

## APPENDIX D: REGIONAL AND SHORTLINE RAILROADS

**American Short Line and Regional Railroad Association.** The American Short Line and Regional Railroad Association (ASLRRA)<sup>106</sup> indicates that, although it applauds the Board for the stated overall objectives of the rules proposed in the NPR, it believes that the proposed rules must be revised if the stated objectives are to be accomplished. The proposed rules, ASLRRA argues, are not specific enough about what will be required of applicants in future Class I mergers; there is, ASLRRA insists, too much leeway left for the applicants, and not enough precision about what will be required; and, ASLRRA adds, the proposed rules do not clearly carry through the Board's intent to increase the burden on applicants to enhance competition and to offset negative impacts of service disruptions and competitive harms. ASLRRA therefore urges that we put "teeth" in the rules by adding specific minimum conditions that will be required. Specific minimum conditions, ASLRRA argues, are necessary to accomplish the Board's stated intent of raising the bar for merger approval, enhancing competition, and safeguarding service.

ASLRRA's "Bill of Rights" conditions. ASLRRA contends that, to address the service and competitive issues of critical concern to small railroads that will arise in any future Class I merger, we should add to our merger rules ASLRRA's "Bill of Rights" conditions.

(1) ASLRRA contends that Class II and Class III railroads that connect to the consolidated carrier must have the right to compensation by the consolidated carrier for service failures related to the consolidation.<sup>107</sup> ASLRRA further contends that, when the consolidated carrier cannot provide an acceptable level of service post-transaction, connecting Class II and Class III railroads should be allowed to perform additional services as necessary to provide acceptable service to shippers.

(2) ASLRRA contends that Class II and Class III railroads must have the right to interchange and routing freedom. ASLRRA further contends: that contractual barriers affecting Class II and Class III railroads that connect with the consolidated carrier that prohibit or disadvantage full interchange rights, competitive routes, and/or rates must be immediately removed by the consolidated carrier, and none imposed in the future; that the consolidated carrier must maintain competitive joint rates through existing gateways; that Class II and Class III

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<sup>106</sup> ASLRRA submitted its comments on behalf of its 418 shortline and regional railroad members.

<sup>107</sup> ASLRRA adds, however, that the Board would not need to get into the business of handling freight claims. ASLRRA explains that most claims would not be disputed, and that an expedited process could be put in place to handle those that were.

railroads must be free to interchange with all other carriers in a terminal area without pricing or operational disadvantage; and that any pricing or operational restrictions that disadvantage connecting Class II or Class III railroads must be immediately removed by the consolidated carrier, and none imposed in the future.

(3) ASLRRRA contends that Class II and Class III railroads that connect to the consolidated carrier must have the right to competitive and nondiscriminatory rates and pricing. ASLRRRA further contends that rates and pricing of the consolidated carrier that do not meet this standard must be promptly corrected by the consolidated carrier upon request by a connecting Class II or Class III railroad.

(4) ASLRRRA contends that Class II and Class III railroads that connect to the consolidated carrier must have the right to fair and nondiscriminatory car supply. ASLRRRA further contends that car supply issues regarding this standard must be promptly addressed by the consolidated carrier upon request by a connecting Class II or Class III railroad.

(5) ASLRRRA contends that the Board should strongly encourage the consolidated carrier to work out any issues regarding these conditions with its connecting Class II and Class III carriers in a mutually agreeable fashion without resorting to the Board for interpretation or enforcement. ASLRRRA further contends that, if needed, the Board should put in place an expedited and cost-effective remedy process to be initiated by complaint filed with the Board by a connecting Class II or Class III carrier.

Minimum conditions for future mergers. ASLRRRA indicates: that the conditions it contemplates would be minimum conditions; that, although the Board would retain the flexibility to craft appropriate conditions, the burden would be on applicants to make the case as to why something different than the minimum conditions should be imposed; and that, in effect, the rules would establish a rebuttable presumption in favor of the set of minimum conditions. ASLRRRA adds that applicants: could agree to accept more than what the minimum conditions require; could propose variations on the minimum conditions tailored to particular or unique circumstances; and/or could argue for imposition of less than the minimum conditions if they can convince the Board that the minimum conditions would be inappropriate for their transaction or would be unduly burdensome.

Regulatory Flexibility Act issues. (1) ASLRRRA contends that the approach it advocates would greatly reduce the burden on small railroads. ASLRRRA explains that its minimum conditions might meet the needs of many of the affected small railroads, which would mean that the concerns of these railroads would be addressed without the burden and expense of participating as a party of record in a major merger proceeding. And, ASLRRRA adds, its minimum conditions would also address the issue of disparity in bargaining power between the merging mega-carriers and their small railroad connections (minimum conditions, ASLRRRA

explains, would raise the floor from which negotiations begin, making it more likely that private negotiations between the parties could lead to a satisfactory outcome). Minimum conditions, ASLRRRA contends, would make the process less burdensome and more user friendly for small railroads.

(2) ASLRRRA insists that, without minimum conditions, our merger rules will not effectively address the important issues raised by small railroads. ASLRRRA argues: that our proposed merger rules, as presently drafted, will have a significant economic impact on a substantial number of small entities; that requiring hundreds of small railroads that connect with merger applicants to undertake individual negotiations and/or to participate in a major regulatory proceeding would be unnecessarily burdensome and expensive; and that the hundreds of small railroads that will be affected by any future Class I merger simply do not have the resources to put them on an equal footing with the applicants for negotiating, or for litigating before the Board or the courts.

**Eastern Shore Railroad.** Eastern Shore Railroad, Inc. (ESHR) is a Class III shortline that operates a 63-mile line of railroad extending between Pocomoke City, MD, and Cape Charles, VA.<sup>108</sup> (1) ESHR claims that, although the NPR appears to raise the barriers to merger approval, it is unclear whether or to what extent the Board will change existing law on granting protective conditions on competition or essential rail service. The Board, ESHR therefore contends, needs to explain whether it will be easier for adversely affected parties to obtain relief and what types of fact situations will warrant relief. (2) ESHR contends that the Board should formally recognize that shortline and regional railroads are part of the country's transportation infrastructure and can play an important role as "congestion relievers." ESHR further contends that, because many smaller railroads are fragile financially, the Board should bend over backwards to protect them where there are merger-related impacts such as traffic diversion. (3) ESHR contends that preservation of competition is not sufficient unless it is the preservation of "effective competition." ESHR further contends that, where the Board grants another carrier rights to use a rail line, it should grant that carrier a common carrier service obligation as well. (4) ESHR contends that, although the Board seems to place a very heavy reliance on voluntary arrangements to resolve problems between merger applicants and potential protestants, the Board should recognize that parties will only be able to reach meaningful voluntary agreements if the parties have equal bargaining power (which, ESHR notes, shortlines generally lack) or if the Board is likely to use its regulatory power to provide relief if the parties cannot agree.

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<sup>108</sup> ESHR, a quasi-public entity, is indirectly owned by the Accomack/Northampton Transportation District Commission, a political subdivision of the Commonwealth of Virginia.

**Farmrail System.** Farmrail System, Inc. (FMRS)<sup>109</sup> contends that future mergers should be subject to conditions similar to those provided for in ASLRRRA’s “Bill of Rights” and those suggested by FMRS earlier in this proceeding. FMRS argues that, although the broad procompetitive principles announced in the NPR are steps in the right direction, too much has been left to the discretion of the applicants, without any specifics for either judging an application or guiding shortlines as to what they should expect. FMRS insists that, by relying on applicants to propose how competition will be preserved and enhanced, the regulations proposed in the NPR virtually guarantee that shortlines and the shippers they serve on the fringe of the rail network will continue to be ignored in future merger proceedings.

