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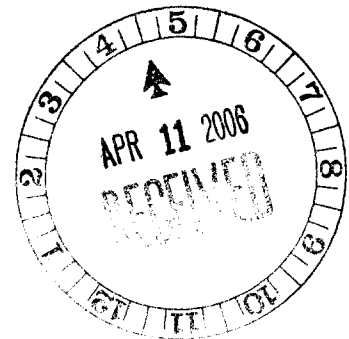
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April 11, 2006

BY HAND

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

216220



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

Dear Secretary Williams:

I enclose for filing in this proceeding an original and 10 copies of each of two versions of the Rebuttal of Norfolk Southern Corporation and Norfolk Southern Railway Company To Replies To Petition For Exemption. One version is marked “Confidential Version– Subject to STB Protective Order” and should not be placed in the public file. The other is marked “Public Version,” from which materials designated Confidential have been redacted.

I also enclose a 3.5” floppy disc containing the text of the two versions of the Rebuttal and the verified statements attached thereto.

Sincerely,

Richard A. Allen

Encl.

cc: (w/encl.) All parties of record

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 34839

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



REBUTTAL OF NORFOLK SOUTHERN CORPORATION AND NORFOLK
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Dated: April 11, 2006

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34839

**NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
– CONTROL AND CONSOLIDATION EXEMPTION –
ALGERS, WINSLOW AND WESTERN RAILWAY COMPANY**

**REBUTTAL OF NORFOLK SOUTHERN CORPORATION AND NORFOLK
SOUTHERN RAILWAY COMPANY TO REPLIES TO PETITION FOR
EXEMPTION**

Pursuant to the Board's order served April 3, 2006, Norfolk Southern Corporation ("NSC") and Norfolk Southern Railway Company ("NSR") (collectively, "NS") submit this rebuttal to the replies filed by Indiana Southern Railroad, Inc. ("ISRR"), PSI Energy, Inc. ("Cinergy/PSI"), Indianapolis Power and Light Company ("IPL") and Solar Sources Underground, LLC ("Solar") (collectively, "Respondents") opposing and requesting the imposition of conditions upon the petition for exemption NSR filed on February 14, 2006 (the "Petition"). The Petition seeks authority for NSR to acquire the remaining 50 percent of the stock of the Algiers, Winslow and Western Railway Company ("AWW") not currently owned by NSR (the "Transaction").¹

INTRODUCTION AND SUMMARY

There is no substance to any of the replies. The Petition seeks authority to effect a minor end-to-end consolidation of NSR and a 19-mile long short line railroad with

¹ On March 27, 2006, NS filed a motion to amend the petition to add NSC and to exempt NSC from the prior approval requirements of 49 U.S.C. § 11323 to control AWW. The Board granted the motion on April 3, 2006.

which NSR connects. Respondents central contention – that the Transaction will reduce rail competition for coal movements from mines on AWW that have been closed – is contrary to well-established STB and Interstate Commerce Commission (“ICC”) precedent, none of which is even acknowledged in the replies. The STB and ICC have consistently rejected claims that end-to-end transactions like this one will reduce competition and will lead the combined railroad to favor its longer single-line movements and foreclose other connecting carriers from participating in efficient interline movements. None of the replies raises any issues that would warrant further delay or denial of the petition for exemption or the imposition of any conditions upon it.

In fact, there are no reasons to conclude that the Board’s precedents and well-established competitive analysis should not apply to this minor transaction. On the contrary, the facts of this case demonstrate that the Transaction will have no adverse effects on competition or shippers but will in fact be beneficial. These facts include the following:

- NSR and its predecessor, Southern Railway Company, have been a 50 percent owner of AWW since 1974, and thus have been substantially involved in AWW’s business for more than 30 years, during which time AWW interchanged substantial amounts of coal shipments with ISRR and CSXT at Oakland City, IN for interline movements via those and other railroads to power plants in Indiana.
- There are approximately 60 coal mines and several truck transload facilities within 100 miles of the mines and loading facilities on AWW’s line. Many of these, including a transload on ISRR’s line at nearby Petersburg, IN that ISRR’s reply neglects to mention, are closer to the power plants discussed by Respondents.
- Respondents acknowledge that most, if not all, of those plants presently receive coal by truck as well as rail.

- The availability of truck transload facilities on competing railroads in the vicinity and the prevalence of truck shipments of coal further undermine any contention that the Transaction will reduce the competitive alternatives for shippers.
- None of the Respondents disputes the undeniable fact that the Transaction will substantially improve rail service for many coal shippers at destinations served directly by NSR by giving them a direct single-line service and eliminating the inefficiencies and added costs of an AWW-NSR interchange at Oakland City. These shippers include Cinergy/PSI's plant at Gibson, IN as well as three plants of Duke Energy, which has recently merged with Cinergy Corp., parent of Cinergy/PSI. This improvement will substantially increase the attractiveness of the coal origins now served by AWW for those shippers, to the benefit of buyers of those origins, like Solar.

The number of replies to NS' Petition and the erroneous contentions made necessitate the length of this response but should not be allowed to create the illusion that the Petition presents substantial competitive or other transportation issues or to obscure the fact that Respondents' arguments have no substance and no support in the Board's firmly established precedent and that this is a minor transaction clearly warranting exemption under 49 U.S.C. § 10502.

Accordingly, NSR and NSC respectfully request that the STB expeditiously grant the Petition for Exemption to provide certainty in the rail transportation market as the mines prepare to reopen to meet the nation's growing energy needs.

STATEMENT OF FACTS

All the relevant facts are set forth in the Petition for Exemption at issue. We review the basics here.

1. The AWW, Its Owners and Customers.

AWW owns and operates approximately 19 miles of railroad in southwestern Indiana. These lines are in the shape of a horizontal “Y.” Their western terminus is at Oakland City, IN, where AWW can interchange traffic with NSR, ISRR and CSXT.²

At the end of each branch of the “Y” are a coal mine and a loading facility where coal can be transferred from trucks to railcars, known as Pike #1 and Pike #2. As noted in the Petition, both mines and loading facilities are currently closed.³ Accordingly, AWW has moved little traffic and no coal since the second mine closed in October 2004.

NSR and its predecessor, Southern Railway Company, have owned 50 percent of the stock of AWW since 1974 pursuant to an ICC decision authorizing that acquisition.⁴ The other 50 percent of AWW’s stock is currently owned by American Metals and Coal, International, Inc. (“AMCI”). Subject to obtaining necessary regulatory authority or exemption, AMCI has agreed to sell its 50 percent ownership of AWW to NSR. Indiana Land and Mineral Company (“IL&M”), a joint venture of AMCI and T&T Washing Company, sold its interest in AWW to AMCI in January 2006. IL&M sold Pike #2 to Solar on April 7, 2006 and has agreed to sell Pike #1 to James River Coal Company.

