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February 23, 1998

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 the original and twenty-five (25) copies of the Brief of The National Railroad Passenger Corporation (AMTRAK) (NRPC-13). In accordance with the Board's prior order, we have enclosed a Wordperfect 5.1 diskettes containing this filing.

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

Sincerely,

Donald G. Avery

Donald G. Avery
Attorney for National Railroad Passenger Corporation (AMTRAK)

DGA:cef
Enclosures

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NRPC-13

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

BRIEF OF THE
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

NATIONAL RAILROAD PASSENGER CORPORATION

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Date: February 23, 1998

BEFOkE 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

BRIEF OF THE
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

The National Railroad Passenger Corporation ("NRPC" or "Amtrak") hereby submits this, its Brief in response to the Application filed in this docket by CSX Corporation and CSX Transportation, Inc. (jointly, "CSX"); Norfolk Southern Corporation and Norfolk Southern Railway Company (jointly, "NS"); and Conrail, Inc. and Consolidated Rail Corporation (jointly, "Conrail") (collectively, "Applicants"). The Application seeks authorization for NS and CSX to acquire and control Conrail, and to divide up its assets between them. (Hereinafter the transactions for which Applicants seek approval shall be referred to for convenience as the "merger.")

For the reasons set forth in its October 21, 1997 Comments (NRPC-7) ("Comments") and in this Brief, Amtrak urges the Surface Transportation Board ("STB" or "Board")[1]:

[1]References herein to the STB include its predecessor the Interstate Commerce Commission, unless the context clearly indicates otherwise. Similarly, references to Section 11321 of

(1) to reject Applicants' request that it order expansion of Conrail's limited freight service easement on Amtrak's Northeast Corridor ("NEC") rail line between Washington and New York City, to enable multiple freight operators to "share" the easement without Amtrak's consent; and

(2) to condition any approval of the Application on Applicants' acceptance of (a) a carefully-delimited oversight condition to guard against any merger-caused worsening of Amtrak's on-time passenger operations over Applicants' lines; and (b) a "good faith cooperation" condition respecting future publicly-funded projects to permit higher-speed passenger service over both the "Empire Corridor" from Buffalo to Albany in New York, and the Detroit-Chicago Corridor in the Midwest.

* * * *

Amtrak continues to negotiate with the Applicants in an effort to resolve all of its concerns, and remains optimistic that a mutually agreeable settlement will be achieved shortly. No such resolution has yet been reached, however, and thus Amtrak is constrained to file this brief and to reiterate those concerns.

Title 49, as enacted by the *ICC Termination Act*, Pub. L. 104-88, 109 Stat. 803 (December 29, 1995), include the parallel provision of the Interstate Commerce Act prior to 1996 (Section 11341).

FACTS

As explained by Amtrak's witness James L. Larson in his verified statement that accompanied Amtrak's Comments ("VS Larson"), the Applicants' proposed transactions, as initially described, could significantly impact Amtrak's passenger operations, and commuter rail operations, on Amtrak's own Northeast Corridor ("NEC") between Washington, DC and New York City, where Conrail presently provides freight service under a reserved easement and associated operating agreement. Additionally, the transactions could adversely affect the reliability of Amtrak's intercity passenger operations elsewhere in the East and Midwest, where Amtrak operates over certain lines owned by Applicants that are scheduled for increased freight usage following the merger.

1. NEC

Amtrak owns the rail line between New York and Washington that is commonly known as the Northeast Corridor. When Conrail conveyed the NEC to Amtrak on April 1, 1976, it retained a limited "Freight Service Easement" (the "NEC Easement").[2] Conrail's rights under that easement are defined in the Second Amended and Restated Northeast Corridor Freight Operating Agreement between Amtrak and Conrail dated October 1, 1986 ("the NEC Agreement").

The Northeast Corridor is unique. In addition to being America's only high speed railroad, featuring Amtrak's 125 mph

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[2]A copy of the NEC Easement is included in CSX/NS-178, Rebuttal, vol. 3A of 3, at 644-47.

Metroliners, it also accommodates high density commuter train services and significant freight operations. Indeed, the NEC has the highest train densities of any rail line utilized for freight train service. (VS Larson at 6-7)

The agreement between NS and CSX for their joint acquisition of Conrail ("the Merger Agreement") contemplates that, between Washington and Philadelphia, Conrail will assign its rights under the NEC Easement and Agreement to both NS and CSX.[3] Between Philadelphia and New York, Conrail will retain its rights under the NEC Easement and Agreement so that it can provide local train service, but will also grant trackage rights, including the right to directly serve all shippers, to both NS and CSX. (Comments at 7.) In short, the Merger Agreement would transfer Conrail's operating rights between Washington and Philadelphia to two separate railroads, while in the most densely used portion of the NEC between Philadelphia and New York, Conrail would both retain its operating rights and grant unlimited trackage rights to two other railroads.[4]

The Applicants' Operating Plan contemplates significant increases in NEC freight operations. They include the reinstitution of through train services along the length of the Corridor; the introduction of both RoadRailer and double stack trains; and

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[3]Under the Merger Agreement, only NS would be able to serve local shippers on the NEC between Washington and Philadelphia. (Comments at 7.)

[4]We refer to Applicants' plan to share and jointly use Conrail's NEC trackage rights as the "trackage rights sharing plan".

the operation of some freight trains outside of the 10PM to 6AM window to which virtually all through freight trains have been confined as a result of restrictions imposed after the tragic Amtrak-Conrail accident at Chase, MD in 1987. (VS Larson at 10-13.)

Amtrak's Comments noted Amtrak's willingness to work with Applicants to improve freight services on the NEC and to accommodate additional freight services that were compatible with Amtrak and commuter train operations. However, Amtrak expressed concerns about some of Applicants' plans for NEC freight operations, including in particular certain of the proposed freight train schedules and their plans to assign to three railroads -- NS, CSX and Conrail -- Conrail s right to operate freight trains and directly serve all local shippers between New York and Philadelphia. Amtrak also expressed its strong belief that these and other issues should be resolved in the context of the ongoing negotiations among the parties. (VS Larson at 11-15.)

Applicants responded to Amtrak's Comments by representing unequivocally that their post-merger operations on the NEC will remain fully subject to Amtrak's approval and control, as provided in the NEC Agreement, between Amtrak and Conrail, and that in particular they recognize and accept Amtrak's right to exercise its control in a manner that prevents interference with intercity passenger and commuter usage of the NEC. Unfortunately, Applicants also reiterated and expanded upon their request that the STB override Amtrak's right, as owner of the NEC, to

object to implementation of the trackage rights sharing plan absent Amtrak's consent. For the reasons explained below, such action, which would constitute a radical expansion of the Board's use of its pre-emption authority under 49 U.S.C. § 11321, is totally unwarranted and would exceed the Board's powers under that statutory provision.

2. Off-Corridor Amtrak Operations

As witness Larson observed, more than 95% of Amtrak's passenger route-miles are outside the NEC, on lines owned and operated by the freight railroads. On those lines, the quality and reliability of Amtrak's service is heavily dependent on the cooperation and efficient support of the host railroads, for they dispatch all the trains on their lines, including Amtrak's. (VS Larson at 4.)

According to Mr. Larson, off-Corridor Amtrak operations that will be affected by the merger include both those on current Conrail lines that will be taken over by NS and CSX, and those on certain current CSX lines that will experience material increases in freight volume as a direct and predicted result of the merger. He expressed particular concern regarding:

(1) Conrail's "Empire Corridor" between Albany and Buffalo, New York, over which Amtrak currently operates an average of 7.4 trains per day, and to which CSX is slated to add another 6 to 7 freight trains per day;

(2) Conrail's portions of the Detroit-Chicago route used by 8 Amtrak trains per day, which NS will take over and to

parts of which NS predicted the addition up to 19 freight trains per day (including haulage trains operated for the Canadian Pacific ("CP")); and

(3) current CSX routes (a) from Washington, DC to Rocky Mount, North Carolina, over which 10 to 18 daily Amtrak trains (plus commuter Virginia Railway Express trains on the northernmost segment between Washington and Fredericksburg, VA) operate, and (b) from Pensacola to New Orleans, to which the merger will add only two trains per day but over which Amtrak's Sunset Limited had already been experiencing unacceptable levels of freight interference that the merger could only exacerbate.

VS Larson at 16-24.

Mr. Larson testified that Amtrak's concerns regarding the two current CSX lines, and the Empire Corridor that CSX will inherit from Conrail, are intensified by Amtrak's unhappy recent experiences in dealing with CSX (VS Larson at 16):

> CSX's performance in handling Amtrak's trains has been consistently poor in recent years, dropping from an average of approximately 85% in FY 1990 and 1991 to an average of just 70% over the past five years under the "ICC formula" (as compared to the 80% level that the ICC deemed to be the minimum acceptable). And until very recently, CSX made no attempt to hide its disdain for all passenger services, both Amtrak and commuter, that operate over its lines.

(Footnote omitted, emphasis in original.) Mr. Larson acknowledged that CSX had finally begun to pay more attention to its

handling of Amtrak's passenger operations, which he welcomed, but he noted that this "sudden interest" coincided with CSX's need to enlist support for its merger plans. *Id.* at 16-17. Accordingly, he recommended that the Board hold CSX to its representations that the merger will not adversely affect passenger service, by imposing a limited five-year oversight condition under which Amtrak would have the right to seek Board intervention if it could show that future degradations in CSX's handling of Amtrak trains were directly traceable to the merger. Additionally, because of the particular importance of the Empire Corridor for passenger service in the State of New York, and of the likelihood of further state-funded improvements in the Corridor to permit increased passenger train speeds thereon, Mr. Larson asked the STB to impose a condition requiring CSX to cooperate with the state and with Amtrak in the development and implementation of such improvement projects, just as Conrail was doing. *Id.* at 23-24.

Although Amtrak's experiences with NS to date have been much happier (Comments at 12), Mr. Larson expressed concern that NS's projections of significant additional freight usage of the Chicago-Detroit corridor (97 miles of which Amtrak owns) will make NS less willing than Conrail was to cooperate in the publicly-funded improvements required to permit 100+ mph passenger service over this important corridor. VS Larson at 20-23. Amtrak therefore requested imposition of a good-faith cooperation

condition on NS for this line, similar to that recommended for CSX on the Empire Corridor.

In Applicants' Rebuttal filing on December 15, 1997 ("Rebuttal"), CSX disputed Amtrak's portrayal of its handling of Amtrak trains, contending that Amtrak erroneously used the "ICC formula" for on-time performance measurement rather than the formula for calculating incentive payments under the parties' contract; and that in any event its performance had improved dramatically in recent months and no longer merited criticism. CSX also argued that Board intervention would be inappropriate in any event because Amtrak allegedly has sufficient remedies in other forums to take care of its concerns.

Both NS and CSX objected to the good faith cooperation conditions sought by Amtrak for the Detroit-Chicago and Albany-Buffalo corridors, respectively, arguing *inter alia* that such cooperation was already required under Conrail's contract with Amtrak, which Applicants promised to honor on their respective portions of Conrail lines. (CSX/NS-176, Rebuttal, at P-229-32.) Their objections are discussed in greater detail, and answered, in the Part III of the Argument that follows.

ARGUMENT

I. INTRODUCTION--THE STATUTORY STANDARDS.

Under the ICC Termination Act, the Board may approve the instant Application, under which NS and CSX would divide up Conrail between them, only if it affirmatively finds that the proposed transaction is "consistent with the public interest."

49 U.S.C. § 11324(c). In making that finding the Board must consider, *inter alia*, the transaction's effect on "the adequacy of transportation to the public" (§ 11324(b)(1)), and it is beyond dispute that adverse impacts on passenger transportation must be a part of that analysis. *See, e.g., Rio Grande Industries, Inc. -- Purchase and Trackage Rights -- Chicago, M. & W. Ry. Line Between St. Louis, MO and Chicago, IL*, 5 I.C.C. 2d 952, 968, 978 (1989); 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 250-51 (Commissioner Owen, concurring).

The strong public interest in preserving and promoting rail passenger service in the United States is also evidenced by Congressional enactment of the *Rail Passenger Service Act of 1970*, Pub.L 91-518, 84 Stat. 1328 (October 30, 1970) ("*Amtrak Act*"), which as amended is now codified at 49 U.S.C. §§ 24101 *et seq.* *See* especially 49 U.S.C. § 24101(a), in which Congress expressly found that

> [p]ublic convenience and necessity requires that Amtrak ... provide modern, cost-efficient, and energy-efficient intercity rail passenger transportation between crowded urban areas and in other areas of the United States,

and that

> [m]odern and efficient commuter rail passenger transportation is important to the viability and well-being of major urban areas and to the energy conservation and self-sufficiency goals of the United States.

These unequivocal expressions of public policy by Congress must inform the Board's public interest determinations in this case, insofar as Amtrak or commuter passenger service could be adversely affected by certain aspects of the Application.

II. THE BOARD CANNOT, AND IN ANY EVENT SHOULD NOT, EXPAND CONRAIL'S FREIGHT EASEMENT SO AS TO ALLOW MULTIPLE "SUCCESSORS" TO CONRAIL, AS WELL AS CONRAIL ITSELF, TO OPERATE OVER THE SAME PORTIONS OF THE AMTRAK-OWNED NORTHEAST CORRIDOR WITHOUT AMTRAK'S CONSENT.

Applicants contend that the NEC Easement and NEC Agreement do not in any way preclude them from effectuating the trackage rights sharing plan, even where Conrail would retain rights over the same track segment for itself. However, they urge the Board to utilize its pre-emption powers under 49 U.S.C. § 11321 to override any "[b]oilerplate" that might preclude them from carrying out this plans. (CSX/NS-176, Rebuttal vol. 1 at P-223). While Applicants characterize the relief that they seek as "very narrow", *id.*, it is in fact the most extraordinary action that the Board has ever been requested to take under Section 11321.

A. While Applicants' Plans to Share Conrail's NEC Rights Require Amtrak's Consent, That Issue Is Not Before the Board.

Under the NEC Easement, Conrail retained "[t]he easement and right . . . contemplated for retention by [Conrail] under the Final System Plan certified by [the United States Railway Administration] . . . to operate freight trains" over the

NEC. (NEC Easement at 1.) The NEC Easement states that, should Conrail

> assign the freight service easement, in whole or part, other than to a subsidiary, affiliate or successor entity, [Amtrak] shall have a first option to acquire such easement, or portion thereof, at the purchase price of one dollar ($1.00)

(NEC Easement at 4.)

The NEC Easement also specifies that Conrail's easement is:

> subject to such terms, provisions, qualifications and limitations as the Grantor and the Grantee have agreed upon in a certain Northeast Corridor Freight Operating Agreement, dated March 31, 1976, as such agreement may be amended . . ..

(NEC Easement at 3.) The NEC Agreement explicitly states that Conrail cannot, without Amtrak's consent, give another freight railroad the right to operate over the NEC:

> Neither party shall grant to another railroad or person any right to operate freight service on the NEC or any portion thereof without the agreement of the other party.

(Comments at 6, *quoting* NEC Agreement.)

Notwithstanding these provisions, Applicants contend that "the plain terms of the Freight Service Easement" allow Conrail to effectuate the trackage rights sharing plan, even where Conrail would retain for itself the right to operate over the same track segment. (CSX/NS-176, Rebuttal at P-97.) They also claim that the NEC Agreement does not in any way limit

Conrail's ability to grant operating rights over the same segments of the NEC to both NS and CSX. (*Id.* at P-97 and n.3.)

Amtrak disagrees with Applicants' views on these issues. But the Board need not, and should not, resolve this dispute. The NEC Easement expressly states that the freight operating rights Conrail retained thereunder are the rights contemplated for Conrail's retention under the Final System Plan. Thus, Applicants' contentions that those rights include the power to confer trackage rights upon multiple successors, or should be altered if they do not, may well be within the exclusive jurisdiction of the US Special Court, Regional Rail Reorganization Act. (*See* 45 U.S.C. § 719(e)(2).) Likewise, disputes over whether these grants of trackage rights are permitted by the NEC Freight Agreement are subject to arbitration before the National Arbitration Panel. *See National Railroad Passenger Corp. v. Consolidated Rail Corp.*, 892 F.2d 1066, 1072 (D.C. Cir. 1990) ("issues of contract interpretation" that arise under the NEC Freight Agreement "are for the NAP"). And for the reasons expressed below, the Board should not usurp the power of these bodies by granting Applicants' request to override under § 11321 the provisions of the NEC Agreement and Easement that require Amtrak's consent to the introduction of additional freight operators on the NEC.

B. Applicants Seek an Unprecedented Override of the Terms of the NEC Agreement.

> [T]here is no basis in law or policy for the Board to amend private contracts that were reached during arm's-length negotiations.
>
> - Applicants' Rebuttal at P-221.

We address first the question of whether the Board should override the terms of the NEC Agreement to the extent that they preclude Applicants from allocating Conrail's rights as contemplated by the trackage rights sharing plan. While the Board has taken the position that Section 11321 gives it the power to override terms of trackage rights agreements,[5] it has made it clear that it will not exercise that power except in "the most extraordinary circumstances." *SP/Soo*, at 7. Thus, in *SP/Soo*, the Board stated that, assuming that it had the power to grant the override requested in that case -- which would have allowed SP and Soo to "share" operating rights in a manner

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[5]Until quite recently, the Board had "considerable doubts" about its authority to override the terms of trackage rights agreements under § 11321. Finance Docket No. 31505, *Rio Grande Industries, Inc. -- Purchase and Related Trackage Rights -- Soo Line R.R. Between Kansas City, MO and Chicago, IL*, Decision served Nov. 15, 1989 ("*SP/Soo*"), at 8. However, the Board has indicated in its most recent decisions that those doubts have been erased by the Supreme Court's decision in *Norfolk & Western Ry. v. American Train Dispatchers' Association*, 499 U.S. 117 (1991). See Finance Docket No. 32760, *Union Pacific Corp. -- Control and Merger -- Southern Pacific Rail Corp.*, Decision No. 44, served Aug. 12, 1996 ("*UP/SP Decision No. 44*"), at 170 n.217.

similar to what Applicants propose here, although on a far more limited scale[6] -- it would decline to exercise that power.

Indeed, the only circumstance under which the Board has ever used, or even suggested that it might use, its power under Section 11321 to override terms of trackage rights agreements is to effectuate important conditions it has imposed to remedy the anti-competitive impacts of rail mergers. And the scope of the override ordered by the Board in these cases has been very limited, whether measured by the degree to which existing contractual rights have been altered, the length of the trackage affected, or the resulting changes in rail operations.

In *UP/SP* Decision No. 66, served Dec. 31, 1996 ("*UP/SP Decision No. 66*"), the Board overrode the restrictions in a 1913 joint track agreement between Utah Ry ("URC") and an SP predecessor to the extent that they would have prevented Burlington Northern & Santa Fe Ry. ("BNSF") from effectively exercising trackage rights, imposed by the Board as a condition to the merger (and to which URC had consented), over 73 miles of SP-owned track "in the mountains of Utah" over which URC had track-

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[6]The override the Board declined to order in *SP/Soo* was similar to that NS and CSX are seeking in that it would have overridden contractual limitations that precluded Soo from conveying its interest in jointly owned and paired track to SP while retaining trackage rights for itself. However, is was far more limited in scope than the override NS and CSX have requested in that (i) it would have granted operating rights over the line at issue to only one rather than two additional railroads; (ii) Soo had an ownership interest in -- as opposed to mere trackage rights over -- the line; and (iii) the line was only 42 miles long, situated in a rural area, and had no passenger service. *SP/Soo* at 6, 8.

age rights. The Board concluded that, unless the restrictions in the 1913 agreement were overridden, the conditions it had imposed on the merger would not "fulfill . . . the purposes they were intended to serve." (*UP/SP Decision No. 66* at 11 & n. 25)[7]

Similarly, in *UP/SP Decision No. 44*, the Board stated in *dictum* that, if BNSF had lacked another remedy (an application for terminal trackage rights, which the Board granted), it would have overridden provisions of trackage rights agreements between UP/SP and KCS that would have precluded UP/SP from giving BNSF access to three short segments of track totalling less than six miles in length. The Board found that the line segments at issue "form essential parts" of two key routes (Houston to New Orleans and Houston to Memphis) to which BNSF's access was "essential to the merger conditions" the Board was imposing. The Board also noted that BNSF's operations over the affected line segments:

> will not substantially impair KCS's ability to handle its own traffic. For the most part, BNSF trains will be using track capacity freed up by UP/SP, so that KCS track will not be subjected to greater use by other railroads than it was previously."

(*Id.* at 168.)

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[7]In its decision approving the UP/SP merger, the STB had found that the trackage rights granted to BNSF were necessary "to ameliorate the competitive harms that would be generated by an unconditioned merger", and that the modifications to the terms of those trackage rights to which URC took exception were required to "allow BNSF to replicate the competition that would otherwise be lost when SP is absorbed into UP." *UP/SP Decision No. 44* at 145.

The relief Applicants seek from the Board under Section 11321 is many orders of magnitude different -- in its scope, its impact, and its legal effect -- from that which the Board has granted in these prior cases. NS and CSX are not requesting minor changes in the scope of already-existing trackage rights over a rail line that they own, or the right to substitute one trackage rights tenant for another (with no net increase in the level of freight train operations) over very short segments of track that form an integral part of a key route. Rather, they seek to use the Board's powers under Section 11321 to force Amtrak to accept not one but two additional trackage rights tenants on a rail line that is more than 200 miles long; accommodates the highest speed passenger train operations in the North America; has the highest train densities of any U.S. rail line utilized for freight service; and that will experience significant increases in freight traffic if the merger is approved. If the Board were to grant such a request, there clearly would be no limits on the use of Section 11321 to circumvent existing contractual rights for the sole purpose of furthering private commercial objectives.

Equally unavailing are Applicants' arguments that Amtrak's position is no different from that of two other railroads -- the Gateway Eastern/Gateway Western ("GWWR") and the Providence & Worcester ("P&W") -- which take exception to Applicants' planned allocation of certain of Conrail's trackage rights. In fact, as Applicants explain in their response to

these railroads' filings,[8] both GWWR and P&W object to Applicants' undivided assignment of the pertinent Conrail rights to a single "successor" of Conrail, CSX. That, of course, is not Amtrak's position, as evidenced by the fact that Amtrak has not taken exception to Applicant's plans to assign Conrail's rights on Amtrak lines other than the NEC between New York and Washington to either NS or CSX.[9] Rather, Amtrak objects to Applicants' plans to transform, without Amtrak's consent, the right of a single railroad (Conrail) to operate freight service over a densely trafficked Amtrak-owned line into a right that can be shared by multiple "successors" operating over the same line, while continuing to be enjoyed by Conrail itself.

Interestingly, Applicants take a very different view of arguments that they should be required to accommodate additional trackage rights tenants on their lines. In a section of his rebuttal verified statement entitled "Forced Trackage Rights Create Operational Complications", John Orrison, the architect of CSX's Operating Plan, asserts that requiring CSX to accommodate such proposals would "cripple[ ]" its operations. (Rebuttal Verified Statement of John Orrison ("RVS Orrison") at P-566.) He goes on to explain that:

> The presence of multiple carriers with trackage rights over vast portions of CSX's newly-

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[8] Rebuttal, vol. 1 at P-96 to 97 and P-99 to 100.

[9] For example, Amtrak does not object to Applicants' plans to assign Conrail's rights over the Amtrak-owned portion of the Detroit-to-Chicago Michigan line to NS, and Conrail's rights over a portion of Amtrak's New York-to-New Rochelle line to CSX.

> obtained routes would disrupt schedules, increase the risk of delays and congestion, and subvert CSX's ability to control its destiny. Each new tenant would bring increased risk of delays, and other uncertainties that jeopardize schedules and impede efficient operations.

Id., p. P-570.

C. The Board Cannot, and Should Not, Diminish Amtrak's Property Interest in the NEC By Enlarging the Rights Conrail Retained Under the NEC Easement.

Even if the Board could override the provisions of the NEC Agreement that preclude implementation of the trackage rights sharing plan without Amtrak's consent, and there were grounds for it to do so, it could not override the similar provisions in the NEC Easement. Thus, there is a "crucial difference" (to use the Board's term) between the nature of the relief Applicants seek here and the relief that the Board is empowered to grant under Section 11321, and has granted in previous cases.

Amtrak's right to prevent the granting of NEC trackage rights to additional freight railroads without its consent is not derived merely from a contract, as would be the case if Amtrak had only trackage rights over the NEC. Rather, Amtrak's control over the granting of freight trackage rights is derived from its ownership of the NEC.

While Section 11321 has been interpreted as empowering the Board to override provisions of contracts, it does not authorize the Board to diminish an owner's property interest by enlarging the scope of a tenant's easement. Thus, while the Board found in *UP/SP Decision No. 66* that it had the power to

override the "veto power" over the augmentation of BNSF's trackage rights that URC possessed under the agreement that gave it trackage rights over SP-owned track, it reached a different result with respect to the URC-owned trackage at issue. As the Board explained, the "crucial difference" was that URC's "veto power" with respect to the SP-owned trackage over which URC had trackage rights was "derived from the 1913 . . . Agreement [and] therefore rooted in contract". By contrast, while URC's power to block the augmentation of BNSF's trackage rights on the track it owned "may be reflected in the 1913 URC/DRGW Agreement [it] is ultimately derived from URC's ownership of, or easement in, the underlying real estate." The Board also noted that the purposes to be served by an override with respect to the URC-owned track were "adequately served" by other means (the override with respect to parallel SP-owned track). Thus, the Board did not purport to override URC's "veto power" with respect to the track of which it was the sole owner. (*UP/SP Decision No. 66* at 11-12.)

Like URC's control over the URC-owned track, Amtrak's control over additional freight carrier access to the NEC is derived from its ownership of the NEC rather than from the terms of a contract. For this additional reason, the Board cannot, and should not, utilize its power under Section 11321 to force Amtrak to allow additional freight carriers to operate over the NEC.

D. The Requested Override Clearly Is Not "Necessary".

The requested override must be denied for the additional reason that Applicants have made no showing that it is "necessary" to carry out the transactions they ask the Board to approve.

In effectuating the "necessity" requirement, the Board has required merger applicants seeking overrides to exhaust all other Board and contractual remedies before invoking the Board's powers under Section 11321. Thus, for example, in *UP/SP* Decision No. 63, served Dec. 4, 1996 ("*UP/SP Decision No. 63*"), the Board denied BNSF's request for an override of certain provisions in joint facility agreements between UP/SP and KCS that arguably precluded UP/SP from granting BNSF access to several short segments of track. Even though BNSF's access to this trackage was required to effectuate "important aspects of the conditions" the Board had imposed on the merger, the Board directed that the dispute be "submitted to arbitration" under the terms of the pertinent agreements, holding that an override would not be "necessary" unless and until there was an arbitration decision that the agreements did in fact preclude UP/SP from granting rights to BNSF without KCS's consent. (*UP/SP Decision No. 63* at 2, 4-5, 9.) Here as well, NS and CSX have an arbitration remedy. If the arbitrators were to adopt their view that the NEC Agree-

ment allows Conrail to convey rights to both NS and CSX without Amtrak's consent, no override would be "necessary".[10]

Finally, even if Applicants ultimately were unable to both enjoy Conrail's NEC operating rights in precisely the manner they have proposed, they have not demonstrated that there would be any resulting harm to either their merger plans or the public interest. Indeed, Applicants plan to retain Conrail as a jointly-owned subsidiary to conduct certain operations on their behalf between New York and Philadelphia, and there is nothing in the Easement or NEC Agreement that would prevent them from utilizing Conrail to conduct all of their post-merger NEC operations.[11]

III. THE BOARD SHOULD IMPOSE THE LIMITED CONDITIONS REQUESTED BY AMTRAK TO PROTECT ITS IMPORTANT OFF-CORRIDOR PASSENGER OPERATIONS FROM MERGER-CAUSED DEGRADATION.

A. The Five-Year Oversight Condition.

CSX advances five arguments against imposition of the oversight condition requested by Amtrak to guard against a

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[10]Amtrak is engaged in negotiations with both NS and CSX with respect to their planned division of Conrail's NEC operating rights, and anticipates that a mutually satisfactory solution without Board intervention. Applicants share this view. *See* Rebuttal, vol. 1 at P-223 ("CSX and NS concur with Amtrak's stated expectation that all issues relating to use of the NEC will be resolved before the Board must decide this case.").

[11]Thus, Applicants' claim that the Board's failure to grant the requested override would "largely frustrate the intent of the Application to bring competitive Class I freight service to the Greater New York Area" Rebuttal, vol. 1 at P-98) is quite specious, even putting aside the fact that NS and CSX will both acquire from Conrail at least two routes other than the NEC that will provide them with access to New York.

merger-caused worsening of CSX's on-time operation of Amtrak trains. On close examination, however, none of those arguments supports its position.

CSX first asserts that "'there is no reason to believe that Amtrak will experience merger-related harm,'" Rebuttal at P-224 (emphasis in original), *quoting* Finance Docket No. 32549, *Burlington Northern, Inc. and Burlington Northern RR--Control and Merger--Santa Fe Pacific Corp. and Atchison, Topeka and Santa Fe Ry.*, Decision served August 23, 1995 ("*BN/SF*") at 97, and that in any event it would be difficult or impossible to trace any particular traffic increases at issue to the merger (*id.*). To the contrary, Amtrak submits that it has shown ample justification for its concern about the merger-caused degradation of its service over certain CSX lines. More fundamentally, however, if these arguments had merit it would simply mean that Amtrak could never successfully carry its burden of persuasion if it sought to enforce the condition at a later time; accordingly they furnish no basis for rejection of the oversight condition.[12]

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[12]CSX notes that the ICC relied on similar arguments in rejecting an on-time performance condition sought by Amtrak in the BN/SF merger proceeding. However, that decision has little relevance to the instant situation, both because Amtrak's requested condition in this case is clearly confined (as the requested condition in BN/SF was not) to performance degradations that Amtrak can show are the direct result of the merger, and because the instant transaction entails far more complex operational changes than the BN/SF merger did, and affects lines with far greater passenger service. In other words, the potential harm to the Applicants from the requested condition in this case is essentially eliminated, while the need for it is greatly enhanced.

CSX next argues that a condition is unnecessary because Amtrak has adequate statutory and contractual remedies for any problems it may experience with its passenger operations on CSX lines. This is simply untrue. The statutory right to dispatching priority, while an important mandate, simply does not address the complex congestion and inefficiency problems that may be exacerbated on the lines at issue by the merger and that will in turn exacerbate freight train interference with Amtrak's operations. By the same token, Amtrak's contracts with the freight railroads -- including CSX -- will not necessarily reward the railroads enough for the quality of their Amtrak train operations to ensure that the on-time performance of Amtrak trains is not adversely impacted by the merger.[13] An oversight condition, by contrast, would enable Amtrak and the Board to fashion appropriate and effective remedial actions if Amtrak can demonstrate that on-time performance has been worsened by the merger.[14]

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[13]Amtrak's right to seek a Federal Railroad Administration prescription of higher passenger train speeds over recalcitrant freight lines is similarly useless in this context: higher maximum speeds do not help where congestion prevents passenger trains from operating at maximum speeds anyway.

[14]Of course, freight traffic increases, and resulting congestion, can occur independent of mergers, and there may indeed be difficulty in some cases in distinguishing merger-related traffic increases from those attributable to other causes. But none of this supports Applicants' argument that the Board should decline to impose the narrowly-tailored oversight condition Amtrak is seeking. Indeed, if Applicants' argument were taken to its logical conclusion, there would be no basis for any of the environmental conditions that the Board has imposed in recent merger cases to remedy environmental harms from projected post-merger increases in traffic.

CSX next argues that it would be unfair to single it out for imposition of a performance condition not applicable to all of the nation's freight railroads over whose lines Amtrak trains operate. (*Id.* at P-225.) This is nonsense; as proposed, Amtrak's condition would apply only insofar as its future CSX service problems are directly traceable to the merger, and the other railroads are not merging.[15]

CSX's fourth ground for objecting to the proposed oversight condition is that it would allegedly "intrude on the statutory jurisdiction of the Federal Railroad Administration ("FRA") ... to grant relief from the statute's grant of dispatching preference to Amtrak trains ...." (*Id.* at P-226.) This argument, too, is without merit. In the first place, CSX has not sought any such relief from the FRA, let alone obtained it; absent such relief CSX remains fully subject to the statutory mandate requiring dispatching priority for Amtrak trains and cannot transform the right to seek relief into an excuse for failing to honor the mandate in all respects. More fundamentally, as explained above there is very little practical relationship between the mandate for dispatching priority and the very

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[15]CSX also notes that it negotiated a new contract with Amtrak in the spring of 1997, and argues that Amtrak should have included whatever performance terms it deemed necessary in that contract to deal with CSX's then-contemplated acquisition of Conrail. (*Id.* at P-225-26.) But it would have been impossible in that contract to deal with the potential impacts of a merger that will have very different impacts on Amtrak from the unilateral merger with Conrail that CSX was proposing when that contract was negotiated.

real potential for merger-related delays, even if CSX adheres to that dispatching priority, which Amtrak is concerned about.

