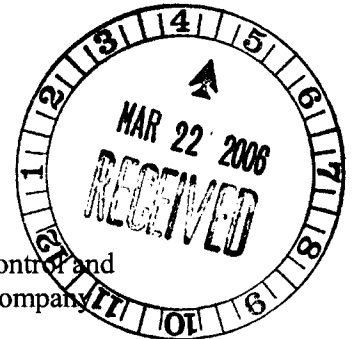


216 659

March 21, 2006

WRITER'S DIRECT NUMBER: (317) 236-2230
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Honorable Vernon A. Williams
Secretary
Surface Transportation Board – Case Control Unit
1925 K Street, N.W.
Washington, DC 20423



Re: Finance Docket No. 34839, Norfolk Southern Railway Company—Control and Consolidation Exemption—Algers, Winslow and Western Railway Company

Dear Secretary Williams:

Enclosed for filing are the original and ten copies of the Reply of Solar Sources Underground, LLC in Opposition to Petition for Exemption to Norfolk Southern Railway Company's Petition for Exemption in the above-referenced proceeding.

Please acknowledge receipt of the enclosed filing by date-stamping and returning the enclosed extra copy of this letter in the enclosed self-addressed stamped envelope.

Very truly yours,

ICE MILLER

G. Daniel Kelley, Jr.

GDK:cw
Enclosures

cc: Service List per Certificate of Service

216059

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34839

NORFOLK SOUTHERN RAILWAY COMPANY—CONTROL AND CONSOLIDATION
EXEMPTION—ALGERS, WINSLOW AND WESTERN RAILWAY COMPANY

ENTERED
Office of Proceedings

MAR 22 2006

REPLY OF SOLAR SOURCES UNDERGROUND, LLC
IN OPPOSITION TO PETITION FOR EXEMPTION

Part of
Public Record

Issue. NS¹ seeks to exempt the transaction (acquisition of and merger with AWW) from the requirements of 49 U.S.C. § 11323, as implemented, for a merger of a Class I and Class III railroad in 49 U.S.C. § 11324(d).² The exemption NS seeks is via 49 U.S.C. § 10502(a). Pursuant to this, NS must prove that its acquisition of control and merger with AWW,

- (1) is not contrary to the rail transportation policies in 49 U.S.C. § 10101(1)-(15),
and
- (2) that either (A) the merger is of limited scope or (B) will not result in an abuse
of market power.³

¹ The following are the abbreviations, the parties and their relationship to these proceedings: "NS" means the petitioner Norfolk Southern Railway Company; "AWW" means Algiers, Winslow and Western Railway Company, in which NS seeks to purchase the remaining 50% interest to obtain control of and then to merge AWW into NS; "ISRR" means Indiana Southern Railroad, Inc., an objector herein with a railroad connecting via an interchange to AWW at Oakland City Junction, IN; "IPL" means Indianapolis Power & Light Company which has three electric generating stations, Petersburg, Eagle Valley and Harding Street stations which burn coal that could be transported by ISRR for all or part of any movement from Pike #1 and #2 served by AWW; "PSI" means PSI Energy, Inc. which operates two coal-fired electric generating stations which burn coal that could be transported via an interchange with the ISRR at Oakland City; "Hoosier" means Hoosier Energy which owns and operates a coal-fired electric generating station which again could be served by transporting coal from the mines via ISSR from the Oakland City interchange.

² Section 11324(d) requires that the Board approve an application by one railroad to acquire control of another unless (1) . . . there is likely to be a substantial lessening of competition . . . in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. . . ."

³ 49 U.S.C. § 10502(a) provides that the Board may grant an exemption "whenever the Board finds that the application . . . of [§ 11323-4] (1) is not necessary to carry out the transportation policy of Section 10101 . . . ; and (2) either — the transaction . . . is of limited scope; or (B) the application [of Section 11323-24] is not needed to protect shippers from an abuse of market power."

Essentially, NS must carry the burden of proof that the proposed merger is not contrary to allowing "to the maximum extent possible, competition and demand" for rail services [§ 10101(1)], or not necessary "to ensure development and continuation of a sound rail transportation system with effective competition among rail carriers . . ." [§ 10101(4)] or "to ensuring effective competition . . . between rail carriers" [§ 10101(5), or to "avoid[ing] undue discrimination or market power" [10101(12)].