² NSR has an east-west line that runs through Oakland City, where it can interchange with AWW and ISRR.. Twelve miles further west of Oakland City, NSR’s line crosses a north-south line of CSXT at Princeton, IN, where NSR can interchange traffic with CSXT. CSXT also has trackage rights over NSR’s line between Oakland City and Princeton and may use these trackage rights to transport coal from AWW origins. *See* Verified Statement of Doug Evans, attached to this Rebuttal.

³ *See* Verified Statement of Donald Evans, attached to this rebuttal. As Mr. Evans relates, Pike #1 has been closed since 1999, and Pike #2 closed in October 2004.

⁴ *Southern Railway Co. – Control – Algers, Winslow and Western Railway Co.*, Finance Docket No. 27542 (served March 11, 1974).

2. AWW's Rail Traffic.

In the years before October 2004, AWW originated substantial amounts of coal traffic from Pike #1 and Pike #2. Although some of that traffic was interchanged with NSR at Oakland City, AWW also interchanged significant amounts of that traffic at Oakland City with ISRR and CSXT for transportation to destinations served by those railroads and their connections, including some of the plants discussed by the Respondents. This was true before and after 1974, when NSR's predecessor, Southern Railway Company, acquired 50 percent of AWW's stock. *See Donald Evans V.S.* at 3-4.

[[REDACTED]
[REDACTED]
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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].]]

3. The NSC/NSR Petition and the Replies.

NSR filed the Petition for Exemption on February 14, 2006. On April 3, 2006, the Board granted the motion of NSC and NSR to amend the Petition to add NSC and to seek exemption from 49 U.S.C. §11323 for NSC, as well as NSR, to control AWW. The

Petition stated that NSR anticipated no change in interchange arrangements and that NSR will honor all transportation contracts applicable to movements from AWW origins for their duration. *See* Petition at 11, 12.

On March 16, 2006, ISRR, Cinergy PSI and IPL filed replies opposing the granting of the Petition unless it is conditioned by a grant of trackage rights to ISRR to operate over AWW's tracks to serve the mines and loading facilities, or alternatively, an order requiring NSR to switch cars to ISRR on unspecified terms. On March 22, 2006, Solar filed a similar reply.

All of the replies make the same essential argument: that the Transaction will harm shippers because NSR will allegedly favor longer single-line movements over its own lines and refuse to participate in interline movements with other railroads. Despite the fact that AWW is now the only railroad serving those mines and facilities, ISRR contends that the Transaction "will result in a classic two-to-one situation." ISRR Reply at 11.

Each of the replies is based on various incorrect statements of fact and on contentions of law, policy and competitive analysis that have been consistently rejected by the Board and the ICC in decisions that Respondents ignore.

ARGUMENT

I. RESPONDENTS' CENTRAL ARGUMENT IS CONTRARY TO NUMEROUS BOARD AND ICC DECISIONS CONCERNING THE EFFECTS OF END-TO-END CONSOLIDATIONS.

NS submits that this Transaction clearly warrants exemption under the standards of 49 U.S.C. § 10502. There is no need for any further review to protect shippers from an abuse of market power or to carry out the rail transportation policy. In fact, the concerns raised by Respondents have been consistently rejected by the STB and ICC.⁵ The Transaction is a garden variety end-to-end consolidation of a small short line railroad with one of its connecting rail carriers. The Board and the ICC have held many times that end-to-end rail consolidations, even ones involving two or more Class I railroads, generally present no significant competitive concerns. *See, e.g., CSX Corp. et al.—Control—Conrail Inc. at al.*, 3 S.T.B. 196, 248 (1998), *aff'd sub nom. Erie-Niagara Rail Steering Committee v. STB*, 247 F.3d 437 (2d Cir. 2001). (“*Conrail*”) (“It has been our experience that end-to-end restructurings of this kind rarely result in competitive harm.”)⁶ Nothing in the circumstances here indicates a different conclusion.

⁵ Even if it were not exempted however, inasmuch as the Transaction does not involve the merger or control of at least two Class I railroads, the governing statute would *require* the Board to approve it unless it could find that –

- (1) as a result of the transaction, there is likely to be *substantial* lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and
- (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

49 U.S.C. § 11324(d) (emphasis supplied). For the same reasons discussed *infra*, there is simply no basis for supposing that the Transaction at issue in this case would result in *any* lessening of competition, much less a substantial lessening of competition.

⁶ *See also Kansas City Southern—Control—The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and the Texas Mexican Railway Company*, STB Finance Docket No. 34342 (served November 29, 2005), slip op. at 17 (“An end-to-end transaction, by its very nature, is not likely to generate the kinds of competitive problems that often arise in connection with a ‘parallel’ transaction.”);

ISRR and Solar attempt to overcome the lack of legal support for their position, first, by blatantly mischaracterizing the nature of this Transaction. ISRR asserts at page 11 of its reply that the Transaction “will result in a classic two-to-one situation.” On the next page it asserts: “In similar two-to-one situation, the Board has imposed trackage rights to protect competition,” but cites no cases in support of the assertion. In the same vein, Solar asserts: “Whereas before the transaction, there were two competitors for transportation of coal from the mines – post-transaction there will be no competition.” Solar Reply at 3.

The claim that the Transaction will result in a “two-to-one situation” is manifestly false. Only AWW now serves the mines and other facilities located on its lines. There are no rail routes between those mines and facilities and other locations that do not require AWW’s participation. After the Transaction there will still be only one railroad serving the same locations and one carrier involved in all the routes – NSR – and there will be no reduction in the number of competitive rail alternatives available to those locations. Not only is the Transaction not a “classic” two-to-one situation; it is not a two-to-one situation at all.

Furthermore, the Board and the ICC have consistently rejected the contention, which is the central argument of Respondents in this case, that the consolidation of one railroad having exclusive access to shippers at one end of a rail route with a connecting railroad will harm competition or shippers. See *Burlington Northern et al.—Merger—Santa Fe Pacific et al.*, 10 I.C.C.2d 661, 751 (1995), *aff’d sub nom Western Resources, Inc. v. STB*, 109 F.3d 782 (D.C. Cir. 1997); *Conrail*, 3 S.T.B. at 248; *Union Pacific Corp*

Canadian National Ry. Co and Grand Trunk Corp.—Control—Duluth, Missabe and Iron Range Ry. Co. et al., STB Finance Docket No 34424, (served April 9, 2004), slip op. at 14 (same).

et al.—Control—MO-KS-TX Co. et al., 4 I.C.C.2d 409, 476 (1988); *Milwaukee—Reorganization—Acquisition by GTC*, 2 I.C.C.2d 427, 454-56 (1985); *Union Pacific—Control—Missouri Pacific; Western Pacific*, 366 I.C.C. 459, 538 (1982), *aff'd in relevant part sub nom Southern Pacific Transp. Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984).

