

BEFORE THE SURFACE TRANSPORTATION BOARD

304972

FINANCE DOCKET NO. 36500

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

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**NORFOLK SOUTHERN RAILWAY COMPANY'S RESPONSE TO COMMENTS AND
REQUEST FOR CONDITIONS**

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Introduction

This Proceeding was established to analyze Canadian Pacific Railway Limited’s acquisition of Kansas City Southern (the “CP-KCS Transaction”).¹ CSX Transportation, Inc. (“CSXT”), however, seeks to use it as a venue to air complaints regarding a *different* transaction—the Meridian Speedway LLC joint venture between Norfolk Southern Railway Company (“NS”) and KCS (the “Meridian Speedway Joint Venture”) formed in 2006, which has operated for *sixteen years* with no allegations of competitive harm.

The allegations in CSXT’s Comments and Request for Conditions² (“CSXT Comments”) and CSXT’s Amended Comments and Request for Conditions³ (“CSXT Amended Comments”)

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. (hereinafter “CP”). 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 CP-KCS Transaction refers to the proposed control application by Canadian Pacific Railway Limited, et al. (“CP”), of Kansas City Southern, et al. (“KCS”), in STB Docket No. FD 36500 (the “Proceeding”).

² CSX Transportation, Inc.’s Comments and Request for Conditions, STB Docket No. FD 36500 (filed February 28, 2022) (“CSXT Comments”).

³ CSX Transportation, Inc.’s Amended Comments and Request for Conditions, STB Docket No. FD 36500 (filed June 9, 2022) (“CSXT Amended Comments”).

are nothing more than an opportunistic attempt to take advantage of the CP-KCS Proceeding and must fail.

First, CSXT’s surprise attack on the Meridian Speedway Joint Venture does not meet the standard set by the Board for the review of the CP-KCS Transaction, which is the sole focus of this Proceeding. For the Board to grant CSXT’s request for conditions, the harm alleged by CSXT must be “directly and causally related to” the CP-KCS Transaction,⁴ and not “from any pre-existing, anticompetitive condition or disadvantage that other railroads, shippers, or communities may have been experiencing.”⁵

Because the Board has determined that the pre-2001 rules apply to its review of the CP-KCS Transaction,⁶ the Board must consider whether a requested condition would *preserve* competition lost as a result of the CP-KCS Transaction, not whether the condition would *enhance* competition.⁷ Put another way, the purpose of the Board’s condition power is “to preserve competitive options (not to expand them).”⁸ CSXT’s requests for conditions relating to the Meridian Speedway seek to address alleged harm from a transaction that is unrelated to the CP-KCS Transaction based on effects from pre-existing conditions that have been in place for 16 years. For this reason alone, CSXT’s requests for conditions relating to the Meridian Speedway must fail.

⁴ *Union Pacific Corp., et al. – Control and Merger – Southern Pacific Rail Corp., et al.*, STB Docket No. FD 32760 (served August 6, 1996) (“UP-SP”), at 364.

⁵ *Id.*

⁶ *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, STB Docket No. 36500 (served April 23, 2021).

⁷ 49 C.F.R. part 1180 (2000). See *Union Pacific Corp., et al. – Control and Merger – Southern Pacific Rail Corp., et al.*, STB Docket No. FD 32760 (served August 6, 1996).

⁸ *CSX Corp. et al. – Control and Merger – Pan AM Systems, Inc., et al.*, STB Docket No. 36472 (served April 14, 2022) (“CSX-PAS”) quoting *Burlington N. Inc. – Control & Merger – Santa Fe Pac. Corp.*, 10 I.C.C. 2d 661, 745 (1995); See BN-SF, at 78; See Conrail, at 283; CN-IC, at 55-56.

Second, CSXT's antitrust complaints regarding the Meridian Speedway Joint Venture are meritless; they are simply wrong on the facts, the economics,⁹ and the law. The joint venture was, and remains, a pro-competitive transaction between NS and KCS that resulted in significant improvements to the rail line between Meridian, MS and Shreveport, LA (the "Meridian Speedway" or "Speedway") due to NS's initial investment of \$300 million in the joint venture and subsequent investments since.¹⁰ The joint venture unlocked much-needed capacity for shippers moving product between the Southeast and Southwest United States, increasing options for shippers not only on the Meridian Speedway, but also by spurring CSXT's own alliance with BNSF Railway ("BNSF") that serves the very intermodal traffic at issue in CSXT's Comments and Amended Comments.¹¹

CSXT's conclusory assertion that the Meridian Speedway Joint Venture operates as an explicit market allocation scheme fails for the simple reason that KCS and NS did not compete for the movement of traffic over the Meridian Speedway prior to the formation of the joint venture. The formation of the Meridian Speedway Joint Venture, therefore, cannot constitute a market allocation scheme or pooling arrangement between competitors as CSXT alleges. Further, consistent with antitrust precedent favoring joint ventures and narrowly tailored ancillary restraints, the exclusivity provision with which CSXT now takes issue is narrowly tailored to protect NS's substantial investment in the joint venture, which NS would not have made without assurance that the investment would be protected from free-riding by others such as CSXT.

⁹ For a full discussion of the flawed economic analysis put forth by Carey/Bremser, see Verified Statement of Professor John W. Mayo (July 12, 2022), attached hereto as Exhibit A.

¹⁰ *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 Jan. 17, 2006).

¹¹ *BNSF, CSX Create High-Volume Intermodal Corridor*, <http://www.bnsf.com/media/news/articles/2006/10/2006-10-12a.html> (last accessed July 12, 2022).

CSXT's failure to demonstrate any competitive harm resulting from the Meridian Speedway Joint Venture transaction is an independent basis upon which the requests in CSXT's Comment and Amended Comment must fail.

Finally, CSXT fails to connect the CP-KCS Transaction to its allegations against the Meridian Speedway Joint Venture. CSXT's Comments improperly relied on requests that NS anticipated making, but did not ultimately make in its Comments and Request for Conditions.¹² Even after NS filed its Comments with a more narrow request for conditions, however, CSXT did not reverse course. Instead, in CSXT's Amended Comments, CSXT sought to connect its requests to the CP-KCS Transaction based on the Amended Operating Plan that Applicants filed. CSXT makes a number of assumptions and outright errors in this process. Once unpacked, the Amended Operating Plan {{[REDACTED]}} in the category of traffic on the Meridian Speedway that is exclusive to NS, {{[REDACTED]}} that CSXT incorrectly alleges is exclusive to NS. Therefore, there is no diminution in competition as a result of the CP-KCS Transaction for which the imposition of conditions sought by CSXT relating to the Meridian Speedway is appropriate.¹³

CSXT's Comments and Amended Comments do not meet the standards clearly set by the Board for this Proceeding. And its antitrust arguments are unsupported by the facts, economics, or the law. For these reasons, NS respectfully requests that the Board deny each of CSXT's request for conditions relating to the Meridian Speedway.

¹² CSXT Comments, at 5. NS's Amended Comments fully replaced NS's Comments filed on February 28, 2022. NS Amended Comments, at 2.

¹³ UP-SP, at 364.

I. CSXT Seeks Conditions Inconsistent with the Standard Set by the Board for This Proceeding

It is a fundamental principle that the Board may only grant conditions that bear a sufficient nexus to the transaction that is the subject of the proceeding. The Board recently reaffirmed this principle in its review of CSX Corporation's acquisition of Pan Am Systems, Inc. ("CSX-PAS Proceeding."):

the Board (and the courts) have repeatedly indicated that the Board should not impose a condition unless it is reasonable and *bears a sufficient nexus to the proposed transaction*. (emphasis added).¹⁴

In addition, the Board has determined that the pre-2001 rules apply to its review of the CP-KCS Transaction.¹⁵ Under this standard, the Board must consider whether a requested condition would *preserve* competition lost as a result of the CP-KCS Transaction, not whether the condition would *enhance* competition.¹⁶ The Board must not grant conditions that seek to remedy any pre-existing anti-competitive harm or disadvantage.¹⁷

In this Proceeding, CSXT is asking the Board to abrogate Meridian Speedway LLC agreements between NS (a non-applicant) and KCS.¹⁸ At its core, CSXT's challenge is to a single

¹⁴ CSX-PAS, at 27.

¹⁵ *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, STB Docket No. 36500 (served April 23, 2021).

¹⁶ 49 C.F.R. part 1180 (2000). *See Union Pacific Corp., et al. – Control and Merger – Southern Pacific Rail Corp., et al.*, STB Docket No. FD 32760 (served August 6, 1996).

¹⁷ *See, e.g.,* UP-SP, at 364 ("In evaluating whether a merger is in the public interest, we seek to determine what competitive harm is **directly and causally related to the merger and to distinguish that harm from any pre-existing, anticompetitive condition or disadvantage** that other railroads, shippers, or communities may have been experiencing. We attempt to ameliorate harm that is caused by the merger with conditions.") (emphasis added); UP-SP, at 480 (denying the condition sought by CIC International Corporation where "the merger [would] change nothing" about the relevant operations and the condition "would vastly improve, not merely preserve, the competitive status quo.")

¹⁸ CSXT is seeking conditions related to the New Orleans Gateway and the East St. Louis gateway. NS takes no position in this filing on CSXT's requested conditions that are not related to the Meridian Speedway.

provision in the NSR Joint Use Agreement¹⁹ that provides, in exchange for NS's significant capital investment in the Meridian Speedway Joint Venture, NS has exclusive rights to transport a narrow category of traffic. That traffic is defined as:

all intermodal traffic that: (i) originates or terminates in the United States west of Dallas/Ft. Worth (including intermodal traffic originating by steamship line at a port along the west coast of the United States) and enters or exits the Subject Trackage at Shreveport; and (ii) originates or terminates in the United States at or east of Meridian and enters or exits the Subject Trackage at Meridian; and (iii) does not consist of traffic originating or terminating at any station on the KCSR system which includes the Texas Mexican Railway Company, (including any station where KCSR, or the Texas Mexican Railway Company have trackage rights or access via reciprocal switch), as it exists on the date of the Transaction Agreement (the "NS Traffic Provision").²⁰

Any alleged harm that might flow from the NS Traffic Provision is pre-existing and not related to the CP-KCS Transaction. CSXT concedes this point in its Comments, noting that it is seeking to "re-establish the competitive *status quo* before 2006"²¹ and "*increase competition* in the Eastern U.S. railroad markets."²² Such a request is unrelated to the CP-KCS Transaction, goes beyond preserving competition impacted by the CP-KCS Transaction, and runs afoul of the standard adopted by the Board for this Proceeding. The relevant *status quo* for purposes of imposing conditions on the CP-KCS Transaction is not 2006. Instead, 2019 (long after the Meridian Speedway Joint Venture was consummated) is the base year for evaluating the effects of the

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 Jan. 17, 2006) ("KCS Notice of Exemption"), Exhibit C ("NSR Joint Use Agreement").

²⁰ NSR Joint Use Agreement, at 11. *See also*, KCS Notice of Exemption, at 6.

²¹ CSXT Comments, at 20.

²² *Verified Statement of Professor Julie M. Carey and Dr. Albert W. Bremser, CSX Transportation, Inc.'s Comments and Request for Conditions*, STB Docket No. FD 36500 (filed February 28, 2022), at 54 (stating that CSXT's requested conditions would "**increase competition** in the Eastern U.S. railroad markets") (emphasis added).

proposed CP-KCS Transaction.²³ Moreover, the Board has great reluctance to interfere in a contract between an Applicant and a *third party* in connection with the Board's review of the Applicant's proposed merger transaction.²⁴ CSXT's request is nothing more than an opportunistic attempt to use the CP-KCS Proceeding to revisit a longstanding and successful joint venture transaction unrelated to the CP-KCS Transaction.

II. CSXT's Allegation That the Meridian Speedway Joint Venture Was An "Explicit Market Allocation Scheme" Is Baseless and Completely Devoid of Merit

CSXT attacks the Meridian Speedway Joint Venture as an unlawful market allocation scheme. Under long-standing antitrust precedent, there can be no market allocation scheme unless the parties were competitors prior to entering into an agreement.²⁵ Indeed, CSXT itself understands this to be true. In the Verified Statement of Professor Julie M. Carey and Dr. Albert W. Bremser ("Carey/Bremser"), it is acknowledged that "agreements that solely divide markets among *competing firms* have been considered illegal."²⁶ Courts consistently have held that in order for parties to allocate a market, they must have first been competitors competing in that market.²⁷ The precedent is clear. Only competitors can create market allocation schemes.

²³ Applicants use 2019 as the base year for the impact analysis included in their Application. *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al., Notice of Intent to File Application*, STB Docket No. FD 36500 (filed March 22, 2021).

²⁴ See *Hall v. Norfolk Southern Ry. Co.*, 469 F.3d 590 (7th Cir. 2006); *Soo Line R.R. Co. v. Consol. Rail Corp.*, No. 2:17-CV-106, 2018 WL 1566816 (N.D. Ind. Mar. 29, 2018). See also, CSX-Pan Am Merger Hr'g Tr. 467:19-468:2, Jan. 14, 2022 (Member Fuchs: "[E]ven more broadly in a Subsection C, the major merger context, the Board via its major merger rules, as well as the 95 case indicated a great reluctance to adjudicate contract issues, or things that could be worked out in contract, in the context of a merger.").

²⁵ *United States v. Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 1133-34 (1972) ("One of the classic examples of a *per se* violation of §1 is an **agreement between competitors** at the same level of the market structure to allocate territories in order to minimize competition....This Court has reiterated time and time again that '[h]orizontal territorial limitationsare naked restraints of trade with no purpose except stifling of competition.' Such limitations are *per se* violations of the Sherman Act.") (emphasis added).

²⁶ *CSX Transportation, Inc.'s Comments and Request for Conditions*, STB Docket No. FD 36500 (filed Feb. 28, 2022) ("CSXT Comments"), Verified Statement of Professor Julie M. Carey and Dr. Albert W. Bremser, at 47 (emphasis added).

²⁷ See *Topco*, *supra* n. 25.

NS and KCS did not compete for traffic on the Meridian Speedway and therefore could not have devised a market allocation scheme. Prior to the formation of the Meridian Speedway Joint Venture, the line between Meridian, MS and Shreveport, LA was owned by KCS.²⁸ NS had no ownership or other interest in the line that gave NS an ability to compete with KCS for traffic traversing the route between Meridian, MS and Shreveport, LA. Rather, recognizing that each of NS and KCS owned lines that are in an end-to-end service, in 2000, NS and KCS entered into a haulage agreement to offer service for intermodal customers on the line between Meridian, MS and Shreveport, LA.²⁹ The haulage agreement provided that KCS would haul intermodal traffic for NS on the KCS line.³⁰ NS and KCS had an end-to-end relationship for traffic moving over the KCS line, and the haulage agreement did not change this relationship (*i.e.*, NS and KCS were not competitors for overhead intermodal traffic on the line between Meridian, MS and Shreveport, LA). At the time the Meridian Speedway Joint Venture was formed, KCS confirmed to the Board that: “KCS 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 Line.”³¹

Because NS and KCS did not compete to move traffic between Meridian, MS and Shreveport, LA prior to the formation of the Meridian Speedway Joint Venture, NS and KCS were incapable of entering into, and did not enter into, a market allocation scheme.³² CSXT’s allegation

²⁸ KCS Notice of Exemption, at 3.

²⁹ KCS Notice of Exemption, at 4.

³⁰ “Transcontinental intermodal service is currently provided across the Speedway pursuant to a haulage agreement between NSR and KCSR, which the parties entered in 2000.” KCS Notice of Exemption, at 4.

³¹ KCS Notice of Exemption, at 4.

³² Further, because NS and KCS were not competitors, they were incapable of entering into a pooling arrangement. *Union Pacific RR. et al. – Trackage Rights Over CNW*, 7 I.C.C.2d 177, 184 (1990) (“For an agreement to be considered pooling, two elements must exist. First the arrangement must be between competitors and second, the arrangement must involve some restraint or potential restraint on competition.”).

that NS and KCS entered into a market allocation scheme by creating the Meridian Speedway Joint Venture is inconsistent with the facts and completely without merit.

III. CSXT's Allegations That the Meridian Speedway Joint Venture Is Anti-competitive Also Fails

CSXT's allegations that the Meridian Speedway Joint Venture is anticompetitive runs counter to antitrust decisional law regarding joint ventures generally as well as specific Board precedent regarding the Meridian Speedway Joint Venture and undisputed facts regarding the movement of intermodal traffic in the United States.

A. Well-Established Antitrust Precedent Supports Joint Venture Transactions and Ancillary Restraints in Connection with Joint Venture Transactions

Joint ventures are consistently upheld under the U.S. antitrust laws as pro-competitive transactions that generate efficiencies and promote competition.³³ A key advantage of joint ventures is their ability to create a new service or product not otherwise available to customers.³⁴ Because of this and other pro-competitive features, joint ventures are not reviewed as *per se* unlawful under the antitrust laws. Instead, they are considered under the more relaxed rule of reason standard, which balances any anticompetitive effects against the pro-competitive benefits of the joint venture.³⁵ The U.S. antitrust agencies also recognize that consumers may benefit from competitor collaborations in a variety of ways:

³³ Joint ventures “hold the promise of increasing a firm’s efficiency and enabling it to compete more effectively.” *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L.Ed.2d 628 (1984).

³⁴ *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 324 (2nd Cir. 2008) quoting *NCAA v. Bd. of Regents*, 468 U.S. 85, 113, 104 S. Ct. 2948; 82 L.Ed.2d 70 (1984) (“A joint selling arrangement may mak[e] possible a new product by reaping otherwise unattainable efficiencies.”).

³⁵ Courts review joint ventures under the rule of reason and not *per se* anticompetitive because Joint Ventures have noted pro-competitive elements. *Copperweld Corp.*, at 768. While the Supreme Court has stated that the *per se* rule applies to practices that are facially recognized to be anticompetitive (e.g., market allocation, price-fixing, bid-rigging) (see *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979)), the antitrust rule of reason requires the factfinder to consider the pro-competitive aspects of the challenged arrangement in assessing whether any anti-competitive effects are outweighed by pro-competitive benefits. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

For example, a competitor collaboration may enable participants to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would be possible absent the collaboration. A collaboration may also allow its participants to better use existing assets, or may provide incentives for them to make output-enhancing investments that would not occur absent the collaboration. The potential efficiencies from competitor collaborations may be achieved through a variety of contractual arrangements including joint ventures, trade or professional associations, licensing arrangements, or strategic alliances.³⁶

Limited restraints within joint ventures may be necessary to protect and incentivize investment, eliminate free-riding, and promote pro-competitive cooperation between the joint venture parties. However, to be legitimate, such restraints must be ancillary to the main agreement and reasonable.³⁷

In comparison with a naked restraint, which serves no broader pro-competitive purpose, an ancillary restraint is simply “part of a larger endeavor whose success they promote.”³⁸ Ancillary restraints, in essence, “contribute to the success of a cooperative venture that promises greater productivity and output.”³⁹ Such limited restraints protect the interests of the joint venture parties to ensure that the venture can achieve its goals and generate pro-competitive value. These ancillary restraints can also mitigate free-riding concerns associated with joint ventures.⁴⁰ So, where a risk of free-riding exists, ancillary restraints protect the investments made in the joint venture to ensure that others who are not involved do not free-ride and benefit from the venture’s activities and efficiencies without bearing any costs.⁴¹

³⁶ Guidelines for Collaboration Among Competitors, at 4.

³⁷ *Id.*

³⁸ *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 54 USLW 2281 (7th Cir. 1985)

³⁹ *Polk Bros., Inc.*, at 189, 190 (“the reason for distinguishing between “ancillary” and “naked” restraints is to determine whether the agreement is part of a cooperative venture with prospects for increasing output. If it is, it should not be condemned *per se*.”).

⁴⁰ *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 253 U.S. App. D.C. 142, 228 (D.C. Cir. 1986)(“Elimination of the free ride is an efficiency justification available to horizontal restraints that are ancillary to a contract integration.”).

