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d. There Is No Basis for Granting IORY Trackage Rights to Columbus, Marion, Ft. Wayne or Marysville, or at Lima.

IORY contends it should be granted the extensive trackage rights described in its fourth through eighth conditions -- trackage rights from Sharonville to Columbus, from Quincy to Marion, from Lima to Ft. Wayne, from Quincy to Marysville and on a track in Lima -- to remedy competitive harm that will result because Conrail allegedly has served as a "neutral gateway" to both CSX and NS. IORY claims CSX will be more likely to favor CSX lines, and NS will be more likely to favor NS lines. IC, Y-4 at 6-7, 8; IORY-4, Burkart VS at 8. According to IORY, such actions could include "through rate and service actions" that would render the other carrier's service noncompetitive. IORY-4 at 8.

As explained in Section V.B., IORY's position is contrary to Board precedent and economic theory. CSX and NS have no incentives to foreclose efficient through rates. See Kalt RVS at 55. If they were to do so, the Board's competitive access rules provide a remedy for adversely affected parties. See Section V.B. Moreover, CSX and NS intend to maintain efficient routes. See Section V.B.

Even if these requests were not premised on such an untenable theory, there are numerous other reasons they would have to be denied. In seeking these five sets of trackage rights, the only customers IORY mentions are shippers of grain and related products. See IORY-4, Burkart VS at 6-7. However, IORY's sole focus is on movements from the "nearby Ohio grain region" to Sidney. Id. That overly narrow perspective ignores the substantial benefits the Transaction will offer Ohio grain shippers, including access to two large rail systems that will be able to offer them single line service to new markets.

Beyond this, IORY's tight focus on grain in the context of these requests is highly disingenuous. One of its requests is for trackage rights to serve Marysville, where there are major automobile manufacturing facilities. IORY's request for access to a new source of automotive business -- whether under the guise of seeking grain traffic or otherwise -- seeks precisely the sort of windfall the conditioning power should not be used to grant.

IORY's grab bag of requests also should be denied because of the substantial operating problems they would create. IORY itself states that the routes it seeks to use "would largely be served as side trips for existing local train operations." IORY-4 at 4-5. Inserting such local shortline onto busy mainlines carrying through freight movements will inevitably interfere with Applicant's operations and ability to realize the full public benefits of the Transaction. For example, combined with its earlier request to reach Sidney, IORY's request for local trackage rights from Quincy to Marion and from Quincy to Marysville would place its local trains on CSX's Sidney-Marion line. See IORY-4, Ex. 15; Orrison RVS at 46. That line is a crucial part of CSX's new Heartland and St. Louis gateway service routes -- which will be its primary routes for high-density, time-priority automotive and intermodal traffic. Id. Inserting IORY as a local carrier on these lines would interfere with moving that traffic, increasing congestion and decreasing CSX's ability to provide the high level of service required. Id.^{57/}

^{57/} There is a similar problem with IORY's request for trackage rights from Lima to Ft. Wayne. That track is part of Conrail's line from Crestline, OH to Chicago, which CSX will use for bulk commodity movements between the Northeast and the Chicago gateway. See CSX/NS-20, Vol. 3A at 115-17. As Mr. Orrison explains in the context of other requests to operate over that line, inserting another carrier would seriously impede those operations. See, e.g., Orrison RVS at 40.

(continued...)

Moreover, these rights would clearly give IORY a windfall by closing the existing gap between its line reaching Quincy and its line reaching Bellefontaine, OH. See IORY-4, Ex. 15. It appears that IORY may also be trying to piece together a connection with its isolated Columbus-Logan line with another of these requests. This connect-the-dots approach for preexisting conditions is no substitute for proving an entitlement to narrowly drawn relief that remedies actual competitive harm. The Board should refuse to use the conditioning power to give IORY the windfalls it seeks.

7. Indiana Southern Railroad.

Another RailTex subsidiary, Indiana Southern Railroad ("ISRR"), filed a responsive application in Sub-No. 76 seeking trackage rights in Indianapolis and from there to Crawfordsville, Shelbyville and Muncie, IN. ISRR-4 at 2-3. None of those requests is justified.^{58/}

^{57/}(...continued)

Furthermore, contrary to IORY's theme in seeking trackage rights over CSX's Washington Court House line, if IORY's request for local access trackage rights over the future NS Cincinnati (Sharonville) - Columbus line with connection rights at Springfield were granted, there would be additional IORY trains on the present Conrail Cincinnati Line. Moon RVS at 14.

^{58/} III

III

a. ISRR Is Not Entitled to Trackage Rights
to Serve IP&L or Other Shippers in Indianapolis.

ISRR asks the Board to grant it a variety of trackage rights in Indianapolis. First, it seeks overhead trackage rights to reach two Indiana Power & Light Company facilities. Id. Those rights would be over (1) a Conrail line to IP&L's Perry K plant that will be operated by CSX; and (2) a Conrail line to be operated by CSX and a line owned by Indiana Railroad Company to IP&L's Stout facility. Id.^{59/} Second, it seeks local trackage rights (including the right to interchange with all carriers at all junctions and serve all shippers, sidings and team tracks) over the Conrail rail lines in Indianapolis "to be acquired by CSX," specifically including the Indianapolis Belt Line. Id.^{60/}

It is clear from the responsive application that ISRR's principal objective in Indianapolis is to gain direct connections for coal movements to IP&L's two plants. See id. at 7-8.^{61/} As demonstrated above, however, there will be no loss of competitive access for such coal movements. The Perry K plant, which is currently rail served solely by Conrail, will gain two carrier access, an improvement over the status quo. See Section IV.A.4. In addition, CSX is willing to assume Conrail's obligations under any contract affecting ISRR/Conrail/IP&L coal movements to IP&L's Stout plant for the duration of the current INRD-IP&L coal contract, another improvement. See Section id.

^{59/} In both cases, the trackage rights would begin at MP 6.0 on ISRR's Petersburg Subdivision. Id.

^{60/} ISRR further clarifies that this request is for trackage rights "over all CRC rail lines in Indianapolis needed to access the 2-to-1 shippers located in Indianapolis." Id. at 3 n.3.

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Nor is there any justification for granting ISRR local trackage rights at Indianapolis. All 2-to-1 situations at Indianapolis have already been remedied by Applicants through the grant of trackage rights to NS. See Section IV.A; see also CSX/NS-18, Vol. 1 at 18; CSX/NS-19, Vol. 2A, Hart VS at 146-49. ISRR's bare assertions that this NS competitive option will be "inadequate" and not "effective" (ISRR-4 at 8) have no merit. See Section IV.A.6. There certainly is no reason to assume that NS will be less aggressive and resourceful a competitor than ISRR might be.

ISRR's suggestion that it would be preferable solution at Indianapolis because it is "a low cost, shortline railroad" that could provide Indianapolis with "efficient and economical switching service to nearby Class I connections" (ISRR-4, Neumann VS at 5) actually undermines its request. NS will be able to provide 2-to-1 shippers with a direct competitive alternative, accessing a major railroad system; that alternative will obviously be far more efficient for shippers than inserting ISRR as an additional carrier for Indianapolis switch movements.

ISRR also reveals that one of its principal goals has nothing to do with this transaction at all. Its General Manager testifies that these trackage rights have been sought to give ISRR "access to the three other shortlines operating in Indianapolis" so that they can link together to attract new business. Id. at 5-6. The absence of such shortline connections at this time is plainly a preexisting condition that cannot support any grant of relief here.

b. There is No Basis for Trackage Rights
to Crawfordsville, Shelbyville or Muncie.

ISRR's request for trackage rights to reach points beyond Indianapolis -- Crawfordsville, Shelbyville and Muncie-- should likewise be denied. The very limited 2-to-1

issues at Crawfordsville have been fully addressed by Applicants, and there is no basis for ISRR's claim that NS will not provide fully competitive service there.

As to Shelbyville and Muncie, ISRR does not claim that any shippers will face a loss of two-carrier competition as a result of the Transaction, nor could it. Shelbyville is now served by both Conrail and Central Railroad of Indiana ("CIND"), and after consummation will be served by CSX and CIND; there is no competitive change as a result of the Transaction. Muncie is currently served by both Conrail and NS. See, e.g., CSX/NS-18, Vol. 1, Ex. 1, Map A. When CSX takes over operation of the Conrail line there, Muncie will continue to have service from two Class I carriers, just as it does today. Moreover, NS will be given trackage rights over the CSX-operated line from Indianapolis to Muncie as well. See CSX/NS-18, Vol. 1 at 53; CSX-NS-20, Vol. 3B at 231.^{62/} In short, there will be no loss of competition at any of these cities that has not already been remedied by Applicants.

Apart from unsubstantiated rhetoric that it will provide "efficient and economical switching services" and divert truck traffic to rail, the only other argument ISRR offers for trackage rights to Crawfordsville, Shelbyville and Muncie is that it will step into CRC's shoes as an allegedly "neutral and indifferent gateway." ISRR-4 at 5, 9. As

^{62/} The Indianapolis-Muncie line will provide a critical segment in CSX's new route from St. Louis through Cleveland and into New York. See CSX/NS-20, Vol. 3A at 124-26, 137-40. CSX plans to use that route for general merchandise traffic and automotive traffic. Id. It will be heavily used by CSX for through-train traffic, and the trackage rights that NS will have on the Indianapolis-Muncie line will add still more traffic. Under these circumstances, introducing ISRR as another carrier on that line -- particularly one conducting local operations -- would create substantial operating problems. See Orrison RVS at 49.

discussed above in the context of IORY's similar "neutral gateway" claim, however, that argument offers no valid basis for relief. See Section XIII.C.6.d.; see also Section V.B..

The lack of any need for another carrier to reach these cities is underscored by ISRR's own operating plan. ISRR states it intends to provide service between Indianapolis and the three cities "on an as needed basis." ISRR-4, Ex. 15 at 2. It hastens to add "unless, of course, the immediate service needs of any of these customers require regularly scheduled service" (id.), but even that caveat emphasizes that ISRR cannot identify any customer at Crawfordsville, Shelbyville or Muncie that in fact will require any ISRR service at all.

A number of serious operating problems would be created by giving ISRR the operating rights it seeks. Adding ISRR local service would inevitably interfere with and delay operations on these lines. The line to Crawfordsville is used in an Amtrak route and is not signalled, raising additional operating interference and delay issues. Orrison RVS at 48-49. The proposed ISRR trackage rights to Shelbyville would add an interchange, and CSX estimates that they would delay movements by at least one day, as well as creating other difficulties. Id. The line to Muncie will be part of CSX's mainline between Cleveland and St. Louis, and will thus be part of two key service routes (Heartland and St. Louis) that will carry automotive and general merchandise traffic. Id. at 48. Adding shortline operations over that line will inevitably interfere with and delay that service. The operating problems ISRR's proposed conditions would create for Applicants are another reason why they should not be granted.

c. ISRR Has Failed to Demonstrate That There
Will Be Any Loss of Essential Rail Services.

No doubt because it recognizes there is no competitive need for any of the trackage rights it seeks, ISRR has sought to buttress its requests with a cursory claim that they are needed to prevent a loss of essential services. See ISRR-4 at 2, 5, 11-12. However offers no evidence that could support such a claim.

The only service ISRR even threatens to consider abandoning is on its line north of milepost 17, near Mooresville, IN. See Interrogatory Response, ISRR-6 at 7; ISRR-4, Neumann VS at 4. As ISRR states, abandoning that line would "sever its ties to Indianapolis." Id. There is no reason to believe ISRR would do . . . As described above, ISRR will continue to be able to move coal to IP&L's Stout plant under existing contracts affecting ISRR/Conrail/IP&L coal movements to that plant for the duration of the current INRD-IP&L coal contract. ISRR's assumption that it will lose all traffic into Indianapolis thus is incorrect, and it will presumably will want to continue receiving revenue from those IP&L movements by continuing to operate this portion of its line.

Nor can the financial assumptions underlying ISRR's essential services claim stand scrutiny. The sole basis for that claim is an assertion that ISRR will lose \$1.5 million, which represents its 1996 gross revenues from traffic to the Perry K and Stout plants. ISRR-4 at 5; Neumann VS at 4; see also Interrogatory Response, ISRR-6 at 7.

There is no Transaction-related reason why ISRR should lose any revenue from its participation in coal movements to the Perry K plant while the underlying coal transportation contract remains in effect. Those movements accounted for [[[]]] of ISRR's 1996 revenues from Perry K and Stout traffic. See ISRR000150 (Vol. 3).

Moreover, ISRR's use of 1996 revenue data is highly misleading.^{63/}

[[[

]]] See also Vaninetti RVS at 13-15.^{64/} ISRR's use of gross revenue numbers is misleading as well because the potential effect on net income would obviously be far less.

In any event, ISRR clearly does not provide any essential rail service on the segment it wrongly speculates it might have to abandon. ISRR concedes that six of the seven shippers it claims would lose rail service if it abandoned that line can use trucks as an alternative and in fact have done so in the past. See Interrogatory Response, ISRR-6 at 7-9. The one remaining shipper is located in Indianapolis itself, close to both other railroads and extensive transportation alternatives.^{65/}

^{63/} ISRR's total 1996 revenues were \$9 million. ISRR-4, Neumann RVS at 3.

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^{65/} That shipper, Indy Railway Service Corp., is located at 6111 West Hanna Avenue in Indianapolis. Interrogatory Response, ISRR-6 at 7-9. ISRR states that shipper has not to ISRR's knowledge used trucks in the past. Id. However, the shipper is located only about six miles from the junction of the ISRR and CRC lines. Orrison RVS at 48 n.5. Thus, in the event ISRR were to abandon the portion of its line reaching that connection while there was significant demand for rail service by that customer, the short distance involved makes it very likely another party would step in and that no essential services would be lost.

In sum, ISRR's attempt to raise an essential services claim fails on a number of grounds. There thus is no basis for granting ISRR any of the trackage rights it seeks, whether on competitive or essential service grounds. The Board should therefore deny ISRR's responsive application in its entirety.

8. Livonia, Avon & Lakeville Railroad.

Livonia Avon & Lakeville Railroad ("LAL") filed a responsive application in Sub-No. 39 requesting the Board to impose a condition authorizing "LAL's acquisition of ownership or trackage rights on approximately one route mile of trackage constituting CRC's Genesee Junction Yard in Chili, New York to directly interchange with all carriers with access to the Genesee Junction Yard" LAL-4 at 1. See id. at 6. LAL states that it seeks this condition "in order to directly interchange with Rochester & Southern Railroad ("R&S") in the Genesee Junction Yard." Id., Exhibit 15, at 1.

LAL's request must be denied. LAL has not shown it will be harmed by the Transaction; to the contrary, it is clear that LAL is simply attempting to obtain relief from a preexisting condition. Even were that not the case, LAL's proposed condition would not remedy the harm alleged and would create operational problems for CSX.

LAL is a Class III railroad that owns and operates some 30 miles of track between Lakeville, NY and Genesee Junction Yard. LAL-4 at 3. LAL interchanges only with Conrail at Genesee Junction Yard. Id. at 6. Although R&S also reaches Genesee Junction Yard, LAL has never interchanged there with R&S. Id. at 8; see also Interrogatory Response, LAL-5 at 6.

LAL seeks ownership or trackage rights over a mile of track in Genesee Junction Yard "in order to directly interchange with ... R&S." LAL-4, Exhibit 15 at 1. LAL's own filing makes clear that its lack of operating rights into, and inability to interchange with other carriers at, Genesee Junction Yard dates back to Conrail's creation. See LAL-4 at 6-7. Indeed, LAL charges that the United States Railway Association ("USRA") itself created what it calls a "'firewall'" preventing LAL from connecting with carriers other than Conrail. Id. at 7-11.^{66/} When Conrail sold LAL its line from Avon to the east end of Genesee Junction Yard in 1996, it simply retained ownership of the yard itself.^{67/}

LAL's efforts to buy access to other carriers at Genesee Junction Yard confirms that its responsive application involves a preexisting condition and nothing more. On two separate occasions before the Transaction was even proposed, LAL unsuccessfully sought to obtain a direct interchange with R&S by seeking to purchase the yard. In August 1994 and June 1995, LAL made offers to Conrail to acquire the yard, but on both occasions Conrail refused to sell it. See Interrogatory Response, LAL-5 at 5.

When LAL purchased the Avon line in 1996, Conrail again declined to sell track that would give LAL a direct connection with R&S. LAL-4, Burt VS at 4-5. The

^{66/} LAL's effort to relitigate the 1975 USRA Final System Plan (see LAL-4 at 7-10) only serves to underscore how totally remote the lack of access about which it complains is from the transaction before the Board.

^{67/} See id. at 7-8; see also Livonia, Avon & Lakeville R.R. -- Acquisition and Operation Exemption -- Line of Consolidated Rail Corp., ICC Finance Docket No. 32754 (served Mar. 11, 1996).

purchase price LAL paid for the Avon line thus reflected the fact that it would not connect with R&S.

It is clear that what LAL is seeking is to enhance -- not merely preserve -- its competitive position.^{68/} The Board should therefore deny LAL's responsive application on the ground that it seeks relief to correct a preexisting condition rather than any effect of this transaction. See UP/SP, Decision No. 44 at 100.^{69/}

LAL's attempts to manufacture some transaction-related harm to bolster its request are unpersuasive. Its claim that CSX and NS will be more dominant than Conrail and therefore more likely to raise line-haul rates or diminish the level and frequency of interchange with LAL is pure speculation.^{70/} CSX will be assuming Conrail's existing agreements with LAL, and while those agreements are in effect, CSX will abide by their terms. See Section IX.A. There is no basis for concluding that any changes in such arrangements after expiration of those agreements would be unreasonable.

^{68/} The fact that LAL is seeking to enhance its competitive position is underscored by the fact that it is offering next to nothing for the trackage rights over the one mile line at Genesee Junction Yard. The proposed trackage rights agreement (LAL-4, Exhibit 2A) provides for compensation of 29 cents per car-mile. LAL handled 2,900 carloads in 1996. Interrogatory Response, LAL-5 at 7. Assuming comparable volumes continue to be transported, LAL would pay CSX less than \$2,000 a year to interchange with R&S under its proposed agreement.

^{69/} Nor should LAL's contentions regarding the Final System Plan have any relevance. See Kalt RVS at 12-13 n.16.

^{70/} The letters in LAL's Exhibit 24 making similar arguments likewise are speculative. See LAL-4, Exhibit 24, letters from Genesee Reserve Supply, Inc., Turf Line, King Cole Bean Company, Kraft Foods, Matthew & Fields Lumber of Henrietta, Inc., J. MacKenzie, Ltd. and Hillside Crop Service.

LAL also contends it will be harmed because some traffic will change from a two carrier movement (LAL-CRC) to a three carrier movement (LAL-CSX-NS). See LAL-4 at 11-12; LAL-4, Burt VS at 19-21. As a general matter, that situation does not call for imposing any condition. See Section XVI.B. Shippers will continue to have the same number of rail options at origin and destination. Moreover, shippers' contract rates have been protected, a pre-agreed division is applied and non-price provisions in the contract are observed as well. See Section IX.A. CSX and NS will in any event work together to provide efficient interline service for such movements. See Orrison RVS at 146.

More important, the relief LAL seeks plainly would not remedy the harm alleged. Even if LAL had the right to interchange with R&S at Genesee Junction Yard for NS destinations, that traffic would still require a three-carrier movement -- LAL-R&S-NS. LAL's 2-to-3 argument is simply spurious.

LAL alleges that it should be given ownership of Genesee Junction Yard because the yard is in poor condition and LAL has the strongest interest in maintaining it. LAL states that it will bring the yard up to FRA Class 1 standards. LAL-4 at 12-13. However, the yard's condition is clearly a preexisting one, not a harm resulting from the Transaction; it thus cannot support the condition sought. In any event, CSX plans to maintain Genesee Junction Yard at Class 1 standards, so that any harm LAL may suffer from the yard's current condition will be eliminated, not exacerbated. See Orrison RVS at 51-53.

LAL mentions the concept of essential services in passing. See LAL-4 at 5, 15. However, it does not allege that any of its shippers will lose rail service as a result of the Transaction.^{21/} There consequently is no basis for an essential services claim.

Finally, granting LAL's request for divestiture of Genesee Junction Yard could interfere with CSX's long term plans to develop traffic in that area. See Orrison RVS at 53.

For all the foregoing reasons, LAL has failed to offer any basis for granting its request for the divestiture of Genesee Junction Yard or trackage rights. The Board should accordingly deny that request and LAL's responsive application.

9. New England Central Railroad.

New England Central Railroad ("NECR") filed a responsive application in Sub-No. 75 seeking trackage rights that would expand its service over an additional 256 miles of line between Palmer, Massachusetts and the North Jersey Shared Assets Area. NECR-4 at 2, 14.^{22/} Specifically, NECR seeks trackage rights (including the right to operate trains over the lines and to interchange with all carriers, including shortlines, at all junctions):

- (1) over the CRC rail line between Palmer and West Springfield, MA (to be operated by CSX);

^{21/} Asked specifically whether it claimed shippers would lose rail service as a result of the Transaction, LAL did not identify anyone and could only offer airy rhetoric. See Interrogatory Response, LAL-6 at 4 (contending that the Transaction "will exacerbate the incentives of a monopolistic connection to allocate available resources away from captive markets such as the LAL and its customers to more competitive markets"). Such unfounded speculation cannot satisfy the Board's exacting standards for essential services claims.

^{22/} NECR is a class III rail carrier that provides service over 343 miles of line between East Alburgh, Vermont and New London, Connecticut. NECR-4 at 13 & Exhibit 1 (map).

- (2) over the CRC rail line between West Springfield and Albany, NY (to be operated by CSX), and;
- (3) over the CRC rail line between Albany and an as yet to be determined location in the North Jersey Shared Assets Area (to be operated by CSX).

NECR-4 at 2-3.

NECR is not entitled to the requested trackage rights because it will suffer no harm as a result of the Transaction. NECR will be in the same position post-Transaction as it is in now. NECR currently connects with Conrail at one location -- Palmer; the only change post-Transaction will be that NECR will connect with CSX rather than Conrail there.

The arguments NECR offers in attempting to demonstrate it would be harmed are transparently unpersuasive. There is no basis for concluding that the Transaction will have anticompetitive effects on New England shippers or shortlines, or that there will be any loss of essential rail services. Moreover, the trackage rights NECR seeks would create severe operational problems.

NECR claims the Transaction will have anticompetitive effects. Those effects are alleged to take several forms.

First, NECR asserts that New England shippers currently captive to Conrail will be competitively disadvantaged as compared to competitors in areas that will be opened to rail competition. NECR-4 at 7. However, as explained in Section VIII, the failure to share in benefits that other shippers receive as a result of the transaction is not a competitive harm that can support the imposition of conditions. Moreover, there are sound policy reasons for refusing to grant conditions in such circumstances. See Kalt RVS at 12.

NECR's argument also fails to take into account the fact that shippers outside Shared Assets Areas benefit from their creation. Id. at 13-17.

Second, NECR claims that harm will result from Conrail's disappearance as an allegedly "neutral or indifferent gateway" to CSX and NS. NECR-4 at 7. Specifically, NECR contends that CSX will be a more dominant carrier than Conrail has been and consequently "will have a strong economic incentive to favor its own routes by raising rates or reducing service for any traffic moving to the NSR destinations." Id. at 8. That claim is pure speculation. As explained in Section V.B., CSX and NS have no incentive to foreclose efficient through routes following the division of Conrail. To the contrary, they have expressed their intention to maintain efficient routings. See, e.g., Section V.B.^{73/} Moreover, CSX will be assuming Conrail's existing agreements with NECR, and while those agreements are in effect, CSX will adhere to their terms. See Section IX.A.

NECR also claims there will be a loss of essential services resulting from projected traffic diversions that NECR estimates would reduce its annual revenues by \$8 million. NECR-4 at 4-5; see also NECR-6 at 8 (Vol. 3). That \$8.0 million estimate is completely unsubstantiated and cannot support any grant of relief.

In coming up with its \$8 million figure, NECR assumed that all shipments of paper and wood products received from Canadian origins would be diverted because of "CSX's and NS's access to producers in the South, their control of the New York and New Jersey area intermodal facilities and advantages of single-line service." Interrogatory

^{73/} Failure to do so could result in challenges under the Board's competitive access rules. See Section V.B.

Response, NECR-6 at 9-10. As Mr. Rosen explains, however, the \$8 million figure is based upon a number of unfounded assumptions, including assumptions:

- that paper and wood products produced in the South are equivalent to or substitutes for the products produced in Canada;
- that paper and wood products moved from the South into the New York and New Jersey area intermodal facilities are likely to penetrate New England markets;
- that CSX and NS will be able to deliver Southern paper and wood products to New England customers at an attractive enough price to replace Canadian products, despite the fact that the Canadian products are much closer to New England than the Southern products;
- that CSX and NS distribution centers would materially change competition in the NECR customer markets; and
- that New England consumers would quickly and completely sever longstanding ties with Canadian producers.

Rosen RVS at 3. Because of those numerous unfounded assumptions, as well as NECR's failure to provide factual support for specific revenue losses, the \$8 million estimate is simply not credible. Id. at 2-4. Even the \$1.6 million estimate in the Primary Application may overstate the potential NECR diversion revenue loss due to assumptions used in the underlying study.⁷⁴ In any event, NECR does not rely on the \$1.6 million diversion

⁷⁴ For example, the default assumption in that study was that any railroad (such as NECR) serving a station assigned to a six-digit standard point location code (SPLC) has access to all shippers and consignees assigned to that SPLC. See CSX/NS-19, Vol. 2A, Rosen VS at 158. If, contrary to that assumption, some or all of the stations served by a carrier are closed (i.e., shippers at those stations can access only one of multiple carriers that reach the location), traffic cannot be diverted at those locations. Thus, the \$1.6 million estimate is conservative, and NECR diversions will be below that unless all of the NECR stations are open.

estimate as the basis for its essential services claim and only contends that essential services might be affected by its unsupported estimate of \$8 million in diversions.^{75/}

In addition, NECR has failed to demonstrate that its estimated revenue loss will cause any loss of essential services. [[[

]]] As Mr. Rosen explains, however, any such diversions (and resulting reductions in NECR revenues) would be the consequence of reduced market demand for NECR's services, not from any loss of essential NECR rail service. Rosen RVS at 7.

Moreover, the NECR system is a single, twisty line from East Alburgh, VT to New London, CT. As Mr. Rosen explains, due to the configuration of its connections, the location of its customers and other factors, it is likely NECR will continue to operate its complete system post-transaction. Rosen RVS at 6-7. NECR should thus be able to continue serving all of its customers. In any event, NECR has admitted that many of the shippers it claims would lose rail service have the alternative of truck transportation. Interrogatory Response, NECR-6 at 12.

Moreover, NECR has failed to establish that the conditions it seeks -- extending its operations to Springfield, Albany and the North Jersey Shared Assets Area --

^{75/} When asked in discovery to specify the basis for its essential services claim, NECR responded "the loss of \$8 million in revenue annually would force NECR significantly to reduce service systemwide and to discontinue service altogether on the marginal sections of the NECR system." Interrogatory Response, NECR-6 at 8 (emphasis added).

would remedy the essential services loss it alleges. While NECR claims that its conditions will give it \$7 million in additional revenues (NECR-4 at 8), the \$7 million figure appears to be pure speculation. Rosen RVS at 4-6.^{76/} NECR has provided no evidence that a current or potential market exists for its services at the additional destinations. Rosen RVS at 4. At bottom, as Mr. Rosen demonstrates, NECR's \$7 million claim boils down to the absurd contention that NECR will provide twice the amount of service for double the number of cars at one-third its current average per-car revenue. See Rosen RVS at 5-6. In sum, NECR has failed to provide any basis for concluding that there will be any loss of essential services as a consequence of this transaction, or that the relief it seeks would remedy even the alleged harm.

In any event, the conditions NECR seeks should be denied because of the interference they would cause for CSX operations. The three line segments over which NECR seeks trackage rights are integral to the new CSX Northeastern Gateway Service Route. See Orrison RVS at 56. This route will serve as a major artery connecting the Northeast and the Chicago, Memphis and St. Louis gateways. Two of the line segments NECR proposes to operate over will be heavily traveled by both freight and passenger trains. Id. NECR operations by a railroad that by its own admission operates in undeveloped and rural areas would complicate communications and coordination over these lines, and the fact

^{76/} The \$7 million figure was developed based solely on "the general familiarity of NECR management with traffic moving to, from or through the New England area and traffic moving to New York" Interrogatory Response, NECR-6 at 12. There is no documentation to support it. Rosen RVS at 5, HAR-Exh. 1.

that NECR proposes to use the lines to connect with and haul traffic for other shortline carriers would only make those problems worse. Id.

At bottom, NECR's request for conditions inappropriately seeks to enhance its existing competitive position. Were those requests granted, NECR would expand its operations by over by 75%. NECR also would obtain access to another RailTex affiliate, Connecticut Southern Railroad ("CSO"). NECR-4 at 5, 8. NECR admits it previously sought a connection to CSO from Conrail that Conrail refused to grant. Interrogatory Response, NECR-6 at 6-7.^{27/} That failed effort confirms that what NECR seeks here is not a remedy for any transaction-related harm but merely relief from a preexisting condition. Indeed, it was a prerequisite of the exemption RailTex obtained to control CSO that -- as RailTex represented to the Board --- (i) "the rail lines to be operated by CSO do not connect with any railroad in the RailTex corporate family" and (ii) "the transaction is not part of a series of anticipated transactions that would connect CSO with any railroad in the RailTex corporate family." Id. at 3; see also 49 C.F.R. § 1180.2(d)(2). Having purchased the CSO lines on that basis in late 1996, RailTex, through NECR, now seeks a CSO-NECR connection in this proceeding. It is in no way entitled to such a windfall, and NECR's requests should accordingly be denied.

^{27/} The purchase price paid for the CSO lines also presumably reflected the fact that CSO connected only with Conrail and could not interchange directly with the NECR (then CV) lines. CSO acquired those lines from Conrail only a year little more than a year ago. See Connecticut Southern R.R. -- Acquisition and Operation Exemption -- Lines of Consolidated Rail Corporation, STB Finance Docket No. 33120 (served Sept. 27, 1996); RailTex, Inc. -- Continuance in Control Exemption -- Connecticut Southern R.R., STB Finance Docket No. 33121 (served Sept. 27, 1996).

10. New York Cross Harbor Railroad.

New York Cross Harbor Railroad ("NYCH") filed comments requesting that CSX should be required to honor certain shipper routing directions and that CSX and NS should be made jointly responsible for all pre-Closing Conrail liabilities. NYCH-3. Those arguments are addressed in Section VIII.1. As set forth therein, neither condition is justified and NYCH's requests should be denied.

11. Northwest Pennsylvania Rail Authority.

The Northwest Pennsylvania Rail Authority ("NWPRA") claims that it -- and not Conrail -- has operating rights on a 3/10ths mile long segment at Corry, Pennsylvania on the former Erie line between Hornell and Corry that is allocated to NS in the proposed transaction. NWPRA-2 at 3-4. NWPRA believes that NS needs trackage rights over that 3/10ths of a mile segment (the "NWPRA Segment") in order to move traffic between Erie, PA and Hornell, NY via Corry. In exchange for these trackage rights, NWPRA asks that 27 miles of "reciprocal trackage rights" be granted to the Oil Creek and Titusville Lines -- Meadville Divisions, NWPRA's contract operator. NWPRA does not argue that the reciprocal trackage rights are justified to resolve any transaction-related harm.

Even assuming NWPRA correctly has described the ownership and operating rights with regard to the NWPRA Segment, NWPRA is not entitled to any relief. NWPRA is under the mistaken impression that NS will operate over the NWPRA Segment. As described in the Rebuttal Verified Statement of Michael Mohan, NS does not anticipate sending any through traffic over the NWPRA Segment. Mohan RVS at 70. While the route from Hubbard to Hornell via the former Erie Lackawanna is assigned to NS under the

Transaction Agreement, NS has no immediate plans to restore operations on other segments of the route that are presently out of service, and the trackage rights are not essential to NS's service to local customers. Id. NS does not need nor want trackage rights over the NWPR Segment for through movements. Thus, operations over this segment are not critical to the proposed operating plan.

If NS at some time needs to operate over the line, and if NS must receive permission from NWPR to do so, NS can negotiate directly with NWPR. Imposition of the reciprocal trackage rights request has no legal justification and is totally unrelated to the proposed transaction.

12. Ohi-Rail Corporation.

Ohi-Rail Corporation filed comments asking the Board to require CSX to grant NS access to Centene Energy's Eastlake plant. (OHIRAIL-2). That request should be denied for the reasons set forth in Section XIV.C.4.

13. Philadelphia Belt Line Railroad.

Philadelphia Belt Line Railroad filed comments seeking a condition that would expand access to certain rail lines in Philadelphia. PBL-3. As is demonstrated in Section VIII.5.b., there is no basis for granting that access and PBL's request should be denied.

14. Providence & Worcester Railroad.

Providence & Worcester Railroad fully supports approval of the Transaction and has not sought any relief from the Board. See P&W Letter of Oct. 17, 1997 (Vol. 3). However, it has brought to the Board's attention its effort to acquire New Haven Station in a

separate proceeding under the 3R Act. Id. As explained in Section VI, P&W's effort to seize New Haven Station not only lacks any legal basis but also contravenes the terms of P&W's settlement agreement with CSX.

15. Reading, Blue Mountain & Northern Railroad.

Reading Blue Mountain and Northern Railroad ("RBMN") acknowledges the public benefits of the proposed transaction, but contends that it fails to extend new competition to the region RBMN serves. RBMN-5 at 3. RBMN therefore requests that the Board condition its approval of the proposed transaction on an amendment of an agreement RBMN entered into with Conrail last year in order to relieve RBMN of certain contractual provisions of that agreement. Id.

Specifically, RBMN asks the Board to require amendment of the Purchase and Sale Agreement for the sale of the Lehigh Division from Conrail to RBMN (and the related deed) to remove or modify the provision requiring RBMN to pay additional consideration for traffic interlined with carriers other than Conrail on the Lehigh Division. RBMN purchased its Lehigh Division from Conrail on August 19, 1996. See RBMN-5 at 3. As provided for in the sales agreement and the related deed, RBMN must pay Conrail a specified amount for each carload of traffic that it could interchange with Conrail, but that it instead interchanges with another carrier. If the Board approves the Application, this additional consideration will be paid to NS as Conrail's successor with respect to the lines connecting with RBMN's Lehigh Division.