The Board applied these precedents most recently in *Kansas City Southern—Control—The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and the Texas Mexican Railway Company*, STB Finance Docket No. 34342 (served November 29, 2004), which approved the control by Kansas City Southern (“KCS”) of the Texas Mexican Railway. In its decision, the Board rejected the argument of the Union Pacific Railroad (“UP”) that KCS’s impending acquisition of a Mexican railroad, TFM, would allow KCS to extract higher through rates from shippers and foreclose UP and Burlington Northern Santa Fe Railway from the Mexican market. The STB, however, found that “it would be unprofitable for KCS to use its control of TFM to foreclose this [UP and BNSF] traffic.” Slip op. at 18. The Board went on to observe:

If control of TFM would lead KCS to favor its own routings for those few points that are served both by KCS and UP (or KCS and BNSF), KCS might earn more revenue than in the past, and UP (or BNSF) might earn less, but that is not going to result in higher costs to shippers. This could well mean some harm to a competitor (UP, BNSF), but not harm to competition.

Id.

Furthermore, as a general matter, the Board and the ICC have concluded that, contrary to Respondents’ contention here, merging end-to-end railroads will generally not be inclined to foreclose other connecting carriers from interline movements with the merged railroad or necessarily to favor their own longer single-line routes. The ICC in the *BN/Santa Fe* case found that the claim of various shippers to the contrary was against

“both experience and logic.” 10 I.C.C. at 751. The ICC said: “Simply put, there is no reason for a carrier to foreclose an efficient connecting carrier just to achieve a long haul. If a connecting carrier can provide service at a lower cost than can BN/Santa Fe, it is in the interest of all of the carriers to reach an agreement for a joint service.” *Id.* at 752.⁷ As noted earlier, the Board recently reached the same conclusion in the *KCS* case. *See also, Seaboard Air Line Railroad Company—Merger—Atlantic Coast Line Railroad Company (Petition to Remove Traffic Protective Conditions)*, ICC Finance Docket No. 21215 (Sub-No. 5) (served March 27, 1995), slip op. at 5, and *Traffic Protective Conditions*, 366 I.C.C. 112 (1982), *rev’d on other grounds sub nom. Detroit, Toledo & Ironton R. Co. v. United States*, 725 F.2d 47 (6th Cir. 1984).

The courts have affirmed the foregoing conclusions and competitive analysis about the effects of vertical consolidations as well as the Agency’s application of them in particular cases. *Western Resources, Inc. v. STB*, 109 F.3d 782 (D.C. Cir. 1997); *Southern Pacific Transp. Co. v. ICC*, 736 F.2d 708, 717-719 (D.C. Cir. 1984).

In sum, Respondents’ central claim – that NSR’s acquisition of the remaining 50 percent of the stock of AWW will harm competition and shippers – is directly contrary to numerous STB and ICC decisions, all of which Respondents have simply ignored.⁸

⁷ In a footnote, the Commission observed: “A railroad’s choice of using its own single-line route or a joint line alternative route is similar to the ‘make or buy’ decision made by firms throughout the country. Railroads, like other firms, normally have no incentive to foreclose efficient alternatives to in-house production.” *Id.* at 752, n. 95.

⁸ ISRR’s is the only reply to cite any Board precedents, but the decisions cited by ISRR are cited only for general propositions having no bearing on the competitive issues presented by its arguments.

II. THE RELEVANT FACTS STRONGLY REINFORCE THE CONCLUSION THAT THE TRANSACTION WILL NOT HARM COMPETITION OR SHIPPERS AND WILL PROMOTE THE PUBLIC INTEREST AND NATIONAL RAIL TRANSPORTATION POLICIES.

Furthermore, far from suggesting that it is inapplicable, the relevant facts strongly indicate that the general conclusion – that end-to-end rail consolidations will not harm competition or shippers – is correct in this case and that the Transaction will benefit shippers and promote the national rail transportation policies set out in 49 U.S.C. § 10101.

Although Respondents repeatedly refer to AWW as “neutral” and “independent,” they unanimously ignore the fact that since 1974 NSR and its predecessor Southern Railway Company have owned 50 percent of AWW. While that ownership may not have amounted to control of AWW, it cannot plausibly be denied that it certainly gave NSR a substantial voice and interest in the affairs of AWW, which gives Respondents’ contentions even less force here than they might have in other contexts.

More importantly, NSR’s substantial ownership of AWW since 1974 has *not* foreclosed substantial interline movements of coal and other products from AWW origins. *See* Donald Evans V.S. at 3-4. Nor is there any reason to suppose that NSR would do so after the Transaction. NSR is purchasing the remaining 50 percent of AWW to generate profits. If coal markets for AWW-sourced coal are on another railroad, then NSR will want to participate in those moves, which it would not otherwise be a part of. NSR’s incentive is to participate in moves that generate a profit, whether interline or single-line, as evidenced by the fact that [[REDACTED]]

[REDACTED]

[REDACTED]] Respondents' assertions, made without citing any supporting evidence, that after the Transaction, NSR "will have no incentive to participate in rates for [interline movements from AWW origins]" and will "foreclose" such movements, ISRR Reply at 11 and 58 (*Leitze V.S.*), is contrary to common business sense. Those unsupported allegations are not only contrary to the evidence but also, as the ICC observed in *BN/Santa Fe*, "against experience and logic." 10 I.C.C.2d at 751.

Furthermore, there is very substantial geographic and intermodal competition for the rail transportation of coal from AWW coal origins, which further demonstrates that the Transaction will have no significant adverse effect on rail competition or shippers, including Cinergy/PSI, Hoosier, and IPL. As discussed in the verified statement of Doug Evans, there are approximately 60 other coal mines within 100 miles of Pike #1 and Pike #2. Many of these are much closer to the plants than are Pike #1 and Pike #2. Given that "relatively short distance[s] from the mines to the plants generally translate[] into low total delivered cost," IPL Reply at 2, these other mines provide numerous competitive sources for coal for Respondents' Indiana power stations, in addition to Pike #1 and Pike #2.

Likewise, there are other truck transload facilities in the vicinity of Pike #1 and Pike #2 where coal can be trucked in and loaded onto rail cars for delivery by rail to Respondents' Indiana power stations. Two of these facilities, at Petersburg and Maysville, IN, are directly on the ISRR. In fact, the Petersburg transload facility is 21 rail miles closer to all of the plants discussed by Respondents than Pike #1 and 30 miles

closer than Pike #2.⁹ Thus, ISRR need not have access via trackage rights to the transload facilities at Pike #1 and Pike #2 in order to move coal from nearby mines to Respondents' Indiana power stations.

Furthermore, trucks themselves are direct competitors. IPL notes that it is receiving coal at its Petersburg Station via truck from Augusta Mine.¹⁰ IPL Reply at 3. Similarly, Mr. Harold Leitze acknowledges in his verified statement that truck transportation of coal is an alternative. Harold D. Leitze V.S. at 3.

