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October 25, 2021

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VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

ENTERED
Office of Proceedings
October 25, 2021
Part of
Public Record

Re: **NORFOLK SOUTHERN RAILWAY COMPANY – PETITION FOR
DECLARATORY ORDER, FD 36522**

Dear Ms. Brown:

Please find attached Norfolk Southern Railway Company's ("NSR") Reply to CSXT's Opening Statement in the above-captioned proceeding. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com. If I am unavailable, you may contact my associate, Erin Glavich, by telephone at (202) 663-7830 or by e-mail at eglavich@bakerandmiller.com.

Sincerely,

/s/ **William A. Mullins**

William A. Mullins

Enclosure

cc: Anthony J. LaRocca (CSXT)
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T.J. Litwiler (NPBL)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36522

**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO CSXT'S OPENING
STATEMENT**

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October 25, 2021

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36522

**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO CSX'S OPENING
STATEMENT**

INTRODUCTION AND SUMMARY OF ARGUMENT

For over 36 years, CSX Transportation, Inc. ("CSX") knew of, accepted, and never contested Norfolk Southern Railway Company's ("NSR") control of Norfolk & Portsmouth Belt Line Railroad Co. ("NPBL").

- CSX did not oppose, seek conditions, or otherwise take a position on NPBL in the original 1982 proceeding despite knowing that the transaction would give Norfolk Southern Corporation ("NSC") control of NPBL and despite the Interstate Commerce Commission's ("ICC") heavy focus on competition with CSX in the Norfolk, VA region. See 1982 Transaction Decision, at 181-88; 220-29.¹
- At no time did CSX ever file an action with the ICC complaining that NSC,² after the transaction, was exercising unauthorized control over NPBL when NSC asserted its majority ownership over NPBL through its combined ownership of three entities with a combined 57.14% interest and instituted common management procedures, such as accounting changes, at NPBL. See NPBL's Opening Statement, at 3-5, FD No. 36522 (filed September 23, 2021).
- CSX did not file a complaint or assert unauthorized control in 1989 when CSX, Norfolk and Western Railway Company ("N&W") and Southern Railway Company ("SRC")

¹ Norfolk S. Corp. — Control — Norfolk and W. Ry. Co. and S. Ry. Co., FD 29430 (Sub-No. 1), 366 I.C.C. 173 (I.C.C. served March 19, 1982) ("1982 Transaction Decision"); CSX participated in the transaction but did not ask the ICC to impose any conditions. See 1982 Transaction Decision, at 181-188. The 1982 application and resulting changes are referred to as the "1982 Transaction."

² As stated in NSR's Opening Statement filed on September 23, 2021, NWS Enterprise, Inc. ("NWS") was the merger entity that filed the original merger application. By the time the application was approved, NWS had changed its name to NSC.

revised the original July 7, 1897 Agreement, acknowledging and memorializing the change in majority ownership in NPBL in the 1989 Supplement Agreement. See NPBL's Opening Statement, at 3-4; Exhibit 1 -1989 Supplemental Agreement between CSX Transportation, Inc. and Norfolk and Western Railway, and Southern Railway, Co., ("1989 Supplemental Agreement"). By this point, CSX had known of NSR's active control, ownership, and management of NPBL for seven years and yet knowingly executed the 1989 amendment without raising the control issue with the ICC.

- A year later, in 1990, SRC (who later changed its name to NSR) filed its notice of exemption under then 49 U.S.C. §10505 to further consolidate the corporate structure based in part on requests by customers to allow them to "do business with a single entity." S. Ry. Co. – Control Exemption – Norfolk and W. Ry. Co., Chesapeake W. Ry., the Toledo Belt Ry. Co., and Wabash R.R. Co., FD No. 31791 (I.C.C. served Jan. 14, 1991)(filed in 1990 so sometimes referred to as the 1990 transaction). Again, CSX did not object or raise the issue of improper control of NPBL.
- In 1998, the ICC approved the consolidation of all rail operations in the corporate family to be under NSR. CSX again did not object or raise the issue that allowing the entities to combine into a single entity under NSR's control would result in improper control of NPBL. Norfolk S. Ry. Co. – Exemption – Norfolk and W. Ry. Co., FD No. 33648 (S.T.B. served Aug. 31, 1998).

At no time during this nearly four-decade period did CSX claim that NSR was exercising unauthorized control of NPBL or argue that NSR and NPBL were independent entities that could "conspire" under the antitrust laws to foreclose CSX's ability to utilize NPBL. It was only after CSX objected to the trackage rights fee that NSR was proposing to charge NPBL for NPBL's continued access to/from the Norfolk Intermodal Terminal ("NIT") that CSX decided, not to pursue trackage rights or a competitive access case at the Board,³ but rather, file an antitrust case. Of course, for an antitrust case to even have any plausibility, NSR and NPBL must not be within

³ Contrary to CSX's unsupported and outlandish claims that NSC is trying to block CSX's access to Norfolk International Terminal ("NIT"), NSC/ NSR has done quite the opposite. NSR has provided NPBL with trackage rights over NSR's track for decades for NPBL to access NIT Terminal, and CSX therefore has on-dock access to NIT via NPBL. If NSR had truly wanted to foreclose CSX's access, it did not have to provide NPBL with such trackage rights or it would seek to establish a rate so high that no CSX traffic could move. Instead, NSR is more than willing to allow the Board to set the trackage rights fee consistent with precedent or for CSX to pursue a competitive access case under 49 U.S.C. §11102. It is CSX that seeks to avoid its rights and remedies under ICCTA, notwithstanding the Board's exclusive jurisdiction over such issues.

the same corporate family. Accordingly, at this point, and only at this point, did CSX begin to assert unlawful control and a conspiracy.

There is also another reason why CSX only recently concocted its unlawful control theory and that is because CSX has known all along that NSR and its predecessors have for four decades legally controlled NPBL. CSX knows that it was understood *at the time of the application* that NSR's parent company, NSC,⁴ sought and was granted approval to control *all* of SRC and N&W, including its subsidiaries and affiliates, including NPBL. And the clarity of that answer only improves when the application is understood correctly and in the context of the merger rules in existence at the time, which CSX fails to do in its Opening Statement.

The crux of CSX's argument is that NSC, N&W, and SRC never sought specific, delineated permission to control NPBL, and therefore, control of NPBL could not have been granted. See CSXT Opening Statement at 4-6, 12-29. Their theory is that NPBL was excluded from NSC's 1980 application for control of N&W and SRC ("Application") in the 1982 Transaction and that the ICC approval only covered the SRC and N&W systems. Id. Its evidence is the Application's use of "systems" to describe N&W and SRC, the appendices with only wholly controlled subsidiaries listed, the exclusion of non-controlled subsidiaries from the definition of applicant, and missing documentation and competitive analysis specifically on NPBL. Id. Because NPBL was not individually named *and* analyzed, CSX claims that NSC did not receive authority to control NPBL. Id.

The problem with this argument is that it is divorced from the applicable rules, the standards at the time, and the decisions that guided the application. CSX fails to understand the applicable rules, the petitions for waiver, and the ICC's decision on the waiver requests, and how

⁴ Where speaking of the applicants at the time of the 1982 Transaction, we will reference N&W, SRC, and NSC. Where speaking of 1990 to present, we will use NSR and NSC.

they shaped the Application. The precedents on which CSX relies were filed and decided under different rules that did not exist in 1982. The proposition that an applicant must specifically list and seek control of all terminal railroads in which it held a non-controlling ownership interest simply did not apply at the time or was specifically governed by waivers.

Because of its parade of misunderstandings, CSX comes to the wrong conclusion on the basic question before the Board today: was NPBL included in the 1982 Transaction? When the rules in existence are understood in context, the answer to that is an unequivocal "yes." In NSR's Opening Statement, NSR set out the basics of how NSC gained control of NPBL through its stock ownership of N&W and SRC and that the decision specifically gave NSC control of N&W, SRC, and "*their [N&W's and SRC's] affiliated carriers*" (including NPBL). But even if the 1982 Transaction did not include authority to control NPBL, as discussed in NSR's Opening Statement and herein, at a minimum, certainly the 1991 and 1998 exemption proceedings authorized control of NPBL. NPBL was part of the NSC corporate family at those times, a fact that CSX knew full well and raised no objections to the corporate family exemptions and the final consolidation of NPBL coming under the full control of NSR in 1998.

Understood in context and the rules of the time, it is clear that the authority granted by the ICC (and later the Board) included control of SRC and N&W, including all subsidiaries and affiliates, including NPBL, into the NSC corporate family. In doing so, under 49 U.S.C. §11341(a), the ICC and Board authorizations included immunity from actions under the antitrust

laws as necessary to allow NSC to exercise its control of SRC, N&W, and Norfolk Southern⁵ and their affiliated carriers (including NPBL).⁶

ARGUMENT

I. BECAUSE CSX MISUNDERSTANDS THE CONCEPTS OF “SYSTEMS” AND “APPLICANT” IN THE CONTEXT OF THE 1980 APPLICATION, IT DRAWS THE WRONG CONCLUSIONS ABOUT THE SCOPE OF THE TRANSACTION APPROVED IN THE 1982 DECISION

The 1982 Transaction was a whole, top-down consolidation of two railroads under the common control of a holding company. See, e.g., 1982 Transaction Decisions; App. Vol. 2, page 2 (found at CSXT’s Opening Statement Exhibit F); Exhibit 2 – Application Excerpts (Vol. 3, Exh. 9 (1980 Merger Agreement and Merger Plans), Vol. 4 (Operating Plan)). NSC, N&W, and SRC (together “applicants”) sought ICC approval for the transaction. Id. As has been the case under every iteration of the rail consolidation procedures, the applicants filed the Application in accordance with the ICC’s rail consolidation procedures. Those procedures established the informational and procedural rules, which in turn guided the contents of the application. N&W and SRC sought waivers to reduce the informational burdens, in relevant part, by submitting information on a “system-basis” and defining “applicant” as only the

⁵ “Norfolk Southern” refers to the historical subsidiary of SRC, and a different entity than NSR or NSC. The subsidiary Norfolk Southern changed its name to Carolina and Northwestern Railway Company following the 1982 Transaction.

⁶ Of course, the Board need not address the antitrust immunity question. The only real issue before the Board should be whether or not “control” was authorized. If it was, then the District Court can determine whether NSC has a valid defense to assertions that it violated the antitrust laws in carrying out that control. See Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984); Interstate Inv’rs, Inc. v. Transcontinental Bus Sys., Inc., 310 F.Supp. 1053 (1970). If CSX is unhappy with the Court’s decision, at any time, CSX can pursue a competitive access case against NSC under 49 U.S.C. §11102 or allow the Board to set the appropriate trackage rights fee for NPBL’s trackage rights over NSR, a case that CSX is already actively participating in but asked to be held in abeyance so that it could pursue its antitrust claims. Even if, the Board holds that NSC and NSR do have lawful control of NPBL, CSX can still pursue a competitive access case or continue with its participation in the trackage rights fee dispute.

initiating parties (NSC, SRC, N&W, and D&H)⁷. CSX fails to understand this basic concept: the applicable rules in conjunction with waivers, shape the form and content of the application and not the scope of the approvals granted.

Proof that the entire transaction, including independent partially-owned subsidiaries, was before the ICC, and that the ICC understood it was considering the entire transaction, is evident when the Application is considered in the context of the applicable rules, procedures, and standards of the time. A holistic approach is critical. At the time, rail consolidation procedures were in the middle of an evolution. The Application itself was filed under a hybrid set of rules that straddled different methodologies and procedures. The rules that governed the contents and substance of the Application were those in effect in 1979, which the ICC admitted were voluminous and burdensome. See Exhibit 3 - Railroad Consolidation Procedures (1979), Ex Parte No. 282 (Sub-No. 3), 44 FR 66626 (Nov. 20, 1979) (“1979 Proposed Rules”). The rules that governed procedure were the more modern, lighter version. See Railroad Consolidation Procedure (1980), Ex Parte No. 282 (Sub-No. 3), 363 I.C.C. 200 (I.C.C. served Aug. 8, 1980) (“1980 Rail Consolidation Procedures”). This amalgamation directly determined the scope of information *submitted* in the Application, including how “systems” were used and how “applicant” was defined. CSX misses this and as a result misinterprets the use of “systems” and the definition of “applicant” to misread both as evidence of the scope of the transaction’s approval authority, instead of simply what was required to be submitted in the application.

⁷ Delaware and Hudson Railway Company (“D&H”) was a wholly-owned subsidiary of Dereco, Inc., which was a wholly-owned subsidiary of N&W, but was operated and managed separately from N&W. Because of its relationship to N&W, it was deemed an applicant. See Waiver and Clarification of Procedural Regulations and Filing Requirements, 45 FR 66911, 66912 (Oct. 8, 1980) (“Waiver Decision”), found at CSXT Opening Statement, Exhibit E. D&H originally opposed the primary application, but withdrew the opposition after an agreement was reached to sell control of D&H to Guilford Transportation, Inc. See 1982 Transaction Decision at 185.

CSX understands the use of “systems” in the Application as a limiting factor because the application only discusses the transaction in terms of “systems.” See CSXT Opening Statement at 4-6, 12-29. As such, according to CSX, the intent and result was that the transaction was limited to the SRC and N&W systems, not including their ownership interests in other carriers. Id. CSX’s interpretation of “systems” is incorrect and is not supported by the petitions for waiver, the ICC’s decision on the waivers, or the Application. Instead, “systems” is a common approach to understanding the extent of a carrier beyond corporate identity and, importantly here, only a method to reduce informational burdens under the applicable rules.

Similarly, CSX argues that because the definition of “applicant” excluded independent, partially-owned carriers, and that there was no information or competitive analysis as to any excluded entity, including independent partially-owned subsidiaries, the intent and result was to limit the scope of the ICC’s approval to exclude any entity not named, including independent partially-owned subsidiaries.⁸ See CSXT Opening Statement at 4-6, 12-29. But, again, where CSX sees a limit to the scope of the ICC’s approval, the original Application, in the context of the applicable rules, waiver requests, and the ICC’s waiver decision, is in reality, a method of reducing the informational burden, not to limit the scope of the approval.

A. The Waiver Requests Sought To Reduce The Substantive Informational Burden Under The Applicable Rules That Without Modification, Were Burdensome

Shortly after NSC, N&W, and SRC filed a notice of intent to file an application for consolidation, N&W and SRC filed a Petition for Waiver and Clarification of the ICC’s Railroad

⁸ Under CSX’s view, this would include all affiliates that were only partially owned by applicants but would be majority-owned after the transaction and for which no “system” information was presented were somehow excluded from the scope of the approval, i.e., NPBL.

Consolidation Procedures, at 49 C.F.R. Part 1111 (“July Petition”).⁹ Relevant to the proceeding are three requests: (1) to apply the rail consolidation procedures then in effect to the application; (2) to clarify which entities were to submit data; and (3) to modify the definition of “applicant” to reduce the regulatory and informational burden.

The first request in the July Petition asked the ICC to apply the rail consolidation procedures then in effect (49 C.F.R. Part 1111 (1979) “the 1979 Rules”). See July Petition at 2-4; Exhibit 4 – 49 C.F.R. Part 1111 (1979)). In November 1979, the ICC had issued a notice of proposed rulemaking seeking to substantially revise the rail consolidation procedures under Part 1111. This was done in recognition that the old rules, adopted in 1977, required voluminous information and needed wholesale revising. See 1979 Proposed Rules. The July Petition asked the ICC to apply the then-effective 1979 Rules to the 1982 Transaction because it appeared the proposed rules would not be in place by the time the application was filed in late 1980. See July Petition, at 1-4.

The 1979 Rules consisted of five parts: Section 1111.1 (Content of applications); 1111.2 (Exhibits); 1111.3 (Form and style); 1111.4 (Procedures); and 1111.10 (General policy statement.). The 1979 Rules applied to all transactions and defined, in footnote 1, the term “applicant” very broadly:

The term “applicant” is used throughout Part 1111 as a general reference to persons initiating an application under section 5(2) or (3) and on behalf of whom an application is initiated. In all instances, except as noted immediately below, the term covers the actual initiating party, whether or not a carrier, and *all* carriers with properties directly involved in the proposed transaction. In all applications under section 5(3) in which the Secretary of

⁹ See N&WS Enter., Inc. — Control Of — Norfolk and W. Ry. Co. and S. Ry. Co., FD 29430, Petition of Norfolk and Western Railway Company and Southern Railway Company Seeking Waiver and Clarification of the Railroad Consolidation Procedures (49 C.F.R. Part 1111), filed July 24, 1980, attached as Exhibit A to NSR’s Opening Evidence.

Transportation is the proposing party, the term ‘applicant’ shall refer only to the carriers with properties directly involved in the proposed transaction. (*Italics original*).

The 1979 Rules only applied to applicants. There was no ‘applicant carrier’ or other sub-designations as there are now. All informational requests were therefore all-encompassing and applied to initiating parties and *all* carriers involved in the transaction. The term “all carriers” included all ownership interests in carriers whether those carriers were wholly or partially owned.

From a practical standpoint, the burden facing an applicant without a waiver was substantial. For example, Section 1111.2(b)(2)(ii) requires "a table showing the applicant's revenue freight traffic, indicating by year for the 10-year period preceding the filing of the application, the number of local, interline originated, interline terminated, overhead, total carloads, total revenue tones, revenue tons-miles, and total freight revenue." To apply this, and every requirement, to “all carriers,” particularly those operated independently of the applicants, and whether owned in whole or in part, creates an exponential burden.

However, before the ICC heard the waiver request, it issued the 1980 Rail Consolidation Procedures.¹⁰ N&W and SRC then filed a supplemental petition for waivers and clarification, requesting only that the ICC apply the now effective rules: the 1979 Rules, as modified by the 1980 Adopted Rules. See Exhibit 5 - N&W and SRC’s’ Supplementary Petition for Waiver and

¹⁰ The ICC acknowledged the undue burden of its prior rules. It was the reason behind the 1979 Proposed Rules. See 1979 Proposed Rules. In early August, the Board issued its 1980 Rail Consolidation Procedures, bifurcating its decision on the 1979 Proposed Rules. See 1980 Rail Consolidation Procedures, 363 I.C.C. 200. The ICC adopted the procedural rules of the 1979 Proposed Rules (Part A and Appendix A)(here, “1980 Adopted Rules”) and issued continued rulemaking on the remaining informational requests (Part B and Appendix B). Id. The 1980 Adopted Rules included minor changes to the Contents and Exhibits section; adopted a new “Definitions” section, superseded the Procedures section, and added a new “Types of Transaction” section, introducing new categories of “major,” “minor,” and, for the first time in the ICC’s rail consolidation procedures, “exempt” transactions. See Id.

Clarification of the Railroad Consolidation Procedures, FD No. 29430, dated September 10, 1980.

As the substantive parts of the 1979 Rules were in effect, N&W and SRC's July Petition, particularly their waivers relating to which entities would be required to submit data and who should be defined as "applicant," otherwise remained relevant. See July Petition at 3-12. Both waivers sought to define which entities would be required to submit information in the application considering the substantial burden of the informational requests in the 1979 Rules. N&W and SRC sought waivers to submit data on a "system-basis" and to define "applicant" as only the initiating parties, N&W, SRC, the holding company, and D&H. The applicants sought to exclude the otherwise required information for the other carrier subsidiaries, including carriers that were owned either in whole or in part, as identified. It is these two waiver requests, and the resulting ICC's decision, that CSX misinterpreted.

B. CSX Misinterpreted The Term "Systems" And How It Was Used In The Application

CSX argues the waiver request and use of "systems" is evidence that the ICC's approval of the transaction is limited to the N&W and SRC "systems" and excluded all other carriers, including carriers that would remain independent. See CSXT Opening Statement at 13. In support of its belief, CSX cites the waiver request itself, the appendices that include only wholly controlled subsidiaries, the discussion in the Application about N&W and SRC systems, and economic and competitive analysis of SRC and N&W systems. Id. at 5, 12-19. CSX goes so far as to state, *without citation*, that N&W and SRC "explained that the request for control authority was limited to the N&W and SRC *systems*." Id. at 13 (emphasis original). This is demonstrably false. And CSX is wrong about how "systems" is both defined and used.

The concept of “systems” was introduced in the July Petition to address the data requirements of the 1979 Rules. See July Petition at 4-10 (“I. Waiver to Permit Submission of Data on a System Basis.”). “Systems” was raised in the context of waivers on *data* submission. See July Petition at 4-10. As N&W and SRC clearly state, the waiver is about what information should be submitted and by whom. See Id. In fact, under the applicable rules, a systems-based approach to data was a way to *expand* the information before the ICC beyond simply the “initiating parties,” not to narrow the scope to only specific individual carriers as CSX appears to argue.¹¹

SRC and N&W each had several subsidiaries and affiliates that maintained separate corporate identities but whose operations were effectively consolidated in and controlled by their respective parent. See July Petition at 4-8. Those subsidiaries were identified in Appendix A and B to the July Petition. See Id. at 4-7; Appendices at 35-37. SRC and N&W each also had partial ownership in other carriers that operated independently of the SRC and N&W systems. Under the old rules, N&W and SRC would have had to submit individual data for “all carriers,” including wholly owned and partially owned carriers. To avoid this, SRC sought a waiver to submit data on a systems basis because that was how it operated and kept records. N&W (and D&H) sought a waiver to submit data on an individual basis, despite their operating within their own “systems,” because neither kept information on a consolidated basis and their respective

¹¹ System-based reporting was an accepted practice in which the ICC looked beyond a singular corporate identity to get a better, more accurate picture of a carrier and its operations. See July Waiver at 5 and the ICC’s Waiver Decision at 66912. The practice considered the commercial and economic interdependence of a corporate parent and its subsidiaries and affiliates to understand the extent of a carrier that may otherwise be obscured by the corporate structure. See Id. (citing Southern Ry. Co. Purchase, 275 I.C.C. 724, 732 (1950), in an attempt to determine Southern Railway’s commercial value, the ICC looked beyond its singular corporate identity to its “earning capacity[] determined from the standpoint of its relations to the system of which it is a member.”).

subsidiaries accounted for a minor amount of their overall figures. See Id. at 4-10. The data waivers applied to specific provisions of the rules, identified on pages 8-10. Id. In addition, both SRC and N&W sought a waiver to submit certain financial documents that were kept on a consolidated basis for SRC, N&W, and D&H. See July Petition at 26-29.

The ICC clearly understood the purpose of the waiver and the scope of the requests was about reducing the informational burden. Under the section titled “Entities to Submit Data,” the ICC acknowledged that the new definition of “applicant” is limited to the initiating parties and that the petitioners sought clarification regarding which entities must submit data under the new definition and the old informational rules. See Waiver Decision at 66912. The ICC cited its prior acceptance of SRC’s information on a consolidated basis and accepted N&W and D&H’s request to submit data only as to their individual corporate identities. Id. The ICC also granted the waiver to produce certain financial data on a consolidated basis. Id. at 66913-14.¹²

One can see how CSX's misinterpretations lead it to the wrong conclusion. Contrary to CSX’s interpretation, the waiver to use “systems-based” data was about who had to submit data under the applicable rules. But for the new definition of the applicant and the waivers, all carriers, including independent partially-owned subsidiaries like NPBL, would have had to submit all data. Granting the waivers and limiting the information to the “systems” was a method to reduce the burden imposed by oppressive 1979 data informational requirements, while also ensuring the ICC had sufficient and accurate information by which to judge the transaction.

¹² This is not the only case in which the ICC approved a waiver to limit the submission of data on a system basis, and for the same reasons, even under the post-1982 rules. See, e.g., Union Pac. Corp. et al—Control—Chi. and N. W. Holding Corp. and Chi. and N. W. Transp. Co., FD No. 32133, Decision No. 3 (I.C.C. served Oct. 26, 1992)(accepting applicant’s arguments that information on an individual basis was not pertinent to the control application and burdensome to collect and “permit[ting] the filing of information pertaining to each of the applicant carriers (including their controlled subsidiary railroads) on a consolidated basis”)

The Application was then consistent with the waiver. The data submitted was on a system-based approach, the appendices identified which subsidiaries were in each system, and the information submitted and analyses are about systems *because* of the interplay between the rules and the waivers as granted by the ICC.

The “systems” waiver was not intended to limit the scope of any subsequent ICC approval to cover only those specific railroads who were named applicants or whose systems were consolidated with the applicants. Indeed, at no point in the July Petition do N&W or SRC indicate that the scope of the approval they were seeking was limited to the specific systems for which information was being provided. Neither does the ICC. The ICC Waiver Decision made it clear that the decision was about which entities and what information should be submitted under the term “applicants” in the Application. It was not about the scope of what “carriers” and “affiliated carriers” would be covered by the ICC’s approval.

C. CSX Does Not Properly Understand How The Definition Of “Applicant” Was Changed Via The Waiver Process And How Those Changes Impacted The Form And Content Of The Application

The same analysis discussed above also applies to the term “applicant.” When the July Petition was filed, the definition of “applicant,” was the expansive “initiating parties and all carriers” (including wholly owned and partially owned carriers) version. Without a waiver, all of the substantive informational requirements would apply to *all* of SRC and N&W’s carrier subsidiaries, whether wholly or partially owned. The waiver and the identification of “applicants” was to act as a limit to the informational requirements that underpin the Application, as it has under the applicable rules here and continues to be in consolidation applications to modern times. There is no basis for CSX’s argument that a waiver of

informational requirements is a limitation of the scope of the ICC's overall approval to cover only the specifically named carriers.

SRC and N&W sought to reduce the entities under the definition, citing the extreme burden of including all carriers for every provision. See July Petition at 11-12. SRC and N&W originally requested that “applicants” only refer to the initiating parties of SRC, N&W, the holding company, and D&H. See July Waiver at 11. SRC and N&W also sought clarification to exclude non-controlled carriers from the definition of applicant, again recognizing that *who* is in the definition drives the quantity of information. Id. at 11-12.

As stated by SRC and N&W, they did not exercise control over the non-controlled subsidiaries, did not intend to exercise control over the non-controlled subsidiaries, and the records were maintained separately, making it burdensome to include subsidiaries that had no overall impact on the ICC's analysis of the initiating parties.¹³ SRC and N&W indicated that even with a waiver, they would include all of the SRC and N&W subsidiaries and affiliates in the required narrative description of all carriers and the measure of control over each, per Section 1111.1(c)(8)(“the measure of control of ownership if any, now exercised by the applicant over any carrier subject to the act, or over the properties of such carrier.”).¹⁴

¹³ CSX makes much of the fact that SRC and N&W specifically declared that the listed carriers, which included NPBL, would not be controlled by either SRC or N&W in a post-transaction environment. CSX ignores that this was simply a factual statement because neither SRC standing alone nor N&W standing alone would control NPBL in a post-transaction environment. CSX ignores that NSC would have control of NPBL in a post-transaction environment and that NSC never stated that it would not control NPBL in a post-transaction environment. CSX also ignores that absent the waiver, NPBL would have had to be an “applicant” and would have been required to produce a substantial amount of information about its operations and revenues.

¹⁴ It is important to note that the ownership shares held in NPBL by SRC and N&W were indeed eventually listed and disclosed. Simple math would have indicated that NSC would have majority control of NPBL in a post-transaction environment.

CSX repeatedly cites the existence of the N&W and SRC's waiver request as the smoking gun proof of NPBL's exclusion from the transaction. See, e.g., Id. at 14-16. It argues the waiver requests, and related absence of information related to independent carriers, are evidence that non-controlled subsidiaries and affiliates are excluded from the scope of the entire transaction and ICC's approval.¹⁵ See generally CSXT Opening Statement 12-29.

But CSX's argument only works if one takes that one statement wholly out of context. The statement that N&W and SR do not currently or intend to exercise control is made in the context of what information should be considered in the larger transaction application. The lack of control of the subsidiaries is a *factor*, along with access to records and independent operation, considered by the ICC in determining whether they should be subject to the full panoply of informational requirements as "applicants."¹⁶

In contrast to CSX, the ICC did understand that the discussion about burden, control, and subsidiaries was about definitions and informational burdens, not exclusion from the scope of its approval. It is clear in its Waiver Decision. In granting the waiver with modification, under the heading, "Clarification of Term 'Applicant,'" the ICC acknowledged that the Petition's request to

¹⁵ By relying upon conclusory language, CSX stretches the meaning of the language used in the application to establish conclusions that are not supported by the context of the quoted section, which relates to the informational burden associated with the term "applicant." For example, on page 13, CSX twice quotes the line "no useful purpose and would substantially burden the record." The first to say that "because" petitioners did not seek control of any non-controlled subsidiaries, their information "served no useful purpose...". The second is to say that ICC noted petitioners "have no intention of exercising control..." therefore, "it would serve no useful purpose..." Neither of these is supported by the original documents and the conclusion is not supported by the ICC's decision. See Waiver Decision at 666912 ("We agree with petitioners that *the term 'applicant,' as used in our regulations*, does not encompass such non-controlled carriers.").

¹⁶ The impetus for the statement and the waivers, to begin with, was the understanding that smaller subsidiaries that do not greatly impact the overall operation or analysis of the initiating parties need not be included. It was the reason for submitting data on a consolidated basis. It was the reason for the definition of "applicant." Where substantial information is not needed, it made sense to exclude these entities from the informational requirements applicable to applicants.

define "applicants" as only the initiating parties is in line with the new definition of applicant and that the parties believe there is a substantial burden associated with including subsidiaries in the term. Waiver Decision at 66912. Concerning non-controlled carriers, the ICC is explicit that this is about burden under the rules: "We believe it would serve no useful purpose to produce *detailed information* for these companies (other than identifying them as required by 49 CFR 1111.1(c)(8), which may be done on the corporate charts). *We agree with petitioners that the term 'applicant,' as used in our regulations, does not encompass such non-controlled carriers.*" See Id. (emphasis added).

Again, with a proper understanding, one sees where CSX goes awry. In 1980, non-controlled subsidiaries and affiliates, even if only partially owned by the applicants, would be a "carrier" for which full information would have had to be provided and thus would have been part of the application. Without a waiver, NPBL, because it was owned by Norfolk Southern N&W, and SRC, would have had to have been an applicant carrier under the "all carriers" requirement. Thus, absent the new definitions and waivers, NPBL would have been named in the Application and would have been required to submit information as required by the 1979 Rules. But, because of the changes in the rules and the waivers received, NPBL was not an applicant and did not have to submit the substantial information required of "applicants."

But to CSX, exclusion in the definitional phase is exclusion from the whole transaction and ICC approval. It argues that NSC was required to explicitly and separately raise NPBL in its request for control authority, without regard to how the rules and waivers change the calculus. This is CSX's failing. And yet, why CSX fails to understand the rules and waivers is baffling. Waivers have been a part of rail consolidation procedures explicitly since 1980 and used extensively in major rail consolidations. See 1980 Rail Consolidation Procedures, 363 I.C.C.

200; 49 C.F.R. 1111.4(f)(1981); 49 C.F.R. 1180.4(f)(1982); Can. Nat'l Ry. Co., et al — Control — Ill. Cent. Corp., et al., FD No. 33556, Decision No. 7, 1998 STB LEXIS 250, at *5-6, 13-15, fn.3 (S.T.B. served Sept. 19, 1998)(granting CSX's waiver request on the definition of "applicant carrier" to exclude certain interests and subsidiaries from a responsive application.).¹⁷

Furthermore, waivers of the definitions of "applicants" or "applicant carriers" (and thus who is subject to informational burdens) are not limited to partially-owned or non-controlled subsidiaries. Waivers have been granted for carriers in which applicants own majority control. See, e.g., Union Pac. Corp., et al., — Control — Mo. Pac. Corp., et al., FD No. 30000, and Union Pac., et al., — Control — W. Pac. Corp., et al., FD No. 30000 (Sub-No. 1), 366 I.C.C. 459 (I.C.C. served Sept. 24, 1982);¹⁸ Exhibit 6 – UP/MP/WP Waiver Petition; UP/MP/WP Waiver Decision, 45 FR 63164 (Sept. 23, 1980). And, waivers have even been granted to exclude subsidiaries from the definition of applicant carrier (and thus from the informational requirements) where neither applicant has a controlling interest *but will have a majority interest following the transaction, just as NPBL* in the 1982 Transaction. See, e.g., BN/SF, 1994 ICC LEXIS, at *4; Santa Fe S. Pac. Corp. — Control — S. Pac. Transp. Co., et al., at *1, FD No. 30400 (I.C.C. served Feb. 3, 1984)("Santa Fe/Southern"); Union Pac. Corp., et al. — Control

¹⁷ In footnote 3, the Board clarifies that CSX's waiver also seeks to exclude Lakefront Dock and Railroad Terminal Company (Lakefront), a company which at the time of the request CSX only owned a 50% interest. However, CSX was in the midst of an acquisition of certain Conrail assets, which would bring Lakefront under 100% CSX control. The Board granted CSX's request to exclude this soon-to-be wholly-owned terminal rail subsidiary because CSX argued that did not anticipate any changes in management or operations as a result of its responsive application and the information on the terminal railroad would not enhance the Board's inquiry on the transaction at issue.

¹⁸ Union Pac. Corp. and Union Pac. R.R. Co. — Control — Mo. Pac. Corp. and Mo. Pac. R.R. Co., FD No. 300000 was consolidated with Union Pac. Corp. and Union Pac. R.R. Company — Control — The W. Pac. R.R. Co., FD No. 30000 (Sub-No. 1). Referred to herein as the "UP/MP/WP" transaction.

and Merger — S. Pac. Rail Corp., et al., FD No. 32760, 1995 ICC LEXIS 229, at *6 (I.C.C. served Sept. 5, 1995).

In the same BN/SF¹⁹ case cited by CSX, the ICC excluded The Wichita Union Terminal Railway Company (“WUTR”) from the definition of “applicant carriers,” stating, “[w]e have previously granted similar waivers or clarifications to exclude from the definition of “applicant carriers” rail carriers in which no applicant presently owns more than a 50% interest, *even though those applicants would together own more than a 50% interest following our approval of the transaction.*” See BN/SF, 1994 ICC LEXIS 187, at *4 (emphasis added). Yet, with such waivers, no party could argue that non-controlled carriers were excluded from the scope of the approval of the transaction. No party would argue that WUTR was not covered by the scope of the ICC approval decision simply because it was the subject of a waiver. Indeed, CSX cites the case for the proposition that NSC was required to specifically name and analyze NPBL *because the ICC later asked for more information about excluded entities.* See CSXT Opening Statement at 28. Yet under CSX's argument, by being excluded, WUTR should not be considered part of the transaction before the ICC for approval.

Excluding subsidiaries, whether owned in whole or in part, from the definition of “applicant” or “applicant carrier” has never been understood to exclude them from the scope of the ICC’s or Board’s approval of the transaction, as CSX wants to argue concerning NPBL.²⁰ And in fact, this concept is so universally understood today that it is rarely discussed outright and

¹⁹ Burlington N., et al. – Control & Merger – Santa Fe Pac., et al., 10 I.C.C.2d 661 (1995) (“BN/SF”).

²⁰ CSX cannot cite to one single case supporting the proposition that unless an “applicant” or “applicant carrier” specifically requests that the ICC (or Board) authority include specific control authority for a subsidiary, whether owned in whole or in part, that subsidiary is therefore excluded from the scope of the approval, even if control would occur, nor could they. There is no such precedent.

must be understood from a basic reading of the application and decisions. But, where it is discussed, it is clear. For example, in the Santa Fe/Southern Pacific transaction, the ICC granted a waiver excluding from the definition of “applicant carrier” two rail carriers over which the merged company would have control if the transaction was approved. See Santa Fe/Southern, Feb. 3, 1984, at *1. As with N&W and SRC, the applicants stated in support of the waiver that control would not affect the shippers and was limited in scope; that the carriers were operated independently and maintained their records; and that it would be burdensome to submit all the information required from an applicant. Id. In granting the waiver, the ICC noted that since they will be identified in the corporate chart (as NPBL was here), “any interested parties may seek discovery regarding them during the initial stages of the proceeding upon a showing of good cause.” Id.²¹

Here, the ICC’s Waiver Decision also demonstrated recognition and consciousness that the excluded carriers, such as independent partially owned subsidiaries, were included in the transaction to be considered by ICC as a whole, by adding requirements to address information that, *but for* the waivers and new procedural rules, would have been submitted on “all carriers.” See Waiver Decision at 66912. The ICC added a new requirement, the corporate chart: “In lieu of filing extensive information regarding the subsidiaries, corporate charts should be filed for SRC, N&W, D&H, and the new holding company, as described in section 1111.2[(b)(1)(vi)] of

²¹ The ownership interests in NPBL were fully disclosed. Any party could have sought discovery on NPBL or requested the ICC to request additional information. No party did so. Likewise, CSX did not object to NSC’s control of NPBL for over 36 years. Having not objected for these many years, CSX cannot now claim that NS is somehow unlawfully controlling NPBL. The doctrine of laches requires proof of two elements: (1) lack of diligence by the party against whom the defense is asserted and (2) resultant prejudice to the party asserting the defense. Southern Pacific Co. v. Bogert, 250 U.S. 483, 488-490. CSX did not pursue its claim of unauthorized control for nearly 40 years and clearly, it would be prejudicial to NSC and NSR to now hold that their control of NPBL was never authorized.

the 1979 proposed regulations.” Id. The ICC further instructed N&W and SRC to incorporate the current applicable regulations on identifying measures of control into that new condition. Id. Thus, under the applicable rules, as modified by the 1980 Adopted rules, and as further modified by the Wavier Decision, the interests in NPBL were fully disclosed in the Application. See App. Vol. 2, Appendix 2 (found at CSXT Opening Statement, Exhibit F).

CSX dismisses this condition, calling it “a simple alphabetical listing.” See CSXT Opening Statement at 16. In doing so, CSX denies the ICC’s deliberate actions concerning subsidiaries in the transaction. CSX ignores that the existence of the corporate chart and the listing of the various ownership interests were intended to provide a substantive role. Further, CSX dismisses the chart, and why it was added, to deny the fact that it stands as evidence that the applicants intended, and the ICC understood, that these subsidiaries were part of the transaction and would be covered by the scope of the ICC’s approval.

D. Because CSX Misunderstands The Rules And The Waivers, It Consequently Reads The Application Incorrectly

The Application was consistent with the 1979 Rules, as modified by the 1980 Adopted rules, and as further modified by the Waiver Decision. Data submitted under the Rules was likewise consistent with the approved “system-based” approach. The Application included the specially added corporate chart, at Volume 2, Appendix 2, and incorporated Section 1111.2(c)(8), the measure of control of ownership for all carriers subject to the Act, as required by the ICC, and cited by reference throughout the Application and related applications. See Id. Central to the Application was the concept that while NSC would hold stock ownership of all of SRC and all of N&W, each would retain their separate corporate identities and operations. See, e.g., App., Vol. 2 (CSXT’s Opening Statement, Exhibit F); Exhibit Excerpts. That the Application included discussion in terms of systems was because that was how N&W and SRC

then operated and how they would continue to operate after the transaction was consummated. See Exhibit 2, and, generally, App., Vol. 4, Exhibit A-17 (Operation Plan).

The Application is, however, clear that the transaction included all of SRC and N&W, including subsidiaries and affiliates, whether owned in whole or in part. It was upfront on page 2 of the Application, responsive to Section 1111.1(a), which required a narrative summary of the transaction: “As a result of the proposed transaction, [NSC] will also acquire indirect control through stock ownership of all subsidiaries of N&W and Southern...” See App., Vol. 2, page 2 (CSXT’s Opening Statement Exhibit F); Exhibit 2 - Vol. 3, Ex. 9 (1980 Merger Agreement and Merger Plans). The phrase was not limited to only wholly-owned subsidiaries, but included any subsidiary for which NSC would, as a result of the transaction, obtain indirect control over, including NPBL (although not explicitly so stated).

CSX holds up the consistency between the waivers and Application as “evidence” that the *transaction* and the scope of the ICC’s approval is limited to N&W and SRC systems. See, e.g., CSXT Opening Statement at 12-19. It cites discussion of “systems,” the appendices, and failure to include an in-depth analysis of NPBL, with apparently zero awareness that this is what the Waiver Decision granted, i.e., the specific authority to not produce information and analysis on non-applicants, including wholly and partially owned subsidiaries, including NPBL. See CSXT Opening Statement at 12-19; but see Waiver Decision at 66912. For example, CSX argued (again without citations) that “the Application made it clear that the operational and competitive analysis of the transaction was only focused on the system companies of N&W and SRC, not independent railroads in which N&W and SRC held individual non-controlling interest such as NPBL.” See CSXT Opening Statement at 17. But the *waiver* permitted the operational and competitive analysis of the *Application* to be focused on the systems of N&W and SRC and

excused the applicants from having to provide detailed information about the independent railroads, including NPBL. See supra at I.A-C; see also Waiver Decision at 66912.

When boiled down to its essence, CSX's position is that waivers have no effect. Information in an application must be 100% coextensive with the entire scope of the transaction. And any "missing" information is proof that the transaction, and the scope of the ICC's approval, was so limited. This position should be rejected. CSX wrongly conflates the waiver of informational requirements with the scope of the transaction and ICC approval.²²

E. CSX Has No Authority To Support Its Assertions; Instead, Relying Upon More Recent Practices And Standards Not In Effect In 1980 When The Application Was Filed

CSX argues that case law establishes the "obvious principle that control over a terminal railroad must be explicitly requested, evaluated based on evidence submitted, and expressly authorized by the Board." CSXT Opening Statement at 26-29. There is no case standing for that proposition. Instead, there are cases after 1982 where the parties adopted such a practice, and the new merger rules may require such a practice, but there was no such rule or practice in 1982. This argument simply fails to consider the Application in light of the applicable rules during that period.

²² Waivers are commonplace in rail consolidation procedures, particularly with the definition of "applicant carriers." See infra at I.C. Under CSX's logic, anyone who has received a waiver on "applicant" or "applicant carrier" and did not submit documentation and analysis on those entities covered by the waiver has excluded those entities from the scope of the transaction and the ICC's approval. To accept this argument is to create a slippery slope and open a Pandora's Box. Anyone could now go back to any transaction in which a waiver was granted, ignore it, and point to "missing" information in the application as justification to file a myriad of claims, including antitrust claims, against companies who have believed their control authority was blessed long ago, and with antitrust immunity. Such a result may be in the interests of the antitrust plaintiff's bar, but it is not in the public interest.

CSX cites two cases in support of its position: UP/MKT and BN/SF.²³ CSX uses both as the template for the specific information CSX feels should have been submitted about NPBL (although it does so without citation to the cases). See CSXT Opening Statement at 15-19, 26-29. However, the two cases on which CSX relies occurred after the 1982 Transaction. Both were subject to different rules and different standards, adopted during and after the 1982 Transaction. Exemptions under the merger rules were brand new in the 1980 Adopted Procedures. There was no practice of filing exemptions as related applications at the time, as there is now. Research revealed no such “related exemption” requests until at least 1984, and any examples were filed under the post-1982 rules. Thus, while these cases may demonstrate what the obvious principle is today, it was not the standard or practice applicable to this case when it was decided in 1982.

1. The practice under which the applicants in BN/SF and UP/MKT “explicitly requested” authority over terminal railroads did not exist at the time the 1980 Application was filed.

In both the BN/SF and UP/MKT transactions, the applicants filed notices of exemption for control of the terminal railroads under 49 U.S.C. §10505, as sub-dockets under the primary application. See Id.; see also CSXT Opening Statement at 26-29. While the ICC’s exemption power under §10505 had existed previously, exemptions under the merger rules did not appear until the 1980 Adopted Procedures. See 1980 Rail Consolidation Procedures, 363 I.C.C. 200. Previous merger rules applied to all transactions under Section 5(2) without distinction. See 1979 Proposed Rules. Issued four months before the Application was filed, the 1980 Adopted Procedures introduced the three categories and differing standards for major, minor, and exempt transactions. See Id.; 1980 Rail Consolidation Procedures, 363 I.C.C. 200. The new rules were

²³ BN/SF, cited supra; Union Pac. Corp., et al. – Control – Mo.-Kan.-Tex. R.R. Co., et al., 4 I.C.C.2d 409 (I.C.C. served May 13, 1988) (“UP/MKT”).

very much a work in progress. As evidenced in the 1980 Rail Consolidation Procedures adopting the rules, there is a lengthy discussion on whether the ICC even had the authority to exempt transactions as a class, what kind of transactions could qualify, and the purpose for such exemptions, as well as new modifications based on the comments received. See Id. at 202-06.

At the time of the filing of the Application, parties did not believe that separate exemptions needed to be filed as related transactions because parties believed that such transactions, especially control of related terminal railroads and subsidiaries, were subsumed in the overall application and ICC approval. Research identified no merger, consolidation, or acquisition under §11343 that used a notice of exemption as a related application before 1984, two years after the 1982 Rail Consolidation Procedures²⁴ were introduced and after approval of the 1982 Transaction. See Santa Fe/Southern, at *1, FD No. 30400 (I.C.C. served July 24, 1986). Therefore, contrary to the two cases cited by CSX, it appears that there was no practice or expectation of filing exemptions as related applications at the time of the 1982 Transaction, nor would there be for several years.

2. Informational requirements on market and competitive analysis were not required as part of the 1980 Application.

Similar to its misplaced arguments regarding ICC practices in 1980, CSX also misidentifies the law regarding informational requirements as they existed in 1980. CSX argues that substantial information and competitive analysis on NPBL was required, citing the two BN/SF and UP/MKT as evidence of the exemplar process. See CSXT Opening Statement at 18, 21, 26-27. While CSX provides no citations, it appears that it further used the two cases as

²⁴ On February 19, 1982, the ICC adopted a revised and updated set of consolidation procedures, adopting the 1979 Proposed Rules, with additional modifications based on statutory changes as well as experience under the older procedural rules. See Railroad Consolidation Procedures (1982), 366 I.C.C. 75, Ex Parte No. 282 (Sub-No. 3) (I.C.C. served Feb. 19, 1982) (“1982 Rail Consolidation Procedures”)

templates for what information should have been produced in 1980.²⁵ Id. at 16, 18, 19.

Repeatedly, CSX argues that if NPBL was intended to be included, there would have been competitive analysis in the Application and ICC's Decision. Id. at 5-6, 17-19, 21, 25, 26-29. However, the informational requirements that underpin CSX's assertions did not apply to the 1980 Application. Specific informational requirements related to market and competitive analysis did not exist in the applicable rules and were not adopted until the 1982 Rules. See 1982 Rail Consolidation Procedures.²⁶ And indeed, NSC, N&W, and SRC were specifically granted a waiver from having to provide such competitive analysis concerning "all carriers" involved in the transaction for partially owned subsidiaries.

Not only does CSX ignore all of this and seek to impose an informational requirement that was not required due to the waivers, but it also seeks to impose more than what the rules required. The BN/SF case cited by CSX is a perfect example. In the decision accepting the BN/SF primary and related applications, including the notice of exemption on WUTR,²⁷ the ICC found that *because* it exempted the WUTR from the definition of "applicant carrier," the ICC

²⁵ On page 24, CSX does cite the appropriate regulation and lists the various documents required. Id. It does not however understand how those requirements were modified by the waiver requests and the ICC's Waiver Decision.

²⁶ Section 1111.7, Market Analysis, was adopted in 1982. See 1982 Rail Consolidation Procedures, 366 ICC 75, at 103. The section added a requirement to present an "impact analyses" exhibit of the transaction's impact on essential services, competition, and other statutory criteria under §11344(b). See Id. The 1979 Rules, which applied to the Application, did not have a market or competitive analysis informational requirement or an equivalent. See 1979 Rules, generally. The 1982 Rules also included an expanded public interest section in which many of the narrative "arguments in support" sections were moved under and now required analysis under a public interest standard. See 1982 Rail Consolidation Procedures, 366 I.C.C. at 100-103; 1979 Rules, Section 1111.1(e) and 1111.6(a)(2)(i-vi)

²⁷ Again, at the time of the 1980 Application, there was no "exemption notice" procedure by which parties could file for authority of related transactions, such as control of a terminal railroad. One either had to present such information for "all carriers" or seek a waiver. Using subsequent cases after new rules and new practices were instituted proves nothing about the scope of the 1980 Application and certainly shouldn't limit the scope of the ICC's approval.

was “lacking certain information that we believe is necessary to conduct our *market analysis*” and *the ICC* directed the applicants to produce any agreement concerning the use of the property. See BN/SF Notice of Acceptance of Application, FD No. 32549, 1994 ICC LEXIS 222, at *11-12 (I.C.C. served on Nov. 2, 1994) (emphasis added). The ICC also *sua sponte* required supplemental information for a different subsidiary that was also exempted from the definition of “applicant carrier” and for which the merged entity would gain a 50% ownership. Id.

There, WUTR was an excluded entity and did not have to submit substantive information for competitive analysis. It was only the ICC’s supplemental request, after reviewing the application and finding it deficient, that WUTR had to produce the documentation that CSX is now trying to argue that NPBL had to submit first, without ICC prompting, in the application, despite it being excluded from the more onerous term “applicant.”

Further, in 1982, CSX could have requested additional information about the entities listed in the corporate charts, including NPBL, but it did not. Likewise, the ICC did not request additional information about NPBL notwithstanding that it was clear that NSC would obtain control of NPBL, but it did not. Simply because in a later case the ICC did request such information does not mean that NSC should have, or was required to, present such information about NPBL in the 1980 Application, especially since N&W and SRC obtained a specific waiver from having to provide such information.

F. The 1979 CSX Application To Control Chessie Systems, Inc. And Seaboard Coast Line Industries, Inc. And The 1980 Union Pacific, Missouri Pacific, And Western Pacific Transactions Support NSR’s Understanding That The ICC Approval Applies To the Whole Transaction

The 1982 Transaction is unique. Research indicates that it was the only consolidation application filed under the hybrid rules. Two other major consolidations occurred around the same time, but each under different applicable rules. The result is three different approaches to

consolidation. Together, they demonstrate how the applicable rules shaped their respective applications at the time and help explain the 1980 Application.

In 1979, CSX filed an application for control of the Chessie System, Inc. and Seaboard Coast Line Industries, Inc. See CSX Corp. — Control — Chessie System, Inc. and Seaboard Coast Line Industries, Inc., FD No. 28905 (Sub-No. 1), 363 I.C.C. 521 (referred to generally as “CSX/Chessie”). The transaction was filed under the 1979 Rules in their entirety. Id. Notably, the applicants did not seek a waiver as to the definition of applicants, which meant the old definition of applicant applied (initiating carriers and all carriers with properties involved in the transaction). See Id.; CSX/Chessie, Acceptance of Application, 44 FR 9839 (Feb. 15, 1979). Applicants were thus defined as the initiating parties and their subsidiaries. See CSX/Chessie, 363 I.C.C. at 531. The Applicants included Richmond, Fredericksburg and Potomac Railroad (RF&P), which as a result of the transaction CSX would then own majority control.²⁸ Id. at 528. The control authority of RF&P was part of the primary application and not subject to a separate application. Id. As an applicant, RF&P was included in the informational requirements, including the traffic studies. See Id. at 624-44. The entirety of the discussion on control of RF&P is nine sentences, only three of which analyze the effect of the consolidation. Id. at 595-96.