Enhanced competition. FMRS contends that, although we are requiring the application to provide not only for preserving but also for enhancing competition, we have presented nothing specific in this regard. Applicants, FMRS believes, have been left to determine the regions where an accommodation will be offered and the manner in which it will be offered; and, FMRS adds, the minimal opportunities offered shortlines in recent mergers leave little doubt that small carriers will fare no better under this scheme. FMRS insists that our final regulations should provide for imposition of conditions to ensure that shortlines and their customers receive due consideration in terms of procompetitive effects. FMRS further insists that the final regulations should establish a “floor” of enhanced competition, with the applicants being free to provide for more if circumstances warrant.

(1) *Competitive pricing.* FMRS contends that small railroads need competitive, nondiscriminatory rates determined on the same basis as nearby Class I stations.

(2) *Paper and steel barriers.* (a) FMRS contends that, in any new merger, the applicants should be required to rescind all paper and steel barriers that restrict the ability of shortlines to provide competitive service. (b) FMRS contends that another restrictive practice that should be discouraged is Class I refusal to allow a shortline over which it has ratemaking authority to make (either with another Class I or with a non-contiguous shortline) a rate for business that is either new or that the Class I cannot reasonably handle. FMRS explains that an awkward situation arises under a “competitive block” when the blocked carrier (e.g., another Class I) calls with a new business opportunity or a competitive rate proposal; the carrier taking the initiative, FMRS advises, is disadvantaged whether the shortline simply advises that the traffic is blocked or refers the inquiry to the blocking carrier so it can attempt to be inserted or to remain in the routing. It

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<sup>109</sup> FMRS is a holding company for two wholly owned Class III railroads (Farmrail Corporation and Grainbelt Corporation) that together operate approximately 354 miles of line in western Oklahoma. FMRS has, in addition to its 100% ownership interests in Farmrail Corporation and Grainbelt Corporation, a partial ownership interest in Finger Lakes Railway Corp. (FGLK).

doesn't take long, FMRS notes, before the growth-promoting marketing calls from the "competing" Class I stop coming. (c) FMRS contends that routing flexibility could also be improved by requiring merging carriers to provide shortlines with haulage or trackage rights to nearby interchanges with other Class I carriers.

Essential services. FMRS contends that the proposed regulations should be revised to indicate that, because shortlines provide "essential services" to the fringes of the rail network, any significant adverse merger-caused traffic shifts<sup>110</sup> will undermine the ability of the shortline to continue to provide that service and will therefore entitle the shortline to relief. FMRS explains that shortlines play a vital role in preserving rail service, particularly in rural agricultural areas where rail alternatives rarely exist. FMRS further explains that, almost by definition, any significant loss of traffic by a shortline will undermine (in the long run, if not immediately) its ability to maintain its lines, to upgrade its infrastructure to handle the next generation of cars, and to provide reliable competitive service. A shortline, FMRS argues, should be entitled to relief even if it cannot demonstrate that a merger will force the shortline out of business immediately.

Service-related losses. (1) FMRS agrees that the requirement of service assurance plans, including contingency plans, is a step in the right direction toward the goal of minimizing post-merger service disruptions. FMRS contends, however, that the requirement that a "problem resolution team" be established to deal with service problems and "related claims" is not sufficient. FMRS further contends that, in such circumstances, applicants should be required not only to provide a team to address the problems but also to make prompt reimbursement to shippers and connecting shortlines for demonstrable service-related losses. (2) FMRS contends that we should clearly establish that shortlines have claims for lost traffic or additional operating expenses that result from post-merger service-related failures. Shortlines, FMRS explains, cannot provide satisfactory service to their customers when their Class I connections are not performing normally. And, FMRS adds, this is particularly true when there are paper or steel barriers that prevent the shortline from handling the traffic with another carrier. (3) FMRS insists that, with respect to service assurance failures, shortlines should be given the same rights to relief and compensation as shippers.

**Finger Lakes Railway.** Finger Lakes Railway Corp. (FGLK),<sup>111</sup> a Class III railroad, agrees that, instead of imposing a number of new fixed conditions, we should require specific disclosures by applicants of how they will handle different relevant issues. FGLK adds that it is

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<sup>110</sup> FMRS suggests that we could select a standard such as a 10% loss of traffic, and give parties the opportunity in particular instances to demonstrate that a different level is appropriate.

<sup>111</sup> FMRS and FGLK filed separately.

particularly interested in requiring disclosures about how a proposed merger would treat affected shortlines.

Specific references to Class II and Class III carriers. FGLK contends that, although it is evident that our intention is to develop a more inclusive consideration of the concerns of shippers and Class II and Class III carriers in merger applications, this is not specifically stated as such (at least in certain instances) in the regulations proposed in the NPR. FGLK therefore asks that we include in the final regulations specific references to Class II and Class III carriers in each instance where it is appropriate.

Service assurance plans. FGLK argues that, although it agrees that applicants should be required to develop service assurance and contingency plans, it also believes that we should specify that Class II and Class III railroads are entitled to compensation when the applicants' breach of their assurances causes lost traffic or other harms.

Merchandise freight. FGLK contends that applicants should be required to address, in their SAPs, their plans for the coordinated movement of "merchandise freight" (which FGLK refers to as "loose car business"). FGLK explains that it believes that most of the service complaints that have occurred in connection with post-merger service problems have involved merchandise freight services. FGLK adds that we might also wish to address merchandise freight issues in a separate proceeding, which (FGLK argues) would allow shippers, railroads, and other interested parties an opportunity to provide meaningful input on the needs and issues surrounding the handling of merchandise traffic.

**Housatonic Railroad Company.** Housatonic Railroad Company, Inc. (HRC),<sup>112</sup> a Class III railroad operating in Connecticut, Massachusetts, and New York, contends that we should develop policies to ensure a fair, efficient, and non-discriminatory transportation system for Class III railroads and their customers. HRC explains: that, whereas a Class I railroad is both a network service provider and a local service provider, a Class III railroad is primarily a local service provider only; that the Class I-Class III relationship is complicated by the fact that, although the Class I is the Class III's only access to the general transportation network, the Class I is also a competitor of the Class III; and that, although the Class I can engage in significant anticompetitive conduct to the significant disadvantage of the Class III and the customers of the Class III, the Class III must work with the Class I as a partner in the development of transportation business. HRC therefore contends that we should adopt policies designed to ensure that Class I railroads do not use their monopoly power as network service

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<sup>112</sup> HRC's request that its late-filed rebuttal comments (filed January 17, 2001) be accepted is granted.

providers to compete unfairly with Class III railroads or to discriminate against them with respect to rates or service.

Merger effects upon Class III railroads. HRC contends that the businesses most likely to suffer adverse consequences from a major rail consolidation are the Class III carriers affected by the consolidation. HRC explains that Class III railroads, unlike shippers, cannot alleviate anticompetitive merger consequences by turning to other modes of transportation; Class III railroads, HRC notes, are “captive” to their Class I connections. HRC insists that Class III railroads deserve protection from merger harms resulting from unfair competition caused by monopolistic, anticompetitive behavior of Class I railroads.

Use of monopoly power to harm Class III railroads. (1) HRC contends that, when a Class III is “captive” to a Class I (i.e., when the Class III has no meaningful alternative connection to the railroad network), the connecting Class I has the power to completely control rates, routing, and service enjoyed by the Class III. The Class I, HRC explains, can compete unfairly with the Class III by discriminatory or differential pricing to disadvantage a Class III’s local service relative to the Class I’s.

(2) HRC contends that the competitive balance can best be achieved by requiring Class I railroads to price network services and local services separately, and by prohibiting the Class I railroads from using their network monopoly to extract monopoly profits. HRC further contends: that Class I railroads should be required to provide wholesale network services to Class III carriers at prices that reflect the marginal cost of providing the service plus a reasonable return to the Class I; that pricing of overhead services between a Class III and another carrier should not be used by the Class I to disadvantage one route compared to another or to attempt to profit from local services provided by the Class III; and that reasonable overhead rates should be provided to all gateways and other Class I interchange points.

