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February 23, 1998

BY HAND DELIVERY

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

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Re: Finance Docket No. 33388 SUS-69
CSX Corporation and CSX Transportation Inc.,
Norfolk Southern Corporation and Norfolk
Southern Railway Company -- Control and Operating
Leases/Agreements -- Conrail Inc.
and Consolidated Rail Corporation

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding, please find the original and twenty-five (25) copies of the Brief of The State of New York (NYS-27). In accordance with the Board's prior order, we have enclosed a Wordperfect 5.1 diskette containing this filing.

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

Sincerely,

Kelvin J. Dowd
An Attorney for
The State of New York

KJD:cef
Enclosures

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NYS-27

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENT -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION	Finance Docket No. 33388
THE STATE OF NEW YORK, BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION -- TRACKAGE RIGHTS OVER LINES OF CONSOLIDATED RAIL CORPORATION AND DECLARATION CONCERNING TRACKAGE RIGHTS RESTRICTIONS ON LINES OF METRO-NORTH COMMUTER RAILROAD COMPANY	Finance Docket No. 33388 (Sub-No. 69)

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BRIEF OF
THE STATE OF NEW YORK

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THE STATE OF NEW YORK BY AND
THROUGH ITS DEPARTMENT OF
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Dated: February 23, 1998

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BRIEF OF
THE STATE OF NEW YORK

Pursuant to the schedule established by the Board in Decision Nos. 12 and 52, the State of New York acting by and through the New York State Department of Transportation (NYSDOT), hereinafter referred to as "New York," hereby submits its brief in support of its Joint Responsive Application in Sub-No. 69,[1] and the relief described in New York's Comments[2] in the primary docket.

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[1] The Joint Responsive Application (NYS-11/NYC-10) was submitted jointly with the New York City Economic Development Corporation ("NYCEDC").

[2] NYS-10.

INTRODUCTION

Since the birth of the railroad industry in the 1830s, the fortunes of New York and those of the railroad industry have been closely intertwined. New York's long tradition of industrial leadership has been enabled in large part by its network of rail carriers, which linked its major metropolitan areas and connected those areas with other national and international commercial centers. When the economic events of the 1970s threatened the very existence of the railroads serving the State, New York stepped up and provided major amounts of funding which insured the continuation of essential intra- and interstate railroad services, until such time as the Federal Government implemented its own solution through legislation leading to the creation of Conrail[3] and Amtrak. Following Conrail's creation, New York invested hundreds of millions of additional taxpayer funds in its railroads. New York's interest in railroad matters is second to none, and comprehensively encompasses freight, passenger, safety and environmental considerations.

As a consequence of its very substantial stake in the transaction proposed by Applicants, New York has participated actively in all phases of the proceedings before the Board. Led by its Governor, George E. Pataki, New York filed Comments, the Joint Responsive Application, a Joint Rebuttal Statement in

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[3] As used herein, "Conrail" refers to Conrail Inc. and Consolidated Rail Corporation. "CSX" refers to CSX Corporation and CSX Transportation, Inc. "NS" refers to Norfolk Southern Corporation and Norfolk Southern Railway Company. Collectively, Conrail, CSX and NS are referred to as "Applicants".

support of that Application (NYS-24/NYC-17), and Comments on the Section of Environmental Analysis' Draft Environmental Impact Statement (NYS-26). In support of its positions before the Board, New York sponsored or co-sponsored the testimonies of fifteen (15) different witnesses, including public officials, representatives of the business communities most affected by Applicants' proposal, and recognized experts in the fields of national railroad policy, and transportation operations and economics.

New York's position on the Applicants' plan for the acquisition and division of Conrail is summarized in the testimony of Governor George E. Pataki. Conrail operates more than 2000 miles of trackage in New York and serves all of New York's major cities. New York's current and future economic health is highly dependent upon adequate and efficient railroad service. Because railroads are so crucial to New York, it has invested enormous sums of its citizens' tax revenues to preserve and promote railroading, primarily through Conrail-related investments. New York's total investment is in excess of one billion dollars, some $600 million of which was made since 1974. See NYS-10, V.S. Utermark at 6-7. New York is an important Conrail partner, and while it holds no Conrail stock or bonds, its capital contributions make it a major Conrail stakeholder. The New York-Conrail nexus is one unprecedented in rail consolidations heretofore considered by the Board.

The proposal by CSX and NS to jointly acquire and divide Conrail has the potential to help the New York economy in certain regions, through improved rail service quality and increased competitive opportunities. See NYS-10, V.S. Pataki at 2. In several critical respects, however, Applicants' plan falls short of meeting key public interest objectives. In its Comments, New York demonstrated that in order for the proposed transaction to conform with the mandates of the public interest, Board intervention was required to:

1. Provide for competitive rail service to shippers and communities east of the Hudson River between Albany and Brooklyn, by approving New York and NYCEDC's Joint Responsive Application for competitive trackage rights over the Hudson Line.

2. Restore competitive rail service to Buffalo and its surrounding environs (the Niagara Frontier) by granting the petition of the Erie Niagara Rail Steering Committee ("ENRSC") for establishment of a Shared Assets Area encompassing the Niagara Frontier, or establishment and expansion of reasonable reciprocal switching terms.

3. Provide for a ten (10) year oversight and reporting condition to monitor the impact of Applicants' transaction on New York's commuter and inter-city passenger service and safety.

4. Expressly hold that the "override" clause of 49 U.S.C. § 11321(a) is inapplicable to the thirteen (13) contracts between New York and Conrail which Applicants have agreed to honor.

5. Grant the specific conditions sought by Metro-North and Southern Tier West concerning their acquisition of and/or reliance upon certain rail facilities allocated to NS.

6. Require that NS and CSX record the Conrail assets which they acquire at their historic book values for ratemaking purposes, so that they cannot assess New York's shippers for the cost of Applicants' purchase.

In their Rebuttal filed on December 15, 1997 (CSX/NS-176), Applicants opposed many of the conditions sought and supported by New York.[4] Applicants' arguments in opposition to New York's Joint Responsive Application were comprehensively addressed and rebutted by the extensive evidence and argument set forth in New York's January 14, 1998 Joint Rebuttal Statement. Herein, after a review of the legal principles, precedents and Congressionally-mandated policy goals that properly must govern the Board's disposition of this unique proceeding, New York will summarize the evidence and arguments that compel the relief outlined above, and demonstrate the lack of merit in Applicants' opposition.

It will be shown that upon a full and fair consideration of the relevant record as assembled in this case, the Board must conclude that if Applicants' plan for the division of Conrail is to be approved, such approval must be conditioned in the specific manner requested by New York.

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[4] As discussed in Part V, infra, Applicants did stipulate their commitment to fully assume all of Conrail's obligations under the thirteen (13) contracts identified in New York's Comments, thereby resolving the merits of this particular issue.