Moreover, none of the Respondents dispute that the Transaction would result in new, more efficient single-line service to numerous NS-served destinations. One such beneficiary of new single-line service from Pike #1 and Pike #2 would be Cinergy/PSI's Gibson Station near Carol, IN.¹¹ In addition, as a result of the recent merger of Duke Energy and Cinergy/PSI, NS would be able to provide efficient, single-line service from Pike #1 and Pike #2 to three Duke power stations in North Carolina (at Belews Creek, Allen and Marshall). Doug Evans V.S. at 3.

As discussed in the Petition, the Board has frequently recognized the public benefits of transactions that allow railroads to provide single-line service where only interline service was available before. Most recently, for example, in *Kansas City Southern—Control—The Kansas City Southern Ry. Co. et al.*, STB Finance Docket No.

⁹ The transload facility at Maysville, approximately 15 miles north of Petersburg, is that much closer to all of the plants except the IPL plant at Petersburg itself.

¹⁰ As Doug Evans notes in his verified statement, attached hereto, the Petersburg Station and the ISRR's transload facility at Petersburg are less than 10 highway miles from Pike #2, but approximately 30 rail miles. Doug Evans V.S. at 5.

¹¹ As discussed in the attached verified statement of Doug Evans, Cinergy/PSI is incorrect that NSR can now serve the Gibson plant from AWW origins in single-line service. Cinergy/PSI says that it assumes NSR has trackage rights over AWW because Cinergy/PSI has a contract with NSR for single-line movements of coal to Gibson Station from various mine origins, including Pike #1 and Pike #2. See Cinergy/PSI Reply at 3, n.2 and Vincent Stroud V.S. at 3. This is incorrect. Although the contract is only between Cinergy/PSI and NSR, AWW would transport the coal under this to Oakland City as NSR's agent and interchange it there with NSR.

34342 (served November 29, 2004), slip op. at 17, the Board approved an end-to-end transaction and noted that the transaction will “benefit shippers by enabling KCS to offer expanded single-line service.”¹² The fact that single-line moves are generally more efficient, faster and economical for shippers than interline moves does not mean that NSR will not participate in interline movements when those movements are efficient and provide a reasonable return to NSR and the other participating carriers. Nor does the fact that railroads can offer shippers a better price for more efficient moves than for less efficient ones mean that a transaction that allows the more efficient move is against the public interest. On the contrary, the public interest is best served when shippers have options that allow them to move their products more efficiently and inexpensively, as single-line service allows.

III. RESPONDENTS’ OTHER CLAIMS ARE WITHOUT MERIT.

A. NSR’s Petition Amply Showed That The Transaction Warrants Exemption Under the Standards of 49 U.S.C. § 10502.

ISRR and Solar argue that the NS failed to show that the Transaction qualifies for an exemption under the requirements of 49 U.S.C. § 10502. Other than ISRR’s principal argument, which was discussed in the prior section, ISRR incorrectly claims that the Transaction is not of “limited scope” within the meaning of § 10502(a)(2)(A). ISRR Reply at 14. The Transaction involves NSR’s acquisition of the remaining 50 percent of the stock of a 19-mile short line railroad that once served two coal mines that have been closed since October 2004 in one case and for seven years in

¹² See also, e.g. *Canadian National Railway Co. et al.—Control—Illinois Central Corp.*, 4 S.T.B. 122, 1999 STB LEXIS 305, at *38 (1999) (citing as a public benefit of the merger the “enhanced opportunities for single-line service preferred by shippers”); *Conrail*, 3 S.T.B. at 333 (citing as a public benefit the fact that “the expansion of the NS and CSX systems will enable them to provide more competitive single-line service over more direct routes . . .”).

the other. Indeed, it is difficult to imagine a transaction more limited in scope. ISRR refers to “the volumes of coal affected by the Merger,” (ISRR Reply at 7), but AWW has moved no coal at all for a year and a half. In any event and as noted in our Petition, the Board has found considerably larger transactions to be of limited scope within the meaning of § 10502(a)(2)(A).¹³

ISRR and Solar also incorrectly contend that the Petition did not adduce sufficient evidence to satisfy the requirements of § 10502 and 49 C.F.R. § 1121.3(a). ISRR Reply at 4, 15; Solar Reply at 1-2. Contrary to ISRR’s claim that “[n]o public benefits are set forth in the Petition,” ISRR Reply at 4, the Petition describes the public benefits of the Transaction at some length. *See* Petition at 8-12. The substantial benefits to shippers, also discussed in the previous section, have not been disputed by any of the Respondents.

Moreover, ISRR’s and Solar’s argument that NS failed to adduce sufficient evidence to meet its alleged burden of proving that the Transaction would not harm competition and shippers puts the burden in the wrong place. NS was entitled to rely on the well-settled presumption, established by the many cases cited earlier, that this end-to-end consolidation would not harm competition and shippers. Respondents have shown no harm to shippers, only alleged potential harm to a competitor.

Furthermore, § 10502 expressly directs the Board to exempt transactions from regulatory requirements “to the maximum extent consistent with this part,” and the Board and the ICC have recognized in many cases that Congress intended that the Board should

¹³ *See Village of Palestine v. I.C.C.*, 936 F.2d 1335, 1341 (D.C. Cir. 1991) (affirming ICC’s decision which found transaction be of limited scope where railroad acquired 90.3 miles of track and the transaction was to be consummated without the issuance of new securities or the restructuring of rail operations). *See also Union Pacific Railroad Co.—Acquisition and Operation Exemption—Mid Michigan Railroad, Inc.*, STB Finance Docket No. 33652 (served April 13, 1999) (exempting transaction to permit acquisition and operation of a 107.3-mile line of railroad); *Texas Mexican Railway Co.—Purchase Exemption—Union Pacific Railroad Co.*, STB Finance Docket No. 33914 (served December 11, 2000) (exempting transaction to permit acquisition and operation of an 84.5-mile line of railroad).

use its exemption authority liberally. *See Norfolk Southern Railway Co.—Purchase Exemption—Union Pacific Railroad Co.*, STB Finance Docket No. 33609 (served November 10, 1999), slip op. at 5 (“Congress instructed us to use this exemption authority liberally and ‘to adopt the policy of reviewing carrier transactions after the fact to correct abuses of market power.’”) (quoting H.R. Conf. Rep. 96-1430, at 105 (1980)); *Orange County Transportation Authority et al.—Acquisition Exemption—The Atchison, Topeka and Santa Fe Railway Co.*, STB Finance Docket No. 32173 (served March 12, 1997), slip op. at 5 (“The legislative history of former section 10505 (now section 10502) indicates that the ICC was, and the Board is, to grant exemptions liberally and to correct problems after they arise.”).

