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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36347

BESSEMER AND LAKE ERIE RAILROAD COMPANY
—ACQUISITION AND OPERATION—
CERTAIN RAIL LINES OF CSX TRANSPORTATION, INC. IN ONONDAGA, OSWEGO, JEFFERSON, SAINT LAWRENCE, AND FRANKLIN COUNTIES, N.Y.

Decision No. 7

Digest:[1] This decision denies reconsideration of a Board decision, served April 6, 2020, in which the Board authorized, subject to conditions, Bessemer and Lake Erie Railroad Company to acquire from CSX Transportation, Inc., and to operate 236.3 miles of rail line in New York.

Decided: February 24, 2021

By decision served on April 6, 2020, the Board authorized, subject to conditions, Bessemer and Lake Erie Railroad Company (B&LE), an indirect wholly owned rail carrier subsidiary of Canadian National Railway Company (CNR), to acquire from CSX Transportation, Inc. (CSXT), and operate 236.3 miles of rail line in New York (the Transaction). Bessemer & Lake Erie R.R.—Acquis. & Operation—Certain Rail Line of CSX Transp., Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence & Franklin Cntys., N.Y. (Decision No. 4), FD 36347 (STB served Apr. 6, 2020) (with Board Member Fuchs dissenting in part). On June 5, 2020, B&LE and CSXT filed separate petitions for reconsideration of Decision No. 4, each seeking removal of a condition imposed by the Board. For the reasons discussed below, the petitions for reconsideration will be denied.

BACKGROUND

On October 11, 2019, B&LE sought the Board's prior review and authorization pursuant to 49 U.S.C. §§ 11323-25 to acquire and operate certain CSXT lines, collectively known as the Massena Lines, from Woodard, N.Y., to the U.S.-Canadian border near Fort Covington, N.Y. (Appl. 1-2.) As explained in B&LE's application, the Transaction would move the current

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

interchange between the CN System[2] and CSXT from Huntingdon, Que., to Woodard, where the ends of each railroad would meet. (Id., Ex. 15 at 5.)[3] However, B&LE stated that, because there are not adequate facilities at Woodard for physically interchanging traffic (nor could such facilities easily be added), B&LE would physically interchange traffic with CSXT at CSXT's Belle Isle Yard (near Solvay, N.Y.) or CSXT's Dewitt Yard (near Syracuse, N.Y.), depending on the type and direction of traffic. (Id. at 22, 25, Ex. 15 at 5.) B&LE stated that CSXT would grant operating rights that would allow B&LE to operate over CSXT's tracks between the Massena Lines and the two CSXT yards solely for the purpose of effectuating interchange with CSXT. (Id. at 25 n.25, Ex. 15 at 5-6.) Indeed, the Purchase and Sale Agreement (PSA) governing the Transaction discusses B&LE's limited operating rights over CSXT's trackage near Syracuse and expressly prohibits B&LE from seeking access to two nearby rail carriers, New York Susquehanna and Western Railway (NYSW) and Finger Lakes Railway Corp. (FGLK). Specifically, section 5.14(b) of the PSA states:

> The Parties agree that [CSXT] will not grant to Buyer, and Buyer will not seek, directly or indirectly, before or after Closing, through the transactions contemplated by this Agreement or other means, access to the New York, Susquehanna and Western Railway ("**NYSW**") or the Finger Lakes Railway Corporation ("**FGLK**") or any successor or assign of NYSW or FGLK. In the event such access is acquired or required to be afforded prior to, or as a condition of Closing, either Party shall have the right to terminate the Transaction pursuant to Section 11.02 hereof. Buyer shall be entitled to the limited use of certain trackage as described in the Operative Documents for the purpose of effectuating interchange, with [CSXT] only, at each of Belle Isle and in Dewitt Yard *provided* that such interchange shall not be used for the purpose of achieving access to NYSW or FGLK. This Section 5.14(b) shall survive Closing.

(Id., Ex. 2 at 32-33.)

In its comments filed on December 9, 2019, FGLK requested conditions to alleviate alleged competitive harms that would impact FGLK traffic moving between Canada and the United States on the St. Lawrence Subdivision, the approximately 179.2-mile main line of the Massena Lines that runs between Woodard and Fort Covington, on the U.S.-Canadian border. FGLK asserted that the provision in the PSA preventing B&LE from seeking direct access to FGLK (without first interchanging with CSXT) would prevent FGLK from competing for

[2] Applicant defines "CN" as CNR's U.S. rail operating subsidiaries, including B&LE, and "CN System" as the rail system operated in Canada by CNR and in the United States by CN. (Appl. iv.)

[3] Additional background can be found in the Board's decision in Bessemer & Lake Erie Railroad—Acquisition & Operation—Certain Rail Lines of CSX Transportation, Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, & Franklin Counties, N.Y., FD 36347, slip op. at 2-3 (STB served Nov. 8, 2019).

Canadian traffic moving over the Massena Lines to and from the Syracuse area, leaving "FGLK at the mercy of CSXT who controls the FGLK's gateway to the CN System despite [CSXT's] minimal participation in such moves." (FGLK Comment 8, Dec. 9, 2019.) Accordingly, FGLK requested that the Board condition its approval on the removal of the PSA restriction on B&LE/CNR accessing or seeking to access FGLK.[4] (Id. at 16.)

On February 7, 2020, the Board sought additional information regarding potential anticompetitive effects raised by FGLK, namely concerns regarding section 5.14(b), which would prevent B&LE from seeking direct access to FGLK even though B&LE would operate less than 600 feet from FGLK's Solvay Yard. Bessemer & Lake Erie R.R.—Acquis. & Operation—Certain Rail Line of CSX Transp., Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence & Franklin Cntys., N.Y., FD 36347, slip op. at 4 (STB served Feb. 7, 2020). The Board required B&LE and CSXT to submit supplemental information addressing the potential anticompetitive effect of section 5.14(b) of the PSA and invited other interested parties to address potential anticompetitive effects on shippers served by FGLK. On February 14, 2020, B&LE, CSXT, and FGLK each filed supplemental information, and on February 21, 2020, B&LE, CSXT, and FGLK each filed a reply to the supplemental information.

In Decision No. 4, the Board authorized, subject to conditions, B&LE's acquisition and operation of CSXT's Massena Lines. In considering the conditions sought by commenting parties, the Board noted its broad authority under 49 U.S.C. § 11324(c) to impose conditions on a transaction subject to § 11324(d), which has typically been used to ameliorate competitive harm that would result from a proposed transaction. Decision No. 4, FD 36347, slip op. at 6 (citing Grainbelt Corp. v. STB, 109 F.3d 794, 798 (D.C. Cir. 1997); Kan. City S.—Control—Kan. City S. Ry., FD 34342, slip op. at 16 (STB served Nov. 29, 2004)).

As relevant here, the Board found that section 5.14(b) of the PSA posed serious competitive concerns in that it restricted B&LE from *ever* seeking access to FGLK and NYSW, whether directly or indirectly, before the Transaction or after, even through means other than the Transaction. Decision No. 4, FD 36347, slip op. at 9. The Board determined that "[t]he inclusion of this broad, prohibitive provision in the Transaction runs contrary to the statutory objectives of providing carriers and their customers access to the Board to resolve competitive issues and puts B&LE (and FGLK and NYSW) at a competitive disadvantage relative to other carriers that also connect to CSXT going forward." Id. To ameliorate this competitive harm, the Board imposed a condition that required B&LE and CSXT to modify or eliminate section 5.14(b) to address the Board's concerns and to submit their proposed changes to

[4] FGLK also requested trackage rights over CSXT to interchange with B&LE and the CN System at the Woodard Yard, or, alternatively, trackage rights for B&LE and the CN System over CSXT to FGLK's interchange point at the Solvay Yard. The Board denied this request for trackage rights. Decision No. 4, FD 36347, slip op. at 7, 8-9.

section 5.14(b) to the Board for review by May 6, 2020 (the section 5.14(b) condition). Id. at 14, Ordering Paragraph 3.[5]

By decisions served on May 8, 2020, and May 20, 2020, the Board granted two joint requests from B&LE and CSXT to extend the deadline for submitting proposed changes to section 5.14(b). As noted in the May 20 decision, B&LE and CSXT stated that they had made "significant progress" on an alternative proposal but needed additional time to reach a potential agreement. See Bessemer & Lake Erie R.R.—Acquis. & Operation—Certain Rail Line of CSX Transp., Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence & Franklin Cntys., N.Y. (Decision No. 6), FD 36347, slip op. at 1 (STB served May 20, 2020). On May 26, 2020, B&LE and CSXT jointly notified the Board that, despite having "held numerous negotiating sessions and exchanged proposals since [Decision No. 4]," the parties were unable to agree to a proposed solution in response to the section 5.14(b) condition.

On June 5, 2020, B&LE filed its petition for reconsideration of Decision No. 4, seeking removal of the section 5.14(b) condition. B&LE asserts that section 5.14(b) does not diminish its ability to serve customers on the Massena Lines or provide service over those lines for overhead traffic. (B&LE Pet. 6-7.) B&LE contends that section 5.14(b) would neither result in a reduction of competition, as the Transaction would enable B&LE to preserve its existing direct gateway with CSXT over the Massena Lines, nor impact current shippers moving traffic to or from FGLK. (Id. at 8-10.) B&LE asserts that, if the Board's condition is not removed, the Transaction will not proceed and its public benefits would be lost. (Id. at 10-13.) B&LE argues that CSXT's and B&LE's inability to propose a response to the Board's condition amounts to changed circumstances that warrant reconsideration. (Id. at 14.) B&LE also argues that in Decision No. 4 the Board did not find that the Transaction, subject to section 5.14(b), would cause a substantial lessening of competition and did not balance the anticipated benefits of the Transaction against the perceived potential future harm of section 5.14(b), as allegedly required under 49 U.S.C. § 11324(d). (Id. at 13-14.) B&LE asserts that the Board would "avoid material error" by doing so now on reconsideration. (Id. at 14.)

CSXT also filed a petition for reconsideration on June 5, 2020, requesting that the Board remove the section 5.14(b) condition. CSXT argues that the Board should have approved the Transaction without the condition, which CSXT posits is "inconsistent with both the law and policy." (CSXT Pet. 3.) CSXT asserts that "[i]t would be material error for the Board to withhold approval" of the Transaction based on "speculative future effects" of section 5.14(b). (Id. at 4.) CSXT argues that the Board did not appear to weigh the anticipated benefits of the

[5] The Board also imposed the employee protective conditions under New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C 60, aff'd New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979), as modified by Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation Inc., 6 I.C.C.2d 799, 814-26 (1990), aff'd sub nom. Railway Labor Executives' Ass'n v. I.C.C., 930 F.2d 511 (6th Cir. 1991). Decision No. 4, FD 36347, slip op. at 13-14.

Transaction against the perceived competitive harm of section 5.14(b). (Id. at 4-5.) CSXT further asserts that the Board wrongly focused on the potential adverse impact on a particular competitor—B&LE, a party that "needs no protection from the Board"—rather than competition, which CSXT asserts is not affected by section 5.14(b). (Id. at 5-6.)

On June 25, 2020, FGLK replied in opposition to the petitions, arguing that the Board should reject the petitions because they do not meet the standards for reconsideration. FGLK asserts that B&LE and CSXT's failure to modify section 5.14(b) is not new evidence or a changed circumstance, as the PSA remains the same as when the Board previously analyzed it. (FGLK Reply 6, June 25, 2020.) FGLK contends that it was within the Board's broad authority to impose conditions to address the anticompetitive effects of the Transaction and that the condition requiring CSXT and B&LE to remove or modify section 5.14(b) reflects the Board's long-standing concerns regarding permanent restrictions on competitive options. (Id. at 7-8.)

Samuel J. Nasca, for and on behalf of SMART-Transportation Division-New York State Legislative Board (SMART/TD-NY) also filed a reply in opposition to the petitions for reconsideration but argues that, should the Board reevaluate the Transaction with section 5.14(b) in place, the Board should revise the employee protection imposed in Decision No. 4, so as to impose the standard New York Dock conditions without the Wilmington Terminal modification. (SMART/TD-NY Reply 5, July 1, 2020.)

