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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36500

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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 & HUDSON RAILWAY
COMPANY, INC. – CONTROL – KANSAS CITY SOUTH
ERN, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, GATEWAY
EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN RAILWAY
COMPANY

CSX TRANSPORTATION, INC.'S RESPONSE TO COMMENTS
AND RESPONSIVE APPLICATIONS

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CSX TRANSPORTATION, INC.’S RESPONSE TO COMMENTS
AND RESPONSIVE APPLICATIONS

CSXT¹ responds to the comments and responsive competitive applications filed by other parties to this proceeding February 28, 2022, and any amendments they filed June 9, 2022. These responses include the verified statements of Professor Julie Carey, Dr. Ramsey Shehadeh, and Mr. Robert Girardot.

To assist readers, we highlight defined terms and describe them in footnotes when they are first used. A glossary of the terms can be found in Appendix I.

I. INTRODUCTION

The proposed CPKC² transaction has the potential to benefit the public interest in more efficient rail transportation. As many parties have recognized,³ however, the Board must impose

¹ CSX Transportation, Inc.

² “CPKC” refers to the potential entity that would result from the Proposed Transaction.

³ *E.g.*, Finance Docket No. 36500, Comments and Request for Conditions of The American Chemistry Council, The Fertilizer Institute, and The National Industrial Transportation League (ACC-6/TFI-5/NITL-3), at 9 (Feb. 28, 2022); Finance Docket No. 36500, Opening Comments of Energy Metro, Inc., at 2 (Feb. 28, 2022); Finance Docket No. 36500, Comments of the National Corn Growers Association, at 2 (Feb. 28, 2022); Finance Docket No. 36500, Opening Comments

conditions on the **Proposed Transaction**⁴ to assure that the limited public benefits demonstrated by Applicants⁵ are realized and are not offset by anticompetitive practices arising from or aggravated by the Proposed Transaction.⁶ As **NSR**'s⁷ witness, Dr. Mayo, has explained, vertical mergers, which can be competitively benign, can also pose the risk of vertical foreclosure of competition.⁸ Those risks are presented here and conditions are required to mitigate those risks.

of the National Grain and Feed Association (NGFA-1), at 5-6 (Feb. 28, 2022); Finance Docket No. 36500, Comments and Request for Conditions of Texas International Terminals LTD, at 9 (Feb. 28, 2022).

⁴ "Proposed Transaction" refers to CP's proposed acquisition of KCS.

⁵ For Applicants asserted benefits, *see* Finance Docket No. 36500, Railroad Control Application (CP-25/KCS-13), Volume 1, at 74 (October 29, 2021)

⁶ For assessments of demonstrated public benefits, *See* Finance Docket No. 36500, CSX Transportation, Inc.'s Comments and Requests for Conditions (CSX-8), Exhibit A, V.S. of Prof. Julie M. Carey and Dr. Albert W. Bremser, at 25-43 (February 28, 2022) ("Carey February 28 V.S.").

⁷ "NSR" refers to Norfolk Southern Railway Company (also referred to as "NS").

⁸ Finance Docket No. 36500, Comments of Norfolk Southern Railway Company and Request for Conditions (NS-9), Exhibit C, V.S. of Professor John Mayo, Ph.D., at 88 (Feb. 28, 2022). *See infra* Section V.1.b.i.

Commentators express many concerns about the Proposed Transaction.⁹ Several share CSXT’s apprehension regarding two types of harm threatening the public interest:¹⁰

- The potential for CPKC to close gateways, maintain unreasonably closed gateways, or erect or exacerbate other overt restraints on competition and efficient railroad operations; and
- CPKC’s incentive and ability to abuse any market power provided by those restraints to raise prices or reduce service to shippers or force diversions of traffic from efficient routes to inefficient routes without compensating price reductions or improved service.

NSR’s expert witness explains why a vertical merger might result in harm to competitors of the vertically integrated firm when downstream rivals are charged increased input prices, or perhaps

⁹ Regarding concerns not related to restrictions on competition, *see, e.g.*, Finance Docket No. 36500, Comments and Request for Conditions of the Commuter Rail Division of the Regional Transportation Authority D/B/A METRA (METR-7), at 18-23 (March. 15, 2022) (concerned about Applicants’ traffic increasing METRA train delays by more than 400% (per 100 train miles) on METRA’s Milwaukee District-West and North lines); Finance Docket No. 36500, Supplemental Opening Comments and Request for Conditions of the Coalition to Stop CPKC, (ITAS-4), at 3-6 (June 9, 2022) (concerned about the projected effect of quadrupling the number of 10,000+ ft. trains passing through—and in some cases, blocking all crossings in—small Coalition communities); Finance Docket No. 36500, Opening Comments of Evergy Metro, Inc., at 9-14 (Feb. 28, 2022) (concerned about being exposed to “serious and adverse service quality impacts” and the “effects of degraded rail service on La Cygne’s reliability”); ACC-6/TFI-5/NITL-3 at 21 (concerned that increasing traffic volumes through already congested areas will cause major service disruptions); Finance Docket No. 36500, CN’s Comments on Application and Request for Conditions (CN-13), at 34 (Feb. 28, 2022) (pointing out that Applicants fail “to prove any quantifiable public benefits”).

¹⁰ *See, e.g.*, Finance Docket No. 36500, Comments of Federal Maritime Commissioners Carl W. Bentzel, Louis E. Sola, and Max M. Vekich (June 21, 2022); Finance Docket No. 36500, Comments of the National Corn Growers Association, at 2 (Feb. 28, 2022); NGFA-1 at 5-7; Finance Docket No. 36500, Comments and Request for Conditions of Texas International Terminals LTD, at 3-4 (Feb. 28, 2022); ACC-6/TFI-5/NITL-3 at 7-9; Finance Docket No. 36500, Comments of BNSF Railway Company (BNSF-9), at 32, 53, 446 (Feb. 28, 2022); CN-13 at 12, 14, 67; NS-9 at 4, 9, 28-30, (Feb. 28, 2022); Finance Docket No. 36500, Union Pacific Railroad Company’s Comments and Requests for Conditions (UP-10), at 1, 12, 23 (Feb. 28, 2022).

even foreclosed completely. Such actions “may in turn harm consumers in the downstream market.”¹¹

Applicants do not support conditions requiring all CPKC gateways to be open on commercially reasonable terms.¹² Instead, they have taken a “no conditions” stance. They 1) would deny shippers recourse to the Board when gateways are closed to competition for their traffic, 2) remain vague as to what, if any, gateways they would keep open, and 3) will not provide definite guidance as to what constitutes commercially reasonable access.¹³

Applicants’ stance is contrary to the public interest in open gateways, as recently articulated by the Board.¹⁴ It is also contrary to national policy. Applicants’ opposition to well-defined, Board-enforceable open gateway conditions seems designed to frustrate well established

¹¹ V.S. of Professor John Mayo at 89.

¹² *See generally* CP-25/KCS-13, V.S. of Patrick J. Ottensmeyer, at 187, 202-203.

¹³ After being asked about what CP meant by “providing commercially reasonable rates,” Mr. Brooks testified that it merely meant working with “shippers or connecting partners in good faith to develop rates that would allow the existing gateways that shippers are efficiently using today to continue in the future.” (Brooks Deposition. Tr. 98. Subsequently, Mr. Brooks confirmed that “CP isn’t promising to agree with shippers on a more concrete standard for what it means for a rate to be commercially reasonable”; they are just saying they will talk to shippers or connecting partners and “try to develop some sort of standard.” *See* Brooks Dep. Tr. 100:2-9).

¹⁴ Recognizing that CSX “has committed to ensuring that all gateways on the PAR System remain open from a financial perspective,” the Board found that “the open gateway commitment is vital to ensuring that the PAR System remain a competitive option, as it will allow other carriers that connect with the PAR System to continue offering competitive interline rates.” Norfolk Southern Railway Company – Trackage Rights Exemption – CSX Transportation, Inc., Decision No. 9, STB Finance Docket No. 36472, at 16 (served April 14, 2022).

national economic,¹⁵ transportation,¹⁶ and trade policies,¹⁷ and instead funnel revenue to Applicants from inefficient and uncompetitive operations.¹⁸ CSXT has already identified its particular interest in certain gateways¹⁹ but continues to believe that, for the benefit of shippers, conditions must be imposed by the Board to require Applicants to open all significant gateways for all traffic that could benefit from competition to and from those gateways.

The need for these conditions is well illustrated by the example of traffic to and from Mexico. Applicants expect **Mexico Traffic**²⁰ to grow substantially.²¹ Independent analysts agree

¹⁵ On current policies concerning the importance of efficient supply chains to the economy, *see* “Executive Order on America’s Supply Chains (E.O. 14017)” The White House, June 8, 2021, and “Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth, 100-Day Reviews under E.O. 14017, A Report by The White House, Including Reviews by Departments of Commerce, Energy, Defense and Health and Human Services” June 2021.

¹⁶ Beginning with The Staggers Rail Act of 1980, cooperation between railroads facilitating a competitive rail system has been an aim of federal policy and has produced enormous benefits to consumers and shippers, *see* “The Success of the Staggers Rail Act of 1980”, Brookings Institute, October 15, 2005. Federal policies promoting safe, reliable, and efficient freight transportation to boost exports, enhance commerce and power economic growth is the core of National Multimodal Freight Policy, *see* “USDOT National Freight Strategic Plan, Executive Summary”, September 3, 2020. 49 U.S. Code Section 11323(b) considers that a consolidation, merger, or acquisition of control may be accomplished by rail carriers “only with the approval and authorization of the Board under this subchapter”.

¹⁷ On current policies addressing supply chain efficiency for ports, rail, and trucking, *see* “America’s Supply Chains and the Transportation Industrial Base”, Transportation Department, September 16, 2021. *See also* “Can the Biden Administration Improve the Manufacturing Sector?” The Brookings Institution Webinar, July 15, 2021.

¹⁸ This approach is contrary to the position that CP took in the CSX-Pan Am hearing. *See* FD 36472, *CSXT et. al. – Control and Merger – PAN AM Systems et. al.*, Canadian Pacific’s Comments, at 23-28 (August 27, 2021); FD 36472, Canadian Pacific’s Brief, at 11-19 (January 3, 2022).

¹⁹ Finance Docket No. 36500, CSX Transportation Inc.’s Comments and Request for Conditions (CSXT-8), at 4-6 (Feb. 28, 2022); Finance Docket No. 36500, CSX Transportation Inc.’s Amended Comments and Request for Conditions (CSXT-11) (June 9, 2022).

²⁰ “Mexico Traffic” is traffic to and from Mexico on the proposed CPKC rail system.

²¹ *See, e.g.*, V.S. of Jon Wahba and Mike Naatz, “Growth Initiative Calculations” workpaper.

that Mexico Traffic is expected to grow dramatically as national economic and trade policies encourage onshoring of vital production from China to the US in collaboration with Mexico.²²

CPKC would have incentive and opportunity to deny commercially reasonable access to competition over the most efficient rail routes available, thereby raising the cost of trade and reducing opportunities for railroads to divert Mexico Traffic from the highways, of which {{ [REDACTED] }} now travels by truck.²³ Yet Applicants oppose providing shippers recourse to the Board to assure competition to and from the Laredo, TX gateway, and to and from the Shreveport, LA and Meridian, MS gateways, which offer the most efficient route for Mexico Traffic to and from the Southeast and Mid-Atlantic. Only a Board-enforceable condition requiring CPKC's gateways be open to shippers can prevent these results.

The comments of UP²⁴, BNSF²⁵, and CSXT²⁶ all identify the significance of Mexico Traffic and the need for Board-enforceable conditions to assure shippers access to competition to and from the Laredo Gateway.

NSR's comments recognize the importance of ensuring that "NS-CPKC Gateways remain open on commercially reasonable terms and the Meridian-Wylie Route remains a viable option for intermodal shippers."²⁷ However, as things now stand, for {{ [REDACTED] }} traffic now

²² See n. 17 *supra*. Carey VS at Figure 9 and 10 at pages 34 -35 shows strong forecasts for rail and truck volumes with traffic movements with Mexico.

²³ {{ [REDACTED] }} V.S. of Professor Julie M. Carey, Figures 9 and 10 at pages 34-35.

²⁴ UP-10 at 14-19, 67.

²⁵ BNSF-9 at 16-49.

²⁶ CSXT-8 at 23.

²⁷ Finance Docket No. 36500, Amended Comments of Norfolk Southern Railway Company, and Request for Conditions (NS-12), at 7 (June 9, 2022).

moving over the line between Shreveport and Meridian, those gateways are only open to shippers using NSR. More important, NSR's comments show that both Shreveport and Meridian will be affected by the Proposed Transaction and NSR's responsive application does as well. Combined, these proposals demonstrate the need to open both Meridian and Shreveport to competition to prevent exacerbating and enshrining in perpetuity the harm currently being caused by keeping them closed. If NS recognizes the benefits to shippers of keeping NS-CPKC gateways open, surely they recognize the even greater benefit of opening them to others. NSR's comments and responsive application also reveal the need for the Board to condition the Proposed Transaction and NSR's proposed application by abrogating the anticompetitive provisions of the MSLLC Agreements.²⁸ Those agreements were made in connection with the formation of the KCS-NSR joint venture – the Meridian Speedway LLC – that acquired the KCS line between Shreveport, LA and Meridian, MS in 2006. The **Exclusivity Arrangements**²⁹

²⁸ "MSLLC Agreements" refers to all agreements included as exhibits to the public Notice of Exemption in FD 34822 filed January 17, 2006, as well as subsequent amendments to those agreements. These include but are not limited to the Dallas Terminal Marketing Agreement (included as Exhibit J to the 2006 notice), the NS-KCS Western Haulage agreement (included as Exhibit E to the 2006 notice), and the LLC Agreement of the MSLLC (included as Exhibit A to the 2006 notice). See FD 34822, *The Kansas City Southern Railway Company, and Meridian Speedway, LLC – Exemption for Transactions Within a Corporate Family*, Verified Notice of Exemption Pursuant to 49 C.F.R. Sec. 1180.2(d)(3) ("Notice of Exemption") (January 17, 2006).

²⁹ "Exclusivity Arrangements" refers to the unlawful and anticompetitive provisions of the Meridian Speedway Agreements. These include the exclusivity provisions regarding DITT between Dallas, TX and Shreveport, LA and NS Traffic between Shreveport, LA and Meridian, MS, and the control provisions regarding NS control over the MSLLC.

unlawfully divide {{[REDACTED]}} traffic over the **MSLLC Line**³⁰ and the **Meridian Speedway**³¹ between KCS and NSR and give NSR unlawful control over the **JV**.³²

Figure 1: Map of the Meridian Speedway



³⁰ “MSLLC Line” refers to the line from Shreveport, LA to Meridian, MS. *See* Figure 1 *infra*.

³¹ “Meridian Speedway” and “Speedway” refer to the line from Dallas, TX to Meridian, MS. The portion of the speedway west of Shreveport, LA (the “KCS Line”) is owned by Kansas City Southern Railway; the portion east of Shreveport (the MSLLC Line) is owned by the MSLLC. *See* Figure 1 *infra*.

³² “MSLLC” refers to the Meridian Speedway LLC, a joint venture (“JV”) between KCS (70% membership interest) and NSR (30% membership interest) that owns the MSLLC Line; MSLLC was formed when the Meridian Speedway Agreements were executed in 2006. *See* FD 34822, *Notice of Exemption*, at 21 (filed January 17, 2006).

Figure 2: Map of the Meridian Speedway and Connecting Carriers Potentially Most Affected by CPKC's proposed Conditions



The Exclusivity Arrangements are unlawful. Their competitive effects were never reviewed or approved by the Board as required under 49 U.S.C. § 11322 or under 49 U.S.C. § 11323. They have harmed shippers and the public interest for over 16 years. If perpetuated by the Proposed Transaction and NSR's proposed transaction, they will continue to deny shippers meaningful access to competition for {{ [REDACTED] [REDACTED] }}.

NSR's comments demonstrate the Proposed Transaction would aggravate the *status quo* harm caused by the unlawful Exclusivity Arrangements. The public interest requires that the Exclusivity Arrangements be abrogated to assure: 1) they will not be perpetuated and their harm to the public interest will not be exacerbated by the Proposed Transaction; and 2) the benefits of these anticompetitive provisions may not be used by the Applicants or NSR in their public or private benefits calculations.

Even if the Exclusivity Arrangements were plausibly pro-competitive – and we explain below why they are not – they should be abrogated as unlawful. The Board should not hesitate to abrogate these unlawful provisions because:

- There is no legal obstacle to abrogation.
 - o The Board has the authority to condition on any approval of the Proposed Transaction and NSR’s proposed transaction on abrogation.³³
 - o There is no time bar to ending the perpetual unlawful traffic division provisions that have governed MSLLC for over sixteen years.
 - o There is also no time bar to upsetting unlawful control, even long after the controlling party presumed to exercise that control.³⁴ No public interest is served by further perpetuating these provisions.
- Abrogating the unlawful provisions would not terminate the MSLLC JV. The agreements governing that venture contain a severability provision that maintains the remaining arrangements if certain provisions are found unlawful.³⁵
- The unlawful provisions were not required to assure NSR an adequate return on its investment in MSLLC.³⁶ Even if they did, they are not required to assure MSLLC has adequate capital going forward. Abrogation will allow MSLLC to maintain the MSLLC Line as an efficient conduit for the large volume of traffic (projected to grow substantially) that

³³ See discussion *infra* Section IV.A.

³⁴ Norfolk Southern Railway Company — Petition for Declaratory Order, Decision No. 2, STB Finance Docket No. 36522, at 17 (served June 17, 2022).

³⁵ Every agreement containing an Exclusivity Arrangement that requires abrogation includes a section on invalid provisions. See Finance Docket No. 34822, *Notice of Exemption*, (January 17, 2006) at 67, 77, 135, 169, 200, 233, 254, 269, 387, 398, 426.

³⁶ See *infra* Section V.A.4.

can most efficiently move over the MSLLC Line but is denied competition by the unlawful provisions.

- Finally, there is no law or economic logic suggesting KCS and NSR should be allowed to unlawfully restrict competition over the MSLLC Line without approval by the Board. The transaction creating MSLLC was subject to a class exemption from the Board, but this exemption cannot extend to the KCS-NSR traffic division, which required separate Board approval under 49 U.S.C. 11322(a) (“A rail carrier... may not agree or combine with another of those rail carriers to... divide traffic... without the approval of the Board under this section...”). Nor does it exempt control transactions outside the corporate family or inside a corporate family if they will have competitive effects.³⁷

II. THE PROPOSED TRANSACTION SHOULD BE CONDITIONED UPON A BOARD-ENFORCEABLE CONDITION THAT ASSURES SHIPPERS THAT ALL CPKC GATEWAYS FOR TRAFFIC TO, FROM OR THROUGH THE UNITED STATES WILL BE OPEN ON COMMERCIALY REASONABLE TERMS

We have explained above how closed gateways can harm competition. Here we explain why the Board should provide a general rule requiring Responsive Applicants to protect shippers against these harms.

The Proposed Transaction is a thirty-billion-dollar deal that would dwarf any railroad transaction approved by the Board in this century. Applicants project they will move increased traffic within three years that will produce additional annual revenues exceeding \$1.02 billion.³⁸ Applicants anticipate large traffic diversions, principally from changed operations, and

³⁷ See *infra*-Section IV.A.1.

³⁸ For Applicants asserted benefits, see Finance Docket No. 36500, Railroad Control Application (CP-25/KCS-13), Volume 1, at 74 (October 29, 2021)

principally affecting international intermodal moving to and from Mexico and to and from Pacific ports.

In these circumstances, the opportunities for shippers to be deprived of competition at significant gateways will be manifold, and how competition might be affected is highly unpredictable. For this reason, the Board cannot assure that the pro-competitive advances touted by Applicants will not be stymied except by imposition of a clear general rule that: 1) significant interchanges with Applicants and carriers subject to their control must be open; and 2) shippers must have standards and remedies by which they can assess and, if necessary, enforce in expedited Board proceedings, their right to open gateways.

No party disputes the desirability of open gateways. What is at issue is which gateways should be open, to whom, and whether gateways should be protected by conditions. NSR's Comments and the testimony of its corporate representative, Norfolk Southern Corporation's Senior Vice President and Chief Strategy Officer, Michael R. McClellan, illustrate well the nature of these issues. NSR's Comments call for open gateways at both Meridian, MS and Shreveport, LA.³⁹ Yet in deposition, Mr. McClellan declined to call Shreveport a gateway even though about { [REDACTED] } the traffic flowing over the Line between Shreveport and Meridian moves over the Shreveport interchange.⁴⁰ And, as he rightly points out, and the traffic data confirm,⁴¹ most of that traffic is exclusively interchanged with NSR at Shreveport or Meridian and those gateways are not open to other carriers that might compete for that traffic.

³⁹ NS-12, at 30-33, 40-46.

⁴⁰ McClellan Dep. Tr. 27-28. *See also* McClellan Dep. Tr. 10:30:20- 10:30:42 23 (characterizing Shreveport as a "broad gateway")

⁴¹ *See* V.S. of Julie Carey at 16, Figure 3.

As we elaborate upon below, NSR and KCS have long followed Exclusivity Arrangements governing the Meridian Speedway that keep the Speedway effectively closed to traffic interchanging with any carrier other than NSR at Meridian. These Arrangements have had significant anticompetitive effects that would be exacerbated by the Proposed Transaction, and they should be abrogated. But merely abrogating the contract terms will not prevent competitive harm if NSR and CPKC can accomplish the same end by refusing to interchange with other carriers at Shreveport and Meridian on competitive terms. And each element that has given NSR and KCS the ability and incentive to cooperate to cut off rivals' access to traffic over the Meridian Speedway applies equally to incent them to close rivals' access to traffic at either end. Remedying the anticompetitive effects of the Exclusivity Arrangements will be ineffective without conditions requiring the Shreveport and Meridian gateways to remain open.

Shippers are unlikely to have a reasonable chance to secure competitive rates or service over those and other gateways unless there is a clear path to remedying the closing of a gateway to competition via any carrier that might reach those gateways (directly or through interchange with a carrier physically present at those gateways). The principal public benefit claimed by NSR and Applicants to support their positions in this proceeding is competition. *They* should be expected to support that benefit for all shippers at significant interchanges on the CPKC system.⁴²

III. SUMMARY OF RELEVANT FACTS REGARDING THE UNLAWFUL CONSTRAINTS ON COMPETITION IN THE MSLLC AGREEMENTS.

A. The Role of the Meridian Speedway and the Traffic at Issue

⁴² CSXT has been informed by counsel for Canadian National Railway ("CN") that, should the Board grant CN's request for the divestiture of KCS's Springfield Line, CN will support the application of any open gateway requirement generally adopted by the Board.

The Meridian Speedway connects Dallas, TX with Meridian, MS and consists of two segments, one between Dallas and Shreveport, LA, owned by KCS, and one between Shreveport and Meridian, owned by MSLLC. At the west end, UP connects at Dallas and Shreveport, and BNSF connects at Dallas. At the east end, NSR connects at Meridian, as does Meridian & Bigbee Railroad (MNBR), a short line owned by Genesee & Wyoming, over which CSXT has haulage rights.⁴³ Thus, but for a *de jure* or *de facto* restriction on interchange or the openness of gateways, two carriers would connect at both ends of the Speedway and/or MSLLC Line. See maps of the Meridian Speedway and its connecting carriers above at Figures 1 and 2 *supra*.

As Applicants and NSR have both recognized, in pleadings here and in public statements,⁴⁴ the Meridian Speedway is an important route, especially for intermodal traffic. However, {{[REDACTED]}} of that traffic is subject to the unlawful restraints on competition imposed by the Exclusivity Arrangements.

B. Competition Before the Exclusivity Arrangements

Before the formation of the MSLLC with its attendant Exclusivity Arrangements, KCS was the sole owner of the Meridian Speedway. KCS could handle all types of Speedway traffic.

⁴³ V.S. of Robert Girardot, at 5. See “Haulage Agreement Among CSX Transportation, Inc., and Meridian & Bigbee Railroad, L.L.C., and The Kansas City Southern Railway Company,” CSX_HC_0012806.

⁴⁴ NSR states, “The Meridian Speedway is the most efficient link for shippers who need to move traffic through the major population centers in the Southeast and Southwest, areas of tremendous population and economic growth.” NSR also states, “All it takes is one look at a map and the advantages of this route are apparent. Compared to the next-shortest available route, the Meridian Speedway saves 184 miles between Atlanta and Dallas, 212 miles between Charlotte and Dallas, and 41 miles between Jacksonville and Dallas.” NS-9 at 15-16. Additionally, on their website, NSR claims the Speedway eliminates “150 route miles on transcontinental shipments” and provides “automotive manufacturers in the South the shortest, most direct route from points in the Southeast to California markets.” *Meridian Speedway*, Norfolk Southern, <http://www.nscorp.com/content/nscorp/en/shipping-options/corridors/meridian-speedway.html>. Applicants also recognize the Speedway as a “a critical link in creating the most direct route between the southwest and southeast/northeast U.S.” Finance Docket No. 36500, Railroad Control Application (CP-28/KCS-16), Volume 4, at 535 (October 29, 2021).

Under a 2000 agreement, KCS provided NSR haulage over the Speedway, but NSR's haulage arrangement was not exclusive, and KCS maintained the right to carry all traffic and to interchange traffic best served by the Speedway at Shreveport and Meridian with any carrier.

C. Formation of the MSLLC Exclusivity Arrangements

In 2005, KCS and NSR reached agreements forming the MSLLC JV. KCS contributed its rail lines between Shreveport and Meridian⁴⁵ to the MSLLC. NSR purchased a 30% share in the MSLLC for \$260-300 million, to be invested in the MSLLC's rail facilities over four years. In return, NSR received: 1) assurance that "other carriers would not use the capacity NSR's investment would help create;"⁴⁶ 2) veto rights to any "Major Decision" made by MSLLC; and 3) exclusive rights regarding two types of traffic. Combined, these agreements are the Exclusivity Arrangements referred to herein.

First, NSR gained the exclusive right to serve all overhead intermodal traffic moving on the MSLLC Line between domestic points west of Fort Worth and at or east of Meridian, other than points on the KCS network ("**NSR-Exclusivity Traffic**").⁴⁷

MSLLC agreed to provide NSR with haulage over the MSLLC Line for NSR-Exclusivity Traffic.⁴⁸ KCS is the operator of MSLLC and thus performs the haulage.⁴⁹ Neither KCS nor the

⁴⁵ FD 34822, *Notice of Exemption*, (served January 17, 2006) at 5.

⁴⁶ *Id.*

⁴⁷ The agreements define NSR-Exclusivity Traffic (titled Traffic") as all (i) intermodal traffic, (ii) entering/exiting at Shreveport and entering/exiting at Meridian, (iii) with O/D in U.S. west of Dallas/Fort Worth (including west coast port traffic), (iv) with O/D in U.S. at or east of Meridian, and (v) without O/D on KCS system as it existed at time of formation of the MSLLC Agreements. *See* FD 34822, *Notice of Exemption*, at 99, 182, 217, 241 (January 17, 2006).

⁴⁸ *See* FD 34822, *Notice of Exemption*, "NSR-MSLLC Joint Use Agreement," Section 2(b), at 185-86 (January 17, 2006). MSLLC also grants NSR trackage rights over the Line for NSR-Exclusivity Traffic only if upon a Major Service Standard Failure or Permitted Asset Transfer. *See id.* Section 2(a), at 184-85.

⁴⁹ *See* FD 34822, *Notice of Exemption*, "MSLLC-KCS Operating Agreement," Section 2, at 157-58 (January 17, 2006).

MSLLC itself can provide service for NSR-Exclusivity Traffic on behalf of any other carrier, or on their own behalf, to interchange with any other carrier. NSR's right to serve NSR-Exclusivity Traffic is explicit and MSLLC may not perform haulage of NSR-Exclusivity Traffic for KCS or any third party, nor grant operating rights over the MSLLC Line to KCS or any third party, absent NSR's consent.⁵⁰

MSLLC granted KCS trackage rights to handle traffic in its account,⁵¹ but KCS may not use its trackage rights to carry NSR-Exclusivity Traffic in its account, move any traffic in any other railroad's account, or grant haulage or other operating rights for any traffic to any third party (i.e., any party not NSR).⁵² And even though KCS acts as MSLLC operator, KCS does not have the right to participate in, collect revenues, or establish rates for any traffic over the MSLLC Line.⁵³

Second, NSR also received a right of first refusal to carry all domestic intermodal traffic processed at the Dallas Intermodal Terminal (“DIT”) traveling overhead between the DIT and Meridian, with domestic origin and destination at or west of Dallas-Fort Worth and at or east of Meridian.⁵⁴

⁵⁰ See FD 34822, *Notice of Exemption*, “KCS-MSLLC Joint Use Agreement,” Section 4(c), at 221 (January 17, 2006).

⁵¹ See *id.* Section 2(a), at 219 (trackage rights for Permitted Traffic); *id.* Section 4(a), at 221 (defining Permitted Traffic).

⁵² *Id.* Section 2(d), at 220.

⁵³ See FD 34822, *Notice of Exemption*, “MSLLC-KCS Operating Agreement,” Section 2(g), at 158 (January 17, 2006).

⁵⁴ The agreements define Dallas Intermodal Terminal Traffic as comprising all (i) domestic intermodal traffic with a lift or drop at the DIT, (ii) moving over the track between Meridian and Shreveport and over KCSR's tracks between Shreveport and DIT, (iii) with O/D in U.S. at or west of DFW SMSA (iv) with O/D in U.S. at or east of Meridian. See FD 34822, *Notice of Exemption*, at 91, 180, 216, 391 (January 17, 2006).

KCS retained ownership of its line between Shreveport and Dallas. Under the **Dallas Option**,⁵⁵ however, NSR can buy DIT at Wylie, TX, during the year commencing in May, 2024.⁵⁶

Unless and until NSR exercises the Dallas Option, NSR and KCS must jointly market and agree on rates for **DIT Traffic** (“DITT”). NSR has a right of first refusal to move DITT, and KCS moves that traffic in interchange between the DIT and Meridian.⁵⁷ KCS must first offer potential movements of DITT for interchange with NSR at Meridian, and KCS may not enter into any transportation agreement with another carrier to move that traffic.⁵⁸ {{ [REDACTED]

[REDACTED] [REDACTED]
[REDACTED]^{0}}}

These restrictions prohibit the MSLLC and KCS from providing their services to move NSR-Exclusivity Traffic between UP at Shreveport and Meridian or move DITT to Meridian for downstream service by carriers competing with NSR between Meridian and points east, such as CSXT.

The provisions of the MSLLC Agreements require NSR’s consent to all Major Decisions made by the Management Committee of the MSLLC, whether to protect NSR’s minority

⁵⁵ The Dallas Option is “an option to permit [NSR] or any of its subsidiaries or affiliates to purchase, at Fair Market Value as defined below, all of KCSR’s right, title and interest in the Terminal, together with all of the buildings, improvements and other fixtures located on the Terminal....” See FD 34822, *Notice of Exemption*, “Dallas Terminal Marketing Agreement,” Section 3, at 393 (January 17, 2006). The terms governing the exercise of that option are in Section 4 of the Dallas Terminal Marketing Agreement. *Id.* Section 4, at 4-5.

⁵⁶ *Id.* Section 3-4.

⁵⁷ *Id.* Section 2, at 392-93.

⁵⁸ *Id.*

⁵⁹ See FD 34822, *Notice of Exemption*, “KCS-MSLLC Joint Use Agreement,” Section 4(b), at 221 (January 17, 2006).

⁶⁰ V.S. of Professor Julie M. Carey, Figure 21, at 73.

interest, as is often the case in these arrangements, or, as here, to preclude the majority partner from acting in the interest of the JV.⁶¹ Through these provisions, NSR gained effective control of MSLLC including the ability to preclude KCS's use of MSLLC facilities for interchange with carriers other than NSR.⁶²

IV. THE NSR-KCS EXCLUSIVITY ARRANGEMENTS ARE UNLAWFUL, LIMIT COMPETITION, AND CANNOT BE SHOWN TO BE CONSISTENT WITH THE PUBLIC INTEREST. THEY SHOULD NOT BE ENSHRINED BY THE BOARD

A. The Board Has Authority to Abrogate the Exclusivity Arrangements

The Board's conditioning authority is granted by 49 U.S.C. § 11321(b). The "overriding factor governing the imposition of all conditions in the past has been the public interest."⁶³ While the Board will generally not seek to rectify pre-existing conditions, it will do so to protect the public interest. As explained by the ICC, it has "imposed conditions to...enhance competition, to improve the position of a carrier, to open new gateways, to establish new single-line service, to preserve the integrity of an important switch carrier, to preclude diversion of traffic, to compensate partially a railroad for its anticipated traffic losses, to protect railroads even though

⁶¹ See FD 34822, *Notice of Exemption*, at 95, 98, 114, 119 (January 17, 2006).

⁶² See FD 34822, *Notice of Exemption*, "KCS MSLLC Master Interchange Agreement," at 263-64 (January 17, 2006). See also *Union Pacific-Control-CNW*, 9 I.C.C.2d 939, 946-948 (1993), and *Michigan Central Railway, LLC-Acquisition and Operation-Lines of Norfolk Southern Railway Company*, STB Finance Docket No. 35063, (served December 10, 2007).

⁶³ *Burlington N., Inc.-Control & Merger-St. Louis-San Francisco Ry. Co.* 360 I.C.C. 788, at 950 (I.C.C. 1980). Despite recognizing that any "condition imposed on that merger tends to decrease or eliminate the merger's expected benefits," the I.C.C. held, "there are certain conditions which might not adversely offset a merger's anticipated benefits because the operational efficiencies or competition resulting from the condition are of greater benefit to the public interest than harm to the merger." *Id.* at 950.

they will not suffer serious anticompetitive harm, and to aid railroads not likely to be harmed by the transaction.”⁶⁴

Here, nothing about the Exclusivity Arrangements serves the public interest. They were not approved by the Board and are therefore unlawful. They facially restrict competition, and, as explained in Section V below by Professor Carey and Dr. Shehadeh, are shown to harm the public interest. A condition abrogating the Exclusivity Arrangements will ameliorate or eliminate the harmful effects, will be operationally feasible, and will produce public benefits outweighing any reduction to the public benefits produced by the merger.]

Not only does the board have the authority to abrogate the Exclusivity Arrangements in the MSLLC Agreements, but the Board should exercise this power (and not just order Applicants to do so) because Applicants *cannot* legally make such a commitment; KCS does not have the power to remove those provisions even if it wished to because of NSR’s control of the MSLLC. Only Board intervention can open these gateways on commercially reasonable terms and protect the public interest.⁶⁵

1. The Exclusivity Arrangements Harm Competition and Were Made Without Competition Review or Board Approval. They are Therefore Unlawful

The Exclusivity Arrangements harm competition by a) allowing prices exceeding those prevailing in more competitive markets and b) precluding service competition downstream (to

⁶⁴ *Id.* at 950. Private-sector initiatives like the MSLLC, which are not inherently sound because they are unlawful, are not protected from the Board’s authority. *See* Missouri Central Railroad Company–Acquisition and Operation Exemption–Lines of Union Pacific Railroad Company, Decision, STB Finance Docket No. 33508, at 10 (Decided Feb. 27, 2013) (“While the Board encourages privately negotiated agreements, contractual restrictions that unreasonably interfere with common carrier operations may be deemed void as contrary to public policy. The contractual restrictions found by the agency to be unreasonable usually involved agreements between two parties that abrogate the rights or common carrier duties of a third party, which had limited or no involvement in the negotiations or contractual agreement.”).

⁶⁵ *See supra* notes 61-62. *See also* CSXT-11 at 9. *See also* CSXT-8 at 8-9, n. 23.

and from points east of Meridian). They also restrict the growth of intermodal traffic over the Speedway. All these effects harm shippers and keep trucks on the highway.

The Exclusivity Arrangements required KCS and NSR to receive the Board's approval of their competitive impacts. But KCS and NSR did not seek that Board review and approval. The Exclusivity Arrangements were not sanctioned by the Board. The MSLLC Agreements only received an exemption for an "intracorporate transaction" within KCS.⁶⁶

The transaction exemption under 49 C.F.R. § 1180(d) (2000) exempts only transactions "proposed under 49 U.S.C. § 11323" to the extent they have no effects on the competitive balance outside the corporate family. Agreements "to pool or divide traffic" fall under 49 U.S.C. § 11322, not § 11323.

Because the Exclusivity Arrangements influenced the competitive balance regarding the affected traffic and constituted a division of traffic, they were neither eligible for, nor exempted from, regulation by the intracorporate transaction exemption they received under 49 C.F.R. § 1180.2(d)(3).⁶⁷ And never have either KCS or NSR sought authority for the anticompetitive effects of the Exclusivity Arrangements. They are unlawful in two respects. First, the elements of the MSLLC Agreements that give NSR exclusive control of {{[REDACTED]}} of the traffic moving over the MSLLC Line constitute an agreement to "divide traffic" within the meaning of 49 U.S.C. § 11322. KCS previously could handle all traffic across the line, but post-agreement it can only handle limited traffic, leaving NSR as the sole handler of certain traffic east of Dallas and east of Meridian. This is a straightforward, obvious division of traffic, as {{[REDACTED]}}

⁶⁶ See FD 34822, *Notice of Exemption*, (served January 17, 2006).

⁶⁷ Nor were Exclusivity Arrangements approved by the two trackage rights exemptions granted NSR and KCS under 49 C.F.R. § 1180(d)(7).

}}.⁶⁸ But NSR and KCS did not apply for § 11322 authority for this traffic division.

Second, the MSLLC Agreements give NSR control of MSLLC. NSR was nominally to be a minority (30%) owner of MSLLC and was not a party to the Notice of Exemption.⁶⁹ However, the MSLLC Agreements require NSR to agree with KCS on all major decisions they make regarding MSLLC. That authority gives NSR effective control over MSLLC. That control is unlawful⁷⁰ and makes it impossible for KCS to unilaterally void NSR's other Exclusivity Arrangements.⁷¹

⁶⁸ "CP Acquisition of KCS Overview and Update," NS internal presentation, September 2021, at 16 (NS 00004803).

⁶⁹ See FD 34822, *Notice of Exemption*, at 5 (January 17, 2006); *id.* at 2.

⁷⁰ Transactions are subject to approval under 49 U.S.C. 11323 when they result in effective control of the entity in question (here, MSLLC) even if the controlling party nominally has less than a 50% interest. Under the statute, "Control," includes the power to exercise control or management. The key test is whether one entity would have "the power to manage the day to day affairs" of the other. *Declaratory Order—Control—Rio Grande Indus., Inc.*, Finance Docket No. 31243, slip op. at 3 (STB served Aug. 25, 1988), *aff'd sub nom. Kansas City S. Indus., Inc. v. ICC*, 902 F.2d 423 (5th Cir. 1990). In assessing control, the STB and its predecessor the ICC have long "rejected any arbitrary formula based upon percentage of stock ownership, and instead, looked to a number of additional factors, including distribution of the remaining stock, the ability to elect directors and otherwise control or influence decision-making machinery, and the existence of management, marketing, operating and financial ties." *Union Pac. Corp. - Control - Chicago & N. W. Holdings. Corp.*, 9 I.C.C. 2d 939, 947 (1993) ("UP/CNW"). Here NSR, with a nominal 30% interest in MSLLC has effective control because it can assure no "major decisions" are made by the JV without NSR's approval.

⁷¹ Applicants and NSR may contend that because the traffic subject to the Exclusivity Arrangements is exempt from regulation, they are excused from challenge for effecting an unlawful division of traffic or NSR's unlawful control of the MSLLC. However, the fact that traffic is not otherwise subject to Board regulation does not excuse parties from restraining competition for that traffic. The Board has authority to abrogate the Exclusivity Arrangements which, if not exercised because the affected traffic is subject to a class exemption, would subject KCS and NSR and their Exclusivity Arrangements to the antitrust laws. In proposing to exempt intermodal traffic from regulation, the Interstate Commerce Commission stated: "In this proceeding we are again unwilling to sacrifice the benefits of competition promised by the exemption by continuing to offer antitrust immunity to the railroads. An exemption of TOFC/COFC service will enhance both intermodal and intramodal competitive opportunities.

2. The Proposed Transaction and NSR's Responsive Transaction Would Exacerbate the Anticompetitive Effects of the Exclusivity Arrangements

Applicants claim the Proposed Transaction will cause a significant increase in intermodal traffic traveling between the CP and KCS networks because of “new single-line routing options.” As explained further in Section IV, this growth exacerbates the anticompetitive effects of the Exclusivity Arrangements in three ways.

First, as the Applicants explain, Shreveport is the hub for the KCS network, through which effectively all the “new single-line routing options would travel.”⁷² For much of that “new single-line routing” intermodal traffic, the Meridian Speedway is the most efficient routing to serve points in the Southeast and Mid-Atlantic. Because no CP origins and destinations (other than Kansas City itself) are on the 2006 KCS network, NSR would have an exclusive right to carry this “new single-line routing” intermodal traffic over the Speedway if its origin or destination were in the United States west of Fort Worth. Applicants’ projected increase in intermodal traffic flowing between the CP and KCS systems therefore implies a significant increase in traffic over efficient routings for which NSR would have exclusivity.

Second, as NSR suggests, the CPKC Transaction creates a new ability for KCS to bypass the Speedway using CP-controlled routings to the north, even if the Speedway is the most efficient routing. But it is precisely NSR’s exclusive rights over the Speedway that give CPKC

Railroads will be able to offer a complete intermodal service without regulatory restraints. They will be able to compete vigorously with trucks and with other railroads. If we were to immunize TOFC/COFC ratemaking from the antitrust laws, most of these benefits would be lost. Ex Parte No. 230 (Sub-No. 5), *Improvement of TOFC/COFC Regulation*, 45 Federal Register 79123, 79124 (Nov. 28, 1980). The ICC adopted this reasoning in its final decision. Ex Parte No. 230 (Sub-No. 5), *Improvement of TOFC/COFC Regulation*, 46 Federal Register 14348, 14350 (February 27, 1981).

⁷² Finance Docket No. 36500, Railroad Control Application (CP-26/KCS-14), Volume 2, at 275 (October 29, 2021).

the incentive to do so. Such diversions could result not merely in longer routings, but in increased traffic congestion at alternative gateways—the very problem KCS argued NSR’s investment in the MSLLC was intended to solve. This risk would be reduced if the Exclusivity Arrangements were abrogated.

Third, NSR’s Responsive Application seeks springing trackage rights over KCS’s section of the Speedway between Dallas and Shreveport that NSR could use to carry traffic in its own account upon its purchase of KCS’s Dallas Intermodal Terminal (exercising its option from the MSLLC Agreements). This would further extend and dramatically increase the anticompetitive effects of the Exclusivity Arrangements.

If NSR exercised its Dallas Option, {{

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}}

⁷³ FD 34822, *Notice of Exemption*, “Dallas Terminal Marketing Agreement,” Section 5(a)(i), at (January 17, 2006); FD 34822, *Notice of Exemption*, “NSR-MSLLC Joint Use Agreement,” Section 2(d)(i).

Third, as discussed below, NSR itself contends that the Proposed Transaction will reduce or substantially eliminate the sole benefits to the public interest that it claims justify or even mitigate the anticompetitive effects of the Exclusivity Arrangements, namely improvements in speed and quality of service and the diversion of highway traffic to rail traffic. If the harm to competition remains, and the supposed quality benefits are reduced, the net result would be significant harm to the public interest resulting from the nexus of the MSLLC Agreements, NSR proposed Meridian Speedway Transactions, and the Proposed CPKC Transaction.

3. The Exclusivity Arrangements are Integral to the Application and NSR's Responsive Application

Applicants seek approval for CP control of KCS, which is a party to the Exclusivity Arrangements, and assert that operations under those arrangements are beneficial to the Public Interest.⁷⁴

Applicants claim the transaction will cause significant increases in intermodal traffic traveling between the CP and KCS networks because of “new single-line routings” the combined CPKC can offer. As Applicants recognize, Shreveport, at the west end of the MSLLC Line, is the “hub” of KCS’s network, through which this “new single-line” intermodal traffic will flow.⁷⁵ From there, the route continues to the east end of the Speedway, which NSR says is the most efficient routing to reach certain points in the East.⁷⁶ Without abrogation of the Exclusivity Arrangements, all that traffic would be subject to NSR’s exclusive control.

4. Approving of the Proposed Transaction and NSR's Responsive Application Without Abrogating the Exclusivity Arrangements Risks Perpetually Enshrining the Anticompetitive Effect of those Arrangements

⁷⁴ CP-25/KCS-13, V.S. of John Brooks, at 218; (Brooks Deposition, 199:16-19, 230:14-17).

⁷⁵ Finance Docket No. 36500, Railroad Control Application (CP-26/KCS-14), Volume 2, at 275 (October 29, 2021).

⁷⁶ *Supra* n. 44.

The Board does not favor perpetual agreements that risk anticompetitive effects.⁷⁷ The benefits Applicants project are founded in part on the Exclusivity Arrangements. Those arrangements are contrary to the public interest and unlawful. They should not be the basis for approval of the Proposed Application; they should be abrogated. Otherwise, approval of the Proposed Transaction may perpetually exempt them from Federal, State, and local law, including the antitrust laws. 49 U.S.C. § 11321.

The same perpetual exemption could result from approval of NSR's proposed transaction, the claimed benefits of which are predicated on the Exclusivity Arrangements and on an increase of the traffic subject to those arrangements. They should not be approved without conditions abrogating the Exclusivity Arrangements to assure they are not enshrined as perpetually exempt from Federal, State, and local law, including the antitrust laws.⁷⁸

V. THE EXCLUSIVITY ARRANGEMENTS HARM COMPETITION AND THE PUBLIC INTEREST; THE PROPOSED TRANSACTION WILL SIGNIFICANTLY EXACERBATE THAT HARM.

A. The Exclusivity Arrangements Have Been Harming the Public Interest Since 2006.

CSXT has explained that the Exclusivity Arrangements harmed competition and the public interest while evading public interest review.⁷⁹ NSR argues that "CSXT's Comments are factually inaccurate and contain a number of incorrect legal conclusions,"⁸⁰ and that the

⁷⁷ See *Disclosure of Rail Interchange Commitments*, EP 575 Sub-No.1, slip op. at 15 (STB served October 30, 2007); *Bessemer and Lake Erie Railroad Company—Acquisition and Operation—Certain Rail Lines of CSX Transportation, Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, and Franklin Counties, N.Y.*, FD 36347, slip op. at 9-10 & n.12 (STB served April 6, 2020).

⁷⁸ 49 U.S.C. § 11321.

⁷⁹ CSXT-8 at 7-19; CSXT-11 at 3-8.

⁸⁰ NS-12 at 12 n.31.

Meridian Speedway Transactions were “pro-competitive.”⁸¹ NSR offers no basis for that conclusion in the laws governing STB or antitrust review of restrictions on competition.

Before 2006, KCS and NSR each had the ability and legal right to carry domestic transcontinental intermodal traffic over the Meridian Speedway.⁸² In 2006, the arrangement changed and NSR and KCS agreed to divide specific intermodal traffic. They agreed NSR alone could use the Meridian Speedway to serve its Exclusivity Traffic and all DITT it chose to carry, while KCS would serve other markets.⁸³ Such a division of traffic requires advance approval from the STB, which was never sought or obtained. Under antitrust standards, this division standing alone would be held anticompetitive as an agreement to allocate markets. That these

⁸¹ NS-12 at 10.

⁸² See { {

}}.

⁸³ See FD 34822, *Notice of Exemption*, “NSR-MSLLC Joint Use Agreement,” Section 4(a)-(b), at 188 (January 17, 2006) (“NSR shall have the exclusive right to transport NSR Traffic over the Subject Trackage... for NSR Traffic only, MSLLC may not perform haulage services for any carrier other than NSR or grant trackage rights or operating rights to KCSR or any Foreign Railroad on the Subject Trackage for NSR Traffic, absent the express written consent of NSR, which may be withheld in NSR's sole discretion.”); See FD 34822, *Notice of Exemption*, “KCS MSLLC Master Interchange Agreement,” Section 4(d), at 264 (January 17, 2006) (“Neither KCSR nor MSLLC shall have the right to permit or admit any third party to the use of all or any portion of the other Party's Interchange Tracks without the prior written approval of the other Party, which may be withheld in said other Party's sole discretion.”); See FD 34822, *Notice of Exemption*, “Dallas Terminal Marketing Agreement,” Section 3, at 393 (January 17, 2006) (“KCSR hereby grants to NSR an option to permit it or any of its subsidiaries or affiliates to purchase, at Fair Market Value as defined below, all of KCSR's right, title and interest in the Terminal, together with all of the buildings, improvements and other fixtures located on the Terminal, but only upon the terms and conditions stated herein”).

Exclusivity Arrangements occur within the context of a JV does not, by itself, alter that conclusion.⁸⁴

NSR's Comments, however, appear to contend that the anticompetitive character and effects of the Exclusivity Arrangements should be excused because the Meridian Speedway Transactions were "pro-growth, pro-competitive, and allowed shippers to utilize a highly efficient route service," generating public interest benefits.⁸⁵ But the MSLLC Transactions led only to a contribution of money, without integrating complementary productive capacities or eliminating double-marginalization.⁸⁶ NSR's argument is therefore that the anticompetitive character and effects of the Exclusivity Arrangements are justified entirely by its capital investment in the line and public benefits supposedly resulting from that investment.⁸⁷

⁸⁴ See *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990) ("Here, HBJ and BRG had previously competed in the Georgia market; under their allocation agreement, BRG received that market, while HBJ received the remainder of the United States. Each agreed not to compete in the other's territories. Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other."); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951) ("Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled."), *overruled in part on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

⁸⁵ NS-12 at 10. The contention that the Meridian Speedway Transactions resulted in significant public benefits, despite or thanks to the Exclusivity Arrangements, is the focus or predicate of the entirety of NS's Comments. See *id.* at 9-21 (arguing that the Meridian Speedway Transactions resulted in significant output, competitive, and other public interest benefits); *id.* at 21-40 (arguing the Proposed Transaction will undermine the supposed output, competitive, and other public interest benefits NS attributes to the Meridian Speedway Transactions); *id.* at 40-51 (arguing conditions are needed to protect the output, competitive, and other public interest benefits NS claims resulted from the Meridian Speedway Transactions).

⁸⁶ See Part V(A)(3), *infra*.

⁸⁷ See NS-12 at 11-12. ("Because of NSR's investments, the Meridian Speedway today is faster and more reliable Thus, NSR's investments continue to support NSR's ability to deliver the premium service that intermodal customers demand and help achieve public interest benefits supported by the Board.").

An antitrust tribunal faced with this argument would assess the legality of the Exclusivity Arrangements first by examining any anticompetitive effects and then by considering whether the Exclusivity Arrangements were reasonably necessary to achieve any efficiencies resulting from NSR's contribution of capital to the JV, and in particular whether such efficiencies could have been achieved through arrangements substantially less restrictive of competition.⁸⁸ Here, the anticompetitive effects of the Exclusivity Arrangements have been substantial, and they neither advance nor are reasonably necessary to serve any pro-competitive purpose, including to address NSR's apparent concern that rivals would "free ride" on its investment. The Exclusivity Arrangements therefore unjustifiably restricted competition, causing significant harm to the public interest.

1. The Exclusivity Arrangements Are a Significant Restriction on Competition with Substantial Anticompetitive Effects

The Exclusivity Arrangements harmed competition in two related ways. First, they directly reduced competition to provide service over the Speedway and between the Speedway and points East. Second, because – as NSR itself stresses – no similarly-efficient alternative routes exist for transcontinental intermodal traffic or DITT, cutting off other carriers' access to Speedway traffic has harmed competition along lanes to and from the Southeast.

a. The Exclusivity Arrangements Reduced Competition on the Speedway

The Exclusivity Arrangements restricted competition for two types of traffic: NSR Exclusivity Traffic and **Dallas Intermodal Terminal Traffic** ("DITT").

⁸⁸ See, e.g., Fed. Trade Com. and Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors 4 (2000) ("Competitor Collaboration Guidelines"); *NCAA v. Alston*, 141 S. Ct. 2141, 2160 (2021).

i. The Exclusivity Arrangements caused a perpetual 2-to-1 reduction in carriers able to serve domestic transcontinental intermodal traffic over the Speedway.

For NSR Exclusivity Traffic, the Exclusivity Arrangements reduced the number of carriers offering service over the Meridian Speedway from two to one, in perpetuity. Before 2006, either KCS (as owner of the Speedway) or NSR (using KCS haulage) could carry transcontinental intermodal traffic to and from designated points in the western U.S., including U.S. Pacific ports, over the Speedway.⁸⁹ In 2006, KCS granted NSR the *exclusive* right to carry substantially the same traffic that NSR could carry under the 2000 KCS-NSR Haulage Agreement, and KCS surrendered its own right to handle that traffic, thus dividing the traffic moving over the Meridian Speedway, without prior Board approval.⁹⁰ Thus, KCS could no longer carry such traffic and could not grant other carriers operating rights to carry such traffic.⁹¹

⁸⁹ See {{ [REDACTED] }}

⁹⁰ Compare {{ [REDACTED] }}

}}, with FD 34822, *Notice of Exemption*, at 199 (served January 17, 2006) (“all intermodal traffic moving on the Line that (a) originates or terminates in the United States at or east of Meridian, Mississippi and enters or exits the Line at Meridian, Mississippi, (b) originates or terminates in the United States west of Fort Worth, Texas (including intermodal traffic originating by steamship line at a port along the west coast of the United States) and enters or exits the Line at Shreveport, Louisiana and (c) does not consist of traffic originating or terminating at any station on the KCSR system (including any station where KCSR or the Texas Mexican Railway Company have trackage rights or access via reciprocal switch), as it exists on the date of the Transaction Agreement”). Competition was directly reduced for any traffic falling within both definitions, even if the definitions diverge as to other traffic.

⁹¹ FD 34822, *Notice of Exemption*, “NSR-MSLLC Joint Use Agreement,” Section 4(a), 4(b)(ii), at 188 (January 17, 2006) (NSR has exclusive right to transport restricted traffic over the line);

KCS and NSR have stated that KCS did not carry such traffic at the time of the Speedway transactions, except for “a small volume” of California-originated intermodal trailer traffic transferred by road at Dallas.⁹² It was nonetheless moved by KCS by shippers’ choice. KCS’s presence offered potential competition. KCS’s technical capabilities and legal rights gave it the means to compete competition with its haulage client for that California-based traffic over its own line,⁹³ and a JV that eliminates potential competition by allocating markets between its parents significantly restricts competition.⁹⁴

This reduction in the number of carriers offering a relevant service directly reduced competition. As Dr. Ramsey Shehadeh demonstrates, that reduction in competition has significant effects on market performance.⁹⁵ It harms the public interest and would not ordinarily be approved by the Board without careful consideration and strong justification.⁹⁶

ii. The Exclusivity Arrangements perpetually forbade KCS from interchanging intermodal traffic to and from its Dallas intermodal terminal with any downstream carrier but NSR, unless NSR consented.

FD 34822, *Notice of Exemption*, “KCS-MSLLC Joint Use Agreement,” Section 2(d), at 220 (January 17, 2006) (KCSR may not use its trackage rights to move restricted traffic, move traffic in any other railroad’s account, or grant haulage or other operating rights to any third party.); *id.* Section 4(c), at 221 (With respect to restricted traffic, MSLLC may not perform haulage over the Line for, nor grant operating rights over the Line to, KCSR or any third party absent NSR’s consent).

⁹² FD 34822, *Notice of Exemption*, at 4-5 n.2 (January 17, 2006); NS-12 at 11 (citing Notice of Exemption).

⁹³ See, e.g., *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 633 (1974).

⁹⁴ See *Yamaha Motor Co. v. Fed. Trade Com.*, 657 F.2d 971, 977-79 (8th Cir. 1981); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 214 (D.C. Cir. 1986) (JV’s exclusivity policy restricted horizontal competition because each participant “was an actual *or potential* competitor” with the venture and thus under the challenged policy each “adhered to a policy of ending or lessening its competition ... *or of not entering into full competition*” with the venture (emphases supplied)).

⁹⁵ See Verified Statement of Dr. Ramsey Shehadeh, at 18.

⁹⁶ See 49 U.S.C. § 11322. See FD 27590, “TTX Company – Application for Approval of Pooling of Car Service with Respect to Flatcars.” (January 16, 2004; September 30, 2014).

For DITT, the Exclusivity Arrangements' reduced competition east of the Speedway. Before 2006, KCS could interchange DITT at Meridian with any carrier. The Exclusivity Arrangements forbid it from doing so with anyone, but NSR unless NSR has affirmatively refused to carry the traffic itself.⁹⁷ Even if NSR so refuses, KCS may not offer a more competitive rate to another carrier than KCS-NSR have agreed to charge for the same movement. The rate for such carriage is "to be established jointly by [KCS] and NSR" based on { [REDACTED] }⁹⁸ Nor may KCS { [REDACTED] }⁹⁹ Thus, NSR gained the exclusive right to carry all DITT it desired to carry between Meridian and points east, free from any service competition to which it did not consent, and free from any price competition. NSR thereby gained control over whether its downstream rivals would have access to any DITT at Meridian and assured that any competition its rivals could offer NSR to and from points east of Meridian would not include price competition. These

⁹⁷ FD 34822, *Notice of Exemption*, “Dallas Terminal Marketing Agreement,” Section 2(d), at 393 (served January 17, 2006) (“KCSR shall develop a Rate Quote ... and shall offer a potential movement to NSR utilizing such developed Rate Quote, for any Dallas Intermodal Terminal Traffic. KCSR shall not enter into a transportation agreement involving a Rate Quote in conjunction with a Foreign Railroad unless KCSR first offers such a potential movement to NSR and NSR declines the offer to participate in such movement... Failure to decline the offer... shall be deemed an acceptance.”). *See also* McClellan Dep. Tr. 12:17:42- 12:18:00 (July 11, 2022) ({} [REDACTED])

⁹⁸ FD 34822, *Notice of Exemption*, “Dallas Terminal Marketing Agreement,” Section 2(b), at 392 (“Rates and rate increases for the interline movement of Dallas Intermodal Terminal Traffic shall be established jointly by KCSR and NSR based on { [REDACTED]”).

}}). See also McClellan Dep. Tr. 87
}}).

restraints have been effective. All DITT traffic has moved over NSR East of Meridian since 2006.

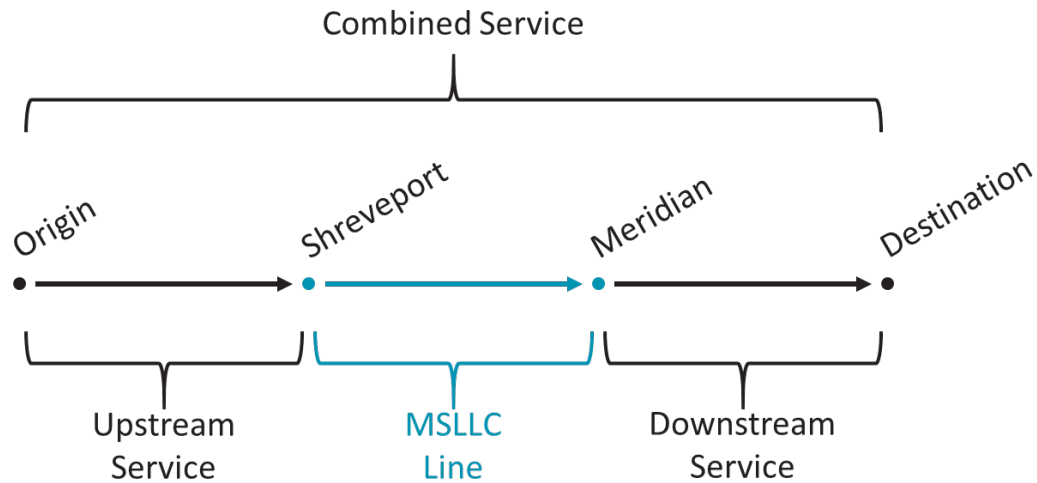
b. The Exclusivity Arrangements Substantially Reduced Competition in Relevant Markets East of Meridian.

The Exclusivity Arrangements' restriction of competition over the Speedway substantially reduced competition more broadly, because similarly efficient alternative routes do not exist to constrain the market power of a carrier with exclusive access to Speedway traffic.

i. Vertically related markets and vertical anti-competitive effects.

Relevant markets in which rail carriers compete are traditionally defined by their origin, destination, and traffic type.¹⁰⁰ When rail traffic moves over multiple carriers from its ultimate origin to its ultimate destination, each carrier contributes a complementary service to the overall competitive character of the movement. These services are called vertically related, located “upstream” and “downstream” of one another. In the case of the MSLLC Line, there exists the potential for competition for service over the MSLLC Line itself, for service upstream and downstream of the MSLLC Line, and for combined services of which service over the MSLLC Line is a part.

¹⁰⁰ Ex Parte No. 627, Market Dominance Determinations – Product and Geographic Competition, page 10, served December 21, 1998 (consider moving same product between the same origin and destination).

Figure 3: MSLLC Line and Vertically Related Services

These Responsive Comments refer to service over and points west of Shreveport as upstream of the MSLLC Line, and to services to and from points east of Meridian as downstream of the MSLLC Line. Service over the MSLLC Line is called an “input” to service downstream, and providers of that downstream service are the direct “customers” of that input service, with shippers being its “consumers.”¹⁰¹ These comments focus on service over the MSLLC line as a key input into downstream service to and from points east of Meridian.

¹⁰¹ Cf. Dep’t of Justice and Fed. Trade. Com., Vertical Merger Guidelines 4 n.4 (2020) (likewise using example of input foreclosure for ease of exposition, explaining customer foreclosure is analogous). In terms of the movement of traffic, for east-to-west traffic, service between the Speedway and points east would be upstream, service between the Speedway and points west would be downstream, and those offering service between the Speedway and points west would be customers of the input service provided over the Speedway. Alternatively, the destination carrier can be termed the upstream service provider where shippers purchase the interline service from the origin carrier, which must incorporate destination carrier service as an “input” into the interline movement it offers the shipper. This distinction between framing one service or the other as the one “upstream” is not relevant to the analysis, because so-called “input foreclosure” and “customer foreclosure” are largely mirror images of one another. What matters is that under certain circumstances market power as to any one service can have vertical anticompetitive effects throughout the chain and on shippers.

Exclusive control of a key service along an interline movement can have so-called vertical anticompetitive effects upstream and downstream of that service. NSR's own expert, Dr. John W. Mayo, succinctly explains the mechanisms by which vertical integration – which may also be achieved through merger but in this case occurred through exclusive control of input traffic – can produce anticompetitive effects:

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

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

36. The intuition behind why a vertical merger may result in increased prices (therefore costs) to downstream rivals is straightforward. Professor Rogerson observes “This effect occurs because, after the merger, the vertically integrated firm now views the lost profit of its own downstream partner as an extra opportunity cost of providing the input to rival downstream firms. This opportunity cost is just as real as any production cost, and an increase in the opportunity cost has the same role in affecting the vertically integrated firm's incentives and behavior as would a similar increase in production cost. When the vertically integrated firm negotiates the input price with a downstream rival, a share of this cost increase is passed through to the downstream firm in the form of an increase in the negotiated input price.”¹⁰²

Based on Dr. Mayo's analysis, the “key input[s]” to which downstream rivals' access may be foreclosed, or for which their “input prices” might be raised, are NSR Exclusivity Traffic and DITT flowing over the Speedway.

¹⁰² V.S. of Professor John Mayo ¶¶ 34-36.

To determine whether exclusive control of inputs is likely to result in foreclosure or the raising of rivals' costs, courts and antitrust agencies look to two elements. First, they consider whether, by altering the terms on which the vertically integrating firm provides its inputs to one or more of its downstream rivals, it could likely cause those rivals to lose significant sales. If so, the vertically integrating firm is deemed to have the "ability" to foreclose competition. Second, they consider whether the vertically integrating firm, because of integration, would likely find it profitable to foreclose rivals or offer them inferior terms for supplying the input it controls because the integrating firm benefits significantly in the relevant market when rivals lose sales. If so, the vertically integrating firm has the "incentive" to foreclose.¹⁰³

The decisive factor in this inquiry is whether rivals can continue to compete with similar effectiveness by "readily switch[ing] ... to alternatives to the [input] ... without any meaningful effect on the price, quality, or availability" of the service they offer in the downstream market.¹⁰⁴ In this context, the question is whether downstream rivals could continue to serve points east of Meridian by using similarly-efficient alternative routings if their efficient access to the Speedway were cut off. For this purpose, "[t]he mere existence of other avenues of distribution is insufficient without an assessment of their overall significance to the market."¹⁰⁵ Thus, evidence that rivals can physically serve markets at all using alternative routings "and are even able to stay in business" by doing so "is insufficient proof that [the alternative path to market] is an effective means of competition."¹⁰⁶ Here, the exclusionary strategies NSR's own expert describes reduce competition even if the rival "is not completely blocked from distributing its product."¹⁰⁷ As the

¹⁰³ Vertical Merger Guidelines, 4-5.

¹⁰⁴ Vertical Merger Guidelines, 4-5.

¹⁰⁵ *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 196 (3d Cir. 2005)

¹⁰⁶ *Id.* at 193.

¹⁰⁷ *United States v. Microsoft Corp.*, 253 F.3d 34, 64 (D.C. Cir. 2001).

seminal *Microsoft* decision explained, the mere existence of alternative routings does not mean that competition has not been harmed, “because, although Microsoft did not bar its rivals from all means of distribution, it did bar them from the cost-efficient ones.”¹⁰⁸

ii. The natural advantages of the Meridian Speedway route prevent alternative routings from constraining service over the Speedway, resulting in market power for a competitor that controls it exclusively.

As shown by Professor Carey, and by Dr. Shehadeh and Mr. Girardot, alternative routes for domestic transcontinental intermodal traffic and DITT are not adequate substitutes for routings over the Meridian Speedway. As NSR has itself stated many times, including in this proceeding, the Meridian Speedway has dramatic advantages over alternative transcontinental routings to and from the Southeast, particularly in terms of mileage and gateway congestion.

First, “[a]ll it takes is one look at a map and the advantages of this route are apparent. Compared to the next-shortest available route, the Meridian-Wylie Route saves 184 miles between Atlanta and Dallas, 212 miles between Charlotte and Dallas, and 41 miles between Jacksonville and Dallas.”¹⁰⁹

¹⁰⁸ *Id.*

¹⁰⁹ NS-12 at 16.

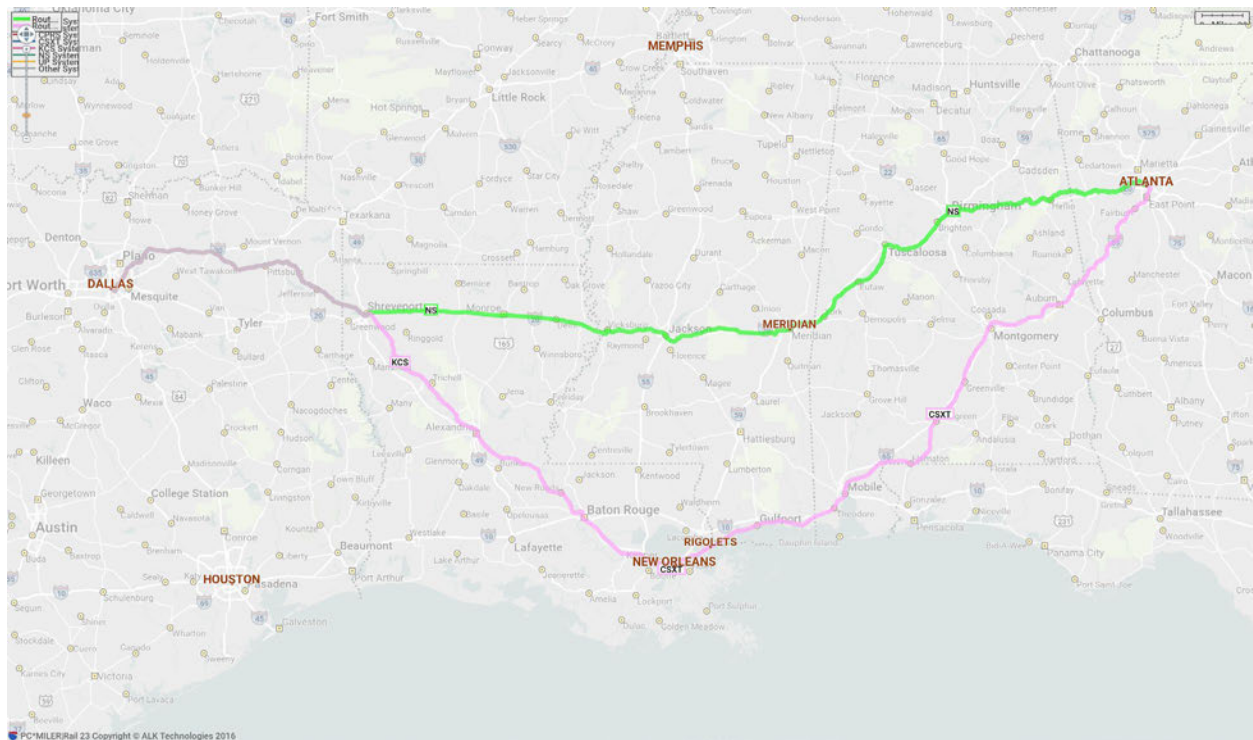
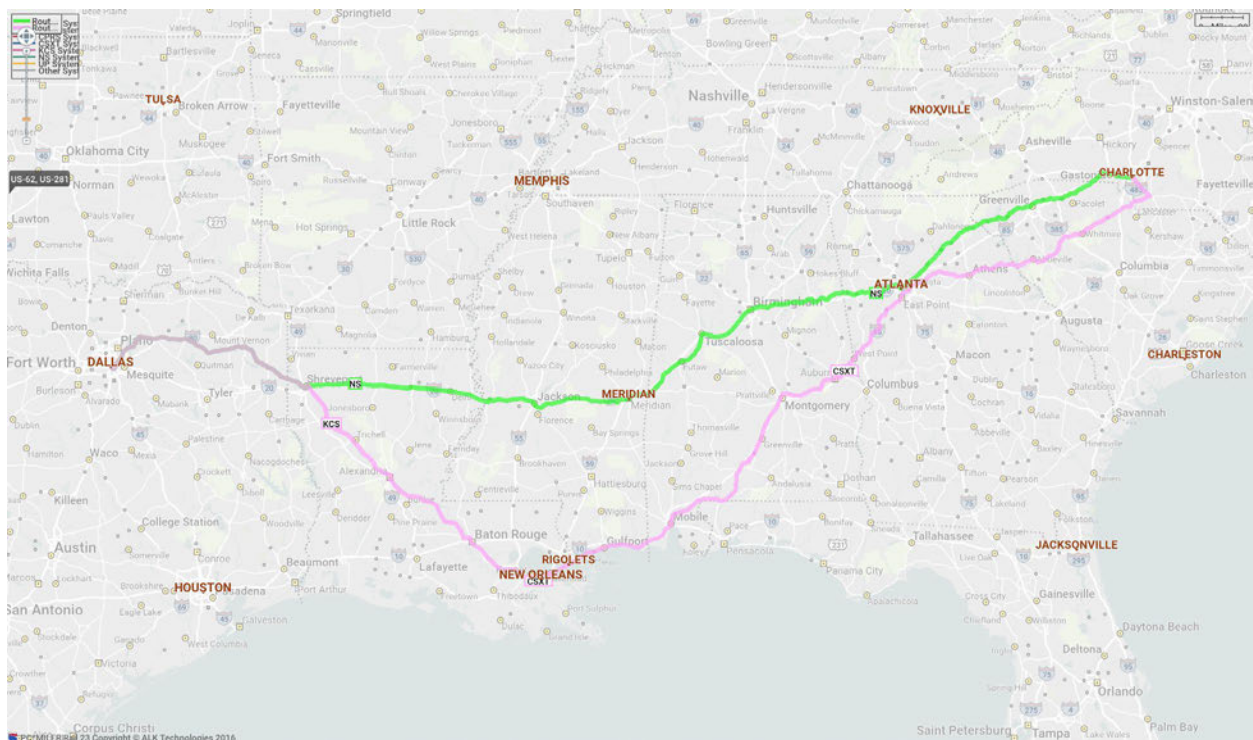
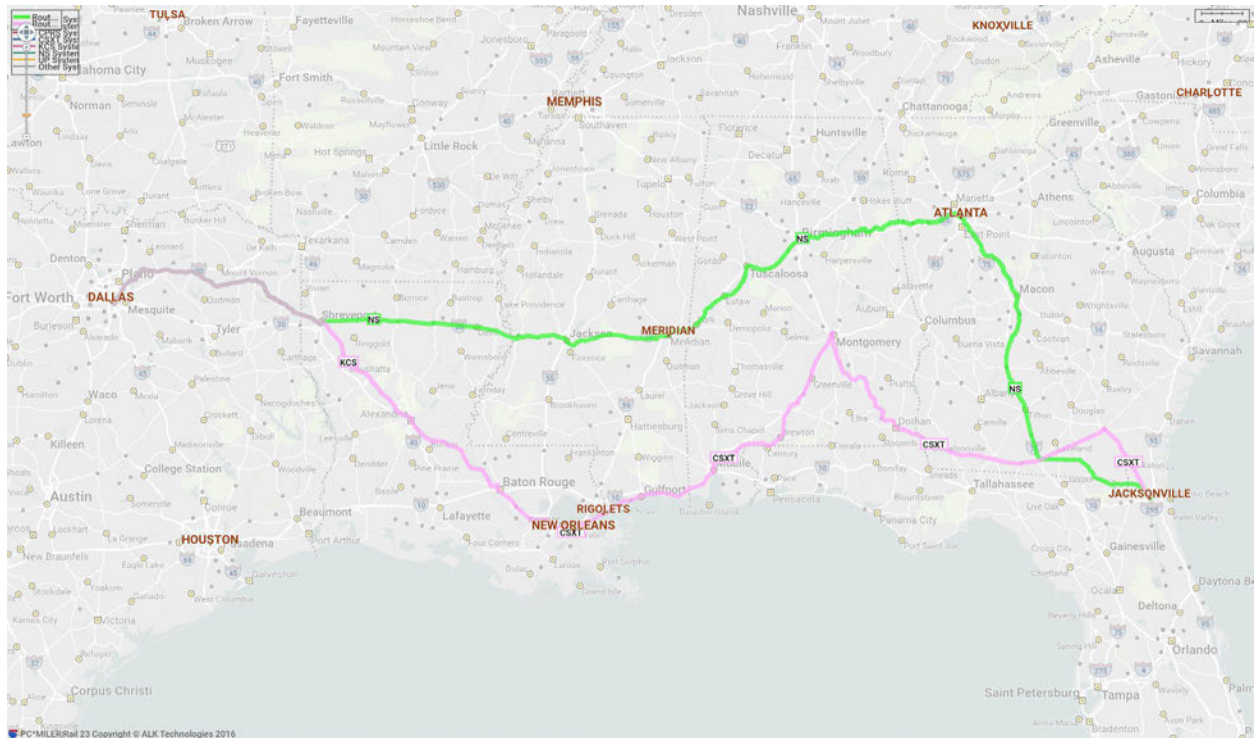
Figure 4: Dallas-Atlanta over Meridian Speedway compared to the CSXT Route**Figure 5: Dallas-Charlotte over Meridian Speedway compared to the CSXT Route**

Figure 6: Dallas-Jacksonville over Meridian Speedway Compared to CSXT Route



The advantage pertains in regional moves and those traversing the whole continent. Compared to the next-shortest route, the Meridian Speedway route saves 295 between Atlanta and Los Angeles; 434 miles between Charlotte and Los Angeles; and 411 miles between Jacksonville and Los Angeles.¹¹⁰

Second, as NSR has also explained, “[E]ach of these alternative routes are [sic] subject to further complications that could adversely affect through and local freight operations.”¹¹¹ The next-shortest routings require interchanges at the New Orleans or Memphis gateways.¹¹²

¹¹⁰ See V.S. of Professor Julie M. Carey Appendix B – Port Competition and the Meridian Advantage.

¹¹¹ NS-12 at 16.

¹¹² See V.S. of Professor Julie M. Carey Appendix B – Port Competition and the Meridian Advantage.

Moreover, NSR's internal documents show it knew that exclusive access to the Speedway would shield it from competitive pressures downstream that relied on alternative routes. A May 2005 presentation to the Board of Directors shows that first and foremost,

[REDACTED]

[REDACTED] } }¹¹³ Two months later, { [REDACTED]
[REDACTED] } } a

conclusion it could not have reached had it believed alternative routings would compete effectively against the Speedway.¹¹⁴

{ [REDACTED]
[REDACTED] } }, but recommended proceeding despite the risk.¹¹⁵

NSR's contemporaneous internal documents show why. After BNSF and CSXT agreed to develop an alternative service bypassing the Speedway, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } }¹¹⁶ Whatever

NSR asserts about alternative paths to market, NSR's internal documents show { [REDACTED]

¹¹³ *Proposed NS-KCS Joint Venture: Chairman's Talking Points*, NS00005474 at NS00005479 (May 12, 2005).

¹¹⁴ *Proposed NS-KCS Joint Venture, Project Orion: Presentation to Norfolk Southern Corp. Board of Directors*, NS00006573 at NS00006586 (July 26, 2005)

¹¹⁵ *Proposed NS-KCS Joint Venture, Project Orion: Presentation to Norfolk Southern Corp. Board of Directors*, NS00006573 at NS00006583 (July 26, 2005)

¹¹⁶ *Intermodal Response to One-on-one Customer Inquiries on BNSF – CSX Announcement*, NS00005980 at NS00005980 (undated).

[REDACTED]

[REDACTED].}}

Critically, none of the advantages of the Meridian Speedway described above, nor those on which NSR itself relies so heavily to claim the Speedway is a uniquely efficient route to and from the Southeast, result from NSR's investment in the MSLLC Line. NSR does not claim its investment shortened the Speedway or routings over it. NSR does not claim its investment altered the efficiency of the Shreveport or Meridian gateway relative to New Orleans and Memphis, only that the investment improved the facilities and capacity of the MSLLC Line itself.¹¹⁷ What NSR points to are preexisting natural advantages unaffected by its investment. Thus, the cause of NSR's competitively unconstrained is not NSR's *investment*. The cause is the Exclusivity Arrangements themselves.

iii. The experience of CSXT and BNSF when the Exclusivity Arrangements cut off their access to the Meridian Speedway confirms that alternative routings are not competitive constraints.