(3) HRC insists that, although many of its concerns exist even in the absence of a major rail consolidation, they should nonetheless be addressed in our merger regulations. HRC explains that, because a major rail consolidation strengthens a government-sanctioned monopoly, it is reasonable to require the consolidating carriers, as a cost of obtaining the private benefits of the transaction, to take reasonable measures to enhance rail competition. HRC further explains that, because the monopoly power of the surviving Class I is increased by the merger and because the surviving Class I is often under substantial pressure to increase revenue to pay for the costs of the transaction, many of the anticompetitive circumstances that existed before the transaction are often exacerbated by the transaction.

Proposed separate proceeding. HRC contends that we should institute a separate proceeding to consider whether and under what circumstances it would be appropriate to

mandate competitive access, and whether we should require fair and competitive pricing by Class I railroads of network services provided to their connections.

Regulations proposed in the NPR. (1) HRC, which supports our NPR § 1180.1(a) recognition of the important role that Class II and Class III carriers play in the transportation network, indicates that it is hopeful that we will interpret NPR § 1180.1(a) broadly to address the unique role of Class III carriers in connection with major rail consolidations. (2) HRC contends that we should revise the second sentence of NPR § 1180.1(b) to read as follows: “In determining the public interest, the Board must consider the various goals of enhanced effective competition, carrier safety and efficiency, improved service for shippers, environmental safeguards, fair working conditions for employees, and the impact on the railroad network (including Class II and Class III carriers).” (3) HRC contends that, in implementing NPR § 1180.1(c), we should focus on the role of Class III carriers in enhancing competition, improving service, and promoting economic efficiency. (4) HRC contends that NPR § 1180.1(c)(1) should be revised to make clear that the potential public benefits of the merger apply not only to customers of the merging carriers but to the railroad network as a whole, and to give explicit recognition to the important role that Class II and Class III carriers can play in achieving public benefits. (5) HRC contends that, in applying NPR § 1180.1(c)(2), we should consider potential harm to Class II and Class III carriers caused by major rail consolidations even if such harms do not result in the inability of the carrier to provide essential services. (6) HRC contends that NPR § 1180.1(d) should be revised to include a requirement that the Board carefully consider conditions proposed by Class II and Class III carriers. HRC further contends that the NPR § 1180.1(d) statement that “[c]onditions are generally not appropriate to compensate parties who may be disadvantaged by increased competition” is unfortunate. HRC explains that, when a post-merger Class I uses its monopoly power as a network provider to a connecting Class III to enable the Class I to compete with the Class III, the resulting “competition” is unfair and tainted, and protective conditions in favor of the smaller carrier are warranted.

Other issues. (1) HRC contends that Class I railroads should not be permitted to use differential pricing for network services provided to Class III railroads. (2) HRC contends that, although we should not permit the expansion of old paper or steel barriers or the creation of new ones in connection with a consolidation transaction, the commitments made by a Class III in a line sale transaction should be honored following a major rail consolidation. (3) HRC contends that all Class III carriers should have the right to interchange with any new additional carriers which operate through a junction or physical track connection with the Class III as a result of a consolidation transaction. (4) HRC contends that, although it does not endorse ASLRRRA’s “Bill of Rights,” that proposal is a useful starting point for identifying the specific issues that we should address. (5) HRC contends that consolidating Class I carriers should be required to compensate their Class III connections in those cases in which the Class III connections can

document existing traffic that was lost because of service deterioration that occurred as a result of the consolidation transaction.

**Texas Mexican Railway Company.** Texas Mexican Railway Company (Tex Mex)<sup>113</sup> is a Class II railroad that owns and operates over a 157-mile line between Corpus Christi and Laredo, TX, and that also operates over some 400 miles of trackage rights in Texas from Corpus Christi to Houston and Beaumont. Tex Mex contends that we should not adopt any proposals that would have the effect of placing restrictions on the ownership of interests in railroads operating in the United States based on citizenship or nationality, or that would place special burdens on rail consolidation transactions that involve non-U.S. railroads or parties. Tex Mex argues that, because our jurisdiction is limited to rail transportation in the United States, we have no basis for examining, or requiring evidence about, the effects of a rail transaction outside the borders of the United States.

Transnational issues. (1) Tex Mex contends that it is not clear what is meant by the “full system” competitive analyses and operating plans required by NPR § 1180.1(k)(1). Tex Mex argues that, if this means that a major transaction involving a Canadian railroad would require an analysis of the competitive effects on rail or other transportation in Canada, it is not clear why such analyses would be relevant to the issues before the Board, or how the Board’s review of those issues would avoid encroaching on the proper jurisdiction of Canadian agencies. (2) Tex Mex contends that the information that would be required by NPR § 1180.11(b) and (c) appears to be based on an unwarranted presumption that major transactions involving non-U.S. railroads would have some adverse effect on the commercial or national defense interests of the United States. Tex Mex insists that we should clearly disclaim any such presumption.

Procedural schedule. Tex Mex contends that, because Board proceedings involving major transactions are expensive and burdensome and create great uncertainty throughout the entire transportation community, the presumption should be that evidentiary proceedings in a major transaction proceeding should be completed in 180 days from the filing of the application.

**Wisconsin Central System.** WCS,<sup>114</sup> which is concerned that, in drafting the regulations proposed in the NPR, we may have overlooked the interests of small and regional railroads,

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<sup>113</sup> Tex Mex is a wholly owned subsidiary of Mexrail, Inc., which is itself owned 51% by Transportación Marítima Mexicana (a Mexican company) and 49% by Kansas City Southern Industries (the corporate parent of KCS).

<sup>114</sup> Affiliated entities Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, Wisconsin Chicago Link Ltd., and Algoma Central Railway, Inc. are referred to collectively as Wisconsin Central System or WCS.

contends that we must ensure that rules developed with the 6 remaining mega-carriers in mind do not unduly or inadvertently harm other carriers.<sup>115</sup>

Competition enhancements. WCS, which believes that we should require that parties in major mergers identify specific competitive harms arising from a proposed transaction and then identify specific solutions and remedies that address or otherwise relate to the specified harm, is concerned with the proposed “open-ended” requirement that mega-merger applicants submit proposals to create and enhance competition. WCS insists that, if there is to be a new, procompetitive movement within the rail regulatory system, the Board should do it directly, through its own statutory powers, and not by using merger proceedings as a back-door tool to produce such results in a necessarily arbitrary and piecemeal fashion, depending on which carriers happen to first engage in mega-mergers after the new rules take effect. WCS adds that, although it does not endorse the need for such a reorientation of the Board’s competition policies, it would prefer that the debate on the subject be open and direct, and that the outcome of the debate (whatever it may be) be equally available to all.

Service/terminals/interchange. WCS indicates that, although it endorses NPR §§ 1180.1(h) and 1180.10, it believes that we should develop and implement these “extremely broad” regulations in as tangible and practical a manner as possible. WCS contends, in particular, that, in order to achieve the effective access to neutral switching and interchange facilities in major terminal areas that (WCS claims) is an absolute prerequisite if the smaller railroads which comprise the feeder system for the national rail industry are to survive and prosper, our regulations should provide that, where a proposed transaction would further concentrate the ownership of any “neutral” terminal carrier in any major transportation hub, the applicants must divest part of their interest in the terminal carrier to other railroads in the area, preferably to other railroads that currently have no ownership interest in the terminal carrier. WCS further contends that, alternatively, we could require the elimination of any existing discrimination against non-owners in the pricing of the terminal carrier’s services and the availability of the terminal carrier’s facilities.

Cross-border issues. WCS indicates that it is perplexed by the continued focus on international ownership of U.S. rail carriers and the imagined difficulties that such ownership might bring. There has been, WCS contends, no sign to date that further ownership of U.S. railroads by CN or CP would lead to detrimental commercial decisions; and, WCS adds, there has been no indication that we could not adequately deal with any such unlikely behavior through our own statutory powers and clear jurisdiction over any rail carrier operating in the United States, regardless of its ownership. WCS further contends that, although the NPR appears

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<sup>115</sup> WCS consists of three Class II railroads, one Class III railroad, and one Canadian railroad.

to suggest that “intrusions” into foreign operations and data are necessary to determine the impacts of a transaction in the United States, that has not been true in the past and there is no evidence that it will be true in the future. The nature of the “problem,” WCS insists, simply does not warrant the “reach” outside of its jurisdiction that (WCS claims) the Board is attempting here.