The following parties provided letters in support of the petitions for reconsideration: Atlantic Container Line; Hapag-Lloyd (America) LLC; A.P. Moller - Maersk; Evergreen Shipping Agency (America) Corp.; Holt Logistics Corp.; CMA CGM America; Maher Terminals LLC; GCT Global Container Terminals Inc.; MSC Mediterranean Shipping Company (USA) Inc.; North County Chamber of Commerce Plattsburgh; and Mayor William J. Barlow, Jr., Oswego, N.Y.

On November 30, 2020, B&LE and CSXT filed a request for the Board to issue a decision on the petitions for reconsideration of Decision No. 4.

DISCUSSION AND CONCLUSIONS

Statutory Criteria. A party may seek reconsideration of a decision by submitting a timely petition demonstrating material error in the prior decision or identifying new evidence or substantially changed circumstances that would materially affect the case. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009). Moreover, no matter the claimed basis for reconsideration (new evidence, changed circumstances, or material error), the alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected in order for reconsideration to be granted. See Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Canadian

Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Dec. 21, 2018); see also 49 C.F.R. § 1115.3.

Material Error. CSXT asserts that, in assessing the competitive impact of section 5.14(b), "the Board could not, and did not, point to any particular circumstances where Section 5.14(b) would have an identifiable or measurable competitive impact in the future" and that "it would be material error for the Board to withhold approval" of the Transaction based on "speculative future effects." (CSXT Pet. 4.) Similarly, B&LE argues that "the Board did not find that the Transaction, subject to Section 5.14(b), would cause a substantial lessening of competition," and that, "[i]n imposing the [c]ondition, the Board speculated about potential future harm to B&LE from the limitation of Section 5.14(b), but it never addressed whether such a concern was substantial." (B&LE Pet. 6, 13.) CSXT and B&LE also argue that the Board did not weigh the anticipated benefits of the transaction against the perceived competitive harm of section 5.14(b) and that, had the Board done so, it could not have concluded that the anticompetitive effects outweigh the public interest. (B&LE Pet. 14-15, 19; CSXT Pet. 4-5.)

The Board finds no basis for concluding that it materially erred in imposing a condition to address the substantial competitive harm of section 5.14(b).[6] Contrary to B&LE's argument, the Board repeatedly noted that section 5.14(b) could have anticompetitive effects and imposed a limited condition that gave the parties flexibility to decide how to ameliorate those effects.[7] Overall, the Board found that "*apart from* the potential anticompetitive effect" of section 5.14(b), "B&LE's acquisition of the Massena Lines from CSXT, *in itself*, would not likely cause a substantial lessening of competition." Decision No. 4, FD 36347, slip op. at 5 & n.8 (emphasis added).[8]

Further, in assessing the competitive impact of the Transaction, the Board specifically considered the substantial competitive harm of section 5.14(b), finding that the "broad, prohibitive provision . . . runs contrary to the statutory objectives of providing carriers and their customers access to the Board to resolve competitive issues." Id. at 9. The Board found the provision to be analogous to an interchange commitment that required heightened scrutiny, in that it contractually prohibited, in perpetuity, a short line purchaser from exploring new competitive options with FGLK and NYSW. Id. at 9-10. Contrary to B&LE's and CSXT's assertions, the Board did not address merely "speculative" effects of the provision; rather, the Board determined that the provision was anticompetitive, in that it would, upon effectiveness,

[6] Furthermore, contrary to CSXT's suggestion, the Board did not withhold approval of the Transaction, but approved the Transaction subject to conditions. (See CSXT Pet. 3-4.)

[7] Contra Illinois v. ICC, 687 F.2d 1047, 1050-1053 (7th Cir. 1982).

[8] See also Decision No. 4, FD 36347, slip op. at 13 (finding that neither FGLK nor the Port of Oswego Authority had "shown a reduction in competition or any other substantial or likely anticompetitive impact directly related to the Transaction (other than the effects of [section 5.14(b)] discussed above)").

permanently restrict B&LE's ability to ever seek access or interchange with nearby carriers, placing B&LE (and FGLK and NYSW) in a less favorable competitive position and thus impacting regional rail competition. Id. Taken together, the Board's statements and imposition of a condition clearly amounted to a finding that section 5.14 would result in a substantial lessening of competition.

The Board also finds no merit in B&LE's and CSXT's arguments that the Board erred in imposing a condition to protect B&LE, a "sophisticated buyer" capable of evaluating the commercial impacts of the Transaction. (B&LE Pet.7; CSXT Pet. 5-6.) The condition was not designed only to protect B&LE, but rather, was meant to protect the public interest in a competitive rail system. B&LE's agreeing to a provision that the Board has deemed anticompetitive does not remove the Board's authority to address the anticompetitive impacts of a transaction by ensuring a carrier's ability to seek access or interchange with nearby carriers, consistent with the Board's statutory objectives.

In addition, the Board considered the anticompetitive effects of section 5.14(b) in evaluating the public benefits of the Transaction, finding that, "[e]ven if there were potential anticompetitive effects of the acquisition transaction (*other than the contractual provision discussed below*), they would be outweighed by the public benefits of this Transaction." Decision No. 4, FD 36347, slip op. at 5 (emphasis added).[9] Moreover, while the Board recognized the public benefits of the Transaction, it expressed concern that those benefits would be diminished by the potential anticompetitive effect of section 5.14(b). Specifically, the Board found that section 5.14(b) would *permanently* bar B&LE from having the same rights as other carriers to seek access over CSXT (or otherwise access FGLK and NYSW), and that this would "limit regional rail competition in the long run, *reducing the potential public benefits* of the Transaction." Id. at 10 (emphasis added).

The Board has issued numerous decisions over many years imposing conditions under 49 U.S.C. § 11324(c) to mitigate various concerns and protect the public interest broadly. B&LE and CSXT now imply that the Board's broad conditioning authority under § 11324(c) is constrained by both of the approval criteria in § 11324(d)—that is, they argue that the Board may impose a condition to address an issue only if (1) the issue would likely cause anticompetitive effects and (2) those anticompetitive effects would outweigh the public benefits of the

[9] This language in Decision No. 4 is nearly identical to that used in Norfolk Southern Railway—Acquisition & Operation—Certain Rail Lines of the Delaware & Hudson Railway (NS/D&H), FD 35873, slip op. at 21 (STB served May 15, 2015). See also id. at 34-35 (imposing a contingent build-out condition on the approval of a minor transaction, without explicitly weighing the transaction's public benefits against the potential reduction of competition that would be remedied by that condition).

transaction.[10] But the agency has not previously interpreted its statute or precedent in such a narrow manner. And although the agency has frequently imposed conditions to mitigate the kinds of anticompetitive effects identified under § 11324(d)(1), the Board has not indicated or maintained a practice that it is necessary to make a finding, for each competition-related condition imposed, that the anticompetitive effects outweigh the public benefits of the transaction under § 11324(d)(2). See, e.g., NS/D&H, FD 35873, slip op. at 34-35; Can. Nat'l Ry.—Control—EJ&E W. Co., FD 35087, slip op. at 13-14 (STB served Dec. 24, 2008); Can. Nat'l Ry.—Control—Wis. Cent. Transp. Corp., FD 34000, slip op. at 12-14 (STB served Sept. 7, 2001); Kan. City S., FD 34342, slip op. at 16, 18-19; see also Vill. of Barrington, Ill. v. STB, 636 F.3d 650, 662-65 (D.C. Cir. 2011) (recognizing that nothing in the statute requires the Board to construe its conditioning authority under (c) as narrowly as its disapproval authority under (d)).

The Board's prior application of its statutory conditioning authority with respect to competitive issues in many non-major mergers has been reasonable given that the statute does not explicitly speak to the potential constraint(s) of § 11324(d) on the Board's broad authority to impose competition-related conditions under § 11324(c). Subsection (c) unambiguously applies to "transaction[s] under this section," which includes the non-major transactions identified under subsection (d). See Vill. of Barrington, 636 F.3d at 661; Can. Nat'l Ry., FD 35087, slip op. at 31. Subsection (d) discusses only the Board's approval/disapproval criteria, and it is silent with regard to conditioning. Consequently, the precise interaction that Congress intended between subsection (d)'s approval/disapproval standard for non-major transactions and subsection (c)'s general conditioning sentence is unclear under the language of both subsections. What is clear is that there is no language unambiguously restricting the Board's subsection (c) conditioning authority to the criteria for approval/disapproval under subsection (d).[11]

Subsections (c) and (d) can be harmonized through a statutory interpretation by which a Board condition under subsection (c) that ameliorates anticompetitive effects found under subsection (d)(1) can obviate the need for the weighing that could otherwise be required under

[10] Under § 11324(d), the Board "shall approve" a transaction not involving the merger or control of at least two Class I railroads unless it finds that: "(1) as a result of the transaction, there is likely to be a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs."

[11] See Vill. of Barrington, 636 F.3d at 661-65 (concluding that the relationship between subsections (c) and (d) creates ambiguity, including as it pertains to the Board's unquestioned authority to impose competition-related conditions on "minor" mergers).

subsection (d)(2).[12] Thus, when the Board determines that an aspect of a non-major transaction is likely to result in anticompetitive effects of the sort described in subsection (d)(1) (e.g., substantial lessening of competition), it may impose a condition to alleviate or eliminate those anticompetitive effects, and approve the transaction, without also determining whether the anticompetitive effects would outweigh the public interest under subsection (d)(2). Because such conditioning would remove the potential for competitive harm found under subsection (d)(1), there would be no need for a specific (d)(2) weighing of such harm against the public interest, and therefore (d)(2) would not apply in these circumstances. Accordingly, the Board will impose competition-related conditions in non-major transactions only after concluding that, absent such conditions, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade under § 11324(d)(1).[13] As stated above, the Board may impose such conditions without also making a finding under § 11324(d)(2) that those anticompetitive effects would outweigh the overall public interest.

This approach, which is essentially reflected in Decision No. 4 and much of the agency's precedent on this issue, comports with the language of the statute, its legislative history, and the overall policy of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (Staggers Act), and the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. First, subsection (d) is silent regarding the Board's conditioning authority. See Vill. of Barrington, 636 F.3d at 664. It requires that the Board "shall approve" an application "unless" both (d)(1) and (d)(2) hold true, but it does not require that such approval be without conditions or subject only to certain types of conditions. 49 U.S.C. § 11324(d). Under the plain language of the statute, therefore, it is only the Board's authority to *deny* approval that is constrained by both (d)(1) and (d)(2); there is no such constraint on its authority to *approve with conditions*. See Vill. of Barrington, 636 F.3d at 664 (citing Vill. of Palestine v. ICC, 936 F.2d 1335 (D.C. Cir. 1991); Illinois v. ICC, 687 F.2d 1047 (7th Cir. 1982)).

Moreover, while the Staggers Act added subsection (d) with the goal of encouraging and expediting smaller transactions, that act made no relevant changes to the language in subsection (c) that continues to provide that the agency "may impose conditions governing the transaction" and continues to apply to all control transactions under § 11324. See Staggers Rail Act of 1980; H.R. Rep. No. 96–1430, at 120-21 (1980) (reducing the number of approval factors for purposes of reviewing of non-major transactions). And as the court in Village of Barrington stated, "[u]nder subsection (c)'s 'public interest' standard," the agency has long "possessed 'extraordinarily broad' discretion to decide . . . what kind of conditions, if any, to impose."

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[12] The instant decision focuses on competition-related conditions. It is well established that the Board has authority to impose environmental-related conditions in § 11324(d) transactions. Vill. of Barrington, 636 F.3d at 664-65.

[13] The Board recognizes that, in some past decisions, it has not always made an explicit finding of anticompetitive effects under subsection (d)(1) before imposing competition-related conditions. See, e.g., Can. Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081 (STB served Sept. 30, 2008).

