APPENDIX K: NITL, CURE, & ARC

National Industrial Transportation League. The National Industrial Transportation League (NITL)[141] indicates that, although it agrees with the fundamental premises of the NPR (that a significant overhaul of the Board's rail merger policies is clearly appropriate, and that the Board should revise its policies with an eye toward affirmatively "enhancing" competition in future rail consolidation proceedings rather than simply attempting to "preserve" competition), it nevertheless has several concerns. (1) NITL contends that the proposed rules are extremely vague or unclear in a variety of key areas, and that the rules should thus be significantly revised to provide both railroads and shippers with much greater specificity as to how and what competition will be enhanced, and what will be required, in future rail merger applications. (2) NITL contends that the scope of the NPR, which is focused purely on merger policy, would create a serious disparity between the competitive conditions facing merging as compared to non-merging carriers, to the detriment of both merging carriers and the shipping public. NITL therefore insists that, to create a level competitive playing field for both merging and non-merging carriers and the shippers served by them, the Board should put into place procedures that would work to insure greater rail-to-rail competition for both merging and non-merging carriers, at a minimum as part of the next major merger proceeding (if not sooner). (3) NITL contends that the proposed rules can also be improved in a number of other important areas, including: the proposals on the definition and treatment of major gateways; the content of service assurance plans; the treatment of the acquisition premium in rail mergers; and the proposals for post-merger operational monitoring.

<u>Rationale for a paradigm shift</u>. (1) *In general.* NITL contends that it is appropriate to shift the focus of the Board's policy toward "enhancing" and not simply "preserving" competition; the result of the Board's prior policy, NITL argues, has been not the preservation but rather the loss of rail-to-rail competition. NITL further contends: that such reductions in competition have principally involved the loss of "segment competition" and the loss of product and geographic competition; that the Board's past merger policy, by narrowly focusing only on the competitive harm of parallel mergers at specific geographic points ("2-to-1" points, build-out points, etc.), while ignoring the competitive effects as end-to-end routes have been combined, has lost sight of the fact that rail mergers of the size and scope of those recently approved, and of the size and scope that could take place in the future, result in systemic losses in competition that geographically-specific ameliorating conditions simply do not cure; that, therefore, the analytical framework within which the Board operates in rail merger proceedings must be revised and broadened, and a renewed focus on and sensitivity to the complex and subtle tones and tints of competition in the rail marketplace must be the place to start; and that, in light of the losses in

[141] NITL has approximately 600 separate company members, ranging from smaller shippers to some of the largest shippers in the country.

competition in past mergers and the likelihood that there will be even greater losses in future mergers, "enhanced competition" must be the cornerstone of the Board's new merger policy. And, NITL warns, the Board should not lose sight of the fact that, if it fails to focus on enhancing rail-to-rail competition in the transportation marketplace or if it simply gives lip-service to the concept, there could be a reversal in the rail arena of the fundamental direction of domestic and international transportation policy. The surest way to prevent comprehensive reregulation of rates and service, NITL advises, is for the Board to act now to ensure that the forces of competition flower in the rail industry to their fullest possible extent.

(2) *Segment competition.* NITL contends that, in the past, shippers have lost "segment competition" provided by carriers over part of a rail movement, when mergers involving the combination of end-to-end routes have been permitted without ameliorating conditions. NITL explains: that the Board, in reliance on its "terribly flawed in practice" "one lump" theory, has permitted mergers of an upstream Carrier A and a downstream Carrier B with no ameliorating conditions to compensate for the loss of segment competition between downstream Carrier B and downstream Carrier C; that the loss of such segment competition has had both business and legal ramifications; that the business result of a merger of an upstream carrier with one of two neutral and competitive downstream carriers has been the elimination of the competition formerly provided by the other competitive downstream carrier, when the merged carrier completely eliminates any interchange with the other downstream carrier (either by refusing to quote joint line rates over the downstream carrier or by simply increasing its portion of the rates over the joint line route so that the formerly competitive route becomes completely uneconomic); that the legal result of the merger of an upstream carrier with one of two neutral and competitive downstream carriers has been the elimination of the little protection provided by the "contract exception" to the bottleneck rules; and that the same loss of segment competition has occurred when a downstream carrier has merged with one of two competitive upstream carriers.

(3) *Geographic competition.* NITL contends that rail mergers of the size and scope of those approved since 1994 have vastly reduced the amount of potential leverage provided by geographic competition, as carriers with much broader rail systems have begun to serve more and more of the producing and consuming regions for various commodities. NITL explains: that, although the loss of geographic competition has been gradual, the cumulative effect has been very real; that, from a systemic standpoint, in chemicals, coal, agricultural products, and other commodities, a single carrier now often serves many of the producing and/or consuming regions for that commodity, thus eliminating the leverage that a shipper might have had to enable it to argue that an unfavorable rate from the rail carrier serving its plant would simply accrue to the benefit of another carrier serving the plant of its competitor; and that, from an individual shipper's standpoint, a single carrier is today much more likely to serve multiple plants of a single shipper, thus eliminating whatever leverage the shipper may have had to play carriers off against one another, even when the shipper's individual plants were singly served.

Specificity as respects enhanced competition. NITL contends that the Board should revise the proposed rules in order to provide carriers and shippers with clear notice of what is required, and what will be expected, in the area of "enhanced competition." The proposed rules as currently written, NITL explains, are simply too vague.

(1) NITL contends that the proposed rules should be revised to indicate that "enhanced competition" means enhanced rail-to-rail (i.e., intramodal) competition. NITL explains: that, in all mergers since 1990, applicants have touted the "enhanced competition" that the proposed merger would provide to truck and barge competitors; that, however, such enhanced intermodal competition does nothing to cure the loss of segment competition and/or geographic competition; and that, if future merger policy is to be truly different from past merger policy, the rules should specify that "enhanced competition" must provide for enhanced rail-to-rail or intramodal competition in a significant way. NITL adds: that the Board can take the existence of enhanced intermodal competition into the calculus of the "public interest" in a particular proposed merger; that, however, the Board should not permit merging railroads to rely solely on enhanced intermodal competition to fulfill the "enhanced competition" requirement; and that, therefore, the Board should make clear that enhancements in rail-to-rail or intramodal competition must be proposed by future merging carriers.

(2) NITL contends that the proposed rules should be revised to include examples of enhanced rail-to-rail competition that the Board expects applicant carriers to consider when submitting an application. NITL contends, in particular, that NPR § 1180.1(c)(2)(iv) should be revised to read: "Applicants shall propose conditions for enhanced competition, including but not limited to enhanced rail-to-rail competition, in all or major parts of the geographic area affected by the proposed merger. Such proposals may include provisions for the introduction of reciprocal switching where it has not previously existed or expanded reciprocal switching in terminal areas or at interchanges, at rates that reflect the cost of service; commitments to provide contract and common carrier rates to interchanges; elimination of existing and future barriers to shortlines providing competitive rail service; establishment of terminal carriers to connect with railroads serving an area; and similar proposals."

(3) NITL contends that NPR § 1180.1(a)'s fourth sentence should be revised to indicate that the Board "does not favor consolidations that reduce railroad and other transportation alternatives." NITL explains: that the cited sentence can be read to suggest that, as long as there are substantial public benefits, the Board favors consolidations that reduce railroad and other transportation alternatives; that, however, such a reading would be flatly inconsistent with sound public policy, and would be inconsistent even with the Board's past practice; and that, therefore, the Board should make clear that, where a reduction in competition can be specifically proved, the Board will approve the proposed merger only if such specifically-identified reductions in competition are cured. And, NITL adds, "offsets" to such specifically-identified competitive harm that increase competition elsewhere simply cannot suffice.

(4) NITL contends that NPR § 1180.1(c)'s fifth sentence should be revised by eliminating the phrase "where both carriers are financially sound." NITL explains: that the NPR does not specify what a "financially sound" rail carrier is considered to be; that NITL would strongly object if the Board's "clearly flawed" "revenue adequacy" determinations were used in any way to dilute the strength of the proposed rule to "enhance competition," or if the standard of "financial soundness" were used to dilute the protections envisioned by the proposed rules; and that, although general merger policy under the Sherman Act leaves room for approval of a merger where there is a "failing firm," the standards of the "failing firm" doctrine are much more stringent than the Board's apparent reliance on "financial soundness."

(5) NITL contends that NPR § 1180.1(d)'s third sentence ("The Board will impose conditions that are operationally feasible and produce net public benefits so as not to undermine or defeat beneficial transactions by creating unreasonable operating, financial, or other problems for the combined carrier.") should be revised by eliminating the words "financial, or other." NITL explains: that the statement that the Board will not impose conditions that create "financial or other" problems is far too broad, and could be a source of mischief; that the preservation of existing competition and the development of enhanced competition may result in short- to medium-term reductions in the financial benefits of a proposed rail consolidation, compared to the financial benefits that would otherwise accrue; that, however, applicants should not be allowed to argue that the preservation or enhancement of competition would result in an "unreasonable" financial burden for applicants, such that if the conditions were imposed, applicants would not go forward with (and thus the nation would lose the contemplated "benefits" of) the proposed transaction; and that, if competitive harm can only be remedied or enhancements to competition can only be obtained through the imposition of conditions that will result in a reduction in the financial benefits of the transaction, it would be better to alter the financial terms of the transaction than to ignore the competitive harm.

<u>Scope of "enhanced competition" requirements</u>. (1) NITL contends that the Board, by focusing purely on merger policy to accomplish the "enhanced competition" objective, may create an "unlevel playing field" for carriers and shippers. NITL explains: that, if the enhanced competition that the proposed rules require applicants to propose includes enhanced rail-to-rail competition, applicants will have to provide some type of access to their systems to non-merging carriers; that, however, because these other carriers will not be obligated to provide access to their own systems, the merging carriers will be unable to compete for traffic on the systems of the non-merging carriers; and that this will result both in a significant disincentive for potentially beneficial transactions (particularly given the vagueness of the proposed rules as to what quantum of "enhanced competition" will be necessary to win agency approval of a proposed transaction) and also in an inequitable and asymmetrical situation for shippers on the non-merging vs. the merging carriers. NITL therefore believes that the Board must act to provide for enhanced competition not just on the lines of the merging carriers but also on the lines of non-merging carriers.

(2) NITL concedes that, although the Board can clearly utilize its conditioning power to provide for enhanced competition (such as increased reciprocal switching) on the lines of the merging carriers, it would appear to be much more problematic as a legal matter for the Board to utilize its conditioning authority to require enhanced competition on the lines of non-merging carriers. NITL insists, however, that the Board can utilize its authority under 49 U.S.C. 11102 to act directly on non-merging carriers in certain areas of enhanced competition (in particular, in the areas of terminal trackage rights and reciprocal switching). This authority, NITL notes (NITL cites action taken in the UP/MP/WP and UP/SP proceedings), has been used in the past, in the merger context, to impose trackage rights in favor of applicants on the lines of non-merging carriers. The UP/MP/WP and UP/SP precedents, NITL argues, establish that, in merger proceedings, the Board has the authority to utilize terminal trackage rights and reciprocal switching broadly to promote the public interest.

(3) NITL therefore contends that the Board should revise its merger rules to make clear that, if "enhanced competition" is ordered over the lines of merging carriers, the Board will act broadly and symmetrically to impose concomitant access over the lines of non-merging carriers, to provide for equal competition. NITL contends, in particular, that a sentence should be added to NPR § 1180.1(d) to read as follows: "In the case of enhanced competition proposed by applicants or ordered by the Board resulting in access to the lines of applicant carriers by other rail carriers, the Board will also impose access under the authority granted to it by 49 U.S.C. 11102 to permit comparable access over the lines of such other rail carriers, at the same or similar locations." NITL has in mind: that, if the Board orders "enhanced competition" through reciprocal switching at designated terminals of the applicants, it would use its authority under 49 U.S.C. 11102 to order reciprocal switching over the lines of non-merging carriers at those same terminal areas; and that, similarly, if the Board orders terminal trackage rights over the lines of merging carriers, it would also order similar trackage rights over the lines of non-merging carriers in the affected areas. NITL adds that, in the alternative, the Board could commit to reopen its 49 CFR part 1144 "intramodal rail competition" rules when and if the next "major merger" application is filed, in order to permit competitive access to both merging and non-merging carriers in terminal areas at which merging carriers interchange cars with non-merging carriers.