ARGUMENT

I

THE APPLICABLE STANDARDS OF LAW

The law under which the sufficiency of Applicants' proposal must be gauged requires that the transaction be "consistent with the public interest." 49 U.S.C. §11323. This public interest standard is among the broadest and most powerful in the law. As the Supreme Court explained in New York Central v. U.S.:

> ... the term "public interest" ... is not a concept without ascertainable criteria but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities.

187 U.S. 12, 25 (1902).

Not surprisingly, the law is bereft of any meaningful limitations when the guiding standard is the public interest. To be effective, the standard must be sufficiently flexible to evaluate and accommodate myriad transactions and different transportation scenarios and consequences. Thus, as New York explained in its Comments, the requirements of the public interest in this case are distinctly different from those in the recent western rail merger cases before the Board, which involved more straightforward consolidations of erstwhile competing systems.[5] NYS-10, Argument at 6-10. In those cases, the public interest called upon both the applicant carriers and the Board to

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[5] See, e.g., Docket No. 32760, Union Pacific Corp., Et Al. -- Control and Merger -- Southern Pacific Rail Corp., Et Al., Decision served August 12, 1996 ("UP/SP").

structure and condition the transactions principally to lessen anti-competitive impacts of the proposed mergers. In contrast to those applications, however, the proposal concerning Conrail now before the Board invokes very different dimensions of the public interest standard. Here, the Board is presented not only with the responsibility to scrutinize the claimed benefits of Applicants' privately brokered division plan, but also with an opportunity to right past wrongs which led to a railroad monopoly throughout much of New York and elsewhere.

There is unanimity among those connected with the creation of Conrail in 1976 that it was the result of a default choice, which compromised acknowledged public interest requirements. Each of Applicants' principal policy witnesses endorses this view:

> The preferred solution, then, was not a Conrail of the shape and size as we know it today or a rail monopoly in all of New York State except the area immediately around Buffalo, but a system under which there would be competitive access to the New York City area both from the north and west, via Cleveland and Buffalo (and from Syracuse and Utica) and from the south, via Philadelphia, Reading, Harrisburg, and points west and south.

CSX/NS-20, Vol. 1, V.S. Hoppe at 14.

> Thus, on April 1, 1976, "Unified" Conrail was born, essentially by default. The Federal planners concluded that the first goal of a northeastern rail reorganization was restoration of the rail carriers' financial viability. A more competitive rail system would have to wait for another day, if it came at all.

CSX/NS-20, Vol. 1, V.S. McClellan at 6.

The "day" about which witness McClellan speaks has arrived. The primary issue now before the Board, however, is whether the long-

awaited restoration of Northeastern rail competition which the public interest requires is to be left solely for Applicants to determine through their private, commercial bargain.

New York submits that the unequivocal answer must be "no." By putting Conrail in play in a manner that requires the Board's endorsement, Applicants have brought the Conrail franchise within the public interest ambit, subjecting it anew to public examination and Board jurisdiction now governed by principles of law which make competition the lodestar of our national railroad policy.

At one time in history, the transportation laws and policies favored rail consolidations. See Transportation Act of 1920, ch.91, 41 Stat. 481. As a consequence of the pro-consolidation policy of Congress, the Nation witnessed a dramatic reduction in the number of Class I railroads. By 1970, the ranks of Class I railroads operating in the United States had shrunk from a high of 186 in 1920 to 71.[6] By 1973, Congress had grown apprehensive over the greatly increased concentration in the rail industry:

> Mergers have substantially reduced railroad competition in point-to-point markets. Of 57 point-to-point markets with three or more rail carriers in 1955, after the Penn Central and Northern Lines mergers there were only 36 -- a decline of 37 percent.

S. Rep. No. 94-499, at 19 (1975).

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[6] Wilner, Railroad Mergers, Simmons-Boardman (1997) at 70. Not ten (10) years later, the number had been cut by almost half. Id. Today, there are only nine (9) Class I railroads operating in the United States.

In addition to their anti-competitive aspects, many past rail mergers were misguided as a matter of long-range transportation policy and carrier viability. New York strongly opposed the piecemeal evolution of the eastern rail system, which the Interstate Commerce Commission (ICC) aided and abetted. See, e.g., Pennsylvania R. Co. -- Merger -- New York Central R. Co., 327 I.C.C. 475, 482-485 (1966) ("Penn Central"); Norfolk & Western Railway Company and New York, Chicago & St. Louis Railroad Company -- Merger, Etc., 324 I.C.C. 1, 14-17 (1964); Chesapeake & Ohio Ry. Co. -- Control -- Baltimore & Ohio R. Co., 317 I.C.C. 261, 263-66 (1962). Had New York's warnings been heeded at the time, it is entirely possible that a viable, profitable, and competitive northeastern rail system could have been maintained.[7]

In the wake of the eventual failure of its pro-consolidation policies, Congress in 1976 changed the focus of national railroad policy from one favoring mergers to one favoring competition. Under the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31 (1976), it was "declared to be the new policy of the Congress" (emphasis supplied) to "foster competition among all carriers by railroad". Id. at §101(b). The Congressional decision to promote competition was prompted by the widespread collapse of merged railroads in the

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[7] In 1962, then Commissioner Tucker presciently argued that the ICC's handling of the eastern mergers would result in "another Frankenstein's monster far more ruinous than its fictional counterpart." Chesapeake & Ohio Railway Company, 317 I.C.C. at 293 (Commissioner Tucker, dissenting).

1970s, and afforded vindication to interests such as New York which had long been on record that more enlightened mergers designed to enhance competition should have been encouraged by regulatory authorities.

The new Congressional commitment to competition, born out of the Penn Central and other 1970s rail consolidation fiascos, was reinforced and further articulated in the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (1980). There, Congress re-affirmed its conversion to the virtues of rail competition through the enactment of several specific provisions to guide the ICC -- and now the Board -- in interpreting and applying the public interest standard. Specifically, Congress directed the agency:

> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail...;
>
> (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers...;
>
> (5) to ensure effective competition and coordination between rail carriers...; [and]
>
> (12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power....

49 U.S.C. §10101. The Board acknowledged this sea change in our national rail regulatory policy in its own merger guidelines, which highlight the pre-eminence of rail competition in the evaluation of proposed mergers. 49 CFR Part 1180.1(a). Thus, in the present case it is not enough merely to ask whether Applicants have crafted a sound or efficient business deal. To be

approved, their proposal also must be demonstrated to serve the goal of increased and enhanced intramodal rail competition.

As the record in this case demonstrates, the public interest requirements vis-a-vis rail transportation in New York and the Northeast already have been articulated by Congress, the ICC, the U.S. Department of Transportation and the United States Railway Association, among others.[8] These mandates and principles are summarized in the testimony of New York's witness R. L. Banks.[9] In short, they require the reintroduction and restoration of rail competition throughout the Conrail service territory. Applicants' spokesmen acknowledge this public interest requirement, and highlight those areas where it is achieved through their proposal.[10] As the record shows, however, Applicants' plan fails to accomplish this objective in New York. Consistent with the modern mandates of the public interest, particularly as they have been demonstrated to affect New York, any Board approval of Applicants' proposal must be made subject to specific conditions that in essence complete the job that Applicants themselves claim to have undertaken.