636 F.3d at 657 (quoting S. Pac. Transp. Co. v. ICC, 736 F.2d 708, 721 (D.C. Cir. 1984). In contrast to the provisions regarding major transactions, Congress directed the Board to approve non-major transactions where the competitive effects would be unsubstantial and/or unlikely. Thus, making a finding under subsection (d)(1) before imposing competition-related conditions in non-major transactions is consistent with § 11324(d)'s focus on anticompetitive effects and with the Board's well-established policy of focusing its subsection (d) review on discerning and remedying such anticompetitive effects.[14]

In addition, when the Staggers Act streamlined the Board's subsection (d) analysis to focus on likely anticompetitive effects,[15] nothing in that statute or legislative history constrained the Board's ability to remedy such effects in the transactions that it approves. Interpreting the statute to forbid the imposition of competitive conditions where anticompetitive effects would be likely under § 11324(d)(1), but not enough in themselves to outweigh a transaction's public benefits under § 11324(d)(2), would effectively require the Board to approve, without any mitigation, transactions that could cause significant harm to competition. Avoiding such an outcome is important in pursuit of the Board's commitment to fostering competition in accordance with national rail transportation policy. See, e.g., 49 U.S.C. § 10101 (1), (4), & (5).[16] Furthermore, nothing in the statute indicates that Congress intended to prohibit certain types of conditions routinely imposed by the Board that address anticompetitive harms not necessarily susceptible to precise "weighing" under (d)(2), yet important to remedy in order to protect competition.[17]

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[14] See, e.g., Norfolk S. Ry.—Joint Control & Operation/Pooling Agreements—Pan Am S. LLC, FD 35147, slip op. at 4 (STB served Mar. 10, 2009); Can. Nat'l Ry., FD 35087, slip op. at 31; Consol. Rail Corp.—Acquis. & Operation—Nicholas, Fayette, & Greenbrier R.R., FD 32845, slip op. at 5 (STB served June 20, 1996).

[15] See, e.g., Commuter Rail Div. of Reg'l Transp. Auth. v. STB, 608 F.3d 24, 32 (D.C. Cir. 2010) ("Subsection (d)'s primary focus is indeed to preserve competition after a merger or acquisition"); see also Consol. Rail Corp.—Acquis. & Operation—Nicholas, Fayette, & Greenbrier R.R., FD 32845, slip op. at 5 (STB served June 20, 1996); Norfolk S. Ry.—Joint Control & Operation/Pooling Agreements—Pan Am S. LLC, FD 35147, slip op. at 7-9 (STB served Mar. 10, 2009).

[16] These policies were carried forward in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

[17] Further, nothing in the statute indicates that Congress intended to constrain the Board's ability to impose conditions to protect the integrity of its processes, such as by requiring parties to adhere to their representations. Cf. Jefferson Terminal R.R.—Acquis. & Operation Exemption—Crown Enters., Inc., FD 33950, slip op. at 5 (STB served Mar. 19, 2001) (agency has inherent authority to protect its statutory processes from abuse) (citing ICC v. Am. Trucking Ass'ns, 467 U.S. 354, 364-65 (1984)).

Therefore, consistent with the approach and statutory interpretation explained above, the Board here conditioned its approval of the Transaction on the parties modifying or eliminating section 5.14(b). Decision No. 4, FD 36347, slip op. at 5, 9-10. The Board ultimately concluded, as in past cases, that the Transaction, *as conditioned*, would not likely cause a substantial lessening of competition and would create significant public benefits. Id. at 5 & n.8. Accord Can. Nat'l Ry., FD 35087, slip op. at 2, 14; Kan. City S., FD 34342, slip op. at 11, 16; Can. Nat'l Ry.—Control—Duluth, Missabe & Iron Range Ry., FD 34424, slip op. at 14 (STB served Apr. 9, 2004).

For these reasons, the Board finds no material error in its decision to impose a flexible, narrowly tailored condition that required the parties to address the substantial anticompetitive impacts of section 5.14(b).

New Evidence & Changed Circumstance. B&LE and CSXT argue that their inability to agree to a proposed response to the Board's condition constitutes changed circumstances that warrant reconsideration. B&LE asserts that these facts also amount to new evidence warranting reconsideration. B&LE and CSXT suggest that the Board may not have been able to fully analyze the potential future impact of the Transaction until the results of the parties' negotiations became known. (B&LE Pet. 14; CSXT Pet. 4.) B&LE and CSXT state that, in light of the parties' inability to propose a response to the condition, the Board may now fully analyze the anticipated impact of the Transaction and weigh it against the benefits of the Transaction. (B&LE Pet. 14; CSXT Pet. 4.)

The Board finds no new evidence or changed circumstances. As discussed above, the Board carefully considered the benefits of the Transaction and the anticompetitive concerns raised by the Transaction as proposed, including section 5.14(b). That provision today remains unmodified and poses the same anticompetitive concerns the Board previously considered. B&LE claims that, should the Board decline to remove the condition from its approval, the Transaction will not proceed, and the public benefits of the Transaction will be lost. (B&LE Pet. 10-13.) It is, of course, true that if the section 5.14(b) condition remains in place and the parties do not comply with it, the Transaction may not proceed, but that is a choice that the parties are free to make.[18] But the parties' voluntary choice not to comply with the section 5.14(b) condition is fundamentally not a "changed circumstance," and does not, by itself, constitute a basis for the Board to revisit its judgment or remove the condition, although the parties' failure to reach an agreement would seem to confirm the Board's concerns about

[18] In any event, should the parties ultimately decide not to proceed with this Transaction, it should not cause any disruption to the new joint-line CN-CSXT service between New York/New Jersey/Philadelphia and Canada, which several shippers addressed in letters to the Board. As CNR/B&LE's proposed operating plan states, "This new interline service, which is separate from and independent of the Massena Lines acquisition, is effective early October, and offered regardless of whether the Transaction is consummated." (Appl., Ex. 15, Operating Plan-Minor at 4-5.)

section 5.14(b)'s effects on competition. To consider the parties' decision not to comply with the condition imposed by the Board a "changed circumstance" would be preposterous and would invite parties to seek reconsideration of every Board decision imposing a condition with which they disagree, essentially creating an untenable "bootstrap" basis for reconsiderations.

The Board's condition was limited to removing the perpetual, total, and extra-Transactional aspects of the ban and offered the parties the option to modify section 5.14(b) as they saw fit. The parties make no attempt to explain why section 5.14(b), as written, is so critical to the operational or competitive benefits of the Transaction, nor how the Board's tailored condition would erode those proposed benefits. As such, the Board finds no basis for reconsidering Decision No. 4 based on new evidence or changed circumstances.

Conclusion. After carefully considering the potential anticompetitive effects of the Transaction and the public benefits of the Transaction, the Board properly authorized the Transaction, conditioned on B&LE and CSXT removing or modifying section 5.14(b). Neither B&LE nor CSXT has presented evidence showing that the Board materially erred in imposing a condition designed to alleviate or eliminate the competitive harm of section 5.14(b) or that reconsideration is warranted due to new evidence or changed circumstances.[19]

For these reasons, B&LE's and CSXT's petitions for reconsideration will be denied.[20]

It is ordered:

1. B&LE's petition for reconsideration is denied.

2. CSXT's petition for reconsideration is denied.

3. SMART/TD-NY's request to revise the employee protection in Decision No. 4 is denied as moot.

4. This decision will be effective on its date of service.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz. Board Member Begeman concurred with a separate expression. Board Members Fuchs and Schultz dissented with a separate expression.

[19] Should B&LE and CSXT agree to a proposed change to section 5.14(b), they may submit their proposal in the near term to the Board for review, notwithstanding the deadline in ordering paragraph 1 of Decision No. 6.

[20] Because the Board is denying the petitions for reconsideration, SMART/TD-NY's request to revise the employee protection imposed in Decision No. 4 will be denied as moot.

BOARD MEMBER BEGEMAN, concurring:

I concur in the result, specifically to uphold Decision No. 4, which approved the transaction subject to conditions that I believe help to serve and protect the public interest. It is up to the parties to determine whether to proceed with the transaction, as conditioned. If they ultimately conclude they do not wish to proceed, such action, in my view, will only further confirm the Board's concerns and the significance of section 5.14(b), which would prevent B&LE from ever seeking future Board consideration to allow B&LE direct access to two specific short line railroads.

BOARD MEMBER FUCHS, dissenting:

I agree with the findings in today's decision (Reconsideration Decision) that petitioners[1] do not demonstrate "new evidence" or "substantially changed circumstances" justifying reconsideration of Decision No. 4, but I dissent from the majority's conclusion that Decision No. 4 does not commit "material error." Recons. Decision 6. The Reconsideration Decision states that Decision No. 4 correctly found section 5.14(b) of the Transaction's Purchase and Sale Agreement likely results in a substantial lessening of competition. As such, the majority affirms Decision No. 4's imposition of a condition requiring modification or elimination of section 5.14(b) (Condition). However, Decision No. 4 commits material error because it ignores and obscures the significant, pre-existing geographic separation between the CN System and FGLK, even though the carriers' geographic positioning is essential for identifying the baseline level of competition in the relevant market. As a result of this error, Decision No. 4 has an inadequate basis for assessing the likelihood or magnitude of section 5.14(b)'s purported harm to competition. Instead of properly accounting for pre-existing circumstances, Decision No. 4 essentially assumes the post-Transaction geography and then relies on wholly speculative claims about ill-defined scenarios in the distant future. As such, the Condition is best understood not as a remedy to address harm caused by the Transaction but as a mechanism to advance an idealized vision of the rail network. For these reasons, detailed below, I would remove the Condition. The majority's erroneous attempt to perfect the Transaction has delayed and jeopardized meaningful network improvements and may well discourage similar improvements in the future.

[1] By decision served on April 6, 2020, the Board authorized, subject to conditions, Bessemer and Lake Erie Railroad Company (B&LE), an indirect wholly owned rail carrier subsidiary of Canadian National Railway Company (CNR), to acquire from CSX Transportation, Inc. (CSXT), and operate 236.3 miles of rail line in New York (Transaction). Bessemer & Lake Erie R.R.—Acquis. & Operation—Certain Rail Line of CSX Transp., Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence & Franklin Cntys., N.Y. (Decision No. 4), FD 36347 (STB served Apr. 6, 2020) (with Board Member Fuchs dissenting in part). On June 5, 2020, B&LE and CSXT filed separate petitions for reconsideration of Decision No. 4, each seeking removal of a condition imposed by the Board. The 2020 application defines "CN" as CNR's U.S. rail operating subsidiaries, including B&LE, and "CN System" as the rail system operated in Canada by CNR and in the United States by CN. (Appl. iv.) This expression refers to B&LE and CSXT as petitioners.

Standards

Reconsideration Standard. As the Reconsideration Decision accurately explains, the Board may reconsider a proceeding because of material error, new evidence, or substantially changed circumstances. Recons. Decision 5 (citing 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3). In order to grant reconsideration, the alleged grounds must be sufficient to lead the Board to materially alter its prior decision. See Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Can. Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub No. 8), slip op. at 4 (STB served Dec. 21, 2018). The petitioners allege each of these three grounds, and each will be evaluated in the Reconsideration section below.

Conditioning Standard.[2] Before turning to the merits of petitioners' claims that Decision No. 4 commits material error in finding section 5.14(b) causes competitive harm warranting the Condition, (CSXT Pet. 3-4; B&LE Pet. 13-14), the Board must correctly identify the applicable conditioning standard. Petitioners' arguments imply that, as applicable here, the Board's conditioning authority, § 11324(c), is constrained by *both* criteria in the Board's approval authority for non-major transactions, § 11324(d). In response to petitioners' claims, the Reconsideration Decision states that the agency has not always applied a consistent conditioning standard to address competition-related issues in non-major transactions. Recons. Decision 8 n.13. In clarifying the matter, the Reconsideration Decision asserts that petitioners' view on the relevant standard is mistaken[3] because *only* § 11324(d)(1)—the first of two criteria in that approval authority—constrains the Board's § 11324(c) conditioning authority when the Board addresses a competition-related issue in a non-major transaction. With respect for my colleagues' efforts to clarify the applicable conditioning standard, I disagree with the approach

[2] Today's decision discusses the Board's subsection (c) conditioning authority and constraints on that authority. The conditioning standard, as used in this expression, refers to the criteria that must be met for the Board to impose a condition.

