

216461

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34839

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

PETITION FOR EXEMPTION FROM 49 U.S.C § 11323

**REPLY OF INDIANAPOLIS POWER AND LIGHT COMPANY TO THE
SUPPLEMENTAL EVIDENCE FILED BY NORFOLK SOUTHERN CORPORATION
AND NORFOLK SOUTHERN RAILWAY COMPANY**

**I.
Introduction**

In response to the Board's decision in this proceeding served April 24, 2006¹, Indianapolis Power and Light Company ("IPL") hereby replies to the additional evidence and arguments filed by Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") on April 11, 2006 in support of the Petition for Exemption ("Petition") filed by Norfolk Southern Railway seeking exemption authority under 49 U.S.C. § 10502 to acquire the remaining 50% of the Algiers, Winslow and Western Railway Company ("AWW"). The additional filing made by NS, styled a "Rebuttal to Replies to Petition for Exemption" but which IPL will refer to in this pleading as "Supplemental Evidence," contains new legal argument and

¹ The Board's April 24 Decision was in response to a letter filed by IPL on April 12 suggesting that the Board on its own motion issue a procedural schedule in this proceeding that provided parties of record at least 20 days from the date the Supplemental Evidence was filed to reply to it. On April 24, prior to the Board's issuance of its decision, IPL filed a Motion for Leave to Reply to the Supplemental Evidence and Argument Filed by Norfolk Southern Corporation and Norfolk Southern Railway Company. The Board's decision later that day has apparently mooted the Motion.

evidence offered for the purpose of trying to bolster NS's claims that the proposed transaction will not adversely affect the competitive status quo at this location. This Reply is accompanied by the Second Verified Statement of Mr. Barry J. Bentley, who responds to the new factual allegations contained in the Supplemental Evidence pertaining to IPL and its purported coal and coal transportation sourcing alternatives.

II. **Argument**

A. The Supplemental Evidence Confirms That the Transaction Will Result in Competitive Harm.

1. NS's new characterization of the transaction as "end to end" is misplaced.²

In offering legal support for the Petition, NS cited a single Board decision stating that "as a general matter, single-line service is superior to join-line [sic] service."³ In the Supplemental Evidence, NS has offered four pages of new purported legal justification for why the transaction should be exempted because it is an "end-to-end consolidation." See, e.g., Supplemental Evidence at 1, 2, 7, and 11, citing *Kansas City Southern – Control – The Kansas City Southern Railway Company*, *Gateway Eastern Railway Company*, and *the Texas Mexican Railway Company*, Docket No. 34342, Dec. No. 12 at 17 (Nov. 29, 2004) ("*KCS-TM Approval*") (Board states that a transaction which is end-to-end "is not likely to generate the kinds of competitive problems that often arise in connection with a 'parallel' consolidation.")). The Board has generally defined "end to end" transactions in the context of major rail mergers, where one major

² In the Supplemental Evidence, NS claims that IPL and other commenting parties did not mention the Board and ICC precedent regarding end-to-end transactions in their replies to the Petition. However, NS did not make the "end-to-end" argument until its Supplemental Evidence, so there was nothing to which IPL could reply.

³ See Petition at 11, citing, *CSX Corp. and CSX Transp., Inc., Norfolk Southern Corp. and Norfolk Southern Railway Co. – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corp.*, Docket No. 33388, Decision No. 89, slip op. at 60 (served July 20, 1998).

railroad merges with another major railroad that has a monopoly over a segment or segments of the merged system. *Id.*

However, characterizing the proposed acquisition of the remaining 50% interest of the AWW as an “end to end” transaction is misplaced. In the first place, NS continues to gloss over the fact that AWW is not a major railroad with sufficient market power or interest in exploiting any monopoly it might have for transportation over its line to the Oakland City interchange point. On the contrary, given that the coal from the Pike #1 and Pike #2 mines can and has been used by IPL and other Indiana utilities via the Indiana Southern Railroad (“ISRR”), AWW has every incentive to offer competitive rate or switching terms to facilitate joint line transportation with ISRR in competition with NS single line service to other destinations. NS, on the other hand, has every incentive to eliminate interchange with the ISRR in favor of its single line movements once it acquires 100% of the AWW. Second, the comparison of this transaction to an “end to end” transaction of major railroads is misplaced from a factual standpoint. Specifically, NS admits that part of the AWW is actually parallel to NS. Petition at 4. NS and its witnesses also make a number of statements indicating that both NS and AWW operate on the AWW tracks, but these statements are inconsistent and unclear. For example, the Petition states that “NSR uses the AWW track to interchange some coal and carload traffic that does not originate on AWW . . .” (*Id.* at 5) and that “most of the rail activity currently on AWW’s tracks is NSR activity.” *Id.* at 6. On the other hand, the Supplemental Evidence contends that “[o]nly AWW now serves the mines and other facilities located on its line.” Supplemental Evidence at 8. NS employee Evans also notes that train operations on the line are “usually” with AWW equipment, thus implying that NS equipment also operates on the line. Doug Evans V.S. at 1.