Finally, CSX argues that there is "no factual basis" for imposing Amtrak's five-year oversight condition. (*Id.*) Amtrak's evidence of past performance problems on CSX is misleading, CSX argues, because Amtrak used the "ICC formula" instead of the contract incentive formula, which excludes delays caused by "factors beyond the control of CSX" (RVS Reistrup at P-231), and the former is allegedly "not appropriate for determining whether CSX is providing good service to Amtrak." (*Id.*)[16] Moreover, contends CSX, its operation of Amtrak trains has improved significantly in recent months to such a degree that it now often attains 100% on-time performance on given days. (*Id.* at P-232.)

This argument, like the others, provides no basis for rejecting an oversight condition. Amtrak welcomes CSX's very recent performance improvements, as discussed earlier. However, there is no assurance, absent an oversight condition, that this good behavior will continue after the merger is approved, there

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[16]Curiously, CSX then turns around and denigrates Amtrak's unfavorable comparisons of its on-time performance with those of other carriers, *inter alia* on the ground that Amtrak had not shown that the performance standards in all the contracts were the same. (RVS Reistrup at P-230 n.1.) But of course Amtrak's comparisons were based on application of the ICC standard to all the carriers, and thus did not exhibit any such inconsistency. (Amtrak also pointed out, however, that CSX's on-time performance was at or near the bottom of the list on either basis, *see* VS Larson at 17 n.8, 18 n.9.)

is a resulting increase in freight traffic, and the spotlight has moved elsewhere.[17]

CSX's criticism of Amtrak's use of the ICC formula to gauge its on-time performance is, in the context of this proceeding, completely misplaced. The only performance statistic that matters to Amtrak's customers -- and therefore the only one that ultimately can matter to Amtrak -- is whether Amtrak's trains reach their destinations consistently, and in accordance with published schedules. CSX's performance under this measure, when compared to that of the other railroads over which Amtrak operates, is clearly deficient. And contrary to the implications of CSX's Rebuttal evidence, delays that occur on another railroad prior to CSX's receipt of the train -- such as the major delays experienced by the eastbound *Sunset Limited* west of New Orleans due to UP's service problems following the UP/SP merger (RVS Reistrup at P-228, n.8) -- are not counted against the railroad that receives the train late.

In the final analysis, then, one must ask why CSX is opposed to the oversight condition requested by Amtrak. If, as CSX contends, the merger will not cause any worsening of Amtrak operations over CSX lines, then the condition will never be triggered. But if things turn out badly, as they did with the UP/SP merger in the West, and if Amtrak can show that the cause

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[17]In that regard, Amtrak welcomes CSX's appointment of Mr. Paul Reistrup, Amtrak's former President, as its Vice President in charge of "passenger integration." However, a single change in CSX's management, albeit an encouraging one, does not obviate the need for future oversight.

of the problem is a direct result of the merger, an oversight condition will at least furnish a platform for the Board's consideration of reasonable corrective measures.

B. The "Good Faith Cooperation" Condition.

Applicants' arguments against Amtrak's requested condition that would require them to cooperate in good faith on publicly-supported passenger service improvements to the Detroit-Chicago and Schenectady-Buffalo corridors mirror CSX's arguments against the oversight condition -- and are without merit for many of the same reasons, as well.

Applicants first argue without elaboration that the condition is "wholly unrelated to the proposed Transaction." (Rebuttal at P-230.) That is not true: as Amtrak explained in its Comments, the request was made because the traffic increases that Applicants projected for the two corridors as the direct result of the merger[18] raised a concern that the Applicants might be less willing to cooperate than Conrail was on improvements that would facilitate and encourage greater passenger use.

Applicants next argue that a condition is unnecessary because Applicants are willing, even without a condition, to conduct such good-faith discussions, and because they will succeed to Conrail's obligations under its 1996 Agreement with Amtrak, and that Agreement explicitly requires such cooperation.

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[18]Of course, the Applicants' Operating Plan by design projects changes resulting from the proposed transaction, and not changes that would occur anyway through ordinary traffic growth.

At first blush this argument seems more convincing. However, the Board and the ICC have frequently imposed, as conditions, terms upon which the parties had expressed their agreement. No reason appears why the same thing should not be done in this instance; certainly, imposing the condition will not demand anything of Applicants that they have not already represented they intend to do. What imposing the condition will do, in this limited situation, is hold them to those representations.[19]

CONCLUSION

For the reasons set forth in Amtrak's October 21, 1997 Comments and in this Brief, the Board should (1) deny Applicants' request that it "override" Amtrak's right to consent to expansion of Conrail's freight easement on the NEC to include multiple freight tenants; and (2) grant Amtrak's requests for conditions on its approval of the Application that would (a) establish a

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[19]Applicants make two other arguments against the good-faith cooperation condition that deserve only brief mention. They argue, first, that the condition would "intrud[e] on the jurisdiction of the FRA ... to grant relief when a rail carrier refuses to allow Amtrak trains to operate at accelerated speeds." (Rebuttal at P-231.) There is no conflict, however: the condition simply requires good faith negotiations; it does not dictate any particular outcome. If despite such good-faith negotiations the parties were unable to agree, then and only then would the FRA become an appropriate venue in which Amtrak could seek relief.

Second, CSX argues that a condition is "premature" as to the Schenectady-Buffalo line, because plans for improvement projects on that line are not as far advanced as those on the Detroit-Chicago line. But of course the time for seeking a such a condition has to be now, inasmuch as the merger application to which the condition would apply is being considered now.

five-year oversight condition to guard against any merger-caused deterioration in Applicants' on-time operation of Amtrak trains; and (b) require Applicants to cooperate in good faith with publicly-funded efforts to enhance high-speed passenger service on the Detroit-Chicago and Schenectady-Buffalo corridors.

Respectfully submitted,

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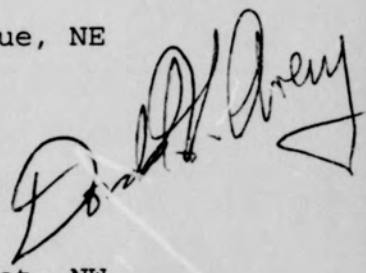

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February 23, 1998

VIA HAND DELIVERY

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20423-0001

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

Finance Docket No. 33388 (Sub-No. 61)
Bessemer and Lake Erie Railroad Company -- Trackage Rights -- Lines of CSX Transportation, Inc. and Pennsylvania Lines LLC

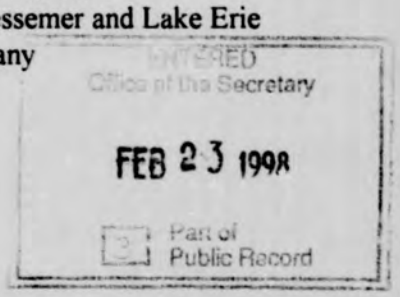
Dear Secretary Williams:

Enclosed for filing with the Board in the above-captioned proceedings are an original and twenty-five copies of the **Brief of Bessemer and Lake Erie Railroad Company** (BLE-10), dated February 23, 1998. A computer diskette containing the text of BLE-10 in WordPerfect 5.1 format also is enclosed.

I have also enclosed herewith an extra copy of BLE-10 and this transmittal letter, and would request that you date-stamp those copies to show receipt of this filing and return them to me in the provided envelope. Thank you for your assistance on this matter.

Respectfully submitted,

Christopher E.V. Quinn
Attorney for Bessemer and Lake Erie
Railroad Company



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Enclosures

cc: Parties of Record

*Known as Oppenheimer Wolff & Donnelly LLP in these cities.

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ORIGINAL

BLE-10

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

FINANCE DOCKET NO. 33388 (SUB-NO. 61)

BESSEMER AND LAKE ERIE RAILROAD COMPANY -- TRACKAGE RIGHTS -- LINES OF CSX TRANSPORTATION, INC. AND PENNSYLVANIA LINES LLC

BRIEF OF BESSEMER AND LAKE ERIE RAILROAD COMPANY

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Dated: February 23, 1998

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

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BESSEMER AND LAKE ERIE RAILROAD COMPANY -- TRACKAGE RIGHTS -- LINES OF CSX TRANSPORTATION, INC. AND PENNSYLVANIA LINES LLC

BRIEF OF BESSEMER AND LAKE ERIE RAILROAD COMPANY

Pursuant to the Orders of the Board served May 30, 1997 and July 23, 1997, the Bessemer and Lake Erie Railroad Company ("B&LE") respectfully submits this Brief in support of its request for the imposition of conditions upon any approval of the proposed acquisition of control of Conrail, Inc. and the division of the rail assets, lines and operations of Consolidated Rail Corporation (collectively "Conrail") by CSX Corporation and CSXT Transportation, Inc. (collectively "CSXT") and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "NS").[1]

INTRODUCTION AND SUMMARY

The transactions contemplated by the proposed Conrail takeover constitute the largest rail merger in United States

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[1] CSXT, NS and Conrail are referred to collectively herein as the "Primary Applicants."

history. Parties on both sides agree that it is a transaction which, if approved, would change permanently the freight railroad industry in the United States. Not surprisingly, the Primary Applicants have touted the proposed transaction as one that will create new single-line routes for freight rail transportation and open up major portions of the Northeast to rail competition for the first time in over 25 years. However, if left unremedied, the proposed Conrail transaction will cause serious transportation service and competitive routing problems in the transportation of northern Appalachia coal to the Great Lakes. B&LE has identified specific harms arising from the Conrail takeover that could be substantially ameliorated if the Surface Transportation Board grants the relief requested in the Responsive Application of Bessemer and Lake Erie Railroad Company for Trackage Rights, BLE-7 ("B&LE Resp. App.") and its Comments and Requests for Conditions, BLE-8 ("Comments and Requests"). The relief sought by B&LE is operationally feasible and would enhance rather than reduce the public benefits of the proposed Conrail takeover.

STATEMENT OF FACTS

I. B&LE AND THE LAKE COAL MARKET

B&LE is a Class II railroad which owns and operates 335.9 miles of trackage, including approximately 150 route miles in the states of Pennsylvania and Ohio. B&LE's principal line extends between North Bessemer, Pennsylvania (near Pittsburgh) and Conneaut, Ohio, on Lake Erie.

The principal commodities handled by B&LE are: (a) coal from mines served by the B&LE, from river sources using the inland waterways and transferred at the Duquesne Wharf of B&LE affiliate the Union Railroad ("URR") on the Monongahela River, and from off-line mines located in Pennsylvania, West Virginia and Ohio interchanged to B&LE by the Buffalo & Pittsburgh Railroad ("BPR"), CSXT, Conrail or NS for movement to Conneaut, Ohio; (b) iron ore and other steel raw materials from B&LE's port at Conneaut, Ohio, moving to integrated steel plants; (c) fluxing and industrial stones, aggregate, salt and gypsum delivered via vessel to Conneaut for outbound rail and truck delivery; and (d) steel, scrap and miscellaneous freight to and from points on the B&LE. Verified Statement of Timothy R. Howerter, BLE-8 ("Howerter V.S.") at 2.

B&LE has long been an active competitor for the transportation of coal in the so-called "lake coal market." The "lake coal market" is defined as the market for bituminous (soft) coal, primarily from northern Appalachia coal fields moving either to B&LE's Pittsburgh & Conneaut Dock (referred to as "P&C Dock") at Conneaut, Ohio, or Conrail's Ashtabula Dock at Ashtabula, Ohio. The northern Appalachia coal fields consist generally of mines located in Maryland, Ohio, Pennsylvania and Northern West Virginia. Primarily high- and mid-sulfur coal from these northern Appalachia mines are transported by rail to these dock facilities for transshipment via lake vessel to customers

served by the maritime industry on the Great Lakes.[2] End users include electric utilities and industrial customers on the Great Lakes and export traders which serve markets overseas via the St. Lawrence Seaway. Howerter V.S. at 3.

Since the mid-1980s, the scope of the lake coal market has been expanded to include the movement of low-sulfur coal to the historical users of the P&C and Ashtabula Docks (the same electric utilities, industrial customers and export traders described above). More stringent federal and state environmental regulations have forced many of the long-term users of the P&C and Ashtabula Docks to purchase low-sulfur coals and decrease, or in some cases, abandon traditional higher sulfur coal sources. Howerter V.S. at 3.

The lake coal market to the P&C and Ashtabula Docks does not include shipments of low-sulfur coal from the central (as opposed to northern) Appalachia coal fields. Coal from the central Appalachia coal fields moves via NS' lake terminal at Sandusky, Ohio, or CSXT's lake terminal at Toledo (which is also served by Conrail). The central Appalachia coal fields consist generally of mines located in eastern Kentucky, Virginia and southern West Virginia. See Map attached as Exhibit A to the Verified Statement of Grant R. Seiveright, BLE-8 at 43. The central Appalachia coal mines involved are almost exclusively served by NS and CSXT, both of which provide efficient, single-line service from these mines to Sandusky/Toledo. NS and

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[2] Some of the West Virginia coal is low sulfur, originating on CSXT and routed to P&C Dock at Conneaut.

CSXT do not serve the same customer base and end-user markets as B&LE and Conrail serve via Conneaut/Ashtabula. Furthermore, as the coal mining industry in northern Appalachia has evolved into a concentration of production controlled by several very large coal companies that utilize longwall mining technology, transportation economics have not supported the movement of the high- and mid-sulfur production from those mines to Sandusky/Toledo, which are at least 120 rail miles farther west. Howerter V.S. at 3-4.

Northern Appalachia coal which has moved through P&C Dock has traditionally come from either coal mines directly served by the B&LE or from sources with access to the river (which permits the coal to be barged to Duquesne Wharf and transferred to B&LE rail cars for movement to the Lake), or from off-line mines which reach the B&LE via rail connections. P&C Dock and its coal sources directly compete with Conrail's Ashtabula Dock and Conrail's own portfolio of coal sources, including directly-served origins in Pennsylvania, West Virginia and Ohio and off-line sources interchanged to Conrail via its own connections, including the former Monongahela Railway ("MGA"). Howerter V.S. at 6.

Thus, the competition for movements of northern Appalachia primarily high- and mid-sulfur coals to the lake coal market is between Conrail's Ashtabula Dock and B&LE's P&C Dock at Conneaut. P&C Dock and Ashtabula have not directly competed with Sandusky (NS) and Toledo (CSXT) for the most part because of a

different end-user customer base and because the coal chemistry of their respective origins is different. Howerter V.S. at 3-5.

II. B&LE'S DOCK AT CONNEAUT

The B&LE has been a participant in the lake coal market since before the turn of the century, with B&LE's first coal dock commencing operation at Conneaut in 1897. The coal terminal facilities at P&C Dock have since been modernized, refined and expanded over the years. P&C Dock has two separate coal unloading and storage facilities which can operate either independently on a stand-alone basis, or in a coordinated mode to provide unparalleled flexibility. Each unloading facility is capable of unloading an average of two hundred, 100-ton rail cars per eight-hour shift. Each facility is equipped with inbound, automatic sampling. The lower coal facility can store up to 1.7 million tons of coal at any time, and the upper coal facility can store up to 4.0 million additional tons of coal, depending upon the number and size of the stockpiles. Howerter V.S. at 5.

Both the lower and upper coal facilities access two 6,000-ton storage silos. These silos serve two primary functions. First, the silos reduce vessel loading time when operated in concert with each coal facilities' direct rail car to vessel loading capability and each facilities' coal reclaiming capacity. Second, the silos provide the ability to blend coal as demanded by the market through seven adjustable, metered discharge gates which are located at the base of each silo. Both coal facilities also share access to two ship-loaders which can load coal into either lake vessels or barges. The rated capacity

of the two ship-loaders is 11,000 tons per hour. Howerter V.S. at 5.

III. THE APPLICANTS' PROPOSED TRANSACTION

Under the proposed division of Conrail's assets, NS (through Pennsylvania Lines LLP "PRR") will acquire Conrail's former MGA coal lines (serving primarily northern Appalachian mines), Conrail's rail line between Youngstown and Ashtabula, Ohio and Conrail's Ashtabula Dock on Lake Erie. NS thus will obtain a single-line route from the MGA coal mines to Lake Erie. NS will grant trackage rights to CSXT over the former MGA lines to access MGA mines, will continue to grant CSXT trackage rights over the NS/PRR/Conrail line from Youngstown to Ashtabula, and will allocate 42% of the capacity of Ashtabula Dock to CSXT. In each instance the rail lines and the Ashtabula Dock will be owned, controlled and dispatched by NS.

IV. B&LE AND SHIPPERS' RESPONSE TO THE PROPOSED TRANSACTION

After consulting with the principal shippers and receivers of coal in the affected lake coal market, B&LE proposed certain conditions set forth in its Comments and Requests and Responsive Application designed to ameliorate the harmful effects to the public interest that would otherwise result from the proposed transaction.[3] Not surprisingly, given the critical importance of adequate and competitive rail transportation and dock facilities to the movement of coal from northern Appalachia

[3] The "ARGUMENT" section infra discusses the transaction-related harms and proposed conditions in detail.

to the Great Lakes, B&LE's proposed conditions have received strong support from major utilities and coal producers in the lake coal market. See Shipper Verified Statements submitted with B&LE's Comments and Requests. All of these shippers submit strong and compelling evidence that absent the relief proposed by B&LE the transportation of coal in this critical region will be seriously threatened under the Primary Applicants proposed transaction in regard to both capacity and competition. The extensive support from some of the largest producers and consumers of coal in the lake coal market is telling of the merger related threat to both capacity and competition for these important coal shipments.

For example, in his verified statement, Mr. James H. Bonnie of Niagara Mohawk Power Corporation ("Niagara Mohawk") addresses the critical need to ensure that participants in the lake coal market have reliable, long-term access to adequate transportation and dock facilities for lake coal shipments. See Verified Statement of James H. Bonnie, BLE-8 ("Bonnie V.S.") at 9. Niagara Mohawk is a major utility company based in Syracuse providing electric service to over 1.5 million customers in eastern and upstate New York. The Company's total electric generating capacity is 8,194,000 kilowatts, of which approximately 1.3 million kilowatts is generated by the Company's two coal-fired power plants. To fuel these plants, Niagara Mohawk purchases approximately 3 million tons of coal per year.

Mr. Bonnie points out that with the imminent deregulation of the electric power industry and, at the same

time, the implementation of more stringent air emission standards, the survival of the industry will depend heavily on the ability to generate electricity at low cost. Bonnie V.S. at 2-3. He confirms that economical access to the available capacity of B&LE and P&C Dock is a "key component" to meeting these challenges. Bonnie V.S. at 3.

In order to maintain some level of competition for the transportation of coal to Niagara Mohawk's plants, which are currently served by Conrail and will be served only by CSXT under the proposed merger, Niagara Mohawk has purchased coal from the Cumberland Mine of Cyprus Amax Coal Company, a Pittsburgh Seam mine with access to barge service on the Monongahela River. Cumberland Mine is one of the few longwall producers that is not captive to Conrail. Coal from Cumberland is routed via barge to B&LE's Duquesne Wharf for movement to P&C Dock for transfer to lake vessel for delivery to Niagara Mohawk's plants. Current contracts in place support up to 500,000 tons of Cumberland Mine coal via B&LE through P&C Dock annually.

In his verified statement, Mr. Bonnie notes a number of merger-related harms that Niagara Mohawk will suffer. The first is that:

> as a result of the proposed Conrail transaction, the existing limited competitive alternative we have developed via B&LE and P&C Dock, even with Cumberland Mine coal, could be in jeopardy. Specifically, we are very concerned that unless B&LE is assured a fair opportunity to compete for coal moving from mines on the former Monongahela Railway to the lake, B&LE management may elect to downgrade or even abandon the B&LE and downsize P&C Dock to meet current levels of usage. Thus, not only do we face a

> competitive block on our ability to expand our use of blended coal through P&C Dock, we face the possibility that our existing limited competitive alternative may be lost.

Bonnie V.S. at 9 (emphasis added).

He also notes that Niagara Mohawk's future needs for blended coal are seriously threatened by the proposed transaction as Niagara Mohawk's increased need cannot be adequately served by NS and CSXT alone. Bonnie V.S. at 7-8. Without P&C Dock's blending capabilities, Niagara Mohawk's ability to economically acquire blended coal is effectively cut off. Id. Blending at Ashtabula will be unavailable to handle increased needs as Ashtabula's capacity and ability to process the needed coal will effectively be prevented due to the Dock's capacity and service problems. Bonnie V.S at 9.

Accordingly, Niagara Mohawk strongly supports the conditions sought by B&LE in this proceeding. As Mr. Bonnie states:

> B&LE is a known transportation supplier to Niagara Mohawk and has a proven track record when given the chance to compete. Unless the proposed Conrail transaction is conditioned so as to assure competitive joint line rates with B&LE to P&C Dock, our ability to continue to develop this competitive alternative will be frustrated and even worse, may be lost.

Bonnie V.S. at 9 (emphasis added).

The CONSOL Coal Group ("CONSOL") also submitted a detailed verified statement describing its concerns with the proposed transaction and supporting B&LE's proposed conditions. See Verified Statement of William G. Rieland, BLE-8 ("Rieland V.S."). CONSOL is a major bituminous coal producer operating in

various coal basins throughout the United States. In 1996, CONSOL mines produced approximately 72 million tons of coal and had sales of nearly $2.4 billion. CONSOL sells its products to electric utilities and industrial customers throughout the eastern and Midwestern areas of the United States, electric utility and steel industry customers in Canada, and to electric utilities and steel companies in 24 foreign countries. Rieland V.S. at 1-2.

CONSOL operates the Bailey, Enlow Fork, Blacksville and Loveridge Mines located in southwestern Pennsylvania and northern West Virginia. These mines are currently served exclusively by Conrail which acquired the Monongahela Railway in 1990. All of the coal produced from these mines, currently 24 million tons per year, is shipped by rail. These mines are all directly affected by the proposed breakup of the Conrail system. Rieland V.S. at 2.

Given that the market for coal has expanded steadily in recent years and is expected to grow steadily into the 21st century, CONSOL points out that "[i]t is absolutely critical to CONSOL's long-term competitive position that the rail transportation infrastructure available have sufficient capacity, be efficient, flexible and provide adequate levels of service to handle not only current volumes but increased volumes of traffic." Rieland V.S. at 3.

The lake coal market represents one of the most important markets for the coal from CONSOL's Pennsylvania and northern West Virginia mines. To meet the demands of this

market, CONSOL must efficiently move the coal north to vessel-loading facilities on Lake Erie, where it can be unloaded from railcar, stored, and loaded into vessel for movement by water to the ultimate customer. Because CONSOL has very limited space to store coal at its mines, it is absolutely essential to its ability to competitively market coal from its mines to the lake coal market that access be available to adequate facilities for the shipment, storage, and reshipment of this coal to its ultimate destination. Rieland V.S. at 3-4.

CONSOL points out that at first blush, the proposed Conrail transaction, which provides for both NS and CSXT to jointly serve mines on the former Monongahela Railway, including CONSOL mines, would seem to provide more capacity and more options, not less. Rieland V.S. at 4.

However, CONSOL points out that:

> with respect to our ability to be efficient and participate in the lake coal market, we believe that without regulatory intervention, the Conrail transaction as presently structured, will actually result in inadequate service and <u>less</u> capacity being available to us than we have now. As we propose to increase our MGA production, CONSOL is concerned that insufficient lakefront capacity would limit our success in the lake coal market.

<u>Id</u>. (emphasis in original).

Specifically, CONSOL notes that the Ashtabula Dock simply does not have the facilities or the capacity to handle the volume of coal that is expected to move to the Lake in the near future, let alone expanded production over the long term. <u>Id</u>. In 1997, approximately 12% of the coal from CONSOL's MGA mines

moved via Conrail over the Youngstown-Ashtabula line and through the Ashtabula Dock. That current traffic was bottlenecked and subject to congestion on a recurring basis, particularly in the period between August and the end of the Lake shipping season. Id. The "result of congestion at the Dock is that CONSOL gets 'rationed,' i.e., only allowed to load the number of cars prescribed by Conrail, regardless of how much coal needed to move and regardless of customers' needs and shipping schedules." Id. at 4-5. Future volume increases will only make the situation worse. As a result, CONSOL "strongly supports" the conditions proposed by B&LE in this proceeding.

Cyprus Amax Coal Sales Corporation, the marketing and sales arm of Cyprus Amax Coal Company ("Cyprus Amax" or "the Company"), similarly supports imposition of B&LE's conditions. See Verified Statement of Brad F. Huston, BLE-8 ("Houston V.S."). Cyprus Amax is the second largest coal mining company in the United States. Cyprus Amax currently operates 21 coal mines in 9 states, including mines located in the Powder River Basin, Colorado, Utah, the Illinois Basin, Kentucky, Pennsylvania, West Virginia and Tennessee. In 1996, Cyprus Amax mined 82 million tons of coal from total company reserves of 2.5 billion tons. Although Cyprus Amax participates in the metallurgical and industrial coal market, the vast majority of the Company's coal is sold to domestic electric utilities. Cyprus Amax points out that "[t]he adequacy of the rail transportation facilities and service available to our Company is a critical factor in our

ability to successfully market our coal to these customers." Huston V.S. at 2.

The market for coal from Cyprus Amax's Pennsylvania mines has expanded steadily in recent years and is expected to grow in the future. Id. at 2-3. To meet the demands of the market for our coal, Cyprus Amax is investing millions of dollars in new equipment to expand production and further reduce operating costs and is investigating the feasibility of opening an entirely new state-of-the-art mine not far from the Cumberland Mine, to tap the Company's Freeport low-sulfur coal reserves in this area. Id. at 3.

Cyprus Amax notes that the transaction as presently structured will make available to it single-line routes from both NS and CSXT between its Emerald Mine and the Ashtabula Dock. However, NS and CSXT plan to move the entire combined volume of both railroads of MGA-originated coal moving to the Lake over the exact same line (between Youngstown and Ashtabula) and through the same dock at Ashtabula. Cyprus Amax points out in no uncertain terms that such a plan will not succeed:

> What [NS and CSXT] propose has failed in the past at existing tonnage levels and will not work in the future at increased tonnage levels. The Ashtabula Dock simply does not have the facilities or the capacity to handle the volume of coal that is expected to move to the Lake in the near future, let alone over the long term. . . . . This already intolerable situation will be made even worse once CSXT begins to market its single line routes from coal mines on its West Virginia lines through Ashtabula Dock, which the

> proposed Conrail transaction gives CSXT a strong incentive to pursue.

Huston V.S. at 5-6 (emphasis added). Moreover, its concerns over the adequacy of service that will be provided extend beyond capacity issues associated with Ashtabula Dock:

> Moreover, we are concerned that the former Conrail line to the Ashtabula Dock between Youngstown and Ashtabula to be owned and operated by NS and over which CSXT will operate via trackage rights, will be unable to efficiently handle the combined volumes of the two railroads and will become a serious operating bottleneck. Indeed, at times, it is already a bottleneck. If a single railroad cannot operate the line without congestion problems today, how can anyone expect that two railroads operating over the same line trying to stay out of each other's way, handling greater volumes than Conrail handles today, will be able to avoid even worse congestion? The effect on our ability to market our Emerald Mine coal in the lake coal market would be greatly hampered.

Huston V.S. at 6-7 (emphasis added). Cyprus Amax "strongly supports" the conditions proposed by B&LE in this proceeding.

Ontario Hydro also strongly supports B&LE's proposed conditions. See Verified Statement of Grant R. Seiveright, BLE-8 ("Seiveright V.S."). Measured by installed generating capacity, Ontario Hydro is one of the largest utilities in North America. Ontario Hydro directly serves almost one million customers and indirectly serves almost three million customers. A portion of its electrical production is sold to utilities in New York and Michigan. The Ontario Hydro system includes 69 hydroelectric stations, 5 nuclear stations, and 6 operating fossil-fueled stations (5 of which burn coal).

Ontario Hydro is one of the largest single receivers of coal in the lake coal market. The two principal Ohio lake terminals or docks used by Ontario Hydro for its coal are Ashtabula Dock and P&C Dock. Although Ontario Hydro supports "meaningful competition" between NS and CSXT over the former MGA, nevertheless it is:

> very concerned that the proposed Conrail transaction will in fact have a substantial adverse effect on Ontario Hydro's long-term access to Pennsylvania and West Virginia coal through the lake terminals in at least two respects: (1) the potential for NS and CSXT to attempt to route <u>all</u> current and future volumes of MGA-origin coal through the already congested Ashtabula Dock; and (2) the potential for CSXT to attempt to route volumes of low sulphur coal, which originate on CSXT in West Virginia and which currently move via B&LE to their dock at Conneaut, to the Ashtabula dock.

Seiveright V.S. at 3-4 (emphasis in original). The need for two viable ports will become even more critical in the near future as Ontario Hydro recently announced that it will begin an extensive overhaul of its nuclear power plants that will result in a lay-up of about one-third of its nuclear generating capacity over the next several years. A significant portion of the replacement generation will come from Ontario Hydro's fossil-fueled plants, which will be operated at higher capacities. This will result in a sharp increase in Ontario Hydro's need for coal through the lake terminals for the next three years and possibly longer. Congestion at any one port, or a loss of Ontario Hydro's ability to use the extensive ground storage and loading capacity at P&C Dock, "would be harmful for the company, the customers (some of whom are, through our sales program, in the U.S.) and our coal

suppliers (in large measure U.S. coal suppliers)." Seiveright V.S. at 5.

The threat to Ontario Hydro from a lack of adequate transportation capacity is clear. "Without access to the facilities and storage areas of the P&C Dock, Ontario Hydro wil not be able to move the volumes of coal that [it] must move over the next three years; and unless significant expansion occurs at Ashtabula or another dock facility in the area, [its] ability to move coal will be jeopardized in the longer term as well." Id. at 5. Consequently, Ontario Hydro "strongly supports" B&LE's proposed conditions. Id. at 6.

ARGUMENT

I. THE CONDITIONS REQUESTED BY B&LE FIT SQUARELY WITHIN THE BOARD'S CRITERIA FOR IMPOSITION OF CONDITIONS IN RAILROAD MERGERS

A. Applicable Standard For Imposition Of Conditions

In considering the Primary Application, the Board has a statutory obligation to, among other things, consider "**the effect of the proposed transaction on the adequacy of transportation to the public,**" 49 U.S.C. § 11324(b)(1), as well as "**whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.**" 49 U.S.C § 11324(b)(5). See, e.g., Decision No. 44, served October 15, 1997, at 4. The Board's authority to impose conditions on rail consolidation transactions is broad.[4] The Board prescribes conditions upon finding that:

[4] See 49 U.S.C. § 11324(c); Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad

- Absent a condition, the proposed railroad consolidation may produce effects harmful to the public interest (such as to transportation services and competition);

- An appropriate condition will ameliorate (or eliminate) the harmful effects;

- The condition is operationally feasible; and

- The conditions will yield public benefits outweighing any reduction in the benefits of the railroad consolidation.

Id. As is explained in the sections below, B&LE's requested conditions meet each of these criteria and therefore should be granted.[5]

Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760 (STB served August 12, 1996) ("UP/SP") at 144; Burlington Northern, Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (ICC served August 23, 1995) ("BN/Santa Fe") at 55; Union Pacific -- Control -- Missouri Pacific; Western Pacific, 366 I.C.C. 459, 562 (1982), aff'd sub nom. Southern Pacific Transp. Co. v. ICC, 736 F.2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985) ("UP/MP/WP").

[5] In the Application and the Rebuttal submission, the Primary Applicants attempt to rewrite the case law on the standard to be applied, adding provisions that are not part of the case law. For example, Applicants state that a condition "may not be imposed to change the competitive balance among shippers." Applicants' Rebuttal ("App. Reb.") at 42. However, the standard as determined by the Board is a different one. The Applicants themselves quote (App. Reb. at 37) the real standard from the BN/Santa Fe case that the Board is "disinclined" to grant a condition that "would broadly restructure the competitive balance among railroads." BN/Santa Fe at 55-56 (emphasis added). Applicants again fail to follow the very language they quote from BN/Santa Fe when they state that "conditions are not appropriate if alternative remedies exist." App. Reb. at 40. Nowhere in BN/Santa Fe, UP/SP or the other merger decisions is such a rule articulated. Instead, a condition must be "narrowly

B. Merger-Related Harms

In its evidence in this proceeding, B&LE has identified several specific harms resulting from the Conrail takeover. B&LE has demonstrated that transactions contemplated by the Primary Application will diminish the adequacy of transportation services for and have serious anticompetitive effects on the transportation of coal in the eastern United States, particularly from origins on the former MGA in southwestern Pennsylvania and northern West Virginia. Absent appropriate conditions to ameliorate these harms, the proposed transaction cannot be found to be consistent with the public interest. See Comments and Requests at 6-12. In rebuttal, the Primary Applicants have attempted to sidestep B&LE's evidence of the harms by either ignoring, mischaracterizing, or conceding the evidence.

1. Harms To Competition

B&LE seeks to preserve for lake coal customers the competitive alternative interline rates and routes that currently exist for B&O Origin District coal destined for P&C Dock. Today, P&C Dock competes with Conrail's dock facilities at Ashtabula, Ohio, for coal business originating on CSXT bound for vessel movement on the Great Lakes. As a competitive alternative to Conrail's sources routed to Ashtabula, CSXT currently routes its B&O Origin District coal to P&C Dock in interline movements over

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tailored." BN/Santa Fe at 55-56. Even under Applicants' view of the law, B&LE meets the criteria as B&LE's condition ensures adequate transportation services and is the most narrowly tailored condition available in order to ensure adequate transportation services and competition in the lake coal market.

the Buffalo & Pittsburgh Railroad ("BPRR") and B&LE. CSXT delivers the coal to New Castle, PA, for interchange with BPRR, which then moves the coal to Butler, PA. At Butler, B&LE takes over the movement for delivery to P&C Dock. Howerter V.S. at 7.