Gateway preservation. NITL contends that, as respects gateways, the last sentence of NPR § 1180.1(c)(2)(i) ("Applicants shall also explain how they would at a minimum preserve competitive options such as those involving the use of major existing gateways, build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.") needs substantial clarification and definition.

(1) NITL insists that the Board should clarify the phrase "major existing gateways." NITL contends: that the phrase itself is flawed, because there is no objective measure as to what

constitutes a "gateway" as opposed to an ordinary "interchange," and because the use of the adjective "major" simply confuses the issue even more; that, therefore, the phrase should be discarded in favor of a more objective and precise phrase; and that the proper area of inquiry should be whether there is an "existing interchange" between an applicant carrier and a non-applicant carrier (the existence of an "interchange," NITL explains, depends upon physically-verifiable conditions such as whether there is an actual exchange of cars between carriers at a specific geographic point). NITL further contends: that, if the Board agrees that the focus should be on whether there is an "existing interchange" between a merging and a non-merging carrier, the question then becomes the proper standard for determining whether such an existing interchange should be preserved; and that the proper regulatory standard here would forbid merging carriers, either as part of the application or in the future, from closing any existing interchange unless the carrier can show clearly that the existing interchange is not necessary to preserve the competitive routing options of any shipper or that maintenance of the existing interchange would be patently inefficient. The "patently inefficient" standard, NITL insists, would place the burden on the carrier to show that any proposed or future interchange closure was indeed justified.

(2) NITL contends that the Board should clarify what it means when it says that carriers must "preserve" gateways. NITL explains that, because interchanges can be "closed" in various ways (by tearing up track, by not permitting the exchange of cars with another carrier, and by pricing routings with another carrier so as to make transportation via that route uneconomic), the Board should make clear that carriers must explain how they would preserve the routing over such interchanges not just physically (i.e., by permitting routing over the gateway) but also economically (i.e., by ensuring that the rate to be charged to the interchange permits competition over the remainder of the movement).

(3) NITL contends that, to accomplish these clarifications and changes, the last sentence of NPR § 1180.1(c)(2)(i) should be revised to read as follows: "Applicants shall also explain how they would at a minimum preserve existing competitive options including but not limited to those involving the use of existing interchanges, build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement. The Board shall not permit the closure of existing interchanges by any means (through direct interchange closures, rate increases, or otherwise) unless the applicants can show clearly that an existing interchange is not necessary to preserve the competitive routing options of any shipper, or that maintenance of the existing interchange would be patently inefficient."

Service assurance plans. NITL indicates that, although it supports the "service assurance plan" concept outlined in NPR §§ 1180.1(h) and 1180.10, it believes that the existence of a SAP, by itself, is not enough. Every SAP, NITL insists, should include a compensation requirement, a procedural requirement, and a substituted service requirement.

(1) *Compensation requirement.* (a) NITL contends that the Board should require that every SAP include provisions for the compensation of shippers in the event of a carrier's failure to provide the levels of service experienced by shippers pre-merger (NITL explains that service will truly be "assured" only if carriers are aware beforehand that failure to provide promised service levels will result in sure financial penalties). NITL adds that, although it believes that the promises of merging carriers should be scrutinized very carefully in the course of the Board's review of the merger application, it is not arguing that there should be remedies if the projections of merging carriers fail to materialize; rather, NITL explains, it has limited its right to remedies to "damages experienced as a result of the failure of the applicant carriers to provide service to any shipper at levels experienced prior to the implementation of the transaction." (b) NITL further contends that the Board should also make clear that, although a shipper's recovery cannot exceed the total damages the shipper has suffered, the remedies in a SAP will complement, and not replace, any remedies the shipper might already have against the carrier as part, for example, of a shipper's contract with the carrier (NITL explains that it is concerned that the inclusion of remedies in a SAP as a condition of the merger, combined with the agency's authority to exempt a merger from the force of other law, might act to strip a shipper of its existing rights).

(2) *Procedural requirement.* NITL contends that every SAP should include an expeditious and fair procedure for obtaining compensation for merger-related service failures. NITL contends, in particular, that every SAP should include a provision for expedited arbitration (e.g., to be completed within 90 days), at the shipper's election, of disputes over compensation for rail service failures as a result of a consolidation transaction, for a reasonable time after a consolidation is implemented (recent history, NITL adds, would suggest that a "reasonable time" after implementation of a transaction would need to be at least a year). NITL explains that, in the past, if a carrier has denied a shipper's claim, the shipper has been obligated to go to court to obtain compensation for the carrier's service failures. Litigation, NITL further explains, is an expensive and lengthy proposition that has discouraged many shippers from pursuing their rights at all.

(3) *Substituted service requirement.* (a) NITL contends that the SAP should be required to provide for access by alternative carriers to remedy post-merger service failures. NITL explains that some damages resulting from service failures (e.g., damages to customer relations, to a shipper's competitive presence in a particular market, or to a shipper's reputation) are difficult if not impossible to compensate, and can best be minimized by allowing affected shippers access to alternative carriers. (b) NITL contends that the Board's 49 CFR 1146.1 "expedited relief for service emergencies" regulation (which requires that a shipper, in order to obtain emergency or temporary service relief, must show "a substantial, measurable deterioration or other demonstrated inadequacy in rail service," along with advance discussions with the incumbent carrier and a commitment from another railroad to provide safe and operationally feasible service) might have a role to play in this context. NITL contends, in particular, that the Board should consider requiring applicant carriers to link service levels in their SAPs with the

49 CFR 1146.1 standards for proving a "measurable deterioration" in rail service. NITL contemplates that a carrier's SAP would be required to provide that, if service levels for any shipper deteriorated a specified percentage from service levels experienced by that shipper for a reasonable period prior to implementation of the transaction, the Board would presume that there had been a "measurable deterioration" in rail service for the purpose of ordering relief under 49 CFR 1146.1. NITL further contemplates that, if service fell below the specified level, a shipper would not have to prove that there had been a "measurable deterioration" in rail service but would simply have to show that it had attempted to resolve the service problem with the incumbent carrier and that it had a substitute carrier willing and able to provide substituted service.

Operational monitoring and oversight. NITL indicates that, although it supports the Board's call for increased operational monitoring and post-merger oversight, it believes that the proposed rules focus too much on generalized data that give only a broad picture of a carrier's operational health (e.g., on-time performance at principal yards) and do not focus sufficiently on the key operational information that is the most important and direct determinant of the quality of a carrier's service (i.e., transit times and cycle times over major corridors). NITL therefore insists that, as part of the requirement for operational monitoring, applicant carriers should be required to provide information on transit times and cycle times for traffic categories over major corridors for the year immediately preceding the application, and then should be required to provide the same information on a continuing basis following the application and the implementation of the transaction.[142]

Acquisition premiums and financial burdens. (1) NITL contends that the Board should revise its proposed rules to ensure that acquisition premiums will be included neither in the calculation of the jurisdictional threshold for rate regulation nor in the evaluation of a carrier's revenue adequacy. NITL explains that the inclusion of an acquisition premium (i.e., the difference between the purchase price of a rail acquisition and the market or book value just prior to acquisition) will cause the jurisdictional threshold to rise, and will increase the likelihood that a railroad is determined to be revenue inadequate. And, NITL adds, because acquisition premium costs work their way into RCAF calculations, shippers that utilize the RCAF in their contracts may also be adversely affected by an acquisition premium. (2) NITL contends that the Board should undertake to examine, more carefully than it has in the past, the possible effects of the financial burden imposed by a proposed consolidation transaction. NITL advises, in this context, that shippers have reported that they are beginning to experience in the eastern United States rate increases that do not appear to be justified by carrier cost increases, a

[142] NITL notes that, whereas "transit times" are the appropriate service measure for some traffic (e.g., merchandise traffic), "cycle times" are the appropriate service measure for other traffic (e.g., unit coal trains).

development (NITL adds) that shippers believe to be related, at least in part, to the very substantial debt levels assumed by both CSX and NS in connection with their purchase of Conrail.

Operational alliances. The last two sentences of the opening paragraph of NPR § 1180.1(c) provide: "When evaluating the public interest, the Board will also consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation. The Board believes that other private sector initiatives, such as joint marketing agreements and interline partnerships, can produce many of the efficiencies of a merger while risking less potential harm to the public." NITL indicates that, although it supports the first cited sentence, it believes that the second cited sentence should be deleted. As respects the second cited sentence, NITL explains that, although joint marketing agreements and interline partnerships may have anticompetitive consequences, such consequences may escape all regulatory review, because the transportation regulatory agency (the Board) takes a narrow view of "control" and "pooling" and because the antitrust regulatory agencies (DOJ and FTC) review most agreements among competitors under guidelines that were not developed with the specific situation regarding rail alliance agreements in mind (NITL notes, by way of example, that the relevant DOJ/FTC guidelines indicate that a competitor collaboration will not be challenged when the market shares of the collaboration and its participants collectively account for no more than 20% of each relevant market in which competition may be affected). The Board, NITL insists, should not give the appearance of "blessing" in advance joint venture or alliance arrangements, but, rather, should leave it to future proceedings to determine both the proper jurisdiction for reviewing the legality of a joint venture or alliance arrangement and also the competitive or anticompetitive effects of a particular arrangement.

Cumulative impacts. (1) *Downstream effects.* NITL agrees that, because there are now only a few remaining Class I carriers, the "one case at a time" rule has outlived its usefulness; the Board, NITL insists, should examine the reasonably foreseeable downstream effects of a proposed merger. NITL contends, however, that, in order to harmonize the text of NPR § 1180.1(i) and the commentary thereon (see NPR, slip op. at 20-21), NPR § 1180.1(i) should be revised to require applicants to anticipate "with reasonable certainty" what additional applications are likely to be filed. (2) *Upstream effects.* NITL contends that the applicants to a future major merger should address what impacts, if any, the proposed merger would have on conditions imposed in previously-approved mergers. NITL explains: that, in view of the gradual loss of geographic and segment competition that has taken place since the latest wave of major mergers began in 1994, a future merger may require a re-examination of past merger conditions in order to uncover a serious loss of, for example, geographic competition that might occur if a major western carrier were to merge with a major eastern carrier; that, although such a merger might give the combined system a national stranglehold over a particular commodity, it might be possible to cure that result by altering the configuration of trackage rights granted in a previous merger, to permit access to the western origins of the commodity by the non-merging western carrier; and that, therefore, in this context, the Board needs to look at the entire picture, and should not only look forward.

Transnational issues. NITL indicates that it supports the NPR's approach to transnational issues. It is crucial, NITL explains, that, in cases involving major foreign railroads, applicants should submit "full system" competitive analyses and operating plans, including operations in the foreign country.

Consumers United For Rail Equity. Consumers United for Rail Equity (CURE)[143] agrees that future rail mergers must be measured against a procompetitive standard; CURE argues that merger rules that are unequivocal in their demand that future rail mergers result in enhanced competition are critical to the future health of the rail industry and many aspects of the national economy; and CURE insists that the necessary components of a national rail policy include a merger policy focused on enhancing competition, rules that allow competitive rail opportunities to develop for captive shippers, and actions that create healthy regional railroads throughout the U.S. CURE contends, however, that the rules proposed in the NPR fail to make effective competition the centerpiece of U.S. rail policy. CURE further contends: that the Board should revise the proposed rules so that the final rules have a demonstrable impact on the fundamental problem facing the rail industry today (a regulatory framework that encourages monopolistic behavior); and that, where the Board believes that it lacks the authority to act, it should give Congress a clear signal so that Congress may take the steps necessary to pass legislation that will result in a comprehensive rail policy that keeps railroads healthy and provides transportation competition for shippers.