The CSX/Chessie and 1982 Transaction begin with the same structure, but immediately diverge. Both underlying transactions were the same – top-down consolidations of rail carriers (and their subsidiaries) under common control of a holding company. See 363 I.C.C. 521 and 1982 Transaction Decision. Despite this similarity, the two transactions followed divergent

²⁸ Chessie and Seaboard Coast Line each owned 40% of Richmond-Washington Company, a non-carrier. Richmond-Washington Company owned 65.9% of RF&P. As a result of the transaction, CSX would hold stock of 80% of Richmond-Washington, which then held 65.9% of RF&P.

paths. CSX/Chessie was filed under 1979 Rules and the old definition of “applicant.” Importantly, the CSX/Chessie applicants did not file for a waiver of the definition of “applicant” and therefore had to include information about their then partially owned subsidiaries that would come under the control of the consolidated entity, *i.e.*, RF&P (very much like NPBL). The 1980 Transaction was filed under hybrid rules: it had the 1979 informational requirements, but applicant was defined only as “initiating parties.” Importantly, N&W and SRC in the 1982 Transaction did seek a waiver to reduce the information required under the definition of “applicant” including their partially-owned subsidiaries. The effect of the applicable rules and waivers, therefore, changed what was required in the application. In the CSX/Chessie case, RF&P was an applicant, had to submit the required information, and the applicants sought control authority as part of the primary application. The 1982 Transaction is in an entirely different posture. “Applicant” was defined by rule and waivers as only the initiating parties; non-applicants were not subject to the informational requirements. NPBL was not subject to the same informational requirements as RF&P was. Instead, the control of NPBL was disclosed under the terms established by the rules, as modified by the waivers, *i.e.*, the corporate chart.

A third contemporaneous transaction, the UP/MP/WP consolidation fell under the 1979 Proposed Rules (which were substantially the same as the 1982 Rules). *See* UP/MP/WP Acceptance of Application, 45 FR 68365. In the UP/MP/WP transaction, the applicants sought and were granted waivers to not only submit their data on a consolidated system basis but to also exclude from the definition of “applicant carriers” what the petitioners termed “non-system” carriers, including entities over which they exercised majority control. Yet, the application as well as later filings indicate that these “non-system” but majority-controlled subsidiaries were included in the scope of the ICC’s approval. *See, e.g.,* UP/MP/WP Waiver Petition, Appendix B

(“non-system” companies excluded from definition of “applicant carrier”); Union Pac. Co., et al. — Control — S. Pac. Rail Corp., et al., FD No. 32760, 1996 STB LEXIS 293 (S.T.B. served Nov. 20, 1996)(includes related applications for current Union Pacific subsidiaries that were previously identified as “non-system” (and thus excluded) Missouri Pacific subsidiaries, such as Southern Illinois & Missouri Bridge Company).

Both the CSX/Chessie transaction and the UP/MP/WP transaction stand as bookends to the 1982 Transaction and demonstrate how the rules and procedures were evolving at the time. Each transaction and its applications were determined by the applicable rules, as modified by waivers. RF&P was included because there was no waiver and “applicants” was defined broadly. NPBL was not included because “applicant” was defined narrowly and the ICC granted waivers further excluding from the definition partially-owned subsidiaries but required a corporate chart. UP, MP, and WP majority-owned subsidiaries, which normally are included as applicant carriers, were excluded from the informational requirements where those carriers did not impact the analysis of the system primarily at issue. None of the changes to definitions changed the scope of the ICC’s approval authority.

Further, the requirements CSX attempts to retroactively impose on the 1980 Application are also missing in the CSX application. This makes sense because at the time of these applications, there was no practice of submitting separate control applications. There was no requirement for in-depth market and competitive analysis of minor subsidiaries over which the consolidated holding company gained a majority interest nor was there such a requirement when the CSX/Chessie application was filed. Not only was using “systems” or a consolidated basis for submitting information accepted, excluding those carriers outside those systems was an accepted

practice and it was understood that those carriers were still part of the transaction approved by the ICC.

II. PUTTING ASIDE CSX’S THOROUGHLY MISTAKEN UNDERSTANDING OF THE 1982 TRANSACTION, THE REAL QUESTION FOR THE BOARD IS WHETHER NPBL WAS INCLUDED IN THE SCOPE OF THE ICC’S APPROVAL OF THE 1982 TRANSACTION?

The answer is yes. And with a proper understanding of the applicable rules, the waiver requests, Waiver Decision, and Application, there is no doubt.

One must start with the context of consolidations in late 1980. The ICC was actively moving to reduce the informational burden required of applicants in consolidations. See 1979 Proposed Rules; 1980 Rail Consolidation Procedures; 1982 Rail Consolidation Procedures. The ICC admitted the 1979 Rules were burdensome and the impetus for the revisions. See 1979 Proposed Rules. The 1980 Adopted Rules changed the procedures but did not adopt the substantive changes, which included new market and competitive analysis, an expanded public interest factor, and modified informational requirements. See 1980 Rail Consolidation Procedures. Exemptions as part of the consolidation procedures were new and there was no developed practice on how they fit into the process. See *Id.*; supra at I.E-F.

Amid this evolution of proper burden and consolidation policy, the 1982 Transaction occurred under “Frankensteined” rules: the contents and substance of the application fell under the 1979 Rules; the procedures fell under the 1980 Adopted Rules; the general policy and consideration criteria came from the 1981 Rail Consolidation Procedures. See 1982 Transaction Decision; supra at I.A.

The entire application process mirrored the evolution. To reduce the informational burden of the 1979 Rules, which, if they had been fully applied would have required the applicants to provide substantial information about “all carriers” involved, including wholly and

partially owned subsidiary carriers, including NPBL (and many others). SRC and N&W sought to limit the definition of “applicant” to only the initiating carriers. See July Waiver at 4-12. For the same reason, SRC and N&W also sought clarification to exclude carriers in which neither SRC nor N&W held a controlling interest independently from the definition of an applicant. Id. at 11-12. As N&W and SRC stated, they did not then control the subsidiaries or affiliates and cited the burden of including non-controlled subsidiaries in the definition of applicant (and subject to the 1979 informational requirements). Id. The ICC granted the waivers on the definition of “applicant,” but expanded SRC to include its consolidated system. See Waiver Decision at 66912. This is still a common and accepted practice, even under modern rules. See supra at I.C.

N&W and SRC also sought a waiver to submit information based on SRC’s consolidated system and to not submit N&W’s information on a consolidated system to both reduce the informational burden and give the ICC a more accurate picture of the carriers’ operations. Id. at 4-10; supra at I.B. This was granted by the ICC. See Waiver Decisions at 662912. This too is still an accepted practice, even under post-1982 Rules. See supra at I.B.

In recognition that, but for the waiver and new procedural rules certain information about subsidiaries (including NPBL) would have normally been in the application, the ICC added a new condition: produce a corporate chart and incorporate Section 1111.1(c)(8), in which applicants must state the control and ownership of all wholly-owned or partially owned subsidiaries, including NPBL. See Waiver Decision at 66912. The ICC also required the applicants to submit additional information relating to competitive impacts, including further information and analysis regarding the effect of consolidation on N&W and SRC parallel lines in Norfolk, VA. See Exhibit 2 - App., Vol. 1 at fn.** at 25, 35-76. Notably, as it later did in

did not request information about the acquisition of control of related carriers like NPBL. The ICC could have requested further information about NPBL or CSX could have requested such information be provided, but neither party did so.

The Application was filed on December 4, 1980, under the 1979 Rules, as modified by the 1980 Adopted Rules, and as modified by the Waiver Decision. See 1982 Transaction Decision. The effect was a balance between the requirements of the applicable rules and the evolution of the rail consolidation procedures to reduce the burden. The rules and waiver determined the content and form of the Application but did not impact the scope of the transaction for which the parties were seeking approval, including, where applicable, control over wholly or partially owned subsidiaries.

While the informational requests underlying the Application were guided by applicable rules, as modified by the waivers, the Application itself was clear that the request for control authority was for all of the stock interests held by N&W and SRC, including their subsidiaries. See, e.g., App. Vol. 2, page 2(CSXT's Opening Statement Exhibit F); Exhibit 2 - Vol. 3, Exh. 3 (1980 Merger Agreement and Merger Plans). By acquiring all of the stock interests held by N&W and SRC, NSC would be obtaining control of NPBL, although neither SRC nor N&W would, either individually or collectively, control NPBL. Indeed, as noted previously, since that time, CSX has always understood that NSC (and later NSR) controlled NPBL and for 36 years never objected to that control.

The Application included several related dockets but did not include a separate notice of exemption. There was no practice or understanding that sub-parts of a consolidation transaction, such as obtaining control over independently operated terminal railroads, would be considered separate transactions as to require a filing under the exemption transaction provision or a notice

of exemption as a related transaction. At that time, related applications were those subject to other rules, such as abandonments, construction authority, and trackage rights. See, e.g., 1982 Transaction Decision, 366 I.C.C. at 173, 177 (listing related applications for construction, abandonment, issuance of securities, and acquisition of motor carrier); UP/MP/WP, 366 I.C.C. at 459, 472 (listing related applications for issuing securities, trackage rights, polling, and acquisition of motor carriers). At no point did the applicants state any intention to exclude subsidiaries and affiliates from the scope of the approval that was being sought, and control of NPBL was part and parcel of the interests owned by N&W and SRC.

Decisions made by the ICC demonstrate that it was aware of and understood the scope of the transaction. Because the waiver decisions allowed the applicants to avoid having to include information about each wholly or partially owned carrier, the Waiver Decision imposed the new requirement that a corporate chart be included and that such a chart list all of the carriers either wholly owned or partially owned by SRC and N&W. See Waiver Decision at 66912. This way, the public would be on notice as to what was and was not included in the scope of the application. NPBL was listed in that corporate chart.

Further, as the ICC discussed in its 1982 Transaction Decision, the 1982 Transaction was not a typical merger but consolidation in which the holding company would take stock ownership and consolidate some of the administrative tasks, but where the two new subsidiaries (and their subsidiaries) would continue to operate independently. Id. at 214-15. That N&W and SRC stated in their waiver petition that they did not now exercise control over and had no intention of exercising control over NPBL after the application was true.²⁹

²⁹ From a technical standpoint, the Petition for Waiver was submitted by N&W and SRC and the statement on non-controlling subsidiaries was as to N&W and SRC. Neither asserted control over NPBL. The common holding company (NSC) was to have majority ownership, not N&W

While NSC held indirect control via the 1982 Transaction, NPBL was operated prior to the transaction *and* continued afterward to be operated as an independent company whose operations were not to be consolidated with those of SRC or N&W. While its *operations* were not consolidated or changed in any manner post-control, its majority ownership was now controlled and owned by NSC. That its operations were not to change was expressed in the operating plan regarding Norfolk, VA submitted in the FD No. 3 sub-docket, which refers to NPBL as a separate entity with whom N&W and SRC will continue to interchange. See App., Vol. 4 at 183-187 (found at CSXT Opening Statement, Exhibit I). That NPBL is listed is indicia that N&W and SRC considered it still a separate entity with which they would interact, on an operational basis, as they would with any other carrier, and while N&W or SRC would not control NPBL's management and ownership, NSC certainly would. No party claimed otherwise. It is simply that NSC chose to exercise its control over NPBL to not change its operations, service, or corporate charters. This did not mean NSC did not have control or its control was unauthorized. Indeed, NPBL and CSX have acknowledged NSC's control for nearly 40 years, including specifically in the 1989 Supplemental Agreement amending the original July 7, 1987 Agreement.

III. EVEN IF THE 1982 TRANSACTION DID NOT AUTHORIZE CONTROL OF NPBL, AT A MINIMUM, THE SUBSEQUENT ICC AND BOARD APPROVED TRANSACTIONS CERTAINLY DID

Even if there is some doubt that the scope of the 1982 Transaction did not grant NSC the authority to control NPBL (and there should not be), at a minimum, the subsequent corporate family exemptions certainly granted NSC, and later, NSR itself, the authority to exercise control

or SRC (and their subsidiaries) individually. NSC already owned non-controlling shares in NPBL through its control of Norfolk Southern's NPBL shares, and the approval of the control of N&W's and SRC's, including all of their ownership interests in wholly or partially owned carriers, including NPBL's shares, gave NSC control of NPBL.

over NPBL. As discussed in NSR's Opening Statement and these Reply Comments, the 1982 Transaction authorized NSC to indirectly control NPBL by authorizing NSC to control N&W and SRC directly and Norfolk Southern indirectly. It also included the authority to control any affiliated carriers of SRC, N&W, and Norfolk Southern, including NPBL, who was an affiliated carrier under the ICC's definitions and rules at the time. Assuming CSX is correct and that the 1982 Transaction specifically did not authorize NSC to control NPBL, as also argued in NSR's Opening Statement, the 1990/91 and the 1998 transactions certainly did.³⁰ As such, whether authorized in 1981, 1991, or 1998, the result is that NSC (and later NSR itself) was authorized to exercise control over NPBL.³¹

After the 1982 Transaction, SRC (who directly owned and controlled Norfolk Southern) and N&W continued to operate as separate subsidiaries, although controlled by NSC. The ICC fully expected and *encouraged* further consolidation in its 1982 Transaction Decision: "the NS carriers have a clear incentive to implement whatever management plan is most efficient. Were they to discover that a merger of N&W and Southern operations would lead to greater efficiency gains, we think it likely that such an approach would be adopted." See 1982 Transaction

³⁰ See S. Ry. Co. – Control Exemption – Norfolk and W. Ry. Co., Chesapeake W. Ry., the Toledo Belt Ry. Co., and Wabash R.R. Co., FD 31791 (I.C.C. served Jan. 14, 1991)(filed in 1990 so sometimes referred to as the 1990 transaction); Norfolk S. Ry. Co. – Exemption – Norfolk and W. Ry. Co., FD 33648 (S.T.B. served Aug. 31, 1998).

³¹ It is worth noting that according to CSXT's filings in the District Court case as summarized in CSXT's Opening Statement, the concerns CSXT raises about NSR's conduct are largely 2008 forward. It is indisputable that no later than 1998, N&W, SRC's, and Norfolk Southern's individual minority interests in NPBL were under the unilateral control of NSR, the result being that NSR held a 57.14% interest in NPBL. As such, by the time of the alleged anticompetitive taken by NSR and NPBL, NSR had possessed for over a decade, at a minimum, Board-blessed control authority and, for two decades, the contractual rights to appoint the majority of the Board as agreed upon by CSX. Collectively, these two distinct rights gave NSR autonomy to control NPBL's operations. Whether actions taken by a parent and its controlled subsidiary can constitute violations of the antitrust laws is a question for the District Court, not the STB.

Decision, 366 I.C.C. at 215. As was foretold, further consolidation and corporate changes did happen. In 1991, SRC was granted authority to directly control N&W through a corporate family exemption. At that time, SRC changed its name to Norfolk Southern Railway Company (“NSR”), which then directly controlled N&W and its subsidiaries. This meant the newly renamed NSR held the shares of SRC and the former Norfolk Southern and controlled the shares held by N&W.

Again, assuming CSX is correct, NSC may not have been authorized to “control” NPBL in 1982, but there is no question that NSC exercised and did control NPBL (whether authorized or not) from 1982 forward, a fact NPBL admits in its Opening Comments. CSX did not object to this “unauthorized” control and in fact, acquiesced in it. So, at best, CSX’s “evidence” may prove that even though NSC had and did exercise control over NPBL, it was not approved from 1982 to 1990. However, through the corporate family exemption, which CSX did not object to, this “unauthorized” control was certainly remedied in 1991 when NSC, SRC, and N&W were “authorized” to undertake various corporate changes.

At the time the 1990 notice of exemption was filed, SRC would have owned and controlled SRC’s 14.29% and Norfolk Southern’s 14.29% ownership of NPBL, giving SRC 28.58% ownership. This structure had been specifically approved by CSX in the 1989 Supplemental Agreement. See 1989 Supplemental Agreement. The 1991 approval brought N&W’s 28.57% under the control of SRC. This would mean that post the 1991 transaction, NSC’s control of NPBL was certainly now “authorized.” In 1991, one could use the corporate family exemption if the transaction within the corporate family did not “result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family.” 49 C.F.R. §1180.2(d)(3).

At that time, there was no question that NPBL was part of the NSC corporate family (whether “authorized” or not). Because NPBL was operated independently, and the transaction did not result in any changes in service, operations, or the competitive balance with other carriers, especially given that CSX was using NPBL to access NIT, NSC’s and SRC’s control of the shares of NPBL fit within the corporate family exemption. As a result, the 1991 notice authorized the newly renamed NSR to control NPBL, who was a member of the corporate family and whose ownership shares were being rearranged as a result of the corporate changes. There was no requirement in the notice of exemption rules that NSC or SRC specifically “declare” that NPBL would not come under the direct control of SRC. The rules were simple, and NSC and SRC followed those rules.³²

This control of NPBL was reaffirmed in 1998 when another corporate family exemption was filed. In that transaction, the Board authorized N&W’s merger into NSR. Again, the requirements of Section 1180.2(d)(3) were met. NPBL was part of the corporate family. There would be no changes in service levels, operations, or the competitive balance with CSX because CSX would still have access. Again, CSX did not object. This was so even though this transaction would give NSR direct control of NPBL by bringing all of the former SRC, N&W, and Norfolk Southern shares in NPBL under the direct control of NSR.

As such, NSC’s control of NPBL (and later NSR’s direct control of NPBL) was authorized three times. At no time did CSX ever object to these control transactions. CSX cannot plausibly argue that the ICC or the Board did not authorize the control of NPBL, whether that was in 1982, 1991, or 1998. It is only now, almost 40 years later, that CSX concocts a

³² This is especially true because NSC and CSX, per the 1989 Agreement, already believed that NS had the authority to control NPBL. There would not have been a need, or a requirement, to specifically point out that NPBL was now being “authorized” to be controlled. But certainly, that notice did authorize such control.

theory that NSC was never authorized to control NPBL. They have done so in a deliberate effort to avoid the Board's exclusive jurisdiction and remedies. If NSR had indeed undertaken anticompetitive acts, which it has not, CSX can invoke its remedies under ICCTA or attempt to argue in the District Court that a parent, who has authority to control a subsidiary, somehow violates the antitrust laws when the parent exercises that control.

IV. THE ONLY QUESTION BEFORE THE BOARD IS WHETHER NSC HAS THE AUTHORITY TO CONTROL NPBL

The limited question before the Board is whether NSC has authority to control NPBL. Despite the limited nature of this proceeding, CSX spends at least three pages of its brief laying out its antitrust claim – a claim properly before the District Court, not the Board. CSX submitted bullet-pointed "evidence" of unlawful actions, citing the Court's opinion on a motion to dismiss (a decision that itself noted was issued without the benefit of discovery and based primarily on CSX's unsubstantiated allegations). CSX further attached its Complaint and opposition to summary judgment. This was done most likely in an attempt to prejudice the Board against NSR because neither exhibit is substantively necessary to the issue before the Board. Only it is not a wonder; it is a temptation and a silent ask that the Board see NSR as a "bad actor," even though such allegations have not been proven in a court of law. This serves to bias the STB against NSR and distracts the STB from focusing on the real issue, which is whether control was authorized or not.

CSX's numerous statements are unproven. They are mere allegations framed in dramatic terms for optimal effect. See, e.g., Id. at 9 ("But CSXT has been thwarted at every step by NSR's and NPBL's manipulation of NPBL's rates and practices."). While phrasing the issue in terms of a denial of access and essential facilities, loaded concepts in both antitrust and railroad regulation, CSX's antitrust claim rests on an alleged conspiracy between NSR and its subsidiary.

CSX has known that NSC has controlled NPBL since the 1982 Transaction and specifically acquiesced to that control in the 1989 Supplemental Agreement. How can there be a “conspiracy” between a parent and its controlled subsidiary? There can’t be and that is why for 36 years, CSX never objected until it became unhappy with what is essentially a rate or competitive access dispute. Id. at 8-11 (arguing that CSX has been precluded from access for switching service for intermodal traffic at NIT by NSR and NPBL’s anticompetitive conduct; NSR and NPBL’s anticompetitive conduct has resulted in high switch rates and undue profits).³³

None of these allegations have been proven. The court proceeding has not even entered the trial stage and there are pending motions for summary judgment filed by NSR and NPBL currently pending. The District Court has not yet made any factual findings concerning NSR’s and NPBL’s conduct, even though CSX presents its allegations as fact. As such, NSC respectfully requests that the Board disregard CSX’s allegations about access, equal representation, antitrust, and essential services. NSC does not put forth evidence on these issues because they are not part of the declaratory action and are not properly before the Board. To give any credence to these claims in an STB proceeding not designed to address them is prejudicial to NSC as the record is not properly developed, no discovery has been taken, and this proceeding is not designed to address those claims. CSX has intentionally set forth in this case its unproven allegations filed in the court case. They have done so in an attempt to bias the Board against NSC. The Board should reject this effort. If CSX truly believes that “CSX has

³³ It is worth noting that according to CSXT’s filings in the District Court case as summarized in CSXT’s Opening Statement, the concerns CSXT raises about NSR’s conduct are largely 2008 forward. It is undisputable that no later than 1998, N&W, SRC’s and Norfolk Southern’s individual minority interests in NPBL were merged into NSR, with the end result being that NSR held a 57.14% interest in NPBL. As such, by the time CSXT’s concerns began, NSR had possessed Board-blessed control authority (and the contractual rights to appoint the majority of the Board as agreed upon by CSX). Collectively, these two distinct rights gave NSR autonomy to control NPBL’s operations.

been precluded from access for switching service,” CSX has a remedy: It can file a competitive access application under 49 U.S.C. §11102 seeking either terminal trackage rights or forced reciprocal switching.

Of course, CSX has not pursued actions at the STB because NSR has not denied CSX access to NPBL’s switching service. NSR has granted NPBL trackage rights to directly serve NIT³⁴ for decades. Using those trackage rights, CSX has, through NPBL’s switching service, served NIT for decades. It was only when NSR sought to change the trackage rights fee that NPBL has to pay (a fee whose methodology has not been adjusted since 1917) that CSX began to complain.

CSX has avoided seeking remedies under ICCTA even though there are avenues available to them. CSX believes that they can avoid the Board’s jurisdiction, avoid having to meet the standards and precedents under ICCTA, and obtain a better result from a District Court in an antitrust case. To get into court, CSX has had to jettison 36 years of consent to NSC’s control of NPBL and argue that NSC (or NSR) was never granted authority to control NPBL – not in 1982, not in 1990, or 1998. The Board should not allow CSX to avoid its exclusive jurisdiction and to “switch gears” after 36 years of consent to NSC’s and NSR’s control of NPBL. The Board should make it clear that NSC (and NSR) has had authorized control of NPBL, regardless of what year that control took place. With such a finding, CSX may return to court and seek what available remedies there are under the antitrust laws, the corporate laws of

³⁴ NPBL’s tracks that directly serve NIT only connect with NSR tracks. NSR has no obligation to grant another carrier (whether NPBL or CSX) access over its tracks to reach NIT, but it does. These trackage rights provide CSX with access to the NIT facility through a NPBL switch. The fact that NSR has not, and still is not, seeking to terminate NPBL’s trackage rights to serve NIT already provides CSX with competitive access to serve NIT. CSX’s real complaint is that it does not like the switch fee that NPBL charges or the trackage rights fee that NSR proposes NPBL pay.

Virginia regarding the rights of minority shareholders, or for alleged violations of contract. One thing CSX should be precluded from arguing is that NSC and NSR were not authorized to control NPBL. They were.³⁵

CONCLUSION

CSX asks the Board to not only overturn a nearly 40-year-old decision, but to consequently potentially expose NSR to antitrust liability for a decision NSR relied upon for decades. In its Opening Statement, CSX repeats over and over that NSR “never obtained permission” to control NPBL. But the basis for this statement looks through the lens of how applications are filed today, under the rules and requirements of today, with 40 years of hindsight and experience on how rules are interpreted, how they apply, and what information should be considered. That is exactly what CSX wants the Board to do: a *de novo* consideration of an application filed in 1980 while ignoring the rules that were in place at the time. The Board must reject CSX’s attempt to undo what was approved almost four decades ago. The Board should affirm that the 1982 Transaction (or the 1990 and 1998 transactions, at a minimum) did authorize NSC (and later NSR) to control NPBL. The implications of such a finding should be left up to the District Court.

³⁵ The Board need not delve into the scope of the antitrust immunity to resolve the question as to whether control was authorized or not, although ICC and Board approval come with antitrust immunity. The Board should not concern itself with the antitrust implications of its findings on control. Those are matters for the court.

Respectfully Submitted,

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Attorneys for Norfolk Southern Railway
Company

October 25, 2021

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36522

**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO CSX'S OPENING
STATEMENT**

EXHIBIT 1

Dated: March 1, 1989

NORFOLK AND PORTSMOUTH BELT LINE
RAILROAD COMPANY

NPBL not made a party to this
Agreement - Copy of Supplemental
Agreement between Proprietary Companies
of the Belt Line) AS INFORMATION

AMONG

CSX TRANSPORTATION

and

NORFOLK AND WESTERN

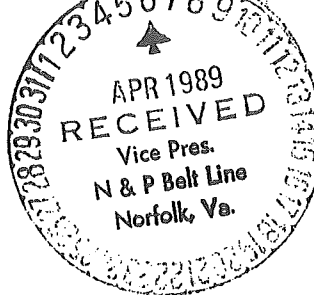
and

SOUTHERN RAILWAY

Copy of Supplemental Agreement
between Proprietary Companies, relating
to the NPBL Operating Agreement No. 1897,
dated July 7, 1897, and No. 267 dated
February 1, 1924.



Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-2191



Writer's Direct Dial Number

(804) 629-2818

Norfolk, VA - April 5, 1989

Mr. J. M. Donnelly
Vice President, Secretary and Comptroller
Norfolk and Portsmouth Belt Line Railroad Company
P. O. Box 3669
Norfolk, VA 23514

Dear Mr. Donnelly:

Enclosed for your information is a copy of the Supplemental Agreement dated March 1, 1989, among CSXT, Norfolk and Western, and Southern Railway, relating to the NPBL operating agreement dated July 7, 1897. The parties have agreed that, notwithstanding Article Fourth of the 1897 agreement, CSXT will continue to have the right to appoint two representatives to the NPBL Board of Directors, and NW and Southern will have the right to appoint a total of three representatives.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'J. Gary Lane'.

J. Gary Lane
General Attorney

Enclosure

CC L.W. FISHER

SUPPLEMENTAL AGREEMENT

THIS SUPPLEMENTAL AGREEMENT, dated as of March 1, 1989, is between CSX TRANSPORTATION, INC., a Virginia corporation ("CSX"), NORFOLK AND WESTERN RAILWAY COMPANY, a Virginia corporation ("NW"), and SOUTHERN RAILWAY COMPANY, a Virginia corporation ("SR").

WITNESSETH:

WHEREAS, CSX owns 216 shares of the common stock of Norfolk and Portsmouth Belt Line Railroad Company, a Virginia corporation ("NPBL");

WHEREAS, NW and SR each owns 144 shares of the common stock of NPBL;

WHEREAS, CSX, on the one hand, and NW and SR, on the other hand (NW and SR together being hereinafter referred to as "NW/SR"), are successors in interest to railroad companies that were parties to an Agreement dated July 7, 1897 (the "NPBL Agreement"), relating to the ownership and operation of NPBL;

WHEREAS, Article Fourth of the NPBL Agreement provides that the number of directors of NPBL shall always be fixed to correspond to the number of companies owning stock in NPBL;

WHEREAS, as of the date hereof, two of the directors of NPBL are representatives of CSX and three of the directors are representatives of NW/SR, and the parties hereto desire to retain such representation on the board of directors of NPBL ("NPBL Board") notwithstanding the provisions of Article Fourth of the NPBL Agreement;

NOW, THEREFORE, the parties hereto agree as follows:

1. Notwithstanding the first sentence of Article Fourth of the NPBL Agreement, CSX shall have the right to appoint two representatives to the NPBL Board, and NW/SR shall have the right to appoint three representatives to the NPBL Board.

2. Nothing herein shall be deemed to amend, alter, or affect any other provision of the NPBL Agreement.

-2-

IN WITNESS WHEREOF, the parties have caused this Supplemental Agreement to be executed by their duly authorized officers.

CSX TRANSPORTATION, INC.

By: 
~~Vice President~~ Treasurer

NORFOLK AND WESTERN RAILWAY COMPANY

By: 
Vice President

SOUTHERN RAILWAY COMPANY

By: 
Vice President

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36522

**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO CSX'S OPENING
STATEMENT**

EXHIBIT 2

Excerpt of Vol. 1
Executive Summary &
Responses to Additional ICC
Questions on Virginia and North
Carolina Competition

EXECUTIVE SUMMARY

The primary application in this transaction seeks Interstate Commerce Commission authorization for NWS Enterprises, Inc. (NWS), a newly-incorporated non-carrier holding company, to acquire control through stock ownership of Norfolk and Western Railway Company (NW) and subsidiary carrier companies, and of Southern Railway Company and its consolidated system companies (collectively referred to as SR).

An agreement to consolidate NW and SR was announced on June 2, 1980. A definitive Agreement of Merger and Reorganization and related Plans of Merger were approved by the Boards of Directors of the two companies on July 22, 1980, and the stockholders overwhelmingly ratified the proposed transaction at special meetings held on November 7, 1980.*

The consolidation of NW and SR under common ownership will generate numerous and substantial benefits for both the Applicants and the public. These benefits, and the means by which NWS proposes to achieve them, are described in considerable detail in Volumes 2 through 6 (and accompanying

* The Agreement of Merger and related Plans of Merger have also been approved by the directors of Applicant NWS (see Vol. 3, NWS Exh. 3).

verified statement volumes) of this application.* This Volume contains a summary of the contents of both the primary and related applications, and Applicants' responses to the Commission's Request for Supplemental Information.

I. THE INCREASING IMPORTANCE OF SINGLE-SYSTEM RAIL SERVICE

The transportation industry does not create demand for its services. Rather, the railroads (like transporters generally) must respond to the needs of the shipping public, which are in turn dictated by a variety of factors. The regions served by the proposed NWS system have undergone significant demographic and economic changes which have generated demand for coordinated, flexible interregional transportation service.**

Production and consumption patterns and the flow of commodities between markets in the eastern United States have

* Volume 7 contains a number of related applications for authority to construct connections between NW's and SR's system lines at certain common points, and to abandon line segments which will no longer be required to provide adequate rail service after consolidation. Volume 7 also contains NWS' application for authority to acquire indirect control of Southern Region Motor Transport, Inc. (SRMT), a motor carrier subsidiary of a wholly owned subsidiary of Southern Railway Company. Volume 8 contains the application of NWS under 49 U.S.C. §11301 for authority to issue securities in connection with the proposed transaction.

** See Vol. 1B, Verified Statement of Richard J. Barber (hereinafter "Barber") at 7-15.

changed dramatically in the past several decades. While the Northeast and Midwest continue to be important production and consumption centers today, the Southeast has emerged as a significant economic force during the past forty years, and is now the largest supplier of such commodities as textiles, furniture and pulpboard and paperboard.* At the same time, industrialization of the Southeast has generated increased demand for a number of commodities, including industrial machinery, coal and grain products.**

The growing economic interdependence of the Northeast, Midwest and Southeast regions has fundamentally altered commodity flow patterns and has generated a need for improved interterritorial transportation. Moreover, shippers overwhelmingly prefer single-system service (see Vol. 1C). This preference is grounded in their belief (supported by experience) that it improves service reliability by eliminating intramodal interchange, improves equipment utilization and distribution, and also focuses responsibility for an entire movement on a single carrier. Research conducted by the Rail Services Planning Office indicates that shippers will

* Barber at 16-22.

** See Barber at 22-24; Vol. 1A, Verified Statement of John P. Duncan, Jr.; Vol. 1B, Verified Statement of Peter M. Cukor.

select single-line over interline railroad service by more than nine to one.*

The rapid expansion of the motor carrier industry has weakened the ability of railroads to compete for inter-territorial traffic. Motor carriers handle 89 percent of their overall traffic in single-line service, giving them an enormous competitive advantage over the "Balkanized" railroad industry.** The trucking industry's superior single-line capability has resulted in part from the Commission's liberal approval of mergers and extensions of operating authorities, as well as irregular route applications tailored to the needs of specific shippers. Motor carriers have also benefitted from government subsidization in the form of an extensive network of interstate and intrastate highways, and from the absence of extensive government regulation. Competition from motor carriers is particularly intense in the relatively short-haul markets served by the proposed NWS system.***

* Rail Services Planning Office, Rail Merger Study - Final Report at 31. The Commission itself has also explicitly recognized that "shippers prefer single-system to interline service." Finance Docket No. 28905, CSX Corporation -- Control -- Chessie System, Inc. and Seaboard Coast Line Industries, Inc., Decision served September 25, 1980 at 42.

** See Barber at 33, Figure 16.

*** Barber at 38-50.

Congress and the Commission have taken large steps toward deregulating the railroad industry, in order to remove in part the impediments to its ability effectively to compete with other modes for interregional traffic. However, deregulation generally, and the Staggers Rail Act of 1980 in particular, place a premium upon individualized and independent action, and restrict the degree to which rail carriers may take collective action in the future.* These characteristics of recent deregulation legislation, particularly with respect to ratemaking, will work to the benefit of single-system rail carriers at the expense of those which must interline their traffic with other carriers.**

"Deregulation may give railroads a legal right to respond to market opportunities, but affiliation will give them more ability to do so, without which the right alone is empty."***

The railroad industry has been severely handicapped in attempting to meet shipper demand for reliable interterritorial service. The key impediment for railroads has been

* See Barber at 93-94; Vol. 1A, Verified Statement of Robert B. Claytor at 15; Verified Statement of Edward G. Kreyling, Jr. at 63.

** See Vol. 1A, Verified Statement of Harold H. Hall at 37; Barber at 94-97.

*** Vol. 1A, Verified Statement of Robert B. Claytor at 15.

the "Balkanized" structure of the nation's rail system, limited by artificial corporate boundaries established to meet transportation needs far different from those of today's shippers. NW and SR each must rely on non-affiliated connections that may be disinterested and often far less efficient.

This fragmented structure has also given rise to the so-called "gateway watershed" problem, which reduces the incentive for carriers to solicit a significant volume of interregional traffic. When one railroad receives a small portion of the total haul, that carrier often decides that its share of the revenue is insufficient to warrant its participation in the movement.* As a result, the shipper turns to another transportation mode.

The proposed transaction, combining NW's extensive coverage of the Northeast and Midwest with SR's access to most major southeastern markets, will permit new single-system rail service for a greater volume of interregional freight traffic. In particular, consolidation of NW and SR will help to improve service and competition on movements

* Even though the Staggers Rail Act of 1980 affords the short-haul carrier an improved opportunity to cover its variable costs, the return to it in terms of absolute dollars may be insufficient to interest it in the traffic. Thus, the "watershed" problem is more than just a divisions problem. See Vol. 1A, Verified Statement of Edward G. Kreyling at 83-85.

between such major markets as Chicago, Cleveland and Detroit, on the one hand, and southeastern points served by SR, on the other,* and for movements of grain and coal from NW origins to consumption points and ports in the Southeast.**

The proposed transaction is also a logical and necessary competitive response to the recent creation of the CSX rail system. In assessing the competitive impact of CSX, the Commission observed:

"The new system will have greatly expanded single-system capabilities which shippers find attractive. No other railroad at present can equal those capabilities in direct competition with CSX."***

The Chessie/Family Lines consolidation has created a 27,500 mile rail network which blankets the area served by NW and SR. The enhanced market power of the combined CSX system poses a genuine threat even to such financially strong rail carriers as NW and SR.**** Moreover, the shipping public

* See Vol. 6B, Verified Statement of Lester K. Kloss.

** See Vol. 1A, Verified Statement of John P. Duncan, Jr.; Vol. 1B, Verified Statement of Peter M. Cukor.

*** CSX Corporation -- Control -- Chessie System, Inc. and Seaboard Coast Line Industries, Inc., Decision served September 25, 1980 at 39-40.

**** See Vol. 1A, Verified Statements of Robert B. Claytor at 17; Harold H. Hall at 36-37.

overwhelmingly supports the proposed transaction because a unified NWS system will provide an effective competitive alternative to CSX, and will guarantee the availability of efficient transportation service at competitive rates.*

In summary, the evolving interdependence among the Northeast, Midwest and Southeast regions has produced new patterns of traffic for which railroads are generally poorly positioned to compete. In order to remain competitive with other modes, railroads must expand their single-system capabilities, and must be able to respond quickly and flexibly to the needs of the shipping public. (CSX has already created such a single-system capability.) Consolidation of NW and SR under common ownership will reduce their dependence upon increasingly unreliable interline operations,** expand the marketing opportunities available to each carrier and to their customers, and will better enable them to meet the challenges presented by deregulation, intensified intra-modal and intermodal competition, and future demands for specialized transportation services.

* See, e.g., Vol. 1C, Verified Statements of James P. Deehan, Donald Espen, Van L. Hayes, Jr., C.A. Johnpeter, E. Morgan Massey, J. D. Middleton.

** See Vol. 1A, Verified Statements of Harold H. Hall at 13; Edward G. Kreyling, Jr. at 64.

The following sections of this summary will outline the means by which NWS proposes to provide improved, competitive rail service, capsulize the economic benefits of the consolidation, and discuss the competitive impact of the transaction.

II. ROLE OF THE HOLDING COMPANY

NWS Enterprises, Inc., a newly-incorporated non-carrier holding company, will acquire control of NW and SR through stock ownership. The Board of Directors of NWS will consist of 16 members, eight each to be designated by the NW and SR Boards of Directors. The initial NWS Board will have authority to appoint the officers of NWS, including a Chairman and Chief Executive Officer and a President. The Agreement of Merger contemplates a "partnership approach" in which NW and SR will have equal representation in the holding company while maintaining their individual corporate identities.*

The proposed holding company structure will centralize the marketing, sales, financial and overall policymaking functions of the system, without disrupting day-to-day operations in a way that would impair the railroads' ability to

* See Vol. 1A, Verified Statements of Robert B. Claytor at 2-9; Harold H. Hall at 24-29.

continue to provide quality service to shippers. With the exception of the consolidation of sales offices (resulting in the elimination of duplicate facilities during the first year after consummation) and terminal forces at common points,* Applicants do not plan any wholesale unification of the constituent carriers' departments or relocation of employees immediately upon consummation of the proposed transaction.

A number of important functions will, however, be coordinated at the holding company. An NWS chief marketing officer will coordinate all traffic activities of the NWS system and will head the combined NW/SR sales forces. Coordination of these functions at the parent company level will insure that NWS system sales and marketing policies are clearly presented to shippers. Overall financial management, including NWS system capital improvements and equipment financing, will be controlled by the chief financial officer of NWS.** Major purchasing activities will also be coordinated in the holding company.*** These measures will maximize the combined system's financial strength and will result in significant savings with respect to purchasing and plant improvement.

* See Vol. 1A, Verified Statement of Harold H. Hall at 6-7; Section III, infra.

** Vol. 1A, Verified Statement of Harold H. Hall at 27.

*** See Vol. 4A, Verified Statement of Neil B. Coggins, Jr.

In addition, shareholder relations will be centralized, and accounting, computer and management information services will be coordinated at the holding company level.*

Functions such as public affairs, labor and personnel management, and legal matters will be divided between the parent company and the carriers. For example, NWS will have a unified policy with respect to national affairs, federal legislation and national labor bargaining, while implementation of more localized labor agreements and state and local public affairs will be the responsibility of the operating companies under overall policy guidelines established by NWS. Operating matters will generally continue to be handled by the carriers themselves, subject to supervision by the chief operating officer of NWS, who will insure that NW and SR are operated for the benefit of the system as a whole.**

III. MARKETING PHILOSOPHY AND CONSOLIDATION OF SALES OFFICES

Consolidation of NW and SR will bring together two railroads with long-standing reputations for innovative and

* See Vol. 1A, Verified Statements of Robert B. Claytor at 7; Harold H. Hall at 25-28.

** See Vol. 1A, Verified Statement of Harold H. Hall at 8; Vol. 4, Exh. A-17.

aggressive marketing.* Operating efficiencies and route extensions generated by the proposed transaction will enhance Applicants' ability to meet shippers' demands for reliable and efficient rail services in the future.

The consolidated company will adopt an aggressive but realistic attitude toward traffic solicitation and rate competition. NWS will concentrate its marketing resources on identifying and developing traffic for which it can reasonably compete.** Of course, the expanded single-system service capability of the combined system will enhance Applicants' ability to compete effectively both with CSX and with other modes, particularly motor carriers, for a larger share of the overall transportation market.***

A number of additional marketing-related benefits for both Applicants and the shipping public will result from the broader geographic coverage of the NWS system. By eliminating the need to negotiate with and rely upon interline carriers on a greater volume of interregional movements,

* The testimony of Edward G. Kreyling, Jr. (Vol. 1A at 59) and John R. McMichael (Vol. 1A at 41) outline several measures which Applicants have taken in recent years to develop price/service packages tailored to the specific needs of shippers.

** Vol. 1A, Verified Statement of John R. McMichael at 50, Verified Statement of Edward G. Kreyling, Jr. at 63.

*** See Vol. 1A, Verified Statement of John R. McMichael at 10-11; Vol. 6B, Verified Statement of Lester K. Kloss at 4, 11-16.

Applicants will enjoy greater freedom to experiment with innovative marketing strategies in the deregulated environment.* The size of the new system will also increase opportunities for backhauls and triangular movements, reducing operating costs and improving car utilization.

NWS' single-system capabilities will also substantially improve the marketing opportunities available to shippers located on NWS' lines, resulting in increased source competition in a variety of industries. In addition, consumers on NWS, particularly receivers of coal and grain located at SR destination points, will gain access to alternative sources of supply.**

The proposed transaction will spur industrial development in the states served by NWS, as evidenced by the testimony of Reeder C. Miller (A.E. Staley Manufacturing Co.)*** and John Betz (Adolph Coors Company).**** Thus, consolidation of NW and SR is important not only to the ability of these carriers to compete in the transportation market,

* See Vol. 1A, Verified Statement of Edward G. Kreyling, Jr. at 62.

** See Vol. 1A, Verified Statement of John P. Duncan, Jr. at 91; Vol. 1B, Verified Statement of Peter M. Cukor at 123.

*** Vol. 1C at 101.

**** Vol. 1C at 147. See also Vol. 1A, Verified Statement of Robert S. Geer.

but also to the ability of the NWS service territory to compete with other regions in terms of economic development.*

Immediate coordination of the sales function will insure that the NWS system speaks with one voice with respect to traffic matters.** Elimination of duplicative sales offices will also produce annual savings of approximately \$5.6 million by the second year after consummation.

IV. OPERATING CHANGES AND SYSTEM IMPROVEMENTS

Applicants' Operating Plan (Vol. 4, Exh. A-17) reflects the substantial operating changes that NWS will make to provide more efficient, economical and reliable service. Consolidation will permit NW and SR to cooperate in a variety of ways made possible only because of the proposed transaction.

A major benefit will be the establishment of new routes, including the following five principal routes: The Altavista Gateway Route, the Lynchburg-Knoxville Cutoff Route, the Mid South Corridor Route, the Kansas City Gateway Route and the Shenandoah Corridor Route. These new routes

* See Vol. 1A, Verified Statement of Robert S. Geer at 136.

** See Vol. 1A, Verified Statements of Robert B. Claytor at 4; Harold H. Hall at 26-27; John R. McMichael at 55-56.

will substantially reduce circuitry and running times, and assure reliability of service between many major points on the NWS system.* All traffic will move via the most efficient system route.** In order to take maximum advantage of the benefits available from NWS' new routes, Applicants will also operate a number of new run-through and interroad trains over these lines.***

More than 1.45 billion gross ton miles nationally will be saved annually as a result of the creation of these routes. Together with implementation of run-through and interroad train service, the proposed new routes will generate savings of \$20 million per year,**** and will reduce the annual nationwide consumption of fuel by more than 5 million gallons.***** (Moreover, there will be no significant adverse environmental effects as a result of the consolidation.)

* Section IIA of Applicants' Operating Plan describes with particularity the benefits to be derived from creation of the proposed new principal routes. (Vol. 4, Exh. A-17 at 50-67).

** Although the Operating Plan is designed to maximize NWS (rather than NW or SR) revenues, neither NW nor SR will suffer financially as a result. Where internal rerouting occurs, necessary financial adjustments between the carriers will periodically be made. (See Vol. 1A, Verified Statement of Robert B. Claytor at 5; Vol. 3, Exh. 9, "Joint Terminal and Joint Agency Agreement").

*** Interroad trains involve pooled crews in addition to the pooled locomotives and cabooses which will also be used in NWS run-through trains.

**** See Vol. 4, Exh. A-17 at 46. The figure is higher, \$21.4 million, when increased to reflect an annual return on avoided investment in equipment. See Vol. 2, Exh. 20.

*****See Vol. 5.

NWS also plans to combine NW and SR facilities and operations at 10 common points served by the two carriers. At most of these common points, terminal operations, yard operations and personnel, as well as local service, will be concentrated at one facility. This will greatly reduce delays currently caused by interchange activities, resulting in faster, more reliable service. Moreover, retirement of duplicative terminal and yard facilities will, in certain instances, reduce the system's operating costs.

In order to enhance the NWS system's ability to divert traffic from motor carriers to rail intermodal service, NW will construct a major intermodal terminal facility at NW's Landers Yard in Chicago, and the new system will operate dedicated intermodal trains between Chicago and points in the Southeast.* NW and SR are firmly committed to developing the growth of profitable TOFC business on NWS, and a substantial potential for diversions from motor carriers has been identified.**

Consolidation will also permit Applicants to achieve operating economies in a number of additional areas. Common

* Intermodal traffic originating in Detroit will be added to the proposed dedicated trains at Fort Wayne, Indiana, for movement to destination. (Vol. 4A, Verified Statement of Louis M. Newton at 6).

** See Vol. 6B, Non-Rail Traffic Diversion Study.

policies for equipment utilization will improve the ability of NW and SR to meet the car requirements of their shippers, and will improve overall efficiency by reducing empty hauls. While each carrier will maintain supervision over the day-to-day use of its equipment, all cars will be deployed for the benefit of the NWS system as a whole.* Significant capital savings will also result from implementation of system-wide utilization policies by reducing substantially the additional equipment needed to handle future growth in NWS' traffic base.

NWS will also utilize shop and repair facilities on a system-wide basis. NW's car facility at Roanoke, Virginia will build open top hoppers, covered hoppers and gondolas for SR. Utilization of this untapped capacity will lower unit costs for cars produced by the Roanoke Car Shops, will significantly reduce the cost of cars to SR, and is expected to save the NWS system approximately \$10.5 million during each of the first three years after consummation of the proposed transaction. Significant savings will also be generated by consolidation of locomotive repairs, rail welding, and production of a number of equipment related items.**

* See Vol. 4, Exh. A-17 at 110.

** See Vol. 4, Exh. A-17, Section C.

Achievement of these benefits will require Applicants to make a number of substantial capital investments. As stated previously, a new intermodal terminal will be built at NW's Landers Yard in Chicago, at a cost of approximately \$6.5 million. Creation of the new Mid South Corridor Route will require substantial improvements to NW's line between Fort Wayne and Muncie, Indiana*, at a cost of \$18.5 million. This line, a light density branch line today, will be upgraded to 60 mph standards with welded rail and traffic control.

A number of improvements must be made at other points on both NW's and SR's lines, and new connections must be constructed at several locations**, at a total cost of approximately \$31 million, in order to facilitate the efficient movement of trains between system points. In addition, the new system will make an investment in excess of \$40 million for rolling stock.

It is important to note that these improvements and coordinations would not be justified, and the resulting efficiencies and service capabilities would not be possible,

* Vol. 4A, Verified Statement of Louis M. Newton at 6-7.

** See Vol. 7.

but for the proposed consolidation.* In almost all cases, the changes planned would not provide sufficient operating and financial benefits to NW or SR individually for such measures to be undertaken. Furthermore, the service improvements and operating economies which will result from creation of new NWS principal routes and rerouting of traffic over the most efficient system lines could never be attained absent consolidation because each carrier's interest would dictate that it preserve its corporate long-haul, both to maximize its revenues and to maintain control over service for the greatest possible portion of the movement.** Upon creation of NWS, however, NW and SR will share a common interest in providing reliable service and maximizing system revenues.

The testimony in Volume 1A discusses instances in the past where coordinations and proposals for cooperation between NW or SR and other carriers were seriously considered, sometimes implemented, but eventually failed.*** Consolidation will eliminate some of the obstacles experienced by NW and SR in the past, at least between constituent lines, and will facilitate implementation of the operating changes planned.

* See, e.g., Vol. 1A, Verified Statement of Robert B. Claytor at 9-10; Vol. 4A Verified Statement of Louis M. Newton at 3.

** See Vol. 1A, Verified Statement of Harold H. Hall at 32; Vol. 4A, Verified Statement of John R. Martin at 20-21.

*** See Vol. 1A, Verified Statements of Robert B. Claytor at 9-10; Edward G. Kreyling, Jr. at 77-89.

Moreover, by combining the financial strengths of NW and SR, the new system will be in a stronger position to make the major capital investments necessary to meet the future requirements of the shipping public. Thus, the financial strength of NWS is a significant public benefit weighing in favor of the proposed transaction.*

V. SUMMARY OF ECONOMIC BENEFITS

Significant economic benefits, amounting to \$95.8 million per year, will accrue to NWS after complete implementation of the plans for the new system. Benefits from improvements in operations (including common point consolidations, reroutes and run-through operations, coordination of shop, repair and maintenance-of-way facilities, improvements in car utilization, and construction of cars at Roanoke Shops) will total \$54.6 million by the third year after consolidation. Consolidation of sales offices and savings in purchasing will generate net benefits of \$16.5 million annually.

Diversions from other railroads will generate a net benefit of \$22.5 million per year by the third year after consummation. A detailed breakdown of diversions (and

* See Barber at 107.

resulting revenues) obtained from other rail carriers appears at Exhibit A-16(vii) in Volume 6.* Diversions from motor carriers identified in the Non-Rail Traffic Diversion Study (Vol. 6B) will produce approximately \$2.2 million net annually.