[3] Even if petitioners are mistaken, Decision No. 4 could be clearer on this matter. In Decision No. 4's discussion of the Board's conditioning authority, the decision does not explicitly state that the Board's authority is at all constrained by subsection (d). See Decision No. 4, FD 36347, slip op. at 6 (citing only § 11324(c) for the Board's conditioning authority). Nevertheless, Decision No. 4 twice supports its denial of the trackage rights conditions sought by Finger Lakes Railway Corp. (FGLK) and the Port of Oswego Authority by stating it finds no "likely" or "substantial" competitive harm, reasoning which suggests the decision views its conditioning authority constrained at least by subsection (d)(1). Id. at 8-9, 12-13. In its specific justification for the Condition, Decision No. 4 claims that section 5.14(b) reduces the Transaction's "public benefits," which is the term the decision uses for discussing the criteria in subsection (d)(2). Compare Decision No. 4, FD 36347, slip op. at 5 with Decision No. 4, FD 36347, slip op. at 10. In my previous expression, I implied, but did not explicitly state, a constraint on the Board's conditioning authority. My expression focused on Decision No. 4's issue with pre-existing disadvantages—which affects whether the Board could find any competitive harm—and discussed the likelihood and magnitude of any purported harm (subsection (d)(1)) and the weighing of the Transaction's public benefits (subsection (d)(2)). Decision No. 4, FD 36347, slip op. at 15-18 (Board Member Fuchs dissenting in part).

detailed in today's decision. Petitioners advance an eminently reasonable[4] and superior interpretation of the statute.

As relevant here, an approach in which both criteria in subsection (d) constrain the Board's conditioning authority better advances the subsection's purpose and harmonizes the provisions of § 11324 without disregarding statutory text or applying inconsistent reasoning. To be sure, I share my colleagues' view that the Staggers Act,[5] in adding § 11324(d), sought to expedite and encourage non-major transactions. Recons. Decision 9. And, like my colleagues, I value the importance of protecting against transactions that likely result in a substantial lessening of competition, creation of a monopoly, or restraint of trade. § 11324(d)(1). However, petitioners' interpretation is superior because subsection (d)'s approval authority has *two requirements*, and their interpretation constraining the Board's conditioning authority with subsection (d)'s approval authority criteria appropriately uses the criteria in both of those requirements. The Board should not impose a competition-related condition when, as a result of a non-major transaction, the public interest in meeting significant transportation needs is not outweighed by anticompetitive effects. § 11324(d)(2). In practice, this distinction may be modest because the Board might assign hefty weight to the anticompetitive effects described in subsection (d)(1), which in turn would set a high bar for the Board to decline imposition of a condition based on the criteria in subsection (d)(2). Nonetheless, it is the responsibility of the Board to articulate and apply a conditioning standard, grounded in consistent reasoning, that effectuates the statute's text and advances its purpose.

Because the Reconsideration Decision's clarification endeavors both to respond to petitioners and to define the Board's approach to competition-related conditions going forward, I provide a detailed exploration of the decision's underlying reasoning before explaining why I depart from that reasoning. First, I identify the issues in § 11324 underlying the disagreement, and I explain that precedent both provides the relevant approval authority in this case and guides the Board to use approval authority criteria to constrain its conditioning authority. Then, I analyze the reasoning for the use of some criteria in subsection (d)'s approval authority, rather than criteria in subsection (c)'s approval authority, to constrain the Board's conditioning authority. Next, I explain that this reasoning better supports use of the criteria in both subsections (d)(1) and (d)(2). Finally, I describe the reasons a conditioning standard based on the criteria in both subsections (d)(1) and (d)(2) advances the statute's purpose and harmonizes the provisions of § 11324. Notwithstanding this discussion, my view that Decision No. 4 committed material error warranting removal of the Condition does not turn on whether the Board uses a conditioning standard based on the criteria in subsection (d)(1) or in both subsections (d)(1) and (d)(2). However, I intend this discussion to suggest a better way for the Board to approach not only this case but similar cases in the future.

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[4] In a case involving environmental conditions in a non-major transaction, the D.C. Circuit indicated that a statutory interpretation that constrains the Board's conditioning authority based on subsection (d) is "eminently reasonable." See Vill. of Barrington, Ill. v. STB, 636 F.3d 650, 662, 664-65 (D.C. Cir. 2011) (noting that the agency may interpret its conditioning authority that narrowly so long as it can reasonably defend that decision).

[5] Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (Staggers Act).

Statutory Issues and Pertinent Precedent. To explore the underlying reasoning detailed in the Reconsideration Decision, it is necessary to start with the relevant text in § 11324:

> (b) In a proceeding under this section which involves the merger or control of at least two Class I railroads, as defined by the Board, the Board shall consider at least—[five factors listed in the statute].
>
> (c) The Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Board may impose conditions governing the transaction, including the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities. . . .
> (d) In a proceeding under this section which does not involve the merger or control of at least two Class I railroads . . . the Board shall approve such an application unless it finds that—
>
> > (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and
> >
> > (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

Important to this discussion, § 11324 presents two issues that give rise to conflicting interpretations of the Board's approval and conditioning authorities and the interplay between those authorities. First, § 11324 includes two different, seemingly overlapping approval authorities. The approval authority found in subsection (d) applies only to non-major transactions, but the approval authority found in the first sentence of subsection (c) is not explicitly limited to a type of transaction (e.g., major transactions).[6] Second, the conditioning authority, found in the second sentence of subsection (c), allows the Board to impose a competition-related condition, but that sentence does not explicitly refer to a constraint on that conditioning authority.[7] Subsection (d) neither references subsection (c) nor contains its own explicit conditioning authority. These issues are intertwined.

On the first issue, the different, seemingly overlapping approval authorities might raise a question as to which approval authority properly applies to non-major transactions like this case, but courts have resolved this matter. In Illinois v. ICC, a case also involving a non-major

[6] By decision served November 8, 2019, the Board preliminarily determined that the transaction at issue here is a minor transaction. Bessemer & Lake Erie R.R.—Acquis. & Operation—Certain Rail Line of CSX Transp., Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence & Franklin Cntys., N.Y., FD 36347, slip op. at 1 (STB served Nov. 8, 2019). A minor transaction is one type of non-major transaction; a major transaction is a control or merger involving two or more class I railroads. See 49 C.F.R. § 1180.2.

[7] In addition, the Board is subject to, among other statutes, the specific labor-related conditioning requirements found in 49 U.S.C. § 11326. The employee protective conditions imposed in Decision No. 4 are not subject to the petitions for reconsideration.

transaction, the Seventh Circuit explained that subsection (d) is more specific and more recently-enacted than subsection (c) and that "a careful reading of . . . [§ 11324] in its entirety discloses that the broad public interest standard of [subsection c] applies only to consolidations of two or more Class I railroads whereas the more limited criteria of [subsection d] apply to all other rail consolidations." Illinois v. ICC, 687 F.2d 1047, 1053 (7th Cir. 1982). The court also explained that, in enacting subsection (d) as part of the Staggers Act, Congress simultaneously enacted shorter limits on the time the agency may consider transactions subject to the subsection. Id. at 1054 n.14. The court held that if the agency "finds no substantial anticompetitive effect flowing from the proposed [non-major] transaction, its analysis is at an end. At that point, [the agency] must approve the transaction . . . ." Id. at 1053.[8] In Village of Palestine, the D.C. Circuit embraced this holding. Vill. of Palestine v. ICC, 936 F.2d 1335, 1339 (D.C. Cir. 1991) (citing Illinois v. ICC, 687 F.2d at 1053). Later, in Village of Barrington, the D.C. Circuit described subsection (d) as further constraining subsection (c), a view that the court stated was consistent with the holdings in Village of Palestine and Illinois v. ICC. See Vill. of Barrington, 636 F.3d at 661. As such, Board applies subsection (d) in deciding whether to approve a non-major transaction. Decision No. 4, FD 36347, slip op. at 4 (stating the Transaction "is governed" by subsection (d)).[9]

On the second issue, though the lack of an explicit constraint on the Board's conditioning authority in subsection (c) might raise a question as to whether that authority is constrained at all, courts have looked to the agency's approval authority to constrain its conditioning authority. In Lamoille Valley Railroad, a case involving a major transaction, the D.C. Circuit observed that

[8] The Seventh Circuit also generally agreed with the agency's view that Congress legislatively determined non-major transactions that did not have "substantial anticompetitive effects are consistent with the public interest and should be approved." Illinois v. ICC, 687 F.2d at 1055. The court stated that this interpretation is consistent with the "Congressional findings made in connection with the Staggers Act that 'many of the government regulations affecting railroads have become unnecessary and inefficient' and that '(m)odernization of economic regulation for railroads, with greater reliance on the market place, is essential to achieve maximum utilization of railroads, to save energy and to combat inflation.'" Id. at 1055 (citing H.R. Rep. No. 96-1430, at 7, 9 (1980) (Conf. Rep.)). The court also noted legislative history connecting the Staggers Act's expedited timelines with the need for the agency to reduce factors it considers in ruling on transactions and differentiating the tests under subsections (c) and (d). Id. at 1054-55 nn.12-14.

[9] Though the Reconsideration Decision states that subsection (c) "unambiguously applies to 'transaction[s] under this section,' which includes the non-major transactions identified under subsection (d)," Decision No. 4 applies subsection (d) and makes no reference to subsection (c) when describing the statutory criteria relevant to approval. Decision No. 4, FD 36347, slip op. at 4; see also Reconsideration Decision 7-8 (citing Vill. of Barrington, 636 F.3d at 661). The only places that Decision No. 4 uses the term "public interest" are in citing, or referring to, subsection (d)(2), not subsection (c). Decision No. 4, FD 36347, slip op. at 3, 4. Given the interplay described above, it is understandable that Decision No. 4 would not address a broader standard that is not directly relevant to whether the Board would approve the Transaction.

context[10] and statutory history establish a link between the *conditioning authority* in the second sentence of subsection (c) and the "consistent with the public interest" standard in the *approval authority* in the subsection's preceding sentence. See Lamoille Valley R.R. v. ICC, 711 F.2d 295, 301 n.3 (D.C. Cir. 1983). In particular, the court noted that, prior to 1978, the agency's approval and conditioning authorities were joined in the same sentence.

> Prior to 1978, the Act directed the ICC to approve a merger if the Commission "finds that, subject to such terms and conditions and such modifications as it shall find to be *just and reasonable*, the proposed transaction is . . . consistent with the public interest." The Interstate Commerce Act was recodified to its current form in 1978 "without substantive change." The revisers deleted the words "just and reasonable" as redundant "in view of the words 'the transaction is consistent with the public interest.'"

Id. (internal citations omitted).

Though the court in Lamoille Valley Railroad presented an unequivocal view that the agency has a public interest conditioning standard in major transactions, the court in Village of Barrington found the statute ambiguous as to the applicable conditioning standard in non-major transactions. In Village of Barrington, a case involving environmental conditions in a non-major transaction, the court stated that subsection (d) indeed narrowed the Board's *approval authority* for non-major transactions, but "because subsection (d) says nothing about *conditioning authority*, the Board's subsection (c) conditioning authority need not also be so narrow."[11] Vill. of Barrington, 636 F.3d at 664 (emphasis added). As such, the court held it permissible for the Board—in imposing the environmental conditions in the underlying proceeding—to constrain its conditioning authority by using the public interest standard from the Board's approval authority in subsection (c), even though subsection (d) is the relevant approval authority in a non-major transaction. Id. at 661-64. However, unlike the environmental conditions in Village of Barrington, the Condition here involves competition-related issues.

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[10] In addition to the statutory history, context indicates linkage between the approval of "a transaction" in the first sentence of subsection (c) and the conditioning of "the transaction" in the next sentence. § 11324(c). In considering a case involving a major transaction, the court in Lamoille Valley Railroad suggested this linkage further supports use of the approval authority in subsection (c), relevant to major transactions, to constrain the Board's conditioning authority. Lamoille Valley R.R., 711 F.2d at 301 n.3.

[11] It must be noted that, in Village of Barrington, the D.C. Circuit pointed out that the Staggers Act left subsection (c) unchanged, even though the law explicitly limited subsection (b) to apply only to major transactions. Vill. of Barrington, 636 F.3d at 661. In Illinois v. ICC, the Seventh Circuit explained that subsections (b) and (c) should be read together because subsection (c) contains the approval authority that is missing from subsection (b) and subsection (c) tracks the factors enunciated in subsection (b). Illinois v. ICC, 687 F.2d at 1053-54, n.12. The court stated that to read subsection (c) into subsection (d) would "contradict the plain language" of subsection (d). Id. at 1054.

