

Anthony J. LaRocca
202 429 8119
alarocca@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
www.steptoe.com



304970

ENTERED
Office of Proceedings
July 12, 2022
Part of
Public Record

PUBLIC VERSION

July 12, 2022

BNSF-12

VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

**Re: STB Docket No. FD 36500, Canadian Pacific Railway Limited, et al.—
Control—Kansas City Southern, et al.**

Dear Ms. Brown:

Enclosed for e-filing in the above-referenced proceeding is a public version of the Response Comments of BNSF Railway Company (BNSF-12), with appropriate redactions that the Board can place in its docket. We are concurrently filing a highly confidential version of the Comments to be filed under seal.

Respectfully submitted,

/s/ Anthony J. LaRocca

Anthony J. LaRocca
Peter W. Denton
John J. Kavanagh
Onika K. Williams
Attorneys for BNSF Railway Company

REDACTED – TO BE PLACED ON PUBLIC FILE

Cynthia T. Brown

July 12, 2022

Page 2

Enclosures

cc: Adrian L. Steel, Jr.
All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

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

RESPONSE COMMENTS OF BNSF RAILWAY COMPANY

Roger P. Nober
Jill K. Mulligan
Courtney B. Estes
Tyler R. White
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2383

Anthony J. LaRocca
Peter W. Denton
John J. Kavanagh
Onika K. Williams
Steptoe & Johnson LLP
1330 Connecticut Ave., NW
Washington, DC 20036
(202) 429-3000

Adrian L. Steel, Jr.
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3237

Counsel for BNSF Railway Company

Dated: July 12, 2022

Table of Contents

1.	Introduction and Summary of Response Comments.....	1
2.	Commenting parties agree that the Transaction creates a serious risk of anticompetitive foreclosure of Mexican markets.	6
2.1	Like BNSF, other parties recognize the importance of the Laredo Gateway.	7
2.2	CN's analysis of Applicants' diversion estimates supports BNSF's foreclosure concerns.	8
2.3	UP shares BNSF's foreclosure concerns.	11
2.4	The Joint Associations share BNSF's foreclosure concerns.	12
3.	There is broad agreement that a rate-setting mechanism is required to preclude anticompetitive foreclosure and ensure open gateways.	13
3.1	BNSF, UP, and the Joint Associations have all proposed proportional rate mechanisms.	13
3.1.1	BNSF's proposal is based on the I-5 agreement imposed in the UP/SP merger that has worked effectively for decades.	14
3.1.2	The proposals by UP and the Joint Associations are similar to each other.	15
3.2	The UP and Joint Associations proposals differ from the BNSF proposal.	17
3.2.1	The alternative proposals are nationwide in scope.	17
3.2.2	Rate mechanisms relying on the shipper to seek relief would effectively limit the relief to large and sophisticated shippers.	18
3.2.3	As proposed, the UP and Joint Associations proposals would effectively exclude U.S. grain shippers to the benefit of Canadian grain shippers.	19

3.2.4	The UP and Joint Associations proposals as currently formulated would not allow motor carriers or other logistics providers to obtain open gateway rates from CP-KCS.	21
3.3	BNSF proposes an established and validated proportional rate mechanism.	21
3.4	In addition to conditioning approval on a proportional rate mechanism, the Board should require Applicants to regularly report on the fulfillment of their open gateway commitments as part of the post-merger oversight process.	23
4.	The opening comments support BNSF’s concern that increased traffic from the Transaction could cause serious congestion and service issues in the Houston area without additional capacity.	24
4.1	Other commenters expressed concern over Applicants’ lack of a plan for addressing Houston congestion.	25
4.2	The lack of adequate capacity to handle the increased merger-related traffic will likely cause operational gridlock in the Houston region.	28
4.3	Applicants should be responsible for the full cost of capacity improvements required by increased CP-KCS traffic resulting from the Transaction.	30
4.4	BNSF supports CN’s request that Applicants be required to fulfill their commitment to provide the equivalent of a Service Assurance Plan as part of the post-merger oversight.	32
4.5	In addition to a Service Assurance Plan, the Board should require service reporting as part of the post-merger oversight process.	33
4.6	BNSF supports the conditions proposed by LyondellBasell.	34
5.	Conclusion.	35

Verified Statements

- Response Verified Statement of Jon Gabriel, BNSF's Vice President, Service Design and Performance, and Travis Thowe, BNSF's General Director of Network Development.
- Response Verified Statement of David Reishus, PhD, Executive Vice President, Compass Lexecon, BNSF's outside expert.
- Response Verified Statement of William W. Wilson, PhD, Professor at North Dakota State University, BNSF's outside expert.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

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

RESPONSE COMMENTS OF BNSF RAILWAY COMPANY

1. Introduction and Summary of Response Comments

Pursuant to *Decision No. 18* in this proceeding, BNSF Railway Company (“BNSF”) respectfully submits BNSF’s response to comments, protests, requests for conditions, and other opposition regarding the proposed consolidation of the railroad systems of CP and KCS (the “Transaction”).¹ On February 28, 2022, many parties, including railroads, shippers, local governments, unions, and others, filed opening comments with the Board regarding the Application. On June 9, 2022, some parties (including BNSF) filed amended or supplemented comments to account the amended Application and related workpapers filed by Applicants on May 13, 2022, and the errata filed by Applicants on May 20, 2022. BNSF hereby responds to the February 28 and June 9 opening comments.

In BNSF’s opening comments, as amended, BNSF explained that the Transaction will adversely affect a broad cross-section of U.S. shippers. BNSF

¹ Unless otherwise defined in these Response Comments, the acronyms and defined terms used in these comments are the same as those used in the BNSF Comments.

has two key concerns: (1) the Transaction will result in the continued foreclosure of BNSF and its shippers from competitive access to the increasingly important Mexico market, and (2) the Transaction will produce debilitating congestion in the critical Houston complex, because Applicants lack any plan to accommodate increased CP-KCS traffic in Houston and elsewhere in Texas. We explain below that the opening comments from a broad cross-section of stakeholders reinforce these concerns. BNSF and other commenting parties proposed a number of conditions to address these and other concerns. We explain below that many of the conditions requested by other parties generally point in the right direction, but fall short of addressing the common concerns in some important ways that can be remedied by the conditions proposed by BNSF.

There is widespread agreement among the commenting parties that the Transaction will likely cause serious competitive harm to shippers moving traffic into and out of the important and growing Mexico market through Laredo, Texas. Unless the Transaction is appropriately conditioned, CP-KCS will be able to foreclose cross-border traffic from competitors by manipulating rates on the bottleneck segment of the cross-border movements through the Laredo gateway. As we explained on opening, BNSF's concern is that CP-KCS could commercially close the Laredo gateway to competitors by (1) increasing the rates that KCSM charges in Mexico for movements that can originate or terminate in the United States on another carrier to make those movements non-competitive, and (2) lowering CP-KCS rates on the U.S. portion of the movement to compensate for the increased Mexican rates and to drive the traffic onto a less efficient CP-KCS route.

BNSF's concerns about Mexican foreclosure are supported by a number of other commenting parties:

- CN's traffic diversion evidence supports BNSF's conclusion that CP-KCS will try to force traffic onto CP-KCS by manipulating rates on the Mexican portion of cross-border movements.
- UP's economic testimony shows why foreclosure of traffic through the Laredo gateway is likely to result in price increases on Mexico movements after the merger.
- The shippers' Joint Associations explain that CP-KCS will have the incentive post-merger to commercially close gateways to competitors in order to achieve long-haul movements.

The commenting parties all agree that a general open gateway commitment is insufficient – too vague and toothless – to protect against these competitive harms. KCS has acknowledged that it bears an [REDACTED]

[REDACTED], but discovery in this merger proceeding has shown that KCS has taken no affirmative steps to implement this historical and ongoing commitment. (See BNSF Comments BNSF-9-46 to BNSF-9-47, Feb. 28, 2022.)² There is no reason to believe this would change if the Board does not condition

² KCS was unable to produce a single document reflecting (i) its implementation of the representations, pledges and commitments KCS made in the *KCS/Tex Mex* proceeding; (ii) its policies, protocols, instructions or other documents concerning commercially reasonable terms and how such rates should be determined; or (iii) its performance of its obligations under the KCS/NITL Agreement. The last failure is of particular import given that KCS is obligated under Section 2(a) of the KCS/NITL Agreement to use its control of KCSM (formerly, TFM) to cause KCSM to establish and maintain commercially reasonable rates for its portion of through movements between Mexico and the U.S. that are interchanged between KCS and BNSF at Robstown. KCSM's failure to comply with this obligation may well be a primary cause of the foreclosure that BNSF and its shippers have already faced at Laredo and Robstown.

any approval of the Transaction on CP-KCS implementing a more specific, transparent, and enforceable rate mechanism.

The Joint Associations and UP agree with BNSF that a specific rate-setting mechanism should be in place to preserve competition through the Laredo gateway, and each of the three parties proposed mechanisms. All three share the same fundamental characteristic – they would calculate a proportional rate for the bottleneck segment of the movement (i.e., the segment serving Mexican origins and destinations) using actual market-based rates CP-KCS uses for its own traffic and the mileage applicable to the bottleneck segment. BNSF's proposal, based on the highly successful and long-standing I-5 arrangement with UP in the Pacific Northwest – stemming from the UP/SP merger – would be the most effective rate-setting mechanism. The Joint Associations and UP proposals would require modification to ensure access for important segments of the U.S. market, in particular for U.S. farmers and intermodal shippers.

On the important issue of congestion in the Houston area, there is also broad agreement among the commenting parties that the Transaction could create serious rail traffic congestion problems in the Texas Gulf region that would affect a multitude of shippers. Applicants have admittedly failed to conduct any formal analysis of Houston capacity to determine whether Houston-area infrastructure can accommodate the increase in CP-KCS traffic projected by Applicants. BNSF believes that Applicants should be required to conduct such an analysis and identify infrastructure needed to handle the increased traffic resulting from the Transaction.

In the absence of a plan by Applicants to address how increased CP-KCS traffic will be handled on shared lines in Texas – and until necessary capital improvements are identified, fully funded by Applicants, and implemented – the Board should restrict Applicants from increasing existing KCS traffic levels on those lines if such increases would displace existing traffic or compromise fluidity on those lines. UP agrees with BNSF that CP-KCS should not be permitted to increase traffic levels through Houston as a result of the merger until capacity has been added to ensure that congestion will not worsen. (*See* UP Comments 76, Feb. 28, 2022.)

In response to the concerns expressed by other parties in the opening comments about the impact of the Transaction on the Houston complex, BNSF retained Mark Dingler, P.E. of HNTB Corporation (“HNTB”) to undertake an initial assessment of the impacts of the new merger-related traffic.³ The assessment, described below, did not seek to identify particular capacity improvements that will be needed to accommodate the increased merger-related traffic. Instead, the HNTB study broadly illustrates the congestion issues presented by the new merger-related traffic and the need for Applicants to study these issues with the input of all stakeholders and to develop a plan for avoiding harmful congestion as a result of the Transaction.

BNSF’s response comments are supported by the following verified statements:

- Jon Gabriel, BNSF’s Vice President, Service Design and Performance, and Travis Thowe, BNSF’s General Director of Network Development;

³ Mr. Dingler is a Senior Rail Simulation Project Manager at HNTB, a firm specializing in infrastructure design.

- David Reishus, PhD, Executive Vice President, Compass Lexecon, BNSF's outside expert; and
- William W. Wilson, PhD, Professor at North Dakota State University, BNSF's outside expert.

2. Commenting parties agree that the Transaction creates a serious risk of anticompetitive foreclosure of Mexican markets.

BNSF showed on opening that it was largely forced out of the market for carload traffic into Mexico through the Laredo border crossing soon after KCS acquired Tex Mex. KCS used its control over the price of movements through Laredo to effectively close the Laredo gateway to BNSF and BNSF's shippers regardless of the relative efficiency of BNSF's transportation service or the desire of rail shippers to use BNSF to access Mexican markets through Laredo. Therefore, BNSF's historical experience shows that this foreclosure risk from a cross-border merger of CP and KCS – the risk that CP-KCS will force Mexico-bound traffic onto their lines regardless of the relative efficiency of the movement – is not an idle concern. It happened before and will happen again if protective conditions are not imposed.

Comments by other parties reinforce BNSF's concern that, if unremedied, the proposed CP-KCS merger will adversely affect the ability of BNSF's shippers to compete for future traffic to and from the growing Mexican market. Moreover, the merger will expand the scope of potential foreclosure due to the expanded CP-KCS network that will route cross-border traffic over Laredo. This expanded foreclosure will not only continue to harm BNSF and its customers, but will also continue to frustrate the Board's mandate that BNSF should act as a competitive replacement for SP in cross-border traffic following the UP/SP merger.

2.1 Like BNSF, other parties recognize the importance of the Laredo Gateway.

BNSF explained in its opening comments that, while BNSF has access to multiple Mexican border crossings, rail transportation through Laredo is important to efficiently serve critical areas of Mexican demand. UP's opening comments also recognized the importance of the Laredo gateway. UP stated that "no gateway is more important to competition in the United States, or more likely to be affected by the proposed transaction, than the Laredo Gateway." (UP Comments 14.) UP further explained: "[b]asic geography makes the three rail gateways in western Mexico—Calexico, El Paso, and Nogales—non-viable alternatives to Laredo for most rail traffic flowing between the central and eastern United States (and Canada) and the most populous and industrialized regions of Mexico." (*Compare* UP Comments 17 *with* BNSF Comments BNSF-9-25 to BNSF-9-26.) Notably, "UP has an additional incentive to encourage customers to route traffic via Eagle Pass whenever feasible" because it owns 26% of Mexican railway FXE which crosses the border at Eagle Pass. (UP Comments 17.) However, UP still favors Laredo. In 2019, UP moved more than half of its Mexico traffic through Laredo. (*See id.*)

Similarly, BNSF might appear to have an "incentive" to route its traffic over El Paso because it is the only Texas-Mexico gateway that BNSF can reach on its own tracks. But the benefits of a Laredo border crossing still make Laredo a critical access point to Mexican markets. When KCS questioned Paul Hirsch, BNSF's Assistant Vice President for Mexico, in deposition about the possibility of shifting freight volume from Laredo to Eagle Pass or El Paso, Mr.

Hirsch responded that Laredo was indispensable and that the other gateways were not adequate substitutes:

The fact that you can go to the other border [crossings] doesn't mean you can serve that customer or certain markets on the eastern part, say agricultural markets on the eastern part of Mexico, if you don't go through Laredo, you know, you cannot reach them. If it goes by rail, then the eastern part of Mexico is only served by KCS, you know, except in certain locations that you can go into. But the major markets are basically served by KCS. And if you don't go over Laredo, it's, you know, very difficult to compete.

(Hirsch Dep. Tr. 139:17-140:8, June 3, 2022.)

CN similarly recognized in its opening comments that Laredo is a major gateway that will become even more critical in the post-merger period – “[t]he KCS Bridge at Laredo, TX, which is used by both KCS and UP, is a critical link for traffic moving between Mexico and points in the United States and Canada. By Year 3, given the projected increase in trains crossing the bridge, congestion may become a problem.” (CN Comments, V.S. Randall 23 (pdf page 220), Feb. 28, 2022.)

Even CSX, whose routes end at the Mississippi River, points out in its comments the importance of the Laredo gateway and the threat to competition at Laredo that the merger can bring. (See CSX Comments 5 n.13, Feb. 28, 2022; *id.*, V.S. Carey 3.)

2.2 CN's analysis of Applicants' diversion estimates supports BNSF's foreclosure concerns.

CN's opening comments contained an extensive analysis of Applicants' traffic diversion assumptions. CN's analysis concluded that Applicants “grossly overstate expected rail-to-rail diversions and, as a result, the revenues

they will earn post-merger.” (CN Comments 18, Feb. 28, 2022.) In addition to that shortcoming, CN concluded that Applicants “overstate[] revenue amounts for many diverted carloads that are much higher than the average per carload revenue.” (*Id.* at 19.) Indeed, CN shows that CP-KCS assume they will “collect more revenue from shippers on diverted traffic than those shippers pay today.” (*Id.*) And Applicants “proffer ‘supplemental’ diversion estimates,” which add additional projected revenues gains. (*Id.*)

CN uses its analysis of Applicants’ diversion assumptions to raise questions in both its February 28 comments and again in its June 9 comments about the financial viability of the Transaction and whether the merger is in the public interest.⁴ To the extent Applicants have overstated revenue that can be earned on diverted traffic, or overstated the amount of traffic likely to be diverted to CP-KCS, CN concludes that the Transaction does not have the financial justification that Applicants claim.

But CN’s analysis also strongly supports BNSF’s concerns about foreclosure. As Dr. Reishus explains, CN’s analysis shows that the assumptions built into Applicants’ traffic diversion forecasts reflect the future diversion of traffic to CP-KCS lines through a commercial closure of the Laredo gateway to competing carriers, and not through price competition. (Response V.S. Reishus 3-4.) Dr. Reishus also explains that the only plausible way for CP-KCS to achieve the financial results that Applicants project from the traffic diversions is to engage in anticompetitive foreclosure to force traffic from UP

⁴ CN states in its June 9, 2022 comments that “none of the numerous problems with Applicant’s [sic] initial Operating Plan and Application that were highlighted in CN’s February 28 Comments have been cured by the Amended Plan and some problems are actually worse now.” (CN Comments 3, June 9, 2022.)

and BNSF onto the CP-KCS lines over Laredo. (*See id.* at 3-4, 30-32.) Dr. Reishus states that CN's analysis of CP-KCS's predicted traffic diversions shows that Applicants assume that they will divert the traffic to CP-KCS lines without having to offer lower rates to attract the traffic. (*See id.* at 3-4, 30.)

According to CN's analysis, the new revenue CP-KCS would earn on rail-to-rail diversions is the same or higher than that earned now by the non-CP-KCS railroads on their portions of current interline movements. But the competing carriers handling that traffic today clearly will have the incentive to compete with CP-KCS to retain the traffic following the merger. If CP-KCS had to compete based on price to attempt to divert traffic to the newly-merged carrier, it would have to offer lower rates and thereby earn substantially less revenue than it assumes. But CP-KCS's diversion evidence assumes that there will be no reduction in revenue on that traffic – i.e., that they will not engage in price competition to attract that traffic. (*See id.* at 30-33.)

The only plausible way for CP-KCS to attract the diverted traffic without engaging in price competition is to force the traffic onto the new CP-KCS lines through the foreclosure strategy that BNSF, CSX, and UP described on opening – manipulating rates on the Mexico and U.S. bottleneck segments. (*See* CSX Comments 2; UP Comments 26-28; BNSF Comments BNSF-9-42; BNSF Comments, V.S. Hirsch BNSF-9-200 to BNSF-9-201.) In particular, Applicants' control over the Mexican rates (and the rates for BNSF from Robstown to Laredo) give CP-KCS the ability to raise the rates through the Laredo gateway to make competing carriers non-competitive, while reducing the U.S. portion of the rate to keep the revenue on the diverted traffic basically the same. Competition based on efforts to improve service cannot plausibly

explain the huge volumes of traffic at the large margins that CP-KCS assume it will be able to divert from competing carriers following the merger. (*See* Response V.S. Reishus 30-33.)

The elimination of price competition is itself anticompetitive and unacceptable on its face. But there are two concrete harms that will directly flow from the foreclosure strategy. First, it will force traffic onto lines through the critical Houston terminal that would likely not be used by other carriers with routing alternatives if competitive forces were allowed to determine where traffic flows. This could have serious consequences for service for the vast number of shippers that rely on the Houston complex.

Second, as explained in more detail by UP's economic expert Professor Steven Salop, it will result in price increases for shippers. (UP Comments, V.S. Salop 23.) Professor Salop's analysis, based on much of the same sources that Dr. Reishus relied on in his opening comments, is based on the theory that the lack of full information on demand elasticity on cross-border movements prevents the existing interline carriers from capturing the full "lump" available on cross-border movements, but that a merger between carriers on both sides of the border eliminates those information shortfalls and allows the newly-merged carrier to fully capture the "lump," thus leading to price increases. (*See* Response V.S. Reishus 3-4, 30-32.)

2.3 UP shares BNSF's foreclosure concerns.

UP asserts that an unconditioned combination of CP and KCS would likely cause a significant loss of competition to the detriment of shippers. (*See* UP Comments 2-3, 12-16.) Specifically, UP contends that CP-KCS would have the incentive and ability to use its control of KCSM to deprive shippers of the

price and service benefits of UP-KCSM routings. (*Id.* at 21-26.) UP asserts that CP-KCS could “disable competition for cross-border traffic by raising the rates KCSM charges shippers for UP-KCSM movements.” (*Id.* at 26.) As BNSF contends, CP-KCS could offset the raise in the KCSM rates by reducing the rates charged in the U.S. (*See, e.g.*, BNSF Comments BNSF-9-33 to BNSF-9-34.)

2.4 The Joint Associations share BNSF’s foreclosure concerns.

The “primary concern” of the Joint Associations is that the Transaction “threaten[s] existing competition through [the Applicants’] extension of origin and destination bottlenecks.” (Joint Ass’ns Comments 2, Feb. 28, 2022.) According to the Joint Associations, following the proposed merger, “KCS and CP will have strong incentives to favor their long-haul route” by foreclosing interline movements that are more efficient. (*See id.* at 7-9.) The Joint Associations also explain that there is risk that CP-KCS could commercially close interchanges for traffic that today has the option to use another railroad. (*Id.* at 9.)

While the Joint Associations do not focus on Mexico traffic specifically, the concern they identify is particularly applicable to Mexico. BNSF urges the Board to ensure that the Laredo gateway remain open by establishing a specific rate-setting mechanism that will prevent foreclosure of movements into and out of Mexico. For reasons discussed at length in BNSF’s opening comments, the regulatory system in Mexico cannot be relied upon to provide relief from anticompetitive conduct involving Mexican movements. (*See* BNSF Comments, V.S. Dychter BNSF-9-484 to BNSF-9-489.) Moreover, the problems of pursuing litigation, or even information, within Mexico make it important

to address the risk of anticompetitive conduct in advance, through remedies established today.

3. There is broad agreement that a rate-setting mechanism is required to preclude anticompetitive foreclosure and ensure open gateways.

3.1 BNSF, UP, and the Joint Associations have all proposed proportional rate mechanisms.

As noted earlier, there is a general consensus among the commenting parties that expressed concern over foreclosure that a proportional rate mechanism could effectively address the foreclosure risk. Three proportional rate mechanisms were proposed by BNSF, UP, and the Joint Associations. (*See* Response V.S. Reishus 9.) Each of those proposals features a process for determining a CP-KCS Rule 11 rate to or from a gateway by apportioning CP-KCS through rates to calculate a “proportional rate” based on ton-miles for the segment across the gateway bottleneck.⁵ The proportional rate for the bottleneck segment could then be combined with a rate set by competing carriers to establish a competitive interline rate. There are some notable differences between the proposed mechanisms that are addressed below.

⁵ A concrete solution like a proportional rate mechanism is consistent with the enhanced protections that CP sought in the KCS/Tex Mex consolidation where CP proposed that the Board “require KCS to agree to an ‘effective plan’ to preserve rail competition via Laredo” (CP Opening Comments 7-8, Aug. 4, 2003, *Kan. City S.—Control—Kan. City S. Ry. (KCS/Tex Mex)*, FD 34342) and that the applicants be required to enter into written agreements defining the “commercially reasonable” terms upon which railroads and shippers would be able to access Laredo. (*Id.* at 2; CP Add’l. Comments 7, Sept. 30, 2004, *KCS/Tex Mex*, FD 34342.)

3.1.1 BNSF’s proposal is based on the I-5 agreement imposed in the UP/SP merger that has worked effectively for decades.

As explained by Dr. Reishus, BNSF’s proposed arrangement is a proven, Board-approved mechanism that has worked for decades and addresses precisely the type of competitive concern raised here. (*See* BNSF Comments, Opening V.S. Reishus BNSF-9-451 to BNSF-9-453; Response V.S. Reishus 16-17.) The BNSF proportional rate proposal is based on the I-5 Proportional Rate Agreement (“I-5 PRA”) that was negotiated between UP and BNSF in the UP-SP merger several decades ago. (*See* BNSF Comments, Opening V.S. Reishus BNSF-9-451 to BNSF-9-453.) Unlike the UP and the Joint Associations proposals, BNSF’s proposal is modeled on a real-world proportional rate arrangement that is familiar to the STB, accepted by the STB, and successfully used for many years in complex and highly competitive markets. Dr. Reishus provides further detail about the I-5 PRA and how a similar solution could be implemented here. (*See* Response V.S. Reishus 3, 16-26.)

There are several key differences between the BNSF proportional rate proposal and those of UP and the Joint Associations. First, BNSF’s proposal is limited to movements over the Laredo gateway, which for BNSF includes movements over KCS/Tex Mex from Robstown to Laredo. Second, BNSF’s proportional rate proposal is not limited to movements originating or terminating at locations served by both CP-KCS and a competing railroad. This issue is discussed further below in the context of grain and intermodal shipments, where geographic competition is extremely strong. Third, like the I-5 PRA, the proportional rates that would be available on CP-KCS through

the Laredo gateway would be published in a matrix that is updated quarterly by a third party and made available to competing railroads so that those railroads can vigorously compete for business moving into and out of Mexico.

Under the BNSF proposal, a neutral third-party administrator would calculate the proportional rate per ton-mile for the bottleneck portion of the movement based on actual CP-KCS revenues from the previous quarter for the through movements to or from Mexico. As noted above, for BNSF, the bottleneck portion of the movement would include the segment in Texas from its interchange with KCS at Robstown to Laredo,⁶ plus the Mexican portion of the movement on KCSM. For UP, the bottleneck segment would be limited to the KCSM segment in Mexico.

Each quarter, the administrator would provide the matrix to CP-KCS and the other two railroads who compete via the Laredo gateway – BNSF and UP. BNSF or UP would apply the applicable CP-KCS proportional rate per mile from the matrix for the bottleneck segment, add its own rate for the remaining piece of the movement, and provide the shipper with one quote for interline service for the whole movement.

3.1.2 The proposals by UP and the Joint Associations are similar to each other.

The UP and Joint Associations proportional rate proposals are quite similar to each other. In both, a shipper must ask CP-KCS for a through rate

⁶ The Board conditioned the UP/SP merger on BNSF being granted trackage rights over UP's line from Houston to enable BNSF to reach an independent Tex Mex at Robstown, where BNSF could interchange traffic with Tex Mex in fulfillment of BNSF's obligation to provide SP-replacement cross-border service to and from Mexico. (BNSF Comments BNSF-9-26.) The Board envisioned that the interchange for BNSF Mexico traffic would occur at Robstown as SP had done pre-merger.

from origin to destination. CP-KCS would then be obligated to use that through rate to calculate a Rule 11 proportional rate on the bottleneck segment of the movement. The Rule 11 rate would be determined by allocating the through revenue on a per-mile basis and then multiplying the per-mile rate by the miles of the bottleneck segment. The shipper could take the Rule 11 rate and combine it with a rate obtained from a competing carrier to create a competitive through rate for the interline movement.

An important feature of both proposals is that they are generally limited to locations that are jointly served (directly or through switching or haulage) by CP-KCS and a competing railroad. UP's proposal provides exceptions for intermodal and automotive shipments to separate locations within the "same area" (e.g., intermodal ramps, auto ramps, transloading facilities), UP provides an example consisting of two auto ramps in the Chicago area, one on CP-KCS and one on UP. (*See* UP Comments 20-24.) The Joint Associations' proposed mechanism does not include this exception for intermodal facilities and auto ramps, and therefore appears to be limited to carload traffic at jointly-served locations. Also, both proposals first require the shipper to seek rates from CP-KCS and then to solicit rates from other competing railroads. Further, the UP and Joint Association proposals are not limited to traffic traveling over Laredo, but would appear to apply to traffic moving through any gateway on the CP-KCS network.