Unfounded opposition should not be sufficient to deny worthy transactions the benefits of the petition for exemption process in this case. It has not been in the past. Indeed, the Board has routinely exempted transactions despite vocal opposition from interested parties. *See, e.g., San Pedro Operating Railroad Co. LLC—Abandonment Exemption—In Cochise County, AZ*, STB Docket No. AB-1081X (served February 3, 2006); *Norfolk Southern Railway Company – Abandonment Exemption – in Nottoway, Prince Edward, Cumberland, and Appomattox Counties, VA*, STB Docket No AB-290 (Sub No. 252X) at 4 (Jan. 8, 2005); *Soo Line Railroad Co.—Abandonment Exemption—In St. Paul, Ramsey County, MN*, STB Docket No. AB-57 (Sub-No. 46X) (served April 20, 1999).

In sum, ISRR and Solar have made no convincing case that this Transaction does not warrant exemption under 49 U.S.C. § 10502.

B. The Conditions Sought By Respondents Are Completely Unjustified.

To rectify the supposed anticompetitive effects of the Transaction, ISRR asks the Board to require NSR to provide what ISRR terms “limited” trackage rights over AWW’s lines. ISRR Reply at 4. Inasmuch as the requested trackage rights would give ISSR direct local access to the two mines and truck transload facilities on the lines, it is difficult to see anything “limited” about them. In any event, since the Transaction will have no substantial anticompetitive effects for the reasons previously discussed, imposition of such a condition would be a completely unjustified governmental interference with a freely negotiated marketplace transaction. The Board has consistently recognized that it is inappropriate to impose conditions on transactions requiring its approval simply to give shippers access to more railroads than they had before the transaction and that conditions are warranted only when the transaction itself would result in a “significant loss of competition or the loss by another rail carrier of the ability to provide essential services,”¹⁴ neither of which is the case here.¹⁵

The alternative condition requested by ISRR is equally unjustified. ISRR describes it as “requir[ing] the establishment of negotiated switch charges covering rail transportation of coal from the two mine load outs served by AWW to the interchange location between AWW and ISRR at Oakland City Junction, IN that will maintain the competitive option for shippers.” ISRR Reply at 4. The term “negotiated” means charges mutually agreed to by both railroads. But after the Transaction, if a customer wants coal to move to any destination requiring movements over the ISRR, NSR will

¹⁴ *Conrail*, 3 S.T.B. at 277-278.

¹⁵ It is also noteworthy that the trackage rights ISRR requests would create for ISRR single-line service to at least two of the IPL plants, Petersburg and Eagle Valley, service that ISRR argues is anticompetitive, at least when NSR is the carrier gaining single-line service.

have a statutory obligation to interchange traffic with ISRR at Oakland City for movements to destinations not served by NSR, *see* 49 U.S.C. §10703, and it will certainly negotiate with ISRR concerning the compensation it will require for the transportation to the interchange, whether in the form of switch charges, local rates or divisions of joint rates. There would be no reason, however, for the *Board* to order NSR to establish charges for that transportation to which NSR will agree. NSR will do that itself.

Although ISRR describes the alternative condition it seeks in terms of mutually negotiated rates, Cinergy/PSI, Hoosier and IPL (but not Solar) support an alternative condition that would require switching by NSR at rates to be determined and established by the *Board*, although as a decidedly less preferred alternative. *See* Cinergy/PSI Reply (Stroud V.S. at 9); ISRR Reply at 58-59 (Leitze V.S. at 5-6); IPL Reply at 4-5. Again, because the Transaction will not have an adverse effect on competition or shippers, such a condition is entirely unjustified and intrusive and would, moreover, require a form of ratemaking proceeding by the Board to establish the level of the charge.

C. Hoosier Energy Will Not Be Harmed By The Transaction.

Most of the arguments in the verified statement of Mr. Leitze of Hoosier, attached to ISRR's reply, echo those of the other Respondents and have been discussed above; they will not be readdressed here. Moreover, the specific facts alleged by Mr. Leitze concerning service to Merom Station only confirm that the Transaction will have no adverse effect on that service.

For example, Mr. Leitze states that Merom Station previously received coal from Pike #2 before it closed in October 2004 under a contract covering "one million tons of

coal annually” that was “routed over the lines of AWW, ISRR and INRD.” *Id.* at 56. Inasmuch as NSR owned 50 percent of AWW at that time, this substantial previous service squarely refutes the claim that NSR will be unwilling to participate in future movements of coal from Pike # 2 to Merom station. Mr. Leitze also fails to note the many other sources of coal as close or closer to Merom Station as Pike #2, as discussed earlier.

Mr. Leitze also asserts that “Hoosier generally prefers using rail service to deliver coal to Merom Station.” ISRR Reply at 56. This statement, however, indicates that Merom Station also receives coal by truck and that truck service is not only an alternative transportation option to rail but also sometimes a preferred option. Mr. Leitze’s further asserts that the truck transloads at Pike # 1 and Pike #2 will “provide additional transportation alternatives for Hoosier,” *id.* at 57, but fails to mention that a truck transload facility exists directly on the ISRR at Petersburg, IN, some 20 or 30 rail miles closer to Merom Station than Pike #1 or Pike # 2, to which coal from nearby mines can also be trucked.

Finally, there is no basis for Mr. Leitze’s statement that NSR’s cooperation in connection to movements to Merom Station “has not been forthcoming.” ISRR Reply at 58. Mr. Leitze provides no explanation or support for this statement, and it is incorrect, as detailed in the attached verified statement of Doug Evans. [[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]]

D. Cinergy/PSI Will Benefit From The Transaction.

Cinergy/PSI's claims that the Transaction will harm service to its Wabash and Cayuga plants are also not supported by its reply.

First, the claim that NSR will "promote its long haul, single-line service at the expense of short-haul [interline] movement," Cinergy/PSI Reply at 6, thereby causing the "economic foreclosure of the Oakland City interchange," *id.* at 7, is refuted by many examples of NSR's participation in relatively short-haul segments of joint line movements where NSR is the only railroad serving either the origin or destination, including, most tellingly for present purposes, its service [[REDACTED]

[[REDACTED]]¹⁶ Furthermore, the verified statement of Mr. Stroud of Cinergy/PSI confirms the existence of substantial geographic and intermodal competition from rail service in southwestern Indiana when he states:

In this regard, the Indiana coal mining industry consists of a few relatively large mines that can ship coal in trainload quantities and numerous smaller mines that can ship only via truck. In order to take advantage of the economies of scale inherent in unit-train operations, several coal producers in southern Indiana have constructed transloading facilities that receive coal by truck from smaller mines.

Stroud V.S. at 4. Although Mr. Stroud states that Cinergy/PSI would like ISRR to have direct access to the transloading facilities on the AWW in order for Cinergy/PSI "to broaden its base of available coal suppliers," *id.* at 5, like Mr. Leitze of Hoosier he fails to mention the transload facility directly on the ISRR at Petersburg. Mr. Stroud's desire

¹⁶ [[REDACTED]]

to “broaden” Cinergy’s existing source of coal supplies, moreover, is not a valid basis for imposing trackage rights or other conditions on transactions subject to Board approval.

