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SERVICE DATE – MAY 26, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No: FD 36472¹

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.

—CONTROL AND MERGER—

PAN AM SYSTEMS, INC., PAN AM RAILWAYS, INC., BOSTON AND MAINE CORPORATION, MAINE CENTRAL RAILROAD COMPANY, NORTHERN RAILROAD, PAN AM SOUTHERN LLC, PORTLAND TERMINAL COMPANY, SPRINGFIELD TERMINAL RAILWAY COMPANY, STONY BROOK RAILROAD COMPANY, AND VERMONT & MASSACHUSETTS RAILROAD COMPANY

Digest:² In this decision, the Board rejects as incomplete an application seeking approval for CSX Corporation, CSX Transportation, Inc. (CSXT), and 747 Merger Sub 2, Inc., to acquire control of seven rail carriers owned by Pan Am Systems, Inc., and Pan Am Railways, Inc., and to merge six of those railroads into CSXT. The Board finds that the application fails to include all of the information needed to satisfy the Market Analysis requirement for a “significant” transaction application under 49 C.F.R § 1180.7. However, the applicants are permitted to file a revised application.

Decision No. 3

Decided: May 26, 2021

¹ This decision embraces the following dockets: Norfolk Southern Railway—Trackage Rights Exemption—CSX Transportation, Inc., Docket No. FD 36472 (Sub-No. 1); Norfolk Southern Railway—Trackage Rights Exemption—Providence & Worcester Railroad, Docket No. FD 36472 (Sub-No. 2); Norfolk Southern Railway—Trackage Rights Exemption—Boston & Maine Corp., Docket No. FD 36472 (Sub-No. 3); Norfolk Southern Railway—Trackage Rights Exemption—Pan Am Southern LLC, Docket No. FD 36472 (Sub-No. 4); Pittsburg & Shawmut Railroad—Operation Exemption—Pan Am Southern LLC, Docket No. FD 36472 (Sub-No. 5); SMS Rail Lines of New York, LLC—Discontinuance Exemption—in Albany County, N.Y., Docket No. AB 1312X.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

On April 26, 2021, CSX Corporation (CSXC), CSX Transportation Inc. (CSXT),³ 747 Merger Sub 2, Inc. (747 Merger Sub 2), Pan Am Systems, Inc. (Systems), Pan Am Railways, Inc. (PAR), Boston and Maine Corporation (Boston & Maine), Maine Central Railroad Company (Maine Central), Northern Railroad (Northern), Portland Terminal Company (Portland Terminal), Springfield Terminal Railway Company (Springfield Terminal), Stony Brook Railroad Company (Stony Brook), and Vermont & Massachusetts Railroad Company (V&M) (collectively, Applicants) filed an application (Application) seeking Board approval under 49 U.S.C. §§ 11321-26 for: (1) CSXC, CSXT, and 747 Merger Sub 2 to control the seven railroads controlled by Systems and PAR, and (2) CSXT to merge six of the seven railroads into CSXT. This proposal is referred to as the Merger Transaction.

In addition to the Application, there are several filings for transactions related to the Merger Transaction, including: four notices of exemption for Norfolk Southern Railway Company (NSR) to acquire trackage rights over existing lines owned by four separate railroads; a petition for exemption to allow Pittsburg & Shawmut Railroad, LLC d/b/a Berkshire & Eastern Railroad (B&E), to replace Springfield Terminal as the operator of Pan Am Southern LLC (PAS); and a notice of exemption to allow SMS Rail Lines of New York, LLC (SMS)⁴ to discontinue service and terminate its lease of a rail line known as the Voorheesville Running Track. These transactions will be referred to as the Related Transactions.

The Board finds that the Application fails to include the information needed to satisfy the Market Analysis requirement for a “significant” transaction application under 49 C.F.R. § 1180.7. Accordingly, the Board will reject the Application as incomplete. 49 U.S.C. § 11325(a). However, Applicants are permitted to file a revised application to remedy the deficiencies identified in this decision. 49 C.F.R. § 1180.4(c)(7)(ii).

BACKGROUND

On February 25, 2021, Applicants submitted an application for the proposed Merger Transaction and requested that the Board treat the transaction as a “minor” transaction. In Decision No. 1, served and published in the Federal Register (86 Fed. Reg. 16,009) on March 25, 2021, the Board found the proposed transaction should be classified as a “significant” transaction, which is subject to different procedural and informational requirements, and that Applicants’ submission therefore could not be treated as an application. However, the Board determined that it would consider the February 25, 2021 submission a pre-filing notification (referred to herein as the Notice), as required in “significant” transactions. See 49 C.F.R. § 1180.4(b)(1). As such, Applicants were permitted to perfect their application by supplementing their submission with the requisite information for a “significant” transaction in accordance with the Board’s regulations, between April 25 and June 25, 2021 (i.e., two to four months after the Notice was filed). (Id.) The Board also required Applicants to submit the difference between the filing fee for a “minor” transaction (which Applicants had already paid)

³ CSXT is a wholly owned subsidiary of CSXC. CSXC and CSXT are referred to collectively as CSX.

⁴ The notice of exemption for SMS to discontinue was filed by NSR on behalf of SMS.

and the fee for a “significant” transaction. On April 26, 2021, Applicants submitted the Application for a “significant” transaction and paid the difference in filing fees.⁵

According to the Application, Systems directly and wholly owns PAR, which in turn directly and wholly owns four rail carriers: Boston & Maine, Maine Central, Portland Terminal, and Springfield Terminal. Boston & Maine directly and wholly owns Northern and Stony Brook, as well as a 98% interest in V&M. These seven rail carriers will be referred to collectively as the PAR Railroads. The PAR Railroads own rail lines and provide rail service on a freight rail network (PAR System) in New England, from Maine in the north to the Boston region in the south.⁶ Springfield Terminal operates rail service on the PAR System on behalf of the PAR Railroads pursuant to leases over lines owned and leased by the other PAR Railroads. (Appl. 3.)

