

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

**CANADIAN PACIFIC RAILWAY LIMITED, ET AL.
- CONTROL -
KANSAS CITY SOUTHERN, ET AL.**

304746
ENTERED
Office of Proceedings
June 9, 2022
Part of
Public Record

**AMENDED COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY AND
REQUEST FOR CONDITIONS**

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June 9, 2022

TABLE OF CONTENTS

Introduction and Summary of Argument.....	1
I. The Meridian Speedway Joint Venture Created a Pro-Growth, Pro-Competitive Route That Is Highly Efficient.	9
a. Through the Meridian Speedway transaction, NS revitalized an efficient East-West route that was in need of significant repair.	10
b. There are four critical components to the Meridian-Wylie Route: (i) the Meridian Gateway; (ii) the Meridian Speedway; (iii) the Shreveport-Wylie Section; and (iv) the Wylie Intermodal Terminal.	13
c. As a result of NS’s investment, the Meridian-Wylie Route has become a highly efficient route for shippers who need to move traffic between the growing Southeast and Dallas-Fort Worth area.	15
d. The Board recognizes the importance and value of maintaining efficient routes, in particular, for intermodal traffic.	20
II. Applicants’ Plan for the CP-KCS Transaction Threatens The Pro-Growth, Pro-Competitive Intermodal Gains on the Meridian-Wylie Route.	21
a. Applicants plan to increase traffic over the Shreveport-Wylie Section.	22
b. Applicants’ train plan proposes merging NS intermodal traffic with KCS merchandise freight and running trains that exceed existing sidings on the Meridian-Wylie Route.	23
c. The Applicants’ plan threatens to exceed capacity at the Wylie Intermodal Terminal.	25
III. The Threats That the CP-KCS Transaction Poses to Existing NS-CPKC Gateways and the Meridian-Wylie Route Are Against the Public Interest in Preserving Competition and Ensuring Efficient and Sustainable Rail Routes.	27
a. The Board may only approve the CP-KCS Transaction if it is consistent with the public interest.	28
b. Competition will be adversely affected by the CP-KCS Transaction if NS-CPKC Gateways, including the Meridian Gateway, do not remain open on commercially reasonable and operationally efficient terms.	30
c. Applicants’ plan threatens to marginalize current intermodal traffic and reduce future growth or even drive traffic loss on the Meridian-Wylie Route, reducing options for intermodal shippers.	33
d. Applicants’ plan threatens to shift significant volumes of intermodal traffic from rail to highways, resulting in increased emissions and additional congestion on highways.	36
IV. NS Proposes Narrowly Tailored Conditions to Address the Risks Presented by the CP-KCS Transaction and Applicants’ Amended Operating Plan.	40

a. The Board has broad conditioning authority and should use that authority to ensure that the CP-KCS Transaction does not harm the public interest.	41
b. Applicants’ commitments with respect to gateways mitigate the adverse effects of the CP-KCS Transaction on NS-CPKC Gateways only if clarified and imposed as conditions by the Board.....	42
c. The Board should require Applicants to enter into a contingent trackage rights agreement with NS in order to address the adverse effects of the CP-KCS Transaction on intermodal shippers that rely on the Meridian-Wylie Route.....	46
d. The proposed conditions are narrowly tailored and do not inhibit the ability of Applicants to achieve the claimed benefits of the CP-KCS Transaction.....	50
V. Conclusion	51

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Introduction and Summary of Argument

Two decades have passed since a merger involving two Class I railroads was last before the Surface Transportation Board.¹ The Board now considers the application filed on October 29, 2021, for Canadian Pacific Railway Limited² to acquire control of Kansas City Southern³ (the “Application”), including the Amended Operating Plan filed on May 13, 2022 following the Board’s *Decision No. 17* (served April 27, 2022) directing Applicants to update certain data and file an amended operating plan (the “Amended Operating Plan”).⁴ The significance of the Board’s decision in this matter is undeniable. If approved, CP’s proposed acquisition of KCS (the “CP-KCS Transaction”) would fundamentally alter the rail network in North America. This is why Congress empowered the Board under 49 U.S.C. §§ 11323 and 11324 to approve, reject,

¹ This is a major transaction under 49 C.F.R § 1180.2 (2021), defined as a “control or merger involving two or more class I railroads.”

² Canadian Pacific refers to Canadian Pacific Railway Limited, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (hereinafter “CP”).

³ Kansas City Southern refers to Kansas City Southern and its U.S. rail carrier subsidiaries The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company (hereinafter “KCS”), together with CP, “Applicants.” The term “CPKC” refers to the combined entity that would be created if the Application is approved.

⁴ Amended Operating Plan filed on May 13, 2022 as CP-47/KCS-34.

or condition transactions to ensure they are consistent with the public interest. The Board should exercise this power and impose conditions here. Absent conditions, the CP-KCS Transaction cannot be found to be in the public interest. In accordance with the revised procedural schedule set forth in *Decision No. 18* (served May 27, 2022) in connection with this matter, Norfolk Southern Railway Company (“NS”) hereby submits these Amended Comments and Request for Conditions, which fully replace the previous Comments and Request for Conditions filed by NS on February 28, 2022 (NS-9) that was in response to Applicant’s original operating plan.⁵

Applicants tout benefits they claim will flow from the CP-KCS Transaction.⁶ But the Application itself betrays potential adverse effects on competition by offering at the outset to keep CPKC Gateways⁷ open on commercially reasonable terms.⁸ Indeed, Applicants’ expert, Dr. Majure, bases his entire analysis on the assumption that gateway commitments will be in place.⁹ If the CP-KCS Transaction truly posed no risk to the public interest, there would be no need to offer these commitments, let alone assume their existence when analyzing potential harm resulting from the transaction. Moreover, the Applicants’ Amended Operating Plan raises serious concerns regarding CPKC’s future incentives and ability to provide reliable and efficient service

⁵ The Amended Operating Plan provides significantly different traffic density estimates for each of the segments addressed by NS in its initial Comments and Request for Conditions (NS-9). Accordingly, NS has incorporated significant amendments in these Amended Comments and the accompanying Amended Responsive Application. Appendix A shows a comparison of the traffic densities based on the Operating Plan initially filed with the CP-KCS Application and the Amended Operating Plan.

⁶ Railroad Control Application, Vol. I, (CP-25/KCS-13) at 10 (“CP/KCS Application”). While NS accepts certain assertions made in the Application and Amended Operating Plan for purposes of argument, such acceptance should not be an indication that NS accepts the arguments and evidence in the Application as accurate or complete.

⁷ CPKC Gateways refer to all existing CP-NS and KCS-NS gateways. NS currently connects with CP at Kansas City, MO, Chicago, IL, Detroit, MI, Buffalo, NY, and Schenectady, NY and with KCS at Kansas City, MO, New Orleans, LA, Meridian, MS, Corinth, MS, Tuscaloosa, AL, Hattiesburg, MS, Mexico, MO, and St. Louis, MO.

⁸ CP/KCS Application, Vol. I, at 16.

⁹ Dep. of W. Robert Majure, Ph.D. (dated Feb. 7, 2022) 93:7-93:17. “Q: Your analysis didn’t try to control for the commitments and analyze a but-for world in which they didn’t exist. Correct? A: I did not, because my understanding is that the parties in this merger have undertaken or committed to follow the same commitments. So the commitments are – they’re part of today and they’re part of tomorrow, as far as I can tell.”

for shippers relying on existing efficient interline routes through current NS-CPKC Gateways¹⁰, especially at the Meridian, MS and Shreveport, LA gateways which connect the line owned by the Meridian Speedway LLC (“MSLLC”).¹¹ These are reasons enough for the Board summarily to, at a minimum, clarify and impose CP’s own gateway commitments as conditions. However, that is not enough.

In addition to concerns over a deterioration of service over the line between Meridian, MS and Shreveport, LA (the “Meridian Speedway”), the CP-KCS Transaction also harms intermodal shippers by threatening NS’s ability to offer efficient and reliable interline service between the NS network and the Dallas-Fort Worth area on the “Meridian-Wylie Route.” The Meridian-Wylie Route runs between Meridian, MS and the Wylie Intermodal Terminal in Wylie, TX, connecting Dallas-Fort Worth and major southeast markets like Atlanta, GA, Charlotte, NC, and Jacksonville, FL. As shown below, this route involves (1) the KCS-NS gateway at Meridian, MS (the “Meridian Gateway”), (2) the Meridian Speedway, (3) the KCS line between Shreveport, LA and the Wylie Intermodal Terminal located near Dallas, TX (the “Shreveport-Wylie Section”), and (4) the Wylie Intermodal Terminal itself.

¹⁰ The term NS-CPKC Gateways refers to all existing gateways between NS and KCS and between NS and CP.

¹¹ The segment between Meridian and Shreveport is bifurcated by a short segment in Jackson, MS, owned by the Canadian National Railway (“CN”). KCS and NS have rights to move traffic over this segment, and this segment is not relevant to the conditions sought by NS in this proceeding.

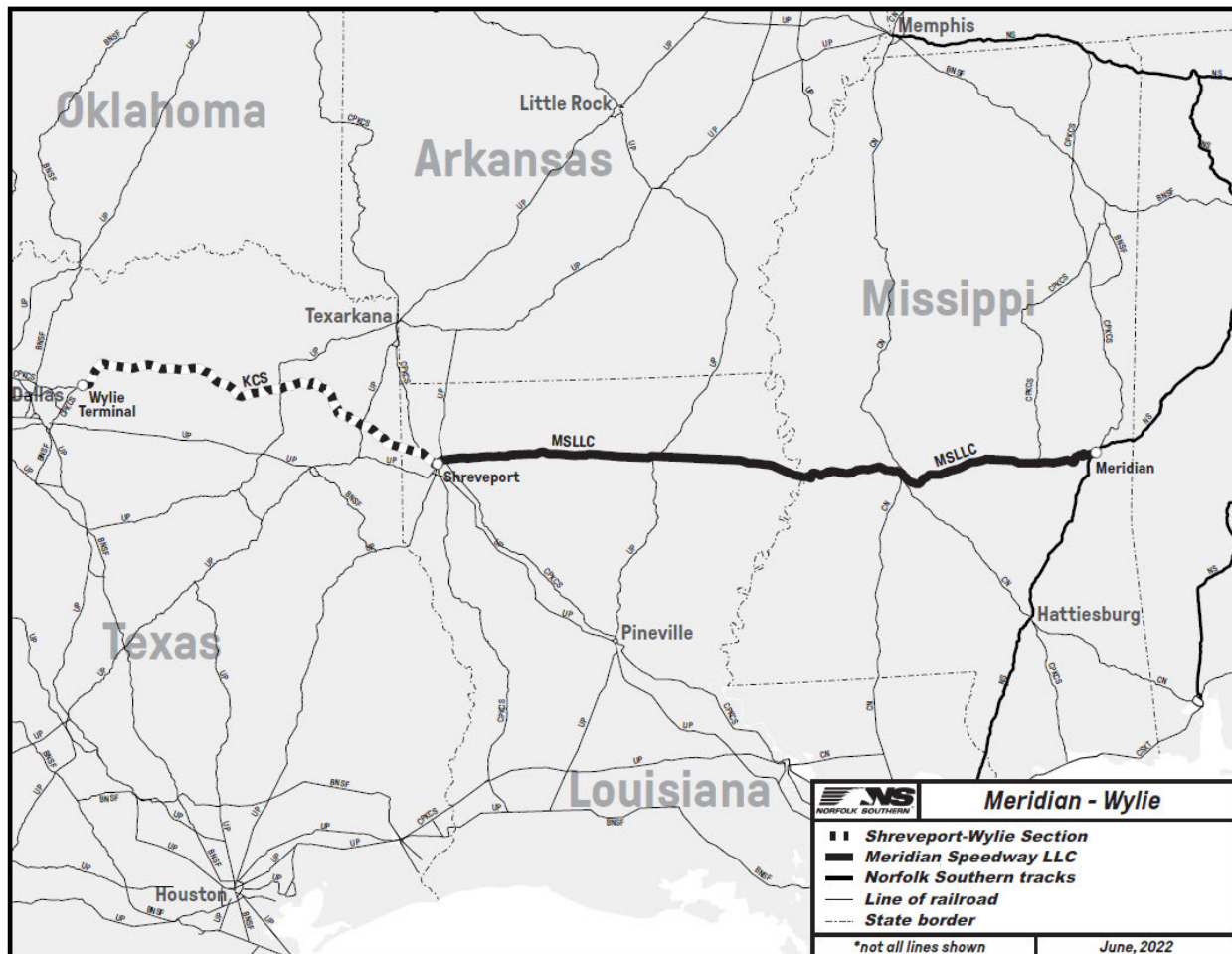
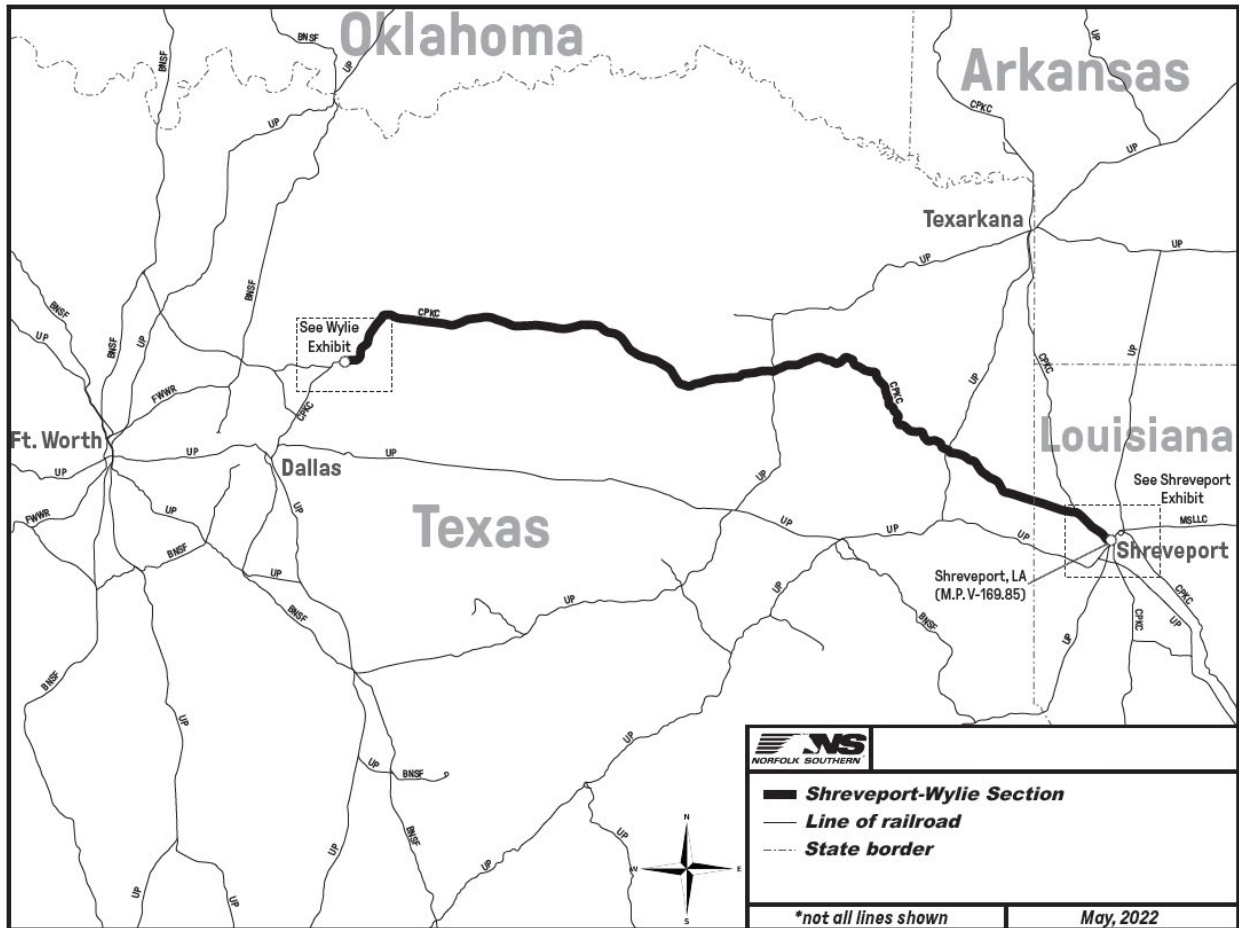
Exhibit 1: Meridian, MS to Shreveport, LA (The Meridian Speedway)

Exhibit 2: Shreveport, LA to Wylie Intermodal Terminal (The Shreveport-Wylie Section)

The CP-KCS Transaction threatens to degrade the success of the Meridian-Wylie Route and limit its use as an option for intermodal shippers who demand fast and reliable service. Today, NS relies on The Kansas City Southern Railway (“KCSR”), a subsidiary of KCS, as operator of the Meridian Speedway LLC (“MSLLC”), and on KCS, owner and operator of the Shreveport-Wylie Section and the Wylie Intermodal Terminal, to move intermodal traffic efficiently and reliably on the Meridian-Wylie Route. Applicants’ Amended Operating Plan raises serious questions regarding Applicants’ ability and commitment to continue to move NS intermodal traffic quickly and reliably in the event of the CP-KCS Transaction is approved, particularly in light of the plans laid out in their Amended Operating Plan. First, the Amended

Operating Plan reveals that Applicants anticipate significant growth on the Shreveport-Wylie Section as a result of the transaction, with transaction-specific traffic increases of 46-59%.¹² Second, Applicants plan to operate mixed trains with NS's intermodal traffic and KCS's merchandise traffic over the Meridian-Wylie Route, which would cause significant service disruptions for intermodal customers.¹³ Third, Applicants plan to increase traffic handled at the Wylie Intermodal Terminal to the point of exceeding its capacity with no plan to accommodate existing intermodal customers who rely on the Wylie Intermodal Terminal.¹⁴

The net result of this combination of operational changes suggests that Applicants lack the incentive and ability to provide reliable service for NS traffic on the Meridian-Wylie Route, including on the Meridian Speedway, if the CP-KCS Transaction is approved by the Board without conditions. If service declines on the Meridian-Wylie Route, including at the Wylie Intermodal Terminal itself, intermodal shippers, who rely on consistent and fast service, would likely be forced to use longer rail routes or highway to move goods between the southeastern United States and the Dallas-Fort Worth area. Degradation of the Meridian-Wylie Route as an option for shippers would likely reduce competition for the movement of intermodal goods between the southeastern United States and the Dallas-Fort Worth area and lead to significant harm to the public interest.

Since 2006, NS has invested heavily to accomplish the opposite, taking intermodal shipments off highways and placing them on the Meridian-Wylie Route. These investments include more than \$300 million in the MSLLC, with the great bulk of that investment going

¹² Amended Operating Plan, Appendix T.

¹³ Amended Operating Plan, Appendix H at 2. Amended Verified Statement of Michael R. McClellan.

¹⁴ Amended Operating Plan at 126-27.

directly into improvements into the track and structure of the Meridian Speedway itself. In addition, NS had made significant investment in its own intermodal facilities, as outlined in Exhibit 3 below.¹⁵

Exhibit 3: Capital Expenditures in Intermodal Terminals that Support the Meridian-Wylie Route (2006-2021)

Terminal	Amount (\$ thousands)
Inman Terminal (Atlanta)	17,786
Charlotte Terminal	96,134
Jacksonville IM Terminal	28,963
Austell Terminal (Austell, GA)	63,878
Charleston	7,223
Croxtan	20,504
Rutherford	50,682
Titusville	9,483
McCalla (Birmingham)	29,502
Total	324,154

These investments continue to support NS’s ability to deliver the premium service intermodal customers demand and help achieve the public benefits supported by the Board. If the CP-KCS Transaction is approved without conditions, Applicants’ plan for the Meridian-Wylie Route would place these benefits in jeopardy. For these reasons, NS opposes the CP-KCS Transaction unless the Board imposes conditions to ensure NS-CPKC Gateways remain open on commercially reasonable terms and the Meridian-Wylie Route remains a viable option for intermodal shippers. In particular, NS respectfully requests that the Board impose upon Applicants the following narrowly-tailored conditions:

¹⁵ Meridian Speedway, Norfolk Southern, available at <http://www.nscorp.com/content/nscorp/en/shipping-options/corridors/meridian-speedway.html> (last visited June 7, 2022) (“The Meridian Speedway is a \$300 million (NS invested \$260) joint venture between NS and Kansas City Southern.”); *see also* Amended Verified Statement of Michael R. McClellan.

1. Require Applicants to clarify and abide by all commitments and representations about NS-CPKC Gateways made in this Proceeding, including the commitment to keep all NS-CPKC Gateways open on commercially reasonable terms; and
2. Grant NS contingent trackage rights for intermodal traffic, the rail movement of which originates or terminates at the Wylie Intermodal Terminal, over the Shreveport-Wylie Section, exercisable in the event that NS elects to purchase the Wylie Intermodal Terminal and CPKC fails to meet established service standards for haulage service for NS intermodal shippers.¹⁶

Consistent with prior Board precedent, NS requests that the Board establish an oversight period of five years so that the Board may monitor Applicants' compliance with the representations made in this proceeding and any conditions imposed by the Board.¹⁷

The requests in this Amended Comment are supported by three verified statements. First, Exhibit A is the Amended Verified Statement of Claude E. "Ed" Elkins. Mr. Elkins is Executive Vice President and Chief Marketing Officer at Norfolk Southern Corporation. His statement describes NS's intermodal business, the threats that the CP-KCS Transaction presents to NS's intermodal customers, and how the conditions requested in this Amended Comment mitigate potential harm from the CP-KCS Transaction. Second, Exhibit B contains the Amended Verified Statement of Michael R. McClellan. Mr. McClellan is the Senior Vice President and Chief Strategy Officer at Norfolk Southern Corporation. His statement describes the harm, from an

¹⁶ For a detailed description of the requested trackage rights, *see* NS Amended Responsive Application, filed concurrently as NS-13.

¹⁷ *See, e.g., Canadian National Railway Co., Grand Trunk Corp., and Grand Trunk Western Railroad Incorporated—Control—Illinois Central Corp., Illinois Central Railroad Co., Chicago, Central and Pacific Railroad Co., and Cedar Rivier Railroad Co.* FD 33556 (served on May 25, 1999) [hereinafter "CN-IC"], at 39-40 (imposing an oversight period of up to five years to "monitor whether applicants [adhered] to the various representations they [made] on the record during the course of the proceeding").

operational perspective that could arise if NS-CPKC Gateways do not remain open and the Wylie-Meridian Route is degraded as a result of the CP-KCS Transaction. Finally, Exhibit C contains the Amended Verified Statement of Professor John Mayo, Ph.D. Professor Mayo is the Elsa Carlson McDonough Chair of Business Administration and Professor of Economics, Business and Public Policy in Georgetown University's McDonough School of Business. His statement describes the potential harm to competition that could occur if the CP-KCS Transaction is approved without necessary conditions.

Argument

I. The Meridian Speedway Joint Venture Created a Pro-Growth, Pro-Competitive Route That Is Highly Efficient.

The Meridian Speedway is the rail line between Shreveport, LA and Meridian, MS, owned by the MSLLC, a joint venture limited liability company that was formed by NS and KCS in 2006 through the Meridian Speedway Agreements, subject to the regulatory jurisdiction of the Surface Transportation Board.¹⁸ In the Notice of Exemption filed as part of the MSLLC creation, KCS recognized the importance of the Meridian Speedway for intermodal traffic in particular. KCS stated, “[w]ith this investment, the [Meridian Speedway] should be more competitive for intermodal traffic with other rail routes, including routes via the New Orleans, Memphis, and Birmingham gateways, and other modes of transportation.”¹⁹ The Meridian Speedway Agreements explicitly embodied and were designed to effectuate this prediction.²⁰

¹⁸ Press Release, Kansas City Southern, Kansas City Southern and Norfolk Southern Close on Meridian Speedway Joint Venture (May 1, 2006), <https://www.sec.gov/Archives/edgar/data/702165/000070216506000158/pressrelease1.htm> (noting that KCS would “begin [operating] the line according to the joint venture operations agreement.”).

¹⁹ *Kansas City Southern, The Kansas City Southern Railway Company, and Meridian Speedway, LLC – Exemption for Transactions Within a Corporate Family*, STB Docket No. FD 34822 (filed January 17, 2006), [hereinafter KCS-MSLLC Exemption].

²⁰ See, e.g., KCS-MSLLC Exemption, Exhibit J (“Dallas Terminal Marketing Agreement”), Section 2(a) (explaining the intent was to market the Dallas – Meridian route “with the intent that both Parties can receive greater benefits

Indeed, this prediction, backed by the financial and marketing efforts of both KCS and NS, proved accurate—today intermodal shippers comprise the majority of traffic over this route.²¹ The Meridian Speedway transaction was pro-growth, pro-competitive, and allowed shippers to utilize a highly efficient route service.²²

- a. Through the Meridian Speedway transaction, NS revitalized an efficient East-West route that was in need of significant repair.

In 2006, NS and KCS formed the joint venture with the goal of updating and improving the Meridian Speedway in order to provide shippers a substantially more efficient and upgraded rail option compared to the route available prior to the formation of the joint venture. Applauded by shippers from across the spectrum from international ocean shipping companies, motor carriers, intermodal consolidators and others,²³ and later cited approvingly by the Board,²⁴ that transaction, as explained to the Board at the time, involved the following:

The first step involved the creation of a new, wholly-owned KCS subsidiary, MSLLC. Upon regulatory approval, KCSR will contribute to MSLLC the Line.... Concurrent with MSLLC's acquisition of the Line, NSR will acquire a 30% equity interest and certain

than handling the traffic over alternate routes"). Meridian Speedway Agreements include the NSR Joint Use Agreement, the Western Haulage Agreement, the Jackson Assignment and Assumption Agreement, the Dallas Terminal Marketing Agreement, and the Jackson Haulage Agreement, all of which were filed in the KCS-MSLLC Exemption.

²¹ Orr and Elphick Dep. 208:8-21 (John Orr testified that, { [REDACTED] })

²² Deposition of Patrick Ottensmeyer dated February at 70:13-21 ({ [REDACTED] }); Deposition of John Brooks dated Feb. 4, 2022 ("Brooks Dep") at 230:5-17 ("It seems like a really good East-West option" that "KCS uses today.").