The Board's authority to impose conditions on Applicants' proposal, of course, is well-established. Missouri-Kansas-Texas R.R. v. U.S., 632 F.2d 392, 395 (5th Cir. 1980); 49

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[8] See NYS-24/NYC-17 at 8-11.

[9] NYS-10, V.S. Banks at 19-21.

[10] See CSX/NS-20, Vol 1, V.S. McClellan at 13, 22; CSX/NS-176, Vol. 2A, R.V.S. Kalt at 11-12.

C.F.R. Part 1180.1(d)(1). The size and complexity of Applicants' transaction, the nature and history of the region affected, and the proven, adverse effects on other regions caused by recent, large railroad mergers all support the careful consideration and conditioning of Applicants' plan, if approval is to be given by the Board. The uncontroverted evidence and testimony sponsored by New York comprises a compelling record in support of the six (6) conditions of critical importance to the State.

II

APPLICANTS' PROPOSAL MUST BE CONDITIONED UPON THE GRANTING OF NEW YORK'S JOINT RESPONSIVE APPLICATION

A. Consequences of the Conrail Monopoly

Before the collapse of the railroad system in the Northeast in the early 1970s, New York enjoyed a high level of intramodal rail competition in the region situated along the east side of the Hudson River between Albany and Brooklyn. New York's witness R. L. Banks presented extensive and unrebutted testimony demonstrating that prior to the establishment of the Conrail monopoly, nine (9) separate line-haul rail options were open to shippers and receivers in the eleven (11) county region situated along the east bank of the Hudson River. See NYS-10, V.S. Banks at 7. By 1976, however, the entire region had become captive to Conrail. As a consequence of Conrail's monopoly, rail service in the eleven (11) county region served via the Hudson Line atrophied, and New York's economy suffered as a consequence. The

evidence presented by New York and NYCEDC in this case is replete with representative examples:

- Witness Stephen D'Arrigo, a prominent traffic executive, appeared on behalf of the Hunts Point Market, a major shipper and receiver of over 1.5 million tons of produce annually. When Hunts Point commenced commercial operations in 1967, rail traffic predominated, but by 1997 motor carriage had replaced rail service as the dominant mode. Produce receivers diverted their traffic to motor carriers because of Conrail's high rates and poor service. NYS-10, V.S. D'Arrigo at 2.

- Witness Alan Firestone, a lumber executive, testified that like the Hunts Point Market, his company once was a large rail shipper as well. Because of Conrail's poor service and high rates, however, Firestone Plywood Corp. shifted its transportation to motor carriers. NYS-10, V.S. Firestone at 2.

- Because New York is a huge receiver of goods, it is also a huge generator of municipal solid waste (MSW), one of the largest potential sources of rail traffic in the eleven (11) county region. The New York City area lacks facilities adequate to dispose of the region's MSW, so large volumes must be exported each day to distant landfills. However, Conrail has discouraged rail movements of MSW on its Hudson Line through high charges, lack of equipment and indifferent service. See NYS-10, V.S. Christie at 2. The wholesale dependence of east-of-Hudson MSW shipments on motor carriage due to Conrail's unsatisfactory performance has been brought before the Board in previous pro-

ceedings,[11] such that now it can be considered a matter of administrative notice.

The evidence is undisputed that the elimination of rail competition in the shipping regions east of the Hudson River resulting from the creation and perpetuation of the Conrail monopoly has stunted the growth of the region's economy, and worked to the overall detriment of its rail shippers -- past, present and prospective.

B. Applicants' Proposal Will Exacerbate the Problems Faced By East-of-Hudson Shippers

In its Comments and Joint Rebuttal Statement, New York and its witnesses demonstrated that the restoration of competitive rail service east of the Hudson River[12] not only was compelled by Congressional mandates given full voice by USRA through its Preliminary and Final System Plans,[13] but is consistent with the standard employed by Applicants themselves in selecting the areas that they would open to rail competition voluntarily. See NYS-24/NYC-17 at 9-14. New York also explained how the magnitude

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[11] See, e.g., Ex Parte No. 346 (Sub-No. 36), Rail General Exemption Authority -- Exemption of Non-Ferrous Recyclables, Comments of Star Recycling, Inc., November 7, 1994, Verified Statement of Daniel G. Cleary at 2-4.

[12] New York's witness Banks testified without contradiction as to the vigorous rail competition which once existed in the eleven (11) county region east of the Hudson. See NYS-10, V.S. Banks at 7-11.

[13] See Final System Plan, Chap. 1, at 13-36; NYS-10, V.S. Banks at 11-17; NYS-24/NYC-17 at 9-11.

of its own investment in rail infrastructure, coupled with the deliberate nature of Applicants' exclusion of 5.5% of the New York BEA (the east-of Hudson traffic) from competitive benefits being conferred on the rest of that discrete market, clearly distinguished New York's request for relief from other claims rejected by the Board in the western merger cases.[14] See NYS-24/NYC-17 at 18-21.

Those arguments need not be recounted in detail here. It bears emphasis, however, that this is not a case in which Applicants simply are turning a deaf ear to an unsatisfactory status quo, declining to improve the competitive balance in a region they will inherit. Here, as New York's witnesses testified, Applicants' plan to partition the New York BEA into competitive (west-of-Hudson) and captive (east-of-Hudson) sub-markets will have a new, direct and adverse impact on east side shippers. See NYS-10, V.S. Christie at 4; V.S. D'Arrigo at 4; NYS-24/NYC-17, V.S. Klempner at 2-4. The President of Firestone Plywood succinctly summarized the problem:

> If this plan is approved, our New Jersey competitors will gain new access to the services of two rail carriers, while we remain dependent on a single system. The consequences, I believe, are not hard to predict: the availability of competitive rail and well as truck service will increase significantly the source competition enjoyed by our rivals. This, in

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[14] See, e.g., UP/SP at 183, 190; F.D. No. 32549, Burlington Northern Inc., Et Al. -- Control and Merger -- Santa Fe Pacific Corp., Et Al., Decision served August 23, 1995 at 99.

> turn, would lower their delivered product costs and tip the market balance in their favor, at our expense.

NYS-10, V.S. Firestone at 3. As with the other witnesses sponsored by New York, Mr. Firestone's testimony stands unrebutted.

New York has identified a specific, public harm that will result directly from Applicants' plan for the division of Conrail. Conditions to ameliorate that harm not only are consistent with the standards governing rail mergers generally,[15] but are in furtherance of Congressional mandates and policy goals to which Applicants themselves pay homage in their statements.[16] See, e.g., CSX/NS-20, Vol. 1, V.S. Hoppe at 14, 18-19; V.S. McClellan at 2; CSX/NS-176, Vol. 2A, R.V.S. Kalt at 11-12. See also NYS-24/NYC-17 at 7-13.