If NS does not carry its burden of proof on these, the Board never reaches the exemption section (a)(2) as to being "limited in scope" or not potentially resulting in "an abuse of market power". In sum, pursuant to these policies, NS must prove that its acquisition of control of, and merger with, AWW will not have an adverse effect on competition among railroads in the market.

NS – Fails Its Burden. NS has submitted essentially no evidence whatsoever, ignoring the requirement to file, with the Petition, its case in chief with all supporting evidence as required by 49 C.F.R. § 1121.3(a). Moreover, the evidence/affidavits⁴ filed by ISRR, the electric utilities (IPL, PSI and Hoosier) and the mines (Solar) demonstrate that competitive rail transportation is necessary to the development of Pike #1 and Pike #2 (to the extent of several million tons of annual coal production plus another million tons per annum of trans-shipped coal), which development is necessary to a competitive coal market in the region⁵ and in turn to the efficient, low cost production of electricity, an important component of economic development, in the region.

The proposed transaction eliminates a neutral short line/switching carrier that connects the mines to both the NS and ISRR. This result could not possibly avoid having a substantial adverse

⁴ Solar incorporates herein the evidence filed by PSI in its Reply, including the verified statement of Vincent E. Stroud, the evidence filed in support of IPL's Reply, the Verified Statement of Barry J. Bentley; and the evidence filed in support of ISRR's Reply, including the Verified Statement of Harold Leitze, ISRR's Reply, p. 55.

⁵ The geographic relationship of Kindill #1, Kindill #2 and the transloading area to the AWW line and to the Oakland interchange, the ISRR and the NS lines at the interchange, as well as the six electric generating stations specified by PSI, IPL and Hoosier comprising the market for the coal and the transportation are best set forth on ISRR's map, pp. 22 and PSI's map, PSI Reply, p. 11, incorporated herein by reference.

effect on competition and result in market power where there was none before. It essentially would make Pike #1 and #2 and the transloading shippers captives of NS. Whereas before the transaction, there were two competitors for transportation of coal from the mines – post-transaction, there will be no competition.

The economic realities are that AWW, with its locomotive units and employees, existed only to serve Pike #1 and #2 and the transloading shippers for the short haul (3 miles and 11 miles respectively) to the Oakland City interchange with NS and ISRR. NS has stated it intends to remove the locomotives (see attached Bowman Verified Statement, ¶ 11), *i.e.*, no longer operate AWW as a short line switching carrier – indeed, that is the basis of the proclaimed efficiencies and the pursuit of single line haulage as set forth in the Petition.

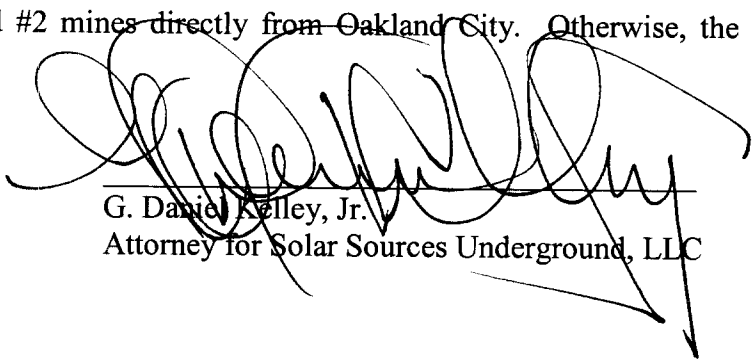
After the transaction, NS has no incentive whatsoever to remain neutral, or to in any way enhance rail competition. It is inconceivable that NS has any incentive to offer a rate structure that would maintain the competitive *status quo*. NS's espousal of its goal to maximize transportation of coal to NS-served single line movements – speaks to the contrary. Rather, the primary effect of the transaction will be to destroy competition – unless it can be said that NS might compete against itself. The economic realities support that NS's acquisition of control and merger with the AWW is more likely to result in the closure of the Oakland City interchange as suggested by PSI, Reply pp. 6-7, and the inability of the mines to sell coal at a competitive price to the utilities.

The only manner in which to avoid this anticompetitive effect is for the Board to impose the condition requested by ISRR giving it trackage rights (ISRR's Response Application, p. 23) – which, while not maintaining a neutral shortline switching carrier with two competitors, would maintain two competitors.

