members of Congress, members of the Senate, and local communities, to arrive at solutions to many of these concerns. Great progress has been made.

If there is one overriding concern that encompasses the issues I will raise today, it is the concern for safety. I was pleased that the section on environmental analysis saw the need for safety mitigation throughout our state. I am particularly grateful that 28 of the 89 crossings that were recommended for improved active warning devices happened to be located in my home state of Ohio.

However, I must tell you that I remain concerned that many towns, many communities and villages will be short changed in their efforts to keep Ohioans safe. Ohio has a demonstrated track record of successful negotiations with CSX and NS regarding safety corridors.

While SEA has recognized the need for grade crossing safety, I believe its approach, one which emphasizes individual sites rather than rail corridors is frankly inferior to Ohio's. My understanding is that Ohio is currently negotiating
with CSX and NS on a number of rail corridors. I would hope that the Board would mandate that these negotiations to finalize these agreements continue for 120 days. If by the end of that time resolutions can not be reached, then the SEA recommendations should of course be enforced.

Many areas in Ohio will experience sharp increases in train traffic as a result of this acquisition. These increases could impact the ability of cities and towns located along the rail lines to provide emergency services to its citizens, services such as fire, police, or ambulatory services. These are services where a few seconds can make the difference literally between life and death.

Increased train traffic also increases the likelihood of derailments, increases the potential for train and car collisions at many rail grade crossings.

Last October I wrote a letter to the SEA outlining my concerns about the sharp increases in train traffic that many communities would face if this acquisition does go forward. In that letter I highlighted the west side of Cleveland and its west
shore suburbs as examples of how increased train traffic could devastate small communities.

I was very pleased to learn that the process of negotiation and resolution was effective in dealing with the concerns of Ohio communities around Cleveland. All parties, both public and private, deserve a great deal of thanks for their diligence in resolving these differences. I remain hopeful that this spirit of collaboration will continue and that CSX and the city of Cleveland, and I know we’re working on this as we speak, will be able to reach a mutually agreeable resolution to their differences.

It is my understanding that CSX and NS have been active in resolving these problems. That’s good news for those communities. But what about towns such as Fostoria, who have been seeking acceptable mitigation, but have to this date gotten no relief? As an example, all parties including the railroads agree that Fostoria will be severely impacted as a result of increased train traffic.

I had the opportunity, Madam Chairman, to visit Fostoria about a month ago and to talk to the
safety director, talk to the mayor and other elected officials about the tremendous impact that this is going to have.

I will just be very candid with you. They are very frightened, if I can use that term, about what they foresee as their safety problems that are going to take place because of this.

In the entire area affected by the acquisition, only one grade separation has been ordered. In short, I support Ohio’s local communities and efforts for adequate mitigation, and request that as a condition of approval the Board go beyond the recommendations of the SEA and mandate that the applicants continue negotiations for a period of at least one year with the communities on record in this proceeding which have requested grade separations. The communities should have the right within one year to request that the Board review the record to determine if reopening of the issue would be warranted.

I am also concerned about the SEA’s criteria for recommending which communities receive
different tools for dealing effectively with hazardous waste transportation through their communities. Two examples of course are Operation Response Software and the special HazMat training in Pueblo.

The SEC appears to reserve and seems to have reserved these valuable tools for communities with environmental justice concerns. I understand that. However, many communities that face the same problems are not recommended to receive these items. I would request that the Board instruct the SEA to determine which additional communities should be provided Operation Respond and other special training.

Finally, I have concerns about the effect of the acquisition on the Wheeling and Lake Erie Railway. More than 20,000 Ohio jobs and Ohio’s investment in the neo-modal facility in Star County are directly related to Wheeling’s post acquisition viability.

Over the past year, Wheeling has negotiated with Norfolk Southern to reach a mutually agreeable solution to their problems. Unfortunately they have not been able to reach as of this date an
acceptable conclusion.

If Wheeling is allowed to go bankrupt, the resulting uncertainties, ranging from service interruptions to other unknowns, would have a devastating impact on key Ohio industries such as steel, stone, petrochemicals and plastics, just to name several.

I believe that the Board must impose conditions that are sufficient to keep the Wheeling and Lake Erie Railway viable. It is very important for our state.

In conclusion, I believe that CSX and Norfolk Southern’s acquisition of Conrail has enormous potential to benefit Ohio’s economy. However, the harm that it will bring to Ohio’s community and Ohio’s economic interests are too great to support the acquisition in its current form. It is the function of a Service Transportation Board of course to mandate conditions under which a deal of this importance and magnitude can go forward. I urge the Board to ensure that these conditions address the vital safety issues that I have talked about today.
Again, Madam Chairman, let me just thank you for allowing me to go out of order. I apologize to my friends who I have interrupted. I appreciate your courtesy very much.

CHAIRMAN MORGAN: Well certainly this transaction has a great effect on Ohio. So we are happy you are here to express your views. We will be hearing from other people from Ohio as the day wears on and tomorrow. So thank you.

SENATOR DEWINE: Thank you very much.

VICE CHAIRMAN OWEN: Senator, one other point on this, if you will. A number of the highways do come to the railroads. Towns are built around the railroads. As the ISTEA and the BESTEA funding goes forward, sometimes there might be some funds found in those particular programs. We trust it’s there to assist your community.

SENATOR DEWINE: We trust that they will be.

VICE CHAIRMAN OWEN: Okay. I just thought I would urge you to look in that direction.

SENATOR DEWINE: Thank you very much.
CHAIRMAN MORGAN: Mr. McBride?

MR. MCBRIDE: Thank you, Madam Chairman, Mr. Vice Chairman. TFI supports the NIT League argument you just heard. We filed this morning a letter of support for the transaction with two exceptions, the captive shipper protections Mr. DiMichael spoke about and TFI’s contention that any rail cost adjustment factor that the Board uses in those captive shipper protections or otherwise in the transaction must be adjusted for productivity.

That is the RCAF the ICC adopted, this Board follows, and most importantly, Madam Chairman, as you yourself have said many times, you follow the law around here. We commend you for it. I have put the law before you. The law is sparkingly clear. Any RCAF that you use shall be adjusted for productivity. So in any captive shipper remedies that you adopt, you must use the productivity adjusted RCAF.

Now in the settlement agreement we have reached with the applicants, in view of the fact that they have reduced the switching charges, we have
agreed not to insist on application of the productivity adjusted RCAF to those. But in all other respects you must follow the productivity adjustment.

The NIT League settlement was a settlement with NIT League, not with the rest of us. We weren’t part of it. We are not bound by it.

Now let me turn to the other captive shipper issues. As Mr. DiMichael told you, the purchase price paid by CSX and Norfolk Southern is over $20 billion. That is not our number. That is their number. It comes from the erratum to witness Whitehurst’s testimony. It’s not a $10 billion transaction as has been reported. It assumed another $10 billion in debts and liabilities, severance payments and the like.

So they have raised costs, not lowered them. We are greatly concerned that the only way they are going to pay for this is out of the captive shippers. But in the immortal words of Mr. McClellan from Norfolk Southern, this is at ACE et al 18 Exhibit 3. That’s a risk NS took. Mr. Anderson of CSX told shippers, the same exhibit, that CSX would not
raise rates to pay for this transaction. So hold them to it.

Mr. Goode and Mr. Snow told you this morning that's not how they intend to pay for it. They intend to pay for it by growing the business and by cutting costs. Fine. They also like to argue around here they can't raise our rates any higher because they are as high as they can be. If so, hold them to it. Just order them to do what they said they would do.

If we are wrong and they can't raise their rates anyway, it won't matter. But if we are right, we will be protected as we have a right to be. Because as Mr. DiMichael told you, and this is where we part company with the DOT, this premium is a result of this transaction. We are entitled to be protected here. The Board said we would be protected here.

Now on revenue adequacy and jurisdictional threshold. These are important matters. They are affected uniquely by NS and CSX's premium. We are talking about their revenue adequacy calculation and their jurisdictional thresholds. Under your costing
system, the acquisition premium becomes a variable
cost which would raise the variable cost denominator,
if we go back to our high school arithmetic, and lower
the jurisdictional -- raise the jurisdictional
threshold so captive shippers would not be able to get
protection until their rates were raised even higher.

As with that, the revenue adequacy
calculation, the same kind of effect will occur.
Since the investment will go up, their return on the
investment will go down. As Dr. Kahn explained to you
in the ex parte 575 proceeding, in no other regulated
industry would anyone ever be allowed to pay the sky
is the limit in acquiring one another and then pass it
through to the captive customers. No other industry
allows that. You can’t allow it here.

There has never been an acquisition
premium remotely this large. You have never ruled on
this issue before. There is no precedent to allow
this. You must protect the captive shippers from
this. We were not consulted about the amount of the
acquisition premium.

When I had my first opportunity about a
day after they filed the notice with you that they wanted to buy Conrail and put it in a voting trust, I said time up. Order them to go negotiate a lower price. You said we don’t have the authority to do that, but we’ll treat it as an issue in this proceeding. Fire. We are here. We have been waiting.

You have to tell them that we didn’t play a part in this. We can’t be made to pay for this. Madam Chairman, we can’t be consigned to rulemaking proceedings and rate complaints. The harm will have already occurred. We need to be protected from it now. We ask you to order them to do what they have told us, that they will not do anyway, which is to raise our rates. Thank you very much.

CHAIRMAN MORGAN: I guess we can get the lights.

Why don’t we turn next to you.

MR. STONE: Chairman Morgan, Vice Chairman Owen, ladies and gentleman, I am Scott Stone of Patton Boggs, here for CMA. With me is Tom Schick of CMA and Marty Bercovici of Keller and Heckman for the Society
of Plastics Industry. Mr. Schick and I will be presenting the argument jointly for CMA and SPI. We would appreciate it if it’s possible to set the clock for 10 minutes. We’ll both promise to finish up before then.

CMA and SPI can not support this transaction. There are too many risks of serious service disruptions. There are too few benefits to shippers of chemicals and plastics. We don’t think our members should be asked to bear those risks.

We will address two main categories of problems with the transaction. First, the likelihood of impaired service. Second, various threats to rate and service competition.

CMA and SPI have proposed conditions that would mitigate but not eliminate these problems. These are set forth in attachment 1 to our brief. We don’t have time to address all of the conditions today, so if we don’t mention something that’s a condition we refer you to our comments in our brief, including our supplemental comments on the NIT League agreement.
I would like to assure the Board that CMA and SPI have devoted considerable time to trying to reach accommodation with the railroads. We have been unsuccessful unfortunately, and I don’t think it would be appropriate to comment on the details, but we have tried.

First I would like to address what we see as a serious risk of service disruptions during implementation. There are serious questions of how NS and CSX are going to unscramble the various pieces of Conrail and reintegrate them into their own respective systems. We are colored in our perspective by the Union Pacific situation. I would just like to say that many of the problems that UP has seen do relate squarely to difficulties in integrating the SP and the UP.

For example, cars were lost because UP and SP car tracking systems didn’t mesh. Operations were hampered because labor agreements weren’t in place so UP crews couldn’t work on the SP territory and vice versa. Efficient utilization of SP facilities was undermined by the departure of many skilled SP
employees. All of this happened despite the fact that Union Pacific was always considered a well managed railroad. I hope they still are.

Plainly, the Board as part of its public interest inquiry must look at the issue of whether the operations proposed will be feasible and the transportation adequate. We see the potential for even greater service problems with this transaction than was the case with UP because as I said, before NS and CSX can begin to operate their pieces of Conrail, they have to figure out what it is they own and unscramble it.

Some assets obviously like track and equipment are easy to split up. But others, like databases, communications systems, and the many physical and electronic links that tie Conrail together today are going to be very difficult to untangle and sever and divide up. They have to be divided three ways. There’s the NS portion, there’s a CSX portion, and there’s the residual Conrail portion. Of course compounding that job is the fact that NS and CSX are rivals.
Dividing up a major rail system has never been done before. We think it is going to be quite messy. If the planning for the cutover isn’t done right, it’s shippers who are going to pay the price in the form of service disruptions. We think the potential for service disruptions as great as those we’re seeing in the west is there.

Now to their credit, the applicants have pledged to have the necessary information systems and labor agreements in place prior to beginning operations. They made those commitments in their depositions. They have repeated them in the NIT League agreement. We welcome those commitments. But those commitments aren’t enough in our view.

After NS and CSX certify to the Board that those elements are in place, we believe there should be an expedited period, we say 15 days, to allow public comment, and further 15 days for the Board to accept or reject the certifications that these elements are in place.

We view it as preferable for the Board to take this short period to ensure that the elements are...
really in place than for shippers to endure months or years of disruption afterwards. Just as one example, if CSX and NS say that all necessary labor agreements are in place and a union comes in and says well, number one is not in place or number two, we think it’s necessary and nothing has been done at all, it is better to get that on the table before NS and CSX attempt to begin operations.

In an ideal world, we could just take NS and CSX’s word that all these things are in place. But the whole purpose of this proceeding of course is to verify what the applicants have said about their claimed benefits. So let’s allow the 30 days for verification to be as certain as we can that the cutover to restructured service is going to be done right. If it’s not, again, everyone including CMA’s and SPI’s members are going to pay for that. They are going to pay far more than the interest costs of the extra 30 days, even at $2 million a day.

I would refer you to the conditions under heading A in our attachment 1 to our brief entitled "Pre-implementation Conditions" for the details of
what we have proposed.

The second set of issues I want to address are those relating to post-implementation, particularly in the shared asset areas, and particularly the north Jersey area. Obviously the shared asset areas carry some benefits. We have never denied that. But that tells only part of the story.

One of the reasons NS and CSX decided to create the areas is not only because they both wanted to be in those markets, but because there weren’t enough tracks to divide up the tracks. Conrail had spent years consolidating the tracks and the yards in those areas to fit a single railroad’s operations.

Now we are going to have a situation in which NS and CSX both have to be in those areas. They are going to run their trains into those areas. They are also going to have residual Conrail there doing the switching operations. So there will be three carriers instead of one.

Even today there is chronic congestion in the vicinity of the Oak Island terminal. That would become worse as Oak Island becomes a major interchange.
point between NS and CSX, and as I mentioned, as CSX
and NS begin to run their own trains in and out and
through the shared asset areas.

Unfortunately, the best record evidence we
have of whether if the operations are going to be able
to work is the operating plan that NS and CSX filed in
response to Decision 44. You may recall that Port
Authority hired an expert to look at that plan. He
said, this is pretty close to a direct quote, that if
this plan were implemented it would result in
operational paralysis in a matter of weeks.

We recognize that the Port Authority has
settled with the applicants, but nothing in the
settlement changes that record testimony. It's still
the best record evidence about, at least from the
shippers' side, about what might happen there in the
New Jersey area.

We also think that management of the
shared asset areas is going to be contentious and not
necessarily in the best interest of shippers. The
infrastructure in New Jersey is very tight. So it's
going to be very important to NS and CSX how that
infrastructure is expanded. What may be good for NS may be by definition bad for CSX. So the two railroads are going to be in perpetual deadlock, we fear. Even with the provision for arbitration, the management of the SAAs is going to be very cumbersome.

Unfortunately again, we fear it's going to be the shippers who are going to be caught between the rock and the hard place when NS and CSX can't agree. To the extent they can't agree and the infrastructure is not improved on a basis that it needs to be, shippers will suffer.

While CMA and SPI have requested among their pre-implementation conditions that the necessary management protocols for the shared asset areas be in place, we think realistically those aren't going to prevent problems and that the Board, if the transaction is approved, is going to have to devote very considerable attention during the oversight phase to the shared asset area operations.

Another big issue for CMA and SPI in the SAAs is the responsibility of NS and CSX for the handling of traffic by Conrail. Specifically, what
about the catastrophic situation in which Conrail is handling a car and there's a spill of hazardous materials.

We would request a condition B-1, which again is in attachment 1 to our brief, and I'll quote it. Recognizing that Conrail will operate the SAAs as an agent, NS and CSX each must be fully responsible and liable for its shipments to, from, and within the SAAs.

NS and CSX have said in their application and in discovery that they rather than Conrail are going to be the only common carriers, that all traffic in the SAAs is going to be handled under either an NS or CSX weight bill. Yet they have given inclusive answers when we have asked them well doesn't that mean you are going to take responsibility for what Conrail does for you.

Given those inclusive and unsatisfactory answers, we would ask the Board if it approves the transaction, to adopt the condition B-1, which I just quoted.

I am now going to introduce Tom Schick,
you is going to present the balance of the argument.

Good luck, Tom, in one minute.

MR. SCHICK: Madam Chairman, I may ask your indulgence for an extra minute or two.

CHAIRMAN MORGAN: You have it.

MR. SCHICK: Thank you. Good afternoon.

We see a variety of other problems in this transaction. I will touch on them only very briefly.

First, many chemical and plastic shippers will lose single line service. Their current routes and movements will be split between NS and CSX. The agreement with the NIT League freezes rates for that traffic, but only where 50 cars or more were shipped between a specific origin and specific destination. Many other shippers who have widely distributed traffic patterns such as chemicals and plastics shippers, may not meet that 50 car threshold. These shippers would be disadvantaged by losing single system service and would probably be among those who would face rate increases as well.

We believe that in order to prevent both worse service and likely higher rates for those
shippers, the Board should impose a rate freeze on this limited category of traffic that would lose single line service on Conrail.

As an alternative, you could extend the freeze as provided in the NIT League agreement so it would apply to shippers moving at least 50 cars from an origin through a point that becomes an interchange between NS and CSX after the breakup of Conrail.

Next, we are concerned that NS and CSX will attempt to reroute traffic, coming up from the Gulf Coast and moving to the Northeast. Today this airline traffic moves overwhelmingly through Illinois gateways. We fear that NS and CSX will attempt to move it instead through southern gateways, Memphis and New Orleans, for example. As we explained in our comments, this would give a longer haul to the eastern carriers, but likely result in higher rates for shippers. You ask why would the airline rates be higher. The answer is that the originating western carriers are likely to attempt to maintain their current revenue on what would become for them shorter hauls, while the eastern carriers would charge more
for what become longer hauls.

We are not asking for anything like the DT and I conditions. We are simply asking that the major Illinois gateways that are used by chemical and plastics shippers be maintained on a commercially competitive basis. We don't want to try to define those terms precisely. We would leave it to you to hear evidence from shippers that gateways that they have relied on have as a commercial matter become closed by rate increases or by service curtailments.

We have also requested certain conditions related to reciprocal switching. We remain concerned that the NIT League settlement preserves reciprocal switching that Conrail provides to Norfolk Southern and to CSX, but not vice versa. This threatens to create two-to-one points in the future.

We have learned that ARCO Chemical has reached a settlement of its concerns in this regard, but with other shippers facing that situation, we urge you to extend the reciprocal switching relief as in our condition (C)(2)(a), so it would apply uniformly to all shippers regardless of where they are located.
on these three railroads.

    We are also concerned about the likelihood that service handled by Conrail under contracts will deteriorate after the carve up of Conrail. The applicants propose to reroute traffic according to their own desires. As DOT noted this morning, shippers should be the ones with the option to select service by NS or by CSX under those contracts or to terminate and renegotiate.

    In the NIT League agreement, there is a cumbersome arbitration system to resolve complaints that contract service has deteriorated. We ask that you impose our condition (b)(4). We are confident that the applicants could even have implemented that condition in an orderly manner already if they had chosen to work with the shippers.

    We are concerned as well that by their own admissions there will be problems if there’s not faultless execution of this transaction.

    The final point in our comment is that if you do approve the transaction, we believe five years of oversight will be crucial. This is what was
imposed in UP/SP. This is an even more complex
transaction. Details of the process and the elements
are set forth in (c)(4) and (c)(5) in our conditions.

Thank you very much. Mr. Stone, Mr.
Bercovici and I will answer any questions about that.

CHAIRMAN MORGAN: So you don’t have a --

MR. BERCOVICI: I don’t have a prepared
statement.

CHAIRMAN MORGAN: Okay. Thank you.

Let me just start with you, Mr. DiMichael.
We have heard a lot of discussion today about
abrogation of contracts. Of course part of the NIT
League agreement addresses the transition period
relative to contracts and the arbitration process as
well.

The NIT League’s position I presume, given
the NIT League agreement, is that the abrogation of
contracts as requested by the applicants is something
that you support?

MR. DIMICHAEL: Well we believe that with
the NIT League agreement, with the settlement
agreement and the section in the settlement agreement
dealing with that, it is a reasonable compromise and
would take care of the most serious concerns.

Obviously the settlement agreement was a
compromise agreement. I think it's fair to say that
everyone was moving toward a central position. We
believe that the position that we have gotten to in
that agreement is a reasonable resolution of that.

CHAIRMAN MORGAN: The second question
relates to the council that is also part of the NIT
League agreement. Am I correct that this council has
been meeting on a regular basis already and has a
broad membership of shippers and carriers?

MR. DIMICHAEL: Yes. That is true. There
has been two meetings, two formal meetings of the
council so far. There is a third meeting coming up
this Tuesday, upcoming Tuesday. Agenda topics have
ranged everything from shared asset areas to MIS
systems to the contract question. There has been a
subcommittee designated to work up recommendations for
reporting requirements. There has been a summary of
shared asset area operations developed.

The council has it right now I think a
pretty broad fair cross section of shipper groups, electric utility groups, iron and steel, scrap metals, coal. So things have been going along we think fairly well on that.

CHAIRMAN MORGAN: What is the membership by numbers on the council, roughly?

MR. DIMICHAEL: I am trying to think. It must be probably about a dozen shipper groups right now and then the carriers, NS and CSX and substantial people, and at the last meeting Conrail itself sent representatives.

CHAIRMAN MORGAN: Now one of the things that I understand is part of the council’s responsibilities if we approve the merger with the NIT League agreement associated with that, that the council will set up what I guess I would call monitoring standards for judging how the implementation is going. Am I correct?

MR. DIMICHAEL: Well, what is happening is that we are developing reporting standards now. The idea will be to submit those to the Board for its consideration. The council, by the terms of the
settlement agreement, is not intended and will not supplant the Board. Obviously the reporting issues are things within the Board's jurisdiction.

But these things we thought would be areas where through the council shippers and carriers could get together to discuss what types of reporting is needed and would be convenient way of developing recommendations for the Board's consideration.

CHAIRMAN MORGAN: Thank you.

Mr. McBride, relative to the RCAF proposal that you have, now what exactly are we talking about in terms of application? Obviously under the NIT League agreement there are certain provisions that involve the RCAF. Is that what you are referring to?

MR. MCBRIDE: That and any other captive shipper protection remedies you might adopt. If I may remind you, first of all in the NIT League agreement and in the applicants own proposal there are proposals about things like trackage rights, trackage rights fees. We would argue the RCAF adjusted has to be used for those.

We did agree in the spirit of compromise
in the settlement that we did enter into just
yesterday, and as evidenced by a letter I filed this
morning with the Secretary, that because the
applicants had reduced the switching charges
substantially, switching charges not the trackage
rights fees in the NIT League agreement, that we would
not insist on the RCAF adjusted for those reduced
switching charges.

But in any other application of the RCAF
under captive shipper protections, we would insist on
what the law requires. So if I may, for example,
refer you back to what Dr. Kahn recommended.