The total net cost of planned system improvements, equipment requirements and modifications to effect common point consolidations during the first three years after consummation will total \$97.1 million. In addition \$4.2 million will be required for the protection of labor.** However, as noted, the net annual economic benefit which the NWS system will realize by the third year after consolidation will total \$95.829 million annually. Achievement of these benefits will enable NWS to provide a rapid and effective private sector response to the future demand for transportation services in the regions served by the new system.

VI. THE COMPETITIVE IMPACT OF THE PROPOSED TRANSACTION

The numerous and substantial benefits of the proposed consolidation can be achieved without generating any

* The development of Applicants' Summary of Economic Benefits (Vol. 2, Exh. 20) is discussed in the testimony of Thomas H. Kerwin (Vol. 2A).

** See Vol. 4, Exh. 10.

** Vol. 1B, Verified Statement of Peter M. Cukor at 131-134 and 146.

significant anticompetitive impacts. To the contrary, creation of the NWS system has many procompetitive features.*

competition, but will instead create an alternative source of low-sulfur steam coal presently unavailable to southeastern utilities.*

NW and SR do not compete directly for coal traffic to midwestern points because they serve no common points of coal consumption in that region. In addition, the gateway watershed problem inhibits SR's incentive to participate in movements to midwestern destinations.** Therefore, creation of NWS poses no threat to competition in midwestern coal markets.

NWS will, in fact, enhance the vigor of competition for coal carriage in both the domestic and export markets, by eliminating the gateway watershed problem on joint system movements and by creating access to new markets for both NW and SR originated coals.***

While the creation of NWS will result in the loss of some freight revenues by other carriers, traffic diversions will be realized only through rational choices by shippers, who will transfer traffic (and the revenues there-

* See Vol. 1B, Verified Statement of Peter M. Cukor at 134-155.

** See Vol. 1B, Verified Statement of Peter M. Cukor at 170.

*** See, Vol. 1B, Verified Statement of Peter M. Cukor at 185.

from) to NWS only if it offers more reliable and competitive service. Viewed in this light, diversions identified by Applicants constitute a public benefit in the form of improved efficiency in freight transportation.* In no case will anticipated diversions threaten the continuation of essential rail services by other railroads.**

CONCLUSION

The proposed transaction will significantly expand the availability of single-system rail service in the markets served by NW and SR. As NWS, Applicants can compete more effectively for interregional commodity flows which have resulted from changes in the economic structure of the eastern United States during the past forty years. NWS will provide a necessary competitive counterweight to the recently-created CSX system, and will be well-positioned to compete with other existing and proposed interterritorial rail systems. Implementation of certain operating changes proposed by Applicants will also make NWS more competitive with respect to traffic currently moving by other modes.

* See Barber at 107.

** See Ex Parte No. 282 (Sub-No. 6), Railroad Consolidation Procedures, 363 I.C.C. 241 (1980). Applicants' responses to certain questions relating to the competitive impacts of the proposed transaction, raised by the Commission in its Request for Supplemental Information served October 1, 1980, are set forth at p. 29, infra.

Approval of the proposed transaction will permit NW and SR to improve markedly the quality of rail service available to their shippers, through the creation of new principal routes; internal rerouting of traffic to less circuitous routes; adoption of system-wide marketing and operating policies; and through unified efforts to assist industrial development. The NWS system's financial position will be strengthened and its ability to meet future demands for transportation services will therefore be enhanced.

Finally, the benefits of the proposed transaction will be achieved without any significant adverse competitive impacts. NWS is basically an end-to-end joinder of complementary rail systems whose unification will involve little diminution of intramodal competition. To the contrary, common ownership of NW and SR will strengthen both intramodal and intermodal competition in NWS' service area.

The proposed transaction satisfies each of the criteria set forth at Section 11344(b) of the Interstate Commerce Act, and is also consistent with the Commission's general policy statement on railroad consolidations (see 363 I.C.C. 241 (1980)). Therefore the proposed unification of NW and SR under the common ownership of NWS should be approved.

APPLICANTS' RESPONSES TO
COMMISSION'S OCTOBER 1, 1980,
REQUEST FOR SUPPLEMENTAL INFORMATION

On October 1, 1980, the Commission issued an order in this proceeding directing the applicants to provide certain additional information.

Six questions were propounded, preceded by the following statement:

We believe the markets and issues dealt with in the questions set out below may be of particular concern in this proceeding. Where applicants' responses indicate that projected traffic levels may differ from current levels, applicants should explain the factors accounting for the difference. We are specifically interested in changes applicants would make after consolidation in routings, in frequency and quality of service, and in traffic solicitation. This information is to be submitted in addition to the operating plan required under 49 C.F.R. §1111.2(b)(4). We expect applicants' answers to the specific items listed to be more detailed than the system operating plan, and to describe the differences between the ways they currently conduct operations and the ways they would conduct operations if the transaction is approved.

In the discussion below, the applicants first restate the six questions and then provide supplementary information responsive to these questions. In this connection, reference should also be made to the Operating Plan and the testimony of applicants' marketing officials which explain in detail the changes in routings, in frequency and quality of service, and in traffic

solicitation which are anticipated to result from the consolidation. Both the application and specific exhibits and verified statements were prepared in an effort to be fully responsive to the Commission's order for supplemental information.

I. General Impacts on Traffic Routings.

Information Request:

To identify the general impacts of this transaction applicants are to provide: a projected traffic density map (tonnage chart) for the consolidated system with notes explaining (a) the assumptions and methodology used in generating the map and (b) the differences between this map and the current traffic density map required as Exhibit A-14(i) to the application, 49 C.F.R. §1111.2(b)(1)(i).

Answer:

In Appendix A to Exhibit A-17, there appear traffic density maps and tables showing traffic densities for the SR and NW systems for 1979 before consolidation, the changes that would occur as a result of the NWS consolidation through the combination of (1) diversions from other railroads, (2) diversions from trucks, and (3) the internal rerouting of traffic, and (finally) the resulting NWS system traffic densities in Year 3 over all principal segments.

The changes in density adopt all of the assumptions and methodology set forth in detail in the operating plan (Vol. 4, Exh. A-17, Vol. 4A), the traffic study (Vol. 6, Exh. A-16, Vol. 6A), and the non-rail traffic diversion study (Vol. 6B). The maps and tables in Appendix A to Exhibit A-17 differ from the maps shown in Exhibit A-14(i) because they apply actual and projected traffic densities

for the links and nodes contained in the NWS traffic and operating studies rather than the more detailed station-pairings contained in Exhibit A-14(i).

In interpreting these maps and tables, it should be recognized that none of them reflects diversions of traffic from SR or NW resulting from implementation of other consolidations which have been approved by the Commission. It is estimated that such consolidations would cause diversions from SR and NW of approximately \$120 million at 1979 traffic and revenue levels, based on the following:

SR-NW Freight Revenue Losses (1979 Levels)From Other Consolidations.

	SR	NW
<u>BN-Frisco 1/</u>		
SR \$7,925,260 (1976) x 1.418	\$11,238,000	
NW 2,083,800 (1976) x 1.233		\$ 2,569,000
<u>GTW-DTI 2/</u>		
NW \$3,771,000 (1976-77)		
x 1.217		\$ 4,589,000
<u>SP-RI Tucumcari Line 3/</u>		
NW \$3,860,383 (1977) x. 1.186		\$ 4,578,000
<u>CSX 4/</u>		
SR \$51,696,750 (1977) x 1.270	\$65,665,000	
NW 26,000,000 (1977) x 1.186		\$30,836,000
Totals	\$76,993,000	\$42,572,000

- 1/ As reported at 360 I.C.C. 805-06, 909-11.
2/ As reported in initial decision, App. D, p. 12.
3/ As reported in Commission decision, App. C, p. C-54.
4/ As shown in CSX-NW stipulation (Exh. 1-C) and in Southern's damages study (Exh. 20).

The above diversion estimates have been updated to 1979 revenue levels through application of Eastern District trends for NW and of Southern District trends for SR, as published by the AAR.

The above diversion estimates were premised on the assumption that SR and NW would continue to be unaffiliated. The NWS consolidation would tend to forestall a part of these diversions. For example, piggyback traffic routed between Chicago and the Carolinas via Mopac and Southern in 1979 which Southern estimated would be diverted to CSX also appears in Southern's study as traffic diverted by NWS. Thus the net diversions from NWS by the above transactions would be somewhat less than shown.

II. Effect on Local Rail Service in Virginia and North Carolina

A. North/South Traffic.

Information Request:

Currently, SR and NW operate parallel routes between points in North Carolina and Northern Virginia/Maryland. Specifically, NW's line runs from Winston-Salem or Durham, NC, to Hagerstown, MD, through the Shendandoah Valley, where connections are made with Conrail and Chessie.

SR's route runs from Winston-Salem (through Greensboro) or Durham to Alexandria, VA, through the Piedmont region, where connections are also made with Conrail and Chessie.

If the transaction is approved, applicants could consolidate their operations. Therefore, applicants are directed to indicate:

1. amounts of originated, terminated, and overhead traffic on these lines, both current and projected;

2. whether there will be any consolidation of these north/south lines;

3. a list of the feasible active routings available today for traffic moving north/south through Virginia and North Carolina by carrier (not limited to applicants), and those projected after consummation (not limited to applicants);

4. the impact on communities and shippers along the affected routes if there is a lessening of alternative routings; and

5. the extent to which other rail carriers or modes provide current or potential competitive alternatives for shippers using these routes.

Answers:

1. (a) NW's 1979 carload traffic originated, terminated and overhead (i.e., interchanged) at all stations located on its line between Hagerstown, MD, and Winston-Salem and Durham, NC, was as follows:

Carloads originated	31,514
Carloads terminated	117,774
Carloads interchanged	
inbound to NW	77,342
outbound from NW	115,221

(b) Southern's 1979 carload traffic originated, terminated and overhead (i.e., interchanged) at all stations located on its lines between Washington, DC, and Winston-Salem, NC, via Greensboro, NC, was as follows:

Carloads originated	37,229
Carloads terminated	90,115
Carloads interchanged	
inbound to SR	110,269
outbound from SR	119,028

For the net effect of projected traffic changes over these routes, see the density maps in Appendix A to Exhibit A-17 in Volume 4.

2. Applicants propose no consolidation of the NW and Southern north/south lines in question. In all cases, because of the significant volumes of local traffic, shippers and receivers along these lines will continue to receive at least the same, if not a better level of service than they receive today.

There will, however, be some rerouting of traffic overhead to both routes which will change traffic densities on these north/south routes. Generally, use of the Southern main line from Potomac Yard to Greensboro will be reduced as east/west traffic is shifted to more direct NW routes and as north/south traffic is shifted to the Shenandoah Valley Route. The principal changes affecting these north/south routes are the shifts in traffic from the Potomac Yard gateway to the Hagerstown/Shenandoah Junction gateway. These changes in through traffic patterns reflect the overall policy of NWS to solicit and move traffic via the most efficient internal routes available. No adverse effect on local traffic or local service is anticipated.

3. There are today basically five north-south rail routes through Virginia and North Carolina available to shippers:

1. The RF&P route (CSX) extending southward from Potomac Yard to Richmond, where it joins with SCL's extensive route system into the South (the Coastal Route).

2. The C&O's route (CSX) extending southwesterly from Potomac Yard to Gordonsville where it fans out to intersect other north-south lines, including SCL's lines at Richmond (C&O Piedmont Route).

3. Southern's route extending southwesterly from Potomac Yard to Danville and Charlotte, where it fans out into the states south of North Carolina (Southern's Piedmont Route).

4. NW's route extending from Hagerstown, Maryland, and Shenandoah Junction, W. Va., southward to Roanoke, where it fans out to intersect north-south routes of SCL, Southern, and the Clinchfield (Shenandoah Valley Route).

5. Clinchfield's route (CSX) extending from Elkhorn City, Kentucky, across Virginia and North Carolina to Spartanburg, South Carolina (the Mountain Route).

North of Potomac Yard, the first three routes connect with the B&O (CSX), Conrail, and Delaware & Hudson. North of Hagerstown/Shenandoah Junction, the NW's Shenandoah Valley Route connects with the B&O (CSX), Western Maryland (CSX), and Conrail. North of Elkhorn City, the Clinchfield's route connects only with C&O (CSX).

To determine the activity and feasibility of these routings, the 1977 state-to-state carload interchange records submitted by Seaboard Coast Line Industries, the Chessie System, Southern, and Norfolk & Western in the CSX proceeding were examined. For purposes of this analysis, traffic moving "north/south through Virginia and North

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Carolina" was defined as including all traffic moving between South Carolina, Georgia, Alabama, and Florida (far southeast), on the one hand, and the northeastern states of Maryland (including D.C.), Delaware, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and the Canadian provinces of New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, Quebec, and Ontario, on the other hand.

The relative usage of these routings (in carloads) was as follows:

RF&P Coastal Route	120,067
SOU Piedmont Route	74,477
NW Shenandoah Valley Route	13,622
Clinchfield Mountain Route	5,081
C&O Piedmont Route	122

Examination of this state-to-state data showed two other routes, not traversing Virginia and North Carolina, which handled more of this north/south traffic than either the NW Shendandoah Valley Route or the Clinchfield Mountain Route; namely, the interior routes of Southern and L&N between the Cincinnati gateway and the same four southeastern states.

Figure 1 on the next page summarizes the results of these seven routings for north/south traffic. (Routings via junctions west of Cincinnati, such as Louisville, Chicago, and St. Louis, are not shown.)

1977 Northeast/Eastern Canada-Far Southeast Carloads
Via North-South Gateways, Potomac Yard to Cincinnati

<u>Routing</u>	<u>Carloads</u>	<u>Percent</u>
Potomac Yard-RF&P (CSX) (Coastal Route)	120,067	44.04
Potomac Yard-C&O (CSX) (Piedmont Route)	122	0.04
Potomac Yard-SOU (Piedmont Route)	74,477	27.32
Hagerstown/Shenandoah Jct.-NW (Shenandoah Valley Route)	13,622	5.00
Elkhorn City-Clinchfield (CSX) (Mountain Route)	5,081	1.86
Cincinnati-Southern (Interior Route)	35,332	12.96
Cincinnati-I&N (CSX) (Interior Route)	23,955	8.79
	<u>272,656</u>	

Northeast/Eastern Canada includes Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, Quebec, Ontario, Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Delaware, Maryland, and the District of Columbia.

Far Southeast includes South Carolina, Georgia, Florida, and Alabama.

Source: State-to-state interchange tables submitted by SCL Industries, Chessie System, Southern, and Norfolk and Western in CSX case.

Another approach to examine the "feasible" north-south routings is to refer to the latest ICC one percent waybill sample (1978). With the approval of the Commission, applicants retained Dr. Alain L. Kornhauser of Princeton University to aggregate sampled 1978 traffic by carloads at the route level. The waybill sample is incomplete in that it omits all traffic to and from Canada and all domestic shipments terminated by carriers with less than \$3 million annual operating revenues. Dr. Kornhauser was requested to submit printouts showing for 1978 all carloads (by route) between the four southeastern states (South Carolina, Georgia, Florida, Alabama), on the one hand, and all New England states, New York, Pennsylvania, New Jersey, Delaware, Maryland, and D.C., on the other hand. The results are summarized in Figure 2. They essentially confirm the relative shipper preference for the north/south rail routings analyzed from 1977 carrier interchange data. 1/

1/ The complete detail of the Kornhauser printouts used in this and later summaries is reproduced in the Addendum to Volume 1.

1978 Northeast-Far Southeast Carloads
Via North-South Gateways, Potomac Yard to Cincinnati

<u>Routing</u>	<u>Carloads</u>	<u>Percent</u>
Potomac Yard-RF&P (CSX) (Coastal Route)	952	46.19
Potomac Yard-C&O (CSX) (Piedmont Route)	0	0.00
Potomac Yard-SOU (Piedmont Route)	607	29.45
Hagerstown/Shenandoah Jct.-NW (Shenandoah Valley Route)	109	5.29
Elkhorn City-Clinchfield (CSX) (Mountain Route)	7	0.34
Cincinnati-Southern (Interior Route)	207	10.04
Cincinnati-L&N (CSX) (Interior Route)	179	8.69
Subtotal	2,061	
Other Routes *	86	

Northeast includes New England states, New York, New Jersey, Pennsylvania, Delaware, Maryland, and District of Columbia. (Eastern Canada not included). Southeast includes South Carolina, Georgia, Florida, and Alabama.

*Fulton KY (ICG) 33, St. Louis MO (SLSF) 31, Pocomoke MD (VAM) 13, Louisville KY (L&N) 5, and Louisville KY (SOU), Kenova WV (NW), Chicago, IL (L&N), and St. Louis MO (SSW), one apiece.

Source: One percent waybill sample.

The differences between the two tables are due primarily to the exclusion from the one percent waybill sample of traffic to and from eastern Canada. The Canadian lines (CP and CN) solicit traffic to move via their long haul, to and from the Detroit-Windsor gateway, from which the most direct routes to the Southeast are via the Cincinnati and Elkhorn City gateways.

The 1978 one percent waybill sample also provides data with regard to the routes preferred by shippers between stations within Virginia and North Carolina and the same northeastern states. In Figure 3, applicants reproduce Kornhauser's printouts on this traffic aggregated by north/south gateways and north/south carriers. It will be noted that the more westerly gateways (Cincinnati and Elkhorn City) decline sharply in importance, and both Chessie's Piedmont Route and NW's Shenandoah Valley Route rise in significance. Overall, the traffic is rather equally divided between the present CSX routes and the routes that would be unified under the NWS proposal.

Between Virginia/North Carolina and the southeastern states of South Carolina, Georgia, Florida, and Alabama, rail traffic is relatively equally divided between the present CSX roads, on the one hand, and NW and Southern, on the other hand. According to the Kornhauser printouts

Figure 3

1978 Northeast-Virginia/North Carolina Carloads

<u>Routing</u>	<u>Via North-South Gateways</u>		<u>North Carolina</u>		<u>Total</u>	
	<u>Carloads</u>	<u>Percent</u>	<u>Carloads</u>	<u>Percent</u>	<u>Carloads</u>	<u>Percent</u>
Pocomoke MD (VAM)	13	1.4	3	0.5	16	1.0
Potomac Yard VA (RFP)	182	19.3	242	38.3	424	26.9
Potomac Yard VA (SOU)	115	12.2	275	43.5	390	24.7
Potomac Yard VA (C&O)	243	25.7	11	1.7	254	16.1
Pot Yd/Hagerstown (CR)	20	2.1	-	-	20	1.3
Hagerstown MD (NW)	268	28.4	71	11.2	339	21.5
Hinton WV (C&O)	8	0.8	-	-	8	0.5
Kenova WV (NW)	86	9.1	17	2.7	103	6.5
Elkhorn City KY	7	0.7	2	0.3	9	0.6
Cincinnati OH (SOU)	-	-	8	1.3	8	0.5
Cincinnati OH (L&N)	2	0.2	3	0.5	5	0.3
Totals	944		632		1,576	

Northeast includes New England states, New York, New Jersey, Pennsylvania, Delaware, Maryland and District of Columbia. (Eastern Canada not included)

Source: One percent waybill sample.

of the 1978 one percent waybill sample, there were 2,757 carloads of rail freight between Virginia/North Carolina and these four southeastern states in the 1978 waybill sample. Of these, Southern and NW originated or terminated 49.6% in the states of Virginia and North Carolina (Southern 44.0% and NW 5.6%); the CSX roads originated or terminated 45.9% (SCL 30.7%, RFP 13.3%, C&O 1.9%); other roads originated or terminated the balance (Winston-Salem Southbound 4.0% and other roads 0.5%).

Of this traffic, Southern handled 54.7% crossing the northern boundaries of South Carolina, Georgia, and Alabama, and SCL handled the other 45.3%. These figures do not reflect interchanges within South Carolina, Georgia, Florida, or Alabama to or from other roads such as FEC, ASAB, AN, SLSF, ICG, BS, VS, MBR, etc.

After consummation of the Southern-NW consolidation, applicants anticipate that NW's Shendandoah Valley Route will be increasingly used by shippers and that traffic over Southern's Piedmont Route will decline. In the CSX case, the CSX applicants proposed the operation of new run-through trains between Baltimore/Philadelphia and the far southeast via Potomac Yard and the RF&P Coastal Route and new run-through trains via the Elkhorn City Mountain Route to and from the far southeast. Both such routes

should also see increases in traffic volume. It is expected that the circuitous routings via Cincinnati and other gateways to the west will decline through reroutes via the Elkhorn City, Hagerstown, and Potomac Yard gateways by reason of north/south service improvements by CSX and NWS.

4. There will be no lessening of alternative rail routings for communities and shippers along the affected routes.

5. Prior to November 1, 1980, Southern's Piedmont Route and NW's Shenandoah Valley Route confronted active rail competition for north/south traffic traversing Virginia and North Carolina by RF&P's Coastal Route, C&O's Piedmont Route and the Clinchfield's Mountain Route. On November 1, 1980, the CSX merger was consummated, thereby consolidating the Chessie System (B&O, C&O, Western Maryland), the Seaboard Coast Line system (SCL, L&N, Clinchfield, Georgia, Durham & Southern, Columbia Newberry & Laurens, Gainesville Midland, Atlanta & West Point, Western of Alabama, Carrollton), and the RF&P under single management. As a result of such consolidation, the CSX applicants contemplated that by the third year of their consolidation, traffic over RF&P's Coastal Route (Potomac Yard to Richmond) would increase by 2.1 million gross tons

and traffic over Clinchfield's Mountain Route would increase by between 3.9 million gross tons (measured between Erwin, TN, and Spartanburg, SC) and 6.9 million gross tons (measured between Elkhorn City, KY, and Dante, VA). The CSX applicants forecast little change on C&O's Piedmont Route (no change between Potomac Yard and Gordonsville; 0.1 million increase in gross tons between Gordonsville and both Richmond and Clifton Forge). These changes reflect traffic diversions from Southern, NW, and truck lines and traffic reroutings of both north/south and east/west traffic based on 1977 traffic studies.

The joint Southern-NW traffic studies in this case show a net decline of traffic on Southern's Piedmont Route of 7.2 million gross tons between Potomac Yard and Manassas and a net increase of traffic on NW's Shenandoah Valley Route between Shenandoah Junction and Riverton of 7.9 million gross tons. These changes reflect traffic diversions both from the CSX System and truck lines and traffic reroutings of both north/south and east/west traffic, based on 1979 traffic studies.

The active intramodal competition in the north/south corridor through Virginia and North Carolina is shown in Figures 1-3 applying available 1977 and 1978 traffic

routing data. The balance in favor of the CSX RF&P Coastal Route and Clinchfield Mountain Route will intensify as a result of the CSX consolidation and will be somewhat offset if Southern and NW are unified under NWS.

Both CSX and NWS would also face strong intermodal competition.

For many large volume north/south freight movements between selected aggregations of BEA's on the East Coast, the non-rail modes predominate (Figure 4). For example, non-rail carriers transported more than half of the almost 11 million tons which originated in 1978 in the BEA's in Virginia and North Carolina and terminated in the BEA's in South Carolina, Georgia, Florida, and Alabama. Between Virginia/North Carolina and the 18 BEA's which lie north of the Potomac River and east of Ohio, the non-rail share exceeded three-fifths for the more than 16 million tons of traffic moving northbound and the over 18 million tons carried southbound. Even for those few northbound movements where the rail percentage is greater than 50, such as for traffic moving between the four states in the deep South to the 18 BEA's north of the Potomac and to those in Virginia/North Carolina, the non-rail modes still carry more than two-fifths of the total freight.

Figure 4

MODAL SHARE OF NORTH-SOUTH TRAFFIC BETWEEN
SELECTED AREAS ON THE EAST COAST

<u>BEA Areas</u>	<u>Total Tons</u>	<u>Northbound</u>		<u>Total Tons</u>	<u>Southbound</u>	
		<u>Rail</u> <u>Share</u> (Per Cent)	<u>Non-Rail</u> <u>Share</u> (Per Cent)		<u>Rail</u> <u>Share</u> (Per Cent)	<u>Non-Rail</u> <u>Share</u> (Per Cent)
SC-GA-FL-AL and North of the Potomac River	13,539,174	51.9	48.1	19,205,578	16.6	83.4
VA-NC and North of the Potomac River	16,350,742	39.5	60.5	18,551,348	37.8	62.2
SC-GA-FL-AL and VA-NC	15,828,817	58.5	41.5	10,864,317	44.2	55.8

Source: Transearch Data Base.

Moreover, for the largest freight volume of these selected areas -- the more than 19 million tons which were transported in 1978 from the BEA's north of the Potomac to South Carolina, Georgia, Florida, and Alabama -- the non-rail share was an overwhelming 83 percent. Large as each of these non-rail shares is, such percentages are no doubt still understated due to the undercounting of truck and barge movements in the government transportation surveys which are the inputs to the Transearch data base from which these BEA freight tonnage and modal shares are drawn. ^{1/}

In order to focus more directly on intermodal alternatives to "local rail service in Virginia and North Carolina," Figure 5 was also prepared from the Transearch data base. The Figure displays truck shares of tonnage moving among all of the ten BEA's in the Virginia-North Carolina region and is pertinent to both north-south and east-west local movements.

^{1/} While the Transearch data base includes virtually all rail movements, it reports less than half of the tonnage carried nationwide by the truck and water modes due to data collection limitations in the government transportation surveys which comprise the data base. Reebie Associates, Transearch Reference Manual (1978) at 18-20. See also Vol. 1B, Witness Barber's statement (NWS-16), p. 42, note 2.

Figure 5

PER CENT OF FREIGHT TONNAGE MOVING BY
TRUCK BETWEEN VIRGINIA AND NORTH CAROLINA BEA'S*

To: From:	Washington, DC	Staunton, VA	Roanoke, VA	Richmond, VA	Norfolk, VA	Raleigh, NC	Wilmington, NC	Greensboro, NC	Charlotte, NC	Asheville, NC
Washington, DC		77.6	74.2	75.1	96.9	34.3	100.0	71.3	82.4	100.0
Staunton, VA	43.3		76.6	84.3	81.4	100.0	63.9	99.7	87.1	100.0
Roanoke, VA	82.0	97.8		40.2	42.8	33.3	31.0	72.4	71.6	49.3
Richmond, VA	31.7	85.7	54.2		23.2	44.1	71.9	91.8	84.1	100.0
Norfolk, VA	86.8	68.5	49.5	22.2		25.2	33.1	38.8	34.3	98.6
Raleigh, NC	48.6	81.3	44.3	29.2	30.6		27.2	50.3	69.3	80.5
Wilmington, NC	70.5	61.5	84.0	19.5	41.7	23.4		41.2	51.0	81.2
Greensboro, NC	46.4	74.7	35.8	51.8	57.4	68.5	66.7		71.8	60.4
Charlotte, NC	55.6	81.5	70.5	66.0	87.2	63.5	42.1	82.5		27.3
Asheville, NC	89.1	99.7	62.1	80.4	62.2	68.3	55.2	70.1	69.3	

* Nationwide, data base includes 45 per cent of truck traffic and 95 per cent of rail traffic.

Source: Transearch Data Base.

As can be seen from the Figure, despite the substantial understatement of truck traffic relative to rail traffic in the data base, the Transearch compilation shows that more than two-thirds of local traffic moves by truck in 47 of the 90 displayed Virginia-North Carolina movements between BEA pairs. In other words, less than a third of local tonnage in most cases is moved by the CSX and NWS carriers combined. In only eight cases was the truck share less than 30 percent. ^{1/} The continued rail-rail competition that will persist, and intensify, between the two consolidated rail systems following consummation of NWS will be greatly overshadowed by pervasive truck competition for local traffic.

B. East/West Traffic

Information Request:

Currently applicants also operate parallel routes running east/west through North Carolina or Virginia. Southern has a route originating in Norfolk, VA, which runs west through Virginia and then North Carolina. NW has a route also originating in Norfolk that runs west through southern Virginia.

^{1/} In some cases there are significant water movements in addition to truck. From Norfolk to Richmond, for example, 22 percent of tonnage is estimated to move by truck, but only 6.6 percent by rail -- indicating substantial local barge movements.

It appears that these routes compete at various points in southern Virginia and northern North Carolina for local traffic. Merger could result in consolidation of these lines.

Applicants are directed to indicate:

1. amounts of originated, terminated and overhead traffic on these lines, both current and projected;
2. whether there will be any consolidation of these east/west lines;
3. a list of the feasible active routings available today for traffic moving east/west through Virginia and North Carolina by carrier (not limited to applicants), and those projected after consummation (not limited to applicants);
4. the impact on communities and shippers along the affected routes if there is a lessening of alternative routings; and
5. the extent to which other rail carriers or modes provide current or potential competitive alternatives for shippers using these routes.

Answers:

1. (a) NW's 1979 carload traffic originated, terminated and overhead (i.e., interchanged) at all stations located between Norfolk, VA, and the western border of Virginia (Bristol, VA) was as follows:

Carloads originated	48,058
Carloads terminated	119,673
Carloads interchanged	
inbound to NW	48,836
outbound from NW	85,201

(b) Southern's 1979 carload traffic originated, terminated and overhead (i.e., interchanged) at all stations located between Norfolk, VA, and the western border of North Carolina (Hot Springs, NC) was as follows:

Carloads originated	70,254
Carloads terminated	119,592
Carloads interchanged	
inbound to SR	18,046
outbound from SR	10,795

For the net effect of projected traffic changes over these routes, see the density maps in Appendix A to Exhibit A-17 in Volume 4.

2. Applicants propose no consolidation of the NW and Southern east/west lines in question. ^{1/} In all cases, because of the significant volume of local traffic, shippers and receivers along these lines will continue to receive the same or better level of service as they receive today.

^{1/} The Commission's order does not appear to relate directly to the Norfolk, Franklin & Danville route from Norfolk to Danville. However, it should be noted that NW has concurrently filed an application to abandon approximately 80 miles of the NF&D (closely paralleling Southern) between South Hill, VA, and Blanche, NC. Stations to be abandoned on this very low density line segment accounted for less than 500 total originations and terminations in 1979, and the few shippers on the line have alternative transportation modes available. Moreover, Southern will provide service to the western portion of the line between Blanche, NC, and Danville, thereby preserving rail service to several shipping concerns. For a more detailed explanation of the abandonment proposal, see NW's application in Docket No. AB-216 (Sub No. 1F), Vol. 7.

There will, however, be some rerouting of traffic overhead to both routes which will change traffic densities on these east/west routes. Generally, use of the Southern main line via Asheville will be reduced as east/west traffic is shifted to the Lynchburg-Knoxville Cutoff route and NW's route via Kenova and Portsmouth. These changes in through traffic patterns reflect the overall policy of NWS to shift traffic to the most efficient internal routes available. No adverse effect on local traffic is anticipated.

3. There are today basically five east-west rail routes between Virginia and North Carolina, on the one hand, and the west:

1. The Family Lines routes extending from Potomac Yard (via RFP), Richmond and Hampton Roads, Virginia, and from Lee Creek, New Bern, and Wilmington, North Carolina, via Hamlet Yard, North Carolina, southwesterly to the Montgomery, Birmingham, and New Orleans gateways, and via Bostic, N.C., or Atlanta to the Elkhorn City, Cincinnati, Louisville, Chicago, St. Louis, and Memphis gateways.

2. Southern's routes extending from Potomac Yard, Richmond, and Hampton Roads, Virginia, and from Lee Creek, New Bern, and Morehead City, North Carolina,

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via Spencer Yard, North Carolina, southwesterly to the Montgomery, Birmingham, and New Orleans gateways, and via Asheville-Knoxville to the Cincinnati, Louisville, Mount Vernon, Centralia, St. Louis, and Memphis gateways.

3. Chessie's routes extending from Potomac Yard, Richmond, and Hampton Roads, Virginia (with numerous interline connections to and from North Carolina), extending westward via Clifton Forge, Virginia, and Russell Yard, Kentucky, to the Cincinnati, Louisville, St. Louis, and Chicago gateways. Also, from Potomac Yard via Cumberland, MD, to the same gateways.

4. Norfolk & Western's route, extending from Hagerstown, Maryland, Hampton Roads, Virginia, and Durham and Winston-Salem, NC, via Roanoke, northwesterly via Portsmouth, Ohio, to the Cincinnati, Chicago, Peoria, Tolono, St. Louis, and Kansas City gateways.

5. Conrail's route, extending from Potomac Yard and Winchester, Virginia (with connections via Gauley Bridge, Hagerstown, Potomac Yard, and Pocomoke with other Virginia/North Carolina lines), via Harrisburg, PA, to the St. Louis, Peoria, Streator, Effingham, and Chicago gateways.

To determine the activity and feasibility of these routings, the 1977 state-to-state carload interchange records submitted by Seaboard Coast Line Industries, the Chessie System, Southern, and Norfolk & Western in the CSX proceeding were examined. For purposes of this first analysis, traffic "moving east/west through Virginia and North Carolina" was defined as including all interline traffic moving between Virginia and North Carolina, on the one hand, and all states and provinces located west of the Mississippi River, on the other hand. All major interchanges (5,000 or more carloads) between four of the five roads serving Virginia/North Carolina (Conrail did not submit data for 1977) and all western roads (plus Illinois Central Gulf, Toledo Peoria & Western, and Illinois Terminal Railroad) were examined. Active interchanges for this east/west traffic extend from Kewaunee, Wisconsin, on the north, to New Orleans, on the south. The interchanges examined and the relevant carriers were as follows:

<u>Interchange</u>	<u>VA/NC Road</u>	<u>Connections</u>
Kewaunee, WI	CSI	GBW
Milwaukee, WI	CSI	CNW, MLW
Chicago, IL	CSI, FLS, N&W	ATSF, BN, CNW, ICG, MLW, MP, NW, RI, SOO
Peoria, IL	N&W	BN, CNW, RI, ICG, ITC, TPW
Tolono, IL	N&W	ICG
Humrick, IL	N&W	MLW
Mt. Vernon, IL	SOU	MP
Louisville, KY	CSI, FLS, SOU	ICG, MLW
Centralia, IL	SOU	ICG, BN
St. Louis, MO	CSI, FLS, N&W, SOU	BN, CNW, ICG, ITC, MKT, MP, NW, RI, SLSF, SSW
Kansas City, MO	N&W	ATSF, BN, CNW, MLW, RI KCS, MKT, MP, SLSF, UP
Memphis, TN	FLS, SOU	ICG, MP, RI, SLSF, SSW
Jackson, TN	FLS	ICG
Birmingham, AL	FLS, SOU	ICG, SLSF
Montgomery, AL	FLS, SOU	ICG
Myrtlewood, AL	FLS	MB-ICG
Columbus, MS	SOU	CAGY-ICG
Corinth, MS	SOU	ICG
Hattiesburg, MS	SOU	ICG
Meridian, MS	SOU	ICG
New Orleans, LA	FLS, SOU	ICG, LA, MP, SP

Similar information was not available for Conrail. Thus, its Virginia/North Carolina traffic interchanged at the Chicago, Peoria, Streator, Effingham, and St. Louis and intermediate gateways is not included. Also not examined were minor interchanges with less than 5,000 carloads in 1977.

This analysis, even with these significant but unavoidable omissions of additional routing options, disclosed 123 active routings between Virginia/North

Carolina and points west of the Mississippi River. Ninety-nine of these routes were utilized between Virginia/North Carolina and one state alone, California; 100 were utilized to and from Oregon; 73 were utilized to and from Texas, etc. 1/

1/ These listings do not include Conrail routes. In 1977, Conrail handled at least 146 carloads between Virginia/North Carolina and California via 13 routes, including RFP-Potomac Yard, SOU-Potomac Yard, C&O-Potomac Yard, VAMD-Pokomoke, N&W-Hagerstown, C&O-Gauley Bridge, C&O-Charleston, N&W-Columbus, C&O-Columbus, N&W-Cincinnati, C&O-Cincinnati, SOU-Cincinnati, L&N-Cincinnati. The western junctions are not known.

Between Virginia/North Carolina and Oregon, Conrail handled at least 63 carloads via 9 routes, including RFP-Potomac Yard, Southern-Potomac Yard, VAMD-Pokomoke, N&W-Hagerstown, C&O-Columbus, N&W-Cincinnati, Southern-Cincinnati, L&N-Cincinnati, L&N-Louisville.

Between Virginia/North Carolina and Texas, Conrail handled at least 44 carloads via 8 routes, including RFP-Potomac Yard, SOU-Potomac Yard, C&O-Potomac Yard, N&W-Hagerstown, N&W-Columbus, N&W-Cincinnati, C&O-Cincinnati, SOU-Cincinnati.

The total number of carloads between Virginia/North Carolina and the West was over 200,000 in 1977. The principal states, in terms of volume, were Texas (45,000), California (37,000), Louisiana (18,000), Washington (11,000), Oregon (9,000), Missouri (9,000), Minnesota (8,000), and British Columbia (8,000).

The most active routings followed the service patterns being provided by the four primary Virginia/North Carolina systems in 1977. Southern emphasized train service to and from the New Orleans, Memphis, St. Louis, Centralia, and Mount Vernon gateways; the Family Lines to and from the New Orleans, Birmingham, and Chicago gateways; the Norfolk & Western to and from the Chicago and Kansas City gateways; and the Chessie to and from the Chicago gateway.

Routings accounting for 5% or more of the interline traffic between Virginia/North Carolina and each Western state or province are summarized below:

Family Lines:

Birmingham-SLSF -- Arkansas (23%), Arizona (10%), California (11%), Colorado (15%), Iowa (6%), Idaho (13%), Kansas (16%), Missouri (21%), Montana (6%), Nebraska (7%), New Mexico (27%), Nevada (31%), Oklahoma (20%), Oregon (8%), Texas (7%), Utah (22%), Washington (8%), Wyoming (45%).

Birmingham-ICG -- Louisiana (12%).

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New Orleans-SP -- Arizona (14%), California (7%), Louisiana (7%), Texas (10%).

New Orleans-LA -- Louisiana (7%).

New Orleans-MP -- Louisiana (5%), New Mexico (8%), Texas (8%).

Memphis-MP -- Arkansas (6%).

Memphis-RI -- Oklahoma (6%).

St. Louis (Woodlawn)-BN -- Montana (7%).

Chicago-SOO -- Alberta (11%), Manitoba (5%), Saskatchewan (10%).

Chicago-CNW -- Manitoba (17%), Minnesota (6%).

Southern:

Birmingham-SLSF -- Arkansas (10%), Idaho (10%), Oklahoma (7%).

Meridian-ICG -- Louisiana (7%).

New Orleans-SP -- Arizona (15%), Louisiana (13%), Texas (13%).

New Orleans-LA -- Louisiana (11%).

New Orleans-MP -- Louisiana (7%), Texas (8%).

Memphis-MP -- Arkansas (16%), California (6%), Colorado (17%), Idaho (7%), Kansas (5%), Louisiana (7%), Missouri (13%), Nebraska (19%), New Mexico (5%), Nevada (32%), Oregon (7%), Texas (10%), Utah (19%), Washington (7%).

Memphis-SSW -- Arkansas (11%), Arizona (9%), California (12%), Oregon (6%), Texas (9%).

Memphis-RI -- Arkansas (7%), New Mexico (5%), Oklahoma (20%).

Memphis-SLSF -- Arizona (11%), California (16%), Colorado (9%), Idaho (13%), Kansas (10%), Missouri (8%), New Mexico (22%), Nevada (19%), Oklahoma (16%), Oregon (8%), Utah (18%), Washington (10%), Wyoming (6%).

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St. Louis-CNW -- Alberta (7%), British Columbia (18%), Iowa (17%), Minnesota (9%), Nebraska (15%), South Dakota (19%), Saskatchewan (6%).

St. Louis-MP -- Colorado (7%), Kansas (9%), Missouri (8%), Nebraska (5%).

St. Louis-MKT -- Kansas (7%).

Centralia/St. Louis-BN -- British Columbia (13%), Colorado (19%), Iowa (13%), Manitoba (9%), Missouri (8%), Minnesota (15%), Montana (33%), North Dakota (55%), Nebraska (16%), Oregon (7%), South Dakota (43%), Saskatchewan (6%), Washington (12%).

Mount Vernon-MP -- Alberta (21%), British Columbia (10%), Manitoba (22%), Saskatchewan (8%).

Louisville-MLW -- Minnesota (7%), South Dakota (7%).

Chessie System:

Chicago-SOO -- Alberta (11%), Manitoba (10%), Saskatchewan (22%).

Chicago-RI -- Iowa (9%).

Chicago-CNW -- Iowa (8%), Saskatchewan (7%), Wyoming (5%).

Chicago-BN -- North Dakota (7%), Washington (7%).

St. Louis-SSW -- Arkansas (5%).

Norfolk and Western:

Kansas City-ATSF -- Arizona (6%), California (18%), New Mexico (9%).

Kansas City-UP -- California (9%), Idaho (18%), Nevada (5%), Oregon (20%), Utah (14%), Washington (12%), Wyoming (21%).

Kansas City-BN -- Montana (11%)

St. Louis-SSW -- Arizona (6%).

Chicago-SOO -- Alberta (26%), British Columbia (6%), Manitoba (15%), North Dakota (6%), Saskatchewan (16%).

Chicago-CNW -- Alberta (5%), British Columbia (7%), Minnesota (10%), Nebraska (5%), South Dakota (16%), Saskatchewan (5%).

Chicago-RI -- Iowa (8%).

Chicago-BN -- Iowa (5%), Manitoba (7%), Montana (14%), North Dakota (11%), Washington (20%).

Chicago-MLW -- Minnesota (7%), South Dakota (6%).

Substantial changes in the above patterns will occur as a result of approved railroad unifications and the proposed NWS consolidation. As a result of the BN-SLSF unification, it may be anticipated that the merged company will tend to favor its longer hauls to the Memphis and Birmingham gateways, in lieu of Kansas City, Chicago, Woodlawn, and Centralia. Furthermore, the merger of the Chessie System with the Family Lines System (Seaboard Coast Line Industries) will create an increased competitive presence of CSX in Virginia/North Carolina-West markets in several ways. First, it will blanket the Virginia/North Carolina area with single-system service to all major western gateways. Second, the applicants in the CSX case proposed new run-through train service between Virginia and the St. Louis gateway (a market heretofore relatively neglected by both Chessie and Family Lines) and between Bostic, North

Carolina, and the Chicago gateway via Elkhorn City; these trains will cross at Russell Yard, Kentucky (see Figure 6, attached). Generally both of these services are more direct than any that Southern and N&W can provide, either separately, or together.

The NWS proposal provides a competitive response to the CSX merger in the same Virginia/North Carolina-West markets. It will likewise blanket the two-state area with single-system service to all major western gateways. It will also shorten through-train services between many Virginia points and St. Louis and between many North Carolina points and Chicago. After unification, NW and Southern will place increased emphasis on solicitation of traffic between Virginia/North Carolina and Pacific-Mountain territory, northern WTL territory, and the western provinces via Chicago and Kansas City.

Other developments, such as the Milwaukee's abandonment of its western lines, the sale of the Rock Island Tucumcari line to Southern Pacific, and the dissolution of the Rock Island will also affect these traffic flows. A further factor is the pending UP-MP-WP consolidation which, if approved, will tend to move interchanges on traffic to and from UP-WP stations eastward toward the MP's gateways of Chicago, St. Louis, Memphis, and New Orleans.



These various consolidations will not only intensify competition between Virginia/North Carolina and the West but will also probably result in a reduction in the many circuitous routings that occurred in 1977. For example, NW traffic between Virginia/North Carolina and Texas/Louisiana was generally routed via St. Louis or Kansas City in 1977; upon unification with Southern, NWS will solicit such traffic via more direct interchanges at New Orleans or Memphis.

4. There will be no lessening of alternative routings for communities and shippers along the affected routes.

5. The most current information on present rail competition between Virginia/North Carolina and the west is that contained in the Commission's 1978 one percent waybill sample. ^{1/} This disclosed 1,627 carloads

^{1/} We have not interpreted the Commission's question as relating to traffic between Virginia/North Carolina and Kentucky, Ohio, lower Michigan, Indiana, and Illinois. With respect to such traffic (all of which is shown in the Addendum to Vol. 1), the Virginia distribution was NW 26%, CSI 23%, FLS 3%, SOU 2%, interline 47%, and the North Carolina distribution was NW 23% (principally coal from KY), SOU 13%, FLS 9%, interline 55%. The Addendum also discloses active routings between Virginia/North Carolina and Tennessee/Mississippi which will not be materially affected by the NWS proposal.

between Virginia/North Carolina and all states west of the Mississippi. To enhance the sample, traffic between Virginia/North Carolina and Wisconsin and the northern peninsula of Michigan was also included, yielding 601 carloads to and from Virginia and 1,159 carloads to and from North Carolina.

Because of the paucity of sample carloads in most state-pairs, western states were aggregated into five groups in order to provide 100 or more sample cars in each group. The resulting aggregations are:

1. Texas
2. Other Southwest states (LA-AR-OK);
3. Far Southwest (CA-NV-UT-AZ-CO-NM);
4. Northwest/Western Plains (WA-OR-ID-MT-WY-ND-SD-NE-KA);
5. Midwest (MI-WI-MN-IA-MO)

The sample traffic was then distributed according to the five railroad routings described in answer to part 3 of this question. The resulting distributions are shown in the following two tables. The first summarizes the 1978 intramodal competitive picture between Virginia and the West.

Shares of Virginia-West Carloads
Handled By East-West Trunklines

<u>Between Virginia and:</u>	<u>FLS</u>	<u>SOU</u>	<u>CSI</u>	<u>NW</u>	<u>CR</u>
Texas	38%	30%	11%	20%	-
Other Southwest	35	40	7	17	1%
Far Southwest	23	16	11	50	-
Northwest/ Western Plains	10	21	22	46	1
Midwest	9	15	24	46	5

In terms of routings and gateways, the traffic was distributed far more diversely than the percents shown above. Thus, between Virginia and Texas, there were 19 routings shown in the waybill sample involving the above railroads. The principal ones were FLS Virginia-New Orleans-connections (28%) and NW Virginia-St. Louis-connections (19%).

The primary routings in the other Virginia-west markets were:

Virginia-Other Southwest	SOU-New Orleans	27%
	FLS-New Orleans	26%
Virginia-Far Southwest	NW-Kansas City	37%
	FLS-Birmingham	13%
Virginia-Northwest/ Western Plains	CSI-Chicago	18%
	NW-Chicago	18%
Virginia-Midwest	NW-Chicago	31%
	CSI-Chicago	17%

Turning to North Carolina-West markets, the waybill sample shows the following distributions:

Shares of North Carolina-West Carloads
Handled By East-West Trunklines

<u>Between N.C. and:</u>	<u>FLS</u>	<u>SOU</u>	<u>CSI</u>	<u>NW</u>	<u>CR</u>
Texas	30%	69%	-	1%	-
Other Southwest	43	55	-	1	-
Far Southwest	34	59	1	6	-
Northwest/ Western Plains	32	57	1	9	-
Midwest	22	49	8	22	0*

*Less than 0.5%

The primary routings were as follows:

NC-Texas	SOU-Memphis	36%
	SOU-New Orleans	32
	FLS-New Orleans	19
NC-Other Southwest	SOU-New Orleans	28%
	FLS-New Orleans	21
	SOU-Memphis	21
NC-Far Southwest	SOU-Memphis	45%
	FLS-Birmingham	19
NC-Northwest	SOU-Memphis	30%
	FLS-Birmingham	21
NC-Midwest	SOU-St. Louis	23%
	NW-Chicago	11

Of the ten Virginia/North Carolina-West state-pair groupings examined, North Carolina-Midwest is the only rail market group where Southern and NW's combined 1978 shares exceeded 70%. It is also an excellent example of unsatisfactory rail service from the shippers' standpoint. In Figure 7, we summarize the carload routings between North Carolina and the Midwest area. 1/

1/To simplify this display, participation by intrastate carriers in North Carolina (WSS, DS, LRS, AR) as well as connections beyond the Chicago, St. Louis, Memphis, and New Orleans gateways are not shown.

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Detail of 1978 One Percent Waybill Sample,
North Carolina-Midwest
(Carloads in Both Directions)

<u>Southern</u>	MI	WI	MN	IA	MO	Total
SOU-St.Louis-Conn.	-	15	9	13	5	42
SOU-St.Louis local	-	-	-	-	14	14
SOU-Memphis-Conn.	-	-	2	-	19	21
SOU-Louisville-MLW	-	10	6	2	-	18
SOU-Centralia-BN	-	3	6	5	1	15
SOU-Bham-ICG	-	-	-	1	2	3
SOU-Bham-SLSF	-	-	-	-	3	3
FLS-Atla-SOU-St.L.	-	3	-	-	-	3
SOU-Mt.Ver.-MP	-	-	2	-	-	2
FLS-Frisco-SOU-Mem.	-	-	-	-	1	1
						122
<u>Family Lines</u>						
FLS-Chicago	-	3	8	2	-	13
FLS-Louisville-MLW	-	8	1	1	-	10
FLS-Bham-SLSF	-	-	-	4	6	10
FLS-Woodlawn-BN	-	1	2	1	1	5
FLS-St.Louis local	-	-	-	-	4	4
FLS-Bham-ICG	1	-	-	-	2	3
FLS-St.Louis-Conn.	-	2	-	-	1	3
SOU-Louisv-FLS-Chic.	-	3	-	-	-	3
FLS-Memphis-Conn.	-	-	-	-	2	2
FLS-New OrL.-Conn.	-	-	-	-	1	1
						54
<u>Norfolk Western</u>						
NW-Missouri-local	-	-	-	-	22	22
NW-Chicago	1	10	1	7	-	19
FLS-Ptrsbg-NW-Chic.	-	2	1	1	-	4
SOU-Cinc-NW-Chicago	1	3	-	-	-	4
FLS-Ptrsbg-NW local	-	-	-	-	2	2
FLS-St.Paul-NW-Des M.	-	1	-	-	-	1
SOU-Norfolk-NW Chic.	-	1	-	-	-	1
SOU-Norfolk-NW local	-	-	-	1	-	1
						54

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Chessie

SOU-Cinc-CSI Chic.	1	1	-	6	-	8
FLS-Rich-CSI Chic.	-	4	-	-	-	5
FLS-Rich-CSI local	-	2	-	-	-	2
FLS-Elkh-CSI Chic.	-	1	1	-	-	2
FLS-Elkh-CSI-						
Kewaunee	-	1	-	-	-	1
FLS-Ptrsbg-NW Toledo-						
CSI Kewaunee	-	1	-	-	-	<u>1</u>
						20

Conrail

SOU-Cinc-CR-Chic.	-	1	-	-	-	1
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The 1978 waybill sample showed 251 carloads between North Carolina and upper Michigan, Wisconsin, Minnesota, Iowa, and Missouri. Only 40 of these carloads enjoyed single-system service (to and from Missouri, NW 22, Southern 14, FLS 4). The balance (84%) used interline service, usually by highly circuitous routings. Thus, the principal interline routing utilized by rail shippers between North Carolina and the Midwest (42 carloads) was Southern to St. Louis (via Knoxville, TN, Danville, KY) and connections beyond (via Chicago). The Family Lines' single-system service between North Carolina and the Chicago gateway (via Atlanta) was so circuitous that it was used by only 13 sampled carloads, only 5% of the total.

