

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

JOSHUA R. DIAMOND
DEPUTY ATTORNEY GENERAL

SARAH E.B. LONDON
CHIEF ASST. ATTORNEY GENERAL



TEL: (802)622-1310
<http://www.ago.vermont.gov>

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STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
VERMONT AGENCY OF TRANSPORTATION
BARRE CITY PLACE
219 N MAIN STREET, SUITE 201
BARRE, VERMONT 05641

March 22, 2021

Surface Transportation Board
395 E Street SW
Washington, DC 20423
(202) 245-0245 | TTY (800) 877-8339

Re: STB Finance Docket no. FD 36472

To Whom it May Concern,

Please find enclosed for filing the State of Vermont, Agency of Transportation's *Reply to Applicants' March 18, 2021 Response to Initial Comments* and *Certificate of Service* for the above-referenced matter.

Thank you for your attention to this matter. Please let me know if you have any questions.

Sincerely,

/s/ Megan Gregory

Megan Gregory, Transportation Paralegal
Legal Unit

Vermont Agency of Transportation

219 N Main Street, Suite 201

Barre, VT 05641

(802) 793-6657

megan.gregory@vermont.gov

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

TEL: (802) 622-1310

JOSHUA R. DIAMOND
DEPUTY ATTORNEY GENERAL

<http://www.ago.vermont.gov>

SARAH E.B. LONDON
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OFFICE OF THE ATTORNEY GENERAL
VERMONT AGENCY OF TRANSPORTATION
BARRE CITY PLACE
219 N MAIN STREET, SUITE 201
BARRE, VERMONT 05641

March 22, 2021

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street S.W., Room 1034
Washington, D.C. 20423-0001

Re: Docket No. FD 36472

CSX Corporation and CSX Transportation, Inc. — Control and Merger — Pan Am Systems, Inc., Pan Am Railways, Inc., Boston & Maine Corporation, Maine Central Railroad Company, Northern Railroad, Pan Am Southern LLC, Portland Terminal Company, Springfield Terminal Railway Company, Stony Brook Railroad Company, and Vermont & Massachusetts Railroad Company

Docket No. FD 36472 (Sub-No. 5)

Pittsburg & Shawmut Railroad, LLC d/b/a Berkshire & Eastern Railroad — Operation of Property of Property of Rail Carrier Pan Am Southern LLC — Pan Am Southern LLC and Springfield Terminal Railway Company

**STATE OF VERMONT'S REPLY TO APPLICANTS' MARCH 18, 2021
RESPONSE TO INITIAL COMMENTS**

Dear Ms. Brown:

The State of Vermont, acting through its Agency of Transportation (“VTrans”) and by and through its undersigned counsel, hereby replies to the Applicants’ Response to Initial Comments dated March 18, 2021.

Vermont’s March 17, 2021 filing explains its concerns with the proposed transaction. These center around the interchanges that anchor the south ends of the State-owned railroad lines: Hoosick Junction, New York and White River Junction and Bellows Falls, Vermont. The status quo offers Vermonters competitive pricing and service alternatives, the latter of which can be critical in responding to winter weather and other operating challenges, as discussed in Daniel P. Delabruere’s Verified Statement. See Exhibit A of State of Vermont’s March 17, 2021 Opposition at 6. Applicants responded to initial comments submitted, including Vermont’s, on March 18, 2021. See Applicant’s March 18, 2021 Response, at 1 n.1.

Applicants’ response does not meaningfully address Vermont’s concerns that the transaction, if approved, will result in a 2-to-1 reduction in competition along the north-south Connecticut River Line. Applicants’ response falls short for two reasons: first, the voluntary agreements cited by Applicants appear primarily directed to the competitive concerns of the two Class I carriers (Norfolk Southern Railway Company (“NSR”) and CSX) regarding the east-west traffic across Massachusetts, not the north-south traffic along the Connecticut River Line. Moreover, such agreements do not alone overcome a 2-to-1 reduction in service on the Connecticut River Line and the factors that may make such agreements acceptable do not exist here.

Second, Applicants continue to be tone deaf to the anticompetitive consequences of their choice of GWI to take over the regional services now operated by PAS. This is particularly concerning in view of the existing competitive balance between GWI/NECR and the State-owned lines presently operated by Vermont Rail System (“VRS”). The application and response fail to address the very recent (2014-2018) attempt by GWI/NECR to choke off Pan Am System, Inc.’s (“PAS”) use of trackage rights. See New England Central R.R., Inc.—Trackage Rights Order—Pan Am Southern, LLC, FD 35842 (STB served Oct. 31, 2017). Had the Surface Transportation Board not granted relief to PAS, this transaction would have effectively reduced competitive services from 2-to-1 along the Connecticut River Line corridor (including the critical Bellows Falls and White River Junction interchanges) with adverse consequences for the connecting State-owned railroad lines operated by VRS.