⁴¹ *Id.*

In addition, such ancillary restraints to a joint venture must be reasonable. If an aspect of a joint venture is challenged, “the relationship of the challenged conduct to the joint venture is analyzed to see if the conduct is reasonably related to the joint venture’s procompetitive features.”⁴² To be reasonably related and legitimate, the restraint “must be limited to those inevitably arising out of dealings between partners, and necessary to make the joint venture work.”⁴³ So, there must be “a reasonable procompetitive justification,” that is “related to the efficiency-enhancing purposes of the joint venture.”⁴⁴

Accordingly, courts support joint ventures with ancillary restraints so long as the joint venture itself is pro-competitive and achieves efficiencies that benefit competition and the consumer and any restraints are both ancillary and reasonably related to the agreement. As detailed below, the Meridian Speedway Joint Venture was and is clearly pro-competitive and continues to achieve efficiencies for shippers.⁴⁵ Furthermore, the narrow exclusivity provision for certain intermodal freight that traverses the Meridian Speedway is ancillary and reasonable to the Meridian Speedway Joint Venture, as it serves to mitigate against free-riding by parties who have not invested to ensure that NS continues to benefit from its substantial and ongoing investments in the transformation and improvement of the Meridian Speedway line. The NS Traffic Provision is, as explained further below, a reasonable ancillary restraint that was and remains necessary for the smooth-functioning of the Meridian Speedway Joint Venture.

⁴² *Medical Center at Elizabeth Place, LLC v. Atrium Health System*, 922 F.3d 713, 724 (6th Cir. 2019).

⁴³ *Brunswick Corp.* 94 F.TC. 1174, 1275 (1979).

⁴⁴ *Major League Baseball Props., Inc. v. Salvino*, 542 F.3d 290, 339-40 (2d Cir. 2008)(Sotomayor, J., concurring).

⁴⁵ Verified Statement of Professor John W. Mayo (July 12, 2022), at 19.

B. The Meridian Speedway Joint Venture Revitalized a Route Between Meridian, MS and Shreveport, LA That Had Limited Capacity, Was in Need of Significant Investment, and Was Facing Increasing Demand

Prior to the creation of the Meridian Speedway joint venture in 2006, the KCS line between Meridian, MS and Shreveport, LA lacked the capacity to sustain efficient and reliable intermodal service.⁴⁶ As noted above, between 2000 and 2006, KCS and NS had a haulage arrangement whereby NS could move, via haulage by KCS, certain intermodal traffic on the KCS line.⁴⁷ In 2004, NS moved roughly {{[REDACTED]}} intermodal loads between Meridian, MS and Shreveport, LA.⁴⁸ However, the line was ill-equipped to achieve the speeds and service levels desired by intermodal customers and it could not compete effectively with the speed and reliability offered by truck service or the other Southeast rail routes through New Orleans, Memphis, and Birmingham.⁴⁹

By 2005, “it became clear that substantial capital investments would be required to provide the train speeds and line capacity the parties believed was needed to handle future traffic growth on the line.”⁵⁰ However, KCS lacked the resources to make the “sustained capital spending” needed to make the line competitive with the already existing routes, including for transcontinental intermodal service.⁵¹ NS, recognizing that the line would not be competitive without substantial investments, offered to invest in the line in exchange for an interest in the line. The parties agreed

⁴⁶ “The [Meridian Speedway] has become capacity constrained as traffic between the Southwest and Southeast has grown. This capacity crunch and other constraints currently limit the ability of CKSR and NSR to attract more traffic to their services using the Speedway.” KCS Notice of Exemption, at 4.

⁴⁷ KCS Notice of Exemption, at 4.

⁴⁸ *Amended Comments of Norfolk Southern Railway Company and Request for Conditions*, STB Docket No. FD 36500 (filed June 9, 2022), Amended Verified Statement of Michael R. McClellan (“Amended McClellan VS”), at 2.

⁴⁹ KCS Notice of Exemption, at 4; *See* Amended McClellan VS, at 2.

⁵⁰ KCS Notice of Exemption, at 5.

⁵¹ *Id.*

that in exchange for a 30% stake in a new Meridian Speedway Joint Venture that owned the line, NS would make a substantial capital investment into the Meridian Speedway Joint Venture totaling greater than \$300 million.⁵² NS's considerable investment has transformed the line into a new, competitive option for shippers seeking to move east-west traffic to and from the Southeastern U.S.⁵³ Since 2006, NS has continued to invest in the Meridian Speedway Joint Venture. NS committed to a volume guarantee for traffic moving on the Meridian Speedway. Funding for the ongoing maintenance of the Meridian Speedway lines comes in part from the revenue that the Meridian Speedway Joint Venture generates from NS's traffic on the Speedway.⁵⁴ NS has also made significant investments into NS's intermodal network in the Southeast, including no less than \$324 million in intermodal terminals in NS's network. These investments continue to support NS's ability to deliver the premium and truck competitive services intermodal customers demand and help achieve public interest benefits supported by the Board.

C. No Party —Including CSXT—Raised Any Concerns When the MSLLC Exemptions Were Filed in 2006 or in the 16 Years Since the Formation of the Meridian Speedway Joint Venture

KCS (including its subsidiary KCSR), the Meridian Speedway LLC ("MSLLC"), and NS each filed explicitly interrelated⁵⁵ notices with the Board prior to the formation of the Meridian Speedway Joint Venture, and those notices specifically discussed the NS haulage and trackage

⁵² *Id.*; NS Amended Comments, at 6-7.

⁵³ "The result has been to create *new rail connections* and a much improved option for intermodal shippers." NS Amended Comments, at 11-12 (emphasis added).

⁵⁴ See NS00013443 ({{[REDACTED]}}).

⁵⁵ See, e.g., *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 16, 2006), at 6, n. 5 and 6 (referencing the Notice of Exemption filed in STB Docket No. 34823 and the Notice of Exemption filed in STB Docket No. 34821, respectively).

rights provisions.⁵⁶ First, KCS and the MSLLC together submitted a notice of exemption for a transaction within a corporate family.⁵⁷ That exemption involved the transfer of KCS's line between Meridian, MS and Shreveport, LA to the MSLLC.⁵⁸ It also included KCS's continued control of the Speedway after the MSLLC acquired the line, the MSLLC's grant of operating rights to KCS, and KCS's responsibility to fulfill the MSLLC's "contractual and common carrier obligations."⁵⁹ Second, KCSR submitted an exemption notice for local and overhead trackage rights to allow KCSR to continue operating over the Meridian Speedway following the creation of the MSLLC.⁶⁰ Third, NS submitted an exemption notice for overhead trackage rights over the Meridian Speedway.⁶¹

In conjunction with the filing of these notices, KCS and NS also submitted, as required by 49 C.F.R. § 1180.6(a)(7)(ii), public copies of each accompanying MSLLC agreement for public review and comment.⁶² NS and KCS fully complied with this requirement and made redacted

⁵⁶ See KCS Notice of Exemption, at 6. See also, *CSX Transportation, Inc. – Joint Use – Louisville & Indiana Railroad Company, Inc.*, STB Docket No. FD 35534 (filed Oct. 21, 2013) (citing the KCS Notice of Exemption in stating that the Board "has permitted" certain restrictions in transactions involving significant capital investments by a railroad to improve lines that it does not own). Further, CSXT seems to suggest that the MSLLC transaction could have been reviewed by the Board as a pooling arrangement. See CSXT Comment, at 16. However, because NS and KCS did not compete for the traffic that was covered by the MSLLC Agreements, the agreement could not be considered pooling. *Union Pacific RR. et al. – Trackage Rights Over CNW*, 7 I.C.C.2d 177, 184 (1990) ("For an agreement to be considered pooling, two elements must exist. First the arrangement must be between competitors and second, the arrangement must involve some restraint or potential restraint on competition.").

⁵⁷ *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 16, 2006).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Kansas City Southern Railway Company – Trackage Rights Exemption – Meridian Speedway, LLC*, STB Docket No. FD 34823 (filed January 16, 2006).

⁶¹ *Norfolk Southern Railway Company – Trackage Rights Exemption – Meridian Speedway LLC – Between Meridian, MS and Shreveport, LA*, STB Docket No. FD 34821 (filed January 16, 2006).

⁶² *Norfolk Southern Railway Company – Trackage Rights Exemption – Meridian Speedway LLC – Between Meridian, MS and Shreveport, LA*, STB Docket No. FD 34821 (served February 2, 2006), at 1. n. 1 ("A redacted version of the trackage rights agreement was filed with the notice of exemption. The full version of the agreement, as required by 49 CFR 1180.6(a)(7)(ii), was filed under seal along with a motion for a protective order.").

copies of all relevant MSLLC operating agreements available to the public and confidential copies available to interested parties subject to the protective order in the proceeding.⁶³ The notice and comment period guaranteed any interested party the opportunity to raise any objections concerning a proposed exempted transaction before the proposed transaction may close. As a result, any party or interested member of the public had the opportunity to scrutinize the agreements in 2006 and notify the Board of any concerns or points of clarification prior to the formation of the Meridian Speedway Joint Venture and NS's investment in the Meridian Speedway.

No party, including CSXT, raised any competitive concerns regarding the Meridian Speedway Joint Venture. Rather, 41 intermodal customers of NS and KCS, including intermodal consolidators, intermodal drayage companies, and motor carriers, submitted statements of support for the Meridian Speedway Joint Venture transaction and emphasized the increased capacity, efficiencies, and service reliability that the joint venture would create.⁶⁴ For example, UPS

⁶³ Finance Docket No. 34822, at 9 (“Not every agreement that the parties have entered into in connection with the transaction is relevant to the matters involved in this Notice of Exemption. Nonetheless, the Parties attach as [copies] of the various agreements governing the transaction among KCS, KCSR, MSLLC, and NSR...KCS is also submitting, under seal, and subject to the Protective Order, un-redacted Highly Confidential versions of the agreements that were submitted in the public version of this notice.”).

⁶⁴ *Norfolk Southern Railway Company – Trackage Rights Exemption – Meridian Speedway LLC – Between Meridian, MS and Shreveport, LA*, STB Docket No. FD 34821 (filed Jan. 20, 2006), Statements from Intermodal Customers. For example, UPS “applaud[ed]” the “announcement of the proposed Norfolk Southern-Kansas City Southern infrastructure improvement project to the Meridian Speedway.” They emphasized the Speedway’s “innovative financing solution to enhance intermodal capacity [which] demonstrates the value of the intermodal sector of the industry” and that it “commend[ed] this enlightened decision and strongly encourages other Class I railroads to make similar investments.” UPS concluded that “The NS-KCS project represents a creative financing approach to provide much needed relief to a capacity constrained rail network. This project validates UPS’s contention that railroads need to find additional unique solutions to meet their customer’s needs.” Similarly, Schneider National noted that they are a “major customer of both of these railroads” and that good service “requires investment by railroads to improve capacity” and that “infrastructure is critical.” Hub Group, Inc., too, noted its support for the MSLLC. In 2005 they shipped over 196,000 containers with NS and 25,000 loads on the Speedway. Hub Group noted that “Kansas City Southern and Norfolk Southern have been working together for 12 years to provide intermodal service over this line. We view this transaction as the next logical step in their efforts to improve that service.”

applauded the project for “provid[ing] much needed relief to a capacity constrained rail network.”⁶⁵

The result of the Meridian Speedway Joint Venture was demonstrably pro-competitive. Intermodal traffic on the Meridian Speedway increased from {{[REDACTED]}} intermodal revenue moves in 2005 to {{[REDACTED]}} intermodal revenue moves in 2021 and over {{[REDACTED]}} total moves over the Speedway annually.⁶⁶ In fact, the Meridian Speedway created a competitive alternative to the three dominant rail routes in the region (through Memphis, New Orleans, and Birmingham gateways) as well as truck routes, that may not have existed absent the Meridian Speedway Joint Venture.⁶⁷ Further, shortly after the creation of the Meridian Speedway Joint Venture, CSXT and BNSF partnered to establish another new, efficient, and competitive option for intermodal shippers moving between Los Angeles, CA and Atlanta, GA.⁶⁸ The stated goal of the alliance was to take intermodal freight from NS.⁶⁹ And it was effective in doing so.⁷⁰ In a presentation to the CSXT Board of Directors in July 2006, CSXT senior leadership emphasized that:

- {{[REDACTED]}}
- {{[REDACTED]}}
- {{[REDACTED]}}
- {{[REDACTED]}}

⁶⁵ *Id.*

⁶⁶ Amended McClellan VS, at 2-3.

⁶⁷ *Id.*

⁶⁸ See {{[REDACTED]}}, CSX_HC_00000022.

⁶⁹ CSX_HC_0002646, at 6 ({{[REDACTED]}}).

⁷⁰ NS00006119, at 2 ({{[REDACTED]}}).

- [REDACTED] } }⁷¹

In addition, in a CSXT presentation from December 2013 relating to { [REDACTED]

[REDACTED] } }⁷² The BNSF-CSXT partnership was highly successful. NS estimates that { [REDACTED] } loads that were moving between the West Coast and Southeast on the Meridian Speedway were diverted to the BNSF-CSXT route.⁷³

NS's investment in the Meridian Speedway Joint Venture improved the quality of the Meridian Speedway infrastructure, which led to shorter transit times, more consistent service, and increased competition for the movement of traffic between the Southeast and the Southwest United States.

D. The NS Traffic Provision Is a Narrowly-Tailored Ancillary Restraint That Was Necessary to the Formation of the Meridian Speedway Joint Venture

The Meridian Speedway Joint Venture was created following extensive negotiations that resulted in significant commitments from both joint venture partners. Not the least of which was NS's significant financial commitment. Absent NS's pledge to commit \$300 million to the Meridian Speedway Joint Venture, the above-referenced benefits would not have been achieved. NS and KCS agreed that NS would "contribute \$300 million in cash, at least \$260 million of which

⁷¹ CSX_HC_0005138.

⁷² CSX_HC_0005211, at 3.

⁷³ See also, CSX_HC_0005211, at 4. { [REDACTED] };
Id, at 5 { [REDACTED] }.

will be used to fund capital improvements over the next four years to increase capacity of the line.”⁷⁴ This considerable investment amounted to an average of nearly \$800,000 per route mile.⁷⁵

Furthermore, to this day NS continues to support the Speedway and make investments in reliance on the MSLLC agreements, including the NS Traffic Provision. Not only did NS fulfill its initial contractual commitment to invest \$300 million in 2011, but it also continues to invest in the development of the Speedway.⁷⁶ NS has continually supported the maintenance and development of the Speedway alongside KCS to ensure the Speedway remains efficient and reliable.⁷⁷ In particular, NS committed to move a certain volume of traffic on the Meridian Speedway.⁷⁸ The Meridian Speedway Joint Venture generates revenue from the services it provides for NS’s traffic. This revenue contributes directly to the Meridian Speedway Joint Venture’s budget for maintenance of the Meridian Speedway track.⁷⁹ The Meridian Speedway Joint Venture can also make a formal request for capital from the joint venture partners to make investments in infrastructure beyond what the joint venture’s normal operations can fund. In

⁷⁴ KCS Notice of Exemption, at 5; The purpose of the Meridian Speedway transaction and related investment was to “expand capacity on the [Meridian Speedway] for the benefit of customers and the national transportation network.” Recognizing that traffic between the Southeast and the Southwest, including to the West Coast ports, was growing faster than the Meridian Speedway capacity could handle it, NS invested \$283 million into the route in the first four years after the MSLLC was formed. *Amended Comments of Norfolk Southern Railway Company and Request for Conditions*, STB Docket No. FD 36500 (filed June 9, 2022) (“NS Amended Comments”), at 6-7.

⁷⁵ KCS Notice of Exemption, at 8.

⁷⁶ Meridian Speedway, Norfolk Southern, <http://www.nscorp.com/content/nscorp/en/shipping-options/corridors/meridian-speedway.html>.

⁷⁷ See, e.g., Minutes of the Meridian Speedway, LLC Management Committee, NS 00008173 (March 2013 minutes discussing {{[REDACTED]}} which included {{[REDACTED]}}); NS00007411 (September 2014 minutes discussing {{[REDACTED]}}); NS00007714 (August 2016 minutes referencing {{[REDACTED]}} and the {{[REDACTED]}}); NS00007291 (August, 2019 minutes discussing the {{[REDACTED]}} which included {{[REDACTED]}});

⁷⁸ NSR Joint Use Agreement, at 33.

⁷⁹ See NS00013477 (showing the Meridian Speedway Joint Venture’s 2022 budget, including {{[REDACTED]}}).

recent years, NS also has devoted {{[REDACTED]}} in capital expenditures on intermodal terminals in NS's network, {{[REDACTED]}} of which was invested in intermodal terminals in the region surrounding the Speedway in Atlanta, Charlotte, and Jacksonville. Such expenditures further ensure that NS may continue to provide efficient intermodal services across the Southeast.

Given such a significant financial undertaking, NS needed to ensure that other carriers would not free ride on its investment; otherwise, such an investment would have made no economic sense.⁸⁰ As KCSR explained in its Notice of Exemption, “while NSR was willing to participate in the necessary investment, it did not want to do so unless it could be assured that other carriers would not use the capacity NS’s investment would help create. The parties reached a series of agreements that addressed these concerns.”⁸¹ Put differently, the significant increase in capacity and competition created through NS’s investment in the Meridian Speedway Joint Venture would not have been achieved without the narrow NS Traffic Provision to protect that investment. Because of NS’s continuing investment, the need for a limited restraint remains necessary to protect NS’s substantial and continuing commitment from free riding by other carriers.

The NS Traffic Provision is narrowly tailored to achieve this goal. It covers only one category of traffic (intermodal), does not restrict KCS from moving any traffic that originates or terminates on the then-current KCS network, and applies only to traffic that moves on the Meridian Speedway that originates or terminates west of Dallas, TX. As testament to the reasonableness of

⁸⁰ See Verified Statement of Professor John W. Mayo (July 12, 2022), at 13 (“By granting exclusivity to NS for this traffic on the Meridian Speedway, the joint venture agreement eliminated the ability of other rail carriers to free-ride on the investments made by NS to improve the Meridian Speedway.”).

⁸¹ KCS Notice of Exemption, at 5.

this modest ancillary restraint, it affects just {█}% of NS's traffic on the Speedway and an even smaller portion of total traffic on the Speedway.

Moreover, the restraint did not preclude CSXT from serving the very traffic at issue in CSXT's Comments and Amended Comments. As discussed in Section III.C, shortly after the creation of the Meridian Speedway Joint Venture, CSXT entered into a partnership with BNSF that established an alternative competitive option for transcontinental intermodal traffic.

E. The Board Has Previously Endorsed the Meridian Speedway Joint Venture and the Ancillary Restraint Protecting NS's Investment

For these reasons, it is not surprising that the Board has signaled support for the Meridian Speedway Joint Venture and the NS Traffic Provision in prior proceedings, notwithstanding CSXT's allegations in its Comments that the Board has given no attention to the exclusivity arrangement.⁸² All the necessary information was presented to the Board in the Meridian Speedway exemption proceedings, and the Board has ratified the outcome of those proceedings in subsequent proceedings. In particular, in a proceeding involving CSXT's joint use of track owned by another carrier, the Board has recognized that certain restrictions aimed at protecting significant capital investments are permissible, specifically citing the Meridian Speedway Joint Venture:

In other transactions involving a significant capital investment by a railroad to improve lines that it does not own or fully control, the Board has permitted certain restrictions similarly aimed at protecting that investment. See Kansas City S. Ry. and Meridian Speedway LLC—Exemption for Transactions Within a Corporate Family, FD 34822 (STB served Feb. 16, 2006) (authorizing a transaction that involved a significant investment by Norfolk Southern Railway Company (NSR) in capital improvements to a line of the Kansas City Southern Railroad, but imposed certain restrictions on other railroads from operating over it)⁸³

⁸² CSXT Comments, at 11-12.

⁸³ *CSX Transportation, Inc. – Joint Use – Louisville & Indiana Railroad Company, Inc.*, STB Docket No. FD 35534 (served August 1, 2013).

In the same proceeding, CSXT touted the Meridian Speedway Joint Venture, and the NS Traffic Provision, as a positive example of a transaction “involving significant capital investment by a railroad to improve lines it does not own or fully control, [where] the Board has permitted certain restrictions similarly aimed at protecting that investment.”⁸⁴ Limited ancillary restraints are necessary to protect substantial investments and absent such restraints, parties may not invest if others may free ride and erode their investments.