Hence, the proposed transaction is not as simple as NS claims, and should raise competitive concerns as the two carriers become one. At the very least, the conflicting statements in NS's filings require that the Petition for Exemption be conditioned or denied; if NS wishes to go forward with a formal application, the Board should investigate the current rights of NS and AWW to operate on the AWW line, and how the proposed transaction would alter those rights. In short, the numerous questions regarding operations on the AWW, despite the extra filing by NS, reveal that NS has not submitted sufficient evidence for the Board to make a decision. Hence, the petition for exemption should be denied. *San Pedro Operating Company, LLC – Abandonment Exemption – In Cochise County, AZ*, Docket No. AB-441 (Sub-No. 4X) at 4 (served September 15, 2005) (“An exemption is appropriate only when we have sufficient information to reach an informed decision.”).

2. Precedent relied upon by NS to support its “end to end” claim has largely been superseded by the Board’s new merger rules and underlying policy changes.

The proposed transaction is not a merger between two major railroads. However, to the extent the Board considers the decisions cited by NS regarding the Board’s treatment of “end to end” consolidations, IPL maintains this consideration must include that fact that in June 2001 the Board dramatically changed its approach to large railroad mergers based on criteria that have application in this proceeding. *Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No. 1) (served June 11, 2001). Specifically, the new merger rules represented a major shift in Board policy concerning rail transactions in an environment of increasing consolidation and diminishing rail options for shippers. The Board noted that the rules were developed as a response to the increasing size of Class I railroads, the lack of excess capacity in the nationwide rail system, and the need to begin placing an emphasis on enhancing competition in merger

proposals. *Id.* at 9. The Board noted that, as the number of independent major railroads declines, there is a need for enhancements in competition, not just retaining the status quo. *Id.* at 17. While the Board acknowledged that these revised rules “reflect a significant change in the way in which we will apply the statutory public interest test to any major rail merger application,” it found that this heavier burden on merger applicants was consistent with the public interest. *Id.* at 9. The great majority of supporting Board precedent relied upon by NS in its Supplemental Evidence predates the substantial revision of the Board’s rail merger policies in Ex Parte No. 582. Although the proposed NS acquisition is not technically governed by these revised rules, the Board has relied on the new rules in considering recent “minor” transactions. In its approval of the control of the Texas Mexican Railway by Kansas City Southern, the Board noted that “[a]lthough the new rules do not formally apply to this proceeding, the Board has followed a similar policy in recent ‘minor’ cases,” and then cited to the control of the Wisconsin Central by the Canadian National Railway Company. *KCS-TM Approval* at 38. Furthermore, the Board mentioned some general concerns in the new rules that should be applied to the NS proposal. For example, the Board expressed generalized worry over the size of Class I railroads, stating that even end-to-end mergers can result in competitive harms due to geographic competition, and noted that even shippers served by a single carrier sometimes benefit from the nearby presence of a second carrier. *Id.* at 9, 18, and 19.

The new rules require merging railroads to “include measures for preserving competition wherever feasible, including effective plans to keep open major existing gateways and to preserve opportunities to challenge segment rates in bottleneck situations.” *Id.* at 10. They also contemplate the adoption of “competitive enhancements,” such as “reciprocal switching arrangements, trackage rights, or elimination of ‘paper barriers’ on interchange by shortline

carriers.” *Id.* When viewed in light of these possible steps that the Board could take to enhance competition, the heavy emphasis by NS on pre-2001 precedent is misplaced when evaluating how the proposed transaction affects the transportation policies enunciated in 49 U.S.C. § 10101, as required by § 10502(a)(1). In particular, transportation policies (1), (4), (5), (6), and (12) of § 10101 focus on the need for fostering competition and avoiding undue concentrations of market power. Moreover, the petition for exemption process also requires the Board to consider possible abuses of market power that may result from transactions proposed in a petition for exemption. 49 U.S.C. § 10502(a)(2)(B). As stated above, NS has glossed over the significant and critical differences between NS and AWW in terms of their respective sizes, scope of operations, and relative market power.