Scope of coverage of rules; Class I status. (1) WCS contends that rules designed to govern mergers among the 6 largest Class I railroads do not apply comfortably to transactions between a large Class I and a smaller Class I, and could have serious adverse consequences on the smaller carriers involved in those transactions. WCS explains that application of the new “competition enhancement” policy to smaller Class I railroads with limited geographic reach, little market power, and predominantly short-haul, joint-line, truck-competitive traffic could be devastating to the smaller carrier’s traffic base and operations. Transcontinental merger rules, WCS argues, should not apply to regional rail transactions.

(2) WCS indicates that, on November 15, 2000, its Wisconsin Central Ltd. (WCL) component filed with the Board a petition seeking the institution of a rulemaking proceeding to amend the Board’s rail classification regulations by raising the Class I revenue threshold from \$250 million to \$500 million. WCS further indicates that, without favorable action on that petition, WCL could become a Class I carrier as of January 1, 2002. WCS insists that we should act, either in this proceeding or in a separate proceeding, to ensure that our new merger rules apply only to mergers involving 2 or more of the 6 largest Class I railroads.

(3) WCS contends that, in considering the interests of non-merging carriers in a consolidation proceeding, we should recognize that there are crucial distinctions between the remaining Class I mega-carriers and the feeder system of regional and shortline railroads.

Speculative aspects of the proposed regulations. WCS contends that, in a number of instances (WCS cites downstream effects, alternatives to merger, and competitive enhancements), the proposed regulations call for speculative information or analysis that is likely to cause more confusion than clarity. WCS insists that, although we will require a certain degree of flexibility in adjudging the major consolidation proposals that will come before us, our merger regulations also need to provide guidance, i.e., to provide some degree of certainty as to what is expected from applicants and some defined notion of the criteria upon which their applications will be considered. Mergers, WCS argues, should be judged on their own actual merits, and not on how they *could* lead to other, undesirable mergers, or *could* have been structured differently, or *could* lead to presumed, unidentified competitive harms that must be remedied. WCS maintains that these speculative components of the proposed regulations should be minimized to the greatest extent possible.

## APPENDIX E: PASSENGER RAILROADS AND RELATED INTERESTS

**National Railroad Passenger Corporation (Amtrak).** The National Railroad Passenger Corporation (Amtrak), which advises that many of its guests have suffered greatly as a result of the service problems that followed recent rail mergers, agrees that future merger applicants should be required: (a) to submit “service assurance plans” and “impact analyses” that address in detail the impact of their proposed merger on affected rail lines and terminals and on Amtrak service; and (b) to develop detailed capital and contingency plans to remedy “potential infrastructure impediments” and “potential areas of disruption” during merger implementation. Amtrak believes that these requirements will allow us to ensure that, if we approve future mergers, Amtrak trains will receive both the priority over freight trains to which they are entitled by law and the high level of on-time performance that Congress has deemed essential for Amtrak’s rail passenger services. Amtrak insists, however, that the regulations we have proposed to govern SAPs fall short of the mark in several critical respects.

Infrastructure analyses and contingency plans. (1) Amtrak contends that the proposed regulations provide no guidance or thresholds for use in determining what level of merger-related impacts triggers the requirements in NPR § 1180.10(d) and (i) for detailed analyses of infrastructure needs and development of contingency plans. The proposed regulations, Amtrak further contends, leave it entirely to the applicants to decide where “potential infrastructure impediments” and “potential areas of disruption” exist. Amtrak warns, however, that, even if we assume that future merger applicants will exercise this unfettered discretion in good faith, recent experience suggests that their predictive powers will leave a great deal to be desired; applicants in recent merger proceedings, Amtrak explains, significantly underestimated the number of locations on their systems where additional rail line and terminal capacity, and contingency plans to address merger implementation service problems, would be required. Amtrak therefore insists that the proposed regulations should be revised to establish objective specifications as to when detailed infrastructure analyses and contingency plans will be required.

(2) Amtrak indicates that there are a number of ways to ensure that applicants will be required to undertake detailed infrastructure studies, and to develop contingency plans, with respect to all rail lines and facilities where their proposed transaction creates the potential for service disruptions. Amtrak suggests that applicants might be required to conduct capacity studies and operational simulations, and to develop infrastructure plans, for all rail lines on which their proposed merger will increase traffic by 4 or more trains a day, or on which capacity problems are already being experienced. Amtrak also suggests that, as with environmental matters, we might retain outside consultants at the applicants’ expense to scrutinize their service and infrastructure plans. Amtrak further suggests that we might apply to NPR § 1180.10(d) and (i) the 49 CFR 1105.7 thresholds for merger-related increases in traffic volume and terminal activity that are used to identify merger impacts that require environmental scrutiny in non-attainment areas.

Passenger/freight coordination plans. (1) Amtrak contends that, although NPR § 1180.10(b) requires applicants to “describe definitively” how they will ensure that they “fulfill existing performance agreements” with Amtrak and commuter service operators, applicants are not required to provide, with respect to rail passenger services, either “benchmark” performance data for the period preceding their application or projected performance data for the period following implementation of their merger. Amtrak further contends that NPR § 1180.10(a) and (c), dealing with impacts on shippers and yard and terminal operations, do require that applicants include in their SAPs both benchmark and projected performance data. Amtrak insists that there is no reason for treating passenger operations differently from freight operations with respect to benchmarking and quantitatively measuring performance. Amtrak further insists that, if we do not require applicants to provide specific pre- and projected post-merger performance measurements for rail passenger performance, we will not be able to accurately measure potential benefits of proposed transactions, and we will not be able to hold applicants to their commitments post-merger.

(2) Amtrak contends that, with respect to Amtrak operations, appropriate performance measurements are readily available. Amtrak explains that the total number of minutes that each Amtrak train has been delayed during a month or year by causes within a particular freight railroad’s control (e.g., freight train interference, slow orders, or restrictive signals) can readily be derived from the delay reports that are used by Amtrak and the freight railroads to determine the railroads’ entitlement to incentive payments. And, Amtrak adds, agreements between freight railroads and commuter authorities typically include quantifiable performance measures.

(3) Amtrak therefore asks that we revise NPR § 1180.10(b) to require applicants to furnish, for each route over which passenger services are operated, mutually agreed-upon performance measurements that quantify railroad-controlled delays to passenger trains for 1 year prior to the transaction, and projected performance figures for the same route after the implementation of the proposed transaction.

Maintenance needed prior to merger implementation. Amtrak contends that the proposed regulations do nothing to ensure that future mergers will not be implemented until key rail lines are in such condition that they will not require major maintenance during merger implementation. This, Amtrak explains, is a matter of some concern, because (Amtrak claims) many of the delays that Amtrak’s trains experienced after the implementation of the UP/SP and Conrail transactions were attributable to the implementation of these transactions at a time when key lines on SP and CSX had an immediate need for major maintenance work. And this, Amtrak further explains, resulted in a multitude of slow orders, and an urgent need to take track out of service to catch up on deferred maintenance, at the very same time that merger implementation was placing unprecedented demands upon the UP and CSX systems. Amtrak therefore insists that, at a minimum, NPR § 1180.10 should be revised to require applicants to describe in their SAPs: (i) the steps they will take to address maintenance needs on key lines before they

implement their proposed mergers; and (ii) how they will schedule or augment their pre-implementation maintenance-of-way activities so that they will not have to take key lines and tracks out of service for major maintenance during the crush of merger implementation. And, Amtrak adds, applicants should also be required to update this portion of their SAPs prior to the implementation of their merger.

Other issues. (1) Amtrak contends that, in connection with the development of SAPs, we should specifically require applicants to consult with passenger railroads that operate over their lines. Participation by passenger railroads in the SAP process, Amtrak insists, is essential if SAPs are to fulfill their intended purpose of ensuring that future mergers will not harm passenger rail service.