Dr. Kahn recommended by way of captive
shipper protection, which is the sort of thing that
Mr. DiMichael said the NIT League endorses today when
he referred to Dr. Kahn’s testimony. Dr. Kahn
indicated that the concept of the shared asset area or
equal access, as he referred to it, should be applied.
Or in the alternative, that the Board should adopt
bottleneck rate jurisdiction for these carriers to
deal with those captive shipper problems on a
structural basis.
But if you are not inclined to do either one of those, he could think of no other remedy to protect the captive shippers but to put on a rate cap. He is not one who advocates first and foremost rate caps. As you know, he is a deregulator. He is a structural economist. But if you don’t adopt the structural remedies and you do adopt a rate cap, then you have to confront the question of what index do you use. We suggest that the only lawful index you can use is the RCAF adjusted for productivity.

So it is in that sort of process, when you go through and decide what remedies, if any, to adopt for captive shipper protection, that the RCAF adjusted issue may or may not come up.

CHAIRMAN MORGAN: Thank you.

Mr. Stone, let me, and if anyone else wants to chime in as well, but a couple of things that come out of your testimony. First of all, you have made several specific suggestions for conditions which I guess I characterize as adding to the NIT League if we were to approve the merger, adding to the NIT League agreement providing for specific implementation
certification, more oversight and some conditions in
the shared asset areas. You mentioned interchange and
reciprocal switching as kind of an addition to some of
the provisions in the NIT League agreement. Does that
sort of summarize, and I know I’m taking several pages
worth of conditions and --

MR. SCHICK: Yes and no. They could be,
one format could be to add them, as you say. That’s
not how they came up. Obviously these conditions were
proposed in October and discussed with the railroads
prior to the NIT League agreement.

So we were not intending that they should
be an addition. We didn’t even know about the NIT
League agreement at the time we developed those 14
conditions. They are still on four sheets for you.
But that would be another way I suppose to implement
them certainly.

CHAIRMAN MORGAN: Just so that I put it in
the proper perspective relative to the NIT League
agreement.

MR. STONE: But if I could just add.

CHAIRMAN MORGAN: Sure.
MR. STONE: Some of our conditions are so inconsistent with the NIT League agreement that they would have to be essentially replacing NIT League provisions wholesale.

CHAIRMAN MORGAN: Right.

Talk for a minute about contracts. I asked Mr. DiMichael about the position of the NIT League relative to abrogating the contracts. I think you all have a different view of that, which is that we should not override the non-assignability clauses. Furthermore that in the shared asset areas there be more of an open competitive activity as it relates to contracts. Have I got that right?

MR. SCHICK: Yes. And in the shared asset area, it was primarily where it would arise because as everyone has been saying throughout the day, where there is only one railroad succeeding the Conrail, it’s not that much of an issue.

Our proposal would have a shipper’s choice for a test period and also for a reopener. The non-assignability clauses came up in a different manner. We commented last week or two weeks ago when the issue
came up about some additional evidence around that issue. But certainly we feel that the shippers have bargained for a non-assignability clause. They should also have the right to that form of protection. It's an alternative perhaps for many of the people to what we have proposed, but we weren't looking at the contracts. We were looking at kind of a uniform remedy for everyone.

I would assume that the predominance of the contracts are alleged to have these conditions. So that would be another way to get that kind of protection in addition to what we have proposed.

CHAIRMAN MORGAN: We heard earlier that one of the concerns in this whole area of the contracts is implementation in this transition period. If the merger was approved, how would the railroads and the shippers handle the transition period relative to the contracts and the movements under those contracts.

Now you all are concerned about service if we approve this merger. I presume that you are not concerned about service as it relates to not
abrogating the non-assignability provisions in the contracts.

MR. STONE: Well, contracts are one of the forms of assets that NS and CSX are going to have to divide up. It is a complicated business to divide all that up, but we see no reason why NS and CSX can’t begin that process as soon as they take control. Apparently they or their experts have already seen the contracts. They have submitted some evidence on that. So we think with planning there should be no reason that there is going to be operational chaos because of some inability of NS and CSX to divide up the contract responsibilities.

MR. BERCOWICI: If I can just add to that, Chairman Morgan. The applicants have asked for the opportunity if the transaction gets favorable dispensation next Monday at the voting conference to begin looking at those contracts promptly. It is in the shippers’ best interests to have their freight moved smoothly and without interruption once the split date comes. So the shippers will be working very vigorously with the carriers, with Norfolk Southern
and CSX, the Conrail residual people as applicable, to identify moves that would be subject to this reopening and to work with them to make sure that they have provisions in place, rate and routing provisions for the traffic to continue to move.

So I think that that is another provision that will help keep this so-called chaos from occurring.

MR. STONE: Just one observation from the record. The NS and CSX operating plans that were submitted with the application have no knowledge of the Conrail contracts. So it seems somewhat anomalous to say that there would be operational chaos because all of a sudden they find out what the contracts are and are scrambling to try to respond to the shippers where they are already going to be I suppose scrambling to deal with the contracts after they can first glimpse them after taking control of Conrail.

CHAIRMAN MORGAN: Now I also hear that the concerns that you have about operations if the merger were approved focuses primarily on the shared asset areas. I also hear your concern there being one of
infrastructure in the shared asset areas. Is that the concern?

MR. STONE: That's a prime example of an operating problem. I don't want to get too far off on other possibilities, but clearly when you are splitting up the Conrail system you have less routing flexibility, the same thing Mr. Lyons acknowledged this morning. That could lead to bottlenecks after the split that don't exist before the split.

But yes, the shared asset area infrastructure is our main concern in New Jersey. It's a very tightly configured system. It's a very highly developed densely populated area. It's difficult to reconfigure that system, although it can be done. It probably needs to be done.

CHAIRMAN MORGAN: You heard the railroads earlier discuss some of their plans in this regard. Did that give you any comfort?

MR. STONE: I guess I would just repeat briefly our concern about the management of the SAA and the likely disputes that are going to arise about which capital improvements should be made when, given
that what may be good for NS may be bad for CSX by
definition.

CHAIRMAN MORGAN: Just one last question
which is that under any scenario here, you clearly
want a lot of monitoring.

MR. SCHICK: Yes.

CHAIRMAN MORGAN: That's a safe whatever
we want to call it. If this merger is approved, you
definitely want monitoring.

MR. SCHICK: Yes.

CHAIRMAN MORGAN: Thank you.

VICE CHAIRMAN OWEN: Is there anything
left?

MR. MCBRIDE: Acquisition premiums.

VICE CHAIRMAN OWEN: It's an interesting
point though that the fact that no contracts have been
looked at as of yet. Am I right on that assumption?

MR. BERCOCVICI: That's what we understand.

VICE CHAIRMAN OWEN: And so no contracts
have been looked at at this point in time. Then we're
going into a shared asset situation. I can understand
where your concern might be there that once you start
splitting those contracts up and then trying to parcel out the power and so forth and trying to get it to function, but will it be gridlock and will it be a bottleneck. I think that's why we have been talking to the railroads about going slow and making certain that they have at least all of the contracts aligned up first and do those things properly and one at a time, not rush into it.

MR. STONE: Vice Chairman Owen, the contracts will probably have to be parcelled out anyway in this sense. Most contracts are multi-point contracts, not all but most. So they are probably going to be, most of the contracts, part of the contract can only be performed by NS post-transaction. Part of it can only be performed by CSX.

Then there's this part which is, we think, probably a small percentage where the contract provides for movement from an open origin to an open destination. That's the only part that CSX and NS are arguing today they should have absolute control over. In reality, we think those are the minority of the contract movements.
So there would have to be some sorting out anyway. The only issue is what about that part of the contracts where there’s movement between open points.

VICE CHAIRMAN OWEN: Okay, I’m optimistic that, if it does go forward, that we would have some type of a reaction immediately from everybody involved in this process if we should consider to move this thing forward.

I would like to go back, if I could, to the other side of the table over here with the guy with the funny tie.

MR. McBRIDE: I was afraid you wouldn’t recognize me.

CHAIRMAN MORGAN: Same one you always wear.

(Laughter.)

CHAIRMAN MORGAN: Watch these things.

VICE CHAIRMAN OWEN: I would like to have a little bit of clarification on the NIT League agreement here in the Board approval or lack of approval and so forth.

It goes to -- reading down through here,
Section 3 further provides that the parties, through the NIT League agreement, will ask the Board to approve the creation of a council, the exchange of information, the process provided for addressing shipper implementation and service concerns, and the allocation of transportation contracts under Section 2(c).

Section 3(f) also provides that, in the absence of such approval by the Board, CSX and NS shall not be obliged to take any action which, in their sole judgement, might create liability under the anti-trust laws.

I was just looking for the approval or disapproval there and the relationship to the Board as such.

MR. DIMICHAEL: Well, Vice Chairman, there are several things in here that will involve Board action either fairly soon or eventually.

For example, Chairman Morgan, you asked about the reporting process. Reporting is to the Board, and so the reporting -- in a sense, the draft of the reporting or the recommendations for the
reporting that are being developed now under another section of the agreement is said that they will be submitted to the Board.

And so the Board itself would then need to say that, you know, these are the kinds of things we think are a good idea. They’ve been developed, and the Board would presumably get input from a whole variety of people.

So there are things in here that would require, to at least some extent, some Board action. And all this Section 3(f) is really saying is, to the extent that there are those things, we would ask the Board to take action at that time.

MR. McBRIDE: If I may just add, Vice Chairman Owen, one of the major reasons why the Fertilizer Institute wanted to enter into an agreement with the Applicants was because of this provision and the existence of the council.

We see this as a real positive aspect of this as opposed to what happened in UP/SP. This is a mechanism to try to take these issues back and deal with them privately and work them out. But with the
hook that, if need be, we have the Board to enforce what’s been agreed to on an expedited basis.

Shippers want to work with the carriers to make this go smoothly. This is the mechanism to do that.

VICE CHAIRMAN OWEN: I think this would be an excellent program whether the merger goes forward or not for you to have -- for the long range program.

MR. DiMICHAIL: I would just --

VICE CHAIRMAN OWEN: And try to include the other people in it also.

MR. DiMICHAIL: I would just mention that really, for a number of years now in fact, the NIT League has had -- scheduled periodic meetings with individual carriers and with the rail industry. The League certainly believes that that kind of exchange is very, very necessary.

It was especially thought to be prudent and useful to have a more formalized thing here that would involve even, you know, other groups. And, to the extent that there is any group so far that would like to become involve in the council, I’m sure that
we’d be interested in hearing from them.

VICE CHAIRMAN OWEN: Thank you.

CHAIRMAN MORGAN: Are you all -- the Chemical and Plastics folks, are you on this council right now?

MR. BERCOCICI: We are not participating at this time.

CHAIRMAN MORGAN: Anything else?

VICE CHAIRMAN OWEN: I have no other questions.

Thank you very much.

CHAIRMAN MORGAN: Thank you all very much. Okay, we’ll go next to specific shipper interests.

AK Steel Corporation, Frederic Wood; ASHTA Chemical, Inajo David Chappell. I think I probably messed that name up. Eastman Kodak Company, Byron Olson; Joseph Smith & Sons, Jeffrey Moreno; Millennium Petrochemicals, Michael Ferro.

And hopefully we have enough chairs.

Citizen Gas and Coke Utility, F. Ronalds Walker.

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433 www.nealgross.com
Now whose name did I mess up?

MS. CHAPPELL: Inajo Davis Chappell.

CHAIRMAN MORGAN: Inajo Davis Chappell.

MS. CHAPPELL: That's correct.

CHAIRMAN MORGAN: Thank you. I apologize in advance.

MS. CHAPPELL: No problem, Madame Chair.

CHAIRMAN MORGAN: With 50 people today, I'm bound to get one wrong at least.

MS. CHAPPELL: No problem.

CHAIRMAN MORGAN: Mr. Wood, if you'd like to begin.

MR. WOOD: Thank you, Chairman Morgan.

May it please the Board, the relief sought by AK Steel in this proceeding is essential to the maintenance of existing rail competition for the transportation of iron ore and other bulk commodities to and from the Toledo docks on Lake Erie in Northwestern Ohio.

Since 1946, Conrail and CSX and their predecessors have jointly owned and had the right to operate jointly the facilities at the Lake Front Dock
and Railroad Terminal Company.

As stated in the Applicants' rebuttal, the Applicants now propose that Norfolk Southern acquire only Conrail’s operating rights at the Toledo docks. However, they are still proposing that Conrail’s 50% ownership interest in Lake Front Dock under the related application in the Sub No. 26 proceeding be transferred to CSX which already owns the other 50%.

On February 18th of this year, after the record in this proceeding was closed, NS entered into a settlement agreement with certain Toledo area governmental interests.

In that agreement, NS promised that it will aggressively market Toledo docks in the same manner it markets other Lake Erie ports for the movement of waterborne coal, ore and other traffic moving to, from or via Lake Erie.

But this promise will be of no significance unless Conrail’s 50% ownership interest in Lake Front Dock is transferred to NS. When the agreements that give Conrail operational access to the Toledo docks expire, NS will have no interest in or
leverage to obtain renewal of the operating rights obtained from CSX by Conrail.

In his deposition, Mr. Goode, Chairman of the NS, explained that one of NS’s principles of balance competition meant that, and I quote, "competitors need to make a commitment to owning lines and terminals, and that competition requires investment in order to establish the base for it."

Mr. Goode has it exactly right. Conrail obtained access rights to the Toledo docks over the years precisely because it had an ownership stake in the rail lines and terminal facilities.

Unless NS has an ownership interest in the Toledo docks, it will not be able to obtain continuation or renewal of the access rights, particularly when two of the most agreements expire in the near future.

Then shippers like AK Steel will not be able to seek or obtain a competitive service from NS over the Toledo docks.

Beginning in October of 1996, we have heard much about NS principles of balance competition.
Recently, we haven’t heard much about them. We certainly didn’t hear anything about them this morning.

But Mr. Goode did say in his deposition in September last year that NS still advocates those principles, and that it would be fair to say that the implementation of these principles would be in the public interest.

One way to ensure the implementation of these principles and to ensure balanced competition at the Toledo docks would be for the Board to deny the related application and condition the main transaction on the transfer to NS of Conrail’s 50% ownership interest in Lake Front Dock and Railroad Terminal.

In addition, Applicants admit that preserving NS access under the various Conrail agreements to the Toledo docks will require further agreements and other arrangements. None have been presented to the parties for review or to the Board for approval.

In the UP/SP case where a similar situation existed, the Board explicitly required the
Applicants there to honor all amendments and modifications of the various agreements made on the record.

Such action is also required here. Both of these steps are essential to carry out the Board's well established policy of protecting shippers like AK Steel that have competitive choices available today from lots of those alternatives now or in the future as a result of a rail acquisition.

I want to thank the Board for the opportunity to appear today, and I'll be happy to answer any questions that you might have.

CHAIRMAN MORGAN: I think what we'll do is just keep moving down. Now I want to make sure you have a place to sit while someone else is speaking is the key.

MR. WOOD: Plenty of room in the front row.

Thank you.

CHAIRMAN MORGAN: Ms. Chappell.

MS. CHAPPELL: Good afternoon, Chairman, Vice Chair.
Consistent with the Ohio Attorney General’s Office, the Ohio Rail Development Commission and the Public Utilities Commission of Ohio, ASHTA has asked this Board to impose conditions on the proposed acquisition that would serve the public interest.

Specifically, a reciprocal switching or other competitive access arrangement between NS and CSX in Ashtabula, Ohio will reduce the number of times hazardous cargo is shipped to and from Ashtabula and in and about the Ashtabula area.

Reciprocal switching or other competitive access remedy will reduce the volume of HAZMAT transported back and forth from Cleveland to Ashtabula and to Buffalo. Ultimately, these conditions will benefit the public by promoting rail efficiency as well as environmental health and safety in Ashtabula, Ohio.

In the final EIS, the SEA recognized that there are increases in HAZMAT transport along the CSX rail line segments, as well as the NS rail line segments. Although it opines that, with respect to the CSX rail line segments, there’s a minimal 10%
increase such that key route mitigation is not warranted.

With respect to the NS rail segments, the SEA acknowledged a 225% increase in HAZMAT traffic.

Our concern is that this Board must look to the total impact to the Ashtabula community. We are looking at a 235% increase in HAZMAT traffic impacting our entire area.

The approach taken and suggested by -- to the Board by the SEA is unduly narrow, and the potential safety risks associated with increased HAZMAT transport are not adequately addressed.

The SEA concedes that it did not look at the effects a reciprocal switching agreement might have with respect to mitigation in this area, and we would ask that the Board conduct such an analysis before reaching a decision on this issue.

Additionally, the Board must impose reciprocal switching or other competitive access remedy on the Applicants because conditions overall will reduce the inefficient transport of chemical products in the area.

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1333 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701
(202) 234-4433
www.nealgross.com
As it currently stands and is proposed by the Applicants, hazardous chemical materials are being routed in a circuitous manner. Although the Applicants claim that no one seriously disputes efficiency with respect to the total transaction, obviously ASHTA does dispute the efficiency argument as it relates to Ashtabula, Ohio.

Product that our company ships to southern and western destinations is first being routed northeast to Buffalo, then back through Ashtabula to southern and western destinations.

Given the additional rail traffic expected in the Ashtabula area post transaction, the Board is justified in imposing reciprocal switching or other access requirements in our area.

Imposition of a switching requirement at the west yard in Ashtabula, Ohio will allow ASHTA to route directly more than one-third of the hazardous material product it ships annually.

Under the standards set forth in the UP/SP merger, the Burlington Northern and other cases, environmental effects are properly considered by this
Board as a part of the public interest determination. And public interest considerations in Ashtabula, Ohio clearly and substantially outweigh any claimed benefit of the proposed transaction in our community.

In this case, a switching arrangement is practical and feasible. Imposition of such a condition would not burden the Applicants, nor this transaction. And this morning we heard them speak about conditions that would impair the transaction and impede the transaction.

The condition that we pose, a reciprocal switching agreement or other access at the west yard, is not, not a burden. If you have the handout that I've provided, you can see that there is already existing switching facilities at two locations in the Ashtabula area: one at the west yard and one at a rail interconnect near the Gary and Fitch Streets.

Use of these existing switches would promote safety, reduce congestion and rail traffic in Ashtabula and would allow for chemical products to be routed in a more efficient and direct manner.

With respect to the economic and the
merits issues, we've provided this Board with analysis of the competitive harm we believe we would suffer as a result of the transaction, and several people have touched on it today.

ASHTA will suffer an obvious economic hardship in instances post transaction where rerouting of single line products become two line or multiple product movements. The proposed transaction will eliminate a number of direct routes for our company and create the need for multi-line movements of our chemical product.

The change in product line movement will result in increased freight rates for us and a potential loss of customers in areas where transaction costs cannot be absorbed. Also, we expect that ASHTA will incur enormous costs in correcting logistical inefficiencies that will impede its ability to compete in the chemical industry.

This Board does not err in imposing a condition on the Applicants that would require reciprocal switching or other access at the west yard or at the Gary and Fitch Street rail interconnect.
given the need to redress the harm to ASHTA and to further the public interest in Ashtabula, Ohio.

I understand that I need to bring my remarks to a close.

Our feeling is that the public will benefit if access is mandated so that chemical product is routed directly. ASHTA has not been able to get CSX or NS to the table.

Contrary to what you've heard today with respect to the outreach, we have not been able to sit down with the Applicants to discuss a way that might benefit all of us in coming up with a solution to this problem.

We do have confidence, however, that this Board is capable of balancing all of the interests and in drawing the appropriate lines as to the appropriate conditions that need to be imposed on this transaction.

Statutory standards require that the transaction be consistent with the public interest. Competitive logistical efficiency and environmental considerations all require that this Board condition
the transaction on reciprocal switching or other access at the west yard or at the Gary and Fitch Street rail interconnect in Ashtabula, Ohio.

Common sense also dictates this result.

I thank you for your time.

CHAIRMAN MORGAN: Thank you.

Mr. Olson.

MR. OLSON: Chairman Morgan, Vice Chairman Owen, good afternoon.

My name is Byron Olson. I represent Eastman Kodak in this proceeding as transportation counsel.

Kodak has three concerns that I'd like to call the Board's attention to today. But before delineating these concerns, let me say that Kodak supports the application so long as these concerns are satisfactorily addressed.

Indeed, my 30 years in the railroad industry and my involvement in a number of mergers has led me to the conclusion that this is what should have happened in 1968 instead of the Penn Central merger.

There are two unique aspects to this...
proceeding. The first is that it could be the last merger of this magnitude to occur in North America, although one should never say never.

The second is that it's not a merger at all, but rather an acquisition inseparation. And that's why Kodak supports the basic concept. We take the assertions of the Applicants seriously; that they mean to bring competition back to Conrail territory.

We think that's commendable, and we hope that it proves to be the case, particularly with respect to shared and joint access areas important to Kodak. But there are some disturbing indications that cause us to question the good faith of these assertions, and that's the subject of our concerns which I'll summarize.

First, we urge that the Board do nothing to modify consent to assignment clauses in existing Conrail transportation contracts. These clauses were specifically bargained for at arms length between the parties. They are legitimate, private agreements, and we see no reason or justification to tamper with them in the context of this proceeding.
Second, we urge that the rights of short line carriers to participate in routes serving Kodak not be impaired. And third, we urge that the Board take steps, if necessary, to assure equality as between CSX and Norfolk Southern in the Monongahela coal fields formerly served by the Monongahela Railroad, the so-called MGA territory.

And to provide the Board some perspective, Kodak is indeed a significant user of coal transportation by Conrail to the tune of some 800,000 tons a year. And Kodak's been happy with Conrail's performance under its existing coal transportation contract and, indeed, is happy generally with its relationship with Conrail.

Kodak, like all rail shippers, needs a railroad that will make commitments and keep them. But let me talk a bit more about the background of this present contract so that you can understand our position on the assignment clause issue.

Kodak negotiated its present contract with Conrail in 1992. It is a ten year contract and will not expire until the year 2002. One of the clauses
that is in the contract, but only as a result of negotiation by Kodak, is a consent to assignment clause that reads in part as follows:

"This contract is not assignable in whole or in part by one party without the prior, written consent of the other parties."

That’s fairly simple. Conrail resisted incorporating this provision into the contract, but finally agreed. Whatever Conrail’s policy toward these clauses generally in their contract rate making, all Kodak knew is that it wanted this provision in its contract, and Conrail finally agreed to it.

After all, it’s a ten year contract. That’s a long time in this business.

Well, in the context of 1991 and ’92 when this negotiation was going on, there was a competitive alternative of sorts available for Kodak’s coal movements, which generally come from the MGA fields to Rochester, New York.

But, by the mid ’90s, Kodak was dealing with a monopoly. Conrail had taken over the Monongahela Railroad by that time and controlled all
or most of the origin mines. And, of course, they had
a route all the way to the destination in Rochester.

Thus, Kodak had made the best deal it
could at the time. We urge that the Board not let
competitive access to again be lost as a result of
actions taken in this case.

In any event, the future shape of the
eastern railroad system was, by no means, permanently
in place at that time. Norfolk Southern had already
made clear its interest in acquiring Conrail.

And, of course, the post World War II
history of the railroad system in Northeastern United
States had been one of continuous turmoil, doubt and
uncertainty. All of this history provided Kodak with
ample reason to keep its options open in the event of
yet another major eastern rail system reshuffle.

This proceeding today is proof that that
reshuffling has arrived, and it also shows why Kodak
bargained for this clause in the event that
competition might return. And it appears from the
application that that is indeed what will happen.

Time does not permit me to address why
Section 11321(a) of the act neither mandates nor permits tampering with these contracts, but clearly it was not intended for that purpose.

