APPENDIX G: FEDERAL AND FOREIGN AGENCIES

U.S. Department of Agriculture. The U.S. Department of Agriculture (USDA) contends that, although we have attempted to address the concerns expressed by shippers, the proposed regulations fall far short of protecting the public interest in the event of future major railroad consolidations. There is, USDA insists, a lack of specificity in the proposed rules and too much reliance on voluntary offers, negotiations, and applicant-proposed penalties.

In general. USDA contends: that there has been, in recent years, a reduction in the rail share of transportation of wheat, corn, and soybeans; that the severe service disruptions associated with recent rail mergers have been a major reason for the recent loss of rail share; that, because rail is the only cost-effective transportation mode for agricultural producers located distant from markets and water transportation, the shift to truck transportation could only have been accomplished at great cost to agricultural producers and rural communities; and that this is particularly true in large areas of the Midwest and Plains States where shippers have little direct access to inland waterway transportation and the distances involved make truck transportation uneconomical. USDA further contends that, to more fully protect the public interest, we should revise our proposed regulations for a number of reasons.

(1) USDA contends that the increased concentration of Class I railroads, and the corresponding increase in their market power relative to connecting shortline and regional railroads, threatens the viability of smaller railroads serving rural regions. Shortline and regional railroads, USDA notes, are important to the grain-gathering process.

(2) USDA contends that, to compete effectively in increasingly competitive world markets, U.S. farmers must have access to efficient, reliable, and cost-competitive transportation. USDA further contends that the rates agricultural shippers pay for rail transportation must be at a level that promotes, not penalizes, American competitiveness in world agricultural markets. USDA warns that if, due to inadequate or non-competitive transportation services, farm incomes cannot be expanded through exports of raw and value-added goods, the freedom provided under the Federal Agricultural Improvement and Reform Act of 1996 (the 1996 Farm Bill) to farmers to plant and compete will have less value.

(3) USDA contends that the loss of rural rail lines will result in greatly increased road maintenance costs for rural areas. USDA explains that increased truck traffic, caused by shipping to locations on Class I railroads and/or the loss of rural rail lines, greatly increases highway maintenance costs because (USDA further explains) many of the roads in rural agricultural regions were not designed for heavy truck traffic. And, USDA adds, since rural regions typically have lower population densities, they are less able to pay for the increased highway maintenance costs or increased road capacities required by increased truck traffic.

(4) USDA contends: that the Staggers Act relies upon the effectiveness of competition, rather than regulation, to discipline the marketplace; that, indeed, in many agricultural production regions, truck and barge transportation provide adequate competition to constrain rail prices; that, however, barge transportation is not available to agricultural producers located in the western portions of the Plains States, and truck transportation is not cost-effective due to the long distances to market; and that, therefore, for agricultural producers located in those regions, there will not be effective competition unless competition, including rail-to-rail competition, is preserved and promoted.

(5) USDA contends that, as the market power of Class I railroads has increased relative to that of shippers and connecting shortline railroads, the potential for the violation of antitrust laws to the detriment of agricultural producers and rural communities has also increased. USDA therefore insists that, in revising our merger rules, we should consider this increased potential for violations of antitrust law and the effects these violations, should they occur, can have upon shippers and smaller connecting railroads.

<u>NPR § 1180.1(b)</u>. USDA contends that the last sentence of NPR § 1180.1(b) ("The Board must ensure that any approved transaction will promote a competitive, efficient, and reliable national rail system.") should be changed to read: "The Board must ensure that any approved transaction will promote competition, as well as an efficient and reliable national rail system." USDA explains that the word "competitive" could be interpreted as cost-efficient, rather than requiring the presence of sufficient transportation competition.

<u>NPR § 1180.1(c)</u>. USDA applauds the increased emphasis on enhancing competition; competition between rail carriers, USDA explains, is the essential ingredient needed to encourage improved customer service in the railroad industry, to preserve the economic vitality of the railroad industry, and to protect shippers from the abuse of railroad market power. USDA contends, however, that the fifth sentence of NPR § 1180.1(c) should be revised to *require* the Board, where both carriers are financially sound, "to make broad use of the powers available to it . . . to condition its approval to preserve and enhance competition." USDA further contends that, if the conditions proposed by the consolidating carriers fail to fully alleviate the effects of reduced competition, or if the plan proposed by the consolidating carriers fails to remedy specific competitive or other harms that are threatened by the merger, the Board should be *required* to condition the transaction to accomplish the goal of preserving and enhancing competition. And, USDA adds, the words "financially sound" should be defined in specific terms so that the exemption from Board-imposed conditions refers only to railroads in immediate danger of bankruptcy or service discontinuance, and not to railroads that are determined not to be "revenue adequate."

<u>NPR § 1180.1(c)(1)</u>. USDA indicates that, although it applauds our intention to more carefully evaluate merger applicants' claims of the net public benefits a merger will generate, it

does not believe that any penalties suggested by the applicants will sufficiently protect the public interest, particularly that of shippers and financially vulnerable smaller railroads.

NPR § 1180.1(c)(2)(i). USDA contends that consolidating railroads should be required to preserve competitive options, such as those involving the use of major existing gateways and build-outs or build-ins; it is not enough, USDA argues, to require consolidating railroads to propose remedies to mitigate and offset competitive harms. USDA also contends that we should prohibit carriers from charging shippers higher tariffs to recover the "premiums" paid for the acquired railroad or to take advantage of their increased market power; and, USDA adds, this could be accomplished by capping post-merger tariff rate increases to no more than the increase in the adjusted rail cost adjustment factor for a period of 5 years subsequent to the merger. USDA further contends: that the antitrust statutes should be applied more rigorously to those Class I railroads proposing further consolidations; and that we should be required to seek and consider the opinions of the U.S. Department of Justice and the Federal Trade Commission before approving any further consolidations involving Class I railroads.

NPR § 1180.1(c)(2)(ii). USDA indicates that it is pleased that we have recognized the importance of preserving essential freight, passenger, and commuter services by considering whether projected shifts in traffic patterns could undermine the ability of the various network links (including Class II and Class III rail carriers and ports) to sustain essential services. USDA recommends, however, that in NPR § 1180.1(c)(2)(ii)'s second sentence ("An existing service is essential if there is sufficient public need for the service and adequate alternative transportation is not available.") the words "adequate alternative transportation" should be revised to read "adequate cost-effective alternative transportation."

NPR § 1180.1(c)(2)(iii). USDA contends that our proposal, by placing only an increased weight upon the likelihood of transitional service problems, allows the consolidating carriers to transfer the costs of service disruptions to shippers, affected communities, and other railroads. USDA insists that, if a merger truly makes economic sense, the consolidating railroads should be able to reimburse those harmed by transitional service disruptions. USDA therefore contends that, rather than placing a heavier weight on transitional service harms when balancing the public interest, we should require consolidating railroads to reimburse shippers and other railroads fully for any damages caused by service degradation. And, USDA adds, this reimbursement should be required until the rail service provided each shipper and railroad is equal to that received prior to the consolidation.

NPR § 1180.1(d). USDA contends that, although it is difficult to condition a transaction to offset the harm to the public interest without undermining or defeating the transaction itself, the potential magnitude and probability of public harm caused by future Class I railroad consolidations may be so great as to justify extraordinary caution. USDA therefore argues: that the final merger rules should be phrased so that, in the application of conditions, the Board errs on the side of protecting the public interest; and the final rules should be phrased to make clear that the Board is not limited to conditions suggested by the consolidating railroads.

NPR § 1180.1(h). USDA indicates that it agrees with the Board's emphasis upon contingency plans and post-approval monitoring to help ensure that service levels after a merger are reasonable and adequate. USDA contends that we should include in the text of NPR § 1180.1(h): a statement to the effect that the Board expects applicants to engage in good faith negotiations with shippers and connecting carriers and that the Board, when determining the need for mitigation, will consider the extent to which applicants are successful in such negotiations; and a requirement that the Board monitor negotiations between applicants, on the one hand, and shippers and connecting railroads, on the other hand, to prevent unfair discrimination against smaller shippers and smaller railroads.

NPR § 1180.1(i). USDA indicates that it agrees that we should consider cumulative impacts and crossover effects.

NPR § 1180.1(k). USDA contends that in the last sentence of NPR § 1180.1(k) ("When an application would result in foreign control of a Class I railroad, applicants must assess the likelihood that commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations and be detrimental to the interests of the United States rail network, and applicants must address how any ownership restrictions imposed by foreign governments should affect our public interest assessment.") the words "detrimental to the interests of the United States rail network" should be revised to read "detrimental to the interests of the United States rail network and shippers."

NPR § 1180.10. USDA, which applauds the Board for recognizing the importance of adequate service to shippers and other affected parties, indicates that the comprehensive information required in the service assurance plan addresses numerous issues of concern to shippers. USDA indicates that it particularly appreciates the requirement that applicant railroads furnish dwell time information for 1 year prior to the transaction; the availability of prior benchmarks, USDA explains, is essential for the Board to be able to assess post-merger service levels. USDA recommends, however, that we should also require applicant railroads to provide historical data on the transit times for major origin-destination pairs.

NPR § 1180.11(b). USDA agrees that transnational merger applicants should be required: to assess the likelihood that commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations, and could be detrimental to the interests of the United States; and to discuss any ownership restrictions imposed on them by foreign governments.

Other issues. (1) USDA opposes any decrease in the review period of proposed mergers. USDA explains that rail shippers need the current length of time provided in the merger review period to adequately assess the effect of the proposed merger upon their operations, particularly since the competitive effects of end-to-end mergers are more difficult to quantify than those effects due to parallel mergers. USDA further explains that a shorter review period would not allow the Board to adequately analyze the public benefits and costs of a rail merger. (2) USDA contends that our final rules should require Board approval of railroad marketing alliances and the remediation of any anticompetitive effects of such alliances.

U.S. Department of Defense. The U.S. Department of Defense (DOD),[131] which insists that the ability to deploy military forces rapidly by rail must be preserved, indicates that it supports the modifications proposed in the NPR in their entirety.

National defense. DOD contends that, to ensure that rail mergers do not detract from the U.S. military's ability to deploy by rail, merger applicants should be required to assess and discuss the effects mergers will have on national defense. DOD further contends that the following specific areas of concern should be addressed by applicants and considered by the Board: the impact of a merger on maintenance of the STRACNET and connector lines under the control of the merging carriers;[132] the impact of the merger on traffic levels over STRACNET lines under the control of the merging carriers; the specific plans for prioritization of DOD freight in the event of war or other contingency; the agreements in place, if any, between DOD and the merging carriers, addressing provisions of rail services to DOD in times of war or other contingency, and the impact a merger would have on those agreements; the plans, procedures, and/or agreements in place to ensure that the routes, locomotives, rolling stock, and other equipment essential to the national defense will be operated and adequately maintained after the merger; the degree to which DOD traffic will be routed, as a result of the merger, over foreign rail lines, and the likelihood of assured access to such rail lines in time of war or other contingency; and, in the event the merged carrier is owned or controlled by a foreign entity, the ability of that entity to sell its ownership or controlling interest to a third party without further regulatory review and approval (DOD is concerned that an acceptable foreign owner might sell its interests to a foreign owner that, for financial, national defense, or other reasons, is not

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[131] DOD's comments were submitted by the Military Traffic Management Command Transportation Engineering Agency (MTMCTEA), which is responsible for the management and execution of DOD's Railroads for National Defense Program.

[132] DOD indicates that the Strategic Rail Corridor Network (STRACNET), which consists of some 38,000 miles of main lines and connectors, is the minimum integrated and inter-connected rail corridor network essential to meeting national defense rail transportation needs.

acceptable). And, DOD adds, we should also consider (particularly in the event of a merger that will result in foreign ownership or control of a U.S. carrier) whether the merging carriers have established, or are willing to establish, agreements with DOD designed to ensure that the carriers' rail services and equipment will be available for the movement of DOD equipment and material in time of war or other contingency.