There is no better illustration of the lack of similarly efficient alternatives than the experience of CSXT and BNSF formulating a competitive response after the Exclusivity Arrangements cut off their ability to cooperate using Meridian Speedway routings.

As Mr. Girardot recounts, before the Meridian Speedway Transaction was announced, not only did KCS and NSR both have the ability to carry traffic to and from Meridian over the Speedway, but {{ [REDACTED]

[REDACTED] [REDACTED]

¹¹⁷ See NS-12 at 11 (discussing "the need for considerable investments in [the line's] roadbed, signal systems, yards and sidings"); FD 34822, *Verified Notice of Exemption*, (served January 17, 2006) at 6 n.4. ("These capital improvements will include signal systems, extended sidings, stretches of double track, upgrading track speeds, and other capacity enhancements.").

¹¹⁸ V.S. of Robert Girardot, at 5-6.

[REDACTED]

[REDACTED]

[REDACTED] }} This outcome would have been in KCS's interest as the owner of the Speedway, but contrary to that of NSR.

Thus, competition against NSR to serve points east of Meridian over Meridian Speedway routings was not a theoretical possibility; it was imminent. The KCS-NSR Exclusivity Arrangements nipped that competition in the bud.

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}¹²⁰ For transcontinental traffic, this arrangement preserved access to the largest and most strategically- significant market in the Southeast, and it did so over a single-line routing. But because the routing is inferior to the Speedway route even for that purpose, being substantially less direct and traversing the Memphis gateway, it can compete against the Speedway routing only {{ [REDACTED]

[REDACTED] }}.¹²¹ Even for Atlanta, this alternative route provides no competitive constraint against NSR's position regarding traffic originating or terminating in Dallas and Atlanta. There, the BNSF-CSXT route's disadvantages are insurmountable, and NSR's market share is {{ [REDACTED] }}.¹²² And that route provides only a limited constraint on Transcontinental traffic that requires the shortest, fastest route.¹²³ Were BNSF and CSXT not

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*; V.S. of Professor Julie M. Carey, at 73.

¹²² V.S. of Professor Julie M. Carey, Figure 21, at 71.

¹²³ *See* V.S. of Robert Girardot, at 6.

limited to an inferior route over disadvantaged gateways, transcontinental and Dallas intermodal traffic to and from Atlanta would likely increase.¹²⁴

Regarding destinations south of Atlanta such as Jacksonville and Miami, there is likewise no way to overcome the geographic disadvantages of a route that passes so far north before returning south – precisely as NSR itself contends. NSR’s market shares to Jacksonville and Miami for transcontinental intermodal traffic are {{[REDACTED]}}.¹²⁵

For both NSR Exclusivity Traffic and DITT, there are no similarly efficient alternative routings with which downstream rivals could competitively constrain service involving the Meridian Speedway, which gave NSR the ability and incentive to cut off its rivals’ access to the Speedway to gain undue competitive advantages.

c. The Exclusivity Arrangements Caused Substantial Anticompetitive Harm.

Harm to competition may also be shown through proof of actual detrimental effects on competition, such as increased prices, reduced output, increased prices, or decreased quality in a relevant market.¹²⁶ This list is not exhaustive; harm may also be shown through “some other economic indicator.”¹²⁷ The Exclusivity Arrangements have inflicted these competitive harms on shippers.

First, NSR’s pricing for transcontinental intermodal moves is substantially higher than pricing offered by CSXT for transcontinental intermodal service not utilizing the Meridian Speedway. Professor Carey demonstrates that “one can observe lower CSXT rates to and from

¹²⁴ See V.S. of Robert Girardot, at 4-5; V.S. of Dr. Ramsey Shehadeh, at 28; V.S. of Prof. Julie Carey, at 69-70.

¹²⁵ V.S. of Professor Julie M. Carey, Figure 21 at page 71.

¹²⁶ See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

¹²⁷ *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 390 (8th Cir. 2007). See also *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 457 (1986) (deeming evidence that customers could not obtain a service they desired and had to resort to costlier alternatives to be direct evidence of anticompetitive effects).

key intermodal locations such as Atlanta, Charlotte, and Jacksonville,” and estimates that “westward transcontinental moves are about {{ [REDACTED] }} on CSXT than NSR, and up to {{ [REDACTED] }} on CSXT moving eastward.”¹²⁸ Further, as Professor Carey observes, “No observable customer rate reductions from efficiency enhancing removal of one railroad carrier’s contribution margin/overhead occurred for the Dallas Traffic as a result of the JV.”¹²⁹ If CSXT’s service over alternative routings were comparable, such price differentials should result in significant diversions from NSR service to CSXT service. That this has not occurred confirms that CSXT’s alternative routings do not exert pricing pressure on, and cannot constrain, NSR’s use of its exclusive control of the Meridian Speedway.

Second, NSR claims that its perpetual exclusive control of the Meridian Speedway facilitated output expansion, but real-world market performance shows that relative output on the Speedway has gone *down*. As Dr. Shehadeh explains, output in 2005 standing alone is not a relevant comparison to determine economic effects. Rather, the relevant comparison is what would have occurred since 2005 in a but-for world without exclusivity, which he estimates by comparing output both before and after exclusivity and relative to similar routes.¹³⁰

The evidence suggests the Exclusivity Arrangements have *reduced* the potential output of the Meridian Speedway substantially overall, {{ [REDACTED] }}

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹²⁸ See V.S. of Professor Julie M. Carey, at 64-65.

¹²⁹ See V.S. of Professor Julie M. Carey, at 46-47.

¹³⁰ See V.S. of Dr. Ramsey Shehadeh Section IV.B.1-2.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } }¹³³ Given that NSR has offered no

evidence suggesting that any volume growth over the Meridian Speedway depended on the restrictions in the MSLLC Agreements, the clear implication is that traffic would have grown faster had the Exclusivity Arrangements not been in place.

Likewise, while the quality of service over the Meridian Speedway is not directly observable in the record, available evidence does not suggest it has improved. As Professor Carey explains, the nature of the service offered via the Meridian Speedway has not changed; both before and after the formation of the MSLLC, NSR Transcontinental Traffic has continued to be served via a haulage arrangement, while DITT transportation has continued to function as an interline move.

The service standards have not changed for the better either. As discussed by Professor Carey, before 2006 when it owned the Line, { [REDACTED]

¹³¹ See V.S. of Dr. Ramsey Shehadeh at Section 1.B and Section IV.B

¹³² {

[REDACTED]

[REDACTED] } See V.S. of Dr. Ramsey Shehadeh, at 24 n.54.

¹³³ See V.S. of Dr. Ramsey Shehadeh at Section 1.B and Section IV A: V.S. of Julie M. Carey, Figure 21 at 71.

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] .}}

Finally, the Exclusivity Agreements harm shippers by depriving them of competitive terms on the most direct routing for transcontinental intermodal traffic to several locations – forcing them to seek more competitive pricing over inferior routes. NSR concedes that length of haul is an economic indicator of competitive harm. NSR argues that resorting to longer routings because of commercially unreasonable terms on shorter routings harms the public interest.¹³⁵ As NSR explains, longer routings “add unnecessary transit time to the shipment, increase the fleet requirements of the shippers, increase total cost, and significantly increase the amount of emissions associated with these moves.”¹³⁶ Depriving shippers of competitive terms over a more direct routing harms the public interest even if those shippers can resort to rival service, if that rival service is over a longer route.¹³⁷ Here, as the BNSF-CSXT route to Atlanta illustrates, that is precisely the result of NSR’s unauthorized division of traffic over the Meridian Speedway, which forces customers to choose between NSR and competing transcontinental service that must use longer routings.

¹³⁴ Verified Statement of Professor Julie M. Carey, at 47-49.

¹³⁵ NS-12 at 33.

¹³⁶ NS-12 at 31-32.

¹³⁷ *Cf. FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 457 (1986) (“The lower court’s conclusion that this evidence is to be discounted because Federation members continued to cooperate with insurers by allowing them to use more costly – indeed, prohibitively costly – methods of reviewing treatment decisions is unpersuasive The Federation’s collective activities resulted in the denial of the information the customers requested in the form that they requested it and forced them to choose between acquiring that information in a more costly manner or foregoing it altogether.”).

The foregoing harms correlate with NSR's high shares of transcontinental intermodal service affected by the Exclusivity Arrangements, and the lack of efficiency-enhancing integration associated with the MSLLC JV, as explained by Professor Carey.¹³⁸ NSR enjoys very high shares of transcontinental intermodal traffic and Dallas intermodal traffic passing over the Meridian Speedway. It also enjoys very high shares for transcontinental intermodal traffic and Dallas intermodal traffic to and from markets in the Southeast generally. Professor Carey's and Dr. Shehadeh's analyses demonstrate how these high shares facilitate higher pricing and lower output. And the continuity of operations over the Meridian Speedway from before to after the JV formation – with all traffic affected by the Exclusivity Arrangements continuing to be handled via haulage or interline movement much as they were before – demonstrates why shippers have not benefited from the integration efficiencies commonly associated with procompetitive collaborations, including elimination of double marginalization and service innovation or improvements.

The Exclusivity Arrangements facially reduced competition both over the Speedway and downstream of it for routings involving the Speedway. Because, as NSR itself insists, alternative routings are not similarly efficient, NSR has long had (and exercised) the ability and incentive to exclude its rivals from offering service in interchange with the Speedway, and those rivals cannot competitively constrain NSR when so excluded. Real-world evidence shows this has led to harm in terms of length of haul, prices, market shares, and even output, while offering none of the benefits vertical integration can produce. The Exclusivity Arrangements severely harmed competition and the public interest.

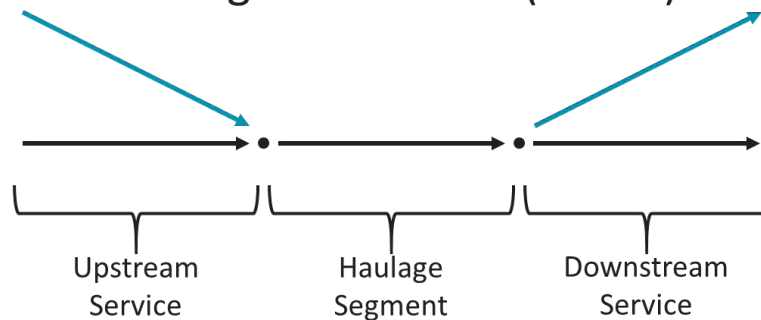
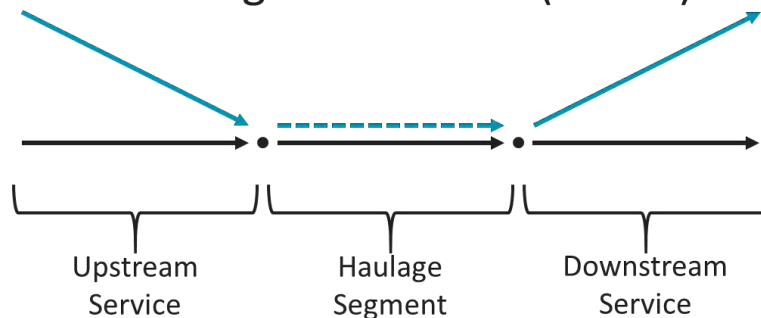
2. The Exclusivity Arrangements Did Not Facilitate a Haulage Arrangement Because a Haulage Arrangement Already Existed.

¹³⁸ See Verified Statement of Professor Julie M. Carey Section IV.A.

NSR appears to contend that the harm the Exclusivity Arrangements cause to competition and the public interest are excused by some pro-competitive justification.¹³⁹ None of the potentially plausible justifications, however, support the Exclusivity Arrangements.

NSR's most obvious defense would be that the MSLLC Transaction are an ordinary haulage arrangement with commonplace operating and traffic limitations. But they are not. When typical haulage or trackage rights are first granted, they may be subject to restrictions on the traffic the grantee may carry or what rights the grantee may extend to other carriers. Such an agreement normally *increases* the number of carriers offering a service on a line, because the granting carrier does not agree to exclude itself from access or agree to divide traffic. This increases competition, benefiting the public interest, while providing the grantor control over the extent to which it agrees to expose its business to new competitive pressure. Figure 7, below, illustrates such an arrangement, using black arrows to show the line owner and haulage provider and colored arrows to show the haulage client (dashed where haulage is provided).

¹³⁹ See NS-12 at 10 (“The Meridian Speedway transaction was pro-growth, pro-competitive, and allowed shippers to utilize a highly efficient route service.”).

Figure 7: Normal Haulage Facilitation Expands Options**Normal Haulage Facilitation (1-to-2): Before****Normal Haulage Facilitation (1-to-2): After**

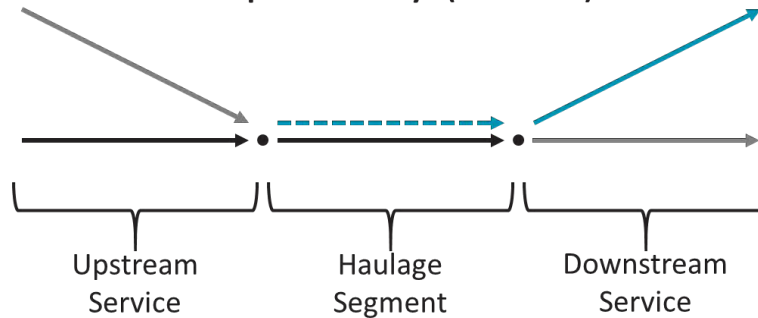
The Exclusivity Arrangements, however, are not a normal haulage arrangement and cannot be justified as ancillary to one. Competition analysis “must look to the time an agreement was adopted in assessing its potential for promoting enterprise and productivity—or ... competition.”¹⁴⁰ At “the time [the KCS-NSR] agreement was adopted,” NSR already had operating rights over the line for traffic quite similar to what became NSR- Exclusivity Traffic. The MSLLC Transactions did not grant NSR the right to provide an alternative service; they reduced competition by making NSR’s earlier granted right exclusive. Figure 8 below, illustrates this arrangement, using black arrows to show KCS, colored arrows to show NSR (dashed where

¹⁴⁰ *Blackburn v. Sweeney*, 53 F.3d 825, 828 (7th Cir. 1995).

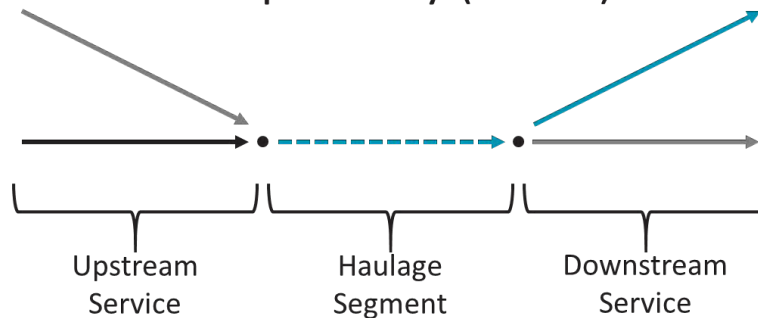
haulage is provided), and gray arrows to show providers of actual or potential competing service upstream and downstream.

Figure 8: Meridian Speedway Reduced Options

Meridian Speedway (2-to-1): Before



Meridian Speedway (2-to-1): After



Thus “at the time [the agreement] was entered it was not necessary for the ... potential increase in competition” resulting from NSR’s haulage rights that those rights be exclusive.¹⁴¹ On the contrary, “[s]tarting then with the actual status quo ... the only effect of the Agreement was to limit the potential competition between the resulting firms.”¹⁴²

¹⁴¹ *Id.* (A covenant between two formerly affiliated lawyers not to compete might have been reasonable if it had facilitated the partnership dissolution resulting in the creation of independent practices, but because the covenant occurred after the breakup, the former partners were already competing, and the covenant was *per se* illegal.).

¹⁴² *Id.* Further, the very fact that NSR already had haulage rights without exclusivity belies any argument that exclusivity was reasonably necessary to secure those rights’ extension.

3. The Exclusivity Arrangements Were Not Collateral to Any “Efficiency-Enhancing Integration” Because None Occurred

The argument most generally used to justify collateral restraints on competition among vertically related businesses is that the restraint facilitates a so-called “efficiency-enhancing integration of economic activity.”¹⁴³ Here, however, the Exclusivity Arrangements cannot be justified as ancillary to this purpose, because no “efficiency-enhancing integration of economic activity,” as that term is used by the Antitrust Agencies, occurred.

Where, as here, competitors form a so-called production collaboration, the principal sources of efficiency are that “[p]articipants may combine complementary technologies, know-how, or other assets that enable the collaboration to produce a good more efficiently or to produce a good that no one participant alone could produce.”¹⁴⁴ Further, a principal benefit of combinations between vertically-related firms is the elimination of double marginalization for such production, which occurs where “the merged firm will have access to the upstream input at cost, whereas often the downstream firm would have paid a price that included a markup.”¹⁴⁵

Here, however, none of these efficiency-enhancing benefits from integrating NSR’s and KCS’s operations has occurred. The carriers did not combine complementary technologies or know-how. And the only way they “combine[d]” production capacity was to continue to have KCS operate the relevant carrier service, in MSLLC’s name and NSR’s account. This is analogous not to building a new, streamlined factory, but to one firm agreeing to purchase its requirements from the other’s existing factory, which it invested cash to expand. This allows no

¹⁴³ Competitor Collaboration Guidelines 8.

¹⁴⁴ *Id.* at 13.

¹⁴⁵ Vertical Merger Guidelines 11.

one to “produce a good more efficiently or to produce a good that no one participant alone could produce.” It simply invests money in the production process.

Perhaps most glaringly, as Professor Carey shows, the MSLLC Transactions did not create efficiencies through vertical integration. For NSR Exclusivity Traffic, NSR continues to pay a haulage fee to MSLLC like what it paid before, as MSLLC makes operating payments to KCS for the haulage services performed. Relative to the pre-existing arrangement, the MSLLC JV continuation of the prior haulage service did not create enhanced efficiencies or further eliminate any of the contribution margin of two railroads to lower customer rates.¹⁴⁶ For the Dallas traffic, the arrangement is still an interline movement – NSR does not receive the “upstream input at cost,” but continues to pay a markup.¹⁴⁷ The joint venture did not eliminate double marginalization. It simply became its intermediary.

Nor does NSR contend otherwise. NSR attributes every benefit the Meridian Speedway Agreements supposedly produced merely to its *investment* in the physical facilities of the MSLLC Line.¹⁴⁸ It contends this produced a higher-capacity, more efficient service, but only through the sheer contribution of money rather than the efficiency-enhancing mechanisms

¹⁴⁶ V.S. of Professor Julie M. Carey, at 46-48.

¹⁴⁷ V.S. of Professor Julie M. Carey, at 46-48.

¹⁴⁸ NS-12 at 6-7 (“These investments include more than \$300 million in the MSLLC, with the great bulk of that investment going directly into improvements into the track and structure of the Meridian Speedway itself.”); *id.* at 7 (“These investments continue to support NS’s ability to deliver the premium service intermodal customers demand and help achieve the public benefits supported by the Board.”); *id.* at 10 (Speedway “was underutilized at the time because of the need for considerable investments in its roadbed, signal systems, yards and sidings.”); *id.* at 11-12 (“Because of NSR’s investments, the Meridian Speedway today is faster and more reliable Thus, NSR’s investments continue to support NSR’s ability to deliver the premium service that intermodal customers demand and help achieve public interest benefits supported by the Board.”); FD 34822, *Notice of Exemption*, at 6 n.4 (January 17, 2006) (“These capital improvements will include signal systems, extended sidings, stretches of double track, upgrading track speeds, and other capacity enhancements.”).

normally associated with a production joint venture or vertical integration. As Professor Carey shows, service standards remained approximately the same after the Meridian Speedway Transactions.¹⁴⁹

None of the usual “efficiency-enhancing” benefits of production joint ventures or vertical integration are present in the Meridian Speedway Agreements. The Meridian Speedway Agreements were not an “efficiency-enhancing integration of economic activity.” They were no more than a defined capital investment – in exchange for an exclusive supply relationship.

4. The Exclusivity Arrangements Were Not Reasonably Necessary to Secure an Investment in the Meridian Speedway

NSR appears to be contending that the substantial anticompetitive effects of the Exclusivity Arrangements are justified because the MSLLC Transactions were “pro-growth, pro-competitive, and allowed shippers to utilize a highly efficient route service.”¹⁵⁰ In so doing, NSR appears to allude to the “ancillary restraints” doctrine: that “an agreement that is reasonably related to [an] integration and reasonably necessary to achieve its procompetitive benefits” may be justified by the beneficial effects of that integration.¹⁵¹ The MSLLC Transactions constituted only a contribution of money, not an efficiency-enhancing integration of complementary assets or even of productive capacities. NSR is contending that the anticompetitive character and

¹⁴⁹ Verified Statement of Professor Julie M. Carey, at 46-48.

¹⁵⁰ NS-12 at 10.

¹⁵¹ Competitor Collaboration Guidelines 8. Alternatively, NSR’s argument may simply be an investment facilitating output expansion is “the procompetitive rationale for the restraint [of competition],” *i.e.*, the second step of the so-called Rule of Reason. *Alston*, 141 S. Ct. at 2160. As explained below, the analysis is similar, and the argument fails under either approach if the restriction on competition is not reasonably necessary for the supposedly pro-competitive purpose, or if substantially less restrictive means exist to achieve any proven procompetitive benefits.

effects of the Exclusivity Arrangements are justified simply because NSR made a significant capital investment in the MSLLC Line.

However, a capital investment does not convey a license to restrict competition in whatever way best serves the investor, regardless of its size. Nor would such a blank check be conveyed by a more comprehensive integration. Only restrictions on competition that are “reasonably necessary” to achieve efficiency-enhancing benefits can be justified by an arrangement producing those benefits.¹⁵² The restriction chosen cannot suppress competition without creating efficiency.¹⁵³ And even arguably “ancillary” restrictions on competition must be regarded as unreasonable and illegal where “substantially less restrictive means exist to achieve any proven procompetitive benefits.”¹⁵⁴

¹⁵² *E.g.*, *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1375, 1381 (5th Cir. 1980); *In re I. Brokerage Antitrust Litig.*, 618 F.3d 300, 345-46 (3d Cir. 2010) (“[A] restraint is not automatically deemed ancillary because it ‘facilitates’ a procompetitive arrangement.”); *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 338-39 (2d Cir. 2008) (Sotomayor, J., concurring) (citing *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985); *Aya Healthcare Servs. V. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021); Competitor Collaboration Guidelines 8-9.

¹⁵³ *See Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1073 (11th Cir. 2005); *Rothery Storage*, 792 F.2d at 224.

¹⁵⁴ *Alston*, 141 S. Ct. at 2162. Under the Sherman Act, ancillary restraints are assessed under the three-part Rule of Reason framework, the last step of which is to consider whether procompetitive benefits proven by the defendant “could be reasonably achieved through less anticompetitive means.” *Id.* at 2160 (“[T]he plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect. Should the plaintiff carry that burden, the burden then shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant can make that showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.” (Internal citations and quotation marks omitted)). In practice, the questions of “reasonable necessity” and the existence of “less restrictive alternatives” often merge. *See id.* at 2162 (affirming liability for restriction on competition that was “‘patently and inexplicably stricter than is necessary’ to achieve the procompetitive benefits the league had demonstrated,” for which “substantially less restrictive restraints” would have sufficed). *See also L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381, 1396-98 (9th Cir. 1984) (analyzing supposedly ancillary restraint under rule of reason, concluding restraint was

Here, the Exclusivity Arrangements cannot be reasonably justified by NSR's capital investment for two reasons. First, to take the JV carrier's inherent control over access to its line and transfer that control to a vertically-integrated parent does nothing to protect that parent's investment against freeriding; its *sole* "virtue" is to exclude rivals from vertically-related markets. Second, even if the arrangements marginally advanced the objective of protecting the investment against freeriding, they were not reasonably necessary to do so when industry-standard arrangements would have accomplished the same end while restricting competition far less – and there is simply no excuse for restricting competition *in perpetuity*.

a. NSR's Perpetual Exclusivity Does Nothing to Protect its Investment in MSLLC Against Freeriding.

"An allegedly legitimate objective is, of course, entirely immaterial unless it is served by the challenged restraint. Sometimes the restraint makes no significant contribution to the alleged justification."¹⁵⁵

Generally, the proponent of a restriction on competition bears the burden to show this so-called "restraint-virtue connection."¹⁵⁶ This burden serves two purposes. First, once that burden is carried, the party challenging the restriction on competition then bears the burden only to address "*proven* procompetitive benefits," and therefore "deficiencies in the [proponent's] proof of procompetitive benefits influence[] the analysis" in this subsequent stage.¹⁵⁷ Second, this burden "illuminates the restraint as well as the objective," because "[e]xamining *how* the

"not reasonably necessary"); PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1505 (2022) ("AREEDA & HOVENKAMP") ("To be reasonably necessary, the restraint must not only promote the legitimate objective but must also do significantly better than the available less restrictive alternatives.").

¹⁵⁵ AREEDA & HOVENKAMP ¶ 1505a.

¹⁵⁶ *Id.* See *Alston*, 141 S. Ct. at 2162.

¹⁵⁷ *Alston*, 141 S. Ct. at 2162 (emphasis supplied).

restraint serves the asserted objective ... might suggest that the defendants' objective is illegitimate."¹⁵⁸

Here, KCS has articulated the purported connection between NSR's perpetual exclusivity and NSR's investment:

During ... discussions [about extending the then-existing KCS-NS haulage agreement], it became clear that substantial capital investments would be required to provide the train speeds and line capacity the parties believed was needed to handle future traffic growth on the Line [W]hile NS was willing to participate in the necessary investment, it did not want to do so unless it could be assured that other carriers would not use the capacity NS's investment would help to create.¹⁵⁹

i. Preventing free riding is distinct from excluding rivals from facilities one has purchased, and the latter is not a legitimate or pro-competitive purpose.

The articulated connection between investment and exclusivity can be read in one of two ways.

The first is that NSR explicitly sought to purchase the right to exclude rivals from a critical rail corridor – to obtain “assur[ance] that other carriers would not use” the capacity of the Speedway – and the price for that right to exclude was an investment to expand the Speedway's capacity.

This interpretation is supported by the evidence. NSR did not, in exchange for its investment, merely eliminate competition for all traffic *above the Speedway's pre-existing capacity* (i.e., the incremental capacity its investment “would help to create”); it did so for all traffic meeting the definition of NSR Exclusivity Traffic or DITT. Nor does the agreement allow the realistic possibility for other carriers to make investments to *further* expand the Speedway's capacity to accommodate growth in NSR Exclusivity Traffic or DITT in which downstream

¹⁵⁸ AREEDA & HOVENKAMP ¶ 1505a (emphasis supplied).

¹⁵⁹ FD 34822, *Verified Notice of Exemption*, (January 17, 2006) at 5.

carriers other than NSR participate. Other carriers cannot participate in movements including the Speedway unless NSR consents, and NSR has the ability and incentive not to offer that consent except at uncompetitive rates. NSR has locked up the market forever in exchange for a defined payment to the asset-holder.

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}.

{{ [REDACTED]

[REDACTED]

¹⁶⁰ McClellan Dep. Tr.77-78.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } }.

{ { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁶¹ See Memorandum from Mike McClellan to Mr. L.I. Prillaman and Mr. D.W. Seale, Subject: KCS – Confidential, NS00006606 at NS00006611-12 (Dec. 29, 2004) { { [REDACTED]

[REDACTED] } } ; id. at NS00006614 {

[REDACTED] } }.

¹⁶² Memorandum from Mike McClellan to Mr. L.I. Prillaman and Mr. D.W. Seale, Subject: KCS – Confidential, NS00006606 at NS00006610 (Dec. 29, 2004)

¹⁶³ Memorandum from M.R. McClellan to K.B. McQuade, Subject: Kudzu, NS00006569 at NS00006569 (April 4, 2005).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] },¹⁶⁷

{[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] },¹⁷⁰

¹⁶⁴ See McClellan Dep. Tr. 55 ({[REDACTED]

[REDACTED] })).

¹⁶⁵ Memorandum from M.R. McClellan to K.B. McQuade, Subject: Kudzu, NS00006569 at NS00006570 (April 4, 2005).

¹⁶⁶ Memorandum from M.R. McClellan to K.B. McQuade, Subject: Kudzu, NS00006569 at NS00006571 (April 4, 2005) (emphasis supplied).

¹⁶⁷ Memorandum from M.R. McClellan to K.B. McQuade, Subject: Kudzu, NS00006569 at NS00006571 (April 4, 2005).

¹⁶⁸ Proposed NS-KCS Joint Venture: Chairman's Talking Points, NS00005474 at NS00005479 (May 12, 2005).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at NS00005481.

This raises a question: Why did NSR value exclusivity so highly? If an increased investment in the line would improve the quality and volume of the service NSR could provide and monetize over the Speedway, why not pay for it anyway? Why was *exclusivity* such a valuable incremental benefit? {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}.¹⁷²

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁷¹ *Proposed NS-KCS Joint Venture, Project Orion: Presentation to Norfolk Southern Corp. Board of Directors*, NS00006573 at NS00006586 (July 26, 2005) (emphasis supplied).

¹⁷² *Id.* at NS00006587.

[REDACTED]

[REDACTED] .”}}¹⁷³

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}.

This is not a legitimate purpose served by exclusivity. Its very “value” is its anticompetitive effect, benefitting NSR while harming consumers, shippers, and the public interest. Businesses are frequently willing to invest large sums of money to obtain market power. This does not make such investment in the public interest. To the contrary, the Meridian Speedway is a monopoly purchase agreement little different from that in *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990). There, BRG and HBJ, the two leading providers of bar review courses in Georgia, formed a joint venture under which HBJ granted BRG an exclusive license to use HBJ’s materials and trademarks in Georgia, HBJ otherwise withdrew from the Georgia market, and BRG would not compete with HBJ outside of Georgia.¹⁷⁴ As the Supreme Court later noted, in context, such license payments under a joint venture agreement serve primarily as the means by which “one company pa[id] a potential competitor not to enter the

¹⁷³ *Memorandum from M.R. McClellan to J.A. Squires and D.H. Butler, Subject: Pace of Investment – MSLLC*, NS00006642 at NS00006642 (August 17, 2007)

¹⁷⁴ *Palmer*, 498 U.S. at 46-50.

market.”¹⁷⁵ The Supreme Court held the joint venture was an agreement to divide markets that was illegal *per se*.¹⁷⁶

ii. The Exclusivity Arrangements do not prevent free riding because other carriers’ access to traffic traversing the Speedway would not be free.

A second, alternative interpretation is that NSR sought to protect its capital investment from other carriers utilizing the benefits of that investment *without paying for them* – to preclude a so-called “free riding” problem.¹⁷⁷ But this interpretation fares no better.

In the leading antitrust case on using exclusivity to prevent free riding, a moving company, Atlas Van Lines, faced the possibility that the agents it contracted to perform moving services might use trucks, trademarks, and other facilities that Atlas had supplied them to perform moves in which Atlas was not involved and for which Atlas received no compensation.

The court explained the problem:

A free ride occurs when one party to an arrangement reaps benefits for which another party pays, though that transfer of wealth is not part of the agreement between them. The free ride can become a serious problem for a partnership or joint venture because the party that provides capital and services without receiving compensation has a strong incentive to provide less, thus rendering the common enterprise less effective [B]ecause carrier agents could utilize Atlas services and equipment on non-Atlas interstate shipments, the possible increase of such shipments meant that Atlas might make large outlays for which it received no return.¹⁷⁸

The trial court found as an issue of fact, and the court of appeals affirmed, that free riding would occur absent a restriction on competition, because agents utilized Atlas-supplied facilities to

¹⁷⁵ *Fed. Trade Comm. v. Actavis, Inc.*, 570 U.S. 136, 146 (2013). Such license payments effectively split monopoly profits that resulted after HBJ’s withdrawal from the market allowed BRG to increase its prices.

¹⁷⁶ *Palmer*, 498 U.S. at 46-50.

¹⁷⁷ *See Rothery Storage*, 792 F.2d at 212-13 (“A free ride occurs when one party to an arrangement reaps benefits for which another party pays, though that transfer of wealth is not part of the agreement between them.”)

¹⁷⁸ *Id.*

perform moving services from which Atlas received no revenue.¹⁷⁹ The court of appeals thus held it reasonably justified for Atlas to prohibit its carrier agents from providing service independent of Atlas, except through separately incorporated businesses Atlas did not supply.¹⁸⁰

Where free riding is a risk, courts frequently regard its prevention as a legitimate justification for restrictions on the competitive activity of JV partners. Given the principle, it may seem intuitive that, as NSR appears to argue, any form of exclusivity is justified to protect an investment in a line, so any investor may prohibit granting operating rights and even forbid interline service except with the partners the investor chooses.

But there are two problems with this reasoning.

The first is simple: Interline partners and haulage or trackage clients do not “free ride” on investments improving the MSLLC Line because, literally, their ride is not free. The owner of the line gets to charge interline carriers a factor and haulage or trackage clients a fee. Here, that owner was the very LLC in which NSR’s very investment gave it an “equity interest and voting and ownership rights.”¹⁸¹ NSR would have earned at least a portion of that revenue and would have had a hand in determining its magnitude.

As courts have repeatedly explained, “What gives this [problem] the name free riding is the lack of charge Put the [parties] in a contractual relation, however, and they could adjust their accounts so that the person providing a valuable service gets paid. *When payment is possible, free riding is not a problem because the ‘ride’ is not free.*”¹⁸² The same court explained in a later case involving vertically imposed exclusivity like that here:

¹⁷⁹ *Id.* at 221-23 & n.9.

¹⁸⁰ *Id.* at 223.

¹⁸¹ FD 34822, *Verified Notice of Exemption*, (January 17, 2006) at 5.

¹⁸² *Chi. Prof'l Sprots Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 675 (7th Cir. 1992) (emphasis supplied).

The consumer is not taking a free ride if the cost of the service can be captured in the price of the item. As our earlier review of the facts demonstrated, the manufacturers were paying for the services [the distributor] furnished These expenses, we may assume, were folded into the price of the goods the manufacturers charged to [the distributor], and thus these services were not susceptible to free riding.¹⁸³

Here, by analogy, the cost of service over the Meridian Speedway, including the cost of any capacity expansions, would be “folded into” the factor MSLLC quotes downstream carriers or the fee it charges haulage or trackage clients, so the “service[] [is] not susceptible to free riding.”

Even in *Rothery Storage*, a case frequently cited to justify exclusive relationships that combat free riding, the court explained repeatedly that the free ride principle arises where one party invests in facilities “without receiving compensation” for their use and “might make large outlays for which it received no return.”¹⁸⁴ Thus, that free riding was a serious concern in that case was a *finding of fact* based on numerous specific ways Atlas’ facilities provided benefits for which its partners would not pay. The analogy to *Rothery Storage* would be for downstream carriers to use MSLLC’s capacity and *not pay for it*. NSR cannot plausibly suggest this would occur.

Critically, by creating a JV carrier – MSLLC – and contributing the line itself to that carrier, KCS already ensured such a contractual relationship would govern any interline arrangements or operating rights, guaranteeing payment, without NSR needing exclusive control of Speedway traffic. Nor was there a risk that KCS would somehow take the money and run, because as NSR has stressed, NSR obtained a 30% equity interest and voting and ownership

¹⁸³ *Toys “R” Us v. FTC*, 221 F.3d 928, 937-38 (7th Cir. 2000). Specifically, Toys “R” Us, a distributor, had sought to induce toy manufacturers to grant it the exclusive right to distribute their toys to combat what Toys “R” Us called “free riding” by then-emerging discount warehouse stores. The court rejected the argument that Toys “R” Us’ downstream rivals in fact “free ride” upon anything Toys “R” Us or its toy suppliers provide and held such restrictions unjustified.

¹⁸⁴ *Rothery Storage*, 792 F.2d at 212-13.

rights in that LLC “[i]n exchange for” its investment.¹⁸⁵ The LLC therefore had both the interest and the fiduciary duty to NSR, one protected by voting and ownership rights, to charge profit-maximizing prices regarding the service under its control. Thus, as a co-owner and recipient of the JV’s profits – or, as Professor Carey shows, as the recipient of 100% of haulage payments for transcontinental services provided to third party carriers¹⁸⁶ – NSR could readily have earned a full return on its investment simply through “the core activity of the JV itself—namely the pricing of the very [service] produced and sold by [it],” service over the Meridian Speedway segment itself.¹⁸⁷ This required no special measures to ensure MSLLC would earn NSR a return on its investment in the JV it co-owned: “What could be more integral to the running of a business than setting a price for its goods and services?”¹⁸⁸

The *Exclusivity Arrangements*, as distinct from the formation of the JV, were a distinct, incremental step by which KCS and NSR took MSLLC’s control of the MSLLC Line and, for key traffic, transferred it from the JV to NSR, exclusively and in perpetuity. NSR recognized this, {{ [REDACTED] }}. ¹⁸⁹ That step did nothing to protect against free riding. It maintained a haulage relationship between MSLLC and NSR. To whatever extent such a haulage relationship results in freeriding when the client is a carrier other than the one investing in the line (which it does not), the Exclusivity Arrangements in fact *guaranteed* that form of free riding by NSR on KCS’s significant investment in MSLLC through its contribution

¹⁸⁵ NS-12 at 10-11 (quoting Notice of Exemption 5-6).

¹⁸⁶ Verified Statement of Julie M. Carey, at 53-57.

¹⁸⁷ *Texaco Inc. v. Dagher*, 547 U.S. 1, 7-8 (2006).

¹⁸⁸ *Id.*

¹⁸⁹ *Proposed NS-KCS Joint Venture, Project Orion: Presentation to Norfolk Southern Corp. Board of Directors*, NS00006573 at NS00006586-87 (July 26, 2005) (emphasis supplied).

of the line between Shreveport and Meridian. Exclusivity was not needed to serve its ostensible purpose of preventing free riding on NSR's investment in the line. Nor was it needed to protect a return that could have been earned by pricing the MSLLC Line to optimize MSLLC's earnings. To the contrary, it gave NSR the ability to earn an additional, supracompetitive return *downstream* of the Meridian Speedway segment.

And NSR knew this. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

}}. ¹⁹¹ The Meridian Speedway transactions benefitted NSR by excluding competition downstream of the Speedway, but that has nothing to do with other carriers free riding on its investment.

iii. The Exclusivity Arrangements do not protect against free riding because, absent an NSR service downstream on which rivals could freeride, granting NSR exclusivity benefits NSR while harming the joint venture.

The second problem with the free riding theory is that, unless the downstream carrier offers a service on which its rivals might free ride, giving the downstream carrier exclusive control over Speedway traffic does nothing protect the *MSLLC owner's* interest. It ensures only

¹⁹⁰ *Proposed NS-KCS Joint Venture, Project Orion: Presentation to Norfolk Southern Corp. Board of Directors*, NS00006573 at NS00006586 (July 26, 2005).

¹⁹¹ *Proposed NS-KCS Joint Venture, Project Orion: Presentation to Norfolk Southern Corp. Board of Directors*, NS00006573 at NS00006587 (July 26, 2005) (emphasis supplied).

that control will be exercised in the interest of the *downstream carrier*, an interest separate from and contrary to the interests of the MSLLC.

All else equal, businesses in vertical relationships each prefer their upstream or downstream counterparts to mark up prices as little above cost as possible, precisely as competition pressures them to do.¹⁹² It is ordinarily in the upstream supplier's interest that its downstream customers are themselves in competition, and the upstream supplier will ordinarily choose who to supply based on that competition. Conversely, all else equal, any downstream customer's interest is that its competitors be weakened, and it would be expected to exercise any power from an exclusionary interest to determine who its supplier can supply in that exclusionary interest. Thus, "the most important insight behind the free rider concept is the fact that ... the interests of the manufacturer and the consumer are aligned and are basically adverse to the interests of the retailer (who would presumably like to charge as much as possible)."¹⁹³

For this reason, antitrust law and competition policy "distinguish between a conspiracy among dealers and their supplying manufacturer for the purpose of retail price maintenance that would benefit the dealers and one involving the same parties but redounding primarily to the benefit of the manufacturer as a result of increased interbrand competition."¹⁹⁴ Specifically, unless "the higher markup enables the dealer[] to furnish consumers with something the average consumer values" but which rival distributors might free ride on, to grant a distributor exclusivity confers no apparent benefit on the supplier, only on the distributor.¹⁹⁵ And "[w]hen

¹⁹² *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Asso.*, 814 F.2d 358, 368-70 (7th Cir. 1987).

¹⁹³ *Toys "R" Us*, 221 F.3d at 937-38.

¹⁹⁴ *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15, 16 (4th Cir. 1981).

¹⁹⁵ *Premier Elec. Constr.*, 814 F.2d at 368-70. The quintessential example is the electronics store whose skilled sales staff directs its customers to the right television, which the customers then walk across the street to purchase from the discount chain.

dealer interests rather than manufacturer interests appear to be served, many courts describe a vertical restraint as ‘horizontal,’ even in the absence of collective action by dealers,” and hold the agreement to be illegal per se.¹⁹⁶

But NSR does not even claim it provides a *downstream* service on which its rivals could free ride if they received traffic in interchange with the Meridian Speedway. It claims only that its investment in MSLLC itself needs a return – and that the return it would earn as the MSLLC’s co-owner is inadequate. In this situation, “the free-riding story is inverted.”¹⁹⁷ Because there is no NSR service downstream on which its rivals might free ride, it is only NSR’s interest in excluding those rivals that supports a decision not to supply those rivals with traffic. The MSLLC therefore does not “ha[ve] consumers’ interest at heart” by ensuring that NSR, rather than some other railroad, carries Speedway traffic downstream;¹⁹⁸ it simply granted NSR exclusive rights in exchange for investment. Where, as here, a downstream customer – NSR - induces its input supplier – MSLLC – to exclude competition in downstream markets (or allow the downstream customer to do so itself), notwithstanding that there are no downstream services the MSLLC’s customers value on which NSR’s rivals could free ride, antitrust red flags abound.¹⁹⁹

¹⁹⁶ AREEDA & HOVENKAMP ¶ 1604e2

¹⁹⁷ *Toys “R” Us*, 221 F.3d at 937-38.

¹⁹⁸ *Premier Elec. Constr.*, 814 F.2d at 368-70.

¹⁹⁹ *Premier Elec. Constr.*, 814 F.2d at 368-70 (“If the dealers meet and agree on the price they will charge or the territories they will occupy, and then induce the manufacturer to go along, that agreement will be illegal per se.”); *Alloy Int’l Co. v. Hoover-NSK Bearing Co.*, 635 F.2d 1222, 1225-26 (7th Cir. 1980); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 170 (3d Cir. 1979) (“If [the excluded distributor] can prove at trial that [the supplier], [its agent] and [the chosen distributor] conspired to protect [the chosen distributor] from price competition by [the excluded distributor], and that [the supplier and its agent] terminated [the excluded distributor] at [the chosen distributor’s] request and in pursuit of a price related end, then it can prevail on a price-fixing theory.”); AREEDA & HOVENKAMP ¶¶ 1604e2, 1605d2.

“[The free riding] rationale depends on the alignment of interests between consumers and manufacturers. Destroy that alignment and you destroy the power of the argument.”²⁰⁰ An exclusivity provision like that here, which serves primarily to exclude downstream rivals from services rather than to protect any services actually vulnerable to free riding, serves no apparent pro-competitive purpose. Parties to such an agreement may not “turn around and try to squelch lower prices ... by branding the lower prices ‘free riding.’”²⁰¹

d. Substantially Less Restrictive Arrangements that Are Widespread in the Industry Would have Been adequate to Protect NSR’s Investment.

A restriction on competition is not justified if procompetitive efficiencies to which it is proven to contribute “could be reasonably achieved through less anticompetitive means.”²⁰² While this rule does not require tribunals to determine whether a business has used “the *least* restrictive means of achieving legitimate business purposes,” a restriction is not justified where “substantially less restrictive alternative rules” could achieve the procompetitive benefits proven to be served by the restriction on competition, or if the restriction chosen is “patently and inexplicably stricter than is necessary” to achieve those benefits.²⁰³

Here, other arrangements pervasive in the rail industry and in other industries would readily have protected NSR’s investment and ensured the success of the MSLLC JV while being substantially less restrictive of competition.

i. NSR could have earned a return on the MSLLC’s interline factors and haulage or trackage fees from third parties.

First, the JV’s inherent ability to charge interline partners and haulage or trackage clients for services over the MSLLC Line would have readily ensured a return on their investment.

²⁰⁰ *Premier Elec. Constr.*, 814 F.2d at 368-70.

²⁰¹ *Id.*

²⁰² *Alston*, 141 S. Ct. at 1260.

²⁰³ *Alston*, 141 S. Ct. at 1261-62 (emphasis supplied).

The MSLLC Transactions created a JV carrier (MSLLC) controlling a rail line (the MSLLC Line). As Professor Carey demonstrates, the MSLLC JV is a profitable enterprise that could have charged a profitable haulage-based rate to NSR's competitors, and that rate would have amply compensated NSR for its investment in the MSLLC Line.²⁰⁴ Were the LLC to charge carriers this rate to haul traffic over the MSLLC Line, NSR would have been indifferent to whether it carried the traffic over the Line itself or received others' payments for carriage.²⁰⁵ Further, the incremental step of transferring the JV's control of access to the line to the vertically-integrated parent does nothing to protect NSR's investment in the MSLLC against free riding. That objective "can be equally served by simply abandoning the restraint, which is surely a less restrictive alternative."²⁰⁶

Allowing the JV to retain its inherent control of traffic rather than granting that control exclusively to NSR eliminates the many vertical harms to competition described above. While the JV could still protect and provide a return on NSR's and KCS's investments in the Meridian Speedway, its control of the line would not create the ability and incentive for a vertically integrated parent to leverage its exclusivity and right of first refusal to exclude competition in downstream markets. That ability and incentive derives specifically from NSR having those rights. If NSR does not have them, these harms to competition disappear.

The difference between the JV without the Exclusivity Arrangements, which create no vertical harm to competition, and the JV with the Exclusivity Arrangements, which create significant vertical harm, is substantial rather than a matter of "degrees of efficiency." The JV

²⁰⁴ Carey V.S., at 54-58.

²⁰⁵ Carey V.S., 54-55. Specifically, it would have been a less restrictive alternative for NS to receive 100% of the LLC's revenue for hauling traffic meeting the definition of NS Exclusivity Traffic.

²⁰⁶ *Alston*, 141 S. Ct. at 1262 (quoting AREEDA & HOVENKAMP § 1505).

without the Exclusivity Arrangements is therefore a “substantially less restrictive alternative,” and NSR’s exclusivity and right of first refusal are each “patently and inexplicably stricter than is necessary” to protect its interest in its investment.²⁰⁷

ii. Railroads commonly use a variety of arrangements, without exclusivity, to protect investments in one another’s lines.

Second, there is nothing unusual about railroads investing in one another’s lines without receiving exclusive (much less perpetually exclusive) traffic rights in exchange. NSR itself calls its arrangement an “innovative approach to joint investment.”²⁰⁸ CSXT is unaware of any other haulage arrangement over a major route in which the underlying carrier-owner has agreed to remove its own ability to serve traffic over that route, even when the haulage client invested in the owner’s facilities.²⁰⁹

For example, as Professor Carey explains, to support the CSXT-BNSF haulage arrangement serving Atlanta, { { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } }²¹⁰

iii. Granting exclusivity to the joint venture itself would not have produced vertical anticompetitive effects, although it would still have reduced horizontal competition.

²⁰⁷ *Alston*, 141 S. Ct. at 1261-62.

²⁰⁸ NS-12 at 11.

²⁰⁹ V.S. of Robert Girardot, at 7.

²¹⁰ Carey V.S. at 50-52

Third, if exclusivity were deemed the only feasible way to protect investments in the joint venture against the “free riding” of competition, it would be far less restrictive of competition to grant that exclusivity to the joint venture itself rather than to its vertically integrated parent, provided the joint venture operated with genuine independence from that parent. This is the usual way joint venture partners in any industry address any concern arising from competition between the joint venture and its parents – where the joint venture itself does not create, increase, or preserve market power.²¹¹

This would differ little from the natural result of forming the MSLLC joint venture and contributing KCS’s Speedway assets to it. MSLLC is already a rail carrier, and it already functions as one, with KCS as its contract operator. MSLLC already had control over access to the line KCS had contributed to it. An arrangement granting it exclusivity would differ only by eliminating NSR’s haulage rights and providing that the joint venture carrier could not grant operating rights to any carrier (continuing to operate the line via KCS as contract operator).

This arrangement, too, eliminates the many vertical harms to competition described in Part I(C)(1) above. While still protecting and providing a return on NSR’s and KCS’s investments in the Meridian Speedway, assuming the joint venture operates independently, giving the joint venture exclusivity does not create the ability or incentive to leverage that exclusivity to exclude competition in downstream markets.

²¹¹ See, e.g., *Rothery Storage*, 792 F.2d at 221 (analyzing whether horizontally-integrative joint venture that prohibited partners from competing against the joint venture could confer market power). As the Antitrust Agencies explain, an integrative joint venture that eliminates all competition among parents that were competitors in a relevant market, and which does not terminate within a sufficiently limited period, will be analyzed under the Horizontal Merger Guidelines. Competitor Collaboration Guidelines 5. The “unifying theme” of those Guidelines is to prohibit transactions that “create, enhance, or entrench market power or ... facilitate its exercise.” Fed. Trade Com. and Dep’t of Justice, Horizontal Merger Guidelines 2 (2010).

However, a joint venture containing ancillary restraints must still be assessed for its overall competitive effect. Where the joint venture limits independent decision-making and creates market power or facilitates its exercise, it may not be permissible.²¹² Here, granting exclusivity to the joint venture itself would still eliminate one of two independent decision-makers regarding NSR Exclusivity Traffic, and because of the lack of similarly efficient alternatives to the Speedway for transcontinental intermodal movements, this limitation would significantly reduce competition overall. Thus, the same *horizontal* harms to competition would result from any exclusivity arrangement, and any exclusivity, even that held by an independently operated joint venture company, would be substantially more restrictive of competition than no exclusivity.

iv. Perpetual restrictions on competition are not reasonably necessary to protect a defined investment, and fifteen years of exclusivity have more than protected NSR's investment.

Finally, and perhaps most obviously, even if the Exclusivity Arrangements were deemed reasonably necessary to protect NSR's investment for some period, it cannot be reasonably necessary that they continue in perpetuity, and *any* limit to their duration is substantially less restrictive than none.

Any claim that a restriction on competition is reasonably necessary to recoup investment and thus "ancillary" to a procompetitive purpose is "undermined by the Agreement's infinite duration."²¹³ KCS admits that its exclusive right to carry NSR Exclusivity Traffic and right of

²¹² See, e.g., Competitor Collaboration Guidelines 4, 6.

²¹³ *Blackburn*, 53 F.3d at 828-29 (finding restriction "naked, not ancillary, and per se illegal to boot").

first refusal to carry DITT continue indefinitely unless NSR consents.²¹⁴ NSR may seek to quibble with the distinction between an agreement that is perpetual and one that is terminable only by mutual consent, but competition tribunals have seen this argument before and have rejected it.²¹⁵

Such indefinite restrictions on competition are highly suspect because competitive conditions change, and what might have been justified at the time of agreement may become unreasonably restrictive of competition later.²¹⁶ In this case, it is unreasonable to argue that the continuing anticompetitive effects of the Exclusivity Arrangements today are permissible because the Meridian Speedway was less competitively significant in 2006. That is one of the primary reasons perpetual restrictions on competition are so pernicious.

The Board has long applied “a higher level of scrutiny on agreements that contain a total ban on interchange with other carriers or go on in perpetuity.”²¹⁷ The Board has recently exercised its conditioning authority to modify perpetual restrictions on competition that

²¹⁴ Kansas City Southern Responses and Objections to CSX Transportation, Inc.’s Third Set of Discovery Requests to Kansas City Southern, Response to Request for Admission No. 1, 3, 5, 7, 9 (April 11, 2022) (admitting that relevant provisions “remain effective with no exact temporal limits, absent consent of NS”).

²¹⁵ *See Yamaha*, 657 F.2d at 979-80 (“The anticompetitive impact of the agreement is said to be mitigated by the temporary nature of the agreement The agreement between Yamaha and Brunswick is more properly characterized as ‘terminable’ than as ‘temporary.’ By its terms the agreement had a life of ten years with automatic extension of three years, subject to termination by prior notice of either party.”).

²¹⁶ *Quality Mercury, Inc. v. Ford Motor Co.*, 542 F.2d 466, 471 (8th Cir. 1976) (“The granting of a perpetual exclusive franchise is suspect under the Sherman Act, because changes in conditions, unforeseen when the exclusive franchise was granted, may combine to create an anticompetitive effect.”).

²¹⁷ *Disclosure of Rail Interchange Commitments*, EP 575 Sub-No.1, slip op. at 15 (STB served October 30, 2007), Slip Op. 15.

accompany transactions.²¹⁸ In doing so, the Board explained that such “restrictive covenants are enforceable (and pro-competitive) only when reasonably limited in scope and duration,” citing antitrust case law.²¹⁹ The Board further stressed that modifying perpetual restrictions on competition is a measured form of relief that does not “create new competitive options or ... address pre-existing competitive circumstances” because the modification “merely ensures that [a restricted party] is not *forever* foreclosed from seeking new competitive options in the future.”²²⁰

While a restriction on competition might sometimes produce temporary benefits from an investment for which it is reasonably necessary, a perpetual restriction precludes competition long after any incentive to provide those investments disappears. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } }.

{{ [REDACTED]

[REDACTED]

[REDACTED]

²¹⁸ See *Bessemer and Lake Erie Railroad Company—Acquisition and Operation—Certain Rail Lines of CSX Transportation, Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, and Franklin Counties, N.Y.*, FD 36347, slip op. at 9-10 & n.12 (STB served April 6, 2020).

²¹⁹ *Id.* at 10 n.12.

²²⁰ *Id.* at 10 (emphasis original)

²²¹ { [REDACTED] } }

}} Where the argument that a restriction on competition is justified by the need to secure the return on an investment, but there is no apparent connection between the duration of the restriction and the time needed for recoupment and the restriction appears to be perpetual, such a restriction may be regarded as illegal *per se*.²²⁴

If nothing else, the Board should exercise the same power here it has exercised elsewhere, for the same reasons, and limit the Exclusivity Arrangements to a defined period { [REDACTED] [REDACTED] } NSR's exclusive control of the Meridian Speedway for key traffic cannot be justified forever and should end.

B. Without Conditions, the Proposed Transaction and NSR's Responsive Application Will Perpetuate and Exacerbate the Harm Caused by the Exclusivity Arrangements.

Competitive harm from a “‘pre-existing disadvantage []’” does not result from the transaction under Board review if it “‘will neither be caused nor exacerbated’ by the transaction.”²²⁵ Although the Exclusivity Arrangements predate the Proposed Transaction, the harm they cause to competition and the public interest will be seriously “‘exacerbated’ by the [Proposed] [T]ransaction” in two distinct ways.

222 { { [REDACTED] } }

223 { } . } }

²²⁴ *Blackburn*, 53 F.3d at 829 (“[T]his [provision] does not establish a necessary relation between the period for payment and the duration of the advertising Agreement. The restriction on advertising is thus naked, not ancillary, and per se illegal to boot.”).

²²⁵ E.g., *CSX Corporation—Control—Pan Am Systems, Inc.*, FD 36472, slip op. at 10-11 (STB served April 14, 2022).

First, the Revised Application indicates a significant increase in the traffic affected by the Exclusivity Arrangements and exacerbates the harm they continue to cause to the public interest.

The second reason is explained by NSR itself: Although NSR contends that the Exclusivity Arrangements should be maintained in perpetuity because improvements in quality of service over the Meridian Speedway supposedly outweigh their manifest anticompetitive effects, it argues in the same breath that the Proposed Transaction will severely *reduce* that quality of service, substantially eliminating the only factor that arguably mitigates the Exclusivity Arrangements' anticompetitive effects. This change produces a substantial, adverse net impact to competition and the public interest that results ultimately from the Exclusivity Arrangements, but which NSR itself agrees would not occur but for the Proposed Transaction.

Thus, the traffic flowing to NSR's exclusive control will increase, but the quality of the service provided over it will decrease. Competition and the public interest will only be harmed by the nexus of the Exclusivity Arrangements and the Proposed Transaction.

1. The Proposed Transaction Will Likely Increase the Amount of Traffic Flowing to NSR's Illegal Exclusive Control.

As explained in CSXT's Amended Comments and Request for Conditions of June 9, 2022 (CSXT-11), Applicants' Operating Plan projects a significant increase in traffic over the Meridian Speedway, and much of that increase would consist of intermodal traffic, much of which would be NSR Exclusivity Traffic or DITT.²²⁶ NSR's Amended Comments only further illustrate that this increase in traffic under NSR's exclusive control would result from the Proposed Transaction.

²²⁶ CSXT-11 at 6-8.

Because the Proposed Transaction would increase the traffic delivered to the NSR's exclusive control, it would increase the shippers and movements affected by NSR's illegally obtained market power, exacerbating the anticompetitive effects and harm to the public interest that continue to result from the Exclusivity Arrangements.

2. Serious Harm to the Quality of Service over the Meridian Speedway Eliminates the Only Factor Mitigating the Exclusivity Arrangements' Harm to Competition and the Public Interest.

The Proposed Transaction will significantly exacerbate the harms to competition and the public interest that resulted from the Exclusivity Arrangements because, to whatever extent the MSLLC Transactions produced public benefits that mitigated their substantial anticompetitive effects, the Proposed Transaction will substantially reduce those benefits, leaving the harm to the public interest offset less by public benefits and, on net, increased.

Where a transaction has significant vertical competitive effects, the relationship between its beneficial and harmful effects can be understood by the theory of intra-brand and inter-brand competition. This theory holds that an arrangement may reduce the competition within a supply chain (intra-brand competition) but in doing so it may sometimes enhance the efficiency and competitiveness of that supply chain relative to other supply chains (inter-brand competition). Provided these alternative supply chains continue to compete effectively against and therefore competitively constrain one another, the effect of an improvement to one such supply chain may be to increase competitive pressure on the others to improve, creating public benefits generally.

Here, the MSLLC Transactions eliminated competition over routings involving the Meridian Speedway, analogous to intra-brand competition. Because there are not similarly efficient alternative routings that can competitively constrain service involving the Meridian Speedway, the usual inter-brand justification for this reduction in intra-brand competition does

not apply; rather, excluding downstream rivals from the most efficient path to market harms inter-brand competition rather than improving it. But NSR claims this reduction in intra-brand competition promised intra-brand benefits to the public interest in improvements to speed and reliability of intermodal service, resulting in the diversion of truck traffic to rail traffic over the Speedway.

But now, as NSR itself contends, because of the Proposed Transaction, the intra-brand quality benefits ostensibly promised by its reduction in competition will be substantially reduced, while leaving harm to intra-brand and inter-brand competition intact. The result of a reduction in intra-brand competition resulting from the Exclusivity Arrangements and reduction in intra-brand quality resulting from the Proposed Transaction is a reduction in competition without (or with substantially reduced) improvements in quality.

NSR itself articulates this link between the MSLLC Transactions and the Proposed Transaction succinctly: “[NS’s] investments continue to support NS’s ability to deliver the premium service intermodal customers demand and help achieve the public benefits supported by the Board. If the CP-KCS Transaction is approved without conditions, Applicants’ plan for the Meridian-Wylie Route would *place these benefits in jeopardy*.”²²⁷ Thus, “premium service” and “public benefits supported by the Board” are exactly what NSR attributes to the MSLLC Transactions and claims justify the Exclusivity Arrangements even though “these benefits” are exactly what the Proposed Transaction would jeopardize.²²⁸

²²⁷ NS-12 at 7 (emphasis supplied). *See also* NS-12 at 28 (“The resulting harm Would undermine the efficacy of NS’s investment of hundreds of millions of dollars in the MSLLC and the Meridian Speedway.”).

²²⁸ *Compare also* NS-12 at 10 (“The Meridian Speedway transaction was pro-growth, pro-competitive, and allowed shippers to utilize a highly efficient route service.”), *with* NS-12 at 21 (“Applicants’ Plan for the CP-KCS Transaction Threatens The Pro-Growth, Pro-Competitive Intermodal Gains on the Meridian-Wylie Route.”).

NSR points to two concrete benefits it attributes to the MSLLC Transactions, and according to NSR's own argument, the Proposed Transaction would undermine both benefits.

The principal benefits NSR suggests mitigate the loss of competition are the speed and reliability of intermodal service over the Speedway. NSR claims it invested "to improve the transit time and reliability of the line,"²²⁹ that its investments made the Meridian Speedway "faster and more reliable,"²³⁰ and that "[t]hanks in large part to NS's more than \$300 million investment ... if a shipper needs timely service between the Southeast and the Dallas Fort-Worth area, an intermodal move on the Meridian Speedway is a highly efficient alternative to moving that product over the highway."²³¹ NSR appears to contend that these features made the Exclusivity Arrangements on net "pro-growth" and "pro-competitive," though directly restrictive of competition over the most efficient route to and from the Southeast.²³²

But, as NSR explains, the Proposed Transaction will likely reduce the speed and reliability of service over the Speedway. This would occur because NSR does not fully control what traffic might flow over the Speedway, and the Applicants' plan for traffic growth prioritizes increasing the merchandise traffic KCS has long transported over the same facilities NSR uses for intermodal traffic. To accomplish this, the Applicants plan to "increase the number of trains over the Meridian-Wylie Route and operate mixed trains with NS intermodal traffic and KCS merchandise traffic."²³³ But because merchandise traffic requires additional stops, this "makes

²²⁹ NS-12 at 11.

²³⁰ NS-12 at 12.

²³¹ NS-12 at 19.

²³² NS-12 at 10.

²³³ NS-12 at 23.

the train less reliable and increases transit time over the entire Meridian-Wylie Route.”²³⁴

Likewise, Applicants plan to increase train length beyond what existing sidings can accommodate, which would force other trains to “hold in sidings while the new trains passed.”²³⁵ Thus, the speed and reliability of service over the Meridian Speedway – the principal benefits that NSR says make the reduction in competition resulting from the Exclusivity Arrangements worthwhile – will be significantly reduced because of the Proposed Transaction.

NSR further argues that its investments resulted in the diversion of traffic from truck to rail and that this results in myriad public benefits.²³⁶ Indeed, NSR claims this truck-to-rail diversion accounts for most volume benefits resulting from its investment: “Nearly all of the growth in intermodal shipments over the Meridian-Wylie Route has been taken off the highways.”²³⁷

But NSR explains a “direct result” of the Proposed Transaction will be to halt and at least partially reverse these benefits because changes to service over the Speedway outside NSR’s control are likely to “drive intermodal rail traffic to the highways.”²³⁸ This is true both for the “Meridian-Wylie Route” itself, on which NSR claims “a significant portion of the intermodal freight that NS moves” on this route “is at risk of diversion to highway,”²³⁹ and for longer routes such as Wylie-Atlanta, on which “current NS intermodal shippers would be forced to switch to highways to meet the demands of their end customers” and future shippers “would be unlikely to

²³⁴ NS-12 at 24. *See also* NS-12 at 34 (“This new traffic will include bulk traffic that will likely slow down the overall speeds on the entire Meridian-Wylie Route, significantly impacting the fluidity of the route and specifically having a direct and adverse effect on important NS intermodal service.”).

²³⁵ NS-12 at 24-25.

²³⁶ NS-12 at 20-21, 38-40.

²³⁷ NS-12 at 37.

²³⁸ NS-12 at 27, 28.

²³⁹ NS-12 at 37.

move their intermodal traffic by rail.”²⁴⁰ Thus, the second significant source of public interest benefits that NSR claims were enabled by directly restricting competition over the Meridian Speedway will also be eliminated.

VI. SUMMARY

The Exclusivity Arrangements illegally excluded rivals from access to the Meridian Speedway and granted NSR control over the line, with significant anticompetitive effects, all without required STB approval. This has long harmed the public interest. NSR contends that its investment and certain quality improvements it attributes to the Arrangements created offsetting benefits to the public interest, but that the Proposed Transaction would “place... in jeopardy”²⁴¹ those same supposedly offsetting benefits and “undermine the efficacy of NS’s investment.”²⁴² Thus, because of the Proposed Transaction, all that will remain is a critical transcontinental route to the Southeast that rivals have been excluded from, in perpetuity, but for which the party illegally controlling access to the line cannot improve or even maintain its quality of service. Through this effect, the Proposed Transaction significantly exacerbates the harm to the public interest caused by the Exclusivity Arrangements.

If the Board abrogates the Exclusivity Arrangements and adopts an enforceable open gateway policy that extends to Shreveport and Meridian, it will assure shippers and the economy can fully realize the competitive potential of the Transaction and the Meridian Speedway. .

²⁴⁰ NS-12 at 38.

²⁴¹ NS-12 at 7.

²⁴² NS-12 at 28.

Respectfully Submitted,

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Dated: July 12, 2022

Appendix 1: Terms

CPKC	“CPKC” refers to the potential entity that would result from the Proposed Transaction.
Applicants	“Applicants” refers to CP and KCS together with their United States subsidiaries
CP	“CP” refers to Canadian Pacific Railway and its subsidiaries
CSXT	“CSXT” refers to CSX Transportation Inc (otherwise referred to as CSX)
DIT	“DIT” refers to the Dallas Intermodal Terminal
DITT	“DITT” refers to Dallas Intermodal Terminal Traffic, as defined in the Dallas Terminal Marketing Agreement. The agreements define Dallas Intermodal Terminal Traffic as comprising all (i) domestic intermodal traffic with a lift or drop at the DIT, (ii) moving over the track between Meridian and Shreveport and over KCSR’s tracks between Shreveport and DIT, and (iii) with O/D in U.S. at or west of DFW SMSA (iv) with O/D in U.S. at or east of Meridian.
Exclusivity Arrangements	“Exclusivity Arrangements” refers to the unlawful and anticompetitive provisions of the MSLLC Agreements. These include the 1) exclusivity provisions regarding DITT between Laredo and Shreveport, 2) exclusivity provisions regarding “NS Traffic” between Shreveport and Meridian, and 3) the control provisions regarding NSR control over the MSLLC.
KCS	“KCS” refers to Kansas City Southern Railroad and its United States subsidiaries (otherwise referred to as KCSR)
KCS Line	“KCS Line” refers to the line from Dallas, TX to Shreveport, LA, which is the western portion of the Meridian Speedway
Meridian Speedway	“Meridian Speedway” refers to the line from Dallas, TX to Meridian, MS (otherwise referred to as simply the “Speedway”)

Meridian Speedway: Dallas, TX ↔ Meridian, MS

KCS Line:

Dallas, TX ↔ Shreveport, LA

MSLLC Line:

Shreveport, LA ↔ Meridian, MS



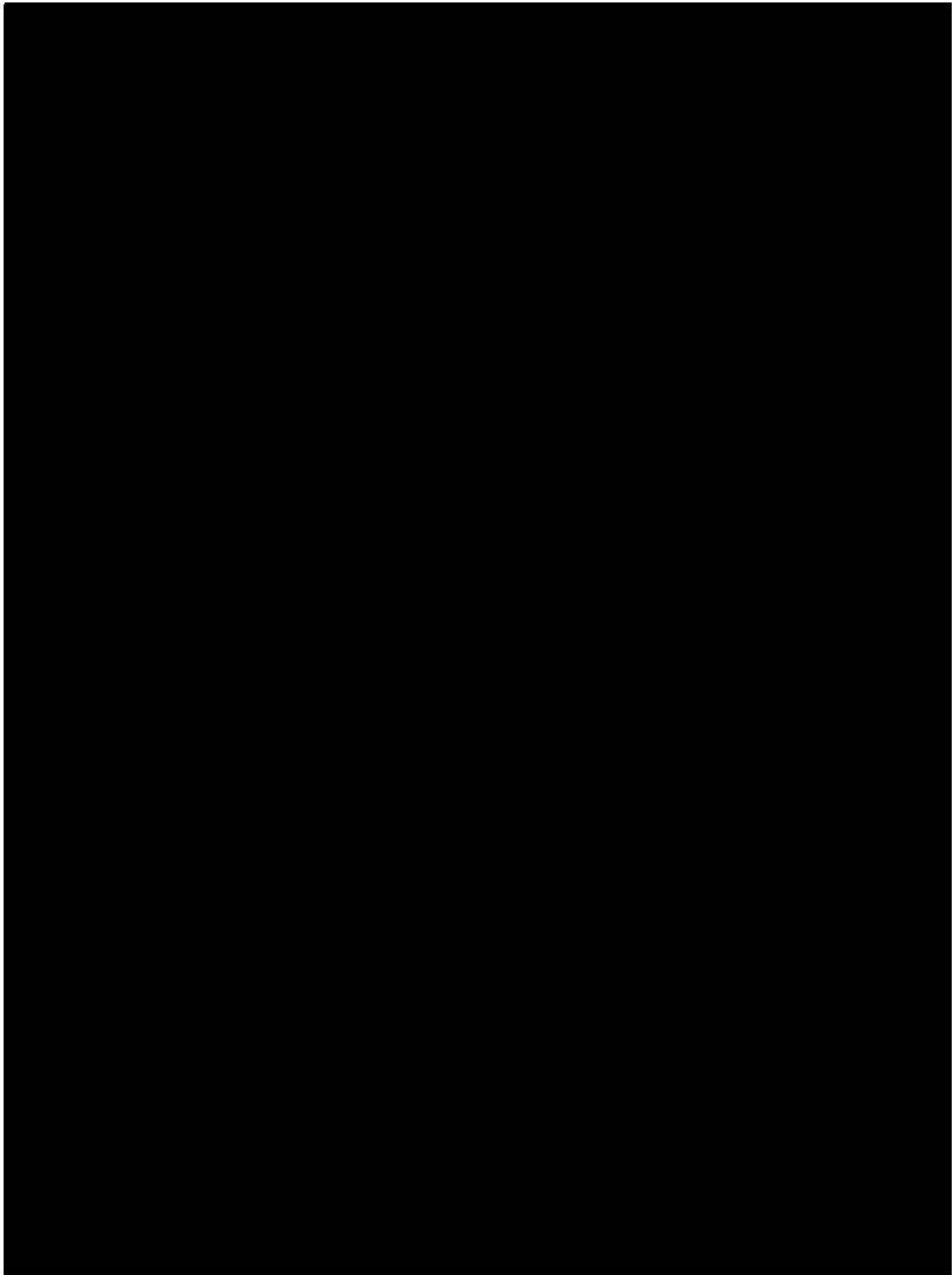
Mexico Traffic	“Mexico Traffic” refers to traffic to and from Mexico on the proposed CPKC rail system
MSLLC	“MSLLC” refers to the Meridian Speedway LLC, a joint venture between KCS (70% membership interest) and NSR (30% membership interest) that

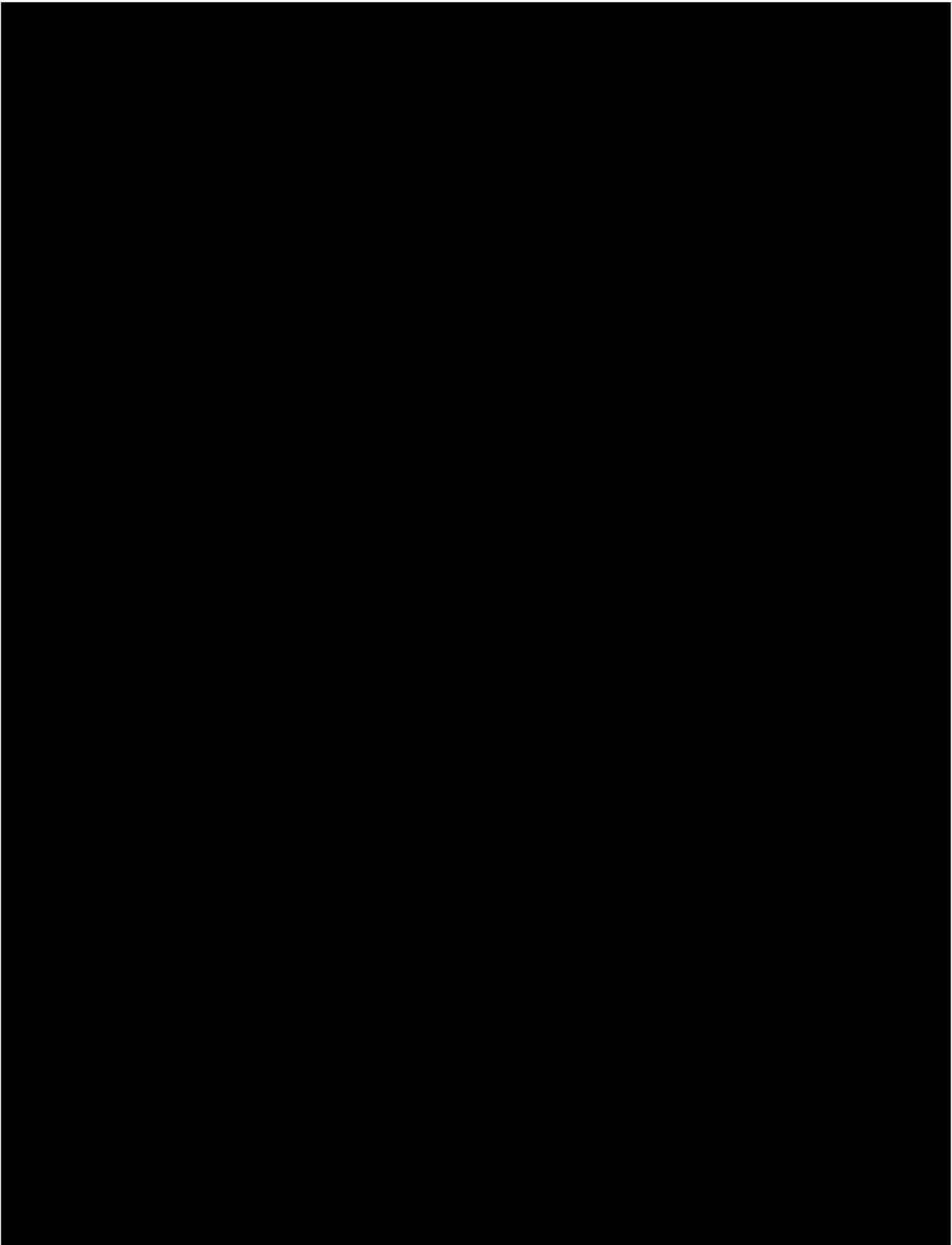
owns the MSLLC Line; MSLLC was formed when the MSLLC Agreements were executed in 2006. See FD 34822 Verified Notice of Exemption, filed January 17, 2006, at 21.