C. Trackage Rights Over the Hudson Line Is the Proper and Effective Remedy

Through careful analysis of the specific transportation circumstances relevant to competitive rail service in the east-of-Hudson region, and after consultation with NYCEDC, the Metro-

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[15] See 49 C.F.R. Part 1180.1(d).

[16] Ironically, the inability of various governmental institutions committed to the preservation of Northeastern rail competition to accomplish their goals in the 1970s was due directly to actions of Applicants. Initially, it was Applicants who vigorously opposed a coordinated review by the ICC of the eastern railroad system. See Chesapeake & Ohio Railway, 317 I.C.C. at 265. After the collapse of the Northeastern railroads in 1973, again it was Applicants who refused to participate in the formation of a more competitive network, which refusal resulted in the creation of the Conrail monopoly. See NYS-24/NYC-17 at 10-11.

North Commuter Railroad, other freight rail operators, and recognized experts in transportation economics and operations, New York crafted a trackage rights condition specifically tailored to ameliorate the adverse impact of Applicants' proposal. The essence of the condition is as follows:

1. Full service and equal access trackage rights in favor of a rail carrier other than Conrail or CSX, over Conrail's lines between connections with the Canadian Pacific Railway/ Delaware & Hudson Railroad at CP-160 near Schenectady, NY and Selkirk Yard near Selkirk, NY, and CP-75 near Poughkeepsie, NY, together with sufficient rights within the Selkirk Yard to permit the efficient interchange of freight.

2. Full service trackage rights over Conrail's lines between Mott Haven Junction ("MO"), NY and Conrail's connection with the lines of the Long Island Railroad near Fresh Pond ("MONT"), NY,[17] via the Harlem River Yard. See NYS-11/NYC-10 at 5.

Between Poughkeepsie and Mott Haven Junction, the Hudson Line is controlled by Metro-North, with Conrail conducting freight service under trackage rights. Metro-North likewise would have to grant trackage rights to New York and NYCEDC's designated operator in order to permit competitive rail service to be provided over the entire Hudson Line. Metro-North President Donald N. Nelson, testifying in support of the Joint Respon-

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[17] Freight operations over the Long Island Railroad are conducted by the New York & Atlantic Railway.

sive Application, confirmed Metro-North's ability and willingness to enter into such an arrangement.[18] As an addendum to the requested trackage rights, therefore, New York asked for a Board declaration that pursuant to 49 U.S.C. §11321(a), approval of the Joint Responsive Application would allow Metro-North to grant trackage rights to a second carrier notwithstanding any purported restrictions that might be claimed under Conrail's trackage rights agreement with Metro-North.

In the Joint Responsive Application and Joint Rebuttal Statement, New York clearly established the economic and operational feasibility of dual carrier service over the Hudson Line, and in the process effectively rebutted Applicants' challenges to these conclusions.

Witness Andrew Robertson, an expert in rail marketing, testified that a new rail competitor in the relevant region easily would be in a position to generate a minimum of 29,000 empty and loaded cars annually (about one train per day) solely on the basis of diversions of Conrail's current rail traffic. See NYS-11/NYC-10, V.S. Robertson at 11. The real market for a new competitor, however, would be in the diversion of traffic now moving by truck. Numerous witnesses testified that they were prepared to switch from motor carrier service to rail service if high quality, competitive rail service was offered,[19] and witness Robertson conservatively estimated a near-term diversion

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[18] See NYS-11/NYC-10, V.S. Nelson at 8-9.

[19] See, e.g., NYS-10, V.S. D'Arrigo; V.S. Firestone.

potential of 30,000 to 40,000 trailers per year. NYS-24/NYC-17, S.V.S. Robertson at 3. Mr. Robertson's estimates were further buttressed by the testimony of NYSDOT Assistant Commissioner John F. Guinan, who pointed out that the George Washington Bridge alone handles over 30,000 truckloads daily to and from the affected region. Similarly, witness Ronald Klempner, a major shipper of MSW, estimated that an additional 11,000 tons of new rail traffic will become available with the "looming closure" of New York City's major landfill. See NYS-24/NYC-17, R.V.S. Guinan at 7; R.V.S. Klempner at 4. The record is replete with evidence that the Hudson Line region has an excellent potential for new rail business which presently is discouraged by Conrail's high rates, poor equipment, and indifferent service.

That a second rail competitor on the Hudson Line could look forward to attracting a substantial amount of traffic is further confirmed by the fact that several experienced rail operators are interested in supplying rail freight service under the trackage rights sought by New York. One such carrier, the New York & Atlantic Railway, operates on Long Island and would be positioned to extend its service area. The same is true for Canadian Pacific, which conducts rail operations at the north end of the Hudson Line and offers a competitive connection to NS as well as to points within its own system. Each of these lines has offered to perform the service if New York's requested trackage rights are granted. See NYS-24/NYC-17 at 36. Finally, Mr. Greg Petersen, Vice President of the New England Central Railroad

Company, a rail operator in an adjacent region, appeared in this proceeding to specifically warrant that his company would seek to be selected as the operator of the trackage rights if they are awarded. See NYS-24/NYC-17, V.S. Petersen at 2. Applicants' contention that no qualified rail carrier would "step forward" to provide the requested service[20] is simply wrong.

The operational feasibility of New York's east-of-Hudson relief was confirmed by witness Walter Schuchmann, an expert in rail operations who personally conducted a physical inspection of the lines in question. NYS-11/NYC-10, V.S. Schuchmann at 5. Both witness Schuchmann and Mr. John Orrison, CSX's own operations expert, expressed confidence that there was sufficient capacity on the Hudson Line to handle significant, additional traffic and a second operator. See Orrison Depo. Tr. at 51-52.

The excess, available line capacity described by Messrs. Schuchmann and Orrison was confirmed by Metro-North President Nelson. Appearing on behalf of New York, witness Nelson was unequivocal that current freight operations are at "an all-time low" in the region, and that the facilities easily could accommodate a second operator moving an additional six (6) to eight (8) trains daily. NYS-11/NYC-10, V.S. Nelson at 6. While Applicants allege that physical and operational problems militate against the introduction of competitive service over the Hudson

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[20] CSX/NS-176, Vol. 1, Narrative at VIII-17.

Line,[21] they offer no real evidence to support the claim. To the contrary, the evidence of record conclusively demonstrates that New York's proposal is highly feasible and practicable.

As clearly as the record confirms the effectiveness and feasibility of trackage rights as a solution to the east-of-Hudson problem created by Applicants' proposal, it likewise shows the gross inadequacy of the "alternatives" to competitive rail service that Applicants argue make New York's relief unnecessary.

Primarily through their witness Joseph Kalt, Applicants contend that motor carrier service in the form of drayage between shipping points east of the Hudson and the North Jersey Shared Assets Area would provide east-of-Hudson shippers with competitive alternatives to CSX rail service. See CSX/NS-176, Vol. 1, Narrative at VIII-13; Vol. 2A, R.V.S. Kalt at 15-17.[22] However, the record shows that continued or increased use of trucks by New York Metropolitan Area shippers is neither realistic nor an adequate "alternative."