Cumulative impacts and crossover effects. DOD contends that the "one case at a time rule" should be eliminated, both to allow DOD to comment upon possible adverse effects to national defense interests arising from downstream responses by other carriers and also to enable the STB to address the impact a merger will have on other carriers, consumers, shippers, and national defense, and other areas currently beyond the scope of the STB's merger inquiries. DOD further contends that the relevant criteria for analyzing downstream effects include the following: (1) If the merging carriers' management teams were involved in prior mergers, did they accomplish their stated goals in such mergers? If not, how can the merger be conditioned to ensure that goals are met in the present transaction? (2) Same questions as (1) above for the responding carriers. (3) Timing and benchmarks for implementation and phasing of the initial and downstream transactions.

Oversight. DOD contends that, given the large size of future mergers and the potential for service problems, 5-year oversight authority is necessary to ensure that the objectives of the merger are accomplished. And, DOD adds, oversight authority will enable the STB to intervene if problems with military deployments occur as a result of a merger.

Service assurance and operational monitoring. DOD contends that, because quality rail service is vital to successful military deployments, the merging carriers' application should establish benchmarks for delivery schedules. DOD further contends that the merging carriers should prioritize the benchmarks (to reflect different levels of on-time performance based upon the price or urgency of the service) and should substantiate how these benchmarks will be met or exceeded as well as the penalties they will accept if the benchmarks are not attained. And, DOD adds, it is very concerned about post-merger abandonments as well as on-time delivery of material.

Transnational issues. DOD indicates that, in addition to its "DOD-unique" concerns relating to foreign ownership or control of a U.S. rail carrier, it also has more general concerns about the effect such ownership or control may have on the maintenance and safety of U.S. rail lines. DOD contends, in this regard, that the requirement that applicants address how ownership restrictions imposed by foreign governments should affect the public service assessment will help DOD determine the effects on rail line maintenance and safety. DOD also contends that the requirement for carriers to explain how cooperation with the FRA will be maintained without regard to the nationality of merger applicants will support a safe rail network in the U.S. DOD further contends that the likelihood of traffic being shifted from U.S. to foreign ports should also be considered when reviewing the application. A significant shift in traffic, DOD explains, could threaten the economic health of U.S. ports and thereby eventually impact the ability to meet national defense needs.

U.S. Department of Transportation. The U.S. Department of Transportation (DOT) indicated, in its remarks at the oral argument held in this proceeding on April 5, 2001, that, because its leadership had "changed significantly" after the filing of DOT's written comments in this proceeding, DOT could neither support nor oppose the positions it had taken in its previously filed written comments, except with respect to the few specific issues on which it was prepared to offer guidance at the oral argument. DOT further indicated, in its oral argument remarks, that, although it was prepared to offer guidance on a few specific issues, circumstances had not allowed its new leadership to accord to a great many other subjects the thorough consideration that such subjects require.

(1) *Development of new standards.* DOT indicated, in its oral argument remarks: that it agrees that the changes that have occurred since the Staggers Act, and the uncertainties attending future mega-mergers, fully support the development of new standards by which to judge Class I rail mergers; that such new standards must consider the effects of mergers not only on railroads but also on shippers, communities, the transportation network at large, and other interested parties; and that the moratorium imposed by the Board has provided a useful respite within which to undertake the development of such new standards, free from the influence of specific pending applications. DOT further indicated, in its oral argument remarks, that it intends to participate in major future rail merger proceedings to aid in the specific application of the Board's proposed standards. Such proceedings, DOT advised in its oral argument remarks, will enable DOT to address these issues as they arise in concrete circumstances.

(2) *Cramdown and other labor issues.* DOT indicated, in its oral argument remarks: that, as respects differences between labor and management on merger implementation issues, DOT prefers privately negotiated agreements to government imposed solutions; that, therefore, DOT is pleased that rail management and labor appear to have reasonably reached agreement on a process to resolve the core issues of cramdown; and that the Board should support this agreement by leaving the matter to the parties and abiding by their request that it refrain from reviewing arbitration appeals, and instead permit such appeals to go directly to the courts. DOT further indicated, in its oral argument remarks, that, apart from the cramdown agreement, DOT does not endorse its previously advanced positions on labor issues.

(3) *NAFTA issues.* DOT indicated, in its oral argument remarks, that it strongly supports NAFTA and the continental trading zone that NAFTA envisions. DOT also indicated, in its oral argument remarks, that, although hindrances to the equal opportunity to compete within North America are (as a general matter) suspect and must (as a general matter) be justified, the "unlike circumstances" that exist within the NAFTA countries may offer support for treating

some elements of transnational mergers differently than consolidations of wholly U.S.-based railroads. DOT further indicated, in its oral argument remarks, that, although it had previously urged the Board to require carriers proposing a transnational merger to submit information and explanations with their application that were not required of U.S.-based applicants, it now believes that, with the exception of full-system operating plans (which, DOT advised, have a strong safety component), it would be appropriate to adopt a more neutral course, which (DOT further advised) would be to require applicants in such cases to provide information in response to specific questions raised by a party to the case or by the Board itself. This more neutral course, DOT explained in its oral argument remarks, would avoid a meaningless exercise, and would allow the Board to concentrate on issues that are germane to the application at hand. DOT added, in its oral argument remarks: that DOT does not agree with conclusions of law that the Board's proposals are in violation of NAFTA; that, however, DOT has (except for the full system operating plans) a different policy preference (i.e., DOT would prefer to require transnational merger applicants to provide information in response to specific questions raised by another party or by the Board, and would also prefer that the Board consider such issues on a case-by-case and issue-by-issue basis); and that (except for the full system operating plans) DOT now disagrees with the proposed rules insofar as such proposed rules call for applications involving foreign-based rail mergers to include at the outset additional information and/or explanations about various subject matters.

Canadian Government. The Government of Canada (CDA)[133] requests the deletion of NPR § 1180.11 from the Final Rules in its entirety. CDA argues that NPR § 1180.11 is redundant and poses an unfair administrative burden only to transnational applicants and not to domestic ones. Furthermore, because the proposed § 1180.11 takes the form of a preliminary requirement necessary to establish the *prima facie* merits of a merger application, CDA argues that foreign applicants would face both additional and unnecessary risks and burdens in accessing the process of merger review, which would constitute a violation of the national treatment provision of the NAFTA.

<u>NPR § 1180.11(a) – Rail Safety</u>. CDA argues that, given that the proposed regulations require all merger applicants to provide an operating plan and a Safety Integration Plan, it is not evident why proposed § 1180.11(a) is also required. Moreover, while recognizing that safety is a vital concern, CDA states that safety as such is covered by the ongoing relationship between the FRA and the rail operators, be they domestically-owned or foreign-owned. CDA therefore argues that, in light of the provisions already in place which would allow the Board to query

[133] Along with its comments (CDA-2) filed May 16, 2001, CDA simultaneously filed a petition (CDA-1) for leave to file comments out of time. We will accept CDA's late-filed comments.

transnational applicants with respect to rail safety, proposed § 1180.11(a) is an unnecessary administrative burden.

NPR § 1180.11(b) – Foreign National or Provincial Goals. CDA argues that the proposed rule imposes a hurdle not faced by domestic applicants by requiring transnational applicants not only to provide information about foreign policies, but also to assess the likelihood that foreign policies would have a detrimental bearing on their operations in the United States. CDA states that national and provincial laws and policies in Canada, as in the United States, are public. It also states that Board's merger review process provides parties with ample opportunity to offer arguments and evidence about such laws and policies, and to explore their potential relevance to the commercial behavior of a transnational applicant. Therefore, CDA argues that the proposed § 1180.11(b) constitutes an unnecessary and prejudicial burden.

NPR § 1180.11(b) – Ownership Restrictions. CDA argues that ownership restrictions are not unique to foreign applicants and that such restrictions can be raised and discussed during the Board's merger review process. To require a foreign applicant to discuss them beforehand as in the proposed rule, CDA argues, is both unfair and redundant.

NPR § 1180.11(c) – National Defense. In light of the requirement in proposed § 1180.1(l), which would require all applicants, be they foreign or domestic, to consider national defense issues, CDA argues that proposed § 1180.11(c) is redundant.

APPENDIX H: REGIONAL AND LOCAL INTERESTS

California Public Utilities Commission. The California Public Utilities Commission (CPUC) contends that we should protect the national rail transportation network through the development and implementation of regulations designed to ensure lower-cost rail transportation rates and to improve service through competition. Mergers, CPUC insists, must be carefully reviewed and structured to avoid increased monopoly or duopoly power.

(1) CPUC agrees that merger applicants should be required to include concrete provisions for "enhanced competition" but insists that we should provide a better definition of the term. CPUC contends that a definition that assures lowered rates and/or provides meaningful and quantifiable service benefits will not unduly restrict an applicant's creativity in this area, but is necessary to properly judge whether a proposal will truly enhance competition. CPUC therefore suggests that NPR § 1180.1(c) should be revised to provide that "descriptions of 'enhanced competition' shall require clearly described merger benefits to shippers which demonstrably reduce rates by passing through cost savings from the efficiencies of scale resulting from the merger and/or result in meaningful and quantifiable service improvements."

(2) CPUC contends that an oversight program, to be truly effective, should include a detailed accounting of the applicant's progress in attaining all claimed public benefits made in the merger application as well as measures indicating the level of competition generated by the combination. CPUC further contends: that a simple listing by the applicant showing the status of all the promised service improvements, infrastructure projects, and efforts to enhance competition coupled with an explanation why a particular item is pending would suffice; that statistics showing price and market share fluctuations after the merger indicating how well competition is functioning should also be filed by the applicant in its periodic oversight reports; that the applicant should be subject to civil penalties and/or sanctions if it fails to make sufficient efforts to meet its goals and accomplishments for improved service or enhanced competition; that the Board should be able to impose new conditions on the merger to take advantage of new opportunities to further enhance competition; and that the Board's authority to impose conditions on the merged system should not terminate after the 5-year oversight period but, rather, should extend until the merger has been fully implemented (i.e., when the applicant fulfills all of its representations made in the Service Assurance Plan).

(3) CPUC contends that, because service assurance plans will only be effective to the extent they are thoughtfully developed and implemented: the Board must closely monitor whether the carrier is fulfilling all aspects of its SAP and enhancing competition; applicant should be required to reimburse shippers any additional cost they incur due to a merger-related service breakdown; and, furthermore, the Board should have the authority to impose civil penalties and/or sanctions in the event the Board determines that post-merger service levels have deteriorated to a significant extent, or that the applicant failed to adequately comply with its

SAP, or that the SAP was insufficient in addressing issues that the applicant knew or should have known could adversely affect service or safety at the time the SAP was submitted.

(4) CPUC contends that, because mergers involving carriers with operations outside the U.S. present unique challenges to safety (particularly if the carrier maintains its headquarters in a foreign country), applicants should be required: to disclose any functions that may be moved to a foreign country following a merger; to agree that any functions relocated will be conducted in accordance with FRA and other state and federal governmental rail safety requirements; and to discuss and evaluate, in their Safety Integration Plan, the safety impact of foreign rail safety requirements inconsistent with those of the FRA.

(5) CPUC contends that, in future merger proceedings, the new emphasis on enhancing competition will require us to review procompetitive proposals submitted by non-applicant railroads or other interested parties even if such proposals do not address specific merger-related harms or would result in "new" competition. CPUC further contends that we should affirm that we will approve proposals to the merger made by non-applicant railroads and other interested parties consistent with our objective to increase rail competition.

Kansas Department of Transportation and Corporation Commission. The Kansas Agencies[134] object to the regulations proposed in the NPR as general in nature and short on specifics. Our merger regulations, the Kansas Agencies insist, should provide certainty and predictability. (1) The Kansas Agencies contend that the regulations proposed in the NPR fail to provide solutions for the problems experienced in previous mergers and fail to adequately address the major areas of concern raised in the comments filed in the ANPR stage of this proceeding, and, furthermore, are exceedingly vague and lacking in accountability. The proposed rules, the Kansas Agencies insist, should be specific, easily definable, enforceable, and verifiable. (2) The Kansas Agencies contend that we should modify the proposed rules by including specific guidelines and conditions that would work to: ensure enhanced competition; do more to protect shippers from merger-related service disruptions; provide regional and shortline railroads with meaningful competitive access through the elimination of "steel" and "paper" barriers; hold merger applicants accountable for promises made in merger applications by imposing distinct performance measures and penalties; maintain open gateways; and address the needs and concerns of captive shippers.