Additionally, Boston & Maine owns a 50% interest in PAS, a Class II carrier. (Id.) PAS is a 50/50 joint venture between Boston & Maine and NSR. (Id.) The PAS lines include two main line corridors. The first line runs east-west between upstate New York and a point just past Ayer, Mass., where it connects with the PAR System. (Appl., Ex. 22, V.S. Reishus 7.) This line is referred to as the “Patriot Corridor.” (Id.) The second line is a north-south route running between Vermont and Connecticut over lines partly owned by Genesee & Wyoming, Inc. (GWI), which connects with the PAS mainline at East Deerfield, Mass., and connects with other PAS lines in Connecticut.⁷ (Id.) This line is referred to as the “Knowledge Corridor.” (Appl., Ex. 22, Market Analysis 15.) Springfield Terminal, also a Class II rail carrier, operates PAS as PAS’s agent. (Appl. 3.) NSR has trackage rights over the PAS line between Mechanicville, N.Y., and Ayer, but Springfield Terminal currently operates NSR trains over that segment pursuant to a haulage agreement between PAS and NSR. (Appl., Ex. 13, Operating Plan 5-6.)

CSXT, a Class I rail carrier, owns and operates approximately 19,500 miles of railroad in 23 states and the District of Columbia, as well as in the Canadian Provinces of Ontario and Quebec. (Appl. 26.) Applicants state that CSXT’s access to New England shippers occurs primarily through its own mainline, which connects with several New England railroads, including with the PAR System at Barbers Station, Mass., near Worcester, Mass. (Appl., Ex. 22, V.S. Reishus 6.) Applicants state that CSXT also serves New England shippers by interlining with PAS at Rotterdam Junction, N.Y. (Id.)

⁵ Applicants have submitted a public version and a highly confidential version of the Application. The public version is available on the Board’s website. The highly confidential version may be obtained subject to the protective order issued by the Board on March 3, 2021.

⁶ The PAR System consists of approximately 808 route miles of rail lines, including approximately 724.53 owned and leased (including perpetual freight easement) route miles and approximately 83.62 trackage-rights route miles in Massachusetts, Maine, New Hampshire, and Vermont. (Appl. 26.)

⁷ PAS’s network consists of approximately 425 route miles, including approximately 281.38 owned route miles (including perpetual freight easement) and approximately 143.62 trackage-rights route miles. (Appl. 26.)

Under the Proposed Transaction, CSX and 747 Merger Sub 2 would acquire control of the PAR Railroads, and CSXT would merge the PAR Railroads, except V&M, into CSXT.⁸ (Appl. 4.) As CSXT would wholly own and control Boston & Maine, CSX and 747 Merger Sub 2 also seek authority to acquire Boston & Maine's 50% joint ownership in PAS. (*Id.* at 4-5.) Applicants state that CSXT, NSR, and GWI have entered into agreements regarding the operation of PAS upon consummation of the Merger Transaction, specifically: (1) a settlement agreement between CSXT and NSR (NSR Settlement Agreement), which includes an agreement relating to operations at Ayer; and (2) a Term Sheet Agreement among CSXT, NSR, and GWI (Term Sheet Agreement). (*Id.* at 5.) Applicants state that these two agreements contemplate transactions (Related Transactions) that are integrally related to the Merger Transaction and require Board authorization. These Related Transactions are discussed in the following section.

Related Filings. Several notices of exemption and a petition for exemption were filed in connection with the Application.

NSR Trackage Rights Authority. NSR filed four verified notices of exemption under 49 C.F.R. § 1180.2(d)(7) for overhead trackage rights pursuant to four separate trackage rights agreements with CSXT, Providence & Worcester Railroad Company (P&W) (a GWI subsidiary), Boston & Maine, and PAS.⁹ Specifically:

- In Norfolk Southern Railway—Trackage Rights Exemption—CSX Transportation, Inc., Docket No. FD 36472 (Sub-No. 1), NSR seeks approximately 161.5 miles of overhead trackage rights on CSXT's mainline between approximately Voorheesville, N.Y. (at or near milepost QG 22.5) and Worcester (at or near milepost QB 44.5) (inclusive of appurtenant passing tracks and sidings).
- In Norfolk Southern Railway—Trackage Rights Exemption—Providence & Worcester Railroad, Docket No. FD 36472 (Sub-No. 2), NSR seeks approximately 2.90 miles of overhead trackage rights on P&W's mainline between a connection with the tracks of CSXT at Worcester at milepost 0.0, over Track 1 extending from the east side of Green Street to the point of merger of said Track 1 and the so-called Main Track at milepost 1.05, south of Garden Street, and over the Main Track thereafter from milepost 1.05 to P&W's Gardner Branch baseline station 153+50, which is the point of connection with the tracks of Boston

⁸ Specifically, Systems would be merged with 747 Merger Sub 1, Inc., with Systems surviving. Immediately thereafter, Systems would be merged with 747 Merger Sub 2, with 747 Merger Sub 2 surviving and the separate corporate existence of Systems ceasing. 747 Merger Sub 2, as the surviving corporation, would be renamed Pan Am Systems, Inc., and would be a wholly owned subsidiary of CSXC. Concurrent with closing, CSXC would contribute Pan Am Systems, Inc., and all of its subsidiaries to CSXT. CSXT would thereafter control the rail carrier subsidiaries of Pan Am Systems, Inc., and would merge those subsidiaries, except V&M, into CSXT at a later date. (Appl. 4.)

⁹ NSR has filed public version and highly confidential versions of the trackage rights agreements in each of these sub-dockets. Persons seeking access to the highly confidential versions must do so pursuant to the protective order governing the proceeding, issued on March 3, 2021.

& Maine at Barbers Station at milepost 2.90.

- In Norfolk Southern Railway—Trackage Rights Exemption—Boston & Maine Corp., Docket No. FD 36472 (Sub-No. 3), NSR seeks approximately 22.08 miles of overhead trackage rights on Boston & Maine’s line from milepost X 2.92 at Barber,¹⁰ and connection to P&W, to milepost X 25.0 at Harvard, Mass., and connection to PAS.¹¹
- In Norfolk Southern Railway—Trackage Rights Exemption—Pan Am Southern LLC, Docket No. FD 36472 (Sub-No. 4), NSR seeks approximately 3.01 miles of overhead trackage rights on PAS’s line from milepost X 25.0 at Harvard, and a connection to Boston & Maine, to milepost X 28.01 at Ayer.¹²

Applicants state that the combined trackage rights would allow NSR flexibility for its existing intermodal and automotive service to facilities at Ayer. (Appl. 5-6.) By obtaining trackage rights over the lines currently owned by CSXT, Boston & Maine, P&W, and PAS, NSR would be able to run double-stack intermodal and automotive trains into the Boston area. NSR lacks the ability to double-stack these trains on its current PAS route because of height restrictions in the Hoosac Tunnel. (Appl., Ex. 22, V.S. Pelkey 2, 11-12.)