Scope of proceeding. CURE contends that the Board must reach beyond the merger context and must develop (either in this rulemaking or in a separate rulemaking) procompetitive rules that apply to the industry as a whole, whether or not future mergers are approved. This more expansive approach is necessary, CURE explains, to address effectively the concerns repeatedly raised by rail shippers, to promote a more robust and competitive rail industry, and to

[143] CURE's membership includes Algona Municipal Utilities, American Electric Power Service Corporation, American Public Power Association, Arizona Electric Power Cooperative, Arkansas Electric Cooperative Association, Buckeye Power, Inc., Camelot Coal Company, Carolina Power and Light Company, Consumers Energy Company, Dairyland Power Cooperative, Duke Energy Company, Edison Electric Institute, Empire District Electric Company, Entergy Services, Inc., Ethyl Corporation, Exelon Corporation, Kansas City Power and Light Company, Minnesota Power, Municipal Electric Systems of Oklahoma, National Rural Electric Cooperative Association, Nebraska Public Power District, The Ohio Valley Coal Company, Potomac Electric Power Company, Shawnee Coal Company, Southern Indiana Gas and Electric Company, Sunoco, Inc., and Wisconsin Power and Light Company.

meet the principal goals of the Staggers Act. CURE further contends that the following changes to current policy are critical to the promotion of effective rail competition: (1) CURE contends that, as respects any rail merger in which the application is filed after January 2000, the Board should adopt stronger merger review guidelines that evaluate each merger's impact on competition and that apply the following requirements: a requirement that applicants demonstrate that an increase in competitive options will be available to shippers following the merger; a requirement that no merger will be approved that reduces transportation alternatives available to current railroad customers, including an analysis beyond any "bottleneck" affecting a rail shipper; and a requirement that no merger will be approved that fails to provide additional options and enhanced service for railroad customers. (2) CURE contends that the Board should reverse its current policy regarding "bottlenecks" and adopt a new policy requiring a railroad to quote a rate between any two points on its system where traffic can originate or be interchanged. (3) CURE contends that the Board should affirmatively grant the right of Class I and small railroads to interchange at terminal areas and interchange points without being disadvantaged in any way in terms of operations or pricing. (4) CURE contends that the Board should eliminate all "paper barriers" that arbitrarily restrict full interchange rights for Class II and III railroads.

Discretion. CURE contends that the proposed rules do not provide that certain procompetitive standards must be met as a condition to merger, but, rather, give the Board absolute discretion concerning whether to apply procompetitive conditions to merging railroads. CURE insists that, because the discretionary application of the proposed rules falls short of ensuring that the public interest will be protected adequately in future mergers, the Board must amend the rules to establish mandatory procompetitive provisions that will apply to all merging railroads. CURE contends, in particular, that the final rules should require a merged railroad: to quote a rate between any two points on its system where traffic can originate or be interchanged; to allow other rail carriers to interchange at terminal areas and interchange points without being disadvantaged in any way in terms of operations or pricing; and to eliminate all paper and steel barriers that arbitrarily restrict full interchange rights for Class II and III railroads.

Alliance For Rail Competition. The Alliance for Rail Competition (ARC)[144] contends that, although the NPR's procompetitive rhetoric reflects a "paradigm shift," there is little to indicate that the proposed rules can or will achieve the stated goal of "balanced and sustainable competition in the railroad industry." ARC further contends that, because the Board has provided no specific guidelines indicating how it would balance its stated goal of enhanced competition with the public benefits that (the Board claims) resulted from past rail mergers, ARC does not believe that the proposed rules live up to the spirit of the rail customer community's

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[144] ARC, which describes itself as a representative of the rail customer community, indicates that two organizations (the National Council of Farmers Cooperatives and the National Farmers Union) have requested to be listed as endorsing ARC's comments.

recommendations. ARC argues that, for good public policy to result from this proceeding, the Board must take the difficult step of developing a clearly defined merger policy that recognizes and adequately responds to the procompetitive intentions of the statute and the legitimate concerns repeatedly forwarded by the rail customer community and others. And, ARC adds, because it believes that the Board's statutory authority is not likely to be appropriately exercised to achieve the public benefits that would result from increased competition among railroads, ARC will call even more insistently upon Congress to undertake a complete overhaul of the existing regulatory framework in order to introduce and expand competition among railroads.

Public interest considerations. ARC contends that the public interest requires a competitive rail system that provides consistent, reliable, and safe service at a fair price to all who wish to use rail service. Such a system, ARC explains, would play a major role in the nation's transportation network, alleviating highway congestion, reducing air pollution, and providing critical transportation services supporting and encouraging economic development and growth. ARC further contends: that the past several "major mergers" have not significantly improved service, enhanced competitive service alternatives for any but a select few, resulted in remarkably more efficient or more responsive rail transportation, or generally reduced the costs associated with rail transportation; that increasing the discretion of the Board regarding how it balances the railroads' future merger proposals with the need for enhanced rail-to-rail competition will not likely improve the chances that any future merger will produce different results; that no amount of regulatory monitoring will correct the harms caused by a merger that does not live up to expectations; that service disruptions harm rail customers, result in significant losses to local, state, and national economies through lost wages, lost tax revenues, lost sales, and lost productivity, add to highway congestion and air pollution by putting more trucks on the road, and generally lower the bar on expectations of rail performance; that, in the highly consolidated rail marketplace, it is imperative that the Board view any future mergers as an opportunity to increase competition between railroads throughout the rail industry under the auspices of its broad authority; that efforts to ensure that gateways remain physically open, but without specifically requiring that they remain economically open, provide little or no assurance that even existing competition will be maintained; that, for those customers that must rely solely on rail transportation, competition can only be enhanced through increased rail transportation options; that the dwindling number of Class I railroads and the lack of competition among those railroads allows them to behave in ways that determine the viability of geographic markets; and that the unreliability and inconsistency of rail service performance undermines rail transportation as a viable mode of freight movement, and, as a result, contributes to the congestion of highways and associated air pollution in many urban areas of the country.

Guidelines. ARC contends that the Board, in crafting actual, specific, and definitive rules, should take into account: that a viable freight railroad industry is in the public interest; that railroad viability can and should be enhanced with competition; that the net impact on customers should be the key merger criterion; that competitive access is the preferred protection for customers; that railroad customers need “safe harbor” protection; that railroad mergers are not the only way to lower operating costs; that post-merger performance must be closely monitored for a period of 10 years; and that, when railroad mergers cause unanticipated adverse impacts on customers, or when competitive alternatives provided for within a merger proceeding are determined either to have not worked or to have disappeared, the situation should be rectified post-merger by opening competitive access and/or by making economic regulation more effective.

APPENDIX L: COAL INTERESTS

The "Subscribing Coal Shippers" Group. The "Subscribing Coal Shippers" group (referred to as SCS)[145] indicates that it is disappointed with the NPR. SCS explains that, whereas it expected the NPR to propose "fundamental changes" in the merger rules, the NPR actually proposes only "opaque linguistic changes" that leave the Board, carriers, and other parties to flesh out the details (whatever they may be) in the next major rail merger case. SCS further explains that, although the Board claims to have "raised the bar" for approval of the next round of major rail mergers, the Board's proposed new standards are so elastic that no one will really know whether the "bar" has been raised and if it has, by how much, until the rules are applied in an individual case. SCS insists: that there is no certainty that the "bar" has been raised to address competitive and service concerns previously mentioned by SCS; that the "bar" can only be truly raised if the Board includes in its new merger rules specific conditions that will require merging carriers to open up their systems to increased competition via the access, bottleneck, and paper barrier relief conditions previously advocated by SCS; and that, similarly, "service assurance" plans can provide meaningful relief to shippers only if the Board requires merging carriers to reimburse shippers for merger-related service failure costs resulting from failure to meet such plans. SCS specifically contends that the Board should include in the new rules the procompetitive merger remedies advocated by SCS, and should require merging carriers to compensate shippers for post-merger service failure costs and to exclude acquisition premiums and service failure costs in calculating rail costs for regulatory purposes, including the RCAF calculations.

Competitive remedies. SCS contends that the Board's new competition-enhancing standard, no matter how well intentioned, is so open-ended that it is likely to provide no meaningful relief to captive coal shippers; the rail applicants in all recent major rail merger proceedings, SCS insists, have claimed that the mergers will enhance competition, and in some cases (SCS adds) the ICC/STB has agreed. SCS further contends that the only way to ensure that competition will be meaningfully enhanced is to prescribe, in advance, procompetitive conditions of the type previously advocated by SCS (i.e., conditions that would require merging carriers to provide access, bottleneck, paper barrier, and other forms of competitive relief). SCS, which insists that this proceeding was initiated because of fears that the next round of major rail mergers would result in a national rail duopoly, argues that, if this "frightening" concentration of

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[145] The members of the SCS group are Western Coal Traffic League, American Public Power Association, National Rural Electric Cooperative Association, Alliant Energy Corporation, City of Grand Island, NE, City Utilities of Springfield, MO, Lafayette Utilities System, Platte River Power Authority, Salt River Project Agricultural Improvement and Power District, Texas Municipal Power Agency, and Xcel Energy Inc.

economic power in the hands of two mega-carriers is allowed to occur, it must include major competition-enhancing conditions.

Access relief condition. SCS contends that the Board should condition every major rail consolidation transaction by allowing "any person, including an affected shipper, [to] request the consolidated carrier(s) to allow a second carrier to use its or their facilities to provide competitive rail service." The access relief condition contemplated by SCS: would allow the carrier 90 days to respond to the request; would, if the carrier denies the request, allow the requesting person to seek relief in an administrative proceeding; would, in the case of such a proceeding, result in an order requiring "railroad facilities owned by the involved rail carrier to be used by another rail carrier if the Board finds that use will not substantially impair the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business"; and would, if such an order were issued, require that the owning carrier be compensated "for the use of the facilities on a usage basis based upon a sharing of the total costs incurred." SCS indicates that its access relief condition is intended to promote effective rail competition by giving shippers the opportunity to obtain competitive access relief from the consolidated carrier in those instances where access relief is physically practicable. SCS further indicates that its access relief condition is also intended to promote shipper/carrier negotiated access solutions, subject to Board intervention in those instances where the parties are unable to work out the terms of the relief via negotiations.

Bottleneck relief condition. SCS contends that the Board should condition every major rail consolidation transaction by requiring the consolidated rail carrier(s) to establish, upon the request of a shipper, "a rate for transportation and [to] provide service requested by the shipper between any two points on the system of that carrier where traffic originates, terminates, or may reasonably be interchanged." The bottleneck relief condition contemplated by SCS would require the carrier to establish a rate and provide service upon request and would allow the shipper to challenge the reasonableness of such rate, without regard to (a) whether the rate is for only part of a movement between an origin and a destination, (b) whether the shipper has made arrangements for transportation for any other part of that movement, or (c) whether the shipper currently has a contract with any rail carrier for part or all of its transportation needs over the route of movement. SCS, which argues that rail mergers exacerbate bottleneck problems (by, e.g., converting a bottleneck involving a separate destination carrier that connects with 2 competing origin carriers into a situation where the bottleneck destination carrier also serves the origin), indicates that its bottleneck relief condition is intended to promote competition by requiring consolidated carriers to provide transportation rates over bottleneck route segments. SCS further indicates that its bottleneck relief condition is intended to allow a shipper to seek maximum rate relief from the Board if the bottleneck rate established by the consolidated carrier is unreasonably high.

Paper barrier relief condition. SCS contends that the Board should condition every major rail consolidation transaction by allowing "any person (including an affected shipper)" to request that the consolidated carrier(s) remove any paper barrier (i.e., any term in an agreement between a Class I railroad, on the one hand, and a Class II or Class III railroad or noncarrier, on the other hand, that impairs or penalizes the freedom of the Class II or Class III railroad to interchange traffic with carriers with which the Class II or Class III railroad can physically connect). The paper barrier relief condition contemplated by SCS: would require the consolidated carrier to respond within 30 days; would, if the consolidated carrier does not grant the request, allow the requesting person to seek relief in an administrative proceeding; and would, in the case of such a proceeding, result in an order directing the consolidated carrier to remove the paper barrier, "unless the carrier can demonstrate that retention of the paper barrier is in the public interest." The paper barrier relief condition contemplated by SCS further provides that, in making a public interest finding, the Board would be guided: (1) by the principle that paper barriers to interchange are inherently anticompetitive, and are unreasonable unless they are necessary to the achievement of a public benefit that outweighs the harm they cause to competition, and then only if they are no broader or more restrictive than necessary to achieve that benefit; and (2) by the rebuttable presumption that a paper barrier is unreasonable insofar as it (i) lasts longer than 5 years from the date of the agreement containing the paper barrier, or (ii) includes any financial penalty on a Class II or Class III railroad that is triggered by the interchange of traffic with another carrier, or (iii) includes credits for traffic interchanged with a carrier against a rental or sale price that reflects a return of more than the railroad industry's cost of capital on the fair market value of the properties sold or leased. SCS indicates that its paper barrier relief condition is intended to eliminate restrictions that prevent Class II and Class III railroads from providing competitive interchanges with major rail carriers. SCS further indicates that its paper barrier relief condition would allow shippers and carriers to first negotiate removal of unreasonable paper barriers, subject to Board resolution of disputes that the parties are unable to successfully negotiate.