3.2 The UP and Joint Associations proposals differ from the BNSF proposal.

3.2.1 The alternative proposals are nationwide in scope.

The proposals of both UP and the Joint Associations are nationwide in scope, covering all gateways on the CP-KCS network. BNSF's approach focuses exclusively on the Laredo gateway (including Robstown for BNSF). As Dr. Reishus explains, it is widely accepted by economists that, absent certain features or conditions, vertical mergers do not generally cause competitive harm. The cross-border nature of the Transaction is just such a feature, and the extension into Mexico is where the competitive concerns have historically arisen and will likely arise in the future. (*See* BNSF Comments BNSF-9-20 to BNSF-9-31.)⁷

In addition, the Mexican rate regulation regime provides opportunities to engage in foreclosure, as Dr. Reishus explained on opening. Dr. Reishus stated that the opportunities arise from the differences in the rate regulations between the U.S. and Mexico – in particular the non-discrimination provision of the Mexican regulations. (BNSF Comments, Opening V.S. Reishus BNSF-9-425 to BNSF-9-426.) Further, it would not be feasible to rely on access to regulatory remedies in Mexico to deal with anticompetitive foreclosure of Mexican markets.

⁷ (*See also* CSX Comments, V.S. Carey 5.) (“[W]ith KCSM’s substantial market power of railroad movements entering and exiting the U.S. for its customers, and KCS’s dominance of movements to and from KCSM at Laredo, the expanded CPKC network locations, the combined CPKC could potentially impair competition through vertical effects absent conditions by the STB to ensure that the important Laredo gateway (and all gateways used for traffic movements to and from Mexico) remain open on commercially reasonable price and service terms for rivals such that competition is not distorted, including allowing future challenges to rates and service.”)

Consistent with BNSF's opening comments and the verified statement of its expert Dr. Aaron Dychter (*see* BNSF Comments BNSF-9-33), UP also explains that Mexican law would not prevent CP-KCS from foreclosing competition by raising KCSM rates between Laredo and KCSM-served points on a non-discriminatory basis, while reducing the U.S. portion of CPKC rates as needed because "Mexican law does not impose a practical limit on how high KCSM could raise its rates in Mexico to carry out this strategy." (UP Comments 48.) For all of these reasons, a regulatory remedy is particularly needed as to movements crossing the border with Mexico.

3.2.2 Rate mechanisms relying on the shipper to seek relief would effectively limit the relief to large and sophisticated shippers.

Under the UP and Joint Associations proposals, shippers would be required first to obtain a through rate from CP-KCS and a corresponding Rule 11 rate for the bottleneck portion of the movement. Only then would they be able to reach out to other competing railroads to negotiate a rate that can be combined with the CP-KCS Rule 11 rate. (*See* UP Comments 72; Joint Ass'ns Comments 9-10.) This complex process puts the burden on the shippers to negotiate with multiple carriers – a task that could be onerous for small shippers with limited resources or sophistication. The STB has been focused in recent years on how to ensure access to regulatory remedies by small shippers. A merger condition that is particularly difficult to use by small shippers would go against the thrust of the STB's recent regulatory initiatives.

In contrast, BNSF's matrix-based mechanism does not require any action be taken by shippers. The matrix would be generated quarterly by the

neutral third-party administrator, and it could be used by competing railroads to market competitive service directly to shippers, including small shippers. BNSF's proposed rate structure also has the benefit of transparency since the administrator's work could be readily monitored.

3.2.3 As proposed, the UP and Joint Associations proposals would effectively exclude U.S. grain shippers to the benefit of Canadian grain shippers.

BNSF's expert William W. Wilson, professor at North Dakota State University in Agribusiness and Applied Economics, explains in his Response Verified Statement why it is particularly important that a regulatory remedy aimed at preventing competitive foreclosure from Mexican markets be available to U.S. farmers and grain shippers to avoid unfair competition from Canadian grain farmers.

Professor Wilson agrees with comments of North Dakota Wheat Commission, National Association of Wheat Growers, and U.S. Wheat Associates that U.S. grain farmers face a serious risk of foreclosure due to Canadian regulatory policies that mandate low rates for grain shipments within Canada. (Response V.S. Wilson 3-4.) These Canadian policies will give a merged CP-KCS an incentive to move Canadian grain into U.S. and Mexican markets where CP-KCS can earn higher revenues, and Applicants have stated that such movements are a goal of the merger. (*Id.* at 4-6.) The ability to foreclose BNSF/UP's access to Mexico through Laredo by manipulating rates for the cross-border movements will give CP-KCS the mechanism it can use to favor the movement of Canadian grain to Mexico. This could result in the sale

of Canadian grain to Mexican customers who are currently served by U.S. grain farmers. (*Id.* at 9.)

Professor Wilson and Dr. Reishus explain that the proposals of the Joint Associations and UP will not be sufficient to address this competitive risk to U.S. grain farmers. (*See* Response V.S. Wilson 10-13; Response V.S. Reishus 6-16.) The remedies under those proposals will not be available to many grain (and many other commodity) shippers because the proportional rates under those proposals will be available only to shippers at origins served by both CP-KCS and another competing railroad. (Response V.S. Wilson 10-11.) But as Professor Wilson explains, many U.S. farmers are located on lines served only by BNSF or UP with a competing railway located miles away. (*Id.* at 11-13.) In fact, of BNSF's {█} highest-volume grain origins in the northern and central plains areas that are also served by CP, only {█} {█} served by both CP and BNSF. (*Id.* at 11-12.) Shippers at grain origins on BNSF compete vigorously with origins on other rail lines, including the lines of the CP and KCS, so they need to have access to a regulatory remedy that preserves that competition.

A remedy that can only be used by shippers located at dual-served origins would not be available to the majority of grain shippers. While farmers served at origins located on BNSF and UP lines compete with farmers served at origins located on CP lines, including Canadian farmers, they risk foreclosure from Mexican markets and will be unable to challenge that foreclosure through the proportional rate mechanisms proposed by UP and the Joint Associations.

3.2.4 The UP and Joint Associations proposals as currently formulated would not allow motor carriers or other logistics providers to obtain open gateway rates from CP-KCS.

The UP proportional rate proposal would also not be workable for intermodal traffic. Intermodal shippers could use the UP-proposed remedy, but there are many third parties, including motor carriers and logistics providers, that solicit intermodal traffic directly from shippers and then purchase intermodal service from railroads. The UP proposal would not provide a remedy for the full spectrum of parties involved in intermodal service. By structuring their proposed relief to be available only to dual-served locations, the proposal of the Joint Associations does not seem to reflect the fact that intermodal facilities are usually located on the lines of a particular carrier. As BNSF explained on opening, intermodal traffic has been a particularly important segment of cross-border transportation in recent years, so the exclusion of intermodal service from the scope of a regulatory remedy, or limits on the availability of a remedy for intermodal traffic, would leave an important market segment without the assurance of competitive access to Mexico.

3.3 BNSF proposes an established and validated proportional rate mechanism.

While all three proposals have similarities, the BNSF mechanism is the more effective approach. UP suggests that the I-5 approach is complex. (UP Comments 73.) But Drs. Reishus and Wilson have shown, with examples involving grain and intermodal movements, that the I-5 approach can be easily adapted to those markets. It is not necessary to include numerous specific locations in the rate matrices because there are broad and/or active origin and

destination markets for both commodity types. For example, in the grain market, BNSF has proposed a proportional mechanism with three regional origins and two regional destinations in Mexico because these regions are relatively homogenous regarding the economics of shipping, modal competition, and competition among both the supply and demand regions. (Response V.S. Wilson 16-17.) Similarly, for intermodal, the I-5 approach could be a relatively simple matrix structure with few origins and destinations. (See Response V.S. Reishus 24-26.)

The BNSF proposal is more likely to result in enhanced competition to the benefit of all shippers. It does not require shippers to negotiate first with CP-KCS for its best rate and then seek out alternatives. UP and BNSF can compete for the business of shippers without involvement of CP-KCS by consulting the matrix for the CP-KCS rate per mile for segment to/from Laredo (for UP) or to/from Robstown (for BNSF), adding the rate for its own part of the route, and then providing the quote to the shipper. While the UP and Joint Associations-style proposals may provide protection for powerful, sophisticated jointly-served shippers, the BNSF proposal will help ensure that fair competition is available to a wider variety of shippers. Moreover, BNSF proposes a more limited regulatory remedy since the scope of BNSF's proportional rate solution is targeted only at the Laredo gateway – where there is a demonstrated history of foreclosure and incentive for further foreclosure.

3.4 In addition to conditioning approval on a proportional rate mechanism, the Board should require Applicants to regularly report on the fulfillment of their open gateway commitments as part of the post-merger oversight process.

In its opening comments, BNSF requested that Applicants be required to regularly report to the public and the Board during an oversight period of at least five years “information and data sufficient to enable the public and the Board to evaluate CP-KCS’s compliance with the conditions imposed by the Board on its approval of the Transaction.” (BNSF Comments BNSF-9-77.) Included within this requested condition would be CP-KCS’s compliance with a proportional rate mechanism or other mechanism imposed by the Board to ensure that the Laredo and Robstown gateways remain open on commercially reasonable rate and service terms. KCS was unable in discovery to show that it took any steps to implement the similar commitments it made in the *KCS/Tex Mex* proceeding, and KCS’s failure to do so led to the demonstrated foreclosure of certain shipper traffic which occurred on the Mexico border.

Consistent with the purposes of 49 C.F.R. § 1180.1(g) (Oversight), the Board should act to ensure Applicants here in fact comply this time with their obligations, commitments, and conditions imposed by the Board by requiring Applicants to regularly report sufficient data and other information to enable the Board and interested parties to review their performance of their open gateway rate and service obligations and commitments.⁸

⁸ Other commenters similarly support the need for oversight of Applicants’ implementation of their commitments: (i) CN (Oversight period should include required updates about whether Applicants are complying with imposed conditions) (CN Comments 76-77, Feb. 28, 2022); (ii) NS (Board should implement a 5 year oversight period to ensure conditions are followed) (NS Comments 8, Feb. 28, 2022); (iii) the National Grain and Feed Association (“NGFA”) (Board should establish an

4. The opening comments support BNSF’s concern that increased traffic from the Transaction could cause serious congestion and service issues in the Houston area without additional capacity.

A major focus of BNSF’s opening comments was the concern that merger-caused traffic increases could result in serious traffic problems that would affect a multitude of shippers, particularly in the critical Houston complex. Given the history of merger-caused traffic disruptions in the Houston area in past mergers and the sharp increases in traffic projected to move through Houston by Applicants, it is astonishing, and very troubling, that Applicants have identified **no** capacity additions in the Texas Gulf region that will be needed to handle the new merger traffic. Indeed, Applicants have not even formally studied the issue. Other commenting parties, as discussed below, share BNSF’s concern.

BNSF urged the Board to find that that CP-KCS should not be permitted to increase traffic levels through Houston as a result of the Transaction until capacity has been added to ensure that congestion will not result. In its opening comments, UP requested the same relief to avoid potentially harmful congestion. (*See* UP Comments 76.) BNSF also asked the Board to make it clear that CP-KCS will be responsible for the full costs of the needed capacity, and that other railroads and their shippers should not bear the costs needed to

oversight period of at least five years, including monthly reports on use of gateways, bottleneck rates, reciprocal switching, and service levels) (NGFA Comments 11, Feb. 28, 2022); (iv) the National Corn Growers Association (“NCGA”) (Board should use oversight to ensure existing gateways kept open both operationally and commercially) (NCGA Comments 3, Feb. 28, 2022); and (v) Texas International Terminals Ltd. (“TxIT”) (“Without adequate Board oversight, CP-KCS could effectively discriminate against competing rail traffic simply by closing gateways, or effectively closing them as a competitive option, by raising its rates for the competing, interline service”) (TxIT Comments 5, Feb. 28, 2022).

support higher merger-related traffic volumes. UP similarly requested the STB to make it clear that Applicants would be responsible for the cost of capacity additions needed to handle the merger traffic. (*See id.*)

These and other comments addressing the traffic impacts of the proposed merger in the Houston area are discussed further below.

4.1 Other commenters expressed concern over Applicants’ lack of a plan for addressing Houston congestion.

As BNSF explained in its opening comments, a key objective of the Transaction is to create a corridor for rail traffic that will connect Canada with Mexico. KCS connects to Mexico today by operating over a through route that runs between DeQuincy, Louisiana and Laredo via Houston, generally paralleling the Gulf of Mexico coast and running mostly through the state of Texas (the “KCS Texas Gulf Route”). (BNSF Comments BNSF-9-62.) All of the CP-KCS traffic to Mexico – including the substantial increases in traffic that CP-KCS project to result from the Transaction – must move along this route. CP-KCS project that their merger will result in approximately eight new CP-KCS trains running on this route through Houston daily. (*See* Appl., Ex. 13, Am. Operating Plan, App. A 7, UP Beaumont to Rosenberg Subdivision, May 13, 2022.)

BNSF and other commenters are especially concerned about the impact of these new trains on the critical Houston complex. However, Applicants have not proposed any additional capacity to handle these increased traffic flows in their Original Operating Plan or in their Amended Operating Plan. (*See id.*, Ex. 13, Operating Plan, App. R, Oct. 29, 2021; *see also id.*, Ex. 13, Am. Operating Plan, App. R.) In fact, Applicants have admitted that they have not

even formally studied the issue. (*See, e.g.*, Appl., Ex. 13, Am. Operating Plan 66 n.63.) The lack of any such study and a plan for adding capacity on this route is a major shortfall in Applicants’ merger assumptions.

Other commenting parties share BNSF’s concern. UP noted that Applicants “fail to address the impact of their projected new traffic on operations in the Houston terminal.” (UP Comments, V.S. Rocker-Turner 29.) As UP explained, “Houston is an extremely challenging rail operating environment, even when everything is running smoothly,” particularly given the need for coordination among UP, BNSF, KCS, Amtrak, and the Port Terminal Railroad Association (PTRA). (*Id.*) Moreover, UP states that capacity on its lines between Robstown and Victoria is currently “just sufficient” to accommodate existing pre-merger traffic. (UP Comments 56.) According to UP, “[a]dditional capacity would be required on all UP’s lines between Robstown and Beaumont to accommodate Applicants’ planned traffic volumes.” (*Id.*) UP explained that any increased demand for capacity due to merger-related traffic would not be offset by UP’s loss of Mexico business to CP-KCS because UP’s Laredo gateway traffic moves over different lines through San Antonio. (*Id.*)⁹

LyondellBasell also noted concerns over inadequate capacity in the Gulf Coast region to handle the increased merger-related traffic. As explained by

⁹ In its February 28 comments, BNSF stated that UP’s Laredo shipments do not currently travel via Houston, and instead use UP’s more direct route via San Antonio, based on BNSF’s understanding and public materials. UP’s February 28 comments confirm that Applicants’ proposed diversions and growth traffic would be fully additive to the volumes traversing the Houston complex today. Since filing its February 28 comments, UP produced detailed train movement data for 2019 that indicate that less than {█}% of UP trains operating between Illinois and Laredo traversed any portion of the Houston complex. (*See* UP Reply to Applicants’ Motion to Compel Discovery 2, June 1, 2022.)

LyondellBasell, it “has serious concerns that . . . the application that Applicants filed in this proceeding (Application) indicates that traffic levels will increase substantially along the Gulf Coast, but infrastructure investment to support this traffic will be few and far between.” (LyondellBasell Comments 2, Feb. 28, 2022.) LyondellBasell’s concern is that the inadequate capacity to handle the new traffic “will actually reduce competition and/or service in the Lake Charles, LA, area (i.e., Lake Charles, West Lake Charles, Westlake, and Mossville, LA; collectively, the Lake Charles Area) and for facilities in Corpus Christi, TX, served by KCS.” (*Id.*)

CN also addressed the Houston congestion issue. CN witness Carl Van Dyke argued generally that Applicants failed to correctly estimate line density, train counts, and yard activity. His discussion of the Applicants’ inadequate study of yard activities directly implicates the Houston complex. Mr. Van Dyke explained that accurate estimates of yard activity are essential for identifying yards with insufficient capacity to handle post-merger switching activity. (CN Comments, V.S. Van Dyke 22-28 (pdf pages 144–50), Feb. 28, 2022.) Mr. Van Dyke contended that a failure to correctly estimate post-merger yard activity and to provide for sufficient capital investment needed to keep yards fluid can lead to network failures. (*Id.* at 23 (pdf page 145).) Mr. Van Dyke used the example of Englewood Yard in Houston after the UP/SP merger as an example of a yard that did not have enough capacity to handle increased traffic after a major merger. The overwhelmed yard led to gridlock across the network. (*Id.*)

In addition to the inadequate assessment of yard capacity, BNSF noted that a major shortfall in the Application is that Applicants did not account for UP, BNSF, and Amtrak operations over the Neches River Bridge, a bottleneck

for traffic moving between Houston and New Orleans. (BNSF Comments BNSF-9-63 to BNSF-9-65; *id.*, Opening V.S. Gabriel-Howe BNSF-9-220 to BNSF-9-222.) UP shared BNSF’s concerns. (*See, e.g.*, UP Comments 59–61). UP explained that “[t]he bridge is a single-track choke point for UP, BNSF and KCS” and that “Amtrak’s Sunset Limited also uses the bridge.” (*Id.* at 60.) According to UP, the bridge “is already near or at the limits of its fluid capacity.” (*Id.*) While Applicants plan to increase existing KCS traffic over the bridge by 128% or 11 additional trains, they failed to identify any capacity additions that would be needed to accommodate these traffic increases. (*See id.* at 61.)

4.2 The lack of adequate capacity to handle the increased merger-related traffic will likely cause operational gridlock in the Houston region.

On opening, BNSF explained that the adequacy of rail capacity in the Houston area has already been the subject of a recent study carried out by HNTB on behalf of Texas Department of Transportation (“TxDOT”), using the widely accepted Rail Traffic Controller (“RTC”) model. Given the extent of concerns over Houston congestion issues raised in the Opening Comments and the lack of any plan by Applicants to address Houston capacity issues, BNSF retained Mark Dingler with HNTB to update the TxDOT study to evaluate the impact of the Transaction on Houston-area congestion.

BNSF witnesses Jon Gabriel, Vice President, Service Design and Performance, and Travis Thowe, General Director of Network Development, describe the HNTB study and its results – including a Technical Memorandum prepared by Mr. Dingler – in their joint Response Verified Statement. (*See*

Response V.S. Gabriel-Howe 7-15.) As Messrs. Gabriel and Howe explain, the HNTB study confirms that BNSF, its customers, and all stakeholders in the Houston area should be concerned about merger-related congestion in Houston. (*Id.* at 10.)

The HNTB Technical Memorandum concluded that the Houston Terminal Complex can support projected organic growth between 2019 and 2027. But once Mr. Dinger added the CP-KCS merger-related traffic to the RTC model, he determined that “the CPKC operating plan train volumes, train lengths, and available siding lengths are incompatible. Without any additional infrastructure the train sizes stated by CPKC would result in gridlock.” (*Id.*, Ex. A, HNTB Technical Memorandum 12.)

Messrs. Gabriel and Howe performed an independent validation and analysis of HNTB’s work. They loaded HNTB’s track files and information into BNSF’s RTC system and ran the HNTB RTC model to validate the track charts and infrastructure. Messrs. Gabriel and Howe conducted quality tests on the HNTB RTC model and confirmed that the RTC model was generally reflecting the train files correctly. BNSF replicated the HNTB RTC model to use as the base case and ran test cases to confirm that the model was operational. (*See* Response V.S. Gabriel-Howe 7-15.)

RTC models are used in the railroad industry to evaluate the impact of certain rail traffic movements on existing track capacity and also to evaluate the impact of adding new capacity to an existing network. The HNTB study only evaluated existing track capacity and did not seek to identify new capacity to solve for the gridlock shown in the RTC model. Messrs. Gabriel and Howe believe that the HNTB study broadly illustrates the congestion concerns

presented by the projected CP-KCS merger-related traffic growth. (*Id.* at 15.) They further believe that the study could serve as a model for an analysis that Applicants could perform with other stakeholders that would serve as the basis for a plan by Applicants to accommodate their merger-related traffic growth. (*Id.*)

BNSF continues to believe that, in the absence of a plan by Applicants to address how increased CP-KCS traffic will be handled on shared lines in Texas – and until necessary capital improvements are identified, fully funded by Applicants, and implemented – the Board should restrict Applicants from increasing existing KCS traffic levels on those lines if such increases would displace existing traffic or compromise fluidity on those lines.

4.3 Applicants should be responsible for the full cost of capacity improvements required by increased CP-KCS traffic resulting from the Transaction.

BNSF was not alone in commenting on the need for Applicants to identify, fund and implement capacity improvements in the Houston area to address future congestion. Other parties have requested that the Board order CP-KCS to fund merger-related capacity improvements. (*See* UP Comments 76-77; Metra Comments 46-47, Mar. 15, 2022.)

The need for Applicants to fully fund the capacity additions needed to accommodate the merger-related traffic increases in the Gulf region is particularly important for two reasons. First, Applicants completely ignored the need for capacity additions in the region and failed to present a study of any kind that could be used to identify specific capacity improvements and additions that will be needed. Therefore, on the record in this proceeding, it is

not possible to identify specific capacity projects that will be needed and to assign specific financial responsibility for the cost of those projects. Studies will have to be performed in the future to identify the needed capacity. The Board needs to make clear in advance that CP-KCS will be fully responsible for the cost of adding capacity needed to accommodate the merger-related traffic increases, including the requisite studies.

Second, most of the KCS Texas Gulf Route trackage on which the increased CP-KCS traffic will move post-merger is owned not by Applicants, but by other railroads. Applicants use those tracks under trackage rights agreements that allocate responsibility for cost incurred by organic traffic growth. But the traffic increases resulting from the merger are extraordinary, and the existing agreements are not the proper vehicle for allocating responsibility for such extraordinary events. (*See* BNSF Comments BNSF-9-216; *id.*, V.S. Bailiff BNSF-9-396 to BNSF-9-397.) Moreover, the merging parties should be held responsible for the costs imposed by their merger, regardless of how costs are allocated in the ordinary course outside of the context of a merger.

Therefore, the Board should make it clear that CP-KCS will be fully responsible for the costs to add capacity needed to accommodate the traffic growth resulting from the proposed merger. In its opening comments, UP expressed this same view that CP-KCS must be responsible “to fund necessary investments in new capacity.” (UP Comments 76.) However, UP’s comments on the funding responsibility went on to say that “other railroads [would pay] their fair share to the extent they use the new capacity in the future.” (*Id.*)

BNSF believes this assertion by UP should be clarified. BNSF agrees that other railroads should “pay[] their fair share to the extent they use the new capacity in the future.” (*See id.*) But BNSF believes that such “fair share” should be limited to forward-looking operation and maintenance costs related to usage of the lines – as specified in relevant joint use agreements governing the lines – after Applicants fully fund the necessary capital improvements in the first instance.

BNSF and its customers should not be required to fund the installation of any new capacity that is required to accommodate merger-related traffic. To the extent BNSF uses the newly-installed capacity, it should pay its “fair share” of the usage costs. But the costs to install new capacity is a merger-related cost that should be borne exclusively by the merging parties. Dr. Reishus explained in his opening Verified Statement that imposing significant Transaction-related costs on BNSF and other CP-KCS competitors would have anticompetitive effects and would not be in the public interest as sound merger policy. (Opening V.S. Reishus BNSF-9-456 to BNSF-9-457.)

4.4 BNSF supports CN’s request that Applicants be required to fulfill their commitment to provide the equivalent of a Service Assurance Plan as part of the post-merger oversight.

In its opening comments, CN argued that “[i]n light of the errors, inconsistencies, and illogic embedded in Applicants’ Operating Plan, which cascade into the Application’s projected operating expenses and investment planning, service disruptions are a serious concern.” (CN Comments 76, Feb. 28, 2022.) According to CN, this failure to provide adequate information about Applicants’ plans to avoid service problems as a result of the merger is directly

contrary to Applicants' commitments to the Board. CN stated that "Applicants received approval to proceed under the old rules after expressly committing to provide the Board with adequate information to ensure that the merger would not result in service disruptions." (*Id.*) CN therefore requested a condition that the Applicants be required to fulfill their promise to provide the equivalent of a Service Assurance Plan. (*See id.*)

Based on BNSF's concerns about the potential service disruptions in the Houston area and the lack of any plan to address Houston congestion, BNSF agrees with CN that a Service Assurance Plan would be an important element of robust oversight of CP-KCS merger implementation. The Board should ensure that such a plan would require Applicants to address service and capacity issues on the KCS Texas Gulf Route.

4.5 In addition to a Service Assurance Plan, the Board should require service reporting as part of the post-merger oversight process.

In addition to requiring that Applicants prepare and implement a plan for dealing with capacity needs in Houston, BNSF requested that the Board establish post-merger oversight as a condition to the merger. Such an oversight process is a common condition to major mergers, and oversight should be imposed as a condition here to monitor the effects of the merger on rail service. CN concurs with the need for oversight in addition to a Service Assurance Plan. (*See id.* at 2-3, 58-59.)

BNSF also proposed that the Board should require the reporting of service and congestion-related metrics by Applicants post-merger. As explained in our opening comments, BNSF believes that the Board should use

the successful Chicago Terminal Operating Condition Agreement as a framework for the reporting that CP-KCS must perform here to keep the Houston terminal area operations fluid. (*See* 49 C.F.R. § 1250.3; BNSF Comments BNSF-9-75.) Comments of other parties supports the need for regular reports of service and congestion metrics. (*See, e.g.*, NGFA Comments 11; TxIT Comments 9; Evergy Metro Comments 17-18, Feb. 28, 2022.)

BNSF agrees with commenting parties that the Board should also preserve the ability to impose further conditions during the oversight period – such as temporary or permanent trackage rights for BNSF or other carriers to avoid congestion – if service and capacity issues arise. (*See, e.g.*, NGFA Comments 11; TxIT Comments 9; Evergy Metro Comments 17-18; CN Comments 76-77, Feb. 28, 2022; NS Comments 8; NCGA Comments 3; Coalition to Stop CPKC Comments 19-21, Feb. 28, 2022; Metra Comments 79-80 (requesting a 10-year oversight period); BNSF Comments BNSF-9-53 to BNSF-9-55.)

4.6 BNSF supports the conditions proposed by LyondellBasell.

As noted previously, LyondellBasell expressed concern that Applicants' failure to plan for and implement additional capacity to support Gulf region operations could have anticompetitive consequences for Corpus Christi area facilities that are captive to KCS. (LyondellBasell Comments 3.) To resolve these issues, LyondellBasell requested that the Board impose three conditions:

- Grant BNSF immediate access via reciprocal switch or direct access to all facilities connected to any line over which BNSF has access under the merger conditions that the UP/SP Merger imposed for the Lake Charles Area ("Lake Charles Merger

Conditions”), particularly with respect to Mossville, LA, which Applicants describe as being within the Lake Charles Area.

- Establish access conditions and compensation for BNSF’s access to all shippers on the Rosebluff Lead, a track that UP and KCS jointly own in the Lake Charles Area and to which the Lake Charles Merger Conditions provide BNSF with access.
- Provide UP with access via reciprocal switch at Robstown to Corpus Christi shippers located on the short KCS branch line that connects to KCS’s north-south corridor at Robstown and runs east into Corpus Christi.

(*Id.* at 3-4.)

With respect to the first two conditions, BNSF supports the LyondellBasell requests as they reflect the Board’s Lake Charles Merger Conditions. *See BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. (Decision No. 8)*, FD 32760 (Sub-No. 46) (STB served Feb. 21, 2020). In this regard, BNSF is encouraged that the Board has recently granted the BNSF petition to establish access conditions to shippers in the northern portion of Zone 2 of the Rosebluff Lead in the Lake Charles area. *See BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. (Decision No. 10)*, FD 32760 (Sub-No. 46) (STB served Apr. 13, 2022). The Board is currently reviewing the parties’ evidence and argument on the setting of compensation terms for BNSF’s use of its terminal trackage rights on the Rosebluff Lead. *See id.*, slip op. at 8.