IV. CSXT Identifies No Competitive Harm Resulting From the Meridian Speedway Joint Venture

CSXT makes no allegation of harm related to the Meridian Speedway Joint Venture that is “directly and causally related to”⁸⁵ the CP-KCS Transaction other than an alleged increase in NS’s market share for certain intermodal traffic. CSXT’s allegation that NS has a nearly {{[REDACTED]}} market share for “specific BEA origin and termination market lanes (or pairs) between the west coast and the Southeast U.S. for intermodal traffic not directly served by a single railroad”⁸⁶ is on its own a meaningless metric for determining competitive harm even if it were accurate – which it is not.

A. Market Share Alone Is Not a Sufficient Metric to Demonstrate Competitive Harm

As described in the KCS Notice of Exemption, one of the purposes of the Meridian Speedway joint venture was to create a new rail route that could compete with existing rail routes

⁸⁴ *Id.*

⁸⁵ UP-SP, at 364.

⁸⁶ CSXT Comments, at 17. CSXT makes conflicting statements about what constitutes the alleged {{[REDACTED]}} share. Compare CSXT Comments, at 17 (describing the share as “overhead intermodal traffic **moving over the Meridian Speedway gateway** to serve specific lanes connecting west coast and east coast markets not directly served by a single railroad.”) (emphasis added) with Carey/Bremser VS, at 50 (describing the share as “specific BEA origin and termination market lanes (or pairs) between the west coast and the Southeast U.S. for intermodal traffic not directly served by a single railroad.”).

through New Orleans, Memphis, and Birmingham and offer an alternative to highway routes.⁸⁷ The investment in the Meridian Speedway increased competition for intermodal traffic moving between the Southeast and Southwest, but the other southeastern gateways continue to serve a significant volume of intermodal traffic. The fact that NS's market share for transcontinental intermodal traffic grew as a result of its significant investment in the Meridian Speedway is not indicative of harm to competition, but rather is a direct result of the increased efficiencies brought about by the formation of the Meridian Speedway Joint Venture, including competition with truck alternatives.

B. CSXT Failed to Properly Define a Relevant Market and Therefore Its Market Share Calculations Are Flawed

CSXT's experts' relevant market definition is flawed, and as a result, the "market shares" that Carey/Bremser put forward are meaningless. When properly defined and calculated, market shares can provide an indication of the extent to which a provider has power in a market.⁸⁸ When improperly defined, however, market shares are not a meaningful indicator of market power.⁸⁹ CSXT's use of "intermodal traffic between West Coast and Southeast (no single-line service)" as a market for purposes of calculating market shares is overly narrow both in terms of product categories and the geographic coverage.

First, Carey/Bremser exclude single-line service from the calculation of NS's market share. CSXT and BNSF partner to move intermodal traffic between California and Atlanta.⁹⁰ The CSXT-

⁸⁷ KCS Notice of Exemption, at 8.

⁸⁸ Verified Statement of Professor John W. Mayo (July 12, 2022), at 33-34.

⁸⁹ *Id.* ("Consider, for instance, the clearly erroneous calculation and inference that McDonald's market share for Big Mac sales is 100 percent and that McDonald's consequently has monopoly power.").

⁹⁰ *BNSF, CSX Create High-Volume Intermodal Corridor*, <http://www.bnsf.com/media/news/articles/2006/10/2006-10-12a.html> (last accessed July 12, 2022).

BNSF traffic between the West Coast and Atlanta is considered single-line service.⁹¹ Without explanation, Carey/Bremser exclude the CSXT-BNSF transcontinental intermodal traffic when calculating NS's "market share." In 2019, the CSXT-BNSF route handled {{[REDACTED]}} intermodal carloads between Los Angeles and Atlanta, compared to the {{[REDACTED]}} carloads that NS handled between the West Coast and locations in the Southeast identified by Carey/Bremser.⁹² The failure to include the CSXT-BNSF traffic improperly narrows the market size when calculating market shares.

Carey/Bremser also fail to account for the competitive presence of truck alternatives. Given the nature of intermodal traffic, truck provides an important competitive constraint on rail routes for the overall movement of traffic from customer origin to customer destination. Carey/Bremser recognize that a truck competitor is estimated to extend as long as 500 miles,⁹³ but they fail to account for this competition when calculating market shares. Consider, for example, intermodal traffic moving from Long Beach, CA to points in the Southeast. If that traffic reaches Atlanta, GA, it can be moved via truck for the final delivery to customers the vast majority of destinations that Carey/Bremser identify.⁹⁴ By focusing only on the rail portion of a transcontinental move, Carey/Bremser fail to include the significant competitive pressure and expansion of geographic scope that truck alternatives create.

Taken together, Carey/Bremser's failure to account for the single-line service between the West Coast and Atlanta or the competitive pressure and geographic scope that truck provides are

⁹¹ Carey/Bremser VS, at 50, n. 214.

⁹² Verified Statement of Professor John W. Mayo (July 12, 2022), at 37.

⁹³ Carey/Bremser VS, at 50, n. 212.

⁹⁴ See CSX HC 0005211 (showing how the {{[REDACTED]}}). CSXT describes the BNSF-CSXT partnership as {{[REDACTED]}}.

fatal. The traffic moved under the BNSF-CSXT agreement from the West Coast to Atlanta can easily be trucked to final destinations where Carey/Bremser allege NS has a { } market share. Carey/Bremser's cherry-picked origin-destination pairs and traffic renders the "market share" estimate meaningless and certainly not indicative of any market power by NS.

Given CSXT's inability to demonstrate harm flowing from either the Meridian Speedway Joint Venture or the CP-KCS transaction, and further given that the Meridian Speedway Joint Venture was presented properly to the Board, it follows that CSXT's request for the Board to impose conditions involving the Meridian Speedway joint venture should not be granted.

V. CSXT Fails to Connect the CP-KCS Transaction to its Allegations Against the Meridian Speedway Joint Venture

CSXT first sought to connect its unsupported requests for conditions to the CP-KCS Transaction by citing the requests for conditions that CSXT *anticipated* NS would request based on NS's Description of Anticipated Responsive Application.⁹⁵ Then, once it was clear that NS did not make such requests for conditions, CSXT sought to connect their requests to the CP-KCS Transaction based on Applicants' Amended Operating Plan.⁹⁶ In doing so, CSXT makes a number of assumptions and outright errors that, once unpacked, demonstrate that the CP-KCS Transaction has no impact on the traffic subject to the NS Traffic Provision.

In particular, in its Amended Comments, CSXT makes two arguments seeking to connect the Meridian Speedway joint venture to the CP-KCS Transaction. First, CSXT argues that NS's Comments and Responsive Application seek to expand NS's rights with respect to traffic on the Meridian Speedway.⁹⁷ Second, CSXT maintains that the Applicants' plan to increase traffic on

⁹⁵ CSXT Comments, at 5.

⁹⁶ CSXT Amended Comments, at 7-8.

⁹⁷ CSXT Comments, at 5.

the Meridian Speedway as a result of the CP-KCS Transaction will expand NS's rights with respect to traffic on the Meridian Speedway.⁹⁸ However, CSXT misstates the facts in support of both arguments. CSXT has failed to identify any harm from the CP-KCS Transaction for which the imposition of conditions would be justified.

A. NS's Request for Conditions and Responsive Application Will Not Increase the Traffic Subject to the "NS Traffic" Provision

CSXT cites NS's Comments and Request for Conditions and Responsive Application as a basis for linking its allegations regarding the Meridian Speedway Joint Venture to the CP-KCS Proceeding.⁹⁹ CSXT argues that, because NS has asked the Board to amend or expand its contractual rights under the MSLLC Agreements, the Board has jurisdiction to abrogate the MSLLC Agreements.¹⁰⁰ CSXT's argument fails because CSXT inaccurately relied on the Comments and Request for Conditions and Responsive Application that NS filed on February 28, 2022, rather than the Amended Comments and Request for Conditions and Amended Responsive Application that NS filed on June 9, 2022, which replaced its earlier filed Comments and Responsive Application. The Amended Operating Plan, to which NS's Amended Comments and Amended Responsive Application responded, showed significantly different traffic densities on the Meridian Speedway compared to those initially filed with the CP-KCS Application. In particular, the Amended Operating Plan showed significant growth on KCS's Shreveport-Wylie line, not on the Meridian Speedway. Accordingly, NS's Amended Comments and Amended Responsive Application focus on the Shreveport-Wylie line.

⁹⁸ CSXT Amended Comments, at 7.

⁹⁹ CSXT Amended Comments, at 6-7.

¹⁰⁰ CSXT Comments, at 12-13.

In its Amended Comments and Amended Responsive Application, NS does not seek amendment or expansion of its rights under the Meridian Speedway Joint Venture. Rather, NS makes only two requests: (i) a request for contingent trackage rights on the KCS line between Shreveport, LA and Wylie, TX, which is **not** part of the Meridian Speedway; and (ii) a request that CP and KCS be required 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. NS made these requests in order to maintain what the status quo that exists today absent the CP-KCS Transaction. Neither request would alter or expand NS's limited rights to certain intermodal traffic on the Speedway under the NS Traffic Provision. More specifically, as discussed above, the relevant NS Traffic Provision covers only intermodal traffic that "originates or terminates west of Dallas/Ft. Worth."¹⁰¹ NS's requested contingent trackage rights would apply only to traffic having a lift or drop at the intermodal facility in Wylie, TX, which is not west of Dallas,¹⁰² and therefore clearly would not fall under the NS Traffic Provision. NS's gateway request does not seek any expansion of NS's rights at NS-CPKC Gateways. Rather, NS's gateway request seeks to maintain the openness of existing gateways so customers can continue using efficient interline routes should they desire to do so. For these reasons, any CSXT effort to seek conditions from the Board on the basis of NS's Amended Comments and Request for Conditions and Amended Responsive Application cannot be sustained.

¹⁰¹ MSLLC Joint Use Agreement.

¹⁰² NSR Joint Use Agreement, at 5. In determining the origin or destination, the agreements use the Standard Metropolitan Statistical Area ("SMSA"). Wylie, TX is located east of Dallas, TX but in the Dallas SMSA. In any event, Wylie, TX is not located west of Dallas either by true location or by SMSA.

B. The CP-KCS Transaction Will Not Increase the Traffic Subject to the NS Traffic Provision

CSXT argues that the Applicants' Amended Operating Plan shows an increase in traffic on the Meridian Speedway and that this increase in traffic will increase the amount of traffic subject to NS Traffic Provision.¹⁰³ However, CSXT makes numerous critical and obvious misstatements of fact in making this overbroad and unfounded argument in its Comments and Amended Comments.

- The first error that CSXT makes is to misrepresent what the Meridian Speedway even if. CSXT asserts that the Meridian Speedway includes the KCS's track from Shreveport, LA, to Dallas, TX.¹⁰⁴ This is incorrect. The Meridian Speedway Joint Venture only owns the track between Meridian, MS and Shreveport, LA. It is that track that is the Meridian Speedway. KCS's Shreveport-Dallas line *connects* with the Meridian Speedway, but it *is not part of* the Meridian Speedway. Increases in traffic on the Shreveport-Dallas line are not increases on the Meridian Speedway.
- CSXT's second error is its assumption that 100% of the traffic on the Meridian Speedway is NS's traffic.¹⁰⁵ This is also incorrect. Traffic from NS, KCS, or another railroad in partnership with KCS can and does move on the Meridian Speedway.

¹⁰³ CSXT Amended Comment, at 2.

¹⁰⁴ CSXT-11 at 3 ("The KCS corridor between Meridian, MS and Dallas, TX (the "Meridian Speedway" or "Speedway")..."). *See also* CSXT-8 at 8 ("The Meridian Speedway runs between Meridian, MS, and Dallas, TX...").

¹⁰⁵ CSXT Amended Comments, at 2, n. 6 (using only NS's traffic as the complete universe of traffic on the Meridian Speedway).

- The third faulty assumption by CSXT makes is that Dallas Intermodal Terminal Traffic is covered by the NS Traffic Provision. Dallas Intermodal Terminal Traffic is covered by an entirely different agreement and is not subject to the NS Traffic Provision that is the subject of CSXT's allegations.

Relying on these three factual assumptions, CSXT suggests that the Board “can reasonably infer” that most of the increase in traffic on the Meridian Speedway as a result of the CP-KCS Transaction would fall under the NS Traffic Provision.¹⁰⁶ This is CSXT's fourth error. The Board does not have to infer anything about Applicants' traffic plan because Applicants' Amended Operating Plan explicitly { [REDACTED] [REDACTED] }.

- NS Traffic under the NS Traffic Provision is traffic that KCS, as operator of the Meridian Speedway, hauls for NS. Applicants' explicitly state in the Amended Operating Plan that NS Traffic is excluded from the Master Segment Table (Appendix T),¹⁰⁷ which is the source that CSXT relies on to show the alleged growth in NS Traffic.¹⁰⁸
- Dallas Intermodal Terminal Traffic is *not* subject to the NS Traffic Provision and therefore not relevant to CSXT's allegations or harm. Nonetheless, even if it were relevant to CSXT's allegations of harm, it is not impacted by the CP-KCS Transaction. Dallas Intermodal Terminal Traffic is traffic with a handling at the Wylie Intermodal Terminal that traverses the Meridian-Wylie Route, originates or terminates at or west of

¹⁰⁶ CSXT Amended Comments, at 7.

¹⁰⁷ Amended Operating Plan, Appendix T, at 14. (“KCS moves NS trains in Haulage service as part of the Meridian Speedway between Shreveport, LA and Meridian, MS. NS traffic is not included in the Master Segment Table.”).

¹⁰⁸ CSXT Amended Comments, at 8 (citing to Applicants' Trains per day and Gross Ton Miles workpaper, which contains the Master Segment Table and the footnote that the NS trains that KCS moves in haulage on the Meridian Speedway are excluded from the Master Segment Table.).

Dallas, TX, and originates or terminates east of Meridian, MS. This means that the traffic must flow through the Wylie Intermodal Terminal. Applicants' intermodal terminal plans show that {{REDACTED}}

[REDACTED] } }¹⁰⁹ Applicants' plan for their intermodal terminals shows that the increase in handlings at the Wylie Intermodal Terminal { [REDACTED] } } The [REDACTED] } } The Amended Operating Plan shows an increase in daily handlings at the Wylie Intermodal Terminal of 292.¹¹⁰ The workpaper underlying this increase shows { [REDACTED] } } } }¹¹¹

{ }

Figure 1 is a 3D bar chart illustrating the distribution of cases across different age groups and sexes. The x-axis represents age groups from 0-4 to 95-99. The y-axis represents sex (Male, Female). The z-axis represents the number of cases, ranging from 0 to 100. The chart shows a high number of cases for males in the 0-4 age group, which decreases significantly for older age groups. Females show a more gradual decline in cases with age.

[illegible]

} }

¹⁰⁹ See Applicants' Workpaper "Intermodal Terminal Capacity.xlsx."

¹¹⁰ Amended Operating Plan, Table 13, at 126.

¹¹¹ See Applicants' Workpaper "Intermodal Terminal Capacity.xlsx."

- The total increase in carloads handled at the Wylie Intermodal Terminal is {{[REDACTED]}} per year. Applicants assume a {{[REDACTED]}} operating year, which equates to 292 daily handlings.¹¹² Accordingly, {{[REDACTED]}}

Thus, CSXT's attempt to use the traffic growth on one segment of the Meridian Speedway (the Meridian-Newton segment) fails because the traffic growth in the Amended Operating Plan {{[REDACTED]}}. {{[REDACTED]}}

In sum, the Amended Operating Plan shows *no increase* in traffic subject to the NS Traffic Provision. In fact, the Amended Operating Plan does not even include the traffic that KCS, as operator of the Meridian Speedway, hauls for NS between Meridian, MS, and Shreveport, LA. Moreover, the Amended Operating Plan does not show any increase to NS due to {{[REDACTED]}}. CSXT is simply wrong on the facts and can show no nexus between its allegations regarding the Meridian Speedway Joint Venture and the CP-KCS Transaction.

* * *

For these reasons and others described above, CSXT's broadside against the Meridian Speedway Joint Venture and requests for Board action relating to the Meridian Speedway Joint Venture in the CP-KCS Proceeding must fail. NS respectfully requests that the Board deny the conditions requested by CSXT.

¹¹² {{[REDACTED]}} = 292.

Exhibit A
Verified Statement of Professor John W. Mayo (July 12, 2022)

PUBLIC REDACTED VERSION

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET No. 36500

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

VERIFIED STATEMENT OF JOHN W. MAYO – RESPONSE TO CSXT’S COMMENTS

JULY 12, 2022

PUBLIC REDACTED VERSION

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I. INTRODUCTION

A. Qualifications

1. My name is John Mayo. I am the Elsa Carlson McDonough Chair of Business Administration and Professor of Economic, Business and Public Policy in Georgetown University's McDonough School of Business. On February 28th, 2022, I provided a Verified Statement in Finance Docket No. 36500, amended on June 9th, 2022.¹ A description of my qualifications and experience is provided in that earlier statement.

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

B. Assignment

3. This is a case precipitated by the proposed merger of CP and KCS. As I explained in my initial Verified Statement, the principal issues in this case turn on an assessment of changes in the incentives and ability of the merged entity to alter competition in an anticompetitive fashion. My assessment indicates that the merger will produce undesirable changes by increasing the likelihood of anticompetitive harm in the provision of freight rail services. Consequently, to address the increased likelihood of anticompetitive behavior by a merged CP/KCS, the public interest will be best served by the imposition of certain merger conditions that put checks in place to assure that anticompetitive changes to rail service in the United States does not occur.

¹ Verified Statement of John W. Mayo, Canadian Pacific Railway Limited *et al.* – Control – Kansas City Southern Railroad *et al.*, Finance Docket No. 36500, February 28, 2022. *See also*, Amended Verified Statement of John W. Mayo, Canadian Pacific Railway Limited, *et al.* – Control – Kansas City Southern, *et al.*, Finance Docket No. 36500, June 9, 2022.

4. In its comment filed February 28th, 2022, and amended June 9th, 2022, CSXT presented an argument that does not address the central issue of changes in the incentives and abilities by the merging parties, but instead introduces an argument that the Meridian Speedway Agreements are “conspiracies that seek to limit price competition.”² This argument does not address, but rather is a distraction from, the central competitive issues of the present case. Nonetheless, I have been asked by Norfolk Southern to assess the economic merits of this and related claims made by CSXT.

C. Summary of Findings

5. For reasons that I describe below, there is no merit to the claims that the Meridian Speedway Agreements constitute harm to competition. Rather, these agreements arose as a pro-competitive collaboration that serves to enhance investment, increase output, improve quality, and lower prices. Abrogating these agreements through regulatory fiat would produce a massively chilling effect on pro-competitive collaborations going forward with consequent harm to prices, output, quality, and investment in the provision of rail services.

D. Materials Considered

6. 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**.

² Verified Statement of Professor Julie M. Carey and Dr. Albert W. Bremser, Canadian Pacific Railway Limited *et al.* – Control – Kansas City Southern Railroad *et al.*, Finance Docket No. 36500, February 28, 2022 (“Carey and Bremser Statement”), at p. 47. *See also*, CSX Transportation, Inc.’s Amended Comments and Request for Conditions, Canadian Pacific Railway Limited *et al.* – Control – Kansas City Southern Railroad *et al.*, Finance Docket No. 36500, June 9, 2022.

7. 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. ECONOMIC POLICY GUIDEPOSTS FOR THE ASSESSMENT OF COLLABORATIONS BETWEEN COMPETITORS

8. To form a basic foundation for understanding the impact of the Meridian Speedway joint venture between NS and KCS, it is important to understand the generic lessons that have emerged from economic analyses of collaborations among firms. In this section, I provide those generic lessons. Given this understanding, Section III will then provide a specific assessment of the economic impacts of the NS-KCS Meridian Speedway collaboration.

9. Collaborations between businesses are common. As noted in a seminal assessment of cooperation between organizations, “rapid changes in technology, the competitive environment, firm strategies and other pressures are prompting many firms to seek continuing cooperative relationships with other firms.”³ In their simplest terms, collaborations arise because firms have different resources and capabilities that create competitive gains from doing business with one another.⁴

10. These gains from collaboration are assessed relative to alternative exchange governance mechanisms, including spot markets, contracts, or vertical or horizontal mergers (integration). In this regard, the evolution of the theory of the firm provides several key insights.