There is no basis for the condition RBMN requests because it has no relation to any impact the proposed transaction might have on RBMN. Clearly, RBMN is simply

seeking to use this transaction to relieve itself of pre-existing contractual obligations that it wishes to avoid but that have no connection with the Transaction. Under well settled principles, the Board will not impose conditions to address pre-existing circumstances that are not created by the transaction before it. See Section III.C.

Furthermore, contrary to RBMN's claim, the requirement that RBMN pay additional consideration (which RBMN mistakenly refers to as a "penalty") is not arbitrary. Rather, these provisions were a part of the bargain between Conrail and RBMN. As stated by James Hartman, Jr., Director, Asset Utilization, for Conrail, in his Verified Statement, the additional consideration reflects a reduced up-front purchase price for the property. Hartman RVS at 3-4. The effect of RBMN's request, if granted, would be to reduce the total consideration for the Lehigh Division below the negotiated price. This purchase occurred only recently -- August 1996 -- and Conrail therefore has not had time to realize the benefits that justified the reduced up-front purchase price. See Purchase and Sale Agreement at 9.8, Appendix HC-1 to Muller VS [[[

RBMN argues that it might pay more under the contract provision it challenges after this transaction because the scope of what can "commercially be interchanged" could be substantially greater. This allegation is baseless and the perceived harm is highly speculative. RBMN cannot point to any traffic that moves over the Lehigh Division that is currently not subject to the "penalty provisions" because it cannot "commercially be interchanged" with Conrail, but that may be subject to the "penalty provisions" if a combined NS/Conrail is substituted for Conrail after the transaction. See Interrogatory Response,

RBMN-7, at 6. RBMN has failed to show that it will suffer any harm from this contractual provision as a result of the Transaction.

RBMN further contends that, if the Transaction is approved, it will lose \$400,000 from the movement of fly ash that currently originates in Connecticut on the New England Central Railroad, continues over Conrail, and then moves over the RBMN to destination. See Id. at 3. Conrail's portion of this service will be divided between CSX and NS. RBMN asserts that it may lose this movement as a result of changes in pricing or handling efficiencies. RBMN contends that if it were not required to pay additional consideration, RBMN could continue to participate in the fly ash movement since the fly ash could be handled by Delaware & Hudson (CP) in single-line service between New England Central and RBMN. Muller VS at 9.

Contrary to RBMN's concerns, there is no reason to believe that RBMN will lose the fly ash movement. See Mohan RVS at 63-65. It is in NS's interest to keep the fly ash movement on its lines. NS has been successful, and believes it can continue to be successful, competing for movements in New England. RBMN claims the movement from Connecticut may be diverted to a destination on CSX, but if so, the receiver on RBMN would serve its needs from another origin. The traffic moves in rail cars owned by the receiver and will likely continue to move via rail and via RBMN regardless of the Transaction. In any event, RBMN does not argue the Transaction will result in the loss of essential services, but rather simply reduced revenue. Reduced revenue, however, is not a competitive harm that justifies the imposition of conditions.

Mr. Muller claims that the ability of RBMN to interchange with other carriers without the payment of additional consideration is consistent with the policies espoused by NS, and supports this assertion by reference to a settlement offer contained in a draft NS letter regarding NS's proposed acquisition of the entire Conrail system. However, that settlement offer is irrelevant to the present transaction, as it has nothing to do with the joint NS-CSX acquisition of control.

RBMN also requests that the Board order NS to grant Delaware & Hudson access at Reading to the overhead trackage rights NS recently granted D&H in the CP Agreement. D&H currently operates over the RBMN's Lehigh Division and pays trackage rights fees to RBMN of approximately \$85,000 per month. As a result of the CP Agreement, RBMN contends that D&H will shift traffic away from RBMN's Lehigh Division, and thus reduce trackage fees paid to RBMN. RBMN contends that, with the requested condition, D&H would continue to operate over RBMN's Reading Division, rather than on the NS "Penn Route," and RBMN would be able to retain some of its trackage rights fees.

RBMN's prediction about how D&H will choose to route its traffic is entirely speculative. Furthermore, RBMN admits that these predicted effects will not impact shippers; nor has it claimed that they would result in any loss of essential rail services. If RBMN's predictions are correct, they will simply result in reduced revenue to RBMN. That is not a competitive harm justifying imposition of conditions.

Moreover, RBMN's unsubstantiated assertion that the transaction will result in congestion and safety problems on NS's "Penn Route" based upon D&H's use of major

sections of that route is erroneous. NS will be investing heavily in the line to increase capacity and, as a result, the line may well become less congested. See Mohan RVS at 65.

In sum, RBMN's requests for conditions should be denied.

16. Southern Railroad of New Jersey.

Southern Railroad of New Jersey ("SRNJ") a shortline serving Atlantic, Camden, Cumberland, Gloucester and Salem Counties in New Jersey, submitted a letter dated October 8, 1997 stating that it "conditionally supports" approval of the Transaction "based on the assumption that [SRNJ] and a neighboring shortline, the Winchester and Western (WW) will be allowed unrestricted interchange of traffic at Vineland, NJ." SRNJ notes that it has discussed such an interchange, which would be at a location inside the South Jersey/Philadelphia Shared Assets area, with both CSX and NS.

CSX and NS have no objection to a SRNJ-WW interchange at Vineland for the exchange of traffic between them, and intend to continue negotiations for suitable interchange arrangements. However, because SRNJ has not sought any conditions or other relief, no action by the Board is required.

17. Wheeling & Lake Erie Railway.

In its Responsive Application, the Wheeling & Lake Erie Railway Company ("W&LE") seeks an extremely ambitious and totally unwarranted series of conditions. The requested conditions would, among other things, dramatically and unjustifiably expand the size of W&LE's route structure.

The conditions sought by W&LE involving expansion of market access are as follows:

- (1) Haulage and trackage rights to Chicago, IL, including access to the Belt Railway of Chicago and rights for interchange with all carriers, specifically including Wisconsin Central Ltd. ("WCL");
- (2) Haulage and trackage rights from Bellevue, OH, to Toledo, OH, a distance of 54 miles, for an interchange with the Ann Arbor Railroad, Canadian National and the Indiana & Ohio Railroad (also including access to British Petroleum for movement of coke to Cressup, WV);
- (3) Haulage and trackage rights to Erie, PA, with the right to interchange with other railroads;
- (4) The right "to lease to own" Conrail's Randall Secondary from Cleveland, MP 2.5, to Mantua, MP 27.5;
- (5) The right "to lease to own" the Huron Branch (Shinrock to Huron) and Huron dock on Lake Erie;
- (6) Haulage and trackage rights on CSX from Benwood to Brooklyn Junction and its yard facilities for commercial access to PPG and²Bayer;
- (7) Access on the Conrail Fort Wayne Line to the National Stone quarry near Bucyrus, via the Spore Industrial Track, a distance of 6.2 miles from CP Colsan, MP 200.5, on the Fort Wayne Line (access to the Fort Wayne line would be from the W&LE at CP Orr, MP 124, and from a point near Fairhope at MP 97.8);
- (8) Trackage rights on the NS Sandusky District from Chatfield, OH, to Colsan, OH (for a junction with the Conrail Fort Wayne Line and access to the Spore Industrial Track);
- (9) Access, apparently via trackage rights, to a stone quarry located on the Northern Ohio Railway at Maple Grove, via a junction on the NS Fostoria District at MP 269.4;
- (10) Access, apparently via trackage rights, to the stone terminals in the Macedonia, Twinsburg and Ravenna areas;
- (11) Access, via haulage and trackage rights, to Wheeling Pittsburgh Steel at Allenport, PA; and

(12) Access, via haulage and trackage rights on the CSX New Castle Subdivision, to the Ohio Edison Power plant at Niles, OH, and to Erie, PA, for interchange to the Buffalo & Pittsburgh.^{78/}

W&LE also asks the Board to impose certain guarantees relating to service when W&LE operates as a tenant on lines owned by other carriers. In particular, W&LE seeks an order: (a) compelling a Class I carrier to "make the W&LE whole" for revenue lost if the Class I carrier holds a W&LE train at any location for "an extended period of hours" while the Class I carrier's trains are run without delay; (b) requiring a Class I carrier to pay \$1,000 to W&LE whenever a decision to hold a W&LE train "results in a delay that requires the train to be recrewed;" and (c) requiring a Class I carrier to pay W&LE \$10,000 as liquidated damages each time a W&LE customer misses a particular day's switch due to a Class I carrier deciding to give other trains preference.

W&LE also seeks to be relieved of its joint facility maintenance obligations at four railroad grade crossing locations at Wellington, Canton, Steubenville and Cleveland, OH, with maintenance costs instead to be allocated on a "proportional use" basis.

^{78/} There are two additional access requests contained in the Verified Statement of Larry R. Parsons--trackage rights and commercial access to Reserve Iron & Metal (a purported "2-to-1" shipper) and trackage rights and commercial access to Weirton Steel. However, these requests are not echoed in the Verified Statement of W&LE's operating witness, Steven Wait, and no operating plan is provided with respect to such requests. On the other hand, Mr. Wait's Verified Statement contains what appears to be characterized as a "recommendation" that is not referenced in Mr. Parson's Verified Statement, namely, that for purposes of "route congestion relief," NS should operate its trains (presumably via trackage rights) from Bellevue, OH to Orrville and on to East Canton via the W&LE.

Finally, W&LE requests a post-transaction approval oversight condition by which the Board would retain jurisdiction to entertain an inclusion petition in the event that W&LE fails during such an oversight period.^{79/}

As discussed below, there is no factual or legal basis for imposition of the conditions sought by W&LE. W&LE's Responsive Application is, in sum, an opportunistic attempt by a financially struggling carrier to "make itself healthy" at the expense of the parties to the Conrail acquisition.

a. W&LE Has Dramatically Overstated the Potential Competitive Harm It May Suffer From The Transaction.

- (i) The Proposed Acquisition of Conrail Will Result in Traffic Diversions Amounting to a Net Annual Revenue Loss for W&LE of Approximately \$1.5 Million, Not an Annual Loss of \$12.7 Million or Greater Claimed by W&LE.

The Applicants' original diversion studies showed a net annual revenue loss for W&LE of approximately \$1.4 million. The NS study showed W&LE losing \$1.9 million annually, while the CSX study showed W&LE gaining \$451,000 annually, due to traffic diversions to and from rail carriers. CSX/NS-18 at 82-83; CSX/NS-19, Vol. 2B, Williams VS at 88; CSX/NS-19, Vol. 2A, Rosen VS at 176. The NS and CSX studies were performed by highly experienced outside consultants. NS' consultant, John H. Williams, has

^{79/} Several parties, including the following, express support for conditions to preserve the W&LE and/or for some other aspect of the W&LE's submission: Ohio Rail Development Commission, Public Utilities Commission of Ohio (OAG-4); Pennsylvania House Transportation Committee (Pa H.T.C.-2); PPG Industries; Redland Ohio, Inc. (Redland-2); Southwestern Pennsylvania Regional Planning Commission (SPRPC-2); Stark Development Board, Inc. (SDB-4); the Timken Co.; Toledo-Lucas County Port Authority (TLCPA-4); Toledo Metropolitan Area council of Governments (TMAC-1-3).

34 years of railroad-related experience; CSX's consultant, Howard A. Rosen, has 16 years of experience in conducting railroad traffic studies.

By contrast, W&LE's diversion study, which was performed by Reginald M. Thompson, W&LE's own Vice President Marketing & Sales, purports to show a loss to W&LE of \$12.7 million in annual gross revenue as a result of the instant transaction. And a separate study performed for W&LE by Wilbert A. Pinkerton, Jr., an outside consultant, projects an even greater loss to W&LE than does Mr. Thompson (as much as \$15.0 in annual revenues).

As demonstrated in the Rebuttal Verified Statement of John H. Williams, the traffic and revenue losses projected by W&LE's witnesses are dramatically overstated. Mr. Williams finds that even using the FY 1996 traffic data utilized by W&LE's witnesses as the basis for analysis (as contrasted to 1995 calendar year data), W&LE's annual revenue loss from diversions to NS will be \$2.0 million. Williams RVS at 49-50. This loss is only \$100,000 per year greater than that originally projected by Mr. Williams (in CSX/NS-19) and is, of course, much lower than that projected by W&LE.

In the case of Mr. Thompson, the overstatement of losses appears to have resulted from a combination of questionable methodology, assumptions and conclusions. (Among other things, the work papers deposited by W&LE for Mr. Thompson fail to provide support for his methodology and conclusions. See Williams RVS at 47-49.) The vast majority of the W&LE losses claimed by Mr. Thompson will either not occur, or, if they do occur, will be unrelated to the Conrail transaction or will be much smaller than projected.

Approximately \$8.8 million of Mr. Thompson's projected annual losses will not occur at all. \$3.6 million of this projected loss was attributed to the loss of what Mr. Williams aptly characterizes as W&LE's "Phantom Train"--certain run-through NS intermodal service between Bellevue, OH and Hagerstown, MD that operated over W&LE for about six weeks in 1997 and that was cancelled by NS due to seriously inadequate on-time performance and service by W&LE. Williams RVS at 50-51. The short-term movement of this traffic is not relevant to either the 1995 calendar year period relevant to this transaction or to the FY 1996 analysis conducted by W&LE, and the cancellation of the movement had absolutely nothing to do with the proposed acquisition of Conrail by CSX and NS.

Some \$3.1 million of loss projected by Mr. Thompson will not occur either because the competitive position of the expanded NS vis a vis W&LE will be identical to that of Conrail before the transaction (i.e., NS simply stepping into Conrail's shoes as a competitor of W&LE^{80/}) or because only W&LE today serves the origin or destination station (so another carrier would not be capable of diverting the movements). Williams RVS at 51-54. An additional \$2.1 million of loss projected by Mr. Thompson will not occur because the relevant W&LE stations to which such loss is attributed are important enough that the expanded CSX can be expected to enter into a commercial alliance with W&LE to serve them via joint line service in competition with NS. Williams RVS at 54-55.

^{80/} This category includes the Huron Dock situation. W&LE's ability to retain iron ore traffic from Huron, OH to Mingo Junction, OH depends not on the Conrail transaction but rather on commercial negotiations between W&LE and NS regarding extension of W&LE's Huron Dock lease. That lease was entered into in 1994, and its expiration date resulted from negotiations at that time, not from the present Conrail transaction.

The remaining \$3.9 million of the losses projected by Mr. Thompson pertains to competitive factors that would account for diversions from W&LE to NS (primarily competition between W&LE single system service and NS single system service, and redistribution of Pittsburgh market traffic), but Mr. Thompson has overstated the extent of these losses by about 100 percent. Williams RVS at 55-57.

In the case of Mr. Pinkerton, his projections of carload, intermodal and revenue losses are unreliable and should be disregarded. Mr. Pinkerton's inflation of Mr. Thompson's projected loss figures is not supported by any verifiable methodology. Mr. Pinkerton's inflation of Mr. Thompson's projected W&LE diversion losses appears to have resulted chiefly from (a) Mr. Pinkerton's undue reliance upon a W&LE Five-Year Plan (developed in October 1996) that itself incorporated unrealistically high projected increases in W&LE carloads and linehaul revenues and (b) his further inflation of iron ore and intermodal revenues even beyond those projected in the W&LE Five-Year Plan.^{81/} Williams RVS at 57-64. When asked in discovery to describe the methodology and sources of data used to develop the carload and revenue projections contained in the W&LE Five-Year Plan, W&LE provided an unresponsive answer, simply referring back to the Five-Year Plan itself. Interrogatory Response, W&LE-6 at 15. The unreliability of Mr. Pinkerton's projections is underscored by the fact that some categories of carload and revenue losses he projects in his study actually exceed the total carloads and revenues projected for FY 2001 in W&LE's own Five-Year Plan.

^{81/} As compared with W&LE's averages for the 1992-96 fiscal years, the W&LE Five-Year Plan projected a 90% increase in carloads and a 47% increase in net linehaul revenues for FY 2001.

(ii) The Fundamental W&LE Theory That W&LE Was Created to Fix Competitive Harms of a NS-Conrail Merger is Erroneous.

W&LE's competition arguments rest in no small measure on its assertion that W&LE was created as a competitive "fix" for a merger between NS and Conrail. This assertion is simply incorrect. While W&LE's current Chairman and CEO, Mr. Parsons, did not join the W&LE until March 1992, NS witnesses James W. McClellan and John H. Williams were "present at the creation" of the W&LE. Mr. McClellan was one of the NS officials involved in the corporate planning effort resulting in the sale of the W&LE lines; Mr. Williams was a consultant to the promoters of the Wheeling Acquisition Corporation and he was involved in, among other things, the preparation of a business plan for what would become the new W&LE. McClellan RVS at 12-13; Williams RVS at 43-44.

Messrs. McClellan and Williams agree that NS sold the lines that became the "new" W&LE in 1990 as part of a NS' downsizing effort, not as a competitive solution to a Conrail acquisition. Although NS endeavored to buy Conrail in the 1980's, that effort failed, and NS turned to other matters. NS decided in 1987 that it needed to downsize its route structure and personnel to avoid deterioration in operating income, and as part of this effort NS identified over 2500 route miles for potential sale. McClellan RVS at 10-13.^{82/} The W&LE lines did not fit NS strategic objectives; among other things, the W&LE was designed as a through route but could not serve that function effectively for NS. It was the

^{82/} Indeed, Mr. McClellan's recollection is entirely consistent with the language of the 1988 Offering Proposal issued by the W&LE's founders and promoters, which explained, in pertinent part, that "NS decided to divest the Wheeling lines as part of an overall plan to trim an estimated 2,500 miles of rail lines from its system . . ." See Williams RVS at 36-37.

third carrier in most markets it served and it was going to need reinvestment in the near future. Id. at 12-13.

Moreover, the W&LE's founders did not view the W&LE as a prospective competitor of a NS/Conrail combination in the Pittsburgh/Chicago corridor at the time of the sale. There was no longer the prospect of such a combination, and the motivation of the W&LE's founders and investors was to create a highly profitable regional railroad that would provide a high rate of return on investment. Williams RVS at 35-42.

The "revisionist history" practiced by W&LE in its Responsive Application, and particularly by its Chairman Mr. Parsons in his Verified Statement, should cast the credibility of its entire application into serious doubt. Mr. Parsons asserts, for example, that:

I have reason to believe that the recreation of the W&LE in [the Pittsburgh/Chicago Corridor] was NS's response to the²Antitrust Division's divestiture demand. This would-be new W&LE, added to the then-viable Pittsburgh & Lake Erie, was supposed to offset the clearly anticompetitive aspects of a Conrail/NS combination in the Pittsburgh/Chicago Corridor.

. . . What is not so well known is that the creation of the new W&LE could be seen as the divestiture mechanism intended to bring competition to the new NS/Conrail combination in the Pittsburgh/Chicago Corridor. This fact, coupled with the excessive price of the later W&LE spin off . . . appeared to assure the new NS/Conrail combination of not-too-worrisome competition despite the technical compliance with the Antitrust Division's divestiture order.

WLE-4, Parsons VS at 24-25. Of course, there was no NS/Conrail combination at the time when NS sold the lines making up the W&LE to the founders of the W&LE, and the views of the Antitrust Division in 1985 with respect to what was by then an abandoned effort by

NS to acquire Conrail were irrelevant to the 1990 sale. Such views are even more irrelevant today, because NS is not proposing to acquire all of Conrail's operation, but rather to allocate those operations between NS and CSX.^{83/}

W&LE's "retelling" of the history of its formation also involves misrepresentations about its more recent dealings with NS. While W&LE begrudgingly acknowledges NS' cooperation in the 1994 W&LE debt restructuring and NS' forgiveness of debt and relief from a portion of the P&T √ lease payment obligations (W&LE-4, Parsons VS at 23), W&LE seeks to suggest that NS failed to negotiate fairly with W&LE after the instant Conrail transaction was underway. NS has been fair in its dealings with W&LE. The sale of lines to the W&LE's founders in 1990 was an arms length transaction. NS has repeatedly helped W&LE since its financial problems arose. In addition to the debt forgiveness and lease payment relief noted above, NS gave W&LE access to Huron Dock (and thereby to new ore traffic) through a lease entered into in 1994. NS made a settlement offer in this proceeding to W&LE in the interest of moving forward and settling as many

^{83/} Mr. Parsons' credibility, and the credibility of W&LE's entire filing, is further diminished by Mr. Parsons' misguided effort to blame W&LE's financial woes on the Woodside Consulting Group (which is the company of which Mr. Williams is the President). As demonstrated in Mr. Williams' Rebuttal Verified Statement, there are numerous inaccuracies in Mr. Parsons' description of Woodside's role during the founding of the W&LE. Williams RVS at 42-46. Moreover, the incredibility of Mr. Parson's testimony is patent on its face. For example, Mr. Parsons' asserts that, by the time he took over leadership of W&LE in 1992, the previous W&LE management team had already experienced two years of the railroad's performance "not going according to plan." WLE-4, Parsons VS at 28-29. Nevertheless, he also claims that he relied on (what presumably would have been by then discredited) a pre-acquisition study and plans by Woodside Group in believing that W&LE "still had at least 3 years to replace any loss of coal revenues." Id. at 29.

issues as possible on a voluntary basis. McClellan RVS at 17-18. This offer, which had a value well in excess of the revenue losses that will be experienced by W&LE as a result of the transaction, was rebuffed by W&LE.

(iii) W&LE Significantly Overstates the Potential for
NS Market Dominance Following the Conrail Transaction.

W&LE has portrayed NS as having overwhelming market dominance in the region in which W&LE operates following this transaction, but in view of the proposed division of Conrail operations between NS and CSX, this portrayal is not accurate. CSX already vigorously competes in many of the regions (including Western Pennsylvania) where W&LE and Conrail currently operate, and it will be commercially advantageous for CSX to use W&LE in joint line service to compete with NS after the transaction. Seale RVS at 1-2; Williams RVS at 54-55. W&LE's efforts to overplay the size and dominance of the NS' post-transaction system include a graphic display in its Responsive Application: a map of the "Post Acquisition of Conrail by Norfolk Southern." That map incorrectly shows NS as operating several lines that will actually be operated by CSX.^{84/}

WLE's claim that it plays a role as a "rate policeman" in the Pittsburgh - Chicago corridor, which role must be preserved (See W&LE-4, Parsons VS at 34), is similarly, insubstantial. NS and CSX already compete with each other in that corridor, and such competition will continue following the transaction. Moreover, it strains credulity to believe that WL&E would be able to offer significantly lower rates to shippers for markets

^{84/} These lines are Berea, OH to Crestline, OH; Crestline to Columbus, OH; Crestline through Lima, OH and Ft. Wayne, IN to Chicago, IL; Galion, OH through Muncie, IN to East St. Louis, IL; and Columbus through Ridgeway, OH and Dunkirk, OH to Toledo, OH. See Seale RVS at 2-3.

that W&LE now seeks to serve via trackage or haulage rights, given the costs to W&LE that would be associated with its operations as a tenant on such lines.

W&LE also contends that an expanded NS will be anti-competitive because even when W&LE has a superior rate and service on an individual move, NS may be able to offer "package rates" to a shipper with multiple locations. WLE-4, Parsons VS at 15. In this regard, W&LE is attempting to characterize a benefit to shippers as anti-competitive. Packaged service is driven by shipper demands and competitive forces. See Seale RVS at 3-4. Shippers are increasingly looking for rate and service packages. Id. It is up to a shipper to choose whether the benefits of packaged service outweigh the benefits of a particular single-line move. The existence of such a choice is a hallmark of competition, not of a lack of competition.

(iv) W&LE Overstates the Creation of 2-to-1 Situations.

Mr. Parsons alleges that Reserve Iron & Metal is a "2-to-1" shipper and states that W&LE is seeking trackage rights and commercial access to this shipper. WLE-4, Parson VS at 34. This request is not included in Mr. Wait's list of requested conditions, and no operating plan is presented with respect to it. In any event, Reserve Iron & Metal is not a 2-to-1 shipper. It is served today by both Conrail and CSX and is open to switching on both. Seale RVS at 5. After the transaction, NS will step into Conrail's shoes and CSX's service will not change. Additionally, the facility will remain open to switching for other carriers that reach Cleveland.

(v) W&LE Also Overstates the Competitive Impacts of the Transaction on Stone Transportation.

Short haul movement of stone is extremely truck competitive, so single-line rail movement can make it easier to capture the traffic. However, joint-line stone movement can and does work, particularly if the rail carriers work together to simulate the efficiencies of single-line service, for example by utilizing operational mechanisms such as run-through locomotives and pooling of cars. Seale RVS at 5-6. NS and CSX have agreed to honor existing contracts for the duration of the contracts. Forced intrusion of a third party would exacerbate complex operational situations. See Friedmann RVS at 12-25.

b. If W&LE Is Facing a Threat to Its Continued Financial Viability, That Threat Is the Result of W&LE'S Long-Standing and Structural Problems, Not the Result of the Conrail Transaction.

W&LE's financial performance has been poor since its formation in 1990. Almost immediately, W&LE failed to meet the expectations of its founders and investors, and the original management team was replaced after about two years of operations. In order to stay afloat, W&LE was required to restructure its debt in 1994. Even under its current management, W&LE has generated little if any net income. W&LE's financial statements and earnings performance show little net income for the past five fiscal years, due to poor operating performance and a highly leveraged capital structure. See Williams RVS at 66.

W&LE has long-term structural problems unrelated to the Conrail transaction. While W&LE reduced transportation costs on the lines acquired from NS, anticipated traffic growth did not occur. W&LE has very low revenues per route mile. At the same time, W&LE has avoided "rationalizing" its network, electing instead to continue to hope for a

substantial increase in its revenue base. McClellan RVS at 14. To solve its financial woes, the W&LE should downsize its system, focusing on markets such as the Akron and Canton areas where it has a significant presence, and shedding the most unprofitable segments of its system. Id. However, W&LE has refused to take this step, even though it could feasibly be done in its service area, and even though continued access to markets W&LE is reluctant to give up could likely be achieved through trackage rights and other arrangements even after light density lines are sold. Id. at 15.

Only a few months ago, in a different context, W&LE advised the Board that its financial condition had been deteriorating sharply. See Docket No. AB-227 (Sub-No. 10X) (involving the abandonment by W&LE of the Massillon Branch). W&LE stated at that time that its financial condition was so poor that money it expected to receive from salvage of track materials associated with an abandonment would be "vital" to its short-term viability. This only reinforces the point: the precarious nature of W&LE's financial condition is not related to the Conrail transaction.

c. The Instant Transaction Does Not Threaten
 Essential Services for W&LE Shippers.

Even with its precarious condition, W&LE has weathered temporary downturns with impacts greater than any threatened by this transaction. According to W&LE's Chairman, W&LE survived the loss of 25% of its traffic base during the 10 1/2 month Wheeling Pitt strike. WLE-4, Parsons VS at 30. By contrast, a loss of \$1.5 million per year in revenues (due to net diversions associated with the Conrail transaction) would represent less than 5% of W&LE's total revenue base.

W&LE's Responsive Application is grounded on an essential services claim, but W&LE fails utterly to demonstrate that any loss of essential transportation services for its shippers and customers is threatened. Indeed, W&LE has conceded in discovery that rail service can be expected to continue on its system even if it were to go into bankruptcy. NS asked the following question in its Interrogatories to W&LE:

Explain the basis for your contention that, in the event that W&LE entered bankruptcy, rail service would not be continued on the rail lines (or any part of them) currently operated by W&LE. . . .

W&LE responded as follows:

W&LE objects to this interrogatory in that it is based on a faulty premise. W&LE does not argue that all rail service would close if it entered bankruptcy. Service under directed service order, or by NS if inclusion is ordered, would have different characteristics than that now provided by W&LE which has been endorsed by its supporting shippers in W&LE-4.

Interrogatory Response, W&LE-6 at 5.

W&LE misconstrues the meaning of an "essential service." Ensuring essential service to shippers and customers does not mean ensuring the continuation of a particular railroad's existing management, financial structure or route structure. W&LE has not shown, and could not show, that shippers and customers would be deprived of service if W&LE were to cease to exist in its current form.

The majority of W&LE's major customers are also served by other rail carriers. McClellan RVS at 15. To the extent that the cessation of W&LE service would result in creation of any 2-to-1 points, the affected shippers and customers could be protected

through various means, including, as appropriate, direct access to another carrier, trackage rights or ownership of lines. Id. at 16.

Moreover, W&LE's primary load centers all are near other railroads. Thus, it would be very feasible for other railroads to serve these load centers by modest extensions of their existing route systems. Indeed, less than 220 miles of the W&LE system (about 25% of its system) would need to be operated to provide rail service to all of the W&LE's customers. And less than 140 miles of the W&LE (about 16% of its system) would be needed to provide service to all stations having 1000 or more carloads per year. McClellan RVS at 16.

The presence of the Neomodal Terminal on W&LE does not make W&LE an essential service. As discussed separately in this Rebuttal with respect to the Comments of Stark Development Board, Neomodal is not itself an essential service and Neomodal's financial problems cannot be blamed on NS and/or CSX. See Section XV. W&LE incorrectly represents (W&LE-4, Parsons VS at 36) that "NS and CSXT closely advised and consulted with the Stark Development Board in placing the Terminal on W&LE." As demonstrated separately in Section XV of the Rebuttal, NS and CSX were not consulted in advance about the placement of the terminal on W&LE. W&LE has also confirmed in discovery that prior to the construction of the Neomodal Terminal, NS never made any guarantees to W&LE concerning the use by NS of such terminal. Interrogatory Response, W&LE-6 at 7.

- d. The W&LE'S Requested Conditions Are Not Reasonably Related to the Alleged Competitive Harm to the W&LE and the Requested Conditions Would Unduly Interfere With and Harm NS and CSX Operations.

Even assuming, arguendo, that W&LE had established some competitive harm necessitating the imposition by the Board of conditions, any such conditions would have to be reasonably related to the competitive harm. The extraordinary list of conditions sought by W&LE does not bear any reasonable relation to the asserted harm and is way out of proportion in nature and degree to the asserted harm.

W&LE has not demonstrated that any of the markets affected by its proposed conditions would experience competitive harm as a result of the Conrail transaction. For example, W&LE seeks rights to provide it with direct access to Chicago and Toledo, but the Conrail transaction will have absolutely no adverse effect on W&LE's ability to serve those markets through indirect access via a connecting carrier as it does today (though in some instances the connection may change). See Williams RVS at 65. W&LE was asked in discovery to identify, with respect to each condition being sought, the particular competitive harm to which each condition relates, and to detail the manner in which the condition is expected to ameliorate such competitive harm. W&LE's response was telling: W&LE claimed that a special study would be required to do so and said only that its requested conditions "are addressed to the cumulative impact of the expected diversions from W&LE which would render it incapable of providing competitive service to its shippers."

Interrogatory Response, W&LE-6 at 5.

W&LE presently operates over a total of 864 miles in four states (inclusive of trackage rights operations). W&LE-4, Wait VS at 69. The trackage rights, haulage rights

and other rights and access sought by W&LE as conditions herein would dramatically enlarge the size of the W&LE's route structure. While W&LE included in its Responsive Application a map purporting to show the expanded route structure of NS in W&LE's service area (which map, as discussed above, inaccurately overstates the number of lines to be operated by NS post-transaction), W&LE did not provide any graphic display of its own requested conditions. Applicants are supplying such a graphic display (See maps following Page 2 of Friedmann RVS); it shows clearly the dimensions of W&LE's opportunistic attempt to broaden its geographic reach.

Not only are W&LE's requested conditions way out of proportion geographically to the limited competitive harm it will suffer, these requested conditions would also provide W&LE with a financial windfall. W&LE's witness Mr. Thompson quantifies gross revenue gains to W&LE of almost \$11 million per year from the requested conditions, even without taking into account revenues attributable to the requested haulage/trackage rights to Toledo, OH (which Thompson shows as "Unknown"). W&LE-4, Thompson VS at 107. Thus, the requested conditions would represent revenue gains for W&LE more than seven times the size of the net \$1.5 million annual revenue loss for W&LE projected by Applicants.

There are, moreover, serious operational problems for NS and CSX associated with W&LE's requested conditions. These problems are detailed at length in the Rebuttal Verified Statements of NS witness John Friedmann at 1-28 and CSX witness John Orrison at 58-68. Generally speaking the trackage rights and other access conditions requested by W&LE would, individually and cumulatively, cause operational problems and/or increase

congestion and/or increase operating costs and/or require unanticipated and costly construction projects, and these conditions would result in a diminution of the public benefits associated with the Conrail transaction. Among other things, many of W&LE's requested access conditions would involve complicated run-around moves, reverse moves and movements against the current of traffic that would entail serious delays and impediments to operations on high-density main lines. See Orrison RVS at 62-64; Friedmann RVS at 4-6, 13-26.

The performance guarantees sought by W&LE from Class I carriers who would be forced to "host" W&LE if the conditions are imposed seek unjustified preferential treatment for W&LE together with draconian penalties that could impose significant financial obligations on NS or CSX for problems that are really the fault of W&LE itself. See Friedmann RVS at 28-30. W&LE also seeks, without justification, to use this transaction as a means of extricating itself from certain joint facility maintenance obligations entered into at previous points in time. It should not be permitted to do so. See Friedmann RVS at 30-32.^{85/}

Nor should NS be forced to operate over W&LE between Bellevue and Orrville, OH and Canton, OH pursuant to W&LE's "congestion relief" proposal. This route is not currently suitable to NS operations. It is parallel to what will be two major east-west NS routes through Ohio, and the other two routes are high-speed, high-capacity routes. The W&LE route, by contrast, has too few sidings, lacks sufficient signalling and already

^{85/} In at least one instance, an accommodation can almost certainly be reached. Orrison RVS at 68, 69.

experiences delays unacceptable to NS' type of operation. Friedmann RVS at 9-11. Moreover, the new connection that would be required at Orrville, OH would be expensive. W&LE acknowledges that it has not even performed an engineering study for this new connection. Interrogatory Response, W&LE-6 at 15-16.

D. Other Parties Seeking Conditions
for the Benefit of Shortline Railroads.

1. American Short Line Railroad Association
and Regional Railroads of America.

The American Short Line Railroad Association ("ASLRA") and the Regional Railroads of America ("RRA") (collectively, the "Associations") filed comments supporting approval of the Transaction but asking the Board to impose a variety of broad conditions designed to benefit their members. The conditions sought are generic and far reaching.^{86/}

The very breadth of those requests requires that they be denied. The Associations' requests are essentially legislative in nature. They seek sweeping and fundamental changes in the ground rules governing the relationships between Eastern Class I

^{86/} They include requiring CSX and NS to adopt and continue, until changed "by mutual consent of the parties", all existing agreements "between Conrail and its connecting short line and regional rail carriers," and to freeze -- again until changed by consent of all parties -- "[e]xisting gateways and rate relationships between Conrail, CSX and NS, and connecting shortline and regional railroads."