Maryland Department of Transportation. The Maryland Department of Transportation (MDDOT) agrees that the regulations proposed in the NPR accomplish the important public objective of requiring applicants in merger proceedings to acknowledge and

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[134] The Kansas Department of Transportation and the Kansas Corporation Commission filed jointly as the "Kansas Agencies."

take more care to address the interests of the elements of the public that will be affected by a transaction they propose. MDDOT insists, however: that applicants should be held responsible for the consequences of their actions; and that we have the authority to impose new conditions on consummated mergers.

(1) MDDOT insists that, although the future cannot be foreseen with precision, applicant carriers should nevertheless be held accountable for their projections and responsible for the consequences of their actions. MDDOT contends: that the merger application submitted by applicants provides most of the information that the Board and third parties (including other freight railroads and shippers, and also commuter railroads and their customers) use to begin understanding whether a proposed transaction is consistent with the public interest; that, although each third party has a choice (support the transaction, oppose it and seek conditions, or remain silent), third parties, in making their choices, rely heavily on applicants' projections; and that, therefore, applicants should be held to their promises, and should be required to compensate affected parties for the damage they cause. MDDOT further contends that, although it is true that changes in the market totally independent of the merger may trigger service or other problems for third parties, the fact of the matter is that applicants in a rail merger are often the ones who are responsible for the impacts being experienced by the third parties.

(2) MDDOT insists that the Board has, and should continue to exercise, the authority to impose new conditions on consummated mergers. MDDOT contends: that 49 U.S.C. 722(c) provides that, in the event of material error, new evidence, or substantially changed circumstances, the Board may, at any time, reopen a proceeding, or grant rehearing, reargument, or reconsideration of an action of the Board, or change an action of the Board; that 49 CFR 1115.4 similarly provides that, in the event of material error, new evidence, or substantially changed circumstances, a person may, at any time, file a petition to reopen any administratively final action of the Board; that the remedy provided by 49 U.S.C. 722(c) and 49 CFR 1115.4 was established to permit the Board to require carriers to fix problems that their transaction has created; and that, in view of the existence of this remedy, carriers implementing transactions take the risk that the Board will reopen a consummated merger and impose further conditions when a third party is experiencing harm as a result of a transaction.

Michigan Department of Transportation. The Michigan Department of Transportation (MIDOT) contends that we should review each proposed transaction on its own merits, including the resulting service to be offered to shippers, the effects on competition, and the impact to the environment. MIDOT adds that, although it is certainly appropriate to identify changes in service provided to shippers by the combining carriers, MIDOT would be concerned with any "downstream" requirement that an applicant identify how other carriers would subsequently react. To expect applicants to speculate on future reactions by other carriers, MIDOT argues, is unreasonable and inappropriate.

New York. The State of New York, acting by and through the New York State Department of Transportation (New York), agrees that a "paradigm shift" in the policies underlying the exercise of the Board's authority over rail merger and consolidation proposals is needed.

NPR §§ 1180.1(c)(2) and 1180.1(d). New York contends that, although NPR §§ 1180.1(c)(2) and 1180.1(d) advance the status quo insofar as the promotion of competition is concerned, certain modifications and/or clarifications are needed to bring the actual impact and effect of these rules closer to the acknowledged public policy goal of preserved and enhanced competitive options for shippers and communities.

(1) New York, which notes that NPR § 1180.1(c)(2)(i) relies in the first instance on applicants to "propose remedies to mitigate and offset competitive harms," contends that this rule should be revised to affirm that applicants' proposed remedial measures will not carry any presumption of superiority to conditions proposed by other interested parties, particularly shippers and public authorities. New York, which claims that experience teaches that carrier views respecting the effectiveness of a competitive remedy that an applicant has agreed to offer a shipper or region often are not shared by those who are supposed to benefit from that remedy, insists that all proposed remedies should be considered on an equal footing.

(2) New York contends that we should clarify NPR § 1180.1(d) to confirm that carrier parties to future mergers will not be given a license that would allow for the reduction or elimination of competition in one region or market so long as competition is enhanced in another region or market as an offset. New York insists that, where a party or region is threatened with the reduction or elimination of competition, the right to seek redress through appropriate conditions should not be compromised by a carrier's offer to offset that anticompetitive impact by giving new options to shippers somewhere else.

(3) New York contends that we should reconsider our apparent reluctance to adopt a more proactive posture that would encourage the use of our conditioning authority to promote new competition in markets and regions dominated by a single carrier. New York insists that our handling, in connection with our consideration of the Conrail transaction, of the issue of increased rail-to-rail competition east of the Hudson River could serve as an instructive starting point for an expanded procompetitive policy that, while stopping short of a broad program of open access, would serve the public interest in increased competition as an effective counterweight to increased rail industry market concentration.

NPR § 1180.10(b). New York agrees that, in general, NPR § 1180.10(b), which requires applicants to "describe definitively how they will continue to operate [the lines of applicant carriers over which Amtrak or commuter services are operated]," adequately addresses the passenger rail-related issues raised by New York in its ANPR comments. New York contends, however, that we should clarify that the mandatory description requirement will apply with respect to any line over which both passenger and freight rail operations are conducted that is the subject of a proposed merger or consolidation transaction, without regard to whether the freight railroad is the owner of the line. New York indicates that this clarification would mean that, if a major freight railroad operates (or would operate) over a line owned by Amtrak or a public entity such as Metro-North Commuter Railroad Company, the carrier would be required to submit the same definitive description of the steps to be taken to accommodate passenger service that would be required if the passenger authority were the tenant.

NPR §§ 1180.1(h) and 1180.10. (1) New York contends that we should adopt the proposed "Service Assurance Plan" rules in full, with no weakening conditions. New York argues that, in addition to the universal agreement regarding the importance of service quality and efficiency as priority considerations in evaluating any new rail mergers or consolidations, there appears to be basic consensus among virtually all parties that the new merger rules should include meaningful and forceful mandates for the submission of data that will facilitate the design and implementation of before-the-fact controls to avoid post-merger service disruptions. (2) New York also contends that we should clarify that SAPs will be probative not only for the purpose of before-the-fact assessments of the need for mitigation conditions but also as benchmarks for measuring post-transaction performance during the oversight phase. (3) New York further contends that, in evaluating SAPs, we should give special attention to the interests of smaller communities and shippers. New York insists that, because rural areas and those served by branch lines face the greatest risk from the de facto resource rationing that typically occurs when post-merger service problems materialize, our final SAP rules should include special safeguards for rail-dependent smaller communities, especially as respects infrastructure, yard and terminal operations, and contingency plans.

NPR §§ 1180.1(c)(2)(ii) and 1180.1(h). New York contends that, although NPR §§ 1180.1(c)(2)(ii) and 1180.1(h) include certain provisions that appear to have been designed to advance the interests of shortline and regional railroads, these provisions do not go far enough. (1) New York contends that we should adopt a rule raising a rebuttable presumption in favor of the removal of Class II and Class III interchange barriers as a condition of approval of any new Class I mergers or acquisitions. The time has come, New York insists, to take a new look at artificial interchange barriers that foreclose competitive options for smaller carriers and their customers; the recent growth in the size and market power of the Class I railroads, New York explains, has narrowed the legitimacy of these "paper barriers" to competitive interchange; and, New York adds, these now-obsolete barriers can no longer be justified as alternative financing vehicles for new carrier line acquisitions. New York further insists that the narrow relief it contemplates would not involve a broad program of open access; such relief, New York explains, would apply only to circumstances where feasible, effective physical interchange capability exists but is precluded by contract terms that cannot be justified on competitive or financing grounds. (2) New York further contends that our final rules should provide that Class II and Class III railroads that connect to the consolidated carrier have the right to compensation by the consolidated carrier for service failures related to the consolidation. New York explains that Class I service delays or equipment shortages during or following implementation of a major merger or consolidation can result in traffic diversions to motor carriage, with direct and disproportionately adverse economic consequences for connecting shortlines and regionals.

NPR § 1180.1(c)(1). New York contends that, although NPR § 1180.1(c)(1) represents a meaningful step toward reform as respects scrutiny of claimed future merger benefits, firm enforcement terms should be added to the proposed rule. The UP/SP and Conrail transactions, New York explains, have demonstrated that there is a need for closer scrutiny of claims by merger applicants that a particular consolidation is justified by cost savings and efficiency gains expected to be realized as a result of the transaction; and, New York insists, the UP/SP and Conrail transactions have further demonstrated that applicants should be required to propose remedial measures to be taken in the event that claimed benefits do not materialize. New York argues, however, that the absence of a specific enforcement provision and deferential reliance on carrier-crafted remedies could blunt the effectiveness of NPR § 1180.1(c)(1) as a deterrent to inflated claims by merger applicants. New York therefore contends that this rule should be modified to include confirmation that the Board will consider and, where appropriate, will impose conditions proffered by parties other than applicant carriers to address the failure of claimed benefits to be realized on a timely basis. And, New York adds, this rule should be further modified to require the imposition of conditions precluding carriers from transferring the economic burdens of merger-related cost overruns to shippers and communities through rate increases or demands for public funding of needed infrastructure improvements.

North Dakota. North Dakota,[135] which commends the Board for its efforts in this proceeding, argues that the changed economic and operating environment that has evolved over the past 20 years in the rail industry truly warrants a paradigm shift in how the Board perceives and processes proposed mergers. North Dakota further argues that a similar shift is warranted in rate complaint proceedings and complaints against unreasonable carrier practices related to demurrage rules, volume requirements, reciprocal switching, etc.

Policy statement. North Dakota contends that the proposed policy statement recognizes changes that have taken place in the rail industry and attempts to strike a new balance between the needs of the rail industry and the needs of shippers. North Dakota adds that it hopes that the

[135] The North Dakota Public Service Commission, the North Dakota Grain Dealers Association, the North Dakota Wheat Commission, and the North Dakota Barley Council filed jointly as “North Dakota.”

paradigm shift reflected in the proposed rules will also be reflected in the Board's handling of other matters involving carrier market power.

Potential harm and service disruptions. (1) North Dakota insists that "enhanced competition" must accrue to the benefit of captive shippers; it would be a travesty, North Dakota explains, if the "balancing test" supported a merger because a large number of non-captive shippers were given even more competitive options while a smaller number of already captive shippers received no benefits. The Board, North Dakota insists, must recognize this situation and stand ready to protect those shippers who are most captive. And, North Dakota adds, revenue to variable cost ratios would be a good indicator of captivity.

(2) North Dakota, which notes that the proposed rules call on carriers to suggest remedies to mitigate and offset negative harms, contends that carrier proposals must include agreed-to penalties that will automatically be paid if the carrier fails to perform. North Dakota, which insists that carrier proposals and promises without related penalties would be meaningless and counterproductive, argues that the penalties must be significant and must accrue to the benefit of aggrieved shippers.

(3) North Dakota contends that mergers do not impact shippers simply in the areas of service disruptions and upward pressure on rates. North Dakota explains: that, as railroads have gotten larger, they have gained control of an increasing share of origins and destinations for certain commodities; that this has put them in a position not only to charge higher rates but also to dictate terms and conditions to the shippers and receivers on their lines; that recent mega-mergers have made it possible for railroads to demand shipper operating systems that are perfectly matched to the railroad's operations; that, in particular, the lack of competitive pressure has made it possible for railroads to demand things such as larger shipping volumes and faster loading times; that, however, compliance may carry great costs in terms of capital improvements and increased operating costs; and that, to the extent the railroads can force shippers to consolidate shipments at fewer and fewer origins, related costs may be paid not only by shippers but also by the public sector in the form of increased highway maintenance expenses. North Dakota insists that these shippers already need protection. North Dakota further insists that, if enhanced competition is insufficient to protect shippers from this type of abuse, the Board must stand ready to remedy such abuses.

(4) North Dakota contends that the ability to use interchanges to access markets is another tool that the Board should use to enhance competition, or at least to maintain pre-merger levels of competition, in merger cases. North Dakota further contends that the Board must stand guard to ensure that gateways remain open, both physically and economically (physical possibilities are meaningless, North Dakota explains, if carriers can make an interchange economically impractical). And, North Dakota adds, new gateways should be created whenever possible to enhance competition.