³ Ring, Peter Smith, and Andrew H. Van De Ven, “Structuring Cooperative Relationships Between Organizations,” *Strategic Management Journal*, Vol. 13 (1992): 483-498, at p. 483.

⁴ “Efficiency gains from competitor collaborations often stem from combinations of different capabilities or resources.” See, U.S. Department of Justice and the Federal Trade Commission, “Antitrust Guidelines for Collaborations Among Competitors,” April, 2000 (“Collaboration Guidelines”), at p. 6, available at https://www.ftc.gov/system/files/documents/public_statements/300481/000407ftcdojguidelines.pdf.

Specifically, beginning with the seminal work of Coase,⁵ economists have recognized that profit-maximizing firms will organize themselves to minimize the summation of the costs of producing (goods or) services and the transaction costs associated with ongoing relationships they have with suppliers and other firms in the marketplace. For simple market exchanges that involve no relationship-specific investments, the costs of exchange either through spot markets or a series of short-run contracts with other market participants may prove efficient.

11. In the course of ongoing business relationships, however, the need to design, negotiate and enforce intra-firm contracts can raise significant transaction costs. Moreover, it is common for investments necessary for efficient production to be specific to particular intra-firm business relationships.⁶ In this situation, it is often more efficient for firms to move from traditional spot markets or short-run contracts to equity partnerships, joint ventures or vertical integration. In particular, in these cases, it is widely recognized that the potential for post-contractual opportunistic behavior can arise. A classic example of this was studied by Professor Joskow where he found that power plants and electric utilities with greater relationship-specific investments (such as mine-mouth plants) efficiently moved away from spot markets and short-run contracts to more collaborative exchange governance mechanisms, such as long-term contracts or vertical integration.⁷

⁵ Coase, Ronald H., "The Nature of the Firm," *Economica*, Vol. 4, No. 16 (1937): 386-405 ("Coase (1937)").

⁶ Klein, Benjamin, Robert G. Crawford, and Armen A. Alchian, "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process," *Journal of Law and Economics*, Vol. 21, No. 2 (1978): 297-326.

⁷ Joskow, Paul L., "Contract Duration and Relationship-Specific Investments: Empirical Evidence from Coal Markets," *American Economic Review*, Vol. 77, No. 1 (1987): 168-185, ("Joskow (1987)") at p. 183. *See also*, Joskow, Paul L., "Vertical Integration and Long-Term Contracts: The Case of Coal-Burning Electric Generating Plants," *Journal of Law, Economics, and Organization*, Vol. 1, No. 1 (1985): 33-80, at pp. 76-77.

12. Joint ventures provide an exchange governance mechanism that is especially adept at addressing the difficulties associated with standard spot markets or short-run contracts. As noted in an article in the *Antitrust Law Journal*, “[j]oint ventures owned by participants can avoid problems commonly arising in long-term supply, licensing, and similar contractual relationships. Such long-term relationships generally lead to investments in assets that are, to some extent at least, specific to that relationship. Such relationships also may eliminate the need by one party to make certain investments because another party has made them. In either event, there is a risk of opportunistic exploitation of one party by another, and the added control possible in joint ventures may mitigate or eliminate this risk.”⁸

13. The potential benefits of collaboration extend to the full range of firms in the marketplace, ranging from those that are completely unrelated to those that operate in the same industry and are competitors. Indeed, firms in the same industry may have more similar assets that are valuable to each other which can stimulate collaborations. As noted by the U.S. Department of Justice Antitrust Division (the “DOJ”) and U.S. Federal Trade Commission (the “FTC”) and together with DOJ the “Agencies”), “[i]n order to compete in modern markets, competitors sometimes need to collaborate. Competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs. *Such collaborations often are not only benign but procompetitive.*”⁹

⁸ Werden, Gregory J., “Antitrust Analysis of Joint Ventures: An Overview,” *Antitrust Law Journal*, Vol. 66, No. 3 (1988): 701-735 (“Werden (1988)”), at pp. 702-703.

⁹ Collaboration Guidelines, at p. 1, *emphasis added*.

14. The potential gains from strategic alliances between companies that are reflected in the Agencies' statements is consistent with a substantial body of academic research that reveals how such alliances can expand output, lower cost, improve quality and promote investment. Alliances have been shown to improve firms' abilities to: (a) realize scale economies or spread risks by pooling resources;¹⁰ (b) access complementary assets,¹¹ specialized capabilities,¹² or knowledge¹³; and (c) facilitate learning and information sharing,¹⁴ among others.

15. It is widely recognized that collaborative arrangements (such as joint ventures) can create a number of benefits not only for the parties that are directly involved but also for society more generally by permitting the realization of economies of scale and scope, efficiently combining complementary assets, enhancing brand marketing and reducing risk. For example, the FTC and DOJ indicate that "The Agencies recognize that consumers may benefit from

¹⁰ See, e.g., Gomes-Casseres, Benjamin, "Alliance of Strategic Small Firms," *Small Business Economics*, Vol. 9, No. 1 (1997): 33-44; Dussuage, Pierre, Bernard Garrette, and Will Mitchell, "Learning from Competing Partners: Outcomes and Durations of Scale and Link Alliances in Europe, North America, and Asia," *Strategic Management Journal*, Vol. 21 (2000): 99-126; Powell, Walter W., "Neither Market Nor Hierarchy: Network Forms of Organization," *Organizational Behavior*, Vol. 12 (1990): 295-336.

¹¹ See, e.g., Teece, David J., "Firm Organization, Industrial Structure, and Technological Innovation," *Journal of Economic Behavior and Organization*, Vol. 31 (1996): 193-224; Rothaermel, Frank T., "Incumbents Advantage through Exploiting Complementary Assets Via Interfirm Competition," *Strategic Management Journal*, Vol. 22 (2001): 687-699.

¹² See, e.g., Dyer, Jeffrey H., and William G. Ouchi, "Japanese Style Partnerships: Giving Companies a Competitive Edge," *Sloan Management Review*, Vol. 35, No. 1 (1993), 51-63; Mowery, David C., Joanne E. Oxley, and Brian S. Silverman, "Strategic Alliances and Interfirm Knowledge Transfer," *Strategic Management Journal*, Vol. 17 (1996): 77-91 ("Mowery et al. (1996)").

¹³ See, e.g., Eisenhardt, Kathleen M., and Claudia Bird Schoonhoven, "Resource-based View of Strategic Alliance Formation: Strategic and Social Effects in Entrepreneurial Firms," *Organization Science*, Vol. 7, No. 2 (1996): 136-150; Mowery, David C., Joanne E. Oxley, and Brian S. Silverman, "Technological Overlap and Interfirm Cooperation: Implications for the Resource-Based View of the Firm," *Research Policy*, Vol. 27 (1998): 507-523.

¹⁴ See, e.g., Dyer, Jeffrey H., and Kentaro Nobeoka, "Creating and Managing a High-Performance Knowledge-Sharing Network: The Toyota Case," *Strategic Management Journal*, Vol. 21, No. 3 (2000): 345-367; Khanna, Tarun, Ranjay Gulati, and Nitin Nohria, "The Dynamics of Learning Alliance: Competition, Cooperation, and Relative Scope," *Strategic Management Journal*, Vol. 19, No. 3 (1998): 193-210; Mowery et al. (1996).

competitor collaborations in a variety of ways. For example, a competitor collaboration may enable participants to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would be possible absent the collaboration. A collaboration may allow its participants to better use existing assets or may provide incentives for them to make output-enhancing investments that would not occur absent the collaboration.”¹⁵

16. Although strategic alliances are widely seen to be efficiency-enhancing and procompetitive, there is the possibility that a given collaboration may act to harm competition. If the collaboration increases incentives for, and the ability of, the collaborating firms to reduce output, raise price, or lower quality, then collaboration can harm competition. Similarly, collaborations may harm competition if they facilitate collusion.

17. Joint venture collaborations often involve agreements by the participating firms to restrain their marketplace behaviors in some respects. For example, consider a joint venture between a manufacturing firm (Firm A) and a retail provider that is currently selling not only Firm A’s products but also those of rival manufacturers Firm B, Firm C and Firm D. Further imagine that the retail firm’s sales of A have become constrained by an under-investment in the sales force at the retail level. In that case, a common tactic to enhance sales for Firm A may be a joint venture investment in the retail firm’s salesperson training. Absent a contractual restraint, however, the investment in salesperson training can enhance the ability of the retail provider to sell rival manufacturers’ products. This free riding by other manufacturers on the investments made by Firm A will deter pro-competitive, output-expanding investment by Firm A. In such situations, it is common for joint ventures to include an exclusivity clause, in which the retail-

¹⁵ Collaboration Guidelines, at p. 6.

level participant in the joint venture will agree, in exchange for the benefits provided by the manufacturing firm's investment, to exclusively sell Firm A's products.¹⁶

18. Given the common presence of such restraints in joint ventures, the assessment of the competitive effects of joint ventures typically considers whether restraints within the joint venture are “ancillary” to the larger agreement. Ancillary agreements are those that are “reasonably necessary to the accomplishment of a venture’s efficiency-enhancing purposes.”¹⁷

19. As described by Werden, these restraints “[m]ay make the venture itself operate more efficiently, as might a requirement that joint venture participants buy exclusively from a manufacturing joint venture, in order to facilitate the realization of economies of scale. A collateral restraint may prevent a participant in a joint venture from appropriating an undue share of the venture's benefits, as might exclusive distribution territories for a brand created and promoted by a joint venture. A collateral restraint may prevent nonparticipants from appropriating joint venture benefits for which they have not shared the costs, as might restrictions on resale of a joint venture's output to nonparticipants. A collateral restraint may also prevent unintended competitive consequences that might make the venture uneconomic. For example, by supplying participants with certain products, a joint venture could induce some participants to sell complementary products that only some participants had previously sold, and

¹⁶ This example provides only one among a myriad of joint venture configurations whose efficiency-enhancing features are enabled through the contractual restrictions imposed on the joint venture participants and which impose no anticompetitive harm. *See also, e.g., “Chicagoland Radiological Network,” Department of Justice Business Review Letters*. December 8, 1994, in which the introduction of new service provided by a joint venture of radiologists was protected from free riding by restrictions of joint venture participants to compete outside the joint venture. *See also, e.g., Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987).

¹⁷ Werden (1988), at p. 706. *See also, e.g., U.S. v. Addyston Pipe Steel Co.*, 85 F. 271 (6th Cir. 1898); *Polk Bros., Inc., Plaintiff-Appellant, v. Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985).

this effect could be forestalled by exclusive distribution territories for participants' products not supplied by the joint venture.”¹⁸

20. Given the potential for collaborative agreements to promote or harm competition, the Agencies frame the matter as follows: “[t]he central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.”¹⁹

21. To address this central question “the Agencies ask about the business purpose of the agreement and examine whether the agreement, if already in operation, has caused anticompetitive harm.”²⁰ Furthermore, “[i]f the nature of the agreement and the absence of market power together demonstrate the absence of anticompetitive harm, the Agencies do not challenge the Agreement.”²¹

22. Consistent with the guidance provided here, in the next section I turn to a specific assessment of the Meridian Speedway joint venture: first, by examining (as suggested by the Agencies’ Guidelines) the business purpose of the agreement; and second, by assessing other economic metrics identified by the Agencies as they shed light on the competitive impact of the Meridian Speedway.

¹⁸ Werden (1988), at p. 707.

¹⁹ Collaboration Guidelines, at p. 10.

²⁰ Collaboration Guidelines, at p. 10.

²¹ Collaboration Guidelines, at p. 10.

III. AN ECONOMIC ANALYSIS OF THE MERIDIAN SPEEDWAY AGREEMENTS

A. Description of Transaction

23. The Meridian Speedway is a rail line located between Meridian, Mississippi and Shreveport, Louisiana. Prior to 2006, the Meridian Speedway was wholly-owned by KCS. In a series of short-run contracts, KCS provided NS with haulage services for NS intermodal traffic across the Speedway.²² KCS did not provide commercial intermodal service in competition with NS,²³ nor did it provide haulage service of intermodal traffic to any other railroad on the Meridian Speedway.²⁴

24. Both KCS and NS benefitted from, and were constrained by, the features of the Meridian Speedway. Its location provided (and still provides) an attractive route for transporting east/west rail traffic across the Southern United States. Over time, however, the traffic growth on the Meridian Speedway outpaced its capacity and attractiveness as a rail route, and KCS was not in a financial position to undertake the investments necessary to ensure the competitiveness of these facilities. As stated by KCS at the time of creation of the NS and KCS joint venture, “KCSR does not have sufficient resources to support the sustained capital spending program necessary to accommodate both NS[R]’s and KCS[R]’s projected traffic needs.”²⁵ To alleviate the financial constraints of KCS and to address the need to be able to grow traffic, the two companies formed a collaborative agreement. The heart of the agreement was the establishment

²² <https://www.bizjournals.com/kansascity/stories/2005/11/28/daily31.html> (viewed April 7, 2022); Kansas City Southern, The Kansas City Southern Railway Company, and Meridian Speedway LLC – Exemption for Transactions Within a Corporate Family, Finance Docket No. 34822 (filed January 17, 2006), (“KCS-MSLLC Exemption”), at p. 4.

²³ KCS-MSLLC Exemption, at p. 4.

²⁴ KCS-MSLLC Exemption, at p. 4.

²⁵ KCSR-HC-00013177-227, at 183.

of a joint venture, known as the MSLLC. KCS contributed the 320-mile line between Meridian, MS and Shreveport, LA for a 70 percent equity share; and NS contributed \$300 million and received a 30 percent equity share.²⁶

B. Rationale for the Transaction

25. To assess the economic effects of the Meridian Speedway agreement, it is essential to understand the motivation for the agreement. As identified in the last section, the Agencies indicate that any determination of the competitive effects of a collaboration should examine “the business purpose of the agreement.”²⁷ In this regard it is telling that CSXT, seemingly without the benefit of such an analysis, chooses to characterize the Speedway Agreements as anticompetitive in both intent and effect.²⁸ My analysis, however, indicates that the business rationale for the formation of the Speedway joint venture was not only innocuous, but distinctly procompetitive.

26. To understand the motivations for, and effects of, the Meridian Speedway joint venture, it is important to set the context by addressing two relevant questions. First, what was the business arrangement between NS and KCS prior to the formation of the joint venture? As discussed above, prior to the joint venture, KCS and NS engaged in a series of short-run contracts in which KCS provided haulage over the Speedway for NS intermodal traffic.²⁹ As indicated at the time of the formation of the MSLLC, the line between Shreveport and Meridian

²⁶ KCSR-HC-00013177-227, at 183.

²⁷ Collaboration Guidelines, at p. 10.

²⁸ I will address these claims in more detail in Section IV below.

²⁹ <https://www.bizjournals.com/kansascity/stories/2005/11/28/daily31.html> (viewed April 7, 2022); KCS-MSLLC Exemption, at p. 4.

had become “capacity constrained.”³⁰ This capacity crunch “limit(ed) the ability of KCSR and NSR to attract more traffic to their service using the Speedway.”³¹ To make that expansion possible required “substantial capital investments”³² because the line was “in need of considerable investment in roadbed, signal systems, yards and sidings.”³³

27. Second, against that backdrop, what was the economic rationale for the formation of the joint venture? Documents presented to the Board as well as contemporaneous public statements provide a clear account of the economic rationale for the joint venture:

- a. The joint venture was, in part, motivated by a desire to reduce the recurring transaction costs associated with designing, implementing and enforcing short-run contracts between NS and KCS;³⁴
- b. The formation of the joint venture could alleviate capacity constraints that acted to limit the economic vitality of both KCS and NS;³⁵

³⁰ KCSR-HC-00013177-227, at 182.

³¹ KCSR-HC-00013177-227, at 183.

³² KCSR-HC-00013177-227, at 183.

³³ KCSR-HC-00013177-227, at 186.

³⁴ According to a 2005 article, “Since 2000, Haverty said KCS had been allowing Norfolk to use the line through temporary contracts that had to be renewed every couple of years. The current contract was to expire in 2006... ‘This is a continuation of what we’ve been doing for five years,’ [KCS CEO Michael] Haverty said. ‘What this does is formalizes it and allows us to put some capital back into the line.’” See, <https://www.bizjournals.com/kansascity/stories/2005/11/28/daily31.html> (viewed April 7, 2022).

³⁵ See, SEC Archives, “Remarks by Henry C. Wolf”, December 2005, available at <https://www.sec.gov/Archives/edgar/data/702165/000070216505000255/hcw-remarks1.htm> (viewed April 7, 2022), stating that “we are seeking to increase capacity and improve service for all customers using the Speedway.” See also, Kansas City Southern 2006 Annual Report (“KCS 2006 Annual Report”), at p. 8, stating “When completed in four years, the track and signaling enhancements will result in enough capacity to handle more than twice the current traffic, or between 40 and 50 trains, with seven-hour faster transit times between Shreveport and Meridian.”

- c. The joint venture would permit expanded service and enhanced quality of transportation services over the Meridian Speedway, thereby improving shippers' welfare;³⁶ and
- d. The joint venture would create classic "gains from trade." Specifically, KCS would secure much needed capital investment to increase and improve the infrastructure of the Meridian Speedway and NS in return would secure a 30 percent equity stake in the newly created MSLLC.³⁷

28. To achieve these efficiency enhancing objectives, the joint venture granted NS the exclusive right to carry certain intermodal traffic over the Meridian Speedway.³⁸ By granting exclusivity to NS for this traffic on the Meridian Speedway, the joint venture agreement eliminated the ability of other rail carriers to free-ride on the investments made by NS to improve the Meridian Speedway. As stated at the time of the formation of the joint venture, "while NSR was willing to participate in the necessary investment, it did not want to do so unless it could be assured that other carriers would not use the capacity NS's investment would help to create."³⁹ As described in Section II, such exclusivity agreements are both common and widely acknowledged to typically be pro-competitive. Indeed, it is apparent that in the absence of this ancillary exclusivity restraint, the joint venture, along with its efficiency-enhancing features,

³⁶ *Id.* See also, Amended 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, June 9, 2022 ("Amended McClellan Statement"), Exhibit B.

³⁷ Exhibit 3 draws on the Board's Revenue Adequacy data, confirming the disparate financial position of KCS and NS at the time of the formation of the joint venture. It indicates both the financially encumbered position of KCS as well as the stronger financial posture of NS.

³⁸ KCSR-HC-00013177-227, at 184.

³⁹ KCSR-HC-00013177-227, at 183.

would not have occurred. In this sense, the (partial) exclusivity restraint is perfectly in keeping with the Agencies' Guidelines' requirement that contractual restraints must be "Reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity."⁴⁰

C. Effects of the Transaction

29. The establishment of the MSLLC has had a number of beneficial economic effects that are consistent with the economic motivations that stimulated the joint venture. First, the Meridian Speedway joint venture has replaced a series of short-run contracts with a sustainable long-run agreement relating, primarily, to intermodal traffic. In so doing, NS and KCS have been able to eliminate the repeated costs associated with haggling over evolving short-run contract terms, writing detailed contracts, and enforcing these contracts.⁴¹ Consequently, this move from a series of short-run and high-transaction-cost contracts to a long-run and low-transaction-cost joint venture has enhanced economic efficiency.

30. Second, the transaction costs efficiencies created by the Agreements appear to have been matched by increases in the operational efficiency of NS traffic that moves across the Speedway. As early as 2007, Norfolk Southern's investments into the Meridian Speedway had already improved intermodal shipping efficiency.⁴² The investment eliminated substantial mileage on transcontinental shipments, significantly increased train speeds, and reduced transit

⁴⁰ Collaboration Guidelines, at p. 4.

⁴¹ It is widely recognized that such reductions in transaction costs are efficiency enhancing. *See, e.g.*, Coase (1937).