The Associations also ask the Board to declare that "[a]t junctions and terminal areas served by both NS and CSX, small railroads should have rights to interchange with both carriers as well as each other." In addition, they call for the Board to "expressly retain jurisdiction over inter-carrier relationships between CSX and NS and connecting short line and regional carriers," as well as a five-year oversight period with a "post-transaction study" and further actions at its end.

railroads and smaller connecting carriers. The Associations offer no proof of any specific impact on a particular shortline or regional railroad, and have failed to demonstrate any causal nexus between the Transaction and the concerns they raise, whether on a generic basis or otherwise.

To the contrary, it is evident the Associations are seeking relief to address existing conditions affecting their members. The terms of existing agreements with Conrail obviously predate approval of the Transaction. There is no justification for freezing existing terms into the indefinite future and making them immutable without the shortline or regional railroad's consent.^{87/} To the contrary, such an artificial lock-in of negotiated terms would be both unreasonable and inefficient.

The request to lock-in all existing gateways and rate relationships that CSX, NS and CRC have with shortlines and regional roads would return to the era of DT&I traffic protective conditions, which the Board's predecessor correctly repudiated. As explained above, such conditions are inherently inefficient and anticompetitive. See Section XIII.A.2.b.; Kalt RVS at 55-56. They would undermine the benefits of the Transaction, are not in the public interest and should be rejected by the Board here.

The Associations' request to expand the interchange rights of "small railroads" at all "junctions and terminal areas served by both NS and CSX" likewise must be denied. The extent of a shortline or regional railroad's interchange rights -- including any interchange

^{87/} While CSX and NS will step into CRC's shoes with respect to such agreements, that is not to say those agreements should be kept in force beyond their normal expiration date or that CSX and NS should not have the same rights to modify or cancel them that CRC now enjoys.

restrictions -- is beyond question a preexisting condition, not an effect of the Transaction, and as such cannot support any grant of relief in this proceeding. Moreover, where a "small railroad" purchased its lines from one of the Applicants or a predecessor, the extent of its interchange rights were a matter for bargaining and the purchase price reflected the value of what was agreed to; if there are limitations on interchange, the buyer presumably paid less than it would have for the unrestricted interchange opportunities the Associations seek.

The Associations' interchange proposal thus would give "small railroads" a substantial windfall, which is another reason why such relief should not be granted. See, e.g., BN/Frisco at 951-52 & n.101. Moreover, the Associations utterly ignore the very real possibility that throwing open interchanges at all of the "junctions and terminal areas" in question may be operationally infeasible or impose substantial costs on CSX and NS, undermining the Transaction's benefits.

The proposal that the Board retain jurisdiction over all "inter-carrier relationships" between CSX and NS and connecting shortline and regional railroads is simply an invitation to expand Board involvement in such matters beyond the areas Congress defined in enacting ICCTA. There is no basis for expanding statutory jurisdiction on such matters, and no reason for the Board to accept the Associations' request that it do so. The Associations' request for Board oversight are also overreaching, as explained in Section XXI.

88/

88/ The Associations' additional request that the Board use shortlines and regional railroads to cure any competitive and operating problems that may require conditions is both contingent and purely hortatory. Any alleged problems must be examined individually, as Applicants have addressed them herein.

In sum, there is no justification for any of the Associations' proposed conditions. Those requests should accordingly be denied.

2. Genesee Transportation Council.

The Genesee Transportation Council ("GTC") is a metropolitan planning organization for nine counties in the Rochester area of upstate New York. GTC-2 at 3. GTC supports the Transaction and states that "CSX and NS apparently worked hard to create a balanced, post-purchase market share that will be viewed as competitive by the STB." Id. at 17. In fact, the Transaction offers very real benefits for the Rochester area, such as the expansion of Frontier Yard, which will improve classification of local and regional traffic as well as reduce transit times. See CSX/NS-20, Vol. 3A at 197. However, GTC nonetheless requests the Board to impose a laundry list of conditions.^{89/}

GTC has not established that the Board should impose any of those conditions. In fact, GTC admits that most of them address preexisting conditions rather than any harm

^{89/} GTC asks the Board to: (1) require NS to report how it proposes to offer truck competitive north-south service between Rochester and the Southeast via the Southern Tier, including the feasibility of re-opening the Gang Mills-Jersey Shore connection with the Buffalo line, via WCOR to Wellsboro Junction and the 63 mile rail-banked right of way beyond; (2) order CSX to examine the merits of re-establishing an intermodal terminal in Rochester; (3) establish a procedure for monitoring the MGA Usage Agreement to ensure fair and impartial enforcement; (4) require inclusion of R&S in NS if either of its sister railroads -- Buffalo & Pittsburgh or Allegheny & Eastern -- are included in CSX or NS, or, if R&S is not included, require NS to join R&S as a full partner to vigorously compete with the CSX main line route; (5) remove a variety of short line interchange restrictions: (a) granting LAL its request to purchase Genesee Junction Yard from CSX; (b) granting R&S its request to connect with LAL in Genesee Junction Yard; and (c) granting Falls Road Railroad ("FRRR") access to carriers in addition to CSX and; (6) remind CSX and NS of their obligation to give priority to Amtrak trains and maintain tracks to Class 5 or better standards. GTC-2 at 35-41. Elsewhere, GTC adds a request that the Board order CSX to examine reciprocal switching charges in the Rochester District and adjust the level of the charges at an RVC ratio not exceeding 120%. Id. at 33.

caused by the Transaction. GTC's overall justification for requesting conditions is that "the STB, in order to create a rail transportation system that will truly offer competitive rail service for large and small shippers, must take the opportunity presented in Finance Docket 33388 to impose conditions that will correct the problems that have evolved during 21 years of Conrail domination." GTC-2 at 17 (emphasis in original). That request must fail because conditions will not be imposed to correct preexisting conditions. See Section III.C.

Requested conditions 1, 2, 5(a), 5(b) and 6 (as well as GTC's request regarding Rochester District switching charges) plainly involve nothing more than preexisting conditions. GTC has not even attempted to assert they are needed to remedy any alleged harm caused by this transaction. As to condition 2 (re-establishing a Rochester intermodal facility), GTC admits there has been no intermodal facility in Rochester since 1992. GTC-2 at 5-6, 14 n.14, 23-25. Condition 5 generally seeks to alter interchange limitations that were negotiated between Conrail and shortline purchasers; the purchase price for the shortlines thus reflected the availability or lack of availability of interchange with other carriers, and there is no justification for altering those bargained results here. Specifically, with respect to conditions 5(a) and (b), seeking an LAL-R&S interchange in Genesee Junction Yard, GTC acknowledges that to date those two shortlines have not had such an interchange. Id. at 22.^{90/} Condition 6 merely asks CSX and NS to comply with federal law regarding

^{90/} A more detailed discussion of the reasons why LAL is not entitled to purchase or obtain trackage rights over Genesee Junction Yard to interchange with R&S is set forth above in Section XIII.C.8. R&S has not asked the Board for the right to interchange with LAL at Genesee Junction Yard. To the contrary, R&S and its affiliated railroads filed comments supporting the Transaction without conditions, based on agreements reached with CSX and NS.

passenger train priority, which they will certainly do. GTC also seeks the adjustment of Conrail switching charges in the Rochester area; as explained in Section XI.A., however, the level of those existing charges is not a consequence of this transaction, and there is no justification for imposing any condition requiring them to be modified.

GTC likewise has failed to offer anything as to the remaining requests that meets the Board's standards for conditions. As explained in Section VII.B.3.c., there is no need for the Board to establish procedures for monitoring the MGA Usage Agreement (GTC condition 3) because the parties have every incentive to make sure the Monongahela efficiently, and the agreement itself has provisions for fair and nondiscriminatory operations. With respect to GTC condition 4, inclusion of R&S is irrelevant because there is no proposal to include either it nor its affiliates, BPRR and ALY, in the CSX or NS systems. Further the Board does not need to order NS to join with R&S as a full partner because NS and R&S will have, and have already started developing, a partnership to compete with CSX in the Rochester area.

Finally, GTC has not established any harm that would justify condition 5(c), which seeks to give FRRR direct connections with carriers in addition to CSX.^{21/} FRRR is a 45-mile branch line running from a Conrail connection at Lockport, NY to Brockport, NY. GTC-2, Appendix XI at 2. GTC's claim is that a large FRRR shipper will go from a two

^{21/} This condition is supported by Genesee Valley Transportation Company ("GVT"), FRRR's parent. See GTC-2, Appendix XI, Monte Verde VS. However, in another verified statement, the same executive declared that FRRR "wholeheartedly supports the acquisition of Conrail by CSX and NS" and explained that "it would be in the best interests of the FRR and its customers if this acquisition can be quickly concluded." See CSX/NS- 21, Vol. 4F at 176-77, Monte Verde VS.

carrier movement (FRRR-CRC) to a three carrier movement (FRRR-CSX-NS) post-Transaction. GTC-2 at 21, 40, GTC-2, Appendix XI at 2. As Applicants explain in Section XVI.B., increasing the number of carriers in a movement does not result in a reduction of competition; in any event, CSX and NS can and will work together to provide efficient joint-line service. See Orrison RVS at 120.

In sum, GTC has not demonstrated that the Board should grant any of the various conditions it proposes. GTC's requests must therefore be denied.

3. New York State Business Council.

The Business Council of the State of New York, Inc. ("NYSBC") filed letter comments asking the Board to address a number of issues for the benefit of shortline and regional railroads. Some of those matters are so generic they cannot possibly serve as the basis for Board action.^{92/} Others involve proposals that have been raised by other parties, and should be rejected on the same grounds.^{93/}

^{92/} For example, NYSBC urges the Board to "[e]nsure the viability of short line and regional carriers" and shippers that rely on their service. NYSBC Comments at 2.

^{93/} NYSBC suggests the Board should modify existing switching charges for the Port of New York and "upstate population centers" such as Buffalo. NYSBC Comments at 2. As explained in Section XI.F.2., there is no reason or justification to do so.

Similarly, NYSBC suggests the removal of all existing limitations on interchanges by "short line, regional and other Class I railroads" with "Conrail/Applicants' lines and other proximate railroads." NYSBC Comments at 2. That suggestion parallels -- and should be denied for the same reasons as -- the similar request by the shortline and regional associations. See Section XIII.D.1.

Finally, NYSBC asks the Board to consider allowing a third carrier "trackage rights from upstate New York to the metropolitan area and the Port of New York, especially on the East Side of the Hudson River." NYSBC Comments at 2. That request should be denied for

(continued...)

4. Pennsylvania House Transportation Committee.

The Pennsylvania House Transportation Committee ("PHTC") filed comments seeking a number of conditions. See Pa.H.T.C.-2. Many of these requests duplicate ones made by other parties and should be disposed of accordingly. See also Section XVII.^{93/} None provides any basis for relief.

^{93/}(...continued)

the same reasons as other requests for additional carrier access into the North Jersey Shared Assets area or expansion of that area east of the Hudson, as explained in Section VIII.A.2.

^{94/} PHTC's request regarding B&LE access to the MGA is addressed in Section VIII.A.2.c., its request for CP access in Section VIII, its requests regarding the RBMN in Section XIII.C.15. and its requests regarding W&LE in Section XIII.C.17. Its requests regarding the BPRR have been mooted by BPRR's settlement with CSX and its support of the Transaction. See BPRR-7.

**XIV. OTHER ISSUES RAISED BY COAL INTERESTS SEEK PRIVATE
ADVANTAGE OR REMEDIES FOR ALLEGED HARM NOT CAUSED BY
THE TRANSACTION**

A. Introduction and Summary

The Application demonstrated the significant benefits to shippers and receivers of coal that would result from the Transaction. These benefits include:

- Expanded network reach, providing new and expanded single-line access to coal sources for utilities, and to utility plants for coal producers, over the networks of both CSX and NS.
- Shorter, more efficient routes and improved equipment utilization, yielding benefits for both the railroads and their customers.
- Increased direct rail-to-rail competition between CSX and NS for utilities located in shared assets areas and for shipments from MGA mines.
- Improved service resulting from capital improvements by CSXT and NS to their respective networks.
- Expanded opportunities for coal exports.

See CSX/NS-19, Sansom VS, Vol. 2A at 313-46; id., Sharp VS, Vol. 2A at 347-79; id., Fox VS, Vol. 2B at 261-82.

Thirteen electric utilities¹ and two coal producers² have filed comments and requests for conditions in this Proceeding. While it is characteristic for coal-shippers opportunistically to seek improvements in the status quo in railroad control proceedings, it is worth noting that the Transaction has won support from Delmarva Power & Light, Pennsylvania Power & Light and Ohio Valley Coal Company, among others. Fox RVS at 2. In general, moreover, those commentators seeking relief do not challenge the fact that, on an overall basis, the Transaction will provide significant pro-competitive benefits and improve conditions for the transportation of coal to electric utilities. Rather, the thrust of several of the comments is that the Board should impose conditions because these protestants do not receive the same benefits that others will gain. In a similar vein, many of these commentators raise concerns about conditions that are not created by the Transaction and in some cases are completely unrelated to it. As the Board has made clear in previous cases, these are not grounds for the imposition of conditions.

¹ American Electric Power Service Corporation (AEP-5), Centerior Energy Corporation (CEC-05), Consumers Energy Company (CE-04), Detroit Edison Company (DE-02), GPU Generation (GPU-02), Indianapolis Power & Light Company (IP&L-3), Niagara Mohawk Power Corporation (NIMO-6), Northern Indiana Public Service Company (NIPS-1), Orange and Rockland Utilities (ORU-3), Potomac Electric Power Company (PEPC-4), and Rochester Gas and Electric Corporation (RG&E-1) filed individual comments. In addition, Indianapolis Power & Light filed a joint comment with Atlantic City Electric Company (ACE, et al. - 18). New York State Electric & Gas Corporation filed its opposition and request for comments in the form of a responsive application (NYSEG-14). The Department of Justice (DOJ-1) requests conditions affecting three utilities: Indianapolis Power & Light, PEPCO and PSI Energy (which made no filing on its own behalf). In this section Applicants also respond to the request for conditions of Ohi-Rail Corporation (OHI-RAIL-2), which is closely related to issues raised by Centerior. Citizens Gas & Coke Utility, a municipal gas utility in Indianapolis, also seeks rate conditions. Its comment is discussed in Section IV above.

² Eighty-Four Mining Company (EFM-7) and A.T. Massey Coal Company (ATMC-2).

In the next section, Applicants address some of the recurring themes in the comments filed by coal interests, showing that these arguments do not afford a basis for the imposition of relief. Following that discussion, Applicants will address specifically the comments of each filing party.

B. General Themes

1. Claims That The Transaction Will Help Protestants' Competitors Do Not Warrant the Imposition of Conditions.

Several utilities, including Potomac Electric Power Company ("PEPCO"), Centerior Energy Corporation ("Centerior"), and Niagara Mohawk Power Corporation ("NIMO"), complain that the Transaction will increase competition for the transportation of coal to other utilities with whom they claim they compete. These utilities, therefore, request that the Board impose conditions so that they receive the same benefits they acknowledge will be provided to other utilities.

As we discuss above, this is plainly not a basis on which the Board may impose conditions. By definition, what these protestants are complaining about is an increase in competition. The fact that Applicants have not structured the Transaction to bestow the same benefits equally on all of their customers does not mean that these protestants have suffered any loss of competition which must be remedied. UP/SP at 110.

Moreover, these claims of alleged "harm" are largely unfounded. As we discuss below, these protestants ignore not only their existing coal transportation alternatives, including lake vessel, barge and truck deliveries but, more important, new options created by the Transaction. For example, NIMO, which receives a considerable volume of coal in

combined rail-lake vessel moves, will experience increased competition for the movement of MGA coal to Lake Erie ports as a result of the Transaction.

In addition, these protestants grossly overstate the impact of the increased competition they will face. For example, a correct analysis of the impact of reduced costs on the ability of PEPCO's competitors to supply power for sale at wholesale compared to PEPCO shows that there will be little or no impact on PEPCO. Likewise, NIMO greatly overstates the extent to which it competes with utilities located in Shared Assets Areas and the impact of the Transaction on its wholesale position. See Sections XIV.C.1 and XIV.C.6 below.

2. The Regulatory Treatment of Acquisition Costs
Does Not Warrant the Imposition of Conditions.

Several utilities, including Atlantic City Electric Company ("ACE"), Indianapolis Power & Light ("IP&L"), GPU Generation, Consumers Energy Company ("Consumers"), Centerior, and PEPCO contend that they will face rate increases arising as a result of the acquisition of the stock of Conrail. They urge the Board to impose sweeping conditions that would restrict the rates charged these utilities. As discussed in Section VII above, this contention is entirely without merit and is no basis for the Board to impose conditions in this control proceeding.

In addition, some of the claims of feared overcharges are frankly preposterous. For example, ACE, which makes the claim, will experience an undeniable increase in competition as a result of the Transaction. Today, ACE is served exclusively at destination by Conrail at both of its coal-fired generating plants. Because both of those plants are in the South Jersey Shared Assets Area, as a result of the Transaction they will for the first time have access to two rail carriers, CSX and NS. ACE will thus have end-to-end single-line

service on either NS or CSX or both from all of its coal origins, including competing end-to-end service from MGA mines to ACE's plants. Absent a clear showing of a reduction in competition -- which neither ACE nor any other protestant has made -- there is no basis for the Board to impose safeguards against hypothetical feared "overcharges."

3. Claims That The Transaction Should Be Restructured to Preserve Single-Line Service Should Be Rejected.

Centerior, Eighty-Four Mining ("EFM"), NIMO and Orange and Rockland Utilities ("O&R") contend that the Transaction will convert current single-line movements of coal to interline moves, and ask that the Board require broad grants of trackage rights to redress this situation. As discussed in Section XVI below, this is not competitive harm that justifies the imposition of conditions by the Board. In any event, Applicant's settlement with NITL specifically and fully addresses any concerns arising from losses of single-line service. See Section II.B above.

Moreover, these protestants exaggerate any adverse impact the Transaction could have on the efficiency of their transportation. Indeed, many Conrail-served power plants obtain coal in interline service from sources located on NS or CSX and, in some cases, interline movements account for a majority of the coal used at such plants, notwithstanding single-line options. See, e.g., PEPC-4, Kaplan VS at 12; [[

]].

More important, the affected utilities and coal suppliers will find new sources or outlets on CSX or NS, and their options will increase as a result of the Transaction. For example, while the Transaction will result in some current single-line Conrail movements of

high-sulfur coal from Ohio mines to Centerior becoming interline NS-CSX moves, it is also true that Centerior will gain single-line access to abundant sources of low-sulfur coal located on CSX lines. Given Centerior's obligations under Phase II of the Clean Air Act, this is an unquestionable benefit to Centerior. See Sansom RVS at 19-10, 27-30. Moreover, CSX and NS have reached an agreement with Centerior's principal affected coal supplier, the Ohio Valley Coal Company ("OVCC"), that will protect rates and service from its mine to Centerior. As Robert E. Murray, the President of OVCC, wrote to the Governor of Ohio, this settlement "substantially resolves OVCC's concerns arising from the creation of a two-line haul from OVCC's mine to Centerior's plants. Mr. Murray also noted that "Messrs. John W. Snow, David R. Goode, and other senior executives of CSX and NS have demonstrated a genuine concern for the problems that the two-line haul would create for [OVCC] and have shown total good faith and sincerity in addressing them." Accordingly, OVCC expressed its support for the transaction. Letter from Robert E. Murray to Governor George V. Voinovich, October 8, 1997 (Vol. 3).

Similarly, while some current single-line movements of coal from Mine 84 to Conrail-served utilities would become joint-line NS/CSX movements, Eighty-Four Mining Company will benefit from gaining new single-line service to other utilities on the NS system. See Fox RVS at 5-6. Factually and legally, these sorts of claims do not justify imposing conditions.

4. Claims That Protestants Will Lose the "Benefits" of
Origin Competition Do Not Warrant the Imposition of Conditions

In contrast to the parties who decry the feared loss of single-line service, several utilities (ACE, IP&L, Consumers and O&R) complain that they will lose the "benefits" of origin competition once either CSX or NS is able to provide them with single-line service. As the Board held in BN/SF, and as discussed above, this is no basis on which either to disapprove or condition the Transaction. Indeed, these protestants' claims fly in the face of the clear benefits provided by single-line service.

ACE, IP&L, and Consumers rely on the testimony of Mr. Crowley and Drs. Kahn and Dunbar to support their attempt to show that the "one lump" principle of economics does not apply and that they will have to pay more for coal delivered in single-line service than coal delivered in joint-line service. As Dr. Kalt demonstrates, and as discussed above, this effort is completely unsuccessful. See Section V above and Kalt RVS at 24-53. Moreover, the factual premises advanced by these protestants are completely wrong. ACE, which is currently sole-served by Conrail, will have access to both NS and CSX at destination, not only preserving but significantly enhancing existing competition. Indeed, as noted above, other utilities have filed comments seeking the same advantages that ACE will receive from the Transaction. Likewise, Consumers, IP&L and O&R will also have no less competition for coal transportation than before. See Section IV.A.3 (IP&L) above, and Sections XIV.C.7 and XIV.C.8 below.

5. Claims That Protestants Will Lose The Benefit of Existing Rail Competition Do Not Warrant the Imposition of Conditions.

As discussed above, in appropriate circumstances (including an absence of intermodal, source and product competition), a reduction in the number of rail carriers serving a shipper from two to one can justify imposition of remedial conditions. Only one utility, IP&L, claims that it faces such a situation; another, American Electric Power Service Corp. ("AEP"), claims that it might at some time in the future. As discussed in Section IV.A.3 above, IP&L is incorrect in claiming "2-to-1" status, and its competitive alternatives are enhanced by the Transaction. The Department of Justice ("DOJ") is wrong in asserting that PEPCO and PSI Energy (as well as IP&L) are 2-to-1 shippers in need of relief from the Board. Likewise, AEP is not a 2-to-1 point and is not entitled to 2-to-1 relief.

None of the other claims of lost competition are valid. For example, Consumers' claims that its transportation options will be reduced from three to two, even if true, would not justify relief under Board precedent. See, e.g., UP/SP at 118. Moreover, its claim is unsupported and is unrelated to its request for trackage rights on behalf of NS to Consumers' Campbell plant, which would increase, not merely preserve, the rail options to that plant.

Indeed, rather than reducing competition, the Transaction is plainly procompetitive. Several utilities -- including, ACE, PECO Energy, Detroit Edison and Vineland Electric -- will experience increased destination competition, and the MGA coal producers and their customers will benefit from the direct competition for those coal origins that will be reintroduced there by the Transaction. These clear procompetitive effects are not offset by any anticompetitive effects that have not been corrected.

6. Claims That Requested Trackage Rights and Other Conditions
Are Operationally Feasible And Will Produce Net Public Benefits.

The conditions sought by protestants range from the creation of new shared assets areas in Indianapolis and the Niagara Frontier to extensive trackage rights, sometimes extending for hundreds of miles. For example, IP&L asks that NS be granted trackage rights over lines to be operated by CSX from Indianapolis to Chicago and St. Louis; NYSEG asks that CSX be granted trackage rights over 333 miles of the Southern Tier and branch lines to be operated by NS to serve NYSEG's coal-fired plants; and Rochester Gas & Electric ("RG&E") seeks, among other things, the introduction of a second carrier all the way from northern West Virginia to Rochester, New York. While some of these protestants assert that the requested conditions are operationally feasible, few actually consider whether they meet the standards established by the Board. See Section III above. Individually and in the aggregate, these conditions would involve a major restructuring of the Transaction and would threaten the net public benefits promised by the Transaction.

C. RESPONSE TO INDIVIDUAL CONTENTIONS

1. Potomac Electric Power Company

Although the Transaction will produce no change in the number of rail carriers serving its facilities, PEPCO urges the Board not to approve the Transaction unless it imposes conditions: (1) granting NS trackage rights over a Conrail line to be operated by CSX to allow NS to serve PEPCO's Chalk Point and Morgantown generating stations; (2) granting CSX access to Mine 84, a Pennsylvania mine served by a Conrail line to be

operated by NS;³ and (3) excluding the so-called "acquisition premium" from the net investment base of CSX and NS for regulatory costing purposes.⁴

PEPCO does not demonstrate, nor does it even contend, that the Transaction would have an adverse effect on transportation competition. Today each of PEPCO's four coal-fired generating stations is exclusively rail-served by one carrier: Chalk Point and Morgantown by Conrail; Dickerson by CSX; and Potomac River by NS.⁵ After the Transaction, the only change will be that CSX, rather than Conrail, will serve Chalk Point and Morgantown. PEPCO's claim of harm is based on its assertion that, by offering increased rail access to other utilities located in Shared Assets Areas, the Transaction will place PEPCO at a competitive disadvantage.⁶

Like PEPCO, the Department of Justice ("DOJ") suggests that the Board grant NS trackage rights to serve Morgantown and Chalk Point. Unlike PEPCO, DOJ asserts that PEPCO is a 2-to-1 snipper. This is based on the theory that all of PEPCO's generating plants -- but only PEPCO plants -- constitute a relevant market; that NS, which serves one of the four plants, is an insignificant competitor; and that the elimination of competition between CSX, which serves the Dickerson plant, and Conrail, which serves Morgantown and Chalk Point, could cause PEPCO's rail rates to rise. DOJ's analysis is incorrect. Applicants acknowledge that, as a general matter, a utility can gain bargaining leverage by threatening

³ PEPCO only requests this condition in the event its first condition, trackage rights for NS to the Chalk Point and Morgantown plants, is granted.

⁴ E.g., PEPC-4, Argument at 1.

⁵ PEPC-4, Felton VS at 5-7.

⁶ PEPC-4, Argument at 9.

to generate electricity at one plant rather than another. But that fact does not support DOJ's conclusion that having the same carrier, CSX, serve both Dickerson and Morgantown will lead to a substantial lessening of competition.

DOJ's error is in viewing the relevant competition as limited to the possibility that PEPCO can substitute electricity generated at Dickerson for that generated at Morgantown, and vice versa.⁷ Indeed, PEPCO does not make the same claim, and its contentions do not support DOJ's theory. Applicants' witness, Dr. Sansom, and PEPCO agree that the relevant competition affecting rail rates is not merely competition among PEPCO's plants but competition in the entire PJM power pool.⁸ See Sansom RVS at 11; PEPC-4, Kaplan VS at 7. For its part, PEPCO states that Chalk Point, Morgantown and Dickerson are all baseload plants whose level of generation, for the most part, is not affected by changes in rail rates or

⁷ See, e.g., DOJ-1, Woodward VS at 10-11, 22-23.

⁸ If the relevant market were defined as rail transportation of coal to PJM utilities, the Transaction would reduce concentration in the market. Sansom RVS at 11-13; CSX/NS-19, Sansom VS, Vol. 2A at 323-25. In the Federal Energy Regulatory Commission proceeding approving PEPCO's planned merger with Baltimore Gas & Electric ("BG&E"), PEPCO and BG&E argued extensively and successfully that the relevant geographic market for the sale of energy at wholesale is the PJM market. See id. at 317-18.

delivered fuel costs.⁹ If PEPCO is correct, DOJ's witness acknowledges that his premise is substantially undermined.¹⁰

Rather than alleging any reduction of competition in any rail or transportation market, PEPCO complains that the Transaction will benefit its competitors in the wholesale power market. As PEPCO puts it, "the transaction will actually harm PEPCO through the enhancement of the competitive position of PEPCO's rival utilities."¹¹ This is based on the fact that the Transaction will permit both CSX and NS to provide direct rail service to plants of Atlantic City Electric, PECO Energy and Vineland Electric Department.¹² As discussed above, this is not the sort of "harm" that justifies the imposition of conditions by the Board. In fact, it is not "harm" at all.

Moreover, PEPCO has not shown in any reliable way that its competitive position vis-a-vis other utilities will be impaired, even if one believed that it would be denied the benefits bestowed on the four plants identified by PEPCO that will receive two-carrier access as a

⁹ PEPC-4, Argument at 3. Even during so-called "shoulder" periods, these plants "still operate at a significant percentage of capacity due to various operational factors." *Id.* Moreover, to the extent that PEPCO's claim of harm is limited to "shoulder" periods, DOJ witness Woodward observes that in periods of low demand the relevant geographic market may be the entire electrical interconnection network, not the plants of a single utility. DOJ-1, Woodward VS at 12.

¹⁰ In a footnote, DOJ witness Woodward concedes this conclusion, but tries to salvage his analysis by stating that "eventually" Conrail could constrain CSX price increases at Dickerson. DOJ-1, Woodward VS at 23 n.53. Woodward provides no support for this assertion, nor is there any in PEPCO's evidence. Nor is it clear why that "eventual" constraint is relevant for purposes of this case in light of the undisputed dispatch competition within the power pool that effectively constrains rail rates to utilities.

¹¹ PEPC-4 at 13.

¹² *Id.*

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result of the Transaction (ACE's Deepwater and England plants, PECO's Eddystone Station and Vineland's Down plant). In comparing the marginal costs of Chalk Point and Morgantown to other plants in the PJM Pool, PEPCO's witness Kaplan fails to include all the PJM plants (including among others PEPCO's efficient Dickerson plant), making it impossible to tell how any reduced cost at other plants would affect the dispatching of PEPCO's power relative to other utilities.¹³ In fact, as Dr. Sansom demonstrates, PEPCO's evidence provides no basis on which to conclude that the dispatching of power from PEPCO's plants, even on an incremental basis, will be affected even if one assumed that the costs of generation at Eddystone, Deepwater, England and Down were reduced. See Sansom RVS at 13-16.

PEPCO also fails to take account of the fact that replacing Conrail with CSX as the carrier serving its Chalk Point and Morgantown stations offers significant benefits. Today, over 60% of the coal consumed at those two Conrail-served plants originates on CSX and is delivered in joint-line service.¹⁴ As a result of the Transaction, that coal will be delivered in more efficient single-line service. Thus, PEPCO will obtain improved service from its current coal origins, as well as new single-line service from other coal sources, including

¹³ PEPC-4, Kaplan V.S., Exhibits SK-4 and SK-5. Moreover, Pepco's claim that it fears competition from the Down plant, a 22 MW plant operated by a municipal utility in southern New Jersey (Sansom RVS at 14 n.7), strains credulity.

¹⁴ PEPC-4, Kaplan VS at 12.

Central Appalachian compliance coal that may be needed by PEPCO under Phase II of the Clean Air Act. See Sansom RVS at 3-5; PEPC-4, Felton VS at 16. ¹⁵

Finally, PEPCO has current alternatives to rail delivery at its Morgantown and Chalk Point plants. PEPCO currently receives residual oil by barge at Morgantown. It has considered installation of facilities to receive and unload coal by barge at that facility. In fact, it asserts that it used the threat of barge deliveries to constrain Conrail's pricing. PEPC-4, Felton VS at 20. After the Transaction, PEPCO will be able to threaten CSX with bringing in coal originated from NS-served mines via barge.

DOJ witness Woodward appears to concede that an effective barge alternative would contain CSX pricing at Morgantown, but appears to accept uncritically PEPCO's statement that such an alternative will no longer be effective as a result of the Transaction.

[[[

]]] PEPCO has not offered any credible reason why the threat of bringing in NS-originated coal is any less potent than the successful earlier threat to bring in CSX-originated coal.¹⁶

¹⁵ See PEPC-4, Felton VS at 20 [[[

]]] While PEPCO is considering the use of MGA coal for Phase II compliance (*id.* at 17), the Transaction will provide PEPCO with single-line access from the MGA mines to all of its stations, including (for the first time) the CSX-served Dickerson station.

¹⁶ NS has the ability to supply the coal needed at Morgantown and Chalk Point. See, e.g., CSX/NS-19, Fox VS, Vol. 2B at 267. PEPCO is reduced to making the unsupported argument that NS would not be interested in supplying coal to PEPCO, because its Lamberts Point facility is used primarily for export purposes and lacks capacity for domestic shipments. Even if relevant, this ignores the fact that Lamberts Point handles over 3 million tons of coastwise coal shipments annually. Sansom RVS at 10. There is no evidence that Lamberts Point lacks capacity

PEPCO will face no loss of actual or potential competition as a result of the Transaction,¹⁷ and its request, and that of DOJ, for trackage rights conditions should be rejected.

PEPCO's request for dual access to Mine 84, i.e., access by CSX to serve that mine directly, should also be rejected. As PEPCO itself admits, the relief EFM seeks is relevant to PEPCO only if the Board grants PEPCO's request for NS trackage rights to Chalk Point and Morgantown. PEPC-4 at 20 n.13. Because those conditions are not warranted, as discussed above, PEPCO's request is essentially moot.

Moreover, PEPCO is not currently dependent upon Mine 84 coal. Indeed, it has taken no Mine 84 coal in 1995, 1996 or 1997. See PEPC-6 at 14 (Vol. 3). Should it wish to do so in the future, the record in this case reflects a number of examples, as discussed in the Rebuttal Verified Statement of John William Fox, Jr., in which mutually beneficial agreements providing for economical joint-line service have been reached. See Fox RVS at 2-3. Additionally, PEPCO admits that other "highly efficient" mines that will have joint access by NS and CSX produce the type of MGA coal that PEPCO might seek. PEPC-4, Kaplan VS at 18.

Finally, PEPCO, like several other parties, seeks a condition excluding the "acquisition premium" from Applicants' net investment base for regulatory costing purposes. For the reasons set forth in Section VII above, such relief is unwarranted.

to ship coal to PEPCO. See Sansom RVS at 9; CSX/NS-19, Fox VS, Vol. 2B at 270.

¹⁷ Coal delivered by barge to Morgantown could easily be trucked to Chalk Point. [[[]]].

2. Indianapolis Power & Light

IP&L alleges that its two Indianapolis-area plants are "2-to-1 points". As a remedy, it seeks either the creation of a new shared assets area in Indianapolis or the grant of extensive trackage rights to NS and ancillary relief. As discussed in Section IV.A.3 above, neither of IP&L's plants is properly considered a 2-to-1 point, and neither will lose competitive rail transportation options after the Transaction. Indeed, by opening IP&L's Perry K plant to cost-based switching, that plant's competitive options will improve compared with the present situation in which the plant is closed to reciprocal switching and is rail-served exclusively by Conrail. Moreover, even if the Board concluded that either or both of IP&L's plants would lose a rail option, radically restructuring the Transaction to create another shared assets area would be excessive and unwarranted.