Shortline and regional carriers. North Dakota indicates that the viability of shortline and regional carriers is a major concern; the 3 such carriers that now operate in North Dakota, North Dakota explains, may be threatened by Class I efforts to concentrate originating traffic at a few select points on Class I main lines. North Dakota, which warns that these occurrences impact shippers, local communities, roads, etc., insists that, if private-sector negotiations regarding these matters fail, the Board must be available to settle disputes, both during the merger review process and once the merger has been consummated. And, North Dakota adds, the Board should presume that the shortline or regional carrier is entitled to the protection it seeks unless the Class I can clearly prove otherwise.

Transnational issues. North Dakota is concerned that transnational rail mergers will make North Dakota's seldom-competitive shipping situation even worse; the "free" trade promised by NAFTA, North Dakota explains, has not always been "free" in both directions. North Dakota further explains: that its shippers are already served by one transnational carrier (CP) and must compete with another (CN); that, although significant rate spreads on wheat now exist between North Dakota and Saskatchewan, North Dakota may have little recourse in this regard because (North Dakota explains) it is more a matter of disparity than of the reasonableness of an individual rate; that, furthermore, Canada has a totally different approach to grain marketing than does the U.S., and its rate reasonableness tests on grain are far different than the comparable U.S. tests; and that, when combined with border crossing issues and marketing systems that make it impossible for U.S. farmers to sell their grain to Canadian elevators, rate spreads of several cents per bushel on shipping points that are within a few miles of each other make it impossible for U.S. farmers to compete with their Canadian neighbors to various markets. North Dakota therefore contends that we should act to ensure rate and service parity in geographic regions and industries that span the border and that are served on both sides of the border by a merged carrier. North Dakota contends, in particular, that rules should be put in place to allow aggrieved U.S. shippers to compete effectively with their counterparts on the other side of the border.

Acquisition premiums. North Dakota contends that our merger rules should address acquisition premiums; history, North Dakota explains, indicates not only that carriers are willing to pay huge premiums to acquire their competitors but also that, to the extent competition is reduced, the resulting carrier is in a much better position to charge higher rates to finance the transaction. North Dakota further contends: that the incentive for future mergers should be increased efficiencies; that carriers should not look to captive shippers to finance premium payments; that rates should cover associated operating costs and provide the carrier with a reasonable return on its investment; and that, to the extent the carrier paid more than the reasonable value of the property, it should not be able to recoup those costs via higher rates from its captive shippers. North Dakota therefore suggests that a rule be promulgated to provide that acquisition premiums are to be considered "below the line" expenses in rate cases and in determining revenue adequacy.

Specifics. North Dakota notes that some have suggested that the proposed rules are short on specifics and will, if enacted as drafted, lead to years of extremely costly litigation. North Dakota, which claims that this would benefit the rail industry (because, North Dakota explains, litigation is something that railroads are extremely good at), contends that, whenever possible, we should provide details that will help minimize the need for further interpretive action by the Board or the courts.

Ohio Rail Development Commission. The Ohio Rail Development Commission (ORDC) applauds the NPR for its recognition that excess capacity has largely disappeared from Class I railroads and that "enhanced competition" needs to be a major part of the template by which the STB will evaluate whether further major consolidations will be consistent with the public interest.

NPR § 1180.1(c). ORDC contends that the "enhanced competition" requirement should be used as a guiding principle in merger and control proceedings. ORDC further contends: that future mergers must enhance competition through "Reasonable Access" along the lines of the 1998 AAR/ASLRRA "Railroad Industry Agreement" (RIA); that, in this regard, the STB should not rely solely on the applicants to suggest ways to enhance competition but, rather, should also seek suggestions from States, shippers, and small railroads; and that, because the STB's "public interest" conditioning power is by its nature both vague and expansive, the STB, where justified by the public interest, should impose relief that is not strictly "transaction-related." And, ORDC adds, because the enhanced competition it contemplates is primarily intramodal (i.e., rail-to-rail) competition, the final rules should specify "enhanced rail to rail, intramodal competition" rather than merely "enhanced competition" (ORDC explains that, although it appreciates the value of rail-truck and rail-barge competition, the reality of the matter is that, in many instances, there really is no substitute for rail-to-rail competition). ORDC also contends: that we should require applicants to identify the beneficiaries of any new rail-to-rail competition so that it is clear to all whether any "captive shippers" or "captive shortlines" are positively impacted; and that we should require applicants to identify competitive options (including reciprocal switching arrangements, haulage rights arrangements, voluntary marketing agreements, and other market access arrangements) that were canceled during the 24-month period prior to the filing of the notice of intent.

NPR § 1180.1(c)(1). ORDC contends that merging railroads should be required to compare asserted merger-related benefits with key priorities established by States and other public bodies, as well as shippers, trade associations, and ASLRRA. Such a requirement, ORDC explains, would motivate merging railroads to better interact with their constituents and would motivate States and trade groups to make hard choices as to just what their top priorities are.

NPR § 1180.1(c)(2). ORDC, which cites the transitional service problems that occurred in connection with the Conrail transaction, contends that, because even the best laid plans can go astray, we should require merging railroads to pay shippers and small railroads reparations for merger-related service failures; merging railroads, ORDC insists, simply must be held responsible if service problems occur in any future merger. ORDC further contends that, because service agreements negotiated as part of the merger process would go a long way toward ensuring that the proper remunerations would be paid if post-merger service became a problem, we should encourage such self-executing up-front service agreements.

NPR § 1180.1(d). ORDC agrees that any future mega-merger must enhance competition. ORDC contends, however, that, because applicants by their very nature are not well equipped to determine what is most in the public interest (especially in the areas of the environment and economic development), we should, at the very least, require applicants to make good faith efforts to determine what States, rail users, and Class II and III railroads envision as effective ways to enhance competition. And, ORDC adds, we should place on applicants the burden to prove that specific enhancements to competition sought by States, communities, rail users, and small railroads would unduly impact the proposed merger.

NPR § 1180.1(e). ORDC, which agrees that rail labor should be treated fairly and equitably, contends that we should ensure that the safety of rail labor will be in no way compromised by a proposed rail merger.

NPR § 1180.1(f). ORDC, which cites its experiences in connection with the Conrail transaction, insists that a one-on-one negotiation process is not a fair and effective platform on which to base merger policy. ORDC concedes that negotiations between railroads and communities can play an important role in solving environmental issues, but insists that this type of negotiation is intrinsically biased toward the railroads. ORDC explains: that the environmental issues are simply too complex and obtuse for many communities, and even for State agencies, to handle effectively without help; that, because true environmental impacts cannot be known until well after trains start running, environmental issues simply cannot be adequately resolved before the merger is implemented; and that the existing system of formal STB filings and proceedings to determine environmental issues is fundamentally flawed and limits access by small shippers and railroads. ORDC, which believes that ongoing mediation will effectively bring parties to mutually acceptable solutions to most environmental issues without expensive and burdensome filings during consideration of the merits of a merger proposal, contends that we should make clear in the NPR § 1180.1 policy statement that, given the resources by Congress, we will make mediators available to all parties throughout the environmental review process.

NPR § 1180.1(h). ORDC, which supports the proposal for Service Assurance Plans and Service Councils, argues that the additional planning and oversight envisioned by this proposal will make it possible to avoid some of the mistakes of the past. ORDC insists, however, that it does not believe that the new policy statement goes far enough. ORDC explains: that, for all the emphasis on more planning and oversight, the basis of the proposed policy is still good faith negotiations between merging railroads and shippers and between merging railroads and small railroads; that, however, many shippers (especially small or captive shippers) and virtually all small railroads are at a huge disadvantage in this system; that, therefore, to protect the interests of small shippers and small railroads, as well as States and communities, we should adopt a "field mediation system" involving mediation conducted by outside mediators supervised by the STB; and that such mediation should be mandatory and binding for applicant railroads but not for other parties. And, ORDC adds, we should affirm that the principles of the ASLRRA "Bill of Rights" are issues that would be subject to mediation between small railroads and merger applicants.

NPR § 1180.4(b)(4)(iii). ORDC contends that it is a very good idea to require that merging railroads supply 100% data tapes under proper protective orders. ORDC, citing its experience in connection with the Conrail transaction, explains that the 1% data tapes can be sorely lacking in relevance to the proposed transaction.

NPR § 1180.6(b)(9). ORDC contends that better accounting of employee impacts is needed; precipitous cutbacks in front line management, ORDC explains, can be detrimental to rail operations in general, and can result in poor service to rail users and to shortline partners. In addition, ORDC, which believes that the impacts of disruption on families is never fully accounted for in the merger process, applauds the attempt to quantify "Jobs Transferred."

NPR § 1180.6(b)(10)(ii). ORDC contends that the requirement that applicants "explain how the transaction and conditions they propose will enhance competition and improve service" is woefully inadequate. ORDC explains that solely relying on the applicant railroads to provide ways to enhance competition will not adequately take into account relevant priorities and concerns of communities, rail users, rail labor, and small railroads, as well as the environmental and economic development priorities of the States.

NPR § 1180.6(b)(11). ORDC agrees that applicant railroads should be responsible for presenting and quantifying benefits and detriments of the proposed transaction. ORDC insists, however: that we should add much more detail to this procedure; that, in particular, we should require the applicants to specify in detail their measurement systems through which the benefits and detriments were quantified so that we and other parties can assess whether such benefits will actually occur; and that we should specify the categories of benefits and detriments that the applicant railroads need to address. The benefit categories contemplated by ORDC would include but not be limited to: increased capacity in multi-modal shipping corridors; increased capacity for intercity and commuter rail passenger services; better service/reduced rates for intermodal shippers due to improved access to ports and terminals; reduced noise and environmental impacts from reduction of trains on routes; reduced rates for shippers from such efficiencies as decreased car ownership and maintenance costs due to quicker car turn-around or heavier loadings and other such savings; reduced rates for carload shippers from the efficiencies of longer single-line hauls and from improved access to terminals and ports; reduced rates to shippers attributable to enhanced competition; increased viability for connecting railroads due to better access to terminals, gateways, and ports, including the elimination of paper barriers; increased viability for connecting railroads due to better efficiency of the applicant railroad in such areas as faster car turn-around, expanded car supply, and related areas; increased viability for connecting carriers from the efficiencies of longer single-line connecting hauls; and improvements for communities from the reduction of blocked crossings, reduction of noise and pollution, and reduction of hazardous materials moving through towns, and related issues. The detriment categories contemplated by ORDC would include but not be limited to: loss of freight and passenger capacity due to congestion and inadequate infrastructure; increased energy use from running of additional trains; increased blocked crossings due to increased train traffic; increased pollution and noise and other adverse impacts on lines where traffic will increase; increased environmental problems near yards and intermodal terminals where usage will increase; higher rates or reduced quality of service for shippers due to the loss of competitive options; lost business for connecting railroads due to the loss of competitive options and connections; loss of business for shippers due to loss of direct service or competitive options; increased costs for connecting railroads due to merger-related decisions to increase train lengths, increase car weights, reduce crews serving interchange points, and related actions; and constraints on shipper flexibility because of minimum tender limitations.

NPR § 1180.6(b)(12). ORDC agrees that the "one case at a time policy" should be discarded; the next mega-merger, ORDC explains, will set off a chain reaction resulting in 2 major transcontinental railroads in the U.S. and Canada in the short term, with mergers with Mexican railroads likely to follow. ORDC, adds, however, that it will have great difficulty discerning how the downstream process will play out until the follow-up plans are actually announced; until two mega-railroads emerge with certainty, ORDC argues, the permutations of downstream impacts could be overwhelming. ORDC contends that, because the upcoming round of mergers is likely to determine the North American railroad map for the next 100 years, North America would be better off if the Big Six railroads came forward at once with a proposed final map and the STB and its Canadian and Mexican counterparts took as long as was needed to sufficiently analyze the results. And, ORDC adds, the stakes are sufficiently high that provision for thorough evaluation of future ramifications should not be constrained by current time limitations. ORDC further contends that we should commence a separate proceeding to address the shape of the ultimate transcontinental rail duopoly.

