MR. EDELMAN: Thanks very much. Good morning, Chairman Nober, Vice Chairman Mulvey and Commissioner Buttrey. I'm Richard Edelman. I'm counsel for the BMWE. On behalf of the BMWE, we want to thank the Board for holding this hearing this morning in this important case.

I want to begin by highlighting several
factual matters. The BMWE has characterized the Richmond-to-Clifton Forge line as in abysmal condition. Applicants dispute this, saying that the line is in good condition and that BMWE's story here is two years old. Frankly, this is a stunning assertion unsupported by any actual evidence such as a declaration, or a verified statement, and it likely ignores all of the evidence provided by BMWE.

Like Vice Chairman Mulvey pointed out, they say there haven't been any reportable derailments in two years. Well, that's setting a low threshold for yourself and their overall rate of violations isn't really pertinent to this particular line, which has its own specific history that we've documented for you. BMWE has shown that conditions on many parts of this line are so bad that a gauge measurement car derailed during an inspection. That was in 2002.

BMWE provided several FRA reports to you well past 2002 showing extremely poor track conditions on this line, especially on the Piedmont subdivision. We have also provided you with a declaration of Roy Griffith, former track inspector on this very line,
and his recent inspection demonstrated there are numerous defects all over this line.

CSXT responded that the line is in good condition. There were just problems at mileposts 160, 180 to 184 and 189. That's at page 15 of their reply. We have demonstrated there are many serious problems in many locations. This is shown by the Brassell and Griffith declaration, paragraph 10, Exhibit B and C which include observation from mileposts 118, 160, 207, 276. We give you pictures from all three subdivisions and you can see serious problems all over the place.

We submit the evidence is clear that CSX has essentially just fixed whatever violations it's been cited for by the FRA. When they are cited, they fix that and they move on and they scrap the supposed plans that they talked about coming in and doing major renewal work on this line. Their brief would leave with you the impression that everything is fixed, as if they ran a tie and surfacing gang over this line since 2002. But their characterization of this line is unsupported by any evidence at all, much less
competent evidence. It is just not so.

They refer to the track charts and you may hear about track chart that they provided and suggested BMWE didn't provide enough evidence. There are track charts, but the track charts don't show wide gauge, washed out ballast, broken joints, frayed ties, broken tie bolts. That's not what they show. They basically show the record of production type work when they've done surfacing, when they've put new ties in, physical characteristics of the right of way such as grade and curve.

CSX produced no declarants to talk about the actual track charts, what they say, and no declarant would even attempt to refute BMWE's evidence on the condition of the track and right of way. The actual record evidence supports our description of the condition of those lines.

Next I want to talk about the terms of the lease. CSXT will be the dominant operator on this line. Applicants dispute this assertion, but they say that they anticipate BB will have 11,700 carloads: 6,200 of them local traffic, 1,000 from NS, 4500 of
them are CSX non-revenues. CSX will have 7,900 local carloads from a shipper on this line that it is supposedly leasing to someone else, and 156,000 empty cars for reverse load movements coordinated with the James River movements and Amtrak will have two trains per day three times per week.

This shows that BB will be a minority operator on this line and that CSXT will be the dominant operator. Even if you count the 4,500 CSX non-revenue carloadings so that BB's carloadings exceed CSX's, the Applicant ignored the movement of 156,000 empty cars. But ignoring them doesn't make them go away.

Certain financial aspects of this arrangement are also significant. BB will pay CSX $140,000 per year. CSXT will pay BB $2 million a year for trackage rights to continue its reverse-flow movement. In effect, CSXT is paying BB $1.86 million a year to take the lines off its hands while CSXT continues to use the lines. That's what the financial terms net out to.

Or you can look at it this way. BB says
they're going to spend about $1.8 to $2.2 million to maintain the lines for the current, not particularly satisfactory condition. One could look at this as CSXT is paying BB just to keep the line in its current poor condition while CSXT continues to use the line but is not responsible for the track and the right-of-way.