C. NS incorrectly portrays the current coal market and the existence of trucking options in southern Indiana.

NS and its witnesses have made a number of statements in the Supplemental Evidence that are misleading and incorrectly suggest, either implicitly or explicitly, that competitive coal transportation options for IPL are widespread. *See, e.g.*, Supplemental Evidence at 12-13 and 23; Doug Evans, V.S. at 4-6. Chief among the factual inaccuracies in the Supplemental Evidence is a pervasive suggestion that a viable competitive option for IPL is trucking coal from mines to a truck-to-rail transload facility in Petersburg, IN for transfer and final rail transportation to IPL’s stations. For example, NS has stated that 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.” Supplemental Evidence at 12. However, as summarized in the accompanying Second Verified Statement of the Vice President of IPL’s Fuel and Energy Supply, Barry Bentley, this statement by NS may be factually true but ignores the additional costs associated with trucking the coal from mines to the Petersburg transload facility. *See V.S.*

of Barry J. Bentley (attached to this filing) at 3. As Bentley notes, trucking is generally more expensive than rail service. NS has also ignored the fact that the Petersburg facility is operationally inferior to the facilities served by the AWW. *Id.* It is therefore economically and operationally feasible, and therefore a more competitive alternative, to transport coal from Pike #1 and Pike #2 on an all-rail route than to truck coal from other mines to Petersburg for transloading to trains and then final rail transportation to the destination generating station. *Id.*

NS witness Doug Evans also states that Pike #2 is only 10 miles by truck from Petersburg, but 30 miles by rail. Supplemental Evidence, V.S. of Doug Evans at 5-6. Again, however, Mr. Evans has ignored the higher costs of trucking and the extra steps required for transloading at Petersburg. All of IPL's Stations are rail-served, so it is generally much more economical for IPL to engage in an all-rail movement from Pike #2 to the generating stations than to include a trucking segment and transload at Petersburg. Bentley V.S. at 3. Compared to an all-rail route, it is slower and more costly to truck coal, transload it to railcars, and then transport it by rail. Thus, it is not a competitive option, as NS suggests, for IPL to truck coal from the rail-served Pike #1 and Pike #2 mines to Petersburg for transloading to trains. Supplemental Evidence at 23.

Mr. Bentley also notes that, if IPL were to use a transload facility as part of a transportation movement from truck-served mines in the area, then the transload facility at Pike #1 might be more efficient and competitive than the Petersburg transload facility. Bentley V.S. at 3. For example, the Augusta mine is only five (5) miles to the Pike #1 transload facility but 14 miles from the Petersburg transload facility. *Id.* Secondly, as stated above, the Petersburg transload facility is operationally inferior to the AWW-served transload facility. Specifically,

coal transloaded there must be dumped from trucks on the ground and then placed in railcars by a front-end loader. *Id.*

Another inaccurate attempt to imply that competitive options for IPL are plentiful is a statement by NS that there are approximately 60 other coal mines within 100 miles of the Pike #1 and #2 mines served by the AWW. Supplemental Evidence at 12. As Mr. Bentley notes, this statement is factually correct but it ignores (1) the distance of the mines from the generating plants, and (2) the cost and feasibility of transportation. Bentley V.S. at 3. In actuality, coal outside a radius of about 25 miles from IPL's Petersburg Station is often not competitive, especially if transportation is by truck.

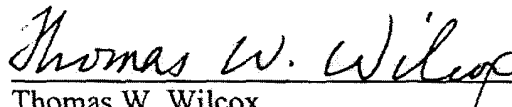
Lastly, NS witness Evans incorrectly states that the IPL Petersburg Station is in the same location as the ISRR transload facility. Doug Evans V.S. at 5. In fact, the Petersburg Station is 3 miles north of the ISRR transload facility. Bentley V.S. at 4. Therefore, as Mr. Bentley states, coal trucked to the Petersburg transload facility would not be useful to the Petersburg Station unless transloading to trains or additional trucking took place, which makes no sense from an operational and cost standpoint. *Id.*