5. Conclusion

Upon review and consideration of the opening comments of the various parties, BNSF continues to believe that the Transaction will result in effects harmful to the public interest, including a significant loss in competition,

unless the Board imposes the following conditions on any approval of the Transaction. As CP itself told the Board in 2003 in the *KCS/Tex Mex* proceeding: “Given the ‘surpassing economic significance’ of the Laredo gateway to North American trade, the future competitive viability of interline routes connecting Mexico and the rest of the North American continent via Laredo is simply too important to be left to chance.” (CP Opening Comments 7, Aug. 4, 2003, *KCS/TexMex*, FD 34342) (internal citations omitted.) CP was right back then, and its 2003 position remains correct. The Board should impose the following conditions to ensure that the future of effective and vibrant cross-border competition is ensured:¹⁰

- Order that Applicants are required to fulfill their promise to provide the equivalent of a Service Assurance Plan.
- Order that Applicants are subject to and must fulfill the conditions imposed by the Board in the *KCS/Tex Mex* proceeding as well as the terms of the NITL Agreement.
- Order that Applicants are required to keep the Laredo and Robstown gateways open on commercially reasonable rate and service terms.
- Ensure that the open gateway commitment will function as intended by requiring CP-KCS to adopt a rate-setting mechanism, such as a proportional rate mechanism, that will ensure that BNSF will have access to Mexico through Laredo at market-based rates, as well as service commitments to equal treatment of BNSF’s traffic into and out of Mexico through Laredo. For the rate-setting mechanism to be in place at the time that the merger becomes effective, the Board should order CP-KCS to negotiate the rate-setting mechanism for approval by the Board prior to the effective date of the merger.

¹⁰ These are the same conditions proposed in the BNSF opening comments, with the addition of the Service Assurance Plan condition proposed by CN.

- Require Applicants to fully fund any capital improvements that would not be required but for increased CP-KCS traffic on lines owned by BNSF or other railroads.
- In the absence of a plan by Applicants to address how increased CP-KCS traffic will be handled on shared lines in Texas – and until necessary capital improvements are identified, fully funded by Applicants, and implemented – require Applicants to not increase existing KCS traffic levels on those lines if such increases would displace existing traffic or compromise fluidity on those lines.
- Require Applicants to shift their crew change location near Ottumwa, Iowa to eliminate the potential for blockage by CP-KCS trains of at-grade intersections in Ottumwa with BNSF and a public road.
- Require Applicants to regularly report to the public and the Board on the status of the Transaction during an oversight period of at least five years, including in such reports information and data sufficient to enable the public and the Board to evaluate CP-KCS's compliance with the conditions imposed by the Board on its approval of the Transaction.
- Require Applicants during the Board's oversight period to regularly report service metrics relating to traffic through Laredo and congestion metrics at locations potentially affected by traffic increases brought about by the Transaction.
- Reserve jurisdiction to impose further conditions, including trackage rights, during the oversight period if the open gateway commitment does not function as intended, or if congestion or service issues arise.

Respectfully submitted,

Roger P. Nober
Jill K. Mulligan
Courtney Biery Estes
Tyler R. White
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2383

/s/ Anthony J. LaRocca
Anthony J. LaRocca
Peter W. Denton
John J. Kavanagh
Onika K. Williams
Steptoe & Johnson LLP
1330 Connecticut Ave., NW
Washington, DC 20036
(202) 429-3000

Adrian L. Steel, Jr.
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3237

Counsel for BNSF Railway Company

Dated: July 12, 2022

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36500

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

Response Verified Statement of Jon Gabriel and Travis Thowe

I. Introduction and Summary

My name is Jon Gabriel. I am Vice President, Service Design and Performance for BNSF Railway Company (“BNSF”). My name is Travis Thowe. I am General Director of Network Development for BNSF. We previously submitted a Joint Verified Statement in support of BNSF’s February 28, 2022 Opening Comments (“Opening Verified Statement”) regarding the impact of the proposed CP-KCS transaction (the “Transaction”) on BNSF’s operations, including Applicants’ traffic projections and planned capacity improvements. In this Response Verified Statement, we respond to comments submitted by other parties in this proceeding regarding Transaction-related capacity and congestion concerns.

We see agreement among commenters that the proposed merger could create serious traffic problems that would affect a multitude of shippers, particularly in the already congested Houston complex. Even after having the opportunity to amend their Operating Plan, Applicants have not studied the effects of the Transaction on the Houston area. (*See Appl., Ex. 13, Am. Operating Plan 66 n.63, May 13, 2022.*) (“This analysis was a manual exercise drawing on the experience and expertise of the Operating Plan Team, and did not lead to the creation of a workpaper.”) We know from experience that Houston will require additional capacity to handle the significant levels of proposed new merger traffic. We believe that the current Houston complex network is sufficient for current traffic flows, but the network does not have capacity to support the proposed merger-related increase in traffic without additional capacity improvements.

As explained in our Opening Verified Statement, we continue to believe that in the absence of a plan by Applicants to address how increased CP-KCS traffic will be handled on shared lines in Texas – and until necessary capital improvements are identified, fully funded by Applicants, and implemented – the Board should restrict Applicants from increasing existing KCS traffic levels on those lines if such increases would displace existing traffic or compromise fluidity on those lines. (*See* Opening V.S. Gabriel-Howe BNSF-9-216.) The Board should also require CP-KCS, in connection with the Board’s oversight process, to regularly report congestion metrics on the KCS Texas Gulf Route and to fully fund and implement any capacity improvements necessary to accommodate increased CP-KCS traffic during that period. (*Id.* at BNSF-9-216 to BNSF-9-217.)

We respond to other commenters regarding the current state of Houston’s capacity and the expected impact of the new CP-KCS trains that Applicants project will run through the Houston complex. Next, we describe the HNTB study commissioned by BNSF in response to these concerns that analyzes the impact of the new CP-KCS merger-related traffic and indicates that the complex does not have sufficient capacity to handle the merger-related volume increases. We describe how we validated the study and updated the Rail Traffic Controller (“RTC”) model used by HNTB with BNSF-specific inputs. We also explain that the study provides a starting point for the efforts that Applicants should undertake with all stakeholders to identify investments in new capacity necessary to accommodate CP-KCS’s planned traffic growth.

II. Commenters agree that the Houston complex could melt down if CP-KCS increases traffic levels before merger-related congestion issues are addressed.

CP-KCS projects that their merger will result in approximately eight new CP-KCS trains running through Houston daily. (*See* Appl., Ex. 13, Am. Operating Plan, App. A 7, UP Beaumont to Rosenberg Subdivision.) However, CP-KCS has not formally studied the effects of these new trains nor proposed any capacity improvements to handle these increased traffic flows in their Original Operating Plan nor their Amended Operating Plan. (*See id.*, Ex. 13, Operating Plan, App. R, Oct. 29, 2021; *see also id.*, Ex. 13, Am. Operating Plan, App. R.)

As we explain in our Opening Verified Statement, KCS connects to Mexico by operating over a through route that runs between DeQuincy, Louisiana and Laredo via Houston, generally paralleling the Gulf of Mexico coast and running mostly through the state of Texas (the “KCS Texas Gulf Route”). (Opening V.S. Gabriel-Thowe BNSF-9-217 to BNSF-9-230.) In our Opening Verified Statement, we expressed concerns about merger-related congestion along this route. (*See id.* at BNSF-9-227.) This route consists of a number of connected line segments, owned by different combinations of KCS, UP, and BNSF. We explained that Houston is a major hub and a vital piece of rail and port commerce through the Southwest, similar to Chicago in the Midwest. (*See id.* at BNSF-9-214 to BNSF-9-215; BNSF-9-222 to BNSF-9-228.) As discussed in our comments, after the UP/SP merger serious service issues developed in and around Houston, caused in large part by inadequate infrastructure in the Houston area and affecting rail service throughout the western

United States. (BNSF Comments BNSF-9-57 to BNSF-9-58.) We remain concerned that the significant traffic increases and longer trains projected by Applicants will cause serious congestion and service issues in critical areas such as Houston, absent capacity improvements. (*See id.* at BNSF-9-61 to BNSF-9-68.)

In its February 28 comments, UP raised many similar concerns. UP described Houston as “an extremely challenging area in the best of times, requiring careful operational coordination among UP, BNSF, KCS, Amtrak, and the Port Terminal Railroad Association (PTRA).” (UP Comments 57, Feb. 28, 2022.) According to UP, “[a]dditional capacity would be required on all UP’s lines between Robstown and Beaumont to accommodate Applicants’ planned traffic volumes.” (*Id.* at 56.) UP states that capacity on its lines between Robstown and Victoria is currently “just sufficient” to accommodate existing (pre-merger) traffic, which includes KCS trains, UP trains moving between Houston, Corpus Christi, and Brownsville, and BNSF trains moving over UP’s lines to interchange traffic with KCS at Robstown. (*Id.*)

Further complicating capacity concerns, UP points out that Applicants’ post-merger traffic plans depend on their use of the KCS Robstown-Beaumont trackage rights over UP lines. (*Id.* at 53-59.) Additionally, UP explains that any increased demand for capacity due to merger-related traffic would not be offset by UP’s loss of Mexico business to CP-KCS because UP’s Laredo Gateway traffic traverses to and from Mexico on different lines through San Antonio. (*Id.* at 56.)

Moreover, Canadian National (“CN”) witness Carl Van Dyke claims that Applicants failed to correctly estimate line density, train counts, and yard activity

and that accurate estimates of yard activity are essential for identifying yards with insufficient capacity to handle post-merger switching activity. (CN Comments, V.S. Van Dyke 22-28 (pdf pages 144–50), Feb. 28, 2022.) Mr. Van Dyke observes that failure to correctly estimate post-merger yard activity and to provide for sufficient capital investment needed to keep yards fluid can lead to network failures. (*Id.* at 23 (pdf page 145).) We agree with this assessment. Mr. Van Dyke pointed to the Englewood Yard in Houston after the UP/SP merger as an example of a yard without sufficient capacity to handle increased traffic after a major merger, and the overwhelmed yard led to gridlock across the network. (*Id.*)

Commenters also note that Applicants did not account for UP, BNSF, and Amtrak operations over the Neches River Bridge, a bottleneck for traffic moving between Houston and New Orleans. (*See, e.g.*, UP Comments 59–61; BNSF Comments BNSF-9-63 to BNSF-9-65; Opening V.S. Gabriel-Howe BNSF-9-220 to BNSF-9-222.) As we stated in our Opening Verified Statement, we are particularly concerned about the effects of adding approximately 11 new CP-KCS trains every day: (1) over the Neches River bridge chokepoint, which constitutes a critical link in the 50/50 Line¹ and is currently owned and dispatched by KCS, and (2) through the central areas of Beaumont, where east-west rail traffic intersects with north-south movements. (*See* Opening V.S. Gabriel-Howe BNSF-9-220.)

¹ KCS operates exclusively over the KCS Beaumont Subdivision from DeQuincy, La., to a point of connection just east of Beaumont, Tex. with the former Southern Pacific Lafayette Subdivision, now owned jointly and equally by UP and BNSF and referred to as the “50/50 Line.”

The 2021 TxDOT Houston-Beaumont Region Freight Study (“TxDOT Study”) identifies current congestion issues in Beaumont and notes that “[t]he existing Neches River bridge is a single-mainline lift bridge and is a constraint for train traffic in the area.” (Opening V.S. Gabriel-Howe, Ex. 1, TxDOT Study 3-14.) The Neches River Bridge is an example of a key area that would need to be examined in more detail by Applicants.

These comments from UP and other parties mirror our concerns about Transaction-related congestion. We agree with UP that Houston is a challenging operating environment today. From our perspective, the main driver of congestion in the Houston complex is traffic volume. Texas is a growing region with new and expanded industrial facilities regularly coming online, adding to overall rail traffic volume that moves directly through a capacity-constrained major metropolitan area. BNSF does its best to relieve pressure in the Houston complex by routing through traffic around the area on other lines of its network. These alternative routes can have higher costs and mileage as compared to a direct route through Houston. However, BNSF has the flexibility to make limited use of these alternatives routes to relieve pressure in Houston. We understand that UP takes similar actions on its system. KCS does not have this ability on its system. As CP-KCS would operate over only the Texas Gulf Route, it does not have routing flexibility. All CP-KCS through traffic to and from the Laredo border crossing – including the new traffic resulting from the merger – must run directly through the Houston complex. This traffic will create serious fluidity issues absent capacity improvements.

III. The 2022 HNTB Study

As we mentioned above, Applicants admit that they did not conduct a formal analysis of whether current Houston-area infrastructure can accommodate the increase in traffic caused by the merger projected by Applicants. (*See* Appl., Ex. 13, Am. Operating Plan 66 n.63). Such an analysis is an essential predicate to Applicants developing a plan to address how increased CP-KCS traffic will be handled on shared lines in Texas, including identifying necessary capital improvements.

In order to better quantify our concerns, and in response to the similar concerns expressed by UP and other commenters, we retained Mark Dingler, P.E. of HNTB Corporation (“HNTB”) to conduct a capacity study of the Houston area and to undertake initial calculations of the impacts of the new CP-KCS traffic using the RTC model (the “HNTB Study”).² We have attached Mr. Dingler’s Technical Memorandum summarizing this study as Exhibit A. As described further below, our team independently analyzed and validated the RTC model and outputs that underlie the HNTB Study.

The HNTB Study has limitations, described further below. Importantly, we are not introducing the HNTB Study in order to justify the need for any particular capacity improvement as a result of the additional CP-KCS merger-related traffic. Rather, we intend the HNTB Study to illustrate the types and scope of the issues

² An RTC model is a “railroad operations simulation model” that “requires detailed operations and infrastructure inputs and attempts to resolve conflicts between trains in the same manner as an actual railroad dispatcher.” (Opening V.S. Gabriel-Howe, Ex. 1, TxDOT Study 3-1.) Mr. Dingler is a Senior Rail Simulation Project Manager at HNTB, a firm specializing in infrastructure design.

presented by the new traffic and the need for the Applicants to study these issues with the input of affected stakeholders. With the input of all Houston-area stakeholders — including Applicants — a more detailed study could be performed that could properly identify any needed capacity improvements to account for the impacts of the merger.

A. Background on TxDOT Study.

In our Opening Verified Statement, we submitted an earlier study of Houston-area rail capacity performed by HNTB on behalf of TxDOT. (*See* Opening V.S. Gabriel-Howe, Ex. 1, TxDOT Study.) To determine constraints and potential solutions within the Houston area’s freight rail network, HNTB created an RTC model for the TxDOT Study. HNTB developed the base case of the TxDOT RTC model using information provided by UP for the period of April 7-14, 2019, including infrastructure, track charts, timetables, and train operations data. (*Id.* at 3-3.)

HNTB then updated the TxDOT RTC model to match then-current track infrastructure, including the location of signals, switches, grade crossings, sidings, and yard tracks. (*See id.*) Where the railroad data was not complete or not received, the study used train volumes from the FRA Grade Crossing Inventory database. (*See id.*) Additional information about the TxDOT RTC modeling methodology can be found in Section 3 of the TxDOT Study. (*See id.* at 3-1 to 3-25.)

B. HNTB Study and its conclusions.

Given HNTB’s familiarity with modeling the Houston complex and its role in developing the RTC model used in the TxDOT Study, we hired HNTB to update that

RTC model and to prepare a technical memorandum summarizing how the RTC model depicts the impact of merger-related traffic on the Houston terminal area. As HNTB details in the Technical Memorandum attached here as Exhibit A, HNTB updated its RTC model to reflect changes in operations (including additional train information from Automatic Equipment Identification (“AEI”) data supplied by BNSF), additional infrastructure, and to include the UP Brownsville Subdivision to more completely model the joint trackage route between Robstown and Beaumont.

We did not ask HNTB to solve for the specific capacity constraints caused by merger-related traffic. Instead, the model is intended to be used as a tool to better understand the impact of the Transaction’s traffic increase on Houston’s rail network. To further improve the RTC model used in the TxDOT Study, BNSF supplied HNTB with certain AEI data at various locations within the study area. An AEI reader records that a train has passed and provides information such as the length of the train, how many cars the train has, and how long it took the train to travel past the sensor. The AEI reader data provides additional information about trains that were omitted in the original 2019 data, but is not an exhaustive list as AEI sites are only useful to provide information at a given site and are limited by the location and density of reader placement. For example, BNSF does not have AEI data regarding traffic traversing the Neches River Bridge. HNTB added the AEI reader information BNSF provided to its model, correcting in part the fact that certain trains were missing from the original TxDOT RTC model.

As the HNTB Technical Memorandum describes, the HNTB RTC model is a useful tool for the exercise of understanding the impact of the CP-KCS merger in Houston complex. HNTB found that the Houston area's current capacity can handle current traffic flows and gradual changes to the area's traffic. However, Applicants did not verify that the system could handle eight-to-eleven additional daily trains, diverted from other carriers from other locations and inserted into a complex operating network such as Houston and the Texas Gulf region. We wanted to understand what impact such an increase in traffic would have on the area's capacity.

The HNTB Study confirmed that BNSF, its customers, and all stakeholders in the Houston area should be concerned about merger-related congestion. The HNTB Study shows that the Houston complex cannot handle Applicants' projected traffic without any additional infrastructure. In particular, the HNTB Technical Memorandum concludes:

- The CPKC operating plan train volumes, train lengths, and available siding lengths are incompatible. Without any additional infrastructure, the train sizes stated by CPKC would result in gridlock. An additional study should be completed in cooperation with the railroads to better align operations and infrastructure.
- The Houston Terminal Complex can support projected organic growth (without merger growth) between 2019 and 2027.
- Once the projected merger growth volume is added to the complex, the model is unable to consistently run to successful completion. Additional capacity will need to be constructed to avoid gridlock.

(Ex. A, HNTB Study 12.)

C. RTC modeling confirms that BNSF is rightfully concerned about serving their customers in a post-merger Houston complex.

Our team analyzed and independently ran the RTC model created by HNTB. Our team also refined the model by adding certain inputs related to BNSF train movements that HNTB did not have, given that the HNTB model was based on information provided by UP and limited AEI data from BNSF. Using the HNTB RTC model as a foundation and refining certain inputs related to BNSF train movements, we have confirmed that – even under the most optimal RTC conditions – Applicants’ projected CP-KCS traffic growth will create serious fluidity problems throughout the Houston terminal area.

The HNTB Study broadly illustrates the issues presented by the new CP-KCS traffic, but the study has certain limitations. For example, because the RTC model from the TxDOT Study was originally based only on information provided by UP, the updated model still largely represents UP’s interpretation of BNSF, KCS, and Amtrak trains traversing the Houston complex.

Additionally, while RTC models are good at measuring infrastructure capacity when dispatcher decisions are the sole input, there are many other operational factors that can impact railroad capacity. (*See* Opening V.S. Gabriel-Howe, Ex. 1, TxDOT Study 3-2.) For example, it can be complicated to build into the RTC model certain aspects of the infrastructure and nodes in the system such as crew, locomotive, and customer availability – particularly where BNSF does not have full visibility into a network largely controlled by a different railroad. Moreover, the AEI data described above that BNSF provided to HNTB does not include certain locations in the Houston

complex. This is an example of information that BNSF does not have, but that Applicants and other stakeholders could provide for a more comprehensive study. Set forth below are additional observations based on our work with the HNTB model.

Validation. To analyze the HNTB RTC model, we loaded HNTB's track files and information into our RTC system. We ran the HNTB RTC model to validate the track charts and infrastructure. We did not have enough information to validate the specific train files, which were largely derived from UP information. We conducted quality tests on the HNTB RTC model and confirmed that the RTC model was generally reflecting the train files correctly. We replicated the HNTB RTC model to use as the base case and ran test cases to confirm that the model was operational.

Running longer run-times. The HNTB Study performed RTC simulations over the course of three simulation days, bracketed by one day of model warm-up and two days of model cool-down. (Ex. A, HNTB Study 7.) To conduct more realistic analyses of high-volume operations in a complex area such as Houston, we prefer to run simulations longer than three days. This allows congestion to gradually work itself through the network and provides a better picture of how the simulated network will operate. Therefore, we tested the model by running the HNTB RTC simulation for seven simulation days with a similar warmup and cool down period. Not surprisingly, the end results experienced by HNTB and summarized below were amplified under this longer run-time. When we ran the RTC model for a seven-day simulation period, the results showed increased train delays and a greater impact on the Houston complex as compared to HNTB's three-day model run. The three-day

statistical simulation period performed by HNTB showed the RTC model was unable to reliably calculate a dispatching solution in a high percentage of the runs. When we increased the simulation period to seven days, the model produced an even lower completion percentage of successful dispatching solutions.

Non-through freight trains and interchanges. Certain aspects of railroad operations are complicated and are difficult to accurately reflect in an RTC model. For example, interchanges, yard jobs, local trains, and switchers (as compared to through trains) are difficult to replicate in an RTC model because the schedules and responsibilities of these elements can be irregular and vary widely. Just as on the actual Houston network, the timing of these events in the model varies considerably. The variability of these events can have a major impact on line capacity, but can be difficult to categorize and incorporate in an RTC simulation without current, accurate information from all stakeholder carriers.

The HNTB RTC model is generally presumed to have reliable information because it is based on UP data and research. However, the model lacked current and complete movements of BNSF's non-through train operations at several locations, including in the Houston and Dayton areas. The model also lacked the KCS local train operations on the eastern side of the network in the Beaumont area.³ Moreover, interchange movements are not fully reflected in the model. In some models, these types of trains and movements are not significant. However, in an area such as

³ We described the involved operations in both of these areas in our Opening V.S. (See Opening V.S. Gabriel-Thowe BNSF-9-219 to BNSF-9-228.)

Houston there are a high number of transfer jobs for many customers and railroads operating in the Houston area. Complex infrastructure is compressed into a small area. For instance, movements on UP between Settegast and Englewood Yards are only a mile apart but are located on a junction that is critical to operations across the entire model. Activities between these two points can have a backlog effect throughout the network. We updated the HNTB RTC model using BNSF knowledge and information to include data for some of these non-through trains operating around the Dayton area where possible.

To test this updated model, we evaluated several scenarios, including BNSF trains with an origin in Dayton and a destination in Houston. The updated model resulted in simulation runs that showed an increase in train delays of almost 40% on the line between Houston and Beaumont, greatly impacting local customers' ability to get timely switches as well as impacting Amtrak and thru-freight on-time performance.

Clear routing into yards. Another complication with the HNTB RTC model involves clear routing into yards, where the model presumes a pathway into a yard and that trains are not being held at any point on the system. This simply does not happen in a real-world environment. Even a small train waiting to get off a single-track main line can back up that main line, affecting yard access. This type of information is difficult to model in highly dense urban environments such as Houston. To simulate this level of detail, we would need to build in more information and variability into the model, which could only be accomplished by input from all

Houston-area stakeholders. This information would likely show additional congestion than the HNTB model was able to depict.

Operational updates. The HNTB RTC model used 2019 traffic as a base case, with some updated information provided from BNSF's limited AEI data. (*See id.* at 7-11.) While this information is relatively recent, there have been a number of operational updates over the last few years. We understand that adjustments to UP's operating plan have resulted in different train makeups, longer train lengths, and different yard and terminal operations. If we had new information from all stakeholders, the RTC model could properly reflect a current base case.

Based on our work with the HNTB RTC model, we agree with the conclusions reached by HNTB in the Technical Memorandum. The refinements to the model made by our team reinforce the conclusion that the current infrastructure cannot handle the new CP-KCS traffic that Applicants project will result from the merger. The additional inputs noted above would help to better reflect the current operating scenario, and many of the inputs would likely show additional congestion.

Notwithstanding the limitations described above, we believe that the HNTB Study broadly illustrates the issues presented by the projected CP-KCS merger-related traffic growth. The study could serve as a model for an analysis that Applicants could perform with other stakeholders that would serve as the basis for a plan by Applicants to accommodate their merger-related traffic growth in addition to a more accurate representation of volume growth expected by local customers in the region. With all stakeholders contributing data and expertise, this study could fully

identify the impact of the CP-KCS traffic growth, as well as a better understanding of the impact to local customers whose service will degrade without the capacity improvements needed to accommodate that traffic.

IV. Conclusion

For the reasons explained above, it is imperative that Applicants perform a modeling study jointly with all stakeholders to analyze the effects of its proposed traffic on the Houston complex. In the absence of a plan by Applicants to address how increased CP-KCS traffic will be handled on shared lines in Texas – and until necessary capital improvements are identified, fully funded by Applicants, and implemented – the Board should restrict Applicants from increasing existing KCS traffic levels on those lines if such increases would displace existing traffic or compromise fluidity on those lines.

VERIFICATION

I, Jon Gabriel, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

/s/ Jon Gabriel

Jon Gabriel

Executed on July 12, 2022.

VERIFICATION

I, Travis Thowe, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

/s/ Travis Thowe

Travis Thowe

Executed on July 12, 2022.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

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

Exhibit A

HNTB Technical Memorandum

Technical Memorandum

Impact of Additional CPKC trains in the Houston Complex

PREPARED FOR

BNSF Railway



PREPARED BY

HNTB Corporation

July 2022

I believe that the analysis in this technical memo follows industry best practices and that the RTC cases in this study accurately depict the current and future operations in the Houston Terminal Complex. The models were developed using the best information available and accurately reflect the potential impact of a new proposed CP & KCS merger volume growth.



DATE 06/24/2022

Mark H. Dinger, PE

1.0 Background

The railroad network in and around Houston, TX, or Houston Railroad Complex, is a dense configuration of tracks and yards, with multiple railroads. Canadian Pacific (CP) and Kansas City Southern (KCS), jointly referred to as CPKC, has projected that their merger will add non-organic growth, growth greater than would occur in the normal-course-of-business, of more than eight additional trains on the routes they jointly operate along with Union Pacific (UP) and BNSF Railway (BNSF) between Beaumont, TX and Robstown, TX.

This study uses information created from a Rail Traffic Controller (RTC) model of the Houston Railroad terminal complex to quantify the operational impact of traffic growth due to the CPKC merger. This study updates the RTC model originally developed for the August 2021 TxDOT Houston-Beaumont Freight Rail Study of the Houston Railroad Complex (HBFRS). That RTC case was updated to reflect current operations and to model the merger-related growth traffic volumes projected by CPKC in their STB merger application and environmental documents.

1.1 Houston Railroad Complex

While Union Pacific owns, or jointly-owns with BNSF, most of the trackage and dispatches the train movements in the Houston area, BNSF, KCS and the Port Terminal Railroad Association (PTRA) also conduct extensive train operations in the complex. Two of the subdivisions, the West Belt and East Belt, are owned by the Houston Belt and Terminal Railway (HB&T). UP has major yards at Englewood, Settegast and Lloyd. BNSF has two yards located on the West Belt Subdivision near the University of Houston and Mykawa Yard near William P. Hobby Airport on the BNSF Mykawa Subdivision.

KCS train traffic in the Houston Complex travels between three unconnected subdivisions on jointly used corridors owned by UP and BNSF (**Figure 1**). The KCS Laredo Subdivision connects Laredo, TX to Corpus Christi, TX. At Robstown, roughly 13 miles to the west of Corpus Christi, the majority of traffic shifts onto the UP Brownsville Subdivision. From Robstown, the KCS trains travel across the UP Brownsville and Cuero Subdivisions before connecting with the KCS Rosenberg Subdivision at Victoria, TX. The KCS Rosenberg Subdivision connects Victoria, TX to Rosenberg, TX and includes the KCS Kendleton intermodal facility. From Rosenberg, KCS trains travel on the UP Glidden Subdivision towards West Junction located in southwest Houston. From West Junction, the majority of the traffic shifts onto the UP Houston Subdivision to Tower 26 (**Figure 2**). Between Tower 26 and Beaumont, eastbound traffic moves on the UP Beaumont Subdivision, and westbound traffic moves on the UP Houston Subdivision. In Beaumont, the BNSF, UP, and KCS traffic splits between the BNSF Silsbee Subdivision, the UP Lafayette Subdivision and the KCS Beaumont Subdivision (**Figure 3**).

