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October 21, 1997

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

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

Dear Secretary Williams:

Please find enclosed for filing in the above-reference proceeding an original and twenty-five (25) copies of the Redacted (to be filed in the public record) Comments, Evidence and Request for Conditions of Niagara Mohawk Power Corporation, which has been designated as NIMO-7.

Respectfully submitted,

John K. Maser III
Frederic L. Wood
Karyn A. Booth
Attorney for Niagara Mohawk Power Corporation

ENCLOSURES
3315-020

cc: All Parties of Record

NIMO-7

182965

PUBLIC/REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION
AND NORFOLK SOUTHERN RAILWAY COMPANY

—CONTROL AND OPERATING LEASES/AGREEMENTS—

CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

COMMENTS, EVIDENCE AND REQUEST FOR CONDITIONS

OF

NIAGARA MOHAWK POWER CORPORATION

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DATE: OCTOBER 21, 1997

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PART A

PUBLIC/REDACTED

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COMMENTS, EVIDENCE AND REQUEST FOR CONDITIONS

OF

NIAGARA MOHAWK POWER CORPORATION

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

I. INTRODUCTION AND SUMMARY OF RELIEF REQUESTED

NIMO is an investor-owned electric utility with headquarters in Syracuse, New York. NIMO owns and operates two coal-fired generating facilities, the C.R. Huntley Station ("Huntley Station") located in Tonawanda, New York and the Dunkirk Steam Station ("Dunkirk Station") located in Dunkirk, New York. The

proposed acquisition and division of Conrail by CSX and NS will have a serious adverse impact on NIMO's Huntley and Dunkirk facilities. These facilities will be competitively disadvantaged *vis-a-vis* plants of competing utilities in the proposed Shared Assets Areas of Detroit and Southern New Jersey/Philadelphia. NIMO's Huntley and Dunkirk Stations will be captive to CSX under the proposed transaction, whereas utilities located in the shared assets areas will obtain dual rail service from both CSX and NS. As a captive shipper, NIMO expects to face rate increases under the existing proposal, which are likely to be magnified as CSX attempts to recover the substantial, multi-billion dollar acquisition premium paid for Conrail. In addition, the claimed benefits of competition at coal mines located in the former Monongahela Railroad ("MGA") service area and the Ashtabula Coal Storage and Transfer Terminal ("Ashtabula") will be unavailable to NIMO. NIMO is further concerned about the competitive impact of the proposal on a potential transportation alternative and an important supplier of coal, Mine 84.

Accordingly, NIMO respectfully requests the Surface Transportation Board ("STB" or "Board"), pursuant to its authority under 49 U.S.C. § 11324, to impose conditions governing the transaction that will ameliorate the competitive harm that will occur to NIMO, as described more fully herein. An outline of this submission and a summary of the conditions requested follows.

A. Outline Of This Submission

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

1. Part A contains the comments submitted by NIMO and a formal request for conditions, including legal argument in support thereof.

2. Part B contains the Verified Statement of G. W. Fauth III ("Fauth V.S.") and accompanying exhibits. Mr. Fauth is an outside consultant who has conducted an independent analysis of the impact of the proposed transaction on

NIMO's facilities.

3. Part C contains the Verified Statement of James H. Bonnie ("Bonnie V.S."). Mr. Bonnie is the Manager, Fuel Procurement, Transportation and Contract Administration for NIMO. Mr. Bonnie describes NIMO's facilities, operations, and transportation requirements and discusses the expected adverse impact of the proposed transaction on two of NIMO's coal-fired generating stations.

4. Part D contains the Joint Verified Statement of Scott D. Leuthauser and Michael J. Mathis ("Leuthauser/Mathis V.S."). Mr. Leuthhauser is the Manager of Supply Planning in the Power Transaction and Planning Department of NIMO. Mr. Mathis is the Manager of Generation Performance and Fuel Analysis in the Fossil and Hydro Generation Department of NIMO. Mr. Leuthhauser and Mr. Mathis jointly describe NIMO's wholesale market activity, the increasing competitive pressures on utilities arising from federal and state legislation and regulatory requirements, and how NIMO will be competitively harmed by the proposed transaction.

5. Part E contains excerpts from deposition transcripts concerning this proceeding.

B. Relief Requested

To prevent the adverse competitive impacts of the proposed transaction, NIMO requests the following relief:

1. Relief Requested by the Erie-Niagara Rail Steering Committee

NIMO is a member of the Erie-Niagara Rail Steering Committee ("ENRS") and supports each aspect of the relief requested by that organization in this proceeding which would alleviate the anticompetitive effects of the proposed transaction with respect to NIMO. These conditions are:

(a) (i) Creation by the Applicants of another Shared Assets Area,

i.e., the "Niagara Frontier Shared Assets Area" which would permit equal access to both CSX and NS by Conrail customers, including NIMO's Huntley and Dunkirk Stations, and (ii) in addition, establishment within the Niagara Frontier Shared Assets Area of reciprocal switching arrangements for all current Conrail customers (including NIMO's Huntley and Dunkirk Stations) that would allow other rail carriers serving the area, such as CN, CP and existing shortline operators, also to provide competitive service and at a reasonable level of charges, i.e. $156.00 per car.

(b) Alternatively, if a Niagara Frontier Shared Assets Area is not created, approval of the joint acquisition of Conrail should be conditioned on the reciprocal grant of terminal trackage rights to each other by CSX and NS for operations over the Conrail lines in the same geographical area covered by the proposed Niagara Frontier Shared Assets Area; ownership and operation of the Conrail assets in that area would be divided as proposed by the applicants, but all current Conrail customers, such as NIMO's Huntley and Dunkirk Stations, would receive rail service directly from both CSX and NS; and a reasonable level of charges for the reciprocal terminal trackage rights would be established, i.e., a rate of $0.29 per car mile.

(c) If neither of the above alternatives is established, approval of the proposed transaction should be conditioned on the establishment by CSX and NS of reciprocal switching to all current and future customers that are or will be served by the Conrail lines located within the Niagara Frontier Shared Assets Area, such as NIMO's Huntley and Dunkirk Stations, and a reasonable reciprocal switching charge should be established, i.e. $156.00.

(d) If none of the above conditions proposed by ENRS are adopted by the Board, then the Board should condition approval of the transaction on the granting of trackage rights by CSX to NS that would permit NS to serve the Huntley and Dunkirk Stations directly as follows:

(i) Huntley Station—Under the proposed transaction, NS would obtain overhead trackage rights on Conrail's Belt Line Branch and Niagara Branch (which lines are proposed to be allocated to CSX), from which lines NIMO's Huntley Station is accessed. The Board should order that these overhead trackage rights be modified to allow NS the right to operate over such tracks and any necessary connecting tracks in order to access and serve NIMO's Huntley Station, including delivery of coal to the Huntley Station.

(ii) Dunkirk Station– Trackage rights in favor of NS should also be established over Conrail's Chicago Line between Control Point 58 (CP 58) near Westfield, New York, to NIMO's Dunkirk Station which is located near CP 42 in Dunkirk, New York in order to allow NS to access and serve NIMO's Dunkirk Station, including the delivery of coal to that station.

These trackage rights to both Huntley and Dunkirk Stations would permit NS to provide direct service to these NIMO facilities, in addition to direct service by CSX, thereby alleviating the competitive harm that would otherwise occur to NIMO as a result of the proposed transaction. To the extent that connections, crossings, and related rail facilities are required to permit the exercise of the above trackage rights by NS, the Board should further condition approval of the transaction upon any necessary construction or relocation of tracks or other steps necessary to permit such trackage rights operations by NS to serve NIMO's Huntley and Dunkirk Stations. As Mr. Fauth emphasizes in his accompanying testimony, there are no operational reasons that would preclude the granting of the requested trackage rights. Fauth V. S. at 20.

II. DESCRIPTION OF NIMO'S OPERATIONS AND THE HUNTLEY AND DUNKIRK STATIONS

NIMO is engaged in the generation, transmission and distribution of electricity to communities in upstate New York. As a retail provider of electricity,

NIMO serves 1,556,000 customers in 37 counties and 669 cities, towns and villages. Bonnie V.S. at 2. NIMO's total service area is approximately 24,000 square miles. *Id.* NIMO also engages in the sale of electricity in the wholesale market as a participant in the New York Power Pool ("NYPP"). NIMO owns and operates a number of power plants in several areas across upstate New York. At issue in this proceeding are NIMO's two coal-fired generating stations located in western New York. As earlier indicated, these facilities are the Huntley Station which is located just north of Buffalo, in Tonawanda, New York and the Dunkirk Station located in the city of Dunkirk, New York.

A. Huntley Station

The largest of NIMO's coal-fired stations, Huntley is situated on the Niagara River, three miles downstream from the City of Buffalo. Huntley Station began commercial service in 1916 and was renowned for its reputation as the largest coal-fired plant in the world during World War II. Bonnie V.S. at 3. The plant has since been continuously modernized and maintains four 100,000 kilowatt units and two 200,000 kilowatt units. Huntley Station currently produces 715,000 kilowatts of 60—hertz power and feeds that power into the NYPP to serve NIMO customers across the state.

Huntley Station obtains bituminous coal from mines located in the Pittsburgh Seam, which is located in southwestern Pennsylvania and northern West Virginia. The primary coal source for the Huntley Station currently is the Bailey mine, although coal has been bought from the following other coal mines in the area: Blacksville, Loveridge, Warwick, Mine #84, Shannon, and Tanoma. Bonnie V.S. at 4.

Huntley Station is dependent upon rail transportation for coal deliveries. Although NIMO has been able to bring a limited amount of coal to the Huntley Station by vessel, as discussed below, there are serious limitations on this

transportation alternative that prevent NIMO from using lake vessels to deliver all, or even a significant portion, of Huntley's coal requirements. Today, Huntley Station is captive to Conrail for rail deliveries of coal. Conrail also serves the mine origins listed above and, thus, provides coal deliveries to Huntley Station in single-line service. The Huntley Station typically receives four Conrail trains per week consisting of 100 to 105 loaded cars. Fauth V.S. at 11. Coal delivered to Huntley Station travels through a system of conveyors and can be brought directly into the plant or stored on a large coal pile. Bonnie V.S. at 4. The Huntley plant normally maintains a 20 day supply of coal, approximately 100,000 to 150,000 tons. *Id.*

B. Dunkirk Station

Dunkirk Station is situated on a peninsula jutting out into the City of Dunkirk harbor on Lake Erie. The Dunkirk Station came into operation in the 1950s. Initially comprised of two coal-fired units, today the plant maintains four such units, two with a capacity of 100,000 kilowatts, and another two with a capacity of 200,000 kilowatts. On average, the station produces 600,000 kilowatts of 60-cycle power, which is also fed into the NYPP. Bonnie V.S. at 5.

Like the Huntley Station, Dunkirk Station obtains coal from sources in the Pittsburgh Seam. The primary mine sources for Dunkirk Station currently are Blacksville and Cumberland, although coal from the Bailey, Loveridge, Federal 2, Humphrey and Warwick mines has also been burned at Dunkirk Station. Bonnie V.S. at 5.

The Dunkirk Station is primarily dependent upon rail service for its coal deliveries, and Conrail is the only carrier that can physically serve the station.[1] Currently, the Dunkirk Station receives weekly rail deliveries of coal, generally

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1 Although NS also has a main line of rail that runs through the City of Dunkirk, this line does not serve NIMO's Dunkirk facility. NS's line is located several hundred yards east of Conrail's main line. Moreover, the Dunkirk facility is not open to reciprocal switching, although NS maintains a viable interchange in Dunkirk. Fauth V.S. at 15, 16.

comprised of 90 cars, wit.' 100 tons of coal in each car. Fauth V.S. at 15; Bonnie V.S. at 5. Loaded rail cars are placed on a dumper at the station and are weighed and unloaded in less than a minute. Bonnie V.S. at 5-6. The coal is either brought directly into the plant or stored on the coal pile on the plant's grounds. *Id.* The Dunkirk Station normally maintains a 21 to 28 day supply of coal. *Id.* A more detailed description of the operations and process for receiving coal at the Dunkirk Station is included in the testimony of Mr. Fauth. Fauth V.S. at 14-16.

III. DESCRIPTION OF NIMO'S CURRENT TRANSPORTATION SERVICE AND COMPETITIVE OPTIONS

As noted above, the Huntley Station is almost exclusively dependent upon rail deliveries of coal. In 1996, the plant received a total of ıs, all of which were delivered solely by rail, with Conrail being the exclusive provider of transportation to the station. Bonnie V.S. at 6. In 1995, out of a total of tons, Conrail delivered ons, with the balance, ons, being delivered by water vessel. *Id.* Between January 1 and October 7, 1997, the Huntley Station has received a total of ons, with tons being delivered by Conrail and the balance, delivered by vessel. *Id.* During 1997 and the prior two years, there have been no truck deliveries of coal to Huntley Station. *Id.*

Dunkirk Station is also captive to Conrail for the majority of its coal deliveries by rail. In 1996, Dunkirk Station received a total of tons, of whic s were delivered by Conrail ons were delivered by vessel, and s were delivered by truck. Bonnie V.S. at 7. In 1995, Dunkirk received a total of tons, of which ons were delivered by Conrail, tons were delivered by vessel, and ons were delivered by truck. *Id.* Between January 1 and October 7, 1997, Dunkirk Station has received a total of tons of coal with tons delivered by Conrail and s delivered by vessel. There have been no truck deliveries of coal in 1997 to Dunkirk Station,

and no significant deliveries of coal by truck are anticipated. *Id.*

While coal deliveries have been made to NIMO's Huntley and Dunkirk Stations by vessel, such deliveries are severely limited, particularly at Huntley, due to weather conditions, vessel availability, ice conditions, unpredictability of the shipping season, and, in connection with the rail-water movements to Huntley Station, constraints and costs associated with Black Lock Rock. Fauth V.S. at 13; Bonnie V.S. at 8.

Vessel deliveries of coal to Huntley must pass through Black Rock Lock, which is located where Lake Erie drains into the Niagara River. Larger vessels are forced to use the Black Rock Lock and Channel, which provides protection from fast currents and rapids associated with the Niagara River, and because of a height restriction on the Niagara River. Fauth V.S. at 13. Vessels that pass through the lock are restricted to a length of 625 feet, a width of 68 feet, and a depth over lock sills of 21.6 feet, and these restrictions require that smaller vessels be used for deliveries of coal to Huntley Station. *Id.* at 13. But even more significantly, movements of coal by this mode are suspended during the winter months due to weather conditions, which generally require that the lock be closed from January 1 through mid-April. Fauth V.S. at 13; Bonnie V.S. at 9. In some cases the lock has been closed as late as early May. *Id.* For practical purposes, NIMO can schedule rail-water movements to Huntley Station only seven to eight months of the year. Bonnie V.S. at 9.

It would not be feasible for the Huntley Station to receive all, or even most, of its coal via rail-water movements. Fauth V.S. at 14; Bonnie V.S. at 9. This would require NIMO to store approximately tons of vessel-delivered coal by early December, assuming a four-month winter storage period from mid-December to mid-April. Bonnie V.S. at 9. Coal burn at Huntley Station during the winter, which is peak demand, averages ons per day. *Id.* In addition, demand for fossil

generation also increases during the months of December through March due to a decrease in hydro generation that generally occurs during that time. *Id.* at 10.

While Dunkirk Station is not affected by the Black Lock Rock restrictions on lake movements of coal, its movements are impacted by poor weather conditions and other factors. Dunkirk Station has always relied most heavily on rail transportation service for the majority of its coal shipments. The Dunkirk facility is designed to receive coal primarily by rail and NIMO has made significant investments in equipment and facilities in order to receive rail deliveries of coal. Bonnie V.S. at 8. In short, water transportation is a limited alternative that does not provide effective competition to deliveries of coal by rail, which is used for the majority of Dunkirk Station's shipments.

While in the past, NIMO has moved coal to the Huntley and Dunkirk Stations by truck, this alternative has only been used by NIMO recently to a very limited extent. Moving coal by truck has always been limited by distance, proximity and convenient access to interstate highways, as well as by costs and availability of product that meets the stations' coal requirements. Bonnie V.S. at 10. Truck shipments to the stations have also been significantly curtailed due to mine closings in the area of Central Pennsylvania, which were closer in proximity to the stations than the Pittsburgh Seam mines, and were located along the Interstate 80 Corridor. Bonnie V.S. at 10. Today, virtually all of the mines along that highway that could meet the stations' coal requirements have discontinued operations due to competition from the Pittsburgh Seam mines. *Id.* at 10-11. Trucking coal from the Pittsburgh Seam mines is not a feasible option due to the distance between the mines and the stations. *Id.* at 11.

In sum, NIMO relies on rail transportation service for nearly all of its coal deliveries at the Huntley Station, and for most of the coal deliveries at the Dunkirk Station. Both the Huntley and Dunkirk Stations are captive to Conrail for rail

service and, under the proposed transaction, CSX will step into Conrail's shoes as the sole provider of rail transportation to the stations.

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

A. The Statutory Standard And Other Factors To Be Considered By The Board

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

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

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

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

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

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

In analyzing factor number (5), regarding competitive effects on competition among rail carriers, "[the Board does] not limit [its] consideration of competition to rail carriers alone, but examine[s] the total transportation market(s)." *Union Pacific*

Corporation, et al. — Control and Merger — Southern Pacific Rail Corporation, et al., Finance Docket No. 32760, slip op. at 53 (1996) (*"UP/SP"*).

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

The Board is also required by *McLean Trucking Co. v. United States*, 321 U.S. 67, 87-88 (1944) and the *Northern Lines Merger Cases*, 396 U.S. 491, 510-13 (1970), to weigh the policy of the antitrust laws disfavoring diminution in competition resulting from a proposed merger against the overall transportation policy favoring improvements in efficiencies. The Supreme Court has recognized that the antitrust laws give "understandable content to the broad statutory concept of the 'public interest.' " *FMC v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244 (1968). Even if a particular transaction would not violate the antitrust laws, the Board has the discretion to disapprove it. *Burlington Northern Inc. et al. — Control and*

Merger — Santa Fe Pacific Corp. et al., Finance Docket No. 32549, slip op. at 53 (1995) ("*BN/SF*").

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

In evaluating whether a particular acquisition proposal is in the public interest, a primary concern of the Board is to determine whether competitive harm would result from the transaction. Traditionally, the Board and its predecessor, the Interstate Commerce Commission ("ICC"), have sought to identify "what competitive harm is directly and causally related to the merger" as distinguished from competitive disadvantages that existed prior to the proposed transaction. *UP/SP* at 56; *BN/SF* at 54. Also, the Board's Policy Statement specifically refers to a reduction or "lessening of competition" that would arise when two carriers consolidate as the kind of harm that would be contrary to the public interest.[2] 49 C.F.R. § 1180.1(c)(2)(i). The law, however, is clear that the Board is not constrained by statements of policy. *See generally, American Bus Ass'n v. United States*, 627 F.2d 525 (D.C. Cir. 1980); *Community Nutrition Inst. v. Young*, 818 F.2d 94? (D.C.

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

Cir. 1987). The courts have characterized general statements of policy in the following manner:

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

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

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

B. The Board's Broad Conditioning Power

Where the Board determines that the public interest would not be served by a particular railroad acquisition proposal, it may seek to alleviate the harm that would result from the proposed transaction by exercising its conditioning power that arises

from the Interstate Commerce Act. *See* 49 U.S.C. § 11324. The Board's authority to condition its approval of a consolidation transaction, in order to ameliorate potential anticompetitive effects of a proposed transaction, is not narrow or limited but is, in the agency's own terms, broad. 49 C.F.R. § 1180.1(d); *UP/SP*, slip op. at 62; *Union Pacific Corporation, et al. — Control — Missouri Pacific Corporation, et al.*, 366 I.C.C. 462, 502 (1982) (*"UP/MP"*). Indeed, in describing its obligations in railroad merger proceedings subsequent to passage of the Staggers Act, the ICC stated, ". . . we must take even greater care to identify harmful competitive effects and to mitigate those effects where possible." *UP/MP*, 366 I.C.C. at 562.

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

The evidence presented by this filing establishes that NIMO is entitled to relief from the Board because the proposed transaction would result directly in

competitive harm to NIMO's Huntley and Dunkirk Stations.

V. THE EVIDENCE CLEARLY ESTABLISHES THAT NIMO WILL SUFFER SUBSTANTIAL COMPETITIVE HARM AS A DIRECT RESULT OF THE PROPOSED TRANSACTION

A. NIMO Will Be Competitively Disadvantaged Vis-a-Vis Other Utilities In The Northeast As A Result Of The Proposed Transaction

As a captive shipper with limited transportation alternatives, NIMO is likely to suffer rate increases for coal deliveries by rail to its Huntley and Dunkirk Stations, as a result of the proposed transaction. At the same time, a number of NIMO's competitors can expect to obtain rate decreases. As stated above, NIMO is dependent on rail deliveries for almost all of its coal requirements at Huntley, and for most of its coal requirements at Dunkirk. In 1995, Conrail, as the sole provider of rail service to these stations, moved percent of NIMO's coal requirements. Fauth V.S. at 27. These coal movements generated an average revenue-to-variable-cost ratio ("R/VC") of percent and, thus, were extremely profitable to Conrail. *Id.* These figures demonstrate that Conrail is market-dominant over NIMO's Huntley and Dunkirk coal shipments.

Water transportation of coal is not a viable option for the Huntley Station, based upon the restrictions associated with the Black Rock Lock and other factors. For Dunkirk, water transportation may be more feasible but the option is limited and, as established by Mr. Fauth, has resulted in little, if any, competitive pressure on Conrail. Fauth V.S. at 29-30. Although the Dunkirk Station has utilized the water option for some of its coal requirements, Conrail's rates on a per-ton-mile basis are higher to Dunkirk than to Huntley, as are Conrail's profits. Fauth V.S. at 29. Moreover, water deliveries to Dunkirk, which involve a highly circuitous and inefficient rail-water-rail-water route, appear to have only a slightly lower-than-average freight rate per ton than Conrail's movement to Dunkirk (er ton vs.

per ton). Fauth V.S. at 29. Thus, despite the existence of the water alternative, Conrail has been able to extract high monopoly rents for coal movements to the Dunkirk Station, with Conrail's freight movements to the station generating an average R/VC of at. Fauth V.S. at 29-30.

Under the proposed transaction, CSX will simply step into Conrail's shoes. As the sole provider of rail service to the Huntley and Dunkirk Stations, there will be no incentive for CSX to reduce NIMO's freight charges. In fact, NIMO will likely experience rate increases from CSX in the near future, in order to help defray the tremendous acquisition premium paid by CSX and NS for Conrail, as discussed further below. A number of other external and internal factors that will likely cause NIMO's delivered coal costs to increase make NIMO more vulnerable to the competitive harm that will occur as a result of the proposed transaction. For instance, Phase II standards of the 1990 Amendments to the Clean Air Act will require NIMO to obtain lower-sulfur coal, which generally has a lower Btu content. This will increase NIMO's delivered cost per MBtu. Fauth V.S. at 24. A recent decision by Ontario Hydro, one of NIMO's primary interconnections, to lay up seven nuclear plants and convert its electricity generation to coal burn will likely increase demand and delivered cost for movements of low sulfur coal from CSX and NS origins. *Id.* Further, pursuant to internal restructuring, NIMO is unable to engage in long term coal supply and transportation contracts, which normally protect utilities from repeated upward rate fluctuations. Fauth V.S. at 25.

In addition to these considerations, significant restructuring of the electric utility industry, at both the federal and state levels, are expected to dramatically increase competition between electric utilities located in different regions. Leuthauser/Mathis V.S. at 9-12. These anticipated changes will make it critical for power producers, such as NIMO, to minimize production costs. *Id.* at 11. As transportation costs comprise approximately one-third of the delivered costs of coal

to the Huntley and Dunkirk Stations, rail rates have a major impact on the competitiveness of the stations relative to other Northeastern power plants. *Id.* at 4. In light of all of these considerations, NIMO is particularly concerned with the competitive harm that would occur to its coal-fired facilities as a result of the Applicants' proposal to afford a number of NIMO's competitors head-to-head rail competition, while NIMO would remain a captive shipper.

The evidence in this case shows that NIMO's Huntley and Dunkirk plants are competitive with and have similar characteristics to two plants of Detroit Edison, but Detroit Edison's plants will obtain dual CSX and NS rail service as a result of the Applicants' intent to make Detroit a Shared Assets Area. NIMO's Dunkirk Station and Detroit Edison's River Rouge Plant both have among the lowest variable costs per megawatt-hour of energy produced and both have similar production efficiencies. Leuthauser/Mathis V.S. at 5. In addition, NIMO's Huntley Station and Detroit Edison's Trenton Channel Plant share a competitive relationship. Both of these plants are similar in size, 740 MW at Huntley Station versus 725 MW at Trenton, and maintain similar production efficiencies, 10,395 Btus/kWh at Huntley Station versus 10,365 Btus/kWh at Trenton. *Id.* The 1995 delivered fuel cost for these competing plants, however, was substantially higher for Huntley Station (er ton) than for Trenton (on). Fauth V.S. at 21, 37. Moreover, like NIMO's Huntley Station, Detroit Edison's Trenton Plant obtains rail deliveries of coal only from Conrail and has a limited water transportation alternative. Fauth V.S. at 38.

Under the proposed transaction, Detroit Edison's River Rouge and Trenton plants will obtain the benefit of head-to-head rail competition between CSX and NS for service to the plants, while Dunkirk Station will be captive to a single rail carrier. Detroit Edison's River Rouge and Trenton plants will also obtain, for the first time, the benefit of single-line service, which should further improve their competitive

positions. Fauth V.S. at 38-39. The result of the increased competition and other benefits will result in lower delivered-fuel costs at Detroit Edison's plants, whereas NIMO, as a captive shipper, can expect to face rate increases in the future. *Id.* Thus, NIMO's ability to compete effectively with Detroit Edison's plants in the future will be severely diminished if the Applicants' proposal is allowed to stand without protective conditions for NIMO.

NIMO also engages in wholesale energy transactions both with utilities that are members of the NYPP and with utilities located in surrounding states as well as in Canada. Leuthauser/Mathis at 6. In this respect, NIMO and Detroit Edison both interconnect with Ontario Hydro, a Canadian utility, and compete to provide potential wholesale power to that company. *Id.* at 9. In August 1997, as earlier indicated, Ontario Hydro announced that it will lay up seven nuclear units, which collectively have a capacity of about 4367 MW. Fauth V.S. at 33. Ontario Hydro has since sought to secure capacity and energy from neighboring utilities. *Id* at 34. NIMO's Huntley and Dunkirk Stations, along with Detroit Edison's River Rouge and Trenton Stations, are likely to be in close competition for providing power to Ontario Hydro. However, if Detroit Edison's plants obtain competitive rail service in the near future, which would lower those facilities' delivered-fuel costs, and NIMO's facilities do not, as is proposed by the Applicants, then NIMO will be competitively disadvantaged with respect to wholesale sales of power to Ontario Hydro. Leuthauser/Mathis V.S. at 9.

As part of its decision to lay up seven nuclear facilities, Ontario Hydro intends to increase production at two of its coal-fired stations, Nanticoke and Lambton, in order to replace lost capacity. Fauth V.S. at 33-34. The Nanticoke station is located on Lake Erie, near Port Dover, Ontario, and is approximately 50 miles across from NIMO's Dunkirk plant. *Id.* Nanticoke, which is Ontario Hydro's largest facility, operates eight units with a total capacity of 4000 MW. *Id.* Ontario Hydro, which

currently moves coal from MGA mines through Ashtabula, is expected to increase the volume of its coal movements. CSX and NS will be in competition for this traffic and, thus, Ontario Hydro can expect to obtain a decline in its transportation rates. *Id.* at 33 - 34.

NIMO also expects to compete with other coal-fired power plants in the Northeast that will obtain access to both CSX and NS under the proposed transaction. These plants include Atlantic City Electric's ("ACE") Deepwater and England plants, Vineland's H.M. Down plant in New Jersey, and Philadelphia Electric Power Company's ("PECO") Eddystone plant in Pennsylvania. Leuthauser/Mathis V.S. at 6. These plants will obtain both single-line service and head-to-head rail competition under the Applicants' proposal, which should dramatically improve their competitive position among Northeast power plants. Fauth V.S. at 40-43. NIMO's Dunkirk Station and PECO's Eddystone plant have a similar capacity, 560 MW versus 548 MW, and received similar tonnages of coal in 1996, for Dunkirk Station versus for Eddystone. *Id.* Eddystone currently enjoys lower average rates than NIMO's Dunkirk facility on a per-ton-mile basis and can expect to obtain even lower rates as a result of Applicants' designation of the Philadelphia area as a shared assets area.

In sum, the Applicants' proposal will provide a number of electric utilities in the Northeast and Midwest with competitive rail transportation and other benefits, such as competitive single-line service on either CSX and NS, which will make these plants more competitive as compared to other captive power plants in the region, such as NIMO's Dunkirk and Huntley Stations. Unless NIMO's plants are also able to receive dual rail service, they will suffer a severe competitive disadvantage as a direct result of the Applicants' proposal.