²³ See, e.g., Finance Docket No. 34821, Norfolk Southern Railway Co. – Trackage Rights Exemption – Meridian Speedway LLC – Between Meridian, MS and Shreveport, LA, Statements from Intermodal Customers, submitted January 20, 2006.

²⁴ See CSX Transportation, Inc. – Joint Use – Louisville & Indiana Railroad Company, Inc., Docket No. FD 35523, slip op. at 6 (served August 1, 2013) (also citing Norfolk Southern Railway Co., Pan Am Railway, et al. – Joint Control and Operating/Pooling Agreements – Pan Am Southern LLC, F.D. 35147 (STB Served Mar. 10, 2009), an LLC transaction at the center of a recent STB proceeding involving the CSXT acquisition of control of Pan Am Railway, together with the Boston and Maine Corporation's membership interest in Pan Am Southern); see also, CSX Corporation and CSX Transportation, Inc., et al. – Control and Merger – Pan Am Systems, Inc., et al, STB Docket No. 36472, served April 14, 2022.

minority voting and ownership rights in MSLLC; however, KCS will remain in control of MSLLC. In exchange for its equity interest and voting and ownership rights, NSR will contribute \$300 million in cash, at least \$260 million of which will be used to fund capital improvements over the next four years to increase capacity of the Line. NSR will be the sole provider of service for transcontinental intermodal traffic over the Line. Specifically, NSR will be the sole provider, via haulage and trackage rights over the Line, of service for transcontinental intermodal container traffic moving on the Line that does not originate or terminate on KCS's current system and that both (a) originates or terminates in the United States at or east of Meridian and enters or exits the Line at Meridian, and (b) originates or terminates in the United States west of Fort Worth, Texas, and enters or exits the [Meridian Speedway] Line at Shreveport.²⁵

At the time of the MSLLC joint venture transaction, NS and KCS explained to the Board the innovative approach to joint investment in a line that was underutilized at the time because of the need for considerable investments in its roadbed, signal systems, yards and sidings. The contemplated joint venture, as NS and KCS detailed, would upgrade the line for intermodal shippers (served at the time of the transaction solely by NS)²⁶ and for all other shippers served by KCS.²⁷

The MSLLC joint venture has achieved this goal. Since 2006, NS alone has invested (i) more than \$300 million into upgrading the Meridian Speedway track and infrastructure to improve the transit time and reliability of the line and (ii) no less than \$324 million in intermodal terminals in the southeastern United States.²⁸ The result has been to create new rail connections

²⁵ STB Finance Docket No. 34822, Kansas City Southern, et al. – Exemption for Transactions within a Corporate Family, submitted January 17, 2006, at 5-6.

²⁶ “KCSR does not provide haulage service for intermodal traffic over the Speedway to any other railroad and NS is the sole provider of such transcontinental container traffic over the [Meridian Speedway] Line.” STB Finance Docket No. 34822, Verified Notice of Exemption Pursuant to 49 C.F.R. Section 1180.2(d)(3), submitted January 17, 2006.

²⁷ Environmental Notice: Request for Public Comment, STB Finance Docket Nos. 34821, 34822 and 34823, served March 7, 2006, slip op. at 3 (“STB Environmental Notice”).

²⁸ Meridian Speedway, Norfolk Southern, available at <http://www.nscorp.com/content/nscorp/en/shipping-options/corridors/meridian-speedway.html> (last visited June 7, 2022) (“The Meridian Speedway is a \$300 million (NS invested \$260 million) joint venture between NS and Kansas City Southern.”); *see also* Verified Statement from Ed Elkins.

and a much improved option for intermodal shippers. Because of NS's investments, the Meridian Speedway today is faster and more reliable, making it a popular option for shippers as an intermodal alternative for the movement of goods to/from the southeastern United States that would have otherwise moved by highway. Intermodal traffic on the Meridian Speedway increased 340% from 2004 to 2021.²⁹ In 2021, {{ [REDACTED] }} of NS's traffic that traversed the Meridian Speedway originated or terminated at the Wylie Intermodal Terminal and traversed the full Meridian-Wylie Route.³⁰ Thus, NS's investments continue to support NS's ability to deliver the premium service that intermodal customers demand and help achieve public interest benefits supported by the Board.³¹

The efficiency of the Meridian Speedway was illustrated by the significant increase in traffic. In 2004, NS handled roughly {{ [REDACTED] }} intermodal moves that traversed the Meridian Speedway, compared to roughly {{ [REDACTED] }} intermodal moves in 2021.³² NS's investments in capacity allowed new traffic to flow over this route. Today, the MSLLC and its Meridian Speedway support over {{ [REDACTED] }} intermodal revenue loads per year, and over {{ [REDACTED] }} total moves overall.³³

One segment of NS's intermodal business on the Meridian Speedway that would be impacted by the CP-KCS Transaction is the intermodal traffic moving between Dallas-Fort

²⁹ Amended Verified Statement of Michael R. McClellan.

³⁰ *Id.*

³¹ CSX Transportation, Inc. ("CSXT") filed Comments and Request for Conditions on February 28, 2022, (CSXT-8) alleging that the Meridian Speedway Agreements restrain competition for certain traffic to and from the eastern United States. CSXT's Comments are factually inaccurate and contain a number of incorrect legal conclusions. NS will address CSXT's Comments (or amended comments if CSXT chooses to file them) in the appropriate filing pursuant to the Board's updated procedural schedule.

³² *Id.*

³³ The {{ [REDACTED] }} total moves includes over {{ [REDACTED] }} revenue loads per year. The remaining moves consist of non-revenue empty containers and railcars.

Worth and the eastern United States (“DFW Intermodal”). The DFW Intermodal business moves between the Wylie Intermodal Terminal and multiple NS and Florida East Coast Railway (“FEC”) terminals in the Southeast and Northeast. Total moves in this segment are approaching {{ [REDACTED] }} revenue moves per year.

- b. There are four critical components to the Meridian-Wylie Route: (i) the Meridian Gateway; (ii) the Meridian Speedway; (iii) the Shreveport-Wylie Section; and (iv) the Wylie Intermodal Terminal.

The Meridian Gateway

The Meridian Gateway is the connection between the MSLLC line from Shreveport, LA and the NS line to Birmingham, AL and points deeper in the NS network. As shown below in Exhibits 4, 5, and 6, a significant portion of the NS network connecting to the Dallas-Fort Worth area funnels to the Meridian Gateway. With respect to DFW Intermodal traffic in particular, {{ [REDACTED] }} of NS intermodal traffic with a lift or set-off at Wylie that originates or terminates at Atlanta, Charlotte, or Jacksonville passes through the Meridian Gateway.

The Meridian Speedway

The Meridian Speedway is the line owned by MSLLC that runs from the Meridian Gateway to Shreveport, LA.³⁴ As described above, NS has invested heavily in the Meridian Speedway to improve the conditions and allow for growth of traffic over this route. This strategic investment has resulted in the creation of one of the most competitive new rail routes this century.³⁵

³⁴ Meridian Speedway, *supra* note 15.

³⁵ Amended Verified Statement of Michael R. McClellan.

The Shreveport-Wylie Section

KCS owns the line from Shreveport, LA to Metro Junction, TX.³⁶ The Shreveport-Wylie Section is a subset of this KCS line that begins at the Shreveport Gateway and includes the line where the Wylie Intermodal Terminal is located, but the Shreveport-Wylie Section does not extend to Metro Junction, TX.³⁷ The CPKC proposed single-line route connecting Mexico and Canada and the Shreveport-Wylie section, which handles DFW Intermodal traffic, overlap from Shreveport, LA to Blanchard, LA.

The Wylie Intermodal Terminal

The Wylie Intermodal Terminal is a 500-acre intermodal facility owned by KCS that opened in 2015.³⁸ Located 20 miles northeast of Dallas, in Wylie, TX, the terminal sits adjacent to the KCS line that serves Shreveport, LA to Metro Junction, TX.³⁹ The Wylie Intermodal Terminal has annual lift capacity of 342,000 lifts.⁴⁰ In 2019, there were 564 handlings (lifts) per day, equal to 203,040 handlings per year or 59% of annual capacity.⁴¹

The Wylie Intermodal Terminal is located in a major area of both intermodal demand and production. The Dallas-Fort Worth metro area is one of the fastest growing areas in the United

³⁶ *Meridian Speedway*, Kansas City Southern, <https://www.kcsouthern.com/en-us/work-with-us/partners/meridian-speedway> (last visited June 7, 2022) (showing the Meridian Speedway connecting to the KCS line at Shreveport).

³⁷ KCS Intermodal, Wylie, TX Economic Development Corporation, <https://wylieedc.com/doing-business-wylie/industrial-warehouse/kcs-intermodal> (last visited June 7, 2022).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* Because the Wylie Intermodal Terminal is an intermodal facility, the relevant capacity measure is the number of lifts that the facility can handle. A lift is the literal movement of a container from train to truck or vice versa.

⁴¹ *Canadian Pacific Railway Limited, et al – Control – Kansas City Southern, et al. Railroad Control Application*, Filing No. 303143, STB Docket No. FD 36500 (filed Oct. 29, 2021) [hereinafter “CP/KCS Application”], Vol. 2, at 345. NS uses a 360 operating day year to estimate annual handlings.

States.⁴² The population growth has driven significant increases in demand for products that move in intermodal transportation service. As such, an increasing amount of intermodal traffic terminates in the Dallas metro area, including Wylie.⁴³ Over the last 2 years, Wylie had a {{ [REDACTED] }} increase in annual lifts for NS traffic alone.⁴⁴ Intermodal traffic generated in the Dallas-Fort Worth area is loaded onto trains at Wylie and sent over the Meridian-Wylie Route to reach multiple growing regions in the Southeast. NS Wylie Intermodal Terminal Traffic represents {{ [REDACTED] }} of all NS traffic that traverses the Meridian Speedway.⁴⁵ In connection with the MSLLC transaction, KCS granted NS an option to purchase the Wylie Intermodal Terminal (the “Wylie Option”).⁴⁶

- c. As a result of NS’s investment, the Meridian-Wylie Route has become a highly efficient route for shippers who need to move traffic between the growing Southeast and Dallas-Fort Worth area.

The Meridian-Wylie Route is an efficient link for shippers who need to move traffic through the major population centers in the Southeast and Dallas-Fort Worth area, areas of

⁴² Jon Bortin, *Fastest-growing cities in the U.S.*, Consumer Affairs, (Feb. 17, 2022), <https://www.consumeraffairs.com/homeowners/fastest-growing-cities.html>.

⁴³ *U.S. Intermodal Ramps*, Kansas City Southern, <https://www.kcsouthern.com/en-us/pdf/kcsr-intermodalramps/kcsr-us-intermodal-ramps.pdf> (last accessed Feb. 26, 2022). Intermodal lifts at the Wylie Intermodal Terminal grew from 161,270 in 2017 to 209,380 in 2021.

⁴⁴ Amended Verified Statement of Michael R. McClellan.

⁴⁵ NS Wylie Intermodal Terminal Traffic consists of “all domestic intermodal containers or trailers with an origin and destination in the United States, with a lift or drop at the [Wylie] Terminal, that moves over the [Subject Trackage] and over KCSR’s tracks between Shreveport and the [Wylie] Terminal, and that originates or terminates at or east of Meridian, and that originates or terminates at or west of the Dallas/Ft. Worth, TX, Standard Metropolitan Statistical Area (SMSA) as published by the Office of Management and Budget (OMB).” Norfolk Southern Railway Company – Meridian Speedway LLC Joint Use Agreement (“NSR Joint Use Agreement”) (KCS-MSLLC Exemption, Exhibit C), Section 1 (definition of the term Dallas Intermodal Terminal Traffic”; First Amendment to Dallas Terminal Marketing Agreement, dated September 28, 2016 (substituting the Wylie Intermodal Terminal for the Zacha Terminal).

⁴⁶ See Dallas Terminal Marketing Agreement. A redacted copy of the Dallas Terminal Marketing Agreement was filed in the KCS-MSLLC Exemption. The Dallas Terminal Marketing Agreement provides that NS may exercise the Wylie Option at any time during the defined Notice Trigger Period, which is a one-year period beginning on the 18th anniversary of the Closing (May 2024), unless previously triggered. Dallas Terminal Marketing Agreement, Section 1(b) (definition of Notice Trigger Period) and Section 4(b).

tremendous population and economic growth. Of the fifteen fastest growing cities in the United States, four are located within the Dallas-Fort Worth market alone.⁴⁷ Shippers throughout the NS network today rely on the speed and reliability of this route to serve their customers in these growing markets.⁴⁸

All it takes is one look at a map and the advantages of this route are apparent.⁴⁹ Compared to the next-shortest available route, the Meridian-Wylie Route saves 184 miles between Atlanta and Dallas, 212 miles between Charlotte and Dallas, and 41 miles between Jacksonville and Dallas.⁵⁰ Exhibit 4, 5, and 6 below shows the Meridian-Wylie Route compared to other possible routes with KCS to move between these two markets. Of course, each of these alternative routes are subject to further complications that could adversely affect through and local freight operations.⁵¹ {{ [REDACTED] }} of the NS intermodal traffic that moves between Atlanta, Charlotte, or Jacksonville and the Wylie Intermodal Terminal moves on the Meridian-Wylie Route.⁵²

⁴⁷ Bortin, *supra* note 42. The towns in the Dallas-Fort Worth market are Frisco, TX; McKinney, TX; Round Rock, TX; and Denton, TX. Growth is measured by percentage increase in population from 2010 to 2020.

⁴⁸ Amended Verified Statement of Michael R. McClellan.

⁴⁹ Brooks Dep. at 199:16-19 (“It seems like a – in looking at a map, it seems like an efficient route, and...the two carriers use it today.”); 230: 11-17 (“When I look at a map, it makes a lot of sense.”).

⁵⁰ See Exhibits 4, 5, and 6. Mileage was calculated using PC*Miler.

⁵¹ See, *Application of the National Railroad Passenger Corp. under 49 U.S.C. § 24308(e) – CSX Transportation, Inc. and Norfolk Southern Railway Company*, Filing No. 301767, STB Docket No. 36496 (filed March 16, 2021).

⁵² Amended Verified Statement of Michael R. McClellan.

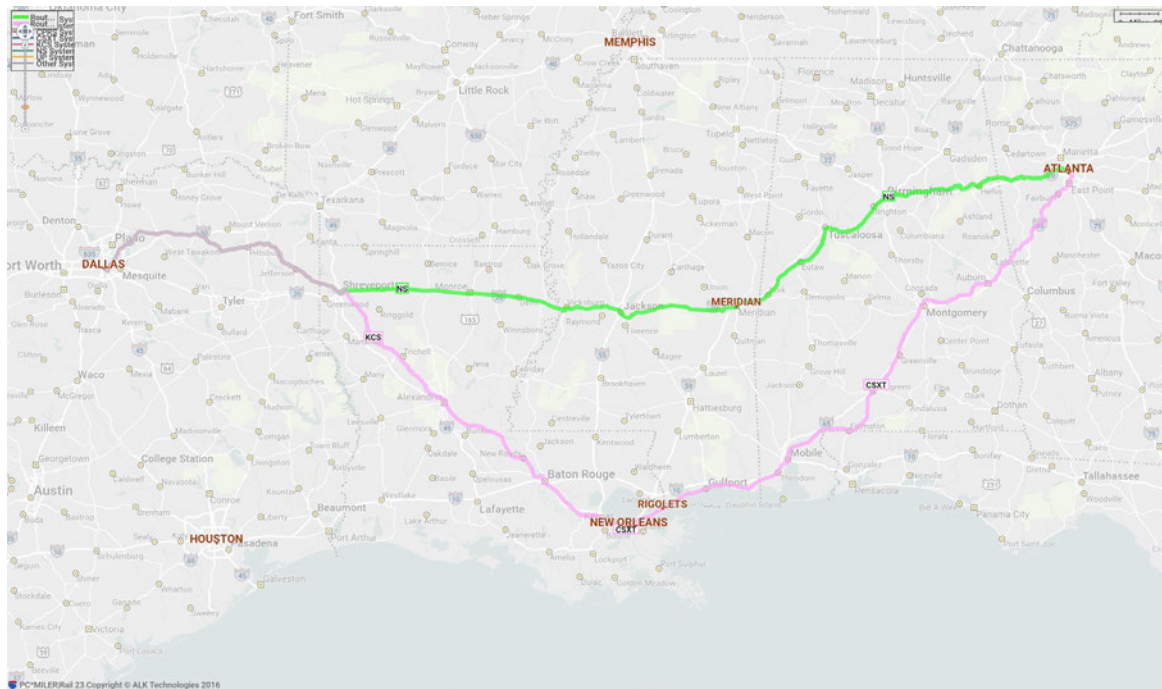
Exhibit 4: Dallas-Atlanta over the Meridian Speedway compared to the CSXT Route

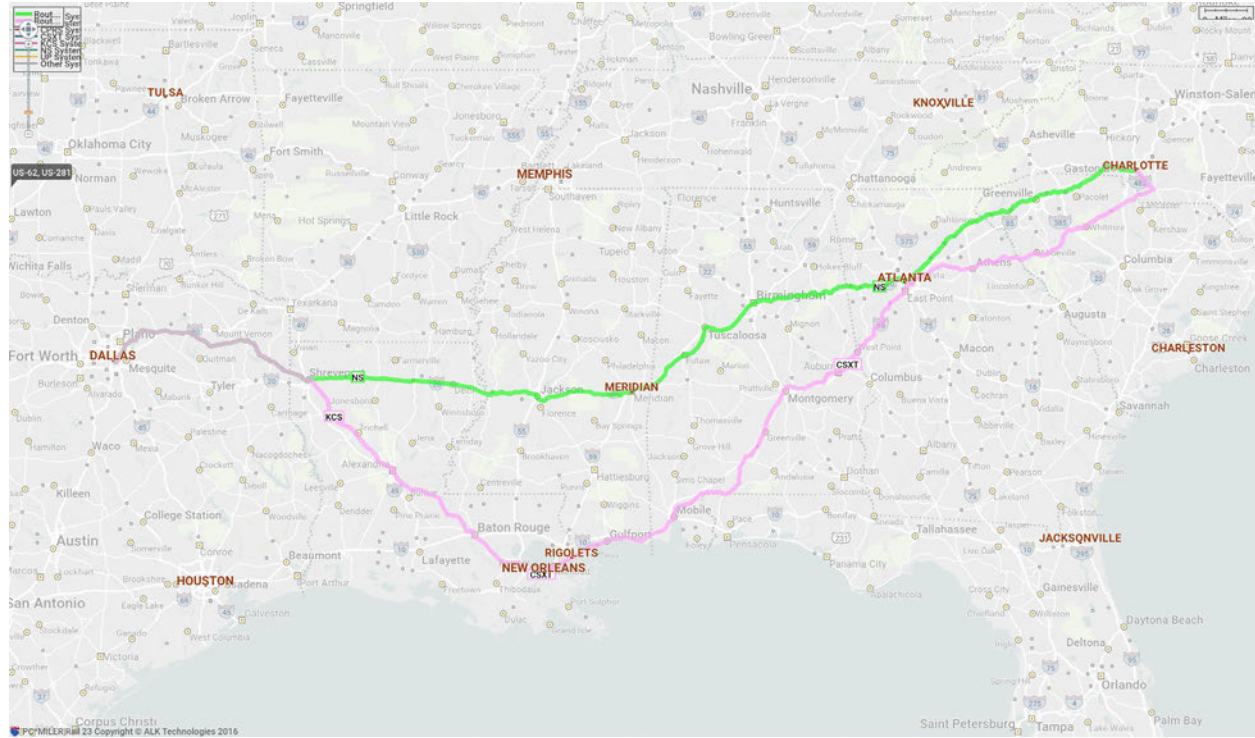
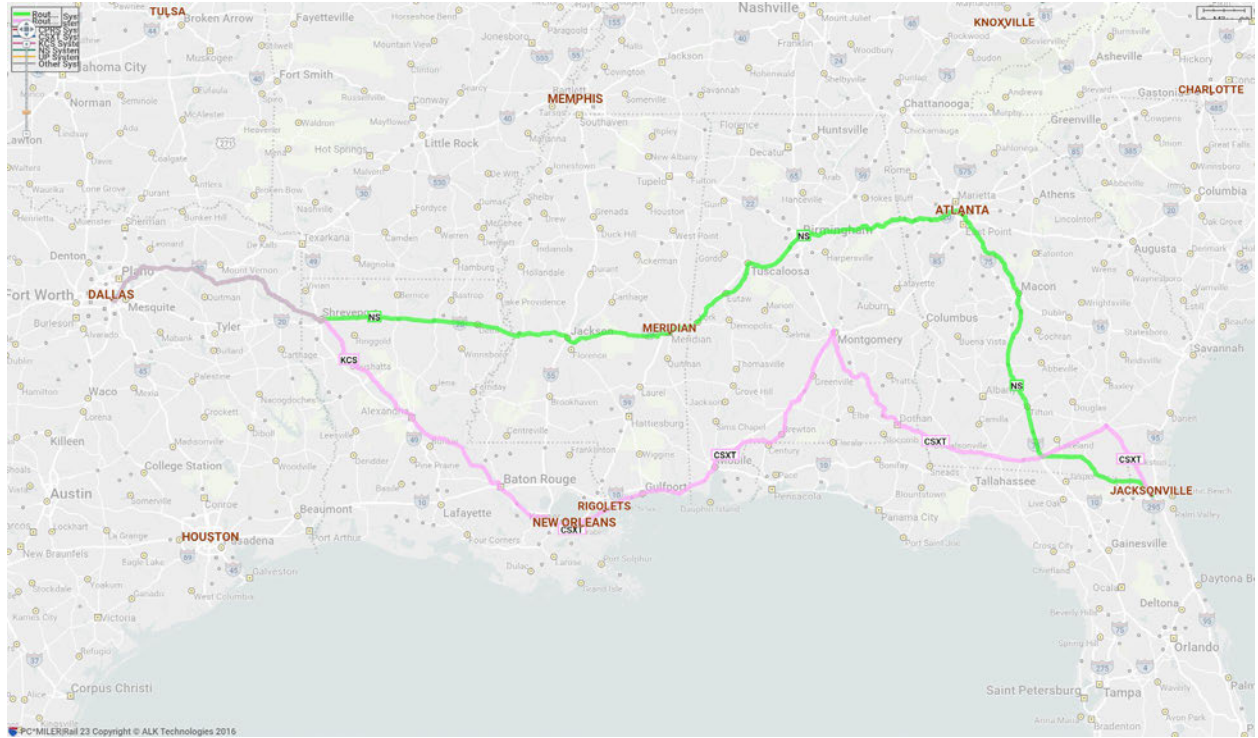
Exhibit 5: Dallas-Charlotte over the Meridian Speedway compared to CSXT Route

Exhibit 6: Dallas-Jacksonville over the Meridian Speedway compared to CSXT Route



In addition to the efficiency of the route itself, NS invested heavily in its intermodal service to provide a high quality, premium service that benefits intermodal shippers moving traffic over that route.⁵³ Thanks in large part to NS's more than \$300 million investment⁵⁴ in the MSLLC and the Meridian Speedway, if a shipper needs timely service between the Southeast and the Dallas Fort-Worth area, an intermodal move on the Meridian Speedway is a highly efficient alternative to moving that product over a highway.⁵⁵ The utility of this option was further enhanced by NS's construction of and continued investment in significant intermodal facilities in the southeastern United States, including Atlanta, Charlotte, and Jacksonville.⁵⁶ Not

⁵³ Amended Verified Statement of Ed Elkins. *See also*, Meridian Speedway, *supra* note 15.

⁵⁴ Amended Verified Statement of Michael R. McClellan.

⁵⁵ Amended Verified Statement of Michael R. McClellan.

⁵⁶ Amended Verified Statement of Ed Elkins.

only did NS make substantial capital investments to create intermodal terminals in the Southeast, it is continuing to invest in those terminals. For example, NS recently installed three new diesel-electric hybrid overhead gantry cranes at its Atlanta intermodal terminal.⁵⁷ These cranes generate environmental benefits through their use of electrical power, along with operational benefits derived from newer, more reliable, technology.⁵⁸ NS plans to replace all its traditional gantry cranes with new diesel-electric hybrid gantry cranes network-wide.⁵⁹

d. The Board recognizes the importance and value of maintaining efficient routes, in particular, for intermodal traffic.

The Board has highlighted the value of intermodal service to the national rail network in a variety of contexts. In prior rail consolidation proceedings in particular, the Board characterized the impact a transaction has on intermodal transportation service as an important consideration, viewing expanded intermodal service offerings favorably when evaluating a proposed merger's likely effects.⁶⁰ The Board has been clear that moving freight by rail rather than highway is a benefit to the public.⁶¹ In the Conrail proceeding, the Board found that "diversion of traffic away from the highways will result in substantial net environmental benefits in terms of reduced air pollution and highway traffic congestion."⁶² Similarly, in the BN-SF

⁵⁷ Press Release, Norfolk Southern, Norfolk Southern installs efficient, hybrid-powered cranes at Chicago and Atlanta intermodal terminals (Jan. 27, 2022) <http://www.nscorp.com/content/nscorp/en/news/norfolk-southern-installs-efficient-hybrid-powered-cranes-at-c.html>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *CSX Corp.—Control & Operating Leases/Agreements— Conrail, Inc.*, 3 S.T.B. 196, 1998 WL 456510 at *84 (1998) [hereinafter "Conrail"] ("This transaction will significantly expand rail intermodal service offerings in the Eastern United States, and enhance the already substantial level of rail/truck competition for this **important transportation service.**") (emphasis added).

⁶¹ *Id.* See also *Burlington Northern Inc. and Burlington Northern Railroad Co.—Control and Merger- Santa Fe Pacific Corp. and the Atchison, Topeka and Santa Fe Railway Co.*, 10 I.C.C. 2d 661, 1995 WL 528184, at *40 (1995) [hereinafter "BN-SF"].

⁶² Conrail, at *28.

proceeding, the Board noted, “the shift to rail of freight that might otherwise have moved by truck should reduce both highway congestion and fuel consumption.”⁶³ Summarizing all of the major benefits of diversion from highway to rail, the Board in the UP-SP proceeding established that “efficient railroads attract freight from the highway, relieve traffic congestion, reduce highway accidents, save lives, decrease pavement damage caused by heavy trucks, conserve fuel, and improve the environment.”⁶⁴ And, considering each of these benefits, the Board concluded that “each is a worthy public goal.”⁶⁵

II. Applicants’ Plan for the CP-KCS Transaction Threatens The Pro-Growth, Pro-Competitive Intermodal Gains on the Meridian-Wylie Route.