<u>Service failure monetary damage remedy</u>. SCS contends that the Board should condition every major rail consolidation transaction by requiring the consolidated carrier(s) to make every shipper "financially whole for any injuries the shipper incurs as a result of post-consolidation service problems." The service failure monetary damage remedy contemplated by SCS: would apply to all major consolidation transactions approved on or after January 1, 1996; would require the consolidated carrier either to pay a claim or to reject the claim (and to explain, with specificity, the reason for the rejection) within 14 days of the receipt thereof; would, in the case of a rejected claim, allow the shipper to institute an administrative proceeding to obtain payment; and would require the Board to complete any such proceeding within 180 days after the filing of the request for relief. The service failure monetary damage remedy contemplated by SCS would also preclude the consolidated carrier from raising as a defense that its liability to any shipper is limited by the terms of any contract or other arrangement with the shipper. SCS indicates that, although it does not object to the "service assurance plans" proposed in the NPR, it believes that

SAPs alone are not sufficient. SCS argues that recent experience has taught that, despite "assurances," detailed service integration plans, etc., mergers can cause major service problems; SCS further argues that recent experience has also taught that, when a major railroad experiences severe service problems, marketplace solutions (e.g., the substitution of a second rail carrier) are extremely limited; and SCS concludes that the Board should therefore require as part of any "service assurance plan" the service failure monetary damage remedy advocated by SCS. SCS adds that, with such a remedy in place, shippers will have a meaningful "assurance" that they will be directly reimbursed for increased costs they incur as a result of the service failures of merging carriers. SCS further adds that it would not be enough to require that such "assurances" be included in "contractual agreements" between shippers and merging carriers; the problem with that approach, SCS insists, is that it assumes that the merging carriers will voluntarily enter into such contractual arrangements, a result (SCS claims) that is most unlikely given the industry's articulated position in this proceeding.[146]

Regulatory cost remedy. SCS contends that the Board should impose on every major rail consolidation transaction approved on or after January 1, 1996, a condition providing that, "[i]n any proceeding at the Board involving development or use of a consolidated carrier's costs for providing rail transportation service, costs associated with rail service problems, or purchase premiums paid for a carrier's assets,[147] shall be excluded from the carrier's cost of service under the Board's General Purpose Costing Systems." SCS argues that it is fundamentally unfair to make shippers pay for service congestion costs and acquisition premiums; a consolidated carrier, SCS insists, should not be allowed to pass through increased costs in the form of service disruption costs and purchase premiums to shippers via the inclusion of these costs in the Board's General Purpose Costing Systems (e.g., the Uniform Railroad Costing System) and in its calculation of the RCAF.

The "Certain Coal Shippers" Group. The "Certain Coal Shippers" group (referred to as CCS)[148] contends: that recent major rail mergers have not resulted in the efficiencies and

[146] SCS rejects the argument that its service failure monetary damage remedy would turn the Board into a "claims tribunal." SCS explains that the principal reason the Board exists is to hear and adjudicate shipper claims. And, SCS adds, an agency with the broad authority to approve rail mergers certainly has the statutory authority to remedy harms caused to rail shippers by the exercise of that authority.

[147] SCS defines "purchase premium" as the difference between net book value and purchase price.

[148] The members of the CCS group are Otter Tail Power Company, Public Service Company of Colorado, Southwestern Public Service Company, TUCO INC., Tucson Electric

(continued...)

improved service touted by the merger applicants in their merger proceedings; that the deterioration of rail service that has occurred in the recent past is directly tied to and rooted in the diminishment of competition between the major Class I railroads and in the industry as a whole as the rail industry has become consolidated; and that this cause-and-effect relationship between the deterioration of service and the lack of meaningful competition between the Class I railroads and in the rail industry is particularly evident in the coal transportation segment of the rail industry, and more particularly in the transportation of coal from western coal mines to electric generating plants in the western and mid-western United States. CCS insists that the Board should clearly revise its rules with the goal of adopting regulatory changes that will facilitate improved service in the railroad industry by enhancing meaningful competition between the major Class I railroads and in the rail industry generally. CCS adds: that, although the NPR incorporates certain measures designed to improve rail service after a major rail merger, the NPR is impermissibly vague (i.e., it does not provide meaningful standards that merging railroads can rely upon when preparing a merger application, nor does it enable parties affected by a proposed merger to evaluate whether to expend valuable resources to participate in a merger proceeding in order to protect their interests); that the enhancement of rail-to-rail competition and improved rail service go hand-in-hand; and that the goal of improved rail service will only be realized if rail-to-rail competition is improved and if specific, meaningful regulatory "hammers" are in place that provide the major railroads with incentives to improve rail service or continue good rail service.

(1) CCS agrees that the Board, in reviewing future merger applications, should require the enhancement of competition; CCS explains that the fact that competition and service levels have generally decreased (both in the rail industry in general and in the coal transportation segment of the rail industry in particular) as the rail industry has become more consolidated demonstrates that the overall standard applied by the ICC/STB in prior mergers (preservation of pre-merger competitive levels) has been insufficient; and, CCS adds, the Board's new merger policy must be structured so that the overall state of the rail industry improves as further consolidation occurs (i.e., the Board, CCS argues, must act in future major rail merger proceedings to rectify not only the competitive harm and service deterioration associated with such future mergers but also the competitive harm and service deterioration that have already resulted from past mergers). CCS insists that the competition that must be enhanced is intramodal (i.e., rail-to-rail) competition), which (CCS explains) is the kind of competition that is lost when railroads merge. CCS contends: that the NPR has changed the nature of the competition that would be enhanced as a result of a proposed rail merger from rail-to-rail competition to something much broader and less clear; that the NPR does not even expressly

[148](...continued)
Power Company, and Western Resources, Inc. Public Service Company of Colorado and Southwestern Public Service Company are operating divisions of Xcel Energy Inc.

state that the Board's merger policy will henceforth be to require rail mergers to result in the improvement or increased intensity of rail-to-rail competition, rather than merely preservation of pre-merger competition levels; that, in fact, the NPR can be read to allow the reduction of rail transportation alternatives available to shippers if there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved, or if the applicants can show enhanced competition in the broader "transportation infrastructure"; and that, therefore, the rules proposed in the NPR should be revised by clearly defining the "enhanced competition" concept as expressly requiring the enhancement of rail-to-rail competition. CCS, which insists that the Board has ample statutory authority (CCS cites 49 U.S.C. 10101, 11102, and 11324 in particular) to adopt specific measures that require the enhancement of intramodal competition as part of the process of considering a major rail merger application, adds that the final rules should also state that future railroad mergers should not result in any reduction of railroad options to any shipper.[149]

(2) CCS argues that any changes to the rules governing rail mergers should be applied to the rail industry as a whole. Such application is required, CCS claims, because a policy of improving competition and service in the railroad industry can only be accomplished by applying any changes to the rules to non-merging railroads as well as merging railroads; changing the rules only in the context of mergers, CCS further claims, would result in an unbalanced rail industry,[150] where the merged railroad would be required to provide access, rates, and service that its competitors would not have to provide under the Board's current regulations and decisional rules. CCS, which believes that a broad review of all the Board's rules related to rates and service must be conducted for the purpose of establishing whether the rules will facilitate

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[149] CCS rejects the argument that to require enhanced intramodal rail competition would be to substitute regulation for "the market." CCS explains: that the rail market is not a competitive, thriving market similar to telecommunications or automobiles or computers; that, rather, the rail market is an amalgam of separate markets controlled by regional rail duopolies, in which the railroads do not engage in competition at a fraction of the level present in other industries, and where many rail shippers do not have any rail alternatives, let alone competitive rail alternatives; that, furthermore, certain rail market participants, such as shortlines and regionals, are barred from participating for market share by anticompetitive paper and steel barriers; and that the lack of a competitive rail alternative for many shippers means that a prerequisite for participation in the "market" is regulatory relief, in the form of prescribed rates, rail build-outs and crossing proceedings, and the like.

[150] CCS cites, as examples of such imbalance, the 49 CFR part 1144 "intramodal rail competition" regulations, the 49 CFR part 1146 "expedited relief for service emergencies" regulation, the 49 CFR part 1147 "temporary relief under 49 U.S.C. 10705 and 11102 for service inadequacies" regulation, and the Board's so-called "Bottleneck Rules."

improved rail service and meaningful competition as the railroad industry continues to consolidate, insists that the Board should reconsider its decision to limit any changes to its regulations regarding rail-to-rail competition and service to the narrow rail merger context. CCS further insists that, if the Board declines to reconsider that decision, the Board should provide a detailed explanation of why it believes that limiting changes to existing rules regarding competition in the railroad industry to the rail merger context will not in fact hamper the advancement of a policy of enhancing competition and improving service in the railroad industry by creating an uneven playing field, thereby discouraging rail mergers in the first place.

(3) CCS, which insists that the Board's bottleneck rules must be revised if rail competition for coal transportation is to improve as the industry continues to consolidate, contends that merging railroads should be required to provide, upon request, rates over bottleneck segments created by the merger and over pre-existing bottleneck segments on the merging railroads. CCS contends, in particular, that the Board should promulgate regulations that require merger applicants to provide rates and service terms upon request over all bottleneck segments of track in cases where (a) the merging railroad combines with a bottleneck railroad, thereby acquiring the full routing from an origin to a destination, and (b) there is an existing bottleneck on either of the merger applicants' systems where there is a current interchange between the merging carriers.

(4) CCS, which insists that the "one lump" theory that has been used to deny relief to captive shippers in the merger context is inconsistent with the "contract exception" to the bottleneck rules, contends that the Board should resolve this inconsistency by abandoning the "one lump" theory. CCS explains: that, although the BN/SF and UP/SP mergers resulted in the merged railroad obtaining a monopoly over both a bottleneck segment of track owned by a previously neutral carrier and the remainder of the movement from origin to destination, the ICC/STB denied the requests of captive coal shippers for relief from the extension of the bottleneck carrier's monopoly; that relief was denied because, the ICC/STB theorized, the level of the harm to the captive shipper after the merger was no greater than the harm existing prior to the merger, because (so the ICC/STB claimed) there is only one "lump" of profit to be had on the overall movement and the monopoly destination carrier would absorb the lion's share of that profit regardless of whether or not it merged with an upstream carrier; that, however, the Board's bottleneck rules provide that, if a coal shipper is able to obtain a contract for the movement of its coal by a non-bottleneck carrier from a different mine origin than that served by the incumbent carrier, the Board will prescribe a maximum reasonable rate over just the bottleneck portion of the movement; and that this prescription effectively prohibits the bottleneck carrier from "soaking up" all the profit remaining on the overall movement after the non-bottleneck carriers compete for that portion of the movement. CCS adds that, if the Board were to continue to adhere to the "one lump" theory in rail mergers, the "contract exception" would cease to be available to the captive shipper to the extent a merger results in the railroad with the bottleneck serving the same origin as a potential competitor over the non-bottleneck segment.

(5) CCS contends that the Board should strengthen the ability of coal shippers to achieve the intended benefits of the "contract exception" to the bottleneck rules by eliminating the "same origin" restriction and by requiring merging carriers to provide separately challengeable rates over bottleneck segments even if no contract exists for the non-bottleneck segment. (a) As respects the request that the Board eliminate the "same origin" restriction, CCS explains: that the "same origin" restriction to the "contract exception" provides that a railroad need not supply a rate over a bottleneck segment if the bottleneck railroad and the non-bottleneck railroad that wishes to contract with the shipper for service over the non-bottleneck segment serve the same origin; and that, because many key western coal mines are served both by UP and by BNSF, the "same origin" restriction discourages most shippers of western coal from even attempting to obtain a contract for service over non-bottleneck segments (because, CCS adds, the Board, in these circumstances, will not entertain a request that a bottleneck rate be prescribed until a coal shipper has successfully prosecuted a competitive access case). (b) As respects the request that the Board require merging carriers to provide separately challengeable rates over bottleneck segments even if no contract exists for the non-bottleneck segment, CCS explains: that, because neither UP nor BNSF has actively sought to enter into competitively-priced contracts for transportation of coal over non-bottleneck segments where the other railroad holds a monopoly over a bottleneck segment, there has not been vigorous competition for captive traffic under the "contract exception" to the bottleneck rules; and that, therefore, the Board should reconsider its refusal to require railroads to provide rates over bottleneck segments of track if no contract is present for transportation above or below the bottleneck. The procompetitive goals of the "contract exception" will only be reached, CCS argues, if the bottleneck carriers are required to provide the rate first.