B. The Substantial Acquisition Premium Paid For Conrail By The Applicants And Other Economic Factors Will Result in Higher Transportation Rates For NIMO

As discussed above, NIMO's Huntley and Dunkirk stations will be captive to CSX under the proposed transaction. As captive facilities, Huntley and Dunkirk Station will face rate increases in the future. Fauth V.S. at 48. At the same time, however, as discussed below, CSX will be subject to competitive pressures in serving other shippers, including other electric utilities, in the major service areas of Detroit, North Jersey, and South Jersey/Philadelphia. These competitive pressures, which will result from the Applicants' creation of shared assets areas in those selected regions, are expected to lead to rate reductions for shippers located in those areas. In addition, CSX also will be required to attempt to pay for the substantial acquisition premium paid for Conrail.

NS and CSX have agreed to pay $9.985 billion to purchase Conrail. According to the Application, the net book value of Conrail as of December 31, 1995 was $3.169 billion. Vol. I, Exh. 16, Appdx. C at 3 and Appdx. G at 10. By this measure, NS and CSX have paid a premium over net book value of $6.726 billion.

Compounding the financial burden that results from this acquisition is the downward pressure on certain rates that the Applicants expect to occur as a result of the injection of new rail-to-rail competition in certain geographic areas. NS has included in its calculation of the statement of benefits from the proposed acquisition a downward adjustment of its normal year revenues of $82 million, which is stated to be the result of new rail competition as a result of the transaction. Vol. 1 at 594; Vol. 2B, Ingram V.S. at 66. In addition, NS witness Seale has admitted that more current estimates of the amount of such downward pressure on rates are double the figure in the Application, "in the range of $160 million." Seale Dep. at 68, Exh. E-1. Unlike NS, CSX has apparently not included in any of its financial projects any

estimate of revenue loss from new rail-to-rail competition introduced into the Conrail service area. However, CSX witnesses have admitted that there will be pressure to reduce rates in the newly-competitive geographic areas. Anderson Dep. at 50-51, Exh. E-2. Given the fact that rate compression is likely to occur in CSX's competitive service areas, it is logical to believe that the amount of rate compression to be experienced by CSX will be comparable to the amount of rate compression to which NS has admitted.

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

The simple facts are that the costs of this transaction are massive. NS and CSX claim that efficiency gains and growth will help defray these costs. However, there are legitimate concerns on the part of captive shippers, such as NIMO, that CSX and NS will raise their transportation rates -- substantially -- in order to pay for the tremendous acquisition premium. The temptation for such rate increases will be exacerbated, and a virtual certainty, should the Applicants' projections on growth and efficiency gains not be accurate. As stated by Mr. Fauth, "[v]ulnerable residual captive CSX and NS shippers, such as NIMO, are likely to be subjected to railroad rate increases in the near future as a result of several factors, including the more than $6 billion acquisition premium paid for Conrail . . . ." Fauth V.S. at 7.

C. NIMO Will Not Benefit From Increased Competition At MGA Mines Or At Ashtabula

As previously stated, a large percentage of NIMO's coal supply comes from mines in the Pittsburgh Seam, in the region of the former MGA. Thus, the ability of NIMO to obtain coal from this region at reasonable and competitive prices is essential to NIMO being a cost-effective producer of electricity and a viable

competitor in power production in the Northeast. The Applicants have proposed to establish head-to-head rail competition between CSX and NS in the MGA region. In addition, dual rail service is proposed to be provided at the Ashtabula Harbor facility at Ashtabula, Ohio, at which facility coal may be transloaded to vessels for lake transportation. Although NS is proposed to operate the facility, CSX will be allocated 42 of the capacity at the Harbor. Vol. 1 at 52. The Applicants can be expected to maintain that the establishment of competition at mine origins used by NIMO and at Ashtabula, where coal could be transloaded and moved by vessel to NIMO's Dunkirk Station, will be of benefit to NIMO. However, as explained by Mr. Fauth, NIMO will not be able to take advantage of this competition. Fauth V.S. at 35.

Putting aside for the moment a rail-water movement through Ashtabula, NIMO will not benefit from competition in the MGA region since CSX will control the destinations at the Huntley and Dunkirk plants. Even if NS were to participate in a move to NIMO's plants, it can be expected that CSX would impose a high switching charge that would make a movement involving NS non-competitive. Fauth V.S. at 31. With respect to movements through Ashtabula, a variety of factors are likely to make this putative option unavailable for NIMO. Ashtabula has a very limited coal storage area that appears to be landlocked, which would make expansion difficult, if not impossible. Fauth V.S. at 17. In addition, Ashtabula is already operating at near capacity. *Id.* On top of these limitations is the fact that Ontario Hydro is expected to vastly increase its coal shipments through Ashtabula to operate two of its coal-fired stations, Nanticoke and Lambton, in order to replace capacity lost by the laying up of its seven nuclear facilities.

In 1995, movements to Ontario Hydro's stations represented more than 30 percent of the total coal movements at Ashtabula. Fauth V.S. at 34. A substantial increase in production at Nanticoke would also be expected to result in large

increases in coal movements through Ashtabula. NS and CSX can be expected to compete aggressively to carry Ontario Hydro's increased coal business. Fauth V.S. at 35. But with capacity at Ashtabula already limited, the increase in coal movements by Ontario Hydro will likely maximize the already limited coal handling facility, preventing NIMO from receiving the benefits of the increase in competition at Ashtabula. Fauth V.S. at 35. NIMO's opportunities at Ashtabula are likely to be further limited, since CSX will have little incentive to use its limited share of capacity at Ashtabula to compete against itself to move coal to Dunkirk Station. *Id.*

In sum, NIMO will receive little, if any, benefit from the Applicants' injection of increased rail competition in the MGA region and at Ashtabula.

D. The Proposed Transaction Will Cause Competitive Harm To The Bessemer & Lake Erie Railroad And To Conneaut Dock

Water movements of coal to NIMO's Dunkirk Station, while limited, have generally moved through the Conneaut Harbor facility ("Conneaut") in Conneaut, Ohio, rather than through Ashtabula. This facility is operated by the Pittsburgh & Conneaut Dock Company ("P&C") and, like Ashtabula, serves as a transloading point where coal is transferred from rail cars to lake vessels. The Bessemer & Lake Erie Railroad Company ("BLE") is the provider of rail service to Conneaut. The BLE and P&C are subsidiaries of Transtar.

Conneaut and Ashtabula are competing facilities. The Applicants' proposal, which provides for joint access by CSX and NS to MGA mines and Ashtabula, could significantly harm the ability of the BLE to move MGA coal to Conneaut. The BLE has limited access to quality low cost coal sources, such as those in the MGA area; thus, significant movements of coal to Conneaut would require the BLE to interchange with CSX or NS. Fauth V.S. at 19. CSX, however, would have no incentive to offer competitive service to Dunkirk Station that would involve an interchange with the BLE and a subsequent vessel movement from Conneaut,

because CSX would be competing with its own direct rail service to Dunkirk Station. *Id.* Thus, NIMO is concerned about the potential loss of this limited, but important, alternative for moving coal to Dunkirk Station. Bonnie V.S. at 14-15.

E. The Proposed Transaction Will Cause Competitive Harm To Mine 84

Mine 84, which is owned by the Rochester and Pittsburgh Coal Company, is an important and significant supplier of low-sulfur coal to NIMO's Huntley plant. Bonnie V.S. at 16. At the present time, Mine 84 is served by Conrail, and Conrail can provide direct single-line service to NIMO's Huntley and Dunkirk Stations. Although Mine 84 is located in the MGA region, it is not proposed to receive dual rail service by CSX and NS but, instead, will be sole-served by NS. As a result of the transaction, NIMO will lose single-line rail service from Mine 84. Thus, movements from the mine to NIMO's Stations will require a switch from NS to CSX, which will likely be subject to a high switching charge. Fauth V.S. at 31. The harm to NIMO and Mine 84 that would otherwise result would be alleviated if Mine 84 received dual access to CSX and NS, comparable to that which is being provided to most other mines in the MGA area. Accordingly, NIMO strongly supports the relief being sought in this proceeding by Mine 84.

VI. THE BOARD MUST GRANT NIMO'S REQUEST FOR CONDITIONS TO PREVENT THE ANTICOMPETITIVE EFFECTS OF THE PROPOSED TRANSACTION

As noted above, the Board maintains broad authority to impose conditions upon a transaction involving the acquisition of a Class I railroad by one or more other Class I carriers, in order to ensure that the public interest is not harmed by the proposal. The harm identified above to NIMO is substantial and must be addressed by the Board. In order to alleviate the harmful effects of the CSX/NS proposal that would otherwise result to NIMO, NIMO respectfully urges the Board to condition its approval of the proposed acquisition of Conrail in the following manner.

A. Award The Conditions Requested By The Erie-Niagara Rail Steering Committee

NIMO is a member of the ENRS and strongly supports each aspect of the relief requested by that organization in this proceeding which would alleviate the anticompetitive effects of the proposed transaction with respect to NIMO. These conditions were set forth earlier in these Comments and will not be repeated here.

As further justification and support for this request for relief, NIMO incorporates by reference the Comments, Evidence and Request for Conditions Submitted On Behalf of the Erie-Niagara Rail Steering Committee (ENRS-6).

B. Trackage Rights Allowing NS to Serve NIMO's Huntley and Dunkirk Stations

In the alternative, if the Board declines to require the conditions requested by ENRS, of which NIMO is a member, the Board should award NS trackage rights that would allow NS to serve NIMO's Huntley and Dunkirk Stations, as set forth earlier in these comments.

The grant of trackage rights to NS, as requested by NIMO herein, would alleviate the substantial competitive harm described in this filing that would occur to NIMO if the transaction were to be approved as proposed. The requested relief is otherwise in the public interest and should, therefore, be required as a condition by the Board in this proceeding.

Respectfully submitted,

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DATE: OCTOBER 21, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the foregoing COMMENTS, EVIDENCE AND REQUEST FOR CONDITIONS OF NIAGARA MOHAWK POWER CORPORATION to be served by first class mail, postage prepaid, on all parties of record in this proceeding this 21st day of October, 1997.

Karyn A. Booth

PART B

BEFORE

THE

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

VERIFIED STATEMENT

OF

GERALD W. FAUTH III

ON BEHALF

OF

NIAGARA MOHAWK POWER CORPORATION

DATED: OCTOBER 21, 1997

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Section I

INTRODUCTION

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

I have been asked by Niagara Mohawk Power Corporation (**NIMO**) to review and analyze the Railroad Control Application and other documents and information submitted in and/or related to STB Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corporation. CSX Corporation (**CSX**), Norfolk Southern Corporation (**NS**), and Conrail Inc. (**CR** or **Conrail**) (collectively the **Applicants**) are seeking regulatory approval from the STB for CSX's and NS's proposed acquisition and division of the railroad and other assets owned and controlled by Conrail.

NIMO is an investor-owned utility providing electric and gas service to customers in upstate New York. NIMO has two coal-fired steam electric generating facilities: Huntley, located near Buffalo in Tonawanda, New York; and Dunkirk, located in Dunkirk, New York. Conrail provides the only rail service to these stations. Under the proposed transaction, these plants will be served exclusively by CSX.

NIMO is primarily concerned about the potential impact that the proposed transaction may have on railroad rates and service to these plants. NIMO is also concerned about competitive impact on it and other ramifications resulting from the proposed injection of competition via the establishment of Joint and Shared Access Areas (**JAA or SAA**) that do not benefit NIMO. These JAA or SAA locations include:

- The proposed SAA in the Southern New Jersey / Philadelphia, Pennsylvania area which includes four (**4**) coal-fired electric generating stations: Philadelphia Electric's (**PECO**) Eddystone station; Atlantic City Electric's (**ACE**) Deepwater and England stations; and the City of Vineland's (**Vineland**) Howard M. Down station;

- The proposed SAA in the Detroit, Michigan area which will include the Detroit Edison Company's (**DE**) Trenton and River Rouge coal-fired generating stations;

- The proposed JAA which includes the "Pittsburgh Seam" coal mines in Pennsylvania and West Virginia formerly served by Monongahela Railroad Company (**MGA**) and now sole-served by Conrail; and

- The proposed JAA which includes Conrail's bulk commodity transloading facility in Ashtabula, Ohio.

The recent settlement reached by Pennsylvania Power & Light (**PP&L**) with the Applicants in conjunction with this proceeding could also have a competitive impact on NIMO. The proposed selected areas of competition and the PP&L settlement will impact specific railroad markets, i.e., lower railroad freight rates for DE, ACE, PECO, PP&L and Vineland, all to the competitive disadvantage to NIMO in what is an increasingly competitive marketplace for the utility industry.

Railroad freight charges are an important revenue center for the railroads and cost element for the utility industry. For example, in 1995, the total annual gross freight charges generated by coal movements handled by the three Applicants combined were approximately **$3.5 billion**. Therefore, the specific competitive elements associated with the proposed transaction must be evaluated in conjunction with other broader issues and dynamics in the railroad and utility industries that could impact or be impacted by the proposed transaction. In other words, the proposed transaction cannot be evaluated with blinders on. Specifically, the proposed transaction must be evaluated in conjunction with the following areas:

- The current and accelerating deregulation and restructuring of the electric utility industry;
- The upcoming emission restrictions resulting from Phase II of the 1990 Amendments to the Clean Air Act;
- The substantial acquisition premium paid by CSX and NS for Conrail's assets;
- Recent service problems and failures in Texas and Louisiana associated with the recently approved merger between Union Pacific Corporation (**UP**) and Southern Pacific Rail Corporation (**SP**);
- Ontario Hydro's recent decision to lay up seven (7) nuclear units, which account for 4,367 MW in service capacity, and will substantially increase its coal burn and its requirement for purchased power; and
- Other external factors, such as the plummeting world market price for export steam coal.

As indicated herein, if the proposed transaction is approved, NIMO is likely to sustain substantial competitive harm. As a residual captive shipper, NIMO's freight rates are likely to increase, whereas, several of NIMO's competitors have obtained or should obtain rate reductions as a result of the proposed transaction. In order to eliminate this very real potential for competitive harm, NIMO's Huntley and Dunkirk stations should be included in a SAA which has equal terms and conditions as the proposed SAA's in Detroit and South New Jersey / Philadeiphia. Absent such relief, NS should be provided access to NIMO's stations via reasonable reciprocal switching charges or trackage rights charges.

It should be noted that the proposed creation of a **Niagara Frontier SAA** in the Erie, Niagara and Chautauqua County area of the State of New York is discussed in more detail in my Verified Statement submitted in this proceeding on behalf of the Erie-Niagara Rail Steering Committee (**ENRS**), of which NIMO is a member.

Section II

SUMMARY OF FINDINGS

The following points summarize my findings:

- Coal generation represents **30.52 percent** of NIMO's production capacity.
- In 1995, NIMO received . of coal, the vast majority of which moved from Conrail origins to Huntley and Dunkirk, which had a total delivered cost of
- The total 1995 transportation charges associated with coal movements to Huntley and Dunkirk were approximately .
- Currently, Conrail exclusively serves NIMO's stations. If the transaction is approved, NIMO's stations will be exclusively served by CSX.
- The rates associated with NIMO's coal movements via Conrail generate an average revenue-to-variable cost (**R/VC**) ratio of at least , which exceeds the STB's jurisdictional threshold of 180 percent.
- As a residual captive shipper with no viable transportation alternatives, CSX will be able to extract monopoly rents from NIMO which will likely lead to rate increases in the near future.
- NIMO is particularly vulnerable to such abuses of monopoly power. Due to its own internal restructuring, NIMO is forced to engage in short term, i.e., generally one to two year, coal supply and transportation contracts. Therefore, NIMO does not have the protection provided other utilities via long term contracts;

- Vulnerable residual captive CSX and NS shippers, such as NIMO, are likely to be subjected to railroad rate increases in the near future as a result of several factors. These factors include: the **$6 billion** acquisition premium paid for Conrail; the revenue loss experienced by CSX and NS as a result of the recent move to low-sulfur western coal; the recent dramatic drop in the export coal market; and other factors.

- External factors will increase NIMO's coal costs, such as, NIMO's increased demand for low-sulfur domestic coal and a result of Phase II compliance standards of the 1990 amendments to the Clean Air Act.

- One of NIMO's primary interconnections, Ontario Hydro, will increase its coal burn as a result of its lay up of seven (7) nuclear units with **4,367 MW** in service capacity. This conversion will increase the demand for low-sulfur eastern coal from CSX and NS origins and will likely result in an increase in the delivered coal prices for NIMO.

- In addition, a significant amount of Ontario Hydro's coal traffic is likely to move from CSX and NS mines through Conrail's Ashtabula Harbor transloading facility, which will be a JAA facility under the proposed transaction. This will have an adverse impact on NIMO in several ways.

- Ontario Hydro will receive the benefit of head-to-head rail competition for CSX and NS coal moving via the Ashtabula Harbor transloading facility, which should result in lower freight rates for Ontario Hydro, which is a major NIMO competitor.

- The increase in tonnage through Ashtabula, which is already operating at or near capacity, will effectively eliminate any potential benefits that NIMO could receive by the establishment of the MGA JAA and Ashtabula JAA.

- The increased head-to-head competition between CSX and NS for Ontario Hydro's new business will result in competitive harm to Bessemer and Lake Erie Railroad Company's (**BLE**) nearby Conneaut, Ohio coal transloading facility, which currently moves coal to Ontario Hydro and will not have access to the MGA JAA.

- Coal movements via BLE's nearby Conneaut transloading facility represent NIMO's only viable, albeit limited, transportation alternative to Conrail's service. Moreover, Conneaut is one of the few facilities in the area that has the capacity to blend low sulfur western coal with higher sulfur eastern coal. Therefore, competitive harm to Conneaut represents competitive harm to NIMO.

- Ontario Hydro will also be required to increase its purchased power to replace the lost capacity. Like NIMO, DE has a major interconnection with Ontario Hydro. Thus, NIMO and DE will be competing to sell power to Ontario Hydro. Since DE's Trenton and River Rouge plants will obtain the benefits of head-to-head rail competition from origin to destination, DE will obtain a competitive advantage over NIMO;

- In addition to Ontario Hydro and DE, the freight rates for other real and potential competitors are likely to decrease, i.e., PP&L has already obtained rate relief in conjunction with this proceeding and ACE, PECO and Vineland, will likely obtain rate reductions via the proposed inclusion of their plants in the Southern New Jersey SAA and the establishment of the MGA JAA.

- Since NIMO's railroad freight rates are likely to increase and the rates charged Ontario Hydro, DE and other competing utilities are likely to decrease as a result of the proposed transaction, NIMO is likely to sustain substantial competitive harm.

- In order to alleviate this very real potential for competitive harm, the STB should approve the application with a condition that requires the Applicants to establish the Niagara Frontier area as a "Shared Assets Area," which includes competitive service to NIMO's Huntley and Dunkirk stations, with terms and conditions similar to the SAA's that the Applicants have established in other areas: Detroit, Northern New Jersey; and Southern New Jersey / Philadelphia.

- In addition, the STB should require the Applicants to open all NIMO's stations to reciprocal switching and to establish reasonable reciprocal switching charges, which would allow the existing carriers in the Niagara Frontier area to compete with CSX and NS.

- In the alternative, the STB should require CSX to grant NS trackage rights over the Conrail lines it will be acquiring in the Niagara Frontier area that will enable NS to serve NIMO's Huntley and Dunkirk stations.

Section III

RAILROAD OPERATIONS

In connection with this proceeding, I traveled to the Niagara Frontier area on three occasions. During the period August 24, 1997 through August 27, 1997, I undertook an extensive review and/or inspection of most of the major railroad facilities in the Niagara Frontier area, including the facilities and operations associated with railroad service at Huntley and Dunkirk.

My Verified Statement submitted on behalf on ENRS describes the railroad operations in the Niagara Frontier area in more detail. As indicated therein, my observations and traffic analyses indicate that Conrail dominates the large and profitable Niagara Frontier area railroad market. The majority of Conrail's operations in the Niagara Frontier area will be taken over by CSX. This is also true in relation to NIMO's coal traffic. Currently, Conrail provides the only direct railroad service to both Huntley and Dunkirk and, based on the proposed transaction, CSX will assume these operations.

A. **Huntley**

On August 25, 1997, I traveled to NIMO's Huntley station, which is located approximately 3 miles north of Buffalo near Tonawanda, New York on the Niagara River. There, I interviewed NIMO employees in the coal supply department who were knowledgeable about the railroad operations. After interviewing these NIMO personnel concerning the railroad and coal handling operations, I was given an extensive tour of the Huntley facility.

As part of this inspection tour, I traveled a short distance to NIMO's rotary dump coal unloading facility. This facility connects to Conrail's "**BG&E Yard**", which Conrail utilizes to switch loaded and empty cars in and out of the Huntley facility. The BG&E Yard consists of four (4) tracks and an adjoining main line track. The BG&E yard is apparently dedicated to NIMO's traffic. I was able to observe the Conrail crews switching loaded cars into the BG&E Yard. After my tour and inspection of the BG&E Yard, I traveled to the Kenmore Yard, which serves NIMO's Huntley station and other shippers in the Tonawanda area. The Kenmore Yard has approximately 23 tracks.

Based on my conversations and observations, it appears that the NIMO coal trains for Huntley initially arrive in Conrail's Seneca Yard, which is south of Buffalo. It is possible that other railroad traffic could move with NIMO's coal trains, e.g., steam coal to New York State Electric and Gas (NYSEG) or metallurgical coal to coking facilities in the area, for delivery in the Niagara Frontier area. This would add to the economies of these movements.

The NIMO cars are then moved as a unit to the Kenmore Yard where they are placed on the longer number 1, 2 and 3 tracks in the yard. The yard crews then split the train for the short movement to the BG&E Yard. It appears that NIMO normally receives approximately four trains per week consisting of 100 to 105 loaded cars. A Conrail crew, with one or two locomotives and two or three men, splits these trains into four cuts of approximately 25 cars and pushes these cuts onto the 4 tracks in the BG&E Yard.

The NIMO crew and locomotive then move over the main line into position behind the loaded car cuts and push the loaded cars through the rotary dump facility, which is heated during the winter. After a cut of cars is unloaded, at a rate of approximately 3 minutes per car, the empties are pulled back through the unloading facility and on to the BG&E track. This operation is repeated four times after which NIMO notifies Conrail that the empties are ready for pick-up.

Since NIMO's crew and locomotive perform the bulk of the switching service, this appears to be a very efficient operation for Conrail. It appears that the Conrail crews can pull out the empties and push in the loads in approximately one hour, which is less than a minute per car.

After my trip to the Kenmore Yard, I returned to Huntley and inspected the coal storage area and the lake vessel unloading area. Huntley receives a very limited amount of coal via lake vessel. According to NIMO Witness James H. Bonnie, NIMO received tons via lake vessel at Huntley in 1995. This represents only percent of the total coal received at Huntley in 1995. There are several constraints on the rail-water movements, such as the limitations and restrictions on movements through Black Rock Lock, which are discussed in detail herein.

B. Black Rock Lock

After my visit to Huntley, I traveled to the local headquarters of the U.S. Army Corps of Engineers and the **Black Rock Lock**. There I met with James D. Boyle, a civil engineer with the Corps and was provided with a tour of the facility. Black Rock Lock is located where Lake Erie drains into the Niagara River. The Black Rock Channel and Black Rock Lock provide a protected waterway for vessels around the fast current (estimated to be at least 17 knots) and rapids that exist near the mouth of the Niagara River. There is also a height restriction on the Niagara River since the portion of the International Bridge over the Niagara River has not been opened in many years. Therefore, most large vessels are forced to use the Black Rock Channel and Lock system.

The Black Rock Lock allows for vessels that have a length of 625 feet, a width of 68 feet and a depth over lock sills of 21.6 feet. This restricts the size of the vessel and the load of the vessel that can serve Huntley and other shippers north of Black Rock. In addition, the weather restricts and suspends movements in the winter. According to Mr. Boyle, the Black Rock Lock is normally closed from January 1 through at least March 31, and quite often, well into April and sometimes May.

With respect to Huntley's coal requirements, reliance on such movements is impractical and unrealistic. Assuming a sufficient fleet of lake vessels is available, such movements would involve approximately 140 lake vessel deliveries in less than a nine-month period and the stockpiling of approximately 350,000 tons of coal for the three-month winter period (Huntley normally maintains a 20-day supply). This would exceed Huntley's existing storage capacity. Therefore, this is not a viable transportation alternative.

C. Dunkirk

On August 26, 1997, I traveled to Dunkirk, New York for an inspection of NIMO's Dunkirk generating station. There, I met with the NIMO plant manager at Dunkirk and other NIMO employees who are familiar with the operations. Like Huntley, NIMO's Dunkirk station is served by Conrail and is equipped with a heating shed and a rotary dump facility. Unlike Huntley, however, the majority of the railroad switching is performed on four tracks, which are owned and maintained by NIMO.

The coal trains delivered to Dunkirk usually are dropped off by the road crew on a siding track that is parallel to the Conrail main line tracks. The loaded cars are then pushed into the spur, which connects to NIMO's tracks by a local crew. Dunkirk usually receives 90-car trains. Three cuts of thirty cars are delivered to Dunkirk. The fourth track is normally reserved for empties.

Conrail normally uses two locomotives with a two-man crew for this operation. I am informed that a local Conrail crew performs this service, however, with certain improvements, a road crew could easily handle this operation. Like the Huntley operation, NIMO crews push the loads through the rotary dumper and pull out the empties, at a rate of 10 to 12 cars per push/pull.

I walked a short distance on Conrail's spur line to the point where it connects to Conrail's main line tracks, via a siding track. Although Conrail's and NS's main lines between Buffalo and Cleveland are generally parallel, NS's main line track, at that point, is located several hundred yards east of Conrail's main lines. I then traveled by car to two points where I could observe the NS's main-line tracks.

I also traveled to Conrail's Dunkirk Yard and reviewed the nearby interchange tracks in Dunkirk between NS and Conrail, which is near Maple Street. Although NS serves Dunkirk, it does not have access to NIMO's Dunkirk station. NS service would involve an interchange with Conrail through various lines that connects with Conrail near the Dunkirk Yard. Although this is no longer an open interchange, it appears to be a viable, albeit complicated, interchange. From an operational standpoint, the NS and Conrail interchange near Control Point 58 (**CP 58**) in Westfield, New York, which is approximately 16 miles south of Dunkirk, should be more efficient. (See CSX 21 CO 005367-005377). Of course, northern interchanges in Silver Creek, Buffalo and other locations could also be utilized.

With respect to rail-water movements, Dunkirk is not faced with the Black Rock Lock restrictions on lake vessel movements and, in fact, NIMO has recently upgraded the coal unloading dock at Dunkirk. Of course, the winter weather and other factors restrict Dunkirk's lake vessel movements. According to the Verified Statement of James Bonnie, Dunkirk received tons in 1995, of which, only tons were delivered by lake vessel, which equates to only percent of the total tons to Dunkirk.

D. Ashtabula

In the morning of August 27, 1997, I traveled to Ashtabula Harbor to view the facility and observe Conrail's operations. It is a very open area and I was able to find several vantage points that allowed me to view the entire facility and operations. I could see that Conrail trains are brought into the harbor area and dumped via a rotary dumper. The coal is then moved by conveyor over a river to the coal storage area, which is on the south side of the harbor.

Ashtabula is operating at or near capacity. Conrail's 1995 100 percent traffic tapes and Responses to interrogatories indicate that approximately 5 million tons of coal moves via Ashtabula per year. Moreover, it has a very limited coal storage area, which appears to be land-locked and, thus, cannot be expanded.

Under the proposed transaction, NS will operate the Ashtabula Harbor facility, but CSX will be provided access to 42 percent of the capacity. Therefore, NS will be able to move approximately 3 million coal tons and CSX will be allocated approximately 2 million tons. It should be noted, however, that NS will apparently have sole access to the Pinney Dock facility, which is on the north side of Ashtabula Harbor. However, this dock is used for inbound bulk commodity movements, such as iron ore, and has no coal loading equipment in place.

E. **Conneaut**

On August 26, 1997, I traveled to Conneaut, Ohio to visit and inspect the transloading operations at the Conneaut Harbor. This facility is operated by the Pittsburgh & Conneaut Dock Company (P&C). The BLE provides railroad service to Conneaut. P&C and BLE are both subsidiaries of Transtar. Coal is moved to Conneaut from BLE origins and transloaded into lake vessel for water movements on Lake Erie. I was provided a complete tour and inspection of the facility. I also returned the next morning to observe the loading of a lake vessel, which was destined to NIMO's Dunkirk plant.

I was impressed by the capacity and the substantial investment in the Conneaut facility. Its coal handling capacity is approximately double Conrail's Ashtabula Harbor facility, which is Transtar's major competitor in the area. Conneaut has two major coal storage areas and could convert other areas to coal storage. It also has two train unloading facilities: a shaker unit for bottom dump hoppers and a more modern rotary dump, which is not in use at this time. It also has two lake vessel loading machines.