I’d be glad to answer questions on that subject.

Finally, let me say that, unlike most parties represented here today, Kodak is not asking the Board -- if I might finish my -- is not asking the Board to do anything.

Rather, we are asking the Board to refrain from taking any action in response to that portion of Applicants’ prayer for relief which seeks to nullify and invalidate consent to assignment clauses.

All we ask is that you just leave it alone and let the intent of the contracting parties be preserved.

Thank you for the privilege of addressing the Board.

CHAIRMAN MORGAN: Thank you.

Mr. Moreno.

MR. MORENO: Good afternoon, Chairman Morgan and Vice Chairman Owen.
My name is Jeff Moreno, and I'm here today on behalf of Joseph Smith & Sons.

Joseph Smith & Sons is a scrap metal recycler located in our own backyard in Capital Heights, Maryland. It has come to the board to seek two conditions to be imposed upon this transaction.

Each condition would protect the build out and interconnection option that Joseph Smith & Sons has today.

Joseph Smith & Sons' Capital Heights, Maryland facility is bordered on three sides by three different railroads. The facility is served solely by Conrail today which operates a line on the southern border.

In addition to Conrail, CSX also operates a line that parallels Conrail's line on the south, and also borders the Joseph Smith & Sons property on the east side of the property. And finally, Amtrak's northeast corridor line creates the northern border of the Capital Heights facility.

Joseph Smith & Sons has potential interconnections with both CSX and with the Amtrak...
line. Twice in the early 90's, CSX approached Joseph Smith & Sons about a build out proposal that would traverse a distance of not more than 100 yards.

The build out proposal ultimately was not constructed because Conrail, in response, lowered its rates and the build out was unnecessary to create competition.

In addition, Joseph Smith & Sons actually once had a connection with the Amtrak line. That connection was removed at some time in the past, at which we've been unable to determine.

What Joseph Smith & Sons seeks to do with its conditions is preserve its build out and interconnection options with both the CSX and the Amtrak lines. Post merger, CSX will acquire Conrail's line that serves the Capital Heights facility.

As a result of this, there will no longer be a build out option from the current CSX line -- such a build out would be pointless. Fortunately, however, Norfolk Southern has been grated trackage rights over this very same CSX line as part of this merger transaction.

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701 www.nealrgross.com
In addition, Norfolk Southern will succeed to Conrail's trackage rights on the Amtrak line. Joseph Smith & Sons asked the STB to impose conditions that would preserve each of these build out and interconnection options.

The Applicants, namely CSX and Conrail, have not disputed either of these facts -- any of these facts. Rather, what they have done is assert that these conditions are unnecessary to protect and preserve Joseph Smith & Sons' current competitive position.

And the reason they say the conditions are unnecessary is because the NIT League settlement agreement imposes a five year reciprocal switching obligation upon CSX to keep the facility open to reciprocal switching for Norfolk Southern.

Now while Joseph Smith & Sons applaud this settlement agreement, this agreement does not preserve its current competitive situation. The reciprocal switching agreement is only for a five year period, after which CSX will be free to either raise the reciprocal switching rate to uneconomic levels or
terminate reciprocal switching all together.

Only continuation of the build out threat
will give Joseph Smith & Sons its competitive leverage
that it currently has beyond the five year reciprocal
switching period.

As for the Amtrak interconnection, the
Applicants state only that Norfolk Southern will
assume the same rights that Conrail currently has on
the Amtrak northeast corridor.

Joseph Smith & Sons agrees with this
statement and believes that, if the statement is true,
Norfolk Southern will have the ability to provide
service to Joseph Smith & Sons via an interconnection
on the Amtrak trackage rights.

Joseph Smith & Sons seeks only to confirm
this fact by asking the Board to impose a condition
that would eliminate any doubt over this question and
eliminate the potential for any future dispute that
might arise.

Now a number of parties have come before
the Board and will come before the Board talking about
the unique situation of this merger at justifying
their request for conditions. Joseph Smith & Sons is not in that position.

The facts that Joseph Smith & Sons presents here are identical to facts that this Board addressed in both the BN/Santa Fe and the UP/SP mergers. And if this Board follows that precedent, it should grant the conditions that have been requested by Joseph Smith & Sons.

Whereas the CSX reference to reciprocal switching would only provide a solution for five years, the build out option and conditions would provide a solution forever for Joseph Smith & Sons.

Therefore, Joseph Smith & Sons ask that you impose their requested conditions and preserve their existing build out options.

Thank you.

CHAIRMAN MORGAN: Thank you.

Mr. Ferro.

MR. FERRO: Chairman Morgan and Vice Chairman Owen, good afternoon.

Before I begin, I'd like to advise the Board of a development which has taken place since
Millennium Petrochemicals filed its comments in this proceeding and which are not part of the record.

On December 1st, 1997, Millennium Petrochemicals contributed its oliphants and polymers business to Equistar Chemicals, LP, which is a joint venture between Millennium Petrochemicals, Liondel Chemicals and Occidental Chemical Corporation.

Among the assets contributed to Equistar is a polymers regional distribution center in Finderne, New Jersey, which is the subject of our comments.

Today the name over the door, so to speak, is Equistar; but otherwise, all the facts that we have in our comment NPI2 remain the same.

I bring this development to the Board's attention so that you are not confused when I say Equistar and you're expecting Millennium Petrochemical, because the interests of Equistar and Millennium Petrochemicals in this docket are interchangeable and coincident.

The concern I bring to the Board's attention is simple, and the solution that we propose
is straightforward. Our Finderne RDC is a linchpin in a polymer distribution network for New England and the Mid Atlantic.

This regional distribution facility transload plastic pellets from covered hopper cars into bulk hopper trailers or bags and boxes for truck shipment to customers whose locations or needs preclude the shipment of hopper cars.

This facility has had to adapt to many operational difficulties. Yet, Conrail has learned how to juggle hopper cars amongst the RDC, the marshalling yard and the overflow storage yards so that loaded hopper cars are delivered and empty hopper cars are removed in a timely manner.

The Applicants' respective operating plans will require the coordination of at least two, and sometimes three, separate entities to move hopper cars into and out of the Fenderne RDC.

This coordination will be necessary because all three elements currently used by Conrail are to be scattered amongst the Applicants' and the Conrail shared asset operation. The Applicants'
operation plans only generally address getting Equistar's hopper cars to and from Manville yard.

There is no detail on how these hopper cars are to get from Manville yard to Fenderne RDC or which entity or entities will have that responsibility.

The Applicants, particularly the NS, argue that their operating plans are already adequate to address Equistar's concerns. They state that the Fenderne RDC will continue to enjoy single line service with the NS which it enjoys with Conrail today.

They claim Equistar is mistaken in its assumption that the Fenderne RDC must be switched and interchanged using Manville yard as Conrail now does today. Applicants then attempt to obfuscate the issue by inferring that any economic disadvantage that Equistar suffers as a result of their operating plans will be offset by some benefit derived at its Newark, New Jersey facility under their operating plans.

We find that Applicants' arguments against inclusion of the Fenderne RDC in the North Jersey
shared asset area unpersuasive, and we trust that the Board will likewise find these arguments unpersuasive.

Conrail currently controls all the assets that are to be allocated amongst the Applicants and the CSAO. Time and experience have shown that the current arrangement utilizing Manville yard for marshalling hopper cars in Boundbrook and South Plainfield for temporary storage to be the most efficient.

Despite the peculiar operating conditions at Fenderne RDC, the current arrangement has worked, and has worked efficiently, for the past decade. Any offsetting benefit to Equistar from elsewhere in the new system -- by bringing that, the Applicants miss the point entirely.

Even if we assume, for the sake of argument, that Equistar will gain some offsetting economic benefit elsewhere in the new system, Applicants seem to ignore how any degradation of service to the Fenderne RDC will affect Equistar's customers.

Equistar's experience from the rail
problems in the Gulf Coast is that our customers will blame us for late shipments even if they are aware that the root cause of the problem lies with the railroads.

One of the reasons that our customers in the New England and Mid Atlantic region are happy and loyal is because of the timely and dependable service they receive from the Fenderne RDC.

Yet, Rock D'Amio, who operates the Fenderne RDC for Equistar, has thoroughly reviewed the Applicants' operating plans and he has serious reservations about his ability to function at the current level of service if those plans are implemented.

The straightforward solution that we propose is to include Equistar's Fenderne RDC in the North Jersey shared asset area. The Applicants propose that the CSAO operate the North Jersey shared asset area as a neutral switching and dispatching agent for both Applicants.

The CSAO will operate Manville yard for the CSX and the South Plainfield yard which is to be
in the shared asset area. If Fenderne were moved within the shared asset area, all three elements presently used by Conrail to deliver and pick up cars at Fenderne would continue to be operated by Conrail, such an arrangement where it closely mirrors the status quo than what is proposed in the -- than the Applicants.

I can crystallize in conclusion the relief that we ask. The Applicants ask us to accept two birds in the bush. We ask the Board to make them keep -- let us keep the bird in hand.

CHAIRMAN MORGAN: Thank you.

Mr. Walker.

MR. WALKER: Chairman Morgan and Vice Chairman Owen, I am Ron Walker.

Citizens Gas and Coke Utility is a public municipal trust which provides gas service to the citizens in Indianapolis in which rail ships about 900,000 tons of coal a year to manufacture metallurgical coke.

I am pleased to tell you that, earlier this morning, Citizens and CSX reached an agreement;
and, as a result, we are going to ask the Board formally in writing and, of course, now ask to withdraw all our requests to impose conditions.

Thank you very much.

CHAIRMAN MORGAN: You're excused.

(Laughter.)

Okay, let me just ask a question of each of you just to make sure I get your position.

Let me start with you, Mr. Wood. You found a chair.

My understanding, Mr. Wood, is that both of the Applicants have indicated that they are prepared to serve Toledo, as you request. You seem to be saying though that you’re not sure how that will work and what the specifics of that arrangement would be.

Is that, in essence, what you’re --

MR. WOOD: The Applicants' rebuttal statement, Chairman Morgan, that was filed in December does indicate that the -- although there was some uncertainty when the original application was filed, that Norfolk Southern will apparently -- or it is, as
they put it, it is their intention that Norfolk Southern succeed to whatever operating rights Conrail has today to operate on and serve the Lake Front Dock, including the Lake Front Dock Perco Ironwork facility which is used by AK Steel’s traffic.

What we’re not certain about is precisely what implementing agreements or, as they put it in the rebuttal statement, other arrangements are going to be put in place to implement that statement of intention.

And all we asked for was a clear requirement as was done in the UP/SP proceeding where such representations were made on the record about accommodating concerns that were raised that the Board explicitly direct, as part of the decision, the Applicants to put those arrangements in place.

And I trust that clarifies your question?

CHAIRMAN MORGAN: Yes, thank you; that’s perfect.

Ms. Chappell.

MS. CHAPPELL: Yes.

CHAIRMAN MORGAN: The way I understand your position, you are looking for more direct routing
because you carry hazardous materials and you feel that the more direct routing would be safer.

Is that --

MS. CHAPPELL: We think, Madame Chair, there are a number of hats this Board can basically hang its -- number of hooks the Board can hang its hat on in terms of granting our relief.

We believe that reciprocal switching would obviously produce a HAZMAT reduction, a reduction in traffic rails, relieve congestion in the area, would reduce HAZMAT transport in the area.

We are, just as a number of other parties, a captive shipper. Conrail has had a monopoly in our area for a number of years and, in effect, is handing that over to CSX. If, in fact, the byproduct of this Board's acting in the public interest in promoting competition in Ashtabula, Ohio is that we improve our position, we think then that's all well and okay.

I mean, I know that -- I anticipate the Applicants' objection in that, you know, we will no longer have the status quo in Ashtabula; and somehow, if you grant our relief, ASHTA will be improving its
position.

But we believe that the public interest considerations require -- not only because of the environmental impact, but the economic harm that we suffer in a number of other areas -- that are relief be granted.

And our relief, frankly, is not going to cost anybody a lot of money. The switching facilities are there. And we’re willing to pay a reasonable switching fee, so we think that this condition is something that can be done without unduly burdening the transaction.

CHAIRMAN MORGAN: Thank you.

VICE CHAIRMAN OWEN: Have you talked to the participants?

MS. CHAPPELL: Meaning the Applicants?

VICE CHAIRMAN OWEN: The Applicants, yes.

MS. CHAPPELL: We’ve tried on a number of occasions to engage them in discussion. We’ve invited them to the table before the October filing when we first got wind of it. I know company representatives attempted to try to talk to the folks both at CSX and
I, frankly, am aware also the issue had been raised with Conrail representatives as well. And so we have no choice but to ask this Board for relief. We don’t seem to be getting anywhere.

VICE CHAIRMAN OWEN: Seems reasonable.

MS. CHAPPELL: Thank you. We think so.

CHAIRMAN MORGAN: Mr. Olson, --

MR. OLSON: Yes, Chairman Morgan.

CHAIRMAN MORGAN: -- I guess, to summarize, you made several points in your testimony, but clearly one of your main focuses is this issue of not abrogating non-assignability clauses in contracts.

Is that a good summary of your concern?

MR. OLSON: That’s correct.

The Applicants have said they’re bringing competition back. And, by preserving these clauses, we will -- Kodak will be -- have the opportunity to test them on that. Because, as we see the application, there will once again be two competitive routes to bring Kodak’s coal from the Monongahela fields to Rochester.
So all we're saying is, if you're serious about restoring competition, fine; just leave the clause in effect and we'll be free then to talk to the competitive alternative.

We're not terribly concerned with who decides to take over the Conrail contract. We expect one of the Applicants will do it. It will probably be CSX because they serve both the origin and the destination.

NS could participate, but in conjunction with a short line connection into Rochester. So we're not concerned about who decides to take over the Kodak contract. All we want is the right to immediately sit down with the other alternative and start talking rates and service to them.

CHAIRMAN MORGAN: Mr. Ferro, it seems to me that we have -- what you've discussed really are operational concerns relative to switching outside the shared asset area.

Is that --

MR. FERRO: That's correct.

CHAIRMAN MORGAN: That's your main
concern. And that commitments have been made in a
general way, but you don’t feel that you’ve had enough
details as to how your service is going to be handled?

MR. FERRO: Well, we have thoroughly
combed over the Applicants’ operating plans and their
revised operation plan for the North Jersey shared
asset -- or the North Jersey area, and we weren’t
satisfied.

And we went back to the Applicants and
said, you know, give us some more detail. On several
occasions, we’ve asked them to sit down with us and
explain how this is going to work.

We’ve basically been told that we would be
adequately served; that we were mistaken if we assumed
that we had to be served out of Manville yard the same
way that Conrail does it today; that they would
probably switch that service over to a local crew
operating out of Allentown, which is 56 miles away.

One of the peculiarities about our
situation that we outlined in our comment is that
boundary line for the shared asset area falls six
miles or one stop to our east at Boundbrook. We are
on a terminal line for the Rariton Valley line.

There's no industry to the west of us. So when they drew the line, we just happened to fall outside. And the Applicants have been very reluctant to either include us as an omission somehow or to give us details as to how we are going to get the same level of service.

Because this location, as is set forward in our comments, has some very peculiar operating parameters. It has very small yards, its yards are bisected by the two main lines of New Jersey Transit. So therefore, you need somebody who knows how to switch the cars in and out in order that we do not suffer any service problems.

And we think that the Conrail residual, the CSAO, would be the ones that would have that experience.

CHAIRMAN MORGAN: Thank you.

Mr. Moreno, I'm still trying to understand. Seems to me that, given the Amtrak settlement that you discussed, that you still have a build out opportunity, is that right, that exists?
MR. MORENO: We have two --

CHAIRMAN MORGAN: I mean, obviously the names have changed here a little bit in terms of who has what line, but a build out opportunity still exists?

MR. MORENO: Are you referring to the Amtrak line?

CHAIRMAN MORGAN: Right.

MR. MORENO: Potentially it's been unclear. The Applicants have not made any clear statement one way or the other. All it says is we will -- that Norfolk Southern will succeed to the same rights as Conrail.

We're just looking for a clear understanding that Joseph Smith & Sons can get service from Conrail over the Amtrak build out.

But we also feel we need to preserve the CSX build out opportunity because there could be operational issues operating over the Amtrak line that don't exist with the CSX line. And that's where CSX was offering a competitive threat directly prior to this merger.
So we're seeking to preserve both build
d out options here.

CHAIRMAN MORGAN: Well, are you asking for
more than what you have today?

MR. MORENO: No, we have the ability to
connect to the Norfolk Southern line today -- excuse
me, the Amtrak line today, and to the CSX line today.
And we're asking that you simply preserve our right to
connect to both of those lines.

They will simply have different service
providers now.

CHAIRMAN MORGAN: Thank you.

VICE CHAIRMAN OWEN: I'd like to go back
to the gentleman over here with Kodak.

Now if you have a non-assignable contract
here and then they parcel it out between NS and CSX,
then, under the NIT League agreement, if I'm not
mistaken, then after six months, if you're unhappy,
you can go some other place.

But, by and large, you have a competitive
situation here, do you not?

MR. OLSON: Well, we don't see the NIT
League settlement as addressing the competitive opportunity we think we’ll be entitled to after the -- if this application is approved. The NIT League --

VICE CHAIRMAN OWEN: Were you entitled to a competitive opportunity before this came about?

MR. OLSON: No, but they’re selling this to the Board on the basis of we’re bringing back competition to Conrail territory. And we’re just saying fine, don’t try to take -- give it with one hand and take it away with another.

The fact is that the consent to assignment clause is there for just that specific purpose. They’re going to -- we think there are going to be two routes again available as we once had several years ago.

I think I’m getting away from your question. Can we refocus on that?

VICE CHAIRMAN OWEN: Yes.

MR. OLSON: What was your question?

VICE CHAIRMAN OWEN: I just thought you were counting here on the basis that basically you had a competitive situation here that they’re going to
divide up the contracts.

Okay. So they'll take -- one of them will take yours. And so after a period of six months, if you're unhappy for some lack of service, or something like that, then you can go to the other one and see what you can get there, or go to arbitration.

MR. OLSEN: We're not --

VICE CHAIRMAN OWEN: But --

MR. OLSEN: Oh, excuse me.

VICE CHAIRMAN OWEN: Which gives you more than what you've got now, is what I'm saying.

MR. OLSEN: No, I don't agree. The NIT League settlement doesn't address our concerns. We assumed that whoever takes over the Kodak contract will do as good a job as Conrail is now doing in terms of service. We want the opportunity to talk to the competitive -- the new competitive opportunities about rates, and we don't want to wait six months to do that or a year or have to prove that service is bad.

See, the NIT League settlement only permits relief if you can prove service deficiencies. We're not so concerned about that we think we should
have -- because of our clause, our assignment clause, our content to assignment clause, we should have the opportunity to talk to competitive -- whatever new competitive alternatives come along, as a result of an assignment.

VICE CHAIRMAN OWEN: What I just said, though, was you're looking to better the situation that you had with Conrail, because with Conrail you just had one -- one carrier there and you had no way to go and negotiate a lower rate. They had good service, so if you get good service with CSX from the same rate you had with Conrail, but then you want more. Now you must go to CNS and see if I can drive them down another dollar a pound, or whatever it might be.

I know where you're coming from -- shaking a Christmas tree.

(Laughter.)

MR. OLSEN: Vice Chairman Owen, I remind you -- I remind you that these -- this clause, as well as the rest of the contract, was arrived at through arms length negotiations. It was not handed over as
a gratuity by Conrail, and it was in the context of a very volatile and continually changing eastern railroad situation. So we think we bargained for this, and we should have the right to make use of it.

VICE CHAIRMAN OWEN: Okay. Good. That’s good.

I have no other questions.

CHAIRMAN MORGAN: Okay. Thank you all very much.

Next we will move to a coal panel -- Centerior Energy Corporation, First Energy Corp., Christopher Mills; Consumers Energy Company, Kelvin Dowd; Eighty-Four Mining Company, Marty Bercovici; Niagara Mohawk Power Corporation, John Maser; Orange and Rockland Utilities, John Cutler; American Electric Power Service Corporation, Michael McBride.

Now, do we have enough chairs?

MR. MILLS: Chairman Morgan, Vice Chairman Owen, I’m Chris Mills, and I represent First Energy Corporation, which is the successor to Centerior Energy Corporation.

CHAIRMAN MORGAN: I saw it bracketed. I
wasn't exactly sure where we were in the transition period here.

MR. MILLS: Well, Centerior no longer exists, so it's now --

CHAIRMAN MORGAN: Oh, okay.

MR. MILLS: -- First Energy, and hopefully I'll remember that.

First Energy provides electric service in Ohio. Its interest in this proceeding relates to three power plants it owns or operates in the Cleveland area.

If the Board approves the Conrail transaction as it's proposed, CSX will acquire the east-west Conrail line between Cleveland and Ashtabula, Ohio, as shown on the schematic in red color and blue color, denoting that it will be acquired by CSX. This line serves the three power plants in the Cleveland area -- the East Lake, Lake Shore, and Ashtabula Generating Stations.

The transfer of this line to CSX will convert the single-line Conrail route that is used to transport about 40 percent of the coal burned at these
plants to a less efficient NS/CSX joint route. In addition, all three of these plants in the Cleveland area will become captive at destination to CSX.

This is going to cause competitive harm to First Energy by making it more difficult to compete with other utilities who are receiving new access to two railroads at both origin and destination, which was all the transaction. First Energy has proposed a trackage rights condition that would remedy all of the harm caused by the transaction. That is the trackage rights proposal shown on the schematic.

The other Conrail lines that are used to transport coal to these three Cleveland area power plants are the vertical green lines shown on the schematic, and green denotes that they’re going to be acquired by NS as a result of this transaction.

The line on the left is the line from the coal-producing region in southeastern Ohio that goes up to Collinwood where it connects with this line. And the green line on the right is the Conrail line from the MGA-producing region you’re heard about in southwestern Pennsylvania. It’s also being acquired.
You'll notice there is also a blue line on the right side, and that is a single-line CSX route from the MGA region, because CSX is also getting access to that region.

Almost all of the coal burned at First Energy's Cleveland area plants comes from these two coal-producing regions, which are now served by Conrail. Both regions will continue to be the primary coal sources for these plants in the future. Because NS is not being granted access to any shippers on the Conrail line, the east-west line in red that serves these three plants, the present single-line Conrail routes from both the Ohio and the MGA origins will become joint routes.

The trackage rights conditions sought by First Energy would preserve the present single-line route from the southeastern Ohio coal origins by enabling NS to transport coal from these origins all the way to the plants. And by enabling NS to compete directly with CSX, the condition would also prevent First Energy from suffering competitive harm as a
result of a merger.

The competitive harm results from two factors. First, CSX’s destination monopoly will enable it to control First Energy’s coal sourcing options, and it will do this by favoring its much longer single-line haul from the MGA origins.

CSX can do this by adjusting its division of revenue for the short destination segment of joint movements with NS from the southeastern Ohio origins so as to ensure that the delivered cost of coal from the MGA region is always slightly lower than the delivered cost of coal from southeastern Ohio, and that’s regardless of the level of its own single-line rate from the MGA mines. It can do the same thing with respect to a possible joint movement from the MGA origin as well.

Conrail, by contrast, has no incentive to do this because it has a relatively long single-line haul from both origin districts, and it’s relatively indifferent as to which origin they come from -- the coal comes from.