B&E Operating Authority. In Pittsburg & Shawmut Railroad—Operation Exemption—Pan Am Southern LLC, Docket No. FD 36472 (Sub-No. 5), B&E filed an amended petition for exemption under 49 U.S.C. § 10502 and 49 C.F.R. part 1121 from the provisions of 49 U.S.C. §§ 11323(a)(2) and 11324 to allow B&E to enter into contracts to operate on behalf of PAS, and to accept an assignment from Springfield Terminal of Springfield Terminal’s current rights to operate the PAS lines, totaling approximately 425 route miles of rail line and incidental trackage rights. (B&E Amended Pet. 3, FD 36472 (Sub-No. 5).) B&E is a wholly owned subsidiary of GWI. B&E notes that its petition is filed as a transaction integrally related to, and dependent upon, approval of the Merger Transaction. (*Id.* at 1-2.)

As noted above, Springfield Terminal, an affiliate of PAR, currently operates PAS as PAS’s agent. (Appl. 3.) Springfield Terminal also operates NSR trains over the PAS-owned line between Mechanicville and Ayer pursuant to a haulage agreement between PAS and NSR. (Appl., Ex. 13, Operating Plan 5-6.)¹³ According to Applicants, replacing Springfield

¹⁰ In the verified notice, NSR uses milepost X 2.92 at Barber, Mass., to describe the overhead trackage rights it seeks. The trackage rights agreement governing this transaction refers to this point as being in Barbers Station.

¹¹ If the Proposed Transaction is approved and consummated, this Boston & Maine line would be owned by CSXT.

¹² As noted, PAS is jointly owned by NSR and Boston & Maine. If the Proposed Transaction is approved and consummated, the PAS lines—including the line that is the subject of this trackage rights proceeding—would be jointly owned by NSR and CSXT.

¹³ NSR also has authority to operate over this line pursuant to trackage rights it obtained as part of the creation of PAS. See Norfolk S. Ry.—Joint Control & Operation/Pooling Agreement—Pan Am S. LLC, FD 35147 et al., slip op. at 18-19 (STB served March 10, 2009).

Terminal—which as a result of the Merger Transaction would be under the exclusive control of CSXT—with B&E will ensure that there are no anticompetitive effects as a result of CSXT’s and NSR’s joint ownership of PAS. (Appl. 9.)¹⁴

Discontinuance Authority Over NSR Line. In SMS Rail Lines of New York, LLC—Discontinuance Exemption—in Albany County, N.Y., Docket No. AB 1312X, NSR filed, on behalf of SMS and with SMS’s consent, a verified notice of exemption for SMS to discontinue common carrier service and terminate its lease operations over approximately 15 miles of rail line owned by NSR and located between milepost 11.00 in Voorheesville and a point 50 feet south of the centerline of the bridge at milepost 26.14 (or engineering station 6136+/-) in Delanson, N.Y., including the use of a wye track and any track leading to the Northeast Industrial Park at milepost 12.1 and 12.29, in Albany County, N.Y.¹⁵ According to NSR, SMS’ request for discontinuance authority is related to the trackage rights NSR is seeking in Docket No. FD 36472 (Sub-Nos. 1-4). (SMS Notice 3 n.5, AB 1312.) Specifically, NSR asserts that the discontinuance, along with the trackage rights it would receive, are necessary to improve NSR’s ability to move intermodal traffic and automotive vehicles into the greater Boston marketplace. (*Id.*)

DISCUSSION AND CONCLUSIONS

In Decision No. 1, the Board concluded, based on the record before it at the time, that it was unable to make a determination that the transaction clearly would not have any anticompetitive effects, or that any anticompetitive impacts would clearly be outweighed by the potential contribution to the public interest in meeting significant transportation needs. Accordingly, the Board ruled the proposed Merger and Related Transactions must be considered a “significant” transaction under 49 C.F.R. § 1180.2. Decision No. 1, slip op. at 10-11 (discussing several aspects of the proposed Merger and Related Transactions that raised questions about competitive effects.) The Board found that classifying the Merger Transaction as “significant” would provide it with the additional information and time needed to develop a more comprehensive record so that it could analyze the competitive concerns (and any others not apparent from the Notice) and consider whether Applicants’ proposed remedies, including the conditions that Applicants have requested the Board impose, adequately address these concerns. (*Id.*)

A key difference between the applications for “minor” and “significant” transactions is the requirement for applicants in “significant” transactions to include a Market Analysis that “describe[s] the impacts of the proposed transaction—both adverse and beneficial—on inter-and intramodal competition with respect to freight surface transportation in the regions affected and on

¹⁴ Applicants’ assertion that having B&E serve as PAS’s contract carrier will preserve PAS as an economically independent rail option is discussed in greater detail in the verified statements of Mr. Pelkey and Dr. Reishus. (See Appl., Ex. 22.)

¹⁵ NSR, on behalf of SMS, filed the verified notice of exemption on February 25, 2021. Pursuant to 49 C.F.R. § 1152.50(d), the railroad seeking the exemption must notify certain parties at least 10 days prior to filing with the Board. NSR states that it provided notice to these parties on the same day that it filed its notice with the Board and, therefore, it would not object to the Board treating the verified notice as filed on March 8, 2021. (SMS Notice 1 n.2, AB 1312.) Accordingly, the Board will consider March 8, 2021, as the filing date of the verified notice.