(6) CCS, which insists that the NPR is too open ended and vague regarding the consequences for merging railroads that fail to live up to their promises regarding post-merger rail service (the NPR, CCS maintains, does not provide clear procedures and standards that could be utilized by rail shippers to seek compensation and other relief for post-merger service problems), contends that the Board should establish remedies in the event that service declines after a rail merger and should provide for the substitution of rail service by another railroad on more lenient grounds. CCS argues: that the Board's present policies permit a certain level of service deterioration after a merger before the Board will act, and the Board has to date afforded merging railroads a substantial degree of deference in their representations regarding their ability to return service levels to pre-merger levels; that, in these circumstances, a large amount of the risk that merging railroads cannot effectively implement their merger has been unfairly shifted to the shoulders of rail customers; that, given this reality, the service problems that have accompanied the last several major rail mergers have caused tremendous harm to individual shippers and to the national economy; and that coal shippers and electric utilities alone suffered losses and damages in the tens of millions of dollars on account of the service problems that accompanied implementation of one recent merger (the UP/SP merger). CCS adds: that, in general, most coal-fired generating facilities can normally withstand not more than 30-45 days of

deteriorated service before their coal inventories are depleted; that, in the event of such deterioration, it is not enough for service levels to be restored to prior levels; that, rather, in the event of such deterioration, service must be restored to a greater level to quickly build inventories back up to levels that provide adequate insurance that electric power will be supplied to wholesale and retail customers in the event of future rail service deterioration; and that, in view of the service disruptions that have accompanied the past several major rail mergers, the Board's policies and regulations must be changed to require more scrutiny of representations regarding service made by merger applicants, and less deference to merging railroads regarding rail service issues post-merger. CCS therefore contends that, in order to advance a policy of improving rail service by enhancing competition and not tolerating any reductions in overall rail service as the industry continues to consolidate, the Board should amend its rules: (a) to establish remedies in the form of damages, including consequential damages, for any measurable reduction in rail service after a rail merger; and (b) to include provisions setting forth the circumstances in which an alternate carrier may be utilized in the event of post-merger service deterioration (and, CCS adds, the Board should put the burden on the incumbent railroad to rebut a presumption that alternative service will not interfere with its operations).[151]

(7) CCS contends that the Board should require merging railroads to provide reciprocal switching and/or trackage rights at established rate levels from established terminal points to facilities physically connected to only one major railroad. CCS argues: that the reciprocal

[151] CCS has also addressed several arguments that have been made respecting post-merger service problems. (1) CCS notes that an argument has been made that SAPs have to be flexible. CCS insists that, although some flexibility may be necessary, the Board must limit the flexibility of SAPs to that which is truly required for the carriers to respond to and correct service problems. (2) CCS notes that an argument has been made that railroads already have powerful economic incentives to avoid service problems, because (so the argument goes) the costs of such problems fall on the railroads. CCS, which insists that this is an exaggeration, notes: that the Board allows the costs of post-merger service deterioration to be passed on to shippers by permitting such costs to be included in the calculation of the merged railroad's variable costs; that such inclusion, combined with the fact that the Board only has jurisdiction to assess the reasonableness of rates that are greater than 180% of variable costs, allows a merged railroad to increase rates to recover service-related costs immune from Board scrutiny; and that, furthermore, current Board policy permits a merged railroad to raise rates immediately after a merger even when a so-called "merger premium" has been paid, thereby further shifting the risk of service failures from the railroad to its customers. (3) CCS notes that an argument has been made that shippers can always negotiate service guarantees. CCS insists that this is simply not true for the majority of rail shippers, and that it is particularly not true for captive rail shippers; the absence of meaningful competition in much of the rail industry, CCS adds, means the inability to negotiate meaningful service guarantees.

switching should be at a single rate in a terminal and for a reasonable distance beyond the terminal for all connecting carriers; that the Board should set the switching rate at levels that enhance the competitive options available to shippers while covering the railroads' costs; and that, although agreements between railroads regarding the level of the charge should be considered, such agreements should be accepted by the Board only if the agreed-upon level enhances the feasible options of rail shippers after the merger. And, CCS adds, the Board should overrule the Midtec decision and its unreachable threshold requirement of showing anticompetitive conduct before reciprocal switching and use of terminal facilities will be permitted.

(8) CCS contends that, in order to advance the policy of improving rail rates and service through competition, the Board should act to ensure the viability and independence of shortline, regional, and smaller Class I railroads as competitive alternatives to major Class I railroads for coal transportation. CCS contends, in particular, that the Board should promulgate regulations intended: (a) to eliminate non-competitive "paper barriers" erected by major Class I railroads as part of the sale of a particular rail line as an outgrowth of a merger; (b) to closely scrutinize the operating plans of merger applicants for evidence of intent to close interchanges and connections with shortlines for anticompetitive reasons; and (c) to facilitate the use of smaller Class I railroads and regional shortlines as alternatives to incumbents in the event of service disruptions, even if such service is over the track of the incumbent railroad.

(9) CCS contends that, although the pace at which FERC processes utility mergers is somewhat faster than the pace at which the Board processes rail mergers, the Board should not adopt an expedited procedural schedule for rail mergers. CCS argues: that FERC's ability to proceed at a faster pace is due in large part to the fact that FERC already has in place important measures (e.g., open transmission access requirements and rate freezes) that require utility merger applicants to enhance competition and to keep rates from increasing post-merger; that, given the existence of FERC's clearly defined rules and guidelines regarding the enhancement of competition, utility merger applicants know which measures to include in their applications, and there are thus fewer questions about whether the public interest has been served; and that the Board will not be able to proceed at FERC's pace unless the Board's final rules set out much more clearly and distinctly the Board's "enhanced competition" policy, and clearly establish procompetitive measures on a par with those known to parties seeking merger approval from FERC.

The Committee to Improve American Coal Transportation. The Committee to Improve American Coal Transportation (referred to as IMPACT),[152] which insists that the Board

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[152] The members of the IMPACT group are Arkansas Electric Cooperative Corporation, (continued...)

should act to enhance the chances that adequate intramodal competition can be established among Class I railroads, argues that this proceeding gives the Board a last chance to preserve the benefits of the Staggers Act reforms by turning the Class I railroad industry away from its fatal compulsion to merge its way to duopoly. IMPACT contends that, although it is still not too late to make a last effort to restore adequate intramodal competition among Class I railroads, it will be too late if the Board's merger moratorium expires without effective, procompetitive merger rules in place. IMPACT adds that trying to preserve the inadequate existing level of intramodal competition is not enough; the Board, IMPACT believes, must adopt rules that will do what the rules proposed in the NPR will not do (i.e., enhance competition, and restore competition that was lost in the mergers of the last decade). And, IMPACT warns, if the Board allows the big railroads to create a North American railroad industry without effective rail-to-rail competition, a return to strict regulation is inevitable.

Adequate intramodal competition. (1) IMPACT contends: that experience has demonstrated that intramodal competition in the railroad industry is much more effective where customers have at least 3 rail options than where there are only 2 carriers; that the "2 is enough" view of the ICC/STB (i.e., the belief that markets that include 2 railroads are sufficiently competitive) has led the rail industry to evolve into a duo of duopolies, one in the East and another in the West; and that, because the U.S. railroad industry already has too few Class I railroads to provide a balanced and sustainable rail transportation system, there is no way that mergers that reduce the number of Class I carriers in major markets can possibly improve that situation. IMPACT further contends that, because adequate intramodal railroad competition requires 3 railroads, the Board should seek to foster enhanced intramodal competition in the railroad industry and to increase the number of markets in which at least 3 railroads compete. It is not enough, IMPACT insists, for the Board to adopt merger policies that merely arrest the slide to duopoly and preserve the status quo. Rather, IMPACT argues, what the Board needs is a policy that will increase the number of Class I railroads serving major rail-oriented markets.

(2) IMPACT indicates that it is disturbed that the NPR not only fails to require that merger applicants provide means to enhance intramodal competition but also seems to assume that Class I rail mergers must continue to be approved, even to the point of duopoly. IMPACT argues that, although the Board is correct not to attempt to prescribe some rigid formula for how to enhance competition, the Board should make clear that future Class I rail mergers will not be approved unless they enhance effective intramodal competition by effectively introducing new carriers into significant rail markets. IMPACT adds that how many markets need be so addressed should depend on the size of the proposed transaction, and the benefits that the applicants would gain from it.

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[152](...continued)
Edison Mission Energy, Midwest Generation LLC, and UtiliCorp United.

(3) IMPACT maintains that, if the rules proposed in the NPR are adopted as is, the Class I railroads will draw the obvious conclusion that it is going to be, in the future, pretty much business as usual as far as mergers are concerned. The NPR, IMPACT argues, suggests that, if applicants provide more window dressing in terms of "enhancing" competition (ideally, from the perspective of applicants, competition with trucks), and if applicants make their statements of alleged "public benefits" look more quantitative than they have looked in the past, the Board is prepared to approve an additional round of consolidations leading to a continent-wide duopoly. This, IMPACT maintains, is the wrong message to send.

(4) IMPACT insists that the Board should make clear not only that further concentration in the rail industry is not acceptable, but also that the current degree of concentration in the rail industry is similarly not acceptable. IMPACT further insists that a merger (even an end-to-end merger) should not be approved unless it enhances intramodal competition (i.e., unless it increases the number of independent rail carriers serving major markets and does not decrease the number of independent rail carriers serving any other significant, rail-dependent markets). IMPACT suggests that the "enhanced competition" it contemplates would occur if the merging carriers agreed to divest certain of their lines to other railroads. IMPACT adds: that, although proposals to enhance competition by divestiture of certain lines should be initiated by the carriers involved and not by the Board, the Board should carefully scrutinize each such proposal to be sure that it really would enhance intramodal competition as promised; and that, if the applicants fail to convince the Board of this, the proposed merger should be denied (because, IMPACT argues, it should not be the Board's job to fashion a remedy to permit consummation of a merger if the applicants fail to do so).

(5) IMPACT argues that, if participants in an industry that is already too concentrated want to obtain the prospective profits of a merger, there is no reason why they should not be required to share a portion of that private benefit of the merger with the public by conditioning the merger in a way that will enhance rail competition. IMPACT further argues that, because the now-concentrated rail industry is no longer financially weak, it no longer makes sense to say that competition-enhancing conditions should not be imposed because they would impair the benefits that the merging railroads would obtain from the merger.

(6) IMPACT contends that certain proposals, although desirable in their own right, are inadequate to maintain intramodal competition. (a) IMPACT argues that maintaining open gateways, while desirable, is inadequate to preserve intramodal competition. IMPACT indicates that, although it agrees both that the gateways that must be kept open should not be limited to "major" gateways and also that gateways must be kept open economically as well as physically, it believes that a commitment to keep existing gateways open will do little to preserve competition and can do nothing to enhance it. (b) IMPACT argues that post-merger monitoring, while desirable, is inadequate to preserve intramodal competition. IMPACT explains that, although oversight conditions for post-merger monitoring of competitive and service issues may

provide some limited benefits, such conditions are unlikely to be very effective in preserving, much less enhancing, intramodal competition. IMPACT adds, however, that it agrees that it makes sense for the Board to formalize its oversight practice. (c) IMPACT argues that elimination of paper and steel barriers, while desirable, is inadequate to preserve intramodal competition. IMPACT indicates that, although it agrees that paper and steel barriers should be eliminated (thereby opening up new markets to Class II and Class III railroads), it believes that, in most cases, such reforms can enhance intramodal competition only where they permit another major railroad to use a shortline or regional carrier to reach an otherwise captive customer. And, IMPACT adds, unless there are more Class I railroads in major markets, removal of such restrictions on small railroads can have only a minimal effect on competition.

Service assurances. (1) IMPACT indicates that it believes that the service breakdowns that have occurred in connection with past mergers raise a serious question whether the big railroads may not already be "too big" in the economic sense (i.e., IMPACT suggests that difficulties in management and control may have already made the big railroads less efficient than they would be if they were smaller). IMPACT adds that the extreme concentration in the railroad industry today means that, when a merged railroad's lines and yards are so clogged that cars cannot move, there too often is no other railroad that can provide substitute service.