Applicants’ Amended Operating Plan illustrates how Applicants plan to change traffic as a result of the CP-KCS Transaction.⁶⁶ The Amended Operating Plan shows the following changes in traffic over the Meridian-Wylie Route:

⁶³ BN-SF at *52.

⁶⁴ *Union Pacific, et al. – Control and Merger – Southern Pacific Rail Corporation, et al.*, FD No. 327600 (served Aug. 12, 1996) [hereinafter “UP-SP”]. Applicants also acknowledge the significant benefits of intermodal service. Compared to highway, Applicants note that intermodal rail services are “more efficient and environmentally friendly.” CP/KCS Application, Vol. I, at 16.

⁶⁵ UP-SP at 543.

⁶⁶ CP/KCS Application, Vol. II, at 257.

Exhibit 7: Applicants' Planned Traffic Change over the Meridian-Wylie Route⁶⁷

Segment	Base	3-Year (Organic)		3-Year (Synergies)		3-Year (Total)	
		MGTs	% Change	MGTs	% Change	MGTs	% Change
Wylie-Greenville	13.88	15.86	14%	22.06	59%	24.04	73%
Greenville-Shreveport	12.94	14.94	16%	18.91	46%	20.92	62%
Shreveport-Sibley	35.90	41.91	17%	42.07	17%	48.09	34%
Sibley-Gibbsland	34.41	40.18	17%	40.32	17%	46.09	34%
Gibbsland-Monroe	36.51	42.66	17%	42.62	17%	48.77	34%
Monroe-Vicksburg	29.88	34.95	17%	34.33	15%	39.40	32%
Vicksburg-Jackson	29.64	34.75	17%	33.11	12%	38.22	29%
Jackson-Newton	30.18	35.40	17%	32.92	9%	38.14	26%
Newton-Meridian	26.59	31.04	17%	31.63	19%	36.09	36%

The data that Applicants filed in the Amended Operating Plan is significantly different from what was filed in the CP-KCS Application and what NS's initial comments (NS-9) were based on.⁶⁸ The data filed with the initial operating plan showed a significant increase in traffic on the Meridian Speedway but no overall growth on the Meridian-Wylie Route. Now, the data in the Amended Operating Plan shows significant increase on the Shreveport-Wylie Section and increases ranging from 9% to 19% on the Meridian Speedway. The data in the Amended Operating Plan does not ameliorate the concerns that NS has about the impact of the CP-KCS Transaction. Rather, and as described fully below, NS's concerns regarding the potential harm to shippers as a result of the CP-KCS Transaction persist.⁶⁹

a. Applicants plan to increase traffic over the Shreveport-Wylie Section.

The segments highlighted in green in Exhibit 7 comprise the Shreveport-Wylie Section. As shown above, Applicants plan to increase traffic by an average of 53% transaction-specific

⁶⁷ Amended Operating Plan, Appendix T. "Organic" growth refers to growth that would have occurred in the ordinary course of business absent the CP-KCS Transaction. "Synergies" refers to the growth that would not happen but-for the CP-KCS Transaction.

⁶⁸ See Appendix A for a comparison of the original data and the corrected data.

⁶⁹ Consistent with the Board's direction in *Decision No. 17* (served April 17, 2022), NS is relying on the Amended Operating Plan base densities in this Amended Comment and Request for Conditions. NS is continuing to review the accuracy of the Amended Operating Plan.

growth on the segments between Shreveport and Wylie that would not occur but-for the CP-KCS Transaction.⁷⁰ The additional traffic will be handled by approximately one net train pair per day on the line according to Applicants.⁷¹ Further, it appears that the traffic mix for the combined CPKC will consist of more bulk traffic than KCS currently handles.⁷² Large increases in bulk traffic can strain the current capacity of the Shreveport-Wylie Section and would have adverse impacts on the speed and reliability of intermodal traffic moving over the Meridian-Wylie Route.⁷³

- b. Applicants' train plan proposes merging NS intermodal traffic with KCS merchandise freight and running trains that exceed existing sidings on the Meridian-Wylie Route.

The Amended Operating Plan shows Applicants plan to increase the number of trains over the Meridian-Wylie Route and operate mixed trains with NS intermodal traffic and KCS merchandise traffic as well as NS-KCS interline merchandise traffic, which will be to the detriment of current shippers.⁷⁴ Currently, I-DAAT2 is the train symbol for an intermodal train that operates eastbound from Wylie to Meridian, and I-ATDA2 is the train symbol for an intermodal train that operates westbound from Meridian to Wylie. Applicants plan to add current merchandise traffic with the existing intermodal traffic on these trains.⁷⁵ In particular, Applicants plan to operate train 166 combining the eastbound intermodal train I-DAAT2 with manifest

⁷⁰ *Id.* The two segments that comprise the Shreveport-Wylie Section have transaction-specific growth of 59% and 46% respectively, resulting in average transaction-specific growth of 53%.

⁷¹ Amended Operating Plan, Appendix H.

⁷² CP/KCS Application, Vol. I at 215 (showing that KCS has 18% bulk traffic while the combined CPKC would have 36% bulk traffic).

⁷³ Amended Verified Statement of Michael R. McClellan.

⁷⁴ Amended Operating Plan, Appendix H at 2 (showing intermodal trains 166 and 167 will start handling manifest traffic that was previously moved on separate trains); Amended Verified Statement of Michael R. McClellan.

⁷⁵ *Id.*

traffic currently handled on M-DASH, M-SHJAB, and M-JANS.⁷⁶ Applicants plan to operate train 167 combining the westbound intermodal train I-ATDA2 with manifest traffic as well.

Merchandise traffic requires additional set-offs and pick-ups, which adds significant transit time to what otherwise would be a dedicated intermodal train.⁷⁷ NS only has overhead rights for the Meridian-Wylie Route, so NS's intermodal traffic must traverse the entire route. The additional stops required to serve merchandise traffic along the route makes the train less reliable and increases transit time over the entire Meridian-Wylie Route.

In addition, contrary to what Applicants state, the new mixed merchandise and intermodal trains will exceed the 10,000 feet max length that Applicants suggest in the Amended Operating Plan.⁷⁸ Currently, the eastbound intermodal train (I-DAAT2) operates at an average length of 6,878 feet and the westbound train (I-ATDA2) operates at an average length of 5,758 feet. Given the average lengths of the current eastbound manifests M-DASH (6,575 feet) and M-SHNS (6,971 feet), which Applicants plan to mix with the I-DAAT2 to create a new eastbound train symbolled '166,' the resulting average length of Train 166 would be 13,453 feet on the Shreveport-Wylie Section and 13,849 feet on the Meridian Speedway. Likewise, given the average lengths of the current westbound manifests M-NSJA (5,997 feet), M-JASH (6,717 feet), and M-SHDA (5,830 feet) which Applicants plan to mix with the I-ATDA2 to create a new westbound train symbolled '167,' the resulting average length of Train 167 would be 11,588 feet on the Shreveport-Wylie Section, and 12,475 feet on the Meridian Speedway. These two new combined trains would not fit in the existing sidings on the Meridian-Wylie Route. For

⁷⁶ *Id.*

⁷⁷ Amended Verified Statement of Michael R. McClellan.

⁷⁸ Amended Operating Plan, Appendix H.

Applicants to operate these new trains, all other traffic (including all other trains carrying NS's interline and haulage intermodal traffic) on the line would have to hold in sidings while the new trains passed.

c. The Applicants' plan threatens to exceed capacity at the Wylie Intermodal Terminal.

Described above in Section 1.B, the Wylie Intermodal Terminal is an intermodal terminal located on KCS's line in the Dallas-Fort Worth area. The Applicants' Amended Operating Plan envisions traffic growth that is likely to exceed the capacity at Wylie Intermodal Terminal itself. The Wylie Intermodal Terminal has annual lift capacity of 342,000.⁷⁹ In 2019, the Wylie Intermodal Terminal had 203,040 lifts per year, which represents 59% of stated capacity.⁸⁰

Applicants state, "Wylie will have sufficient capacity to handle" additional planned daily volumes.⁸¹ Applicants' growth plan directly contradicts this statement. In 2019, of the 203,040 lifts handled at the Wylie Intermodal Terminal, at least {{ [REDACTED] }} lifts were completed for NS traffic and {{ [REDACTED] }} lifts were completed for other KCS traffic.⁸² Applicants plan to add 292 daily lifts at the Wylie Intermodal Terminal to handle additional CPKC traffic, which is equivalent to 105,120 additional lifts per year.⁸³ In total, using 2019 data, this means that Applicants plan to use {{ [REDACTED] }} of the 342,000 possible annual lifts for CPKC traffic, which would leave {{ [REDACTED] }} annual lifts for NS traffic. The Amended Operating Plan

⁷⁹ *U.S. Intermodal Ramps*, *supra* note 43.

⁸⁰ CP/KCS Application, Vol. II, at 346. Annual lifts are based on 360 operating days per year.

⁸¹ *Id.* at 346.

⁸² *Id.* at 345. Annual lifts are based on 360 operating days per year. {{ [REDACTED] }}

⁸³ CP/KCS Application, Vol. II, at 345. Annual lifts are based on 360 operating days per year.

anticipates that the Wylie Intermodal Terminal will be operating at 308,160 annual lifts, or 90% capacity, by Year 3 of the Amended Operating Plan.⁸⁴

But the Amended Operating Plan failed to account for any growth in NS intermodal traffic at Wylie from 2019 to the present. In 2021, NS intermodal traffic accounted for at least {{ [REDACTED] }} lifts at the Wylie Intermodal Terminal (compared to {{ [REDACTED] }} in 2019). Using 2021 data for NS intermodal traffic, the Wylie Intermodal Terminal would have to handle at least {{ [REDACTED] }} total lifts, consisting of {{ [REDACTED] }} lifts for planned CPKC traffic and at least {{ [REDACTED] }} lifts for NS traffic, which would significantly exceed the 342,000 annual lift capacity.⁸⁵ To accommodate the {{ [REDACTED] }} lifts that Applicants plan to make at the Wylie Intermodal Terminal, Applicants would have to foreclose roughly {{ [REDACTED] }} NS lifts per year and otherwise operate the Wylie Intermodal Terminal at full capacity.⁸⁶ Even assuming flawless full capacity operations, the Wylie Intermodal Terminal simply cannot handle the planned growth without foreclosing current NS intermodal shippers who are using the Wylie Intermodal Terminal today. Applicants' plan would effectively cap growth at the Wylie Intermodal Terminal and would foreclose NS's ability to grow the Meridian-Wylie Route to serve the growing intermodal demand in this corridor.

KCS, as owner and operator of the Wylie Intermodal Terminal, controls everything from gate preference to assembly and unloading of the actual trains. In order to effectuate the Amended Operating Plan, CPKC would have to prefer its own intermodal shipments in and out

⁸⁴ *Id.*

⁸⁵ The {{ [REDACTED] }} lifts for CPKC includes the 105,120 additional lifts described in the Amended Operating Plan and the {{ [REDACTED] }} KCS lifts from 2019. Note that this does not assume any increase in KCS lifts from 2019 to present.

⁸⁶ Applicants' plan would require {{ [REDACTED] }} annual lifts to accommodate their incremental volume at the Wylie Intermodal Terminal and NS's existing lifts at the terminal, which would exceed the 342,000 annual lifts by {{ [REDACTED] }}.

of the Wylie Intermodal Terminal. For example, if there are time-sensitive containers that need to leave the Wylie Intermodal Terminal, through its control of the terminal, KCS can prioritize its traffic for lifts, set-offs, drayage and other services, ahead of NS traffic in order to accommodate CPKC's planned growth, thereby harming NS's intermodal customers.

If the CP-KCS Transaction is approved, CPKC will have the same ability to preference its own traffic, but its incentives will have changed. After the CP-KCS Transaction, the Meridian-Wylie Route will be burdened by a significant amount of additional CPKC traffic. Moreover, the growth of CPKC traffic with a lift/set-off at the Wylie Intermodal Terminal, by Applicants' own predictions, will exceed the current capacity of the terminal, and Applicants have enunciated no plans to expand that capacity. A direct result of the CP-KCS Transaction is that NS intermodal traffic moving to and from the Wylie Intermodal Terminal will be adversely affected, threatening intermodal shippers moving freight between the Southeast and the Dallas-Fort Worth area and potentially inflicting significant public interest harm due to diversion to highway for traffic that otherwise could have used rail intermodal service between these regions.⁸⁷ This diversion is a direct harm that affects the public interest by creating increased truck traffic throughout the southern United States.

III. The Threats That the CP-KCS Transaction Poses to Existing NS-CPKC Gateways and the Meridian-Wylie Route Are Against the Public Interest in Preserving Competition and Ensuring Efficient and Sustainable Rail Routes.

The Application is clear. Applicants acknowledge the potential for competitive harm at NS-CPKC gateways. In addition, Applicants plan to increase traffic over the Shreveport-Wylie Section and increase handlings at the Wylie Intermodal Terminal with no plan to ensure that

⁸⁷ Applicants state that they could divert certain traffic destined for points in Texas from Mexico from the Wylie Intermodal Terminal to the Kendleton Intermodal Facility "should there be a need." Amended Operating Plan at 127. The Kendleton Intermodal Facility, located in Houston, TX, is not a viable alternative to the Wylie Intermodal Terminal for NS's intermodal traffic on the Meridian-Wylie Route.

intermodal service levels remain competitive with truck and other rail routes.⁸⁸ These actions threaten to harm existing, and effectively foreclose expanded, shipper access to the Wylie Intermodal Terminal and the Meridian-Wylie Route. The resulting harm would adversely affect efficient and highly utilized intermodal rail routes. It would undermine the efficacy of NS's investment of hundreds of millions of dollars in the MSLLC and the Meridian Speedway, as well as throughout the rest of NS's intermodal network. It would undermine the intermodal community's investment and development in reliance on the MSLLC and the Meridian Speedway over the years since its inception. Finally, it would drive intermodal rail traffic to the highways, resulting in increased emissions and additional congestion on the highways.

- a. The Board may only approve the CP-KCS Transaction if it is consistent with the public interest.

The acquisition by a Class I rail carrier of a line of railroad of another rail carrier requires Board approval pursuant to 49 U.S.C. §§11323-11325. When a rail proceeding involves at least two Class I railroads, as in the CP-KCS Transaction, 49 U.S.C. § 11324(b) requires the Board, in deciding whether to approve or reject the transaction, to “consider at least . . . whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.” Although the Board must evaluate numerous factors, the statute's “single and essential standard of approval” is that the transaction must be “consistent with the public interest.”⁸⁹ A transaction is not in the public interest when “the merging parties would gain sufficient market power to profit by raising rates and/or reducing

⁸⁸ Elphick and Orr Dep. at 209:1:4, 212:10-18. Mr. Elphick testified that { [REDACTED] }.

⁸⁹ *Missouri-Kansas-Texas R. Co. v. United States*, 632 F.2d 392,395 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981). Accord *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486, 498-99 (1968).

service.”⁹⁰ A transaction further is not in the public interest when a likely result is that intermodal traffic currently moving over the rails would be diverted to the highways.

Applicants assert that the CP-KCS Transaction is consistent with the public interest. Applicants assert this is a purely vertical transaction, because their “networks are entirely end-to-end, with no overlapping routes, corridors, or territories.”⁹¹ It is, in fact, well-established that vertical mergers can improve economic welfare through enhanced economic efficiencies.⁹² Indeed, the Application and supporting verified statements tout the many potential improved operational efficiencies that Applicants anticipate achieving. These include fewer interchange handoffs, reduced transit times, new intermodal services linking terminals, expedited options for time-sensitive shipments, and affordable options for non-urgent shipments.⁹³ Applicants also emphasize investments in infrastructure to improve capacity over the combined lines, and the ability to divert truck traffic from the nation’s highways to rails, which they argue will reduce fuel consumption and otherwise benefit the environment.⁹⁴ Although not verified by NS, if true, these are all plausible, potential benefits of a vertical transaction.

Nevertheless, even efficiency-enhancing vertical mergers can cause discrete harm, both to competition and the public interest. Under 49 U.S.C. § 11324(c), the Board has considerable discretion to “impose conditions governing the transaction, including . . . requiring the granting of trackage rights and access to other facilities.” If the transaction “produces effects harmful to

⁹⁰ *Kansas City Southern—Control—The Kansas City Southern Ry. Co., Gateway E. Ry. Co, The Texas Mexican Ry. Co.*, STB Docket No. FD 34342, (served Nov. 29, 2004) [hereinafter “KCS/TM”], at 16.

⁹¹ CP/KCS Application, Vol. I, at 160.

⁹² Amended Verified Statement of Professor John Mayo.

⁹³ CP/KCS Application, Vol. I, at 15.

⁹⁴ CP/KCS Application, Vol. I, at 16.

the public interest” and a “condition will ameliorate or eliminate” that effect, then the Board will impose conditions.⁹⁵

- b. Competition would be adversely affected by the CP-KCS Transaction if NS-CPKC Gateways, including the Meridian Gateway, do not remain open on commercially reasonable and operationally efficient terms.

Applicants acknowledge that shippers have “efficient interline routes that [they] may prefer today.”⁹⁶ These efficient interline routes depend on open gateways on terms that allow the interline railroad to compete for the traffic.⁹⁷ In 2021, NS interchanged almost {{ [REDACTED] }} merchandise (non-intermodal) revenue loads with KCS at the Meridian Gateway alone.⁹⁸ The six major gateways over which NS interchanges with KCS, {{ [REDACTED] }}, are Meridian, MS, New Orleans, LA, Kansas City, MO, Corinth, MS, Tuscaloosa, AL, E. St. Louis, IL, and Hattiesburg, MS.⁹⁹ Meridian, MS and New Orleans, LA are {{ [REDACTED] [REDACTED] }}.¹⁰⁰

Two examples illustrate the potential harm to shippers that CPKC could cause if gateways do not remain open on reasonable terms. First, consider the route from Coldwater, MI to Norco, LA. Currently, this is a significant southbound move served over the New Orleans gateway. Traffic moves through the NS network to New Orleans where it is interchanged with

⁹⁵ CN-IC at 21. *See also* BN-SF at 69 (stating the Board will impose pro-competitive conditions to “ameliorate what would otherwise be the anticompetitive impacts of the transaction.”).

⁹⁶ CP/KCS Application, Vol. II, at 20.

⁹⁷ *CSX Corp. and CSX Transportation, Inc., et al. – Control and Merger – Pan Am Systems, Inc., et al.*, STB Docket No. 36472, (August 27, 2021) (Canadian Pacific’s Comment) [hereinafter “CSX/PanAm CP Comment”] at 25 (seeking gateway protections so CP “can continue to compete effectively for” traffic affected by the proposed CSXT transaction).

⁹⁸ Amended Verified Statement of Michael R. McClellan.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

KCS to complete the move.¹⁰¹ If CPKC wanted to maximize its length of haul, it could create a Chicago gateway for this freight and move it on the NS network to Chicago, interchange with CPKC, and be moved through the CPKC network to Norco, LA.¹⁰² The current route is 1,150 rail miles, and potential Chicago gateway route would be 1,510 rail miles.¹⁰³ If Applicants do not keep the New Orleans gateway open on reasonable terms, shippers who utilize this efficient North-South route could be diverted to a much longer, more congested, Chicago gateway route.

Second, consider the route between Aberdeen, MS, and Detroit, MI. This is a northbound move currently served by the Meridian Gateway moving on the KCS network, interchanging with NS at the Meridian Gateway, and traversing in the NS network to Detroit, MI.¹⁰⁴ If CPKC wanted to maximize its length of haul, it could create a Chicago gateway for the freight using a route from Aberdeen, MS to Kansas City, north to Chicago, where the traffic would be interchanged with NS to reach Detroit, MI.¹⁰⁵ The current route is 1,071 rail miles, while the potential CPKC route would be 1,770 rail miles. Shippers could be forced to a route that would be almost 700 miles (or 65% longer) if the Meridian Gateway does not remain open.

These are just two examples of the sub-optimal outcomes that could emerge from a failure to protect the efficient gateways that NS and KCS have worked hard to develop, particularly over the highly efficient and revitalized Meridian Speedway. Conversion of just the two moves above to the Chicago routes would add almost 100 million ton-miles to this total

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Mileages are calculated using PC*Miler.

¹⁰⁴ Amended Verified Statement of Michael R. McClellan.

¹⁰⁵ *Id.*

volume of shipments.¹⁰⁶ This in turn would add unnecessary transit time to the shipment, increase the fleet requirements of the shippers, increase total cost, and significantly increase the amount of emissions associated with these moves.¹⁰⁷

In the Application, Applicants commit to “keeping existing gateways open on commercially reasonable terms.”¹⁰⁸ Applicants further pledge that they “will not create any new ‘bottlenecks’ that might constrain shippers’ existing access to the Board’s regulatory processes.”¹⁰⁹ Mr. John Brooks states that maintaining open gateways involves both “operational efficiency and commercial viability” and concedes that a gateway is not open “just because there are tracks that allow railcars to be exchanged.”¹¹⁰ Mr. Brooks further acknowledges that open gateways must include “terms capable of supporting the continued movement of traffic via the gateway.”¹¹¹ Applicants do not, however, commit to any specific terms beyond offering reasonable rates to ensure that gateways remain open in a commercially viable manner.¹¹² In essence, Applicants are not even willing to provide the same level of gateway protection that CP demanded—and received—in the proceeding involving the acquisition of Pan Am Systems by CSX Transportation.¹¹³

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ CP/KCS Application, Vol. I, at 191.

¹⁰⁹ *Id.* at 169.

¹¹⁰ *Id.* at 233.

¹¹¹ *Id.*

¹¹² *Id.* at 20.

¹¹³ See the {{ [REDACTED] }}.

As described in the Verified Statement from Professor John Mayo, if gateways do not remain open on commercially reasonable terms, shippers could be forced onto significantly longer routes.¹¹⁴ Based on 2019 Carload Waybill data, for existing NS traffic that interlines with CP or KCS, if CPKC Gateways do not remain open and current traffic is shifted to a CPKC single-line route as a result, routes miles would increase by {{ [REDACTED] }} on average.¹¹⁵ Applicants acknowledge that existing interline routes are efficient.¹¹⁶ Without adequate gateway protections, shippers could be forced from efficient routes they utilize today onto less-efficient routes, creating longer transit times, worse service, and more environmental harm.¹¹⁷ In addition to forcing traffic onto less efficient routes, interline routes serve as important competitive constraints against the new single-line routes that would result if the CP-KCS Transaction is approved.¹¹⁸ Applicants could capture some of that traffic at supra-competitive rates, or, in the case of intermodal traffic specifically, shippers may divert to highways causing a cascade of harms to the public.¹¹⁹

- c. Applicants' plan threatens to marginalize current intermodal traffic and reduce future growth or even drive traffic loss on the Meridian-Wylie Route, reducing options for intermodal shippers.

Intermodal shippers who use the Meridian-Wylie Route rely on the speed and reliability of the service.¹²⁰ Intermodal service is demand-driven, “just-in-time” traffic.¹²¹ The flow of

¹¹⁴ Amended Verified Statement of Professor John Mayo.

¹¹⁵ *Id.*

¹¹⁶ CP/KCS Application, Vol. I, at 203.

¹¹⁷ Amended Verified Statement of Professor John Mayo.

¹¹⁸ *Id.*

¹¹⁹ Amended Verified Statement of Michael R. McClellan.

¹²⁰ Amended Verified Statement of Ed Elkins. Amended Verified Statement of Michael R. McClellan.

¹²¹ Amended Verified Statement of Ed Elkins.

intermodal traffic is determined by the need to have the goods at the destination at a specific, designated time.¹²² To offer a viable intermodal service, NS (as all freight rail carriers) must be able to offer such service reliably and with consistent transit times.¹²³

In the Amended Operating Plan, Applicants appear to load up the Meridian-Wylie Route with non-intermodal freight¹²⁴, which is particularly troublesome because such traffic is not as sensitive to fluctuations in transit times. The movement of bulk traffic can add significant congestion and delays, affecting the overall fluidity of a route and jeopardizing intermodal traffic, because it moves significantly slower in transit, and otherwise is not optimized around just-in-time delivery.¹²⁵

Shreveport-Wylie Section

As described above in Section 2.A, Applicants plan a transaction-specific increase in traffic over the Shreveport-Wylie Section an average of 53%. This new traffic will include bulk traffic that will likely slow down the overall speeds on the entire Meridian-Wylie Route, significantly impacting the fluidity of the route and specifically having a direct and adverse effect on important NS intermodal service.¹²⁶

In the Amended Operating Plan, Applicants outline the infrastructure and capacity projects they plan to undertake “to improve service quality and accommodate the anticipated growth in traffic.”¹²⁷ Nearly all of the \$276 million planned investment is on the single-line route

¹²² *Id.*

¹²³ *Id.*

¹²⁴ CP/KCS Application, Vol. I, at 215. As a percentage of traffic mix, CPKC will have double the amount of bulk freight compared KCS today.

¹²⁵ Amended Verified Statement of Ed Elkins.

¹²⁶ CP/KCS Application, Vol. II, at 309.

¹²⁷ CP/KCS Application, Vol. II, at 337.

from the Chicago area to Beaumont. Figure 11 from the Amended Operating Plan, reproduced below as Exhibit 9, shows the location of planned capital investments.¹²⁸

Exhibit 9: Applicants' Planned Investment



Notably, Applicants have no planned capital investment anywhere on the Meridian-Wylie Route.¹²⁹ This fact is consistent with the rationale behind the CP-KCS Transaction. Applicants state that the CPKC will “provide dramatically improved rail service in important North-South corridors.”¹³⁰ The rationale for the CP-KCS Transaction includes shifting a significant amount of traffic to the new single-line, North-South, route.¹³¹

¹²⁸ *Id.* at 337. The red oval inserted onto Exhibit 9 below shows the location of the Meridian-Wylie Route.

¹²⁹ See Orr and Elphick Dep. at 212:10-18.

¹³⁰ CP-KCS Application, Vol. 1, at. 15.

¹³¹ *Id.* at 19; CP/KCS Application, Vol. I, at 163.