Second, First Energy will be disadvantaged
in competing for off-system power sales compared to several of its competitors who also use coal from the MGA region in particular, which is an important source of coal for compliance with phase 2 of the Clean Air Act. These competitors include Detroit Edison on the west and PECO Energy on the east. Detroit Edison is located in the Detroit shared assets area, and PECO Energy is located in the Philadelphia/South Jersey shared assets area.

This means that both of these utilities will have new competitive two-carrier service available for the origin and the destination power plants, so they can expect lower delivered fuel costs than First Energy, which will continue to be captive to one carrier at destination.

As everyone has recognized, the Conrail transaction is unprecedented. The CSX and NS have agreed to carve up Conrail in a way that intentionally extends new two-carrier competition to some shippers but not to others. They have argued they do not need to do this for their transaction to pass muster under the Board’s precedence, but they seek to have their
cake and eat it, too, because they also tout the additional competition as one of the major benefits that justifies approval of the transaction.

So having voluntarily opened the door to additional rail competition for some shippers where it suits their own purposes, they should not be allowed to close that same door to other shippers who will be disadvantaged by their action.

The trackage rights conditions sought by First Energy is operationally feasible. The applicants have not denied it. The applicants have also conceded that First Energy will suffer competitive harm, and their solution is a settlement agreement they have entered into with one of First Energy's major coal producers, Ohio Valley Coal Company. That settlement agreement is highly confidential, and I can't go into it. The reasons why it does not protect First Energy are explained in our brief, pages 14 to 24, and I refer the Board to those pages.

Thank you.

CHAIRMAN MORGAN: Thank you.
Mr. Dowd?

MR. DOWD: May it please the Board, Consumers Energy Company submits that approval of this transaction should be denied, absent the imposition of at least two conditions. First, the exclusion of the multi-billion dollar acquisition premium from the applicants' cost basis for regulatory purposes. And, second, the imposition of an oversight condition that assures an effective forum for the enforcement not only of conditions imposed by the Board but of the applicants' covenant in the complex agreements that memorialize the transaction.

Those are explained in our comments and in our brief. Allowing the applicants to write up the value of Conrail's assets for regulatory purposes will not serve any of the goals of the national rail transportation policy, and, in fact, is at odds with the standards applied to other regulated industries.

Such a writeup would have only one clear regulatory effect. It would artificially raise the threshold for maximum rate relief for the relatively limited class of shippers that are subject to rail
market dominance. Consumers Energy Company’s base load Campbell station, which is captive to CSX, potentially one of those sites.

By one measure, as Consumers showed in its evidence, inclusion of the acquisition premium would raise the jurisdictional threshold on a typical CSX coal movement by over 15 percent, and, on a comparable Norfolk Southern movement, by over 24 percent. The end result is higher rates on captive traffic, effectively a guaranteed shipper subsidy for the applicants’ tender offer battle. And that, we submit, fails the Board’s public interest balancing test and should not be permitted.

And the balance of my time I will devote to a second issue that is of importance to Consumers, and that is the need for effective oversight. In particular, I refer to the continued serious uncertainty surrounding the applicants’ intentions with respect to Section 2.2(c) of their transaction agreement governing the allocation of Conrail contracts.

This schematic depicts current alternate
routings from one of Consumers' principal coal sources to its Karn Weadock facility near Essexville, Michigan. The deep concern over the dominance that CSX generally holds over Consumers' coal movements, and the resulting higher costs and inconsistent service, led Consumers to assemble and contract for a three-carrier haul via Conrail, the Grand Trunk Western, and the Central Michigan Railroad, in an effort to exert at least some competitive pressure on CSX.

Now, the applicants plan to allocate the Conrail line from the origin to Columbus to Norfolk Southern, and the shorter segment from Columbus to Toledo to CSX. NS and CSX also each have their own lines between Columbus and Toledo.

Now, the applicants have pledged to respect and assume all existing Conrail transportation contracts, and recently confirmed that they would make no attempt to circumvent the participation of the Grand Trunk and the Central Michigan. But despite repeated requests from Consumers, they have refused to confirm that Norfolk Southern will take over the
Conrail portion of the Conrail contract.

And, in fact, CSX has suggested, or CSX representatives have suggested that CSX might do it, by virtue of the fact that they could serve both the Fola Mine and the Essexville facility. Now, this is of critical importance to Consumers because the sole reason for the contract's existence is to set up some sort of alternative to CSX.

Now, ours is a situation that is not squarely covered in Section 2.2(c), and the carriers have claimed flexibility to allocate our traffic as they see fit. But 2.2(c) does state that Conrail contracts are to be allocated "in a manner to achieve reliability and proper service to the customers." And they recognize "the importance of assuring that the acquisition of Conrail does not create shipping disruptions for Conrail customers."

Well, nothing could be more disruptive for Consumers than for the applicants to be permitted to allocate this contract in a manner which frustrates its fundamental purpose. Such an action also would be anti-competitive, nullifying the only reasonable
alternative to CSX for movements to Essexville.

Now, in our supplemental filing on May 26th, we asked that the Board condition any approval of this transaction on NS’s assumption of Conrail’s portion of our contract. We reiterate that request today. Alternatively, though, we would endorse the remedies suggested by the Department of Transportation, which would give Consumers Energy the right to choose which carrier would take over the Conrail portion.

And, in addition, we respectfully submit that the Board should impose an oversight condition that specifically affords a forum for claims. But applicants’ after-the-fact implementation of their plan, they violate the transaction terms now before the Board, or the mandates of the public interest. The assignment of our Conrail contract to CSX would be a prime example of such a violation.

I thank the Board.

CHAIRMAN MORGAN: Thank you.

Mr. Bercovici?

MR. BERCOVICI: Chairman Morgan, Vice
Chairman Owen, I’m going to have some slides.

This morning you heard about Eighty-Four Mining Company. Now you’ll hear from Eighty-Four Mining Company, which we submit is in a unique position in this proceeding.

Mine 84 operates in a distinct subset of the coal mining industry, producing at a high Btu content and medium sulphur coal. Yet the six mines with which it competes in southwestern Pennsylvania and northern West Virginia all draw from the Pittsburgh seam. Mine 84, acquired by its present ownership in 1992, and subsequently expanded, is the second largest producer of this Pittsburgh seam coal.

The seven mines and virtually all of the utility customers for this quality of coal today are served by Conrail. In dividing Conrail’s territory, as you can see from the map, CSX and NS have agreed to joint access to the six mines which are the competitors of Mine 84 located on the lines of the former Monongahela Railway. They tout this as a benefit of the division of Conrail.

Mine 84 is relegated to the stepchild
status of Cinderella in this proceeding, having been subject to exclusive service by Norfolk Southern. From the standpoint of the customers of Pittsburgh seam coal, the division of Conrail gives about 20 percent of that market exclusively to CSX, 22 percent to Norfolk Southern, and 58 percent subject to dual access.

The realities of transportation pricing, as conceded by applicants' witnesses, since CSX will be able to source the same quality of coal and single-line service, Mine 84 effectively will be foreclosed from that 20 percent of the market share going to CSX. And it will be significantly disadvantaged in the 58 percent shared market area.

Additionally, CSX and NS have agreed to jointly share in any extension of the former Monongahela railway lines, thus extending dual service to the already-identified Berkshire coal field and possibly other future competitors of Mine 84.

These facts are not in dispute. Responsive Norfolk Southern to Mine 84's plea for relief is that Mine 84 will gain benefits from single-
line access to the NS system, including access to new markets. In fact, the market for Pittsburgh seam coal is in Conrail territory, and NS offers Mine 84 no new and no compensating market opportunities.

This is surely demonstrated in the deposition of NS's vice president for coal marketing, which is associated with our brief. And if there were any benefits, those same opportunities also will accrue to each of Mine 84's competitors, and those competitors also will gain the advantage of any single-line access to the CSX system.

The claimed benefits accordingly would serve -- would actually serve to exacerbate the market foreclosure and market disadvantage resulting from this transaction.

NS having provided no substantive counter to Mine 84's concerns, Mr. Allen this morning posed the question to you, "If you attempt to correct this inequity, where do you stop?" Chairman Morgan, Vice Chairman Owen, I can't give you a formula for where you stop. Your job is to determine the public interest --
CHAIRMAN MORGAN: To figure that out.

MR. BERCOVICI: -- in the transaction.

(Laughter.)

But I will say that similar situation -- or an analogous situation arose in the BN/SF case regarding Bungee Corporation. And the ICC in that case said typically -- typically, the agency does not seek to equalize opportunities between competitors. That situation, however, entailed an extension to a competitor through a settlement with another railroad, not a division, not a direct output of the transaction. And this certainly is not the typical situation.

As I said at the beginning, Mine 84 is truly unique. While others may experience some disadvantage due to competitors gaining access to both CNS -- CSX and NS, while they retain single carrier service, not one other party has demonstrated that all of its competitors will gain such access, and it will be subject to foreclosure and disadvantage in more than 75 percent of its markets.

Moreover, in no other case does this
prejudice occur due to applicants having carefully, 
but with no stated criteria and no alternative 
objective, extended dual service to a portion of a 
discrete competitive market while excluding one of the 
major market participants, simply because it is 
located on a branch line.

The remedy sought by Mine 84 is simple and 
fully consistent with the transaction. We seek the 
small trackage right amount for CSX or for NS to 
provide switching of Mine 84 traffic to CSX either at 
the southern junction, West Brownsville, or the 
northern junction shown off the map, Homestead. 
Applicants have raised no objection that either remedy 
is not practical or feasible.

Chairman Morgan, Vice Chairman Owen, 
Mine 84 asks no more than NS asked when it challenged 
the merger agreement between CSX and Conrail.

If you can indulge me for another moment 
or two, Chairman. After four months of complaining 
about the unfair market division from the Conrail-CSX 
combination, NS, after taking this position when it 
was subject to merger impact by CSX and Conrail, now
tells you it is beyond the scope of the Board's authority or sound public policy in a free market economy to attempt to equalize transportation alternatives to shippers.

On the other hand, while telling you, contrary to the testimony of their economic witness, that Mine 84 does not suffer competitive harm, they want you to immunize them from antitrust immunity for their market division. These positions pose some very fundamental questions.

In concluding, let me pose two. First, is there no harm to Mine 84; and, thus, no basis for immunity? Or is there some harm in the justification for granting immunity? Secondly, is it solely the province of the railroads to determine winners and losers among their customers? Or is it the responsibility of this Board to protect the public interest and assure that there are no adverse effects in the total transportation market?

Like the stepchild Cinderella sought the matching slipper, Mine 84 is looking for you to come forward with a matching switch engine -- the one
reading CSX -- so that it can participate in the same
arena as its direct competitors.

Thank you for your time.

CHAIRMAN MORGAN: Thank you. We needed a
little levity at this hour.

(Laughter.)

Thank you.

MR. BERCOVICI: Thank you.

CHAIRMAN MORGAN: Mr. Maser?

MR. MASER: Good afternoon. Chairman
Morgan, Vice Chairman Owen, may it please the Board,
I appear today on behalf of Niagara Mohawk Power
Corporation in this important proceeding. Niagara
Mohawk’s position in this proceeding is a substantial
one because it is very concerned about the competitive
harm that two of its electric coal-fired generating
facilities would experience as a direct result of this
transaction as proposed.

Now, to remedy this competitive harm,
Niagara Mohawk has joined in the request for
conditions that have been advanced by the Erie Niagara
Rail Steering Committee, of which Niagara Mohawk is a
member. Those conditions will be addressed later today on behalf of the Steering Committee, and I will not repeat them at this time.

Alternatively, Niagara Mohawk has requested individual trackage rights for the benefit of its two facilities, and these are the Huntley station, which is located in Tonawanda, New York, a few miles north of Buffalo, and the Dunkirk station, which is located southwest of Buffalo, all in western New York in the Niagara frontier region.

The trackage rights that we have requested would permit Norfolk Southern direct access to these facilities over the lines of CSX, which will be acquiring them from Conrail, and CSX will be the carrier providing direct rail service to the facility. However, as I say, we request trackage rights for Norfolk Southern.

Now, the applicants do not dispute the operational feasibility of the conditions that the Niagara Mohawk has requested individually, or that the Erie Niagara Rail Steering Committee has requested from this Board. What the applicants do argue,
however, is simply this: that since Niagara Mohawk stations are solely served by Conrail today, and will be solely served by CSX post-transaction, that Niagara Mohawk has suffered no competitive relief. To them, and particularly to CSX, it is a simple proposition.

Now, I generally agree that simplicity is a good thing, and that we should seek simplicity, but we should always suspect it. And that maxim applies with a vengeance here, because CSX is doing much more than merely stepping into the shoes of Conrail.

What is happening here is that this unique transaction is causing direct competitive harm to Niagara Mohawk’s Dunkirk and Huntley stations, and, as I say, directly caused by this application itself, and that is because of the creation of shared asset areas in the Detroit area and in the South Jersey/Philadelphia area where competing utilities to Niagara Mohawk stations are located.

Detroit Edison’s two facilities in the Detroit shared assets areas propose the Trenton Channel station and the River Russe station are direct competitors with Niagara Mohawk. Similarly, there are
four competing utilities in the South Jersey/Philadelphia area as well.

Now, those facilities will be receiving direct head-to-head competition from both Norfolk Southern and CSX. Niagara Mohawk’s facilities, on the other hand, would remain captive to CSX after the transaction. To us, and the record amply supports this, the need for protective conditions is clear.

Now, the applicants do say, in addition, they argue, that because Niagara Mohawk’s stations do have the limited vessel option available to them, that there is no competitive harm here, and that Niagara Mohawk is not entitled to any relief. However, I want to emphasize and underline the limited nature of this vessel option to these stations.

The vessel option is limited by weather conditions on Lake Erie where the Dunkirk station is located, and on -- at the Huntley station on the Niagara River. Those weather conditions, particularly in the wintertime, are very severe ice conditions, particularly on the Niagara River, and the shipping season is short and it’s unpredictable as to when it’s
going to open and close. That's always a concern.

There are vessel availability constraints.

And with respect to the Huntley station, located on the Niagara River, there are constraints imposed by the Black Rock lock, such as vessel size restrictions and opening and closing dates.

So that vessel option is simply a limited option, and the fact remains that Niagara Mohawk's facilities will remain captive to CSX, as they are to Conrail today, for the majority of their shipments. And those vessel options have not caused any competitive constraints on rail rates to the stations as our evidence shows.

So, in closing, let me stress this. We have shown, we believe, that the competitive harm to Niagara Mohawk station is the direct result of the transaction as proposed by the applicants, because of the creation of the shared asset areas and the direct competition that competitive utilities will be obtaining post-transaction. Therefore, we are entitled to relief, we submit most respectfully.

In addition, the applicants have touted
this as a unique transaction, a pro-competitive transaction. We agree that it is to a limited extent, but it needs to be expanded to include the other competing facilities that are going to be competitively injured. And we respectfully urge the Board to grant the conditions imposed by the Rail Steering Committee or by Niagara Mohawk individually.

Thank you very much, and I'd be happy to answer any questions you may have.

CHAIRMAN MORGAN: Thank you.

Mr. Cutler?

MR. CUTLER: Good afternoon. I'm John Cutler. I'm appearing for Orange and Rockland Utilities, Inc.

Orange and Rockland's coal-fired Levitt plant, located on the Hudson River about 45 miles north of North York, is captive to Conrail today and will be captive to CSX in the future, if the applicants' proposal is granted.

Orange and Rockland does not ask that the proposal be disapproved. We do think, however, it can and should be improved. We have two main concerns.
Orange and Rockland's first concern is service problems. A UP-type meltdown, or even localized service problems, could lead to a shutdown at the Levitt plant.

The Applicants have two responses. The first is trust us; the second is use barges. No doubt the Applicants are working hard to avoid a recurrence of the UP disaster. But that's not good enough, particularly given the vulnerability of Levitt.

Space constraints make the -- mean the coal stockpile is very small: 18 days supply of coal. In addition, Conrail's Hudson River line barely has the capacity it needs today. The Applicants project a 20% increase in traffic over the line.

The barge option doesn't exist. There are no barge unloading facilities at the Levitt plant and no reason to construct them. For environmental reasons, the Levitt plant must burn very low sulphur, super compliance coal.

Orange and Rockland knows of no sources served by barge.

Our second concern involves reduced
competition. Since Conrail doesn't serve mines that can produce super compliance coal in the volumes required at the Levitt plant, Orange and Rockland has enjoyed the benefits of competition on two levels.

First, the mines have competed to supply the best coal at the best price. Second, CSX and NS competed to carry the coal from the mines to their interchange points with Conrail. After Levitt becomes captive to CSX, competition from Norfolk Southern and from Norfolk Southern served mines will be neutralized.

In response, the Applicants say origin competition is a myth, citing the one lump theory. They know better since they, themselves, competed to serve that coal. In any event, the one lump theory ignores competition among coal suppliers as opposed to coal transporters.

There is a better way of addressing both of Orange and Rockland's concerns. Trackage rights for Norfolk Southern over the last 45 miles between the Levitt plant and the northern New Jersey rail yards will enable Orange and Rockland to respond
effectively to any service problems in CSX.

It will also preserve the benefits of the competition Orange and Rockland now enjoys.

We recognize that ICC policy in past merger cases was to deny trackage rights in cases like this one. However, that policy rested not on the statute, but rather on the ICC's belief that merger conditioning power should be exercised sparingly.

The policy at the time was to preserve, but never to promote, competition. That policy is no longer sound. The act permits the Board to take a more active role, and there is good reason for it to do so.

In the last year -- in recent years, Congress, the Federal Communications Commission and FERC have all moved to promote new competition in the electric utility, the telecommunications and the natural gas industry.

In the last few weeks, this Board has moved in Ex Parte 575, Ex Parte 628, and in the reopened UP/SP merger proceeding to modify prior policies in recognition that they have done too little
to promote competition as an alternative to regulation.

The Board has broad conditioning power in merger proceedings that it can't exercise in any other forum. It can promote competition in proceedings like this one that it can't promote -- it can take steps in a proceeding like this that it can't take in 628 or 575.

If the Board won't exercise that power now, when will it do so?

The public interest concept is not a static concept. It changes over time. As it is understood today, the public interest requires a new approach to pro-competitive merger conditions.

Now that the Board is putting the finishing touches on the railroad map of the Eastern United States, the trackage rights requested by Orange and Rockland should be granted.

The theme of the Applicants this morning was don't change the old policies. It's perfectly understandable; the old policies have been good for the railroad industry.
However -- and Mr. Allen gave you two other reasons: pro competitive merger conditions deter mergers, and there's a slippery slope.

And as far as the first of these reasons is concerned, we submit that pro competitive merger conditions mean better mergers, not fewer mergers. And in any event, how many mergers are left?

Railroad consolidation in the United States is almost at the end of the possible line. As for the slippery slope argument, that sounds very much like saying don't go out and do something good because you might have to do more of it.

We're confident that the Board can figure out ways to limit pro competitive merger conditions appropriately, probably on the basis of walking before you run, testing the benefits of pro competitive merger conditions in this proceeding on at least a small scale, and then building on experience gained through those conditions.

Thank you very much.

CHAIRMAN MORGAN: Thank you.

Mr. McBride.
MR. McBRIDE: Thank you again, Madame Chairman and Mr. Vice Chairman.

It's late in the afternoon, so I have a simple problem and a simple fix for you.

American Electric Power is served by two railroads at its cardinal plant today, and they are Conrail and the Wheeling in Lake Erie. NS will take the Conrail line. We have no problem with that.

Our concern is the same that you heard from Senator DeWine and that WNLE has expressed in its response to the application, and that is that Wheeling and Lake Erie may go bankrupt as a result of this transaction.

If that should occur, the cardinal plant will be a two to one facility and, under your precedence, would be entitled to relief. And so all we ask is that you adopt a conditional protective provision that, if Wheeling and Lake Erie is unable to serve AEP's cardinal plant, CSX would be required to do so with unrestricted access to the plant.

Mr. Snow resisted being required to do so when I asked him about this in the deposition, so we
couldn’t work it out and I had to ask you to order that.

Now, turns out that he apparently didn’t know, and neither did his counsel until after the case was briefed, that CSX also has access to the plant today; but it’s restricted, as it turns out, to only low sulphur coal which is not the only kind of fuel used at the plant.

So we need a provision that CSX would have unrestricted access to AEP’s cardinal plant if the Wheeling and Lake Erie cannot serve it. CSX would be obliged to provide this service, and NS would be obliged to permit that access under the same terms as exist today in the WNLE Conrail agreement now in effect.

We’re not asking for anything different than we have today. We’re simply trying to preserve the access that WNLE has in CSX, which would be the only other railroad around.

Now, the Applicants say we can also get coal at the cardinal plant by barge, but I say so what. First of all, the Ohio River has a tendency to
freeze in the winter, so it's not always an available mode.

But secondly, there is no authority in your precedence, none, that a railroad merger or acquisition may cause the loss of one of two rail carriers serving a plant if the plant can also be served by another mode.

You have not even considered that in past mergers such as BN/Santa Fe or UP/SP. And it is inappropriate that a shipper could lose one of its two rail carrier options because of a transaction such as this and yet be entitled to no relief.

Yet, that is Applicants' position, and we ask you simply to preserve the rail options -- the two rail options that the cardinal plant has today in an unrestricted fashion.

Thank you very much.

CHAIRMAN MORGAN: Thank you.

Well, let me just -- while you're standing, --

MR. McBRIDE: Sure.

CHAIRMAN MORGAN: -- the key to your
concern is the viability of the Wheeling and Lake Erie.

MR. McBRIDE: That's absolutely right.

CHAIRMAN MORGAN: If we take care of the viability of Wheeling and Lake Erie, then you're taken care of. Is that --

MR. McBRIDE: That's correct.

CHAIRMAN MORGAN: -- a pretty good summary?

MR. McBRIDE: That is exactly right.

CHAIRMAN MORGAN: You may sit down now.

(Laughter.)

Mr. Cutler.

MR. CUTLER: Yes.

CHAIRMAN MORGAN: And you don't need to stand necessarily.

One of the things you discussed was service congestion in this east of the Hudson area.

MR. CUTLER: Yes.

CHAIRMAN MORGAN: And that's one of the things, obviously, that we are dealing with in this proceeding is this issue of adding options east of the
Hudson.

What do you think that congestion -- well, go ahead.

MR. CUTLER: My only point was going to be that the Levitt plant is actually on the west side of the Hudson River, so we are not really --

CHAIRMAN MORGAN: But you're still concerned about congestion?

MR. CUTLER: Absolutely.

CHAIRMAN MORGAN: And what is your suggestion on fixing that?

MR. CUTLER: Well, the trackage rights option is obviously one solution to the congestion problem in the sense that, if CSX gets jammed up, we have NS as a back up. But the other request in the comments that Orange and Rockland has filed in this proceeding is for monitoring of the situation and oversight.

Something along the lines of what you have recently done in UP/SP would certainly be something to keep in reserve.

CHAIRMAN MORGAN: Okay.
Mr. Maser, relative to your competitive situation today, are you asking for something more than you have today?

MR. DOWD: No, we are not indeed, Your Honor.

What we are asking for is to prevent competitive harm that would otherwise occur as a direct result of the transaction as proposed. Because what would be occurring here would be that Niagara Mohawk, Huntley and Dunkirk stations would be competitively disadvantaged vis-à-vis competing utilities in other shared asset areas as proposed.

