSX or NS will

[9] See, e.g., NECR-4 at 7; Comments of American Short Line Railroad Association, (unnumbered) at 4; IC-5, Skelton VS at 6-7; CMA-10 at 26-27; RJC-6 at 5-7.

step into Conrail's shoes and supposedly will insist on handling the traffic in single-line service, thereby foreclosing a potential connecting carrier from the route.

To the extent that this vertical foreclosure argument has the overtones of a "loss of origin competition" claim, the short answer, again, is that no party has satisfied the Board's test for granting a condition to remedy a loss of origin competition. To the extent that the concern focuses on the potential loss of an efficient through route, there is no basis to presume that this will occur. Dr. Kalt explains that CSX and NS have no incentive to foreclose efficient through routes following the transaction:

> [A]fter the transaction the integrated carrier must now decide whether to provide upstream carriage itself or, effectively, to purchase such carriage, i.e., whether to "make" or "buy" upstream transportation. A vertically-integrated, profit-seeking rail carrier has every incentive to make an efficient "make-or-buy" decision. The vertically-integrated carrier will remain properly neutral in deciding whether to provide carriage itself or to use carriage provided by the competing carrier. If the competing upstream railroad can provide carriage at a price less than what it costs the vertically-integrated carrier to provide the same service, then it has every economic incentive to use the competitor.

Kalt RVS at 26.

In BN/Santa Fe, the ICC reiterated the well-established view that there is no basis for presuming that merging railroads would foreclose efficient through routes:

> In Traffic Protective Conditions, 366 I.C.C. 112 (1982), aff'd in relevant part, Detroit, Toledo & Ironton R. Co. v. U.S., 725 F.2d 47 (6th Cir. 1984), we rejected the notion that new single-line movements created through merger would lead the merged carrier to "vertically foreclose" competition over efficient routes by refusing to cooperate with unaffiliated carriers. In Seaboard Air Line Railroad Company--Merger--Atlantic Coast Line Railroad Company (Petition to Remove Traffic Protective Conditions) we recently reaffirmed that "merged railroads --

> regardless of whether they maintain bottleneck facilities or market dominance -- have the incentive to encourage full use of the most efficient routing, even when it entails a joint-line alternative to a single system route." CSX/FEC, slip op. at 5.

BN/Santa Fe, slip op. at 71-72.

No party to this proceeding has presented a persuasive argument as to why the same presumption of efficient routing after the Transaction should not apply here. In fact, Applicants' marketing witnesses have stated their intention to maintain efficient routes following the transaction.[10] Not only do CSX and NS have a commercial incentive to maintain efficient through routes, they could be subject to challenge under the Board's competitive access rules if they failed to do so.

C. The Proposed Transaction is Pro-Competitive Because it Will Convert Existing Bottleneck Situations Into Situations Involving Horizontal Competition.

One final point regarding the vertical aspects of this transaction should be emphasized. This transaction is unique in annals of railroad mergers because it eliminates bottlenecks. The creation of the shared assets areas and other joint use arrangements have the effect of converting a substantial number of movements from bottlenecks to situations in which competitive options exist at both origin and destination. Thus, even if there were any valid basis for concern over the loss of origin competition or possible vertical foreclosure -- and we emphasize that there is none -- the Board could conclude the creation of additional horizontal competition outweighs any harmful vertical effects.

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[10] See CSX/NS-19, Vol. 2A, Jenkins VS at 12-20; CSX/NS-19, Vol. 2B, Seale VS at 287-88, 314, 319.

VI. THE BOARD SHOULD NOT PERMIT ANTI-ASSIGNMENT CLAUSES TO STRIP CONRAIL'S ASSETS AWAY FROM THEIR INTENDED USE BY CSX AND NS.

In order to carry out the Transaction and effectively divide the operation and use of Conrail's system between NS and CSX, the Application seeks a determination from the Board that NS and CSX will have full rights to operate on that system and to succeed fully to all of Conrail's existing operating rights. Specifically, the last sentence of item (1)(c) of the Prayers for Relief, CSX/NS-18, Vol. 1 at 102-03 requests, in pertinent part, that the STB provide:

> a declaration, to the same effect as a declaratory order, that the foregoing authorizations will permit CSXT and NSR to conduct operations over the routes of Conrail covered by Trackage Rights Agreement as defined above, including but not limited to those listed on Appendix L, as fully and to the same extent as CRC itself could, notwithstanding any provisions in such Trackage Agreements purporting to limit or prohibit Conrail's unilateral assignment of its operating rights to another person or persons. Similarly, with respect to the Allocated Assets or the assets in Shared Assets Areas consisting of assets other than routes, (including, without limitation the Existing Transportation Contracts), authorization and declaration that CSXT and NSR may use, operate and perform and enjoy such assets to the same extent as CRC itself could, notwithstanding any provisions purporting to limit or prohibit CRC's assignment of its rights to use, operate and perform and enjoy such assets to another person or persons.

Notwithstanding the manifest necessity of this relief to enable NS and CSX to carry out the Transaction, a number of parties filing comments and requests for conditions have objected, either expressly or by implication, to this prayer for relief. The parties in question include APL Limited (APL-4), the Chemical Manufacturers Association ("CMA") (CMA-

10), the City of Indianapolis (CI-5), Eastman Kodak Company (EKC-2), the Gateway Western Railway and the Gateway Eastern Railway (GWWR-3), National Railroad Passenger Corporation (Amtrak) (NRPC-7), NYK Line (North America) Inc., Providence and Worcester Railroad Company (P&W) (undesignated), and Redland Ohio, Inc. (Redland-2).[1]

The objections of these parties ignore the text and legislative history of the STB's statutory authorization to exercise "exclusive and plenary"[2] authority over rail combinations, and the provisions of the statute that exempt a party to an approved combination "from all other law, including State and municipal law as necessary to let that rail carrier . . . carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction." 49 U.S.C. § 11321(a). The Board and its predecessor have ruled, and the Supreme Court has affirmed, that this language permits overriding of private contracts, inasmuch as the reference "to State law" includes the law providing for the enforcement of contracts. *Norfolk and Western Ry. Co.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 129-33 (1991); *see also Schwabacher* v. *United States*, 334 U.S. 182, 201 (1948). In approving rail combinations, the STB and its predecessor have authorized the assignment of the properties to the surviving rail carrier under Section 11321(a). The ICC stated, in this regard, that Section 11321(a) "enables the

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[1] Some of these parties do not focus on anti-assignment clauses, but, apparently conceding that such clauses would not be effective, suggest that the Board disapprove the section of the Applicants' Transaction Agreement dealing with succession to rail transportation contracts. The filings by APL Limited, CMA and NYK Line are in this category. The filing by the City of Indianapolis raises issues as to the appropriateness of a two-to-one "fix" and is discussed in Section IV.

[2] See also H.R. Rep. No. 1395, 95th Cong., 2d Sess. 158 (1978) (noting substitution of "is exclusive" for "shall be exclusive and plenary" in interest of clarity).

carriers to implement . . . not only the legal and financial, but also the operational aspects of the [merger] transaction upon consummation, without the need to apply to courts . . . for authority to do so." ICC, *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control -- Missouri -- Kansas -- Texas Railroad Company*, 4 I.C.C.2d 409, 1988 WL 224716, at *79 (May 13, 1988); *see also BN/SF* at 82 (noting self-executing nature of statute). The Board's power to override private contracts includes the power to override consent requirements in trackage rights agreements. *UP/SP* Decision No. 66, 1996 WL 742738 at *6 (December 30, 1996), *UP/SP* at 170 & n.217.

Notwithstanding this clear purpose of the statute -- that in rail combinations it is essential that the property, both tangible and intangible, of the predecessor carrier pass to the consolidated carrier or the carrier that will exercise an operating authority submitted for approval -- the interests of the aforementioned objecting parties lead them to propose that the Board defer to anti-assignment clauses contained in private agreements with Conrail and, accordingly, prevent CSX and NS from succeeding to Conrail's rights under those agreements.

1. *Gateway Western/Gateway Eastern*. Citing a boilerplate anti-assignment clause in two trackage rights agreements made between Conrail and their predecessors (GWWR-3 at 7-8), these two railroads claim (GWWR-3 at 7-10) that upon the consummation of the transaction, CSX, to whom these trackage rights agreements have been allocated, will not be entitled to exercise Conrail's rights under them. The claim is apparently made as a negotiating tool in connection with working out operational issues with CSX (*see* GWWR-3 at 3-4, 16, 23), but for whatever purposes made, it cannot go unanswered. It strikes at the

basic purpose of the pertinent language of 49 U.S.C. § 11321(a), the right of the consolidated or successor rail carrier to "hold, maintain, and operate property . . . acquired through the transaction."

2. *National Railroad Passenger Corporation (Amtrak)*. Amtrak takes a position similar to Gateway with respect to the right of CSX and NS to operate on the Northeast Corridor ("NEC") from Washington, D.C. to New York City. The NEC was owned by Conrail or its predecessors prior to 1976 when Conrail conveyed the NEC to Amtrak in accordance with the Final System Plan under the Regional Rail Reorganization Act of 1973. Conrail retained a Freight Service Easement over the NEC. Amtrak relies (NRPC-7 at 8) on an anti-assignment clause of the 1976 Transfer Agreement which prohibits assignment of the Freight Service Easement "other than to a subsidiary, affiliate or successor entity" of Conrail.

Under the plain terms of the Freight Service Easement, if the Transaction is approved by the Board, NS and CSX will each be a "successor entity" to Conrail for this purpose; under the statutory provisions at all pertinent times, the only "legal successors" to Conrail were the entities the I.C.C. or the Board approved as such under Section 11321(a) and its predecessors.[3] The Board need not rely solely on a construction of the Transfer Agreement, as it is plain that Section 11321(a) may and should be applied to reach the same result. The assertion by Amtrak would cut off a principal artery of NS's proposed freight

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[3] Amtrak also relies on the Second Amended and Restated Northeast Corridor Freight Operating Agreement dated October 1, 1986 between Conrail and Amtrak (NRPC-7 at 8), but that Agreement is inapposite. Because CSX and NS will be successor entities to Conrail under the Transfer Agreement, CSX and NS merely step into Conrail's shoes for purposes of the Operating Agreement and the cited provision is not implicated.

service from the Greater New York Area to Philadelphia and Washington, D.C. (as well as a secondary but important New York Area to Philadelphia route allocated to CSX). Amtrak's position would thus largely frustrate the intent of the Application to bring competitive Class I freight service to the Greater New York Area. It would cut off the State of Connecticut from freight rail service from Long Island and New York State.

Such anti-assignment clauses are the most obvious of the provisions which might stand in the way of a carrier, approved by the Board to effectuate a transaction in the public interest, from operating a property and exercising franchises involved in the transaction. Here again, as in the case of the Gateway railroads, Amtrak's position appears to be taken for negotiating purposes (NRPC-7 at 8), and it is without merit. Boilerplate clauses like those cited by Gateway and Amtrak should not be permitted to stand in the way of the implementation of a major rail combination found to be in the public interest by the Board.

Amtrak is understandably concerned about protecting passenger operations on the NEC, but it should be remembered that the Congress has found that "[t]he Northeast Corridor is a valuable resource of the United States used by intercity and commuter rail passenger transportation and freight transportation." 49 U.S.C. § 24101(a)(7) (emphasis added). Moreover, as a practical matter, Amtrak need not be concerned about the succession of the freight easement rights to CSX and NS. Upon the Control Date, the Conrail trains operating over the NEC will continue to operate as they did prior to control by CSX and NS. CSX and NS cannot implement their proposed changes in the number and schedule of freight trains on the NEC without approval by Amtrak. Amtrak retains the full protections of the 1986 Freight Operating Agreement, most significantly Sections 2.3(b) and (c) which

subject freight service to the "physical limitations of the NEC, to Amtrak's speed, weight and similar operating restrictions and rules or safety standards, and to the needs of, and in particular to the adequacy, safety and efficiency of, Amtrak passenger train operations and commuter service." With respect to safety concerns in particular, CSX and NS will each bring their excellent safety records to their operations over the NEC. And to the extent that Amtrak is complaining that the substitution of two carriers for Conrail will be complex, there is no reason to doubt that Amtrak can ably handle the situation. When faced with a similar contention by Kansas City Southern with respect to the grant of terminal trackage rights to BN/SF in the *UP/SP* proceeding, the Board concluded that use of the segment by three carriers rather than two was practicable and that this would simply "'require coordination of operations between the parties.'" *UP/SP* at 168 (citing UP/MP/WP, 366 I.C.C. at 576).

3. *Providence & Worcester*. A somewhat similar argument is made by P&W. It contends that, upon Conrail's cessation to be the operator of the New Haven Station, a rail terminal property in Connecticut, it may exercise a right to purchase the terminal from Conrail. That right is claimed under an order of the Special Court dated April 13, 1982, which reads in pertinent part as follows:

> If Conrail elects to withdraw from or abandon or discontinue freight service obligations on the "Shore Line" between Westbrook, Connecticut (MP 101.2) and New Haven, Connecticut (MP 70.2) or on the terminal properties known as "New Haven Station" (which properties are more precisely defined in Appendix D) and if the [Federal Railroad] Administrator shall find, on application of P&W, that P&W is continuing to operate as a self-sustaining railroad capable of undertaking additional common carrier responsibilities without Federal financial assistance, Conrail shall sell said rail properties at a reasonable price and on reasonable terms and conditions to be agreed upon by

> Conrail and P&W or, in the absence of agreement in accordance with the procedures of the American Arbitration Association, and P&W shall succeed to Conrail's service obligations upon the following conditions . . . .

The assertion is unfounded, not simply for the reasons given above with respect to the Gateway Railroads, but on two other bases as well:

(a) The transaction in question does not even implicate the language of the Order with respect to the right of first refusal, which order appears to contemplate abandonment of rail properties or of freight service using them. In any event, it does not contemplate a situation in which Conrail will continue to be the owner of the facility in question, although allocated to another rail carrier to operate for a term of years, which is the situation involved here.

(b) P&W and CSX, the allocated operator of the terminal and the associated rail lines, entered into a settlement agreement on August 6, 1997. While the agreement is generally confidential, one provision under it contemplates public disclosure, and was not, accordingly, confidential. It provides:

> **SECTION 2.** ***SUPPORT OF APPLICATION***.
> P&W shall submit a letter of support to the Board expressing unconditional support for approval of the Application. If the letter has not been received by the Board on or before September 1, 1997, then this Agreement shall automatically terminate with no further right or obligation remaining with either party.

The letter was duly sent. But the Application P&W agreed to support on an "unconditional" basis in this settlement agreement contained, of course, the prayer for CSX's and NS's full enjoyment of Conrail's allocated property quoted above. Because P&W has, for a valuable consideration, agreed to support the transaction contemplated by the

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Application, it is accordingly estopped from denying CSX the quiet enjoyment of the New Haven Station.