Public Interest. As with any transportation issue, the public interest arising out of the matters affected must be considered. NS tries to misfocus the Board's attention to the 20 or so miles

of track – obviously seeking to have the reader ignore the loss of a neutral carrier and the loss of a two competitor market – but more important, NS seeks to ignore the public interest in the development of upwards of 100 million tons of coal reserves, the access of more than five generating stations to a significant supply of coal at a competitive price and in turn, the effect the availability of low-cost energy, a vital component of economic growth in the region. Each and all of these matters would be adversely effected by the unconditional grant of NS's petition. Indeed, the continuing viability of rail transportation to Kindill #1, Kindill #2 and transloading from surrounding coal mines would be at risk. Without the likelihood of efficient, competitive transportation costs, it is unlikely that this coal would be competitive with the larger mines that have ready access to rail transportation, the lesser cost per mile and per ton loading and unloading costs – thereby jeopardizing what could well be three to three and one-half million tons of coal production and transportation per year, with the concomitant effect on coal prices and ultimately increased costs of energy to industry and slower economic growth in the region.

Requested Relief. Solar Sources Underground, LLC supports ISRR's request for trackage rights so that it can serve the Pike #1 and #2 mines directly from Oakland City. Otherwise, the Petition for Exemption should be denied.



G. Daniel Kelley, Jr.
Attorney for Solar Sources Underground, LLC

CERTIFICATE OF SERVICE

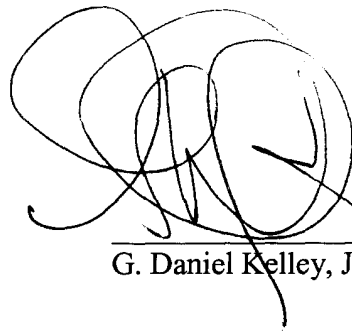
I hereby certify that I have this 21st day of March, 2006, caused copies of the foregoing Reply of Solar Sources Underground, LLC to be served by United States mail upon counsel for all parties of record in Finance Docket No. 34839, as follows:

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SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34839

NORFOLK SOUTHERN RAILWAY COMPANY—CONTROL AND CONSOLIDATION
EXEMPTION—ALGERS, WINSLOW AND WESTERN RAILWAY COMPANY

VERIFIED STATEMENT OF FELSON BOWMAN
IN SUPPORT OF SOLAR'S REPLY

I am Felson Bowman, submit this verified statement in opposition to the Petition for Exemption and state:

1. I am an owner and President of Solar Sources, Inc., and Manager of Solar Sources Underground, LLC, which are coal companies engaged in the acquisition of coal reserves, the development, construction and operation of surface and underground coal mines and the mining, producing, processing and selling of coal and have been so engaged since the early 1970's, whose mines have mined and sold over 66,000,000 tons of coal and employed up to 330 people yearly. In my capacities as an officer and an owner, I oversee, primarily in Indiana, the acquisition of reserves, and the development and operation of surface and underground mines, the marketing of coal and the development of transportation from the mines to the purchasers. I have been active in the Indiana coal industry association (the Indiana Coal Council, Inc.) over the years with several terms as chairman, the last being 2002, and am presently secretary. In 2005, the Council represented 99% of coal production in Indiana.

2. I am familiar with the demand for and supply of coal to the electric utility industry in Indiana and the effects of such demand/supply on the price of coal and the effect of the availability of competitive rail transportation on the delivered cost per million Btu of the coal as set forth hereafter.

3. The vast majority of the coal mined in Indiana is sold to Indiana utilities, including PSI, IPL and Hoosier Energy, who burn coal to provide steam to generate electricity.¹ The utilities' decision on which coal to purchase is based in part on the coal's delivered cost at the plant, expressed as a cost per million Btu delivered.

4. As expressed the utilities' affidavits, rail is the most efficient means of transporting and unloading coal because coal is a bulk commodity and automatic loading and unloading facilities for unit trains (100 cars±) facilitate the delivery of the coal to the boiler where it is burned. The availability of competitive rail transportation is, therefore, critical to a coal mine's being able to competitively market coal to the utilities and therefore critical to the electric utilities obtaining coal at competitive prices so that electric energy can be delivered to industry and consumers as economically as possible (coal comprises 75% to 80% of the incremental cost of generating electricity).

5. Rail transportation is, therefore, the integral piece of the infrastructure which ties the coal mines to the utilities' coal fired steam generators which provide power for industry and economic growth.

