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BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500¹

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

APPLICANTS' FINAL BRIEF

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Decision No. 13	Finance Docket No. 36500 (STB Decision No. 13, served Feb. 18, 2022)

Citations to Board Precedent

<i>CN/EJE</i>	<i>Canadian National Ry. – Control – EJ&E West Co.</i> , Finance Docket No. 35087 (Decision No. 16 served Dec. 24, 2008)
<i>CN/IC</i>	<i>Canadian National Ry., & Grand Trunk Corp. & Grand Trunk Western R.R. – Control – Illinois Central Corp., Illinois Central R.R., Chicago, Central & Pacific R.R., & Cedar River R.R.</i> , 4 S.T.B. 122 (1999)
<i>CP/DM&E</i>	<i>Canadian Pacific Ry., et al. – Control – Dakota, Minnesota & Eastern R.R., et al.</i> , Finance Docket No. 35081 (STB decision served Sept. 30, 2008)
<i>CSX/NS/Conrail</i>	<i>CSX Corp. & CSX Transportation, Inc., Norfolk Southern Corp. & Norfolk Southern Ry. – Control & Operating Leases/Agreements – Conrail Inc. & Consolidated Rail Corp.</i> , 3 S.T.B. 196 (1998)
<i>CSX/Pan Am</i>	<i>CSX Corp. & CSX Transportation, Inc., et al. – Control & Merger – Pan Am Systems, Inc., Pan Am Railways, Inc., Boston & Maine Corp., Maine Central R.R., Northern R.R., Pan Am Southern LLC, Portland Terminal R.R., Springfield Terminal Ry., Stony Brook R.R. & Vermont & Massachusetts R.R.</i> , Finance Docket 36472 (Decision No. 9 served Apr. 14, 2022)
<i>DT&I</i>	<i>Detroit, T. & I. R. Co. Control</i> , 275 I.C.C. 455 (1950)
<i>KCS/Tex Mex/TFM</i>	<i>Kansas City Southern – Control – The Kansas City Southern Ry., Gateway Eastern Ry., & The Texas Mexican Ry.</i> , 7 S.T.B. 933 (2004)
<i>UP/MP/WP</i>	<i>Union Pacific Corp., Pacific Rail System, Inc., & Union Pacific R.R. – Control – Missouri Pacific Corp. & Missouri Pacific R.R.</i> , 366 I.C.C. 462 (1982)
<i>UP/MKT</i>	<i>Union Pacific Corp., Union Pacific R.R., & Missouri Pacific R.R. – Control – Missouri-Kansas-Texas R.R., et al.</i> , 4 I.C.C. 2d 409 (1988)

UP/SP

Union Pacific Corp., Union Pacific R.R., & Missouri Pacific R.R. – Control & Merger – Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Ry., SPCSL Corp., & The Denver & Rio Grande Western R.R., 1 S.T.B. 233 (1996)

Citations to the Public Hearing

Hearing Day 1	S.T.B. Hearing, Sept. 28, 2022 (recording available at https://www.youtube.com/watch?v=CbmzhM3S0Bc)
Hearing Day 2	S.T.B. Hearing, Sept. 29, 2022 (recording available at https://www.youtube.com/watch?v=EUyvM1zomYA&t=3075s)
Hearing Day 3	S.T.B. Hearing, Sept. 30, 2022 (recording available at https://www.youtube.com/watch?v=_ZWhnm7gpNw)
Hearing Day 4	S.T.B. Hearing, Oct. 3, 2022 (recording available at https://www.youtube.com/watch?v=cijrg9XV6o4)
Hearing Day 5	S.T.B. Hearing, Oct. 4, 2022 (recording available at https://www.youtube.com/watch?v=PB7Q8tm4RCo)
Hearing Day 6	S.T.B. Hearing, Oct. 6, 2022 (recording available at https://www.youtube.com/watch?v=H30c0FW3yS0)
Hearing Day 7	S.T.B. Hearing, Oct. 7, 2022 (recording available at https://www.youtube.com/watch?v=HEqEA7fuCr8)

Applicants' Filings in This Docket

Amended Op. Plan	Applicants' Amended Operating Plan (CP-47/KCS-34) (filed May 13, 2022)
Application	Applicants' Railroad Control Application, Vol. 1 (CP-25/KCS-13), Vol. 2 (CP-26/KCS-14), Vol. 3 (CP-27/KCS-15), Vol. 4 (CP-28/KCS-16) (filed Oct. 29, 2021)
Baranowski V.S.	Verified Statement of Michael R. Baranowski, Application Vol. 1 at 1-401 to -435
Baranowski R.V.S.	Reply Verified Statement of Michael R. Baranowski, Rebuttal Vol. 2 at 2-1990 to -2011
Becker V.S.	Verified Statement of Myron Becker, Application Vol. 2 at 2-240 to -255
Brooks V.S.	Verified Statement of John Brooks, Application Vol. 1 at 1-211 to -242
Brooks R.V.S.	Reply Verified Statement of John Brooks, Rebuttal Vol. 2. at 2-33 to -70

Brown/Zebrowski V.S.	Verified Statement of Richard W. Brown and Nathaniel S. Zebrowski, Application Vol. 2 at 2-112 to -202
Brown/Zebrowski R.V.S.	Reply Verified Statement of Richard W. Brown and Nathaniel S. Zebrowski, Rebuttal Vol. 2 at 2-113 to -201
Clements V.S.	Verified Statement of James Clements, Application Vol. 1 at 1-317 to -337
Creel V.S.	Verified Statement of Keith Creel, Application Vol. 1 at 1-155 to -185
Creel R.V.S.	Reply Verified Statement of Keith Creel, Rebuttal Vol. 2 at 2-2 to -17
Del Cueto R.V.S.	Reply Verified Statement of Oscar Del Cueto Cuevas, Rebuttal Vol. 2 at 2-1713 to -1731
Elphick R.V.S	Reply Verified Statement of Raymond A. Elphick, Rebuttal Vol. 2 at 2-483 to -773
Elphick S.V.S.	Supplemental Verified Statement of Raymond A. Elphick, Applicants' Reply to Metra's Motion to Strike (CP-68/KCS-54) (filed Sept. 28, 2022)
Elphick/Orr R.V.S.	Reply Verified Statement of Raymond A. Elphick and John F. Orr, Rebuttal Vol. 2 at 2-396 to -482
Gameiro R.V.S.	Reply Verified Statement of Adolph Gameiro, Rebuttal Vol. 2 at 2-1417 to -1712
Majure V.S.	Verified Statement of W. Robert Majure, Ph.D., Application Vol. 2 at 2-4 to -111
Majure R.V.S.	Expert Reply Statement of W. Robert Majure, Ph.D., Rebuttal Vol. at 2-1732 to -1924
Mutén V.S.	Verified Statement of Bengt Mutén, Application Vol. 2 at 2-203 to -239
Mutén R.V.S.	Reply Verified Statement of Bengt Mutén, Rebuttal Vol. 2 at 2-2012 to -2022
Naatz R.V.S.	Reply Verified Statement of Michael Naatz, Rebuttal Vol. 2 at 2-240 to -328
Operating Plan	Applicants' Operating Plan, Application Vol. 2 at 2-256 to -516
Orr R.V.S.	Reply Verified Statement of John F. Orr, Rebuttal Vol. 2 at 2-329 to -395
Ottensmeyer R.V.S.	Reply Verified Statement of Patrick J. Ottensmeyer, Rebuttal Vol. 2 at 2-18 to -32