We should further note that at the present time, the FRA has refused to take any action contemplated by the order of the Special Court in furtherance of P&W's request. A letter of October 30, 1997, from S. Mark Lindsey, Chief Counsel to the FRA, to the General Counsel of the P&W, attached to the Verified Statement of Jonathan M. Broder (Vol. 2), indicates the reasons. The letter notes the exclusive jurisdiction of the STB over the Conrail transaction, and expresses a belief that the pendency of the transaction in and of itself does not indicate any election by Conrail to abandon service at New Haven. The letter further says that, in the view of the FRA, the transaction itself does not contemplate any action by Conrail or a legal successor to it to withdraw from, abandon or discontinue services at New Haven Station. This is the point we make in Item (a) above. P&W is proceeding, nonetheless, before the United States District Court for the District of Columbia, successor to the Special Court, in furtherance of its attempt to obtain the New Haven Station; a Complaint was filed in that Court by P&W on November 10, 1997. Conrail will make appropriate representations before the Court as to the jurisdictional issues. The Board should grant the CSX/NS Prayer for Relief without making any exception for P&W or anyone else.

4. *Rail Transportation Contracts*. Similar issues are raised by a number of parties to rail transportation contracts, including Eastman Kodak Company (EKC-2) and Redland Ohio, Inc. (Redland-2).) In the past, there has been no question but that these contracts are not affected by rail combinations approved by the Board or its predecessor and that they remain binding on the shippers and the successor railroads after such approval. To be sure,

under its conditioning power, the Board may "open up" contracts, relieving the shipper or both parties from the duty of observance. The Board's decision in *UP/SP* indicates the correctness of both propositions; that ordinarily these contracts would pass with the transaction but that for good cause the Board might open them up. *UP/SP* at 146. In Section IX below, we explain why the Board should not exercise its conditioning power to open up the existing rail transportation contracts of Conrail, but should hold both parties to them and permit the arrangements for the succession of Conrail's rights and duties to go forward.

A few of the parties to rail transportation contracts do not raise policy or operational issues concerning succession to rail transportation contracts, but rely on anti-assignment clauses. Accordingly, we address here the assertion, most clearly made in the comments of Eastman Kodak Company, that an anti-assignment clause in a rail transportation contract prevents the contract from passing to the allocated successor to Conrail's operations.[4] It is clear that since the destination of the movements under the Eastman Kodak contract are Rochester, New York, which is "Local" to CSX and accordingly, where the origination stations are anything other than "Local" to NS,[5] the movement will be on CSX, under Section 2.2(c) of the Transaction Agreement. So there is no question as to which carrier will

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[4] We note that the Eastman Kodak filing does not raise the issue raised by the APL filing where a number of movements of the APL contract are to be allocated for use by CSX and NS, in a process yet to be conducted, so that there will be a 50-50 division of responsibility for providing service under them and a like allocation of revenues and expenses. That issue will be addressed in Section IX also.

[5] As to those origination-destination pairs, an interline movement on a 30%/30%/mileage prorate division will be effected.

perform the movements between the various origination and destination points in the Eastman Kodak contract.

Rail transportation contacts are "property" and clearly fit within the statutory language. They are valuable assets of the railroads. Their performance gives the railroad a traffic and revenue base that creates the means and the need for high density, high speed maintenance of its lines and both the need and the means for furnishing additional service to the public. To say that these anti-assignment clauses should be permitted to prevent the rights and duties of the predecessor company, the lessee, or the operator under an operating agreement, from being vested with the right to perform and receive the benefits under the contract would contravene the purpose of the statute.

Furthermore, shippers that entered into contracts with Conrail that have not yet expired obtained, and have enjoyed, various benefits from their side of the bargain. In any event, in this, as in other areas of the law,[6] the provisions of anti-assignment clauses in private contracts must bow to the public interest as declared by Congress -- in this case under the commerce power to provide an exclusive and plenary forum and authorization for the review and efficient implementation of rail combinations.

The only anti-assignment clause actually in the contract on which Eastman Kodak relies is a standard or "boilerplate" one. It reads as follows:

> 15. AGREEMENT: This Contract is not assignable in whole or in part by one party without the prior written consent of the other parties. This Contract shall inure to and be binding upon the parties

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[6] *See*, *e.g.*, 11 U.S.C. § 541(c) (anti-assignment provisions generally unenforceable in succession to a debtor's estate in bankruptcy).

hereto and their respective successors and permitted assigns.

(EKC-2 at 5; Document EKC 3-4.)

Eastman Kodak claims in a verified statement that in the contract, in addition to its standard anti-assignment clause, "there are other provisions making the Contract inapplicable whenever Conrail sells or disposes of a line of railroad used to carry out the Contract. This provision was entered into by Kodak with full awareness of the somewhat fluid state of the eastern railroad network since World War II." The verified statement goes on to record the rail mergers in the East since World War II and claims that "certain provisions of the coal transportation contract, including the ones cited above, were entered into advisedly, and with the anticipation that there was a major probability that further changes were ahead for the eastern railroad system." (EKC-2 at 5-6.)

This argument takes certain liberties with the facts as to the negotiation of any special anti-assignment clause. To be sure, it appears that in the negotiations Eastman Kodak sought from Conrail a specific clause giving itself a "one-way street" option to maintain the contract in the event of a line transfer or to cancel it. *See* the clause for Article 12 proposed at Document EKC 3-7. (Vol. 3). However, Conrail responded by proposing a clause that in the event of a line sale "Conrail will use it's [sic] best efforts to have the railroad purchasing said line or part of line assume the terms of this contract." Document EKC 3-8; EKC 3-9. (Vol. 3). This was the clause in fact incorporated in the contract as executed. Document EKC 3-3. (Vol. 3). Thus, the clause that Eastman Kodak agreed to was not a clause giving it the right to abrogate the contract in the event of a line transfer, but rather a clause assuring

that the contract would continue. That is what the Applicants are seeking to assure Eastman Kodak here.

To be sure, it should not make any difference whether a "boilerplate" or an "express" termination clause is employed; the enforcement of any such clause would be an impediment to transactions the Board is to consider and authorize under Sections 11321 to 11327 of Title 49 U.S.C. If a railroad decides to turn its routes over to another railroad to operate -- which is the essence of the plan of division contemplated here -- that should not result in a massive cancellation of the railroad's leases and contracts that contain, as most leases and contracts do, anti-assignment clauses. Even if Eastman Kodak had negotiated a special "non-boilerplate" clause here -- which the evidence indicates it did not -- it should not have the power to cancel its contract in the face of a Board-approved transaction.

An argument similar to Eastman Kodak's but without any claim as to other than a boilerplate clause, is made by Redland Ohio, Inc., which deals in lime and limestone products, shipping a substantial quantity of them by rail, and receiving inbound coal at its facilities. Redland-2 at 3-4. In a brief and conclusionary presentation (*id.* at 11) Redland contends that boilerplate contract anti-assignment clauses prevent succession to its rail transportation contracts. This contention should fail for the same reasons as those just stated as to Eastman Kodak.

VII. THE BOARD SHOULD REJECT REQUESTED CONDITIONS THAT WOULD RADICALLY ALTER, SOLELY FOR APPLICANTS, ESTABLISHED RULES GOVERNING RAILROAD ACCOUNTING AND MAXIMUM RATE REGULATION.

Several shippers and shipper groups ask the Board to impose conditions in this proceeding that would reverse or alter, for NS and CSX alone, established rules governing railroad accounting and maximum rate regulation. If adopted, the requested conditions would (1) preclude Applicants from including the full acquisition cost of Conrail in their accounts for purposes of revenue adequacy and jurisdictional threshold determinations, (2) modify existing rules governing market dominance and rate reasonableness determinations, and (3) impose an absolute rate cap for certain movements.[1/]

There is no justification whatsoever for any of these requested conditions. There is no showing that they are needed to redress any adverse competitive impact of the Transaction or that they are warranted on any other ground. They would result in substantial re-regulation of one part of the railroad industry -- Applicants -- contrary to consistent congressional policy since at least 1976.

The arguments advanced in support of these conditions are discussed and refuted in detail in Appendix A to this Volume 1 and in the rebuttal verified statements of Professor Joseph P. Kalt and Mr. William W. Whitehurst, contained in Volume 2. We summarize the main points of that discussion here.

[1/] ACE, et al.-18 at 32-50; CMA-10 at 6-16; NITL-7 at 15-27; GPU-02, Argument at 6-21; CE-05, Argument at 10-29; CEC-05, Argument at 22-25; PEPC-4, Argument at 20-24; General Mills, Wasecha VS (unnumbered) (dated October 16, 1997); SOC-3, Hall VS at 6, 14-15; NYS-10, Argument at 4, 34-37; NIMO-7 at 21-22; Indiana Port Commission (unnumbered), at 10-11; ASHT-11 at 15-16; ENRS-7 at 25-28; TFI-2.

A. Treatment of Acquisition Costs of Conrail. ACE et al., NITL and other shipper interests contend that NS and CSX paid an excessive amount for Conrail, which amount includes what these parties claim is an "acquisition premium," and that NS and CSX will, or may, attempt to pay for their purchase by raising rates unreasonably to captive shippers. To prevent this, these parties ask the Board to overturn its well-established rules and precedents governing the accounting of costs of acquired rail property and to impose a condition prohibiting NS and CSX from accounting for their cost of acquiring Conrail in accordance with those rules and precedents. These parties seek a condition that would prevent CSX and NS from including the full acquisition cost of Conrail in their accounts for purposes of revenue adequacy and jurisdictional threshold determinations and, in effect, would require that those determinations be based on the pre-transaction book value of Conrail's assets (predecessor cost) rather than the actual cost incurred by CSX and NS to acquire Conrail.

Inasmuch as ACE itself and a great many of CMA's members themselves will be gaining direct two-carrier competition as a result of the Transaction, it is difficult to see why such shippers are even making this novel argument. In any event, it is groundless for many reasons.

First, there is no truth whatsoever in the implication, contained in these parties' loose use of the term "acquisition premium," that NS and CSX paid an excessive amount for Conrail. The consideration paid was the result of a competitive bidding in the market, and the amount paid is therefore the best and most reliable measure of fair market value. Moreover, Board approval of the Transaction will include a finding that the terms are "just

and reasonable." CSX/NS-18 at 104. It is ludicrous to suppose that NS and CSX paid any more for Conrail than they believed it to be worth, based on their assessments of the cost savings, efficiencies and traffic growth that they think they can achieve from the Transaction. The suggestion that they paid a "premium" above Conrail's fair value is simply incorrect. See Kalt RVS at 60; Whitehurst RVS at 4-5.[2/] No party has submitted any substantive evidence to support any claim that CSX and NS paid an "excessive" amount for Conrail.

Second, a grant of the relief sought by these parties would directly conflict with well-established accounting rules and controlling Board precedent. These are not new issues for the Board and the ICC. Both Generally Accepted Accounting Principles (GAAP), which the Board is statutorily required to follow (49 U.S.C. § 11161), and the Board's accounting rules have long required railroads to make purchase accounting adjustments in their accounts to reflect their acquisition costs.[3/] Furthermore, with respect specifically to revenue adequacy determinations, the ICC in 1990 squarely decided -- after extensive debate and with the support of shipper groups (including NITL) -- to require railroads to use acquisition cost rather than pre-Transaction book value for purposes of revenue adequacy determinations.

[2/] These parties and their witnesses use the term "acquisition premium" frequently, variously and inconsistently. They sometimes use it to refer to the difference between the acquisition cost of Conrail and the historic net book value of Conrail's assets; at other times as the difference between acquisition cost and the pre-Transaction market share price of Conrail's outstanding publicly traded common stock; and yet other times as the difference between acquisition cost and Conrail's total shareholder equity. See, e.g., ACE et al.-18 at 9, 15-16; NITL-7 at 15-16; ACE et al.-18, Crowley VS at 25-29. See Whitehurst RVS at 4; Kalt RVS at 59-60.

[3/] Whitehurst RVS at 10-14; 49 C.F.R. § 1201 (Instructions for Property Accounts § 2-15(c); see also BNSF at 104 & n.141 ("Purchase accounting requires adjustment, either up or down, of the book value of the acquired railroad's assets to take into account the total purchase price paid for the railroad's stock)(emphasis added).

That decision was fully upheld on judicial review. Railroad Revenue Adequacy -- 1988 Determination, 6 I.C.C.2d 933, 935-42 (1990)("Ex Parte 483"), aff'd sub nom. Association of American Railroads v. ICC, 978 F.2d 737 (D.C. Cir. 1992). The parties seeking these novel conditions scarcely reference these rules and precedents and do not address at all their well-considered reasoning.

Third, those rules and precedents are based on sound public policy. They are based on the recognition that railroads must be given an opportunity to earn (if market conditions and the demand for service permit) a competitive rate of return on the current value of their invested capital. If railroads were not given that opportunity, they could not compete for capital with other businesses, and over time would be unable to replace their assets. The ability to earn adequate returns is thus imperative for the long-term survival of the industry. Those rules and precedents are also based on the recognition that the price recently paid for a railroad or its assets is a far better measure of the current value of that railroad's assets than historic book value appearing on the books of that railroad.

Furthermore, if adopted, the argument of ACE, et al. and others that only the historic book value of rail assets should be used for regulatory purposes would impose an artificial and entirely inappropriate disincentive for investment in railroads and on creating rail efficiencies. As Professor Kalt explains, those who might see a potential for profit in creating unrealized efficiencies in a railroad or combination of railroads might well be deterred from committing their capital if they were not assured that they would have at least the opportunity to earn enough to recoup their full investment. Moreover, for this Board to accept the premise of ACE, et al. that NS and CSX paid too much for Conrail, the Board

would in effect be second-guessing the marketplace. That is not an appropriate function of this agency.[3/]

Fourth, even if there were any reason to reconsider the Board's rules and precedents, which there is not, it would be plainly inappropriate to do so in a proceeding that would apply to only two railroads. Any such reconsideration would be appropriate only in the context of a rulemaking, such as the annual revenue adequacy proceeding (where the Board's existing rule was developed) or the ongoing URCS rulemaking, the results of which would apply to all railroads, not just NS and CSX, and which would apply to all similar transactions (including those in which acquisition cost is less than predecessor costs).