the provision of essential services by applicants and other carriers.” 49 C.F.R. § 1180.7(a). As part of the analysis, Applicants “must identify and address relevant markets and issues.” *Id.* The Market Analysis also “should reflect the consolidated company’s marketing plan and existing and potential competitive alternatives (inter- as well as intramodal).” *Id.* Applicants may present evidence on “city pairs, interregional movements, movements through a point, or other factors; a particular commodity, group of commodities, or other commodity factor that would be significantly affected by the transaction; or other effects of the transaction (such as on a particular type of service offered).” *Id.* Although § 1180.7(c) gives applicants in “significant” transactions “the greatest leeway to develop the best evidence on the impacts of each individual transaction” and applicants “are free to choose the type(s) and format,” the regulation also makes clear that applicants “must provide supporting data.” 49 C.F.R. § 1180.7(c). The regulation further provides a list that is “neither limiting nor all-inclusive” of the types of such supporting data applicants may provide, including “current and projected traffic flows; data underlying sales forecasts or marketing goals; interchange data; market share analysis; and/or shipper surveys.” *Id.*

Here, the Applicants provided a Market Analysis (Exhibit 12), with supporting verified statements of Mr. Sean Pelkey, Dr. David Reishus, and Dr. William Huneke. (Appl., Exs. 12 & 22.) However, the Board finds that the Market Analysis and supporting verified statements do not sufficiently describe “the impacts of the proposed transaction—both adverse and beneficial—on inter-and intramodal competition,” nor do they meet the other specific requirements for a Market Analysis, including the requirement for supporting data.¹⁶ Because the Market Analysis is incomplete, the Application will be rejected. Although Applicants are given leeway on the type of evidence to present in support of their Market Analysis in “significant” transactions, 49 C.F.R. § 1180.7(a) and (c), the Market Analysis provided by Applicants here does not contain information sufficient for the Board to assess the impacts of the proposed transaction. Moreover, the Market Analysis contains far less information and analysis than what was provided in Canadian Pacific Railway—Control—Dakota, Minnesota & Eastern Railroad (CP-DM&E), Docket No. FD 35081, the only other “significant” transaction that has been reviewed by the Board. While this decision refers to the CP-DM&E Market Analysis as a point of comparison to help explain why the Applicants’ Market Analysis in this proceeding is deficient, the Board is not suggesting that the market analysis in CP-DM&E is the only sufficient way to present the analysis.

¹⁶ For a “significant” transaction application, applicants must also submit an Operating Plan, which entails a “summary of the proposed operating plan changes, *based on the impact analyses*, that will result from the transaction, and their anticipated timing, allowing for any time required to complete rehabilitation, upgrading, yard construction, or other major operational changes following consummation of the proposed transaction. The plan should make clear the gains in service, operating efficiencies, and other benefits anticipated from the merger.” 49 C.F.R. § 1180.8(b) (emphasis added). Here, because the Market Analysis is lacking information, the Applicants’ Operating Plan must also be considered incomplete. For example, because the Market Analysis here contains almost no information supporting Applicants’ assertion that the Merger and Related Transactions will not affect traffic patterns, there is no support for their assertion that there would not be any impact on passenger or commuter trains operated on the lines that are part of these proceedings, as required by 49 C.F.R. § 1180.8(b)(2).

Relevant Markets. Section 1180.7(a) requires that merger applicants “identify and address relevant markets and issues” as part of the Market Analysis. 49 C.F.R. § 1180.7(a). Here, the Applicants’ “Description of the Relevant Markets” section merely provides a general geographic overview of the current PAR System and PAS lines and where they connect with CSXT and other carriers. (Appl., Ex. 12, Market Analysis 2-4.) While Applicants provide some data on the amount of traffic moved by the PAR System and PAS broken out by commodity, (id. at 4-5), there is nothing further regarding how this traffic relates to the broader transportation market for these commodities in the New England region. For example, the Market Analysis states that paper products accounted for 33% of PAR Systems’ 50,000 carloads in 2019, (id.), but it does not provide any data on the volumes of paper products moved by CSXT or how the combined volumes of the consolidated company would fit within the broader transportation market for paper products in the New England region. Additionally, Applicants provide only limited information on commodity volumes for PAS. (Compare Appl., Ex. 12, Market Analysis 4-5, with Prefiling Notice, V.S. Williams 9-11 & V.S. Foot 3-7, Oct. 5, 2007, CP-DM&E, FD 35081 (using Waybill data to create lists of commodities carried by applicants based on volume, comparing lists to identify commodities where there is overlap, and addressing why competition for those commodities would not be impacted).)

Marketing Plan and Existing/Potential Competitive Alternatives. The Market Analysis also “should reflect the consolidated company’s marketing plan and existing and potential competitive alternatives (inter- as well as intramodal).” 49 C.F.R. § 1180.7(a). As the regulation explains, Applicants may present evidence on “city pairs, interregional movements, movements through a point, or other factors; a particular commodity, group of commodities, or other commodity factor that would be significantly affected by the transaction; or other effects of the transaction (such as on a particular type of service offered).” Id.

a. Marketing Plan.

Applicants present no evidence for any of the listed items regarding the consolidated company’s marketing plan. In fact, the only discussion of a marketing plan occurs in Mr. Pelkey’s verified statement, in which he asserts that shippers of pulp and paper products and chemical and energy-related imports “will now have greater opportunities” as a result of the single-line service efficiencies that would result from the Merger Transaction. However, the verified statement provides no examples or data to support this assertion. (Appl., Ex. 12, V.S. Pelkey 8.) Mr. Pelkey also mentions that the PAR System connects to four ports, including the port of Saint John (through a haulage arrangement with the Eastern Maine Railway and New Brunswick Southern Railway), and claims that shippers located on the consolidated company will thus have greater access to the inbound and outbound traffic using these ports. (Id. at 8-9.) But no additional detail is provided, such as the impact that improved service to these ports could have on traffic patterns or volumes.

b. Existing/Potential Competitive Alternatives.