MSLLC Agreements	“MSLLC Agreements” refers to all agreements included as exhibits to the public Verified Notice of Exemption in FD 34822 filed January 17, 2006, as well as subsequent amendments to those agreements. These include but are not limited to the Dallas Terminal Marketing Agreement (included as Exhibit J to the 2006 notice), the NS-KCS Western Haulage Agreement (included as Exhibit E to the 2006 notice), and the LLC Agreement of the MSLLC (included as Exhibit A to the 2006 notice).
MSLLC Line	“MSLLC Line” refers to the line from Shreveport, LA to Meridian, MS which is the eastern section of the Meridian Speedway
NSR	“NSR” refers to Norfolk Southern Railway Company (otherwise referred to as "NS")
NSR-Exclusivity Traffic	“NSR-Exclusivity Traffic” refers to the traffic defined as “NSR Traffic” in the MSLLC Agreements: all (i) intermodal traffic, (ii) entering/exiting at Shreveport and entering/exiting at Meridian, (iii) with O/D in U.S. west of Dallas/Fort Worth (including west coast port traffic), (iv) with O/D in U.S. at or east of Meridian, and (v) without O/D on KCS system as it existed at time of formation of the MSLLC Agreements. See LLC Ag. 13, PDF 99; NSR JUA § 1(b), PDF 182; KCSR JUA § 1(b), PDF 217; Western Haulage Ag. § 1(b), PDF 241.
Proposed Transaction	“Proposed Transaction” refers to CP’s proposed acquisition of KCS
JV	Joint venture

Highly Confidential

Appendix 2: MNBR- CSXT Haulage Agreement





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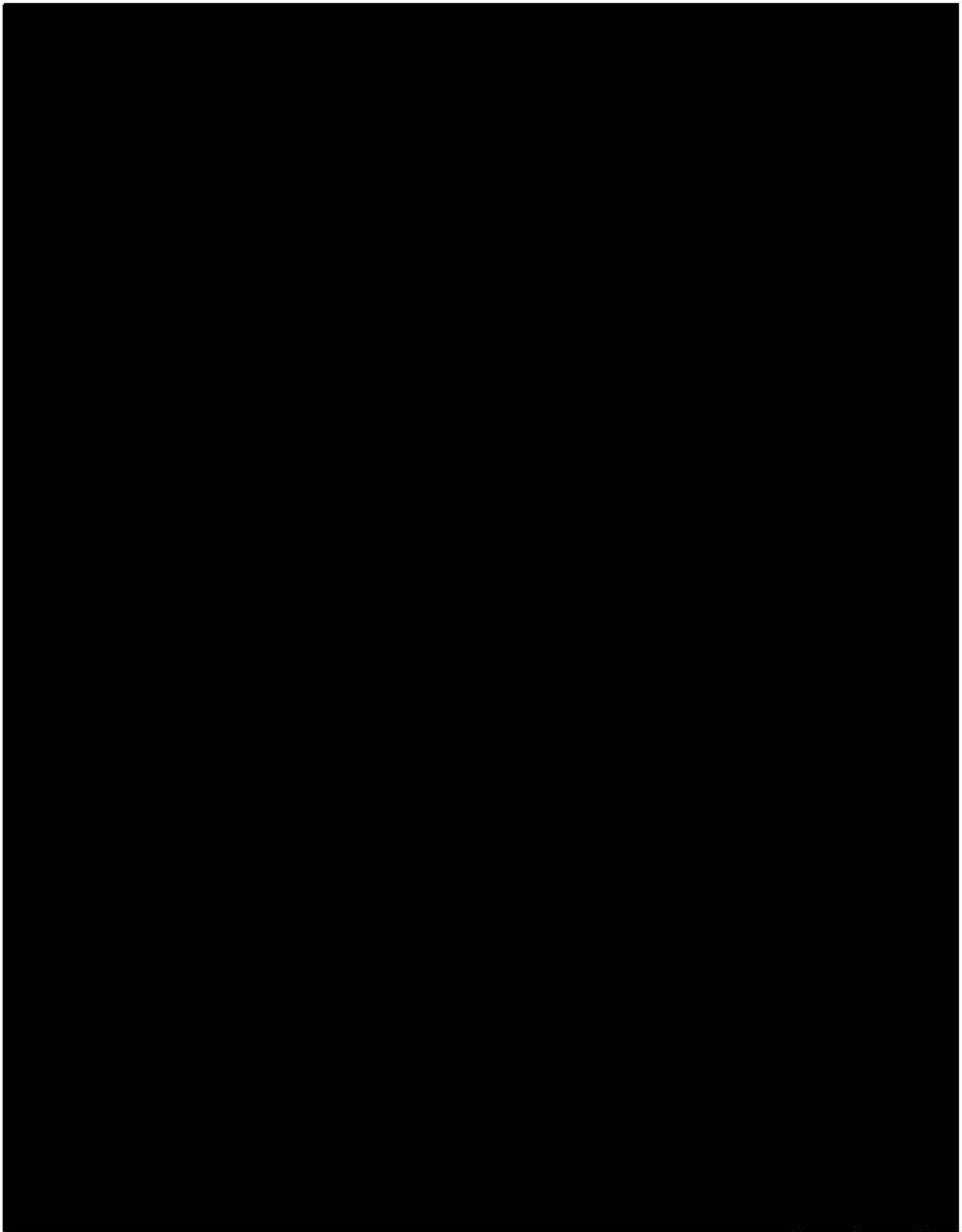
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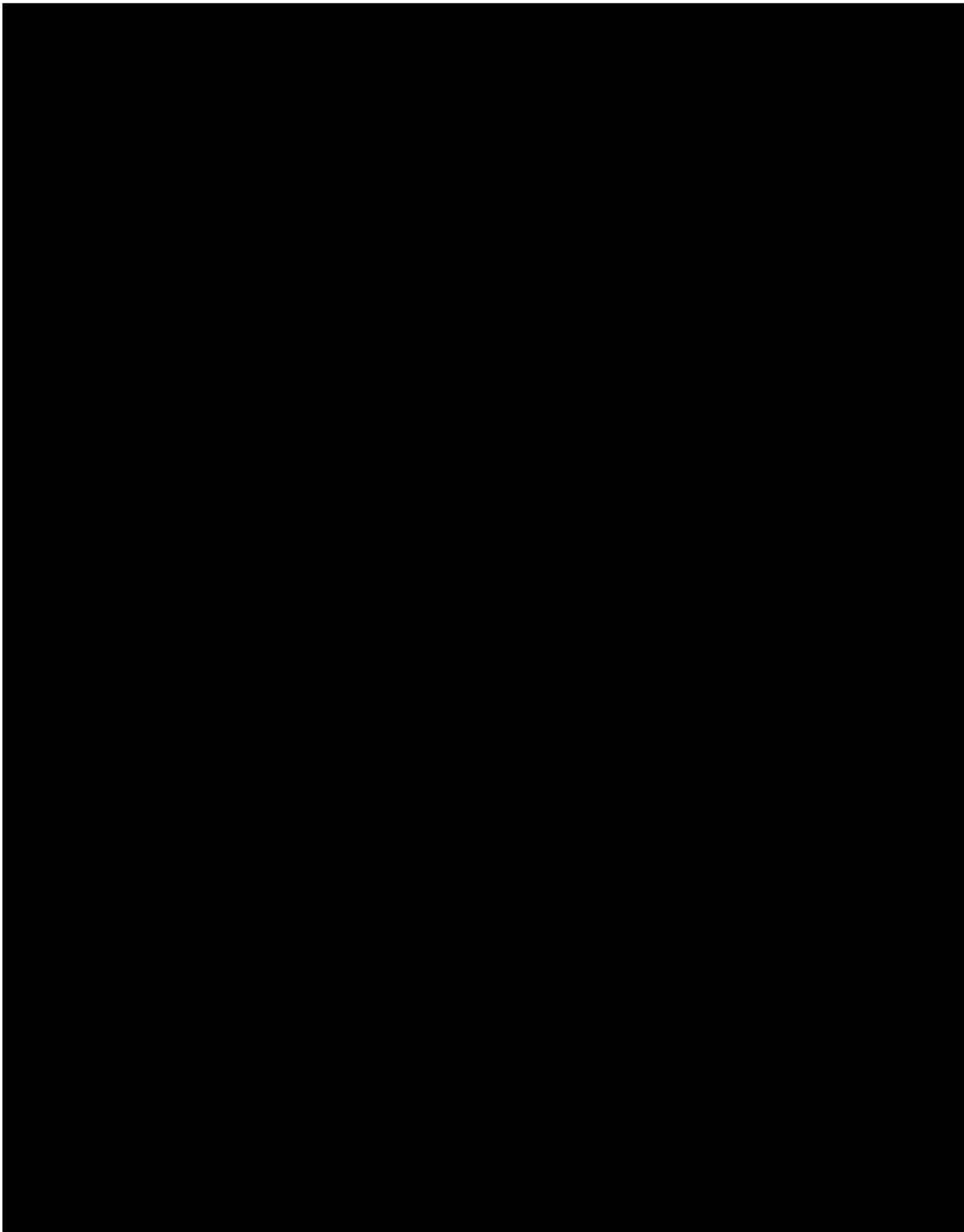
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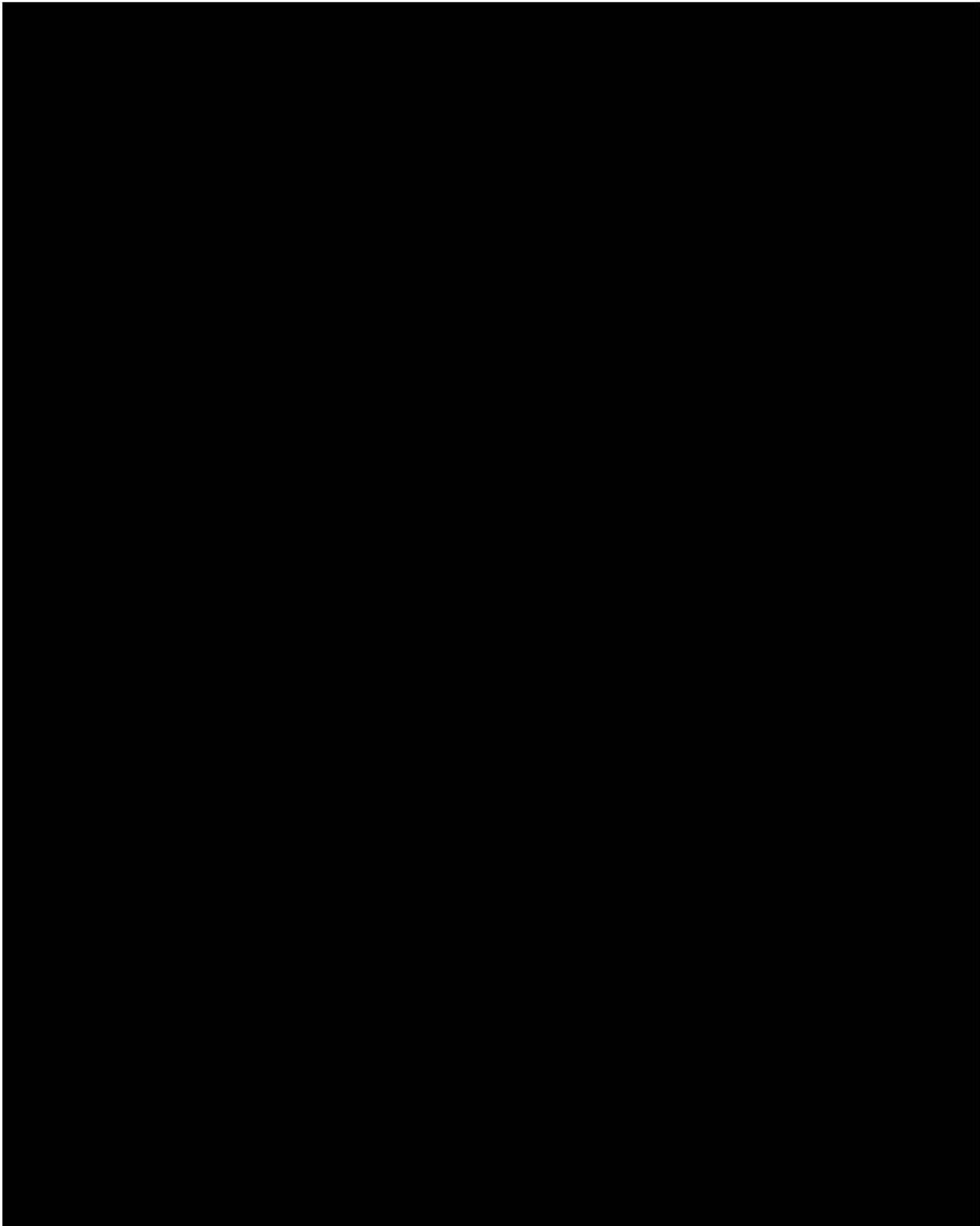
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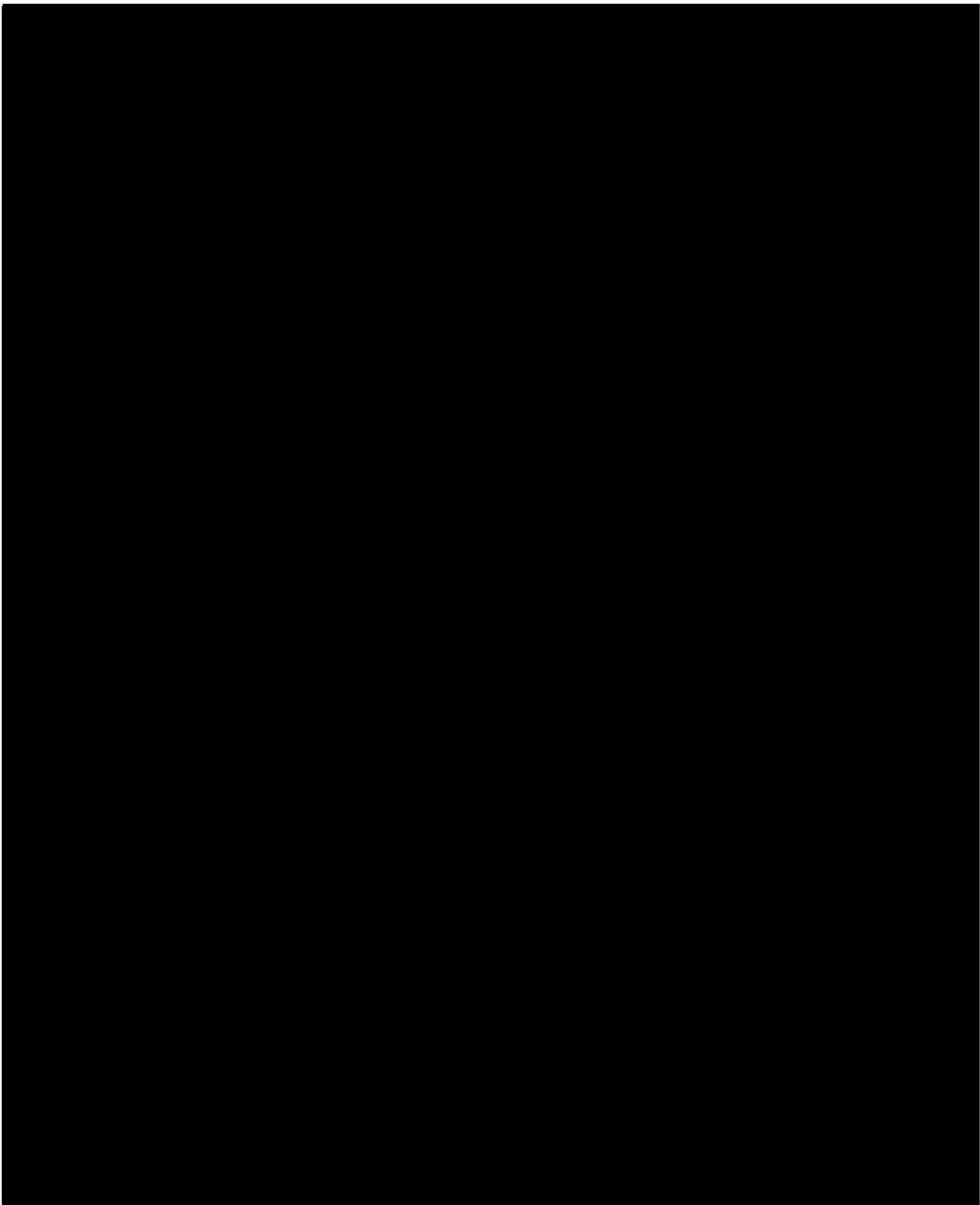
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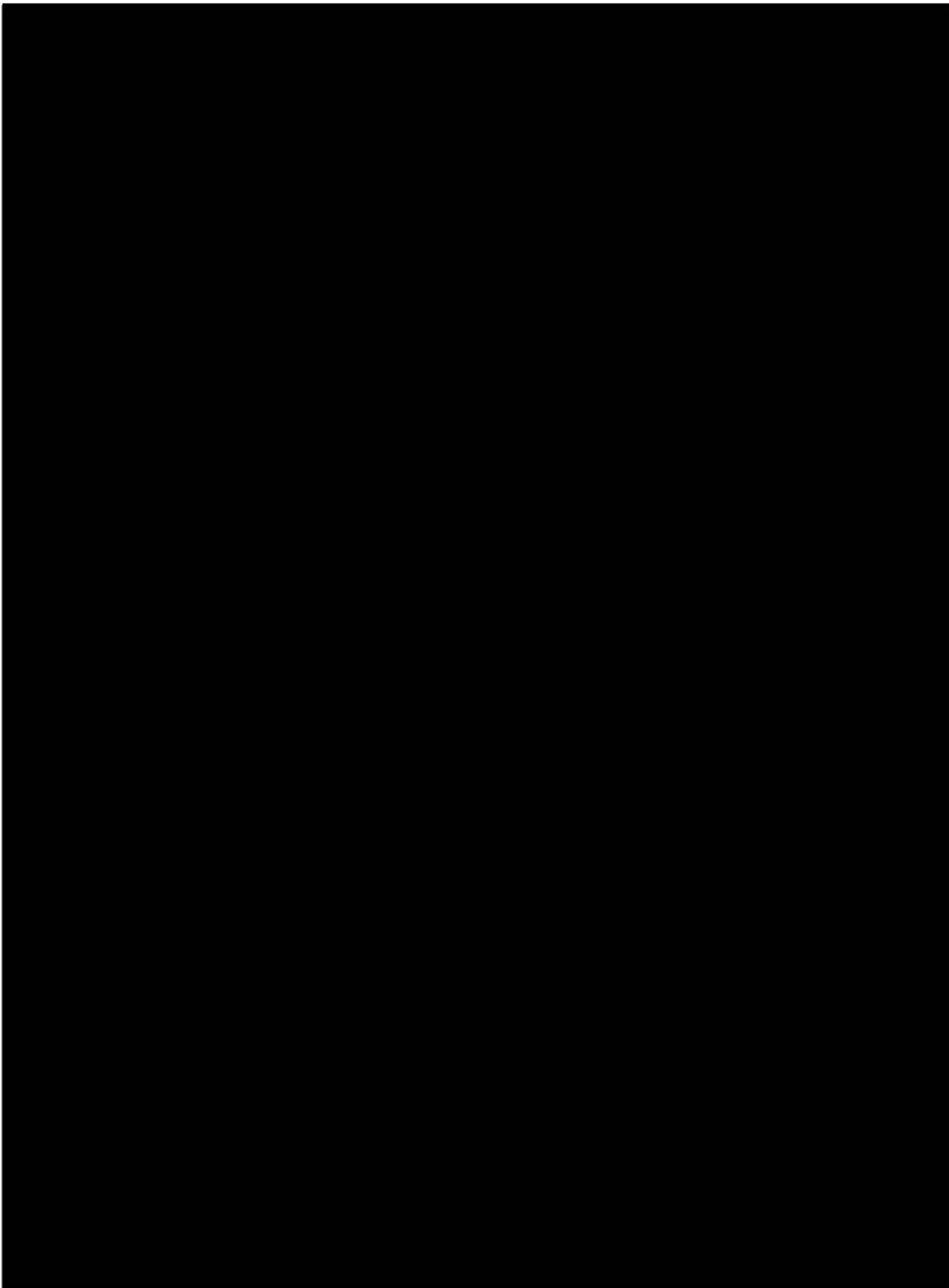
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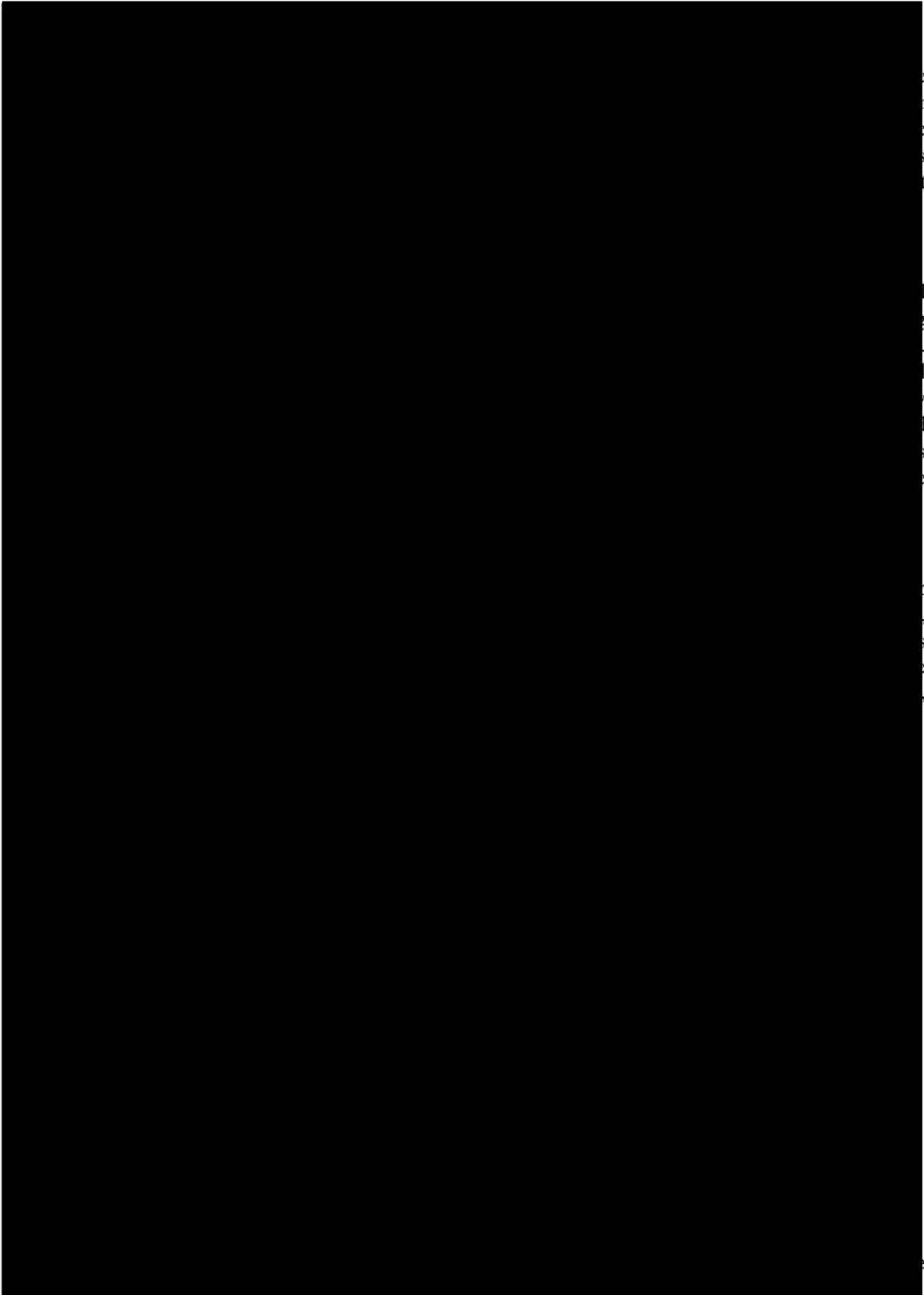


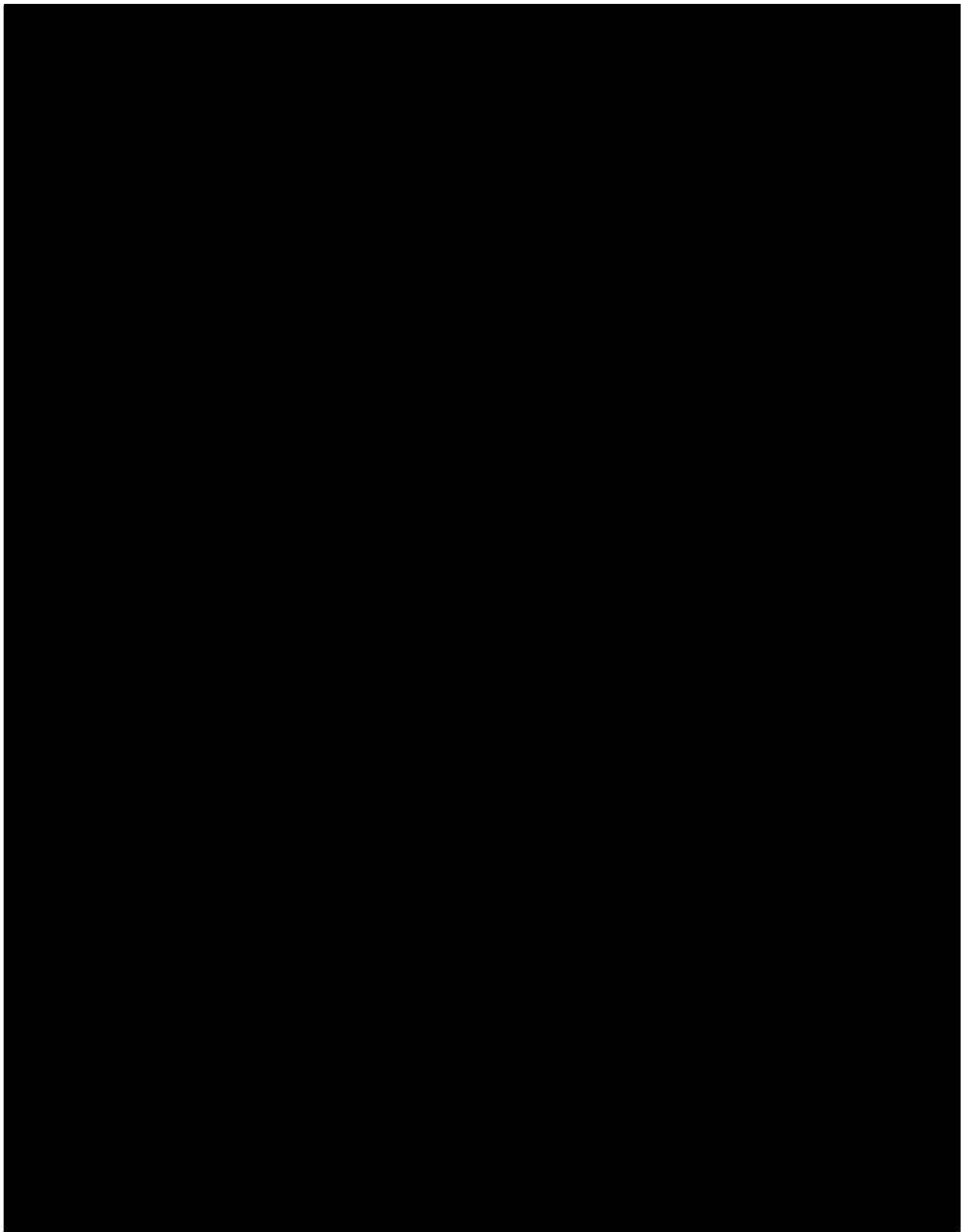


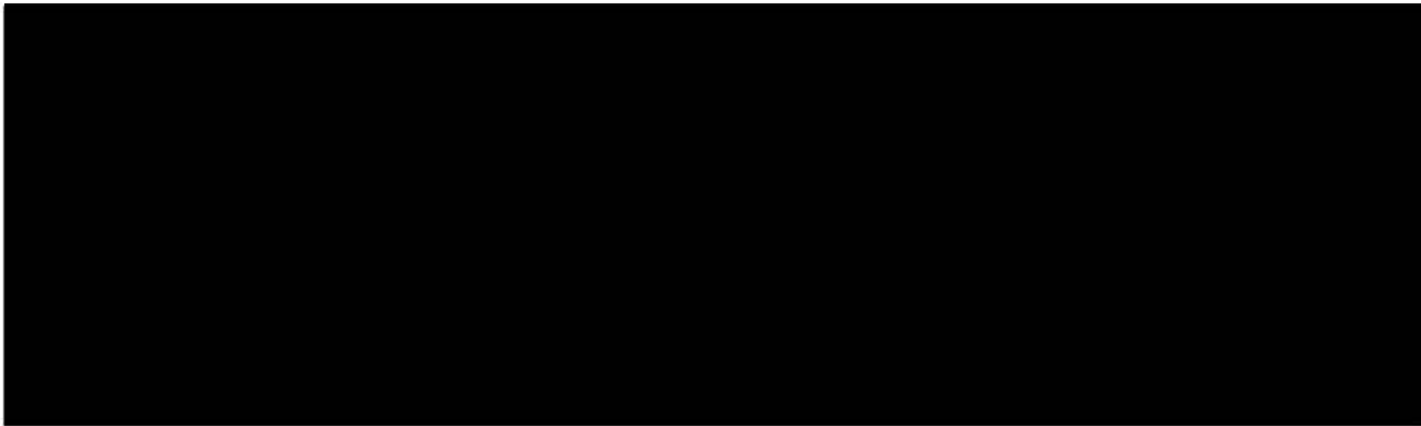


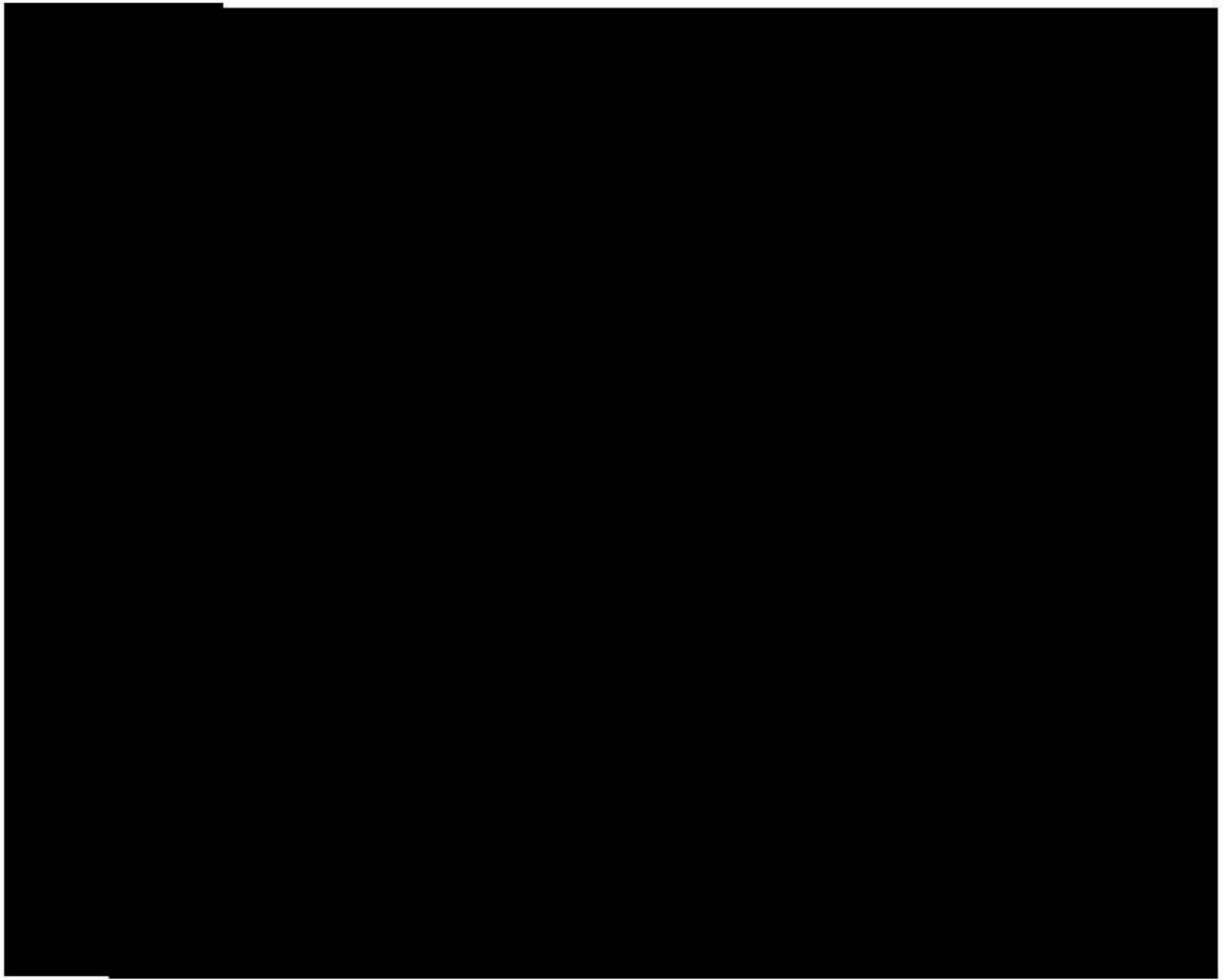












[REDACTED]

[REDACTED]

CERTIFICATE OF SERVICE

I certify that I have caused the foregoing CSX Transportation, Inc. Amended Comments and Request for Conditions 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/ Paul A. Cunningham

Paul A. Cunningham
*Attorney for CSX
Transportation, Inc.*

Dated: July 12, 2022

PUBLIC VERSION

HIGHLY CONFIDENTIAL—FILED UNDER SEAL

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 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 & HUDSON RAILWAY COMPANY, INC. – CONTROL – KANSAS
CITY SOUTHERN, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, GATEWAY
EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN RAILWAY COMPANY**

**CSX TRANSPORTATION, INC.’S RESPONSE TO COMMENTS AND RESPONSIVE
APPLICATIONS**

**VERIFIED STATEMENT OF PROFESSOR JULIE M. CAREY
NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC.
(NERA)**

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RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION;
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**CSX TRANSPORTATION, INC.'S RESPONSE TO COMMENTS AND RESPONSIVE
APPLICATIONS**

**VERIFIED STATEMENT OF PROFESSOR JULIE M. CAREY
NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC.
(NERA)**

I. INTRODUCTION AND SUMMARY CONCLUSIONS

My name is Julie M. Carey. I am an economist and Managing Director with National Economic Research Associates, Inc. (“NERA”). I filed a verified statement in this proceeding on February 28, 2022.¹ Additional details regarding my professional qualifications, including my CV are provided in that filing.

I am responding to the Amended Responsive Application by Norfolk Southern Railway Company (“NSR”)² and therefore its Amended Comments³ to the Amended Operating Plan regarding “contingent trackage rights on the Shreveport-Wylie Section for intermodal traffic originating or terminating at the Wylie Intermodal Terminal.”⁴ These contingent trackage rights would expand NSR’s access through the Meridian Speedway (the “Speedway”) that connects the Southeast U.S. rail markets to the Southwest (Transcontinental) and Dallas, TX rail markets. NSR is currently a 30% owner in the Meridian Speedway LLC (“MSLLC”) joint venture (“JV”) with Kansas City Southern (“KCS”) having the remaining 70% ownership. Throughout its pleadings, NSR attempts to suggest the MSLLC JV is procompetitive endeavor.⁵ However, NSR principally ignores the fact that the original request to the Board for approval for the MSLLC JV was incomplete and inappropriate (and therefore I understand from the CSXT legal brief it was unlawful). Further, NSR also ignores that the perpetual nature of the Meridian Speedway’s exclusivity arrangements (“Exclusivity Arrangements”) exacerbates the negative effect on competition and the public interest, and that the CPKC Transaction compounds these issues through its impact on the east-west gateway at Shreveport and Meridian.

The MSLLC Line (Shreveport, LA to Meridian, MS) which is owned by the JV and the entire Meridian Speedway is a key route in the Post-CPKC Transaction system. The Meridian Speedway is majority owned by KCS,⁶ and control of the Speedway will transfer to CPKC as a part of the

¹ See Finance Docket No. 36500, *Canadian Pacific Railway Limited, Et Al. – Control – Kansas City Southern, Et Al.*, CSX Transportation, Inc.’s Comments and Request for Conditions (“CSXT-8, Carey V.S.”), (February 28, 2022).

² See Finance Docket No. 36500, *Norfolk Southern Railway Company – Trackage Rights – Kansas City Southern*, Amended Responsive Application of Norfolk Southern Railway Company (“NS-13”), (June 9, 2022).

³ See Finance Docket No. 36500, *Canadian Pacific Railway Limited, Et Al. – Control – Kansas City Southern, Et Al.*, Amended Comments of Norfolk Southern Railway Company and Request for Conditions (“NS-12”).

⁴ *Ibid.* at 4

⁵ Below, I discuss NSR’s attempts to characterize the Meridian Speedway JV as a “pro-competitive” and “pro-growth.” See NS-12 at 9-21.

⁶ See Section III *supra*.

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Applicants' proposed transaction. The Meridian Speedway is clearly an important asset in the CPKC Transaction as observable in CPKC business and marketing materials that tout the Meridian Speedway as the major east-west intermodal route on the CPKC's U.S. network (into the Southeastern U.S.). NSR also highlights the importance of the Meridian Speedway with respect to the CPKC Transaction, including the Applicants' amended operating plan which projects significant traffic increases over the Meridian Speedway, including for non-intermodal traffic.⁷

I also discuss the potential for competitive harm to customers in the Eastern U.S. that results from the KCS and NSR MSLLC Agreements⁸, and which could be aggravated as a result of the Transaction described in NSR's Responsive Application.⁹ These concerns arise from the MSLLC Agreements use of perpetual Exclusivity Arrangements pertaining to transcontinental intermodal traffic and Dallas Intermodal Terminal Traffic that traverses the MSLLC Line. These Exclusivity Arrangements include a market division that divides the control of certain geographic areas and products between KCS and NSR and has vertical effects that reduce competition. Further, for intermodal traffic originating or terminating in Dallas, NSR has the ability to prevent KCS from interchanging traffic with other carriers and while NSR also works directly with KCS to jointly set rates.

NSR's control of MSLLC reinforces the NSR-KCS traffic division and therefore adversely impacts competition. The MSLLC Exclusivity Arrangements provide NSR with exclusive access from Shreveport to Meridian for transcontinental intermodal traffic and Dallas to Meridian for Dallas Traffic for locations into Southeastern U.S. that are advantaged on the Meridian Speedway route. Both NSR's existing Exclusivity Arrangements and its proposed expansion of those rights are anticompetitive and distort competition between NSR, KCSR, and CSXT for NSR Traffic for whom the most efficient route is over the MSLLC Line. I present economic indicia of competitive harm in the Eastern U.S. railroad markets that arises from the MSLLC JV and the indefinite Exclusivity Arrangements. My analysis shows that intermodal traffic moving under the Exclusivity

⁷ See NS-12 at 5-6.

⁸ "MSLLC Agreements" refers to all agreements included as exhibits to the public Notice of Exemption in FD 34822 filed January 17, 2006 as well as subsequent amendments to those agreements. These include but are not limited to the Dallas Terminal Marketing Agreement (included as Exhibit J to the 2006 notice), the NS-KCS Western Haulage agreement (included as Exhibit E to the 2006 notice), and the LLC Agreement of the MSLLC (included as Exhibit A to the 2006 notice). See FD 34822, *The Kansas City Southern Railway Company, and Meridian Speedway, LLC – Exemption for Transactions Within a Corporate Family*, Verified Notice of Exemption Pursuant to 49 C.F.R. Sec. 1180.2(d)(3) ("Notice of Exemption"), (January 17, 2006).

⁹ See NS-13.

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Arrangements over the MSLLC Line has [REDACTED] than [REDACTED], as well as [REDACTED]. In addition, I conducted a statistical analysis of interchange (i.e., gateway) competition demonstrating that the existence of only one railroad alternative at a gateway results in higher rates than if more than one railroad competitor is present. These are the circumstances under the Exclusivity Arrangements.

NSR did not address the effects on competition of the perpetual Exclusivity Arrangements associated with the MSLLC Agreements with respect to the Transaction. Fully open gateways on both ends of the MSLLC Line (Shreveport and Meridian) are needed to address competitive concerns arising from the CPKC Transaction. Ensuring Shreveport and Meridian gateways are open, as well as all other gateways used for traffic movements with Mexico, will act as constraint against CPKC's market power related to Mexico, and specifically in regard to originating and terminating traffic in the Southeastern U.S. and Mid-Atlantic. For Shreveport to adequately constrain CPKC Post Transaction, Meridian must also be an open gateway with commercially reasonable terms and operations to ensure that competitive access across the entire MSLLC Line for traffic movements with the Southeastern and Mid-Atlantic regions. The importance of ensuring a competitive MSLLC Line for Mexico Traffic is amplified by the large future growth in truck and rail movements into the Eastern U.S. railroad markets (including the Southeastern U.S.) and the ability of an improved interchange to potentially take these trucks off the road. Furthermore, open gateways at both ends of the MSLLC Line are required to adequately constrain CPKC's market power with respect to long hauls to and from West Coast ports (into the Eastern U.S. markets particularly the Southeastern U.S. and Mid-Atlantic regions) as well as other transcontinental NSR Exclusivity Traffic that traverses the Meridian Speedway to or from Eastern U.S. railroad markets.

I also show that the MSLLC Agreements were not reasonably economically necessary for NSR and KCS to achieve business success in 2006, nor are they reasonably economically necessary on an ongoing basis. As discussed below, NSR and KCS could have entered into a non-exclusive haulage agreement which are common forms in the railroad industry. In addition, the Exclusivity Arrangements appear as the prominent, new and significant feature to the MSLLC Agreements, and the general type of service and economic terms over the MSLLC Line Pre-JV world (i.e., haulage service for NSR Transcontinental Traffic and interline traffic for Dallas traffic) continued after the formation of the JV. Therefore, no material efficiency gains from vertical integration were associated with the MSLLC JV (as compared to the Pre-JV world). Furthermore, NSR's strong historical financial performance [REDACTED] from the MSLLC Line traffic, confirm that even if the Exclusivity Arrangements were needed in 2006, they are no longer needed.

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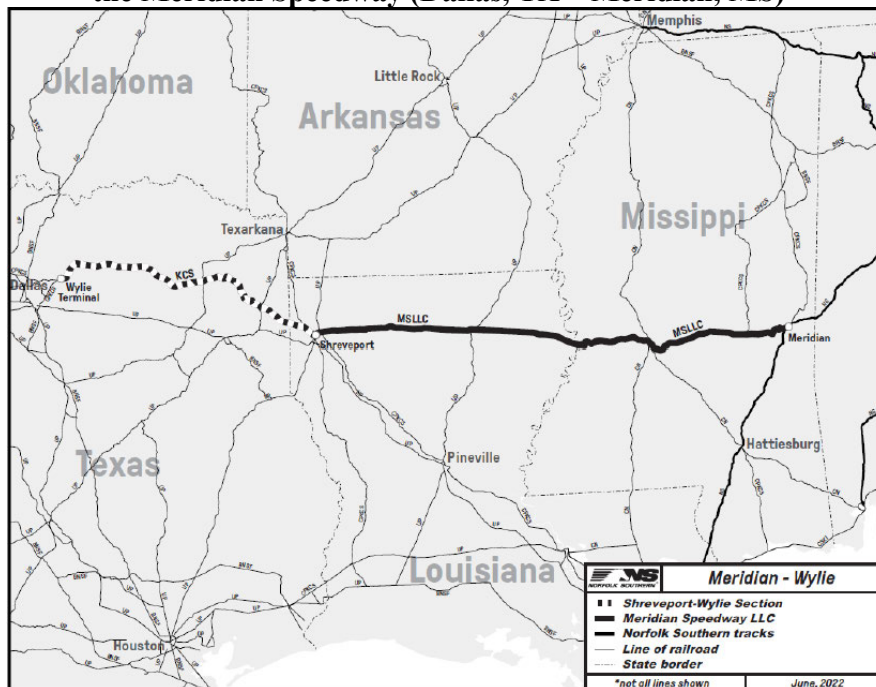
Despite claims of efficiency benefits from Meridian Speedway and the MSLLC JV, NSR fails to assess the economic implications of the Exclusivity Arrangements and the closed gateways at Meridian and Shreveport. My analysis below shows that shippers would achieve overwhelming economic benefits from the abrogation of the perpetual KCS-NSR Exclusivity Arrangements and opening of both the Shreveport and Meridian gateways to the MSLLC Line. Specifically, my annual public benefits analysis estimates customer savings ranging from \$37 to \$49 million as being achievable from the additional railroad competitor over the MSLLC Line. I conducted a statistical analysis of interchange (i.e., gateway) competition that reaffirms the well understood economic principle that increased competition constrains prices (i.e., benefiting customers with lower prices). I also looked to direct evidence of CSXT's ability to offer Eastern U.S. rail customers lower rates for intermodal traffic movements serving the same origin and destination. My analysis shows that [REDACTED] rates would result by opening both the Shreveport and Meridian gateways to the MSLLC Line. Opening both the Shreveport and Meridian gateways to the MSLLC Line enables an additional Class-I railroad to compete in the Eastern U.S. railroad markets for traffic that moves over the MSLLC Line. My annual public benefit estimates of customer savings also consider that increased railroad competition can induce shippers currently using trucks to use a rail alternative instead. Given the very modest efficiency-related benefits associated with the proposed CPKC Transaction, removing these obstacles to competition will lead to a higher level of public benefits from the Proposed Transaction and best ensure competitive railroad markets going forward.

In sum, from a public interest perspective, CPKC (and NSR's attempts) to keep certain gateways closed is an overt restraint to competition and should be disallowed. Open gateways enhance competition and can constrain a railroad from otherwise raising prices (even if the gateway is not consistently or substantially used today). The Board should not approve the Proposed Transaction without conditions to mitigate the risks it presents for competition and opening the gateways to competitive alternatives at both ends of the MSLLC Line (Shreveport and Meridian) as well as all other CPKC gateways to ensure that traffic movements involving CPKC can move over the most economically efficient routes, consistent with the public interest.

II. THE MSLLC LINE (SHREVEPORT TO MERIDIAN) AND THE ENTIRE MERIDIAN SPEEDWAY IS A KEY ROUTE IN THE POST CPKC SYSTEM

The Meridian Speedway, from Dallas, TX, to Meridian, MS, is a major east-west gateway connecting traffic between the Southwestern and Southeastern United States.¹⁰ The MSLLC Line is a segment of the Meridian Speedway that extends from Shreveport, LA in the west to Meridian, MS in the east. All traffic that enters the MSLLC Line under the MSLLC Agreements, discussed further below, traverses the entire track of the MSLLC Line that enters or exits at Meridian or Shreveport¹¹ The MSLLC Line is shown below in Figure 1 as submitted by NSR in its filings in this proceeding.¹²

**Figure 1: The MSLLC Line (Shreveport, LA – Meridian, MS)
and
the Meridian Speedway (Dallas, TX – Meridian, MS)¹³**



As noted in Section I, the MSLLC Line is owned and by the Meridian Speedway LLC, the joint venture between Norfolk Southern Railway Company and Kansas City Southern railroads.¹⁴ It provides haulage services to NSR that are operated by KCS on MSLLC's behalf and trackage rights to KCS. The vast majority of traffic over the MSLLC Line and the Meridian Speedway as a whole is

¹⁰ Smaller amounts of traffic to and from the Northwest and Northeast of the United States is also moved across the Meridian Speedway as discussed in Section III.D *supra*.

¹¹ See NS-12 at 3.

¹² See NS-12 at 4.

¹³ See NS-12 at 4.

¹⁴ See NS-12 at 9.

intermodal containers.¹⁵ This traffic flows over the Speedway by two principal methods: (1) Intermodal traffic originating or terminating west of Dallas enters or exits the Speedway at Shreveport through a connection with Union Pacific (“UP”), where it connects with NSR which carries traffic (via haulage over the MSLLC line and directly over its lines) to or from locations throughout the Southeastern U.S. and Mid-Atlantic Regions; (2) KCS track from the Wylie Intermodal Terminal near Dallas, TX¹⁶ connects to MSLLC Line at Shreveport forming the “KCS Line” portion of the Speedway from Wylie to Shreveport.¹⁷ KCS and NSR jointly market traffic to and from Wylie, and that traffic is carried over the Meridian Speedway to or from locations on NSR’s network in the east. The entire Meridian Speedway and its subparts, the MSLLC Line and the KCS Line, are displayed above in Figure 1.

MSLLC is nominally majority-owned by KCS,¹⁸ and control of the MSLLC will transfer to the combined Canadian Pacific Railway (“CP”) and KCS (collectively “CPKC”) as a part of the transaction proposed by the Applicants. It is my understanding that NSR has the right to dissent from “major decisions” which effectively provides a 50% control, despite the fact that it only receives 30% share of income.¹⁹ The Meridian Speedway is an important asset in the CPKC Transaction. This is evident from both the business and marketing materials produced by the Applicants and the Application for approval of the Proposed CPKC Transaction, including Applicants’ transaction operating plan and the amended operating plan.

For example, CP identified the Meridian Speedway as a key asset in the future CPKC intermodal network in their marketing materials discussing the strengths of a potential CPKC.²⁰ CP has touted the Meridian Speedway as the major east-west intermodal route on the CPKC U.S. network (into the Southeastern U.S.).²¹ In this material, CP highlights the connection of UP and NSR at Shreveport, and the use of the MSLLC Line to connect to NSR at Meridian. Further, CP CEO Keith Creel has publicly commented to investors on the importance of the Speedway to the potential

¹⁵ See NS-12 at 12. 400,000 IM units / 440,000 total revenue units = 91% of traffic.

¹⁶ See NS-12 at 3.

¹⁷ See NS-12 at 3.

¹⁸ See *infra* Section III.

¹⁹ See CSXT Legal Brief at 23. “Neither the Management Committee nor any committee thereof shall authorize or effect any action that constitutes a Major Decision unless such action has received the approval of at least one of the Committee Representatives appointed by NS.” See FD 34822, *Notice of Exemption*, at 114. See also FD 34822, *Notice of Exemption*, definition of “Major Decisions,” at 95-97.

²⁰ See Canadian Pacific, “North American Rail Shippers Association,” at 6 (May 11, 2022), available at <https://www.railshippers.com/wp-content/uploads/2022/05/Brooks-CP-NARS-2022.pdf>.

²¹ *Ibid.*

CPKC entity, speaking about the potential to expand facilities at the Dallas Intermodal Terminal (“DIT”) even further to include new lumber facilities, transloads facilities, and liquid facilities, therefore increasing the importance of the Terminal to CPKC.²² This development is in addition to what Mr. Creel characterized as the already existing, substantial, traffic on the line.²³

Figure 2: CPKC Intermodal Network Map used for Business Marketing²⁴



The centrality of the MSLLC Line (and the Shreveport and Meridian gateways that are the termini of that of that line) is also evident in the Applicants’ operating plan. The MSLLC Line is situated as the center of the North-South and East-West movements on KCS’s U.S. network. Shreveport, LA is an extremely important part of CPKC’s plans for the combined network. The amended operating plan projects that by the third post-transaction year, eight of the nine scheduled intermodal trains that traverse the CPKC system will traverse the Shreveport area (North, South, East and West) which is a major location on the western end of the MSLLC Line. The Shreveport Terminal will handle more tons of traffic, intermodal or otherwise, than all other parts of the KCS

²² St. John is in New Brunswick on the Canadian Atlantic Coast shown in Figure 2. *See* Canadian Pacific, “Wolfe Research Global Transportation & Industrials Conference,” at 11 (May 25, 2022) available at https://s21.q4cdn.com/736796105/files/doc_downloads/2022/05/Wolfe-2022-Conference-CP-Transcript.pdf.

²³ Mr. Creel even went as far as to travel the route with NSR while surveying the plans for a future merged CPKC entity. *See Id.* at 10-11.

²⁴ *See* Canadian Pacific, “North American Rail Shippers Association,” at 6 (May 11, 2022) available at <https://www.railshippers.com/wp-content/uploads/2022/05/Brooks-CP-NARS-2022.pdf>.

system.²⁵ Additionally, Shreveport is important for the efficiency gains that CPKC plans to create across its network scheduling more new blockings at Shreveport than any other part of its network.²⁶

The amended operating plan projects about a 36% increase in density over the entire Meridian Speedway, with some segments seeing even greater increases in traffic.²⁷ The amended operating plan projects an even greater increase in traffic than was originally projected in the operating plan submitted last October.²⁸

The importance of the Meridian Speedway to the Proposed Transaction is also apparent to NSR. NSR's request for merger conditions notes that the Applicants' plan forecasts significant traffic increases over the Speedway, and that Applicants will potentially increase the use of the Speedway for non-intermodal traffic.²⁹ In order to accommodate these changes over the Speedway, and to presumably protect what NSR sees as an important traffic segment, NSR has requested numerous changes relating to the Meridian Speedway as a condition for the transaction's approval. These conditions include a condition to ensure "NS-CPKC Gateways remain open on commercially reasonable terms and the Meridian-Wylie Route remains a viable option for intermodal shippers."³⁰

In short, Applicants see the Meridian Speedway as a key hub in existing operational plans and as an important segment for future business development within a potential CPKC entity. Further, NSR has recognized the necessity of an open "Meridian Gateway" to facilitate efficient movement of traffic in the Southeastern U.S. rail network.

²⁵ See FD 36500, CP-47/KCS-34, Amended Operating Plan ("AOP"), Appendix G, at 1 (May 13, 2022). Three will traverse the entire Speedway, one on the KCS Line (the section from the Wylie Intermodal terminal to Shreveport) on an east-west routing, and the remaining five through Shreveport on a north-south routing. This is based on counting the routes on CPKC's submitted train route schedule. See also AOP, Appendix T, at 11. Shreveport Terminal 1 handles over 120 GTMs in 2027, with the next densest location at about 80 GTMs.

²⁶ See AOP, Appendix F, at 2. Seven new blocks are scheduled at Shreveport, with the next highest being four at multiple locations.

²⁷ See FD 36500, CSX Transportation, Inc.'s Amended Comments and Request for Conditions ("CSXT-11"), Section II, at 6-8 (June 9, 2022).

²⁸ See CSXT-11, Section II, at 8. See also AOP, Resubmitted Workpapers, "24.1.1.9- Trains per day and Gross Ton Miles," row 281, column BI (May 13, 2022). See also AOP at 81; AOP, Resubmitted Workpapers, "24.1.1.3.18- Comparison of Meridian Speedway Segment Densities" (May 13, 2022) (Applicants' instructions for comparing AOP and OOP).

²⁹ See NS-12 at 5-6.

³⁰ See NS-12 at 7-8.

III. NSR/KCS MERIDIAN AGREEMENT

A. The Prior KCS and NSR Haulage Arrangement

Prior to the MSLLC Agreements,³¹ both KCS and NSR could move traffic over the span of track between Meridian and Shreveport (now the MSLLC Line).³² [REDACTED]

First, for transcontinental intermodal traffic destined for NSR's network,³⁵ [REDACTED]

Second, intermodal traffic that originated or terminated at Dallas was operated as a standard interline movement where [REDACTED]

[REDACTED] This was confirmed by NSR witness McClellan at deposition.³⁸

³¹ "MSLLC Agreements" refers to all agreements included as exhibits to the public Notice of Exemption in FD 34822 filed January 17, 2006 as well as subsequent amendments to those agreements. These include but are not limited to the Dallas Terminal Marketing Agreement (included as Exhibit J to the 2006 notice), the NS-KCS Western Haulage agreement (included as Exhibit E to the 2006 notice), and the LLC Agreement of the MSLLC (included as Exhibit A to the 2006 notice). See FD 34822, *The Kansas City Southern Railway Company, and Meridian Speedway, LLC – Exemption for Transactions Within a Corporate Family*, Verified Notice of Exemption Pursuant to 49 C.F.R. Sec. 1180.2(d)(3) ("Notice of Exemption"), (January 17, 2006).

³² See FD 34822, *Notice of Exemption*, at 4 (January 17, 2006).

³³ [REDACTED]

NSR is one of two Class-I carriers operating throughout the Eastern United States. For a complete network map, see Norfolk Southern System Map, available at <http://www.nscorp.com/content/dam/nscorp/maps/2016-svstem-map-print.pdf>.

³⁶ [REDACTED]

³⁷ [REDACTED]

³⁸ [REDACTED]

For both types of traffic, prior to the formation of MSLLC, KCS was also able to move the traffic³⁹ [REDACTED]

B. The Revisions to the Prior KCS and NSR Haulage Arrangement

The MSLLC Agreements created the Meridian Speedway LLC, a JV with two owners. NSR contributed \$300 million in investments along the Meridian Speedway in exchange for a 30% equity interest in MSLLC JV.⁴² KCS retained the remaining 70% equity interest, associated with its existing railroad assets, and imputed a \$1 billion valuation for the entire Meridian Speedway project at that time. Despite the numerous agreements and complexity in the JV arrangements, much of the pre-MSLLC JV functionality of the transcontinental and Dallas intermodal traffic moves remained intact, as I discuss in Section VI.A below. The major change facilitated by the MSLLC JV was the insertion of perpetual Exclusivity Arrangements that I discuss in the next section.

For the NSR transcontinental intermodal traffic (“NSR Exclusivity Traffic” or “NSR Transcontinental Traffic”) NSR continued to receive haulage after the MSLLC JV was in place, just over a shorter route.⁴³ Under the MSLLC Agreements, MSLLC (operated by KCS) performs haulage for NSR between Shreveport and Meridian, instead of between Dallas and Meridian.⁴⁴ In exchange for this service, NSR pays its haulage payment to the MSLLC JV (instead of KCS, which it

³⁹ See FD 34822, *Notice of Exemption*, at 4 (January 17, 2006).

⁴⁰ [REDACTED]

⁴¹ See “Kansas City Southern 2005 Annual Report,” at 11, available at <https://investors.kcsouthern.com/~media/Files/K/KC-Southern-IR-V2/annual-reports/annualreport2005.pdf> (“Recognizing the efficiency of the Meridian Speedway, CSX opted to enter into an agreement with KCS to reroute interchange traffic with KCS that previously moved through New Orleans onto the Meridian Speedway on a permanent basis.”).

⁴² See Norfolk Southern, “Form 8-K,” December 2, 2005, at item 1.01, available at <https://sec.report/Document/0000702165-05-000255/>.

⁴³ See FD 34822, *Notice of Exemption*, at 8 (January 17, 2006).

⁴⁴ In fact, in NSR and KCS’s application to create the MSLLC JV, it asserts that the transaction would perpetuate the haulage agreement that is already in place between KCS and NSR. See FD 34822, *Notice of Exemption*, at 8 (January 17, 2006). See also [REDACTED]

previously paid).^{45, 46} The interchange at Shreveport was a location that UP had previously served in interchange with KCS.⁴⁷

For traffic that originated or terminated at Dallas and moved through the Meridian Gateway, the prior business arrangement [REDACTED] after the MSLLC JV. As to trains and crews, KCS is responsible for the entirety of the movement, from Dallas to or from Meridian where it interchanges intermodal traffic with NSR for connections to and from customer locations on its system.^{48, 49} As to revenues, each railroad receives the benefit for its portion of the move and is responsible for the operational costs on their portions of the move.⁵⁰ Put more simply, the Dallas area intermodal traffic is operated as an interline move today [REDACTED]^{51, 52} Traffic to or from Mexico ("Mexico Traffic") is [REDACTED] to or from the Dallas area⁵³ because [REDACTED] traffic is operated as an interline movement where KCS is responsible for the move west of Meridian. Traffic is interchanged at Meridian with NSR which is responsible for the portion of the moves east of Meridian to and from locations on its network.

KCS pays [REDACTED] to the MSLLC for its use of the MSLLC Line based on [REDACTED]

[REDACTED]⁵⁴

⁴⁵ See FD 34822, *Notice of Exemption*, NSR-MSLLC Joint Use Agreement, starting at 178 (January 17, 2006). See also FD 34822, *Notice of Exemption*, at 4 (January 17, 2006).

⁴⁶ As discussed in Section VI *infra*, the [REDACTED].

⁴⁷ See Union Pacific, "Union Pacific 2001 Annual Report," at 11 (2001), available at <https://www.up.com/investors/annuals/01annual/up2001annreport.pdf>.

⁴⁸ See FD 34822, *Notice of Exemption*, "KCSRR-MSLLC Joint Use Agreement," starting at 214 (January 17, 2006). [REDACTED]

NSR committed to an adjustable volume guarantee of [REDACTED]
See [REDACTED]

See FD 34822, *Notice of Exemption*, Dallas Terminal Marketing Agreement, Section 2(b), at 392 (January 17, 2006).

⁵¹ See FD 34822, *Notice of Exemption*, Dallas Terminal Marketing Agreement, Section 2(b), at 392 (January 17, 2006).

⁵² See McClellan Dep. Tr. 11:06:32-11:06:58 (July 11, 2022). [REDACTED]

⁵³ See Norfolk Southern, "Remarks by Henry C. Wolf," slide 3 (December 2005), available at <https://www.sec.gov/Archives/edgar/data/702165/000070216505000255/hcw-remarks1.htm>

⁵⁴ See 8.1.13-KCSR-HC-00013412 to KCSR-HC-00013436.pdf, The Kansas City Southern Railway Company-Meridian Speedway LLC-Joint Use Agreement, at KCSR-HC-00013436, Appendix B Section 5(1) (May 2006).

C. The Perpetual Exclusivity Arrangements in the MSLLC Agreements

The most conspicuous change in the post-2006 KCS-NSR business arrangement is the imposition of perpetual Exclusivity Arrangements which remove the possibility for competition for two types of traffic: (1) NSR transcontinental intermodal traffic (“NSR Exclusivity Traffic”) and (2) Dallas Intermodal Terminal Traffic (“DITT”).⁵⁵

For NSR Exclusivity Traffic,⁵⁶ the Exclusivity Arrangements in the MSLLC Agreements explicitly remove KCS as an alternative railroad transportation provider for transcontinental intermodal traffic over the Meridian Speedway.⁵⁷ The MSLLC Agreements state that “NSR shall have exclusive right to transport NSR Traffic” and that “MSLLC may not perform haulage services for...KCS or any Foreign railroad.”⁵⁸ While KCS previously was able to receive or deliver traffic movements to another eastern railroad at the Meridian interchange location,⁵⁹ the Exclusivity Arrangements ensure that NSR is now the only carrier permitted to take transcontinental intermodal traffic over the Meridian Speedway.⁶⁰ The implication of removing KCS as an alternative railroad⁶¹

⁵⁵ The perpetual exclusivity arrangements which remove the possibility for “NSR Exclusivity Traffic” and “DITT” are herein referred to as the “Exclusivity Arrangements.”

⁵⁶ “NSR Exclusivity Traffic” refers to what the MSLLC Agreements call “NS Traffic”: “‘NS Traffic’ shall mean all intermodal traffic that: (i) originates or terminates in the United States west of Dallas/Ft. Worth (including intermodal traffic originating by steamship line at a port along the west coast of the United States) and enters or exits the Subject Trackage at Shreveport; and (ii) originates or terminates in the United States at or east of Meridian and enters or exits the Subject Trackage at Meridian; and (iii) does not consist of traffic originating or terminating at any station on the KCSR system which includes the Texas Mexican Railway Company, (including any station where KCSR, or the Texas Mexican Railway Company have trackage rights or access via reciprocal switch), as it exists on the date of the Transaction Agreement. See FD 34822, *Notice of Exemption*, NSR-MSLLC Joint Use Agreement, at 182 (January 17, 2006).

⁵⁷ See FD 34822, *Notice of Exemption*, KCS-MSLLC Joint Use Agreement, Section 4(a), at 221 (January 17, 2006).

⁵⁸ See FD 34822, *Notice of Exemption*, NSR-MSLLC Joint Use Agreement, Section 4(a) and 4(b)(ii), at 188 (January 17, 2006).

⁵⁹ See FD 34822, *Notice of Exemption* at 4 (January 17, 2006).

⁶⁰ See FD 34822, *Notice of Exemption*, NSR-MSLLC Joint Use Agreement, Section 4(a), at 188 (January 17, 2006).

⁶¹ Prior to the MSLLC Agreements, KCS acted as an alternative railroad between Dallas and Meridian for certain volumes of intermodal traffic. (“KCSR participates today as a line-haul carrier in a small volume of intermodal trailer traffic that originates on BNSF in California. These trailers, which total approximately 2,600 units per year, or 50 units per week, are transferred over the road to KCSR at Dallas, are rebilled, and then subsequently moved in KCSR’s account between Dallas and Meridian in different trains than those in which NSR haulage traffic moves. At Meridian, they are delivered to NSR for subsequent movement by NSR to destination. This trailer traffic will continue to move in the same manner following consummation of the proposed transaction.” See FD 34822, *Notice of Exemption* at 4-5.) This trailer traffic does not exist today. (“Transcontinental intermodal service is currently provided across the Speedway pursuant to a haulage agreement between NSR and KCSR, which the parties entered in 2000 (the “Existing NSR Haulage Agreement”).” See FD 34822, *Notice of Exemption* at 4.)

to NSR for the transcontinental intermodal traffic is that KCS can no longer provide these customers with railroad service as a joint line move (with interchange at Meridian). This constraint reduces potential competition between NSR and CSXT east of Meridian.⁶² The Exclusivity Arrangements results in a market division of the traffic with a carve-out for NSR alone (not KCS) to handle transcontinental intermodal traffic. As I discuss below in Section VI, this perpetual market division creates considerably different competitive circumstances from typical railroad haulage agreements. KCS provides local service to shippers located on the line between Meridian, MS and Dallas, TX while NSR has exclusive rights to operate transcontinental, intermodal trains via haulage.⁶³

A second unique aspect of the MSLLC JV is that it grants NSR unique privileges for DITT. When moving traffic to or from the DIT, KCS must first offer the traffic to NSR at a rate established by agreement between NSR and KCS.⁶⁴ If NSR declines the offer, KCS may make the same exact offer to another carrier; however, if they alter the rate offer in any way, it must be re-presented to NSR. Therefore, if KCS seeks to interchange traffic with another railroad on better terms than first presented to NSR, NSR can simply reject the request and take the traffic itself. This means NSR can always preclude KCS from interchanging DITT with other carriers serving the East. The MSLLC Agreements also coordinate rate setting by NSR and KCS for customers to and from the DIT for traffic on KCS and NSR railroad networks. NSR must post all rates for intermodal traffic to Dallas from locations on NSR's network and KCS posts rates from Dallas to points on NSR's system.⁶⁵ Again, the terms of the MSLLC Agreements are perpetual.⁶⁶

These Exclusivity Arrangements regarding DITT are likely unique in the industry. [REDACTED]

[REDACTED] NSR stated that [REDACTED]

⁶² I discuss the ills arising from closed gateways in Section V, including the economic benefit of having another railroad alternative to competitively negotiate with, as well as the compounding concerns about the need for open gateways to constrain CPKC's market power post-Transaction.

⁶³ See Section III.B. *Supra*. See also Norfolk Southern, "Remarks by Henry C. Wolf," December 2005, available at <https://www.sec.gov/Archives/edgar/data/702165/000070216505000255/hcw-remarks1.htm>.

⁶⁴ See FD 34822, *Notice of Exemption*, Dallas Terminal Marketing Agreement", Section 2(d), at 393 (January 17, 2006).

⁶⁵ *Id.*, Section 2(b), at 392.

⁶⁶ See FD 34822, *Notice of Exemption*, at 195, 228, 397.

⁶⁷ [REDACTED]
[REDACTED] See KCS Responses and Objections to CSXT's Fifth Set of Discovery Requests to KCS, response to Interrogatory 4, at 13 (June 21, 2022).

[REDACTED]⁶⁸ This allows NSR to develop its chosen rates to its customers with the understanding that it sits in the driver seat. NSR can accept all the business opportunities at the rate it desires without any alternative railroad competitor in the eastern rail markets. In practice, NSR [REDACTED]

[REDACTED]⁶⁹ The combination of the right of first refusal and rate setting collaboration are a form of exclusivity for DITT over the Meridian Speedway and has an economic effect similar to that associated with a market division. NSR has recognized the Exclusivity Arrangements' role [REDACTED]

As discussed further below (Section VI), the Exclusivity Arrangements for the NSR Exclusivity Traffic and DITT are not commonplace business practices used by railroads. More common haulage or trackage arrangements could have been used by NSR to achieve its legitimate business goals without limiting competition.

D. The Nature of NSR Intermodal and Other Traffic that Uses the MSLLC Line

The Meridian Speedway is used to transport substantial intermodal and other types of traffic volumes to/from the Eastern U.S. Figure 3 below reports all traffic traversing the MSLLC Line between its Shreveport and Meridian gateways with further movement on NSR's railroad network.⁷¹ The DITT movements enhanced by the perpetual Exclusivity Arrangements give NSR its [REDACTED] traffic category across the Meridian Speedway, approximately [REDACTED]

[REDACTED], but is expected to [REDACTED] It is particularly relevant to the CPKC transaction, as I discuss in Section V.A. below.

⁶⁸ See McClellan Dep. Tr. 12:17:30 (July 11, 2022). [REDACTED]

⁶⁹ See Carey HC-WP "2019 KCS Tapes - All Intermodal Dallas Moves.xlsx".

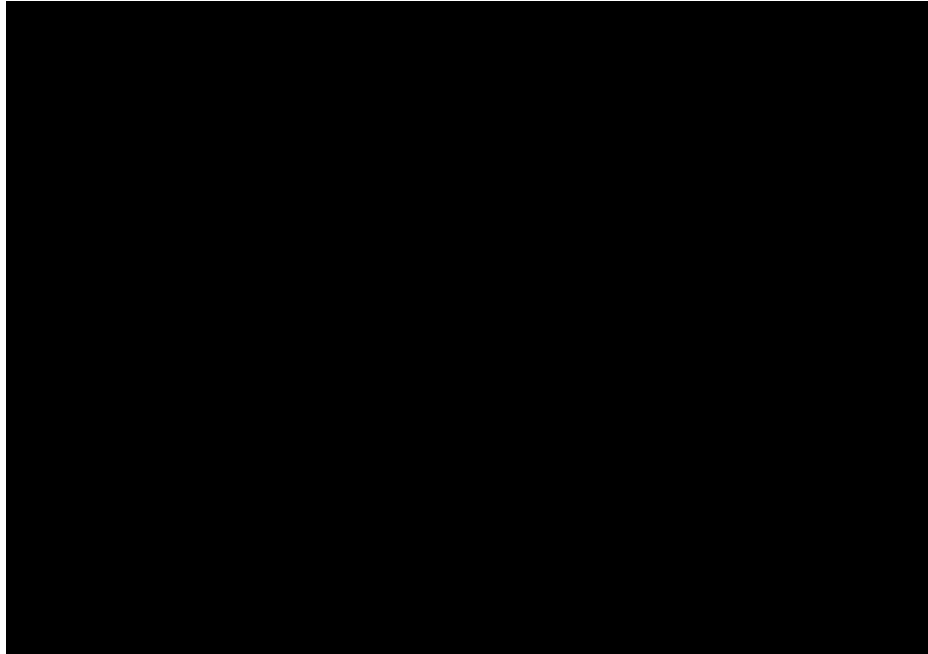
⁷⁰ [REDACTED]

⁷¹ These figures exclude traffic movements that are local to the Meridian Speedway and enter or exit locations between the Meridian and Shreveport.

⁷² [REDACTED]

Figure 3: Traffic Volumes for NSR Exclusivity Traffic, DITT, Mexico Intermodal, and other types of traffic moving over the MSLLC Line⁷³

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}}

The intermodal traffic that moves across the MSLLC Line primarily goes to or from the Southeast U.S., with the [REDACTED]

[REDACTED]

[REDACTED] Regarding

Transcontinental Intermodal Traffic, the Los Angeles area is the most important West Coast location. Important volumes also move to and from [REDACTED]

[REDACTED] are also occasionally routed through the Speedway, but at a much lower rate.

NSR's comments on the Applicants' amended operating plan discuss the increasing intermodal traffic that traverses the Meridian Speedway to and from the Southeastern U.S. region.⁷⁴ This discussion includes a misplaced attempt to assign investments in NSR's intermodal terminals in the

⁷³ See Carey HC-WP "2019-2021 Meridian Volume Summary.xlsx"

⁷⁴ "Because of NSR's investments, the Meridian Speedway today is faster and more reliable, making it a popular option for shippers as an intermodal alternative for the movement of goods to/from the southeastern United States that would have otherwise moved by highway. Intermodal traffic on the Meridian Speedway increased 340% from 2004 to 2021." See NS-12 at 12.

Southeastern U.S. to NSR's investment in the trackage along the Meridian Speedway that was agreed to in the MSLLC Agreements.⁷⁵ NSR's intermodal terminals in the Southeastern U.S. rely heavily on traffic from the rest of NSR's intermodal network, not only the Meridian Speedway. NSR therefore has the incentive to improve this network regardless of activity on the Speedway.⁷⁶ Specifically, in its Amended Comments, NSR identified \$324 million in capital expenditures made in Southeastern U.S. intermodal terminals from 2006 to 2021 which it states support the Meridian Speedway all the way from Meridian to Wylie.⁷⁷ However, these are not investments on the Meridian Speedway nor are they relevant to the Meridian Speedway in any meaningful way: [REDACTED]

[REDACTED]
[REDACTED].⁷⁸

IV. THE PERPETUAL EXCLUSIVITY ARRANGEMENTS IN THE MSLLC AGREEMENTS HARM COMPETITION AND THE PUBLIC INTEREST THAT WOULD BE COMPOUNDED BY THE CPKC TRANSACTION BUT ARE NOT ADDRESSED BY NSR

The Meridian Speedway Notice of Exemption was crafted as an intercompany transaction and provided certain details about the assets and planned infrastructure improvements.⁷⁹ In basic economic terms, however, an intercompany transfer reassigns the ownership and control of an asset from one entity to another entity but remains under the ownership and control of the same parent company. To illustrate, consider subparts of a company to be gold coins, and an intercompany transfer moves a few gold coins from a person's left-side pocket to its right-side pocket. In the end, the gold coins remain with the same person. Based on my experience,⁸⁰ an appropriate competition analysis considers all entities operated by the parent company as being under common control by the parent (i.e., under one tent).

From an economic perspective, the MSLLC JV did not have even the limited effect of shifting parts of a company around (i.e., moving a few gold coins from a person's left-side pocket to its right-side pocket). The MSLLC JV involves two separate and non-affiliated railroads with two different

⁷⁵ See NS-12 at 6-7.

⁷⁶ NSR has a very large overall intermodal business, totaling about 4.1 million units in 2021. See NSR 2021 Annual Report at k22, available at <http://nscorp.com/content/dam/nscorp/get-to-know-us/investor-relations/annual-reports/annual-report-2021.pdf>

⁷⁷ See NS-12, Exhibit 3, at 7.

⁷⁸ See Carey HC-WP "NS IM Terminals- Meridian Share.xlsx"

⁷⁹ See FD 34822, *Notice of Exemption* at 8-10.

⁸⁰ I have worked on many dozens of such economic analyses for submission to a variety of different industry regulators.

networks—NSR, an Eastern U.S. railroad, and KCS, a midwestern U.S. railroad. Each of these may have distinct effects on competition. The perpetual Exclusivity Arrangements have the effect of integrating ████████ of the services provided over the MSLLC Line into NSR’s entire railroad network in the Eastern U.S., where it competes with CSXT (not KCS). The extending nature of the integration of the two networks is a vertical integration. NSR’s economist expert, Dr. John Mayo, acknowledges the economic concerns that arise from transactions involving vertical integration that can lead to vertical anticompetitive effects upstream and downstream of the service through exclusive control of input traffic.⁸¹ While Dr. Mayo expresses concerns about CPKC’s vertical integration and potentially anticompetitive effects, he is silent on these issues arising from the exacerbating effects of the proposed CPKC Transaction on the MSLLC Exclusivity Arrangements.

The Meridian Speedway Exemption Notice did not include competition analysis on the relevant markets or potential benefits analyses, nor did it discuss specific public interest considerations.⁸² Nor did the Board’s exemption address the implication of the MSLLC JV on competition or any potential benefits and public interest considerations.^{83, 84} In the exemption proceeding, the Board was not asked to address 49 U.S.C. § 11322, which provides that rail carriers **may not pool or divide traffic** or services or any part of their earnings without Board approval.^{85, 86} Yet, as discussed above in Section III, the MSLLC Agreements divide traffic with a carve-out for NSR alone (not KCS) to handle transcontinental intermodal traffic. By virtue of the pricing provisions regarding the DITT,

⁸¹ See NS-12, Exhibit C, V.S. of Prof. John Mayo, Ph.D, at 17-18. Dr. Mayo describes potential economic harm associated with foreclosure of “upstream rivals from access to distribution (customer foreclosure) or unilaterally to foreclose downstream rivals from access to a key input (input foreclosure),” as well as concern that arises from raising rivals’ costs.

⁸² See FD 34822, *Notice of Exemption* (January 17, 2006).

⁸³ See FD 34821 et. al., STB Decision (February 22, 2006); See also FD 34821 et. al., STB Decision (April 6, 2006). KCS et al. mention in passing, without economic analysis regarding the exclusivity implications, that rail capacity improvements will make this route more competitive compared to other gateways Memphis, New Orleans, and Birmingham for intermodal traffic.

⁸⁴ Regarding the MSLLC-related transactions, the Board addressed whether environmental review was needed, but did not assess the impact on competition or other public interest considerations. See FD 34821 et. al., STB Decision (February 22, 2006); See also FD 34821 et. al., STB Decision (April 6, 2006).

⁸⁵ See FD 33556, *Canadian Nat’l Ry, Grand Trunk et al.—Control—IL Central Corp. et al.*, Decision No. 37, at 18 (May 25, 1999).

⁸⁶ The Board has defined pooling as a situation where carriers which otherwise would be competitors take a common position toward the public and divide the benefits and costs equally or by special agreement, rather than according to individual performance. First the arrangement must be between competitors and, second, the arrangement must involve some restraint or potential restraint on competition. See Interstate Commerce Commission, “Decisions of the Interstate Commerce Commission of the United States June 1990 to July 1991,” Vol. 7, 2nd Series, at 185 (discussing Union Pacific RR. Et Al. – Trackage Rights over CNW in FD 31562).

NSR's right to carry that traffic is also exclusive and has a similar economic effect as a market division.

Notably, Applicants are seeking approval to continue to divide this traffic, but they do not evaluate the competitive implications, public benefits, or public interest considerations of continuing the Exclusivity Arrangements if their Proposed Transaction is approved. NSR did not address the implications of continuing the Exclusivity Arrangements into perpetuity if the Board approves the CPKC Transaction or NSR's Responsive Application.⁸⁷

Had KCS and NSR submitted a pooling application or, for the reasons discussed below, sought approval for NSR's control of MSLLC under 49 USC § 11323 for the MSLLC JV, they would have been expected to address the relevant economic aspects of the effects on competition, public benefits, and the overall public interest. By means of the intra-company exemption, KCS and NSR denied the Board the opportunity to assess these effects. As a result, NSR acquired effective control over MSLLC by the requirements in the MSLLC Agreements that MSLLC make no "Major Decisions" without NSR's consent.⁸⁸

The MSLLC Exclusivity Arrangements provide NSR with exclusive access from Shreveport to Meridian for transcontinental intermodal traffic and from Dallas to Meridian for Dallas Traffic for locations into the Southeastern U.S. that are advantaged on the Meridian Speedway route. Both NSR's existing Exclusivity Arrangements and its proposed expansion of those rights are anticompetitive and distort competition between NSR, KCSR, and CSXT for NSR Traffic for whom the most efficient route is over the MSLLC Line.

NSR's control of MSLLC reinforces the NSR-KCS traffic division and therefore adversely impacts competition by allowing NSR to charge higher rates, which lead to lower output that would otherwise result. I show the commonly used railroad industry agreements that KCS and NSR could have used without restricting competition in Section VI below. In Section VIII I discuss economic indicia such as NSR's higher MSLLC rates and shares as compared to other gateways. In addition, in

⁸⁷ See NS-13 at 2-4 (discussing the MSLLC and agreement but not addressing Exclusivity Arrangements); NS-12, at 9-40 (discussing the MSLLC and impacts of the proposed CPKC Transaction but not addressing Exclusivity Arrangements); NS-12, "Amended V.S. of John W. Mayo," at 24-29 (discussing the MSLLC and agreements but not addressing Exclusivity Arrangements).

⁸⁸ "Neither the Management Committee nor any committee thereof shall authorize or effect any action that constitutes a Major Decision unless such action has received the approval of at least one of the Committee Representatives appointed by NS." See FD 34822, *Notice of Exemption*, at 114. See also FD 34822, *Notice of Exemption*, definition of "Major Decisions," at 95-97.

Section VII, I show my analysis of the lower rates that would result from increasing the number of competitive alternatives available to shippers at a gateway from 1 to 2. Dr. Shehadeh elaborates in his Verified Statement on the resulting competitive harm associated with the perpetual Exclusivity Arrangements contained in the MSLLC Agreements and presents economic evidence of resulting output restrictions. He concludes that the Exclusivity Arrangements provide NSR the ability to foreclose competitors from the MSLLC Line by raising rivals' costs to serve transcontinental intermodal traffic to and from the Southeastern U.S. and demonstrates empirically that shipper-customers in the [REDACTED] have suffered reduced output and economic welfare.⁸⁹

NSR has recognized the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ■ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This anticompetitive concern that NSR feared is what was done to CSX through the Exclusivity Arrangements. In deposition, Mr. McClellan, the author of the document,⁹⁴ stated [REDACTED]

[REDACTED]

[REDACTED]

⁸⁹ See Verified Statement of Dr. Ramsey Shehadeh at Section I.B. and Section IV.

⁹⁰ See NS00006573.pdf, "Proposed NS-KCS Joint Venture Project Orion, Presentation to Norfolk Southern Corp. Board of Directors," at NS00006586 (July 26, 2005).

⁹¹ *Ibid.*

⁹² *Id.* at NS00006576.

⁹³ See NS00006606.pdf, "KCS-Confidential," at NS00006610 (December 29, 2004).