Finally, there is nothing about the facts of this case that would warrant making the Board's accounting rules and precedents inapplicable to NS and CSX. As has been frequently shown, this Transaction is extremely pro-competitive, and there is no basis for believing that the Transaction will enable Applicants to raise their rates. Furthermore, there is no merit to the analysis of the shippers' witness, Mr. Thomas Crowley, who claims to show that the acquisition cost of Conrail will have a significantly negative effect on NS's and CSX's revenue adequacy status and will significantly increase the revenue-to-variable-cost jurisdictional threshold levels for particular CSX and NS traffic movements. That analysis is

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[3/] As explained more fully in the Appendix and statement of Professor Kalt, there is also no merit to the argument that basing railroad rate regulation on the railroads' acquisition costs would lead to a "fatal circularity" in conflict with principles established for public utility rate regulation in cases like FPC v. Hope Natural Gas Co., 320 U.S. 591, 601 (1944). Congress and this agency have recognized many times that railroads are not public utilities, but are subject to intense competition from each other and from other modes. Railroads cannot pay excessive amounts for their assets on the basis of any assurance that they can recoup their investments. For those reasons, the ICC expressly rejected the "fatal circularity" argument advanced by some parties in Ex Parte 483. 6 I.C.C.2d at 940-941.

based on only one side of the equation affecting those calculations, the cost-increasing impacts. It completely ignores the other, cost reducing and revenue enhancing side of the equation: the large efficiencies, cost savings and incremental traffic and revenue gains, amounting to more than $1 billion a year, that will have the opposite effect on those calculations. This oversight renders Mr. Crowley's analysis worthless.

B. Changing rules on bottleneck complaints. ACE et al. also seek a condition that would make inapplicable to NS and CSX the Board's recent "bottleneck" decision.[4/] Contrary to that decision, the condition sought by ACE et al. would permit solely-served shippers to challenge and seek rate prescriptions of maximum reasonable rates applicable solely to the "bottleneck" portion of interline through movements without regard to the reasonableness of the through rate applicable to the entire through movement. The only basis ACE et al. offer for their claim that this condition is related to some effect of the Transaction is their entirely specious attack on the Board's well-established presumption that vertical integration will not harm competition. As discussed earlier and in Professor Kalt's statement, that attack is groundless, as is the requested "bottleneck" condition on which it is based.

C. Presumptions of Market Dominance. NITL and others seek a condition that would render statutory and regulatory standards for determining market dominance inapplicable to NS and CSX. Under this condition, NS and CSX would be presumed to be market dominant, regardless of the facts, in every case for the next five years in which a

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[4/] STB Docket No. 41242, Central Power & Light Co. v. Southern Pacific Transportation Co. (served December 31, 1996), clarified (served April 30, 1997).

shipper served by only one railroad at origin or destination challenges a rate that is increased by more than the RCAF-U (or, in the case of the Fertilizer Institute, the RCAF-A). NS and CSX would also have the burden of proving the reasonableness of the challenged rate. Again, however, these parties have shown no connection between this proposed condition and any plausible adverse competitive effect of this Transaction.

D. Rate Caps. ACE et al. and CMA seek conditions that would impose arbitrary rate caps on various categories of traffic for five years or, in CMA's case, indefinitely. Here again, no plausible claim is made that these conditions are rationally related to any harm caused by the Transaction. CMA's condition would pertain to movements that are currently single-line and will become interline NS-CSX moves after the Transaction. We discuss elsewhere why that circumstance is not a competitive harm that warrants the imposition of conditions. See Section XVI. The permanent rate caps sought by CMA with respect to such movements are plainly unwarranted, as they could well result in requiring NS and CSX to render service below cost. Furthermore, since no shipper would enjoy such a permanent rate freeze in the absence of this Transaction, the requested condition would amount to an unwarranted windfall for some shippers.

In sum, there is no justification for any of the various requested conditions that would radically alter, for Applicants alone, established rules and standards governing accounting and the regulation of rates.

VIII. CONDITIONS REQUESTING ADDITIONAL SHARED ASSETS AREAS OR ENLARGEMENT OF THE SHARED ASSETS AREAS OR THE EQUIVALENT, AND OTHER REQUESTED CONDITIONS CONCERNING THE SHARED ASSETS AREAS, SHOULD BE DENIED.

A. Requests For Additional or Expanded Shared Assets Areas Should Be Rejected.

The Transaction Agreement and the CSX and NS Operating Plans provide for three Shared Assets Areas that will be operated by Conrail to provide NS and CSX competitive and equal access to customers located in those areas.[1] The Shared Assets Areas are North Jersey, South Jersey/Philadelphia, and Detroit. Through several ancillary agreements and the development of operating plans, substantial care has been taken by CSX and NS to ensure safe and efficient operation within each of the Shared Assets Areas.[2]

In the Shared Assets Areas, separation of trackage allocation between NS and CSX was either not feasible or was not acceptable to NS and/or CSX, for a variety of commercial and operational reasons. McClellan V.S., CSX/NS-18, Vol. 1 at 514. Detailed Shared Assets Area Operating Agreements were negotiated between CSX and NS through arms-length bargaining, addressing the designation and configuration of these areas and the operations therein, providing

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[1] The primary function for Conrail within each Shared Assets Area will be to provide switching and train breakup and assembly services for CSX and NS. CSX and NS responsibilities will be to operate trains to, from and within the Shared Assets Areas, as the case may be, picking up and setting off cars or blocks of cars in order to provide safe, efficient and timely service to customers.

CSXT and NSR will each have exclusive and independent authority to establish all rates, charges, service terms, routes and divisions, and to collect all freight revenues, relating to freight traffic transported for its account within the Shared Assets Areas and Conrail will not establish, participate or appear in any such rates, routes, or divisions. CSX/NS-18, Vol. 1 at 46.

[2] See CSX/NS Operating Agreement for the North Jersey Shared Assets Area. CSX/NS-25, Vol 8C at 57.

both CSX and NS equal and efficient access to customers within each Shared Assets Area. See Shared Assets Area Operating Agreements, CSX/NS-25, Vol. 8C. Other carriers that previously had access to points within the Shared Assets Areas will continue to have the same access as before to them. CSX/NS-18, Vol. 1 at 45.

The Transaction Agreement also provides for NS' operation of the former Monongahela railroad, with full CSX access via trackage rights, in the Monongahela coal region in southwestern Pennsylvania and adjacent West Virginia. CSX/NS-18, Vol. 1 at 50; Transaction Agreement, Ex. GG, CSX/NX-25, Vol. 8C at 715ff. Virtually all Monongahela traffic is coal moving in full trainloads. Both railroads will be in a position to serve mines in that region directly, with competitive access to customers. Transaction Agreement, Ex. GG, CSX/NS-25, Vol. 8C at 715-16. While not a "Shared Assets Area," the Monongahela arrangement is intended fully to open up competition to shippers on the former Monongahela Railway. A disposition similar to that of the Monongahela is made with respect to the use of Conrail's dock facilities at Ashtabula, Ohio, on Lake Erie. CSX/NS-18, Vol. 1 at 51; Transaction Agreement, Exhibit T, CSX/NS-25, Vol. 8C at 397ff.[3]

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[3] We do not discuss herein the case of Indianapolis, where extensive trackage rights are to be afforded to NS to cure a "2-to-1" situation caused by the fact that while at the present time CSX and Conrail serve Indianapolis and NS does not, the Conrail line to St. Louis running through Indianapolis is to be allocated for use by CSX. The complaints as to the adequacy of the cure in Indianapolis are dealt with in Section IV. None of the comments and other filings dealt with in this Section is about the alleged inadequacy of a "2-to-1" "fix."

A torrent of comments and/or inconsistent and/or responsive applications argues that additional geographic regions, as well as various narrower points in the Northeast, somehow deserve or need a shared asset area or some equivalent thereof.[4] These include filings by:

American Trucking Associations
Baltimore Citizens Advisory Committee
Bessemer & Lake Erie Railroad
Coalition of Northeastern Governors
Connecticut Department of Transportation
Erie-Niagara Rail Steering Committee
Institute of Scrap Recycling Industries, Inc.
State of Maine Department of Transportation
Congressman Nadler, and other Representatives.
National Industrial Transportation League
U.S. Clay Producers Traffic Association
The Fertilizer Institute
State of New York
State of New York and the New York City Economic Development Corporation
New York City Economic Development Corporation
Niagara Mohawk Power Corporation
Potomac Electric Power Company
Senator Jack Reed/Rhode Island Department of Transportation
Tri-State Transportation Campaign
West Virginia Association for Economic Development through the Joint Use of Conrail Tracks by Norfolk Southern and CSXT
West Virginia State Rail Authority

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[4] See Baltimore Citizens Advisory Committee, BLE-7 and BLE-8, CN-13, CNEG-5, Connecticut Department of Transportation, DE-02, State of Maine Department of Transportation, MPI-2, Congressman Nadler, et al., NYS-10, NYS-11, NYC-9, NYCH-3, PBL-10, RBTC-9, Senator Jack Reed/Rhode Island Department of Transportation, RWCS-3, SPRPC-2, Tri-State Transportation Campaign, WVED-2, West Virginia State Rail Authority, ATA-6, APL-4, ACE, et al.-18, The Business Council of New York State, Inc., CMA-10, State of Delaware Department of Transportation, DVRPC-02 ELKR-2, ENRS-6, FINA-2, FOPC-3, ISRI-6, Congressman Dennis J. Kucinich, NITL-7, NECR-4, NIMO-6, PEPC-4 and PEPC-5, SOC-3.

These requests, either individually or collectively, seem to cover the entirety of the Northeastern United States. Some requests are pointed at Conrail's operations in entire states. See, e.g., Comments and Requests for Conditions of Connecticut Department of Transportation; Congressman Nadler, et al. (unnumbered). One, by the Coalition of Northeast Governors (CNEG-5), includes each state within those governors' constituencies, although the Governor of Massachusetts supports the Transaction without any such condition. Comments and Requests For Conditions by The Commonwealth of Massachusetts (unnumbered). The State of Rhode Island appears to want to have a Shared Assets Area, or some equivalent, although neither Conrail nor either of CSX or NS has or will have any operations in the state. Comments and Requests For Conditions by the Rhode Island Department of Transportation (unnumbered).

Other requests are narrower. The State of New York wishes to have the rail lines of Conrail in the portion of New York State East of the Hudson River, in effect, included in a Shared Assets Area through trackage rights. NYS-10 at 5. The same request, including within its scope the Conrail lines in Connecticut and, indeed, lines owned by entities which are not Applicants, is made by another group of commentors. Congressman Nadler, et al. at 2-3 (unnumbered). The Erie-Niagara Rail Steering Committee (ENRS) requests a Shared Assets Area for two and a half counties in Northwestern New York State, including Buffalo. ENRS-6 at 6. New Shared Assets Areas, or the extension of existing Shared Assets Areas or similar remedies, are proposed for portions of the states of West Virginia, Maryland, Delaware, Pennsylvania, New Jersey, New York, Michigan, Rhode Island, Maine and Connecticut. See n.4, supra.

These claims generally resonate with the theme: "[i]t is highly inequitable to introduce direct competition to one region and deny it to the other." Comments by Connecticut Dept. of Transp. at 2 (unnumbered).

Most of the comments and applications of this nature request the imposition of additional or expanded shared assets areas either with the same structure as that negotiated for the voluntary Shared Assets Areas, seeking what the commentors term "the purest form of rail competition" through operations in a shared assets areas (CNEG-5 at 2), or through the grant of specific trackage rights to either NS or CSX. The claims are as follows: Because others are advantaged and the claimants are left where they were before the Transaction, they are, on a comparative basis, disadvantaged; so something must be done for them by the Board. The State of New York, for example, asks the Board to impose trackage rights over portions of the Conrail rail line east of the Hudson (allocated to CSX) that will enable an unidentified (and apparently unlocated) third party operator to provide service to, from, and in New York City and Long Island. NYS-11/NYC-10. ENRS requests that the Greater Buffalo area be designated as a formal shared assets area to place Buffalo shippers on a parity with those located within the voluntary shared assets areas provided for in the Transaction Agreement. The West Virginia Association for Economic Development seeks to have the Board require NS to grant CSX shared use of the West Virginia Secondary line in order to "even the playing field" in light of "the dual-carrier competitive rail service that their competitors in other key regions will suddenly enjoy." WVED-2 at 2.

Several shippers make the objection that they are located outside shared assets areas, and seek a new gerrymandered shared assets area to include their own specific destination or origin

points.[5] These parties appear to contend that no shipper should be advantaged by the Transaction unless other shippers are advantaged. They argue that it is inappropriate that rail competition be introduced to some areas and not to themselves. For example, Fort Orange Paper Company complains that as to it "the only change will be in the paint scheme on the engines . . . One monopoly will merely replace another." FOPC-3 at 7.

One submission goes so far as to request the Board essentially to override in its entirety the proposed allocation of Conrail's routes between CSX and NS, and instead configure the entire Northeast region as a single shared area, with no allocation of existing Conrail lines to either CSX or NS individually.[6]

Some of those believing themselves disadvantaged by the creation of Shared Assets Areas that do not include them point to competitors who are allegedly vaulted over them competitively; while those so pointed out themselves complain. Niagara Mohawk claims that it will be disadvantaged vis a-vis Detroit Edison and Atlantic City Electric, which are in Shared Assets Areas. NIMO-6 at 18-20. Yet Detroit Edison complains about the adequacy of the service route of one of the two carriers which will now serve one of its plants, and wants service from a third; and Atlantic City Electric, to be dually served by CSX and NS, has joined in sponsoring a major attack on the premises that the Board has consistently previously applied in rail mergers and on

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[5] Comments and Request for Protective Conditions of the Fort Orange Paper Company (FOPC-3); Comments and Responsive Application for Conditions of Resources Warehousing & Consolidation Services, Inc. (RWCS-3); Institute of Group Recycling Industries, Inc. (ISRI-6).

[6] ATA-6; see also CNEG-5; Connecticut Department of Transportation; Senator Jack Reed/Rhode Island Department of Transportation; State of Maine Department of Transportation.

the Board's regulations. DE-2 at 2; ACE-18 at 33-49. Envy on one side is thus complemented by ingratitude on the other.

1. The Failure To Achieve Benefits Received By Others From The Transaction Is Not Competitive Harm Warranting the Imposition of Conditions by the Board

All of the requests to create additional Shared Assets Areas, either formally or by trackage rights, or to reshape the Shared Assets Areas and other shared or joint use arrangements which were voluntarily negotiated and carefully crafted by CSX and NS, should be denied. The Board has made clear in a consistent line of precedent that it will impose conditions to its approval of a merger or similar combination only to remedy competitive harms caused by a merger, and not to address conditions involving a lack of competition that predate, and are not exacerbated by, the transaction. Yet remedying conditions that predate the proposed Transaction is the gravamen of almost all the complaints advanced by these commentors and responsive applicants.

> A condition must address an effect of the transaction. We will not impose conditions "to ameliorate longstanding problems which were not created by the merger," nor will we impose conditions that "are in no way related either directly or indirectly to the involved merger.

UP/SP at 145, citing Burlington Northern, Inc.-- Control & Merger -- St. L., 360 I.C.C. 788, 952 (1980). The Board has rejected numerous proposed conditions on the ground that they were unrelated to the transaction. *UP/SP* at 178; *BN/SF* at 93 ("There must be a nexus between the merger and the alleged harm for which the proposed condition would act as a remedy"); *UP/SP*

at 183 (Magma Copper's "captivity predates the merger and will not be exacerbated by it.")[7] The fact that shippers served by only one railroad before the merger would remain that way after the merger provides no basis for relief. *BN/SF* at 98-100.