Applicants’ Market Analysis also provides limited evidence on the “existing and potential competitive alternatives.” Applicants claim that because this is predominantly an end-to-end merger, “there are very few areas where there is even a potential for a reduction in direct competition between CSXT and PAR System.” (Appl., Ex. 12, Market Analysis 6.) The Market

Analysis claims that there are only four potential shippers served by both CSXT and PAR System—three located in Everett, Mass., and one in Boston. (*Id.*) However, Applicants do not disclose the methodology used to determine that these are the only such shippers. See 49 C.F.R. § 1180.7(a) (“Applicants . . . must demonstrate both the relevance of the markets and issues analyzed and the validity of their methodology.”) In fact, Applicants appear to identify only active 2-to-1 shippers, rather than 2-to-1 stations. Importantly, a station can have many shippers beyond those who are actively using rail service. (Compare Appl., Ex. 22, V.S. Reishus 20-21, with Prefiling Notice, V.S. Williams 6-8, 11-19, Oct. 5, 2007, CP-DM&E, FD 35081 (identifying all stations served by both merging parties using the Official Railway Station List and then using Waybill data to assess the competitive impact at each individual station).) In any event, Applicants provide little, if any, specific information on the 2-to-1 shippers they do identify. Applicants state that there will be no competitive harm to dual-served shippers because “CSXT has committed to provide the option of switching service to connect these shippers to PAS which then connects to the rest of the U.S. rail network.” (Appl., Ex. 12, Market Analysis 6.) To allow the Board to make a determination about the adequacy of Applicants’ proposed means of addressing the potential for competitive harm, more information is needed regarding these shippers’ current service and how Applicants determined that competition would not be affected at other, undisclosed 2-to-1 stations.

In addition, as a result of the Merger and Related Transactions, both carriers operating on the Knowledge Corridor between East Northfield, Mass. and White River Junction, Vt.—B&E (operating on behalf of PAS) and New England Central Railroad (NECR)¹⁷—would be under the control of GWI. The Market Analysis and verified statements indicate that there are two shippers that are currently served by both carriers. (Appl., Ex. 12, Market Analysis 10.) However, Applicants do not explain how they identified that these are the only two affected shippers, nor identify the shippers, what commodities they ship, or the amount of traffic they ship.¹⁸ Applicants’ failure to include this information is noteworthy, given that the Board specifically identified the potential impact on these 2-to-1 shippers as an example of why it classified this transaction as “significant,” Decision No. 1, slip op. at 10 (noting that the “significant” process “would provide the Board with the additional information and time needed to develop a more comprehensive record so that the Board may analyze the competitive concerns identified here.”). Yet the verified statements include only slightly more explanation than was provided in the original versions submitted with the “minor” transaction application, and the Market Analysis merely summarizes information found in other parts of the Application.

Impacts of the Merger on Inter- and Intramodal Competition. The Market Analysis must include a description of the impacts of the proposed transaction—“both adverse and beneficial”—on inter- and intramodal competition. 49 C.F.R. § 1180.7(a); see also 49 C.F.R. § 1180.8(b) (stating that the Operating Plan “should make clear the gains in service, operating efficiencies, and other

¹⁷ NECR owns this portion of the line but PAS has trackage rights. (Appl. 32.)

¹⁸ Applicants also state that “[t]here are a few shippers located in Springfield that can be served by both PAS and CSXT. However, the agreement to have B&E set rates and operate PAS in the interest of PAS as an independent rail carrier ensures that the Springfield shippers will continue to have access to two competing rail carriers with independent and unilateral interests.” (Appl., Ex. 12, Market Analysis 9.) Applicants provide no other information regarding these shippers.

benefits anticipated from the merger”). However, the Market Analysis contains little information on the impact the Merger Transaction would have on other carriers, including whether the transactions would impact traffic flows or the amount of traffic that is interchanged with these carriers.¹⁹ For example, it appears the Merger Transaction would provide CSXT with a competitive routing alternative to Canadian Pacific Railway (CP) to and from the Port of Saint John.²⁰ Applicants, however, fail to address what impact the Merger Transaction would have on traffic patterns to and from the port, other than an assertion that improved service “will provide new opportunities for rail shippers to access overseas markets.” (Appl., Ex. 22, V.S. Pelkey 8-9.) Even if Applicants believe that there would be no impact on traffic flows, they fail to provide any evidence to support this assertion. (Compare Appl., Ex. 12, Ex. 22, V.S. Pelkey 8-9, with Prefiling Notice, V.S. Williams 19-28, Oct. 5, 2007, CP-DM&E, FD 35081 (assessing the competitive impact of the proposed transaction on all 14 connecting short line carriers, including their ability to interchange traffic with non-applicant carriers and the potential for diverting traffic).)

As for benefits of the proposed Merger Transaction, Applicants’ witness Mr. Pelkey asserts that competition will be enhanced through conversion of joint-line traffic to single-line service. (See Appl., Ex. 22, V.S. Pelkey 4 (“Single-line service will reduce switching and interchange, will eliminate the need to coordinate a hand-off between separate rail carriers, will result in a savings in transit times, and will reduce the chance of unexpected problems in the physical interchange of traffic between two independent carriers.”).) However, Applicants state that they are “not able to quantify the benefits in terms of cost savings or increases in net revenue at this time.” (Appl. 19.) The Board finds this explanation insufficient. Although benefits cannot be calculated with absolute precision at this time, Applicants do not even provide basic information, such as how much traffic would be converted to single-line service, a figure that is readily available through examination of Applicants’ own traffic data. Applicants also state that the Merger Transaction will provide “increased opportunities to convert traffic from truck to rail and remove that traffic from congested highways.” (Appl., Ex. 22, V.S. Pelkey 2.) However, no supporting data on the anticipated amount or benefits of truck-to-rail conversions is provided. Although the Board’s regulations give Applicants leeway on how to present their Market Analysis, “applicants shall submit impact analyses . . . describing the impacts of the proposed transaction—both adverse and beneficial—on inter-and intramodal competition,” 49 C.F.R. § 1180.7(a), and “must provide supporting data,”

¹⁹ The only carrier that the Market Analysis and verified statements acknowledge would be impacted is the Vermont Railway, Inc. (VTR), which connects with PAS at several locations. The Market Analysis and verified statements explain the measures the Applicants would take to mitigate the impacts on VTR.

²⁰ The Merger Transaction would give CSXT the ability to offer single-line service from the port of Saint John south through New England and onto the rest of the interstate rail network. Traffic from that port currently moves west over the New Brunswick Southern Railway and then the Eastern Maine Railway to an interchange with CP at Brownville Junction, Me. CP can then route traffic further west into Quebec and then south through New York, eventually connecting with NSR and the rest of the interstate rail network at Schenectady, N.Y.—roughly the same location where CSXT and PAS lines connect with NSR. See Soo Line—Control—Cent. Me. & Que. Ry., FD 36368, slip op. at 4 (STB served May 4, 2020) (noting that one benefit of CP’s acquisition of Central Maine & Quebec Railway would be the opening of new markets, including the Port of Saint John).