Conneaut is underutilized and Ashtabula is operating at or near capacity. In 1995, only moved through Conneaut compared to through Ashtabula. Therefore, although it has nearly double the capacity of Ashtabula, Conneaut moves little more than half the tonnage.

As indicated herein, Ontario Hydro's decision to lay up seven nuclear units and increase its coal burn will result in an increased demand for eastern coal. As indicated by NIMO Witness James Bonnie, however, BLE has limited access to quality low-cost coal, which is comparable to the coal that will be originated by CSX and NS. Conneaut is a logical location that could be utilized to help meet this demand. However, it appears the economics, in terms of high rates and divisions demanded by CSX and NS, will preclude such movements. In fact, Conneaut could lose the limited amount of traffic that it currently handles for Ontario Hydro.

Therefore, it appears that the proposed transaction could have serious anticompetitive effects on the movement of coal via Conneaut. According to its recently filed Anticipated Responsive Application, BLE is seeking certain overhead trackage rights which will provide it access to the MGA coal mines.

Conneaut also has the capacity and real potential to serve as a blending facility for low sulfur and higher sulfur coals in order for NIMO to comply with the upcoming stricter emission standards. As indicated by Witness Bonnie, NIMO is currently evaluating this option and the Conneaut facility appears to be one of the most viable options.

Since coal movements via Conneaut transloading facility represent NIMO's only viable, albeit limited, transportation alternative to Conrail's service and Conneaut is one of the few facilities in the area that has the capacity to blend coals, competitive harm to Conneaut represents competitive harm to NIMO.

F. Proposed Niagara Frontier SAA

In my inspection of railroad operations in the Niagara Frontier area, I found that there are no operational restrictions that would prohibit the proposed establishment of a SAA in the Niagara Frontier area. Under the SAA approach, CSX or NS would be able to directly serve points in the SAA or service could be provided by the jointly-owned SAA operator. In terms of NIMO's coal movements, these stations could be directly served by CSX or NS with little or no problems. This subject is addressed in more detail in my Verified Statement submitted on behalf of ENRS.

Section IV

NIMO'S COAL MOVEMENTS

The following table describes and summarizes the characteristics of NIMO's 1995 coal movements to Huntley and Dunkirk based on data published by the Energy Information Administration (**EIA**):

Table 1

Summary of NIMO's 1995 Total Coal Movements to Huntley and Dunkirk

Item	Huntley	Dunkirk	Total
Tons From (County):			
Greene, PA	1,102,000	960,000	2,062,000
Monongalia, WV	0	296,000	296,000
Indiana, PA	192,000	0	192,000
Washington, PA	72,000	0	72,000
Armstrong, PA	0	49,000	49,000
Elk, PA	0	34,000	34,000
Clarion, PA	22,000	0	22,000
Marion, WV	0	17,000	17,000
Total Tons	**1,388,000**	**1,356,000**	**2,744,000**
Avg. Btu Per Pound	**13,099**	**13,044**	**13,072**
Avg. Sulfur % by Weight	**1.60 %**	**2.06 %**	**1.83 %**
Avg. Ash % by Weight	**7.04 %**	**8.30 %**	**7.66 %**
Avg. Delivered Cost / Ton	**$ 36.21**	**$ 33.04**	**$ 34.64**
Avg. Delivered Cost / M.Btu	**138.2 ¢**	**126.6 ¢**	**132.5 ¢**
Total Delivered Cost	**$ 50,254,280**	**$ 44,796,790**	**$ 95,051,070**

It should be noted that 1995 is the base year for this STB proceeding. However, 1996 EIA data is available. In 1996, the total tons received by NIMO remained fairly constant, 2,744,000 in 1995 versus 2,711,000 in 1996. The characteristic of the coal did not change significantly (Btu: 13,072 versus 13,013; Sulfur: 1.83% versus 1.74%). NIMO's unit cost dropped from $34.64 per ton to $33.76 per ton and from 132.5 cents per M.Btu to 129.2 cents per M.Btu.

A. 1995 Coal Characteristics

As can be seen from Table 1, NIMO received 2,744,000 tons in 1995. NIMO Witness James Bonnie indicates that this figure was actually . The total Delivered Cost, i.e., coal plus transportation, was $95 million, which equates to an average of $34.64 per ton and 132.5 cents per Million Btu. The following table compares NIMO's coal characteristics with all coal received by electric utility plants in 1995:

Table 2

Comparison of NIMO Coal with Total U.S. Coal

Item	NIMO	U.S.
Total Tons	2,744,000	826,860,000
Average Btu Per lb.	13,072	10,248
Sulfur % by Weight	1.83	1.08
Ash % by Weight	7.66	9.23
Delivered Cost per M.Btu	132.5 ¢	131.8 ¢
Delivered Cost per Ton	$ 34.64	$ 27.01

As can be seen, NIMO's coal has a higher-than-average Btu content (13,072 versus 10,248) and sulfur content (1.83% versus 1.08%). NIMO's delivered cost per ton is higher ($34.64 versus $27.01). However, NIMO's delivered cost in cents per M.Btu is only slightly higher than the average (132.5 versus 131.8). Therefore, NIMO's costs are currently competitive. Based on these characteristics, however, it is likely that NIMO's costs will increase in the near future.

B. External Pressure

The Phase II standards of the 1990 Amendments to the Clean Air Act will require a 1.2 lbs. SO_2 emissions limit for each utility on a system-wide basis. Therefore, NIMO will be forced to obtain coal from low-sulfur sources. Low sulfur coal generally has a lower Btu content, which will result in a concomitant increase in NIMO's delivered cost per M. Btu.

As indicated herein, Ontario Hydro's decision to lay up seven nuclear units and increase its coal burn will result in an increased demand and delivered cost for movements of low-sulfur coal from CSX and NS origins. Moreover, one of the primary sources for low sulfur coal is the Powder River Basin (**PRB**) served by BNSF and UPSP. Therefore, such movements could involve two railroad service, e.g., BNSF or UPSP and CSX, and longer hauls, both of which will result in increased freight charges and an increase in NIMO's delivered cost for any such movements.

Consequently, these external factors are likely to result in an increase in NIMO's delivered coal cost in the near future. In addition, this upward pressure on NIMO's delivered coal cost will be increased since, under the proposed transaction, NIMO will remain in a captive railroad environment.

C. NIMO's Vulnerability

NIMO is particularly vulnerable to abuses of monopoly power. Due to its own internal restructuring, NIMO is forced to engage in short term, i.e., generally one to two year, coal supply and transportation contracts. Therefore, NIMO does not have the protection provided other utilities via long term contracts. Vulnerable residual captive CSX and NS shippers, such as NIMO, are likely to be subjected to railroad rate increases in the near future as a result of several factors. These factors include: the $6 billion acquisition premium paid for Conrail; the revenue loss experienced by CSX and NS as a result of the continuing movement to low-sulfur western coal; the recent dramatic drop in the export coal market; and other factors.

D. Conrail's Coal Movements

I have also prepared the following analysis of NIMO movements via Conrail based on Conrail's 100 percent traffic tapes and the STB's 1995 Costed Waybill Sample:

Table 3

Summary of NIMO's 1995 Conrail
Movements to Huntley and Dunkirk

Movement	Miles	Tons	Freight Charges	Rate/ Ton	Rate / Ton-Mi.	R/VC
To Harriet From:						
Total/Average						
To Dunkirk From:						
Total/Average						
NIMO Total / Average						

The following table compares the characteristics of NIMO's total 1995 coal receipts with the characteristics of Conrail's railroad coal movements for NIMO:

Table 4

Comparison of 1995 Coal Moved By
Conrail with the Total Coal Received by NIMO

Item	Conrail	Total
Total Tons		2,744,000
Percent of Total Tons		100.00 %
Total NIMO Cost		$ 95,051,070
Percent of Total NIMO Cost		100.00 %
Average NIMO Cost Per Ton		$ 34.64
Percent of Avg. Cost Per Ton		100.00 %

As can be seen, Conrail moves . of NIMO's coal requirements. Therefore, Conrail is clearly in a market dominant position. At per year, the freight charges associated with these movements are a significant cost to NIMO. In addition, NIMO moved ons via rail water movements, for which NIMO's transportation charges were approximately . Therefore, NIMO's total transportation charges exceeded . These coal movements are also extremely profitable for Conrail. As can be seen from Table 3, the average R/VC generated by NIMO's 1995 coal movements via Conrail was , which exceeds the STB's jurisdictional threshold of 180 percent. Moreover, I believe that these ratios are understated. Conrail's high market share and the high R/VC ratios associated with NIMO's coal movements demonstrate that Conrail dominates this traffic.

The 1995 average freight charges for each movement were determined from Conrail's 100 percent traffic tapes. The variable cost figures were determined from records of these movements that were extracted from STB's 1995 Costed Waybill Sample.

I believe that the costing approach utilized by the STB generally overstates the costs associated with bulk commodity movements and, by the use of system-wide adjustments, would not reflect the economies associated with the issue movements. For example, NIMO's largest movement, from , Pennsylvania to Harriet, has been assigned a variable cost of per ton. A smaller volume movement of approximately the same distance, however, has been assigned a variable cost of per ton, i.e., tons from , West Virginia to Dunkirk which involves a distance of miles compared to for the movement from Bailey to Harriet.

E. Rail-Water Movements

There are effectively no alternatives to rail transportation at Huntley. Dunkirk has a viable rail-water option, however, this option is limited and has resulted in little, if any, competitive pressure on Conrail. In fact, Conrail's rates on a per ton-mile basis are higher to Dunkirk than to Huntley (versus) and Conrail's profits are higher on movements to Dunkirk (percent versus percent).

It should be noted the rail-water movements to Dunkirk via BLE and Conneaut involve circuitous rail-water-rail-water movements. Since BLE does not have access to quality coal reserves, the movements to Dunkirk via Conneaut involve: a short rail movement to a transloading facility on the Monongahela River, transloading from rail to barge, a barge movement to Duquesne Wharf, transloading to rail cars, a BLE rail movement to Conneaut for dumping and transloading to lake vessel for movement to Dunkirk. NIMO estimates that the total freight charges for this circuitous and inefficient movement are approximately per ton, which is only slightly lower than the average freight rate of per ton associated with Conrail's railroad movements to Dunkirk.

Therefore, it appears that the competing rail-water movement via Conneaut does not place significant downward pressure on Conrail. In fact, the total saving for NIMO resulting from the rail-water movements to Dunkirk would be only per year ( ). This is also indicated by Conrail's high R/VC ratios for its movements to Dunkirk, which average percent. In a true competitive environment, Conrail would not be able to extract such high monopoly rents.

Since BLE has limited quality coal sources, substantial coal movements via Conneaut would involve interchange movements with CSX and NS. CSX, of course, would be reluctant to provide NIMO coal service through Conneaut at reasonable and competitive rates since it would be competing against itself. Moreover, BLE has been unable to reach an agreement with NS that would enable BLE to establish reasonable joint rates with NS.

The Applicants maintain that the proposed MGA and Ashtabula Harbor JAA agreements will benefit NIMO, since two carriers will be competing for movements to the lakes. According to the proposed agreement, NS will share the Ashtabula limited capacity by a 58 percent and 42 percent split. As indicated herein, it appears that Ontario Hydro's increased coal demand will maximize the capacity at Ashtabula and thus deny NIMO any potential benefit from this joint access.

F. Mine 84

As indicated by NIMO Witness Bonnie, Mine 84, which is owned by the Rochester and Pittsburgh Coal Company, is an important coal source for NIMO. In fact, my analysis indicates that, in 1995, NIMO's Harriet station received tons from Mine 84. Although Mine 84 is in the MGA area, it is not included in the proposed MGA JAA. It will be sole-served by NS. Thus, it will not receive the benefit of competitive rail service. Since NIMO's stations will be served by CSX, NIMO will lose the benefit of direct single line service from Mine 84. Moreover, any such NS-CSX movements would probably involve a high reciprocal switching charge, which would make these movements uneconomical.

G. Reciprocal Switching

It should be noted that, although there is a viable interchange in Dunkirk, NIMO's Dunkirk station is not open to reciprocal switching. Huntley is also closed, except for limited access to the CN. However, CN is not a major coal-originating railroad. Therefore, in addition to the high charges, such movements would involve an interchange with another coal originating carrier, such as NS, BNSF and UPSP. My Verified Statement on behalf of ENRS discusses this issue in more detail.

Section V

COMPETITION IN THE UTILITY INDUSTRY

The Joint Verified Statement of Scott D. Leuthauser and Michael J. Mathis highlights recent and upcoming changes in the electric utility industry. They indicate that the passage of the Federal Energy Policy Act of 1992, Federal Energy Regulatory Commission (**FERC**) Order No. 888 issued in 1996, anticipated Federal legislation concerning retail competition, and the anticipated restructuring of the electric utility industry in New York State as a consequence of the Competitive Opportunities Proceeding before the New York Public Service Commission will dramatically increase the intensity and geographic breadth of competition among individual power plants.

Consequently, NIMO is concerned about competitive impact and other ramifications resulting from the proposed injection of competition via the establishment of the proposed Southern New Jersey / Philadelphia and Detroit SAA's. These areas include six (**6**) coal-fired electric generating stations: PECO's Eddystone station; ACE's Deepwater and England stations; Vineland's Howard M. Down station; and DE's Trenton and River Rouge stations. The recent settlement reached by PP&L with the Applicants in conjunction with this proceeding and the economic benefits which Ontario Hydro may realize as a result of the proposed transaction could also impact the existing competitive environment.

As indicated by Witnesses Leuthauser and Mathis, these utilities currently compete directly or indirectly with NIMO and this competition will intensify in the near future. For example, DE interconnects with NIMO through Ontario Hydro and thus competes for generation.

As indicated herein, NIMO's freight rates are likely to increase in the near future. At the same time, the proposed selected areas of competition and other factors associated with this proceeding should result in lower railroad freight rates for DE, ACE, PECO, Vineland, PP&L and Ontario Hydro. This section describes the 1995 coal movements to these plants and the potential economic benefits that these competing utilities will accrue as a result of the proposed transaction.

A. Ontario Hydro

Ontario Hydro plans to lay up seven nuclear units, which have a capacity of 4,367 MW. This capacity will be primarily replaced by operating its coal burning Nanticoke and Lambton plants at higher levels. Ontario Hydro's largest coal burning plant is Nanticoke, which has eight units and a total capacity of 4,000 MW. Nanticoke is located near Port Dover, Ontario, which is on Lake Erie, approximately 50 miles across from NIMO's Dunkirk plant.

In 1995, Ontario Hydro received tons of coal via rail-water movements via Ashtabula. This represents over percent of the total coal movements via Ashtabula. The data provided in Conrail's 100 percent traffic tapes do not provide the ultimate destination for this traffic. However, it is safe to assume that most of this moved to Nanticoke. It is my understanding that Ontario Hydro receives coal from other sources, but I could not identify any other coal movements to Ontario Hydro's plants.

Nanticoke, with a 4,000 MW capacity, is the largest generating station served by Conrail. According to CSX Witness Robert Sansom's Table 1, the next largest station in terms of capacity is DE's Monroe station with 3,002.1 MW. In 1995, Monroe received 9,271,000 tons. Therefore, since Nanticoke is underutilized and Ontario Hydro must replace lost capacity, the coal movements to Nanticoke will substantially increase.

Under the proposed transaction, NS and CSX can be expected to aggressively compete for this significant new market, i.e., Ontario Hydro's increased volume, from the jointly served MGA and other mines via Ashtabula. Thus, Ontario Hydro should receive the benefit of lower transportation rates. Conrail's 1995 100 percent tapes indicate that the tons to Ashtabula moved at an average rate of per ton, which was higher than the average of all other coal traffic via Ashtabula (tons), which moved at an average rate of .

The competition for the Ontario Hydro's new high volume coal movements should force rates down to reasonable level. NIMO, however, will receive no benefit from this competition at Ashtabula. It is highly unlikely that CSX would be willing to use its minority share of the limited Ashtabula capacity to compete against itself for the shipments to Dunkirk. Moreover, CSX and NS will attempt to utilize the limited Ashtabula capacity to move coal across the lake to Ontario Hydro.

The Ontario Hydro movements will maximize the already limited coal handling capacity at Ashtabula. It is likely that some of the current coal traffic through Ashtabula will be replaced by direct rail service, however, it appears that Ontario Hydro's increased demand alone could maximize the existing capacity at Ashtabula. Moreover, there also appears to be line-density constraints on the lines from the MGA area to Ashtabula, which could further impact NIMO.

Moreover, Ontario Hydro is faced with strict emission standards and cannot take advantage of the emission credit system. Therefore, Ontario Hydro's decision to lay up seven nuclear units and increase its coal burn will result in an increased demand and delivered cost for movements of "low-sulfur" coal from CSX and NS origins. This increased demand should have an upward impact on the market delivered coal price.

Ontario Hydro's demand for purchased power is also likely to increase as it attempts to replace its lost capacity, which represents over 14 percent of its total capacity (4,367 MW / 30,352). As indicated by NIMO Witnesses Leuthauser and Mathis, NIMO and DE have separate 2,000 MW connections with Ontario Hydro. As indicated herein, the head-to-head rail competition provided DE under the proposed transaction will provide DE with a competitive advantage for this market.

B. Detroit Edison

The following table summarizes DE's 1995 coal movements to Trenton and River Rouge:

Table 5

Summary of DE's 1995 Coal
Movements to Trenton and River Rouge

Item	Trenton	River Rouge	Total DE
Tons Received	1,679,000	1,290,000	20,988,000
Percent of Total	8.00 %	6.15 %	100.00 %
Total Delivered Cost	$51,008,020	$ 38,158,200	$ 614,528,640
Percent of Total	8.30 %	6.21 %	100.00 %
Avg. Sulfur %	0.53 %	0.51 %	0.59 %
Avg. Cost Per Ton	$ 30.38	$ 29.58	$ 29.28
Avg. Cost Per M. Btu	143.3 ¢	138.4 ¢	141.2 ¢

As can be seen, DE burns a substantial amount of coal, i.e. nearly 21 million tons. DE's average delivered cost is substantially lower than NIMO ($29.28 versus $34.64). In addition to its high volume, DE has the advantage of existing railroad competition at several locations which will be augmented under the proposed transaction.

DE's largest coal burning generating station, Monroe, is served by two Class I carriers: Conrail and Grand Trunk Western Railroad Company (**GTW**), a subsidiary of Canadian National Railway (**CN**). Conrail and GTW also serve River Rouge. DE's St. Clair and Belle River facilities are served only by CSX, however, the majority of this coal is received via lake vessel from the Superior transloading facility which is currently served by Burlington Northern Santa Fe (**BNSF**) and UPSP. Trenton Channel is served only by Conrail and has limited lake vessel capacity.

Therefore, DE's Trenton station will benefit the most from joint access to CSX and NS. As can be seen, the average delivered cost to Trenton is higher than the average for DE ($30.38 versus $29.28). Although Conrail is the only carrier serving Trenton, Conrail did not originate the majority of the coal movements. Conrail's 100 percent tapes indicate that Conrail only originated tons to Trenton, whereas, NS originated tons. CSX originated tons, BNSF originated tons and UPSP originated tons. Therefore, Trenton will receive the benefit of head-to-head competition at origin and destination and the benefit of single-line service from NS and CSX for its eastern coal movements.

It is difficult to determine the R/VC ratios for DE's movements for Trenton since the Conrail 100 percent traffic data, in most cases, reflects only Conrail's division of the rates (primarily from Toledo and Chicago) and, therefore, does not provide the total freight charges. The single Conrail direct movement to Trenton originated in and had a rate of per ton, which is lower than NIMO's average rate of per ton. However, it is clear that with the new head-to-head competition and single-line service to Trenton, the total freight charges to Trenton should be reduced.

Conrail and GTW currently serve DE's River Rouge plant. In fact, GTW provides the majority of the service to River Rouge. Of the total 1,290,000 tons received at River Rouge in 1995, Conrail served as the origin and destination carrier for only movement which accounted for tons and the destination carrier via an interchange with for tons. Although two carriers currently serve River Rouge, it will benefit from CSX/NS head-to-head competition. GTW does not originate coal for DE. All of its traffic is handled in interchange service, primarily via Toledo from CSX origins in West Virginia and Kentucky. Therefore, for the first time, CSX and NS will be able to by-pass GTW and provide River Rouge with direct service.

C. **Atlantic City Electric**

The following table summarizes ACE's 1995 coal movements to its Deepwater and England stations, which will be included in the proposed Southern New Jersey / Philadelphia SAA:

Table 6

Summary of ACE's 1995 Coal Movements to Deepwater and England

Item	Deepwater	England	Total ACE
Tons Received	162,000	594,000	756,000
Percent of Total	21.43 %	78.57 %	100.00 %
Total Delivered Cost	$ 7,409,880	$ 25,654,860	$ 33,064,740
Percent of Total	22.41 %	77.59 %	100.00 %
Avg. Sulfur %	0.75 %	2.43 %	2.07 %
Avg. Cost Per Ton	$ 45.74	$ 43.19	$ 43.73
Avg. Cost Per M. Btu	178.1 ¢	168.4 ¢	170.5 ¢

Conrail's 1995 100 percent traffic tapes reflect the movement of tons to Deepwater and tons to England. It should be noted that ACE's coal burn increased from 756,000 in 1995 to 1,035,000 in 1996.

The majority of the tons to Deepwater ( ) were originated by CSX. CSX also originated tons to England. Thus, ACE will receive the benefit of competitive single line service from NS and CSX.

ACE's delivered coal cost is higher than the U.S. average ($43.73 versus $27.01). One of the primary reasons for this high average delivered cost is the fact that ACE's railroad freight rates are higher than average. According to the Conrail's 1995 100 percent traffic tapes, Conrail moved tons to Deepwater and England at an average rate of per ton. whereas, Conrail's 1995 average revenue per ton carried was only per ton. The average R/VC ratio for ACE's movements is percent. Therefore, ACE should be able to derive a significant benefit from the inclusion of Deepwater and England in the Southern New Jersey / Philadelphia SAA.

D. Philadelphia Electric

The following table summarizes PECO's 1995 coal movements to its Eddystone station, which will be included in the proposed Southern New Jersey / Philadelphia SAA:

Table 7

Summary of PECO's 1995 Coal Movements to Eddystone

Item	Eddystone	Total PECO
Tons Received	806,000	1,144,000
Percent of Total	70.45 %	100.00 %
Total Delivered Cost	$ 31,288,920	$ 44,295,680
Percent of Total	70.64 %	100.00 %
Avg. Sulfur %	1.22 %	1.63 %
Avg. Cost Per Ton	$ 38.82	$ 38.72
Avg. Cost Per M. Btu	146.9 ¢	146.7 ¢

In addition to Eddystone, PECO burns coal at its Cromby plant (338,000 tons in 1995), which will be served by NS under the proposed transaction. However, Eddystone is its primary station. It should be noted that PECO's coal receipts at Eddystone increased from 806,000 in 1995 to 1,377,000 in 1996.

According to CSX Witness Sansom's Table 1, PECO's Eddystone station is comparable in many respects to NIMO's Dunkirk station: Eddystone has a capacity of 548.0 MW compared to 560.0 MW for Dunkirk; Eddystone received 1,393,000 tons in 1996 compared to 1,323,000 for Dunkirk; and both can receive coal by water. Of course, the one primary difference is that Eddystone will receive the benefit of head-to-head rail competition, whereas, Dunkirk will be captive to CSX.

Conrail's 1995 100 percent traffic tapes indicate that Conrail moved tons to Eddystone at an average rate of per ton. The vast majority of this traffic moved via Conrail direct from several of the same sources utilized by NIMO. The rates to Eddystone were higher than NIMO's on a per ton basis, i.e., versus per ton. However, the rail distance to Eddystone is longer, i.e., versus miles. On a per ton-mile basis, the rates to Eddystone are lower than NIMO's average rate, i.e., for Eddystone versus for NIMO.

The average R/VC ratio for Conrail's coal movements was percent compared to percent for Dunkirk. Therefore, PECO should be able to derive a significant benefit from the inclusion of Eddystone in the Southern New Jersey / Philadelphia SAA.

E. Pennsylvania Power & Light

In 1995, PP&L received 7,577,000 tons of coal at its five coal fired generating stations: Brunner Island, Holtwood, Martins Creek, Montour and Sunbury. All of PP&L's railroad coal movements were from Conrail origins to Conrail destinations. NS will serve PP&L's stations under the proposed transaction. The following table shows the characteristics of this coal:

Table 8

Summary of PP&L 1995 Coal Movements

Item	Total PP&L
Tons Received	7,577,000
Percent of Total	100.00 %
Total Delivered Cost	$ 263,452,290
Percent of Total	100.00 %
Avg. Sulfur %	1.62 %
Avg. Cost Per Ton	$ 34.77
Avg. Cost Per M. Btu	143.1 ¢

In connection with this proceeding, PP&L reached a settlement with NS. PP&L also has settled a separate Stand-Alone Cost (**SAC**) rate reasonableness proceeding before the STB. Although I do not know the specific terms of this settlement agreement, I have been informed that PP&L was able to obtain a reduction in their railroad freight rates.

According to Conrail's 1995 100 percent traffic tapes, Conrail moved tons to PP&L's generating stations at an average rate of per ton. This traffic had an average R/VC ratio of percent. In their STB rate reasonableness proceeding, PP&L argued that the rate should not exceed a 180 percent R/VC level. Therefore, it is safe to assume that PP&L was able to achieve a significant rate reduction in connection with these proceedings.

F. Vineland

The following table summarizes Vineland's 1995 coal movements to its Howard M. Down station, which will be included in the proposed Southern New Jersey / Philadelphia SAA:

Table 8

Summary of Vineland's 1995 Coal
Movements to Howard M. Down

Item	H. M. Down	Total Vineland
Tons Received	26,000	26,000
Percent of Total	100.00 %	100.00 %
Total Delivered Cost	$ 1,356,420	$ 1,356,420
Percent of Total	100.00 %	100.00 %
Avg. Sulfur %	0.81 %	0.81 %
Avg. Cost Per Ton	$ 52.17	$ 52.17
Avg. Cost Per M. Btu	195.7 ¢	195.7 ¢

As can be seen, this is a very small coal movement. In fact, I could not find any records of coal movements to this facility in Conrail's 1995 100 percent traffic tapes. Although it is small, it will receive the benefit of head-to-head rail competition and NIMO will not.

Section VI

COMPETITIVE HARM

As indicated herein, the proposed transaction, in conjunction with other industry dynamics, will result in competitive harm to NIMO. In general, NIMO's delivered coal prices are likely to increase, whereas, the costs for competing utilities, such as Ontario Hydro, DE, ACE, PECO, PP&L and Vineland, should decrease as a result of new head-to-head competition. The following points summarize this very real potential for competitive harm:

NIMO's Rates Will Increase:

- As a residual captive shipper with no viable transportation alternatives, CSX will be able to extract monopoly rents from NIMO which will likely lead to rate increases in the near future.

- NIMO is particularly vulnerable to such monopoly power. Due to its own internal restructuring, NIMO is forced to engage in short term, i.e., generally one to two year, coal supply and transportation contracts. Therefore, NIMO does not have the protection provided other utilities via long term contracts;

- Vulnerable residual captive CSX and NS shippers, such as NIMO, are likely to be subjected to railroad rate increases in the near future as a result of several factors, including the $6 billion acquisition premium paid for Conrail and the revenue loss experienced by CSX and NS as a result of the dramatic drop in the export coal market.

- Other external factors will increase NIMO's coal costs, such as, NIMO's increased demand for low-sulfur domestic coal and a result of Phase II compliance standards of the 1990 amendments to the Clean Air Act.

- One of NIMO's primary interconnections, Ontario Hydro, will increase its coal burn as a result of its lay up of seven (7) nuclear units with 4,367 MW in service capacity. This conversion will increase the demand for low-sulfur eastern coal from CSX and NS origins and will likely result in an increase in the delivered coal prices for NIMO.

- In addition, a significant amount of Ontario Hydro's coal traffic is likely to move from CSX and NS mines through Conrail's Ashtabula Harbor transloading facility, which will be a JAA facility under the proposed transaction. This increase in tonnage through Ashtabula, which is already operating at or near capacity, will effectively eliminate any potential benefits that NIMO could receive by the establishment of a JAA.

- NIMO's coal movements from Mine 84 will move from Conrail single-line serve to an interchange movement via NS and CSX. This will result in an increase in NIMO's freight rates from Mine 84.

NIMO's Competitors Will Obtain Reduced Rates and Improved Service:

- Ontario Hydro will receive the benefits of volume discounts and the benefit of head-to-head rail competition for CSX and NS coal moving via the Ashtabula Harbor transloading facility, which should result in lower freight rates for Ontario Hydro;

- Ontario Hydro will also be required to increase its purchased power to replace the lost capacity. Like NIMO, DE has a major interconnection with Ontario Hydro. Thus, NIMO and DE will be competing to sell power to Ontario Hydro. Since DE's Trenton and River Rouge plants will obtain the benefits of head-to-head rail competition from origin to destination, DE will obtain a competitive advantage over NIMO;

- In addition to Ontario Hydro and DE, the freight rates for other real and potential competitors are likely to decrease, i.e., PP&L has already obtained a settlement and presumably rate relief in conjunction with this proceeding and ACE, PECO and Vineland, should obtain rate reductions via the proposed inclusion of their plants in the Southern New Jersey SAA and the establishment of the MCA JAA.