The Detroit shared asset area, Detroit Edison's facilities there -- for example, the Dunkirk and Huntley stations would be in the position to compete with the Detroit Edison to serve power to the Ontario Hydro facility which is in the market to take additional coal because, as the record indicates, Ontario Hydro has laid up seven nuclear facilities; and therefore, there's increased coal movements and energy requirements to that facility.

That is one competitive situation, among
others. But there are also four competing utilities
in the south Jersey/Philadelphia area that will also
be getting direct head to head competition post
transaction while Niagara Mohawk would not; and
therefore, it’s going to place us in a competitive
disadvantage in what is really an increasingly
competitive utility -- electric utility marketplace.

With the mandates of the restructuring
that’s going on, federal and state requirements, it’s
a very increasingly competitive situation, and we
would be competitive injured. So we are not asking
for any additional benefits.

I always say all we want is a fair
advantage, but we’re not even asking for that here.
We just don’t want to be unfairly disadvantaged.

CHAIRMAN MORGAN: Mr. Bercovici, how far
is 84 Mining from the MGA?

MR. BERCOVICI: It’s about 32 miles,
Chairman Morgan, from the mine through the branch line
down the Mon, which is the main north-south line to
West Brownsville. And it’s about the same distance
north to the junction with CSX at Homestead.
Compared to what we heard this morning was about 190 miles of trackage rights in the Monongahela that have been granted to CSX.

CHAIRMAN MORGAN: Okay.

Mr. Dowd, regarding the issue of abrogation of contracts that we’ve been discussing all day, I presume that your position is to not override non-assignability provisions.

Is that --

MR. DOWD: Well, in the case of the Consumer’s contract that I mentioned, Consumers does not have --

CHAIRMAN MORGAN: You do not have?

MR. DOWD: -- any objection to Norfolk Southern assuming Conrail’s obligations under that contract. And indeed, we believe that that’s what’s required under the transaction agreement.

Insofar as the override of assignability generally, our position is that you need to be guided by the statute which talks about being exempt from other law to the extent necessary.

And we would suggest that the wholesale
abrogation of contracts would be excessive in light of
the statute; that there needs to be some a more
direct connection drawn between particular contracts
and the elements of the transaction before a finding
could be made that abrogation was necessary.

But as to the Carn Weadock contract with
Conrail, Consumers doesn’t object to its assumption by
Norfolk Southern.

CHAIRMAN MORGAN: And Mr. Mills, I presume
from your testimony that the interline relief
provisions that are included in the NIT League
agreement to accommodate single line to joint line
situations is not enough for your situation?

MR. MILLS: That’s correct, Chairman
Morgan. I think --

CHAIRMAN MORGAN: And why is that?

MR. MILLS: Well, the concern here is that
a -- not only that a single line route would be
converted to a joint line route, but that CSX will
have another single line route from another region
which will enable it to foreclose the joint line
route, which is a somewhat unique situation.
That's one of the two concerns that First Energy has.

CHAIRMAN MORGAN: Okay, thank you.

VICE CHAIRMAN OWEN: I just have a couple of comments here regarding the Pittsburgh coal. Seems like there's about three of you involved in that here, a couple of you burning it and one of you supplying it.

MR. BERCOVICI: There are seven mines operated by four companies.

VICE CHAIRMAN OWEN: I'm just talking about right here at this table.

MR. BERCOVICI: There are several --

VICE CHAIRMAN OWEN: Oh, more of you than that?

MR. BERCOVICI: Niagara Mohawk is --

VICE CHAIRMAN OWEN: Yeah, one, two, three.

MR. MILLS: First Energy can burn it.

VICE CHAIRMAN OWEN: Okay.

MR. MASER: We have burned it and would like to have the opportunity to continue to burn it.
Actually, we’re losing single line service to that as a result of this transaction, which is another concern to us.

And we support Mine 84 in this proceeding.

VICE CHAIRMAN OWEN: And you keep alluding to the fact that you may lose WNLE as one of your carriers there. Is that what I’ve heard somebody say?

MR. McBRIEDE: That’s the concern of American Electric Power. And they have a responsive application before you saying exactly that.

VICE CHAIRMAN OWEN: I can’t comment on that. It was just -- in fact, all of this was tying together and trying to say okay, if one railroad goes, one short line goes here, then we’ve got a serious problem.

We’re anticipating a lot of things that really haven’t happened, so I think we probably should wait a little bit longer until --

MR. McBRIEDE: Well, that was why I made my proposal as a conditional protective condition. If they don’t go under, then my condition wouldn’t apply; and that’s why I answered the Chairman as forthrightly

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701
(202) 234-4433
www.nealgross.com
as I did.

If you protect Wheeling and Lake Erie, then we don’t have a problem. I just don’t know how the two of you, with all the problems you have on your plate, can assure anybody of anything.

VICE CHAIRMAN OWEN: We have no problems.

(Laughter.)

CHAIRMAN MORGAN: Where did you get that idea?

(Laughter.)

MR. McBRIDE: Good, but you’re not a miracle worker.

CHAIRMAN MORGAN: You’d be surprised.

VICE CHAIRMAN OWEN: I have no other questions.

Thank you very much.

CHAIRMAN MORGAN: Thank you all.

Our next panel includes passenger and commuter interests. We first will hear from Arthur Gazetti representing the American Public Transit Association; Kevin Sheys representing Northern Virginia Transportation Commission & Potomac and
Rappahannock Transportation Commission; and finally,
Walter Zullig, Jr. representing Metro-North Commuter Railroad.

And hopefully I got those names right.

MR. GAZETTI: Very good.

CHAIRMAN MORGAN: Please proceed.

MR. GAZETTI: Good evening, Chairman Morgan and Vice Chairman Owen.

I am Mark Gazetti appearing for the American Public Transit Association. APTA represents public transit providers serving over 90% of the public transit riders in America.

As you know, the transaction under STB’s consideration includes rail corridors heavily utilized by rapid transit, commuter rail and intercity rail service. These passenger operations are critical to millions of people every day.

The three freight railroads involved in this action each have existing operating agreements with these passenger railroads. The Applicants have resolved merger related issues with some of the affected rail passenger providers.
Other providers, including some you will hear from today, have issues critical to the traveling public which have yet to be addressed. My comments will not deal with the specifics of any of these cases, but will emphasize an ongoing public interest in rail passengers that needs to be formally acknowledged.

I wish to make five recommendations. First, I call attention to the fact that, in many instances, the proposed merger will result in increased freight traffic on existing lines.

Where increased freight traffic occurs on lines also used for passenger traffic, conflicts between freight and passenger service are likely to increase. Scheduling and dispatching procedures are critical.

As a condition for approval, APTA requests that STB require assurances from the Applicants that the ability of rail passenger providers to provide reliable and high quality service will not be undermined by the effects of consolidation.

Second, I point out that, across the
nation, there are a large number of new start rail projects under active consideration addressing regional goals for economic development and growth or to find low cost solutions to congestion problems and support broader national economic and environmental goals.

Unfortunately, achieving the access agreements necessary for rail passenger service is becoming increasingly difficult. A forum is lacking to consider public interest issues which may become present.

APTA urges STB to use the pending transaction as an opportunity to define an ongoing process that will allow for negotiation of fair and reasonable operating rights agreements with fair and reasonable compensation to CSX and Norfolk Southern.

This should include a process for resolving any disputes.

Third, it is important that STB provide a means to resolve disputes beyond the three year time frame as others have requested. The oversight period should be extended to five years or longer.
Fourth, we note that CSX, Norfolk Southern and Amtrak recently agreed that, as part of this continuing oversight, STB should require quarterly reports in regard to on time performance.

Perhaps it makes sense to extend this same condition to other passenger rail operators where dispatching is controlled by freight carriers, not merely to Amtrak.

Fifth, work force reductions from the proposed merger will result in additional railroad retirement payments by taxpayer supported commuter railroads. APTA requests that STB include conditions on the acquisition requiring CSX and NS to fund any negative financial impacts of the merger upon passenger railroads' contribution to railroad retirement.

Approval of the merger with these five conditions will help ensure the continuation of essential rail passenger service throughout the mammoth consolidation before you.

I have kept my oral remarks brief, but have a written statement which I have summarized that
I would like to submit for the record.

Thank you for the privilege to appear before you. As we run our trains on time, I will finish my statement just on time.

CHAIRMAN MORGAN: Thank you. That's a good ad.

Mr. Sheys.

MR. SHEYS: Thank you.

I'll try to come as close as the freight railroads to --

CHAIRMAN MORGAN: Yes, you have a heavy burden.

MR. SHEYS: My name is Kevin Sheys. I am counsel for Virginia Railway Express.

VRE operates 24 weekday commuter trains serving communities in the heavily congested I-95 and I-66 corridors linking the fast growing Virginia bedroom communities with major employment centers in Virginia and D.C., and connecting with all the other parts of the critical passenger transportation network of this region including the metro, rail and bus system.
VRE operates on the line between Fredericksburg and D.C., which is shown in red on this map; and the line between Manassas and D.C., which is shown in blue.

The Conrail takeover will have a significant impact on VRE operations because it will have a substantial -- it will involve a substantial increase in freight traffic on the lines where VRE operates.

VRE has requested the imposition of several important and carefully tailored conditions that would give VRE a reasonable chance to preserve its current service after the Conrail takeover.

VRE is not trying to use this merger as an opportunity to enhance its service. To the contrary, without the conditions, VRE service will not operate on time or even close; will deteriorate until it becomes untenable and then will fail.

From the standpoint of passenger rail, the Fredericksburg line into D.C. is the hot spot of this merger. If you look at all the lines involved in this merger, if you look at any of those lines that have
any significant passenger traffic, the Fredericksburg line has, by far, the greatest increase in freight traffic.

You have seven new trains on the Fredericksburg line between Fredericksburg and Alexandria, and 12 new trains on the line between Alexandria and Washington. And that's pretty hard to see right now.

This is actually for my next point.

The line between Alexandria and D.C. is the funnel through which all of the new freight trains to or from either of these lines must pass. The CSX operating plan was prepared without consideration of the presence of VRE trains.

And I'm not saying that because we have hurt feelings or making a subjective statement. They literally did not include a consideration of the existence of the 24 VRE trains when they did their operating plan.

When we asked them about this in deposition, they explained that they plan to deal with VRE through proper scheduling. However, the freight
train schedules later made available showed that most of the new trains were scheduled during the morning and evening VRE rush hour periods.

Five of the seven new trains on the Fredericksburg line to Alexandria are during the rush hour periods. And they actually moved an existing train from outside the rush hour period to inside the rush hour period.

CSX did not look at VRE’s trains in the operating plan, and they did not schedule with VRE trains in mind. CSX has not accounted for VRE at all. And they, frankly, have no way of knowing whether the VRE trains will run anywhere near on time.

Unfortunately, VRE knows that they will not.

VRE’s request for conditions included a streamlined capacity analysis of the entire Fredericksburg line. It identified all the congestion points. CSX’s rebuttal streamlined the capacity of the line between Alexandria and Virginia, seven of the 50 miles -- the best seven of the 50 miles.

Their streamlined analysis of the part
that’s shown in red on this map in no way supports
their assertion that the whole line has sufficient
capacity.

Another important point here is that I’m
talking about CSX’s failure to show on paper how the
trains are going to run on time. And as we all now
know, real operations are much more difficult.

One brief point on the FEIS before I wrap
up. The FEIS, which does not recommend transportation
system mitigation for this line, is fatally flawed
because it repeatedly states the erroneous fact that
VRE has dispatching priority under the Rail Passenger
Service Act.

VRE has no such dispatching priority.

Overall, the conditions VRE seek would allow on
operations reasonable schedule adherence. And on
capital improvements, the conditions relate to VRE
paying only for what VRE uses and being able to use
post merger what they paid for pre merger.

The standard has been repeated. And to
shorten my statements, I won’t repeat it. But the
standard for this Board and this merger, the adequacy
of transportation to the public clearly includes VRE. It includes the people who ride the VRE trains and the people who drive on the roads of Northern Virginia and D.C., I-95, I-66, through the mixing bowl in Springfield, across the 14th and Teddy Roosevelt Bridges.

It's all right outside. And maybe later, after -- we can roll these up and we can watch the congestion stack up.

Thank you for listening.

CHAIRMAN MORGAN: Thank you very much.

Mr. Zullig.

MR. ZULLIG: Thank you.

Chairman Morgan, Vice Chairman Owen, good evening.

My name is Walter Zullig. I represent the Metro North Railroad. We are the second largest commuter railroad in the United States and are a unit of New York State's Metropolitan Transportation Authority.

This case is unprecedented. And one of the unprecedented aspects of it is the potential for
serious adverse impact on commuter railroad service.

Now, I am here to discuss one particular problem at one location which is of serious concern to us.

One of the Conrail lines which will be transferred to Norfolk Southern is the southern route which extends from Northern New Jersey to Buffalo New York. The first 30 miles of that route from Hoboken to Suffern, New York is owned by NJ Transit.

And our concern here is with the next 66 miles, which is the section from Suffern to Port Jervis. That section is owned by Conrail, dispatched by NJ Transit, and handles Conrail freight trains as well as Metro North passenger trains.

We had reached agreement with Conrail for the purchase of this line, and unfortunately we were not able to consummate that or get it reduced to writing because of the pendency of this proceeding.

Now, we pointed out in our testimony and in our brief that both the number of passengers and the number of passenger trains on this line has been increasing; that the territory served is projected to be the fastest growing county in the MTA district over
the next ten years; and that there will be a need for additional passenger trains when the Secaucus transfer station, which is now under construction in the New Jersey Meadows, opens in the year 2002.

Now, conversely, until very recently, the number of freight trains on this line had been declining, and we think that was why Conrail was willing to sell it to us. The control application states that this line will see significant traffic increases, but is utterly silent as to any plan for capital improvements in this territory.

Now, conversely, Metro North's evidence showed that an expense of $85 million dollar -- sorry, $88 million dollars is needed for right of way improvements including installation of some 48 miles of welded rail, complete replacement of the signal system, burial of the track side pole line, and under grade bridge improvements.

We also showed that an exceedingly large additional capital investment, which we estimate to be about $104 million dollars, will be needed to support long term future improvements to passenger service.
through the year 2020.

Those improvements will include additional double track sections and installation of passing sidings -- additional passing sidings, as well as station and parking enhancements.

Now what has been Norfolk Southern's response to this? Well, they did not depose our witnesses. Their rebuttal testimony on this point consists of about one page from a former official of the Southern Pacific Railroad who states an unfounded conclusion that this line segment has more than ample capacity to accommodate the projected increase in freight traffic as well as the existing level of passenger traffic.

It says nothing about the future passenger traffic. So the evidence presented by the Applicants, in our opinion, simply ignores the problems that we have raised.

Now if Norfolk Southern takes title to the line and does not make these improvements, the future of our commuter service to this part of New York State will be in jeopardy. Conversely, Norfolk Southern may
recognize -- may come to recognize the need for these improvements and ask that Metro North pay for them or for a large portion of them which would be related to passenger service.

That leads to another dilemma. How does a publicly funded agency use state and possibly federal funds to invest in long term improvements to a line of railroad which it can be -- which it has no long term interest in -- no long term ownership interest?

We have a trackage rights agreement that runs for about five more years, after which we have no agreement. It was primarily our concern over the need for the capital improvements which led us to begin the property negotiations with Conrail.

And those discussions were proceeding, and there is no question but that a contract of sale would have been reached with Conrail were it not for the filing of this application.

Therefore, as a direct result of this control application, Metro North has been unable to acquire the line and has no legal basis to make the
necessary long term capital improvements. It will be
difficult to operate the present level of passenger
trains and virtually impossible to provide the
enhanced passenger service presently planned without
those capital improvements.

And despite the best of intentions on the
part of all concerned, it is inevitable that passenger
trains will encounter freight train delay in the
absence of very, very careful dispatching and
implementation of these capital improvements.

These issues are not extraordinarily
complicated. And, quite frankly, we just do not
understand why Norfolk Southern has not addressed
them.

In any event, at this point, Metro North
does respectfully request that the Board impose a
condition requiring that Norfolk Southern convey the
Suffern to Port Jervis line segment to Metro North at
the purchase price which had been agreed upon with
Conrail.

In the event that the Board does not see
fit to impose that condition, we would ask at least
that we be given a long term lease of the line to justify the capital improvements. And we also would ask that dispatching of the line be retained with NJ Transit as is at present.

Norfolk Southern has stated that it does not plan to change the dispatching, so they should have no objection to that condition.

In conclusion, our condition will in no way impair this transaction. In fact, it would give Norfolk Southern some additional money, so we’re at a loss to understand their resistance.

Thank you.

CHAIRMAN MORGAN: Thank you.

Mr. Gazetti, you are supportive of an oversight for five years --

MR. GAZETTI: Yes.

CHAIRMAN MORGAN: -- obviously focusing on passenger issues. And you also are supportive of reporting that would reflect the on time performance. And I presume that if we were to approve the merger and did have oversight, that this reporting would be part of the oversight --
MR. GAZETTI: That's right.

CHAIRMAN MORGAN: -- to us. Is that --

now, do we have -- I mean, is there on time
performance reporting going on elsewhere? I mean, I
presume that the local level and so forth --

MR. GAZETTI: There is, but it ties into
the oversight principle. And as I have been reading
the many things that have been coming through as a
part of your record, Amtrak's recent agreement, as
part of this merger, has a, you know, condition that
on time reports on time performance will be submitted,
you know, to STB for review giving Amtrak the
opportunity to comment from their perspective if they
concur.

And it would seem to make sense that
similar reports exist for other passenger providers as
part of the oversight.

CHAIRMAN MORGAN: Thank you.

Mr. Sheys, have you all been in discussion
with CSX about some of these issues? I mean, my
impression was that these issues were being discussed.

MR. SHEYS: Well, I don't have to worry
about disclosing many details because there aren’t many. We provided full A to Z draft proposals to both railroads in October or November of last year.

We’ve had a couple of good meetings, general discussions between now and then. We have not had a response to the contract proposals. We have had a letter from each of the railroads not responding to the comments, raising some other points that certainly will be discussed or would have been discussed.

But no, we have not had any nuts and bolts discussions.

CHAIRMAN MORGAN: Now presumably you have a contract in place between the parties that addresses things such as performance and capacity investments and so forth?

MR. SHEYS: That is right, and the contracts were provided -- a mark up of the contracts with our proposed conditions were provided with our response of application. And it’s -- you know, we gave every word we wanted.

CHAIRMAN MORGAN: So are you suggesting that we somehow get into these contracts in some way?
Is that --

MR. SHEYS: I think that you can look at the contracts. The Board has ample authority to structure conditions in any way it sees fit. We think our conditions are very practical because they're very specific and they define narrow tailoring.

We don’t tell you that we want on time performance guarantees. We tell you that we want their increased compensation from VRE to be based upon a percentage of on time performance that’s measurable.

I see it in a way as getting into contracts; but, in another way, you could look at what we wrote in the contract, you could lift the language, you could make it conditions. You might have to draw broader language if you departed from the contract language that we provided.

Our effort was to be as specific as possible.

CHAIRMAN MORGAN: Mr. Zullig, you are suggesting, with respect to this segment that you’re concerned about, either divestiture of some sort or a lease -- long term lease?
MR. ZULLIG: Yes.

CHAIRMAN MORGAN: Now what authority do you feel that we have to direct one of those things?

MR. ZULLIG: Well, I would say in the public interest that is the primary criteria under the statute. And here we have a very compelling public interest situation involving serious consequences to an established and expanding railroad passenger service.

And I would say that you have very broad authority in the public interest to do this.

CHAIRMAN MORGAN: Thank you.

Vice Chairman.

VICE CHAIRMAN OWEN: Yes, thank you.

Mr. Sheys, I have a footnote here on one of the pages. It says, for example, in decision number 33 served September 17, 1997, we required Virginia Railway Express, if it expects its conditions to be granted, to submit evidence about the feasibility of the proposed operations and whether they will interfere with freight operations that are conducted over the routes.
VRE, however, failed to submit that evidence. And so I’m just wondering if you knew anything about that.

MR. SHEYS: What was the date?

VICE CHAIRMAN OWEN: Pardon?

MR. SHEYS: Mr. Vice Chairman, what was the date of the decision?

VICE CHAIRMAN OWEN: September 17, 1997, and it was pertaining to this particular case right here, was it not?

MR. SHEYS: Well, I don’t -- that was before the submission of the response of applications, right? Help me with the dates here.

I’m not sure that that decision related to case in chief.

VICE CHAIRMAN OWEN: We were just asking if you wanted to participate or you wanted us to consider your problem, then you should submit something, and nothing was submitted. That’s what I was getting at.

And I guess one other point I just -- I hear the frustration coming from you, but I brought
together the Southern California Metro Link people out
in California since I live out there, and the
Burlington Northern/Santa Fe people and UP/SP people.

First time they had ever sat down at a
board room table together and chatted about the common
problems, whether the need to run a triple line or,
you know, third line here or do this or that.

I said, you know, you folks got to sit
down more often together and talk about your common
problems. Because the freight railroads, by and
large, on the lines, they’ve got to service their
customers and you hear their shippers in here
complaining all the time.

And then you want to run on those lines to
a great degree o’ parallel to them or some of your own
lines you own maybe. And somehow or the other, you’ve
got to sit down at a board room table and continue the
dialogue because traffic is going to continue to build
on passenger and freight.

And somehow we’re going to have to work it
out. And it’s not to work it out to come in here and
get us to impose conditions on those folks or on you.
Now, we can do that, and we can re-regulate the industry and bankrupt everything, you know, from passenger to freight if that's what people want.

But I think we need more dialogue out there between you guys. I don't know, I just -- I sense your frustration. A couple of you were very frustrated when you were standing up here.

MR. ZULLIG: May I say something on that, Vice Chairman Owen?

VICE CHAIRMAN OWEN: Yes, go ahead.

MR. ZULLIG: We have sat down with Norfolk Southern and we've been on inspection trains and so on and had very nice dialogue. But on this issue, and as recently as about a month ago, I myself reached out again and the person I spoke with, their representative, ran it upstairs and then came back down and said no, there is no point --

VICE CHAIRMAN OWEN: Maybe there's not enough money on the table. You know, it's economics that drives all of these things. I don't know. And I know it's difficult for you guys to get money from where you're coming from.
MR. ZULLIG: Unfortunately, we thought we had a deal with Conrail for a certain amount of money and it seems to have gone away.

VICE CHAIRMAN OWEN: Well, I want to see the passenger service grow, but I don't know how to do it as far as what you're talking about here. I say well, get you both in a room, lock you up and don't let you come out until you come to some agreement.

I think that will do it.

MR. SHEYS: Well, I guess I would -- I have two brief comments. First of all, if I gave you the impression that we haven't been talking, that was wrong. We have been talking. What I meant to say, what I tried to say, is that we haven't gotten to the nuts and bolts issues.

There have been a lot of meetings, and it's only fair for me to say that.

Secondly, I want to be clear. We are not trying to expand our service. We're not trying to meet with them to sit down to figure out how to add trains. We're trying to see how we can get the current trains to run at or near on schedule.
It’s not an expansion thing. We already write big checks to the railroads, and we’re trying to make sure that the trains we have run reasonably on time for those big checks.

MR. GAZETTI: I’d also like to interject, if I could. Public transit authorities generally have imminent domain powers, you know, to do the projects they need to do across the country in the vein of public interest.