These requests blithely disregard the reminder (indeed, admonition) of the Board in this case in Decision No. 40 (decided October 1, 1997), that responsive and/or inconsistent applicants must address the "specific criteria" set forth in Union Pacific -Control - Missouri Pacific: Western Pacific, 366 I.C.C. 462, 562-63 (1982),[8] and establish through substantial evidence that approval of the primary application "without imposition of the conditions [requested] will harm their ability to provide essential services and/or competition." See Lamoille Valley R.R. Co. v. ICC, 711 F.2d 295 (D.C. Cir. 1982).

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[7] See also *BN/SF* at 98 ("The complaints voiced by [Montana Wheat & Barley Committee] have nothing to do with the merger. Montana shippers' captivity to BN will not be exacerbated by the merger.").

[8] The Board emphasized that:

> [t]here, the Interstate Commerce Commission (ICC) stated that it would not impose conditions on a railroad consolidation unless it found [1] that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market), [2] that the conditions to be imposed will ameliorate or eliminate the harmful effects, [3] that the conditions will be operationally feasible, and [4] that the conditions will produce public benefits (through reduction or elimination of possible harm) outweighing any reduction to the public benefits produced by the merger. Additionally, the criteria for imposing conditions to remedy a claim of harm to essential services appear at 49 CFR 1180.1(d).

Decision No. 40 at 2.

Moreover, if railroads were required to maintain competitive balance vis-a-vis shippers' transportation options so that improved service to some shippers would have to be equalized throughout the systems -- a second underlying premise of this group of submissions -- rail mergers and consolidations would become prohibitively complex and expensive. They would rarely, if ever, occur. If they did, they would have to strenuously avoid giving any shippers new competitive options or, indeed, any benefit whatsoever, lest the same options or benefits be required to be given to all.

The Board has squarely and consistently rejected requests, identical to those made here, to misuse its conditioning power to preserve the competitive balance among the industry served by railroad carriers. That many shippers may be gaining a transportation option not given to others is a necessary result whenever carriers take the initiative in proposing rail consolidations that permit railroads to create superior networks, or to provide better service, or to operate more efficiently -- objectives which the Board is affirmatively committed to promote. See *UP/SP* at 183, 190. In *UP/SP* for example, the Board emphasized that it would "not impose a condition just because one group of shippers obtains pro-competitive merger benefits that other shippers do not enjoy." *UP/SP* at 130. "[W]e do not have a mandate to equalize the competitive situation among the industries served by rail carriers." *UP/SP* at 190. That "increased rail options for some shippers but not for all may work to the disadvantage of those for whom increased options is not provided," is not to be "rectified under the conditioning power, which

was not used by the ICC and will not be used by [the Board] to equalize rates and service among shippers." Id. at 183.[9]

These requests complaining about the Shared Assets Areas reflect a proposition to the effect that because an industry in New Jersey may be better off than its competitor in Connecticu as a result of a Transaction, the Board should equalize conditions; thus imposing standards in the railroad industry unthinkable in other industries. These requests are totally inconsistent with Board precedent as discussed above.

The fundamental point is this: No company in any industry would take the initiative to improve competition or service if a government agency were then to require it to underwrite the cost of extending the competitive or other benefits thereby conferred to any customer not receiving their equivalent.

Finally, we note that if the Board were to require extension of, or additions to, the Shared Assets Areas as proposed by several of the parties discussed below, the economics of the Conrail acquisition and Transaction Agreement would be dramatically and drastically changed -- possibly to an extent warranting reconsideration by the Applicants of the pro-competitive structure contemplated by the Transaction Agreement, a structure which could well be rendered commercially impracticable and/or operationally infeasible by such conditions.

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[9] The Board's predecessor consistently rejected such requests in other cases. In *BN/SF*, for example, the ICC declined to grant conditions to benefit Montana's mining, lumber, and agriculture industries, which were totally dependent on rail transport and served only by one railroad. A group of Montana shippers in that case requested identical treatment to shippers in Nebraska, were rail-to-rail competition existed. *BN/SF* at 38-39. The ICC rejected these proposed conditions, reasoning that "Montana shippers' captivity to [one railroad] will not be exacerbated by the merger." *BN/SF* at 98; see also *BN/SF* at 100 ("American Maize . . . will experience no merger-related reduction in competitive options. The present competitive situation . . . will not be worsened by the merger."); *UP/MKT*, 4 I.C.C.2d at 469.

The facts associated with each of these comments and responsive applications are discussed in the sections that follow, generally organized on an area-by-area basis. As discussed below, and contrary to the assertions of the protestants, there is neither precedent nor rationale to reallocate the Conrail lines and reconfigure routes, lines, and arrangements voluntarily worked out. Moreover, the CSX/NS acquisition of Conrail -- and indeed the voluntary Shared Assets Areas themselves -- are likely to improve the competitive positions of most, if not all, of these complainants by affording new rail transportation options, and providing better, more reliable, and more competitive transportation services. To be sure, the provision of new competitive options need not be made for a transaction to be in the public interest. For a transaction to be approved, it need only be "consistent with the public interest," *UP/SP* at 98 (quoting Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981)), which means "not inconsistent with the public interest." In re Rio Grande Industries, Inc., 1988 WL24782 (I.C.C.) at 93. Service by a single railroad before a transaction can be followed by service by a single railroad after the transaction. Consistency with the public interest does not mean some abstract "perfection" that the parties never agreed to. The Transaction will provide much benefit for many of those who complain the loudest about their exclusion from Shared Assets Areas. Many, in fact, will be greatly benefitted by the efficiencies of the transactions and by the new single line service opportunities. Applicants need not provide more.

These concepts will be developed further, in support of CSX's and NS' thesis -- well above the standard required under the governing statute and precedents -- that not only is this

transaction "consistent with the public interest" but the most pro-competitive rail combination in memory.

2. The Parties Seeking New or Expanded Shared Assets Areas Are Not Sustaining Diminution of Rail Alternatives; Indeed Many Will Obtain Improved Service and Competition

a. New York City and "East of the Hudson"

New York State, New York City and the New York City Economic Development Corporation complain that while the part of the Greater New York area west of the Hudson will have direct rail access competition between CSX and NS, the area east of the Hudson will continue with access to only one Class I carrier (CSX).[10] They say that this "status quo" condition should be remedied by the Board. NYS-10 at 4. The State of New York asks the Board to impose trackage rights over portions of the Conrail rail line east of the Hudson that will enable a third party operator of the State's choosing to provide competitive alternative service to and from shippers and receivers in New York City and Long Island. NYS-11/NYC-10 at 5. Trackage rights are sought for a Class I carrier for the line east of the Hudson from Albany to New York City, as far as the South Bronx site of the Oak Point Yard. Id. at 5-6.[11]

These submissions fail to establish, however, that there is any cognizable injury that results from the Transaction. There was one Class I carrier before the Transaction in the region

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[10] See also Comments of the Business Council of New York State, Inc. (unnumbered) at 2; Coalition of Northeast Governors (CNEG-5). The (unnumbered) filing by the Connecticut Department of Transportation supports New York's request.

[11] The New York State filing says that Metro North, the owner of the line in question from Mott Haven Junction to Poughkeepsie, is willing, for its part, to grant such rights. NYS-11/NYC-10 at 5-6.

East of the Hudson, and there will be one Class I carrier after the Transaction. Moreover, in addition to the physical and operational problems associated with their proposal (and associated with variations of it by other parties noted below), these parties fail to acknowledge that the Transaction will enhance the competitive posture of shippers and receivers east of the Hudson in several respects without any of the conditions sought.

i. Shippers East of the Hudson Will Derive Direct Benefits from CSX/NS Competition to the West

Shippers east of the Hudson will, as a result of the Transaction, receive extended single-line service throughout the expanded CSX rail system. Moreover, it is undisputed that shippers east of the Hudson can access NS and the lines to the west of the Hudson in the North Jersey Shared Assets Area through intermodal and drayage services. The State of New York acknowledges that such options will exist. NYS-10, Argument at 13.[12] As the Rebuttal Verified Statement of Dr. Joseph Kalt points out (Kalt RVS at 17), CSX's ability to set rates for transportation east of the Hudson will accordingly be constrained by competition from NS and the North Jersey Shared Assets Area. In this connection, it is relevant to note that shippers providing support for the New York State submission are themselves in a position to use drayage. Most supporting parties are not shippers or receivers of bulk materials, and thus are precisely those who have the greatest ability to use trucks to reach rail lines. See, e.g., NYS-10, D'Arrigo VS at 2-3 (Chairman of the Traffic Committee of the Hunts Point Market

[12] The State of New York tries to downplay the efficacy of this option by contending that any suggestion by the Applicants of the use of intermodal access here is inconsistent with the Applicants' position that the proposed transaction, through extended rail hauls, will "reduce" the need for motor carriage. NYS-10 at 13. That later proposition is, of course, entirely correct, but is hardly inconsistent with the economic impact of drayage options for shippers east of the Hudson upon their all-rail rates and service.

Board whose 67 fresh produce wholesalers and jobbers compete with wholesale markets in New Jersey and Philadelphia);[13] see also NYS-10, Firestone VS (distributor of plywood and plywood products). In response to CSX's Interrogatories seeking information from New York State as to "industries" or "important shipments" for the requested trackage rights, New York State specifically identified, out of five categories named, "inbound fruits, vegetables, and other produce shipments," "inbound plywood products," as well as "as inbound wine shipments" from California and Washington State. NYS-15 at 8-9. These are categories of products clearly eligible for drayage to and from the North Jersey Shared Assets Area to points east of the Hudson, so that direct competitive constraints will be in play; the drayage may not take place because its availability will operate as a constraint on CSX's pricing and service behavior. Indeed, as Dr. Kalt's Rebuttal Verified Statement explains, the vast majority of traffic east of the Hudson region is made up of goods that can be, or are already trucked from the railhead to the distribution center or the ultimate destination. Kalt RVS at 16-17.

As Dr. Kalt's Rebuttal Verified Statement points out, CSX will have a clear incentive to work with shippers east of the Hudson to develop a price and service structure to allow those shippers to compete with firms having direct access to the North Jersey Shared Assets Area (and which therefore can chose NS as a rail option). Kalt RVS at 17-18. Conrail was never confronted with this problem (and challenge), and accordingly was free of price constraints from other rail carriers, on the East side of the Hudson. If a shipper East of the Hudson looked to Northern New Jersey to find Class I rail competition to Conrail, the only Class I carrier there

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[13] The zone of competition here can be taken to be a surrogate for the area of easy truck haulage.

was Conrail. By satisfying the service and price needs of shippers East of the Hudson through its direct service, CSX can dissuade them from drayage to or from intermodal service in the North Jersey Shared Assets Area, where its rail competitor can provide service; and, whether or not drayage is possible, it can maintain the strength of a customer for which it is the sole on-site rail option against dually-served competitor shippers in North Jersey. If there is a market for expanded services, CSX will have every incentive to provide them.

The Board's predecessor has specifically recognized the dynamics of the marketplace in such a setting. In the *BN/SF* proceeding, for example, Bunge Corporation, a soybean processor, complained that two of its competitors would obtain new access to SP under terms of the SP settlement agreement, while one of Bunge's facilities would continue to depend entirely on SF for movement of outbound freight. While recognizing that "the SP settlement agreement, by providing increased rail options for Bunge's competitors but not for Bunge, may work to Bunge's disadvantage," the ICC rejected Bunge's proposed condition because the harm complained of was "not the kind of harm that we should rectify under our conditioning power." *BN/SF* at 99. Significantly, the ICC went on to emphasize that, "If the competitive relationship between Bunge and its competitors is as intense as Bunge claims, rates and services probably will not change much. In cases where there is strong geographic competition for particular movements, it is in the interest of a railroad, even if it is the sole carrier serving one of the shippers, to publish rates that permit its shipper to compete." Id.

In the *UP/SP* proceeding as well, the Board, in addressing a similar situation, emphasized:

> to the extent that some shippers benefit by receiving improved competitive options, the more intensive geographic competition that results should keep rates for other shippers in check.

UP/SP at 110.

Finally, the submissions seeking trackage rights for an additional carrier east of the Hudson concede the prospect of low traffic density. At present, Conrail only provides freight service through a single train five days a week. Yet, adequate density is required to provide effective service to and from Albany on the line. Their consultant's study finds present justification through the creation of new traffic for an additional train each way on the line East of and parallel to the Hudson River five days a week (260 days a year). However, in response to CSX's First Set of Interrogatories (CSX-72) seeking an estimate as to the number of loaded cars for these five-days-a-week trains for the proposed route, New York State and NYCEDC could only identify the volume of traffic at "approximately 50 loads, with a 100 percent empty return" (NYC-13 at 5; NYS-15 at 7), hardly a sufficient trainload. Orrison RVS at 124 n.12. The prospects for acceptable densities for two carriers hardly look good even if that were the test to be applied to the grant of trackage rights in the present situation, which it is not. See Orrison RVS at 123-24.

In this regard, while proposing a condition which would allow an additional carrier in the region, New York State and New York City fail to identify any rail carrier committed to assume such a role. An interrogatory elicited that discussions had been had only with CP/D&H and the New York & Atlantic. There were only "oral" statements by the two that they were

"interested." "No formal agreements were proposed or reached." NYS-15 at 4. Presumably the "interest" of CP/D&H was satisfied by the commercial access furnished by CSX's settlement with it, discussed below. The New York & Atlantic serves only Long Island and coupling it to the trackage rights sought hardly expands many horizons for the East of Hudson shippers. If the New York State proposal had realistic economics presumably a qualified carrier would have stepped forward and participated in the Responsive Application.

ii. Improved Commercial Access Will Be Provided Through the Settlements with CN, CP/D&H, and P&W

Improved rail freight access to the area east of the Hudson will also result from the recently negotiated agreements with Canadian National Railway ("CN") (Included in Vol. 3) and the Canadian Pacific Railway and the Delaware & Hudson ("CP/D&H") (Included in Vol. 3). CN and CP/D&H will now have increased commercial access to New York City. Shippers and receivers in New York City and on Long Island will be able to solicit bids from these carriers for general merchandise traffic to and from Canadian points served by CP/D&H and CN. Jenkins RVS at 15-16. CSX will handle the traffic for the other roads, to and from its connections with these carriers -- Albany in the case of CP/D&H and Buffalo or Montreal in the case of CN. Id. A similar agreement is in place with the Providence & Worcester Railroad ("P&W") allowing P&W to use CSX's services between New Haven and an interchange with New York & Atlantic Railway at New York City. Id. A mechanism has been established so that these carriers can quote a price that involves CSX in their routing without CSX's prior consent. Id.