1. Applicants' voluntary agreements fail to address the 2-to-1 reduction in competitive services the transaction would have in Vermont and such agreements do not alone overcome a 2-to-1 reduction in this case.

In responding to Vermont's concerns that the transaction will result in a reduction in the regional competitive status quo as a result of the 2-to-1 reduction in services, Applicants direct the Board's attention to the following voluntary agreements: (1) a contractual agreement between GWI/B&E and PAS; (2) the rate commitments it contends CSXT and NSR have made to VRS to preserve existing competition for VRS movements to the east through Ayer, MA and the west through Hoosick Junction, NY; and (3) the haulage rights it contends CSXT and NSR offered to VRS to move Vermont Railway traffic between Bellows Falls, VT and East Deerfield, MA. See Applicants' Response, at 10. But none of these commitments address the 2-to-1 reduction in competition between East Deerfield, MA and White River Junction, VT along the Connecticut River Line. Moreover, Applicants' reliance on the Norfolk So. Ry. Co.—Acq. and Op.—Certain Lines of the Del. & Hud. Ry. Co., Inc., FD 35873 (STB served May 15, 2015) ("Norfolk S. Ry.") decision is misleading because voluntary agreements do not alone overcome a 2-to-1 reduction.

a. Applicants' voluntary agreements fail to address the 2-to-1 reduction in competitive services the transaction would have in Vermont.

Applicants' contractual agreement between GWI/B&E and PAS does not address the 2-to-1 effects of the transaction. Instead, the contract appears to be directed primarily to the competitive concerns of the two Class I carriers, NSR and CSX, regarding the east-west traffic across Massachusetts. See Applicants' Response, at 10. It does not substantively address the north-south traffic along the Connecticut River Line. See id. In addition, the contract provides that GWI/B&E pay PAS a fee for its trackage rights and that GWI/B&E operate in the interest of PAS and not other GWI-owned railroads to the detriment of PAS. See id. These provisions do not assure that GWI and PAS will maintain competitive pricing for shippers and receivers in Vermont nor do they preserve the existing redundancies to ensure deliveries of critical commodities when one carrier has service challenges. Moreover, Applicants' explanation fails to acknowledge that GWI and PAS could both benefit from practices which would have anticompetitive effects in Vermont. As a result, although the contract terms may contemplate how PAS will not allow GWI/B&E to operate to PAS's detriment, the contract does not protect the competitive status quo of shippers or short-line service in Vermont. It follows that, while the contract may benefit its signatories, the contract fails to protect Vermont's regional service options and, thus, fails to adequately address Vermont's concerns.

The two other voluntary agreements cited by Applicants—the rate commitments afforded to VRS for movements on the Massachusetts line and the haulage rights afforded to VRS between Bellows Falls, VT and East Deerfield, MA—may very well mitigate some of the competitive effects on VRS, but ultimately fail to provide meaningful mitigation to the 2-to-1 reduction in services along the

Connecticut River Line in Vermont. In particular, offering only haulage agreements leaves the actual operation of trains under the complete control of the owner railroad. Moreover, Applicants fail to address the effects on VRS from GWI control of operations at the Hoosick Junction, NY interchange.

In short, despite revealing additional details about the contractual relationships between B&E and GWI, the Applicants continue to skirt the issue as to how the 2-to-1 reduction in carriers will affect regional competition. Even if the additional details about the GWI/B&E contract with PAS introduced by Applicants in its response addressed Vermont's concerns, the fact that this information was not included in the original application underscores Vermont's point that the application provided inadequate information.

b. Applicants' voluntary agreements alone do not overcome a 2-to-1 reduction and the factors that make such agreements acceptable do not exist here.

Applicants' proposition that voluntary agreements can, alone, resolve any concerns about 2-to-1 reductions in competition ignores several other factors historically considered by the Board. For example, in the decision in Norfolk S. Ry., cited supra, although the Board considered voluntary shipping agreements as mitigation when assessing the impacts of several "potential" 2-to-1 interchanges, the Board ultimately found that no corridors would experience "true" reductions in competition because three of the four corridors had independent routing alternatives with CSXT. Norfolk S. Ry., at 18. The Board also noted that the remaining affected interchange was more appropriately characterized as a 1-to-1 corridor as it already involved just a single carrier. Id. at 18-19. In this application, by contrast, there are currently no economically viable alternative routes for VRS at the two interchanges on the north-south Connecticut River Line.

Even in cases where voluntary agreements accompany a transaction, the Board also considers whether affected parties have objected to a proposed transaction when assessing its anticompetitive impacts. Again, in Norfolk S. Ry., the Board noted that the absence of any objection from affected shippers or connecting short line "strongly suggest[ed] that the transaction will not cause substantive competitive harm." Id. at 18. In this transaction, the Applicants have no consensus to rely on, as evidenced by the opposition filings.

Therefore, although the Board has sometimes accepted voluntary agreements when assessing the ultimate impacts of a 2-to-1 reduction in competition, viable shipping alternatives and industry-wide consensus are also significant considerations, neither of which exist in the current application.