If the transaction contemplated by the Primary Applicants is approved, CSXT will gain shared access to the Conrail port facilities at Ashtabula, OH, thereby removing any incentive to interline this B&O Origin District coal over the B&LE to P&C Dock. Howerter V.S. at 7. Such action would strike a critical blow to lake coal customers who rely on P&C Dock. For example, as Mr. Seiveright testified, Ontario Hydro relies heavily on the substantial ground storage capacity of P&C Dock. Absent conditions requiring long-term, market-based rates to protect interline movements via B&LE to P&C Dock, CSXT will likely divert this B&O Origin District coal away from P&C Dock to the already congested Ashtabula Dock thus further constraining capacity. Seiveright V.S. at 4. The Board can ameliorate this demonstrated harm through the protection of the existing interline rate structure that will ensure competitive traffic routings for customers desiring to transload coal via P&C Dock.

Thus, the proposed diversion of this coal to Ashtabula will not only result in harm to competition, it will add volume to an overburdened Ashtabula Dock, thus adversely affecting the adequacy of transportation services provided to all shippers and receivers in the lake coal market.

2. Harms To Adequacy Of Transportation

a. Ashtabula Dock is Overburdened

The proposed routing of all MGA coal moving to the Great Lakes via the former Conrail Youngstown-Ashtabula line and the Ashtabula Dock will not result in adequate transportation service to the public or effective competition for the traffic. Currently, Ashtabula Dock runs at full capacity and lacks adequate capacity to efficiently handle all of the current traffic, with Conrail forced to divert traffic from Ashtabula more than 120 miles west to the ports of Sandusky and Toledo, Ohio.[6] These diversions add significant distance, expense and inconvenience to the movement of lake-bound coal.

b. Joint Use Will Overburden Ashtabula Dock Further

The Primary Applicants' proposal to provide joint access to and use of the Ashtabula Dock will cause further and additional problems at the dock. See verified statements attached to BLE-8. Properly coordinating and allocating resources at Ashtabula will not be easy, and the Primary

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[6] Applicants contest B&LE's statement that the Ashtabula Dock is already an overburdened facility. App. Reb. at 144. Interestingly, nowhere do Applicants dispute the accuracy of B&LE's statement. They only assert (inaccurately) that B&LE has provided no factual support for such conclusion. B&LE's extensive verified statements prove otherwise. See BLE-8, Bonnie V.S. at 9, Huston V.S. at 5-7 and Rieland V.S. at 4-6.

Moreover, Applicants' own evidence proves the point. See Rebuttal Verified Statement of John W. Orrison ("Orrison R.V.S.") at 492-493. Applicants admit that during 1997, several trains were diverted from the Ashtabula Dock to the Sandusky or Toledo Dock facilities. See also Rebuttal Verified Statement of Timothy R. Howerter, BLE-9 ("Howerter R.V.S.") at 4-5.

Applicants have not commented on how this may be accomplished. Extremely effective and coordinated management between two archrivals will be required if the joint users are to even approach the volumes of coal handled solely by Conrail today. That is not likely to occur at this already overburdened port facility. See Howerter V.S. at 7, 11-13. Furthermore, CSXT's need to rely on its major competitor for its access to and use of the port, all subject to NS direction and control, will impede effective use of the dock for this important coal traffic. Id.

In their Application, Applicants have stated that the coal dock at Ashtabula will be shared on the basis of Applicants' ownership division of Conrail (58% NS and 42% CSXT). NS will have the right to operate and control Ashtabula Dock with CSXT receiving access to and use of a 42% proportion of the total ground storage throughput and tonnage capacity. What this means in practical terms is decidedly unclear. Does CSXT get 42% of the support track capacity at the dock on a daily, weekly, monthly or some other time-frame basis? Does CSXT get 42% of the carloading dumping turns or do they get 42% of the unloading capacity on a daily, weekly, monthly or some other time-frame basis? Does CSXT get 42% of the storage piles at any time at the dock? Does CSXT have veto power on how its 42% of the ground storage area is used? If one user does not need all its ground storage capacity (whenever and however this may be defined by the Applicants in the future) at any given time, does this mean it is obligated to pass that unused capacity to the other user? Does CSXT get 42% of the use of ground crews? This is anything but an

exhaustive list of the questions that must be answered to determine what the effective capacity of Ashtabula will be after NS and CSXT split up the dock.

The next set of significant questions revolve around how the two companies (NS and CSXT) can share a facility and still get the same throughput as one company (Conrail) does now. As stated above, Conrail as the sole carrier serving the port today already cannot handle current volumes without diverting tonnage to out-of-route ports. NS and CSXT will have to effectively manage and jointly use several shared components needed to deliver coal to the shared coal dock at Ashtabula. First, the rail line between Youngstown and Ashtabula will be owned and dispatched by NS with CSXT retaining trackage rights over this line. It is questionable whether CSXT will get its needed line capacity to effectively utilize its shared use of Ashtabula Dock. Second, the Youngstown-to-Ashtabula line which both CSXT and NS will use to access Ashtabula Dock crosses Conrail's Cleveland-to-Buffalo main line at Ashtabula. CSXT will be assigned ownership of Conrail's Cleveland-to-Buffalo main line and will be responsible for dispatching the line to allow both CSXT and NS trains to cross it in order to get into the port of Ashtabula. Will crossing access be handled equitably?

With so many potential pitfalls and unanswered questions, the Board must assure that shippers in the lake coal market have access to adequate capacity for the handling of both existing coal traffic and the growing market for coal produced by the efficient production Pittsburgh Seam mines. The conditions

proposed herein by B&LE will assure the shipping public of needed port capacity and competition for the movement of MGA-origin coal via B&LE's route to Conneaut, Ohio, and the P&C Dock.

c. Assured Shipper Access to P&C Dock is the Long-Term Solution

P&C Dock at Conneaut is a state-of-the-art port with unused capacity that can immediately address the growing needs of lake coal customers. Howerter V.S. at 5-6. Its coal terminal has been modernized and expanded over the years to provide a facility second to none. P&C Dock offers two separate coal unloading and storage facilities which can operate either independently, on a stand-alone basis, or in a coordinated mode to provide unparalleled flexibility. It has extensive unused capacity available to provide a true competitive alternative to the Ashtabula Dock.[7] Competitive access to the P&C Dock is a necessity if the volumes of coal demanded through the lake coal market are to be efficiently handled for its end users. The lake coal market deserves no less than to have all port facilities available to it to meet its growing capacity and service demands.

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[7] In his Rebuttal R.V.S., Mr. Orrison claims that the P&C Dock is less efficient than the Ashtabula Dock because of multiple switching moves needed to access and utilize the rotary dumper. Orrison R.V.S. at 489. Mr. Orrison does not know what he is talking about. First of all, there are two dumping facilities at the P&C Dock, one utilizing a rotary dumper and one utilizing a bottom drop dumper. Currently, the rotary dumper is not being utilized because it is not needed based on the amount of coal currently moving through the P&C Dock. Howerter R.V.S. at 7. Secondly, as further detailed in the Rebuttal Verified Statement of James E. Streett, BLE-9 ("Streett R.V.S.") there are no multiple switching moves required to utilize the rotary dumper. Moreover, the bottom drop dumper that is in use at P&C Dock has the capacity to unload approximately 10 million tons of coal per year -- significantly more than the facility at Ashtabula.

The issue presented by the proposed Conrail transaction is not about protecting B&LE, its port at Conneaut, or its long-term coal sources from changes in competition in the lake coal market. It is about assuring adequate transportation service to the shipping public and retaining essential port capacity to support the lake coal customers in their fuel procurement and transportation purchases. The service and capacity provided by B&LE and P&C Dock is vital to the transportation needs of the lake coal customers. Access to both ports (Ashtabula and Conneaut) provides access to three unloading systems instead of one, three ground storage areas instead of one, three ship-loaders instead of one, and additional facilities and capabilities to satisfy current and future customer coal transfer, storage and ship-loading needs. Howerter V.S. at 6-7.

As demonstrated in the Verified Statements of Grant R. Seiveright, James H. Bonnie, Brad F. Huston and William G. Rieland, representing some of the largest coal producers and users in the lake coal market, two carriers (NS and CSXT) jointly serving an already congested port at Ashtabula on a shared basis (and acting to foreclose shipper access to P&C Dock on a competitive basis) will not come close to being able to provide adequate transportation service, or the total port capability, total port capacity and competitive options responsive to the needs of lake coal customers.[8]

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[8] The Applicants allege that "[w]hat B&LE actually seeks is redress of wrongs it claims it suffered when Conrail was granted control of the Monongahela Railway by the ICC in 1991." App. Reb. at 145. Again, they are wrong. What B&LE seeks is to ensure that adequate transportation service will

As their main defense to the shippers' testimony regarding the inadequacies of Ashtabula Dock, the Applicants claim that there are inconsistencies and contradictions in the Verified Statements submitted by B&LE concerning the capacity of the Ashtabula Dock. Applicants cite to the V.S. of Mr. Seiveright of Ontario Hydro at 4 and to the V.S. of Mr. Howerter at 7. Even a cursory look at both statements shows that they are not at all inconsistent or contradictory. Mr. Howerter simply and accurately stated that current capacity at Ashtabula was constrained and that traffic diversions anticipated in a post-transaction setting would further burden that facility. Mr. Seiveright stated that Ashtabula currently has adequate ground storage capacity available for Ontario Hydro (unlike other shippers, see, e.g., Rieland V.S. at 4-5). That Ontario Hydro's ground storage capacity needs are currently being met is hardly proof that Ashtabula Dock overall has adequate capacity to accommodate all of the MGA coal moving to the lake coal market. Nor does it mean that the Dock has adequate loading or unloading

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be provided for MGA-origin coal moving to the lake and that Great Lakes coal customers have a real competitive alternative to moving MGA-origin coal through the Ashtabula Dock facility. What happened in 1991 is history, but seeking to protect the market from being subjected to inadequate service, as both NS and CSXT attempt to move all of the MGA coal over the same line to Ashtabula and through the same congested Ashtabula Dock, is not. The Applicants argue that market forces will serve to direct the movement of MGA-origin coal. However, the market cannot function properly if the combined traffic cannot be handled over congested and inadequate facilities and the customers have no other options. The conditions sought by B&LE are intended to provide MGA coal customers with a true service and competitive option that the Applicants' proposal will not.

facilities, nor does it account for the increased traffic that the Applicants admit the Ashtabula Dock will experience.

The Applicants' failure to respond to B&LE's evidence of current and future service and capacity problems at Ashtabula Dock is telling of the merger-related harms that B&LE and its shippers will suffer.

d. The Coal Market in the Future Will Push Volumes to Ashtabula That it Cannot Handle

A review of current and projected coal and coal transportation market conditions confirms why the conditions sought by the B&LE are needed to assure adequate service and competitive options for the lake coal market. Historically, the traffic base for the Ports of both Conneaut and Ashtabula has consisted of high- and mid-sulfur steam coals from northern Appalachia producers located in central and western Pennsylvania, northern West Virginia and eastern Ohio. Since the early 1970s, various economic and environmental factors have reduced the marketability of northern Appalachian coal in its broad market segments, including the lake coal market. Although total production in northern Appalachia has decreased by over 20% since 1980, one significant production area has expanded and prospered -- the Pittsburgh Seam mines which utilize highly efficient longwall mining technology. Howerter V.S. at 11.

The evidence submitted by B&LE demonstrates that production and shipment of coal to the lake coal market via the Ashtabula or P&C Dock will increase in the future. See, e.g., Seiveright V.S. at 5. The Primary Applicants do not dispute this

point. But when faced with the question of how they will be able to handle such further traffic increases, their response is legal one that there is no proof that Ashtabula is already congested.

e. Without Conditions, P&C Dock 's Future is Threatened

If NS and CSXT are allowed to foreclose shipper access to P&C Dock on competitive terms, P&C Dock will likely experience further declines in the amount of lake coal traffic transloaded at the port. See, e.g., Huston V.S. at 8. The likely diversion of the B&O Origin District Coal from P&C Dock to Ashtabula Dock will continue the recent downward trend of lake coal business moving through P&C Dock in Conneaut. This downward trend has not, however, been the result of inadequate service or facilities at the P&C Dock. Rather, it has resulted from Conrail's market power and revenue incentive to route nearly all northern Appalachia coal to its Ashtabula Dock to the exclusion of P&C Dock. This has not been in the best interests of the participants in the lake coal market which have been forced to accept delay, disruptions and diversion of their traffic. If this is allowed to worsen, as it will under the transaction proposed in the Primary Application, continued maintenance of current operations at P&C Dock may not be possible. Id.

C. B&LE's Proposed Conditions Will Ameliorate The Demonstrated Harms

In its Responsive Application, B&LE seeks limited overhead trackage rights over approximately 54 miles of rail line in a single, defined area of one state. B&LE Resp. App. at 8. As is explained more fully in the Responsive Application and the

Verified Statement of B&LE Director of Marketing Timothy R. Howerter which accompanies it, the requested trackage rights will become effective only in the event that NS initiates or provides haulage service for CSXT to and from the current and future mines served by the former MGA. If activated, the proposed trackage rights will ensure and enhance adequate transportation service and competitive routing options for MGA-origin coal. Such rights will clearly offer lake coal customers competitive service to the P&C Dock where, in the absence of such trackage rights, none would exist.

It should be noted that the trackage rights sought in B&LE's Responsive Application would become effective only in the event that NS initiates or provides haulage service for CSXT to and from the current and future mines served by the former MGA in southwestern Pennsylvania and northern West Virginia. Thus, the trackage rights are intended to work in conjunction with any such haulage arrangement to allow for the efficient movement of coal from the MGA mines to the B&LE and via the B&LE to P&C Dock at Conneaut. B&LE has not sought to compel any haulage arrangement with NS, but rather to provide for efficient operations and an additional shipper option should NS and CSXT implement such an arrangement.

To make the requested trackage rights work effectively for the movement of coal originating on the former MGA lines, NS would haul the traffic directly to the B&LE at either Shire Oaks or Brownsville where B&LE would move it north via the trackage rights back to its own line and on to the P&C Dock. The haulage

rights provided by NS between the mines and Shire Oaks/Brownsville would be under the same terms and conditions as those between CSXT and NS.

Even in the absence of a haulage agreement between CSXT and NS that would trigger the B&LE trackage rights, the lake coal customers must still be assured of adequate coal transportation services to and adequate coal handling capacity at the Lake Erie ports. As shown in the evidence submitted by B&LE and its supporting shippers, under the transaction contemplated by the Primary Applicants that will not occur. Therefore, B&LE has also requested that the Board condition any approval of the proposed Conrail transaction on assuring that coal shippers from MGA and B&O Origin Coal District mines have access on competitive terms to the facilities and capacity of B&LE's line to P&C Dock. B&LE's condition would assure that competitive long-term, market-based joint line rates and routings via B&LE would be available to meet the future market demands of the lake coal market. Comments and Requests at 12-13.

In their Rebuttal, Applicants seriously mischaracterize the trackage rights condition sought by the B&LE. Such mischaracterization seems calculated to distract the Board from the legitimate service and competitive issues raised by B&LE and others concerning the movement of MGA-origin coal to the lake coal market in the post-Conrail environment. Applicants state that it is B&LE's position that "coal producers in the Monongahela area should be offered yet a third carrier." App. Reb. at 143. They also state that adding a third carrier's

operations to these lines would further complicate an already complex operational situation. See Orrison R.V.S. at 489-492. Applicants have completely missed (or ignored) the point.

B&LE does not seek to add a "third" carrier. As expressly stated in B&LE's Responsive Application, the trackage rights sought by B&LE would only be triggered in the event NS were to provide haulage service for CSXT to and from the mines, in which case only NS would have direct operating access to the MGA mines. B&LE's proposed condition seeks only to assure that adequate transportation service to the lake coal market will be provided by assuring access to the additional service, and line and dock capacity of B&LE's route via P&C Dock. Applicants' operating plan contemplates that regardless of any haulage arrangement, NS and CSXT plan to move all MGA-origin coal moving to the Great Lakes over the same rail line between Youngstown and Ashtabula and through the same dock at Ashtabula. As discussed infra, NS and CSXT will not be able to provide the capacity or needed service levels to move the combined tonnage of MGA-origin coal. Shippers in the lake coal market require the protection afforded by B&LE's proposed conditions to assure that adequate transportation service will be provided to this market.

D. B&LE's Conditions are Narrowly Tailored To Remedy The Demonstrated Harms

B&LE's conditions do not guarantee any business to the B&LE, only an equitable means for B&LE to offer shippers the service and capacity demanded by the market. The requested conditions will assure adequate competition for both NS and CSXT in providing service through their acquired port at Ashtabula as

well as assuring adequate transportation services to the lake coal market. Tellingly, the Applicants have not cited a less burdensome alternative.

E. B&LE's Proposed Conditions Are Operationally Feasible

The trackage rights condition that B&LE seeks as a condition to STB approval of the transaction is operationally feasible. See Verified Statement of James E. Streett, BLE-8 ("Streett V.S.") at 2-3. Each of the two lines over which B&LE would obtain trackage rights has adequate capacity to accommodate the trackage rights operation proposed by B&LE. Id. Marketing forecasts indicate the availability of one to three million tons of MGA-origin coal that could move on B&LE via the trackage rights proposed in this proceeding. Id. Assuming B&LE were to handle two million tons of such coal, it would require operation of approximately four trains per week over the trackage rights lines with each train handling about 10,000 tons of coal. This service would require the addition of eight engine and train crews per week on each of the URR and B&LE. Id.

In response, the Applicants allege that the operation proposed by B&LE to move MGA-origin coal to the P&C Dock would be inefficient. They assert that yard congestion, lack of appropriate staging facilities, inadequate locomotive power, and track and grade problems exist on the B&LE and less efficient dock facilities at P&C Dock make the B&LE/URR route less desirable for lake coal customers. None of these unsubstantiated claims is accurate. See Streett R.V.S. at 2-4. In fact, currently two and one-half million tons of coal move over B&LE's

route annually and P&C Dock is a modern and efficient facility with substantially greater throughput capacity than Ashtabula Dock. Id. See also Howerter V.S. at 15.

Specifically, Applicants claim that the proposed movement from B&LE to URR to CSXT at Bessemer is "not an efficient connection." Orrison R.V.S. at 489. They claim that switching operations and movement of road trains originating and working at Demmler Yard (just south of Bessemer) would become congested causing delay to CSXT, BLE and URR operations. Id. Applicants' argument indicates their lack of familiarity with BLE/URR facilities. B&LE/URR trains would not be required to stop and/or switch cars at Demmler Yard. Streett R.V.S. at 2. Trains moving through Demmler Yard would be unit trains operating on the mainline. Id. They could efficiently move past Demmler Yard in 15 to 20 minutes without significant disruption to other road and yard operations. Id. at 2-3.

Similarly, Applicants assert that under their current operating plan, car inspection and staging of trains moving into Newell Yard will be done at New Castle, PA and Cumberland, MD. Orrison R.V.S. at 489. They argue that the B&LE/URR trains coming into their system through Bessemer will create congestion, inefficiencies and delay, apparently because they believe that B&LE staging and car inspection work will be done at Newell Yard. Applicants here again misunderstand the proposed trackage rights operations. First, the staging of such trains in Newell Yard would be minimal or non-existent. The operating plan submitted by B&LE provides that unit trains of empties will be delivered to

Newell Yard for subsequent movement intact to the mines and a loaded unit train will be retrieved intact at Newell and operated north. Staging of B&LE trains in Newell Yard would therefore be unusual. Streett R.V.S. at 3.

Nor is the fact that Applicants do not plan to perform car inspections at Newell material to B&LE's operations. B&LE plans to perform required car inspections at Conneaut on outbound empties and at North Bessemer Yard for loaded trains moving north. This will fully comply with all applicable federal regulations. If operationally necessary, B&LE is prepared to send URR car inspectors to Newell Yard to perform the required inspections. Streett R.V.S. at 3.

Finally, Applicants claim that the proposed B&LE route is less efficient than the route to Ashtabula because the "grades and curvature on the [B&LE] route require more motive power than the Youngstown-Ashtabula line." Orrison R.V.S. at 492. That is a wholly inaccurate statement. The grades and curvature on the B&LE route are typical of the entire geographical region and are no more difficult than those existing on the route to and from Ashtabula. Streett R.V.S. at 4. Simply put, there are no operational impediments to the service proposed by B&LE/URR. The rebuttal points raised by the Applicants are simply untrue or immaterial and represent a poorly disguised effort to inject confusion into the record.

F. B&LE's Proposed Condition Will Not Diminish The Benefits Of The Conrail Takeover

Applicants cite as the primary public benefit of the proposed transaction the introduction of "rail competition into

areas previously rail-served only by Conrail." App. Reb. at 13. Given this backdrop of cited public benefits, the Applicants have not argued and, therefore, concede that B&LE's requested condition will not reduce the cited public benefits of the transaction and, in fact, is consistent with the public benefits.

B&LE's conditions ensure that adequate transportation services, capacity and competitive routing options will be available to meet the future transportation needs of shippers in the lake coal market. It is simply not credible for the Applicants to argue that the public benefits of the proposed Conrail transaction would in any way be reduced by B&LE's conditions.

These proposed conditions are necessary to ameliorate the anticompetitive and harmful effects of the transaction proposed in the Primary Application upon the transportation of certain northern Appalachia coal to the Great Lakes. These conditions have been narrowly crafted to help satisfy the port capacity needs of the lake coal market and provide essential competition to the Ashtabula Dock. The conditions requested will not diminish the anticipated benefits of the transaction as proposed in the Primary Application.

CONCLUSION

For the foregoing reasons, B&LE respectfully requests that if the Board decides to approve the proposed Conrail transaction, it condition such approval upon grant of the trackage rights and efficient routing relief sought by B&LE in this proceeding.

Respectfully submitted,

By: _____

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Dated: February 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 1998, a copy of the foregoing **Brief of Bessemer and Lake Erie Railroad Company** (BLE-10) was served by overnight delivery upon the Primary Applicants herein, as follows:

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and by first class mail, postage prepaid, upon all designated parties of record appearing on the Surface Transportation Board's official service list in this proceeding, served August 19, 1997 and revised on October 7, 1997 and December 5, 1997.

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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 Brief of Potomac Electric Power Company (PEPC-8). In accordance with the Board's order, we have enclosed a Wordperfect 5.1 diskette containing this filing.

Also enclosed for filing please find an original and twenty-five (25) copies of the REDACTED, PUBLIC VERSION of the Brief of Potomac Electric Power Company (PEPC-9).

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

Sincerely,

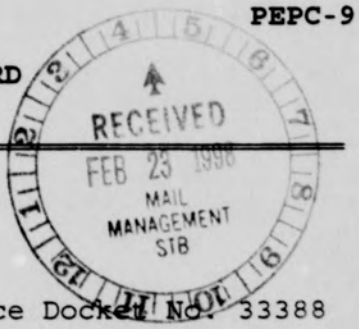
Christopher A. Mills
An Attorney for Potomac
Electric Power Company

Enclosures

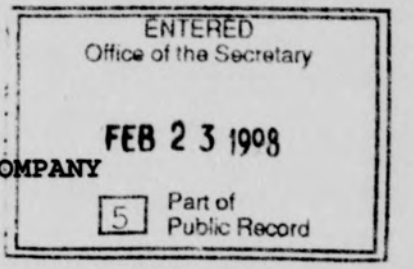
18553

PEPC-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



BRIEF OF
POTOMAC ELECTRIC POWER COMPANY

REDACTED, PUBLIC VERSION

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Dated: February 23, 1998

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

BRIEF OF
POTOMAC ELECTRIC POWER COMPANY

Pursuant to the Board's prior orders in this proceeding, Potomac Electric Power Company ("PEPCO") hereby submits its brief in opposition to the proposed acquisition and division of Conrail (the "Conrail Control Transaction" or the "Transaction") by CSX Corporation and its rail affiliates ("CSX") and Norfolk Southern Corporation and its rail affiliates ("NS") (collectively the "Applicants"). As PEPCO demonstrated in its October 21, 1997 Comments (PEPC-4), the Transaction is inconsistent with the public interest and should be denied, absent the imposition of certain conditions to ameliorate its harmful effects.

SUMMARY OF POSITION

Under the Applicants' proposal for the division of Conrail, CSX will acquire Conrail's Pope's Creek Secondary Line, which serves PEPCO's Chalk Point and Morgantown electric gener-

ating stations in southern Maryland.[1] CSX therefore will replace Conrail as the exclusive provider of rail service to these plants, and will assume control over rail service to all three of PEPCO's baseload, coal-burning plants (i.e., the Chalk Point, Morgantown, and Dickerson Generating Stations).[2]

Moreover, the replacement of Conrail by CSX as the sole rail carrier serving PEPCO's Morgantown Generating Station will eliminate an existing constraint on rail rates to that plant. Specifically, through the elimination of a potential "build-out" option (in the form of the construction of a barge unloader) to enable PEPCO to obtain rail/water delivery of coal to the Morgantown Station via CSX's line to Baltimore, this replacement will preclude PEPCO's ability to constrain its rail rates through the threatened or actual introduction of direct competition.[3]

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[1] The Pope's Creek Secondary extends from Bowie, MD to Brandywine, MD, a distance of approximately 24.9 miles, where it splits into two branches. One branch extends 17.3 miles to the Chalk Point Generating Station, which is located on the lower Patuxent River near Herbert, MD. The other branch extends 24.4 miles to the Morgantown Generating Station which is located on the lower Potomac River near Woodzell, MD. The Verified Statement of Susann D. Felton ("Felton V.S."), which PEPCO submitted with its October 21, 1997 Comments, includes a map depicting the Pope's Creek Secondary as Exhibit SDF-1.

[2] CSX presently provides sole destination service to the Dickerson Station.

[3] As is explained in greater detail below, the Transaction destroys the effectiveness of this threat because

In addition, the Conrail Control Transaction also will extend new competitive rail service to certain of PEPCO's electric utility competitors (i.e., fellow members of the "tight" Pennsylvania-New Jersey-Maryland Interconnection pool ("PJM")), without doing the same for PEPCO -- thus resulting in relative competitive harm to PEPCO that can only be remedied by the imposition of a trackage rights condition. Significantly, the Applicants acknowledge this effect, but seek to prevent the Board from considering this impact of their Transaction.

Finally, the Conrail Control Transaction will also threaten PEPCO with direct financial harm because of the possibility of ultimate responsibility for the huge premium that the Applicants are paying to acquire Conrail. PEPCO and similarly-situated captive shippers should not be forced to subsidize the Applicants' grand ambitions.

The narrow conditions requested by PEPCO are designed to ameliorate these harmful effects. First, the Board should require CSX to grant trackage rights to NS over the Pope's Creek Secondary Line for purposes of delivering shipments of coal to the Chalk Point and Morgantown plants. These trackage rights would allow NS to operate in competition with CSX, and thus would permit PEPCO to maintain a level playing field with its rival electric generators. Second, the Board should require CSX to remove the acquisition premium over Conrail's pre-acquisition book value from all cost and other financial data that are rele-

vant to the Board in making rail rate reasonableness determinations.[4]

BACKGROUND

As indicated in its October 21, 1997 Comments (PEPC-4), PEPCO owns and operates four coal-fired generating facilities. These include the 2,423 megawatt ("MW") Chalk Point Generating Station, the 1,412 MW Morgantown Generating Station, the 837 MW Dickerson Generating Station, and the 482 MW Potomac River Generating Station. At the present time, Conrail provides exclusive destination service to both the Chalk Point and Morgantown Stations which are located in southern Maryland. CSX provides exclusive service to the Dickerson Station, located in northwestern Montgomery County, Maryland, and NS provides exclusive service to the Potomac River Station located at Alexandria, Virginia.

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[4] As indicated in its Comments, PEPCO supports the request of Eighty-Four Mining Company that its Mine 84 be included in the "MGA" region for purposes of this Transaction, thus enabling it to be served by both CSX and NS. Such an inclusion is necessary to counteract the Applicants' disparate treatment of western Pennsylvania coal origins (and therefore to further competition between the two remaining eastern carriers).

PEPCO otherwise supports the Applicants' plan for joint access to the MGA region, and submits that such access is in the public interest. In this regard, PEPCO requests that the Board condition any approval of the Transaction upon the Applicants' provision of joint access to the MGA region as set forth in the Application, and in so doing, require equal and fair service conditions for each carrier.

The Dickerson, Chalk Point and Morgantown Stations are baseload power plants, which means that

. However, during certain "shoulder" periods, i.e., the late-night hours in the Spring and Fall, when both the PEPCO system and the PJM system (of which PEPCO is a part) have excess capacity, these plants have to compete with other generation facilities for load (particularly for off-system sales).[5]

The proposed Conrail Transaction, as structured by agreement between CSX and NS, involves the transfer of Conrail's Pope's Creek Secondary Line to CSX. Thus, the Transaction as presently configured would secure CSX's status as the sole rail carrier serving the Chalk Point and Morgantown Stations (in addition to maintaining its existing control over rail deliveries to the Dickerson Station). As PEPCO will demonstrate below, CSX's destination monopoly at the three largest of PEPCO's four coal-fired plants will give it significant new market power that will enable it to limit PEPCO's coal options for compliance with Phase 2 of the Clean Air Act Amendments of 1990.

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[5] Even during these periods, however,

. See Felton V.S. at 7-8.

ARGUMENT

I. Legal Standard

The proposed acquisition and division of Conrail is subject to the Board's review pursuant to the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) ("ICCTA"). As the Board has explained, the "single and essential standard of approval" for merger transactions is the public interest standard set forth at 49 U.S.C. § 11324(b)(1) and (2). Finance Docket No. 32760, Union Pacific Corp., Union Pacific R.R. Co., and Missouri Pacific R.R. Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and The Denver and Rio Grande Western R.R. Co., Decision No. 44, served August 12, 1996, at 98 (unprinted) ("UP/SP"), petition for review pending, Docket No. 96-1373, Western Coal Traffic League v. STB, (D.C. Cir.).[6]

To determine whether a merger is in the public interest, the Board balances the claimed economic and operational benefits of the merger against any potential competitive harm. Moreover, the Board is required to consider the following factors:

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[6] Citing, Missouri-Kansas-Texas R.R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981); Penn-Central Merger and N&W Inclusion Cases, 389 U.S. 486, 498-99 (1968).

> (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.

49 U.S.C. § 11324(b) (emphasis added).

Moreover, the Board must consider, inter alia, whether claimed or perceived public benefits are overshadowed by purely private benefits, which accrue solely to the merging carriers at the expense of the public. See CSX Corp. -- Control -- Chessie and Seaboard C.L.I., 363 I.C.C. 518, 551-52 (1980). As the ICC stated in its UP/CNW decision:

> [B]enefits to the combining carriers which are the result of increased market power, such as the ability to increase rates at the same or reduced service levels, are exclusively private benefits that detract from any public benefits associated with the control transaction.

See Finance Docket No. 32133, Union Pacific Corp., Union Pacific R.R. Co. and Missouri Pacific R.R. Co. -- Control -- Chicago and

North Western Transp. Co. and Chicago and North Western Ry. Co., Decision served February 21, 1995, at 53.

Consistent with the breadth of its oversight and review responsibilities, the Board has broad authority to protect and promote the public interest by imposing conditions on a rail consolidation so as to reduce or eliminate its detrimental effects. See Union Pacific -- Control -- Missouri Pacific; Western Pacific, 366 I.C.C. 459, 562-64 (1982), aff'd sub nom. Southern Pacific Transp. Co. v. ICC, 736 F.2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985); see also 49 U.S.C. § 11324(c). Where harmful effects are shown to result from a proposed consolidation or control transaction, conditions are appropriate if:

> [T]he 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.

Finance Docket No. 32549, Burlington Northern Inc. and Burlington Northern R.R. Co. -- Control and Merger -- Santa Fe Pacific Corp. and The Atchison, Topeka and Santa Fe Ry. Co., Decision No. 38, served August 23, 1995, at 55-56 (unprinted) ("BN/Santa Fe"), aff'd, Western Resources, Inc. v. STB, 109 F.3d 782 (D.C. Cir. 1997); cf. Lamoille Valley R.R. Co. v. ICC, 711 F.2d 295, 300 (D.C. Cir. 1983).

The Board, of course, may deny approval of a merger in its entirety if it believes that the anticompetitive effects of

the merger are significant enough, and are not susceptible to remediation through the imposition of conditions. Santa Fe Southern Pacific Corp. -- Control -- SPT Co., 2 I.C.C.2d 709 (1986).

II. The Complete Absence of Public Benefits to PEPCO

The Conrail Control Transaction will not benefit PEPCO in any respect. To the contrary, the Transaction's supposed service benefit to PEPCO (i.e., new single line service) merely yields an additional private benefit to the Applicants, and therefore cannot support a finding that the Transaction is in the public interest. In addition, the Applicants' position with respect to the benefits to PEPCO of single-line service militates against the Applicants with respect to the significant volume of coal presently moving in single-line Conrail service from Central Pennsylvania origins to Chalk Point and Morgantown which will become interline (NS-CSX).