Rebuttal	Applicants' Reply to Comments and Requests for Conditions, Opposition to Responsive Applications, and Rebuttal in Support of the Application, Vols. 1-3 (CP-53/KCS-39) (filed July 12, 2022)
Simmons R.V.S.	Reply Verified Statement of Stephen D. Simmons, Rebuttal Vol. 2 at 2-774 to -1272
Vargas V.S.	Verified Statement of Dean Vargas, Application Vol. 1 at 1-338 to -382
Wahba/Naatz V.S.	Verified Statement of Jonathan Wahba and Michael Naatz, Application Vol. 1 at 1-243 to -302
Wahba/Naatz R.V.S.	Reply Verified Statement of Jonathan Wahba and Michael Naatz, Rebuttal Vol. 2 at 2-219 to -239
Waiver Reply	Applicants' Reply to Objections to KCS Waiver from 2001 Major Merger Rules (CP-8/KCS-8) (filed Apr. 12, 2021)
Walker R.V.S.	Reply Verified Statement of Nick Walker, Rebuttal Vol. 2 at 2-1288 to -1415
Wilkerson R.V.S.	Reply Verified Statement of Jason Wilkerson, Rebuttal Vol. 2 at 2-1273 to -1287
Wilson V.S.	Verified Statement of Glen Wilson, Application Vol. 1 at 1-303 to -316

Other Filings in This Docket

ACC-6/TFI-5/NITL-3	Comments and Requests for Conditions of the American Chemistry Council, The Fertilizer Institute, & The National Industrial Transportation League (ACC-6/TFI-5/NITL-3) (filed Feb. 28, 2022)
Amtrak Letter to Board	Amtrak Letter to Board (filed Feb. 2, 2022)
Bayer-2	Comments of Bayer CropScience LP (Bayer-2) (filed Feb. 28, 2022)
CI-3	Amended Comments of The Chlorine Institute (CI-3) (filed June 9, 2022)
CN-13	CN's Comments on Application and Request for Conditions (CN-13) (filed Feb. 28, 2022)
CN Hunt V.S.	Verified Statement of David T. Hunt in Support of CN's Comments on Application and Request for Conditions (CN-13) (filed Feb. 28, 2022)
Knief V.S.	Verified Statement of Bob Knief, President of Bartlett Grain Co. (filed June 20, 2022)
NEW Cooperative R.V.S.	Reply Verified Statement of NEW Cooperative, Rebuttal Vol. 2 at 2-2036 to -2037

OxyChem Comments	Comments of Occidental Chemical Corporation and Oxy Vinyls, LP (filed Feb. 28, 2022)
Ray-Carroll R.V.S.	Reply Verified Statement of Ray-Carroll County Grain Growers, Inc., Rebuttal Vol. 2 at 2-2038 to -2040
Richardson R.V.S.	Reply Verified Statement of Richardson International Limited, Rebuttal Vol. 2 at 2-2041 to -2043
UP-10	Union Pacific Railroad Company's Comments and Request for Conditions, Finance Docket No. 36500 (UP-10) (filed Feb. 28, 2022)

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APPLICANTS' FINAL BRIEF

The record in this proceeding is extensive and overwhelmingly supports approval of the proposed CP/KCS Transaction² without conditions beyond those Applicants have already accepted. The creation of a newly-enabled and more competitive CPKC network is strongly in the public interest. The combination of CP and KCS is a once-in-a-lifetime opportunity to inject new competition into the U.S. railroad industry without the need for Board regulatory intervention, and without any downsides for the U.S. public interest.

Applicants' Brief will barely scratch the surface of the truly mammoth record in this proceeding. We will highlight for the Board the key reasons why the Transaction should be approved and why the various condition requests should be rejected. As the record amply demonstrates, the Transaction will generate extraordinary procompetitive and other public benefits, and – especially as conditioned by Applicants' commitments as described further herein – will cause no public interest harms. The best way to ensure that the public's interest in a competitive and robust freight rail network is furthered by the Transaction is to resist the calls by Applicants' adversaries – especially our Class 1 railroad rivals – for regulatory conditions that would burden the Transaction beyond the commitments that Applicants have made.

² Abbreviations, and defined terms have the meaning set forth in the Application and Rebuttal.
Applicants' Final Brief, page 1

I. THE STATUTORY FRAMEWORK, THE BOARD’S “OLD RULES,” AND BOARD PRECEDENT PROVIDE THE PROPER FRAMEWORK FOR EVALUATING THE APPLICATION AND THE REQUESTS OF CONDITION SEEKERS

The Board’s Major Merger precedents, all decided under the pre-2001 Major Merger Rules (the “Old Rules”), provide a straightforward path for concluding that the Transaction is in the public interest and that the conditions sought by participants in this proceeding are without merit.³

The Board’s precedents consistently find that end-to-end transactions like this one yield significant benefits for the public interest, both quantitative and qualitative.⁴

Likewise, the Board has held time and time again that it “will not impose public interest conditions on a railroad consolidation” unless, at a minimum, four elements are satisfied: “[1] that the consolidation may produce effects harmful to the public interest (such as an anticompetitive reduction of competition in an affected market), [2] that the conditions to be imposed will ameliorate or eliminate the harmful effects, [3] that the conditions will be operationally feasible, and [4] that the conditions will produce public benefits (through reduction or elimination of the possible harm) outweighing their harm to the merger.”⁵ The Board’s consistent and well-established precedents have applied these principles repeatedly to reject conditions (a) aimed at *protecting another rail carrier*, absent a showing that essential services are threatened; (b) that would “ameliorate *longstanding problems* which were not created by the merger;” (c) that “would put the proponent of a condition in a *better position than before the merger*;” (d) that are *not* “*narrowly tailored* to remedy [proven Transaction-related] effects;” and

³ See, e.g., Rebuttal § II.B & Apps. A & B; Decision No. 4 at 2, 3; *CN/IC* at 128.

⁴ See, e.g., *CN/IC* at 167-69; *UP/MKT* at 417; *CP/DM&E* at 11; *KCS/Tex Mex/TFM* at 948-50; *CSX/Pan Am* at 22; see generally Rebuttal App. A.

⁵ *UP/MP/WP*, 366 I.C.C. at 565; see also Decision No. 13 at 4.

(e) that “*could alter the competitive balance* otherwise to be realized from the merger” or would be “vehicles for *rail system restructuring*.”⁶

The conditions sought in this case do not measure up against these well-established standards. The condition seekers fail to demonstrate that the Transaction will cause any actual harm. They seek Board intervention to address long pre-existing conditions. They propose conditions that are not narrowly-tailored to address only Transaction-related effects, even if one imagined some risk of harm. Their proposed conditions would harm the public interest by imposing on CPKC and CPKC alone a set of regulatory constraints that would hobble its quest to be a more formidable competitor against the larger Class 1s and trucks. Indeed, many of the proposed conditions would also degrade options and services that exist in today’s pre-Transaction world.

To the extent some commenters have raised worries about *possible* post-Transaction outcomes that might warrant Board attention – were they actually to arise despite CPKC’s incentives to avoid them – the Board’s oversight process, augmented by the commitments Applicants have made to address these areas of concern, provide an adequate and effective way to ensure that these concerns do not arise or would be swiftly remediated. In particular, as explained below and in Appendix A, Applicants have refined their commitments – adherence to which Applicants accept as a condition of approval – to address (a) general service concerns, (b) concerns about service on the lines CPKC will share with UP and BNSF in Texas; (c) concerns about service (and impacts on Metra) in the Chicago area; (d) concerns about the closure of gateways; and (e) concerns about changes in certain tariffs, such as the elimination of reciprocal switching or changes to KCS’s TIH tariff terms.