Need for mediation/arbitration. ORDC, citing its experience in connection with the Conrail transaction, contends that the Conrail negotiations that it witnessed were difficult because (ORDC explains) railroad officials were in many instances unsympathetic to community and shipper needs, and local and shipper officials often did not comprehend the perspective of the railroad responsible for moving interstate commerce and running an efficient business. ORDC, which notes that the NPR (despite the many new elements it contains) still relies overwhelmingly on negotiated solutions, indicates that future negotiations are no more likely to succeed than past negotiations; without a fundamental change in human nature, ORDC explains, the perspectives of the opposing parties in these negotiations are not likely to encompass the "gray areas" concerning important issues. ORDC therefore requests that we formally incorporate mediation/arbitration (ORDC refers to mediation and arbitration more or less interchangeably) into the merger process. ORDC contends: that mediation would greatly reduce the burdens on communities, shippers, small railroads, rail labor, and States as well as the STB and the applicant railroads in a merger process; that, furthermore, mediation would facilitate mutually acceptable resolutions of issues that would then not have to be dealt with in a formal decision; that, although STB-supplied mediators would be optimal, outside mediators under the direction of the STB would be more cost-effective; and that, in either instance, mediation should be mandatory for the applicant railroads but voluntary (though strongly encouraged) for other parties.

Need for STB Office of Public Counsel. ORDC contends: that, if the STB had a fully staffed Office of Public Counsel that could assist entities that believe they will be adversely impacted by a proposed merger, that Office could be the best resource in directing parties to acceptable compromises; that guidance from STB experts would be invaluable in leading parties to fruitful negotiations or mediation and, when deemed appropriate, in representing the interests of small shippers or communities in the development of an adequate record; and that, although the existing Office of Congressional and Public Services has been of great assistance to ORDC when ORDC has used its services, that Office is simply too small to be a key component of a mega-merger.

Impacts of unregulated joint route agreements. ORDC contends that, because the Class I railroads may find it in their best interests to bypass our new merger procedures and to gain the benefits of mergers without formally merging, we should take a hard look at the "alliance" issue. ORDC explains that alliances, just like mergers, have the potential to create great benefits in capacity and efficiency as well as adverse impacts.

Gateway issues. ORDC contends that, because it would be unfair to the applicants to require them (but not non-applicant railroads) to offer continued access to certain gateways to enhance competition, such non-applicant railroads should also be required to offer continued access to such gateways (provided, ORDC adds, that such non-applicant railroads are not unduly harmed by such a requirement).

National defense. ORDC contends that, because transportation is a critical element of national defense, the new merger rules should fully address national defense issues. ORDC further contends that, because of the end-to-end nature of the next round of transcontinental mergers, the reporting requirements sought by DOD should not be an undue burden upon applicants.

Oklahoma Department of Transportation. The Oklahoma Department of Transportation (OKDOT) indicates that, although it generally supports a "paradigm shift" that would place greater emphasis on "enhanced competition" and "improved service," it is concerned that the NPR relies too heavily on applicants to propose solutions. OKDOT contends that, to be effective, our merger regulations must provide more specific guidance both to applicants and to parties affected by the proposed merger.

Measurement of merger benefits. OKDOT contends that applicants, when calculating potential merger benefits, should not be permitted to include economic efficiencies unless they can show that they were operating efficiently before the merger. OKDOT, which notes that one of the benefits applicants often claim is that they will be better able to utilize their equipment, insists that, as carriers get bigger, they do not necessarily use their equipment more efficiently. And, OKDOT adds, it questions why carriers need to grow larger to make more efficient use of their equipment, when it seems they could find more efficient ways to use their equipment now.

Enhanced competition. OKDOT contends that, although the NPR would require applicants to provide for enhanced competition, the NPR does not specify "how" or "where" this is to be done; the "how" and the "where," OKDOT adds, have been left for applicants to propose. This is troubling, OKDOT explains, because in past mergers (OKDOT cites the BN/SF, UP/SP, and Conrail transactions in particular) such enhancement of competition as has occurred has involved deals negotiated by the Class I applicants with other Class I railroads, and not with shortlines. OKDOT, which believes that the new regulations should ensure that shortlines and the rural shippers they serve get their fair share of the enhanced competition that is created as a result of any future merger, insists that, to ensure that some level of enhanced competition will be supplied to the shortline fringes that will otherwise be ignored, the new regulations should require some minimal conditions such as those suggested by ASLRRA's "Bill of Rights."

(1) *Competitive pricing*. OKDOT contends: that, as the Class I railroads have grown ever larger, their pricing has changed to emphasize their longest hauls and to encourage shippers to invest in larger facilities that can handle 100-car unit grain trains; that the Class I railroads have even talked about eliminating the 26-car units common in Oklahoma, even though (OKDOT adds) few if any country elevators can handle even 26-car units, enlargement of these elevator facilities is usually not practicable, and, even if enlargement were practicable, most shortline track infrastructure cannot handle 100-car trains; that shortlines have attempted to deal with these issues by providing multiple switches and co-loading between elevators to put together the size units (either 26 or 54 or 100 cars) that the Class I requires, while at the same time making the better pricing available to their customers; that, even though there is no increased handling cost to the Class I connection (which still receives a unit train bound for a single destination), the Class I railroads (which often have retained pricing authority over their shortline spinoffs) have limited the ability of shortlines to co-load from different stations or to perform multiple switches; and that these Class I pricing decisions have hurt the shippers that are

located on Oklahoma's many shortlines. OKDOT insists that smaller shippers should not be priced out of the market just because they are small; rather, OKDOT argues, they should be given the opportunity to compete by receiving fair, competitive pricing. OKDOT therefore contends that our merger regulations should require merging carriers to provide fair, competitive pricing to connecting shortlines and their customers.

(2) *Elimination of barriers.* OKDOT contends: that "paper barriers" that restrict the ability of shortlines to provide competitive service were originally designed to make the sale more attractive to the shortline buyer, while preserving the bulk of the revenue for the Class I seller and eliminating what was often costly branch line service; that, although the deals were premised on the economics, pricing, and service that existed at the time of the sale, all of these factors have since changed; that, in particular, while the Class I railroads have merged and grown larger, the shortlines have been limited to the lines they bought; that, furthermore, while the Class I railroads have focused on longer hauls and larger trains to become more profitable, the shortlines have been able to rely only on traffic growth; and that, because many shortlines have been around for 5 to 10 years, the Class I sellers have already received substantial value as a result of the barriers they imposed. OKDOT therefore insists that, in order to create additional competitive options for shippers located on shortlines and to stimulate both a growth in traffic and improved pricing, any future merger applicants should be required to rescind all paper barriers.

(3) *Opening terminals.* OKDOT indicates that it would support opening terminals by requiring merger applicants to provide switching, at an agreed-upon reasonable fee, to all exclusively served shippers and shortlines located within or adjacent to terminal areas. OKDOT adds that, if such a condition were imposed for the benefit of shortlines, it would have to be further conditioned on the elimination of contractual barriers that would otherwise frustrate use of the switching fee to connect with shippers or other carriers.

Harm to shortlines. OKDOT contends that, in view of the vital role that shortlines play in preserving service (in particular to rural agricultural areas), and given that there are almost never rail alternatives in the areas that shortlines serve, our merger regulations should provide that shortlines provide "essential services" in preserving rail service to the fringes of the rail network. OKDOT further contends that, because any loss of traffic by a shortline will undermine (in the long run, if not immediately) its ability to maintain its lines, to upgrade its infrastructure to handle the next generation of cars, and to provide reliable competitive service, our merger regulations should provide that any significant loss of traffic resulting from traffic shifts caused by a merger will undermine the ability of the shortline to continue to provide service and will therefore entitle the shortline to relief. OKDOT, in an effort to quantify the "significant loss of traffic" concept, suggests that we could create a presumption that, for example, a 10% loss of traffic would entitle a shortline to relief. The presumption contemplated by OKDOT would be rebuttable, and (OKDOT explains) parties would be allowed to demonstrate that a different level of loss would be appropriate in particular instances.

Service-related losses. OKDOT contends that, although the requirement of service assurance plans is a step in the right direction that will hopefully foster the goal of minimizing post-merger service disruptions, such disruptions are still almost certain to occur; no amount of planning, OKDOT explains, can anticipate all problems. OKDOT, which notes that past merger-related service disruptions have resulted in higher costs to shippers and loss of traffic for shortlines when traffic was trucked around them because of "choke points" on the connecting Class I carriers, insists that the requirement that a "problem resolution team" be established to deal with service problems and "related claims" is not sufficient. Rather, OKDOT contends, our regulations should require that, in such circumstances, applicants must provide both a team to address the service disruptions and prompt reimbursement to shippers and shortlines for demonstrable service-related losses. And, OKDOT insists, it is imperative that we clearly establish that shortlines are entitled to reimbursement for lost traffic that results from post-merger service-related failures.

Passenger service. OKDOT contends that, although its concerns relating to passenger traffic have been met in large measure by the proposed regulations, certain problems remain. OKDOT contends, in particular, that the regulations: should make clear that any substantial interference with passenger service will be grounds for protective conditions; should require applicants to address passenger operations that have been proposed at the time of the application; should require applicants to meet with passenger operators as part of the SAP preparation process; and should include arrangements for remedies or damages if the SAP is not fulfilled. And, OKDOT adds, a reference to passenger operators should be added to NPR § 1180.1(h).

Oregon Department of Transportation. The Oregon Department of Transportation (ORDOT), which filed on behalf of the State of Oregon, indicates that it generally supports the regulations proposed in the NPR; the new rules, ORDOT believes, will do a great deal to better balance America's transportation system. ORDOT indicates, however, that, although it generally supports the proposed regulations, it is concerned about the wording of NPR § 1180.1(c)(2)(ii). ORDOT, which notes that Oregon is in the process of rebuilding its passenger rail service, explains: that the term "essential service" is problematic; that, interpreted strictly, very little rail service is actually "essential" (there is, ORDOT insists, very little freight that cannot move by truck); that it is not clear how "public need" and "adequate alternative transportation" are to be defined; and that ORDOT would not like to think that new passenger rail service will not be deemed "essential" until I-5 is in complete gridlock from Eugene to Portland and no air service is available. ORDOT suggests that, without some clear definition of "essential," the caption for NPR § 1180.1(c)(2)(ii) should be changed to "Harm to service opportunities," the third sentence of NPR § 1180.1(c)(2)(ii) should be deleted, and the first 2 sentences of NPR § 1180.1(c)(2)(ii) should be revised to read as follows: "The Board must ensure that freight, passenger, and commuter rail service opportunities are preserved. Existing service and future opportunities should demonstrate public need and an over-all benefit to the transportation system."

Pennsylvania House Transportation Committee. The Pennsylvania House Transportation Committee (PHTC) indicates that, although it applauds our increased focus on enhancement of competition as an offset to negative impacts resulting from service disruptions and competitive harms caused by merger transactions, it does not believe that the proposed regulations contain effective or adequate remedial measures to address those problems. PHTC contends, in particular, that our merger regulations: should provide for meaningful competitive access for regional and shortline carriers to competing Class I connections; should reject efforts by merged carriers to maintain barriers to competitive interchange; should require the preservation of competitive gateways to connecting carriers; should incorporate ASLRRA's "Bill of Rights" and the comments submitted by PPL and other coal interests; and should adopt expedited measures to allow connecting carriers and shippers to recover financial damages caused by service disruptions and other operational problems resulting from ineffectively implemented transactions.

The City of Mankato, Minnesota. The City of Mankato, MN (Mankato), which is located 90 miles south of the Twin Cities and 125 miles west of the Mississippi River, has direct access to 2 railroads: DM&E, which operates a former CNW east-west line from Winona (on the west bank of the Mississippi River) through Mankato and westward into South Dakota; and UP, which operates a former CNW north-south line that passes through Mankato on its way from the Twin Cities to Omaha.

(1) Mankato's main focus appears to be on the Powder River Basin (PRB) line that DM&E has proposed to build. Mankato indicates: that the PRB line would transform DM&E from a grain hauling regional carrier with a modest traffic base and modest frequency levels (presently 3 trains daily through Mankato) into a virtual coal hauling conveyer belt (expected to handle 37 trains daily through Mankato); that DM&E, which now operates through downtown Mankato by way of trackage rights over the UP line, is considering whether to build a short bypass to the south of Mankato ("the southern bypass"), to construct a new DM&E track on the present UP alignment, or to substantially increase its trackage rights use of the UP line; that, although Mankato would prefer to see DM&E build the southern bypass, DM&E prefers either of the two cheaper "in town" alternatives (i.e., construction of a new DM&E track on the UP alignment or substantially increased use of the UP trackage rights); that, however, Mankato fears that the noise and vibration associated with either "in town" alternative might weaken flood control structures; that, furthermore, Mankato fears that, absent mitigation measures, any "in town" solution would have numerous adverse effects on street and pedestrian traffic, public safety, property values, emergency vehicle access, environmental considerations, and the quality of life generally; and that, to the extent DM&E can implement either "in town" alternative

without Board approval (i.e, to the extent either such alternative is not within the jurisdiction of the Board), Mankato will not be able to secure mitigation relief from the Board.