The lack of planning around the Meridian-Wylie Route was reinforced in the depositions of John Brooks and the joint deposition of John Orr and Raymond Elphick.¹³² Potentially undermining the efficiency of the routes that traverse the Meridian Speedway compared to others that do not serve to harm rail service for important competitive traffic moving between the Southeast and Southwest.¹³³ Shippers have access to an efficient, reliable, route to move traffic between these regions.¹³⁴ If there is a degradation in the quality of the Meridian-Wylie Route, the competitive constraint that the Meridian-Wylie Route provides today would be lessened, leading to worse outcomes for shippers.¹³⁵

- d. Applicants' plan threatens to shift significant volumes of intermodal traffic from rail to highways, resulting in increased emissions and additional congestion on highways.

Every day, intermodal shippers choose whether to move containers by rail or highway.¹³⁶ All else being equal, for short moves, highway is generally more competitive than rail.¹³⁷ This is true even though trucks are more expensive on the through movement because trucks generally can complete short moves faster, and without the time and expense involved in truck-rail and

¹³² Brooks Dep. at 231:2-8. Brooks testified that "I have not dug into it and we've, frankly, been more focused on a lot of the north-south volume." When asked whether he was aware of any documents that would "reflect CP's plans for the Meridian Speedway following the Transaction," Brooks testified that he was not aware of any; Raymond Elphick & John Orr Dep. at 206: 11-16. Orr testified that he was { } as part of a general { } ; 209:13-16. Orr also testified that he was { } about the types of anticipated additional traffic on the Speedway.; Robert Majure too testified that he had not "done an analysis that is limited to the Meridian Speedway." Majure Dep. at 243:18-20.

¹³³ Amended Verified Statement of Professor John Mayo.

¹³⁴ Amended Verified Statement of Michael R. McClellan.

¹³⁵ Amended Verified Statement of Professor John Mayo.

¹³⁶ Amended Verified Statement of Ed Elkins.

¹³⁷ Amended Verified Statement of Ed Elkins; Amylee Silva, *Intermodal vs. Truckload: Hiring the Right Delivery Method* RailGateway (Dec. 28, 2021), <https://railgateway.ca/blog/intermodal-vs-truckload> ("Truckload is ideal for time-sensitive shipments, high-value freight that will travel a short distance...Intermodal transportation requires more planning and is ideal for high-volume shipments that aren't time-sensitive and can travel a long distance without damage.").

rail-truck transfer.¹³⁸ In contrast, for longer movements, the speed advantage that over-the-road trucks have is offset by the lower cost and consistent (albeit slower) movement that rail can provide.¹³⁹ For medium length-of-haul moves intermodal shippers can (and do) shift between highway and rail with minimal impact on service to the end customer.

If existing rail service deteriorates on the Meridian-Wylie Route, a significant portion of the intermodal freight that NS moves to or from the on the route (particularly NS's premium and less-than-truckload ("LTL") freight) is at risk of diversion to highway if the existing rail service deteriorates. As detailed in the Amended Verified Statement from Michael R. McClellan, the Atlanta-Meridian-Wylie, Jacksonville-Meridian-Wylie, and Charlotte-Meridian-Wylie routes are routes where the traffic is at risk of diversion to highway if NS is not able to maintain its high quality intermodal service or if the Wylie Intermodal Terminal does not have capacity to handle the traffic.¹⁴⁰ Over the years, and particularly in coordination with and in consideration of the Meridian Speedway, NS has made significant investments to develop its intermodal service and compete with highways for movement between the Southeast and Southwest.¹⁴¹ Nearly all of the growth in intermodal shipments over the Meridian-Wylie Route has been taken off highways, as opposed to other rail routes.¹⁴²

¹³⁸ Amended Verified Statement of Ed Elkins; *See Silva, Intermodal vs Truckload* (2021) ("When to choose truckload?...urgent, last-minute, time-sensitive shipments where speed is the most important logistics factor...inconvenient intermodal ramp locations.").

¹³⁹ Amended Verified Statement of Ed Elkins; *See Silva, Intermodal vs Truckload* (2021) ("When to choose intermodal?...larger intermodal freight shipments with longer transit times or irregular/unpredictable shipments that do not require urgent delivery, delivery distance is more than 800-1000 km or 500-700 miles, a desire to offset carbon footprint or reduce greenhouse gas emissions.").

¹⁴⁰ Amended Verified Statement of Ed Elkins; Amended Verified Statement of Michael R. McClellan.

¹⁴¹ Amended Verified Statement of Michael R. McClellan.

¹⁴² Amended Verified Statement of Ed Elkins.

And for medium length of haul shippers (750-1250 mile hauls), like those who currently move between the Southeast and the Wylie Intermodal Terminal, unpredictable rail service is likely to cause diversion from rail to highways. The Meridian-Wylie Route parallels U.S. Interstate 20 (“I-20”) for nearly the entire route, and, from a mileage basis, is extremely competitive. For example, the Wylie-Atlanta rail route is 819 miles, and the Wylie-Atlanta highway route is 782 miles.¹⁴³ This comparable mileage is one of the reasons that NS and KCS have been so effective at taking DFW Intermodal traffic off highways.

Faced with unreliable intermodal rail service because of Applicants’ failure to accommodate Applicants’ anticipated increase in traffic over all or a portion of the Meridian-Wylie Route, current NS intermodal shippers would be forced to switch to highways to meet the demands of their end customers. Future shippers considering the Meridian-Wylie Route would face similar service concerns and would be unlikely to move their intermodal traffic by rail.

Moving intermodal traffic via rail has significant benefits to the public compared to moving the traffic via highway. Rail emits less greenhouse gas and is safer, and railcars do not impose wear on highways, which lessens taxpayers’ expense of having to repair them. In short, the public interest benefits greatly from the diversion of highway traffic to the rail. Conversely, the public interest is harmed greatly from the diversion of rail traffic back to the highways.

Emissions

Compared to rail, trucks are significantly worse for the environment. Applicants highlight this “well-known fact” throughout the Application.¹⁴⁴ In 2018, for example, 67% of domestic shipments by weight were moved by trucks, but trucks comprised 78% of greenhouse gas

¹⁴³ Mileages are calculated using PC*Miler.

¹⁴⁴ CP/KCS Application. Vol. I, at 200.

emissions.¹⁴⁵ The EPA reports that trucks are the fastest-growing contributor to greenhouse gas emissions.¹⁴⁶ In contrast, NS is taking steps to reduce its greenhouse gas emissions. NS has consistently reduced its greenhouse gas emissions each year from 2017 through 2020.¹⁴⁷

Safety

Moving containers on highways rather than rail poses dangers to truck drivers and the general public that are not present with intermodal rail movements. Nationwide, between 2016 and 2019, there were 17,484 fatal crashes involving large trucks.¹⁴⁸ Texas, Louisiana, and Mississippi all had higher-than-average numbers of large truck fatalities in 2019 when adjusted for vehicle miles travelled.¹⁴⁹ By contrast, freight rail incurs just 3% of the injuries and 14% of fatalities per trillion ton miles.¹⁵⁰

Road Congestion and Repair

Truck traffic causes roads to wear down faster.¹⁵¹ I-20, which parallels the Meridian-Wylie Route, is already in need of repairs. For example, the Louisiana Department of

¹⁴⁵ US Department of Transportation, Bureau of Transportation Statistics, Moving Goods in the United States, (last accessed June 8, 2022) <https://data.bts.gov/stories/s/Moving-Goods-in-the-United-States/bcyt-rqmu#>. *See also* US Department of Transportation, Bureau of Transportation Statistics, Freight Transportation Energy Use & Environmental Impacts, (last accessed June 8, 2022) <https://data.bts.gov/stories/s/Freight-Transportation-Energy-Use-Environmental-Im/f7sr-d4s8>.

¹⁴⁶ United States Environmental Protection Agency, *Why Freight Matters to Supply Chain Sustainability*, <https://www.epa.gov/smartway/why-freight-matters-supply-chain-sustainability>.

¹⁴⁷ Press Release, *Norfolk Southern, Norfolk Southern releases 2021 ESG report*, Norfolk Southern (Aug. 9, 2021) <http://www.nscorp.com/content/nscorp/en/news/norfolk-southern-releases-2021-esg-report.html>.

¹⁴⁸ Federal Motor Car Safety Administration, Pocket Guide to Large Truck and Bus Statistics, 34 <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2022-01/FMCSA%20Pocket%20Guide%202021.pdf>.

¹⁴⁹ *Id.* at 38-39.

¹⁵⁰ Freight Railroad Administration, Office of Safety Analysis, *Freight Passenger Operations Ten Year Overview* (last accessed Feb. 26, 2022) <https://safetydata.fra.dot.gov/officeofsafety/publicsite/Query/TenYearFreightPassengerOperationsOverview.aspx>.

¹⁵¹ David Harrison, *Trucks are Clogging America's Roads, Delivering Goods and Tearing up Yards*, Wall Street Journal (Jan. 26, 2022), <https://www.wsj.com/articles/trucks-roads-damage-traffic-supply-chain-11643210764> (“State and federal transportation agencies estimate that trucks are responsible for between 35% and 40% of highway maintenance costs even though they account for less than 10% of miles driven.”).

Transportation and Development estimated it would cost \$56 million to repair a section of I-20 near Bossier City.¹⁵² The Mississippi Department of Transportation is spending a similar amount to repair a bridge on I-20 in Jackson, MS.¹⁵³ The cost to maintain the I-20 corridor will grow if freight currently moving by rail is shifted to the highway.

In addition to the cost to maintain the corridor, rail removes congestion from the roads. Road congestion exacerbates the problems of emissions and safety. As road congestion increases, average speeds go down and emissions go up.¹⁵⁴

IV. NS Proposes Narrowly Tailored Conditions to Address the Risks Presented by the CP-KCS Transaction and Applicants' Amended Operating Plan.

Applicants only make vague commitments to address the potential harm to competition that may occur at NS-CPKC Gateways as a result of the CP-KCS Transaction and entirely fail to address the potential harms that may result from their planned changes to traffic over the Meridian-Wylie Route. NS seeks limited, narrowly-tailored conditions to protect competition, preserve NS's ability to provide shippers with competitive rail service options, and avoid negative effects on the public interest resulting from the CP-KCS Transaction on NS-CPKC Gateways and the Meridian-Wylie Route.¹⁵⁵ NS opposes the CP-KCS Transaction without these conditions.

¹⁵² Press Release, Louisiana Department of Transportation and Development, *Dept. of Transportation and Development Announces Bid Results for Statewide Projects* (June 30, 2021), <http://wwwapps.dotd.la.gov/administration/announcements/announcement.aspx?key=28802>. The Louisiana Department of Transportation and Development received bids of \$82 million and \$124 million for the project.

¹⁵³ Press Release, Mississippi Department of Transportation, *Crew continues beam placement for new I-20 bridge in Jackson* (December 3, 2020), https://mdot.ms.gov/portal/news_release_view/441.

¹⁵⁴ Kai Zhang & Stuart Batterman, Air Pollution and health risks due to vehicle traffic. 450-51 *Science of the Total Environment* 307 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4243514/> (“Congestion lowers the average speed, which increases travel time and exposure on a per vehicle basis...congestion diminishes dispersion of vehicle-related pollutants since vehicle-induced turbulence depends on vehicle speed...thus, lower vehicle speeds can increase pollutant concentrations from roadway sources.”).

¹⁵⁵ On January 12, 2022, NS filed NS-6, a Description of Anticipated Responsive Application, which would have allowed for the submission of a far more wide-ranging request for conditions. The conditions requested herein are a

- a. The Board has broad conditioning authority and should use that authority to ensure that the CP-KCS Transaction does not harm the public interest.

If the Board finds a transaction may adversely affect competition, the Board may impose conditions pursuant to its broad conditioning authority under 49 U.S.C. § 11324(c) to eliminate the risk of “diminutions of competition in certain areas more affected by the merger.”¹⁵⁶ In particular, under 49 U.S.C. § 11324(c), the Board has considerable discretion to “impose conditions governing the transaction, including . . . requiring the granting of trackage rights and access to other facilities.” If the transaction “produces effects harmful to the public interest” and a “condition will ameliorate or eliminate” that effect, then the Board will impose conditions.¹⁵⁷

Such conditions are warranted here. There is a meaningful risk of harm because of the changed incentive and ability for the post-merger entity to foreclose NS’s use of CPKC Gateways and degrade the service on the Meridian-Wylie Route, raising NS’s costs and diminishing NS’s ability to provide premium service to its intermodal shippers who depend on this highly competitive route. These changes arise directly as a result of the CP-KCS Transaction.

defined subset of the conditions described on January 12th, but more narrowly tailored to address specifically the harms identified. *Canadian Pacific Railway Limited, et al – Control – Kansas City Southern, et al. Railroad Control Application*, STB Docket No. FD 36500 (filed Jan 12, 2022) (NS Description of Anticipated Responsive Application).

¹⁵⁶ BN-SF at *40.

¹⁵⁷ CN-IC at 21 (“The principal harms for which conditions are appropriate are a significant loss of competition or the loss by another rail carrier of the ability to provide essential services.”). *See also* BN-SF at *69 (stating the Board will impose pro-competitive conditions to “ameliorate what would otherwise be the anticompetitive impacts of the transaction.”).

- b. Applicants' commitments with respect to gateways mitigate the adverse effects of the CP-KCS Transaction on NS-CPKC Gateways only if clarified and imposed as conditions by the Board.

Applicants acknowledge the importance of NS-CPKC Gateways, including the gateways of Meridian, MS and Shreveport, LA, and the potential for adverse effects on competition resulting from the CP-KCS Transaction at each of Applicants' gateways.¹⁵⁸ Applicants make commitments to keep all NS-CPKC Gateways open on commercially reasonable terms. In particular, Applicants commit as follows:

- “CPKC will keep all existing gateways open on commercially reasonable terms and create no new bottlenecks.”¹⁵⁹
- “CPKC will continue to support, both operationally and commercially, KCS's existing interline routes with other railroads, including KCS-NS routes via Meridian, MS.”¹⁶⁰
- “CP/KCS will continue to maintain efficient operations serving existing gateways wherever traffic levels warrant—in terms of both the through train services to and from the gateways as well as the operational capabilities and infrastructure necessary to carry out efficient interchange.”¹⁶¹
- “[A] gateway is not open just because there are tracks that allow railcars to be exchanged there; interline options via these gateways must be commercially viable as well. CP's commitment means that we will continue to offer commercially reasonable rates and terms capable of supporting the continued

¹⁵⁸ CP/KCS Application, Vol. I, at 231.

¹⁵⁹ *Id.* at 16, 169.

¹⁶⁰ *Id.* at 20.

¹⁶¹ *Id.* at 233.

movement of traffic via the gateway. In these situations when a customer requests a rate for not only the former-CP or former-KCS portion of an origin-to-destination routing, we will provide the shipper with a Rule 11 rate to the gateway...we will not make it impossible to construct viable interline options for shippers by refusing to quote commercially reasonable rates.”¹⁶²

- “CPKC will not prevail [in competition for shippers] by closing off efficient interline routes that shippers may prefer in certain cases.”¹⁶³
- “[N]o customer will lose the opportunity to continue to use their existing interline routings, that involve KCS or CP or another carrier.”¹⁶⁴

While NS appreciates Applicants’ recognition of the importance of NS-CPKC Gateways, Applicants’ gateway commitments fall short of what the Board has required, and CP has demanded, in the past in order to ensure that gateways are open on commercially reasonable terms both in form and function.

First, Applicants focus on the gateway commitments imposed by the Board in the proceeding involving the acquisition of Tex Mex by KCS as the basis for their position that the CP-KCS Transaction will not harm competition, ***but they do not appear to agree to abide by these same commitments at all gateways.***¹⁶⁵ In particular, Applicants’ commitments do not

¹⁶² *Id.* at 233 (In committing to keep gateways open, John Brooks describes that maintaining open gateways involves two foundational elements: “operational efficiency and commercial viability.” Brooks clarified that CP “commits to maintaining both.” Recognizing that open gateways means that routes must not only be commercially viable by offering reasonable rates, Brooks detailed his understanding that gateway “terms [must be] capable of supporting the continued movement of traffic via the gateway.” CP accordingly understands that open gateways may require specific conditions and terms beyond the minimum standard of committing to commercially reasonable terms generally in order to ensure the “continued movement of traffic via the gateway.”).

¹⁶³ *Id.* at 20.

¹⁶⁴ *Id.* at 192.

¹⁶⁵ “The commitments KCS made in KCS/TFM/Tex Mex will remain. In addition, CP and KCS have publicly stated that in addition to abiding by those prior commitments, the combined entity will commit to maintain all existing interchange gateways on commercially reasonable rates, and this includes the Laredo Gateway.” CP/KCS

contain the same level of detail as the following commitments the Board previously imposed on KCS with respect to the Laredo Gateway:

- “to continue to work with UP and BNSF on operating matters such as pre-blocking rail cars improving automated customs pre-clearance procedures, supplying cars, accommodating run-through train service, providing excellent service, and promptly quoting rates”;
- “to honor the terms of all existing Tex Mex and TFM agreements and allow such agreements to continue to their full term (and not seek to cancel early, even if it has that legal right)”;
- “to treat all carriers fairly at the Laredo Bridge, preserving existing dispatching and operating practices over the Bridge, with Tex Mex and TFM continuing to be bound by agreements governing operations over the Bridge”; and
- “to make no significant changes in applicants’ operations, with safety remaining a top priority, ensuring that the KCS/TFM transaction would not have operational impacts within the United States.”¹⁶⁶

Moreover, CP recently demanded and received the following additional gateway commitments in order to mitigate harm at the Mechanicville Gateway that CP alleged in the proceeding involving the acquisition of Pan Am Systems by CSX Transportation:

Application, Vol. 1, at 203. Applicants’ economic expert, Dr. Majure, only analyzes the Laredo gateway, which has existing gateway protections, to reach his conclusion that CPKC would not have an incentive to harm competition at **any** gateway. *See also*, CP/KCS Application, Vol. 2, at 15 (“I use traffic KCS currently brings to the Laredo gateway to illustrate the balance of vertical effects that is likely to prevail at all the gateways of a combined CP/KCS and show that the effect is beneficial to shippers.”).

¹⁶⁶ KCS/TM, at 18-19.

- “Requiring PAS and its owners to support sufficient spending on maintenance and infrastructure on the Hoosac Tunnel Route to maintain service levels (frequency, transit times, and consistency) at pre-Transaction levels between Mechanicville and Ayer (for online shippers and efficient interline connection to CSX’s former-PAR lines).”¹⁶⁷
- “Requiring that PAS and its operator provide service levels (again, frequency, transit times, and consistency) that are at least comparable to those offered pre-Transaction for traffic interchanged at the Mechanicville Gateway.”¹⁶⁸

The Amended Operating Plan here presents the potential for significant harm to competition and shippers at NS-CPKC Gateways. This is especially true at Meridian, MS and Shreveport, LA due to CPKC’s future control of the Meridian Speedway and growth plans that do not include investment on the Meridian-Wylie Route.¹⁶⁹

For these reasons, in order to protect the traffic through CPKC Gateways with NS, including on the Meridian-Wylie Route, the Board should impose as conditions (i) all general gateway commitments made by Applicants in the Application and throughout this proceeding, including Applicants’ specific Meridian Gateway commitment¹⁷⁰ and (ii) the following additional gateway commitments:

- Make no significant detrimental changes to current operations on the Meridian Speedway and provide excellent service while also promptly quoting

¹⁶⁷ CSX/PanAm CP Comment at 27.

¹⁶⁸ CSX/PanAm, CP Comment at 27.

¹⁶⁹ Amended Verified Statement of Professor John Mayo. Amended Verified Statement of Michael R. McClellan.

¹⁷⁰ CP/KCS Application, Vol. 1, at 20.

commercially reasonable rates for traffic that interlines with NS at the Meridian Gateway and the other CPKC Gateways (such as New Orleans, LA); and

- Provide service levels (“frequency, transit times, and consistency”¹⁷¹) comparable, at a minimum, to those offered for traffic interchanged with NS at existing CPKC Gateways pre-CP-KCS Transaction.

These conditions are the *minimum* conditions that the Board must impose in order to ensure that the CP-KCS Transaction does not negatively impact competition and result in other harms to shippers, including intermodal shippers on the Meridian-Wylie Route.

- c. The Board should require Applicants to enter into a contingent trackage rights agreement with NS in order to address the adverse effects of the CP-KCS Transaction on intermodal shippers that rely on the Meridian-Wylie Route.

Applicants’ stated plan for the CP-KCS Transaction would lead to adverse effects on intermodal shippers that rely on the Meridian-Wylie Route that could be addressed by a combination of two elements, one within the power of NS to effectuate, and one within the power of the Board. KCS granted NS the unilateral right to exercise the Wylie Option as an integral element of the formation of the joint venture in the Meridian Speedway in the Meridian Speedway Agreements.¹⁷² Given the unique circumstances presented by the Applicants’ plans, exercising the Wylie Option would be a means to address the harm to the public interest raised by the CP-KCS Transaction to the Meridian-Wylie Route, but only if NS shippers have a reliable

¹⁷¹ NS requests service level commitments comparable to the service levels commitments requested by CP in the CSX-PanAm transaction. CSX/PanAm CP Comment, at 6.

¹⁷² The Wylie Option set forth in the Dallas Terminal Marketing Agreement originally applied to the Dallas-area terminal at Zacha Junction. The option was transferred to the Wylie Intermodal Terminal as a result of an amendment to that agreement. The Wylie Option is able to be exercised during the “Notice Trigger Period” which could be triggered by KCSR giving written notice to NSR that KCSR intends to abandon, discontinue the use of, sell, lease or otherwise transfer control or use of the Terminal. This Comment assumes that this abandonment will not take place sooner than May 2024. Otherwise, the Notice Trigger Period is the one-year period beginning on the eighteenth anniversary of the Closing of the Meridian Speedway transaction.

and efficient route to reach the Wylie Intermodal Terminal from the Meridian Speedway. To continue offering efficient, reliable service on the Meridian-Wylie Route, contingent trackage rights are a necessary complement to NS's potential ownership of the Wylie Intermodal Terminal.

The terms of the Wylie Option are set out in the Dallas Terminal Marketing Agreement as amended.¹⁷³ That agreement also provides that, if NS exercises the Wylie Option, KCS must provide NS with haulage on the Shreveport-Wylie Section that connects the Wylie Intermodal Terminal with the Meridian Speedway for NS intermodal traffic originating or terminating at the Wylie Intermodal Terminal.¹⁷⁴

For the reasons discussed in detail above, the Application and Amended Operating Plan raise significant concerns about Applicants' ability and incentive to haul NS intermodal traffic over the Shreveport-Wylie Section with the standards demanded by intermodal shippers. As a result, NS respectfully requests that the Board require CPKC to enter into an agreement with NS providing NS with contingent trackage rights for NS intermodal traffic moving between the Wylie Intermodal Terminal and the Meridian Speedway over the Shreveport-Wylie Section in the event that NS exercises the Wylie Option. These trackage rights ***would only be triggered in the event of a sustained service failure by CPKC*** (the "Shreveport-Wylie Section Trackage Rights Agreement").

This is consistent with the terms of the existing Meridian Speedway Agreements, which already provide NS with contingent trackage rights for NS traffic moving over the Meridian

¹⁷³ Dallas Terminal Marketing Agreement, Section 3. *See also*, First Amendment to the Dallas Terminal Marketing Agreement, Section 3 (substituting an option to purchase the Wylie Intermodal Terminal for the option to purchase the Zacha Terminal).

¹⁷⁴ Dallas Terminal Marketing Agreement, Section 5.

Speedway in the event of a “Major Service Standard Failure” by MSLLC and its designated operator KCS.¹⁷⁵ A Major Service Standard Failure occurs when service standard transit times are not met for {{ [REDACTED] }}.¹⁷⁶ This standard was designed to apply only in circumstances of a sustained service failure and is the same standard NS requests be applied for the NS intermodal traffic CPKC would haul between the Wylie Intermodal Terminal and the Meridian Speedway over the Shreveport-Wylie Section if NS exercises the Wylie Option.

Imposing the contingent trackage rights enshrined in the Shreveport-Wylie Section Trackage Rights Agreement would serve two important functions. First, it would provide CPKC a significant incentive to not allow degradation of service over the Meridian-Wylie Route notwithstanding Applicants current plans as outlined in the Application and Amended Operating Plan. Second, it provides NS and its customers an important backup should that degradation occur, guaranteeing that, in that eventuality, NS would be able to control the composition of its

¹⁷⁵ Under the NSR Joint Use Agreement, MSLLC and its designated operator KCS has already committed to provide (and CPKC would be committed to provide, if the Board approves the CP-KCS Transaction) specific transit times for movement of NS traffic over the Meridian Speedway and also for the traffic moving to and from the Wylie Intermodal Terminal and other traffic available to be moved thereunder. If KCS (or CPKC, if the Board approves the CP-KCS Transaction) fails to meet the service standards in the NSR Joint Use Agreement, the agreement provides for liquidated damages to NS. NSR Joint Use Agreement (KCS-MSLLC Exemption, Exhibit C), Appendix B – Commercial Appendix, Section 3. If KCS (or CPKC, if the Board approves the CP-KCS Transaction) fails {{ [REDACTED] }}, the agreement provides NS with the option to initiate trackage rights service. NSR Joint Use Agreement, Section 2(a)(ii). The contingent trackage rights granted pursuant to the NSR Joint Use Agreement specifically exclude movement over the so-called “Jackson Trackage Rights Section”. *Id.*, Section 2(a)(i). The Jackson Trackage Rights Section is a short (four-tenths of a mile) section of track in Jackson, MS controlled by Canadian National. Consistent with the intent of the parties at the time, KCSR assigned its trackage rights over the Jackson Trackage Rights Section to NS in the Jackson Assignment and Assumption Agreement, dated May 1, 2006, with the consent of CN in the Assignment, Assumption and Consent Agreement, dated April 6, 2006. The contingent trackage rights provided for in the NSR Joint Use Agreement are connective with those provided for in the Jackson Assignment and Assumption Agreement, therefore providing for a seamless through movement between Shreveport, LA and Meridian, MS.

¹⁷⁶ See NSR Joint Use Agreement (KCS-MSLLC Exemption, Exhibit C), Appendix B, Section 4.

intermodal trains for the Meridian-Wylie Route and continue offering intermodal service between the Southeast and the Wylie Intermodal Terminal.