(2) IMPACT indicates that, although it agrees that future merger applicants should be required to provide "service assurance plans" as part of their applications, it also believes that any future major rail merger is likely to be accompanied by significant service problems, despite the applicants' best planning efforts and most sincere assurances. IMPACT therefore contends that, in addition to SAPs, the Board should require merger applicants to provide specific and enforceable assurances to their customers against service disruptions. IMPACT further contends: that these assurances should include damage recovery and financial penalties to compensate customers if the merger results in service disruptions; that customers would have the right to be heard in the merger proceedings if they were not satisfied by what the merger applicants had offered; and that the Board would weigh these concerns in deciding whether or not to approve the proposed merger. IMPACT argues that merger applicants should be required to show the Board that they have entered into agreements with their customers to provide service assurances that the customers consider adequate; and, IMPACT adds, to make this happen, service assurances offered by a merging party that are in good faith rejected by customers should be grounds for Board rejection of that merger.

(3) IMPACT indicates that, in its ANPR comments, it urged that merger applicants be required to provide back-up plans to allow independent carriers to provide service (including the right to operate over lines of the merged system, and the right to override paper barriers that restrict otherwise-accessible shortlines) when merger-related disruptions prevent a carrier from providing normal service. IMPACT further indicates that NPR § 1180.10(i) would apparently require this. IMPACT contends, however, that, to avoid any misunderstanding, the Board should

state explicitly that its NPR § 1180.10(i) requirement that "contingency plans are in place" means that alternative rail service can go into effect when needed, without requiring lengthy administrative proceedings such as were required to address the UP/SP service meltdown.

Downstream effects; cumulative impacts and crossover effects; a "cooling off" period between mergers. (1) IMPACT agrees that the "one case at a time" approach should be abandoned; the Board, IMPACT believes, should consider the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination; and merger applicants, IMPACT adds, should be required to anticipate with as much certainty as possible what additional Class I merger applications are likely to be filed in response to their own applications and to address how such events would affect the structure of the industry, the calculation of public benefits, and the conditions to be imposed. Considering downstream effects, IMPACT explains, is simply common sense in the current highly concentrated state of the Class I railroad industry.

(2) IMPACT contends, however, that, although cumulative impacts and crossover effects should be considered, this may prove to be difficult; predicting exactly how the end game of rail mergers is likely to play out, IMPACT explains, may be controversial, and any estimate of the effects of various possible outcomes will be condemned by some interested parties as speculative. IMPACT therefore contends that the Board should require a reasonable "cooling off" period between major rail mergers. IMPACT indicates that, under the "cooling off" plan it advocates, the Board would have the power to refuse to consider any merger application involving Class I railroads that is filed within 36 months after the implementation of a previous merger of Class I railroads, although (IMPACT adds) this cooling off period would not apply to merger proposals filed as "responsive" merger applications in the proceedings on the initial merger.

(3) IMPACT argues that its 36-month cooling off period would reduce the crossover effects that the Board would have to consider in deciding the first merger. IMPACT further argues: that, after the 36-month period had passed, the Board would be in a better position to evaluate a second merger application, because the competitive relationships created by the first merger would at least have begun to emerge; that a cooling off period would also address merger-related service problems by providing a breathing spell for rail customers, as well as for the railroad industry itself, to adjust to the new service and competitive realities created by one merger before having to address the next merger proposal; and that, because there might be circumstances in which a pause between mergers was not necessary, the cooling off proposal advocated by IMPACT would allow the Board to waive the cooling off period if it were convinced that a new merger could be effected without injury to the public.

Remedies for competitive problems in rail mergers; divestiture; construction of new rail facilities; bottleneck relief. IMPACT contends that the Board should be more specific in explaining how it intends to use its conditioning power to combat the anticompetitive effects of Class I rail mergers.

(1) *Deny anticompetitive mergers.* IMPACT contends: that the practice of the ICC/STB has generally not been to disapprove a merger that it finds to be anticompetitive, but rather to approve it subject to "conditions" that are supposed to "cure" the competitive problems; that this approach, however, has fostered the increasing concentration of ownership in the railroad industry; that, therefore, the Board should make clear that it will not use its conditioning power to save a flawed transaction; and that, if applicants propose a merger without sufficient conditions to eliminate competitive injury, the Board should deny the merger. And, IMPACT adds, the Board should make clear that, where reductions in competition can be specifically proved, such specifically-identified reductions in competition must be cured if the proposed merger is to be approved.

(2) *Do not tailor conditions too narrowly.* IMPACT contends that the conditions heretofore imposed by the ICC/STB have not redressed all the competitive injuries caused by rail mergers, both because the ICC/STB has insisted that conditions be imposed only to address the specific, narrowly-defined competitive problems created by the proposed merger, and also because the ICC/STB has tended to scrutinize very strictly shippers' claims of competitive injury from proposed mergers, and to grant relief only when injury is most obvious. IMPACT also contends: that, as the rail industry has become more concentrated, it has fallen more and more to rail customer groups to propose merger remedies, whereas a decade ago this role was played by other railroads; that, however, such groups quite naturally focus on the interests of their own particular industry or membership; that small or unorganized customers or other interests may not have the resources or specialized knowledge needed to make or support a case before the Board in support of conditions; and that, because the Board has tended to impose the most narrowly tailored merger conditions possible to remedy whatever competitive problems are found to exist, it is almost inevitable that more competition has been lost than has been restored through conditions. IMPACT therefore recommends: that the Board reverse its presumptions with respect to conditions; that, if a proposed rail merger would materially increase concentration in a market (e.g., if it would reduce the number of competing railroads in a market), then the burden of proof should rest on the merger applicants to establish that all competitive harm from the merger can be eliminated through appropriate conditions; that, where there is doubt about how extensive conditions need to be to remedy threatened competitive harm, the Board should err on the side of greater protection of competition, rather than less; and that, in appropriate cases, the Board should deny the merger application where competitive considerations so warrant.

(3) *Divestiture should be the preferred remedy for competitive problems.* IMPACT contends that, although divestiture is a common antitrust remedy for competitive problems, the ICC/STB has not favored divestiture, but instead has relied on lesser remedies, especially

granting a supposedly-independent railroad the right to move traffic over certain lines of the merged railroad (for example, through trackage rights or haulage rights) in order to restore lost competition. IMPACT insists, however: that trackage or haulage rights may not effectively replace the competition that is lost as a result of the merger, both because trackage rights compensation is often set in a way that precludes replication of the competition that existed prior to the merger, and also because trackage rights are often limited in scope (e.g., as to types of traffic that can be handled or points that can be served); and that, therefore, the grantee of the trackage rights is necessarily a less effective competitor than was the railroad that owned the line before it was merged with its competitor. IMPACT therefore recommends that the Board make greater use of divestiture of rail lines to an independent railroad as a remedy for anticompetitive merger effects, with trackage or haulage rights over the divested lines granted to the merged carrier if appropriate; the Board's objective in imposing conditions on a merger, IMPACT explains, should be to replace all the competition that the merger takes away (and, IMPACT further explains, if the lost competition was provided by a railroad that owned its own lines, then in most cases that competition can best be replaced by an independent railroad that owns those lines). IMPACT adds: that whenever trackage or haulage rights are granted in connection with a merger (whether to the merged carrier over lines divested to an independent railroad, or to an independent railroad over lines of the merged carrier), they should be structured to ensure that the recipient of the rights is able to compete effectively with the line owner, to preserve the full scope of competitive influences that would otherwise be lost in the merger; and that this means that full service rights are to be preferred to overhead or other limited rights, and that compensation should be set at a level that will encourage effective competition.

(4) *Rail line construction should be facilitated.* IMPACT contends that, because the objective of Board policy should be to encourage enhanced intramodal competition and not merely to preserve existing, inadequate levels of competition, the Board should encourage the construction of new rail lines. IMPACT argues that a new line, such as a "build-out" or "build-in," may make it possible for a rail-dependent customer that is "captive" to one railroad to obtain service from a competing railroad. IMPACT adds that the Board should expand this build-in/build-out remedy to 3-to-2 situations, and should also facilitate all new construction proposals that respond to Class I rail mergers.

(5) *Class exemption for rail line construction.* IMPACT contends that the Board should issue a general class exemption for the construction of new rail lines. IMPACT explains that, although having to file a request for exemption does not impose an insuperable burden, the absence of a specific exemption for new line construction implies a negative attitude by the Board towards such construction. IMPACT further explains: that the current procedures provide an opportunity for a railroad that opposes new competition to delay that competition and further entrench its dominance of the market; and that, although opponents of a class exemption construction project could still file a petition to revoke, that petition would not stay the effectiveness of the exemption. IMPACT also contends that environmental review, which is

typically required for major line construction proposals under current regulations, should be expedited.

(6) *The Board should abandon the "one lump" theory.* IMPACT contends that the Board should abandon its reliance on the "one lump" theory as an irrefutable economic principle and should consider, instead, the ways in which vertical integration may produce competitive harm for shippers in the specific circumstances of each merger. IMPACT further contends that merger proponents who advocate the applicability of the "one lump" theory should be required to prove its relevance and application in fact. And, IMPACT adds, the Board should not approve mergers that would impair the ability of shippers to challenge the reasonableness of bottleneck rates.

<u>Other issues</u>. (1) IMPACT contends that the Board should not permit "acquisition premiums" to erode the rate protections available for captive shippers. (2) IMPACT contends that a rail service secondary market is a promising innovation that the Board should consider. (3) IMPACT contends that the Board should adopt a procedural schedule that allows adequate investigation and evaluation of proposed mergers. IMPACT explains: that rail merger proceedings should be as expedited as possible and as prolonged as necessary in order for the parties and the Board to explore the issues thoroughly; that, at present, a 1-year schedule seems totally unrealistic; and that the idea that effective discovery procedures should be abandoned in order to expedite merger proceedings is particularly offensive. (4) IMPACT contends that, although there is some merit in the proposal to exclude KCS from the full scope of the Board's new Class I merger rules, it is too soon to grant KCS the special treatment it requests. IMPACT explains that, given the extremely high degree of concentration in the Class I railroad industry, it is entirely possible that the acquisition of KCS by one of the larger Class I railroads could have a crucial effect on the overall structure of the railroad industry. IMPACT adds, however, that, if the Board adopts procompetition merger rules, and as a result intramodal competition among Class I railroads is increased, then it may be possible to grant KCS the special treatment it requests.

Edison Electric Institute. Edison Electric Institute (EEI),[153] which believes that the proposal to require enhanced competition in rail merger proceedings is an appropriate response to the effects of prior mergers, contends, however, that the proposed rules would appear to permit any conceivable Class I railroad merger transaction so long as the application satisfies certain informational requirements; the proposed rules, EEI insists, do not have the "teeth" that would be necessary to enhance intramodal competition, to assure adequate service, and to require demonstrable public benefits. EEI therefore argues that the Board should propose specific rules

[153] EEI is the association of U.S. shareholder-owned electric companies, international affiliates, and industry associates worldwide.

that would become conditions of any approvals of Class I rail mergers that would assure shippers and smaller railroads that they would be protected as a result of such transactions.

Response to comments. EEI contends that the Administrative Procedure Act required the Board to respond to the important comments submitted in response to the ANPR; it was not enough, EEI argues, to summarize these comments in an appendix to the NPR. EEI further contends that the APA also requires the Board to respond to, and not merely to summarize, the important comments submitted in response to the NPR. EEI adds that failure to respond to such comments makes it unclear whether the comments of parties such as EEI have been accepted or rejected.

The NPR, in general. EEI contends: that the NPR adopts almost none of the specific proposals made by shipper interests, and proposes no non-procedural "bright line" rules; that the rules proposed in the NPR would permit any conceivable remaining rail merger; that, in fact, the proposed rules would actually provide the Board with greater discretion than before, and would produce greater uncertainty as to when mergers will occur and what conditions the Board will impose on them; and that the greatest problem with the proposed rules is that the Board has made clear that industry-wide measures to promote competition in the railroad industry are not for the Board to consider, but rather are for Congress. EEI further contends that, without industry-wide solutions, the proposed rules will almost certainly lead to one of two unpalatable alternatives: either no mergers, and a continuation of the status quo; or one merger leading to another and another, to maintain what has been called "balanced competition," with the inevitable result that there will be only 2 Class I railroads in the United States, or even in all of North America. EEI adds that, because both alternatives are unacceptable, the shipping community intends to seek a legislative solution.