⁶ See Rebuttal § II.B & App. A.
Applicants’ Final Brief, page 3

Among the Board’s responsibilities in this proceeding is to give a “hard look” at the potential adverse environmental impacts of the Transaction under NEPA. As the Board explained in *CN/EJE*, “[w]hile NEPA prescribes the process that must be followed, it does not mandate a particular result.”⁷ The Board’s “consistent practice has been to mitigate only those [environmental impacts] that result directly from a proposed transaction,” as opposed to “the effects of current railroad operations,” and to do so only with measures that are both “reasonable and feasible to address the environmental effects” identified during the NEPA process.⁸

The Board’s environmental review process in this proceeding has amply satisfied the “hard look” standard, and Applicants’ extensive voluntary mitigation commitments, agreements with communities, and commitment to ongoing community engagement provide adequate mitigation of localized environmental effects. The Board should resist calls by individual communities to burden this strongly-procompetitive and overall-environmentally-beneficial Transaction with efforts to address problems that “would not be caused solely by applicants’ [new] trains ..., but rather by the combined presence of multiple freight railroads and, in some locations, commuter trains as well.”⁹

II. THERE IS COMPELLING EVIDENCE OF THE TRANSACTION’S PUBLIC INTEREST BENEFITS

The record establishes unambiguously that the Transaction will generate extraordinary public benefits.¹⁰ It will:

⁷ *CN/EJE* at 34.

⁸ *Id.* at 38.

⁹ *Id.* at 45.

¹⁰ Much of the evidence submitted with the Application and Rebuttal speaks to these benefits, with their quantification addressed most directly in: Application App. B at 1-74; Vargas V.S.; Baranowski V.S.; Baranowski R.V.S.; the Operating Plan (and Amended Operating Plan); Brown/Zebrowski V.S.; and Mutén V.S.

- Make possible *new and more competitive transportation services*, delivering benefits to rail customers, strengthening the competitive process;¹¹
- Improve CPKC's *operating efficiency*, allowing the same resources to deliver more;¹²
- Generate (through CPKC's own investments and investments by others to take advantage of new CPKC options) a more robust rail network, especially in CPKC's core North-South corridor;¹³
- Remove tens of thousands of truck shipments from the Nation's highways by attracting them to new rail intermodal services;¹⁴
- Deliver meaningful environmental improvements;¹⁵
- Create many hundreds of new U.S. railroad jobs;¹⁶ and
- Support the expansion of Amtrak and other passenger services on the CPKC network.¹⁷

None of these benefits is seriously contested, and to the extent anyone quibbles with their magnitude it is only CPKC's future rivals, especially CN.¹⁸ They suggest that CPKC's new ability to attract customers reflects merely "private profits"¹⁹ or should be discounted because

¹¹ See especially Creel V.S. § III; Ottensmeyer R.V.S.; Brooks V.S.; Wahba/Naatz V.S.; Wahba/Naatz R.V.S.; Brown/Zebrowski V.S.; Brown/Zebrowski R.V.S.; Mutén V.S.; Mutén R.V.S.; Rebuttal § III.C.; Hearing Day 1 at 1:05:16-1:17:52 (Ottensmeyer); Hearing Day 1 at 1:17:58-1:40:20 (Brooks).

¹² See especially Amended Op. Plan; Baranowski V.S. § I; Rebuttal § III.C.

¹³ See especially Creel V.S. § V; Amended Op. Plan.

¹⁴ See especially Creel V.S. at 1-166; Wahba/Naatz V.S. § III.A; Mutén V.S.; Mutén R.V.S.; Hearing Day 1 at 1:24:38-1:26:48 (Brooks).

¹⁵ See especially Wilson V.S.; Rebuttal § X.

¹⁶ See especially Amended Op. Plan; Becker V.S.; Rebuttal § IX.

¹⁷ See especially Creel V.S. § VII; Rebuttal at 15-16 & n.2 (citing Amtrak Letter to Board).

¹⁸ Applicants explained at the Hearing that the anticipated traffic gains almost entirely involve traffic moving to and from the United States, and that even traffic between Mexico and Canada will generate public interest benefits within the United States. Hearing Day 6 at 24:56-28:30 (Meyer).

¹⁹ E.g., Hearing Day 2 at 51:06-51:15 (CN counsel Atkins).

traffic would shift away from routes (on UP and BNSF in particular) that are somewhat shorter than CPKC single-line routes. These railroads should be encouraged to make their case in the marketplace, in competition with new CPKC options. Their arguments ask the Board to ignore the well-established truths that customers strongly prefer single-line railroad services and that route mileage is not the sole or dispositive factor in rail-to-rail competition. Shipper after shipper has confirmed that truth in this proceeding, voicing strong and nearly-unanimous support on the record for the Transaction's approval. The public interest advantages of single-line service are an indelible feature of the Board's precedents. And, equally significant, the same parties that call into question the Transaction's benefits simultaneously acknowledge that shippers prefer their own single-line service – built through prior end-to-end mergers approved by the Board – to interline services.²⁰ At bottom, these critiques by Class 1s only serve to underscore the central public benefit of the Transaction: the intensification of competition across the U.S. rail network. Sadly, these Class 1s do not view that as a positive.

One of those Class 1s – CN – hired consulting witnesses who expended significant effort attempting to call into question Applicants' Operating Plan, suggesting that the methodology used to develop base year data leaves the Board unable to compare pre- and post-Transaction operations (in terms of train counts, densities, and other statistics). As Applicants have extensively and repeatedly demonstrated, CN's criticisms are invalid. Not only did Applicants approach the Operating Plan exactly as they would their own real-world, best-in-class operational planning, Applicants used the best-available data and deployed that data in a manner that provided the Board with a reliable apples-to-apples comparison of the pre- and post-

²⁰ See, e.g., Hearing Day 2 at 3:41:21-3:41:45 & 3:48:18-3:48:47 (CN witness Breslin touting new single-line services); 7:30:42-49 (BNSF witness Nober: CPKC will "compete strongly ... as it should"); see generally Rebuttal App. B.

Transaction worlds. Any other approach – including that favored by CN’s paid consultants – would have been less reliable, not more.²¹

In merger case after merger case under the Old Rules, the Board has recognized the extraordinary value to the public interest – in terms both quantifiable and unquantifiable – from end-to-end features of railroad combinations.²² The record in this case establishing the Transaction’s benefits is more extensive than in any of those prior cases. The CP/KCS combination presents a unique opportunity to serve the public’s interest in a better, more robust, and more competitive rail network, and in turn a better-functioning supply chain and national economy. Those benefits are, in a word, priceless.

III. THERE IS NO BASIS FOR ADDITIONAL CONDITIONS TO ADDRESS SERVICE-RELATED CONCERNS

A. There Is No Threat of Rail Service Disruption, Especially in Light of Applicants’ Extensive Service Assurance Commitments

Certain parties have advanced concerns about potential service disruptions or degradations arising from the Transaction, and some have urged the Board to require a formal Service Assurance Plan. Those concerns stem from past experience with complex rail mergers bearing no resemblance to this purely end-to-end Transaction, and there is *no foundation in this record* for any fear that CPKC will lead to service problems. The principal antagonist here is (again) CN, which acknowledges that its own formative Major Merger (*CN/IC*) – the prior transaction most similar to this one – caused no service-related harm notwithstanding the

²¹ See, e.g., Rebuttal § III.D; Amended Op. Plan; Elphick/Orr R.V.S. § II; *see also* Hearing Day 1 at 1:45:21-1:47:18 (Elphick).

²² See, e.g., *CN/IC* at 167-69; *see generally* Rebuttal Apps. A & B.
Applicants’ Final Brief, page 7

absence of any formal “Service Assurance Plan.”²³ The transactions that *did* lead to serious disruptions – *UP/SP* and *NS/CSX/Conrail* – each had salient features not at all present here.²⁴

Nonetheless, Applicants have devoted extensive attention to careful planning for Transaction implementation, and we are mindful of the vital importance of a smooth integration. CPKC’s incentives will be tightly aligned with those of rail customers and the public interest because the growth CPKC anticipates from the Transaction will depend on *improving service for* new and existing customers, not degrading it. The record amply demonstrates that there is no meaningful risk of service disruption arising from this Transaction.²⁵

The reassurance provided by Applicants’ careful planning and CPKC’s strong incentives to perform well will be bolstered by Applicants’ service-related commitments, which will be reinforced both through CPKC’s proactive engagement with its customers, the public, and the Board during the oversight period as well as by Applicants’ commitment to informal dispute resolution with customers who may perceive a Transaction-related disruption to their service.