49 C.F.R. § 1180.7(c). For the reasons given above, Applicants have not met those requirements here.

Applicants also state that “CSXT expects that rail traffic will increase organically over time as CSXT integrates the existing CSXT and PAR System networks, implements its operating model, and makes capital improvements, but CSXT does not expect significant traffic increases to occur in the next few years.” (Appl. 19.) Again, Applicants do not explain what data (e.g., shipper surveys, forecast modeling) they used to arrive at such a conclusion. Such a conclusion also seems to contradict other statements in the Application. As noted, Mr. Pelkey’s verified statement asserts that certain shippers will have expanded marketing opportunities. (Appl., Ex. 22, V.S. Pelkey 8-9.) If so, one would expect some growth in traffic volume. Pelkey also states that “[f]rom 2017 to 2019, the PAR System significantly increased growth in carloads and revenues and managed to attract new customers and expand existing business.” (Appl. Ex. 22, V.S. Pelkey 7.) Although the pandemic caused traffic volumes for most rail carriers to decrease in 2020, Applicants provide no evidence that growth would not resume this upward trend from 2021 onward. Even if Applicants reason there will be no traffic growth, they have not explained how they arrived at this conclusion.

Applicants also include a verified statement from Dr. Huneke that states that the two settlement agreements reached between CSXT, NSR, and GWI “will ultimately produce a stronger rail network that enhances competition among railroads and with other transportation modes.” (Appl., Ex. 22, V.S. Huneke 3.) Dr. Huneke specifically notes aspects of the Merger and Related Transactions that he asserts will preserve, if not enhance, competition, including: the fact that B&E will be required to set rates that are competitively neutral; that NSR will be able to double-stack intermodal trains by avoiding the Hoosac Tunnel; and that the volume cap on the number cars that can move via trackage rights through Ayer will be lifted. (*Id.* Ex. 22, V.S. Huneke 4-6.) While it appears that these actions on their face may be beneficial, little to no evidence is provided to support these claims. For example, by lifting the volume cap on the Ayer trackage rights, the Applicants presumably anticipate that more intermodal traffic will flow through Ayer. But no evidence is provided on how this will affect traffic patterns or, more broadly, the impact this could have on the transportation market for intermodal service in the region. (*Compare* Appl., Ex. 12, Market Analysis 14, *with* Appl., Suppl. V.S. Williams 4-19, Dec. 5, 2007, *CP-DM&E*, FD 35081 (using Waybill data and a “50/10” volume screen to identify 42 routes where competition could be impacted and then individually analyzing each route to determine if traffic on these routes would still have competitive options).) Additionally, while there may be operating efficiencies by diverting NSR’s intermodal and automotive trains and avoiding the Hoosac Tunnel, Applicants fail to address the financial and other impact such a loss of traffic would have on PAS.²¹

Other important information needed to assess the impact on inter- and intramodal competition is not provided in the Application. In the Market Analysis, Applicants state that B&E,

²¹ In an Apr. 7, 2021 letter from Applicants to the Board’s Office of Environmental Analysis, Applicants present charts showing projected traffic changes on the PAS line from Ayer to Rotterdam Junction. Those charts indicate that one PAS segment between Rotterdam Junction and Mechanicville is projected to experience a 24% increase in traffic by the year 2022, but that all the other segments on the PAS line will experience traffic level reductions ranging from 27% to 48%. (Appl., Ex. 4A, Attachments 2 and 3.)

as operator of PAS, will commit to providing VTR with service that is the same as or better than that provided today. (Appl., Ex. 12, Market Analysis 11; see also Appl., Ex. 22, V.S. Pelkey 16.) They also state that B&E will not share with any other GWI-controlled rail carriers any information regarding rate divisions from connecting railroads that B&E becomes aware of as a result of operating PAS. (Appl., Ex. 12, Market Analysis 11.) However, the specific terms of such commitments are not provided. Without additional details, the Board cannot assess whether these commitments would sufficiently preserve competition as the Applicants claim.

Supporting Data. Although 49 C.F.R. § 1180.7(c) provides that applicants in a “significant” transaction are given leeway to develop the “best evidence” on the impact of the transaction, it also states that “parties must provide supporting data.” See also id. (“As a general guideline, applicants shall provide supporting data . . .”) The regulation further suggests a list of such data that applicants may choose to include: “current and projected traffic flows; data underlying sales forecasts or marketing goals; interchange data; market share analysis; and/or shipper surveys.” 49 C.F.R. § 1180.7(c). Applicants are not required to present all this supporting data, but here they have presented almost none and have not submitted alternative information that would otherwise satisfy the informational requirements concerning the impact of the transaction. As noted, there is little evidence on current or projected traffic flows. The only evidence of current traffic flows appears to be in Applicants’ density charts, which shows the projected gross tons per segment, and the only evidence of projected traffic flows concerns the rerouting of NSR traffic between Rotterdam Junction and Ayer. But Applicants do not support their assertion that there would otherwise be no change in traffic flows or explain how they reached such a conclusion. In addition, Applicants provide no sales forecasts or marketing goals (much less data underlying forecasts or goals) or market share analysis. While Applicants do provide some interchange data, specifically, a table that shows the number of cars interchanged at each gateway, (see Appl., Ex. 22, V.S. Reishus 11-12), they present no evidence on how these figures would change post-transaction. Applicants also do not provide evidence of shipper surveys or other relevant analysis, though they include letters of support from some shippers. The lack of this particular supporting data may not have been deficient had Applicants provided other forms of supporting data. But Applicants have not done so.

Conclusion. Given the numerous deficiencies described above, the Board cannot properly analyze the competitive effects of the proposed Merger and Related Transactions, including those discussed in Decision No. 1. The Board therefore finds the Application is incomplete and must be rejected. See 49 U.S.C. § 11325(a) (“[I]f the application is incomplete, the Board shall reject it by the end of [the 30-day] period.”). The regulations provide merger applicants with leeway on the types of evidence to present in the Market Analysis, but here the Market Analysis is too vague and the supporting evidence too scant to tell the Board, or interested parties, much about the impacts of the proposed Merger and Related Transactions, which could reshape rail transportation throughout New England. In the interest of fairness and transparency to the public, it is important that the Board be able to consider the full range of information required in its regulations for “significant” transaction applications. The Board’s decision to reject the Application should not be read as an indication of how the Board might ultimately assess and weigh the benefits and any impacts on competition after development of a more complete record, should Applicants decide to submit a revised application.