(2) Mankato contends that, just as changes in traffic flows and operations associated with new rail construction can have serious environmental and community impacts, changes in traffic flows and operations associated with rail mergers can also have serious environmental and community impacts. Mankato further contends that, although the regulations proposed in the NPR would substantially raise the bar that merger applicants must pass to obtain approval, such regulations would not make it any easier for affected parties to obtain relief from the adverse effects of an approved transaction. Mankato insists that, rather than raising so substantially the standard for future mergers, we should scrutinize future merger proposals more carefully using hearings (including on-site hearings) chaired by objective factfinders. Mankato also insists: that field hearings would give the Board a better sense of the transaction's community impact; and that use of public counsel and/or publicly-funded independent consultants would ensure the proper representation of interests that may lack the financial resources to employ expertise skilled in the intricacies of a very esoteric field of administrative law and economics. Mankato further insists that we should clarify and simplify the standards for adversely affected parties to obtain relief. And, Mankato adds, although it agrees that there should be a greater emphasis on post-consummation remedies, it also believes that serious attention should be given to a phased-in consummation of any major rail merger, with each new step to be implemented after previous ones have been successful.

(3) Mankato contends that another environmental and social impact issue common to both mergers and rail construction cases involves mitigation efforts and who should pay for those efforts. Mankato notes, in this respect, that, in either class of cases, modest cities such as Mankato are forced to retain expensive and specialized engineering and legal counsel to make their views known at the Board. And, Mankato adds, although it agrees that voluntary arrangements are always preferable to government-mandated solutions, the NPR's reliance on voluntary arrangements overlooks the basic fact that those parties most likely to reach a negotiated solution are those with equal bargaining power.

(4) Mankato is apparently concerned that DM&E's future prospects will be threatened either if the PRB line is not constructed or if UP is involved in another major merger. Mankato notes that, if DM&E were to fail, such rail competition as presently exists in the Mankato market would vanish. Mankato therefore contends that we should scrutinize merger proposals more carefully when financially fragile Class II and III railroads are involved and should lower the standard for granting relief for Class II and III railroads alleging loss of competition and essential rail service. And, Mankato adds, any revision of our merger regulations that would permit us to condition future transactions or reopen past transactions (such as the UP/CNW merger) might possibly provide a basis for relief for Mankato.

(5) Mankato contends that various types of agreements made between merger applicants and other parties (e.g., unregulated traffic routing agreements such as haulage agreements, carrier alliances, marketing agreements, and traffic-related settlement agreements, and also settlement or other agreements involving community impact and environmental issues) should be filed with the Board for its approval and should be available for public review subject to appropriate protection for confidential information. Mankato concedes that, under traditional railroad commerce law, some of these agreements are not normally subject to Board scrutiny. Mankato insists, however, that, where these agreements could drastically affect traffic flows with obvious environmental and community impacts of the sort presented in the DM&E construction case and several recent rail mergers, the Board should act. And, Mankato adds, Board action is especially important in view of recent court rulings preempting state or local safety and environmental regulation. Mankato further contends that the Board should be able to examine agreements imposed or approved in prior transactions that could present serious environmental or community impacts involving traffic flows (Mankato indicates that it believes that the Board could revisit the appropriateness of a provision in an agreement when one party to that agreement is an applicant for a new merger transaction).

(6) Mankato warns that, because many shortlines are so fragile financially that a service problem with their Class I connection that affects their cash flow could well be their death knell, post-merger service disruptions may cause shippers to lose the essential rail service provided by their shortlines. Mankato therefore contends that we should formulate a mechanism, either in this proceeding or in a specific merger proceeding, to allow shortlines affected by traffic loss due to merger-related service breakdowns to recoup lost revenues.

The City of Owatonna, Minnesota. The City of Owatonna, MN (Owatonna), which is located 70 miles south of the Twin Cities and 70 miles west of the Mississippi River, has direct access to 3 railroads: DM&E, which operates a former CNW east-west line from Winona (on the west bank of the Mississippi River) through Owatonna and westward into South Dakota; I&M, which operates a former CP line through Owatonna; and UP, which operates a former CNW north-south line that passes through Owatonna on its way from Minneapolis to Kansas City.

(1) Owatonna's main focus appears to be on the Powder River Basin line that DM&E has proposed to build. Owatonna indicates: that the PRB line would transform DM&E from a grain hauling regional carrier with a modest traffic base and modest frequency levels (presently 3 trains daily through Owatonna) into a virtual coal hauling conveyer belt (expected to handle 37 trains daily through Owatonna, with as many as 10 of these trains turning at Owatonna to move northwards onto I&M); that because UP, which (as successor to CNW) leases to DM&E a small segment of the "DM&E" line through Owatonna, has refused to let DM&E build an

"in town" DM&E/I&M connection on UP-owned property,[136] DM&E has proposed to build an "Inner Loop" DM&E/I&M connection on the DM&E-owned portion of the line inside the city limits; that, however, in view of the numerous adverse effects of the "Inner Loop" on street and pedestrian traffic, public safety, property values, emergency vehicle access, environmental considerations, and the quality of life generally, Owatonna prefers an "in town" DM&E/I&M connection on UP-owned property; that, under an agreement reached by Owatonna and DM&E, Owatonna has dropped its "Outer Loop" proposal (which Owatonna apparently prefers to both the "in town" connection and the "Inner Loop" connection) and DM&E has agreed to pursue the "in town" DM&E/I&M connection on UP-owned property; but that, although construction of the "in town" DM&E/I&M connection on UP-owned property would require UP's consent, DM&E has so far been unable to obtain that consent.

(2) Owatonna contends that, just as changes in traffic flows and operations associated with new rail construction can have serious environmental and community impacts, changes in traffic flows and operations associated with rail mergers can also have serious environmental and community impacts. Owatonna further contends that, although the regulations proposed in the NPR would substantially raise the bar that merger applicants must pass to obtain approval, such regulations would not make it any easier for affected parties to obtain relief from the adverse effects of an approved transaction. Owatonna insists that, rather than raising so substantially the standard for future mergers, we should scrutinize future merger proposals more carefully using hearings (including on-site hearings) chaired by objective factfinders. Owatonna also insists: that field hearings would give the Board a better sense of the transaction's community impact; and that use of public counsel and/or publicly-funded independent consultants would ensure the proper representation of interests that may lack the financial resources to employ expertise skilled in the intricacies of a very esoteric field of administrative law and economics. Owatonna further insists that we should clarify and simplify the standards for adversely affected parties to obtain relief. And, Owatonna adds, although it agrees that there should be a greater emphasis on post-consummation remedies, it also believes that serious attention should be given to a phased-in consummation of any major rail merger, with each new step to be implemented after previous ones have been successful.

(3) Owatonna contends that another environmental and social impact issue common to both mergers and rail construction cases involves mitigation efforts and who should pay for those efforts. Owatonna notes, in this respect, that, in either class of cases, modest cities such as Owatonna are forced to retain expensive and specialized engineering and legal counsel to make their views known at the Board. And, Owatonna adds, although it agrees that voluntary arrangements are always preferable to government-mandated solutions, the NPR's reliance on

[136] Owatonna indicates that, although the DM&E and I&M lines presently cross at grade in Owatonna, these lines do not now "connect" in Owatonna.

voluntary arrangements overlooks the basic fact that those parties most likely to reach a negotiated solution are those with equal bargaining power.

(4) Owatonna contends that a revision of the merger regulations that would permit the Board to condition future mergers or reopen past transactions by requiring the elimination of anticompetitive practices such as "paper barriers" would be very beneficial to parties such as Owatonna. Owatonna explains: that a "paper barrier" has allowed UP to block the "in town" DM&E/I&M connection favored both by Owatonna and by DM&E; that this "paper barrier," which dates back to the creation of the DM&E and which involves ownership by UP (formerly CNW) of a small portion of the "DM&E" line, was established in order to prevent DM&E from interchanging traffic with CP (I&M's predecessor); and that the elimination of this "paper barrier" would allow DM&E to construct an "in town" DM&E/I&M connection, which would eliminate the need for both the "Inner Loop" favored by DM&E and the "Outer Loop" favored by Owatonna.

(5) Owatonna, which is apparently concerned that the future prospects of DM&E and I&M will be threatened either if the PRB line is not constructed or if UP is involved in another major merger, warns that, if DM&E and/or I&M fail, the level of competition in the Owatonna market would be measurably diminished and the essential rail service now provided by these carriers would be jeopardized. Owatonna, which is also apparently concerned that either DM&E or I&M might be acquired by UP and that we might decide not to mitigate this 3-to-2 reduction in competition, insists that, although the "superficial analysis" that sees no harm in 3-to-2 competitive reductions might be appropriate for some markets, it would not be appropriate for the Owatonna market because (Owatonna explains) both DM&E and I&M are fairly weak carriers. The simple fact of the matter, Owatonna contends, is that the Board should scrutinize merger proposals more carefully than it has in the past when financially fragile Class II and III railroads are involved and should lower the standard for granting relief for Class II and III railroads alleging loss of competition and essential rail service.

(6) Owatonna contends that various types of agreements made between merger applicants and other parties (e.g., unregulated traffic routing agreements such as haulage agreements, carrier alliances, marketing agreements, and traffic-related settlement agreements, and also settlement or other agreements involving community impact and environmental issues) should be filed with the Board for its approval and should be available for public review subject to appropriate protection for confidential information. Owatonna concedes that, under traditional railroad commerce law, some of these agreements are not normally subject to Board scrutiny. Owatonna insists, however, that, where these agreements could drastically affect traffic flows with obvious environmental and community impacts of the sort presented in the DM&E construction case and several recent rail mergers, the Board should act. And, Owatonna adds, Board action is especially important in view of recent court rulings preempting state or local safety and environmental regulation. Owatonna further contends that the Board should be able to examine

agreements (e.g., the agreement that created the DM&E "paper barrier" in downtown Owatonna) imposed or approved in prior transactions that could present serious environmental or community impacts involving traffic flows (Owatonna indicates that it believes that the Board could revisit the appropriateness of a provision in an agreement when one party to that agreement is an applicant for a new merger transaction).

(7) Owatonna warns that, because many shortlines are so fragile financially that a service problem with their Class I connection that affects their cash flow could well be their death knell, post-merger service disruptions may cause shippers to lose the essential rail service provided by their shortlines. Owatonna therefore contends that we should formulate a mechanism, either in this proceeding or in a specific merger proceeding, to allow shortlines affected by traffic loss due to merger-related service breakdowns to recoup lost revenues.

The New York City Economic Development Corporation. The New York City Economic Development Corporation (NYCEDC), a local development corporation created by the City of New York to promote economic growth and create business opportunities through a variety of financial incentives and assistance programs, contends that, if we use the full range of our authority to guard the public interest by preserving a level competitive playing field and by preventing adverse impacts on safety and the environment, the rules proposed in the NPR have the potential to provide safeguards for the public and private interests that will be at risk as a result of the merger proposals that are sure to come in the future.

(1) NYCEDC agrees that our analysis of the competitive impacts of the transaction must look beyond the borders of the U.S. to assess the transaction's transnational impacts. NYCEDC explains: that the rail networks of the U.S., Canada, and Mexico are increasingly integrated; that the implementation of NAFTA has expanded the interest of all of the U.S. railroads in marketing and operating arrangements that move traffic across both the northern and southern borders; that, however, actions of transnational merging carriers may disadvantage certain U.S. interests; that, by way of example, actions of transnational merging carriers that advantage Canadian ports may potentially disadvantage U.S. ports; that, although our merger rules are not designed to protect against the impacts of increased competition, we must nevertheless identify and address impacts that will affect the availability of the national transportation infrastructure for use by U.S. commercial and defense interests; and that, although we cannot regulate transportation that occurs beyond the borders of the U.S., we must assess the impact of actions or strategies beyond those borders on the interests of the public within the U.S. NYCEDC contends, in particular, that our recognition of the need to address "full system" competitive analyses in transactions involving major Canadian or Mexican railroads is both a necessary and an appropriate exercise of our authority.