Applicants have taken to heart the Board’s comments at the public hearing seeking more clarity about the steps CPKC will take to guard against and as necessary address potential service issues. To provide greater clarity, Appendix A includes Applicants’ augmented Service Promise that formalizes Applicants’ commitment in three key respects

First, in addition to the service metric reporting Applicants have already committed to, CPKC will develop pre-Transaction benchmarks for three key metrics (at an appropriately aggregated level) that reflect customer experience, and then develop, implement, and report to

²³ Hearing Day 2 at 1:57:00-1:57:06 (CN counsel Warren).

²⁴ Hearing Day 6 at 47:20-53:30 (Meyer and Clements); *see also* Rebuttal at 1-155 to -158; Brooks R.V.S. at 2-46 to -47; Waiver Reply at 15-16.

²⁵ *See especially* Rebuttal § V; Amended Op. Plan; Brooks V.S. § III.C; Brooks R.V.S. § III; Clements V.S.; Elphick/Orr R.V.S. § III; Hearing Day 1 at 2:48:27-2:53:57 (Clements).

the Board on concrete “Service Action Plans” in the event trends in those metrics indicate a post-Transaction service concern. These metrics are: (a) on-time performance relative to customers’ manifest service trip plans; (b) on time performance for bulk train operations (including grain and other unit trains); and (c) first-mile/last-mile performance relative to plan. Collectively, they will provide reliable diagnostics reflecting how effectively the CPKC network is delivering the performance that matters most to rail customers. In the event these metrics move in an undesirable direction, CPKC will immediately and proactively assess the root cause of the change, develop a plan to address it, and promptly report that plan to the Board and public.²⁶

Second, to ensure that no part of CPKC’s U.S. network is overlooked, CPKC will actively monitor service metrics as they relate to all geographies and lines of business and affirmatively reach out to potentially affected customers with custom-tailored Service Action Plans if Transaction-related service issues materialize.²⁷

Third, as Applicants have previously committed, if customers have concerns that the Transaction has degraded their service, CPKC will address those concerns via a formal escalation process, ultimately with formal mediation if that is the customer’s desire. That process is spelled out in Appendix A as well (at A6-7 (§ 3)). But in the meantime, if the Transaction creates conditions that negatively impact a shipper’s service (or threaten to do so), CPKC will be in direct contact about a customized plans aimed at avoiding or remedying the issue.

²⁶ See Appendix A hereto at A6 (Rider 1, § 2(c)).

²⁷ See Appendix A hereto at A6 (Rider 1, § 2(b)). This is not a difficult commitment for Applicants to make. It is in line with CP’s ordinary course approach – which has yielded best-in-class service quality and resiliency – to take the steps necessary to ensure that the network is adequately resourced, operations are adjusted as necessary to address changing conditions, and customer needs are met.

Given CPKC’s strong incentives to improve service rather than degrade it, and the lack of any concrete basis for concern that this end-to-end transaction will cause any service disruptions, there is no justification for any conditions that extend beyond the service-related commitments Applicants have made on the record in this proceeding.

B. There Is No Need for Board Intervention to Address UP’s and BNSF’s Claims Regarding Shared Lines in Texas

The UP-owned lines in Texas over which KCS operates today (*i.e.*, the “Shared Lines”) will be integral to CPKC’s success. CPKC has compelling incentives to avoid a situation where its own traffic growth – or any other circumstance resulting *from any railroad’s growth or operational activity* – leads to congestion that prevents CPKC and the other users from operating efficiently on those lines.

Fortunately, the Board need not be concerned that the Transaction will cause any operational disruption. The record on this issue is extensive, but six points bear emphasis:

First, Applicants have carefully studied available capacity on the Shared Lines and have confirmed that there is sufficient room for the additional trains they anticipate between Robstown and Beaumont. Attacks on Applicants’ analysis, principally by UP, ignore the extensive recent and underway infrastructure additions on these lines or seek to treat existing operational inefficiencies as inalterable (including those resulting from UP’s own decisions to force longer trains into Englewood Yard or regarding the prioritization of maintenance work needed to address slow orders).²⁸

Second, the specter put forward by UP and BNSF – analogizing to the 1997-98 Houston service meltdown – is scare-mongering that is entirely self-serving and divorced from the

²⁸ See, e.g., Hearing Day 6 at 4:36:09-4:40:50 (Creel); Hearing Day 1 at 217:21-219:22 (Creel); Hearing Day 1 at 2:03:55-2:11:50 (Orr); *see generally* Rebuttal §§ IV.A-B; Wilkerson R.V.S. §§ I-III; Orr R.V.S. Appendix B (at pages B9-B12) provides satellite image views of the routes used by KCS (and future) CPKC trains through Beaumont and the primary route of those trains through Houston.

realities of present circumstances. Unlike in *UP/SP*, CPKC will not be reconfiguring the entire Houston rail network with terminal consolidations and other extensive changes on top of a fragile SP network. CPKC will merely be increasing – in a measured way over the course of three years – the number of through trains it runs across the “expressway” routes to which Tex Mex was granted “equal” rights in 1996. Nor will CPKC be making these changes with the “arrogance” that CN’s counsel attributed to UP’s late-90s actions in Houston.²⁹

Third, the framework of existing agreements – particularly the Tex Mex trackage rights agreements imposed by the Board on UP in 1996 *to support competition and allow Tex Mex to grow*³⁰ – provide a complete and workable framework for addressing all of the potential infrastructure (and other) adjustments that might eventually become necessary to accommodate the traffic growth of all of the users of the Shared Trackage. They establish a collaborative process for joint operations, they provide for infrastructure expansion (including financial responsibility for the same), and they establish a binding dispute resolution framework.³¹ Board intervention is not necessary.

Fourth, the conditions requested by UP and BNSF – essentially a veto on any new CPKC traffic between Mexico and the rest of CPKC’s network – would be blatantly anticompetitive and overreaching. They would empower UP and BNSF to hold up CPKC competition indefinitely with an unending process of RTC study and debate over needed infrastructure, and unfairly saddle CPKC with the cost of infrastructure that UP and BNSF would inevitably benefit from and which their own traffic growth would eventually require. There is no link whatsoever

²⁹ See Hearing Day 2 at 1:51:47-1:52:01 (CN counsel Warren).

³⁰ *UP/SP* at 403-05.

³¹ See Hearing Day 1 at 2:11:50-2:13:00 (Orr); Hearing Day 6 at 3:42:20-3:45:34 (Meyer); Rebuttal § VI.B.; Simmons R.V.S. § I; Wilkerson R.V.S. § IV.

between the UP/BNSF position and the public interest, much less any Transaction-related harm to the service levels provided to shippers.³²

Fifth, the Board has rightfully been attentive to issues affecting rail service in the Houston area given the recent (and unpleasant) experience of the railroads operating there. However, none of the issues that arose in Houston in early 2022 had anything to do with KCS's operations, and they will not be exacerbated by CPKC's anticipated traffic growth. Whether the root cause was UP's crew and locomotive shortages, or its imprudent decisions to force additional work (and longer trains) into Englewood Yard and other facilities before they were fully equipped to handle that traffic, UP is (or surely will be) addressing those concerns, and CPKC's future through train operations will not be an obstacle to efficient and fluid operations for all carriers in and around the Houston terminal.³³

Finally, as Applicants have made clear, they recognize the importance of close collaboration among all users of Texas rail infrastructure (from the Neches River Bridge all the way to Robstown, TX) to ensure that it is used efficiently and the needs of all users are maintained. Applicants' success will depend on avoiding gridlock in Houston, at the Neches River Bridge, and on UP's line between Victoria and Robstown. To that end, Applicants have committed to detailed reporting on information about their own operations on these lines, including the evolution of train counts, train length, and transit times across the shared trackage.³⁴ In addition, Applicants have committed to fully collaborative engagement with both UP and BNSF about all of the issues – from operational design to infrastructure investments –

³² See especially Rebuttal § VI.