As New York's witness Guinan explained in detail, the principal bridge routes available for motor carriage of freight are seriously and dangerously congested, frequently exhibiting volume/capacity ratios at or near gridlock conditions. NYS-24/NYC-17, R.V.S. Guinan at 7-11. So overtaxed are these routes, that New York spent over $200 million to construct the Oak Point

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[21] CSX/NS-176, Vol. 1, Narrative at VIII-19.

[22] Notably, Dr. Kalt and Applicants' theory at most would apply to only 42% of the traffic units originating or terminating east of the Hudson. See NYS-24/NYC-17 at 23 n.22.

Link -- a facility on the Hudson Line -- to promote the diversion of truck traffic to rail. Separately, as part of a regional Congestion Mitigation and Air Quality Improvement Program, New York regularly subsidizes car float service across New York Harbor, specifically to entice traffic off of the New Jersey-Brooklyn bridge routes. Id. at 5, 11.

Not only is there little or no room on the roads for the drayage vehicles that Applicants claim can act as a substitute for competitive rail service, federal and state environmental mandates are dictating policies intended to remove many of the vehicles that already may be in service. As witness Guinan and Mr. Seth Kaye, Director of the New York City Mayor's Office of Transportation testified, most of the affected downstate counties are classified as "severe non-attainment areas" under the federal Clean Air Act. As such, the State and City are bound by statute to implement policies to reduce -- not increase -- truck traffic. See NYS-24/NYC-17, R.V.S. Guinan at 12-13; R.V.S. Kaye at 3-5. In authorizing construction of the new Oak Point Link, for example, New York determined that the diversion to rail of 500 trucks a day would save 5 million gallons of fuel annually, and result in a dramatic reduction of nitrogen oxide (2 million pounds), carbon monoxide (6 million pounds), and other targeted pollutants. Id., R.V.S. Guinan at 12. Given these facts, the notion that expanded rail competition should be eschewed in favor of increased reliance on truck transportation between New York City and Northern New Jersey is at odds with

common sense, as well as the National Rail Transportation Policy. See 49 U.S.C. §10101(8),(14).[23]

Alternatively, Applicants contend that CSX's monopoly over east-of-Hudson traffic will be tempered by new rail service which allegedly will become available from other rail carriers with whom Applicants have reached settlement agreements in connection with their proposal before the Board. Here too, however, Applicants grossly overstate the case.

As New York explained in its Joint Rebuttal Statement, only the settlement with Canadian Pacific even technically could apply to east-of-Hudson traffic. However, the high cost of access to Canadian Pacific service -- particularly in comparison to the actual cost of operating over the Hudson Line[24] -- coupled with numerous exclusions and restrictions on commodities, shippers, geographic areas, etc.,[25] makes the Canadian Pacific "option" offered by Applicants wholly inferior to true, fully competitive rail service throughout the eleven (11) county region.

Simply stated, the reasons offered by Applicants for keeping east-of-Hudson shippers captive while providing new rail competition to their west side counterparts are unsound, unsup-

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[23] As New York pointed out in its Joint Rebuttal Statement, it also is noteworthy that while drayage plays a central role in Applicants' view of trans-Hudson competition in their Rebuttal, it is wholly absent from Applicants' original assessment and related operating plan. See NYS-24/NYC-17 at 28-29.

[24] Compare NYS-24/NYC-17 at 30, V.S. Crowley at 2.

[25] NYS-24/NYC-17 at 32-33.

ported in the record, and fundamentally contrary to Congress' goals as reflected in the National Rail Transportation Policy and the Conrail Final System Plan. Particularly in the context of this unique case, New York's request for Hudson Line trackage rights fully meets the applicable legal criteria. The New York/NYCEDC Joint Responsive Application therefore should be granted.

III

APPLICANTS' PROPOSAL MUST BE CONDITIONED UPON THE RESTORATION OF RAIL COMPETITION IN THE BUFFALO AREA

Buffalo and the surrounding vicinities comprising Erie and Niagara counties form an important upstate New York and regional commercial center. Once known as a key "gateway to the West," Buffalo enjoyed vigorous intermodal rail competition prior to the emergence of the Conrail monopoly. See NYS-10, V.S. Banks at 7.[26] Since the Conrail monopoly formed and took hold, however, less and less traffic moving to and from the Buffalo switching district can be said to be subject to bona fide rail competition. To be sure, some stations within the region are open to reciprocal switching. The number of such stations has declined in recent years due to Conrail cancellations, however,[27] and

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[26] The area is designated as the Niagara Frontier, in comments filed by ENRSC. See ENRSC-6, Part A at 8.

[27] See ENRSC-6, Part A at 28-29.

those that remain face switching charges so high that they preclude meaningful competition.[28]

Applicants' plan for the division of Conrail contains no real relief for the Niagara Frontier.[29] The record shows, however, that many Buffalo area shippers whose rivals are located within the Shared Assets Areas planned for Detroit and South Jersey/Philadelphia will suffer severe, adverse competitive impacts as a direct result of the subject transaction. See, e.g., ENRSC-6, Part A at 18-22. To remedy this harm, New York joined ENRSC in petitioning the Board for a condition requiring Applicants to restore and preserve the competitive balance by either: (1) establishing a Shared Assets Area for the Niagara Frontier, on a par with those planned for Detroit and South Jersey/Philadelphia; or (2) establishing an open reciprocal switching district encompassing all shippers within the boundaries of the Niagara Frontier, with switching charges set and maintained at competitive levels. See NYS-10, Argument at 20-22; ENRSC-6, Part A at 39-46.

In their Rebuttal, Applicants oppose any pro-competitive relief for Buffalo. In response to ENRSC's stated concerns regarding destruction of the competitive balance between the Niagara Frontier and Detroit, Philadelphia and Southern New

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[28] Id., V.S. Fauth at 27-28.

[29] In general, CSX will replace Conrail as the market's dominant railroad. While NS will have certain trackage rights in the Niagara area, they will not open up any additional competitive options for shippers in the region. See NYS-10, Argument at 20; Mohan Depo. Tr. at 429-30.

Jersey, Applicants rest on the familiar refrain that while new rail competition in Detroit and South Jersey/Philadelphia would be "unambiguously good," Applicants "are not required to provide similar benefits elsewhere...." CSX/NS-176, Vol. 1, Narrative at VIII-25. Similarly, on the issue of reciprocal switching Applicants assert that their public settlement agreement with the National Industrial Transportation League (NITL) preserving existing open stations for five (5) years at a base fee of $250 per car goes far enough:

> These concessions, acceptable to the largest organization of affected shippers, should lay to rest all complaints on the subject.

Id. at XI-8. Applicants are wrong on both counts.