Figure 1: Beaumont to Corpus Christi Overview with Key Subdivisions Labeled

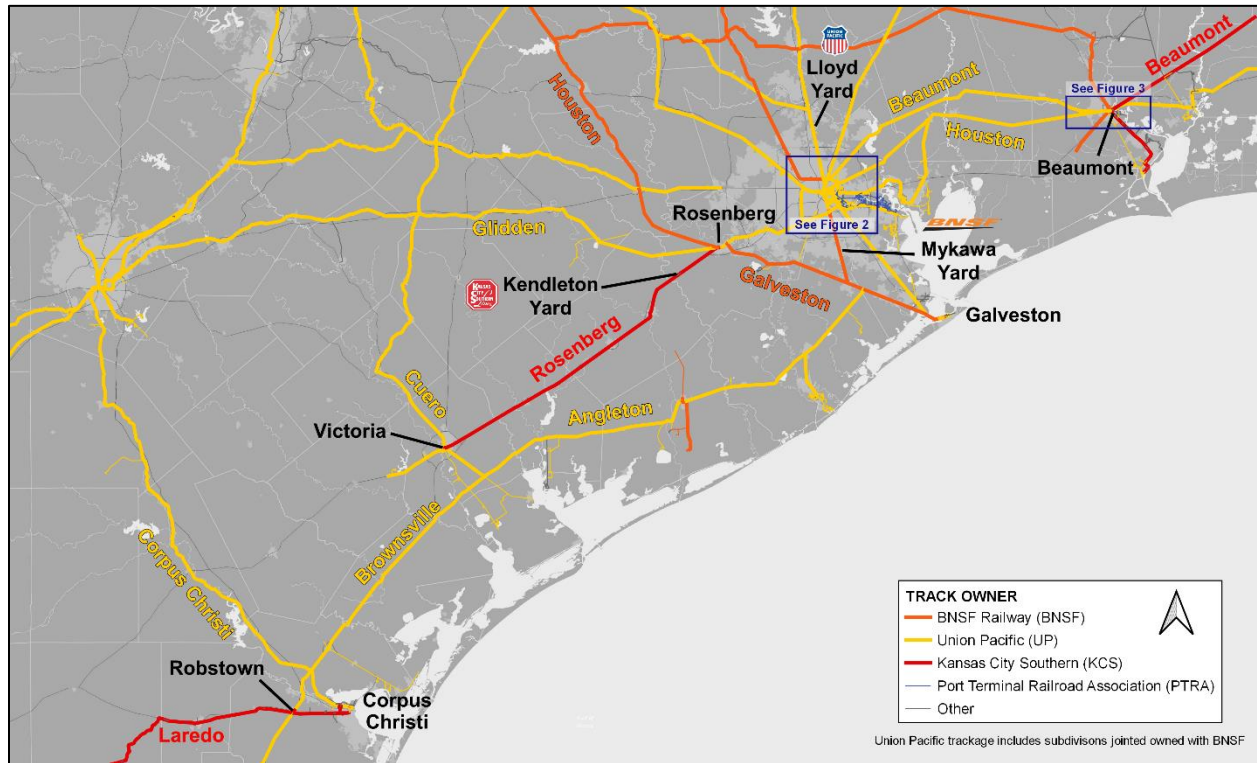


Figure 2: Detailed Map of Houston Complex

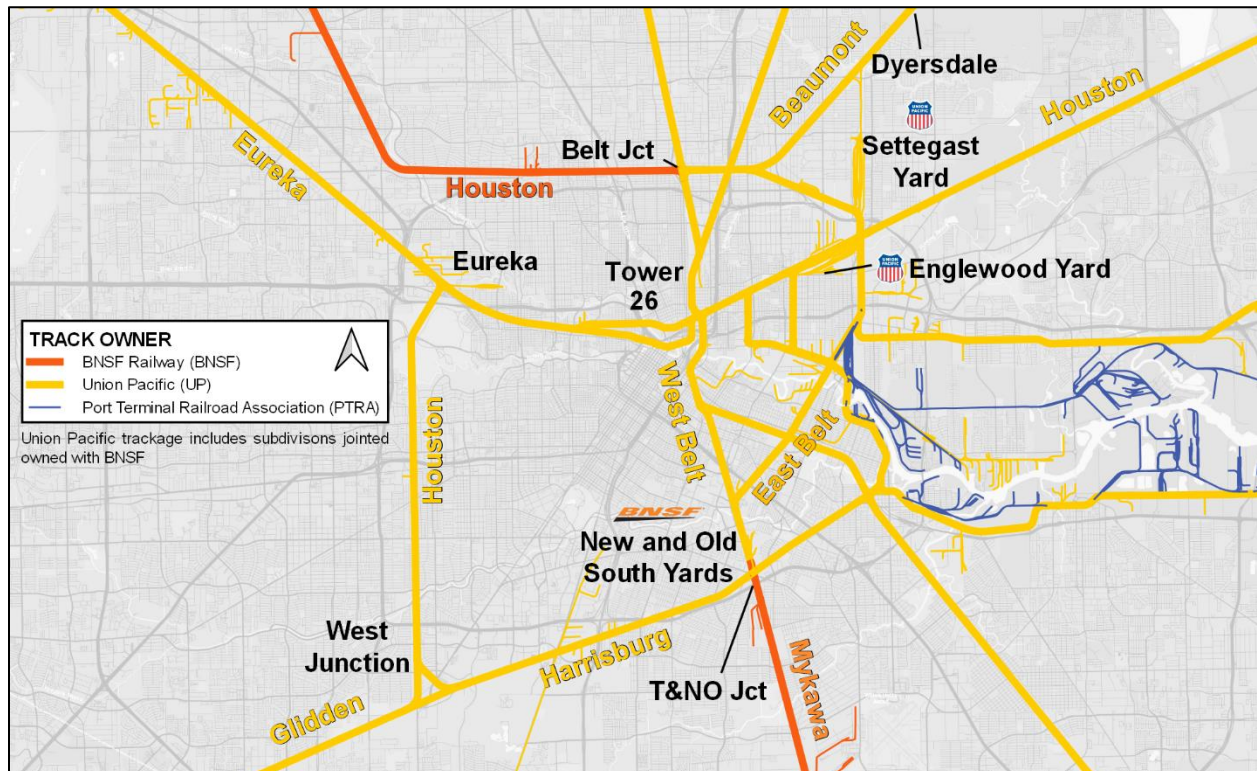
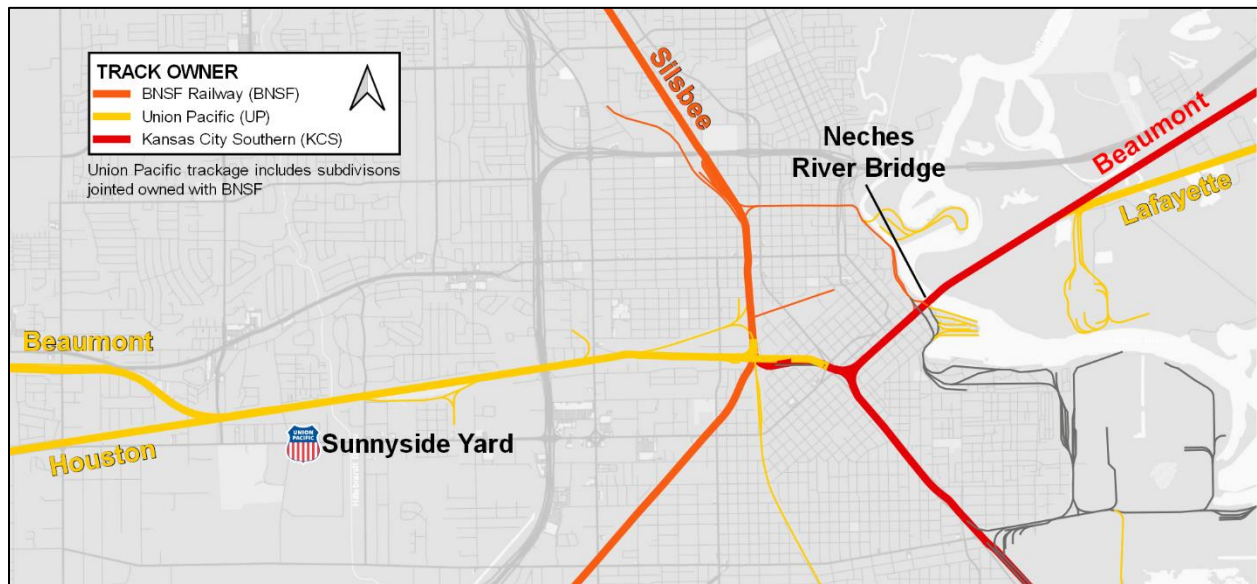


Figure 3: Detailed Map of Beaumont



The configuration and operations of the primary subdivision that the KCS traffic travels across are referenced below:

1.1.1 UP Brownsville Subdivision

The UP Brownsville Subdivision is entirely single-track with sidings between the Mexico border and Placedo, where there is a junction with the UP Cuero and UP Angleton Subdivisions. The route is bi-directional, with both northbound and southbound UP, BNSF and KCS traffic. From Brownsville to Robstown, the route is non-signaled, requiring trains to stop to enter and depart any siding. At Robstown, the route is joined by the KCS Laredo Subdivision, bringing BNSF and KCS traffic onto the corridor. From Robstown to Placedo, the route is single track with powered turnouts.

1.1.2 KCS Rosenberg Subdivision

The KCS Rosenberg Subdivision is single-track throughout with sidings only between Victoria, TX and Rosenberg, TX. The subdivision connects at its southern end with the UP Cuero Subdivision at Victoria and the UP Glidden Subdivision at its north end. Roughly 10 miles south of Rosenberg is an intermodal facility and crew change point at Kendleton. All the KCS trains crew change at this location before continuing to Beaumont or Robstown.

1.1.3 UP Glidden Subdivision

The Glidden Subdivision is predominately a double-track railroad that runs between West Junction and San Antonio, Texas. At Rosenberg (located 24 miles west of West Junction), the subdivision is joined by the BNSF Galveston Subdivision and the KCS Rosenberg Subdivision. The 24 mile segment between West Junction and Rosenberg has nearly 40 at-grade crossings with bi-directional UP, BNSF, KCS and Amtrak traffic.

1.1.4 UP Houston Subdivision

The UP Houston Subdivision is predominately a double-track railroad within the Houston complex and single-track with sidings east of Houston that runs between West Junction, its connection with the Glidden Subdivision, and Beaumont, TX. The subdivision has three segments with different operations. Coming from the west, between West Junction and Tower 26, the route is double track with bi-directional traffic. Immediately to the east of Tower 26 is Englewood Yard with bi-directional train movements into and around the yard. East of the Yard towards Beaumont, the route is composed of single track and sidings with the predominate flow of traffic being westbound. However, multiple BNSF trains each day between Dayton, TX and Beaumont travel against the flow of traffic towards Beaumont.

1.1.5 UP Beaumont Subdivision

The Beaumont Subdivision is predominately single-track with sidings between Houston and Beaumont. The traffic on the subdivision is directional with most of the train movements traveling eastbound to Beaumont, TX. Many UP trains change crews at both ends of the subdivision, Dyersdale at the west end and Beaumont at the east end. Trains at the east end of the subdivision are routinely delayed due to congestion in Beaumont.

2.0 Modeling Methodology

An RTC model was created to determine the operational impact of the proposed merger traffic within the region's freight rail network. Berkeley Simulation Software's RTC is used by all Class 1 railroads and the STB. RTC is the de-facto railroad industry standard for the simulation of both passenger and freight train operations. RTC requires detailed operations and infrastructure inputs and attempts to resolve conflicts between trains in the same manner as an actual railroad dispatcher. This allows for quantification of "what-if" scenarios, which in this study is the impact of additional traffic to existing operations.

The standard methodology when performing an RTC study is to first build a Base Case. The Base Case is then validated using current infrastructure and operations. Anticipated future train growth, and already-planned or under-construction infrastructure, are added to the base model to create the No Build Case. Finally, comparison cases are created, adding traffic and/or infrastructure improvements to the "No Build" scenario, to determine the impact of proposed changes to the current railway system. In this study, these steps were done based on 1) an existing year Base Case of 2019, 2) a 2027 "No Merger" Case, and 3) a 2027 Merger Case.

2.1 RTC Inputs

RTC models require detailed infrastructure and operational inputs. The track infrastructure includes detailed inputs on the type of track, speed, direction, signals, and switches. Each train in the model is developed separately in accordance with the characteristics of each model case including type, route, dwell time, priority, length, weight, and number of locomotives.

Once the train and infrastructure data are entered into the model, the model simulates the train movements along their routes. If the train is in the same place at the same time as another train, a conflict is created. The model logic attempts to resolve these conflicts between trains in the same manner as an actual railroad dispatcher.

While the model is good at measuring infrastructure capacity when dispatcher decisions are the sole constraint, there are many operational factors not considered by the model that impact railroad operations and capacity. These can include:

- Train failures or derailments
- Severe weather
- Grade-crossing incidents
- Maintenance-of-way track outages for capital programs
- Resource availability (crews and locomotives)
- Customer availability

Consequently, simulations produced by the RTC model frequently provide a more optimistic operational result than can be obtained in real-world railroad operations. As a railroad network nears its available capacity, the ability for the network to recover and for trains to move fluidly decreases, making disruptions to the network increasingly difficult to resolve. These disruptions can have a ripple effect on the railroad network far beyond the location of the original disruption. In light of the limitations in the model's ability to account for certain operational factors – and the challenges even to input others at all – the simulation results represent more ideal conditions than the railroads' real-world experience.

To address this potential disconnect, the metrics for each simulated case are an average of multiple random scenarios. Each scenario incorporates a different set of random values in the model including train departure times, dwells, train sizes and maintenance-of-way outages. The randomization of the model reflects the variability in train operations that are encountered in the real world, increasing the accuracy and applicability of the model output. To best represent this variability, in addition to the built-in RTC randomization tools, HNTB proprietary tools were used to allow for different randomization of dwell times at each location, randomization of train consists, and the use of non-uniform distributions. This higher degree of randomization was used to forecast future volume train lengths and dwell times since the exact characteristics for future train traffic are unknown. This simulation was repeated ten times per studied scenario to analyze a variety of randomized events as encountered by the model.

Each RTC Simulation will consist of a model warm-up, statistical period, and a cool-down. Only the trains that start during the statistical period are included in the results. The purpose of the model warm-up and cool-down is to obtain a steady-state of network operation. During the model warm-up period, trains populate the network, allowing for the trains to enter into a fully populated network. The model cool-down period provides time for the trains that started during the statistical period to fully complete their simulation. For this study, each RTC case will consist of six days, with one day of model warm-up, three simulation days, and two days of model cool-down.

Once a simulation is complete, the model provides detailed information for each train in the statistical period. These metrics include the simulated time and distance a train traveled by node, as well as delay and train stop time.

2.2 Base Model Development

The base RTC case for this study, representing operations in 2019, was originally built for the 2021 TxDOT HBFRS with support of UP and BNSF. In accordance with the study, the model has been updated to reflect any changes in operations, additional infrastructure, and the UP Brownsville Subdivision to model the joint trackage route between Robstown and Beaumont.

To confirm an accurate comparison against the proposed CPKC traffic, the originally modeled KCS traffic was removed and replaced with trains matching those outlined in the CPKC merger application and environmental documents filed with the STB in Docket No. FD 36500 (**Table 1**).

The train volumes and routes were developed using the Exhibit 13: Train Services Amended Operating Plan submitted on May 13, 2022 (Exhibit 13).¹ The weekly scheduled train volumes were used as described in Appendix C. Any difference between the daily train counts in Appendix C and Appendix T were filed with “as required” traffic or unscheduled bulk (grain or oil) traffic.

Train sizes were developed using the scheduled train lengths included in Appendix C and the subdivision average trains lengths provided in Docket No. FD 36500, Response to Information Request No. 2 (Response No. 2) (**Table 1**). Bulk traffic was assumed to be between 6,200 feet and 7,600 feet.² For the scheduled traffic train lengths, using values from Exhibit 13 as maximums, were adjusted to match with the values in Response No. 2. Train lengths were modeled using a triangular distribution with the calculated average, evenly spaced between the maximum found in Response No. 2 and a calculated minimum length.

Table 1: Base Train Statistics from CPKC STB Filings vs. Modeled values in RTC

KCS Subdivision	CPKC		RTC	
	Trains per Day ^a	Avg. Train Length ^b	Trains per Day	Avg. Train Length
Beaumont ^c	8.67	5,399	8.86	5,598
Rosenberg ^d	8.70	5,740	9.00	5,655
Laredo ^e	13.55	5,576	14.05	5,410

- a) Canadian Pacific Ry. – Control – Kansas City Southern, Docket No. NOR 36500 (S.T.B. filed May 13, 2022) Appendix T.
- b) From Docket No. FD 36500, Response to Information Request No. 2 Table 1
- c) Segment #147, De Quincy, LA – Beaumont, TX
- d) Segment #153, Kendleton, TX – Victoria, TX
- e) Segment #156, Robstown, TX – Laredo, TX

The KCS trains were assumed to change crews at Robstown, Kendleton and Beaumont. Since trains enter and exit the model at Robstown, no crew change dwell was modeled. The crew change at Kendleton was modeled in a triangular distribution with a minimum, average and maximum of 15 minutes, 30 minutes, and 60 minutes, respectively. The dwell of trains of two trains that perform work at Kendleton were assumed to have a triangular distribution of 60 minutes, 90 minutes, and 120 minutes. The Beaumont crew change was modeled between 15 to 30 minutes based on the information in the *Neches River Bridge Feasibility Study Final Report*.³

Locomotives were assumed to provide sufficient power to reach 1 horsepower per trailing ton, with a minimum of 2 locomotives. Scheduled trains were developed to be evenly spread out, based on existing traffic patterns in the model.

¹ Canadian Pacific Ry. – Control – Kansas City Southern, Amended Operating Plan Exhibit 13, Docket No. NOR 36500 (filed May 13, 2022)

² Amended Operating Plan p.83

³ *Neches River Bridge Feasibility Study Final Report*, Texas Department of Transportation, June 2013, P. 57

2.3 Organic Train Growth

The No Merger Case, simulating operations in the Houston Complex in 2027 assuming there is no merger, was developed by adding organic growth to the Base Case. The UP and BNSF organic growth was developed using the publicly available United States Department of Transportation (USDOT) Freight Analysis Framework (FAF)⁴ data, with some additional traffic on the UP Angleton and UP Brownsville Subdivisions based on publicly announced new customers that will result in traffic growing faster than the secular FAF growth values⁵. The KCS organic growth referenced in Exhibit 13 Appendix T and Response No. 2 was used.

The FAF framework provides, by commodity, projected freight tonnage by year, location, and transportation mode. The commodity categories are assigned to logical train types: merchandise, intermodal, bulk, and auto. With years 2019 and 2027 being unavailable in the referenced FAF framework, these parameters were estimated using linear interpolation of the 2025 to 2030 values to approximate the tonnages in 2027. These tons were used to determine the growth between 2020 and 2027. (**Table 2**). Eight percent of the growth for the merchandise, intermodal and auto traffic was met via increases in train length with the remaining growth being met through new trains. The computed growth was applied across the complex based on existing train flow and volumes.

Table 2: Percentage Growth in Freight Traffic between 2020 and 2027

Train Type	2020-2027 % Increase	2020-2027 CAGR ⁶
Merchandise	12.7%	2.4%
Intermodal	17.4%	3.3%
Bulk	-1.8%	-0.4%
Auto	18.8%	3.5%

Wherever possible, the CPKC information was used directly to develop the KCS organic growth. CPKC claim that “There is no train design change for 2027 without merger.”⁷ Without train design changes, or new scheduled trains, the growth is anticipated to be handled through additional new frequencies for trains that do not currently operate seven days a week and through increased train lengths. The increased frequencies result in a minor increase in train volumes (**Table 3**).

CPKC do not identify any new track infrastructure projects to be built to support traffic growth between Beaumont and Robstown.⁸ In order to match the optimized service plan,⁹ traffic was modeled using a 9,840 foot maximum length of the scheduled traffic (merchandise, intermodal and auto). While existing sidings on the KCS Rosenberg Subdivision have a maximum length of 9,500 feet, it is possible to support a limited number of trains that may exceed current siding lengths. Using the CPKC information, and with the operational and train length constraints, the

⁴ https://ops.fhwa.dot.gov/freight/freight_analysis/faf/

⁵ Toto, DeAnne, “SDI to build EAF steel mill in Sinton, Texas” *Recycling Today*. 25, July 2019.

<https://www.recyclingtoday.com/article/sdi-to-build-eaf-steel-mill-sinton-texas/> accessed 21 May 2022;

“United States: Bayport Polymers to Double Polyethylene Capacity” *Total Energies* 25 August 2018

<https://totalenergies.com/media/news/press-releases/united-states-bayport-polymers-double-polyethylene-capacity>. Press release.

⁶ Compound Annual Growth Rate

⁷ Response 2 Table 1

⁸ Amended Operating Plan Table 11, Figure 11, and Appendix R.

⁹ Exhibit 13 Appendix H

modeled average trains lengths were less than documented in Response No. 2. Therefore, the volume growth projected by CPKC can only be met by adding additional trains or adding additional infrastructure to support longer trains. For this analysis, to avoid adding additional trains or infrastructure, the trains are assumed to be shorter than the values provided by CPKC.

Table 3: 2027 “No Merger” Case Train Statistics from CPKC STB Filings vs. Modeled values in RTC

KCS Subdivision	CPKC		RTC	
	Trains per Day ^a	Avg. Train Length ^b	Trains per Day	Avg. Train Length
Beaumont ^c	9.32	8,898	9.43	8,518
Rosenberg ^d	9.14	9,821	9.43	8,450
Laredo ^e	14.77	12,943	14.76	8,678

- a) *Canadian Pacific Ry. – Control – Kansas City Southern*, Docket No. NOR 36500 (S.T.B. filed May 13, 2022) Appendix T.
- b) From Docket No. FD 36500, Response to Information Request No. 2 Table 1
- c) Segment #147, De Quincy, LA – Beaumont, TX
- d) Segment #153, Kendleton, TX – Victoria, TX
- e) Segment #156, Robstown, TX – Laredo, TX

2.4 Merger Train Growth

CPKC projected that the merger will result in an additional eight trains per day between Beaumont and Laredo (**Figure 4**). This growth is beyond any organic growth and represents “anticipated increases in the traffic on the combined network arising from the new traffic that CPKC is expected to attract.”¹⁰

The new traffic, described in Exhibit 13 Appendix G and Appendix I of the Amended Operating Plan,¹¹ is four new intermodal pairs across the Houston Railroad Complex and 4.6 new daily bulk trains operating into and out of Beaumont. These trains are assumed to have the same operating characteristics as the existing traffic, with crew changes at Robstown, Kendleton and Beaumont. The traffic will be split between the UP Beaumont and UP Houston Subdivisions between these respective cities due to the directional running of the subdivisions. This case adds the projected merger traffic in addition to the base traffic of the 2027 No Merger case (**Table 4**).

No new infrastructure was added for the new traffic, as CPKC does not propose any new track infrastructure projects between DeQuincy, LA and Robstown, TX. Accordingly, the existing 9,500 foot siding length restriction on the KCS Rosenberg Subdivision limits the potential sizes of these new trains.

¹⁰ Exhibit 13 p.44

¹¹ *Canadian Pacific Ry. – Control – Kansas City Southern*, Amended Operating Plan Exhibit 13, Docket No. NOR 36500 (filed May 13, 2022)

Figure 4: CPKC Merger Train Volume Growth¹²

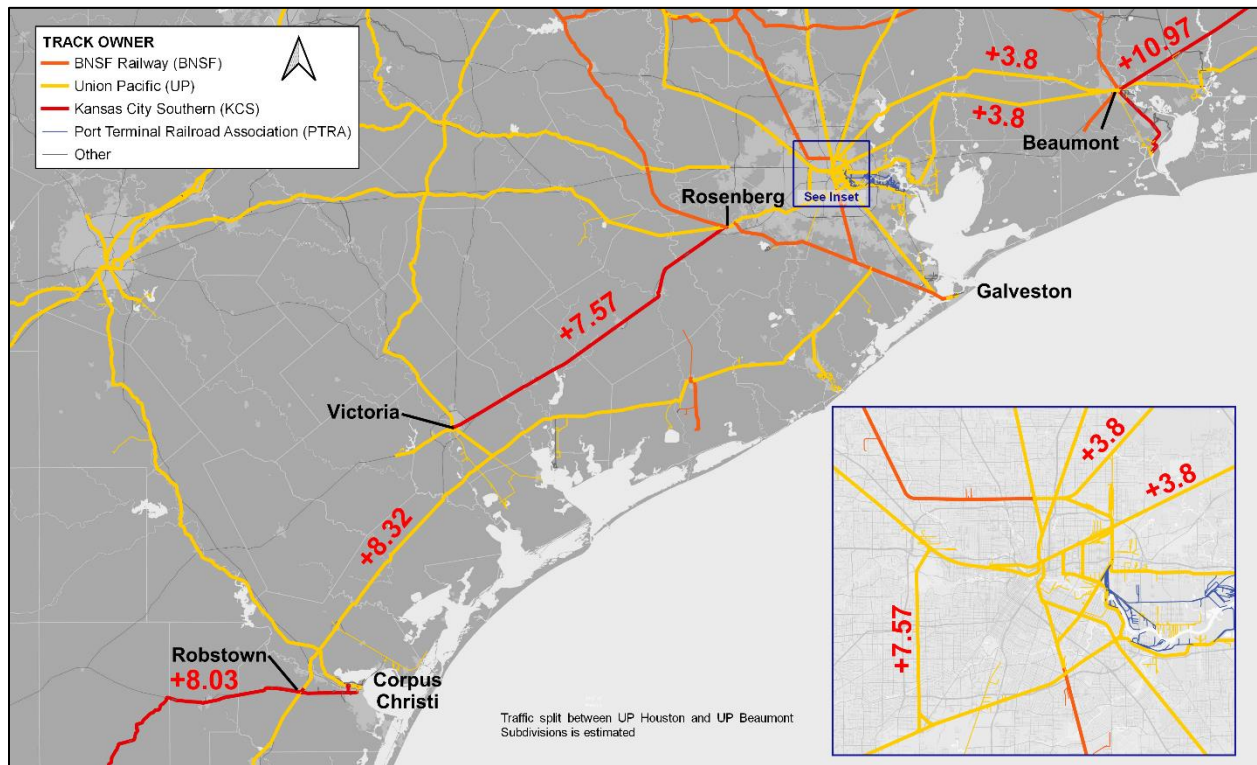


Table 4: 2027 Merger Case Train Statistics from CPKC STB Filings vs. Modeled values in RTC

KCS Subdivision	Trains per Day ^a	Avg. Train Length ^b	Trains per Day	Avg. Train Length
Beaumont ^c	20.29	10,321	21.43	9,348
Rosenberg ^d	17.46	7,995	17.43	7,919
Laredo ^e	22.80	9,912	22.76	8,616

- a) Canadian Pacific Ry. – Control – Kansas City Southern, Docket No. NOR 36500 (S.T.B. filed May 13, 2022) Appendix T.
- b) From Docket No. FD 36500, Response to Information Request No. 2 Table 1
- c) Segment #147, De Quincy, LA – Beaumont, TX
- d) Segment #153, Kendleton, TX – Victoria, TX
- e) Segment #156, Robstown, TX – Laredo, TX

3.0 Impact of CPKC Merger Traffic

Without any additional infrastructure, the additional CPKC merger trains create gridlock in the Houston Terminal Complex. With only organic growth in 2027 (the “No Merger” case), while congested, the existing infrastructure is sufficient to operate, and the model was able to complete. However, once the merger traffic is added, the model is unable to consistently run to completion. While most RTC cases will occasionally be unable to reach a dispatching solution

¹² Canadian Pacific Ry. – Control – Kansas City Southern, Docket No. 36500 (filed Oct. 29, 2021), at App Vol. 2 p.364

based on the random values in the specific scenario, the Merger Case failed too frequently to represent feasible railroads operations. The model found that with the additional merger traffic added, there is insufficient capacity to support the projected traffic demand. This corridor serves freight traffic from multiple railroads plus the three times weekly Amtrak Sunset Limited. When there is limited capacity, the performance of this high-priority passenger service will degrade.