(2) NYCEDC contends that, as the number of rail transportation alternatives shrinks due to the continuing mergers among rail carriers, it is appropriate and within the Board's authority

for the Board to require applicants to propose actions that will enhance competition in the context of a proposed merger. NYCEDC cites, in this regard, the "east of the Hudson" remedy that we imposed on the Conrail transaction. This remedy, NYCEDC argues, is the type of remedy that the proposed new regulations will encourage applicants to craft on their own, working together with interests that, like the public agencies and commercial interests on the "east of the Hudson" corridor, see a problem and a solution that does not unduly disadvantage the applicants.

(3) NYCEDC agrees that we should make the oversight process we have used in recent cases part of our standard operating procedure; no amount of planning and projection, NYCEDC explains, will be able to predict with certainty the fallout from future mergers. NYCEDC insists, however, that, if oversight jurisdiction is to be effective, the Board must use aggressively and affirmatively the NPR § 1180.1(g) authority "to impose any additional conditions it determines are necessary to remedy or offset unforeseen adverse consequences of the underlying transaction." NYCEDC further insists that, if the Board's oversight jurisdiction is to play a meaningful role, the Board will need to put the merging parties to the test of responding fully and accurately to issues, whether related to competition, harms to the environment, or impacts on local commuter operations, raised during the course of the oversight proceeding or in petitions for immediate relief that parties may file. And, NYCEDC adds, it is essential that the Board use its authority to investigate fully any claims for post-merger relief and to respond pro-actively; it is not enough, NYCEDC argues, to leave the merged carrier and the claimant to work out a private solution.

(4) NYCEDC insists that, although the future cannot be foreseen with precision, applicant carriers should nevertheless be held accountable for their projections and responsible for the consequences of their actions. NYCEDC contends: that the merger application submitted by applicants provides most of the information that the Board and third parties (including other freight railroads and shippers, and also commuter railroads and their customers) use to begin understanding whether a proposed transaction is consistent with the public interest; that, although each third party has a choice (support the transaction, oppose it and seek conditions, or remain silent), third parties, in making their choices, rely heavily on applicants' projections; and that, therefore, applicants should be held to their promises, and should be required to compensate affected parties for the damage they cause. NYCEDC further contends that, although it is true that changes in the market totally independent of the merger may trigger service or other problems for third parties, the fact of the matter is that applicants in a rail merger are often the ones who are responsible for the impacts being experienced by the third parties.

(5) NYCEDC insists that the Board has, and should continue to exercise, the authority to impose new conditions on consummated mergers. NYCEDC contends: that 49 U.S.C. 722(c) provides that, in the event of material error, new evidence, or substantially changed circumstances, the Board may, at any time, reopen a proceeding, or grant rehearing, reargument,

or reconsideration of an action of the Board, or change an action of the Board; that 49 CFR 1115.4 similarly provides that, in the event of material error, new evidence, or substantially changed circumstances, a person may, at any time, file a petition to reopen any administratively final action of the Board; that the remedy provided by 49 U.S.C. 722(c) and 49 CFR 1115.4 was established to permit the Board to require carriers to fix problems that their transaction has created; and that, in view of the existence of this remedy, carriers implementing transactions take the risk that the Board will reopen a consummated merger and impose further conditions when a third party is experiencing harm as a result of a transaction.

The Greater Houston Partnership. The Greater Houston Partnership (GHP)[137] indicates that, although it is pleased that some of its ANPR recommendations were addressed in the NPR, it is disappointed that some of its recommendations were not addressed and that certain that were addressed do not provide sufficient specifics. (1) GHP contends that merging railroads should be required: to maintain existing gateways and existing joint line rate levels at those gateways, subject to an annual indexing administered by the STB; to permit competitive access to all shippers located in major terminal areas by all railroads serving the terminal area; and to permit competitive access to all shippers located within a pre-determined distance of a railroad interchange point. GHP insists that a requirement that existing gateways be kept open will not be effective if the shipper must obtain a transportation contract from the competing railroad simply to continue using a route that was available before the merger. And, GHP adds, our regulations should identify the specific actions merging railroads must take to enhance competition, and should not leave the specifics to be determined by the railroads themselves. (2) GHP contends that we should impose severe sanctions (including mandated shipper access to another railroad) on railroads whose service failures cause substantial financial harm to their customers. It is not enough, GHP argues, simply to require the merging railroads to prepare a contingency plan for merger-related service disruptions, with no sanctions to be imposed on the merged railroad for failing to provide adequate service. GHP adds that more precise rules are needed in this area, specifying the sanctions the STB will impose on merged railroads whose service severely impacts shippers. And, GHP insists, these rules should be in addition to shippers' existing rights to pursue other legal remedies. (3) GHP contends that all merging railroads should be required to maintain strict neutrality between ports. The neutrality contemplated by GHP would require that railroads not give routing, service, rate, or promotional preferences to one port over another. And, GHP adds, an effective, neutral forum should be available to adjudicate disputes between ports and railroads over this issue.

[137] GHP's 2,200 members are located in the Houston region.

APPENDIX I: PORT INTERESTS

Port of Seattle, WA. The Port of Seattle, WA (POSW) endorses, with certain reservations, the changes proposed in the NPR. (1) POSW endorses a reasonable implementation of the "enhanced competition" proposal, because (POSW argues) competitive benefits, including the merging railroads' increased ability to compete with intermodal and motor carriers, should be considered in determining whether a merger is in the public interest. POSW adds, however, that it does not believe that we should require competitive enhancements beyond those needed to offset any harmful effects of the merger. (2) POSW contends that, to ensure that the rail structure resulting from a final round of industry mergers is acceptable from a competitive standpoint, we should look at the "downstream effects" of future mergers. (3) POSW endorses the new focus on ensuring smooth merger implementation, which (POSW suggests) will help in avoiding the disruption that has accompanied some recent mergers. (4) POSW contends that the NPR takes a realistic and reasonable approach to transnational issues by requiring applicant carriers to address a number of unique issues that may arise when a merger has significant transnational elements. POSW suggests, however, that NPR § 1180.1(k)(1) should be revised to require that, where a merger has significant transnational elements, applicants must address, among other things, whether "commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations and be detrimental to the interests of the United States rail network or United States ports." (5) POSW indicates that it is concerned that the proposed guidelines may not give sufficient weight to the economic efficiency gains that can result from railroad consolidations. POSW adds that, although future mergers may present difficult challenges as respects preserving and enhancing competition, difficulty in meeting those challenges should not be used as a sole reason for denying mergers that will result in substantial economic efficiency gains for the merging carriers. (6) POSW contends that, because a timely merger implementation process is beneficial for all concerned, we should take a closer look at streamlining timelines to keep the process to a manageable and efficient length.

Port of Portland, OR; Port of Corpus Christi Authority of Nueces County, TX. The Port of Portland, OR (POPO) and the Port of Corpus Christi Authority of Nueces County, TX (POCCA)[138] contend that we should adopt the rules as proposed, with special consideration given to avoiding the presumption that all proposed mergers cause harm, avoiding prolonged and lingering procedures, and including the views of and impact on ports in STB decisions that are responsive to market needs and market dynamics. (1) POPO and POCCA insist that they do not believe that there should be a presumption that all proposed mergers will be detrimental. POPO and POCCA argue that, if applicants can satisfy the criteria set forth in the rules as proposed, a merger should be approved as in the public interest. (2) POPO and POCCA, which agree that the

[138] POPO and POCCA filed separately.

rail industry is part of a broader transportation infrastructure that also embraces the nation's ports, contend that any proposed merger must enhance the capabilities and the competitiveness, and avoid harming any of the essential components, of this broader transportation infrastructure. (3) POPO and POCCA contend that adoption of standards that require consideration of the impact of a merger on ports: will allow ports to go ahead with long-lead time infrastructure projects; will allow the Board to determine the routing, service, rates, and any promotional preferences that the railroads intend to provide each port; and will enable ports and the Board to determine whether the proposed merger will impact positively or negatively the competitiveness of the ports. (4) POPO and POCCA endorse the NPR § 1180.1(h)(3) "Service Council" concept. POPO and POCCA, which claim that ports have heretofore been excluded from participation in the regular meetings that past rail merger parties have held with shippers, argue that the inclusion of ports in the Service Council will go a long way to provide ports up-to-date information and potential resolution of problems, which (POPO and POCCA add) will allow ports to continue to serve domestic and international customers and to have the opportunity to protect the huge public and private investment they have made in port facilities.

Port of Houston Authority. (1) The Port of Houston Authority (POHA) endorses the NPR § 1180.7(b)(6) requirement that applicants' impact analyses must include an "explicit delineation of the projected impacts of the transaction on the ability of various network links (including Class II and Class III rail carriers and ports) to participate in the competitive process and to sustain essential services." (2) POHA insists, however, that, in order to provide an ongoing forum for the discussion of implementation issues related to ports, we should require applicants to establish a "Ports Council" that (as contemplated by POHA) would be similar to NPR § 1180.1(h)(3)'s Service Council. POHA, which insists that a Ports Council would be important to assuring effective implementation of the merger in terms of the ability of ports to sustain essential services and to effectively participate in the competitive process, argues that problems related to ports cannot be handled by the Service Council because the nature of ports is different from the experience and expertise that one would expect to find in the shipper community. POHA explains: that ports are not shippers or receivers; that, rather, ports are links in the transportation network, partners with railroads rather than customers of railroads; and that, for this reason, a Council comprised of shippers and railroads would not be attuned to port issues. (3) POHA indicates that it is pleased that the proposed regulations recognize that enhanced competition is in the public interest. (4) POHA insists, however, that the most effective method of assuring quality, responsive, and competitive service in a major terminal or port area is through the use of a neutral switching carrier accountable to a board comprised of local shippers and receivers. POHA adds that it does not propose seizing railroads' local service infrastructure without compensation; rather, POHA indicates, it envisions that the railroads will receive fair compensation for any properties included in a neutral switching carrier.

Port of Pascagoula, MS. The Port of Pascagoula, MS (POPM)[139] contends that, although the NPR is a very positive and welcome document that identifies numerous issues that should concern everyone involved with railroads and rail service, the NPR is nevertheless deficient in a number of respects. POPM contends, in particular, that the NPR does not go far enough in suggesting available remedies to protect the interests of affected parties such as rail-served ports, shippers, communities, shortline and regional railroads, and rail passenger service providers. And, POPM adds, the NPR does not identify changes in Board policies that will enable affected parties to preserve essential rail service and to obtain enhanced competitive rail service (other than through an applicant's self-serving gestures). Our merger regulations, POPM insists, must preserve competition, must be more specific, must provide closer scrutiny of claimed benefits, and must protect shortline and regional railroad interests.

(1) POPM commends the Board on its efforts to persuade applicants to include enhanced competition as part of their merger proposals, the requirement that applicants provide affected parties with greater detail about potential merger impacts, the Board's heightened attention on preventing and resolving service problems, and the abandonment of the "one case at a time" merger analysis in favor of the "downstream" approach.

(2) POPM contends that the public interest merger approval standard should be modified to include impacts on rail-served ports. POPM explains that, for all intents and purposes, the interest of a port is in some respects similar to that of a rail shipper or customer and should be accorded the same level of respect by the Board.

(3) POPM contends that ports are part of the country's national transportation infrastructure and that the term "essential rail service" should reflect the rail service needs of ports. POPM insists that we must recognize the role that smaller ports and the rail lines serving them fulfill as "congestion relievers" for larger facilities. POPM explains that if, as a result of merger-induced traffic diversion, rail lines serving smaller ports are downgraded or abandoned, these ports will be adversely affected and may be forced to close or eliminate facilities with great harm to the public interest.