Analysis of the Reconsideration Decision's Reasoning. The Reconsideration Decision's definitive statements in this proceeding suggest that it finds the distinction between competition-related and environmental issues makes all the difference for the Board's conditioning authority in a non-major transaction. The Reconsideration Decision asserts that the Board will impose "*competition-related* conditions in non-major transactions *only* after concluding that, absent such conditions, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade under § 11324(d)(1)." Recons. Decision 8 (emphasis added). By stating that the approval authority criteria in subsection (d)(1) is the Board's applicable conditioning standard (i.e., requiring a likely substantial lessening of competition, creation of a monopoly, or restraint of trade), the Reconsideration Decision implicitly rejects the notion that subsection (c)'s public interest standard is the applicable conditioning standard. According to the Reconsideration Decision, this approach harmonizes subsections (c) and (d), and comports with the language of the statute, its legislative history, and the overall policy of the Staggers Act and the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. Recons. Decision 8. Though the Reconsideration Decision argues in detail why the Board's conditioning authority is not also constrained by the criteria in subsection (d)(2), it spends less time explaining why its conditioning authority is not simply constrained by subsection (c)'s public interest standard as the court allowed in Village of Barrington. However, a more detailed exploration of the Reconsideration Decision's rejection of subsection (c)'s public interest standard for competition-related conditions illuminates the underlying reasoning for a conditioning standard based on approval authority criteria in subsection (d).

Compared to subsection (c)'s public interest standard, a subsection (d)(1) standard for competition-related conditions runs counter to the Reconsideration Decision's statements on the rail transportation policy (RTP) of 49 U.S.C. § 10101. In particular, the Reconsideration Decision supports a subsection (d)(1) approach to competition-related conditioning by emphasizing "the Board's commitment to fostering competition" in accordance with the RTP. Recons. Decision 9 (citing § 10101 (1), (4), (5)). However, constraining the Board's conditioning authority with the criteria in subsection (d)(1), rather than a public interest standard based on the first sentence of subsection (c), in fact makes it more difficult to foster competition because subsection (d)(1) requires the Board to make findings on whether the competitive harm described in that subsection is "likely" and, as applicable, "substantial."[12] By contrast, under

[12] In the context of rail mergers in which the agency applies subsection (c)'s public interest standard, the agency has long acknowledged that pertinent to its examination are policies embodied in the antitrust laws, particularly section 7 of the Clayton Act. And, while the agency is not an antirust court, "antitrust factors have a special place in [the agency's] analysis." Burlington N. Inc.—Control & Merger—St. L., 360 I.C.C. 784, 931-33 (1980); see also U. Pac. Corp.—Control—Mo. Pac. Corp., 366 I.C.C. 462 503 (1982) (section 7 of the Clayton Act provides substantial guidance in our assessment of the competitive impact of rail consolidations). In the context of transactions subject to subsection (d), the purpose of which is to expedite and encourage non-major transactions, it is doubtless true that the agency does not function as an antitrust court. However, it is worth noting that section 7 of the Clayton Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C § 18. And the agency has considered antitrust principles in other

subsection (c)'s public interest standard, the Board might be free to address unlikely or non-substantial competitive harm, among other things.

Considering that subsection (c)'s public interest standard, if applied to competition-related conditions, would afford the Board greater latitude to advance the Reconsideration Decision's stated RTP emphasis on competition, the decision must have another reason for foreclosing the broader public interest standard. The Reconsideration Decision asserts that a subsection (d)(1) conditioning standard is reflected in "much of the agency's precedent on this issue," Recons. Decision 8, but that does not bar a public interest standard or any other statutory interpretation that the agency might find better carries out the RTP. The Reconsideration Decision cites Commuter Rail Division of the Regional Transportation Authority v. STB (Metra), 608 F.3d 24 (D.C. Cir. 2010), to state that "subsection (d)'s primary focus is indeed to preserve competition after a merger or acquisition." Recons. Decision 9 n.14. However, that does not fully explain why the Board could not seek to preserve competition under subsection (c)'s public interest standard. Moreover, subsection (d) does not merely require the Board to focus on preserving competition but instead requires the Board to approve transactions that might, under certain circumstances, negatively affect competition.

In light of these issues, I conclude that the adoption of a subsection (d)(1) conditioning standard, as detailed by the Reconsideration Decision, suggests the decision finds a subsection (c) public interest standard for competition-related conditions would render subsection (d)(1) insignificant or superfluous. Subsection (d)(1) requires the agency to approve a transaction if it would result in competitive harm that is not likely or, as applicable, not substantial.[13] Congress enacted subsection (d) as part of the Staggers Act, a law that focused on reducing regulation and increasing reliance on the private sector, and included subsection (d) in a section of that law that expedited timelines for agency consideration of non-major transactions. See, e.g., Illinois v. ICC, 687 F.2d at 1054 n.14 (comparing the timelines in what is now 49 U.S.C. § 11325). If the Board could impose a condition addressing competitive harm that is, for example, not likely or not substantial, the requirement in subsection (d) to approve a transaction unless it would likely result in a substantial lessening of competition would seem to have little effect or significance.[14] Under such a scenario, Congress would have enacted a more specific approval authority designed to expedite transactions and reduce regulatory burden, yet it would have continued to permit the more cumbersome analysis and conditions under subsection (c)'s public interest standard that formed the basis for the agency's previous approach. Indeed, if the Board were to apply the broader public interest standard for

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contexts, including contexts cited by the majority. See, e.g., Review of Rail Access & Competition Issues—Renewed Pet. of the W. Coal Traffic League, EP 575 et al., slip op at 8-11 (STB served Oct. 30, 2007).

[13] Of course, subsection (d)(1) also requires the agency to approve a transaction that would result in no competitive harm at all.

[14] This example assumes that the competitive harm also does not likely result in the creation of a monopoly or restraint of trade, the two other requirements in subsection (d)(1). As noted, the majority does not find section 5.14(b) likely creates a monopoly or constitutes a restraint of trade.

competition-related conditioning, which would subject a non-major transaction to the same analysis and condition-related burdens as before, it might raise the question as to why Congress enacted subsection (d) at all.[15] See, e.g., Corley v. United States, 556 U.S. 303 (2009) (explaining that a basic interpretive cannon is that a statute should be construed to give effect "to all its provisions, so that no part will be inoperative or superfluous, void or insignificant") (citing Hibbs v. Winn, 542 U.S. 88, 101 (2004)).

By stating that criteria from subsection (d) constrains the Board's conditioning standard, the Reconsideration Decision affirms the link between the Board's conditioning authority and its approval authority. To the extent that the Reconsideration Decision views a public interest conditioning standard as rendering subsection (d)(1) insignificant or superfluous, it is essentially drawing an equivalency between the types of issues on which it could impose a condition with those in which it could withhold approval. Immediately following passage of the Staggers Act, the agency stated that it should impose a condition only when the issue would allow the Board to lawfully withhold approval of the transaction. See Norfolk & W. Ry.—Purchase—Ill. Term. R.R. (Ill. Term. R.R.), 363 I.C.C. 882, 891 (1981) (non-major transaction).[16] In Lamoille Valley Railroad, the D.C. Circuit stated in dicta that it rejects the notion the agency "has broader discretion in imposing conditions on a merger than in approving or rejecting the merger as a whole." Lamoille Valley R.R., 711 F.2d at 301 n.3 (major transaction). The D.C. Circuit in Village of Barrington—though noting the differences between conditioning and approval authorities[17] and stating the foregoing cases do not require that the Board constrain its conditioning authority by using criteria from the approval authority in subsection (d)—also constrained the Board's conditioning authority by using criteria from an approval authority—the subsection (c) public interest approval authority. See Vill. of Barrington, 636 F.3d at 661-62. As explained, subsection (c)'s approval authority is older, not specific to non-major transactions,

[15] Alternative explanations appear to raise questions as to how the Board approaches certain issues that are not related to competition. According to the Reconsideration Decision, the Board need not resolve these important questions for the purposes of analyzing the Condition.

[16] Specifically, in Illinois Terminal Railroad, the agency stated "we believe we should not attempt to impose a condition on our approval of a transaction related to a matter which we could not lawfully consider as a basis for withholding our approval of that transaction." Ill. Term. R.R., 363 I.C.C. at 891.

[17] In Village of Barrington, the D.C. Circuit explained that the distinction between approval and conditioning authorities appears throughout the law, "perhaps most prominently in First Amendment jurisprudence, which distinguishes between unlawful prohibitions on speech and lawful time, place, and manner restrictions that place conditions on speech." Vill. of Barrington, 636 F.3d at 662 (citing Ward v. Rock Against Racism, 491 U.S. 781, 790-91 (1989)). However, as relevant here, the distinction between conditioning and approval authorities may not be so meaningful. Since the Staggers Act, to the extent that the Board has used subsection (c)'s public interest standard to impose a competition-related condition in a non-major transaction, it is not clear if the Board has ever approved a transaction that it would have disapproved under the criteria in subsection (c), standing alone, but did approve because of the criteria in subsection (d)(1). Further, as noted, the court in Village of Barrington also used criteria in an approval authority to constrain the Board's conditioning authority.

and less closely related to the purpose and provisions of the Staggers Act. Importantly, Village of Barrington—with its focus on environmental conditions—did not involve competition-related issues in which a public interest conditioning standard has the potential to render subsection (d)'s competition-related requirements insignificant or superfluous.[18]

Subsection (d) Conditioning Standard. I depart from the approach detailed in the Reconsideration Decision because the foregoing reasoning counsels in favor of constraining the Board's conditioning authority with all the criteria in subsection (d), not just in subsection (d)(1). Subsection (d) includes an "and" between subsections (1) and (2), signifying two requirements. 49 U.S.C. § 11324(d); see also Illinois v. ICC, 687 F.2d at 1054. Under subsection (d), the Board must not only satisfy subsection (d)(1) by finding there is likely to be a substantial lessening of competition, monopoly, or restraint of trade,[19] it also must satisfy subsection (d)(2) by finding that the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. If the Board finds it must constrain its conditioning authority when addressing competition-related issues because the "focus" of subsection (d) is competition, it does not follow that the Board must only focus on one part of (d)—subsection (d)(1)—rather than the subsection as a whole. If the Board is concerned that a public interest conditioning standard would render the requirements of subsection (d)(1) insignificant or superfluous, it ought to be concerned that a subsection (d)(1) conditioning standard would render the requirements of subsection (d)(2) insignificant or superfluous. Indeed, if the Board would impose a condition to address competitive harm before conducting a weighing of that harm, the approach raises the question as to when the outweighing requirement in subsection (d)(2) would apply at all. If the Board imposes conditions to mitigate the need for the outweighing requirement, it is not clear the extent to which the agency would ever apply the outweighing requirement for the purposes of denying a transaction. If the Reconsideration Decision links the Board's conditioning authority with its approval authority, it should look to all the requirements to its approval authority—both subsections (d)(1) *and* (d)(2).

Advancing the Statutory Purpose. The purpose of the Staggers Act, in enacting subsection (d), favors using the criteria in both subsections (d)(1) and (d)(2) to constrain the Board's conditioning authority, rather than just the criteria in subsection (d)(1). As the Reconsideration Decision states, "the Staggers Act added subsection (d) with the goal of encouraging and expediting smaller transactions." Recons. Decision 9. Compared to the Reconsideration Decision's subsection (d)(1) standard, a more constrained conditioning

[18] It might be argued that the Reconsideration Decision is exacerbating a tension with other decisions that used subsection (d) to support denials of conditions not based on competition. See Metra, 608 F.3d at 32. But that tension need not be resolved here, and in Village of Barrington the tension was not seen as foreclosing environmental conditions under a public interest conditioning standard. See Vill. of Barrington, 636 F.3d at 665.

[19] The Reconsideration Decision refers to each of the three effects described in subsection (d)(1) as its own anticompetitive effect (i.e., likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade) and implies that "the anticompetitive effects" in subsection (d)(2) refers to those three anticompetitive effects. The agency and courts have not always used such terminology. Because resolving this issue does not determine my view of the standard or outcome in this case, I need not resolve it here.

authority, using criteria from both subsections (d)(1) and (2), would further encourage and expedite smaller transactions because it would reduce condition-related burdens and potentially quicken the Board's analysis of clearly beneficial transactions. Moreover, under the more constrained conditioning standard, faster, less burdensome reviews would be consistent with other policy changes in the Staggers Act, including the law's expedited timelines for the Board's consideration of non-major transactions. See supra note 8.