The RTC model uses an operating gridlock constraint for at-grade crossings. Specifically, the RTC model was built with trains being limited from stopping on a grade crossing for more than 20 minutes. If the merger growth is added without any additional projects, either the expected freight traffic will be unable to operate, or grade crossings blockage times will increase along the corridor.

The most significant stopping constraints are on the KCS Rosenberg and Beaumont Subdivisions. These constraints arise from the insufficient number and length of sidings to meet the higher volumes, even with the modeled train lengths being shorter than the projected siding lengths. If the projected averages are achieved, further congestion and gridlock will result.

In addition to the limitations on the KCS Subdivisions, there are two key bottlenecks on the corridor between Rosenberg and Beaumont along single-track bridges at the Neches River and Brazos River, respectively. As described in **Section 1.1** and shown in **Figure 3**, Beaumont is a major junction for UP, BNSF and KCS, and it is a crew change and work location for trains at UP Sunnyside Yard. Trains dwell on the mainlines to change crews, leave their cars on the mainline when picking up and setting out cars at Sunnyside Yard and to dwell due to congestion on their outbound routes. Adding to this congestion is the KCS-owned and dispatched single track over the Neches River Bridge. All traffic converges to a single track over the Neches River, where the operating challenges are further exacerbated to serve a high-volume customer on the east side of the single-track bridge.

The UP Glidden Subdivision between West Junction and Rosenberg has a high volume of UP, KCS and BNSF traffic. The route is mostly double track, with the exception of 3.8 miles of single track across the Brazos River. While there is double track to the east of the bridge to West Junction, the route has many at-grade crossings, limiting the locations a train can stop and wait for an opposing train on the single track. This results in trains queuing on the KCS Rosenberg Subdivision, UP Glidden Subdivision, and BNSF Galveston Subdivision. Queuing occurs to the west and near Eureka on the UP Houston Subdivision, nearly 20 miles to the east. Similar to the Neches River Bridge, this single track segment can handle the existing volumes, although an additional 8 to 9 trains a day would significantly exacerbate the delays.

4.0 Conclusions

The RTC modeling of the impact of the CPKC merger traffic shows that:

- The CPKC operating plan train volumes, train lengths, and available siding lengths are incompatible. Without any additional infrastructure, the train sizes stated by CPKC would result in gridlock. An additional study should be completed in cooperation with the railroads to better align operations and infrastructure.
- The Houston Terminal Complex can support projected organic growth between 2019 and 2027.
- Once the projected merger growth volume is added to the complex, the model is unable to consistently run to successful completion. Additional capacity will need to be constructed to avoid gridlock.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

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

Response Verified Statement of David Reishus, PhD

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO 36500

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY
COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC
RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD
CORPORATION; AND DELAWARE AND HUDSON RAILWAY COMPANY, INC.

– CONTROL –

KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
GATEWAY EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN
RAILWAY COMPANY

**Responsive Verified Statement of
David Reishus, Ph.D.**

July 12, 2022

TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	1
A.	BACKGROUND AND TASK	1
B.	SUMMARY	2
II.	RESPONSE TO COMMENTS AND PROPOSALS TO PRESERVE COMPETITION ACROSS GATEWAYS.....	4
A.	CONCERNS REGARDING THE LOSS OF COMPETITION ACROSS GATEWAYS AS A RESULT OF THE TRANSACTION	4
B.	PROPOSALS TO PRECLUDE CP-KCS FORECLOSURE	6
1.	Proportional Rates Are Common to the Proposals.....	7
2.	Distinctions in Gateways, Traffic and Methods	8
C.	THE BNSF PROPOSAL CAN READILY BE IMPLEMENTED TO PRESERVE COMPETITION FOR ALL SHIPPERS TO AND FROM MEXICO	16
1.	Outline of BNSF Proposal.....	17
2.	BNSF Proposal: Grain.....	19
3.	BNSF Proposal: Intermodal	24
III.	RESPONSE TO CN COMMENTS REGARDING DIVERSIONS, REVENUES AND COSTS IN THE APPLICATION.....	26
A.	CN COMMENTS WITH RESPECT TO RAIL-TO-RAIL DIVERSIONS AND FORECLOSURE	26
1.	According to CN, CP-KCS diverts traffic to routes that are, on average, longer resulting in an overstatement of diversions	27
2.	Rates for traffic diverted to CP-KCS	28
3.	Assumed CP-KCS margins on rail-to-rail diversions	29
B.	CP-KCS' RAIL-TO-RAIL DIVERSION ANALYSES ARE CONSISTENT WITH THE INCENTIVE AND ABILITY TO FORECLOSE THE LAREDO GATEWAY.....	30
1.	Applicants have no basis for assuming no effective price competition for Mexico traffic diversions absent foreclosure	30
2.	Applicants anticipate they will earn large margins for traffic diverted from other railroads across the Laredo gateway	32
3.	Shippers will be harmed by CP-KCS' incentive and ability to foreclose competition over the Laredo gateway	33

I. INTRODUCTION AND SUMMARY

A. BACKGROUND AND TASK

1. My name is David Reishus. I am an Executive Vice President at Compass Lexecon in Boston, Massachusetts. Compass Lexecon is an economics consulting firm with offices in various cities throughout North America, South America, Europe, and Asia. I earned my M.A. and Ph.D. degrees in economics from Harvard University. I previously submitted a verified statement in this proceeding.¹

2. I have been asked by BNSF Railway Company (“BNSF”) to analyze and respond to certain comments, opposition, and requests for conditions filed in this proceeding. I have been asked to address two specific issues. First, I have been asked to analyze various requested conditions related to preservation of ‘open gateways’ by the railroad (“CP-KCS”) resulting from the Proposed Transaction between Canadian Pacific (“CP”)² and Kansas City Southern (“KCS”)³ railroads (collectively, the “Applicants”). In particular, I have been asked to address the commonalities and differences among shippers’⁴ and railroads’⁵ comments and requested conditions and evaluate these proposals in connection with conditions requested by BNSF. Second, I have been asked to evaluate aspects of the Application identified and emphasized by CN. I analyze their implications for potential vertical competitive harm, foreclosure, and proposed gateway conditions.

¹ Verified Statement of David Reishus, February 28, 2022, BNSF-9 (“Reishus V.S.”). My vita can be found in Appendix A of Reishus V.S.

² CP refers collectively to Canadian Pacific Railway Limited, Canadian Pacific Railway and their U.S. rail carrier subsidiaries.

³ KCS encompasses Kansas City Southern Railway (“KCSR”) and affiliates, The Texas Mexican Railway Company (“Tex Mex”) and Kansas City Southern de México, S.A. de C.V. (“KCSM”).

⁴ These requests and comments encompass Comments of the North Dakota Wheat Commission (“ND Wheat”), February 28, 2022; the National Grain and Feed Association (“NGFA”), NGFA-1; and Comments and Requests for Conditions of The American Chemistry Council, The Fertilizer League, and The National Industrial Transportation League (“Joint Associations”), ACC-6/TFI-5/NITL-3.

⁵ These requests encompass Comments of: Union Pacific Railroad Company (“UP”), UP-10; CSX Transportation, Inc. (“CSXT”), CSXT-8; Norfolk Southern Railway Company (“NS”), NS-9; and Canadian National Railway Company (“CN”), CN-13.

B. SUMMARY

3. Numerous parties have expressed concerns about the ability and incentive of the combined CP-KCS to take actions involving price and/or service across various gateways that will harm competition and shippers. There is also widespread recognition that commitments by Applicants to maintain open gateways and offer “commercially reasonable rates and terms,” while important, lack standards and processes by which shippers can obtain meaningful protection in a timely and cost-effective manner. The ill-defined open gateway commitments imposed in the KCS-Tex Mex merger at the Laredo gateway, which encompasses BNSF’s interchange at Robstown, were demonstrably ineffective in preventing foreclosure.⁶ Shipper groups and railroads have both identified market-determined, proportional rates as a means of preserving competition across gateways and precluding anticompetitive foreclosure by CP-KCS.

4. The proportional rate conditions proposed by multiple parties are intended to establish competitive, market-based rates that preclude vertical foreclosure by CP-KCS. The proposals share a common characteristic to prevent foreclosure: the rate that CP-KCS may charge for interchange service to or from a gateway is determined by pro-rating (by mileage) the through rates charged (or offered) by CP-KCS in the market for competing traffic. The proposed conditions differ, however, in the details of operation and the traffic and gateways to which they apply.

5. The conditions proposed by BNSF are focused on the only gateway (Laredo) for which an analysis of traffic data shows a substantial likelihood of competitive harm. CSXT, UP, and BNSF each demonstrate patterns of rail traffic across the Laredo gateway consistent with foreclosure; there is no similar demonstration provided for any other gateway.

6. The proposed BNSF conditions provide protections to shippers that could be subject to competitive harm that are not protected by the Joint Associations and UP approaches. The approaches of Joint Associations and UP require the shipper to obtain a price quote from CP-KCS. Only shippers at locations that are jointly served by CP-KCS and a competing railroad can avail

⁶ References to the “Laredo gateway” include the interchange between UP and KCSM at Laredo and the interchange between BNSF and KCS (Tex-Mex) at Robstown and include the connection with KCSM at Laredo.

themselves of the protection proposed by Joint Associations and UP.⁷ But geographic competition among shippers means that harm from vertical foreclosure is not limited to shippers that are served by CP-KCS at both ends of a shipment. When shippers engage in geographic competition for movements of product (e.g., grain from the Midwest to Mexico), foreclosure can eliminate competition for transportation from shippers located on different railroads to the harm of all shippers. Unlike the other proposals, the BNSF proportional rate approach preserves the benefits of geographic competition in the face of potential anticompetitive foreclosure.

7. The BNSF proportional rate proposal is based on a long-standing merger condition that has proved to be successful in providing competitive gateway access. The BNSF proportional rate proposal, based on the I-5 Proportional Rate Agreement (“I-5 PRA”), permits railroads to market to shippers—such as Midwest grain shippers—that otherwise may be foreclosed in competing for shipments to Mexico. Adapting the I-5 PRA for the Laredo gateway, I illustrate how rates under the BNSF proportional rate proposal can be determined. The mechanism can be readily implemented. The resulting rates provide meaningful protection against the exercise of anticompetitive foreclosure.

8. CN’s comments identified numerous issues and shortcomings with the CP-KCS Application. In particular, CN identified that CP-KCS anticipates diverting large volumes of traffic from competing routes even though the CP-KCS routes are longer, and rates are, in most cases, not anticipated to be less than rates on the existing traffic to be diverted. Moreover, the rail-to-rail traffic diversions are anticipated by the Applicants to generate extraordinary incremental revenues above costs. These findings apply to the anticipated rail-to-rail diversions over the Laredo gateway.

9. The CN analysis establishes that the Application’s diversion analysis is consistent with anticipated foreclosure over the Laredo gateway and inconsistent with the Applicants’ arguments for why they lack the incentive to foreclose competition. CP-KCS’s analysis of rail diversions implies that KCS-KCSM is not capturing the full “lump” on its bottleneck traffic. CP-KCS anticipates earning significant margins—revenue above incremental cost—on diversions from

⁷ The UP proposal requires the shipper obtain a price quote from CP-KCS for a movement from a CP-KCS served location but may then apply the protective condition for service at non-CP-KCS intermodal and auto facilities within the same area.

existing interline traffic with no reduction in through rates resulting from price competition by the incumbent interline carriers to retain this traffic. This occurs, for example, in the case of Chicago-Laredo traffic, where the CP-KCS route is longer than either the UP or BNSF route. Applicants' expert argues that KCSM is already extracting the full return available on the existing interline traffic. But this is inconsistent with the Application's assumed margins that CP-KCS anticipates earning on diverted traffic over the Laredo gateway with little or no increase in rates above those currently charged by BNSF and UP. Rather, anticompetitive foreclosure by KCS-KCSM over the Laredo gateway will prevent price competition by UP and BNSF to retain this traffic. The CN analysis of the Application implies that the traffic diversions over Laredo represent an exercise of foreclosure by CP-KCS.

10. The ability and incentive of CP-KCS to foreclose competition across the Laredo gateway harms shippers. CP-KCS claims they will divert traffic across the gateway to longer routings with little or no change in rates but with large incremental margins above cost. BNSF and UP have the incentive to compete to retain this traffic that CP-KCS says will be diverted and could do so by lowering rates to meet or beat CP-KCS' rate-service bundle. The assumed diversions imply that UP and BNSF are unable to do so, which would be the result of KCSM (and Tex-Mex) foreclosing this competition through higher south-of-Laredo-gateway rates. Such foreclosure eliminates the benefits of enhanced rail-on-rail competition to shippers over the gateway that the merger is purported to provide.

II. RESPONSE TO COMMENTS AND PROPOSALS TO PRESERVE COMPETITION ACROSS GATEWAYS

A. CONCERNS REGARDING THE LOSS OF COMPETITION ACROSS GATEWAYS AS A RESULT OF THE TRANSACTION

11. Vertical rail mergers present the risk of competitive harm through anticompetitive actions over gateways. This harm can arise from actions that raise rivals' costs, limit competition, or result in higher prices or reduced competition for shippers. In the rail industry, short of physically closing

a gateway, foreclosure can occur through prices or service that prevent an equally or more efficient carrier from competing for traffic across a gateway.⁸

12. The combination of CP and KCS threatens the loss of competition resulting from the combined railroad's ability to control pricing and service for competing traffic across gateways of the combined carrier. In recognition of this concern, CP-KCS commits to customers generally to "keep existing gateways open on commercially reasonable terms."⁹ CP-KCS explains its understanding that "keeping gateways open has two core dimensions: operational efficiencies and commercial viability."¹⁰ CP-KCS promises when requested by shippers to provide them a Rule 11 rate to a gateway for a "former-CP or former-KCS" portion of a routing.¹¹ CP-KCS asserts these rates and terms will be "commercially reasonable" and interline options must be "commercially viable."¹² CP will also "inherit KCS's commitment to keep the Laredo Gateway open on commercially reasonable terms."¹³ CP-KCS recognizes that commercially reasonable terms would allow UP and BNSF to compete for cross border traffic when they can provide service that is equally or more efficient.¹⁴

13. Numerous parties have expressed concern about the potential competitive harm that may result from the Proposed Transaction and the need to provide additional conditions to address this harm. Examples include:

- Joint Associations: "A proper condition is needed to protect existing routing options by preserving all pre-merger interchanges both physically and commercially. ... But the Applicants have not offered any proposal to protect those interchanges commercially."¹⁵

⁸ See discussions and citations in Verified Statement of Steven C. Salop, February 27, 2022 ("Salop V.S."), attached to UP Comments, at 7-27, and Reishus V.S. at 11-16.

⁹ Verified Statement of John Brooks, October 28, 2021, ("Brooks V.S."), CP-KCS Application, Vol. 1 ¶ 42.

¹⁰ Brooks V.S. ¶ 45

¹¹ Brooks V.S. ¶ 46.

¹² Brooks V.S. ¶ 46

¹³ Brooks V.S. ¶ 42.

¹⁴ Deposition of John Brooks, February 4, 2022, at 140:7-20.

¹⁵ Joint Associations Comments at pdf page 9.

- ND Wheat Association: “this further consolidation ... will only result in less competition, higher rates, and poorer service.... As a result, the time has come for the Board to remedy this loss of competition caused by this merger...”¹⁶
- UP: “[Applicants’] pricing commitment is vague and incomplete. Mr. Brooks’ [CP-KCS witness] statement does not define either ‘viable’ or ‘commercially reasonable rates.’”¹⁷
- CSXT: “Applicants’ equivocal commitment to maintaining open gateways is inadequate to protect against CPKC’s incentive and capability to close commercially both cross-border and domestic gateways.”¹⁸

These concerns are consonant with those presented by BNSF and myself.¹⁹

14. CP-KCS has not provided a standard by which to determine whether its commitment to provide “commercially reasonable” rates has been kept. As pointed out by UP, Applicants have stated:

The Board did not define “commercially reasonable” in its 2004 Tex Mex decision. There are no set metrics; there are no dollar caps. There is no ruler by which UP could even determine, at this later date and with full hindsight, whether a particular rate offered for one customer in 2019 for intermodal traffic between Mexico City and Kansas City is “commercially reasonable” without wild speculation.²⁰

The inability to judge whether CP-KCS offered rates over a gateway for interline traffic that are “commercially reasonable” even with “full hindsight” makes this standard unworkable as a means to prevent economic foreclosure over a gateway.

B. PROPOSALS TO PRECLUDE CP-KCS FORECLOSURE

15. Multiple parties provided proposals that identified specific mechanisms that eliminate the vagueness and uncertainty embedded in the CP-KCS commitment and instead provide

¹⁶ ND Wheat Comments at 17.

¹⁷ Salop V.S., ¶ 111.

¹⁸ CSXT Comments at 4.

¹⁹ See BNSF Comments § 4; Reishus V.S. §§ V.B and IV.D.

²⁰ UP Comments at 71.

mechanisms by which commercial rates can be determined. Proposals by Joint Associations,²¹ UP²², and BNSF²³ to address these competitive concerns share the common characteristic that rates to the gateway are determined by pro-rating commercially determined through rates by CP-KCS.²⁴ These proposals differ in terms of what gateways and traffic are covered by the proposal, the specific source for determining the CP-KCS through rates that are pro-rated, and how that rate is used.

1. Proportional Rates Are Common to the Proposals

16. The three proposals designed to preclude the exercise of market power across gateways, by Joint Associations, UP and BNSF, all establish rates to a gateway based on a mileage proration of CP-KCS rates. Figure 1 below illustrates how the calculation of the proportional gateway calculation works in common across these proposals. The first step is to identify a potential CP-KCS movement (or movements) across a gateway for determining the benchmark rate to the gateway. In Figure 1, the illustration uses a CP-KCS movement of 1,000 miles with a \$10,000 through rate, leading to a rate of \$10 per mile. The next step is to use these through rates to determine a rate to the gateway based on prorating the mileage. In the middle panel of Figure 1, the illustration assumes the distance from the gateway to destination is 100 miles. This implies that the rate available from CP-KCS from the gateway to destination in this example is \$1,000 (equal to 100 miles times \$10/mile).²⁵ Finally, with this rate in hand, a shipper can utilize a railroad that competes with CP-KCS for an interline movement to the gateway where the rate from the gateway to destination is established as above.

²¹ Joint Associations Comments at pdf pages 9-10.

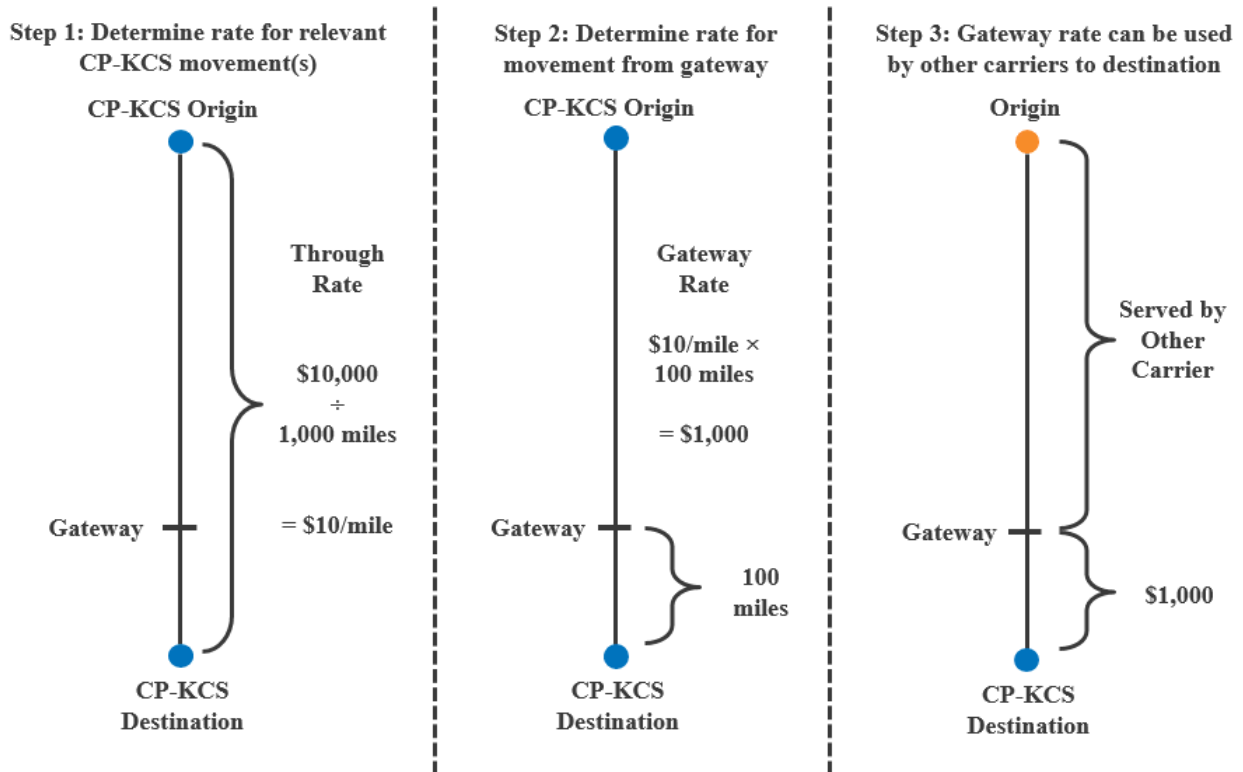
²² UP Comments at 68-74; Salop V.S. ¶¶ 117-120; Verified Statement of Kenny Rocker and John Turner, February 27, 2022 (“Rocker/Turner V.S.”), attached to UP Comments, at 17-25.

²³ Reishus V.S. at 48-51; BNSF Comments at 44-49.

²⁴ I use the term “through rates” to refer to the total rate charged by the Applicants for movements over a gateway between origin and destination (which may include further interchange to another railroad), regardless of whether a single rate is charged, or there are separate rates charged, for example, by KCSM and KCS.

²⁵ Equivalently in this example, using a mileage pro-rate directly to the through rate gives the same result: \$1,000 = \$10,000 * (10% = 100 miles / 1,000 miles.)

Figure 1
Illustration of Calculation of Proportionate Rates



17. The three proposals provide a similar formula for establishing a cap on the “commercially reasonable” rate that could be charged by CP-KCS to (or from) the gateway for affected traffic. The rates are designed to provide CP-KCS a proportional, fair share of through rates that would be viewed as commercially acceptable to CP-KCS and in the marketplace. These rates would naturally differ based on the composition of the traffic in terms of commodity, direction, and volume. Nothing in the proposals precludes CP-KCS from offering lower rates across the gateway if that were in the interest of CP-KCS nor do the proposals establish caps (or floors) on CP-KCS through rates.

2. Distinctions in Gateways, Traffic and Methods

18. While the three proposals have in common the use of proportional rates, they differ in terms of the shippers, traffic and gateways covered, the source of the CP-KCS rates used to establish the benchmark for the proportional rate calculation, and how those rates can be used to provide a competitive, interline alternative for the shipper. The following table outlines the similarities and differences among the proposals.

Table 1
Summary of Proportional Rate Proposals²⁶

	Joint Associations	UP	BNSF
<i>Gateways and Routes</i>	All, but limited to “movements where the merger creates a longer haul ... than pre-merger” ²⁷	All. ²⁸	Traffic through the Laredo Gateway
<i>Shipper Locations</i>	Effectively limited to jointly-served facilities	Jointly-served facilities and “different but competing locations” serving the same shipper ²⁹	Facilities in U.S. and Mexico locations in regions overlapping with CP-KCS network
<i>Method for Obtaining Rate</i>	Shipper must request through rate from CP-KCS	Shipper must request through rate from CP-KCS	Competing carriers access rate matrix to market or respond to shippers
<i>Source of Benchmark Rates for Establishing Proportional Rate</i>	Offer from CP-KCS to shipper	Offer from CP-KCS to shipper	Average of actual rates on comparable CP-KCS movements
<i>Process for Competitive Alternative</i>	Shipper must request CP-KCS rate and approach interline carrier for Rule 11 rate to gateway	Shipper must request CP-KCS rate and approach interline carrier for Rule 11 rate to gateway	Interline carriers can market to shippers; shippers can approach interline carrier directly for through rate
<i>Information on Rates</i>	Rule 11 rate known to shipper	Rule 11 rate known to shipper	Average gateway rate available to competing carriers; no shipper-specific information

²⁶ See Joint Associations Comments at pdf pages 9-13, UP Comments at 67-74, Rocker/Turner V.S. at 20-24, and BNSF Comments at 44-49.

²⁷ Joint Associations Comments at pdf page 11. This precludes movements where the CP/KCS route does not change as a result of the Proposed Transaction.

²⁸ Possible ambiguity arises from the limitation to a rate “for the former-CP, former-KCS, or former-KCSM portions.” UP Comments at 69.

I highlight three important differences among these proposals.

a. Gateways

19. All of the proposals provide proportional rate mechanisms to preserve competition across gateways. The BNSF proposal is focused on the Laredo gateway (including the KCS-Tex Mex segment between Laredo and the Robstown interchange), while the proposals of Joint Associations and UP are applicable, in principle, to all CP-KCS gateways.

20. Competitive conditions and outcomes at the Laredo gateway have been the subject of extensive analysis. Given the nature of the merger, focus on the Laredo gateway is merited. CP-KCS claims that traffic over the Laredo gateway accounts for {{[REDACTED]}} million of its projected annual rail diversions and an additional {{[REDACTED]}} million of annual new traffic by 2025.³⁰ Traffic across this gateway represents {{[REDACTED]}} of the anticipated new revenue resulting from the proposed merger. Laredo remains the most important gateway for the growing traffic between the U.S. and Mexico, and, as explained by Prof. Wilson, a necessary gateway for U.S. grain producers.³¹ Laredo was the only gateway that CP-KCS found reason to analyze with any specificity.³² This analysis supports the conclusion that vertical foreclosure is a significant concern at this gateway, and the merger is likely to exacerbate such concerns at the Laredo gateway.

21. Analyses from multiple parties demonstrate the need for meaningful protection from competitive harm arising from actual or potential foreclosure across the Laredo gateway. UP, BNSF, and CSXT—which does not even reach the Laredo gateway—have all shown the actual and potential competitive harm that would arise from the merger absent meaningful competitive

²⁹ Rucker/Turner V.S. at 20. Because the shipper must request a rate from CN the “competing locations,” the shipper must both be served by CP-KCS, in order to request a rate, and served by a competing interline carrier in order to use the Rule 11 gateway rate with the interline carrier.

³⁰ See Table 4 below, Reishus V.S., Figure 9, and Verified Statement of Mike Baranowski, October 29, 2021, (“Baranowski V.S.”), CP-KCS Application, Vol. 1, Table 16.

³¹ See Reishus V.S. ¶¶ 20-21, Verified Statement of William W. Wilson, February 28, 2022 (“Wilson V.S.”), attached to BNSF Comments, at 18-21, and Verified Statement of William W. Wilson, July 12, 2022 (“Wilson R.V.S.”), attached to BNSF Response Comments, at 9.

³² See Verified Statement of W. Robert Majure, Ph.D., October 29, 2021 (“Majure V.S.”), CP-KCS Application, Vol. 2, § 3.2.

protections across the Laredo gateway.³³ Prof. Salop, as well as Prof. Carey and Dr. Bremser, in analyses parallel to my own, confirm that the one-directional snapshot of traffic over the Laredo gateway presented by the Applicants is “deficient” and incapable of showing an absence of foreclosure.³⁴ Further analyses, including that for the omitted Southbound traffic, refute CP-KCS’s claims regarding the absence of foreclosure, and instead “are indicators of CPKC’s potential incentive and ability to engage in anticompetitive actions.”³⁵ No other gateway has been subject to this degree of empirical study.