(4) POPM contends that, because ports compete aggressively for business, the presence or absence of effective rail competition at a port can enhance or erode a port's competitiveness. POPM notes that, although it competes aggressively for business with other Gulf Coast ports, several of these ports (Houston, New Orleans, and Mobile in particular) have more vigorous rail service options and more aggressive rail carrier competition than POPM enjoys. POPM adds: that the quantity and quality of available rail service is one of a series of assets that can give a port a competitive edge over adjacent facilities; that rail carrier actions such as discriminatory

[139] POPM's formal name is the Jackson County Port Authority.

pricing, car supply availability, and reciprocal switching practices that have the practical effect of favoring one port over its competitors can have a devastating impact on a port's ability to compete with others for cargo; and that, through pricing and marketing initiatives (including the unwillingness of one carrier to make reasonable joint rates with another carrier on interline traffic), a railroad can literally dry up traffic moving to a port and can use its market power to punish some ports and reward others. The Board, POPM insists, must use its merger approval and conditioning powers in a way that will not permit such abuses to occur.

(5) POPM contends that structural changes in the competitive dynamics of the railroad industry during the past 20 years require a total re-examination of the Board's current policies on competitive access and competition between railroads. POPM explains: that today's rail industry is a vastly different entity than that which existed in the late 1970s and early 1980s; that, in particular, today's industry is far more concentrated than it was when the current regulations were fashioned; that, in fact, many major markets now enjoy service from just 2 railroads, and some markets now enjoy service from just 1 railroad; that the elimination of many railroads and routes has resulted in decreased competition and fewer competitive alternatives; that, in many cases, shippers (and ports too) find "they can't get from here to there" on today's rail system; and that, although tracks permitting traffic to move may exist, the marketing and pricing policies of the owning railroads may render specific "gateways" economically impractical. POPM further contends that, just as today's duopolistic American railroad structure has begun to resemble the 2-carrier Canadian railroad system, the same sort of relief adopted by Canadian authorities (i.e., the regulations that ensure that rail shippers have access to competitive rail service so long as their facilities are within 30 kilometers of a competing long-haul carrier) could prove appropriate for preserving competition for the new American railroad duopoly. And, POPM adds, competition could also be maintained through other arrangements such as neutral terminal switching railroads, shared asset railroads such as that established to assume certain Conrail operations, and the use of shortline railroads to provide neutral switching for Class I railroad connections.

(6) POPM contends that, if we decide not to include in the new merger rules competitive "enhancements" such as restrictions on gateway closings and reciprocal switching access, we should initiate an independent rulemaking proceeding to consider these alternate ways to maintain competitive rail access; and, POPM adds, issues such as rate equalization (or discrimination) between competing ports and bottleneck rates deserve attention, either here or in a new rulemaking. POPM further contends that, if a broad program of open access would indeed require a fundamental shift in policy better left to Congress, the Board should let the public know whether the Board would support or seek legislation in favor of that policy shift.

(7) POPM contends that, when the Board preserves competition or competitive alternatives to mitigate the adverse effects of a merger, the resulting competition will only be meaningful if it is effective competition. POPM explains that, on some past occasions, only the

semblance of competition has been preserved when a true competitive service has been replaced by an inferior substitute provided by a weaker carrier or a carrier with an inferior route. POPM, which notes that Pascagoula is served by 2 freight railroads (CSX and MSE),[140] warns that, if CSX were to merge with CN/IC, rail competition at Pascagoula would suffer absent some protective arrangements. POPM is concerned, however, that under what it regards as the Board's no-relief precedent of 2 carriers before (CSX and MSE) and 2 carriers after (CSX+CN/IC and MSE), the Board would not act to preserve effective competition.

(8) POPM indicates that, just as it wants to preserve competitive rail service in Pascagoula, it also wants to preserve essential rail service in Pascagoula. POPM, which notes that MSE provides both alternate north-south rail service to Pascagoula and also an alternative to CSX's congested east-west route, indicates that its concern respecting the preservation of essential rail service arises in the context of Class I service failures that can adversely affect the financial health of connecting shortlines such as MSE. POPM explains: that many shortlines do not have the financial staying power of larger carriers; that, while a larger railroad could survive the financial impact of a disruption, a shortline deprived of revenues from connecting traffic might be forced to curtail service or might even be forced into bankruptcy; that, in the case of Pascagoula, the loss of MSE could terminate essential rail service to those shippers who are solely dependent upon it as well as eliminate the rail competition MSE provides for the Pascagoula market; and that, therefore, the Board needs to formulate a mechanism (either in this proceeding or in a specific merger proceeding) that will allow shortlines affected by traffic loss due to merger-related service breakdowns to recoup lost revenues.

(9) POPM contends that, although voluntary arrangements normally represent a desirable resolution of a dispute, consensual solutions are less likely to occur for parties with unequal bargaining power absent the prospect of regulatory intervention on behalf of the weaker party. POPM therefore argues that the Board should play an active but behind the scenes role to ensure successful private negotiations.

(10) POPM contends that applicants should be required to disclose all stations, facilities, or terminals that were open to reciprocal switching at any time during the 24-month period prior to filing a notice of intent to merge, and that there should be a rebuttable presumption that favors reinstatement of reciprocal switching at a closed location. POPM also contends that the disclosure requirement and the rebuttable presumption should also apply with respect to similar

[140] POPM indicates that Mississippi Export Railroad (MSE), a north-south Class III railroad that is jointly owned by International Paper Company, the Illinois Central Railroad (IC), and several private investors, connects with IC at Evanston and with CSX at Pascagoula. POPM further indicates that, although POPM's facilities are physically located on a CSX spur, POPM enjoys access to MSE via a CSX reciprocal switching tariff.

cancellations of other commercial arrangements that provide a semblance of rail competition (including haulage agreements, carrier alliances, voluntary cooperation agreements, and so forth). POPM further contends that applicants should also be required to disclose settlement agreements and "paper" and "steel" barriers subject to appropriate protection for confidentiality.

Port Authority of New York and New Jersey. The Port Authority of New York and New Jersey (PANYNJ), which welcomes our recognition of the fact that the rail industry is part of a transportation network that includes the nation's ports, indicates that, in general, the NPR satisfies its concerns. PANYNJ adds, however, that certain "relatively minor adjustments" should be made to further clarify and effectuate our goals.

<u>Transnational issues</u>. (1) PANYNJ contends: that foreign control of a rail carrier operating in the United States may lead to decisions, particularly marketing and routing decisions, being made for other than normal commercial reasons; that, to the extent those decisions may involve the movement of export/import traffic over Atlantic Coast or Pacific Coast ports, such non-commercial reasons may be detrimental to the interests of U.S. ports as well as the U.S. rail network; and that any fair reading of the NPR taken as a whole would support a conclusion that we mean to protect both the U.S. rail network and U.S. ports from such injurious non-commercial considerations. PANYNJ adds, however, that it would prefer that the potential negative impact on United States ports vs. their foreign competitors be specifically recognized as a transnational issue under NPR § 1180.1(k).

(2) PANYNJ disputes CN's argument that there would have to be something very peculiar about wholly privatized and publicly traded freight railroads to legitimate an across-the-board concern that they are instruments of national or provincial political agendas that displace normal economic incentives. PANYNJ explains: that implicit in this argument is the incorrect premise that it would be contrary to the economic interests of a foreign railroad to implement a plan conceived by a foreign government or governmental interest, the purpose of which is to discriminate in favor of foreign interests at the expense of U.S. interests; that, for example, in 1992 a Canadian task force recommended that certain Canadian statutory rate restrictions be amended to permit Canadian railways to charge less than compensatory rates for the movement of import/export containers where the principal objective of such pricing is the maintenance or promotion of increased import/export container traffic through Canadian ports; and that the Canadian task force further recommended that the railroads reducing rates below compensatory levels to attract traffic away from U.S. ports to the Canadian port of Halifax be compensated by various federal and provincial tax reductions and incentives. PANYNJ argues that it would hardly be contrary to the economic interests of CN, whether it was a governmental agent or a fully privatized entity, to take advantage of tax breaks to reduce its rates below a compensatory level, if the costs to it of such reductions were less than the net benefits of the tax breaks. PANYNJ, which advocates adoption of the NPR's transnational transaction provisions, insists that the NPR does not presume that transnational consolidations will involve discriminations

against U.S. interests but merely suggests the possibility of such discrimination, and provides U.S. interests (including U.S. ports) with an opportunity to address that possible discrimination.

Railroad financial health. (1) PANYNJ contends that, although the NPR places considerable emphasis on the ability of any surviving carrier interest to meet its common carrier obligations, PANYNJ believes that NPR § 1180.1(c) should specifically state that no merger or consolidation can be found to be in the public interest when the surviving carrier is to be placed in a position of questionable financial health. PANYNJ further contends that we must be able affirmatively to find that the merger or consolidation will not impose such financial burdens upon the surviving carrier as to interfere with its ability to meet its common carrier obligations and to properly maintain its rail infrastructure. (2) PANYNJ also contends that we must consider the financial impact on any other carriers that may be adversely affected by any proposed merger or consolidation. PANYNJ contends, in particular, that NPR § 1180.1(i) should contain specific language calling upon applicants to anticipate not only the likely downstream affects of their application but also the likely financial health of their consolidated railroad and of the responding carriers as well. PANYNJ insists that we should not approve any merger that would force upon other carriers a Hobson's choice of entering into a financially unsound merger or being crushed by the competitive strength of the merging carriers.

Voting trusts. PANYNJ indicates that NPR § 1180.4(b)(4)(iv) contains a procedure for approving voting trusts at a time and generally in a manner that would meet the goals expressed by PANYNJ in its ANPR comments. PANYNJ contends, however, that, although our proposal imposes a "public interest" test with which to evaluate the voting trust and determine whether it should be approved, meeting such a test at the earliest stage of the proceeding might be difficult or, indeed, impossible. PANYNJ therefore suggests that we should approve voting trusts, under the procedures set forth in the proposed rules, when the carriers establish that the voting trust will properly address the control issue and that the financial aspects of the proposed transaction will not leave the surviving carrier(s) in a situation where it or they will not be able to raise sufficient debt or capital monies to meet the investment needs of the carrier(s). PANYNJ explains that this type of examination would both protect the carriers from being forced to meet an unreasonable burden of proof and also protect the public from further service deterioration based on the inability of the carriers to raise capital funds.

APPENDIX J: MEMBERS OF CONGRESS

U.S. Representative Jerrold Nadler. Rep. Nadler indicates that, because the proposed rules go a long way toward resolving his objections to the way prior mergers were reviewed, he has only a few suggestions for improvements.

(1) Rep. Nadler contends that the inclusion of lines owned by a non-applicant railroad should be allowed, either on application by the applicant carriers, upon the Board's own motion, or upon application by any affected party, including a governmental or civic organization, for good cause shown. Rep. Nadler explains that, because so many shortlines and public track owners hold portions of once major lines, the possibility that some of these assets may need to be incorporated in a Class I for the public good, with or without the current owner's approval, must be part of any consideration of a realignment of the national system.

(2) Rep. Nadler contends that the improvement of system capacity and efficiency should become the major goal of all activity by the Board, not just to maintain or improve competition but to assure that the system can satisfy the needs of the public anywhere those needs exist or should exist. It is time, Rep. Nadler argues, for the public to become involved in determining what capital improvements may be required to achieve public goals, such as the removal of truck traffic from highways, particularly congested highways.

(3) Rep. Nadler contends that, if grade separation or grade crossing improvements are required to accommodate a road or highway that did not exist when the railway was built, the financial burden of creating any needed improvement should not be imposed on the railroad. Rep. Nadler adds that the applicants' responsibility in the application should be to identify crossings where a problem may or will be created, and to suggest a correction.

(4) Rep. Nadler contends that applicants should be relieved of the burden of making any capital improvements on rail assets (main lines, yards, and terminals) that would subject the railroad to increased real estate or other local or state taxes.

(5) Rep. Nadler contends that, in addition to Board review of an application, DOD should review such applications for their impact upon the nation's ability to supply its armed forces in any theater of operations. Rep. Nadler further contends: that there is grave doubt that the nation could sustain a war of any duration because of the demonstrated limits of the rail system's capacity; that line abandonments or service discontinuances should be severely restricted, and redundancy should be provided to all major points; and that under no circumstances should the fact that service can be provided by another mode of transportation be considered in any application to reduce or terminate service on a line or to eliminate competitive rail service. And, Rep. Nadler adds, we should make explicit in the rules that returning freight to the rail system has become a primary goal of the Board.