- DE, ACE and PECO will enjoy the benefit of competitive single line service from both CSX and NS, which should result in reduced rates.

Section VII

REQUESTED CONDITIONS

As indicated herein, the proposed transaction is likely to result in substantial competitive harm to NIMO. Consequently, the STB should impose conditions in order to alleviate this very real potential for competitive harm. Specifically, approval of the joint acquisition and control of Conrail by NS and CSX should be conditioned as requested by ENRS in this proceeding. These requested conditions are as follows:

(1) The creation by the Applicants of another SAA, i.e., the "Niagara Frontier Shared Assets Area," which would permit equal access by both CSX and NS to Conrail customers, including NIMO's Huntley and Dunkirk stations. In addition, the establishment within the Niagara Frontier SAA of reciprocal switching arrangements for all current Conrail customers, including NIMO's Huntley and Dunkirk stations, that would allow other rail carriers serving the area, such as CN, CP and existing shortline operators, also to provide competitive service and at a reasonable level of charges, i.e., $156.00 per car.

(2) Alternately, if a Niagara Frontier SAA is not created, approval of the joint acquisition of Conrail should be conditioned on the reciprocal grant of terminal trackage rights to each other by CSX and NS for operations over the Conrail lines in the same geographic area covered by the proposed Niagara Frontier SAA. Ownership and operation of the Conrail assets in that area would be divided as proposed by the Applicants, but all customers currently served only by Conrail, including NIMO's Huntley and Dunkirk stations, would receive rail service directly from both CSX and NS. A reasonable level of charges for the reciprocal terminal trackage rights would be established, i.e., a rate of $0.29 per car mile.

(3) If neither of the above alternatives is established, approval of the proposed transaction should be conditioned on the establishment by CSX and NS of reciprocal switching to all current and future customers served by Conrail, including NIMO's Huntley and Dunkirk stations, and a reasonable reciprocal switching charge would be established, i.e., the $156.00 per car charge discussed earlier.

(4) If none of the above conditions proposed by ENRS for the Niagara Frontier area is adopted by the STB, the STB should condition approval of the transaction on the granting of trackage rights by CSX to NS that would permit NS to serve the Huntley and Dunkirk stations directly as follows:

(a) **Huntley** - Under the proposed transaction, NS would obtain overhead trackage rights on Conrail's Belt Line Branch and Niagara Branch , which lines are proposed to be allocated to CSX, from which lines NIMO's Huntley station is accessed. The STB should order that these overhead trackage rights be modified to allow NS the right to operate over such tracks and any necessary connecting tracks in order to access and serve NIMO's Huntley station, including the delivery of coal trains to the Huntley station.

(b) **Dunkirk** - Trackage rights in favor of NS should also be established on Conrail's Chicago Line between Control Point 58 (**CP 58**) near Westfield, New York, to NIMO's Dunkirk station, which is located near CP 42 in Dunkirk, New York in order to allow NS to access and serve NIMO's Dunkirk station, including the delivery of coal trains to that station.

These trackage rights to both Huntley and Dunkirk stations would permit NS to provide direct service to the NIMO facilities, in addition to direct service by CSX, thereby alleviating the competitive harm that would otherwise occur to NIMO as a result of the proposed transaction. To the extent that connections, crossings, and related rail facilities are required to permit the exercise of the above trackage rights by NS, the STB should further condition approval of the transaction upon any necessary construction or relocation of tracks or other steps necessary to permit such trackage rights operations by NS to serve NIMO's Huntley and Dunkirk stations.

Section VIII

CONCLUSION

If the proposed transaction is approved, NIMO is likely to sustain substantial competitive harm. As a vulnerable residual captive shipper, NIMO's freight rates are likely to increase, whereas, several of NIMO's competitors have obtained or should obtain rate reductions as a result of the proposed transaction. In order to eliminate this very real potential for competitive harm, the STB should impose the requested conditions set forth herein.

Alexandria, Virginia: ss

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

Gerald W. Fauth III

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

Notary Public

My Commission expires on 8-31-99.

STATEMENT OF QUALIFICATIONS
OF
GERALD W. FAUTH III

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

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

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

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

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

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

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

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

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

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

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

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

Selected Testimony

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

PART C

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
CONTROL AND MERGER
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

VERIFIED STATEMENT OF JAMES H. BONNIE

I. INTRODUCTION

My name is James H. Bonnie. I am Manager, Fuel Procurement, Transportation and Contract Administration for Niagara Mohawk Power Corporation (hereinafter "NIMO"). I hold a Bachelor's degree in Engineering from the State University of New York at Buffalo and a Master's degree in Business Administration from Corpus Christi State University. I have been directly involved in the procurement and transportation of coal for NIMO during the past 17 years. Since January 1985, I have held my current position.

In my present position, I direct the planning and procurement of all fossil fuels (coal, oil, and natural gas) and related transportation services on the spot and contract market required by the Company's generating facilities to produce electricity, as well as, all other fuels used throughout NIMO's system (i.e., gasoline, diesel fuel, heating oil, aviation fuel).

The purpose of my Verified Statement in this proceeding is to discuss the impact of the proposed transaction among CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation, Norfolk Southern Railway Company and Conrail Inc. and Consolidated Rail Corporation (hereinafter collectively referred to as "Applicants") upon NIMO's generation facilities in

western New York, generally, and their fossil fuel supply and transportation requirements, specifically. These generating facilities are the Dunkirk Steam Station (hereinafter "Dunkirk") in the City of Dunkirk, New York and C.R. Huntley Station in the City of Tonawanda, New York (hereinafter "Huntley") (hereinafter Dunkirk and Huntley will collectively be referred to as the "Stations"). It is my further objective to discuss the impact of the proposed transaction upon one of my coal suppliers (Mine 84), and upon NIMO's limited options for rail-vessel transportation of coal from accessible ports on Lake Erie within close proximity of the mines, where we source our coal supply.

II. STATEMENT OF FACTS

A. GENERAL DESCRIPTION OF NIMO'S FACILITIES AND OPERATIONS

NIMO is an investor-owned utility providing electrical and gas service to communities in upstate New York. As a retail provider of electricity, NIMO is engaged in the generation (production), transmission and distribution of electricity in a service area of approximately 24,000 square miles, and serves 1,556,000 customers in 37 counties and 669 cities, towns and villages. NIMO also generates electricity which is sold in the New York Power Pool on the wholesale market, which is discussed in the accompanying Joint Verified Statement of Messrs. Scott D. Leuthauser and Michael J. Mathis. NIMO's electrical capability by product generation type and purchased power is set forth in an appendix to my Verified Statement (Appendix "A").[1]

As pertinent to this proceeding, I describe below NIMO's two coal-fired generating Stations. I note that, in addition to its coal-fired generating stations,

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[1] As a distributor of natural gas, NIMO serves approximately 526,000 gas customers in a service area of about 4,500 square miles, comprised of 15 counties and 197 cities, towns and villages. 1996 electric sales comprised 39,127 million kwhrs and revenues of $3,308,999,000.

NIMO also operates two fuel oil/natural gas fired stations, one in Albany and the other in Oswego, New York.

Before discussing specific facts concerning NIMO's Huntley and Dunkirk facilities, operations, fuel sources and transportation requirements, it might be helpful to provide an overview of NIMO's coal procurement and transportation situation. NIMO currently burns approximately 3,000,000 tons of coal each year at the Stations. Coal transportation costs are about 35 percent of the total delivered cost of coal for the NIMO Stations.

B. DESCRIPTION OF THE HUNTLEY FACILITY, OPERATIONS, COAL SOURCES

Three miles downstream from the City of Buffalo, on the Niagara River, is Huntley, the largest of NIMO's two coal-fired power plants. Though some of the present buildings date back to 1916, when Huntley first began commercial service, the plant has been continuously modernized and now produces enough electricity to serve over 1,000,000 households (based on 500 kwhr average use per month per household).

As a result of continuous expansion, Huntley enjoyed the reputation of being the largest coal-fired plant in the world during World War II. The plant now houses four 100,000 kilowatt units in the north building (Units 63-66), the oldest installed in 1942, the newest in 1954; and two 200,000 kilowatt units in the south building, (Units 67 and 68), both installed in 1957-1958. Currently, the Station produces 715,000 kilowatts of 60 hertz power and feeds it into the vast New York State Power Pool to serve NIMO customers across the state.

Huntley employs approximately 300 people in many departments. Most supplies are purchased locally, further contributing to western New York's economy. In addition, the plant employs many contractors to support its construction program and various operations and maintenance activities.

Bituminous coal is currently burned at the Station from supply sources in the Pittsburgh seam in southwestern Pennsylvania and northern West Virginia. The Bailey mine is our primary loading point today, but coal has been sourced from Blacksville, Loveridge, Warwick, Mine #84, Shannon and Tanoma. Following are the typical specifications of the coal:

Moisture (Wt %)	7.0 max
Ash (Wt %)	12.0 max
Volatile (Wt %)	25.0 min/38.0 max
Heating Value (BTU/lb)	12,300 min
Ash Fusion Initial Deformation Temp °F reducing	2,000 min
Ash Fusion Fluid Temp °F (reducing)	2,550 max (Units #63-66 only)
Grindability (Hardgrove)	55.0 min/80.0 max
Sulfur (lbs S/MMBTU)	1.7 lbs. per shipment max (As Received), not to exceed 1.4 lbs on a quarterly weighted average basis

Coal arriving at Huntley travels through a system of conveyors and can be brought directly into the plant or stored on the large coal pile. Normally, the pile contains 100,000-150,000 tons - enough to last Huntley approximately 20 days supply. When coal is brought into the Station it is placed in bunkers capable of holding about 18 hours' supply, thus allowing time for periodic maintenance on the coal handling equipment while the units continue to generate power. In his accompanying Verified Statement on behalf of NIMO, G.W. Fauth III describes Conrail's coal delivery and handling operations involving rail service to Huntley.

Huntley also has a coal storage area and the lake vessel unloading area. Huntley receives a very limited amount of coal via lake vessel. One constraint on water movements is directly related to the vessel restrictions at Black Rock Lock which are discussed in more detail later in my Verified Statement and in the accompanying Verified Statement of Mr. Fauth.

C. DESCRIPTION OF THE DUNKIRK FACILITY, OPERATIONS AND COAL SOURCES

Dunkirk is situated on a peninsula jutting out into the City of Dunkirk harbor on Lake Erie. The plant began operation in 1950 with two coal-fired units, each with a capacity of 100,000 kilowatts (Dunkirk Units 1 & 2). Two larger units of 200,000 kilowatts each were added in 1959 (Dunkirk Units 3 & 4). All four units, built by Combustion Engineering Corp., were designed to burn pulverized bituminous coal.

Today, the Station produces 600,000 kilowatts of 60-cycle power, feeding it into a vast power pool serving NIMO customers across upstate New York.

Dunkirk has approximately 230 employees in various departments. Most supplies are purchased locally, further contributing to western New York's economy.

Bituminous coal is currently burned at the Station from supply sources in the Pittsburgh seam located in southwestern Pennsylvania and northern West Virginia. The Blacksville and Cumberland mines are our primary loading points today, but coal has been sourced from Bailey, Loveridge, Federal 2, Humphrey and Warwick. Following are typical specifications of the coal:

Moisture (Wt %)	7.0 max
Ash (Wt %)	12.0 max
Volatile (Wt %)	25.0 min/38.0 max
Heating Value	12,300 min
Ash Fusion Initial Deformation Temp °F (reducing)	2,000 min
Ash Fusion Fluid Temp °F (reducing)	2,550 max (Units #63-66 only)
Grindability (Hardgrove)	55.0 min/80.0 max
Sulfur (lbs S/MMBTU)	2.5 lbs/MMBTU per shipment max (As Received), not to exceed 1.9 lbs/MMBTU on a quarterly weighted average basis and 1.7 lbs/MMBTU on a yearly weighted average basis.

Trains of 100-ton cars arrive at Dunkirk's car dumper weekly where each car is placed on the dumper, weighed, and turned upside down, unloading its entire

contents in less than a minute. The coal travels through a system of conveyors and can be brought directly into the plant or stored on the large coal pile. Normally the pile contains several thousand tons - enough to last the Station for 21 to 28 days. When coal is brought into Dunkirk it is placed in bunkers capable of holding about 18 hours' supply, thus allowing time for periodic maintenance on the coal handling equipment while the units continue to generate power. As the coal is needed, it is fed by variable speed feeders into scales where it is weighed and then into pulverizers where it is dried and ground to talcum powder consistency. The pulverized coal is blown by warm transport air into the boiler where, when mixed with 700° F (371° C) combustion air, the combination burns intensely. Again, Mr. Fauth discusses Conrail service involving Dunkirk in more detail in his testimony.

III. DESCRIPTION OF NIMO'S CURRENT TRANSPORTATION SERVICE AND COMPETITIVE OPTIONS

A. RAIL

1. HUNTLEY

The Huntley facility is heavily dependent, almost exclusively dependent, upon rail service for its coal deliveries. In 1996, for example, the Huntley plant received a total of tons, all of which was delivered by rail and by Conrail as the carrier directly and exclusively serving the Huntley facility. In 1995, out of a total of tons, Conrail delivered tons, with the balance, tons being delivered by water vessel. In 1997 (January 1-October 7), the Huntley plant has received a total of tons, with tons being delivered by Conrail and the balance, tons delivered by vessel. There have been no truck deliveries of coal to the Huntley facility during 1995, 1996 or 1997. In short, rail is clearly the dominant mode of transportation for Huntley's coal transportation needs and, since Conrail currently is the only carrier capable of providing direct service to the plant,

Huntley is captive to it. The Applicants propose that CSX will step into the shoes of Conrail and thereby acquire this captive market.

2. DUNKIRK

The Dunkirk facility is also captive to rail service for a majority of its coal deliveries and to Conrail as the only railroad physically able to serve the facility. In 1996, Dunkirk received a total of tons, of which tons were delivered by Conrail, tons delivered by vessel and tons delivered by truck. In 1995, Dunkirk received a total of tons, of which tons were delivered by Conrail, tons delivered by vessel and tons delivered by truck. Thus far in 1997 (January 1-October 7), Dunkirk has received a total of tons of coal with tons delivered by Conrail and tons delivered by vessel. There have been no truck deliveries of coal in 1997 and, as discussed more fully below, Dunkirk does not anticipate receiving any significant deliveries of coal by truck.

In connection with vessel deliveries at Dunkirk, it is important to note that all of that coal was purchased from the Cumberland Mine of Cypress Amax Coal Company, a Pittsburgh Seam Mine with access to barge service on the Monongehela River. Cumberland Mine is one of the few longwall producers that is not captive to Conrail. Coal from Cumberland Mine is routed by short line to the Monongahela River, river barge to Duquesne Wharf (near Pittsburgh), where it is offloaded onto B&LE and moved by rail to the Conneaut P&C Terminal for transhipment to the Stations by vessel. These shipments began in 1993 shortly after installation of the new vessel dock at Dunkirk. With respect to the vessel delivered tonnage at Dunkirk, while not insignificant, it is important also to emphasize that the Dunkirk facility is captive to rail receipt of coal for the majority of its coal requirements. Stated differently, the availability of a vessel option with respect to delivery of coal to Dunkirk, while helpful to the limited extent available, does not provide effective

competition to rail delivered coal for the majority of our coal needs. Indeed, as I will discuss later in my testimony, NIMO has serious concerns about the continued availability of even this limited water delivery option to Dunkirk. The Dunkirk facility, like the Huntley facility, is designed to receive coal primarily by rail and NIMO has invested in locomotives and related equipment to accomplish the necessary rail deliveries. Coal will and must continue to be received by rail at these facilities, regardless of the relatively limited alternative options available.

B. VESSEL/TRUCK

As earlier indicated, NIMO has, in the past, transhipped some of its coal by rail-water mode via Lake Erie port facilities during the lake shipping season to the Stations (primarily P&C dock in Conneaut, Ohio and rarely through Ashtabula Coal Storage and Transfer Terminal in Ashtabula Harbor, Ohio). NIMO's use of these terminal facilities is limited by the weather, vessel availability, ice conditions on the Niagara River, unpredictability of the shipping season (start/close) and, in connection with the rail-water movements to Huntley, constraints and costs associated with the Black Rock Lock (traffic delays, opening/closing dates, and vessel size restrictions), as discussed below.

Prior to installation of a new vessel dock, Dunkirk received virtually no vessel deliveries of coal from 1978 until November 1993. In late October 1993, NIMO replaced its coal unloading dock facility at Dunkirk. Since that time, as earlier noted, NIMO has been able to bring in a limited portion of its coal tonnage by vessel from a single source--Cumberland Mine. The balance is delivered by rail and rail will continue to be the dominant mode of transportation.

Huntley is also captive to rail, even though it can take a limited amount of coal by vessel. But there is an additional impediment for Huntley--the Black Rock Lock. Black Rock Lock is located where Lake Erie drains into the Niagara River near

Huntley. In his testimony, Mr. Fauth discusses various restrictions associated with Huntley's use of the Black Rock Lock. For example, the weather restricts and suspends movements, primarily in the winter. The Black Rock Lock is normally closed from the first of the year through mid-April. I recall one year when the lock was closed until early May because the ice on the Niagara River behind the boom backed up past the entrance into the Black Rock Channel south of the breakwall separating the channel from the river. For practical purposes, rail-vessel movements to Huntley are foreclosed to NIMO after early December each year because the vessel companies have to deal with a multitude of navigation issues: loading time and conditions at the dock facilities; weather and ice conditions on Lake Erie; ice, weather and traffic conditions on the Niagara River; traffic volumes in the Black Rock Channel; unloading and turn around time at Huntley; return time to home port, etc. In April (or later) each year, coal shippers and lake vessel companies have to wait until the U.S. Army Corps of Engineers reopens Black Rock Lock before scheduling deliveries, resulting in lag time for commencement of vessel movements at the beginning of each new shipping season. Consequently, NIMO can schedule rail-water movements of coal to Huntley only seven to eight months out of the year.

Huntley cannot receive all, or even most, of its coal requirements by vessel, primarily due to the closure of the Black Rock Lock. NIMO would need to store 720,000 tons of vessel-delivered coal by early December, assuming a four-month winter storage period from mid-December through mid-April. This is because the coal burn at Huntley during that winter period averages about 6,000 tons per day. NIMO burn requirements are higher in the winter months than the rest of the year because of the winter energy peak demand. During December - March, Huntley and Dunkirk operate more like base-load units and are not taken off line with the same frequency as the rest of the year (certainly not with nearly the same frequency that

they are during spring [April-June] and fall [September-November]). Also, hydro generation drops off in winter which increases the demand for fossil generation at the same time customer winter demand picks up.

NIMO used to move a considerable portion of its coal requirement to Huntley and Dunkirk by truck. NIMO's ability to move coal by truck to the Stations has always been limited by distance, proximity and convenient access to interstate highway, costs and availability of product that meets Station coal quality requirements.

In the mid 1970's, to early 1980's, NIMO procured a considerable amount of coal for transport by truck from the northern tier of the Central Pennsylvania coal region (in and around Reynoldsville, Brookville, New Bethlehem, Clearfield, Punxsatawney, and Butler/Mercer, Pennsylvania area). All of these locations are within close proximity of the Stations and conveniently located near Interstate 80. As recently as the late 1980's and early 1990's, NIMO purchased truck-transported coal from the Adobe and Rosebud Mine to the Stations via Interstate 90.

For a number of reasons, it is no longer feasible to ship coal by truck to the Stations. Essentially, all of the mines in this area of Central Pennsylvania were eventually shut down during the 1980's because they became uneconomical to keep open due primarily to competition with Monongehala mine coal (hereinafter "MGA") in terms of commodity price. The northern tier-Central Pennsylvania mines were small strip mines that produced coal using less-efficient techniques. From a cost standpoint, these mines were unable to compete with the large Pittsburgh seam producers in southwestern Pennsylvania and northern West Virginia (the majority of which are on the former MGA), which use efficient, high production longwall mining techniques. As a result, essentially all of the mines along the Interstate 80 Corridor, that could meet NIMO Stations quality requirements, discontinued operating due to economic competition on the

delivered price of coal from the Pittsburgh seam producers. Later, in the 1990's Adobe became uneconomical to operate and was permanently shut down.

NIMO's coal cannot be shipped economically by truck from Pittsburgh seam coal mines because of the distance to the Stations. Feasibility studies performed by NIMO indicate that it is uneconomical to truck coal from mines located further than approximately 150 miles from the Stations.

In conclusion, NIMO is a captive rail shipper of coal to the Stations. Huntley is clearly in a rail captive situation (i.e., having no viable alternatives to rail transportation) given the unavailability of truck and very limited availability of vessel transportation. Dunkirk has a viable, but limited, water option (dependent upon a single mine for vessel deliveries), and therefore, must rely on rail shipments for the majority of its coal deliveries.

IV. COMPETITIVE IMPACT OF THE PROPOSED ACQUISITION AND DIVISION OF CONRAIL

NIMO is concerned about a number of harmful competitive effects of the Conrail acquisition, if the proposed transaction is approved by the STB (without conditions), as summarized below:

- NIMO and other shippers in the Erie, Niagara and northern Chautauqua area (hereinafter "Niagara Frontier") will face rate increases as CSX and NS attempt to recover the substantial, multi-billion dollar acquisition premium paid for Conrail.
- NIMO will be competitively disadvantaged *vis-a-vis* plants of competing utilities in the proposed "shared assets areas" (hereinafter "S/A/A") of Detroit and southern New Jersey/Pennsylvania areas.
- NIMO will not be able to avail itself of joint NS/CSX access to MGA under the proposed transaction because NIMO's Stations will be captive to CSX post-merger.

- The proposed transaction could have serious anticompetitive effects on Transtar and its subsidiaries Pittsburgh and Conneaut Dock Company (hereinafter "P&C") and the Bessemer and Lake Erie Railroad (hereinafter "BLE"), in particular, moving coal from the MGA if BLE cannot obtain reasonable access to MGA mines.
- NIMO will not be able to utilize and receive the claimed benefits of the Ashtabula Coal Storage and Transfer Terminal (hereinafter "Ashtabula").
- NIMO will lose an important source of low-sulfur coal if Mine 84 does not receive competitive access to CSX under reasonable terms and conditions.

A. PURCHASE PRICE/PREMIUM

As discussed above, both Huntley and Dunkirk are captive to rail for most of these deliveries i.e., there are no viable alternatives to rail transportation for most of the coal necessary for operation of the Stations. Consequently, NIMO will have limited viable transportation alternatives. Under the proposed transaction, NIMO's Stations will be sole-served by CSX. As discussed in the accompanying verified statement of G. W. Fauth, CSX and NS are paying a substantial premium for Conrail's assets. Therefore, NIMO, as a captive shipper, can expect rate increases to help pay for this premium.

B. COMPETITIVE HARM FROM PROPOSED S/A/A UTILITY PLANTS

The Applicants have proposed the establishment of selected areas of competition. For example, the Applicants have proposed S/A/A in the Detroit, Michigan area, the northern New Jersey area and the southern New Jersey/Philadelphia, Pennsylvania area. These proposed selected areas of competition will presumably result in lower transportation charges for railroad traffic from and to these areas. However, as discussed in the comments of the Erie-

Niagara Rail Steering Committee, of which NIMO is a member, the selected injection of competition to these areas will have competitive ramifications on other Conrail markets and, in fact, could result in substantial competitive harm to many NIMO customers in the Niagara Frontier area and to NIMO itself.

As a captive shipper, NIMO can expect rate increases in the future. While NIMO's freight rates likely will increase, several of its competitors may obtain rate reductions as a result of head-to-head competition created by the establishment of the proposed S/A/A's. A more detailed discussion of this negative competitive impact of the proposed acquisition is contained in the accompanying Joint Verified Statement of Messrs. Michael J. Mathis and Scott D. Leuthauser, and in the accompanying Verified Statement of Mr. Fauth.

C. MGA COAL DISTRICT

The ability to obtain coal from the MGA region at reasonable and competitive prices is critical to NIMO's goal of being a cost-competitive supplier of electricity in upstate New York, since a large percentage of its coal supply comes from mines in this area. At the present time, NIMO's only alternative to Conrail (single-line service origin to destination) is a circuitous rail-barge-rail-vessel routing from the Cumberland Mine as previously discussed in Section III. A. 2. of my Verified Statement.

Because of NIMO's captive shipper status at the Stations (CSX post-merger), NIMO will not benefit from joint NS/CSX access to the MGA mines under the proposed transaction. The majority of these MGA mines will have joint NS/CSX access under the proposed transaction. However, CSX will control rail service to the Stations since they will be solely served by CSX. As a practical matter, NS will not be able to participate in the movements or provide competitive rail service to the Stations even though NS will gain access to the MGA.

In addition, as discussed by witness Fauth in his testimony, demand for MGA coal will increase as a result of the proposed transaction. Currently, Conrail serves 16 utilities and 41 plants. Under the proposed transaction, utilities currently served by NS and CSX will also gain access to this high-demand coal. In fact, both CSX and NS state in the Application documents that they plan to aggressively market MGA coal to new customers in the Great Lakes region, and along the East Coast. Moreover, Ontario Hydro's demand will increase in light of that Provincial utility's recent announcement to shut down seven nuclear units and increase fossil generation. This aspect is discussed more fully in the accompanying statement of Mr. Fauth. All of these developments will tend to prevent NIMO from obtaining benefits from the transaction as proposed by the Applicants. Indeed, their acquisition premium will cause harm to NIMO, unless appropriate conditions are imposed by the Board.

D. ANTICOMPETITIVE EFFECTS OF THE MERGER ON BLE AND P&C (CONNEAUT)

The Conneaut Harbor in Conneaut, Ohio, is operated by P&C, which is a subsidiary of BLE's parent company, Transtar. As discussed by Mr. Fauth in his accompanying statement, the Conneaut facility's coal handling capacity is approximately double Conrail's Ashtabula Harbor facility, which is Conneaut's major competitor in the area. As indicated earlier, NIMO has used the Conneaut facility and the BLE to move some coal to its stations.

As Mr. Fauth notes, the proposed transaction could have serious anticompetitive effects on the BLE and the Conneaut operation, especially concerning the movement of coal from the former MGA. NIMO's concerns about the loss of this limited, but important, Conneaut option is discussed in more detail in my separate Verified Statement that is being submitted by BLE as part of its

Responsive Application being filed by BLE . ı this proceeding. I incorporate by reference my separate statement herein.

As discussed in my incorporated statement, NIMO would like the option of contracting with BLE for direct, single line service from MGA to Conneaut for rail-vessel movements of coal to the Stations. Alternatively, NIMO would like the option of joint movements via CSX and NS out of the MGA with a switch to BLE, and a reasonable switching charge, to P&C in Conneaut. NIMO, P&C, BLE and other coal utilities and dock facilities along the Great Lakes would benefit if BLE obtained reasonable access, at reasonable rates, to MGA mines.

E. CLAIMED BENEFITS OF ASHTABULA ARE ILLUSORY

In the past, NIMO was able only rarely to effect rail-water movements via Ashtabula because either the harbor facility was unavailable (due to prior commitments and pre-existing capacity constraints) or the rail transportation charges quoted by Conrail to Ashtabula from the MGA were not competitive with Conrail single-line service to the Stations. Under the proposed transaction, Norfolk Southern will operate Ashtabula, but CSX will be provided access to the 42 percent of the thruport and capacity. It is not likely that NIMO will be able to receive the claimed benefits of Ashtabula due to its limited capacity and the proposed utilization of that facility by two Class I railroads, particularly in light of CSX's and Norfolk Southern's aggressive coal marketing plans I discussed previously. Further, Ashtabula's capacity limitations will be exacerbated by Ontario Hydro's current nuclear problems.

According to public reports, Ontario Hydro plans to lay up seven nuclear units, which have a capacity of 4,367 MW. This capacity will be primarily replaced by operating its coal burning Nanticoke and Lambton plants at higher levels. Ontario Hydro's largest coal burning plant, Nanticoke, is located near Port Dover,

Ontario, which is on Lake Erie, approximately 50 miles across from NIMO's Dunkirk plant. Currently, Ontario Hydro receives a limited amount of coal via rail-vessel movements via Ashtabula, which is served by Conrail, and Conneaut, which is served by BLE, as aforesaid. The Ontario Hydro movements will maximize the limited coal handling capacity at Ashtabula. Under the proposed transaction, NS and CSX should aggressively compete for Ontario Hydro's increased volume from the jointly served MGA via Ashtabula. Consequently, Ontario Hydro will receive the benefit of lower coal transportation charges to NIMO's competitive disadvantage. Therefore, it is very unlikely that NIMO will not be able to receive any benefits that might otherwise be available due to that proposed service by both CSX and Norfolk Southern to the Ashtabula facility.