(2) Amtrak contends that allowing railroads to modify the plans set forth in their SAPs, but requiring them to give notice of such modifications: will give applicants the flexibility they need to implement their merger; will enable the Board to ensure that applicants meet the commitments in their SAPs, even if not in precisely the manner that was initially contemplated; and will put other parties on notice of changes in applicants' plans that may affect them or to which they may take exception.

(3) Amtrak contends that, to ensure that the most relevant data are used for benchmarking purposes, applicants should be directed to use data from the most recent 12-month period for which reliable data are available, rather than for the most recent calendar year.

(4) Amtrak notes that several parties have argued that applicants should be required to describe how their proposed transaction will impact passenger rail services operated over lines owned by passenger railroads. Amtrak further notes that APTA has argued that applicants should be required to obtain the approval of the affected passenger railroad before increasing freight traffic over the passenger railroad's lines. Amtrak indicates, however, that such requirements are not necessary with respect to freight railroad operations over Amtrak-owned trackage. Amtrak explains that the agreements between Amtrak and the freight railroads that operate over Amtrak-owned lines require that any proposed changes in freight operations be submitted to Amtrak for its approval, and provide for arbitration if a freight railroad believes that Amtrak's approval has been unreasonably withheld. And, Amtrak adds, during the course of the Conrail proceeding Amtrak entered into a separate agreement with CSX and NS that established principles applicable to acquisition-related changes in freight operations on Amtrak-owned lines.<sup>116</sup>

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<sup>116</sup> Amtrak notes, however, that it recognizes that commuter railroads may be in a very different situation. Amtrak indicates, in particular, that commuter railroads' agreements with the  
(continued...)

(5) Amtrak contends that any rail passenger service supported by governmental funding is an “essential service” that must be preserved.

(6) Amtrak contends that any service guarantees or monetary remedies for merger-related service problems offered to shippers should be made equally available to Amtrak and commuter rail operators. Such parity, Amtrak explains, is essential to ensure that we do not unwittingly create incentives for railroads to disregard their contractual and statutory obligations to give Amtrak trains priority over freight transportation.

(7) Amtrak insists that we have no authority to extend labor protection rights to employees of passenger railroads.

(8) Amtrak advises that, even if the UP/SP merger had not occurred, Amtrak would not be operating passenger trains over the lines identified by URPA.

(9) *NPR § 1180.1(h)(1): technical matter.* Amtrak contends that, to ensure that NPR § 1180.1(h)(1) is consistent with NPR § 1180.10, NPR § 1180.1(h)(1) should be revised to specify that SAPs must detail how shippers, connecting railroads, *and* passenger railroads will be affected and benefitted by the proposed transaction.

**American Public Transportation Association.** The American Public Transportation Association (APTA)<sup>117</sup> contends that we must consider the impact of any future mergers on passenger rail providers. APTA further contends that our consideration of passenger rail impacts should include, in addition to commuter railroads, the impact on rail transit systems that are users or potential users of the tracks and/or right-of-way of the affected freight railroads, in accordance with policies of the FRA.

Overall approach. APTA agrees that we should place on merger applicants a significantly increased burden to demonstrate that the proposed merger would be in the public interest. Recent consolidations, APTA contends, have led to significant transitional service problems, which have harmed the public interest; and, APTA adds, because experience has shown that mergers can disrupt operations in ways never contemplated in merger filings and service contracts (e.g., by the consolidation of dispatching operations in distant centralized

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<sup>116</sup>(...continued)

freight railroads that operate over the commuter railroads’ lines may give the commuter railroads less ability than Amtrak has to prevent changes in freight operations that could harm passenger services.

<sup>117</sup> APTA’s 1,300+ members include commuter railroads and rail transit systems.

dispatch centers), special action needs to be provided for in those circumstances. APTA further contends that further consolidation will likely aggravate the access challenges that passenger rail systems that are in the planning and design stages already face. APTA explains: that there is a shortcoming in the current framework in which new passenger rail projects move forward; that, in particular, there is no process for resolving disagreements that arise when parties cannot agree on terms and conditions for use of a railroad right-of-way; that, although APTA and AAR have discussed the possibility of an industry-wide framework to help facilitate the negotiation of local agreements, APTA and AAR have not been able to negotiate a process for resolving disputes; that, therefore, freight railroads continue to be able to unilaterally deny access to passenger rail agencies, for no reason at all other than not wanting passenger rail operations; and that public agencies so denied have no recourse under the existing framework, because state law-based condemnation authority does not extend to property owned by freight railroads. APTA warns that the ability of rail passenger agencies to obtain the rail access agreements they need to serve the public, which is a very difficult task even under normal circumstances, becomes even more complex with a continually downsizing core system with fewer and larger owners.

Enhancement of competition. APTA, which agrees that further consolidations in the rail industry are likely to result in some competitive harms that are difficult to remedy directly, contends that we should require merger applicants to address separately and specifically the issue of competitive harm to passenger rail projects, both those currently in operation and those which have been under public consideration. APTA further contends that we should explicitly include passenger rail interests in our analysis of the public interest, and that we should use the conditioning power to mitigate and offset competitive harms to passenger rail interests. APTA explains that, because new commuter rail operations are almost always contracted out to existing railroads, APTA's "new start" members need a competitive rail industry with alternative contract operators in order to keep contract costs under control. And, APTA adds, unless there is a healthy measure of competition in the market, further consolidations in the freight industry will likely result in increased trackage rights costs and increased operations contracts costs to public agencies.

Assessment of benefits/harms. (1) APTA, which believes that the Board should assist in ensuring that benefits claimed by merger applicants materialize, indicates that it would support the establishment of a mechanism whereby those affected by a merger could bring their disputes for resolution by the Board in situations where benefits that were claimed by merger participants have not materialized. (2) APTA, which argues that essential passenger rail services must be preserved, asks that we explain, as respects passenger rail services, precisely how the "essential existing service" concept would work in evaluating harm to the essential services provided by rail passenger agencies. APTA argues that, when commuter rail is built in a region, the choice of that mode is often the outcome of a long, locally-driven planning process in which several issues have been considered, including congestion mitigation, air quality, and cost. APTA further argues that these considerations demonstrate public need and the inadequacy of other local

transportation alternatives for a significant portion of the local population. (3) APTA, which contends that passenger rail properties have often borne the brunt of the harmful effects of past mergers, insists that, in connection with future mergers, passenger rail operators, just like Rail Labor, should not have the harmful effects of mergers “crammed down” upon them.

Downstream effects. APTA insists that our examination of downstream effects must take into account the ongoing redevelopment of American rail passenger service. APTA explains: that, because “new starts” often rely on unused freight rail capacity or right-of-way, mergers that eliminate all unused capacity will stifle the future growth of passenger rail; that, in addition, access negotiations, which are never simple, become more difficult when passenger rail systems must negotiate with what are, in essence, oligopolists; and that, with little competition and no other recourse for getting fair access to rail right-of-way, new passenger rail systems would face an even steeper uphill climb with further consolidation of freight railroads.

Service and oversight. (1) APTA contends that the role of the proposed Service Councils should be enhanced; our regulations, APTA insists, should specifically identify commuter and passenger rail entities as participants on this Council. And, APTA adds, an additional Council might be necessary to give focused attention to commuter and passenger rail issues in a post-merger environment. (2) APTA contends that we must ensure that attention is given to system-wide impacts, and not just to the new territories affected by the merger. APTA explains that, in the case of the Conrail transaction, passenger service problems were generally in the established portions of the system, not in the newly affected areas. (3) APTA contends that reporting requirements must be established at the beginning of the process and must be monitored on a continuing basis. APTA further contends that we should commit to oversight of the SAPs for a period of at least 5 years. (4) APTA contends that, because mergers can impact commuter railroads in instances where freight railroads operate on tracks owned by commuter railroads, a formal approval process should be established in which these commuter railroad owners can agree to projected freight volumes and not be forced to accept increased volumes that occur post-merger. (5) APTA contends that, whether through a Service Council or directly through the Board, a mechanism needs to be created whereby complaints related to mergers can be received and promptly resolved. APTA insists that, rather than simply requiring reporting and forums for discussion, we should mandate arbitration on deviations from the service assurance plans. APTA explains, by way of example, that if track improvements are needed in order to maintain service levels promised in the SAP, the Board should be empowered to direct the railroad to complete the needed track improvements.