22. Access to BNSF data unavailable to CSXT and UP permits findings with respect to past effects of foreclosure for certain groups of traffic across the gateway. As I previously concluded, analysis of “past and current operation...points toward foreclosure against BNSF and its shippers” across the Laredo gateway.³⁶ Testimony of BNSF personnel reports substantial rate increases for cross-border traffic as responsible for previously lost traffic and the belief that BNSF has been “foreclosed from effectively competing for carload traffic through Laredo” as a result of these pricing decisions.³⁷

23. In addition to the oversized role of the Laredo gateway in the Proposed Transaction and the North American rail network, this gateway is also uniquely vulnerable to the differences and limitations in the regulatory environments across the border. The ability of the combined railroad to reduce prices in the U.S. on CP-KCS and raise prices in Mexico (along with the independent ability to set prices on the U.S. Robstown-Laredo segment of BNSF’s Laredo gateway access)

³³ Reishus V.S. at 45-48. See also Salop V.S. at 3-5 and Verified Statement of Professor Julie M. Carey and Dr. Albert W. Bremser, February 28, 2022 (“Carey/Bremser V.S.”), attached to CSX Comments, at 22-23.

³⁴ See Reishus V.S. ¶ 80, “A more careful review of 2019 traffic over the Laredo gateway fails to dispel concerns regarding the ability and incentive of KCS to foreclose BNSF (or UP) for traffic over this gateway.” See also Carey/Bremser V.S. at 17, “Dr. Majure’s vertical effects analysis is deficient because it is limited to northbound traffic from Mexico and does not analyze southbound traffic to Mexico.” See also Salop V.S. ¶¶ 94-95.

³⁵ Carey/Bremser V.S. at 19. See also Salop V.S. ¶ 95. “Dr. Majure should have concluded that this high rate indicated that foreclosure was occurring.”

³⁶ Reishus V.S. ¶ 88.

³⁷ Hirsch V.S. at 9.

provides a ready mechanism to engage in foreclosure in a manner only available for trans-border traffic.³⁸

24. In summary, in discussing the expected expansion of CP-KCS trans-border Mexico movements, CSXT economists find “the combined CPKC would have a unique economic opportunity and incentive to implement a pricing strategy that could harm shippers today and tomorrow which was not achievable pre-transaction.”³⁹ For these reasons, conditions to prevent further foreclosure and additional competitive harm across the Laredo gateway from the Proposed Transaction are economically supported.⁴⁰

b. Shippers and Locations

25. As discussed in my opening comments and further below, BNSF proposes an approach modeled on the longstanding and successful I-5 agreement imposed as a condition in the UP/SP merger. This approach preserves competition for all affected shippers to and from Mexico because it gives competing rail carriers the incentive and ability to compete for Mexico traffic. The Joint Associations and UP proposals, through the mechanism they have adopted, limit the shippers and locations to which the remedy would apply. Under the Joint Associations and UP proposals, the shipper must request a through rate from CP-KCS from origin to destination.⁴¹ This rate would serve as the starting point for the proportional rate calculation described above. For CP-KCS to quote such a rate, it must serve the shipper and locations at both ends of the movement. In order for the shipper to take advantage of a gateway rate, however, it must also be served by another interline carrier at origin or destination. Thus, these proposals are only effective for shippers and locations that are jointly-served by CP-KCS and another potential interline railroad.

³⁸ See *Reishus V.S.* ¶¶ 46-50, and *Carey/Bremser V.S.* at 22-23.

³⁹ *Carey/Bremser V.S.* at 20-21.

⁴⁰ This conclusion is not intended to reject intervention in the future if foreclosure is found to be occurring at other gateways.

⁴¹ See Joint Associations Comments § II.B, and UP Comments at 71-72. UP explicitly indicates that this would apply to certain bridge interline moves such as a request from CP-KCS for a rate from an interchange in St. Paul to Mexico. See *Rocker/Turner V.S.* at 23-24. For purposes of exposition, I focus on origin-to-destination through rates.

26. The Joint Associations proposal appears to provide potential relief in terms of proportional gateway rates to actual jointly-served CP-KCS and other railroad facilities. The UP proposal goes further and would provide access when another railroad and CP-KCS “compete by serving facilities in the same area (*e.g.*, intermodal ramps, auto ramps, transloading facilities), even if both railroads do not serve precisely the same facility.”⁴² UP witnesses give the example of a movement from a Mexico location to two “competing” auto ramps in Chicago.⁴³ The UP example appears to require the shipper to obtain both a rate to the CP-served ramp in Chicago and be able to be served from the competing UP ramp in Chicago. Under the UP proposal, the shipper would get a through rate from CP-KCS to the CP-served auto ramp that would be used to generate the Rule 11 proportional rate from the Mexico location to the Laredo gateway which could then be used to interline over UP to the UP-served auto ramp. The UP proposal provides proportional rates to shippers that have access to both of the UP-served and CP-KCS-served competing facilities and can credibly demonstrate to CP-KCS that it is a viable customer from the CP-KCS-served facility. The UP proposal appears to expand the protection offered by the Joint Associations proposal beyond purely jointly-served facilities. The UP proposal may require, however, a degree of sophistication and access to multiple facilities by shippers (such as some automobile manufacturers) in order to benefit from it.

27. Threats to vertical competition resulting from the Proposed Transaction are not limited, however, to jointly-served locations. Geographic competition across alternative origins (or destinations) means that foreclosure can occur against shippers that are not directly served by CP-KCS. This is easily understood by looking at grain markets.⁴⁴ Mexican purchasers of wheat can choose among different U.S. and Canadian originating grain elevators, regardless of whether they are served by CP, BNSF, UP or other railroads. These different sources compete for the ability to serve Mexican markets. CP-KCS has the incentive to attract that traffic to its system, either by providing superior service or by raising rates in Mexico for interline service such that these alternative sources are unable to compete. As such, a loss of vertical competition at the Laredo

⁴² Rucker/Turner V.S. at 23.

⁴³ Rucker/Turner V.S. at 20.

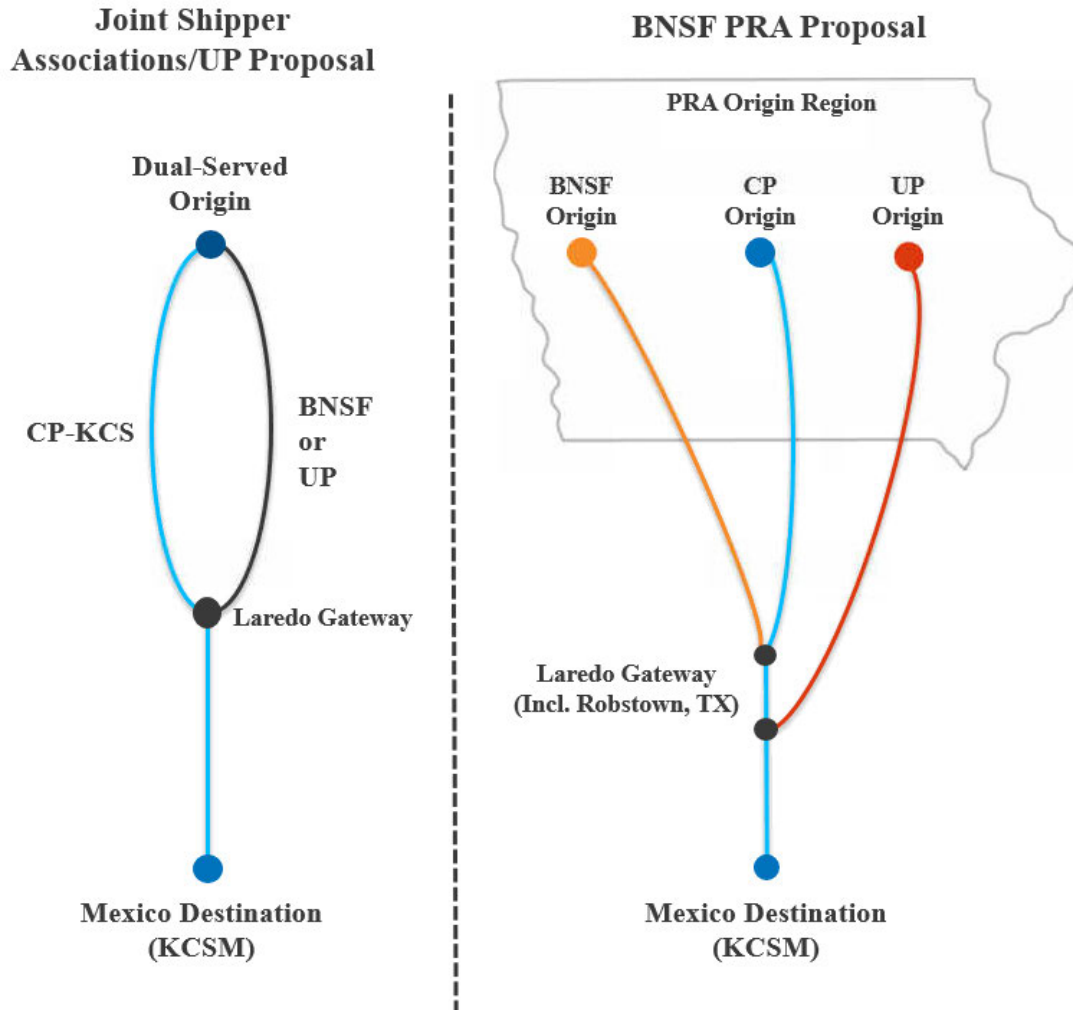
⁴⁴ See Wilson V.S. and Wilson R.V.S. for more detailed discussion of agricultural markets.

gateway can harm not just dual-served shippers, but U.S. grain shippers solely served by non-CP-KCS carriers.

28. The BNSF proposal provides proportional gateway rates to an additional range of shippers, whether dual-served or not, that may compete for traffic to or from Mexico. As discussed further below, the BNSF proposal provides proportional rates for the Laredo gateway to all shippers within the overlapping regions. (See Figure 2.) For example, grain elevators across the Midwest can compete for selling grain to Mexico destinations. Absent the BNSF proposal or some other form of effective protective conditions, CP-KCS would be able to manipulate rates from the Laredo gateway to Mexico destinations for grain movements from non-CP-KCS origins that would favor CP-KCS origins.⁴⁵

⁴⁵ Although non-CP-KCS-served grain shippers may be foreclosed, CP-KCS-served shippers may also suffer due to higher rates charged by CP-KCS absent this competition.

Figure 2
The BNSF Proposal Preserves Benefit of Geographic Competition Across the Laredo Gateway
Joint Associations/UP v. BNSF Proposal



c. Method for Obtaining Gateway Rates

29. The BNSF proposal, by providing a proportional rate matrix to interline carriers, provides the ability and incentive for interlining carriers to market directly to shippers; it does not require shippers first to negotiate with CP-KCS. As discussed below, this approach has proven successful in enabling UP to compete with BNSF for traffic under the I-5 PRA.

30. The Joint Associations and UP proposals instead require shippers to approach CP-KCS to obtain a through rate between origin and destination and a corresponding proportional Rule 11 rate to the gateway. With a proportional Rule 11 rate in hand, the shipper can then negotiate with the

competing interline carrier. This approach requires shippers to engage with CP-KCS in order to get a rate for the interline movement: this may work well for large, sophisticated carriers, but it may be more difficult for smaller shippers to negotiate successfully with CP-KCS and only then negotiate with the other interline railroads.

31. None of the proposals result in shipper-specific rates being shared across railroads. The Joint Associations and UP proposals achieve this by putting the onus on the shipper to obtain a Rule 11 rate from CP-KCS. Whether that shipper-specific rate is shared with the potential interline partner is at the discretion of the shipper. The BNSF proposal averages rates across shippers and routings, such that the interline carriers are provided no information on the identity of the shippers or traffic that results in the proportional rate.

C. THE BNSF PROPOSAL CAN READILY BE IMPLEMENTED TO PRESERVE COMPETITION FOR ALL SHIPPERS TO AND FROM MEXICO

32. The BNSF proposal is based on a long-standing and successful gateway protection arrangement imposed as a condition in the UP/SP merger. As explained by a UP witness, the I-5 PRA arose from changes in the rail network as part of the UP/SP transaction and the desire to preserve single-line and interline competition across an important, affected gateway:

UP and BNSF agreed to a similar approach [a mileage-based prorate] under their “I-5 Agreement” to keep the Portland Gateway open following the UP/SP merger. ... the railroads recognized that BNSF would no longer have incentives to work with UP on an interline basis via the Portland, Oregon gateway for traffic moving between BNSF points north of Portland and points served by UP and BNSF south of Portland. BNSF and SP had previously cooperated closely on such movements. To preserve a UP-BNSF interline option as an alternative to BNSF single-line routes, the parties essentially use a mileage-based prorate of BNSF single-line rates to develop and update a rate factor that UP can use to offer UP-BNSF interline service.⁴⁶

Similar concerns arise regarding the Proposed Transaction, with the Laredo gateway and KCSM points in Mexico analogous to Portland and BNSF points north in the I-5 PRA.⁴⁷

⁴⁶ Rocker/Turner V.S. at 22.

⁴⁷ The I-5 PRA can be found at Rocker/Turner V.S. workpaper “HC – I-5 Agreement.pdf.”

33. The BNSF proposal, like the I-5 PRA, is consistent with preserving the benefits of the Proposed Transaction. The success of the I-5 PRA for BNSF, UP and the affected shippers over the past 25 years demonstrates the value and viability of this approach. As stated by UP executives: “UP’s and BNSF’s agreement to a mileage-based prorate approach in the UP/SP merger demonstrates that use of a mileage-based prorate here would not undermine the benefits of a CP/KCS transaction.”⁴⁸

34. As has been demonstrated by the experience of the I-5 PRA, the BNSF proposal is fully capable of being implemented in this transaction and necessary to preserve competition across the Laredo gateway. UP witnesses argue, however, that the UP proposal (and, by extension, the Joint Associations proposal) are more limited and less complicated than the I-5 Agreement.⁴⁹ The proposals differ in scope, but the Joint Associations and UP are not more limited, as they apply across all gateways. BNSF’s proposal on the other hand is focused on the one gateway with specific demonstrated competitive issues. More significantly, as explained above and by Prof. Wilson, these other approaches would not preserve competition for many shippers that collectively ship large volumes of important commodities (e.g., grain to Mexico).⁵⁰

1. Outline of BNSF Proposal

35. Using the I-5 PRA as a template, I outline how the BNSF proposal can be applied to preserve competition across the Laredo gateway. This involves three steps:

- Establish the traffic categories (the “cells”) for which the Laredo gateway proportional rates are to be established. This involves identifying the regions, commodities, and other economic characteristics of movements (i.e., shipment size, car ownership) that will be included in the same cell for determining an average proportional rate.
- CP-KCS reports relevant information on through revenues and movement characteristics (origin and destination, commodity train size, etc.) to a third-party consultancy which processes the confidential data to calculate the average through revenue per mile for each cell for which there is data, and then populates the “cells” with this average mileage rate.

⁴⁸ Rocker/Turner V.S. at 22.

⁴⁹ Rocker/Turner V.S. at 22.

⁵⁰ See Wilson R.V.S. at § III.

- Other competing railroads can then use the rates from the applicable cell in the matrix as the basis for the rate between the Mexican location and the Laredo gateway (i.e., Laredo or Robstown) to serve shippers and shipments that are covered by the arrangements.

Once the matrix has been initially populated, CP-KCS provides data on a quarterly basis to the third-party consultancy which processes the confidential data to update the rate matrix.

36. Consistent with I-5 PRA, the BNSF proposal provides competitive relief for shippers across much of the U.S. The I-5 PRA applies to large portions of the Western U.S. and Canada. The BNSF-served⁵¹ locations north of Portland subject to the I-5 PRA represent the potential ‘bottleneck’ traffic; this corresponds to the KCSM-served traffic in the BNSF proposal. The UP-served locations in a defined portion of the western U.S. (south of Portland) eligible under the I-5 PRA for proportional rates correspond to the shippers and locations in the U.S. and Canada eligible under the BNSF proposal. The competitive protection against anticompetitive foreclosure that the I-5 PRA provides for access to potential ‘bottleneck’ locations north of Portland is analogous to the access protection against anticompetitive foreclosure that the BNSF proposal gives to KCSM-served ‘bottleneck’ locations in Mexico across the Laredo gateway.

37. In order to account for economic differences that can affect rates, the I-5 PRA categorizes traffic into cells by region (five in the north, one in the south for a total of five combinations of regions), direction (northbound and southbound), and commodity (3-digit STCC). The I-5 PRA also separates traffic based on car type, car ownership (railroad or private), and whether trainload (or not). In general, these same types of distinctions apply to the BNSF proposal.

38. In practice, the implementation of the BNSF proposal is simpler than UP suggests;⁵² most “cells” based on combinations of all characteristics currently lack any traffic. The vast bulk of traffic falls into a small number of distinct cells for establishing proportional rates. A large share of traffic is made up of few different commodities that mostly travel in one direction. These typically travel in one (or a couple) of car types depending on commodity. For example, large shares of the covered traffic consist of {{ [REDACTED] }}

⁵¹ Under the I-5 PRA, certain connecting and interline traffic are included in what I refer to as BNSF-served and UP-served traffic.

⁵² See Rucker/Turner V.S. at 22.

[REDACTED]

[REDACTED] } }⁵³

39. The BNSF proposal automatically accounts for changes in traffic make-up over time. When new movements occur, a corresponding new “cell” would be populated in the matrix the following quarter. Thus, as the transportation service expands, the availability of competitive rates expands in lockstep. The flexibility of the rate matrix and ease with which it is readily updated are important features of BNSF’s proposal.

40. I discuss below two specific important cases for implementing the BNSF proposal: southbound grain and northbound intermodal traffic.

2. BNSF Proposal: Grain

41. Grain is an important commodity for demonstrating how the BNSF proposal can be applied. As explained by Prof. Wilson, grain is an economically important commodity for cross-border traffic, and the Proposed Transaction presents specific new competitive risks for U.S. grain producers.⁵⁴ Moreover, evidence on historical traffic patterns demonstrates that concerns regarding foreclosure must be taken seriously.⁵⁵ Figure 3 shows the origin and destination regions for establishing proportional rates over the Laredo gateway that can be used by U.S. (and Canadian) grain shippers. Based on a review of the existing traffic, the origin regions are divided into two U.S. regions plus Canada, and KCSM-served Mexico destinations are divided into two regions.⁵⁶

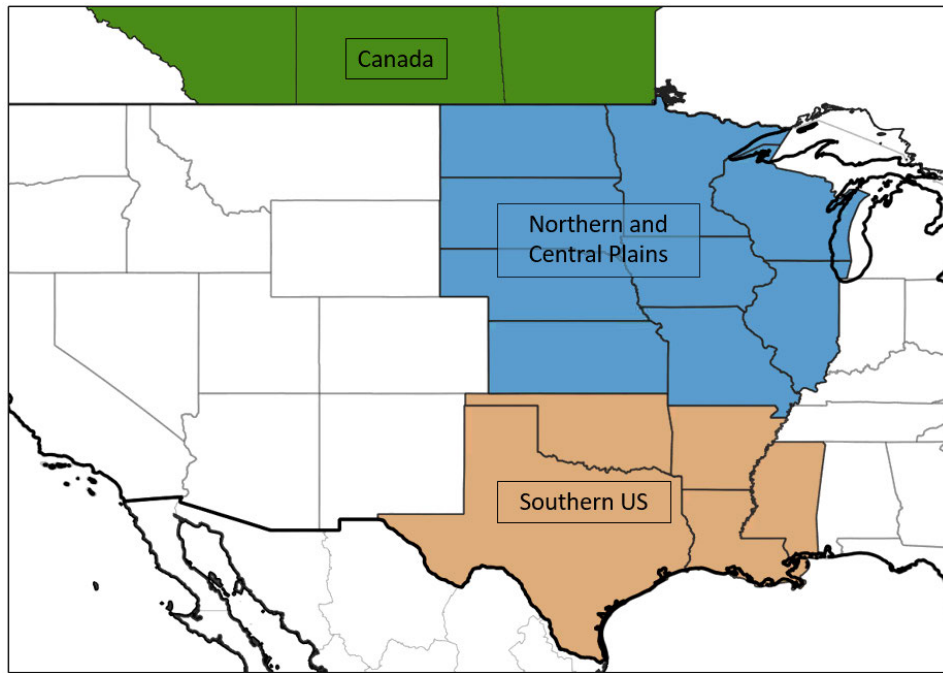
⁵³ See my backup materials.

⁵⁴ Wilson R.V.S. at §§ II and III.

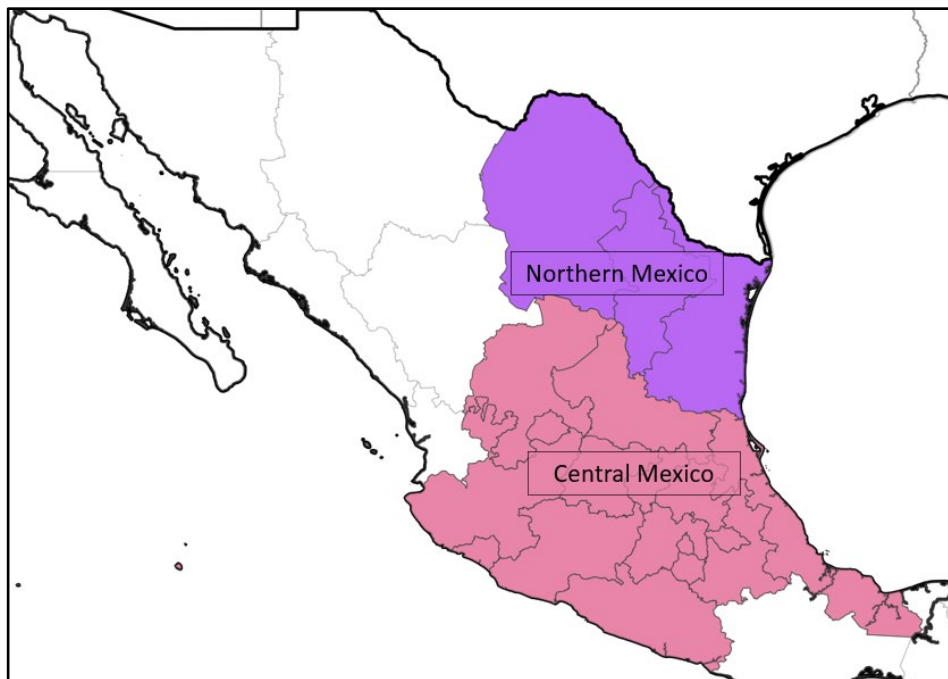
⁵⁵ Reishus V.S. at 38-39

⁵⁶ { [REDACTED] }

Figure 3
Origin and Destination Regions for Grain Under the BNSF Proposal
Proposed Origin Regions



Proposed Destination Regions



42. The resulting structure for the grain matrix is shown in Table 2, with three origin regions and two destination regions for each grain commodity. Table 2 presents a format showing how

the regions and commodities would be used to identify the categories for which proportional mileage rates would be determined based on average rates for CP-KCS grain movements. The proportional rate table is unpopulated; I show below how a calculation would be performed, using existing 2019 KCS data as an example.

Table 2
Example of Format for Proportional Rate Matrix Over the Laredo Gateway
Grain Shipments
Proportional Rates to be Expressed in Cents per Ton-mile

Commodity	Destination Region	<i>Origin Region</i>		
		Canada	Northern & Central Plains	Southern U.S.
Corn	Northern Mexico			
	Central Mexico			
Soybeans	Northern Mexico			
	Central Mexico			
Wheat	Northern Mexico			
	Central Mexico			

Note: Unpopulated matrix for proportional rates for major grain commodities. The cents per ton-mile proportionate rates would be determined from combined CP-KCS traffic.

43. Using the example of soybeans shipped from Northern & Central Plains to Northern Mexico, I illustrate how the calculation of the proportional rate would be performed. To begin, CP-KCS provides information on shipment revenues and related information on movements between the identified regions to the independent third-party consultancy responsible for the calculation on a confidential basis. The revenues would generally be net of refunds and rebates.

44. Using data from the consolidated CP-KCS waybill data, I examine CP or KCS originating soybean shipments from the U.S. states in the Northern and Central Plains region (as defined above) that moved southbound over Laredo to Northern Mexico.⁵⁷ Consistent with the categories

⁵⁷ For purposes of the illustrative calculation, CP-KCS movements from the 2019 data would be included even though they represent interline movements in this period. There are {█} CP-originating movements in the data that meet the criteria for this illustrative calculation.

in the I-5 PRA and for purposes of calculating a proportional rate to be included in the example matrix, I limit these movements to trainload shipments of soybeans moving in railroad-owned, covered hoppers. In this data, {{[REDACTED]}} soybeans shipments from the Northern and Central Plains to Northern Mexico travel in covered hoppers, {{[REDACTED]}} occur in train sizes of 70 carloads or more, and {{[REDACTED]}} are in rail-owned equipment. This example illustrates that, despite the multiple movement characteristics that are considered, most traffic will be covered by a small number of cells. Based on 2019 CP-KCS waybill data, {{[REDACTED]}} carloads of soybeans meet these criteria for movements from the Central and Northern Plains to Northern Mexico.

45. The independent third-party consultancy calculates the average rate per ton-mile across the movements from the revenue data provided by CP-KCS. The per ton-mile through rate for each movement is calculated by dividing the total CP-KCS through revenue by the through ton-miles on CP-KCS.⁵⁸ The resulting proportional rate is the average per ton-mile through rate across all movements. In this example, using 2019 KCS waybill data, the third-party consultancy would calculate a proportional rate of {{[REDACTED]}} cents per ton-mile in the matrix above for soybeans from Central and Northern U.S. to Northern Mexico.⁵⁹ See Table 4 for an example matrix with this value included.

⁵⁸ Waybill data do not fully reflect rebates and refunds attributable to individual waybill movements.

⁵⁹ The carriers could agree that for some or all commodities, a car-mile rate would be more appropriate.

Table 3
Proportional Rate Matrix Over the Laredo Gateway for Grain Shipments
Example of Soybeans from Northern/Central Plains to Northern Mexico
Cents per Ton-mile

Commodity	Destination Region	<i>Origin Region</i>		
		Canada	Northern & Central Plains	Southern U.S.
Corn	Northern Mexico			
	Central Mexico			
Soybeans	Northern Mexico		{{[REDACTED]}}	
	Central Mexico			
Wheat	Northern Mexico			
	Central Mexico			

Note: Value based on historic KCS data. The proportionate rates would be determined from combined CP-KCS traffic and revenues.

46. This value from the matrix can be used by the connecting U.S. carriers to establish the rate from the Laredo gateway (i.e., Laredo for UP, Robstown for BNSF) to Northern Mexico destinations for applicable soybeans traffic, based on KCSM system mileage between Laredo and the Northern Mexico destinations. For example, consider a potential movement of soybeans from a shipper in Illinois to Monterrey. With the proportional rate from the matrix above, BNSF would know the rate that it would pay to KCS-KCSM from Robstown to Monterrey. With that distance being approximately 308 miles (143 miles from Robstown to Laredo and 165 miles from Laredo to Monterrey), BNSF would know the rate for that movement across the Laredo gateway (from Robstown) would be {{[REDACTED]}} per ton or {{[REDACTED]}} per car (assuming a weight of around 110 tons per car). Based on this knowledge, BNSF could market to soybean shippers in an attempt to compete for this traffic. (UP would make a similar calculation from Laredo to Monterrey and could also compete for this traffic.) There is no guarantee that BNSF (or UP) would capture this traffic as BNSF, UP and CP-KCS would compete on rates and service to obtain this cross-border traffic from U.S. shippers. Under the proposal, however, BNSF and UP would be assured that the rates for the CP-KCS movement to or from the Laredo gateway that would be incorporated into the through rates offered to shippers would be derived from CP-KCS market rates.