As set forth in the Rebuttal Verified Statement of Christopher Jenkins, these agreements permit these other railroads to offer to provide transportation services to shippers in New York

City and Long Island for general merchandise truckload traffic, and are specifically designed to attract truck-competitive freight business off the roads and on to rail. Jenkins RVS at 16. The agreements permit shippers in New York City or Long Island, in many circumstances, to solicit independent competitive bids from at least two railroads. Id. To ensure coordinated dispatching and other operational efficiencies, CSX will move the cars for the carrier selected. Id.[14]

iii. Requests for New Trackage Rights East of the Hudson Present Numerous Operational Difficulties

Finally, the proponents of trackage rights East of the Hudson fail to acknowledge, let alone address, a variety of serious physical and operational implementing problems. As set forth in the Rebuttal Verified Statement of John W. Orrison, for example, the lines over which these proponents would impose trackage rights are heavily traveled passenger lines. Metro North operates as many as 332 passenger trains a day over some of these segments. Orrison RVS at 123. Moreover, the lack of an additional yard or lack of additional space within yards to accommodate a second Class I carrier coming to New York City is not addressed. Harlem Yard and Oak Point Yard do not have the capacity to accommodate additional carriers. Id.

[14] With respect to intermodal service to the east side of the Hudson, the final portion of the Oak Point Link has not yet been fully completed, and there is no intermodal rail terminal currently available at the Harlem Yard. Therefore the agreements with CN and CP/D&H do not at this time contain similar commercial access provision to that location. CSX will be willing to discuss modifications of its arrangements with other railroads to permit similar commercial access to any newly constructed intermodal terminal at Harlem Yard, for the marketing of new joint line intermodal service to that location. Jenkins RVS at 16.

In this connection, a submission styled "Intervention Petition" by Congressman Nadler and a number of his colleagues[15] proposes, on behalf of Representatives from Connecticut, a new freight route directly along the Northeast Corridor rail line, north and east from Newark, New Jersey, using existing passenger railroad tunnels through midtown Manhattan.

The line in question passes through the Bergen (Hudson) River Tunnel leading into Manhattan from the west and through Penn Station in Manhattan. Height clearances are 14'8", with a profile only 3' wide at the top. Carey RVS at 5. As the proponents seem to recognize, such clearance restricts freight train operations to specialized equipment. Indeed, neither Roadrailers as operated by Conrail's Triple-Crown affiliate nor Amtrak's own Roadrailer equipment can clear this route. Carey RVS at 5. Standard boxcars used in conventional carload movements today require at least 15'4" clearance (average height of 15'1" with 3" clearance). Orrison RVS at 125. Standard intermodal equipment requires clearances ranging up to 20'6" for high cube double stack containers. Id. Indeed, most intermodal trains, could not clear the tunnel and thus could not operate over this route. Length limitations are also observed at and through Penn Station. The current limitation imposes a train length limitation of 18 cars of 85 feet each, so as not to impede other movements of commuter and intercity passenger trains through the interlockings at the ends of the Penn Station platforms. Carey RVS at 6. Freight movements in trains of that diminutive length would be inefficient. Id.

No assessment of the time and expense for clearing the tunnels involved for more advanced forms of intermodal service is provided, though the prospect of closing the tunnels,

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[15] Intervention Petition of Nadler, et al. (unnumbered). See also Tri-State Transportation Campaign (unnumbered).

used for substantial passenger movements, for such work is staggering. Id. at 126. No study is provided as to what sort of commodities, if any, would be handled in non-intermodal service on this routing. The submission offers no study or analysis to support the commercial practicability of such a routing. As set forth in the Carey Rebuttal Verified Statement (at 6), Conrail has never operated freight trains from Newark to New Haven.

Operational and maintenance problems in using Penn Station and other tunnels in this manner are not addressed. As set forth in the Rebuttal Verified Statement of R.Paul Carey, even a limited operation through the tunnels entails the potential of enormous costs. Carey RVS at 4. Even if the tunnels could be cleared for freight trains, the proposal fails to acknowledge many substantial problems given the high density passenger traffic over this route. Scheduling additional freight traffic would not only be difficult, but also would increase substantially the risk of delay, disrupting passenger service, and even creating risk of injury in the event of a freight train derailment or breakdown. Orrison RVS at 126. Operating these trains at night would not resolve the problem. Evening is the only time available for Amtrak to perform its ongoing and complex maintenance operations on the rights of way through Penn Station. Carey RVS at 4. Moreover, even if a freight train did reach Penn Station, there is no provision for switching the train for service further east. Orrison RVS at 126.

Moreover, the submission overlooks an early 1900's New York City ordinance prohibiting the use of any locomotive utilizing a combustion engine in underground tunnels. Carey RVS at 5. Thus, absent an override of that ordinance by the Board, for which no environmental or other justification has been supplied, only electric locomotives would be permitted. Neither Conrail nor either of the other Applicants has any electric locomotives.

Carey RVS at 4-5; Orrison RVS at 126. Moreover, portions of this segment of the Northeast Corridor use a third rail, to power the trains. As the third rail is in addition to the normal rail/track configuration, operations in third rail territory require special equipment. Orrison RVS at 126. Given the above, it is hardly surprising that Conrail has never negotiated any operating protocols, including frequency of movement, time of day restrictions and the like for freight moves through the tunnels. Carey RVS at 6.

iv. The Conscription of the Applicants to Provide a Cross-Harbor Car Float Service, Even If Possible, Is Not Justified

In addition to the tunnel/Penn Station proposal just discussed, a number of commentors address the current geographic limitations on rail service to New York City and other points in New York State East of the Hudson. Rail patrons in that area who wish to access points to the North and West from the Conrail line on the East side of the Hudson (such as to upstate New York, Canada, Detroit, Chicago, St. Louis and points West), will be well-served by the competitive pressures from the North Jersey Shared Assets Area discussed above. But, some shippers East of the Hudson may have a concern as to circuity. The facts of the matter are that there is no railroad bridge across the Hudson River south of Albany; that there are no rail tunnels (apart from the PATH tunnels, essentially subway operations) under the Hudson River south of Albany except the Hudson River Tunnel to Penn Station, use of which for the reasons set forth above is not feasible; and that one possible alternative, car float service across New York Bay, currently operated by the New York Cross-Harbor Railroad (NYCH), has been subjected to criticism as inadequate in its present form. Congressman Nadler, et al. (unnumbered) at 7.

Various alternative proposals to address this geographical situation have been made over the years, the most recent being a well-publicized proposal to construct a rail tunnel between Brooklyn and Staten Island. See Andrew C. Revkins, "Giuliani Proposes Rail Tunnel To Carry Freight Past Hudson," *N.Y. Times*, Jan. 15, 1997 at A1 (Included in Vol. 3); "A Tale of Two Ports," *Providence J.-Bull. (RI)*, Feb. 7, 1991 at 8b (Included in Vol. 3). Efforts are also being made to rehabilitate the Staten Island Railroad to provide rail connections from Staten Island to New Jersey. See Robert E. Misseck, "Freeholders Turn Attention to Transportation Decision," *Star-Ledger (Newark, N.J.), June 26, 1997 at 31* (Inlcuded in Vol.3); Maryann Spoto, "Union Hears From N.Y. Rail Line." *Star-Ledger (Newark, N.J.)*, July 26, 1996 at 30 (Included in Vol. 3); James C. McKinle, Jr., "Restoring the Rails on Staten Island," *N.Y. Times*, Nov. 11, 1994 at 32 (Vol. 3). But that is only a piece of a solution, since Staten Island has no rail connections to the other four boroughs of New York City.

Certain of these service issues, caused by geography, have been injected into the present proceeding. Thus, the Tri-State Transportation Campaign (TSTC) seeks through the Board's conditioning power to require NS to purchase NYCH's operation, and to make improvements including repair of the disused 65th Street float bridges in Brooklyn and of the operational float bridges at Greenville Yard, Bayonne, New Jersey. Comments of TSTC (unnumbered) at 3. The Petition of Congressman Nadler and a number of his colleagues similarly asks for an imposed takeover or ouster of the NYCHR and estimates that the total cost of the needed capital improvements at $83 million. Petition at 12. That submission asserts that CSX and NS, while being required to incur all or part of such costs under their proposal, will "assuredly increase

their combined market share, substantially benefitting the region and the national transportation system." Id.

The present operator of Cross-Harbor rail service is NYCH. It operates from New York City points on Long Island to Greenville Yard. It holds the necessary authority from the Board to provide that service. It has commenced an antitrust suit against Conrail claiming that the declines in its revenues and profits over the years have been due to unlawful actions on Conrail's part. NYCH-3 at 4-5. Since CSX and NS are the indirect holders, through a voting trust, of 100% of Conrail's stock and propose to exercise control over Conrail's continuing operations upon approval of the Transaction, they have an interest on the defense side of that lawsuit. CSX and NS do not propose to be a participant in any effort to deprive NYCH of its business or franchises. They have made it plain that NYCH has an established connection with the North Jersey Shared Assets Area at Greenville Yard, and the continuing Conrail operating the North Jersey Shared Assets Area; and whichever one of CSX and NS is called for in the routing, will receive cars from NYCH, and deliver cars to NYCH, at the Greenville point of interchange.

The submissions do not provide any lawful scenario for the succession to NYCH of any other rail carrier or carriers. Moreover, they offer no rationale or justification for the conscription of CSX and NS to succeed NYCH, whether in accordance with or against the latter's will, or to compete with it, to provide cross-harbor car float services.

This is an issue independent of the efforts of those parties seeking to overcome any limitations of geography that involve potential rail shippers in New York City East of the Hudson and in Long Island and portions of Eastern New York State and Connecticut who do not wish to use routes over Albany and who wish to have an alternative to use of the North Jersey

Shared Assets Area. If a solution to the provision of such service, whether by car floats or through the construction of bridges or tunnels, can be effected through governmental action or private entrepreneurship, or a combination of the two, each of CSX and NS would be willing to explore participation in any proposal that does not violate the rights of others and which makes economic sense. In this regard, we note that the New York City Economic Development Corporation has published a Notice (Included in Vol. 3) looking toward the letting of a contract for a study, anticipated to start in Spring 1998 and to take 24 months to complete, of "cross harbor freight movement," that is, the examination of freight movement, and a preferred alternative that can improve freight movement, into, around and out of the New York City region. Federal and local funding has been, according to the Notice, made available for this study. CSX and NS certainly are willing to participate in this or any other governmental studies of the problem with a view toward sharing their expertise and assisting the public authorities in reaching a solution that will be operationally feasible. The requests for conditions and the comments that have been made, however, do not afford the basis for any appropriate action by the Board.

b. Buffalo/Erie-Niagara

The Erie-Niagara Rail Steering Committee (ENRS), a Buffalo area group of local public agencies and shippers, requests that the Buffalo area[16] be designated as a Shared Assets Area, or, alternatively, that the STB either grant reciprocal terminal trackage rights between NS and

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[16] Consisting of the New York counties of Niagara and Erie and the Northern half of Chautauqua county. ENRS-6 at 6.

CSX in this area, or establish reciprocal switching to all current and future customers at a rate of $156.00 per car.[17] ENRS-6 at 6, 7-8.

ENRS claims that the Buffalo area will sustain a competitive disadvantage because existing and potential business in or to Buffalo will shift to the new Shared Assets Areas in Detroit, North Jersey, and South Jersey/Philadelphia. Id. at 19-23. ENRS contends that the presence of two Class I carriers in the shared assets areas will result in lower freight rates there, and that Buffalo shippers and receivers should be similarly advantaged. Id.

The Detroit, North Jersey and South Jersey/Philadelphia regions were designated as Shared Assets Areas, however, as a result of arms-lengths negotiations between CSX and NS, and reflected consideration of a number of complex factors. Although the introduction of two railroads into those markets where only one has previously existed is expected to produce improvements in terms of types, volumes and prices of services offered, the ENRS presumptions are entirely incorrect to the extent they assume that rail service in other markets should be organized in the same way to yield comparable benefits.

The essential points are that (i) new rail competition in the Shared Assets Areas is unambiguously good (ii) the Applicants are not required to provide similar benefits elsewhere; (iii) not receiving identical benefits to those provided to others is not the type of "harm" requiring or justifying a remedy from the Board; (iv) nonetheless, CSX or NS will have an incentive, with respect to those shippers that either serves solely in non-Shared Assets Areas, to assure that those customers remain competitive; and (v) competition in Shared Assets Areas

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[17] See also NYS-10 at 5. The ENRS claims regarding switching rates are addressed in Section XI.

will force the two carriers to become more competitive and efficient generally, benefiting all of their customers.

The Shared Assets Areas, together with the Monongahela, were designed (with the exception of Detroit) to bring a second Class I carrier into an area currently served by only one Class I carrier, Conrail. Historically, Buffalo has been served from United States points by three carriers, Conrail, NS and CP/D&H. CSX until recently provided some service from the north, through the Ontario Peninsula, but none through the United States. Had the present Transaction simply replaced Conrail with CSX, under the Board's precedents the Buffalo commentors would have had no cause for complaint. The Transaction does much more than that for the Buffalo area; it introduces additional service by NS, in new directions, by allocating the Conrail Southern Tier line and Buffalo Line for operation by it; these routes provide new NS access to the Buffalo area.

The ENRS submission fails to acknowledge that the effect of the Transaction on the Buffalo/Niagara region will be very positive, greatly reducing any "dominance" that Conrail historically may have enjoyed in that area, and providing increased competitive rail options for shippers. Jenkins RVS at 16. NS' expanded presence through the Southern Tier and Buffalo South routes will provide increased competition for automobiles and parts, Buffalo's leading origination commodities. Id. at 17. The ENRS filing stresses the claim that CSX will be involved in more traffic out of and into Buffalo than Conrail itself ever was (ENRS-6 at 24, Fauth VS at 31, Table 6), but even if that were so, the argument overlooks the fact that NS' presence in Buffalo is being substantially increased. Jenkins RVS at 17. NS will have the opportunity for service over the Southern Tier -- a line used relatively lightly by Conrail -- to

offer additional service to the East and South and to compete with CSX. Id. Historically, NS has served Buffalo only from the West. Since Conrail had two alternative lines from New York City to Buffalo and preferred the line that will be used by CSX, use of the 1995 waybill data, as the ENRS's traffic witness did, provides a misleading analysis. Id. New connections and operating practices designed to reduce congestion and costs will be introduced by the Transaction, (See CSX/NS-20, Vol. 3A, Orrison VS at 52-53) as acknowledged by the ENRS consultant: "NS plans to reroute traffic from this area . . . should eliminate the potential bottleneck at CP Draw." ENRS-6, Fauth VS at 56.