However, with railroads, that power is lacking. Railroads come under the interstate authority of the STB, and that is the one exception to the imminent domain powers we have. In our negotiations with railroads -- and I’ve worked for a couple transit authorities along the way -- there is not sufficient leverage.

I mean, the public interest is often not taken into account, and there’s on public forum in which that public interest can be considered.

VICE CHAIRMAN OWEN: Well, it’s very difficult to equate between freight and passenger and come to a reasonable balance there.
MR. GAZETTI: Not all the time. Many people have successfully negotiated good agreements. If it can be done sometimes, let's try to see if it can be done all the time.

VICE CHAIRMAN OWEN: Well, I wish you luck.

MR. GAZETTI: Well, hopefully you can help us.

VICE CHAIRMAN OWEN: Okay.

Thank you very much. I have no other comments or questions.

CHAIRMAN MORGAN: Thank you all.

I think what we're going to do is take a 30 minute break. And this will be the last break of the day. And, of course, some people have already taken their break, I see. We need a break.

But let me just advise everybody that the 20th Street entrance, which is the entrance you've been using, will close at 7:00. So get in here for the remainder. But if you go out of the building, then you will not be able to get back in after 7:00.

You may not want to get back in after
7:00. I don’t know. But anyway, be back in 30 minutes.

(Whereupon, the foregoing matter went off the record at 5:51 p.m. and went back on the record at 6:30 p.m.)

SECRETARY WILLIAMS: The hearing will resume immediately. Please be seated and come to order.

CHAIRMAN MORGAN: Okay, let’s get started. We have a panel with a lot of people on it titled "Other Railroads." What I think I’m going to do is try to split it up.

First we’ll hear from Myles Tobin, Illinois Central Railroad; Karl Morell, Ann Arbor Railroad; Karl Morell, New England Central Railroad; William Sippel, Bessemer & Lake Erie; Edward Rodriguez, Housatonic Railroad Company.

Now let’s take those five first and then we’ll do the second five next.

Mr. Tobin.

MR. TOBIN: Good evening, Chairman Morgan,

Vice Chairman Owen.
I’ll talk about one issue, CSX’s operational choke hold over IC and the anti-competitive effects of that as it relates to the merger. If time permits, I’ll discuss the maintenance of access to efficient routings and efficient gateways.

A lot of folks have said that past is prologue, and I think, in the context of this merger, we need to look at the debacle going on in the west and understand that there are a lot of shippers out there who are real upset about the absence of effective shipper routing options, effective service options.

So, frankly, here we are. We are that service option for the east in the event that there are issues associated with this merger in terms of service or competitive routing. We’ve often been referred to as "the little railroad that could," and we can so long as we’re allowed to.

But if CSX prevents us from doing so, we’re not going to be able to. And that brings me to the subject to Leewood to Alwin on the subject of this
evening's argument. Leewood to Alwin is a two mile stretch of railroad in Memphis. IC operates over it on trackage rights with CSX.

And I've got a little illustration there of -- we're pressed a little for time.

CHAIRMAN MORGAN: I wasn't going to say a thing, but you started to laugh, so --

MR. TOBIN: Well, certainly it's humorous; but although a humorous picture, frankly it's got a pretty serious message because it depicts exactly the problem we've got.

Memphis Leewood to Alwin particular is the throe to the Illinois Central system. It's the tail of the CSX system, and they've literally got their tail around our throat and are squeezing pretty hard.

It is going to get a lot worse as this merger goes forward because, right now, they've got no particular incentive to squeeze; they're just doing it either through an inadvertence, ineptitude, or whatever.

But the access to the Conrail territory is going to motivate them -- incentivize them, if you
will, to make sure that our trains continue to be
delayed as they are being now. That’s the issue that
Leewood to Alwin relates to insofar as the merger is
concerned.

You’ll see that we operate from New
Orleans to Chicago. We are one of the major service
providers into the Conrail territory from the
southwest going up to the northeast into Conrail.

We do it via either Memphis or New Orleans
up to Effingham, which is the dotted line up there
which is sort of red. That line is currently a
Conrail line; will be owned by CSX after this merger
is approved, if it in fact is approved.

You’ll see just above that what’s called
-- it’s a little blurry, but it’s called the New
Talono connection. That’s the connection that NS is
building to IC to provide competitive routing service
to Conrail territories via NS.

CSX will be incentivized, we believe, now
that it will have access to the Conrail territory to
continue the Leewood/Alwin delays to the detriment of
the IC/NS routing.
Understand that we move 100,000 cars a year to and from Conrail. BN uses us as its primary service provider from the territory that it got trackage rights on, the UP, for access to the northeast.

They have put us in their application as the efficient route that they were going to utilize to get the Conrail territory.

With the combination of the New Talono connection, we believe that we’ll be able to provide efficient service to Conrail territory via NS. And certainly we’re agreeable to working with CSX if they want to work with us.

But the concern that we’ve got is they are really making our lives miserable at Leewood to Alwin and will have an incentive to do that in the future. I’ve been up here before, and I’ve discussed with you the IC efficiencies, and you need to understand our problem in the context of those efficiencies.

As you know, we’re the most efficient railroad in the United States. Our operating ratio is the best, bar none, of any Class I, and it’s been so
for as long as I can remember. We have been one of the safest railroads in the United States.

We’ve won eight Harriman Awards in a row, four silver, four gold, and we’re trying to strive to make it all gold for as long as we can do so.

But our ability to compete, our ability to provide service depends on our ability to use innovative operation techniques like scheduled service. Our trains get from point A to point B on time, every time, if at all possible.

Our shippers can depend on us to get the trains there. We don’t wait until cars come to move a train. We move them like airlines move them, better than airlines move them. They get to -- they move from New Orleans to Chicago just as fast as they can -- scheduled service.

Turn around service, part and parcel of scheduled service. Our crews, instead of going to the hinterlands and sleeping in motels, they meet in the middle and then switch trains and go back to their home terminal.

They sleep in their own beds at night.
That allows -- reduces fatigue, improves employee morale, and has been just a wonderful asset on our system and asset for our crews.

But all that is totally dependent on predictability of service, predictability of operations. CSX systematic delays have wreaked havoc on our scheduled service, have wreaked havoc on our turn around service.

In 1996, they moved their Memphis dispatching to Jacksonville. Since then, they’ve forgotten about this line. You can’t get their dispatchers. You call them, they don’t answer. They answer, they don’t give you clearance.

In combination, they park trains on the line. They park trains out of the Leewood yard that just sit on the line for hours at a time. They park whole trains on the line. CSX dispatchers give us the clearance, we get up to Leewood, there’s a CSX train there, we’re sitting there.

And this is affecting, on a routine basis, train after train after train on the Illinois Central system. And it’s a cascading effect because we
operate 20 trains a day over Leewood to Alwin. And once one is delayed for an hour or two or three, the rest are going to be delayed, and it just truly wreaks havoc with our service.

In order to compete effectively with CSX, IC needs to maximize its service and operating innovations. Control of Leewood to Alwin by CSX adversely impacts that and prevents us from operating competitively with the restructuring of rail transportation in the east.

Now they will tell you tomorrow, they being CSX, will say that this is a preexisting problem. But because -- well, they're delaying our trains now, so what -- it's not a merger related problem.

What the delays show you is that they've got the power to delay our trains, and that power is real and substantial. But the merger related aspect of it, as I indicted to you earlier, is that, for the first time, they have access to Conrail territory.

They have the ability and desire to compete with us, and therefore the motivation and
incentive to continue to delay our trains.

They will also tell you that we’ve asked
for purchase and dispatching authority on this line.
They will tell you that well, this line is important
to CSX as well, and so why should the IC get it.
That’s bunk.

This is the throat of our system. This is
a backwater for them.

If I can just go for a couple more
seconds.

We operate 76% of the traffic on this
line. This is our main line system. In their
operating plan, they anticipate maybe a 2% increase on
overall traffic on this line. So -- and if it was so
important to them, they wouldn’t be parking coal
trains for days at a time and our trains for hours at
a time.

This is our through route. This is a
backwater for them. Why should we dispatch as opposed
to CSX? They will tell you, you know, do unto others.
If we do it to IC, they’re going to do it to us.

We are absolutely committed to neutral
dispatching on this line. And if you don’t believe it’s because of altruism, it’s because of it’s in our interest to do so. It’s in our interest to do because we have the majority of traffic on this line.

This is our through route. We need to keep trains moving on this line hour after hour after hour. It’s in our incentive to -- it’s in our interest to do so.

Beyond that, six of the ten current operating trains between -- of CSX on this line operate to us. Four of them are trains to and from IC; two are trains that operate on IC track. It’s in our interest to get those trains moving.

They’re our business. If they sit on the line, then our service continues to be screwed up. CSX doesn’t have a comparable interest for the 20 trains a day that we’ve got moving over that line.

If you believe though that -- and CSX will probably spend some time on this tomorrow telling you well, you know, you can’t rely on IC. If you truly believe that we can’t provide neutral dispatching on this line, then we’ve got a plan B for you, if you
will.

And that plan B is okay, don’t sell us the line, don’t give us sole dispatching authority; order CSX and IC to hire a neutral, joint employee dispatcher to sit at Memphis and dispatch this line because this is the number one operating problem in the Illinois Central and we need to get it resolved.

They will also tell you that IC has an alternate route through Memphis. And the bottom line is, we do not. We did formerly have a line that was -- is on land owned by the City of Memphis right through basically -- it looks like right outside.

It’s right through downtown Memphis -- sports complexes, concerts, pedestrians everywhere, 12 crossings in a mile. And Memphis said we’re not renewing your lease because we don’t want you on this line. It’s nuts.

We cut a deal with them, say hey, we don’t use the river front line very much now, we use it for Amtrak, just a couple of intermodal trains. Let’s just continue using the Amtrak, let’s just continue the emergency basis for these intermodal trains.
But we'll -- we've got 98% of our traffic on Leewood to Alwin, we'll move the other 2%. So if CSX tells you tomorrow that there's an alternate line, there is no alternate line.

I appreciate your indulgence. Let me just leave you with one final thought.

You chastised -- or it was reported that you chastised shippers in the CSX -- oh, I'm sorry, in the UP/SP proceeding for not stepping up to the plate, for not coming forward and telling you in the context of this merger that there's a problem that needs to be dealt with.

Well, as you will see in our filing, shippers from all varieties of commodities, all areas of the country have come forward and have said there are problems that need to be fixed. You can look at the -- in the chemicals area, BASF out of New Jersey; Diamond Shamrock, Fina out of Texas; Huntsman, the largest private chemical company in the United States out of Texas; Whitgo, Mississippi Chemical.

Those companies combined have $25 billion dollars in sales annually. International Paper, the
largest paper producer in the world; Crown Vantage out of Oakland, California; Georgia Pacific; Stone Container.

In the coal area, Kerr-McGee; in intermodal, Consolidated Freightways out of Menlo Park, California; Bay Area Piggyback out of Walnut Creek, California.

All of these shippers and a host of others more have come together to tell you there are problems in the context of Leewood to Alwin and the context of the efficient gateway issue which we have raised. Those problems need to be solved.

They have stepped up to the plate and they’re asking you to do so as well.

Thanks for your indulgence.

CHAIRMAN MORGAN: Thank you.

I guess we can put the lights back on. I need all the light I can get.

Mr. Morell, you can -- I think you have two parties here that you want to speak on behalf of, so you have the floor for a little bit.

MR. MORELL: Thank you.
Good evening, Madame Chairman, Vice Chairman Owen.

Ann Arbor Railroad thanks you for this opportunity to appear here today and address its concerns over the proposed transaction which are twofold. First, the loss of essential services on the Ann Arbor rail system; and second, the loss of rail competition in Toledo to Chicago rail corridor.

Ann Arbor is a short line railroad operating over approximately 46 miles of main line track between Ann Arbor, Michigan and Toledo, Ohio. All of Ann Arbor's traffic consists of overhead or interline traffic.

As is the case with most short line railroads, Ann Arbor's economic survival depends on its ability to provide efficient and economic switching services for its customers to the connecting Class I carriers.

Despite its small size and limited financial resources, Ann Arbor has fully participated in this proceeding because it believes its own survival and the competition rail options for is
shippers are at stake.

Ann Arbor has estimated that it stands to lose over $3 million dollars, or about 42% of its annual gross revenues as a result of the proposed transaction.

The disagreement in this proceeding between Ann Arbor and the Applicants is not whether Ann Arbor will lose any revenues, but rather the degree of those losses and whether Ann Arbor is entitled to any remedies.

Ann Arbor’s projected revenue losses consist of three elements. First, Ann Arbor will lose approximately $800,000 a year in annual trackage rights fees which it currently earns from NS. There is little dispute that Ann Arbor will lose these fees.

NS has conceded that Ann Arbor will lose virtually all of the fees since NS will acquire a more direct route between Toledo and Detroit and will use the Ann Arbor route only for, as NS put it, “some niche traffic.”

Ann Arbor also stands to lose about one-half million dollars in annual revenues that earns
from a three carrier haul of sand from Yuma, Michigan
to Cleveland, Ohio. With CSX gaining direct access to
the receiver of this sand traffic in Cleveland, CSX
will have the ability to divert this traffic either to
a two carrier haul from the current origin, or a
single line haul from western Michigan where CSX
directly serves shippers of sand.

Applicants' contention that the current
three carrier haul involving Ann Arbor will remain
competitive with CSX's new routing flies in the face
of their very extensive evidence that they've
introduced in this proceeding which -- by which they
intended to demonstrate the advantages and benefits of
reducing interchanges and single lines service.

The third category of losses that Ann
Arbor stands -- excuse me.

The third category of losses consist of
approximately $1.7 million dollars in revenue that Ann
Arbor derives from automotive traffic in Myelin and in
Toledo. The Myelin traffic originates on the NS line
and moves to Louisville and Chicago.

NS does not contest that this traffic will
be diverted from Ann Arbor after the proposed transaction. It simply claims that the diversion should not be attributed to this transaction because NS can divert that traffic today.

NS's contention, however, ignores two fundamental facts. First, the current routing over the Ann Arbor is more direct and efficient than the other alternatives that exist today.

Second, Ann Arbor will acquire substantially more direct routes to the destinations which will make Ann Arbor's participation in this traffic unnecessary.

Ann Arbor therefore believes that the diversions of this traffic are directly attributable to this transaction. The automotive traffic -- excuse me. The Toledo automotive traffic is switched by Ann Arbor to Conrail for line hauls to Chicago or to NS for line hauls to Winston-Salem and Atlanta.

In its rebuttal filing, Ann Arbor pointed out that shortly before NS filed its reply in this proceeding, Ann Arbor was successful in negotiating a multi-year contract with Chrysler Corporation to
perform switching services in Toledo.

In its reply, NS chose to ignore the contract and essentially conceded the variability of the Toledo traffic, but again claimed that the diversions were not related to the proposed transaction.

On brief, NS has switched course and now claims that the traffic cannot be diverted because of the contract. Ann Arbor continues to be concerned about the potential loss of the Toledo traffic for three reasons.

First, the contract Ann Arbor was able to negotiate may simply have delayed some of the projected revenue losses; it has not avoided them.

Second, even if Ann Arbor is able to protect its Toledo automotive traffic for the duration of the contract, Ann Arbor still stands to lose one and a half million dollars or about 20% of its annual revenues.

The third and most important reason involves certain aspects of the contract which Ann Arbor deems highly confidential and are addressed in
In brief, since my time is almost up, I'd like to just quickly address Ann Arbor's second concern which is the loss of competition in the Toledo, Chicago rail corridor.

Applicants claim that there is an alternative route to the three routes which NS will acquire post transaction, which is the CSX route. Applicants' claim -- sole claim that this alternative route is competitive is because it involves -- or it has security -- small security.

Applicants have totally failed to rebut Ann Arbor's evidence that there are operational constraints and that there are time delays on the CSX line.

Thank you.

CHAIRMAN MORGAN: Now you're speaking on behalf of New England Central?

MR. MORELL: Yes.

Again, I would like to thank you on behalf of New England Central for this opportunity to address the issues that are of great concern to New England
Central in this proceeding.

In its responsive application and subsequent filings, New England Central demonstrated that the proposed transaction, if approved without appropriate conditions, will eliminate essential services on the New England Central rail system and significantly reduce competition in the New England area.

Other parties participating in this proceeding have echoed this same concern. In my remaining time, I would like to just briefly address the six issues CSX has raised in response to New England Central’s responsive application.

First, CSX claims that New England Central failed to substantiate the projected $8 million dollars in revenue losses. Applicants themselves, however, have projected revenue losses for the New England Central of $1.6 million.

Even these smaller losses conceded by Applicants would have significant adverse effects on New England Central’s ability to provide services to its customers. The Board’s predecessor recognized
that the rail lines operated by New England Central
have a history of unprofitable operations.

Between 1984 and 1993, New England’s
predecessor reported positive income in only one year
and accumulated a total of $17 million dollars in
operating losses. CSX has acknowledged that its
diversion analysis for small carriers could
significantly understate diversion impacts.

This is particularly true in situations
where the traffic is diverted -- where the traffic
diverted is transloaded and moves by truck to the
ultimate destination.

About 50% of New England Central’s car
load consists of lumber and forest products. Because
of the way this traffic is marketed throughout the
northeast, New England Central projects that all or
virtually all of this traffic will be diverted to CSX
and NS.

A significant portion of New England
Central’s forest product traffic originates in western
Canada and northwest regions of the United States and
moves in joint line and multi-line services to
distribution centers on the New England Central.

From these distribution centers, the products are trucked throughout the northeast. With CSX’s and NS’s direct access to producers of forest products in the southeast United States, they will be able to use single line service to the northeast to displace forest products currently moving via the New England Central.

Also, with the agreements Applicants have reached with CN and CP, NS and CSX will be able to redirect some of New England Central’s forest product traffic moving from Canada.

While CSX and NS dispute New England Central’s diversion projects, they, at the same time, significantly -- they, at the same time, project significantly increased forest product traffic moving over their lines to the areas that are now served by New England Central’s distributors.

For example, CSX projects that it will gain over $111 million dollars in revenues from increased pulp and paper traffic, and over $41 million dollars in revenues from increased lumber and wood.
products as a result of the proposed transaction.

CSX highlights the new single line access it will gain to the northeast which, according to CSX, will facilitate the movement of lumber and paper products from the south.

This Board is being asked to accept the benefits of this traffic shifts to CSX and NS, but to ignore the harm that these shifts will cause to the New England Central.

Second, CSX claims that New England Central does not provide any essential services. As the record demonstrates, New England Central handles a diverse range of commodities such as coal, cement, grain and others which cannot economically or efficiently be handled by truck over considerable distances.

CSX itself points to two New England Central customers -- two of New England’s largest customers that are rail dependent: a shipper fly ash and a shipper of copper. The essential services performed by New England Central are further confirmed by the State of Vermont in its filings in this
proceeding.

CSX also contends that New England Central’s requested conditions to connect with its affiliate, the Connecticut Southern, is somehow contrary to a representation that RailTex made in 1996 when the control of the Connecticut Southern -- when it represented that the control of the Connecticut Southern was not part of a series of anticipated transactions which would connect the two carriers.

The short answer to this contention is that if RailTex had known in 1996 that CSX and NS were about to enter into a bidding war for Conrail, RailTex would have been much better served investing in Conrail stock than acquiring the Connecticut Southern.

Fourth, in an attempt to portray New England Central as over reaching, CSX states that the requested trackage rights would expand New England Central lines about 75%. New England Central is not seeking to serve any new customers.

It is simply seeking access to other connections.

Fifth, CSX claims that New England Central
has failed to show that the requested conditions will remedy any harm since the projections we have made are, in the words of CSX, "sheer speculation."

If, as CSX suggests, New England Central would not be able to generate any additional traffic from its requested conditions, why is CSX opposing the responsive application?

The final matter I intended to address was the issue of the competitive harm in the New England area. Since that's being addressed by a number of the other parties in this proceeding and in the interest of time, I will just join in those comments.

Thank you.

CHAIRMAN MORGAN: Thank you very much.

Mr. Sippel.

MR. SIPPEL: Chairman Morgan and Vice Chairman Owen, good evening.

I am William Sippel. I am representing the Bessemer & Lake Erie Railway Company.

I am pleased to advise the Board that, this afternoon, the Transtar Railroads, the Bessemer & Lake Erie Railway, and the Elgin, Joliet and Eastern
Railway reached a settlement agreement with CSXT.

Accordingly, the Bessemer & Lake Erie withdraws its opposition to the proposed transaction and requests leave to withdraw its responsive application in this proceeding.

Its sister railroad, the EJ&E, has also reached a settlement with CSX. Although negotiations with NS are continuing, EJ&E is confident that an agreement can be reached.

Accordingly, Transtar and EJ&E withdraw their request for conditions otherwise relating to the primary application and request leave to withdraw their names from their responsive application filed in this proceeding relating to the Indiana Harbor Belt Railroad.

The withdrawal of Transtar and EJ&E from that responsive application does not result in the withdrawal of that application. That responsive application is a joint application. I&M Rail Link remains a party to that application, and that application therefore remains pending before the Board and will be argued later in this schedule.
I am pleased to return the remainder of my oral argument time for the Bessemer back to the Board.

Thank you.

CHAIRMAN MORGAN: Thank you.

As I said to someone else, you’re excused.

Mr. Rodriguez.

MR. RODRIGUEZ: Thank you.

Good evening. I’m Edward Rodriguez and I represent Housatonic Railroad. I plan to address this evening the haulage conditions requested by Housatonic Railroad.

Housatonic Railroad operates in western Massachusetts and Connecticut and eastern New York. It serves a portion of the east of Hudson market and, through truck transfer, is an alternative service route to New York City.

HRRC customers generally compete within a market area encompassing Connecticut, Massachusetts, eastern New York and the New Jersey shared asset area. Currently, Housatonic interchanges all of its traffic with Conrail at Pittsfield, Massachusetts.

After the transaction, it will interchange
all of its traffic with CSX at Pittsfield.

Applicants would have you believe that no material changes to Housatonic and its customers will occur as a result of their transaction. However, there will be important changes which result in transaction related harms.

Housatonic and its customers now have neutral, direct access to all Conrail points and neutral access to southern, western and Canadian gateways. After the transaction, Housatonic will have direct access to less than one-half of the present Conrail territory, and its access to gateways through CSX will lose its neutrality.

Housatonic customers have already begun to experience the consequences of this change. A customer trying to finalize a traffic movement to a central Pennsylvania receiver is encountering difficulty because of anticipated increased transportation costs due to the introduction of a third carrier, NS, in the route.

Another customer that wants to ship plastic onto Housatonic for distribution reports that
concern about the lack of neutral access to NS may rule out a location on Housatonic.

The relationship between Conrail and Housatonic is a partnership. Housatonic and its customers depend upon this partnership to successfully compete in the market.

Conrail fulfills its partnership obligations by striving to ensure that Housatonic customers and stations are not rate disadvantaged relative to competing Conrail served stations.

Conrail and Housatonic do not compete with each other.

Applicants, however, will not be partners with Housatonic. They will be competitors with Housatonic and with each other. One of their stated goals in their application is to divert traffic from other railroads.

The change in control of the Conrail property from a partner to competitors therefore causes additional transaction related harms. Not only will the Conrail property be controlled by two competitors, but Housatonic will have direct access to only one.
As captives to CSX, Housatonic customers can expect to face higher transportation costs than their competitors and higher costs than they now experience. Compounding the harm is the unique geographic location of Housatonic’s lines.