2. Applicants have not acknowledged or addressed GWI/NECR's recent attempt to render PAS's trackage rights uneconomic, which would have effectively reduced competitive services from 2-to-1 in the same Connecticut River Line corridor.

Applicants fail to acknowledge—much less address—GWI/NECR’s prior attempt to dramatically increase PAS’s trackage rights fees and impose oppressive operating restrictions on PAS during litigation before the Board between 2014 and 2018. Had GWI/NECR succeeded, PAS’s use of the trackage rights would have been rendered uneconomical, choking off competitive access to both the Bellows Falls and White River Junction interchanges. Vermont Opposition, Exhibit A at 8. The Board resolved this dispute largely in favor of PAS in 2017, which maintained the competitive status quo in this corridor. Id.; see also New England Central R.R., Inc.—Trackage Rights Order—Pan Am Southern, LLC, FD 35842 (STB served Oct. 31, 2017). Applicants’ proposal would again put GWI in a strategic posture to eliminate viable competition along this corridor. The contract between GWI/B&E and PAS—assuming the terms are as described by Applicants—does little to ensure the survival of the competitive status quo at the Bellows Falls and White River Junction interchanges.

Overall, Applicants’ response sheds additional light on the voluntary agreements being contemplated alongside its proposed transaction. However, the additional details provided do not adequately address the reduction in competitive status quo caused by the 2-to-1 services on the Connecticut River Line in Vermont. Moreover, Applicants’ failure to acknowledge GWI/NECR’s prior attempts to choke off competitive access to the Bellows Falls and White River Junction interchanges is disquieting given its contentions that the two GWI subsidiaries—GWI/NECR and GWI/B&E—will maintain meaningful competition along this corridor. Because Applicants have not adequately demonstrated how the reduction in competitive services from 2-to-1 will be addressed, the State of Vermont’s opposition to the application remains unchanged.

Sincerely,



Jenny E. Ronis
Gordon P. Landrigan
Assistant Attorneys General
Vermont Agency of Transportation
219 N. Main Street, Suite 201
Barre, Vermont 05641
(802) 279-4264
jenny.ronis@vermont.gov
gordon.landrigan@vermont.gov

cc: Certificate of Service

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. FD 36472

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.

—CONTROL AND MERGER—

**PAN AM SYSTEMS, INC., PAN AM RAILWAYS, INC., BOSTON AND MAINE
CORPORATION, MAINE CENTRAL RAILROAD COMPANY, NORTHERN
RAILROAD, PAN AM SOUTHERN LLC, PORTLAND TERMINAL
COMPANY, SPRINGFIELD TERMINAL RAILWAY COMPANY, STONY
BROOK RAILROAD COMPANY, AND VERMONT & MASSACHUSETTS
RAILROAD COMPANY**

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *State of Vermont's Reply to Applicants' March 18, 2021 Response to Initial Comments* has been e-filed this 22nd day of March, 2021 via the STB's e-filing system and served by electronic mail per 49 CFR § 1104.12 upon the following parties of record:

Robert A. Wimbish
29 N Wacker Drive
Suite 800
Chicago, IL 60606-3208
United States

Jeffrey A. Bartos
1900 M Street, NW
Suite 700
Washington, DC 20036
United States

Joshua D. McInerney
4200 Regent Street
Suite 210
Columbus, OH 43219
United States

Eric M Hocky
2001 Market St., Suite 2620
Philadelphia, PA 19103
United States

William Mullins
2401 Pennsylvania Avenue 300
Washington, DC 20010
United States

Kevin C. Brodar
4239 W. 150th St.
Cleveland, OH 44135
United States

Anthony J. LaRocca
1330 Connecticut Avenue, NW
Washington, DC 20036
United States

Richard S. Edelman
1920 L Street, NW
Suite 400
Washington, DC 20036
United States

Robert B. Culliford
1330 Connecticut Avenue, NW
Washington, DC 20036
United States

Janet H. Gilbert
29 North Wacker Dr.
Suite 800
Chicago, IL 60606-3208
United States

Allison B. Greenstein
33 Capitol Street
Concord, NH 03301-6397
United States

Sally Mordi
1330 Connecticut Avenue, NW
Washington, DC 20036
United States

Erika A. Diehl-Gibbons
4239 W. 150th Street
Cleveland, OH 44135
United States

Erika A. Diehl-Gibbons
24950 Country Club Blvd., Ste. 300
North Olmsted, OH 44070
United States

Jeffrey A. Bartos
1900 M Street, NW
Suite 700
Washington, DC 20036
United States

Antonia Bird
1900 M Street, NW
Suite 700
Washington, DC 20036
United States

Frederick Laskey
100 First Avenue - Building 39
Charlestown Navy Yard
Boston, MA 02129
United States

Dated: March 22, 2021

/s/ Jenny E. Ronis
Jenny E. Ronis
Attorney for VTrans