³³ See especially Rebuttal § VI.B; Elphick/Orr R.V.S. §§ III, IV.A-E; Orr R.V.S. ¶¶ 7-41; Simmons R.V.S. §§ I-II; Wilkerson R.V.S. § I.

³⁴ See Appendix A hereto at A1 (§ 2). For these data to be most informative to the Board and the public, it would be desirable for UP and BNSF to report data on their operations as well.

raised by future growth by all of these rail carriers that place demands on these shared lines.³⁵

Applicants' ability to carry out this commitment is necessarily dependent on UP and BNSF coming to the table in an equally collaborative and transparent manner. With this collaboration, however, the governing trackage rights agreements will provide an effective framework for ensuring that the rail traffic of all users of this trackage is accommodated for the benefit of customers, competition, and the public interest.

IV. THE BOARD SHOULD DENY METRA'S CONDITION REQUESTS TO THE EXTENT NOT FULLY ADDRESSED BY APPLICANTS' VOLUNTARY COMMITMENTS

Metra's concerns in this proceeding are founded upon bad advice from their consultants about the operational impacts of the Transaction and a misguided aim to use this proceeding as a vehicle for addressing a host of perceived pre-existing conditions.

The essential predicate for all of Metra's alleged concerns is the claim that the modest number of additional freight trains that Applicants anticipate from the Transaction will devastate the performance of Metra's passenger trains. Metra is incorrect, for five reasons.

First, Metra erroneously asserts that Applicants' estimated traffic growth on lines shared with Metra should be nearly doubled because – according to Metra's consultant – CPKC will reroute six Kansas City-St. Paul trains per day to a 250-mile longer route via Milwaukee and Chicago. That will not happen. The Marquette Subdivision – as augmented by the capacity-expanding investments CPKC will make – will accommodate the anticipated growth, with capacity staying well ahead of traffic volumes.³⁶ The RTC analysis of Metra's consultant that is

³⁵ See Appendix A hereto at A1 (§ 3); *see also, e.g.*, Rebuttal § VI; Hearing Day 1 at 1:02:01-1:02:27 (Creel); 2:11:54-2:13:24 (Orr), Hearing Day 6 at 3:45:21-3:42:41; 5:08:41-5:10:42 (Meyer).

³⁶ See *especially* Rebuttal § VII.A.2; Elphick R.V.S. §§ I.D, II.A; Hearing Day 6 at 2:29:22-2:41:36 (Meyer and Elphick).

driving Metra's contrary conclusion is grievously flawed and unworthy of the Board's consideration.³⁷

Metra's hypothesis would be self-defeating, as CPKC would not be able to attract the anticipated new traffic were it to force those trains over the much longer route via Milwaukee and Chicago. In any event, Applicants have committed not to reroute these trains absent some exigency requiring their detour via an alternative route.³⁸

Once it is understood that CPKC will not be routing Kansas City-St. Paul trains via Milwaukee and Chicago, all of Metra's concerns (and those of various parties that echo Metra's analysis) about added freight trains on Metra's MD-N line and between Bensenville Yard and the MD-N line via Tower B-17 evaporate entirely.

Second, Metra's concerns about increased freight train activity on its MD-W line east of Bensenville are equally misplaced given the facts. Applicants' anticipated new trains will originate and terminate at CP's Bensenville Yard. Additional traffic moving to and from points east will not miraculously "disappear," but will not impact Metra because it will be handled in *existing CP trains* (including not only through trains, but transfer jobs and local trains as well), which have ample room for the incremental traffic. These operations will not interfere with Metra, and certainly will not do so any more than in the pre-Transaction environment.³⁹

Third, the vast majority of Metra's assertions regarding *existing conflicts* between CP freight trains and Metra trains involve activities that will be mitigated (if not eliminated) by CP's underway transformation of its Bensenville Yard and the relocation of CP intermodal and

³⁷ See especially Rebuttal § VII.A.2; Elphick R.V.S. §§ I.D-E; Elphick S.V.S.; Hearing Day 6 at 2:42:26-2:46:48 (Elphick).

³⁸ See Appendix A hereto at A4 (§ 11); see also Hearing Day 1 at 2:36:02-2:37:06 (Clements); 2:22:13-2:22:26 (Elphick).

³⁹ See especially Rebuttal § VII.A.1; Elphick R.V.S. §§ I.A-C; Hearing Day 6 at 2:47:24-2:55:04 (Meyer, Elphick, Clements).

automotive activity from Schiller Park into the expanded Bensenville terminal. Metra's extensive complaints about conflicts with trains entering and exiting Bensenville (mostly from the north via Towers A-20 and B-17, where train counts will not change as a result of the Transaction) will be addressed by improved arrival and departure tracks at the west end of Bensenville. Likewise, today's need for some of CP's intermodal trains to reverse across Metra tracks at Tower B-12 to reach Schiller Park will be eliminated by the shift of these trains into Bensenville.⁴⁰

Fourth, with the focus properly on whether CP's anticipated additional freight trains *west of Bensenville* will impact Metra, the evidence makes abundantly clear that there is no basis for concern. Extensive operating slots are available on the high-capacity double track west of Bensenville to accommodate the growth of CP's freight operations alongside future growth in Metra's operations, without degrading either. This capacity will be augmented by CPKC's new Monroe Siding west of the MD-W line.⁴¹ The lack of concern is reinforced by the superlative level of performance CP achieves for Metra passenger trains on its MD-W line, where, as judged by Metra's own data and metrics, Metra meets its 95-percent on-time performance target and fewer than one in a hundred Metra trains suffers any delay as a result of CP trains.⁴²

⁴⁰ See Rebuttal §§ VII.A.1, VII.A.4; Elphick R.V.S. §§ I.A, I.C; Walker R.V.S. § I.D; Hearing Day 6 at 2:47:24-2:55:04 (Meyer, Elphick, Clements). In addition, the routes for CPKC trains moving between Bensenville and the IHB and BRC do not require freight trains to traverse Metra's two primary mainline tracks. See *id.* The satellite image maps in Appendix B (at pages B2-B8) depict these lines in detail.

⁴¹ See Rebuttal § VII.A.3; Elphick R.V.S. § I.B; Hearing Day 1 at 2:22:25-2:27:27 (Elphick); Hearing Day 6 at 3:07:36-3:08:49 (Meyer).

⁴² See Rebuttal § VII.B; Walker R.V.S. § I.B; Hearing Day 1 at 2:27:27-2:28:31 (Elphick); Hearing Day 6 at 3:04:33-3:06:07 (Meyer).

Again, virtually none of Metra's complaints about pre-Transaction delays have anything to do with freight operations west of Bensenville Yard. See Rebuttal § VII.C; Elphick R.V.S. § I.F; Walker R.V.S. §§ I.C, I.E, III, IV.

Fifth, Applicants' extensive commitments regarding their interactions with Metra strongly reinforce that the Transaction will not adversely affect Metra's passenger operations, particularly in a manner that would warrant Board intervention. These commitments, including the augmentations made at the Hearing, are spelled out in detail in Appendix A and will commit Applicants to reporting on the growth in their traffic (in terms of train frequency and length) on lines shared with Metra and to proactive engagement with Metra about how to accommodate the future plans of both CPKC and Metra for the use of these shared lines.⁴³

In short, the Transaction will not cause any harm to Metra's operations, and there is no basis for any Board-imposed remedy. Instead, once these foundational facts are understood, it is apparent that the true target of Metra's ire is a set of pre-existing circumstances that Metra wants to change. Whatever the merits of Metra's desires as a matter of policy – and CP disagrees that Metra's proposed changes would be good policy – the additional conditions Metra desires would be inconsistent with Board precedent and unsupported by the facts. Even if the Board perceived some residual risk to Metra's services from Transaction-related growth, the conditions Metra seeks are overreaching and would cause public interest harm without any offsetting benefit.