As the map indicates, Housatonic is situated just east of the Hudson River. The Hudson River has been used by Applicants as a wall to competition separating the areas of northeast rail competition, which exists west of the river, from the noncompetitive area east of it.

In the case of Housatonic, as the map shows, the boundary is a mere few miles away. While CSX will have a monopoly east of the river, NS will compete in the Albany area; the Maybrook, Beacon, New York area; and in the North Jersey shared asset area.

Rail customers in those areas will experience rail competition and lower transportation costs, further disadvantaging HRRC customers who compete in that market. As a reload operator and rail customer, Housatonic’s own lumber distribution facility serves the east of Hudson market, but also
sends more than 50% of its trucks to New York and New Jersey points west of the Hudson.

The Housatonic reload center and its customers will also be harmed. These concerns have been expressed to the Board by existing Housatonic customers, by the Coalition of Northeastern Governors, all four United States senators from Connecticut and Massachusetts, and they are the principal concerns raised by the State of New York and the New York City Economic Development Corporation who will address you shortly.

Housatonic does not seek to be protected from this new competition, but to be permitted to participate in it by means of a haulage arrangement over CSX primarily between Pittsfield and the Albany area for interchange with other carriers there -- NS, CSX, CP, ST -- and also between Pittsfield and Palmer, Massachusetts for interchange with other carriers.

The relief requested would ameliorate the harm to Housatonic's customers by preserving direct rail access to all lines formerly owned by Conrail and by fostering neutral access to gateways. It will
allow Housatonic’s customers to continue to compete
with firms west of the Hudson River, and it would
advance public policy.

The haulage remedy is operationally
feasible. Applicants have not claimed otherwise. The
haulage remedy is non-intrusive and would not harm
Applicants in any measurable or material way, nor
interfere with a legitimate stated benefit sought to
be achieved by the transaction.

Applicants have not claimed that they
would be harmed in any way.

On the other hand, failure to grant the
relief would dramatically change the service
Housatonic offers its customers and allow the
transaction to impose substantial harm on Housatonic
Railroad and its customers.

The haulage rights condition is narrowly
tailored to remedy that harm by preserving
Housatonic’s customer status quo without disturbing
the benefits of the transaction.

Thank you for your time and patience.

CHAIRMAN MORGAN: Thank you.
Let me start with you, Mr. Tobin.

You’ve discussed the Memphis gateway.

Now, aside from IC and CSX, who else is in the Memphis gateway -- who is served in that area? I mean, obviously it’s pretty important to you clearly given what you’ve said.

MR. TOBIN: We have UP in there and NS is also in the Memphis gateway.

CHAIRMAN MORGAN: But your main -- the concerns that you’ve raised are mainly with CSX and their handling of your traffic through?

MR. TOBIN: Well, it’s strictly an operating problem. One of the issues that we did talk about was the efficient routing via efficient gateways, and that’s a separate issue. But the bottom line is, that is our main line. We operate over CSX trackage rights there.

There wasn’t a problem really until 1996 until they moved their dispatching center to Jacksonville. You’ve heard in other context, in other mergers that sometimes centralize dispatching far away is a good idea; sometimes it’s not a good idea.
There are areas where you need localized dispatching, and this is one of those areas. It was, up until this merger, strictly an operating problem. Now it's a competitive problem because, you know, even with the difficulties that they were causing us, we still were moping along providing as good a service as we could to Conrail territory.

Now they will have access to that Conrail territory and have the incentive and the motivation to continue those delays and exacerbate them.

CHAIRMAN MORGAN: And have you been in discussions with them about these issues?

MR. TOBIN: You know, you would think we could have resolved something like this. It shouldn't be that big a deal. I personally have been in discussions with them in the context of a merger settlement, and they haven't given us the time of day on this issue.

Beyond that, just as an operating matter, John McPherson, our president, has talked to Pete Carpenter, CSXT's president. Hunter Harrison, when he was still with IC, talked to those folks at the train
master level, at the supervisor level, at the general manager level.

We've talked to everyone we can talk to and the problem continues to crop up. You know, they'll address it for a day, maybe it will get better for a day or two or three.

You know, you would think, in the context of this merger, that they would at least advise their guys to be on their best behavior while the merger is going on and then screw us afterwards, but they're still doing it.

(Laughter.)

When we were writing the briefs, there was -- right in the middle of just right around the rebuttal, there was a ten or 12 hour delay and our trains were stacked up from Memphis to New Orleans. It just continues to be a problem.

We do delay reports on a monthly basis. Every day there are more and more delays. You know, CSX is a good management and NS is a good management, and I don't want to cast dispersions on them, but they can't seem to get their act together on this as an
operational issue.

And now it's more than an operational issue; it's a competitive issue. And it's something that needs to be remedied in the context of this merger.

CHAIRMAN MORGAN: Now am I right that you did cut some sort of deal with NS?

MR. TOBIN: On the efficient gateways aspect, you know. Real briefly, everyone here realizes there are not a lot of Class I's left in the United States anymore and they're going to be -- there probably, as of Monday, there will be one less.

When our shippers saw that, they came to us and said look, you know, we've got some routes to Conrail territory, let's see what we can do to preserve them. We went to NS and we went to CSX and we proposed -- look, let's do a deal on statement of principles.

All we want you to commit to us is on our on line originating terminating traffic; you'll commit to market competitive joint rates when we -- when the service is efficient or when we can provide a
competitive package to these shippers.

On overhead traffic, you'll just provide reasonable rates. That's all you got to say. We'll do an agreement. Just have some statement of principles in agreement form. NS said yeah, that sounds fine to us, signed up, we were done.

CSX said reasonable rates, market competitive rates, joint line rates? I don't think so. So that's why we're here is our fear that -- their unwillingness to sign what I thought was pretty much of a milk/toast agreement is -- does not bode well for the shipping public.

CHAIRMAN MORGAN: And the relief you're asking for is transfer of a line and/or dispatching relief, is that --

MR. TOBIN: The preferable relief is purchase of the line and dispatching. Certainly the key is the dispatching control of it, but it generally follows that it's better if one carrier has both.

CHAIRMAN MORGAN: Thank you.

VICE CHAIRMAN OWEN: Could I follow on that?
Mr. Tobin, please, would anything be construed by CSX -- with the most recent talks with CN and KCS, would that have any impact upon the -- of traffic running through there, excess traffic you might be running through there at a later date?

MR. TOBIN: Well, there hasn’t been any talks recently about this particular topic as CSX and CN have been talking about other operational issues that they have. At least I’m led to believe that they’ve been talking.

As far as the later date goes, you know, IC is, at the moment, a stand alone railroad that the traffic that we bring to Conrail territory is via a competitive service option and obviously we’ll hope that there will be more traffic down the road.

But the real key is here that we do provide the competitive service now to Conrail territory and we want to continue to provide it.

VICE CHAIRMAN OWEN: Now then how would you handle neutral dispatching if you didn’t own the line and you had a neutral dispatcher just for that particular portion of a line?
MR. TOBIN: Well, there are really two ways to do it. One way is to use our centralized dispatching control in Homewood. The reason why that would be preferable to CSX is because this is literally the throat of our system.

It’s a backwater to them, and they frankly don’t pay a lot of attention to it. We’ve got a heck of a lot of our trains running through this system, so it would be a primary focus.

If you felt uncomfortable with that, you know, a tower operator operationally is a little bit more expensive than doing centralized dispatching; but this is such an important link in our system that that would be an alternate that we would do if need be is have a guy there dispatching those trains because there are a heck of a lot of them.

VICE CHAIRMAN OWEN: I have no other questions.

CHAIRMAN MORGAN: Thank you.

Let me move to you, Mr. Morell.

Regarding the Ann Arbor first, your argument is loss of essential services. And obviously
there's differing figures on the record about how much traffic is actually being diverted and so forth, but that's the argument is that you will be harmed and there will be a loss of essential services, --

M. MORELL: That's correct.

CHAIRMAN MORGAN: -- is that correct?

Now, the State of -- I believe it's the State of Ohio has suggested help for you by way of a connection with the Wheeling and Lake Erie in the Toledo area.

Are you aware of that proposal?

M. MORELL: Yes, I am, Madame Chairman.

CHAIRMAN MORGAN: And how do you feel about that proposal?

M. MORELL: Well, certainly it would be of some benefit, but it's certainly not going to give Ann Arbor the additional revenues it needs to continue operating if it loses all the revenues that it projects. It will be some help, no doubt about it; but it's not the total solution.

CHAIRMAN MORGAN: Now this Chrysler contract which also is of concern to Ann Arbor in
terms of performance, as I understand it, --

MR. MORELL: That's correct.

CHAIRMAN MORGAN: -- the concern is that,

if the merger is approved, that the -- somehow the
performance of that contract will be hurt by the
different routing.

Is that accurate?

MR. MORELL: This is somewhat of a

sensitive topic, Madame Chairman. My client hasn’t
really authorized me to say very much on it. The
problem with it is Ann Arbor was able to enter into
this contract. It’s a highly confidential contract.

There are termination provisions in it
which my client does not want me to discuss in front
of NS and CSX for quite obvious reasons. Ann Arbor’s
concern is that, post transaction, CSX and/or NS will
be able to -- through certain mechanism, be able to
induce the termination of that contract whereby then
Ann Arbor stands to lose all of that traffic.

CHAIRMAN MORGAN: And, of course, this is

an issue that has been discussed in documents, so I’m
not raising something that has not already been
But in terms of the changed environment, if you will, if we approve the merger, as I understand it, you feel -- or Ann Arbor feels that it has friendly connections now that it would not have post merger, is that --

MR. MORELL: That's exactly correct, Madame Chairman.

The major difference is today Ann Arbor -- most of Ann Arbor's interline traffic, automotive traffic is with Conrail. It has a friendly connection with Conrail. It connects at two places with Conrail. And particularly for routes to Chicago, Conrail, like I say, has been a friendly connection.

Ann Arbor also interchanges traffic with NS. Post transaction, however, NS is going to take over essentially Conrail's automotive business in the Toledo area. It will become much more of a competitor with Ann Arbor.

Ann Arbor does not believe that NS will be as cooperative as Conrail is today.

CHAIRMAN MORGAN: Okay, now let me move to
New England Central.

Again, traffic diversion, loss of essential services?

MR. MORELL: That’s correct, Madame Chairman.

CHAIRMAN MORGAN: Now in terms of other deals that have been cut -- and again, some of these deals are public and we don’t have all of the details, but I’m going to ask you this question anyway.

NS has cut a deal with Gillford, and you do connect with Gillford, I believe?

MR. MORELL: That’s correct, Madame Chairman.

CHAIRMAN MORGAN: Do you have any idea how you would fit into that scenario?

MR. MORELL: New England Central doesn’t really believe it’s going to benefit much at all from that arrangement. Again, the traffic that New England Central stands to lose, it’s not going to be able to preserve with that arrangement.

New England Central has somewhat of a unique situation. It’s not your typical traffic
diversions. About 50% of its traffic, which is forest products traffic, moves mainly from Canadian northwestern sources to the New England Central system.

From there, it’s transloaded substantial distances. It goes to New York. Some of it moves all the way to Pennsylvania.

This is the traffic that NS and CSX will easily be able to divert. The movements from the southeast -- they have direct line service. They have single-line service. They said they were going to move the traffic up. They’ve told you that they’re going to move all of this additional traffic. Well, people aren’t going to consume more lumber. It’s going to shift from somewhere, and the shift is from the New England Central.

The Guildford arrangement doesn’t do anything for us in terms of preserving that traffic or giving us additional traffic. It may, to some extent, increase competition in the New England area. From a competitive standpoint, it’s certainly an improvement. But from an essential service case for New England
Central, it really does not do much, Madam Chairman.

CHAIRMAN MORGAN: And in terms of the issue of competition east of the Hudson, how is that going to -- how would that help your situation? I mean, I presume that New England Central would like to be that competition east of the Hudson. That would be one approach. But if you're not, if someone else happens to be, how would that affect you one way or the other?

MR. MORELL: That's correct, Madam Chairman. I mean, obviously, New England Central does not -- does not come here and propose to be the competitive solution east of the Hudson. Its case is essentially twofold. One is the loss of essential services. The remedy that we chose -- we looked at -- to see how New England Central could recoup some of those losses was to get trackage rights primarily to Albany. We've also sought down to New York.

But it's mainly to connect with its subsidiary -- the CSO -- which would -- we project would generate about $2 million additional revenues for the New England Central by just allowing us the
short connection to the affiliate. It's not a long
distance. By giving us access to Albany, we get
access to all of the other carriers.

The competition argument we have made --
we have joined in -- because we're in New England we
joined in with most of the other parties who are still
here claiming that this transaction will result in
reduction in competition in the New England area. We
agree with that argument. We have joined in it. We
are not suggesting we are the solution. We have just
suggested that if we get that access to Albany, we
will solve some of those competitive problems.

CHAIRMAN MORGAN: But --

MR. MORELL: In other words -- excuse me.

CHAIRMAN MORGAN: But the competition is
reduced because you don't have the friendly
connections that you used to have? Is that the basis
of that --

MR. MORELL: It's --

CHAIRMAN MORGAN: I mean, we've heard a
lot about this merger being, you know, pro-

competitive.
MR. MORELL: Exactly.

CHAIRMAN MORGAN: And --

MR. MORELL: Well, it’s essentially a twofold argument, Madam Chairman. It’s one -- and we’re not the only ones making it. It’s very similar to New York and other arguments that we’ve made. One is, is today Conrail -- Conrail has a monopoly up there, but Conrail is a friendly connection to many of the destinations where traffic moves from New England Central or from other locations.

Conrail is sort of an intermediate carrier. If a shipper on New England Central, or some other short line that connected with us or other railroads in New England Central, wants to ship to a destination in the southeast, it has to deal with Conrail certainly. But it has the ability to negotiate with NS and CSX.

Once CSX takes over New England, it will be the sole Class 1 carrier there. CSX will have no incentive whatsoever to give the shipper a decent or economic rate to connect with NS. It’s going to want to keep that traffic on its system. So it’s the loss...
of Conrail as an intermediate connection that -- that
is one of the harms.

The second harm -- and, again, this is
addressed by several other people. It has been
addressed earlier today -- and that is that shippers
on New England Central and nearby areas today compete
with other shippers that are in the competitive access
areas. They are going to be at a distinct
disadvantage.

Applicants have stated that the service
and the rate -- the service is going to improve; the
rates are going to go down for those shippers in the
competitive access areas. The fear of the shippers in
New England is as their rates go down, New England’s
rates will go up. As the service improves in the
competitive access areas, the service may deteriorate
in other areas.

And so again, Madam Chairman, it’s
basically a two-part argument, and we’re not the only
ones making it.

CHAIRMAN MORGAN: Okay.

And, Mr. Rodriguez, just let me make sure
I understand what you're arguing. Are you arguing
that you are at a competitive disadvantage relative to
other areas post-merger and that that is the relief
that your -- that is why you're seeking relief?

MR. RODRIGUEZ: Well, that's part of our
argument, Madam Chairman. We're arguing that, first
of all, we are at a competitive disadvantage. Well,
first of all, we are being deprived of direct access
to over half of the Conrail territory, in that to go
there will require a three-line movement and we're
going to lose current and prospective business as a
result of that.

Second, we're arguing that we're losing
Conrail as a neutral intermediate carrier. It's the
argument Mr. Morell was discussing a moment ago, but
not only to southern connections, but also to western
connections.

Like New England Central, about 80 percent
of our business is in forest products. And we
anticipate a natural tendency for southern connections
to be favored, southern CSX connections to be favored
over western connections as well.

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701
(202) 334-4433 www.nealrgross.com
The third argument that we make is that our -- we are right at the dividing line between the competitive zone and the non-competitive zone. Our customers compete with industry in the North Jersey shared asset area. In fact, our own railroad-owned lumber distribution facility competes in the shared asset zone. Over 50 percent of the trucking is east of -- is west of the Hudson River.

We believe, because applicants have said so, that rates in the shared asset zone and the other competitive areas around Albany, around Maybrook, New York, right at our doorstep, are going to go down because there is competition there. As a result of that, our customers will be disadvantaged. And as a result of that, rail traffic will be diminished.

And, finally, we believe -- I guess there's a fourth prong to it. We believe that NS and CSX will be competitors to Housatonic Railroad for our carload business. And we believe that, first, because we know that they're going to compete with others more vigorously.

We know that NS can't get access to us, so
they’re going to compete by trying to get our business through -- to our customers through drayage, and otherwise, and they’ve stated that one of their goals is to divert traffic from other railroads. So we’re fearful of that as well.

All we’re trying to do is preserve the access that we now have -- neutral access to other connections -- and in a very unobtrusive manner, despite having CSX haul our traffic basically to Albany, and we also are asking for haulage in the other direction to New England Central and Palmer and Springfield terminal in Springfield.

But the Albany connection is the crucial one because that gives us access to Springfield terminal CP and NS, either directly or through CP or through ST.

CHAIRMAN MORGAN: Thank you.

MR. RODRIGUEZ: Thank you, Madam.

CHAIRMAN MORGAN: Questions?

VICE CHAIRMAN OWEN: It’s fascinating listening to this because if I recall correctly, Conrail was, in the words of an awful lot of the
people in the audience, arrogant, very high priced, and yet they were somewhat steady to deal with at times. And now I hear this CSX and NS is going to be so bad, and yet they’re bringing competition and everything.

And I know that they may take some traffic away from you, but I’m just saying, now wait a minute here. We’ve been hearing this complaint for a long time about Conrail, and now all of a sudden we’re hearing complaints about people that you really haven’t even met, or you haven’t even had a relationship with.

And I would hope that we can help you in some of these minor issues that -- as we identify some of these problems here. But I just wonder if we’re kind of coming down here kind of portraying a picture that may not be there yet. I don’t know. It does disturb me that we’ve heard two different stories here in the last -- I’ve only been here three and a half years, but I have heard an awful lot of shippers complain about Conrail. Some have said they were driven out of business. Some short lines tell you
horror stories about them. And now the --

MR. RODRIGUEZ: Well, I --

VICE CHAIRMAN OWEN: I’m just trying to
sort it out and read all of the documents here and
say, okay --

MR. RODRIGUEZ: Well, I’ve heard --

VICE CHAIRMAN OWEN: -- who’s telling the
truth?

MR. RODRIGUEZ: I’ve heard some of those
stories as well, but it hasn’t been our experience.
Our relationship with Conrail has had a glitch or two
along the way, but generally it has been very good.
They have been a partner.

Now, maybe it arises out of the particular
circumstances of our relationship with them and our
line sale agreement with them. But they could put us
out of business in a heartbeat by simply diverting
traffic, which they could do. I mean, they operate
competing facilities to ours, and all they have to do
is put lower rates to them and they could put us out
of business. But they’ve been even-handed, they’ve
been a benevolent monopolist, an even-handed
monopolist.

If CSX or NS were acquiring -- if either one of those were acquiring the entire Conrail franchise, there would be other problems, but we wouldn’t be here today with this complaint, and --

VICE CHAIRMAN OWEN: There would be people screaming all over the place.

MR. RODRIGUEZ: Indeed, there would. But we wouldn’t be screaming at least on this grounds. But we believe that our relationship with Conrail is such that they have a fiduciary duty to treat us in a certain way as a partner because of the way our relationship has developed.

And we know, because we’ve been told by CSX, that they’re not going to treat us that way, and we view the applicants as one applicant. I mean, it’s CSX and NS. We can’t look at them really separately. We have to look at them together, and the applicant is clearly going to be a competitor.

But all -- and that’s great, and competition is great. And they’re bringing competition, and that’s wonderful. But we need to be
able to participate in that competition, and it's not very hard to let us do it. All we need is to get to Albany through haulage on some reasonable basis and bring competition a little bit east of the Hudson River.

VICE CHAIRMAN OWEN: I hope we can help you some way. I'm in favor of the short lines. But anyway, that was all I have to say. Thank you.

MR. RODRIGUEZ: Thank you. I appreciate it.

CHAIRMAN MORGAN: Thank you all. Let's go to the second half of this group -- Levin Sheys for Livonia, Avon & Lakeville Railroad Corporation; Charles Spitulnik, Philadelphia Belt Line Railroad Company; Eric Hocky, Reading, Blue Mountain & Northern Railroad Company; Mark Sidman, New York & Atlantic Railway; and William Mullins, Gateway Western Railway Company.

Mr. Sheys?

MR. SHEYS: Thank you. The Livonia, Avon & Lakeville Railroad is a short line that owns
and operates the line between Genesee Junction Yard, which is just south of Rochester, New York, and Lakeville, New York, which is about 30 miles south of Rochester.

In 1997, the LAL was named Short Line Railroad of the Year by Railway Age Magazine. LAL seeks elimination of a paper barrier, or firewall, between itself and the Rochester and Southern Railroad. The firewall is located in Genesee Junction Yard, which, as I said, is the northern end point of the LAL.

I'd like to direct your attention to the top of the map shown. When the LAL was formed, it made an effort -- unsuccessful -- to buy the Erie Lackawanna line between Avon and Caledonia. The goal was to reach the B&O. This was not to be, and instead the USRA decided to have Conrail serve Avon from Rochester, inserting a firewall between the LAL and the Erie Lackawanna. The EL line on the north side of the firewall was later abandoned.

Now, if you could direct your attention to the bottom half of the map -- in '96, the LAL bought...
Conrail's line between Avon and Genesee Junction yard. LAL did not buy that line for the 300 carloads, but because it was in such deplorable condition that the LAL's very existence was threatened. Not buying and rebuilding that line would have meant cutting the railroad off from the rest of the general railroad system. Thus, in 1996, the firewall was moved a few miles to the north.

I'd like to put up a diagram of the Genesee Junction firewall as it exists today for the balance of my comments.

Rochester and Southern and LAL both operate in Genesee Junction Yard, but neither has the right to interchange traffic with the other. Rochester and Southern connects with the southern Tier Line, which is going to NS. So what LAL wants is elimination of the paper barrier between it and the Rochester and Southern so it can offer its shippers access to NS.

LAL has identified three merger-related harms; any one of which would justify removal of this firewall. First, and perhaps most importantly, LAL
will suffer the diversion of resources from its captive market to the competitive markets recreated by this merger. The applicants cite as a primary benefit of this merger the opening of competitive markets.

While CSX and NS are busy fighting for the business of the shippers in these reopened markets, shippers in captive markets, such as those served by LAL, will be left wanting. The customers who have the options will get the attention of CSX. They will, as Mr. Lyons said this morning, eat cake.

LAL shippers will be left wanting -- wanting maintenance of interchange facilities; adequate locomotive, power, and crews; good car supply; wanting marketing personnel and systems; to provide quick rate quotes and service terms to customers; wanting customer service personnel to deal with car tracing, damage claims, billing, revenue settlement, and other real-world issues that are at the heart of railroad customer service.

Second, certain LAL traffic currently moving essentially in single-line service between LAL to short line and Conrail will be converted to LAL-
CSX-NS joint line service. And this is not just any joint line service; this is joint line service between arch rivals.

Third, LAL also will lose Conrail as a neutral gateway, and I'm going to leave that to my brief.

So what we have is we have harms in this merger that the firewall will eliminate, and elimination of the firewall is an operational no-brainer. Both of the railroads are already in the yard.

One other point I'd like you to consider. The firewall that LAL wants taken out was created by the USRA to prop up a fledgling Conrail. The applicants now concede that the congressionally mandated goal of competition was sacrificed in creating Conrail, and ask the Board's approval to rectify that mistake with "the most pro-competitive restructuring in railroad history."