See, e.g., Conrail, 3 S.T.B. at 278.

Mr. Stroud’s statement also indicates that Cinergy/PSI plants in Indiana receive coal by truck as well as rail. *See Stroud V.S.* at 2. While he says Cinergy/PSI “prefers” rail service, he indicates that truck movements are a more feasible alternative in Indiana than elsewhere, when he states: “In the Indiana coal market, short-haul multi-carrier transportation is the norm and has developed into efficient operations moving significant volumes of coal.” *Id.* at 2, 3. Furthermore, while he states that the Wabash River Station is 104 miles and Cayuga Station is 140 miles from Oakland City, he fails to mention the numerous coal mines and transload facilities much closer to those plants than Pike #1 and Pike #2, as discussed earlier.¹⁷

Finally, Mr. Stroud is incorrect that “there is no direct interchange between the AWW and CSXT at Oakland City Jct.” *Id.* at 8. As discussed in the attached verified statements, CSXT has trackage rights over NSR’s line between Oakland City and Princeton, IN, for movements of coal from AWW origins to the Southern Indiana Gas & Electric Company’s plant at Abee, IN, [[REDACTED]

REDACTED]]

Not only will the Transaction not harm service to Cinergy/PSI’s Wabash River and Cayuga plants, it will provide significant benefits to other Cinergy/PSI plants served

¹⁷ Cinergy/PSI’s professed concern about the supposed effect of this Transaction on service to the Wabash and Cayuga plants is also surprising in view of the fact that Cinergy/PSI is supporting the transaction before the Board in *The Indiana Rail Road Co.—Acquisition—Lines of Soo Line Railroad Co.*, STB Finance Docket No. 34783, in which a line which the Soo Line Railroad now uses to serve the Wabash Station and which it could use to provide interline service to Cayuga Station with ISRR is being sold to INRD, a subsidiary of CSXT.

by NSR at destination by enabling NSR to provide direct single-line service to those plants from AWW origins that could only now be provided by joint AWW-NSR service. As discussed earlier, these plants include Cinergy/PSI's Gibson Station plant near Carol, IN as well as at least three plants of Duke Energy Company, which has recently consummated a merger with Cinergy/PSI. Cinergy/PSI does not dispute these benefits, and, as previously noted, the Board has frequently recognized them as public benefits in other end-to-end consolidations.

E. Solar Will Benefit From The Transaction.

For the same reasons, the Transaction should benefit Solar, the recent purchaser of Pike #2, by allowing more efficient single-line service from that location and therefore making it a more attractive source of coal for plants served at destination by NSR. Like the other Respondents, Solar does not dispute these benefits.

Felson Bowman of Solar claims to be concerned that NSR may sell AWW's locomotives, *see* Bowman V.S. at 5, but the retention or sale of AWW's equipment has no bearing on whether and to what extent NSR will interchange traffic with other carriers at Oakland City. If an interline movement is efficient and makes economic sense, it will not be less so if NSR equipment rather than AWW equipment is used.

Although Mr. Bowan supports ISRR's request for conditions out of professed concern with the alleged anti-competitive consequences of the Transaction on service to Pike #2, it is worth noting that Solar nevertheless recently consummated its purchase of Pike #2. Moreover, the current owner of Pike #1, IL&M, and the current owner of AWW, AMCI, appears to have no such concerns. IL&M sold its interest in AWW to AMCI in January 2006, when it still owned Pike #1 and Pike #2, and AMCI has agreed to

sell that interest to NSR. Since AMCI is one of the joint ventures in IL&M and therefore still has an indirect interest in Pike #1, these facts strongly suggest that IL&M and AMCI recognize that the sale of AWW to NSR will significantly benefit those properties and add to their value, not the reverse.¹⁸

F. The Transaction Will Not Harm IPL.

The Transaction will also not harm IPL. IPL offers no more convincing reasons than the other Respondents for its claim to the contrary.

Barry J. Bentley of IPL states that IPL believes that coal from Pike #1 and Pike #2 “could be an economical supply” for its Petersburg, Eagle Valley and Harding Street plants and that IPL “is considering” using the transload at Pike #1 to source coal that would be trucked to that transload from the nearby Augusta Mine. Bentley V.S. at 3. He acknowledges, however, that coal is currently being trucked from that mine some 25 miles to IPL’s Petersburg Station and does not explain why it would be more efficient for that relatively short move to load that coal on trucks and then transfer it from the trucks to rail cars. Nor does he note that coal can also be trucked from Augusta, Pike #1 and #2 and other mines in the area to Petersburg and transloaded there onto ISRR cars for delivery to IPL’s Eagle Valley and Harding Street plants.

In sum, IPL’s statement not only fails to show that the Transaction will harm IPL but also affirmatively shows that IPL has ample transportation options for its plants.

¹⁸ Mr. Bowman claims he made inquiries about the plans of IL&M to sell its interest in AWW, presumably before that interest was sold on January 23, 2006 to AMCI, but could get no information. Bowman V.S. at 4. If Mr. Bowman and Solar were not satisfied with the information they were getting from the owner or owners of Pike #2, however, they were not required to pursue the purchase of that property.

REQUESTS FOR ORAL ARGUMENT AND FURTHER REPLIES

Although the number of replies to NS' petition and the number of contentions made therein have necessitated this extended reply, its length and the volume of Respondents' arguments should not obscure from the Board that those arguments have no substance and no support in the Board's well established precedents and that this is a minor transaction of limited scope, which presents no substantial competitive or other transportation issues and which clearly warrants exemption under 49 U.S.C. §10502.

In their effort to portray the Transaction as presenting difficult issues, some Respondents claim that the Petition failed to address their points and have requested oral argument or the right to file further written replies.¹⁹ But NS had no reason to anticipate Respondents' insubstantial arguments, and the making of those arguments does not create substantial issues. Respondents, however, made their arguments without any discussion, or even acknowledgement, of the substantial Board precedent adverse to their basic position, which surely must have been known to them. They also made factual assertions, such as the claim the Transaction is a "classic two-to-one situation," that are plainly incorrect, and omitted relevant facts adverse to their claims, such as the previous participation of AWW and NSR in interline shipments and the existence of a nearby truck transload facility on ISRR.

In these circumstances, NS respectfully submits that oral argument or further pleadings would not materially assist the Board in reaching a correct decision but would only thwart Congress's purpose in requiring the Board to exempt appropriate transactions from the burdens and delays of regulation.

¹⁹ Letter filed on March 24, 2006 by Louis Gitomer, counsel for ISRR; letter filed April 4, 2006, by Christopher Mills, counsel for Cinergy/PSI.

CONCLUSION

The Board should grant NS' Petition for Exemption without further delay.