With respect to the duration of the lease, we submit the only certain duration is ten years because the financial terms are subject to renewal after ten years. If the parties cannot agree, it's terminable at will. Now the Applicants deny the significance of this fact. They talk about the renegotiation provision as prudent and difficult, but the fact is the lease is terminable at will after ten years.

There was nothing like an arbitration provision here to set the terms. If CSXT wants to dramatically increase the lease payments and/or dramatically reduce the trackage rights payment after ten years, it could do so and effectively terminate the lease.
We submit that the Board can and must take these facts, and our arguments based on these facts, and the National Rail Transportation Policy into account when considering this application. We also submit that, independent of the Rail Transportation Policy, the Board should consider that this transaction is not a legitimate lease and I will address that a little bit later.

Now just because this is the Section 11324(d) transaction does not mean that the Rail Transportation Policies are irrelevant. The Rail Transportation Policies express basic policies of this Act and we have cited to you Supreme Court and appellate decisions since 2000 that make it clear that a statute must be interpreted and applied as in an entire statutory scheme.

This agency cannot then ignore the Rail Transportation Policy. We have cited other cases where the Board has rejected facially compliant transactions, things that appeared to comply with specific provisions of the statute, but that conflicted with basic policies of the act that were
shunned for improper purposes.

Now our position is not in conflict with 11324(d) and would not overwhelm 11324(d). We are not saying in these cases that Applicants must affirmatively show a transaction that satisfies all of the criteria of the RTP, but that the Board can and should consider the RTP. And when a transaction is plainly inconsistent with important transportation policy, it should be rejected.

It seems like here this morning the Applicants acknowledged that the Board may consider the transportation policies and we submit it should consider the transportation policies.

Chairman Nober, you asked a question about safety issues. The third item under Rail Transportation Policy, "(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by The Board (8) to operate transportation facilities and equipment without detriment to the public health and safety and (9) to encourage honest and efficient management of railroads." I think you certainly can
say safety concerns come into account. The FRA has its role and its function but so do you. In particular, safety becomes relevant to an arrangement that has its own problems and its own odd structures that don't make sense. It makes sense to me that safety is a relevant consideration for you.

We have cited situations where the Board surely would consider the RTP in its transactions. Applicants say we cite extreme and hypothetical cases, but they demonstrate they can and should be considered. The position that the Board must approve a transaction unless it finds competitive harm is extreme in itself. The transportation policy must inform the decision of this Board.

We submit that approval of this proposed lease would be contrary to several of the Rail Transportation Policies as described in our comment because BB is not in a position to be the operator of this line, given its current conditions and BB's experience and abilities.

Just briefly, we rely on factors relating to development and continuation of sound rail
transportation; meeting the needs of the public and national defense; operation of facilities and equipment without detriment to public health and safety; and encouragement of honest and efficient management of railroads. Contrary to the argument of the Applicants, we have shown this line in fact is in very poor condition in many places. We demonstrated this by FRA reports, our recent observations, our photos. This line needs major renewal and overhauls. It really needs a production type of T&S gang, which CSXT has, but will not commit to this line. It is not a task that BB is up to.

We do not see the big line of workers that exist with respect to their current line, but even if it increases maintenance-of-way way forces from the eight that they refer to as multi-function employees to 12 as it now says, that is not sufficient. This line is not in adequate condition now while being maintained by CSX's 13 assigned full maintenance-of-way employees and BB plainly doesn't have the equipment required for maintaining those lines. The FRA has observed, and I believe that the State of
Virginia believes, major work is required on this line. A production gang is needed, that is not going and to happen if this lease is approved.

Also, this is not just like putting together four separate short lines as Mr. Bryant suggested. Not only are there the serious remedial problems with respect to the track and the right-of-way, we're talking about a line now that is going to have CSX, BB and Amtrak all operating on it. It's going to have HazMats operating on it. It's going to have passengers operating on it. This is a far, far more complicated operation than what they're doing now on their 17 miles of track a couple days a week. or saying as if you're doing that four times over this segment of track.