⁴² Norfolk Southern Corporation Form 8-K EX 99.6, June 12 2007, at slide 19.

schedules for certain markets by a full day or more.⁴³ Compared to the next-shortest alternative, the Meridian-Wylie Route is 184 miles shorter between Atlanta and Dallas, 212 miles shorter between Charlotte and Dallas, and 41 miles shorter between Jacksonville and Dallas.⁴⁴ In fact, capital enhancements into the Meridian Speedway allowed 60 percent of the route to operate at 60 miles per hour, 90 percent of the route to operate at 50 miles per hour,⁴⁵ and were designed to enable seven-hour faster transit times between Shreveport and Meridian.⁴⁶ In 2006, the standard run time from Los Angeles to Atlanta was 100 hours; by 2007, the MSLLC premium run time was 74 hours.⁴⁷ As a consequence of improvements, “BMW multilevel traffic routed over [the] Speedway had 2-3 days of transit time removed from routing.”⁴⁸ Other large shippers also benefited, such as UPS for whom, “service between Los Angeles and Atlanta reduced from 80 hours in 2006 to 66 hours, 45 minutes [in 2009].”⁴⁹ These efficiency gains allowed UP and NS to launch “the fastest available service by far between L.A. and Atlanta.”⁵⁰

31. Third, the joint venture provided much needed quality and service improvements for Norfolk Southern that enhanced its ability to compete, while at the same time it provided KCS with much needed financial capital to improve its facilities and the quality of its own

⁴³ <http://www.nscorp.com/content/nscorp/en/shipping-options/corridors/meridian-speedway.html> (viewed June 27, 2022). *See also*, Norfolk Southern Corporation Form 8-K EX 99.3, June 4, 2009, at slide 47.

⁴⁴ Amended Comments of Norfolk Southern Railway Company and Request for Conditions, Canadian Pacific Railway Limited, *et al.* – Control – Kansas City Southern, *et al.*, Finance Docket No. 36500, June 9, 2022 (“Amended NS Comments”), at p. 16.

⁴⁵ Norfolk Southern Corporation Form 8-K EX 99.3, June 4, 2009, at slide 47.

⁴⁶ Kansas City Southern 2005 Annual Report, at p. 11.

⁴⁷ Norfolk Southern Corporation Form 8-K EX 99.6, June 12, 2007, at slide 18.

⁴⁸ Norfolk Southern Corporation Form 8-K EX 99.3, June 4, 2009, at slide 47.

⁴⁹ Norfolk Southern Corporation Form 8-K EX 99.3, June 4, 2009, at slide 47.

⁵⁰ Norfolk Southern Corporation Form 8-K EX 99.6, June 12, 2007, at slide 18.

services that relied on the Meridian Speedway. These improvements were funded by a commitment by NS to expend no less than \$260 million on capital improvements on the Speedway in the first four years of the agreement.⁵¹ The explicit aim was “to increase the capacity of the Line” by making capital investments in signal systems, extended sidings, double track additions, track speed upgrades, and other capacity enhancements.⁵² These capital investments provided tangible upgrades and improvements to the Meridian Speedway. For instance, as described in its 2006 Annual Report in a section entitled “Building Capacity for the Future,” NS observed that, “[s]ignificant improvements to the route’s capacity already have been made. Forty-five miles of formerly nonsignalized territory between Jackson and Vicksburg, Miss., were converted to centralized traffic control in 2006, and design has been completed and construction has begun on an additional 23 miles of centralized traffic control territory east of Shreveport. Forty miles of new rail replacement has been completed in three locations, and approximately 100 miles of crosstie replacement work, along with nearly 150 miles of ballast and surfacing work, has been done. Also, designs have been completed and site preparation work has begun for new sidings or siding extensions totaling 5.5 additional miles in Meehan and Rankin, Miss., and Stevens, La. With completion of these projects expected in 2007, it will be much easier for trains to meet and pass, thereby increasing capacity.”⁵³

32. KCS also signaled the immediate positive effects of the MSLLC in its 2006 Annual Report: “The Meridian Speedway capacity upgrade project got off to a great start in 2006

⁵¹ KCSR-HC-00013177-227, at 183-184. *See also*, SEC Archives, “Remarks by Henry C. Wolf,” December 2, 2005, available at <https://www.sec.gov/Archives/edgar/data/702165/000070216505000255/hcw-remarks1.htm> (viewed April 7, 2022).

⁵² KCSR-HC-00013177-227, at 183-184.

⁵³ Norfolk Southern Annual Report 2006 (“NS 2006 Annual Report”), at pp. 24-25.

with the completion of Centralized Traffic Control (CTC) between Vicksburg and Jackson, Mississippi, the installation of approximately 100,000 ties, the laying of 45 miles of new rail, the upgrade of bridges, and the grading work necessary for new sidings and double tracking.”⁵⁴

33. The formation of the MSLLC has been seen very positively by rail shippers. Presaging the subsequent evolution of service over the Meridian Speedway, shippers opined that infrastructure improvements to the Speedway resulting from the joint venture would increase service reliability and efficiency. For example, James Burke, Director of Intermodal Logistics, wrote that, “[w]e plan to double our Intermodal fleet size in 2006 and the Southeast is slated as one of our growth markets. Bottom line; our information concerning the Joint Venture proposal indicates a benefit to CRE and its customers moving forward.”⁵⁵ Similarly, Thomas Chen, President of Evergreen America Corporation, projected in 2005 that, “approval of [the Meridian Speedway] could allow us to route almost 20,000 containers via this corridor from the US West Coast,” adding further, “11% of these movements could be improved with the approval of this joint venture agreement.”⁵⁶

34. Expedited service would not be limited to one sector, but encompassed a range of different types of shipments, namely: raw materials, retail products, US manufactured products, imported goods, and food products.⁵⁷ The Meridian Speedway was expected to “facilitate the handling of increased volumes” via “improvements in sidings that will eliminate delays and

⁵⁴ KCS 2006 Annual Report, at p. 4.

⁵⁵ Norfolk Southern Railway Company – Trackage Rights Exemption – Meridian Speedway LLC – Between Meridian, MS and Shreveport, LA, Finance Docket No. 34821, January 20, 2006 (“NS MSLLC Trackage Rights Exemption”), at p. 32.

⁵⁶ NS MSLLC Trackage Rights Exemption, at p. 34.

⁵⁷ NS MSLLC Trackage Rights Exemption, at pp. 69-72, 77.

maintain the velocity of intermodal trains,”⁵⁸ which was of critical importance to Norfolk Southern shippers.

35. As perhaps the most ringing endorsement, the largest corporate customer of the US Class I Railroad industry at the time, UPS, urged that “[t]he benefits of the NS-KCS joint venture will not only be realized by intermodal customers, but throughout the entire supply chain. Improving rail infrastructure and providing critical new rail capacity is a key component to maintaining our nation’s economic competitiveness.”⁵⁹

36. Fourth, the capital improvements made to the Meridian Speedway have created spillover benefits to other parties beyond those enjoyed by NS and KCS customers. As noted at the time of its formation, “[t]he purpose of this transaction is innovatively to expand capacity on the Line for the benefit of customers and the national transportation network.”⁶⁰ That is, the benefits produced by the formation of the MSLLC—additional capacity and, more generally, a more fluid and reliable transportation network—has consequently benefitted all shippers routed through the Speedway; this includes not just intermodal traffic handled exclusively by NS and KCS that is the primary concern of the Meridian Speedway Agreements, but also unrelated merchandise traffic, which often involves KCS interlining with other Class I railroads besides NS. As noted at the time of the formation of the joint venture, “[t]he capacity improvements made possible by the transaction will benefit all traffic on the Line.”⁶¹

⁵⁸ NS MSLLC Trackage Rights Exemption, at p. 50.

⁵⁹ NS MSLLC Trackage Rights Exemption, at p. 91.

⁶⁰ KCSR-HC-00013177-227, at 186.

⁶¹ KCSR-HC-00013177-227, at 186.

37. The pro-competitive benefits enabled by the formation of the MSLLC have continued beyond the initial investments made by NS. For instance, it is my understanding that since 2006, NS has invested roughly \$300 million in the MSLLC directly and another \$324 million in complementary intermodal terminals throughout NS's network.⁶² The result is that the Meridian Speedway offers more reliable and faster intermodal service than prior to the formation of the joint venture.⁶³ This investment has enabled intermodal growth over the Speedway of 340 percent since the inception of the joint venture.⁶⁴ Additionally, the Speedway has facilitated the growth of total revenue moves.⁶⁵

38. Other carriers may not benefit from the use of the Meridian Speedway to the same extent as KCS and NS. However, Exhibit 4 illustrates the importance of the Speedway to the other Class I railroads that interline with KCS, NS, or both KCS and NS on routes that traverse parts of the Speedway. A substantial amount of such traffic traverses the Meridian Speedway. Altogether, BNSF, CN, CSXT, and UP rely on Meridian Speedway for over {{REDACTED}} routes, generating approximately {{REDACTED}} in split revenues for these other Class I Carriers. Most notably, CN, which interchanges with KCS in Jackson, has at least {{REDACTED}} routes that rely on at least part of the Meridian Speedway, generating at least {{REDACTED}} in split revenue for CN in 2019 and moving traffic as far as from Canada to Mexico.⁶⁶ UP, too, benefits substantially, with at least {{REDACTED}} routes that rely on at least part of the Meridian Speedway,

⁶² Amended NS Comments, at p. 11.

⁶³ Amended Verified Statement of Claude E. "Ed" Elkins, Finance Docket No. 36500, June 9, 2022, at p. 4. *See also*, Amended McClellan Statement, Exhibit B, at p. 2.

⁶⁴ Amended McClellan Statement, Exhibit B, at p. 3.

⁶⁵ Amended McClellan Statement, Exhibit B, at p. 3.

⁶⁶ Exhibit 4. *See also*, Exhibit 4 Workpapers. *See also*, <https://www.trains.com/trn/news-reviews/news-wire/canadian-national-emphasizes-shorter-faster-routes-in-proposed-kcs-combination/> (viewed June 21, 2022).

generating at least{{[REDACTED]}} in split revenue for the railroad in 2019.⁶⁷ Many routes that traverse the Speedway—in fact {{[REDACTED]}}—do not involve NS.⁶⁸ In fact, among traffic that involves at least two Class I carriers, approximately {{[REDACTED]}} percent of carloads that traverse the Speedway do not involve NS.⁶⁹

D. Summary Assessment of the Economics of the Joint Venture

39. Prior to MSLLC, NS and KCS were not horizontal competitors but were vertically related in the provision of east/west intermodal traffic. However, due to insufficient capacity, they formed the joint venture to increase capacity and quality. To protect against free riding, the joint venture included an ancillary exclusivity restraint for intermodal traffic traversing the Speedway. The grant of (partial) exclusivity in this instance is pro-competitive, not anticompetitive.

IV. ASSESSMENT OF CSXT’S CLAIMS OF HARM TO COMPETITION

40. In the previous section, I assessed both the motivation for and economic effects of the Meridian Speedway joint venture. My analysis indicates that both the motivation and effects have been pro-competitive. Nonetheless, Professor Carey and Dr. Bremser (hereafter, “Carey/Bremser”) have argued that the joint venture is a conspiracy to “divide a market into exclusive scopes and/or allocate customers by sellers in an exclusive manner” in order to limit

⁶⁷ Exhibit 4.

⁶⁸ Except indirectly, to the extent that NS has an ownership interest in the MSLLC. *See*, Exhibit 4, comparing columns [A] and [B].

⁶⁹ *See*, Exhibit 4 footnotes. *See also*, Exhibit 4 Workpapers.

price competition and restrain trade.⁷⁰ Their analysis, however, is incorrect in at least three fundamental respects, which I turn to now.

A. Carey/Bremser Misconstrue the Very Nature of Competition

41. Carey/Bremser's contention that the Meridian Speedway joint venture harms competition does not accord with the facts or economic reasoning. For the reasons I have described in Section III, the joint venture provides an efficient means for expanding output and enhancing shippers' experiences.

42. In this regard, Carey/Bremser's error arises because they misconstrue the very nature of competition, attributing what is a normal and salubrious part of the competitive process to anticompetitive harm. Specifically, competition between firms in general (and railroads in particular) often involves firms that provide multiple heterogeneous outputs, employ multiple heterogeneous inputs, and serve a heterogeneous pool of customers. In freight rail and on the output side, railroads may, for instance, offer differentiated services that are faster or slower, offer movements on more well-maintained or less well-maintained trackage, or offer more or less advantageous routing. Some firms offer higher quality customer service than others. On the input side, firms may utilize higher or lower quality labor, employ more or less skilled management, or utilize better or worse accounting systems or IT. Shippers are also heterogeneous—some are large and others are small, some ship frequently and others infrequently, some ship products to the same destination repeatedly and others have varying shipping locations, some shippers and products require strict on-time performance to accommodate finely-tuned manufacturing needs

⁷⁰ Carey and Bremser Statement, at p. 47.

(e.g., car parts), while other products, such as bulk commodities, can be moved more slowly and stored for extended periods (e.g., salt).

43. In this diverse environment, the competitive process involves firms with differentiated inputs and differentiated outputs competing against each other. One firm may have the best routing for certain customers, another firm may have the best customer service support, and yet another firm may be able to provide unit train movements that provide the most efficient and reliable service. No single firm has access to all of the highest quality inputs, or uniquely offers the highest quality service at all times and to all customers. Instead, different firms, each with their own diverse combinations of inputs and outputs that translate into their own competitive advantages, compete vigorously for customers' patronage. Firms in such a rough-and-tumble environment compete against one another by making investments, by forming collaborations, and by strategically undertaking their own initiatives and reacting to the actions of competitors repeatedly over time. It is exactly this competitive process that is extolled by economists as enhancing economic welfare.

44. Rather than recognizing this diverse competitive environment, Carey/Bremser take the simplistic stance that, because CSXT does not have access to a *particular* part of a *particular* route that it sees as attractive, the competitive process has been harmed. Such a narrative grossly simplifies and distorts the essence of the competitive process, particularly the competitive environment for transportation of goods via rail. Carey/Bremser would like the Board to consider the competitive field as irrevocably tilted as a consequence of NS's exclusive access for certain intermodal traffic that traverses the Meridian Speedway. In reality, however, the Meridian Speedway is just one route among many. While it is a route that may be best suited for certain shippers, alternative routes allow other railroads to successfully compete for rail

transportation services (including intermodal) along origin-destination (“O-D”) pairs the Meridian Speedway helps connect. As noted at the time that the MSLLC joint venture was established, “[f]or such east/west intermodal traffic, the Speedway acts as an alternative route to those more commonly used by other railroads via other gateways, including Memphis, New Orleans and Birmingham.”⁷¹

45. Carey/Bremser do not acknowledge that CSXT has access to its own set of competitively advantaged resources and capabilities that allows it to compete very successfully in the transportation of intermodal services. For example, the CSXT’s Southeastern Corridor embodies a critical part of its network that “runs between CSXT’s western gateways of Chicago, St. Louis and Memphis through the cities of Nashville, Birmingham, and Atlanta and markets in the Southeast. The Southeastern Corridor is the premier rail route connecting these key cities, gateways, and markets and positions CSXT to efficiently handle projected traffic volumes of intermodal [] traffic.”⁷² Similarly, CSXT’s Northwest Ohio Intermodal terminal, built in 2011, is “one of North America’s most technologically advanced” terminals with a lift capacity of 700,000 units”, “strategically located between Chicago and the Northeast mainlines” and “enabling convenient truck access to local and regional markets from Chicago to Pittsburgh and Detroit to Cincinnati.”⁷³ CSXT also boasts the Interstate 95 (I-95) Corridor, connecting Charleston, Jacksonville, and Miami along with many other heavily-populated cities in the Southeast and mid-Atlantic, as a “leading rail corridor along the eastern seaboard” providing

⁷¹ KCS-MSLLC Exemption, at p. 4.

⁷² CSX 2019 Form 10-K, at p. 13.

⁷³ CSX 2020 Environmental, Social and Governance Report (“CSX ESG Report 2020”), at p. 61; <https://www.csx.com/index.cfm/about-us/media/press-releases/csx-announces-new-growth-initiatives-for-northwest-ohio-intermodal-terminal/> (viewed April 27, 2022).

intermodal access to major ports in the Eastern U.S.⁷⁴ CSXT has continued to invest in the I-95 Corridor, and plans to eventually provide double stack efficiency along most of the Corridor.⁷⁵ Further, in 2021, CSXT introduced premium intermodal service along the I-95 Corridor which efficiently moves produce and other food products along the east coast.⁷⁶

46. In its 2019 Annual Report, CSXT champions its Trip Plan Performance, indicating “[o]ne of several major enhancements made to the ShipCSX customer service portal during the year, [...] enables carload and intermodal customers to view CSX performance at the system, location and lane level, providing them with unprecedented transparency for managing their supply chains and making shipping decisions.”⁷⁷ At its intermodal terminals, CSXT employs XGate, a mobile application that automates outbound validation, optimizing the pickup and delivery of intermodal services.⁷⁸ “[A] revolutionary new system,” XGate had been used for 85 percent of gate transactions by 2020, increasing the pace of customer deliveries and reducing potential emissions at intermodal terminals by up to 90 percent.⁷⁹

⁷⁴ CSX Corporation 2020 Annual Report, at p. 37.

⁷⁵ As recently as June 23, 2021, CSXT committed \$113 million to expand a critical railroad tunnel in Maryland. This along with the recently rebuilt tunnel in Washington, D.C. represented “the last major impediment[s] for the rail network to accommodate rail cars with double-stacked containers in CSX’s I-95 rail network.” See, Lazo, Luz, “Expansion of CSX Railroad Tunnel, which would Boost Port of Baltimore, to Begin this Year, Maryland Gov. Hogan Says,” Washington Post, June 23, 2021, available at <https://www.washingtonpost.com/transportation/2021/06/23/port-of-baltimore-csx-tunnel/> (viewed July 7, 2022).

⁷⁶ Stephens, Bill, “CSX Testing Florida-Northeast Perishables Market with Premium Intermodal Service,” Trains.com, April 11, 2022, available at <https://www.trains.com/trn/news-reviews/news-wire/csx-testing-florida-northeast-perishables-market-with-premium-intermodal-service/> (viewed July 6, 2022). See also, CSX Corporation 2021 Annual Report, at p. 9. This premium intermodal service is called “CSX Greenway.”

⁷⁷ CSX Corporation 2019 Annual Report, at pp. 2-3.

⁷⁸ CSX 2022 Proxy Statement, at p. 4. See also, <http://www.csxintermodalterminals.com/index.cfm/resources1/xgate-faq/> (viewed April 21, 2022).

⁷⁹ CSX ESG 2020, at p. 53.

47. These competitive resources and capabilities have allowed CSXT to successfully capture intermodal customers' business. In 2005, the year that NS and KCS formed the MSLLC joint venture, CSXT earned \$1.36 billion in revenues from its intermodal service.⁸⁰ By 2021, CSXT's intermodal revenues had grown by 50 percent to \$2.04 billion.⁸¹ CSXT is dominant on certain intermodal routes, as shown in Exhibit 5, which highlights a few illustrative corridors where CSXT has a high market share, according to the market definition (BEA-to-BEA) proffered by Carey/Bremser.⁸² All of these origin-destination pairs involve one endpoint east of Meridian, the other endpoint west of Fort Worth, and would not originate or terminate on KCS's system; thus, I understand that intermodal traffic along these O-Ds would be subject to the MSLLC exclusivity arrangements granted to NS.⁸³ As shown, in 2019, CSXT carried fully {{REDACTED}} percent of all intermodal rail traffic between Charlotte and Las Vegas, {{REDACTED}} percent of all intermodal rail traffic between El Paso and Jacksonville, and {{REDACTED}} percent of all intermodal rail traffic between San Francisco and Jacksonville.⁸⁴

48. While asking the Board to focus on perceived disadvantages faced by a hapless CSXT, Carey/Bremser also fail to identify the robust competitive interplay between CSXT and NS in the provision of intermodal services. Typical of this omission, Carey/Bremser fail to acknowledge the (pro) competitive response by CSXT in 2006 to the establishment of the MSLLC. In October 2006, in the wake of the establishment of the NS/KCS joint venture, CSXT announced the formation of its own agreement with BNSF that, similarly to MSLLC, provides

⁸⁰ CSX 2005 Form 10-K, at p. 34.

⁸¹ CSX 2021 Form 10-K, at p. 26.

⁸² Carey and Bremser Statement, at p. 50.

⁸³ KCSR-HC-00013177-227, at 184; KCSR-HC-00013437-459, at 439-440.