A. The Applicants' Claim of a Public Benefit to PEPCO is Illusory

In their Rebuttal filing, the Applicants claim that PEPCO will benefit as a result of the Transaction through new access to single-line service. See, e.g., Applicants' Rebuttal, Vol. 1 at p. 427 ("PEPCO also fails to take account of the fact that replacing Conrail with CSX as the carrier serving its Chalk Point and Morgantown stations offers significant benefits."); id., Vol. 2B, Sansom Reb. V.S. at 3 ("Major Benefits to PEPCO Are

Ignored by PEPCO and DOJ Witnesses"). Specifically, the Applicants indicate that coal movements from "B&O" origins in northern West Virginia and western Maryland to the Chalk Point and Morgantown Stations would be converted from interline CSX-Conrail routings to single-line CSX routings. Id. While this change in carrier identity is accurate, it is significant to observe that the Applicants neglect to offer any explanation of the manner in which the benefit supposedly associated with this change will flow through to PEPCO.

Instead, the Applicants' Dr. Sansom merely presents an analysis of rail rates paid by PEPCO for deliveries to these Conrail-served plants. Id. at 4. Specifically, Dr. Sansom shows that

. From this simple rate comparison, Dr. Sansom concludes that

Id. at 5.

Rather than suggesting a benefit to single-line service, however, this comparison confirms only that a destination monopolist enjoys sufficient control to assure that it will obtain a satisfactory profit level for every movement into its captive destination, whether or not it originates the shipment in

question (i.e., the "one-lump" theory). Dr. Sansom neglects even to address the effect of this theory on the validity of his conclusion.

Not only has Dr. Sansom completely failed to explain why CSX would have any incentive to share the benefits of its post-Transaction "single line efficiencies" with PEPCO, but CSX has not presented the testimony of any marketing or other management personnel indicating that it will reduce the present rates from the B&O origins to Chalk Point and Morgantown, or otherwise share the supposed benefits of single-line service with PEPCO. (Nor has CSX presented any testimony indicating that it actually considers possible source competition from other generating facilities within PJM is setting rates to any of its exclusively-served power plants.)

Neither PEPCO nor the Board should expect CSX to allow the "benefits" of single-line service to flow through to PEPCO, and in fact, a careful reading of the Applicants' Rebuttal reveals that the Applicants present no rationale for expecting such a pass-through to occur.

B. The Applicants Ignore the Impact of the Loss of Single-Line Service to PEPCO

Even if the Applicants' position regarding the benefits of new single-line service from B&O origins were to be accepted, this same argument would undermine the supposed benefits of the Transaction with respect to the Central Pennsylvania coal cur-

rently moving in single-line Conrail service. As indicated previously, movements of this coal to Chalk Point and Morgantown will become interline (NS-CSX) as a result of the Transaction. Consequently, if the Board concludes that there is any validity to the Applicants' claims that the creation of single-line service constitutes a "major" public benefit to PEPCO, then the Board should hold with equal force that the elimination of single-line service from Central Pennsylvania origins constitutes a "major" public detriment.

Significantly, the December 11, 1997 settlement agreement that the Applicants entered into with the National Industrial Transportation League ("NITL") fails to resolve PEPCO's concerns. In particular, this agreement provides only three years of relief to parties like PEPCO that will lose single-line service options, and only requires that the Applicants hold rates to RCAF-U adjusted levels. See Applicants' Rebuttal, Vol. 1, p. 773-74. Moreover, it would not help PEPCO with respect to shipments from MGA origins, which are expected to be an important source of coal supply for future Clean Air Act compliance purposes. Felton V.S. at 9-10.[7]

Even more importantly, and as is described in greater detail below, PEPCO will suffer as a result of the Transaction relative to certain specially benefitted competitors. An agree-

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[7] To date, PEPCO has received only test shipments of MGA coal to determine its suitability for use in the boilers at Chalk Point and Morgantown. Id. at 17.

ment which is both extremely limited in duration and fails even to allow PEPCO to maintain the status quo with respect to existing contractual service clearly does not eliminate that harm.

C. The Board Should Carefully Scrutinize Claims of Service Benefits in Light of the UP/SP Service Crisis

The Applicants seek to emphasize the role of service improvements as a factor militating in favor of the Transaction. As the Board's recent experience with the utter collapse of the UP/SP system amply demonstrates, however, it is easy for merger applicants to make predictions of service benefits, but the reality may prove to be quite different. There is good reason to be skeptical of the Applicants' claims here concerning the service benefits that will flow from the Transaction. A reasonable view in light of the all too vivid UP/SP precedent would suggest that a transaction of this size and scope undoubtedly will (in the near term at the very least) result in a net service detriment to the public. Consequently, the Board should decline to find that the Transaction offers any service-related benefit to PEPCO.

III. PEPCO will Suffer Significant Harm as a Result of the Transaction

There are several principal respects in which the Transaction will harm PEPCO. First, the Transaction will place exclusive control over deliveries of coal to each of PEPCO's three baseload coal-burning plants in CSX's hands. Second, the

Transaction will eliminate competitive leverage at Morgantown that exists in the form of a potential barge unloader "build-out" to CSX. Third, the Transaction will place PEPCO at a severe disadvantage relative to its competitors in the electric generating market. Finally, the Transaction will place PEPCO at risk of having to bear a disproportionate share of the tremendous price that the Applicants are paying to acquire Conrail.

A. Consolidation of Control Over PEPCO's Baseload Coal-Fired Plants

With its new control over rail deliveries to Chalk Point and Morgantown, CSX will provide exclusive destination rail service to each of PEPCO's three baseload, coal-burning plants. While existing competitive pressure between CSX and Conrail certainly is not effective in constraining rail rates at any plant (and in particular, at Dickerson) to "reasonable" levels,[8] any threat of diversion provides some measure of competitive benefit. In this regard, the holding of the United States Court of Appeals for the District of Columbia Circuit is instructive:

> At the core of the "effective competition" standard is the idea that there are competitive, market pressures on the railroads deterring them from charging monopoly prices for transporting goods. Of course, any such effective competition will always be relative to a particular price that the railroads charge. At some point the availability of an alternative such as the horse and buggy or

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[8] See Potomac Electric Power Co. v. CSX Transportation, Inc., STB Docket No. 41989 (Complaint filed January 3, 1997).

> even people carrying oil in buckets theoretically prevents railroads from raising their rates beyond an outer bound.

Arizona Public Service Co. v. United States, 742 F.2d 644, 650-51 (D.C. Cir. 1984). Any approval of the Transaction without the imposition of additional conditions would further increase the "outer bound" above which the rates that PEPCO presently pays for rail service will not rise.

B. Elimination of Potential Barge Unloader "Build-Out"

As indicated in the Verified Statement of Susann D. Felton, PEPCO has utilized the threat of constructing a barge unloading facility at Morgantown

Felton V.S. at 20-21. As is discussed in greater detail below, the construction of this facility would be a somewhat questionable proposition even absent the Conrail Transaction. Specifically, engineering difficulties, environmental concerns, and high

construction costs each raise serious questions about the actual development of the project. Nevertheless, PEPCO was able to

. Id. at 21.

The key fact associated with this possible construction was that it would have allowed PEPCO to receive coal at Morgantown via a CSX/barge routing from Central Appalachian coal origins via Baltimore. Since the Transaction will place CSX in control of rail deliveries to Morgantown, it will eliminate this possible source of competitive leverage. CSX, of course, will not face any pressure from a build-out to its own line. Consequently, PEPCO can expect

, and in that respect, will suffer anticompetitive harm as a result of the Transaction.

In the past, the Board and the Commission have recognized the adverse impact of mergers on similarly situated shippers. For example, in its BN/Santa Fe decision, the Commission found that the elimination of "potential" competition constituted a harm of the merger:

> We consider first the parallel effect feared by OG&E: the loss of what is today potential BN competition at Red Rock. In 1993, OG&E signed a new long-term contract with Santa Fe for deliveries from 1994 through 2008 containing much lower rates than previously available, and with a very favorable (to the utility) escalation mechanism. According to both Santa Fe and OG&E, Santa Fe

> agreed to the contract largely due to OG&E's threat to build a spur to the nearby BN line. This threat was perceived to be real, and Santa Fe priced its services accordingly.
>
> The negotiating leverage provided by the build-out option will disappear after the merger. . . .
>
> To preserve the competitive status quo, we have crafted a condition that will permit OG&E to maintain its existing build-out option.

BN/Santa Fe, at 68; id. at 98 ("We will impose a condition to maintain [Phillips Petroleum Company's] current competitive situation as respects the prospective PNR build-out. Though evidence is conflicting, the build-out option may be feasible.").

In its UP/SP decision, the Board acknowledged the existence of a similar anticompetitive impact upon Entergy Services, Inc. and its affiliates at their White Bluff Station:

> We will grant the build-out relief sought by Entergy vis-a-vis its White Bluff plant, and thereby preserve the White Bluff build-out status quo . . . .

Id. at 185. PEPCO's threatened construction of a barge unloader closely parallels the threatened construction of a rail spur by each of these parties. The Board therefore should find that the Transaction harms PEPCO in this respect.

C. Anticompetitive Harm Relative to Competitors

Due to the unique nature of the Conrail Control Transaction, and the increasingly integrated nature of the bulk power market, PEPCO will suffer an indirect, yet nevertheless real, form of harm. In particular, the Applicants have agreed amongst themselves to grant new dual-carrier destination service to a number of individual shippers.[9] Unlike prior mergers in which applicant-carriers entered into agreements to preserve two-carrier service that otherwise would be eliminated, the instant Transaction actually will itself disturb the status quo by creating this new competition as a result of the negotiations between the Applicants. In a very literal sense, the Applicants now ask the Board to approve their choice of the winners and losers in the electric generating market. The Board should not join in this endeavor.

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[9] For example, the Transaction will specially benefit PECO's Eddystone Station, Atlantic City Electric Company's Deepwater and England plants, and Vineland's Down plant. PEPCO Comments (PEPC-4), Verified Statement of Stan M. Kaplan ("Kaplan V.S.") at 17. Each of these plants is served exclusively by Conrail at the present time. Following the Transaction, however, each will enjoy both CSX and NS destination service.

Furthermore, the Applicants reportedly have reached agreements with Pennsylvania Power & Light and Delmarva Power & Light relating to competitive access at destination. Felton V.S. at 12; Kaplan V.S. at 17. See also Mr. Sharp's Verified Statement on behalf of CSX at 16 (App. Vol. 2A [CSX/NS 19] at 363).

Compounding this effect is the highly coordinated or "tight" nature of PJM.[10] This pool operates as a single system with a common economic dispatch of generation on a pool-wide, lowest-cost basis. If a given plant's marginal generation cost decreases (as the result of a reduced rail rate, for example), then that plant likely will be called upon by the PJM central dispatch authority to meet a greater share of system load. Such increased utilization may, of course, lead to a decreased utilization of those plants which enjoyed similar generating costs to the "benefitted" plant before the Transaction. See Felton V.S. at 13.

Since PEPCO and these utilities compete for sales of incremental power (either amongst fellow PJM members or against external sources of power), and since these utilities doubtless will be able to take advantage of their new intramodal competition to obtain lower rail rates than PEPCO (which will remain captive to a single carrier at all of its coal-fired plants), they should be able to generate electricity more cheaply than before -- thus putting them in an improved competitive position compared with PEPCO.[11]

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[10] Other utility PJM members include Atlantic City Electric Company, Baltimore Gas and Electric Company, Delmarva Power & Light Company, Jersey Central Power & Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, PECO Energy Company, Pennsylvania Power & Light Company, and Public Service Electric and Gas Company.

[11] Given the baseload status of PEPCO's Dickerson, Chalk
(continued...)

Moreover, the PJM utilities with new joint service will be in a better position than PEPCO to take advantage of new joint CSX and NS access to coal suppliers in the MGA region. MGA-origin coal is an important source of coal for the Clean Air Act Phase 2 compliance plans of PEPCO and other utiliti[illegible] Felton V.S. at 10, 17. Utilities that will have dual-carrier service at destination will obviously be in a better position than PEPCO to take advantage of the new dual-carrier service to the MGA origins.

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[11](...continued)
Point and Morgantown Stations, the new intramodal competition available to some of PEPCO's competitors

PEPCO's diminished ability to compete effectively for , which would result from an unconditioned Conrail Control Transaction, will not

1. The Board Should Consider this Effect as an Adverse Impact of the Transaction

Although they acknowledge its existence,[12] the Applicants contend that this form of relative competitive harm is not relevant to the Board's analysis. Specifically, in their Narrative Rebuttal, the Applicants state that:

> [t]he failure to achieve benefits received by others from the transaction is not competitive harm warranting the imposition of conditions by the Board.

Applicants' Rebuttal, Vol. 1 at 119. Similarly, the Applicants add that:

> this is not the sort of "harm" that justifies the imposition of conditions by the Board. In fact, it is not "harm" at all.

Id. at 426. This view is outdated and ill-suited to the Board's analysis of this unique Transaction. It also represents a blatant attempt by the Applicants to have their cake and eat it too.

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[12] See, e.g., Sansom Reb. V.S. at 14 (emphasis added):

> It is true, as Witness Kaplan testifies (see p. 17) that there is competition from PECO's Eddystone plant,[] PP&L's plants, and DP&L's plants. Indeed, due to the NS's service to these plants, this competition will be more intense, whereas previously these plants and PEPCO's two plants were rail-served exclusively by Conrail. . . . While PEPCO may not like this competition, it is a benefit of the Transaction.

Reduced to its essence, the Applicants' argument is that because they are not required under existing railroad merger precedent to extend new competition (i.e., dual-carrier service) to any shipper that does not presently have it, the Conrail Transaction would be consistent with the public interest even if they had not chosen to establish Shared Asset Areas and new joint access areas such as the MGA region. However, the fact is that the Applicants did choose to extend new intramodal competition to regions and shippers that do not presently have it -- and, throughout their Application and their Rebuttal, they tout this new competition as a major public benefit of the Transaction warranting its approval. Having chosen to do what they say they are not required to do, the Applicants cannot have it both ways. To the extent the voluntary extension of new dual-carrier service to some shippers causes competitive harm to other shippers such as PEPCO, the Board should intervene to ameliorate such harm through the imposition of appropriate conditions.

Moreover, the public interest requires that the Board, not the Applicants, balance the competitive benefits of the transaction against the competitive harms. The Board's policy in prior merger cases has been reactive in this area, not proactive. Given the competitive and service problems that have arisen in the West as a result of the Board's reactive approach in approving the UP/SP merger, as well as the unique nature of the Conrail Transaction, a different approach is required here.

Unlike the incidental competitive benefits to shippers that arguably have resulted from prior mergers, the provision of new competitive benefits through the creation of Shared Asset Areas and joint access areas such as the MGA region constitutes one of the central aspects of the Conrail Control Transaction. Given this entirely novel approach, the Board should consider whether, as a matter of policy, it will turn a blind eye toward the members of the public that will suffer competitive harm, merely to hold fast to jurisprudential approaches developed under vastly different circumstances. PEPCO is not asking the Board to remedy a pre-existing competitive problem that is unrelated to the Transaction. To the contrary, the harm of which PEPCO complains is the direct result of this Transaction.

As an additional line of defense of their Transaction, the Applicants characterize PEPCO's argument as one which would require the protection of all shippers who might suffer the kind of competitive harm being suffered by PEPCO.[13] This argument is completely specious. The Board's acceptance of PEPCO's argument does not require that similar benefits be given to all shippers. To the contrary, only a limited number of parties have determined that their interests will be compromised substantially by the

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[13] See, e.g. Applicants' Rebuttal, Vol.1 at 121 ("[I]f railroads were required to maintain competitive balance vis-a-vis shippers' transportation options so that improved service to some shippers would have to be equalized throughout the system . . . [Applicants] would have to strenuously avoid giving any shippers new competitive options or, indeed, any benefit whatsoever, lest the same options or benefits be required to be given to all.").

extension of new dual-carrier service to shippers that do not presently have it -- and most of these have been able to reach agreement with the Applicants. PEPCO is not in a position to opine as to whether other parties may be entitled to relief. However, the limited group of active shipper parties to this proceeding, and not all potentially impacted shippers, represents the potential universe of those that could obtain the right to preserve the competitive status quo. The Applicants' suggestion that a grant of the kind of relief requested by PEPCO would make the Transaction "prohibitively complex and expensive" therefore is inapposite.

2. PEPCO Lacks Any Effective Alternative to Rail Delivery of Coal to Morgantown and Chalk Point

The Applicants assert in their Rebuttal filing that even if relative competitive harm were a legitimate consideration for the Board, PEPCO still would not be harmed by the Conrail Control Transaction because PEPCO will have an alternative to CSX rail delivery to the Morgantown and Chalk Point plants, namely, the construction of facilities to receive coal at Morgantown in NS/barge service via Lamberts Point, VA. Applicants' Rebuttal, Vol. 1, Narrative, at 428-29; Sansom Reb. V.S. at 5-10. This assertion is fundamentally flawed.

The evidence of record confirms that

. Specifically, both the testimony of PEPCO's witnesses and the documents produced by PEPCO in discov-

ery demonstrate that

. Even more importantly, this same evidence confirms that even if such a barge unloading facility could be constructed

a. Background

As indicated, supra, PEPCO considered the possible construction of a barge unloading facility at Morgantown prior to the announcement of the CSX/NS agreement to acquire and divide Conrail, as means of reducing Conrail's leverage as the exclusive destination carrier at both Morgantown and Chalk Point. Felton V.S. at 19. However, PEPCO placed the barge unloader project on hold after the Conrail transaction was announced because both: (i) ; and (ii) the uncertainty of obtaining the necessary environmental permits and approvals, appeared to outweigh its potential benefits if the Conrail Control Transaction is approved in its present form. Id. at 19-22.

b. Engineering Feasibility

As indicated by Dr. Sansom in his Rebuttal statement (see Sansom Reb. V.S. at 6), in 1992-93, a preliminary study of the feasibility of constructing a barge unloading facility at

Morgantown was prepared for PEPCO by Roberts & Schaefer Company, an engineering consulting firm.[14] The study concluded that the most feasible alternative would involve construction of a barge unloading pier 1,100 feet offshore together with a continuous bucket unloader and conveyor system to get the coal from the barges to the existing railcar dumper.

. See PEPC 1016-1020HC. The study concluded

; it did not address either competitive or environmental issues (other than dredging the Potomac River) and, in fact, contained the following disclaimer: "The environmental and permitting concerns for this project remain to be examined." PEPC-1081HC. Notably, Dr. Sansom neglects to include any mention of this disclaimer in his analysis of the Roberts and Schaefer study.

c. Environmental Concerns

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[14] This study was produced by PEPCO during discovery in this proceeding, and bears Bates Numbers PEPC 1012-1193HC. Although Dr. Sansom refers to it in his testimony, he has not included it in his workpapers. Given its length (181 pages), it is not susceptible of reproduction as a Counsel's Exhibit in this brief.

In a similarly questionable manner, Dr. Sansom also contends on Rebuttal that a barge unloader at Morgantown would be feasible from the standpoint of obtaining required environmental approvals. Dr. Sansom's tenuous reasoning in support of this conclusion is that the Corps of Engineers recently approved a "Shore Erosion Control Project" on the Potomac River at Morgantown, and that "[a] well designed barge unloading facility at Morgantown should be similarly acceptable to the Corps of Engineers." Sansom Reb. V.S. at 7. This assertion requires a tremendous leap of logic; it is absurd to equate a shore erosion project designed to contain and prevent further damage to the Potomac River shoreline with the placement of a barge unloader at Morgantown.[15]

The location of the Morgantown plant (and hence the barge unloading facility) is potentially problematic from the standpoint of securing the necessary environmental approvals and permits. The plant is located on the Potomac River estuary in southern Charles County, MD. Felton V.S. at 5. This is an ecologically sensitive area, and

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[15] Dr. Sansom provides no details indicating how PEPCO's Morgantown shore erosion project would equate to construction of a barge unloading facility. The erosion project is described in the excerpt from the October 1997 issue of PEPCO's employee publication, "The Pepco Communicator," attached hereto as Counsel's Exhibit No. 1. A quick perusal of this article demonstrates the absurdity of comparing this project to construction of a barge unloading facility and related conveyor system.

. Id. at 21, 22.

While it is, of course, possible that PEPCO would be able to obtain the federal and state environmental approvals and permits necessary to enable it to construct a barge unloading facility at Morgantown

, the undisputed fact is that the facility would be located in an ecologically sensitive area along the lower Potomac River. PEPCO

and it is simply presumptuous to assume that

d. Competitive Economics

In addition to claiming that construction of a barge unloader at Morgantown would not be problematic from an environmental standpoint, Dr. Sansom also asserts that the barge unloader would constrain CSX's future ratemaking practices with respect to both the Morgantown and Chalk Point plants. This assertion is demonstrably incorrect.

To reiterate, PEPCO's initial consideration of constructing a barge unloader at Morgantown was based largely on the premise that

. However, CSX's acquisition of Conrail's Pope's Creek Secondary obviously would

due to CSX's destination control over all-rail movements to the Morgantown and Chalk Point plants regardless of origin. Felton V.S. at 20-22.

As PEPCO's Witness Felton testifies, PEPCO

. Id. at 20. Until very recently, Chalk Point and Morgantown burned only coals originating at mines in the CSX (B&O) rate districts in northern West Virginia and in Conrail rate districts in Central Pennsylvania, whose logical rail/water movement would be

. In addition, NS's Lamberts Point facility is used primarily for exports, and

Id.[16]

Moreover, the results of PEPCO's discussions with NS in September of 1997 concerning

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[16] Indeed,

. In these discussions, NS indicated that

.

In his Rebuttal testimony, Dr. Sansom asserts that NS coal moving via Lamberts Point is not the only choice for barged coal delivered to Morgantown, and that a market survey conducted for PEPCO by Hill & Associates in 1997 (and produced by PEPCO in discovery)

Sansom Reb. V-.S. at 9. In fact, the results of the 1997 Hill & Associates market survey

.[17]

In short, even if a barge unloader were constructed at Morgantown , there is no reason to believe that

3. The Requested Trackage Rights Condition is Operationally Feasible and An Appropriate Means of Ameliorating the Transactions Competitive Harm to PEPCO

The Applicants have not challenged the operational feasibility of CSX granting NS trackage rights over the Pope's

[17]

Creek Secondary Line for purposes of delivering trainload shipments of coal to Chalk Point and Morgantown. The Pope's Creek Secondary connects with Amtrak's Northeast Corridor at Bowie, MD. Both NS and CSX will have freight operating rights over the Northeast Corridor after the Transaction is consummated, and both carriers would be able to use those rights to reach the Pope's Creek Secondary.

Trackage rights are the only feasible means of remedying the identified competitive harm that PEPCO will suffer as a result of the Conrail Transaction. Although PEPCO does not presently have two-carrier service at Chalk Point and Morgantown, the addition of a second competitor at destination is necessary to place PEPCO on equal footing with its electric utility competitors who are receiving new destination competition courtesy of the Applicants' much-touted restructuring of rail service in the East (including in particular the creation of Shared Asset Areas and the MGA joint service area). Since the Applicants themselves have voluntarily added new destination rail competition to several of PEPCO's competitors, they cannot complain if the Board does the same for PEPCO. Again, this Transaction is unique among recent rail consolidations, and new approaches are warranted to remedy new competitive situations.

D. The Transaction is not in the Public Interest Because the Acquisition Premium Exposes PEPCO and Other Exclusively Served Shippers to Higher Future Rail Rates

On Rebuttal, the Applicants offer a troubling response to the numerous objections (including PEPCO's) that the tremendous acquisition premium associated with the Transaction would harm those shippers with generating facilities that are served by a single carrier. In particular, the Applicants blithely claim that they will "have no difficulty" recovering the full amount of the acquisition premium. See Applicants' Rebuttal, Vol. 1, Narrative, at 34 ("Debt financings effected in connection with the acquisition by CSX and NS of CRR's common stock will add to their fixed charges. However, . . . CSXC and NSC will have no difficulty absorbing these additional fixed charges. The Transaction is expected to be accretive to both CSX and NS shareholders within three years."). Seemingly validating the worst fears of destination-captive shippers, the Applicants add that "railroads must be given an opportunity to earn (if market conditions and the demand for service permit) a competitive rate of return on the current value of their invested capital." Id. at 109 (emphasis added).

As a shipper with single-carrier service at each of its coal-receiving plants, PEPCO is extremely concerned with this language. PEPCO is particularly apprehensive because of CSX's behavior which led to PEPCO's institution of the pending coal rate case against CSX involving coal requirements for its Dickerson Station (Docket No. 41989, PEPCO v. CSX Transportation, Inc.). See Felton V.S. at 13-14, 25.

In light of the Applicants' seemingly admitted intention to foist the acquisition premium upon parties such as PEPCO, and if their rosy financial projections prove wrong (as did the applicants' financial projections in UP/SP), PEPCO requests that, if the proposed acquisition and division of Conrail assets is approved by the Board, the Board impose the following additional condition upon Applicants, pursuant to 49 U.S.C. § 11324(c):

> Each of the Applicants shall quantify the amount of the premium over Conrail's pre-acquisition book value that it is paying, and shall exclude that amount from its net investment base for regulatory costing purposes.

The exclusion of the premium from Applicants' net investment bases for regulatory costing purposes will eliminate the harmful effects of the consolidation by protecting exclusively served shippers from future railroad pricing abuses. The requested condition is narrowly tailored and will only benefit exclusively served coal shippers who are able to demonstrate, in a regulatory context, that the rates charged by a given railroad are unreasonable. In this regard, the shipper would have to prove that the railroad's rates exceed the Board's 180% revenue to variable cost ratio which is the jurisdictional threshold for rate reasonableness jurisdiction.

If the Applicants' financial projections are legitimate, the premium condition will never come into play. If they are not, then it would be contrary to the public interest to

permit the Applicants to recover the acquisition premium from captive shippers. The Applicants should not be insulated from a risk of their own making when they bid up the price for Conrail.

CONCLUSION

The Conrail Control Transaction adversely impacts PEPCO in a variety of fashions. First, the Transaction will consolidate CSX's control over coal deliveries to PEPCO's three baseload plants. Second, the Transaction will eliminate the existing competitive threat of the barge unloader "build-out" to CSX from Morgantown. Third, the Conrail Transaction will hinder PEPCO's competitive standing in the bulk power market by artificially disrupting the existing competitive balance among the utility members of PJM. Finally, the transaction threatens to burden PEPCO and other shippers with the tremendous burden of the acquisition premium that CSX and NS are paying to acquire Conrail. The Transaction therefore is inconsistent with the public interest and should be denied absent the imposition of appropriate protective conditions.

The conditions requested by PEPCO will ameliorate or eliminate these harmful effects of the transaction, are operationally feasible, and will produce public benefits outweighing any reduction of the public benefits produced by the transaction. As such, these requested conditions comport with the Board's governing standard. BN/Santa Fe, at 55-56.

Accordingly, PEPCO requests that, if the Board decides to approve the Conrail Control Transaction, such approval be made subject to: (1) a grant by CSX of trackage rights to NS to enable it to serve PEPCO's Chalk Point and Morgantown Stations in competition with CSX, and (2) a condition requiring the exclusion of the acquisition premium from CSX's and NS' net investment bases for regulatory costing purposes.

Respectfully submitted,

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Environmental Efforts Remedy Erosion Problem

CERTIFICATE OF SERVICE

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ENRS-20

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

BRIEF ON BEHALF OF

ERIE-NIAGARA RAIL STEERING COMMITTEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURT CASES

ADMINISTRATIVE CASES

STATUTES AND REGULATIONS

OTHER

BEFORE THE
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AND NORFOLK SOUTHERN RAILWAY COMPANY

—CONTROL AND OPERATING LEASES/AGREEMENTS—

CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

BRIEF ON BEHALF OF

ERIE-NIAGARA RAIL STEERING COMMITTEE

The Erie-Niagara Rail Steering Committee ("Erie-Niagara") hereby submits its Brief, summarizing the grounds for the Surface Transportation Board ("STB" or "Board") to impose certain conditions on its approval of the joint application of CSX Corporation and CSX Transportation ("CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS") for authorization to acquire, divide, and operate the assets of Conrail Inc. and Consolidated Rail Corporation ("Conrail") (collectively "Applicants"). Erie-Niagara has previously submitted its Comments, Evidence and Request for Conditions on October 21, 1997.[1]

I. INTRODUCTION AND SUMMARY OF POSITION

Erie-Niagara is an ad-hoc committee that was created, in response to the filing of the joint application of Applicants, to represent and protect the interests of businesses located in the New York State counties of Erie, Niagara, and Northern

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1 Hereafter referred to as "ENRS Comments." The Comments were filed in two versions, designated as ENRS-6 (Highly Confidential) and ENRS-7 (Public/Redacted).

Chautauqua that will be impacted by this transaction. The membership of Erie-Niagara is comprised of railroad shippers, economic and industrial development organizations, public transportation representatives, and county representatives.

Throughout their joint application and the course of this proceeding, the Applicants have characterized their proposal to acquire and divide Conrail as "unprecedented," as "the most pro-competitive," and as a transaction which will yield "enormous public benefits." In addition, the Applicants, particularly NS, have asserted that a major goal of the proposed transaction is to restore balanced competition among railroads "in major markets" in the northeast, comparable to that which was proposed in the Final System Plan developed by the United States Railway Association ("USRA") in 1975. *See, e.g.*, Applicants' Rebuttal Narrative at 13-17.

While the Applicants' statements may hold true for certain selected regions in the Northeast presently served by Conrail, they do not and cannot serve to describe the railroad service that will result in the Niagara Frontier area, a large and very significant market encompassing the New York State counties of Erie, Niagara and Northern Chautauqua, should the transaction as currently proposed be approved by the Board.[2] As demonstrated by the evidence in the record, the proposed division of Conrail will not result in increased competition and enormous public benefits to shippers located in the Niagara Frontier area but instead will be contrary to the public interest and will cause them direct competitive harm.

Erie-Niagara contends that the record of this proceeding, as it relates to the impact of the proposed transaction on the Niagara Frontier area, will require the Board to make the following findings:

- The Conrail monopoly created in most of New York State and in the

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2 The geographic boundaries of the Niagara Frontier area are described in the Verified Statement of Gerald W. Fauth III in ENRS Comments (hereafter referred to as "Fauth V.S.") at 54.

Niagara Frontier region from the bankrupt northeastern rail systems under the Final System Plan in the 1970's was not the preferred alternative of Congress and the United States Railway Association. In light of the Congressional directive to preserve competition, USRA's preferred alternative would have provided extensive opportunities for rail shippers in the Niagara Frontier to be served by at least two rail carriers. The preferred alternative would have introduced broad competition to Conrail in the Niagara Frontier (and elsewhere) from the Chessie System (now CSX).

- The preferred alternative was not implemented, because Chessie was unable to make acceptable arrangements to acquire the rail lines in the Niagara Frontier region (and elsewhere) that would have been the source of competition for Conrail. Those lines were transferred to Conrail, thus creating a broad Conrail monopoly in the Niagara Frontier region, in New York City and elsewhere.

- Since the creation of the Conrail monopoly, the Niagara Frontier has experienced a steady loss of the benefits of competitive rail service. The efforts to introduce competition for Conrail from the Delaware & Hudson (now part of the CP system) have been strenuously resisted by Conrail, and have been largely unsuccessful.

- Since its creation, Conrail has restricted the availability of reciprocal switching to Niagara Frontier shippers; Conrail has also raised the level of the charges applicable to the remaining reciprocal switching services to a very high level, generally around $450 per car. It has thus steadily reduced the number of Niagara Frontier shippers that can obtain access to other rail carriers' services by such means, either by eliminating the service altogether or raising the charge to such a high level as to make its use uneconomical for

most commodities.

- The relief sought by Erie-Niagara would restore, to the extent possible in light of intervening structural changes, the opportunity for a large number of Niagara Frontier rail shippers to obtain the benefits of competitive rail services, services that were lost as a result of the failure of the Final System Plan's preferred alternative. Other areas of the State (such as east of the Hudson River) are seeking similar relief because it is recognized that competitive rail services are the best means of ensuring the benefits of efficient service at reasonable prices. The State of New York supports the relief sought by Erie-Niagara.

- The relief sought by Erie-Niagara is entirely consistent with the Principles of Balanced Rail Competition established by Norfolk Southern in October, 1996. Those Principles, among other things, explicitly advocated the restoration of the competitive rail service options that were unavailable as a result of the failure of the preferred Final System Plan. However, the CSX/NS division and allocation of Conrail does not provide the level of rail competition in the Niagara Frontier region that would have been preserved under the preferred alternative.

- The NITL settlement agreement does not address at all the structural issue raised by Erie-Niagara of the failure of the CSX/NS transaction to remove the Conrail monopoly. Indeed, the transaction creates new rail competition in areas such as Detroit that compete with the Niagara Frontier region. Any settlement agreement that does not address this fundamental structural issue will be harmful to the interests of the Niagara Frontier.