Consideration of impacts on rail passenger service. (1) APTA contends that our focus on the need for service improvement should extend to passenger services as well as freight services. (2) APTA contends that we should carefully consider the impacts of mergers on existing and future rail passenger services as a key factor in our determination on the merger itself. APTA further contends that any adverse impacts to rail passenger operations should be specifically

determined and weighed, as a public policy issue, in the decision as to whether or not to approve any merger. APTA adds that this consideration should be given to both existing passenger rail projects and proposed passenger rail projects, and should be given regardless of whether a passenger rail property owns its railroad right-of-way or operates on freight tracks. (3) APTA contends that, if there are any existing or future rail passenger operations that will be adversely affected by a merger, we should mitigate the impacts of that merger by granting additional access rights in that corridor, by granting rights to prospective new services, or by directing the merging railroads to take other action to remedy the situation.

**MARC and SCRRA.** Initial comments on behalf of the MARC Commuter Train Service (MARC)<sup>118</sup> and the Southern California Regional Rail Authority (SCRRA)<sup>119</sup> were jointly filed: by the Maryland Mass Transit Administration, on behalf of MARC; and by SCRRA, on behalf of itself. Thereafter: reply comments were separately filed by SCRRA, on behalf of itself; rebuttal comments were separately filed by the Maryland Department of Transportation (MDDOT), on behalf of MARC,<sup>120</sup> and rebuttal comments were separately filed by SCRRA, on behalf of itself.<sup>121</sup>

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<sup>118</sup> MARC operates on 3 lines serving the Baltimore, MD, and Washington, DC, metropolitan regions. MARC indicates: that it shares the road with other carriers on all 3 lines; that 2 of its lines are owned by CSX, which operates the MARC service on these 2 lines; that the third line is owned by Amtrak, which operates the MARC service on this line; that Amtrak also operates intercity rail service on 2 of the lines MARC uses; that NS operates freight service on the Northeast Corridor line owned and operated by Amtrak; and that CSX operates freight service on all 3 MARC lines.

<sup>119</sup> SCRRA, a joint powers authority comprised of 5 county member agencies (the Los Angeles County Metropolitan Transportation Authority, the Orange County Transportation Authority, the Riverside County Transportation Commission, the San Bernardino Associated Governments, and the Ventura County Transportation Commission), operates on 5 lines that its member agencies either own outright or have operating rights over. SCRRA indicates that, in almost all instances, SCRRA operations share the road with freight service provided either by BNSF or by UP. SCRRA further indicates that Amtrak also operates intercity rail passenger service on lines SCRRA uses for its Metrolink service.

<sup>120</sup> MDDOT's request that its late-filed rebuttal comments (filed January 17, 2001) be accepted is granted.

<sup>121</sup> SCRRA's request that its late-filed rebuttal comments (filed January 17, 2001) be accepted is granted.

MARC and SCRRA contend that, notwithstanding the close working relationships MARC and SCRRA had established with the freight railroads with which they share tracks, and notwithstanding the intensively negotiated contractual arrangements MARC and SCRRA had entered into with these freight railroads, the commuter rail services provided by MARC and SCRRA were adversely affected by the service disruptions that occurred in connection with the Conrail and UP/SP transactions, respectively. MARC and SCRRA further contend that their experience with these transactions demonstrates that the measures included in the NPR do not satisfactorily address the issues that commuter rail authorities encounter as a direct result of mergers this Board approves. MARC and SCRRA insist that we should acknowledge the important role that commuter railroads play in the communities they serve, the contribution these public agencies frequently make to the coffers or to the enhanced operations of the railroads with whom they share tracks, and the need to protect this segment of the public from the ravages that the exercise of merger authority can wreak upon the quality and reliability of commuter rail service.

Conditioning authority; oversight. (1) MARC and SCRRA contend that the public interest clearly lies in the preservation of commuter rail service; the presence of commuter rail operations in a community, MARC and SCRRA explain, means that community leaders have made a public policy decision that this service is a valid expenditure of substantial public funds because of the benefits the service will bring to the community. MARC and SCRRA note, however, that, although our broad authority to impose conditions on mergers encompasses the ability to address all harms that can arise as a result of a merger (and therefore allows us to impose conditions intended to preserve commuter rail services in which communities have made a substantial financial and political investment), NPR § 1180.1(d) does not explicitly indicate that we will exercise our conditioning authority to preserve such commuter rail services. MARC and SCRRA therefore contend that we should indicate, in NPR § 1180.1(d), that the conditions we will impose to protect the public interest include conditions to ameliorate impacts on commuter rail service, including (but not limited to) conditions that require applicants to make and fund improvements to lines owned by the public agencies and operated over by applicants. MARC and SCRRA further contend that we should be clear that we will exercise our authority to require applicants to make investments in infrastructure when post-merger developments demonstrate that the implementation of a transaction has created congestion or other circumstances that adversely impact the service provided by the commuter authorities.

(2) MARC and SCRRA insist that it is not enough to remind applicants that they should honor their commitments to commuter railroads. MARC and SCRRA explain that, without a specific statement of our willingness to require the applicants to spend money to fix problems created by their merger, their attention is likely to be focused on other issues, particularly issues relating to shippers. Shipper issues, MARC and SCRRA concede, are indeed important; but shippers, MARC and SCRRA insist, are not necessarily more important than the taxpayers who fund and the riders who depend upon commuter service.

(3) MARC and SCRRA argue that the potential for facing a condition that will cause applicants to pay for improvements needed to preserve the integrity of agreed-upon service commitments would have the desired effect of causing applicants to think realistically about their operating plans, and either be certain to plan around the service that exists on their lines or look for low-cost ways to address the issues before they arise. And, MARC and SCRRA insist, we should not allow applicants to hide behind the terms of contracts made at the time the commuter service was planned and service was preparing to begin. MARC and SCRRA explain that the contracts entered into by commuter agencies, and the extensive investments made by such agencies in reliance on such contracts, are entered into and made in a pre-merger environment; the fundamental assumptions underlying such contracts and such investments, MARC and SCRRA note, reflect that pre-merger environment; and the consequences resulting from a future merger, MARC and SCRRA insist, are not foreseeable at the time such contracts are entered into and such investments are made. MARC and SCRRA contend that commuter agencies, having made such investments and having commenced operations in accordance with such contracts, must have the assurance that, to protect the public's investment and preserve the reliability of the service, this Board will impose conditions that go beyond any financial commitments the railroad may have made in the original agreements.

(4) MARC and SCRRA contend that we should acknowledge that our oversight authority extends, and will be used, to protect commuter operations that are occurring on the lines applicants use. MARC and SCRRA contend, in particular, that NPR § 1180.1(g) should specifically indicate that, under our oversight authority, we will impose conditions intended to preserve the public interest in the reliability and integrity of commuter rail service operations. MARC and SCRRA further contend that our authority to impose conditions intended to address unforeseen or unforeseeable merger-caused harms to commuter operators continues "after" the merger has been implemented and "beyond" the oversight period.

Pre-filing planning process; service assurance plans. (1) MARC and SCRRA contend that because applicants, in the development of their SAPs, should be expected to engage all affected parties in a dialogue to assess the impacts of the transaction and to focus on steps that will be required to ensure an efficient transition, NPR § 1180.10(b) should be revised to require applicants to consult with Amtrak and commuter service operators prior to preparing the freight/passenger coordination description that NPR § 1180.10(b) calls for. MARC and SCRRA argue: that fuller participation in the planning process will give public authorities more information upon which to base their understanding of the impacts of the transaction and their discussions with applicants about protection of their public's interests; and that, after the merger goes forward, commuters (like others involved in this process) will be better positioned to understand the differences between what was promised and what is actually occurring, and thus will be in a better position to support requests that the carriers invest in improvements needed to fulfill the promises they made.