47. As explained in more detail by Prof. Wilson, the BNSF proposal preserves competitive alternatives for U.S. grain producers and shippers that would be impaired by the Proposed Transaction. Grain elevators not located on CP-KCS will see competitive access preserved across Laredo to numerous destinations located on KCSM. But CP-KCS shippers can also benefit from this competition; to the extent that the competing interline carriers in the U.S. successfully provide low-cost, efficient service to Laredo, CP-KCS will need to provide comparable service and pricing to shippers using CP-KCS. All shippers can benefit from the absence of foreclosure and the rail-on-rail competition that is preserved by the BNSF proposal.

3. BNSF Proposal: Intermodal

48. As another example, the BNSF proposal also can apply to intermodal traffic. Intermodal traffic represents a large portion ({{[REDACTED]}}) of the northbound Laredo gateway traffic and an even larger share of anticipated diversions and new traffic over the gateway identified by CP-KCS.⁶⁰ Given the economics associated with intermodal (and auto) traffic, however, certain details may need to be adjusted. Intermodal and auto ramps can directly compete within the same local area.⁶¹ The regions for categorizing intermodal traffic in the proportional rate matrix can reflect these more localized geographic areas. (See Table 4 for an example of a partial listing.) Likewise, rather than determining rates on a ton-mile basis, proportional rates can be determined based on container miles.

⁶⁰ See Reishus V.S. Table B-1. Percentages are determined by counting intermodal units and carloads. See also my workpaper, “Estimated Incremental CP-KCS Revenues and Costs.xlsx.”

⁶¹ See also Rucker/Turner V.S. at 23.

Table 4
Example Format for the Proportional Rate Matrix for Intermodal Shipments
Northbound, Selected U.S. Locations, Rates in \$ per Container-miles

Mexico Intermodal Areas

U.S. Area	Monterrey	San Luis Potosí	Greater Mexico City
Chicago, IL			
Minneapolis, MN			
Kansas City, MO			
Detroit, MI			
Dallas-Fort Worth, TX			

Note: Value based on historic KCS data. The proportional rates would be determined from combined CP-KCS traffic and revenues.

49. The BNSF proposal will preserve competition across the Laredo gateway for intermodal traffic. The complexity of the intermodal business with shippers, consignees, trucking companies, and third-party logistics companies does not make either of these proposals, which require “shippers” to obtain rates from CP-KCS to the same (or neighboring) ramp in order to access proportional rates for interline service, practical or available for many intermodal shippers. The other proposals would provide no competitive relief for many, typical intermodal shippers, particularly those shipping via trucking companies using intermodal and the logistic entities that broadly serve the intermodal marketplace.

50. Similar to the example for grain, we can use the existing KCS waybill data to calculate example rates. Using KCS single-line movements from 2019, there were {{REDACTED}} units moving from Monterrey to the Kansas City area. Based on the information available in the waybill data, these calculations would result in a rate of {{REDACTED}} per container mile to be included in the rate matrix.⁶² Thus, both BNSF and UP could compete for intermodal traffic over the Laredo gateway between Monterrey and Kansas City with a known rate for the movement. In this example and with an estimate of the distances involved, the resulting rate for BNSF from the Monterrey ramp to Robstown would be {{REDACTED}}/container; the corresponding rate for UP to Laredo from the

⁶² This value would be entered into the cell Kansas City – Monterrey in the example matrix in Table 4. The revenue in the waybill may not accurately reflect the actual revenue and rates earned by KCS.

same ramp would be {{[REDACTED]}}/container. With these rates, BNSF and UP could compete with CP-KCS for this intermodal traffic based on total through rates and service characteristics.

III. RESPONSE TO CN COMMENTS REGARDING DIVERSIONS, REVENUES AND COSTS IN THE APPLICATION

A. CN COMMENTS WITH RESPECT TO RAIL-TO-RAIL DIVERSIONS AND FORECLOSURE

51. CN has identified numerous issues with Applicants' estimation of rail-to-rail diversion traffic. CN describes how Applicants' volumes of diversions are overstated,⁶³ the incremental revenues received for those volumes are overestimated,⁶⁴ and the incremental costs for CP-KCS to serve these diversions are underestimated.⁶⁵ CN highlights how the Application presumes large diversions with no rate reductions, often over longer routes, and for which CP-KCS will be earning large incremental margins.⁶⁶

52. CN's criticisms highlight a fundamental contradiction in the Application: if CP-KCS' Application is to be believed regarding the economics of its anticipated rail-to-rail diversions, then it effectively implies that CP-KCS expects to be foreclosing competitive traffic in the future. As CN expert David Hunt states: "Applicants' experts appear to assume that customers after the merger will choose CPKC as a rail carrier even if distances are longer and rates are higher than those of the current rail movement. *Absent competitive foreclosure by CPKC, this is not a logical assumption.*"⁶⁷

53. CN's criticisms focus on what they view as errors in the Application. Despite having reviewed the CN criticism, being ordered by the Board to update its Operating Plan, and submitting an updated Operating Plan, the Applicants did not alter any of the relevant analysis of the rail-to-

⁶³ See, e.g., Verified Statement of David T. Hunt, February 28, 2022 ("Hunt V.S."), attached to CN Comments, §§ 4.1 and 4.3.

⁶⁴ See, e.g., Hunt V.S. § 4.2.

⁶⁵ See, e.g., Verified Statement of Hugh Randall, February 28, 2022 ("Randall V.S."), attached to CN Comments, §§ 4.2, 4.4, and 4.5.

⁶⁶ CN Comments at 35-36.

⁶⁷ Hunt V.S. at 19. (Emphasis added.)

rail diversions.⁶⁸ I consider here the possibility that the Application is more or less correct with respect to rail-to-rail diversions; if certain of CN’s criticisms hold, and the margins on the anticipated diversions are in fact overstated, my basic finding still holds. The analysis strongly demonstrates the likelihood of foreclosure arising from the Proposed Transaction.

1. According to CN, CP-KCS diverts traffic to routes that are, on average, longer resulting in an overstatement of diversions

54. As CN expert David Hunt describes, Applicants’ methodology for estimating diversions to CP-KCS does not sufficiently account for route distance in their methodology.⁶⁹ The overall impact of this lack of attention to route circuitry is that Applicants project that CP-KCS diversions will travel along routes that are, on average, 12% longer than the existing movement.⁷⁰ This approach leads to nonsensical results such as CP-KCS diverting the same percentage of traffic on two routes regardless of whether the CP-KCS route is hundreds of miles shorter or hundreds of miles longer than the route of the traffic that is being diverted.⁷¹ Given this and other facts, Mr. Hunt concludes that Applicants’ estimated diversions “[are] simply not credible.”⁷²

55. The case of the Laredo gateway illustrates how CP-KCS diversions result in longer hauls for shippers. Figure 4 shows the route mileage for CP-KCS, BNSF, and UP between Chicago, IL and Laredo, TX. Chicago is a large market for Applicants’ diverted traffic, representing {{[REDACTED]}} of revenues from rail-to-rail diversions over Laredo.⁷³ The route that CP-KCS projects to divert this traffic to is 20% longer in the case of UP, and 4% longer in the case of BNSF.

⁶⁸ Decision No. 17 and CP-KCS, Amended Operating Plan, CP-47/KCS-34, May 13, 2022.

⁶⁹ Hunt V.S. at 8-14.

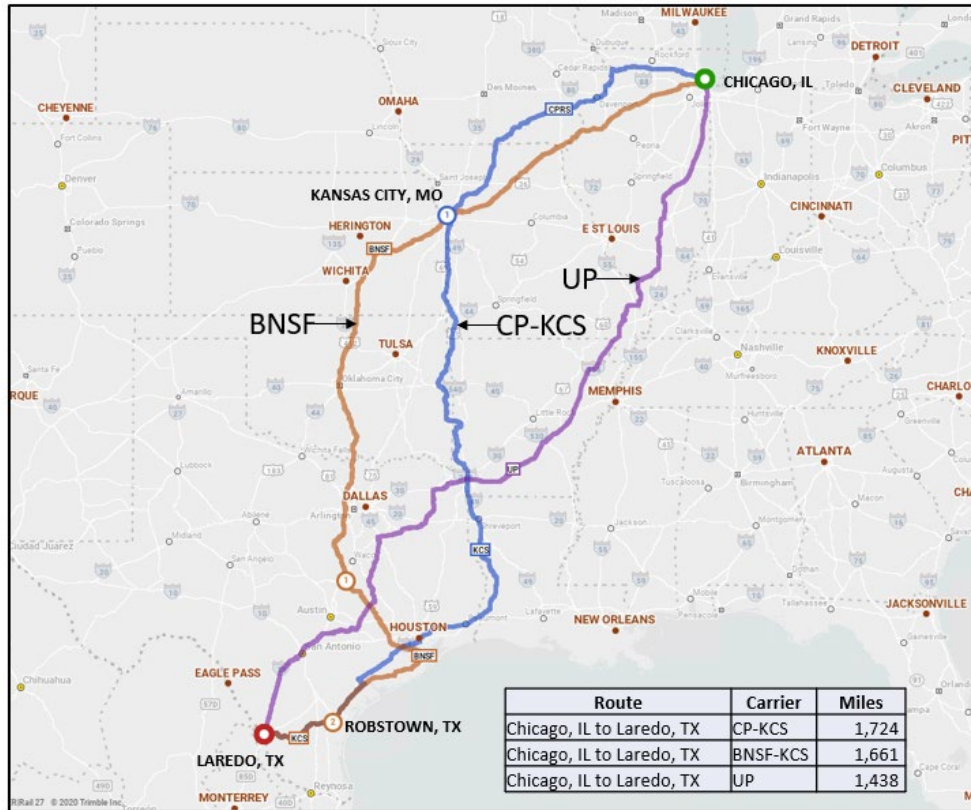
⁷⁰ See Hunt V.S. Exhibit 4-3 and Verified Statement of Richard W. Brown and Nathaniel S. Zebrowski, October 28, 2021 (“Brown/Zebrowski V.S.”), attached to Application, Table 6.

⁷¹ See Hunt V.S. at 10-11.

⁷² See Hunt V.S. at 14.

⁷³ See my backup materials, “Estimated Incremental CP-KCS Revenues and Costs.xlsx.”

Figure 4
Map of Route Length Between Chicago, IL and Laredo, TX



Source: PC Miler

2. Rates for traffic diverted to CP-KCS

56. Mr. Hunt also criticizes Applicants' estimation of per-unit revenues for the diverted movements, and shows that, where data is available, Applicants often used incremental revenue figures that are higher than the current revenue earned by the non-CP-KCS interline carrier.⁷⁴ This assumption is in direct conflict with the choice regarding route distances explained above, in that Applicants assume shippers will be diverted to CP-KCS regardless of whether the rate is increased or whether the route is more circuitous.⁷⁵

⁷⁴ See Hunt V.S. Exhibit 4-5.

⁷⁵ Hunt V.S. at 19.

57. CP-KCS, however, contends that its incremental revenues on rail-to-rail diversions will be less than, or not exceed, revenues currently earned by the competing railroad. CP-KCS' witnesses Messrs. Brown and Zebrowski begin their analysis by attempting to identify the "revenue earned by other carriers for portion of move that will shift to CP/KCS."⁷⁶ CP-KCS' experts identify CP-KCS' incremental revenue based on the reported or estimated revenue earned by the existing carrier(s) for the diverted traffic, depending on the type of diversion and the nature of the data available.⁷⁷ Applicants assume they will be able to charge the same price and earn revenue equal to what the existing carrier is earning.⁷⁸ Only in the case of the diversion of existing single-line traffic on another carrier, does CP-KCS assume competition would require it to lower its price by a 5% level.⁷⁹

3. Assumed CP-KCS margins on rail-to-rail diversions

58. CN expert Mr. Randall examines Applicants' estimated incremental costs for traffic that CP-KCS proposes to divert. As explained by Mr. Baranowski, these costs represent "the incremental cost to CP/KCS of handling the diverted shipments."⁸⁰ By several metrics, Mr. Randall finds these costs to be "well below historical benchmarks" and "significantly underestimated."⁸¹ In summary, he finds that the incremental revenues anticipated by CP-KCS are out of line with expenses and operating ratios of not only other Class I carriers, but also Applicants' own historical operations.⁸²

⁷⁶ Brown/Zebrowski V.S. at 52.

⁷⁷ Brown/Zebrowski V.S. at 52-53.

⁷⁸ Brown/Zebrowski V.S. at 52-53.

⁷⁹ Brown/Zebrowski V.S. at 21.

⁸⁰ Baranowski V.S. at 20.

⁸¹ See Randall V.S. at pdf pages 37-38.

⁸² See Randall V.S. at pdf pages 33-34 and 37-39.

B. CP-KCS’ RAIL-TO-RAIL DIVERSION ANALYSES ARE CONSISTENT WITH THE INCENTIVE AND ABILITY TO FORECLOSE THE LAREDO GATEWAY

1. Applicants have no basis for assuming no effective price competition for Mexico traffic diversions absent foreclosure

59. As discussed above, numerous parties have expressed concern regarding the ability and willingness of CP-KCS to engage in foreclosure, and the need for conditions to preserve vertical competition. The Applicants’ economic expert, Dr. Majure, however, argues that CP-KCS lack the incentive to foreclose other railroads such that shippers would be harmed. “A combined CP/KCS would not be expected to have any *incentive* to affect the competitive terms” of a sole-served shipper, “because KCS would already be collecting the full measure of returns associated with its existing market power.”⁸³ This is what has been “labelled as ‘the one-lump theory’.”⁸⁴ According to Dr. Majure, under the one-lump theory, following the Proposed Transaction, a “diversion to the KCS/CP route would indicate a presumptively better outcome for that shipper. Likewise, if the other carrier responds to this pressure with *an offer to tighten margins and retain the shipper*, the outcome reflects enhanced competition.”⁸⁵

60. CN has shown, however, that CP-KCS’ rail-to-rail diversion analysis contradicts Dr. Majure’s assumptions. As I show below with respect to the Laredo gateway, CP-KCS routes for diverted traffic are as long or longer than existing routes.⁸⁶ CP-KCS assumes no reduction in rates for diversion of existing Laredo gateway traffic, and it assumes it will earn incremental margins above costs on this traffic.⁸⁷ But this is wholly inconsistent with the one-lump theory which says KCSM and KCS should already be “collecting the full measure of returns” associated with its market power. CP-KCS assumes that there is an additional large “lump” – revenue above

⁸³ Majure V.S. at 15.

⁸⁴ Majure V.S. at 15. Footnote omitted. See also discussion at Reishus V.S at 12-14 and Salop V.S. at 7-14.

⁸⁵ Majure V.S. at 15. Emphasis added.

⁸⁶ On average, the new CP-KCS single-line routes are 217 miles longer. CN Comments at 35, citing Brown/Zebrowski V.S., Table 6.

⁸⁷ KCSM participates in all existing Laredo gateway movements, so none of this traffic is existing single-line traffic on which CP-KCS would reduce rates by 5%.

incremental cost – that it will capture on the diverted traffic it takes from the existing interline carriers.

61. CP-KCS also assumes that competition for traffic over the Laredo gateway will not cause the rates that it receives on diverted traffic to be less than what the competing U.S. railroad is already earning for its portion of the move. But the incumbent interline carriers, UP and BNSF, will have the incentive to try to retain this traffic through additional price competition.⁸⁸ The CP-KCS diversion analysis, which anticipates earning incremental margins on the diverted traffic, implies that the incumbent railroad from which traffic will be diverted, often with a shorter route than that of the merged CP-KCS, possesses the ability and incentive to compete on price for the traffic that CP-KCS says it will divert. Given the anticipated margins that CP-KCS expects to earn on traffic that travels on average over longer routes, there is no basis for assuming that the existing carrier earning the same revenue would lack the ability to compete on price.

62. The CP-KCS diversion analysis is consistent only with foreclosure by CP-KCS for existing interline traffic. It is foreclosure that would prevent the existing shipper from competing on price by reducing margins in an effort to retain potentially divertible traffic following the Proposed Transaction.⁸⁹ As Dr. Majure explained, with competition the existing “carrier responds to this pressure [i.e., from single-line routes arising from the merger] with an offer to tighten margins and retain the shipper.”⁹⁰ This is, however, precisely what is *not* happening under the CP-KCS diversion analysis. CP-KCS indicates that the competing interconnecting carrier will be unable to tighten margins and meaningfully compete on price to retain the traffic that CP-KCS says it will divert. But this is inconsistent with the large incremental margins with no reduction in rates that CP-KCS claims for its diverted traffic.

63. Consistent with its diversion analysis, CP-KCS has the incentive and ability to foreclose the existing shipper to keep it from competing on price and lowering CP-KCS’ incremental revenues and margins. This foreclosure can be the result of a manipulated increase in rates (or

⁸⁸ Note that the one-lump theory does not imply that the non-bottleneck carrier is pricing at marginal cost, rather that it is pricing at the marginal cost of the second-best (i.e., the next more costly) alternative.

⁸⁹ As highlighted by CN, the CP-KCS diversion analysis lacks logic “absent competitive foreclosure.” Hunt V.S. at 19.

⁹⁰ Majure V.S. at 15.

degradation in service) by the bottleneck railroad such that the incumbent interline carrier is no longer in the position to “tighten margins.” Introduction of potentially improved single-line service from the Proposed Transaction may add to competitive alternatives, but the full benefits of competition to shippers will be lost if foreclosure over the gateway is allowed to occur.

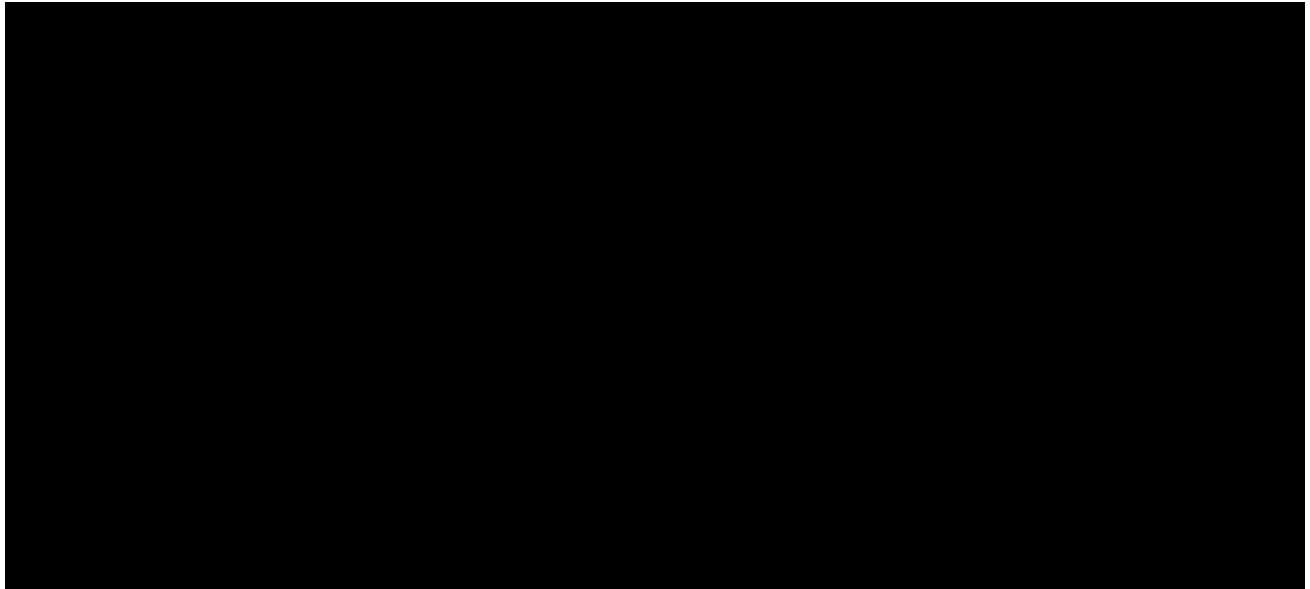
64. I demonstrate the operation of this foreclosure under the CP-KCS diversion analysis across the Laredo gateway.

2. Applicants anticipate they will earn large margins for traffic diverted from other railroads across the Laredo gateway

65. Table 5 below shows, for the subset of Applicants’ rail-to-rail diversions that will move over Laredo, the incremental revenues, costs, and margins anticipated by CP-KCS as provided by Mr. Baranowski. The incremental revenues are estimated by Messrs. Brown and Zebrowski as part of their diversion estimates. Incremental costs are those estimated by Mr. Baranowski using a modified URCS costing process to estimate the incremental cost for each additional unit for all diverted traffic.⁹¹ Final incremental costs are calculated by multiplying the per-unit costs by the number of diverted units for that movement. The incremental margins anticipated by CP-KCS amount to a total of {{[REDACTED]}} and, on a per-car basis, range from {{[REDACTED]}} for intermodal traffic to over {{[REDACTED]}} dollars per carload for energy and metals.

⁹¹ See Baranowski V.S. at 20-21.

Table 5
Summary of Applicants’ Estimated Incremental CP-KCS Revenues and Costs
for Rail-to-Rail Diversions over Laredo {{



}}

66. Table 5 demonstrates, consistent with the CN analysis, that CP-KCS expects to earn extraordinary incremental margins on rail traffic across the Laredo gateway that it expects to divert from other rail carriers. Across all commodities shown, CP-KCS expects to earn revenue that is {{[REDACTED]}} times the estimated incremental costs ({{[REDACTED]}}).⁹²

3. Shippers will be harmed by CP-KCS’ incentive and ability to foreclose competition over the Laredo gateway

67. CP-KCS anticipates no reduction in through rates to shippers on the rail-to-rail diversions for interline traffic over the Laredo gateway. This follows from the preceding analysis and from statements from CP-KCS themselves that the projected incremental revenues to the merged CP-KCS are either approximately the same or occasionally higher than the current rate earned by the existing interline carrier. This implies that the anticipated through rates provided to shippers by

⁹² The CN critique contends that the incremental margins are overstated. See, for example, Randall V.S. at §§ 4.1 and 4.2. Even at more ordinary levels, the assumed incremental margins earned on diverted traffic imply that the existing interline carriers would have the ability to compete on price for Laredo gateway traffic, absent foreclosure.

CP-KCS on the diverted traffic are the same as the total through rates provided by the existing interline service.

68. Under the CP-KCS diversion analysis, shippers do not benefit from price competition across the Laredo gateway. For example, KCSM (and KCS-Tex Mex) can raise rates for existing traffic to all connecting U.S. carriers – UP, BNSF, and CP-KCS – such that the new higher Mexico rates would prevent the incumbent carriers from effectively competing by lowering rates on the U.S. interline movement. Absent rate manipulation on the Mexico portion of the movement, the incumbent interline carriers would have the incentive and ability to compete on rates to retain the traffic that CP-KCS intends to divert. At the same time, CP-KCS can set the rate on the U.S. portion of *its* movements to maintain the existing through rate. This strategy would maintain through rates at current levels, provide the merged carriers incremental revenue equal to what the interline carriers had previously been earning, and preclude the existing carriers from competing on rates to retain the diverted traffic.

69. In essence, CP-KCS assumes it will be able to divert these shipments without price competition from the currently serving railroads; a result that would be achievable only by foreclosing rivals. Instead, as the proportional rate proposals provide, a competitive rate for access through the Laredo gateway will encourage competition between CP-KCS and the existing carriers.

70. CN's analysis demonstrates that the CP-KCS diversions are fully consistent with the incentive and ability to foreclose competition across the Laredo gateway. Similarly, the empirical analyses of the Laredo gateway by UP, BNSF and CSX show foreclosure for certain current traffic.⁹³ Elimination of the expected price competition, due to foreclosure, across the Laredo gateway harms shippers and results in rates above those that would prevail if vertical competition among railroads were allowed to occur.

⁹³ Reishus V.S. at §V.A. See also Salop V.S. at 27-32, and Carey/Bremser V.S. at §§II.A and B

I declare under penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink, appearing to read "David Reishus". The signature is stylized with a large, looped initial "D" and a cursive "R".

David Reishus
July 12, 2022

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36500

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

Response Verified Statement of William W. Wilson, PhD

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

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

**Verified Statement of William W. Wilson, PhD in Support of
July 12, 2022 Response Comments by BNSF Railway Company**

I. Introduction and Summary

I am William W. Wilson, a Professor at North Dakota State University (“NDSU”) in Agribusiness and Applied Economics with a sabbatical at Stanford University. I previously submitted on February 28, 2022 a verified statement in this proceeding as a witness for BNSF.¹ My background as an expert in agricultural economics and logistics is further described in my February 28 statement.²

In my February 28 verified statement, I explained that: 1) Mexico is a rapidly growing agricultural importer, primarily by rail; 2) the Mexican market is geographically disperse, but more concentrated in the east and southeast; 3) the U.S. and Mexican grain marketing systems, especially for shipments by rail, have become highly integrated; 4) while there are several rail border crossing points,

¹ Unless otherwise noted, I will use the same acronyms and abbreviations used in my prior verified statement.

² My vitae can be found at https://www.ndsu.edu/fileadmin/agecon/bio_jan_2022.pdf

Laredo is by far dominant; 5) the KCS has effectively foreclosed BNSF's ability to compete for the shipment of grain over Laredo and BNSF's grain shipments have declined to near zero; 6) foreclosure at Laredo has limited BNSF's access to the larger and more concentrated markets in the east and southeast of Mexico and/or forced it to use longer and more circuitous routings through other border crossings; and 7) any new diversions of grain traffic to Mexico through Laredo as a result of the merger of CP and KCS would create a serious risk of congestion in the Houston area.

A number of other parties, including shippers, shipper groups and rail carriers, also submitted comments on issues that I addressed in my February 28 verified statement. BNSF has asked me to respond to those comments, in particular to the concerns raised that the CP-KCS merger could harm agricultural interests in the United States. This Reply Statement responds to the comments as follows:

- (1) As grain shippers North Dakota Wheat Commission ("NDWC"), U.S. Wheat Associates ("USWA"), and The National Association of Wheat Growers ("NAWG") point out, Canadian railway rate mechanisms already encourage the shipment of grain to the United States and Mexico, displacing shipments by U.S. farmers and shippers. The control that CP-KCS will have over movements of grain through the Laredo gateway will likely lead to a rise in Canadian shipments to Mexico following the merger – risking a loss of market access by U.S. grain farmers.
- (2) Concerns over possible foreclosure of access to Mexico led some commenting parties including the Union Pacific Railroad ("UP") and the National Industrial Transportation League ("NITL") to propose proportional rate mechanisms to ensure that reasonable and competitive rates will be available for movements into and out of Mexico. The specific mechanisms proposed by those parties, however, will not help U.S. grain

farmers because the rate remedies would only be available to shippers from origins served by both CP-KCS and a competing railway. Those proposed mechanisms ignore the importance and prevalence of geographic competition among grain shippers in broader regional areas.

- (3) BNSF proposed a proportional rate mechanism that would be more effective than the mechanisms proposed by the other commenting parties. BNSF's proposal is based on a time-tested, transparent model that accounts for geographic competition in relevant grain markets and would ensure that U.S. grain farmers will continue to have commercial access to growing Mexican markets. BNSF's prop-rate proposal also avoids the key limitations of the gateway protections proposed by other parties.

I discuss these issues further below.

II. Grain Shippers Are Correct that the CP-KCS Merger Will Unfairly Promote Canadian Grain Shipments at the Expense of U.S. Grain Farmers.

Several associations representing U.S. grain farmers and shippers expressed concerns that the CP-KCS merger could harm U.S. producers by displacing shipments of U.S. grains to Mexico with Canadian shipments. The North Dakota Wheat Commission ("NDWC") stated that "NDWC is concerned that Canadian shippers may gain an unfair advantage over North Dakota wheat shippers." (NDWC Comments 5, Feb 28, 2022.). One of NDWC's biggest concerns is "unfair Canadian wheat competition based on rail inequities. . . ." (*Id.* at 12.). Similarly, the United States Wheat Associates ("USWA") stated that "USWA has some concerns about how this transaction will affect wheat shippers in the U.S. While USWA welcomes the addition of the CP's Northern US plains network to the KCS system, we are concerned that Canadian shippers may gain an unfair advantage over US wheat shippers." (USWA Comments 3, Feb. 28, 2022.). The National

Association of Wheat Growers (“NAWG”) expressed “concern about how the proposed CPKC will affect wheat shipments moving from Canada to the [United States] and Mexico putting US wheat producers at a disadvantage. If these concerns come to fruition, the CPKC having a direct line into Mexico would put US wheat producers at a competitive disadvantage in their largest market.” (NAWG Comments 2, Mar. 3, 2022.). The NAWG flagged as a specific concern “the potential for preferential rates for Canadian shippers due to differing domestic rail policies between the US and Canada” and pointed out “[t]hese policies keep Canadian rail rates lower compared to the US.” (*Id.* at 2.). All of these associations asked the STB to impose conditions to preserve competition on grain exports to the growing market in Mexico.