⁸⁴ Exhibit 5.

capacity commitments and haulage services for intermodal traffic in the Southeastern United States.⁸⁵ As a part of the Transportation Services Agreement (“BNSF-CSXT Agreement”), CSXT provides haulage services between its Fairburn Terminal (outside Atlanta, GA) to Birmingham, AL (“Atlanta Corridor”) and BNSF provides haulage services between its Memphis intermodal facility to Birmingham, AL (“Memphis Corridor”).⁸⁶

49. Included in the BNSF-CSXT Agreement are [REDACTED]

[REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁸⁷ Similarly, the agreement includes a volume commitment in which CSXT is required to tender to BNSF at least {{[REDACTED]}} of all non-interline CSXT Units between Memphis and Florida and at least {{[REDACTED]}} of all CSXT/BNSF Memphis interchange traffic; furthermore, {{[REDACTED]}} CSXT Charlotte Area traffic received from BNSF at Memphis must move via the Memphis Corridor.⁸⁸

50. The Transportation Service Agreement fashioned between CSXT and BNSF highlights two important lessons for the present proceeding. First, it represents a powerful example of the competitive dynamic that is at play in the transportation of intermodal services; a dynamic that is altogether overlooked by Carey/Bremser. While Carey/Bremser fashion a narrative that the MSLLC distorts CSXT’s ability to compete and harms competition, the

⁸⁵ CSX_HC_00000022-082, at 032-033, 037, 040-041.

⁸⁶ CSX_HC_00000022-082, at 030, 033, 040.

⁸⁷ CSX_HC_00000022-082, at 031, 039. [REDACTED]

[REDACTED] See, CSX_HC_00000022-082, at 031.

⁸⁸ CSX_HC_00000022-082, at 041.

marketplace reality is that CSXT adjusted quickly to the Meridian Speedway joint venture and has subsequently been competitively successful in the provision on intermodal services. Second, the Transportation Service Agreement fashioned by CSXT and BNSF [REDACTED] [REDACTED]. As I have indicated above, both the Agencies and the underlying academic literature indicate that such restrictions are most often competitively innocuous or overtly pro-competitive.⁸⁹ Thus, rather than embracing the incongruent story of competitive harm proffered by Carey/Bremser, a more sensible interpretation of these restrictions [REDACTED]

[REDACTED]⁹⁰

51. In yet another example of Carey/Bremser’s misconstrual of the competitive process, they complain that with the Meridian Speedway agreement in place, CSXT must compete “over routes that are longer or operationally disadvantaged.”⁹¹ This claim, meant to paint CSXT as a hobbled competitor, is entirely misleading, as it ignores the evolution of competition in this industry. Specifically, the gains ultimately realized by Norfolk Southern through its commitment of capital investments in the Meridian Speedway line were presumably available to CSXT in 2005 at the time of the formation of the KCS-NS joint venture. If, at that time, CSXT had determined that the Speedway (or any other advantageous route) would provide a competitive advantage for its intermodal shipments (or equivalently avoided the need to carry traffic over “longer or operationally disadvantaged” routes) then it could have approached KCS

⁸⁹ See, paragraphs 13-14, *supra*.

⁹⁰ A caveat to this conclusion is that I have not engaged in a detailed economic analysis of the CSXT-BNSF agreement, as I have for the MSLLC.

⁹¹ Carey and Bremser Statement, at p. 49.

with a business proposition of its own. My understanding is that it did not do so. Thus, the failure of CSXT to consummate its own deal with KCS regarding traffic over the Speedway may be more an indictment of CSXT's business acumen than a *bona fide* criticism of the Meridian Speedway joint venture that NS consummated.

B. Carey/Bremser Do Not Offer or Analyze a Correctly Specified Theory of Anticompetitive Harm Arising from the Meridian Speedway

52. I have explained in Section III that the creation of the MSLLC joint venture entailed a clear efficiency rationale and created a number of economic benefits in the provision of rail services. Exclusive dealing arrangements, such as those embodied in the MSLLC, often involve such economic efficiencies,⁹² but may occasionally adversely affect competition. Consequently, economic analyses of such exclusive dealing arrangements typically involve a consideration of the presence and magnitude of the economic merits of the exclusivity and the presence and magnitude of any associated economic harms. Unfortunately, Carey/Bremser miscategorize the MSLLC agreement as a simple agreement to divide a market in order to limit price competition.⁹³ This incorrect characterization of the joint venture consequently leads Carey/Bremser to equate the MSLLC agreement with naked price fixing agreements, whose economic analysis is substantially different from the treatment of standard exclusivity clauses as embodied in the MSLLC joint venture.⁹⁴

⁹² See, Section II.

⁹³ Carey and Bremser Statement, at p. 47.

⁹⁴ See, e.g., *Polk Bros., Inc., Plaintiff-Appellant, v. Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985), which explains, "A court must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote. [] If two people meet one day and decide not to compete, the restraint is 'naked'; it does nothing but suppress competition. If A hires B as a salesman and passes customer lists to B, then B's reciprocal covenant not to compete with A is 'ancillary.' At the time A and B strike their bargain, the enterprise (viewed as a

53. In particular, economic analysis of simple price-fixing need not typically include an analysis of whether the agreement between firms entails economic efficiencies.⁹⁵ In this counter-factual world, simple assessments of “did the price-fixing conspiracy take place” suffice. This is the path adopted by Carey/Bremser. Unfortunately, these too-simple conclusions are entirely unwarranted.

54. Specifically, Carey/Bremser’s claim that the MSLLC constitutes a “horizontal market division”⁹⁶ is incorrect. Indeed, this characterization stands in stark contrast to the description offered by the Board’s assessment of the MSLLC which identified no such horizontal market division, but rather saw the Agreement as “a joint venture...to share and upgrade a portion of the Meridian Speedway, a line located between Meridian, MS, and Dallas, Texas.”⁹⁷

55. Consistent with the Board’s characterization, a careful reading of the Joint Use Agreement indicates that it is not a market division. Rather, the language in question simply provides trackage and haulage rights for NS to transport certain portions of its traffic between Meridian, MS and Shreveport, LA. The Agreement does not limit competition or divide markets, but rather simply identifies the circumstances in which one or the other of the joint venture co-owners have the rights to use the Meridian Speedway trackage. The agreements clearly do not meet the characterization provided by the FTC of market division as “agreements not to

whole) expands output and competition by putting B to work. The covenant not to compete means that A may trust B with broader responsibilities, the better to compete against third parties. Covenants of this type are evaluated under the Rule of Reason as ancillary restraints, and unless they bring a large market share under a single firm’s control they are lawful.”

⁹⁵ Collaboration Guidelines, at p. 8.

⁹⁶ Carey and Bremser Statement, at p. 45.

⁹⁷ Norfolk Southern Railway Company — Trackage Rights Exemption — Meridian Speedway LLC — Between Meridian, MS and Shreveport, LA, Decision, Finance Docket No. 34821, April 6, 2006, at p. 1.

compete: I won't sell in your market if you don't sell in mine.”⁹⁸ Not only does the agreement fail to divide markets between NS and KCS, the notion that the carriers conspire to “limit price competition”⁹⁹ is directly contradicted in the original Notice of Exemption in which KCS observes that “NSR is solely responsible for, and exercises control over, the pricing and marketing of that traffic.”¹⁰⁰ In the absence of a *bona fide* conspiracy to limit price competition, Carey/Bremser's conclusory opinion (rather than a rigorous demonstration of competitive harm from the joint venture using economic analysis) of likely harsh treatment by antitrust authorities is entirely unwarranted.

56. Additionally, Carey/Bremser mischaracterize the nature of the agreement as horizontal rather than vertical. This error substantially distorts their subsequent analysis. Recall that prior to the formation of the MSLLC, the trackage between Meridian, MS and Shreveport, LA was owned by KCS. Because the trackage provided an attractive routing for a portion of its intermodal transportation, NS contracted with KCS for transportation services across the Speedway. As such, NS's retail provision of intermodal rail service relied upon the input of KCS's trackage that was complementary (and, in particular, end-to-end) with its own trackage. While the establishment of the MSLLC altered the *legal structure* of the provision of these vertical services, the joint venture did not change the fundamentally *vertical nature* of the commerce in question. Specifically, after the formation of the MSLLC, and still today, NS relies on the input of transportation services across the Meridian Speedway for providing certain

⁹⁸ <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/market-division-or-customer-allocation> (viewed April 7, 2022).

⁹⁹ Carey and Bremser Statement, at p. 47.

¹⁰⁰ KCSR-HC-00013177-227 at 182.

intermodal customers an efficient routing. The provision of the input transportation services is provided through haulage rights.¹⁰¹ For example, I understand that, in the case of westbound NS intermodal services provided over the Meridian Speedway, an NSR crew gets off the train at Meridian and is replaced by a KCS crew.¹⁰² The trackage is now owned by the MSLLC, while KCS continues to be the operator of track services across the Speedway.¹⁰³ Nothing about the legal creation of the joint venture has altered this vertical relationship.

57. Carey/Bremser deny this vertical relationship, however, stating that the Meridian Speedway agreement is “horizontal in nature.”¹⁰⁴ Given the *prima facie* vertical nature of the input services acquired by NS for transportation across the Meridian Speedway, Carey/Bremser’s claim is flummoxing. Based on the evidence that I have seen, my understanding is that prior to the formation of the MSLLC, NS and KCS neither competed for intermodal customers, nor intended to compete for this traffic.¹⁰⁵ Consequently, the MSLLC Agreement, which simply altered the legal framework within which transportation services would be provided over the Speedway, is not accurately characterized as horizontal.

58. Carey/Bremser’s failure to recognize the vertical nature of the transportation services that NS acquires through the use of the Meridian Speedway trackage truncates important economic analysis and substantially distorts their conclusions. Indeed, the effects of this

¹⁰¹ KCSR-HC-00013584-597, at 584; KCSR-HC-00013373-408, at 373-374; KCSR-HC-00013437-459, at 437; KCSR-HC-00012689-691, at 689.

¹⁰² I understand further that KCS power may replace NSR power at Meridian as well. Furthermore, NS relies on KCSR for dispatching NS traffic moving over the Meridian Speedway. *See*, Amended McClellan Statement, at pp. 2-3.

¹⁰³ KCSR-HC-00013177-227 at 184.

¹⁰⁴ Carey and Bremser Statement, at p. 48, footnote 200.

¹⁰⁵ KCS-MSLLC Exemption, at p. 4.

distortion are known to Carey/Bremser, who acknowledge that “[v]ertical agreements ... may be considered to enhance efficiencies and have the effect of resolving free-rider problems and promoting intra-brand competition at the retail level by limiting competition among retailers or distributors in downstream markets. *E.g.*, certain instances of resale price maintenance and territorial restrictions.”¹⁰⁶ By inaccurately portraying KCS and NS as horizontal competitors in the provision of intermodal services, Carey/Bremser turn to anticompetitive conspiracy explanations for the joint venture rather than the vertical and pro-competitive agreement that it is.

C. Carey/Bremser’s Empirical Evidence of Anticompetitive Harm Arising from the Meridian Speedway is Flawed

59. Absent a naked agreement to restrain trade, the FTC indicates that assessments of collaborations between firms often “require[s] fact-intensive inquiry into the purpose and effect of the collaboration, including any business justifications.”¹⁰⁷ As I determined in Section III above, the business justification and economic effects of the formation of the Meridian Speedway are consistent with enhanced efficiencies and competition. Carey/Bremser, however, offer virtually no analysis of the business justification, motivation, or effects of the joint venture. In the absence of such analysis, their conclusions of harm to competition should be taken as naïve and unfounded speculation.

¹⁰⁶ Carey and Bremser Statement, at p. 48, footnote 200.

¹⁰⁷ <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors> (viewed July 7, 2022). *See also*, Werden (1988), at p. 717, observing that “Any genuine economic integration that plausibly could confer nontrivial social benefits suffices to take a joint venture outside the purview of the *per se* rule.”

60. In lieu of the required fact-intensive inquiry, Carey/Bremser turn to a (as it turns out, too) simple compilation of market share data they believe is indicative of anticompetitive harm arising from the MSLLC joint venture. Specifically, Figure 14 of Carey/Bremser purports to identify NS's "high market shares for specific BEA origin and termination market lanes"¹⁰⁸ for intermodal traffic between the West Coast and Southeast. Carey/Bremser suggest that these market shares "raise concerns for anticompetitive effects and lessening of competition."¹⁰⁹

61. This element of the Carey/Bremser analysis is central to their conclusion yet profoundly flawed. It provides utterly no useful information, but instead only sows confusion and incorrect inferences. To see this, note first that the reason that economists examine market shares is that, *when properly defined and calculated*, they may provide an indication of the extent of control that a provider has over a market. For instance, a firm with 90 percent of a properly defined market has more power to influence the market price than a smaller firm with only a 10 percent market share, *ceteris paribus*. To draw proper inferences from market share analysis, however, it is essential that the market be properly defined. Consider, for instance, the clearly erroneous calculation and inference that McDonald's market share for Big Mac sales is 100 percent and that McDonald's consequently has monopoly power. Such a calculation provides no useful information regarding the market power¹¹⁰ of McDonald's because the relevant market is not "the Big Mac market" but rather something considerably broader. Such a broader market may include not only competitors' burger products, but sandwiches in general. In

¹⁰⁸ Carey and Bremser Statement, at p. 50.

¹⁰⁹ Carey and Bremser Statement, at p. 51. Incidentally, if Carey/Bremser are alarmed by NS's market shares in the cherry-picked O-Ds in their Figure 14, surely, according to the logic they expound, they would be also alarmed by CSXT's "undue market power" highlighted in Exhibit 5 discussed above.

¹¹⁰ Market power is commonly defined as the ability to raise prices above competitive levels without losing sales so rapidly such that the price increase must be rescinded. See, Landes, William M. and Richard A. Posner "Market Power in Antitrust Cases," *Harvard Law Review*, Vol. 94, No. 5, March (1981): 937-996, at p. 937.

such a broader market, a market share calculation would more appropriately point toward a lower market share, and any inference of market power would appropriately dissipate.

62. A properly defined market is a set of products and a geographic area within which price is determined. As such, two salient dimensions of markets emerge: a product dimension and a geographic dimension. Carey/Bremser's calculation of NS's market share of "Intermodal Traffic Between West Coast and Southeast (No-Single Line Service)"¹¹¹ is flawed in both of these dimensions.

63. In the product dimension, Carey/Bremser exclude single-line rail service between the West Coast and the Southeast.¹¹² The primary issue with this choice is discussed next; this issue notwithstanding, given the readily observable substitutability between interline and single-line services throughout the industry, this exclusion is unwarranted. Why might Carey/Bremser invoke this restriction, when there are no transcontinental (coast-to-coast single-line) U.S. carriers? Upon inspection of the data, it can be seen that the decision conveniently, though at the cost of substantially distorting the economic analysis, eliminates substantial competitive capacity from their market share analysis. Specifically, CSXT, through its haulage agreement with BNSF, moves freight between Birmingham and Atlanta¹¹³ that *ostensibly* appears in the confidential 2019 Carload Waybill Sample ("CWS") to be single-line service terminated (eastbound) or originated (westbound) by BNSF into and out of Atlanta.

¹¹¹ Carey and Bremser Statement, at p. 51.

¹¹² Carey and Bremser Statement, at p. 50, footnote 214.

¹¹³ CSX_HC_00000022-082, at 033.

64. Assigning the Atlanta-Birmingham traffic to CSXT,¹¹⁴ and considering it as (different in name only) BNSF-CSXT interline service, [REDACTED]. Exhibit 6 highlights four BNSF-CSXT transcontinental routes into and out of Atlanta, to and from Los Angeles, and, separately, to and from San Francisco. [REDACTED]. [REDACTED]. Moreover, as I discuss further below, the omission of this traffic also relates to an important oversight related to the appropriate geographic market. As such, Carey/Bremser's market share analysis is highly distorted and has virtually no normative policy implications.

65. Still in the product dimension, Carey/Bremser fail to account for competition between railroads and trucks in the transportation of intermodal traffic. Specifically, as an alternative to rail carriage, intermodal traffic may involve truck transport, and the presence of this alternative substantially disciplines the pricing of intermodal transport by rail carriers.¹¹⁵ This truck transport may involve complementary transport of part of the total transport (by originating or terminating transportation) or as an outright replacement for rail services.

¹¹⁴ Appropriate in the sense that it provides a fair comparison, given that CSXT services the traffic east of Birmingham.

¹¹⁵ In March 1981, the Interstate Commerce Commission chose to relieve intermodal rail regulation from pricing regulation recognizing that intermodal rail traffic is "highly competitive with motor carrier service, that [] regulatory restraints had impeded the development of intermodal service, and that exemption from regulation would likely stimulate improvements in service without threatening any harm to individual shippers." See, Interstate Commerce Commission, Ex Parte No. 230 (Sub-No. 5), Improvement of TOFC/COFC Regulation, February 19, 1981 ("ICC Improvement of TOFC/COFC Regulation (1981)"), at p. 732.

66. This competition in the provision of intermodal services has been widely recognized for over forty years.¹¹⁶ Indeed, while trucking and rail remain highly competitive today, as early as 1981 the Interstate Commerce Commission summarized its analysis of intermodal competition, stating that “[n]o one has seriously questioned the existence of vigorous competition between TOFC/COFC and motor carrier service.”¹¹⁷

67. The Carey/Bremser calculation of market shares, which focuses only on rail transport, mistakenly excludes the competitive presence of trucking. The rationale for this exclusion offered by Carey/Bremser is that the routes they consider from the West Coast to the Southeast “exceed the general distance of the competitiveness of a route exclusively carried by a truck versus a railroad.” Carey/Bremser indicate that “[a] truck competitor for intermodal traffic is estimated to extend to routes as long as 500 miles.”¹¹⁸

68. However, the competitive presence of trucking alternatives can pressure rail carriers not merely for its ability to replace end-to-end rail transportation, but also for its ability to replace particular segments of the route. This realization drastically alters the market share calculus proposed by Carey/Bremser in their Figure 14. For instance, Carey/Bremser calculate that in 2019 NS carried {{[REDACTED]}} between Los Angeles, CA and Charlotte, NC for a “market share” of {{[REDACTED]}} Assuming, however, the Carey/Bremser proposition that “[a] truck competitor for intermodal traffic is estimated to extend

¹¹⁶ ICC Improvement of TOFC/COFC Regulation (1981), at pp. 732, 734.

¹¹⁷ ICC Improvement of TOFC/COFC Regulation (1981), at p. 3.

¹¹⁸ Carey and Bremser Statement, at p. 50, footnote 212.

to routes as long as 500 miles,”¹¹⁹ then the distance from Atlanta to Charlotte of 245 miles¹²⁰ puts final-leg truck termination well within the realm of competitive possibilities for intermodal shippers that employ the BNSF rail route from the West Coast to Atlanta (via CSXT haulage for the final leg from Birmingham to Atlanta).¹²¹ In short, the option of rail-to-truck or truck-to-rail intermodal transportation provides an entirely different picture of the likely market structure than that projected by Carey/Bremser.

69. For instance, consider that intermodal shippers in Los Angeles who desire to ship to Charlotte have the option of transporting by rail from Los Angeles to Atlanta on BNSF (via CSXT haulage for the final leg from Birmingham to Atlanta)¹²² and from there by truck to terminate the traffic at its final destination in Charlotte. To give a sense of the competitive capacity presented by this option, consider that, as shown in Exhibit 6, row [7], in 2019 BNSF transported fully {{[REDACTED]}} intermodal carloads between Los Angeles and Atlanta while NS terminated only {{[REDACTED]}} intermodal carloads originated from Los Angeles in Charlotte.¹²³

70. More generally, Map Appendix Exhibits 1-5 show a 500-mile radius around five east-west gateways: Atlanta, Memphis, Meridian, New Orleans and Shreveport for intermodal traffic. As readily seen, the option of rail-to-truck and truck-to-rail traffic provides a viable competitive alternative to rail-only transport for shippers originating and terminating intermodal traffic over a vast majority of the Southeast.

¹¹⁹ Carey and Bremser Statement, at p. 50, footnote 212.

¹²⁰ Distance from Google Maps route from Atlanta, GA to Charlotte, NC.

¹²¹ CSX_HC_00000022-082, at 033.

¹²² CSX_HC_00000022-082, at 033.

¹²³ See, Exhibit 7, row [3].