IP&L's additional argument that the Transaction could adversely affect it by "altering today's balanced competition for the movement of western coal to Indianapolis" (IP&L-3 at 34) is likewise without merit, as discussed in Section IV.A.3. There is no basis on which to grant IP&L's request for extensive trackage rights and other conditions, and they should be denied in their entirety.

3. American Electric Power Service Corporation

American Electric Power Service Corporation (AEP) expresses concern about rail access to its Cardinal plant, a coal-fired generating station on the Ohio River at Brilliant, Ohio. AEP states that it currently enjoys two-carrier access, by the Wheeling and Lake Erie Railway (WLE) and by Conrail [[[AEP-5 at 2. It notes that NS will obtain Conrail's right to access the Cardinal plant, but fears that the plant may

lose access to the WLE, based on WLE's claim that "it may not survive as a result of the proposed transaction." Id. AEP claims, therefore, that it is entitled to relief equivalent to that of a 2-to-1 shipper, and asks the Board (1) to require CSX to assume WLE's obligations to serve the Cardinal plant in the event that WLE becomes unable to do so, and (2) to require NS to permit CSX to access the Cardinal plant over the current Conrail line if the WLE's line is not capable of carrying CSX's trains into the plant.

The Board should reject AEP's requested relief. First, as even AEP is forced reluctantly to admit (see AEP-5 at 3), the Cardinal plant is not a 2-to-1 point. The Transaction will not eliminate any rail service to the Cardinal plant; it merely will allow NS to step into the shoes of Conrail with respect to service to that plant.

Second, AEP provides absolutely no evidence whatsoever that it will suffer competitive harm as a result of the Transaction, nor has it even attempted to do so. AEP itself admits it is seeking relief for a harm that might not occur, and for which AEP has no knowledge of any evidentiary basis. See AEP-5 at 2 ("AEP is not privy to evidence regarding whether WLE will or will not survive if the Board approves the Application."). Indeed, the verified statement of AEP's witness, Thomas D. Crowley, includes not one shred of evidence that AEP will suffer the harm it claims to foresee. Moreover, as discussed extensively in Section XIII, WLE itself has failed to show that it will suffer harm as a result of this Transaction.

Additionally, AEP's comments paint a misleading picture of the current status of the Cardinal plant. AEP claims that the plant "has access to two rail carriers" (the WLE

directly, and Conrail [[[]]]), and that if WLE becomes unable to serve AEP, AEP "will lose one of its two carriers serving the Cardinal Plant." Id.

That is incorrect. First, AEP acknowledges that the Cardinal plant received no coal via Conrail in 1995 or 1996, and has received no coal via Conrail in 1997 (through October 31). During those years, the only rail delivery to Cardinal has been via WLE, following interchange with CSX. AEP-P-0001 to 0003. Although Conrail recently [[[

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Thus, post-Transaction, the Cardinal plant will have the opportunity for greater rail access than it now enjoys: over the WLE, and over NS [[[

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Finally, and very importantly, AEP also fails to note that in any event, the vast bulk of the coal delivered to the Cardinal plant is delivered by river barge, not by rail. Since January 1, 1996, river barges have accounted for nearly 90% of the coal tons delivered to Cardinal, with the rest being delivered by rail and truck; in 1995, more than 93% was delivered by barge, and only about 5.6% by rail. See AEP-6 at 5. [[[

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In sum, AEP has failed to show that it will suffer any harm as a result of this Transaction. The Transaction affects the Cardinal plant only insofar as it transfers the rights of one carrier (Conrail) to another (NS). The overwhelmingly dominant mode of delivery to the Cardinal plant -- by barge -- will be unaffected. Moreover, even as to the small portion of Cardinal's coal delivered by rail, the plant actually could enjoy a de facto increase in rail service from one carrier to two: WLE and NS. The facts thus show that AEP's requested guarantee of access by yet another carrier, CSX, is not justified and should be denied.

4. New York State Electric & Gas

NYSEG does not contend that it will face any loss of transportation competition as a result of the Transaction. Nevertheless, it seeks trackage rights relief that would introduce a second carrier at some of its plants. Its request should be denied.

NYSEG's concerns stem from the fact that today its four coal-fired power plants receive rail service only from Conrail, whereas after the Transaction the Kintigh plant will be served by CSX and the Milliken, Goudey and Greenidge plants will be served by NS. NYSEG asks the Board either to grant NS (or another carrier of NYSEG's choosing) trackage rights over CSX to serve the Kintigh plant, or to grant CSX (or another carrier of NYSEG's choosing) trackage rights over NS to serve the Milliken, Goudey and Greenidge plants. NYSEG bases its request on its claim that the Transaction will result in loss of efficiencies and bargaining leverage. These claims are not supported by the evidence.¹⁸

¹⁸ NYSEG also asserts that the Transaction will increase inefficient joint-line service, NYSEG-14 at 15, but that is misleading. NYSEG's plants will continue to obtain single-line service from all the plants that currently supply coal to them under contract. While NYSEG refers to Mine 84 and Powhatan #6 as mines that will be served by NS and "cut off" from Kintigh (NYSEG-14 at 16), NYSEG fails to mention that neither of those mines supplies any coal on a contract basis

NYSEG claims that it has obtained substantial efficiencies and cost savings from an "Alliance" among NYSEG, its principal coal supplier, Consol, and Conrail. It suggests that these savings would be jeopardized by the allocation of Conrail's assets and routes. Virtually all of the savings attributed to the Alliance, however, are due to specific actions affecting individual plants. For example, NYSEG received a rebate on coal shipments to its [] plant as an incentive to restart a generating unit that had been shut down, thereby generating increased traffic volume for Conrail. NYSEG-14, Mulligan VS at 48. The fact that NS will serve [] (and two other plants) but not Kintigh should have no effect on its incentive to make a similar arrangement at [] if it would increase rail volumes. Similarly, Conrail agreed to forgo annual rate adjustments on the separate transportation contracts for Kintigh and Milliken in exchange for savings achieved through the use of larger trains at each plant, reducing the number of crews needed. NYSEG-14, Brady VS at 64, Edwards VS at 78. Each of CSX and NS would have similar incentives to find more efficient ways of serving their respective plants.¹⁹

to Kintigh, and Powhatan #6 has supplied only a small amount on a spot basis.

¹⁹ NYSEG cites the testimony of NS's Mr. Fox and CSX's Mr. Sharp to the effect that neither could not recall a tripartite arrangement like the one among NYSEG, Conrail and Consol as evidence of a "predisposition . . . against building a long-term partnership with a shipper." NYSEG-14 at 32. Not only is that flatly wrong, it misstates the testimony of both witnesses. []

[] Mr. Fox likewise outlined the way NS works with utilities and coal producers to increase volumes and efficiency. Fox Dep., Aug. 25, 1997, at 49-56. []

III

It is also worth noting that the Alliance itself is nascent and tentative. While a few ad hoc agreements -- notably the rate reductions referred to above, which are not unusual in the industry -- have been implemented, the parties have executed only one written agreement under the Alliance, the Memorandum of Understanding ("MOU") dated April 14, 1997, included as an exhibit to NYSEG's Responsive Application. NYSEG-14 at 249-52. [[[

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Clearly, NYSEG overstates not only the importance of the Alliance but the threat the Transaction poses to NYSEG's goal of achieving the most efficient transportation service.

NYSEG's claim that it will lose efficiencies as a result of the Transaction are likewise overblown. NYSEG claims that because all of its plants are currently served by Conrail, it has developed an efficient system, involving the use of customer-owned cars, for the delivery of coal to those plants. NYSEG's rail carrier subsidiary, the Somerset Railroad Corporation ("SRC") owns 428 rail cars that can be deployed in three 130-car unit train sets. One of these train sets is dedicated to use at the Kintigh plant, one to the Milliken plant, and the third cycles between the two. NYSEG-14 at 16.

NYSEG claims that, once its plants are divided between CSX and NS, it will lose the ability to utilize its equipment efficiently. This is incorrect. For the train sets dedicated to Kintigh and Milliken, respectively, there will be no change. One will travel over tracks operated by CSX and one over tracks operated by NS, but there will be no effect on the

efficiency of their use.²⁰ Nor will there be any effect on NYSEG's ability to cycle the third train set. That train set rotates between the plants on a monthly basis. Given the regularity of the schedules and the fact that both plants are supplied by Consol's Blacksville Mine, there should be little difficulty in returning a train empty from Kintigh on CSX tracks and sending it loaded to Milliken on NS, or vice versa. [[[

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NYSEG's claim that it will suffer decreased loading flexibility similarly lacks merit. NYSEG claims that, because all its plants are served by Conrail, it can redesignate loading dates for its coal trains from one destination to another. There is no indication of how often NYSEG has made use of this capability. In any event, even if this capability were significant, the Transaction will not eliminate it. Both NS and CSX will serve the Blacksville mine, which is in the MGA Joint Use Area, and, as discussed below, they will have to coordinate operations to assure efficient service. NYSEG's speculation that NS will favor its own coal trains over a NYSEG train shifted to a CSX destination, NYSEG-14 at 18, is unfounded and contrary to the principles of operation for the MGA. The Monongahela Usage Agreement, Exhibit GG to the Transaction Agreement, contains detailed provisions

²⁰ NYSEG also contends that it can divert a train destined for Milliken to unload at Kintigh. NYSEG-14, Edwards VS at 79. In 1996, out of approximately 150 unit trains serving the two plants (see id. at 78), [[[

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prescribing nondiscriminatory treatment for both carriers in the best interests of the shippers.

See CSX/NS-19, Vol. 8C at 723-31. That agreement provides, inter alia, that:

The operation and equal access to the mines on the Monongahela (the "Mines") will be governed by the loading demand of the Mines, while taking into account the customer's choice of carrier for the particular movement. Trains will be scheduled onto the Monongahela based on the Mines [sic] request.

Id. at 725. NS and CSX will establish a Service Standards Committee which will develop a "report card" to evaluate service and to assure impartial access to all mines in the Monongahela. Id. at 726. These and other provisions will assure that customers' priorities are taken fully into account in operations on the MGA.

Likewise, NYSEG's claims that it will lose maintenance flexibility are unfounded. This issue arises solely because the contract repair shop typically used by NYSEG is on a line to be operated by NS, meaning that cars serving the Kintigh Station would have to be interchanged with NS to use that repair shop. The evidence suggests that this is a minor problem if it is a problem at all.²¹

NYSEG also raises concerns about potential inefficiency of joint operations on the MGA and potential operational difficulties on the Youngstown-Ashtabula line. As the Rebuttal Verified Statements of John W. Orrison and D. Michael Mohan make clear, these concerns are unfounded. The new facilities and egresses CSX will bring to the MGA, combined with the existing Conrail facilities, will offset any complexity added by two carriers operating over that line. See Orrison RVS at 118-20. As Mr. Mohan points out,

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total yard capacity in the MGA region will increase post-Transaction, and NYSEG's concerns about operating difficulties on the Youngstown-Ashtabula line are without basis. See Mohan RVS at 73-77. See also the Rebuttal Verified Statement of Thomas D. Newhart, detailing the improvements Conrail had made to the MGA since 1995. The evidence does not support NYSEG's attempt to show that its transportation costs will increase due to transportation inefficiencies caused by the Transaction. In any event, both CSX and NS are prepared to cooperate with each other and with NYSEG to address any operational issues that may arise and to provide efficient service. Orrison RVS at 147-48; Mohan RVS at 77.

Finally, NYSEG argues that it will lose bargaining leverage it had over Conrail if service to its plants is divided between NS and CSX. NYSEG-14 at 26. As Dr. Sansom notes, NYSEG's coal volume on each railroad will be substantial enough to secure competitive rates. Sansom RVS at 59-60.²²

NYSEG misstates the record in implying that CSX and NS will not compete vigorously against one another. NYSEG-14 at 30. It cites a highly confidential CSX document for the proposition that "CSX will not even attempt to quote rates to utility plants that are exclusively served by NS." Id. at 30 n.20. In fact, the cited page simply recites the fact that CSX supplies no coal to those plants of a certain utility that are exclusively rail-served by NS. [[[The record is clear that competition between CSX and NS for utility customers is vigorous and benefits consumers. See Sansom RVS at

²² NYSEG's claim may be contrasted with the comments of PEPCO (PEPC-4) which bemoan the fact that instead of having one plant served by CSX, one by NS and two by Conrail, PEPCO will have its three largest plants served by CSX.

59-61. See also CSX/NS-19, Anderson VS, Vol. 2A at 285; id., Prillaman VS, Vol. 2B at 198.

NYSEG's assertion that CSX and NS will not be vigorous competitors is baseless. Its contention that its rates will go up is unfounded. Its claim of reduced "leverage" has no basis and, in any event, is not a loss of competition that justifies the imposition of conditions.²³ Its Responsive Application seeking additional access to its plants should be denied.

5. Centerior Energy Corporation and Ohi-Rail Corporation

Centerior will not experience any reduction in the number of rail carriers serving its plants. Despite this fact, which should dispose of its claims for relief,²⁴ Centerior claims that it will be harmed by the loss of single-line rail access to some of its current coal suppliers in southeastern Ohio; by the fact that other utilities that gain increased access to rail service through the Transaction will be able to compete more effectively with Centerior "in the market for off-system energy sales" (CEC-05 at 2); and by being forced to pay the "acquisition premium." Centerior asks that NS be granted trackage rights over some

²³ In addition, NYSEG's fondness for Conrail, while perhaps genuine, is recent. In September 1996, NYSEG witness Mulligan, who now says Conrail views NYSEG "as a friend", [[

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²⁴ Centerior witness Harris argues that a "monopoly imposed by CSXT becomes far more anti-competitive" than a monopoly by Conrail. CEC-05, Harris VS at 8. His reasoning appears to be nothing more than a rejection of the Board's one-lump presumption without the benefit of any supporting evidence. As discussed in Section V above, no protestant has established any harm from the substitution of either CSX or NS at a destination now exclusively rail-served by Conrail.

54 miles of Conrail track to be operated by CSX, for the purpose of serving Centerior's Ashtabula, Eastlake and Lake Shore plants, and that the "acquisition premium" be excluded from Applicants' net investment base for regulatory costing purposes. None of Centerior's contentions has genuine merit, and none justifies the trackage rights and rate regulatory relief sought by Centerior.²⁵ Ohi-Rail seeks relief based on its hopes to make future shipments to Centerior's Eastlake plant, and its claims are likewise without merit.

Centerior's comments focus on three of its plants that currently receive rail service only from Conrail and that are on lines to be operated by CSX as part of the Transaction. These plants -- the Lake Shore plant in Cleveland (currently out of service), and plants in Eastlake and Ashtabula, Ohio -- obtain some of their coal under contracts with the Ohio Valley Coal Company ("OVCC"), whose mine in southeastern Ohio is located on a Conrail line that will be operated by NS. OVCC also supplies coal on a spot basis to the three Centerior plants in question.

Applicants certainly do not dispute Centerior's contention that single-line service is generally superior to interline service. CEC-05, Kovach VS at 10-11 and Argument at 8-12. Indeed, one of the undisputed benefits of the Transaction is a vast increase in single-line service it will create. See, e.g., CSX/NS-19, Snow VS, Vol. 1 at 311-12; id., Goode VS, Vol. 1 at 335. In addition, the Applicants' settlement with NITL, along with settlements with individual shippers such as OVCC, are intended to prevent undue harm resulting from disruption of some single-line service. But, as discussed above, the virtues of single-line

²⁵ The comments of the Ohio Attorney General, et al. support Centerior's position as it relates to the loss of single-line service. OAG-4 at 24-26, 50.

service do not mandate that it be preserved in all situations for all shippers at all costs. As discussed above, the fact that a shipper or receiver of a commodity will see its service change from single-line to interline service is not a ground for the imposition of conditions, and certainly not for broad grants of trackage rights, as requested by Centerior.²⁶

Moreover, Centerior's case for any such relief is especially weak. First, the vast majority of the Ohio coal shipped to the Ashtabula, Eastlake and Lake Shore plants comes from OVCC. CSX and NS have agreed to an arrangement with OVCC that will permit it to continue supplying coal efficiently to Centerior's plants. OVCC supports the Transaction.²⁷ Although Applicants have done exactly what one would think Centerior would want -- reaching a contractual arrangement that makes it economically feasible for Centerior to continue to make use of one of its traditional coal suppliers notwithstanding the change from single-line to interline service -- Centerior now opposes the OVCC settlement. See Centerior Energy Corporation's Petition to File Supplemental Comments and Supplemental Comments (CEC-14), filed December 10, 1997.²⁸ Centerior erroneously claims that the settlement is

²⁶ Centerior's citation to Burlington Northern, Inc. -- Control -- Green Bay and Western Railroad Co., 354 I.C.C. 458 (1977) ("BN/GBW"), is inapposite. Although in that case the ICC rejected one of two competing acquisition proposals that would have destroyed much single-line service, the rejected proposal also would have resulted in abandonment of over half of GBW's trackage and was overwhelmingly opposed by shippers. 354 I.C.C. at 501-02. Here, in contrast, the Transaction proposed by Applicants creates extensive new single-line service. See Kalt RVS at 22-24; CSX/NS-19, McClellan VS, Vol. 1 at 550.

²⁷ See Letter from Robert E. Murray to Governor George V. Voinovich, Oct. 8, 1997 (Vol. 3); Fox RVS at 2-3.

²⁸ Centerior's petition was filed on the eve of Applicants' rebuttal answering the comments and responsive applications of over 160 parties. In our response to Centerior's petition, filed today, Applicants are requesting an opportunity to make a brief supplemental filing to respond specifically to the erroneous charges by Centerior if the Board grants Centerior's petition.

anticompetitive,²⁹ but its real agenda is obvious: to use the leverage of this proceeding to negotiate rate concessions from the Applicants. As the OVCC settlement, the NITL settlement and others reached by Applicants (see Fox RVS at 2-3) indicate, the Applicants are prepared to enter into reasonable arrangements to meet the needs of their customers whose existing transportation arrangements are disrupted by the Transaction. But there is no basis for granting trackage rights merely to remedy a transitory change in service patterns.

Having lost any claim respecting OVCC, Centerior argues that it will lose single-line service from other Ohio coal origins. CEC-05, Kovach VS at 13. All of those mines, however, can and do ship coal to the Centerior plants by truck. In fact, virtually all of the coal shipped by non-OVCC mines to Ashtabula and Eastlake is shipped by truck, and some OVCC coal has also been delivered by truck. Sansom RVS at 21.³⁰ []

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²⁹ This imaginative claim is based in part on a misreading of the agreement. []

]] That would occur if, as is likely, Centerior shifts its coal supplies to sources other than OVCC and OVCC is successful in securing replacement outlets for its coal. There is no plausible reason why such a provision should be considered anticompetitive.

³⁰ Moreover, Centerior has had substantial volumes of coal delivered by Ashtabula via a Conrail move to the Ashtabula Dock, transfer to the adjacent Pinney Dock and truck delivery to the plant. Sansom RVS at 22. NS will be able to provide single-line service to the Ashtabula Dock, fully preserving this option.

Moreover, Centerior's current environmental compliance plan contemplates switching the Ashtabula and Eastlake plants to lower sulfur coals, subject to cost and other considerations. *Id.* at 19-20. It is likely that Centerior will face increased pressure to reduce its consumption of this higher sulfur Ohio coal.

Thus, because of the OVCC settlement, substantial truck competition and its changing coal requirements, Centerior faces little or no actual harm from the alleged loss of single-line rail service. On the other hand, Centerior will gain expanded access to new coal sources located on CSX lines.

In a similar vein, Ohi-Rail Corporation, a shortline operating in eastern Ohio, contends that it will lose a future opportunity to supply coal to Centerior's Eastlake plant via a two-line haul, interchanging with Conrail. OHI-RAIL-2. It seeks either trackage rights over NS from Bayard, OH (its current interchange with Conrail) to Collinwood Yard near Cleveland, or a grant of trackage rights to NS between Collinwood and the Eastlake plant.

Ohi-Rail's claim of harm is entirely conjectural, based on the prospect that a coal producer will develop a property that might then supply Centerior, and on the fear that an NS-CSX movement might not be competitive. In addition to its wholly speculative quality, Ohi-Rail's claim is deficient for all the reasons discussed above in connection with Centerior, including the uncertainty about Centerior's future demand for the coal that might originate on Ohi-Rail. Its requests should be rejected.

Centerior also contends that it will be disadvantaged competitively because it is not gaining two-carrier access to its plants in the same manner as other utilities with which it competes for off-system power sales. As discussed above, even if true this is no basis for

the imposition of conditions. It also ignores the benefits of the Transaction to Centerior, as discussed above and in the Application. See CSX/NS-19, Sharp VS, Vol. 2A at 360-61. Centerior will also retain the ability to use its generating alternatives to discipline rail rates. Sansom RVS at 21. Centerior's recent merger with Ohio Edison, which is primarily a barge-served utility, enhances its power to do so. Id.

Finally, Centerior's arguments concerning the "acquisition premium" are no different from, and no more meritorious than, those of other commentaries. They should be rejected for the reasons set forth in Section VII above. Centerior's request for conditions should be denied.³¹

5. Niagara Mohawk Power Corporation

NIMO is another utility whose coal transportation options will not change as a result of the Transaction. NIMO seeks sweeping relief to expand the existing rail access to its power plants on the ground that the Transaction will confer disproportionate benefits on NIMO's alleged competitors. Its claims of harm do not support the imposition of any conditions.

NIMO operates two coal-fired power plants in western New York, the Huntley Station in Harriet, New York and the Dunkirk Station in Dunkirk, New York. Both plants receive coal directly by rail and by lake vessel. Conrail has the sole direct rail access to both plants. After the Transaction, CSX will replace Conrail as the sole rail carrier serving Huntley and Dunkirk.

³¹ Centerior's concerns about potential service problems on the MGA (CEC-05, Kovach VS at 16) are unsupported. See discussion in Section IV.C.4 above.

NIMO seeks the following relief, in descending order of preference:

- (a) Creation of a new "Niagara Frontier Shared Assets Area," covering a swath of western New York large enough to encompass all of the Buffalo area and both of NIMO's Huntley and Dunkirk Stations, along with a reciprocal switching arrangement for all current Conrail customers with a suggested switching fee of \$156 per car;
- (b) Reciprocal grant of terminal trackage rights to each other by CSX and NS throughout the area described in (a) above, with a suggested trackage rights fee of \$0.29 per car mile;
- (c) A reciprocal switching arrangement between CSX and NS covering "all current and future customers" served by the Conrail lines in the area described in (a) above, with a suggested switching fee of \$156 per car;
- (d) Granting trackage rights to NS over Conrail lines to be operated by CSX in order to permit NS to serve NIMO's Huntley and Dunkirk Stations.

The proposed conditions described in (a)-(c) above are the same as those proposed by the Erie-Niagara Rail Steering Committee (ENRS-6), and should be rejected for the reasons discussed in Section VIII above. NIMO's fourth alternative, seeking a second rail carrier to serve its Huntley and Dunkirk stations, should likewise be rejected because it is an attempt to change preexisting conditions and is not necessary to remedy any reduction in competition. Indeed, NIMO has shown no threatened loss of competition for its coal transportation.

As discussed above, NIMO's claim that it will be competitively disadvantaged in the sale of bulk power as a result of the increased rail access gained by other utilities, including Detroit Edison, PECO Energy and Atlantic City Electric, through the Transaction is not a basis on which the Board may impose conditions. Moreover, NIMO's claim of harm is unsupported. In the first place, NIMO has existing transportation alternatives to the Huntley and Dunkirk plants. In 1995, [[[]]] of all of the coal consumed at the two plants was delivered by means other than Conrail. NIMO-6, Fauth VS at 27.

Although NIMO characterizes vessel transport to Dunkirk as a "relatively limited alternative option," that plant received [[[]]] of its coal by lake vessel during the first ten months of 1997. NIMO-6, Bonnie VS at 7. Moreover, NIMO grossly understates the ability of Huntley to receive coal by lake. NIMO says that "Huntley receives a very limited amount of coal via lake vessel" (NIMO-6, Bonnie VS at 4), but that plant received more than [[[]]] of coal in 1992 by lake vessel, amounting to approximately [[[]]] of its total coal deliveries that year. [[[]]]. In fact, the principal reason that Huntley has stopped receiving coal by lake vessel and by truck is that this intermodal competition has induced Conrail to enter into more favorable contracts with NIMO. Sansom RVS at 43.

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³² NIMO's assertion that Black Rock Lock is a major impediment to water deliveries of coal to Huntley is refuted by these data. In addition, the evidence shows that the lock accepts vessels similar in capacity to unit trains that serve Huntley; it is open 41-42 weeks per year, longer than claimed by NIMO; and Huntley has adequate capacity to stockpile the coal needed in the winter months when the lock is closed. Sansom RVS at 45-46.

NIMO has also provided no concrete evidence to support its assertions that it will be hurt in competing with Detroit Edison and with various Pennsylvania and New Jersey utilities that belong to the PJM Pool (e.g., ACE, PECO, Pennsylvania Power & Light).³³ In fact, as the Rebuttal Verified Statement of Robert L. Sansom points out, NIMO already has a substantial cost advantage over these PJM utilities and NIMO's power moves preferentially to other New York Power Pool plants. Sansom RVS at 52-53. For similar reasons, NIMO is unlikely to compete with Detroit Edison for power sales to Ontario Hydro. *Id.* at 54. Indeed, rather than being harmed by the Transaction, NIMO will experience increased rail competition for its plants because they are both lake-served. NIMO already benefits from competition between the Lake Erie docks at Ashtabula, Ohio (served by Conrail) and Conneaut, Ohio (served by the Bessemer & Lake Erie ("B&LE")). The Transaction will add to that competition by giving both CSX and NS meaningful access to the Ashtabula Dock where CSX is currently inhibited by the need to absorb Conrail switch charges. See CSX/NS-19, Vol. 3A at 166. NIMO contends that it will not benefit from increased competition at Ashtabula because of capacity limitations. NIMO-6 at 23. In almost the same breath, however, NIMO argues that "NS and CSX can be expected to compete aggressively

³³ NIMO's "evidence" consists solely of a table comparing the costs of coal-fired plants in New York and from surrounding states. NIMO-6, Leuthauser/Mathis VS, Table 1. This table omits other plants in the PJM and ECAR pools. More important, "competitiveness" is determined without reference to the fact that some of the plants being compared are in different pools and may have different natural markets.

to carry Ontario Hydro's increased coal business" -- through Ashtabula. Id. at 24. NIMO's efforts to contrive a theory of competitive harm are baseless.³⁴

NIMO also contends that it will be forced to pay higher prices for coal transportation as a result of the Transaction because it will be forced to pay the "acquisition premium" and because there will be more competition for low-sulfur coal. We have addressed the first of these arguments above.³⁵ The second, of course, is not Transaction-related harm.

Moreover, while NIMO argues that it will increasingly require low-sulfur coal in the future, NIMO-6 at 17, it overlooks the fact that the Transaction will give it expanded access to low-sulfur coal reserves located on CSX lines that will now be available to it via single-line rail service, as well as access to NS low-sulfur coal origins via efficient single-line rail service to the Ashtabula Dock. To the extent that NIMO uses Powder River Basin coal to meet its low-sulfur needs (see NIMO-6, Fauth VS at 24), it will have the option of receiving such coal by lake, completely bypassing CSX.

Finally, NIMO's claim that EFM's Mine 84 will be harmed is without merit. EFM's request for relief is discussed elsewhere in this Section. Moreover, NIMO's assertion that EFM is "an important NIMO supplier" (NIMO-6, Bonnie VS at 16) is incorrect. EFM's

³⁴ NIMO's claim that B&LE's ability to compete via Conneaut will be jeopardized by the Transaction is unfounded. See Section VIII above. Indeed, if, as NIMO alleges, the capacity of the Ashtabula Dock to absorb new coal volumes is limited, both CSX and NS would have strong incentives to move coal via B&LE to Conneaut, as CSX does today.

³⁵ NIMO's argument also overlooks both its existing transportation alternatives and the increased competition created by the Transaction, as discussed above. NIMO also claims that it cannot engage in long-term contracting -- a way utilities can help assure lower rates -- because of "its own internal restructuring." NIMO-6, Fauth VS at 25. There is clearly no basis for the Board to impose conditions to relieve NIMO from a condition of its own creation and one that it could freely and easily change on its own.

own data show that in 1996, EFM supplied no coal to NIMO's Dunkirk and Huntley stations. EFM-P-027; see also Sansom RVS at 48. NIMO's comments thus provide no basis for the relief sought by EFM.

7. Consumers Energy Company

Although it concedes that its current coal transportation options will not be reduced by the Transaction and that its Campbell plant -- exclusively rail-served by CSX -- will not see its competitive options reduced now or in the future,³⁶ Consumers nevertheless seeks trackage rights on behalf of NS to its Campbell plant. This transparent attempt to change preexisting competitive conditions should be rejected by the Board. Similarly, Consumers' claims regarding the "acquisition premium" are without merit and do not justify the imposition of conditions.³⁷

Notwithstanding the fact that there will be no change in the rail carriers serving its plants, Consumers argues that "the loss of an independent Conrail will lead to an undue

³⁶ As Consumers' counsel has stated:

Consumers, however, did not allege in its Comments that any presently-available "competitive options" would be eliminated by the subject transaction . . .

Likewise, Consumers' claims regarding single-carrier service related solely and specifically to its Campbell Station, which is now and for the foreseeable future will be served solely by CSX.

Letter from Kelvin J. Dowd to ALJ Leventhal, November 18, 1997, at 2 (Vol. 3).

³⁷ See Section VII above. Consumers also includes the testimony of Drs. Kahn and Dunbar regarding the "one lump" principle in its Comments, but does not seem to make any argument that it will lose the alleged benefits of origin competition. In any event, for the reasons set forth below, any such contention would be groundless.

concentration of market power in CSX's hands," because "NS is not an effective substitute for Conrail when it comes to lower sulfur coal traffic moving north to Consumers' facilities." CE-04, Argument at 7. Consumers makes no showing, however, of the "market power" allegedly possessed by CSX or how it would increase as a result of the Transaction. Of the four Consumers' coal-fired plants, Cobb has no rail access and is served exclusively by lake vessel; Whiting is served by CN and CSX; the Karn-Weadock complex is served by lake vessel, CSX and the Central Michigan; and Campbell is served solely by CSX.³⁸ None is served directly by Conrail or NS. The Transaction thus does nothing to affect Consumers' options.

Consumers alludes to a "reduction in the number of rail carriers from 3 to 2" (CE-04, Argument at 7), without elaboration. Consumers grudgingly concedes that the Board has declared that such a reduction "may not always result in a significant loss of competition." Id., citing UP/SP at 119-21. In fact, Consumers understates the case. The Board has recognized that in the railroad industry such consolidation has produced intensified competition, specifically between NS and CSX. Id. at 118.

Moreover, Consumers' "3-to-2" argument is contradicted by its main argument that, as its counsel explains, "NS would not share Conrail's Great Lakes market focus when it came to the transportation of low-sulfur coal."³⁹ This statement lacks any foundation and is irrelevant to the relief Consumers seeks. Consumers ignores the fact that NS currently supplies other Great Lakes plants such as Centerior's Avon Lake and Bayshore plants. See

³⁸ See CE-04, Garrity VS at 7-8; Sansom RVS at 32.

³⁹ Dowd letter, supra, at 2.

CEC-06, Kovach VS at 4; see also Sansom RVS at 18. In addition, after the Transaction NS will operate the Conrail lines that currently move coal to Karn-Weadock either through interchange with CN at Toledo or via transfer to lake vessel at Ashtabula.⁴⁰ NS, which serves a far greater share of eastern low-sulfur coal production than Conrail, can plainly substitute for Conrail in supplying such coal to Consumers.⁴¹

Furthermore, Consumers states that its Campbell plant is now, and for the foreseeable future will be, exclusively rail-served by CSX.⁴² Its current coal sources are mines served by CSX and western sources.⁴³ If it were true, as Consumers alleges, that MGA coal is not suitable for use at Campbell⁴⁴ and NS is not a likely source of eastern low-sulfur coal for Campbell, then there is no conceivable way the Transaction would have any effect on the Campbell plant or that the requested trackage rights would be of any benefit to Consumers.

⁴⁰ See CE-08 at 7-8.

⁴¹ Sansom RVS at 38-39. Consumers' claim that NS' routing to such interchanges as Toledo are more circuitous than Conrail's (CE-04, Argument at 9) is also incorrect. Sansom RVS at 39. NS obviously will operate the Conrail lines that currently bring coal to Toledo. It has shipped coal to the Lake Erie coal dock at Sandusky, Ohio. Id. at 31. As a result of the Transaction, it will gain access to the Ashtabula Dock and will step into Conrail's shoes at several Great Lakes power plants including Detroit Edison's River Rouge, Trenton Channel and Monroe plants. CSX/NS-19, Sansom VS, Vol. 2A at 322.

⁴² See note 36, supra.

⁴³ Sansom RVS at 32.

⁴⁴ Dr. Sansom points out that, contrary to Consumers' assertion here, MGA coal is suitable for use in coal blends burned at Campbell. Sansom RVS at 34-38. Expanded single-line access to such coal is a benefit of the Transaction to Consumers.

8. Orange & Rockland Utilities

O&R is another utility whose coal transportation options will not change as a result of the Transaction. O&R concedes that it "does not qualify as a '2-to-1' shipper of the kind the ICC and the Board have tried to help in recent merger decisions." ORU-3 at 6. Nevertheless, O&R contends that it will be hurt by an alleged loss of origin competition. As discussed above, such a claim does not justify the imposition of conditions. Moreover, it is incorrect. O&R's other contention, that the Transaction will aggravate existing service problems on Conrail, is totally speculative and flatly wrong.

O&R's Lovett plant, in Tomkins Cove, New York, is currently rail-served only by Conrail. As a result of the Transaction, the line serving Lovett will be operated by CSX. 90 percent of the coal burned at Lovett originates at NS-served mines and is delivered in a two-line NS-Conrail haul. ORU-3 at 4. After the Transaction, that coal will still move in a two-line NS-CSX haul. O&R requests that NS be granted trackage rights over the line to be operated by CSX for a distance of approximately 45 miles (from Oak Island, NJ) or over 250 miles (from Binghamton, NY) in order to provide single-line service that does not currently exist. This claim should be rejected as O&R has not met the basic requirements for the imposition of conditions. See Section III above.⁴⁵

O&R's claim that it will lose origin competition for its coal supply is contradicted by the record. First, O&R has a contract for at least 90% of its coal requirements that extends through 2007. ORU-3, Bogin VS at 2. Thus, there is no meaningful "origin competition"

⁴⁵ O&R's alternative request, that the Board CSX to establish "reasonable interchange rates" from the nearest point of interchange with NS (ORU-3 at 12), is likewise unjustified and contrary to ICC and Board precedent. See Section XIII above.

for O&R's coal supply today and there will be none for ten years. Nor has O&R shown that it has derived any benefit from origin competition in the past. See e.g., BN/SF at 78.