NS' presence at Ashtabula Dock, combined with the presence of water shipment options, will also increase the opportunities for competitively priced movements of coal, the region's largest incoming rail commodity. Niagara Mohawk Power Corporation (NIMO), the area's largest rail user, will receive significant benefits from delivery to Lake Erie of rail originated for Monongahela and other Pittsburgh seam coal, NIMO's coal of choice, coming into Ashtabula and other Docks and moving via water to the Huntley and Dunkirk plants. Sansom RVS at 40, 44. While the Niagara Mohawk filing attempts to minimize the importance of water shipment on Lake Erie to Niagara Mohawk, a Niagara Mohawk witness, in the filing made by the Bessemer & Lake Erie Railroad ("B&LE") stresses the critical importance of this rail/lake route as a competitive option for NIMO. BLE-8, Bonnie VS at 69. And the statistics show substantial use of coal delivered by vessel to Niagara Mohawk's Dunkirk Plant as recently as 1996, and historically to its Huntley Plant. Sansom RVS at 41, 45.

In addition, the position of shippers in the Niagara/Buffalo area will be improved by new agreements negotiated by CSX with both CN and CP. Jenkins RVS at 16-17. They provide the

area with increased commercial access between the United States and Canadian markets for new truck-competitive traffic at mutually agreeable charges. Jenkins RVS at 16.

Specifically, CSX's settlement agreement with CP provides that, through special traffic interchange and joint line marketing arrangements, rail customers located in the Buffalo/Niagara area will receive effective access to and from CP/D&H served markets. The settlement agreement provides effective commercial access for traffic which will be diverted from motor carriers and for certain other categories of rail traffic as well. Id. at 17.

ENRS compares the Buffalo area with the other Shared Assets Areas, using various self-selected tests, and contends that this area is as worthy of Shared Assets Area status as the others. ENRS-6 at 42-43. Statistical and demographic analysis is, of course, not the test. The perceived need by the two competitors to have such an area, as opposed to competing in another fashion, is the touchstone in a regime where rail combinations are effected through private ordering subject to regulatory review, rather than by governmental planning. We note that some parties, on the other hand, contend that the creation of Shared Assets Areas poses grave risks of organizational and operational failure, and should not be attempted at all; this, at last roll-call, was the position of the Port of New York and New Jersey. NYNJ-14 at 5. While this is not so, certainly it would be wrong to require the Applicants to create and maintain a Shared Assets Area where they believe it is not necessary for their operations and where they have not made any plans to operate one. Moreover, as to Buffalo, they have negotiated a solution, satisfactory to themselves and which more than meets the tests taught by the Board's precedents, not simply to maintain the existing level of competition in the Buffalo area but to increase it by not only substituting CSX service for Conrail, but by greatly increasing the presence of NS in the area.

A group of shippers (NIMO, NYSEG, NYNEX, General Mills, Olin) who have joined the ERNS Committee complain that their service may decline, their rates may go up, or competitors in the Shared Assets Areas may grow at their expense. See, e.g., ENRS-6, Bonnie VS at 8-10; Patterson VS at 8-9; Derocher VS at 2; Edwards VS at 9. Each of these shippers has different requirements, however, that should be individually addressed in the market place -- which the Applicants are prepared to do. The Primary Application establishes new competition -- both rail-to-rail and rail-to-truck -- in areas where it has not existed for a generation.

The Transaction brings additional competition to the Buffalo area. It does not, to be sure, bring it about that both CSX and NS will be able to serve each and every shipper in the area. That sort of inability is, of course, a common fact of life in the organization of rail transportation in the United States. But many shippers in the Buffalo area are open to reciprocal switching. ENRS-6, Fauth VS at 27. The ENRS expert witness, Fauth, found the reciprocal switching charges in the area to be "very high" and enumerated charges ranging from $390 to $450 per car imposed by Conrail and, apparently in response, by NS. Id. at 27-29. Presumably the effect of these switching charges was reflected in the studies and analyses made by the witness Fauth on behalf of ENRS. The NITL Settlement, however, provides that reciprocal switching between CSX and NS in the Buffalo area and elsewhere at former Conrail stations will be $250 a car. The effect of this reduction on competition, not accounted for in ENRS's submission, cannot fail to be substantial.

To the extent there are shippers in the area that can only be served by one or the other of CSX and NS, the carrier having that access will certainly be strongly motivated to see that

that shipper survives and prospers and that it will not be driven to the wall by a competitor in one of the Shared Assets Areas. See Kalt RVS at 17. To the extent that the Buffalo area filings establish that Buffalo area shippers and other Buffalo users of rail services are in competition with those in Detroit -- at the other end of Lake Erie -- or in other Shared Assets Areas, they are demonstrating that the railroads that serve particular shippers in the Buffalo area will be motivated to give them services and rates that will permit them to prosper.[18] As in the case of the East of Hudson situation, the alternative for the carrier is to lose a rail customer and thus to aggrandize a competing rail customer in a competitive area where direct head-to-head competition between the two rail carriers exists.

This proceeding should not be used as a vehicle to address all previously existing concerns and complaints that may have arisen with respect to Conrail's policies and practices, or to the changing demands on rail transportation in a global economy. Nor is this proceeding the place to protect against doomsday scenarios as projected by several ENRS shippers of what "might happen" under alternative speculative assumptions. See, e.g., ENRS-6, Patterson VS at 9; Whitbeck VS at 3; Rudnick VS at 6-7; and Reifter VS at 1.

c. Monongahela

In the Monongahela area, the Conrail lines formerly a part of the Monongahela Railroad (including the Waynesburg Southern) will be operated by NS, but CSX will have access to all current and future facilities located on or accessed from it. CSX will bear all costs directly

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[18] As the Board has pointed out in past cases, geographic competition acts as an important constraint on rail rates. In *UP/SP*, the Board noticed the source and destination competition for lumber shippers in Oregon and held that "[t]hese forms of geographic competition were highly effective pre-merger and, with the BNSF TRA, will improve post-merger." *UP/SP* at 132. The same will be the case here.

associated with operation of its trains and crews in the area. All other operating and maintenance expenses of the area will be shared on a usage basis. This will provide for direct two carrier access to coal shippers who today are only served by Conrail.

The Conrail dock at Ashtabula will be similarly owned by NS, but CSX will receive the right to use up to 42% of the capacity of the dock. This will provide additional competition for coal from the Monongahela and other areas destined to transfer to lake vessels.

i. B&LE.--Bessemer and Lake Erie Railway (B&LE) claims that the coal producers in the Monongahela area should be offered yet a third carrier. Proposing itself as that carrier, B&LE would provide coal transportation in a rail/lake vessel movement over its P&C Dock at Conneaut, Ohio, on Lake Erie, as an alternative route in addition to the CSX and NS routings over Ashtabula, OH, through the Ashtabula Dock, where arrangements similar to those of the Monongahela are proposed by the Transaction Agreement. BLE-8 at 5; see CSX/NS-25, Vol. 8C, at 397ff. B&LE seeks overhead trackage rights over either (i) the Conrail line, to be assigned to NS, between Pittsburgh (Duquesne), PA and Shire Oaks Yard in Shire Oaks, PA, or (ii) CSX's line between Bessemer (Pittsburgh), PA and Newell Interchange Yard near Brownsville, PA. BLE-7 at 8. According to BLE, these trackage rights would "function in conjunction with BLE haulage rights via NS over the MGA lines for the movement of coal between MGA mines and Shire Oaks or Brownsville . . . on the same terms and conditions as any haulage agreement between CSXT and NSR relating to coal traffic on the MGA lines." Id. at 8-9.[19]

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[19] BLE's requests are confusing in that both the trackage and haulage rights sought appear tied to NS and CSX "entering into a haulage agreement providing for NS's handling of coal traffic on the MGA lines in CSX's account." Id. at 9. BLE fails to identify the rationale for this

At the present time, CSXT cannot directly access the Conrail Ashtabula Dock and cannot carry coal out of the Monongahela.[20] B&LE's complaints are (1) that B&LE will not handle any of the coal coming out of the Monongahela, since NS and CSX will both take it to Ashtabula (or points west) for their long haul; and (2) B&LE will be cut out of the route on movements of B&O coal to Lake Erie, since CSX will take its long haul to Ashtabula.

The assertion that northern Appalachian coal will be "routed exclusively to an already overburdened Ashtabula or other lake ports west" (BLE-8 at 10) has no factual support. Moreover, the fact that B&LE may be cut out of the routing (even if true) does not mean that there will be a diminution of competition. Any routing change made by CSX would be to benefit the efficiency of the movement by using rail options not previously open to CSX. Nor does B&LE claim that it will be unable to render essential services to the public as a result of the Transaction.

The comments of B&LE and the Verified Statements in support thereof provide no basis for the imposition of the conditions sought. The comments disingenuously assert that the Transaction will "diminish the adequacy of transportation services" (BLE-8 at 4); but it is hard to fathom how CSX's and NS' introduction of competition to a principal coal field and joint use of a principal dock on Lake Erie would diminish the adequacy of transportation services to the Monongahela and those using its coal. The comments and supporting statements contain

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precondition.

[20] If CSX, at the present, wishes to go to Lake Erie from the B&O fields in West Virginia and Maryland, it uses the B&LE P&C Dock at Conneaut, to the east of Ashtabula, by an interchange with the Buffalo & Pittsburgh at New Castle, PA, which interchanges with the B&LE at Butler, PA. BLE-8 at 6.

numerous inconsistencies and contradictions as well.[21] And the Rebuttal Verified Statement of John W. Orrison makes plain that the routing proposed by B&LE is relatively inefficient and will cause severe operational problems. Orrison RVS at 18.[22]

There has been absolutely no showing that B&LE is needed as a third carrier to the Monongahela coal fields which heretofore have been served by only one carrier, and now will be served by NS and CSXT. What B&LE actually seeks is redress of wrongs it claims it suffered when Conrail was granted control of the Monongahela Railway by the ICC in 1991.

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[21] Compare Verified Statement of Seiverght (BLE-8 at 4) as to the capacity of the Ashtabula dock with the Verified Statement of Howerter. Howerter VS at 7. The Verified Statement of James Bonnie (an officer of NIMO) states that NS may not have any incentive or ability "given the limited storage and throughput capacity of the Ashtabula facility" to compete with CSX as a coal supplier to Niagara Mohawk on a rail-water movement coming out of the Monongahela. (What the basis for this speculative statement is not stated. No evidentiary support is provided for other speculations as well that lace the comments.) Access by the B&LE to the Monongahela for movements out of the Conneaut Dock is a necessary alternative, Bonnie postulates. Yet pages 11-13 of Howerter's statement (BLR-8 at 25-27) suggest that NS will have the upper hand on the movements out of the Monongahela and at Ashtabula Dock, and that CSX will be in an inferior position.

Disregard of the operative facts surfaces elsewhere in these filings. For example, Bonnie also submitted a Verified Statement supporting the request of Eighty-Four Mining Company (EFM) for a condition which would require NS to grant trackage rights to CSX to access EFM's Mine 84. Bonnie asserts that this is required because EFM is "an important NIMO supplier." NIMO-6, Bonnie VS at 16. Yet, EFM's own data show that as recently as 1996 (the most recent year for which EFM provided data), EFM supplied no coal to NIMO's Dunkirk and Huntley stations. Document EFM-P-027 (Included in Vol. 3).

[22] The movement from BLE to URR to CSXT at Bessemer is not an efficient connection. Orrison RVS at 18. The addition of BLE onto CSX (or NS) lines used for movement of coal to and from MGA mines would also be problematic. The two carriers (CSX and NS) will require close coordination of activities to ensure a smooth and fluid operation in the MGA territory. A third carrier would make the coordination that much more difficult. BLE does not bring any additional physical facilities to offset the added complexity of communications, operations and coordination. Orrison RVS at 18, 21.

B&LE opposed that transaction and sought direct access to the Monongahela mines, but was rebuffed by the ICC. Now, seeing another opportunity to warm itself by fires it did not start, B&LE uses this transaction to press its case again for Monongahela access. If the Ashtabula Dock proves too congested, as B&LE asserts, and the more western Lake Erie ports are viewed as providing too circuitous a route to a particular destination, the operation of the free market will serve to move coal over the B&LE to the Conneaut Dock. Market forces will dictate the capacity and level of service demanded by customers, whether through Ashtabula, P&C Dock or otherwise.[23]

If in fact B&LE is concerned about Dock capacity (versus capturing coal revenues that would otherwise accrue to CSX and NS), the best remedy would be to grant NS and CSX access to B&LE's dock via interchanges at Sherango and Conneaut, instead of forcing coal over an inefficient URR/BLE routing.

ii. *Genesee Transportation Council (GTC-2)*. This group supports the arrangements of the Applicants for the Monongahela but asks the Board to establish a procedure for the fair and impartial enforcement of the terms of those arrangements. GTC-2 at 17-18. CSX and NS believe that they, as substantial corporations, keen competitors, and parties who are greatly interested in providing transportation services out of the Monongahela area, will have every incentive, on NS' part, to operate the Monongahela efficiently and, on CSX's part, to see that NS operates it in a fair and impartial manner. The Applicants believe

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[23] As noted in the Orrison RVS, if lake coal movements continue to grow such that use of the Conneaut dock would make economic sense, the parties can negotiate appropriate arrangements. There is hardly any need for the Board to impose conditions as sought by B&LE. Orrison RVS at 22.

that a continuing layer of governmental supervision is not necessary. CSX and NS have incorporated in their agreement detailed provisions for fair and nondiscriminatory operations of the Monongahela. See CSX/NS-25, Vol. 8C at 723-31. See also Section XIV below.

iii. *Pennsylvania House Transportation Committee (PaHTC-2).* This Committee of the Pennsylvania House of Representatives supports the BL&E's request for access to the Monongahela, discussed in subpart (i) above. PaHTC-2 at 11, 15-16, 27-28.[24] For the reasons stated in subpart (i) above, CSX and NS oppose the responsive application and proposal for conditions of BL&E in that regard. We also note that the Governor and the Commonwealth of Pennsylvania support approval of the Transaction without conditions.

d. Detroit Shared Assets Area

Two commentors -- Detroit Edison, an electric utility with 8 coal-fired generating plants serving southeastern Michigan, and CN -- address the Detroit Shared Assets Area. Both complain that service should be improved to Detroit Edison's Trenton Channel plant ("Trenton Channel"). Both seek the same relief: a grant of trackage rights to CN over approximately 1.5 miles of the current Conrail track in Trenton, Michigan, that serves Trenton Channel. See DE-02 at 2-3; CN-13 at 5. The request should be denied.

To accomplish the requested access, CN has filed a responsive application in Finance Docket No. 33388 (Sub-No. 81) seeking the aforementioned trackage rights, and a Notice of Exemption in Finance Docket No. 33388 (Sub-No. 83) for the construction of certain connecting track that it asserts is necessary in order to use the trackage rights it requests.

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[24] The Southwestern Pennsylvania Regional Planning Commission, while recognizing the important benefits and opportunities the transaction provides for the Monongahela (SPRPC-2 at 9), also supports the conditions sought by BLE. Id. at 7-8.