F. PROPOSED MERGER HARMS NIMO'S SUPPLIER MINE 84

The proposed merger will place an important NIMO supplier, Mine 84 (owned by the Rochester and Pittsburgh Coal Company) on a NS owned line post-merger. Mine 84 is an important source of lower sulfur coal to Huntley. Mine 84 is one of the few sources of lower sulfur coal in Pennsylvania. CSX will serve Huntley post-merger. Therefore, future movements of Mine 84 coal will necessitate a switch from NS to CSX which would likely involve a high switching charge. NIMO and Mine 84 would benefit if Mine 84 received dual access to CSX and NS comparable to the eight Pittsburgh seam MGA producers. It is my understanding that Mine 84 is seeking trackage rights to CSX, as the preferred condition, or at least switching rights to CSX rail lines with switching charges based upon actual costs. NIMO strongly supports Mine 84 in this effort.

V. REQUESTED RELIEF FROM STB

NIMO requests the following conditions be imposed on the transaction by the STB:

1. Niagara Frontier Shared Assets Area/Open Reciprocal Switching Condition at Reasonable Charges. NIMO strongly supports the conditions sought by the Erie-Niagara Rail Steering Committee ("ENRS"), of which NIMO is a member, for the very substantial reasons set forth in the Comments and Requests for Conditions which is being filed currently herewith by ENRS. The shared assets approach would help remedy the competitive harms that would otherwise be experienced by NIMO as a result of the proposed transaction.

2. Alternative Trackage Rights Condition. If, contrary to NIMO's hope and expectation, the Niagara Frontier Shared Asset Area Condition is not required by the Board in this proceeding, then NIMO supports the alternative trackage rights condition, also sought by ENRS in its filing, for the reasons indicated therein. With respect to NIMO, approval of a trackage rights condition whereby Norfolk Southern would be able to provide direct service to NIMO's Huntley and Dunkirk stations would also remedy the anticompetitive harm that would otherwise be experienced by NIMO without such a condition.

3. Reciprocal Switching at A Reasonable Level of Charges Condition. As an alternative to both of the above two requested conditions, NIMO also supports the open reciprocal switching condition sought by ENRS in its filing. While application of this condition would not permit direct rail service by both CSX and Norfolk Southern to its facilities, this alternative condition would at least Norfolk Southern to provide indirect service to NIMO's Huntley and Dunkirk facilities, thereby alleviating the competitive harm that would otherwise result without such a condition.

4. In the event that the Board does not require any of the above-reference conditions as requested by ENRS [illegible]n NIMO requests that the Board condition approval of the proposed transaction on the granting of trackage rights by CSX to Norfolk Southern in order to permit NS to provide direct service to NIMO's Huntley and Dunkirk Stations, as described in the accompanying statement of Mr. Fauth, and for the reasons stated therein.

5. Single-Line Service on BLE Out of the MGA to P&C at Conneaut. The STB should grant BLE trackage rights or other reasonable access to MGA coal. Alternatively, the STB should require CSX and NS to offer joint movements out of the MGA area via BLE to P&C at reasonable joint-line rates and a cost-based switching charge.

6. Mine 84 Access to CSX. The STB should grant Mine 84 dual access to NS and CSX comparable to MGA Pittsburgh seam coal producers as the preferred option. In the alternative, the STB should impose a condition requiring NS to provide switching rights to CSX with switching charges based upon actual costs.

APPENDIX A

NIMO'S ELECTRIC CAPABILITY
(in kw. - as of 01/01/97)

Item	Percent	Amount
Steam Plants, Coal	30.52%	1,333,000
Steam Plants, Nuclear	24.77%	1,082,000
Steam Plants, Oil and Natural Gas	16.03%	700,000
Steam Plants, Oil	14.56%	636,000
Hydro Plants	14.13%	617,000
Total Produced Capacity	**100.00%**	**4,368,000**
Independent Power Producers	62.89%	2,406,000
Hydro - Purchased Firm Contracts	34.24%	1,310,000
Nuclear - Purchased Firm Contracts	2.88%	110,000
Total Purchased Capacity	**100.00%**	**3,826,000**
Total Capacity		**8,194,000**
Electric Peak Load - 1996		**6,021,000**

I, James H. Bonnie, declare under penalty of perjury that the foregoing is true and correct and that I am qualified and authorized to file this Verified Statement on behalf of Niagara Mohawk Power Corporation. Executed on this 17 day of October, 1997.

James H. Bonnie

PART D

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
CONTROL AND MERGER
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

JOINT VERIFIED STATEMENT OF SCOTT D. LEUTHAUSER AND MICHAEL J. MATHIS

My name is Scott D. Leuthauser. I am Manager of Supply Planning in the Power Transaction and Planning Department of Niagara Mohawk Power Corporation (hereinafter "NIMO"). My qualifications and experience are set forth in Appendix A hereto.

My name is Michael J. Mathis. I am Manager of Generation Performance and Fuel Analysis in the Fossil and Hydro Generation Department of NIMO. My qualifications and experience are set forth in Appendix B hereto.

The purpose of our Joint Verified Statement is to provide for the Surface Transportation Board our analysis of the competitive impact of the proposed acquisition and division of Conrail by CSX and Norfolk Southern in this proceeding. As discussed more fully below, in our judgment the proposed division and operation of Conrail lines by CSX and Norfolk Southern would have a harmful, anticompetitive effect with respect to NIMO's Dunkirk and Huntley Steam Stations.

INTRODUCTION

Under the proposed acquisition of Conrail by CSX and Norfolk Southern Railroads, NIMO's coal-fired Dunkirk and Huntley Steam Stations (hereinafter "Stations") would be served exclusively by CSX. Service by only one railroad will deny these plants the benefits of the level of competitive rail transportation pricing that could be brought about by the inclusion of these plants in a shared assets area, in which both CSX and Norfolk Southern would have the right to deliver coal directly to the Stations. Alternatively, this access could be brought about by other appropriate means, such as trackage rights. Moreover, if only one railroad is allowed to deliver coal to the Stations, they will be placed at a competitive disadvantage relative to those other power plants in the Northeast and Midwest that would be included in shared assets areas under the present CSX and Norfolk Southern proposals.

The Stations today compete with other power plants through NIMO's participation as a member of the New York Power Pool, and through bilateral wholesale power-sales and power-purchase agreements that NIMO negotiates with other utilities. With the anticipated nationwide restructuring of the electric industry in the aftermath of the passage of the federal Energy Policy Act of 1992 and the subsequent issuance of FERC Orders 888 and 889[1], and with the further anticipated restructuring of the electric utility industry in New York State as a consequence of the Competitive Opportunities Proceeding before the New York

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1 Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery Stranded Costs by Public Utilities, Order No. 888, FERC Stats. & Regs., 1991-96 Transfer Binder, ¶ 31,036 (1996). Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct, Order No. 889, FERC Stats. & Regs., 1991-96 Transfer Binder, ¶ 31,035 (1996).

Public Service Commission[2], the intensity and geographic breadth of competition among individual power plants is likely to increase.

In the face of such competition in the electric industry, the Surface Transportation Board should seek to establish the greatest level of direct competition practical among railroads that deliver fuel to power plants. This will allow competitive forces to directly control the prices charged for rail transportation of coal. In turn, with widespread competition among power producers, a large share of the benefits from competitive rail pricing will be realized by consumers of electricity. Achieving this level of competition would be facilitated by inclusion of the Stations within a shared assets area between CSX and Norfolk Southern, or by otherwise requiring direct access by CSX and Norfolk Southern.

NIMO'S GENERATION SYSTEM

NIMO currently owns electric generating plants that total 5248 megawatts in installed capability. This capability is distributed among power plants spread across upstate New York, from Dunkirk in the western part of the state to Albany and Roseton in the eastern part of the state. NIMO plants consist of hydroelectric plants, nuclear plants, and fossil-fueled plants, with two of NIMO's fossil plants, Dunkirk and Huntley Steam Stations, being coal fired. Dunkirk Steam Station, located in Dunkirk, New York west of Buffalo, New York, houses four units with a total capacity of 597 megawatts. Huntley Steam Station, located in Tonawanda, New York, just north of Buffalo, houses six units that total 749 megawatts in capability. Rail deliveries of coal to both of these plants is provided exclusively by Conrail. Under the proposed acquisition of

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2 New York Public Service Commission, Cases 94-E-0952 et. al.-In the Matter of Competitive Opportunities Regarding Electric Service.

Conrail, rail deliveries to both of these plants would be provided exclusively by CSX.

POWER PLANTS IN SHARED ASSETS AREAS WILL ENJOY COMPETITIVE ADVANTAGE OVER NIMO'S PLANTS

The dispatch of power plants is generally based on their short-term variable costs. By far, the largest component of these short-term variable costs is delivered fuel costs. Some additional short-term variable costs are incurred in the form of non-fuel variable operation and maintenance costs, such as equipment wear and tear and the use of fuel additives and other consumables. A review of FERC Form-1 data for 1996 as contained in the PowerDat database of Resource Data International for coal-fired utility power plants in the states of Michigan, New Jersey, New York, Ohio, and Pennsylvania, which are the states nearby and including New York in the northeastern and midwestern region with significant coal-fired resources, reveals that, while delivered coal costs averaged $15.09 per megawatt-hour (MWH) of electrical energy produced, non-fuel variable operation and maintenance costs averaged only $0.95/MWH. Therefore, the delivered price of coal is, along with the plant's cycle efficiency, the predominant factor in determining the level at which the plant is dispatched. Typically, for Rankine-cycle coal-fired power plants, which are the type of plants included in this region, the efficiencies as expressed in heat rate will range around the value of 10,000/Btu/kWh.

Transportation costs comprise approximately one-third of the delivered costs of coal to the Stations. Consequently, rail rates are a significant component in the determination of the level of competitiveness of the Stations relative to other northeastern U.S. power plants. A review of the data in Table 1, which is attached hereto, displays the level of competitiveness among all of the utility-

owned coal-fired power plants in New York and the four surrounding states referred to previously. In particular, it can be seen that Detroit Edison's River Rouge Plant, which will enjoy competing service from CSX and Norfolk Southern by virtue of its location in the Detroit shared assets area, already has among the lowest variable costs per megawatt-hour of energy produced, $14.11, in the region. NIMO's Dunkirk Steam Station, with a variable unit cost of $14.27/MWH, is close behind. Both of these plants have very similar production efficiencies, with River Rouge having an average heat rate in 1996 of 9,996 Btu/kWh, versus Dunkirk's 10,033 Btu/kWh. Both plants are currently served by Conrail. But under the proposed plans of CSX and Norfolk Southern, River Rouge will enjoy competing service between these railroads, while Dunkirk will remain captive to one railroad, CSX. Under this arrangement, the competition between CSX and NS for business at River Rouge is likely to reduce that plant's delivered cost of coal from where it was in 1996. With no similar competition for business at Dunkirk, it seems unlikely that CSX will unilaterally reduce its margins, since it faces no credible threat of a majority of its loss of business at Dunkirk. It is therefore altogether likely that the present narrow gap in short-term variable production costs between River Rouge and Dunkirk will widen in favor of River Rouge after the split up of Conrail between CSX and Norfolk Southern.

Similarly, Detroit Edison's Trenton Channel Plant, which also will enjoy competing service from CSX and Norfolk Southern by virtue of its location in the Detroit shared assets area, has a comparable competitive relationship with NIMO's Huntley Steam Station. Both plants are similar in size, with Trenton Channel being 725 MW and Huntley Steam Station being 740 MW. Trenton Channel has a heat rate of 10,365 Btu's/kWh while Huntley has a heat rate of 10,395 Btu's/kWh. Trenton Channel's delivered fuel cost in 1996 was $1.52 per

million Btu, while Huntley's fuel cost was $1.42 per million Btu. Consequently, only an approximate 7% reduction in Trenton Channel's delivered fuel cost would bring its variable production costs equal to those of Huntley. If, by virtue of being in the Detroit shared assets area, Trenton Channel were able to achieve a reduction in delivered fuel cost greater than 7%, then Trenton Channel would have lower variable production costs in relation to Huntley, which would not enjoy the same transportation leverage that Trenton Channel would enjoy.

In addition to River Rouge and Trenton Channel, four other coal-fired power plants in the northeast are expected to see head-to-head competition between CSX and NS: Eddystone in Pennsylvania; and Deepwater, England and H. M. Down in New Jersey. In 1996 none of these plants had lower short-term variable production costs than either Dunkirk or Huntley Steam Stations. But head-to-head competition between CSX and NS at these plants is likely to exert downward pressure on the railroads' margins to gain or retain business at them. Such competition and pressure can only have the effect of lowering delivered coal costs, thereby making these plants more competitive vis-a-vis other plants in the region, such as NIMO's Dunkirk and Huntley plants, which will not enjoy similar direct rail competition.

NIMO'S WHOLESALE MARKET ACTIVITY

NIMO has historically carried on a significant amount of wholesale energy transactions, both with other utilities who are members of NYPP, and with utilities in surrounding states and in Canada. NIMO is a member, along with the New York Power Authority and all of the other investor-owned utilities in New York, of the New York Power Pool (NYPP). NYPP has been identified by FERC as a "tight" power pool, inasmuch as it coordinates the operations of its members' electric systems for the purposes of maximizing the reliability of the

electric grid and of minimizing overall electric production costs among its members. Consequently, NYPP was required by FERC to submit a pool tariff to comply with Orders 888 and 889.

NYPP maintains a Power Control Center near Albany that, among its other responsibilities, economically coordinates the dispatch of the units of its members. Each member remains responsible for committing sufficient reserves to serve its own native load, with a margin to cover contingencies. The member releases some or all of these committed units to the NYPP, however, so that the NYPP may direct their dispatch. The NYPP maintains a computer-based system to calculate the optimum load point of each unit so as to minimize total electric production costs within the NYPP, with the system redetermining load points and sending a new load-point signal to each unit approximately every five minutes. In general, within the constraints of the transmission system's capability to move energy from one area to another, the load points of units are established by equalizing the incremental production costs of all units while simultaneously satisfying total demand on the system. Under this scheme certain utilities generate energy in excess of that necessary to supply their own customers, and sell that energy to other utilities that are generating less energy than that demanded by their customers. The price paid to a selling utility is the average of its incremental production cost and the buying utility's avoided cost. Consequently, the selling utility always earns a margin on these wholesale sales, and always has an incentive to maximize the level of these sales. But, it is important to emphasize that only the utilities with the lowest costs will be able to achieve these sales. Fuel transportation costs can be a deciding factor in determining whether a particular power plant is in the favored position of being a seller within the pool.

Pool-directed dispatch has been the foundation of an efficient wholesale-energy market among New York's utility-owned generating plants since 1970. NIMO's generating plants have been and continue to be in direct competition on virtually a minute-to-minute basis with those of the other New York utilities. Moreover, this competition has been based on actual variable costs, with the major portion of those costs being comprised of delivered fuel costs. To the extent that NIMO's variable electric production costs at its generating plants are lower than those of other generating plants, the dispatch of NIMO's plants is increased by the NYPP, and NIMO's margins on power production are increased. Consequently, NIMO and the other New York utilities have historically had a very strong incentive to be aggressive in keeping their delivered fuel costs lower than those of their sister utilities.

Aside from the NYPP's economy transactions, NIMO conducts numerous additional transactions through bilateral agreements in which NIMO may be either a buyer or a seller. Unlike NYPP economy transactions, which are determined automatically by a computer-based system, bilateral transactions are individually negotiated between NIMO and other utilities, and are scheduled through independent franchise control centers under FERC-approved transmission tariffs. For the 1996 calendar year, NIMO completed wholesale transactions in excess of 4.3 terrawatt-hours of energy with over fifty entities over a region extending south to Virginia, north to Ontario and Quebec, east to the Atlantic coastline, and west to Ohio. Furthermore, NIMO is interconnected with other utilities by means of an extensive electrical grid that extends well beyond the region described above. This fact widens the potential market area within which NIMO may compete for bilateral energy sales.

IMPACT OF ONTARIO HYDRO NUCLEAR PLANT SHUTDOWNS

At this point, we also want to address the competitive opportunities that both NIMO and Detroit Edison have with regard to potential wholesale electricity sales to Ontario Hydro. In August 1997, Ontario Hydro unexpectedly announced the shutdown of seven out of its 19 operating nuclear reactors, which total approximately 4000 MW and represent 14% of Ontario Hydro's overall capacity. NIMO has interconnections with Ontario Hydro that allow the transfer of approximately 2,000 MW of power. Similarly, Detroit Edison also has interconnections with Ontario Hydro that allow it to transfer 2,000 MW of power to Ontario Hydro. With the announced shut-down of the seven nuclear units, Ontario Hydro has sought to secure capacity and energy from neighboring utilities. Given the respective similarities between NIMO's Dunkirk and Huntley Stations, on the one hand, and Detroit Edison's River Rouge and Trenton Channel, on the other, these utilities are likely to be in close competition for sales to Ontario Hydro. Therefore, to the extent that the Detroit shared assets area places downward pressure on delivered fuel costs to Detroit Edison, which downward pressure would not be enjoyed by NIMO under the CSX and Norfolk Southern proposal, Detroit Edison will have a competitive advantage over NIMO regarding sales to Ontario Hydro.

THE FEDERAL ENERGY POLICY ACT OF 1992 WILL FURTHER INCREASE COMPETITION AMONG POWER PLANTS

In 1992 the federal Energy Policy Act was enacted into law. Among its other purposes, it was intended to encourage direct competition among wholesale producers and suppliers of electrical energy on a widespread regional basis. The law's major feature to encourage such competition is a requirement that owners of transmission lines grant access to those lines on a non-discriminatory basis to any entity wishing to transmit bulk electricity. This

means that any utility must allow any wholesale buyer or seller of electricity to have access to its transmission lines on the same basis that the utility gives access to the lines to its own generating plants.

In response to this requirement of the law, the members of the NYPP developed and filed a proposal with the Federal Energy Regulatory Commission on January 31, 1997 for the restructuring of the wholesale electric power market in New York State. Under this proposal the current NYPP would be dissolved and replaced with several institutions, one of which would be an Independent System Operator, or ISO. The ISO would have responsibility for control of access to the bulk-power transmission grid in New York State. In assuming this responsibility, the ISO would have three objectives: (i) to satisfy the FERC standards for open, non-discriminatory access to the transmission system; (ii) to preserve reliability in a competitive environment; and (iii) to facilitate an economically efficient wholesale electricity market. All wholesale buyers and sellers of electricity, whether located inside or outside of New York State, would be eligible to participate in this market.

An ISO will control access to the system grid. Under the proposed scheme, existing New York Power Pool members will enjoy no preferential access to the grid. Any generator wishing to have access to the transmission grid will essentially have to submit bids to the ISO. The ISO will fulfill demands of wholesale consumers for energy by selecting generators in ascending order of their bids until sufficient energy has been placed on the grid to satisfy demand. At any given time, all generators will be paid the same price for their energy, regardless of the price they bid, with that price being equal to the bid of the last, or marginal, generator necessary to fulfill the requirements. Also, any wholesale consumer drawing energy off the grid pays that same price. In short, under this scheme, electricity is essentially a fungible commodity. Therefore, it is critical for

power producers, such as NIMO's generating plants, to minimize production costs, both to make it more likely that its plants will be dispatched, and to maximize the margin on those plants that are actually dispatched. Every other power producer has exactly the same motivation. In a market such as this, competition can be expected to be intense.

PLANNED SEPARATION OF GENERATION FROM TRANSMISSION AND DISTRIBUTION WILL FURTHER INCREASE COMPETITION AMONG POWER PLANTS

As indicated earlier, on May 16, 1996 The New York State Public Service Commission issued a decision intended to create a more competitive electric industry in the State. This decision and order initiated the process of development of restructuring plans for each utility in New York State. These restructuring plans are currently being reviewed by the Public Service Commission on a utility-specific basis. During the process of developing these plans, the staff of the Department of Public Service has pressed for the separation of the control of fossil and hydro generating plants from the control of the transmission and distribution system. On October 10, 1997, NIMO announced that it had reached an agreement with the staff of the New York Public Service Commission (hereinafter "PSC" or "Commission"), Multiple Intervenors, and other parties (hereinafter "Settlement Agreement") to, among other things, divest all of its fossil and essentially all of hydro generation plants either by an auction process or, if acceptable bids are not received, by creating a legally separate generation company. NIMO has committed to filing a detailed auction plan within 30 days of the PSC Order approving the Settlement Agreement. The Settlement Agreement will be submitted to the PSC for approval, following evidentiary and public hearings before an administrative law judge (hereinafter "ALJ"). The PSC will review the settlement and the ALJ's written analysis and

opinion before voting on the Settlement Agreement. The settlement must be approved by the full Commission. NIMO hopes to obtain approval by the PSC of the settlement by early 1998. Following PSC approval of the Settlement Agreement, NIMO will file a detailed auction plan which will also undergo Commission review and approval, along with a comment period for the other parties. NIMO will select the winning bidder or bidders of the generation assets, if any, no later than 11 months after PSC approval of the auction plan.

Once these power plants are divested, they will be separated from any support from a utility's rate base. All of their revenue will come from power sales into the wholesale market, in which they will compete head-to-head with other generating plants.

Upon the completion of the agreed upon divestiture of NIMO's fossil and hydro generating plants, the Stations will be, insofar as the resulting NIMO is concerned, independent power producers seeking to sell electricity and ancillary services to various regional ISO's and wholesale buyers of electricity. These plants will enjoy no special relationship with NIMO. At that time, NIMO, and, it is presumed, the other utilities in New York will seek to secure a supply of wholesale power from the lowest delivered-price sources, without regard to their location, fuel type or ownership.

CONCLUSION

NIMO's Dunkirk and Huntley power plants today compete against the power plants of the other members of the New York Power Pool. In addition, the Stations compete with power plants outside of the New York State Pool through individually negotiated bilateral contracts. In the near future, the scope of competition will be widened with the anticipated formation of ISO's in response to the Energy Policy Act of 1992. At that time, all power plants, regardless of

their locations, will be eligible to bid for supply of energy into any of the various ISO's that are likely to be formed as the result of the Energy Policy Act of 1992. The widespread development of these ISO's will increase the geographic scope of competition among power plants. Coincidentally with the formation of the New York ISO, NIMO anticipates the divestiture of all of its fossil and essentially all hydro generating plants, including the Stations. Consequently, these plants will have increased pressure to be effective competitors in the wholesale market since they will no longer enjoy any rate-based financial support from a parent utility. All of their revenues will come from the wholesale of electricity, with competitive market forces setting the price of electricity. With the widening of the geographic area of competition, the Stations will find themselves in even greater competition than that which exists today with plants in the Detroit shared assets area, the South Jersey/Philadelphia shared assets area, and the North Jersey shared assets area. To the extent that plants in these areas benefit from competitive downward pressure on rail transportation rates that is not available to NIMO's plants, the Huntley and Dunkirk plants will be competitively harmed.

Table 1
Coal-Fired Power Plant Data for 1996

Name	State	Capacity MW	Net Generation MWH	Heat Rate BTU/KWH	Fuel Cost	Fuel Cost/MWH	Non-Fuel Variable Cost	Non-Fuel Var Cost/MWH	Fuel + Var Cost/MWH
W H. Zimmer	OH	1,300	10,294,411	9,480	$ 96,693,854	$ 9.39	$ 8,350,657	$ 0.81	$ 10.20
Burger	OH	406	2,084,116	10,094	$ 18,193,125	$ 8.73	$ 3,186,526	$ 1.53	$ 10.26
Ottawa	MI	3	2,711	-	$ -	$ -	$ 30,844	$ 11.38	$ 11.38
Kyger Creek	OH	1,070	7,742,355	9,815	$ 91,879,429	$ 11.87	$ 7,886,591	$ 1.02	$ 12.89
Niles	OH	216	1,201,784	11,314	$ 13,838,048	$ 11.51	$ 1,861,861	$ 1.55	$ 13.06
Monroe	MI	3,000	19,516,684	9,724	$ 251,527,254	$ 12.89	$ 11,079,365	$ 0.57	$ 13.46
Killen	OH	624	4,300,770	9,849	$ 57,945,970	$ 13.47	$ -	$ -	$ 13.47
Armstrong	PA	352	2,064,868	10,058	$ 26,224,975	$ 12.70	$ 1,795,697	$ 0.87	$ 13.57
Shawville	PA	618	3,530,825	10,854	$ 44,423,060	$ 12.58	$ 4,017,279	$ 1.14	$ 13.72
River Rouge	**MI**	**517**	**3,355,917**	**9,996**	**$ 44,094,296**	**$ 13.14**	**$ 3,261,408**	**$ 0.97**	**$ 14.11**
Cheswick	PA	570	3,101,155	10,465	$ 41,551,504	$ 13.40	$ 2,672,093	$ 0.86	$ 14.26
Dunkirk	**NY**	**593**	**3,483,845**	**10,033**	**$ 47,146,666**	**$ 13.53**	**$ 2,584,087**	**$ 0.74**	**$ 14.27**
Stuart	OH	2,340	13,872,382	9,555	$ 188,204,092	$ 13.57	$ 9,840,142	$ 0.71	$ 14.28
Picway	OH	100	402,536	11,738	$ 4,921,786	$ 12.23	$ 840,768	$ 2.09	$ 14.32
New Castle	PA	333	1,369,984	11,108	$ 18,022,513	$ 13.16	$ 1,725,595	$ 1.26	$ 14.42
Allen E. Kintigh	NY	675	4,456,280	9,426	$ 60,842,713	$ 13.65	$ 3,762,958	$ 0.84	$ 14.49
Milliken	NY	302	1,925,865	9,743	$ 26,264,021	$ 13.64	$ 2,090,144	$ 1.09	$ 14.73
Keystone	PA	1,664	12,626,641	9,502	$ 180,920,736	$ 14.33	$ 9,190,590	$ 0.73	$ 15.06
Cobb	MI	296	1,931,212	10,077	$ 27,271,002	$ 14.12	$ 1,978,319	$ 1.02	$ 15.14
Huntley	**NY**	**740**	**3,611,262**	**10,395**	**$ 53,460,306**	**$ 14.80**	**$ 2,796,248**	**$ 0.77**	**$ 15.57**
Seward	PA	199	1,226,404	11,110	$ 17,271,350	$ 14.08	$ 1,868,519	$ 1.52	$ 15.60
Campbell	MI	1,404	8,514,067	9,451	$ 130,304,776	$ 15.30	$ 4,339,468	$ 0.51	$ 15.81
Weadock	MI	310	1,706,846	9,992	$ 24,488,463	$ 14.35	$ 2,691,746	$ 1.58	$ 15.93
Muskingum River	OH	1,425	8,268,478	9,475	$ 125,885,943	$ 15.22	$ 6,067,418	$ 0.73	$ 15.95
Montour	PA	1,525	7,622,452	9,898	$ 115,903,176	$ 15.21	$ 7,699,958	$ 1.01	$ 16.22
Gavin	OH	2,600	16,888,010	9,703	$ 261,659,234	$ 15.49	$ 12,674,983	$ 0.75	$ 16.24
Homer City	PA	1,901	12,454,832	9,712	$ 193,052,018	$ 15.50	$ 10,023,734	$ 0.80	$ 16.30
Goudey	NY	80	582,534	10,577	$ 8,933,094	$ 15.33	$ 704,725	$ 1.21	$ 16.54
Brunner Island	PA	1,469	7,573,755	9,916	$ 118,518,671	$ 15.65	$ 6,998,085	$ 0.92	$ 16.57
Trenton Channel	**MI**	**725**	**4,029,758**	**10,365**	**$ 63,466,811**	**$ 15.75**	**$ 3,481,389**	**$ 0.86**	**$ 16.61**
Portland	PA	401	1,689,031	10,344	$ 26,022,060	$ 15.41	$ 2,057,173	$ 1.22	$ 16.63
Sunbury	PA	389	2,457,594	11,724	$ 37,313,889	$ 15.18	$ 3,554,049	$ 1.45	$ 16.63
Holtwood	PA	73	500,911	13,004	$ 7,154,693	$ 14.28	$ 1,192,370	$ 2.38	$ 16.66
Whiting	MI	310	1,796,964	10,144	$ 28,137,797	$ 15.66	$ 1,809,373	$ 1.01	$ 16.67
Belle River	MI	1,260	8,668,062	10,214	$ 139,626,425	$ 16.11	$ 4,952,734	$ 0.57	$ 16.68
Russell	NY	260	1,098,660	10,571	$ 16,538,947	$ 15.05	$ 1,856,921	$ 1.69	$ 16.74
St. Clair	MI	1,379	7,577,543	10,572	$ 120,588,127	$ 15.91	$ 7,518,583	$ 0.99	$ 16.90
Greenidge	NY	104	586,287	10,323	$ 9,230,457	$ 15.74	$ 1,060,395	$ 1.81	$ 17.55
Erickson	MI	156	923,775	9,832	$ 15,578,945	$ 16.86	$ 665,351	$ 0.72	$ 17.58
Avon Lake	OH	788	4,121,488	10,307	$ 68,162,005	$ 16.54	$ 4,273,475	$ 1.04	$ 17.58
Beebee	NY	80	400,081	10,096	$ 6,260,913	$ 15.65	$ 831,757	$ 2.08	$ 17.73
Titus	PA	249	1,197,481	10,706	$ 19,962,709	$ 16.67	$ 1,893,885	$ 1.58	$ 18.25
Presque Isle	MI	617	3,092,405	11,290	$ 53,581,272	$ 17.33	$ 3,382,542	$ 1.09	$ 18.42
Bay Shore	OH	631	3,108,789	9,840	$ 58,213,066	$ 18.73	$ 3,810,704	$ 1.23	$ 19.96
Ashtabula	OH	420	1,617,162	12,002	$ 29,379,395	$ 18.17	$ 2,988,705	$ 1.85	$ 20.02
Mitchell (PA)	PA	366	823,750	10,113	$ 14,728,447	$ 17.88	$ 2,218,910	$ 2.69	$ 20.57
England	NJ	449	1,827,000	10,607	$ 36,123,012	$ 19.77	$ 3,036,139	$ 1.66	$ 21.43
Danskammer	NY	505	2,133,513	9,886	$ 43,668,308	$ 20.47	$ 2,063,704	$ 0.97	$ 21.44
Hickling	NY	44	184,657	16,417	$ 3,577,008	$ 19.37	$ 572,855	$ 3.10	$ 22.47
Hutchings	OH	371	497,392	11,343	$ 10,056,669	$ 20.22	$ 1,239,226	$ 2.49	$ 22.71
Shiras	MI	64	217,555	12,972	$ 4,567,045	$ 20.99	$ 500,894	$ 2.30	$ 23.29
Warren	PA	82	284,778	14,458	$ 5,882,626	$ 20.66	$ 753,251	$ 2.65	$ 23.31
Advance	MI	40	143,102	11,542	$ 2,917,626	$ 20.39	$ 419,180	$ 2.93	$ 23.32
Elrama	PA	487	2,572,107	11,502	$ 56,765,543	$ 22.07	$ 3,302,780	$ 1.28	$ 23.35
Deepwater	NJ	220	501,383	10,390	$ 10,712,396	$ 21.37	$ 1,287,820	$ 2.57	$ 23.94
Eddystone	PA	1,359	4,326,180	11,181	$ 99,708,554	$ 23.05	$ 7,874,957	$ 1.82	$ 24.87
Cromby	PA	358	1,197,039	11,044	$ 27,144,845	$ 22.68	$ 2,643,179	$ 2.21	$ 24.89
Eckert	MI	375	588,807	12,017	$ 13,407,265	$ 22.77	$ 1,466,954	$ 2.49	$ 25.26
Jennison	NY	72	230,053	16,131	$ 5,165,418	$ 22.45	$ 653,714	$ 2.84	$ 25.29
Carlson	NY	50	156,134	15,130	$ 3,489,680	$ 22.35	$ 476,408	$ 3.05	$ 25.40
James De Young	MI	58	278,397	12,996	$ 6,838,471	$ 24.56	$ 666,366	$ 2.39	$ 26.95
Lovett	NY	430	1,919,400	10,757	$ 48,781,250	$ 25.41	$ 3,074,232	$ 1.60	$ 27.01
Martins Creek	PA	1,892	2,438,804	12,005	$ 67,482,792	$ 27.67	$ 6,478,433	$ 2.66	$ 30.33
Harbor Beach	MI	103	144,251	12,314	$ 4,035,324	$ 27.97	$ 404,814	$ 2.81	$ 30.78
Marysville	MI	167	51,595	17,170	$ 2,144,772	$ 41.57	$ 611,145	$ 11.85	$ 53.42
H.M. Down	NJ	69	65,543	15,469	$ 2,597,815	$ 39.64	$ 1,000,293	$ 15.26	$ 54.90