The centerpiece of Metra's demands is its renewed effort to force a transfer of dispatching responsibility from CP to Metra. Such a condition would be contrary to consistent Board precedent rejecting efforts to compel a change in dispatching responsibility, including the Board's recent decision in *CSX/Pan Am* and its rejection of Metra's own request in *CP/DM&E*.⁴⁴ A forced transfer of dispatching to Metra would also be extraordinarily overreaching, because most of the trackage for which Metra seeks to take over dispatching (its MD-N line and the

⁴³ Appendix A hereto at A2-A4 (§§ 4-11), A8 (§ 2), A10 (§§ 3-4); *see also* Rebuttal § VII.D; Creel R.V.S. ¶ 16; Hearing Day 6 at 3:08:24-3:08:47 (Meyer), 3:27:15-3:31:26 (Creel).

⁴⁴ *CSX/Pan Am* at 29-30; *CP/DM&E* at 13-15.

portion of the MD-W line east of Bensenville) will see exactly zero transaction-related changes in CPKC train counts. There is no harm that Metra dispatching would “fix.”

The dispatching change Metra desires would come at a steep public interest cost, with no countervailing benefit. Transferring dispatching to Metra would hurt the safety and efficiency of dispatching by substituting a narrower and parochial set of interests (a “Chicagoland viewpoint”)⁴⁵ for CP’s network-wide approach, which benefits the operations of CP, Amtrak, and Metra alike. These inevitable costs would yield no material benefit. There is *no evidence* that Metra would dispatch train movements within the confines of the MD-W and MD-N lines any differently from CP, much less better than CP’s dispatchers do today. Even if Metra dispatching magically avoided 100 percent of freight train interference – as if the freight trains were not present at all – Metra’s operations would at best achieve a tiny improvement in on-time performance. And in reality there is no reason to think Metra’s dispatching would be any better than CP’s. Metra’s on-time performance on lines it dispatches is not materially different from what CP achieves on the MD-W and MD-N lines, even though the CP-shared lines have more complex freight operations and (in the case of the MD-N line) more than a dozen daily Amtrak trains.⁴⁶ Underscoring the irrationality of Metra’s claim that its dispatching would be a panacea, Metra’s chief dispatcher made clear that running freight trains ahead of even rush hour passenger trains is often “the right thing to do for the network.”⁴⁷

The remainder of Metra’s condition requests relate to other dissatisfactions with the pre-Transaction state of affairs, none of which is created by the Transaction. Metra understandably would prefer to separate its passenger operations completely from CP’s freight operations, but its

⁴⁵ Hearing Day 1 at 8:06:16-8:06:31 (Metra witness Godfrey).

⁴⁶ See Hearing Day 6 at 3:17:19-3:22:26 (Creel); Rebuttal §§ VII.B.1, VII.D.1; Walker R.V.S. § II.

⁴⁷ Hearing Day 1 at 7:24:17-27 (Metra witness Godfrey); Hearing Day 6 at 3:26:41-3:27:15 (Creel).
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extensive – and expensive – infrastructure demands do not address any Transaction-related impacts. Metra also desires to renegotiate the framework of its existing contract with CP to, among other things, revise the mechanisms for adding additional commuter frequencies outside of peak windows (in light of Metra’s complaints about a 2018 episode relating to its MD-N line). But the Transaction did not create the existing mechanisms (or other contract terms) and will not interfere with the parties’ future engagement on these issues.⁴⁸

Applicants have made extensive commitments aimed at fostering a constructive – and likely improved – post-Transaction relationship between CPKC and Metra, and there is no merit or evidentiary support for further conditions addressing alleged impacts on Metra’s operations.

V. THERE IS NO BASIS FOR CONDITIONS PURPORTING TO ADDRESS “COMPETITIVE” HARM

A. Conditions Addressing Vertical Competition (or “Gateway”) Issues Are Unwarranted

The claims by UP and BNSF that the transaction will cause “vertical foreclosure” of interline routes in which they participate today for traffic moving to/from Mexico – and thereby harm competition in affected transportation markets – lack merit and do not support imposition of any conditions, much less their requests for anticompetitive protective conditions. The undeveloped claims of other parties (including ACC/TFI/NITL) along the same lines – but less focused on Mexican traffic – are equally meritless.

The vertical (*i.e.*, synonymously, “end-to-end”) features of this Transaction are in fact what makes the combination of CP and KCS highly procompetitive. It will greatly improve CP-KCS transportation services, creating new and better options for rail customers and sparking

⁴⁸ Appendix A hereto at A2-A4 (§§ 5-7, 10); *see also* Rebuttal § VII.C-D; Elphick R.V.S. §§ I.F-G; Gameiro R.V.S. § I; Walker R.V.S. § III-IV.

enhanced competition by CPKC against larger Class 1s.⁴⁹ The economic testimony offered by UP and BNSF turns these benefits upside down and wrongly assumes that *increases in competition that benefit consumers* (shippers) are reasons to worry about competitive harm to UP and BNSF.⁵⁰ But as the extensive evidence in this record demonstrates – and as the Board has consistently ruled, including in the *KCS/Tex Mex/TFM* when the exact same issues were presented by the same antagonists (UP and BNSF) – competition will be strengthened, not harmed. UP and BNSF (and other Class 1s) should be encouraged to compete hard, not seek refuge in protection from the Board that would stifle the Transaction’s procompetitive benefits.

First, CPKC will continue to have strong incentives to support efficient interline routes that its customers have demonstrated their interest in through their pre-Transaction choices. These incentives flow from numerous sources. For the vast preponderance of all existing interline rail traffic, any CPKC “foreclosure strategy” that made an interline route unattractive would risk losing the traffic altogether. Taking UP and BNSF’s claims about Mexican traffic as illustrative, CPKC would risk losing pre-Transaction KCSM traffic to trucks (especially for intensely competitive intermodal traffic); losing it to alternative rail routes (like FXE-UP or FXE-BNSF routes via alternative gateways); losing it to water routes (like vessels carrying finished vehicles from the Port of Veracruz to U.S. Gulf or East Coast ports); or having it shift to alternative origins or destinations. Indeed, the vast majority of the traffic about which UP and BNSF complain – and seek to protect for themselves – is highly contestable intermodal and

⁴⁹ This fact is established by the raft of testimony from Applicant witnesses (especially Brooks V.S.; Brooks R.V.S § I; Wahba/Naatz V.S.; Wahba/Naatz R.V.S.; Brown/Zebrowski V.S.; Brown/Zebrowski R.V.S.; Mutén V.S.; Mutén R.V.S.) as well as that of the hundreds of supporting rail customers.

⁵⁰ See Majure R.V.S. §§ 2, 4.1; *see also* Hearing Day 1 at 3:06:32-3:18:45 (Dr. Majure); Hearing Day 7 at 1:121:14:26-1:15:55 (Dr. Majure).

automotive traffic, as well as grain traffic that can readily switch to alternative destinations or from alternative origins.⁵¹

Second, the Board previously considered exactly the same arguments that UP and BNSF now make about vertical foreclosure, evaluated them with care, and rejected them. The Board got it right then when it found that “a ‘competition-preserving’ condition is not needed for the Laredo gateway,”⁵² and nothing has changed since: not the “economics” of vertical mergers, not the factual context, and not any evidence supporting the risk of anticompetitive foreclosure.