To ensure that any revised application contains all the necessary information, the Board will provide the Applicants with additional guidance. Although applicants have leeway on what evidence to present, Applicants are advised to:

- Provide additional detail on the impacts the transactions would have on the rail transportation market in New England, particularly for customers on the PAR System and PAS. Given that the rail carriers that are parties to the Merger and Related Transactions—CSXT, PAR/PAS, NSR, and GWI’s subsidiaries—make up a significant portion of the New England rail market, Applicants are advised to estimate the size of the New England rail market and changes in concentration likely to result from the transaction.
- Provide more detailed information on how the transactions would affect the major commodity groups on the PAR System and PAS.
- Provide additional explanation on what the state of inter- and intramodal competition would be following the transactions, including carriers that would compete with the consolidated company’s expanded offering.
- Employ and explain a methodology for identifying 2-to-1 shippers and stations and, at a minimum, list all of the freight stations (by Standard Point Location Code) that are served by both CSXT and PAR Systems or PAS, or by PAS and NECR, and identify the commodities and volumes shipped.
- Quantify the amount of traffic that would benefit from the single-line service and discuss the impact such service would have on particular markets and commodities.

Additional materials that may be helpful include: density tables (or maps) that include segment miles;²² regional maps of the parts of CSXT’s system that are adjacent to the lines being acquired; underlying workpapers relied on in the verified statements; and copies of the most recent versions of any agreements (including amendments and supplements) that are referenced in the Merger Transaction agreements, such as the “LLC Agreement” or the “JV Transaction Agreements” that are referred to in the NSR Settlement Agreement.²³

Additional Clarifications. The Board has also identified what appear to be minor discrepancies, errors, or ambiguities in the Application and Related Transactions filings. The Board has separately identified these because they, by themselves, would not have been grounds for rejecting the Application but nonetheless should be addressed upon refiling of any revised application.

²² See 49 C.F.R. § 1180.8(a)(5) (“The mileage of each segment of line shall be provided, and should be shown on the chart.”)

²³ Although these agreements were included as part of the record in Norfolk Southern Railway—Joint Control and Operation/Pooling Agreement—Pan Am S. LLC, Docket No. FD 35147 et al., there may be more recent versions.

First, in the Corporate Chart of Systems included with the Application, Vermont & Maine, which is a subsidiary of B&M, is not shown. (Appl., Ex. 11.) In addition, CSX's Corporate Chart lists CSX as a partial owner of DOCP Holdings, Inc., which controls several carriers, and CRR Holdings LLC, which includes CSX's interests in Consolidated Rail Corporation and Indiana Harbor Belt Railroad Company. (Id. Ex. 11.) However, these interests are not listed under CSX's intra-corporate or financial relationships. (Appl. 37-39.) CSX also mentions its 35% interest in P&L Transportation Inc. and its railroad subsidiaries and lists these interests in its Corporate Chart, (Appl. 39; id. Ex. 11), but does not list the Midway Southern Railway under its intra-corporate or financial relationships. (Appl. 37-39.) Accordingly, Applicants should correct or clarify these discrepancies in a revised application.

Second, the Application does not address potential changes at PAS's East Deerfield yard. According to Applicants' labor impact statement, the loss of jobs resulting from B&E taking over operations from Springfield Terminal will primarily occur at East Deerfield. (Appl., Ex. 1.) The loss of jobs indicates that CSXT may have plans to make changes to the yard, consistent with similar actions it has taken as part of its implementation of Precision Scheduled Railroading (PSR). See Letter from James M. Foot, President & Chief Executive Officer, CSXT, to STB 1 (Jan. 3, 2018) (noting that one aspect of PSR involves "the conversion of certain hump yards to flat switching and strategic adjustments to other facilities.") Accordingly, a future application should address if there are intentions to modify operations at this (or any other) yard.

Third, the Board has identified some traffic that Applicants may have failed to include in their Operations Service Map, (Appl., Ex. 1.), or the list of PAS road trains provided in their Operating Plan, (Appl., Ex. 1 & Ex. 13, Operating Plan 5-7). Specifically, the Board is aware that Granite Shore Power's Merrimack Station, located at Bow, N.H., has two coal-fired steam units, which are served by Boston & Maine (a PAR Railroad), yet this train service is not included among the list of PAS or PAR trains.²⁴ In addition, the traffic volume for these shipments may be missing from Applicants' density charts. Applicants should include information about any "as needed" revenue trains (coal or otherwise) in a revised application.

Fourth, in its notice, SMS states that "SMS is discontinuing its common carrier local service and common carrier overhead trackage rights over the Line. However, SMS will continue to utilize overhead operating rights over the Line for the sole purpose of interchanging with NSR." (SMS Notice 3 n.4, AB 1312X.) As SMS would be discontinuing service over the line—including its overhead trackage rights—it is unclear what traffic there would be for it to continue interchanging with NSR. Accordingly, SMS should clarify this statement in a supplemental filing.

Lastly, according to its petition, B&E is the same entity as Pittsburg & Shawmut Railroad, LLC (P&S), an existing Class III carrier. According to B&E, the business name Berkshire & Eastern Railroad would be used only for P&S's operations of PAS lines. However, the system map included with the petition is for the Buffalo & Pittsburgh Railroad, Inc. (BPRR).

²⁴ See U.S. Energy Information Administration, EIA-923 Monthly Generation and Fuel Consumption Time Series File, 2019 Final Revision, <https://www.eia.gov/electricity/data/eia923/>.

(B&E Amended Pet., Ex. B, FD 36475 (Sub-No. 5).) The Board has previously stated that P&S is a wholly owned subsidiary of BPRR that was formed to acquire from BPRR the physical rail line assets of the former Pittsburg & Shawmut Railroad, Inc. See Pittsburg & Shawmut R.R.—Acquis. Exemption—Buffalo & Pittsburgh R.R., FD 34449 (STB served Jan. 22, 2004). That notice further states that “BPRR will retain the operating authority over the lines and P&S will have a residual common carrier obligation.” (*Id.* at 2.) This statement, along with the BPRR map, suggests that P&S is not an active rail carrier.²⁵ Accordingly, B&E should clarify its relationship with P&S and BPRR and which of these entities will be providing rail service as PAS’s operating carrier.