III. **Conclusion**

The Supplemental Evidence filed by NS does little to ameliorate the deficiencies of the Petition. In fact, the Supplemental Evidence only muddies the waters regarding how the proposal will change current AWW operations. It does not demonstrate that the standards of §10502 have been met, or that this consolidation should not be conditioned to preserve, if not enhance, the competitive status quo. Hence, IPL continues to assert that the proposed transaction should not be approved by the Board without conditions to preserve the current competitive situation along the AWW. If not appropriately conditioned by the Board, the control by NS of

the AWW will result in a significant reduction in competitive options for IPL. Accordingly, IPL continues to support the request by the ISRR that the proposed transaction be conditioned upon the grant of trackage rights to ISRR over the AWW line sufficient to serve the Pike #1 and Pike #2 Mines and their respective loadout facilities. In addition, subject to the reservations expressed by IPL in its March 16, 2006 Reply, IPL also supports the alternative condition proposed by ISRR of requiring NS to establish a switch charge rate for service between the mine origins served by AWW and the ISRR at Oakland City Junction.

Respectfully submitted,



Thomas W. Wilcox

David E. Benz

TROUTMAN SANDERS LLP

401 9th Street, N.W., Suite 1000

Washington, DC 20004

TEL: (202) 274-2950

FAX: (202) 654-5603

*Attorneys for Indianapolis Power and Light
Company*

May 1, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34839

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

PETITION FOR EXEMPTION FROM 49 U.S.C § 11323

SECOND VERIFIED STATEMENT OF BARRY J. BENTLEY

I am Barry J. Bentley, Vice President of Fuel and Energy Supply for Indianapolis Power and Light Company ("IPL"). I am the same Barry J. Bentley who supplied the Verified Statement in support of the Reply of IPL filed on March 16, 2006 with the Board. As my prior statement summarized, I am responsible for the purchase of fuel and transportation services necessary for the operation of IPL's coal-fired electric generating stations, which include IPL stations at Petersburg, Eagle Valley, and Harding Street (the "Stations"). Petersburg Station is located in Pike County near Petersburg, IN and is served by the Indiana Southern Railroad ("ISRR"). Eagle Valley Station is located in Morgan County near Martinsville, IN and is also served by the ISRR. Harding Street Station is located in Indianapolis, IN and is served by the Indiana Railroad Company ("INRD"). ISRR currently transports over three million tons of coal annually to the Petersburg Station, approximately 700,000 tons of coal annually to the Eagle Valley Station, and ISRR originates smaller volumes of coal destined to the Harding Street Station. IPL owns and maintains its own fleet of open top hopper railcars which are used for the transportation of coal to its generating stations.

I have reviewed the "Rebuttal to Replies to Petition for Exemption" ("Supplemental Evidence") filed by the Norfolk Southern Corporation and the Norfolk Southern Railway Company (together referred to as "NS") on April 11, 2006 in support of Norfolk Southern Railway's Petition for Exemption to acquire the remaining 50% interest in and control of the Algiers, Winslow and Western Railway Company ("AWW"). The Supplemental Evidence, which includes two verified statements, contains a variety of allegations regarding the coal supply and transportation options supposedly available to IPL. These factual claims and the conclusions drawn from them are largely incorrect and overstate the extent to which alternatives to joint-line rail service from the Pike #1 and Pike #2 using the ISRR and the AWW are competitive options available to IPL.

In the Supplemental Evidence, NS states that substantial intermodal competition for rail transportation of coal from AWW coal origins is provided by approximately 60 other coal mines within 100 miles of the Pike #1 and #2 mines served by the AWW. Supplemental Evidence at 12. While this statement may be factually correct, the implication that all these mines offer competitive options to the AWW coal origins is not correct. The crucial question is not the number of mines, but (1) the distance of the mines from the generating plants, and (2) the feasibility and cost effectiveness of truck transportation. For example, trucking coal from outside a radius of about 25 miles from IPL's Petersburg Station is not competitive with rail transportation.

NS has also tried to create the inference that IPL does not even need the AWW-served transload facilities because competitive options exist at other transload facilities. Specifically, NS states that 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." Supplemental

Evidence at 12. However, NS has again ignored the trucking miles needed to get from the other mines to the Petersburg transload facility. Per-mile, trucking is more expensive than rail service. Thus, transportation of coal by rail from Pike #1 and Pike #2 is less costly than first trucking the coal several miles to the Petersburg transload facility, then transporting it by rail for the remainder of the journey. For example, even if IPL were to source coal from a truck-served mine in the area, such as the Augusta mine, it is much less costly for IPL to truck the Augusta coal five (5) miles to the Pike #1 transload facility than to truck it 14 miles to the Petersburg transload facility. NS also does not mention that the Petersburg transload facility is operationally inferior to the AWW-served facilities. Specifically, the Petersburg facility operates more slowly because the coal must be dumped on the ground by trucks and then loaded into railcars using a front-end loader. The extra steps required add costs and time, making use of the Petersburg facility less competitive.