O&R also overlooks the fact that it may be able to move coal to Lovett via single-line service on CSX. O&R's coal supplier, A.T. Massey, has mines located on CSX lines that can supply the Central Appalachian "supercompliance" coal O&R claims it needs and that is called for by its contract with Massey.⁴⁶ See Sansom RVS at 66. Thus, O&R could gain single-line service if CSX made an attractive offer to transport Massey coal to Lovett. O&R has shown no competitive harm justifying any trackage rights or rate conditions.⁴⁷

O&R also requests that the Board retain jurisdiction after approving the Transaction to deal with service problems that may arise. As we discuss in Section XXI and in the Rebuttal Verified Statements of Michael J. Ward, James W. McClellan and John W. Orrison, the Applicants are taking unprecedented steps to assure that service quality will be maintained and enhanced through the allocation of Conrail's lines and the subsequent operation by NS and CSX. O&R details its concerns with the level of service provided by Conrail in the past and worries about what will happen if traffic increases on the line serving Lovett. As the future operator of that line, CSX has detailed a sound operating plan that will provide new customers, such as O&R, with the same consistently high level of service its traditional customers have enjoyed. Any further conditions are unnecessary.

⁴⁶ O&R notes in passing that 80% of Massey's supplies of "supercompliance coal" in the East are served by NS. It omits the fact that the rest are served by CSX. See ATMC-3 at 4.

⁴⁷ O&R's competitive options are enhanced by a very practical option for barge delivery. See Sansom RVS at 64-66.

9. Eighty-Four Mining Company

Eighty-Four Mining Company ("EFM"), operates Mine 84, a coal mine in Washington County, Pennsylvania, sole-served by Conrail. Following consummation of the proposed Transaction, NS would operate over the current Conrail line leading to Mine 84, and thus would replace Conrail as the sole rail carrier serving that mine.

EFM asks the Board to compel new joint access to Mine 84, either by granting trackage rights to CSX over the line leading to the mine, or by requiring NS to switch Mine 84 traffic to CSX.⁴⁸

The requested relief is not necessary to remedy any competitive harm, and should not be granted.

First, Mine 84 is sole-served by Conrail now; it will be sole-served by NS under the proposed Transaction. EFM thus will not lose any rail competition; in fact, as discussed further below, it will gain the benefit of single-line access to the NS system.

Second, EFM itself acknowledges that the proposed Transaction will be procompetitive. "This opening of closed or captive points is the opposite of customary concern in rail mergers, i.e., elimination of competition. In some regions, as Applicants vigorously assert, the proposed transaction will create competitive rail service where none currently exists." EFM-7 at 3.

Additionally, as John William Fox, Jr. notes in his Rebuttal Verified Statement, the Applicants' proposed joint access to the former Monongahela Railroad represents a

⁴⁸ PEPCO and NIMO cursorily support EFM's request; their comments are addressed in Applicants' rebuttal to those parties in this Section.

reintroduction of the rail competition that historically has been available there; Mine 84 has no such history of competitive rail access. Fox RVS at 4.

EFM argues that it is entitled to relief because coal mines on the former Monongahela Railway which, like EFM, now are rail-served only by Conrail will be open to joint access by NS and CSX post-Transaction. In essence, EFM complains that it will be disadvantaged in that its competitors will receive joint access, while EFM will not. In this respect, EFM's claim is the same as other commentators who argue for their inclusion in a Shared Assets Area.

As already discussed, however, that claim is without merit. An increase in rail competition in a particular region, as this Transaction will accomplish in the Monongahela coal region, is simply not a competitive "harm" justifying the imposition of trackage rights or other conditions. Indeed, the introduction of new rail competition in a market can benefit those who are not themselves jointly-served. See Kalt RVS at 14-15, 17-18.

Moreover, imposing EFM's requested condition on the Applicants would place EFM in a better position than before the Transaction, by mandating access by two carriers where currently EFM is served by only one -- a result directly contrary to the established principle that conditions that will make their proponents better off than before the transaction should not be imposed. See BN/SF at 56.

EFM asserts that its competitive position will suffer because it will lose access to certain Conrail-served utilities that will be served exclusively by CSX post-Transaction, representing, by EFM's calculation, 20% of the demand for MGA coal (based on 1996 figures) and that it will be "disadvantaged" in serving other Conrail-served facilities that will

be jointly served by NS and CSX post-Transaction, representing an additional 58% of the demand (again, based on 1996 figures). See EFM-7, Morey VS at 19. Those claims are baseless.

EFM fails to note that, according to its own data, the 1996 demand for MGA coals included a number of plants, with coal receipts totalling more than 7 million tons, that will be served exclusively by NS post-Transaction. See EFM-P-034.

Additionally, the expanded NS system will offer broad new market opportunities for EFM coal, as discussed in Mr. Fox's Rebuttal Verified Statement, including new access to utilities on the NS system that in 1996 consumed a total of approximately 26 million tons of coal. See Fox RVS at 5-6. As Mr. Fox explains, Mine 84 is better situated geographically than the mines on the MGA to take advantage of these new markets. Moreover, EFM itself points out that the market for MGA coals steadily has expanded over the past several years, and is moving into markets formerly dominated by other coals. EFM-7, Morey VS at 9. EFM gives short shrift to the new opportunities that access to the NS system will provide.

EFM's claim that the Transaction will "disadvantage" EFM in 58% of the demand for MGA coal is absurd. First, EFM argues that it will be "disadvantaged" in serving customers -- the Mount Tom plant of Holyoke Water Power Company and the Merrimack plant of Public Service New Hampshire are specifically mentioned -- to whom NS will have "poor connections." EFM-7, Morey VS at 20. But as explained in the Rebuttal Verified Statement of D. Michael Mohan (at 73), NS will in fact be able to serve these customers efficiently. Second, EFM claims it will be "disadvantaged" in cases where EFM will have only one carrier -- NS -- bidding for its business, while other mines will have two. EFM-7, Morey

VS at 20. This again is nothing more than the argument that EFM will be "disadvantaged" because the Transaction is opening up new rail competition to certain mines other than EFM. But as already discussed, the opening of new rail competition is simply not, to those who do not receive it, a "harm" in the sense necessary to satisfy the test for imposing conditions on the Transaction.

EFM's claim that it will be "disadvantaged" in serving destinations that will be dual-served by CSX and NS post-Transaction is simply wrong. See Fox RVS at 4-5. As Mr. Fox explains, NS will have as much incentive to move Mine 84 coal competitively to plants served by both NS and CSX as it will to move coal from jointly-served mines to those destinations. Indeed, common sense suggests that NS has an interest in ensuring that a shipper to whom NS has sole access remains competitive in the market it serves. Additionally, EFM's own data show that in 1996 (the base year used by EFM to determine the 58% "market share" in which EFM claims it will be "disadvantaged" post-Transaction), EFM had no sales at all to most of the customers EFM identifies as to whom it claims it will be "disadvantaged." Compare EFM-P-037 to -040 with EFM-P-027. Those data suggest that there will be plentiful opportunity for NS to seek to expand Mine 84's penetration into that market.

Finally, EFM claims it will be "effectively foreclosed" from reaching utilities that will be sole-served by CSX. As Mr. Fox points out in his Rebuttal Verified Statement, it is often possible to negotiate joint-line service arrangements that are commercially satisfactory to both railroad and customer. See Fox RVS at 2-3. As Mr. Fox also notes, a large portion of NS' domestic utility and metallurgical coal traffic in 1996 -- about 22% -- consisted of

interchanged traffic. Id. And in any event, examining the "market" comprised (by EFM's own description) of 1996 MGA coal customers who will be served exclusively by CSX post-Transaction, EFM sold no coal at all in 1996 to customers comprising well over half that demand. Compare EFM-P-035 with EFM-P-027 (showing no Mine 84 coal in 1996 to NYSEG's Kintigh, NIMO's Dunkirk and Huntley or Rochester Gas & Electric's Russell stations).

In sum, EFM has not demonstrated that it will suffer substantial competitive harm as a result of this Transaction. Mine 84 will not lose any transportation options, but will merely gain access by NS in place of its current access by Conrail. Substituting NS for Conrail as the sole rail carrier serving Mine 84 will substantially preserve EFM's current market and will open new opportunities for the sale of Mine 84 coal on the NS system. The trackage rights EFM seeks therefore are not necessary and should be denied.

10. Atlantic City Electric, Indianapolis Power & Light
and GPU Generation

ACE and IP&L, in their Joint Comments (ACE, et al.-18), and GPU Generation in its separate comments (GPU 22), make no claim of competitive injury or loss of essential rail service. Rather, they raise the speculative fear that they will be forced to pay the "acquisition premium." They also launch a generally unfocused and flawed attack on the ICC's and the Board's "one lump" principle. As we discuss above, these arguments are totally without merit. The conclusion of these commentators is that they -- and any other coal shipper making such a request -- should receive "equal access" to NS and CSX. Leaving aside the obvious point that ACE, which is in a Shared Asset Area, will receive just such equal access for the first time as a result of the Transaction, there is no basis for the

sweeping and unprecedented relief sought by these parties in what is a control proceeding. These requests should be denied.

11. Detroit Edison Company

The Detroit Edison Company, an electric utility with 8 coal-fired generating plants serving southeastern Michigan, and Canadian National Railway Company seek the same condition: a grant of trackage rights to CN over approximately 1.5 miles of the current Conrail track in Trenton, Michigan, that serves Detroit Edison's Trenton Channel power plant (the "Trenton Facility"). See DE-02 at 2-3; CN-13 at 5. CN's and Detroit Edison's request is discussed more fully in Section VIII above. As discussed there, far from suffering competitive harm as a result of the proposed Transaction, the Trenton plant, as part of the Detroit Shared Assets Area, will enjoy more transportation options than before the Transaction. The condition requested by Detroit Edison and CN should be denied.⁴⁹

12. Rochester Gas & Electric Corporation

RG&E makes no argument that it will suffer competitive harm as a result of the Transaction. It is served by Conrail today and will be served by CSX after the Transaction. It also applauds the "clearly positive" potential of the MGA Joint Use Area. RG&E-1 at 2.

⁴⁹ 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 certain railroads regarding the Chicago area. *Id.* at 4. Applicants respond specifically to the contentions of those parties in Section XIII above.

Nevertheless, RG&E seeks sweeping conditions designed to improve its situation and dramatically restructure rail transportation in New York State and elsewhere. It asks the Board to improve conditions to create two-carrier competition "for the entire route between the former Monongahela Railroad System in northern West Virginia and RG&E's Russell Station in suburban Rochester," as well as new regulation of switching and through rates. Id. at 8-9.⁵⁰

RG&E's proposed conditions are not supported by evidence, they do not meet the legal standards established by the Board, and they would dramatically restructure the Transaction in ways that would undermine many of its benefits. They should be rejected.

13. A.T. Massey Coal Company

A.T. Massey Coal Company ("Massey") is a coal shipper that operates 20 mining facilities in West Virginia, Tennessee, Kentucky and Virginia. Currently, 9 of Massey's facilities are served by NS, 9 by CSX, and 2 by Conrail. Post-transaction, the two Conrail-served facilities would be served by NS.

Massey supports the proposed transaction. ATMC-2 at 3. Massey expresses generalized concern, however, that it may be harmed at some point in the future because

⁵⁰ Among other things, RG&E suggests opening portions of Conrail's line between Lyons and Buffalo, NY (over 100 miles of track to be operated by CSX) to NS "and perhaps other carriers"; authorizing shortlines to provide service between Rochester and the Southern Tier Line to be operated by NS; and permitting shortlines to operate over a spare line in the Rochester area to be operated by CSX. RG&E-1 at 3-4. RG&E also supports the request of the Livonia, Avon and Lakeville Railroad for divestiture to it of Genesee Junction Yard. See discussion in Section XIII above. Among its requested regulatory conditions RG&E seeks regulation of switching charges and requiring origin carriers to "be open to reaching reasonable contract provisions with shippers where another carrier is capable of providing origin-to-destination through service." RG&E-1 at 9.

shippers located on the former Monongahela Railroad ("MGA") with whom Massey competes will be newly-served by both NS and CSX post-transaction. Massey seeks continuing STB oversight over ten years, reservation of continuing Board jurisdiction to impose conditions as warranted in the future, and leave to seek further conditions, including the imposition of competitive access, in the future, should Massey suffer "harm to [its] relative competitive position" vis-a-vis its competitors on the MGA with joint rail access. ATMC-2 at 4-5; ATMC-3 at 6.

The requested relief is unnecessary and should be not granted. First, as Massey acknowledges, the harm it fears is purely speculative. See ATMC-3 at 5. Massey has adduced no evidence of any substantial competitive harm that would justify imposing conditions on the transaction.

Second, Massey admits that the transaction will, in fact, provide a concrete and substantial competitive benefit to the company, in that "it will produce more single-line service than has ever existed for the movement of Massey's coal." ATMC-2 at 3. Indeed, it is because of that benefit that Massey supports the transaction. Id.

Third, the "harm" Massey foresees would not justify imposing conditions even if it were to materialize some time in the future. Massey argues, in essence, that it may be harmed because its competitors will receive the benefits of new joint rail access, while Massey will not. But as discussed above and in Section VIII, the opening of new, competitive joint rail access in a certain region is not a competitive "harm" as to those who do not receive it, and thus is not a basis for imposing conditions on the transaction. Massey does not argue, or provide evidence, that its own competitive options will be foreclosed in

any way; indeed, as already noted, Massey recognizes that its own position will improve, in that more single-line service will be created for the movement of Massey's coal.

Finally, in any event, Applicants' settlement with the NITL provides for oversight that is adequate to address any residual shipper concerns. The 10-year oversight proposed by Massey is excessive and unnecessary. The Applicants' views on oversight are discussed more fully in Section XXI, below.

14. Northern Indiana Public Service Company

Northern Indiana Public Service Company ("NIPS") raises a generalized concern over the quality of service it will receive post-Transaction, based on alleged past service problems with Conrail and the current difficulties of UP. As discussed above and in Section XXI below, the Applicants are taking extensive steps to assure that service quality does not degrade and is in fact enhanced, and no further conditions are necessary to assure that result. In any event, the Applicants' settlement with NITL meets the request of NIPS for Board oversight.

NIPS also asserts that by transferring Conrail's majority stock interest in the IHB to CSX and NS, the Transaction would give CSX and NS some form of control over switching in Chicago. It supports the position of EJ&E and WCL that Conrail's interest in the IHB should be divested or, in the alternative, asks the Board to impose conditions requiring non-discriminatory dispatch on the IHB. This request is discussed in Section VIII above and should be rejected for the reasons set forth therein.

**XV. THE CONDITIONS REQUESTED BY VARIOUS
INTERMODAL PARTIES SHOULD BE REJECTED**

Over 100 motor carriers, Intermodal Marketing Companies ("IMC's"), ocean carriers and other intermodal users support the Transaction. These intermodal users recognize that expanded CSX and NS rail networks will provide them with greater opportunities to efficiently use intermodal services to transport their freight. As explained in detail in the Verified Statements of John Q. Anderson for CSX (CSX/NS-19, Vol. 2A, Anderson VS at 275-312) and Thomas Finkbiner for NS (CSX/NS-19, Vol. 2B, Finkbiner VS at 217-60), the allocation of Conrail lines for CSX and NS use will allow for significantly more single-line service than is now available in the Eastern U.S. The reduction in transit times associated with new single-line service between points on the current Conrail system and points on the CSX and NS systems will make intermodal services more competitive with all-highway service in a series of traffic corridors in which trucking now predominates. In addition, both CSX and NS will experience network efficiencies that will enhance their ability to offer more frequent and reliable intermodal service on traffic lanes now served by Conrail.

CSX and NS have predicted that over one million truckload units will be diverted from all-highway carriage to intermodal service as a consequence of the Transaction. CSX/NS-19, Vol. 2A, Bryan VS at 250 and CSX/NS-19, Vol. 2B, Krick VS at 121-22. The environmental and safety benefits associated with these diversions are substantial. CSX/NS-23, Volume 6A, at 70-78.

Intermodal users will not only benefit from new and more competitive intermodal services that CSX and NS will offer, but also from more efficient equipment utilization. Motor carriers, for example, will have expanded options to find backhaul opportunities for their equipment.

Significant capital investments in intermodal terminals have also been planned by CSX and NS. For example, CSX is constructing a new intermodal terminal at 59th Street in Chicago that will help speed the interchange of cars with Western railroads and a connection to its Little Ferry Terminal that will allow access between that Terminal and Conrail's River Line. CSX is also double tracking a large section of the B&O Line between Chicago and Cleveland to accommodate high speed intermodal trains. CSX/NS-20, Volume 3A at 147-161.

NS capital plans include a new \$40 million intermodal facility at Harrisburg, PA; clearance improvements in Ohio and New Jersey; new connections in Ohio and other states; and significant investments in capacity throughout the Midwest, Southeast and Northeast.

No party challenges the proposition that the Transaction will strongly enhance intermodal transportation, extending to more Eastern shippers the benefits of broader and more competitive intermodal services that Western shippers have long enjoyed. However, several parties with an interest in intermodal transportation have asked the Board to impose conditions on the Transaction. These conditions assume a variety of forms (e.g., one party asks the Board to require CSX and NS to enter long-term contracts with a particular intermodal terminal and another requests a condition that would require CSX and NS to

assume safety responsibility for intermodal equipment). Common to all of the requests is that none are legitimately related to this Transaction and that their imposition would impose undue and unjustified costs on CSX and NS.

Further, several of the conditions that are requested would impose new regulatory requirements on intermodal transportation that are grossly inconsistent with the ICC's findings in 1981 that intermodal transportation is fundamentally competitive, not subject to the abuse of market power and therefore should be exempt from regulatory controls. Ex Parte No. 230 (Sub No. 5), Improvement of TOFC/COFC Regulation, 364 I.C.C. 731 (1981). As the ICC appropriately observed in that case, "We believe that our proposed exemption is consistent with congressional intent that we vigorously pursue exemptions from economic regulation in the railroad area where regulatory control appears unnecessary to protect against abuses of market power." *Id.* at 732.

The competitive market forces that led the ICC to adopt an exemption for intermodal transportation have matured and grown stronger in recent years. Intermodal transportation now accounts for a larger percentage of freight transported than ever, and the number of market participants is continually growing. CSX/NS-19, Volume 2A, Anderson VS at 291-293; CSX/NS-19, Volume 2B, Finkbiner VS at 231-240. In short, experience has proven the wisdom of deregulating intermodal transportation. The Board should be leery of those that seek, through the back door of conditions imposed on CSX and NS, to re-regulate it.

The parties that we will address in this section are the American Trucking Associations (ATA); Genesee Transportation Council; J.B. Hunt; Stark Development Board;

and Transportation Intermediaries Association. Other parties with an interest in intermodal transportation are addressed elsewhere in this Narrative -- APL and NYK Lines are addressed in Section IX; Port Authority of New York and New Jersey is addressed in Section XVII; and various "East of Hudson" parties (State of New York, New York City Economic Development Corporation, Congressman Nadler, et al. and Tri-State Transportation Campaign) are addressed in Section VIII.

American Trucking Associations -- In its Comments (ATA-6), the American Trucking Associations ("ATA") requests a series of largely unrelated conditions best characterized as a trucking industry wish list. Its requested conditions would advance the agenda of that industry, but not address any transaction-related competitive issue that might justify the imposition of a condition on this Transaction.

First, ATA seeks a condition that would require that CSX and NS ensure the safety of intermodal equipment (containers, trailers, and chassis) tendered by them to motor carriers. ATA makes this request notwithstanding that the current federal motor vehicle safety rules of the Federal Highway Administration ("FHWA") set forth at 49 C.F.R. Part 396 obligate motor carriers to ensure the safety of the equipment that they operate over the highways. ATA's proposed condition therefore would run directly counter to the rules of another federal agency.

What ATA has not told the Board is that on March 17, 1997, together with the ATA Intermodal Conference, it filed a joint petition asking FHWA to initiate a proceeding to modify the FHWA equipment safety rules so as to shift intermodal equipment safety responsibility away from motor carriers. See Volume 3. ATA so acted for reasons that are

obviously unrelated to this Transaction (which, of course, had not even been submitted to the Board at that time). In fact, ATA's petition to the FHWA relies largely on the same arguments that ATA has presented here.

FHWA has recently agreed to institute an advance rulemaking proceeding in response to ATA's petition. See Volume 3; Rutski RVS at 5. In these circumstances, the Board should not accept ATA's invitation to re-write the rules of another federal agency, particularly where that agency has undertaken to review those rules. The intermodal equipment safety issue implicates diverse interests, including (a) railroads not party to this proceeding, (b) ocean carriers, (c) terminal operators, (d) equipment owners and lessors and (e) elements of the trucking industry not represented by ATA. The FHWA proceeding will offer each of these interests the appropriate forum in which to address the equipment safety issue; this rail control proceeding does not.

Further, ATA's pre-transaction filing with FHWA makes clear that its interest in equipment safety evolves out of concerns that have nothing to do with this Transaction. The hook on which ATA tries to hang its argument -- that there will be a large number of diverted containers resulting from the Transaction -- is not sufficient. CSX and NS already handle a large and increasing amount of intermodal equipment and no evidence has been offered to suggest that the condition of that equipment has posed a material risk to highway safety. In any event, the picture that ATA paints of motor carriers somehow forced by railroads to handle unsafe intermodal equipment is far from accurate. Adequate procedures are in place to address intermodal equipment safety. Rutski RVS at 6-7.

ATA also seeks a condition that would prohibit CSX and NS from discriminating in favor of affiliated intermodal service providers with respect to intermodal services.¹ ATA has not demonstrated that any such discrimination has occurred and its discovery responses indicate that it is not aware of any such discrimination having occurred. See Interrogatory Response, ATA-7 at 4-5, set forth in Volume 3. There is no basis for concluding that approval of the Transaction will result in discrimination or even increase the risk of it occurring. If either railroad discriminated against its own customers, it would quickly find that its business would be lost to competing truckers. Nothing about this transaction changes that competitive fact of life.

When the ICC exempted intermodal transportation from regulation in 1981, that agency recognized that such transportation was an area where the free market and competition worked quite well. By requesting an anti-discrimination condition applicable to these two railroads, ATA -- relying only on a completely speculative fear that CSX and NS will act contrary to their own best interests -- is trying to roll back the regulatory clock. Such a condition would be tantamount to restoring rate regulation, but for only two railroads. The Board should decline ATA's invitation to re-regulate intermodal services, and should instead rely on the market to ensure that competition continues to be fair.

ATA next seeks a condition that would prohibit CSX and NS from requiring that the names of the customers whose freight is tendered to the railroad by a motor carrier utilizing intermodal services be disclosed to the railroad. This practice has been in place at

¹ APL seeks a similar "no-discrimination" condition in its submission (APL-4, Rhein V.S. at 25), and several parties have submitted "me-too" statements in support of APL's position. For the same reasons articulated here, those requests should also be denied.

both CSX and NS for several years, and nothing about the Transaction will change it. Rutski RVS at 7-8; Finkbiner RVS at 9-10.

The requirement that the name of the cargo interest be disclosed is perfectly legitimate. CSX and NS have a right to know whose freight they are carrying. In fact, they impose a disclosure requirement not only on motor carriers, but on third party Intermodal Marketing Companies ("IMC's"), and this is a standard practice in the industry. Further, ATA has failed to document a single example of back-solicitation of freight, which is the concern underlying its request. See Interrogatory Response, ATA-7 at 4 (Vol. 3); Interrogatory Response, and ATA-8 at 4 (Vol. 3).

ATA's suggestion that the required disclosure of cargo interest names is a violation of 49 U.S.C. section 14908 is far afield. That statute prohibits the disclosure of confidential shipper information where such "information may be used to the detriment of the shipper or consignee or may disclose improperly to a competitor the business transactions of the shipper or consignee." Disclosure of the shipper's identity to the railroad transporting its freight is not the type of disclosure that would be prohibited by this statute. The disclosed information is of no competitive value to CSX or NS and is in all cases retained in confidence.²

The last proposed condition on ATA's wish list is the most far-reaching. ATA asks the Board to study and implement "open access" to rail lines in this proceeding, a notion apparently designed to require CSX and NS to make their lines available to any other

² In any event, intermodal traffic has been exempted from the provisions of this statute for some time. See Ex Parte No. 230 (Sub No. 5), Improvement of TOFC/COFC Regulation, 364 I.C.C. 731 (1981).

railroad. As in the case of its other requests, ATA offers no expert or other testimony to support its position. It simply claims that such open access will enhance competition.

This proposed condition deserves no serious attention. Not only does it fail to meet the test of being transaction-related (this Transaction will in fact expand, not contract, competitive options), but this issue far exceeds the scope of this case.³

Genesee Transportation Council -- Genesee Transportation Council ("GTC"), a regional planning organization for nine counties in the vicinity of Rochester, New York, seeks conditions to address concerns with problems it sees in the existing New York State rail network. GTC seeks truck-competitive north-south routes to the Southeast from a Southern Tier junction, protection for a Rochester & Southern Railroad (R&S) route, removal of Conrail restrictions on short-line interchanges, access by CSX and NS to the Port of New York and other North Atlantic ports and a condition that would require CSX to re-establish an intermodal facility in the Rochester area. Conrail previously maintained such a terminal, but closed it in 1992 in favor of handling intermodal cargoes through other Western New York terminals.

CSXI has expressed a willingness to discuss the matter of the intermodal facility with GTC following the integration of the Conrail lines. Rutski RVS at 23-24. This matter should be left for CSX, in consultation with interested parties, to address based on relevant business considerations. GTC's other requests have nothing to do with this Transaction and thus should be rejected.

³ ATA's argument is a variation on the theme of those parties that seek an expansion of the Shared Assets Areas. That issue is addressed in Section VIII of this Narrative.

Further, NS has arrived at an agreement with the Genesee & Wyoming Inc., which owns the R&S and the Allegheny and Eastern. This agreement will benefit the Rochester area by helping preserve business for the R&S and keeping it competitive and viable, and by providing shippers with additional Class I carrier competition.

J.B. Hunt -- This motor carrier asks for a condition that would require CSX and NS to continue to serve this carrier and other motor carriers under contractual terms no less favorable than those offered by Conrail. Each of CSX and NS are prepared to offer J.B. Hunt and other motor carriers commercially reasonable terms for the transportation of intermodal cargo, terms that ultimately will be established by the competitive marketplace. They should expect no less and are entitled to no more. To the extent that J.B. Hunt or any other carrier has a contract in place with Conrail, CSX and NS will honor Conrail's obligations under that contract. Rutski RVS at 24; Finkbiner RVS at 10. Thus, no condition is required.

Stark Development Board -- The Stark Development Board ("SDB"), an economic development entity based in Stark County, Ohio has filed comments (SDB-6) that request that CSX and NS offer special conditions with respect to an intermodal terminal (known as the Neomodal Terminal) located in that county on the lines of the W&LE.⁴ In its Responsive Application filed in Finance Docket No. 33388 (Sub No. 80), W&LE supports

⁴ SDB filed its comments in the form of a responsive application. Finance Docket No. 33388 (Sub No. 79). CSX and NS moved to have the SDB filing treated as comments and requests for conditions. (CSX/NS-151). By Decision No. 55, the Board granted that motion, finding that the SDB filing did "not comply with our procedural and informational requirements applicable to responsive applications . . ."

these requested conditions (WLE-4). The State of Ohio Parties also support (OAG-4) the conditions requested by SDB.⁵

SDB requests a series of broad conditions that would require CSX and NS to (1) provide competitive pricing, schedules, market access and reliability to Neomodal, (2) work with W&LE to assure competitive rates, (3) integrate Neomodal into the CSX and NS systems and market it as if it were their own terminal, and (4) enter into long-term lift contracts to repay the loans used to pay for the Terminal's construction. Alternatively, SDB asks that CSX and/or NS be required to purchase the Neomodal Terminal at fair market value and integrate it into their systems.

SDB bases its request for these extraordinary conditions on two fundamentally flawed propositions -- first, that CSX and NS somehow induced SDB to construct the Neomodal Terminal with commitments to utilize the Terminal and, second, that CSX and NS are not living up to these commitments because of the Conrail Transaction, with the result that the Terminal is facing transaction-related financial problems. The theme underlying the filing is that CSX and NS got SDB into the financial problems that now confront the Terminal and that they must now bail SDB and its supporters out of those problems. These propositions are far removed from the reality of the situation.

First, CSX and NS not only did not induce SDB to build the Neomodal Terminal, they did not even know that the Terminal was under construction until very late in the day. Rutski RVS at 31; Finkbiner RVS at 12-13. In fact, SDB acknowledges in its

⁵ These are the Ohio Attorney General, Ohio Rail Development Commission and the Ohio Public Utilities Commission.

discovery responses that it did not advise CSX or NS (or any Class I railroad) of the plans to build the Terminal until federal and state funding was secured and construction was underway. Interrogatory Response, SDB-5 at 1 (Volume 3). SDB adopted a "build it and they will come" approach to the construction of the Neomodal Terminal -- neither CSX nor NS had any involvement whatever in the decision to build the Terminal, in the siting of the Terminal or in the funding of the Terminal. Rutski RVS at 31-32; Finkbiner RVS at 13.

CSX first learned that an intermodal terminal was under construction in Stark County in early 1995, when it was consulted by W&LE about its design. CSX provided gratis some design specifications to W&LE and SDB so that it would at least be possible for CSX to effectively use the Terminal (which was already funded and under construction at the time) once it was finished. Rutski RVS at 31.

NS first learned about the Neomodal facility in the summer of 1995, and first visited the site in September 1995, well after construction had begun. Like CSX, NS provided virtually no input into the design of the Terminal, and was not consulted by W&LE or SDB. Finkbiner RVS at 12-13. Neither railroad, moreover, provided any commitments to utilize the Terminal prior to its construction or has since entered any agreements obligating use of the Terminal.

Following the opening of the Terminal in 1996, CSX and NS have utilized the Terminal to the extent that it has made good business sense to do so. They have marketed the Terminal (SDB admits that CSX has marketed it actively) to shippers and have offered services to shippers wishing to use the Terminal. Rutski RVS at 32-33; Finkbiner RVS at 12; Interrogatory Response, SDB-5 at 3 and Attachment D (Volume 3).

The Neomodal Terminal, however, has problems that no amount of marketing by CSX or NS can solve. The core problem is the Terminal's location -- it is not located on or near either CSX's or NS' mainlines and is distant from major population and commercial centers. In an intermodal market where most freight is time-sensitive, and where competition with the door-to-door services offered by motor carriers is keen, Neomodal's location far from CSX or NS mainlines places it at a distinct disadvantage. All freight moving to or from the Terminal must be switched with W&LE at the nearest CSX and NS yards, an operation that adds both time and expense to the interchange of intermodal units. Rutski RVS at 33; Finkbiner RVS at 13.

CSX traffic must be handled through the Willard Yard, 85 miles distant from Neomodal, where its handling must be coordinated with CSX's intermodal trains that operate through that yard. Rutski RVS at 33. This additional handling and coordination results in slower (and thus less attractive) service for Neomodal traffic. Id. NS has experienced substantial operational problems and delays in handling Neomodal traffic jointly with W&LE. Finkbiner RVS at 13. In addition, the Terminal is not even located on W&LE's Bellevue-Connellsville mainline, but rather is several miles distant on another line.

The railroad operational disadvantages that burden Neomodal were not taken into account in SDB's decision to build the Terminal at its current site. Rather, the impetus behind SDB's decision to locate the Terminal had nothing at all to do with promoting the Terminal's operational viability, and everything to do with promoting SDB's desire to retain in Stark County the operations of a major local employer, Fleming Foods. SDB's own filing, and documents produced during the course of discovery, demonstrate that Fleming

Foods threatened to relocate out of Stark County unless W&LE tracks located adjacent to its property could be relocated to allow for expansion of Fleming's facility. Rutski RVS at 28-30. With the help of public and private funds, the tracks were relocated and, as a by-product of that decision, SDB decided to construct the Neomodal Terminal on the relocated tracks. An attachment to the Verified Statement of SDB President Stephen L. Paquette is bl. . . about the matter: "The Neomodal Terminal . . . was built to keep an established company, Fleming Foods, in Stark County . . . A major obstacle that confronted [Fleming's] plans was the existence of a main-line rail track owned by the [W&LE], which ran directly through Fleming's property proposed for their expansion In order to retain Fleming's operations, ODOT proposed to construct a new truck/rail intermodal terminal that would allow for the plant expansion and rail relocation." SDB-4, Exhibit B to Paquette VS at 2. The interests of Fleming Foods, and the job protection interests of SDB, were thus very much part of the calculation behind the Terminal's construction, but as noted, no Class I railroad was even consulted about this project until it was already well under construction. See Rutski RVS at 32; Finkbiner RVS at 13.

Having assumed the risk that the intermodal terminal it decided to construct on the relocated tracks would succeed in attracting business, SDB now claims that the Terminal's financial problems are attributable to the Conrail Transaction. In the "Summary" of SDB's position set forth at the beginning of its filing, SDB claims that, "Customers were beginning to use the Terminal, when CSX and NS diverted their attentions to the divestiture of Conrail. As a result of the Conrail divestiture, marketing, sales, reliable service and

transit times suffered and Neomodal lost customers and the Terminal ramp up of lifts volume slowed." SDB-4 at 1.

The proposition that CSX and NS have been too busy to market the Terminal because of the transaction is so far afield as to warrant no extended response. The Conrail Transaction has had no effect at all on CSX's or NS' marketing of the Terminal or their marketing elsewhere. Both carriers marketed the Terminal before the Transaction, and both are marketing it today. The Terminal's location-related liabilities pre-dated the Conrail Transaction, and they remain unchanged by it.⁶

SDB also argues that the Conrail Transaction will leave only one Class I railroad serving Northeast Ohio, NS, and that this "lack of competition will significantly disadvantage [Northeast Ohio] industries and create an anticompetitive rail environment." This argument is also wrong. Like NS, CSX will retain a significant presence in Northeast Ohio post-transaction. Both carriers will also continue to offer competitive service to Neomodal customers to the extent that there is a market demand for those services. Conrail, in fact, did not serve Neomodal and thus the allocation of its assets will not have any significant impact on the Terminal.