Without the Shreveport-Wylie Section Trackage Rights Agreement, if a Major Service Standard Failure occurs, NS would have the ability to exercise trackage rights on the Meridian Speedway but not on the Shreveport-Wylie Section. In practice, this would preclude NS from effectively holding CPKC to a service standard because trains on the Meridian-Wylie Route would move with NS's power, crew, and train composition on the Meridian Speedway but with KCS's (or CPKC's) power, crew, and train composition on the Shreveport-Wylie Section. From an operations perspective, it can take as much as a full 24 hours to reconfigure a mixed train. These additional handlings and added time would undermine the efficacy of the route for NS and the NS intermodal service that traverses the Meridian-Wylie Route, thus harming the intermodal customers who have come to rely on that service.¹⁷⁷

NS intermodal shippers who utilize the reliable and fast service over the Meridian-Wylie Route are at significant risk because of Applicants' stated plan. Indeed, those shippers are likely to be forced to use a much longer rail route or switch to highways as a result of the CP-KCS Transaction, which would cause loss of efficient, competitive transportation options and significant harm to the public interest. The potential exercise of the Wylie Option avoids this harm, but only if NS has a reliable means of reaching the Meridian Speedway from the Wylie Intermodal Terminal. As a result, NS respectfully requests that the Board require Applicants to execute the Shreveport-Wylie Section Trackage Rights Agreement as a condition of the Board's approval of the CP-KCS Transaction.

¹⁷⁷ Amended Verified Statement of Michael R. McClellan.

- d. The proposed conditions are narrowly tailored and do not inhibit the ability of Applicants to achieve the claimed benefits of the CP-KCS Transaction.

The proposed conditions contained in this Amended Comment and the accompanying Amended Responsive Application are narrowly tailored to remedy the harm that would result if the CP-KCS Transaction were to proceed and, as such, do not prevent Applicants from achieving the benefits that they claim will result from the CP-KCS Transaction.¹⁷⁸

First, Applicants acknowledge the importance of NS-CPKC Gateways, including the Meridian Gateway, and the potential for adverse effects on competition resulting from the CP-KCS Transaction. They further commit to “keep all existing gateways open on commercially reasonable terms and create no new bottlenecks.”¹⁷⁹ As a result, Applicants already contemplate maintaining open gateways and therefore their ability to achieve the claimed benefits of the CP-KCS Transaction will not be impacted by NS’s request that the Board clarify Applicants’ commitments consistent with the Board’s decisions in the KCS-Tex Mex and CSX-Pan Am proceedings and impose those commitments as conditions on the CP-KCS Transaction.

Second, the contingent trackage rights requested by NS apply (i) ***only*** in the event that NS exercises the Wylie Option; (ii) ***only*** with respect to NS intermodal traffic moving between the Wylie Intermodal Terminal (at Wylie, TX) and the Meridian Speedway (at Shreveport, LA) on the Shreveport-Wylie Section, and (iii) ***only*** in the event of a Major Service Standard Failure over the Shreveport-Wylie Section. The trigger for the contingent trackage rights would be entirely within ***Applicants’*** control. In other words, the contingent trackage rights would not take effect unless and until CPKC itself fails to take actions, entirely within their control, to avoid the

¹⁷⁸ As noted supra note 6, while NS accepts certain assertions made in the Application for purposes of argument, such acceptance should not be an indication that NS accepts the arguments and evidence in the Application as accurate or complete.

¹⁷⁹ CP/KCS Application, Vol. I, at 16, 169.

harms identified that would give rise to a Major Service Standard Failure. The service standards that would trigger NS's requested contingent trackage rights are identical to KCSR's existing service obligations in the NSR Joint Use Agreement, which are obligations CPKC would inherit if the CP-KCS Transaction is approved. The rights NS seeks are narrowly crafted to apply only in the event a harm to the public interest occurs.

For these reasons, none of NS's proposed conditions impose any new burden on Applicants. Rather, the conditions merely serve as a more fulsome protection if Applicants fail to abide by their commitments in the Application with respect to gateways and their existing obligations under the Meridian Speedway Agreements. Even if there were some *de minimis* harm to Applicants as a result of the proposed conditions, the public interest considerations weigh in favor of NS's narrow conditions.

V. Conclusion

Although Applicants describe the CP-KCS Transaction as purely “end-to-end” such that “no shipper will face any reduction in competition,”¹⁸⁰ the underlying details of their Application convey a different picture—one that may lead to significant potential for harm to competition and the public interest with respect Applicants' post-merger actions around current NS-CPKC Gateways and with respect to the Meridian-Wylie Route. If Applicants follow the Amended Operating Plan that they have presented to the Board, there is a very real, imminent threat of harm to competition and the public interest that arises not only from the CP-KCS Transaction, but also from the way Applicants claim that they will operate following the CP-KCS Transaction. The Board must impose the narrowly tailored conditions requested by NS in order

¹⁸⁰ CP/KCS Application, Vol. I, at 20.

to ensure that the public's interest in competition is fully protected if the CP-KCS Transaction proceeds.

Appendix A: Comparison of Traffic Densities

Comparison of Year 3 Growth on Meridian-Wylie Route

	Amended Operating Plan			Original Operating Plan		
		3-Year (Total)			3-Year (Total)	
Segment	Base	MGTs	% Change	Base	MGTs	% Change
Wylie-Greenville	13.88	24.04	73%	17.73	26.25	48%
Greenville-Shreveport	12.94	20.92	62%	22.64	22.90	1%
Shreveport-Sibley	35.90	48.09	34%	54.66	52.77	-3%
Sibley-Gibbsland	34.41	46.09	34%	28.66	50.34	76%
Gibbsland-Monroe	36.51	48.77	34%	29.71	53.54	80%
Monroe-Vicksburg	29.88	39.40	32%	30.01	43.70	46%
Vicksburg-Jackson	29.64	38.22	29%	34.32	42.65	24%
Jackson-Newton	30.18	38.14	26%	32.26	39.60	23%
Newton-Meridian	26.59	36.09	36%	28.54	37.04	30%

Exhibit A

Amended Verified Statement of Claude E. “Ed” Elkins

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

**CANADIAN PACIFIC RAILWAY LIMITED, ET AL.
- CONTROL –
KANSAS CITY SOUTHERN, ET AL.**

**AMENDED COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY AND
REQUEST FOR CONDITIONS**

Amended Verified Statement of Claude E. “Ed” Elkins

My name is Ed Elkins. I am Executive Vice President and Chief Marketing Officer at Norfolk Southern Corporation (“NS”). I started working at NS as a Road Brakeman in 1988. Since then I have held positions throughout the company, including Director Intermodal Marketing; Group Vice President International Intermodal Marketing; Group Vice President Chemicals Marketing; and most recently Vice President – Industrial Products. I was appointed Executive Vice President & Chief Marketing Officer in December 2021. In my current role, I am responsible for oversight of NS’s marketing strategies and customer relations.

The purpose of my statement is to: (1) describe how NS competes for and earns intermodal business today, (2) address the likely negative effects of the CP-KCS Transaction on current NS intermodal customers, and (3) describe how conditions requested in NS’s Amended Comments and Request for Conditions mitigate the likely harm from the CP-KCS Transaction.

I. NS Intermodal Traffic Today

NS’s intermodal franchise is a strategically important component of our business value proposition and critically important to the movement of consumer goods across the United

States. NS's intermodal network is the most extensive in the eastern United States and as such is a key component of the nation's supply chain. Our intermodal franchise consists of shipments moving in domestic and international containers and trailers. We handle these shipments on behalf of intermodal marketing companies, international steamship lines, parcel carriers, and truckload service providers. NS works hard every day to make our intermodal product more efficient and predictable to deliver industry-leading service and value to our customers. To that end, NS has invested heavily in our network, including the more than \$300 million invested in the Meridian Speedway joint venture since the creation of the Meridian Speedway LLC in 2006 and additional investments of roughly \$340 million in intermodal facilities throughout the Southeast. In 2020, NS handled four (4) million intermodal units, accounting for 59% of NS's total volume, making intermodal the largest business group at NS by volume.

I am personally familiar with the competitive nature of intermodal freight. Intermodal customers make decisions every day as to whether to move their freight by rail or highway. In general, for a given origin and destination with substantial length of haul, over-the-road trucks are faster, but less efficient overall and more carbon-intensive. For longer routes, the efficiencies of rail tend to outweigh the speed of over-the-road trucks. The opposite is generally true on most short haul movements, particularly those of less than several hundred miles. For middle-distance routes, the intermodal shipper's decision to use highway or rail is highly sensitive to factors like time, cost, and consistency.

UPS, a significant user of intermodal rail services, has testified to many of the considerations intermodal customers make when selecting rail to move intermodal business: "The freight rail intermodal franchise provides UPS a safe, efficient, sustainable manner to move commercial vehicles off the highway as we transport both small packages and palletized freight

throughout the United States. . . . [T]he rail intermodal component is critical in helping to alleviate highway congestion, promote air quality, and mitigate highway infrastructure degradation. UPS works closely with all Class I freight railroads to maximize opportunities to move intermodal rail traffic, while balancing financial and time-in-transit constraints of rail transportation. Ultimately, if rail intermodal service levels fall below UPS time-in-transit obligation standards, we would have no business option but to move these containers and trailers back onto the highway, thus defeating the efficiency objectives of intermodal transportation, which would merely exacerbate current challenges (i.e., congestion, surface transportation, wear/tear, air quality standards) related to highway transportation.” UPS Comment, *Reciprocal Switching*, STB Ex Parte No. 711 (Sub-No. 1) at 1 (Oct. 26, 2016). In my experience, the considerations UPS highlighted in 2016 remain true today.

As I have already stated, NS has invested significantly in our intermodal service to compete and earn business from over-the-road alternatives. NS continuously develops its network operations and infrastructure to ensure that it has the capacity to meet the needs of our intermodal customers. For example, NS built and expanded major intermodal facilities in Atlanta, Charlotte, Harrisburg, Memphis, and Chicago – all important and growing hubs for intermodal traffic. In fact, earlier this year, NS announced that we have installed five new diesel-electric hybrid overhead gantry cranes—two at the Chicago Landers and three at Atlanta Inman intermodal terminals—which will save fuel and reduce emissions, while adding valuable capacity for our intermodal customers.

Similarly, the Meridian Speedway and NS’s investments into that line were key to delivering value to intermodal shippers and providing efficient and compelling alternatives to congested interstate roadways. Prior to the creation of the Meridian Speedway joint venture, the

service on the route was not consistent or capable of supporting significant intermodal traffic. However, because of NS's investments, the Meridian Speedway today is faster and more reliable, making it a popular option for intermodal shippers for the movement of intermodal goods. Intermodal traffic on the Meridian Speedway increased 340% from 2004 to 2021. Since its inception in 2006, the Meridian Speedway has delivered efficiency enhancements that have increased options for and improved the transportation experience for NS's intermodal customers.

This growth in intermodal shipments over the Meridian Speedway has primarily come from the highway as opposed to other rail routes. The connection from the Meridian Speedway to the Wylie Intermodal Terminal is a vital component of the value proposition that NS has worked hard to deliver for intermodal customers. It is a middle-distance route that runs between the southeastern United States and the Dallas-Fort Worth area using the Meridian-Wylie Route (which runs between the Meridian Gateway in Meridian, MS, across the Meridian Speedway to the Shreveport Gateway in Shreveport, LA, and across the KCS line (the "Shreveport-Wylie Section") to the Wylie Intermodal Terminal in Wylie, Texas). Indeed, the Meridian-Wylie Route is critical to NS's intermodal customers who rely on the direct connection between the southeastern United States and key Texas markets for the movement of their goods. In 2021, the Meridian-Wylie Route represented [REDACTED] of NS's traffic on the Meridian Speedway.

II. Effects of the CP-KCS Transaction

I understand that the Applicants estimate that the CP-KCS Transaction would lead to a transaction-specific increase in traffic moving over the Shreveport-Wylie Section of over 50% and a transaction-specific increase in traffic that would exceed the capacity at the Wylie Intermodal Terminal. The result of this proposal is likely to have a direct negative impact on NS's intermodal customers.

The intermodal traffic that moves over the Meridian-Wylie Route is highly sensitive to changes in service levels. In his Amended Verified Statement, Michael R. McClellan describes how, from the operations perspective, service over the Meridian-Wylie Route would degrade because of the Applicants' planned use of the Shreveport-Wylie Section and the Wylie Intermodal Terminal. From the marketing perspective, I can say the operational issues would translate to harm to NS intermodal customers, many of whom rely on fast, reliable service, are likely to divert their shipments to U.S. highways. As a result, if the CP-KCS Transaction is approved without the conditions NS is requesting, I expect a significant volume of intermodal traffic will divert from rail to the highway.

III. The Contingent Trackage Rights and Gateway Conditions That NS Is Requesting Are Necessary to Mitigate Harm to Intermodal Shippers.

The conditions that NS is requesting are necessary to mitigate likely CP-KCS Transaction-caused harm to intermodal customers transporting traffic across the Meridian-Wylie Route. NS's request for contingent trackage rights between Shreveport, LA and Wylie, TX ensures that service will not be degraded on the line as a result of the CP-KCS Transaction and intermodal shippers are not diverted to less safe, less environmentally sustainable, highway service. Following regulatory approval of the CP-KCS Transaction—if granted—intermodal traffic will either receive from CPKC the same effective service between Meridian and Wylie it receives today, or in the event NS exercises its option at the Wylie Intermodal Terminal, the NS trackage rights will kick in so that NS can step in and make that happen.

In addition, NS's request that the Board impose the Applicants' gateway commitments as a condition to the approval of the CP-KCS Transaction is critical to ensure that NS-CPKC Gateways¹ remain fully and effectively open in the same way that they are operated today by CP

¹ The term NS-CPKC Gateways refers to all existing gateways between NS and KCS and between NS and CP.

and KCS independently. This in turn preserves options for intermodal shippers, including NS intermodal customers, and avoids the harm described in the Amended Verified Statements of Professor John Mayo and Michael R. McClellan.

In all, NS's requested conditions, if imposed, would allow intermodal customers, U.S. consumers, and the public interest, to continue benefitting from NS's dedicated investments in the Meridian Speedway that have resulted in fast and reliable southern corridor service.

Verification

I, Claude E. “Ed” Elkins, Executive Vice President and Chief Marketing Officer at Norfolk Southern Corporation, verify under penalty of perjury that I have read the foregoing document and know its contents, and that the same is true and correct to the best of my knowledge and belief.

Executed this 9th day of June, 2022.

A handwritten signature in black ink, appearing to read "Claude E. Elkins", written in a cursive style.

Claude E. “Ed” Elkins

Exhibit B
Amended Verified Statement of Michael R. McClellan

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

**CANADIAN PACIFIC RAILWAY LIMITED, ET AL.
- CONTROL -
KANSAS CITY SOUTHERN, ET AL.**

**AMENDED COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY AND
REQUEST FOR CONDITIONS**

Amended Verified Statement of Michael R. McClellan**I. Introduction and Background**

My name is Michael R. McClellan and I am Senior Vice President and Chief Strategy Officer at Norfolk Southern Corporation (“NS”). I have 36 years of experience in the freight rail industry. I hold a Bachelor’s Degree in Foreign Affairs and Economics from the University of Virginia and a Masters of Business Administration from the University of Cincinnati.

I began my career at Conrail in 1986 in various commercial and planning positions. In 1996, I went to work for the Transportation Practice of Ernst & Young. In 1998, I returned to the rail industry as Assistant Vice President of Planning in the Intermodal group at NS. In 2000, I was promoted to the Vice President of Intermodal where I ran, among other things, NS’s intermodal and trucking business for almost 14 years until mid-2013. During this period, I wrote the business plan for NS’s investment in the Meridian Speedway and was one of the chief negotiators of this transaction with the Kansas City Southern Railway (“KCS”).

In 2013, I became Vice President of Industrial Products and, in 2018, I assumed responsibility for NS’s Strategic Planning group. In my role as Chief Strategy Officer, I am responsible for oversight of NS’s strategic planning initiatives, including strategic acquisitions

and divestitures. As it relates to the CP-KCS Transaction, unless the STB grants the conditions requested by NS in this Amended Comments and Request for Conditions and the accompanying Amended Responsive Application, NS opposes the proposed acquisition of KCS by Canadian Pacific (“CP”). In this statement, I review the strategic importance of the Meridian Speedway to NS and explain why the Applicants’ Amended Operating Plan puts NS operations at NS-CPKC Gateways¹ and over the Meridian-Wylie Route, including the Meridian Speedway and into the Wylie Intermodal Terminal, at risk.

II. The Meridian Speedway is a Highly Efficient Route That Was Revitalized by the Meridian Speedway Joint Venture

In 2004, NS had approximately {{ [REDACTED] }} intermodal loads that traversed the route between Meridian, MS, and Shreveport, LA. The route provided an efficient East-West connection, but it was in need of significant repair and service concerns by KCS’ and NS’ mutual shippers on this route were becoming more acute. NS and KCS formed a joint venture in 2006, the Meridian Speedway LLC (“MSLLC”), to revitalize the route between Meridian, MS, and Shreveport, LA, which is known as the “Meridian Speedway.”

Over the past sixteen years, the Meridian Speedway joint venture has promoted growth and competition in the region, both in terms of rail-to-rail and rail-to-highway. In that time, NS invested more than \$300 million into the Meridian Speedway LLC, with the great bulk of that investment going directly into improvements into the track and infrastructure. As a result of this direct investment into the MSLLC and the Meridian Speedway, as well as other initiatives, the Meridian Speedway route became one of NS’s most highly trafficked East-West connections and one of the most competitive rail routes created this century. Speed and service both improved over the Meridian Speedway, and, as a result, intermodal shippers increasingly use the route to

¹ The term NS-CPKC Gateways refers to all existing gateways between NS and KCS and between NS and CP.

transport freight between the Southeast and Southwest United States. In 2021, for example, NS had over {{ [REDACTED] }} intermodal revenue moves over the Meridian Speedway, a 340% increase since the inception of the MSLLC joint venture, and over {{ [REDACTED] }} total moves over the Meridian Speedway. Today, almost 10% of NS's entire intermodal book of business moves over the Meridian Speedway.

The Meridian Speedway is operated by KCS's subsidiary, Kansas City Southern Railway ("KCSR"). KCSR provides haulage for certain categories of NS traffic and provides interline service for others. NS is reliant on KCSR for dispatching NS traffic moving over the Meridian Speedway.

Recognizing that NS would be reliant on KCSR for its traffic over the Meridian Speedway, and with recognition of NS's significant investment into the Meridian Speedway, NS and KCS negotiated certain service standards for NS traffic. For example, in the relevant Meridian Speedway transaction agreements, KCS granted NS certain contingent trackage rights that would be exercisable in the event of a significant service disruption ("Major Service Standard Failure"). In essence, KCS is obligated to move NS traffic over the Meridian Speedway within a certain amount of time. {{ [REDACTED] }}

[[[REDACTED]]}]. These contingent trackage rights protect NS's investment in the Meridian Speedway, kicking in, for example, in the event KCSR degrades service to NS's traffic over the route.

Because shippers rely on efficient and reliable transport via the Meridian Speedway, it is essential that the Meridian Speedway and its gateways of Meridian, MS and Shreveport, LA remain open and that NS traffic is not degraded in this important corridor. This concern is

especially true for intermodal traffic destined for or coming from the Dallas-Fort Worth area. NS and KCS also interchange roughly {{ [REDACTED] }} merchandise (non-intermodal) revenue loads at the Meridian Gateway, which traverse the Meridian Speedway. Currently {{ [REDACTED] }} of NS's intermodal business to and from the Dallas-Fort Worth area with origin or destination at Atlanta, GA, Charlotte, NC, or Jacksonville, FL traverses the Meridian Speedway over the Meridian Gateway. In total, {{ [REDACTED] }} of the traffic interchanged with KCS goes through the Meridian Gateway.

III. The Meridian-Wylie Route Is a Highly Efficient Option for Intermodal Shippers

The Wylie Intermodal Terminal is an intermodal facility currently owned by KCS that is located in Wylie, TX (a Dallas suburb). In addition to its role as operator of the Meridian Speedway, KCS is the current owner and operator of the Wylie Intermodal Terminal, as well as current operator of the rail line between Wylie, TX and Shreveport, LA connecting to the Meridian Speedway ("Shreveport-Wylie Section"). As the operator of the Wylie Intermodal Terminal, KCS manages all aspects of terminal operations. This includes which gates to preference and how trains are loaded and unloaded. In connection with the formation of the MSLLC, KCS granted NS an option to purchase an intermodal facility in the vicinity of Dallas, TX, which is now the Wylie Intermodal Terminal (the "Wylie Option"). The Wylie Option will become exercisable in 2024 (the 18th anniversary of the formation of the MSLLC).

Together, the Meridian Gateway, Meridian Speedway, the Shreveport-Wylie Section, and Wylie Intermodal Terminal create an efficient and reliable route for intermodal shippers moving traffic between the Southeast and the Dallas-Fort Worth metro area (the "Meridian-Wylie Route"). This traffic includes intermodal business that moves between the Wylie Intermodal Terminal and multiple NS and Florida East Coast Railway ("FEC") terminals in the Southeast

and Northeast (“DFW Intermodal”). Total moves in the DFW Intermodal segment are approaching {{ [REDACTED] }} revenue moves per year. The Meridian-Wylie Route has grown significantly in the past two years, which is a testament to the efficiency of the route. In 2019, NS had at least {{ [REDACTED] }} lifts at the Wylie Intermodal Terminal.² That number grew to at least {{ [REDACTED] }} in 2021, an increase of roughly 28%.

Currently [REDACTED] of NS’s intermodal freight that traverses the Meridian Speedway is handled at the Wylie Intermodal Terminal. If service on the Shreveport-Wylie Section is degraded or the Wylie Intermodal Terminal usage exceeds its capacity as a result of the CP-KCS Transaction, the intermodal service over the entire Meridian-Wylie Route will become less competitive.

IV. The Impact of Applicants’ Amended Operating Plan

The Amended Operating Plan identifies changes resulting from the CP-KCS Transaction that pose significant risks to NS’s ability to both continue serving current customers at NS-CPKC Gateways and over the Meridian-Wylie Route and serving additional customers in the future.

First, the Amended Operating Plan has the potential to effectively eliminate routes where NS is dependent on current CP or KCS Gateways, including the Meridian Gateway.

Second, there are a combination of operational changes identified in the Amended Operating Plan impacting the Meridian-Wylie Route, including:

² NS estimates that, on average, a revenue move can require up to 10% additional lifts. Annual lift estimates are based on a 360-day operating year.

Increase in Traffic on the Shreveport-Wylie Section: Table 1 below shows that

Applicants plan to increase traffic on the Shreveport-Wylie Section by an average of 53% on top of the growth that would occur absent the CP-KCS Transaction.³

Table 1: Summary of Applicants' Operating Plan over the Meridian-Wylie Route⁴

		3-Year (Organic)		3-Year (Synergies)		3-Year (Total)	
Segment	Base	MGTs	% Change	MGTs	% Change	MGTs	% Change
Wylie-Greenville	13.88	15.86	14%	22.06	59%	24.04	73%
Greenville-Shreveport	12.94	14.94	16%	18.91	46%	20.92	62%
Shreveport-Sibley	35.90	41.91	17%	42.07	17%	48.09	34%
Sibley-Gibbsland	34.41	40.18	17%	40.32	17%	46.09	34%
Gibbsland-Monroe	36.51	42.66	17%	42.62	17%	48.77	34%
Monroe-Vicksburg	29.88	34.95	17%	34.33	15%	39.40	32%
Vicksburg-Jackson	29.64	34.75	17%	33.11	12%	38.22	29%
Jackson-Newton	30.18	35.40	17%	32.92	9%	38.14	26%
Newton-Meridian	26.59	31.04	17%	31.63	19%	36.09	36%

Train Reconfigurations Mixing Intermodal and Merchandise Traffic: Appendix H of the Amended Operating Plan shows Applicants' optimized plan train changes. The "Meridian to Shreveport/Wylie" section shows that Applicants plan to mix merchandise traffic with an existing intermodal train that handles traffic on the Meridian-Wylie Route. Today, these trains operate separately. I-DAAT2 is the train symbol for an intermodal train that operates eastbound from Wylie to Meridian, and I-ATDA2 is the train symbol for an intermodal train that operates westbound from Meridian to Wylie. Applicants plan to add current manifest traffic with the existing intermodal traffic.⁵ In particular, Applicants plan to operate train 166 combining the eastbound intermodal train I-DAAT2 with manifest traffic currently handled on the trains with

³ Table 1 shows a 59% increase on the Wylie-Greenville segment and a 46% increase on the Greenville-Shreveport segment, which is an average transaction-specific increase of 53% on the Shreveport-Wylie Section.

⁴ Amended Operating Plan (CP-47, KCS-34) (filed May 13, 2022).

⁵ *Id.*, Appendix H at 2.

the current train symbols M-DASH, M-SHJAB, and M-JANS.⁶ Applicants plan to operate train 167 combining the westbound intermodal train I-ATDA2 with manifest traffic as well.