(2) *NPR § 1180.10(b): technical matter.* MARC and SCRRA contend that, as respects coordination of freight and passenger operations, SAPs should focus not just on lines owned by applicants and operated over by commuter railroads, but also on lines owned by commuter railroads and operated over by applicants. MARC and SCRRA suggest, in particular, that the first sentence of NPR § 1180.10(b) should be revised to read: “If Amtrak or commuter services are operated over lines used by the applicant carriers to provide freight service, applicants must describe definitively how they will continue to operate these lines to fulfill existing performance agreements for those services.”

Test for essential services. (1) MARC and SCRRA note that NPR § 1180.1(c)(2)(ii) provides that an existing service is essential, and therefore the Board must ensure its preservation, if there is “sufficient public need” for the service and “adequate alternative transportation” is not available. MARC and SCRRA take no position on the use of this “essential services” test for freight or intercity passenger service, but they insist that the use of this test for commuter rail service does not work. MARC and SCRRA explain that the very existence of commuter service (and, apparently, the very existence of plans to introduce and/or extend commuter service) represents a determination by the relevant local governments that there is indeed “sufficient public need” for the service and that “adequate alternative transportation” is not available; the relevant local governments, MARC and SCRRA further explain, would not undertake the enormous tasks involving in establishing and/or continuing commuter service (and, apparently, planning for future commuter service) if there were not a “sufficient public need” for the service or if “adequate alternative transportation” were available. MARC and SCRRA therefore insist: that we should use a standard other than “essential services” as the threshold for protecting commuter rail operations; and that we should include in our regulations a presumption that the decision of the local governments to continue investing in commuter service means that there is a “sufficient public need” and that “adequate alternative transportation” is not available in those communities.<sup>122</sup>

(2) MARC and SCRRA insist that, in the context of freight railroad mergers, we should not “second guess” the decisions made by local governments respecting “sufficient public need” and “adequate alternative transportation.” MARC and SCRRA argue that, although the ICC and the STB have historically been the arbiters of public need and adequacy of transportation alternatives in the freight transportation business, it has long been the province of local governments to make decisions about satisfying the transit needs of the citizens in their regions.

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<sup>122</sup> MARC and SCRRA insist that they are not asking us to presume that the preservation of passenger rail service takes precedence over freight rail service or other public interest considerations. MARC and SCRRA insist, rather, that they are only asking us to presume that the services provided by commuter rail operators are “essential” within the meaning of NPR § 1180.1(c)(2)(ii).

MARC and SCRRA further argue that, although the ICC may have been involved in similar analyses with respect to intercity passenger service many years ago, the creation of Amtrak marked the removal of that jurisdiction from the ICC and the end of the ICC's expertise in assessing the need for intercity rail passenger service.

(3) MARC and SCRRA note that in many situations (e.g., Chicago, New York/New Jersey, Philadelphia, Boston, and the MARC train service) local governments now operate commuter rail services that were once operated by freight railroads. MARC and SCRRA contend that, because local governments relieved the freight railroads of their commuter service obligations and have continued to invest in the preservation of commuter service, to permit a situation where the local governments' decision to continue that service could be undercut by a conclusion by this Board that the service is not "essential" would introduce a fundamental inequity into the regulatory scheme.

**Regional Transportation Authority of Northeast Illinois (Metra).** The Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois d/b/a Metra (Metra), the commuter rail authority serving the Chicago metropolitan area, indicates that the rail mergers of the past 5 years have impacted its operations. Metra, which notes that efficient coordination of its services with those of the freight railroads with which it shares operating corridors, joint facilities, or junctions is absolutely essential if Metra is to provide dependable service to its passengers, contends: that, in evaluating essential services, we should look at the entire transportation infrastructure, not just the rail network; that we should retain jurisdiction during an oversight period in order to impose any additional conditions that are needed to remedy or offset unforeseen adverse consequences of the underlying transaction; and that applicants should be required to include, in their "full system" impact analyses, the specific measures they propose to preserve existing levels of essential services.

Metra contends that, if the level and quality of the commuter and passenger rail services in effect under contract at the time a proposed merger is announced are to be preserved, the regulations proposed in the NPR should be clarified and strengthened in a number of ways.

(1) Metra contends that we should explicitly state that commuter and passenger rail services (including commuter and passenger rail services that have been approved and funded, although not actually implemented, at the time of filing of a merger application) are "essential services." Metra argues that, given the significant public expenditure involved in operating and maintaining commuter and passenger rail systems, we should establish a presumption that such systems meet the test for essential services (i.e., a sufficient public need for the service and an unavailability of adequate alternative transportation). Merger applicants, Metra adds, should have an extraordinary burden to demonstrate that their proposed merger should be permitted to disrupt or reduce the reliability of commuter and passenger rail services.

(2) Metra asks that we confirm that our asserted “willingness to use our conditioning power to mitigate or offset all types of threatened merger harms to the public interest,” NPR, slip op. at 16, means that harm to commuter rail service can be considered a harm to the public interest.

(3) Metra argues that, in appropriate circumstances, we should use the conditioning power to reopen and override contracts between freight railroads and commuter operators, in order to preserve pre-merger levels and quality of commuter service. Metra explains: that, although some commuter authorities may have included provisions addressing mergers in their trackage rights/use agreements or PSAs, others may not have done so; that, if the parties did address potential merger impacts in their contract, that contract provision should govern their relationship, unless the commuter operator satisfies a heavy burden of demonstrating why the contract provision should not control; but that, if the parties did not address potential merger impacts, it might be appropriate for the Board to open up that contract, to ensure that the commuter service is not displaced or otherwise harmed by the merger.

(4) Metra contends that, in appropriate circumstances, we should order merger applicants to fund capital improvements as a condition to merger approval. Metra argues that, regardless of whether such improvements are specifically aimed at alleviating impacts on commuter and passenger operators, or whether they are intended primarily to benefit freight railroads with corollary benefits to commuter operators, the funding of such improvements is another potent remedy against merger-related harm. The Board, Metra insists, should not allow contractual commitments regarding funding responsibilities to preclude it from imposing this condition where appropriate.

(5) Metra contends that the NPR § 1180.10(b) freight/passenger coordination requirement should be expanded to require applicants to consider, among other things, problems that might arise at junction points on the commuter operator’s system as well as at junction points on lines owned by applicants, and to establish remedial measures to alleviate these problems. Metra also asks that we confirm that the NPR § 1180.10(b) freight/passenger coordination requirement will apply regardless of whether the commuter railroads that might be affected are “connecting” railroads, or even carriers regulated by the Board. Metra adds that, while it takes no position with respect to Amtrak’s argument that applicants should not be required to describe the impact of their proposed transaction on passenger rail services where they operate over certain Amtrak lines, Metra believes that applicants should be required to describe the impact of their proposed transaction with respect to lines owned by the commuter authorities themselves.

(6) Metra contends that NPR § 1180.10 should be revised to require applicants to consult with commuter authorities prior to filing a rail merger application. Metra contends, in particular, that, during the period between the filing of the pre-filing notification and the filing of the application, applicants should be required to consult with local commuter rail authorities that

operate trains on shared right-of-way or at junctions with a party to the transaction. Metra explains: that the purpose of this consultation would be to review the preliminary results of the traffic analyses and the preliminary operating plan being devised for the terminal area where the commuter authority operates; that, if there are to be system-wide changes (e.g., a reorganization or consolidation of dispatching centers), these too should be reviewed with the commuter authority during this consultation; and that, if changes in the supervisory personnel of the consolidating carriers are possible, the applicants should at this stage agree to prepare and review with commuter authorities a transition plan that ensures that supervisors experienced with specific commuter operations remain in control pending the training and orientation of their replacements.

(7) Metra asks that we confirm that NPR § 1180.6(b)(11) requires applicants to account for how the merger will impact commuter rail operations, and creates incentives for applicants to improve commuter operations on their lines and to promote improved commuter service as a public interest benefit of the transaction.