The CSX consolidation of the Family Lines, Chessie, and RF&P and the NWS consolidation of NW and Southern will cause dramatic changes in these routing patterns. The CSX operating plan called for emphasis on the FLS-Chessie connections at Elkhorn City and Richmond for improved service between North Carolina and the Chicago and St. Louis gateways. In 1978, the Elkhorn City routing was used by only 3 sampled carloads, and the Richmond routing was used by only 7 sampled carloads.

The NWS operating plan will respond to these service improvements by emphasizing the Southern-NW connections at Altavista, Virginia, and Bristol, Virginia, for service between North Carolina and the Midwest. There were no sampled cars in this market via either route in 1978.

The two resulting North Carolina-Midwest rail systems will not only provide shippers with far superior service than was available in 1978 but also will provide balanced intramodal competition. In the absence of an NWS consolidation, it is applicants' opinion that CSX will obtain an overwhelming dominance in the rail traffic in this market; with the consolidation, the two systems will compete on much more equal terms.

Aside from this intramodal competition, railroads face strong competition from other modes in the east/west Virginia and North Carolina markets. (See Figure 8).

Westbound, between Virginia/North Carolina BEA's and all BEA's west of the Mississippi River, the non-rail share of 3.5 million tons of freight which originates in these two states in 1978 was more than 40 percent, while the non-rail modes transported almost three-fifths of eastbound movements which are more than two and a half times as large as the westbound traffic. Overall, for the

Figure 8

MODAL SHARE OF TRAFFIC BETWEEN
VIRGINIA/NORTH CAROLINA AND BEA'S
WEST OF THE MISSISSIPPI RIVER

	<u>Total Tons</u>	<u>Rail Share (Per Cent)</u>	<u>Non-Rail Share (Per Cent)</u>
Eastbound	9,129,194	40.3	59.7
Westbound	3,508,691	59.0	41.0
Total	12,637,885	45.5	54.5

Source: Transearch Data Base.

12.6 million tons moving in both directions between these areas, the non-rail carriers haul more than half the traffic, despite the underreporting of non-rail movements which characterizes the Transearch data base from which these modal shares are drawn.

Excerpt of Vol. 3, Exhibit 9
1980 Merger Agreement and
Merger Plans

AGREEMENT OF MERGER AND REORGANIZATION

This Agreement of Merger and Reorganization dated as of July 31, 1980, among
NORFOLK AND WESTERN RAILROAD COMPANY OF VIRGINIA (NWRC),
NORFOLK AND WESTERN RAILWAY COMPANY (NW),
NWS ENTERPRISES, INC. (NWS),
SOUTHERN RAILROAD COMPANY OF VIRGINIA (SRC), and
SOUTHERN RAILWAY COMPANY (Southern),
all Virginia corporations,

WITNESSETH:

WHEREAS, NW and Southern have agreed that it is desirable to bring their properties under common control through ownership of all the common stock of NW and of Southern by NWS, the shares of which are to be acquired by the stockholders of NW and of Southern through mergers of NWRC into NW and SRC into Southern on the terms hereinafter provided; and

WHEREAS, as of the date of this Agreement, NWRC had authorized capital stock consisting of 1,000 shares of \$10 par Common Stock, all of which was issued and outstanding (NWRC Common Stock) and owned by NWS; and

WHEREAS, as of the date of this Agreement, NW had authorized capital stock consisting of 60,000,000 shares of Common Stock, par value \$8.33 $\frac{1}{3}$ per share, of which there were issued 33,682,551 shares as of June 30, 1980 (NW Common Stock), and of which issued shares 31,281,663 were outstanding and 2,400,888 were treasury shares (including 2,326,734 shares reserved for conversion of a total of \$100.8 million principal amount of NW 4% 15-year Subordinated Debentures maturing serially from October 1, 1981 to June 1, 1989), and of which authorized but unissued shares, 26,520 as of June 30, 1980 were reserved for exchange of Dereco, Inc. Preferred Stock Class A, Series 1, and Class B, Series 1, or conversion of Erie Railroad Company General Mortgage 4 $\frac{1}{2}$ % Income Bonds, Series A, due January 1, 2015 (Erie Bonds), or any successor security to the Erie Bonds issued to the holders of such Erie Bonds pursuant to the Plan of Reorganization of Erie Lackawanna Railway Company; and

WHEREAS, as of the date of this Agreement, NWS had authorized capital stock consisting of 1,000 shares of \$1 par Common Stock, all of which was issued and outstanding (NWS Common Stock) and owned, 500 shares each, by NW and by Southern; and

WHEREAS, as of the date of this Agreement, SRC had authorized capital stock consisting of 1,000 shares of \$10 par Common Stock, all of which was issued and outstanding (SRC Common Stock) and owned by NWS; and

WHEREAS, as of the date of this Agreement, Southern had authorized capital stock consisting of 70,000,000 shares, divided into 10,000,000 shares of no-par Serial Preferred Stock, 10,000,000 shares of no-par Serial Preference Stock and 50,000,000 shares of no-par Common Stock (Southern Common Stock), of which there were issued and outstanding, as of July 22,

1980, 1,198,611 shares of \$2.60 Cumulative Preferred Stock, Series A and 16,549,030 shares of Southern Common Stock, and of which issued and outstanding shares of Common Stock 15,395,286 were outstanding in the hands of persons other than a subsidiary of which Southern owns, directly or indirectly, more than 50% of the outstanding voting shares; and

WHEREAS, Southern has adopted and intends to put into effect on August 1, 1980, a dividend reinvestment plan (Southern Dividend Reinvestment Plan) utilizing shares of Southern Common Stock; and

WHEREAS, the Articles of Incorporation of NWS (NWS Articles) and the Amendment of NWS Articles are attached as Exhibits A and A1 hereto and made a part hereof; and

WHEREAS, the Plans of Merger of NWRC into NW (NW Plan) and SRC into Southern (Southern Plan), which specify the date on which the mergers are to occur (Merger Date), are attached hereto as Exhibits B and C (collectively, Plans) and made a part hereof; and

WHEREAS, this Agreement is intended to constitute a Plan or Plans of Reorganization pursuant to Section 368 of the Internal Revenue Code of 1954 (hereinafter called the Code);

NOW, THEREFORE, in consideration of the premises and the mutual covenants hereinafter contained, it is agreed:

1. MERGERS.

The NWRC-NW merger shall become effective on the Merger Date as provided in the NW Plan. The SRC-Southern merger shall become effective on the Merger Date as provided in the Southern Plan. The Merger Date in both cases shall be the same day. The conversion of NW Common Stock and of Southern Common Stock into common stock of NWS shall then occur on the bases (each issued share of NW Common Stock into one share of common stock of NWS and each issued share of Southern Common Stock into 1.9 shares of common stock of NWS) set forth in the respective Plans.

2. LISTING OF NWS STOCK.

NWS shall take all necessary steps to cause all issued and issuable common stock of NWS after giving effect to the transactions occurring on the Merger Date to be authorized for listing upon the New York Stock Exchange (Exchange), subject to the official notice of issuance, effective no later than the Merger Date.

3. DIRECTORS AND PRINCIPAL OFFICERS.

3.1 NWS Directors. The initial directors of NWS and their duly elected successors shall constitute the Board of Directors of NWS until the Merger Date, provided, however, that the parties will until the Merger Date cause to be elected as successors to directors 3 and 4 in Exhibit A hereto the individuals designated by NW, and as successors to directors 1 and 2 in Exhibit B hereto the individuals designated by Southern, the intent of this Article 3.1 being to retain equal representation of NW and of Southern on the board of NWS during the pendency of this Agreement. The NWS Articles will be amended as of the Merger Date in the manner provided by Exhibit A1 hereto. Prior to the Merger Date, three members of the first class, three members of the second class and two members of the third class of directors provided for by Exhibit A1 shall be designated by the Board of Directors of NW, and the other members of each of the three classes shall be designated by the Board of Directors of Southern (which designees in each case need not be directors of NW or Southern, provided that not more than three of the designees may be officers or former officers of NW and not more than three of the Southern designees may be officers or former officers of Southern) and the NW or Southern board

similarly designate replacements for any NWS board designee designated by it who becomes unable or unwilling to serve as a director of NWS on the Merger Date. The parties hereto will cause such designees to be elected prior to the Merger Date, to hold office from the Merger Date until their successors are duly elected and qualified pursuant to the Articles and Bylaws of NWS.

3.2 Boards of NWRC and SRC. Until the Merger Date, the parties hereto (when vacancies occur whether by resignation, death, retirement, or expiration of term) will cause to be elected to the board of NWRC the individuals designated by NW, and to the board of SRC, the individuals designated by Southern.

3.3 NWS Principal Officers. The present principal officers of NWS shall serve during the pendency of this Agreement except as may be otherwise determined by the Board of Directors of NWS. On or after the Merger Date, the Board of Directors of NWS constituted pursuant to Article 3.1 hereof shall elect officers of NWS to hold office from their date of election until their successors are duly elected and qualified pursuant to the Articles and Bylaws of NWS.

4. VOTE OF STOCKHOLDERS.

Each party to this Agreement except NWS shall cause this Agreement and the Plan to which it is a party to be duly and promptly submitted to its stockholders for their approval by the requisite vote. NWS agrees to vote the shares of capital stock it owns in NWRC and SRC for approval of this Agreement and such Plans. NW and Southern agree to vote the shares of capital stock they own in NWS to amend the NWS Articles as provided in Exhibit A1 hereto by the Merger Date and to carry out the intent of and effectuate this Agreement if any other NWS stockholder vote becomes necessary or expedient. Each of the parties hereto will supply all material required for compliance with applicable provisions of federal securities laws in connection with obtaining the requisite stockholder votes.

5. REQUEST FOR FEDERAL INCOME TAX RULINGS.

NW and Southern shall promptly submit to the Internal Revenue Service (IRS) a joint application for rulings concerning the federal income tax consequences of the transactions contemplated by this Agreement and the Plans. Among the rulings requested shall be rulings to the effect that:

(i) Transactions pursuant to this Agreement and the Plans will qualify as reorganizations within the meaning of Section 368 of the Internal Revenue Code and no gain or loss will be recognized by NW, Southern, or NWS as a result of such transactions;

(ii) No gain or loss will be recognized by NW stockholders or by Southern stockholders upon the exchange of their NW or Southern stock for NWS stock pursuant to this Agreement and the Plans;

(iii) The basis to the NW and Southern stockholders for the shares of NWS received pursuant to this Agreement and the Plans will be the same as the basis of the shares of NW and Southern stock surrendered in exchange therefor; and

(iv) The holding period for the shares of NWS received by the NW and Southern stockholders pursuant to this Agreement and the Plans will include the holding period for the shares of NW and Southern stock exchanged therefor, provided such shares are capital assets in the hands of such stockholders on the date of the exchange.

6. SUBMISSION TO ICC.

The parties to this Agreement, individually or jointly as may be appropriate, (i) shall prepare, execute, file and exercise their best efforts in prosecuting applications to the Inter-

state Commerce Commission (ICC), together with any and all necessary amendments and supplements thereto, for all necessary approvals and authorizations of the transactions contemplated herein, and for such other approvals or authorizations of the ICC, if any, as may be necessary or appropriate, through entry of a final nonappealable order and (ii) shall obtain any approvals or authorizations of other public authorities which may be necessary or appropriate.

7. COVENANTS.

7.1 NW Covenants. Except with the prior written consent of Southern, NW will not:

(i) Declare, set aside or pay any dividends on its Common Stock except cash dividends not to exceed in any calendar quarter the greater of (a) the amount paid per share in the immediately preceding calendar quarter or (b) an aggregate amount equal to 12½ % of its consolidated net income (before extraordinary items) for the immediately preceding calendar year. NW does not anticipate increasing its dividend per share in response to any dividend increase by Southern to a level not exceeding 1.9 times NW's dividend per share;

(ii) Other than upon conversion or exchange of securities identified in the third recital paragraph of this Agreement, issue or sell, or permit any subsidiary of which it owns, directly or indirectly, more than 50% of the outstanding voting shares to issue or sell other than to another such subsidiary or to NW, (a) any shares of its Common Stock, (b) any securities convertible into or exchangeable, with or without additional consideration, for such Common Stock, or (c) any rights or options to purchase or subscribe to any shares of such Common Stock, provided, however, nothing in this Agreement shall prohibit NW from effecting any stock split-up of its Common Stock or from acquiring outstanding shares of its Common Stock and reissuing no more than an equal number of shares of Common Stock, provided, however, that any such shares of Common Stock acquired from a subsidiary of which it owns, directly or indirectly, more than 50% of the outstanding voting shares may be issued or distributed only to another such subsidiary; or

(iii) Merge or consolidate with, purchase the stock of, lease, purchase some or all of the assets of, acquire operating rights over, or otherwise acquire or assume the operation of another rail carrier, provided, however, that the following shall not be prohibited hereby:

(a) A purchase of equipment or supplies in the ordinary course of NW's business and customary in the railroad industry;

(b) A transaction not involving extension of more than 50 route miles;

(c) A transaction between NW or a subsidiary of which it owns, directly or indirectly, more than 50% of the outstanding voting shares and another such subsidiary;

(d) Any acquisitions by NW pursuant to agreements reached by any parties to this Agreement with the primary applicants or conditions imposed by the ICC in connection with *CSX Corporation — Control — Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, Finance Docket No. 28905 (Sub-No. 1), *et al.*;

(e) The purchase by NW of the shares of stock of The Detroit and Toledo Shore Line Railroad Company owned by Grand Trunk Western Railroad Company; or

(f) The acquisition by NW of additional shares of stock or some or all of the assets of Illinois Terminal Railroad Company.

7.2 Southern Covenants. Except with the prior written consent of NW, Southern will not:

(i) Declare, set aside or pay any dividends on its Common Stock except cash dividends not to exceed in any calendar quarter the greater of (a) the amount paid per share in the immediately preceding calendar quarter or (b) an aggregate amount equal to 12½ % of its consolidated net income (before extraordinary items) for the immediately preceding calendar year;

(ii) Other than pursuant to the Southern Dividend Reinvestment Plan, in its present form, issue or sell, or permit any subsidiary of which it owns, directly or indirectly, more than 50% of the outstanding voting shares to issue or sell other than to another such subsidiary or to Southern, (a) any shares of its Common Stock, (b) any securities convertible into or exchangeable, with or without additional consideration, for such Common Stock, or (c) any rights or options to purchase or subscribe to any shares of such Common Stock, provided, however, nothing in this Agreement shall prohibit Southern from effecting any stock split-up of its Common Stock or from acquiring outstanding shares of its Common Stock and reissuing no more than an equal number of shares of Common Stock, provided however, that any such shares of Common Stock acquired from a subsidiary of which it owns, directly or indirectly, more than 50% of the outstanding voting shares may be issued or distributed only to another such subsidiary; or

(iii) Merge or consolidate with, purchase the stock of, lease, purchase some or all of the assets of, acquire operating rights over, or otherwise acquire or assume the operation of another rail carrier, provided, however, that the following shall not be prohibited hereby:

(a) A purchase of equipment or supplies in the ordinary course of Southern's business and customary in the railroad industry;

(b) A transaction not involving extension of more than 50 route miles;

(c) A transaction between Southern or a subsidiary of which it owns, directly or indirectly, more than 50% of the outstanding voting shares and another such subsidiary;

(d) Any acquisitions by Southern pursuant to agreements reached by any parties to this Agreement with the primary applicants or conditions imposed by the ICC in connection with *CSX Corporation — Control — Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, Finance Docket No. 28905 (Sub-No. 1), *et al.*

7.3 Common Covenants. NWRC, NW, NWS, SRC and Southern will cooperate to insure that:

(i) NWRC, NWS and SRC prior to the Merger Date transact no business and incur no indebtedness except as is reasonably necessary to carry out an obligation under this Agreement;

(ii) NWS amends its Articles of Incorporation by the Merger Date as provided in Exhibit A1 hereto, delivers its validly issued, fully paid and nonassessable shares necessary for the mergers and related transactions provided for in Article 1 hereof, and causes its stock to be listed on the Exchange as provided in Article 2 hereof; and

(iii) NW and Southern surrender to NWS for cancellation on the Merger Date the shares of NWS Common Stock theretofore owned by each.

8. REPRESENTATIONS AND WARRANTIES.

8.1 NW. NW represents and warrants as follows:

(i) NW is a corporation duly organized, validly existing and in good standing under the laws of the Commonwealth of Virginia;

(ii) As of the date of this Agreement, NW's capital stock as authorized by its Articles consisted of 60,000,000 shares of Common Stock, par value \$8.33 $\frac{1}{3}$ each, of which, as of June 30, 1980, 31,281,663 shares were outstanding; and

(iii) NW has delivered to Southern copies of the consolidated balance sheet of NW as of December 31, 1979, and statements of income of NW for the year ended December 31, 1979, in each case including notes thereto, which have been prepared in accordance with

generally accepted accounting principles consistently followed throughout the period indicated and which have been certified by Peat, Marwick, Mitchell & Co., certified public accountants. The aforesaid consolidated balance sheet fairly presents as of its date the financial condition and assets and liabilities of NW and the aforesaid statements of income fairly present the results of operations of NW for the period indicated. Except as otherwise contemplated by this Agreement and except as and to the extent reflected or reserved against in the aforesaid consolidated balance sheet or referred to in the related notes, as of the date thereof NW had no material liabilities or obligations (whether accrued, absolute, contingent or otherwise) of a nature customarily reflected in a corporate balance sheet prepared in accordance with generally accepted accounting principles.

8.2 Southern. Southern represents and warrants as follows:

(i) Southern is a corporation duly organized, validly existing and in good standing under the laws of the Commonwealth of Virginia;

(ii) As of the date of this Agreement, Southern's capital stock as authorized by its Restated Articles consisted of 10,000,000 shares of no-par Serial Preferred Stock, 1,198,611 shares of which were outstanding as of July 22, 1980, 10,000,000 shares of no-par Serial Preference Stock, and 50,000,000 shares of no-par Common Stock, 16,549,030 shares of which were outstanding as of July 22, 1980; and

(iii) Southern has delivered to NW copies of the consolidated balance sheet of Southern as of December 31, 1979, and statements of income of Southern for the year ended December 31, 1979, in each case including notes thereto, which have been prepared in accordance with generally accepted accounting principles consistently followed throughout the period indicated and which have been certified by Price Waterhouse & Co., certified public accountants. The aforesaid consolidated balance sheet fairly presents as of its date the financial condition and assets and liabilities of Southern and the aforesaid statements of income fairly present the results of operations of Southern for the period indicated. Except as otherwise contemplated by this Agreement and except as and to the extent reflected or reserved against in the aforesaid consolidated balance sheet or referred to in the related notes, as of the date thereof Southern had no material liabilities or obligations (whether accrued, absolute, contingent or otherwise) of a nature customarily reflected in a corporate balance sheet prepared in accordance with generally accepted accounting principles.

9. CONDITIONS PRECEDENT.

The obligations of NW and the obligations of Southern under this Agreement are subject to and shall be conditional upon the satisfaction, or waiver (in whole or in part) in writing, of each of the following conditions:

(i) The representations and warranties made by the other party in Article 8 hereof shall, on the Merger Date, be true and correct in all material respects, except with respect to changes in authorized or outstanding capital stock as contemplated by Article 7 hereof;

(ii) On the Merger Date the shares of common stock of NWS issued and issuable after giving effect to the transactions provided for in Article 1 hereof shall be authorized for listing upon the Exchange, subject to official notice of issuance;

(iii) The mergers provided for in this Agreement and all other transactions contemplated in connection therewith shall, to the extent required by law, have been duly approved prior to the Merger Date by the stockholders entitled to vote thereon of the parties to such mergers;

(iv) NW and Southern each shall have amended its employee benefit and dividend reinvestment plans, if any, under which shares of its Common Stock are granted, purchased, credited, issued or sold to provide that after the Merger Date no additional shares of its Common Stock shall be so granted, purchased, credited, issued or sold and, if required, to permit the trustee under any such plan to receive and hold common stock of NWS to be received upon the conversion of NW and Southern Common Stock provided for in Article 1 hereof;

(v) The order or orders of the ICC referred to in Article 6 of this Agreement shall have been obtained and be in effect on the Merger Date;

(vi) The ruling or rulings from the IRS referred to in Article 5 hereof, or legal opinions to such effect satisfactory in form and substance to NW and Southern, shall have been obtained on or prior to the Merger Date;

(vii) No other party to this Agreement between the date of this Agreement and the Merger Date shall have breached materially and left uncured on the 60th day after notice of such breach or on the Merger Date, whichever is first, any covenant, condition or agreement required by this Agreement to be complied with by such party;

(viii) There shall have been no material adverse change, existing or prospective, in the consolidated business, financial condition or properties of any other party as the result of an acquisition or otherwise from the date of the financial statements referred to in Article 8 above;

(ix) On the Merger Date, NW shall have received from counsel for Southern satisfactory to NW a written opinion satisfactory to NW dated the Merger Date, and Southern shall have received from counsel for NW satisfactory to Southern a written opinion satisfactory to Southern dated the Merger Date, substantially to the effect that:

(a) The railroad furnishing the opinion is a corporation duly organized, validly existing, and in good standing under the laws of the Commonwealth of Virginia;

(b) Since the date of this Agreement, there have been no changes in its authorized or outstanding capital stock, except as contemplated by Article 7 hereof, and all of the issued and outstanding shares of its capital stock, as constituted just prior to the Merger Date, were duly authorized, validly issued, fully paid and nonassessable;

(c) This Agreement and the applicable Plan constitute its valid and binding obligations and it has the corporate power and has taken all requisite corporate action to effect the merger provided in such Plan in accordance with the terms of this Agreement and such Plan; and

(d) Its execution, delivery and performance of this Agreement and the consummation of the transactions on its part contemplated hereby will not result in any breach, violation, default or acceleration of obligations under any provision of its Articles of Incorporation or Bylaws, or of any judgment, decree or order of any court or administrative agency having jurisdiction, or of any mortgage, indenture, loan agreement or other instrument evidencing indebtedness or the guaranty of indebtedness for money borrowed, or of any other material agreement, lease, license or other instrument applicable to it or any of its subsidiaries, of which such counsel is aware;

(x) On the Merger Date, each of NW and Southern shall have received from counsel to NWS, acceptable to NW and Southern, a written opinion satisfactory to NW and Southern, dated the Merger Date, substantially to the effect that:

(a) NWS, NWRC and SRC are corporations duly organized, validly existing and in good standing under the laws of the Commonwealth of Virginia;

(b) All of the issued and outstanding shares of Common Stock of NWRC and as constituted just prior to the Merger Date, were duly and validly issued, fully paid and nonassessable;

(c) The NW Plan constitutes a valid and binding obligation of NWRC and NWRC has the corporate power and has taken all requisite corporate action to effect the NWRC-NW merger in accordance with the terms of the NW Plan;

(d) The Southern Plan constitutes a valid and binding obligation of SRC and SRC has the corporate power and has taken all requisite corporate action to effect the Southern merger in accordance with the terms of the Southern Plan;

(e) All of the shares of common stock of NWS to be issued in the NWRC-NWRC-Southern mergers, if issued in accordance with the terms of this Agreement, the Plans, will be duly authorized, validly issued, fully paid and nonassessable;

(f) This Agreement constitutes the valid and binding obligation of NWS; and

(g) The execution, delivery and performance of this Agreement by NWS and the consummation of the transactions on the part of NWS contemplated hereby will not result in any breach, violation, default or acceleration of obligations under any provision of its Articles of Incorporation or Bylaws, or of any judgment, decree or order of any court or administrative agency having jurisdiction, or of any mortgage, indenture, loan agreement or other instrument evidencing indebtedness or the guaranty of indebtedness for money borrowed, or of any other material agreement, lease, license or other instrument applicable to NWS or any subsidiary of NWS of which counsel is aware, it being understood that such counsel may rely upon a certification of appropriate officers of NWS as to the existence of any of the foregoing; and

(xi) Each party to this Agreement except NWRC and SRC shall have furnished a certificate, dated the Merger Date, of its President or Chairman of the Board, and its Treasurer certifying to the best of their knowledge to the fulfillment by such party of all the conditions required to be fulfilled by such party set forth in this Article 9 and shall have furnished a certificate to each other party hereto.

10. TERMINATION OF AGREEMENT.

Anything herein to the contrary notwithstanding, this Agreement may be terminated if the mergers provided for herein may be abandoned any time prior to the Merger Date:

10.1 By mutual agreement of NW and Southern, evidenced by resolutions of the Board of Directors of NW and Southern;

10.2 At the option of the Board of Directors of NW if, in its reasonable opinion, there has been any material adverse change, existing or prospective, in the consolidated business financial condition or properties of Southern as the result of an acquisition or otherwise from the date of the Southern financial statement referred to in Article 8 hereof;

10.3 At the option of the Board of Directors of Southern if, in its reasonable opinion, there has been any material adverse change, existing or prospective, in the consolidated business financial condition or properties of NW as the result of an acquisition or otherwise from the date of the NW financial statement referred to in Article 8 hereof;

10.4 At the option of the Board of Directors of NW or Southern after giving notice to the other party of such other party's breach of covenant pursuant to Article 7 hereof, if such breach remains uncured on the 60th day after notice thereof is received from the terminating party prior to the Merger Date, whichever is first; or

10.5 At the option of the Board of Directors of NW or Southern to the extent set forth below:

(i) If the ICC shall in any order respecting the transactions contemplated herein impose any term or condition which will (a) have the effect of changing the exchange ratios set forth in the Plans or (b) require the inclusion of any other rail carriers or rail properties or (c) require protection of employees, other than by standard conditions substantially similar to the conditions heretofore imposed by the ICC in *New York Dock Railway — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), or (d) in the reasonable opinion of such Board, materially and adversely affect the economic benefits of the transactions contemplated by this Agreement, and in any such case proceedings shall not have been instituted within 90 days from the effective date of said order or orders seeking judicial review thereof, or, in the event such proceedings are so instituted, if such order or orders shall be sustained upon final disposition of the judicial proceedings in question;

(ii) If the ICC shall have declined, by a final order or orders, to provide any necessary approval of the transactions contemplated herein, and proceedings shall not have been instituted within 90 days from the effective date of said order or orders seeking judicial review thereof, or, in the event such proceedings are so instituted, if such order or orders shall be sustained upon final disposition of the judicial proceedings in question;

(iii) If (a) the IRS shall have failed or declined to furnish the written ruling or rulings contemplated by Article 5 hereof or if the ruling or rulings as issued are not in substance as requested, and (b) the legal opinions referred to in Article 9(vi) hereof shall not be obtainable;

(iv) If any public authority other than the IRS or the ICC whose approval or authorization is materially important to the carrying out of this Agreement fails or declines to grant such approval or authorization, and proceedings shall not have been instituted within 90 days from the effective date of said approval or authorization seeking judicial review thereof, or, in the event such proceedings are so instituted, if such failure or refusal shall be sustained upon final disposition of the judicial proceedings in question;

(v) In the event that the mergers provided for in this Agreement shall not be approved by the stockholders of any party to such merger by the requisite vote; or

(vi) In the event that the mergers provided for in this Agreement shall not have been consummated within six years of the date hereof.

11. MODIFICATION OF AGREEMENT.

This Agreement (but not the NW Plan or the Southern Plan unless permitted by law at the time in effect) may, subject to applicable law, be amended by action of the Boards of Directors of all the parties hereto, except that no change shall be made in the exchange ratios stated in Article 2(a) of the NW Plan or Article 2(b) of the Southern Plan without appropriate consent of the stockholders of NW and Southern. Except with respect to such exchange ratios, a condition imposed by the ICC on the affiliation and not rejected pursuant to Article 10.5 hereof shall not be deemed a modification of this Agreement and shall not require further approval of the stockholders of NW and Southern.

12. MERGER DATE.

The appropriate parties to this Agreement, upon the obtaining of the order or orders from the ICC, and from any other public body whose approval or authorization is necessary or appropriate to the carrying out of this Agreement, granting all necessary approval and authority to carry out the mergers and other transactions provided for in this Agreement, shall as promptly as possible tender articles of merger for filing with the State Corporation Commission of

Virginia (State Commission) and for issuance of a certificate of merger. In the event such certificate of merger is not issued promptly, such parties agree to seek promptly such further regulatory or judicial review as may be necessary in connection with the effectuation of the merger provided for in this Agreement. As provided for in the Plans, the Merger Date shall be the date after appropriate articles of merger shall have been tendered for filing, a certificate of merger issued by the State Commission.

13. WAIVER.

Any party hereto may, by action of its Board of Directors, at its option, waive in writing any and all covenants and conditions contained in this Agreement to which its obligations hereunder are subject.

14. MISCELLANEOUS MATTERS.

14.1 Notices. All notices and other communications under this Agreement shall be in writing and shall be deemed to have been duly given if delivered or mailed by registered or certified mail, postage prepaid:

(i) if to NWRC or NW, to John P. Fishwick, President, Norfolk and Western Railway Company, 8 North Jefferson Street, Roanoke, Virginia 24042 (with a copy to John S. Shannon, Vice President-Law at the same address);

(ii) if to SRC or Southern, to L. Stanley Crane, Chairman, Southern Railway Company, P. O. Box 1808, Washington, D. C. 20013, through September 30, 1980, thereafter to Harold H. Hall, President, Southern Railway Company, at the same address (with a copy to James L. Tapley, Vice President-Law, at the same address); or

(iii) if to NWS, to all the addresses specified in (i) and (ii);
or to such other officer or address as shall be furnished in writing by any of the above parties to the other parties to this Agreement.

14.2 Counterparts. This Agreement may be signed in one or more counterparts, each of which shall be deemed an original.

14.3 Headings. All headings of Articles of this Agreement are for information only and do not constitute parts of the Agreement.

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement to be executed on its behalf and its corporate seal to be hereunto affixed by its officer thereunto duly authorized as of the day and year first above written.

(Corporate Seal)

NORFOLK AND WESTERN RAILROAD
COMPANY OF VIRGINIA

Attest:

/s/ Loretta D. Manning
Secretary

By /s/ Donald E. Middleton
President

(Corporate Seal)

Attest: /s/ Donald E. Middleton
Secretary

NORFOLK AND WESTERN RAILWAY
COMPANY

By /s/ John P. Fishwick
President

(Corporate Seal)

Attest: /s/ Joseph Pakush
Assistant Secretary

NWS ENTERPRISES, INC.

By /s/ Donald E. Middleton
Chairman of the Board

By /s/ Milton M. Davenport
President

(Corporate Seal)

Attest: /s/ R. D. Allen
Assistant Secretary

SOUTHERN RAILROAD COMPANY OF
VIRGINIA

By /s/ Milton M. Davenport
President

(Corporate Seal)

Attest: /s/ Milton M. Davenport
Secretary

SOUTHERN RAILWAY COMPANY

By /s/ L. Stanley Crane
Chairman of the Board

EXHIBIT A
to
Agreement of
Merger and Reorganization

ARTICLES OF INCORPORATION
OF
NWS ENTERPRISES, INC.

ARTICLE I

The name of the Corporation is NWS ENTERPRISES, INC.

ARTICLE II

The purpose for which the Corporation is organized is to transact any lawful business not required to be specifically stated in the Articles of Incorporation.

ARTICLE III

The Corporation shall have authority to issue one thousand (1,000) shares of Common Stock, par value \$1 per share, each of which shall be entitled to one vote on all matters.

ARTICLE IV

No holder of capital stock of the Corporation of any class shall have any preemptive right to subscribe to or purchase (i) any shares of capital stock of the Corporation, (ii) any securities convertible into such shares or (iii) any options, warrants or rights to purchase such shares or securities convertible into such shares.

ARTICLE V

The number of directors, unless otherwise fixed by the By-Laws, shall be four. The names and addresses of the initial directors are:

Name	Address
1. Milton M. Davenport	920 15th Street, N.W. P. O. Box 1808 Washington, D. C. 20013
2. Mahlon D. Edwards	920 15th Street, N.W. P. O. Box 1808 Washington, D. C. 20013
3. Donald E. Middleton	8 N. Jefferson Street Roanoke, Virginia 24042
4. Joseph Pakush	8 N. Jefferson Street Roanoke, Virginia 24042

ARTICLE VI

The initial registered office of the Corporation is at the 11th Floor, 707 East Main Street, Richmond, Virginia 23212, in the City of Richmond, and the initial registered agent is John Riely whose business address is the same as the address of the initial registered office and who is a resident of Virginia and a member of the Virginia State Bar.

ARTICLE VII

(a) The Corporation shall indemnify each director and officer of the Corporation against any and all liabilities, judgments, fines, penalties and claims (including amounts paid in settlement) imposed upon or asserted against him by reason of his being or having been an officer or director of the Corporation (whether or not he continues to be an officer or director at the time of such imposition or assertion), and against all expenses (including counsel fees) reasonably incurred by him in connection therewith, except in respect of matters as to which he shall have been finally adjudged to be liable by reason of having been guilty of gross negligence or willful misconduct in the performance of his duty as such director or officer. In the event of any other judgment against such officer or director or in the event of a settlement, the indemnification shall be made only if the Corporation shall be advised (i) by the Board of Directors, in case none of the persons involved shall then be a director of the Corporation, or (ii) by independent counsel appointed by the Board of Directors, in case any of the persons involved shall then be a director of the Corporation, that in its or his opinion, as the case may be, such director or officer was not guilty of gross negligence or willful misconduct in the performance of his duty, and in the event of a settlement, that such settlement was, or, if still to be made, would be, in the best interests of the Corporation. If the determination is to be made by the Board of Directors, it may rely, as to all questions of law, upon the advice of independent counsel. The foregoing right of indemnification shall not be exclusive of other rights to which any director or officer may be entitled as a matter of law or otherwise.

(b) The Board of Directors is hereby empowered, by majority vote of a quorum of interested directors, to indemnify or contract in advance to indemnify any person not specified in subsection (a) of this Article against liabilities, fines, penalties and claims imposed upon or asserted against him (including amounts paid in settlement) by reason of having been an employee, agent or consultant of the Corporation, whether or not then continuing so to be, against all expenses (including counsel fees) reasonably incurred by him in connection therewith, to the same extent as if such person were specified as one to whom indemnification is granted in subsection (a) of this Article.

(c) Every reference in this Article to director, officer, employee, agent or consultant of the Corporation shall include (i) every director, officer, employee, agent or consultant of the Corporation, (ii) every former director, officer, employee, agent or consultant of the Corporation, every person who may have served at the request of the Corporation as a director, officer, employee, agent, consultant or trustee of another corporation, partnership, joint venture, or other entity and (iv) in all of such cases, his executors and administrators.

(d) Every reference in this Article to the Corporation shall include Norfolk and Western Railway Company and Southern Railway Company, if the shares of Common Stock of both of those corporations shall become owned by the Corporation.

EXHIBIT A1
to
Agreement of
Merger and Reorganization

AMENDMENT TO ARTICLES III AND V OF ARTICLES OF INCORPORATION
OF
NWS ENTERPRISES, INC.

ARTICLE III

The Corporation shall have authority to issue one hundred fifty million (150,000,000) shares of Common Stock, par value \$1 per share, and twenty-five million (25,000,000) shares of Serial Preferred Stock, without par value.

A. Serial Preferred Stock

1. **Issuance in Series.** The Board of Directors is hereby empowered to cause the Serial Preferred Stock of the Corporation to be issued in series with such of the variations permitted by clauses (a)-(h), both inclusive, of this Section 1 as shall have been fixed and determined by the Board of Directors with respect to any series prior to the issue of any shares of such series.

The shares of the Serial Preferred Stock of different series may vary as to:

- (a) the number of shares constituting such series and the designation of such series, which shall be such as to distinguish the shares thereof from the shares of all other series and classes;
- (b) the rate of dividend, the time of payment and, if cumulative, the dates from which dividends shall be cumulative, and the extent of participation rights, if any;
- (c) any right to vote with holders of shares of any other series or class and any right to vote as a class, either generally or as a condition to specified corporate action;
- (d) the price at and the terms and conditions on which shares may be redeemed;
- (e) the amount payable upon shares in event of involuntary liquidation;
- (f) the amount payable upon shares in event of voluntary liquidation;
- (g) any sinking fund provisions for the redemption or purchase of shares; and
- (h) the terms and conditions on which shares may be converted, if the shares of any series are issued with the privilege of conversion.

The shares of all series of Serial Preferred Stock shall be identical except as, within the limitations set forth above in this Section 1, shall have been fixed and determined by the Board of Directors prior to the issuance thereof.

2. **Dividends.** The holders of the Serial Preferred Stock of each series shall be entitled to receive, if and when declared payable by the Board of Directors, dividends in lawful money of the United States of America, at the dividend rate for such series, and not exceeding such rate except to the extent of any participation right. Such dividends shall be payable on such dates as shall be fixed for such series. Dividends, if cumulative and in arrears, shall not bear interest.

No dividends shall be declared or paid upon or set apart for the Common Stock or for stock of any other class hereafter created ranking junior to the Serial Preferred Stock in respect of dividends or assets (hereinafter called Junior Stock), and no shares of Serial Preferred Stock, Common Stock or Junior Stock shall be purchased, redeemed or otherwise reacquired for consideration, nor shall any funds be set aside for or paid to any sinking fund therefor, unless and until (i) full dividends on the outstanding Serial Preferred Stock at the dividend rate or rates therefor, together with the full additional amount required by any participation right, shall have been paid or declared and set apart for payment with respect to all past dividend periods, to the extent that the holders of the Serial Preferred Stock are entitled to dividends with respect to a past dividend period, and the current dividend period, and (ii) all mandatory sinking fund payments that shall have become due in respect of any series of the Serial Preferred Stock shall have been made. Unless full dividends with respect to all past dividend periods on the outstanding Serial Preferred Stock at the dividend rate or rates therefor, to the extent that holders of the Serial Preferred Stock are entitled to dividends with respect to any particular past dividend period, together with the full additional amount required by any participation right, shall have been paid or declared and set apart for payment and all mandatory sinking fund payments that shall have become due in respect of any series of the Serial Preferred Stock shall have been made, no distributions shall be made to the holders of the Serial Preferred Stock of any series unless distributions are made to the holders of the Serial Preferred Stock of all series then outstanding in proportion to the aggregate amounts of the deficiencies in payments due to the respective series, and all payments shall be applied, first, to dividends accrued and in arrears, next, to any amount required by any participation right, and, finally, to mandatory sinking fund payments. The terms "current dividend period" and "past dividend period" mean, if two or more series of Serial Preferred Stock having different dividend periods are at the time outstanding, the current dividend period or any past dividend period, as the case may be, with respect to each such series.

3. Preference on Liquidation. In the event of any liquidation, dissolution or winding up of the Corporation, the holders of the Serial Preferred Stock of each series shall be entitled to receive, for each share thereof, the fixed liquidation price for such series, plus, in case such liquidation, dissolution or winding up shall have been voluntary, the fixed liquidation premium for such series, if any, together in all cases with a sum equal to all dividends accrued or in arrears thereon and the full additional amount required by any participation right, before any distribution of the assets shall be made to holders of the Common Stock or Junior Stock; but the holders of the Serial Preferred Stock shall be entitled to no further participation in such distribution. If, upon any such liquidation, dissolution or winding up, the assets distributable among the holders of the Serial Preferred Stock shall be insufficient to permit the payment of the preferential amounts aforesaid, then such assets shall be distributed among the holders of the Serial Preferred Stock then outstanding ratably in proportion to the full preferential amount which they are respectively entitled. For the purposes of this Section 3, the expression "dividends accrued or in arrears" means, in respect of each share of the Serial Preferred Stock of any series at a particular time, an amount equal to the product of the rate of dividend per annum applicable to the shares of such series multiplied by the number of years and any fractional part of a year that shall have elapsed from the date when dividends on such shares became cumulative to the particular time in question less the total amount of dividends actually paid on the shares of such series or declared and set apart for payment thereon; **provided, however,** that, if the dividends on such shares shall not be fully cumulative, such expression shall mean the dividends, if any, cumulative in respect of such shares for the period stated in the articles of serial designation creating such shares less all dividends paid in or with respect to such period.

B. Common Stock

1. Subject to the provisions of law and the rights of holders of shares at the time outstanding of all classes of stock having prior rights as to dividends, the holders of Common Stock

the time outstanding shall be entitled to receive such dividends at such times and in such amounts as the Board of Directors may deem advisable.

2. In the event of any liquidation, dissolution or winding up (whether voluntary or involuntary) of the Corporation, after the payment or provision for payment in full of all debts and other liabilities of the Corporation and all preferential amounts to which the holders of shares at the time outstanding of all classes of stock having prior rights thereto shall be entitled, the remaining net assets of the Corporation shall be distributed ratably among the holders of the shares at the time outstanding of Common Stock.

3. The holders of Common Stock shall be entitled to one vote per share on all matters.

ARTICLE V

The number of directors, unless otherwise fixed by the By-Laws, shall be sixteen. The directors shall be divided into three classes, the first class to be composed of six directors and the second and third classes each to be composed of five directors. The term of office of directors of the first class shall expire at the first annual meeting of stockholders after the effective date of this amendment, that of the second class shall expire at the second annual meeting after such date and that of the third class shall expire at the third annual meeting after such date. At each annual meeting of stockholders after the effective date of this amendment, the number of directors to be elected shall be equal to the number of directors whose terms of office then expire, except that, if the total number of directors shall have been increased or decreased, the number of directors then to be elected shall be as nearly as possible one-third of the total number of directors, and each director shall hold office until the third succeeding annual meeting after his election; provided, however, that at no election shall a greater number of directors be elected than the number of vacancies then existing, and provided further that, upon any increase in the total number of directors, the additional vacancies shall be so assigned by the Board of Directors to classes that the number of directors of each class shall be as nearly equal as possible and the vacancies shall be filled for terms corresponding to the classes to which the vacancies are so assigned. Each director shall hold office until his successor shall have been elected, and the terms of office of directors elected by the Board of Directors to succeed former directors shall expire at the times when the terms of their predecessors would have expired.

EXHIBIT B
to
Agreement of
Merger and Reorganization

PLAN OF MERGER
OF
NORFOLK AND WESTERN RAILROAD COMPANY OF VIRGINIA
INTO
NORFOLK AND WESTERN RAILWAY COMPANY

1. **Parties.** Norfolk and Western Railroad Company of Virginia (NWRC) shall be merged into Norfolk and Western Railway Company (NW), both Virginia corporations, on the day when a certificate of merger shall be issued by the State Corporation Commission of Virginia (the Merger Date).

2. **Conversion of Shares.** On the Merger Date:

(a) Each share of Common Stock of NW then issued, whether outstanding or held in the treasury of NW, shall be converted into one share of Common Stock, \$1 par value, of NWS Enterprises, Inc., a Virginia corporation (NWS). No fractional shares shall be issued, but NWS shall pay in cash to any stockholder otherwise entitled to receive a fractional share the value of such fraction based on the average of the high and low sales prices for a share of Common Stock as shown by the New York Stock Exchange Consolidated Tape for the first business day after the Merger Date or, if there be no sales on that date, for the first business day thereafter on which a sale or sales are recorded. The foregoing basis shall be appropriately adjusted (to the nearest .001 of a share) in the event of any stock split-up of NW Common Stock prior to the Merger Date.

(b) Rights to acquire shares of NW Common Stock upon conversion or exchange of other securities (NW 4% 15-year Subordinated Debentures maturing serially from October 1, 1981, to June 1, 1989; Dereco, Inc. Preferred Stock Class A, Series 1, and Class B, Series 1; Erie Railroad Company General Mortgage 4½% Income Bonds, Series A, due January 1, 2015 (Erie Bonds), or any successor security to the Erie Bonds issued to the holders of such Erie Bonds pursuant to the Plan of Reorganization of Erie Lackawanna Railway Company) shall, without further action, be converted into rights to acquire the same number of shares of Common Stock of NWS upon conversion or exchange of such other securities from time to time on and after the Merger Date, and subject to the terms and conditions of such rights, and subject also to adjustment (to the nearest .001 of a share) in the event of any stock split-up of NW Common Stock prior to the Merger Date.

(c) The 1,000 outstanding shares of Common Stock of NWRC shall be converted into the aggregate number of shares of Common Stock, \$8.33⅓ par value, of NW outstanding on the Merger Date.

(d) NW shall surrender for cancellation all shares of Common Stock, \$1 par value, of NWS then held by it.

(e) No holder of certificates theretofore representing shares of Common Stock of NW shall, after the Merger Date, be entitled to receive dividends or to vote or to exercise any other rights as a stockholder until the certificate(s) representing such shares are sur-

rendered for certificates for shares of Common Stock of NWS. But upon such surrender dividends not paid because of this provision shall be paid without interest.

3. Restatement of Articles of Incorporation. On the Merger Date, the Articles of Incorporation of NW shall be amended and restated to be in the form of Exhibit 1 annexed here

4. Effect of Merger. On the Merger Date, the merger shall have the effect stated §13.1-74 of the Code of Virginia.

5. Abandonment. This Plan of Merger shall be abandoned by NW and NWRC at any time prior to the Merger Date (notwithstanding any stockholder approval), if the Agreement of Merger and Reorganization, dated as of July 31, 1980, among NWRC, NW, NWS, Southern Railway Company of Virginia and Southern Railway Company is duly terminated.

EXHIBIT 1
to
NWRC-NW Plan of Merger

RESTATED
ARTICLES OF INCORPORATION
OF
NORFOLK AND WESTERN RAILWAY COMPANY

ARTICLE I

The name of the Corporation is Norfolk and Western Railway Company.

ARTICLE II

The purposes for which the Corporation is organized are to conduct the business of a railroad as a public service company anywhere in the United States of America and elsewhere; to engage generally in the business of transportation as a carrier of passengers, mail, express and all kinds and classifications of freight, petroleum, natural gas, and all other things of every kind and nature by means of railroad, motor vehicle, ship, aircraft, pipe lines, conveyors, and other means of transportation or facilities of any and all kinds with any and all types of motive power, on, under or above land, water or air, anywhere in the United States and elsewhere. The Corporation shall have all the powers conferred by the laws of Virginia.

ARTICLE III

The Corporation shall have authority to issue 60,000,000 shares of Common Stock, par value \$8.33 $\frac{1}{3}$ per share, each of which shall be entitled to one vote on all matters submitted to a vote at a meeting of stockholders.

ARTICLE IV

No holder of capital stock of the Corporation of any class shall have any preemptive right to subscribe to or purchase (i) any shares of capital stock of the Corporation, (ii) any securities convertible into such shares or (iii) any options, warrants or rights to purchase such shares or securities convertible into any such shares.

ARTICLE V

The number of directors, unless otherwise fixed by the By-Laws, shall be ten, divided into three classes, one of which shall be composed of four directors and two of which shall be composed of three directors. At each annual meeting of stockholders, the number of directors to be elected shall be equal to the number of directors whose terms of office then expire, except that, if the total number of directors shall have been increased or decreased, the number of directors then to be elected shall be as nearly as possible one-third of the total number of directors, and

each director shall hold office until the third succeeding annual meeting after his election, provided, however, that at no election shall a greater number of directors be elected than the number of vacancies then existing, and provided further that, upon any increase in the number of directors, the additional vacancies shall be so assigned by the Board of Directors to the classes that the number of directors of each class shall be as nearly equal as possible and the vacancies shall be filled for terms corresponding to the classes to which the vacancies are assigned. Each director shall hold office until his successor shall have been elected, and the terms of office of directors elected by the Board of Directors to succeed former directors shall expire at the times when the terms of their predecessors would have expired.

ARTICLE VI

(a) The Corporation shall indemnify each director and officer of the Corporation against any and all liabilities, judgments, fines, penalties and claims (including amounts paid in settlement) imposed upon or asserted against him by reason of his being or having been an officer or director of the Corporation (whether or not he continues to be an officer or director at the time of such imposition or assertion), and against all expenses (including counsel fees) reasonably incurred by him in connection therewith, except in respect of matters as to which he shall have been finally adjudged to be liable by reason of having been guilty of gross negligence or willful misconduct in the performance of his duty as such director or officer. In the event of any judgment against such officer or director or in the event of a settlement, the indemnification shall be made only if the Corporation shall be advised (i) by the Board of Directors, in case any of the persons involved shall then be a director of the Corporation, or (ii) by independent counsel appointed by the Board of Directors, in case any of the persons involved shall then be an officer or director of the Corporation, that in its or his opinion, as the case may be, such director or officer was not guilty of gross negligence or willful misconduct in the performance of his duty, and, in the event of a settlement, that such settlement was, or, if still to be made, would be, in the interests of the Corporation. If the determination is to be made by the Board of Directors, it shall rely, as to all questions of law, upon the advice of independent counsel. The foregoing right of indemnification shall not be exclusive of other rights to which any director or officer may be entitled as a matter of law or otherwise.

(b) The Board of Directors is hereby empowered, by majority vote of a quorum of the interested directors, to indemnify or contract in advance to indemnify any person not specified in subsection (a) of this Article against liabilities, fines, penalties and claims imposed upon or asserted against him (including amounts paid in settlement) by reason of having been an officer, employee, agent or consultant of the Corporation, whether or not then continuing so to be, and against all expenses (including counsel fees) reasonably incurred by him in connection therewith, to the same extent as if such person were specified as one to whom indemnification is granted in subsection (a) of this Article.

(c) Every reference in this Article to director, officer, employee, agent or consultant of the Corporation shall include (i) every director, officer, employee, agent or consultant of the Corporation, (ii) every former director, officer, employee, agent or consultant of the Corporation, (iii) every person who may have served at the request of the Corporation as a director, officer, employee, agent, consultant or trustee of another corporation, partnership, joint venture, or other entity and (iv) in all of such cases, his executors and administrators.

each director shall hold office until the third succeeding annual meeting after his election; provided, however, that at no election shall a greater number of directors be elected than the number of vacancies then existing, and provided further that, upon any increase in the total number of directors, the additional vacancies shall be so assigned by the Board of Directors to classes that the number of directors of each class shall be as nearly equal as possible and the vacancies shall be filled for terms corresponding to the classes to which the vacancies are so assigned. Each director shall hold office until his successor shall have been elected, and the terms of office of directors elected by the Board of Directors to succeed former directors shall expire at the times when the terms of their predecessors would have expired.