UP and BNSF suggest that vertical merger law has changed radically since the Board last considered these issues, but that is just not so. The Board’s precedents are sound. They were predicated on the same economic framework that underpins the DOJ/FTC vertical merger guidelines and modern enforcement of the antitrust laws in non-railroad contexts.⁵³ Contrary to the rhetoric of UP’s witness Salop, vertical transactions are not inherently suspect, as reflected in the Federal Trade Commission’s loss in the *Illumina/Grail* case, one of the examples touted by Professor Salop as evidence of a supposed sea change in attitudes toward vertical deals.⁵⁴

⁵¹ See, e.g., Rebuttal § IV.A; Naatz R.V.S. § III; Hearing Day 7 at 00:02:39-00:07:46; 00:28:05-00:31:18 (Ottensmeyer).

In addition, Mexican non-discrimination regulations would stand in the way of the Mexican rate factor manipulation hypothesis, as any manipulation would also flow through to KCSM traffic for which there would be no opportunity to rebate the increase back to customers in the United States, and CPKC thus would have a disincentive to engage in such manipulation and risk its participation in that traffic. See Hearing Day 7 at 00:35:49-00:42:39 (Meyer and Ottensmeyer); Naatz R.V.S. at 2-273; Del Cueto R.V.S. §§ II-III.

⁵² *KCS/Tex Mex/TFM* at 18; see also Hearing Day 7 at 00:42:40-00:49:18 (Meyer) (demonstrating that Board rejected exact same arguments as advanced by UP and BNSF now). The Board correctly understood the complaints by UP and BNSF to be seeking to preserve their revenue divisions, not protect competition. *KCS/Tex Mex/TFM* at 17.

⁵³ Majure R.V.S § 2.1.1; Hearing Day 7 at 1:03:47-1:07:56 (Dr. Majure).

⁵⁴ See *In the Matter of Illumina, Inc. & Grail, Inc.*, FTC Docket No. 9401, Initial Decision (Sept. 9, 2022) (administrative appeal docketed).

UP suggests that the CP/KCS Transaction poses a much greater danger of foreclosure than past cases because Applicants here forecast more significant traffic gains from their new single-line routes than KCS did in *KCS/Tex Mex/TFM*. But that argument is misguided on multiple counts. First of all, it ignores what UP forecasted in 2004 (when it advanced identical arguments) that the KCS/Tex Mex/TFM transaction would create incentives for KCS to foreclose “huge volumes” of traffic that UP handled north of Laredo. Despite this sky-is-falling 2004 forecast, UP has over the past 17 years come forward with zero evidence of any foreclosure of any traffic whatsoever.⁵⁵ More fundamentally, however, the reason why Applicants anticipate greater traffic gains from this Transaction is because it *will have greater procompetitive benefits* – creating new services better able to meet customer needs and which shippers will *be free – not forced – to choose* if they reach the same conclusion.⁵⁶

History disproves UP’s and BNSF’s concerns about foreclosure, particularly in light of the natural experiment presented by the *KCS/Tex Mex/TFM* transaction and the lack of any customer or other complaints about foreclosure there (as addressed in detail by Dr. Majure based on the highly confidential record).⁵⁷ The only party to even attempt to argue that “foreclosure” has ever occurred is BNSF.⁵⁸ But BNSF’s evidence is contrived and false. Until this year in this proceeding, BNSF never once complained about any foreclosure or contended that KCS acted in a way that was “commercially unreasonable.” BNSF’s representative at the Hearing wrongly

⁵⁵ See Hearing Day 6 at 6:03:50-6:07:37 (Meyer).

⁵⁶ See, e.g., Rebuttal § IV.A.4; Majure R.V.S. § 2-3; Majure V.S. § 3; Hearing Day 1 at 3:08:45-3:09:53 (Dr. Majure).

⁵⁷ Rebuttal § IV.A.3; Majure V.S. § 3.1; Majure R.V.S. at § 3; Hearing Day 1 at 3:11:47-3:13:49 (Dr. Majure); Hearing Day 7 at 1:04:02-1:15:55 (Dr. Majure); Naatz R.V.S. §§ II-III.

⁵⁸ Mr. McBride’s claims at the Hearing about the *MidAmerican* case are not to the contrary, since his “example” involved UP declining to participate in an interline movement of coal after it obtained an efficient single-line route from origin to destination. That UP action raises bottleneck rate issues, not foreclosure ones, and could not arise here because of Applicants’ commitment not to create any new regulatory bottlenecks. Hearing Day 6 at 6:15:54-6:20:01 (Meyer).

stated that BNSF sat on its hands for 16 years because it knew nothing of the alleged 2006 Tex Mex grain rate increase, but in fact BNSF was fully aware of that increase, and undoubtedly knew at the time that the increase was not anticompetitive.⁵⁹

As Applicants have shown, all that KCS did was to move a below-cost Tex Mex rate to one that was marginally remunerative. Foreclosure it was not.⁶⁰ And the record amply demonstrates that the reduction in BNSF's grain traffic volumes via Laredo was not a result of any foreclosure but caused by other factors, including BNSF's very conscious effort to "shift" its traffic to Eagle Pass and El Paso.⁶¹ KCS's largest grain shipper – Bartlett Grain – confirms that throughout this period options for shipment to Mexico via BNSF (and UP) have remained available, but that Bartlett has *chosen KCS*.⁶² In other words, the KCS/Tex Mex/TFM transaction produced exactly what one would expect from an end-to-end rail merger: more competition, not foreclosure.

Third, bolstering CPKC's natural and compelling incentives to continue to support efficient interline routes, Applicants' two interrelated "gateway" commitments – which Applicants have stood by from the very beginning of this proceeding – will provide assurance that no gateways will be closed anticompetitively as a result of the Transaction:

- (1) Applicants' commitment that the Transaction will create no new regulatory bottlenecks, meaning that CPKC will continue to waive any right it might otherwise acquire to decline to quote "bottleneck" rates in cases where the Transaction creates new single-line routes.

⁵⁹ See Hearing Day 2 at 7:27:08-7:30:01 (BNSF witness Nober); *see also* Rebuttal § IV.A.3; Hearing Day 6 at 6:08:11-6:10:22 (Meyer); 6:23:47-6:35:23 (Ottensmeyer). BNSF in fact has consistently negotiated with KCS for higher divisions based on threats to shift traffic to other gateways. Naatz R.V.S. at 2-258 to -260.

⁶⁰ See Rebuttal § IV.A.3; *see also* Naatz R.V.S. § II; Hearing Day 6 at 6:32:47-6:34:10 (Ottensmeyer).

⁶¹ See, e.g., Rebuttal at IV.A.3; Majure R.V.S. § 3; Hearing Day 6 at 06:10:31-06:11:33 (Meyer).

⁶² See Knief V.S. ¶ 14; Hearing Day 2 at 9:35:18-9:35:35 (Knief).

- (2) Separately, and more broadly, Applicants' commitment that CPKC will not close any affected gateways, meaning that for traffic potentially affected any the Transaction (*i.e.*, where CPKC will have a new longer or single-line haul) CPKC will support existing interline routing options with commercially reasonable rates and service.

In response to the Board's input at the Hearing, Applicants are clarifying their commitments in certain respects in Appendix A (at A11-16 (Rider 2)), including to make clear that (a) they are not limited to the precise traffic movements that occurred in the past, but encompass new shippers and new commodities moving via interline routing options that were active pre-Transaction; and (b) to the extent any rail customer disputes whether CPKC has lived up to its commitment to keep gateways open, CPKC agrees to arbitrate those disputes.

With the efficient enforcement of Applicants' gateway commitments as a backstop, there is no basis for any fear that the Transaction will lead to anticompetitive foreclosure at Laredo, Robstown, or any other gateway, and there is accordingly no basis for any further condition aimed at remedying perceived competitive harm.⁶³

Even if the Board were to have some residual doubt about this conclusion, the regulatory "prop rate" (or "mileage prorate") conditions urged by UP, BNSF, and a handful of shipper group advocates would be a "cure" far worse than any disease.

First, and most perniciously, it would be anticompetitive because it would link the rate factors provided to UP and BNSF to the single-line rates offered (or charged) by CPKC, thereby "taxing" (*i.e.*, disincentivizing) the aggressive competition by CPKC that the Board and the public should want to encourage.⁶⁴

⁶³ See Rebuttal § IV.A.5.