Here, the Board is being asked to approve the dismantling of Conrail, and LAL thinks it is only fair that in doing so the Board should also dismantle
the firewall created at the formation of Conrail.

Thank you for listening.

CHAIRMAN MORGAN: Thank you.

Mr. Spitulnik?

MR. SPITULNIK: Thank you, Chairman Morgan, Vice Chairman Owen.

Good evening. My name is Charles Spitulnik, and I'm here today representing the Philadelphia Belt Line Railroad Company. My music is outside.

(Laughter.)

The Belt Line's request of this Board in this proceeding is for a specific affirmation of an existing right. We don't seek any new rights. We don't seek rights for any new carriers to get access to any new tracks. And we don't seek to expand the rights that we already have.

Our request is limited to seeking an order from this Board that confirms that approval of this transaction does not limit, preempt, or otherwise affect the continuing validity and viability of the Belt Line principle. To foreclose any possibility of
an argument in the future, from CSX, Norfolk Southern, or Conrail, that the Board’s approval of this transaction and the shared assets operating agreement preempts the Belt Line principle and preempts the Belt Line and its shippers’ rights under the South Philadelphia agreement, and under the Belt Line principle, we seek affirmation here that this transaction effects no such preemption.

Why do we need this affirmation? Because the applicants’ shared assets operating agreement appears, on its face, to give them an argument that they can ignore their obligations to comply with the Belt Line principle which is embodied in the South Philadelphia agreement.

The Belt Line is a Class 3 railroad chartered by the city of Philadelphia in 1890. It was chartered by the city to guarantee equal access to the waterfront in Philadelphia to all railroads that reach the Philadelphia market. The principle of equal access to its facilities has been the guiding light that has guided the Belt Line’s operations since that time.
In 1914, pursuant to another ordnance of the city, all of the railroads that reach the Philadelphia market, including the B&O and the Pennsylvania Railroad -- two of the many predecessors to two of the applicants in this proceeding -- signed on to the South Philadelphia agreement.

Despite obstructions in its right-of-way, and despite efforts by Conrail to prevent the shippers on the Belt Line north from having equal access to all carriers serving the city of Philadelphia, the company has continued to operate with the Belt Line principle as its guide. This transaction threatens yet again the Belt Line’s ability to continue fulfilling the mandate imposed by the city’s ordinance and by its duty to the shippers who have located on the Belt Line’s properties.

The shared assets operating area concept appears on its face to introduce an element of competition into the Philadelphia market where none has existed for many years due to Conrail’s virtually exclusive grasp on rail transportation within that city. I suspect, Vice Chairman Owen, that some of the
horror stories that you've heard about Conrail have come out of the mouths of the shippers on the Belt Line's facility.

However, with respect to the Belt Line, the agreement between Norfolk Southern and CSX to form this shared assets operating area demonstrates that the new owners of Conrail have every intention to exclude other carriers from the access to the Belt Line north facilities that lies at the Belt Line principle. The Belt Line North property is included with the shared assets operating area, and the agreement specifically says that no party can have access to, or operate over, or use any shared asset without the prior approval of CSX and Norfolk Southern.

What if a shipper on the Belt Line North wants to get access to CP at Philadelphia? What if the Belt Line North shipper wants to take advantage of -- or to reach Amtrak's facilities, to take advantage of the new Amtrak express authority that the Board has recently confirmed in a recent decision?

What if another carrier reaches an
agreement to reach Philadelphia and the shipper on the Belt Line North wants to have the ability to have its outgoing product or its incoming raw materials moved on that shipper? How will this happen in a way that's consistent with the Belt Line principle under the shared assets operating agreement?

Remember, the South Philadelphia agreement that confirmed the existence of the Belt Line principle in 1914 was based on a give and take between the carriers that signed on to that agreement. Each of them gave up some rights and assumed some obligations in exchange for guaranteeing equal access to the Belt Line's facilities that lies at the heart of that agreement.

Denying shippers the right to have equal access to all lines reaching the city would undo the bargain that is embodied in that agreement and the Belt line principle that it confirms.

The Belt Line is not asking this Board to allow other carriers to use Conrail's tracks, and it is not asking for an extension of any carrier's right to have physical access to the Belt Line. All we ask
here is for confirmation that nothing -- nothing in
the proposed transaction limits or preempts the
application of the Belt Line principle, and that
Conrail, CSX, and Norfolk Southern, in accordance with
that principle, cannot assess discriminatory switch
charges to bring traffic to or from the Belt Line
properties or from any other carrier that reaches the
Philadelphia market.

This affirmation of the Belt Line
principle is consistent with the public interest. It
will have no adverse effect on the applicants' ability
to implement their transaction. It will impose no
operating burden but will preserve the competitive
rail transportation options of Belt Line shippers.

There is ample reason to grant the relief
the Belt Line seeks here, and the Belt Line
respectfully asks this Board to condition its approval
of the proposed transaction with a specific
affirmation of the continuing viability of the Belt
Line principle.

Thank you very much.

CHAIRMAN MORGAN: Thank you.
Mr. Hocky?

MR. HOCKY: Chairman Morgan, Vice Chairman Owen, my name is Eric Hocky. I’m here today representing Reading, Blue Mountain & Northern Railroad Company, a Class 3 railroad operating through eight counties in northeast Pennsylvania -- around Reading and between Allentown and Scranton.

Two-hundred sixty of its 280 miles of rail lines have been purchased from Conrail. To justify this transaction, applicants claim that there will be enormous public benefits that will be created through the reintroduction of two-carrier competition in the northeastern United States and through the extended single-line service they will be able to offer.

And in considering whether to approve the transaction as a whole, the Board must, of course, look at the overall benefits being created. However, in considering conditions that have been requested, the Board should look at whether the claimed benefits are present in the region for whose benefit the condition is sought.

I’m going to focus this evening on one of
the two conditions sought by Reading, Blue Mountain, without meaning to diminish the importance of the other. The condition I’ll focus on tonight is the removal of the contractual restrictions on Reading, Blue Mountain’s ability to interchange with carriers other than Conrail or its successor.

The region served by Reading, Blue Mountain will not see any voluntary reintroduction of competition. Instead, an NS monopoly will substitute for the existing Conrail monopoly. Not only will there not be renewed competition, but the transaction will, instead, result in competitive harms. Reading, Blue Mountain shippers will lose the neutral connection that Conrail provided to NS and CSX.

They will also lose the single-line service that Conrail could offer throughout the northeast, in particular to New England and Montreal, where Conrail’s lines are being allocated to CSX.

In our papers, we cite one example of the type of harm that can be expected by setting the specific movement of fly ash that moves currently in Conrail’s single-line service from the New England
Central to the Reading, Blue Mountain. If the
transaction is approved, the Conrail portion of the
line will be split between NS and CSX. The move is
both price- and time-sensitive, and Reading, Blue
Mountain believes the move will be adversely affected
and probably lost.

I would like to simplify the Board's
analysis of this proposed condition by pointing to a
single page in this voluminous record that we believe
demonstrates the appropriateness of the relief
requested. NS's response to this particular claim is
that they don't think that the move will be lost. NS
asserts -- and I'll give you the pages -- page 428 of
CSX/NS 177 -- and that's their witness, Mr. Mohan, he
says Reading, Blue Mountain has the ability to remedy
the situation and preserve the move because, "This
movement can be made via New England Central, Canadian
Pacific, Green Mountain Gateway Routing, using CP's
effective commercial access to the RBMN."

Reading, Blue Mountain agrees that this
routing would do the trick, but disagrees that CP has
effective commercial access to Reading, Blue Mountain.
This, of course, would change if the Board were to grant the relief requested and remove the restrictions RBMN has on interchanging with CPD&H or any carrier other than Conrail.

Removal of the restrictions would also restore to Reading, Blue Mountain shippers a neutral connection to CSX through CPD&H’s existing rights to Philadelphia. This is precisely the type of situation in which relief has been granted in past transactions. In the cases of the Soo Line and the UP/CNW merger, and Grain Belt in the BN/Santa Fe merger, when contractual provisions restricted a carrier from responding to the harmful effects of the transaction, the Commission relieved the carrier from the restrictions.

Now, removal of this barrier does not take away any of the public benefits of the transaction. Even if NS would lose a little bit of revenue, that is, indeed, only a private benefit to NS. But it gives the benefit of competition to the shippers, which is the very justification that the applicants use to justify their entire case.
On any existing traffic diverted, it’s not even necessarily true that Reading, Blue Mountain will receive any private benefit. It will only still receive an allowance from CPD&H or a division, and there’s no guarantee that that will be any higher than what it gets now. It’s merely seeking to preserve for its shippers the opportunities as they currently have.

Because of the acknowledged uniqueness and unprecedented nature of this transaction, the Board should apply its condition powers to the fullest, and consider public interest in the broadest way possible. In this case, the Board can and should relieve Reading, Blue Mountain from the contractual restrictions that prevent it from responding to the harmful effects of the transaction.

Thank you.

CHAIRMAN MORGAN: Thank you.

Mr. Sidman?

MR. SIDMAN: Chairman Morgan, Vice Chairman Owen, my name is Mark Sidman. I’m appearing here today on behalf of the New York & Atlantic Railway. The New York & Atlantic is the freight
operator on the lines of the busiest commuter railroad
in the country -- the Long Island Railroad.

In 1996, in a competitive bid process, the
Long Island awarded New York & Atlantic a 20-year
exclusive freight franchise. Its train operations
must be coordinated award the 4,000 passenger trains
per week operated by the Long Island. In New York &
Atlantic’s 257-mile system, all but approximately 14
miles are used for both passenger and freight
operations.

The 11-mile Bay Ridge branch, which is the
subject of my comments today, is the most significant
of the freight-only segments. It is identified in
blue hashing on the map before you.

New York & Atlantic’s participation in
this proceeding has been limited to opposing a request
for conditions filed by a delegation of legislators
led by New York Congressman Jerrold Nadler. The
delation proposes that approval of the primary
application be conditioned on geographic expansion of
the shared assets carrier to include operations east
of the Hudson.
It requests that New York & Atlantic be required to provide the shared assets carrier with trackage rights over its Bay Ridge branch.

The delegation identifies two statutory provisions in support of its proposal regarding New York & Atlantic. One, the general power of the Board under Section 11324(c), to impose conditions on merger and consolidation transactions; and, two, the power to impose terminal trackage rights pursuant to Section 11102.

The use of the general conditioning power in this context has been addressed in detail by the primary applicants. I will focus my comments today on the delegation’s reliance on the terminal trackage rights provision. The delegation’s filings in this proceeding contain no evidence whatsoever concerning the three statutory criteria that must be met before the Board exercises its power under Section 11102.

Those criteria are, one, that the line in question be a terminal facility or a main line a reasonable distance outside of a terminal facility; two, that use of the line in question for trackage
rights is practicable and in the public interest; and,
three, that the proposed trackage rights will not
substantially impair the ability of the owning carrier
to use the line for its own business.

The delegation did not submit any evidence
to show that trackage rights are practicable on the
Bay Ridge branch. In fact, the line has severe
physical limitations that render it impracticable for
such use. It is single track from end to end. It is
not equipped with signals, nor is it dispatched. It
has only one 15-car siding. Its condition permits
maximum speeds of only 10 miles per hour.

The line is currently used only by the New
York & Atlantic, and it was used only by the Long
Island prior to New York & Atlantic's takeover of
freight operations. Unlike other situations in which
the Board has imposed terminal trackage rights, this
is not a case that involves a line that currently
supports multiple carrier operations, nor is it a case
in which the track in question is in a yard or has
obvious excess capacity.

The only evidence in the record shows that
the Bay Ridge branch is not suitable for joint use.

As to the statutory criteria that the proposed trackage rights not substantially impair the ability of the owner and carrier to use the line for its own business, the delegation is likewise silent. But the reality is that the Bay Ridge branch is the only significant freight-only segment on New York & Atlantic's entire system.

It provides New York & Atlantic with its sole unrestricted access to the railroad's interchange points at Fresh Pond and Bush Junction. This is crucial because New York & Atlantic is subject to highly restrictive operating windows on the lines that it shares with the Long Island.

As a result, the Bay Ridge branch is one of the few places where New York & Atlantic has the operational flexibility to provide the type of service that will enable it to grow its business. It would work a substantial burden on the carrier to be forced to share that only unrestricted line with a third party.

The delegation's complete failure to
address the statutory prerequisites to the imposition of terminal trackage rights is fatal to its attempt to turn the Bay Ridge branch into a multiple carrier line. The delegation did not file an application in these proceedings, and it has not met its burden of proof. New York & Atlantic respectfully requests that the Board deny the delegation's request for conditions insofar as it affects the Bay Ridge branch.

Thank you.

CHAIRMAN MORGAN: Thank you.

Mr. Mullins?

MR. MULLINS: Chairman Morgan and Vice Chairman Owen, my name is William Mullins. I'm with the firm of Troutman Sanders, and I represent Gateway Western Railway Company, which is a wholly-owned subsidiary of the Kansas City Southern.

Gateway's concerns are simple. There are two terminal trackage rights agreements between Conrail and Gateway -- trackage rights agreements that were voluntarily negotiated and involved terminal trackage in the east St. Louis area. Both of these agreements contain anti-assignment clauses, which
prohibit Conrail from assigning these agreements to
any other party without Gateway’s consent.

In disregard of these contractual
provisions, Conrail is proposing to assign these
agreements to CSX over Gateway’s objections. As
authority for forcing such an assignment over
Gateway’s objection, CSX has requested the Board
invoke Section 11321(a) to override the anti-
assignment provisions of these agreements.

Gateway does not take issue with the
Board’s clear authority to override provisions of
contracts. But it is important to note that such
authority only applies when it is necessary to
override a law or contract, such a trackage rights
agreement, in order to carry out a transaction
approved by the Board.

In determining whether an override is
necessary, the Board has required previous merger
applicants to exhaust other remedies first before
invoking the Board’s powers under Section 11321. In
particular, the Board has held that an override cannot
be considered necessary if a terminal trackage rights
remedy is available under Section 1102(a), which it is in this instance.

CSX should have first attempted to negotiate this issue with Gateway. Gateway offered to do so, but CSX showed no willingness to resolve Gateway's concerns about assignment. If negotiations had failed, CSX should have then filed a terminal trackage rights application, which they did not do.

Accordingly, CSX has not shown necessity and cannot simply rely on the general authority of Section 11321 to obtain access to Gateway's east St. Louis track. Furthermore, even if CSX could rely solely on the general authority of Section 11321, CSX has proffered absolutely no evidence to establish the necessity of overriding the anti-assignment clauses in Gateway's contracts.

The D.C. Court of Appeals has held that to satisfy the necessity test, a party must show, at the very least, that the modification of the contract in question is necessary to secure the public some transportation benefit flowing from the underlying transaction. CSX has made no such showing, while
Gateway has shown it will be harmed if CSX operates over its tracks.

In conclusion, because applicants of CSX, in particular, have ignored the legal requirements for an assignment of Conrail's trackage rights over Gateway's facilities, the Board should deny CSX's request for relief as it relates to Gateway.

Thank you.

CHAIRMAN MORGAN: Thank you.

Okay. Let me just see if I've got everybody's position. I think it's pretty clear.

First of all, Mr. Sheys, the key is the firewall. Get rid of the --

MR. SHEYS: Correct.

CHAIRMAN MORGAN: -- firewall; you're taken care of. Is that --

MR. SHEYS: That's correct.

CHAIRMAN MORGAN: -- a pretty good summary?

Mr. Spitulnik, you are concerned the Belt Line principle will get somehow inadvertently overridden? So you don't want --
MR. SPITULNIK: Preempted, but that's correct. 11321 seems to have been a big issue here today. That’s correct.

CHAIRMAN MORGAN: So you don’t want that to happen?

MR. SPITULNIK: Exactly correct.

CHAIRMAN MORGAN: By inadvertence or otherwise.

MR. SPITULNIK: Or otherwise.

CHAIRMAN MORGAN: Mr. Hocky, your concern is paper barriers --

MR. HOCKY: Yes.

CHAIRMAN MORGAN: -- and the removal of that restriction. And I don’t know -- you probably are aware that in another proceeding we have directed the smaller railroads and the larger railroads to meet and discuss short line issues such as paper barriers.

MR. HOCKY: Yes. And I understand, at least as of last Friday, that there was no agreement, and that the --

CHAIRMAN MORGAN: Right.

MR. HOCKY: -- Short Line Association and
that the AAR may be submitting separate proposals on that. And we’re not -- in this case, we’re focused more on a particular barrier as opposed to paper barriers --

CHAIRMAN MORGAN: Barriers in general.

MR. HOCKY: -- generically, which will e addressed in 575.

CHAIRMAN MORGAN: And then, Mr. Sidman, you are obviously opposed to the east of the Hudson solution that would involve the line that you operate.

MR. SIDMAN: That’s correct.

CHAIRMAN MORGAN: And then, Mr. Mullins, you do not want an override of the trackage rights or the terminal arrangement that exists today.

MR. MULLINS: That’s correct.

CHAIRMAN MORGAN: Does that -- okay. Thank you.

VICE CHAIRMAN OWEN: I thought you did an excellent job.

(Laughter.)

I thought you did an excellent job of summarizing. I was going to compliment Mr. Mullins on
his numbers today, that he had them all down pat.

MR. MULLINS: Well, than you. I appreciate that. I had a lot of time today to think about those.

(Laughter.)

CHAIRMAN MORGAN: And it took me, what, a minute to --

(Laughter.)

VICE CHAIRMAN OWEN: No, I have no other questions of them. I’m fairly comfortable with it.

CHAIRMAN MORGAN: Thank you all very much.

Next we will move to the panel of representatives from New Jersey and New York. First of all, State of New York, William Slover; Charles Spitulnik, with the New York City Economic Development Corporation; John Maser for Erie-Niagara Rail Steering Committee; Doug Midiff --

MR. MIDKIFF: Midkiff.

CHAIRMAN MORGAN: -- Midkiff. Well, that’s -- the K is not there on my sheet, so --

MR. MIDKIFF: Is that right? Just like Midriff only it’s a K instead of the R.
CHAIRMAN MORGAN: Okay. Well, Midkiff, I got it. Genesee Transportation Council, and then Paul Lamboley, with Southern Tier West Regional Planning and Development Board.

And I see Congressman Nadler has joined us again. We must have a good shown down here.

(Laughter.)

MR. SLOVER: May it please the Board, my name is William Slover, and I’m appearing here this evening on behalf of the people from the State of New York. They are acting through the State Department of Transportation.

New York has been an active participant in these proceedings. We have presented or sponsored over 15 witnesses, and collectively we oppose the transaction which the applicants propose, unless it is conditioned by six specific conditions which we outline in our pleadings.

The two most important and crucial conditions to the State of New York are the so-called pro-competitive conditions -- namely, conditions which will reintroduce competition into two of the state’s
most important regions, namely the New York City area
east of the Hudson River, between Brooklyn, New York,
and Albany, and the Buffalo, New York, area.

Now, at the table here are regional
counsel for each of these constituencies, and I don’t
intend to overlap or go into their territories. I’ll
leave the details to those people.

But there is a common issue which
underlies all of the pro-competitive requests, and
especially the requests of the State of New York. And
that is the dispute between the state and the
applicants as to whether this agency has the authority
and/or the obligation to impose the conditions that we
seek.

We all agree, basically, that the public
interest is the determinant factor, but that’s the end
of the agreement. We disagree on what the public
interest/obligation requires and authorizes you to do.
The state takes a broad view of the public interest.
We go back to the Supreme Court cases as early as
1910, and the Old Rock Island case, where Chief
Justice Hughes said that the public interest is the
broadest delegation that the Congress can give. And
it is given to this agency because you have to deal
with broad and complex problems.

And so the public interest standard is
about as broad a one as the Congress can grant, and
there are really few, if any, restrictions recorded on
the public interest standard.

Now, we have heard that this is a unique
transaction, and we believe that in this particular
transaction the public interest has to be illuminated
by the rail transportation policy which is set forth
in the statute. And that policy, which the Board
visited in the UP/SP, 15 ingredients, and I believe
there you noted that, taken as a whole, those
ingredients are pro-competitive.

So we think that the policy of the
Congress, while at one time favoring consolidations of
railroads, it is now extraordinarily pro-competitive.

And, finally, applicants themselves, or at
least one applicant, has a principle of balanced
competition, and one of those principles is that every
major transportation market ought to have two large
railroads serving it. So we believe that there is full and ample justification and authority to impose these pro-competitive conditions.

Now, on the other hand, the applicants take a more narrow view. They assert in their evidence, and in their testimonies, that no -- I believe they say the fundamental point is that no company, in any industry, would go out as they have, make an investment, bring new competition, if some government agency could come along and require them to extend that competition to other customers. And that's basically their position. It's at 122 of their rebuttal, and it was, I think, fairly well stated this morning.

Now, the State of New York submits that the fundamental flaw in that position is that the railroads are not any company in any industry. They are a unique industry which is infused with the public interest, and they are given certificates of public convenience and necessity which insulate them from competition. They are immune from the antitrust laws. That's why they are here before you.
They are also insulated from many state and federal laws. Those are very real and important privileges that they get for operating in the railroad industry.

Conversely, unlike other companies and other industries, they have an obligation to the public interest. And in this instance, we feel that that obligation clearly requires them to extend competitive service to the area east of the Hudson River and to the Buffalo area, based upon the public interest standard.

Now, the state has -- as I say, is supporting the east of the Hudson trackage rights, and it's supporting the extension of the shared asset area to Buffalo or, alternatively, reciprocal switching rights throughout the Buffalo area. The one or two other points which will not be covered here by the other panel members are -- one is passengers.

Hundreds of thousands of people a day take the trains in New York. The record shows that New York has invested over a billion dollars in railroad facilities in the state; $600 million of that is cash.
And the great bulk of it is dedicated towards the movement of people.

And we are terribly concerned over the implications of the petitioning of Conrail and feel very strongly that the three-year oversight provision, which the carriers are willing to do, is totally inadequate when it comes to the passenger interest in New York. And, therefore, we are seeking a 10-year oversight provision. We believe that the movement of people in and through the State of New York is of sufficient importance that the public interest requires a 10-year oversight provision.

And, finally, for the same reasons, New York, as our pleadings reveal, came to the rescue of the railroads many years ago when the Reagan administration was doubtful about Conrail, when the Penn Central was going bankrupt, the State of New York stood up at a time when New York City itself was suffering great financial problems and no one would come to the New York City’s rescue. But the state put a great deal of money into the railroads in the state, and we feel very strongly that we -- albeit not
stockholders in Conrail, we are certainly stakeholders in Conrail.

   And so when someone comes along and pays the price that they paid for Conrail, and if they are not able to realize their ambitions to grow the business, New York continues to largely remain captive. While we may be captive to two railroads instead of one, we are still captive; and, therefore, we are greatly concerned about the premium, the acquisition premium, and we are concerned that it might be collected from the captured shippers of the State of New York.

   So, for that reason, we join those parties who ask the Board to prevent the railroads from recording these assets at these escalated values for the purposes of captive shipper ratemaking and the jurisdictional threshold.

   I thank you. It's been a long day. You've been very patient. Thanks a lot.

   CHAIRMAN MORGAN: Thank you.

   Mr. Spitulnik?

   MR. SPITULNIK: Good evening again. I