6. Geographic markets and product markets concerning the sale of and the transportation of coal to electric utilities for the production and the delivery of power to industry and consumers are multi-dimensional and the development of mines such as Pike #1 and #2 are integral to the economic and efficient delivery of power to industry for growth of the economy and employment opportunities in Indiana.²

¹ The development of medium to smaller coal mines is critical to utilities obtaining competitively priced coal. The vast majority of Indiana coal is produced by several large producers as Peabody/Black Beauty which produces over 50% of the coal produced in Indiana.

² *Id.*, and the geographic relationship of Kindill #1, Kindill #2 and the transloading area to the AWW line to the Oakland interchange, the ISRR and the NS lines at the interchange, as well as the six electric generating stations

7. Solar Underground has a letter of intent to purchase the mine presently known as Pike #2, formerly Kindill #2 and before that Old Ben #2, which could be opened in late 2006. The Kindill #1 mine, formerly Old Ben #1, is just south of Kindill #2. The mines are located in the Indiana portion of the Illinois Coal Basin, a geologic structure with multiple coal seams in southwest Indiana, southeast Illinois and northwest Kentucky. As set forth herein, to be economically viable, such mines must have access to a competitive source of rail transportation. The two mines (Pike #1 & #2) contain more than 90 million tons of coal reserves which could be mined in the next 10-20 years. Additionally, each mine has a rail connection to AWW, with load-out capacity to provide rail transportation to surrounding mines' truck-coal to be transloaded onto the AWW. The coal production and rail requirement could exceed 3 million tons per year. The sale and merger of AWW to Norfolk Southern with the prospect of Pike #1 and #2 mines becoming "captive" shippers is jeopardizing their developments.

8. The affidavits of IPL, Hoosier and PSI filed herein set forth that Pike #1 and Pike #2 coal and the transloaded coal from other mines have a potential market of at least six generating stations and that for competitive rail transportation, each needs access to the ISRR line at the Oakland City junction. The six coal-fired generating stations (IPL's, Petersburg, Eagle Valley and Harding Street stations, PSI's Wabash and Cayuga stations and Hoosier's Merom Station) each purchase between .7 and 5 million tons of coal per year and have the combined capacity to produce electricity at the rate of 5000 mw/hr.

9. Up until the bankruptcy of Kindill's parent Horizon, and back to when these mines were originally developed by Old Ben Coal Company, a division of Standard Oil of Ohio, in the late 60's and early 70's (formerly Old Ben #1 and Old Ben #2), the mines had always been

specified by PSI, IPL and Hoosier comprising the market for the coal and the transportation are best set forth on ISRR's map, pp. 22 and PSI's map, PSI Reply, p. 11, incorporated herein by reference.

served by the short line switching carrier AWW. Over the last 25 years, this AWW short line has been critical to the success of Old Ben/Kindill/Pike Mines #1 and #2. The mines' owner owned 50% of the AWW and would not sell the 50% ownership – despite the efforts of Norfolk Southern and its predecessors (I have read in the Petition references to the Norfolk Southern efforts beginning in 1974 to purchase the mine's 50% ownership of AWW). Until now, such efforts were unsuccessful. The only conclusion is that ownership of 50% of the AWW by the mine's owner (keeping AWW neutral) was considered by the mine's owner to be essential to obtaining competitive rail service.

10. Indiana Land and its controlling owners did not advertise or seek to market the AWW before selling such to the Norfolk Southern. I made many inquiries concerning the plans for AWW, but could get no information.

11. I have had conversations with Charlie Baldwin of Norfolk Southern concerning Norfolk Southern's plans for the AWW, aside from what is set forth in the Petition about developing single line hauls to the south – and was informed that engines of AWW would be sold or otherwise placed, which indicates to me that Norfolk Southern will no longer actively pursue coal traffic from Pike #1 and #2 merely to be switched to another carrier.

12. If ISRR were to have trackage rights to serve directly Pike #1 and #2, this would result in a competitive coal price on a delivered per million Btu basis to the utilities that would make the mines able to fully develop the coal reserves and that would allow the utilities to produce energy at a lower cost, all to benefit of the public.


Felson Bowman

VERIFICATION

I, Felson Bowman, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed: 3/21/06

Felson Bowman
Felson Bowman