Increase in Traffic Without a Corresponding Increase in Capacity at the Wylie Intermodal Terminal: The Wylie Intermodal Terminal has an annual capacity of 342,000 lifts. In 2019, the Wylie Intermodal Terminal handled 203,040 lifts, which included at least {{ [REDACTED] }} lifts for NS traffic and {{ [REDACTED] }} lifts for other KCS traffic.⁷ Applicants plan to add 292 daily lifts at the Wylie Intermodal Terminal to handle additional CPKC traffic, which is equivalent to 105,120 additional lifts per year.⁸

V. Serious Competitive Harm Is Likely to Result From the CP-KCS Transaction

Applicants' Amended Operating Plan illustrates two potential harms to NS shippers using NS-CPKC Gateways and/or the Meridian-Wylie Route. First, without effective gateway protections imposed by the Board, the CP-KCS Transaction has the potential to effectively eliminate routes where NS is dependent on current KCS gateways, including the Meridian Gateway. If the combined CPKC pursues lengthening hauls instead of protecting the most efficient gateways, then non-intermodal traffic on these routes may be diverted to more circuitous CPKC routes and intermodal traffic could be diverted to trucks or longer rail routes. The resulting routes, which in many cases would lead to a Chicago gateway, would be far more circuitous than existing routes that travel via gateways such as Meridian. This circuituity could add

⁶ *Id.*

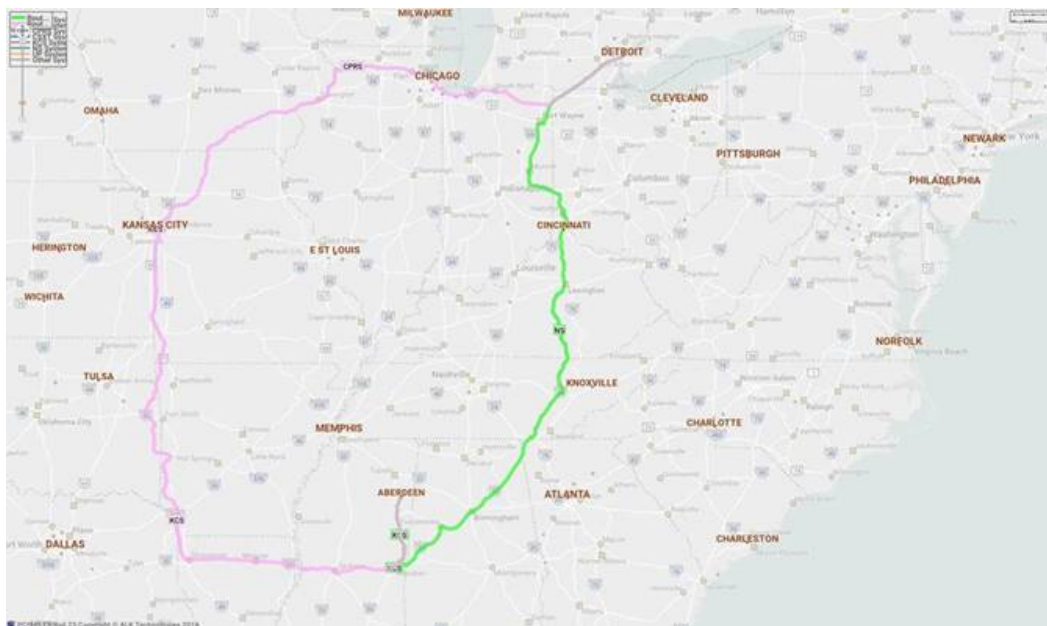
⁷ CP/KCS Application, Vol. II. at 345. Annual lifts are based on 360 operating days per year. {{ [REDACTED] }}

⁸ *Id.*

hundreds of additional miles, while also causing potentially costly and burdensome delays in Chicago. To illustrate how this could occur, consider:

- Aberdeen, MS to Detroit, MI: This involves a large northbound move that is currently served over the Meridian Gateway moving KCS-NS. Combined, this route traverses 1,071 rail miles. If CPKC attempts to maximize their length of haul, they may divert this route through Chicago using an alternate Kansas City to Chicago route. This route covers 1,770 rail miles, almost 700 miles longer than the current, efficient route, as shown below.

Exhibit 1: Alternate Aberdeen-Detroit Route



- Coldwater, MI to Norco, LA: This is a large southbound move currently served over the New Orleans gateway by NS and KCS. Combined this route traverses 1,150 rail miles. If CPKC wished to maximize their length of haul, they might also attempt to establish a Chicago gateway on this freight through Kansas City

and Chicago. Such a route would cover 1,510 rail miles, 30% longer than the current route.

What these examples make clear is the need to ensure that NS-CPKC Gateways, especially at Meridian, MS, remain open and viable. In fact, a diversion of just these two moves to a Chicago gateway would add over 100 million ton-miles to the movement of this volume. If CPKC diverts traffic to single-line service to gain a longer length of haul, the result would be longer, less efficient routes that generate significantly more environmental harm. This would harm shippers that rely today on NS for reliable efficient transport nationwide.

Second, the CP-KCS Transaction has the unique potential to harm shippers that rely on NS intermodal service on the Meridian-Wylie Route. The Amended Operating Plan identifies a combination of operational changes that would degrade the quality of the Meridian-Wylie Route for intermodal shippers who demand fast, reliable service.

- a. Mixing intermodal traffic and merchandise traffic can add significant delay due to the additional handlings required by merchandise traffic.

As discussed above, the optimized train plan in the Amended Operating Plan envisions mixing KCS merchandise traffic with NS's intermodal traffic over the Meridian-Wylie Route. Merchandise traffic requires additional handlings that existing intermodal trains do not, sometimes increasing transit time by as much as a full 24 hours to reconfigure a mixed train. These additional handlings threaten to cause significant delays to the intermodal traffic not experienced today. The additional handlings and added time would undermine the efficacy of the route for NS and in particular NS intermodal service that traverses the entire Meridian-Wylie Route, and thereby harming the important intermodal customers who have come to rely on that service.

- b. Post-CP-KCS Transaction, the combined CPKC will be incentivized to prioritize their own traffic over NS traffic at the Wylie Intermodal Terminal.

For CP and KCS to accomplish the goals established in the Amended Operating Plan, a combined CPKC would have the incentive to preference their own shipments from, to, and through the Wylie Intermodal Terminal. For example, if there are time-sensitive containers that must depart from the Wylie Intermodal Terminal, CPKC could prioritize its traffic for lifts, set-offs, drayage and other services, ahead of NS traffic.

- c. The Amended Operating Plan requires Applicants to exceed the capacity at the Wylie Intermodal Terminal.

Based on 2019 data and projected increases in the Amended Operating Plan, Applicants plan to use {{ [REDACTED] }} of the 342,000 possible annual lifts for CPKC traffic. Including the lifts that NS used in 2019, the Amended Operating Plan would require 308,160 (90% of stated capacity). The problem, however, is that Applicants' plan fails to account for the growth in NS's intermodal traffic at the Wylie Intermodal Terminal since 2019.

In 2021, NS intermodal traffic accounted for at least {{ [REDACTED] }} lifts out of the 342,000 possible lifts at the Wylie Intermodal Terminal. Applicants' Amended Operating Plan requires {{ [REDACTED] }} for CPKC traffic, which would bring the total lifts to {{ [REDACTED] }} (roughly {{ [REDACTED] }} lifts beyond the 342,000 annual lift capacity). Applicants have no plan to handle the additional {{ [REDACTED] }} lifts beyond the Wylie Intermodal Terminal's capacity.

VI. Conclusion

Without the narrowly tailored conditions requested by NS, there is a real threat that shippers who rely on NS-CPKC Gateways and the Meridian-Wylie Route would be forced to less efficient and more circuitous routes and significant volumes of intermodal rail traffic would be forced to the highways. Accordingly, unless the Board imposes NS's requested conditions, NS opposes the CP-KCS Transaction.

Verification

I, Michael McClellan, Senior Vice President of Strategic Planning and Chief Strategy Officer at Norfolk Southern Corporation, verify under penalty of perjury that I have read the foregoing document and know its contents, and that the same is true and correct to the best of my knowledge and belief.

Executed this 9th day of June, 2022.

A handwritten signature in black ink, appearing to read "M. McClellan", is centered within a light gray rectangular box.

Michael McClellan

Exhibit C

Amended Verified Statement of Professor John Mayo, Ph.D.

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET No. 36500

**CANADIAN PACIFIC RAILWAY LIMITED, *ET AL.* – CONTROL – KANSAS CITY
SOUTHERN, *ET AL.***

AMENDED VERIFIED STATEMENT OF JOHN W. MAYO

JUNE 9, 2022

PUBLIC

TABLE OF CONTENTS

I.	INTRODUCTION	2
A.	Qualifications	2
B.	Assignment	3
C.	Summary of Findings.....	3
D.	Materials Considered	5
II.	BACKGROUND	5
A.	The Proposed Transaction.....	5
B.	The Economics of Mergers	7
C.	Standards of Evaluation	7
III.	ECONOMIC EVALUATION OF THE COMPETITIVE EFFECTS OF THE PROPOSED CP/KCS MERGER.....	10
A.	Overview	10
B.	The Economic Effects of the CP/KCS Merger	11
	1. Theory	11
	2. Analysis.....	18
IV.	PRESERVING COMPETITION TODAY AND IN THE FUTURE	30
A.	The Potential to Improve Resource Allocation through Merger Conditions	30
B.	Specific Merger Conditions to Preserve Competition	31
V.	CONCLUSION.....	32
VI.	APPENDIX.....	33
A.	Overview	33
B.	Identifying Circuitous Routes	33
	1. Calculating Potential CPKC SLS Route Distances	34
	2. Calculating Shortest Rail Routes between O-D Pairs.....	35
C.	Analysis.....	36

I. INTRODUCTION

A. Qualifications

1. My name is John W. Mayo. My business address is Georgetown University, McDonough School of Business, 37th and O Streets, N.W., Washington D.C. 20057.
2. I am the Elsa Carlson McDonough Chair of Business Administration and Professor of Economics, Business and Public Policy in Georgetown University's McDonough School of Business. I am also the Executive Director of the Georgetown Center for Business and Public Policy. I have held numerous leadership positions in the University, including Dean of the McDonough School. I have also been an invited Visiting Scholar at Stanford University and the University of California, Berkeley.
3. I hold a Ph.D. in economics from Washington University in St. Louis with a concentration in industrial organization, which includes the analysis of antitrust and regulation. I have authored numerous peer-reviewed articles, research monographs, and a comprehensive text entitled *Government and Business: the Economics of Antitrust and Regulation*. I am currently serving in editorial capacities for the *Journal of Regulatory Economics*, *Economic Inquiry* and the *Review of Industrial Organization*.
4. Over the course of my career, I have studied numerous industries, including the freight rail industry. I have written or co-authored several articles and book chapters related to the economics and regulation of the freight rail industry, and recently co-edited a book *U.S. Freight Rail Economics and Policy: Are We on the Right Track?* (Routledge, 2019). In 2015, I testified in Hearings on the 35th Anniversary of the Staggers Act held before the U.S. House of Representatives Subcommittee on Railroads, Pipelines and Hazardous Materials; in 2016, I

participated in the InterVISTAS/SAC Roundtable proceedings before the Surface Transportation Board (STB).

5. A copy of my CV is attached as **Exhibit 1**.

B. Assignment

6. Canadian Pacific Railway Limited¹ (“CP”) has proposed to acquire Kansas City Southern² (“KCS”; together with CP, the “Applicants”) and to merge KCS and its route system into that of CP’s, resulting in a combined and integrated “CPKC” rail system. I have been asked by Norfolk Southern Railway Company (“NS”) to consider the economic merits of the proposed merger.

C. Summary of Findings

7. Both theoretical and empirical scrutiny by economists has demonstrated that mergers may either promote or harm economic welfare. Although horizontal mergers receive the most attention, modern economics analysis indicates that vertical mergers may, depending on the particular features of the merger, harm competition. This conclusion is embodied in the 2020 Vertical Merger Guidelines.³

¹ Canadian Pacific refers to Canadian Pacific Railway Limited, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc.

² Kansas City Southern refers to Kansas City Southern and its U.S. rail carrier subsidiaries The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company. (hereinafter “KCS”).

³ U.S. Department of Justice and the Federal Trade Commission, “Vertical Merger Guidelines,” June 30, 2020 (“Vertical Merger Guidelines”), at p. 2, available at <https://www.justice.gov/atr/page/file/1290686/download>.

8. Against this backdrop, the Applicants’ application offers unqualified assessments that their proposed merger raises no concerns regarding harm to competition—simply because it is a vertical merger. Similarly, the Applicants’ economist’s analysis, relying on a particular—not general—economic theory sometimes referred to as the “one-lump theory,” quickly dismisses the possibility that the proposed merger could alter either the incentives or ability of the merged firm to harm competition in the wake of the merger. These back-of-the hand dismissals of concerns regarding post-merger competition are unwarranted. Rather than summarily dismissing concerns regarding post-merger conduct, policymakers are well-served to engage in fact-specific analyses and, where problems are indicated, to act accordingly.

9. Economic scrutiny of the specific merger proposed by the Applicants indicates that the industry will be substantially restructured by the merger of CP and KCS. Of particular note, the merger will create the potential for many CPKC single line service routes along which other railroads currently provide interline service with the merging parties. Absent adequate safeguards, such interlining competitors—and the competition they create—are put in jeopardy by the merger.

10. Focusing on NS traffic and routes as illustrative, I find that the proposed merger reveals two principal areas that threaten harm to competition. First, NS traffic that moves between an intermodal terminal at Wylie, Texas and Meridian, MS (the “Meridian-Wylie Route”) along a route that includes the so-called Meridian Speedway,⁴ is vulnerable to post-merger harm in the absence of safeguards. Second, and more generally, gateway traffic between

⁴ The “Meridian Speedway” is a route owned and controlled by Meridian Speedway, LLC (“MSLLC”) that stretches between a connection with NS in Meridian, MS and a connection with a line currently owned and controlled by KCS in Shreveport, LA. *See*, KCSR-HCS 00013177-227, at 180. *See also*, <https://www.progressiverailroading.com/intermodal/article/Intermodal-Texas-style-Kansas-City-Southern-set-to-replace-cramped-Dallas-terminal-with-large-Wylie-hub--44477> (viewed February 21, 2022).

NS and CPKC is susceptible to degradation of competition in the wake of the merger. The potential for such competitive back-sliding also necessitates the imposition of competitive safeguards if the proposed CP/KCS merger is to be approved.

D. Materials Considered

11. In forming my opinions, I have reviewed documents and other materials provided to me by counsel for NS or obtained from public sources. The sources on which I rely are identified in this report and the accompanying exhibits or listed in the attached **Exhibit 2**.

12. I understand that discovery is ongoing. Should additional relevant documents or information be made available to me, I may adjust or supplement my opinions as appropriate.

II. BACKGROUND

A. The Proposed Transaction

13. On September 15, 2021, CP and KCS announced a merger agreement, under which CP would acquire KCS in a stock and cash transaction, representing an enterprise value of approximately \$31 billion and a premium of 34 percent above KCS's closing stock price on March 19, 2021.⁵ The transaction, if approved, would represent the first major railroad merger in more than two decades.

14. CP owns and operates a freight railway spanning approximately 13,000 miles in Canada and the United States Northeast and Midwest regions.⁶ In 2020, CP reported total

⁵ <https://futureforfreight.com/canadian-pacific-and-kansas-city-southern-execute-agreement-to-combine-creating-first-single-line-rail-network-linking-u-s-mexico-canada/> (viewed February 20, 2022).

⁶ Canadian Pacific 2020 Annual Report, at p. 26.

revenues of \$6.1 billion, making it the second smallest of seven Class I railroads by revenues.⁷

KCS is a transportation holding company with two primary subsidiaries: The Kansas City Southern Railway Company, a U.S. Class I railroad, and Kansas City Southern de México, S.A. de C.V, which operates a key commercial corridor of the Mexican railroad system.⁸ The KCS network consists of approximately 7,100 route miles connecting the Midwest and Southeast regions of the U.S. to Mexico.⁹ In 2020, KCS's total revenues were \$2.6 billion, making it the smallest Class I railroad by revenue.¹⁰

15. According to the joint control application, the proposed transaction will “combine America’s two smallest but fastest-growing Class I railroads” and “build a more efficient and competitive rail network” that “advanc[es] the interests of [] current and future customers.”¹¹ In addition, the merger will create new single line services connecting Canada to Mexico, becoming the first railway to traverse the three North American countries. U.S. points north of Kansas City will also receive new single line service to Mexico. The Applicants have argued that the merger will also generate environmental benefits, improve rail service and safety, and enhance competition among Class I railroads, particularly along North-South corridors.¹² According to the Application, CP and KCS connect at only a single point (Kansas City) and

⁷ Canadian Pacific 2020 Annual Report, at p. 58; <https://www.morningstar.com/stocks/xnys/cp/quote> (viewed February 22, 2022). Converted from CAD \$7.7 billion. <https://www.x-rates.com/historical/?from=CAD&amount=7710&date=2022-01-18> (viewed February 20, 2022).

⁸ Kansas City Southern 2020 Annual Report, at p. 3.

⁹ Kansas City Southern 2020 Annual Report, at p. 3.

¹⁰ Kansas City Southern 2020 Annual Report, at p. 55; <https://www.statista.com/statistics/271613/leading-north-american-railroad-companies-based-on-revenue/> (viewed February 25, 2022).

¹¹ Canadian Pacific Railway Limited et al. – Control – Kansas City Southern Railroad et al., Control Application, Finance Docket No. 36500, October 29, 2021 (“The Application”) at p. 15.

¹² The Application, at p. 16.

operate no parallel lines.¹³ As such, the Applicants contend that the merger is vertical and have committed to keeping all existing gateways “open on commercially reasonable terms.”¹⁴

B. The Economics of Mergers

16. At the most general level, mergers represent a transfer of the ownership of assets from one party to another. The potential value of that sale for the merging parties may arise from either efficiencies the merger will create (at least in an expected value sense) or enhanced pricing control that permits the newly-merged firm to convert consumer surplus into profits. Such mergers are of interest not only to the merging parties, but also to competitors, consumers, and, more generally, the public.

17. Considerable theoretical and empirical scrutiny by economists has demonstrated that mergers may either promote or harm economic welfare. Consequently, specific and detailed analysis of each individual merger proposal is necessary to determine its effects on economic welfare.

C. Standards of Evaluation

18. For mergers occurring generally in the United States, Section 7 of the Clayton Act provides a standard which prohibits mergers “when the effect ‘may be substantially to lessen competition, or to tend to create a monopoly.’”¹⁵ A rich case law, informed by economic

¹³ The Application, at p. 11. I understand that Canadian National (“CN”) is seeking a divestiture of KCS lines from Kansas City, Missouri to Springfield, Illinois (the “Springfield Line”) which CN argues is parallel to CP’s mainline between Chicago and Kansas City. *See*, Canadian Pacific Railway Limited et al. – Control – Kansas City Southern Railroad et al., Description of Anticipated Responsive Application, Finance Docket No. 36500, January 12, 2022, at pp. 1-2.

¹⁴ The Application, at p. 16.

¹⁵ <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers> (viewed January 18, 2022).

analysis, has developed around this standard and provided a robust guide for the evaluation of mergers. In most industries the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”)¹⁶ review proposed transactions, assessing the likely effects of a transaction before deciding whether to challenge it.¹⁷ For both vertical and horizontal mergers, the two agencies are concerned with harm to competition, rather than to competitors.¹⁸ The aim is to halt the accumulation of market power in its incipiency. Importantly, the burden is on the agencies to prove that a merger is likely to lessen competition.¹⁹

19. Mergers between railroads, however, are afforded special oversight by the U.S. Surface Transportation Board (“STB”). The Staggers Act of 1980 mandated that the Interstate Commerce Commission approve mergers that advance the public interest.²⁰ In June 2001, the STB decided on new standards for Class I mergers. The STB decided that it would “require merger applicants to bear a heavier burden in showing that a major merger proposal is in the public interest.”²¹ In its updated merger guidelines, the STB re-defines the public interest such that applicants not only need to demonstrate that a merger does not harm competition, but also

¹⁶ I refer to the DOJ and FTC jointly as “the Agencies.”

¹⁷ <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers> (viewed January 18, 2022); <https://uk.practicallaw.thomsonreuters.com/5-501-2849> (viewed February 21, 2022). *See also*, 15 U.S. Code § 18a, available at <https://www.law.cornell.edu/uscode/text/15/18a> (viewed February 21, 2022).

¹⁸ Vertical Merger Guidelines, at p. 2.

¹⁹ Gavil, Andrew I., “Burden of Proof in U.S. Antitrust Law,” *Issues in Competition Law and Policy (ABA Section of Antitrust Law)*, Vol. 1 (2008): 125-157, at pp. 125, 149.

²⁰ <https://www.sec.gov/Archives/edgar/data/16875/000119312516449375/d78061dex991.htm> (viewed February 25, 2022).

²¹ Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1), June 11, 2001 (“2001 Major Rail Consolidation Procedures,”), at p. 11.

demonstrate how the merger would enhance competition.²² These guidelines differentiate the antitrust policies of the rail industry from other industries in which the DOJ and/or the FTC are involved; namely, in Class I merger proceedings heard before the STB, the burden is on the applicants to demonstrate the tangible benefits and potential harms of the merger.²³

20. The STB's 2001 update to its Class I merger regulations included a waiver provision that allows the STB to apply the pre-2001 rules to a particular set of Class I applicants, meaning that applicants only need to demonstrate that merger is not harmful to competition rather than enhancing competition.²⁴ Specifically, a waiver to the post-2001 merger rules are applied to any "consolidation involving The Kansas City Southern Railway Company and another Class I railroad" unless the STB is shown why such a waiver should not be allowed.²⁵ On April 23, 2021, the STB ruled that this waiver provision would be applied to the CP/KCS merger.²⁶

²² 2001 Major Rail Consolidation Procedures, at pp. 12, 27 ("To offset such potential [anticompetitive] harms and improve the prospect that their proposal would be found to be in the public interest, applicants should propose conditions that would not simply preserve but also enhance competition.").

²³ 2001 Major Rail Consolidation Procedures, at 54 ("The new policy and rules we are adopting here reflect these objectives in several ways. They significantly increase the burden on applicants to demonstrate that a proposed transaction would be in the public interest...").

²⁴ 49 C.F.R. § 1180.0(b), available at <https://www.law.cornell.edu/cfr/text/49/1180.0> (viewed February 25, 2021).

²⁵ 2001 Major Rail Consolidation Procedures, at p. 39.

²⁶ See, Canadian Pacific Railway Limited et al. – Control – Kansas City Southern Railroad et al., Decision No. 4, Finance Docket No. 36500, April 23, 2021, slip op. at 2-3; 49 C.F.R. § 1180.0(b), available at <https://www.law.cornell.edu/cfr/text/49/1180.0> (viewed February 25, 2021).

III. ECONOMIC EVALUATION OF THE COMPETITIVE EFFECTS OF THE PROPOSED CP/KCS MERGER

A. Overview

21. Economic theory indicates, at the highest level, that mergers may improve economic welfare (through, for instance, enhanced economic efficiencies) or harm economic welfare (through, for instance, enhanced market power). The obvious public policy implications of this theory are to approve the former mergers and deny the latter mergers.²⁷ Economic theory, however, admits the potential for the more nettlesome case in which a merger both enhances economic efficiencies and market power. In this situation, policy evaluations become more challenging.²⁸

22. Legal evaluation extends to both horizontal mergers (those that combine assets involved in competing activities) and vertical mergers (those that combine assets that operate at different levels in the value chain).²⁹ Economic evaluation of mergers also varies depending on whether the merger in question is horizontal or vertical.³⁰ In the case at hand, the proposed merger between CP and KCS is largely, if not entirely, vertical. As described by the Applicants,

²⁷ This conclusion is driven by my exclusive focus on the competitive effect of the proposed merger. For the balance of my statement, I assume that factors which may be considered by the STB beyond the proposed merger's competition effects, such as the environmental effects of the merger, are, on balance neutral.

²⁸ For a conceptual framework for evaluating vertical mergers involving both economic efficiencies and heightened market power, see, Mayo, John W. and Mark Whitener, "The Welfare Effects of Vertical Mergers and their Remedies," *Review of Industrial Organization*, Vol. 59, No. 2 (2021): 409-441; for the seminal contribution addressing the case of horizontal mergers, see, Williamson, Oliver E., "Allocative Efficiency and the Limits of Antitrust," *American Economic Review*, Vol. 59, No. 2 (1969): 15-118.

²⁹ Gaughan, Patrick A., *Mergers, Acquisitions, & Corporate Restructurings*, Seventh Edition, John Wiley & Sons, 2018, at p. 13. For a recent horizontal merger case, see, *United States of America v. AB Electrolux, Electrolux North America, Inc., and General Electric Company*, Complaint, July 1, 2015; for a recent vertical merger case, see, *United States of America v. AT&T INC., et al.*, Memorandum Opinion, June 12, 2018.

³⁰ Vertical Merger Guidelines, at p. 2; U.S. Department of Justice and the Federal Trade Commission, "Horizontal Merger Guidelines," August 19, 2010 ("Horizontal Merger Guidelines"), at p. 1, available at <https://www.ftc.gov/sites/default/files/attachments/mergers/100819hmg.pdf>.

“[t]he CP and KCS networks are entirely end-to-end, with no overlapping routes, corridors, or territories.”^{31,32}

B. The Economic Effects of the CP/KCS Merger

1. Theory

23. The potential for mergers to generate cost reductions and/or enhanced quality, both of which can improve the competitive position of the merging parties in a market or markets, can provide a powerful incentive for mergers. As noted by the Agencies, “a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm’s ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.”³³ However, the Agencies also observed that “[e]ven when efficiencies generated through a merger enhance a firm’s ability to compete, however, a merger may have other effects that may lessen competition and make the merger anticompetitive.”³⁴

24. Throughout the application, the Applicants claim that the proposed merger will create benefits for shippers by reducing costs and improving efficiencies.³⁵ These efficiencies

³¹ Verified Statement of Keith Creel, Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al., Finance Docket No. 36500, October 29, 2021 (“Creel Statement”), at p. 5.

³² I understand that Canadian National (“CN”) is seeking a divestiture of KCS lines from Kansas City, Missouri to Springfield, Illinois (the “Springfield Line”) which they argue is parallel to the CP mainline between Chicago and Kansas City. Canadian Pacific Railway Limited et al. – Control – Kansas City Southern Railroad et al., Description of Anticipated Responsive Application, Finance Docket No. 36500, January 12, 2022, at pp. 1-2.

³³ Horizontal Merger Guidelines, at p. 29.

³⁴ Horizontal Merger Guidelines, at p. 30.