Data source: Resource Data International, Inc.
"POWERdat" electronic database
August 1997 data set

10/17/97

APPENDIX A

BACKGROUND AND EXPERIENCE OF SCOTT D. LEUTHAUSER

I received a B.S. with distinction in Mechanical Engineering from Clarkson University and a M.B.A. from the State University of New York at Buffalo. I am a Registered Professional Engineer in the State of New York. I joined the Company in 19[illegible] as a Junior Production Engineer in the Fossil Generation Methods and Performance Department in Syracuse. I transferred to C.R. Huntley Steam Station, where I held the position of Performance Engineer and later Assistant Station Shift Supervisor. Following that experience, I transferred to Syracuse to progress through a series of levels as a Fuel Analyst in the Fuel Supply Department. In October, 1993, I transferred to the Supply Planning Department as a Senior Supply Planner and was promoted to Manager in June, 1994. I currently manage the group that performs planning, engineering, and economic analyses which the company uses to make capacity and energy supply decisions for its fossil and hydro units. This includes performing analyses and making recommendations regarding future resource additions, current power plant investment decisions, power purchase decisions, maintenance policy decisions, and tactical planning for the Clean Air Act Amendments of 1990. For the past two years, I have been involved in the development of an Independent System Operator for open electric transmission access to New York State in compliance with FERC 888 and 889.

APPENDIX B

BACKGROUND AND EXPERIENCE OF MICHAEL J. MATHIS

I am an engineer with over 26 years of professional experience. I hold a bachelor's degree in Civil Engineering and a master's degree in Civil and Environmental Engineering, both from Clarkson University in Potsdam, New York. I have been a Registered Professional Engineer in New York State since 1974.

I have been employed by Niagara Mohawk since January, 1980 and have been in my present position since July 1, 1992. As Manager of Performance and Fuel Analysis, my responsibilities involve the management of the Company's programs for monitoring and improving performance of its fossil-fueled generating plants, and for monitoring fuel markets and forecasting future prices of fossil fuels.

Since I joined Niagara Mohawk, I have worked principally in the fossil-generation area. I started as a Project Engineer, eventually becoming a Lead Project Engineer with responsibility for supervising a group of 14 other project engineers. In July, 1987, I became the Supervisor of Fossil Fuel Procurement in the Fuel Supply Department, and in May, 1988, I became the Supervisor of Fuel Transportation and Terminals. From August 1989 to May 1991, I served as Manager of Gas Research. In May 1991, I became Manager of Value Engineering in the Operations Support Department of the Electric Supply and Delivery Business Unit, where I was responsible for merging some of the Company's standards engineers, reliability engineers, and materials engineers into a single working group with the objective of developing standards and programs to

maximize the value of engineering designs. As I mentioned earlier, I came to my present position in July 1992.

Prior to joining Niagara Mohawk, I was a design engineer at Bechtel Power Corporation in Gaithersburg, Maryland, where I worked on the designs of several power plants. My earlier work experience had been as a design engineer with consulting-engineering firms in the Syracuse, New York area and as an engineer for Exxon Research and Engineering Company in Florham Park, New Jersey. I also served for two years in the U.S. Army as a Civil Engineering Assistant.

I, Michael J. Mathis, declare under penalty of perjury that the foregoing is true and correct and that I am qualified and authorized to file this Verified Statement on behalf of Niagara Mohawk Power Corporation. Executed on this 7 day of October, 1997.

Michael J. Mathis

I, Scott D. Leuthauser, declare under penalty of perjury that the foregoing is true and correct and that I am qualified and authorized to file this Verified Statement on behalf of Niagara Mohawk Power Corporation. Executed on this 17 day of October, 1997.

Scott D. Leuthauser

PART E

BEFORE THE

SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.

NORFOLK SOUTHERN CORPORATION AND

NORFOLK SOUTHERN RAILWAY COMPANY

-- CONTROL AND OPERATING LEASES/AGREEMENTS --

CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

RAILROAD CONTROL APPLICATION

HIGHLY CONFIDENTIAL

Washington, D.C.

Tuesday, August 26, 1997

Deposition of DONALD W. SEALE, a witness herein, called for examination by counsel for the Parties in the above-entitled matter, pursuant to agreement, the witness being duly sworn by JAN A. WILLIAMS, a Notary Public in and for the District of Columbia, taken at the offices of Zuckert, Scoutt & Rasenberger, L.L.P., Suite 700, 888 Seventeenth Street, N.W., Washington, D.C., 20006-3939, at 10:00 a.m., Tuesday, August 26, 1997, and the proceedings being taken down by Stenotype by JAN A. WILLIAMS, RPR, and transcribed under her direction.

from the 82 million that Mr. Williams has?

A. It's different in that it's expressed in current inflated dollars. I think Mr. Williams' was expressed in 1995 constant dollars. And also the number has -- there's been some competitive diversions added to the actual rate compression number and an aggregate number generated from those two.

Q. In relation to the 82 million that Mr. Williams has, what is the current estimate as a result of the subsequent studies that you described?

A. I can't recall the number specifically, but I think it's in the range of $160 million compared to the $82 million that Mr. Williams' study generated.

Q. Did you request Mr. Williams to perform that analysis of the rate compression, the subsequent analysis that produced the $160 million figure?

A. No.

Q. Do you know who did from Norfolk Southern?

A. No, I do not.

Q. Do you know if Mr. Williams or anyone

ORIGINAL

BEFORE THE

SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.

NORFOLK SOUTHERN CORPORATION AND

NORFOLK SOUTHERN RAILWAY COMPANY

-- CONTROL AND OPERATING LEASES/AGREEMENTS --

CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

RAILROAD CONTROL APPLICATION

HIGHLY CONFIDENTIAL

Washington, D.C.

Monday, September 8, 1997

Deposition of JOHN Q. ANDERSON, a witness herein, called for examination by counsel for the Parties in the above-entitled matter, pursuant to agreement, the witness being duly sworn by JAN A. WILLIAMS, a Notary Public in and for the District of Columbia, taken at the offices of Arnold & Porter, 555 Twelfth Street, N.W., Washington, D.C., 20004-1202, at 10:05 a.m., Monday, September 8, 1997, and the proceedings being taken down by Stenotype by JAN A. WILLIAMS, RPR, and transcribed under her direction.

question. Are you aware of instances in which CSX's pricing or service offerings are influenced by the choice of some other shipper that competes with the shipper you're trying to serve at the moment, where that other shipper is served by two railroads? Do you understand the question?

A. Yes. I'm not aware of a situation where that has been explicitly addressed, at least as I have been informed or been in discussions internally.

Q. And I believe your testimony, this is switching the subject somewhat, I believe your testimony to Mr. Wood was that you are not aware of any specific studies that CSX has done about what's been referred to elsewhere as rate compression or rate reductions or pressure to reduce rates post-transaction; is that correct?

A. My previous testimony was correct.

Q. And I don't want to beat a dead horse, but I will just ask one more question. Do you believe that there is likely to be rate compression, if you will accept the use of that term, post-transaction?

A. I believe in different markets there will be different competitive dynamics than we

had before the transaction. My experience is that competitive dynamics influence prices and, therefore, it would be unlikely that all prices would remain exactly the same after as before.

Q. So, in a gross sense, would you agree with me that more competition tends to put pressure to lower prices?

A. Yes, I would agree.

Q. And you believe there's going to be more competition post-transaction in the Northeastern United States?

A. I do.

Q. Regarding movements of phosphate from Florida, is it your understanding that that phosphate is used only as fertilizer or does it have other uses in chemical manufacturing?

A. It has other uses also. I'm not familiar with the details, but I know it goes into other products.

Q. Do you recall any specific projection CSX has about new flows of phosphate from Florida to Northeastern points post-transaction?

A. No.

Q. Did you have any involvement in the selection of or designation of which chemical

182940

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October 21, 1997

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
ATTN: STB Finance Docket 33388
1925 K Street, N.W.
Washington, D.C. 20423-0001

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

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding, please find an original and twenty-five (25) copies of the Comments and Requests for Conditions of the Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana (collectively, The Four City Consortium)(FCC-9). Also enclosed, please find a computer diskette containing the text of this document in WordPerfect 5.1 format.

We have included an extra copy of the filing. Kindly indicate receipt by time-stamping this copy and returning it with our messenger.

Sincerely,

C. Michael Loftus

C. Michael Loftus
An Attorney for the Cities of
East Chicago, Indiana; Hammond,
Indiana; Gary, Indiana; and
Whiting, Indiana (collectively,
The Four City Consortium)

Enclosures

182940

FCC-9

BEFORE THE

SURFACE TRANSPORTATION BOARD

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

COMMENTS AND REQUEST FOR CONDITIONS OF THE CITIES OF EAST CHICAGO, INDIANA; HAMMOND, INDIANA; GARY, INDIANA; AND WHITING, INDIANA (COLLECTIVELY, THE FOUR CITY CONSORTIUM)

THE CITIES OF EAST CHICAGO, INDIANA; HAMMOND, INDIANA; GARY, INDIANA; AND WHITING, INDIANA (COLLECTIVELY, THE FOUR CITY CONSORTIUM)

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Attorneys for The Four City Consortium

OF COUNSEL:

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Dated: October 21, 1997

FCC-9

BEFORE THE

SURFACE TRANSPORTATION BOARD

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

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Dated: October 21, 1997

COMMENTS AND REQUEST FOR CONDITIONS OF THE CITIES OF EAST CHICAGO, INDIANA; HAMMOND, INDIANA; GARY, INDIANA; AND WHITING, INDIANA (COLLECTIVELY, THE FOUR CITY CONSORTIUM)

TABLE OF CONTENTS

BEFORE THE

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

COMMENTS AND REQUEST FOR CONDITIONS OF THE CITIES OF EAST CHICAGO, INDIANA; HAMMOND, INDIANA; GARY, INDIANA; AND WHITING, INDIANA (COLLECTIVELY, THE FOUR CITY CONSORTIUM)

INTRODUCTION

The Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana (collectively the "Four City Consortium" or the "Four Cities") hereby submit their Comments and Request for Conditions with respect to the Application by CSX Corporation and its rail affiliates ("CSX") and Norfolk Southern Corporation and its rail affiliates ("NS") (collectively, the "Applicants") for authority to control Conrail Inc. and its rail affiliates ("Conrail").

SUMMARY OF POSITION

The Four City Consortium is an association of the above-named cities, which are all located in northwestern Indiana near Chicago, Illinois. The Consortium was formed for the purpose of analyzing the regional effects of the Conrail control

transaction and recommending solutions to the adverse impacts identified.

As a result of the analysis conducted by the Four City Consortium, it has concluded that while the proposed acquisition and division of Conrail by CSX and NS will have potential efficiency benefits both for the carriers and for freight shippers located in the Four Cities region, the planned post-acquisition operations over critical rail lines in the Four Cities will have a number of adverse impacts. In particular, such operations will adversely impact the highway transportation infrastructure of the region, public health and safety, and the provision of emergency services.

The Four Cities region is criss-crossed by a maze of railroad lines, including several major east-west arteries that have a large number of at-grade rail/highway crossings. The Applicants have projected a substantial increase in rail traffic on several of these lines, including lines that have a high incidence of grade crossings involving heavily-used, arterial highways in several downtown business districts. The increase in rail traffic on these lines will make an already-bad situation significantly worse.

To ameliorate the adverse impacts described above, the Four Cities, working in conjunction with the railroad economic consulting firm of L.E. Peabody & Associates, Inc. have devised an Alternative Routing Plan which would use a directional-flow pattern to route some of the projected rail traffic away from the

lines with the most severe grade-crossing problems, and onto lines that have both a high incidence of grade separations and the capacity to handle additional traffic. The Alternative Routing Plan would entail the rehabilitation of 2.1 miles of out-of-service track on an existing Indiana Harbor Belt Railroad Company ("IHB") grade-separated right of way, as well as the construction of two short track connections. However, the Plan would enable CSX to avoid the necessity of rebuilding nearly 12 miles of another out-of-service rail line, which would require 23 closed rail/highway grade crossings to be rebuilt and put back in service. At the same time, the Plan would enable the Applicants to realize their post-acquisition plans for the efficient routing of through east-west traffic between Chicago and points in the eastern United States over several alternative lines.

The potential adverse effects of the proposed acquisition and division of Conrail are described in the accompanying verified statements of the mayors and city planners of each of the Four Cities. The Four Cities' Alternative Routing Plan is described in detail in the accompanying verified statement of Philip H. Burris of L.E. Peabody & Associates ("Burris V.S."), and supported by vehicle delay and engineering studies described in the verified statement of Dr/ Gary M. Andrew ("Andrew V.S.") and the joint verified statement of Gregg L. Heinzman and Ronald H. Dunn ("Heinzman/Dunn V.S."). Additional support for the Plan is provided in a joint letter from members of the Indiana Congressional delegation representing the Four Cities region, a

joint verified statement of several members of the Indiana State Assembly, and a letter from the Northwest Indiana Regional Planning Commission.

RELIEF REQUESTED

The public interest requires that the Board take action to ameliorate the adverse impacts of the proposed acquisition and division of Conrail by CSX and NS on the Four Cities region. Accordingly, the Four City Consortium requests that the Board impose a condition to its approval of the transaction. The proposed condition, which has two related parts, is as follows:

1. CSX and NS shall amend their respective Operating Plans insofar as they involve the movement of freight traffic across northwest Indiana to incorporate the Four Cities' Alternative Routing Plan.

2. CSX and NS shall adhere to the portions of their amended Operating Plans incorporating the Alternative Routing Plan in conducting freight service in the Four Cities after implementation of the Conrail control transaction.

In addition, the Four City Consortium requests the Board to retain oversight jurisdiction over this matter to address concerns that may arise as the division of Conrail is implemented by CSX and NS. Finally, the Four Cities ask that the Board's Section of Environmental Analysis, to which extra copies of these Comments are being provided, evaluate carefully the adverse incremental environmental impacts of the Applicants' proposal on the critical rail lines in the Four Cities and the much more environmentally acceptable Alternative Routing Plan

proposed by the Four Cities, as it prepares its Draft Environmental Impact Statement.

ARGUMENT

The primary standard for approval of a proposed railroad merger or control transaction is whether the transaction is "consistent with the public interest." 49 U.S.C. § 11324(c).[1] See Finance Docket No. 32760, Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al., Decision No. 44 (served August 12, 1996) at 50-51 (unprinted)("UP/SP"); Finance Docket No. 32549, Burlington Northern Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Decision No. 38 (served August 23, 1995) at 50-51 (unprinted)("BN/Santa Fe"). The Board's merger regulations provide that the Board must perform a "balancing test" in determining whether a merger is in the public interest. That test calls for the Board to weigh "the potential benefits to applicants and the public against the potential harm to the public." 49 C.F.R. § 1180.1(c).

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[1] Statutory citations are to the ICC Termination Act of 1995 (the "Act"), Pub. L. No. 104-88, 109 Stat. 803 (1995). The current statutory standards applicable to the Board's consideration of the Conrail control transaction are similar to those under the former Interstate Commerce Act, which were set forth at 49 U.S.C. § 11344. The only substantive change is the addition of Subparagraph (5) to new § 11324(B), which requires the Board to consider "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system."

Even if the Board determines that the overall effect of a proposed merger is in the public interest, the Board still has broad authority to impose conditions on consolidations in order to ameliorate potential adverse effects. See Union Pacific -- Control -- Missouri Pacific; Western Pacific, 366 I.C.C. 459, 562-64 (1992), aff'd sub. nom. Southern Pacific Transp. Co. v. I.C.C., 736 F. 2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985) ("UP/MP/WP"); Santa Fe Southern Pacific Corporation -- Control -- Southern Pacific Transportation Company, 2 I.C.C. 2d 709, 807-08 (1986)("Santa Fe/SP"); see also 49 U.S.C. § 11344(c).

The criteria for imposing conditions to remedy anti-competitive effects of a proposed merger were described as follows in BN/Santa Fe:

> ... [W]e will not impose conditions unless we find that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market), and that the conditions will ameliorate or eliminate the harmful effects, will be operationally feasible, and will produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits produced by the merger.

BN/Santa Fe, supra, at 55-56, citing, UP/MP/WP, 366 I.C.C. at 562-65. See also 49 U.S.C. § 11324(c), which provides that:

> The Board may impose conditions governing the transaction, including the divestiture of parallel tracks or the granting of trackage rights and access to other facilities.

The adverse effects that the proposed division of Conrail would inflict on the Four Cities are, in many respects,

the types of harm the Board must also consider under the Nation's environmental laws.

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., together with regulations implemented by the Council on Environmental Quality, 40 C.F.R. Parts 1500-1508, sets forth the governing principles for the evaluation of actions involving "major Federal action." These principles" require evaluation of the potential environmental impacts of the operational and physical changes related to a proposed transaction. The consideration by the Board of railroad merger and control transactions involving two or more Class I carriers (such as the instant one) triggers this environmental review process. The Board is the lead agency for ensuring compliance with the above-referenced environmental standards. The Board's regulations setting forth its environmental review procedures are set forth at 49 C.F.R. Part 1105, "Procedures for Implementation of Environmental Laws."

NEPA requires that an Environmental Impact Statement ("EIS") be prepared when a proposed federal action has the potential to significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). In the Board's procedural schedule adopted for this proceeding, it determined that preparation of an EIS was warranted in this case. Decision No. 6. (served May 30, 1997) at 2-3. After reviewing comments from various parties submitted in response to the Draft Scope of the EIS issued July 7, 1997 by the Board's Section of Environmental

Analysis ("SEA"), the Board on October 1, 1997 issued its Notice of Final Scope of Environmental Impact Statement (EIS), outlining the environmental issues to be addressed in the EIS "Notice of Final Scope"). The EIS will address some eleven (11) separate areas of potential environmental impact caused by the proposed transaction.[2] Among other things, as part of the EIS, the SEA will analyze specific rail line segments that trigger the thresholds for environmental review set out in the Board's environmental rules at 49 C.F.R. § 1105.7(e), and SEA will also analyze the Applicants' proposed rail line constructions projects.[3]

Additionally, the Board in its Notice of Final Scope set forth three separate alternatives that it will consider when reviewing the SEA's prepared EIS:

> In making its decision in this proceeding, the Board will consider public comments and SEA's environmental analysis contained in the EIS, including any proposed environmental mitigation. The alternatives SEA will consider in the EIS are: (1) approval of the transaction as proposed; (2) disapproval of the proposed transaction in whole (No-Action alternative); and, (3) approval of the pro-

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[2] The potential impacts addressed through the EIS include the areas of safety; transportation systems; land use; energy; air quality; noise; biological resources; water resources; socioeconomic effects related to physical changes in the environment; environmental justice; cultural and historic resources; and cumulative effects. See Notice of Final Scope at 10-16.

[3] In Decision No. 9 served June 12, 1997, the Board granted the Applicants' waiver petitions allowing the construction of seven construction projects (the "Seven Connections") to proceed, and determined that the operations over the several miles of track embraced in the Seven Connections will be examined in the context of the EIS for the overall proposed transaction. Decision No. 9 at 6-7.

posed transaction with conditions, including environmental mitigation conditions.

Id. at 3.

The Board's standards for setting environmental conditions in merger and control cases is consistent with its broad authority to impose conditions in railroad control transactions under 49 U.S.C. § 11324(c). Among other things, "the record must support the imposition of the condition at issue, . . . there must be a sufficient relationship between the condition imposed and the transaction before the agency, and the condition imposed must be reasonable." Id. at 3 n.2.

The Four City Consortium submits that the proposed Conrail control transaction would result in substantial adverse impacts on the Four Cities, and accordingly is not in the public interest absent the imposition of the condition requested by the Four Cities to ameliorate those impacts. Moreover, the Applicants have failed to submit the kind of detailed information necessary to document the likely impacts of the Conrail transaction on the Four Cities region that is required by the environmental laws, regulations and orders discussed above.

In the sections below, the Four Cities will demonstrate the adverse impacts that will result from the Conrail transaction and why their requested condition is necessary to minimize these impacts. The Four Cities will also show that the condition is operationally feasible, will produce positive public benefits, and will not cause any reduction in the public benefits otherwise producedby the transaction. Finally, they will show that the

Applicants have failed to meet the applicable requirements of the environmental laws.

I. The Conrail Transaction as Presently Structured Will Cause Significant Harm to the Four Cities Region.

The Four Cities sit in a strategic geographic location for east-west through railroad traffic moving between Chicago and eastern points such as Detroit, Cleveland, Pittsburgh, Buffalo, and East Coast points. As such, the area contains some of the most complex and heavily-utilized rail facilities in the Midwest.

The Four Cities region is heavily industrialized and populated. It serves as a railroad corridor, containing hundreds of miles of rail lines. At present Conrail, CSX, and NS are Class I freight carriers providing local and through service in the region. These companies control several of the area's smaller regional and local terminal and switching freight train operators, including the Baltimore and Ohio Chicago Terminal Railroad Company ("BOCT") (which is 100 percent owned by CSX) and the IHB (which is 51 percent owned by Conrail). Also present in the region are the Elgin, Joliet and Eastern Railway Company ("EJE"), the Belt Railway Company of Chicago ("BRC"), and the Chicago, SouthShore & South Bend Railroad ("CSS"), which provide local freight and (in the case of the CSS) commuter passenger service. Amtrak also provides intercity passenger service through the region. Several miles to the south, the Grand Trunk Western Railroad Company (a Canadian National subsidiary) has a

rail line providing through rail service between Chicago and points in Michigan.

The Four Cities' impressive rail infrastructure was built for servicing both through and local freight traffic. Beginning in the late 1800s, the area experienced an expansive population boom largely as a result of rapid industrial growth caused by the development of the steel mills and oil refineries along the southern tip of Lake Michigan. While these local industries have experienced an economic decline in recent years, the region continues to be reliant on the steel and refinery industries for its economic well-being. The railroads remain one of the principal means used by local industries to transport raw and finished materials, and there are numerous local rail service connections to their facilities.

The approximately 208,000 citizens residing in the Four Cities are affected on a daily basis by the enormous amount of rail traffic flowing through their communities. Combined, the Four Cities have a total of 243 at-grade rail/highway crossings. (Burris V.S. at 2). For CSX, NS and Conrail alone (i.e., ignoring the EJE, IHB, BRC, BOCT, CSS and Amtrak), the number of trains passing through the Four Cities exceeds 150 trains per day, while the number of vehicles crossing rail lines at grade exceeds 450,000 a day.[4]

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[4] Burris workpapers at 1007, 1008.

As is explained in detail in the accompanying Verified Statements by each of the Four Cities' city planners,[5] a significant amount of vehicular and pedestrian delays occur because of the high frequency of train movements over local highway grade crossings. The hundreds of daily rail movements over these crossings have resulted in very serious traffic congestion problems throughout the Four Cities. Unfortunately, as Mr. Burris indicates in his Verified Statement, the Applicants' proposed operating plans would make the already-serious (and barely manageable) congestion problems over critical rail line segments in the Four Cities substantially worse.

Mr. Burris has identified the Applicants' rail line segments of principal concern to the Four Cities. Based on Applicants' projected post-transaction traffic levels and traffic flows, vehicle delays over these line segments will increase from their current level of 664 hours per day to 1,614 hours per day, or an increase of 143 percent! (Andrew V.S. at 5; Burris V.S. at 5-6)[6] The most problematic line is the CSX/BOCT[7] line between Pine Junction (Gary) and Calumet Park, IL. This east-west line runs through the East Chicago and Hammond central business

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[5] These city planners include Michael L. Cervay (Gary), Kimberly L. Gordon (East Chicago), Donald F. Thomas (Hammond), and Daniel A. Botich (Whiting).

[6] It is important to note that Mr. Burris' study is based on the CSX and NS Operating Plans set forth in the Application, and does not take into account likely future increases in the volume of rail traffic moving through the region.

[7] The BOCT is a Chicago area switching carrier that, as mentioned previously, is 100 percent owned by CSX.

districts at grade, and is traversed by a large number of heavily-used highway grade crossings. Under the CSX Operating Plan, this busy line will see a post-acquisition increase of six trains per day, and the trains will be longer and heavier than those presently operating over this line. (Id. at Burris V.S. 3-5). This will lead to an increase in vehicle delays on this line segment alone from 517 hours per day to 989 hours per day. (Andrew V.S. at 5).

The substantial increases in vehicular traffic congestion described above would have an enormous impact on the Four Cities. For instance, there are tens of thousands of annual emergency calls in the Four Cities involving police, hospital and fire emergency services ("EMS") vehicular movements that would be disrupted by heightened congestion problems associated with the Applicants' operational plans. (See, e.g., Cervay V.S. at 7; Gordon V.S. at 6; Thomas V.S. at 7).

Additionally, the safe and efficient movement of the tens of thousands of area school children who commute to school via bus, private vehicle, and by foot would be further threatened under the Applicants' proposal. (See, e.g., Cervay V.S. at 7). Because their planned rail traffic increases are concentrated on lines with a high number of heavily-used highway grade crossings, the Applicants' plan would put the residents of the Four Cities in heightened jeopardy of injuries and fatalities at railroad crossings.