CN asserts that the trackage rights are necessary to "provide balanced competition" to Trenton Channel; Detroit Edison echoes that the condition is necessary to "provide competitive access" to the plant. CN-13 at 5; DE-02 at 3.[25]

The requested condition should not be granted. Far from suffering competitive harm as a result of the proposed transaction, Trenton Channel, as part of the Detroit Shared Assets Area, will enjoy more transportation options than before the Transaction.

Currently, Trenton Channel enjoys only one option for delivery of coal by rail -- Conrail. See CN-13, Heller VS at 4; DE-05 at 4. Trenton Channel also can take delivery of coal by water.[26] Post-transaction, NS will step into Conrail's shoes with respect to that service. In addition, under the Applicants' proposed transaction Trenton Channel will gain new rail access to its coal dumper by CSX, thus benefitting from access by two rail carriers where currently there is only one.

The gist of Detroit Edison's and CN's argument, in sum, is that CSX will not provide "balanced" or "effective" competition to NS into Trenton Channel. They assert, in other words, that the new, second-carrier access to Trenton Channel by CSX will not be as good as they would like.

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[25] Detroit Edison also briefly expresses very generalized concern, without supporting evidence, about maintaining the free flow of western coal through the Chicago gateway post-transaction. DE-02 at 3-4. In any event, Detroit Edison seeks no specific relief in connection with that issue, other than asking the Board to "carefully evaluate" the concerns of the Illinois Central, Wisconsin Central, and Elgin, Joliet and Eastern. Id. at 4. Applicants respond specifically to the contentions of those parties elsewhere in this Rebuttal. See Section XIII.

[26] See Excerpt from Fieldston 1994 Coal Transportation Manual (Included in Vol. 3); see also, Documents DE-0003-HC and DE-0017-HC (Included in Vol. 3).

That argument, however, misses the crucial point that, under the Applicants' proposed transaction, Trenton Channel will have more options for coal delivery after the Transaction than before it. Trenton Channel will have access to two rail carriers for delivery of coal (NS and CSX) where now it has only one (Conrail). Indeed, Niagara Mohawk Power Corporation, a competitor of Detroit Edison, recognizes and specifically discusses the benefit that Detroit Edison's Trenton Channel plant will reap from new head-to-head competition at origin and destination and the benefit of single-line service from NS and CSX. See NIMO-6, Fauth VS at 37-38. In addition, the Trenton plant can, and does, receive coal by water.

Moreover, as John W. Orrison clearly demonstrates in his Rebuttal Verified Statement, the access by CSX to Trenton Channel proposed by the Applicants will be competitive, and indeed, will be substantially as competitive as the proposed trackage rights that CN and Detroit Edison seek. Orrison RVS at 23-24.

But even accepting, for the sake of argument, Detroit Edison's and CN's claim that the newly-created second-carrier access by CSX will not be as efficient as the Conrail access to which NS will succeed, that simply is not, and never has been, a sufficient basis for imposing trackage rights to permit access to yet a third carrier, where before the Transaction there was only one. Even if Trenton Channel, hypothetically, were solely served by NS as a replacement for Conrail, the requested trackage rights would not be justified, as they would put the plant in a better position after the Transaction than before it. As the Board's predecessor rightly noted, that is not the proper role of its conditioning power. See BN/SF,[27] slip. op. at 56 ("We will

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[27] 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, Decision No. 3[illegible] (served August 23, 1995).

not impose a condition that would put its proponent in a better position than it occupied before the consolidation.")

Nowhere do either Detroit Edison or CN argue -- nor can they -- that the proposed transaction will cause Trenton Channel to enjoy fewer competitive options for delivery of coal than before. Indeed, the opposite is true: Trenton Channel, as part of the Detroit Shared Assets Area, will enjoy greater rail access than before the Transaction. Under those circumstances, the requested trackage rights condition clearly is not warranted. The Board therefore should deny the relief requested by Detroit Edison in DE-02 and by CN in CN-13 and Finance Docket No. 33388 Sub-Nos. 81 and 83.

e. South Jersey/Philadelphia Shared Assets Area

Three submissions address the South Jersey/Philadelphia Shared Assets Area. None of them provides any basis upon which to grant the requested relief.[28]

i. Port of Wilmington

The State of Delaware Department of Transportation ("DDOT") complains that the Port of Wilmington (which it purchased in 1995) is treated unfairly and placed at a competitive

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[28] In this connection, we note that the City of Philadelphia and the Philadelphia Industrial Development Corporation fully support the Application, indicating that:

> "the application strikes a proper balance between providing the public benefit of restored competition in the Northeastern United States and maintaining the financial viability of the applicants on the one hand and reemphasizing Conrail's headquarters commitments to the City and addressing the future of Contrail's employees on the other."

See also Comments in support of the Application by South Jersey Transportation Planning Organization. SJTPO-1 at 2.

disadvantage vis-a-vis ports in Baltimore and those of the Port of New York and New Jersey, which will have dual carrier access. DDOT at 2-3. While CSX provides rail service to Wilmington, DE, its lines do not access the Port of Wilmington. Only Conrail directly serves the Port. After the Transaction, only NS will directly serve the Port. Thus, there is no change in the Port's competitive situation.

DDOT seeks to have the Board either require Applicants to extend the South Jersey/Philadelphia Shared Assets Area south to the Port of Wilmington, or provide rights to CSX to provide rail service to the Port of Wilmington as a condition to approval of the Application. Id. at 3. The cursory submission offers no evidentiary support, study or analysis. No showing of cognizable harm resulting from the Transaction is demonstrated. Providing dual carrier access to some ports hardly justifies a Board condition to require the Applicants to provide dual carrier service to one, two, or three more East Coast ports.

ii. Philadelphia Belt Line

The Philadelphia Belt Line Railroad ("Belt Line" or "PBL"), a 16.3 mile line railroad within the City of Philadelphia, has asked for the imposition of "equitable" reciprocal switching rates for any carrier that might, in the future, obtain access to Philadelphia and for imposition of reciprocal switching rights on behalf of CP/D&H. PBL-10 at 2. Its argument is that such switching rights are required for it to fulfill the "Belt Line Principle," embodied in a city ordinance of 1914. Id. at 3, 7.[29]

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[29] As part of a large public works project in 1914, the City urged application of what is called the "Belt Line Principle." This "principle" was restated in the Mather VS:

> "The City deems it necessary that all railroad companies now or hereafter entering the City should have free

The Board should deny PBL's request. The Belt Line trackage, post-Transaction, will be served by as many or more carriers than it is today. Shippers located on the Belt Line South have access today to three Class I carriers and will continue to have access to three Class I carriers. Shippers on the Belt Line North today have access to only one Class I carrier -- Conrail -- and post-Transaction will have access to both CSX and NS. Jenkins RVS at 18. In addition, CP, on whose behalf the Belt Line purports to act in its submission, will have commercial access to the Philadelphia Belt Line shippers under its Settlement Agreement with CSX. Id. The Transaction enhances competitive alternatives for Belt Line shippers and is clearly in the public interest without the imposition of further rights for hypothetical future Philadelphia rail carriers to access the Belt Line. Moreover, whether or not the "Belt Line Principle" stands for the proposition asserted in PBL's papers, which proposition is the sole basis for PBL's arguments, is hardly an appropriate subject for this proceeding to resolve. The issue is moot; the three carriers which currently serve Philadelphia have no quarrel about who can reach the Belt Line. The Board need not involve itself in the construction of ancient documents in this case. If a fourth rail carrier comes, in some manner not yet known, to serve Philadelphia, its access to the Belt Line can be examined in an appropriate forum at that time.

> access on equal terms to all public and private wharves on the Delaware river and desirable that what is popularly known as the "Belt Line" principle should be of the most general public application . . ." Belt Line ordinance, ¶ *Sixteenth*, cited in PBL Comments, PBL-10, Exhibit C.

From this archaic hortatory language, the Belt Line has constructed its "right" to reciprocal switch rates. The ordinance does not mention rate levels.

Moreover, the issues the Belt Line seeks to involve the Board in here are essentially a rehash of an earlier complaint dismissed by the Board.[30]

iii. Pennsylvania House Transportation Committee (PaHTC-2)

This committee of the Pennsylvania House of Representatives expresses concern as to whether CSX and NS will provide adequate financial support to assure efficient service within the South Jersey/Philadelphia Shared Assets Area. PaHTC-2 at 10. CSX and NS propose to compete vigorously for traffic destined to or originating in this Shared Assets Area and both, accordingly, will have a stake in its efficient operation. The pertinent Shared Assets Area Operating Agreement (CSX/NS-25, Vol. 8C at 97) provides an adequate means of financing the area through fixed payments and usage charges.

f. New England

i. Connecticut DOT, Rhode Island DOT & Senator Jack Reed (RI), Maine DOT, Coalition of Northeastern Governors

Several public entities and regional interest groups request that a shared assets area be created in, or extended to, New England.[31] They claim that if the STB were to approve the Transaction without this condition, New England States will be placed at a disadvantage in

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[30] In 1995, the Belt Line petitioned the STB to compel trackage rights to connect the North and South Belt trackage. The STB dismissed the petition on Motion stating that PBL was not harmed, and that the only parties who might be harmed -- shippers -- had not come forward in support of PBL's complaint. Philadelphia Belt Line Railroad Co. v. Consolidated Rail Corporation, CP Rail System, and CSX Transportation, Inc., Finance Docket No. 32802 (served July 2, 1996) at 7. And no shipper has offered support for the Belt Line's position here.

[31] See NECR-4, CMEG-5, Comments and Requests for conditions of the State of Maine Department of Transportation, Connecticut Department of Transportation, Rhode Island Department of Transportation, Senator Jack Reed.

relation to regions that have shared assets areas and will thus receive the benefit of direct dual Class I rail carrier competition.[32]

Competitive conditions in the New England area, however, are not adversely affected by the Transaction, and in fact will be improved. Presently the New England area is served by only one Class I U.S. railroad, Conrail, and after the Transaction, it will still be served by a Class I carrier, CSX. Thus, New England suffers no competitive harm in this regard. Furthermore, the claim that because other areas of the country will receive competitive Class I rail service while New England's rail service remains unchanged is not, under Board precedent, sufficient to require the imposition of conditions.

Neither do CDOT, RIDOT or the other submissions provide any evidence to support their contentions that New England communities will suffer affirmative harm as a result of the Transaction.

Additionally, CSX's recent agreement with the P&W will benefit the New England area by allowing shippers using the P&W an additional rail option not previously available. Jenkins RVS at 17. The P&W agreement permits P&W to independently communicate pricing to its customers for certain routes including CSX without CSX approval will eliminate needless delays, and result in more responsive marketing of freight shipments between New York City and New England. Equally important, the agreement signals a commitment by CSX to work with other railroads to market and develop the New York to New England freight market and to divert traffic from trucks on the heavily congested I-95 corridor.

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[32] See, e.g., CNEG-5 at 11.

Moreover, because it is the only U.S. Class I rail carrier in the New England area, CSX will have every incentive to cultivate the New England market by providing quality service at reasonable rates. NS has a presence in the area through its arrangements to Albany and connections there to the Guilford system. McClellan VS, CSX/NS-18, Vol. I at 532. Thus, CSX will hardly be free of rail competition constraints, let alone competition from trucks. CNEG, for example, recognizes that, "NS and CSX are to be applauded for proposing to restore rail competition to the extent to which they have." CNEG-5 at 16. Similarly, the Commonwealth of Massachusetts supports the Transaction, recognizing that it "will enhance certain railroad service opportunities throughout the Eastern United States [which] will benefit shippers, industries and businesses, and communities through the delivery of cost effective freight services." Comments and Requests for Conditions of the Commonwealth of Massachusetts (unnumbered) at 1. Further, Massachusetts states that "CSX has demonstrated a serious commitment to address the concerns raised by the Commonwealth . . . ." Id. at 2.

ii. New England Central Railroad

New England Central Railroad (NECR) is a Class III rail carrier providing rail service over approximately 343 miles of track in a north-south direction between East Alburg, VT and New London, CT. NECR-4, Carlstrom VS at 2. As explained more fully in Section XIII, NECR seeks trackage rights totalling approximately 259 miles, expanding its operation by 75%. For the reasons set forth in Section XIII, NECR will be in the same position post-Transaction as it is now. Its submission reflects an unabashed effort to seek additional service territory unrelated to the issues properly before the Board. The extent of this opportunism, and the

potential operating problems in granting NECR's wish, are developed in the Orrison RVS at 56-57 and Section XIII.

g. West Virginia

i. West Virginia State Rail Authority

The West Virginia State Rail Authority ("WVRSA") supports the Transaction, recognizing the "improved competitive service throughout the eastern United States . . . which will benefit shippers the public." Comments and Request for Conditions of WVRSA (unnumbered) at 7. WVRSA does, however, express concern about possible competitive disadvantages resulting from the competitive access that the Transaction will bring to other areas of the country. Id. at 4. Specifically, WVRSA expressed concern that B&O coal producers will be at a disadvantage with regard to coal producers in the Monongahela region because "Monongahela coal producers will have single line service to all points served by CSX and NS," while B&O producers "will still have single line service to CSX destinations only." Id. WVRSA suggested that this "creates the potential for a shift of production out of the B&O coal fields." Id. at 5. To address this concern, WVRSA requested that NS be granted trackage rights over CSX lines into the B&O coal fields.

As a threshold matter, as set forth in the Sansom Rebuttal Verified Statement (at 3 n.1), B&O coal and Monongahela coal differ in significant ways, and specifically in sulfur content. These power plants with low sulfur emission limits in their State Implementation Plan ("SIP") are unable to utilize Monongahela coal because of its high sulfur content. Consequently, B&O-origin coal and Monongahela-origin coal do not compete for the business of any utility with a SIP requiring low sulfur coal. Thus, WVRSA's argument that the B&O producers will

suffer a competitive disadvantage to the Monongahela producers may be overstated. Furthermore, as the Board has repeatedly stated, the improved situation for one geographic region, here the Monongahela, hardly requires that the same improved services be mirrored be in all other areas where there is possible competition with producers and other industries in the first area. Indeed, in this case, the position of B&O shippers, whether or not equivalent to that of Monongahela shippers, will be significantly improved by the introduction of new single-line service opportunities to B&O producers to a broad selection of coal users, including PEPCO's Morgantown and Chalk Point plants and Atlantic City Electric's Deepwater and England plants. *See*, *e.g.*, CSX/NS-19, Sharpe VS Vol. 2A at 363, 368.

It also appears that the comments of WVRSA may have been rescinded. A letter from the Governor of West Virginia (Included in Vol. 3) to the Board expresses the support of the State for the Transaction without qualification and appears to indicate that the comments of the WVRSA are no longer in effect. In any event, the arguments do not afford any basis for action on the part of the Board.

ii. West Virginia Association for Economic Development (WVED-2)

The WVED states that it is an "informal, ad hoc organization of rail shippers and other interested parties in West Virginia". WVED-2 at 1. Its comments relate entirely to what is known as the "West Virginia Secondary" (WV-2), a 149 mile section of CR track located between Point Pleasant, WV and Charleston, WV. This segment is to be allocated to NS. WVED wants the Board to require NS to grant trackage rights over this line to CSX, so that

shippers served by it will enjoy two-carrier service after the Transaction, even though they are currently served by only one carrier.