⁹⁴ *Id.* at NS00006615 (December 29, 2004). See also McClellan Dep. Tr. 11:43:16-11:43:50 (July 11, 2022) [REDACTED]

⁹⁵ See McClellan Dep. Tr. 11:49:22-11:49:36 (July 11, 2022)

In addressing earlier pooling/divisions of traffic, the Board has carefully considered the full array of public benefits achievable (beyond anticompetitive harm) to reach a conclusion whether no alternative mechanism was available that would adversely affect competition. In one such example regarding pooling of flat cars, the Board discussed the factors that it considered in approving the pooling arrangement. The Board also pointed to technological innovation,⁹⁶ other unique facts from all types of related parties.⁹⁷ Notably in this case, the Board provided for a precise, definite extension of time (from 5 to 15 years) rather than an indefinite or perpetual period.⁹⁸

“On the record before us, TTX has shown that the pooling of flatcars **promotes research and development of new and innovative equipment**, permits standardized fleet repair and maintenance to reduce costs for the participating railroads, **allows the participating railroads to spread the risk of investment in equipment, enables the participating railroads collectively to respond effectively and efficiently to the dynamics of the North American railroad network, and produces substantial capital savings by maximizing the efficient use and distribution of pooled equipment.** That record reflects and the industry’s many years of experience with the pool confirms that the **full array of benefits achieved through flatcar pooling cannot readily be achieved through any other means.** **The benefits of pooling also clearly outweigh any anticompetitive effects** that may flow from the arrangement. Based on the record, the Board believes that such anticompetitive effects (to the extent they exist) are likely to be minimal. **We are aware of no alternative mechanism that would entail less restraint on competition while achieving benefits similar to those generated by the Pooling Agreement.**”

In its Comments on the Amended Operating Plan, NSR characterizes the MSLLC JV as “pro-competitive” and “pro-growth ,”⁹⁹ which implies that net benefits exist with respect to the MSLLC JV despite the parties not making such a showing in 2006 or since. In neither the MSLLC Exemption Notice nor NSR’s Responsive Application in the CPKC Transaction was there any demonstration or discussion of whether an alternative mechanism would have been adequate to secure the asserted

⁹⁶ For example, TTX has played a major role in the ongoing evolution of the doublestack car. *See* FD 27590, “TTX Company – Application for Approval of Pooling of Car Service With Respect to Flatcars,” at 27 (January 16, 2004).

⁹⁷ For instance, there was overwhelming support for the agreement expressed by shippers, ports, manufacturers, suppliers among others in the TTX flat car. “In this proceeding, over 80 interested parties—DOD (through SDDC), shippers, ports, car parts suppliers, car manufacturers, and others—have written in support of continuing the TTX flatcar pool for another 15 years.” *See* FD 27590, “TTX Company – Application for Approval of Pooling of Car Service With Respect to Flatcars,” at 6 (September 30, 2014).

⁹⁸ For instance, in the case of TTX’s authorization for flatcar pooling, a term of 5 years followed by extensions of 10 and 15 year terms were granted. *See* FD 27590, “TTX Company – Application for Approval of Pooling of Car Service With Respect to Flatcars,” at 17-18 (January 16, 2004); *See* FD 27590, “TTX Company – Application for Approval of Pooling of Car Service With Respect to Flatcars,” at 6 (September 30, 2014).

⁹⁹ *See* NS-12 at 9-21.

benefits of the MSLLC transaction with less restraint on competition. Here, neither NSR nor its expert economist consider the competitive implications of the exclusivity arrangement that could be immunized from review in perpetuity upon any approval of the CPKC Transaction or NSR's Responsive Application.¹⁰⁰

V. THE PUBLIC INTEREST IS BEST SERVED BY KEEPING ALL CP/KC GATEWAYS OPEN (INCLUDING THE MERIDIAN SPEEDWAY GATEWAYS).

A. All CPKC Gateways Should be Open, not just CPKC So-Called "Affected Gateways," including Meridian and Shreveport, Laredo-TX (Mexico) and others

In its Responsive Application, NSR raises concerns about CPKC's position regarding open gateways across the Meridian Speedway.¹⁰¹ Specifically, NSR explains that CPKC may have the ability and incentive to divert traffic away from the Meridian Speedway to longer hauls on other sections of the CPKC network.¹⁰² NSR identifies specific examples of potential diversions to CPKC routes instead of the MSLLC Line.¹⁰³ I discussed concerns that arise from Applicants' strategy of traffic diversions to long haul or otherwise disadvantaged railroad routes in my earlier V.S in this matter.¹⁰⁴ CPKC estimated [REDACTED] total carloads/units of diversions of traffic to the CPKC network, of which [REDACTED] will be diverted from other railroads, [REDACTED] from other growth targets for rail, and [REDACTED] port as well as truck to rail.¹⁰⁵

While I share NSR's concerns about the importance of open gateways, and the potential of CPKC to divert traffic, the NSR Responsive Application cherry picks a few self-serving targets rather than presenting a holistic viewpoint. They fail to consider public benefits from the proposed CPKC Transaction that might ensure a more competitive railroad industry in the future were CPKC not constrained by the MSLLC Exclusivity Arrangements.

¹⁰⁰ See NS-13 at 2-4 (discussing the MSLLC and agreement but not addressing Exclusivity Arrangements); NS-12 at 9-40 (discussing the MSLLC and impacts of the proposed CPKC Transaction but not addressing Exclusivity Arrangements); NS-12, "Amended V.S. of John W. Mayo," at 24-29 (discussing the MSLLC and agreements but not addressing Exclusivity Arrangements).

¹⁰¹ See NS-12 at 30-33, 42-46. See also NS-12, "Amended V.S. of John W. Mayo," at 4-5, 20-21, 29-30.

¹⁰² See NS-12, Amended V.S. of John W. Mayo, Appendix at 24-25, 29. [REDACTED]

See NS-12, Amended V.S. of Michael McClellan at 7-9.

¹⁰⁴ See CSXT-8, Carey V.S., at Section II.A and IV.B. (February 28, 2022).

¹⁰⁵ See CSXT-8, Carey V.S., at Section II.A and IV.B. (February 28, 2022).

In the railroad industry, the term gateway refers to a location where two independent railroads connect to interchange cars from one railroad to another. When a gateway is open, shippers have the benefit of the potential competition on both sides of the gateway. Increasing the number of railroad carriers allowed to functionally interchange traffic among other railroads enhances competition. Ensuring that interchange is available at all gateways that connect one railroad carrier to another is fundamental to railroad competition.

The mere existence of a gateway where a competitor railroad can access traffic from a carrier that it connects with offers two alternatives to shippers. This enhances competition and can constrain a railroad from otherwise raising prices. This is true even if a gateway is not consistently or substantially used. In basic economic terms, an additional railroad alternative allows for a second rate offer from the competitor railroad. This can influence first railroad to lower its rate and benefit the shippers.¹⁰⁶ Economic literature recognizes that the existence of an alternative competitor facilitates negotiations and competing offers and so helps to ensure that negotiations will be competitive.¹⁰⁷ My analysis of the economics of competition of gateways/interchanges discussed in Section VII reaffirms the proposition that customer rates are reduced as more competitors take advantage of an open gateway. This highlights the importance of the treatment of open gateways on CPKC's network Post Transaction. The Board has recognized the potential of enhanced competition that arises from

¹⁰⁶ The “one-lump” theory, which is also referred to as “single monopoly profit” theory, suggests that a company with a monopoly in one product cannot use that monopoly power in a related market to increase its profits. However, there are circumstances in which such theory does not apply and certain end-to-end transactions can result in anticompetitive outcomes. Such circumstances exist when a monopolist upstream provider and downstream rivals lack full information about one another's cost and prices of those downstream rivals provide differentiated services. *See* CSXT-8, Carey V.S., Section II.B (February 28, 2022). *See also* Professor Salop *See* UP-10, Union Pacific Railroad Company's Comments and Request for Conditions, Verified Statement of Steven C. Salop at paragraphs 36-39, 40-59.

¹⁰⁷ Economic literature regarding negotiations identifies factors important to competitive market outcomes including similarly bargaining leverage of the two counterparties (i.e., no undue bargaining advantage), negotiations not under circumstances of duress or coercion, the ability to walk away from the negotiations (including for another alternative) that have negotiated a contract under reasonable economic conditions (i.e., relatively similar bargaining leverage, and not under circumstances of duress or undue pressure). *See* Avinash Dixit and Susan Skeath, *Games of Strategy*, 566-595 (W.W. Norton & Company, 2004), 2nd Edition; Robert Cooter and Thomas Ulen, *Law & Economics*, (Addison-Wesley, 2000), 3rd edition, at 43 and 206-7; and Kenneth Binmore, Ariel Rubinstein & Asher Wolinsky, “The Nash Bargaining Solution in Economic Modeling,” 17 *Rand Journal of Economics*, 176-188 (1986).

the ability of a customer to build out railroad tracks and facilities to connect to a second railroad¹⁰⁸ (i.e., importance of enhancement of competition that arises with additional competitive pressures).¹⁰⁹

CPKC's and NSR's attempt to keep certain gateways closed is an overt restraint on competition and should be disallowed. NSR's evaluation of the potential implications of the transaction on the Meridian Speedway is incomplete because it does not address either (1) the advantages of fully open gateways on both ends of the MSLLC Line (Shreveport and Meridian) to all competitors, or (2) the concerns regarding competition at each end of the MSLLC Line arising from the CPKC Transaction.¹¹⁰ NSR does not address CPKC's narrow and restrictive view that only gateways that it deems to be affected by the Transaction should be considered "affected gateways." It seems that CPKC does not want any of its gateway "commitments" embodied in conditions enforceable by the Board so that they might remain open physically and commercially in the future. Mr. Brooks testified in his deposition that [REDACTED]

[REDACTED] CPKC states unconvincingly and without sufficient basis that Mexico gateways are not affected.¹¹²

CPKC's attempts, and by extension NSR's limited view, to pick and choose gateways that it deems affected and only allow CPKC's "selected gateways" required to be open in the future is flawed, incomplete, and susceptible to gaming/bias. These attempts add risks to future competition

¹⁰⁹ For instance, in evaluating a 2-to-1 merger, the Board has acknowledged competitive results can be achieved in a circumstance where merging railroads' lines run near a plant owned by an exclusively served customer and that shipper having the ability to build out to a second carrier "can provide important leverage in rate and service negotiations with the carrier providing direct service to the plant". See FD32760, *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company*, Decision No. 44, at 124.

¹⁰⁹ For instance, in evaluating a 2-to-1 merger, the Board has acknowledged competitive results can be achieved in a circumstance where merging railroads' lines run near a plant owned by an exclusively served customer and that shipper having the ability to build out to a second carrier "can provide important leverage in rate and service negotiations with the carrier providing direct service to the plant". See FD32760, *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company*, Decision No. 44, at 124.

¹¹⁰ NS-12 at 27-28 (discussing impacts at the Meridian Speedway).

¹¹¹ Brooks Deposition, 94:5-7. [REDACTED]

and limit to economic benefits, including unforeseen future events. They lack the necessary teeth to ensure most competitive outcomes possible in the future. CPKC and NSR's attempts to keep certain gateways closed are an overt restraint on competition and should be rejected.

Open gateways are needed to ensure that traffic movements involving CPKC (including the MSLLC Line) can move over the most economically efficient routes, consistent with the public interest. Shippers must be assured of the opportunity for competition on commercially reasonable terms (and service) with CPKC for all gateways. As I discussed in my February V.S. (Section III), the general and non-specific commitments offered by CP lack reliable guarantees.¹¹³ While CP commits to working with shippers it does not promise concrete standards that would ensure that CP (1) sets commercially reasonable rates (and does not directly or indirectly raise rivals' costs); and (2) provides service on a non-discriminatory basis¹¹⁴, with no service-related distortions involving rival railroads.¹¹⁵

Ensuring Shreveport and Meridian gateways, and all other gateways used for traffic movements with Mexico ("Mexico Traffic")¹¹⁶ are open will constrain CPKC's market power related to Mexico Traffic. I discussed CPKC's economic incentive and ability to foreclose this traffic in my February Verified Statement.¹¹⁷ There, I discussed that 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 regarding Mexico.¹¹⁸

¹¹³ [REDACTED]

¹¹⁴ See Brooks Dep. Tr. 102:7-103. See also Brooks V.S. ¶ 42-46.

¹¹⁵ See 49 U.S. Code § 10741, "Prohibitions against discrimination by rail carriers", available at <https://www.law.cornell.edu/uscode/text/49/10741>

¹¹⁶ [REDACTED]

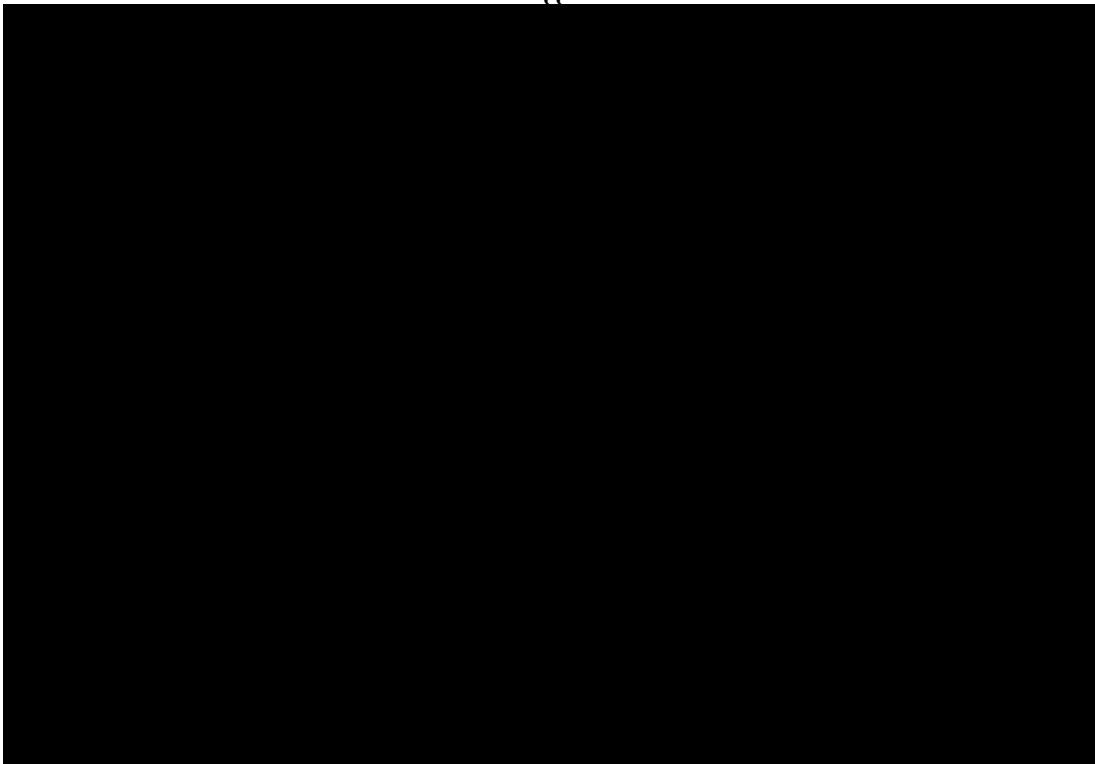
¹¹⁷ Mexico Traffic is any movement of any type of product to and from Mexico locations. I refer to the need for all gateways to remain open on commercially reasonable terms for traffic to and from the many shipper locations in Mexico in my February V.S. See CSXT-8, Carey V.S., at 3 (February 28, 2022).

¹¹⁸ See CSXT-8, Carey V.S., at Section II (February 28, 2022).

¹¹⁹ *Ibid.*

I also discussed the substantial current and future Mexico Traffic as it is anticipated through the Laredo Gateway. This traffic flow is important for the overall efficiency of the North American railroad network to ensure that it moves over the most economically efficient routes, consistent with the public interest.¹¹⁹ Laredo alone is not sufficient to keep as an open gateway to constrain CPKC post transaction for Mexico traffic. All gateways on CPKC's network that currently or may in the future handle Mexico Traffic as interline movements should be required to be open. Opening all gateways will ensure competitive market responses to the unique issues regarding Mexico Traffic and avoid economic harm to competition that could otherwise result today and tomorrow. Figure 4 below shows blue dots identifying the many customer locations (and relative revenues) that use railroad routes for traffic movements with Mexico which are dispersed across the U.S., highlighting the importance to ensure that all gateways potentially available to interline with CPKC as provide alternative transportation are open gateways. The Board should give due consideration to ensure that every gateway connecting to CPKC and all railroads remain open with sufficient requirements to ensure commercial and operational aspects.

¹¹⁹ See CSXT-8, Carey V.S., at 3 (February 28, 2022).

Figure 4: Combined CP-KCS Network Map and 2019 Revenues for Mexico Movements¹²⁰

Regarding the particular advantages of the MSLLC Line, I agree with NSR that the MSLLC Line is a uniquely positioned efficient railroad carrier for the Southeastern U.S. railroad movements (and Mid-Atlantic region).¹²¹ NSR ignores, however, the exacerbating effect the CPKC Transaction has on the harms imposed by the perpetual Exclusivity Arrangements.¹²² And, even if the Exclusivity Arrangements are abrogated, an open gateway at both ends of the MSLLC Line would be required to adequately constrain CPKC's market power with respect to Mexico Traffic and NSR's market power over Exclusivity Traffic that traverses the Meridian Speedway to/from Eastern U.S. railroad markets.

The Proposed Transaction provides CPKC with the potential ability to adversely affect competition for Mexico Traffic Post Transaction. Particularly, with CPKC's unique market power in

¹²⁰ See CSXT-8, Carey V.S., at Section II., (February 28, 2022).and Carey HC-WP "CPKC Network Maps.png"

¹²¹ NS-12 at 37-38 (referencing its mileage advantage relative to highways).

¹²² See NS-13 at 2-4 (discussing the MSLLC and agreement but not addressing Exclusivity Arrangements). See also NS-12 at 9-40 (discussing the MSLLC and impacts of the proposed CPKC Transaction but not addressing Exclusivity Arrangements); NS-12 at 24-29 (discussing the MSLLC and agreements but not addressing Exclusivity Arrangements).

Mexico, Applicants have an increased incentive and ability to reduce competition and harm shippers economically through a profitable pricing strategy that forecloses rival railroads from effectively competing for the U.S. segments of these moves.¹²³ In sum, all U.S. traffic movements with Mexico, including those in the Southeastern/Mid-Atlantic U.S. regions are at risk for economic foreclosure by CPKC Post Transaction, expanding further the anticompetitive effect beyond what existed Pre Transaction.

The CPKC Transaction could potentially lead to CPKC foreclosing the Mexico market.¹²⁴ As a corollary, the Shreveport interchange should be opened as well since this is the most advantaged route competing carriers to reach the Southeastern U.S. The exacerbation of the anticompetitive effect by the CPKC Transaction would be particularly evident at Shreveport. This is because Shreveport is uniquely positioned to constrain the potential exertion of market power by CPKC Post Transaction with respect to Mexico Traffic. As shown in Figure 5 below, open gateways at Laredo and Shreveport would enable UP to be an economic alternative to CPKC for Mexico Traffic to onward movements by CSXT and NSR customers in the Southeastern and Mid-Atlantic regions. Shreveport is apparently a closed gateway today and no intermodal Mexico Traffic is interchanged at this location.¹²⁵ Unless it were opened, even if Laredo were an open gateway, Shreveport could not act as a constraint on CPKC's market power over Mexico Traffic. An open Shreveport gateway would allow shipper to choose UP as a competitive alternative to CPKC for the important Laredo to Shreveport route. Therefore, the head-to-head competition would enable UP to act as CPKC's market power constraints for movements to and from Mexico and the Southeast US.

In addition to Shreveport, on the western end of the MSLLC Line, Meridian on the eastern end must also be open to constrain CPKC Post Transaction and afford shippers an opportunity for competition on commercially reasonable terms and service across the entire Meridian Speedway.¹²⁶ Today, Meridian is open only to NSR for [REDACTED] the traffic that moves over the MSLLC Line. With both Shreveport and Meridian open, shippers could request CPKC interline movements with CSXT or NSR. This would be the case both where CPKC is responsible for the Shreveport to Meridian segment and where CSXT or NSR is responsible for the portion of the move

¹²³ See CSXT-8, Carey V.S., at Section V.B., (February 28, 2022).

¹²⁴ *Ibid.*

¹²⁵ There are a [REDACTED] at Shreveport for traffic movements involving Mexico. See Carey HC-WP "Mexico Cross Border Traffic – Speedway.xlsb".

¹²⁶ Removal of the Exclusivity Arrangement and open gateways on the MSLLC Line would enable CPKC and CSXT to consider commercial arrangements such as interline and haulage service.

between Meridian and locations in the Eastern U.S. railroad network.¹²⁷ While advocating an open gateway at Meridian, NSR's Application and Comments ignore the important fact that the Exclusivity Arrangements preclude another carrier access while NSR benefits from those gateways for most of the traffic that could move to and from the east Post Transaction.¹²⁸

Figure 5: Shreveport and Meridian Gateways' Competitive Alternative to CPKC Post Transaction for Mexico Traffic with the Southeastern U.S and Mid-Atlantic Regions^{129, 130,}



Other gateways into the Southeastern/Mid-Atlantic U.S. are inferior to the Shreveport and Meridian gateways, and would not adequately constrain CPKC Post Transaction for Mexico Traffic to and from the Southeastern U.S. Specifically, UP's route from Laredo to Shreveport is highly advantaged and takes only approximately one day less transit time—approximately half the transit time than it currently takes KCS to move intermodal traffic from Laredo to Shreveport.¹³² Intermodal service is a highly time sensitive business which places a premium value on the most efficient and effective delivery.¹³³

¹²⁷ The constraint of UP Laredo to and from an open Shreveport gateway would greatly enhance competition for Mexico Traffic.

¹²⁸ See NS-13 at 2-4 (discussing the MSLLC and agreement but not addressing Exclusivity Arrangements). See also NS-12 at 9-40 (discussing the MSLLC and impacts of the proposed CPKC Transaction but not addressing Exclusivity Arrangements); NS-12, "Amended V.S. of John W. Mayo", at 24-29 (discussing the MSLLC and agreements but not addressing Exclusivity Arrangements).

¹²⁹ FD 36500, Railroad Control Application (CP-26/KCS-14), Vol. 1, at 167.

¹³⁰ Rail distances in the map are calculated by PC Miler. UP route is set to shortest distance to route through Dallas. See Figure 6 below for the discussion on transit times.

¹³¹ See Appendix B - Port Competition and the Meridian Advantage

¹³² 50% = 38 hours / 76 hours. See Figure 6 below. UP's Intermodal web portal reports 38 hours while KCS's Intermodal portal reports 76 hours.

¹³³ See V.S. of Robert Girardot, at 2 and 4 (statement on value of speed and reliability for rail intermodal moves). Note UP also has access to FXE via the Eagle Pass gateway. However, there are fewer than volumes approximately [REDACTED] of Laredo Interchange and most traffic (is Texas or Chicago and Illinois), nonetheless, the Eagle Pass, TX route to Shreveport, LA has similar route miles to the Laredo route. See [REDACTED]

Additional inadequacies with other gateways such as Memphis and New Orleans that could potential be used for traffic movements to and from Mexico and the Southeastern U.S. are discussed by CSXT witness Girardot.¹³⁴ UP's route to Shreveport is superior to its route to New Orleans and there are other substantial challenges with New Orleans which is a slow and unpredictable route.¹³⁵ Similarly BNSF Corpus Christi via New Orleans is not competitive in time as it has delays throughout the entire route.¹³⁶ The UP economic advantage between Laredo and Shreveport is an important factor to constrain CPKC Post Transaction. Similarly, Memphis movements to the Southeast are circuitous because they go further North than reversing South, and they and traverse less ideal routes with curvatures and sloped grades associated with tougher Southern Appalachia mountain terrain as compared to the flat and straight route across the Meridian Speedway.¹³⁷ Figure 6 below shows estimated times and mileages for various routes to Shreveport and Chicago, highlighting the efficient UP-Laredo-Shreveport route.

Figure 6: Estimated/Published Route Times and Miles for Intermodal Traffic Movements To/From Laredo (for Mexico) on Key Routes (UP, KCS) to Shreveport, New Orleans and Memphis¹³⁸

Southern U.S. Routes				
RR	Route	Miles	Hours	Method
(1) CPKC	Laredo to Shreveport	665	76	estimate
(2) UP	Laredo to Shreveport	595	38	estimate
(3) CPKC	Laredo to New Orleans	971	101	estimate
(4) UP	Laredo to New Orleans	732	57	estimate
(5) UP	Laredo to Memphis	907	70	reported
Northern U.S. Routes				
RR	Route	Miles	Hours	Method
(6) CPKC	Laredo to Kansas City	1,219	139	reported
(7) UP	Laredo to Chicago	1,391	89	reported

NSR's Comments and Responsive Application and supporting economic testimony address the advantages to the MSLLC Line for Mexico Traffic to and from Southeastern/Mid Atlantic U.S.

¹³⁴ See V.S. of Robert Girardot, at 3-5.

¹³⁵ See V.S. of Robert Girardot, at 3-4.

¹³⁶ See V.S. of Robert Girardot, at 3 and 8 (discussion of issues with New Orleans gateway and lack of current competitive nature for BNSF-CSXT moves).

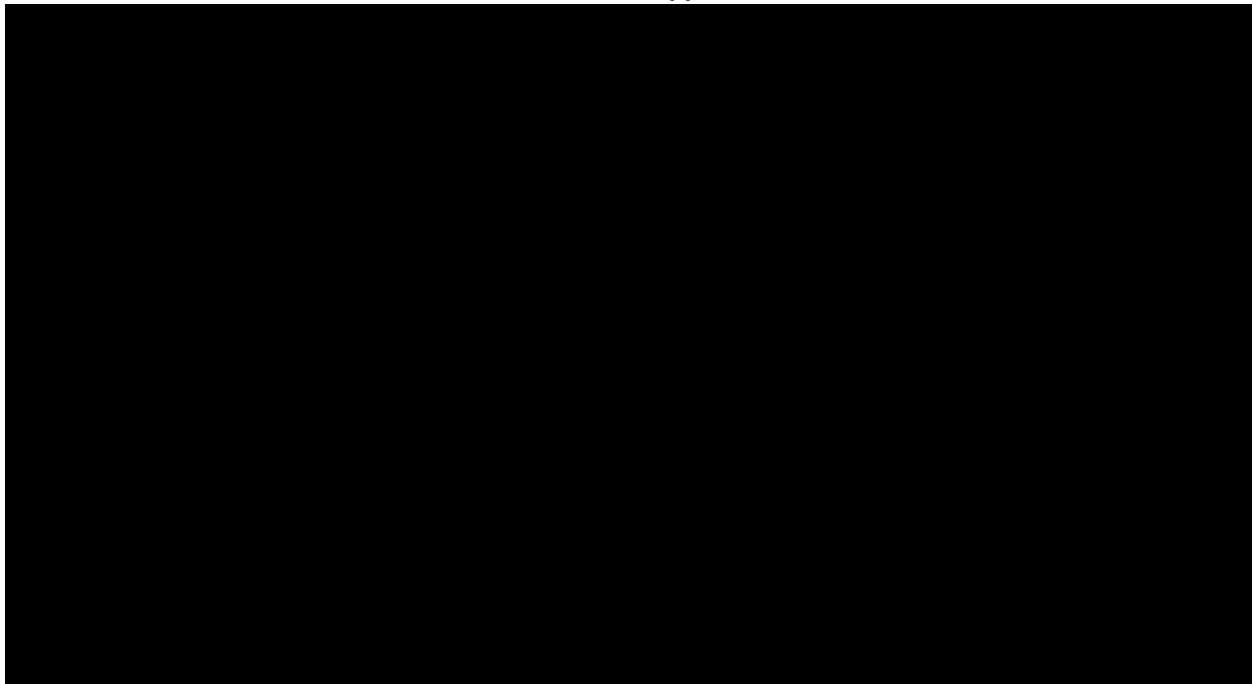
¹³⁷ See V.S. of Robert Girardot, at 3 (statement regarding superiority of Meridian route).

¹³⁸ See V.S. of Robert Girardot, at 3-4 ("UP's route between Laredo and Shreveport is better than KCS's route"). See Carey WP "IM Delivery Times- Company Source.xlsx."

locations. They do not address the negative consequences of the KCS/NSR Exclusivity Arrangements that would unnecessarily limit its ability to constrain CPKC post transaction with respect to Mexico Traffic.¹³⁹ The Meridian Speedway is used for the [REDACTED] of volumes for Mexico traffic movements with locations in the Southeast US. As Figure 7 below shows, small amounts of traffic are interchanged with Memphis and far fewer cars/units rely on New Orleans into the Southeast.

Figure 7: CSXT and NSR Total Carloads/Units Originated or Terminated in Mexico and the Southeast US by Gateway/Interchange Location (Meridian, Memphis, New Orleans, Other Southeast U.S. Gateways) for 2019¹⁴⁰

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A. More important, as shown in Figure 8 below, [REDACTED] intermodal traffic, for which competition over the MSLLC Line is especially likely to reduce prices and increase volumes, moves over the MSLLC Line [REDACTED] than other traffic) and [REDACTED] moves over Memphis.¹⁴¹ This traffic category is especially relevant to the transaction given the large

¹³⁹ See NS-13 at 2-4 (discussing the MSLLC and agreement but not addressing Exclusivity Arrangements). See also NS-12 at 9-40 (discussing the MSLLC and impacts of the proposed CPKC Transaction but not addressing Exclusivity Arrangements); NS-12, Amended V.S. of John W. Mayo, at 24-29 (discussing the MSLLC Agreements but not addressing Exclusivity Arrangements).

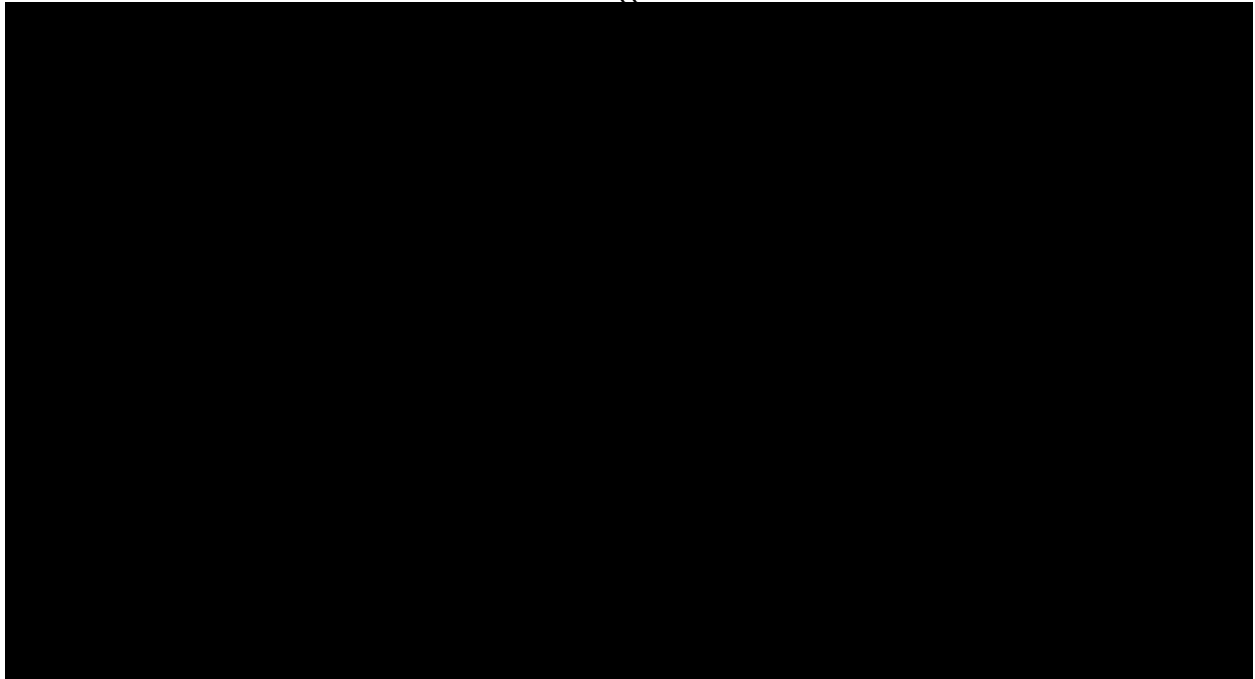
¹⁴⁰ See Carey HC-WP “Mexico Cross Border Traffic - CSX NS Southeast.xlsb”.

¹⁴¹ See Carey HC-WP “Mexico Cross Border Traffic - CSX NS Southeast.xlsb”. See also Appendix A – Mexico Cross Border Traffic.

amount of growth traffic Applicants project will move to and from Mexico, and the large amount intermodal units they believe will be routed through Lazaro Cardenas after the transaction.¹⁴²

Figure 8: CSXT and NSR Total Intermodal Units Originated or Terminated in Mexico and the Southeast US, by Gateway/Interchange Location (Meridian, Memphis, New Orleans, Other Southeast U.S. Gateways) for 2019¹⁴³

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Because the MSLLC Line is the best route for a large volume of current and potential intermodal Mexico traffic, the Shreveport and Meridian gateways must be opened to ensure the public interest providing Mexico Traffic to and from the Southeastern and Mid-Atlantic U.S. has competition the most economically efficient route. consistent with the public interest.

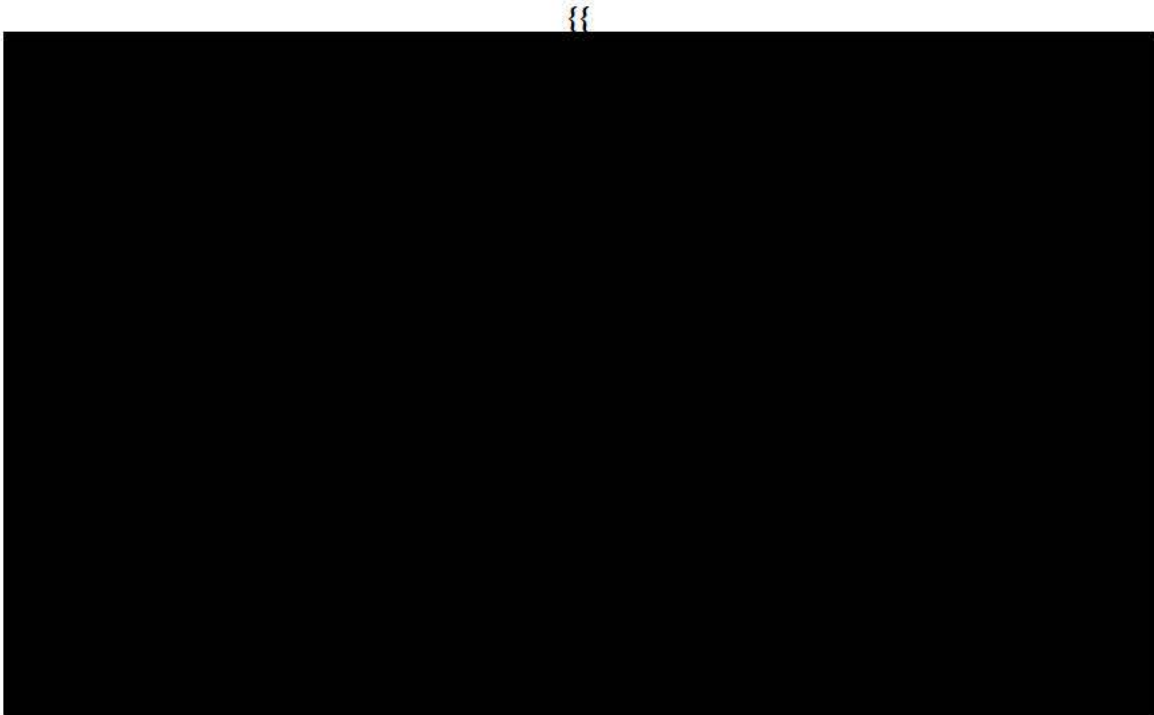
The importance of opening Shreveport and by extension Meridian as uniquely positioned gateways to constrain the potential exertion of market power by CPKC regarding Mexico Traffic to and from with the Southeast and Mid-Atlantic U.S. is amplified by the expected future growth in truck and rail movements in eastern U.S. railroad markets (including the Southeastern U.S.). This is shown in Figure 9 below

¹⁴² See Wahba and Naatz V.S. at 29.

¹⁴³ See Carey HC-WP “Mexico Cross Border Traffic - CSX NS Southeast.xlsb”.

[REDACTED] Further, the
[REDACTED]
[REDACTED] }¹⁴⁵ More competition over open MSLLC Line gateways (Meridian and Shreveport) can be expected to shift more traffic to rail and trucks off the road. Open gateways with abrogation of the Exclusivity Arrangements would best promote full realization of the public interest in the Proposed Transaction and the Meridian Speedway.

Figure 9: Eastern US Cross-border Market Size for Mexico Truck and Rail Movements¹⁴⁶

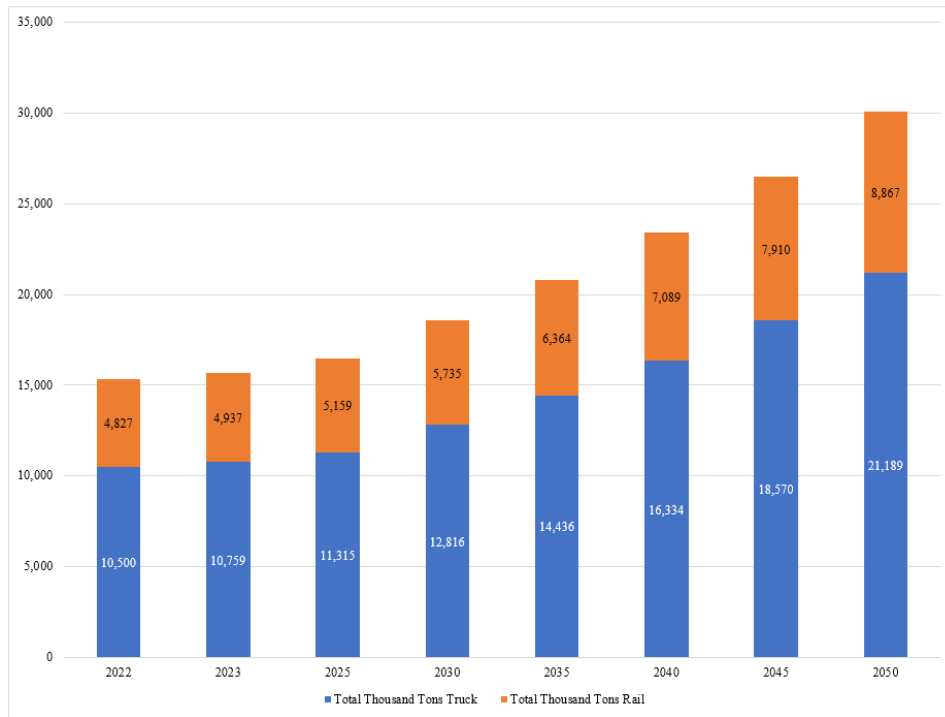


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Figure 10 below reports the Department of Transportation's robust long-term forecast of truck and rail movements involving Mexico and the Southeastern U.S.'s key metropolitan areas in Georgia, Florida, North Carolina, South Carolina, Alabama and Tennessee.

¹⁴⁴ See [REDACTED]
[REDACTED]
Ibid. [REDACTED]
[REDACTED]
See [REDACTED]
[REDACTED] *Id.* at 8.

Figure 10: Southeastern U.S Cross-border Market Size for Mexico Truck and Rail Movements, Thousand Tons (2022- 2050)¹⁴⁷



Notes and sources:

1. FAF data available at https://faf.ornl.gov/faf5/dtt_total.aspx

2. Imports and exports are to Alabama, Florida, Georgia, North Carolina, South Carolina and Tennessee

B. The Economic Importance of Open Gateways is Well Recognized by the Board (and its Predecessor ICC)

The economic importance of open gateways is particularly relevant for a regulator that relies principally on competition instead of other forms of regulation to ensure just and reasonable rates and good service.¹⁴⁸ Further, due to the *de minimis* public benefits associated with the CPKC Transaction, it is imperative to keep open gateways to ensure the most public benefits possible. The only way to do that is by ensuring competition where possible without denying carriers the benefits of legitimate entrepreneurial investments. As I discuss in Section VII below, there are significant public benefits arising from enabling competition with open gateways in general and especially with respect to the Southeastern and Mid-Atlantic U.S. regions. This includes savings to shippers and other benefits stemming from increased competition, which is demonstrated to be statistically

¹⁴⁷ See Carey WP “Mexico Truck and Rail Volumes Over Time.xlsx.”

¹⁴⁸ The Board’s predecessor agency the Interstate Commerce Commission (“ICC”) recognized this in comparing the regulation of public utilities and railroads in context of a case assessing competitive impacts of a proposed merger, including the opening of a gateway. See FD 21215, *Seaboard Air Line Railroad Company - Merger - Atlantic Coast Line Railroad Company*, (December 2, 1963). 320 I.C.C. 122, 167.

significant through my econometric analysis of the industry.¹⁴⁹ Further, as demonstrated in Section VII.B, CSXT rates in the Eastern U.S. are over [REDACTED] less than the NSR traffic moving over the Meridian Speedway and show lower rates can be expected from opening the MSLLC Line to competition. These benefits of competition are well-understood from even the most basic microeconomics textbooks.¹⁵⁰

As I understand it, the Board has broad authority impose conditions on mergers, including to open new gateways and to “**promote interstate transportation in the interest of the public and commerce of the people,**” as explained by the ICC in the BN Frisco decision.¹⁵¹ Here, the operational efficiencies and competition from opening gateways would result in substantial public benefits (as shown in Section VII)¹⁵² that are in the public interest (in particular with regard to the MSLLC gateways Shreveport and Meridian without the perpetual Exclusivity Arrangements.

Indeed, in past transactions before the Board (and ICC predecessor), railroads have often requested certain gateways to remain open or be opened. Historically, a preference for gateways to remain open occurs in most transactions that I am aware of. For example, when CSX sought approval to acquire Pan Am Railways and other railroad entities, it committed to keep all gateways open to other carriers on commercially reasonable terms and ensure that benefits of multi-carrier competition

¹⁴⁹ My analysis demonstrates that having two competitors compared to one competitor results in substantially lower rates and benefits to railroad shippers. *See* Section VII.A *supra*.

¹⁵⁰ For a discussion of price and quantity as the number of firms enter and exit a market, *see* Greenlaw, Steven and Shapiro, David, *Principles of Microeconomics 2e*, Openstax, 2017, page 205, available at <https://assets.openstax.org/oscms-prodcms/media/documents/Microeconomics2e-OP.pdf>

¹⁵¹ *See* 360 I.C.C. 788, 950. (“We have broad authority to impose conditions on railroad unifications. In the past we have imposed conditions to promote interstate transportation in the interest of the public and commerce of the people, to enhance competition, to improve the position of a carrier, to open new gateways, 88 to establish new single-line service, to preserve the integrity of an important switching carrier, to preclude diversion of traffic, to compensate partially a railroad for its anticipated traffic losses, to protect railroads even though they will not suffer serious anticompetitive harm, and to aid railroads not likely to be harmed by the transaction. This has been our policy in the past. However, the overriding factor governing the imposition of all conditions in the past has been the public interest. We would be remiss if we did not consider today's limits when imposing conditions on a railroad merger instead of viewing the industry as static. Although at odds with past policy, applicants' arguments relating to imposition of conditions are quite appealing. The voluntary consolidation of more than one railroad, when properly conceived and executed, is expected to yield certain benefits to that railroad. Any condition imposed on that merger tends to decrease or eliminate the merger's expected benefits. However, there are certain conditions which might not adversely offset a merger's anticipated benefits because the operational efficiencies or competition resulting from the condition are of greater benefit to the public interest than harm to the merger.”)

¹⁵² *See* Section VII *infra* for my calculations of substantial public benefits from customer savings (i.e., lower rates from opening the Meridian and Shreveport gateways).

remain upon completion of the transaction.¹⁵³ In approving the transaction and with respect to the requested conditions, the Board stated, “The Board finds that the open gateway commitment is vital to ensuring that the PAR System remains a competitive option, as it will allow other carriers that connect with the PAR System to continue offering competitive interline rates.”¹⁵⁴ The Board also cites the importance of CSX’s commitment that all gateways remain from a financial perspective as well, noting that the requirement for commercially reasonable access has been imposed as a part of open gateway conditions in prior cases.¹⁵⁵

A few additional case examples are helpful to show the broad discretion the Board has exercised to open new gateways that were previously closed to ensure balanced competition, economic growth and the viability of a competitive alternative. In the Seaboard Air Line Railroad merger with Atlantic Coast Line Railroad the ICC (1) removed a restriction for the Southern Railroad to northbound traffic from the Jacksonville, FL gateway,¹⁵⁶ and (2) opened 3 gateways previously closed to Southern Railroad enabling it to interchange traffic on behalf of shippers post transaction.¹⁵⁷ In Great Northern Pacific, the ICC opened previously closed gateways at 11 different interchange locations to help Milwaukee Railroad become a longhaul competitor.¹⁵⁸

As explained, the reason that the Board often requires open gateways as a condition of long-haul transactions is, simply put, such open gateways increase the number of carriers at significant interchange points on the international rail network, thereby enhancing the benefits of competition, particularly lower rates to shippers.¹⁵⁹ This should be the result in this case, by opening the MSLLC

¹⁵³ FD 36472, *CSX Corporation and CSX Transportation, Inc., Et Al. —Control and Merger—Pan Am Systems, Inc., Pan Am Railways, Inc., Boston and Maine Central Railroad Company, Norther Railroad, Pan Am Southern LLC, Portland Terminal Company, Springfield Terminal Railway Company, Stony Brook Railroad Company, and Vermont & Massachusetts Railroad Company, Amended and Supplemented Application* (“CSX PanAm Amended and Supplemented Application”), at 3-4 (July 1, 2021).

¹⁵⁴ FD 36472, *CSX Corporation et al. - Control and Merger - Pan Am Systems, Inc. et al.*, Decision, at 16 (April 14, 2022).

¹⁵⁵ *Ibid.*

¹⁵⁶ FD 21215, *Seaboard Air Line Railroad Company - Merger - Atlantic Coast Line Railroad Company*, (December 2, 1963). 320 I.C.C. 122, 124, 165, 180. 182, 267.

¹⁵⁷ *Ibid.* at 122, 180, 184-185, 188. The ICC stated that routing and gateway condition would create two balanced competitive systems that would increase competition and contribute to present and future economic growth.

¹⁵⁸ FD 21478, *Great Northern Pacific & Burlington Line, Inc - Merger, Etc. - Great Northern Railway Company, et al*, 331 I.C.C. 228, 276 (November 30, 1967). “The opening by applicants of 11 interior gateways to the Milwaukee will give many shippers a realistic choice of railroads for the first time in history.” *Ibid.* at 228, 268.

¹⁵⁹ *See infra* Section VII.

Line to an additional Eastern U.S. railroad carrier and allowing Eastern railroad shippers the benefits of competition that were inappropriately removed by KCS and NSR in the MSLLC Agreements.

C. Open Gateways on the Meridian Speedway (Shreveport and Meridian) would Provide an Additional Constraint to CPKC Post Transaction for Long Haul Railroad Routes from the West Coast Ports into the Southeastern and Mid-Atlantic U.S. Regions

In addition to domestic traffic consequences, international traffic from the far east Asia Pacific region that lands in North America's west coast ports for onward transport by rail will benefit by more competitive routes into the Southeastern U.S. and Mid-Atlantic region Post Transaction.

Regarding the particular advantages of the MSLLC Line, I agree with NSR that it is a uniquely positioned efficient railroad carrier for the Southeastern U.S. and Mid-Atlantic movements.¹⁶⁰ But NSR's position is unique principally because of the Exclusivity Arrangements and their anticompetitive effect, which will be exacerbated by the proposed CPKC Transaction and the transaction proposed by NSR's Responsive Application.¹⁶¹ Open gateways at both ends of the MSLLC Line are required to adequately constrain CPKC's market power with respect to long hauls to and from West Coast ports (into the Eastern U.S. markets particularly the Southeastern U.S. and Mid-Atlantic region) as well as other transcontinental NSR Exclusivity Traffic that traverses the Meridian Speedway to/from Eastern U.S. railroad markets. This is a substantial concern, as noted by the three Federal Maritime Commissioners who have raised concerns about CPKC's opportunity to favor Canadian ports over U.S. routes.¹⁶²

Post Transaction, Applicants will have a heightened incentive to divert traffic from today's most economically efficient routes that move to and from U.S. west coast ports of Los Angeles and Long Beach ("LA" and "LB") into the Southeastern U.S. for transcontinental traffic (including NSR

¹⁶⁰ NS-12 at 37-38 (referencing its mileage advantage relative to highways). I discussed the MSLLC Line route advantages in my February V.S. *see* CSXT-8, Carey V.S. at Section V.

¹⁶¹ NSR fails to address the CPKC Transaction's exacerbation of anticompetitive effects stemming from the Exclusivity Arrangements. *See* NS-13 at 2-4 (discussing the MSLLC and agreement but not addressing Exclusivity Arrangements). *See also* NS-12 at 9-40 (discussing the MSLLC and impacts of the proposed CPKC Transaction but not addressing Exclusivity Arrangements); NS-12 at 24-29 (discussing the MSLLC and agreements but not addressing Exclusivity Arrangements).

¹⁶² CSXT-8, Carey V.S., at 29. "The proposed merger will adversely impact U.S. ports and the primarily U.S.-based intermodal railway systems that serve our ports and would disproportionately benefit Canadian ports and the primarily Canadian-based intermodal railway systems that service Canadian ports for transportation of U.S.-bound cargo." *See* FD 36500, Comments of Federal Maritime Commissioners Carl W. Bentzel, Louis E. Sola, and Max M. Vekich, (June 21, 2022).

Exclusivity Traffic)¹⁶³ to either: (1) CP's west coast port (Vancouver to Chicago to Shreveport to Meridian into the Southeastern U.S.), or (2) KCS's west coast port (Lazaro Cardenas to Laredo to Shreveport to Meridian into the Southeastern U.S.). Figure 11 below shows the three primary west coast ports, with the much longer CPKC alternative routes into the Southeastern U.S. as well as the visible advantage of the direct route into the Southeastern U.S. from the LA and LB port for transcontinental traffic.

**Figure 11: West Coast Port Alternatives to UP's Route
LA and LB into the Southeastern U.S.**^{164,165,166}



CPKC marketing officials have emphasized the incentives and economic advantages to divert traffic from U.S. West coast ports (LA and LB) to CPKC accessible ports as a specific business strategy.¹⁶⁷ These West coast ports (LA and LB, Vancouver and Lazaro Cardenas) account for the [REDACTED] of intermodal traffic volumes to/from the Southeastern U.S. and the Far East region and global trade with North America. The Los Angeles and Long Beach ports are far and away the largest U.S. ports.¹⁶⁸

¹⁶³ NSR recognizes the portion of the proposed CPKC network traversing the MSLLC Line for its strong route into the southeast U.S. and that it has observed recent growth. *See* NS-12 at 37-38 (referencing its mileage advantage relative to highways and growth in traffic).

¹⁶⁴ *See* FD 36500, Railroad Control Application (CP-26/KCS-14), Vol. 1, at 167.

¹⁶⁵ Rail distances calculated by PC Miler. UP route is set to shortest distance to route through Dallas.

¹⁶⁶ *See* Appendix B - Port Competition and the Meridian Advantage.

¹⁶⁷ *See* Appendix B - Port Competition and the Meridian Advantage.

¹⁶⁸ *See* Appendix B - Port Competition and the Meridian Advantage.

The effects of these diversions would be exacerbated if the Board were to permit the maintenance of the Exclusivity Arrangement and closed gateways at Shreveport and Meridian. CPKC marketing officials have emphasized the incentives and economic advantages to divert traffic from U.S. west coast ports (LA and LB) to CPKC accessible ports as a specific business strategy.¹⁶⁹ Open gateways at Shreveport and Meridian are needed to ensure that the economically efficient routes that move intermodal traffic to and from U.S. West coast ports (LA and LB) into the Southeastern U.S. for transcontinental traffic (including NSR Exclusivity Traffic) can constrain CPKC's West coast port diversion away from U.S. (LA and LB) to ports in Mexico and Canada.

NSR's Application and Comments ignore the fact that its Exclusivity Arrangements are further compounded by the CPKC post Transaction.¹⁷⁰ While NSR acknowledged concerns surrounding Shreveport,¹⁷¹ it failed to address the compounding consequences to the entire MSLLC Line, which includes Meridian.¹⁷²

For the Shreveport gateway to allow shippers to choose UP as a competitive alternative to CPKC for the important transcontinental traffic, Meridian must also be open, affording shippers the opportunity to compete on commercially reasonable terms and service across the entire Meridian Speedway for movements with the Southeastern/Mid Atlantic U.S. regions.

The economic efficiency of the U.S. transcontinental traffic from UP's west coast railroad route with the Southeastern U.S. compared to CPKC's alternatives originating from west coast ports in Canada and Mexico is shown in Figure 12 below. UP is highly competitive for route miles and route times as compared to CPKC alternatives that are susceptible to diversions.

¹⁶⁹ CPKC identified diversions from U.S. West coast port traffic to Mexico (Lazaro Cardenas, MX) for deliveries into the interior U.S. to serve U.S. markets to garner greater revenue through the longer haul on its network. *See* FD 36500, Railroad Control Application (CP-26/KCS-14), Vol. 1, at 159-160.

¹⁷⁰ *See* NS-12, at 2-4 (discussing the MSLLC and agreement but not addressing Exclusivity Arrangements). *See also* NS-12 at 9-40 (discussing the MSLLC and impacts of the proposed CPKC Transaction but not addressing Exclusivity Arrangements); NS-12 "Amended V.S. of John W. Mayo," at 24-29 (discussing the MSLLC and agreements but not addressing Exclusivity Arrangements).

¹⁷¹ NSR expert witness Dr. Mayo cited a similar concern in his V.S., stating that the NSR Shreveport interchange is vulnerable to service degradations and identifies uneconomic diversions from the Meridian interchange to single line CPKC moves. Dr. Mayo did not cite Vancouver or Lazaro Cardenas ports as specific routes of concern as his analysis only focused on routes in which KCS-NSR currently actively interchange traffic, however the same logic applies to traffic rerouted from U.S. ports. *See* NS-12, "Mayo V.S." at 26 and 29.

¹⁷² CSXT-8 at 29.

Figure 12: Estimated/Published Route Times and Miles for Intermodal Traffic Movements To/From West Coast Ports on Key Routes (UP, KCS) to Shreveport and Chicago¹⁷³

Routes to Shreveport				
RR	Route	Miles	Hours	Method
(1) CPKC	Vancouver to Shreveport	3,001	147	estimate
(2) UP	Long Beach to Shreveport	1,665	82	estimate
(3) CPKC	Lazaro Cardenas to Shreveport	1,591	203	estimate
(4) CPKC	Laredo to Shreveport	665	76	estimate
(5) CPKC	Lazaro Cardenas to Laredo	926	127	estimate
Routes to Chicago				
RR	Route	Miles	Hours	Method
(6) CP	Vancouver to Chicago	2,203	108	reported
(7) UP	Long Beach to Chicago	2,264	112	reported
(8) CPKC	Lazaro Cardenas to Chicago	2,650	291	estimate

For these reasons, Shreveport and Meridian should be established as open gateways as a condition of the CPKC Transaction. Otherwise, any limitation on competition—such as only one Eastern railroad carrier has competitively meaningful access to the highly efficient and advantaged route over the Meridian Speedway^{174, 175}—will reduce the achievable benefits of competitive markets, such as lower rates to shippers and overall consumer welfare below otherwise attainable levels (as I discuss in Section VII).

The implications of the CPKC Transaction extend to global international trade and national policies regarding onshoring or nearshoring to increase manufacturing in North America and the U.S. to compete with Asia.¹⁷⁶ With rising international labor costs and supply chain disruption of offshore operations, even before the pandemic, the debate of the benefits of offshoring continues. For

¹⁷³ See V.S. of Robert Girardot, at 3-4 (discussion of superiority of UP routes). See Carey WP “IM Delivery Times- Company Source.xlsx”.

¹⁷⁴ NSR acknowledges the economic advantages of the route used for the Meridian Speedway. See NS-12 at 10.

¹⁷⁵ [REDACTED]

Ibid.

instance, U.S. businesses are reevaluating their offshoring plans. Major companies have scrapped offshoring plans or announced decisions to move production to the United States with new U.S. investment because of the new renegotiated NAFTA or United States-Mexico-Canada Agreement (“USMCA”).¹⁷⁷ The pandemic and recent supply chain disruption have revealed the risk in the entire value chain of the economy from offshoring.¹⁷⁸

Plenty of signals suggest that the era of offshoring might be waning as companies build strategies to bring manufacturing back into North America (nearshoring) or into the U.S. (onshoring). Recent U.S. trade policies point in this direction. A recent survey showed that 78% of the CEOs have considered reshoring or already have returned operations to the U.S. The factors that would contribute to making reshoring decisions are generally invariant to the size of the company. The factors that have all been strengthened during the last two years with the pandemic including labor costs, delivery lead times, logistics costs, and quality of goods.¹⁷⁹ In response to the President’s Executive Order 14017, the Department of Transportation has issued policy recommendations for longer-term strength and resilience of the American transportation industrial base which relies on the freight and logistics supply chain.¹⁸⁰ The nearshoring and offshoring developments have wide ranging impacts across many sectors of the U.S. economy and highlight the importance of achieving the highest level of overall efficiency of the North American railroad network, by ensuring that traffic movements can move over the most economically efficient routes consistent with the public interest. As the Board’s predecessor contemplated the important role railroads have on the overall economy in the past in the context of a Transaction, the Board should do so here.¹⁸¹

¹⁷⁷ Robert E. Lighthizer, “The Era of Offshoring U.S. Jobs Is Over,” *The New York Times*, (May 11, 2020), available at <https://www.nytimes.com/2020/05/11/opinion/coronavirus-jobs-offshoring.html>

¹⁷⁸ Christine Griffith, “Why Onshoring is Growing in Popularity,” (October 20, 2020), available at <https://trinitylogistics.com/why-onshoring-is-growing-in-popularity/>

¹⁷⁹ Kearney, “The tides are turning. 2021 Reshoring Index,” available at <https://www.kenarney.com/operations-performance-transformation/us-reshoring-index>

¹⁸⁰ White House, “Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-based Growth. 100-Day Reviews under Executive Order 14017,” (June 2021), available at <https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf>

¹⁸¹ See 360 I.C.C. 788, 950. In the BN Frisco Decision, the ICC stated its ability to “[p]romote interstate transportation in the interest of the public and commerce of the people.” The ICC also indicated that “...[o]perational efficiencies or competition resulting from the condition are of greater benefit to the public interest than harm to the merger.”)

VI. NSR AND KCS COULD HAVE ACHIEVED BUSINESS SUCCESS FROM THE MSLLC TRANSACTION WITHOUT LIMITING COMPETITION

In this section, I respond to the claims in the NSR Responsive Application,¹⁸² its Amended Comments¹⁸³ and its witnesses¹⁸⁴ that the MSLLC JV created efficiency benefits for customers. NSR appears to assume that the anticompetitive effects of the Exclusivity Arrangements (and investments) were justified because the MSLLC JV was “pro-growth, pro-competitive, and allowed shippers to utilize a highly efficient route service.”¹⁸⁵

I show that these claims are based on an incomplete assessment of the economic implications of the MSLLC JV and its perpetual Exclusivity Arrangements. There was no economic basis for the Exclusivity Arrangements when MSLLC was formed, and no sound economic basis for their continuation. Prior to 2006, KCS and NSR could both provide service over the Speedway.¹⁸⁶ However, the MSLLC Arrangements closed the MSLLC Line to competition for most intermodal traffic moving between Dallas and Meridian¹⁸⁷ and between Shreveport and Meridian.

Exclusivity arrangements are especially concerning to the Board¹⁸⁸ and antitrust agencies.¹⁸⁹ There is no need to limit competition with a restrictive agreement if there are other means of achieving business success without that restriction, such as a haulage rate or other proper pricing. As discussed by Dr. Shehadeh,¹⁹⁰ the restrictions embedded in the MSLLC Agreements are core elements of those agreements, and would only be determined to be reasonable by regulatory

¹⁸² NS-13 at 2-4.

¹⁸³ NS-12 at 9-20.

¹⁸⁴ NS-12, Amended V.S. of John W. Mayo, at 24-25; NS-12, “V.S. of Claude E. “Ed” Elkins” at 1-6; NS-12, “V.S. of Michael R. McClellan,” at 1-10.

¹⁸⁵ NS-12 at 10.

¹⁸⁶ See FD 34822, *Notice of Exemption*, at 4 (January 17, 2006). [REDACTED]

See Supra Section III.C

¹⁸⁸ See *infra* Section VI.B. See also CSXT-8, Carey V.S. at 48 (February 28, 2022).

¹⁸⁹ As discussed in my February V.S., the Meridian Speedway Agreement is of the type considered to be per se illegal by antitrust agencies. That is, the agreement on its face would be anticompetitive and a violation of antitrust laws. See CSXT-8, Carey V.S. at 4 (February 28, 2022).

¹⁹⁰ See Verified Statement of Dr. Ramsey Shehadeh at Section III.B.4.

authorities if they were necessary ancillary components.^{191, 192} Further analysis of the MSLLC Agreements should consider the overall impact on competition to determine whether the goals could be achieved without the competition-limiting Exclusivity Arrangements.¹⁹³ In making this determination, the Board should consider both competitive enhancements and competitive deteriorations.

Because there were limited changes to the functional services (haulage service for Transcontinental traffic and KCS/NSR interline for Dallas) resulting from the MSLLC Agreements, no efficiency related benefits to shippers from vertical integration were created by the MSLLC JV. Benefits from vertical integration arise through the removal of contribution margin and profit (i.e., revenue above variable cost) required by two railroads engaged in an interline movement to just one railroad. As discussed in my February Verified Statement, this is sometimes referred to as double marginalization.¹⁹⁴

The Exclusivity Arrangements appear to be the prominent, new and significant economic feature to the MSLLC Agreements. As I show below, that feature has made possible the substantial,

¹⁹¹ Pursuant to the Ancillary Restraints Doctrine an agreement may avoid per se condemnation and instead be considered under the Rule of Reason—a rule under which procompetitive justifications may be considered. “Under the ancillary restraints doctrine, courts “must distinguish between ‘naked’ restraints, those in which the restriction on competition is unaccompanied by new production or products, and ‘ancillary’ restraints, those that are part of a larger endeavor whose success they promote” *See Polk Bros., Inc., Plaintiff-appellant, v. Forest City Enterprises, Inc., Defendant-appellee*, 776 F.2d 185 (7th Cir. 1985); US Court of Appeals for the Seventh Circuit - 776 F.2d 185 (7th Cir. 1985), available at <https://law.justia.com/cases/federal/appellate-courts/F2/776/185/443156/>.

¹⁹² In other words, the restriction that has anticompetitive effects cannot be the core purpose of the agreement. For the Ancillary Restraints Doctrine to apply, the market division must be demonstrated to be ancillary (i.e., it is ancillary to and promotes a larger productive endeavor such as bringing a new product to market). *See Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, No. 20-55679, 2021 WL 3671384 (9th Cir. Aug. 19, 2021) In my February V.S. I noted that this restraint does not have the characteristics of restraints that are considered ancillary.

¹⁹³ If the MSLLC Agreements were considered ancillary and assessed under the Rule of Reason, the anticompetitive and procompetitive factors of the agreement would be evaluated. Then, as a third step, a determination is made as to whether the procompetitive factor could have been achieved under a less restrictive alternative. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). *See also Hovenkamp*, “The NCAA and the Rule of Reason,” October 14, 2017; Review of Industrial Organization (2018) 52:323–335, available at <https://doi.org/10.1007/s11151-017-9589-5>. *See also Cf. Capital Imaging*, 996 F.2d at 542-543.

¹⁹⁴ *See CSXT-8, Carey V.S.*, at Section II.A., (February 28, 2022). *See also Scherer, F.M., and Ross, David*, “Industrial Market Structure and Economic Performance,” Third Edition, at 524-527; Utton, M.A., “Market Dominance and Antitrust Policy,” Edward Elgar Publishing Limited, 1995, pp 216-219; and Carlton, Dennis W. and Perloff, Jeffrey M., “Modern Industrial Organization,” Fourth Edition, 2005, at 415-416.

supracompetitive contribution margin that NSR has made from traffic that traverses the MSLLC Line since the MSLLC Agreements were put in place; approximately [REDACTED]¹⁹⁵

Based on my analysis below, the MSLLC Agreements were not reasonably economically necessary for NSR and KCS to achieve business success in 2006, nor are they reasonably economically necessary on an ongoing basis.

A. The Meridian Speedway Agreement Lacked Changes to Unlock Vertical-Integration Efficiencies as Compared to the Pre-JV Common Business Practice (i.e., “Business as Usual”) Approach

Shifting from the prior business arrangement to the MSLLC JV structure did not create new economic attributes that were dramatically different in terms of quality of rail service to result in price reductions or other efficiency benefits to customers. The MSLLC JV limited both changes to the types of railroad service and the benefits potentially achievable from vertical integration related from the combination of the two railroads. The MSLLC Agreements did not include economic efficiency-related benefits commonly observed with consolidation of end-to-end transactions (i.e. vertical transactions). The principal economic efficiencies associated with vertical transactions in the railroad industry are cost reductions, including reductions in operational costs from efficiencies and reduced overhead removing the margin (above variable cost).^{196, 197} Vertical transactions that eliminate double marginalization—removal of the contribution margin of the 2nd railroad in an interline movement—and service-related quality improvements and pass along those reduced costs to shippers in the form of reduced rates produce tangible public benefits. As a result, MSLLC JV shippers face reduced competition without the potential benefits of a vertical consolidation.

The same or similar rail service that existed Pre MSLLC JV continued Post MSLLC JV for the NSR Transcontinental traffic as well as for the traffic that originated or terminated at Dallas and was interchanged with NSR at Meridian. Specifically, Pre MSLLC JV, [REDACTED]

¹⁹⁵ See Carey HC-WP “NSR Profits from Meridian Speedway.xlsx”.

¹⁹⁶ See Scherer, F.M., and Ross, David, “Industrial Market Structure and Economic Performance,” Third Edition, at 524-527. See Utton, M.A., “Market Dominance and Antitrust Policy,” Edward Elgar Publishing Limited, 1995, pp 216-219. See also Carlton, Dennis W. and Perloff, Jeffrey M., “Modern Industrial Organization,” Fourth Edition, 2005, at 415-416.

¹⁹⁷ The margin (above variable cost) and contribution margin are terms used in the railroad industry to refer to the revenue in excess of variable cost or mark-up over variable cost. Margin or contribution margin are used to evaluate the additional monies available to the railroad above the incremental cost to serve the traffic that can contribute the overhead functions of the railroad and the broader network investment activities. For a discussion of economic efficiencies associated with vertical transactions, see CSXT-8, Carey V.S. at Section II (February 28, 2022).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] For Dallas Traffic both Pre and Post MSLLC JV, NSR has worked with KCS as an interline partner. KCS was and continues to be responsible for the traffic movement from Dallas to Meridian and NSR was and continues to be responsible for the traffic movement Meridian to/from locations on its network.²⁰¹ In deposition, Mr. McClellan [REDACTED]

[REDACTED]²⁰² For these traffic movements Pre and Post-MSLLC JV, KCS and NSR each have used separate revenues and operations and costs for its segment of the route.²⁰³ Post MSLLC JV, shippers continue to rely on two railroad carriers with interline traffic movements for the same segments as Pre MSLLC JV²⁰⁴ because the same interline traffic movements continue Post JV for Dallas Traffic.²⁰⁵ The shippers have not experienced an improved or otherwise differentiated rail service, but rather continue with the same functional railroad service which includes the exclusivity limitations.²⁰⁶

¹⁹⁸ See KCSR-HC-00027738-KCSR-HC-00027755.pdf Haulage Agreement (KCS-NSR Haulage Agreement), May 21, 2000, at 1-3 (limited to Alliance, TX and Meridian)

¹⁹⁹ See 8.1.11-KCSR-HC-00013373 to KCSR-HC-00013408.pdf, "Norfolk Southern Railway Company-Meridian Speedway LLC-Joint Use Agreement," May 2006, at KCSR-HC-00013380, Section 2(b).

²⁰⁰ See KCS Responses and Objections to CSX Transportation, Inc.'s Fifth Set of Discovery Requests to KCS, response to Interrogatories 12 and 13, at 16 (June 21, 2022).

²⁰¹ Dallas Traffic is to or from the Dallas Intermodal Terminal at Wylie, TX. No haulage agreement was used by KCS and NSR for Dallas origination/termination and Meridian. See McClellan Dep. Tr. 11:06:32-11:06:58 (July 11, 2022)

[REDACTED]

See McClellan Dep. Tr. 11:06:32-11:06:58 (July 11, 2022)

[REDACTED]

See FD 34822, *Notice of Exemption*, "Dallas Terminal Marketing Agreement," Section 2(b) (January 17, 2006). The Pre MSLLC JV Haulage Agreement does not identify Dallas Intermodal Terminal as haulage and therefore only interline traffic movements would be expected.

²⁰⁴ See FD 34822, *Notice of Exemption*, "The Kansas City Southern Railway Company-Meridian Speedway LLC-Joint Use Agreement," Section 4(b) (January 17, 2006).

²⁰⁵ NSR and KCS set rates based as an interline move interchanged at Meridian, MS. See 8.1.18-KCSR-HC-00013584 to KCSR-HC-00013597.pdf, "Dallas Terminal Marketing Agreement," May 2006 at KCSR-HC-00013586-87 Section 2(a).

²⁰⁶ See FD 34822, *Notice of Exemption*, "Dallas Terminal Marketing Agreement," Section 2(b) and 2(d), (January 17, 2006).

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In addition to continuing to use the same or similar railroad service Pre and Post MSLLC JV for NSR Exclusivity Traffic (i.e., transcontinental), a comparable haulage rate is likewise observable Pre and Post MSLLC JV. The Post MSLLC JV haulage-based rate is [REDACTED]

[REDACTED]^{207, 208} The mileage adjustment addresses the slightly shorter route in the Post MSLLC JV.

The generally consistent and comparable rate for the same NSR Transcontinental traffic haulage service Pre and Post MSLLC JV indicates that any efficiencies gained from the two railroads working together with a haulage service arose from the Pre MSLLC haulage agreement—and not from the Post MSLLC Exclusivity Arrangements. The MSLLC JV haulage rate consisted of [REDACTED] again suggesting that potential efficiency benefits to shippers may have been realized through the Pre MSLLC JV haulage agreement (and any rate reduction agreed upon) but not the Post MSLLC. The Post MSLLC JV continuation of the prior haulage service did not create enhanced efficiencies or eliminate some of the contribution margin of two railroads to lower customer rates.

Post MSLLC JV, for the Dallas Traffic, the shippers continue to rely on two railroad carriers with interline traffic movements and, therefore, continue to pay the double margin of a standard interline movement²¹⁰ (as they did prior to the formation of the MSLLC JV).²¹¹ Thus, no customer rate reductions from efficiency enhancing removal of one railroad carriers' contribution margin/overhead occurred for the Dallas Traffic as a result of the MSLLC JV. [REDACTED]

²⁰⁷ [REDACTED]

[REDACTED]

NSR is a 30% owner in the MSLLC, meaning that it eventually recoups a portion of this haulage fee, however that does not change the total cost eventually passed on the shipper. Also, since substantial share of the haulage rate is operating costs, there is a limited amount that NSR receives in return.

²⁰⁹ Average operating costs from 2006 – 2021. *See* Carey HC-WP “Historical NSR Rates and Operating Expenses.xlsx”.

²¹⁰ For Dallas Traffic on KCS’s portion of the interline movement between Dallas and Meridiam KCS [REDACTED] *See* Carey HC-WP “KCS DITT CM.xlsx”.

²¹¹ *See* 8.1.18-KCSR-HC-00013584 to KCSR-HC-00013597.pdf, “Dallas Terminal Marketing Agreement,” Section 2(b) and 2(d), at KCSR-HC-00013586-87 (May 2006).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

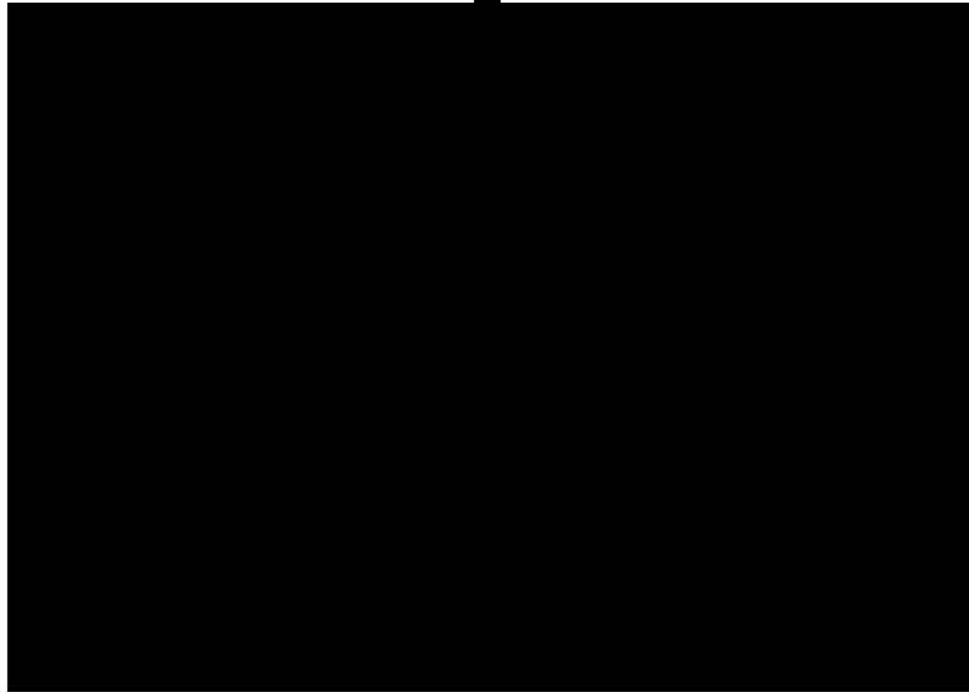
[REDACTED]

[REDACTED] See Figure 13 below for a comparison.

²¹² KCSR-HC-00027738-KCSR-HC-00027755.pdf, Haulage Agreement (KCS-NSR Haulage Agreement), Section 2(a) and (c), at 3 (May 21, 2000). *See* note 3 to Figure 13.

²¹³ 8.1.11-KCSR-HC-00013373 to KCSR-HC-00013408.pdf, Norfolk Southern Railway Company – Meridian Speedway LLC Joint Use Agreement, Appendix B (Commercial Appendix), Section 2.C(1) and (3) and Section (3), at 30-32.

Figure 13: Comparison of Railroad Service and Performance Attributes of Comparison of Pre-MSLLC, Prior KCS/NSR Haulage and Business Arrangement and the MSLLC JV Haulage Service and Locations²¹⁴



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As a result of the very limited changes to the functional railroad service there are limited economic efficiency benefits that would be common in the context of vertical integration. The MSLLC Agreements present none of the efficiency-related benefits from vertical transactions of two railroads that would customarily be presented by Applicants to the Board.²¹⁵

While there has been traffic growth over the MSLLC Line since 2006, NSR has made no showing that this growth was achievable only by virtue of the competition limitations embodied in the Exclusivity Arrangements.²¹⁶ Indeed, greater traffic growth could have resulted from decreased

²¹⁴ See Appendix C – Haulage.

²¹⁵ See CSXT-8, Carey V.S., Section II.A (February 28, 2022) for discussion of economic efficiencies associated with vertical transactions, including elimination of double marginalization, greater opportunities to reduce overhead and thus cost by removing redundancies across two railroads, and improved operating efficiencies of a single line movement.

²¹⁶ NSR stated in its Responsive Application that in 2004

[REDACTED]

In

rates arising from competition. Further, as demonstrated by Dr. Shehadeh, since the investments were in place, the transcontinental intermodal volume that traverses the MSLLC Line has grown more slowly than competitive benchmarks.²¹⁷

B. Haulage Agreements are Commonly Used in the Railroad Industry (without Exclusivity Requirements), even when Accompanied by New Investments

Non-exclusive haulage-based arrangements were available to NSR and KCS at the time of the MSLLC JV and if undertaken would have warranted the necessary investment without unnecessarily limiting competition. By contrast, Exclusivity Arrangements such as those embedded in the MSLLC Agreements are not commonplace in the railroad industry as I show from examples below and as discussed in the *Girardot V.S.*²¹⁸ This is shown by the Board's decision to reject a request by NSR in another matter seeking exclusivity and the closing of gateway/interchanges to competition into perpetuity. Also, antitrust cases look to whether a contract follows the norm in the industry in evaluating evaluate the reasonableness of ancillary restraints.²¹⁹

Along with joint use of rail facilities, trackage rights and run-through trains,²²⁰ haulage agreements²²¹ are one of the common ways railroads economically access new markets or expand the use of already served markets without engaging in market divisions such as those contained in the MSLLC Agreements. Under a haulage agreement, the railroad owning the line grants haulage rights to another carrier. Haulage rights are "rights obtained by one railroad to have its trains operated by

deposition, Mr. McClellan acknowledged that the [REDACTED]

²¹⁷ See Verified Statement of Dr. Ramsey Shehadeh at Section IV.

²¹⁸ See *V.S. of Robert Girardot*, at 7. See also Appendix D – Haulage Agreements.

²¹⁹ In cases considering whether a contract is a lawful restraint of trade, a defense to a claimed unreasonable restrictive covenant in a commercial agreement includes considering whether the contract was of standard form or commonly used in the industry. If the restriction is commonly used in the industry, under the "trading society" test, this fact weighs in favor of the covenant being deemed reasonable and thus not a violation of antitrust law. Two recent cases relied on this contract principle: *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd* [2020] UKSC 36 at 26-27, 46, available at <https://www.supremecourt.uk/cases/docs/uksc-2018-0062-judgment.pdf>; and *Quantum Actuarial LLP v Quantum Advisory Limited* [2021] EWCA Civ 227 at 60 (iii-iv), available at <https://www.bailii.org/ew/cases/EWCA/Civ/2021/227.html>

²²⁰ For instance, trackage rights and access to other rail facilities are recognized as conditions the Board may impose in merger circumstances where needed to mitigate or offset harm. See 49 CFR § 1180.1(d) "General policy statement for merger or control of at least two Class I railroads – Conditions," available at <https://www.ecfr.gov/current/title-49/subtitle-B/chapter-X/subchapter-B/part-1180>.