The implications of the increased rail traffic are especially alarming in light of the widespread practice in the Four Cities of vehicles disregarding rail crossing gates and crossing rail lines rather than waiting for the train to pass and the gates to rise. A one-week traffic study conducted for the Four Cities in late September-early October, 1997 documented thousands of instances of vehicles running around crossing gates. (Andrew V.S. at Exhibit GMA-5). Pedestrians were also observed crossing rail tracks despite activated crossing gates. (Heinzman/Dunn V.S. at 4). It is a sad commentary on how pervasive and disruptive train crossing delays are in the Four Cities that so many of its citizens have adopted such high risk behavior rather than observing the rail crossing safety devices. Additionally, it is not uncommon for citizens traveling over roads running parallel to railroad line segments to speed ahead in an attempt to beat running trains to railroad grade crossings, and to dart around crossing gates in the path of oncoming trains. (Thomas V.S. at 6; Gordon V.S. at 7.) Also, school children are often seen playing along unguarded and heavily-traveled rail lines. The safety implications of these actions are enormous, and are perhaps the most important reason for taking action to prevent incremental traffic increases over certain heavily congested rail line segments in the Four Cities.

The projected incremental increases in rail traffic levels on certain key lines would also aggravate critical environmental problems that are already present in the region. For

example, the Indiana county in which the Four Cities are located, Lake County, is a non-attainment area for regulatory air pollution purposes -- specifically, for carbon monoxide, ozone and particulate matter; in addition, Lake County does not meet primary standards for sulfur dioxide. A significant proportion of the region's air pollution is caused by motor vehicle emissions. The region has been working hard to develop pollution prevention programs to improve the air quality environment. Vehicular delays at railroad crossings elevate vehicle emission pollution problems.

The environmental and safety ramifications of the Applicants' proposal will be discussed in greater detail by the Four Cities in connection with the Board's environmental review process for this proceeding. However, it bears noting that the problematic line segments identified by the Four Cities, on which the Applicants plan to concentrate increases in rail traffic, more than meet the Board's air quality thresholds for environmental concern in terms of safety, emissions, etc.[8]

The heightened vehicular traffic congestion problems associated with the Applicants' post-transaction operating plans

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[8] For example, the Notice of final Scope of Environmental Impact Statement ("Notice") served in this proceeding October 1, 1997 confirmed a threshold for at-grade rail crossing accident probability and safety factors of an average daily traffic level of 5,000 or more trips. (Id. at 11) Nine of the twelve grade crossings studied by the Four Cities exceed this threshold (Andrew V.S. at Exhibit GMA-5). For air quality, the Notice confirmed a threshold for non-attainment areas that is triggered with an increase of three trains a day or more. (Id. at 13). This is exceeded on each of the line segments of concern to the Four Cities.

will have a significant economic impact on the Four Cities. In his Verified Statement, Mr. Burris has identified four factors that together measure at least a portion of the economic impact. (Burris V.S. at 17-23). Increased economic costs caused by vehicular highway/rail crossing congestion include the following: (1) lost productivity, (2) additional fuel and oil consumption, (3) incremental increases in emissions, and (4) additional accidents, injuries, and fatalities. Mr. Burris has quantified the costs associated with these factors to reflect the changes from present operations and train densities indicated in the Applicants' Operating Plans. His analysis identifies annual economic costs from incremental rail traffic totaling $6.8 million for the Four Cities. These costs total $87.5 million (in net present value) over a twenty year period. (Burris V.S. at 17).

Finally, what cannot be quantifiably calculated in a proceeding such as this is the considerable displeasure and frustration that Four Cities Citizens are experiencing as a result of the huge volume of rail movements through the area. For example, one of the City of Whiting's most valuable resources is Whiting Park, a stretch of land along the shore of Lake Michigan in which the City has invested a considerable amount of resources for improvements. In order to get to this park, however, visitors must first negotiate their way over five sets of heavily- used railroad tracks, and once at the park they must endure the constant rumbling and emission nuisances caused by the

numerous train movements. (Botich V.S. at 4-5; Bercik V.S. at 2-3).

One thing that is clear is that the Applicants did not examine these kinds of important factors when putting together their proposed operating plans for this region. Nor did they address them in the Environmental Report submitted as part of their Application. (See Vols. 6A, 6B and 6C.) When these factors are considered, as they must be by the Board, it is clear that the adverse impacts from incremental rail traffic will be substantial. Reasonable alternatives to the Applicants' proposed operations must therefore be explored.

II. The Four Cities' Alternative Routing Plan Will Alleviate the Harm Caused by the Transaction.

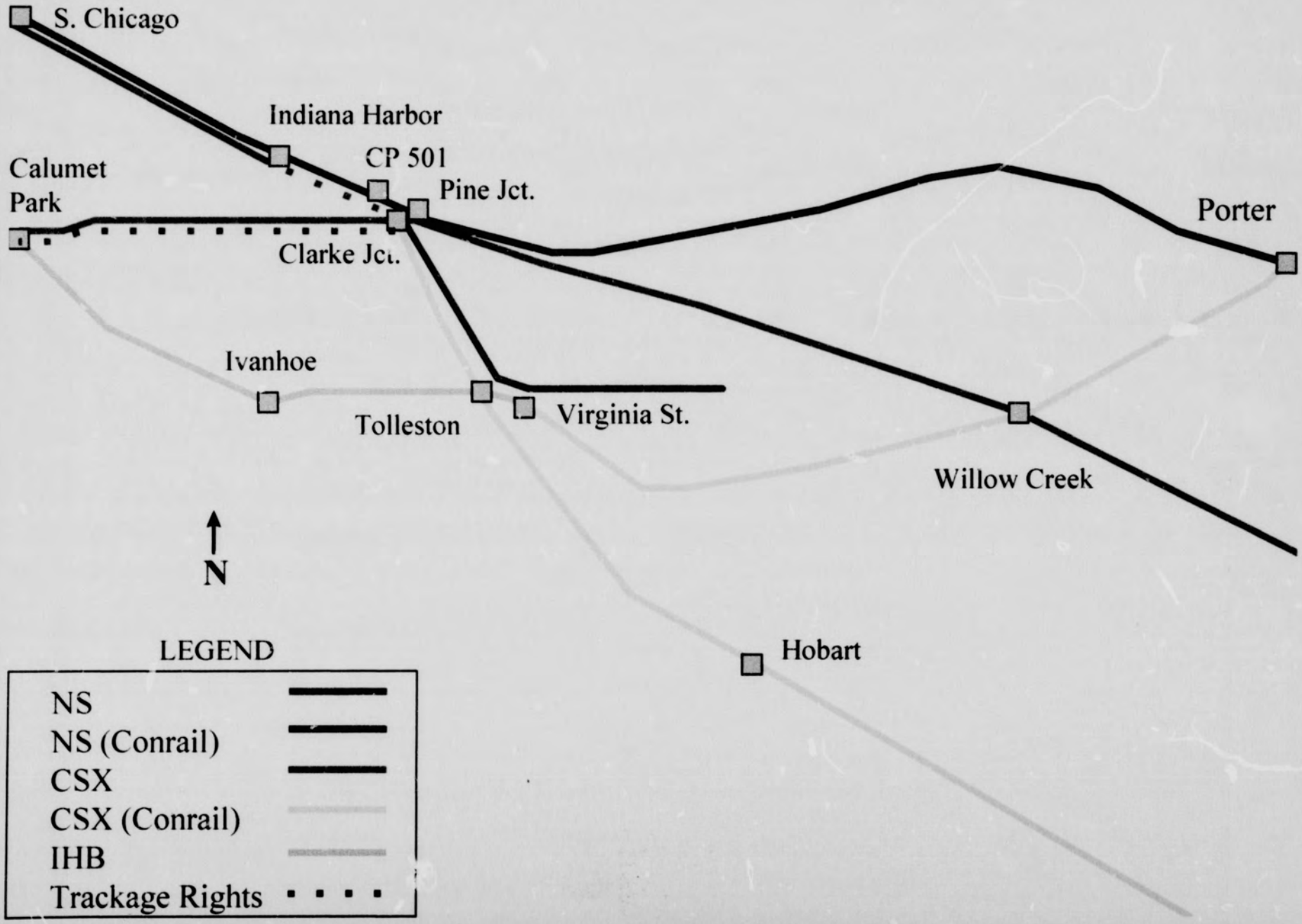
The Four City Consortium has developed a coordinated Alternative Routing Plan which will alleviate the adverse impacts of the Conrail control transaction on the Four Cities described in the preceding section, while at the same time preserving the efficiencies the Applicants expect to realize in moving through rail traffic between Chicago and eastern points such as Cleveland, Pittsburgh, Buffalo and the major metropolitan areas on the East Coast. The development of this Alternative Routing Plan was spearheaded by the economic consulting firm of L.E. Peabody & Associates, Inc., with the assistance of the Planning Departments of each of the Four Cities and two experienced civil engineers. It involves several changes in the flow pattern of rail traffic through the Four Cities area to and from Chicago as proposed by

the Applicants in their Operating Plans. In order to put the Four Cities' Alternative Routing Plan into context, it is first necessary to describe the Applicants' post-acquisition plans for the movement of east-west traffic through the Four Cities region.

The principal rail lines running through the central portions of the Four Cities, and their post-acquisition disposition, are shown in Exhibit PHB-2 attached to Mr. Burris' Verified Statement. For convenience, they are also depicted in the schematic on the following page. (Counsel's Exhibit 1).

A. CSX Operating Plan

As described by Mr. Burris, the CSX Operating Plan indicates that through traffic will flow through this area in a generally counterclockwise direction after the Conrail acquisition. Westbound traffic will move primarily over the CSX (former Baltimore & Ohio) main line between Cleveland/Pittsburgh and Chicago via Willard, OH, Garrett, IN, Willow Creek, IN and Pine Junction (Gary), IN. At Pine Junction, westbound CSX traffic will move either via CSX's lakefront line (portions of which are shared with Conrail) to Rock Island junction, IL and thence to various yards or interchange points with western carriers, or via the CSX/BOCT line extending west from Pine Junction to Barr Yard, IL via State Line Tower and Calumet Park, IL. (This is the line that runs through downtown East Chicago and downtown Hammond at grade, and that has the worst grade crossing problems, as described in the preceding section.)



COUNSEL'S EXHIBIT 1

Eastbound CSX traffic will move primarily through Calumet Park. From Calumet Park, such traffic will move either via the CSX/BOCT line described above to Pine Junction and thence via the CSX (former B&O) main line back to Willow Creek and beyond, or via the Conrail Porter Branch (part of the former Michigan Central line to Detroit), which CSX will acquire, back to Willow Creek via Ivanhoe and Tolleston, IN.[9] CSX proposes to construct a connection between the Porter Branch and its existing east-west main line at Willow Creek to facilitate this traffic flow. CSX will also have operating rights over various IHB lines, including its main line between Calumet Park, Blue Island Yard, and connections with western carriers.

In addition, CSX will acquire the former Pennsylvania Railroad line between Fort Wayne, IN and Tolleston, IN (now owned by NS), and between Tolleston and Clarke Junction, IN (adjacent to Pine Junction) (the "PRR line"). The PRR line is presently out of service between Hobart and Tolleston, a distance of 11.75 miles, and CSX plans to rehabilitate and restore it to service primarily to handle traffic moving to and from the lakefront steel mills at Gary and Indiana Harbor.[10] CSX also plans to

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[9] The Porter Branch is jointly used by the IHB between Calumet Park and Gibson Yard. East of Gibson Yard, the IHB and Conrail lines are separated, but parallel each other as far as Virginia Street in Gary (just east of Tolleston).

[10] In the Applicants' Response to the Four Cities' Second Set of Interrogatories and Document Production Requests, NS stated that the portion of the PRR line between Hobart and Tolleston is in FRA Class 3 condition, thus implying it is in service. In fact, as indicated by Messrs. Heinzman and Dunn,

(continued...)

build a connection between the PRR line and the Conrail Porter Branch at Tolleston.

According to its Operating Plan, CSX plans to put significantly more traffic on the former B&O main line through Willow Creek after the acquisition. West of Pine Junction, as indicated above, this traffic will be split between CSX's lakefront line and the CSX/BOCT line. The latter will see an increase of nearly six trains per day, and these trains will be heavier and longer than the trains presently operating over the line. (Burris V.S. at 3-5).

B. NS Operating Plan

NS will acquire the Conrail (former New York Central) main line between Cleveland and Chicago via Toledo, OH and Elkhart, Porter and Gary, IN. West of Gary, this line runs along the Lake Michigan lakefront through East Chicago, Hammond and Whiting to various yards and connections with the western carriers in Chicago. This will be the primary NS route for through traffic moving between Chicago and eastern points. In addition, NS will continue to use its own line (the former Nickel Plate line) between Cleveland/Fort Wayne and Chicago via Hobart, Van

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[10](...continued)
based on a recent physical inspection this segment is inoperable. (Heinzman/Dunn V.S. at 11). It is overgrown with vegetation (including trees growing between the tracks) and needs substantial rail and tie replacement work. In addition, numerous grade crossings have been paved over. Between Tolleston and Clarke Junction, the PRR line is also out of service and some sections of track have been removed.

Loon and Osborn, IN. NS will also have operating rights over various IHB lines.

The post-acquisition NS lines between Chicago and points east will not see an increase in traffic. The volume of traffic moving over the Conrail main line via Elkhart will remain relatively constant; the traffic volume moving over the NS/Nickel Plate line via Porter will decline by 15.1 trains per day. The reason for this is that NS intends to re-route transcontinental traffic presently moving via Chicago away from the Chicago gateway, through Kansas City and other interchange points with the western carriers. (Burris V.S. at 8-9, 16-17; Mohan deposition (September 17, 1997) at 341-342.)

C. The Four Cities' Alternative Routing Plan

1. Description of the Plan

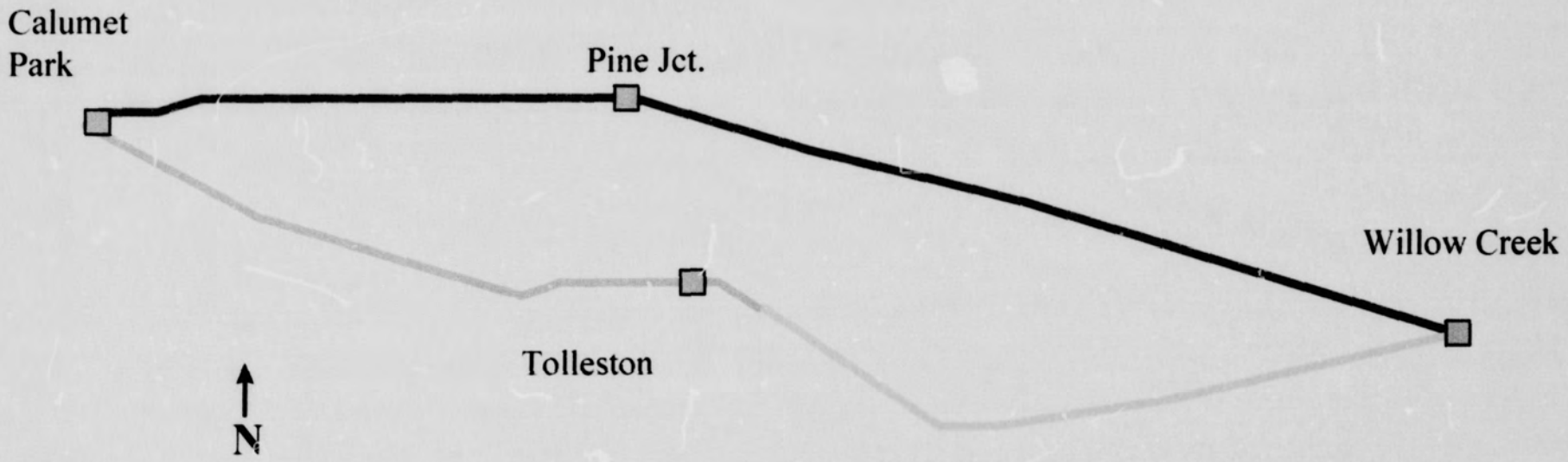
The Alternative Routing plan devised by the Four Cities modifies the Applicants' post-acquisition operating plans for northwest Indiana, as described above, in two important respects. The first involves CSX's east-west operations via Willow Creek. Under the Four Cities' plan, westbound CSX traffic will continue to move primarily via Willow Creek and Pine Junction, and thence via either the CSX lakefront line or the CSX/BOCT line, as contemplated by CSX. Eastbound CSX traffic, however, would be rerouted away from the CSX/BOCT line, with its many heavily-used highway grade crossings, and onto the grade-separated IHB line for movement east from Calumet Park. This aspect of the Alterna-

tive Routing plan is shown on the schematic on the following page. (Counsel's Exhibit 2).

The IHB line east of Calumet Park has plenty of capacity to accommodate the approximately 16.6 additional daily eastbound CSX trains that would use this line. The result of this change is that the number of post-acquisition train movements over the CSX/EOCT line would be reduced from 33.3 per day (the number projected by CSX) to 16.7 per day. This also represents a substantial reduction from the present frequency of 27.6 trains per day. (Burris V.S. at 13-15).

Under the Alternative Routing Plan, CSX trains would operate eastward over the IHB to approximately Virginia Avenue in Gary (just east of Tolleston), where these trains would transfer to Conrail's Porter Branch (which is to be acquired by CSX). The CSX trains would then operate over the Porter Branch back to Willow Creek, where they would use the new connection proposed by CSX to return to the main line for movement to eastern points.

East of Ivanhoe, where there is an existing connection between the IHB and the Porter Branch, the IHB line is used only to serve local industries. This line is presently out-of-service east of Chase Street in Gary. The elevated right of way (including several bridges over highways) still exists, however, and under the Four Cities' plan 2.1 miles of track would be rebuilt on this right of way between Chase Street and Virginia Street. At that point, a new connection would be built between the IHB right-of-way and the parallel Conrail Porter Branch. The reason



LEGEND

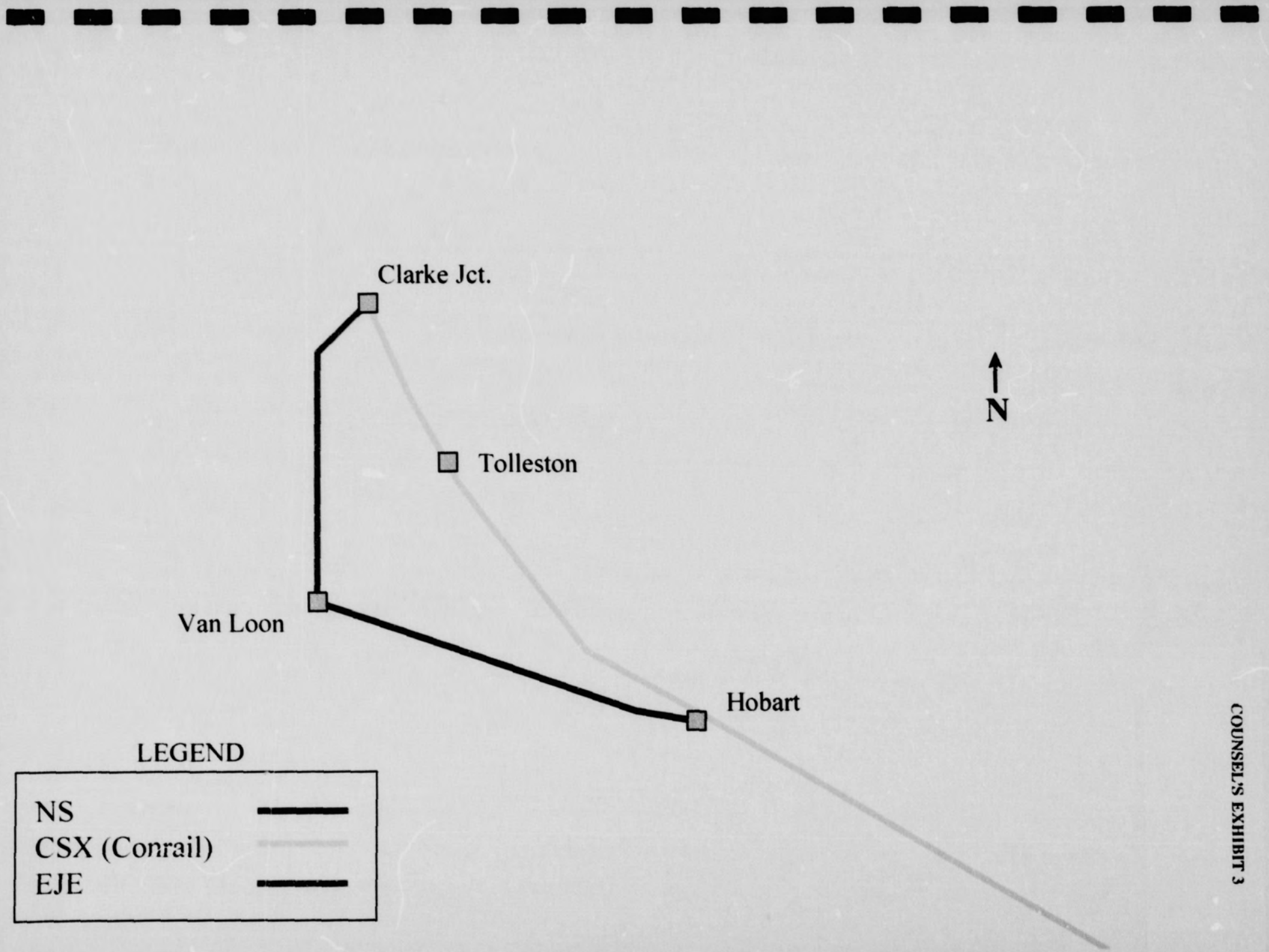
CSX	
CSX (Conrail)	
IHB	

COUNSEL'S EXHIBIT 2

for using the IHB line east of Ivanhoe to the Tolleston area is that this line is grade-separated, whereas the Porter Branch between Ivanhoe and Tolleston has nine at-grade highway crossings. The Alternative Routing Plan is designed to maximize the use of grade-separated lines and minimize the use of at-grade lines in the Four Cities region.

The second change contemplated by the Four Cities' Alternative Routing Plan involves the PRR line between Hobart and Clarke Junction via Tolleston. As indicated above, CSX plans to rehabilitate this line and use it primarily to serve the steel mills along the Gary/East Chicago lakefront. Under the Four Cities' plan, this line need not be used (and thus need not be rebuilt) northwest of Hobart. Instead, CSX traffic from Fort Wayne and points east will operate, via trackage rights, over the NS/Nickel Plate line west to Van Loon, and thence north (again via trackage rights) over an EJE line to Gary via Ivanhoe. The EJE line serves the steel mills, and also connects with CSX's lakefront line at Pine Junction (adjacent to Clarke Junction). This aspect of the Alternative Routing Plan is depicted in the schematic on the following page. (Counsel's Exhibit 3).

The Four Cities' proposed alternative to use of the PRR line requires the construction of a connection between the NS/Nickel Plate line and the EJE at Van Loon. This connection is feasible from an engineering standpoint, and would be far less expensive than rebuilding nearly 12 miles of the PRR line between



COUNSEL'S EXHIBIT 3

Hobart and Clarke Junction. (Burris V.S. at 16, 30-33; Heinzman/Dunn V.S. at 13).[11]

2. Benefits of the Alternative Routing Plan

The Four Cities' Alternative Routing Plan will result in a number of benefits, both to the Four Cities and to the Applicants. From the Cities' standpoint, the plan will avoid the harmful effects on the public health, safety and welfare that would otherwise result from (1) the rail traffic increases projected by CSX on the CSX/BOCT line between Pine Junction and Calumet Park, which runs through downtown East Chicago and downtown Hammond at grade, and (2) restoration of the PRR main line to service between Hobart-Tolleston-Clarke Junction, which would entail the re-establishment of 23 highway grade crossings and interfere with the City of Gary's plans for a new low-income residential development in this area.[12]

From the Applicants' standpoint, the Alternative Routing Plan will still enable both CSX and NS to use more than one route for through traffic moving between Chicago and points east, and to operate the post-acquisition traffic volumes re-

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[11] A possible (but less desirable) alternative to the EJE connection at Van Loon is for CSX to operate further west over the NS/Nickel Plate line to Osborn, and thence north over an IHB line to a connection with CSX's lakefront line at Indiana Harbor. This alternative would also require construction of a connection between the NS and IHB lines at Osborn. The route is more circuitous than the EJE route, and the IHB line has more grade crossings than the EJE line. (Burris V.S. at 16 n.16).

[12] See the Verified Statement of Michael L. Cervay, the Director of Planning and Community Development for the City of Gary, at 8-9.

flected in their respective operating plans smoothly and efficiently.

Significantly, the Four Cities' plan will also result in substantial savings in post-acquisition capital expenditures by CSX (in particular). CSX will avoid the necessity of spending approximately $6.7 million to rebuild the PRR line between Hobart and Clarke Junction. (Heinzman/Dunn V.S. at 10-11.) In addition, the decrease in rail traffic on the CSX/BOCT line west of Pine Junction means that CSX will not have to spend approximately $6.6 million to upgrade the track and accompanying traffic control system to permit higher train speeds and densities. (Burris V.S. at 26, 28-29 n.26).

The Four Cities' Alternative Routing Plan will also result in a significant overall public-interest benefit in the form of cost savings to both the public and the Applicants. As mentioned above, the cost savings total approximately $6.0 million on an annual basis, and they have a net present value of $77.5 million over a 20-year period. These savings are based on a comparative cost/benefit analysis of the Applicants' proposed post-acquisition operating plans for the affected routes and the Alternative Routing Plan, performed by Mr. Burris. (Burris V.S. at 13-17).

As explained by Mr. Burris in his testimony, the savings involve comparative analyses of costs associated with vehicle delays at grade crossings, and rail construction and

operating costs. The vehicle/crossing delay costs include costs for lost productivity, additional fuel and oil consumption, incremental vehicle exhaust emissions, and increased rail/vehicle accidents, injuries and fatalities. The cost savings from the Four Cities' Alternative Routing Plan compared with the Applicants' post-acquisition operating plans resulting from the reduction of vehicle delays at grade crossings total $4.1 million per year. (See Burris V.S. at 25-33).

With respect to rail construction and operating costs, Mr. Burris calculated an annual net saving of $1.9 million based on the change in rail operating costs and a return on investment in the capital required to implement each of the alternatives. (Burris V.S. at 26, 32). The inputs and methodology use to calculate these savings are ex-plained at pp. 23-35 of the Burris V.S.

The very substantial total savings that can reasonably be expected to result from implementation of the Four Cities' Alternative Routing Plan constitute a clear public-interest benefit that warrants imposition of the conditions requested by the Four City Consortium in this proceeding.

3. The Alternative Operating Plan Is Operationally Feasible

In order to justify imposition of a condition requiring Applicants to implement the Four Cities' Alternative Routing Plan, the plan must be shown to be operationally feasible. UP/SP at 144; BN/Santa Fe at 55-56. The Alternative Routing Plan clearly and unequivocally meets this test.

First, the Four Cities have demonstrated that the Alternative Routing Plan will preserve the Applicants' plans to maintain two alternate routes for through rail traffic moving between Chicago and eastern points. They have also demonstrated that the re-routing of traffic over the various line segments involved will not interfere with the efficient post-acquisition operation of these lines.

In particular, the Alternative Routing Plan will result in a net decrease in traffic on the principal rail line of concern: the CSX/BOCT line between Pine Junction and Calumet Park. By reducing the incidence of vehicle delays and crossing accidents on this line, CSX's operations will be made safer and more efficient. Train densities will also be reduced on the portion of the CSX main line between Willow Creek and Pine Junction.

The Alternative Routing Plan will not affect the Applicants' projected post-acquisition operations or traffic volumes on the principal east-west lines to be used by the Applicants: the CSX (former B&O) line between Willard/Garrett and Willow Creek; the Conrail main line between Cleveland and Chicago via Elkhart and Porter (to be acquired by NS); the CSX and Conrail (NS) lines extending from northwest Indiana into Michigan; and the portion of the Conrail Porter Branch (to be acquired by CSX) west of Tolleston.

Two rail lines will see an increase in rail traffic volume as a result of the Four Cities' plan: the combination of

the IHB line between Calumet Park and Virginia Street and the Porter Branch between Virginia Street and Willow Creek (16.7 trains per day), and the EJE line between Van Loon and Pine Junction (five trains per day.) However, as Mr. Burris demonstrates, these lines can easily accommodate these relatively modest traffic increases. (Burris V.S. at 13-17). In addition, the NS/Nickel Plate line between Hobart and Van Loon will see a net decrease of 10.1 trains per day from its present density.[13]

The only objection Applicants could possibly raise concerning the operational feasibility of the Alternative Routing Plan is that it requires the increased use of certain IHB and EJE lines, as well as the construction of track connections between CSX and NS (post-acquisition) lines and IHB and EJE lines. Upon closer examination, however, even this objection evaporates.

With respect to the IHB, the Board clearly has the authority to require the Applicants to implement changes in their operating plans that involve that carrier. Conrail presently owns 51 percent of the IHB's stock (CP/Soo owns the other 49 percent), and for this reason the IHB is deemed to be an "applicant carrier" for purposes of this proceeding. See Decision No. 7 served May 30, 1997, at 5-6.[14] Moreover, as both the courts

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[13] NS's post-acquisition operating plan shows a decrease of 15.1 trains per day on this line compared with the present level of operations. The Four Cities' alternative would reduce this decrease by five trains; the net decrease thus would be 10.1 trains per day.