³⁵ See, e.g., Verified Statement of Patrick Ottensmeyer, Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al., Finance Docket No. 36500, October 29, 2021 (“Ottensmeyer Statement”), at p. 2; Verified Statement of Richard W. Brown and Nathan S. Zebrowski, Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al., Finance Docket No. 36500, October 28, 2021 (“Brown and Zebrowski Statement”), at p. 50; Verified Statement of Jonathan Wahba and Michael J. Naatz, Canadian Pacific Railway

are said to arise from the anticipated introduction of new single line services. The Applicants also claim that the merger will improve operational efficiencies. For example, in supporting verified statements, the Applicants argue the merger will allow them to remove interchange handoffs and improve ease of doing business for shippers, thereby reducing transit times and creating more efficient alternatives.³⁶ The Applicants also anticipate the creation of new intermodal services linking their terminals, including a courier-like shipping service with expedited options for time-sensitive shipments and more affordable options for non-urgent shipments.³⁷ In addition, the Applicants state the combined system will enable investments in efficiency-enhancing infrastructure that would not be justifiable for either CP or KCS as separate entities.³⁸ Finally, as the combined CPKC network presents opportunities for diverting truck traffic from highway movements to rails,³⁹ the Applicants argue that the proposed merger will reduce the fuel consumption, creating both cost savings and environmental benefits.⁴⁰

25. I have not made an independent assessment of the credibility of the efficiency benefits claimed by CP and KCS in this proceeding. That said, to ensure that the proposed

Limited, et al. – Control – Kansas City Southern, et al., Finance Docket No. 36500, October 29, 2021 (“Wahba and Naatz Statement”), at pp. 17, 25.

³⁶ Ottensmeyer Statement, at p. 7; Brown and Zebrowski Statement, at pp. 50-51; Wahba and Naatz Statement, at pp. 5, 6, 23, 40.

³⁷ Wahba and Naatz Statement, at pp. 21, 23.

³⁸ For example, post-merger, CP’s new ability to reach markets beyond Kansas City creates an incentive to invest in grain-loading facilities on CP’s lines in order to maximize movements from Iowa region to the South. Similarly, KCS would consider investing in a new auto compound to move finished autos from Canada to Texas, a route that would not be possible otherwise due to UP trackage rights restrictions. *See*, Wahba and Naatz Statement, at pp. 12-13, 35-36. *See also*, Ottensmeyer Statement, at p. 7; Creel Statement, at pp. 14-15.

³⁹ It is estimated that the combined system will divert approximately 64,000 trailers and containers from road to CPKC rail annually. *See*, Verified Statement of Bengt Mutén, Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al., Finance Docket No. 36500, October 28, 2021 (“Mutén Statement”), at pp. 17, 19-20.

⁴⁰ Ottensmeyer Statement, at p. 14.

merger is in the public interest, the STB should evaluate the credibility the claimed efficiencies by requiring that they are “cognizable.”⁴¹

26. While the Applicants tout the extent of benefits that they anticipate from the proposed merger, they offer unqualified assessments that the proposed merger raises no concerns regarding harm to competition—simply because it is a vertical merger. For instance, Mr. Creel, testifying on behalf of CP, states that the CP/KCS merger will enhance competition “without harming competition anywhere.”⁴² Similarly, Mr. Ottensmeyer, testifying on behalf of KCS, indicates that the proposed merger “has no anticompetitive impacts that require conditions”⁴³ and that “There is no Loss of Competition.”⁴⁴ These statements, however, belie the economic incentives and the ability to thwart competition that the proposed merger may create.

27. Aside from the Applicants’ unqualified claims that competition will be unharmed by the merger, the principal substantive analysis of the prospects of anticompetitive harm associated with the proposed merger is offered by Dr. Majure in his October 29, 2021 Verified Statement. In that Verified Statement, Dr. Majure points to the Agencies’ framework for assessing vertical mergers.⁴⁵ The Vertical Merger Guidelines focus on two questions in such

⁴¹ “Cognizable efficiencies” refer to merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. The Agencies evaluate the magnitude and character of cognizable efficiencies against the likely anticompetitive effects, such that the merger is unlikely to be anticompetitive. Vertical Merger Guidelines, at p. 11; Horizontal Merger Guidelines, at pp. 30-31.

⁴² Creel Statement, at p. 13.

⁴³ Ottensmeyer Statement, at p. 1.

⁴⁴ Ottensmeyer Statement, at p. 6 (emphasis in original).

⁴⁵ Verified Statement of W. Robert Majure, Ph.D., Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al., Finance Docket No. 36500, October 29, 2021 (“Majure Statement”), at p. 14. *See also*, Vertical Merger Guidelines, at pp. 4-5.

merger analyses: (1) does the proposed merger affect the *incentive* of the merged parties to impair competition; and (2) does the proposed merger affect the *ability* of the merged parties to impair competition?⁴⁶ The Agencies' framework is informed by modern economic theory, which has identified situations in which vertical mergers can create incentives, where none exist prior to the merger, for the merged firm to harm competition. The Vertical Merger Guidelines also identify the means by which firms may, post-merger, respond to those changed incentives to the detriment of competition.

28. The economic theory of vertical mergers is the product of considerable economic analysis over the course of many years, and today's perspective reflects this evolution. Central to the theory is an assessment of monopoly leveraging. In its most extreme manifestation, monopoly leveraging occurs when a pure monopoly at one stage in the vertical supply chain has the incentive and ability to extend its monopoly power to a second, otherwise competitive, market. Less extreme, but still worrisome, manifestations of such leveraging occur when a firm with market power, but less than a complete monopoly, in a market, is able to foreclose competition in a vertically related market. Within the analysis of monopoly leveraging, vertical mergers between a monopolist or firm with significant monopoly power in a relevant market and a firm in an adjacent, competitive, market has been seen as one of the vehicles by which monopoly leveraging could occur.⁴⁷

⁴⁶ Vertical Merger Guidelines, at pp. 4-5.

⁴⁷ Early attention on monopoly leveraging also focused on tying, in which a monopolist makes the sale of its non-monopoly product available only on the condition of the purchase of the monopoly good. *See, e.g.,* Bowman Jr., Ward S. "Tying arrangements and the leverage problem," *The Yale Law Journal*, Vol. 67, No. 1(1957): 19-36; "Report of the Attorney General's National Committee to Study the Antitrust Laws," 1955, at pp. 140-141, 145; *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953): 594-608, available at <https://supreme.justia.com/cases/federal/us/345/594> (viewed February 21, 2022); *Standard Oil Co. v. United States*, 337 U.S. 293 (1949): 299, available at <https://supreme.justia.com/cases/federal/us/337/293> (viewed February 21, 2022).

29. In time, scrutiny of monopoly leveraging theory grew.⁴⁸ The central critique came in the form that has alternatively been referred to as the “single-monopoly profit” theory,⁴⁹ the “one-lump theory”⁵⁰ and the “fixed sum theory.”⁵¹ Hereafter, I utilize the term “single-monopoly profit theory” except when discussed in a specific railroad context in which case I use the phrase “one-lump theory” as this is the term that has been used by the STB and Dr. Majure when referring to the single-monopoly profit theory.

30. The logic of this theory is straightforward. Consider an unconstrained firm with (at least some) monopoly power over the provision of a good or service in a market. Now consider the potential for that firm to extend its monopoly power into an adjacent, say vertically-related, market by merging with a firm that operates in that market. Under the “single-monopoly profit” theory, any monopoly profits that exist pre-merger can be fully captured by the firm without merging. Consequently, it is to be presumed that any observed vertical merger is motivated by efficiency rather than anticompetitive motives.

31. In the years since the single-monopoly profit theory gained prominence in the 1970s, economists have had ample opportunities to thoroughly consider the applicability of the theory. In short, these analyses have shown that while the single-monopoly profit theory—and its corollary back-of-the-hand dismissal of the prospects of post-merger anticompetitive

⁴⁸ See e.g., Bowman Jr., Ward S. “Tying arrangements and the leverage problem,” *The Yale Law Journal*, Vol. 67, No. 1 (1957): 19-36; Bork, Robert H., *The Antitrust Paradox. A Policy at War with Itself*, Basic Books, Inc., 1978., at pp. 226-227, 229.

⁴⁹ Riordan, Michael, “Competitive Effects of Vertical Integration,” in *Handbook of Antitrust Economics*, Edited by Buccirossi, Paolo, MIT Press (2008), pp. 145-182; Elhauge, Einer, “Tying, Bundled Discounts, and the Death of the Single-monopoly Profit Theory,” *Harvard Law Review*, Vol. 123, No. 2 (2009): 397-481.

⁵⁰ Burlington Northern Inc. et al. – Control and Merger – Santa Fe Pacific Corporation et al., Decision No. 38, Finance Docket No. 32549, 10 I.C.C.2d, August 16, 1995, at pp. 749, 751.

⁵¹ Kaplow, Louis, “Extension of Monopoly Power through Leverage,” *Columbia Law Review*, Vol. 85, No. 3 (1985): 515-556.

conduct—may hold in some circumstances, there are also situations in which the theory and its policy implications are inapplicable.⁵²

32. While modern theory has revealed that the single-monopoly profit theory cannot provide a universal palliative to concerns regarding post-merger anticompetitive behavior, empirical analyses provide a similarly cautionary tale. Some empirical studies have failed to find evidence of post-merger foreclosure, while other studies have found the presence of vertical foreclosure. For example, empirical evidence of foreclosure has surfaced in the cable television industry,⁵³ gasoline markets,⁵⁴ and video games⁵⁵ but investigations into beer⁵⁶ and cement and ready-mix concrete⁵⁷ have failed to observe vertical foreclosure.

33. In sum, modern economic analysis indicates that it is not possible to conclude that incentives for post-merger anticompetitive conduct are uniformly absent in the case of vertical

⁵² See, e.g., Ordover, J. A., et al, “Nonprice Anticompetitive Behavior by Dominant Firms toward the Producers of Complementary Products,” in *Antitrust and Regulations: Essays in Memory of John J. McGowan*, Edited by Fisher, Franklin M., MIT Press, 1985, at pp. 115-130; Whinston, Michael O., “Tying, Foreclosure, and Exclusion,” *American Economic Review*, Vol. 80, No. 4 (1990): 837-859; Sullivan, Lawrence A., “Post-Chicago Economics: Economists, Lawyers, Judges, and Enforcement Officials in a Less Determinate Theoretical World,” *Antitrust Law Journal*, Vol. 63, No. 2 (1995): 669-681; Baker, Jonathan B., “Note on ‘Single-monopoly Profit’ Theory,” September 18, 2014, available at SSRN: <https://ssrn.com/abstract=2496932>; Kaplow, Louis. “Extension of Monopoly Power through Leverage,” *Columbia Law Review*, Vol. 85, No. 3 (1985): 515-556, at p. 515; Moresi, Serge, et al., “Vertical Mergers in a Model of Upstream Monopoly and Incomplete Competition,” *Review of Industrial Organization*, Vol. 59, No. 2 (2021): 363-380.

⁵³ Waterman, David, and Andrew A. Weiss, “The Effects of Vertical Integration between Cable Television Systems and Pay Cable Networks,” *Journal of Econometrics*, Vol. 72, No.1 (1996): 357-395; Chipty, Tasneem, “Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry,” *American Economic Review*, Vol. 91, No. 3 (2001): 428-453; Crawford, Gregory S., et al., “The Welfare Effects of Vertical Integration in Multichannel Television Markets,” *Econometrica*, Vol. 86, No. 3 (2018): 891-954.

⁵⁴ Hastings, Justine S., and Richard J. Gilbert, “Market Power, Vertical Integration and the Wholesale Price of Gasoline,” *The Journal of Industrial Economics*, Vol. 53, No. 4 (2005): 469-492.

⁵⁵ Lee, Robin S., “Vertical Integration and Exclusivity in Platform and Two-Sided Markets,” *American Economic Review*, Vol. 103, No. 7 (2013): 2960-3000.

⁵⁶ Asker, John, “Diagnosing Foreclosure Due to Exclusive Dealing,” *Journal of Industrial Economics*, Vol. 64, No. 3 (2016): 375-410.

⁵⁷ Hortacsu, Ali, and Chad Syverson, “Cementing Relationships: Vertical Integration, Foreclosure, Productivity, and Prices,” *Journal of Political Economy*, Vol. 115, No. 2 (2007): 250-301.

mergers. Thus, rather than summarily dismissing concerns regarding post-merger conduct, policymakers are well-served to engage in fact-specific analyses and, where problems are indicated, to act accordingly.

34. Two principal vehicles through which vertical mergers may result in post-merger anticompetitive effects have been identified. The first is the heavy hammer of foreclosure. Foreclosure resulting from a vertical merger can arise in two forms. As described in a recent article in the *Antitrust Law Journal*, “A vertical merger may threaten anticompetitive exclusion by conferring an incentive for the merged firm unilaterally to foreclose upstream rivals from access to distribution (customer foreclosure) or unilaterally to foreclose downstream rivals from access to a key input (input foreclosure).”⁵⁸

35. The second vehicle for potential anticompetitive effects is the theory of raising rivals’ costs.⁵⁹ As described recently, “This theory provides a simple, logically consistent economic model of pricing equilibrium in vertically related markets. It explains why a vertical merger might result in the vertically integrated firm increasing input prices to downstream rivals, or perhaps even foreclosing them completely, which may in turn harm consumers in the downstream market.”⁶⁰

36. The intuition behind why a vertical merger may result in increased prices (therefore costs) to downstream rivals is straightforward. Professor Rogerson observes “This

⁵⁸ Baker, Jonathan B., “Exclusion as a Core Competition Concern,” *Antitrust Law Journal*, Vol. 78, No. 3 (2013): 527-589, at p. 540.

⁵⁹ Krattenmaker, Thomas G., and Steven C. Salop, “Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price,” *The Yale Law Journal*, Vol. 96, No. 2 (1986): 209-293; Salop, Steven C., and David T. Scheffman, “Raising Rivals’ Costs,” *American Economic Review*, Vol. 73, No. 2 (1983): 267-271.

⁶⁰ Rogerson, William P., “The Upstream Pass-Through Rate, Bargaining Power and the Magnitude of the Raising Rivals’ Cost (RRC) Effect,” *Review of Industrial Organization*, Vol. 59, No. 2 (2021): 205-227, at pp. 205-206.

effect occurs because, after the merger, the vertically integrated firm now views the lost profit of its own downstream partner as an extra opportunity cost of providing the input to rival downstream firms. This opportunity cost is just as real as any production cost, and an increase in the opportunity cost has exactly the same role in affecting the vertically integrated firm's incentives and behavior as would a similar increase in production cost. In particular, when the vertically integrated firm negotiates the input price with a downstream rival, a share of this cost increase is passed through to the downstream firm in the form of an increase in the negotiated input price.”⁶¹

37. Threats to competition from post-merger strategies that raise rivals' cost may arise from either price or nonprice effects. For instance, while these strategies are typically thought of as being exercised by changes in the post-merger prices charged to rivals, it is also possible that these strategies may be manifest through changes in the quality provided to rivals post-merger. This method of raising rivals' cost is referred to as “sabotage.”⁶²

2. *Analysis*

38. Against the backdrop of the current theory of vertical mergers, a natural question is whether the Applicants provide a compelling fact-based analysis to assuage any competitive concerns that may arise as a consequence of the proposed merger. The Applicants' competitive analysis is provided by Dr. Majure.⁶³

⁶¹ Rogerson, William P., “The Upstream Pass-Through Rate, Bargaining Power and the Magnitude of the Raising Rivals' Cost (RRC) Effect,” *Review of Industrial Organization*, Vol. 59, No. 2 (2021): 205-227, at p. 207.

⁶² Beard, T. Randolph, et al., “Regulation, Vertical Integration and Sabotage,” *Journal of Industrial Economics*, Vol. 49, No. 3 (2001): 319-333, at p. 320.

⁶³ See, Majure Statement, at pp. 4-5.

39. Dr. Majure begins his analysis of the vertical integration of CP and KCS by opining that the merger resolves endemic difficulties that plague the fashioning of efficient interline agreements. Dr. Majure points to “disagreements about [] splits of revenues” and about “the costs of externalities imposed on each railroad’s operations as equipment is outside of their tracking and control,” and “about the need for investment in improving operations across the interconnection.”⁶⁴ Of course, Dr. Majure is correct that these difficulties can raise the cost of interlining relative to single line service enabled by a vertical merger. It is also important to note, however, that these difficulties, which occur under conditions when the incentives of the two pre-merger independent railroads are aligned, may be exacerbated for interline carriers with which the newly-merged firm interacts post-merger, when the incentives for cooperation are markedly lessened. It is precisely these circumstances when such exchange difficulties may provide plausible cover for anticompetitive treatment of interlining partners.

40. Dr. Majure’s consideration of the incentives and ability of a post-merger CPKC to harm competition rests squarely on an appeal to the single-monopoly profit (aka one-lump) theory discussed above. He considers, alternatively, a shipper that is captive (for example, to KCS) and shipper that can readily turn to alternative railroads in the event of any price increase (or presumably quality degradation).⁶⁵ For the captive shipper, Dr. Majure follows the one-lump theory script: “A combined CP/KCS would not be expected to have any incentive to affect the competitive terms available to this shipper, because KCS would already be collecting the full

⁶⁴ Majure Statement, at p. 12. *See also*, Verified Statement of John Brooks, Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al., Finance Docket No. 36500, October 28, 2021, at pp. 16-17.

⁶⁵ Majure Statement, at pp. 14-15.

measure of returns associated with its existing market power.”⁶⁶ Dr. Majure indicates that this absence of an incentive to harm competition has previously been embraced under “the one-lump theory.”⁶⁷ But as I have discussed above, blanket dismissal of anticompetitive harm that springs from an embrace of the “single-monopoly profit” or “one-lump” theory is not always warranted. Indeed, doing so would overlook the scenarios that have been identified by modern economic theory through which vertical integration may harm competition.

41. To address the question regarding the post-merger *ability* of the firm to harm competition, Dr. Majure asks the STB to look at a specific case study, the KCS/TFM merger from 2003 and the current exchange traffic going through Laredo, to shed light on the ability of a post-merger CPKC to harm competition.⁶⁸ He argues that UP’s significant presence in Laredo in 2019 is evidence that firms that vertically merge do not have the ability to harm competition.⁶⁹

42. There are at least two problems with this argument. First, a case study of traffic traversing a single gateway seventeen years following any merger-induced incentives for foreclosure is insufficient to demonstrate the general absence of the ability for a vertically merging firm in the industry to harm competition. Second, the observed traffic patterns in Laredo do not reflect the unconstrained pattern of traffic flows that would have prevailed absent merger conditions imposed at the time of the KCS-Tex Mex merger. Rather, the observed traffic

⁶⁶ Majure Statement, at p. 15.

⁶⁷ Majure Statement, at p. 15.

⁶⁸ Majure Statement, at pp. 17-18. TFM refers to Transportacion Ferroviaria Mexicana, S.A. de C.V. *See*, The Application, at p. 527.

⁶⁹ *See*, Majure Statement, at pp. 17-24.

flows are those that have resulted from a merger *with gateway conditions attached*.⁷⁰ In particular, KCS committed to keeping the Laredo gateway “open on commercially reasonable terms,” with pledges to provide the same level of service to UP and BNSF pre-merger, to make no significant changes in KCS and Tex-Mex operations, and to preserve existing dispatching and operating practices over Laredo Bridge.⁷¹ The approval of the merger was conditional on the monitoring of the operations at Laredo to fulfill the commitments, conducted by the STB’s Office of Compliance and Enforcement (“OCE”).⁷² Thus, the traffic patterns observed at Laredo in 2019 may present a greater insight into the effectiveness of merger conditions than a window into the ability of an unconstrained firm to harm competition.

43. In sum, observed traffic patterns today through the Laredo gateway do not support Dr. Majure’s blanket assurance that in the wake of a vertical merger CPKC could not engage in either raising rivals’ cost or vertical foreclosure strategies to harm competition in the freight rail industry.

44. In the absence of compelling theoretical or empirical analysis that evinces a conclusion that the proposed CP/KCS merger will not harm competition, additional empirical analysis is warranted. To independently assess the potential incentives, ability, and consequences for post-merger anticompetitive harm, I have conducted several analyses. To examine the potential for anticompetitive harm arising from the vertical elements of the proposed CP/KCS merger, I draw upon the confidential 2019 Carload Waybill Sample

⁷⁰ Deposition of W. Robert Majure, Ph.D., February 7, 2022, p. 92.

⁷¹ Kansas City Southern – Control – The Kansas City Southern Railway Company et al., Decision No. 12, Finance Docket No. 34342, November 23, 2004, at pp. 6, 13, 18.

⁷² Kansas City Southern – Control – The Kansas City Southern Railway Company et al., Decision No. 12, Finance Docket No. 34342, November 23, 2004, at pp. 16, 20. KCS is required to submit to the OCE all agreements and protocols, as well as statistical measures of pre-merger activity, and notify them of any changes.

(“CWS”) data to identify potential CPKC single line service routes that may be affected by the proposed merger. Such post-merger single-lining may provide pro-competitive efficiencies, but, depending on the existing traffic patterns of other rail carriers, can also create the incentive and ability for the newly-merged firm to squeeze interline rivals anticompetitively. Specifically, where a carrier currently relies on an interline partnership with either CP or KCS that can potentially become a CPKC single line service, CPKC may have an incentive to disadvantage that interline carrier through anticompetitive action including foreclosure and/or raising rivals’ cost.

45. To explore whether such situations exist, I employ the CWS data to identify potential CPKC single line service routes along which competitors currently provide interline service by partnering with either KCS or CP.⁷³ All potential single line corridors identified in this manner can be classified according to the nature of the competitive presence: (1) competitors interlining today with CP or KCS over the prospective CPKC corridor, (2)

⁷³ The identification of potential single line service routes is sensitive to a variety of assumptions about the economic viability of the potential route (e.g., the volume of trade between the identified origin and destination and the circuitry of the route). In CP’s reply to the CN and KCS voting trust submission, Dr. Majure’s Verified Statement proposed an analysis of potential single-lining corridors for the CP/KCS combination that can be introduced post-merger between origins and destinations where CP and KCS operate but do not necessarily connect currently via interlining. (*See*, Majure Statement; Canadian National Railway Company et al. – Control – Kansas City Southern Railroad et al., Canadian Pacific’s Reply to CN and KCS Joint Motion for Approval of Voting Trust, Finance Docket No. 36514, June 28, 2021, at pp. 38-40.) Modifying Dr. Majure’s assumptions slightly, I consider a corridor to be a potential candidate for a new single line service when CP and KCS are present (originated or terminated traffic in 2019) in respective origin and destination locations. That is, for this analysis, I consider a corridor a “potential route” even if it would involve CP originating from (terminating at) a location in which CP was only observed terminating at (originating from), and similarly vis-a-vis KCS. (*See*, Majure Statement; Canadian National Railway Company et al. – Control – Kansas City Southern Railroad et al., Canadian Pacific’s Reply to CN and KCS Joint Motion for Approval of Voting Trust, Finance Docket No. 36514, June 28, 2021, at p. 39.) My analysis uses U.S. Bureau of Economic Analysis Economic Areas (“BEAs”), Canadian Economic Regions and Mexican States as relevant origins or destinations, which is consistent with Dr. Majure’s October 29th analyses. (*See*, Majure Statement, at pp. 32-33.) I exclude potential corridors with zero 2019 shipments. Although my identification of potential new single line service routes follows closely the approach adopted by Dr. Majure, I also consider the possibility that some potential routes are so circuitous that they will not be implemented by CPKC. As shown in Appendix Exhibits 1 and 2, circuitry restrictions dampen, but do not eliminate the potential for considerable rail traffic to be exposed to anticompetitive incentives in the wake of the proposed merger.

competitors only single-lining today over the prospective CPKC corridor, and (3) competitors interlining today with other competitor railroads over the prospective CPKC corridor. Of these, the incentives for post-merger anticompetitive conduct are most keen in case (1), where competitors interline today with CP or KCS over the prospective CPKC corridor.

46. Exhibit 3 reveals that competitors interline with CP or KCS on {{[REDACTED]}} potential new single line service corridors that will be created by the merger. This indicates that a substantial number of rail traffic routes are subject to potential incentives for anticompetitive conduct in the wake of the proposed CP/KCS merger. Exhibit 3 also indicates that the dollar volume of traffic that is subject to anticompetitive incentives is substantial.

47. To provide greater detail to the risk posed by an unconditioned merger of CP and KCS, I focus on NS traffic as an illustrative example. As shown in Exhibit 4, {{[REDACTED]}} potential CPKC single line routes involve traffic along which NS currently interlines with one of the merging parties and, furthermore, does not provide single line service. The fragility of the rail competition along these origin-destination (“O-D”) pairs is also summarized in Exhibit 4. In the event that interlining carriers are foreclosed from their current participation along these routes, CPKC could emerge as the monopoly carrier on {{[REDACTED]}} routes (representing {{[REDACTED]}} percent of the total routes in which NS interlines with CP or KCS and that have a potential CPKC single line-service).⁷⁴ This underscores the crucial importance of implementing sufficient safeguards to ensure that any new single line service resulting from the merger preserves existing competition rather than degenerating into a monopoly rail service. A complete listing of these corridors is shown in Exhibit 5.

⁷⁴ Calculated as {{[REDACTED]}}.

48. Notably, a significant number of the potential CPKC single line O-D pairs ({ { [REDACTED] [REDACTED] }) would compete with existing NS traffic that traverses the rail trackage known as the Meridian Speedway,⁷⁵ described below and owned by Meridian Speedway, LLC. The Meridian Speedway is an east/west rail line located between Meridian, MS and Shreveport, LA.⁷⁶ As noted above, when combined with the KCS line between Shreveport, LA and Dallas, TX, I refer to the full line as the “Meridian-Wylie Route.”⁷⁷

49. The Meridian Speedway, LLC (“MSLLC”) is a joint venture between KCS and NS that was formed in 2005, with KCS owning 70 percent of MSLLC’s equity and NS owning the remaining 30 percent.⁷⁸ The initial motivation for NS’s involvement in the MSLLC was that traffic moving between the Southeastern and Southwestern United States along rail trackage from Meridian, MS to Shreveport, LA (at that time owned by KCS) had become capacity constrained.⁷⁹ The formation of the MSLLC included an initial investment by Norfolk Southern in large part to be used to expand capacity through capital improvements.⁸⁰ In exchange for this investment, NSC received a thirty percent equity stake and several rights, including the right to transport certain transcontinental and Southeast-Southwest intermodal container traffic over the

⁷⁵ See, Exhibit 4.

⁷⁶ KCSR-HC-00013177-227, at 183, 206; KCSR-HC-00013437-459, at 437.

⁷⁷ KCSR-HC-00013177-227, at 181.

⁷⁸ KCSR-HC-00013177-227, at 183.

⁷⁹ KCSR-HC-00013177-227, at 178, 182-183.