²²¹ For a summary of haulage agreements, see Appendix D – Haulage Agreements.

another railroad over [the operating railroad's] railroad's tracks."²²² In these agreements it is common that the railroad which is granted access to the operating railroad's tracks pays a per-use fee to the operating railroad to perform the haulage service.²²³

Based on my experience and additional review, there are many examples where interline traffic movements over a line compete with the service by a carrier receiving haulage over that same line. The combination of these two features necessarily shows that the gateways/interchanges are open to traffic movements by the line-owning carrier as well as the carrier receiving haulage. One example is CSXT's agreement to haul transcontinental, intermodal units for BNSF between Chicago and North Baltimore, Ohio. That haulage is not exclusive [REDACTED]

[REDACTED]²²⁴ There are many other examples of rail lines are being used in multi-faceted ways by more than one railroad carrier through such agreements.²²⁵ These real-world examples demonstrate that non-exclusive haulage or trackage agreements are common practices in the industry.

These common industry agreements may also include investments to improve the rail service or facilitate the haulage. For instance, under a 2006 intermodal haulage agreement [REDACTED]

²²² See CSXT, "Railroad Dictionary," available at <https://www.csx.com/index.cfm/about-us/company-overview/railroad-dictionary/?i=H>

²²³ See Appendix D – Haulage Agreements

²²⁴ See Appendix D – Haulage Agreements. [REDACTED]

See Appendix D – Haulage Agreements for traffic tape summaries and other third-party industry information. Haulage agreements are considered non-exclusive if the line owner supplying haulage services provides access for multiple carriers to move traffic over, to or from points on the haulage line.

²²⁶ [REDACTED]

[REDACTED] A distance of 215 miles.
Mileage calculated using PC Miler.

CSXT witness Girardot provides additional information on this agreement.²³³

In that intermodal haulage agreement,

227

See V.S. of Robert Girardot, at 5.

Note that NSR does not need to use Meridian & Bigbee Railroad (MNBR) to reach Montgomery as NSR can reach Birmingham from Meridian. *See* map at Appendix D – Haulage Agreements.

[REDACTED]

[REDACTED]

Another example of investments associated with non-exclusive haulage agreements is the Florida East Coast Rail (“FEC”) agreement with NSR to haul intermodal units from Jacksonville, Florida to destinations throughout Florida, including Titusville and Miami.²³⁷ The CWS traffic movement data shows [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²³⁹

As noted above, the Board has rejected exclusive haulage arrangements. NSR and the Watco²⁴⁰ short line operator planned to establish a joint venture railroad called the Michigan Central Railway (“MCR”) which was denied by the Board in 2007.²⁴¹ NSR proposed to contribute 299 miles of track in Michigan and Indiana, trackage rights, and related assets to MCR in exchange for a 33% “membership interest” and certain restrictions on MCR’s ability to interchange traffic with other carriers.²⁴² Watco would contribute \$18 million in cash and locomotives over time to MCR in exchange for a 67% membership interest in the joint venture. MCR stated that it would invest more than \$20 million in these lines over the first 3 years.²⁴³

In its NSR/Watco 2007 decision to reject the joint venture, the Board is critical of many aspects of the Application. Of relevance here, the Board states that MCR’s “ability to control these lines would also be significantly reduced through NSR’s interchange restrictions, retention of trackage

²³⁵ [REDACTED]

²³⁶ See Appendix D – Haulage Agreements at Figure 2.

²³⁷ See Appendix D – Haulage Agreements.

²³⁸ See Appendix D – Haulage Agreements.

²³⁹ See NS-12, Exhibit 3 at 7.

²⁴⁰ See Watco, “System Map”, available at <https://www.watco.com/system-map/>.

²⁴¹ See FD Nos. 35063-65, *Michigan Central Railway, LLC Acquisition and Operation Exemption – Lines of Norfolk Southern Railway Company Et Al.*, “STB Decision,” at 1 (December 10, 2007).

²⁴² *Id.* At 2.

²⁴³ *Id.* At 2.

rights, and haulage rights.”²⁴⁴ The Board continued, indicating that “[t]he interchange restrictions would be unusually severe as they would extend in perpetuity to existing and future traffic.”^{245, 246}

Following the Board’s decision to reject the MCR joint venture, NSR and Watco sought an exemption for a smaller scale transaction that would enable Watco to lease NSR’s lines in Michigan and Indiana.²⁴⁷ Watco would form subsidiary Grand Elk Railroad L.L.C. (“GER”) as the operator.²⁴⁸ The Board approved the transaction in 2009 on the basis that, unlike MCR, GER would be operating independently of the lessor carrier (NSR).²⁴⁹ The Board’s decision highlights the non-exclusive provisions, stating that “GER will make its own separate transportation contracts with its shippers, and GER will have the unrestricted ability to interchange traffic with other carriers with which it physically interconnects.”²⁵⁰

C. NSR/KCS Could have Negotiated a Financial Structure for MSLLC Based on the Existing Haulage Arrangement and Recovered the New Investment Without Exclusivity Arrangements that Unnecessarily Limits Competition

The perpetual Exclusivity Arrangements in the MSLLC Agreements and resulting market division was not reasonably necessary to achieve business success in 2006. As discussed in the previous section, there are common ways for railroads to economically access new markets or expand the use of already served markets without engaging in market division type agreements as contained in the MSLLC Agreements. Here, NSR and KCS could have continued to use a haulage service as it did prior to the creation of MSLLC and satisfied NSR’s investment requirements without restrictions to competition. They could have developed a haulage rate for use by other carriers moving transcontinental intermodal traffic across the Speedway that would have enabled NSR to achieve a return on and of its \$308 million investment. Had NSR and KCS set such a rate, NSR

²⁴⁴ *Id.* At 8.

²⁴⁵ *Id.* At 8.

²⁴⁶ In its decision to deny the joint venture the Board notes “The restrictions generally would bar MCR from interchanging existing or future rail traffic, either by “steel wheel or rubber wheel,” with any carrier other than NSR other than those existing at an “Interchange Point” as of the closing date, except that traffic could be interchanged if: (1) the traffic both originates and terminates on MCR’s lines; (2) the traffic is interchanged only with a Class III rail carrier and both originates and terminates within Michigan; or (3) the traffic originates or terminates at customers open to reciprocal switching in Lansing, Grand Rapids, Kalamazoo and Battle Creek.”” *Id.* at 2-3.

²⁴⁷ See FD 35187, *Grand Elk Railroad LLC – Lease and Operation Exemption-Norfolk Southern Railway Company*, “Decision,” at 3 (November 3, 2008).

²⁴⁸ *Id.* At 4.

²⁴⁹ See FD 35187, *Grand Elk Railroad LLC – Lease and Operation Exemption-Norfolk Southern Railway Company*, “Decision,” at 3 (January 29, 2009).

²⁵⁰ *Id.* At 3.

would have been compensated for its investment in MSLLC both when NSR used the MSLLC Line as well as whenever shippers selected a railroad competitor to use them.

Set appropriately, such a rate would make NSR economically indifferent to whether NSR or a competitor used the MSLLC Line. This approach ensures that NSR would recoup its investment and achieve a return on that invested capital. Whenever shippers selected a railroad competitor to use the facilities for transcontinental traffic, it would do so via unrestricted gateways at Shreveport and Meridian facilitated by KCS with interchange to another railroad; the railroad in whose account the traffic moved would pay the hypothetical haulage rate to MSLLC, and 100% of that rate would be remitted to NSR. Any additional traffic moving over the MSLLC such as the interlined DITT would be operated as standard interline movements as the parties have done in the past and do so today. The remaining Meridian Speedway traffic would not need a haulage rate as it moves (and would move in the future) by interline railroad movements on each carrier's network (and via KCS over the MSLLC Line).

Given this opportunity, there was no economic justification for KCS to grant NSR exclusive rights to DITT. That traffic could have moved, as it does today, in interchange with KCS at Meridian with either NSR or a competing carrier. Accordingly, MSLLC could have collected any additional fees required to recoup NSR's investment or otherwise continue to allow KCS to earn revenues and contribution margin for these traffic movements over the MSLLC Line and the portion of the line to and from the DIT.²⁵¹

In Figure 14 below, I present a summary of my economic analysis by simulating a hypothetical haulage arrangement that could have been negotiated between NSR and KCS. Further, I quantify this haulage rate for MSLLC's services to show that KCS and NSR had an economically viable alternative to their Exclusivity Arrangements. I develop a haulage rate for the NSR Transcontinental traffic for the incremental investment of \$308 million²⁵² representing NSR's capital contribution in MSLLC.²⁵³ This analysis is conceptually consistent with an embedded cost based rate that includes

[REDACTED]

²⁵¹ See McClellan Dep. Tr.12:12:12 (July 11, 2022) [REDACTED]
²⁵² \$308 million in investments made by NSR to MSLLC as of year-end 2021. See Norfolk Southern Combined Railroad Subsidiaries, "Class I Railroad Annual Report," at Schedule 310 (Investments and Advances Affiliated Companies).

the up-front capital contribution and calculates the rate per unit for Transcontinental Traffic subject to haulage service over the Meridian Speedway²⁵⁴ that would be needed to recover that capital contribution,²⁵⁵ as well as a reasonable return on the capital investment²⁵⁶ and an estimate of the operating cost for the haulage service over the Meridian Speedway.²⁵⁷

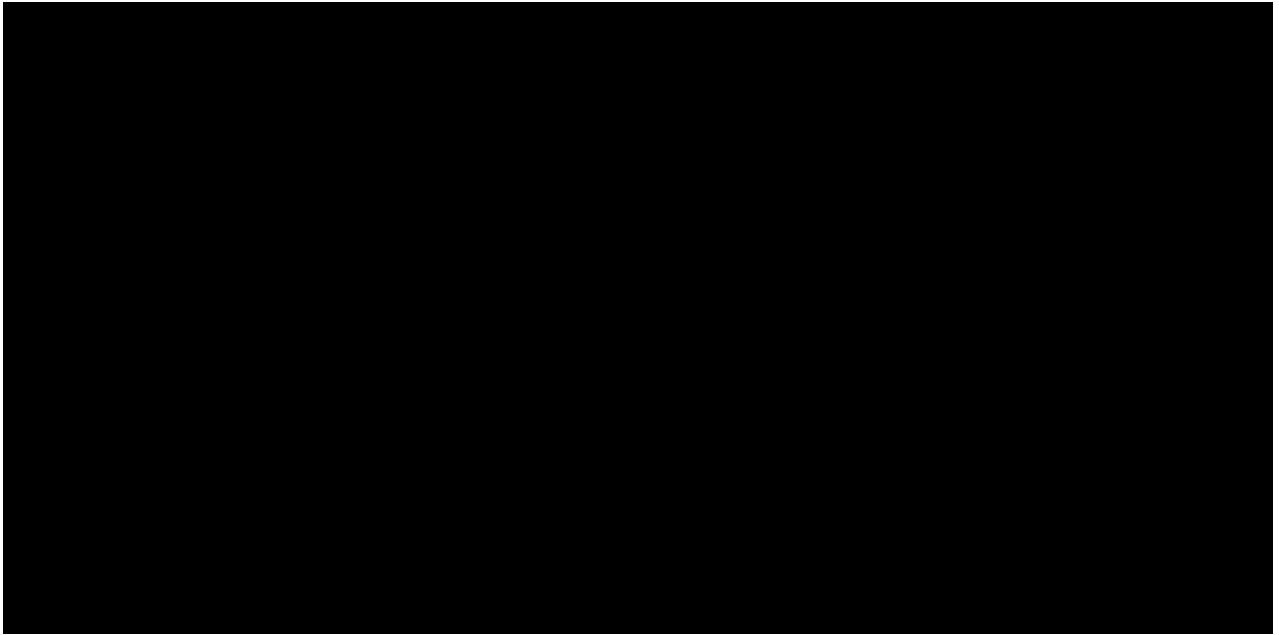
Under this analysis, as shown below in Figure 14, MSLLC could have charged any shipper who desired to use the MSLLC Line with an approximate [REDACTED] / unit haulage rate in 2021 for haulage service over the for transcontinental traffic movements. To the extent that transcontinental traffic volumes are higher than 2021 in the future, the effective haulage rate could be lower (i.e., spreading fixed costs over more units) which makes the analysis conservative. This provides a strong economic incentive for a haulage services that would support additional traffic achievable by more railroad competition over the facilities, consistent with the economic incentives associated with the Meridian Speedway when it was wholly owned by KCS.

254 [REDACTED]

I assume the capital recovery period extends for 40 years, which is consistent with NSR's assumed trackage and related asset life in the 2005 time period. In 2005, NSR's annual composite depreciation rate for roadway was 2.20%, which is equivalent to a 45-year life ($1 / 0.0220 = 45.45$). See Norfolk Southern, STB Class I Railroad Annual Report, 2005, Schedule 332 (Depreciation Base and Rates – Road and Equipment Owned and Used and Leased From Others), Revised, line 30, col. (d), at 34.

²⁵⁶ My 10% cost of capital assumption is consistent with contemporaneous information available during the JV decision in early 2005, including the STB determined cost of capital (Class I railroads) for the 2001-2004 period, which ranged from 9.40% to 10.19%. See STB chart for Railroad Revenue Adequacy, 2000 to 2020, available at <https://www.stb.gov/wp-content/uploads/Revenue-Adequacy-chart-2020-2.xlsx>. In addition, NSR [REDACTED]

This estimate is based on audited financial statements of MSLLC obtained from KCS in discovery. See Carey HC-WP “Historical NSR Rates and Operating Expenses.xlsx”

Figure 14: Estimated NSR Transcontinental Haulage Rate for MSLLC Line (\$/Unit)²⁵⁸}}

}}

With the removal of the harmful perpetual Exclusivity Arrangements in the MSLLC Agreement and in a world where MSLLC is paid (at a rate ensuring that NSR receive a return on and of its investment) for the haulage services it provides over the MSLLC Line for transcontinental intermodal traffic movements, there would be no reason to preclude competition over the MSLLC Line in interline or haulage service to permit CSXT to compete from Shreveport (with KCS haulage) or Meridian (KCS interline) for movements to and from Southeastern U.S. and Mid-Atlantic destinations). With more competition, shippers would be expected to receive tangible savings and public benefits, including potentially higher rail traffic volumes from the lower railroad rates from enhanced rail competition between NSR and CSXT and diversion of more traffic from highways. This is shown in Section VII below. NSR would continue to earn sufficient contribution margin on its movements east of Meridian to be a rigorous competitor with CSXT.²⁵⁹

In addition, KCS would continue earning revenues for traffic movements between Dallas (and other locations) and Meridian for interchange with CSXT and NSR (instead of just NSR) which provides KCS with [REDACTED]²⁶⁰ This approach would avoid [REDACTED]

²⁵⁸ See Carey HC-WP “Estimated NSR Transcon Haulage Rate for MSLLC Line.xlsx”.

²⁵⁹ See Carey HC-WP “NSR Contribution Margin.xlsx”.

²⁶⁰ See Carey HC-WP “KCS DITT CM.xlsx”.

[REDACTED] that KCS receives from the haulage payments associated with the transcontinental intermodal traffic movements based on its 70% ownership interest in the MSLLC. As discussed in section VI.A, the [REDACTED]

[REDACTED] 261

D. NSR's Strong Historical Contributions Margins from the MSLLC Line Traffic show that even if the Exclusivity Arrangements were needed in 2006, they are No Longer Needed

Since 2006, NSR has received unusually large amounts of contribution margin from its participation in the MSLLC JV because of the inappropriate perpetual Exclusivity Arrangements. This indicates that the Exclusivity Arrangements were unnecessary in the first instance for NSR to receive its required return and that NSR has already recouped its investment due to competitive restrictions that are no longer necessary. Even if there was initial uncertainty regarding the need for competitive restrictions to induce capacity-improving investments, NSR has more than recouped its investment in the past 15 years and the restriction is no longer justified. I focus on NSR's profitability regarding the new investment it argues necessitated the MSLLC. The remaining traffic over the MSLLC Line moves by interline railroad movement on each carrier's network (and via KCS over the Meridian Speedway) and will continue to do so in that manner in the future with each railroad earning its contribution margin above the variable cost of the move.²⁶²

I estimate NSR's historical volumes, revenue, and contribution margin achieved for the 2006 to 2022 period. While CSXT asked for this information in discovery, NSR did not provide it.^{263, 264} As

²⁶¹ For example, the current haulage rate is approximately [REDACTED]

[REDACTED] See Appendix C – Haulage.

²⁶² *Ibid.*

²⁶³ For traffic volumes I used 2019 -2021 (NSR Traffic Tapes) and Transcontinental Traffic volumes from KCS discovery for 2008-2018. For other traffic types and 2006-2007 data gaps, I interpolated volumes based on the growth rate in NSR volumes reported by the CWS Waybill sample (by traffic type). For the revenues I used the 2019-2021 revenues from the NSR traffic tapes along with the percentage increase in NSR rates from CWS waybill sample. For the cost estimates, I used URCS costs for the specific movements on NSR's system east of Meridian by traffic type for 2020 and adjusted the unit costs by the percentage change in the adjusted RCAF for all other years. I added the haulage rate payments to the costs of the NSR Transcontinental Traffic. 2022 estimates are based on 2021.

²⁶⁴ A data request was made to NSR for information to determine profitability (of NSR intermodal traffic on Meridian Speedway from 2007 to the present, and the NSR response was to reference NSR

shown in Figure 15 below, I estimate NSR has earned [REDACTED] dollars in contribution margin.²⁶⁵ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Waybill data that had been produced. *See* Norfolk Southern Railway Company's Amended Responses and Objections to CSX Transportation, Inc.'s Second Set of Data Requests, June 22, 2022, Data Requests and Responses 3 and 4. Another data request asked for information on profitability since 2007 (Data Request 5) and specific identification of responsive documents was not provided.

²⁶⁵ *See* Carey HC-WP "NSR Contribution Margin.xlsx". [REDACTED]

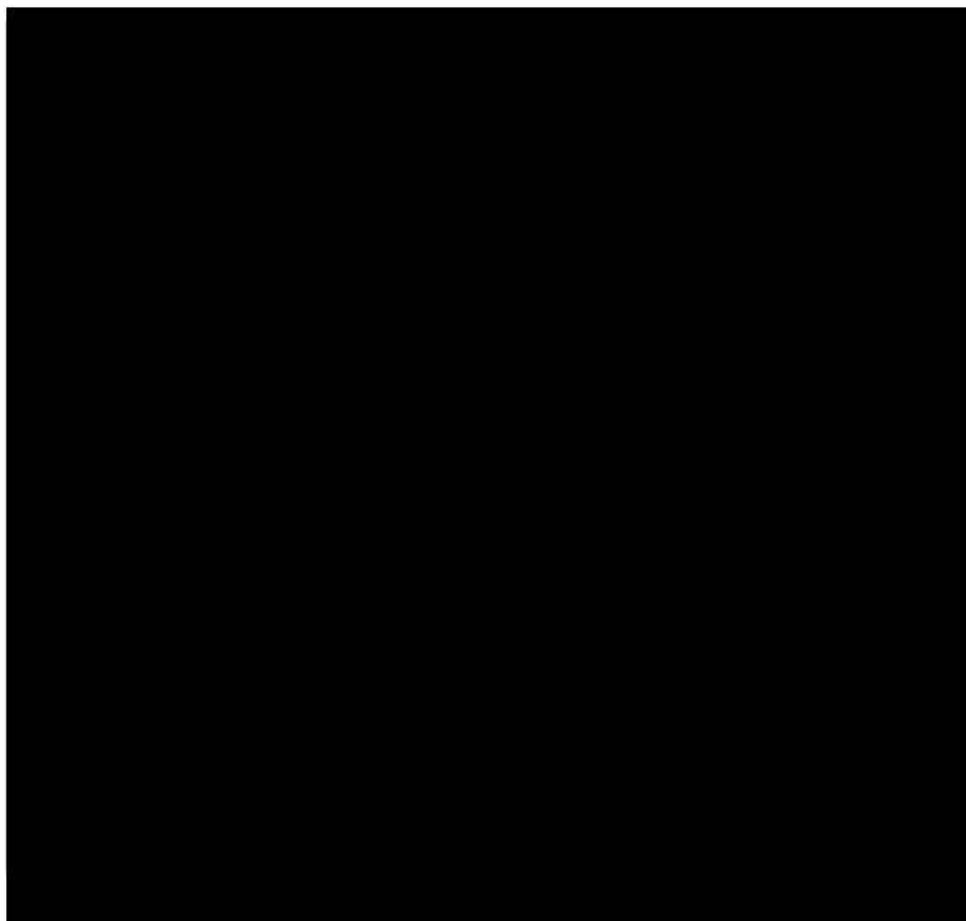
NSR contributed \$300 million in investments along the Meridian Speedway. *See* Norfolk Southern, "Form 8-K," December 2, 2005, at item 1.01, available at <https://sec.report/Document/0000702165-05-000255/>.

²⁶⁷ This number is even higher if you consider any profits that have been redistributed to NSR through its 30% ownership of the Meridian Speedway. [REDACTED]

²⁶⁹ This analysis relies on URCS variable costs. The URCS cost procedure includes a general overhead ratio which allocates administrative and other indirect expenses to cost components. In addition, depreciation and return on investment ("ROI") are included in the linehaul cost component. *See* "The Railroad Cost Program", Surface Transportation Board, available at <https://www.stb.gov/reports-data/uniform-rail-costing-system/>. In addition, taxes are considered when developing "General Overhead and Constant Costs," "Property and Equipment Investment Account Adjustments," "Investment Costs," and "Operating Costs." *See* URCS 2020 Worktables at sheets "D8P2," "B5P3," "A4P3," "A2P4".

Figure 15: NSR Contribution Margin for Traffic over the MSLLC Line²⁷⁰

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Since NSR has already received a reasonable return on its investment, there is limited additional reason to continue exclusivity into the future.

VII. LARGE SHIPPER AND PUBLIC BENEFITS WOULD BE ACHIEVED WITH GATEWAYS AT SHREVEPORT AND MERIDIAN OPEN TO ALLOW ENHANCED COMPETITION TO AND FROM EASTERN RAIL MARKETS

Any unnecessary limitation on competition—such as only one Eastern railroad carrier accessing a highly efficient and advantaged route as the Meridian Speedway²⁷¹—reduces

²⁷⁰ See Carey HC-WP “NSR Contribution Margin.xlsx”

²⁷¹ NSR acknowledges the economic advantages of the route used for the Meridian Speedway. See NS-12 at 10.

achievable benefits of competitive markets, such as lower rates to shippers and overall consumer welfare below otherwise attainable levels. NSR's Responsive Application claims of efficiency benefits from Meridian Speedway and the MSLLC JV fail to assess the economic implications of the Exclusivity Arrangements and the closed gateways at Meridian and Shreveport.²⁷² Despite historical increases in volumes over the Speedway since the formation of the MSLLC JV,²⁷³ shippers would achieve overwhelmingly greater economic benefits from the abrogation of the perpetual KCS-NSR Exclusivity Arrangements and opening both the Shreveport and Meridian gateways to the MSLLC Line. Given the very modest efficiency-related benefits associated with the proposed CPKC Transaction,²⁷⁴ removing these obstacles to competition will lead to a higher level of public benefits from the Proposed Transaction and best ensure competitive railroad markets going forward.

Figure 16 below summarizes the results of my customer savings analysis that quantifies the public benefit to shippers in the form of the lower rates achievable with rail competition over the MSLLC Line, in addition to the benefits of bringing trucks off the road.²⁷⁵ These public benefits are attainable by removing the Exclusivity Arrangements and opening the gateways at Meridian and Shreveport to an additional competition. This analysis is based on two approaches using (1) actual lower CSXT rates and reaffirmed with (2) statistical analysis confirming that two competitors versus one will lower rates. Opening both gateways to the MSLLC Line would enable an additional Class-I railroad interchange partner at the gateways, increasing eastern railroad competitors from one to two and allowing UP to compete with KCS for all traffic to and from Shreveport (i.e., Transcontinental traffic as well as Mexico traffic). I show a range of additional public benefits from \$30 million to \$32 million annually achievable from the additional railroad competitor over the MSLLC Line. Public benefits can even reach as high as \$50 million a year when considering that increased competition can induce shippers currently using trucks to use a rail alternative instead.

[REDACTED]

Ibid. NSR states "the meridian Speedway transaction was pro-growth, procompetitive, allowed shippers to utilize a highly efficient route service."

²⁷³ See NS-12 at 9-15 (general discussion) and at 15-20 (Dallas).

²⁷⁴ In my February V.S., I showed the small transactions related benefits when properly analyzed. See CSXT-8, Carey V.S., Section IV. Specifically, the Applicant's public benefits from annual cost savings approximated \$172-194 million. The majority of Applicant's claimed public benefits are private benefits (additional revenue to CPKC) and not benefits to shippers.

²⁷⁵ My analysis is limited to the lower rates received by shippers. This is distinct from the CPKC application (CP-26/KCS-14) that attempted to include the revenue it would achieve from increased customers instead of the customer benefits of lower rates. See CSXT-8, Carey V.S., Section IV (February 28, 2022).

Figure 16: Annual Customer Savings (Public Benefits) Achievable through an Open Gateway/Interchange Across the MSLLC Line (Shreveport and Meridian)²⁷⁶

Annual Customer Savings Achievable through an Open Gateway Across the Meridian Speedway			
Estimation Method		Minimum	Maximum
(1)	Savings from introduction of second competitor on MSLLC Line	\$30 million	\$32 million
(3)	Saving for shippers who ship from truck to rail moves	\$7 million	\$17 million
(4)	Saving from Line 1 plus Line 3	\$37 million	\$49 million

Notes and sources

1. See Appendix E - Interchange Analysis and See Carey HC-WP “2019 Price Comparison and Savings Analysis.xlsx”

My analysis shows that just an additional railroad competitor accessing traffic across the MSLLC Line will result in substantial additional public benefits to Southeastern and Mid-Atlantic U.S. customers. Adding another railroad lowers rates and intensifies competition, taking trucks off the road.²⁷⁷ These “cognizable efficiencies are important considerations in evaluating any transaction and ensuring the public interest.”²⁷⁸ Since only NSR is currently able to interchange UP transcontinental traffic via the Shreveport gateway and Dallas Intermodal Terminal Traffic via the Meridian gateways, both gateways need to be opened and the restrictions associated with the Exclusivity Arrangements removed.

²⁷⁶ See Carey HC-WP “All Savings All Methods Summary.xlsx”

²⁷⁷ This analysis is conservative for numerous reasons. First, it relies on historical 2019 intermodal traffic volumes for NSR, which have already risen substantially; this assumes that rail carriers cannot lower rates further than 2019 levels and ignores traffic increases that have accrued, and will continue to accrue, since 2019. Second, the analysis does not include other types of traffic that could also compete at the gateways and benefit shippers.

²⁷⁸ NS-12, “Amended V.S. of John W. Mayo,” at 12-13. Dr. Mayo recognizes to ensure that the proposed merger is in the public interest, the STB should evaluate the credibility the claimed efficiencies by requiring that they are “cognizable.” “Cognizable efficiencies” refer to merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. The Agencies evaluate the magnitude and character of cognizable efficiencies against the likely anticompetitive effects, such that the merger is unlikely to be anticompetitive. See Vertical Merger Guidelines at 11 and Horizontal Merger Guidelines at 30-31.

NSR's comments highlight the economic importance of open gateways to best ensure competition and benefits for shippers.²⁷⁹ I agree with NSR about the high importance of open gateways. NSR is silent, however, regarding the substantial additional benefits that I show below are achievable by removal of the Exclusivity Arrangements as well as opening the MSLLC Line gateways.²⁸⁰

A. Substantial Public Benefits Could be Achieved from Opening the MSLLC Line Gateways (at Shreveport and Meridian) Allowing Two Instead of One Eastern Railroad Competitor for All Traffic that Might Efficiently Use that Line (Based on Statistical Analysis of Railroad Rate Competition at Gateways/Interchanges)

In the next two subsections, I discuss my two estimates of the public benefits achievable from opening both gateways to the MSLLC Line that provide shippers with the choice of railroad alternatives and an additional Class-I railroad competitor. The first is a statistical analysis of railroad rates for intermodal traffic movements that involved different numbers of railroad route competitors across gateway locations (i.e., interchange locations). This analysis conducted was for the 2019 study year and included all actively used intermodal lanes across the United States.²⁸¹ The statistical analysis evaluates whether and to what extent the number of railroad routing competitors across gateway/interchange locations is an economically significant attribute of the railroad rates being charged. The analysis seeks to ascertain if the number of actual competitors explains some portion of the difference in the customer railroad rates.

This statistical analysis reaffirms the well understood economic principle that gateways/interchange locations with more than one railroad competitor have lower rates than interchange locations with only one railroad. Having two competitors instead of one results in substantially lower rates and large benefits to shippers. The analysis statistically confirms that lower

²⁷⁹ See NS-12, at 30-33, 42-46; NS-12, "Amended V.S. of John W. Mayo," at 4-5, 20-21, 29-30. NSR's response to the Amended Operating plan provides statistics of volume growth over the Speedway as economic indicia of procompetitive benefits. NS-12 at 11-13. Volume growth is indicative of market trends, but without other economic analysis is not sufficient alone to conclude that the transaction had a competitive benefit to shippers.

²⁸⁰ NSR ignores the benefits of open gateways when discussing its JV, but nonetheless demands that CPKC ensure that the Meridian Speedway gateways remain open for their exclusive use. See NS-12 at 2-4 (discussing the MSLLC and agreement but not addressing Exclusivity Arrangements); NS-12 at 9-40 (discussing the MSLLC and impacts of the proposed CPKC Transaction but not addressing Exclusivity Arrangements); NS-12, "Amended V.S. of John W. Mayo," at 24-29 (discussing the MSLLC Agreements but not addressing Exclusivity Arrangements); NS-12 at 30-33, 42-46 (discussing concerns regarding open gateways); NS-12 at 4-5, 20-21, 29-30 (discussing concerns regarding open gateways).

²⁸¹ The data relied for the analysis is the 2019 STB CWS which includes approximately 350,000 origins and termination locations on Class 1 railroad networks. For further discussion of methodology and data see Appendix E – Interchange Analysis.

rates result with more competitors.²⁸² Further, my analysis demonstrates that the highest incremental benefits result from increasing from one to two competitors, which is the potential result here. I conclude shippers can expect to save about \$0.04 per car-mile with an increase of interchange railroads from one to two competitors.²⁸³ I report the estimated customer savings achievable under two statistical approaches (which I refer to as Model 1 and 2 in Figure 17 below).^{284, 285} If this level of savings is applied to the 2019 NSR traffic levels, shippers could expect to save as much as \$32.7 million dollars a year with an open MSLLC Line (Shreveport and Meridian gateways).²⁸⁶ These public benefits savings estimates are conservative, as traffic volumes have grown since 2019 and can be expected to grow further in the future.

Figure 17: Summary of Annual Public Benefits Achievable for Intermodal Traffic with an Additional Competitor with Open Gateways at Shreveport and Meridian (Statistical Analysis)²⁸⁷

Traffic Type	Savings Model 1	Savings Model 2
[a]	[b]	[c]
Transcontinental	\$21,062,081	\$22,943,528
Dallas	\$7,208,889	\$7,852,849
Mexico	\$1,791,442	\$1,951,469
Total	\$30,062,411	\$32,747,845

²⁸² This economic analysis shows that the number of competitors at the interchange is a statistically significant factor in determining the railroad rate (i.e., it is over 99% likely that the observed effect is due to an existing relationship in the real world rather than a random quirk in the data set).

²⁸³ See Appendix E – Interchange Analysis.

²⁸⁴ Both versions of the econometric specification quantify the customer savings by estimating the impact of an increase in the number of alternative routes available on the rate. Model 1 estimates the effect by controlling for route distance through a non-linear relationship between distance and rate (as similarly modeled in “Harbor, An Assessment of the Effect of Competition on Rail Rates for Export Corn, Soybean, and Wheat Shipments. Journal of Food Distribution Research. 2009). Model 2 estimates the effect by using a piecewise mapping of distance reported in 250-mile increments. Both models control for the same other types of factors such as car ownership, a single line indicator, truck rate, number of interchanges, and Intermodal service code.

²⁸⁵ I tested the econometric model across numerous specifications and the results are robust across varied specifications, meaning that even changes to the variable construction or control inputs in the model does not meaningfully change the results. This is further evidence that the observed phenomenon is not a contrivance of the model, but a causal relationship which exists in the real world.

²⁸⁶ See Appendix E – Interchange Analysis.

²⁸⁷ See Appendix E – Interchange Analysis. See Carey HC-WP “All Meridian Savings.xlsx”. Other specifications were tested that show this estimate is conservative.

An additional benefit will result from the lower railroad rates for intermodal traffic from two eastern railroads competing head-to-head at the Shreveport and Meridian gateways, as shown in Figure 17 above. The lower railroad rates will make rail transportation more competitive with the current trucking transportation alternatives and the number of intermodal units carried by railroads as compared to trucks will increase. The Board has indicated that the lowered carbon emissions characteristics of freight rail movements promises yet another potential benefit to the open gateways.²⁸⁸

B. Substantial Public Benefits Achievable with an Open Gateways at Shreveport and Meridian)

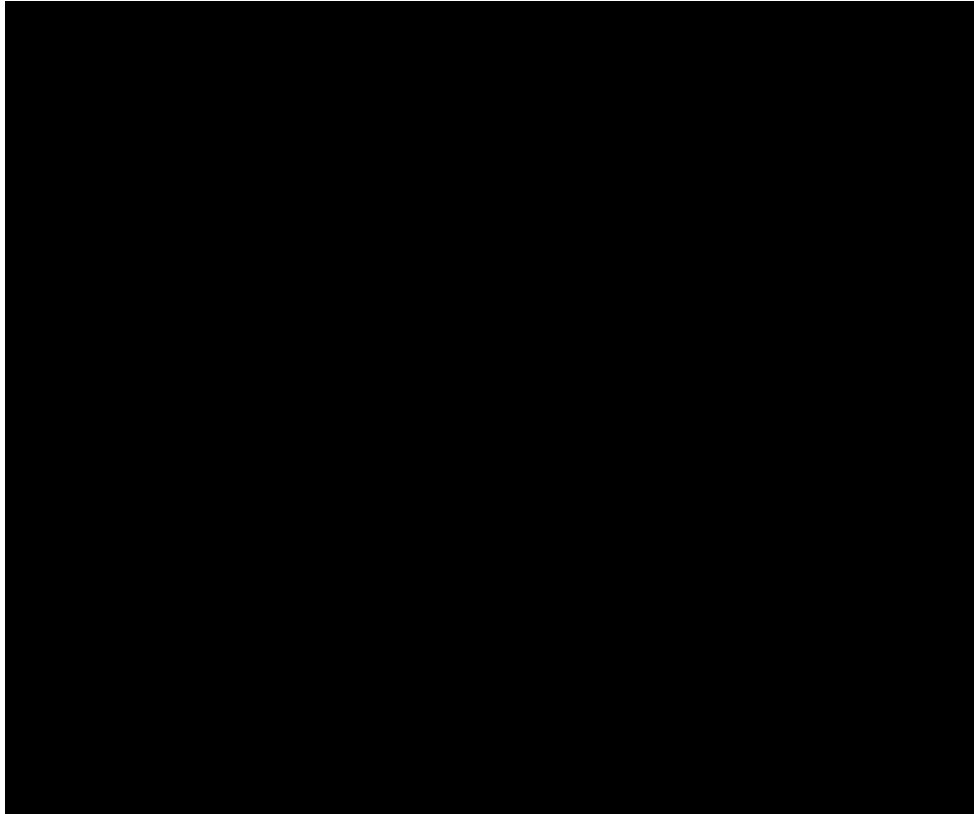
In addition to my statistical analysis, I looked to direct evidence of the ability of CSXT to offer eastern U.S. rail customers [REDACTED] for intermodal traffic. [REDACTED] rates would result by opening both the Shreveport and Meridian gateways to the MSLLC Line enabling an additional Class-I railroad and increasing competitors to and from the east from one to two.

As shown below, lower CSXT intermodal rates provide a real-world estimate of achievable public benefits by making Meridian and Shreveport open gateways and allowing two versus one Eastern railroad to serve Eastern U.S. customers with lower rates.

I compared the actual rates charged by NSR and CSXT for intermodal movements serving the same origin and destination. For example, both railroads serve intermodal movements from Los Angeles, California to Jacksonville, Florida. But NSR takes the more efficient route traversing the MSLLC Line (Shreveport - Meridian), whereas CSXT uses a route through Memphis. As shown in Figure 18 below, CSXT intermodal rates are highly competitive and [REDACTED] than NSR's intermodal rates (both on a per car-mile and per car level basis) for the same origin and destination locations that move across the MSLLC Line.

²⁸⁸ See FD 36500, *Canadian Pacific Railway Limited et Al. – Control – Kansas City Southern et al.*, “STB Decision,” at 3-4 (November 12, 2021).

Figure 18: Comparison of CSXT and NSR MSLLC Line Intermodal Railroad Rates for Transcontinental and Dallas Traffic ²⁸⁹



The NSR intermodal traffic across the MSLLC Line has [REDACTED] rates than the CSXT for transcontinental routes that compete with NSR. On an overall basis, the CSXT rates are [REDACTED] than the NSR rates on a rate per mile and rate per unit basis, respectively. This percentage difference is the weighted average percent difference in the rate per mile and rate per unit of the traffic movements reported.²⁹⁰ For example, one can observe [REDACTED] CSXT rates to and from key intermodal locations such as Atlanta, Charlotte, and Jacksonville. On average, westward transcontinental moves are about [REDACTED] on CSXT than NSR, and up to [REDACTED] on CSXT moving eastward.²⁹¹ This comparison relies on NSR intermodal

²⁸⁹ See Carey HC-WP “2019 Price Comparison and Savings Analysis.xlsx”. The rates presented are for comparable routes only.

²⁹⁰ Weighted on CSXT’s traffic volumes for each of the moves.

²⁹¹ As seen in Section VII *supra*, intuitively, some of the areas with the highest NSR price premiums over CSXT, such as Jacksonville and Charlotte, also have the highest NSR market shares on transcontinental lanes. However, this too is intuitive when considering that BNSF line offers the lowest per-car mile rate and attracts the most carloads of any transcontinental routing. The BNSF per car rate is higher because it represents the rate for the entire Westcoast to Southeastern U.S. move, rather than just the Eastern segment offered by CSXT and NSR.

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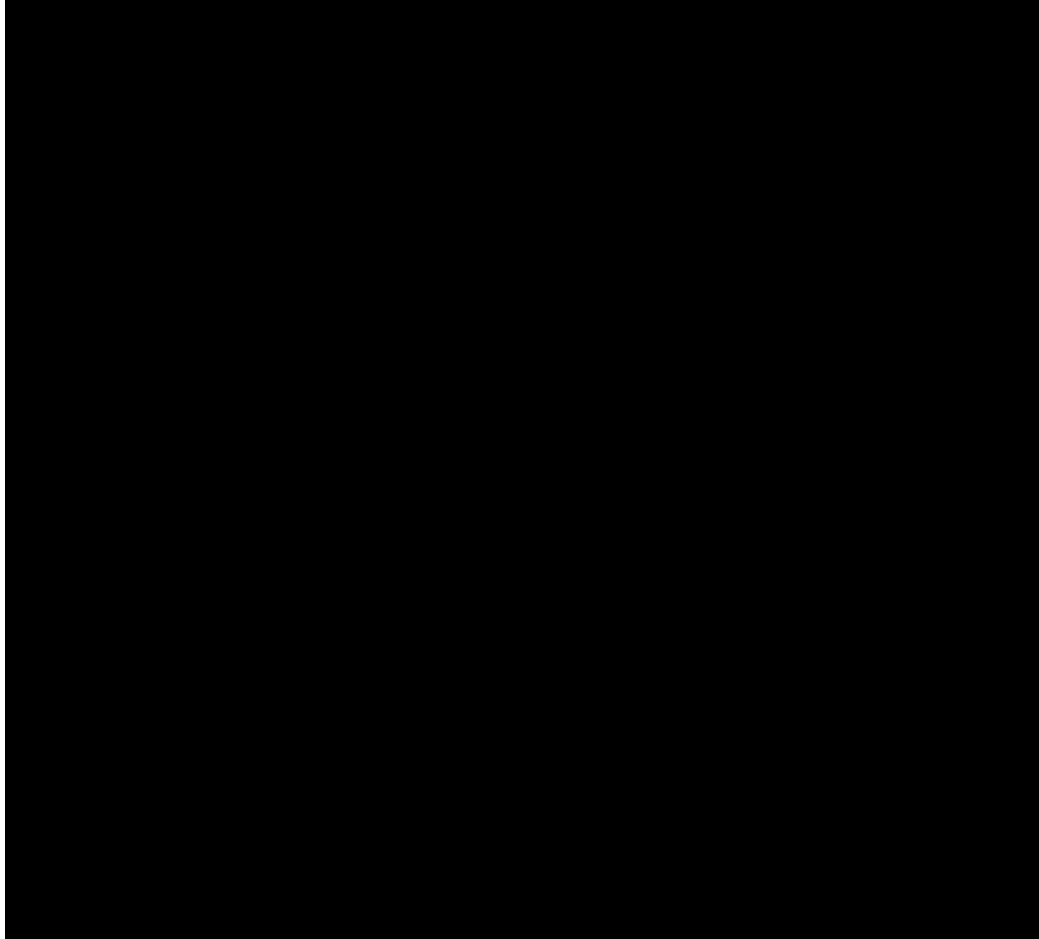
movements over the MSLLC Line and compares them to CSXT intermodal movements to and from the same locations, but which necessarily utilize alternative routings and accordingly, different gateways. [REDACTED]

[REDACTED]

Opening the MSLLC Line's Meridian and Shreveport gateways and removing the Exclusivity Arrangements adds an additional rail competitor and should lead to lower railroad rates for the shipper traffic opened to competition. Figure 19 below summarizes the potential public benefits achievable with open Meridian and Shreveport gateways, no Exclusivity Arrangements and CSXTs competitive railroad rates, saving shippers up to \$ [REDACTED] million annually on the intermodal traffic movements in the Eastern U.S.

**Figure 19: Summary of Annual Benefits Potentially Achievable with CSXT Rates
(instead of NSR Rates for MSLLC Line Traffic) (\$ Millions) ²⁹²**

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This analysis assumes that CSXT may charge the same per-car or per-car mile rate over a potential route on the MSLLC Line that it currently charges for intermodal traffic for other movements. It then compares the difference between the potential CSXT rate and the current NSR rate and assumes that the future price will converge on the lowest existing rate. The analysis then compares the total difference in rate at 2019 traffic levels.

The results of the CSXT and NSR rate comparison are consistent with my findings from the statistical analysis (in Section VII. A.) where additional interchange railroad alternatives are shown to reduce railroad rates. These findings are robust across many different types of routes that have certain economic advantages. The CSXT and NSR rate comparison analysis is conservative because

²⁹² See Carey HC-WP "2019 Price Comparison and Savings Analysis.xlsx". The rates presented are for comparable routes only.

it assumes that rail carriers cannot lower rates further than 2019 levels and ignores traffic volume increases that have accrued, and will continue to accrue, since 2019.

C. Public Benefits and Lower Rates/Costs to Customers Achievable by Taking Trucks Off the Road from Heightened Railroad Competition

The Board has stated that inducing shippers to switch from truck transportation to rail transportation is a cognizable benefit of a rail transaction.²⁹³ As stated above, introducing open gateways on the MSLLC Line (at Shreveport and Meridian) and removing restrictions of the Exclusivity Arrangements will enable an additional Class-I railroad interchange partner which increases the presence of Eastern railroad competitors from one to two and will have the effect of reducing the average intermodal rate charged to customers. The enhanced railroad competition will have the additional benefit associated with lowering the prevailing intermodal rail rate as compared to the trucking alternative, which will necessarily²⁹⁴ induce some shippers to choose rail instead of truck for their shipping options. Therefore, opening the MSLLC Line gateways will lead to additional public benefits.

Assuming the estimated rate reduction produced in the econometric study, the reduced rate will induce about half a percent of current truck volumes to travel by rail instead, which approximates 2,000 units likely to shift from truck to rail transportation.²⁹⁵ However, the benefits do not only extend to current NSR Exclusivity Traffic. Opening the MSLLC Line gateways, including the Shreveport gateway to UP's Mexico traffic and the Meridian gateway to CSXT will also allow CSXT to compete for Mexico Traffic to and from the Eastern U.S. Given the routing advantages enjoyed by UP from the Mexico border via Laredo (as discussed in Section V.A), the CSXT-MSLLC-UP interchange has the possibility to induce a further 4,000 to 13,000 intermodal units to convert from truck to rail when one considers both service and price improvements of the open gateway.²⁹⁶ If one then attributes the lower rate paid by rail intermodal customers, shipper can save another \$7 million to \$17 million per year through diversions from truck to rail.²⁹⁷

²⁹³ See NS-12 at 20-21.

²⁹⁴ In theory a rate reduction could be so low as to not induce any truck displacement, however, all things equal, the resulting decreased rail rate could logically never result in an increase in the use of trucks.

²⁹⁵ See Appendix E – Interchange Analysis.

²⁹⁶ See Appendix E – Interchange Analysis.

²⁹⁷ See Appendix E – Interchange Analysis.

These estimates for shipments diverted from highways are a conservative estimate, as they only rely on diversions across existing traffic lanes.²⁹⁸ However, an increase in service and decrease in price could induce shipments currently using alternative routings through the open MSLLC Line gateways. For example, a move that is currently routed from Monterrey, Nuevo Leon (Mexico) to Nashville, TN via truck could be induced to use the gateways on MSLLC Line (Shreveport and Meridian) via railroads with service and price improvements resulting from open gateway (and removed restrictions associated with the Exclusivity Arrangements), however no such diversions are considered in this study. A similar phenomenon for rail movements could also occur and are similarly not considered in this study.

Figure 20: Railroad Expansion (and Truck Displacement) Resulting From Increased Gateway/Interchange Competition on the MSLLC Line²⁹⁹

Traffic Type	Savings Model 1	Savings Model 2
[a]	[b]	[c]
Transcontinental	\$523,713	\$730,160
Dallas	\$711,269	\$1,063,807
Mexico	\$15,534,082	\$5,050,046
Total	\$16,769,065	\$6,844,013

VIII. HIGH SHARES AND NSR'S HIGHER RATES ON THE MSLLC LINE ARE ECONOMIC INDICIA OF COMPETITIVE HARM

In this section, I discuss economic indicia of competitive harm in the Eastern U.S. railroad markets that arises from the MSLLC JV and the indefinite and perpetual Exclusivity Arrangements. I am responding to the NSR Comments on the Amended Operating Plan which claimed efficiency benefits from the MSLLC JV and show that these claims are an incomplete economic assessment of potential competitive harm.³⁰⁰

²⁹⁸ See Appendix E – Interchange Analysis.

²⁹⁹ See Appendix E – Interchange Analysis.

³⁰⁰ See NS-12 at 9-15 (general discussion) and at 15-20 (Dallas). See also NS-12, “Amended V.S. of Michael R. McClellan,” at 2-5. See also NS-12, “Amended V.S. of Claude E. Elkins,” at 3-4.

My analysis below shows that NSR has [REDACTED] for intermodal traffic moving under the Exclusivity Arrangements over the MSLLC Line. In its recent comments, NSR removed all reference to Transcontinental traffic which was present in its initial comments,³⁰¹ presumably out of concern for the [REDACTED] associated with this traffic. Regarding the NSR DITT traffic, NSR acknowledges its [REDACTED]
[REDACTED] I also show that NSR's rates for this traffic are [REDACTED]
[REDACTED]

These economic indicia of market power over MSLLC Line should be viewed in concert with other economic analyses presented in this filing. First, this includes Dr. Shehadeh's V.S. which demonstrates that the MSLLC Line has restricted rail output across traffic movements that use the MSLLC Line and that the Exclusivity Arrangements provide NSR the ability to foreclose competitors from the MSLLC Line by raising rivals' costs to serve transcontinental intermodal traffic to and from the Southeastern U.S.³⁰³ Second, this includes my previously discussed analysis (Section VII) which demonstrates the benefits achievable by removing the MSLLC Exclusivity Arrangements and opening the gateways at Meridian and Shreveport to an additional competitor; an analysis based on two approaches using [REDACTED] with statistical analysis confirming the fact that 2 competitors versus 1 gateway/interchange competitor lowers rates.

The share and NSR rate comparison below are economic [REDACTED]
[REDACTED] As shown on Figure 21, NSR has near [REDACTED] share for intermodal moves to and from the Dallas area.³⁰⁵ NSR also has about [REDACTED] share for transcontinental intermodal market share when one does not consider the competitive single line route on BNSF to Atlanta which is an unusual single line movement.³⁰⁶ The Exclusivity Arrangements associated with this traffic along with [REDACTED]

³⁰¹ See, e.g., NS-9 at 11 as compared to NS-12 at 12 (for discussion of NSR Meridian Speedway traffic).

³⁰² See NS-12 at 16. See also NS-12, "Amended V.S. of Michael R. McClellan," at 4.

³⁰³ Dr. Shehadeh demonstrates empirically that shipper-customers in the [REDACTED] have suffered reduced output and economic welfare. See Verified Statement of Dr. Ramsey Shehadeh at Section I.B. and Section IV.

³⁰⁴ As discussed in my February V.S., market shares statistics are often used to evaluate the potential for competitive concerns; with larger market shares indicating increasing market concentration and heightened concerns for undue influence on a competitive outcome. See U.S. Department of Justice & The Federal Trade Commission, "Horizontal Merger Guidelines," at 18-19 (August 19, 2010). See CSXT-8, Section V (February 28, 2022).

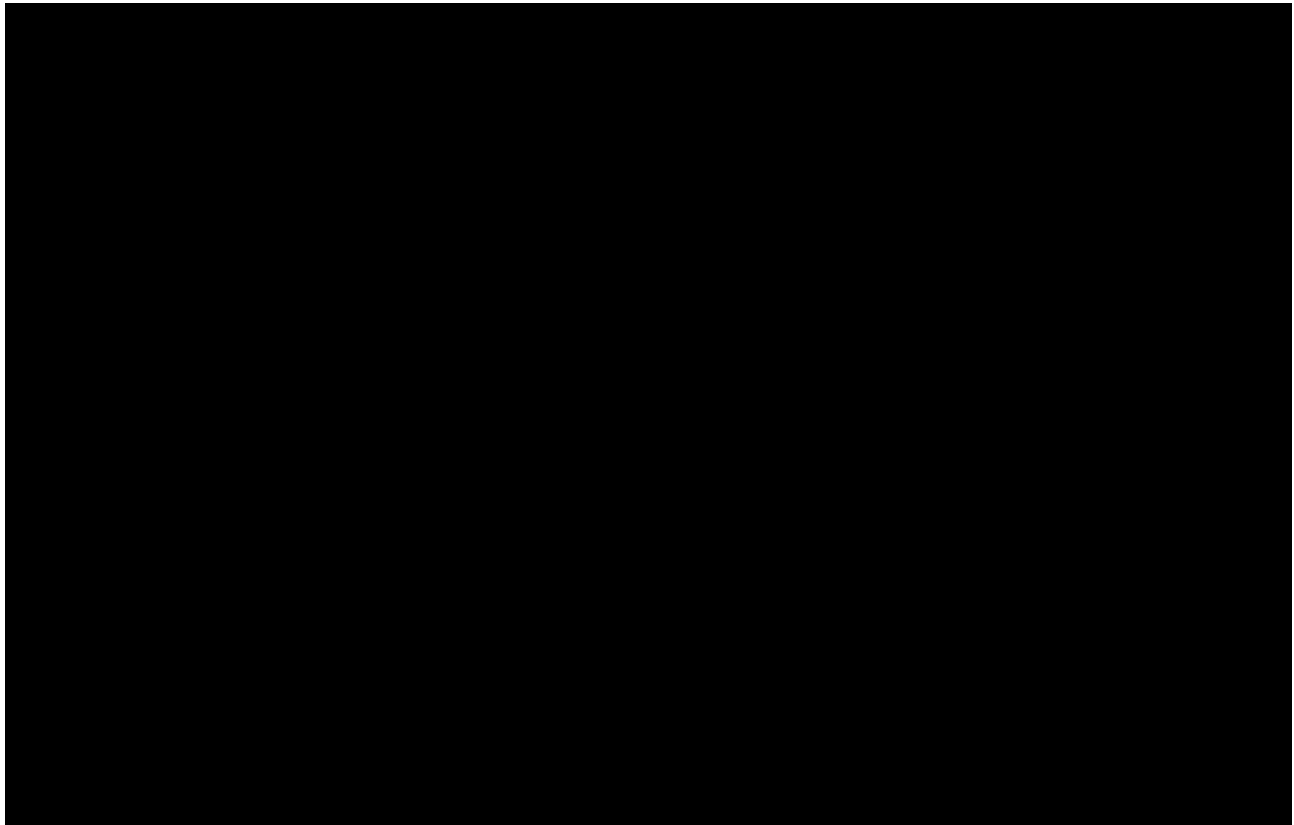
³⁰⁵ Figure 21 at row 13 in column [c].

³⁰⁶ Figure 21 at row 14 in column [f].

³⁰⁷ These are discussed further below.³⁰⁸ Given the length of most moves to/from Dallas and the West Coast to these Eastern locations, trucking alternatives are less able to provide a perfect substitute for the more competitive rail alternatives.³⁰⁹

Figure 21: Summary of NSR Shares for Origin and Termination Lanes Over the MSLLC Line³¹⁰

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As shown in Figure 22, NSR rates for routings over the MSLLC Line are [REDACTED] than the NSR rates over other equivalent origin and termination lanes. This is economic indicia of some level of NSR market power for movements over the MSLLC Line and is [REDACTED]

³⁰⁷ As discussed in my February V.S., anticompetitive problems may arise when one or both levels of the integration possess market power. *See* Viscusi et al., “Economics of Regulation and Antitrust,” The MIT Press, 2nd Edition (1995) at 229, 234. *See* CSXT-8, Section V.

³⁰⁸ My provisional February V.S. also included market shares over the Meridian Speedway calculated using the CWS. The numbers displayed in Figure 21 are calculated using railroad waybills and present and more complete understanding of real-world volumes. *See* CSXT-8, Section V, at 51.

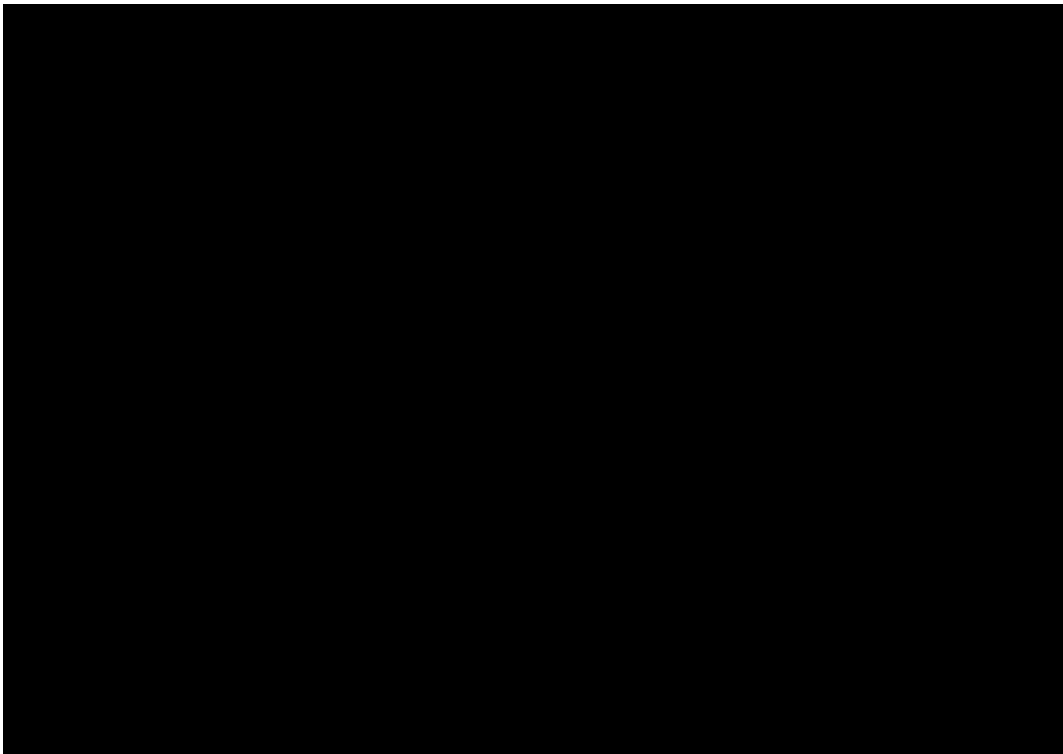
³⁰⁹ A truck competitor for intermodal traffic is estimated to extend to routes as long as 500 miles. *See* Bernstein, “North American Transportation,” at 5 (December 2021).

³¹⁰ *See* Carey HC-WP “MSLLC Line Share Lane Summary.xlsx”

████████████████████ For DITT, a lane in which NSR has near ██████████ share,³¹¹ NSR MSLLC Line routes are ██████████ than alternative NSR options on a per unit-mile basis. See Figure 22 at rows 3 and 4 columns [f] and [g].

Figure 22: Summary of NSR non-Meridian and NSR Meridian Intermodal Railroad Rates for Transcontinental Traffic for 2019³¹²

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The rate difference can be demonstrated by comparing the rate for a move over the MSLLC Line to the rate for a movement along the same origin and destination pair that does not move over the MSLLC Line. There are ██████████ such origin-destination pairs where NSR has both MSLLC Line and non-MSLLC Line traffic to and from Dallas ██████████

██████████ See Figure 21 at ██████████ The two MSLLC Line routes have NSR shares of ██████████ and ██████████, respectively. While the ██████████ non-MSLLC Line route has a NSR rate per unit-mile ██████████ less than the NSR rate per unit-mile of the MSLLC Line route, and the east bound non- MSLLC Line route has a NSR rate per unit-mile

³¹¹ Figure 21 at row 13 in column [c].

³¹² See Carey HC-WP “2019 NS Self Rate Comparison.xlsx”.

less than the NSR rate per unit-mile on the MSLLC Line route.³¹³ Similarly, the non-MSLLC Line route has a NSR rate per unit-mile less than the NSR rate per unit-mile on the MSLLC Line route.³¹⁴ The rate per unit-mile being charged for traffic on the MSLLC Line as compared to non-MSLLC Line traffic suggests a lack of competition for intermodal movements into or from the Dallas area and/or there is a competition issue for intermodal movements over the MSLLC Line.

For transcontinental intermodal moves, NSR traffic on the MSLLC Line accounts for of the origins and terminations as shown in Figure 21. The NSR MSLLC Line rate per unit-mile is than the rates for for transcontinental movements from.³¹⁵ The rate per unit-mile is for a NSR non-MSLLC Line move as compared to for a NSR MSLLC Line move.³¹⁶ The rate per unit-mile for NSR non-MSLLC Line traffic is lower rate per unit-mile as compared to NSR MSLLC Line traffic.³¹⁷ The for the NSR MSLLC Line rate per unit-mile is economic indicia for competitive concern.

Finally, of origin-termination pairs for intermodal for the Dallas area have a NSR MSLLC Line share of.³¹⁸ This suggests moving over the MSLLC Line is the most direct route to and those routes may benefit from competition if the MSLLC Line were opened to other railroads for intermodal traffic. These advantaged routes, coupled with the Exclusivity Arrangements and are further indicia of economic concerns of.³¹⁹

³¹³ See Carey HC-WP “2019 NS Self Rate Comparison.xlsx”.

³¹⁴ See Carey HC-WP “2019 NS Self Rate Comparison.xlsx”.

³¹⁵ See Carey HC-WP “2019 Price Comparison and Savings Analysis.xlsx” and Carey HC-WP “2019 NS Self Rate Comparison.xlsx”.

³¹⁶ See Carey HC-WP “2019 Price Comparison and Savings Analysis.xlsx” and Carey HC-WP “2019 NS Self Rate Comparison.xlsx”.

³¹⁷ See Carey HC-WP “2019 NS Self Rate Comparison.xlsx”.

³¹⁸ See Carey HC-WP “MSLLC Line Share Lane Summary.xlsx”.

³¹⁹ As noted in my February V.S., the DOJ does not set a market share threshold in its guidelines on vertical mergers it states that “levels of concentration may nonetheless be relevant. For example, high concentration in the relevant market may provide evidence about the likelihood, durability, or scope of anticompetitive effects in that relevant market.” This is particularly relevant as there are exclusivity provisions relating to upstream traffic that traverse the Speedway. See U.S. Department of Justice & The Federal Trade Commission, “Vertical Merger Guidelines,” at 3-4 (June 30, 2020). Market shares are squared to calculate HHI which is a measure of market concentration. See CSXT-8, Section V.

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VERIFICATION

I, Julie M. Carey, declare under penalty of perjury that I have read the foregoing Verified Statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to an authorized to submit this Verified Statement.

Executed on July 12, 2022

A handwritten signature in black ink that reads "Julie M. Carey". The signature is written in a cursive style with a large, stylized 'J' and 'C'.

Julie M. Carey

Appendix A – Mexico Cross Border Traffic

Figure 1: CSXT and NSR Carloads Originated or Terminated in Mexico Moving To or From Southeast by Interchange Location (CWS 2019):



Figure 2: CSXT and NSR Intermodal Carloads Originated or Terminated in Mexico Moving To or From Southeast by Interchange Location (CWS 2019)

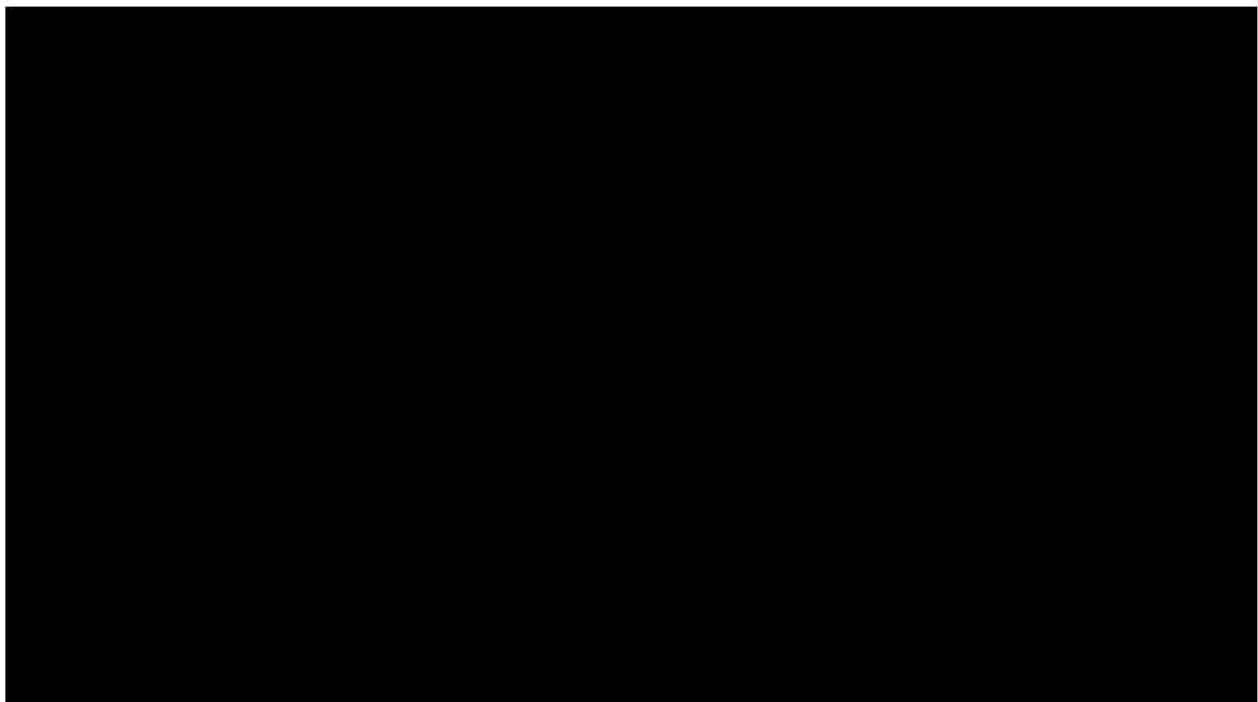


**Figure 3: CSXT Carloads Originated or Terminated in Mexico by Interchange Location
(CWS 2019):**

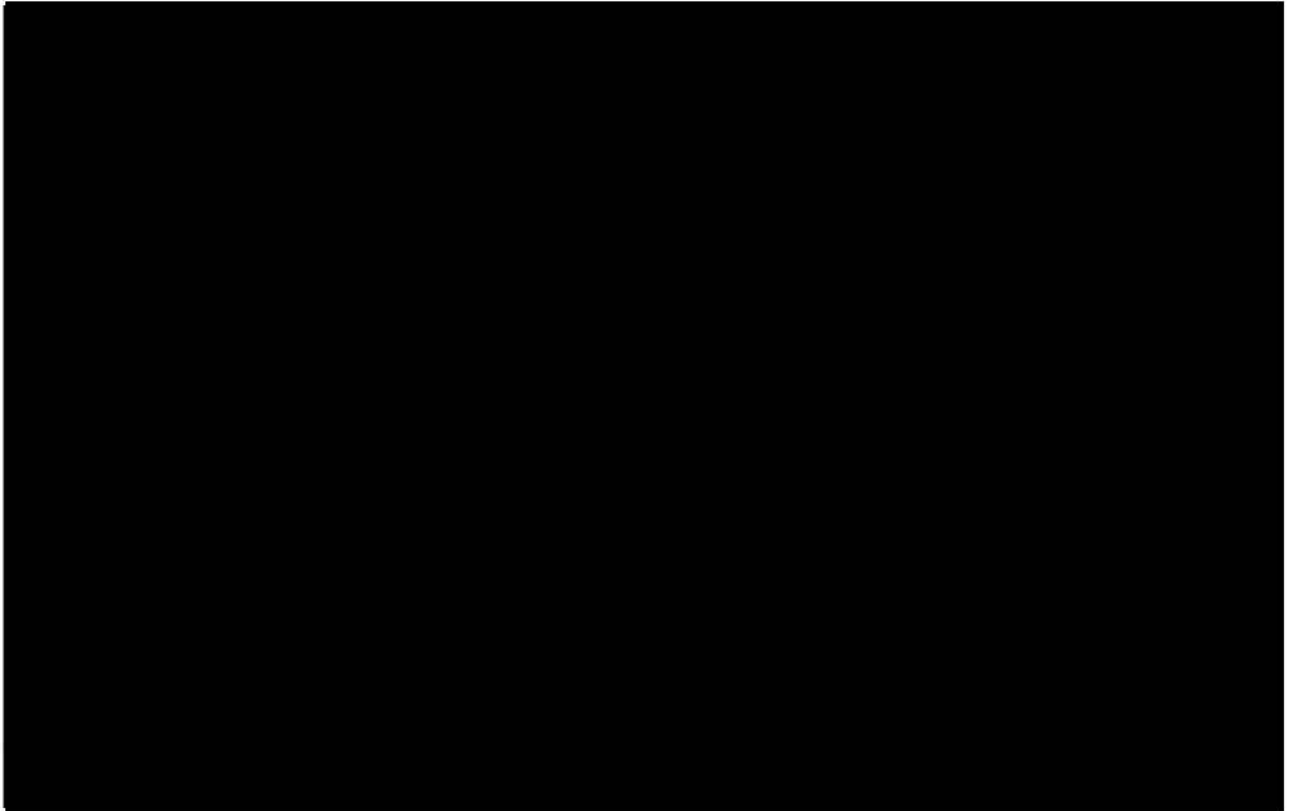


**Figure 4: NSR Carloads Originated or Terminated in Mexico by Interchange Location
(CWS 2019):**

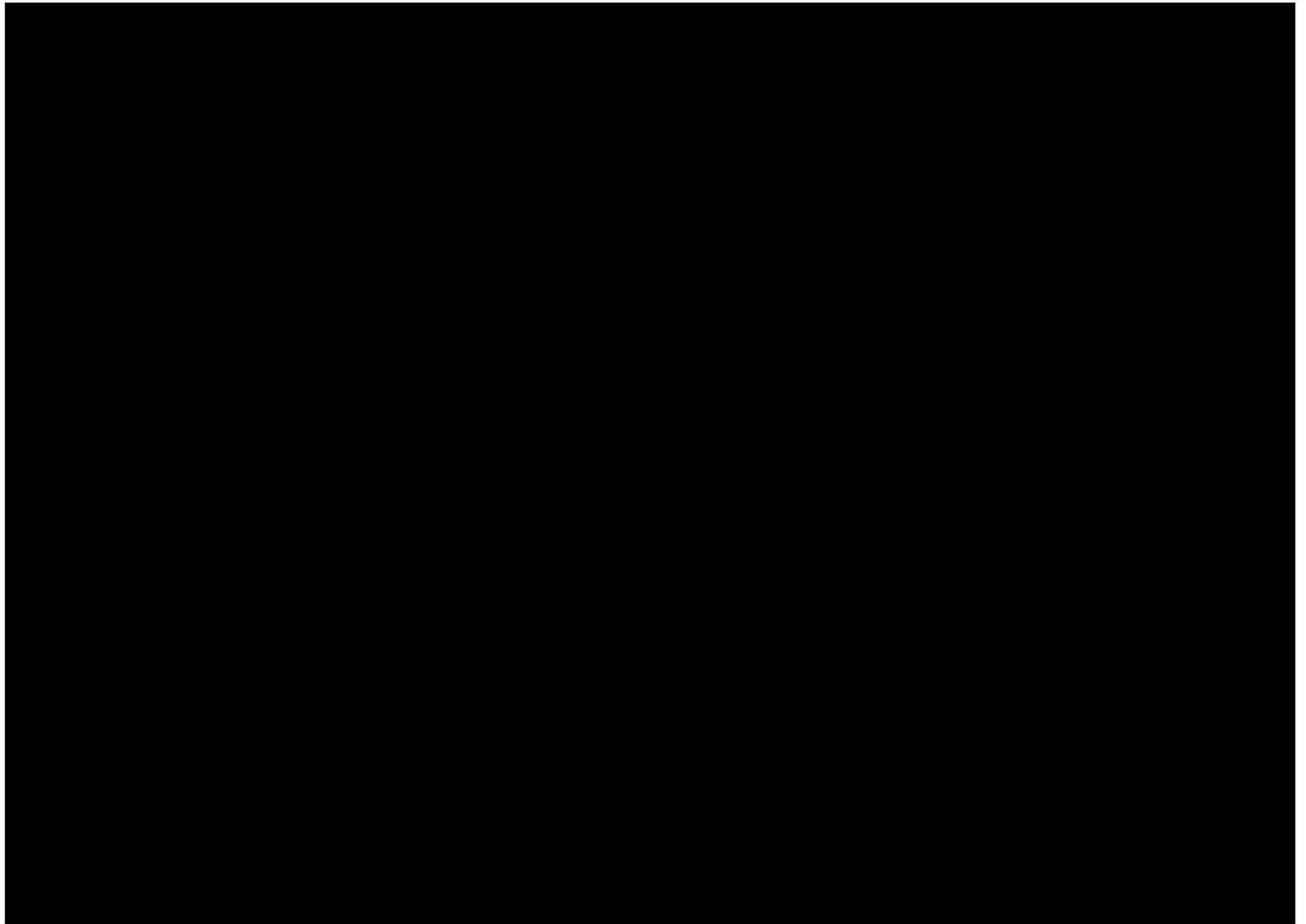
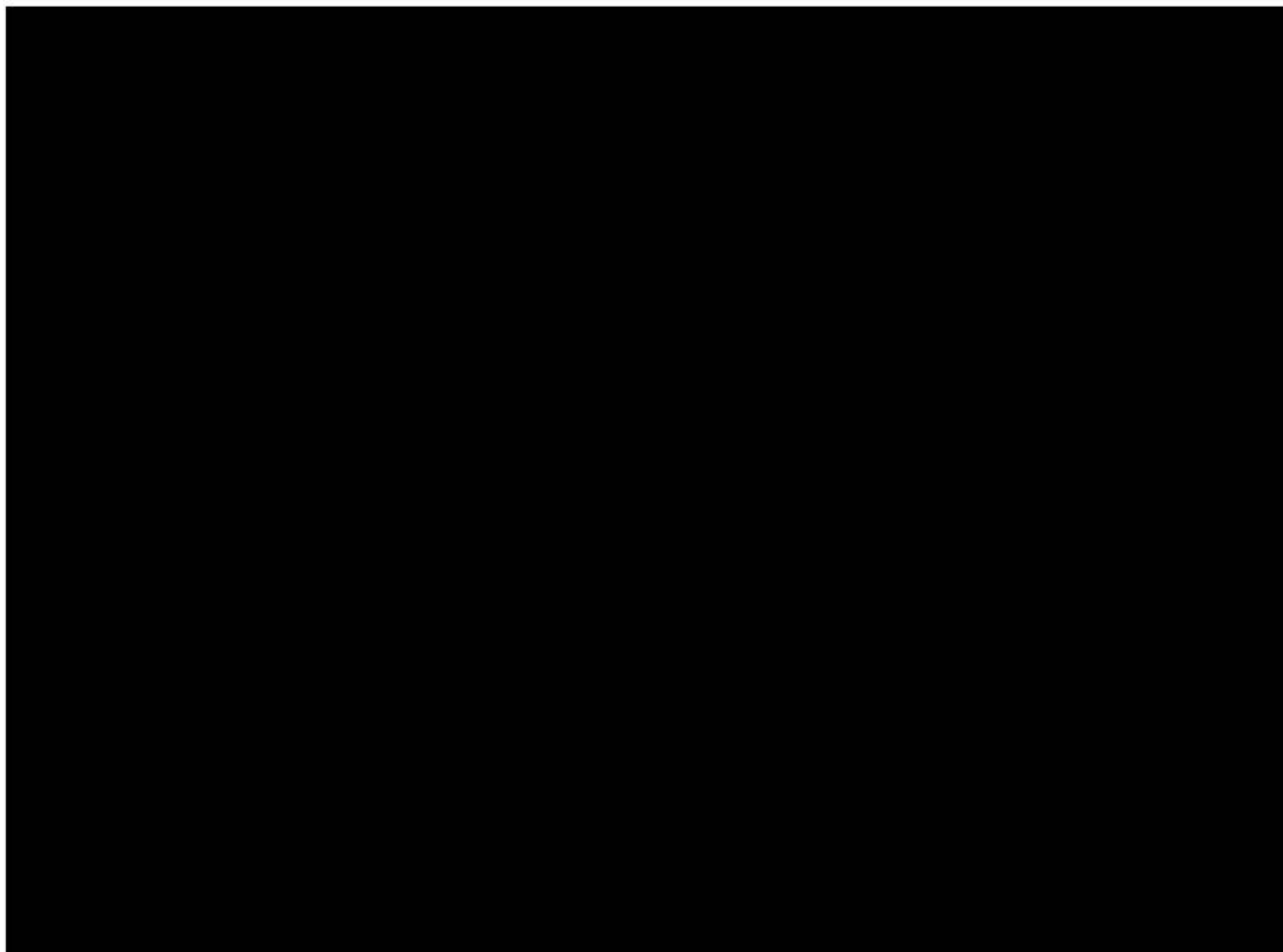
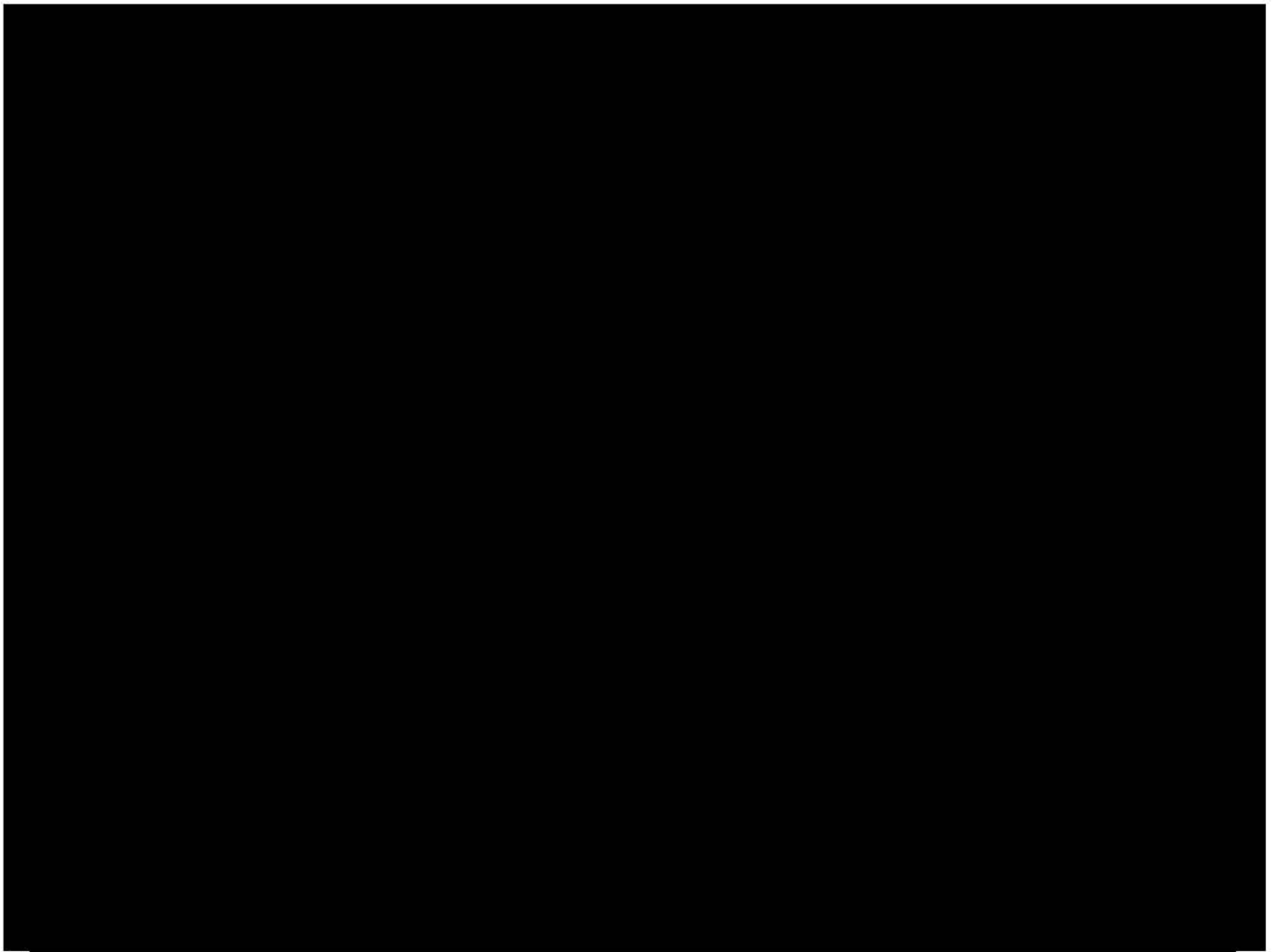
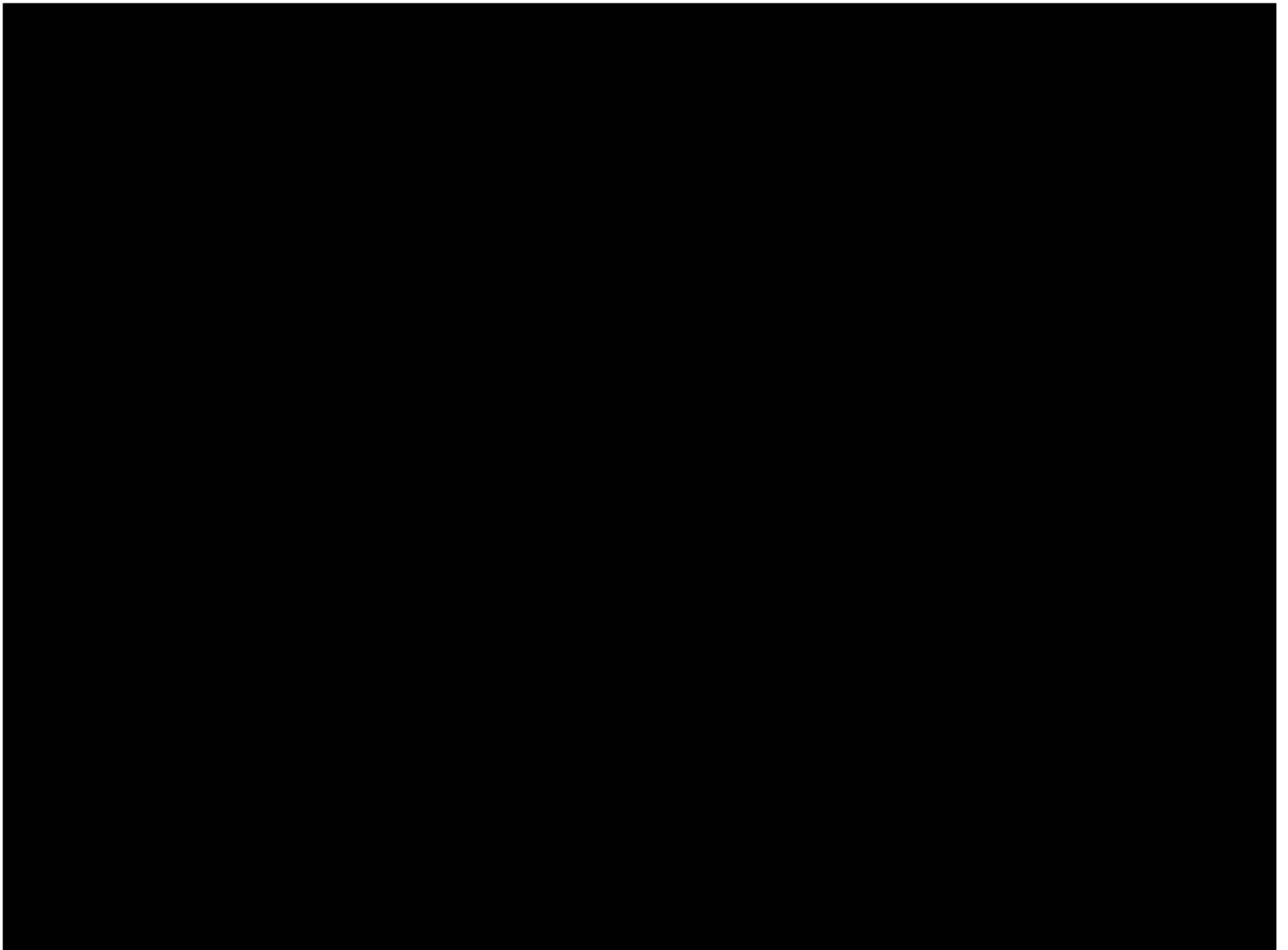
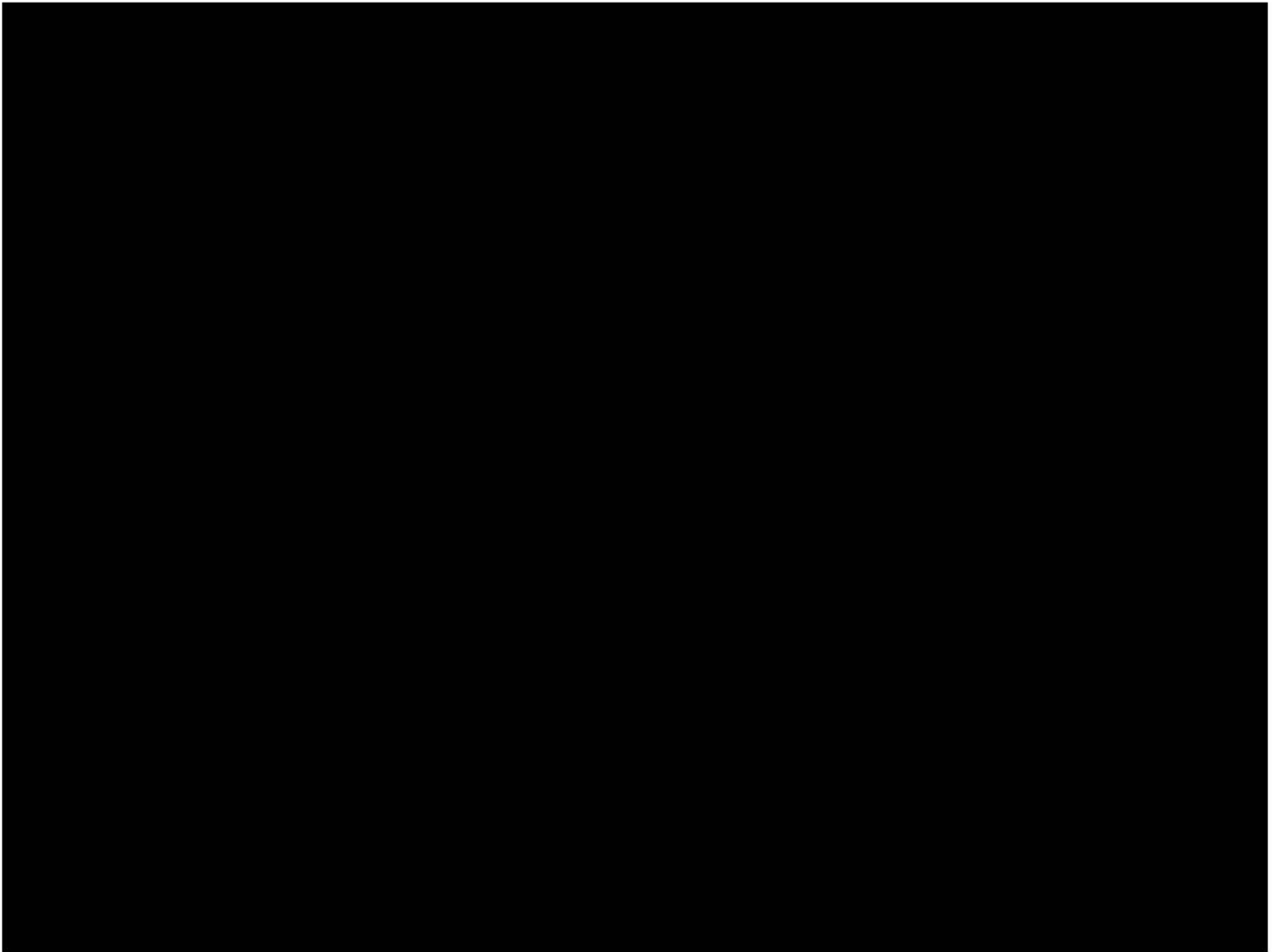