- The NITL settlement agreement provides that any point at which Conrail now provides reciprocal switching service would continue to receive

such service from CSX or NS, as the case may be, for ten years. There is no provision in the agreement for establishing reciprocal switching service where it is not provided today by Conrail. Therefore, the NITL agreement does not address the loss of competitive rail service that has already occurred in the Niagara Frontier region.

- The NITL settlement agreement provides for a reduction at all points where Conrail currently provides reciprocal switching service today for a period of five years of the current Conrail reciprocal switching charge to $250.00. However, this reduction would only be applicable when CSX and NS will be providing such service to each other after the transaction. When either CSX or NS will be providing reciprocal switching to other carriers in place of Conrail, the NITL agreement requires CSX and NS to maintain for the five year period only the charges that are currently in effect (unless lower charges would be placed in effect under any separate settlement agreements). These provisions will only benefit those shippers in the Niagara Frontier region that still have reciprocal switching service available from Conrail today. The majority of rail shippers in the region do not have reciprocal switching available to them.

- The agreements between CSX and the two major Canadian rail carriers, Canadian National Railway Company ("CN") and Canadian Pacific Railroad Company and its affiliates ("CP") likewise do not address the fundamental structural issues. These agreements provide only for modest opportunities for the CN and CP to obtain relatively insignificant reductions by CSX in its required revenue share for new traffic that might move via the Niagara Frontier area.

- Under the proposed transaction, most businesses located in the Niagara

Frontier area that are dependent upon rail service will generally continue to have access to only a single rail carrier, either CSX or NS. In contrast, the Applicants have proposed to create so-called "Shared Assets Areas" in three other significant markets in the northeast, in which CSX and NS will both obtain access to *all* rail served businesses formerly served by Conrail. The proposed Shared Assets Areas are: (1) Detroit, Michigan, (2) Southern New Jersey/Philadelphia, and (3) Northern New Jersey. Many businesses located in the Niagara Frontier region compete directly with companies located in the Shared Assets Areas. Because the businesses located in the Shared Assets Areas will obtain head-to-head rail competition between CSX and NS under the proposal, which expectedly would result in lower transportation rates and costs for such businesses, the competing businesses in the Niagara Frontier that will be solely served by either CSX or NS will be adversely impacted, as a direct result of the proposed transaction.

Accordingly, Erie-Niagara respectfully requests the Board, pursuant to its authority under 49 U.S.C. § 11324, to impose conditions governing the transaction, that will protect shippers located in the Niagara Frontier area from competitive harm arising directly from the proposal and that will make the transaction consistent with the public interest by truly restoring balanced competition in the Niagara Frontier, a major market in the northeast. The conditions specifically requested by Erie-Niagara are more fully described in the conclusion to this brief.

II. THE NIAGARA FRONTIER REGION IS CLEARLY A MAJOR TRANSPORTATION MARKET THAT LACKS SIGNIFICANT RAIL COMPETITION

The ENRS Comments, and the evidence included therein, provides a detailed analysis of the economic, demographic and transportation characteristics of the Niagara Frontier Region. ENRS Comments at 8-13 and evidence there cited. This evidence was uncontested by the Applicants, who have thereby clearly conceded that

the Niagara Frontier, as defined in the ENRS Comments, Fauth V.S. at 54, is a major transportation market. *Cf.* ENRS Comments, Goode Dep. at 76-77, Exh. D-1. Notwithstanding this concession, a brief summary of that evidence will highlight the importance of the Board's need to provide rail-to-rail competition beyond that contemplated by the proposed transaction.

A. Characteristics of Erie, Niagara and Northern Chautauqua Counties

As noted above, the Niagara Frontier region is defined in this proceeding as all of Erie and Niagara Counties, New York and the northwest portion of Chautauqua County, New York. ENRS Comments, Fauth V.S. at 54.

1. Erie County

Erie County is located in western New York State at the eastern end of Lake Erie, at the head of the Niagara River. The largest municipality in Erie County is the city of Buffalo, which is the second largest city in New York State. Both the city and the country have experienced significant population declines between 1970 and 1990. Erie County's strategic location on the Canadian border has established the region as a trade corridor between the United States and Canada.

Historically a center of steel production, Erie County has suffered a dramatic decline in its manufacturing base. Despite the down-turn in manufacturing, the automotive, chemical and medical related industries remain integral components of the county's economy. Many of these industries are dependent on rail service. Of the 44 local municipalities in the County, 42 had rail service at some point in their history. Five have lost access to rail since 1976, the year Conrail was created. ENRS Comments, Verified Statement of Stanley J. Keysa at 3; ENRS Comments, Verified Statement of Ronald W. Coan (hereafter referred to as "Coan V.S.") at 6. The Buffalo/Niagara Falls area experienced a 38% growth in exports in 1994, second only to Detroit in foreign trade expansion. Coan V.S. at 6.

2. Niagara County

Niagara County is located to the north of Erie County. It is bordered on its

west by the Niagara River and on its north by Lake Ontario. Niagara County has a experienced a decrease in population since 1970. The largest municipalities in Niagara County are Niagara Falls, Lockport, and North Tonawanda. There are currently some 80 major businesses in Niagara County that rely upon rail shipping. A number of chemical companies, automotive suppliers, and a coal-powered generating station owned by New York State Electric and Gas are all businesses located in Niagara County that are dependent upon rail service.

3. Northern Chautauqua County

Northern Chautauqua County is located on the southern shore of Lake Erie in the western portion of New York State. For the purpose of this proceeding, Northern Chautauqua County is comprised of the municipalities of Westfield, Dunkirk and Fredonia and all localities north thereof to the county line, including Silver Creek. Major industries in the area include food processors, a pet foods manufacturer, and Niagara Mohawk Power Corporation's Dunkirk Generation Station. These businesses all rely upon rail service to ship raw materials and finished goods and to receive products and supplies.

B. Description of the Rail Transportation Market and Facilities In the Niagara Frontier Region

The Niagara Frontier is a major railroad market. Applicants have not contested the proposition that the Niagara Frontier is a major market. In 1995, railroad movements to and from the region generated nearly in annual freight charges. The Niagara Frontier is also a highly profitable market. Rail traffic in this region yielded an average revenue-to-variable cost ratio (R/VC) of in 1995. Conrail dominates the Niagara Frontier market, which is a major source of revenue for the railroad. In 1995, Conrail realized nearly in revenue on traffic moving to, from or through the Niagara Frontier. ENRS Comments, Fauth V.S. at 4. The Niagara Frontier is also a major gateway for traffic to or from Canada. ENRS Comments, Fauth VS at 25.

Although NS presently has some physical access to the Niagara Frontier market, Conrail controls the major revenue stations. ENRS Comments, Fauth V.S. at 4. In 1995, Conrail originated and terminated the substantial majority of all Niagara Frontier rail traffic. The two major commodities originating in the Niagara Frontier are transportation equipment and chemicals. ENRS Comments, Fauth V.S. at 17-19.

Deliveries of coal represent the largest commodity group of traffic terminating in the Niagara Frontier area. *Id.* at 22. Conrail captures practically all of the coal traffic terminating in the Niagara Frontier. The other major commodity group for terminating traffic is finished motor vehicles, followed by slabs or sheets of iron or steel. ENRS Comments, Fauth V.S. at 23.

The Niagara Frontier is also a major gateway for traffic to and from Canada.[3] The rail market for this traffic is significant and growing. ENRS Comments, Fauth V.S. at 25. It is estimated that, in 1995, at least carloads of Canadian traffic moved through Buffalo. A substantial portion of this traffic moved in interchange service with Conrail. Only a limited amount of this traffic moved to destinations in the Niagara Frontier area. ENRS Comments, Fauth V.S. at 26-28.

While other carriers such as the Canadian Pacific Railway Company ("CP") and its subsidiary Delaware and Hudson, Canadian National Railway ("CN"), and several short lines are able to access the Niagara Frontier market, those carriers are denied direct access to most Conrail's principal revenue stations. ENRS Comments, Fauth V.S. at 5. Even where Conrail stations are "open" to reciprocal switching for the account of other carriers, extremely high switching charges in effect eliminate any potential competition. *Id.* at 27-28. For example, the current reciprocal switching charge that applies in most cases to Conrail revenue stations in the Niagara Frontier

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3 Movements between Canada and the Niagara Frontier are facilitated by the Suspension Bridge in Niagara Falls, New York, owned by the Canadian Pacific Railway Company, and by the International Bridge in Buffalo, New York, owned by the Canadian National Railway.

area is $450.00 per car. This charge substantially exceeds NS's current switching charge for most railroads in the area of $156.00 per car *Id.* and Applicants' Rebuttal Appendix, CSX/NS-178, Vol. 3B at 664.

Conrail's railroad network in the Niagara Frontier region is expansive and services one of the highest railroad traffic volumes on the Conrail system. ENRS Comments, Fauth V.S. at 13. The current Conrail system in the Niagara Frontier was created from the rail lines previously owned by Penn Central Transportation Company, the Lehigh Valley Railroad Company, and the Erie Lackawanna Railroad Company. While several of the lines owned by Conrail's predecessors were consolidated, abandoned or sold to shortlines, numerous rail lines, alternate routes, and large rail yard properties presently exist in the region. ENRS Comments, Fauth V.S. at 13. Conrail's Frontier Yard, which is one of the largest rail yards in the United States, is located in the Niagara Frontier area. *Id.* Conrail also owns six other rail yards in the area. ENRS Comments, Fauth V.S. at 12. Railroad capacity in the region is abundant. *Id.* at 13.

Under the proposed transaction, CSX will replace Conrail as the dominant carrier in the Niagara Frontier. CSX will control the vast majority of freight stations in the area, the major rail yards, and most interchanges with other rail carriers. *See* CSX/NS-25, Vol. 8B, Transaction Agreement, Attachment II to Schedule 1 (Conrail System Map). NS would obtain limited physical access to the South Buffalo area under the proposal by virtue of the proposed allocation to NS of Conrail's existing Southern Tier route. *Id.* But even where NS does enter the Niagara Frontier market, competition between NS and CSX will be practically non-existent, since direct physical access to shipper facilities would be limited to either CSX or NS, and reciprocal switching in that area presently is either not available or is offered at levels that effectively prohibit this form of competition. ENRS Comments, Fauth V.S. at 30-33. It is also proposed that NS would receive trackage rights from Buffalo to Niagara Falls, New York, by obtaining rights on Conrail's Belt Line Branch and

Niagara Branch to Suspension Bridge. But these trackage rights are only *overhead in nature* and are for the limited purpose of allowing NS to interchange traffic with Canadian carriers at Suspension Bridge. Vol. 8B at 111. The grant of overhead trackage rights will prohibit NS from serving local customers and, thus, will fail to establish any competitive rail access in the Niagara Frontier region.[4] Consequently, under the proposed transaction, the Niagara Frontier market will remain largely captive to CSX, and to a lesser extent, NS.

III. THE BOARD HAS BROAD AUTHORITY UNDER THE INTERSTATE COMMERCE ACT TO IMPOSE CONDITIONS UPON A RAILROAD ACQUISITION TRANSACTION TO ENSURE THAT IT IS CONSISTENT WITH THE PUBLIC INTEREST

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 before the transaction can become effective. 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

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4 NS is also obtaining rights to access certain yard tracks at Seneca Yard in Buffalo, which yard is allocated to CSX. These rights are for the limited purpose of improving an existing interchange between NS and the South Buffalo Railroad. Vol. 8B at 117.

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 Corp., et al. — Control and Merger — Southern Pacific Rail Corp., et al.*, STB Finance Docket No. 32760, slip op. at 99 (served Aug. 12, 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. § 10101a. 49 C.F.R. Part 1180.1(b); *UP/SP* at 99. This policy, which was added to the Interstate Commerce Act by the Staggers Rail Act of 1980 (Pub. L. 96-448, 94 Stat. 1895), 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 services 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 between rail carriers*" (49 U.S.C. § 10101(5)) (emphases 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 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 N. Inc. et al. — Control and Merger — Santa Fe Pacific Corp. et al.* , Finance Docket No. 32549, slip op. at 53 (served Aug. 23, 1995), *aff'd sub nom. Western Resources, Inc. v. STB*, 109 F.3d 782 (D.C. Cir. 1997) ("*BN/SF*").

B. The Board's Current Policy Statement

Since the passage of the Staggers Act, the predecessor of the Board, the Interstate Commerce Commission ("ICC"), and now the Board, have applied a Policy Statement regarding major railroad control transactions. That statement further defines the public interest standard by setting forth a balancing test to be performed by the Board. *See* 49 C.F.R. Part 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. Part 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 would 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 under the Policy Statement has been to determine whether competitive harm would result from the transaction. Traditionally, the Board and the 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 100; *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.[5] 49 C.F.R. Part 1180.1(c)(2)(i).

C. The Board Is Not Limited to Applying Its Policy Statement, But Is Also Required to Consider the Greater Public Interest in Effective Rail Competition

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 943 (D.C. 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 Corp. 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

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5 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).

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.

There is no doubt of the unique nature of the proposed transaction. There should also be no doubt of the unparalleled opportunity it provides to the Board to achieve a transportation policy objective that has eluded the federal government for more than twenty years. That objective is the provision of balanced two-carrier competition to the greatest extent possible throughout the Northeastern United States. If the achievement of that objective requires the Board to consider and apply public interest considerations beyond those included in the current policy statement, there is no doubt that it has the legal authority to do so.

D. 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 ensure that the transaction is consistent with the public interest by exercising its conditioning power arising under the 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 term, "broad." 49 C.F.R. Part 1180.1(d); *UP/SP* at 144; *Union Pacific Corp., et al. — Control — Missouri Pacific Corp.*, 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 502.

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 Corp., et al. — Control — Missouri-Kansas-Texas R.R. Co. et al.*, 4 I.C.C.2d 409, 437 (1988) (*"UP/MKT"*); *UP/MP*, 366 I.C.C. at 563-

64. Specifically, the agency has determined that "[i]f 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 usually not been willing to "impose conditions 'to ameliorate longstanding 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.'" *UP/SP* at 145, quoting *Burlington Northern, Inc. — Control and Merger — St. Louis-San Francisco Ry. Co.*, 360 I.C.C. 788, 952.

In this proceeding, the Applicants claim that they "will introduce new rail competition into large portions of the Northeast for the first time since before the creation of Conrail." Applicants' Rebuttal Narrative, CSX/NS-176, vol. 1, at 13. They go on the extol "the competitive and service benefits that come from having two strong rail networks serving them." *Id.* at 14. Applicants plainly believe that this transaction meets the public interest standard, in part, because it re-introduces competition where it has not existed for 20 years. The Board can and should exercise its conditioning to ensure that this transaction truly does reintroduce competition wherever possible.

The evidence presented by Erie-Niagara establishes that the Niagara Frontier region is entitled to relief from the Board under the Board's traditional analysis of railroad consolidations because the proposed transaction would be the direct cause of competitive harm to the area. In addition, the unique nature of the instant proposal, which the Applicants proclaim will restore balanced competition to major markets in the Northeast, further justifies the Board in analyzing this case, and the public interest, in a non-traditional manner and in imposing conditions that will

truly restore competition to all major markets in the Northeast, including the Niagara Frontier region.

IV. THE EVIDENCE SHOWS THAT THE PROPOSED TRANSACTION IS INCONSISTENT WITH THE PUBLIC INTEREST BECAUSE IT FAILS TO PROVIDE BALANCED COMPETITION IN THE NIAGARA FRONTIER AREA

A. The Applicants Have Ignored Their Own Principles That Require More Balanced Competition in the Niagara Frontier

The Board has an obligation to consider whether the transaction proposed by the Applicants is "consistent with the public interest." 49 U.S.C. § 11324(c).[6] As discussed above, when applying the current policy statement on railroad consolidation procedures, the Board and the ICC have evaluated the public interest by balancing the public benefits of the transaction against the need to prevent harm to competition and to prevent the loss of essential rail services. 49 C.F.R. Part 1180.1(c). But the Board needs to recognize, just as the ICC did, that a policy statement is not a binding norm and that parties to a particular proceeding must have and do have "the opportunity to challenge or support the policy through appropriate evidence or argument." *Railroad Consolidation Procedures*, 359 I.C.C. 195, 196 (1978).

The Board's current policy statement contemplates a fairly narrow set of considerations for use in evaluating the potential benefits of a proposed transaction.[7] It is clear that this evaluation of potential benefits focuses almost

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6 As the Board recognized recently: " 'The Act's single and essential standard of approval is that the [Board] find the [transaction] to be "consistent with the public interest." ' " *UP/SP* at 98, quoting *Missouri-Kansas-Texas R. Co. v. United States*, 632 F.2d 392, 395 (5th Cir. 1980).

7 The policy statement currently says that the potential benefits to be considered are:

Both the consolidated carrier and the public can benefit from a consolidation if the result is a financially sound competitor better able to provide adequate service on demand. This beneficial result can occur if the consolidated carrier is able to realize operating efficiencies and increased marketing opportunities. Since consolidations can lead to a reduction in redundant facilities and thereby to an increase in traffic density on underused lines, operating efficiencies may be realized. Furthermore, consolidations are the only feasible way for rail carriers to enter many new markets other than by contractual arrangement, such as for joint use of rail facilities or run-through trains. In some markets where there is sufficient existing rail capacity the construction of new rail line is prohibitively expensive and does not represent a feasible means of entry into the market.

49 C.F.R. § 1180.1(c)(1).

exclusively on the efficiency gains to be achieved by consolidating rail systems. This set of potential benefit considerations was appropriate when, as the ICC recognized over 15 years ago when it first adopted this policy, the national policy was "to rationalize the Nation's rail facilities and reduce excess capacity." *Railroad Consolidation Procedures, General Policy Statement*, 363 I.C.C. 241 (1980) and 363 I.C.C. 784 (1981). Now that the railroad industry has entered a period when there are few opportunities for further rationalization, and little, if any excess capacity, a narrow focus only on efficiency benefits is no longer appropriate.[8]

The transaction in this proceeding thus marks the end of an era in railroad merger proceedings. Nearly all of the opportunities for efficiency gains through rationalization of rail properties and reducing excess capacity have been realized, at least in terms of the consolidation of major systems. The very nature of this transaction demonstrates the truth of this observation. Unlike virtually every other major rail merger in the last 20 years, if not the last 100 years, this transaction does not involve the consolidation of two or more rail systems with the primary purpose of realizing efficiency gains at the cost of a certain amount of reduction in competition. Instead, it involves the joint acquisition by two financially strong and efficient rail systems of the properties of a third, in order to divide (instead of to consolidate) those properties, with the primary purpose of creating new and enhanced competition where none now exists.

The applicants themselves recognize this to be the case at the outset:

> This Application presents a unique, pro-competitive proposal to reconfigure the railroad industry in the eastern United States. If approved, [the proposal] will yield enormous public benefits, *the*

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8 Even when evaluating the public benefits of this narrow set of efficiency considerations, the Board has recognized that the likelihood of these efficiency gains providing any benefit to the public, by being passed on as reduced rates or improved service, would "in varying degrees *depend[] on competitive conditions*." *UP/SP* at 99 (emphasis added). In other words, if competitive forces are not present in the marketplace to drive rail carriers to share the efficiency gains achieved in a consolidation with their customers, there will be little if any *public benefit*, as distinct from the private benefits to the carriers involved. *Id.*

greatest of these being increased competition . . . .

Vol. 1 at 2 (emphasis added). The Applicants' witnesses emphasize over and over in their statements that this transaction will be restoring and increasing rail-to-rail competition in the northeast. *See, e.g.*, Application, Verified Statement of John W. Snow (hereafter referred to as "Snow V.S.") at 3, 5-6, 12-14 and Verified Statement of David R. Goode (hereafter referred to as "Goode V.S.") at 1-2, 9-11.

In light of this dramatic new departure in the nature of the transaction presented to the Board for approval, it is not only appropriate, but necessary, for the Board to modify the factors it considers in evaluating the potential benefits of this transaction. At least for this transaction, the Board should not consider primarily the potential benefits of operating and economic efficiencies that may or may not become public benefits. Instead, its primary consideration should be whether the transaction offers public benefits in the form of increased rail competition.

Indeed, NS issued in October of 1996 and distributed publicly a set of Principles of Balanced Rail Competition that requires just such a shift in emphasis for the Board's evaluation. ENRS Comments, Goode Dep., Ex. 1, Exh. D-1. As summarized by NS, these principles are:

1. Competition requires rail systems of comparable size and scope.
2. The largest markets must be served by (at least) two large railroads.
3. Owned routes are essential to competition.
4. Competition depends on effective terminal access.
5. Competition is not free.

The principles and their application are further elaborated and explained in a letter from NS to shippers on October 29, 1996, which offered them as the basis for developing "the fundamentals of competition in reality and not just in name." *Id.*

Both NS and CSX support these principles of balanced competition. Application, Snow V.S. at 9 and ENRS Comments, Goode Dep. at 73, Exh. D-1. In fact, NS Chairman Goode stated that the implementation of these principles would

be in the public interest.[9] In view of the Applicants' advocacy and commitment to these principles, they should be utilized by the Board as part of the policy consideration that it applies in evaluating whether this transaction, as proposed, is in the public interest.

When this transaction is evaluated in light of the public interest considerations that the applicants themselves regard as relevant, this transaction satisfies most of them. However, in one significant respect, this transaction does not satisfy one of the most important of the five principles, the one that requires that the largest markets have service by (at least) two railroads. One of the largest markets served and dominated by the Conrail system today is the Niagara Frontier area. It is also one of the largest markets that will not be receiving the public benefit of enhanced and restored rail competition. In short, the Principles of Balanced Rail Competition are not being applied to the Niagara Frontier region.

The October 29, 1996, letter provided a detailed explanation as to the reasons why access to the largest markets is an essential element of the implementation of the principles of balanced competition. As NS concluded:

> Competitive rail service is relevant to growth and development. We have an economy and a rail system grounded on the reality that competition works better than monopoly.

ENRS Comments, Goode Dep., Ex. 1., Exh. D-1. That is clearly a relevant consideration in the Niagara Frontier, a once thriving market area that, like the port of New York discussed in the NS letter, has struggled for two decades with the effects of the "Conrail monopoly epoch." *Id.*

Clearly, the identification of the largest markets that CSX and NS should both have access to is a critical part of the implementation of this principle. Elsewhere in

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9 Q. . . . Would it be fair to say that Norfolk Southern would believe that the implementation of these principles would be in the public interest?
A. Yes, that would be fair.
ENRS Comments, Goode Dep. at 72-73.

these comments and the numerous supporting statements, evidence is marshaled that plainly demonstrates that the Niagara Frontier area is a large market by any measure. Mr. Goode for NS has already recognized that this area, which includes the second largest city in New York (ENRS Comments, Keysa V.S. at 3) is a major market. ENRS Comments, Goode Dep. at 76-77, Exh. D-1. The State of New York, in its Comments, also recognizes the importance of the Niagara Frontier area, and urges the Board to provide the relief requested by Erie-Niagara. New York Comments (NYS-10) at 5 and Verified Statement of the Honorable George Pataki.

In addition to those facts, however, consideration must be given by the Board to an additional important element to assist it in determining the major markets that should be served by two major railroads under the proper implementation of the principles of balanced competition supported by the Applicants. As stated in the NS letter, when determining which areas should be considered major markets:

> [W]e are willing to look at New York and we are willing to look at the major markets defined by the Department of Transportation in 1974 in the process which led to the creation of Conrail.

ENRS Comments, Goode Dep., Ex. 1, Exh. D-1. The process referred to there, of course, was the process which led to the creation of Conrail from the most important rail lines owned by the several northeastern rail carriers that entered bankruptcy reorganization in the early to mid-1970's. That process clearly identified the Niagara Frontier area as a major market that needed to have competitive rail service from at least two major rail systems. A brief review of the structure and results of that process, and the history of the creation of Conrail, will clearly demonstrate that the Niagara Frontier area should now have two major rail carriers providing service to all shippers and receivers in the area.

The USRA was created by Congress with the task of restructuring the northeastern rail system, as well as a number of other related functions. Regional Rail Reorganization Act of 1973 (3-R Act), 45 U.S.C. §§ 701-729. In directing the

USRA to create a restructured northeastern rail network, Congress charged it with several major goals. The two most important at the time, given the circumstances then prevailing, were obviously: "(1) the creation . . . of a financially self-sustaining rail . . . service system in the region; [and] (2) the establishment and maintenance of a rail service system adequate to meet the rail transportation needs and service requirements of the region." 3-R Act, 45 U.S.C. § 716(a); S. REP. NO. 93-601 (1973), *reprinted in* 1973 U.S.C.C.A.N. 3242, 3266.

There were, however, other important goals. One of those goals was: "(5) the retention and promotion of competition in the provision of rail and other transportation services in the region." 3-R Act, 45 U.S.C. § 716(a)(5). In the course of developing the Final System Plan ("FSP") under the 3-R Act, the USRA placed great emphasis on this goal. As USRA stated in the FSP:[10]

> The preservation of competition required specific steps either to bring other carriers into the area or to create two carriers out of the bankrupt railroads to provide that level of competition.

Vol. 1 FSP Foreword at 1. This approach by USRA to restructuring the Northeastern rail industry was based on its analysis of the proper approach to a competitive railroad industry structure contained in its Preliminary System Plan ("PSP"). That analysis concluded:

> In general, two railroad firms in a large freight market will produce a "workable" level of intramodal competition.
>
> * * *
>
> The general policy adopted by USRA is that effective competition must be provided in key markets including markets presently dominated by bankrupt carriers.

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10 In view of the importance of the USRA Final System Plan in evaluating whether the proposed transaction is consistent with the public interest, it is requested that the Board take official notice of the contents of the Final System Plan, in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. § 556(e). Administrative agencies likes the Board have great latitude in taking official notice of facts, particularly those that are contained in reports prepared by other governmental entities such as USRA. *Castillo-Villagra v. INS*, 972 F.2d 1017, 1026-31 (9th Cir. 1992) and *McLeod v. INS*, 802 F.2d 89, 93-94 (3d. Cir. 1986).

Vol. 1 PSP at 109, 110.

In order to implement this model of workable rail competition, the Final System Plan issued by USRA on July 26, 1975, included a preferred option that would have provided competition in the Niagara Frontier area between two major rail systems. Under the FSP's preferred option, all of the lines of the Erie-Lackawanna ("EL") system east of Sterling, Ohio (near Akron) would have been conveyed to the Chessie System, predecessor of CSX (and now one of the applicants in this proceeding). The EL had a number of lines, branches, yards and other facilities throughout the Niagara Frontier area, extending from Niagara Falls/Suspension Bridge and Lockport on the north to the southern part of Buffalo.[11] EL had extensive access to customers in the Niagara Frontier area, either over its own lines, over the lines of the switching carriers it owned, or via reciprocal switching rights available from other carriers.[12]

The purpose of this proposed conveyance of the EL lines in the Niagara Frontier area to Chessie System was part of an overall effort by USRA to fulfill the mandate of the 3-R Act to preserve competition in the Northeast while assuring the financial viability of the new operators in the region. Most of the lines of the bankrupt carriers in the Northeast would be transferred to Conrail in order to provide it with the traffic base necessary to survive and prosper. On the other hand, Chessie would have received not only the EL lines just described, but would also

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11 EL had an ownership interest in the Niagara Junction Railroad, a switching carrier which provided EL with access to a number of major industrial facilities located in the Niagara Falls area. *Niagara Jct. Ry. Co. Control*, 267 I.C.C. 649 (1947). EL also jointly owned and operated (with Lehigh Valley) the Buffalo Creek Railroad, a terminal switching carrier serving the lakefront area of Buffalo and other nearby areas. *Incentive Per Diem Charges — 1968 (Lessees Buffalo Creek)*, 361 I.C.C. 939, 940 (1979). This line would have been used to provide trackage rights to Chessie under the preferred option. Vol. 1 FSP at 283.

12 The scope of EL's lines and operations in the Niagara Frontier area at the time the FSP was issued can be readily seen by reference to Exh. D-7, a reproduction of the zone map for the Niagara Frontier area prepared by the U.S. Department of Transportation. The FSP included a detailed listing of EL line segments that would have been conveyed to Chessie System. It includes a number of main line segments, branch lines and related properties in the Niagara Frontier area. Vol. 1 FSP at 308-309.

have received the Reading system lines (and other lines) giving it access to Philadelphia, PA, Wilmington, DE, Southern New Jersey and Northern New Jersey. In the Niagara Frontier region, all of the lines of the Penn Central and the Lehigh Valley would have been assigned to Conrail. Vol. 1 FSP at 14.

As the USRA plainly stated, the purpose of this division was to allow Chessie System, as a financially strong competitor for Conrail, the ability to provide competitive rail service throughout the Northeast:

> The Association believes that the indicated industry structure recommendations offer the best approach to reversing the financial plight of the Region's rail industry, *while ensuring adequate competition*. The Plan contemplates ultimate restoration of the Region's rail system to efficiency levels enjoyed by most railroads in the country. It can also serve as the basis for further evolutionary changes in the regional rail system as may required.
>
> This basic structure will offer competition between at least two railroads in major markets of the Region, supplemented by the services of smaller railroads.

Vol. I FSP at 3 (emphasis added).

Although Chessie System had reached agreement with USRA on a price and terms for acquiring the designated assets (Vol. 1 FSP at 14), Chessie ultimately did not complete the proposed transaction. CSX/NS-18, Vol. 1, Hoppe V.S. at 16. The EL lines in the Niagara Frontier area were therefore all transferred to Conrail in accordance with the alternative designation in the FSP. Vol. 1 FSP at 28, 320-321.[13]

The Applicants contend that the proposed transaction they have presented for approval will meet the objectives of the FSP that were not achieved. Application, Snow V.S. at 3, 6-7, 12-14; Hoppe V.S. at 18-19; McClellan V.S. at 50. However,

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13 The efforts of Congress and USRA to provide for rail competition in New York are also fully decided in the Comments of the State of New York, NYS-10, Banks V.S. at 2-3; 5-7; 11-17. The USRA tried to introduce some competitive options into the Niagara Frontier area by conveying to the D&H trackage rights from Binghamton, NY to Buffalo over the EL line conveyed to Conrail. D&H had a constant struggle with CR over the scope of those rights, including the scope of its right to serve local customers in the Niagara Frontier area. *See, e.g., Consolidated Rail Corp. v. Dicello*, 121 Bankr. 406, 1990 U.S. Dist. LEXIS 15068 (Reg'l Rail Reorg. Ct. 1990).

Applicants' witnesses have also acknowledged that the FSP would have transferred the Erie-Lackawanna lines in the Niagara Frontier area to Chessie. ENRS Comments, Goode Dep. at 77-78, Exh. D-1; Snow Dep. at 209, Exh. D-8; ENRS Comments, McClellan Dep. at 20-21, Exh. D-6. The Applicants provide no explanation for their failure to include the Niagara Frontier area among the other major markets that are receiving a restoration of the balanced two-carrier competition.

The foundation of Applicants' position in this proceeding is that the statutory requirement that the public interest include consideration of the effect on competition is met when the Board addresses *only* "actual reductions in competition." Applicants' Rebuttal Narrative at 36. By advancing this position, however, the Applicants have placed themselves in the posture of disavowing the "Principles of Balanced Rail Competition" so proudly announced and advocated by NS just a short time ago. NS' chairman, Mr. Goode, felt so strongly about these principles that he agreed that it would be in the public interest for these principles to be implemented by the Board. ENRS Comments, Goode Dep. at 72-73, Exh. D-1.

But apparently NS, and the other Applicants, no longer believe, if they ever did, that these Principles of Balanced Rail Competition should be applied by the Board in this proceeding. Erie-Niagara has shown clearly that, if those Principles were applied in this proceeding by the Board as part of its required evaluation of the public interest, the conditions requested by Erie-Niagara would have to be included in any order by the Board approving the proposed transaction. Confronted with the stark reality of this outcome, the Applicants' response has been to ignore completely the NS' Principles of Balanced Rail Competition. One can search the entire rebuttal submission by the Applicants and not a single mention of the Principles of Balanced Rail Competition by the Applicants of any of their witnesses can be found. This absence is all the more mystifying when considered in light of the fact that these Principles were developed and announced at the very moment when the

transaction that is now the subject of this proceeding was in its incipient stages.

The Board cannot and should not so readily ignore in this proceeding an important and fundamentally sound set of policies as those embodied in the Principles of Balanced Rail Competition. The Board is not limited to approving the private bargain presented by the Applicants. Charged with the statutory duty of determining whether the proposed transaction is in the public interest, the Board must consider, in light of the Applicants' own Principles of Balanced Rail Competition, whether to condition the proposed transaction in order to provide two-carrier access throughout the Niagara Frontier area. This was clearly a major objective of the federal government's efforts to restructure the northeastern railroads. Ironically, those efforts were frustrated by the inability of the predecessor of one of the Applicants to obtain satisfactory terms and conditions for entry into that major market. When another opportunity was presented to the Applicants to overcome that deficiency, they failed to seize it. The Board should not allow another opportunity to pass by the Niagara Frontier area again.