CSX and NS will also provide intermodal service at Cleveland, 60 miles from Stark County. CSX will utilize the Collinwood facility that is today operated by Conrail. Northeast Ohio shippers will retain competitive intermodal service and nothing about this

⁶ Most of SDB's filing assumes the form of Neomodal promotional materials that tout the modern nature of the facility. No amount of promotion of the virtues of the Terminal can change the essential fact that this Terminal's problems are not related to this Transaction.

Transaction will undermine that competition. In addition, NS will provide intermodal service at Pittsburgh, part of the Western Pennsylvania market that Neomodal admits targeting.

In this setting, no conditions designed to protect Neomodal or require its integration into the CSX or NS systems have been justified. The free market should be the judge of whether Neomodal flourishes or fails, and the risk associated with the Terminal should remain with those that decided to build it. In fact, the conditions that SDB has requested would effectively restore regulatory control over intermodal services at a single terminal, contrary to the long-standing and sound policy decision, discussed above, to allow market forces to operate with respect to intermodal traffic.

Further, any "integration" or incorporation of the Terminal into the CSX and NS systems is entirely unrealistic given the Terminal's location on the lines of a third carrier and the operational difficulties set forth above. Beyond that, integration of the Terminal would be unprecedented. Whether such a condition might be appropriate under any set of facts is at best debatable, but the issue is not even close in this situation since SDB has failed to show any transaction related impact on the Terminal.

Transportation Intermediaries Association -- The Transportation Intermediaries Association ("TIA") is an association of brokers, forwarders, IMC's and other intermodal third parties. Its members provide warehousing and auditing services, and serve small to medium size shippers and carriers.

TIA seeks a condition that would prohibit CSX and NS from imposing liquidated damages for IMC contract volume commitment shortfalls due to rail rate increases, terminated service, poor service, or cargo loss and damage. TIA also asks for a condition

requiring Applicants to submit plans demonstrating competitive intermodal linehaul service in lanes currently served by Conrail, and requiring Applicants to submit plans concerning the allocation of intermodal equipment.

The theory underlying TIA's unusual requests is that the Transaction will result in reduced intermodal service levels as well as service disruptions. TIA offers no evidence to support its claim that these results will follow from the Transaction, and the evidence of record in this case suggests strongly otherwise. See CSX/NS-19, Vol. 2A, Anderson, VS at 306-07, CSX/NS-19, Vol. 2B, Finkbiner VS at 226-28 and Rutski RVS at 38. TIA's requests should therefore be denied.

XVI. SHIPPER TRADE ASSOCIATIONS AND MERCHANDISE SHIPPERS.

In this section, we address the claims of shipper trade associations and merchandise shippers that are not addressed elsewhere in this narrative. Significantly, there is widespread support for the Transaction from shipper groups and individual parties that filed comments on October 21, 1997, and certain supporting statements are noted in this Section. Because the benefits of the proposed Transaction and the widespread support for the Application are described elsewhere in the narrative, the discussions that follow focus primarily on requests for conditions made by shipper trade associations and individual merchandise shippers. Those requests are uniformly unfounded and should be denied.

A. The Requests for Conditions Made by Various Shipper Trade Associations Should Be Denied.

i. American Farm Bureau Federation.

The American Farm Bureau Federation (AFBF) supports the Application. It recognizes that its objectives are "highly positive," that the Transaction will greatly increase both intramodal and intermodal competition. AFBF believes that the Transaction will provide improved rail access to extremely important agricultural markets, resulting in better services, more competition between well-balanced competing railroads, increased investment to serve agriculture, and greater access to important markets, commodities and raw materials.

Because of the asserted complexity of the Transaction AFBF asks the Board to establish an oversight schedule for each phase of the Transaction. Applicants explain elsewhere, in Section XXI, why oversight conditions are unwarranted. In any event, CSX

and NS have agreed with NITL not to oppose a three-year period of Board oversight of the Transaction.

2. Chemical Manufacturers Association (CMA) And The Society Of The Plastics Industry (SPI) (CMA-10).

CMA/SPI oppose the Application. CMA/SPI raise numerous issues and request extensive conditions. Many of the issues raised and conditions requested have also been expressed by others and are discussed elsewhere.¹ We respond here to the following issues not addressed elsewhere: (a) pre-implementation commercial conditions; (b) the extent of improved service; (c) claim of reduced competitive benefits for chemical shippers; (d) possible gateway shifts; (e) concern over possible congestion at Harrisburg and on the Lehigh line.

a. Pre-Implementation Commercial Conditions.

CMA/SPI propose two pre-implementation commercial conditions which, if adopted, would have a detrimental effect on CSX's and NS's operations and their ability to compete effectively with one another. CMA's proposed condition B.4 would apply to Conrail contracts involving movements to, from or within SAAs and would give shippers the unilateral right to determine which of these contracts would be performed after the Transaction and by which carrier. This condition is addressed in Section IX and in the Rebuttal Verified Statement of Christopher P. Jenkins at pages 1-3. Applicants and NITL

¹ See Sections V (alleged vertical integration effects), VII (requests for various rate regulatory conditions), XI (prescription of switching charges), and XXI (implementation and oversight conditions).

have agreed to the process for allocating such contracts based on the approach set forth in the Application.

CMA/SPI's proposed condition A.2 would have the Board require CSX and NS to adopt all existing Conrail tariff and circulars that were in effect when the Application was filed and to publish supplements incorporating new routes. This proposal is commercially naive and impractical. It ignores the fact that some of Conrail's rates have likely changed in response to changing market conditions. Jenkins RVS at 5. Moreover, this condition would have CSX and NS charging the same rates for movements which they could both serve -- the very antithesis of the competition that shippers say they want. Finally, this proposed condition would effectively revoke exemptions on commodities previously exempted pursuant to section 10505 (now 10502), yet revocation would apply only for Conrail shipments. Shipments via existing CSX and NS routes, as well as shipments on other carriers, would be unaffected -- an incongruous result, to say the least. For all these reasons, CMA/SPI's condition A.2 should be denied.²

b. Service Benefits for Chemicals Shippers.

CMA/SPI make allegations related to limited benefits, reduced competition and gateway shifts, which are discussed in this and the following two sub-sections. These

² CMA/SPI request a similar condition in their proposed condition C.2, which would require Applicants to "[k]eep open all reciprocal switching points on Conrail/NS/CSX that were open when the Application was filed (June 23, 1997)." Although CMA/SPI have shown no merger-related justification for the imposition of such a condition by the Board, Applicants have reasonably addressed the concerns of shippers on this subject in their agreement with NITL, which provides "NS or CSX, as the case may be, will cause any point at which Conrail now provides reciprocal switching to be kept open to reciprocal switching for 10 years after the Closing Date."

allegations are based entirely on an analysis of certain Conrail traffic data prepared by John J. Grocki. CMA-10, Attachment 2, Grocki VS. In rebuttal, John H. Williams of The Woods de Consulting Group, demonstrates that the database used by Mr. Grocki is incomplete because only Conrail traffic was considered, thereby excluding from consideration all other relevant rail traffic and rail stations involving all other rail carriers -- including NS and CSX. That significant flaw, according to Mr. Williams, leads to Mr. Grocki's Study both understating the service and competitive benefits of the Conrail transaction, as well as overemphasizing the importance of the transaction's effects on Conrail's chemicals and plastics traffic. Williams RVS at 2-4. A further deficiency of Mr. Grocki's Study is that the computer logic he used was intended solely to categorize Conrail's traffic, not to model the competitive interplay among railroads. For example, Mr. Grocki's Study did not consider that traffic currently moving NS-CR between a Conrail destination that post-Transaction will be served by only CSX and an origin in the Southeast that is served by NS and CSX would be likely converted to single-system service by CSX. Such database and methodological gaps cause Mr. Grocki's conclusions with regard to the effect of the Conrail transaction on rail service and competition for chemicals and plastics traffic to be incorrect. Williams RVS 3-6.

Mr. Grocki's conclusion that 111,000 carloads, or 32 percent, of chemicals and plastics traffic will "potentially have worse service" as a result of the Conrail transaction (Grocki VS at 4) is simply wrong. Instead Mr. Williams concluded that 233,200 carloads, or 67.5 percent of chemicals and plastics traffic would benefit from improved service resulting from new single-line routes, improved service via cross-territorial gateways, and enhanced competition. Williams RVS at 33.

c. Enhanced Competition For Chemicals Shippers.

Although Mr. Grocki admitted that 52,000 carloads, or 15.1 percent, of total chemicals and plastics traffic -- mostly Shared Assets Area traffic -- would benefit from the Conrail transaction, his conclusion that 63,000 carloads, or 18 percent, of chemicals and plastics traffic would have a "reduction in competition" after the Conrail transaction (Grocki VS at 5) is wrong. Instead, Mr. Williams concluded that 73,200 carloads, or 21 percent, of chemicals and plastics traffic will benefit from enhanced competition, primarily because of the competition created between the new Norfolk Southern/Conrail System and the new CSX/Conrail System for traffic moving to, from or between Shared Assets Areas. Mr. Williams also found that no chemicals and plastics traffic would receive reduced competition. Williams RVS at 34-35.

d. Possible Gateway Shifts.

CMA/SPI state that NS and CSX will attempt to shift traffic away from St. Louis and Illinois gateways to New Orleans and Memphis which, they allege, will lead to higher rates and to reduced competition. CMA-10 at 26. There is no basis in fact, economic theory or railroad business practices to support the contention that this would happen as a result of the Conrail transaction.

First, Mr. Williams' review of Mr. Grocki's workpapers showed that, after considering the profitability of the movements to the railroads involved, Mr. Grocki actually diverted only 22,238 carloads -- approximately one half of the 43,400 carloads which Mr. Grocki identified as potentially divertible. Williams RVS at 27.

As shown by Mr. Williams, Mr. Grocki has made a number of major errors in his process of calculating the profitability and the extent of the possible gateway diversions. His gateway shifts are based on a traffic analysis that concludes that the chemicals and plastics traffic handled by the western railroads is only marginally profitable. As noted by Mr. Williams:

. . . the bottom line result of Mr. Grocki's cost analysis is that Conrail's western connections generate revenues of \$49.9 million and costs of \$48.4 million on this traffic over their existing routes. By my calculation, that is a revenue-to-cost ratio of 1.03, which means that, for the western railroads, such Chemicals & Plastics traffic is only marginally profitable. Based on my experience, I do not believe that either the Union Pacific Southern Pacific System or the Burlington Northern Santa Fe System produces such a low, marginal revenue-to-cost ratio on their Chemicals & Plastics traffic.

Williams RVS at 29. An analysis premised on a methodology that calculates western chemicals traffic as marginally profitable is obviously erroneous on its face and should be disregarded by the Board.

Mr. Grocki's hypothesis that NS and CSX would increase rates if such gateway shifts occurred is further refuted by Mr. Williams' analysis of chemicals and plastics traffic which presently moves through gateways at Memphis and New Orleans.

Mr. Williams found that this traffic generally experienced average rates that were lower than rates on traffic moving over the existing St. Louis and Illinois gateways. Williams RVS at 33.

As noted by CMA/SPI, officials of both CSX and NS have indicated that neither carrier has plans for gateway shifts. CMA-10 at 26-27.³

e. Possible Congestion -- Harrisburg and Lehigh Lines.

CMA/SPI raise an issue of potential congestion at Harrisburg, Pennsylvania, which will become an NS facility. CMA-10 at 13. CMA/SPI offer no evidence whatsoever to support this contention except speculation. Certainly, it will be to NS's advantage that this facility is operated efficiently. As indicated by Mr. Mohan, CMA/SPI appear to misunderstand the proposed operation. Mohan RVS at 62. NS will be investing \$40 million to develop a new intermodal exchange facility east of Harrisburg. Operational programs to be instituted, as discussed by Mr. Mohan, should ensure that this facility operates smoothly. Mohan RVS at 62.

CMA/SPI allude to possible clearance problems on the Lehigh Line. CMA-10 at 11, n.5. The NS Operating Plan provides for various improvements on this line including providing for doublestack clearance through the Musconetcong Tunnel at Pattenburg, NJ. CSX/NS-20, Vol. 3B at 201-202. Mr. Mohan has concluded that the cost of these various Lehigh Line upgrades total \$31.7 million. The upgrades are designed to facilitate the handling of full envelope doublestack container traffic. There will be a decrease in the number of trains over this line. Mohan Dep., Sept. 17, 1997, at 371-374. Consequently, there is no justification for concern over congestion on the Lehigh Line.

³ Citing Seale Dep., Aug. 26, 1997, at 10 and Jenkins Dep., Sept. 15, 1997, at 15, CMA-10, Attachment 5.

With respect to CMA/SPI's request for a condition relating to switching at Buffalo, NY (CMA-10 at 39) we refer to our discussion of switching in Part XI and our response to the comments of the Erie-Niagara Rail Steering Committee.

3. The Fertilizer Institute (TFI-2).

The Fertilizer Institute joins in the comments of the National Industrial Transportation League (NITL) except to state that as to the rate cap proposal the RCAF(A) should be used rather than the RCAF(U). The Fertilizer Institute expresses no reason whatever for this distinction. We refer to our discussion relating to the NITL comments.

4. Institute of Scrap Recycling Industries, Inc. (ISRI-6).

ISRI states that it supports the comments and requests for conditions filed by the NITL. We address those proposed conditions elsewhere.

ISRI adds nothing to the NITL arguments. In addition to supporting the NITL conditions, ISRI requests that the SAAs be expanded (ISRI-6 at 15-6) to include the facilities of three members: Louis Padnos Iron & Metal (LPIM), William Reisner Corporation (WRC) and Royal Green Corporation (RG). All three currently receive service from one rail carrier and those situations will not be changed by the Transaction. ISRI has not alleged any possible reduction in rail competition for these three shippers. Instead it is seeking to improve, not maintain, their competitive rail situation. ISRI argues that these facilities may be disadvantaged because they compete with other facilities that are in the SAAs. This is the same claim asserted by many others. ISRI offers no special facts or other arguments concerning the SAAs. These contentions should be rejected for the reasons set forth in Section VIII.

As to the concern expressed by ISRI regarding continued two rail carrier service to the facility of Reserve Iron & Metal at Cleveland, Ohio (ISRI-6 at 21), contrary to ISRI's beliefs, both NS and CSX will be able to serve that facility. See Mohan RVS at 72.

5. National Grain and Feed Association, NGFA-2.

The National Grain and Feed Association supports the Application. NGFA's support "is premised on the belief that the acquisition of Conrail by both CSX and NS has the potential to improve market access and service through single-line, single-carrier service for rail users." NGFA-2 at 3. In addition, "the NGFA's support is based on the belief that both rail users and the carriers can potentially benefit from post-acquisition efficiencies realized by the carriers where effective competition is maintained." Id.

NGFA notes that some of its members are concerned about Conrail's switching charges. It also states that it believes it is important that CSX and NS have "meaningful performance measurements that can be used to monitor the implementation of their acquisition of Conrail." Id. at 3-4. Both of these concerns are addressed in the NITL settlement.

6. National Industrial Transportation League (NITL) NITL-7
U.S. Clay Producers Traffic Association, Inc. (CPTA)
The Fertilizer Institute (TFI).

These three associations of shippers do not oppose the Transaction. To the contrary, they recognize that it will bring significant competitive benefits to many shippers. NITL/CPTA/TFI state:

Unlike previous Transactions in which no increases in rail-to-rail competition were proposed, this Transaction clearly is intended to bring increased rail-to-rail competition to certain geographic

areas of the country. NITL/CPTA/TFI applaud these aspects of the Transaction.

NITL-7 at 2. As described in Section II, CSX and NS have entered into a settlement agreement with NITL that addresses all of NITL's requested conditions except for certain post-implementation rate conditions. We explain in Section VII why NITL's proposed rate conditions should be rejected.

7. National Mining Association (NMA-2).

The Association's members mine and process coal and minerals and perform other minerals-related activities. The Association notes the industry's reliance on rail transportation throughout the year, and expresses concern that the proposed Transaction will impose greater demand on Applicants' coal traffic operations.

Providing no evidence, the Association states that there have been times in the past when coal transportation services have been inadequate. It asks the Board to: 1) require Applicants to submit a detailed operating plan of rail services provided to coal producers, consumers and/or shippers by Conrail; 2) provide for a public comment period, and 3) consider the comments, order revisions, and require adherence prior to approval of the proposed Transaction.

Applicants address the propriety of implementation and oversight conditions elsewhere and explain why they are unwarranted or should be limited to those Applicants have agreed to with NITL. That discussion applies fully to the conditions requested by the Association. Moreover, Applicants have submitted detailed operating plans as part of the Application and the Association has made no showing that these operating plans are inadequate.

8. Ohio Steel Industry Advisory Council (OSIAC).

OSIAC claims 10 steel company members in Ohio, but it indicates that only three of those members have any concern with the Transaction.

One of these concerns relates to a WCI Steel facility at Warren Ohio, which presently receives iron ore from Ashtabula, Ohio, via CR. NS will be allocated this line. Presently CSX is also able to provide service to Warren from Ashtabula utilizing, in part, trackage rights it has with CR. CSX will continue to have these same trackage rights from NS after the acquisition. WCI will actually have improved service from CSX on shipments from Ashtabula because under the Ashtabula Access Agreement CSX will have use of and access to 42 percent of the ground storage throughput and tonnage capacity of the Ashtabula Harbor facilities. CSX/NS-25, Vol. 8C at 397-399. Consequently, this WCI facility will continue to be served after the merger by two rail carriers, as at present and has the prospect of improved service as a result of the Transaction. OSIAC has not articulated any adverse effect on WCI from the Transaction and WCI has withdrawn from the case. The competitive situation will be improved not degraded.

The other two OSIAC members, Timken Company, with a facility in Canton, Ohio, and Republic Engineered Steels, Inc. with a facility in Massillon, Ohio, are concerned about the viability of the W&LE from whom both presently receive service in addition to service from CR. We refer to the discussion of the W&LE in Section [XIII].

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B. The Board Should Refrain from Imposing Conditions in Favor of Shippers That tWill Receive Joint-Line Service Following the Transaction.

Various merchandise shippers claim that they will be harmed by the proposed Transaction because certain of their movements that were handled by Conrail in single-line service will become joint-line CSX-NS movements as a result of the division of Conrail. We address briefly here certain overview aspects of these so-called "1-to-2" situations. Claims of individual shippers are addressed in the following sub-section of this narrative.

Applicants recognize that single-line service is generally preferable to joint-line service. The creation of new single-line service opportunities, along with the creation of new competition is, in fact, one of the principal benefits of the Transaction. The creation of a limited number of joint-line movements is an unavoidable by-product of this Transaction. While the creation of joint-line movements is not itself a benefit to the affected shippers, neither is it a harm of the sort that the Board should remedy through the imposition of conditions.

The conversion of what was a single-line Conrail movement to a joint line CSX/NS movement clearly does not constitute a reduction in rail competition. Kalt RVS at 23. Affected movements will have the same number of rail options at origin and destination as they did prior to the Transaction. Nor is there any basis for suggesting that the creation of joint-line service threatens a loss of essential rail services. By definition joint-line rail service will exist following the Transaction.

Apart from the fact that the creation of these new joint-line movements is not a harm to be remedied under the Board's precedents, there are sound policy reasons why the

Board should refrain from crafting new, unprecedented conditions to deal with these situations. The Board's overall approach to assessing whether a railroad combination is in the public interest is a balancing approach. There is no dispute that the volume of traffic that could benefit from the new single-line service that will be created by the Transaction will far exceed the volume of traffic that will be converted from single-line to joint-line service. For every carload of traffic that will be converted to joint-line movements as a result of the Transaction, six carloads will receive new single-line service as a result of the Transaction. CSX/NS-19, Vol. 2B, Williams VS at 7. Those figures are limited to traffic that moved in 1995 and do not include new business that will come to CSX and NS because of the single-line rail service that will be created as a result of the Transaction. Shippers who may experience some new joint-line movements will have many new opportunities for single-line service. Applicants should not be penalized for creating net public benefits by being subjected to onerous and unprecedented conditions.

The matter of the quality of service to be provided by CSX and NS on joint-line movements is one that is better addressed through the private initiatives of CSX, NS and the individual shippers than through Board intervention. As explained by Mr. Orrison, CSX and NS have worked effectively together in the past to provide efficient joint-line service and they are committed to doing so in the future. Orrison RVS at 120, 145. CSX and NS are each other's largest interchange partners and have demonstrated their ability over time to provide quality joint-line service. Moreover, the NITL settlement provides that CSX and NS will work with shippers to provide fair and reasonable joint-line service. Shippers of more than 50 cars per year between an origin/destination pair will have recourse to arbitration if

they object to the routing employed by NS and CSX. Particularly, in light of this agreement, the imposition of conditions involving the routing of individual movements would be highly perilous and potentially counterproductive because such conditions could disrupt Applicants' broader service plans.

The extended or perpetual rate caps on all joint-line movements sought by individual shippers and other parties such as CMA/SPI are also unwarranted. In the case of movements that are under contract, CSX and NS have already committed to fulfill Conrail's contractual obligations for the remainder of the contracts. And, under the NITL agreement, NS and CSX will maintain the existing Conrail rates (subject to RCAF-U increases) for three years on newly created joint-line movements of 50 cars or more a year. More stringent rate caps are uncalled for. There is no guarantee that Conrail would not have raised rates on the movements in question, and the statute provides ample protection for any shipper that believes it is being assessed unreasonably high rates. Longer-term rate caps could result in traffic being handled at non-compensatory rates, which is contrary to the public interest. See Jenkins RVS at 14.

C. The Conditions Sought By Individual Shippers Who Will Receive Joint-Line Service Following the Transaction Should Be Denied.

1. Alternative Distribution Systems, Inc.

Alternative Distribution Systems ("ADS") operates metal distribution facilities across the country. ADS "generally support[s]" the Application. However, it is concerned that the movement of steel coils from Burns Harbor, IN to ADS's warehouse in Indiana, which is currently handled in single-line service by Conrail, will become a joint-line movement following the Transaction. ADS notes that CSX and NS have agreed to serve

jointly the General Motors Metal Fabricating Plant in Indianapolis where it says the steel coils it receives at its warehouse are ultimately used. ADS ask the Board "to order CSX and NS to treat our warehouse the same as the G.M. Metal Fabricating Plant. . . ." Letter from Richard P. Dickson to Linda J. Morgan, October 21, 1997 at 2.

Although ADS is concerned about its loss of single-line service, it has not demonstrated that it will suffer harm of the sort that is remediable by the Board. Moreover, ADS is a potential beneficiary of the provision of the NITL settlement agreement governing CSX's and NS's treatment of joint-line movements.

The dual access remedy proposed by ADS should also be rejected because it is disproportionate to the alleged harm. ADS will not suffer a reduction in competitive rail options as a result of the Transaction. Its Indianapolis warehouse will be served by one railroad following the Transaction, as it is now.

2. The International Paper Company (IP-4).

a. The Transaction Will Result in Overall Benefits for IP.

The Board's responsibility in this proceeding is to assess the public benefits of the Transaction and to impose conditions only to remedy competitive harm or a loss of essential rail services. International Paper Company ("IP") will suffer no such harm as a result of this Transaction.

IP is the largest forest products company in the world with annual sales of \$21 billion. IP operates 500 facilities in 31 countries, including facilities in 33 states in this country. See International Paper Recruiting Home Page, Manufacturing Associate Program, Page 2; LaGrange Daily News, Index of Business/Industry, Sept. 11, 1997. IP is a major

user of rail services in the eastern United States and accordingly will receive many of the benefits of the Transaction, including new single-line service. [[

]] IP, however, ignores the overall benefits that it will receive as a result of the Transaction and instead comes to the Board to complain about one isolated movement.

b. IP Will Not Suffer Any Harm Requiring the Imposition of Conditions as a Result of the Transaction.

IP's Comments address movements between IP's Erie Mill and IP's facility in Lock Haven, PA. IP requests that the Board order either that CSX grant trackage rights to NS over a portion of this movement or that CSX and NS both grant trackage rights to ALY. IP-4 at 3. This two-way movement includes three segments: (1) a 75-mile Conrail line between Lock Haven, PA and Emporium, PA; (2) a 150-mile ALY line between Emporium and the OD Yard in Erie over which Conrail has trackage rights; and (3) a 3-mile Conrail line from the OD Yard to IP's Erie Mill. IP-4 at 1. Line haul Service on this movement is currently provided by Conrail using IP dedicated cars. Id. After the Transaction, NS will operate between Lock Haven and Emporium and inherit the trackage rights over the ALY line. CSX will own the line from the OD Yard to IP's Erie mill.

IP argues that the service it currently receives from Conrail between Lock Haven and Erie cannot be maintained after the Transaction unless NS is granted trackage rights between OD yard and IP's Erie mill. This claim is unsubstantiated. As IP's Comments recognize, CSX and NS plan to continue the current service that IP receives. IP-

4 at 2. Service between Lock Haven and the OD Yard will be performed by NS, and CSX will handle the traffic from the OD Yard to IP's Erie Mill. IP's Comments focus on the 12-hour time limit that Conrail has on the ALY line, but this portion of the movement will be unaffected by the Transaction. NS will have the same rights over the ALY line that Conrail currently has. Once the movement reaches the OD Yard, a CSX crew will switch it into IP's Erie Mill, along with other IP traffic. IP's Comments ignore what currently happens to the movement at the OD Yard. Conrail does not operate this movement as a run-through train today; a Conrail yard crew switches the movement into IP's Erie Mill. Moreover, IP neglects to inform the Board that a shortline railroad, the Nittany and Bald Eagle, currently originates IP's traffic at Lock Haven, which means that the service is not strictly single-line today. Therefore, IP's contention that this entire arrangement will be jeopardized as a result of the Transaction is without merit. CSX will provide service over the three-mile segment from the OD Yard to IP's Erie mill that is substantially identical to the service Conrail performs over this segment today.

IP also contends that it will incur "greatly increased costs" if the Lock Haven-Erie movement is handled in joint-line service. IP-4 at 2. This assertion is entirely speculative and, in any event, does not constitute the sort of harm that the Board should remedy. [[[

]]] The rate protections of the NITL agreement extend beyond [[[]]] assuming NITL elects them. Moreover, CSX and NS will have every incentive to offer IP sufficiently attractive rates to keep the Erie Mill in operation

over the longer term. And, in this day of multi-plant rail contracts, IP has sufficient leverage from its multiple rail-served facilities to protect its rates on this one movement.

IP's own comments admit that "some joint-line operations can be, and often are, more efficient than a single-line route." IP-4 at 8. [[

]] Even if a change in the level of service provided a basis for imposing a condition (and it does not), IP has failed to show that CSX and NS cannot and will not provide efficient joint-line service to IP's Erie Mill similar to the service IP receives today. IP's request for NS trackage rights should be denied.

c. IP's Concern about the CP and D&H are Unfounded.

IP also expressed concern about access of the D&H/CP to the port of New York and the North New Jersey Shared Assets Areas in the event that negotiations between the Applicant and CP/D&H were unsuccessful. IP-4 at 13. Settlement agreements were reached. See Vol. 3 and Jenkins RVS at 14.

3. Inland Steel Corporation (IS-5).

Inland Steel Corporation ("ISC") supports the conditions proposed by NITL. ISI-5 at 6. ISC also raises specific issues related to a three-part movement between its steelmaking facility on the IHB in Chicago, a steel finishing plant in New Carlisle, IN in which it is a joint venture participant and then to a customer in Kenton, OH.

a. ISC's Movements to Kenton, OH.

ISC's concern is focused on a movement of steel from its New Carlisle, IN finishing facility to Kenton, OH which is currently handled in single-line Conrail service and will become a joint-line movement if the Transaction is approved. ISI-5 at 3. ISC requests

that NS and CSX agree to provide run-through service for this movement at rates specified in the current contract with Conrail. ISI-5 at 5-6. This movement is currently handled in contract service, and CSX and NS have already committed under the Transaction agreement to provide this service, adhering to any service commitments that may be contained in the contract, and to protect ISC's rate for the duration of the contract. The NITL agreement rate protection could extend beyond the life of the contract if ISC elects it. Moreover, CSX and NS have investigated the operational aspects of this movement and believe they have identified a way to provide post-Transaction joint-line service that is as efficient as the single-line service that Conrail provides today. See Orrison RVS at 148-49; Mohan RVS at 78.

b. ISC's Movement to Indianapolis.

ISC requests that NS and CSX agree to provide run-through service from New Carlisle to ISC's customer in Indianapolis similar to the service that ISC seeks for the movement to Kenton. ISI-5 at 5-6. This situation, however, is very different from that discussed above because the movement from New Carlisle to Indianapolis is a prospective one; no ISC traffic is currently moving by rail on this route. ISC's own comments speak of "arrangements . . . being worked out for the traffic going to Indianapolis. This has the potential of shifting the railcar equivalent of 70 cars per month from truck to rail." ISI-5 at 3. There is no tangible harm to ISC as a result of the Transaction because the traffic is moving by truck now and could still move by truck after the Transaction. ISC's concern is that the Transaction may affect its plans to develop improved transportation service to customers in Indianapolis so as to enhance ISC's business with that customer. CSX and NS

are also interested in developing this business and are willing to develop an operating plan for the Indianapolis movement that will assist ISC. Orrison RVS at 148-49. In any event, the Transaction will not affect ISC's existing business.

c. Trackage Rights to East Chicago.

Finally, ISC requests that NS be granted trackage rights to serve directly ISC's Indiana Harbor Works at East Chicago, Indiana. ISI-5 at 6. This request is unfounded. The Indiana Harbor Works is currently served by two carriers, the EJE and the IHB. ISC-5 at 2. If the Transaction is approved, Indiana Harbor Works will still be served by these two railroads. ISC has not made any showing that it will suffer competitive harm (or, indeed, that it will suffer any harm at all) as a result of the Transaction that would require the grant of trackage rights to NS.

4. Martin Marietta Materials, Inc. (MMM-2).

Like a number of other shippers, Martin Marietta Materials, Inc. (MMM) complains that the Transaction will result in certain of its movements changing from single-line hauls to joint-line hauls.⁴ MMM fails to demonstrate, however, that the Transaction will result in the loss of competition to the particular facilities at issue, or that the Transaction will result in the loss of essential services. MMM also fails to support its claims of harm that will result from the Transaction.

MMM is one of the nation's largest producers of aggregates, with 1996 revenues of \$721,947,000. MMM-2, Zelnak VS at 1. MMM's comments and request for

⁴ The comments of the Ohio Attorney General, Ohio Rail Development Commission and the Public Utilities Commission of Ohio (OAG-4) also raise concerns about the loss of single-line service for Ohio aggregates shippers.

conditions, however, relate to only two movements from its Woodville, Ohio plant, one to Hugo, Ohio, the other to Twinsburg, Ohio. Shipments along these routes are currently served by Conrail in a single-line movement. After the Transaction the Woodville facility will be CSX-served, and Hugo and Twinsburg will be NS-served. MMM seeks the imposition of conditions that would retain single-line service for these movements.

First, MMM asks the Board to require CSX and NS to cooperate in operating run-through trains from Woodville as well as the Twinsburg and Hugo receiving locations to stations on NS if there is a tender of no fewer than sixty 100-ton hopper cars at any given time. MMM also asks that, if between ten and sixty 100-ton hopper cars are tendered at any one time, the cars be pre-blocked and handed off as a block of cars by CSX to NS so the cars may pass through the Toledo gateway without the need for classification. Finally, MMM asks the Board to require NS and CSX to maintain the existing Conrail rates for these movements for five years after the Transaction is implemented, subject to RCAF increases. MMM claims that without the imposition of these conditions, it will lose the traffic over these routes completely.

a. MMM Will Not Suffer a Loss of Rail Competition or a Loss of Essential Services.

MMM's Woodville facility is served now by only one carrier, Conrail. Likewise, the destination points from MMM's Woodville plant at Hugo and Twinsburg are served solely by Conrail. After the Transaction is implemented, Woodville will be served by one carrier and both the Hugo and Twinsburg destinations will be served by one carrier. The imposition of protective conditions where a shipper will not suffer from a loss of rail competition is wholly inappropriate.

Additionally, the Transaction will not result in the loss of essential services with respect to these movements. MMM does not contend that either NS or CSX has expressed an unwillingness to provide service to MMM for the Woodville to Hugo or Woodville to Twinsburg routes. In fact, just the opposite is true. Applicants have made reasonable efforts to accommodate MMM's concerns by offering to maintain the existing Conrail rates on MMM's movements through the end of 1999. MMM, however, rejected that proposal. See Seale RVS at 6-7. In short, adequate transportation service to MMM's Woodville plant will remain after the Transaction is implemented and MMM will not experience a loss of an essential service.

b. MMM's Alleged Harm is Speculative and Unsupported By Facts.

MMM alleges that its shipments from its Woodville plant will be lost if the route becomes a joint-line movement after the Transaction. However, MMM provides no evidence supporting this point. Instead, MMM merely relies on bald assertions of economic loss.

All shipments of aggregates are moved by rail to a point at which the stone is transferred to trucks for movement to a final destination, such as a construction site. For certain large construction projects, some stone receivers will establish a temporary rail unloading facility to reduce the length of the truck portion of the haul. After the Transaction is implemented, MMM will still have the ability to move aggregates via single line service to locations within close proximity of Hugo and Twinsburg, where the stone can be transferred to trucks for shipment to its final destination. The truck portion of the movements after the

Transaction will be well within the normal range of truck service for shipments of aggregates. Moon RVS at 7.

For example, CSX will be able to provide single-line service into Cleveland, approximately 25 miles from the Twinsburg area. The stone would then be transferred from CSX rail lines to trucks for shipment to the final destination. In the case of a shipment that is destined for a construction site near Cleveland, the truck movement could be shorter if the stone is transferred at Cleveland than if the stone is transferred at Hugo or Twinsburg. Id. at 6, 7. Likewise, CSX will to have single-line service to Akron, which is approximately 20 miles from the Hugo area, also well within the normal range of truck service for aggregate movements. Id. at 7. MMM apparently neglected to consider the single-line service it will continue to enjoy after the Transaction to Cleveland and Akron.

Finally, MMM requests that the Board to require "run-through trains between Woodville and stations on NS," MMM-2 at 20, which presumably means that MMM is requesting that single line service be provided between Woodville and Mingo Junction, Ohio and Weirton, West Virginia. See MMM-2 at 2. This requested condition as it relates to the movements to Mingo Junction and Weirton is unwarranted because of the difference between the costs of moving lime versus moving stone aggregates.