(8) Metra contends that the Board should be permitted to provide monetary remedies in the event that passenger service problems arise as a result of merger implementation. Metra explains that, while other remedies such as service orders might resolve a problem, the Board should have the option to impose a remedy, including a monetary penalty, that it believes will be most appropriate and effective under the circumstances. Metra indicates, by way of example, that, where carriers have had a record of persistent violations of contractual performance undertakings to commuter authorities, a monetary penalty might be appropriate.

(9) Metra contends that the Board should continue to exercise its existing authority to impose new or revised conditions on consummated mergers where those mergers have not produced anticipated benefits, or where previously imposed conditions have failed to alleviate harm. Metra argues that if it becomes clear (during an oversight proceeding or in another proceeding seeking to reopen a merger) that unexpected obstacles or changed circumstances have arisen that make the impacts of the merger more harmful than anticipated, the Board should be able to intervene and correct the situation. Such action, Metra explains, need not be any more intrusive or burdensome than was the condition originally imposed, but will restore equity to a situation that has become unbalanced in favor of the merged carrier.

**New Jersey Transit Corporation.** New Jersey Transit Corporation (NJ Transit or NJT) commends the Board for recognizing the potential impact of major rail mergers on passenger rail operations and for requiring future merger applicants to describe how they will coordinate post-merger freight operations with passenger rail operations. NJT contends, however, that we should clarify the scope of these protections and impose additional requirements in order to ensure that effective communication and coordination relating to the potential impact on existing

and proposed passenger rail service takes place prior to the development of post-merger operating plans.<sup>123</sup>

Definition: technical matter. NJT indicates that it generally uses the term “passenger rail” to describe all types of passenger rail operations which use the general railroad network, including but not limited to intercity passenger rail operations, commuter rail operations, and light rail operations over “shared use” track. NJT contends that we should adopt, for purposes of our merger regulations, a similarly expansive definition of the term “passenger rail.”

NPR § 1180.1(a). NJT, which notes that we have recognized that “a transaction involving two Class I rail carriers will affect the entire transportation system, including highways, waterways, ports, and airports,” NPR, slip op. at 11, contends that, in NPR § 1180.1(a), we should acknowledge explicitly that such a transaction will also impact passenger rail services and operators.

NPR § 1180.1(b). NJT contends that NPR § 1180.1(b) should repeat the statutory requirement that we consider the effect of a proposed merger on the adequacy of transportation to the public as a whole. NJT further contends that we should clarify that, in determining whether a proposed merger is in the public interest, we will consider the impact on existing and proposed passenger rail service.

Public interest considerations; essential services. (1) NJT contends that our merger rules should fully take into account the essential services provided by NJT and other passenger railroads across the country. NJT notes, by way of illustration, that, although a future railroad merger might reduce truck transportation in and around Philadelphia or Newark, the net benefit to the public of reduced truck traffic would be offset or eliminated if those trucks were replaced by automobiles driven by former NJT patrons who had grown tired of delayed passenger rail service.

(2) NJT contends: that passenger rail service is an essential service that must be viewed in the context of the entire transportation infrastructure; that, similarly, any evaluation of the benefits of a merger weighed against its potential harms must include an evaluation of the entire transportation infrastructure, including passenger rail service; and that, with a narrower view, it is possible that predicted benefits of improved service, enhanced freight competition, or economic efficiency would not adequately take into account merger-related harms to passenger rail

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<sup>123</sup> NJT’s commuter rail operating subsidiary, New Jersey Transit Rail Operations, Inc., operates 341 route miles (972 track miles) of railroad of which 300 route miles are shared with freight rail carriers.

operations and other essential services provided by the transportation infrastructure as a whole. NJT further contends that the impacts of freight and passenger services in shared territory must be looked at simultaneously; a passenger service, NJT insists, should not need to be “fixed” as a result of changed freight operations. NJT therefore insists that the last sentence of NPR § 1180.1(c)(2)(ii) should be revised to read: “The Board will consider whether projected shifts in traffic patterns could undermine the ability of the various network links (including Class II and Class III rail carriers, passenger rail operators and ports) to sustain essential services.”

(3) NJT notes that NPR § 1180.1(c)(2)(ii) states that “[a]n existing service is essential if there is sufficient public need for the service and adequate alternative transportation is not available.” NJT argues, however: that, although the Board has exclusive and plenary authority over freight rail transportation and is well positioned to evaluate whether there is sufficient public need for freight service and adequate alternatives for that service, the Board does not regulate commuter rail or rail transit service; that State departments of transportation, other State sovereign entities, and the Federal Transit Administration have the primary role for determining the efficiency of, and public need for, particular commuter rail or rail transit services and the adequacy and availability of alternative passenger transportation; and that, therefore, if a publicly-sponsored passenger rail operation is in service or if a publicly-sponsored passenger rail operator has a commitment with a freight railroad for the commencement of new or extended passenger rail service, the Board should presume that there is sufficient public need for the service, that it is an essential service, and that there are no adequate transportation alternatives. NJT indicates, with particular reference to New Jersey, that the continuation and expansion of NJT’s rail passenger services are vital; increased passenger rail ridership, NJT claims, will enable New Jersey to reduce the economic inefficiency and lost human productivity associated with automobile trip delays and the air quality problems caused by excessive numbers of automobile trips.

Service assurance plans. (1) NJT contends that the NPR § 1180.1(h)(3) Service Council should include passenger rail operators affected by any proposed merger. (2) NJT contends that, because NPR § 1180.10(b) could be construed to apply only to freight or passenger operations over lines owned by the applicants themselves, we should explicitly require applicants to describe how they will coordinate post-merger freight operations over lines owned by passenger rail operators. (3) NJT contends that we should also require applicants to address the potential impacts of post-merger freight operations on future passenger rail operations, particularly where the passenger rail operator has contract rights to expand its service over lines owned by or shared with the applicants. NJT contends that, at a minimum, the applicants should be required to address the specific impacts of the proposed merger on passenger or transit projects that are in the Federal Transit Administration or New Jersey State review process and/or for which monies have been committed. (4) NJT contends that NPR § 1180.10(e), regarding information technology systems, would work best if we would employ sufficient resources (including outside

consultants) to carefully review information submitted by applicants. (5) NJT contends that SAPs, including the contingency plans for merger-related service disruptions, should also include (but not be limited to) specific information regarding planned locations for temporary storage of trains whose crews have exceeded their hours of service and assurances that such storage will not adversely affect passenger rail service. (6) NJT contends that we should require applicants to meet and confer with passenger railroads in advance of finalizing their operating plans.

**United Rail Passenger Alliance.** United Rail Passenger Alliance, Inc. (URPA), contends that past rail carrier consolidations have adversely affected existing as well as prospective intercity, regional, and commuter rail operations, and warns that future rail carrier consolidations may also adversely affect existing as well as prospective intercity, regional, and commuter rail operations. Entire routes and major cities, URPA claims, have been lost to rail passenger service as a result of past consolidations; and more routes and more cities, URPA suggests, may be lost to rail passenger service as a consequence of future consolidations. URPA further contends: that future growth in passenger train frequencies in long-distance markets, and the expansion of passenger service into new markets, could be equally impacted by future transactions; that, unless we require complete review of merger impacts on both current and prospective passenger services in future transactions, it will be impossible for Congress, states, cities, regional multistate agencies, and private businesses interested in rail passenger services, both existing and prospective, to understand and to take appropriate ameliorative actions regarding these transactions; and that, for these reasons, we should incorporate into the proposed regulations a fully-articulated requirement that the parties to a covered transaction provide a complete evaluation of the impacts of the transaction on both existing and prospective commuter, regional, and intercity rail passenger services. URPA insists that failure to require complete evaluation of impacts of rail carrier consolidations on both existing and prospective commuter and regional rail passenger services could have a preclusive impact on their future growth and further development, which (URPA insists) would be hostile to the public interest in fostering growth of popular and effective rail transit alternatives to overcrowded highways.