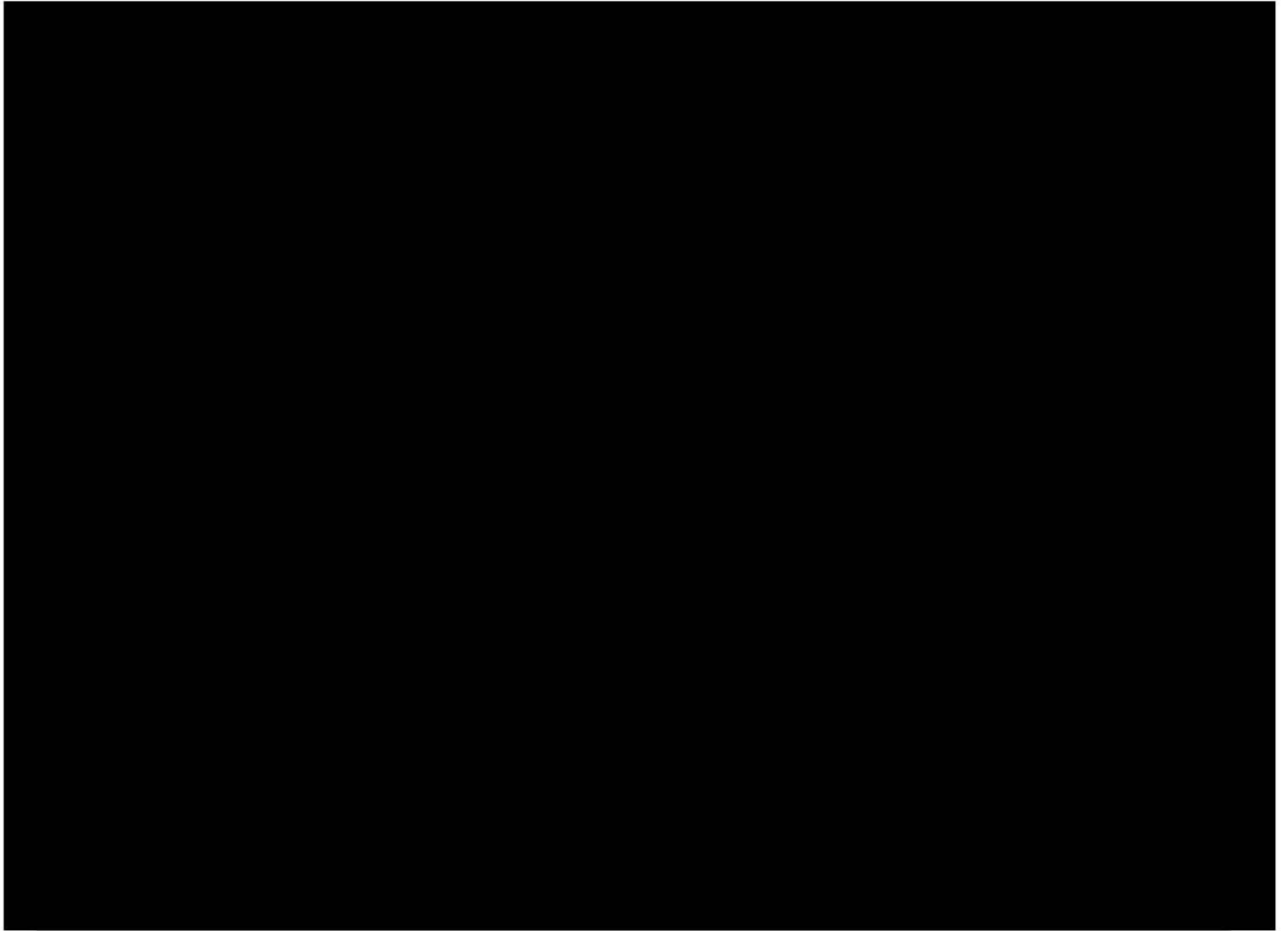
Figure 5: Eagle Pass and Laredo Border Crossing Carloads/Units By U.S. and Canada Origin and Termination Locations











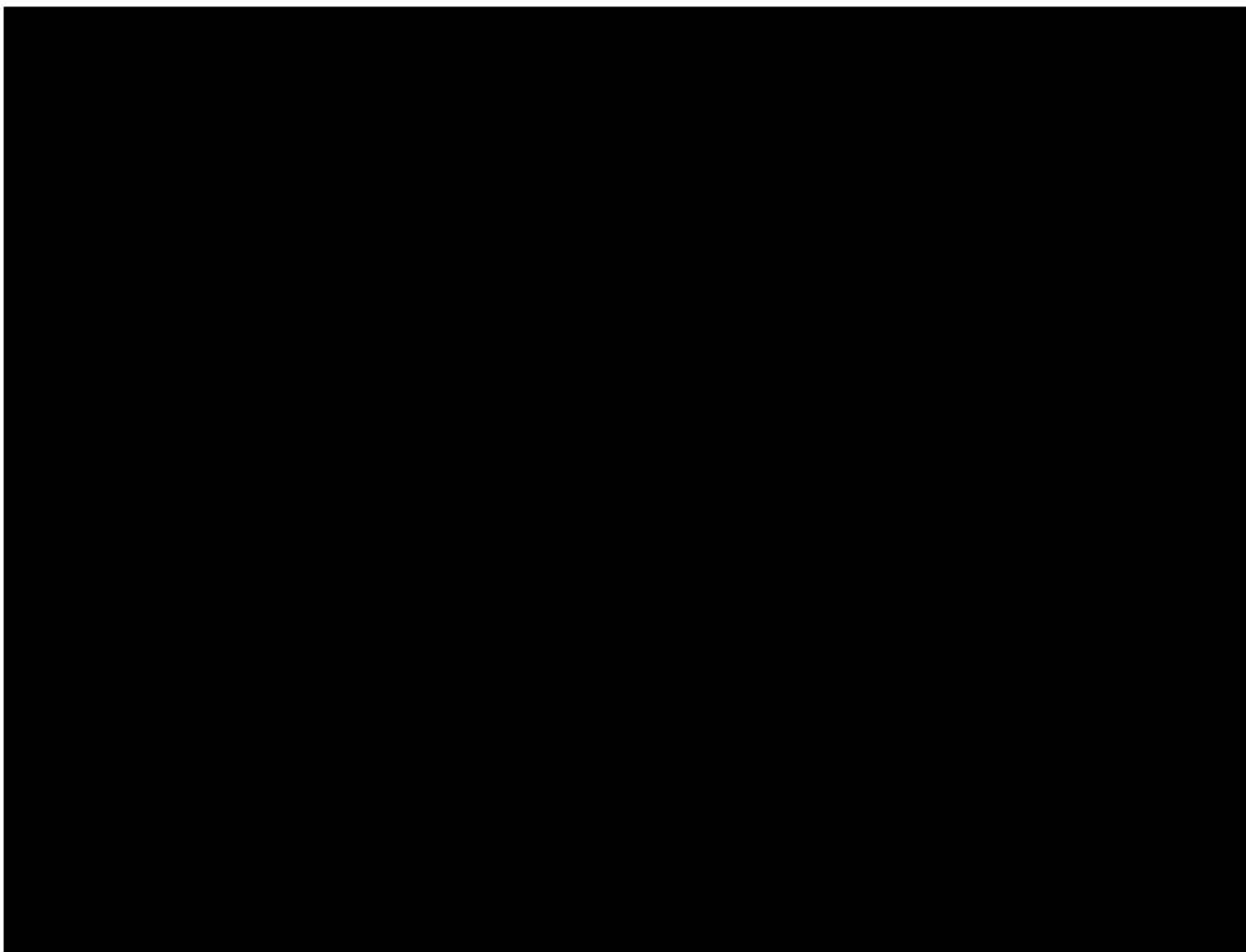
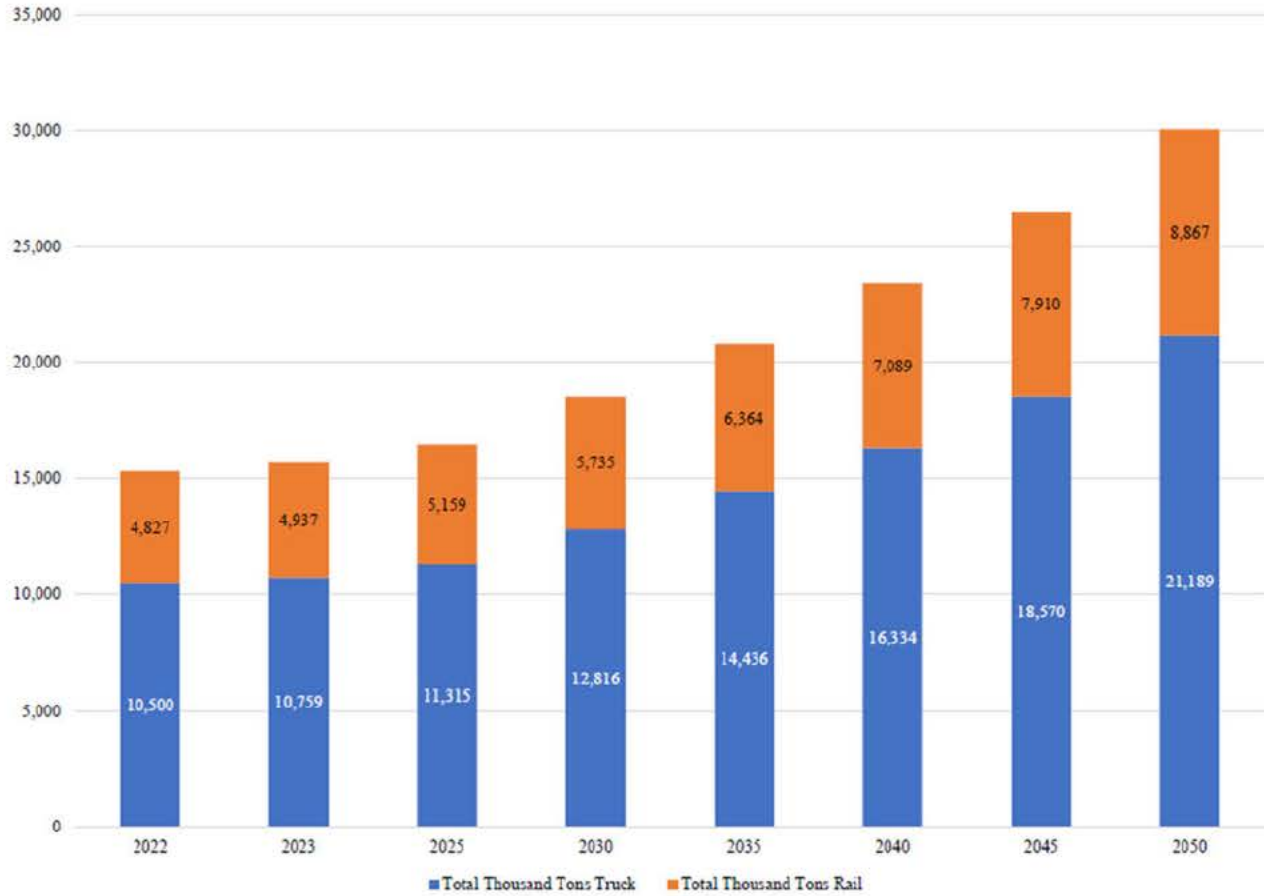


Figure 6: Southeast-Mexico Traffic Growth by Mode, 2022-2050

Notes and sources:

1. FAF data available at https://faf.oml.gov/faf5/dtt_total.aspx
2. Imports and exports are to Alabama, Florida, Georgia, North Carolina, South Carolina and Tennessee
3. See Carey WP 'Mexico Truck and Rail Volumes Over Time.xlsx'

Appendix B – Port Competition and the Meridian Advantage

Overview of North American Ports:

The Port of Los Angeles and Vancouver are the largest west coast ports for intermodal traffic and both the Port of Long Beach and the Port of Lazaro Cardenas have ample capacity.¹ Holding 25 cargo terminals, the Port of Los Angeles moved 10.7 million TEUs in 2021.² It has been the Western Hemisphere's busiest container port since the turn of the century.³ Similarly, though not on quite as large of a scale, the Port of Long Beach handles more than 8.1 million TEUs each year, an impressive mark in its own right.⁴ With ten different piers, 22 individual shipping terminals, and over 8,000 total land and water acres at its disposal, the Port of Long Beach is able to handle considerable trade traffic.⁵ The 21st busiest cargo port in the entire world, the Port of Long Beach was also the 2nd busiest port in the United States, as of 2020.⁶ Taken together, the combined Port of Los Angeles and Port of Long Beach stats become even more impressive. The ports have a combined 57 shipping terminals and together they handle roughly 19 million TEUs each year. The largest port in Canada, the Port of Vancouver is also the third largest port in North America in terms of annual cargo tonnes moved.⁷ ⁸ The Port of Lazaro Cardenas, meanwhile, is the second largest in Mexico, just behind the Port of Manzanillo. The Port of Lazaro Cardenas is also growing rapidly.⁹

The Port of Los Angeles is particularly susceptible to CPKC rail diversions through Vancouver ports for northern far east Asia trade routes and partners, given its status as the largest port on America's west coast and how frequently East Asian nations conduct trade with the Port of Los Angeles.¹⁰ In 2021, the Port of Los Angeles' top trade partners, as measured in U.S. dollars of goods, were China and Hong Kong, Japan, Vietnam, Taiwan, and South Korea. In this same year, the port's trade with China and Hong

¹ CSA Transportation, "Largest and Busiest Sea Ports in the USA and Canada," Available at <https://www.csatransportation.com/blog/largest-ports-in-the-us-canada#:~:text=1.,number%20even%20by%20global%20standards>.

² A significant improvement over its already large total of 9.2 million in 2020. The Port of Los Angeles, "Port of Los Angeles Facts and Figures Card," 2021, available at <https://kentico.portoflosangeles.org/getmedia/c39cbb51-d52e-44bd-89c8-41eba408ab12/2021-facts-figures>.

³ The Port of Los Angeles, "Facts and Figures," available at <https://www.portoflosangeles.org/business/statistics/facts-and-figures>.

⁴ The Port of Long Beach, "Port Facts and FAQs," available at <https://polb.com/port-info/port-facts-faqs#facts-at-a-glance>.

⁵ Id.

⁶ Id.

⁷ Trailing only the Port of Los Angeles and the Port of Savannah. "About the Port of Vancouver," Port of Vancouver, Vancouver Fraser Port Authority, available at https://portvancouver.metro.net/indicators/our_business/about/about_the_port_of_vancouver#:~:text=The%20port%20of%20Vancouver%20is,by%20three%20Class%201%20railroads.

⁸ Specifically, as highlighted in the Port of Vancouver's 2021 financial report, "overall port volume increased to 146 million metric tonnes of cargo in 2021." "Financial report 2021," Port of Vancouver, Vancouver Fraser Port Authority, available at <https://www.portvancouver.com/wp-content/uploads/2022/05/2021-Financial-Report-English.pdf>, 2021.

⁹ In fact, the 1.69 million TEUs that the port handled in 2021 represented a 58.9% growth over the previous year.

Bhattacharjee, Shilavadra, "10 Major Ports in Mexico," Marine Insight, <https://www.marineinsight.com/know-more/10-major-ports-in-mexico/>, May 7, 2022.

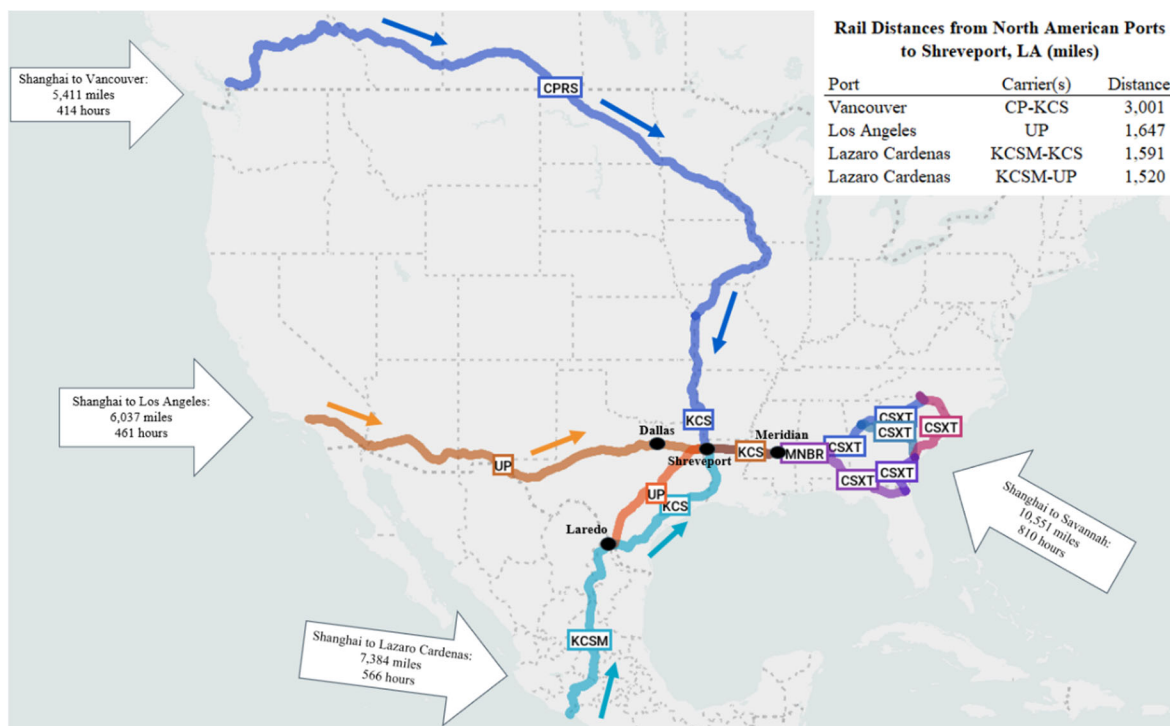
¹⁰ The Port of Los Angeles, "Port of Los Angeles Facts and Figures Card," 2021 available at <https://kentico.portoflosangeles.org/getmedia/c39cbb51-d52e-44bd-89c8-41eba408ab12/2021-facts-figures>.

Kong summed to \$132 billion.¹¹ Furthermore, Northeast Asia was the Port of Los Angeles' most frequently used foreign trade route in 2021. Specifically, the port leaned on this route to handle 73% of its transportation traffic.¹²

The Port of Los Angeles is also susceptible to CPKC rail diversions through Lazaro Cardenas for southern far east Asia trade routes and trade partners. After the Northeast Asian route, the Port of Los Angeles most relied on the Southeast Asia route (21%), the Indian Sub-Continent route (2%), and the Northern Europe route (1%).¹³

The Port of Los Angeles is not alone, however. The Port of Long Beach faces many similar issues, in fact. East Asian trade amounts to a staggering 90% of shipments going through the Port of Long Beach.¹⁴ By TEU quantity, China was the Port of Long Beach's top trade partner for both imports and exports, while South Korea lagged not far behind at second in exports and third in imports.¹⁵ Vietnam, Japan, and Taiwan are also among the Port of Long Beach's most extensive trade partners.¹⁶

Figure 1 – West Coast Port Lanes into the Southeast and MidAtlantic US on CSXT with Time and Distance from Shanghai¹⁷



¹¹The Port of Los Angeles, "Port of Los Angeles Facts and Figures Card," 2021 available at <https://kentico.portoflosangeles.org/getmedia/c39cbb51-d52e-44bd-89c8-41eba408ab12/2021-facts-figures>.

¹² Id.

¹³ Id.

¹⁴ The Port of Long Beach, "Port Facts and FAQs," available at <https://polb.com/port-info/port-facts-faqs#facts-at-a-glance>.

¹⁵ Id.

¹⁶ Id.

¹⁷See Carey WP 'Shipping Distances and Times to North American Ports.pptx'

Figure 2 – West Coast Port Lanes into the Southeast and MidAtlantic US on CSXT with Time and Distance from Shenzhen¹⁸

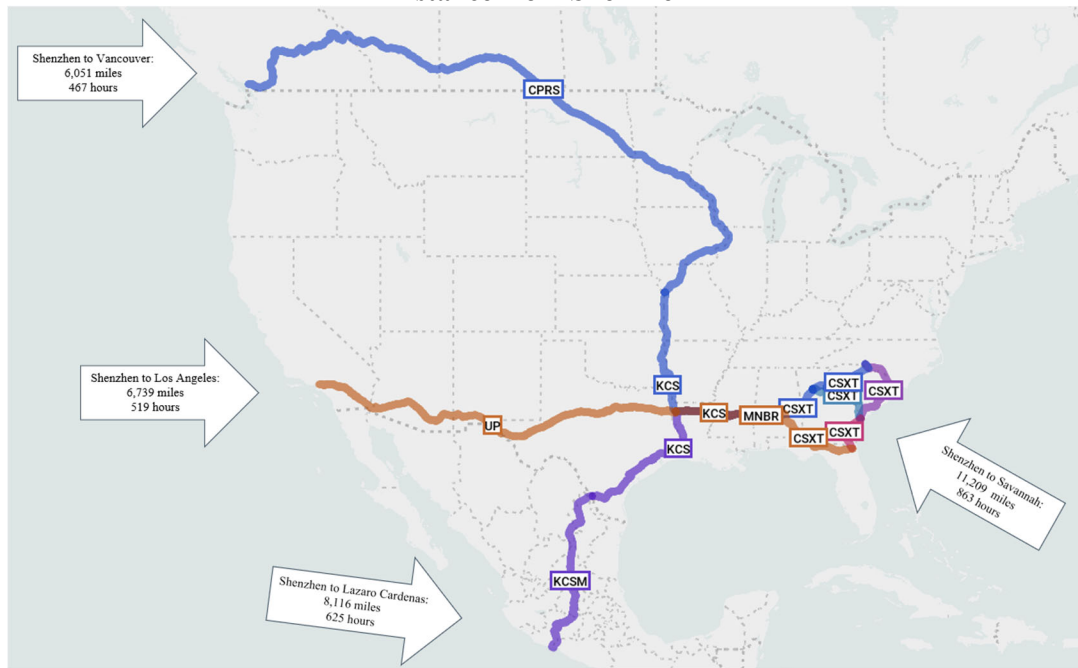
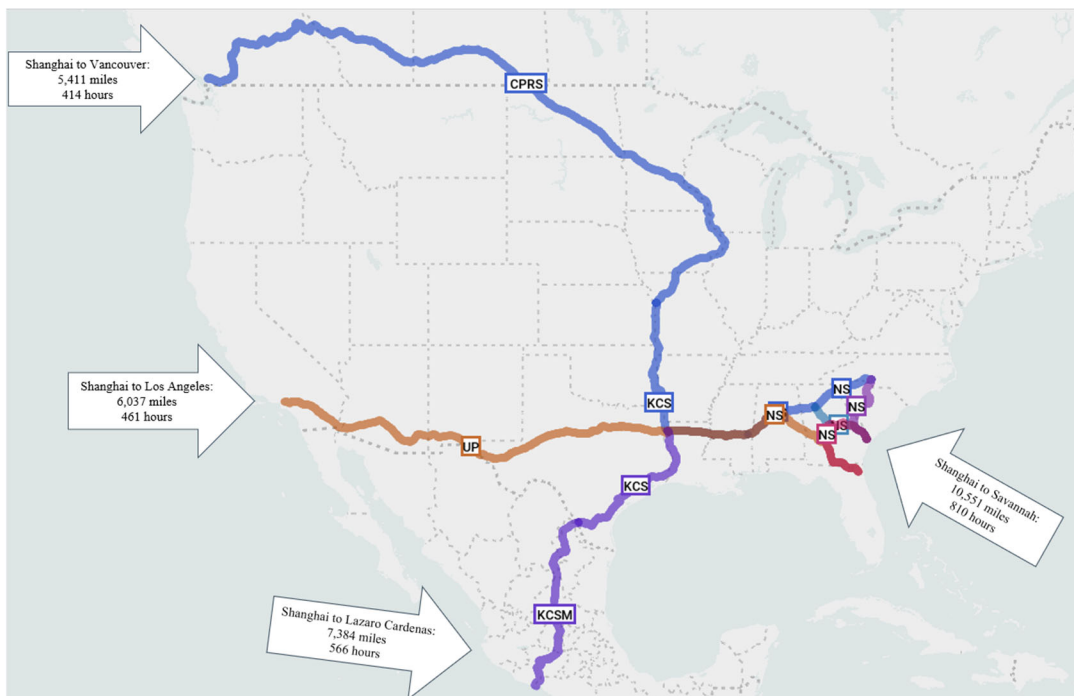


Figure 3 – West Coast Port Lanes into the Southeast and MidAtlantic US on NS with Time and Distance from Shanghai¹⁹



¹⁸See Carey WP 'Shipping Distances and Times to North American Ports.pptx'

¹⁹See Carey WP 'Shipping Distances and Times to North American Ports.pptx'

Figure 4 – West Coast Port Lanes into the Southeast and MidAtlantic US on NS with Time and Distance from Shenzhen²⁰

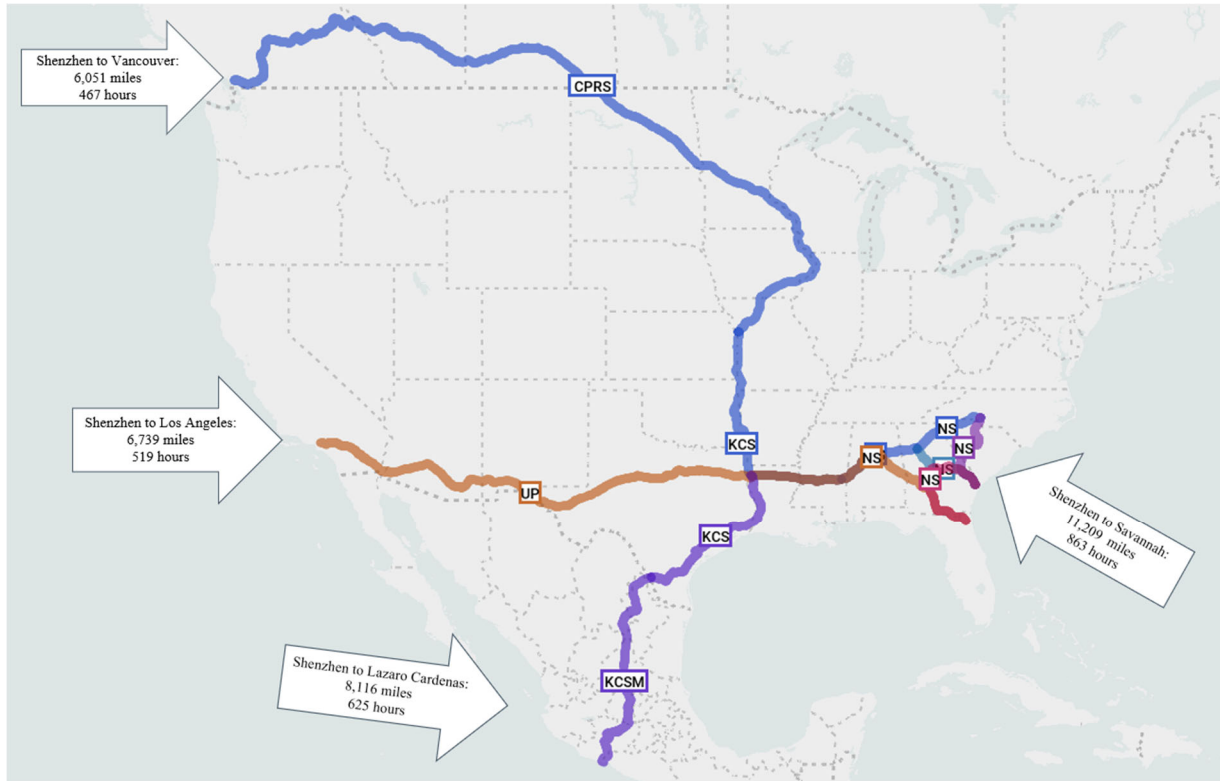


Figure 5 – Shreveport and Meridian Gateway’s Competitive Alternative to CPKC Post Transaction for Mexico Traffic with the Southeast and MidAtlantic US²¹



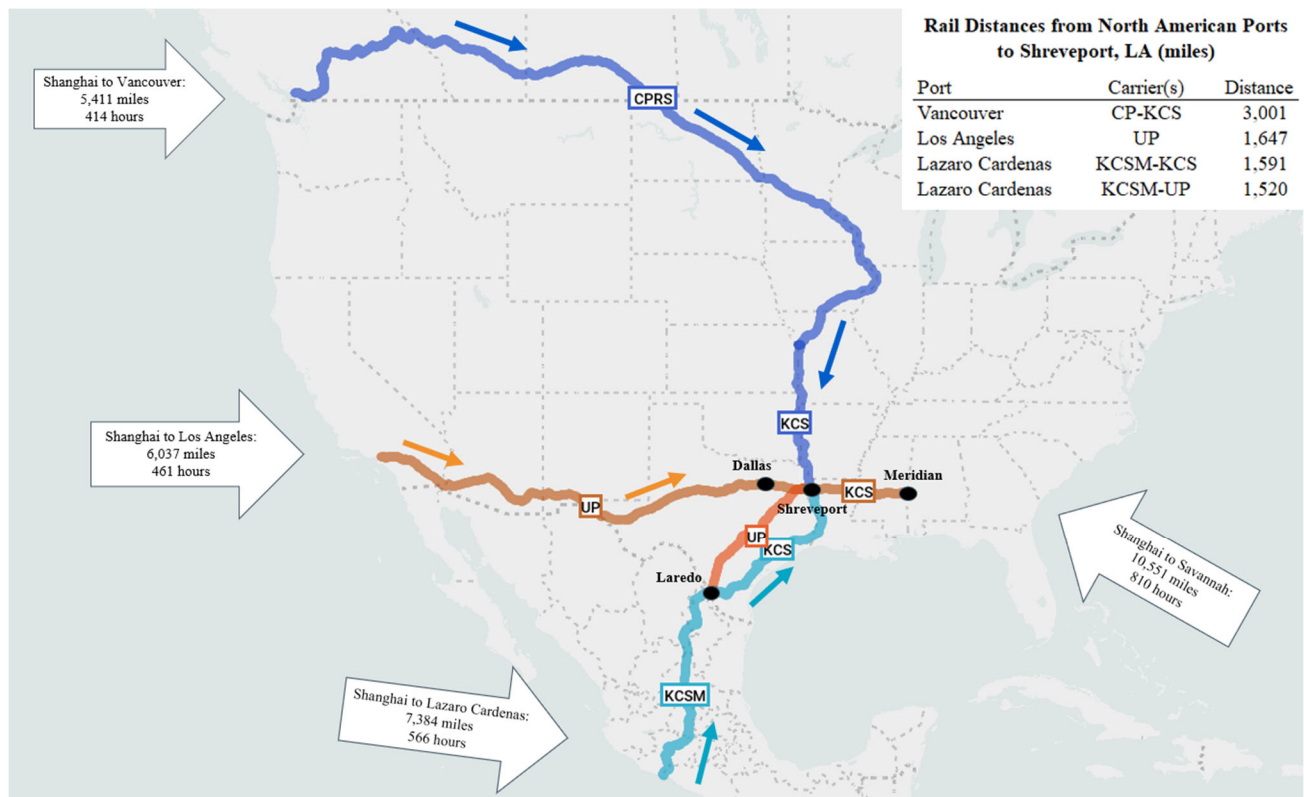
²⁰See Carey WP ‘Shipping Distances and Times to North American Ports.pptx’

²¹See Carey WP ‘Shipping Distances and Times to North American Ports.pptx’

Figure 6 – Shreveport and Meridian Gateway’s Competitive Alternative to CPKC Post Transaction for Mexico Traffic with the Southeast and MidAtlantic US²²



Figure 7 – West Coast Port Lanes to Meridian, MS with Time and Distance from Shanghai²³



²²See Carey WP ‘Shipping Distances and Times to North American Ports.pptx’

²³See Carey WP ‘Shipping Distances and Times to North American Ports.pptx’

Figure 8 – Shipping Distances and Times from Shanghai to North American Ports to Atlanta, Charlotte and Jacksonville²⁴

Port	Termination	Sea		Rail		Total	
		Miles	Time (hrs)	Miles	Time (hrs)	Miles	Time (hrs)
Vancouver	Atlanta	5,411	414	3,633	215	9,044	629
San Francisco	Atlanta	5,702	437	2,959	174	8,661	611
Los Angeles	Atlanta	6,037	461	2,483	159	8,520	620
Lazaro Cardenas	Atlanta	7,384	566	2,223	149	9,607	715
Savannah	Atlanta	10,551	810	279	65	10,830	875
Vancouver	Charlotte	5,411	414	3,894	227	9,305	641
San Francisco	Charlotte	5,702	437	3,219	185	8,921	622
Los Angeles	Charlotte	6,037	461	2,744	171	8,781	632
Lazaro Cardenas	Charlotte	7,384	566	2,484	160	9,868	726
Savannah	Charlotte	10,551	810	326	67	10,877	877
Vancouver	Jacksonville	5,411	414	3,975	230	9,386	644
San Francisco	Jacksonville	5,702	437	3,300	187	9,002	624
Los Angeles	Jacksonville	6,037	461	2,824	172	8,861	633
Lazaro Cardenas	Jacksonville	7,384	566	2,564	162	9,948	728
Savannah	Jacksonville	10,551	810	449	72	11,000	882

Notes and Sources:

- Sea route distance and time calculated by Sea Rates mapping tool, available at <https://www.searates.com/services/distances-time/>
- Sea route to Savannah is through the Panama Canal
- Rail distances calculated using PC Miler. UP route is set to shortest distance to route through Dallas
- Rail times are calculated by dividing a given carriers segment distance by their average intermodal train speed and adding average terminal dwell for each terminal origination, termination and interchange. Performance data including average intermodal train speed and average terminal dwell time reported on 6-22-22, available at <https://www.stb.gov/reports-data/rail-service-data/#railroads-tab-6>
- For CP interchanges CP average dwell time is used. For NS interchanges NS average dwell time is used.

Figure 9 – Nautical Miles and Shipping Times Between Large Ports Involved in Trans-Pacific Trade²⁵

Country	Country Port	Pacific Coast								Atlantic Coast	
		Distance (miles)		Time (hrs)		Distance (miles)		Time (hrs)		Distance (miles)	
		USA		USA		Canada		Mexico		USA	
		Los Angeles	Los Angeles	San Francisco	San Francisco	Vancouver	Vancouver	Lazaro Cardenas	Lazaro Cardenas	Savannah	Savannah
		[a]	[b]	[b]		[d]		[f]		[i]	[i]
Northern Pacific											
(1) Japan	Nagoya	5,180	398	4,849	373	4,475	345	6,507	501	9,699	747
(2) Korea	Busan	5,633	433	5,285	407	4,652	359	6,964	536	10,160	782
(3) China	Shanghai	6,037	463	5,702	439	5,411	416	7,384	568	10,551	812
(4) China	Ningbo-Zhoushan	6,043	465	5,700	440	5,413	418	7,390	570	10,628	819
(5) China	Tianjin	6,294	481	5,959	457	5,569	427	7,626	585	10,822	831
(6) China	Dalian	6,091	468	5,755	444	5,365	414	7,422	572	10,618	818
(7) China	Qingdao	6,045	465	5,710	440	5,319	410	7,376	569	10,572	815
Southern Pacific											
(8) China	Shenzhen	6,739	519	6,411	494	6,051	467	8,116	625	11,209	863
(9) China	Guangzhou	6,801	523	6,473	499	6,013	471	8,178	630	11,271	868
(10) Cambodia	Sihanoukville	7,820	601	NA	NA	7,348	566	9,057	698	12,183	938
(11) Hong Kong	Hong Kong	6,724	517	6,396	493	6,036	465	8,101	624	11,193	862
(12) Indonesia	Jakarta	8,154	626	7,873	606	7,691	592	9,096	700	12,132	934
(13) Malaysia	Klang	8,136	625	7,846	604	7,698	593	9,284	715	12,449	959
(14) Malaysia	Tanjung-Pelepas	7,950	612	7,660	590	7,511	579	9,095	701	12,263	945
(15) Philippines	Manila	6,795	523	6,495	501	6,324	488	7,974	614	11,122	857
(16) Singapore	Singapore	7,935	610	7,645	589	7,497	577	9,080	699	12,248	943
(17) Taiwan	Kaosiung	6,405	492	6,077	468	5,811	448	7,781	599	10,886	838
(18) Thailand	Laem-Chabang	8,043	619	7,743	597	7,571	584	9,280	715	12,407	956
(19) Vietnam	Da Nang	7,228	556	6,907	532	6,595	508	8,486	653	11,813	910

Notes

- Sea route distance and time calculate by Sea Rates mapping tool, available at <https://www.searates.com/services/distances-time/>

²⁴ See Carey WP 'Shipping Distances and Times.xlsx'

²⁵ See Carey WP 'Port Distances - Sea Routes.xlsx'

Figure 10 – 2019 Shipment Volumes from Asia to North American Ports (Containerized Vessel SWT kg)²⁶

Year	Country of Origin	San Francisco	Los Angeles	Savannah	Vancouver	Lazaro Cardenas
[a]	[b]	[c]	[d]	[e]	[f]	[g]
2019	Cambodia	430,066	294,764,272	71,717,003	N/A	N/A
2019	China	221,527,324	25,525,640,823	5,121,995,575	7,479,349,000	187,847,000
2019	Hong Kong	186,432	69,427,784	7,842,087	249,774,000	3,249,457,025
2019	Indonesia	2,861,507	983,080,936	267,114,913	114,341,000	N/A
2019	Japan	65,434,817	1,970,999,585	585,139,091	303,646,000	65,582,000
2019	Malaysia	6,896,047	985,960,602	268,339,068	148,169,000	N/A
2019	Philippines	18,527,827	461,793,025	92,386,525	N/A	10,364,000
2019	Singapore	675,718	79,955,570	36,933,528	N/A	1,343,331,209
2019	Taiwan	4,729,660	2,067,720,593	355,060,068	572,905,000	N/A
2019	Thailand	7,614,354	2,019,297,574	456,728,156	406,582,000	N/A
2019	Vietnam	17,183,630	3,210,822,038	686,180,093	381,824,000	N/A
Total Containerized SWT kg		346,067,382	37,669,462,802	7,949,436,107	9,656,590,000	4,856,581,234

Notes and sources:

1. Los Angeles Port includes pooled data from both the Port of Los Angeles and the Port of Long Beach.
2. Data for Port of Vancouver taken from <https://www.portvancouver.com/wp-content/uploads/2022/03/Stats-Overview-2019-to-2021-1.pdf>.
3. Data for Port of Lazaro Cardenas downloaded from <https://www.puertolazarocardenas.com.mx/plc25/aribo-buques-historico>.
4. Data for US ports taken from the United States Census Bureau, available at <https://usatrade.census.gov/>.

Figure 11 – Transcontinental Mileage Table²⁷

Interchange Location		Memphis, TN				New Orleans, LA				Meridian Speedway			
Railroad Combination		BNSF-CSXT	BNSF-NS	UP-CSX	UP-NS	BNSF-CSXT	BNSF-NS	UP-CSX	UP-NS	BNSF-CSXT	BNSF-NS	UP-CSX	UP-NS
Origin	Destination	[a]	[b]	[c]	[d]	[e]	[f]	[g]	[h]	[k]	[l]	[m]	[n]
Los Angeles, CA	Greensboro, NC	3,016	2,880	3,093	2,958	3,026	2,985	2,897	2,856	2,832	2,775	2,690	2,630
Los Angeles, CA	Jacksonville, FL	2,950	2,870	3,027	2,948	2,734	2,974	2,605	2,845	2,645	2,765	2,504	2,562
Los Angeles, CA	Charlotte, NC	2,895	2,789	2,973	2,867	2,906	2,894	2,777	2,765	2,729	2,684	2,587	2,539
Los Angeles, CA	Miami, FL	3,365	3,217	3,442	3,295	3,127	3,321	2,998	3,192	3,030	3,111	2,888	2,909
Los Angeles, CA	Atlanta, GA	2,598	2,520	2,676	2,606	2,617	2,633	2,488	2,504	2,443	2,423	2,299	2,278
Los Angeles, CA	Birmingham, AL	2,519	2,368	2,597	2,445	2,540	2,472	2,410	2,343	2,363	2,416	2,222	2,118

Notes/sources:

1. Mileage calculated using PC Miller
2. Meridian Speedway interchange is Dallas, TX for BNSF and Shreveport, LA for UP
3. CSXT Meridian Speedway access uses MNBR with interchange at Selma, AL
4. UP Meridian routes are set to shortest distance to route through Dallas

²⁶ See Carey WP 'Port-level Imports.xlsx'

²⁷ See Carey WP 'Transcontinental Mileages.xlsx'

Figure 12 - Dallas-Atlanta over the Meridian Speedway compared to the CSXT Route²⁸

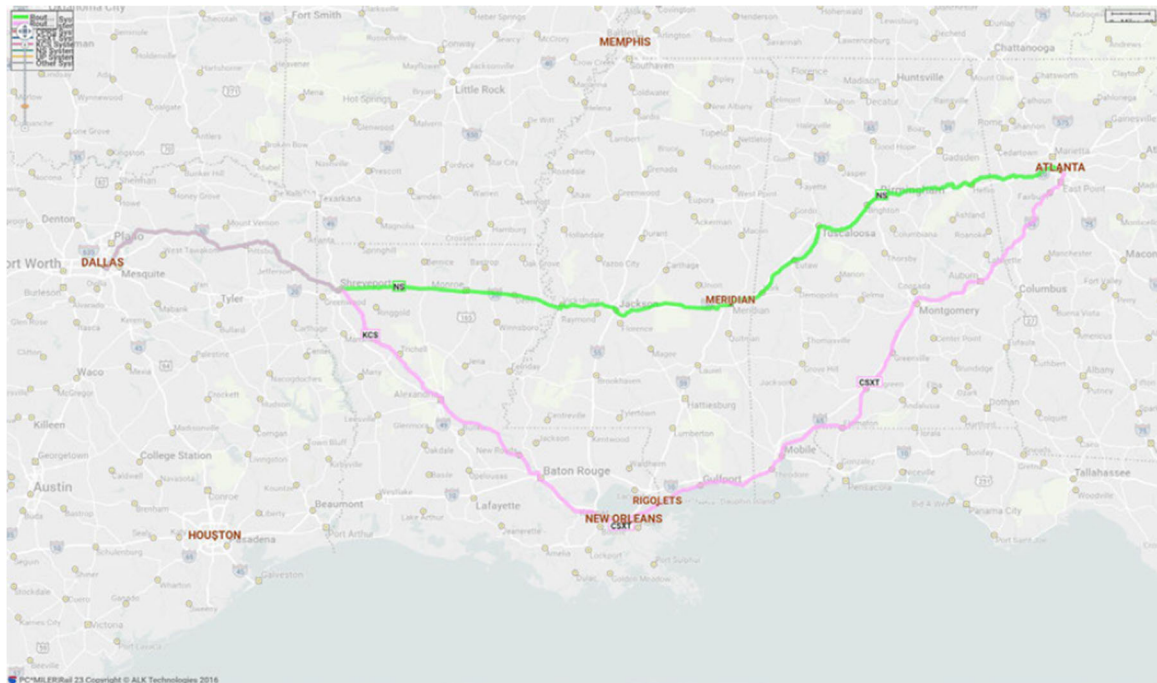
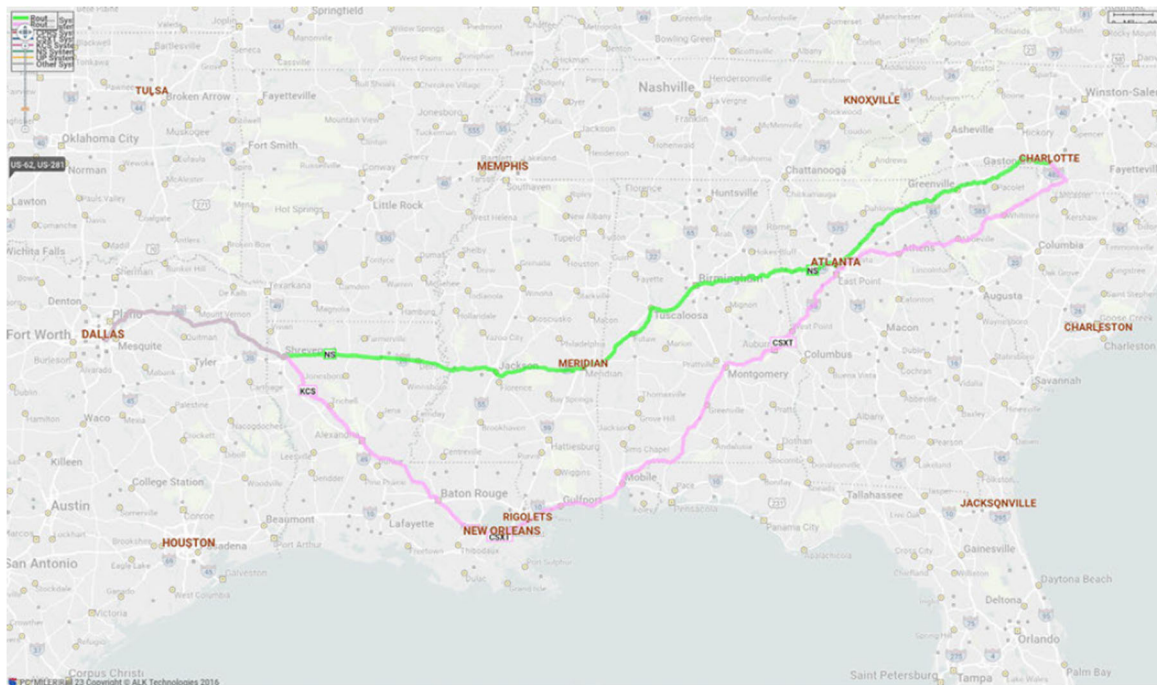


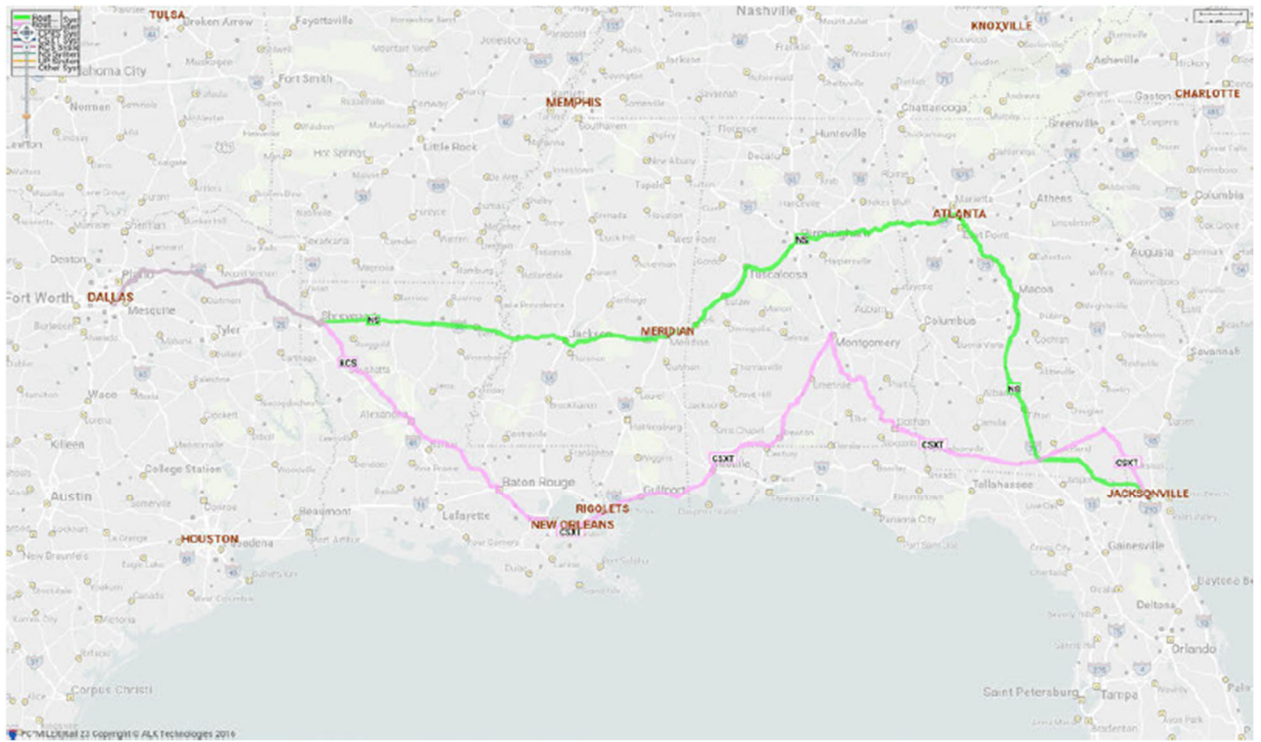
Figure 13 - Dallas-Charlotte over the Meridian Speedway compared to CSXT Route²⁹



²⁸ See Finance Docket No. 36500, *Canadian Pacific Railway Limited, Et Al. – Control – Kansas City Southern, Et Al.*, Amended Comments of Norfolk Southern Railway Company and Request for Conditions (“NS-12”) at 17.

²⁹ See Finance Docket No. 36500, *Canadian Pacific Railway Limited, Et Al. – Control – Kansas City Southern, Et Al.*, Amended Comments of Norfolk Southern Railway Company and Request for Conditions (“NS-12”) at 18.

Figure 14 - Dallas-Jacksonville over the Meridian Speedway compared to CSXT Route³⁰



³⁰ See Finance Docket No. 36500, *Canadian Pacific Railway Limited, Et Al. – Control – Kansas City Southern, Et Al.*, Amended Comments of Norfolk Southern Railway Company and Request for Conditions (“NS-12”) at 19.

Appendix C – Haulage

Page 2 of 8

Comparison of Railroad Service and Performance Attributes of Comparison of Pre-MSLLC, Prior KCS/NSR Haulage and Business Arrangement and the MSLLC JV Haulage Service and Locations

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NSR Haulage Rates on Meridian Speedway LLC from 2006 to 2021¹

Analysis of Audited Financial Statements of Meridian Speedway LLC from 2007 to 2020¹
(thousands of dollars)

The diagram illustrates a mechanical assembly, likely a pump or engine component. It features a central vertical shaft with a cross-shaped handle at the top. The shaft is surrounded by a series of horizontal bars and a large, curved, segmented structure on the right side. The entire assembly is mounted on a base with several vertical supports.

Appendix D – Haulage Agreements

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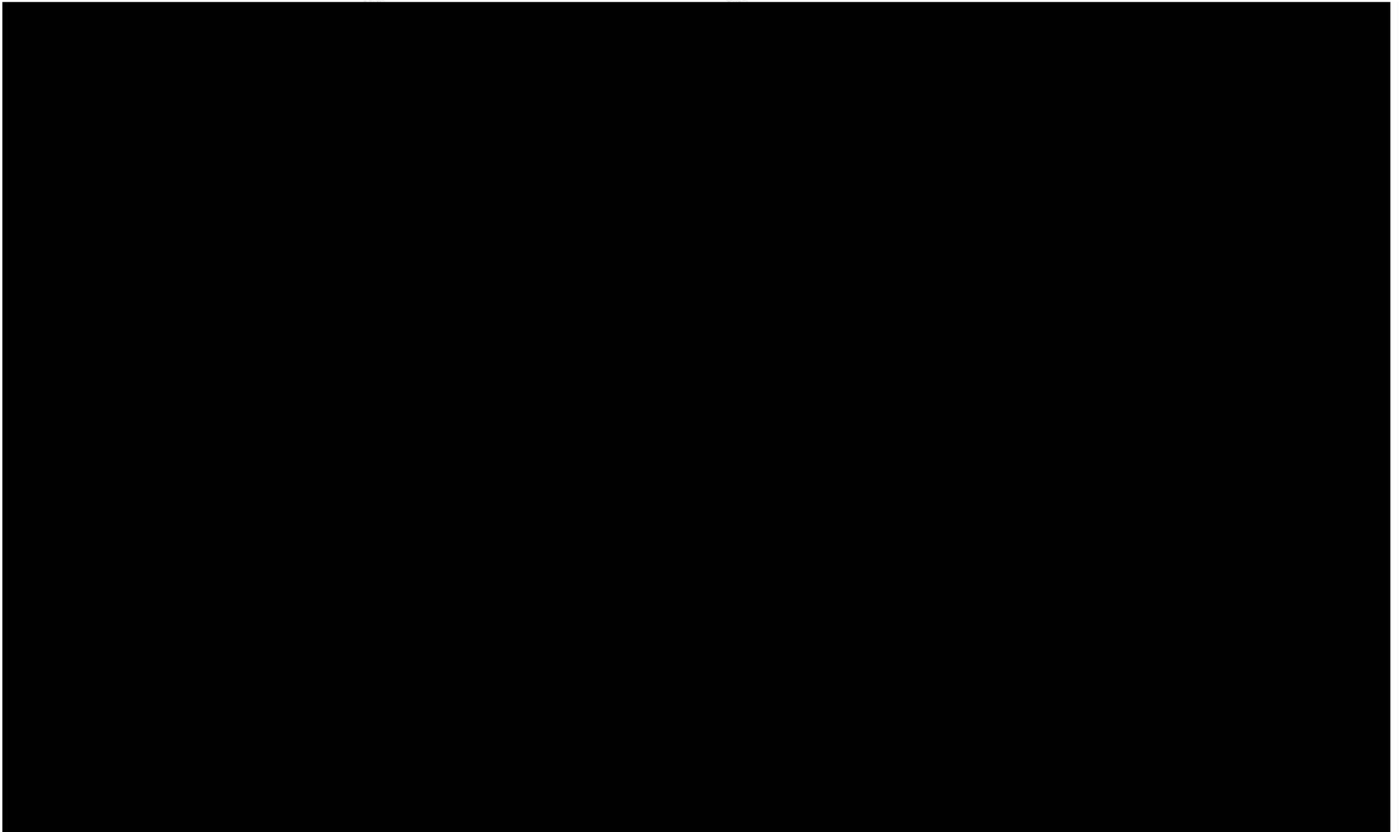
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1. Haulage Agreement Summary Tables

The table below utilizes the 2019 CWS, 2019 CP traffic tapes and 2019 CSXT traffic tapes. Haulage agreements are deemed non-exclusive if the line owner provides access to multiple carriers to move traffic over, to or from points on the relevant haulage line.

{{

Figure 1: Non-Exclusive Haulage from 2019 CWS¹



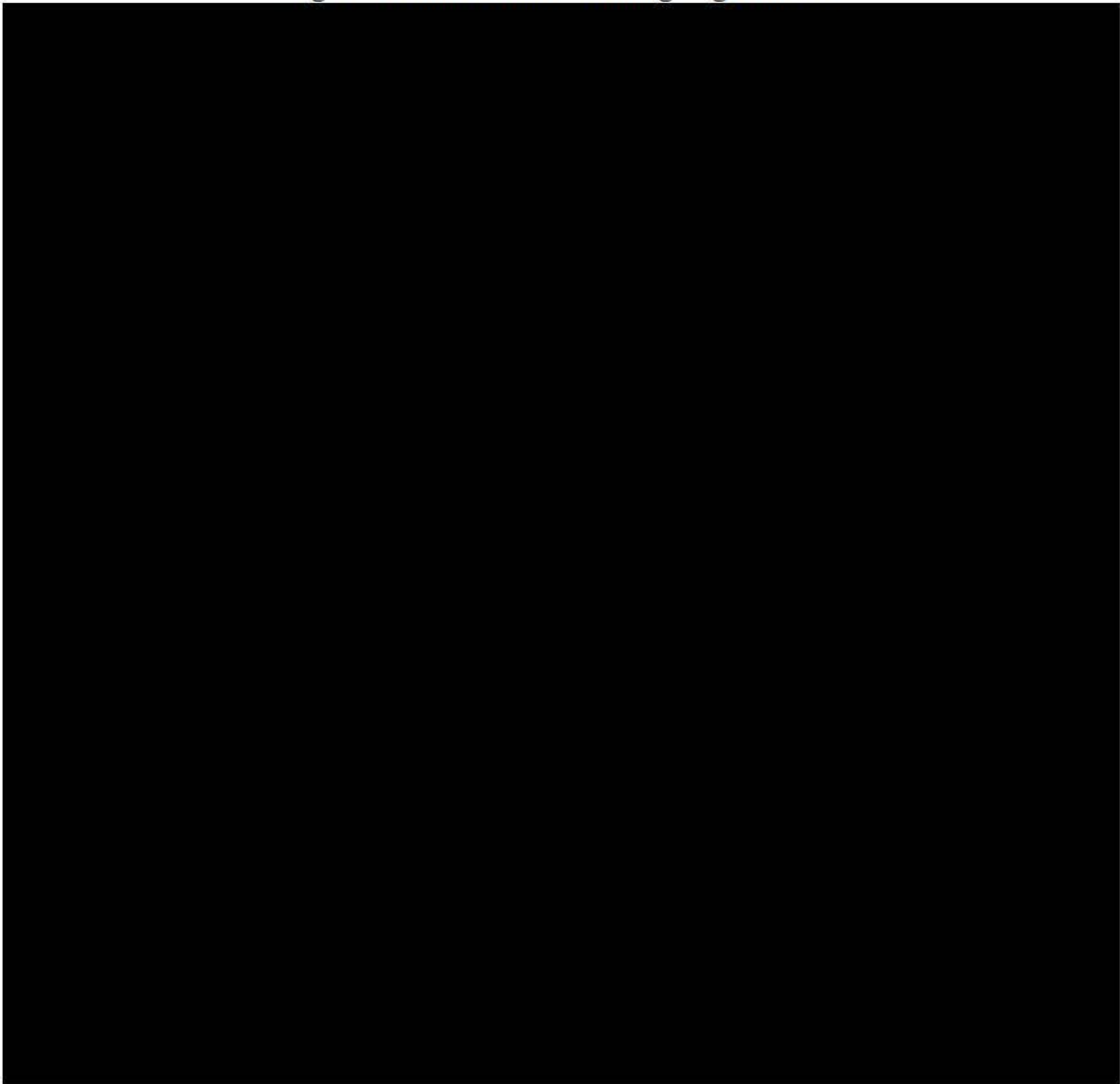
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Figure 2 below identifies non-exclusive haulage agreements and indicates whether the carrier receiving haulage services made capital contributions towards the relevant line including terminal investments. Figure 1 above summarizes the exclusivity analysis.

{{

¹ [REDACTED]

Figure 2: Non-Exclusive Haulage Agreements²



2. Research on Exclusive Haulage Agreements

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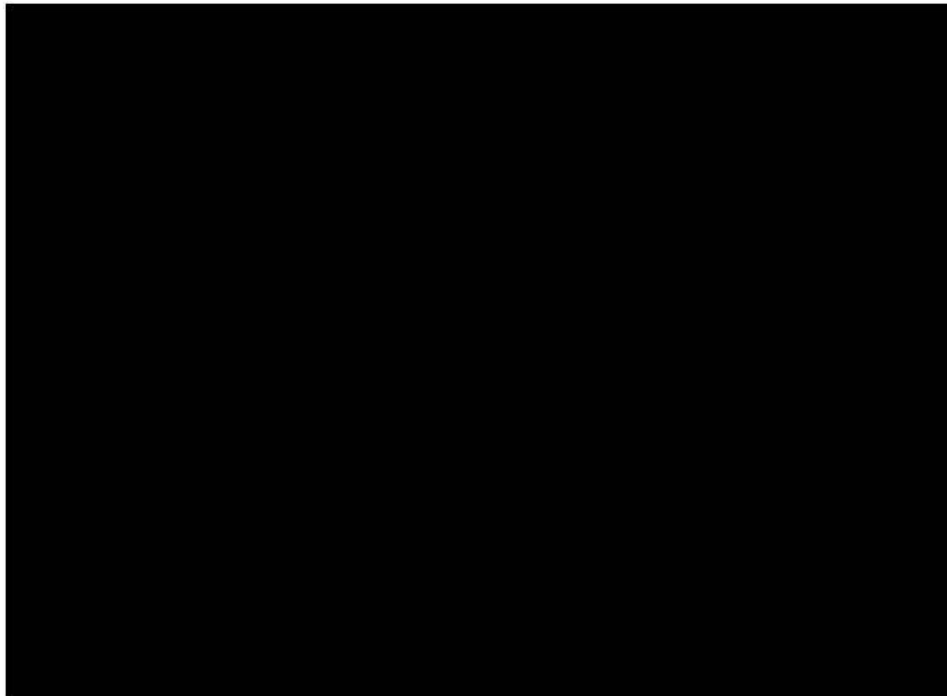
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■ **RESEARCH** *Journal of Applied Social Psychology* 36:10, 1099-1110, 2006. © 2006 Wiley Periodicals, Inc.

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5. Additional Information on Haulage Agreements by Carrier

The following section provides additional information on the complete set of haulage agreements that were considered for exclusivity and investment analysis.

5.1.1. BNSF

- Haulage from Chicago, IL to North Baltimore, OH on CSXT
 - BNSF system map depicts this agreement:⁶⁵



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁶⁵ BNSF, BNSF Network Map, available at <http://www.bnsf.com/bnsf-resources/pdf/ship-with-bnsf/maps-and-shipping-locations/bnsf-network-map.pdf>

- In late 2018, CSX announced a new haulage agreement with BNSF Railway to improve western access to the Ohio region whereby CSX would haul complete BNSF trains between Chicago and North Baltimore for processing at North Baltimore.⁶⁶
- Late last summer, a critical agreement was structured between two large Class 1 US railroads; CSX and BNSF Railway Company (BNSF). The haulage agreement between the two corporations significantly reduces the time of large rail shipments across the country and significantly improves efficiencies of operations for the two carriers. The new service is for direct-rail domestic and international container-only service. The agreement between the carriers provides for important efficiency improvements in the Chicago hubs for both railroads. Prior to the agreement, shipments from the Westcoast came into Chicago and then containers were transferred by truck to the CSX Chicago hub. With the new agreement, trains from the Westcoast will move through Chicago without being taken apart and then sent directly to North Baltimore. Similarly, trains from North Baltimore will also move through Chicago and travel directly to the Westcoast. Further enhancing rail shipping logistics is a change by CSX to offer intermodal service from the Ports of New York and New Jersey to the company's North Baltimore intermodal terminal. Containers will be able to move from the busy Port of New York/ New Jersey and travel to North Baltimore for distribution through the Ohio Valley.⁶⁷
- Haulage from Birmingham, AL to Atlanta, GA on CSXT
 - BNSF system map depicts this agreement⁶⁸



- Much like the BNSF route from Southern California to Atlanta, a portion of this new service from the Los Angeles region to North Baltimore will operate under a haulage agreement with CSX.⁶⁹
- Haulage from Tulsa

⁶⁶ Ohio Rail Development Commission, "State of Ohio Rail Plan", January 2019 at page 103, available at <https://www.rail.ohio.gov/static/Documents/State+of+Ohio+Rail+Plan+Final.pdf>

⁶⁷ Factiva, "LPO target 4.1M sf complex near CSX", December 1, 2019 at page 6.

⁶⁸ BNSF, BNSF Network Map, available at <http://www.bnsf.com/bnsf-resources/pdf/ship-with-bnsf/maps-and-shipping-locations/bnsf-network-map.pdf>

⁶⁹ Factiva, "BNSF Launches Direct Intermodal Service between Southern California and the Ohio Valley Region", October 2, 2018 at page 12.

- BNSF system map depicts this agreement:⁷⁰



- Haulage in British Columbia on CN

- BNSF system map depicts this agreement:⁷¹



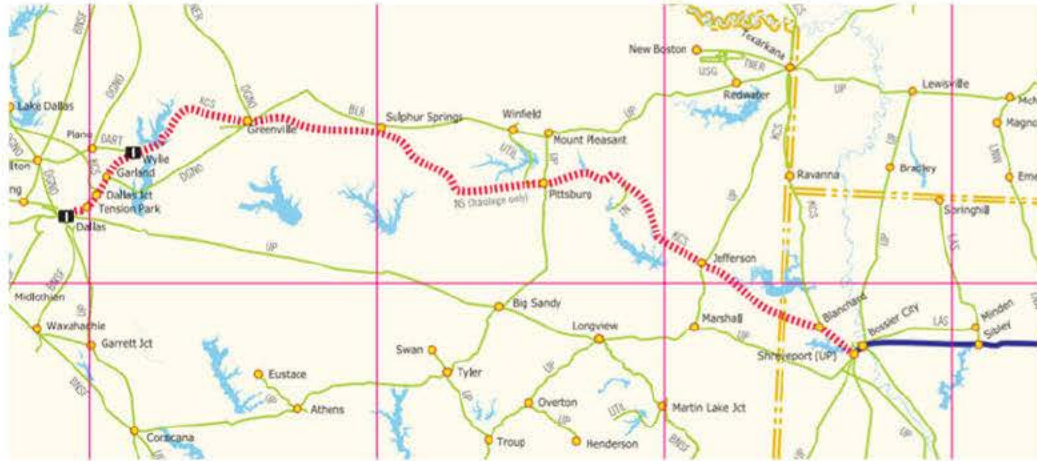
5.1.2. NS

- Haulage from Shreveport, LA to Dallas, TX on KCS
 - NS system map identifies haulage from Shreveport to Dallas⁷²

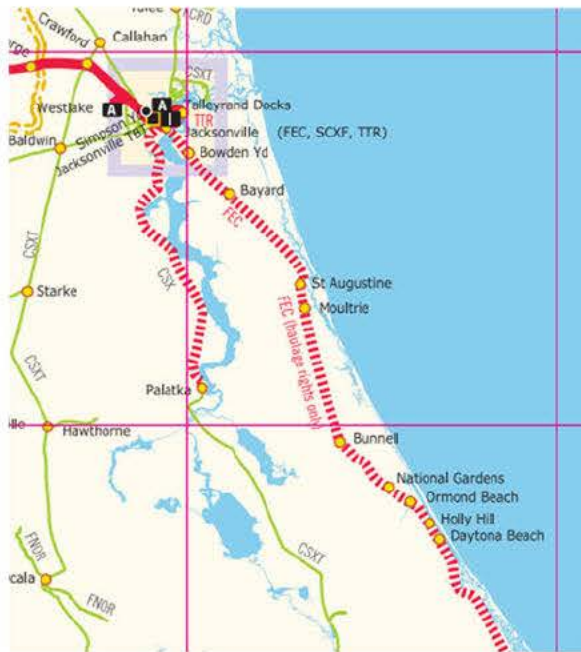
⁷⁰ BNSF, BNSF Network Map, available at <http://www.bnsf.com/bnsf-resources/pdf/ship-with-bnsf/maps-and-shipping-locations/bnsf-network-map.pdf>

⁷¹ BNSF, BNSF Network Map, available at <http://www.bnsf.com/bnsf-resources/pdf/ship-with-bnsf/maps-and-shipping-locations/bnsf-network-map.pdf>

⁷² Norfolk Southern, Norfolk Southern System Map, available at <http://www.nscorp.com/content/dam/nscorp/maps/2016-system-map-print.pdf>



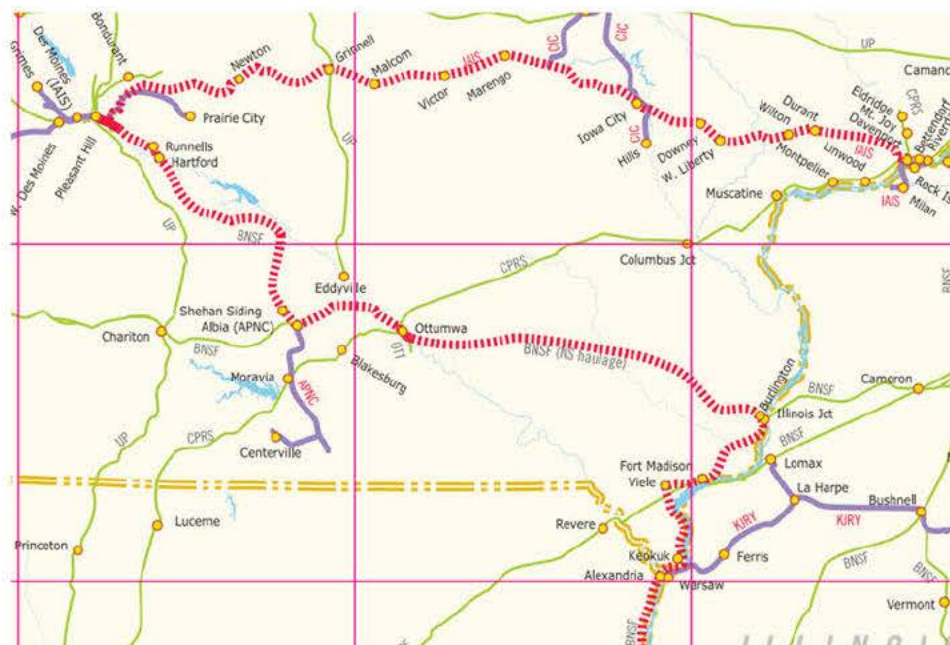
- Twelve years ago, Kansas City Southern and Norfolk Southern entered into a haulage agreement from Meridian, Miss., to Dallas, Tex., in order to facilitate the movement of transcontinental intermodal business.⁷³
- Jacksonville, FL to Miami, FL on FEC
 - NS system map identifies haulage from Jacksonville to Miami⁷⁴



⁷³ Factiva, "Success along the Meridian Speedway (Update)", September 1, 2012, at page 16.