ARTICLE VI

(a) The Corporation shall indemnify each director and officer of the Corporation against any and all liabilities, judgments, fines, penalties and claims (including amounts paid in settlement) imposed upon or asserted against him by reason of his being or having been an officer or director of the Corporation (whether or not he continues to be an officer or director at the time of such imposition or assertion), and against all expenses (including counsel fees) reasonably incurred by him in connection therewith, except in respect of matters as to which he shall have been finally adjudged to be liable by reason of having been guilty of gross negligence or willful misconduct in the performance of his duty as such director or officer. In the event of any other judgment against such officer or director or in the event of a settlement, the indemnification shall be made only if the Corporation shall be advised (i) by the Board of Directors, in case none of the persons involved shall then be a director of the Corporation, or (ii) by independent counsel appointed by the Board of Directors, in case any of the persons involved shall then be a director of the Corporation, that in its or his opinion, as the case may be, such director or officer was not guilty of gross negligence or willful misconduct in the performance of his duty, and, in the event of a settlement, that such settlement was, or, if still to be made, would be, in the best interests of the Corporation. If the determination is to be made by the Board of Directors, it may rely, as to all questions of law, upon the advice of independent counsel. The foregoing right of indemnification shall not be exclusive of other rights to which any director or officer may be entitled as a matter of law or otherwise.

(b) The Board of Directors is hereby empowered, by majority vote of a quorum of disinterested directors, to indemnify or contract in advance to indemnify any person not specified in subsection (a) of this Article against liabilities, fines, penalties and claims imposed upon or asserted against him (including amounts paid in settlement) by reason of having been an employee, agent or consultant of the Corporation, whether or not then continuing so to be, and against all expenses (including counsel fees) reasonably incurred by him in connection therewith, to the same extent as if such person were specified as one to whom indemnification is granted in subsection (a) of this Article.

(c) Every reference in this Article to director, officer, employee, agent or consultant of the Corporation shall include (i) every director, officer, employee, agent or consultant of the Corporation, (ii) every former director, officer, employee, agent or consultant of the Corporation, (iii) every person who may have served at the request of the Corporation as a director, officer, employee, agent, consultant or trustee of another corporation, partnership, joint venture, trust or other entity and (iv) in all of such cases, his executors and administrators.

EXHIBIT C
to
Agreement of
Merger and Reorganization

PLAN OF MERGER
OF
SOUTHERN RAILROAD COMPANY OF VIRGINIA
INTO
SOUTHERN RAILWAY COMPANY

1. Parties. Southern Railroad Company of Virginia (SRC) shall be merged into Southern Railway Company (Southern), both Virginia corporations, on the day when a certificate of merger shall be issued by the State Corporation Commission of Virginia (the Merger Date).

2. Conversion of Shares. On the Merger Date:

(a) The outstanding shares of \$2.60 Cumulative Preferred Stock, Series A, of Southern shall remain outstanding without change or modification in any manner as shares of Southern.

(b) Each share of Common Stock of Southern then issued, whether outstanding or held in the treasury of Southern, shall be converted into 1.9 shares of Common Stock, \$1 par value, of NWS Enterprises, Inc., a Virginia corporation (NWS). No fractional shares shall be issued, but NWS shall pay in cash to any stockholder otherwise entitled to receive a fractional share the value of such fraction based on the average of the high and low sales prices for a share of Common Stock as shown by the New York Stock Exchange Consolidated Tape for the first business day after the Merger Date or, if there be no sales on that date, for the first business day thereafter on which a sale or sales are recorded. The foregoing basis shall be appropriately adjusted (to the nearest .001 of a share) in the event of any stock split-up of Southern Common Stock prior to the Merger Date.

(c) The 1,000 outstanding shares of Common Stock of SRC shall be converted into the aggregate number of shares of Common Stock, without par value, of Southern outstanding on the Merger Date.

(d) Southern shall surrender for cancellation all shares of Common Stock, \$1 par value, of NWS then held by it.

(e) No holder of certificates theretofore representing shares of Common Stock of Southern shall, after the Merger Date, be entitled to receive dividends or to vote or to exercise any other rights as a stockholder until the certificate(s) representing such shares are surrendered for certificates for shares of Common Stock of NWS. But upon such surrender all dividends not paid because of this provision shall be paid without interest.

3. Amendment of Articles of Incorporation. On the Merger Date:

(a) The second paragraph of that portion of Article III preceding Division A of the Articles of Incorporation of Southern shall hereby be amended to provide as follows:

The following Divisions of this Article III state the respective matters listed below:

Division	Subject Matter
A	The relative rights of the Serial Preferred Stock.
B	The particular rights of the \$2.60 Cumulative Preferred Stock, Series A.
C	The relative rights of the Serial Preference Stock.
D	The rights of the Common Stock.

(b) Division D of Article III of the Articles of Incorporation of Southern shall be stricken therefrom.

(c) Division E of such Article III shall be relettered as Division D.

(d) Division F of such Article III shall be stricken from such Articles of Incorporation.

(e) The second paragraph of Article IV of such Articles of Incorporation shall hereby be amended to read as follows:

The provisions of the preceding paragraph shall not, however, apply to any directors elected by the holders of the \$2.60 Cumulative Preferred Stock, Series A, pursuant to clause D of Section 6 of Division B of Article III nor to any directors elected by the holders of shares of the Serial Preferred Stock or of the Serial Preference Stock if, pursuant to certificates of Serial Designation hereafter issued, the holders of any series of such classes are given the right to elect one or more directors voting as a separate class or classes. All of such directors shall be elected for terms expiring at the adjournment of the next annual meeting of the stockholders or earlier if they shall no longer be entitled to serve as directors.

4. Effect of Merger. On the Merger Date, the merger shall have the effect stated in §13.1-74 of the Code of Virginia.

5. Abandonment. This Plan of Merger shall be abandoned by Southern and SRC at any time prior to the Merger Date (notwithstanding any stockholder approval), if the Agreement of Merger and Reorganization, dated as of July 31, 1980, among Norfolk and Western Railroad Company of Virginia, Norfolk and Western Railway Company, NWS, SRC and Southern is duly terminated.

Excerpt of Vol. 4, Exhibit A-17
Operating Plan

OPERATING PLANI. INTRODUCTION AND SUMMARY

The proposed operating plan, submitted as Exhibit A-17, is the result of extensive studies conducted to determine the costs, savings, and benefits that will be obtained through the consolidation of NW and SR. The consolidation is basically end-to-end, and the benefits from consolidation will largely result from increased efficiency in the routing, handling and interchange of traffic; substantial savings from the utilization of NW and SR resources for the benefit of the system as a whole; and considerable economies from the elimination of redundant facilities. The 1979 operations of NW and SR were utilized as the base year from which the proposed operations of the consolidated system have been projected with certain minor exceptions where significant permanent changes occurred during 1980.

It is anticipated that the operating changes needed to obtain the benefits of consolidation will be accomplished during the first three years. These changes are described in this plan. The operating changes assume that all of the internal rerouting of traffic will be effective in the first year following consolidation and that 70 percent, 90 percent

and 100 percent of the diversions from other railroads will be effective in the first, second and third years, respectively, following consolidation.*

The proposed operating plan details the efficiencies resulting from the consolidation as discussed in Section II below. Additionally, the proposed operating plan constitutes an appraisal of the net changes in operations that will occur throughout the consolidated system as a result of the projected traffic volume and flow changes.

The operating plan reflects traffic subject to diversion from other railroads and other modes that will result in traffic gains which must be accommodated by the consolidated system. In addition to routing and handling of diverted traffic, the proposed plan also takes account of rerouted local and joint traffic presently handled by NW, by SR, or jointly by NW and SR. In all cases, the most efficient route for the consolidated system has been selected. Over some routes, these traffic changes are substantial, as detailed by the plan's charts showing density changes (Appendix 1). However, NW has substantial available capacity to accommodate expected increases over its lines, SR has a long

* Diversions from motor carriers (see the verified statement of Lester K. Kloss in Volume 6B) are assumed to be effective 50 percent, 90 percent and 100 percent in the first, second, and third years, respectively.

and successful record of providing additional capacity as necessary, and specific projects to provide the capacity necessary to handle the increased volume are described in the operating plan. The methodology utilized to determine the reroutes is set out in Appendix 2 to this volume.

A principal benefit of the consolidated system will be the establishment of five new principal routes: the Altavista Gateway Route, the Lynchburg-Knoxville Cutoff Route, the Mid South Corridor Route, the Kansas City Gateway Route, and the Shenandoah Corridor Route. Over these new routes run-through and interroad trains* will provide substantially improved service in both the north-south and east-west directions. Single-system service from SR points in the southeast will be offered by shorter, more efficient routes to the north via the Hagerstown gateway, to the midwest via the Altavista, Bristol, Lynchburg, and Cincinnati gateways, and to the west via the St. Louis and Kansas City gateways. Similarly, NW points in the midwest such as Chicago, Detroit, and Cleveland will have single-system service from and to SR points in the south such as Atlanta, Birmingham, New Orleans, and Memphis. More than 1.45 billion gross ton miles will be saved annually by the third year as a result of these new routes, which together with new run-through and interroad train service will make possible savings of more than \$20 million per

* See pages 74 and 81 for definitions of run-through and interroad trains.

year, and reduce future car acquisitions by 164 car equivalents with a total 1979 replacement cost of \$5,733,000.

Substantial cost savings will also be generated through consolidation of certain shop and repair functions. NW will build cars and repair locomotives that SR presently purchases or has repaired by outside contractors, and SR will weld rail, provide journal brass bearings and spring frogs, and perform certain repair work that NW purchases elsewhere. Not only will these items or services be purchased at lower cost, but also the increased utilization of existing facilities will result in improved productivity and efficiency. It is expected that an annual savings of approximately \$12 million and a one-time saving of \$3 million through avoided investments can be achieved as a result of the consolidation with respect to these items.

The consolidated system will permit better utilization of existing cars and will reduce substantially the additional equipment needed to handle additional traffic. Based upon 1979 traffic, the consolidated system could have handled its business with 1928 cars less than it had; these cars have a 1979 replacement value of \$71 million. This saving results from two sources. First, because of the aggregation of car fleets, the consolidated system will be better able to meet seasonal demands. More efficient utilization of existing fleets will produce a savings of 1,362

car equivalents, based upon 1979 traffic needs, with a value of \$51 million, based upon 1979 replacement costs. Second, the efficiencies gained through consolidation will produce a reduction in empty cross-haul miles equal to a savings of 384 open top hoppers, 60 covered hoppers, and 122 equipped box cars with a value of \$19.9 million. The reduction in empty cross-haul mileage will produce an associated annual operating savings of \$1.7 million.

In addition to these savings, substantial savings will also result from the improved use of some NW maintenance-of-way equipment that presently remains idle during the winter months. By permitting SR to utilize this equipment from December through March, nearly \$3 million in otherwise required investments can be avoided.

The consolidation will require additional system investments that will produce service improvements and operating economies. Substantial funds will be invested to connect the communication systems of the two roads. This will permit enhanced car tracing over a wider area with substantial benefits to shippers of all sizes. Substantial capital investments will be made to upgrade certain lines; for example, \$18,502,000 will be invested to improve the Ft. Wayne to Muncie line to be used for traffic between Chicago and Detroit and the southeast. The construction of a new connection at Altavista at a cost of \$ 5,600,000 will permit,

for the first time, run-through train service with inter-road trains.

Extensive studies also have been conducted by NW and SR to increase operating efficiencies at common points where traffic is interchanged between the two systems. The consolidation of facilities at Cincinnati, Lynchburg, Norfolk, Winston-Salem and other points will eliminate or reduce terminal delays between NW and SR, facilitate interchange with foreign roads, and permit elimination of redundant facilities. At certain of the common points, notably Altavista, improved connections will permit new run-through and interroad train service. The detailed operating plan describes all of these changes.

The operations of NW and SR will be coordinated by NWS, a railroad holding company, which will own all of the common stock of NW and SR. NWS will insure that all rail operations and policies are coordinated in order to recognize the maximum operating savings and service efficiencies. A senior officer of NWS will resolve differences in operating policies of NW and SR. Day-to-day operations will continue to be directed by the operating staffs of NW and SR.

II. DETAILED OPERATING PLAN

A. Patterns of Service

(i) Principal Routes

The principal rail lines of NW and SR are described in response to section 1111.1(d)(5) in Volume 2 and are shown in the traffic density maps submitted as Exhibit A-14(i) in Volume 6. In both, the principal routes of NW and SR are indicated for the base year 1979. In general, existing principal routes will remain after consolidation and are as follows:

SR Principal Routes

Alexandria, Va. - Atlanta, Ga. - Birmingham, Ala. -
New Orleans, La.

Cincinnati, Ohio - Atlanta, Ga. - Macon, Ga. -
Jacksonville, Fla.

Birmingham, Ala. - Sheffield, Ala. - Memphis, Tenn.

Birmingham, Ala. - Chattanooga, Tenn. - Knoxville,
Tenn.

Harriman Jct., Tenn. - Knoxville, Tenn. - Asheville,
N.C. - Salisbury, N.C.

Danville, Ky. - Louisville, Ky. - E. St. Louis,
Ill.

Birmingham, Ala. - Columbus, Ga. - Albany, Ga. -
Valdosta, Ga.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36522

**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO CSX'S OPENING
STATEMENT**

EXHIBIT 3

DEPARTMENT OF HEALTH,
EDUCATION, AND WELFARE

Office of the Secretary

45 CFR Part 86

**Nondiscrimination on the Basis of Sex
in Education Programs and Activities
Receiving or Benefiting From Federal
Financial Assistance**

AGENCY: Office of the Secretary, HEW.

ACTION: Withdrawal of notice of
proposed rulemaking.

SUMMARY: The purpose of this notice is to withdraw the notice of proposed rulemaking, published at 43 FR 58076 on December 11, 1978, in which the Department proposed to revoke a subparagraph of its Title IX Regulation which prohibits recipients of Federal funds for education programs and activities from discriminating on the basis of sex in rules governing student appearance.

FOR FURTHER INFORMATION CONTACT: Colleen O'Connor, 202-245-6700.

SUPPLEMENTARY INFORMATION: The Department has determined that rulemaking action on subparagraph, 45 CFR 86.31(b)(5), is not appropriate at the present time, and the proposal published in the Federal Register (43 FR 58076) on December 11, 1978, entitled "Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance" is hereby withdrawn.

Dated: November 13, 1979.

Patricia Roberts Harris,
Secretary of Health, Education, and Welfare.
Albert T. Hamlin,
Acting Director, Office for Civil Rights.

[FR Doc. 79-35677 Filed 11-19-79; 9:45 am]

BILLING CODE 4110-12-M

INTERSTATE COMMERCE
COMMISSION

49 CFR Part 1111

[Ex Parte 282 (Sub-3)]

Railroad Consolidation Procedures

AGENCY: Interstate Commerce
Commission.ACTION: Notice of proposed rule making
and exemption.

SUMMARY: The ICC proposes to revise its regulations relating to rail consolidation procedures. These regulations set out the information to be

filed, and the procedures to be followed in control, merger, acquisition, lease, trackage rights, coordination projects and any other consolidation transaction involving more than one railroad initiated under two sections of the Railroad Revitalization and Regulatory Reform Act of 1976.

DATE: Comments must be received on or before December 20, 1979.

ADDRESS: Send comments to: Interstate Commerce Commission, 12th and Constitution Ave., NW, Washington, D.C. 20423. All written comments will be available in Room 1221 during normal business hours at same address.

FOR FURTHER INFORMATION CONTACT: Michael Erenberg (202) 275-7245.

SUPPLEMENTARY INFORMATION:
Background. We revised the ICC *Railroad and Water Consolidation Procedures*, 49 CFR Part 1111 (1976) pertaining to the content and procedures for applications involving railroad transactions under 49 U.S.C. 11343-11348 and 11350, in *Railroad Consolidation Procedures*, 348 I.C.C. 771 (1977), and 42 FR 14871. These regulations are found in the ICC *Railroad Acquisition, Control, Merger, Coordination Project, Trackage Rights and Lease Procedures*, 49 CFR Part 1111 (1978) (Old Consolidation Procedures).

That revision of our Consolidation Procedures was necessary because of amendments to former section 5 of Interstate Commerce Act (now 49 U.S.C. 11343-11348, and 11350) contained in section 402 and 403 for the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210 (4R Act). These amendments required the Commission to reach a decision in rail proceedings within strict time limits (See 49 U.S.C. 11345), and developed an expedited procedure for considering rail consolidations presented to the United States Secretary of Transportation (See 49 U.S.C. 11346 and 11350). The Old Consolidation Procedures required the information we believed necessary to comply with the statutory time limits in 49 U.S.C. 11345, and proceed under the expedited procedures in 49 U.S.C. 11346 and 11350. We required voluminous information in applications for all types of rail consolidations.

Subsequent to our adoption of the Old Consolidation Procedures, we have been asked to rule on numerous matters concerning waiver, clarification, and other procedural matters involving these procedures. Numerous applications have been filed under the Old Consolidation Procedures. We have reviewed and considered these applications. In light of our experience, we are now in a position

to revise the Old Consolidation Procedures.

Purpose. Our revision of the Old Consolidation Procedures will reduce informational requirements for different types of applications, clarify the information to be filed in all applications, and expand on the procedures for handling, prosecuting, and opposing an application. We have also determined to institute a proceeding to exempt certain transactions from our regulation because of their minimum impact on the national transportation system.

This revision of the Old Consolidation Procedures changes the format to a logical sequence for planning, preparing, and considering an application. The change in format makes the Consolidation Procedures easier to follow, and spells out the specific information that must be included in each type of application.

We request comments on all portions of the Proposed Consolidation Procedures. It would be most valuable, however, to receive comments on the changes.

Preamble. We have added a preamble to the Proposed Consolidation Procedures to give a brief overview. Comments should discuss (1) the concept of a preamble and (2) the contents of the preamble.

Types of Transactions. In the Proposed Consolidation Procedures, we have developed three types of transactions; *major*, *minor*, and *exempt*. Each has different information and filing requirements. The *major* transaction requires more information than the *minor* transaction which requires more information than the *exempt* transaction.

Section 1111.1(a) defines a *major* transaction as including (1) control, merger, or consolidation transactions or (2) a major market extension resulting from acquisition, lease, partial purchase, purchase, or trackage rights involving one or more Class I or Class II railroads acting together with one or more other Class I or Class II railroads. It is our view that *major* transactions require the most information in order to determine whether the proposal is consistent with the public interest within the strict time limits of 49 U.S.C. 11345.

Minor transactions have little competitive or operational impact. They are defined in § 1111.1(b) as transactions involving more than one railroad which are not *major* or *exempt*. Much less information is required to determine, within the time limits, whether a *minor* transaction is

consistent with the public interest compared to a *major* transaction.

Because of *de minimis* competitive and operational impact we propose to exempt seven classes of transactions from our jurisdiction. Comments on the proposed exemptions contained in § 1111.1(c) should evaluate each transaction in light of the standards in 49 U.S.C. 10505.

The proposed exemptions are (1) acquisition of a line railroad where the public convenience and necessity has been found to permit abandonment; (2) acquisition of a non-connecting carrier where (a) the railroads would not connect with each other or any railroad in their corporate family, and (b) the acquisition is not part of a series of anticipated transactions that would connect the railroads with each other or any railroad in their corporate family; (3) transactions within a corporate family that do not result in an operational change or affect the competitive balance with carriers outside the corporate family; (4) renewal of leases or trackage rights contracts and other matters, where the Commission has previously authorized the transaction, and only an extension in time is involved; (5) joint projects involving the relocation of a line or railroad which does not disrupt service to shippers; and (6) reincorporation in a different State. We solicit comments on whether these transactions are the type which should be exempted from our regulation under 49 U.S.C. subtitle IV.

Additionally, we are seeking comments on whether the exemption proposal in § 1111.1(c)(vii) should be adopted. We propose to exempt transactions from the filing of inconsistent applications, petitions for inclusion, or any other proposed relief requiring an application before us if a railroad does not indicate its intention to seek such relief in its written comments. This exemption would permit us to expedite processing applications since we will not have to wait the statutorily-mandated 90 days to see if an inconsistent application, petition for inclusion, etc., is filed. This exemption would apply 49 U.S.C. 11344(b)(2) and 11345(c).

Identifying information. Section 1111.2 of the Proposed Consolidation Procedures requires information identifying the applicant and the transaction.

The information required for all applications is in paragraph (a). Section 1111.2(a)(1) requires a brief summary of the transaction including a time schedule for consummation, the purposes of the transaction, the financial arrangements, public interest

justifications, and other supporting information. An opinion of counsel as to the legality of the transaction is also required. In paragraph (a)(2) information is required identifying the applicants, including name and address, States in which applicants operate, and a map. Paragraph (a)(3) requires an explanation of the transaction including the agreement; the required court order; the property involved; the principal routes involved; the governmental financial assistance involved if any; the labor impact; the environmental data; and the energy data.

Section 1111.2(b) requires further information for *major* transactions. The identity of applicants and their type of business is requested in greater detail. Information is also required about the officers, directors, and stockholders or other owners of the company. A corporate chart is required in § 1111.2(b)(1)(vi) to provide a graphic display of the applicant's relation to other businesses and/or carriers.

A more detailed explanation of the transaction is required by § 1111.2(b)(2). This consists of the documents authorizing the transaction.

Traffic data. Section 1111.3 of the Proposed Consolidation Procedures requires specific traffic data for *major* transactions. *Minor* and *Exempt* transactions do not require this data. The data required is essentially unchanged from that required by the Old Consolidation Procedures.

Paragraph (a) requires Density charts. Carload interchange data and State-to-State interchange data are required by (b). The State-to-State data is only required where 100 or more cars per year per connecting carrier are involved. Carload origin and destination data is required in (c), while (d) requires freight car fleet data. Revenue freight traffic data, paragraph (e), and commodity revenue data, paragraph (f), are also required. Paragraph (g) requires data on Commodity tonnage.

The Traffic study in paragraph (h) has been altered to clarify (1) the information required to make the study, (2) the format for showing the results, and (3) the format for presenting certain traffic information used to determine diversion (a one page study movement sheet-Appendix C). A discretionary Traffic study considering the diversion of traffic not currently moving by rail has been added in § 1111.3(h)(11).

Operational data. The operational information is required by section 1111.4 of the Proposed Consolidation Procedures. The operating plan for a *major* transaction is required by paragraph (A). The information to be presented in the operating plan is

unchanged from the Old Consolidation Procedures, except that it must be for a minimum of 3 years, or for as long as implementation of the plan requires.

The operating plan for *minor* transactions is in paragraph (b). No change has been made in the required information.

Financial information. This data is required by § 1111.5.

In § 1111.5(a) information is required for all transactions. This includes the valuation of property and securities issued, along with a description of encumbered property.

In § 1111.5(b) additional financial data is required for *major* transactions. This includes a balance sheet, *pro forma* balance sheet, income statement, *pro forma* income statement, and a sources and application of funds statement. The *pro forma* balance sheet, *pro forma* income statement, and sources and application of funds statement have been changed from the Old Consolidation Procedures to reflect the length of time, at least 3 years, necessary to implement the operating plan.

In addition to the information required in § 1111.5(a) for all transactions, *minor* transactions require a balance sheet and income statement pursuant to § 1111.5(c).

Procedures. The Proposed Consolidation Procedures have refined and clarified the procedures to be followed in filing, prosecuting, and opposing a proposed transaction. This information is contained in § 1111.6.

Paragraph (a) establishes general requirements for all transactions. These include promptly furnishing any document filed with the Commission, including applications, pleadings, etc., to interested persons on request, unless subject to a protective order. We have also indicated the Commission will prepare and serve a service list 55 days after the application has been accepted. For *major* transactions the original and 20 copies of all documents shall be filed, while the original and 10 copies shall be filed in *minor* transactions. In order to handle expeditiously the documents filed in these proceedings each party must choose a unique four-letter acronym for itself. Having chosen the acronym, the party shall then consecutively number each document filed, prefixed by its acronym.

Paragraph (b) requires a prospective *major* transaction applicant to notify the Commission between 3 to 6 months before the application is filed. Any prospective party, along with the Commission, will then be advised of the prospective transaction. Once the Commission has received the notice, a

notice will be published in the Federal Register briefly describing the transaction, indicating the traffic study year, indicating the approximate filing date of the application, and indicating if it is actually a *major* transaction.

The actual filing of the application is governed by paragraph (c). The filing fee for the original application is \$700. There is no filing fee for a directly related application, or for a responsive application (e.g., a petition for inclusion, an inconsistent application, or any other responsive application). The filing requirements under (c)(2) have only been changed from the Old Consolidation Procedures in (c)(2)(vii). There, an exception to filing a required exhibit has been made for carload interchange data and the traffic study SMS.

Paragraph (c)(3) requires all direct testimony by applicants to be submitted in the form of verified statements concurrently with an application proposing a *major* transaction. Any application responsive to an application proposing a *major* transaction must also contain all direct testimony in the form of verified statements supporting the responsive application.

Paragraph (c)(4) provides for the application or exhibits to be considered part of the evidentiary record, subject to motions to strike.

Paragraph (c)(5) requires the application to be served on certain States, the United States Department of Transportation, the United States Attorney General, the Federal Trade Commission, and certain other railroads. Additionally, a copy of applications filed under 11346, must also be served on the Secretary of Labor. Other carriers must initially be served a copy of the application in a *major* transaction.

Paragraph (c)(6) contains the requirements for an application's format. The information must be presented in the application in the same sequence as the Proposed Consolidation Procedures. Appendices should be used where possible. Colored covers for each volume, if more than one volume is filed, and pages numbered beginning with one in each volume must be used. An informal interpretation of necessary information or format for the application may be obtained, until further notice, from the Commission from the Deputy Director, Section of Finance, of the Office of Proceedings under (c)(6)(iii). The acceptance or rejection of the application is governed by (c)(7). Only a complete application will be accepted.

The procedures for responding to an application are set out in (d).

One response may be written comments. The Proposed Consolidation

Procedures set out when the comments must be filed, on whom they must be served, and what they must contain. Special information must be included by a railroad filing a written comment. This information is contained in (d)(1)(iii)(H) and consists of (1) preferential solicitation agreements, (2) run through train operations, and (3) initial protective conditions. Additionally, a person filing written comments is considered a party of record and need not file a petition to intervene to become a party.

Other special responses include (1) a final list of protective conditions, filed within 75 days of the application's acceptance (Paragraph (d)(3)), (2) all responsive applications filed within 90 days of the application's acceptance ((d)(4)) and (3) protestant traffic studies (only in *major* cases), filed within 90 days of the application's acceptance.

Paragraph (e) describes the information the Commission may consider in setting a proceeding for oral hearing.

Paragraph (f) discusses requirements for filing a petition for waiver or clarification. It must be filed at least 45 days prior to filing an application. No replies will be allowed, except in exceptional instances where the parties are parties to a currently pending related transaction. Waivers will apply to all other parties to a proceeding. The entire Commission will decide all requests for waiver. A petition for waiver must specify the portion of the Proposed Consolidation Procedures sought to be waived, along with the reason supporting waiver.

The notice of exemption is governed by paragraph (g). It must be filed with the Commission when the transaction is consummated and include certain information. The Commission will publish a notice in the Federal Register within 30 days, indicating that the exempt transaction has taken place. In the event the Commission discovers false or misleading information in the notice, it will summarily revoke the exemption for that carrier, and require the carrier to divest.

In the Old Consolidation Procedures the Commission developed special procedures for any application filed under 49 U.S.C. 11346. These special procedures have been adopted in paragraph (h) without any substantive change.

Section 1111.7 defines the terms applicant, applicant carriers, major market extension, railroad, transferee, and transferor.

The General Policy Statement contained in § 1111.10 has not been altered.

Appendix A of the Proposed Consolidation Procedures contains the format to be followed in compiling exhibit 18 describing the revenue carload interchange. Appendix A retains the same format used for exhibit A-13 in the Old Consolidation Procedures.

Appendix B contains the format for exhibit 19. This exhibit concerns itself with revenue carload interchange in state-to-state movements by gateway. This format is the same as used in exhibit A-14 of the Old Consolidation Procedures.

Appendix C contains the Study Movement Sheet (SMS) format for use in exhibit 25, the Traffic study. The SMS was developed to contain all data we believe necessary to be considered in making a judgement as to the divertibility of traffic. We also believe that format will reduce the paper required to prepare the Traffic study. One sheet is sufficient to present all necessary information.

Index I of the Proposed Consolidation Procedures numerically lists all exhibits. Listed with the exhibit numbers are the corresponding names and sections of the Proposed Consolidation Procedures. Additionally, the application type for each exhibit is also listed.

Index II of the Proposed Consolidation Procedures consists of a table of contents detailing the information contained in the Proposed Consolidation Procedures. The contents are in section sequence with a descriptive title. Additionally, any exhibit contained in a section is listed. The type of application corresponding to a section of the Proposed Consolidation Procedures is also listed.

We request comments on the general format of the Proposed Consolidation Procedures. Additionally, we request comments on the individual sections which have been altered.

Comments on the definitions of *major*, *minor*, and *exempt* transactions are solicited. In addition, we also request comments on the information required for each type of application.

The other major change in the Old Consolidation Procedures has been with respect to procedural matters. We solicit comments on all procedural aspects, particularly the new time requirements, the pre-filing notification requirements, and the waiver petition requirements.

The Commission invites all interested persons to participate in this proceeding. The original and 20 copies of written facts, views, and arguments concerning the proposal detailed in this notice shall be submitted. It should be noted that the Proposed Consolidation Procedures may be modified by the comments we receive.

This proceeding does not appear to be a major Federal action significantly affecting energy consumption or the quality of the human environment.

Issued under the authority of 5 U.S.C. 553 and 49 U.S.C. 11343-11348.

Decided: October 19, 1979.

By the Commission, Chairman O'Neal, Vice Chairman Stafford, Commissioners Gresham, Clapp, Christian, Trantum, Gaskins, and Alexis. Vice Chairman Stafford absent and not participating.

Agatha L. Mergenovich,
Secretary.

Accordingly, it is proposed to amend 49 CFR by revising Part 1111 to read as follows:

PART 1111—PROCEDURES FOR RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION, COORDINATION PROJECT, TRACKAGE RIGHTS, LEASE, ETC., PROCEEDINGS

Sec.

1111.0 Preamble.

1111.1 Types of transactions.

1111.2 Identifying information.

1111.3 Traffic data.

1111.4 Operational data.

1111.5 Financial information.

1111.6 Procedures.

1111.7 Definitions.

1111.8 Reserved.

1111.9 Reserved.

1111.10 General Policy Statement.

Authority: 5 U.S.C. 553 and 49 U.S.C. 11343-11348.

§ 1111.0 Preamble.

(a) These regulations set out the information to be filed, and the procedures to be followed in control, merger, acquisition, lease, trackage rights, coordination project and any other consolidation transaction involving more than one railroad initiated under 49 U.S.C. 11344 or 11346. There are three types of transactions, *major*, *minor*, and *exempt*, which are identified in § 1111.1. There are different informational requirements for each type of transaction. Before an application is filed, the designation or type of transaction may be clarified or certain of the information required may be waived upon petition to the Commission. This is detailed in § 1111.6. The required contents of the application are set out in §§ 1111.2. through 1111.5. Information concerning the identity of applicant carriers and the transaction is in § 1111.2, competitive and traffic information is in § 1111.3, operational information is in § 1111.4, and financial data is in § 1111.5.

(b) Procedures, including time limits, filing requirements, participation requirements, and other matters are contained in § 1111.6.

(c) Definitions of the terms applicant, applicant carriers, major market extension, railroad, transferee, and transferor are contained in § 1111.7.

(d) Index number 1 lists all exhibits by number, name, and section, and references the type of application for which the exhibit is required. Index 2 is a table of contents.

(e) All applications must comply with the Commission's general procedural rules, unless otherwise specified. These rules are found in the I.C.C. *General Rules of Practice*, 49 CFR Part 1100.

(f) The information required for a *major* application is contained in §§ 1111.2, 1111.3, 1111.4(a), and 1111.5(a-b). The information required for a *minor* application is contained in §§ 1111.2(a), 1111.4(b), and 1111.5(a and c).

(g) If certain information required is not applicable, provide an explanation.

§ 1111.1 Types of transactions.

Transactions proposed under 49 U.S.C. 11344 and 11346 involving more than one common carrier by railroad are of three types: *major*, *minor*, and *exempt*.

(a) A *major* transaction includes:

(1) Control, merger, or consolidation transactions, or
(2) A major market extension resulting from

- (i) Acquisition;
- (ii) Lease;
- (iii) Partial purchase;
- (iv) Purchase;
- (v) Trackage rights.

A major transaction must involve one or more Class I or Class II railroads, acting together with one or more other Class I or Class II railroads.

(b) A *minor* transaction is one which involves more than one railroad and which is not a *major* or *exempt* transaction.

(c) An *exempt* transaction involves more than one railroad where prior Commission review and approval (1) is not necessary to carry out the transportation policy of 49 U.S.C. 10101, (2) would be an unreasonable burden on a person, class of persons, or interstate and foreign commerce, and (3) would serve little or no useful public purpose. See 49 U.S.C. 10505. The following transactions are exempt:

- (i) Acquisition of a line of railroad where the public convenience and necessity have been found to permit abandonment.
- (ii) Acquisition of a non-connecting carrier where (A) the railroads would not connect with each other or any railroads in their corporate family, (B) the acquisition is not part of a series of anticipated transactions that would connect the railroads with each other or

any railroad in their corporate family, and (C) the transaction does not involve a Class I carrier.

(iii) Transactions within a corporate family that do not result in operational changes or affect the competitive balance with carriers outside the corporate family.

(iv) Renewal of leases or trackage rights contracts and any other matters, where the Commission has previously authorized the transaction, and only an extension in time is involved.

(v) Joint projects involving the relocation of a line of railroad which does not disrupt service to shippers.

(vi) Reincorporation in a different State.

(vii) If no railroad files timely written comments indicating an intent to file an inconsistent application, petition for inclusion or any other relief requiring an application before the Commission, the transaction is exempt from the filing of those applications, and no relief under 49 U.S.C. 11344(b)(2) or 11345(c) may be sought.

§ 1111.2 Identifying information.

(a) All applications filed under 49 U.S.C. 11344 or 11346 shall show in the title, the names of the applicants and the nature of the proposed transaction. Beneath the title indicate the name, title, business address, and telephone number of the person(s) to whom correspondence with respect to the application should be addressed. The following information shall be included in all applications seriatim:

(1) *Summary*: A brief narrative description of the proposed transaction shall serve as an introduction to the application. It shall include appropriate references to supporting exhibits and statements in the application and shall generally discuss the following matters:

(i) A brief summary of the proposed transaction including the name of applicant, and applicant carriers.

(ii) The proposed time schedule for consummation of the proposed transaction.

(iii) The purposes sought to be accomplished by the proposed transaction, e.g., operating economies, elimination of excess facilities, extension of markets, improved financial viability.

(iv) The nature and amount of any new securities or other financial arrangements.

(v) A brief summary of the applicant's public interest justifications in support of the application indicating how the proposed transaction is consistent with the public interest, with particular regard to:

(A) The financial consideration involved in the proposed transaction, including an explanation of economies, if any, to be effected in operations, and increases, if any, in traffic, revenues, earnings available for fixed charges, and net earnings, expected to result from the consummation of the proposed transaction.

(B) The effect of the proposed transaction upon adequate rail and other transportation services to the public.

(C) The effect of the increase, if any, of total fixed charges resulting from the proposed transaction.

(D) The effect of any guaranty or assumption of payment of dividends or fixed charges contemplated in the proposed transaction.

(E) The effect of the proposed transaction upon applicant carriers' employees.

(F) The effect of the inclusion or the failure to include, other railroads in the territory involved in proposed transaction under 49 U.S.C. 11344.

(vi) Any other supporting or descriptive statements applicant deems material.

(vii) An opinion of counsel of applicant that the transaction described in the application meets the requirements of the law and will be legally authorized and valid, if approved by the Commission with specific reference to any specifically pertinent provisions of applicant's charter or articles of incorporation.¹

(2) *Identification of applicant carriers.*

(i) Indicate the full and correct name of each applicant carrier and business address (street and number, city, State, and zip code).

(ii) Indicate the State or States in which any part of the property of each applicant carrier is situated.

(iii) *Map (Exhibit 1).* Submit a general or key map indicating clearly, in separate colors, or otherwise, the line or lines of applicant carriers in their true relation to each other, short line connections, other rail lines in the territory, and the principal geographic points in the region traversed. If a geographically limited transaction is proposed, a map detailing the transaction should also be included. In addition to the maps accompanying each application, three unbound copies of the map shall be filed with the Commission.

(3) *Explanation of the transaction.*

(i) Described the nature of the transaction (e.g., merger, control, coordination project, trackage rights), the significant terms and conditions, and the consideration to be paid (monetary or otherwise).

(ii) *Agreement (Exhibit 2).* Submit a copy of any contract or other written instrument entered into, or proposed to be entered into, pertaining to the transaction covered by the application.²

(iii) If a consolidation or merger is proposed, indicate (A) the name of the company resulting from the consolidation or merger, (B) the State or territory under the laws of which the consolidated company is to be formed or the merged company is to file its certificate of amendment, (C) the capitalization proposed for the company resulting from the consolidation or merger, and (D) the amount and character of capital stock and other securities to be issued.

(iv) *Court order (Exhibit 3).* If a trustee, receiver, assignee, or personal representative of the real party in interest is an applicant, submit a certified copy of the order, if any, of the court having jurisdiction, authorizing the contemplated action.

(v) State whether the property involved in the proposed transaction includes all the property of the applicant carriers and, if not, describe what property is included in the proposed transaction.

(vi) Briefly describe the principal routes and terminals of the lines involved, the principal points of interchange on the routes, and the amount of main line mileage and branch line mileage involved.

(vii) State whether any governmental financial assistance is involved in the proposed transaction and, if so, the form, amount, source, and application of such financial assistance.

(viii) *Labor impact (Exhibit 4).* Furnish the following information with respect to impacts on railway labor:

(A) A copy of any agreement or agreements with employee organizations entered into as a result of the proposed transaction.

(B) For all personnel covered by pension plans supplemental to the Railroad Retirement Act, a list of the pension plans currently in effect, indicating whether or not they are funded, the extent of any unfunded liability, and the time required to bring the plans to a fully funded level.

(C) The number, location, craft or class and classification of all positions of the applicant carriers which under the proposed transaction are to be abolished, consolidated, created or transferred (including the point or points from and to which positions will be transferred).

(D) For each of the changes specified in item (c), the cost and savings to the railroad(s) in effectuating such changes, listed for each of the 3 years following consummation of the proposed transaction and the amount by craft or class and classification to which such costs and/or savings will be attributed.

(E) The date or dates on which each job abolishment, transfer, consolidation, or creation set forth under item (C) above is to be effectuated and a statement as to whether or not implementing agreements have been negotiated with appropriate labor organizations with respect to such proposed changes.

(F) The annual net change in employment for applicant carriers by craft or class and classification for the last 6 years preceding the filing of the application.

(ix) *Environment data (Exhibit 5).* Submit information and data with respect to environmental matters prepared in accordance with the ICC *Revised Guidelines for Implementation of the National Environmental Policy Act of 1969*, 49 CFR Part 1108.

(x) *Energy data (Exhibit 6).* Submit information and data with respect to energy consumption prepared in accordance with the ICC *Implementation of the Energy Policy and Conservation Act of 1975*, 49 CFR Part 1108.

(b) In addition the following information shall be provided only for all major transactions.

(1) *Identification of applicant.* (i) If applicant is a corporation:

(A) Date of incorporation³ and Government, State, or territory of incorporation.

(B) Name and business address of directors.

(C) Name, title and business address of officers.

(D) Name and business address of 10 principal stockholders as of last record date and their respective holdings.

(E) *Charter (Exhibit 7).* One copy each of the charter or articles of incorporation, and the bylaws and amendments thereof, of each applicant.

¹ In a control transaction, or in the case of an inconsistent application, petition for inclusion, or other relief requiring that an application be filed with the Commission, an opinion of counsel is not required for the party sought to be controlled, or for the party against whom relief is sought.

² Where an inconsistent application, petition for inclusion, or any other type of application is filed seeking affirmative relief, a final signed contract or agreement need not be filed. However, a draft contract or agreement spelling out its significant terms should be submitted.

³ If the applicant is incorporated or organized under the laws of, or authorized to operate in, more than one State, territory, or Federal district, give all pertinent facts as to such incorporations, organization, or authorization.

duly certified by the appropriate public officer.

(ii) If applicant is a partnership indicate:

(A) Date on which partnership was formed, and State and county in which it was formed.

(B) Name and business address of all present partners, including limited or silent partners and their respective interests.

(C) Partnership articles (Exhibit 8). A properly authenticated copy of the articles of partnership, if any.

(iii) If applicant is an association or other form of organization, other than a corporation indicate:

(A) Date of organization and place of organization.

(B) Full description of the nature and objectives of the organization.

(C) Name, title, and business address of officers and directors, or trustees.

(D) Name and business address of applicant's 10 principal stockholders or owners.

(E) Documents of association (Exhibit 9). A properly authenticated copy of articles of association, trust agreement, or other similar documents.

(iv) If applicant is a trustee, receiver, assignee, or a personal representative of the real party in interest, provide:

(A) The name and address of the court, if any, under the direction of which applicant is acting.

(B) The nature of the proceedings, if any, in which applicant was appointed.

(C) With respect to the real party in interest, indicate its full and correct name, business address (street and number, city, State, and zip code), type of entity, and its carrier status.

(D) Court appointment (Exhibit 10). A properly authenticated copy of the order of the court or instrument appointing each trustee, receiver, assignee, or personal representative which is a party to the transaction.

(v) Other authorizing document (Exhibit 11). If paragraphs (i), (ii), (iii), and (iv) are not applicable, indicate identity, structure, statutory or charter powers of applicant, and submit appropriate organizational or authorizing documents, or indicate why none is available or necessary.

(vi) *Corporate chart (Exhibit 12)*. Submit a corporate chart indicating all relationships between applicant carriers and all affiliates and subsidiaries and also companies controlling applicant carriers directly, indirectly or through another entity (each chart shall indicate the percentage ownership of every company on the chart by any other company on the chart). For each company include a statement indicating (A) any common officers or directors for

every entity on the chart (with reference to the commission decision by docket number and date authorizing the holding of such positions, or an explanation of why such authorization was not required) and (B) whether each company is a non-carrier or carrier (by railroad, motor, or water, including any Commission certificate or permit number, and the docket number of any proceeding pending before the Commission). Such information may be referenced through notes to the chart.

(vii) If applicant is not a carrier, indicate (A) the type of business in which it is engaged, (B) the length of time so engaged, and (C) the particulars of its present and prospective activities which have or may have a relation to transportation subject to 49 U.S.C. Subtitle IV.

(viii) Indicate whether there are any direct or indirect intercorporate or financial relationships at the time the application is filed, not disclosed in response to prior instructions, through holding companies, ownership of securities, or otherwise, between (A) applicant carriers and any carrier or person affiliated with any carrier or (B) a person affiliated with applicant carriers and any carrier or person affiliated with any other carrier. Indicate the nature and extent of such relationships, if they exist, and, if an applicant carrier owns securities of a carrier subject to, 49 U.S.C. Subtitle IV, provide the carrier's name a description of securities, par value of each class of securities held, and the applicant carriers' percentage of total ownership.

(ix) State the amount of each applicant carriers' outstanding capital stock, by classes, and in connection therewith the par value or stated value of each share, its voting rights, if any, the total number of stockholders of record, and the voting rights of all security holders.

(x) *Annual reports (Exhibit 13)*. Submit a properly authenticated copy of the annual report, if any, to stockholders or shareholders for each of the two calendar or fiscal years preceding the filing of the application.

(2) *Explanation of the transaction (i) Filing resolutions (Exhibit 14)*. Submit a copy of all resolutions of directors of each applicant,⁴ authenticated by a proper executive officer, authorizing (A) the proposed transaction and (B) where applicable, the filing of the application with the Commission for its approval

⁴In a control transaction, or in the case of an inconsistent application, petition for inclusion, or other relief requiring that an application be filed with the Commission, resolutions are not required for the party sought to be controlled, or for the party against whom relief is sought.

and authorization. If the charter or by-laws of the applicant require approval of the stockholders, submit a copy of the resolution of stockholders authorizing the proposed transaction and the filing of the application. All resolutions are to be accompanied by sufficient transcripts of the minutes of meetings of the directors or stockholders of the applicant to show the number of shares entitled to vote, the number of shares voted for and against the resolutions, and the numbers of shares/votes required to adopt the resolution.

(ii) *Executing resolutions (Exhibit 15)*. Submit a copy of all resolutions of stockholders or directors of the applicant,⁵ or duly authorized committee thereof, authenticated by a proper executive officer of the applicant, designating by name and for that purpose the executive officer by whom the application is signed and verified, and filed on behalf of the applicant. For purposes of exhibits 14 and 15, in the event the resolutions of stockholders have not been obtained at the time the application is filed then such resolutions shall be obtained as soon as feasible, but not later than the next regularly scheduled stockholders' meeting. A copy of such resolutions shall be filed with the commission within 30 days following such meeting.

(iii) Other evidence of authorization (Exhibit 16). If the applicant is an organization other than a corporation, submit documentary evidence showing authorization and designation of the individual or individuals signing, verifying, and filing on behalf of the applicant.⁶

§ 1111.3 Traffic data.

The information required in this section should only be filed as part of an application proposing a *major* transaction.

(a) *Density charts (Exhibit 17)*. Gross ton-mile traffic density charts shall be filed for applicant carriers containing a map graphically showing principal lines (those handling 1 million gross ton-miles or more per year) and respective densities, expressed in gross ton-miles per year, in each direction, in segments of such lines between major freight yards and terminals, including major

⁵In a control transaction, or where an inconsistent application, petition for inclusion, or other relief requiring that an application be filed with the commission, resolutions are not required for the party sought to be controlled, or for the party against whom relief is sought.

⁶In a control transaction, or where an inconsistent application, petition for inclusion, or other relief requiring that an application be filed with the Commission, resolutions are not required for the party sought to be controlled, or for the party against whom relief is sought.

intramodal and intermodal interchange points, using the corporate or political subdivision name of the points shown as well as the railroad station name. The mileage of each segment of line shall be provided, and should be shown on the chart. Data shown in the density chart shall be for the latest available full calendar year preceding the filing of the application.

(b) *Carload interchange data (Exhibition 18)*. Revenue carload interchange data between applicant carriers and connecting line-haul rail carriers or water carriers (deleting intermediate switching railroads, if any) shall be in a table setting forth the gateway involved, each connecting line-haul railroad or water carrier, and for each connecting railroad or water carrier the number of interchange carloads originating on applicant carriers' lines, the number of interchange carloads terminating on applicant carrier's line, the overhead traffic delivered or received by applicant carriers, and a separate total of overhead traffic and the total cars interchanged. Gateways to be listed shall be those handling 5,000 or more revenue carloads or 5 percent of total revenue carloads annually, whichever is smaller. Where two or more gateways are contiguous or nearly contiguous, they should be totaled (as examples, Dallas-Fort Worth, Minneapolis-St. Paul, Omaha-Council Bluffs, et cetera). If necessary, such grouped gateways may also be shown separately in supporting tables. Data shown in Exhibit 18 shall be for the latest available full calendar year preceding the filing of the application. It shall be organized as shown in the table in Appendix A. *State-to-State data (Exhibit 19)*. In a separate table for each of the gateways listed in Exhibit 18 described above, there shall be shown, for each connecting carrier, the origin State, and the destination State and the revenue carloads interchanged. Movements of less than 100 cars per year per connecting carrier need not be included in Exhibit 19. Exhibit 19 shall be organized in the format of the table in Appendix B.

(c) *Carload origin and destination (Exhibition 20)*. An exhibit containing revenue carload origin and destination data for the latest available full calendar year preceding the filing of the application, shall list the following:

(1) Points of origin of 5,000 or more revenue carloads or 5 percent or more of applicant carriers' total originated revenue carloads annually, whichever is smaller, broken down to show

originations of local and interline carloads for each point, and

(2) Points of destination of 5,000 or more revenue carloads, or 5 percent or more of applicant carriers' total terminated revenue carloads annually, whichever is smaller, broken down to show terminations of local and interline carloads for each point. This data shall include all of applicant carriers' carloads at each point originated or terminated, as the case may be, by a line-haul, terminal, or switching railroad or by a motor carrier performing pickup or delivery service, *except* where such information would identify a specific shipper(s) or a specific receiver(s).

(d) *Freight car fleet (Exhibit 21)*. A summary table shall show the freight car fleet cars owned and leased by applicant carriers indicating by year for the first, fifth, and tenth years preceding the filing of the application, the number of box, flat (including rack cars), gondola, open hopper, covered hopper, refrigerator, miscellaneous, and total number of cars owned and leased, and the aggregate capacity of these cars.

(e) *Revenue freight traffic (Exhibit 22)*. A table shall show the applicant carriers' revenue freight traffic, indicating by year, for the first, fifth and tenth years preceding the filing of the application, (1) the number of local, interline originated, interline terminated, overhead, and total carloads, (2) total revenue tons, (3) revenue ton-miles, and (4) total freight revenue.

(f) *Commodity revenue (Exhibit 23)*. A table shall show commodity group revenue (at the two-digit level of the STCC) for the 5 largest revenue producing commodity groups as a percentage of total revenue for the first, fifth and tenth year preceding the filing of the application, indicating for each year the 5 largest commodity groups, the revenues attributable to each group and the percentage of that group's revenue as it relates to total revenue.

(g) *Commodity tonnage (Exhibit 24)*. For the commodity groups shown in the table required in F above, a table shall show commodity group tonnage as a percentage of total tonnage, for the first, fifth, and tenth years preceding the filing of the application, indicating by year the various commodity groups, the tonnage attributable to each group and the percentage of that group's tonnage as it relates to total tonnage.

Note.—For each of items (d)–(g), above, separate tables should be prepared covering, where appropriate, similar data for class I railroad subsidiaries and for predecessor railroads, if any, in existence during the first, fifth or tenth years preceding the filing of the application. In addition, if applicant consummated a consolidation during this ten-

year period, similar data should also be shown for the first full calendar year of operation following consummation.

(h) *Traffic study (Exhibit 25)*. The traffic study shall be prepared to show the estimated gains (or losses) in traffic and revenue resulting from the proposed transaction for applicant carriers and affected railroads. The traffic study results for applicant carriers shall also serve as a basis for determining the changes in operations shown in Exhibit 27. Preparation of the traffic study shall be in conformity with the instructions that follow.

(1) The period covered by the traffic study shall be for the latest full calendar year⁷ for which data are available preceding the filing of the application. All other traffic studies filed by any party to the proceeding shall be based on the same calendar year, but need not use the same basis for the calendar year, as the traffic study accompanying the application and are subject to the rules for Exhibit 25.