This is not, as Applicants have said, in fact a Class III acquisition. It is a critique of a particular carrier acquiring a particular line with its difficulties to three and other circumstances surrounding this. It's a critique of this particular transaction. In fact as I said, there are only limited requirements in this lease for BB's
maintenance of the line. It just has to keep it so that it doesn't get any worse. That's basically what you heard this morning.

We submit, the cost for this is likely to be thrown to the state. BB has relied on state support for capital work on its current line. We think it's likely with this line, with a significant event like a derailment or a big crossing problem, because they don't have the resources to handle what is needed there. That is likely.

By the way, we did ask in an interrogatory about their capital investment in the current line. They declined to answer. This morning, you were told they reinvested. We don't know what it was. This is CSXT's line and it will continue to be a major user on the line and has the responsibility for making the repairs.

Now, separate and apart from the Rail Transportation Policy, we have argued and demonstrated that this is not a legitimate lease. We have relied on a number of factors. CSX will continue to be the dominant operator on the line. CSX will continue
heavy use of this line, but will not have the responsibility for anything that will happen on it for a while. The lease is effectively for ten years. The financial term is that CSX is effectively paying BB a net $1.86 million to take the line out of its inventory and CSXT is guaranteeing a certain minimum of revenue support.

The Applicants defend the lease in their reply comments and what you heard this morning by noting an inherent characteristic of a lease is that ownership is retained, that many short line sales and leases have been approved, that leases with retained trackage rights had been approved, that short duration leases have been approved, and that CSX’s continued service to the Martin Marietta rock facility makes operational sense. That's another aspect of the leasing or just good economic sense, good operation.

What they've done is basically sliced and diced this transaction into separate components so that each appears separately innocuous. But it is the combination of these factors that makes this transaction, as a whole, not a legitimate lease.
Again, they are asking the Board to approve a lease and sanction a transfer of the common carrier obligation, but CSX will continue to serve the largest local shipper. CSX will move 156,000 empties and 7,900 carloads while there are only 11,700 carloads for BB.

If you take out the non-revenue CSX move, CSX will handle more local carloading than BB. The only certain term is ten years. They can take this line out of their inventory and not be responsible for it but get it back in a relatively short period and instead of receiving net income from the lease, they will be paying $1.86 million plus more for the non-revenue movements for CSX.

As to the rationale that BB will better serve local shippers, this looks more like a grant of local trackage rights from CSXT to BB. It's not a lease. The fact that you could have a legitimate transaction, either as a sale or something like a local trackage rights arrangement, doesn't make this transaction a legitimate lease.

The key is that those other sorts of transactions would not have served CSXT's interest.
because it wanted relief from its obligations on this line on taking care of this line while retaining control and heavy use of the line without remaining responsible for it. That's the ultimate point. CSXT, it is their line. It must responsible for the line, but it refuses to do the work that needs to be done. It keeps getting cited by the FRA but it will not and indeed cannot give up this track.

All of the factors cited by BMWE taken together show that this is not a legitimate lease. This transaction has been structured the way it has to relieve CSXT of its responsibilities for the line for a short time while it's retaining all of the benefits in heavy use and control of the line, with the ability to take the line back. We submit the CSXT should not be able to use this fact and this agency to obtain approval of this sham transaction that would allow it to evade its obligations to provide safe and efficient service.

While we have urged you to reject this application. We do agree with VDOT that if it is approved, the Board should impose a condition. But
fundamentally, it's important to look at what this transaction is and how it's structured and why it's structured, and we submit it should not be approved. We have shown that this proposed transaction conflicts with several national rail transportation policies, BB is not fit or qualified to be responsible for these lines, and the lease purportedly is a sham. We respectfully urge the Board to look at the reality of this transaction and reject the CSX attempt to defeat the statute. Thank you very much.