New York demonstrated in its Joint Rebuttal Statement[30] that the unique circumstances of Conrail, its history, and the Congressional policy goals it was intended to promote all gainsay the notion that the private interests of CSX and NS alone can determine the requirements of the public interest in the proper execution of the Board's responsibility under 49 U.S.C. §11323. As the D.C. Circuit ruled in an analogous context:

> [I]f the Commission permitted potential applicants to get together to decide how a market would be divided before submitting their proposals to the Commission,... then private parties rather than the Commission would be determining what means of meeting a market demand is most closely in accord with the public interest. We can-

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[30] NYS-24/NYC-17 at 9-11, 18-19.

> not permit such an abrogation of administrative responsibility.

Northern Natural Gas v. Federal Power Comm'n, 399 F.2d 953, 971 (D.C. Cir. 1968). See also United States v. AT&T Corp., 552 F. Supp. 131, 196 (D.D.C. 1982). For the same reasons why the Board properly should not permit Applicants to first strand, and then directly harm the legitimate competitive interests of east-of-Hudson rail shippers, Applicants' claim of a right to choose to allow competition in Detroit and foreclose it in Buffalo should be rejected.

Applicants' argument that the NITL settlement "should lay to rest all complaints" regarding reciprocal switching is equally unmeritorious. To begin with, the NITL settlement only covers stations presently open to reciprocal switching. For the Niagara Frontier, that amounts to fewer than half of the shippers represented by ENRSC. See ENRSC-6, Part A at 28-29; V.S. Fauth at 29. Even for those stations that are covered, the cap on switching charges -- which starts at $250 per car and adjusts according to changes in the RCAF-U -- is almost $100 higher than the level shown by ENRSC's evidence to be necessary to facilitate true competition. Id., Part A at 46. Whatever may have motivated NITL to enter into its settlement, New York and ENRSC are not parties to it and in no way can be considered bound by its terms, particularly where -- as here -- those terms are shown to be wholly inadequate. All that can be considered "laid to rest" by

the NITL settlement are the specific claims advanced by NITL itself.[31]

New York submits that the relief sought by ENRSC is necessary to remediate competitive harms that otherwise would result from Applicants' Conrail division plan, and urges that it be granted by the Board.

IV

APPLICANTS' PROPOSAL MUST BE CONDITIONED UPON A TEN YEAR PASSENGER OVERSIGHT AND REPORTING REQUIREMENT

New York's Comments recounted in detail the importance of the inter-city and commuter passenger operations which take place on New York's Conrail lines. See NYS-10, Argument at 22-24; V.S. Utermark at 14-19. The State traditionally has supported and enjoyed an extensive network of passenger routes, which are of inestimable importance to its citizens. Id., V.S. Utermark at 7.

In order to sustain and promote adequate and efficient rail passenger service to, from, and within the State, New York has invested hundreds of millions of dollars in assets and facilities directly benefiting railroad passenger operations. Witness Utermark's testimony identified numerous, specific con-

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[31] In evaluating the effectiveness of the NITL settlement to the competitive access problems in Buffalo, the Board should bear in mind its experiences with previous NITL-rail "solutions" to competitive access problems. See Ex Parte No. 445 (Sub-No. 1), Intramodal Rail Competition, 1 I.C.C. 2d 822 (1985); 49 C.F.R. Part 1144.

tracts under which New York expended substantial amounts of taxpayer funds on Conrail facilities which directly benefitted both inter-city and commuter passenger operation. See Id., Exhibit ___ (JAU-3). These operations include commuter trains in the New York City Metropolitan Area operated by state agencies such as Metro North, and inter-city trains operated by Amtrak. The inter-city passenger routes are north-south via the Northeast Corridor, and east-west between Manhattan and Chicago via Albany and Buffalo (the Empire Corridor). The planning and development process for passenger services includes complex investment and safety considerations that have horizons well beyond the three (3) year operating plans presented by Applicants. Not surprisingly, therefore, passenger projects involving millions of dollars in taxpayer funds require long-range planning and long-range implementation.

The Conrail lines in New York integral to current and future passenger operations are directly affected by Applicants' division plan. In proper respect of both the magnitude of New York's passenger investments and the need to insure the continued safe growth of rail passenger service, New York proposed an oversight period of ten (10) years during which the Board would retain jurisdiction to address and remedy the inevitable problems which arise when many, sometimes competing interests are involved in the rendition of a single essential service -- the movement of people. Specifically, New York asked that any approval of the

Primary Application be conditioned upon the following:

(1) The imposition of an oversight condition directly connected with passenger operations in New York State. The provision must remain in force for at least ten (10) years in order for New York to insure that its citizens receive a fair return on their Conrail investments.

(2) An express commitment by Applicants to continue the New York program to achieve high speed passenger service between New York City and Albany (125 MPH) and between Albany and Buffalo (100 MPH).

(3) An express commitment by Applicants to enhance and expand their passenger facilities in conjunction with Amtrak as circumstances require as contemplated by the State when the State invested in Conrail facilities.

See NYS-10, Argument at 23.

To characterize Applicants' response as muted risks overstatement. In their Rebuttal, CSX and NS offer only that they will honor any contractual obligations that Conrail may have with New York, and that they are willing to discuss passenger issues when and as they arise. See CSX/NS-176, Vol. 1, Narrative at XII-64. Regarding oversight, Applicants argue that the three (3) year period stipulated in their settlement agreement with the National Industrial Transportation League (NITL) should be sufficient for all purposes. Id. at XXI-23. Plainly, this is not enough.

The importance of protecting and enhancing viable rail passenger service in the context of control transactions involving freight railroads is well-established. Even as the Board's predecessor was considering approval of the transactions that

ultimately led to the creation of Conrail, the public interest in passenger service assumed a primary position:

> It is not too visionary, we think, to anticipate the development of a rail passenger service system more comprehensive and better utilized than any the world has yet seen. In terms of national need, there is no doubt that such a system will be essential not only to the business and leisure activity of countless Americans, but also to the national defense posture of this country....
>
> The overwhelming need demonstrated on this record is for an imaginative and flexible analysis, and a joint railroad-community planning effort, to meet the real passenger service needs of the present and the future. There is no reason why the Pennsylvania and New York Central railroads, whose merger has been approved by this Commission, should not participate openly and fully in this study and planning.

New York, N.H. & H. R. Co., Discontinuance of All Interstate Passenger Trains, 327 I.C.C. 151, 223, 225 (1966); see also Penn Central, 327 I.C.C. at 524.[32]

In this case, New York is not asking Applicants or the Board to completely subordinate the proposed transaction to New York's policies regarding inter-city and commuter rail passenger growth. New York submits, however, that the law mandates respect

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[32] Ultimately reviewing the ICC's decision, the Supreme Court recognized that even where passenger obligations would pose a burden on more lucrative freight service, the public interest required merging railroads to assume the former as part of the consideration for their realization of the latter. New Haven Inclusion Cases, 399 U.S. 392, 494 (1970).

for those policies, and a Board-enforced commitment that if Applicants' proposal for the division and future operation of Conrail's lines is approved, the future of rail passenger service growth in New York will not be compromised. The merits of the conditions requested by New York is underscored by the fact that here, unlike the pre-Conrail cases cited supra, effectuation of the proposed conditions does not make any immediate financial demands on Applicants. The program that New York seeks to protect is one supported by a multi-hundred million dollar State investment, much of which already has produced incidental benefits for freight service.