(2) The railroad performing the traffic study must sample all of the traffic it handled in the study year with the following exceptions: (i) local traffic need not be sampled and (ii) in the case of applicant carriers, interline traffic handled only by applicant carriers in line-haul service need not be sampled unless the transaction involves only a portion of a railroad (e.g., a line purchase or trackage rights) or is desired for the purpose of developing the Proposed Operating Plan (Exhibit 27). The traffic study shall utilize probability sampling techniques and shall include a full explanation of the sample as described in "Guidelines for the Presentation of the Results of Sample Studies," February 1971, published by the Commission's Bureau of Economics, or any superseding publications. The sampling rate chosen should be large enough to produce a sufficiently small standard error to allow accurate estimates of revenue changes and small enough to be manageable in terms of the data evaluation requirements under (3), below. Once the sample has been obtained, movements in the sample considered to be irrelevant to the proposed transaction may be deleted. Printouts of information on the deleted movements sufficient to identify them must be maintained at the headquarters of the party making the study and be open to inspection by the Commission's staff and by other carriers which are parties to the proceedings and have a

⁷ The basis for the calendar year shall be described, whether it is based on settlement date, movement date, accounting date, or any other date.

legitimate interest in such movements. The railroad performing the traffic study shall prepare and make available the complete information specified under (3) below, for the deleted movements at the request of the Commission's staff and parties to the proceeding having a legitimate interest in them.

(3) At a minimum, the evaluation of sample movements shall be based on the data listed in Appendix C. These data and any additional information relied upon for the evaluations shall be reproduced totally on Study Movement Sheets (SMS). An SMS shall be prepared for each sample movement *whether or not a gain (or loss) has been determined*. Documents, including but not limited to waybills, from which data have been extracted and placed on an SMS or considered in making a determination of divertibility, are considered work papers. Work papers are not to be filed with the application but must be made available, on request, to the Commission's staff and to parties to the proceeding having a legitimate interest in them.

The minimum data required are shown in Appendix C in the suggested format for a Study Movement Sheet. This format should be followed as closely as practicable (particularly the use of only one sheet). It is recognized that, in some instances, the data required above for the SMS may not be readily available. In those instances, the party performing the study must use its best efforts to obtain the data, e.g., in the case of overhead traffic, the waybill data may be obtained from the terminating carrier. When the required data cannot be obtained, a separate statement should be prepared describing the missing data and reference should be made to the SMS where the data were omitted.

(4) The traffic study shall include a separate statement showing *all* written instructions, if any, for determining the amount of gains (or losses). *All* instances where those instructions were not followed, but were subordinated to other, unwritten instructions, shall be clearly shown, together with reference in each instance to the appropriate SMS. The written instructions and the reasons for the deviation shall be stated.

(5) If specific percentages (less than 100%) are applied to represent the amount of gains (or losses) on movements, the criteria used to arrive at such percentages shall be stated precisely.

(6) The traffic study shall include a statement showing the name and title of (i) the person or persons making the initial determination of gains or losses, if any; (ii) the person or persons making

the final determinations; and (iii) the method used to resolve any conflicting determinations between the initial and final determinations. The final evaluator(s) shall submit a verified statement that he (they) personally evaluated all movements.

(7) Traffic study results—applicant carriers: The estimates of gains or losses in traffic and revenue shall be broken down separately for each connecting carrier as follows:

(i) Interline originated traffic by off-junction with connecting carrier.

(ii) Interline terminated traffic by on-junction with connecting carrier.

(iii) Overhead traffic by on-or-off junction with connecting carrier.

To the extent known, the gain or loss estimates for each non-connecting carrier participating in the movement under (i), (ii), and (iii) above, should be listed. The participating carriers in this instance are those which do not connect directly with applicant carriers, but which have a portion of the haul prior to or subsequent to the portion performed by the "connecting carrier."

(8) Traffic study results—non-applicant carriers: The gains (or losses) in traffic and revenue shall be broken down separately, showing gains from or losses to applicant carriers only, at each gateway with applicant carriers at which the gain or loss occurs, and classified as interline originated, interline terminated, or overhead movements to the non-applicant carrier performing the study. Local traffic gains or losses should be shown as a separate total.

(9) Traffic study summary—all carriers: A statement shall be prepared showing the gross revenue gains (or losses), the estimated cost of handling the gained or lost traffic, and the net revenue gain or loss thus derived, including a detailed description of the methods used to compute the estimated cost of handling the traffic.

(10) Under 49 U.S.C. 11910(a)(1), the disclosure of certain traffic information is prohibited without the consent of the shipper or consignee when "that information may be used to the detriment of the shipper or consignee or may disclose improperly, to a competitor the business transactions of the shipper or consignee. . . ." (Emphasis added). The voluntary exchange of traffic data to prepare an application under 49 U.S.C. 11344 or 11346 is a proper disclosure which by itself would not constitute a violation of 49 U.S.C. 11910. Any misuse of that data, for purposes other than that for which it was obtained, would violate the statute.

(11) Non-rail traffic study (Exhibit 26). Traffic diversions from non-railroad

modes of transportation may be shown in a statement estimating gross revenue gains from other modes of transportation (on traffic in which applicant carriers do *not* presently participate) developed from any study (e.g., a market study) conducted by applicant carriers. Sufficient information about the study must be submitted with the application so that its validity can be evaluated. The filing of this study is within applicant's discretion.

§ 1111.4 Operational data.

(a) For major transactions: Operating plan (Exhibit 27). Submit a complete description of the proposed operating plan to be effectuated upon approval of the transaction. This shall provide data, projected at *least* 3 years, but not less than the time required to complete rehabilitation, upgrading or other major operational changes following consummation of the proposed transaction, describing the following aspects of the operating plan:

(1) The patterns of service on the properties, including the proposed principal routes, proposed consolidations of main-line operations, and anticipated traffic density and general categories of traffic on all main and secondary lines in the system.

(2) The basic operating and train blocking plan of the system, including the identification of system classification yards, and the anticipated workload of such yards, supported by a proposed blocking plan based on projected origin and destination traffic data.

(3) The location of existing shops and repair facilities, and identification of major installations to be discontinued, and a description of the system repair functions of each remaining facility.

(4) If commuter or other passenger services are operated over the lines of applicant carriers, detail any impacts anticipated on such services, including delays which may be occasioned because a line is scheduled to handle increased traffic due to route consolidations.

(5) The equipment requirements of the proposed system, including locomotives, rolling stock by type, and maintenance-of-way equipment; plans for acquisition and retirement of equipment; and projected improvements in equipment utilization, together with an explanation of the operating changes that will cause such improvements.

(6) The extent to which deferred maintenance or delayed capital improvements apply to any road or equipment properties involved, and the schedule for eliminating such deferrals. Also details of general system

rehabilitation, specific rehabilitation relating to the transaction, and upgrading plans including proposed yard and terminal modifications, together with an estimate of anticipated service improvements or operating economies associated with such projects.

(b) *For minor transactions: Operating plan-minor (Exhibit 28).* Submit information and data, projected at least 3 years following the consummation of the proposed transaction, describing the following aspects of the operating plan:

- (1) Any significant changes in patterns of service.
- (2) Traffic level and density on lines proposed for joint operations.
- (3) Impact on the use of yards or shop facilities and any necessary modifications to yards or terminals.
- (4) Impacts on commuter or other passenger service operated over a line which is to be downgraded, eliminated, or operated on a consolidated basis.
- (5) Operating economies, which include, but are not limited to estimated savings.
- (6) Any associated discontinuances or abandonments.

§ 1111.5 Financial Information.

(a) The following information shall be provided for all transactions:

(1) *Property values (Exhibit 29).* Value of each of the properties involved in the proposed transaction as found by the Commission or, if such value has not been found by the Commission, then the fair market value of the properties as independently appraised for the purposes of the proposed transaction, and, separately, the net cost of additions and betterments made after the date of valuation or appraisal.

(2) *Securities value (Exhibit 30).* The market value of any securities acquired or proposed to be acquired in consummating the proposed transaction or, if there is no ascertainable market value, the estimated value, giving the basis of the estimate.

(3) *Property encumbrance (Exhibit 31).* If any of the property covered by the application is encumbered and applicant has agreed to assume obligation or liability in respect thereof.⁸

(i) A description of the property encumbered.

(ii) Amount of encumbrance and full description thereof, including maturity, interest rate, and other terms and conditions.

(iii) Amount of encumbrance assumed or to be assumed by applicant.

(b) The following information shall be provided for all major transactions:

(1) *Balance sheets (Exhibit 32).* General balance sheets,⁹ as appropriate, of the following:

- (i) Transferee on a corporate entity basis.
- (ii) Transferee's parent company on a corporate entity basis.
- (iii) Each subsidiary of transferee on a corporate entity basis.
- (iv) Transferee and subsidiaries on a consolidated basis.
- (v) Transferor on a corporate entity basis.
- (vi) Each subsidiary of transferor on a corporate entity basis.
- (vii) Transferor and subsidiaries on a consolidated basis.

(2) *Pro forma balance sheets (Exhibit 33).* Where the transaction involves a proceeding other than a control,⁹ submit a *pro forma* balance sheet statement giving effect to the proposed transaction for the year as of the date of the traffic study in Exhibit 25. The *pro forma* data shall be presented in columnar form showing (i) in the first column the balance sheet of transferee on a corporate entity basis, (ii) in the second column a balance sheet of transferor, on a corporate entity basis, (iii) in the third column *pro forma* adjustments and eliminations, and (iv) in the fourth column, transferee's balance sheet "giving effect" to consummation of the proposed transaction. Each adjustment and elimination shall be properly footnoted and fully explained. A *pro forma* balance sheet shall be submitted for the number of years following consummation necessary to effect the operating plan.

(3) *Income statements (Exhibit 34).* Income statements,¹⁰ as appropriate, of the following:

- (i) Transferee on a corporate entity basis.

⁸ All statements requested in (a-g) shall show the latest available data, not exceeding 6 months prior to the filing of the application.

⁹ Where the purchase of a line or line segment is involved, a procedure utilizing three columns should be followed. The first column should show transferee's actual balance sheet on a corporate entity basis for the latest available 12-month period, the second column should show the adjustments necessitated by the purchase, and the third column is a compilation of the first two columns into a *pro forma* balance sheet.

The transferor shall file a balance sheet similar to the one filed by the transferee, with the second column reflecting the adjustments resulting from the sale.

If the parent company (if any) of the transferee or transferor is affected, a similar balance sheet shall be filed for each.

All adjustments to these balance sheets shall be supported in footnotes to the appropriate balance sheet.

¹⁰ All statements requested in Items (a-g) are to be for each of the immediately-preceding 3 calendar years, which may include, for the most recent calendar year, the months or quarters then available (preferably to the date of the balance sheet).

(ii) Transferee's parent company on a corporate entity basis.

(iii) Each of transferee's subsidiaries on a corporate entity basis.

(iv) Transferee and subsidiaries on a consolidated basis.

(v) Transferor on a corporate entity basis.

(vi) Each of transferor's subsidiaries on a corporate entity basis.

(vii) Transferor and subsidiaries on a consolidated basis.

(4) *Pro forma income statements (Exhibit 35).* Where the transaction involves a proceeding other than a control,¹¹ submit a *pro forma* income statement showing transferee's estimate of revenues, expenses, and net income for at least each of the 3 years following consummation¹² of the transaction. The *pro forma* data shall be presented in columnar form, showing (i) in the first column transferee's actual income statement on a corporate entity basis for the year as of the date of the traffic study in Exhibit 25, (ii) in the second column a similar income statement for the transferor, (iii) in the third column forecasted adjustments to the combined revenues, expenses, and net income to reflect increases or decreases anticipated under the unified operation, and (iv) in the fourth column a compilation of the first three columns into a *pro forma* income statement. This information will be submitted for at least each of the three years following the proposed consummation of the transaction. The adjustments are to be supported by a statement explaining the basis used in determining the estimated changes in revenues, expenses, and net income appearing in the third column. Additionally, if the major financial advantage to be derived from the proposed transaction will not occur within the above-prescribed period, then applicant shall furnish additional information to reflect the number of

¹¹ Where the purchase of a line or line segment is involved, a procedure utilizing three columns should be followed. The first column should show transferee's actual income statement on a corporate entity basis for the latest available 12-month period, the second column should show the adjustments necessitated by the purchase, and the third column is a compilation of the first two columns into a *pro forma* income statement.

The transferor shall file an income statement similar to the one filed by the transferee, with the second column reflecting the adjustments resulting from the sale.

If the parent company (if any) of the transferee or transferor is affected, a similar statement shall be filed for each.

All adjustments to these income statements shall be supported in footnotes to the appropriate income statement.

¹² If the operating plan requires more than three years to be put into effect, the *pro forma* income statement shall be prepared for as many years as necessary to implement fully the operating plan.

years within which the financial advantages will be realized. The basis for all such data furnished shall be fully explained and supported.

(5) *Sources and application of funds (Exhibit 36).* Transferor's and transferee's statement of sources and application of funds for the current year, and a forecast¹³ of source and application of funds for each carrier (if a merger or consolidation, the surviving or resulting corporation) for the year following consummation of the proposed transaction, and years necessary to effectuate the operating plan.¹⁴ The form and content of these statements should be constructed in accordance with schedule 240, "Statement of Changes in Financial Position" required in the most recently filed Annual Report R-1 for Class I Railroads.

(c) The following information shall be provided for all *minor* transactions;

(1) *Balance sheets-minor (Exhibit 37).* General balance sheets for the latest calendar year for applicant and applicant's parent on a corporate entity basis.

(2) *Income statements-minor (Exhibit 38).* Income statements for the latest calendar year for applicant and applicant's parent on a corporate entity basis.

§ 1111.6 Procedures.

(a) *General.* (1) Any document filed with the Commission, including applications, pleadings, etc., shall be promptly furnished to interested persons on request, unless subject to a protective order. At any time, the Commission may require the submission of additional copies of any document previously filed by any party to the proceeding.

(2) The Commission shall prepare and serve a service list on all persons who have indicated an interest in the proceeding 55 days after the application has been accepted. From time to time, this service list will be revised.

(3) The original and 20 copies of all documents shall be filed in *major* proceedings. The original and 10 copies shall be filed in *minor* proceedings.

(4) Each party to a proceeding shall choose a unique acronym of four letters or less for itself. It shall number each document filed in the proceeding consecutively, prefixed by its acronym.

(b) *Pre-filing notification.* (1) Between three to six months prior to the proposed

filing of an application in a *major* proceeding, applicant shall file a notice with the Commission. The notice shall:

(i) Briefly describe the transaction,

(ii) Indicate the year to be used for the Traffic study,

(iii) Indicate the approximate filing date of the application, and

(iv) Indicate why the transaction is *major*.

(2) The Commission will publish a notice in the Federal Register within 30 days of the filing of the applicant's notice. The notice to be published shall contain:

(i) A brief description of the transaction,

(ii) The year to be used for the Traffic study,

(iii) The approximate filing date, and

(iv) A determination if the transaction is *major*.

(c) *Application.* (1) There is a \$700 filing fee to file an application with the Commission under these procedures (this may be referred to as the primary application to distinguish it from inconsistent, inclusion, or other directly related applications). There is no filing fee for a directly related application, or for a responsive application (e.g., a petition for inclusion, an inconsistent application, or any other application seeking affirmative relief).

(2) *Filing.* (i) The original of all applications shall be signed in ink by the applicant, if an individual; by all partners, if a partnership; and if a corporation, association, or other similar form of organization, by its president, or such other executive officer having knowledge of the matters therein contained and duly designated for that purpose by the applicant. Applications shall be made under oath and shall contain an appropriate certification (if a corporation, by its secretary) showing that the affiant is duly authorized to verify and file the application. Any person controlling an applicant shall also sign the application.

(ii) The application shall be filed with Secretary, Interstate Commerce Commission, Washington, D.C. 20423.

(iii) Each copy of the application shall conform in all respects to the original and shall be complete in itself except that the signature in the copies may be stamped or typed and the notarial seal may be omitted. In like manner where certified copies of documents are filed with the original application, conformed copies thereof, showing certification in stamped or typewritten form, will be sufficient to accompany the additional copies of the application.

(iv) All applications required to be filed with the Commission or served on designated persons shall include all

exhibits, except as otherwise specifically noted.

(v) The applicant shall submit such additional information to support its application as the Commission may require.

(vi) Applicant shall file concurrently with applications under sections 11344 and 11346 all directly related applications, e.g., those seeking authority to construct or abandon rail lines, to issue securities, control motor carriers, obtain terminal operations, acquire trackage rights, etc.

(vii) Exceptions to required exhibits (A) The original and one copy of Exhibit 18 shall be filed with the Commission. Copies shall be maintained at applicants' headquarters for inspection by interested parties. Applicants must also file with the Commission one copy of a machine readable tape containing *only* the data shown in Exhibit 18. This tape will be returned to applicants when the Commission issues its decision, and no use of the tape will be made by the Commission other than for the purpose of adjudicating the application.

(B) The original and one copy of the SMS used in Exhibit 25 shall be filed with the Commission. Copies of the SMS need not be included as part of the exhibits to the copies of the application furnished to the Commission or served upon designated persons. A conformed copy of the SMS shall be maintained at the principal place of business of the carrier performing the study and shall be made available upon request to parties in the proceeding.

(viii) The application shall contain a certificate of service indicating that all persons designated in 1111.6(c)(5) have been served a copy of the application.

(3) In a *major* transaction, and in all responsive applications, all of the direct testimony of applicants in the form of verified statements, shall be filed and served with each application.

(4) The application and all exhibits shall be considered part of the evidentiary record upon acceptance. Any portion of an application, and exhibits will remain subject to motions to strike. However, no motion need be made to have the application and exhibits admitted to the evidentiary record.

If a major transaction is designated for oral hearing the presiding Administrative Law Judge shall have discretion in extraordinary circumstances to allow for the presentation of oral or written direct testimony not previously submitted with the application.

(5) *Service.* (i) The applicant shall serve a conformed copy of an

¹³ The forecast should reflect only changes anticipated to result from the proposed transaction. Forecasts are not required to reflect general economic conditions unrelated to the proposed transaction.

¹⁴ The *pro forma* balance sheets (Exhibit 33), *pro forma* income statements (Exhibit 35), and sources and application of funds (Exhibit 36) shall cover the same years.

application filed under these procedures by first class mail upon:

(A) The Governor (or Executive Officer), Public Service Commission, and the Department of Transportation of each State in which any part of the properties of the applicant carriers involved in the proposed transaction is situated;

(B) The United States Secretary of Transportation (Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, Room 5101, 400 Seventh Street, SW., Washington, D.C. 20590), except where the Secretary is the proposing party;

(C) The Attorney General of the United States;

(D) The Federal Trade Commission; and

(E) In *major* transactions, all carriers listed in the Traffic study (Exhibit 25).

(ii) The applicant shall serve a conformed copy of an application filed under 49 U.S.C. 11346 by first class mail on the Secretary of Labor in addition to the parties in (5)(i) above.

(6) *Application format.* (i) The application shall be in the same sequence as the information is requested in these procedures, and shall be numbered to correspond to the numbering in the procedures.

(ii) If any material required in the application would lend itself to being placed in an appendix, this should be done. The appendix and application shall be tabulated and cross-referenced in an index for ease in locating and referring to the information. The appendices shall be in the same sequence as the information is required by the regulations. The application should be bound, and it may be bound in more than one volume. If an application is more than one volume, the cover of each volume should be in a different color. The pages in each volume should begin with 1, and shall be sequentially numbered.

(iii) If a question arises regarding an interpretation of the information or format to be included in the application, the party may contact the Commission for assistance.

(iv) All filing, service, or other requirements of these procedures must be complied with when filing the application. Copies of the application filed with the Commission shall be marked in red "Railroad Consolidation Application" on the transmittal envelope or package.

(7) Acceptance or rejection of an application. (i) The Commission shall accept a complete application no later than 30 days after the application is filed with the Commission by publishing a notice in the Federal Register. A

complete application contains all information for all applicant carriers required by these procedures, except as modified by advance waiver.

(ii) The Commission shall reject an incomplete application by serving a decision no later than 30 days after the application is filed with the Commission. The decision shall give specific reasons why the application was rejected, and specify where the application was incomplete. A revised application may be submitted, incorporating portions of the prior application by reference, and the Commission will determine whether the resubmitted application conforms with all prescribed regulations. The resubmission or refiling of an application shall be considered a *de novo* filing for the purpose of computation of the time periods, provided that the resubmitted application is accepted.

(d) *Response to application*—(1) *Written comments.*

(i) Written comments must be filed no later than 45 days after an application is accepted.

(ii) Written comments shall be concurrently served by first class mail on:

(A) The applicants (at each address given in the application).

(B) The United States Secretary of Transportation.

(C) The Attorney General of the United States, and

(D) All parties of record within 10 days of service of the service list by the Commission.

(iii) Written comments must contain:

(A) The docket number and title of the proceeding.

(B) The name and address of the commenting party.

(C) The name, address, and telephone number of the commenting party's representative upon whom service shall be made.

(D) The commenting party's position (in support, opposition, or undetermined).

(E) If the commenting party intends to participate formally in a proceeding or merely comment upon the proposal.

(F) If desired, a request for an oral hearing and supporting reasons.

(G) A list of all information sought to be discovered from applicant carriers.

(H) Railroads filing written comments must submit.

(1) Any existing preferential solicitation agreements.

(2) A list of all run through train operations.

(3) An initial list of specific protective conditions sought and whether the commenting railroad intends to file

inconsistent applications, petitions for inclusion, trackage rights, or any other affirmative relief requiring an application to be filed with the Commission, along with a description of the proposed transactions.

(I) An initial list of specific protective conditions sought by non-railroads.

(iv) All persons who file timely written comments shall be a party of record if they so indicate in their comments. In this event, no petition for leave to intervene need be filed.

(2) The Secretary of Transportation and Attorney General of the United States shall file written comments with the Commission within 60 days of the date of acceptance of the application. These comments shall contain the information in (d)(1)(iii). Copies of these comments shall be concurrently served by first class mail on:

(i) The applicants,

(ii) The parties to the proceeding who have filed written comments, and

(iii) The Attorney General of the United States or Secretary of Transportation (whichever applies).

(3) A second list of protective conditions shall be filed with the Commission within 75 days of acceptance of the application. It shall be concurrently served by first class mail on all parties of record. The second list of protective conditions shall modify the first list based upon changing conditions, such as protective conditions sought by other parties to the proceeding. Parties to the proceeding shall not be permitted to seek any protective conditions not contained in the second list of protective conditions. This does not preclude refinements in conditions sought particularly when stipulations to conditions are reached.

(4) All responsive applications shall be filed within 90 days after the primary application has been accepted. This includes inconsistent applications, petitions for inclusion, and any other affirmative relief that requires an application to be filed with the Commission (such as trackage rights, purchase, purchase of a portion, acquisition, extension, construction, operation, pooling, terminal operations, abandonment, etc.) These applications shall comply as fully as possible with any appropriate Commission regulations, and are presumed to be major market extensions. Any petition for waiver, clarification, or extension of time (of up to 90 days to complete the application) shall be filed no later than 45 days before the application is due to be filed. A petition seeking to rebut the presumption of a major market extension must also be filed at least 45 days in advance of the filing of the

application. Each responsive application filed and accepted (if required) is considered consolidated with the primary application.

(5) In order for a protestant to question the accuracy of diversion estimates, other than through cross-examination, it must prepare and file with the Commission a traffic study that complies with the requirements of § 1111.3(H). This traffic study must be filed within 90 days after the primary application is accepted.

(e) The Commission may order an oral public hearing or a hearing by written submissions. The determination may be made on the basis of written comments. Generally, designation will be made on the basis of indications of a need for hearing.

The Commission will conclude the oral hearing, hearing by written submission, or other evidentiary proceeding within 240 days following the date the application is accepted, except where the transaction involves the merger or control of more than one class I railroad, in which case the evidentiary hearing shall be concluded not more than 24 months following the date the application is accepted. The Commission will issue a final decision by the 180th day after the conclusion of the evidentiary proceedings. The Secretary of Transportation may propose modifications to any transaction and shall have standing to appear before the Commission in support of any such proposed modification.

These time limits begin to run when the primary application is accepted. They apply to all consolidated cases.

(f) *Waiver or clarification.* (1) Upon petition of a prospective applicant, the Commission may waive or clarify a portion of these procedures. A petition to waive *all* of the procedures will not be entertained.

(2) Petitions for waiver or clarification must be filed at least 45 days before the application is filed.

(3) No replies to a petition for waiver will be permitted. An exception to this will be made where a proceeding involving the same parties and a related transaction is pending before us. In that case, the petition shall be served by first class mail on all parties to the pending proceeding, with a reply due within 10 days of service.¹⁵

(4) A waiver of clarification granted to any applicant in a proceeding shall apply to any other applicants filing directly related applications or responsive applications.

(5) All petitions for waiver, clarification or extension shall be ruled upon by the *entire* Commission.

(6) A petition for waiver or clarification must specify the sections for which waiver or clarification is sought and give the specific reasons why each waiver or clarification is necessary.

(g) *Notice of exemption.* (1) In order to qualify for an exemption under § 1111.2(C), a railroad must file a notice of the transaction with the Commission on the day the transaction is consummated.

(2) The notice shall contain the information required in § 1111.2(a)(1)(i-iii), (2)i-iii, and (3)(i).

(3) The Commission shall publish a notice in the Federal Register within 30 days of the filing of the notice of exemption. If the notice of exemption contains false or misleading information which is brought to the Commission's attention, the Commission shall summarily revoke the exemption for that carrier and require divestiture.

(h) *Special procedures for applications filed under 49 U.S.C. 11346.*

(1) An applicant which has filed, or prepared for filing, a merger or consolidation proposal with the U.S. Department of Transportation pursuant to section 11346 may submit a copy of that proposal in partial satisfaction of the information requirements of the application.

An applicant following this course of action shall provide cross-references to the accompanying proposal indicating specifically those portions which contain the information required under each applicable section of the procedures.

(2) In initiating a transaction under 49 U.S.C. 11346, any railroad or the Secretary of Transportation may use the procedures, provided:

(i) The transaction involves a merger, consolidation, unification, or coordination project (as described in section 5(c) of the Department of Transportation Act), joint use of tracks or other facilities, or acquisition or sale of assets;

(ii) The transaction has been proposed (A) by the Secretary of Transportation, with the consent of the railroads which are parties to the transaction, or (B) by any railroad which, not less than 6 months prior to such submission to the Commission, submitted the proposed transaction to the Secretary of Transportation for evaluation pursuant to 49 U.S.C. 11346(3)(f); and

(iii) The application is filed on or before December 31, 1981. At the time an application is filed with the Commission

pursuant to 49 U.S.C. 11346, notice of the filing of the application shall be furnished to the Secretary of Transportation by the proposing party, except where the Secretary is the proposing party.

(3) *Report of the Secretary of Transportation.* The Secretary of Transportation shall submit a written report on the proposed transaction to the Commission, in accordance with 49 U.S.C. 11346(f)(v), within 10 days from the date of submission of an application to the Commission.

(4) Written comments shall comply with § 1111.6(d)(1), but must be filed within 30 days of the applications acceptance and must be served on the Secretary of Labor.

(5) *Public hearings.* The Commission shall commence a public hearing on each application filed under this section within 90 days after the date of receipt of the complete application. The hearing shall be held before a panel of the Commission duly designated by the Commission. The panel shall request the views of (i) the Secretary of Transportation, regarding the effect of the proposed transaction upon the national transportation policy as stated by the Secretary, (ii) the Attorney General, regarding the competitive or anticompetitive effects of the proposed transaction, and (iii) the Secretary of Labor, regarding the effects of the proposed transaction on railroad employees and whether the employee protective provisions contained in the proposal are adequate. Within 35 days after receipt of the request or within such other reasonable time as the panel may prescribe, the views of the three above-named persons shall be submitted to the Commission in a written report. At the same time that each such report of the Secretary of Transportation, the Attorney General, and the Secretary of Labor is submitted to the Commission, the persons submitting such report shall serve, by first-class mail a copy of the report upon all parties of record to the proceeding, and shall so certify to the Commission. The designated panel shall complete the public hearing within 180 days after the date of referral of an application to the panel, and the panel may, in order to meet the requirements of the statute, prescribe rules and make such rulings as may tend to avoid unnecessary cost or delay. The panel shall recommend a decision and certify the record to the full Commission for final decision within 90 days after the termination of the hearing. The full Commission shall hear oral argument on the matter so certified, and it shall render a final decision

¹⁵ See *Itel Corp.—Control—Green Bay and W. R. Co.*, 354 ICC 232, 233 (1978).

within 120 days after receipt of the certified record and recommended decision of such panel. The Commission may, in its discretion, extend any time period set forth in this paragraph, except that the final decision of the Commission shall be rendered not later than the second anniversary of the date of receipt of such an application by the Commission.

§ 1111.7 Definitions.

(a) *Applicant.* The parties initiating a transaction (except where the Secretary of Transportation proposes a transaction under 11346).

(b) *Applicant carriers.* Applicant, all carriers related to the applicant, and all other carriers involved in the transaction.

(c) *Major market extension.* A major market extension includes an end-to-end extension of applicant carriers' routes and services and applicant carriers' participation in additional through routes or joint rates. A major market extension may also significantly increase competition by (1) extending service into a new market or (2) providing significantly more efficient and effective competitive service to a market presently being served. Criteria which can be used to determine if a railroad is proposing to provide a more competitive service to a currently served area include (i) whether or not a shorter route is involved, (ii) if the new route provides faster service, (iii) if this route extends into major markets, (iv) under what conditions the application is filed, and (v) if the route may make the railroad competitive.

See, *Burlington Northern, Inc.—Control & Merger—St. L.*, 354 ICC 616, 617 (1978).

(d) *Railroad.* Any common carrier by railroad as defined in 49 U.S.C. 10102 (17)–(18).

(e) *Transferee.* The transferee is:

- (1) The acquiring corporation in a control proceeding,
- (2) The surviving corporation in a merger,
- (3) The resulting corporation in a consolidation,
- (4) The lessee in a lease, and
- (5) The purchaser in an acquisition.

(f) *Transferor.* The transferor is:

- (1) The corporation acquired in a control proceeding,
- (2) The merging corporation in a merger,
- (3) All corporations to be consolidated in a consolidation,
- (4) The lessor in a lease, and
- (5) The seller in an acquisition.

§ 1111.8 [Reserved]

§ 1111.9 [Reserved]

§ 1111.10 General policy statement.

(a) *General.*—The Interstate Commerce Commission encourages the rationalization of railroad facilities and the reduction of excess rail capacity through private industry initiatives rather than active Government intervention. The Commission favors consolidations where operating efficiencies will occur, marketing opportunities will be enhanced, essential rail services will be retained, and competition will not be unnecessarily diminished. The Commission also encourages other means of attaining these ends, including the joint use of rail facilities and the use of run-through trains. It does not favor rail industry restructuring through the exercise of managerial and financial control unless the controlling entity assumes full responsibility for carrying out the operating railroad's common carrier obligation to provide adequate service upon reasonable demand.

(b) *Consolidation criteria.*—The Commission's consideration of rail consolidation proposals is governed by the criteria prescribed in sections 11344 and 11346 of the Interstate Commerce Act and by the national transportation policy set forth in section 10101 of the act. In addition to the statutory criteria, the Commission will consider:

(1) *Whether essential rail services will continue* to be provided, either by the consolidating companies or by other railroads which may be affected by the consolidation ("essential services" include, but are not limited to, those required by the national defense and those shown necessary to achieve other established national goals, such as energy conservation and rural and community development);

(2) *Whether opportunities to achieve operating efficiencies* will be increased;

(3) *Whether redundant facilities* will be eliminated;

(4) *Whether the ability of the consolidated system to attract new business* will be enhanced;

(5) *Whether the consolidated company will be financially viable;*

(6) *Whether effective inter- and intramodal competition will be maintained* wherever economic realities make it possible; and

(7) *Whether there will be any adverse impact on the environment* of the region served.

(c) *Public interest considerations.*—Individual rail consolidation proposals may have a profound impact upon the national rail system. The Commission will examine each proposal in light of the significant public policy issues raised. In deciding whether to approve a railroad consolidation application the

Commission will examine the effect which the proposed consolidation would have on the total rail system and the needs of the users of rail service. Proposals which fail to take advantage of potential long-run efficiencies, or to provide for the utilization of the most efficient and best located rail facilities, may be denied as not being in the public interest, or approved only subject to conditions. The Commission interprets the public interest tests under sections 11344 and 11346 of the act to be the same.

(d) *Public participation.*—In an effort to assure a fully developed record on the impacts of a proposed railroad consolidation, the Commission will—

(1) Encourage participation in railroad consolidation proceedings by other Government departments and agencies, particularly those with direct responsibility for issues related to the Nation's defense needs, transportation policies, environmental and energy policies, rural and urban needs, employment policies, and business development;

(2) Encourage participation by State and local governments and regional and local planning bodies;

(3) Permit participation by interested persons;

(4) Assure that environmental and energy issues are adequately addressed; and

(5) Provide, if necessary, for the intervention of Commission staff to develop the record.

(e) *Inclusion of other carriers pursuant to section 11344(c).*—(1) *The Commission believes that the railroad consolidation process should not be used as a means for preserving the systems of financially weak and marginal railroads or for protecting them from undergoing reorganization, if necessary, under the bankruptcy laws. The Commission is concerned with the preservation of service, not of companies or railroad systems, and will, therefore, use its powers to condition approval of a railroad consolidation upon the acceptance of inclusion of all or parts of other railroad systems only when it can be shown that there is no other reasonable alternative for preserving essential services; that the facilities to be included fit operationally into the new system; and that inclusion can be accomplished without endangering the operational or financial success of the new company. Application of these criteria will mean that requests for inclusion of an entire railroad system are less likely to be successful than those offering more limited, and clearly identified, facilities*

for acquisition by the railroad consolidation partners.

(2) The Commission recognizes that a particular consolidation of strong carriers could worsen the condition of other railroads to the extent that they could not survive. In such a situation, the Commission will attempt to assess the impact of a particular carrier's being forced into reorganization or having to terminate service. If it appears that the end result of a proposed railroad consolidation would be the permanent cessation of essential services by some other railroad, the Commission may deny the consolidation application or condition its approval upon the willingness of the applicants to restructure their proposal.

(f) *Labor protection.*—The Commission encourages voluntary negotiation of labor protective conditions in individual rail consolidation proceedings. The Commission will, however, review negotiated agreements to assure that they provide adequate protection for railroad employees and do not jeopardize the future viability of the consolidated company. In the absence of a negotiated settlement, labor protective conditions will normally provide for protection at the level mandated by law, unless it is proven that more stringent protection is required to provide a fair and equitable arrangement to protect the interests of the railroad employees adversely affected.

(g) *Procedures.* (1) Generally the Commission will consider applications on an individual basis in order to expedite the proceeding and insure compliance with the statutory time limits. However, related applications by protestants seeking protection from the proposed consolidation will normally be consolidated with the primary application. Other related applications, such as those seeking inclusion or trackage rights, may also be consolidated. Other applications in the same geographic area may be consolidated when appropriate, if they are in similar procedural stages, have common parties, and involve potential cumulative and crossover effects on those parties.

(2) The Commission will not accept petitions for inclusion in proceedings governed by section 11346 of the act. If, however, the record in such a proceeding showed that a transaction would be in the public interest only if some or all of another carrier's system were included to preserve essential rail services, the Commission would consider conditioning its approval of the transaction on the inclusion.

(3) The Commission will accept applications for control under section 11346 of the act, in addition to the transactions specified in that section.

(h) *Expiration date.*—Unless previously extended by the Commission, this section expires (5 years from the date of publication in the Federal Register).

APPENDIX A.—Exhibit 18—Revenue Carloads Interchanged, Calendar Year

Gateway and connecting line-haul railroad or water carrier	Applicant's revenue carloads					Total cars in- terchanged
	Originated on applicant's line	Terminated on applicant's line	Overhead (bridge)			
			Delivered by applicant	Received by applicant	Total	
Point A:						
Carrier X.....	1,000	1,000	1,000	1,000	2,000	4,000
Carrier Y.....		50	6,000		6,000	6,050
Carrier Z.....	5,000	4,000				9,000
Total.....	6,000	5,050	7,000	1,000	8,000	19,050
Point B: Carrier M.....	2,000	4,000	1,000	100	1,100	7,100
Point C:						
Carrier R.....	1,000	500	500	500	1,000	2,500
Carrier X.....			5,000	5,000	10,000	10,000
Total.....	1,000	500	5,500	5,500	11,000	12,500

Appendix B.—Exhibit 19—Revenue Carloads Interchanged, State-to-State Movements, by Gateway, Calendar year

Connecting line-haul railroad or water carrier	Origin State ¹	Destination State ¹	Revenue carloads
(Name) Gateway			
Carrier R	Alabama	New York	400
Do	do	Ohio	100

Appendix B.—Exhibit 19—Revenue Carloads Interchanged, State-to-State Movements, by Gateway, Calendar year—

Connecting line-haul railroad or water carrier	Origin State ¹	Destination State ¹	Revenue carloads
(Name) Gateway			
Do.....do.....	Pennsylvania.....	500	
Do.....do.....	Vermont.....	500	
Do.....do.....	Alabama.....	600	
Do.....do.....	Georgia.....	400	
Carrier X.....Alabama.....	New Jersey.....	5,000	
Do.....New York.....	Florida.....	2,500	
Do.....do.....	Georgia.....	2,500	

¹Use either full State name or standard ZIP Code abbreviation.

Appendix C.—Study Movement Sheet

SMS No.	Stratum identity, if any:	Sequence No.	Car initial: Car No.: Car type: Commodity:
Waybill No.	Total freight revenue: \$	Study road revenue: \$	Weight:
Number of cars:	Study road revenue: \$	TOFC ☐	
Waybill or accounting date:	Study road accessory charges: \$		
Origin Data:			
Station:			
Switching arrangements:			COFC ☐
Open ☐ Closed ☐ Recip. ☐			
Team ☐			
Consignor:			
Carriers Serving:			Special equipment: Yes ☐ No ☐
Destination Data:			
Station:			
Switching arrangements:			Size or weight limitations: Yes ☐ No ☐
Open ☐ Closed ☐ Recip. ☐			
Team ☐			
Consignor:			
Carriers Serving:			
Present route (carriers and junctions to extent known):			
Routed by (if known):			Evaluation:
Carrier ☐ Consignee ☐			Gain ☐ Percent ¹
Consignor ☐			Loss ☐ Percent ¹
Were junctions specified?			No Change ☐
Yes ☐ No ☐ Unknown ☐			Amount of gain or loss:
Transit or other privileges (specify):			Sample basis: \$
Diverted route (carriers and junctions):			Expanded basis: \$
Other data (if any):			Reason(s) for evaluation (may be code-referenced if standardized):
			Initials of evaluators:
			(Delete if only one evaluator made the evaluation on all SMS in the study.)

¹Show percent only if between 0 and 100.

Index I.—Exhibits

Exhibit number and name	Section	Type application
1 Map.....	1111.2(a)(2)(iii).....	All
2 Agreement.....	1111.2(a)(3)(ii).....	All.
3 Court Order.....	1111.2(a)(3)(iv).....	All.
4 Labor Impact.....	1111.2(a)(3)(viii).....	All.
5 Environmental data.....	1111.2(a)(3)(ix).....	All.
6 Energy data.....	1111.2(a)(3)(x).....	All.
7 Charter.....	1111.2(b)(1)(i)(E).....	Major.
8 Partnership articles.....	1111.2(b)(1)(ii).....	Major.
9 Documents of association.....	1111.2(b)(1)(iii)(E).....	Major.
10 Court appointment.....	1111.2(b)(1)(iv)(D).....	Major.
11 Other authorizing document.....	1111.2(b)(1)(v).....	Major.
12 Corporate chart.....	1111.2(b)(1)(vi).....	Major.
13 Annual reports.....	1111.2(b)(1)(ix).....	Major.
1 Filing resolutions.....	1111.2(b)(2)(i).....	Major.
15 Executing resolutions.....	1111.2(b)(2)(ii).....	Major.
16 Other evidence of authorization.....	1111.2(b)(2)(iii).....	Major.
17 Density Charts.....	1111.3(a).....	Major.
18 Carload interchange data.....	1111.3(b).....	Major.
19 State-to-State data.....	1111.3(b).....	Major.
20 Carload origin and destination.....	1111.3(c).....	Major.
21 Freight car fleet.....	1111.3(d).....	Major.
22 Revenue freight traffic.....	1111.3(e).....	Major.
23 Commodity revenue.....	1111.3(f).....	Major.

Index I.—Exhibits—Continued

Exhibit number and name	Section	Type application
24 Commodity tonnage.....	1111.3(g).....	Major.
25 Traffic study.....	1111.3(h).....	Major.
26 Non-rail traffic study.....	1111.3(11)(h)(1).....	Major.
27 Operating plan.....	1111.4(a).....	Major.
28 Operating plan-minor.....	1111.4(b).....	Major.
29 Property value.....	1111.5(a)(1).....	All.
30 Securities value.....	1111.5(a)(2).....	All.
31 Property encumbrance.....	1111.5(a)(3).....	All.
32 Balance sheets.....	1111.5(b)(1).....	Major.
33 Pro forma balance sheets.....	1111.5(b)(2).....	Major.
34 Income statements.....	1111.5(b)(3).....	Major.
35 Pro forma income statements.....	1111.5(b)(4).....	Major.
36 Sources and application of funds.....	1111.5(b)(5).....	Major.
37 Balance sheets—minor.....	1111.5(c)(1).....	Minor.
38 Income statements—minor.....	1111.5(c)(2).....	Minor.

Index II.—Table of Contents

Section		Exhibit		Application Type ¹
Number	Name	Number	Name	
1111.1	Types of Transactions.....			All
(a)	Major.....			Major.
(b)	Minor.....			Minor.
(c)	Exempt.....			Exempt.
(c)(1)	Acquisition—carrier.....			Exempt.
(c)(2)	Acquisition—line.....			Exempt.
(c)(3)	Within corporate family.....			Exempt.
(c)(4)	Renewals.....			Exempt.
(c)(5)	Relocations.....			Exempt.
(c)(6)	Reincorporation.....			Exempt.
(c)(7)	Responsive applications.....			Exempt.
1111.2	Identifying Information.....			All
(a)	All application.....			All
(a)(1)	Summary.....			All
(a)(1)(i)	Summary.....			All
(a)(1)(ii)	Time schedule.....			All
(a)(1)(iii)	Purposes.....			All
(a)(1)(iv)	Financial arrangements.....			All
(a)(1)(v)	Public interest.....			All
(a)(1)(vi)(A)	Financial consideration.....			All
(a)(1)(vi)(B)	Adequate service.....			All
(a)(1)(vi)(C)	Fixed charges.....			All
(a)(1)(vi)(D)	Guaranty.....			All
(a)(1)(vi)(E)	Employees.....			All
(a)(1)(vi)(F)	Inclusion.....			All
(a)(1)(vi)	Other support.....			All
(a)(1)(vii)	Opinion of Counsel.....			All
(a)(2)	Identification of applicant.....			All
(a)(2)(i)	Name and address.....			All
(a)(2)(ii)	States.....			All
(a)(2)(iii)	Map.....	1	Map.....	All
(a)(3)	Explanation of transaction.....			All
(a)(3)(i)	Nature of transaction.....			All
(a)(3)(ii)	Agreement.....	2	Agreement.....	All
(a)(3)(iii)	Resulting merged company.....			All
(a)(3)(iv)	Court order.....	3	Court order.....	All
(a)(3)(v)	Property involved.....			All
(a)(3)(vi)	Routes.....			All
(a)(3)(vii)	Governmental financial assistance.....			All
(a)(3)(viii)	Labor impact.....	4	Labor impact.....	All
(a)(3)(ix)(A)	Agreements.....			All
(a)(3)(ix)(B)	Supplemental pension plans.....			All
(a)(3)(ix)(C)	Position changes.....			All
(a)(3)(ix)(D)	Cost and savings of changes.....			All
(a)(3)(ix)(E)	Date of changes.....			All
(a)(3)(ix)(F)	Annual net change.....			All
(a)(3)(ix)	Environmental data.....	5	Environmental data.....	All
(a)(3)(x)	Energy data.....	6	Energy data.....	All
(b)	Major transaction.....			Major.
(b)(1)	Identification of applicant.....			Major.
(b)(1)(i)	Corporation.....			Major.
(b)(1)(i)(A)	Date of incorporation.....			Major.
(b)(1)(i)(B)	Director.....			Major.
(b)(1)(i)(C)	Officers.....			Major.
(b)(1)(i)(D)	Principal stockholders.....			Major.
(b)(1)(i)(E)	Charter.....	7	Charter.....	Major.
(b)(1)(ii)	Partnership.....			Major.
(b)(1)(ii)(A)	Date and place formed.....			Major.
(b)(1)(ii)(B)	Address of partner.....			Major.
(b)(1)(ii)(C)	Partnership articles.....	8	Partnership articles.....	Major.
(b)(1)(iii)	Other association.....			Major.
(b)(1)(iii)(A)	Date and place formed.....			Major.
(b)(1)(iii)(B)	Nature.....			Major.

Index II.—Table of Contents—Continued

Section		Exhibit		Application Type ¹
Number	Name	Number	Name	
(b)(1)(iii)(C).....	Officers			Major.
(b)(1)(iii)(D).....	Principal owners			Major.
(b)(1)(iii)(C).....	Documents of association.....	Documents of association ⁹		Major.
(b)(1)(iv).....	Representative of real party in interest			Major.
(b)(1)(iv)(A).....	Name of court			Major.
(b)(1)(iv)(B).....	Nature of appointment.....			Major.
(b)(1)(iv)(C).....	Real party in interest			Major.
(b)(1)(iv)(D).....	Court appointment.....	Court appoint- ment ¹⁰		Major.
(b)(1)(v).....	Other authorizing document.....	11	Other authorizing document.....	Major.
(b)(1)(vi).....	Corporate Chart	12	Corporate chart	Major.
(b)(1)(vii).....	Noncarrier activities.....			Major.
(b)(1)(viii).....	Other corporate relations			Major.
(b)(1)(ix).....	Capital stock			Major.
(b)(1)(x).....	Annual reports	13	Annual reports	Major.
(b)(2).....	Explanation of the transaction.....			Major.
(b)(2)(i).....	Filing resolution.....	14	Filing resolutions.....	Major.
(b)(2)(ii).....	Executing resolutions.....	15	Executing resolutions.....	Major.
(b)(2)(iii).....	Other evidence of authorization.....	16	Other evidence of authorization.....	Major.
1111.3.....	Traffic data			Major.
(a).....	Density chart	17	Density chart	Major.
(b).....	Carload interchange data	18	Carload interchange data	Major.
		19	State-to-State data	Major.
(c).....	Carload origins and destinations.....	20	Car load origin or destination.....	Major.
(c)(1).....	Origin			Major.
(c)(2).....	Destination			Major.
(d).....	Freight car fleet	21	Freight car fleet	Major.
(e).....	Revenue freight traffic	22	Revenue freight traffic	Major.
(f).....	Commodity revenue	23	Commodity revenue	Major.
(g).....	Commodity tonnage	24	traffic study	Major.
(h).....	Traffic study.....	25	Traffic study.....	Major.
(h)(1).....	Year.....			Major.
(h)(2).....	Traffic included, probability sampling.....			Major.
(h)(3).....	Data			Major.
(h)(4).....	Written instructions.....			Major.
(h)(5).....	Percentages.....			Major.
(h)(6).....	Evaluators.....			Major.
(h)(7).....	Results—applicant carriers			Major.
(h)(7)(i).....	Interline originated			Major.
(h)(7)(ii).....	Interline originated			Major.
(h)(7)(iii).....	Overhead			Major.
(h)(8).....	Results—nonapplicant carriers.....			Major.
(h)(9).....	Summary.....			Major.
(h)(10).....	Traffic information disclosure.....			Major.
(h)(11).....	Nonrail traffic study	26	nonrail traffic study.....	Major.
1111.4.....	Operational data			Major.
(a).....	Major transactions— operating plan.....	27	Operating plan	Major.
(a)(1).....	Patterns of service			Major.
(a)(2).....	Blocking plan			Major.
(a)(3).....	Location of shops.....			Major.
(a)(4).....	Passenger service			Major.
(a)(5).....	Equipment requirements.....			Major.
(a)(6).....	Condition of properties			Major.
(b).....	Minor transaction—operating plan.....	28	Operating plan—minor.....	Minor.
(b)(1).....	Pattern of service			Minor.
(b)(2).....	Traffic level.....			Minor.
(b)(3).....	Use of yards and shops			Minor.
(b)(4).....	Passenger service			Minor.
(b)(5).....	Operating economics			Minor.
(b)(6).....	Abandonments.....			Minor.
1111.5.....	Financial information			
(a).....	All transactions			All.
(a)(1).....	Property values.....	29	Property values	All.
(a)(2).....	Securities value.....	30	Securities value	All.
(a)(3).....	Property encumbrance.....	31	Property encumbrance	All.
(a)(3)(i).....	Description			All.
(a)(3)(ii).....	Amount			All.
(a)(3)(iii).....	To be assumed.....			All.
(b).....	Major transaction.....			Major.
(b)(1).....	Balance sheets	32	Balance sheets	Major.
(b)(1)(i).....	Transferee—entity			Major.
(b)(1)(ii).....	Transferee parent—entity			Major.
(b)(1)(iii).....	Transferee subsidiaries— entity.....			Major.
(b)(1)(iv).....	Transferee and subsidiaries—consolidated.....			Major.
(b)(1)(v).....	Transferor—entity			Major.
(b)(1)(vi).....	Transferor subsidiaries— entity.....			Major.