Bottleneck rates. EEI indicates that, as it reads the NPR, the Board has proposed no change in its "bottleneck rate" decisions; all that the Board appears to have said, EEI believes, is that, if a shipper has a contract rate over the "non-bottleneck" carrier before a merger, it will require a separately published rate over the "bottleneck" segment after a merger. EEI contends that shippers are not satisfied with the Board's bottleneck rate decisions, and will continue to urge Congress to amend the statute to grant the Board the power to compel railroads to publish bottleneck rates so that either the competition that then can occur over the non-bottleneck segment will occur, or as a last resort a shipper will be able to challenge the bottleneck rate at the Board. EEI further contends that, to enhance competition over the non-bottleneck segments, the Board should adopt conditions requiring the merging railroads to offer bottleneck rates wherever they are the only carrier to serve a particular shipper.

Terminal trackage rights. EEI contends that the Board should overrule its Midtec decision because, EEI argues, the Midtec requirement that a shipper show "competitive harm" before the terminal trackage rights provisions of the statute can be invoked is not compelled by the language of the statute. EEI adds that, because the Board has not indicated an intention to overrule Midtec, shippers will seek relief from Congress. Shippers, EEI argues, believe that Congress intended the terminal trackage rights provision to be applied generally, without being limited only to those situations in which the shipper can prove "competitive harm."

Elimination of paper and steel barriers. EEI contends that the Board, by failing to state an intention to require the elimination of paper and steel barriers, has discouraged shortline and regional railroads from participating in merger proceedings to seek such relief, because (EEI explains) the cost of participation in such proceedings is substantial. EEI insists that the Board should make clear its intention to require the elimination of paper and steel barriers in appropriate circumstances.

Service standards. EEI contends that the Board should establish a framework for measuring damages incurred by tariff shippers (i.e., shippers using tariff service) on account of inadequate service, and should also establish a clear obligation on the part of the railroads to pay such damages in the event that service declines after a merger. EEI adds that, although it believes that the Board should require that railroads guarantee a level of service approximately equal to that provided prior to the merger, it recognizes that exceptional circumstances, such as "force majeure" events, should not be the basis for liability. EEI further contends that there should be a presumption that a decline in service after a merger was caused by the merger; if service, EEI explains, has declined after a merger from historic levels established prior to a merger, that should constitute a prima facie case. EEI further contends: that the suggestion that the merging railroads propose their own service standards and penalties for failing to meet them provides no remedy at all; that, at this time, shippers appear to have no remedies for inadequate service unless their contracts provide for such remedies; and that the Board will not have done all that it can do to assure adequate service unless it imposes financial penalties on railroads that fail to provide appropriate service as a result of a merger. The only way to improve service, EEI argues, is to increase the incentives of the railroads to provide good service by imposing financial penalties on the railroads if they fail to provide good service. EEI, which believes that railroads should be liable for service failures that cause damages to shippers whether those failures are or are not merger-related, adds that, if the Board concludes that it cannot adopt such rules in this proceeding, the Board, after adopting merger-related rules in this proceeding, should propose rules to establish service standards in all circumstances in another rulemaking proceeding.

Open gateways. EEI contends that, although the Board indicated that it is likely not to allow open gateways to be closed, it did not acknowledge that unless it acts to ensure that a gateway can be economically kept open, that gateway will not truly be "open." EEI further contends that the Board should act to ensure that mergers will not cause gateways to be closed, economically or physically, with the only conceivable exception being when there are compelling circumstances requiring their closure. EEI adds that it is particularly concerned about this issue because the fate of the DM&E may depend on it. EEI argues that if it is likely, as many appear to believe it is, that there will be only 2 Class I railroads in the United States before too long, then it is essential that the Board adopt a policy that would ensure that railroads such as the DM&E, that can provide much-needed competition in certain regions, will be protected from the effects of transcontinental mergers.

3-to-2 shippers. EEI contends that, where there are 3 competitors, the Board should ensure that 3 competitors will remain. EEI explains that most economists insist that 2 competitors are not enough to assure competition; the evidence, EEI believes, suggests that 2 potential competitor railroads may collude, or may settle into a comfortable "dual monopoly" situation, while 3 competitors create far greater uncertainty that such understandings may hold, and thus result in a more competitive outcome.

"One lump" theory. EEI believes that, in any future merger proceeding, shippers will likely argue that a rail merger that extends a railroad's geographical reach extends its monopoly power, requiring a remedy, and that reliance on the "one lump" theory would be mistaken. EEI insists that the Board should make clear that it will take a more active role in determining whether the evidence supports the theory, including requiring the applicants to provide evidence necessary to test whether the theory applies.

Acquisition premiums. EEI contends that the Board has an affirmative duty to protect customers, especially captive customers, from increases in rates and charges, especially where acquisition premiums have been paid. EEI further contends that the merging railroads themselves would be better served if the Board's rules clearly provided that they will not be allowed to pass such premiums on to their customers (mergers, EEI explains, would then likely include only smaller premiums that the merging railroads could absorb, or none at all). EEI adds that the Board should adopt FERC's approach to ensuring protection from rate increases after merger transactions (FERC, EEI explains, has made it abundantly clear that customers may not be subject to rate increases as a result of mergers, and that acquisition premiums can never be passed through to customers).

Single-line service. EEI contends that the Board should attempt to ensure that merging companies do not cause harm to any customer due to a merger. EEI contends, in particular, that, where mergers cause shippers to go from single-line to 2-carrier service, the Board should either adopt conditions to prevent that, or, at a minimum, should require that the carriers guarantee, under pain of financial penalties, that service will not deteriorate after a merger. EEI explains that customers, especially captive customers, should not be required to bear the brunt of the service failures that are caused by mergers that they had no part in encouraging.

ADR for service failures. EEI contends that, for shippers who so desire, the Board should formalize its "hot line" for service complaints. EEI contends, in particular, that the Board should require merging railroads to agree, as a condition of approval of the transaction, that they will participate in shipper-initiated arbitration, mediation, or negotiation in which the shipper asserts that it has suffered from worse service as a result of the merger. EEI explains that the Board could, in this fashion, provide shippers with some assurance that their grievances might be expeditiously addressed, by some professional who presumably has the time to do so promptly, in a confidential setting if that is what the shipper desires.

Voting trusts. EEI agrees that voting trusts should be approved only by the Board itself, rather than by its Secretary. EEI also agrees that a voting trust should be approved by the Board only if that voting trust is in the public interest. The approval of a voting trust, EEI argues, is the "point of no return" after which, as a practical matter, it is almost impossible to deny an application for approval of a merger of 2 Class I railroads. EEI argues that, for this reason, it is certainly important for the Board to be involved in approval of the voting trust.

Procedural schedule. EEI argues that the "completely unrealistic" expedited procedural schedule advocated by some railroad parties is not supported by the analogies to such things as FERC merger proceedings. EEI explains: that those FERC proceedings that are at all analogous to mergers of Class I railroads, such as those between large electric utilities covering large sections of the Nation, have taken periods of time comparable to those of mergers involving Class I railroads; that, moreover, FERC has adopted a policy requiring electric utilities to provide open-access transmissions as a condition of the merger in order to mitigate any market power that could result from the combination of transmission lines; that, because utilities must provide open-access transmission, one of the central competitive issues presented by a utility merger has been eliminated, thus enabling FERC to process mergers more quickly; and that, furthermore, FERC has eliminated the need to consider whether an electric utility merger has public benefits that will offset the costs of such a transaction by putting the risks of such transactions on the merging entities. EEI suggests, however, that railroad merger proceedings could be expedited if railroads accepted procompetitive merger conditions and stringent service guarantees.

Traffic tapes. EEI indicates that it supports the proposal to require the availability of the 100% traffic tapes in each future rail merger proceeding; that information, EEI explains, is important, if not essential, to proving that the "one lump" theory does not apply. EEI adds, however, that, in order for the information to be useful to a shipper or other party seeking to prove that the "one lump" theory does not apply, the Board needs to ensure that shipper witnesses have the actual, not the masked, revenues/rates, because (EEI explains) the shipper would be trying to prove that the rates charged are subject to increase as a result of a merger. EEI adds that, by definition, a party requires actual rates in order to make a rate comparison.

Downstream impacts. EEI agrees that the Board should require consideration of "downstream effects" and "downstream mergers," regardless of which railroads first propose to merge. EEI, which believes that recent service problems seem due not only to specific mergers, but also to the gargantuan size of the current Class I railroads (other than KCS), contends that a transcontinental merger is likely to cause service problems, as have occurred in gateways and major interchanges in many recent mergers.

Scope of final rules. (1) EEI argues that the Board can adopt any proposal that is the "logical outgrowth" of the proposals made by the Board in the NPR, even if a proposal adopted by the Board was not itself proposed in the NPR. EEI argues, in particular, that its proposals for such things as service guarantees, protection for 3-to-2 shippers, adoption of FERC's methods of enhancing competition and protecting customers from rate increases as a result of mergers, and the like, are all the "logical outgrowth" of the Board's own proposals, and thus (EEI insists) could be adopted by the Board without further proceedings. (2) EEI, citing 49 U.S.C. 10101 and 11324, argues that the Board clearly has the authority to require that competition be enhanced by any future merger that the Board may approve. EEI explains that § 10101 requires that competition rather than regulation be the prevailing policy with respect to the railroad industry, to the maximum extent possible; and, EEI adds, § 11324 gives Board broad power to adopt conditions on its approval of railroad mergers, and requires the Board to consider the effect on competition of the proposed transaction. (3) EEI argues that the Board's broad authority to impose conditions on mergers to protect the public interest extends to all merger transactions still pending before the Board and still subject to the Board's authority (EEI cites the UP/SP and Conrail transactions in particular), provided, EEI adds, that the Board's exercise of its authority does not interfere with the "settled expectations" of the applicants.

Ameren Services Company. Ameren Services Company (Ameren) agrees that competition among rail carriers should not merely be maintained, it should be enhanced, during future rail merger proceedings. Ameren explains that past attempts at merely preserving competition have resulted in a reduction in competition; merging railroads, Ameren claims, have promised competitive solutions during the merger process, but have then fought implementation of these promises after the merger was completed. The Board, Ameren argues, should aggressively pursue enhanced rail competition via the current rulemaking and in actual merger cases.

(1) Ameren contends that the Board should preserve competition at locations that are "2-to-1" over any segment of a rail move pursuant to the contract exception of the bottleneck cases, in the same manner that any other physical 2-to-1 location has been protected in past mergers.

(2) Ameren contends that, with the lessening of alternative rail competition through mergers, the Board should seek to increase competition not only at 2-to-1 locations but also at locations that enjoy competition over any segment of their route. A merger, Ameren insists, should not result in a diminishing of competition on any portion of a shipper's route of movement.

(3) Ameren agrees "that it is appropriate to reassure the shipping public that at a minimum major existing gateways would be kept open in future mergers," NPR, slip op. at 15-16, but adds that it believes that "major existing gateways" should be expanded to include all gateways, major or not, through which traffic has been interchanged to a competitor.

(4) Ameren contends that the Board should take strong action (e.g., removal of paper and steel barriers, divestiture of parallel tracks, and requiring the granting of trackage rights and access to other facilities) to protect shippers not only from the anticompetitive effects of future mergers but as a remedy for the effects of past mergers. The Board, Ameren argues, should use its broad authority to encourage the viability of a number of carriers, not just existing competition.

(5) Ameren contends that one way to enhance competition during rail consolidations would be to mandate that a merging carrier allow other carriers to serve industries from overhead trackage rights already in place at the time of the merger. Ameren explains that the "overhead" nature of such trackage rights amounts to a "paper barrier" that bars service to customers located on the trackage rights line.

(6) Ameren contends that other paper barriers, such as the prohibition of service to certain shippers in line sale agreements to shortlines, should also be struck down. Ameren explains that many of these shortline sale agreements were structured to stifle competition by the Class I railroads that spun off these lines. Ameren adds that, while Class I railroads have benefitted from sales of these lines to shortlines, shippers have been harmed by the restrictions that prohibit competitive service by the shortline or other railroads.