Applicants also rely on the Board's Decision No. 40 in this proceeding as support for their effort to limit the scope of the Board's public interest considerations.[14] Applicants' Rebuttal Narrative, Vol. 1 CSX/NS 176 at 120, citing Decision No. 40 served October 2, 1997, slip op. at 2. The underlying premise of that reliance is the notion that the Board's only role is to approve the private bargain of the Applicants. *Cf.* Snow Dep. at 218. As the Applicants put it, they believe that "the provision of new competitive options need not be made for a transaction to be in the public interest." Applicants' Rebuttal Narrative at 123. That may or may not be so in general,[15] but it clearly is not the case when the applicants themselves tout the

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14 In any event, Applicants read far too much into Decision No. 40. The decision clearly states the evidence that is required to be presented when conditions are sought "to remedy anticompetitive effects." Decision 40 at 2. When broader public interest goals are involved, as distinct from the limited goal of avoiding until - competitive effects, the Board is required and entitled to consider all evidence relevant to such broader goals.

15 As already discussed, the fact that the Board is guided by a policy statement in determining

benefits of restoring competition that was unavailable during the Conrail monopoly epoch by dividing Conrail's assets in a certain way. Having let the genie out of the bottle, the Applicants cannot and should not be permitted to arrogate to themselves the alone the function of determining where competition should or should not be provided. Under the current regulatory framework put in place by Congress, that is considered to be too important a task to be left to the private motivations and agreements of rail carriers. Congress has clearly given the Board a much larger role than merely approving a private bargain and ameliorating an actual reduction of competition. As long as the Applicants wish to avail themselves of the significant legal benefits arising from approval of their transaction by the Board,[16] they must, and should recognize that part of the regulatory bargain imposed by Congress is the right, indeed the obligation, of the Board to ensure that the transaction meets all of the relevant public interest considerations. Congress has explicitly directed the Board to consider the impact of the proposed transaction on competition. The Congress has invested much treasure and effort in trying to restore a competitive rail structure in the Northeast. It clearly has no desire to leave important policy issues regarding the establishment of effective rail competition to private deals. The long-standing emphasis and directives to the USRA, the ICC and the Board from Congress, in the 3-R Act, the 4-R Act and the Staggers Act, on competition in the rail industry, highlights the need for the Board to consider a broader perspective than that advocated by the Applicants.

B. The Applicants' Agreements with Other Parties Do Not Address the Fundamental Flaws in the Transaction

The Applicants contend that the agreements they have reached with NITL, CP, and CN eliminate the need for any additional relief in the form requested by Erie-Niagara. In all cases, the modest, even niggardly, concessions made by CSX in

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whether a proposed transaction meets the public interest test does not, and cannot, foreclose it from considering other aspects of the public interest, as required by the statute.

16 Such as, for example, full immunity from the antitrust laws and preemption of all other state and federal laws. 49 U.S.C. §11321.

those agreements are far from adequate to address the fundamental structural issues raised by Erie-Niagara regarding the lack of rail competitive alternatives in the Niagara Frontier.

With regard to the NITL agreement, only two provisions have any potential direct relevance to the Niagara Frontier.[17] First, the agreement provides that CSX and NS will keep any point at which Conrail now provides reciprocal switching open to reciprocal switching for ten years. NITL Agreement III.B. Second, the agreement provides that for a period of five years, CSX and NS will charge each other no more than $250 (adjusted for cost inflation) per car for reciprocal switching at any point where Conrail now provides reciprocal switching. Where CSX and NS will be providing reciprocal switching to other carriers (where Conrail provides such service), they also agree to maintain for five years either the current charges or the charges contained in any settlement agreement with such carriers. NITL Agreement III.C.

As already discussed above, during the Conrail monopoly epoch, Conrail customers in the Niagara Frontier have suffered either a steady erosion of the availability of reciprocal switching or the establishment of reciprocal switching charges at such a high level (currently as much as $450 per car[18]) by Conrail as to make its use uneconomical.[19] The NITL agreement only freezes existing arrangements. The reduction of Conrail's current level of charges from $450 would only benefit those shippers and receivers in the Niagara Frontier that would be utilizing reciprocal switching services between CSX and NS, not services provided by them to any other carriers.

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17 The agreement is set out in CSX/NS-176, Applicants' Rebuttal Narrative, at 768-774, in Appendix B.

18 CSX/NS-178, Applicants' Rebuttal Appendix, Vol. 3B at 609-615.

19 There is considerable doubt on the record about the purpose and effect of Conrail's cancellation of reciprocal switching services, as discussed in section V.C.2. As the Applicants' own evidence shows, such cancellations are continuing. *Id.* Whatever the reason for such cancellations, the fact remains that have occurred. See also Comments of State of New York, NYS-10, Banks V.S. at 5.

Applicants also claim that the settlement agreements entered into by CSX with CP and CN will improve the position of shippers in the Niagara Frontier. Applicants' Rebuttal Narrative, CSX/NS-176 at 139. This rather broad statement rests on a very tiny foundation, as can be readily seen by reference to the two agreements. As explained by CSX witness Jenkins, both agreements have a very limited scope and plainly do not address any of the fundamental structural issues raised by Erie-Niagara.

The limited scope of each agreement is set out in a separate appendix.[20]

V. THE EVIDENCE ALSO CLEARLY ESTABLISHES THAT THE NIAGARA FRONTIER AREA WILL SUFFER SUBSTANTIAL COMPETITIVE HARM AS A DIRECT RESULT OF THE PROPOSED TRANSACTION

A. The Establishment By the Applicants of Shared Assets Areas in Detroit, North Jersey, and South Jersey/Philadelphia Will Cause Competitive Harm to the Niagara Frontier Area

In contrast to the Niagara Frontier market, the Applicants intend to create shared assets areas in the major metropolitan areas of Detroit, North Jersey, and South Jersey/Philadelphia. In the shared assets areas, both CSX and NS will obtain the right physically to operate over and use all existing Conrail tracks and facilities. Thus, all shipper facilities located within those designated regions will obtain head-to-head rail competition between CSX and NS. The Applicants' proposal, however, ignores the competitive harm that will result to the Niagara Frontier region, which would become the only remaining major market served by Conrail in the northeast that would have received competitive rail under the USRA Final System Plan and that, under the Applicants' proposal, would still be subject to rail service from only a single carrier, either CSX or NS. The harm to the Niagara Frontier that would result

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20 The use of a separate appendix is necessary under the terms of a stipulation between Erie-Niagara and Applicants, which requires that the specific numerical terms of the two agreements, which were provided to Erie-Niagara during discovery, will be disclosed only to the Board and Applicants' outside counsel.

from this transaction would be direct and substantial, and must be addressed by the Board.

The record in this case plainly shows that the Niagara Frontier is a major economic region that generates substantial rail traffic and revenues. *See* Application CSX/NS-19 Vol. 2A, Kalt V.S. at 14 (showing Buffalo in the top 10 largest markets for Conrail traffic, ranking ahead of Detroit); Kalt V.S. at 63 (showing Buffalo in the top 10 largest New York BEA Routes). The prominence of the Niagara Frontier as an industrial base in the northeast with a substantial rail freight market is also confirmed by the analysis of Mr. Fauth which shows that 1995 annual freight charges for the Niagara Frontier region were in excess of . That traffic is also very profitable. ENRS Comments, Fauth V.S. at 4.

Moreover, in discussing the issue of major markets in the northeast, David R. Goode, President and CEO of NS, expressly stated at his deposition in this proceeding that, "I would regard Buffalo as a major market." ENRS Comments, Goode Dep. at 77.

In addition, as shown by Mr. Fauth, the rail transportation characteristics in the Niagara Frontier region, based upon Conrail's traffic base, are similar in certain important respects to the designated shared assets areas of Detroit, North Jersey, and South Jersey/Philadelphia. ENRS Comments, Fauth V.S. at 35-45. With respect to certain key rail traffic, the Niagara Frontier market is substantially larger than that of the designated shared assets areas. The Applicants have referred to the Northern New Jersey area as Conrail's "Chemical Coast." However, in 1995, Conrail originated only , of chemical traffic in that area compared to in the Niagara Frontier. ENRS Comments, Fauth V.S. at 41. Also, coal deliveries to the Niagara Frontier generated in freight charges as opposed to in the Philadelphia area. *Id.* at 45. Conrail's total origin market in the Philadelphia area generated compared to in the Niagara Frontier. *Id.* at 43. There simply is no compelling justification for failing to afford shippers in the

Niagara Frontier region with competitive rail service, when such competition will be afforded to these other comparable, and in some requests, less significant markets in the northeast.

Many of the industries located in the Niagara Frontier directly compete with industries located in Detroit, North Jersey, and South Jersey/Philadelphia. The lack of dual carrier access in the Niagara Frontier while such access is provided to these other areas will have a particularly negative effect on shippers of transportation equipment, chemicals and allied products, and coal. ENRS Comments, Fauth V.S. at 46-50; Coan V.S. at 9-14. The Applicants' proposal, which prevents this major economic region from receiving rail carrier competition, while affording such competition to almost every other major market in the northeast, is contrary to the public interest, will harm the shippers in the Niagara Frontier and must not be allowed to stand.

B. The Proposed Transaction Will Result in Lost Efficiencies and Minimal Benefits in the Niagara Frontier Area

A substantial portion of Conrail service in the Niagara Frontier is direct or single-line. In single-line service, Conrail services the origin and the destination point. In 1995, Conrail transported percent of its traffic in single-line service where the origin or destination point involved the Niagara Frontier.

Throughout their Application, CSX and NS tout repeatedly the dramatic increase in single-line service that will result from the transaction and praise the public benefits that will arise therefrom. *See* Application CSX/NS-18, Vol. 1, at 3, 12, 16, and 18. However, the Niagara Frontier will not reap such public benefits. ENRS Comments, Keysa V.S. at 3-5, 12-14; Swist V.S. at 2.

Under the proposed transaction, CSX will be assigned the vast majority of Conrail stations in the Niagara Frontier. However, the Conrail destinations for traffic originating in the Niagara Frontier and the Conrail origins for traffic destined to that area will be split between CSX and NS. As a consequence, the proposal will

result in a significant decrease in single-line service, and a corresponding increase in interchange service, involving the Niagara Frontier area.

As shown by Mr. Fauth's analysis, after the transaction, CSX joint-line traffic in the Niagara Frontier will be significantly higher than that of Conrail, percent versus percent, respectively. ENRS Comments, Fauth V.S. at 31, Table 6. Similarly, CSX single-line traffic will be significantly less than Conrail direct traffic today, percent versus percent. *Id.* Based upon the Applicants' *own* assessments, interchange traffic is less efficient and results in higher costs. *See also* ENRS Comments, Fauth V.S. at 33. This, of course, can be expected to lead to higher transportation charges in the area. Accordingly, the reduction in single-line service to the Niagara Frontier area would have a direct adverse impact and would not serve the interest of rail shippers in the Niagara Frontier or the public interest at large.

C. The Proposed Transaction Will Result in Higher Transportation Rates and Charges In the Niagara Frontier Region

1. The Substantial Acquisition Premium Paid For Conrail Will Result in Higher Transportation Rates in the Niagara Frontier

In their Rebuttal filed on December 15, 1997, the Applicants have raised a number of arguments contending that the Board should not consider the effect of the acquisition premium in this proceeding. Several of the points were addressed in Erie-Niagara's comments and will not be repeated here. ENRS Comments at 25-28.

There is a significant disagreement in this record over both the size of and the method of calculating the so-called "acquisition premium," referred to by the Applicants' witness Whitehurst as the "write up of the value of acquired Conrail assets." CSX/NS-177, Vol. 2B, at 669. But the size and method of calculating the acquisition premium is <u>not</u> material to the Board's consideration of this matter. All parties are in agreement that NS and CSX have paid a price for Conrail that *far* exceeds either the book value or the market value of Conrail, by many *billions* of dollars. The Applicants themselves note in their rebuttal that the amount paid by

NS and CSX for Conrail plus assumed liabilities and transaction fees "substantially exceeds the historic net book value of the road property and equipment assets as recorded on Conrail's books." CSX/NS-176, App. A, at 737. Thus, the Board must deal with the acquisition premium issue and the effect of that issue on its regulatory authority regardless of whether the premium is calculated to be $9.550 billion. some higher number on the basis of the conceded $3 billion error, or some lower number. *See* CSX/NS-176, App. A, at 737, fn. 4; CSX/NS-177, Vol. 2B, at 669 and NITL-7, at 15-16.

The Board must deal with this issue both because of the legal principles that apply, as well as because it is a matter of sound economic and regulatory policy. As a legal matter, the courts have uniformly affirmed that market values cannot be used to affect regulatory prices; and some courts have specifically ruled that it is unlawful to include acquisition write-ups in any portion of an investment base used for regulatory purposes. See, *e.g., Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 601 (1944) and *Duquesne Light Company, v. Barasch*, 488 U.S. 299 (1989). The ICC has also recognized that acquisition premiums do not belong in the investment base and that transportation property should be recorded for ratemaking purposes according to original cost. Ex Parte 271, *Net Investment - Railroad Rate Base and Rate of Return*, 345 I.C.C. 1494, 1519 (1976).

It is important to note that the Applicants do not dispute the fact that the acquisition premium in this transaction will *in fact* have a biasing effect upon the Board's calculation of revenue adequacy and the jurisdictional threshold. They argue, however, that the fact of this effect is a non-issue because "rates are not set on the basis of regulation but by prevailing market conditions and negotiations" Kalt Rebuttal Verified Statement (hereafter "R.V.S."), at 72; *see also*, CSX/NS-176, at 107 and App. A, at 740-741, 751, or because the upward-biasing effect of the acquisition premium will be offset by cost-reducing and revenue-enhancing effects of the transaction. CSX-NS 176, at 110-111, and App. A, at 758-762. But neither argument

withstands analysis.

First of all, the argument that all rates are set on the basis of market conditions -- that is, there is no rates that are even subject to the Board's jurisdiction -- runs squarely in the face numerous Board and ICC precedent indicating that certain movements by rail *are* captive, and for these movements, the Congress has granted to the Board regulatory authority to restrain the railroads' market power.

The fact that some rail movements are competitive is irrelevant to the correct methodology for regulating movements that are not competitive: and as long as *any* movements have prices that are actually or even potentially constrained by regulatory action, then the "fatal circularity" problem indicated by the Supreme Court in *Hope Natural Gas* must apply. If the assets used for such movements are valued by reference to acquisition cost, then "the capitalization of such freed-up market power provides the cost-basis for capturing such freed-up market power in subsequent rate setting." Kalt RVS at 71.

Reductions in costs as a result of the transaction that accrue to the calculation of "regulatory" costs does *not* justify allowing carriers to write up the value of their assets, any more than it would if cost reductions occurred for some other reason. If the acquisition premium does represent the capitalization of cost savings -- a matter that is not shown on this record, and indeed, is belied by the bidding process engaged in by NS and CSX for control of Conrail -- then allowing carriers to write up the value of assets to reflect this would ensure that they captured the full extent of any cost saving, regardless of source, rather than passing part on to consumers. This would be contrary to the results expected in a competitive market; contrary to the purposes of regulation; and result in assymmetries between mergers and other cost-reducing events.

In their Rebuttal, NS and CSX also argue that making any change in the Board's policies or procedures would constitute impermissible retroactive relief, and should appropriately be considered, if at all, in a rulemaking or other ex parte

proceeding. CSX/NS-176, at 110 and App. A, at 740 and pp. HC-752-754). But such a contention flies in the face of what the Board has already decided in this case. The issue of the acquisition premium and its effect was raised in this proceeding almost immediately after the filing of the Application, and again when the Applicants sought approval of their voting trust to acquire Conrail, in cash, before the Board's final approval of the transaction could be obtained at the end of the proceeding. Decision No. 4, served May 2, 1997, at 3. It was not until after that date that CSX and NS spent most of the money they expended to purchase the remainder of Conrail and place their shares in a Board-approved voting trust. Given the Board's decision in Decision No. 4, the Applicants' "retroactivity" argument is simply wrong: the Applicants cannot contend that the argument was premature when first raised, but now would be too late to raise it. Moreover, in view of Decision No. 4, the Applicants cannot claim that they acted in "reliance" upon the Board's "longstanding rules and precedent," see CSX/NS-176, App. A, at 740.

2. Reciprocal Switching

Another element of competitive harm occurring as a result of this transaction is the elimination of reciprocal switching that occurred when Conrail made wholesale cancellations of reciprocal switching services in the Niagara Frontier area. ENRS Comments, Fauth V.S. at 29. As the Board's policy statement explicitly acknowledges, any elimination of the only remaining rail competitor by a transaction is a significant element of competitive harm that must be addressed. 49 C.F.R. Part 1180.1(c)(2)(i). The Board has focused recently on the need to prevent loss of competition at points where the available rail competitive alternatives would be reduced from two to one. *See UP/SP* at 98-103.

In that proceeding the Board accepted and imposed as part of a condition a general definition of a "2-to-1 shipper" or a "2-to-1 customer" as one "presently served by both UP and SP and no other railroad." *UP/SP* at 57, n.71 (referring to definition in BNSF agreement, section 8i). For purposes of this proceeding, the term

"presently served" would have to be determined in relation to the time the Applicants began negotiating their merger agreement.

There are indications on the record that NS and CSX began negotiating between themselves and with Conrail as early as 1994. ENRS Comments, Exh. D-6, McClellan Dep. at 24. In 1995, CSX and NS had agreed between themselves on a division of Conrail and a price they would pay for Conrail. This agreement was not implemented because Conrail wished to remain independent at that time. *Id.* at 26. Nonetheless, it is apparent that serious negotiations were well underway, perhaps as early as 1994, for the joint acquisition of Conrail. Therefore, 1995 should be the operative date for determining when a possible 2-to-1 customer was "presently served" under the broad definition adopted in *UP/SP*.

It is obvious that the cancellation by Conrail of reciprocal switching for customers in Niagara Falls and Buffalo in 1996 occurred after an agreement had been reached on the acquisition and division of Conrail. Therefore, shippers that were deprived of reciprocal switching service by these actions are entitled to restoration of such reciprocal switching service so that they are not competitively harmed as a result of this transaction. The establishment of reciprocal switching services for all present and future Conrail customers throughout the Niagara Frontier would ensure that such harm would be removed.

Applicants now claim that the numerous reciprocal switching cancellations that became effective on November 15, 1996, were part of a purported "housekeeping" effort, involving an attempt by Conrail to remove "inactive customers" from the reciprocal switching tariff. Applicants' Rebuttal Narrative, CSX/NS-178 at 64-65.

McGee Dep. Tr. at 9-14. In fact, the witness did not consult any files regarding this housekeeping project

until after his verified statement was prepared, and admitted that he prepared it "off the top of my head." McGee Dep. Tr. at 69.

Applicants also claim that reciprocal switching for CSX was canceled by Conrail at Niagara Falls, New York, supposedly because "CSX no longer went to Niagara Falls" because it "gave up its rights to operate on Conrail between Niagara Falls and Buffalo." Applicants' Rebuttal Verified Statements, CSX/NS-177, McGee RVS at 3-4. However, as Mr. McGee admitted, Conrail still holds itself out as providing reciprocal switching to CSXT at North Tonawanda, New York, a point between Buffalo and Niagara Falls.[21] Mr. McGee admitted that contrary to his testimony, this fact seems to suggest that CSX is still operating at North Tonawanda. McGee Dep. Tr. at 47. If CSX is operating between Niagara Falls and Buffalo, then there was no basis for canceling reciprocal switching at Niagara Falls, contrary to Applicants' claims. In fact, this indicates that North Tonawanda is an additional 2-to-1 point where relief needs to be provided by the Board. If, on the other hand, Conrail was still offering reciprocal switching at North Tonawanda even though CSX no longer operated over that line, then its action canceling reciprocal switching at the nearby point of Niagara Falls was unjustified under the same circumstances.

Applicants' Rebuttal Narrative, CSX/NS-176 at 66 and Rebuttal Appendix, CSX/NS-178, Vol. 3C at 85. The existence of these arrangements with the two Canadian carriers plainly shows that CSX always had and still has the capability to reach customers at Niagara Falls. Conrail's cancellation of reciprocal switching totally lacks any justification.

Finally, Erie-Niagara has already acknowledged the existence of very limited

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21 *See* McGee Dep. Tr. 40-47 and Ex. 3 at ENRS P 000447-449; ENRS Comments, Ex.. D-7, which indicates that CSX's predecessor, C&O, had trackage rights to operate over the former Penn Central (now Conrail) line from Niagara Falls through North Tonawanda to Buffalo.

reciprocal switching services provided by Conrail to CP's U.S. affiliate, the former Delaware & Hudson. ENRS Comments, Fauth V.S. at 28. A note in the tariff makes it very plain that such service is only available on traffic moving through Buffalo. McGee Dep. Ex. 3 at ENRS P 000434-447. Moreover, as Mr. McGee admitted, a shipper wishing to use Conrail's reciprocal switching service to CP/DH at Niagara Falls would have no way of determining the applicable charges, because Conrail failed to publish the charges, a clear violation of former 49 U.S.C. § 10761 and present 49 U.S.C. § 11101. McGee Dep. Tr. at 48-50.[22]

3. Other 2-to-1 Situations[23]

CSX inherited from each of two of its predecessors, the Chesapeake & Ohio (C&O) and the Baltimore & Ohio (B&O), which had or have separate trackage rights under an agreement with Conrail over the former Buffalo Creek Railroad lines in order to reach customers on the waterfront area of Buffalo. This is a line that is to be allocated to CSX. Vol. 8B at 95, Transaction Agreement Att. I and Att. II. *See also* CSX 21 CO 006696-006699. These trackage rights were conveyed to CSX as part of the Final System Plan. *See* CR 11 P 000505-000522. CSX now contends that the rights under the B&O agreement (but not the rights under the C&O agreement) were assigned to the Buffalo and Pittsburgh ("BP"), a short-line carrier serving Buffalo.[24] So CSX clearly has retained the right to serve shippers on the Buffalo Creek line. Applicants' Rebuttal Narrative at 67-68. The BP, a short line, can hardly be considered an adequate replacement for a major Class I carrier such as CSX. Shippers on the Buffalo Creek line, who today have the right to request service from either CSX or CR, should have access after the transaction to a major carrier such as

---

22 In actuality, the level of these reciprocal switching charges is set in accordance with a 1983 agreement. ENRS Comments, Fauth V.S. at 28. But Conrail has apparently decided to keep these charges a secret, another example of its efforts to frustrate competition in the Niagara Frontier.

23 Applicants have agreed with Erie-Niagara's contention that the Niagara Frontier Food Terminal is a 2-to-1 point that both carriers will be given the right to serve. Applicants' Rebuttal Narrative at 68.

24 The Applicants never produced the agreement between CR and B&O or the subsequent assignment to BP in discovery.

NS. Again, this is an area of the Niagara Frontier region that should be protected from competitive harm by ensuring that NS has access to the customers on this line so that they will continue to have the same competitive alternatives they have today.

VI. THE BOARD MUST GRANT ERIE-NIAGARA'S REQUEST FOR CONDITIONS TO SERVE THE PUBLIC INTEREST AND TO PREVENT THE ANTICOMPETITIVE EFFECTS OF THE PROPOSED TRANSACTION

A. The Establishment of a Shared Assets Area in the Niagara Frontier Area Would Eliminate Harm to the Region and Would Serve the Public Interest

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 the Niagara Frontier area, a significant economic market in the Northeast, is substantial and must be addressed by the Board in order to protect the interests of that region and the public interest at large. In order to alleviate the harmful effects of the CSX/NS proposal that will result to the Niagara Frontier Area, Erie-Niagara respectfully urges the Board to require the establishment by the Applicants of the Niagara Frontier Shared Assets Area. As a part of this condition, the Board should require the establishment of reciprocal switching arrangements for all current and future customers that are or will be served by the Conrail lines involved in this proceeding, that would extend to carriers other than NS or CSX, that connect with the Conrail lines in the Niagara Frontier Shared Assets Area.

1. The Establishment of the Niagara Frontier Shared Assets Area Satisfies the Board's Criteria for Imposing Conditions

A requirement by the Board that the Applicants create another Shared Assets Area in the Niagara Frontier would undeniably satisfy each of the Board's established criteria for imposing conditions. Namely, such relief would (1) ameliorate or eliminate the harm threatened by the transaction; (2) be

operationally feasible; and (3) be of greater benefit to the public than detrimental to the transaction. *UP/MP*, 366 I.C.C. at 564.

The establishment of a Niagara Frontier Shared Assets Area would clearly eliminate the significant competitive harm to the Niagara Frontier region that would be caused by the CSX/NS proposal. Under the Shared Assets approach, both CSX and NS would be permitted to serve shipper facilities located within the designated shared assets area, thereby creating effective head-to-head rail competition within the area. Businesses within the Niagara Frontier region would not likely be subject to increases in transportation rates and charges, which would result under the CSX/NS proposal, but could expect to obtain rate reductions as a result of the two carrier competition. Businesses within the area, and the area as a whole, would not be competitively disadvantaged with respect to the locations of Detroit, the Philadelphia area, and North Jersey, which would receive dual access for the first time under the proposal, but could compete with such regions on equal footing. Customers and market-share of rail shippers in the Niagara Frontier would not be lost but could be expected to increase under true rail competition. Moreover, the benefits of single-line service would not be eliminated in many instances, as would be the case under the Applicants' proposal, but would be expanded.

As testified by Mr. Fauth, who has personally inspected and observed rail operations in the Niagara Frontier area, the creation of the new Shared Assets Area would also be operationally feasible. The rail facilities in the region are extensive and capacity is abundant. ENRS Comments, Fauth V.S. at 13. One of the largest rail yards in the nation, Frontier Yard, is located in the Niagara Frontier area. According to Mr. Fauth, "there are no operational or capacity constraints that would prohibit the establishment of a Niagara Frontier SAA." ENRS Comments, Fauth V.S. at 56. Erie-Niagara proposes that the Niagara Frontier Shared Assets Area be operated under the same conditions as proposed by the Applicants for the other shared assets areas. Thus, Conrail would handle much of the local operations in the area.

According to Mr. Fauth, having Conrail remain the primary operator in the Niagara Frontier Shared Assets Area would cause little, if any, operational difficulties. *Id.*

The Applicants' own proposals regarding the Detroit, South Jersey/Philadelphia, and North Jersey Shared Assets Areas also show that the creation of the Niagara Frontier Shared Assets Area would not create operational difficulties for the carriers. Under the transaction, Conrail, CSX and NS have or will enter into Shared Assets Operating Agreements. These Agreements were submitted with the Application as Exhibits G, H, I to the Transaction Agreement included in Volume 8B. Under the Agreements, Conrail will own, operate, maintain, and oversee the areas for the benefit of CSX and NS. Vol. I, at 45. Conrail will also control the dispatching and movement of trains in the areas. *Id.* at 46. Because Conrail is currently the dominant carrier operating in the Niagara Frontier region, a continuing role as operator of a shared assets area in that location could be expected to result in smooth operations. Moreover, the three proposed Shared Assets Area operating agreements for the three major metropolitan areas of Detroit, North Jersey/Philadelphia, and South Jersey are virtually identical. While at first glance the operating agreements may appear complex due to their length and numerous provisions, only three subsections included in the agreements vary from one agreement to the other. These subsections are 3(c), 3(i), and 6(j), which pertain to the grant of rights for operations over certain tracks owned by CSX and NS in the area, dispatching, and capital improvements. Based upon the fact that only minor variations exist under each of the shared assets operating agreements, there is no compelling basis why another such operating agreement could not be created by the Applicants for the Niagara Frontier region, subject to any reasonable and necessary fine tuning desired by the Applicants. Through train generations could be accomplished, for example, as proposed by the Applicants for the Niagara Frontier area.

It is also indisputable that the creation of head-to-head rail competition

throughout the Niagara Frontier area, which would result from the establishment of a shared assets area, will provide greater benefits to the public than harm to the Applicants. The Applicants' own submission and evidence plainly establish that the shared assets concept is a pro-competitive measure that will yield "enormous public benefits." *See generally* Vol. 2B, Harris V.S. and Vol. 2A, Kalt V.S. NS' witness Mr. Harris, an economic consultant, found that "[c]ompetition between Norfolk Southern and CSX for moving traffic on the Shared Assets Areas should provide shippers with superior price and quality choices." Vol. 2B, Harris V.S. at 18. Mr. Harris further concluded that "[c]ompetition between the two railroads will result in cost savings and efficiencies being passed to customers in the form of lower rates and better service." Harris V.S. at 9. CSX's witness, Mr. Kalt, identifies several important public interest benefits that can be expected to arise from new competition, including improved transportation service, faster and more reliable single-line service, and enhanced fleet utilization. Kalt V.S. 27-35.

These substantial public benefits which would result from the creation of a Niagara Frontier Shared Assets Area outweigh any detriment to the Applicants. As discussed above, the creation of a Niagara Frontier Shared Assets Area would not cause operational difficulties. In addition, any reductions in the Applicants' anticipated revenues to be achieved from the proposed transaction that might occur due to the insertion of competition in the Niagara Frontier area could be expected to be recouped over time based upon the Applicants' own evidence which establishes that the creation of competition will cause existing industries to expand production in competitive areas and cause new industries to locate facilities in dual access regions. Mr. John Anderson, Executive Vice-President, Sales and Marketing for CSX stated in his testimony that:

> Customers who are contemplating the construction of new facilities have great competitive leverage in deciding where to site their new facilities. In this connection, I expect that the dual presence of CSX and Norfolk

> Southern in areas that were previously served only by Conrail will stimulate economic growth as businesses choose to locate their facilities in commercial areas where they will have access to two carriers. Facilities located in the shared assets area will establish the competitive baseline for commercial transactions involving the commodities that they produce or consume.

Vol. 2A, Anderson V.S. at 14. Thus, the creation of a Niagara Frontier Shared Assets Area could be expected to increase rail shipping in the region over time, resulting in increased revenues and opportunities for CSX and NS.

2. The Niagara Frontier Area Satisfies the Elements Utilized by the Applicants In Creating the Shared Assets Areas

In addition to satisfying the Board's conditioning criteria, the creation of another shared assets area in the Niagara Frontier would satisfy the elements generally applied by the Applicants in creating the Detroit, North Jersey, South Jersey/Philadelphia Shared Assets Areas. In responding to discovery propounded by Erie-Niagara, the Applicants stated that "CSX and NS did not apply any specific criteria in determining . . . [the] Shared Assets Areas." CSX/NS-61, Applicants Responses to Interrogatory No. 1 of Erie-Niagara, Exh. D-9. However, at the deposition of CSX's witness William Hart, Vice President of Corporate Development for CSX, Mr. Hart identified certain elements that were considered and applied by the Applicants in determining the various shared assets areas. For example, with respect to the creation of the Northern New Jersey Shared Assets Area, the elements Mr. Hart identified were essentially as follows:

(1) Prior to the creation of Conrail, the area had been served by two or more carriers;
(2) The creation of Conrail by the federal government from bankrupt northeastern rail carriers resulted in a virtual monopoly in the area;
(3) That monopoly carrier, Conrail, had integrated the rail properties in the area;
(4) As a result of the proposed transaction, both CSX and NS will have new access to the area, and a division of the properties was not easy; and
(5) The area was a major market that was attractive to both parties.

Hart Dep. at 77-78, Exh. D-10.

The Niagara Frontier region satisfies each of these five elements. It is beyond dispute that, prior to the creation of Conrail, competition between a number of rail carriers in the Niagara Frontier was abundant. ENRS Comments, Fauth V.S. at 8-9; Keysa V.S. at 6-10. It was only subsequent to the federal government's creation of Conrail that rail service in the Niagara Frontier region became subject to a virtual Conrail monopoly. Fauth V.S. at 10. It is also certain that Conrail has integrated rail properties in the region, by consolidating stations, facilities and operations. Fauth V.S. at 9. In addition, under the proposed transaction, both CSX and NS will obtain new access to the Niagara Frontier, although CSX will be the dominant carrier, and freight stations in the area will be served by either CSX or NS. Vol. 8B, Transaction Agreement, Schedule 1, Attachment II. Finally, as shown above, the record is clear that Buffalo is a major market that would be attractive to both CSX and NS. This fact was expressly acknowledged by David R. Goode, Chairman and CEO of NS. ENRS Comments, Goode Dep. at 73, Exh. D-1. Other evidence also establishes this fact. *See aiso*, ENRS Comments, Fauth V.S. at 4 (showing 1995 annual freight charges for the region in excess of ; Vol. 2A, Kalt V.S. at 14 (showing Buffalo in the top 10 largest markets for Conrail traffic, ranking ahead of Detroit).

Establishing competition in the large and profitable Niagara Frontier region also correlates to the NS-established principle of balanced competition, which requires that "the largest markets have service by two railroads." This principle, among others, was reduced to writing and forwarded to thousands of rail shippers in October of 1996. ENRS Comments, Goode Dep., Exh. D-1. NS remains committed to this principle today, and expressly agreed that the implementation of such principle would serve the public interest. *Id.* at 72-73.

Accordingly, under the Applicants' own reasoning and considerations, the Niagara Frontier region should be designated as a shared assets area and the Board should condition its approval of the CSX and NS proposal by requiring the creation

by Applicants of the Niagara Frontier Shared Assets Area.