Index II.—Table of Contents—Continued

Section		Exhibit		Application Type ¹
Number	Name	Number	Name	
(b)(1)(vi)	Transferor and subsidiaries—consolidated.			Major.
(b)(2)	Pro forma balance sheets	33	Pro forma balance sheets	Major.
(b)(3)	Income statements	34	Income statement	Major.
(b)(3)(i)	Transferee—entity			Major.
(b)(3)(ii)	Transferee parent—entity			Major.
(b)(3)(iii)	Transferee subsidiaries—entity.			Major.
(b)(3)(iv)	Transferee and subsidiaries—consolidated.			Major.
(b)(3)(v)	Transferor—entity			Major.
(b)(3)(vi)	Transferor subsidiaries—entity.			Major.
(b)(3)(vii)	Transferor and subsidiaries—consolidated.			Major.
(b)(4)	Pro forma income statement.	35	Pro forma income statements	Major.
(b)(5)	Sources and application of funds.	36	Sources and application of funds.	Major.
(c)	Minor			Minor.
(c)(1)	Balance sheets	37	Balance sheets—	Minor.
(c)(2)	Income statements	38	Income statement—minor	Minor.
1111.6	Procedures			
(a)	General			AIL
(a)(1)	Furnishing documents			AIL
(a)(2)	Service list			AIL
(a)(3)	Copies filed			AIL
(a)(4)	Acronym			AIL
(b)	Prefiling notification			Major.
(b)(1)	Carrier action			Major.
(b)(1)(i)	Description			Major.
(b)(1)(ii)	Traffic study year			Major.
(b)(1)(iii)	Filing date			Major.
(b)(2)	Commission action			Major.
(b)(2)(i)	Description			Major.
(b)(2)(ii)	Traffic study year			Major.
(b)(2)(iii)	Filing date			Major.
(b)(2)(iv)	If major			Major.
(c)	Application			AIL
(c)(1)	Filing fee			AIL
(c)(2)	Filing			AIL
(c)(2)(i)	Signed under oath			AIL
(c)(2)(ii)	Filed with Secretary			AIL
(c)(2)(iii)	Copies conform to origin			AIL
(c)(2)(iv)	Include exhibits			AIL
(c)(2)(v)	Additional information			AIL
(c)(2)(vi)	Directly related applications			AIL
(c)(2)(vii)	Exception to required exhibits			AIL
(c)(2)(viii)(A)	Carload interchange data			Major.
(c)(2)(viii)(B)	Traffic study			Major.
(c)(2)(viii)				AIL
(c)(3)	Direct testimony			Major.
(c)(4)	Evidentiary record			AIL
(c)(5)	Service			AIL
(c)(5)(i)	Application			AIL
(c)(5)(i)(A)	States			AIL
(c)(5)(i)(B)	U.S. Department of Transportation.			AIL
(c)(5)(i)(C)	U.S. Attorney General			AIL
(c)(5)(i)(D)	Federal Trade Commission			AIL
(c)(5)(i)(E)	Carriers			Major.
(c)(5)(i)	Secretary of Labor			AIL
(c)(6)	Application format			AIL
(c)(6)(i)	Sequence			AIL
(c)(6)(ii)	Appendix volumes, numbering.			AIL
(c)(6)(iii)	Interpretation			AIL
(c)(6)(iv)	Compliance			AIL
(c)(7)	Acceptance or rejection			AIL
(c)(7)(i)	Acceptance			AIL
(c)(7)(ii)	Rejection			AIL
(d)	Response to application			AIL
(d)(1)	Written comments			AIL
(d)(1)(i)	When filed			AIL
(d)(1)(ii)	Service			AIL
(d)(1)(ii)(A)	Applicants			AIL
(d)(1)(ii)(B)	U.S. DOT			AIL
(d)(1)(ii)(C)	U.S. Attorney General			AIL
(d)(1)(ii)(D)	Parties on service list			AIL
(d)(1)(ii)(E)	Contents			AIL
(d)(1)(iii)(A)	Docket number and title			AIL
(d)(1)(iii)(B)	Name			AIL
(d)(1)(iii)(C)	Representative			AIL
(d)(1)(iii)(D)	Position			AIL
(d)(1)(iii)(E)	Participation			AIL
(d)(1)(iii)(F)	Oral hearing request			AIL
(d)(1)(iii)(G)	Discovery			AIL
(d)(1)(iii)(H)	Railroad information			AIL
(d)(1)(iii)(I)	Preferential solicitation agreements.			AIL

Index II.—Table of Contents—Continued

Section		Exhibit		Application Type ¹
Number	Name	Number	Name	
(d)(1)(iii)(H)(?)	Run through train operations.			All.
(d)(1)(iii)(H)(?)	Protective conditions—initial.			All.
(d)(1)(iii)(I)	Protective conditions— initial—nonrail.			All.
(d)(1)(iv)	Party of record.			All.
(d)(2)	Comments of DOT and Justice.			All.
(d)(2)(i)				All.
(d)(2)(ii)				All.
(d)(2)(iii)				All.
(d)(3)	Protective conditions—final.			All.
(d)(4)	Responsive applications.			All.
(d)(5)	Protestant traffic study.			Major.
(e)	Oral hearing basis.			All.
(f)	Waiver or clarification.			All.
(f)(1)	Petition required.			All.
(f)(2)	When filed.			All.
(f)(3)	No replies to petition.			All.
(f)(4)	Application of waiver to other parties.			All.
(f)(5)	Entire commission decision.			All.
(f)(6)	Specificity of waiver.			All.
(g)	Notice of exemption.			Exemption.
(g)(1)	When filed.			Exemption.
(g)(2)	Contents.			Exemption.
(g)(3)	Commission action.			Exemption.
(h)	Procedures under 49 U.S.C. 11346.			All.
(h)(1)	Use of DOT application.			All.
(h)(2)	Use of 49 U.S.C. 11346 procedures.			All.
(h)(2)(i)	Type of transaction.			All.
(h)(2)(ii)	Proposing party.			All.
(h)(2)(iii)(A)	DOT.			All.
(h)(2)(iii)(B)	Railroad.			All.
(h)(2)(iii)	Notice of filing.			All.
(h)(3)	Report of Secretary of Treasury.			All.
(h)(4)	Written comments.			All.
(h)(5)	Public hearings.			All.
1111.7	Definitions.			All.
(a)	Applicant.			All.
(b)	Applicant carriers.			All.
(c)	Major market extension.			All.
(d)	Railroad.			All.
(e)	Transferee.			All.
(f)	Transferor.			All.
1111.8	Reserved.			
1111.9	Reserved.			
1111.10	General Policy Statement.			All.
(i)	General.			All.
(ii)	Consolidation criteria.			All.
(iii)	Public interest considerations.			All.
(iv)	Public participation.			All.
(v)	Inclusion.			All.
(vi)	Labor protection.			All.
(vii)	Procedures.			All.
(viii)	Expiration date.			All.
Appendix A	Exhibit 18.			
Appendix B	Exhibit 19.			
Appendix C	Study movement sheet.			
Index I	Exhibits.			
Index II	Table of contents.			

¹ Major is defined in 1111.1(a). Minor is defined in 1111.1(b). Exemption is defined in 1111.1(c). All includes only major and minor.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36522

**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO CSX'S OPENING
STATEMENT**

EXHIBIT 4

nership, and, if a corporation, an association or other similar form of organization, by its president or other executive officer having knowledge of the matters therein set forth. Each person signing the application or report shall also sign a certificate showing, among other things, that such person has knowledge of the matters therein set forth and is duly authorized to verify and file the application or report. A false statement in an application or report is punishable under section 35 of the Criminal Code, 18 U.S.C. 1001. Additional signatures and certificates shall be furnished as directed by the Commission.

§ 1110.7 Filing; number of copies; service.

(a) The original and six copies of each application shall be filed with the Secretary, Interstate Commerce Commission, Washington, D.C., 20423.

(b) Copies of each application shall be served in the manner and upon the persons specified in the prescribed form or instructions. Proof of service of copies of the application shall be made in connection with and as part of the original application filed with the Commission.

(c) Each report shall be filed in duplicate with the Secretary of the Commission. No service of copies is required.

(d) Each copy shall conform in all respects to the original and, except as otherwise specifically provided, shall be complete in itself, but the signature in the copies may be stamped or typed.

§ 1110.8 Additional information.

The applicant or respondent shall submit such additional information to support its application or report as the Commission may require.

§ 1110.9 Incorporation by reference.

(a) If any required document shall have been previously filed in connection with another proceeding, it will be sufficient to refer to the docket number under which previously filed, provided that any change or changes which have occurred in any such document subsequent to the previous filing thereof shall be shown in an exhibit identified to correspond with the specific required exhibit.

(b) Except as in any form of application, or report otherwise specifically provided, income statements, balance sheets or supporting detail for items therein may not be incorporated by reference to annual or quarterly reports filed with the Commission or to other proceedings.

§ 1110.10 Waiver of rules.

If unusual difficulties arise in, or undue burden would result from, the furnishing of the information required in or in connection with any application or report, the Commission may, upon appropriate showing, modify such requirement.

§ 1110.20 List of forms.

Cross REFERENCE: See § 1003.4 of this chapter.

PART 1111—RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION PROJECT, TRACKAGE RIGHTS AND LEASE PROCEDURES

Sec.

1111.1 Contents of applications.

1111.2 Exhibits.

1111.3 Form and style.

1111.4 Procedures.

1111.10 General policy statement.

AUTHORITY: Sec. 5 Interstate Commerce Act, secs. 402 and 403, Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210 (4-R Act).

SOURCE: 42 FR 14871, Mar. 17, 1977, unless otherwise noted.

§ 1111.1 Contents of applications.

Applications under section 5(2) and 5(3) of the Interstate Commerce Act (act) involving more than one common carrier by railroad shall show in the title thereof the nature of the proposed transaction and shall set forth, in the sequence indicated, the following information:

(a) A brief narrative description of the proposed transaction which shall be set apart from the information requested hereinafter and which shall generally discuss the following matters:

(1) A brief summary of the proposed transaction including the name of applicant.¹

(2) The proposed time schedule for consummation of the proposed transaction.

(3) The purposes sought to be accomplished by the proposed transaction, e.g., operating economies, elimination of excess facilities, extension of markets, improved financial viability.

(4) The nature and amount of any new securities or other financial arrangements.

(5) A brief summary of the applicant's public interest justification in support of the application.

(6) Any other supporting or descriptive statements which applicant deems material.

The narrative should also include appropriate references to supporting exhibits and statements contained in the application.

(b) Identification of applicant, showing:

(1) Full and correct name of applicant and the business address of applicant (street and number, city, county, State, and zip code).

(2) Whether applicant is an individual, firm, partnership, corporation, company, association, joint stock company, trustee, receiver, assignee, or other personal representative, and trade name or style, if any, under which applicant is doing business.

(3) Whether applicant is a career subject to part I of the act.

(4) State or States in which any part of the property of the applicant involved is situated.

(5) The name, title, and business address of the persons to whom correspondence with respect to the application should be addressed.

¹The term "applicant" is used throughout Part 111 as a general reference to persons initiating an application under section 5 (2) or (3) and in behalf of whom an application is initiated. In all instances, except as noted immediately below, the term covers the actual initiating party, whether or not a carrier, and all carriers with properties directly involved in the proposed transaction. In all applications under section 5(3) in which the Secretary of Transportation is the proposing party, the term "applicant" shall refer only to the carriers with properties directly involved in the proposed transaction.

(6) Whether applicant or a subsidiary is affiliated with a motor or water carrier subject to the act; also the following information with respect to rail, motor, or water operations, where applicable: the date of the certificate, permit, or temporary authority; and the number of the Commission's docket assigned to the application upon which such certificate, permit, or temporary authority was issued or granted; or if application to engage in interstate or foreign commerce has been made but is still pending, date of the application and the docket number.

(c) Information respecting applicant, as follows:

(1) If applicant is a corporation:

(i) Date of incorporation² and Government, State, or territory of incorporation.

(ii) Name and business address of directors.

(iii) Name, title and business address of officers.

(iv) Name and business address of 10 principal stockholders as of last record date and their respective holdings.

(2) If applicant is a partnership:

(i) Date on which partnership was formed; and State and county in which it was formed.

(ii) Name and business address of all present partners, including limited or silent partners and their respective interests.

(3) If applicant is an association or other form of organization, other than a corporation:

(i) Date of organization and place of organization.

(ii) Full description of the nature and objectives of the organization.

(iii) Name, title, and business address of officers and directors, or trustees.

(iv) Name and business address of applicant's 10 principal stockholders or owners.

(4) If applicant is a trustee, receiver, assignee, or a personal representative of the real party in interest:

²If the applicant is incorporated or organized under the laws of, or authorized to operate in, more than one State, territory, or Federal district, give all pertinent facts as to such incorporation, organization, or authorization.

(i) The name and address of the court, if any, under the direction of which applicant is acting.

(ii) Nature of the proceedings, if any, in which applicant was appointed.

(iii) With respect to the real party in interest: The information required under paragraphs (b) (1), (2), or (3) of this section, whichever is applicable.

(5) If paragraphs (1), (2), (3), and (4) are not applicable, indicate identity, structure, statutory or charter powers of applicant.

(6) If applicant is not a carrier, the type of business in which it is engaged, the length of time so engaged, and particulars of its present and prospective activities which have or may have a relation to transportation subject to the act.

(7) Whether applicant is controlled by any other corporation or corporations, and, if such control is held, state the name of the controlling corporation or each of such corporations, the form of control, whether sole or joint, direct or indirect, and its extent.

(8) The measure of control of ownership if any, now exercised by applicant over any carrier subject to the act, or over the properties of such carrier.

(9) If applicant, or the real party in interest, is part of a system or group of corporations or other persons, the relationship of the applicant, or of the real party in interest, to the members of such system or group, including the form and extent of such relationship, direct or indirect.

(10) Whether there are any intercorporate relationships, not disclosed in responses to prior instructions, through holding companies, ownership of securities, or otherwise, direct or indirect, between applicant and any carrier or person affiliated with any carrier, or between any person affiliated with applicant and any carrier or person affiliated with any carrier, at the time of making the application; if so, the nature and extent of such relationship; and, if applicant owns securities of a carrier corporation or corporations subject to the act, the name of the corporation, a description of securities, the par value of each class of securities held, and the percentage of total ownership.

(11) Whether any applicant or any of its affiliates has officers or directors in common with any other applicant or its affiliates; and, if so, a reference to the Commission's order or orders, if any, authorizing the holding of such positions in common, with the names of such officers or directors and the position held in each corporation.

(12) The amount of applicant's outstanding capital stock, by classes, and in connection therewith the par value or stated value of each share, its voting rights, if any, the total number of stockholders of record, and the voting rights of all security holders.

(d) Information respecting the nature of the transaction proposed and the terms and conditions thereof as follows:

(1) The nature of the transaction, *e.g.*, merger, control, coordination project, trackage rights.

(2) Briefly, the terms and conditions of the contract or agreement pursuant to which the proposed transaction is to be effected, including the manner in which it is proposed to consummate the transaction and the consideration, in money or otherwise, to be paid by applicant.

(3) Whether any governmental financial assistance is involved in the proposed transaction and, if so, the form, amount source, and application of such financial assistance.

(4) Whether there is any financial or other relationship, direct or indirect, not disclosed in responses to prior instructions, existing at the present time between applicant and other parties and affiliates involved in the proposed transaction; and, if so, a full explanation of such relationship.

(5) The route, termini, and mileage of all involved lines, the principal points of interchange, and the main line mileage and branch line mileage shown separately.

(6) Whether the property involved in the proposed transaction includes all the property of the applicant and, if not, described what property is included in the proposed transaction.

(7) Value of each of the properties involved in the proposed transaction as found by the Commission or if such value has not been found by the Commission, then the fair market value of

the properties as independently appraised for the purposes of the proposed transaction; and, separately, the net cost of additions and betterments made after the date of valuation or appraisal.

(8) The policy and practice followed by applicant with respect to reserves for depreciation and similar reserves, including rates by classes of property.

(9) The market value of any securities acquired or proposed to be acquired in consummating the proposed transaction; or, if there be no ascertainable market value, the estimated value, giving the basis of the estimate.

(10) If any of the property covered by the application is encumbered and applicant has agreed to assume obligation or liability in respect thereof:

(i) A description of the property encumbered.

(ii) Amount of encumbrance and full description thereof, including maturity, interest rate, and other terms and conditions.

(iii) Amount of encumbrance assumed or to be assumed by applicant.

(11) If a consolidation or merger is proposed:

(i) The name of the company resulting from the consolidation or merger, and the State or territory under the laws of which the consolidated company is to be formed or the merged company is to file its certificate of amendment.

(ii) The capitalization proposed for the company resulting from the consolidation or merger; and, separately, the amount and character of capital stock and other securities to be issued.

(e) Arguments in support of the proposed transaction, with particular regard to:

(1) The financial consideration involved in the proposed transaction, including an explanation of economies, if any, to be effected in operations, and increase, if any, in traffic, revenues, earnings available for fixed charges, and net earnings, expected to result from the consummation of the proposed transaction.

(2) The effect of the proposed transaction upon adequate rail and other transportation services to the public.

(3) The effect upon the public interest of the increase, if any, of total

fixed charges resulting from the proposed transaction.

(4) The effect upon the public interest of any guaranty or assumption of payment of dividends or fixed charges contemplated in the proposed transaction.

(5) The effect upon the interest of carrier employees resulting from the proposed transaction.

(6) The effect upon the public interest of the inclusion, or the failure to include, other railroads in the territory involved in a proposed transaction under section 5(2) of the act.

§ 1111.2 Exhibits.

(a) Required exhibits for *all* applications.³

(1) As exhibit 1, one or more of the following documents as may be appropriate:

(i) One copy each of the charter or articles of incorporation, and the bylaws and amendments thereof, of each applicant, duly certified by the appropriate public officer.

(ii) A properly authenticated copy of the articles of partnership, if any, of each partnership which is a party to the transaction.

(iii) A properly authenticated copy of articles of association, trust agreement, or other similar documents of each association or other form of organization, except a corporation, which is a party to the transaction.

(iv) A properly authenticated copy of the order of the court or instrument appointing each trustee, receiver, assignee, or personal representative which is a party to the transaction.

(v) If (i), (ii), (iii), and (iv) are not applicable, submit appropriate organizational or authorizing document or

³ Where two or more exhibits bear the same number, distinguish them by giving the second and each additional exhibit a distinguishing letter as, exhibit 1, exhibit 1-2, exhibit 1-b, et cetera.

If documents here requested have been previously filed in connection with an application under sections 1a, 1(18), 5, or 20a of part 1 of the act, it will be sufficient to make reference to the docket number under which filed, provided that any change or changes occurring in such documents since the filing thereof shall be shown in an exhibit identified to correspond with the specific exhibit requested.

indicate why none is available or necessary.

(2) As exhibit 2, a properly authenticated copy of the annual report, if any, to stockholders or shareholders for each of the two calendar or fiscal years preceding the filing of the application.

(3) As exhibit 3, a copy of all resolutions of directors of each applicant, authenticated by a proper executive officer, authorizing the proposed transaction and, where applicable, the making of the application to the Commission for its approval and authorization; and, if the charter or bylaws of the applicant require approval of the stockholders, a copy of the resolution of stockholders authorizing the proposed transaction and the making of the application; all such resolutions to be accompanied by sufficient transcripts of the minutes of meetings of the stockholders or directors of the applicant to show the number of shares entitled to vote, the number of shares voted for and against the resolutions, and the numbers of shares/votes required to adopt the resolution.

(4) As exhibit 4, a copy of all resolutions of stockholders or directors of the applicant, or duly authorized committee thereof, authenticated by a proper executive officer of the applicant, designating by name and for that purpose the executive officer by whom the application is signed and verified, and filed on behalf of the applicant. For purposes of exhibits 3 and 4, in the event the resolutions of stockholders have not been obtained at the time the application is filed then such resolutions shall be obtained as soon as feasible, but not later than the next regularly scheduled stockholders' meeting. A copy of such resolutions shall be filed with the Commission within 30 days following such meeting.

(5) As exhibit 5, if an organization other than a corporation is an applicant, documentary evidence showing authorization and designation of the individual or individuals signing, verifying, and filing on behalf of the applicant.

(6) As exhibit 6, if a trustee, receiver, assignee, or personal representative of the real party in interest is an applicant, a certified copy of the order, if

any, of the court having jurisdiction, authorizing the contemplated action.

(7) As exhibit 7, opinion of counsel of applicant that the transaction described in the application meets the requirements of the law and will be legally authorized and valid, if approved by the Commission with specific reference to any specially pertinent provisions of applicant's charter or articles of incorporation.

(8) As exhibit 8, a general or key map indicating clearly, in separate colors, or otherwise, on a suitable scale, preferably not smaller than 20 miles to the inch, the line or lines of applicant, parts of the line or lines of each applicant in their true relation to each other, short-line connections, other rail lines in the territory, and the principal geographic points of the region traversed. Whenever possible, this map should not be over 30 inches in its largest dimension. There shall also be furnished three copies of the map, unbound, for the use of the Commission.

(9) As exhibit 9, a copy of any contract or other written instrument entered into, or proposed to be entered into pertaining to the transaction covered by the application.

(10) As exhibit 10, the following:

(i) A copy of any agreement or agreements with employee organizations entered into as a result of the proposed transaction.

(ii) For all personnel not covered under the Railroad Retirement Act, a list of the pension plans currently in effect, indicating whether or not they are funded, the extent of any unfunded liability, and the time required to bring the plans to a fully funded level.

(iii) The number, location, craft or class and classification of all positions of the applicant and other involved carriers by railroad, which under the proposed transaction are to be abolished, consolidated, created or transferred (including the point or points from and to which positions will be transferred).

(iv) For each of the changes specified in item (iii), the cost and savings to applicant and other involved carriers by railroad in effectuating such changes, listed for each of the 3 years following consummation of the pro-

posed transaction and the amount by craft or class and classification to which such costs and/or savings will be attributed.

(v) The date or dates on which each job abolishment, transfer, consolidation, or creation set forth under item (iii) above is to be effectuated and a statement as to whether or not implementing agreements have been negotiated with appropriate labor organizations with respect to such proposed changes.

(vi) The rate of attrition for applicant and other involved carriers by railroad by craft or class and classification for the last 6 years preceding the filing of the application.

(11) As exhibit 11, a proposed notice of filing which shall contain a brief summary of the proposed transaction, including as applicable:

(i) The name and address of applicant and applicant's attorney.

(ii) The nature of the proposed transaction, *e.g.*, merger, control, consolidation, coordination project, track-age rights.

(iii) A brief geographical description (including, as applicable, route descriptions) of (A) the operations sought to be performed, and (B) the operations presently performed; or in the event the proposed transaction involves trackage rights, joint use or ownership of a railroad line, a coordination project or a lease renewal, then a brief description of the involved line (or lines) of railroad, including city or county and State location, termini, and approximate distance in miles.

(iv) The final paragraph of the draft notice for proposed transactions filed under section 5(2) of the act shall read as follows:

Interested persons may participate formally in a proceeding by submitting written comments regarding the application. Such submissions shall indicate the proceeding designation (F.D. No. —), and the original and two copies thereof shall be filed with the Secretary, Interstate Commerce Commission, Washington, D.C. 20423, not later than 45 days after the date notice of the filing of the application is published in the FEDERAL REGISTER. Such written comments shall include the following: the person's position, *e.g.*, party protestant or party in support, regarding the proposed transaction; specific reasons why approval would or

would not be in the public interest; and a request for oral hearing if one is desired. Additionally, interested persons who do not intend to participate formally in a proceeding but who desire to comment thereon, may file such statements and information as they may desire, subject to the filing and service requirements specified herein. Persons submitting written comments to the Commission shall, at the same time, serve copies of such written comments upon the applicant, the Secretary of Transportation and the Attorney General.

(v) The final paragraph of the draft notice for proposed transactions filed under section 5(3) of the act shall read as follows:

Interested persons, other than those whose participation is specifically governed by section 5(3) of the act, may make known to the Commission their intention to participate formally in the proceeding by submitting written comments regarding the application. Such submissions shall indicate the proceeding designation (F.D. No. —), and the original and two copies thereof shall be filed with the Secretary, Interstate Commerce Commission, Washington, D.C. 20423, not later than 30 days after the date notice of the filing of the application is published in the FEDERAL REGISTER. Such written comments shall include the following: the person's position, *e.g.*, party protestant or party in support regarding the proposed transaction and specific reasons why approval would or would not be in the public interest. Additionally, interested persons who do not wish to participate formally in a proceeding, but who desire to comment thereon, may file such statements and information as they may desire, subject to the filing and service requirements specified herein. Persons submitting written comments to the Commission shall, at the same time, serve copies of such written comments upon the applicant, the Secretary of Transportation, the Attorney General, and the Secretary of Labor.

(12) As exhibit 12, information and data with respect to environmental matters prepared in accordance with the regulations in Part 1108 of this title of the Code of Federal Regulations.

(13) As exhibit 13, information and data with respect to energy consumption prepared in accordance with the regulations in Part 1106 of this title of the Code of Federal Regulations.

(b) In addition to the exhibits required for *all* applications under § 1111.2(a) the following exhibits are also required for applications involv-

ing two or more class I railroads, except for those applications involving trackage rights, joint use or joint ownership of a railroad line, a coordination project or a lease renewal:

(1) As exhibit A-14, the following data to be submitted by each applicant and any rail carrier seeking inclusion in the proposed transaction:

(i) Gross ton-mile traffic density charts which shall contain a map graphically showing principal lines (those handling 1 million gross ton-miles or more per year) and respective densities, expressed in gross ton-miles per year, in each direction, in segments of such lines between major freight yards and terminals, including major intramodal and intermodal interchange points, using the corporate or political subdivision name of the points shown as well as the railroad station name. The mileage of each segment of line should be shown on the chart. Data shown in the density chart shall be for the latest available full calendar year preceding the filing of the application.

(ii) Revenue carload interchange data between applicant and connecting linehaul rail carriers or water carriers (deleting intermediate switching railroads, if any) setting forth in a table, designated table A, the gateway involved, each connecting line-haul railroad or water carrier, and for each

connecting line-haul railroad or water carrier the number of interchange carloads originating on applicant's line, the number of interchange carloads terminating on applicants' line, the overhead traffic delivered or received by applicant, and a separate total of overhead traffic and the total cars interchanged. Gateways to be listed shall be those handling 5,000 or more revenue carloads or 5 percent of total revenue carloads, whichever is smaller, annually. Gateways shown in table A should follow a geographical sequence, *e.g.*, east to west, in the applicant railroad's system. Where two or more gateways are contiguous or nearly contiguous, they should be totaled (as examples, Dallas-Fort Worth, Minneapolis-St. Paul, Omaha-Council Bluffs, et cetera). If necessary, such grouped gateways may also be shown separately in supporting tables. Data shown in the interchange tables shall be for the latest available full calendar year preceding the filing of the application. In a separate table, designated table B, for each of the gateways listed in table A described above, there shall be shown for each connecting carrier the origin State and the destination State and the revenue carloads interchanged. An example of tables A and B follows:

(A) Table A data shall be organized as shown in the following sample table:

TABLE A.—Revenue carloads interchange, calendar year

Gateway	Connection line-haul railroad or water carrier	Applicant's revenue carloads					
		Originated or appli- cant's line	Termi- nated on applicant's line	Overhead (bridge)		Total	Total cars inter- changed
				Deliv. by applicant	Rec. by applicant		
Point A	Carrier X	1,000	1,000	1,000	1,000	2,000	4,000
Do	Carrier Y		50	6,000		6,000	6,050
Do	Carrier Z	5,000	4,000				9,000
Do	Total	6,000	5,050	7,000	1,000	8,000	19,050
Point B	Carrier M	2,000	4,000	1,000	100	1,100	7,100
Point C	Carrier R	1,000	500	500	500	1,000	2,500
Do	Carrier X			5,000	5,000	10,000	10,000
Do	Total	1,000	500	5,500	5,500	11,000	12,500

(B) Table B data shall be organized as shown in the following sample table:

TABLE B.—Revenue carloads interchanged, State-to-State movements, by gateway, calendar year

Connecting line-haul railroad or water carrier, name	Origin State, gateway	Destination State	Rev. Carloads
Carrier R.....	Alabama.....	New York.....	400
Do.....	do.....	Ohio.....	100
Do.....	do.....	Pennsylvania.....	500
Do.....	do.....	Vermont.....	500
Do.....	Pennsylvania.....	Alabama.....	600
Do.....	do.....	Georgia.....	400
Carrier X.....	Alabama.....	New Jersey.....	5,000
Do.....	New York.....	Florida.....	2,500
Do.....	do.....	Georgia.....	2,500

(iii) Revenue carload origin and destination data for the latest available full calendar year preceding the filing of the application, listing the following:

(A) Points of origin of 5,000 or more revenue carloads of 5 percent or more of applicant's total originated revenue carloads, whichever is smaller, broken down to show originations of local and interline carloads for each point.

(B) Points of destination of 5,000 or more revenue carloads, or 5 percent or more of applicant's total terminated revenue carloads, whichever is smaller, broken down to show terminations of local and interline carloads for each point. The above-listed data shall include all of applicant's carloads at each point originated or terminated, as the case may be, by a line-haul, terminal, or switching railroad or by a motor carrier performing pickup or delivery service, except where such information would identify a specific shipper or shippers or a specific receiver or receivers.

(2) As exhibit A-14, the following data:

(i) A summary table showing the freight car fleet cars owned and leased by applicant indicating by year for the 10-year period preceding the filing of the application the number of box flat

(including rack cars), gondola, open hopper, covered hopper, refrigerator, stock, tank, miscellaneous, and total number of cars owned and leased, and the aggregate capacity of these cars.

(ii) A table showing the applicant's revenue freight traffic, indicating by year, for the 10-year period preceding filing of the application, the number of local, interline originated, interline terminated, overhead, total carloads, total revenue tons, revenue ton-miles, and total freight revenue.

(iii) A table showing commodity group revenue (at the two-digit level of the STCC) for the 10 largest revenue producing commodity groups as a percentage of total revenue for the 10-year period preceding the filing of the application, indicating for each year the 10 largest commodity groups, the revenues attributable to each group and the percentage of that group's revenue as it relates to total revenue.

(iv) For the commodity groups shown in the table required in item (iii) above, a table showing commodity group tonnage as a percentage of total tonnage, for the 10-year period preceding the filing of the application, indicating by year the various commodity groups, the tonnage attributable to each group and the percentage of that group's tonnage as it relates to total tonnage. For the purpose of this exhibit, applicant should utilize the year immediately preceding the filing of the application for which data is available as the first year of the 10-year period. For each of the above items separate tables should be prepared covering, where appropriate, similar data for class I railroad subsidiaries and for predecessor railroads, if any, in existence during a part of the 10-year period covered.

(3) As exhibit A-16,⁴ a copy of a traffic study detailing estimated gains in traffic and revenues expected to result from the consummation of the proposed transaction. The traffic study

⁴This exhibit is not required in applications involving the acquisition of a line of railroad where the line to be acquired has been authorized by the Commission to be abandoned or the line to be acquired connects with no carrier other than applicant.

shall be prepared in conformity with the following instructions:

(i) The period covered by the traffic study shall be for the latest full calendar year for which data are available preceding the filing of the application.

(ii) At a minimum, the traffic study shall be based on the complete data shown on the waybills covering the movements studied. The complete data on these waybills, together with all other information regarding the movement relied upon for determining the gains in traffic and revenue, shall be reproduced totally in an abstract of all the study movements; that is, all movements, whether or not a gain has been determined. On abstracts of movements for which a gain has been determined, the amount of the gain shall be shown. The initial of the person or persons making the determinations shall be shown on all abstracts. *Only two copies of the abstract of the study movements shall be filed with the original application.* A conformed copy of such abstract shall be maintained at applicant's principal place of business and shall be made available, upon request, to parties in the proceeding. Copies of the abstract need not be included as part of the exhibits to the copies of the application furnished to the Commission or served upon designated persons.

(iii) The traffic study shall include a statement showing the name and title of (A) the person or persons making the initial determination of gains, if any; (B) the person or persons making the final determination; and (C) the method used to resolve conflicting determinations, if any.

(iv) Traffic studies shall utilize probability sampling techniques and shall include a full explanation of the sample as described in "Guidelines for the Presentation of the Results of Sample Studies," February 1971, by the Commission's Bureau of Economics, or superceding publications, if any.

(v) The traffic study shall include the written instructions, if any, for determining the amount of gains. All instances where those instructions were not followed but were subordinated to other, unwritten instructions shall be clearly shown, together with references in each instance to the appropri-

ate movement set forth in the abstract of movements under § 1111.2(b)(3)(ii), (exhibit A-16). Applicants shall furnish the unwritten instructions and the reasons for the deviation.

(vi) Where specific percentages (less than 100 percent) are applied to represent the amount of gains on movements, the criteria used to arrive at such percentages shall be stated precisely.

(vii) The estimates of gains in traffic and revenues shall be broken down separately for each connecting carrier, including carriers by other modes from which the traffic is gained, as follows:

(A) Applicant's interline originated traffic by off-junction with connecting carrier.

(B) Applicant's interline terminated traffic by on-junction with connecting carrier.

(C) Applicant's overhead traffic, by on- or off-junction with connecting carrier.

(viii) The traffic study shall contain a statement showing the revenue gains, the estimated cost of handling the gained traffic, and the net gain thus derived, including a detailed description of the methods used to compute the estimated costs of handling the gained traffic.

(4) As exhibit A-17, a complete description of the proposed operating plan to be effectuated upon approval of the transaction. This exhibit shall provide data, projected at least 3 years following consummation of the proposed transaction, describing the following aspects of the operating plan:

(i) The patterns of service on the properties, including the proposed principal routes, proposed consolidations of main-line operations, and the anticipated traffic density and general categories of traffic on all main and secondary lines in the system.

(ii) The basic operating and train blocking plan of the system, including the identification of system classification yards, and the anticipated workload of such yards, supported by a proposed blocking plan based on projected origin and destination traffic data.

(iii) The location of existing shops and repair facilities, and identification of major installations to be discontin-

ued, and a description of the system repair function of each remaining facility.

(iv) If commuter or other passenger services are operated over the lines of applicant, detail any impacts anticipated on such services, including delays which may be occasioned because a line is scheduled to handle increased traffic due to route consolidations.

(v) The equipment requirements of the proposed system, including locomotives, rolling stock by type, and maintenance-of-way equipment, plans for acquisition and retirement of equipment; and projected improvements in equipment utilization, together with an explanation of the operating changes that will cause such improvements.

(vi) The extent to which deferred maintenance or delayed capital improvements apply to any road or equipment properties involved, and the schedule for eliminating such deferrals. Also details of system rehabilitation and upgrading plans including proposed yard and terminal modifications, together with an estimate of anticipated service improvements or operating economies associated with such projects.

(5) As exhibit A-18, general balance sheets, as appropriate, of the following:

(i) Transferee⁵ on a corporate entity basis.

(ii) Transferee's parent company on a corporate entity basis.

(iii) Each subsidiary of transferee and transferor,⁶ on a corporate entity basis.

(iv) Transferee and subsidiaries on a consolidated basis.

⁵The term "transferee" as used in these exhibits includes the following persons, e.g., in a control proceeding, the acquiring corporation; in a merger proceeding, the surviving corporation; in a consolidation, the resulting corporation; in a lease, the lessee; and in an acquisition, the purchaser.

⁶The term "transferor" as used in these exhibits includes the following persons, e.g., in a control proceeding, the corporation being acquired; in a merger proceeding, the merging corporations; in a consolidation, all corporations to be consolidated; in a lease, the lessor; and in an acquisition, the seller.

(v) Transferor on a corporate entity basis.

(vi) Transferor and subsidiaries on a consolidated basis.

All such statements requested in (i)-(vi) shall show the latest available date, not exceeding 6 months prior to the filing of the application.

(vii) Where the transaction involves a proceeding other than a control, a *pro forma* balance sheet statement giving effect to the proposed transaction as of the date of the balance sheets required above. The *pro forma* data shall be presented in columnar form showing in the first column the balance sheet of transferee on a corporate entity basis, in the second column a balance sheet of transferor, on a corporate entity basis, in the third column *pro forma* adjustments and eliminations so as to indicate in the fourth column, transferee's balance sheet "giving effect" to consummation of the proposed transaction. Each adjustment and elimination shall be properly footnoted and fully explained.

(6) As exhibit A-19, income statements, as appropriate, of the following:

(i) Transferee on a corporate entity basis.

(ii) Transferee's parent company on a corporate entity basis.

(iii) Each of transferee's subsidiaries on a corporate entity basis.

(iv) Transferee and subsidiaries on a consolidated basis.

(v) Transferor on a corporate entity basis.

(vi) Transferor and subsidiaries on a consolidated basis.

All statements requested in items (i)-(vi) are to be for each of the immediately preceding 3 calendar years, which may include for the most recent calendar year the months or quarters then available (preferably to the date of the balance sheet).

(vii) Where the transaction involves a proceeding other than a control, a *pro forma* income statement showing transferee's estimate of revenues, expenses, and net income for each of the 3 years following consummation of the transaction. The *pro forma* data shall be presented in columnar form, the first column showing transferee's

actual income statement on a corporate entity basis for the latest available period extended to a 12-month period, the second column a similar income statement for the transferor, the third column forecasted adjustments to the combined revenues, expenses, and net income to reflect increases or decreases anticipated under the unified operation and the fourth column a compilation of the first three columns into a *pro forma* income statement forecasting operations during the first year following consummation and each of the 2 succeeding years. The adjustments are to be supported by a statement explaining the basis used in determining the estimated changes in revenues, expenses, and net income appearing in the third column. Additionally, if applicant determines that the major financial advantage to be derived from the proposed transaction will not occur within the above-prescribed period, then applicant shall furnish additional information to reflect the number of years within which the financial advantages will be realized. The basis for all such data furnished shall be fully explained and supported.

(viii) Transferor's and transferee's statement of sources and application of funds for the current year, and a forecast of source and application of funds for each carrier (if a merger or consolidation, the surviving or resulting corporation) for the year following consummation of the proposed transaction. The form and content of these statements should be constructed in accordance with schedule 309, "Statement of Changes in Financial Position" required in the Annual Report R-1 for Class I Railroads.

(c) In addition to those exhibits required for *all* applications under § 1111.2(a), the following exhibits are also required for applications involving one or more Class II railroads, Class III railroads or railroad lessors or applications involving a Class I railroad and a Class II or Class III railroad or a railroad lessor, except for those applications involving trackage rights, joint use or joint ownership of a railroad line, a coordination project or a lease renewal:

(1) As exhibit B-14, that revenue carload data requested in § 1111.2(b)(1) (i) (if available), (ii) (except table B), and (iii).

(2) As exhibit B-15, that revenue and commodity information required in § 1111.2(b)(2)(ii), (iii), and (iv).

(3) As exhibit B-16, that traffic study information required in § 1111.2(b)(3)(i) through (viii), *however, such exhibit is not required in applications involving nonconnecting carriers or as noted in note 4.*

(4) As exhibit B-17, that operation information required in § 1111.2(b)(4) (i) through (vi), as applicable.

(5) As exhibit B-18, that balance sheet data required in § 1111.2(b)(5)(i) through (viii).

(6) As exhibit B-19, that income statement data required in § 1111.2(b)(6)(i) through (viii).

(d) In addition to those exhibits required for *all* applications under § 1111.2(a), the following exhibits are also required for applications involving trackage rights, joint use or joint ownership of a railroad line, a coordination project or a lease renewal:

(1) As exhibit C-14, information and data, projected at least 3 year following the consummation of the proposed transaction, describing the following aspects of the operating plan:

(i) Any significant changes in patterns of service.

(ii) Traffic level and density on lines proposed for joint operations.

(iii) Impact on the use of yards or shop facilities and any necessary modifications to yards or terminals.

(iv) Impacts on commuter or other passenger service operated over a line which is to be downgraded, eliminated, or operated on a consolidated basis.

(v) Operating economies.

(vi) Any associated discontinuances or abandonments.

(2) As exhibit C-15, general balance sheets of the following:

(i) Applicant on a corporate entity basis.

(ii) Applicant's parent company on a corporate entity basis.

(3) As exhibit C-16, income statements, of the following:

(i) Lessee on a corporate entity basis.

(ii) Lessee's parent company on a corporate entity basis (if affected).

In the event the proposed transaction involves a major market extension⁷ for the applicant, then in addition to the exhibits specified above, applicant shall also file the exhibits required under § 1111.2(b) (1) through (3) inclusive, except for good cause shown.

[42 FR 14871, Mar. 17, 1977, as amended at 44 FR 2177, Jan 10, 1979]

§ 1111.3 Form and style.

(a) The application and exhibits shall conform with rule 15 of the General Rules of Practice (§ 1100.15 of this chapter).

(b) An applicant which has filed, or prepared for filing, a merger or consolidation proposal with the U.S. Department of Transportation pursuant to sections 5(3) of the act may submit a copy of that proposal in partial satisfaction of the information requirements of §§ 1111.1 and 1111.2 of this part. An applicant following this course of action shall provide cross-references to the accompanying proposal indicating specifically those portions which contain the information required under each applicable subdivision of § 1111.1 or each applicable exhibit of § 1111.2 of this part.

§ 1111.4 Procedures.

(a) Procedures for applications and other submission filed under sections 5(2) and 5(3) of the act.

(1) The original application shall be signed in ink by the applicant, if an individual; by all partners, if a partnership; and if a corporation, association, or other similar form or organization, by its president, or such other executive office having knowledge of the matters therein contained and duly designated for that purpose by the applicant, and shall be made under oath. The application shall contain an appropriate certification (if a corporation by its secretary) showing that the affiant is duly authorized to verify and file the application.

⁷A major market extension shall include, but need not be limited to, transactions which effect an end-to-end extension of applicant's routes and services or which requires applicant's participation in additional through routes or joint rates.

(2) There shall be filed with the Secretary, Interstate Commerce Commission, Washington, D.C. 20423 the original application and, in filings under section 5(2), 7 copies thereof and in filings under section 5(3), 19 copies thereof, for the use of the Commission. A copy of the application shall also be furnished to the Rail Services Planning Office and each of the Regional Directors of the Bureau of Operations, Interstate Commerce Commission, in which are located the headquarters of the carriers involved in the application. Applicant should also be prepared to furnish promptly copies of the application to other carriers, employee organizations, and interveners or extra copies to the Commission upon request. Each copy shall conform in all respects to the original and shall be complete in itself except that the signature in the copies may be stamped or typed and notarial seal omitted. In like manner where certified copies of documents are filed with the original application, conformed copies thereof, showing certification in stamped or typewritten form, will be sufficient to accompany the additional copies of the application.

(3) All applications required to be filed with the Commission or served on designated persons shall include all exhibits, except as otherwise specifically noted.

(4) The applicant shall submit such additional information to support its application as the Commission may require.

(5) Applicant shall file concurrently with applications under sections 5(2) and 5(3) all directly related applications, e.g., those seeking authority to construct or abandon rail lines or to issue securities.

(6) All traffic and diversion studies submitted by any party shall be prepared in conformity with the instructions contained in § 1111.2(b)(3) (exhibit A-15). Nonconforming studies are subject to rejection. Any rejection shall be accompanied by a general statement of the reasons therefor.

(b) Procedures pertinent to applications filed pursuant to section 5(2) of the act.

(1) Service of applications under section 5(2) of the act. In addition to the

application service requirements set forth in § 1111.4(a) (2) and (3), applicant shall serve by first-class mail, and shall so certify to the Commission, (i) a conformed copy of the application on the Governor, or executive officer, and the public service commission and the department of transportation of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and (ii) a conformed copy of the application, on the Secretary of the U.S. Department of Transportation (Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, Room 5101, 400 Seventh Street, SW, Washington, D.C. 20590) and the Attorney General of the United States.

(2) Notice. Subject to § 1111.4(b)(7), within 30 days after the date on which an application is filed with the Commission, and certification received by the Commission as to the service of applications described in the preceding paragraph, notice will be published in the *FEDERAL REGISTER*.

(3) Written comments, intervention by the Secretary of Transportation and the Attorney General, and replies.

(i) Persons intending to participate formally in a proceeding shall submit written comments regarding the application. Such submissions shall indicate the proceeding designation (F.D. No. —). The original and two copies thereof shall be filed with the Secretary, Interstate Commerce Commission, Washington, D.C. 20423, not later than 45 days after the date notice of the filing of the application is published in the *FEDERAL REGISTER*. Such written comments shall include the following: the person's position, *e.g.*, party protestant or party in support, regarding the proposed transaction, specific reasons why approval would or would not be in the public interest, and a request for oral hearing if one is desired.

(ii) Additionally, persons who do not intend to participate formally in a proceeding but who wish to comment thereon, may file such statements and information as they may desire, subject to the filing and service requirements specified herein.

(iii) Persons submitting written comments to the Commission shall, at the

same time, serve copies of any such written comments upon the applicant, the Secretary of Transportation (Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, Room 5101, 400 Seventh Street, SW, Washington, D.C. 20590) and the Attorney General.

(iv) In the event written comments are submitted, the Secretary of Transportation and the Attorney General shall be afforded 60 days from the date notice of the filing is published in the *FEDERAL REGISTER* to inform the Commission whether they will intervene as a party to the proceeding, and if so, to submit preliminary views on such application.

(v) Written replies to such written comments may be filed with the Commission within 20 days after the final date for filing such written comments, and copies of such replies shall be served on the applicant, the person filing the written comments, the Secretary of Transportation (Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, Room 5101, 400 Seventh Street, SW, Washington, D.C. 20590) and the Attorney General.

(4) Inconsistent applications.

(i) All applications which are inconsistent, in whole or in part, with the initial application submitted under section 5(2) of the act, shall be filed with the Commission within 90 days from the date notice of the filing of the initial application is published in the *FEDERAL REGISTER*.

(ii) Persons submitting inconsistent applications shall file and serve such applications in the manner specified in § 1111.4(a) (2) and (3) and (b)(1). Additionally, a copy of such application shall also be served upon the applicant, in the initial application, at the time of filing with the Commission.

(iii) Inconsistent applications shall include all information and exhibits required to be filed with an application under these regulations. In addition to supporting fully the alternate relief sought, inconsistent applications shall also address any inadequacies of the original application which would be remedied by the inconsistent application.

(iv) To the fullest extent practicable, all of the required information and exhibits shall be filed with the inconsistent application within the prescribed 90-day period. In the event that the applicant cannot submit all of the required materials with its application, then the Commission may, upon good cause shown for specified materials, afford applicant an additional 90 days to file the specified materials. A request for additional time to submit specified materials will not excuse applicant from the requirement of filing its application, in as complete a manner as possible, within the initial 90-day period.

(v) Subject to § 1111.4(b)(7) notice of the filing of an inconsistent application shall be published in the **FEDERAL REGISTER**, within 30 days of its filing.

(vi) Written comments, intervention by the Secretary of Transportation and the Attorney General, and replies to the inconsistent application shall be governed by the requirements of § 1111.4(b)(3).

(5) Petitions for inclusion.

(i) Petitions for inclusion in a proposed transaction arising under section 5(2) of the act shall be filed with the Commission within 90 days from the date notice of the filing of an application is published in the **FEDERAL REGISTER**.

(ii) Petitions for inclusion shall contain specific information in support thereof and the public interest justifications therefor. Additionally, petitions for inclusion shall contain all information and exhibits required to be filed with an application under these regulations, insofar as such information and exhibits are pertinent to the individual petition. The required information and exhibits should be prepared to reflect fully the effect upon the proposed transaction as a result of both petitioner's inclusion and noninclusion, the effect which both inclusion and noninclusion in the proposed transaction would have upon petitioner, and any inadequacies in the original application which would be remedied by such inclusion.

(iii) To the fullest extent practicable, all of the required information and exhibits shall be filed with the petition for inclusion within the pre-

scribed 90-day period. In the event that petitioner cannot submit all of the required materials with its petition, then the Commission may, upon good cause shown for specified materials, afford petitioner an additional 90 days to file the specified materials. A request for additional time to submit specified materials will not excuse petitioner from the requirement of filing its petition, in as complete a manner as possible, within the initial 90-day period.

(iv) Persons submitting such petitions to the Commission shall, at the same time, serve copies upon all parties to the proceeding, including, if applicable, the Secretary of Transportation, the Attorney General, and persons submitting written comments to the initial application.

(v) Written replies to such petitions may be filed with the Commission within 30 days after the final date for filing such petitions, and copies of such replies shall be served on all parties to the proceeding.

(6) Evidentiary proceedings under section 5(2) of the act.

(i) The Commission may order an oral public hearing or a hearing by written submission with regard to applications filed pursuant to section 5(2) of the act. The determination will be made on the basis of written comments, inconsistent applications, and petitions for inclusion received which contain information indicating a need for such hearing. Generally, such designation will be made following the last date for filing inconsistent applications or petitions for inclusion or the last date for filing written comments or replies thereto.

(ii) The Commission will conclude the oral hearing, hearing by written submission, or other evidentiary proceeding within 240 days following the date notice of filing of the initial application is published in the **FEDERAL REGISTER**, except where the transaction involves the merger or control of two or more class I railroads, which evidentiary hearing shall be concluded not more than 24 months following the date of notice of filing in the **FEDERAL REGISTER**.

(iii) The Secretary of Transportation may propose any modification of any

transaction filed under section 5(2) of the act involving a carrier by railroad, and shall have standing to appear before the Commission in support of any such proposed modification.

(7) Rejection of applications filed under section 5(2) of the act. The Commission reserves the right to reject those applications which do not conform to the regulations prescribed herein regarding form, content, and documentation. Upon the filing of an application, the Commission will review the submitted application and determine whether it conforms with all applicable regulations. If the application is incomplete, or otherwise defective, the Commission may reject for stated reasons said application by order (which order will be administratively final) within 30 days from the date of filing of the application. Thereafter, a revised application may be submitted, and the Commission will determine whether the resubmitted application conforms with all prescribed regulations. The resubmission or refiling of an application shall be considered a *de novo* filing for the purpose of computation of the time periods prescribed under section 5(2) of the act, *Provided*, That such resubmitted application is deemed complete.

(c) Procedures pertinent to applications filed pursuant to section 5(3) of the act.

(1) Initiating transactions under section 5(3) of the act. Any common carrier by railroad subject to part 1 of the act or the Secretary of Transportation may utilize the procedures pursuant to section 5(3) of the act provided:

(i) The transaction involves a merger, consolidation, unification, or coordination project (as described in section 5(c) of the Department of Transportation Act), joint use of tracks or other facilities, or acquisition or sale of assets.

(ii) The transaction has been proposed (A) by the Secretary of Transportation, with the consent of the common carriers by railroad which are parties to the transaction, or (B) by any such carrier which, not less than 6 months prior to such submission to the Commission, submitted the proposed transaction to the Secretary of

Transportation for evaluation pursuant to section 5(3)(f) of the act; and

(iii) The application is filed on or before December 31, 1981. At the time an application is filed with the Commission pursuant to section 5(3), notice of the filing of the application shall be furnished to the Secretary of Transportation by the proposing party, except where the Secretary is the proposing party.

(2) Applications to be filed with the Commission. In addition to the application filing and service requirements set forth in § 1111.4(a)(2), applicant shall submit, at the time of filing with the Commission, a sufficient number of complete applications to permit the Commission to furnish copies of the application to:

(i) The Governor, or executive officer, public service commission, and department of transportation of each State in which any part of applicant's properties is situated.

(ii) The Attorney General.

(iii) The Secretary of Labor.

(iv) The Secretary of Transportation (except where the Secretary of Transportation is the proposing party).

Said application will be forwarded to the above-designated persons within 10 days of the filing of the application.