The concerns voiced by these grain shipping interests are consistent with those raised in my February 28 statement that the merged CP-KCS will favor shippers on its own expanded network and will continue to foreclose BNSF from the growing market in the parts of Mexico accessible through Laredo. (BNSF Comments, V.S. Wilson 21-23, Feb. 28, 2022.). As depicted in Figure 1³ below, an explicit objective of the merging parties is to expand the movement of freight, and in particular grain, between Canada and Mexico. CP’s Vice President of Commercial Integration and KCS’s Executive Vice President and Chief Marketing Officer heralded the opportunity: “Among the most exciting new opportunities created by the CP/KCS combination will be the ability to expand the market reach of grain and

³ From CP-KCS website promoting the merger - <https://futureforfreight.com/>

other bulk shippers that are, or could be, served by CP in the Upper Midwest and Canada.” (Appl., V.S. Wahba/Naatz ¶15, Oct. 29, 2021.)

Figure 1



The significant problem is that this expansion of Canadian grain shipments to Mexico will not be based on fair competition between U.S. and Canadian grain growers, but rather will result from two factors that put U.S. farmers at an unfair disadvantage relative to Canadian farmers. The first factor, which I explain in further detail below, involves the rate regulatory regime in Canada that suppresses rates for movement of grain within Canada and therefore incentivizes the

movement of grain into the United States and Mexico. The second factor is that CP-KCS will be able to control movements over the border at Laredo and thereby facilitate movements by Canadian grain shippers on CP's existing Canadian lines and inhibit movements by U.S. grain shippers that use other rail carriers to access Mexico.

The grain shipper comments discussed above were clear that their concern about the unfair effects of the merger flow from a rate regulation regime in Canada that suppresses rates for grain shippers in Canada. (*See* NAWG Comments 2; USWA Comments 3; NDWC Comments 4, 17-18.) The low railway freight rates within Canada are Canadian national policy to benefit Canadian grain shippers, and have been a source of contention for U.S. grain shippers for at least 30 years.⁴ The low rates paid to Canadian rail carriers for shipments within Canada create an incentive for Canadian rail carriers to prioritize shipping Canadian grain to the United States and Mexico.

Rail rate regulations for grain in Canada have a long history going back to at least the early 1900s. Over time, the rates became distorted relative to rates on other movements within Canada, as well as relative to like movements in the United States. The rate distortion resulted in numerous controversies both within Canada and internationally, and in response, the regime was revised to set the rates at a higher level. However, the rates to ship grain by rail in Canada remained

⁴ CANADIAN TRANSPORT AGENCY, AT THE HEART OF TRANSPORTATION: A MOVING HISTORY (JUNE 2017), available at <https://otc-cta.gc.ca/eng/publication/at-heart-transportation-a-moving-history>.

below competing movements and, after a period, there was further controversy and a subsequent revision to the regulations.

The rail rate regulatory regime for grain in Canada has evolved and is an integral component of national policy. The current Canadian rate regime was established in 2000 for the shipping of western Canadian grain and is called the Maximum Revenue Entitlement (“MRE”).⁵ A formula is used to determine the maximum amount that a carrier can earn on an annual basis for grain shipments. If the carrier’s revenue exceeds the revenue cap, the surplus is given to the *Western Grains Research Foundation*, a farmer-directed research fund. As articulated by the NDWC, “[t]he results of those policies have become clear over time...Canadian producers pay less to move wheat similar distances...by as much as 30% for similar moves.” (NDWC Comments 5.)

However, the rate constraints apply only to movements within Canada of Canadian grain. The MRE rates apply to grain shipments from the western Canadian prairies to Thunder Bay on Lake Superior and Vancouver and Prince Rupert on the Pacific coast. The MRE rates are used for exports from these Canadian locations to any country other than to the United States, and exclude shipment of grains that originate in the United States. Thus, even though these

⁵ The current Canada Transportation Act (“CTA”) and the MRE mechanisms is described in detail at: <https://laws.justice.gc.ca/eng/acts/C-10.4/index.html>. The legislation governing the Transportation of Western Grain Transportation can be found in Division VI of the CTA, and particularly with Paragraphs 147, 150 and 151 which define how the MRE Program is applied. Here is a plain language Guide to the MRE Program: <https://otc-cta.gc.ca/eng/publication/maximum-revenue-entitlement-a-guide> and the link to the MRE Page: <https://otc-cta.gc.ca/eng/western-grain-maximum-revenue-entitlement-program>

freight rates are less than those in the United States, growers in the United States cannot take their grain across the border to access these lower rates.

Without conditions to preserve competition following the merger, the Canadian regulatory regime in Canada will give Canadian grain shippers unfair advantages over U.S. grain shippers. First, the Canadian rate regime provides an incentive for CP to ship Canadian grain to U.S. and Mexican markets. This is due to the depressed rate per car mile for these grain shipments in Canada, which can be avoided by shipping grain to and through the United States. In fact, years before this merger, CP acknowledged the impact of Canadian rate regulation of grain movements within Canada, stating that:

The intent of the MRE is to put an effective cap on rail freight rates for grain and, therefore, to depress revenue earned by railways for the movement of grain. This is evident by the fact that CP's revenue/RTM for regulated grain is 3.7 cents/ton mile versus a system wide average for CP of 4.3 cents/ton mile.⁶

The fact that CP can earn more for shipments to markets other than the MRE destinations provides CP with an incentive to ship to/through the U.S. market and on to Mexico.

Second, as a result of the low regulated rail rates in Canada, Canadian grain growers and shippers have lower rail costs which allow them to penetrate markets

⁶ CP RAIL, CP SUBMISSION TO THE CANADA TRANSPORTATION ACT REVIEW PANEL 54, available at <https://www.cpr.ca/en/about-cp-site/Documents/cp-cta-review-submission.pdf#:~:text=Canadian%20Pacific%20%28CP%29%20is%20pleased%20to%20provide%20this,based%20analysis%20of%20federal%20transportation%20policies%20in%20Canada>

outside of Canada. It is widely acknowledged that CP (and CN) have increased their shipments to the United States in recent years largely as a result of the rate regulations in Canada relating to grain shipments. About 20-25% of the wheat used in domestic milling in the United States is imported, most likely from Canada.

Third, access to the eastern and southern portion of Mexico, where there is strong demand for grain, has been foreclosed to BNSF by KCS over Laredo, resulting in only limited BNSF movements for grain over the Laredo gateway, despite that route being more efficient than alternatives. The merger will worsen the problem. Not only will the Canadian rate regulation policies give CP an incentive to move Canadian grain into Mexico, but the ability also to foreclose other U.S. sources of grain from moving through Laredo will give CP-KCS the ability to displace U.S. grain originating on other carriers moving into Mexico with grain from CP-served origins. The merger will expand the CP-KCS network and attract shipments from Canada to the south, and increase the ability of CP-KCS to continue foreclosing rival shipments over the Laredo gateway. If allowed to proceed without conditions, the merger could very likely result in Canadian grain by-passing U.S. grain origins to penetrate a market in Mexico that is physically closer to the U.S. grain origins.

Fourth, as indicated above, the regulatory regime in Canada for grain shipping differs from that in the United States and is incompatible with freer trade and distorts geographic competition. This has promulgated a number of trade disputes in the past. The proposed merger, without a mechanism to ensure that

U.S. farmers and grain shippers will have competitive access over Laredo, would likely result in further trade disputes.

III. The Proportional Rate Proposals Offered by the Union Pacific Railroad and NITL Are Inaccessible to U.S. Grain Shippers

Applicants have pledged to keep the Laredo gateway open on “commercially reasonable” terms,⁷ but that has not worked in the past and will not work in the future without more than a vague pledge. In my February 28 statement, I expressed concern that the merger would allow CP-KCS to foreclose BNSF’s shippers from important and growing Mexican markets, and I noted that a proportional rate mechanism could be used to ensure an open gateway to Mexico through Laredo. BNSF was not the only commenting party to express a concern about potential foreclosure, nor the only party to propose a proportional rate remedy to maintain competition. In particular, the Union Pacific and NITL have each offered proportional rate proposals to help preserve competition following the CP-KCS merger. While both proposals seek to preserve competition by ensuring that rates for movements in Mexico will be at market rates, they are limited only to shippers at origins in the United States that are dually-served by CP or KCS and another competing carrier.

Under the UP proposal, a shipper that is located at a rail origin served by both CP-KCS and another carrier can request a rate quote from CP-KCS for a through movement to and from Mexico. CP-KCS will then be required to provide

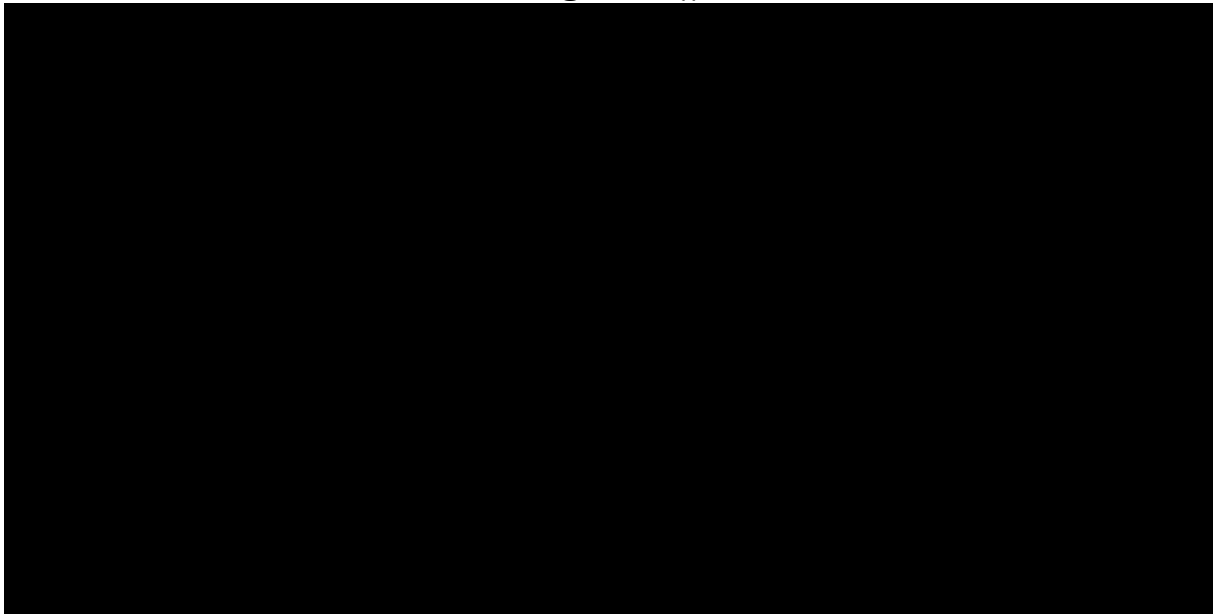
⁷ (See, e.g., Appl., V.S. Brooks ¶¶44-45, Oct. 29, 2021.)

that shipper with a proportional rate for the Mexican bottleneck portion of the movement that can be used by the shipper in combination with a rate provided by the other carrier serving the shipper. The NITL proposal works in much the same way. But if a shipper is not located on CP-KCS, the shipper cannot ask for or use a CP-KCS through rate, so it has no ability to obtain a proportional rate for the Mexican portion of its movement. That shipper has no protection against manipulation of the Mexican rate by CP-KCS to favor movements on CP-KCS (including Canadian grain movements).

In short, the UP and NITL proportional rate proposals only work for dual-served origins, but there are very few such origins in grain markets. Figure 2 shows the 30 highest-volume grain origins on BNSF in the U.S. Northern and Central Plains territory served by CP, and indicates that only {{REDACTED}} also served by CP.⁸ Shippers at the other {{REDACTED}} origins would have no opportunity to obtain a rate that would allow them to compete with shipments from other CP origins post-merger.

⁸ The serving railroads reported for each of these SPLCs (Standard Point Location Code) were identified in the AAR's Centralized Station Master, and it was determined that {{REDACTED}} that CP also served.

Figure 2 {{



}}

In virtually all cases, grain shippers served by one railway are located miles away from a rival carrier. While grain shippers located on rival lines compete vigorously against one another, the UP and NITL proposals do not recognize this geographic competition or preserve the ability of shippers located on the lines of a rival to CP-KCS to compete with CP-KCS's shippers, at least with respect to Mexico movements. As Figure 2 shows, only {{[REDACTED]}} of the BNSF's 30 highest-volume grain origins in the northern and central plains area served by CP in the United States could be dually-served by CP and BNSF. U.S. farmers and grain shippers that use a multitude of other BNSF locations would not be able to obtain a through rate quote on CP-KCS that is the predicate for obtaining a proportional rate on the Mexican bottleneck portion of the movement. For this reason, relying on proposals

centered on ‘dual-served’ origins would not provide a pro-competitive proportional rate solution in the case of grain.

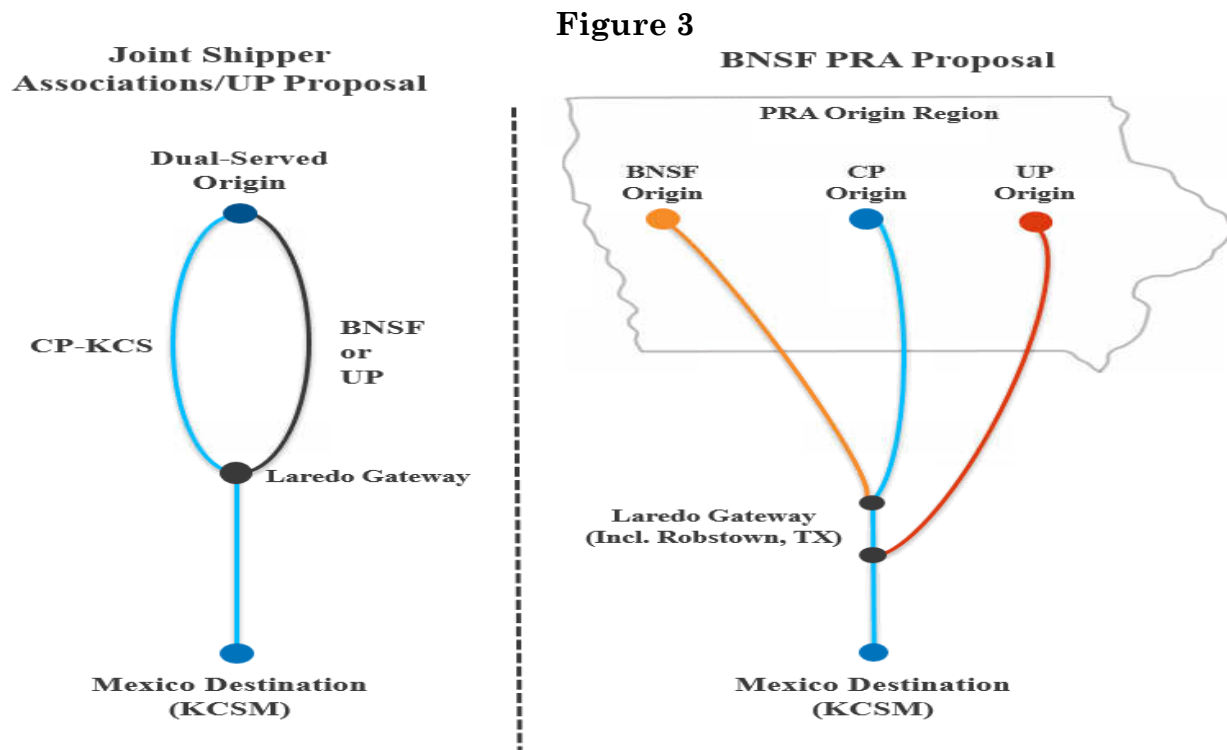
IV. BNSF’s I-5-Style Proportional Rate Proposal Preserves Competition Across Large Areas in Grain Markets

Like UP and NITL, in its February 28 Reply Comments, BNSF asked the STB to impose a proportional rate mechanism to ensure competition through the Laredo gateway on commercially reasonable terms. Like the UP and NITL proposals, the BNSF proposal would establish a proportional rate for movements into and out of Mexico that reflects market conditions. The proportional rate would ensure that shippers using BNSF, UP or CP-KCS have fair and competitive access to Mexican markets. The BNSF proposal is based on the “I-5” proportional rate mechanism that has operated for several decades to protect shippers’ competitive options in the Pacific Northwest. The BNSF proposal was outlined in the BNSF Comments (BNSF Comments 44-47) and in Dr. Reishus’s V.S. (V.S. Reishus ¶¶ 99-104) and is further described in more detail in Dr. Reishus’s Response Comments V.S. My purpose below is to illustrate how this could be implemented in the case of grain shipments and would be compatible with trade practices and competition.

There are two primary differences between the BNSF proposal and the proportional rate proposals set out by UP and NITL. First, the BNSF proposal does not limit availability to dual-served origins. The BNSF proposal acknowledges the geographic competition that exists in grain transportation markets today. Just as grain shippers today compete vigorously even when they are located on the lines of

rival carriers, BNSF’s proposal ensures that grain shippers can compete for Mexico movements even if they are located on lines other than the CP-KCS lines.

Figure 3 below, which is based on a figure in the Response Comments of Dr. Reishus, illustrates this important difference between the more limited UP/NITL proposals, and the BNSF proposal that follows the existing I-5 prop-rate arrangement that reflects competition within broader regions.



As illustrated in the diagram in Figure 3 (left panel), the UP and NITL proposals can be used only by a grain shipper that is located at a rail origin that is served by both CP-KCS and a rival carrier. However, there are very few such origins available to U.S. grain shippers. The diagram to the right depicts BNSF’s prop-rate proposal. As explained by Dr. Reishus, under BNSF’s proposal, the average

revenue per ton-mile is calculated each quarter based on the actual rates charged by CP-KCS for the through movements to/from Mexico.⁹ The rate per ton-mile can then be used by other carriers for the bottleneck portion of the movement, to protect the competition that exists between grain shippers that are located within geographic regions. Grain shippers could combine a rate for movement on BNSF to the gateway (in BNSF's case, the interchange with CP-KCS would occur at Robstown) with the proportional rate for the bottleneck portion of the movement. In this way, grain shippers located on BNSF can compete with grain shippers, including Canadian grain shippers, located on CP-KCS.

A second important difference between BNSF's proposal and the proposals of UP and NITL is that under BNSF's proposal, the individual grain shipper would not have to request a through rate from CP-KCS, and then piece together Rule 11 rates for pricing on an interline route that combines CP-KCS with BNSF or UP – a process that may be particularly difficult for smaller grain shippers. Under BNSF's proposal, a proportional rate per ton-mile is automatically calculated based on actual CP-KCS revenues, and those revenue factors are made available to BNSF and UP to offer rates for movements into and out of Mexico. BNSF or UP would

⁹ For BNSF, the bottleneck portion of the movement into and out of Mexico includes the portion of the movement in Texas from its interchange with KCS at Robstown to Laredo, as well as the Mexican portion of the movement on KCSM. Since BNSF's proposed prop-rate approach calculates a revenue per ton-mile factor, the proportional rate would be applied to the actual bottleneck movement for BNSF by including the miles between Robstown and Laredo along with the miles in Mexico on KCSM.

take the CP-KCS proportional rate per mile from the matrix,¹⁰ add the rate for its segment, and offer customers a single, combined interline rate for the entire movement. The competing rail carriers have an incentive to broadly market their service with access to proportional rates for the bottleneck portion of the movement. This eliminates the burden and potential complexity for smaller grain shippers under the UP and NITL proposals to actively seek out a proportional rate from CP-KCS and obtain separate rates from other carriers for the U.S. portion, before they can obtain the benefit of competition.

BNSF's prop-rate proposal would also be straightforward to implement because competition in grain markets today occurs across broad geographic regions. A relatively small number of proportional rates can be determined to reflect the broad regions within which grain shippers compete. While markets for the primary grain products (wheat, corn and soybeans) can be quite different, within each of these products, competition occurs over broad regions. For example, wheat produced at a location within the Northern and Central Plains region generally competes with other wheat produced within that same region.

Figures 4 and 5 below show the proposed grouping of the origins and destinations for grain shipments to Mexico over the Laredo gateway. These regions are relatively homogenous regarding the economics of shipping, modal competition, and competition among supply and demand regions. Within the grain origin

¹⁰ BNSF would use the rate for the portion of the movement between Robstown and the origin or destination in Mexico; UP would use the rate between Laredo and the Mexican origin or destination.

regions in the U.S. and Canada, conditions are relatively consistent regarding shipping modes and competing markets with respect to different grain commodities. The grain destinations in Mexico are separated into two regions, largely encompassing the Northern States and Central Mexico. Grain movements to the former region involve a shorter haul to and from the United States, which is generally reflected by relatively higher revenues per ton-mile. Moreover, the demand centers within the region are rivalrous. Central Mexico is comprised of areas around and including Mexico City, which largely drives demand.

It is important that a prop-rate proposal must be flexible and reflect the dynamics of markets and changes in the factors that drive different rates. And it is important that the parties to a prop-rate agreement have the opportunity to review the structure and adjust as necessary – particularly as origins and destinations change. For example, while there are currently relatively few CP-KCS-KCSM interline grain shipments, Applicants project considerable diversions and new growth traffic.¹¹ BNSF’s proposal of three origin regions and two destination regions would result in at most six rates for each grain commodity, which is a very manageable number that reflects the differing market factors.

¹¹ CP-KCS estimates “that nearly 13,000 carloads will be diverted annually to CP/KCS single-line service” in the south-central United States, Texas, and Mexico “lanes”. (Appl., V.S. Wahba/Naatz ¶ 15, Oct. 29, 2021.)

Figure 4 – Origin Regions

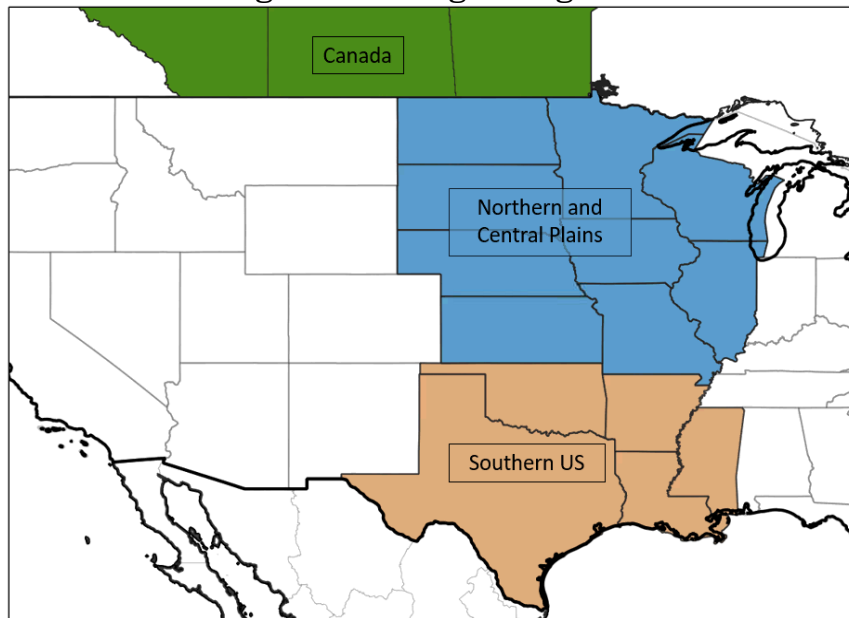


Figure 5 – Destination Regions

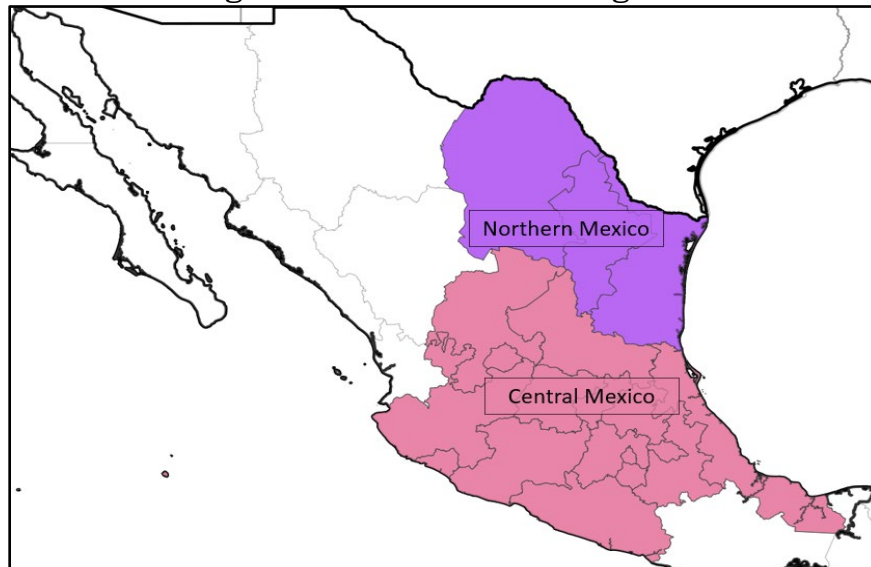


Figure 6 is an illustrative model of the matrix that can be used for the shipment of grain products over the Laredo gateway from the origins illustrated in Figure 4 to the destinations illustrated in Figure 5, by commodity. The revenue per ton-mile values in each cell of the matrix would be derived from actual revenues on CP-KCS through movements from the prior quarter and would therefore change over time based on actual changes in market conditions and observed rates. Figure 6 shows that a relatively straightforward matrix can be developed and used to ensure competition for grain movements into Mexico.¹²

Figure 6

Commodity	Destination Region	Origin Region		
		Canada	Northern & Central Plains	Southern US
Corn	Northern Mexico	*	*	*
	Central Mexico	*	*	*
Soybeans	Northern Mexico	*	*	*
	Central Mexico	*	*	*
Wheat	Northern Mexico	*	*	*
	Central Mexico	*	*	*

* Values in each cell would be filled in based on actual rates on CP-KCS through movements.

V. Conclusion

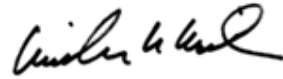
The concerns of U.S. grain shippers raised in this proceeding are consistent with those of BNSF. The advantage already provided to Canadian shippers in the U.S. domestic market resulting from rate regulations in Canada would be expanded into the Mexican market following the merger of CP and KCS. The merger would

¹² In order to reflect the actual revenues paid by grain shippers, the gross revenues used to create the matrix values should be reduced by any allowance amounts before calculating the proportional-rate factors.

allow CP-KCS to block access by U.S. farmers served by other carriers to growing markets for grain products in Mexico's east and southeast. The grain shippers agree with BNSF on the need for concrete measures to ensure competition for traffic into Mexico over the Laredo gateway. The I-5-type proportional rate proposal offered by BNSF provides grain shippers with a transparent and market-based solution to ensure competition over the Laredo gateway at 'commercially reasonable' rates. If the STB does not require the adoption of such a mechanism, the CP-KCS merger will result in distorted and inefficient movements and would put farmers served at non-CP origins at an unfair disadvantage relative to farmers located on CP-KCS.

VERIFICATION

I, William W. Wilson, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

A handwritten signature in black ink, appearing to read "William W. Wilson", written in a cursive style.

William W. Wilson

Executed on July 12, 2022.

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *Response Comments of BNSF Railway Company* to be served electronically or by first-class mail, postage pre-paid, on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, Administrative Law Judge Thomas McCarthy, and all parties of record in this proceeding.

/s/ Onika K. Williams

Onika K. Williams

Attorney for BNSF Railway Company

July 12, 2022