B. In the Alternative, the Board Should Require CSX and NS to Grant Each Other Reciprocal Terminal Trackage Rights in the Niagara Frontier Region

In the alternative, if a shared assets area is not created, approval of the joint acquisition of Conrail should be conditioned on the reciprocal grant of terminal trackage rights by CSX and NS within in the same geographic area that would comprise the proposed Niagara Frontier Shared Assets Area. While Erie-Niagara strongly believes that the public interest would be best served by the creation of a shared assets area, the evidence also justifies this alternative form of relief. In requiring CSX and NS to award each other terminal trackage rights in the Niagara Frontier area, ownership of the Conrail assets in the area would be divided as proposed by the Applicants. The trackage rights condition should be structured to allow all current and future customers located on the Conrail lines in the Niagara Frontier to receive rail service directly from both CSX and NS. In addition, compensation relating to such grant of trackage rights should be established at the reasonable level of $.0.29 per car mile (which is the same level of compensation proposed by the Applicants for other proposed trackage rights arrangements). ENRS Comments, Fauth V.S. at 59.

Reciprocal terminal trackage rights would alleviate the substantial competitive harm that will result in the Niagara Frontier area, were the transaction to be approved as proposed. In addition, it would truly restore balanced competition to the major markets in the northeast, as contemplated by the preferred option of the Final System Plan, which was an important component to the proposed transaction. As both CSX and NS would have access to the Niagara Frontier under the proposed transaction, and rail yards, facilities, and capacity in the area are substantial, there would not be operational difficulties if this condition were to be imposed on the Applicants. Moreover, the injection of competition into the Niagara Frontier would result in substantial benefits to the public interest that

would outweigh any detriment to the Applicants. By providing for competition in this major rail service area, economic growth rather than deterioration would be the end result.

C. As a Third Alternative, the Board Should Require the Applicants to Establish Open Reciprocal Switching in the Niagara Frontier Region

As a third alternative request for relief, Erie-Niagara asks that if neither of the previous conditions are imposed by the Board that approval of the joint acquisition of Conrail should be conditioned on the establishment by CSX and NS of reciprocal switching to all customers that are currently served by Conrail and to future customers that locate on the Conrail lines in the Niagara Frontier Shared Asset Area. Under this condition, reciprocal switching would be provided by CSX and NS separately on their portions of the Conrail assets allocated to each of them within the Niagara Frontier area. Compensation for the reciprocal switching service provided by CSX or NS, as the case may be, should be set by the Board at the reasonable per car charge of $156.00. It is proposed that the reciprocal switching service and reasonable charge would be open to all rail carriers that currently have access to the area and that wish to provide service to customers located at points that would otherwise be served by either CSX or NS.

For each of the same reasons expressed above, the imposition of this condition on the proposed transaction would serve the public interest and would satisfy the established criteria of the Board for imposing conditions in a control proceeding involving Class I rail carriers.

VII. CONCLUSION

In order to ensure that this transaction, when approved, will be consistent with the public interest, Erie-Niagara requests the following relief:

1. Creation of the Niagara Frontier Shared Assets Area

Approval of the joint acquisition of control of Conrail by NS and CSX should be conditioned on the creation by Applicants of another shared assets area -- the

Niagara Frontier Shared Assets Area -- that would include all of Erie and Niagara counties and the northern portion of Chautauqua County in New York State. All current and future customers that are or will be served by the Conrail lines involved in this proceeding within the limits of the Niagara Frontier Shared Assets Area would be able to receive direct and equal access to rail service from both CSX and NS. As in the other proposed shared assets areas, Conrail, as the designated shared assets area operator, should retain ownership of all current Conrail lines, yards, facilities and other equipment and property currently located within those limits necessary to permit it to carry out its required functions as a shared assets operator.

Approval of the acquisition should also be conditioned on the establishment within the Niagara Frontier Shared Assets Area of reciprocal switching arrangements for all current and future customers that are or will be served by the Conrail lines involved in this proceeding, that would extend to carriers other than NS or CSX. This will allow rail carriers serving the area, such as Canadian National, the Canadian Pacific Rail System, and existing short-line operators to also provide competitive service to current Conrail customers. Reciprocal switching services should be made available at the reasonable charge of $156 per car, subject to appropriate adjustment, as discussed below.

2. Reciprocal Grant of Terminal Trackage Rights

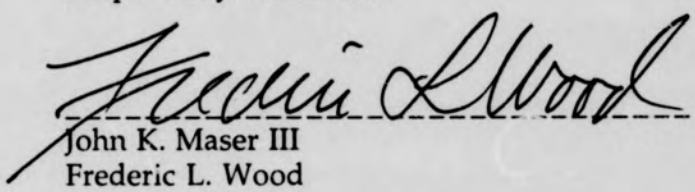
In the alternative, if a shared assets area is not created, approval of the joint acquisition of Conrail should be conditioned on the reciprocal grant of terminal trackage rights by CSX and NS within the same geographic area described above. Ownership of the Conrail assets in the area would be divided as proposed by the Applicants. This would allow all current and future customers located in the proposed boundaries of the Niagara Frontier Shared Assets Area to receive rail service directly from both CSX and NS. Compensation relating to such grant of trackage rights should be established at the reasonable level of $0.29 per car mile

(which is the same level of compensation proposed by the Applicants for other proposed trackage rights arrangements).

3. Reciprocal Switching for All Current and Future Customers Located On Conrail Rail Lines

If neither of the above alternatives is established, approval of the joint acquisition of Conrail 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 in this proceeding. Reciprocal switching would be provided by CSX and NS separately on their portions of the Conrail assets allocated to each of them within the Niagara Frontier area. Service would be provided by CSX or NS, as the case may be, at the reasonable per car charge of $156 for the account of all rail carriers which currently have access to the area and that wish to provide service to customers located at points that would otherwise be served only by either CSX or NS.

Respectfully submitted,



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Attorneys for
Erie-Niagara Rail Steering Committee

Dated: February 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a copy of the foregoing BRIEF OF ERIE-NIAGARA RAIL STEERING COMMITTEE by first class mail, postage prepaid, on all parties of record in this proceeding this 23rd day of February, 1998.

Karyn A. Booth

APPENDIX A

DEPOSITION EXCERPTS

CERTIFIED COPY

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.

Thursday, February 5, 1998

Deposition of A.J. McGEE, JR., 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 Harkins Cunningham, Suite 600, 1300 Nineteenth Street, N.W., Washington, D.C., 20036-1609, at 2:35 p.m., Thursday, February 5, 1998, and the proceedings being taken down by Stenotype by JAN A. WILLIAMS, RPR, and transcribed under her direction.

term, since your change to RPS?

A. In connection with that tariff, I may get questions, I may even receive job sheets that they want passed on to RPS. And what they'll do is ask my opinion on if they're doing something correctly as far as how they want to have it published. And then I will pass it along to RPS for them to publish based on my conversations with the business group.

Q. So there are other employees or current employees of Conrail who are actually the ones who make the decisions about what changes, if any, need to be made in that tariff?

A. Oh, yes.

Q. On page 351 there is a reference, the first sentence in the second full paragraph, referring to a housekeeping project to clean up the existing Conrail tariff 8001-D. Did you make the decision to undertake that housekeeping project?

A. Yes.

Q. Why was it felt necessary to undertake that housekeeping project?

A. We do that for all publications, we have it as an ongoing project, it was part of

goals and objectives to more or less do this for all tariffs.

Q. Why was it decided to focus specifically on 8001-D?

A. In the natural progression of doing publications, that was one that needed to be addressed, because we basically had done a pretty good job on all the other tariffs and they were pretty much cleaned up. So, in the progression of doing housecleaning, we came to this one.

Q. This was not initiated pursuant to a request from other departments at Conrail --

A. No.

Q. -- to make changes in the tariff?

A. No, sir.

Q. In the next paragraph, the third paragraph, you have a statement that you begin, by making sure that shippers who are listed in each switch district actually existed at the locations referenced in the tariff. And the next sentence refers to a customer profile. Do you see that sentence?

A. Yes.

Q. What is a customer profile?

A. A customer profile is a database that's

available or maintained by the National Customer Service Center. And in there they keep pertinent information on shippers at particular locations.

Q. Is it a computer database?

A. Yes, it is.

Q. Is that the only source that you examined in conducting this project and looking for evidence of rail traffic moving to or from that shipper?

A. The individual working on that would have used that as a main source.

Q. Who was that individual?

A. Joe Macoule.

Q. Would you spell his last name.

A. Sure, M-a-c-o-u-l-e.

Q. Was he the only one who was working on the project?

A. Yes.

Q. Were you the one who directed him to use the customer profile database as the main source for this information?

A. Yes, sir.

Q. Were there any other sources of information that he could have consulted to determine if there were any rail traffic moving

to or from a particular shipper?

A. There are other data available at Conrail to determine shipments moving between points.

Q. What specifically other sources were you referring to?

Q. Where would Mr. Macoule be able to obtain the name of the shipper that he wanted to make an inquiry about, by looking at the tariff?

A. Well, you could look at the tariff or you could get a call from someone saying I have this shipper at such and such a location. And then you would look up -- again in the profile you would look for that particular customer.

Q. Was Mr. Macoule the only one who was actually doing these inquiries into the customer profile database or did you actually do some of them yourself?

A. Mr. Macoule did it in connection with this project.

Q. Not anyone else as far as you know?

A. No, no one else.

MR. WOOD: I'd like to have one exhibit marked, the first one, please.

MR. NORTON: Rick, I just want to raise a question about the exhibit. I don't know where this stands in terms of other depositions. But, you know, there's an issue about using a deposition exhibit as a means of putting evidence into the record that's not already there.

And I don't know that we have to resolve it in this proceeding, but what I was going to suggest is you can ask questions about it. But, if we reserve until the end whether it's actually going to be attached to the deposition, then we can see whether it's an issue or not. If you want to have it marked, then it's not a problem.

MR. WOOD: All right. Well, I'd like to have it marked. And I'll just say for the record that I sent over to you yesterday what I planned to use.

MR. NORTON: I understand.

MR. WOOD: The best I can determine, it's public documents which are tariffs but are

BY MR. WOOD:

Q. Let me just get right to the point, Mr. McGee. Can you look at page 437 which is fourth revised page 163. And, referring to item 18040 which appears beginning in the middle of that page which in the heading has a statement that says there is no reciprocal switching between CR and CSXT; is that correct?

A. That's correct.

Q. Looking at the page just before that which is page 436 which is third revised page 163, doesn't this item which is again item 18040, doesn't this item indicate that Conrail would provide reciprocal switching for customers at Niagara Falls in connection with CSXT?

A. Correct.

Q. So that, effective April 1, 1996, the tariff was changed so that reciprocal switching was no longer available in connection with CSX?

A. Correct.

Q. Now, further down on your verified statement, in the last paragraph beginning at the bottom of page 352, you have a statement that CSX operated -- it says at Niagara Falls it operated over Conrail to Buffalo. Do you see that

statement?

A. Yes, sir.

Q. Do you know if CSX served any other points between Niagara Falls and Buffalo?

A. I'm not familiar with that.

Q. Let me ask you to turn to the last page in this Exhibit 3 which is 449 in the document set, second revised page 165. The first item on that page is item 18050. Am I correct in understanding that this item seems to provide that Conrail as of April 17, 1997, was holding itself out to provide reciprocal switching in connection with CSXT at North Tonawanda, New York?

A. That's correct.

Q. Do you know where North Tonawanda is?

A. No, I do not.

Q. If I suggested to you that it is between Niagara Falls and Buffalo, would that refresh your recollection?

A. I would assume it was in that area, sure.

Q. Referring back to page 437 in which the change was made at Niagara Falls, would you have been involved in preparing this tariff

publication at the time it was published?

A. Yes.

Q. Did you make the decision to make this change?

A. No.

Q. Do you recall who did?

A. No. We would have received instructions from someone in Conrail.

Q. Were you still a Conrail employee at that time?

A. Yes, I was.

Q. Was it someone in the marketing department?

A. Possibly.

Q. Do you know if CSX still operates into North Tonawanda, New York?

A. I do not.

Q. Do you have any recollection why the instructions were to cancel reciprocal switching at Niagara Falls but not to cancel it at North Tonawanda?

MR. NORTON: Objection, lack of foundation that he had any personal involvement.

MR. WOOD: I asked the question if he received instructions.

BY MR. WOOD:

Q. Let me rephrase the question.

Did you receive any instructions at the time you were instructed to cancel or modify the item relating to Niagara Falls, receive any instructions about North Tonawanda?

A. No, I did not.

Q. What is the source of your statement that CSX operated over Conrail's line from Niagara Falls to Buffalo?

A. In connection with my work in the divisions area and also in connection with information I may receive in connection with jobs, I would come across that type of information possibly if they defined it.

Q. Do you know if that was pursuant to a trackage rights agreement?

A. I do not know about that.

Q. On the next page, 353, of your verified statement, you have a statement that CSX gave up its rights to operate on Conrail between Niagara Falls and Buffalo. What's the source of your knowledge for that statement?

A. The job sheet that I would have probably received in connection with telling me

to change this, change the Niagara Falls information to say that CSX is no longer open to reciprocal switching.

Q. There would have been a statement on that job sheet as to the reason for the change?

A. I would assume there is. I can't really say. Again I'd have to recall what the job sheet had on it. But I would say yes, there could be a statement on there.

Q. What would be on a job sheet, what kind of information and who would it come from?

A. Job sheets would vary depending on what area it came from, what the person was trying to convey, it may be rather simple, it may be rather detailed, it would vary.

Q. Is it a standard form for instructions to make a tariff change?

A. Just as long as it was clear, there wasn't anything per se that they would do, just a standard form.

Q. Do you know whether or not CSXT is still operating at North Tonawanda, New York?

A. I can't answer that. From the tariff, I would say they are.

Q. Let me move on to the last two

paragraphs on 353. And let's stay with page 437. You refer to this note which is quoted in your last paragraph which, am I correct, it's the same note one that appears at the bottom of this tariff, item 18040?

A. That's correct.

Q. Let's just hypothetically talk about one of the shippers on this list, it really doesn't matter who it is, Airco Speer Carbon, the first one on the list. If Airco Speer Carbon wanted to take advantage of note one and obtain reciprocal switching service in connection with CPRS, how would it know what the charge would be.

A. I really can't answer that.

Q. And the same is true with the shipper, he wouldn't be able to get that answer from the tariff either; is that right?

A. It doesn't appear that way.

Q. Based on your experience in preparing tariffs that comply with the requirements, is this a customary and usual arrangement?

MR. NORTON: Objection. What requirements are you talking about?

BY MR. WOOD:

Q. Okay. Let me clarify the question.

Aren't tariffs required to be filed or were required to be filed in order to disclose the rates that are applicable that the shipper could use?

MR. NORTON: At what point in time?

BY MR. WOOD:

Q. Let's break up the question. Before January 1, 1996. Do you understand the question?

A. I'm sorry, could you repeat the question.

Q. Yes. Is it your understanding that tariffs were required to be filed in order to disclose for the use by the shipping public the rates and charges that would be applicable?

MR. NORTON: Objection as to the relevance of prior to January 1, 1996, because we're talking here about an event that took place April 1, 1996.

BY MR. WOOD:

Q. Let's go back to the previous page, Mr. McGee. Effective date June 1, 1995, before January 1, 1996. Mr. McGee, does the same note appear there?

A. Yes, it does.

Q. If I was a shipper of Airco Speer Carbon in Niagara Falls, New York, and I wanted to obtain reciprocal switching service from Conrail in connection with CPRS, would I be able to determine the charge that would be applied from this tariff?

A. It doesn't appear that way.

Q. Let's go back to the question we left, the subject matter of the housekeeping project. You indicated in response to a question that,

BY MR. WOOD:

Q. Mr. McGee, Mr. Norton asked you about your response when you indicated that you looked at the screen prints that we've referred to in connection with your verified statement. And, as I understand, your response was that you looked at those after you completed your verified statement?

A. That's correct.

Q. When precisely did you look at those?

A. I would say somewhere in December.

Q. Why would you have looked at those?

A. I was asked if there was any papers in connection with what Joe Macoule might have done.

Q. And who asked you that question?

A. Counsel.

Q. Mr. Norton specifically?

A. No.

Q. Who was it by name?

A. Ms. Treadway.

Q. In the course of preparing your verified statement, did you look at any of the files or look at any materials regarding this housekeeping project?

A. I looked at the tariff itself and I did

not see -- basically it was off the top of my head, this was basically what I knew about the project.

Q. In addition to the screen prints, in response to counsel's request, were there any other materials that you looked at?

A. No.

Q. Did you provide copies of those to counsel?

A. Yes, I did.

Q. In response to another question with Mr. Norton, you indicated that this what you referred to as housekeeping project was not suspended because of the merger; is that a correct characterization of your answer?

A. That's true.

Q. Who made the decision to suspend the project?

A. I did.

MR. WOOD: Well, those are all the questions I have. But I still think that there is a question about whether or not those screen prints materials should have been provided as work papers. Certainly the fact that they were asked about indicates that there was some concern

ILCC 371
MDPSC CR 8001-D

MDOT CR 8001-D
NYDOT CR 8001-D

ICC CR 8001-D
PSCWV CR 8[illegible]-D

SECTION 6
RECIPROCAL SWITCHING (Except as Noted)

NEW CASTLE, IN

ITEM	BETWEEN		DISTRICT LOCATION	AND JUNCTION WITH NS
	NAME	BUSINESS		PER CAR
18010	Allegheny Ludlum Steel Co.-- Ingersoll Johnson Steel Co.-	Steel---------- Sheet Steel Mfg.----------	CR	$ 390.00

NIAGARA FALLS, NY

ITEM	BETWEEN		DISTRICT LOCATION	AND JUNCTION WITH CSXT
	NAME	BUSINESS		PER CAR
18040 (Cont'd)	Airco Speer Carbon---------- Alox Corp---------- BI Metals---------- BPI---------- Carbon Graphite Group------- Carbon Products---------- Cecos---------- Chisholm Ryder---------- City of Niagara Falls Wastewater Plant---------- Dupont, E.I.---------- Elkem Metals---------- Forgione Lumber---------- Frontier Foundries---------- Goodyear Tire & Rubber------ Great Lakes Carbon---------- Grief Bros.---------- Hyson---------- L-Tech Welding & Cutting----	---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ----------	CR	$ 390.00

EXHIBIT
McGee 3
2/5/xx

For explanation of abbreviations and reference marks, see concluding page(s) of this tariff.

ILCC 371
MDPSC CR 8001-D

MDOT CR 8001-D
NYDOT CR 8001-D

ICC CR 8001-D
PSCWV CR 8001-D

SECTION 6
RECIPROCAL SWITCHING (Except as Noted)

NEW CASTLE, IN

ITEM	BETWEEN		DISTRICT LOCATION	AND JUNCTION WITH NS
	NAME	BUSINESS/ADDRESS		PER CAR
18010	Allegheny Ludlum Steel Co.-- Ingersoll Johnson Steel Co.-	Steel---------- Sheet Steel Mfg.----------	CR	$ 390.00

NIAGARA FALLS, NY

ITEM	BETWEEN		DISTRICT LOCATION	AND JUNCTION WITH CSXT ▲ (NOTE 1)
	NAME	BUSINESS/ADDRESS		PER CAR
18040 (Cont'd)	Airco Speer Carbon---------- Alox Corp---------- BI Metals---------- BPI---------- Carbon Graphite Group------- Carbon Products---------- Cecos---------- Chisholm Ryder---------- City of Niagara Falls Wastewater Plant---------- Dupont, E.I.---------- Elkem Metals---------- Forgione Lumber---------- Frontier Foundries---------- Goodyear Tire & Rubber------ Great Lakes Carbon---------- Grief Bros.---------- Hyson---------- L-Tech Welding & Cutting----	---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ----------	CR	$ 390.00

NOTE 1 - Carload freight traffic arriving at or departing from Buffalo, NY over CPRS via routes that do not pass through Niagara Falls, NY may be handled by CONRAIL in switch service to or from industries listed in this item, subject to the provisions of an agreement between CPRS and CONRAIL.

For explanation of abbreviations and reference marks, see concluding page(s) of this tariff.

ISSUED JANUARY 27, 1995

EFFECTIVE JANUARY 30, 1995

ISSUED BY
CONSOLIDATED RAIL CORPORATION, 2001 MARKET STREET - 23C, P.O. BOX 41423, PHILADELPHIA, PA 19101-1423

SECTION 6
RECIPROCAL SWITCHING (Except as Noted)

NEW CASTLE, IN

ITEM	BETWEEN			AND JUNCTION WITH
	NAME	BUSINESS/ADDRESS	DISTRICT LOCATION	NS
				PER CAR
18010	Allegheny Ludlum Steel Co.-- Ingersoll Johnson Steel Co.-	Steel---------- Sheet Steel Mfg.----------	CR	$ 390.00

NIAGARA FALLS, NY

ITEM	BETWEEN			AND JUNCTION WITH
	NAME	BUSINESS/ADDRESS	DISTRICT LOCATION	CSXT (NOTE 1)
				PER CAR
18040 (Cont'd)	Airco Speer Carbon----------	----------	CR	$ 390.00
	Alox Corp----------	----------		
	BI Metals----------	----------		
	BPI----------	----------		
	Carbon Graphite Group-------	----------		
	Carbon Products----------	----------		
	Cecos----------	----------		
	Chisholm Ryder----------	----------		
	City of Niagara Falls Wastewater Plant----------	Cancel ▲		
	Dupont, E.I.----------	----------		
	Elkem Metals----------	----------		
	Forgione Lumber----------	----------		
	Frontier Foundries----------	----------		
	Globe Metallurgical---------	3801 Highland Avenue----------		
	Goodyear Tire & Rubber------	----------		
	Grief Bros.----------	----------		
	Hyson----------	----------		
	L-Tech Welding & Cutting----	----------		

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For explanation of abbreviations and reference marks, see concluding page(s) of this tariff.

SECTION 6
RECIPROCAL SWITCHING (Except as Noted)

NEW CASTLE, IN

ITEM	BETWEEN			AND JUNCTION WITH
	NAME	BUSINESS/ADDRESS	DISTRICT LOCATION	NS
				PER CAR
18010	Allegheny Ludlum Steel Co.-- Ingersoll Johnson Steel Co.-	Steel---------- Sheet Steel Mfg.----------	CR	$ 390.00

♦ NIAGARA FALLS, NY (FOR INFORMATION ONLY)
LIST OF INDUSTRIES AND FACILITIES LOCATED ON CONRAIL WITHIN THE NIAGARA FALLS, NY SWITCHING LIMITS
(There is no reciprocal switching between CR and CSXT, See Note 1)

ITEM	FIRM NAME	LOCATION
18040 (Cont'd)	Airco Speer Carbon----------	----------
	Alox Corp----------	----------
	BI Metals----------	----------
	BPI----------	----------
	Carbon Graphite Group----------	----------
	Carbon Products----------	----------
	Cecos----------	----------
	Chisholm Ryder----------	----------
	Dupont, E.I.----------	----------
	Elkem Metals----------	----------
	Forgione Lumber----------	----------
	Frontier Foundries----------	----------
	Globe Metallurgical----------	3801 Highland Avenue----------
	Goodyear Tire & Rubber----------	----------
	Grief Bros.----------	----------
	Hyson----------	----------
	L-Tech Welding & Cutting----------	----------

NOTE 1 - Carload freight traffic arriving at or departing from Buffalo, NY over CPRS via routes that do not pass through Niagara Falls, NY may be handled by CONRAIL in switch service to or from industries listed in this item, subject to the provisions of an agreement between CPRS and CONRAIL.

For explanation of abbreviations and reference marks, see concluding page(s) of this tariff.

SECTION 6
RECIPROCAL SWITCHING (Except as Noted)

NEW CASTLE, IN

ITEM	BETWEEN		DISTRICT LOCATION	AND JUNCTION WITH NS
	NAME	BUSINESS/ADDRESS		PER CAR
18010	Allegheny Ludlum Steel Co.-- Ingersoll Johnson Steel Co.-	Steel---------- Sheet Steel Mfg.----------	CR	$ 390.00

NIAGARA FALLS, NY (FOR INFORMATION ONLY)
LIST OF INDUSTRIES AND FACILITIES LOCATED ON CONRAIL WITHIN THE NIAGARA FALLS, NY SWITCHING LIMITS
(There is no reciprocal switching between CR and CSXT, See Note 1)

ITEM	FIRM NAME	LOCATION
18040 (Cont'd)	Airco Speer Carbon----------	----------
	Alox Corp----------	----------
	BI Metals----------	----------
	BPI----------	----------
	Carbon Graphite Group----------	----------
	Carbon Products----------	♦Cancel.
	Cecos----------	----------
	Chisholm Ryder----------	----------
	Dupont, E.I.----------	----------
	Elkem Metals----------	----------
	Forgione Lumber----------	----------
	Frontier Foundries----------	----------
	Globe Metallurgical----------	3801 Highland Avenue----------
	Goodyear Tire & Rubber----------	----------
	Grief Bros.----------	----------
	Hyson----------	----------
	L-Tech Welding & Cutting----------	----------

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For explanation of abbreviations and reference marks, see concluding page(s) of this tariff.

SECTION 6
RECIPROCAL SWITCHING (Except as Noted)

NEW CASTLE, IN

ITEM	BETWEEN		DISTRICT LOCATION	AND JUNCTION WITH NS
	NAME	BUSINESS/ADDRESS		PER CAR
18010	▲ Allegheny Teledyne-------- Ingersoll Johnson Steel Co.-	Steel---------- Sheet Steel Mfg.----------	CR	$ 390.00

NIAGARA FALLS, NY (FOR INFORMATION ONLY)
LIST OF INDUSTRIES AND FACILITIES LOCATED ON CONRAIL WITHIN THE NIAGARA FALLS, NY SWITCHING LIMITS
(There is no reciprocal switching between CR and CSXT, See Note 1)

ITEM	FIRM NAME	LOCATION
18040 (Cont'd)	Airco Speer Carbon----------	----------
	Alox Corp----------	----------
	BI Metals----------	♦ Cancel (Effective February 5, 1997)----------
	BPI----------	----------
	Carbon Graphite Group----------	----------
	Cecos----------	----------
	Chisholm Ryder----------	----------
	Dupont, E.I.----------	----------
	Elkem Metals----------	----------
	Forgione Lumber----------	----------
	Frontier Foundries----------	----------
	Globe Metallurgical----------	3801 Highland Avenue----------
	Goodyear Tire & Rubber----------	----------
	Grief Bros.----------	----------
	Hyson----------	----------
	L-Tech Welding & Cutting----------	----------

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ILCC 371
MDPSC CR 8001-D

MDOT CR 8001-D
NYDOT CR 8001-D

ICC CR 8001-D
PSCWV CR 8001-D

SECTION 6
RECIPROCAL SWITCHING (Except as Noted)

NIAGARA FALLS, NY

ITEM	BETWEEN		DISTRICT LOCATION	AND JUNCTION WITH CSXT
	NAME	BUSINESS		PER CAR
18040 (Concluded)	Nabisco Brands	----------	CR	$ 390.00
	National Carbon	----------		
	Niacet	----------		
	Niagara Mohawn Power	----------		
	Occidental Chemical Corp.	----------		
	Olin Corp.	----------		
	Ontario Locomotive Industries	----------		
	Power City Distributors	----------		
	Prostolite	----------		
	PT Chemical LTD	----------		
	Rowe Paints	----------		
	Sentry Metal Blast	----------		
	SKW Alloys Inc.	----------		
	Sohio Electro Minerals	----------		
	TAM Ceramic	----------		
	Trebacher Schleifmittel	----------		
	Tulip Corp.	----------		
	Union Carbide	----------		
	V.S. Vanadium	----------		
	Varcum Chemical Reichold	----------		
	Wicker Lumber	----------		

For explanation of abbreviations and reference marks, see concluding page(s) of this tariff.

ILCC 371
MDPSC CR 8001-D

MDOT CR 8001-D
NYDOT CR 8001-D

ICC CR 8001-D
PSCWV CR 8001-D

SECTION 6
RECIPROCAL SWITCHING (Except as Noted)

NIAGARA FALLS, NY

ITEM	BETWEEN			AND JUNCTION WITH
	NAME	BUSINESS	DISTRICT LOCATION	CSXT
				PER CAR
18040 (Concluded)	Nabisco Brands		CR	$ 390.00
	National Carbon			
	Niacet			
	Occidental Chemical Corp.			
	Olin Corp.			
	Ontario Locomotive Industries			
	Power City Distributors			
	Prostolite			
	PT Chemical LTD			
	Rowe Paints			
	Sentry Metal Blast			
	SKW Alloys Inc.			
	Sohio Electro Minerals			
	TAM Ceramic			
	Trebacher Schleifmittel			
	Tulip Corp.			
	Union Carbide			
	V.S. Vanadium			
	Varcum Chemical Reichold			
	Wicker Lumber			

For explanation of abbreviations and reference marks, see concluding page(s) of this tariff.

ILCC 371
MDPSC CR 8001-D

MDOT CR 8001-D
NYDOT CR 8001-D

ICC CR 8001-D
PSCW CR 8001-D

SECTION 6
RECIPROCAL SWITCHING (Except as Noted)

NIAGARA FALLS, NY

ITEM	BETWEEN			AND JUNCTION WITH
	NAME	▲ BUSINESS/ADDRESS	DISTRICT LOCATION	CSXT
				PER CAR
18040 (Concluded)	Nabisco Brands		CR	$ 390.00
	National Carbon			
	Niacet			
	Occidental Chemical Corp.			
	Olin Corp.			
	Ontario Locomotive Industries			
	Power City Distributors			
	Prostolite			
	PT Chemical LTD			
	Rowe Paints			
	Sentry Metal Blast			
	▲SKW Metal Alloys	3801 Highland Ave.		
	Sohio Electro Minerals			
	TAM Ceramic			
	Trebacher Schleifmittel			
	Tulip Corp.			
	Union Carbide			
	V.S. Vanadium			
	Varcum Chemical Reichold			
	Wicker Lumber			

For explanation of abbreviations and reference marks, see concluding page(s) of this tariff.

ILCC 371
MDPSC CR 8001-D

MDOT CR 8001-D
NYDOT CR 8001-D

ICC CR 8001-D
PSCWV CR 8001-D

SECTION 6
RECIPROCAL SWITCHING (Except as Noted)

NIAGARA FALLS, NY

ITEM	BETWEEN			AND JUNCTION WITH
	NAME	BUSINESS/ADDRESS	DISTRICT LOCATION	CSXT ▲ (NOTE 1)
				PER CAR
18040 (Concluded)	Nabisco Brands National Carbon Niacet Occidental Chemical Corp. Olin Corp. Ontario Locomotive Industries Power City Distributors Prostolite PT Chemical LTD Rowe Paints Sentry Metal Blast SKW Metal Alloys 3801 Highland Ave. Sohio Electro Minerals TAM Ceramic Trebacher Schleifmittel Tulip Corp. Union Carbide V.S. Vanadium Varcum Chemical Reichold Wicker Lumber	---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ----------	CR	$ 390.00

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SECTION 6
RECIPROCAL SWITCHING (Except as Noted)

NIAGARA FALLS, NY

ITEM	BETWEEN NAME	BETWEEN BUSINESS/ADDRESS	DISTRICT LOCATION	AND JUNCTION WITH CSXT (NOTE 1) PER CAR
18040 (Concluded)	Nabisco Brands		CR	$ 390.00
	National Carbon			
	Niacet			
	Occidental Chemical Corp.			
	Olin Corp.			
	Ontario Locomotive Industries			
	Power City Distributors			
	Prostolite			
	PT Chemical LTD			
	Rowe Paints			
	Sentry Metal Blast			
	◊ SGL Carbon	6200 Niagara Falls Blvd.		
	Sohio Electro Minerals			
	TAM Ceramic			
	Trebacher Schleifmittel			
	Tulip Corp.			
	Union Carbide			
	V.S. Vanadium			
	Varcum Chemical Reichold			
	Wicker Lumber			

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SECTION 6
RECIPROCAL SWITCHING (Except as Noted)

♦ NIAGARA FALLS, NY (FOR INFORMATION ONLY)
LIST OF INDUSTRIES AND FACILITIES LOCATED ON CONRAIL WITHIN THE NIAGARA FALLS, NY SWITCHING LIMITS
(There is no reciprocal switching between CR and CSXT, See Note 1)

ITEM	FIRM NAME	LOCATION
18040 (Concluded)	Nabisco Brands	
	National Carbon	
	Niacet	
	Occidental Chemical Corp.	
	Olin Corp.	
	Ontario Locomotive Industries	
	Power City Distributors	
	Prostolite	
	PT Chemical LTD	
	Rowe Paints	
	Sentry Metal Blast	
	SGL Carbon	6200 Niagara Falls Blvd.
	Sohio Electro Minerals	
	TAM Ceramic	
	Trebacher Schleifmittel	
	Tulip Corp.	
	Union Carbide	
	V.S. Vanadium	
	Varcum Chemical Reichold	
	Wicker Lumber	

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For explanation of abbreviations and reference marks, see concluding page(s) of this tariff.