[14] According to the service list appended to Decision No. 21 served August 19, 1997, 1997, the IHB is also a party of (continued...)

and the ICC have held, Conrail's 51 percent ownership interest gives it control over the IHB. See, e.g., Winston Network v. Indiana Harbor Belt R.Co., 944 F.2d 1351, (7th Cir. 1991), where the court held at 1354:

> The [IHB] has always been a subsidiary--presently of the Consolidated Rail System ("Conrail"). . . . IHB has never functioned independently of its parent, which has, for example, always handled IHB's real estate transactions.

See, also, Finance Docket No. 31148, Indiana Harbor Belt Railroad Company - Acquisition of Line of Chicago and Western Indiana Railroad Company - Exemption From 49 U.S.C. 11343 (ICC Decision served November, 26, 1993) at 2.

As a result of their acquisition and division of Conrail, CSX and NS clearly intend to exercise Conrail's operational control over the IHB, and to route certain traffic over the IHB's lines in their own trains. See, e.,g., the Verified Statement of John W. Orrison in Volume 2A of the Application in this proceeding (CSX/NS-19), at 5 (Volume page 458). This is confirmed by the "IHB Agreement" which is attached to the Applicants' Transaction Agreement as Exhibit FF (See Volume 8C of the Application (CSX/NS-25) at 693-714), and for which Applicants seek the Board's approval in this proceeding. CSX and NS will each acquire half of Conrail's 51 percent controlling ownership

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[14](...continued)
record to this proceeding -- presumably in its status as an applicant carrier, as IHB has not made any independent filings in this case to our knowledge.

interest in the IHB, and the IHB Agreement provides for the joint exercise of such control.

The IHB also unequivocally confirms that CSX and NS will direct many aspects of the IHB's operations. The agreement provides, inter alia, for the selection by CSX and NS of the IHB's General Manager (Section 2 (b) and (c) at page 698), and for the direction by CSX (or, in certain circumstances, NS) of Conrail's ownership rights with respect to the dispatching of IHB lines (Section 2(d) at page 699). Given all these facts, there is no question that CSX and NS can implement the modest operational changes called for by the Four Cities' Alternative Routing Plan (or cause the IHB to implement such changes) if directed to do so by the Board as a condition to its grant of the control authority they seek.

With respect to the proposed CSX operations via trackage rights over the EJE between Van Loon and Pine Junction, as Mr. Burris explains, CSX apparently has a trackage rights agreement with EJE which would allow CSX to make deliveries to U.S. Steel over the EJE from Pine Junction, using CSX crews. (Burris V.S. at 15-16). This agreement could be expanded, or a new one established, to provide for trackage rights over the EJE from Van Loon to Pine Junction. If reaching such an agreement proved to be a problem, however, the Board clearly has the authority to require the EJE (which is also a party of record in this proceed-

ing)[15] to grant trackage rights to CSX for the purposes of compliance with a condition requiring implementation of this portion of the Alternative Routing Plan pursuant to 49 U.S.C. § 11102 (formerly § 11103). See, e.g., UP/MP/WP, 366 I.C.C. at 573-75; UP/SP, Decision No. 63 served December 4, 1996, at 8-9.[16]

The Four Cities recognize that implementation of their Alternative Routing Plan requires the construction of two new track connections (in addition to the ones already proposed by the Applicants): one at Virginia Street in Gary, and one at Van Loon. Accordingly, if their proposed condition is granted, petitions for exemption will have to be filed before construction of these connections can proceed.[17] In granting the Four Cities' condition, the Board should also direct CSX to promptly file the necessary exemption petitions. The Four Cities are prepared to cooperate with the Applicants in preparing and prosecuting such petitions.

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[15] EJE has given notice of its intent to file a responsive application seeking to acquire Conrail's 51 percent controlling interest in IHB; presumably EJE is also seeking a condition requiring the CSX and NS to divest themselves of Conrail's ownership interest in IHB. The Four Cities take no position with respect to EJE's proposed acquisition of IHB; however, they would oppose it if the result would be to interfere with the implementation of their Alternative Routing Plan.

[16] Even if EJE's status as a non-applicant were a problem, there is an alternative involving a parallel IHB line (see p. 23 n.11, supra), which the Board clearly could compel CSX to use as indicated earlier.

[17] With respect to environmental analysis, the Four Cities believes the Alternative Routing Plan is an alternative that would mitigate adverse environmental impacts that must be addressed by the Applicants and the Section of Environmental Analysis in connection with the Draft and Final EIS.

III. The Condition Requested by the Four City Consortium Is Consistent With Statutory Standards and With ICC/STB Precedent.

The "public interest" standard of the statute governing the Board's consideration of proposed railroad control and merger transactions must be applied in the context of the nation's Rail Transportation Policy, set forth at 49 U.S.C. § 10101. Paragraph (8) of this section provides that, in regulating the railroad industry, it is the policy of the United States Government "to operate transportation facilities and equipment without detriment to the public health and safety."

The specific provisions of the statute dealing with rail merger and control applications expressly authorize the Board to impose conditions governing the transaction. 49 U.S.C. § 11324(c). Applicable precedent dictates that conditions should be imposed to the extent necessary to alleviate "effects harmful to the public interest," and if the Board finds that the conditions sought:

> will ameliorate or eliminate the harmful effects, will be operationally feasible, and will produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits produced by the merger.

BN/Santa Fe at 55-56; see, also, UP/SP, Decision No. 44 at 144. Environmental considerations and requirements also support imposition of the condition requested by the Four Cities, as explained earlier.

The discussion in Part II above amply demonstrates that the imposition of the Four Cities' Alternative Routing Plan as a

condition to the acquisition of Conrail by CSX and NS is consistent with the above standards. First, the Four City Consortium has demonstrated that the post-acquisition operations of CSX and NS will have very significant and harmful effects on public health and safety in the Four Cities. These harmful effects are detailed in Part II(A) above; they are caused primarily by post-acquisition increases in rail traffic on rail lines with a high incidence of heavily-used rail/highway grade crossings. These rail traffic increases will result in a significant worsening of an already-bad (and barely manageable) situation in terms of vehicle delays, placing pedestrians and street traffic in danger, air-quality degradation, and the ability of the Four Cities to provide essential police, fire and medical EMS services in a timely manner.

These adverse impacts can be ameliorated -- and the worst problem area, the CSX/BOCT line through the downtown areas of East Chicago and Hammond, improved slightly -- by the imposition of the Four Cities' Alternative Routing Plan as a condition to the Board's approval of the Conrail control transaction. Amelioration of the significant harmful effects described above is extremely important in terms of the health, safety and welfare of this populous region.

Second, the requested condition is operationally feasible, as demonstrated in Part II(C)(3) above. The operational changes that would be occasioned by the Alternative Service Plan will spread east-west rail traffic out over more

lines, and they will facilitate the Applicants' plans for the efficient movement of through traffic over alternative routes between Chicago and eastern points. They will also result in considerable net savings to the Applicants in terms of the capital investment required to implement their post-acquisition operating plans.

Third, the public benefits that will result from imposition of the condition requested by the Four Cities will far outweigh any reduction of the public benefits produced by the Conrail transaction. Indeed, the Four Cities' study indicates that their Alternative Routing Plan will facilitate, rather than reduce, the achievement of the public benefits of the transaction in terms of the efficient, cost-effective routing of the east-west rail traffic of two equal competitors across northwest Indiana.

Finally, the Alternative Routing Plan is consistent with the requirements of the environmental laws. It is a feasible alternative to the Applicants' operating plan for the Four Cities Region that will mitigate adverse environmental impacts likely to result from that plan. (The precise extent of the environmental impacts, however, have yet to be quantified as explained further in the next section.)

IV. THE APPLICANTS HAVE FAILED TO MEET APPLICABLE ENVIRONMENTAL REQUIREMENTS

As part of their Application, the Applicants are required to file an environmental report (ER) containing informa-

tion that is sufficient to inform the Board and the public of the proposed action, environmental consequences of the proposal, and appropriate mitigation measures. 49 C.F.R. § 1105.7. More specifically, as part of their ER, the Applicants are required to set forth alternative plans of action that would mitigate adverse environmental impacts caused by their proposal.[18]

The Applicants' ER is contained in three (3) separate volumes of their Application. (See Volumes 6A, 6B, and 6C). Through the ER and through supplemental information provided to SEA, the Applicants have discussed many of their anticipated physical and operational changes, and potential environmental impacts that would be caused by the proposed transaction. Unfortunately, as specified in more detail below, the Applicants have failed to sufficiently respond to many of the specific ER requirements.

Among other things, the applicable ER regulations require Applicants to meet with local and regional planners and to discuss with them whether the proposed transaction is consistent with local land use plans.[19] While there have been meetings between the Applicants and Four Cities Officials, the

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[18] See 49 C.F.R. § 1105.7(e)(1) (requiring Applicants to "describe any reasonable alternatives to the proposed action") and § 1105.7(e)(10) ("Describe any actions that are proposed to mitigate adverse environmental impacts, indicating why the proposed mitigation is appropriate").

[19] 49 C.F.R. § 1105.7(e)(3)(i) states as follows: "Based on consultation with local and/or regional planning agencies and/or a review of the official planning documents prepared by such agencies, state whether the proposed action is consistent with existing land use plans. Describe any inconsistencies."

Applicants have made almost no effort to review/discuss with city planners local land use plans and how the Applicants' plan would fit in with short-term or long-range local and regional planning goals. This lack of consultation is attested to by the accompanying Verified Statements of the Four Cities' city planners. See, in particular, the Verified Statement of Kimberly L. Gordon, East Chicago's Director of Planning and Business Development, at 9-10.

Other reporting/consultation matters that must be addressed in the ER relate to proposed rail line construction. For any planned construction projects, Applicants are required to "[d]escribe any alternative routes considered, and a no-build alternative (or why this would not be applicable), and explain why they were not selected," Id. at § 1105.7(e)(11)(ii). Applicants also must "[d]escribe the effects, including impacts on essential public services (e.g., fire, police, ambulance, neighborhood schools), public roads, and adjoining properties, in communities to be traversed by the line." Id. at § 1105.7(e)-(11)(vi).

As indicated in these Comments, CSX plans to rehabilitate the 11.75 mile out-of-service PRR line segment between Hobart and Pine Junction in Gary, which would require the restoration of 23 rail/highway grade crossings that were closed (and largely paved over) a number of years ago. Among other things, restoration of this line would interfere with a critically needed new federally assisted Gary housing project that is located on

property adjoining this line segment southeast of Tolleston (See Cervey V.S., at 7-8 and Attachment No. 1). Because the high number of highway grade crossings, restoration of the Hobart-Pine Junction line would also re-create numerous traffic congestion problems and have significant negative impacts on public health and safety, the provision of emergency services, and the safety of children commuting to area schools.

Despite these critically important impacts, and the above-referenced regulatory requirements, Applicants' ER submitted in this proceeding has completely failed to address the consequences of restoring this out-of-service line. Moreover, while the Applicants' have not taken any steps to mitigate the negative impacts of this proposed construction project, the Four Cities have. The Four Cities' Alternative Routing Plan, described earlier in these Comments, would eliminate the need for restoration of this line segment.

The Four Cities will continue to actively participate in this proceeding through the Board's environmental review processes to address the considerable environmental issues presented by the Applicants' plan. In this regard, the Four Cities reiterate that their region is a non-attainment area for purposes of federal air pollution standards. As such, each of the Four Cities have been working hard on programs to improve air quality.[20]

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[20] The U.S. Environmental Protection Agency (EPA) has developed National Ambient Air Quality Standards for six criteria (continued...)

In particular, the Four Cities region is a non-attainment area for carbon monoxide emissions and ozone, and vehicle emissions at highway/rail grade crossings are a considerable pollution problem in northwest Indiana. Regrettably, the Applicants' operating plan as set forth in this proceeding would significantly increase vehicle emissions in the Four Cities. (The Four Cities' Alternative Routing Plan, on the other hand, would mitigate these air quality problems). In short, in terms of air quality, safety, land use, etc., the Four Cities Alternative Routing Plan is what the Applicants' plan is not: a minimally intrusive, locally sensitive means for the routing of the Applicants' proposed railroad traffic flows that is consistent with applicable environmental standards.

V. CONCLUSION

For all of the foregoing reasons, the Four City Consortium requests the Board to impose the following two-part condition to its approval of the Conrail control transaction:[21]

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[20](...continued)
pollutants: sulfur dioxide (SO_2), nitrogen dioxide (NO_2), ozone (O_3), carbon monoxide (CO), lead (Pb) and particulate matter less than 10 microns in diameter (PM-10). The locations of nonattainment areas are listed in 40 C.F.R. 81 Subpart C, Section 107. For northern Lake County, Indiana (the Four Cities region), ambient concentrations exceed the standards for many of these pollutants. These air quality standards, and the Four Cities efforts to improve northwest Indiana's environment, will be described in more detail as part of the FCC's future submissions made in this proceeding to the Board and the SEA.

[21] The Four Cities also request the SEA to recommend imposition of the Alternative Routing Plan as an appropriate environmental mitigation measure.

1. CSX and NS shall amend their respective Operating Plans insofar as they involve the movement of freight through the Four Cities to incorporate the Four Cities' Alternative Routing Plan.

2. CSX and NS shall adhere to their Operating Plans as amended to incorporate the Alternative Routing Plan in conducting freight service in the Four Cities after implementation of the Conrail control transaction.

In addition, the Four City Consortium requests the Board to retain oversight jurisdiction over this matter to address concerns that may arise as the division of Conrail is implemented by CSX and NS.

Respectfully submitted,

THE CITIES OF EAST CHICAGO, INDIANA; HAMMOND, INDIANA; GARY, INDIANA; AND WHITING, INDIANA (COLLECTIVELY, THE FOUR CITY CONSORTIUM)

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OF COUNSEL:

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Dated: October 21, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of October, 1997, served copies of the foregoing Comments And Request For Conditions Of The Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana (collectively, The Four City Consortium) by hand upon Applicants' counsel:

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and by first-class mail, postage pre-paid upon:

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The Honorable Janet Reno
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The Honorable Jacob Leventhal
Federal Energy Regulatory Commission
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and by first-class mail, postage pre-paid upon all other Parties of Record in Finance Docket No. 33388.

Christopher Mills

Christopher A. Mills

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

VERIFIED STATEMENT
OF
ROBERT A. PASTRICK

My name is Robert A. Pastrick. I am the Mayor of the City of East Chicago, Indiana. My office address is City Hall, 4527 Indianapolis Boulevard, East Chicago, Indiana 46312. I have been mayor of East Chicago since 1971.

The purpose of my testimony in this proceeding is to support the Alternative Routing Plan developed jointly by the Cities of East Chicago, Gary, Hammond and Whiting, Indiana (the "Four City Consortium"). This Plan addresses the concerns and needs of these four communities as a result of the changes in rail operations in the Northwest Indiana region that would otherwise result from proposed acquisition and division of Consolidated Rail Corporation ("Conrail") by CSX Transportation, Inc. ("CSX") and Norfolk Southern Railway Company ("NS") and their affiliates.

The Cities of East Chicago, Gary, Hammond and Whiting are located immediately east of Chicago, Illinois, which is well-known as the railroad crossroads of America. Conrail, CSX and NS, as well as other regional and switching rail carriers, all have rail lines criss-crossing our region. Several of these lines pass through East Chicago, including east-west main lines of Conrail and CSX. The Elgin, Joliet and Eastern Railroad ("EJE") and the Indiana Harbor Belt Railroad ("IHB") also have several lines that traverse the City, both in an east-west and a north-south direction.

One of the two major east-west lines passing through East Chicago, the Conrail/CSX main line along the Lake Michigan lakefront, is grade-separated. The other is a CSX line that passes through our city on the northern edge of the East Chicago central business district. This line has a number of heavily-used highway grade crossings. As described in more detail in the Verified Statement of East Chicago's Director of Planning and Business Development, Kimberly Gordon, these crossings cause numerous safety and quality-of-life problems for our residents and workers.

It is my understanding that as a result of the Conrail control transaction, CSX and NS propose to make several changes in the operation of the rail lines that traverse East Chicago and the other members of the Four City Consortium. Of particular concern to East Chicago, CSX proposes to increase the number of daily train movements using the east-west CSX line through the

heart of our city (and also of our sister city, Hammond). This would result in a worsening of an already-intolerable situation in terms of vehicular delay at highway grade crossings and interference with the provision of emergency services. I also have been given to understand that CSX will acquire the former Pennsylvania Railroad line from Fort Wayne to Chicago via Hobart, Indiana, and plans to restore this line (much of which has been abandoned) to service. This will interfere with the City of Gary's development plans.

The Four City Consortium has investigated alternatives to these proposals, and has concluded that a very sound alternative exists that will take rail traffic off the CSX line, avoid the need for restoring the former Pennsylvania Railroad line to service, and concentrate rail traffic on the grade-separated IHB main line which runs parallel to the CSX line a mile or two to the south. This alternative is reflected in the Four City Consortium's Alternative Service Plan. The Plan not only addresses the adverse impacts of the CSX/NS/Conrail merger on the infrastructure of East Chicago and the other member cities, it also enables CSX and NS to achieve their goals of routing east-west rail traffic to and from Chicago in an efficient manner.

On behalf of the citizens of East Chicago, I urge the Board to take whatever steps are necessary to implement the Four City Consortium's Alternative Service Plan by requiring CSX and NS to use it in conducting their future east-west through rail operations in northwest Indiana.

Verification

State of Indiana)
) ss:
County of Lake)

I Robert A. Pastrick, Mayor, City of East Chicago being duly sworn, deposes and says that he has read the foregoing Verified Statement, knows the contents thereof, and that the same are true as stated except as to those statements made on information and belief, and as to those, that he believes them to be true.

Robert A. Pastrick, Mayor

Subscribed and sworn to before me
this 17th day of October, 1997.

Kimberly K Anderson
Notary Public for Lake County, Indiana.

My commission expires 02/02/01.

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

VERIFIED STATEMENT
OF
KIMBERLY L. GORDON

My name is Kimberly L. Gordon. I am employed by the City of East Chicago in the position of Director of Planning and Business Development, with offices at City Hall, 4525 Indianapolis Boulevard, East Chicago, Indiana 46312.

I was appointed Director of East Chicago's Planning and Business Development Department on September 15, 1997, replacing Mr. Russell Taylor who is now a Consultant to the Mayor of East Chicago. Prior to assuming my present position, I was the Senior Planner (reporting to Mr. Taylor) for three years. Prior to that, I spent approximately five years as Executive Director of the East Chicago Urban Enterprise Association, Inc., in which position I was responsible for initiating neighborhood development and tax incentive programs in East Chicago's enterprise zone. I am thoroughly familiar with the City of East Chicago's

multi-modal transportation infrastructure, and with its economic development activities.

As Director of the East Chicago Planning and Business Development Department, I am responsible for all of the City's planning activities, including those related to transportation, infrastructure and land use. I work closely with my counterparts in the neighboring northwest Indiana cities of Gary, Hammond and Whiting to address planning issues of regional concern. I report to the Mayor of East Chicago, Mr. Robert A. Pastrick.

The City of East Chicago is located in Lake County, Indiana, which borders the Indiana/Illinois state line and the City of Chicago, Illinois. East Chicago is bounded by Hammond and Whiting on the west, Gary on the east, and Lake Michigan on the north. East Chicago, Gary, Hammond and Whiting have recently formed the Four City Consortium. Our purpose in forming this Consortium is to analyze the potential impacts of the application by CSX Corporation and its rail subsidiaries ("CSX") and Norfolk Southern Corporation and its rail subsidiaries ("NS") to acquire control of Consolidated Rail Corporation ("Conrail") on the northwest Indiana region, and to devise recommended solutions to problems posed by the proposed division of Conrail for this region. As part of this effort, the City Planners and Mayors of each of the four cities are submitting testimony relating to his or her own community as well as the region as a whole.

East Chicago is an industrial and residential city of 15 square miles, with a 1990 population of 33,892. Following

several decades of decline in the steel industry in northwest Indiana, East Chicago (as well as the other members of the Four City Consortium) is undergoing something of a renaissance. The steel industry is rebounding, and economic development activity is increasing. For example, in 1996 a new legalized gambling casino located at Pastrick Marina opened on East Chicago's lakefront. In addition, two casinos opened at Buffington Harbor on Gary's lakefront, and another is located in Hammond. These facilities have created over 1,200 jobs each for the region, and contributed an influx of much-needed tax dollars.

A grade-separated overpass across the Conrail and CSX lakefront lines exists for vehicle access to the Pastrick Marina in East Chicago. A new bridge is being constructed to provide additional access. These bridges also affect the Elgin, Joliet & Eastern Railway ("EJE"), which has its own line paralleling the Conrail/CSX lines and Lake Michigan.

East Chicago has another commercial-development project on the drawing boards that may also require the cooperation of CSX and NS after the merger. In conjunction with the East Chicago Waterway Management District, a political jurisdiction overlaying portions of our city, we hope to develop a new Lake Michigan vessel/barge transfer terminal (which is urgently needed in this area) inland from the lake on the Indiana Harbor Canal.[1]

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[1] Development of this terminal would increase water traffic under the Conrail bridge carrying its lakefront line over this waterway. However, our investigation indicates this facility would not have a significant impact on the rail traffic using this bridge after the merger is consummated.

This would be an intermodal port, and an ideal location to stage truck/rail movements of freight transferred from waterway shippers. The City of Hammond has a counterpart to our proposed port: a rail-to-road terminal consolidated with the Conrail/IHB Gibson Yard. I understand that Gibson Yard has excess capacity that will not be used up by the changed rail operations resulting from the Conrail merger, and we would hope (and expect) that NS and CSX will cooperate with the Cities of East Chicago and Hammond in developing both the water transfer terminal and related intermodal rail operations at Gibson Yard.

The City of East Chicago's primary concern with the proposed acquisition of Conrail by CSX and NS is that rail traffic will increase on the CSX/Baltimore & Ohio Chicago Terminal Railroad line extending from Pine Junction (Gary) westward through East Chicago and Hammond to Calumet City and Barr Yard, Illinois. This rail line, which I will refer to as the "CSX/BOCT line", is active with slow-moving freight trains, and it crosses numerous city streets in both East Chicago and Hammond at grade. East Chicago alone has a total of ten highway grade crossings of this line. A single grade-separated crossing of this line exists at Cline Avenue in Gary, to the east of our community.

Several of these grade crossings are major north-south thoroughfares, providing access to Lake Michigan and the industries located near the lake for many East Chicago citizens and workers. Since East Chicago has no north-south grade separated crossings of the CSX/BOCT line, and since the City is strategi-

cally located in the region to encounter north-south truck traffic, the City is proposing a north-south hazardous truck route through East Chicago along Railroad Avenue. This concept includes a new, grade separated crossing of the CSX/BOCT line at that location, which would significantly reduce concerns of our downtown merchants along Indianapolis Boulevard. However, there is room for a third track at this location, and addition of a third track would make construction of an overpass difficult if not impossible because of grade tolerances. We are fearful that the additional traffic that CSX plans to route over this line may lead to introduction of a third track and effectively kill our project to create a grade-separated truck route. I should add that although we view this project as very important, it would not solve the problems that would be created by the additional train traffic CSX plans to route over the CSX/BOCT line. We will still have large volumes of vehicular traffic crossing the line at several at-grade crossings in both East Chicago and Hammond, and all the associated negative impacts from the increased rail traffic.

Five of the existing grade crossings of the CSX/BOCT line have very heavy daily vehicle crossing counts. A one-week study performed for the Four City Consortium starting in late September of this year confirmed this, as shown in the table on the following page.

Highway	Average Daily Vehicle Count
Indianapolis Boulevard (U.S. Highway 20)	13,650
Railroad Avenue	7,500
Kennedy Avenue	7,325
Euclid Avenue	7,500
Cline Avenue (U.S. Highway 12)	14,820

As the Board might expect from these daily traffic counts, the grade crossings of the CSX/BOCT line cause substantial safety problems and adversely impact the City's ability to provide emergency police, fire and medical services. They also adversely affect the quality of life for our citizens, many of whom spend a considerable amount of time in queues waiting for trains to clear these crossings.

With respect to emergency services, the City has four fire stations, one Emergency Medical Services ("EMS") station, and one police station. Our fire stations are located so as to minimize rail crossing delays, but such delays still routinely occur. For example, East Chicago Fire Department vehicles incurred 318 delays at railroad crossings in 1996 while responding to the approximately 1600 emergency fire service calls received that year. EMS and police vehicles incur substantially more delays in providing emergency-response services; there were a total of 966 crossing delays in the case of EMS vehicles and 9,688 delays in the case of police vehicles in 1996.

These problems will undoubtedly become worse under the CSX and NS post-merger operating plans for the Four City region. I understand that CSX plans to increase the daily volume of train movements using the CSX/BOCT line from 27.6 to 33.3 trains per day, an increase of 5.7 trains per day. I also understand that the 33.3 daily trains will be substantially longer than the current 27.6 daily trains, thereby increasing crossing delay times.

I am also advised that CSX intends to upgrade this line to permit an increase in train speeds from 25 to 40 miles per hour and to install an improved signal system. This will cause additional safety problems, as motorists in our community are used to slow-moving trains and, unfortunately, seem to have a penchant for ignoring activated grade crossing protection devices and darting across the tracks if they do not see a train in the immediate vicinity of the crossing.

The Four City Consortium, working with the consulting firm of L.E. Peabody & Associates, Inc., has developed an Alternative Routing Plan that would divert the incremental rail traffic projected by CSX (as well as some of the present rail traffic) off the CSX/BOCT line through East Chicago and Hammond, and move it to the Indiana Harbor Belt Railroad ("IHB") line which parallels the CSX/BOCT line to the south. The IHB line is grade-separated for the most part, and shifting some of the east-west rail traffic moving through the Four City area to this line would avoid the substantial problems both East Chicago and

Hammond would otherwise expect due to the projected increase in rail traffic on the CSX/BOCT line. The resulting rail traffic reduction on the CSX/BOCT line would also minimize the likelihood that CSX would add a third main track in the vicinity of Railroad Avenue in East Chicago, thus interfering with the City's proposed highway overpass at this location.

In addition, the Alternative Routing Plan developed by L.E. Peabody & Associates will enable CSX to avoid having to rebuild portions of the former Pennsylvania Railroad main line through Gary, which it will acquire as a result of the Conrail transaction. Our plan relies on use of the NS line extending from Hobart to Van Loon, Indiana, and the EJE from Van Loon north to the steel mills at Gary and Indiana Harbor, rather than the Pennsylvania Railroad line.

To implement the Alternative Routing Plan, some IHB trackage in Gary that has been removed from service will have to be restored, and a new connection will have to be built between the restored IHB line and an existing Conrail line known as the Porter branch. The Plan is described in more detail in the Verified Statement of Philip H. Burris of L.E. Peabody & Associates which is being submitted on behalf of the Four City Consortium.

The Alternative Routing Plan developed by the Four City Consortium is an excellent example of cooperative regional transportation planning. Different aspects of the plan benefit different communities. East Chicago and Hammond will benefit from the removal of rail traffic from the CSX/BOCT line extending

east from Pine Junction. The parallel IHB line does not pass through East Chicago, but the City of Gary will benefit by avoiding the reconstruction of the out-of-service former Pennsylvania Railroad line and the shifting of traffic that would have used that line to a line that -- even with the shifted traffic -- would still experience a decrease in daily train density based on the railroads' projections. The City of Whiting supports the Plan because it is to the overall benefit of the entire region.

Before closing, I should point out that representatives of the Four Cities have met and corresponded with CSX and NS to gain information concerning the effects of the proposed Conrail acquisition on rail traffic in the region and to share our concerns about our grade crossing congestion problems and other matters related to commercial development that might be impacted by the transaction. We met with representatives of both carriers in mid-July of this year, and there were several follow-up exhanges of information.

However, after the Four Cities decided to engage counsel to represent their interests in this proceeding, the communication stopped. In this regard, I am attaching as Exhibit KLG-1 a copy of a letter from CSX to Mr. Taylor (my predecessor in the East Chicago Department of Planning and Business Development) dated August 25, 1997, indicating that rather than furnish additional information concerning issues of concern to East Chicago and other members of the Four City Consortium, "we

will defer to our STB attorneys concerning the appropriateness of further discussions regarding this matter."

In fairness, I should also note that it took considerable study by our consultants before the Four Cities were able to (1) identify with precision the actual problems posed by the Conrail transaction, and (2) identify a feasible solution. Our Alternative Routing Plan was not fully developed and documented until a short time ago, so we have not had an opportunity to discuss it with CSX and NS. We would welcome an opportunity to do so after they have had a chance to review it, and plan to contact them for this purpose. If we are able to work out a satisfactory arrangement with CSX and NS we will, of course, promptly advise the Board.

In summary, the City of East Chicago urges the Board to adopt the Four City Consortium's Alternative Service Plan and to impose it as a condition to its approval of the Conrail control transaction.