The Reconsideration Decision also refers to the competition-related aspects of the RTP, but the various policies of the RTP do not mean the Board should forego a standard that further encourages and expedites smaller transactions. Today's decision states that using criteria from subsection (d)(2) "would effectively require the Board to approve, without any mitigation, transactions that would cause significant harm to competition." Recons. Decision 9. It is true that applying subsection (d)(2)'s outweighing requirement to competition-related conditions might cause the Board to approve certain transactions with anticompetitive effects, but that outcome would only occur if there were an overriding public interest in meeting significant transportation needs. § 11324(d)(2). If such a public interest finding were so strong that it would not be outweighed by an anticompetitive effects finding, then clean and fast approval (i.e., without conditions) might better advance the RTP by, among other things, fostering sound economic conditions or allowing carriers to earn adequate revenues while minimizing exit and entry barriers, minimizing the need for Federal regulatory control, and providing for expeditious decisions.[20] § 10101(2), (3), (5), (7), (15).[21] Thus, the RTP does not clearly indicate the Board should do less to advance the goal of the Staggers Act to expedite and encourage smaller

[20] It might be argued that the Reconsideration Decision is simply balancing its RTP emphasis on fostering competition with its view of the Staggers Act's goal to encourage and expedite smaller transactions. The majority does not make this argument. But assuming the questionable proposition that the RTP and the purpose of the Staggers Act are in conflict, such an argument does not fully explain why—from among the ways to expedite and encourage transactions, and after explaining the differences between conditioning and approval authorities—the Reconsideration Decision would specifically look to the approval authority criteria in the first place. As described in this expression, the underlying reasoning for using subsection (d) approval criteria to constrain the Board's conditioning authority, and the text of subsection (d) itself, suggest that all the required subsection (d) criteria should be part of such a constraint.

[21] That is not to say the Reconsideration Decision's citation of the RTP is unreasonable. The concurring opinion in Village of Palestine described the RTP as a "'wish list' of imprecisely drafted, overlapping, and somewhat contradictory policy goals." Vill. of Palestine, 936 F.2d at 1342. The majority's emphasis of competition-related aspects of the RTP finds support in court and agency precedent, and indeed one of the factors cited above includes that term. In Village of Palestine, which involved an exemption from (now) § 11324(d), among other provisions, the majority opinion cited Illinois vs. ICC and noted that the agency determined that (now) § 11324(d) promoted the RTP goal of "ensuring effective competition among rail carriers and other modes of transportation." Vill. of Palestine, 936 F.2d at 1339 (citing 49 U.S.C § 10101a(1), (4), (5), (13) (1991); Illinois v. ICC, 687 F.2d at 1053). However, as stated above, § 11324(d) in fact limits the ability of the agency to deny transactions that might have some negative effect on competition, relative to the agency's latitude under a public interest standard.

transactions. Indeed, non-major transactions are less suited to bear the weight of a more interventionist approach by the Board, and a conditioning standard based on the criteria in subsections (d)(1) and (d)(2) could prevent the Board from unintentionally delaying, destroying, and disincentivizing benefits that meet significant transportation needs.

Harmonizing of § 11324. The provisions of § 11324 are harmonized through a conditioning standard based on the criteria in subsections (d)(1) and (d)(2). Notably, both subsection (c) and subsection (d)(2) include the term "public interest," and—to the extent the Board is seeking to harmonize a subsection (d)(1) conditioning standard with a public interest standard—it might be suggested that, upon a finding of likely anticompetitive effects under subsection (d)(1) (i.e., substantial lessening of competition, monopoly, or restraint of trade), the Board would then consider the public interest the same way under either subsection (c) or (d)(2).[22] If so, subsections (c) and (d)(2), might be in harmony.[23] Such harmonization would still technically constitute a standard based on the criteria in subsections (d)(1) and (d)(2). However, the Seventh Circuit has explained that although subsection (d)(2) requires the Board "to review public interest factors if it finds substantial anticompetitive effects, that provision does not require the agency to determine whether the transportation is 'consistent with the public interest' under [subsection c]. Rather, if anticompetitive effects are substantial, the agency must balance against those effects 'the public interest in meeting significant transportation needs.'" Illinois v. ICC, 687 F.2d at 1054 n.13.[24] Though subsections (c) and (d)(2) include the same term—public interest—subsection (d)(2) requires anticompetitive effects to "outweigh" the public interest "in meeting significant transportation needs." Statutory harmonization need not overlook these differences.[25] The provisions of § 11324 are in harmony if all of the subsection (d) criteria constrain the Board's conditioning authority in a non-major transaction, such that, if the public interest in meeting significant transportation needs under subsection (d)(2) is not outweighed by anticompetitive effects, and the Board simply approved the transaction,

[22] Indeed, the agency has stated that "the public interest aspects of a proposed transaction [under § 11324(d)] are material only if significant adverse competitive impacts are found." Rio Grande Indus.—Purchase & Control Related Trackage Rights—Soo Line R.R. Between Kan. City, Mo. and Chi., Ill., 6 I.C.C.2d 854, 889 (1990).

[23] Notably, the majority does not seek to harmonize in this way and instead explicitly foregoes use criteria in subsection (d)(2) to constrain its conditioning authority on competition-related issues in non-major transactions. Considering that subsection (d) does not contain its own explicit conditioning authority, a link between subsections (c) and (d) supports the Board's authority to impose conditions in transactions subject to subsection (d). Given that subsection (d)(2), like subsection (c), includes the term "public interest," some type of link between those two provisions may provide such support.

[24] The Seventh Circuit also cites legislative history that states subsection (d) requires the agency to "balance the transportation benefits against any anticompetitive effects." Illinois v. ICC, 687 F.2d at 1054 (citing H.R. Rep. No. 96-1430, at 120 (1980) (Conf. Rep.)).

[25] See Thryv, Inc. v. Click-To-Call Techs., LP, 140 S. Ct. 1367, 1376 (2020) (explaining that a "departure in language suggests a departure in meaning").

there would be no repugnancy with the public interest standard under subsection (c).[26] See, e.g., Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) ("Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws a court must give effect to both.") (citing Wood v. United States, 41 U.S. 342 (1842)).

Though I do not agree with a subsection (d)(1) conditioning standard, I do not think the Reconsideration Decision presents an unfounded statutory interpretation. The Reconsideration Decision states that the agency has not adopted a conditioning standard that uses the criteria in both subsections (d)(1) and (d)(2). Recons. Decision 7. The petitioners cite no precedent, including in the deregulatory era following the Staggers Act, that shows otherwise. Contrastingly, while the agency has not always been consistent, it has used the criteria in subsection (d)(1) to constrain its conditioning authority, including in Decision No. 4, though in many instances a requested condition fails the criteria in subsection (d)(1) and therefore a finding under subsection (d)(2) is unnecessary.[27] See, e.g., Decision No. 4, FD 36347, slip op. at 9, 12-13. Notwithstanding my concerns with the interpretation described in the Reconsideration Decision, it is impossible to claim that subsections (c) and (d) represent the zenith of legislative clarity. I understand why the Reconsideration Decision might emphasize the competition-related aspects of the RTP and reject an interpretation that is not often, if ever, found in more than 40 years of precedent since passage of the Staggers Act.

While it is the responsibility of the Board to clearly identify the applicable conditioning standard and adopt a reasoned approach that gives effect to the statutory text and advances the statute's purpose, the exact standard applied in this case does not affect my view as to whether the Board correctly imposed the Condition. Given Decision No. 4's erroneous and unsubstantiated analysis, described below, the Condition would fail any of the aforementioned conditioning standards. In the next section, I specifically examine Decision No. 4 in the context of a subsection (d)(1) conditioning standard because the Reconsideration Decision claims that the Board will impose a competition-related condition in a non-major transaction *only* upon

[26] As noted, the Seventh Circuit generally agreed with the agency's view that, Congress legislatively determined non-major transactions that did not have substantial anticompetitive effects are consistent with the public interest and should be approved, Illinois v. ICC, 687 F.2d at 1055, and the same logic could apply to conditioning.

[27] A public interest standard, as applied to the Condition, would create internal inconsistency within Decision No. 4 because that decision twice supports its denial of the trackage rights conditions sought by FGLK and the Port of Oswego Authority by stating it finds no "likely" or "substantial" competitive harm. Decision No. 4, FD 36347, slip op. at 9, 12-13. It would also create inconsistency with many past Board decisions. See, e.g., Soo Line Corp.—Control—Cent. Me. & Que. Ry. U.S., FD 36368, slip op. at 6-7 (STB served May 4, 2020); Genesee & Wyo. Inc.—Control RailAmerica, Inc., FD 35654, slip op. at 7 (STB served Dec. 2012). In addition, for the reasons stated above, a public interest conditioning standard would have even more severe issues in terms of potentially rendering all of subsection (d) insignificant or superfluous. As such, for competition-related conditions, I understand why the Reconsideration Decision suggests a subsection (d)(1) conditioning standard is a superior interpretation than a public interest standard based on subsection (c)'s approval authority criteria.

meeting this standard and then asserts that Decision No. 4 meets it.[28] The purported lessening of competition resulting from section 5.14(b) is neither likely nor substantial, and the Board commits material error in imposing the Condition.

Reconsideration

New Evidence and Substantially Changed Circumstances. I agree with the majority that the petitioners do not demonstrate new evidence or changed circumstances that warrant reconsideration because section 5.14(b) remains unmodified and the petitioners' arguments on the provision's effects were evident at the time of Decision No. 4. Recons. Decision 10-11. Prior to Decision No. 4, the petitioners were clear that section 5.14(b) is an essential element of the Purchase and Sale Agreement, (e.g. CSXT Reply, V.S. Smith 6-8, Jan. 8, 2020), and it comes as no surprise that the Condition has delayed, and potentially destroyed, the benefits resulting from the Transaction. When competition-related provisions in an agreement underlying a line sale are evident at the time of the Board's decision, and the relevant provisions are unmodified, the Board should be especially cautious in declaring new evidence or substantially changed circumstances. For these reasons, petitioners' arguments point more to material error than to new evidence or substantially changed circumstances.

Though I agree with the Reconsideration Decision's conclusion on new evidence and substantially changed circumstances, the decision should not infer that petitioners' continued insistence that section 5.14(b) is essential to the Transaction "would seem to confirm" there is likely to be a substantial lessening of competition. Recons. Decision 11. As explained further below, if a provision protects a seller from becoming worse off from a competitive standpoint after a transaction, it does not necessarily follow that it would cause a third party to be in worse competitive circumstances as compared to before a transaction. Indeed, the majority's inference makes the same type of error as Decision No. 4's competition analysis.