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Dated: April 11, 2006

ATTACHMENTS

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34839

**NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
– CONTROL AND CONSOLIDATION EXEMPTION –
ALGERS, WINSLOW AND WESTERN RAILWAY COMPANY**

VERIFIED STATEMENT OF DOUG EVANS

My name is Doug Evans. My position is Director, Utility North, of the Coal Business Group of Norfolk Southern Railway Company ("NSR"). My responsibilities include marketing and sales in connection with the transportation of coal by NSR. I am providing this statement in support of the petition for exemption filed by NSR and its parent corporation, Norfolk Southern Corporation, to permit NSR to acquire the remaining 50 percent of the stock of the Algiers, Winslow and Western Railway Company ("AWW") and to respond to certain assertions made by other parties to that proceeding.

NSR and its predecessor, Southern Railway Company, have owned 50 percent of the stock of AWW since 1974. The other 50 percent of the stock of AWW has been owned at different times by various mining companies that have owned the two coal mines and truck transload facilities served by AWW, which are not presently operating. As a result of its stock ownership, NSR has had substantial involvement in the management and operations of AWW and a substantial interest in the success of its business, although all train operations over AWW lines have been performed by AWW employees and usually with AWW equipment. NSR does not have trackage rights to operate over AWW lines. For some movements, I and other NSR personnel, at AWW's

request, have acted as the marketing agent for both railroads. For some movements on both NSR and AWW lines, AWW has acted solely as a switching carrier for NSR and has not appeared as a separate line haul carrier in the tariff or contract pertaining to the movements.

The mines and transload facilities on AWW are known as Pike #1 and Pike #2. Pike #1 has not been operating for approximately seven years. Pike #2 has not operated since October 2004. I know that coal is scheduled to move later this week from Pike #2 since Solar Underground LLC (“Solar”) has now completed its acquisition of that property.

AWW can interchange traffic at Oakland City, IN with NSR, Indiana Southern Railroad (“ISRR”) and, for certain traffic, CSXT. In 1993, to accommodate the needs of CSXT and Southern Indiana Gas & Electric Company (“SIGECO”), NSR granted trackage rights to CSXT over NSR’s east-west line between Oakland City and Princeton, IN, where NSR’s line crosses CSXT’s north-south line, in order to permit CSXT to receive from AWW at Oakland City coal traffic originating at Pike #1 and Pike #2 and to deliver that traffic to SIGECO’s plant at Abee, Indiana. Until 1994, CSXT also had trackage rights over ISRR’s line between Evansville, IN and Oakland City and could receive coal from AWW at Oakland City for movement to CSXT destinations and connections over that line, but CSXT discontinued those rights in 1994.¹

NSR can also interchange traffic with CSXT at Princeton, IN. I understand that Mr. Vincent Stroud of PSI Energy Inc. has stated that CSXT is not accepting interchange

¹ See *CSX Transportation, Inc.—Discontinuance of Trackage Rights Exemption--Vanderburgh, Warrick, Gibson and Pike Counties, IN*, ICC Docket No. AB-55 (Sub-No. 494X), served September 28, 1994.

of coal traffic from NSR at Princeton, IN. This is not correct. NSR has interchanged coal traffic at Princeton in the past. Our records show, for example, that NSR interchanged almost 1900 carloads of both merchandise and coal traffic with CSXT at Princeton in 2004. As far as I am aware, CSXT has not advised NSR that it will not accept interchange of coal traffic there in the future.

I believe NSR's acquisition of the remaining 50 percent of the stock of AWW will provide significant benefits to AWW's customers, AWW's employees and NSR's customers. Currently, all rail movements from AWW origins are moved by AWW crews and equipment to Oakland City, IN where they must be interchanged with NSR, ISRR or CSXT. After the transaction, movements to NSR-served destinations can be moved by NSR crews and equipment in single-line service. This single-line service, by eliminating the interchange, will be more efficient than joint-line NSR-AWW service between the same origins and destinations. This improvement will benefit customers at those destinations and should make the coal and other products from those destinations more attractive to those customers and thereby benefit the owners of Pike #1 and Pike #2.

The customers that will benefit from this improved single-line service will include the Gibson Station power plant of Cinergy Corp.'s subsidiary, PSI Energy, Inc. ("Cinergy/PSI"), at Carol, IN, which is served by rail only by NSR. They will also include three power plants of Duke Energy Company, which completed its merger with Cinergy Corp. on April 3, 2006. These plants, all served directly by NSR, are the Belews Creek plant at Belews Creek, NC, the Allen plant at Belmont, NC and the Marshall plant at Catawba, NC.

I understand that some parties in this proceeding have contended that after NSR acquires the remaining 50 percent of the stock of AWW, it will make the interchange of traffic originating at Pike #1 and Pike #2 with other railroads commercially infeasible in order to promote single-line movements from those origins over its own system. I believe this contention is not correct and is contradicted by the historical record.

Although the transaction will permit NSR to provide faster and more efficient single-line service to customers at destinations directly served by NSR, NSR's record has shown it to be very willing to support and participate in interline movements to other destinations when they serve the needs of the customer. First, before Pike #1 and Pike #2 closed, AWW interchanged substantial amounts of coal traffic at Oakland City with railroads other than NSR despite the fact that NSR owned 50 percent of AWW and had substantial involvement in AWW's operations and coal marketing, as discussed in the verified statement of Don Evans of AWW. Second, NSR has frequently participated in relatively short segments of joint line movements of coal to customers in situations in which NSR has been the only railroad serving either the origin or the destination. Recently, for example, NS, as the destination carrier, participated in substantial interline movements of coal [[REDACTED]

[REDACTED]
[REDACTED]]

There is a tremendous amount of both geographic and intermodal competition for the rail transportation of coal to consumers of coal in the vicinity of Pike #1 and #2. A map of the Illinois Basin coal region produced by the Platts Division of the McGraw Hill Company in 2001 shows that there are approximately 60 coal mines within just 100 miles

of Pike #1 and Pike #2. Many of these mines are much closer to most of the power plants discussed by parties in this proceeding, specifically PSI/Energy's Wabash River and Cayuga Stations, the Merom Station of Hoosier Energy Rural Electric Cooperative ("Hoosier") and the Eagle Valley and Harding Street Stations of Indianapolis Power & Light Company ("IPL"). There are, of course, hundreds of additional sources of coal beyond the 100 mile radius that also provide geographic competition for rail transportation from Pike #1 and Pike #2.

Trucks also provide significant competition to the transportation of coal by rail, particularly in Indiana, where the movements from origin to destination are often relatively short compared to other regions of the country. Many power plants receive coal directly by truck as well as rail. I understand these include the Wabash River, Cayuga, Merom and Petersburg Stations.