MMM ships lime to both Mingo Junction and Weirton. MMM-2 at 2. Compared to lime, stone aggregates generally move at a lower rate per ton and thus generally do not move in a joint-line rail service as frequently as lime. Moon RVS at 6. Lime often moves in joint-line service. Thus, the Transaction will have no adverse affect on the lime movements between Woodville and Mingo Junction and Weirton. In fact, MMM

today moves lime from its Woodville facility to Manistee, Michigan via a joint-line movement. MMM-2, Zelnak VS at 1; Interrogatory Response of MMM to CSX First Set of Interrogatories (undesignated) at 10-11. [[

]]

MMM, however, asks the Board to require single-line movements of lime to Mingo Junction and Weirton because they are "stations on NS." Because shipments of lime via joint-line movements are economically feasible, and in fact are being done today by MMM, there is no sound basis for MMM's requested condition. Additionally, by failing to differentiate between shipments of lime and aggregates, MMM's assertions of economic harm to its Woodville plant lose their effect, even more so in light of the fact that the Woodville plant was created to ship lime, and that shipping aggregates from Woodville was merely an afterthought. MMM-2, Zelnak VS at 1.

c. Conclusion.

MMM will suffer no loss of competitive service at its Woodville quarry or at the Hugo and Twinsburg destinations. Nor will the Transaction result in the loss of essential services. MMM's factual assertions, which form the basis for its requests for conditions, do not demonstrate that MMM will be harmed by the Transaction. CSX will continue to be able to provide single-line service to locations in close proximity to Hugo and Twinsburg. MMM's shipments of lime will not be harmed with the institution of joint-line service. Therefore, MMM's allegations of harm to its Woodville plant, which was created to ship lime and not aggregates, are insubstantial, unsupported by the facts, and do not provide the basis for the imposition of protective conditions.

5. National Lime and Stone Company (NLS-2).

National Lime and Stone Company ("National") is an Ohio producer of crushed limestone. It operates eight quarry and stone processing facilities. National claims that certain rail movements originating at two of those eight facilities, i.e. at Bucyrus and Carey, OH, are currently handled in single-line rail service by Conrail and will be handled in joint-line service by CSX and NS following the Transaction. National also contends that there will be a reduction in rail options at its Carey facility (currently served by Conrail, CSX and WLE) from three carriers to one if WLE does not survive following the Transaction.

National claims that its "business will be severely injured by the proposed Transaction and . . . therefore urges the board to deny the Transaction as proposed as being inconsistent with National Transportation Policy and inconsistent with national competition policy." NLS-2 at 3. National asserts that the Transaction may be approved only if the following conditions are granted:

1. CSXT grants NS trackage rights from Crestline, Ohio to Spore (the site of National's Bucyrus plant).
2. CSXT grants NS trackage rights from Upper Sandusky to National's Carey, Ohio plant.
3. NS grants CSXT reciprocal trackage rights to enable CSXT to compete to deliver single-line service to National's existing and future markets east of Crestline, Ohio.
4. If control over WLE or its facilities changes as a result of the Transaction, a railroad other than WLE's successor should be granted trackage rights over WLE's tracks to National's markets now served by WLE.

NLS-2 at 3-4.

The first two of these conditions appear to be addressed to National's concern about receiving joint-line service following the Transaction. The third and fourth appear to be addressed to the alleged reduction in competitive rail options at Carey.⁵

a. The Requested Conditions to Address the Newly Created Joint-Line Service Are Unwarranted.

National's first two requested conditions should be denied for two fundamental reasons. First, while National alleges harm to its business through the creation of joint-line movements, it does not explain how this alleged harm can be said to constitute either a reduction in rail competition or a threatened loss of essential rail services.

National contends that the joint-line service it would receive following the Transaction would be inferior to and more costly than the single-line service it currently

⁵ Curiously, National's filing contains a somewhat different formulation of requested conditions in the verified statement of its witness Ronald W. Kruse, as follows:

National proposes as a remedy that CSXT and Norfolk Southern extend to each other cross trackage rights, at no cost to either party, to enable both to serve National's Carey and Bucyrus plants and to do so on terms to enable price competition for such service.

Specifically, National needs Norfolk Southern to have trackage rights to serve the Bucyrus Plant (Spore). Trackage rights would be from Crestline, Ohio to Spore. National also needs Norfolk Southern to have trackage rights from Upper Sandusky to the Carey Plant.

NLS-2, Kruse VS at 8.

Applicants' response is addressed to the formulation of the requested conditions contained in the filing, rather than the formulation contained in Mr. Kruse's Verified Statement.

receives from Conrail. It suggests that it would lose business if it were forced to rely on trucks. NLS-2 at 11. But National never explains why the creation of joint-line rail service should be viewed as the equivalent of no rail service. [[[

]]] In fact, as explained in D.W. Seale's rebuttal verified statement, NS can and has been able to work with connections such as Conrail in providing completely satisfactory joint-line service for stone shippers in Ohio. Seale RVS at 5-6.

Furthermore, National admits that approximately eight million of the 11 million tons of crushed limestone that it ships each year are carried by trucks. NLS-2 at 2, 6. [[[

]]] Accordingly, National has not established that the creation of joint-line rail movements will result in a loss of essential rail services that should be remedied by the Board.

In alleging the harm to its business that will allegedly result from the creation of certain joint-line movements, National also ignores the benefits of single-line service it will or could enjoy on other movements. [[[

]]] The

benefits to National's business that could result from new single-line rail service might very well exceed any harm to National's business resulting from the creation of joint-line movements.

[[[

]]] Because Applicants have agreed to perform Conrail's contracts, any movement that remains under contract following the Transaction will be subject to the terms of the contract until it expires.

[[[

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There is a final fundamental reason why National's proposed conditions 1 and 2 must be denied. The Board will not impose a condition unless it will be feasible, will produce net public benefits, and will not adversely affect proposed operations. Section III.C. National has made no attempt whatever to assess the impact of its proposed grant of trackage

rights to NS on CSX's operations.⁶ As described more fully in the rebuttal verified statement of John W. Orrison, grants of trackage rights are potentially disruptive of CSX's operations. See Orrison RVS at 6-12. National has failed to meet the Board's standards for imposing trackage rights conditions.

b. The Requested Conditions to Address Alleged Reduction in Competition are Unwarranted.

National's proposed conditions 3 and 4 appear to be intended to remedy the possible reduction in rail carriers serving National's Carey, OH facility from 3-to-1 if WLE does not survive following the Transaction. These requests should be denied, both because National has failed to identify genuine competitive harm and because the requested conditions are disproportionate to the alleged harm.

As a threshold matter, National does not explain whether or how it currently benefits from competition among the three rail carriers that serve its Carey facility. If one were to take National's expressed preference for single-line service at face value, it would appear that National would always choose the carrier that provided single-line service from Carey to a given destination, regardless of the number of carriers serving Carey. National does not identify any movements on which competition would be reduced. Conditions 3 and 4 should be denied because of National's failure to specify competitive harm.

National's suggestion that WLE will not survive following the Transaction is mere speculation. The evidence indicates that WLE will survive and there will still be two

⁶ The proposed conditions are also vague and imprecise. National does not even indicate how traffic would be routed under those rights.

carriers serving national's Carey facility. See Section XIII. A reduction in rail service options from three carriers to two is not a circumstance that normally requires a remedy.

National's requested condition 3 is also disproportionate to the harm it alleges. While the alleged harm relates to the reduction in the number of rail carriers at Carey, condition 3 is not limited to Carey but calls for NS to grant "CSXT reciprocal trackage rights to enable CSXT to compete to deliver single-line service to National's existing and future markets east of Crestline, Ohio." NLS-2 at 4 (emphasis added). National is clearly seeking to obtain both geographically and temporally enhanced rail competition beyond that which exists today.

Finally, condition number 4, which seeks trackage rights "over WLE's tracks to National's markets now served by WLE" in the event that control over WLE changes as a result of the Transaction, is too vague and speculative for the Board to impose.

6. Wyandot Dolomite, Inc. (Wyandot-3).

Wyandot Dolomite ("Wyandot") ships aggregates and limestone from its quarry and processing site at Carey, OH. It is concerned that its current local Conrail movement from Carey to East Ohio Stone in Alliance, OH will become a joint-line CSX/NS movement as a result of the Transaction. Wyandot also currently ships on WLE which serves Carey and says that it is concerned about WLE's future viability.

In effect, Wyandot seeks to compel NS to provide it with single-line service.

The five conditions that Wyandot seeks are as follows:

1. That NS shall be obligated to assume trackage rights operations over lines to be operated by CSX post-Transaction between Wyandot's facilities at Carey, OH, and a connection with a line to be operated by NS at Crestline, OH. (The condition shall be

implemented to reflect the exact route by which CR today transports aggregate between Carey and Alliance.)

2. That the trackage rights to be granted to NS, as described in part one, shall be made mandatory, and that NS shall possess a common carrier obligation to serve Wyandot as a result of its access to Carey, OH.
3. That NS shall retain in effect for five years a rate (or rates) for the movement of aggregate traffic between Carey (Wyandot) and Alliance (East Ohio Stone Co.) that is no higher than that currently charged by CR.
4. Should NS prove unwilling or unable to provide service between Wyandot's Carey facility and East Ohio Stone Co. at Alliance upon a reasonable request for service, and pursuant to the conditions 2 through 3 set forth above, or if NS should abandon or otherwise relinquish its rights of access to or between Carey and Alliance, then the Board must, upon appropriate request from Wyandot, reopen this proceeding. Upon such reopening, the Board shall, at Wyandot's election, direct another rail carrier of Wyandot's choosing to provide Carey to Alliance service.
5. That W&LE, by the most efficient routing possible, be granted trackage rights access to East Ohio Stone Co. at Alliance, OH.

Wyandot has failed to demonstrate Transaction-related harm of the sort that the Board and its predecessor have remedied in prior control proceedings. Wyandot does not show that it will be harmed by the loss of a competitive rail option. Its complaint is the loss of single-line rail service. For the reasons discussed above, the mere creation of a joint-line movement does not constitute a reduction in rail competition.

Nor does Wyandot allege that the Transaction will cause a loss of essential rail services. The verified statement of Wyandot's Executive Vice President, Timothy Wolfe, recounts discussions between Mr. Wolfe and representatives of both NS and CSX regarding post-Transaction service to Wyandot. Mr. Wolfe does not contend that either carrier

represented that it would not or could not serve Wyandot following the Transaction. On the contrary, Mr. Wolfe recites that NS "offered what amounted to a one year rate 'freeze' (at existing Conrail rates) on this traffic after the merger took place." Wyandot-3, Wolfe VS at 3. While that offer was not "acceptable" to Wyandot, it clearly manifests an intent to handle Wyandot's traffic following the Transaction. See Seale RVS at 7.

Additionally, Wyandot makes no effort whatsoever to assess the impact of its proposed grant of trackage rights to NS on CSX's operations. The potentially disruptive effect of these trackage rights is another reason why Wyandot's trackage rights condition should be denied.

D. Requests for Conditions by Other General Merchandise Shippers Should Also Be Rejected.

1. Cargill, Inc. (CARG-5).

Cargill supports the application. Cargill feels the Transaction will enhance the competitive rail balance in the East and provide new and more efficient rail routings. It states: "The potential overall benefit to the shipping public is clear. The Surface Transportation Board should approve the Application." CARG-5 at 2.

2. DeKalb Agra, Inc.

DeKalb is a farmer-owned cooperative which relies on rail for shipments of whole grains to eastern domestic and export markets. In its brief submission, DeKalb first complains that over the past five years Conrail's "service has deteriorated while shipper costs have increased. . . ." Verified Statement of Carl E. Feller on behalf of DeKalb Agra, Inc. (unnumbered) at 1. DeKalb then complains that it will be solely served by NS and implies that NS will be reluctant to move DeKalb's traffic to river markets or to participate in joint-

line movements to southeastern poultry producers served by CSX. Id. To the extent that DeKalb is concerned about vertical foreclosure, those concerns are without merit. See Section V.

Providing no specific factual support, DeKalb asks the Board to "take a proactive stance in reviewing the impact of the control with special emphasis on: switch rates between the carrier and the origin and destinations to insure competitive access, service levels and finally joint line competitive rates be proscribed where necessary to insure access to river markets." Feller VS at 2. DeKalb has alleged no specific Transaction-related harm and is entitled to no relief. The subjects of its general concerns are addressed elsewhere in this narrative.

3. E.I. Dupont de Nemours and Company Inc. (Dupont)
DUPX-02.

Dupont states its support for the conditions requested by CMA/SPI, briefly summarizing those requests. Dupont offers no particular facts or argument not expressed by CMA/SPI. We refer to our response to CMA/SPI concerning those issues.

4. Fina Oil and Chemical Company (Fina-2).

Fina supports the adoption of the conditions requested by CMA/SPI (it is a member of both), and accordingly we refer to our comments relating to CMA/SPI. Fina briefly discusses concerns it has with respect to the alleged premium paid for the acquisition and potential operational problems, including operations in the SAAs, and requests an oversight process. Fina provides no specific facts or arguments to support its generalized concerns. Although Fina states that the Application has not addressed the potential impact of shifts to alternate gateways, Fina does not say what gateways its traffic now traverses, what

alternative gateway shifts it anticipates, or how the Transaction might otherwise have an adverse impact on Fina.

5. The Fort Orange Paper Company (FOPC-3).

The Fort Orange Paper Company ("Forge") is a small shipper that currently uses rail service by Conrail amounting to less than 50 carloads per year for inbound movements of kaolin clay and scrap paper used in manufacturing its product. Forge ships all of its outbound products by truck. Comments of Forge at 2. Forge's Comments do not identify any competitive harm that Forge will suffer as a result of this Transaction. Therefore, the Board should deny the conditions requested by Forge. Forge's concerns about the Transaction relate primarily to Forge's location in Castleton, NY which is east of the Hudson river. This issue is addressed in Section VIII.

Forge first requests that a carrier in addition to CSX be granted trackage rights that would enable it to serve Castleton. Forge, however, is only served by one rail carrier today and will continue to be served by one rail carrier post-Transaction. Forge's comments articulate no competitive harm which result from the Transaction. In fact, Daniel D. Luizzi, Forge's Director of Operations, admits that "the rail competition these trackage rights will provide will cure the problems and attitudes that arose under Conrail's 20 year rail monopoly in the Northeast." Comments of Forge, VS of Luizzi at 3. It is clear from this statement that Forge is requesting relief to cure an alleged problem which in no way relates to this Transaction. Therefore, Forge's request that an additional rail carrier provide it local service must be denied.

Forge also makes certain vague comments about its desire that the Board grant "route and rate relief." Comments of Forge at 10. Forge asks the Board to "order CSX to maintain or establish routes and rates through gateways at Albany and New York City." As discussed above, Forge does not explain in any way how these requests are related to adverse competitive effects of this Transaction. CSX will merely step into Conrail's shoes in serving Castleton. Forge will be no worse off as a result of the Transaction.

Forge also requests that the Board "require CSX to cancel the light density surcharge imposed by Conrail in 1995." Comments of Forge at 10. This surcharge has existed since 1995; it is in no way related to this Transaction. Moreover, Forge's "annual rail usage has varied from a low of 12 cars in 1997 to date to a high of 39 cars in 1995." Comments of Forge, Luizzi VS at 2. Forge makes no claim that Conrail's imposition of the light density surcharge on Forge was improper, and even if it did, this proceeding is not the proper context in which to raise such a claim.

Forge's last request is that the Board "order CSX to fix rates at their current level" because "Forge fears that arch competitors CSX and NS may not cooperate to interline traffic in the way that best serves Forge's interest." Comments of Forge at 8, 10. Forge's comments, however, do not identify any specific movements which will be adversely affected. Moreover, Forge asserts no basis for these "fears" except that there is a "natural tendency of a class I carrier to seek the longest haul possible regardless of customer needs." Comments of Forge at 8. In the absence of any showing of specific competitive harm resulting from the Transaction, the Board must deny Forge's requests.

6. General Mill's.

General Mills is concerned about the commercial viability of its Buffalo, NY flour mill. It complains that its Buffalo mill is currently underutilized because of the level of the switch charges currently assessed by Conrail in Buffalo. General Mills complains generally that its commercial situation in Buffalo will not improve as a result of the Transaction. It seeks broad-ranging conditions, including the imposition of a \$130 per car switch charge; a condition to prevent CSX and NS "from factoring acquisition costs in rate making calculations for a period of five years;" a rate cap on "single factor local rates that post merger will become two factor joint rates for five years;" and a condition requiring applicants to expand the current Buffalo switching district to include a new industrial park located in West Seneca, NY. Verified Statement of Leo J. Wasecha at 3.

General Mills has not established that it will be injured by any reduction in rail competition caused by the Transaction. Its proposed conditions are all versions of relief sought by others that should be rejected for the reasons set forth in Sections VII, VIII and XI. In fact, General Mills will likely benefit from the Transaction, as will other Buffalo/Niagara area shippers for the reasons explained by CSX's witness Christopher P. Jenkins. See Jenkins RVS at 16-17. Moreover, General Mills stands to benefit from various provisions of the NITL settlement agreement, including the provisions governing switching charges and interline movements.

7. Kraft Foods, Inc.

In a one page letter to the Board, Kraft Foods complains that it will receive poorer rail service to its Avon, NY plant if the Transaction is approved, apparently because

there will be more carriers in the route from various western origins. Kraft does not specify movements of particular commodities from particular origins that might be involved. Kraft's Avon, NY plant is served by the Livonia, Avon & Lakeville Railroad and Kraft asks the Board to remove the restriction that currently blocks LAL from interchanging traffic with the Rochester & Southern Railroad at Genesee Junction Yard.

Kraft's request for a condition on behalf of the LAL should be denied because it has not alleged, must less shown, that it will be harmed by a reduction in rail competition or a loss of essential rail services. Moreover, Kraft's requested condition is inappropriate. See Section XIII.

8. Millennium Petrochemicals, Inc. (MPI-2).

Millennium Petrochemicals, Inc. is principally concerned about the non-inclusion of its Findmere, NJ regional distribution facility in the North Jersey Shared Assets Area. This concern is addressed in Section VIII.

Millennium also expresses skepticism that it will benefit from the expanded CSX and NS rail networks that will be created by the Transaction. It speculates that the Transaction may increase the number of interchanges on certain movements. MPI-2 at 5. Millenium does not specify harm that it believes it will occur, nor does it propose any remedy to address this vague concern.

Applicants have demonstrated beyond doubt that the overall effect of the Transaction will be to create more efficient rail networks. While there will be some limited circumstances in which the division of Conrail will lead to increased interchanges, there can be no serious dispute that the overall effect of the Transaction will be increased single-line

routes and increased efficiency. Millennium's expressions of parochial concerns fall far short of proving the contrary.

9. Occidental Chemical Corporation (OxyChem).

OxyChem expresses support for the Application. It recognizes that it will receive new rail-to-rail competition at various points, including its plants at Burlington, NJ and Jersey City, NJ. OxyChem also states that approval will result in a stronger Eastern rail system, will improve transit times due to more single-line service and will reduce costs for rail carriers.

OxyChem does request that certain conditions be adopted. These conditions are similar to those requested by NITL. OxyChem presents no particular facts or arguments not expressed by others relating to these requested conditions. Like other shippers, OxyChem stands to benefit from the NITL settlement.

10. PPG Industries -- Verified Statement of M.E. Petruccelli -- Undesignated.

Mr. M.E. Petruccelli advances arguments and requests conditions on behalf of PPG Industries, Inc. ("PPG") that largely mirror those presented by the NITL, *et al.*, which Applicants address elsewhere.

PPG also wants to ensure that its existing contract with Conrail to PPG's Beauharnois, QC facility is continued. Under the Transaction Agreement, CSX will succeed to Conrail's obligations under that contract.

With respect to PPG's Natrium, WV facility, now served by CSX, PPG seeks a condition providing W&LE access to it. PPG makes no claim or showing that the

Transaction will reduce competition to this plant. The requested condition is plainly unwarranted.

11. Redland Ohio (Redland-2).

Redland is an Ohio aggregates producer with facilities at Woodville and Millersville, Ohio. Redland's concerns about the proposed Transaction are vague, as are its description of the alleged harm that would supposedly result if the Transaction were approved without conditions. These concerns relate in part to the involvement of the Northern Ohio & Western Railway, Ltd. ("NOW") in the routing of traffic originating at Woodville. Redland is also concerned about the future of WLE.

Originally, Redland sought the imposition of three conditions. Redland-2 at 5. Its second requested condition related to Conrail/Redland rail transportation contracts with terms extending beyond the anticipated consummation date of the Transaction. Id. Redland has since ascertained that none of its contracts with Conrail will be in effect after the Transaction is consummated and has withdrawn its second requested condition.⁷

The remaining two conditions sought by Redland are as follows:

1. Where, as a result of the Transaction, NOW will no longer be a necessary participant in the movement of Redland traffic to CSX, the Board must direct that -- (a) CSX is prohibited from insisting that Redland's Woodville traffic be handled by NOW; (b) CSX is required to provide direct switching services to Redland's Woodville facility; and (c) wherever permissible, CSX must arrange to terminate any contracts that require NOW to provide switching or other intermediate services between Redland's Woodville facility and the nearest CSX connection.

⁷ See Letter from Robert A. Wimbish to Hon. Vernon A. Williams, Nov. 26, 1997 (Vol. 3).

2. [Withdrawn.]
3. The Board must direct Applicants to provide to W&LE, upon reasonable terms and conditions, either trackage or haulage rights over an existing NS line from Bellevue, OH, to the NOW interchange at Maple Grove, OH.
 - a. Redland's Proposed Conditions Are Unjustified and Must Be Denied.

The basis for Redland's proposed condition 1 is difficult to understand. CSX will acquire Conrail's line running south from Toledo to Woodville and will have direct access to Redland's Woodville facility. Redland apparently seeks to preclude NOW from participating in any CSX movements originating or terminating at Woodville, by switching for CSX or otherwise, on the grounds that NOW's participation would be inefficient. Redland apparently seeks to preclude NOW from participating in such movements even though there may be contractual arrangements between Conrail and NOW or Conrail, NOW and other parties that will survive the Transaction.

Plainly there is no need for the Board to impose Redland's condition 1 because that condition is not addressed to any harm caused by the Transaction. If NOW is currently in the routing and will be in the routing following the Transaction, nothing will change as a result of the Transaction.

CSX's opposition to this condition should not, however, be construed to mean that CSX will engage in inefficient operations following approval of the Transaction. CSX intends to operate efficiently after the Transaction. If NOW's participation in a Woodville movement is inefficient and CSX has a legal right to avoid it, CSX will do so. But CSX does not have sufficient information at this time about any arrangements to which Conrail

and NOW may be parties to make any representations as to whether it may or should exclude NOW from the routing of Woodville traffic.⁸

Redland's proposed condition 3 is not supported by any showing of harm caused by the proposed Transaction. It is simply a bald request that benefits be bestowed on WLE. As explained in Section XIII addressing WLE's request for relief, there is no basis for any such condition.

12. Shell Oil Company and Shell Chemical Company (SOC-3).

Shell seeks a number of conditions similar to those proposed by CMA/SPI. These include various pre-implementation conditions, rate regulatory conditions and prescription of reciprocal switching fees. Shell offers no specific evidence or argument supporting those conditions. As we explain elsewhere, they are unfounded.

In addition to its request for conditions, Shell expresses concerns about various aspects of CSX and NS operations if the Transaction is approved. Shell complains about the quality of service it has received from CSX in the past and raises questions about the quality of service it will receive following the Transaction. CSX believes that its service to Shell has been more than adequate. But it also recognizes that service can be improved. Achieving such service improvements is a fundamental impetus of the Transaction.

With respect to NS, Shell acknowledges that the interchanges that NS proposes to construct will benefit Shell and other shippers by providing them with competitive routing alternatives. SOC-3, Hall VS at 13. It is concerned, however, that NS's proposed

⁸ As noted in the rebuttal VS of P.W. Seale, NS has offered to work closely with NOW to provide NS-NOW joint-line services and rates to Redland. Seale RVS at 8.

interchanges at Sidney and Tolono, Illinois have not yet been constructed. As to the interchange at Sidney, the STB did not approve NS's application for construction until November 25, 1997.⁹ NS will commence construction of this interchange as quickly as possible. This interchange will have ample capacity to handle the anticipated traffic. See Mohan RVS at 69. NS will certainly keep Shell and other shippers informed of the status of this project.

Authorization from the Board for NS to construct the facility at Tolono, Illinois, has been requested as part of this Application. CSX/NS-22, Vol. 5 at 260 (Finance Docket No. 33388 (Sub-Nos. 15)) and CSX/NS-20, Vol. 3B at 284. When approval is granted, NS will proceed expeditiously to construct that facility.

Shell's consultant, David Hall, expresses several other concerns that are without foundation. Mr. Hall expresses uncertainty as to whether the plan will preserve competitive service from CSX when NS takes over CR's Sharonville Yard at Cincinnati. SOC-3, Hall VS at 16. As indicated in the rebuttal statement of Mr. Mohan, CSX will continue to have access to the Sharonville Yard. Mohan RVS at 69. With respect to Mr. Hall's question about the status of the Indiana Harbor Belt Railroad (IHB), as discussed elsewhere, IHB will retain its own identity and continue to function as a switching line. Mr. Hall's generalized concerns about maintenance of gateways, operations in the SAAs and rates to captive shippers are addressed elsewhere in response to the same concerns of CMA

⁹ See CSX Transportation, Inc. - Construction and Operation Exemption - Connection Tracks at Crestline, Ott, STB Finance Docket No. 33388 (Sub. - No. 1), embracing Norfolk and Western Railway Company - Construction and Operation Exemption - Connecting Tracks with Union Pacific Railroad Company at Sidney, Illinois; STB Finance Docket No. 33388 (Sub - No.6)(decision served November 25, 1997.)

and other shippers. We would only note here that Mr. Hall has ignored the very substantial increase in rail competition that the Transaction will bring to shippers, including Shell and the benefits that new competition will bring to those shippers.

13. Joseph Smith & Sons, Inc. (ISSI-5).

Joseph Smith & Sons, Inc. ("JS&S") is a processor of scrap metal whose primary facility is in Capital Heights, Maryland JSSI-5 at 2. JS&S requests two conditions to maintain its competitive rail options if the Transaction is approved. First, JS&S requests that NS be allowed to build-in to JS&S from its trackage rights over the line that CSX will operate after the Transaction. JSSI-5 at 10. Second, JS&S requests that NS be allowed to provide service to JS&S via a future connection that could be constructed between JS&S and Amtrak's Northeast Corridor line over which NS will have operating rights. JSSI-5 at 10-11.

These conditions, however, are not necessary because JS&S will not suffer competitive harm as a result of the Transaction. JS&S's Comments allege that it is served today by Conrail but enjoys "horizontal competition" from "two prospective build-outs to CSX and to Amtrak's Northeast Corridor line." JSSI-5 at 7. What JS&S's Comments do not say, however, is that Conrail today switches the JS&S facility for CSX, so JS&S currently enjoys service from two carriers. Jenkins RVS at 11. After the Transaction, CSX will operate the current Conrail line that directly serves JS&S. NS will have trackage rights over this line, and CSX has agreed to switch for NS. See NITL Agreement. The switch charge will be lower than that assessed today by Conrail. Id. JS&S will continue, therefore,

to have direct access to two rail carriers to serve its facility. The NS build-out to CSX requested by JS&S is not necessary as CSX will already be switching for NS.

Similarly, although NS will inherit Conrail's rights over Amtrak's Northeast Corridor, JS&S does not need an interconnection to reach NS since NS will be accessible from the CSX line over which it will have trackage rights via switch. In fact, the Transaction will not affect JS&S' rights with respect to constructing a connection to the Amtrak line. NS will inherit the same operating rights that Conrail has today over Amtrak's Northeast Corridor.

Accordingly, there is no need for the Board to impose conditions in favor of JS&S.

14. Terra Nitrogen Corporation.

Nearly all of the conditions requested by Terra Nitrogen Corp. ("Terra") are also conditions requested by NITL. Applicants have fully addressed those conditions elsewhere.

Concerned about its shipments from Courtright, ON to the Buffalo gateway, Terra also asks that shippers not be required to shift traffic patterns that would result in a route which is more circuitous, and would require longer transit times. Terra fears CSX will require Terra to ship from Courtright to Buffalo over a circuitous route through the United States, instead of via the shorter Canadian route.

As a general matter, shippers have the right to direct the routing of their traffic where carriers hold themselves out to provide service over alternative routes. See 49 U.S.C. § 10747. Moreover, Terra has made no showing that the routing of its movements

from Courtright to Buffalo will change. The Board is presented only with the unsubstantiated fears of Terra that its routing will change as a result of the Transaction. Finally, if Terra is seeking the kind of traffic protective conditions that would freeze rates, interchange points, and divisions, this agency has long recognized the impropriety of such conditions. See Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceeding, 366 I.C.C. 112 (1982), rev'd on other grounds sub nom. Detroit, Toledo & Ironton R. Co. v. United States, 725 F.2d 47 (6th Cir. 1984).

Terra also requests that the Board "create a standard for a 'shared assets' area, with a reasonable reciprocal switching fee, similar to those proposed for Detroit." Letter of Richard Ferguson (undesignated) at 3. It is unclear exactly what Terra is requesting of the Board with this proposed condition. To the extent it is arguing for an expansion of a Shared Assets Area to encompass Terra's movements, Applicants have fully addressed the concerns of other parties arguing for such expansion in Section VIII. To the extent Terra request that there be a cap on reciprocal switching fees or a uniform switching fee, Applicants have fully addressed that issue in Section XI. Moreover, CSX and NS have agreed with the NITL to caps on switching charges following the Transaction, including a cap of \$250 per car, subject to the RCAF-U, where CSX or NS switch for one another in former Conrail territory following the Transaction.¹⁰

¹⁰ Without discussion, Terra Nitrogen also request "a build-out and transload condition as imposed in UP/SP." A similarly broad condition was requested in NITL-7 at 6. In light of Applicants' agreement with NITL and Terra Nitrogen's failure to provide any explanation or evidence regarding it, extended discussion of this request is unnecessary. Clearly, the build-out and transload conditions imposed in UP/SP were imposed to insure that the extensive trackage rights granted to remedy widespread 2-to-1 effects provided an effective competitive remedy. No such circumstances exist in this Transaction.

15. Union Camp Corporation.

Union Camp Corporation ("UCC") submitted comments to the Board relating to its Dover, Ohio chemical plant. UCC seeks the removal of a provision contained in the Lease/Sales Agreement between CSX and R.J. Corman that provides for a lower rate when Corman interchanges traffic with CSX than when it interchanges traffic with other carriers. UCC-1 at 7. This provision, however, has been in the lease agreement since 1989 (UCC-1 at 3) and has nothing to do with this Transaction. The Board may only impose a condition to remedy competitive harm which results from this Transaction. This proceeding should not be used to modify an eight-year old agreement because UCC now finds it "anti-competitive." UCC's request is unrelated to this Transaction, and therefor, must be denied.

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XVII. REQUESTS FOR CONDITIONS BY OTHER GOVERNMENTAL PARTIES ARE WITHOUT MERIT AND SHOULD BE DENIED

About 50 governmental entities have expressed their interests in this proceeding. Most of the entities recognize that the Transaction will greatly enhance competition and transportation efficiencies. For example, the Governor and Commonwealth of Pennsylvania state: "[T]he proposed transaction will significantly benefit the Commonwealth and its citizens." The majority of the concerns raised by the governmental agencies are discussed elsewhere.¹ This section includes those governmental parties whose concerns have not been addressed.

¹ For example, the concerns of the Connecticut Department of Transportation are addressed in Section VIII (expansion of Shared Assets Areas) and Section XXI (Board oversight). The Illinois Department of Transportation's comments are addressed in Section XIII (neutrality of the IHB) and the Orrison RVS at 116 (safety of CSX connection at 75th Street). The issues raised by the State of New York are addressed in Section VII (effects of acquisition costs on rates), Section VIII (expansion of Shared Assets Areas to include Buffalo, NY and surrounding areas and requested trackage rights over various lines east of the Hudson River), Section IX (Section 2.2(c) of the Transaction Agreement and CSX and NS assumption of Conrail legal obligations), and Section XXI (Board oversight). The comments of the Ohio Attorney General, the Ohio Rail Development Commission, and the Public Utilities Commission of Ohio are addressed in Section IV (two-carrier access to Toledo Docks and other destinations in Ohio and concerns about the IORY), Section X (effects of Transaction on Cleveland area), Section XI (switching charges), Section XIII (preservation of the W&LE), Section XIV (loss of single-line service for Centerior), Section XV (effects of Transaction on the Neomodal Terminal), Section XVI (loss of single-line service for aggregate shippers), Section XVIII (effects of Transaction on labor), Section XIX (environment), and Section XXI (Board oversight).

A. Federal Parties

1. United States Department of Justice

The United States Department of Justice does not oppose the Transaction. The only concerns it raises relate to the Transaction's effect on rail service to three coal-burning electric power plants: Indianapolis Power & Light's Stout Street plant, the Potomac Electric Power's Chalk Point and Morgantown plants, and PSI Energy, Inc.'s Gibson plant. The concerns of DOJ relating to IP&L are discussed in Section IV. The concerns relating to PEPCO are addressed in Section XIV. As to PSI's Gibson plant, DOJ is simply incorrect as to the facts, and notably, PSI itself has not complained or sought conditions in this case. DOJ's concerns as to the Gibson plant are covered in Section IV.

2. United States Department of Transportation

In its Preliminary Comments (DOT-3), the United States Department of Transportation does not oppose the Transaction. The specific concerns it has raised relate to safety and implementation. As discussed in Section XXI, these concerns are being fully addressed. As requested by DOT, CSX and NS have submitted Safety Integration Plans which were prepared in consultation with the Federal Railroad Administration pursuant to Decision No. 52.

3. U.S. Department of Agriculture

Although the USDA declines to endorse Applicants' Transaction, it does observe that the Transaction "promotes the kind of effective competition Congress refers to in the rail

transportation policy " USDA Public Comments at 15.² USDA also recognizes that the Transaction will bring important competitive benefits to agricultural markets, id. at 14, markets which both CSX and NS view as growth markets.

The only concern USDA has expressed about the Transaction is that a small number of agricultural areas in the Conrail service territory -- areas involving less than 3 percent of the total agricultural products moved by the three Applicant carriers -- will be served by two railroads, rather than three (so-called "3-to-2" situations), which USDA fears may experience some level of increased rates.³ USDA Confidential Comments at 41. Based on a 1989 study by Professor MacDonald,⁴ USDA believes that purported harm resulting from the Transaction may only amount to approximately 7/10th of one percent of the total rail transportation costs for all agricultural shipments on Conrail, CSX and NS. Id. USDA does not ask the Board to impose any conditions on the Transaction to address this concern.

² USDA submitted two sets of comments, one which it designated "Public" (referred to herein as the "USDA Public Comments") and one which it designated "Waybill Confidential" (referred to herein as the "USDA Confidential Comments").