Material Error. The Board committed material error in imposing the Condition because Decision No. 4's competition analysis does not establish the baseline level of competition in the market and fails to substantiate its likelihood and magnitude findings in determining that section 5.14(b) likely results in a substantial lessening of competition. As discussed in my previous expression in this proceeding, the Board must identify anticompetitive effects by comparing the level of competition that would occur in the absence of the Transaction to the level of competition that would result from the Transaction, and any finding of competitive harm

[28] In this expression, I analyze the purported competitive harm of section 5.14(b) individually, factoring in the circumstances that would occur in the absence of the Transaction, and conclude the Condition fails a subsection (d)(1) standard. I also observe the Transaction subject to section 5.14(b)—considered holistically—has pro-competition benefits jeopardized by the Condition. When the Board applies a conditioning standard using criteria in subsection (d), it might be justified in examining effects at the transaction-level (i.e., holistically). However, because section 5.14(b)'s purported harm individually fails a subsection (d)(1) standard, and the majority identifies no other harm contributing to its finding, I need not resolve this issue (i.e., whether to conduct an individualized or holistic competition analysis) to arrive at my position.

must take into account pre-existing circumstances, including disadvantages.[29] As relevant here, the pre-existing disadvantage is fundamentally geographic: the CN System and FGLK are currently separated by about 200 miles.[30] Because rail is a capital-intensive, high fixed cost business, and clear rights-of-way are not easily obtained, the geographic separation would seem to make a pre-Transaction direct connection between the CN System and FGLK far too expensive and difficult relative to the potential increased profits, and the record contains no indication otherwise. Moreover, under current law, use of the Board's competitive access authorities is rare at any distance, but use is even less likely—if not practically unavailable—at longer distances, especially if a connection would need to span two countries, and the record again does not suggest otherwise. As a result, given CN's pre-existing circumstances, a potential connection between the CN System and FGLK is highly unlikely and remote, if not completely infeasible,[31] and Decision No. 4 does not explain the extent to which CN contributes to competition in the relevant market.[32] See Decision No. 4, FD 36347, slip op. at 10. The pre-existing circumstances, accounting for the geographic positioning of carriers in the absence of

[29] This comparison is fundamental to analysis of competitive harm caused by a transaction regardless of whether the Board constrains its conditioning authority using a subsection (d)(1) standard. See, e.g., Norfolk S. Ry.—Acquis. & Operation—Certain Rail Lines of the Del. & Hudson Ry., FD 35873, slip op. at 22-23 (STB served May 15, 2015) (noting that "the harm caused by the transaction 'must be distinguished from pre-existing disadvantages that other railroads, shippers, or communities may have been experiencing . . . i.e., pre-existing disadvantages that will neither be caused nor exacerbated' by the transaction") (citing Canadian Nat'l—Control—Duluth, Missabe & Iron Range Ry., FD 34424, slip op. at 14 (STB served April 9, 2004); Genesee & Wyo. Inc.—Control—RailAmerica, Inc., FD 35654 et al., slip op. at 3 (STB served Dec. 20, 2012).); see also CSX Corp.—Control & Operating Leases/agreements—Conrail Inc., 3 S.T.B. 196, 293 (1998) ("we will not impose conditions that are unlikely to be exacerbated by the transaction"); Portland & W. R.R.—Lease & Operation Exemption—Lines of Burlington N. R.R., FD 32766, slip op. at 5-6 (STB served Oct. 15, 1997).

[30] FGLK refers to a distance of "230+ miles," though this reference may include all U.S. lines in this proceeding. (FGLK Comment, V.S. Smith 1, Dec. 9. 2019.) From Solvay Yard, the physical distance to Beauharnois, QC, near where the CN System and CSXT tracks currently physically meet, is more than 200 miles (tracing CSXT tracks on Google Earth). The distance from Solvay Yard to Huntingdon, where the CN System and CSXT operationally interchange, is about 200 miles (tracing tracks). In addition, CSXT has a Buffalo route between FGLK and the CN System, and the distance between Buffalo, NY, and Solvay Yard is about 150 miles (tracing existing CSXT tracks). For ease of reference, understanding potential variance, this expression will use "about 200 miles" as the current separation distance.

[31] For this reason, as noted in my previous expression, it appears CSXT would continue to participate in movements between the CN System and FGLK. See Decision No. 4, FD 36347, slip op. at 15 (Board Member Fuchs dissenting in part).

[32] Decision No. 4 mentions "regional rail competition," Decision No. 4, FD 36347, slip op. at 10, but otherwise does not clearly define the market. Presumably, the relevant market has some nexus to the service area of FGLK.

the Transaction,[33] constitute the appropriate baseline for the Board's analysis. Decision No. 4's analysis does not adopt an appropriate baseline.

At the outset, it is important to emphasize that Decision No. 4 uses the correct baseline in its denial of other conditions, and it errs only with respect to its analysis of section 5.14(b) and the imposition of the Condition. Though Decision No. 4 could do more to describe the relevant markets at issue, including specific transportation flows, its denials of requested trackage rights conditions correctly recognize that the Transaction would not result in a reduction in competitive service options, such as through a decrease in the number of carriers serving any shipper. Decision No. 4, FD 36347, slip op. at 9, 12. Further, Decision No. 4's denial of the requested trackage rights condition between Solvay and Woodard correctly states, among other things, that CSXT would continue to serve as the bridge carrier for overhead traffic and that there is no local traffic currently routed from FGLK to CSXT which would see the addition of a third intermediate carrier. See Decision No. 4, FD 36347, slip op. at 4, 9. Thus, Decision No. 4's analysis of the requested trackage rights conditions rightly assesses the pre-existing circumstances—the number of carriers directly serving shippers, the presence of a bridge carrier, and the volume of local traffic—and then appropriately makes a comparison to the post-Transaction circumstances. These pre-existing circumstances serve as the baseline for the Board's analysis as to whether there is substantial lessening of competition. By contrast**,** the three primary arguments made by Decision No. 4 to support the Condition commit material error by ignoring or obscuring an appropriate baseline based on pre-existing circumstances.

First, the majority compares section 5.14(b) to an interchange commitment, but—even assuming the validity of this comparison[34]—CN's pre-Transaction geographic positioning is not properly considered. Specifically, Decision No. 4 takes issue with a restriction where CN/B&LE "owns a nearby line," Decision No. 4, FD 36347, slip op. at 9, and today's decision bases its interchange commitment comparison on CN/B&LE's ability to interchange with "nearby carriers," Recons. Decision 6. However, under the pre-existing circumstances, CN/B&LE neither owns a nearby line nor directly interchanges with the alleged nearby carriers.[35] In effect,

[33] In its analysis, the majority does not suggest that CN's geographic positioning will change in the future for any other reason than the Transaction.

[34] As noted in my previous expression, FGLK does not interchange with the CN System, and the provision does not prevent interchange if a new connection were to be established. See Decision No. 4, FD 36347, slip op at 17 n.14 (Board Member Fuchs dissenting in part). Moreover, the precedent supporting Decision No. 4's analogy indicates that an expansive view is intended to ensure the agency's disclosure regulations capture potential connections that are reasonably likely. See Piedmont & Atlantic R.R.—Lease Exemption Containing Interchange Agreement—Norfolk S. Ry., FD 35841, slip op at 4-5 (STB served Sept. 18, 2014) (Board Member Begeman dissenting) (noting earlier dissent on the new requirements for disclosing interchange commitments). It is difficult to claim that a connection of about 200 miles is reasonably likely in this instance, especially given the lack of support in the record.

[35] In addition, Decision No. 4 states that the Transaction as currently structured would put B&LE "in a less favorable competitive position than other carriers in its same position," Decision No. 4, FD 36347, slip op at 9-10, but this statement does not seem to factor in the pre-

the baseline for the majority's analysis of section 5.14(b) is entirely ex post, based on geographic positioning that would not exist without the Transaction. Not only is this approach contrary to precedent concerning pre-existing circumstances, it is especially problematic in the context of an interchange commitment comparison because Decision No. 4 relies on precedent rejecting an "entirely *ex post* view" of restrictions and stating that restrictions considered "*ex ante*" may be beneficial and advance the public interest. Review of Rail Access & Competition Issues—Renewed Pet. of the W. Coal Traffic League (Interchange Commitments), EP 575 et al., slip op. at 14-15 (STB served Oct. 30, 2007) (emphasis original).

Second, though Decision No. 4 takes issue with CN/B&LE's negotiating away its own right to bring a competitive access case, the decision does not explain the extent to which the Board would use its competitive access authorities under a baseline that accounts for the pre-existing circumstances. Decision No. 4's argument suggests a view that, as a result of section 5.14(b), there are effects that the Board would no longer remedy via competitive access order, despite the fact that shippers and FGLK could still bring a competitive access case. According to Decision No. 4, the purported effects that would no longer be remedied essentially amount, or help amount,[36] to a likely substantial lessening of competition. However, as noted, under the pre-existing circumstances, while no party is restricted from bringing a competitive access case, it appears a mandated connection between FGLK and the CN System might need to span two countries and would need to cover about 200 miles, a distance that might challenge the Board's ability to exercise seldom-used competitive access authorities.[37] Decision No. 4 makes no specific showing as to the extent to which CN/B&LE's potential pursuit of a competitive access order—under the pre-existing circumstances—contributes to the baseline level of competition in the relevant market.[38] Decision No. 4 points to nothing specific—no competitive

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Transaction geography that already puts CN/B&LE in a less favorable competitive position than other carriers in this market. It also does not refer to the baseline level of competition in the market or to the magnitude of the "less favorable" position.

[36] Notably, Decision No. 4 does not use the terms "likely" or "substantial" in its specific discussion of section 5.14(b), Decision No. 4, FD 36347, slip op. at 9-10, but the decision uses those terms in its summary approving the Transaction with the Condition, Decision No. 4, FD 36347, slip op. at 5. As such, because the majority does not use those terms in its argument on competitive access authorities, I can only infer this argument, at a minimum, helps constitute the majority's finding.

[37] See, e.g., BNSF Ry.—Term. Trackage Rts.—Kan. City S. Ry., FD 32760 (Sub-No. 46), slip op at 1-2 (July 5, 2016) (granting terminal trackage rights over approximately nine miles of track in the Lake Charles area of Louisiana).

[38] In its only relevant mention of the pre-existing circumstances on this issue, Decision No. 4 states that it is ensuring the "current physical circumstance does not forever bar a short-line purchaser from exercising its statutory/regulatory rights to seek access to other carriers made newly proximate through a line-sale transaction." Decision No. 4, FD 36347, slip op. at 10. This statement suggests that the purchaser (CNR/B&LE) is unlikely to exercise its statutory or regulatory rights under the pre-existing circumstances because the statement seems to describe the pre-existing circumstances as a bar. Moreover, Decision No. 4 provides no information

access statutes, regulations, precedent, or relevant facts—that might help judge likelihood or magnitude of such contribution. Because of the pre-Transaction geography, the Board has reason to think this contribution is unlikely if not also non-substantial, which in turn would mean that any foregone remedy does not amount to a likely substantial lessening of competition.

Third, Decision No. 4 cites as precedent a condition imposed in a 2015 Norfolk Southern Railway Company (NS) acquisition, but—unlike Decision No. 4's evaluation of section 5.14(b)—that precedent considered pre-existing circumstances.[39] See Decision No. 4, FD 36347, slip op. at 10 (noting that the Board has long exercised its authority to resolve competitive concerns caused by minor transactions) (citing Norfolk S. Ry.—Acquis. & Operation—Certain Rail Lines of the Del. & Hudson Ry. (NS/D&H), FD 35873, slip op. at 18-20). In the NS/D&H proceeding, the Board imposed a condition that, among other things, incorporated two voluntary agreements. The "Direct Short Line Access Agreement," a ten-year agreement,[40] protected certain shippers facing a potential "2-to-1" reduction in pre-existing routing options and provided those shippers access (via haulage rights) to both NS and D&H. NS/D&H, FD 35873, slip op at 18. Under the pre-existing circumstances, the routing options were practicable and did not involve a 200-mile separation between the relevant carriers. The other agreement, the "Transitional Divisions and Routing Agreement," protected certain shippers by keeping pre-existing contracts and rate authorities in place until they were amended, renewed, or allowed to expire. Id. This agreement is also grounded in pre-existing circumstances. By contrast, in evaluating section 5.14(b), Decision No. 4 does not properly consider the pre-existing circumstances. More broadly, unlike NS/D&H, Decision No. 4 could not find any shippers would experience reduced competitive service options. Decision No. 4, FD 36347, slip op. at 5.

The majority emphasizes section 5.14(b)'s lack of time limitation, but this emphasis does not cure issues with reliance on an erroneous baseline or demonstrate that the provision likely results in a substantial lessening of competition. If Decision No. 4 were to properly account for the pre-existing circumstances, it is not clear that it could substantiate a finding of likely and substantial competitive harm. To the extent that Decision No. 4 makes a claim regarding effects in the distant future—when those effects are not substantiated in the near- or medium-term—such claim is wholly speculative. (B&LE Pet. 18.)[41] Indeed, beyond emphasizing terms such as

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about any likelihood or magnitude finding related to the use of the Board's competitive access authorities, which obscures the importance of the pre-existing circumstances.

[39] That is not to say the precedent explicitly and correctly stated the applicable conditioning standard.

[40] At the end of the initial ten-year term, either party could extend or renegotiate the agreement for one or more additional 5-year terms. See NS/D&H, FD 35873, slip op. at 18.