(3) Notice. Subject to § 1111.4(c)(7), upon receipt of the original application, and the requested conformed copies, the Commission will review the draft notice submitted by applicant, in accordance with § 1111.2(a)(11) (exhibit 11) and entered the assigned docket number and the date filed. Notice of the filing of the application will be given by publication in the **FEDERAL REGISTER**.

(4) Report of the Secretary of Transportation. The Secretary of Transportation shall submit a written report on the proposed transaction to the Commission in accordance with section 5(3)(f)(v) of the act, within 10 days from the date of submission of an application to the Commission.

(5) Written comments and replies.

(i) Interested persons, other than those whose participation is specifically governed by section 5(3) of the act, may make known to the Commission their intention to participate formally in the proceeding by submitting writ-

ten comments regarding the application. Such submissions shall indicate the proceeding designation (F.D. No. ———), and shall be filed with the Secretary, Interstate Commerce Commission, Washington, D.C. 20423, not later than 30 days from the date of notice of the filing of the application if published in the *FEDERAL REGISTER*. Such written comments shall include the following: the person's position, e.g., party protestant or party in support, regarding the proposed transaction and specific reasons why approval would or would not be in the public interest. Persons submitting written comments to the Commission shall, at the same time, serve copies of such written comments upon the applicant, the Secretary of Transportation, the Attorney General, and the Secretary of Labor.

(ii) Additionally, persons who do not intend to participate formally in a proceeding but who wish to comment thereon, may file such statements and information as they may desire subject to the filing and service requirements specified herein.

(iii) Replies to such written comments may be filed within 20 days after the final date for filing such written comments, and copies of such replies shall be served on the applicant, the person filing the written comment, the Secretary of Transportation, the Attorney General, and the Secretary of Labor.

(6) Required public hearings on applications filed pursuant to section 5(3) of the act.

(i) The Commission shall commence a public hearing on each application filed under this section within 90 days after the date of receipt of such complete application. Such hearing shall be held before a panel of the Commission duly designated by the Commission.

(ii) Upon referral of the application to the designated panel, and upon its receipt thereof, the panel shall request the views of (A) the Secretary of Transportation, regarding the effect of the proposed transaction upon the national transportation policy as stated by the Secretary, (B) the Attorney General, regarding the competitive or anticompetitive effects of the

proposed transaction, and (C) the Secretary of Labor, regarding the effects of the proposed transaction on railroad employees and whether employees protection provisions contained in the proposal are adequate.

(iii) Within 35 days after receipt of said request or within such other reasonable time as the panel may prescribe, the views of the three above-named persons shall be submitted to the Commission in written report form. At the same time each such report of the Secretary of Transportation, the Attorney General, and the Secretary of Labor is submitted to the Commission, the persons submitting such report shall serve, by first-class mail, and shall so certify to the Commission, a copy of the report upon all parties of record to the proceeding.

(iv) The designated panel shall complete the public hearing within 180 days after the date of referral of an application to the panel, and the panel may, in order to meet the requirements of the statute, prescribe rules and makes such rulings as may tend to avoid unnecessary cost or delay.

(v) Such panel shall recommend a decision and certify the record to the full Commission for final decision within 90 days after the termination of such hearing. The full Commission shall hear oral argument on the matter so certified, and it shall render a final decision within 120 days after receipt of the certified record and recommended decision of such panel. The Commission may, in its discretion, extend any time period set forth in this paragraph, except that the final decision of the Commission shall be rendered not later than the second anniversary of the date of receipt of such an application by the Commission.

(7) Rejection of applications filed under section 5(3) of the act. The Commission reserves the right to reject those applications which do not conform to the regulations prescribed herein regarding form, content, and documentation. Upon the filing of an application, the Commission will review the submitted application and determine whether it conforms with all applicable regulations. If the application is incomplete, or otherwise defective, the Commission may reject for

stated reasons said application by order, within 30 days from the date of filing of the application. Thereafter a revised application may be submitted, and the Commission will determine whether the resubmitted application conforms with all prescribed regulations. The resubmission or refiling of an application shall be considered a de novo filing for the purpose of computation of the time periods prescribed under section 5(3) of the act, *Provided*, That such resubmitted application is deemed complete.

§ 1111.10 General policy statement.

(a) *General.* The Interstate Commerce Commission encourages the rationalization of railroad facilities and the reduction of excess rail capacity through private industry initiatives rather than active government intervention. The Commission favors consolidations where operating efficiencies will occur, marketing opportunities will be enhanced, essential rail services will be retained, and competition will not be unnecessarily diminished. The Commission also encourages other means of attaining these ends, including the joint use of rail facilities and the use of run-through trains. It does not favor rail industry restructuring through the exercise of managerial and financial control unless the controlling entity assumes full responsibility for carrying out the operating railroad's common carrier obligation to provide adequate service upon reasonable demand.

(b) *Consolidation Criteria.* The Commission's consideration of rail consolidation proposals is governed by the criteria prescribed in sections 11344 and 11346 of the Interstate Commerce Act and by the National Transportation Policy set forth in section 10101 of the Act. In addition to the statutory criteria, the Commission will consider:

(1) Whether essential rail services will continue to be provided, either by the consolidating companies or by other railroads which may be affected by the consolidation ("essential services" include, but are not limited to, those required by the national defense and those shown necessary to achieve other established national goals, such

as energy conservation and rural and community development);

(2) Whether opportunities to achieve operating efficiencies will be increased;

(3) Whether redundant facilities will be eliminated;

(4) Whether the ability of the consolidated system to attract new business will be enhanced;

(5) Whether the consolidated company will be financially viable;

(6) Whether effective inter- and intramodal competition will be maintained wherever economic realities make it possible; and

(7) Whether there will be any adverse impact on the environment of the region served.

(c) *Public interest considerations.* Individual rail consolidation proposals may have a profound impact upon the national rail system. The Commission will examine each proposal in light of the significant public policy issues raised. In deciding whether to approve a railroad consolidation application the Commission will examine the effect which the proposed consolidation would have on the total rail system and the needs of the users of rail service. Proposals which fail to take advantage of potential long-run efficiencies, or to provide for the utilization of the most efficient and best located rail facilities, may be denied as not being in the public interest, or approved only subject to conditions. The Commission interprets the public interest tests under sections 11344 and 11346 of the Act to be the same.

(d) *Public participation.* In an effort to assure a fully developed record on the impacts of a proposed railroad consolidation, the Commission will—

(1) Encourage participation in railroad consolidation proceedings by other government departments and agencies, particularly those with direct responsibility for issues related to the nation's defense needs, transportation policies, environmental and energy policies, rural and urban needs, employment policies, and business development;

(2) Encourage participation by State and local governments and regional and local planning bodies;

(3) Permit participation by interested persons;

(4) Assure that environmental and energy issues are adequately addressed; and

(5) Provide, if necessary, for the intervention of Commission staff to develop the record.

(e) *Inclusion of other carriers pursuant to section 11344(c).* (1) The Commission believes that the railroad consolidation process should not be used as a means for preserving the systems of financially weak and marginal railroads or for protecting them from undergoing reorganization, if necessary, under the bankruptcy laws. The Commission is concerned with the preservation of service, not of companies or railroad systems, and will, therefore, use its powers to condition approval of a railroad consolidation upon the acceptance of inclusion of all or parts of other railroad systems only when it can be shown that there is no other reasonable alternative for preserving essential services; that the facilities to be included fit operationally into the new system; and that inclusion can be accomplished without endangering the operational or financial success of the new company. Application of these criteria will mean that requests for inclusion of an entire railroad system are less likely to be successful than those offering more limited, and clearly identified, facilities for acquisition by the railroad consolidation partners.

(2) The Commission recognizes that a particular consolidation of strong carriers could worsen the condition of other railroads to the extent that they could not survive. In such a situation, the Commission will attempt to assess the impact of a particular carrier's being forced into reorganization or having to terminate service. If it appears that the end result of a proposed railroad consolidation would be the permanent cessation of essential services by some other railroad, the Commission may deny the consolidation application or condition its approval upon the willingness of the applicants to restructure their proposal.

(f) *Labor protection.* The Commission encourages voluntary negotiation of labor protective conditions in individual rail consolidation proceedings.

The Commission will, however, review negotiated agreements to assure that they provide adequate protection for railroad employees and do not jeopardize the future viability of the consolidated company. In the absence of a negotiated settlement, labor protective conditions will normally provide for protection at the level mandated by law, unless it is proven that more stringent protection is required to provide a fair and equitable arrangement to protect the interests of the railroad employees adversely affected.

(g) *Procedures.* (1) Generally the Commission will consider applications on an individual basis in order to expedite the proceeding and insure compliance with the statutory time limits. However, related applications by protestants seeking protection from the proposed consolidation will normally be consolidated with the primary application. Other related applications, such as those seeking inclusion or trackage rights, may also be consolidated. Other applications in the same geographic area may be consolidated when appropriate, if they are in similar procedural stages, have common parties, and involve potential cumulative and crossover effects on those parties.

(2) The Commission will not accept petitions for inclusion in proceedings governed by section 11346 of the Act. If, however, the record in such a proceeding showed that a transaction would be in the public interest only if some or all of another carrier's system were included to preserve essential rail services, the Commission would consider conditioning its approval of the transaction on the inclusion.

(3) The Commission will accept applications for control under section 11346 of the Act, in addition to the transactions specified in that section.

(h) *Expiration date.* Unless previously extended by the Commission, this section expires January 3, 1984.

[44 FR 884, Jan 3, 1979]

PART 1112—INTERLOCKING OFFICERS

Sec.

1112.1 Meaning of term "carrier."

1112.2 Application of regulations.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36522

**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO CSX'S OPENING
STATEMENT**

EXHIBIT 5

SIDLEY & AUSTIN

FILE IN DOCKET

1730 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20006

TELEPHONE 202: 624-9000

TELEX 39-463

Founded in 1866 as
Williams & Thompson

CHICAGO OFFICE
ONE FIRST NATIONAL PLAZA
CHICAGO, ILLINOIS 60603
TELEPHONE 312: 329-5400
TELEX 25-4364

EUROPEAN OFFICE
9 HOLLAND PARK
LONDON, W11 3TH, ENGLAND
TELEPHONE 01: 727-0132
TELEX 21781

FILED
SEP 10 1980

INTERSTATE
COMMERCE COMMISSION
September 10, 1980

Agatha L. Mergenovich
Secretary
Interstate Commerce Commission
12th & Constitution Ave., N.W.
Washington, D.C. 20423

Re: Finance Docket No. 29430, NWS
Enterprises, Inc. -- Control --
Norfolk and Western Railway
Company and Southern Railway
Company

Dear Ms. Mergenovich:

Enclosed for filing in the above-referenced proceeding are an original and twenty (20) copies of the "Supplementary Petition of Norfolk and Western Railway Company and Southern Railway Company Seeking Waiver and Clarification of the Railroad Consolidation Procedures (49 C.F.R. Part 1111)."

Please direct any inquiries regarding this matter to the undersigned.

Sincerely,

Terence M. Hynes
Terence M. Hynes

Enclosures

RECEIVED
INTERSTATE COMMERCE
COMMISSION
SEP 11 7 33 AM '80
FINANCIAL REPORT
OFFICE OF
PROCEDURES

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 29430

NWS ENTERPRISES, INC. -- CONTROL --
NORFOLK AND WESTERN RAILWAY COMPANY AND
SOUTHERN RAILWAY COMPANY

SUPPLEMENTARY PETITION OF
NORFOLK AND WESTERN RAILWAY COMPANY
AND
SOUTHERN RAILWAY COMPANY
SEEKING WAIVER AND CLARIFICATION OF
THE RAILROAD CONSOLIDATION PROCEDURES
(49 C.F.R. PART 1111)

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JOHN S. SHANNON
DONALD M. TOLMIE
WILLIAM C. WOOLDRIDGE
HENRY D. LIGHT
ANGELICA D. LLOYD
Norfolk and Western
Railway Company
8 North Jefferson Street
Roanoke, Virginia 24042

Dated: September 10, 1980

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 29430

NWS ENTERPRISES, INC. -- CONTROL --
NORFOLK AND WESTERN RAILWAY COMPANY AND
SOUTHERN RAILWAY COMPANY

SUPPLEMENTARY PETITION OF
NORFOLK AND WESTERN RAILWAY COMPANY
AND
SOUTHERN RAILWAY COMPANY
SEEKING WAIVER AND CLARIFICATION OF
THE RAILROAD CONSOLIDATION PROCEDURES
(49 C.F.R. PART 1111)

Norfolk and Western Railway Company (NW), on behalf of itself and its subsidiary companies, and Southern Railway Company (SRC), on behalf of itself and its consolidated system companies, hereby file this supplementary petition, and seek to modify in part the "Petition of Norfolk and Western Railway Company and Southern Railway Company Seeking Waiver and Clarification of the Railroad Consolidation Procedures (49 C.F.R. Part 1111)" ("Petition"), filed July 24, 1980.

On July 23, 1980, NW and SRC filed with the Commission a "Notice of Intent to File Application," stating their intention to file on or about December 1, 1980, a joint application under 49 U.S.C. §§11343 et seq., seeking

approval of the acquisition by NWS Enterprises, Inc. (NWS), a newly incorporated non-carrier holding company, of control of NW and SRC through stock ownership. The Petition filed July 24, 1980, requested guidance as to the requirements which will govern the NW/SRC application, and also sought waiver and/or clarification of a number of these requirements.

Prior to filing their Petition, NW and SRC were advised by Commission staff members that, rather than adopting the regulations contained in the notice of proposed rulemaking served November 8, 1979, in Ex Parte No. 282 (Sub-No. 3), Railroad Consolidation Procedures, the Commission would issue a new set of proposed regulations. Because it appeared that the new regulations would not become final until some indefinite future date, and to prevent interruption of preparations for filing their applications, NW and SRC stated in their Petition:

"NW and SRC hereby advise the Commission that their control application and any related applications will be filed pursuant to the existing regulations found at 49 C.F.R. Part 1111, except to the extent portions of these procedures are modified pursuant to waiver requests in this petition." (Petition at 3.)

Thereafter on August 25, 1980, the Commission issued final revised procedural regulations governing railroad consolidation proceedings. See Ex Parte No. 282,

Sub-No. 3, Railroad Consolidation Procedures, 363 I.C.C. 201, 218-226 (1980). The procedures adopted therein are to become effective thirty days after publication in the Federal Register. Furthermore, the Commission has invited parties to begin using these procedures immediately. Id. at 211.

Insofar as the new procedures will likely be effective at the time NW and SRC file their applications, NW and SRC withdraw their initial request that the regulations relating to procedure currently found at 49 C.F.R. Part 1111 govern this proceeding. NW and SRC intend to file their applications pursuant to the revised procedural regulations set forth at Appendix A to the Commission's decision served August 25, 1980, as modified by the waiver requests contained in their Petition filed July 24, 1980.*

NW and SRC also request that the recently promulgated regulations, as modified pursuant to their Petition filed July 24, 1980, be applied to and govern all procedural aspects of the submissions of all other parties to the NW/SRC control proceeding. As NW and SRC stated in their initial Petition, it is essential that all applications and other pleadings be prepared and handled under the same rules.

* This supplementary petition relates only to the Commission's revised procedural regulations, set forth at Appendix A to its August 25, 1980 decision. The regulations currently found at 49 C.F.R. Part 1111 (as modified by NW and SRC's waiver requests) will govern this proceeding to the extent that they relate to non-procedural matters.

To assure that all interested parties are fully aware of the requirements and procedures which will govern the NW/SRC control proceeding, NW and SRC are filing simultaneously herewith an amended notice of the type required by Section 1111.4(b) of the Commission's revised consolidation regulations, stating that those regulations (as modified by Commission order) will govern all aspects of, and all other pleadings filed in, this proceeding. NW and SRC request that the Commission publish the notice promptly in the Federal Register.

Respectfully submitted,


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Dated: September 10, 1980

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36522

**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO CSX'S OPENING
STATEMENT**

EXHIBIT 6

ORIGINAL
5349

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 30000 F

UNION PACIFIC CORPORATION AND
UNION PACIFIC RAILROAD COMPANY--CONTROL--
MISSOURI PACIFIC CORPORATION AND
MISSOURI PACIFIC RAILROAD COMPANY

Finance Docket No. 30001 F

UNION PACIFIC CORPORATION AND
UNION PACIFIC RAILROAD COMPANY--CONTROL--
THE WESTERN PACIFIC RAILROAD COMPANY

OFFICE OF SECRETARY

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PETITION FOR WAIVER
OR CLARIFICATION
OF RAILROAD CONSOLIDATION PROCEDURES

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May 2, 1980

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. _____

UNION PACIFIC CORPORATION AND
UNION PACIFIC RAILROAD COMPANY--CONTROL--
MISSOURI PACIFIC CORPORATION AND
MISSOURI PACIFIC RAILROAD COMPANY

Finance Docket No. _____

UNION PACIFIC CORPORATION AND
UNION PACIFIC RAILROAD COMPANY--CONTROL--
THE WESTERN PACIFIC RAILROAD COMPANY

PETITION FOR WAIVER
OR CLARIFICATION
OF RAILROAD CONSOLIDATION PROCEDURES

Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Corporation (MPC), Missouri Pacific Railroad Company (MPRR), and The Western Pacific Railroad Company (WPRR) intend to submit applications to the Commission under 49 U.S.C. §§ 11343 et seq. and Part 1111 of Title 49 of the Code of Federal Regulations for approval of transactions under which UPC will acquire control of MPC and WPRR, and as a result of which UPRR may exercise control with respect to MPRR and WPRR to the

extent authorized by UPC. This petition seeks waivers and clarification of various aspects of the Part 1111 procedures for railroad consolidation applications.

Acquisition of control of MPC will be effected through a merger of a wholly-owned subsidiary of UPC with MPC, as a result of which public shareholders of MPC will become holders of UPC Common and Preferred Stock and MPC will become a wholly-owned subsidiary of UPC. Acquisition of control of WPRR will be effected upon approval by the Commission of UPC's ownership of approximately 77 percent of WPRR Class A Common Stock which was acquired by UPC for cash pursuant to a tender offer. This stock is currently held in an independent voting trust.^{*/} When the Commission approves UPC's control of WPRR, a wholly-owned subsidiary (Union Subsidiary, Inc.) of a wholly-owned subsidiary (Pacific Subsidiary, Inc.) of UPC will merge with WPRR. As a result of this merger, WPRR will become a wholly-owned subsidiary of Pacific Subsidiary, Inc.

It is contemplated that separate applications for approval of these transactions will be filed simultaneously in order to facilitate their handling in a single proceeding.

^{*/} An additional 9.9 percent of WPRR stock, previously acquired by UPC, is also being held in the independent voting trust.

The respective companies (hereinafter referred to as "petitioners") are in the process of developing their applications and require waivers or clarifications from the Commission in order to facilitate preparation of the necessary applications.

I. USE OF PROPOSED REVISIONS TO
THE CONSOLIDATION REGULATIONS.

On November 8, 1979, the Commission served a notice of proposed revisions in the railroad consolidation procedures. Railroad Consolidation Procedures, Ex Parte No. 282 (Sub. No. 3). The proposed changes reflect the Commission's experience under the existing regulations, including its treatment of waiver petitions submitted in cases handled under those regulations. If the changes are adopted, considerable duplication and unnecessary information required under the present regulations would be eliminated, the format for submitting necessary data would be improved, and the procedures for handling consolidation cases after applications are filed would be clarified.

The Section of Finance staff have advised that the Commission will likely consider the proposed revisions shortly. Based upon the reasons stated by the Commission in proposing the revisions to the regulation and the comments submitted in response to the notice of proposed

rulemaking, it would appear that the changes are not significantly controversial and that there is a good prospect that they will be adopted substantially as proposed.

Even under the revised procedures, the burden of preparing consolidation applications is enormous. Much of the information required is highly complex and technical. The traffic study and other portions of the application require a long period of time to complete. Petitioners have commenced initial application preparation, but before proceeding further it is vital that they be certain of the procedural requirements that will be controlling as of the time of filing of their applications. If they were to prepare their applications on the basis of the currently effective regulations only to have those regulations changed prior to filing, they could be forced in material respects to start the process of application preparation over, at considerable extra expense and effort and with substantial delay.

To avoid such a situation, and to take advantage of the improvements in the procedures reflected in the proposed regulations, petitioners seek a waiver of the present regulations to permit the filing, processing and handling of their applications under the proposed regulations (except as they may be modified in accordance with petitioners'.

other requests for waiver or clarification). This will give petitioners the assurance they need to go forward with the major effort of preparing the applications without being concerned that the procedures will be substantially altered prior to filing. This general authority to proceed under the proposed regulations should also extend to all other parties, thus assuring that the benefits of the proposed regulations would be available to all parties and providing that all applications and other pleadings that may be filed in response to petitioners' applications will be prepared and processed under the same procedures.

There will be no adverse effects from the grant of this request. Should the Commission determine when it ultimately acts on the proposed revisions to its consolidation regulations that it requires more information than is now contemplated, the petitioners would supply it.

For these reasons, petitioners respectfully request that an order be issued providing that the proposed Railroad Consolidation Procedures will apply to their applications, to any other responsive applications or pleadings, to their processing, and to the ensuing proceedings. Since the proposed regulations call for an advance notification to the Commission of intent to submit

applications, which in turn leads to a Federal Register publication of a notice by the Commission, all interested persons can be informed in the notice that the proposed Railroad Consolidation Procedures will be applicable.

II. WAIVER OR CLARIFICATION OF SPECIFIC REQUIREMENTS.

Summary

Petitioners seek the following waivers or clarifications of the proposed Railroad Consolidation Procedures and the Commission's Rules of Practice:

A. Waiver of proposed sections 1111.2(A) (3) (h) (iii)-(vi) and 1111.3(A)-(H) to permit submission of required information on a consolidated railroad system basis.

B. Clarification that the definition of "applicant carrier" in proposed section 1111.7(B) does not require that the applications contain information concerning non-system railroads.

C. Waiver (or clarification) of proposed section 1111.3(H) concerning traffic studies to permit petitioners to exclude from their traffic study bases (1) shipments for which the study carrier performed only a switching function and (2) certain categories of non-relevant traffic, and to dispense with the preparation of study movement sheets and retrieval of waybills and abstracts for certain categories of unaffected traffic in the data bases.

D. Waiver of proposed sections 1111.2(A) (3) (h) (vi) and 1111.3(D)-(G) to permit submission of certain categories of historical data for the years 1977, 1978, and 1979.

E. Waiver of proposed section 1111.5(B) (1) and (3) to permit submission of financial statements on a consolidated basis, clarification that proposed sections 1111.5(B) (2) and (4) requiring pro forma financial statement applicable to petitioners, and waiver and clarification of proposed section 1111.5(B) (5), which calls for source and application of funds statements, to permit their submission for each of the three railroad systems on a consolidated basis.

F. Waiver of proposed section 1111.6(C) (2) (c) to permit the filing of an original and one copy only of Exhibit 19 (state-by-state carload interchange data), and of proposed section 1111.6(C) (2) (f) to permit the filing of any abandonment applications after the filing of the consolidation applications.

G. Clarification that 49 C.F.R. § 1110.5 permits the inclusion in the application of exhibits that exceed the dimensions specified in Rules 13 and 82 of the General Rules of Practice (49 C.F.R. §§ 1100.13 and 1100.82), so long as they are folded to conform to the size of the application.

A. Submission of Data on a Consolidated System

Basis. The proposed regulations require certain information of "applicant carriers," which is defined to mean "all carriers related to the applicant, and all other carriers involved in the transaction." See proposed section 1111.7.^{*/} (The existing regulations similarly require information of "applicants," which is defined to include "all carriers with properties directly involved in the proposed transaction." Section 1111.1(a)(1), n.1.)

Each of the petitioners owns or controls a railroad system comprised of a number of separate corporate entities (i.e., wholly-owned or leased railroads). The railroads comprising the UPRR, MPRR, and WPRR systems are listed in Appendix A to this petition. Many of the categories of data called for in the application are maintained by these parties on a system basis, rather than on a corporation-by-corporation basis.^{**/} These categories of data include:

^{*/} The numerical references to the proposed regulations are those utilized in the Commission's publication of the proposed regulations in Railroad Consolidation Procedures, Ex Parte No. 282 (Sub. No. 3), served November 8, 1979.

^{**/} In the case of Spokane International Railroad Company, a wholly-owned subsidiary of UPRR, separate records are maintained and there are traffic and other data available for it on a corporate basis. Nevertheless, Spokane International Railroad Company is a part of the UPRR system. No useful purpose would be served by submitting data for it separate from data for the balance of the UPRR system. Its data should be incorporated into the system data.

	<u>Proposed Rules</u>	<u>Corresponding Section of Present Rules</u>
Employee Attrition Data	\$ 1111.2(A) (3) (h) (iii)-(vi)-- Exhibit 4	\$ 1111.2(a) (10) (iii)-(vi)
Traffic Density	\$ 1111.3(A)-- Exhibit 17	\$ 1111.2(b) (1) (i)
Carload Interchange	\$ 1111.3(B)-- Exhibits 18 & 19	\$ 1111.2(b) (1) (ii)
Carload Origin and Destination	\$ 1111.3(C)-- Exhibit 20	\$ 1111.2(b) (1) (iii)
Freight Car Fleet	\$ 1111.3(D)-- Exhibit 21	\$ 1111.2(b) (2) (i)
Revenue Freight Traffic	\$ 1111.3(E)-- Exhibit 22	\$ 1111.2(b) (2) (ii)
Commodity Revenue	\$ 1111.3(F)-- Exhibit 23	\$ 1111.2(b) (2) (iii)
Commodity Tonnage	\$ 1111.3(G)-- Exhibit 24	\$ 1111.2(b) (2) (iv)

In addition, proposed section 1111.3(H) requires the submission of traffic study results for each "applicant carrier."

It would be excessively burdensome to require petitioners to develop and submit this information on an individual subsidiary basis where it does not now exist and such an effort, even if it could be done, would serve no useful purpose. The Commission has so recognized, and in prior cases it has permitted system carriers to submit

this information on a consolidated basis. E.g., CSX Corporation-Control--Chessie System, Inc., and Seaboard Coast Line Industries, Inc., F.D. 28905, served January 16, 1979; Southern Railway Co.-Acquisition of Properties, F.D. 28961, April 4, 1979.

Section 1111.2(A)(2)(c) of the proposed rules (corresponding to section 1111.2(a)(8) of the current regulations) requires a map of the applicant carriers' lines, short line connections, other rail lines and principal geographic points. For the reasons specified above, the purposes of the proposed regulations would be served by permitting petitioners to submit these maps on a system basis.

Accordingly, petitioners request a waiver to permit the submission of the map required by section 1111.2(A)(2)(c) and the data required by section 1111.2(A)(3)(h)(iii)-(vi) and sections 1111.3(A)-(H) of the proposed Railroad Consolidation Procedures on a consolidated basis for each of the petitioners' railroad systems as described in Appendix A hereto.

B. Non-System Railroads. UPRR, MPRR, and WPRR have non-controlling interests (50 percent or less) in certain terminal, switching or short line railroads owned jointly with other railroads. These non-system railroads are listed and briefly described in Appendix B. In addition, MPRR owns a majority interest in two companies of the same nature, which are also listed in Appendix B. These carriers are operated independently, not as part of the systems of the petitioners. Their records are separately maintained, and it would serve no useful purpose to produce detailed data for them. They will be identified in the corporate chart required by proposed section 1111.2(B)(1)(f). Petitioners believe that the proposed regulations calling for traffic, corporate and other data are not intended to include these non-system carriers. They specifically request clarification that the term "applicant carrier" as used in proposed section 1111.7(B) does not include the carriers listed in Appendix B, and that it will not be necessary to submit information concerning them in the application (except in response to proposed section 1111.2(B)(1)(f)).

C. Traffic Diversion Study. Section 1111.3(H) of the proposed regulations (corresponding to section 1111.2(b)(3) of the present regulations) requires the submission of a traffic study. The regulations contain detailed specifications for the study. Petitioners have developed plans for their traffic studies in general conformance with the proposed regulations, but believe that certain waivers or clarifications are necessary.

The traffic study portion of the application in these cases will be a complex and massive undertaking. Although separate applications will be filed covering the Union Pacific-Missouri Pacific and Union Pacific-Western Pacific transactions, each will take cognizance of the other. The result is that the Union Pacific-Missouri Pacific application will include studies of a UPRR-MPRR consolidation and a UPRR-MPRR-WPRR consolidation. Likewise, the Union Pacific-Western Pacific application will include studies of a UPRR-WPRR consolidation and a UPRR-MPRR-WPRR consolidation (the same three-way study submitted with the Union Pacific-Missouri Pacific application). Since each party to a transaction must conduct a traffic study, the overall approach will involve seven traffic studies (two by MPRR and WPRR; three by UPRR).

The petitioners have worked together to develop the methodology for the studies both to assure consistency of approach and to avoid overlap in the selection of sample shipments for study. Given the magnitude of the undertaking, which will require an evaluation of tens of thousands of shipments, it was necessary to consult with the staff of the Commission and proceed with the traffic diversion study without receiving formal waivers from the Commission.

The petitioners have created consistent traffic data bases for 1979 on which to base their studies. These bases do not include shipments for which petitioners served only as switching carriers. These are situations where the study carrier switched a car to or from a shipper located on its lines in a terminal area but did not provide line haul service.

Before the sample was selected, petitioners excluded certain categories of shipments from the data base. They were: (1) local traffic; (2) United States Postal Service mail contract traffic; and (3) geographically irrelevant traffic that could be identified through computer processing. These categories have been determined to be irrelevant in the sense that the shipments would be unaffected by either or both of the proposed transactions.

These exclusions are consistent with the present regulations on traffic studies. The proposed regulations provide that the traffic study must sample all traffic in the study year except for local and interline traffic handled only by the applicant carriers. Proposed section 1111.3(H)(2). However, Finance Section staff have advised that this provision is under reconsideration and that revisions have been proposed to permit a carrier to exclude other categories of non-relevant traffic prior to selecting the sample.

After sampling, the final evaluators identified shipments that would not be affected by either of the proposed transactions because of geography but which could not be identified by computer processing. In addition, traffic that was handled solely by petitioners and unit coal train traffic was determined to be non-divertible. No further analysis is required with respect to these shipments, and it is unnecessary to obtain the bill of lading or prepare a study movement sheet (SMS) for them. This approach saves a vast amount of processing time and makes it possible to complete studies of the magnitude being undertaken by petitioners without excessive delay in the completion and submission of applications.

These exclusions are consistent with the present regulations on traffic studies. The proposed regulations provide that the traffic study must sample all traffic in the study year except for local and interline traffic handled only by the applicant carriers. Proposed section 1111.3(H)(2). However, Finance Section staff have advised that this provision is under reconsideration and that revisions have been proposed to permit a carrier to exclude other categories of non-relevant traffic prior to selecting the sample.

After sampling, the final evaluators identified shipments that would not be affected by either of the proposed transactions because of geography but which could not be identified by computer processing. In addition, traffic that was handled solely by petitioners and unit coal train traffic was determined to be non-divertible. No further analysis is required with respect to these shipments, and it is unnecessary to obtain the bill of lading or prepare a study movement sheet (SMS) for them. This approach saves a vast amount of processing time and makes it possible to complete studies of the magnitude being undertaken by petitioners without excessive delay in the completion and submission of applications.

Petitioners request three rulings in the nature of waiver or clarification in connection with the above-described traffic studies.

(1) A waiver is requested to exclude from the traffic base any shipments for which the study carrier served only as a switching carrier. Under the proposed regulations a "railroad performing the traffic study must sample all of the traffic it handled in the study year" (with certain exceptions not relevant here). Proposed regulations, section 1111.3(H)(2) (emphasis in original). However, records for movements in which study carriers performed only switching services are maintained on paper at the terminal site. Since no line-haul service is provided by the study carrier, it does not have the information necessary to make traffic diversion judgments. The only information available to it would be the connecting line-haul carrier and consignor or consignee. Thus, these records are almost impossible to sample and study without incurring excessive delays in completing the applications. To the extent these shipments might be potentially divertible as a result of the merger, they are subject to being studied in the traffic diversion studies of any protesting carrier that presently participates in any portion of the line-haul movement. For the foregoing reasons, a waiver of proposed section 1111.3(H)(2) is requested to the extent that it would

require any of the petitioners to pay traffic for which it served only as a switching carrier.

(2) A waiver is requested, to the extent necessary, of the restriction in the proposed regulations (section 1111.3(H)(2)) that prohibits elimination of traffic (except local traffic and system local traffic) from data base. This waiver would permit exclusion of geographically non-relevant traffic and United States Postal Service traffic prior to selecting the sample. The result will be a significant reduction in the size of the sample, which will be large in any event. Elimination of this traffic before sampling will also remove the necessity for individual consideration of thousands of shipments that can be determined in advance, on a categorical basis, to be irrelevant to the proposed transactions. This pre-sample-selection elimination of categories of shipments is essential to permit a study of the magnitude being undertaken and is consistent with the staff's suggested modifications to the proposed regulations.

(3) A waiver is requested of the requirement of the proposed regulations (section 1111.3(H)(2)) for the retrieval of the bills of lading and abstracts and the preparation of study movement sheets insofar as it would apply to shipments contained in the sample that were determined by the final evaluator to be unaffected by

either transaction based on geographic or other criteria that were not programmed into the computer prior to selection of the sample. Under the procedure being followed, there will be a computer printout of these shipments showing waybill-type data, such as the class of traffic, i.e., interline received, interline forwarded or intermediate, date waybill issued, origin, destination and partial routing, commodity description, type of shipment (car, TOFC or COFC), tonnage, freight and revenues. These printouts will be available and will permit any interested party to test the validity of the evaluator's judgment of non-divertibility. Attached hereto as Appendix C is a list showing the information concerning these shipments that will be contained in the computer printouts. However, study movement sheets will not be prepared for these shipments, and waybills and abstracts will not be retrieved. The Commission in analogous circumstances has granted a waiver of the requirement that the waybills and abstracts be retrieved and the full study movement sheets be prepared on sampled shipments judged to be unaffected by the proposed transaction. Burlington Northern, Inc.--Control and Merger--St. Louis-San Francisco Ry., 354 I.C.C. 182, 184-87 (1977). A similar waiver is warranted in this case.

D. Historical Data. Under the note following proposed section 1111.3(G) of the proposed regulations, certain categories of data required by Exhibits 21-24

(fleet, revenue traffic, commodity revenue, and commodity tonnage) are to be supplied for the first, fifth, and tenth years preceding the filing of the application. Proposed section 1111.2(A)(3)(h)(vi) requires a showing in Exhibit 4 of the annual net change in employment by craft or class and classification for the last six years preceding the filing of the application. Finance Section staff have advised that these provisions are undergoing reconsideration in favor of a requirement that information in these categories be supplied for the three years preceding the filing of the application. This approach would ease the burden on the petitioners of searching out older data, which in some instances may not be fully available. A waiver is requested to permit the submission of the data called for in Exhibits 21-24 and the net change in employment data of Exhibit 4 for 1977, 1978, and 1979, the three years preceding the filing of the applications later this year.

E. Financial Information.

1. Subsections 1111.5(B)(1) and (3) of the proposed regulations (subsections 1111.2(b)(5) and (6) of the present regulations) require submission in Exhibits 32 and 34 of balance sheets and income statements of the transferee, the transferee's parent, and each subsidiary of the transferee on a "corporate entity" basis, the transferee and its subsidiaries on a consolidated basis, the transferor and each of its subsidiaries on a corporate entity basis,

and the transferor and its subsidiaries on a consolidated basis. Petitioners seek a waiver to satisfy the requirements for Exhibits 32 and 34 by submitting balance sheet and income statement data on a consolidated basis for the applicant railroad corporations and subsidiaries and (in the cases of UPC and MPC) for the holding company and all of its subsidiaries on a consolidated basis. Under this approach separate financial statements for the petitioners, for non-railroad companies and for subsidiary railroad companies would not have to be filed. No useful purpose would be served by submission of these separate financial statements, which do not presently exist for many of the subsidiaries of the petitioners. Finance Section staff have advised that modification of the proposed regulations is under consideration that would eliminate the requirement of separate financial statements for subsidiary corporations. Petitioners' waiver request is consistent with this approach and will avoid the submission of unnecessary (and in some instances presently unavailable) information.

Accordingly, petitioners request that proposed subsections 1111.5(B)(1) and (3) be waived to permit filing of financial statements on a consolidated basis for the UPRR, MPRR, and WPRR systems and for UPC and MPC.

2. Subsections 1111.5(B)(2) and (4) of the proposed regulations (subsections 1111.2(b)(5)(vii) and (6)(vii) of the present regulations) require submission in Exhibits 33 and 35 of pro forma balance sheets and income statements "where the transactions involve a proceeding other than a control." Since the acquired companies (MPC and WPRR) will be maintained as separate corporate entities, the proposed transactions are control proceedings and this requirement would not be applicable. See CSX Corporation--Control--Chessie System, Inc., and Seaboard Coast Line Industries, Inc., supra, p. 3. The petitioners request that the Commission confirm this understanding.

3. Section 1111.5(B)(5) of the proposed regulations requires the submission in Exhibit 36 of transferor's and transferee's statements of sources and application of funds for the "current year" and forecasts of source and application of funds for "each carrier" for the year following consummation of the proposed transaction and years necessary to effectuate the operating plan. Based on the references to "each carrier" and the "operating plan," it appears that the purpose of the statements required in Exhibit 36 is to reflect the impact of the proposed transaction on the cash flow of the railroads involved. However, the

proposed regulation calls for current year statements from the transferor and the transferee, and based on the definition of these terms in proposed sections 1111.7(E) and (F), the requirement in the case of the petitioners' proposed applications would apply to UPC, MPC, and WPRR. The required statements would be more useful to the Commission if they were submitted for the railroad subsidiaries of UPC and MPC rather than for the holding companies.

While the requirement for forecasts of source and application of funds runs to "each carrier," the proposed regulation is unclear on whether the forecasts must be submitted on a consolidated system basis or for each applicant carrier. For reasons previously stated, it would be more useful to submit these statements for each of the applicant carriers on a consolidated railroad basis.

Petitioners request a waiver of proposed section 1111.5(B)(5) to permit the submission of "current year" statements in Exhibit 36 for UPRR, MPRR, and WPRR, with each submitted on a consolidated system basis. Petitioners further seek clarification (or a waiver if necessary) that submission of forecasts for UPRR, MPRR and WPRR, each on a consolidated system basis, will satisfy the requirements of Exhibit 36. Grant of these requests would insure the development of current year statements and forecasts on a consistent basis.

Petitioners construe the term "current year" in proposed section 1111.5(B)(5) to refer to the last full calendar year before the applications are filed. Clarification of this interpretation is also requested.

F. Procedure.

1. Section 1111.6(C)(2)(c) of the proposed regulations requires that each copy of the application conform to the original in all respects, but subparagraph (g) makes an exception for Exhibit 18 (carload interchange data). This exception conforms with several prior rulings in consolidation cases. However, the proposed regulation inadvertently omitted an exception for Exhibit 19 (state-by-state carload interchange data), required by section 1111.3(B), which will be even more voluminous than Exhibit 18. Petitioners request a waiver to submit only an original and one copy of Exhibit 19, subject to the other provisions of proposed section 1111.6(C)(2)(g).

2. Proposed section 1111.6(C)(2)(f) (corresponding to present section 1111.4(a)(5)) requires simultaneous filing with the main consolidation application of all related applications, including those seeking line abandonments. Petitioners are currently evaluating

whether any abandonment applications will be submitted in connection with their consolidation applications. Other provisions of the Commission's regulations, as well as statutory provisions governing abandonments, require publication in System Diagram Maps of lines that carriers may seek to abandon, and preclude Commission approval of contested abandonment applications unless the line has been identified on the Map for at least four months prior to submission of the application. 49 U.S.C. § 10904(d); 49 C.F.R. § 1121.23(d). It may be possible for petitioners to comply with the four-month requirement and still adhere to their present schedule for filing their consolidation applications.

A waiver is requested to permit submission of abandonment applications up to four months after the filing of the consolidation applications. No prejudice will flow to any person by reason of this waiver. Petitioners intend to identify in their consolidation applications any proposed abandonments, and their draft environmental impact reports will take into account the environmental effects, if any, of any such proposed abandonments.

The Commission has previously granted a waiver of the simultaneous filing requirement for reasons outlined above. CSX Corporation--Control--Chessie Systems, Inc., and Seaboard Coast Line Industries, Inc., supra at p. 3. A similar waiver is warranted here.

G. Exhibit Format. The size of many of the exhibits to be submitted with the contemplated applications will be considerably larger than normal pleadings filed with the Commission. These include the map required in Exhibit 1, the corporate chart (Exhibit 12), density charts (Exhibit 17), financial statements (Exhibits 32-36) and material included with the operating plan. 49 C.F.R. § 1110.5 provides that exhibits in applications "may be in any convenient size but shall be folded to conform to the size of the application or report." This would appear to authorize the filing of exhibits without regard to their original dimensions so long as they are folded as required. See 49 C.F.R. § 1110.1(a). On the other hand, Rule 82 of the General Rules of Practice sets forth dimension specifications for exhibits.^{*/} Petitioners have construed Rule 82 as applying to hearing exhibits, but not to application exhibits, which appear to be covered by 49 C.F.R. § 1110.5. This interpretation is consistent with the ruling in Burlington Northern, Inc.--Control and Merger--St. Louis-San Francisco Railway Co., supra at 190, issued prior to the adoption of section 1110.5.

^{*/} Rule 13 of the General Rules of Practice (49 C.F.R. § 1100.13) contains general specifications for pleadings, but refers to Rule 82 on specifications for exhibits. Rule 13 also refers to Rule 36 respecting applications (49 C.F.R. § 1100.36). Rule 36 provides for submission of applications in accordance with any instructions issued by the Commission, which may encompass 49 C.F.R. Part 1110.

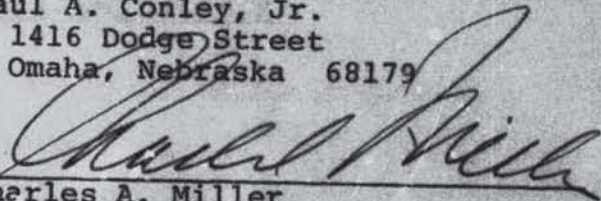
Accordingly, petitioners seek clarification that 49 C.F.R. § 1110.5, rather than Rule 13 or 82, governs the dimensions of exhibits submitted with the applications, so that maps, density charts and other oversized exhibits may exceed the dimension limits of Rule 13 or 82 as long as they are properly folded.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the waivers and clarifications specified in this petition be granted.

Respectfully submitted,

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May 2, 1980

The Western Pacific Railroad and North American
Railway Company

Companies Operating the Western Pacific Railroad System

Western Pacific Railroad Company
Rocky Mountain Railway
The Great Western Railway

SPK Corp. approximately 50 percent of the stock of this company.

APPENDIX A

Companies comprising the Union Pacific Railroad System:

Union Pacific Railroad Company
Des Chutes Railroad Company
Los Angeles and Salt Lake Railroad Company
Mount Hood Railway Company
Oregon Short Line Railroad Company
Oregon-Washington Railroad and Navigation Company
St. Joseph and Grand Island Railway Company
Spokane International Railroad Company
Union Pacific Fruit Express Company
Yakima Valley Transportation Company

Companies comprising the Missouri Pacific Railroad System:

Missouri Pacific Railroad Company
Chicago Heights Terminal Transfer Railroad Company
Doniphan, Kensett & Searcy Railway
The Weatherford Mineral Wells and Northwestern
Railway Company */

Companies comprising the Western Pacific Railroad System:

Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway

*/ MPRR owns approximately 94.7 percent of the stock of this company.

APPENDIX B

Non-System Railroads In Which UPRR, MPRR And/Or WPRR Own Partial Interests

1. Denver Union Terminal Railway Co. (equally owned by six railroads, including UPRR) -- owns Union Passenger Stations in Denver and depot tracks used as an entrance to the city.

2. Harbor Belt Line Railroad (owned by three railroads, including a UPRR subsidiary, and the City of Los Angeles) -- conducts operations in the Los Angeles harbor area.

3. Kansas City Terminal Railway Co. (owned by twelve railroads, including UPRR and MPKR) -- provides connecting and general switching service in the Kansas City area over approximately 159 miles of track.

4. Longview Switching Co. (equally owned by three railroads, including a UPRR subsidiary) -- conducts switching operations between Longview Junction and Longview, Washington.

5. Ogden Union Railway & Depot Co. (owned equally by UPRR and Southern Pacific Transportation Company (SP)) -- operates the depot at Ogden, Utah, and approximately 99.6 miles of track.

6. Portland Terminal Railroad Co. (owned by three railroads, including UPRR (50%)) -- operates over

approximately 76.7 miles of tracks (21.7 miles of which are operated on trackage rights) in the Portland, Oregon, area.

7. Portland Traction Co. (owned jointly by UPRR and SP) -- operates approximately 36 miles of line from Portland to Borling, East Gresham, and Oregon City, Oregon.

8. St. Joseph Terminal Railroad Co. (owned equally by UPRR and Atchison, Topeka and Santa Fe Railway Company (ATSF)) -- performs general switching and terminal services at St. Joseph over approximately one mile of main track and eight miles of sidings.

9. Camas Prairie Railroad Co. (owned jointly by a UPRR subsidiary and Burlington Northern, Inc. (BN)) -- operates over approximately 313 miles of track between Riparia, Washington, and Grangeville, Idaho, Spalding and Stites, Idaho, and Orofino and Headquarters, Idaho.

10. Alton & Southern Railway Co. (owned equally by MPRR and St. Louis Southwestern Railway Company (SSW)) -- operates the Gateway Yard and a terminal railroad in East St. Louis over approximately 157 miles of track, including yard tracks and sidings.

11. Arkansas & Memphis Railway Bridge and Terminal Co. (owned equally by MPRR, SSW, and Chicago,

Rock Island and Pacific Railroad Company (RI)) -- operates a bridge across the Mississippi River from Memphis to Crittenden County, Arkansas, and a terminal facility.

12. The Belt Railway Company of Chicago (owned by eleven railroads, including MPRR (7.7%)) -- provides switching service in the Chicago area.

13. Brownsville & Matamoros Bridge Co. (owned equally by MPRR and Gobierno de los Estados Unidos Mexicanos) -- operates a bridge across the Rio Grande river between Brownsville, Texas, and Matamoros, Mexico.

14. Chicago & Western Indiana Railroad Co. (owned equally by five railroads, including MPRR) -- provides terminal and switching services over approximately 105 miles of track in the Chicago area.

15. Galveston, Houston and Henderson Railroad Co. (owned equally by MPRR and Missouri-Kansas-Texas Railroad Company (M-K-T)) -- provides service over approximately 100 miles of track between Houston and Galveston, Texas.

16. Great Southwest Railroad, Inc. (owned by MPRR (45%), RI and Great Southwest Corporation) -- provides terminal switching service in the Dallas-Ft. Worth area over approximately 23 miles of track.

17. Houston Belt & Terminal Railway Co. (owned by four railroads, including MPRR (50%)) -- owns terminal

facilities in the Houston switching area and approximately 120 miles of track. Facilities are operated by HB&T for the proprietary railroads. In addition, HB&T performs switching for MPRR to and from those Houston industries that are served by the Galveston, Houston and Henderson Railroad Company tracks.

18. Illinois Terminal Railroad Co. (owned by nine railroads, including MPRR (9%)) -- operates lines between St. Louis and Central Illinois over approximately 177 miles of owned track and approximately 266 miles of trackage rights.

19. Jefferson Southwestern Railroad Co. (owned two-thirds by MPRR and one-third by Illinois Central Gulf Railroad) -- operates a line of approximately 11 miles at Mount Vernon, Illinois.

20. Pueblo Union Depot and Railroad Company (owned equally by four railroads, including MPRR) -- owns the Union Passenger Station and facilities in Pueblo, Colorado.

21. Southern Illinois & Missouri Bridge Co. (owned jointly by MPRR (60%) and SSW (40%)) -- owns a bridge across the Mississippi River between Thebes, Illinois, and Illmo, Missouri.

22. Terminal Railroad Association of St. Louis (owned by twelve railroads, including MPRR (18.75%)) --

facilities in the Houston switching area and approximately 120 miles of track. Facilities are operated by HB&T for the proprietary railroads. In addition, HB&T performs switching for MPRR to and from those Houston industries that are served by the Galveston, Houston and Henderson Railroad Company tracks.

18. Illinois Terminal Railroad Co. (owned by nine railroads, including MPRR (9%)) -- operates lines between St. Louis and Central Illinois over approximately 177 miles of owned track and approximately 266 miles of trackage rights.

19. Jefferson Southwestern Railroad Co. (owned two-thirds by MPRR and one-third by Illinois Central Gulf Railroad) -- operates a line of approximately 11 miles at Mount Vernon, Illinois.

20. Pueblo Union Depot and Railroad Company (owned equally by four railroads, including MPRR) -- owns the Union Passenger Station and facilities in Pueblo, Colorado.

21. Southern Illinois & Missouri Bridge Co. (owned jointly by MPRR (60%) and SSW (40%)) -- owns a bridge across the Mississippi River between Thebes, Illinois, and Illmo, Missouri.

22. Terminal Railroad Association of St. Louis (owned by twelve railroads, including MPRR (18.75%)) --

operates terminal facilities, classification yards and provides connections among railroads servicing the St. Louis-East St. Louis area.

23. Texas City Terminal Railway Co. (owned equally by three railroads, including MPRR) -- operates approximately six miles between Terminal Junction and Texas City, Texas, and has approximately 32 miles of track, including sidings.

24. Alameda Belt Line (equally owned by WPRR and ATSF) -- provides service in the industrial and harbor area of Alameda, California.

25. Central California Traction Co. (owned jointly by three railroads, including WPRR) -- operates approximately 53 miles of track between Stockton, Lodi, and Sacramento, California.

26. Oakland Terminal Railway (owned equally by WPRR and ATSF) -- serves the Oakland port of embarkation and the Army depot in the Oakland harbor area as well as industries located there.

APPENDIX C

Information Contained On Computer Printouts For Sample Shipments For Which No Study Movement Sheet Will be Prepared

Movement identification number
Waybill number and data
Station and state of origin
Origin territory
Station and state of destination
Destination territory
Identification of consignor and consignee
Commodity description and seven digit STCC code
Equipment type
Car owner initial and number
Route of movement^{*/}
Type of TOFC/COFC service
Class of traffic (originated, destination, intermediate)
Number of tons
Total freight revenues
Study carrier revenues
Month of shipment

^{*/} In the cases of UPRR and MPRR, the entire routing may not be shown where the study carrier performed an overhead movement and there was another overhead carrier that neither delivered the shipment to nor received it from the study carrier.