³ "In no case did an entire Crop Reporting District (CRD) go from having two competitors to just one." USDA Public Comments at 12.

⁴ James M. MacDonald, Effects of Railroad Deregulation on Grain Transportation (Washington, D.C.; U.S. Department of Agriculture, Economic Research Service, Technical Bulletin Number 1759, June 1989). See, USDA Confidential Comments at 23. USDA admits that this study is based on out-of-date information and that "application of MacDonald's model to contemporary railroad waybill data was viewed as substantially more problematic than the employment of MacDonald's results for the earlier [early 1980s] time period." USDA Confidential Comments at 23, n.24.

Applicants submit that there is no basis for USDA's concern that any agricultural shippers will suffer competitive harm because they are served only by two carriers. In fact, the Board has examined the issue of harm in 3-to-2 situations and repeatedly has found evidence of alleged harm lacking. UP/SP at 119-21, 267-73. The Board rejected the contention that effective competition requires three carriers, or that there is any harm to shippers who prior to a transaction were served by three carriers and after a transaction will be served by two carriers. USDA does not put forth any argument for accepting in this proceeding an analysis that the Board and its predecessor have repeatedly rejected.

In contrast to these relatively minor, and speculative, harms, USDA expressly acknowledges the major benefits of the Transaction. For example, USDA points out that the Transaction "would create single-line service to a number of markets particularly in the Southeast and lower Mid-Atlantic that now must be reached through interchange. Single-line service could increase operating efficiencies for the carriers and improve service levels for shippers." USDA Confidential Comments at 44; see also, USDA Public Comments at 14. USDA also believes that savings could arise from the operating efficiencies inherent in the Transaction. Id.

More important, both CSX and NS view the agricultural markets as important growth markets. NS, for example, has invested heavily in developing these markets and in providing customers in those markets with the necessary equipment to efficiently handle their traffic, so that agricultural shippers on NS do not experience the same car supply and unit train size problems often identified with other railroads. On NS, the fleet of jumbo and

super jumbo covered hopper cars alone consists of 8,300 cars, a majority of which are dedicated to grain service. Martin RVS at 1-2.

This emphasis on the agricultural market is significant from a cost savings perspective. NS runs a 50-car unit train program for agricultural shippers, which includes private as well as NS-owned cars. This unit train program, with its reduced rates, is available for all types of agricultural markets: the export markets, the southeastern feed markets, corn and soybean markets, as well as the flour mill markets. Martin RVS at 2. NS also works in partnership with the agricultural marketplace by developing new facilities and expanding present facilities to enable those facilities to take advantage of the reduced cost 50-car unit train program. Martin RVS at 2.

USDA recognizes the potential for improved market access for agricultural shippers moving eastern Cornbelt grain and feed products to the southeastern feed market, but does not give appropriate weight to the significant benefits of single-line service and the NS 50-car unit train rates to shippers who will now be able to take advantage of these benefits. As Mr. Martin points out in his rebuttal verified statement, elevators and processors on Conrail in the midwest will have new single-line service in reaching the southeastern feed market. This is the fastest growing and largest agricultural market served by NS representing about 38% of NS' carload grain traffic -- nearly 65,000 carloads per year. Mr. Martin argues that "[h]aving this added source of supply will benefit the end users in the Southeast as well as providing new business for the elevators and processors on Conrail." Another area that will experience a direct benefit from the proposed transaction is the Delmarva feed market, which

will be open to the NS 50-car unit train program, NS destination markets, and expansion incentives for the first time.

While USDA does not ask the Board to impose any conditions on the Transaction proposed by the Applicants, it has expressed some concerns with 3-to-2 situations -- concerns that the Board has repeatedly rejected and which simply have no foundation with regard to the proposed transaction. On the contrary, eastern United States agricultural shippers will benefit from increased single-line service, expanded markets, and the extension of the best practices of both NS and CSX.

4. Representative Robert Menendez (D-NJ)

Congressman Menendez raises a number of concerns about the effect of the Transaction within his district in Northern New Jersey and more broadly.

His first concern is noise from railroad operations. As a general matter, noise impacts will be addressed in the Board's environmental review process, not in this submission. See Section XIX. Under the Board's environmental regulations, noise impacts are analyzed where there will be a significant increase in train activity as a result of a transaction. 49 C.F.R. § 1105.7(e)(6). Because the level of rail activity in Congressman Menendez's district is not expected to increase significantly, however, the Applicants do not believe that noise impacts within his district will be analyzed in the Board's EIS. See Environmental Report, CSX/NS-23, Vol. 6B, pages 308-311. Congressman Menendez requests that the Board require "effective noise reduction," but the Board does not exercise its conditioning authority to require mitigation of noise impacts from existing operations.

In addition, Congressman Menendez's explanation of noise impacts is not consistent with Applicants' understanding. The 65 dB level is not considered "intolerable" by the FAA or any other government agency to the best of Applicants' knowledge. Indeed, 65 dB is a normal level of background noise in many urban areas. U.S. DOT Federal Highway Administration, "Highway Noise Fundamentals" (Sept. 1980). The Board's regulations require noise impacts to be described where there is an "increase to a noise level of 65 decibels Ldn or greater." 49 C.F.R. § 1105.7(e)(6)(ii). Applicants stated in their noise methodology presented in the Environmental Report (CSX-NS-23, Vol. 6A at 199-200), quoted by Congressman Menendez, that noise exposure from railroad operations rarely exceeds the threshold for analysis beyond the first row or two of residences because of "acoustic shielding." This does not mean, as Congressman Menendez suggests, that noise levels are higher than 65 dB within the homes in the first row or two. The walls of houses do not absorb sound, but deflect it. The 65 dB noise level is measured outside homes, not within them.

Congress Menendez also raises a concern about safety and suggests that revenues be held in escrow to finance safety improvements. There is no need for the suggested escrow fund. With all due respect to Congressman Menendez, his description of the safety records of CSX and Norfolk Southern does not fairly state their excellent safety records. The Department of Transportation (DOT-3) has acknowledged that "CSX and NS have had the two best safety records among large U.S. railroads for the last six years." See also Applicants' Environmental Report (CSX/NS-23, Vol. 6B at 26-42), CSX and NS Safety

Integration Plans, and Pursley RVS at 16-17. The safety integration planning process for this Transaction commenced even before the Applicants filed their Application in June. In response to transition problems following the UP/SP merger, the Board ordered CSX and NS to draft a safety integration plan, which they did in coordination with the Federal Railroad Administration and submitted to the Board on December 3. The process the Board established will ensure that safety will not be compromised when the Transaction is implemented.

Congressman Menendez also requests, without a great deal of elaboration, that CSX and NS be required "to reach satisfactory resolutions to the trackage right issues with all public transit entities." Congressman Menendez may have been referring to the fact that New Jersey Transit ("NJT") had indicated in its Description of Anticipated Responsive Application (NJT-8) that it would seek Board-ordered operating rights over ten Conrail line segments. However, as explained in Section XII above, NJT pared back its request and sought Board intervention only with respect to one Conrail line, the Conrail Bordentown Secondary over which NJT would like to initiate its proposed South Jersey Light Rail Transit service. For all the reasons presented above, the Board should not impose any condition with respect to the Bordentown Secondary and should leave that controversial project to resolution through private negotiation.

Congressman Menendez requests that the Board not use its authority to abrogate labor contracts. He suggested that the Applicants are attempting to use a former Conrail authorization to drastically reduce the number of union employees. Applicants deny this

allegation, and expect to use the existing labor authority of the Board as the Board directs it to be applied. The Congressman's request is addressed more fully below in Section XVIII.

Finally, Congressman Menendez requests an Operating Plan for the North Jersey Shared Assets Area. This plan was submitted to the Board on October 29, 1997 as a Supplement to Volume 3 of the Application. See CSX/NS-119.

5. Intervention Petition of United States Representatives
Honorable Jerrold Nadler [et al.]

The Petition of Congressman Nadler and a number of his colleagues asks for an expansion of the North Jersey Shared Assets Area to include a cross-harbor car float service across New York Harbor, and certain core rail lines and facilities, including the 65th Street Yard in Brooklyn, the Bay Ridge Line from Bay Ridge to Fresh Pond Junction, the New York Connecting Railroad (Conrail) line from Fresh Pond to Oak Point Yard in the Bronx, the rail terminal to be built within the Harlem River Yard in the Bronx, and the Hunt's Point Terminal Market.

The stated goal of the Congressmembers' filing is to enhance the economy of New York State and southern New England and to reduce dependence on trucks for freight service east of the Hudson River. The Congressmembers, describing the history of declining rail service in New York City, Westchester County and Long Island, argue that the Board must act to correct the situation. The Congressmembers contend that conditions must be imposed because the Applicants have not provided a plan to overcome the problems inhibiting rail service in this area. Specifically, the Congressmembers assert that unless a car float

operation is included in the Joint Facilities Railroad, the lack of service experienced by the region since 1962 will continue.

While the Congressmembers discuss the long standing problems in this region, which will not be exacerbated by the Transaction, they fail to mention the benefits of the Shared Asset Areas discussed in Section VIII of this document. This area only has one railroad serving it today. Although some areas will continue to be served by only one carrier, the Congresspersons ignore the benefits of the Transaction. See Section VIII.

The Congressmembers assert that the estimated cost of needed capital improvements is \$83 million, and suggest that the Applicants should incur a portion of that cost. NS and CSX, however, should not be compelled to fund capital improvements necessary to correct a situation completely unrelated to the Transaction and absent a showing of competitive harm. As discussed in Section VIII, this area will not suffer this sort of harm.

In addition, the Connecticut representatives also ask that the Board (1) permit and require operation of Roadrailer and single TOFC service through New York City via Penn Station to New Haven, Connecticut and beyond, and (2) require joint access along such route to NS and CSX, or, in the alternative, allow Amtrak to license "any responsible operator" to provide such service. As discussed by Paul Carey in his Rebuttal Verified Statement, providing this sort of service presents operational and maintenance problems. Carey RVS at 4-7. It is physically impossible for most conventional freight equipment to clear this route. Carey RVS at 5. This relief is similar to that requested by the Tri-State

Transportation Campaign, which is discussed in detail in Section VIII concerning Shared Assets Areas.

The Congressmembers' requests for conditions are not supported by evidence, are not related to a consequence of the Transaction, and should be denied.

B. State & Local Governments and Related Interests

1. Delaware Department of Transportation

While stating that it supports the proposal, the Delaware Department of Transportation (DelDOT) states that it has "four areas of interest," and asks the Board to impose conditions concerning each of these areas.

First, although the Applicants' operating plans provide that two Class I railroads will provide service in Delaware, as is the case at the present time, DelDOT complains that the Transaction will place it at a competitive disadvantage to other states. Consequently DelDOT asks that the proposed South New Jersey/Philadelphia Shared Assets Area be extended south to include the Port of Wilmington, or that CSX be provided operating rights to the Port of Wilmington.

There is no basis for this request. The Port of Wilmington is currently served by one Class I railroad, Conrail, and if the Transaction is approved, it will continue to be served by one Class I railroad, NS. The Transaction will thus have no adverse effect on the Port of Wilmington; in fact, NS believes that the Port will significantly benefit from the fact that it will be served by a railroad that has NS' experience in serving ports and that will have

significantly greater market reach than Conrail has. In his rebuttal verified statement,

Thomas Finkbiner, NS' Vice President-Intermodal, states:

It is in NS's interest to see that the Port of Wilmington thrives. NS has a good track record in helping to develop all the Atlantic coast and Gulf coast ports it serves and will serve, and will work with the Port of Wilmington to improve service, develop its traffic density, and open new matters. The Port of Wilmington will surely benefit by NS's expanded market reach that will be created as a result of this Transaction.

Accordingly, NS believes that there is no warrant for DelDOT's concern that the Port of Wilmington will be at a competitive disadvantage vis a vis other ports. In any event, however, as discussed in Section VIII, the Board's decisions make clear that the fact that a railroad consolidation may provide competitive or other benefits to some shipper interests and not to others provides no justification for the imposition of conditions to require the railroad to extend the same benefits to the latter.

Second, DelDOT complains that CSX freight traffic presents a major intrusion into the City of Newark, and asks the Board to stipulate that CSX adhere "to the maximum number of trains they include in their Operating Plan," or be required "to complete a comprehensive environmental analysis." Comments of DelDOT at 4. Quite properly, the Board and its predecessor, the Interstate Commerce Commission, have recognized that daily, seasonal, and economy-related variations are an every-day fact of doing business, and have never required Applicants in a consolidation case strictly to adhere to their filed operating plans. In addition, the City of Newark and the University of Delaware have been very effective in bringing their concerns to the attention of CSX and the Board's Section of

Environmental Analysis. The environmental analysis in this proceeding has been and continues to be extensive and detailed, and the Board should rely upon that process, as it has in the past, to address DelDOT's concerns.

Third, DelDOT expresses concerns related to passenger rail service. With respect to concerns about passenger service on the NEC, Amtrak is well able to protect passenger service on the NEC without intervention by the Board, as explained in the discussion of Amtrak's comments. See Section XII.

As to DelDOT's requested stipulation that NS allow passenger service along its entire system, it should be clear that this request bears no relation whatever to any consequence of the Transaction, and finds no support in the Board's standards for imposing conditions. This is obviously the type of issue properly left to negotiation between the parties, and it is outside the scope of this proceeding.

Finally, DelDOT states that the Board should require NS to provide local operating rights, as opposed to overhead operating rights, along the Delmarva Secondary line to shortline railroads. Conrail is currently the only railroad serving the Delmarva Secondary, so NS' assumption of the line does not reduce competition. Post-Transaction, NS has agreed to grant limited overhead rights to the Maryland and Delaware Railroad (M&D), increasing the efficiency of the Delmarva rail network. No responsive application has been filed by or on behalf of any such shortline railroad, and no evidence has been provided to link the requested condition with any consequence of the Transaction. In fact, the only shortline

serving the Delaware portion of the Delmarva Peninsula is the M&D, which supports the Transaction and requests no such conditions.

Several of DelDOT's issues are further addressed in Mr. Eisenach's RVS.

DelDOT's requests for conditions are not supported by evidence, are not related to the Transaction, and should be denied.

2. Delaware Valley Regional Planning Commission

The Delaware Valley Regional Planning Commission (DVRPC) is the metropolitan planning organization for the Delaware Valley area, which includes five counties in Pennsylvania and four counties in New Jersey. DVRPC recognizes that the Transaction will benefit its region in a number of ways by providing increased rail competition, more direct service to other regions, new and upgraded infrastructure, and diversion of traffic from truck to rail.

The DVRPC raises a number of concerns and requests a number of conditions. Many of these concerns have already been addressed in agreements with other parties in the regions or through explanations provided by the Applicants. Other conditions requested by DVRPC are unnecessary or unwarranted.

Applicants have made commitments to the region concerning economic development, investment in facilities and employment that are memorialized in agreements with the State of Pennsylvania and City of Philadelphia. These commitments are all that are needed to address these concerns.

NS and CSX have reached agreements with Canadian Pacific (CP) described elsewhere, which give CP effective commercial access to the Philadelphia/South Jersey Shared Assets Area. This satisfies another concern raised by DVRPC.

DVRPC seeks "greater specificity" in Applicants' environmental assessments about air quality effects of new rail facilities. This and other environmental issues are already being addressed in great detail in the environmental review process in this proceeding. As to new projects, environmental assessments will be a part of the environmental permitting process for those projects.

DVRPC's concern about passenger operations are largely addressed elsewhere, such as in Applicants' responses to the Southeastern Pennsylvania Transportation Authority (SEPTA) and National Railroad Passenger Corporation (Amtrak) comments. See Section XII. Applicants plan to honor all Conrail agreements with commuter rail authorities in the region. If there are to be any changes in these arrangements, they should be freely negotiated outside the scope of this proceeding. NS and CSX will discuss passenger operations on a case-by-case basis with the rail authorities. Passenger train access should not be imposed on freight rail lines without thorough study of the need for such access and the possible disruption of essential freight services. This can only be done on a case-by-case basis outside of this proceeding.

The major ports of the region, the Philadelphia Regional Port Authority, South Jersey Port Corporation, the Delaware River Port Authority and the Port of Philadelphia and Camden, Inc. support the Transaction. Guarantees of future service from rail carriers are

unnecessary and unwarranted because Applicants will provide the service that the business justifies and should not be required to run trains that are not required. They have every incentive to maintain and to increase the business moving over their lines.

The NITL Settlement discussed in Section II adequately addresses DVRPC's concern about public input in the management of the Shared Assets Areas. Further, the rebuttal verified statement of Mr. Mohan shows that these areas will be operated much like other joint railroad operations.

DVRPC wishes to have all train traffic on the left bank of the Schuylkill River through Center City Philadelphia between Park Junction and Grays Ferry diverted to the Highline Branch on the right bank of the Schuylkill River. DVRPC does not support this request with any study as to whether this diversion is economically and operationally feasible or environmentally preferable. Inasmuch as the request is contrary to the unrebutted operating plan of the Applicants, it should be rejected.

DVRPC also seeks additional access by unidentified shortlines to Pavonia Yard. No shortlines have requested this access. The shortlines will have access to the CSAO. DVRPC's proposal would not necessarily be more efficient. Furthermore, DVRPC has made no claim and presented no evidence that such access is required to address any harm caused by the Transaction.

CSX and NS will discuss the interchange of cars between the Winchester and Western Railroad and the Southern Railroad of New Jersey at Vineland after the Transaction is

closed. The matter should be studied. Any change should be based on the mutual benefit of the parties after a determination that the proposal is operationally and economically feasible.

In conclusion, the DVRPC's principal concerns have been addressed by the Applicants. The additional conditions requested by DVRPC are both unnecessary and unjustified.

3. Illinois International Port District

Illinois International Port District's ("The Port of Chicago") concerns are not Transaction related, but instead involve complaints about the current level of service on the east side, as compared to the west side, of the Port of Chicago at Lake Calumet.

The thrust of the Port of Chicago's complaint is that the Operating Plan does nothing to improve the service to the east side of the Port. PORT/CHI-2, Collard V.S. at 2. Currently, the east side is served exclusively by NS. In contrast, while the track on the west side is owned by NS, the Chicago South Shore and South Bend Railroad Company, and the Chicago Rail Link, L.L.C. have operating rights into the Port from the west side. The Port contends that NS provides poor service on the east side because NS does not have competitive incentives to provide better service.

The Port of Chicago asserts that the proposed transaction would further reduce service by converting the Calumet Yard to an intermodal facility. Many of the system functions of the Calumet Yard, not the local functions, will be transferred to the Elkhart Yard. See CSX/NS-19, Vol. 3B at 252-3, Operating Plan at 184-5; PORT/CHI-2 at 6; Moon RVS at 3.

The Port of Chicago asks the Board to create additional services on the east side of Calumet Harbor, the port facilities that the Port of Chicago operates at Lake Calumet. Specifically, the Port asks that the Board require NS to provide trackage rights and access to Calumet Harbor customers to local switching carriers (The Chicago South Shore and South Bend Railroad and Chicago Rail Link) or CSX.

There is no justification for the conditions requested by the Port of Chicago. The concerns raised relate to the fact that NS now is the only rail carrier serving the east side of the Port, and the Port now claims that NS service to that side of the Port is somehow lacking. NS disagrees with the Port's characterization of its service, but in any case the proposed transaction will not adversely affect the level of service the east side of the Port receives. The only argument the Port advances that its requested conditions relate to the proposed transaction is the claim that service will further deteriorate following the Transaction because NS has plans to convert the Calumet Yard to an intermodal facility and transfer its other system functions to Elkhart Yard. This transfer, which will affect system service, not local service, will not adversely affect any service to the east side of the Port. As explained in the rebuttal verified statement of John T. Moon, service will continue to be efficient. Moon RVS at 3-4. Moreover, introduction of additional service in this congested area would disrupt NS service and produce poor additional service.

What is of more relevance to the Board's determination with regard to the Port, however, is the fact that the conversion of the Calumet Yard to an intermodal facility is within the prerogative of NS, and could be done in the absence of the proposed transaction.

The fact that the expected conversion of Calumet Yard will fit in with the rationalization of facilities and services in the context of the proposed transaction does not make the Port's unsupported dissatisfaction with prior service levels Transaction-related. Nor does it transform the proposed conversion of the Calumet Yard into a reduction of competitive access entitling the Port to conditions bringing in additional carriers to a facility that pre-Transaction is sole-served by NS.

4. Indiana Port Commission

The Indiana Port Commission ("IPC") is an Indiana state agency that is charged with constructing, maintaining and operating public ports with terminal facilities and traffic exchange points for all forms of transportation. IPC-2 at 1. IPC has constructed the International Port of Indiana which is commonly called Burns Harbor and is located on the southeastern shore of Lake Michigan. Id. at 2. Burns Harbor is currently served by Conrail and the IHB through a switching arrangement with Conrail. Id. at 3.

IPC's principal concerns with this Transaction relate to the IHB. IPC expresses concern that the current advantages of an independently managed and operated IHB will not exist if the Transaction is approved. IPC asks for several specific service and equipment-related conditions, including mandatory daily IHB service to Burns Harbor and IHB ownership of gondola cars (IPC-2 at 10), but as explained in Section XIII in relation to the EJE and the I&M, these conditions are unnecessary. See Section XIII.

IPC's Comments suggest that after the Transaction, the IHB will change its normal business practices, but this is not true. The IHB will continue to operate as an independent

entity, responsible for its own operating, financial, mechanical, engineering and labor relations functions. See Section XIII. There is no reason to believe, therefore, that the IHB will operate any differently with respect to equipment, service, or the utilization of yards. IPC has not made any case that it will suffered harm as a result of this Transaction. If anything, the IHB will become more efficient after the Transaction. Id. IPC's requests, therefore, should be denied.

IPC also expresses concerns about the effects of the acquisition cost paid for Conrail on future rates. This issue has been addressed in Section VII.

Lastly, IPC raises several issues that are addressed by the NITL settlement. First, IPC expresses concerns about NS and CSX's responsiveness to shipper requests for service. The settlement with the NITL, however, provides for an expedited arbitration for those shippers who are dissatisfied with the service they are receiving under existing Conrail contracts. See Section II. IPC also requests continued oversight by the Board after the Transaction. This issue is both covered by the NITL settlement (see Section II) and addressed more fully in Section XXI.

5. Michigan Department of Transportation

Governor John Engler, speaking for the State of Michigan, recognizes that the Transaction will result in a more efficient transportation system with balanced competition between two strong carriers, and endorses the proposed transaction.

Michigan encourages continued negotiations between NS and Amtrak concerning upgrading the route between Detroit and Chicago for higher speed rail passenger service. As

discussed at greater length in Section XII, concerning Amtrak and commuter rail matters, related questions of capacity and costs must be studied prior to any commitments.

Michigan also encourages CSX and NS to continue to participate in the development of an intermodal freight terminal at Conrail's Junction/Livernois Yard. Applicants have adequate capacity in the area, and have no current need for an expanded intermodal facility.⁵ Thus, no condition has been justified. Nevertheless, both CSX and NS will review this matter in light of the needs of Michigan area shippers.

6. Pennsylvania Authorities and Officials

A number of Pennsylvania State authorities and officials have filed comments generally supportive of the Transaction. These are the Commonwealth of Pennsylvania, Governor Thomas J. Ridge, the Pennsylvania Department of Transportation, Senator Arlen Specter, the Pennsylvania House and Senate Transportation Committees, the City of Philadelphia and the Philadelphia Industrial Development Corporation, the Philadelphia Regional Port Authority, South Jersey Port Corporation, the Delaware River Port Authority and the Port of Philadelphia and Camden, Inc., and the Southwestern Pennsylvania Regional Planning Commission. This responds to the requests for conditions that have not otherwise already been resolved.

First, the Commonwealth, Governor Ridge, and the Department of Transportation unconditionally support this Transaction. They state their belief that the proposed transaction

⁵ This matter is discussed further in Mr. Finkbiner's RVS and in Mr. Rutski's RVS at 36.

will significantly benefit the Commonwealth and its citizens. They describe the benefits to include: 1) increased competition in the Philadelphia/South Jersey Shared Assets Area and in the Monongahela coal fields; 2) increased intermodal competition 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 the Applicants; 7) new access by the CP system to Harrisburg; and 8) reduced truck traffic on the highways as a result of greater penetration into the intermodal market.

Senator Specter comments on seven areas of concern: 1) Conrail's significant role in the State; 2) the price of the Transaction; 3) the impact of the Transaction on Conrail's employees; 4) Conrail's corporate headquarters in Philadelphia; 5) competition and the effect on shippers and other railroads; 6) impact on ports; and 7) the impact on commuter rail. Most of these concerns have been addressed in recent agreements with interested parties. Others are addressed below.

Senator Specter urges the Board, in assessing whether the proposed transaction is in the public interest, to review whether CSX and NS can afford to pay \$115 per share for Conrail: 1) without passing on the cost to shippers in the form of higher rates; or 2) causing the expanded CSX and NS systems to reduce other costs, such as maintenance and safety.

Applicants operate in highly competitive markets which severely constrain their ability to pass on costs associated with acquiring Conrail's stock. Further, Applicants' ability to raise rates is limited by federal statutes and the Board's maximum rate regulations. These issues are discussed in more detail elsewhere. See Appendix A, Kalt RVS, and Whitehurst RVS.

Applicants note that, far from experiencing higher rates, rail customers have enjoyed substantial and continuing rate decreases for many years, attributable in part to the pass-through of merger benefits. The Board's predecessor, the ICC, consistently issued findings demonstrating decreased rates since passage of the Staggers Act. With the introduction of two-carrier rail service to the Northeast, the trend toward rate decreases will continue.

As to Senator Specter's concern that Applicants will reduce costs relating to maintenance and safety, historically Applicants have had among the highest rates of investment in rail infrastructure and maintenance among Class I carriers, higher than those of Conrail. Applicants fully expect to continue this pattern of investments, as demonstrated by the substantial capital improvements they have indicated they intend to make post-approval. See CSX/NS Joint Application Vol. 1, at 24 ("CSX and NS will invest \$488 million and \$729 million, respectively, in new rail property and equipment.").

Applicants concur in Senator Specter's comments concerning the decisive role Conrail's employees have played in Conrail's successes over the years. For reasons outlined in the primary application and in Section XVIII, however, Applicants contend that New York Dock conditions are both appropriate and sufficient in this case, and that labor-related

conditions "beyond the doctrine of New York Dock" should not be applied. See Section XVIII.

Senator Specter states "one of the issues confronting the Board is to ensure that in keeping with the intent of Congress to preserve jobs in Philadelphia, that there is a significant headquarters presence for Conrail or any successor entity." Comments of Senator Arlen Specter at 3. The City of Philadelphia supports the Transaction. As described in the Joint Comments of the City of Philadelphia and the Philadelphia Industrial Development Corporation, at 4-5, Applicants have committed to: 1) retention of the headquarters of Conrail, Inc. in Philadelphia for the jobs involved with the operation of the Shared Assets Areas and other continuing Conrail activities; 2) creation of new rail-related jobs in Philadelphia as a result of NS' commercial and operational activities in the Philadelphia area as well as establishment of a Mid-Atlantic regional headquarters in Philadelphia to include a Regional Vice President; and 3) CSX's commercial and operational activities in the Philadelphia area, as well as the anticipated establishment of a regional office in Philadelphia to include government relations, industrial development, sales, and operations.

Senator Specter urges the Board to consider the impact of the proposed transaction on competition in Pennsylvania and on Pennsylvania's shortlines. As described in various parts of the primary application and support filings, and as discussed, supra, the proposed transaction will bring about an unprecedented increase in competition. See, e.g., Joint Comments of the City of Philadelphia and the Philadelphia Industrial Development

Corporation in Support of Approval of the Proposed Control Application, at 5 ("The application now before the Surface Transportation Board proposes to considerably expand competition by jointly serving selected markets."). Pennsylvania -- in particular the Philadelphia area, through creation of the South Jersey/Philadelphia Shared Assets Area, and southwestern Pennsylvania, by virtue of joint access to the Monongahela coal fields -- will be among the greatest beneficiaries of this increase in competition. See, e.g., Comments of the Commonwealth of Pennsylvania, Governor Ridge, and the Department of Transportation, at 3 (citing the presence of two carriers in southwestern and southeastern Pennsylvania competing for traffic to and from the South as among the proposed transaction's central benefits to Pennsylvania).

Senator Specter urges the Board to "give ample weight to the comments filed by the Canadian Pacific Railway/Delaware and Hudson Railroad and the Pennsylvania short lines" Comments of Senator Specter at 4. CP/D&H now support the proposed transaction. In addition, to the best of Applicants' knowledge, there are only a few remaining objections to the proposed transaction from Pennsylvania's shortline railroads, which are addressed in responses to their individual filings.

Senator Specter notes concerns voiced by the Chairman of the Delaware River Port Authority ("DRPA") at a hearing. In its filing on October 21, 1997, DRPA, joining with several related entities, expressed support for the proposed transaction. See Philadelphia Regional Port Authority, South Jersey Port Corporation, the Delaware River Port Authority and the Port of Philadelphia and Camden, Inc. Comments in Support of Acquisition, at 5

("The Delaware River Port Interests fully support the CSX/NS Application for approval of the acquisition of Conrail's assets since the Applicant's proposal would replace what generally has been a rail monopoly in the Northeastern United States with two competitors.").

The Port interests offer suggestions for implementation concerning labor agreements, computer data, and train schedules. As suggestions, the Port interests' points are noted, their comments are appreciated, and will be incorporated into operations planning. For reasons we discuss at length elsewhere, however, Applicants strongly oppose conditions that would burden Applicants with various requirements prior to implementation of the Transaction.

Senator Specter notes the critical importance of Southeastern Pennsylvania Transportation Authority service to Philadelphia area residents. NS has addressed Senator Specter's concern about future passenger service by agreeing to negotiate with SEPTA seriously and in good faith. Applicants address the issues and concerns regarding SEPTA in their response to SEPTA's filing. See Section XII.

In addition to the matters discussed above, and recognizing that the transaction contains specific benefits for Pennsylvania, the Pennsylvania House and Senate Transportation Committees raised several areas of concern.

The Pennsylvania House Transportation Committee states that "it is unconvinced that the applicants can generate projected revenue levels from the diversion of truck traffic." PAHTC-2 at 13. The Committee suggests that it is unlikely, in view of economic downturns

or equipment availability changes, that the diversion revenues will be achieved and on that basis characterizes the Transaction as "high risk."

The Committee's concerns, which rest wholly on speculation, are addressed by CSX witness Bryan. Bryan RVS at 8-9. Both the CSX and NS truck diversion predictions were based on conservative assumptions as to the amount of freight that could be diverted and the revenues that could be achieved in the growing intermodal sector. CSX/NS-19, Bryan VS at 249; CSX/NS-19, Krick VS at 101. By enlarging single-line transportation opportunities, and thereby opening up new intermodal traffic lanes, this Transaction will promote considerable intermodal traffic and revenue growth. CSX/NS-19, Anderson VS at 294-308; CSX/NS-19, Finkbiner VS at 224-231. While the possibility of business downturns was not expressly considered, the diversion traffic studies were undertaken in conformity with accepted standards for such studies. In addition, the testimony of Darius Gaskins demonstrates that the efficiencies that will follow from the Transaction could lead to much greater intermodal traffic growth than was predicted in either of the truck diversion analyses on which the CSX and NS revenue growth predictions are based. CSX/NS-19, Gaskins VS at 104-111.

Both Committees express concern that the Transaction Agreement provides an opportunity for CSX and NS to "siphon off excess assets from Conrail retirement plans," and ask the Board to require that it review and approve "future disposition of any overfunded portion of Conrail's retirement plans." PAHTC-2 at 6. The same issue is raised in a filing made by a group of Conrail retirees (RETR-8), and is addressed in Section XX.

The Committees express concerns about regional and shortline railroads. Many of these concerns have been addressed by private agreements between Applicants, shortlines, and CP/D&H, and are thus not the subject of filings. The conditions requested by those railroads are addressed in Section XIII.

The Committees ask the Board to subject the Transaction to monitoring of several types. Such oversight requests are addressed in Section XXI.

The Committees ask the Board to condition the Transaction on particular capital investment projects by Applicants. Applicants plan abundant capital investment projects, including many of those cited in the Committees' list. It is not appropriate to make these a condition of approval. To the extent the Committees seek additional projects, they must be studied and justified. The Board is in no position, jurisdictionally or practically, to micro-manage the rail business in this way.

The Southwestern Pennsylvania Regional Planning Commission recognizes numerous important benefits and opportunities of the proposed transaction for the region, including enhanced rail competition, increased intermodal growth and capital investment. Without requesting conditions, it supports the Bessemer & Lake Erie Railroad which seeks participation in Monongahela coal traffic, the Wheeling & Lake Erie Railway, and the Buffalo & Pittsburgh Railroad. The Buffalo & Pittsburgh supports the proposed transaction, because of an agreement between it and CSX and NS. The B&LE and W&LE requests for conditions are addressed elsewhere. See Section XIII; Friedmann RVS at 1-32; Williams RVS at 35-68. In general, the Committees' suggestions make the B&LE and the W&LE

better off than they are today through conditions that do not address effects of the Transaction.

The Commonwealth, Governor Ridge and the Pennsylvania Department of Transportation have stated their commitment to working with the Applicants to protect Pennsylvania's interests "in this transformation of the eastern rail industry." PA-8 at 2. The Applicants are committed to working with all the Pennsylvania interests to address all of their interests and concerns, as noted.

7. Port Authority of New York and New Jersey

Ignoring the clear findings of their own consultants who concluded that, after the Transaction, "rail service should markedly improve from Conrail's current service level,"⁶ the Port Authority of New York and New Jersey (the "Port Authority") calls for the divestiture of the entirety of the Conrail assets in the NJSAA to a terminal railroad company. In its comments,⁷ the Port Authority discusses several unfounded concerns associated with the expansion of competition serving the area, but fails to support its requested condition. That condition would have a totally unpredictable effect upon the Transaction and the rail freight and passenger transportation system in the NJSAA, and should be summarily denied.

⁶ Booz-Allen & Hamilton, Inc., A Strategic and Economic Analysis of Changes in Rail and Maritime Competition and Implications for New York/New Jersey Port Competitiveness, March, 1997 ("Booz-Allen"), p. VI-11, included in Vol. 3.

⁷ On November 24, 1997, the Port Authority also submitted comments on CSX and NS' operating plans for the North Jersey Shared Assets Area. Notably, the Port Authority did not reiterate its request for divestiture. CSX and NS address the Port's comments in Section VIII.