⁸⁰ KCSR-HC-00013177-227, at 178.

line.⁸¹ Although the MSLLC provides a minority ownership share to NSC, KCS retains control of the MSLLC.⁸²

50. The agreement provided benefits to both companies and increased NS's ability to handle greater traffic, providing benefits to consumers. The original aims of the Meridian Speedway were to enhance competition with other rail routes and other modes of traffic, and additionally, to improve safety, and to potentially provide job opportunities.⁸³

51. As described in the Verified Statement of Michael R. McClellan, the MSLLC continues to play a crucial role in facilitating the flow of rail traffic, and in particular a very strong intermodal route that is competitive to alternative shipping via highway. In the wake of the proposed merger between CP and KCS, the vital nature of the Meridian Speedway is underscored. As discussed above, {{[REDACTED]}} identified NS routes exposed to post-merger anticompetitive incentives involve shipments across the Meridian-Wylie Route including the Meridian Speedway.

52. At the western end of the Meridian-Wylie Route, the potential for anticompetitive harm emerges from KCS's control of the intermodal terminal at Wylie, TX.⁸⁴ Since 2006, a Dallas-area facility has provided intermodal lift services for both NS and KCS.⁸⁵ In 2015, KCS completed a \$50 million intermodal facility in Wylie, TX (a suburb of Dallas, TX), which

⁸¹ KCSR-HC-00013177-227, at 178, 183.

⁸² KCSR-HC-00013177-227, at 183.

⁸³ KCSR-HC-00013177-227, at 178, 186.

⁸⁴ KCSR-HC-00013584-597, at 584.

⁸⁵ KCSR-HC-00013584-597, at 584; KCSR-HC-00012692-705, at 692; KCSR-HC-00012742-752, at 742; <http://www.nscorp.com/content/nscorp/en/shipping-options/intermodal/terminals-and-schedules/dallas-texas.html> (viewed February 4, 2022).

replaced KCS's previous facility.⁸⁶ Today, to move goods to/from Wylie Intermodal Terminal to the NS network, NS relies on KCS.⁸⁷

53. The vulnerability of NS to post-merger exclusionary behaviors by CPKC are readily seen in Map Appendix Exhibit 1, which displays (by revenue volumes) the considerable amount of intermodal traffic that NS currently transports via a KCS-NS interline over the Meridian Speedway from the Wylie Intermodal Terminal to the Eastern United States. Similarly, Map Appendix Exhibit 2 displays (by revenue volumes) the considerable amount of intermodal traffic that NS currently transports via NS-KCS interline over the Meridian Speedway from the Eastern United States to the Wylie Intermodal Terminal. As seen in these figures and Exhibit 6, which provides additional details regarding this traffic, the capacity of NS to provide competitive intermodal service is highly dependent on KCS for both highly efficient lift operations at Wylie Intermodal Terminal and the transportation of intermodal freight between Wylie and Shreveport, LA for further movement along the Meridian Speedway to an interchange with NS in Meridian, MS.

54. In the face of altered incentives that CPKC will have to cooperate with NS following the merger, concerns arise regarding potential quality degradation of services provided between Wylie and Shreveport, LA, in conjunction with service operated by KCS between Shreveport, LA and Meridian, MS.⁸⁸ Such concerns exist in a context in which post-

⁸⁶ <https://www.progressiverailroading.com/intermodal/article/Intermodal-Texas-style-Kansas-City-Southern-set-to-replace-cramped-Dallas-terminal-with-large-Wylie-hub--44477> (viewed February 21, 2022).

⁸⁷ KCSR-HC-00013584-597, at 584; KCSR-HC-00012692-705, at 692; KCSR-HC-00013373-408, at 374; KCSR-HC-00013437-459, at 437.

⁸⁸ The Application, at p. 25.

merger quality degradation has been a common,⁸⁹ though not universal, feature of freight rail mergers. In the case at hand, post-merger operations from or to Wylie Intermodal Terminal warrant special attention. Central to this concern is that, in their application, CP and KCS provide projections which suggest that within three years post-merger, volume at the Wylie Intermodal Terminal will increase by approximately 50-55 percent.⁹⁰ I understand that NS had approximately {{[REDACTED]}} “revenue moves” at the Wylie Intermodal Terminal in 2019 (approximately {{[REDACTED]}} daily), and approximately {{[REDACTED]}} “lifts” in 2021 (approximately {{[REDACTED]}} daily).⁹¹ Furthermore, I understand that, for NS traffic at Wylie Intermodal Terminal, total lifts are up to 10 percent greater than the number of revenue moves.⁹² As such, NS had approximately {{[REDACTED]}} lifts at the Wylie Intermodal Terminal in 2019.⁹³ Based on statistics quoted in the Operating Plan, I estimate that KCS had approximately {{[REDACTED]}} lifts at the

⁸⁹ For example, from July 1997 to 1998, following the UP-SP merger in 1996, the UP-SP system began experiencing serious service disruptions, crashes, and lengthy shipment delays of over 40 days. *See*, Breen, Denis A., “The Union Pacific/Southern Pacific Rail Merger: A Retrospective on Merger Benefits,” *Review of Network Economics*, Vol. 3, No. 3 (2004): 283-322, at p. 303; <https://www.wsj.com/articles/SB875724698120686000> (viewed August 17, 2021); https://money.cnn.com/magazines/fortune/fortune_archive/1998/03/30/240141/index.htm (viewed August 17, 2021). Soon thereafter CSX and NS acquired Conrail in 1998, and both CSX and NS suffered from shipment delays and congestions. *See*, <https://www.wsj.com/articles/SB92931326916479400> (viewed August 17, 2021); U.S. General Accounting Office, “Railroad Regulation: Changes in Freight Railroad Rates from 1997 through 2000,” (GAO-02-524), *Report to the Chairman, Committee on Transportation and Infrastructure, House of Representatives*, 2002, at pp. 5-6. In light of these service disruptions during the post-merger transition period, the STB requires applicants to provide a “service assurance plan” to explain how they will solve these transitional issues by cooperating with other carriers. *See*, 49 CFR §1180.1(c)(2)(iii), §1180.1(h), available at <https://www.law.cornell.edu/cfr/text/49/1180.1> (viewed February 3, 2022).

⁹⁰ Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al., Finance Docket No. 36500, October 29, 2021, Operating Plan (Exhibit 13) (“Operating Plan”), at Tables 5 and 10. $292 / 564 \approx 0.52$.

⁹¹ Verified Statement of Michael R. McClellan, Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al., NS Comment and Requests for Conditions, Finance Docket No. 36500, February 28, 2022 (“McClellan Statement”). Daily calculations assume 360 operating days in a year.

⁹² McClellan Statement. For purposes of this statement, and consistent with the McClellan Statement, I use 10% for the conversion from revenue moves to total lifts. Note that $1.1 \times \{[REDACTED]\} = \{[REDACTED]\}$.

⁹³ Calculated as $1.1 \times \{[REDACTED]\} = \{[REDACTED]\}$.

Wylie Intermodal Terminal in 2019 (approximately {{[REDACTED]}} daily).⁹⁴ Assuming no growth in KCS traffic between 2019 and 2021, and no new traffic resulting from the merger, this amounts to approximately {{[REDACTED]}} lifts in 2021.⁹⁵ Inferring from statistics included in the Operating Plan, CP and KCS project that lifts will increase by approximately 105,120 annually as a result of new traffic at the Wylie Intermodal Terminal.⁹⁶ Assuming no growth in NS traffic, this amounts to approximately {{[REDACTED]}} lifts annually.⁹⁷ The Wylie Intermodal Terminal's annual lift capacity is 342,000.⁹⁸ As such, it appears as though post-merger Wylie Intermodal Terminal will be well above capacity, without even accounting for difficulties associated with daily and seasonal variation acknowledged by the Applicants.⁹⁹

55. As Wylie Intermodal Terminal reaches its capacity limits, it can be expected that CPKC will reserve capacity for its own use, effectively constraining NS and allowing the quality of service it provides to NS to degrade. Such quality degradation, through no fault of NS, is not in the public interest. To the best of my understanding, NS has the right to exercise an option to buy the Wylie Intermodal Terminal;¹⁰⁰ if exercised, this may mitigate or eliminate the possibility of harm at the Wylie Intermodal Terminal itself. However, it still remains the possibility that, in the wake of the merger, CPKC would purposefully or incidentally provide

⁹⁴ Calculated as {{[REDACTED]}}. Daily volume at Wylie Intermodal Terminal was 564 handlings in 2019. *See*, Operating Plan, at Table 10. Assumes that "handlings" equate to NS "lifts."

⁹⁵ Calculated as {{[REDACTED]}}.

⁹⁶ Calculated as $360 \times 292 = 105,120$. Daily volume at Wylie Intermodal Terminal is projected to increase by 292 handlings daily, post-merger, as described in CPKC's "Growth Plan." *See*, Operating Plan, at Table 10. *See also*, Operating Plan, Workpapers, at "FD 36500 – Work Paper – HC – IMS Terminal Analysis based on Final FTI Rail to Rail Diversion Results for Merger Application_with Truck to Rail.xlsx" at tab 'All Volumes.'

⁹⁷ Calculated as {{[REDACTED]}}.

⁹⁸ <https://wylieedc.com/doing-business-wylie/industrial-warehouse/kcs-intermodal#:~:text=Capacity,feet%20of%20working%20classification%20track> (viewed February 25, 2022).

⁹⁹ Deposition of Raymond A. Elphick and John F. Orr, February 18, 2022, pp. 202-205.

¹⁰⁰ KCSR-HC-00013584-597, at 584-590.

poorer service to NS between Wylie Intermodal Terminal and Shreveport, LA; that is, it could engage in anticompetitive degradation of NS traffic coming into or out of the Wylie Intermodal Terminal or engage in actions that would otherwise not be in the public interest.

56. The exposure of current competition to post-merger anticompetitive behavior illustrated by these examples also highlights the crucial nature of competitive exchange conditions at gateways (i.e., interexchange points between railroads) between CPKC and its competitors. As seen in Exhibit 7 and Map Appendix Exhibit 3 there are numerous such gateways between NS and KCS and these gateways support millions of dollars of commerce.¹⁰¹ Exhibit 8 and Map Appendix Exhibit 4 show smaller, yet significant, traffic at NS-CP gateways.¹⁰² The crucial importance of keeping gateways open in the wake of the proposed merger is readily seen by considering the consequence of the foreclosure of NS traffic currently interlining with KCS and interchanging at Meridian, MS on routes that could potentially become CPKC single line routes. As noted above, 34 such routes exist. If the NS traffic were foreclosed, the new CPKC routes would be, on average, fully 24 percent longer than the existing KCS-NS interline routes.¹⁰³ Nearly all such diversions, were they to occur, are likely to go through Chicago.

57. Because of the crucial nature of the economic conditions of exchange for gateway traffic, the STB has on a number of occasions imposed particular conditions on gateway traffic

¹⁰¹ I understand that these interchange totals are likely conservative because “Rule 11” rebill movements may be unassociated in the CWS data causing an interchange point along a longer haul to appear as if were an origin or termination in a waybill in the CWS data. Furthermore, I understand it is difficult to recover the full route in such cases. *See, e.g.*, Majure Statement, at p. 53.

¹⁰² *See*, above footnote.

¹⁰³ *See*, Exhibit 5. Calculated as the weighted average ratio of estimated potential CPKC single line distances to route-carrier distances (among route-carrier combinations that (i) involve Norfolk Southern, and (ii) interchange at Meridian); weighted average weights by route-carrier revenue.

to mitigate potential anticompetitive terms or conditions.¹⁰⁴ Michael R. McClellan provides a discussion of the specific conditions that are necessary in the present merger to reduce the ability of a merged CPKC to act on post-merger incentives to anticompetitively harm competition.¹⁰⁵ Although such conditions do not eliminate the incentive for post-merger behavior that may be adverse to NS, other rail carriers, and the public interest generally, such conditions can successfully mitigate the ability of CPKC to harm competition in the forward-going freight rail industry.

IV. PRESERVING COMPETITION TODAY AND IN THE FUTURE

A. The Potential to Improve Resource Allocation through Merger Conditions

58. While the proposed merger can harm competition in the rail industry, the potential exists for appropriate merger conditions to protect shippers from the risk of anticompetitive price increases or quality decreases that may accompany the merger. The welfare effect of any such conditions will depend on their ability to eliminate likely anticompetitive conduct, their ability to preserve merger-induced cognizable efficiencies, and the relative cost of the remedies. For merger conditions that can eliminate anticompetitive conduct and preserve efficiencies with

¹⁰⁴ As discussed above, the approval of the KCS-Tex Mex merger was conditional on several conditions to keep the Laredo gateway “open on commercially reasonable terms.” *See, e.g.*, Kansas City Southern – Control – The Kansas City Southern Railway Company et al., Decision No. 12, Finance Docket No. 34342, November 23, 2004, at pp. 6, 13, 18. In its decision regarding the UP-SP merger, the STB granted about 4,000 miles of trackage rights to BNSF and other railroads to maintain the number of carriers on these lines, as well as imposed as conditions a proportional rate agreement between BNSF and UP/SP. *See, e.g.*, Union Pacific Corporation, et al. – Control and Merger – Southern Pacific Rail Corporation, et al., Decision No. 44, Finance Docket No. 32760, August 6, 1996, at pp. 12, 17.

¹⁰⁵ McClellan Statement.

low enforcement costs, the potential exists in vertical mergers to not only maintain, but also enhance economic welfare.¹⁰⁶

59. The heterogeneous nature of mergers over time has led to a correspondingly heterogeneous set of merger conditions that have been adopted over the years. Such merger conditions generally, however, fall into the category of “structural” or “conduct.” Although structural remedies are generally favored by the Agencies, conduct remedies have been the principal approach adopted for vertical mergers over the years.¹⁰⁷ In its most recent assessment of the efficacy of conduct remedies imposed by the FTC in vertical merger cases, the agency concluded that “All vertical merger orders were judged successful.”¹⁰⁸ This positive assessment of the potential for merger conditions to remedy harm to competition while preserving merger efficiencies points toward the imposition of merger conditions if the proposed CP/KCS merger were to advance.

B. Specific Merger Conditions to Preserve Competition

60. Given the threats to competition posed by the proposed CP/KCS merger, two categories of merger conditions appear apt.

- a. Conditions that provide vigorous protections of gateway traffic to ensure that the price and quality terms and conditions for traffic exchanged at gateways are not

¹⁰⁶ Mayo, John W. and Mark Whitener, “The Welfare Effects of Vertical Mergers and their Remedies,” *Review of Industrial Organization*, Vol. 59, No. 2 (2021): 409-441.

¹⁰⁷ Mayo, John W. and Mark Whitener, “The Welfare Effects of Vertical Mergers and their Remedies,” *Review of Industrial Organization*, Vol. 59, No. 2 (2021): 409-441, at p. 429.

¹⁰⁸ Federal Trade Commission, “The FTC’s Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics,” January 2017, available at https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf, at p. 17.

adversely affected in the wake of the merger. Exemplary conditions for the case of NS traffic are offered by Michael R. McClellan and contained in the NS Comment and Requests for Conditions. As he describes, to preserve the competitive influence of NS traffic being exchanged with CPKC post-merger the Board should establish specific and credible conditions to ensure that these gateways remain open.

- b. Conditions that ensure the preservation of competition as the merger provokes asset reallocation throughout the industry. As described above and by Michael R. McClellan, intermodal traffic facilitated by the Wylie Intermodal Terminal and the free-flow of intermodal traffic from Meridian to Shreveport and from Shreveport to Dallas (and vice versa) provide crucial benefits to intermodal shippers. As described above, these competitive benefits are at risk. The grant of contingent trackage rights to NS for the Wylie Intermodal Terminal to Shreveport portion of the Meridian-Wylie Route can act to mitigate the risks to competition that may otherwise arise as a consequence of the proposed merger.

V. CONCLUSION

61. The proposed CP/KCS merger will fundamentally alter the freight rail industry in the United States. For reasons that I have described in this Verified Statement, the public interest requires that the Board impose conditions on this transaction to ensure that the competitive landscape is not degraded.

VI. APPENDIX

A. Overview

62. In this Appendix, I briefly discuss additional analyses I conducted to ensure that the conclusions of my potential CPKC single line service (“SLS”) foreclosure analyses remain qualitatively unchanged if I screen out potential CPKC SLS routes that may be deemed circuitous, and thus may be less likely to materialize even if theoretically possible. Below I discuss the methodology I adopt to identify circuitous routes, and then discuss the results of analyses which consider those screens.

B. Identifying Circuitous Routes

63. To test the sensitivity of my analyses, I adopt three alternative circuitry screens to flag CPKC SLS routes than may be circuitous: 1) I use Brown and Zebrowski’s guidance, defining circuitous routes as those whose distance is 50 percent greater or 500 miles longer than the shortest rail route;¹⁰⁹ 2) In the same spirit, I examine a slightly less stringent screen which defines circuitous routes as those whose distance is 75 percent greater or 750 miles longer than the shortest rail route; 3) For any given potential O-D pair, I screen a potential CPKC SLS route as circuitous when its distance is at least 10 percent greater than the longest *existing* rail distance among routes on that O-D pair in the 2019 CWS.¹¹⁰ I remain agnostic as to which measurement of circuitry is most accurate, instead relying on the set of circuitry flags as a sensitivity test.

¹⁰⁹ See, Brown and Zebrowski Statement, at pp. 17-18.

¹¹⁰ The longest existing distance between an O-D pair is calculated as the maximum of the average route-carrier combination distance (while grouping non-class I carriers together).

64. To better understand my circuitry definitions in the context of existing rail movements, I note the number of all *existing* route-carrier combinations within the 2019 CWS that would be considered circuitous under each definition.¹¹¹ With circuitry definition 1, {{[REDACTED]}} percent of *existing* route-carrier services would be considered circuitous; among corridors with a minimum route distance of 500 miles, {{[REDACTED]}} percent of *existing* route-carrier services would be considered circuitous. Under circuitry definition 2, {{[REDACTED]}} percent of *existing* route-carrier services would be considered circuitous; among corridors with a minimum route distance of 500 miles, {{[REDACTED]}} percent of *existing* route-carrier services would be considered circuitous.¹¹² Under circuitry definition 3, {{[REDACTED]}} route-carrier services¹¹³ would be considered circuitous by definition.¹¹⁴

1. *Calculating Potential CPKC SLS Route Distances*

65. To estimate distances of potential CPKC SLS routes, I use Brown and Zebrowski's route distance output from PC*Miler, which contains distance estimates for KCS (excluding KCSM) routes to and from Kansas City, CP routes to and from Kansas City, and KCSM routes to and from Laredo.¹¹⁵ I define the distances along a potential CPKC SLS route to

¹¹¹ Note this excludes routes with the same origin and destination, weights by revenue, and groups non-Class I carriers together. For this exercise, the distance of each route-carrier combination is defined as the average distance.

¹¹² Circuitry definitions 1 and 2 may not be best suited for geographically close locations because the "shortest route" between two locations may involve two stations that are respectively close to their border (and each other). As such an efficient route coming from and going to the "far end" of those same locations (i.e., traversing the same O-D pair) may be flagged as circuitous when, for example, the origin BEA and destination BEA are close to each other.

¹¹³ Defined as the average distance of a given route-carrier service.

¹¹⁴ The distance of each route-carrier service will, at most, equal the maximum distance between a given O-D pair (while grouping non-class 1 carriers together).

¹¹⁵ Brown and Zebrowski Statement, Workpapers, at "7 - PC Miler Processing.xlsx", at tabs 'PC Miler Output_New CPKC' and 'New CPKCS Miles Generator.' The PC*Miler output reports routes defined by Standard Point Location Codes ("SPLC"), which I convert to relevant geographic regions, using a crosswalk constructed

be the minimum distance reported in the PC*Miler output along an O-D pair, as defined by U.S. Bureau of Economic Analysis Economic Areas (“BEAs”), Canadian Economic Regions, and Mexican states.¹¹⁶ First, to determine the distances of all KCS routes between Mexican states and Kansas City, I sum the distances along KCSM segments to and from Laredo (using the SPLC of 699380) with the KCS distance between Laredo and Kansas City (using the Kansas City, MO BEA). Second, I then add the appropriate CP distances between a given CP location and Kansas City to these calculated KCS distances to and from Kansas City (the only existing CP-KCS interchange location).¹¹⁷

2. *Calculating Shortest Rail Routes between O-D Pairs*

66. To calculate the shortest rail route (via any carrier) along any given O-D pair, I proceed as follows using CWS and my calculations discussed above. For each O-D pair, I measure the shortest rail route as:

using Dr. Majure’s Waybill Data build. *See*, Majure Statement, Workpapers. Kansas City is identified using the Kansas City, MO BEA and Laredo is identified using its SPLC.

¹¹⁶ *See*, Majure Statement, Workpapers; Railinc Business Services, “2019 Surface Transportation Board Carload Waybill Reference Guide” (“2019 Waybill Reference Guide”), December 23, 2020, available at <https://www.stb.gov/wp-content/uploads/2019-STB-Waybill-Reference-Guide.pdf>, at pp. 79-81.

¹¹⁷ I assume bidirectionality in calculating distances. Note that three segments to and from Kansas City were not included in the source, so I approximated those distances using other methodologies. To calculate the KCS distance between Kansas City and Omaha, because KCS accesses Omaha through haulage rights with UP, I sum minimum UP SLS distances between Omaha and Kansas City, as calculated using CWS. *See*, https://www.joc.com/rail-intermodal/union-pacific-grant-concessions-kcs_19880726.html (viewed December 4, 2021). To calculate CP distances between Columbus and Kansas City, I summed the minimum distance of the CP SLS segment between Kansas City and Chicago, with the estimated distance that CP travels from Chicago to Jeffersonville, a location in the Columbus, OH BEA. The minimum distance of the CP SLS segment between Kansas City and Chicago was estimated using the minimum distance between the Kansas City, MO BEA and Chicago, as calculated using the PC*Miler data. The distance of the CP segment between Chicago, at the SPLC of 380000, and Jeffersonville, OH was calculated using the North American Rail Network (“NARN”) data. The CP SLS distance between Spokane and Kansas City was similarly calculated using the NARN data. *See*, Brown and Zebrowski Statement, Workpapers, at “7 - PC Miler Processing.xlsx”, at tab ‘PC Miler Output_New CPKC;’ NARN dataset, Federal Bureau of Transportation Statistics, July 21, 2021, available at <https://data-usdot.opendata.arcgis.com/datasets/north-american-rail-lines/explore>, downloaded November 17, 2021.

- a. The minimum reported Shortline Miles provided it is greater than or equal to the haversine distance.¹¹⁸
- b. If the minimum reported Shortline Miles is less than the haversine distance, I use the minimum observed distance.¹¹⁹
- c. If the minimum reported Shortline Miles and the minimum observed distance are both less than the minimum haversine distance, I use the minimum observed distance that is greater than the haversine distance.
- d. Additionally, in circuitry calculations that relate to potential CPKC routes, if the shortest distance along a given route (as calculated in the three steps above) is greater than the potential CPKC SLS distance along that route (as calculated in section VI. B. 1.), then the shortest distance along a given route is set equal to the potential CPKC SLS distance for that route.

C. Analysis

67. Appendix Exhibit 1 shows a summary of all potential CPKC SLS corridors where CP or KCS currently interlines with other Class I carriers. As shown in rows [6]-[8], the { { [REDACTED] [REDACTED] } } from existing traffic on potential CPKC SLS corridors is from corridors that are not circuitous under any of the three circuitry screens.

¹¹⁸ The 2019 Waybill Reference Guide defines the Shortline Miles field provided in the CWS data as “the shortest rail route over which carload traffic can be moved without transfer of lading.” See, 2019 Waybill Reference Guide, at p. 48. Haversine distances were determined using Majure’s Waybill Data build. See, Majure Statement, Workpapers.

¹¹⁹ The minimum observed distance of an O-D pair is defined as the distance of the route with the shortest Total Distance on that O-D pair.

68. Appendix Exhibit 2 modifies Exhibit 4, which focuses on corridors where NS interlines with CP or KCS on potential CPKC SLS corridors, to include flags for each of the circuitry screens. Though certain routes may be circuitous, NS interlines on at least {{[REDACTED]}} routes that would not be considered circuitous regardless of the definition applied, of which at least {{[REDACTED]}} interchange at Meridian.¹²⁰ These are likely conservative estimates as under circuitry definition 2, {{[REDACTED]}} routes are flagged as non-circuitous, {{[REDACTED]}} of which interchange at Meridian. Similarly, even after eliminating potentially circuitous routes from consideration, CPKC has the potential to become a monopoly single line service on {{[REDACTED]}} routes depending on the circuitry screen.¹²¹

69. Because it is not possible with certainty to know which potential single line service routes will be activated by CPKC in the wake of its proposed merger, I have conservatively considered the implication of excluding routes that may be deemed too circuitous to be implemented. My analysis, regardless of which definition of circuitry is used, reveals these circuitry restrictions dampen, but do not eliminate the potential for considerable rail traffic to be exposed to anticompetitive incentives in the wake of the proposed merger.

¹²⁰ Appendix Exhibit 2.

¹²¹ Appendix Exhibit 2.

Verification

I, John Mayo, Elsa Carlson McDonough Chair of Business Administration and Professor of Economics, Business and Public Policy in Georgetown University's McDonough School of Business, verify under penalty of perjury that I have read the foregoing document and know its contents, and that the same is true and correct to the best of my knowledge and belief.

Executed this 9th day of June, 2022.

A handwritten signature in black ink, appearing to read "John W. Mayo". The signature is fluid and cursive, with a large initial "J" and a stylized "M".

John Mayo

Exhibit 1

[Redacted]

Exhibit 2

[Redacted]

Exhibit 3

[Redacted]

Exhibit 4
[Redacted]

Exhibit 5

[Redacted]

Exhibit 6
[Redacted]

Exhibit 7
[Redacted]

Exhibit 8

[Redacted]

Appendix Exhibit 1

[Redacted]

Appendix Exhibit 2

[Redacted]

Map Appendix Exhibit 1

[Redacted]

Map Appendix Exhibit 2

[Redacted]

Map Appendix Exhibit 3

[Redacted]

Map Appendix Exhibit 4

[Redacted]

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June 2022 the above Amended Comments and Request for Conditions has been e-filed via the STB's e-filing system and served via email or regular postage pre-paid mail on all parties of record in this proceeding.

/s/ Daniel Baquet

Daniel Baquet

June 9, 2022