Trucks provide competition to railroads not only by direct deliveries to the power plants but also by transporting coal from mines to transload facilities on other railroads from which the coal may then be delivered by rail to the plants. In fact, there is so much coal being produced by smaller, non-rail served coal mines in Southern Indiana that they truck coal everywhere in that region. These small, non-rail served coal producers work very hard to get their coal into new markets.

I am aware of several locations where coal can be and is being transloaded from truck to rail within 30 miles of Pike #1 and Pike #2. Two of these are directly on the ISRR's line. I am aware that ISRR considered and may be transloading coal at its yard at Petersburg, IN, where IPL's Petersburg Station is also located. The Petersburg facility is approximately 30 rail miles from Pike #2 but less than 10 highway miles. Coal can be

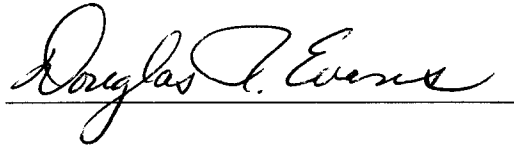
and has been trucked to Petersburg from different mines in the area, transloaded onto rail cars and transported by the ISRR from there to various destinations. The other transload facility is at Maysville, IN, approximately 15 rail and highway miles north of Petersburg. This facility is owned by Black Beauty Coal Company, and coal both from local Black Beauty mines and coal trucked from other non-Black Beauty mines are loaded there onto ISRR trains.

Competition for rail transportation of coal in the region is also provided by the more than 20 power plants located south of Oakland City on the Ohio River, all of which can receive coal by barge. Not only is barge transportation of coal to these potential customers of Pike #1 and Pike #2 and the railroads and trucking companies that serve them highly competitive with both rail and truck transportation, but also the ability of power companies to shift power generation among stations places a very significant competitive constraint on what coal companies and their railroads and trucking companies can charge to plants that are not directly served by barges.

I am aware of [[f

VERIFICATION

I, Doug Evans, verify under penalty of perjury that I have read the foregoing verified statement and know its contents, and that it is true and correct to the best of my knowledge and belief. I further certify that I am qualified and authorized to make this statement.

A handwritten signature in cursive script, reading "Douglas T. Evans", is written over a horizontal line.

Executed on April 10th, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34839

**NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
– CONTROL AND CONSOLIDATION EXEMPTION –
ALGERS, WINSLOW AND WESTERN RAILWAY COMPANY**

VERIFIED STATEMENT OF DONALD EVANS

My name is Donald Evans. My position is General Manager of the Algers, Winslow & Western Railway Company (“AWW”). I have been employed by the AWW since 1979. My most recent positions have been Transportation Supervisor, Manager of Operations and, since December 2005, General Manager. My responsibilities include managing all aspects of AWW’s operations. I am providing this statement in support of the petition for exemption filed by Norfolk Southern Railway Company (“NSR”) and its parent corporation, Norfolk Southern Corporation, to permit NSR to acquire the remaining 50 percent of the stock of the AWW.

AWW owns and operates 24.43 miles of railroad track, including loop track, in southwestern Indiana. The western terminus of these lines is at Oakland City, IN, where AWW has interchanged traffic in recent years with NSR, Indiana Southern Railroad (“ISRR”) and CSX Transportation, Inc. (“CSXT”).

The AWW was organized and built in 1927 primarily to provide rail service to two coal mines, now known as Pike#1 and Pike#2, formerly known as Kindill #1 and Kindill #2. Pike #1 is on the southern branch of AWW at Enosville, IN, and Pike #2 is on the northern branch of AWW at Algers, IN. At each mine are loading facilities at

which coal can be delivered from other locations and transloaded onto rail cars. The AWW also serves Railworks Wood Products, near Algers, which produces railroad ties and in recent years has shipped approximately 80 carloads of ties per month on AWW.

NSR and its predecessor, the Southern Railway, have owned 50 percent of the stock of AWW since 1974. The other 50 percent has been owned by different companies over the years, which have also owned and operated the mines. Recently the mines and the other 50 percent of AWW were owned by Horizon Natural Resources ("Horizon").

Pike #1 ceased operation in December 1999 and has not shipped coal since then. Pike #2 ceased operations in October 2004, after Horizon filed for bankruptcy, and has not shipped coal since then.

I understand that in October 2004, Lexington Coal Company ("Lexington") purchased the mines and Horizon's 50 percent interest in AWW. Lexington sold the mines and its interest in AWW in September 2005 to Indiana Land and Mineral Company, LLC ("IL&M"), which I understand is a joint venture between American Metals and Coal International, Inc. ("AMCI") and T&T Washing Company. In January 2006, IL&M transferred its interest in AWW to AMCI, which has agreed to sell that interest to NSR subject to necessary regulatory approvals. I understand that Solar Sources Underground, LLC ("Solar") completed its purchase of Pike #2 on April 7, 2006 and that James River Coal Company has announced that it has reached a definitive agreement to purchase Pike #1 from IL&M.

Before October 2004, AWW had approximately 8 full-time employees and before December 1999 it had approximately 10 full-time employees. Today, I am AWW's only

full-time employee, although we recall two or three furloughed employees from time to time when we need to move cars for the tie plant and provide track maintenance.

NSR has had substantial involvement over the years in the management of AWW and the marketing of AWW's rail services. At AWW's request, NSR marketing personnel have acted on behalf of AWW to market AWW's services. In the case of traffic that AWW has interchanged at Oakland City with NSR, AWW has often acted as a switching carrier, receiving a switching fee from NSR, and has not appeared as a line haul carrier in the tariff or transportation contract applicable to the movement.

In my experience, NSR has been very willing to have AWW interchange coal traffic with ISRR and CSXT at Oakland City for transportation to destinations not served by NSR. In 1993, NSR granted trackage rights to CSXT to operate over NSR's line between Oakland City and Princeton, IN, where NSR's line crosses and connects with CSXT's north-south line to permit CSXT to receive coal traffic from AWW at Oakland City and deliver it directly to the power plant of Southern Indiana Gas & Electric Company ("SIGECO") at Abee, IN. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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Robert Cox
ZUCKERT, SCOUTT & RASENBER

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I believe that NSR's acquisition of the remaining 50 percent of AWW will benefit many potential consumers of coal originating from Pike #1 and Pike #2 by enabling them to receive single-line service from NSR. I believe that will make those mines and transload facilities more attractive to their customers and more valuable to their owners and will help to improve their future economic viability.

VERIFICATION

I, Donald Evans, verify under penalty of perjury that I have read the foregoing verified statement and know its contents, and that it is true and correct to the best of my knowledge and belief. I further certify that I am qualified and authorized to make this statement.

Executed on April 10, 2006

Donald L. Evans
General Manager
AW & W Railway

CERTIFICATE OF SERVICE

I certify that on April 11, 2006, a true copy of the foregoing “Rebuttal of Norfolk Southern Corporation and Norfolk Southern Railway Company To Replies To Petition For Exemption” was served by hand or first class mail, postage prepaid upon:

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