(7) Ameren indicates that it would also support changes outside the context of a merger to encourage competition and the number of competitors. Ameren suggests, by way of example, that the Board, in dealing with efforts to construct new lines and provide alternative competitive routes, should propose rules to encourage and expedite handling of new construction and rehabilitation efforts.

(8) Ameren contends that, although the NPR speaks of enhancing competition, the absence of a specific reference to the protection of 3-to-2 shippers seems to support the Board's past reluctance to even protect the existing competition of 3-to-2 shippers. Ameren argues that, because 3-to-2 protection merely preserves and does not enhance competition, the Board should adopt specific language that at a minimum preserves all existing rail-to-rail competition at facilities served by a merging railroad whether that competition is provided by 2, 3, 4, or more different alternatives.

PPL (PPL Generation and PPL Montana). PPL[154] contends: that, since 1980, the ICC/STB has approved mergers that have reduced competition for major railroads, and has issued rules and adjudicatory decisions that have reduced shippers' recourse to regulatory solutions; that, as a result of these developments, most shippers can now look neither to competition nor to regulation for solutions when major railroads charge too much and/or provide inadequate service; that further consolidations among major railroads will make matters even worse; and that, unless the Board acts now to reverse the trends toward less effective competition and less effective regulation, the damage is likely to be irreversible. It is, PPL argues, a fundamental tenet of American legal and economic policy that if concentrated market power is not constrained by effective competition, it must be constrained by regulation; without effective regulation, PPL adds, railroads with significant market power will exploit their captive customers. PPL therefore contends that reforms must be implemented now to enhance rail competition among, and the rail service provided by, the major Class I railroads; the Board, PPL insists, should adopt clear, procompetitive rules that will offset any new railroad market power with new accountability; and, PPL adds, it is time for the major Class I railroads to be held accountable for the projections of public benefits on which they base their merger applications. PPL further contends that enhanced competition is necessary to mitigate the enormous concentration of market power threatened by further consolidation among major railroads, and that dependable service guarantees, as opposed to empty promises, are necessary to prevent future meltdowns and integration problems. PPL argues that, the protestations of the major Class I railroads to the contrary notwithstanding, the real issues in this proceeding should be how these goals are to be achieved, not whether the goals themselves are legitimate; and, PPL adds, shippers are concerned that the Board has provided too much flexibility and initiative to the major railroads in meeting the Board's new competition and service objectives, leading to the danger that future compliance with these requirements will be more apparent than real. The Board, PPL insists, should expand and clarify its proposed rules and their explanatory text to do more to promote and enhance rail-to-rail competition, and to prevent merging railroads from funding extravagant, misguided, or bungled mergers through rail rate increases.

<u>The Board's proposed regulations are too vague</u>. PPL contends that the NPR is too vague. PPL explains that, although the ANPR was commendably specific (seeking public comments as to a long list of issues) and although the comments submitted in response to the ANPR addressed those issues, the NPR, although it summarizes these comments, does not otherwise address these matters. PPL insists that, unless the Board provides additional specificity either in its final regulations or in the explanatory text or preamble accompanying the final regulations, those affected by the new merger regulations will not know what the Board has done in many critical areas. Shippers and other interested parties, PPL argues, need to know

[154] Affiliated entities PPL Generation, LLC and PPL Montana, LLC are referred to collectively as PPL.

what to expect from the Board before the next merger application is filed; due process and commercial necessity, PPL insists, require greater specificity than the NPR provides. PPL further contends that greater specificity is also needed to meet the requirements of the Administrative Procedure Act, which (PPL believes) requires a discussion of the issues raised by the comments and an explanation of the connection between the agency's reasoning as to key issues and the resulting regulations; and, PPL adds, because publication of the NPR was preceded by voluminous comments on the ANPR, it is important for the Board to present such an analysis in the explanatory text accompanying the proposed regulations (merely summarizing the comments without discussing them in any detail, PPL insists, is not an adequate substitute).

<u>The Board should limit merging railroads' ability to recover the costs of mergers, or the costs of remedial action for merger problems, through rate increases</u>. PPL contends that, although it argued (in its ANPR comments) that Class I railroads should not be allowed to fund future consolidations through rate increases on captive traffic, this issue was ignored in the NPR; nothing in the NPR, PPL insists, indicates that Class I railroads that pay excessive acquisition premiums, or incur millions of dollars in remedial costs due to poor planning or poor implementation of their mergers, cannot simply increase their rates and make shippers pay for their blunders. PPL, which insists that neither contracts nor rate cases are an adequate answer to this problem,[155] argues that the Board's claim of having "raised the bar" in major rail consolidation proceedings will ring hollow if obtaining Board approval for a transcontinental merger merely requires giant successor railroads to be prepared to spend more of their customers' money to satisfy the new regulations. PPL therefore contends: that the Board should, at a minimum, expand its requirement of contingency plans for merger-related service disruptions to require merger partners to explain, in detail, how they plan to fund corrective action, and to state whether they will commit to funding such action without rate increases; that applicants' contingency plans in the merger proceeding should be required to provide satisfactory assurance that merger costs will not simply be recovered from shippers; and that, in addition, the Board should allow shippers whose rates may have been raised in violation of these commitments to seek relief under Board oversight jurisdiction, on a simplified basis (PPL argues that a showing that the challenged rate increases violate the merger conditions, or constitute an unreasonable practice, should be an adequate basis for relief without the need for full-blown rate cases).

<u>The Board should promote elimination of paper and steel barriers to competition by smaller railroads</u>. PPL contends that the Board should take vigorous action against paper and steel barriers that limit competition by smaller railroads; it is not enough, PPL insists, to call only

[155] Contracts are not an adequate answer, PPL argues, because many shippers cannot get contract service. And rate cases are not an adequate answer, PPL adds, because shippers believe that rate cases are prohibitively expensive and too hard to win.

for such relief from paper and steel barriers as merging Class I railroads are inclined to propose. PPL, which appears to concede that such barriers were part of the quid pro quo for line sales or other cooperative agreements between the Class I and smaller railroads, insists that this factor should not require preservation of such barriers; the "quid pro quo" argument, PPL explains, is not a valid defense to an anticompetitive agreement even in the unregulated marketplace; and, PPL adds, it is all the more important that this argument be rejected in the context of railroad mergers, where there is already too little competition and there may soon be even less. PPL argues that another reason for terminating paper barriers to greater participation in the national rail system is because, in many instances, the line sale in question took place years ago, and the Class I railroad has already received far more in benefit than any reasonable valuation of the access or operating restriction it demanded as a sale condition. PPL therefore contends that the Board should amend NPR § 1180.1(c) by incorporating the policies set forth in the ASLRRA "Bill of Rights" (policies, PPL believes, that offer real hope for new competition from Class II and Class III railroads).

The Board's proposals to enhance competition should be clarified and strengthened. (1) PPL indicates that, although it welcomes the NPR's many references to the need for enhanced competition, it believes that the lack of specificity in the proposed regulations, and in the accompanying explanatory text, leaves it unclear how, or even whether, the status of captive shippers will change in future merger proceedings. PPL contends that a close reading of the NPR raises more questions than it answers, because (PPL claims) the Board's expressions of support for new competition are so often equivocal. PPL notes, by way of example: that NPR § 1180.1(a)'s statement that "the Board does not favor consolidations that reduce the railroad and other transportation alternatives available to shippers" is immediately qualified by the words "unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved," which may mean (PPL suggests) that applicant railroads may reduce competition if this is the price they demand for other "substantial and demonstrable" public benefits; that NPR § 1180.1(b)'s statement of the need to balance various goals, one of which is effective competition, does not expressly state that the Board has adopted a less narrow definition of effective competition than resulted from the "one lump" theory; and that, although NPR § 1180.1(c) appears to require future merger applications to contain provisions for enhanced competition, this provision contains several escape clauses (one such escape clause, PPL suggests, would apparently allow applicants to offset reduced competition for some shippers with enhanced competition for others).

(2) PPL indicates that one of its main concerns is that the major railroads will use their enormous economic power to influence patterns of consumption and distribution in the economy as a whole. PPL explains that it is concerned that sources of raw materials will thrive or wither not because they are fairly priced or efficient, but because they maximize or minimize railroad long hauls. PPL warns that, in its view, the NPR appears to invite major railroads to manipulate the enhancement of competition to maximize their own benefits. PPL suggests, by way of

example, that merging railroads might enhance competition for low-margin intermodal traffic (thereby lessening their own exposure to penalties for poor service), and then argue that they are thereby relieved of any obligation to enhance competition for high-margin coal, chemical, or grain shippers. PPL suggests, by way of further example, that merging railroads might argue that by increasing competition with motor carriers, they have earned the right to reduce competition from smaller railroads, or to close gateways. PPL advises that, although it hopes that such outcomes are not what the Board intended, the absence from either the proposed rules or the explanatory text of any clear and unequivocal endorsement of increased competition creates uncertainty among shipper parties to this proceeding.

(3) Competition, PPL insists, should no longer be considered a threat from which major railroads need to be protected; experience, PPL argues, has demonstrated that competition benefits competitors, customers, the economy, and the nation. PPL therefore indicates that, although it welcomes the Board's statement in the explanatory text accompanying NPR § 1180.1(b) that "We would upgrade the importance of competition," it believes that the new rules or their preamble need to express, more vigorously and more clearly, this bedrock policy.

(4) PPL further contends that, in the interest of promoting competition, the Board: should explicitly overrule the requirement of a showing of anticompetitive conduct by major railroads as a prerequisite to the effective implementation of the Board's competitive access rules; and should maximize the benefits of downstream review of merger impacts by equalizing the exposure to competition of merging and not-yet-merged major railroads.

<u>The Board should make the major railroads responsible for producing the benefits they project and for remedying any service failures they cause</u>. (1) PPL contends: that, because applicants have heretofore had a powerful incentive to claim benefits that might or might not materialize, applicants in past proceedings have too often over-promised and under-delivered; that, in future proceedings (in which the stakes are likely to be even higher than they were in past proceedings), the temptation to exaggerate public benefits in order to achieve private benefits will be overwhelming, particularly if there are no penalties for such exaggerations; that none of the Board's other reforms will make any difference, if the major railroads are allowed to claim the benefits they think necessary to obtain Board approval (service improvements, trackage rights, relief from paper barriers, funding of everything out of efficiency gains, labor benefits, whatever it takes) and then, by citing "changed circumstances," are allowed to simply fail to produce those benefits; and that, therefore, the Board should strengthen, not weaken, its proposal to require merging Class I railroads to produce the benefits they cite in their applications, making this requirement a condition of all future mergers that will be subject to penalties for nonperformance.

(2) PPL argues that, even if the possibility of unexpected developments is a legitimate concern, it does not follow that merging railroads should not keep their promises. Rather, PPL insists, if the merger partners experience new circumstances that were not reasonably foreseeable, the presumption should be that they must take steps to produce the promised benefits despite the new obstacles, not that the Board's conditions are automatically rescinded. PPL adds that, although there may be circumstances in which a waiver is warranted, such a waiver must be applied for, other parties must be able to comment for or against the request, and the petitioning railroad should bear a heavy burden of proof as to the need for relief. PPL insists that the merged firms, not their customers, must bear the risk of poor planning or poor implementation of major rail mergers.

(3) PPL contends that the likelihood of implementation problems will be reduced if the applicants must provide full compensation for such problems. PPL further contends that the claim that shippers themselves can negotiate for contractual compensation for any disruptions that may occur is simply not true. Many shippers, PPL explains, cannot negotiate rail transportation contracts of any kind, let alone binding contracts containing strong indemnification provisions.

FERC policies. (1) PPL indicates that, although it does not oppose a FERC-style screening process to differentiate between mergers that can be expedited and those that cannot, it believes that such screening has already taken place here. PPL explains that, by definition, this rulemaking concerns major mergers among the small number of remaining Class I railroads, with particular emphasis on the likelihood of a final consolidation down to 2 massive rail systems. (2) PPL argues that there are significant differences between FERC utility merger proceedings and major rail consolidations. PPL explains that FERC has been able to accelerate its processing of mergers because it has already ordered protections for captive customers, including open access and rate freezes, that provide a large measure of protection against anticompetitive conduct or rate gouging by consolidated gas pipeline systems or mega-utilities. And, PPL adds, FERC-approved mergers have been free of the service problems that have accompanied recent major rail mergers.