[41] Likewise, to the extent that the Transaction subject to section 5.14(b) enhances potential competitive options and if the Board were to take a more holistic view of competition, the majority provides no reason to find the pro-competitive dynamics would meaningfully shift

"perpetuity" and "ever," Decision No. 4 provides no information as to the potential developments in the distant future that would substantiate its finding. Recons. Decision 6 (citing Decision No. 4, FD 36347, slip op at 9-10); (CSXT Pet. 4). Further, in the precedent relied on by Decision No. 4 to justify "heightened scrutiny" of section 5.14(b), the Board explicitly declined to prohibit non-time-limited restrictions that were broader in scope and related to carriers already connected and interchanging (rather than separated by about 200 miles). See Interchange Commitments, EP 575 et al., slip op. at 11. Finally, under the Condition, parties may modify, and simply not eliminate, section 5.14(b), and—to the extent that Decision No. 4 intends to signal the Board would allow section 5.14(b) if the provision had a time limitation—such a scenario would suggest the decision finds the provision does not likely result in a substantial lessening of competition in the initial years after the Transaction.[42] Otherwise, under a subsection (d)(1) conditioning standard, Decision No. 4 would condition such harm so as not to allow section 5.14(b) for any period of time (i.e., elimination only). The majority does not—and, given the record, cannot—explain when and why any purported lessening of competition would become likely or substantial.

Not only does Decision No. 4 commit material error by ignoring and obscuring the pre-Transaction geographic positioning of carriers, which is essential for understanding the baseline level of competition and evaluating any resulting competitive harm, Decision No. 4 jeopardizes the pro-competition aspects of the Transaction. Post-Transaction, though section 5.14(b) means that CN/B&LE could not construct a build-out or bring a competitive access case, any shipper—and any other carrier, including FGLK—could construct a build-out or bring a case covering less than 10 miles,[43] rather than about 200 miles. The significantly closer proximity between the CN

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over time. Of course, technological advancements and other changes, including to transloading operations, are difficult to predict.

[42] Decision No. 4 does not claim that section 5.14(b) is, on its face or by its very nature, anticompetitive. Decision No. 4 also does not claim section 5.14(b) creates a monopoly or a restraint of trade in freight surface transportation in any region of the United States. § 11324(d)(1).

[43] FGLK emphasizes that CN/B&LE will come within 2.8 miles of a direct connection to FGLK via the CSXT mainline near Solvay Yard. (FGLK Comment 6, Dec. 9, 2019.) The Application states that: (1) manifest freight, and military trains headed east of Syracuse, will be interchanged at Dewitt Yard and (2) unit trains to or from the Fulton Subdivision, and military trains headed west of Syracuse, will be interchanged at Belle Isle Yard. (Appl. 25.) The CN System and CSXT tracks would physically meet at Woodard. (Id. at 4.) FGLK notes the distance between the Solvay interchange and Woodard is a six-mile short haul, the Solvay-Dewitt route is 7.9 miles, and the Solvay-Belle Isle route is less than 3 miles. (FGLK Comment, V.S. Smith 2, Dec. 9, 2019.) Per Google Earth, the distance between Solvay and Woodard is less than 10 miles (both as the crow flies and tracing CSXT tracks). This expression will use "less than 10 miles" to describe a potential move connecting the CN System and FGLK post-Transaction, though this expression would be justified in using a shorter distance consistent with my previous expression.

System and FGLK may make a build-out or case marginally more likely,[44] thereby better positioning shippers to expand their rail options.[45] Moreover, the Transaction subject to section 5.14(b) would help CN/B&LE offer U.S. customers faster and more reliable service, benefits which would make rail more competitive in the broader transportation market.[46] Decision No. 4, FD 36347, slip op. at 5. Indeed, many shippers, including intermodal shippers, support this transaction, and no shipper opposes it. (See, e.g., GCT Global Container Terminals Inc., Support Statement; A.P. Moeller—Maersk, Support Statement.) The Condition may well undermine its very target—competition.[47]

The majority does not and cannot show that the Transaction subject to section 5.14(b) would leave the public worse off, and in fact Decision No. 4 implies that approval without the Condition would still result in public benefits.[48] The majority attempts to perfect a deal that is

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[44] That is not to say post-Transaction build-out or competitive access order is likely under any scenario or to make any inference as to the magnitude of any resulting effects. Even adopting an entirely ex post view of section 5.14(b), imagining the CN System and B&LE are currently separated by less than ten miles, and evaluating effects based on an idealized world that would not exist without the Transaction, Decision No. 4 provides little to judge the likelihood of a foregone build-out or competitive access order and the magnitude of resulting effects.

[45] In effect, this dynamic also better positions CN to take business from CSXT. The possibility that CSXT would be in a worse position than before—a dynamic that would surely dissuade any seller from moving forward—appears to be what is motivating section 5.14(b). However, if a transaction is not as pro-competitive as possible post-transaction, it does not follow that it causes competitive harm as compared to the baseline level of competition. The Board's mandate here—particularly under a conditioning standard using the criteria in subsection (d)—involves addressing certain competitive harm, not enhancing competition. Major Rail Consolidation Procs., 5 S.T.B. 539, 546-47, 597 (2001).

[46] In theory, the closer proximity might also facilitate newly viable truck transloading trips to reach the CN System. See Canadian Nat'l—Control—Duluth, Missabe & Iron Range Ry., FD 34424, slip op. at 14 (STB served April 9, 2004 ("in evaluating claims of competitive harm, consideration must be given not just to the relevant rail market(s) but to the relevant transportation market(s)") (emphasis omitted). However, the record does not contain enough information to substantiate this point.

[47] In addition, the record also suggests that CSXT does not view the Massena Lines as part of its core business, and the CN System has investment plans that may well reflect a higher prioritization of the Massena Lines. (Appl. 8-9, 11.)

[48] Decision No. 4 states that section 5.14(b) would limit regional rail competition in the long run, thereby "*reducing* the potential public benefits of the Transaction." Decision No. 4, FD 36347, slip op. at 10 (emphasis added). But reducing does not mean outweighing and in fact implies that, after accounting for purported competitive harm, the majority finds the public benefits would be lower but still positive overall (or at least not outweighed). Decision No. 4 contains only one other sentence that could be read as comparing section 5.14(b)'s purported competitive harm to the Transaction's benefits, but that sentence is ambiguous and, under any

already good for the rail network and the public. In effect, the majority is deeming its pursuit of an idealized vision of the network to be worth the delay and possibility of terminated benefits. But Decision No. 4 commits material error—using an incorrect baseline and failing to substantiate the likelihood or magnitude of any purported competitive harm—and falls short of a subsection (d)(1) conditioning standard. Though the Transaction may not be as good as the majority thinks it should be, that does not mean section 5.14(b) is likely to result in a substantial lessening of competition. Likewise, even if the parties ultimately consummate this deal, it does not mean the Board has met its standard. More broadly, notwithstanding the erroneous subsection (d)(1) finding, the majority's risky pursuit—in which Board intervention jeopardizes a beneficial transaction—indicates the type of action that a conditioning standard based on the criteria in subsections (d)(1) and (d)(2) could help prevent.[49] Under a subsection (d)(1) and (d)(2) standard, if the public interest in meeting significant transportation needs is not outweighed by anticompetitive effects, the Board would not risk delaying and possibly destroying a non-major transaction and its public benefits. By adopting a more restrained approach to conditioning, the Board would expedite and encourage beneficial transactions, rather than impede and disincentivize them. I respectfully dissent.

BOARD MEMBER SCHULTZ, dissenting:

I find the Board's imposition of the Condition requiring modification or removal of section 5.14 to be material error. For this reason, I respectfully dissent.

The conditioning authority in 49 U.S.C. § 11324(c) is broad, but such authority cannot be so broad as to completely subsume the requirement in 49 U.S.C. § 11324(d) that "the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs." Here, the anticompetitive effects of section 5.14(b), the only anticompetitive effects identified by the Board in its April 2020 decision, are too unlikely and speculative to outweigh the public benefits of the Transaction identified by the Board. See Bessemer & Lake Erie R.R.—Acquis. & Operation—Certain Rail Lines of CSX Transp., Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, and Franklin Cntys., N.Y., FD 36347, slip op. at 5, 13 (STB served Apr. 6, 2020).

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interpretation, insufficient for the proposition that anticompetitive effects outweigh those benefits. Decision No. 4, FD 36347, slip op. at 5. I do not think the majority has conducted a weighing, in any meaningful sense, that might support these general statements. (See also CSXT Pet. 4 (arguing that the Board did not appear to weigh the anticipated benefits of the Transaction against the perceived competitive harm of section 5.14(b)).)

[49] Because the Condition does not satisfy a subsection (d)(1) conditioning standard, it fails a standard based on subsections (d)(1) and (d)(2), and it is not necessary to make a definitive statement on the meaning of the term "meeting significant transportation needs" in the context of the Transaction. I only intend to point out that the majority's action in this proceeding makes it easier to appreciate the merits of a subsection (d)(1) and (d)(2) conditioning standard.

Section 5.14(b) prevents B&LE from seeking direct access to FGLK and NYSW. It does not prevent FGLK or NYSW from seeking that same access, nor does it prevent any customers from doing so. The Board speculated that the provision would "limit regional rail competition *in the long run*" and "reduc[e] the *potential* public benefits of the Transaction." Id. at 10 (emphasis added). While section 5.14(b) may have some anticompetitive effects, § 11324(d) directs that the Board "shall approve" some transactions with anticompetitive effects. The possible, future impact of a provision that restricts a single party from seeking direct access, especially when that party has not expressed a desire or need to seek direct access, does not rise to the level of a "substantial lessening of competition" and does not outweigh the public benefits of this Transaction. See 49 U.S.C. § 11324(d).

With regard to competition-related conditioning authority for non-major transactions, I agree with the Reconsideration Decision that "the precise interaction that Congress intended between subsection (d)'s approval/disapproval standard for non-major transactions and subsection (c)'s general conditioning sentence is unclear under the language of both subsections." See Recons. Decision 8. I also agree with the Reconsideration Decision's choice to define the breadth of its conditioning authority by looking to subsection (d). Cf. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (stating that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"); United States v. Mead Corp., 533 U.S. 218 (2001) ("It can be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when addressing ambiguity in the statute or fills in a space in the enacted law, even one about which Congress did not have intent as to a particular result."). However, I disagree with the Reconsideration Decision's application of only subsection (d)(1) before imposing competition-related conditions because the plain language of the statute requires the Board to apply subsections (d)(1) *and* (d)(2) in reviewing non-major transactions. Nor do I agree that "[s]ubsections (c) and (d) can be harmonized through a statutory interpretation by which a Board condition under subsection (c) that ameliorates anticompetitive effects found under subsection (d)(1) can obviate the need for the weighing that could otherwise be required under subsection (d)(2)." Recons. Decision 8.

It is clear that "Congress directed the Board to approve non-major transactions where the [anti]competitive effects would be unsubstantial and/or unlikely." Id. at 9. But the power to condition a transaction is essentially the power to reject that transaction. Because of this power, I believe it is necessary to make a finding under both subsection (d)(1) and (d)(2)—that "(1) as a result of the transaction, there is likely to be substantial lessening of competition . . . *and* (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs"—*before* imposing competition-related conditions to remedy anticompetitive effects. 49 U.S.C. § 11324(d) (emphasis added). Accordingly, before imposing the Condition in this case, the Board should have considered whether the possible future anticompetitive effects of section 5.14(b) outweigh the public interest, including those benefits identified by CSXT, B&LE, and other interested parties. (See, e.g., Port of N.Y. & N.J. Letter 1, Nov. 18, 2019 (supporting the proposed acquisition and highlighting the preservation of the direct CN-CSXT gateway as one of the benefits of the Transaction).)

Applying both subsection (d)(1) and (d)(2) prior to imposing competition-related conditions is the best way to uphold the intent of Congress to ensure that the Board approves non-major transactions not only where the anticompetitive effects are unsubstantial and/or unlikely, but also where the anticompetitive effects do not outweigh the public benefits of a transaction. In this case, even if the perceived competitive harm of section 5.14(b) were substantial and/or likely under subsection (d)(1), it does not outweigh the anticipated benefits of the Transaction under subsection (d)(2). Therefore, I find that it was material error to impose the Condition and respectfully dissent.