⁷⁴ Norfolk Southern, Norfolk Southern System Map, available at <http://www.nscorp.com/content/dam/nscorp/maps/2016-system-map-print.pdf>

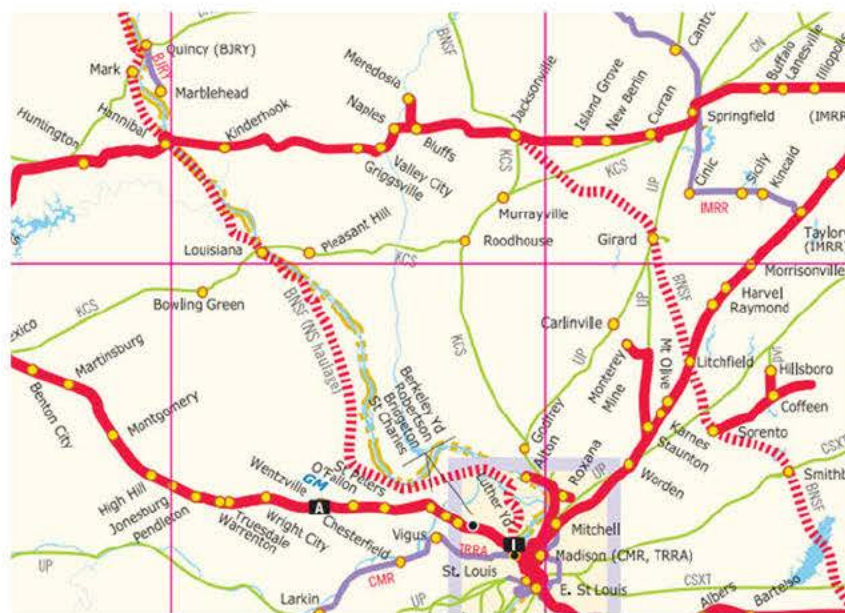
- Trackage rights agreements allow NS to operate over the approximately 53 miles of CSXT's "A Line" between Jacksonville and Palatka (where NS serves Georgia Pacific paper mill) and NS maintains a haulage agreement with FEC from Jacksonville to Miami.⁷⁵
- In connection with a haulage agreement with NS, FECR also serves an approximately 100-acre facility owned by NS near Titusville, FL, which is currently used for automobile distribution.⁷⁶
- STL, IL to Des Moines, IA on BNSF and Des Moines, IA to Peoria, IL on IAIS
 - NS system map identifies haulage from STL to Des Moines and Des Moines to Peoria⁷⁷



⁷⁵ Florida Department of Transportation, "The Florida Rail System Plan", December 2010, page 2-16, available at <https://fdotwww.blob.core.windows.net/sitefinity/docs/default-source/content/rail/plandevel/documents/finalinvestmentelement/a-2010flrailplan-investmentelement.pdf>.

⁷⁶ Finance Docket No. 35031, “FORTRESS INVESTMENT GROUP LLC, ET AL.—CONTROL—FLORIDA EAST COAST RAILWAY, LLC”, September 27, 2007, available at <https://dcms-external.s3.amazonaws.com/MPD/62491/2F26E8C57AAAB44F85257364004C69FD/38382.pdf>

⁷⁷ Norfolk Southern, Norfolk Southern System Map, available at <http://www.nscorp.com/content/dam/nscorp/maps/2016-system-map-print.pdf>



- NS haulage rights in Iowa are maintained over the following line segments and connecting railroads:
 - BNSF Railway (BNSF) Des Moines Subdivision between Des Moines, Iowa, and Albia, Iowa; approximately 67.8 miles.
 - BNSF Railway (BNSF) Ottumwa Subdivision between Albia, Iowa, and Burlington, Iowa; approximately 98.6 miles.
 - BNSF Railway (BNSF) Hannibal Subdivision between Ottumwa, Iowa, and the Iowa/Missouri state line near Keokuk, Iowa.⁷⁸
- NS maintains approximately 386 miles of haulage rights over two connecting railroads (BNSF and IAIS) from Des Moines, Iowa, to access the rest of the NS network at St. Louis, Missouri, and Peoria, Illinois.⁷⁹
- Rouses Point, NY to Saratoga Springs, NY on CP
 - NS system map identifies haulage from Rouses Point to Saratoga Springs⁸⁰

⁷⁸ Iowa Department of Transportation, "Iowa State Rail Plan", December, 2021 at page 234, available at https://iowadot.gov/iowainmotion/railplan/2017/IowaSRP2017_Complete.pdf

⁷⁹ Iowa Department of Transportation, "Iowa State Rail Plan Appendix A", at page 29, available at https://iowadot.gov/iowainmotion/railplan/2017/IowaSRP2017_AppendixA.pdf

⁸⁰ Norfolk Southern, Norfolk Southern System Map, available at <http://www.nscorp.com/content/dam/nscorp/maps/2016-system-map-print.pdf>



- CN-NSR traffic destined for the Eastern U.S. will move in CPR trains on CPR's line between Rouses Point, N.Y., and Saratoga Springs, under a freight haulage arrangement between CPR and NSR. This CN-NSR traffic will then move in NSR trains over CPR's line between Saratoga Springs and the NSR connection near Harrisburg, Pa., under a trackage rights agreement between CPR and NSR.⁸¹
- Haulage to Washington DC on CSXT
 - NS system map identifies trackage/haulage through Washington DC⁸²



- Today, only a small volume of NS freight passes through the District via a haulage agreement with CSX, where NS cars are hauled by CSX locomotives to customers within the District. NS does not use its trackage rights through the District.⁸³
- Haulage rights over Pan Am Railways

⁸¹ Canadian Pacific, "Form 6-k", November 8, 2004, at page 1, available at <https://www.sec.gov/Archives/edgar/data/16875/000113031904000739/o14594e6vk.htm>

⁸² Norfolk Southern, Norfolk Southern System Map, available at <http://www.nscorp.com/content/dam/nscorp/maps/2016-system-map-print.pdf>

⁸³ District Department of Transportation, "District of Columbia State Rail Plan", 2017 at page 44, available at https://ddot.dc.gov/sites/default/files/dc/sites/ddot/page_content/attachments/DC%20SRP%20FinalReport.pdf

- NS, the other major Class I carrier in the Northeast, has haulage rights over Pan Am Railways, which operates a line across northern Massachusetts. Rhode Island rail users likewise may connect to NS via the P&W at Gardner, MA.⁸⁴
- The Knowledge Corridor runs north-south between milepost 183.4 at White River Junction, Vt., and milepost 0.0 at New Haven, Conn., a distance of approximately 183.4 miles. (Id., Ex. 13, Operating Plan 24-25.) The Knowledge Corridor includes segments of rail line owned by New England Central Railroad (NECR), a subsidiary of Genesee & Wyoming, Inc. (GWI), and the National Railroad Passenger Corporation (Amtrak), each of which PAS has trackage rights over, and a segment owned by the Massachusetts Department of Transportation (MassDOT), over which PAS has freight easement rights. (Id.)⁸⁵

5.1.3. CSXT

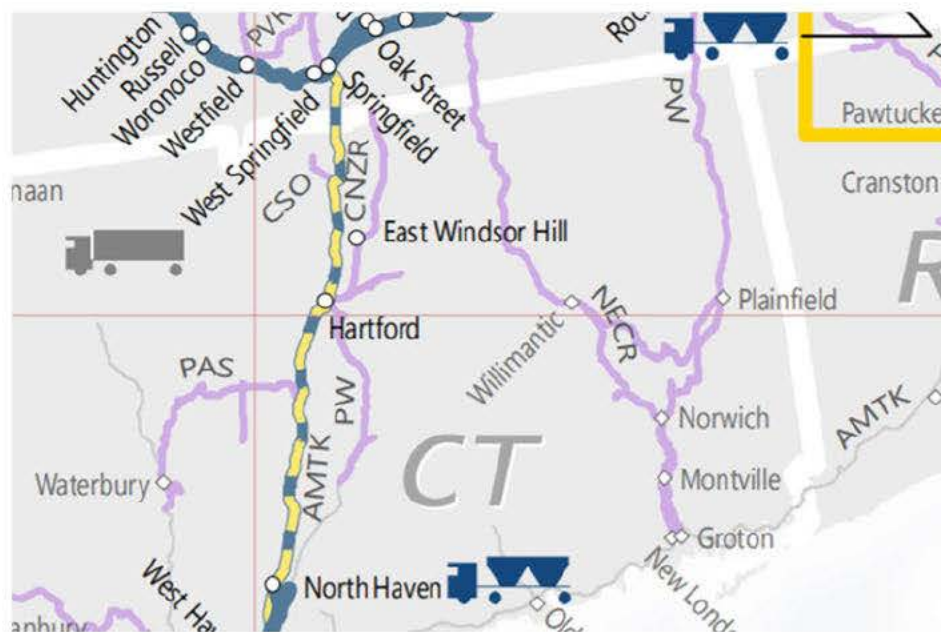
- Mattawamkeag, ME to Saint John, NB (With PAR Acquisition)
 - The expanded market opportunities will extend to international trade. The PAR System's rail network connects to four ports in Revere MA, Portsmouth NH, Portland ME, and Saint John, New Brunswick. The PAR System connects to Saint John through a haulage arrangement with the Eastern Maine Railway and New Brunswick Southern Railway. Shippers on the CSXT/PAR System rail network will have greater access to the inbound and outbound traffic using these ports. Substantial new investment is being made in these port facilities. For example, new investment in the Port Saint John in New Brunswick is making that port an increasingly important gateway for international commerce. Rail traffic from Saint John already accounts for a substantial volume of the PAR System traffic. Improved rail access to and from Saint John and the other New England ports will provide new opportunities for rail shippers to access overseas markets⁸⁶
- West Springfield, MA to North Haven, CT on Connecticut Southern Railroad / RailAmerica, Incorporated
 - CSXT system map identifies an operating agreement from West Springfield to North Haven⁸⁷

⁸⁴ Department of Administration Division of Planning, "Rhode Island State Rail Plan", March 13, 2014 at page 54, available at http://www.planning.ri.gov/documents/trans/Rail/RI_State_Rail_Plan_2014.pdf

⁸⁵ Finance Docket No. 36472, "CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL. —CONTROL AND MERGER— PAN AM SYSTEMS, INC.", July 30, 2021 at page 5.

⁸⁶ FINANCE DOCKET NO. 36472, "Verified Statement of Sean Pelkey", February 25, 2021 at page 201.

⁸⁷ CSXT, CSXT System Map



- Connecticut Southern Railroad / RailAmerica, Incorporated moves traffic for CSX between West Springfield, Massachusetts, and North Haven under a haulage arrangement.⁸⁸

5.1.4. CN

- Haulage arrangements via the New England Central Railroad (NECR) to Worcester, MA
 - Through haulage arrangements via the New England Central Railroad (NECR), Class I carriers Canadian Pacific (CP) and Canadian National (CN) have access to Massachusetts customers for commodities and intermodal shipments. The Worcester, MA, intermodal terminal on the P&W is also a CN intermodal terminal and is reached via a haulage agreement between CN, NECR, and P&W.⁸⁹
- Rouses Point, NY to Saratoga Springs, NY on CP
 - CN-NSR traffic destined for the Eastern U.S. will move in CPR trains on CPR's line between Rouses Point, N.Y., and Saratoga Springs, under a freight haulage arrangement between CPR and NSR. This CN-NSR traffic will then move in NSR trains over CPR's line between Saratoga Springs and the NSR connection near Harrisburg, Pa., under a trackage rights agreement between CPR and NSR.⁹⁰

⁸⁸ Connecticut Department of Transportation, "Connecticut State Rail Plan", 2012 at page 74, available at https://portal.ct.gov/-/media/DOT/documents/dplansprojectsstudies/plans/State_Rail_Plan/StateRailPlanFinal11812pdf.pdf

⁸⁹ Massachusetts Department of Transportation, "Massachusetts State Rail Plan", May 2018 at page 32 available at https://www.mass.gov/files/documents/2018/06/14/FinalRailPlan_Sprng18.pdf

⁹⁰ Canadian Pacific, "Form 6-k", November 8, 2004 at page 1, available at <https://www.sec.gov/Archives/edgar/data/16875/000113031904000739/o14594e6vk.htm>

5.1.5. UP

- Van Buren, AR to Fort Smith AR on Arkansas & Missouri Railroad
 - Arkansas & Missouri Railroad provide haulage of UP traffic between Van Buren and Fort Smith.⁹¹
- Cedar Rapids, Iowa, to Manly, Iowa on IANR and CN
 - UP has haulage rights over the following line segments and connecting railroads: • Iowa Northern Railway (IANR) Cedar Rapids Subdivision between Cedar Rapids, Iowa, and Waterloo, Iowa; approximately 50 miles. • Iowa Northern Railway (IANR) Manly Subdivision between Cedar Falls Junction, Iowa, and Manly, Iowa; approximately 76 miles (this segment includes UP haulage rights over a 9-mile segment between Waterloo and Cedar Falls Junction, Iowa, on which IANR has trackage rights over the CN North Waterloo Industrial Lead and CN Waterloo Subdivision).⁹²

5.1.6. CP

- Albany, NY to Fresh Pond, NY and Albany, NY to Philadelphia, PA
 - Canadian Pacific Railway (CP), which until 2010, operated carload train service east of the Hudson to Oak Point Yard and Fresh Pond Yard, CP has established a haulage agreement with CSX, with CSX handling CP traffic in their trains south of Albany⁹³
 - In Canada CP services the ports of Vancouver, Montreal and Thunder Bay, while haulage agreements with other U.S. railroads provide access to the ports of New York and Philadelphia on the U.S. east coast.⁹⁴
 - See Conrail Dec. No. 89, slip op. at 177, ordering paragraph 28: “CSX must attempt to negotiate, with CP, an agreement pursuant to which CSX will grant CP either haulage rights unrestricted as to commodity and geographic scope, or trackage rights unrestricted as to commodity and geographic scope, over the east-of-the-Hudson Conrail line that runs between Selkirk (near Albany) and Fresh Pond (in Queens), under terms agreeable to CSX and CP, taking into account the investment that needs to continue to be made to the line.” See also Conrail Dec. No. 89, slip op. at 18 (item 10), 82-83; Conrail Dec. No. 99; Conrail Dec. No. 102; Conrail Dec. No. 109; Conrail Dec. No. 112; Conrail Dec. No. 123; Conrail Dec. No. 132; Conrail Dec. No. 133; Conrail Dec. No. 134.⁹⁵

⁹¹ Arkansas State Highway and Transportation Department, “2015 Arkansas State Rail Plan”, December 2015 at page 2-17, available at https://www.nwarpc.org/wp-content/uploads/2021/06/AR_STATE_RAIL_PLAN_2-18-16.pdf

⁹² Iowa Department of Transportation, “Iowa State Rail Plan”, December, 2021 at page 237, available at https://iowadot.gov/iowainmotion/railplan/2017/IowaSRP2017_Complete.pdf

⁹³ New York State Department of Transportation, “New York State Freight Transportation Plan Background Analysis (Deliverable 1), June 2015 at page 43, available at <https://www.dot.ny.gov/content/delivery/Main-Projects/projects/P11618881-Home/P11618881-repository/Background%20Analysis%20Report.pdf>

⁹⁴ Canadian Pacific, “Corporate Sustainability Report 2016”, 2016 at page 10, available at [cp-csr-2016.pdf \(cpr.ca\)](https://www.cpr.ca/cpr-csr-2016.pdf)

⁹⁵ Finance Docket No. 33388 (Sub-No. 91), “CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY — CONTROL AND OPERATING LEASES/AGREEMENTS — CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION”, February 1, 2001 at page 55, available at <https://dcms-external.s3.amazonaws.com/MPD/62491/F7558217D7696587852569E0004EE4D1/31512.pdf>

- Saint-Leonard, NB to Millinocket, ME and Brownville Jct, ME to Saint John, NB
 - With the acquisition of CMQ, CP received haulage depicted below⁹⁶



- Additionally, the improved service will extend market reach for CP and CMQR customers, providing them direct access to markets on each other's systems, including the import and export markets served by the deep water ports of Searsport and (via haulage) Saint John.⁹⁷
- Buffalo, NY to Chicago, IL
 - Canadian Pacific owns a route between Montreal and Buffalo coupled with a haulage arrangement on CSX tracks between Buffalo and Chicago.⁹⁸
- Chicago, IL to Jeffersonville, OH
 - A haulage agreement with Genesee & Wyoming Inc., provides intermodal service to Jeffersonville, OH⁹⁹
 - Canadian Pacific Railway announced a new partnership with Genesee & Wyoming Inc. and Bluegrass Farms of Ohio that will open up the Ohio Valley to CP intermodal customers and further extend its reach into key North American heartland markets. The Calgary-based carrier said it has an exclusive agreement with Bluegrass Farms to use its 90-acre intermodal facility in Jeffersonville, Ohio, on the I-71 corridor, to serve the Columbus, Cincinnati and Dayton markets. The farm consortium will continue to own the facility, and will operate it on behalf of CP. At the same time, CP has also come to an agreement with G&W, which services the site through its Indiana & Ohio (IORY) line.¹⁰⁰
- White Hall, NY to New London, CT
 - New England Central Railroad (NECR) is a subsidiary of RailAmerica, Incorporated and operates on its own line between New London and Stafford (55.8 miles) and on to East

⁹⁶ FINANCE DOCKET NO. 36368, "SOO LINE CORPORATION – CONTROL – CENTRAL MAINE AND QUEBEC RAILWAY US INC.", December 17, 2019 at page 44.

⁹⁷ FINANCE DOCKET NO. 36368, "SOO LINE CORPORATION – CONTROL – CENTRAL MAINE AND QUEBEC RAILWAY US INC.", December 17, 2019 at page 25.

⁹⁸ Canadian Pacific, "2020 Annual Report", 2020 at page 51, available at https://s21.q4cdn.com/736796105/files/doc_financials/2020/ar/CP_AnnualReport2020_SECURED.pdf

⁹⁹ Canadian Pacific, "2020 Annual Report", 2020 at page 51, available at https://s21.q4cdn.com/736796105/files/doc_financials/2020/ar/CP_AnnualReport2020_SECURED.pdf

¹⁰⁰ Railway Age, "CP, G&W in Ohio Intermodal Pact", October 2017, available at <https://www.railwayage.com/news/cp-gw-in-ohio-intermodal-pact/>

Albany, Vermont, and a distance of 326 miles, where it connects with the Canadian National Railway. It also interchanges with CSX at Palmer, Massachusetts, Pan Am Southern at Millers Falls, Massachusetts and Canadian Pacific via Bellows Falls, Vermont. The NECR is unique in that it offers Connecticut businesses access to all four Class I railroads¹⁰¹

- Through haulage arrangements via the New England Central Railroad (NECR), Class I carriers Canadian Pacific (CP) and Canadian National (CN) have access to Massachusetts customers for commodities and intermodal shipments. The Worcester, MA, intermodal terminal on the P&W is also a CN intermodal terminal and is reached via a haulage agreement between CN, NECR, and P&W.¹⁰²
- Canadian Pacific has haulage rights over the Vermont Rail System from Whitehall, New York through Rutland to Bellows Falls and then further south into New England via the New England Central Railroad.¹⁰³

5.1.7. KCS

- Lincoln to Omaha, Nebraska to Council Bluffs, Iowa, to the Iowa/Missouri state line near Hamburg, Iowa to Kansas City, Kansas on BNSF and UP
 - KCS has haulage rights over the following railroad segments in Iowa: • Union Pacific Railroad (UP) Omaha Subdivision between the Iowa/Nebraska state line at Council Bluffs, Iowa, and Council Bluffs, Iowa; approximately 4.0 miles. • BNSF Railway (BNSF) Council Bluffs Subdivision between BN Junction (Council Bluffs), Iowa, and Pacific Junction, Iowa; approximately 18.4 miles. • BNSF Railway (BNSF) Napier Subdivision between Pacific Junction, Iowa, and the Iowa/Missouri state line near Hamburg, Iowa; approximately 33.0 miles.¹⁰⁴
 - As a result of the 1988 acquisition of the Missouri-Kansas-Texas Railroad by UP, KCSR was granted (1) haulage rights between Kansas City and each of Council Bluffs, Iowa, Omaha and Lincoln, Nebraska and Atchison and Topeka, Kansas.¹⁰⁵

¹⁰¹ Connecticut Department of Transportation, “Connecticut State Rail Plan”, 2012 at page 75, available at https://portal.ct.gov/-/media/DOT/documents/dplansprojectsstudies/plans/State_Rail_Plan/StateRailPlanFinal11812pdf.pdf?la=en

¹⁰² Massachusetts Department of Transportation, “Massachusetts State Rail Plan”, May 2018 at page 32 available at https://www.mass.gov/files/documents/2018/06/14/FinalRailPlan_Sprng18.pdf

¹⁰³ Atlantic Northeast Rails & Ports, “G&W: Haulage Rights Offered to Vermont Rail System”, May 6, 2021, available at <https://railsandports.com/2021/05/haulage-rights-offered-to-vermont-rail-system/>

¹⁰⁴ Iowa Department of Transportation, “Iowa State Rail Plan”, December, 2021 at page 232, available at https://iowadot.gov/iowainmotion/railplan/2017/IowaSRP2017_Complete.pdf

¹⁰⁵ Kansas City Southern, “2003 Annual Report”, 2003 at page 24, available at <https://investors.kcsouthern.com/~media/Files/K/KC-Southern-IR-V2/annual-reports/annualreport2003.pdf>

Appendix E – Interchange Analysis

**Figure 1: Savings Under Increased
Interchange Competition on the Meridian
Speedway by Grouping
(CWS 2019 and FAF)**

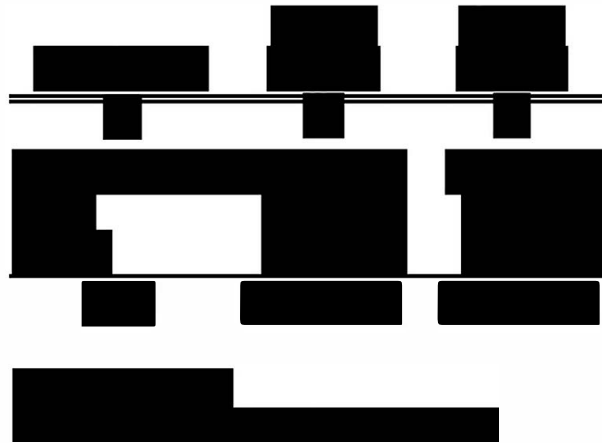


Figure 2: Domestic Savings Under Increased Interchange Competition on the Meridian Speedway by Lane (CWS 2019 and FAF)

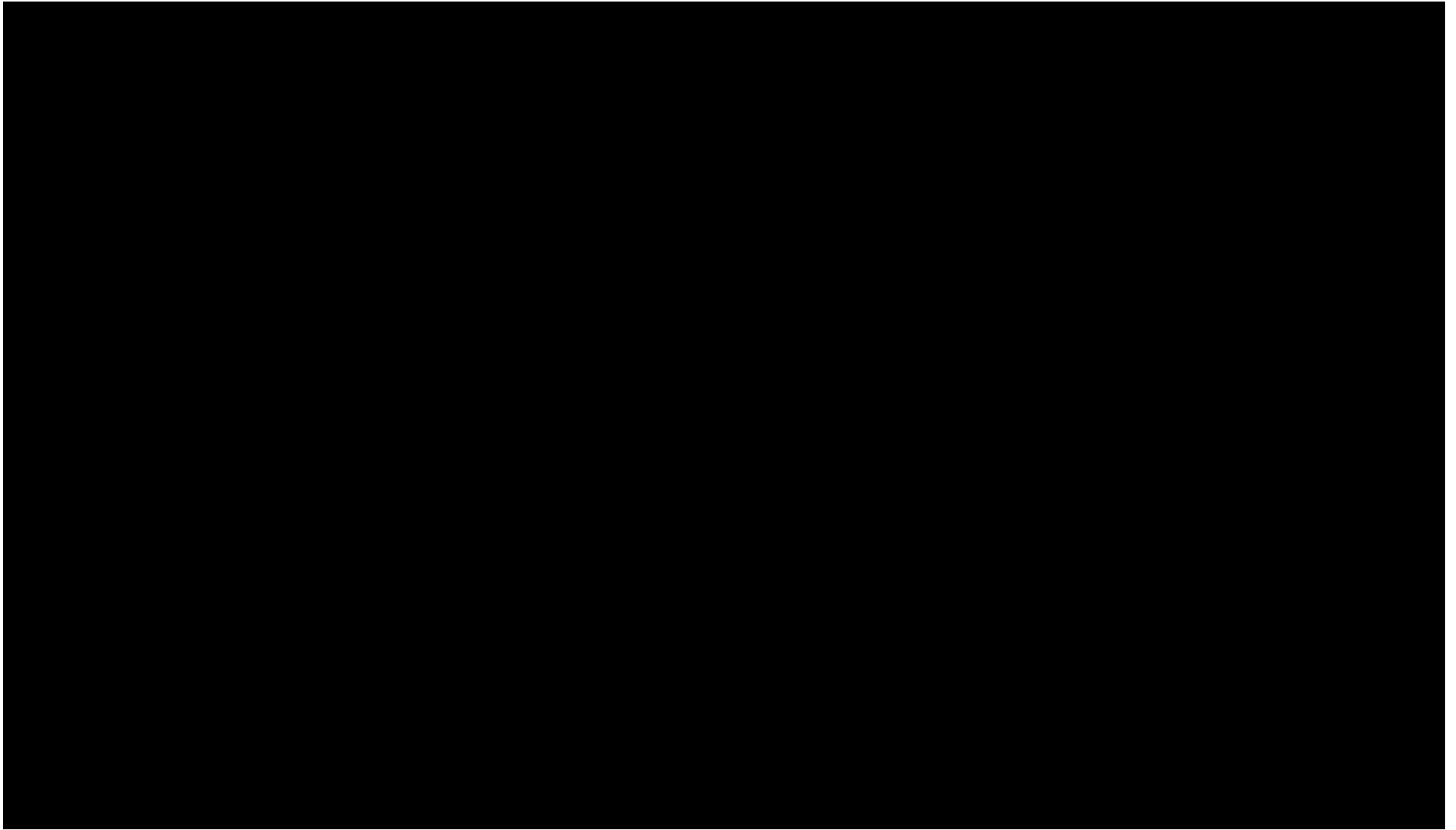


Figure 3: Mexico Savings Under Increased Interchange Competition on the Meridian Speedway by U.S. Segment (CWS 2019 and FAF)

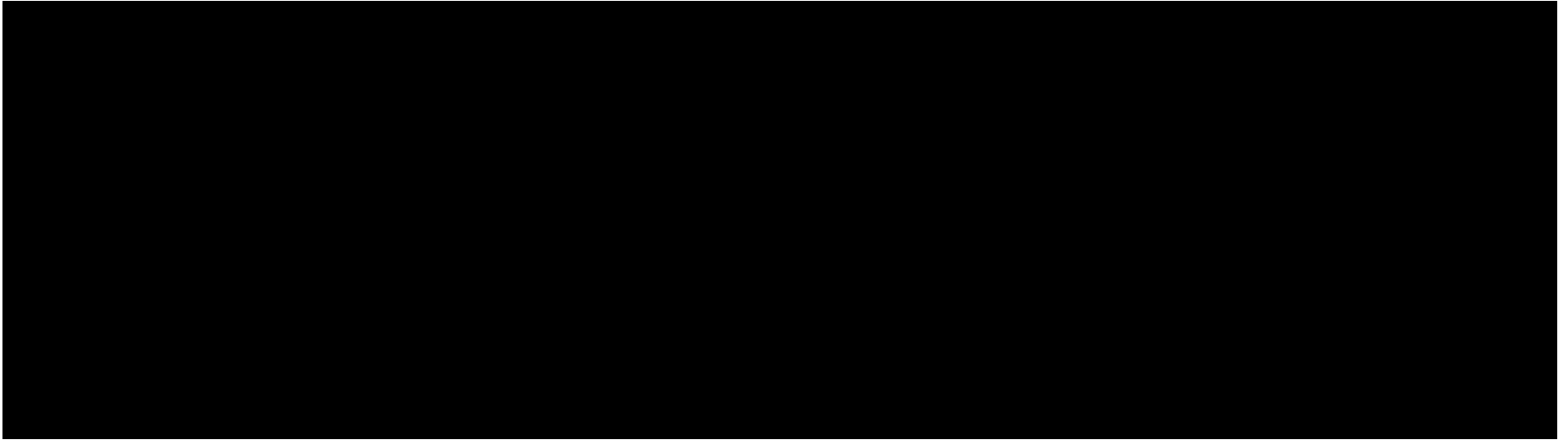


Figure 4: Truck Displacement Under Increased Interchange Competition on the on the Meridian Speedway by Traffic Type (CWS 2019 and FAF)

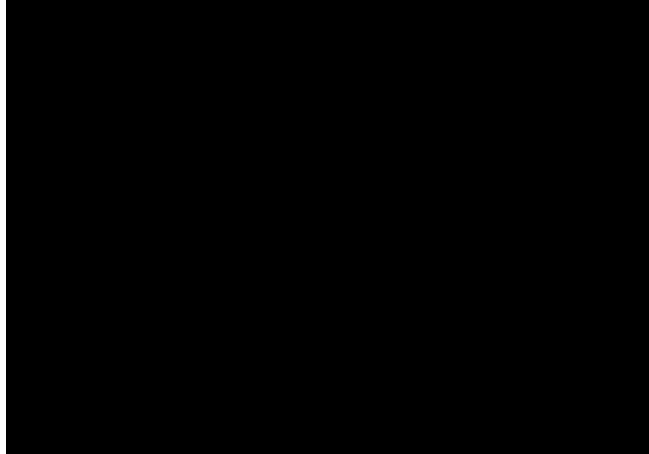


Figure 5: Domestic Truck Displacement Under Increased Interchange Competition on the Meridian Speedway by Lane (CWS 2019 and FAF)

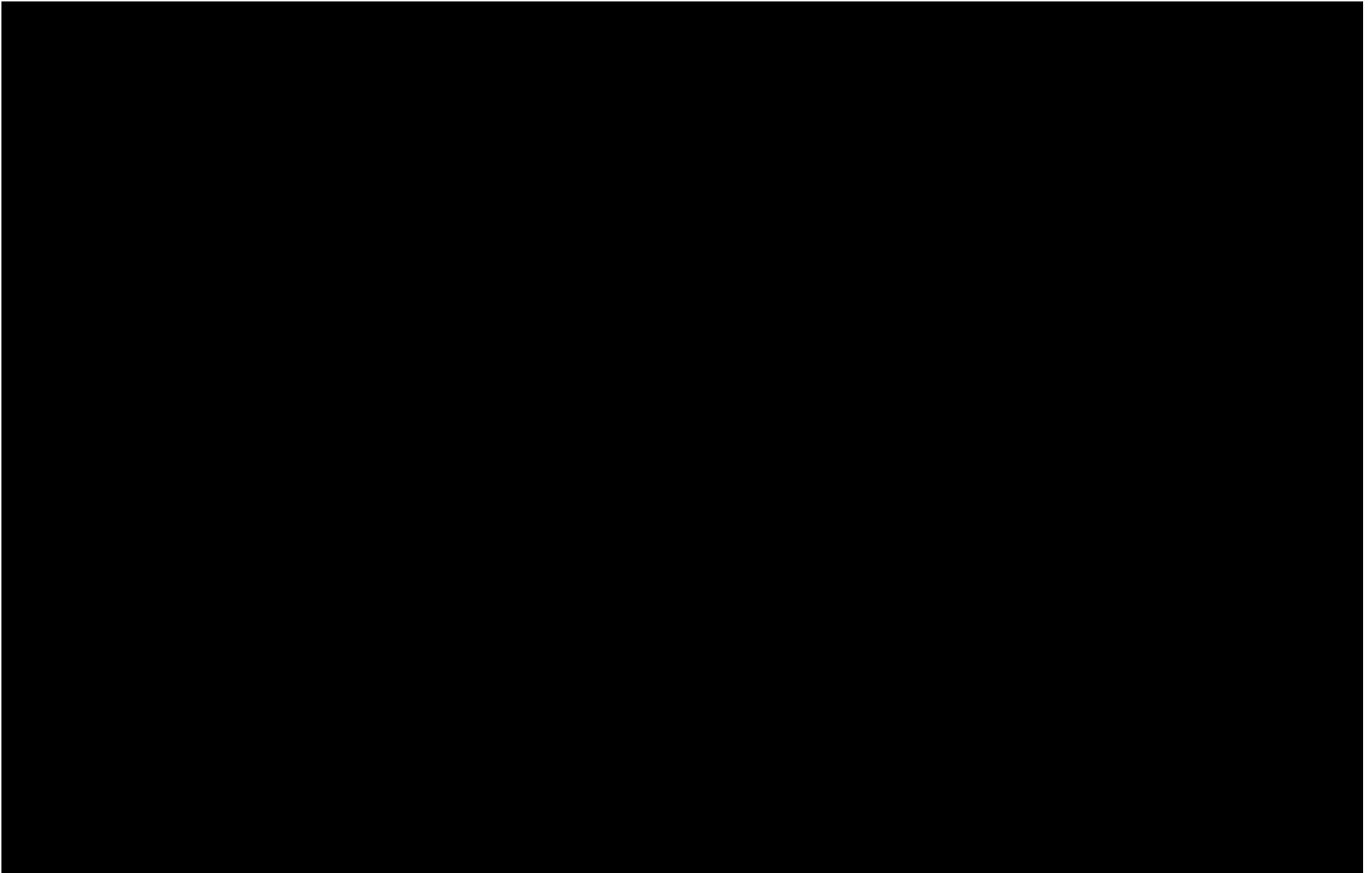
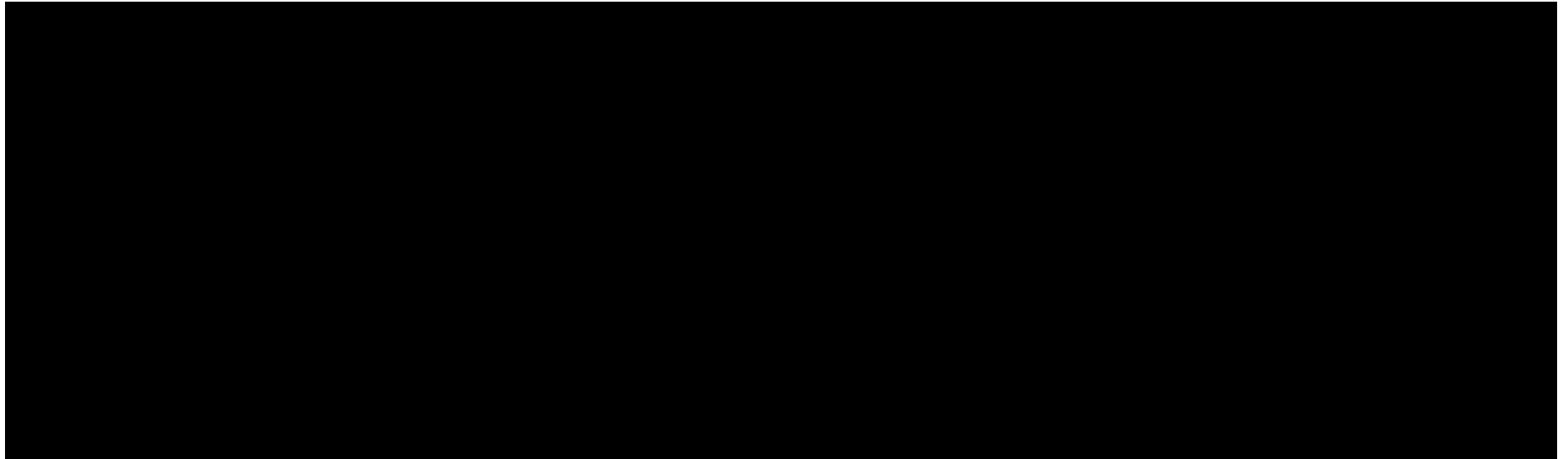


Figure 6: Mexico Truck Displacement Under Increased Competition on the Meridian Speedway by Segment (CWS 2019 and FAF)



A. Data Preparation

2019 Confidential Waybill Sample

My analysis evaluating the impact of an increase in interchange competition on the freight rail rate begins with the 2019 Confidential Waybill Sample (CWS), produced by the Surface Transportation Board (STB). The CWS is a “stratified sample of carload waybills for all U.S. rail traffic submitted by those rail carriers terminating 4,500 or more revenue carloads annually”¹. The CWS is considered a reliable source for data on the rail industry^{2,3}. The 2019 CWS is used because 2019 is the base of analysis in this Transaction⁴. Model specification was considered after a review of existing literature on the effect of competition on the rail rate⁵

Creation of CWS Covariates

The CWS was used to generate the following covariates:

i. Car Ownership

Car ownership is included as a control to account for costs associated with using rail cars. The CWS identifies three different types of car ownership: Privately owned, Rail owned, and Trail Train.

ii. Number of Interchanges

The number of interchanges was determined at the individual level by counting the number of non-missing values using the Interchange Rule 260 1-6 fields provided by the CWS.

iii. Route Distance

PCMiller Rail was used to determine route distances. 98% of all moves in the CWS returned one route distance, the remaining 2% were assigned the shortest possible route.

iv. Class 1 Origin/Termination Access

I calculated the accessibility of class 1 carriers at the origin and termination points of a move for the regression specification that utilizes interchange competition as a treatment.

The calculation was broken into two sections:

¹ Carload Waybill Sample, Surface Transportation Board, available at <https://www.stb.gov/reports-data/waybill/>

² Comprehensive Truck Size and Weight Limits Study – Modal Shift Comparative Analysis Technical Report, Appendix C: Intermodal Transportation and Inventory Cost Model, U.S. Department of Transportation, available at https://ops.fhwa.dot.gov/freight/sw/map21tswstudy/technical_rpts/mscanalysis/app_c_cost_model.htm

³ Carload Waybill Sample Reference Guide, Surface Transportation Board, available at <https://www.stb.gov/wp-content/uploads/2019-STB-Waybill-Reference-Guide.pdf>

⁴ See Application Volume 1, p. 8

⁵ See Babcock, Michael W. “Impacts of Intramodal Competition on 2012 Rates for Wheat,” December 2015, Kansas State University. See also Harbor, Anetra L. “An Assessment of the Effect of Competition on Rail Rates for Export Corn, Soybean, and Wheat Shipments, Transportation Services Branch U.S. Department of Agriculture, 2009. See also Macdonald, James M., “Competition and Rail Rates for the Shipment of Corn, Soybeans, and Wheat,” The RAND Journal of Economics, Spring, 1987, Vol. 18, No. 1 (Spring, 1987), pp. 151-163

(1) Calculate number of Class 1 Carriers that have active access to the Origin SPLC for non-intermodal moves based on the number of distinct Class 1 Carrier names at that Origin SPLC in the CWS.

(2) Calculate the number of Class 1 Carriers that have access to the Origin BEA for intermodal moves based on the number of distinct Class 1 Carrier names at that Origin BEA in the CWS.

(3) Steps (1)-(2) were duplicated for Termination Access

v. Single Line Moves

All moves with 0 interchanges were classified as single line moves. Rebilled moves incorrectly assigned a single line indicator value of 1 were reassigned values later, as described in the Rebill Adjustments section.

vi. Intermodal Service Code

The STB recodes intermodal service codes provided by carriers into alphabetic categories comprising “A” - “R”, with an additional code of “X” for unknown service codes. Like the car ownership in the CWS, this field was simply recoded as a factor variable before being used in estimation, so that during regression estimation, each service code was treated as a discrete variable.

vii. Revenue Per Car-Mile

Two variations on revenue per car-mile were calculated to estimate the regression. One variation on the estimation uses the revenue per car-mile calculated at the individual route level based on the following formula:

$$RPC_i = \frac{ETR_i + FS_i}{(EC_i * RD_i)}$$

Where RPC_i is the revenue per car-mile, ETR_i is the Expanded Total Revenue, FS_i is the fuel surcharge rate, EC_i is the expanded carloads, and RD_i is the route distance as calculated from PCMIler, all for individual route i .

The second variations controls for masked revenues⁶. After the data was cut to only contain observations used for estimation, a variation on the revenue per car-mile was generated using the subset data. When the STB⁷ receives route information from carriers, some revenues are masked using a scaling factor to either inflate or deflate the revenue. A masked revenue is identified using the “Calculated Rate Flag” field. In my final dataset used for estimation, approximately 10% of the data had revenues that were not masked. I

⁶ “For this study, the revenues and variable costs of all records of the same four-digit STCC commodity, moving the same distance between the same origin and destination in the same rail car type are combined and divided by the car-miles generated by those moves to calculate consistent revenue and variable costs per car-mile for the analysis. This treatment provides a transportation cost that is consistent with the single truck rate applied to all moves in the same equipment type between the same origin and destination.”, Comprehensive Truck Size and Weight Limits Study – Modal Shift Comparative Analysis Technical Report, Appendix C: Intermodal Transportation and Inventory Cost Model, U.S. Department of Transportation, available at https://ops.fhwa.dot.gov/freight/sw/map21tswstudy/technical_rpts/mscanalysis/app_c_cost_model.htm

⁷ “Beginning with the 1986 Sample, railroads were allowed to disguise their contract revenues through factoring them by a scalar value at the three digit STCC level.”, Carload Waybill Sample Reference Guide p. 186, Surface Transportation Board, available at <https://www.stb.gov/wp-content/uploads/2019-STB-Waybill-Reference-Guide.pdf>

calculated an average rate for routes grouped by four-digit STCC code, origin BEA area, termination BEA area, and car type to produce a rate less effected by masked rates.

viii. Number of Active Routes

One of two versions of the treatment variable, the number of active routes represents the number of existing routing permutations a shipper can use to get from one BEA to another. The number of active routes was determined in two steps. First, the origin railroad name, all six interchange railroad names, and the termination railroad name were concatenated into one string separated by dashes. For instance, if a move originated on UP and terminated on NS, the resulting field would look like:

“UP-----NS”

For an interchanged move, such as the route above along with the addition of an interchange between NS and FEC, would result in the following:

“UP-----NS-FEC”

The CWS was then grouped by origin and destination BEA area. The number of distinct strings was counted and assigned to each origin-destination BEA pair. The inclusion of junction names in determining active routes was excluded as certain routes with the same carriers may proceed through different interchanges. However, it is unreasonable to assume that routes with the exact same carriers compete

ix. Carrier Options at Interchange 1-3

The second version of the treatment evaluates competition at each interchange; therefore, competition is only determined for interline moves at points within a route.

Interchanges were determined iteratively. The CWS was split into four separate datasets by the number of interchanges on a given route, 0-3.

After this division, all single line moves (routes with zero assigned from (iii)) were given an interchange competition value of 0 for interchange 1, 2, and 3.

For moves with one interchange, the number of interchange competitors was calculated by grouping the data at the first interchange and termination BEA area. The number of distinct termination carriers was then calculated based on this grouping.

Moves with two and three interchanges were handled differently. Competition values calculated for single interchange moves were assigned to all final interchange-termination BEA pairings in the set. The objective in using this method was to capture all theoretical alternatives in each route. For instance, a two interchange move whose ultimate segment of Chicago to Atlanta was assigned the competition value for single interchange moves that interchange at Chicago and terminate in Atlanta. In the case where a final interchange was only present in the set of data containing more than one interchange (or more than two interchanges), the competition value was computed the same way as with single interchange moves. Additional competition values were calculated between interchanges for multiple interchange moves. These were determined by grouping either two or three interchange moves by consecutive Interchange Rule 260 variables (i.e., Interchange 2 Rule 260 and Interchange 3 Rule 260) and counting the number of distinct interchange carriers at the

ending interchange in the segment. Finally, full competition values for two and three interchange moves were calculated row-wise based on the following formulas:

Two Interchange Moves:

$$\text{Options at 1st Interchange} = \max\{Comp_{1,2}, Comp_{1,term}\}$$

$$\text{Options at 2nd Interchange} = Comp_{2,term}$$

Three Interchange Moves:

$$\text{Options at 1st Interchange} = \max\{Comp_{1,2}, Comp_{1,3}, Comp_{1,term}\}$$

$$\text{Options at 2nd Interchange} = \max\{Comp_{2,3}, Comp_{2,term}\}$$

$$\text{Options at 3rd Interchange} = Comp_{3,term}$$

Where $Comp_{i,j}$ is the competition between interchange i and point j , which can be either another interchange or the termination BEA area.

x. Origin/Termination BEA HHI

To better assess the impact of a change in the interchange competition on the rail rate for intermodal moves, a covariate of interest is the market concentration of intermodal containers in each Origin-Destination BEA pair. To incorporate truck volumes, I used the FAF (Freight Analysis Framework), a dataset produced every five years jointly by the Bureau of Transportation Statistics and Federal Highway Administration that “integrates data from a variety of sources to create a comprehensive picture of freight movements among states and major metropolitan areas by all modes of transportation”⁸. Two versions of the FAF were used to determine volumes and weight. The 2018-2019 FAF 5.3 contains regional estimates of weight and value for exports, imports, and domestic movements by origin-destination FAF region or state pairs. The 2017 and 2022 FAF 5 contains weight and daily trips but does not include detailed information on the origin-destination pairs of each observation. To estimate yearly truck trips (i.e., movements), an overall weight per car was calculated using the midpoint of the 2017 and 2022 FAF 5 overall weight per car. Daily truck trips in the FAF 5 were multiplied by 365 to determine yearly movements.

Once the midpoint of the weight per car from the 2017 and 2022 FAF 5 was calculated, the value was then used to estimate yearly trips using the actual 2019 total tons from the 2018-2019 FAF 5.3.

Steps were taken to adjust the FAF to be compatible with the format of the CWS, as well as to allow analysis at the BEA level⁹. First, the raw FAF data was subset to only include observations whose value in any *mode* field contained was labeled as truck.

⁸ Freight Analysis Framework, U.S. Department of Transportation, available at https://ops.fhwa.dot.gov/freight/freight_analysis/faf/

⁹ After the data was subset to only include these observations, the origin and destination FAF regions for each shipment were assigned a BEA area based on the closest match between a FAF region code (which is the coded equivalent of the CFS Metropolitan Area Names) and BEA name using the primary city in both the BEA and FAF region code. Of all the BEA names, the FAF region codes had successful matches with 68 BEAs. Observations used in estimation were ones that had perfect BEA OD matches to the FAF. These observations contained major BEA OD pairs.

For my estimation procedure using the interchange competition as treatment, I controlled for market concentration at either end of a move. I employed the Herfindahl-Hirschman Index (HHI). HHIs were calculated separately for origin and destination BEAs within an origin-destination lane BEA pair. This was done to avoid double counting rail cars from the CWS. In my regression, I include an interaction between the origin and termination HHI to simulate a lane concentration covariate.

HHIs were calculated using the following formula:

$$HHI_k = \sum_{i=1}^7 r_i^2 + \sum_{l=1}^N t_l^2$$

Where for origin or termination BEA region k , r_i^2 are the squared market shares for all seven Class 1 Carriers, calculated as:

$$r_i^2 = \left(\frac{\sum_{m=1}^w \text{expanded_carloads}_m}{\sum_{a=1}^b \text{expanded_carloads}_a + \sum_{g=1}^j \text{truck_volume}_g} \right)^2$$

Where the numerator is the sum of expanded carloads for all moves carrier i handles in BEA area k and the denominator is the sum of expanded carloads all Class 1 carriers handle in BEA area k plus the total truck volumes handled in BEA area k .

The second summation term is the sum of squared market shares for N truck competitors, where N is large enough such that for $0 < t < 1$ we have that

$$\sum_{l=1}^N t_l^2 = s$$

Where s is a very small number close to zero. In essence, my HHI calculation assumes an infinite/very large number of truck competitors such that the truck competitors are not seen to increase the HHI. This assumption does not restrict a uniform distribution of market shares across truck competitors, but instead only assumes that each individual truck competitor has a very small market share.

Van Spot Truck Rates

Truck rates were the final component to be added to the CWS. Truck rates were provided to us at the city origin-destination level and rates were assigned to a unique BEA OD pair. Truck rates were combined with their fuel surcharge rates to determine a new, fuel surcharge inclusive rate.

Rebill Adjustments

The STB describes the rebilling process and the issues it poses in its reference guide for the CWS¹⁰. In some cases, the STB receives moves directly from carriers marked for Rule 11 and splits the move into two separate routes. Steps were taken to adjust rebilled data to better represent the reality of the full moves these segments are a part of.

¹⁰ Carload Waybill Sample Reference Guide pp. 184-185, Surface Transportation Board, available at <https://www.stb.gov/wp-content/uploads/2019-STB-Waybill-Reference-Guide.pdf>

Addressing the rebilling issues in the CWS meant first separating the data into four subsets:

- (1) Rebill Code = 0: local shipment*
- (2) Rebill Code = 1: Originated-Delivered*
- (3) Rebill Code = 2: Received-Delivered*
- (4) Rebill Code = 3: Received-Terminated*

No changes were needed for moves with rebill code 0.

I utilized a SPLC-Junction name crosswalk from PCMiller to determine the junction names at either end of the rebilled move. This step allowed me to further separate the data into data rebilled at a junction and data not rebilled at a junction. Moves that had unsuccessful SPLC-Junction merges were assumed to be rebilled local moves, and if there were no interchanges involved in the rest of the route, these moves were reassigned a single line move value of 1. Origin and termination access and HHIs were also adjusted accordingly. The portion of the rebilled move which was not the ultimate origin or termination was assigned an average of the access and HHI for the same carrier. These averages were calculated using the non-rebilled moves. There were some cases where either a junction or a carrier (in the case of short line carriers) did not appear in the portion of the CWS that was not rebilled. These moves were removed from the estimation as they could not be effectively assigned an origin or termination carrier profile.

For moves rebilled at a junction, the number of interchanges was increased by one and the interchange competition was shifted depending on the rebill code. In the cases where a move rebilled at a junction was classified as a single line move, the value was changed to 0. For moves rebilled at the termination, interchange competition values were shifted backward by one interchange, and for moves rebilled at the origin, competition values were shifted forward by one. In addition to this shifting for moves rebilled at the termination, average competition values were calculated by origin BEA area and junction from the non-rebilled CWS data, since there was no certainty behind the ultimate destination point of moves whose termination point was rebilled. The competition values calculated in section B were then assigned to the relevant junctions for moves with termination rebills as interchange 1 competition.

Rebill code 2 were removed from the estimation because they could not be grouped by origin or termination, This accounted for less than 1% of observations.

C. Final Dataset

The estimation was performed on intermodal moves containing at least one Class 1 Carrier at either the origin or termination point. This was done to ensure that the estimation data most closely represented the study data. The addition of non-intermodal rates, which are typically higher than intermodal rates and lack equivalent truck competition and short line carrier only routes could cause a misidentification of the effect of interchange competition on intermodal rail rates.

My final dataset after all these conditions contained approximately 380,000 observations.

B. Regression Estimation Methodology

I ran three regressions, once with the individual revenue per car-mile, and twice with the grouped rate. The general form of these equations is:

$$Rate_i = \alpha + \beta_1 \text{interchange_1_competition}_i + \sum_{k=1}^n \gamma_k x_i + \varepsilon_i$$

$$Rate_i = \alpha + \beta_1 \text{active_routes}_i + \sum_{k=1}^n \gamma_k x_i + \varepsilon_i$$

Where $Rate_i$ is either the revenue per car-mile for route i or the grouped rate for move i , β_1 is our treatment of interest, and the vector $\sum_{k=1}^n \gamma_k x_i$ is a vector of controls depending on the model specification. For models containing the “active_routes” as treatment, origin and termination variables are omitted to avoid issues of collinearity/endogeneity.

Each version of the active routes model includes different controls for route distance. The first is a non-linear treatment of route distance which accounts for the increased efficiencies of long routes. The second is a piecewise mapping of distance bands through the inclusion of eleven dummy variables. The mapping is as follows:

$$distance_band_i = \begin{cases} 1, 0 < route_distance_i \leq 250 \\ 2, 251 < route_distance_i \leq 500 \\ \vdots \\ 11, 2500 < route_distance_i \end{cases}$$

C. Additional Analyses

Two supplementary analyses were conducted using the results of the regression: estimated savings for shippers on the Meridian Speedway and total Truck Displacement.

Savings on the Meridian Speedway

An obvious outcome of the reduction in rate due to an increase in interchange competition along the Meridian Speedway would be direct savings to shippers. I calculate savings using both versions of the active route model by directly comparing fitted rates from my model to predicted rates under increased interchange competition. In other words, I calculate the difference between the existing rate and the theoretical rate through increased competition at savings on a per-car-mile basis. I then expanded these values into total savings using distance and actual NS volumes over all lanes over the Meridian Speedway.

Estimated total savings were calculated at the BEA origin-destination level using the following regression model:

$$Rate_i = \alpha + \beta_1 \text{active_routes}_i + \sum_{k=1}^n \gamma_k x_i + \varepsilon_i$$

After this regression was estimated, I subset the dataset used in the regression to only contain Meridian interchange moves with BEA origin-destination pairs of interest. These include:

(1) *Transcontinental to/from Charlotte, Charleston, Greensboro, Atlanta, New York, Jacksonville, Harrisburg, and Savannah*

(2) *Dallas to to/from Charlotte, Charleston, Greensboro, Atlanta, New York, Jacksonville, Harrisburg, and Savannah*

(3) *Mexico to/from Atlanta, New York, Jacksonville, and Harrisburg*

After the CWS was subset to only contain routes with these BEA combinations, I adjusted the number of active routes from 1 to 2 (i.e., the theoretical increase in active routes if CSXT were to be given access to Meridian to deliver to the same locations). I then predicted the new rates using my fitted model with the adjusted treatment.

After I predicted the new rate under increased interchange competition, I calculated savings using both versions of the active routes regression and compared the newly predicted values to the fitted values from each regression. The difference between the fitted and predicted value was then multiplied by the full route distance and the actual NS volume by lane to construct total savings by lane. These savings were further collapsed into three groups, Transcontinental, Dallas, and Mexico moves, and savings were summarized up to the level of these groups

Truck Displacement

An indirect effect of the reduction in rate along the Meridian Speedway is the chance for shippers currently using trucks to become rail customers due to decreased rates. The displacement effect from the change in rate was calculated in a two-step process. First, current rates and theoretical rates were calculated. After this, these rates were both used as inputs in a regression estimating the intermodal rail share. The difference in intermodal rail share pre and post CSXT access to Meridian was then applied to current truck volumes along all Meridian Speedway lanes to determine total trucks displaced.

Estimating total truck displacement involved the estimation of an additional regression. Modifying Dr. Bengt Muten's intermodal share regression to account for rates, I estimate the following linear probability model twice¹¹:

$$\begin{aligned} \text{Rail_IM_Share}_i &= \beta_1 \text{rate}_i + \beta_2 \text{single_line_avail}_i + \beta_3 \text{truck_miles}_i + \beta_4 \text{distance_diff}_i \\ &+ \beta_5 \text{tot_tons}_i + \varepsilon_i \end{aligned}$$

Where rate_i is the fitted grouped rate from either of the active routes regression, $\text{single_line_avail}_i$ is an indicator for if there is a single line move currently active at the BEA OD level, truck_miles_i is a weighted average distance calculated by first converting the ton-miles variable from the FAF into miles, and then weighting by yearly trips, distance_diff_i is the difference between the rail and truck miles, all for move i , and tot_tons_i is the combined total intermodal rail and truck weight at the BEA OD level. Rail_IM_Share_i is created by first grouping by origin-destination BEA area pairing, and then calculating the following formula:

¹¹ See Verified Statement of Bengt Muten, Application Volume 2 p. 221

$$Rail_IM_Share_i = \frac{\sum_{i=1}^n rail_im_cars_i}{\sum_{i=1}^n rail_im_cars_i + \sum_{i=1}^n truck_cars_i}$$

Where $rail_im_cars_i$ is the total intermodal cars for a given BEA OD pair and $truck_cars_i$ is the total truck cars for a given BEA OD pair.

For domestic truck displacements, I took the difference between the fitted shares and the predicted shares, where the predicted shares used the predicted rates under increased interchange competition as an input. For moves that involved KCS, a mileage reduction was included in the rail distance to simulate the increase in operational efficiency from a KCS to UP switch on the new route including CSXT. This mileage reduction was calculated using the estimated hours to reach Shreveport from Laredo¹².

Once the difference in shares was calculated for all moves, trucks displaced were determined for the same BEA OD pairs from the savings analysis by multiplying the difference in shares by the estimated FAF truck volume for a given BEA OD pair (in the case of Mexico moves, these displaced volumes were determined at the Port-BEA OD pair, i.e., Laredo or Eagle Pass). These displacements were further collapsed into three groups, Transcontinental, Dallas, and Mexico moves, and displacements were summarized up to the level of these groups.

¹² See Carey HC “IM Delivery Times- Company Source.xlsx”

Summary of Results

The analysis estimates that an increase in routing competition reduces the rail rate. This result persists regardless of the treatment specification and the controls, and the treatment estimate is robust in its direction and always statistically significant. The coefficients of interest in the final specification of the analysis can be seen in Table 1, row two, and the coefficient can be seen to represent the change in dollar per car-mile rate through increased routing competition. Specifically, my analysis shows an approximately \$0.04 per unit mile lower rate.

The models used in the final analysis can be broadly grouped as follows:

- *Active*: Regression model that estimates the effect of the number of active routes on the rate. The model includes a non-linear distance term (the square root of the distance) along with the linear term for distance to control for the diminishing marginal returns of an increase in distance on the rate. In other words, this specification was used to account for the fact that as the distance of a move increases, the rate does not increase proportionally with the distance, but instead steadily has a weaker, continuous effect as the distance gets very large. Columns in Figures 1-5 that are labeled with “Active” contain the estimates using this regression model.
- *Band*: Regression model that estimates the effect of the number of active routes on the rate, using a piecewise mapping of distance in 250-mile increments. This specification was created to instead model the relationship between distance and rate in steps. In this specification, a move that is 250 miles would be estimated using the “Distance Band 2” coefficient¹. If that same move increased in distance to 251 miles, the rate would instead be estimated using the “Distance Band 3” coefficient². Columns in Figures 1-5 that are labeled with “Band” contain the estimates using this regression model.

All versions of my treatment display the same intuitive result, that as the number of competitors increases, the rate decreases. The treatment variables are defined as “Active Routes” and “Options at First Interchange”³, where “Options at First Interchange” is defined as the number of available carriers at the first interchange in a move. An increase in carrier options at the first interchange leads to the rate falling by the coefficient for “Options at First Interchange”⁴. In my model using active routes as my treatment, an increase in the number of available routing options by one leads to the \$0.04 per car-mile decrease in rate, i.e., the coefficient assigned to Active Routes⁵. The fact that regardless of specification, my treatment of interest does not change in its direction (i.e., it is always negative), supports the claim that as competition increases, prices will fall.

In addition to the robustness of the direction of my treatment, the R-squared values for all six versions with a range of 0.55 to 0.60, which are reasonable results when using real world data. The R-squared is valuable in determining the explanatory power of the variables

¹ See Table 1: Interchange Regression Results, row 28

² See Table 1: Interchange Regression Results, row 29

³ See Table 1: Interchange Regression Results, rows 2 and 3

⁴ See Table 1: Interchange Regression Results, row 3

⁵ See Table 1: Interchange Regression Results, row 2

included in a model but does not imply that a model is accurately estimating the causal effect of a variable. A higher R-squared implies that the variables included in a model explain the variation in the output variable well.

All six specifications display a statistically significant negative relationship between the rate and the number of interchange competitors/number of active routes. First, the coefficients for my treatments are at least double their respective standard errors⁶. This check is a heuristic, as the implication of this relationship is that a t-test of the coefficient (i.e., a test to determine if the coefficient being observed is not zero in reality) would result in a value of 1.96. This t-statistic value corresponds to a 95% significance level, meaning that the observed coefficient is 95% likely to not exist randomly and would be replicated using another similar sample of data⁷. Another way of confirming the statistical significance of my treatment is by utilizing the p-values produced from the estimation procedure. The p-value reflects the highest possible likelihood that the coefficient produced in estimation is not observed by chance. All six versions of my model produce p-values for my treatment that corresponds to a 99% significance level, in other words, it is 99% likely that the coefficient we are observing is not due to random chance⁸.

When estimating a regression, one of the outputs of the model is the residuals. The residuals are the real values of the output variable that do not fall on the line estimated in a linear regression. It is possible that the residuals of a model (also called the errors) take on an unidentified functional form, which causes misestimation of standard errors and test statistics. This phenomenon is called heteroskedasticity and is prevalent in models with grouped variables, models that utilize observational data, or large datasets (all of which are characteristics of the data I use in estimation)⁹.

To prevent misidentification of statistical significance and to correct for heteroskedasticity, Breusch-Pagan tests were conducted on all models reported (including rail intermodal share regressions), and heteroskedasticity-robust standard errors are displayed¹⁰. The Breusch-Pagan test is a standard method for testing the presence of heteroskedasticity that takes the squared residuals from a model and regresses these newly squared regressors against the response variables (inputs) from the primary regression model¹¹. A chi-squared statistic is then calculated for this model, and if the p-value for this statistic is at or above 95% significance, there is heteroskedasticity present in the model¹². The Breusch-Pagan tests identified heteroskedasticity in all models. Due to the presence of heteroskedasticity in all models, White Standard Errors¹³ and heteroskedasticity-robust t-statistics were used instead of traditional standard errors and t-statistics to account for heteroskedasticity. After adjusting

⁶ See Table 1: Interchange Regression Results, rows 2 and 3, standard errors reported in parentheses below coefficient

⁷ Jeffrey M. Wooldridge, *Introductory Econometrics*, Appendix G

⁸ Jeffrey M. Wooldridge, *Introductory Econometrics*, Appendix G

⁹ Jeffrey M. Wooldridge, *Econometric Analysis of Cross Section and Panel Data*, MIT Press, 2001, Chapter 4

¹⁰ See Table 1: Interchange Regression Results and Table 2: Intermodal Rail vs Truck Share Regression Results, standard errors reported in parentheses below coefficient

¹¹ Jeffrey M. Wooldridge, *Introductory Econometrics*, Chapter 8

¹² Jeffrey M. Wooldridge, *Introductory Econometrics*, Chapter 8 and Appendix G

¹³ Jeffrey M. Wooldridge, *Econometric Analysis of Cross Section and Panel Data*, MIT Press, 2001, Chapter 6

for heteroskedasticity the statistical significance of my estimates were unchanged from the original results¹⁴.

Finally, the savings and displacement estimates were calculated in two steps. First, the fitted values (the values that the model estimates without any adjustments to competition) from both the Active and Band versions of the model were compared to the predicted values from both the Active and Band versions of the model (the values that the model estimates after an increase in the number of active routes by one). The difference between these two estimated rates is the coefficient for Active Routes, my treatment variable¹⁵. For my estimation of truck displacement, the fitted values from my rate specifications were used as an input in the intermodal share regressions¹⁶. Figures 1 and 2 display both the fitted and predicted value from each specification used with a “Fitted” or “Predicted” column header. In Figures 3-5, the difference between the fitted and predicted values of the rail intermodal share, by model, are displayed with a column header beginning with “Change”. Similar to the estimation of rail savings, this difference is equivalent to taking the difference between the coefficient of my treatment variable in the intermodal share regression multiplied by both the fitted and predicted rate for a given BEA OD lane¹⁷.

¹⁴ See Table 1: Interchange Regression Results and Table 2: Intermodal Rail Share vs Truck Share Regression Results, *Notes* section

¹⁵ See Table 1: Interchange Regression Results, under Grouped Rate, Active and Band, row 2

¹⁶ See Table 2: Intermodal Rail Share vs Truck Share Regression Results rows 2 and 3, “Band Regression Fitted Values” and “Active Regression Fitted Values”

¹⁷ See Table 2: Intermodal Rail Share vs Truck Share Regression Results rows 2 and 3, “Band Regression Fitted Values” and “Active Regression Fitted Values”

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Table 1: Interchange Regression Results

	Rate			Grouped Rate		
	<i>Simple</i>	<i>Active</i>	<i>Band</i>	<i>Simple</i>	<i>Active</i>	<i>Band</i>
(1) Constant	5.721 (0.087)	5.734 (0.079)	1.988 (0.021)	5.019 (0.079)	5.442 (0.075)	1.847 (0.019)
(2) Active Routes		-0.050 (0.004)	-0.056 (0.004)		-0.048 (0.004)	-0.044 (0.003)
(3) Options at First Interchange	-0.285 (0.009)			-0.312 (0.008)		
(4) Railroad Owned	-0.074 (0.004)	-0.060 (0.003)	-0.043 (0.003)	-0.110 (0.004)	-0.044 (0.003)	-0.028 (0.003)
(5) Trail Train	-0.036 (0.004)	-0.013 (0.004)	0.016 (0.004)	-0.043 (0.004)	0.001 (0.004)	0.030 (0.004)
(6) Origin HHI	0.000 (0.000)			0.000 (0.000)		
(7) Termination HHI	0.000 (0.000)			0.000 (0.000)		
(8) Options at Second Interchange	-0.552 (0.023)			-0.531 (0.021)		
(9) Options at Third Interchange	-0.427 (0.027)			-0.567 (0.021)		
(10) Distance	0.002 (0.000)	0.002 (0.000)		0.002 (0.000)	0.002 (0.000)	
(11) $\sqrt{\text{Distance}}$	-0.214 (0.004)	-0.206 (0.003)		-0.202 (0.004)	-0.200 (0.003)	
(12) Class 1 Origin Access	-0.033 (0.001)			-0.034 (0.001)		
(13) Class 1 Termination Access	-0.049 (0.001)			-0.047 (0.001)		
(14) Single Line Move	-1.341 (0.057)	-1.510 (0.04)	0.139 (0.018)	-1.133 (0.057)	-1.323 (0.039)	0.225 (0.017)
(15) Number of Interchanges	0.683 (0.025)	-0.025 (0.004)	0.052 (0.006)	0.816 (0.024)	0.026 (0.004)	0.103 (0.006)
(16) Truck Rate	0.053 (0.001)	0.055 (0.002)	0.058 (0.002)	0.050 (0.001)	0.052 (0.001)	0.055 (0.002)
(17) Origin HHI*Termination HHI	0.000 (0.000)			0.000 (0.000)		
(18) $\sqrt{\text{Distance}}$ *Single Line Move	0.034 (0.001)	0.039 (0.001)		0.031 (0.001)	0.037 (0.001)	
(19) STB IM Code E		-0.012 (0.04)	-0.198 (0.045)		0.004 (0.023)	-0.180 (0.028)

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Table 1: Interchange Regression Results

	Rate			Grouped Rate		
	Simple	Active	Band	Simple	Active	Band
(20) STB IM Code H	-0.604 (0.013)	-0.430 (0.011)	-0.241 (0.01)	-0.320 (0.01)	-0.140 (0.008)	
(21) STB IM Code K		-0.406 (0.331)	0.108 (0.269)	-0.205 (0.467)	0.280 (0.409)	
(22) STB IM Code M	-0.323 (0.012)	-0.186 (0.01)	-0.106 (0.01)	-0.142 (0.008)	-0.066 (0.008)	
(23) STB IM Code P	-0.161 (0.016)	-0.190 (0.017)	0.014 (0.015)	-0.256 (0.012)	-0.068 (0.01)	
(24) STB IM Code Q	-0.473 (0.012)	-0.338 (0.01)	-0.241 (0.01)	-0.250 (0.009)	-0.156 (0.009)	
(25) STB IM Code R	-0.586 (0.016)	-0.390 (0.014)	-0.246 (0.014)	-0.433 (0.011)	-0.304 (0.01)	
(26) STB IM Code X	-0.355 (0.011)	-0.209 (0.009)	-0.115 (0.01)	-0.155 (0.008)	-0.062 (0.008)	
(27) Active Routes*Single Line Move		-0.152 (0.005)	-0.111 (0.006)	-0.164 (0.005)	-0.124 (0.005)	
(28) Distance Band 2			-0.704 (0.018)		-0.716 (0.016)	
(29) Distance Band 3			-0.969 (0.013)		-0.968 (0.012)	
(30) Distance Band 4			-0.997 (0.013)		-1.000 (0.012)	
(31) Distance Band 5			-0.988 (0.013)		-0.982 (0.012)	
(32) Distance Band 6			-0.976 (0.014)		-0.984 (0.013)	
(33) Distance Band 7			-0.982 (0.012)		-0.980 (0.011)	
(34) Distance Band 8			-1.081 (0.013)		-1.075 (0.012)	
(35) Distance Band 9			-1.058 (0.013)		-1.076 (0.011)	
(36) Distance Band 10			-1.148 (0.013)		-1.134 (0.012)	
(37) Distance Band 11			-1.038 (0.014)		-1.026 (0.012)	
<i>Notes</i>						
White Standard Errors	Yes	Yes	Yes	Yes	Yes	Yes
Degrees of Freedom	350116	376865	376137	351416	378290	377562
R ²	0.60	0.57	0.55	0.60	0.57	0.55
Adjusted R ²	0.60	0.57	0.55	0.60	0.57	0.55

Standard Errors Reported in Parantheses

**Table 2: Intermodal Rail vs Truck
Share Regression Results**

	<i>IM Rail Share</i>	
	<i>Active</i>	<i>Band</i>
(1) Constant	0.297 (0.004)	0.282 (0.003)
(2) Band Regression Fitted Values		-0.069 (0.001)
(3) Active Regression Fitted Values	-0.076 (0.001)	
(4) Single Line Availability	0.339 (0.003)	0.345 (0.003)
(5) Truck Distance	0.000 (0.000)	0.000 (0.000)
(6) Rail Distance-Truck Distance	0.000 (0.000)	0.000 (0.000)
(7) Total IM Tons	0.000 (0.000)	0.000 (0.000)

Notes:

White Standard Errors	Yes	Yes
Degrees of Freedom	358625	357904
R ²	0.40	0.39
Adjusted R ²	0.40	0.39

Standard Errors Reported in Parantheses

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 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 & HUDSON RAILWAY COMPANY, INC. – CONTROL – KANSAS
CITY SOUTHERN, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, GATEWAY
EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN RAILWAY COMPANY**

CSX TRANSPORTATION, INC.'S COMMENTS AND REQUEST FOR CONDITIONS

**VERIFIED STATEMENT OF
DR. RAMSEY SHEHADEH
NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC.
(NERA)**

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I. INTRODUCTION

A. Assignment

I have been asked by Harkins Cunningham LLP on behalf of CSX Transportation (“CSX”) to provide an economic opinion regarding the competitive effects resulting from the Meridian Speedway LLC Joint Venture (“MSLLC” or “JV”) between Applicant Kansas City Southern (“KCS”) and Norfolk Southern Railway Company (“NSR”) related to the Meridian Speedway Agreements.¹ I understand that, as a matter of law, the competitive effects of that JV could be aggravated as a result of the Proposed Transaction in the Application to the Surface Transportation Board (“STB”) related to the proposed acquisition by Applicant Canadian Pacific Railway Limited (“CP”) of control of Applicant Kansas City Southern and its subsidiaries.²

B. Summary of Conclusions

The Exclusivity Arrangements (as described in detail in subsequent sections) of the Meridian Speedway Agreements were, are and will continue to be anticompetitive.³ Specifically, the Exclusivity Arrangements provide the ability of NSR to foreclose its competitors including CSX from using the MSLLC Line that was owned and operated by KCS and, thereby, to restrict competition by making it more costly for its rival CSX to serve transcontinental intermodal traffic to and from areas of the Southeast United States. KCS (as the pre-JV provider of haulage on the MSLLC Line) lacked this incentive because it was not a downstream rival to the eastern railroads.

¹ [REDACTED]

² [REDACTED]

³ [REDACTED]

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The restriction on competition arising from the Exclusivity Arrangements enables NSR to reduce competition and market output to the detriment of shipper-customers. I demonstrate empirically that output and therefore welfare would have been higher in the absence of the Exclusivity Arrangements.

Specifically, in destination areas affected by the Exclusivity Arrangements and in which effective competition does not otherwise constrain the JV, the JV with the Exclusivity Arrangements reduced output and economic welfare. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Figure 1: Average Annual Actual and But-For Transcontinental Intermodal Volume by Affected BEA, 2013 – 2019 [REDACTED]

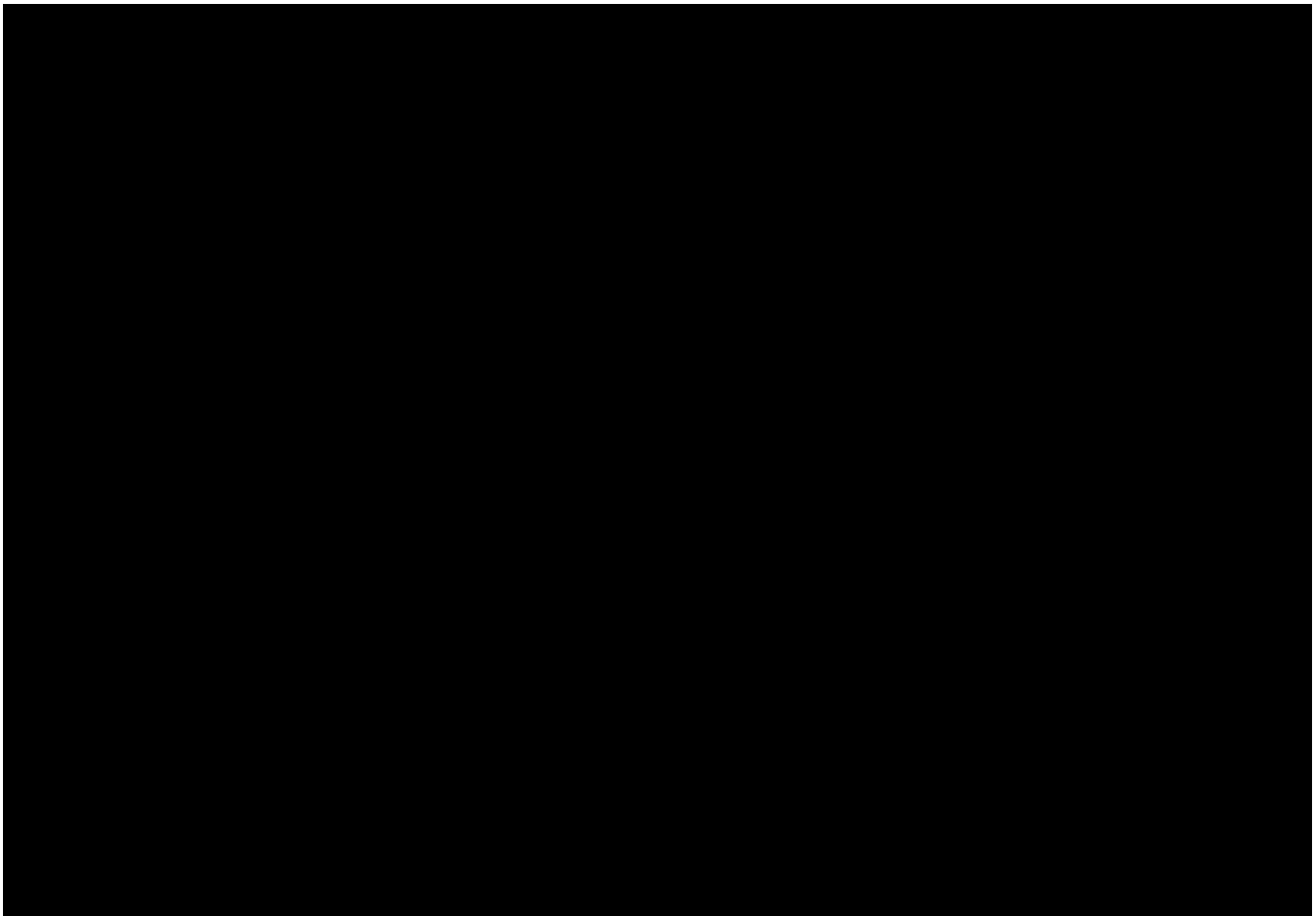
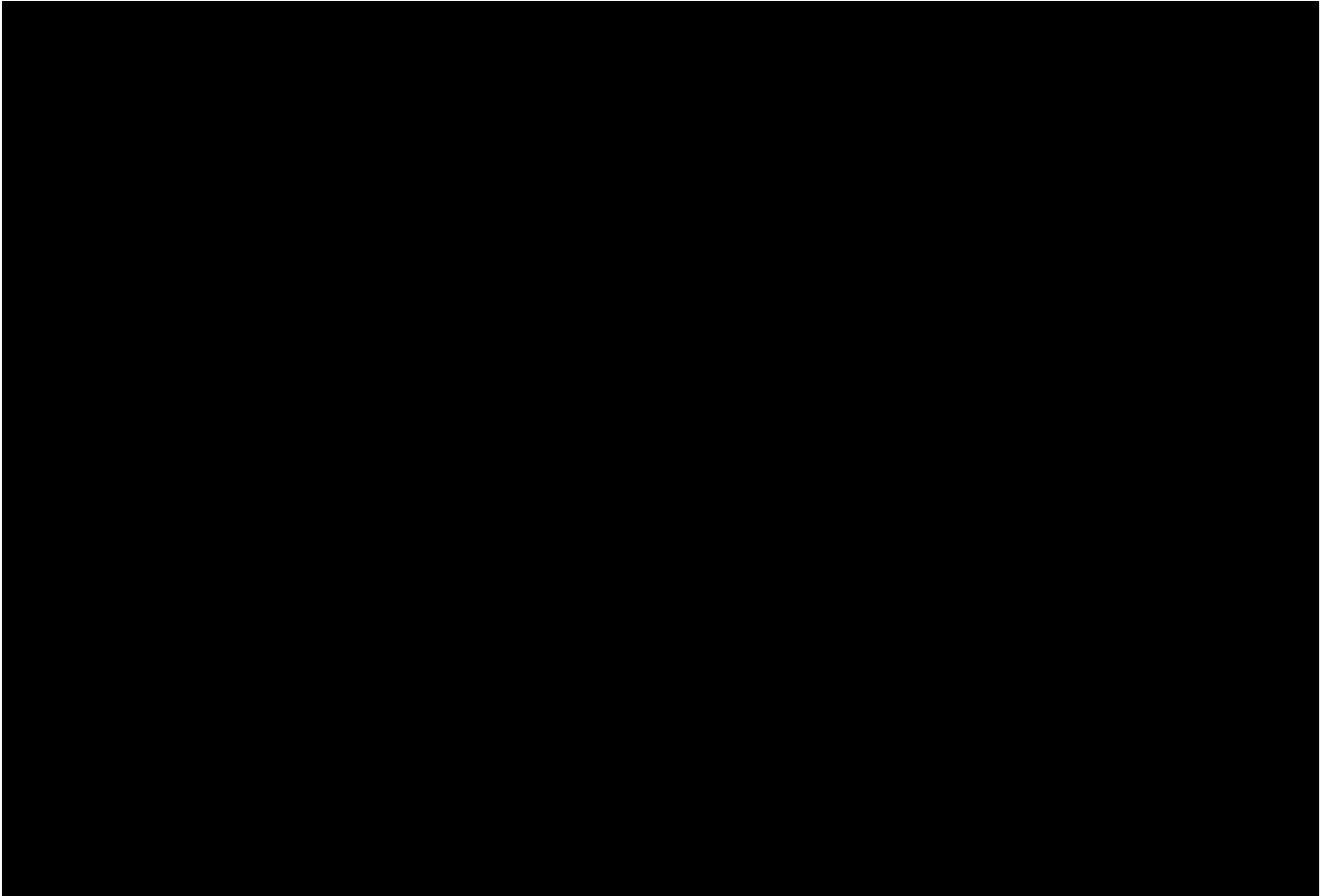


Figure 2: Average Annual Actual and But-For Transcontinental Intermodal Volume Index by Affected BEA, 2013 – 2019 ■



■
■
■
■ This is
because less restrictive alternatives to the Exclusivity Arrangements are available that would
maintain the procompetitive aspects of the JV, while at the same time limiting the ability to act on
incentives to reduce output that arise from the Exclusivity Arrangements. ■
■
■

The Exclusivity Arrangements are not necessary for the formation of the JV or for the
investments it facilitated. In other words, the Exclusivity Arrangements are not ancillary restraints on
competition within the context of the JV. Rather, less restrictive alternatives to the Exclusivity

Arrangements were and are available that would maintain the procompetitive aspects of the JV, including the investments, while facilitating competition and constraining NSR's ability to foreclose its rivals and restrict output relative to the levels that would prevail in the absence of the Exclusivity Arrangements. Specifically, a haulage agreement on the MSLLC Line with a tariff providing a sufficient return on the JV investments would enable competitors to serve shipper-customers with competitive transcontinental intermodal services in the Southeast of the United States while maintaining incentives for the NSR investments in the JV (and incentivizing future investment by the JV).