There is clearly no basis for the requested condition. The only argument advanced in support of it is the familiar one, voiced by many other parties, that shippers on this line will be competitively harmed because other shippers with whom they compete are in areas that will be gaining two-carrier service. Again, we have addressed this argument fully in discussing the many requests to expand the SAAs, and WVED adds no new facts or arguments to the debate. As indicated in the RVS of John H. Friedmann (at 42), the Transaction will not reduce the number of rail carriers serving points along the WV-2.

Indeed, WVED's arguments are especially insubstantial for several reasons. First, as noted in the Rebuttal Verified Statement of D. Michael Mohan, many shippers served by the WV-2 have access to barge traffic via the Kanawha River which connects to the Ohio River system. Mohan RVS at 79. Barge movements are generally an effective competitive transportation alternative for coal and chemical shippers for whom WVED purports to speak.

Second, as indicated in the Operating Plan, NS' acquisition of the WV-2 will eliminate circuitous routes for traffic generated on the WV-2. Post-acquisition, this traffic can be routed over NS' existing Deepwater line which runs from Alloy, WV (where it connects to the WV-2) to Elmore, WV. This is projected to eliminate 143 route miles on the average on rerouted existing movements. CSX/NS-20, Vol. 3B at 147. The shipping distance between Charleston, WV and Atlanta, GA will be shortened with the new NS single-line service from 802 miles at present over a joint CR/NS route to 601 miles over an NS single-line route. The route between

Charleston, WV and Baltimore, MD, utilizing the Deepwater line, will be 492 miles in contrast to 810 miles over the current CR line. Friedmann RVS at 44.

Coal development along the WV-2 should be enhanced by the new single-line routes providing service to both new and existing coal markets, including markets for coal exports from Norfolk, VA. Id. at 44.

NS has committed in the Operating Plan to upgrading its Deepwater line. CSX/NS-20, Vol. 3B at 277. It will invest over $10 million to improve its Deepwater line so that shippers on the WV-2 and the Deepwater line will have efficient service over new or shorter routes. Id. at 43-44. Consequently, shippers located on the WV-2 will benefit from more direct single-line routings to a much larger territory than at present. Id. at 43.

The WVED's contention that 4,000 miles of CR tracks are to receive joint access by both NS and CVSX is factually incorrect. WVED-2 at 6. The total CR mileage to be joint accessed is considerably smaller. Id. at 41.

Reciprocal switching exists at present on the WV-2 to CSX's line on the other side of the Kanawha River, providing competitive alternatives. That CSX line is partially parallel to the WV-2. Id. at 44.

The State of West Virginia fully supports the Transaction, as evidenced by the December 3, 1997 letter to the STB from its Governor (Included in Vol. 3). Among other things, he indicates that the qualifications that had been expressed to the STB by the West Virginia State Rail Authority (WVSRA) (subpart (i) above) have been rescinded. The WVSRA's comments had raised the dual rail carrier issue on the WV-2. Its concerns have now been resolved. We

note that as to the WV-2 the WVSRA recognized that "NS will mean access to many markets in comparison to the current situation." WVSRA (unnumbered) at 5.

Finally, it is questionable whether WVED represents the members it lists at page 2 of its comments as supporting its position.[33] Three of those listed members have filed statements in this proceeding supporting the application. The West Virginia Coal Association (WVCA) has adopted a resolution of unqualified support for the merger. See CSX/NS-21, Vol. 4A, at 130. The WVED also lists among its members Northland Resources with the principal contact for it being Jim Bunn. Mr. Bunn, on behalf of Northland Resources, has submitted a sworn statement of unqualified support for the merger. See CSX/NS-21, Vol. 4D at 582. According to pages 1-2 of Mr. Bunn's statement, Northland is located on existing track of NS and is not on the WV-2. In addition, WVED lists Pevler Coal Sales as a member, with Mark Campbell as its representative. Mr. Campbell has also submitted, on behalf of Pevler Coal Sales, a sworn statement of unqualified support for the merger. See CSX/NS-21, Vol. 4A at 723. According to Mr. Campbell's statement, like Northland, Pevler has no facilities on the WV-2 and is currently served exclusively by NS. Finally, we question the situation of Elkem Metals which is listed as a WVED member. Its facility at Alloy, West Virginia, now has access to CSX and this will continue after the merger. Friedmann RVS at 44.

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[33] WVED claims to list "27 members," but three companies (Appalachian Timber Service, Flexsys America and Union Carbide) are each listed twice.

B. Local Service And Access Issues

1. Rail-Bridge Terminals (New Jersey) Corporation

E-Rail, an intermodal facility leased by Rail-Bridge Terminals (New Jersey) Corporation ("RBTC"), is a sole-served facility seeking an expansion of access as a condition of Board approval of the Transaction. RBTC will not suffer a competitive harm justifying the grant of a condition. RBTC is concerned because, of the intermodal yards in the NJSAA which will be sole served by either NS or CSX, it is the only one that will not be run directly by NS or CSX. The three other intermodal yards which run independently of NS and CSX, (South Kearny, Dockside, Port Newark), will be served by both NS and CSX.[34] RBTC argues that it will be at a competitive disadvantage in relation to the other independently run terminals.

RBTC asks the STB to either (1) grant RBTC equal access to both CSX and NS, or, in the alternative (2) maintain South Kearny (APL portion) as a sole CSX facility and maintain Port Newark and Dockside (Expressrail) as either CSX or NS sole facilities. Thus, RBTC demands that it enjoy new benefits as a result of the Transaction, and that if it cannot, its competitors also should not.[35] Such conditions are not appropriate when a competitive harm has not been demonstrated. Therefore, RBTC's requests for conditions should be denied.

2. Baltimore Citizens Advisory Committee

The Citizens Advisory Committee of the Metropolitan Planning Organization for the Baltimore Region (CAC) supports the Transaction, applauding the Applicants' intention "to win

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[34] Only the APL portion of South Kearny will be served by both NS and CSX.

[35] The NS Operating Plan is predicated on E-Rail being a sole-served facility. Additionally, NS has been in negotiations with RBTC that it expects will be concluded sucessfully in the near future -- negotiations aimed at resolving RBTC's concerns.

a larger share of the market presently carried by truck." Position of CAC (unnumbered) at 1. CAC calls this "a development long overdue, with benefits to the nation's economy and environment as well as relieving the traffic congestion on our highway system, both interstate and local." Id. CAC, however, does express reservations that (i) only CSX will reach the west side of the Port of Baltimore and (ii) coal producers in Western Maryland will be at a competitive disadvantage to producers with joint access to CSX and NS in the Monongahela region. It requests that a condition be imposed requiring NS and CSX to share facilities and track throughout the Port of Baltimore or, alternatively, granting a regional railroad a route from the rail hub in Hagerstown, MD, directly to Baltimore. CAC also requests that the Board require CSX to grant W&LE access to locations along CSX which serve Western Maryland coal producers, which they claim would cure "the inequity created by Applicants' plan for the Monongahela." Id. at 3. Additionally, CAC urges the Board to grant the D&H access to the Port of Baltimore as part of the relief it may need to "survive under the plan advanced by the Applicants," id. at 4, and finally to ensure that MARC and Amtrak service can continue at not less than their operation levels prior to the acquisition.

CAC provides no evidence whatsoever to support the need for more competition in Baltimore or in the coal regions of Western Maryland.[36] The situation for the Port of Baltimore will be improved as both NS and CSX will have access to the East side through CSX

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[36] CAC entirely ignores Board precedent when it states, "If the Applicants must concede that their plans have created new and beneficial rail competition in other parts of the country, then they should be required to do as well by the Baltimore region."

existing lines and NS trackage rights in the area.[37] Further, Applicants' decision to provide dual access to the Monongahela region provides no basis for dual access in other areas. CSX's settlement agreement with CP addresses CAC's concern with regard to any alleged injury to D&H. Finally, CSX has reached a settlement with the State of Maryland and its agencies which resolved any issues as to MARC. See Section XII.

3. Millennium Petrochemicals Inc. (MPI-2)

Millennium Petrochemicals Inc. ("MPI") has two main complaints. First, MPI is concerned that the Transaction will result in increased interchanges on movements of chemicals from Western railroads to destinations in the east. Second, MPI specifically is concerned about its regional distribution center (RDC) in Finderne, NJ. MPI's concerns regarding increased interchanges are addressed in the section dealing with other shippers in Section XVI. MPI also raises a factual issue with regard to the Manville Yard which merits clarification.

As to MPI's concern about its Finderne facility, MPI states that it moves about 700 rail cars from its manufacturing facilities in the west to its Regional Distribution Center in Finderne, NJ, and expresses concern at the exclusion of the Finderne RDC from the nearby North Jersey Shared Assets Area. MPI-2 at 7. MPI complains that, where presently Conrail provides both the line haul and switching of rail cars destined for the distribution center, using Manville Yard to marshall cars for switching to the Finderne facility, the Application proposes to allocate the Conrail assets serving MPI's Regional Distribution Center amongst three parties, with Finderne allocated for use by NS, Manville Yard for use by CSX, and Bound Brook and South Plainfield

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[37] CAC itself rests much of its support for the transaction on "the plan's presentation of competition on the eastern side of the Port of Baltimore."

(where MPI leases track on the Lehigh line for transloading operations to accommodate overflow from Finderne) to the Shared Assets Area. Id. at 7-8. Thus, MPI claims, "Any benefits with respect to single line service, decreased interchanges and reduced logistics costs appear not to apply to traffic moving to and from Finderne." MPI-2 at 8. MPI seeks a reconfiguration of the North Jersey Shared Assets Area to include Finderne and Manville Yard.

First, MPI has not demonstrated any loss of competition that will result from the Transaction. MPI's Finderne facility is currently served by one carrier, Conrail. After the Transaction, it will be served by one carrier, NS. Thus, there is no basis upon which to grant any conditions requested by MPI.

Second, MPI's concerns about service out of the Manville Yard are without merit. MPI assumes that any traffic that is joint-line CSX and NS involving the Finderne RDC must be interchanged at Manville Yard or within the NJSAA. But there are other likely points of interchange, and the interchange points will be determined by agreement between NS and CSX. Mohan RVS at 52-53. Manville Yard will be available for interchange if NS chooses to use it. While Manville Yard will be allocated for use by CSX as an NYC asset, it will be available for use by NS and the North Jersey CSAO. NS may pick up Lehigh Line local industry traffic at Manville for destinations on the NJT Raritan Valley Line West of Bound Brook to MPI and other customers.[38] Orrison RVS at 127. To the extent that NS needs to use Manville Yard to support Millennium's operations, CSX will make available trackage space, and switching services will be provided in the same manner as Conrail provides them today. The local

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[38] MPI has brought to light a difference in the operating plans concerning operations out of the Manville Yard. Ownership of Manville Yard will be allocated to CSX, but NS will have access to the Yard. Mohan RVS at 52.

operation at Manville Yard will be similar to today's Conrail operations. Orrison RVS at 127. In addition, MPI has other rail storage facilities in the North Jersey Shared Assets Area which will be accessed by both CSX and NS.

MPI simply has not demonstrated any transaction-related harm[39] for which the imposition of protective conditions is necessary. The imposition of the conditions sought by MPI is therefore unwarranted.

4. New York Cross Harbor Railroad (NYCH-3)

NYCH has also submitted comments, asking the Board to impose certain conditions on the Applicants. Dealt with here is a requested condition that CSX "honor all shipper directions, routing traffic" between Long Island and points in Southern New England and adjacent New York, on the one hand, and on the other hand, points in the Mid-Atlantic States and the South and Southwest via what NYCH describes as a "Greenville Gateway." NYCH-3 at 8. NYCH's requested condition relates to allegations it is now pursuing in a pending lawsuit against Conrail wherein NYCH alleges that in prior years Conrail has routed traffic moving between Long Island-Southern New England and the Southeastern and Southwestern regions of the country inefficiently via Albany.[40] The NYCH allegations against Conrail should not be injected here.

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[39] Among the benefits to MPI from the transaction is fact that it ships ethanol from its Tuscola, IL, facility to Newark, NJ, and that, as Tuscola will be served by both NS and CSX under the terms of the transaction, MPI will be getting the advantage of competitive long haul moves into Newark.

[40] United States District Court for the Eastern District of New York, at Civil Action No. 97 Civ. 3296. NYCH alleges that Conrail does so solely in order to drive NYCH out of business, and its complaint in the pending litigation seeks damages in an amount slightly in excess of $1.4 billion. NYCH bases its request for conditions on the premise that CSX will continue what NYCH calls "Conrail's practice" of "diverting traffic . . . around the cross harbor gateway" (NYCH-3 at 8). This request might seem at first blush to require the Board to make

Whether or not Conrail in the past has failed to honor shipper directions -- violating 49 U.S.C. § 10747(a)(1), or any STB rule or other provision of federal law as alleged by NYCH -- the contention hardly has a place in this proceeding directed only to future operations of Conrail lines by CSX and NS.[41] Insofar as the Transaction is concerned, NYCH will now have access to both NS and CSX via the Greenville Yard, and NYCH is not adversely affected by the Transaction. Even if it were shown that Conrail violated § 10747(a)(1) or any other provision of law, there is no showing that CSX or NS would continue to do so.

5. Tri-State Transportation Campaign

The Campaign is a consortium of planning groups interested in the metropolitan New York Transportation system. It is concerned that the area has had single carrier service, and seeks to extend NS operations east of the Hudson River.

Bemoaning the transportation history of the area, the group asks the Board to require NS to file an application to operate a car float service across the NY/NJ Harbor, or to purchase the New York Cross Harbor Railroad, or itself to investigate the service provided by the Cross

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determinations about whether Conrail's practices are accurately described in the restatement of the allegations NYCH has made in its recently filed lawsuit (NYCH-3 at 2-5), or whether those practices might violate any laws. But it does not. Even if those allegations were to raise issues that may be within the Board's jurisdiction in some appropriate proceeding, they have no connection with the Transaction and this is not the setting in which to respond to them. That is particularly so in view of the acknowledgment by NYCH's CEO that NYCH is "not asking the STB to decide whether or not [we]'re going to prevail in this litigation." (Crawford Dep., Nov. 25, 1997 at 146-47).

[41] If the routing described in NYCH's filing is an established through route and CSX is instructed by the shipper to follow it, CSX will, consistent with the mandates of 49 U.S.C. § 10747, comply with the shipper's directions. If the route described by NYCH is not an established route, NYCH must follow the proper procedures for requesting a separate proceeding before the Board on the proposed through route.