The acknowledged mechanism for enforcement of conditions such as those proposed by New York is post-transaction oversight. Applicants casually suggest that the three (3) year period which they negotiated with NITL should be sufficient. See CSX/NS-176, Vol. 1, Narrative at XXI-23. The sole concern of NITL, however, is freight service, and the interests advanced in pursuit of NITL's settlement cannot be presumed remotely relevant to New York's passenger concerns. Moreover, the notion of "one size fits all" oversight has no support in past Board/ICC precedent,[33] and its flaws specifically have been exposed by the recent Union Pacific/Southern Pacific transition service debacle.

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[33] See, e.g., CSX Corporation -- Control -- American Commercial Lines, 2 I.C.C. 2d 490, 555 (1984); Norfolk & Western Railway Co., Et Al., 324 I.C.C. at 28-29.

The merits clear and supporting arguments essentially unrebutted, the passenger service protection conditions requested by New York should be granted.

V

APPLICANTS' PROPOSAL MUST BE CONDITIONED UPON APPLICANTS' AGREEMENT TO ASSUME CONRAIL'S CONTRACT OBLIGATIONS TO NEW YORK

In its evidence, New York identified many of the extraordinary rail investments which it had made, including those made in conjunction with Conrail. See NYS-10, V.S. Utermark at 8-9. In particular, thirteen (13) agreements between New York and Conrail that require continuing performance by Conrail were highlighted by New York's witness. Id., Exhibit ___ (JAU-5); Argument at 24-25. In its Comments, New York noted that nowhere in their Application did CSX or NS expressly commit to honor Conrail's obligations under these contracts, an ambiguous posture which made New York understandably apprehensive over the future status of these agreements in light of the override provisions codified in 49 U.S.C. §11321(a).[34]

In their Rebuttal, Applicants unequivocally affirmed that all of Conrail's outstanding contracts with New York will be assumed by CSX and NS, in accordance with the transaction's

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[34] See, e.g., Norfolk and W. Ry. v. American Train Dispatchers' Ass'n, 499 U.S. 115 (1991) (application approved in 1982; abrogation of collective bargaining agreement effected in 1986); American Train Dispatchers Ass'n v. ICC, 26 F.3d 1157 (D.C. Cir. 1994) (application approved in 1980; abrogation of collective bargaining agreement effected in 1988).

allocation of the rail lines and properties to which the contracts apply. See CSX/NS-176, Vol. 1, Narrative at IX-23-25, XII-64. This stipulation satisfies New York's substantive concerns regarding Applicants' intentions vis-a-vis Conrail's current and future contract obligations. To assure the enforceability of Applicants' commitment once the Board's spotlight no longer shines on the subject transaction, however, New York respectfully requests that the Board (1) memorialize Applicants' stipulation in a formal condition imposed on any eventual approval of the Primary Application; and (2) clarify in its final, written decision that for purposes of the application of 49 U.S.C. §11321(a), it is not necessary to override any of the New York contracts in order to effectuate the subject transaction.

VI

APPLICANTS' PROPOSAL MUST BE CONDITIONED UPON THE RELIEF SOUGHT BY METRO-NORTH AND SOUTHERN TIER WEST

A. Metro-North

In its Comments, New York supported the request by Metro-North for a condition compelling NS to honor and carry forward to closure an agreement in principle made by Conrail to sell its Suffern-Port Jervis line to Metro-North. NYS-10, Argument at 31-32. The condition was justified both on the basis of Applicants' general commitment to assume Conrail's obligations vis-a-vis the lines being acquired, and the recognized public interest in preserving and protecting passenger and commuter rail

service in the context of larger, freight-oriented mergers and consolidations. Id. See also New Haven Inclusion Cases, 399 U.S. at 494-5; Penn Central Transp. Co., Discontinuance of Trains, 338 I.C.C. 380, 476-79 (1970).

In their Rebuttal, Applicants do not even acknowledge Conrail's commitment to sell the Suffern-Port Jervis Line to Metro-North. Rather, they oppose Metro-North's conditions request on the ground that the commuter carrier "has made no showing that the proposed Transaction will have any adverse effect on its commuter operations." CSX/NS-176, Vol. 1, Narrative at XII-21.[35]

By Applicants' own reckoning, the proposed transaction will add four (4) to seven (7) freight trains each day to the subject line over the near term, an increase that NS' operating plan refers to as "significant." CSX/NS-20, Vol. 3B at 277. At the same time, commuter ridership on the line is expected to double over the next four (4) years. See MNCR-2, V.S. Nelson. Clearly, the new freight traffic that will result from the proposed transaction will increase the burden on and risk to commuter service -- an obvious adverse impact.

According to Metro-North, some $104 million in new investment will be required in order to support the projected growth in passenger traffic over the Suffern-Port Jervis line.

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[35] Applicants apparently did resolve an alternate concern raised by Metro-North, that important dispatching arrangements for the line would be transferred to different control at a different location, to the obvious detriment of commuter operations. See CSX/NS-176, Vol. 1, Narrative at XII 21-22.

MNCR-2, V.S. Permut. An additional $88.5 million is needed for freight-related right-of-way improvements. Id. Conrail plainly was not prepared or willing to invest such sums -- hence the agreement to sell the line to Metro-North -- and Applicants have shown no greater interest or commitment.[36] Metro-North is prepared to commit the necessary funds; realistically, however, it cannot be expected to do so if ownership of the line remains with a disinterested freight railroad.

Metro-North's proposed condition -- transfer of ownership at the price negotiated with Conrail, with NS retaining full freight service trackage rights -- will allow Applicants to reap the benefits of the transaction vis-a-vis the Suffern-Port Jervis line, while at the same time facilitating the proper protection and preservation of commuter service that the public interest requires. Cf. Pennsylvania Railroad Co., Discontinuance of Trains, 328 I.C.C. 921, 933-35 (1965). New York respectfully urges that Metro-North's condition be granted.

B. Southern Tier West

Among the Board's responsibilities in evaluating a proposed railroad consolidation or control transaction is to consider the impact on and protect the legitimate interests of smaller communities dependent on rail service. See e.g., UP/SP at 80, 196. Cf. 49 C.F.R. Part 1180.1(h). In this case, the

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[36] In Applicants' Rebuttal, NS states only that the line "has adequate capacity to accommodate projected increases in NS freight traffic." CSX/NS-176, Vol. 1, Narrative at XII-22.

Southern Tier West Regional Planning and Development Board represents smaller communities and their constituents along the so-called Southern Tier Extension between Hornell, NY and Corry, PA. As set forth in its Comments, New York supports the relief requested in this proceeding by Southern Tier West, which is directed toward the preservation of needed rail service that otherwise faces an uncertain future should the subject transaction be approved as presented.[37] See NYS-10, Argument at 32-34.