NS has even suggested that IPL should be able to truck coal from Pike #1 and Pike #2 to the Petersburg transload facility for final rail transportation to IPL's Stations. Supplemental Evidence at 23. This is not a competitive alternative to transporting the coal by rail, as it would be foolish for IPL to ignore the rail options available at Pike #1 and Pike #2. Secondly, as mentioned above, the Petersburg transload facility does not operate very efficiently due to the several steps necessary to load the railcars.

NS witness Doug Evans also suggests that IPL should be able to utilize the Petersburg transload facility to provide competitive transportation options for delivery of coal to its Stations. Doug Evans V.S. at 4-6. He overstates the case, however. For example, while it is correct that Pike #2 is only 10 highway miles from the Petersburg transload facility compared to 30 rail miles, trucking is generally more expensive per mile. Moreover, transloading at Petersburg from

truck to rail adds cost and time delay compared to an all-rail movement from Pike #2 to destination.

Mr. Evans also infers that the ISRR Petersburg transload facility and IPL's Petersburg Station are in the same place. Doug Evans, V.S. at 5. The Petersburg Station is actually three miles north of the transload facility. It makes no sense operationally for IPL to use the Petersburg transload facility to switch coal from trucks to trains for shipment to the Petersburg Station. However, IPL would use the Pike #1 transload facility from, for example, the Augusta mine, which is only five (5) miles from Pike #1 but 14 miles from the Petersburg transload facility. By using the Pike #1 transload facility, IPL can eliminate half the trucks that would be required compared to the Petersburg transload facility.

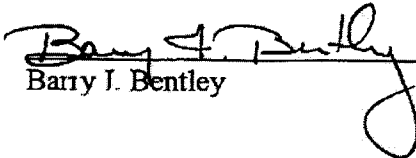
IPL continues to support the preservation of the competitive *status quo* along the AWW by requiring NSR to grant ISRR trackage rights over the AWW line from Oakland City Junction to the Pike #1 Mine, the Pike #2 Mine, and their respective transload facilities. This grant of trackage rights would preserve the competitive options that are available today for IPL. Hence, IPL fully supports ISRR's trackage rights proposal. In the alternative, ISRR has proposed that the Board condition this consolidation on the requirement that NSR establish a switch charge rate for the movement by NSR of coal from Pike #1 and Pike #2 and their respective transload facilities to Oakland City Junction. IPL supports this alternative as well, but IPL believes the trackage rights condition is the much more preferable alternative. IPL considers the flexibility inherent in trackage rights a far superior means of maintaining its competitive options as coal supply and transportation are constantly influenced by acquisitions in the coal and transportation sectors, changing environmental regulations, and other external impacts. Therefore, IPL urges

the Surface Transportation Board to impose the trackage rights sought by ISRR as a condition of this consolidation in order to preserve the competitive situation that exists today over the AWW.

VERIFICATION

I, Barry J. Bentley, 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 Second Verified Statement.

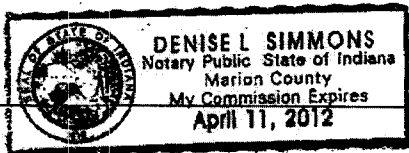
Executed May 1, 2006.


Barry J. Bentley

Subscribed and sworn to before me this 1st day of May 2006.


Notary Public

My Commission Expires:



CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of May 2006 caused copies of the foregoing Reply of Indianapolis Power and Light Company to be served by hand or United States Mail upon counsel for all parties of record in Finance Docket No. 34839, as follows:

By Hand:

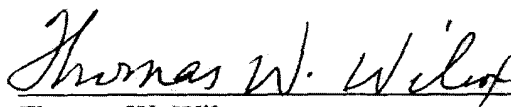
Richard A. Allen, Esq.
Shannon M. Moyer, Esq.
Zuckert, Scoutt & Rasenberger, L.L.P.
888 Seventeenth Street, N.W.
Washington, D.C. 20006-3939

Louis E. Gitomer, Esq.
Ball Janik L.L.P.
1455 F Street, N.W., Suite 225
Washington, D.C. 20005

Christopher A. Mills, Esq.
Peter A. Phol, Esq.
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

By U.S. Mail:

G. Daniel Kelley, Jr., Esq.
Ice Miller LLP
One American Square, Suite 3100
Indianapolis, IN 46282-0200



Thomas W. Wilcox