71. In short, the Carey/Bremser market share calculations for intermodal transportation that exclude the competitive presence of rail-to-truck or truck-to-rail transportation are likely to be grossly misleading and completely uninformative on the issue of whether NS's conduct has led to "anticompetitive effects and lessening of competition."¹²⁴

72. In the geographic dimension, Carey and Bremser assume that the geographic scope of the relevant market for analysis is the BEA,¹²⁵ indicating that it may be "used as a starting point to determine if there is (sic) economic indicia of competitive harm for the area..."¹²⁶ Although the BEA may provide a useful "starting point" for a relevant geographic market for freight rail services generally, the particular characteristics of intermodal transportation compel a substantially broader geographic market for intermodal services. Indeed, as noted, Carey/Bremser observe that "[a] truck competitor for intermodal traffic is estimated to extend to routes as long as 500 miles."¹²⁷ In this case, standard economic analysis indicates that a typical BEA, which is significantly smaller than the 500-mile competitive range of trucking, is too small and must be extended.¹²⁸ As shown in Map Appendix Exhibits 1-5, the geographic areas identified for intermodal traffic substitutability are significantly larger than BEAs. The

¹²⁴ Carey and Bremser Statement, at p. 51.

¹²⁵ Carey and Bremser Statement, at p. 50.

¹²⁶ Carey and Bremser Statement, at p. 50.

¹²⁷ Carey and Bremser Statement, at p. 50, footnote 212.

¹²⁸ Drawing on the "hypothetical monopolist test" that is routinely employed in antitrust economics and practice, suppose there exists a hypothetical monopolist over intermodal rail services originating (terminating) in BEA X and terminating (originating) in BEA Y. The hypothetical monopolist test then asks whether the supposed hypothetical monopolist could profitably raise prices on these services in the proposed geographic market by a small, but significant, and non-transitory amount. If the answer is "yes" then the proposed market stands, but if the answer is "no," say due to substitution of traffic to truck carriage for part of the route, then the geographic market must be expanded. In the case at hand, the conventional wisdom of the competitive advantages for trucking in hauls up to 500 miles suggests that the geographic market in this instance extends well beyond the BEA for intermodal transportation. *See also*, "Horizontal Merger Guidelines," August 19, 2010 ("Horizontal Merger Guidelines"), at pp. 8-9, available at <https://www.ftc.gov/sites/default/files/attachments/mergers/100819hmg.pdf>.

consequence is that competition from trucking transport dictates a larger geographic market than that presumed to hold by Carey/Bremser. As a result, the BEA market share calculations of Carey/Bremser draw on the wrong geographic scope for an assessment of competition in intermodal services.

73. For the sake of illustration, consider the BNSF-CSXT traffic into and out of Atlanta to and from Los Angeles and San Francisco highlighted in Exhibit 6, and the competitive range of trucking around the Atlanta BEA highlighted in Map Appendix Exhibit 1, relative to the markets identified in Carey/Bremser's Figure 14. In Exhibit 7, I replicate Carey/Bremser's Figure 14, grouping O-D pairs by West Coast origin (eastbound traffic) or termination (westbound traffic),¹²⁹ and then pair those groupings with the competitive BNSF-CSXT traffic into or out of Atlanta from Exhibit 6. For example, the (Carey/Bremser omitted) route from Atlanta to Los Angeles is paired with the (Carey/Bremser included) routes from Charlotte, Jacksonville, and Greensboro to Los Angeles because the option to truck to Atlanta from Charlotte, Jacksonville, and Greensboro, and then transfer to train in Atlanta to reach Los Angeles is competitive with said routes. As shown in Exhibit 7, once you consider the BNSF-CSXT traffic that is competitive with those O-Ds, *CSXT, not NS, arguably has the market share advantage*. For example, in row [5], considering the four routes in rows [1]-[4] originating in Los Angeles as in the same market, CSXT, not NS, has an {{[REDACTED]}} "market share." Similarly, CSXT, not NS, has a greater market share among the other groupings (*see*, rows [9], [14], and [19]) and overall (*see*, row [22]). Of course, it's unlikely that *all* of the BNSF-CSXT traffic into or out of Atlanta exclusively competes with the O-Ds from Carey/Bremser Figure 14,

¹²⁹ Routes involving the Miami-Fort Lauderdale, FL BEA are not within a 500-mile radius of Atlanta; hence, I do not consider that traffic competitive with the option to truck to Atlanta, and excluded them from this grouping. *See*, Map Appendix Exhibit 1.

and there are surely other intermodal routes that (by the same logic) compete with the O-Ds in Carey/Bremser's Figure 14; however, the sheer magnitude of traffic coming into and out of Atlanta via BNSF-CSXT service suggests that the possibility of such competition drastically tipping the scales in a manner inconsistent with Carey/Bremser's portrayal cannot be ignored.¹³⁰

74. Yet another problem with the Carey/Bremser market share analysis is that it fundamentally misconstrues the purpose of a market share analysis. Specifically, Carey/Bremser conclude, based on their incorrect calculation of high market shares, that the market shares they (mis)calculate "raise concerns for anticompetitive effects and lessening of competition."¹³¹ But this is an incorrect inference. As I have mentioned, appropriately measured, market shares may provide an insight into whether a firm has market power in a relevant market. However, a market share analysis by itself, as conducted by Carey/Bremser, does not allow an economic conclusion of "anticompetitive effects" or a "lessening of competition" as they infer.

75. Indeed, quite the opposite is possible. Specifically, a firm may enjoy a large market share because it offers highly attractive transportation services at attractive rates. Carey/Bremser fail to consider this important alternative explanation in this instance, despite acknowledging the attractiveness of the Meridian Speedway as a route for some intermodal shippers. Indeed, Carey/Bremser acknowledge elsewhere in their Verified Statement that "The Meridian Speedway gateway has a direct route and shorter mileage between Southwest originating and terminating traffic with certain customers in the Southeastern U.S."¹³² They

¹³⁰ To be clear, I do not claim that the "markets shares" presented in Exhibit 7 are correct; rather, my aim is simply to point out the flaws in the Carey/Bremser analysis.

¹³¹ Carey and Bremser Statement, at p. 51.

¹³² Carey and Bremser Statement, at p. 49.

further observe that the Meridian Speedway Agreements “provide NSR with substantial operational flexibility to efficiently and effectively interchange and operate over its owned and controlled intermodal traffic.”¹³³ To the extent that these features of the Meridian Speedway routing are attractive to some shippers, a higher market share enjoyed by NS is likely to be a reflection not of “anticompetitive effects” or a “lessening of competition” but rather of increased consumer welfare by shippers that utilize this attractive routing.

76. This particular flaw highlights a more basic problem. Specifically, economists’ competitive examinations of market structure (such as performed by Carey/Bremser) are separate from, and do not permit inferences regarding, market conduct (such as Carey/Bremser’s conclusion of “anticompetitive effects”). As such, conclusions regarding anticompetitive conduct require analysis beyond market structure. Carey/Bremser do not, however, conduct any analysis of NS’s market conduct and fail to identify any anticompetitive conduct it may have engaged in.

77. The Carey/Bremser market share analysis is flawed in yet another manner that renders their inferences unreliable. Specifically, their Figure 14 selectively “cherry-picks” routes to project the impression that NS dominates east-west and west-east intermodal traffic. As shown in Exhibit 5, routes that Carey/Bremser do not show reveal that CSXT enjoys a substantial share of the intermodal traffic on a number of east-west and west-east routes. For example, CSXT enjoys {{[REDACTED]}} of the intermodal traffic between the Atlanta, GA-AL-NC BEA and the Reno, NV-CA BEA. Similarly, CSXT enjoys fully {{[REDACTED]}} of the intermodal traffic traveling from the Charlotte-Gastonia-Rock Hill, NS-SC BEA and the Las Vegas, NV-AZ-UT BEA. For reasons that I have identified above, inferences regarding “anticompetitive effects” and

¹³³ Carey and Bremser Statement, at p. 47.

“lessening of competition” pertaining to these CSXT routes is as flawed as Carey/Bremser’s inferences when NS enjoys a high share of traffic on a particular route. Yet, Carey/Bremser’s selective presentation of “market share” data only on routes in which NS enjoys a high share of traffic is profoundly troubling.

78. In sum, Carey/Bremser’s analysis of market shares and their associated inferences are irrevocably flawed and provide no value to an economic assessment of the competitive effects of the MSLLC joint venture.

V. THE PERVERSE EFFECTS OF GRANTING CSXT’S REQUEST

79. Carey/Bremser recommend that the Board consider conditioning the approval for the proposed CP-KCS merger on the abolition of the exclusivity provision in the Meridian Speedway joint venture. Adoption of this recommendation, however, would constitute poor economic policy. As I explained in Section III above, the exclusivity agreement is pro-competitive in nature. It arose not with the intent or consequence of harming competition. Instead, as widely recognized in economics, such exclusivity agreements most often arise as a means of addressing inefficiencies, such as free riding, that occur when market participants engage in relationship-specific investments. In particular, such agreements protect the ability of efficiency-enhancing collaborations to arise. As explained in a seminal economic analysis, “[w]hen exchange involves significant investments in relationship-specific capital, an exchange relationship that relies on repeated bargaining is unattractive. Once the investments are sunk in anticipation of performance, ‘hold-up’ or ‘opportunism’ incentives are created *ex post* which, if mechanisms cannot be designed to mitigate the parties’ ability to act on these incentives, could make a socially cost-minimizing transaction privately unattractive at the contract execution

stage. A long-term contract that specifies the terms and conditions for some set of future transactions *ex ante*, provides a vehicle for guarding against *ex post* performance problems.”¹³⁴

80. It may be tempting for the Board to adopt a zero-sum game perspective regarding the CSXT proposal to abrogate the exclusivity feature of the Meridian Speedway joint venture. Nominally, it may seem that adopting CSXT’s proposal simply harms NS and benefits CSXT. But this regulatory decision would be substantially more negatively impactful than suggested by a zero-sum mindset. In particular, the impact of a Board decision to eliminate the exclusivity feature of the Meridian Speedway joint venture would harm not only the economic well-being of the NS, but would also cause harm throughout the industry.

81. If the Board, through regulatory fiat, were to nullify the exclusivity clause of the MSLLC joint venture, it would allow competitor firms (in the current context, CSXT) to avoid competing on their own merits. Such a policy would eliminate the future competitive incentives throughout the industry for investing in alternative gateways and trackage, would reward competition for regulatory favor-making rather than competition in the marketplace, and would send a signal that competitive energies are best directed toward securing regulatory favors rather than by earning the patronage of customers from investment-intensive collaborations that have the potential for reducing costs and enhancing the quality of rail services for shippers.

82. As observed by one antitrust scholar and practitioner, “Perhaps most importantly, the primary incentive to invest in risky but potentially efficient joint ventures may be the prospect of a product or process innovation that will advantage the joint venture participants over their competitors. Any public policy that threatens to take away much of the benefit from

¹³⁴ Joskow (1987), at p. 169.

successful innovation is bound to retard innovation, and innovation by a joint venture is no less deserving of consideration than innovation by a single firm. Even if joint venture access pricing could totally eliminate free riding, mandating open access could remove the incentive to invest in the joint venture in the first instance. It is irrelevant that the investment in a particular joint venture may already be sunk, and that the joint venture would not be dissolved if access were compelled. The issue is what is the best public policy toward joint ventures, and a policy of open access could significantly retard future investment.”¹³⁵

83. Finally, Carey/Bremser appear to take exception with the fact that the Meridian Speedway joint venture with its ancillary agreement are still in place in 2022, observing that “the Meridian Speedway does not have a term limit.”¹³⁶ In doing so, they implicitly argue that the initial investments made by NS in the Meridian Speedway have depreciated so that there is no economic harm done by abrogating the exclusivity feature of the joint venture. Such thinking is flawed. As observed by Professor Joskow, “the more important are relationship-specific investments, the longer will be the period of time (or number of discrete transactions) over which the parties will establish the terms of trade ex-ante by contract.”¹³⁷ Using contractual data between coal suppliers and electric utilities, he finds support for efficiency-driven increases in contract duration in markets characterized by the presence of relationship-specific investments.¹³⁸ In the case at hand, investments made by NS into the MSLLC are specific to the provision of services over the Speedway. It is to be expected as a matter of economic efficiency that the joint venture would be structured to last for as long as possible.

¹³⁵ Werden (1988), at p. 731.

¹³⁶ Carey and Bremser Statement, at p. 46, footnote omitted.

¹³⁷ Joskow (1987), at p. 169.

¹³⁸ Joskow (1987), at p. 168.

VI. CONCLUSION

84. The proposed merger between CP and KCS raises a set of real policy issues that require Board action. In contrast, my analysis indicates that the issues raised by CSXT regarding the Meridian Speedway joint venture are an unnecessary distraction. An examination of both the business justification for and economic effects of the Meridian Speedway joint venture point toward the pro-competitive nature of the joint venture.

85. Rather than *bona fide* concerns, Carey/Bremser's economic analysis is best understood as supporting an effort by CSXT to secure regulatory rents; that is, to secure marketplace advantages through regulation rather than by earning such advantages through its own pro-competitive efforts.

86. While CSXT's position should be rejected as without economic foundation, the case for rejection becomes even more compelling once the economic consequences of CSXT's policy proposal are analyzed. Specifically, were the Board to abrogate the competitive advantages secured by the formation of the Meridian Speedway joint venture, the incentives for firms to seek out, negotiate and implement economically meritorious collaborations would be substantially undermined. The consequences of such regulatory opportunism in most industries would be substantially negative. In a network industry such as freight rail, in which firms routinely interact and engage in the provision of complementary services, any such policy that acts to isolate firms by discouraging pro-competitive collaboration is likely to be devastating.

PUBLIC VERSION

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 12th day of July, 2022.

A handwritten signature in black ink, appearing to read "John W. Mayo". The signature is fluid and cursive, with a large loop at the beginning and a long, sweeping underline.

John Mayo

VITA

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Professor of Economics (by courtesy), 2011-present.

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COURSES TAUGHT:

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PUBLICATIONS:

A. JOURNAL ARTICLES

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"An Economic Analysis of a Monitored Retrievable Storage Site for Tennessee" (with W. F. Fox, L. T. Hansen, and K. E. Quindry), Final Report and Appendices, December 17, 1985.

CONGRESSIONAL AND REGULATORY TESTIMONIES:

U.S. Senate (Commerce, Science and Transportation Committee; Energy and Natural Resources Committee, Subcommittee on Water and Power); U.S. House of Representatives, Subcommittee on Railroads, Pipelines, and Hazardous Materials); Federal Communications Commission; U.S. International Trade Commission; Tennessee State Legislature (Senate Finance, Ways and Means Committee; Special Joint Legislative Committee on Business Taxation; and, Senate State and Local Government Committee); Maryland State Legislature (Environmental Works Committee); Pennsylvania Public Utility Commission; Michigan Public Service Commission; Missouri Public Service Commission; Illinois Commerce Commission; West Virginia Public Utility Commission; Wyoming Public Utility Commission; Washington Utilities and Transportation Commission; Utah Public Service Commission; Wisconsin Public Service Commission; California Public Utilities Commission; Florida Public Service Commission; Delaware Public Service Commission; Montana Public Service Commission; Maryland Public Service Commission; Massachusetts Department of Public Utilities; Georgia Public Service Commission; Colorado Public Utilities Commission; North Carolina Public Utilities Commission; Missouri Public Service Commission; Texas Public Utility Commission; Arkansas Public Service Commission; Connecticut Department of Public Utility Control; Kansas State Corporation Commission; and New Jersey Board of Public Utility Commissioners.

INVITED SEMINARS AND SELECTED CONFERENCE PRESENTATIONS:

Columbia University, MIT, University of Chicago, London Business School, University of Paris (Dauphine IX), Vanderbilt University, INSEAD, Washington University in St. Louis, University of Michigan, Ohio State University, University of Minnesota, University of Florida, University of Arkansas, University of Texas, University of Missouri, Florida State University, Rutgers University, American University, University of Missouri, Kansas University, University of Utah, University of Colorado, University of Basel (Switzerland), ESMT, University of Freiburg (Germany), Hendrix College, University of Central Florida, American Enterprise Institute, Brookings Institution, Federal Communications Commission, Australian Competition and Consumer Commission (ACCC), COFECE (Mexican antitrust commission), Telecommunications Policy Research Conference (TPRC), National Conference of State Legislatures, U.S. Advisory Commission on Intergovernmental Relations

SELECTED CONSULTING:

U.S. Department of Justice, Antitrust Division; U.S. Federal Trade Commission; AT&T; Sprint; MCI Telecommunications; Verizon; Optus Communications (Australia); Commonwealth of Virginia, Tennessee Valley Authority; Antitrust Division, Office of the Attorney General, State of Tennessee; U.S. Senator Howard Baker, Jr., U.S. Senate Majority Leader; Oak Ridge National Laboratory; AmerenUE; Arkansas Consumer Research; Division of Energy Conservation and Rate Advocacy, Office of the Arkansas Attorney General; U.S. Department of Energy

PROFESSIONAL PRESENTATIONS:

American Economic Association Annual Conference, Western Economic Association Annual Conference, Southern Economic Association Annual Conference, European Association for Research in Industrial Economics Annual Conference, Center for Research in Regulated Industries Eastern Annual Conference, Center for Research in Regulated Industries Western Annual Conference, Southeastern Economic Analysis Conference

WORKING PAPERS:

“Customer Switching, Firm Entry and Regulatory Policy: Evidence from the Electric Utility Industry (with Jeffrey T. Macher and Robert Press), February 2022.

“The Evolution of Judicial Standards: Evidence from Litigated Merger Trials,” (with Jeffrey T. Macher, David E.M. Sappington and Mark Whitener), April 2021.

“The Evolution of Contracting,” (with Jeffrey T. Macher and David E.M. Sappington), January 2021.

“Demand in a Portfolio Choice Environment: The Evolution of Telecommunications” (with Jeffrey T. Macher, Olga Ukhaneva and Glenn Woroch), April 2019.

“Does the Internet Alter Consumer Healthcare Behaviors?” (with Jeffrey T. Macher and Olga Ukhaneva), January 2018.

EDITORIAL REVIEWER:

National Science Foundation, Brookings Institution, Federal Trade Commission, The MIT Press, American Economic Review, Quarterly Journal of Economics, Journal of Law and Economics, Economic Journal, Journal of Business, RAND Journal of Economics, Journal of Regulatory Economics, Review of Economics and Statistics, Economic Inquiry, Journal of Industrial Economics, Journal of Economics & Management Strategy, Journal of Law, Economics and Organization, Journal of Economic Behavior and Organization, Review of Industrial Organization, Scandinavian Journal of Economics, Eastern Economic Journal, Southern Economic Journal, Contemporary Economic Policy, Economic Development and Cultural Change, Industrial Relations, Growth and Change, Review of Regional Studies, Journal of Economics and Business, Quarterly Review of Economics and Business, Journal of Policy Analysis and Management, Quarterly Journal of Business and Economics, Regional Science and Urban Economics, Financial Review, Journal of Money, Credit, and Banking, Social Science Quarterly, Telecommunications Systems, Public Finance Quarterly, Japan and the World Economy, Energy Economics, Information Economics and Policy

EDITORIAL AND ACADEMIC OVERSIGHT BODIES

Associate Editor, Information Economics and Policy, 2007-2011.

Editorial Board, Journal of Regulatory Economics, 1999-present.

Editorial Board, Review of Industrial Organization, 2002-2003; 2010-present.

Associate Editor, Economic Inquiry, 2013-present.

Board of Academic Advisors, The Free State Foundation, 2008 – 2009.

Research Advisory Committee, National Regulatory Research Institute (Ohio State University), 1993-1997.

PROFESSIONAL MEMBERSHIPS:

American Economic Association

Western Economic Association

Southern Economic Association

American Law and Economics Association

International Telecommunications Society

European Association for Research in Industrial Economics

EXHIBIT 2**DOCUMENTS RELIED UPON**

Bates Ranges		
CSX_HC_00000022	—	CSX_HC_00000082
KCSR-HC-00012689	—	KCSR-HC-00012705
KCSR-HC-00012940	—	KCSR-HC-00012942
KCSR-HC-00013177	—	KCSR-HC-00013227
KCSR-HC-00013373	—	KCSR-HC-00013408
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- 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, with Workpapers.