In conclusion, the absence of a careful economic evaluation of the Meridian Speedway Agreements at the time of their formation enabled a reduction in competition and welfare through the anticompetitive Exclusivity Arrangements, which were and are not necessary to incentivize investments, whether through the formation of the JV or otherwise. Removal of the Exclusivity Arrangements or the limitation of their anticompetitive effects through other conditions on them would facilitate competition going forward.

C. Qualifications

I am a Managing Director with National Economic Research Associates, Inc. ("NERA"). I received my Masters and Ph.D. degrees in economics from Cornell University, where I conducted research with Professor Alfred Kahn, including on competition in rail transportation and energy. My fields of specialty within economics are industrial organization, regulation and econometrics. These are the economic fields that underpin the evaluation of the competitive effects of mergers and other business combinations. I have conducted economic research to evaluate the competitive effects of mergers, acquisitions, joint ventures and other business combinations for thirty years, providing expert evidence before competition authorities, regulatory agencies, arbitration panels and courts. Transportation industries have been a particular focus of my economic research. My Curriculum Vitae is attached as Exhibit 1.

D. Materials Considered

In preparing this report, I obtained and considered materials including economic literature, materials produced in discovery, deposition testimony and related exhibits, and publicly available data. In addition, I relied on the Confidential Waybill Sample ("CWS") maintained by the STB. I was provided with access to the documents produced in this matter and the CWS by counsel. I also rely

on my professional training as an economist. I identify the materials upon which I rely via citation or in Appendix A.

Although I do not expect to change my methodology or general approach in this matter, I reserve the right to revise my conclusions if additional information is provided to me or if additional research, reflection, or the correction of inadvertent errors leads me to update my current opinions. If I am asked to do so by counsel to CSX, I also expect to respond, as appropriate, to any assertions made by NSR or NSR's expert(s).

E. Organization of this Report

I first provide relevant background in Section II. I then set out the economic principles for evaluating the competitive effects of mergers and joint ventures in Section III. In Section IV, I apply those principles to evaluate the competitive effects of the JV including the Exclusivity Arrangements. Section V concludes.

II. BACKGROUND ON THE JV AND THE EXCLUSIVITY ARRANGEMENTS

The Meridian Speedway is the line between Meridian, MS and the Wylie Intermodal Terminal in Wylie, TX (near Dallas, TX). The Meridian Speedway has two sections: the MSLLC Line and the Shreveport-Wylie Section. The MSLLC Line is the line between Meridian, MS and Shreveport, LA, and is owned by the JV. The Shreveport-Wylie Section is the line that connects Shreveport to the Wylie Intermodal Terminal. The Wylie Intermodal Terminal is a terminal owned by KCS where intermodal units are lifted from trucks onto trains or dropped from trains onto trucks.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴ [REDACTED]

⁵ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] KCS and NSR formed the MSLLC, a limited liability joint venture company. KCS contributed the MSLLC Line to the JV for a 70% equity interest in the JV, and NSR contributed \$308 million in exchange for a 30% equity interest.⁸ [REDACTED]

[REDACTED]

[REDACTED]

⁶ [REDACTED]
⁷ [REDACTED]

⁸ See Norfolk Southern Corporation, Form 8-K, Current Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934. Filed December 2, 2005 at p. 2. See Norfolk Southern Combined Railroad Subsidiaries, Class I Railroad Annual Report. December 31, 2021 at p. 27 Schedule 310.

⁹ [REDACTED]

¹⁰ See Canadian Pacific Railway Limited et al. – Control – Kansas City Southern Railroad et al., Amended Comments of Norfolk Southern Railway Company and Request for Conditions, Finance Docket No. 36500, June 9, 2022 (hereafter “NS-12”) at p.10-11. See Norfolk Southern Combined Railroad Subsidiaries, Class I Railroad Annual Report. December 31, 2021 at p. 27 Schedule 310.

[REDACTED]

[REDACTED]

III. THE ECONOMICS OF THE COMPETITIVE EFFECTS OF MERGERS AND JOINT VENTURES

A. Mergers and Joint Ventures

Changes in economic control enable the reallocation of economic assets and control over them to their most valuable use. Mergers, acquisitions, joint ventures and other changes in corporate structure enable this reallocation of economic assets and control by assigning economic control to a new corporate entity (e.g., an acquirer, a new joint venture entity, a new “MergerCo”). In this context, mergers, acquisitions and joint ventures can lead to procompetitive effects—increases in

¹¹ [REDACTED]

¹² [REDACTED]

¹³ [REDACTED]

¹⁴ [REDACTED]

¹⁵ [REDACTED]

¹⁶ [REDACTED]

economic welfare—arising, for example, from the reallocation of assets and control to a more efficient operator or to a use that expands output. They can also reduce competition by, for example, combining the operations of competitors that then have the incentive to reduce output and welfare to the detriment of consumers. Which of these effects predominates requires empirical economic evaluation of the specific transaction under consideration.

Mergers and joint ventures are typically either horizontal or vertical in nature, and some might contain both horizontal and vertical elements. A horizontal merger or joint venture is an agreement between parties that are at the same level of a supply chain (i.e., they make and/or sell substitutes) and thus may be direct competitors in the production and sale of products or services within the same properly defined relevant market. On the other hand, a vertical merger or joint venture is an agreement between parties that operate at different levels of the same supply chain and that are not direct competitors.

B. Competitive Effects of Vertical Mergers and Joint Ventures

In the canonical case, a vertical business combination involves combining two companies where the first company is a supplier of an input to the second company that uses it in a subsequent stage of production. In this case, the stage closer to the final consumer in a vertical structure is termed “downstream,” while the stage further from the final consumer is termed “upstream.” The economic principles involved in evaluating vertical business combinations do not rely on the particular form of the relationship between the combining businesses, other than that they are not horizontal competitors. The existence of economic complementarity in either demand and/or supply gives rise to these principles. Either or both efficiencies and anticompetitive effects can arise from such combinations.

1. Potential Efficiencies

First, efficiencies from vertical combinations can arise from sources including (i) production efficiencies, (ii) improved products, and (iii) the alignment of incentives including the elimination of double marginalization.¹⁷ Joint economic control of the production of both upstream and downstream

¹⁷ See *Vertical Merger Guidelines*. U.S. Department of Justice, 2020. <https://www.justice.gov/atr/page/file/1290686/download>. (Hereafter, “Guidelines”). See Riordan, Michael H. “Vertical Integration.” *The New Palgrave Dictionary of Economics*, 2nd Edition (2008). Many of these insights including with respect to rail transport were initially developed formally in Ellet, Charles. *An Essay on the Laws of Trade: In Reference to the Works of Internal Improvement in the United States*. Richmond, VA: 1839 (reprinted P. D. Bernard. Augustus Kelley, 1966).

products can enable efficiencies in production by, for example, enabling the combined entity to align upstream and downstream capacities or by optimizing the design of the input to enable lower costs of production downstream. These efficiencies can also involve innovation to reduce costs or improve product design in ways that require joint ownership and control. Joint ownership and control align incentives, including pricing incentives such that prices charged by a common owner of a vertical chain or by a common owner of complements may be lower (holding other factors constant) than the combined prices that prevail under separate ownership and control. In the particular case of a transaction leading to vertical integration of an upstream input with a downstream manufacturer consuming that input, the resulting firm from the combination of the vertical chain will have the incentive to charge lower prices (all else equal) than would a firm that is not vertically integrated and that therefore has to pay a third-party producer for its input.¹⁸ This incentive is referred to as the elimination of double marginalization arising from vertical combinations.

2. Potential Foreclosure

Second, vertical integration resulting from a business combination can provide the resulting integrated firm with the incentive and ability to reduce competition and economic welfare through unilateral or coordinated effects. Unilateral effects reducing competition could arise from a strategy to foreclose rivals or to raise rivals' costs (RRC).

In the case of RRC, when the business combination results in vertical integration (or the joint control of complementary products), the combined firm may choose to supply inputs to a downstream rival only in quantities less than (and at prices higher than) those that would have prevailed in the absence of the business combination. The lower quantity and higher price of the upstream product, which is an input for the downstream rival, may raise the input costs of the rival. This higher input cost will, all else equal, lead the downstream rival to raise its downstream prices and, thereby, the downstream rival may be forced to compete less effectively than it would have if its supplier were not raising its costs. If this harm to the downstream competitor from the higher input price leads to a reduction in total output downstream and thereby reduces economic welfare, the harm to a competitor also becomes harm to competition. The latter is the focus of competition economics.¹⁹

¹⁸ See Guidelines, at p. 5.

¹⁹ RRC effects are relatively less likely to harm competition if downstream rivals could readily switch to alternative suppliers of the input product, including self-supply, without significant switching costs. If this were the case, one would not expect significant harm to the competitor or to competition (e.g., price, quality, or availability of

An outright refusal to supply the input is analogous from an economic perspective to raising the price upstream to the point at which the downstream rival has no demand for the input (for example, an input price so high the downstream rival could make no profit). This is known as complete foreclosure and likewise can harm the downstream competitor and, potentially, competition.²⁰

3. Downstream Diversion and Capture of Incremental Sales

The incentive to engage in a RRC or foreclosure strategy arises from the ability to capture sales in the affected market—the downstream market in the preceding description. If there were numerous downstream competitors such that the vertically integrating firm would be unlikely to capture sales diverted from the targeted rival(s) on which it imposes higher input costs, then the incentive to engage in such a strategy would be similarly attenuated. Fewer downstream rivals and a higher share downstream would increase the likelihood of profitable capture of sales diverted from the rival in response to higher prices. Thus, the existence and magnitude of effects and diversion downstream (or in whatever market is the target of the strategy) is central to the evaluation of competitive effects in the context of a vertical business combination.²¹

Whether a vertical business combination gives rise to the efficiencies or anticompetitive effects described above—and which predominates—is an empirical question. Thus, competition policy carefully evaluates each business combination to assess whether and the extent to which these effects arise in the context of a particular transaction.²²

4. Ancillary Restraints and Less Restrictive Alternatives

In the case of a vertical merger or acquisition, the upstream and downstream operations and assets are fully owned and controlled. In the case of joint ventures, it is common for restrictions to be imposed on the scope of the operations of the joint venture by the firms contributing the assets and operations. Such restrictions are agreed between parties that operate on different levels of the same

supply in the downstream relevant market). As is evident from these examples, market power in the upstream relevant market of the input is a component of the ability to engage in an RRC strategy of this kind to affect the downstream market. *See* Guidelines, at p. 5. Also, if *other* downstream rivals could expand output because they have access to inputs that the downstream firm targeted by the RRC strategy does not, the RRC strategy might affect the targeted competitor but not competition.

²⁰ As above, while this discussion focuses on RRC/foreclosure strategies using input prices to target downstream rivals, these strategies have analogs in the case of other combinations of vertical and complementary relationships such as foreclosing an upstream rival by not purchasing an input from it.

²¹ *See* Pittman, Russell. “Three Economist's Tools for Antitrust Analysis: A Non-Technical Introduction.” *US Department of Justice, Antitrust Division, Economic Analysis Group Discussion Paper EAG 17-1*, (January 2017). <https://www.justice.gov/atr/page/file/925641/download>.

²² *See* Guidelines at p. 2.

supply chain. Vertical restrictions can take many forms such as territorial restrictions or contractual restrictions requiring the upstream entity not to supply rivals to the joint venture downstream.²³

These restrictions restrain some aspects of either the joint venture operations or the operations of the joint venture “parents”, and specifically may restrain competition between one or both joint venture “parents” and the joint venture, or competition between the “parents”.²⁴ Economics recognizes that while such vertical restrictions may, in isolation, restrain competitive behavior, they may be necessary for the joint venture to exist or to exist in as efficient a form as is achievable to expand output and enhance competition. In other words, in the absence of the restrictions either the joint venture would not exist or would exist but operate less efficiently. In this context, such vertical restrictions are referred to as ancillary restraints—restraints that are ancillary to the joint venture in the sense that (i) they are necessary for the existence and efficient operation of the joint venture and (ii) their restraining effects are outweighed by whatever procompetitive effects arise from the joint venture formation. By way of example, a vertical restriction that enables the formation of a joint venture that eliminates double marginalization can thereby increase overall efficiency if it leads to lower prices for end customers.²⁵ This restriction would satisfy the conditions to be an ancillary restraint to the joint venture if it were reasonably necessary for joint venture formation. Similarly, such vertical restrictions may be motivated by the need to avoid free riding which could undermine the joint venture.²⁶ Flynn and Gilbert describe the following economic considerations:²⁷

First, what is the actual or potential economic relationship between the JV and its activity, on the one hand, and its parents, on the other? In particular, are (any of) the parents actual or potential competitors with the JV in some relevant market, including especially the market(s) in which the output of the JV is sold? Second, what is the relationship between the purpose of the JV and its ancillary restraints? In particular, are those restraints reasonably necessary in order to achieve the procompetitive benefits that have motivated the formation of the JV?

²³ See Church, Jeffrey and Roger Ware. *Industrial Organization: A Strategic Approach*. Irwin McGraw-Hill, 2000: 689-690.

²⁴ See Kattan, Joseph and David A. Balto. “Analyzing Joint Ventures' Ancillary Restraints.” *Antitrust* 8, (1993): 13.

²⁵ See Church, Jeffrey and Roger Ware. *Industrial Organization: A Strategic Approach*. Irwin McGraw-Hill, 2000: 696.

²⁶ See Kattan, Joseph and David A. Balto. “Analyzing Joint Ventures' Ancillary Restraints.” *Antitrust* 8, (1993): 13.

²⁷ See Flynn, Michael A. and Richard J. Gilbert. “The Analysis of Professional Sports Leagues as Joint Ventures.” *The Economic Journal* 111, (2001): F38.

The Department of Justice’s Competitor Collaboration Guidelines similarly describe that, in evaluating whether a vertical restriction is ancillary to a joint venture, the Antitrust Division will examine both whether an agreement is exclusive or non-exclusive as well as the duration of the agreement (relative to, for example, the investment) when determining if a restraint is reasonably necessary and in evaluating its competitive effects.²⁸

An assessment of whether a vertical restriction is an ancillary restraint must necessarily evaluate the options available to the parents and the joint venture to use alternatives to the proposed restraint. Economists recognize that practical alternatives may be available that (i) are sufficient to achieve the existence and efficiency aims of the restriction while (ii) having a less detrimental effect on competition. Economists refer to these as “less restrictive alternatives” and their consideration is reflected in competition authority enforcement, for example as referenced in the Competitor Collaboration Guidelines.²⁹

Less restrictive alternatives—alternatives to restraints on competition that are not ancillary to achieving efficiencies arising from a merger or joint venture—have been employed by this Board in balancing competition and investment. For example, gateway access requirements imposed as a condition on a merger employ this economic logic—that such access requirements can enable merging parties to achieve efficiencies that a merger under review presents while preventing a reduction of competition that is not required to achieve those efficiencies and that would arise from excluding competitor use of a facility resulting from the merger if the requirements or other merger conditions were not imposed.³⁰

²⁸ See *Antitrust Guidelines for Collaborations Among Competitors*. Federal Trade Commission and the U.S. Department of Justice, 2000: 11. https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

²⁹ Ibid. at p. 24.

³⁰ See NS-12 at p. 29, 41. See *Canadian Pacific Railway Limited et al. – Control – Kansas City Southern Railroad et al.*, Amended Verified Statement of John W. Mayo, Finance Docket No. 36500, June 9, 2022 at p. 20-21, (hereafter, “Mayo Report”).

IV. ECONOMIC EVALUATION OF THE COMPETITIVE EFFECTS OF THE CP/KCS MERGER AS IT RELATES TO THE PROPOSED CONTINUATION OF NSR EXCLUSIVITY TRAFFIC IN PERPETUITY AND DALLAS INTERMODAL TERMINAL TRAFFIC

A. Economics of the Evaluation of the Competitive Effects of the Exclusivity Arrangements

1. NSR Exclusivity Traffic

a) The Exclusivity Arrangements Provide the Ability to Foreclose Competitors

In the absence of the Exclusivity Arrangements, CSX could compete against NSR in servicing transcontinental intermodal traffic by using the MSLLC Line (e.g., via a haulage agreement with the JV). The pre-JV owner and operator of the MSLLC Line—KCS—lacked an incentive to restrict competition by raising the costs of CSX to service such traffic because it was not a downstream rival to the eastern railroads before 2006. NSR had no ability to foreclose rival traffic under this operational model.

This changed with the formation of the JV and the associated Exclusivity Arrangements in 2006. [REDACTED]

[REDACTED]

b) NSR's Presence in the Eastern U.S. Provides the Incentive to Foreclose Given NSR's Ability to Capture Diverted Traffic Resulting from the Foreclosure of its Rivals from Use of the MSLLC Line

NSR is a horizontal competitor to CSX and, as a result, has an incentive to restrict competition by raising the costs of CSX to service transcontinental intermodal traffic. [REDACTED]

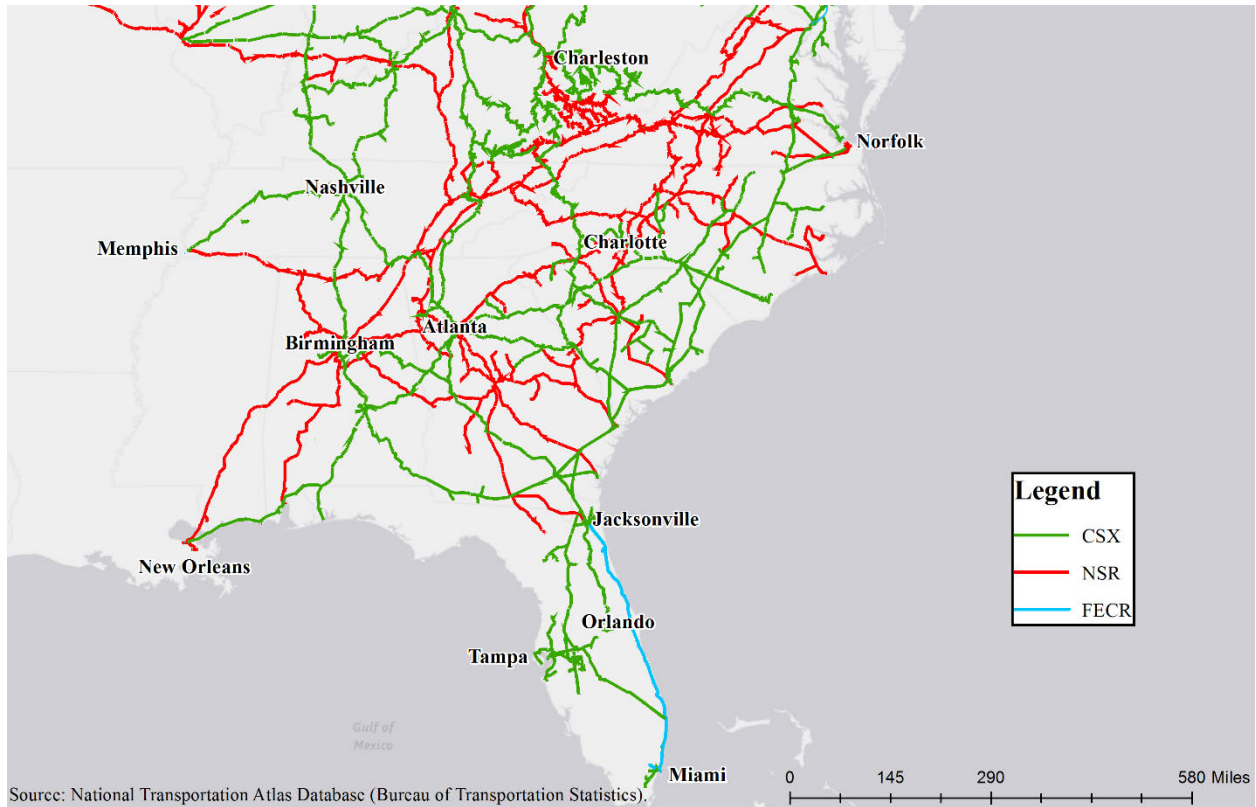
[REDACTED]

[REDACTED] NSR and CSX overlap and compete in transcontinental intermodal supply to destination areas in the Southeast of the United States that NSR serves via the MSLLC Line. Figure 3 shows the lines owned by NSR and CSX and illustrates this overlap. Specifically, NSR and CSX both own lines serving large metropolitan areas in Southeast of the United States.³¹ Given this overlap, NSR can expect to capture diverted traffic resulting from the foreclosure of CSX from use of the MSLLC Line, particularly in areas in which they are the only two

³¹ Neither CSX nor NSR owns a line that runs into Miami. NSR serves Miami by interchanging with FECR at Jacksonville. I understand that CSX serves Miami over its own line that runs to the Lakeland Area in central Florida, from where CSX moves trains to Miami over a line owned by Amtrak. See Wayland, Joshua. ArcGIS National Rail Network Map, September 23, 2021.

railroads providing service. This same incentive would arise in areas to which they move traffic but where the last leg is served via shortline.

Figure 3: NSR and CSX networks in the Southeast of the United States



[REDACTED]

[REDACTED]

[REDACTED]

c) By Foreclosing CSX From Providing Transcontinental Intermodal Traffic Over the MSLLC Line, the JV Raises CSX's Costs of Providing Such Shipments and Degrades the Quality of Service for Competing Shipments

Without access to the MSLLC Line to service transcontinental intermodal traffic, CSX is forced either to forgo offering service on the route or to move such traffic over longer and otherwise competitively disadvantaged routes, thereby raising CSX's costs of servicing such shipments and degrading their quality of service.

Specifically, and as described by Professor Carey, alternative routes connecting the Southwest and Southeast of the United States not involving the MSLLC Line are longer or otherwise operationally disadvantaged, as they involve the New Orleans or Memphis gateways.³³ With reference to the advantages of routes involving the MSLLC Line, NSR states that "*All it takes is one look at a map and the advantages of this route [the Meridian-Wylie route] are apparent.*"³⁴

Affirming that shorter distances and gateway access provide a competitive advantage over other routes, Dr. Mayo's report states that "*the crucial importance of keeping gateways open in the wake of the proposed merger is readily seen by considering the consequence of the foreclosure of NS traffic currently interlining with KCS and interchanging at Meridian, MS on routes that could potentially become CPKC single line routes [...] If the NS traffic were foreclosed, the new CPKC routes would be, on average, fully 24 percent longer than the existing KCS-NS interline routes.*"³⁵

Further, NSR states that congestion in the Shreveport-Wylie Section resulting from the CP/KCS plans could lead to "*potentially undermining the efficiency of the routes that traverse*

³² See Salop, Steven C. and Daniel P. O'Brien. "Competitive Effects of Partial Ownership: Financial Interest and Corporate Control." *Antitrust L.J.* 67, (February 2000): 559-614.

³³ See Canadian Pacific Railway Limited et al. – Control – Kansas City Southern Railroad et al., Verified Statement of Professor Julie M. Carey and Dr. Albert W. Bremser, Finance Docket No. 36500, February 28, 2022 at Section V.

³⁴ [REDACTED]

[REDACTED]

See NS-12 at p. 12. However, as demonstrated in Section IV, the Exclusivity Arrangements restrict output without being necessary for the formation of the JV or for the investments it facilitated, and so growth in traffic over the MSLCC Line would be even higher in the absence of the Exclusivity Arrangements.

³⁵ See Mayo Report at p. 29.

*the Meridian Speedway compared to others that do not serves to harm rail service for important competitive traffic moving between the Southeast and Southwest.”*³⁶ Such a conclusion implies that foreclosure using the Exclusivity Arrangements involving the MSLLC Line would likewise lead to higher costs for competitors, due to degraded quality of service arising from “*longer transit times, worse service [...].*”³⁷

Finally, moving transcontinental intermodal traffic over operationally disadvantaged (e.g., longer) routes raises CSX’s costs of servicing such traffic relative to its competitive position without the Exclusivity Arrangements.

The Exclusivity Arrangements foreclose CSX from use of MSLLC Line, raise the costs and degrade the quality of transcontinental intermodal traffic moved by CSX. Thus, NSR’s conduct renders CSX a less effective competitor to NSR in transcontinental intermodal traffic compared to the level of competition that would prevail in the absence of the Exclusivity Arrangements.

d) Foreclosure of Competitors from the MSLLC Line Harms Competition by Restricting Output for Transcontinental Intermodal Shipments

It is the diminished ability of CSX to compete effectively that provides NSR with the incentive to foreclose summarized above. [REDACTED]

[REDACTED]

[REDACTED] This is because certain shippers that would prefer CSX service in the absence of the Exclusivity Arrangements are forced to use NSR.

[REDACTED]

e) Less Restrictive Alternatives to the Exclusivity Arrangements Are Available, Demonstrating that the MSLLC with the Unnecessary Exclusivity Provisions Harms Competition and Reduces Consumer Welfare

Section IV.C will summarize Professor Carey’s analysis demonstrating that the Exclusivity Arrangements are not necessary for the formation of the JV or for the investments it facilitated. In particular, less restrictive alternatives to the Exclusivity Arrangements (e.g., arrangements granting

³⁶ See NS-12, at p. 36.

³⁷ See NS-12, at p. 33.

CSX haulage rights or limiting the exclusivity period) would have provided NSR with a return on investment (ROI) sufficient to incentivize the \$308 million investment.³⁸

As a result, the overall effect of the JV with the Exclusivity Arrangements was to harm competition and reduce welfare.

2. Dallas Intermodal Terminal Traffic

[REDACTED]

Due to the complementary nature of the Intermodal Terminal at Wylie and the MSLLC Line, the incremental harm to competition that results from the inclusion of the Intermodal Terminal at Wylie into the Exclusivity Arrangements cannot be empirically isolated. However, the anticompetitive effects are evident in the [REDACTED]

[REDACTED]

and given that the Exclusivity Arrangements restrict competition in relation to transcontinental intermodal traffic over the MSLLC Line (see Section IV.B).

B. Empirical Analysis of the Competitive Effects of the JV with the Exclusivity Arrangements Demonstrates that the JV with the Exclusivity Arrangements Harms Competition

To evaluate the competitive effect of the JV empirically, I compare economic output under the JV with the Exclusivity Arrangements to output that would have been achieved in the absence of the Exclusivity Arrangements. Evaluating competitive conditions and market performance (e.g., output) in the absence of the Exclusivity Arrangements is referred to in economics as evaluating a counterfactual or a “but-for” world. I demonstrate empirically that the JV with the Exclusivity

³⁸ See Norfolk Southern Combined Railroad Subsidiaries, Class I Railroad Annual Report. December 31, 2021. at p. 27 Schedule 310.

³⁹

[REDACTED]

Arrangements reduced output and, therefore economic welfare, relative to levels that would have been achieved in the absence of the Exclusivity Arrangements. This empirical finding is consistent with STB's regulatory practice to give due consideration to open gateways/interchanges to maintain or enhance competition.

1. How to Evaluate the JV and Exclusivity Arrangements

While competition policy often states the question of competitive effect in terms of prices (e.g., “are prices higher than they otherwise would be?”⁴⁰), competition economists recognize that price is a synecdoche—economists speak about price as a shorthand for the broader terms of trade between suppliers and customers in a market that generate economic welfare.⁴¹ The exercise of market power can take many forms such as higher prices, reduced discounting, reduced services, foreclosure (such that transaction prices are not observed), etc. Irrespective of the mechanisms of reduced competition, the effect of the mechanism, under the Law of Demand, will be a reduction in output; e.g., a higher price necessarily is associated with a lower quantity demanded (all else equal).⁴² As a result, economists regularly focus on output as the indicia of market performance in empirical evaluations of competitive effects: harm to a downstream competitor from a higher input price or foreclosure that leads to a reduction in total output downstream reduces economic welfare; the harm to a competitor also becomes harm to competition.⁴³ Here, I measure output as the number of intermodal units.⁴⁴

In evaluating the competitive effects of the realized JV, we observe the performance of the Exclusivity Arrangements; we do not directly observe the counterfactual performance in the absence of the Exclusivity Arrangements. I address this using standard economic tools that compare the economic performance of the geographies affected by the Exclusivity Arrangements to geographies that are not affected by the Exclusivity Arrangements and also by comparing the geographies

⁴⁰ See *Horizontal Merger Guidelines*. U.S. Department of Justice, 2010 at p. 20-22 Section 6.1. <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>.

⁴¹ See Farrell, Joseph. “Thoughts on Antitrust and Innovation.” *Department of Justice*, (January 2001). <https://www.justice.gov/atr/speech/thoughts-antitrust-and-innovation>.

⁴² See Varian, Hal R. *Intermediate Microeconomics: A Modern Approach*. 9th ed. W.W. Norton & Company, 2014: 147.

⁴³ See, e.g., generally Varian, Hal R. “Price Discrimination and Social Welfare.” *The American Economic Review* 75, no. 4 (1985):870-875; for the use of output in evaluating economic performance of rail transportation, e.g., Winston, Clifford. “The Success of the Staggers Rail Act of 1980.” *AEI-Brookings Joint Center for Regulatory Study*, Related Publication 05-24, (2005).

⁴⁴ Other measures of output used in economic analyses of the rail industry, such as ton-miles, are less relevant for intermodal traffic given the nature of the service.

affected by the Exclusivity Arrangements over time (e.g., before the Exclusivity Arrangements came into effect).⁴⁵

2. Econometric Evaluation of the Competitive Effects of the Exclusivity Arrangements

To implement the evaluation of the competitive effects of the JV with the Exclusivity Arrangements, I employ an economic technique called “difference-in-difference” econometric analysis.⁴⁶ Econometrics refers to statistical analysis of economic data. Econometric analysis allows isolation of the effect of a merger or joint venture on output from the effect that other factors (such as size of the market and changes in the aggregate economy over time) have on output. This approach compares transcontinental intermodal output (measured in intermodal units) in affected and unaffected destination areas before and after the JV was formed, thereby evaluating the net impact of the JV with the Exclusivity Arrangements on output relative to the levels that would prevail in the absence of the Exclusivity Arrangements.⁴⁷

The net effect will be negative if the harm to competition caused by the Exclusivity Arrangements outweighs any output-expanding effects associated with the procompetitive aspects of the JV (e.g., investment in and expansion of MSLLC Line capacity). It will be positive if the harm to competition caused by the Exclusivity Arrangements is instead outweighed by the procompetitive aspects of the JV.

I address additional technical details in Appendix B.

⁴⁵ Railway companies invest into their lines to maintain or improve the quality of the rail service. Thus, by comparing the JV to alternative operations with investments, the econometric analysis represents a comparison of economic performance under the JV with the Exclusivity Arrangements to economic performance that would have been achieved in the absence of the Exclusivity Arrangements.

⁴⁶ This combines methods sometimes referred to as “before-during-after” approaches and “benchmark” (“or yardstick”) approaches. See *Proving Antitrust Damages: Legal and Economic Issues*. ABA Book Publishing, 2010: Chapter 6.

In a typical before-after approach, one evaluates output only in the markets affected by the JV, comparing output in the periods after the JV was formed to those before. In a typical yardstick approach, one compares output in the markets affected by the JV to output in other markets that are not affected by the JV and that are deemed to be reasonably comparable to the markets at issue.

The use of standalone before-after and yardstick approaches typically requires one to account for supply and demand factors that are unrelated to the JV and that may cause differences in output (i) between the before and after periods (before-after approach) and (ii) between markets affected by the JV and the markets not affected by the JV (yardstick approach).

Difference-in-difference approaches compare output in affected and unaffected markets before and after the JV was formed.

⁴⁷ The use of transcontinental intermodal output per destination area as performance measure allows me to capture all potential impacts of the Exclusivity Arrangements on output, including output restrictions resulting from the increase in price of the foreclosed competitors (i.e., CSX). By comparison, an analysis limited to growth in transcontinental intermodal traffic moved over the MSLLC Line (i.e., traffic that is serviced by NSR) would not capture the impact of the Exclusivity Arrangements on the price of foreclosed rivals to NSR.

3. Implementation

In implementing this approach, my analysis measures the effects of the JV on annual transcontinental intermodal output in each destination area (BEA).⁴⁸ As described in more detail below, the impact of the JV on output in the affected destination areas is assessed by a set of variables that reflect exposure to the MSLLC Line and that are specific to each of the affected destination areas. This approach allows for the “intensity” of exposure to the MSLLC Line to increase with increases in capacity associated with the investments in the JV. My analysis estimates the net effect of the JV and Exclusivity Arrangements on output in the affected destination areas.

The Confidential Carload Waybill Sample (CWS) provides the data for calculating annual transcontinental intermodal output per destination area (BEA); the latter is the variable on which the effect of the JV is measured. Transcontinental intermodal output is measured by intermodal units that originate in the Los Angeles or San Francisco BEAs and that terminate in BEAs to the east of Dallas, TX. That is, I focus my analysis on West-to-East traffic.⁴⁹ I express transcontinental intermodal output as index values with 2003 as the base year; in other words, output in 2003 is set to 100 and other years are expressed relative to this index value (e.g., if output increased by 10 percent from 2003 to 2004, from 100,000 intermodal units to 110,000 units, the index value in 2004 would be 110). As a result, the impact of the JV is measured in percentage points of changes in transcontinental intermodal output. The use of index values also makes geographies with different levels of output more comparable.

My sample includes the years 2003 to 2019.⁵⁰ This provides three years before the initiation of the JV and additional years beginning in 2006 during which the intensity of the JV effect increases as the investments in the JV are implemented.

⁴⁸ BEA refers to geographic areas of related economic activity defined by the U.S. Department of Commerce’s Bureau of Economic Analysis; *see, e.g.,* Johnson, Kenneth P. and John R. Kort. “Redefinition of the BEA Economic Areas.” *Survey of Current Business* (2004): 68-75.

⁴⁹ [REDACTED]

⁵⁰ I exclude the years 2001 to 2002 from my analysis given issues with the rebill variable in those years. See Alexandrov, Alexei et al. “Pricing of Complements in the U.S. Freight Railroads: Cournot versus Coase.” US Department of Justice, Antitrust Division, *Economic Analysis Group Discussion Paper EAG*, (2018): 8. To compare the same set of destination areas over time, I limit my data to destination areas that are observed continuously in the data over the period 2003 to 2019. Specifically, I remove from the estimation sample destination areas for which I either do not observe non-rebilled transcontinental shipments in 2003 or for which there are more than two years where non-rebilled output is equal to zero.

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A destination area is classified as affected by the JV if it has received transcontinental intermodal shipments that traveled over the MSLLC Line in the years since the formation of the JV, i.e., over the period from 2006 to 2019. Within the group of affected destination areas, I focus my analysis on those destinations that account for the vast majority of transcontinental shipments over the MSLLC Line: [REDACTED]

[REDACTED] I classify a destination area as unaffected by the JV if it has not received transcontinental intermodal shipments over the MSLLC Line in the years from 2006 to 2019.

I use the cumulative share of capital spending from the contributions to the JV as a measure of the intensity of exposure to the MSLLC Line. [REDACTED]

⁵¹ By comparison, I exclude the following destination areas from my analysis given the relatively immaterial transcontinental intermodal carloads that they receive over the MSLLC Line: [REDACTED]

⁵² [REDACTED] See Norfolk Southern Combined Railroad Subsidiaries, Class I Railroad Annual Report, December 31, 2021 at p. 27 Schedule 310.

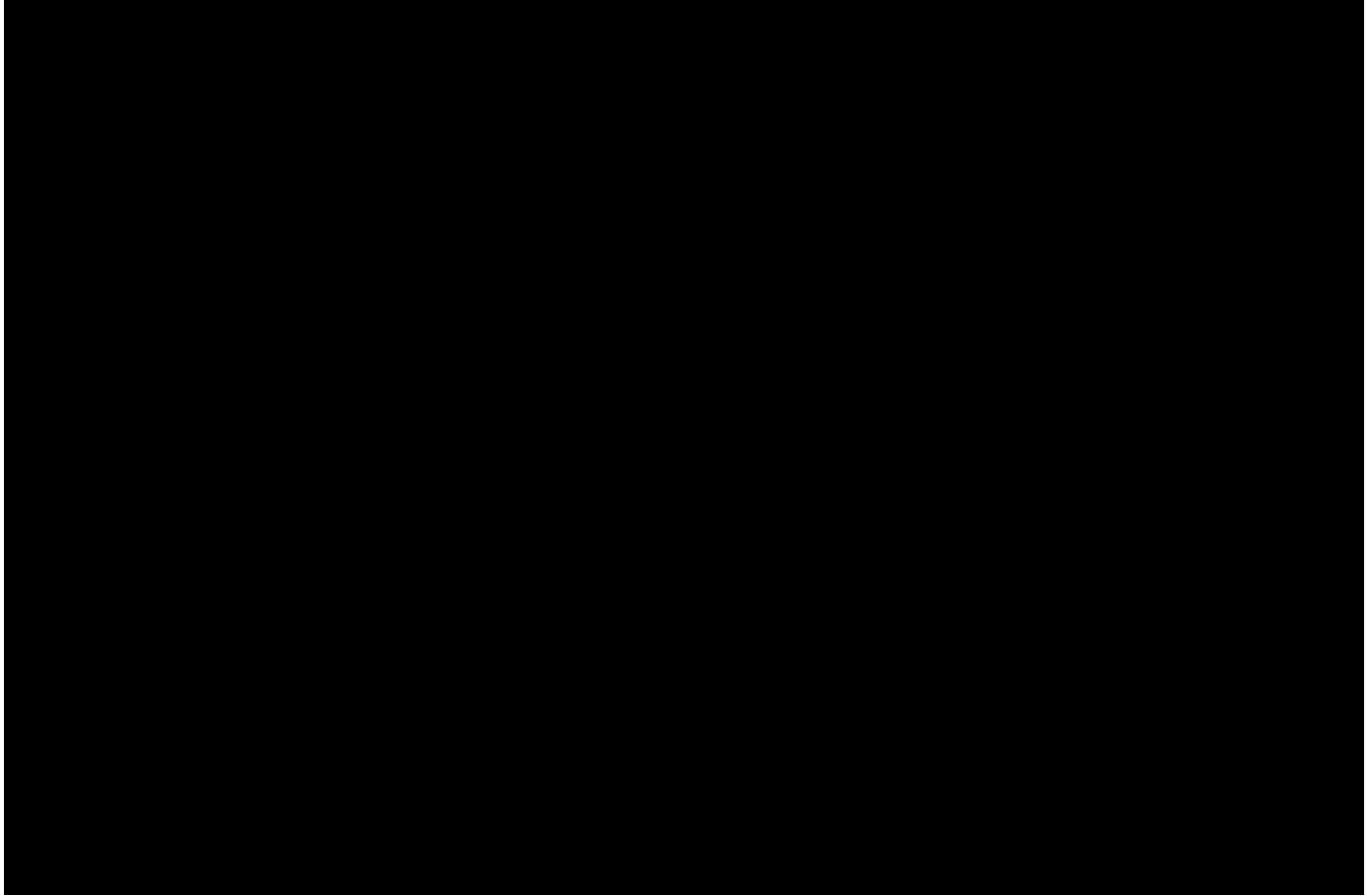
Figure 4: Cumulative Share of Investments from the Contributions to the JV, 2003-2019a) Estimated Impact on Output

Figure 5 depicts the averages of transcontinental intermodal output in the group of affected versus unaffected destination areas in each year from 2003 to 2019. Specifically, the red line represents the average index value for transcontinental intermodal output in the group of affected destination areas in each year. The blue line for the group of unaffected destination areas is computed analogously. The year 2003 is the base year, and so the index value in a given year represents the level of output relative to 2003.⁵³



⁵³ Accordingly, the two lines both start at a value of 100 in 2003.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Econometric analysis enables
evaluation of this relationship while controlling for other factors.

Figure 5: Averages of Transcontinental Intermodal Output (Indexed) in the Group of Affected Versus Unaffected Destination areas, 2003-2019 [REDACTED]

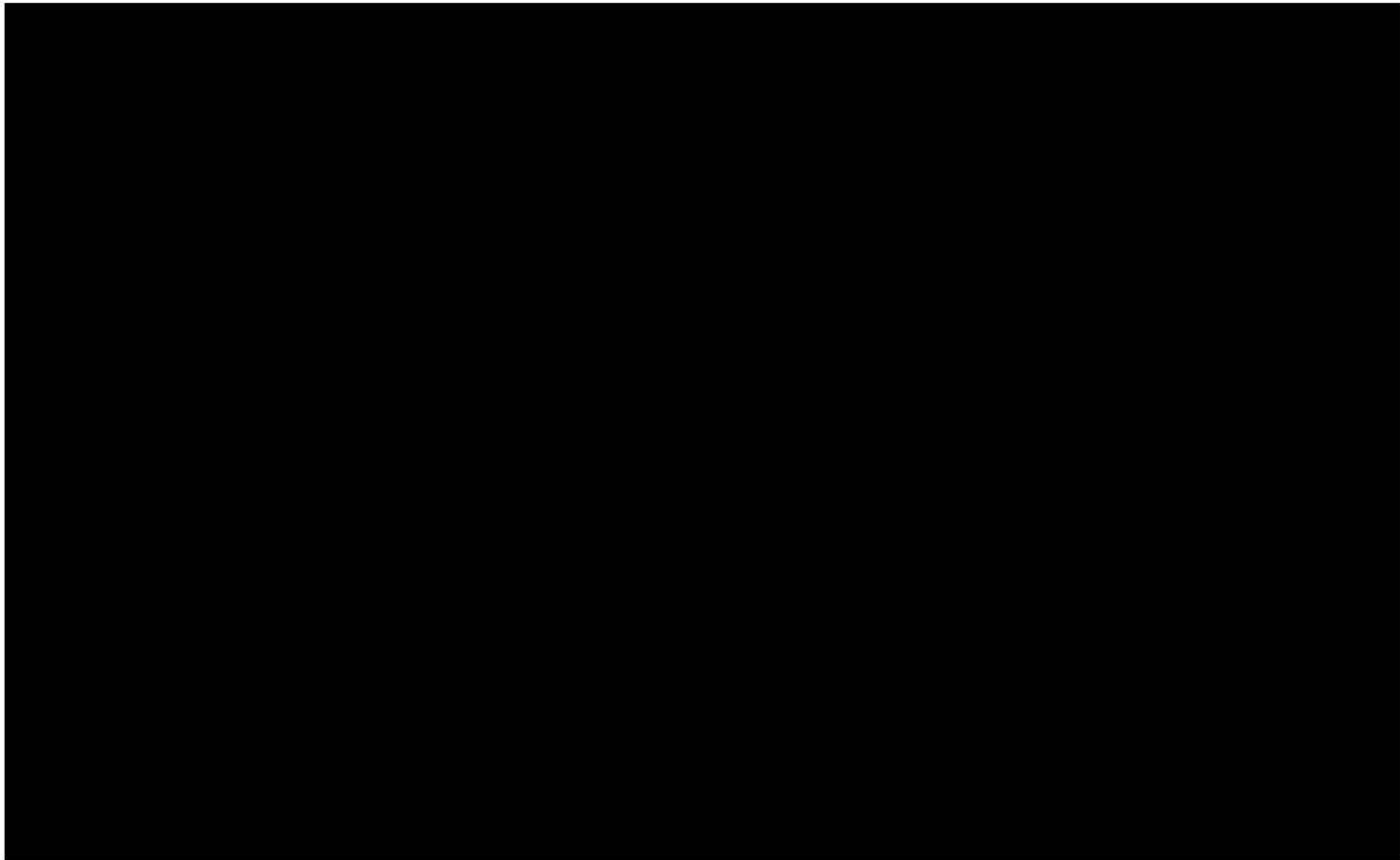


Table 1 shows the estimation results of the econometric model. My baseline specification in column (b) estimates that the net impact of the JV with the Exclusivity Arrangements was to restrict transcontinental intermodal output in [REDACTED]

[REDACTED]

⁵⁴ Visual inspection indicates that the common trend basis is appropriate in this application. That is, Figure 5 indicates that it is appropriate to consider that indexed output would be the same in both types of destination areas in the absence of the JV.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

55 [REDACTED]

[REDACTED]

56 [REDACTED]

Table 1: Net Impact of the JV on the Index of Transcontinental Intermodal Output ■

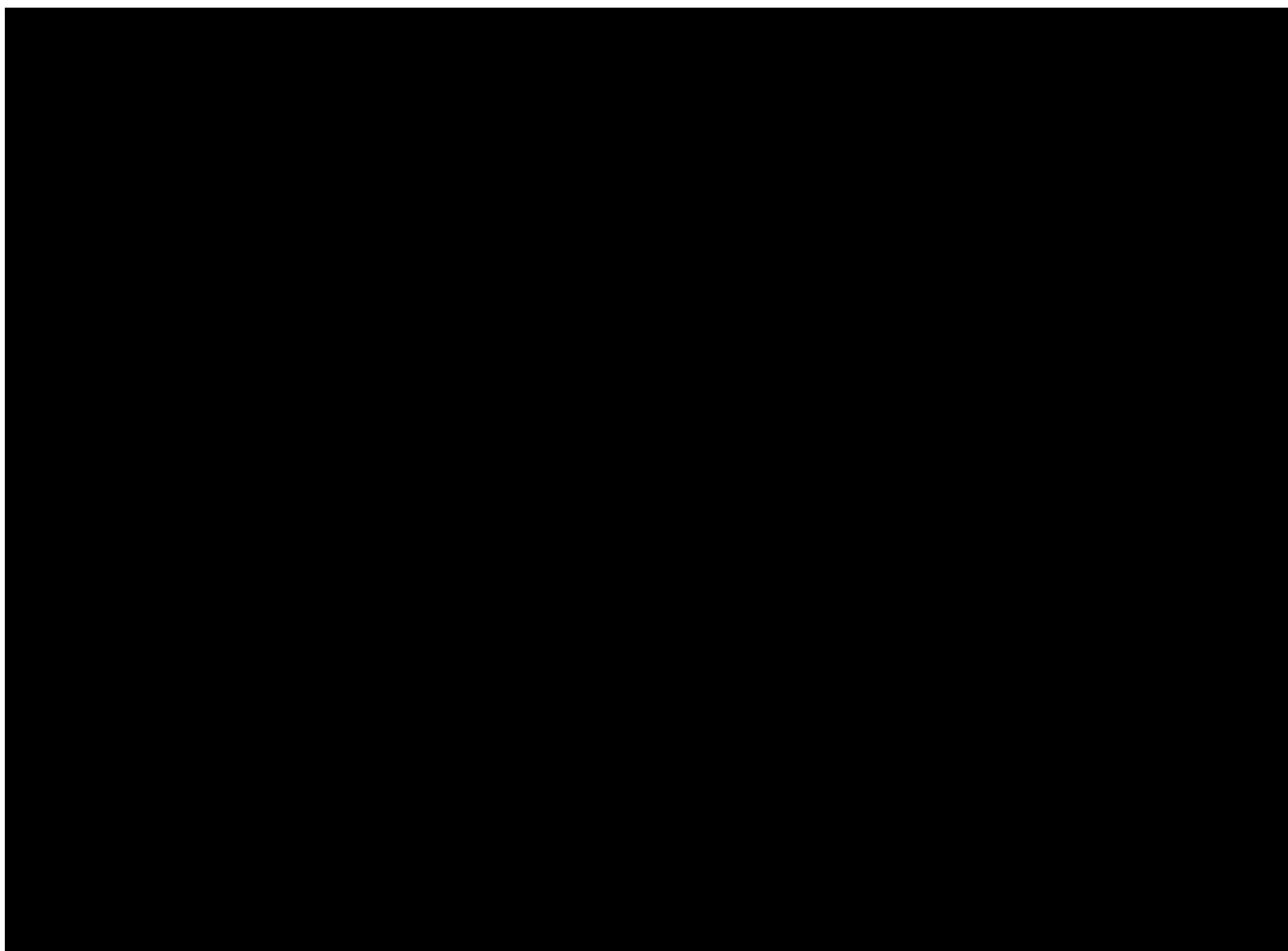
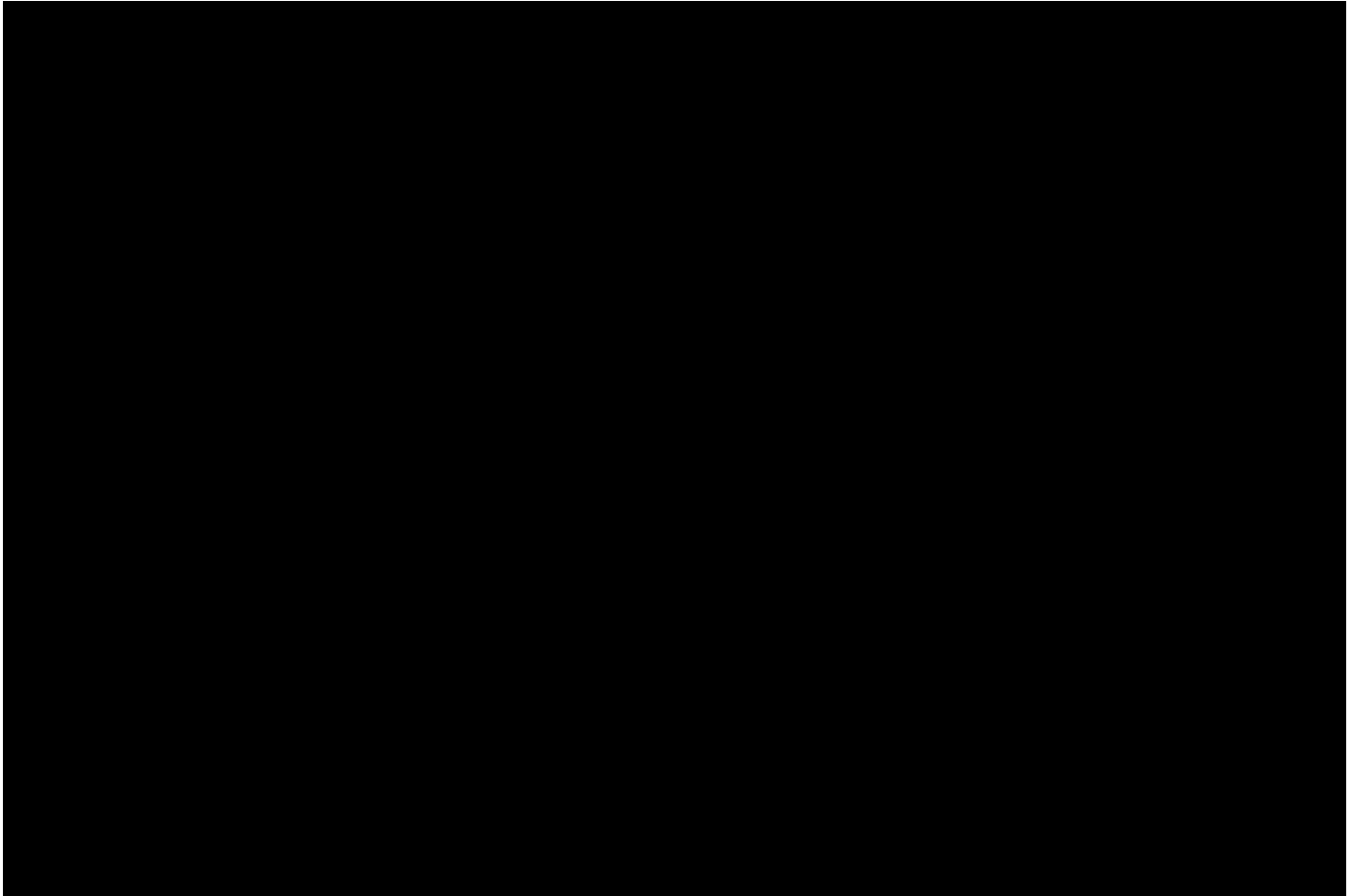


Figure 6: Average Annual Actual and But-For Transcontinental Intermodal Volume by Affected BEA, 2013 – 2019 ■



4. Implications

These results show that the Exclusivity Arrangements of the Meridian Speedway Agreements are anticompetitive and that a removal of the Exclusivity Arrangements would therefore facilitate competition.

C. Less Restrictive Alternatives to the Exclusivity Arrangements Would Preserve Efficiencies of the JV While Avoiding the Reduction in Competition

The Exclusivity Arrangements are not necessary for the formation of the JV or for the investments it facilitated. In other words, the Exclusivity Arrangements are not ancillary restraints on competition within the context of the JV. Rather, less restrictive alternatives to the Exclusivity Arrangements were and are available that would maintain the procompetitive aspects of the JV, including the investments, while facilitating competition and constraining NSR's ability to foreclose its rivals and restrict output relative to the levels that would prevail in the absence of the Exclusivity

Arrangements. Specifically, a haulage agreement on the MSLLC Line providing a tariff sufficient to provide a sufficient return on investment on the JV investments by NSR would enable competitors to serve shipper-customers with transcontinental intermodal services in the Southeast while maintaining incentives for investments in the JV.

1. Less Restrictive Alternatives

Professor Carey shows that non-exclusive haulage and trackage agreements are commonly used in the railroad industry, even when accompanying new investments.⁵⁷ Professor Carey demonstrates that such non-exclusive haulage-based arrangements were available to NSR and/or KCS at the time of the JV and that they would have accommodated the necessary investment without unnecessarily limiting competition (i.e., they would have been less restrictive than an exclusivity arrangement). Specifically, Professor Carey shows that NSR and KCS could have developed a haulage rate for use by other carriers moving transcontinental intermodal traffic across the MSLLC Line that would have enabled NSR to achieve a reasonable return on its \$308 million capital contribution to the JV.

2. Output Effects

The results of my econometric analysis in Section IV.B demonstrate that competition for transcontinental traffic would be more vigorous and transcontinental intermodal output would therefore be higher if the Exclusivity Arrangements were removed. These results are consistent with Professor Carey's econometric analysis of railroad rates for intermodal traffic movements that involved a different number of competitors at specific gateway locations, i.e., interchange locations such as the Meridian gateway.⁵⁸

The Meridian gateway is an interchange location where not only NSR but also CSX would be able to connect with the MSLLC Line to service transcontinental intermodal traffic if the Exclusivity Arrangements were removed. Professor Carey's analysis evaluates whether the number of railroad competitors at a gateway is an important economic attribute of the railroad rates being charged. Professor Carey finds interchange locations with two or more interchange competitors have lower rates than interchange locations with only one interchange competitor. Professor Carey's findings indicate that allowing not only NSR but also CSX to connect to the MSLLC Line to service

⁵⁷ See Carey Report July 2022, Section VI.

⁵⁸ See Carey Report July 2022, Section VII.

transcontinental intermodal traffic would result in lower prices and higher output for transcontinental intermodal traffic that moves over the MSLLC Line.

V. CONCLUSIONS

I demonstrate empirically that the Exclusivity Arrangements of the Meridian Speedway Agreements were, are and will continue to be, anticompetitive. The removal of the Exclusivity Arrangements that CSX is seeking would therefore facilitate competition and constrain NSR's ability to foreclose its rivals and restrict output relative to the levels that would prevail in the absence of the Exclusivity Arrangements, to the benefit of shipper-customers.

Appendix A

[Redacted]

VII. APPENDIX B

This Appendix contains information on data sources and construction of the data variables utilized in the regressions presented in Section IV.B. It also identifies the econometric specification and lists out various checks implemented to test the sensitivity of the analysis.

A. Data Sources

The data utilized in constructing the regression dataset come from the following sources:

1. Confidential Waybill Sample (CWS): This dataset is a sample of carload waybills for U.S. rail traffic, made available by the Surface Transportation Board using information submitted by rail carriers that terminated at least 4,500 revenue carloads annually. The CWS can be used to identify shipments of carloads, including intermodal traffic, across the U.S. It contains data on various characteristics of each shipment, including but not limited to the origin, destination, volume shipped, and identity of the carrier.
2. [REDACTED]
3. U.S. Bureau of Economic Analysis: The Bureau makes available data on several output measures at the state or local (county or MSA) level, together referred to as the “Regional Economic Accounts”. These can be further broken down by NAICS or SIC industry code.

B. Regression Dataset

The CWS dataset was used to calculate transcontinental intermodal output by destination area (BEA) and year, where transcontinental intermodal output is defined as traffic originating in either the “Los Angeles-Riverside-Orange County, CA-AZ” or “San Francisco-Oakland-San Jose, CA” BEA, and terminating at any BEA located to the east of Dallas, TX. The data were compiled for all years from 2003 to 2019 and include both full-move and rebill shipments. They were limited to BEAs for which full move transcontinental volume was observed continuously from 2003 to 2019, with no more than two years of zero volumes during this time frame (and a positive volume in 2003). Further information on the construction of the dataset using CWS can be found in the workpapers.

[REDACTED] This information was merged by year

on to the base dataset constructed using CWS. Finally, the Regional Economic Accounts data available from the Bureau of Economic Analysis of the U.S. Department of Commerce were used to calculate real total GDP and real manufacturing GDP at the county level by year. The annual county level data were further aggregated up to the BEA level, after which they were added to the base dataset to arrive at the final regression dataset utilized for the econometric analysis.

C. Baseline Regression Specification

To implement the difference-in-difference approach econometrically, I estimate the following baseline specification, where the left-hand side of the equation represents the dependent variable and the right-hand side of the equation contains the independent variables, including a set of “interaction” variables that reflect exposure to the MSLLC Line and that are specific to each of the affected destination areas:⁵⁹

$$output_idx_{mt} = \sum_{j=1}^n \beta_j (invest_t * bea_indicator_j) + \delta_m + \gamma_t + \epsilon_{mt}$$

where:

- $output_idx_{mt}$ is the dependent variable. It represents the total volume of transcontinental intermodal output arriving at termination BEA m during year t , indexed to 2003 volumes
- $invest_t$ is the cumulative share of capital spending from the contributions to the JV by year t
- $bea_indicator_j$ is an indicator variable that takes the value 1 for an “affected” BEA j and 0 otherwise; a separate indicator variable was created for [REDACTED]
[REDACTED]
[REDACTED]
- δ_m represents BEA fixed effects, which include the five indicator variables described in the previous bullet point
- γ_t represents year fixed effects
- Standard errors are clustered by BEA

⁵⁹ See Angrist, Joshua D. and Jörn-Steffen Pischke. *Mostly Harmless Econometrics: An Empiricist's Companion*. Princeton University Press, 2009, Chapter 5.

My approach allows for the “treatment intensity” of exposure to the MSLLC Line to increase with increases in capacity associated with NSR’s investment in the JV.

Finally, β_j is the coefficient on the interaction term that captures the effect of exposure to the MSLLC Line on output, separately for each of the [REDACTED]

With the control variables included in the analysis, the relationship between the dependent variable (output) and the interaction variables identifies the net effect of the JV and Exclusivity Arrangements on output in the affected destination areas.

I express transcontinental intermodal output as index values as this transformation allows interpretation of the estimated coefficients as impacts measured in percentage points of changes in transcontinental intermodal output and also controls for certain variation across geographies due to, e.g., aggregate size.

D. Sensitivity Analyses

Model 1 in Table 2 presents the results from the baseline specification, which were also reported in Table 1. The baseline specification includes fixed effects to control for time-invariant differences in demand and supply conditions across destination areas (destination area or BEA “fixed effects”). In addition, to control for changes in demand and supply over time that are common across destination areas, my baseline specification includes year fixed effects.

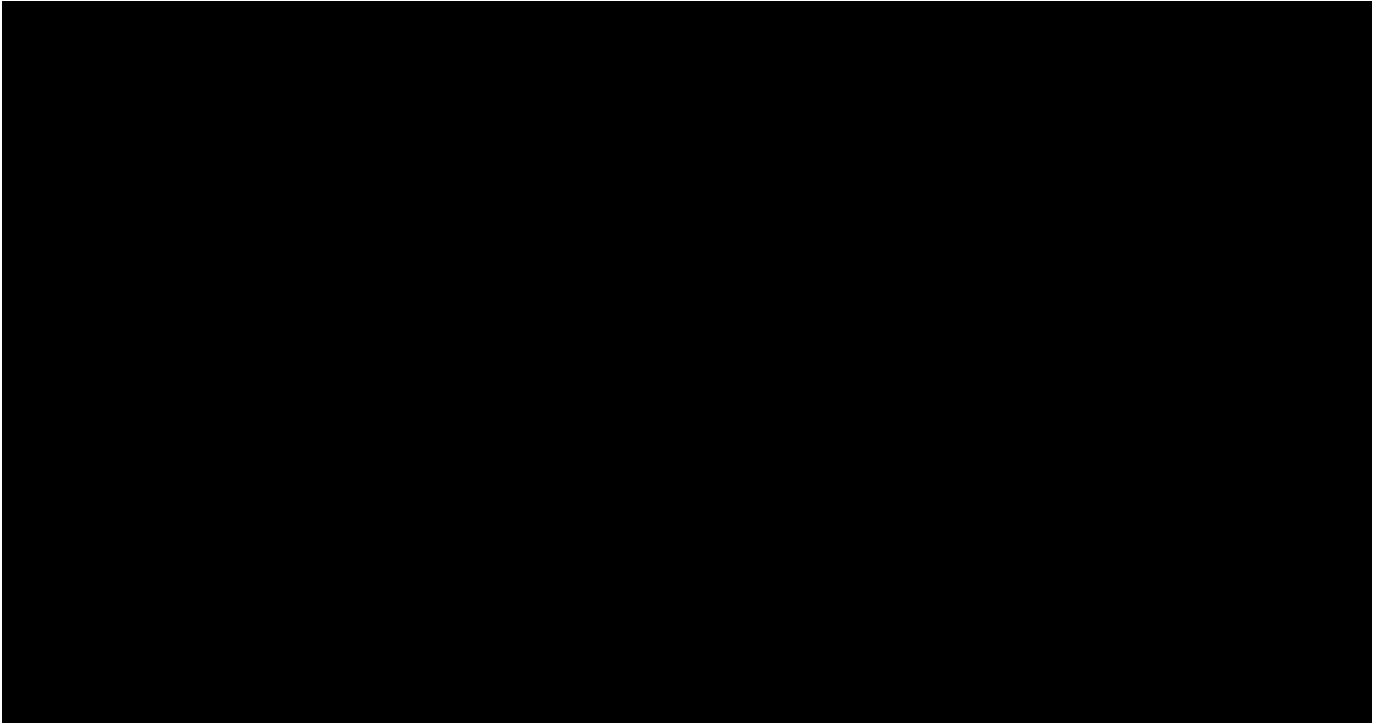
As sensitivity analyses, specifications 2, 3 and 4 of the table present estimation results when additionally including yearly total intermodal (including transcontinental and non-transcontinental) output, yearly total GDP and yearly manufacturing GDP measured at the level of the BEA.

Given that the baseline specification already accounts for differences in demand conditions across destination areas that are time-invariant and for changes in demand over time that are common across destination areas, the sensitivity analyses evaluate if there were changes in demand conditions that affected only certain destination areas in a way that would confound the estimation results of my baseline specification. Table 2 indicates that this is not the case and that the estimated parameters do not tend to change substantially when adding total intermodal output, total GDP, or manufacturing GDP as control variables to the econometric model, [REDACTED]

[REDACTED]

[REDACTED]

Table 2: Net Impact of the JV on the Index of Transcontinental Intermodal Output (Sensitivity Analyses)



The inclusion of total intermodal output as a control variable, which may introduce endogeneity given that transcontinental intermodal output is a component of total intermodal output,



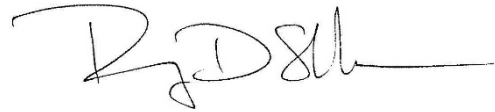
As an additional sensitivity analysis, I have estimated the net impact of the JV and the Exclusivity Arrangements on affected destination areas using a synthetic control approach. Under this approach, I can use pre-JV values of total intermodal output in the selection of control units (unaffected destination areas). The synthetic control analysis shows that the JV with the Exclusivity Arrangements has the net effect of reducing output in



Verification

I, Ramsey Shehadeh, declare under penalty of perjury that I have read the foregoing Verified Statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this Verified Statement.

Executed this 12th day of July, 2022.

A handwritten signature in black ink, appearing to read 'R. Shehadeh', written over a horizontal line.

Ramsey Shehadeh

Exhibit 1
[Redacted]

Public

Public

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 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 & HUDSON RAILWAY COMPANY, INC. –
CONTROL – KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN
RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY, AND THE
TEXAS MEXICAN RAILWAY COMPANY**

**CSX TRANSPORTATION, INC.'S RESPONSE TO COMMENTS AND RESPONSIVE
APPLICATIONS**

VERIFIED STATEMENT OF ROBERT GIRARDOT

My name is Robert Girardot. I have been employed in the management of intermodal transportation performed for or by CSX Transportation Inc. ("CSXT") since 1983. My roles are listed in my attached CV. My current position at CSXT is Director of Strategy and Analytics. My professional expertise is in Intermodal and Rail Transportation and Logistics. My experience extends to all aspects of intermodal operations to and from CSXT territory (which ranges from New England to Florida and from the Atlantic Coast to CSXT's interchanges with other carriers).

My main purpose in this statement is to illuminate:

- The factors that determine whether intermodal is the most efficient way to move our customers' traffic, and especially what it takes to take to divert traffic from truck to rail
- The Nature of competition at each of the major east-west gateways for intermodal traffic
- The history of competition for intermodal movements over the Meridian Speedway and competing routes into the Southeast
- The likely incentives of competing railroads if the Shreveport and Meridian Gateways were open and the Board abrogated the KCS-NSR arrangements that have restrained competition for traffic moving over the Speedway/MSSLLC Line.
- Why this is a suitable time for the Board to abrogate the anticompetitive restraints imposed by the MSSLLC Agreements and open the CPKC gateways at Shreveport and Meridian.

The factors that lead customers to prefer intermodal carriage over end-to-end truck carriage of containerized freight are a combination of service requirements and price. The general expectation is that containerized freight will move by rail when rail service can meet a shipper's service requirements and rail prices are lower than prices for like services provided by truck. All other things being equal, for traffic that moves other than by ocean carrier, i.e., North American traffic with a dray at origin and destination and operating in a highway standard 53 ft. unit, generally railroads can compete with truck in the following circumstances.

The traffic is typically to be moved over 750 miles, and in block quantity of at least 24-36 containers with same rail origin and rail destination to facilitate connections. Available rail routings must have a minimum amount of circuitry relative to the highway route, and no more than 1-2 intermediate connections. Finally, origin and destination rail terminals must be within 150 miles or less from the shipper and receiver door, so that drayage costs, capacity and transit time do not overcome the advantages of rail for the linehaul portion of the move.

Other factors, however, are seldom equal. Faster or more reliable door to door delivery times are often more valuable to shippers than the difference in price between railroads and trucks. Trucks often dominate markets where, considering only distance, railroads would be expected to have a large market share.

However, cost savings combined with consistent and reliable door to door delivery, and the unique ability for rail to provide capacity, can overcome the transit speed advantage that a door to door truck move will always provide vs. rail, regardless of the distances. (A truck is always faster... they average 60 mph, have no connections, and go door to door, vs. pick up/drop off at a terminal and drayage between terminal and door on both ends.)

A good example of this phenomenon is traffic between United States and Mexico (Mexico Traffic). Trucks have the largest share of the market for container movements far beyond the point where railroad costs drop below truck costs. Trucks have such a large market share of these movements because rail service is not as fast or dependable as truck service.

This is illustrated by the small amount of containerized Mexico Traffic that moves via rail over the New Orleans, LA ("NOLA"), gateway to and from the southeast. The shortest rail route from Laredo into the Southeast is via NOLA. However, the Gulf Coast between Houston and New Orleans and eastward along the Gulf is historically congested with Chemical/Merchandise traffic, challenged by seasonal route outages and diversions (Hurricanes/Tropical Storms), numerous drawbridges, rivers, bayous, conflicts with Maritime/Barge traffic, and does not provide the reliability required for intermodal services to succeed. NOLA is highly congested and therefore is a slow interchange. The Meridian Speedway offers a superior route for traffic captured by rail carriers, and the principal route for containerized Mexico Traffic to the Southeast is over the Meridian Speedway.

But the Meridian Speedway is not available for much of the containerized Mexico Traffic that could be diverted from trucks because, as I believe and explain further below, Shreveport is closed to UP's Mexico Traffic. UP's route between Laredo and Shreveport is better than KCS's route. Much of the KCS route between Laredo and Shreveport is over-congested and consists largely of multiple discrete segments of trackage rights not under KCS' control, challenged by conflicts with trains of the host railroad(s) high density carload trains. The entire KCS patchwork route along the Gulf of Mexico between Robstown and Beaumont, TX via Corpus Christi, Houston, Port Arthur, suffers the same challenges as the UP New Orleans route. UP's alternative

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route, over tracks controlled by UP, to Shreveport is at least a day faster and is much more dependable than KCS's route.

There is a long history of running trainloads of high value auto parts via connection with KCSM at the currently open Laredo gateway over UP to the Midwest because UP's route combines consistency and reliability, directness, and speed to allow truck conversion. As an example, the UP-CSX rail route between Laredo and Detroit is 1,609 miles, while highway miles are almost identical at 1,616 miles. UP's route between Laredo and the Southeast via Shreveport could attract more traffic now moving over the highways. I believe KCS keeps Shreveport closed to UP because KCS would prefer to hold on to the traffic it can attract to its route with a single line haul, all the way between Central Mexico to Meridian, MS, rather than risk losing revenue to UP for the portion between Laredo and Shreveport, and even worse, losing a much larger division to a competitive move over a parallel UP interline route connecting the Ferromex gateway at Eagle Pass, TX and Shreveport, even if that means less volume moving off the highways and over the MSLLC Line.

Traffic that could be taken off the highways over UP's superior route to Shreveport will stay on the highways until the Shreveport gateway is open to all traffic that could be attracted to that route between points in Mexico and points in the Southeast.

The route between Shreveport and Meridian is also closed to competition for the "Transcon" intermodal traffic UP now moves between points west of Dallas – especially Pacific Coast ports – to connect with NSR at Shreveport and for the traffic KCS and NSR transport between Dallas, primarily from the Dallas intermodal terminal at Wiley, Texas, and points east of Meridian. Arrangements between NSR and KCS require that traffic move only via NSR to and from points in the east. KCS, which has a 70% interest in the line between Shreveport in Meridian has agreed not to compete with NSR for UP Transcon traffic that NSR moves from Shreveport over Meridian to and from the East.

CSXT would like to offer shippers a competitive alternative at Meridian for all intermodal traffic between the Southeast and Mexico, and Los Angeles/Long Beach, that could move most efficiently over the Speedway. That is impossible today because Shreveport is closed to Mexico Traffic that might be attracted to the more efficient KCSM-UP or FEXE-UP routes between Laredo/Eagle Pass and Shreveport. Similarly, the existing agreements between KCS and NSR prevent CSXT from competing with NSR for UP Transcon Traffic.

Given these constraints, what alternatives does CSXT have? There is an alternative route for a large volume of Transcon intermodal traffic moving to and from the Southeast over a BNSF route well north of the Speedway into Birmingham and over CSXT haulage to Atlanta. It is not a practical competitive route, however, for highly service-sensitive intermodal traffic from Mexico, the West, or Dallas. And a route over Meridian would permit CSXT to capture traffic, especially highway conversions, for which its route with BNSF cannot compete.

My understanding of the history of that alternative route is that before KCS entered its 2006 MSLLC agreements with NSR, {{{[REDACTED]}}

}} After KCS and NSR made their exclusive arrangements, BNSF worked with CSXT to create a route both carriers hoped would compete with the exclusive Speedway routes. BNSF and CSXT have attracted a considerable volume of Transcon traffic moving to and from Atlanta by designing a serve that would overcome the speed and directness of the UP-NSR route over Shreveport. Even so, CSXT and BNSF could not attract any traffic other than California intermodal because the route miles and characteristics via BNSF create too much of a cost and service disadvantage). This, for example, is why we never attracted any Dallas intermodal traffic. Our route with BNSF will never be as desirable to some shippers as a route over the Speedway.

Only an open Shreveport gateway would allow UP to compete with KCS for container traffic between Mexico and the Southeast. It would also help ensure CSXT could compete with NSR for delivery of that traffic to and from points east of Meridian. And BNSF, which once preferred the route over Dallas to Meridian, would have no obvious reason to not prefer that route once again if it were available. And an open gateway at Shreveport would assure UP could compete with CPKC if CPKC attempted to divert intermodal movements from U.S. Pacific ports to ports in Canada and Mexico. The STB would provide many public interest benefits if it would assure that all the traffic for which the Shreveport to Meridian route is the most efficient will be open to competition on both sides of the gateway. If CPKC were required to open Shreveport for all traffic, the Board removed the CPKC-NSR Exclusivity Arrangements, the industry would then be able produce the maximum benefits for competition and the public interest. Traffic between from several markets via any western carrier could be combined into efficient run-through train service to either Eastern carrier to/from any of the major southeast metro markets.

We have been working to compete with NSR for Speedway intermodal traffic and establish a principal interchange for a desirable alternative routing. CSX is present today at Meridian via the haulage rights we have between Birmingham and Meridian over NMBR. If, as I discuss further below, the Board removes the anticompetitive elements of the KCS-NSR MSLLC agreements, then Meridian would be the principal point from which CSXT, with CPKC (or MSLLC if it were allowed to act as a rail carrier) could compete with NSR for Speedway intermodal traffic. If Shreveport were open, KCS would be able to compete with NSR for intermodal Transcon and would be required to compete with UP for Mexico Traffic moving over Shreveport. This would be a positive step toward a more competitive flow from both Mexico and around Dallas. NSR and Applicants, however, appear to want Meridian closed in perpetuity except to NSR. And if both Shreveport and Meridian gateways remained closed, removing the arrangements between KCS and NSR that restrain competition over the Speedway would not result in competition for NSR.

In addition to our requests for open gateways, we ask that any approval of the Proposed CPKC Transaction or the proposed NSR responsive transaction be subject to the abrogation of the KCS-NSR MSLLC Exclusivity Arrangements that foreclose competition for Transcon and Dallas Intermodal Traffic moving over the MSLLC line to and from points in the East. Open gateways at Meridian and Shreveport would be meaningless if CPKC continues to abide by the KCS-NSR Exclusivity Arrangements, which foreclose competition over those gateways.

CSXT's attorneys and expert witnesses explain elsewhere the illegality of the KCS-NSR exclusivity arrangements and the economic harm they cause shippers and the public interest. Let me explain why, from my perspective as an intermodal traffic specialist, those arrangements are especially pernicious.

First, the KCS-NSR exclusivity arrangements are, to my knowledge, unique in the railroad industry. I am aware of no other significant haulage arrangements where the hauling carrier has given up its right to compete with the carrier to which it provides haulage. BNSF and CSXT, for example, can compete with UP-NSR for some Transcon intermodal traffic that moves over BNSF's haulage rights on CSXT between Birmingham and Atlanta. But nothing in our agreements precludes CSXT from turning around and competing with BNSF on the Birmingham – Atlanta line to carry Transcon traffic, e.g., via CSXT's connection with UP at Memphis over CSXT's line through Birmingham to Atlanta. Likewise, BNSF is not constrained to deliver its

Transcon traffic via CSXT's haulage; BNSF also moves Transcon traffic to and from Atlanta in interline service with NSR. As another example, is CSX gave haulage to BNSF for our Northwest Ohio terminal in 2018. That arrangement gave BNSF an exclusive for haulage services, The grant was not perpetual, and CSX was not prohibited in any way from offering interline services via this same route and to/from the Northwest Ohio terminal.

The more typical arrangement in the industry is that railroads seeking haulage or trackage rights do not acquire ownership of the lines at issue. And yet they often make investments commensurate with the expected value of those investments and commensurate with incremental capacity required for the volumes forecasted across the rights. For example, to facilitate its competition with UP after KCS and NSR made their MSLLC deal, {{ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]}}

Finally, I've been asked by counsel to explain why CSXT is taking the opportunity of this proceeding to seek open gateways at Meridian and Shreveport and the KCS-NSR Exclusivity Arrangements. Here are my responses:

First, my recollection is that we and, I suspect, the rest of the industry, did not grasp what becomes obvious only after close examination -- that the anticompetitive MSLLC restrictions were never approved by the Board.

Second, the markets served by the Speedway today are significantly larger than they were in 2006

Third, the BNSF-CSXT route for Transcon intermodal is only competitive for certain traffic moving between Pacific Ports, Southern (Los Angeles/San Bernardino) and Central California (Stockton) and the East. Many shippers have requirements that cannot be met on this route. We would like to offer shippers that cannot choose that route a competitive alternative.

Fourth, we reviewed

- Applicants' unclear position regarding open gateways,
- Applicants' announced intention to divert traffic to inefficient routes without price reductions,
- Projections of growth in Mexico traffic by Applicants and our consultants, and

- NSR's initially forecast Responsive Application,

That review led us to reexamine both the MSLLC agreements and the routing of intermodal traffic that might be affected by the Proposed Transaction. We gained a deeper understanding of the anticompetitive impact of the agreements, which were never reviewed or approved by the Board, and of Applicants' refusal to open all gateways to shippers on commercially reasonable terms.

All these factors led us to conclude it is time now to seek relief for our shippers and assure that the exclusivity arrangements and closed gateways on the Speedway cannot be used to restrain competition.