Procedures for Filing a Revised Application. Under 49 C.F.R. § 1180.4(c)(7), a “revised application may be submitted, incorporating portions of the prior application by reference. The resubmission or refiling of an application shall be considered a de novo filing for the purpose of computation of the time periods, provided that the resubmitted application is accepted as complete.” See also R.R. Consolidation Procedures, 348 I.C.C. 771, 795 (1977) (“[R]ejection of an application for whatever reason would not result in the dismissal of a proceeding. Assuming [a]rguendo that an application were to be rejected, a revised application could be resubmitted for the [agency’s] consideration by supplementing the initial application.”). Accordingly, Applicants will be permitted to file a revised application in this docket by no later than August 26, 2021 (four months from the filing date of the rejected application).²⁶ Applicants shall file a letter in this docket by June 7, 2021, informing the Board and the public if and when they anticipate doing so.

Any statutory time periods that follow from the timing of the filing of the application will be computed from the filing date of the revised application, if it is accepted. Upon receipt of the revised application, the Board will publish a decision accepting or rejecting the revised application within 30 days. 49 C.F.R. § 1180.4(c)(7)(ii). The Board will also establish an appropriate procedural schedule for the remainder of the proceeding, including for any environmental filings (including those relating to the Safety Integration Plan (SIP)).²⁷

²⁵ The GWI website also does not list P&S or B&E as one of its subsidiary carriers. See Genesee & Wyoming, <https://www.gwrr.com/customers/freight-rail-service> (last visited May 25, 2021).

²⁶ Under 49 C.F.R. § 1180.4(b)(1), the prefiling notice must be filed “2 to 4 months prior to the proposed filing of an application.” Here, the prefiling notice was submitted on February 25, 2021, which would make the final date on which the revised application could be submitted June 25, 2021. However, because Applicants may need additional time to prepare the revised application, the Board will waive this subsection of its regulations.

²⁷ On April 1, 2021, Applicants filed a petition to establish a revised procedural schedule as directed by the Board in Decision No. 1. On April 22, 2021 (published in the Federal Register on April 26, 2021 (86 Fed. Reg. 22091)), the Board issued a notice of the proposed procedural schedule and requested public comments. The Board proposed modifications to the Applicants’ proposed schedule. No comments were received in opposition to the Board’s proposed procedural schedule.

Environmental Matters. Applicants contend that the Merger Transaction would not result in any operational changes (such as increases in rail traffic, train operations, or yard activity) that would exceed the Board’s thresholds for environmental review in 49 C.F.R. § 1105.7(e)(4) and (5). (Notice 34-38; Appl., Ex. 4, Environmental Matters 1.) Applicants therefore assert that the Merger Transaction does not require the preparation of environmental documentation. (Appl., Ex. 4, Environmental Matters 1.) On April 7, 2021, CSX submitted a letter to the Board’s Office of Environmental Analysis (OEA) with segment-specific traffic information for the rail lines that are covered by the Merger and Related Transactions in support of its assertion that none of the thresholds for environmental review would be exceeded. (Appl., Ex. 4-A.) Because the Application is being rejected, the Board need not reach a determination on this issue. The Board will determine the appropriate level of environmental review, if any, upon the filing of a revised application by Applicants.²⁸

Applicants indicate that they plan to prepare a SIP under the Board’s rules at 49 C.F.R. § 1106 and 49 C.F.R. § 1180.1(f)(3). A SIP is a comprehensive written plan, prepared in accordance with the Federal Railroad Administration (FRA) guidelines or regulations, explaining the process by which Applicants intend to integrate the operation of the properties involved in a manner that would maintain safety at every step of the integration process, in the event the Board approves the transaction(s). 49 C.F.R. § 1106.2; 49 C.F.R. § 244.9. If the Board authorizes a proposed transaction and adopts the SIP, the Board requires compliance with the SIP as a condition to its authorization. 49 C.F.R. § 1106.4(b)(4).

The Board—in consultation with the FRA—agrees that preparation of a SIP would be required for the Merger and Related Transactions. 49 C.F.R. § 1106.3 (requiring applicants to prepare a SIP when a Class I railroad proposes to consolidate with, merge with, or acquire control of (under 49 U.S.C. § 11323(a)) a Class II railroad where there is a proposed amalgamation of operations as defined by FRA’s regulations); see also 49 C.F.R. § 244.9. The proposed SIP is normally included as part of the environmental record, reviewed by OEA, and put out for public review and comment during the environmental review process. 49 C.F.R. § 1106.4(b); 49 C.F.R. § 244.17. However, in cases where no formal environmental review is required under the National Environmental Policy Act (49 U.S.C. §§ 4321, et seq.), the Board will develop appropriate case-specific SIP procedures based on the facts and circumstances presented. 49 C.F.R. § 1106.4(c). Here, the due dates for submitting the SIP, comments, and the Applicant’s response to comments will be considered as part of the procedural schedule upon the filing of a revised application by Applicants.

It is ordered:

1. The Application in FD 36472 is rejected.

²⁸ The Board notes that CSXT, NSR, and GWI have agreed to modify the “Ayer Operations Protocols, Engineering Planning, and Capacity Roadmap” by, among other things, raising the volume cap for certain trackage rights traffic. (Appl., Ex. 22, V.S. Pelkey, NSR Settlement Agreement, Attach. B at 6.) Applicants are requested to provide further explanation and data concerning this possible change in yard traffic, including the total amount of yard activity in the Ayer Switching District, in a revised application.

2. The regulation at 49 C.F.R. § 1180.4(b)(1) is waived to the extent that applications must be filed two to four months after the filing of a pre-filing notice. Applicants may file a revised application at any time after issuance of this decision, but no later than August 26, 2021.

3. Applicants are directed to file a letter in this docket by June 7, 2021, indicating if and when they anticipate filing a revised application.

4. Notice of this decision will be published in the Federal Register.

5. This decision is effective on May 26, 2021.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.