SECTION 6
RECIPROCAL SWITCHING (Except as Noted)

NIAGARA FALLS, NY (FOR INFORMATION ONLY)
LIST OF INDUSTRIES AND FACILITIES LOCATED ON CONRAIL WITHIN THE NIAGARA FALLS, NY SWITCHING LIMITS
(There is no reciprocal switching between CR and CSXT, See Note 1)

ITEM	FIRM NAME	LOCATION
18040 (Concluded)	Nabisco Brands	
	National Carbon	
	Niacet	
	Occidental Chemical Corp.	
	Olin Corp.	
	Ontario Locomotive Industries	
	Power City Distributors	
	Prostolite	
	PT Chemical LTD	
	Rowe Paints	
	Sentry Metal Blast	
	SGL Carbon	6200 Niagara Falls Blvd.
	Sohio Electro Minerals	
	TAM Ceramic	
	Trebacher Schleifmittel	
	Tulip Corp.	
	▲UCAR Carbon Co.	
	Union Carbide	▲ Cancel
	V.S. Vanadium	
	Varcum Chemical Reichold	
	Wicker Lumber	

NOTE 1 - Carload freight traffic arriving at or departing from Buffalo, NY over CPRS via routes that do not pass through Niagara Falls, NY may be handled by CONRAIL in switch service to or from industries listed in this item, subject to the provisions of an agreement between CPRS and CONRAIL.

For explanation of abbreviations and reference marks, see concluding page(s) of this tariff.

ILCC 371
MDPSC CR 8001-D

MDOT CR 8001-D
NYDOT CR 8001-D

ICC CR 8001-D
PSCWV CR 8001-D

SECTION 6
RECIPROCAL SWITCHING (Except as Noted)

NORTH TONAWANDA, NY

ITEM	BETWEEN NAME	BETWEEN BUSINESS	DISTRICT LOCATION	AND JUNCTION WITH CSXT PER CAR
18050	Amy Warehouse Battenfield Grease and Oil Buffalo Fibre Lawless Container Matranco Warehouse Metal Cladding Mye Lumber Co., H.J. Occidental Chemical Riverside Chemical Roblin Steel Tonawanda News Tondisco		CR	$ 390.00

ORVILLE, OH

ITEM	BETWEEN NAME	BETWEEN BUSINESS	DISTRICT LOCATION	AND JUNCTION WITH NS PER CAR
18080	Kardon Industries		CR	$ 390.00
	Kinney Lumber	Lumber		(99) $ 298.00
	Koppers Co.	Creosoting		
	Quality Castings Co.	Castings		
	Smucker Co., J. M.	Fruit and Butter		

PALMER, MA

ITEM	BETWEEN NAME	BETWEEN BUSINESS	DISTRICT LOCATION	AND JUNCTION WITH CV PER CAR
18082	Contech Construction Prod.		CR	$ 390.00
	Pierson Industries			
	Valentine Lumber			

For explanation of abbreviations and reference marks, see concluding page(s) of this tariff.

ISSUED OCTOBER 24, 1994

EFFECTIVE NOVEMBER 15, 1994

ISSUED BY
CONSOLIDATED RAIL CORPORATION, 2001 MARKET STREET - 23C, P.O. BOX 41423, PHILADELPHIA, PA 19101-1423

ILCC 371
MDPSC CR 8001-D

MDOT CR 8001-D
NYDOT CR 8001-D

ICC CR 8001-D
PSCWV CR 8001-D

SECTION 6
RECIPROCAL SWITCHING (Except as Noted)

NORTH TONAWANDA, NY

ITEM	BETWEEN NAME	BETWEEN BUSINESS/ADDRESS	DISTRICT LOCATION	AND JUNCTION WITH CSXT ▲ (NOTE 1) PER CAR
18050	Amy Warehouse Battenfield Grease and Oil Buffalo Fibre Lawless Container Matranco Warehouse Metal Cladding Mye Lumber Co., N.J. Occidental Chemical Riverside Chemical Roblin Steel Tonawanda News Tondisco	---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ---------- ----------	CR	$ 390.00

NOTE 1 - Carload freight traffic arriving at or departing from Buffalo, NY over CPRS via routes that do not pass through Niagara Falls, NY may be handled by CONRAIL in switch service to or from industries listed in this item, subject to the provisions of an agreement between CPRS and CONRAIL.

ORVILLE, OH

ITEM	BETWEEN NAME	BETWEEN BUSINESS/ADDRESS	DISTRICT LOCATION	AND JUNCTION WITH NS PER CAR
18080	Kardon Industries Kinney Lumber Koppers Co. Quality Castings Co. Smucker Co., J. M.	---------- Lumber---------- Creosoting---------- Castings---------- Fruit and Butter----------	CR	$ 390.00 (99) $ 298.00

PALMER, MA

ITEM	BETWEEN NAME	BETWEEN BUSINESS/ADDRESS	DISTRICT LOCATION	AND JUNCTION WITH CV PER CAR
18082	Contech Construction Prod. Pierson Industries Valentine Lumber	---------- ---------- ----------	CR	$ 390.00

For explanation of abbreviations and reference marks, see concluding page(s) of this tariff.

ISSUED JANUARY 27, 1995

EFFECTIVE JANUARY 30, 1995

ISSUED BY
CONSOLIDATED RAIL CORPORATION, 2001 MARKET STREET - 23C, P.O. BOX 41423, PHILADELPHIA, PA 19101-1423

SECTION 6
RECIPROCAL SWITCHING (Except as Noted)

NORTH TONAWANDA, NY

ITEM	BETWEEN NAME	BETWEEN BUSINESS/ADDRESS	DISTRICT LOCATION	AND JUNCTION WITH CSXT (NOTE 1) PER CAR
18050	Amy Warehouse Battenfield Grease and Oil Buffalo Fibre Lawless Container Matranco Warehouse Metal Cladding Mye Lumber Co., H.J. Occidental Chemical Riverside Chemical Roblin Steel Tonawanda News Tondisco	◊ Cancel	CR	$ 390.00

NOTE 1 - Carload freight traffic arriving at or departing from Buffalo, NY over CPRS via routes that do not pass through Niagara Falls, NY may be handled by CONRAIL in switch service to or from industries listed in this item, subject to the provisions of an agreement between CPRS and CONRAIL.

ORVILLE, OH

ITEM	BETWEEN NAME	BETWEEN BUSINESS/ADDRESS	DISTRICT LOCATION	AND JUNCTION WITH NS PER CAR
18080	Kardon Industries Kinney Lumber Koppers Co. Quality Castings Co. Smucker Co., J. M.	Lumber Creosoting Castings Fruit and Butter	CR	$ 390.00 (99) $ 298.00

PALMER, MA

ITEM	BETWEEN NAME	BETWEEN BUSINESS/ADDRESS	DISTRICT LOCATION	AND JUNCTION WITH CV PER CAR
18082	Contech Construction Prod. Pierson Industries Valentine Lumber		CR	$ 390.00

For explanation of abbreviations and reference marks, see concluding page(s) of this tariff.

STB FD 33388 2-23-98 E 185912

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February 23, 1998

VIA HAND DELIVERY

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20423-0001

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

Finance Docket No. 33388 (Sub-No. 59)
Wisconsin Central Ltd. -- Purchase -- Line of
The Baltimore & Ohio Chicago Terminal Railroad Company

Dear Secretary Williams:

Enclosed for filing with the Board in the above-captioned proceedings are an original and twenty-five copies of the **Brief of Wisconsin Central Ltd.** (WC-18), dated February 23, 1998. A computer diskette containing the text of WC-18 in WordPerfect 5.1 format also is enclosed.

Please note that WCL-18 has been designated as highly confidential and is being filed under seal. It has been served on the Primary Applicants and all parties appearing on the highly confidential restricted service list in this proceeding. A redacted version of WC-18 will be filed tomorrow and served on all remaining designated parties of record in this proceeding.

I have also enclosed herewith an extra copy of WC-18 and this transmittal letter. I would request that you date-stamp those copies to show receipt of this filing and return them to me in the provided envelope.

*Known as Oppenheimer Wolff & Donnelly LLP in these cities.

Please feel free to contact me should any questions arise regarding this filing. Thank you for your assistance on this matter.

Respectfully submitted,

Robert H. Wheeler
Attorney for
Wisconsin Central Ltd.

RHW:tjl

Enclosures

cc: Counsel for Primary Applicants
Parties on Highly Confidential Restricted Service List

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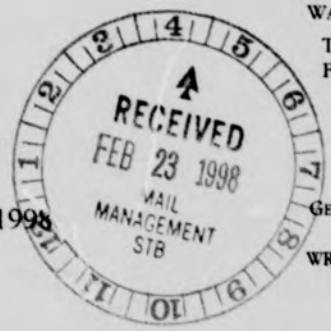

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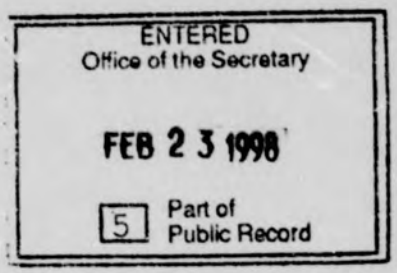

VIA COURIER

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

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

Dear Secretary Williams:

I have enclosed an original and 25 copies of the Brief of International Paper Company in the above-referenced proceeding. In addition, I have also enclosed an electronic copy of this document.

We would appreciate your date stamping the extra copy of this pleading, so that our files can properly reflect the filing. If you have any questions concerning this, please do not hesitate to contact me.

Very truly yours,

Edward D. Greenberg

Enclosures

cc: Charles McHugh

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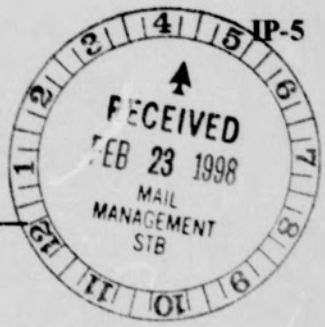

BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.

Finance Docket No. 33388

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

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BRIEF OF INTERNATIONAL PAPER COMPANY

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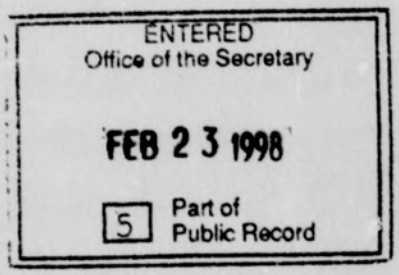

BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.

Finance Docket No. 33383

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

BRIEF OF INTERNATIONAL PAPER COMPANY

In accordance with the governing procedural order in this matter, International Paper Company ("IP") submits its brief with respect to the application pending before the Board that would transfer certain rail lines and trackage rights from Conrail, Inc. ("CR") to the Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS"), and CSX Corporation and CSX Transportation, Inc. ("CSX"), respectively.

PREFATORY STATEMENT

IP recognizes that this proceeding involves issues that are different from those that were before the Board in F.D. 32760, *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southwestern Railway Company, SPCSL Corp. And the Denver & Rio Grande Western Railway Company ("UP/SP Merger").* Yet there are alarming similarities that, given the catastrophic service conditions that surfaced immediately after the *UP/SP Merger* was consummated, should be

recognized and carefully analyzed by the Board before approving the plan developed by these applicants.

It should now be obvious that self-serving assurances of future public benefits and blanket denials of any shortcomings made by railroad merger applicants must be viewed with substantial skepticism. The railroad applicants and their shareholders are understandably hoping to preserve one thing -- *their* profitability. It is therefore understandable that applicants seeking approval of a merger would highlight the strengths of their proposal and downplay any weaknesses. As long as the other side -- *i.e.*, shippers, other railroads and governmental entities -- are given a fair and thorough hearing, so that appropriate conditions can be tailored to ameliorate any shortcomings caused by the merger, the system can work.

But that system cannot work if the applicants deny the undeniable and refuse to recognize that their negotiated plan might be imperfect. Nor can the system work if applicants are able to contend that the other parties are uninformed or, to coin a phrase from the last merger, simply "implacable foes" of the merger. That was nonsense when uttered by UP 2 years ago, when shipper after shipper voiced their concern that negotiated arrangement between the UP and BNSF was not workable in broad regions of the country, that realistic competition would disappear, that essential services would suffer and that rates would go up.

While IP recognizes that the Board wishes not to interfere in private negotiations or to impose conditions on merger parties that the applicants suggest are unacceptable, the *UP/SP* debacle demonstrates that it is not always good policy to pay attention to such posturing. If merger applicants argue, for example, that a fundamental tenet of the merger is that single line service will be available to many shippers, but at the same time argue that no accommodation need be made for

those shippers that will be losing single line service, common sense teaches that those contentions should be rejected. Two plus two does equal four, even when large railroads suggest that the answer really is five.

The applicants here refuse to recognize that there are imperfections in their negotiated carve-up of Conrail. Rather than admit that these blemishes exist or work to cure the problems, they pretend that the shortcomings are fictitious, arguing instead that the shipper is mistaken or confused, that the shipper's facts are wrong, that the shipper will be far better off after the Board grants unconditional approval to their blemish free plan, but that in any event it does not matter what the shipper says because the plan is simply too important to let one (or dozens, or hundreds) of shippers or communities stand in the way. They argue, in other words, that the answer is five.

But that answer is incorrect. And, it need not have been offered in the first place if the Applicants had been willing to redress obvious problems, rather than simply deny they exist in a reprise of both the *UP/SP* fairy tale and Hans Christian Andersen's fable of the *Emperor's New Clothes*. As noted below, the Board has the power to remedy obvious problems caused by any transaction of this nature. The time to exercise that authority is before the transaction is consummated, since it may be impossible to unravel structural problems afterward.

I. THE APPLICABLE STANDARDS

In determining whether to approve this transaction, the Board is obligated to "consider at least" the 5 criteria delineated in 49 U.S.C. §11324(b), which includes "the effect of the proposed transaction on the adequacy of transportation to the public." Applicants suggest that the Board is required to view this issue against the background of Congressional sentiment expressed almost 30

years ago, where mergers and consolidations were to be "favored".[1] (CSX/NS- 176, at HC-31) Of course, the rail industry was much different then, and there are now only 5 mega-carriers in the entire country, with that number to be reduced to 4 if this transaction is approved. Accordingly, it has become increasingly more important for the Board to understand precisely what effect the transaction will have on the essential services required by affected shippers. Whereas the ICC could be a more disinterested overseer of consolidations, the Board does not have that luxury but must instead be more certain that the transaction will not adversely affect rail service to the public as the public has run out of alternatives.

The Applicants suggest that the "only cognizable harm claimed by any party to this proceeding purports to be harms resulting from a reduction in competition..." Based upon this premise, they contend that the Board can only impose conditions that are designed to remedy "actual reductions in competition." (*Id.*, at HC-36) In doing so, Applicants do not even recognize that the issue of diminished service exists or that the Board might need to remedy that problem with appropriate conditions.

But the Applicants are wrong. Just as UP and BNSF, in *UP/SP*, papered over the effect which that transaction would have on service to the public, the Applicants here would have the Board ignore the consequences that their plan would have on individual shippers. In *UP/SP*, UP and BNSF assured the Board that they really would be able to provide adequate and competitive service, for

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[1] In fact, the legislative history does not explain what Congress meant when it instructed the ICC to consider "adequacy of transportation to the public." *See Lemoille Valley Railroad Co. v ICC*, 711 F.2d 295, 311 (D.C. Cir. 1983). The word "adequate" should therefore be given its "ordinary meaning." *Id.*

example, at IP's facilities at Pine Bluff and Camden, Arkansas,[2] and that both carriers would compete for the traffic and effectively replace the efficient and competitive balance that existed prior to the merger. In the short time since that transaction was approved and consummated, it has become painfully obvious that those assurances were misguided, short-sighted and in any event false, and that neither UP nor BNSF had the slightest idea how to provide *any*, let alone competitive, service to those and hundreds of other points.

When shippers come forward to question what will be left if *this* transaction is approved in precisely the same form that the Applicants have proposed, they are entitled to be heard. If the transaction will harm essential services received by shippers, that consequence must also be remedied by appropriate conditions. "A service is essential if there is a sufficient public need for the service and adequate alternative transportation is not available." 49 C.F.R. § 1180.1(c)(2)(ii). In determining whether an "adequate" alternative to a particular service is available, and thus whether the service is essential, relevant considerations include "whether loss of existing service will cause substantial harm to the local economy or to shippers who now use that service." *Lemoille Valley Railroad Co. v ICC*, 711 F.2d 295, 311 (D.C. Cir. 1983).

II. CONDITIONS MUST BE IMPOSED TO PRESERVE ESSENTIAL SERVICES

A. Without Conditions, Essential Rail Service Is Threatened

IP currently has a unique contract with CR, by which that carrier provides IP with dedicated car single-line unit train service *in both directions* over the approximately 228 miles between IP's Erie and Lock Haven, Pennsylvania paper making facilities. In providing this service, CR uses IP cars and

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[2] As the Board will recall, these are major mills located at what were "2-to-1" points along the Houston-Memphis corridor.

traverses (1) approximately three miles over a CR rail line from IP's Erie Mill to the OD Yard in Erie; (2) approximately 150 miles between the OD Yard in Erie and Emporium over an Allegheny & Eastern Railroad ("ALY") line, pursuant to a trackage rights agreement; and (3) approximately 75 miles over a CR rail line between Emporium and Lock Haven. Through this operation, IP is able to ship wood pulp manufactured at the Erie mill to the Lock Haven mill, and to ship pulpwood and logs from various intermediate origin points to the Erie mill. (IP-4, at 3-4)

While this operation is highly efficient -- and plays a significant role in supporting the economic viability of IP's Erie and Lock Haven facilities[3] -- it requires a great deal of rail crew coordination due to timing constraints. First, CR only has access to the ALY line during a 12-hour window between 6 PM and 6 AM each day, as ALY uses the line for its own traffic during the remainder of the day. Second, given the need to switch both Erie and Lock Haven, CR needs the full 12-hours that are available to traverse the 228 miles between the 2 points; if there is any delay, the crews go "dead on the law," pursuant to the provisions of 45 U.S.C. § 61, so that the train either simply stops for the day or CR has to bring in a second crew. If either of these events occur, the costs go up and the operation is likely to become uneconomic.

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[3] IP has been reducing capacity and jobs at Erie due to its relatively high operating cost; at this time, employment at the Erie mill has been reduced to 1,068 employees. In the event the existing efficient rail service is lost, the mill's remaining operations and those jobs would be lost. Further, a large number of other jobs in this economically distressed region, including the 677 positions at the Lock Haven mill, may not survive. *Id.*, at 9. The fact that such "substantial harm to the local economy" would result from the loss of the single-line service establishes that the service is "essential" within the meaning of 49 C.F.R. 1180.1(c)(2). *Lemoille Valley Railroad Co.*, 711 F.2d at 311. *See also Brotherhood of Maintenance of Way Employees v ICC*, 698 F.2d 315, 319 n.14 (7th Cir. 1983) ("Essential services are basically those the deprivation of which would result in inadequate service to the public").

Unfortunately, this operation epitomizes why single-line service is often far superior to a joint-line operation. The issue is timing and coordination. Since CR controls the entire operation at present, it can -- and does -- ensure that the local crew brings the pulp loaded cars from the Erie mill to the OD Yard in time to meet the road crew, which then has 12 hours to traverse the 225 miles over the ALY/CR and complete the trip to Lock Haven during both the 12-hour window permitted by the ALY trackage rights agreement and the hours of service permitted by statute.

That control plainly will not be possible if the transaction is approved without appropriate service protective conditions. NS will simply not be able to control CSX' local crews to ensure the requisite strict levels of coordination. Nor is there any indication that NS even desires to do so, as both NS and CSX have shown no interest in providing any assurance of their intention or ability to do what is necessary to preserve this unique service.

B. The Applicants' Suggestion That IP Will Benefit Is Unsupported

The Applicants have responded to IP's well-founded concerns with 4 pages of groundless denials and assurances. After reciting the obvious fact that IP is a large producer and shipper of forest products, Applicants point out that a number of current routings from IP mills in the South and Southwest United States will go from joint-line to single-line. Thus, in Applicants' view, these are "overall benefits" that IP will receive, so that IP is guilty of ingratitude by complaining "about one isolated movement." (CSX/NS -176, at HC-493-94.)

In the first place, there is *nothing* in this record indicating that the change of some joint-line to single-line routes will result in reduced transit times for IP's goods, or that the movement of IP

owned or leased cars will be facilitated, or that it will receive lower transportation rates.[4] IP understands that single-line service *may*, under certain circumstances, be more efficient than joint-line service. That, of course, is precisely the case with respect to the Erie-Lock Haven movement. It does not necessarily follow, however, that this transition from joint-line to single-line service will yield any benefits for IP or IP's customers.

One of the public benefits typically considered as a justification for a merger is that shipper rates can be reduced due to lower rail operating costs. While those assertions rarely prove to be true, given the acquisition cost of this transaction it is unlikely that the change-over from joint to single-line rates will result in lower freight rates.. Certainly, the Applicants have not provided any details about that topic. A legitimate question, then, is precisely what were the "overall benefits" to be?

C. The Applicants Have Given No Consideration To The Serious Issues IP Raised

We now turn to Applicants' "assurances" that all will be well with respect to the Erie-Lock Haven single-line routing. The Applicants state, first, that IP's Comments recognized that "CSX and NS plan to continue the current service that IP receives." (CSX/NS-176, at HC-495). In making this statement, Applicants apparently were referring to the following sentence in IP's Comments:

> *To the extent they have even focused on the issue,* CSX and NS contemplate providing joint-line service between the points.

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[4] The Applicants certainly had the opportunity to present such evidence in their rebuttal filing, as they obtained detailed information of IP's joint line routings from IP during discovery. Of course, since these parties already serve IP, they had this information in their data bases well before discovery, so that they had ample time to analyze the potential affects -- both positive and negative -- much earlier than rebuttal. That Applicants did not provide any details implies at least that their reliance on unspecified overall benefits to IP is entitled to no weight.

(IP-4, at 2; emphasis supplied.) Applicants obviously have missed the point of that sentence. IP was only pointing out that the Applicants did not yet know how the required service would be provided, because they had not even thought about it.[5] That this would be a joint-line service simply states the obvious, as the lines over which CR operates this service are to be conveyed to both CSX and NS. The only "operational planning" to which the Applicants' had given any thought was the knee-jerk refusal of CSX to give NS the right to access directly the Erie mill from OD yard, a distance of 3 miles; certainly, there is nothing in this record indicating how this coordination will be accomplished. Accordingly, today, 8 months after their application was filed with the Board, the Applicants still do not know how the operation is to be conducted in a way that would ensure that the quality of that service will be preserved.

Applicants suggest that NS will be able to operate over the ALY line during the same 12-hour time period that CR currently enjoys; thus, they imply, the character of the service will not change. To support this, Applicants point out that CR today switches the Erie mill with a local crew, and Lock Haven is switched by a shortline, the Nittany & Bald Eagle Railroad Company ("NBE").[6] But

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[5] At the time IP filed its Comments, CSX was not even aware of how the Erie-Lock Haven service was presently conducted. When IP asked CSX, in discovery, to describe its plans, if any, to participate in this unit train service, it stated:

> CSX does not know the allocation of responsibilities and operations between the shortline and Conrail.

(IP-4, at 12 and Exhibit A.)

[6] Applicants used the existence of the NBE to challenge the character of the service being provided, contending that this "means that the service is not strictly single-line today." (CSX-NS-176, at HC-495. This suggestion is palpably false, as NBE switches Lock Haven as CR's agent, operates over CR's track, does not appear on the billing, and is not a joint-line carrier in this operation.

this is significantly different from what would result after the planned transaction due to the need for inter-company coordination. It is one thing for CR to be able to require that *its* local crews or agent coordinate with *its* road crew operating over the 225 miles of track. It is another thing altogether when this needs to be coordinated by 2 separate and distinct railroads, with the crews reporting to separate management working under different work rules and answering to different priorities. Although IP has been seeking assurances that the "single line character of this service" will be preserved on a post-consummation basis ever since the application was filed, the Applicants have utterly failed to explain how that will occur or why the vague assurances of their counsel can or should serve as a substitute for contractual commitments.

Regrettably, IP has been down this road too often. As noted at the outset of this brief, 2 years ago UP and BNSF made similar assurances that they could and would provide efficient service at, for example, Pine Bluff and Camden, Arkansas. Today, IP cannot get UP switch crews to bring empty cars from the former SP yard at Pine Bluff, a mere ½ mile from that mill. And, notwithstanding its assurances and commitments to the Board and IP, the BNSF is a "paper competitor" only, providing no service at all.

Nonetheless, in *UP/SP* the UP and BNSF at least attempted to put together an operating plan to explain how they would be able to continue competitive service to IP's Pine Bluff and Camden mills. While IP had good cause to believe that they could not accomplish what was promised, those parties at least understood their obligation to demonstrate that IP's service would not be adversely affected by that transaction. By contrast, NS and CSX have yet to even consider how they would handle this operation. Rather than contemplate any change in their master plan so as to permit NS to switch the Erie mill from the OD yard, Applicants contemptuously dismiss IP's concern with vague

assurances not to worry. This approach is a guaranteed prescription that the required--and existing--service will end on the date their proposal is consummated, unless the transaction is properly conditioned.[2]

D. IP's Concerns About Increased Costs Are Not Speculative

Applicants contend, next, that IP's concern of "greatly increased costs" should the character of the service be adversely affected, "is entirely speculative and, in any event, does not constitute the sort of harm that the Board should remedy." *Id.* This, of course, is no response at all and is factually and legally wrong.

As support for the contention that IP will not have increased costs, Applicants point out that the existing contract extends through the end of the current year. But if NS experiences frequent delays and increased crew and equipment costs due to coordination problems with CSX, does anyone seriously believe that the rail rates will not escalate? Certainly, we have not heard any suggestion from Applicants that they are committing not to increase those charges.

Of equal importance, delays will also adversely affect the economics of running those mills in several ways. First, inventories will need to grow in order to keep the mills running on days when the CSX/NS interchange does not work. Second, since CR has been unwilling to invest in these rail cars, it is IP's private cars that are used to service this traffic; hence, cycle time delays will necessarily increase the Erie mill's costs. Third, if the unit train operation comes to an end, IP estimates that it

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[2] Indeed, the history of the relations between CSX and NS teaches that they do not routinely coordinate their operations. As one example, IP has been trying for 2 years to get CSX and NS to coordinate their activities so that shipments of sodium chlorate produced at Nixon, GA could be moved via rail to a mill at Riegelwood, NC pursuant to a modest transit schedule. Due solely to the carriers' inability to work together, IP has experienced over $400,000 in increased costs *and* had plant shut-downs. There is no reason to believe that NS and CSX will magically do better at Erie and Lock Haven than they do at Nixon and Riegelwood.

would need to triple the car fleet needed to service the Erie mill; this is a cost that mill cannot absorb. And, finally, if the Erie mill shuts down, the future of the Lock Haven mill, which today sources the essential wood pulp raw material from Erie, would be in similar jeopardy. Thus, unless Applicants are willing to indemnify IP from problems caused by their coordination problems, it ill behooves them to suggest that the obvious consequences of their service failures are in any way speculative.

E. IP's Concerns Must Be Addressed

Without any support, Applicants argue that IP's concerns, even if true, cannot be remedied.[8] The sheer arrogance of that contention demonstrates how far these railroads have evolved, changing from an industry that grew up to provide reliable service to the shipping public to corporations that disclaim any semblance of such an obligation.

IP well understands that railroads must be economically viable, and certainly there is no suggestion that CSX, NS or CR are wanting from a financial standpoint. But cavalierly dismissing concerns that some rail shippers may be substantially disadvantaged is another example of the Applicants' strategy to ignore facts that are inconvenient.

The possibility that IP may have to close the Erie mill unless the existing service is maintained is unrebutted in this record. Simply stated, these are exactly the type of issues that must be addressed before any generalized statement that the proposed transaction will have "public benefits" can have any meaning. *See Lemoille Valley Railroad Co.*, 711 F.2d at 311-312 (holding that the ICC ought to consider imposing service protective conditions where a transaction results in situation where "a shipper cannot earn a fair return, or can do so only by sharply curtailing operations").

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[8] According to Applicants, assertions of "greatly increased costs" do "not constitute the sort of harm that the Board should remedy." (CSX/NS-176, at HC-495)

F. The NITL Agreement Does Not Address This Issue

Again, without any support or understanding of the problem, the Applicants' contend that the "rate protections of the NITL Agreement" somehow resolve the issue. (CSX/NS - 176, at HC - 495). We assume that Applicants are referring here to Section II.C. of their Agreement with NIT League, which pertains to "Specification of Transportation Contract Movement Responsibilities."

This provision in no way ameliorates the problems caused by Applicants' plan, since it does not address situations where a shipper is losing single line service. Instead, the Agreement is literally intended only to provide a remedy in situations where one carrier is providing deficient service. In that event, the shipper may attempt to seek to transfer the service responsibilities to the other carrier.

That is simply not a cure to the issues raised by the prospective termination of CR's single-line service. As the sole remedy contemplated would be to switch the obligations of NS and CSX (assuming IP prevailed in an arbitration to be held no sooner that 7 months after the consummation), the essential single-line character of the service would still have been arbitrarily terminated. If that service cannot be effectively provided where NS provides the 225-mile service between OD Yard and Lock Haven and CSX handles the 3-mile leg between OD Yard and Erie, is there any reason to believe that simply switching the carriers' respective obligations would somehow cure the problem?

III. THE BOARD SHOULD CONDITION ITS APPROVAL OF THE CR ACQUISITION ON THE GRANTING OF THE TRACKAGE RIGHTS NECESSARY FOR EITHER NS OR ALY TO CONTINUE IP'S SINGLE-LINE UNIT TRAIN SERVICE BETWEEN IP'S ERIE MILL AND LOCK HAVEN

The STB can prevent the dire consequences to IP of having its single-line unit train service converted to a joint-line service that is likely to be fatally defective, by conditioning its approval of the CR acquisition imposing a service protective condition in which either (1) CSX grants trackage

rights to NS over the 3 miles of CSX track between IP's Erie Mill and the OD Yard in Erie; or (2) NS and CSX both grant trackage rights to ALY for the purpose of ALY's carrying IP dedicated cars over NS's line between Lock Haven and Emporium, and over CSX's line between the OD Yard and IP's Erie Mill. The alternative -- relying on CSX and NS reasonably to coordinate their operations in order to accommodate IP's shipping needs -- is unlikely to be effective. And, once the single-line operation is gone and the mills are closed, it will be too late to unravel the damage. [2]

There is no question that the regulatory prerequisites to imposing the requested conditions to preserve IP's essential service are present. A condition may be imposed to preserve an essential service where the condition (1) is shown to be related to the impact of the consolidation; (2) is designed to enable shippers to receive adequate service; (3) would not pose unreasonable operating or other problems for the consolidated carrier; and (4) would not frustrate the ability of the consolidated carrier to obtain the anticipated public benefits. 49 C.F.R. § 1180.1(d).

The granting of the service protective condition sought here is necessarily related to the impact of the consolidation, as there would be no need for the condition at all if CR's subject rail line was not being divided between NS and CSX under the transaction. In addition, the service protective condition is designed to enable IP to receive adequate service. As demonstrated above, the *only* adequate service available to IP with respect to the Erie Mill to Lock Haven movement is the single-

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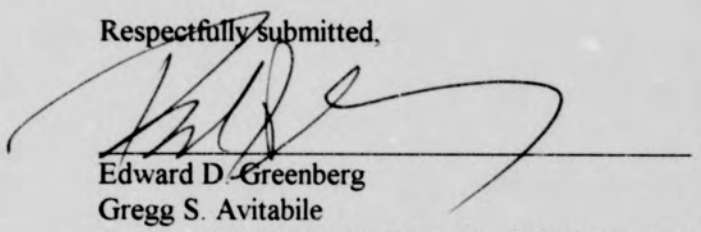
[2] IP recognizes that the Board has in the past generally resisted intervening into the privately negotiated trackage rights agreements incident to railroad mergers and acquisitions. Here, however, CSX and NS propose to carve up the thousands and thousands of miles of CR rail lines into spheres of influence, and their private agreements are not entitled to the same presumption of reasonableness. These are public, not private, rights that are being negotiated away, and the Board should look carefully at the terms of the transaction to ensure that it is in fact in the public interest and not hesitate to exercise its unquestioned authority to impose conditions upon the transaction where necessary to protect the public interest.

line unit train service which the condition will enable IP to maintain. There is also no evidence, or rational reason to believe, that granting this service protective condition would pose unreasonable operating problems for NS or CSX. The first option, granting NS trackage rights over CSX, would involve only three miles of CSX track. Alternatively, granting ALY the trackage rights over CSX and NS lines as necessary to continue IP's unit train service also would not pose any unreasonable operating problems. The track would be occupied during the same time periods by IP's unit-train service in any event. Finally, the vast public benefits applicants foresee resulting from the transaction could hardly be frustrated by the imposition of conditions over the isolated section of track that is so essential to IP.

Given CSX' ignorance of the service CR provides IP between the Erie and Lock Haven mills, CSX' and NS' assurances that the quality of services they provide to their customers will improve as a result of the CR acquisition offer little solace to IP. Accordingly, the STB should act, as requested herein, to impose this service protective condition.

Respectfully submitted,



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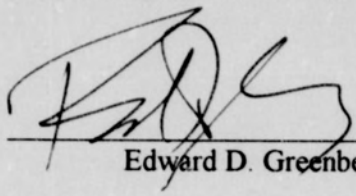
CERTIFICATE OF SERVICE

I certify that on this 23rd day of February, 1998 I caused a copy of the foregoing Comments of International Paper Company to be served by facsimile and first-class mail, postage prepaid, on all parties that have submitted to the Applicants a Request to be Placed on the Restricted Service List in STB Finance Docket No. 33388.



Edward D. Greenberg