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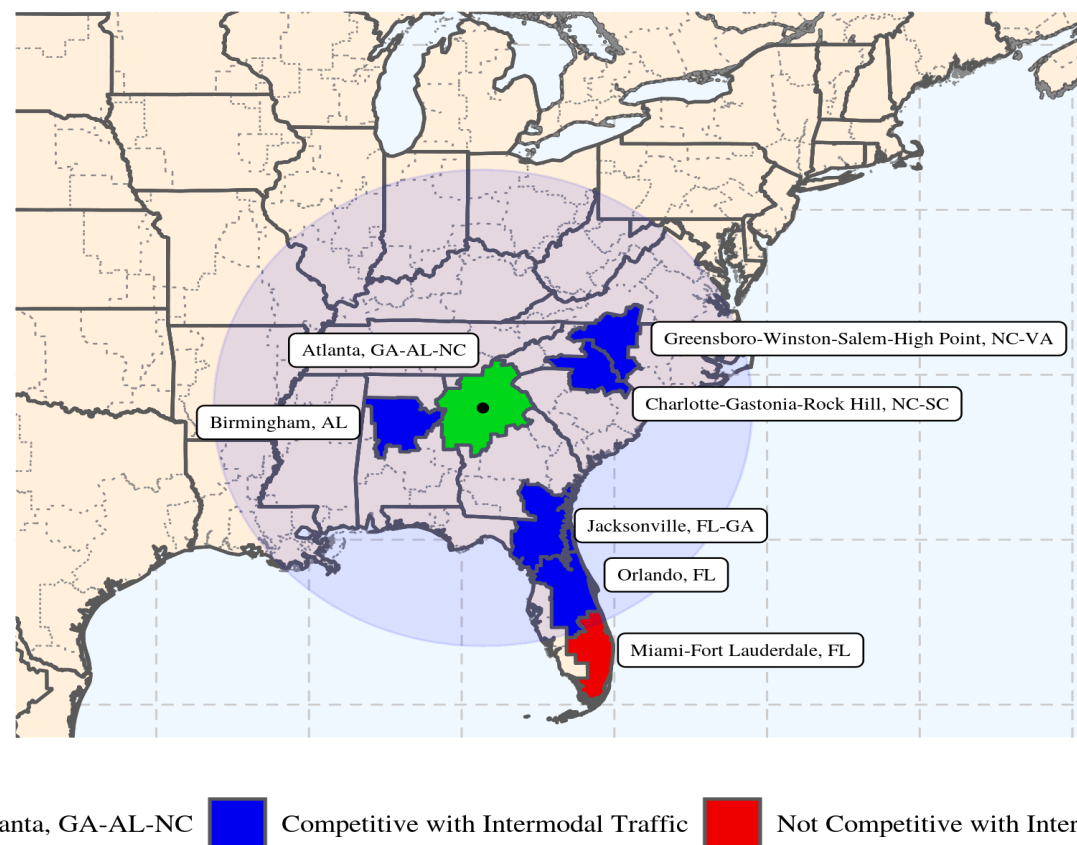
“Revenue-Adequacy-chart-2020-2.xlsx”, available at <https://www.stb.gov/reports-data/economic-data/> (accessed June 2, 2022).

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“waybill_build_LL.csv.”

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MAP APPENDIX EXHIBIT 1

COMPETITIVE GEOGRAPHIC RANGE OF TRANSCONTINENTAL INTERMODAL
TRAFFIC TRANSFERRED TO OR FROM TRUCK IN ATLANTANotes & Sources:

U.S. Bureau of Economic Analysis Economic Areas ("BEAs") identified as origins and/or destinations along transcontinental routes that allegedly operate in anticompetitive markets highlighted. See, Verified Statement of Professor Julie M. Carey and Dr. Albert W. Bremser, February 28, 2022, and Workpapers, Figure 14.

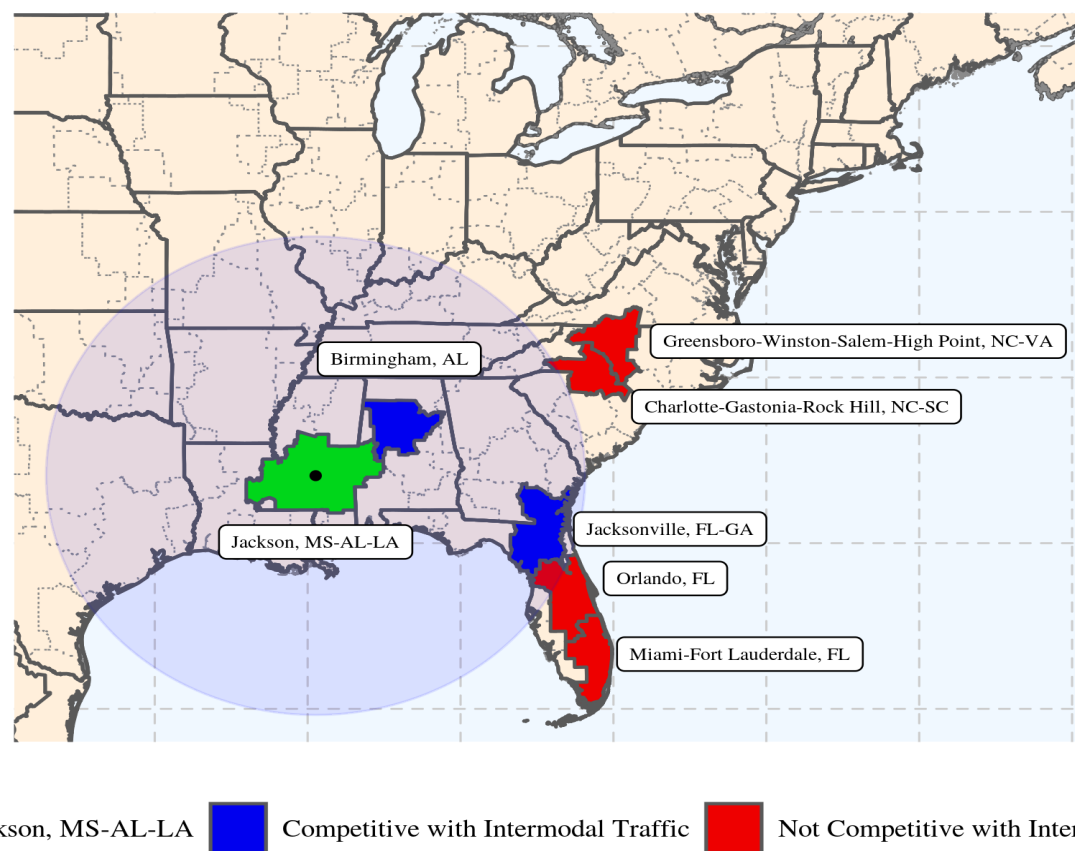
BEAs are designated as "Competitive with Intermodal Traffic" transferred to or from truck in Atlanta if the geographic centroid of the BEA is within 500 miles of the geographic centroid of the Atlanta, GA-AL-NC BEA. BEAs outside this area are designated as "Not Competitive with Intermodal Traffic."

The blue circle represents a 500 mile radius around the geographic centroid of the Atlanta, GA-AL-NC BEA.

BEAs and Canadian Economic Regions are outlined in light gray dots.

U.S. states and Canadian provinces are outlined in gray.

MAP APPENDIX EXHIBIT 2

COMPETITIVE GEOGRAPHIC RANGE OF TRANSCONTINENTAL INTERMODAL
TRAFFIC TRANSFERRED TO OR FROM TRUCK IN MERIDIANNotes & Sources:

U.S. Bureau of Economic Analysis Economic Areas ("BEAs") identified as origins and/or destinations along transcontinental routes that allegedly operate in anticompetitive markets highlighted. See, Verified Statement of Professor Julie M. Carey and Dr. Albert W. Bremser, February 28, 2022, and Workpapers, Figure 14.

BEAs are designated as "Competitive with Intermodal Traffic" transferred to or from truck in Meridian if the geographic centroid of the BEA is within 500 miles of the geographic centroid of the Jackson, MS-AL-LA BEA. BEAs outside this area are designated as "Not Competitive with Intermodal Traffic."

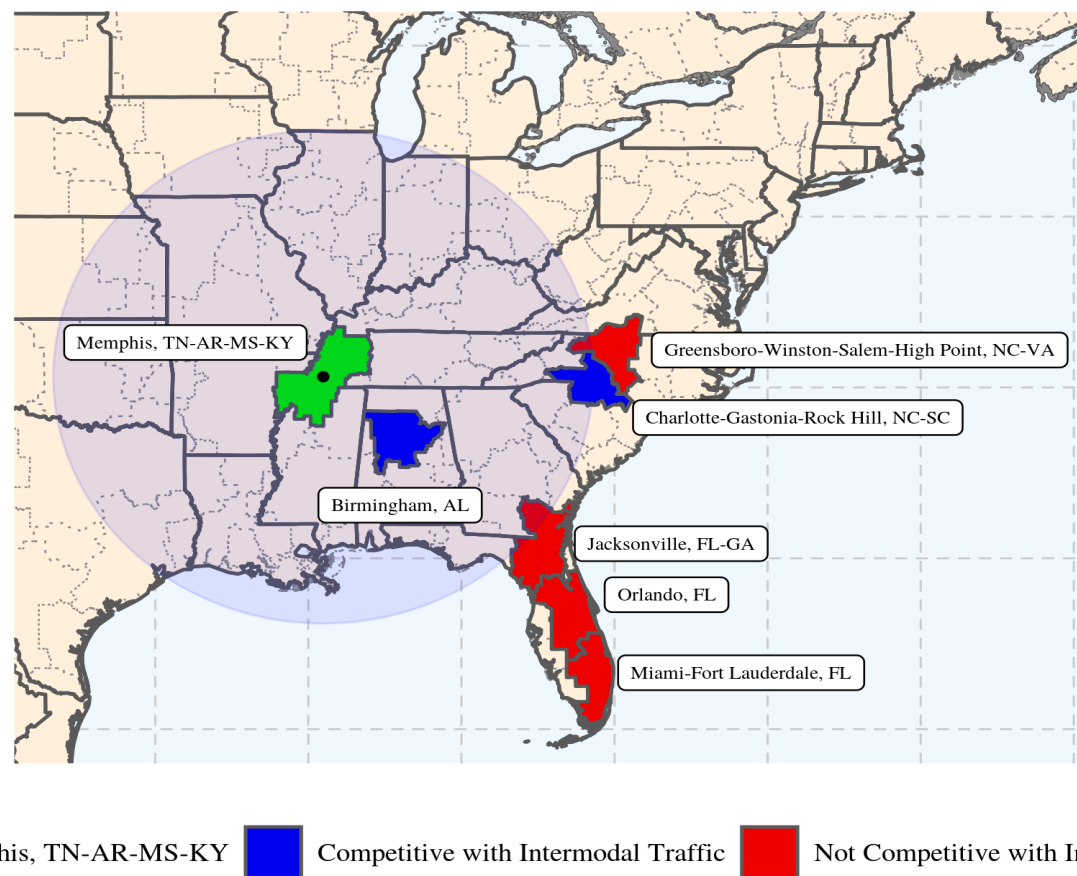
The blue circle represents a 500 mile radius around the geographic centroid of the Jackson, MS-AL-LA BEA.

BEAs and Canadian Economic Regions are outlined in light gray dots.

U.S. states and Canadian provinces are outlined in gray.

MAP APPENDIX EXHIBIT 3

COMPETITIVE GEOGRAPHIC RANGE OF TRANSCONTINENTAL INTERMODAL TRAFFIC TRANSFERRED TO OR FROM TRUCK IN MEMPHIS

**Notes & Sources:**

U.S. Bureau of Economic Analysis Economic Areas ("BEAs") identified as origins and/or destinations along transcontinental routes that allegedly operate in anticompetitive markets highlighted. See, Verified Statement of Professor Julie M. Carey and Dr. Albert W. Bremser, February 28, 2022, and Workpapers, Figure 14.

BEAs are designated as "Competitive with Intermodal Traffic" transferred to or from truck in Memphis if the geographic centroid of the BEA is within 500 miles of the geographic centroid of the Memphis, TN-AR-MS-KY BEA. BEAs outside this area are designated as "Not Competitive with Intermodal Traffic."

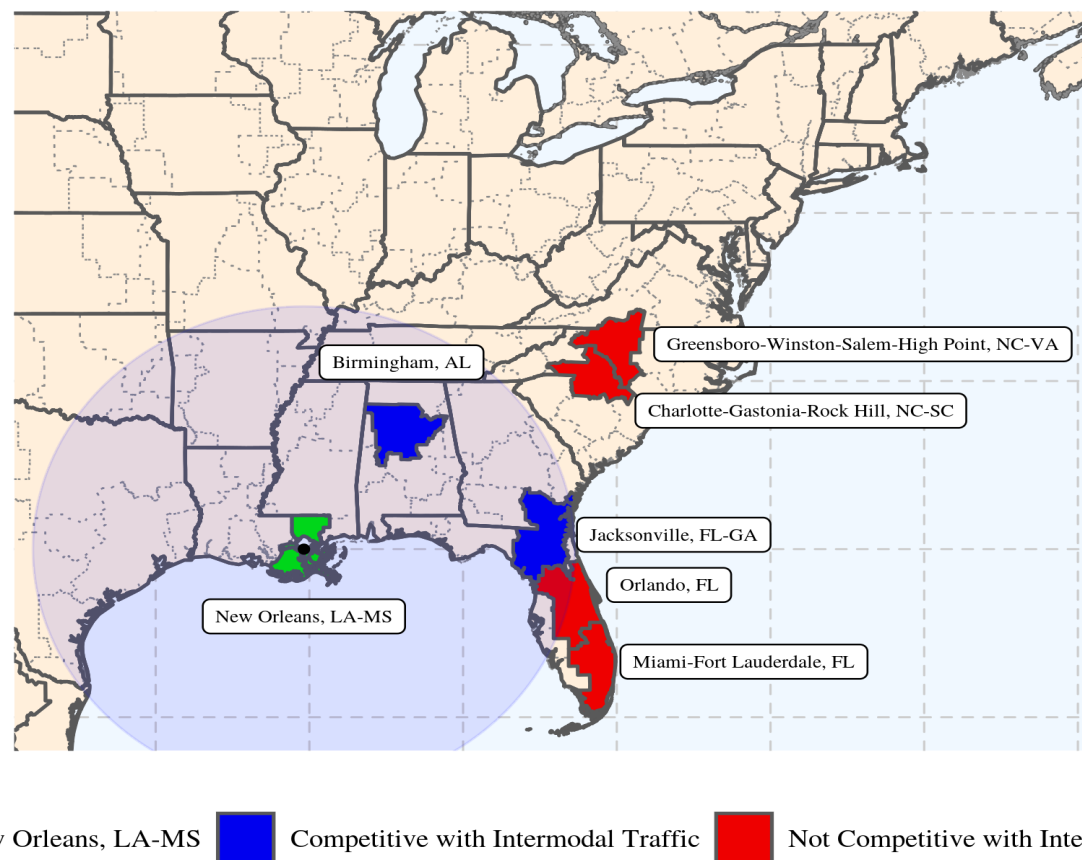
The blue circle represents a 500 mile radius around the geographic centroid of the Memphis, TN-AR-MS-KY BEA.

BEAs and Canadian Economic Regions are outlined in light gray dots.

U.S. states and Canadian provinces are outlined in gray.

MAP APPENDIX EXHIBIT 4

**COMPETITIVE GEOGRAPHIC RANGE OF TRANSCONTINENTAL INTERMODAL
TRAFFIC TRANSFERRED TO OR FROM TRUCK IN NEW ORLEANS**

Notes & Sources:

U.S. Bureau of Economic Analysis Economic Areas ("BEAs") identified as origins and/or destinations along transcontinental routes that allegedly operate in anticompetitive markets highlighted. See, Verified Statement of Professor Julie M. Carey and Dr. Albert W. Bremser, February 28, 2022, and Workpapers, Figure 14.

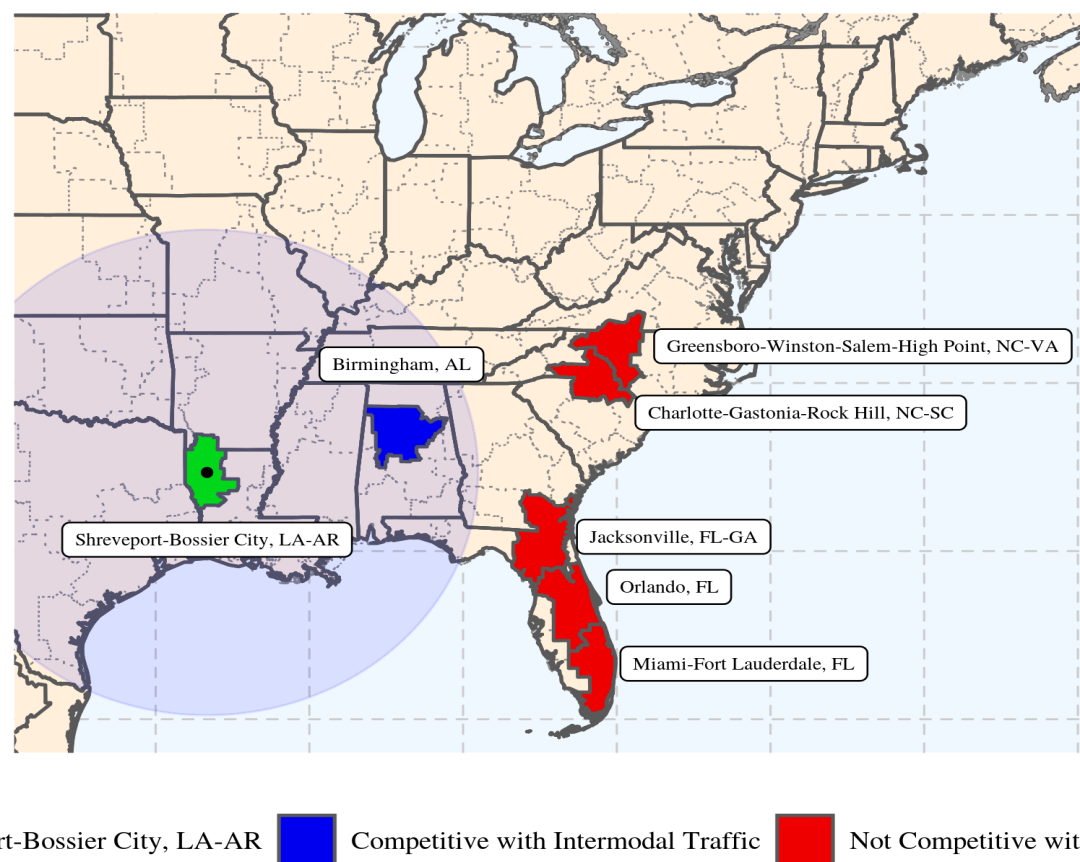
BEAs are designated as "Competitive with Intermodal Traffic" transferred to or from truck in New Orleans if the geographic centroid of the BEA is within 500 miles of the geographic centroid of the New Orleans, LA-MS BEA. BEAs outside this area are designated as "Not Competitive with Intermodal Traffic."

The blue circle represents a 500 mile radius around the geographic centroid of the New Orleans, LA-MS BEA.

BEAs and Canadian Economic Regions are outlined in light gray dots.

U.S. states and Canadian provinces are outlined in gray.

MAP APPENDIX EXHIBIT 5

COMPETITIVE GEOGRAPHIC RANGE OF TRANSCONTINENTAL INTERMODAL
TRAFFIC TRANSFERRED TO OR FROM TRUCK IN SHREVEPORTNotes & Sources:

U.S. Bureau of Economic Analysis Economic Areas ("BEAs") identified as origins and/or destinations along transcontinental routes that allegedly operate in anticompetitive markets highlighted. See, Verified Statement of Professor Julie M. Carey and Dr. Albert W. Bremser, February 28, 2022, and Workpapers, Figure 14.

BEAs are designated as "Competitive with Intermodal Traffic" transferred to or from truck in Shreveport if the geographic centroid of the BEA is within 500 miles of the geographic centroid of the Shreveport-Bossier City, LA-AR BEA. BEAs outside this area are designated as "Not Competitive with Intermodal Traffic."

The blue circle represents a 500 mile radius around the geographic centroid of the Shreveport-Bossier City, LA-AR BEA.

BEAs and Canadian Economic Regions are outlined in light gray dots.

U.S. states and Canadian provinces are outlined in gray.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July 2022 the above Response to 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

July 12, 2022