In opposing the relief sought by Southern Tier West, NS asserts that the group lacks standing to press some of its key claims, as they relate to agreements or commitments between Conrail and New York. See CSX/NS-176, Vol. 1, Narrative at XVII-35. For the record, New York re-confirms its support for and endorsement of the relief requested by Southern Tier West, and urges that it be granted. See NYS-10, Argument at 34. Applicants' standing objection is without merit.

So, too, is the argument that Applicants owe no duty to Southern Tier West because its concerns "address pre-existing circumstances not associated with the Transaction." CSX/NS-176, Vol. 1, Narrative at XVII-35.[38] While the genesis of the issues

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[37] Under Applicants' plan, the Southern Tier Extension would be allocated to NS. Thus far, however, NS has steadfastly declined to offer any assurances as to the future maintenance and operation of the line. See, e.g., CSX/NS-176, Vol. 1, Narrative at XVII-35.

[38] One "pre-existing circumstance" that Applicants do address is Conrail's $2.136 million indebtedness to New York. See NYS-10, Argument at 32. While acknowledging its agreement to assume all Conrail obligations respecting the lines to which the indebtedness relates, NS purports to "reserve[] the right to challenge the amount allegedly owed NYSDOT by Conrail." CSX/NS-

raised by Southern Tier West may predate Applicants' proposal, the threat to the future of rail service along the Southern Tier Extension certainly is exacerbated by Applicants' plans, which include no contemplated role for the line and, in fact, imply strongly that it will be allowed to whither. Moreover, New York notes that Applicants themselves have proposed many remedial measures (such as the creation of Shared Assets Areas) that by their own reckoning are not responsive to problems caused by the transaction. See, e.g., CSX/NS-176, Vol. 2A, R.V.S. Kalt at 9. While New York does not concur with Applicants' position in all such cases (see, e.g., NYS-24/NYC-17 at 18-19), it is disingenuous of them to claim that an issue is justiciable only if they choose to make it so.

The conditions sought by Southern Tier West are reasonable, and responsive to harms threatened or enhanced by the subject transaction. New York urges that they be granted.

VII

THE BOARD MUST ADOPT A CONDITION TO PROTECT NEW YORK SHIPPERS FROM FUTURE RATE INCREASES TO FUND APPLICANTS' ACQUISITION PREMIUM

In its Comments and accompanying evidence, New York underscored its special concern over the manner in which Appli-

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176, Vol. 1, Narrative at XVII-36. Fixing the amount that Conrail owes New York, of course, is not among the Board's responsibilities in this case. NS' "reservation" notwithstanding, however, it is New York's position that both the fact and amount of the debt are clearly established under the relevant agreements, which agreement Applicants have stipulated they will honor.

cants might seek to recover the very significant premium which they paid to acquire Conrail. See NYS-10, Argument at 34-35; V.S. Utermark at 12. Much of this premium represents inflation in Conrail's stock purchase price caused by the hostile takeover battle waged by CSX and NS prior to their decision early last year to pursue a joint acquisition. Having bid up Conrail's sales price, Applicants must now cover their purchase costs.

While Applicants' goals of increasing revenues and decreasing expenses are most estimable,[39] recent history teaches that these objectives are not always attainable. In its application for approval of its acquisition of SP, the Union Pacific System represented and the Board accepted that its merger with SP would result annual savings in excess of $500 million. Yet, most recently, UP reported net operating losses as a direct consequence of its SP merger.[40] Not only did unanticipated consolidation expenses not increase profits, they obliterated UP's current profits. In the not unlikely event that Applicants are unable to reach the lofty goals that their chief executives present to the Board,[41] captive rail shippers are the principal source to which Applicants can turn to generate required revenues. As detailed by New York witnesses Utermark and Banks, New York shippers largely are dependent on Conrail, and will transfer

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[39] See, e.g., CSX/NS-20, Vol. 1 at 73-83; Vol. 2A at 250-56.

[40] See, e.g., "UP Posts Huge Loss," Journal of Commerce, January 23, 1998 at 1A, 10A.

[41] See CSX/NS-20, Vol. 1, V.S. Goode; V.S. Snow.

that dependence to CSX and NS after the transaction.[42] Having already invested hundreds of millions of dollars in Conrail, it would be especially unreasonable if New York's rail customers are forced to fund Applicants' attempted recovery of their Conrail expenditures. Simply put, while New York endorses Applicants' goals to grow their railroads through efficiencies and from revenues now enjoyed by motor carriers, New York's captive shippers should not be made guarantors of last resort.

According to Applicants' evidence, CSX has issued $4.277 billion in new debt (CSX/NS-20, Vol. 1, Exh. 16 at 133) and NS has issued $5.928 billion in new debt (Id., Exh. 17 at 171) to fund their acquisition. The initial annual cost of this new debt will be $683 million. The massive cost of Applicants' voluntary acquisition cannot be placed upon the shoulders of New York shippers in the event that Applicants' rosy projections fail to materialize. See Democratic Central Comm. v. Washington Metro Area Transit Comm'n, 485 F.2d 786, 806-07 (D.C. Cir. 1973). The railroads are well-known advocates and practitioners of differential pricing, and as such, captive rail shippers can expect to bear the brunt of any shortfalls in Applicants' economic aspirations. The Board must take steps to insure that these shippers not be forced to act as guarantors of Applicants' obligations through increased rates. The Board should direct Applicants to record their Conrail acquisition costs in such a way that they

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[42] See NYS-10, V.S. Utermark at 9-12; V.S. Banks at 14-15.

cannot form the basis of or justification for future rate increases on captive traffic.

CONCLUSION

For all of the reasons set forth herein, as well as in New York's Comments (NYS-10), Joint Responsive Application (NYS-11/NYC-10), and Joint Rebuttal Statement (NYS-24/NYC-17), New York submits that if the Board determines to approve the Primary Application, it should only do so upon each of the following conditions:

1. The Joint Responsive Application of New York and NYCEDC should be granted, with the Board retaining jurisdiction to rule upon and resolve potential disputes over implementation.

2. The conditions requested by ENRSC regarding the establishment of a Shared Assets Area or alternative reciprocal switching relief in and around Buffalo, NY should be granted.

3. The Board should prescribe a 10-year oversight and reporting condition as described in Part IV, supra, to monitor Applicants' compliance with other conditions and ensure that their implementation of the subject transaction does not adversely affect current and planned commuter and inter-city passenger rail operations.

4. The Board should formalize Applicants' agreement to assume all of Conrail's obligations under the contracts with New York identified in Exhibit ___ (JAU-5) to the Verified Statement of James Utermark, through a separate approval condi-

tion, and clarify that pursuant to 49 U.S.C. §11321(a), no override or avoidance of any of those contracts is necessary to let Applicants carry out the subject transaction.

5. The separate conditions sought by Metro-North and Southern Tier West and described in Part VI, supra, should be granted.

6. The Board should adopt appropriate conditions to ensure that the acquisition price paid for Conrail by Applicants cannot be used to justify unreasonable rail rate increases to captive New York shippers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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and upon all other parties of record in Finance Docket No. 33388.

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