⁶⁴ See Majure R.V.S. § 4.1.2; Hearing Day 7 at 1:15:56-1:22:37 (Dr. Majure).
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Second, it would impose arbitrary and unnecessary rate regulation on CPKC to which no other carrier – including UP and BNSF at the gateways they serve – would be subject. That may be why shipper group advocates desire such a condition, but as applied to CPKC it would rigidify CPKC’s rate making and preclude those rates from reflecting applicable cost and market factors. The record in this proceeding (and countless others) demonstrates unambiguously that interline rate factors do not hew to any iron rule of relative mileage or any other factor; rather, they are determined by a wide array of market factors. The only respect in which the rigid mileage-based divisions calculations would be “market based” is that they would start with CPKC’s single-line rates, but that only makes them *less appropriate* when applied to interline rates. In fact, application of the UP and BNSF proposals would on Day 1 transfer millions of dollars of KCS interline revenue directly into the pockets of UP and BNSF.⁶⁵

Third, any “mileage prorate” condition would regulate rates for transportation solely within Mexico, not only for allegedly affected gateway traffic but also for all of the other CPKC interline traffic moving via the Laredo gateway.⁶⁶

Fourth, the UP/BNSF proposals are fatally overbroad, no doubt by design. The Rule 11 rates and rate factors generated by these mechanisms are set up by BNSF and UP to apply to all potential interline traffic, even traffic the Transaction could not affect. UP wants CPKC to quote Rule 11 rates to/from Laredo for traffic moving via that gateway to CPKC U.S. points, which would then *also apply* to traffic to/from points on UP’s system that CPKC cannot serve.⁶⁷ BNSF’s focus is on through rates applicable to intermodal traffic even though BNSF’s own

⁶⁵ See Majure R.V.S. at § 4.1.2; Hearing Day 7 at 53:45-54:36 (Meyer); Hearing Day 7 at 1:15:56-1:22:35 (Dr. Majure); *see also, e.g.* Naatz R.V.S. § IV; Brooks R.V.S. § II.B.

⁶⁶ See Rebuttal at 1-112 n.140; *see also* Hearing Day 7 at 49:29-53:38 (Meyer); Del Cueto R.V.S. at §§ II-IV.

⁶⁷ *See id.*; *see also* UP-10 at 71-72.

witness acknowledges that such traffic is hotly competitive and could switch to the highways “in an hour” if CPKC did anything to degrade KCSM-BNSF interline service or rates.⁶⁸

Finally, Mr. McBride’s comments on behalf of The Chlorine Institute underscore the grave regulatory danger here. Any prop rate or other regulation of CPKC’s gateway rates would at its root be aimed at seeking to emulate a world in which CP and KCS *had not been allowed to merge*, and in the process – just like the long-ago-rejected *DT&I* Conditions – would squander all of the public benefits the Transaction promises in terms of improved customer options and more vigorous competition.⁶⁹ That may well be UP and BNSF’s ultimate aim, but it is antagonistic to the interests of the Board and the public.

B. The Board Should Reject CN’s “St. Louis/Springfield Line” Demands

CN’s entire litigation strategy in this proceeding has been aimed at delay or dismemberment of the new CPKC network, which will match CN’s single-line route to the Gulf (created by the *CN/IC* transaction) and compete directly against CN in many markets. CN’s request for a Board order requiring a forced sale of KCS’s lines east of Kansas City is only the most blatant of CN’s efforts to achieve through Board action what it could not achieve in the marketplace. On the facts here, the Board lacks authority to grant the relief CN requests.

First, CN predicates its request on a knowingly erroneous view of the statutory and regulatory standards applicable to this proceeding. Under the Old Rules the Board has no authority to impose conditions aimed at “enhancing competition.” The Board’s precedent is clear that “remedies” may be ordered only as necessary to overcome proven Transaction-related public interest harms, and not just because some party might propose an industry restructuring

⁶⁸ See Hearing Day 3 at 39:15-43:21 (BNSF witness Hirsch and counsel Denton).

⁶⁹ See Rebuttal § IV.A.6; Hearing Day 7 at 58:39-103:25 (Meyer).

that it claims would further the “public interest.” Indeed, the Board’s precedent expressly forecloses conditions that would restructure the industry.⁷⁰

Congress’s 1996 amendment to Section 11324 as part of ICCTA did not override this core principle. It merely codified what tools the Board already had to address proven Transaction-related competitive harm: *i.e.*, the new language was merely to “elaborate on the existing power to impose conditions.”⁷¹ *After ICCTA*, the Board continued to adhere to the same core principles when it considered whether to order trackage rights and line divestitures and trackage rights in cases like *UP/SP*, *CSX/NS/Conrail*, and *CN/IC*.⁷²

Second, there is no evidentiary basis for any condition aimed at remedying competitive harm relating to KCS’s Kansas City-St. Louis/Springfield line, much less the extraordinary and overreaching remedy of a line divestiture. As the evidence shows, and as CN’s hearing testimony acknowledged, *there is no past or present competition to protect*. CN’s claim is solely about hypothetical (but counterfactual) future world *in the future had CN acquired KCS*. In the world without a CN acquisition of KCS, the factual record shows how CN viewed this line: CN moved to shut down the Springfield gateway entirely, and there is almost no interchange at all between CN and KCS of traffic moving between Kansas City and Chicago. All of CN’s interest in a different future for the line came in connection with transactions involving the acquisition of all of KCS, yet no such CN-KCS transaction is part of the real-world future. On this factual record, there is no Transaction-related competitive harm to remedy.⁷³

⁷⁰ See *UP/SP* at 433-34.

⁷¹ House Conf. Report No. 104-422, 104th Cong., 1st Sess., at 191.

⁷² *CSX/NS/Conrail* at 277-78; *UP/SP* at 418-19; *CN/IC* at 141.

⁷³ Rebuttal § VIII.A; Ottensmeyer R.V.S. § I.A; Naatz R.V.S. § V; Hearing Day 1 at 1:13:30-1:14:54 (Ottensmeyer); Hearing Day 7 at 2:15:28-27:17:24 (Ottensmeyer).

Third, even if one gave credence to CN's speculation that a future CN-KCS venture might have been theoretically possible, that possibility would fall well outside the Board's precedents for remedying a claimed loss of competition. When asked by the Board for CN's best precedent supporting the protection of future competitive possibilities, CN's counsel cited *CN/IC*, but that precedent only underscores how unsupported CN's case really is. Unlike here, in *CN/IC*, the Board acted to protect three specific shippers from a 2-to-1 reduction in the number of serving railroads stemming from the elimination of an in-progress build-in by KCS, and the relief was laser focused on just those three shippers (via an expansion of KCS haulage rights).⁷⁴ Here, by contrast, no shipper loses any competitive options, CN's claimed harm is entirely speculative and remote, and its proposed relief is absurdly overbroad and overreaching.

Fourth, a forced sale of KCS's St. Louis/Springfield Line, along with ancillary rights in and around Kansas City – including a 50% stake in KCS's IFG facility – would cause extensive affirmative public interest harm. It would take away single-line KCS service that shippers like Bartlett and Ray-Carroll (who oppose CN's proposal) enjoy today; it would interfere with new CPKC single-line services and growth opportunities; and it would deprive CPKC's customers of the extraordinary potential associated with investments at and around KCS's IFG facility.⁷⁵

Fifth, even if one accepted CN's factually unfounded claims of competitive harm at face value, CN's proposed "remedy" would be fatally overbroad. It is not remotely limited to the Kansas City-Chicago intermodal traffic that might (according to CN, in theory, someday) be affected by the Transaction, but instead targets extensive traffic to/from Memphis, between CN's network and St. Louis, and truck traffic that CN asserts *CP cannot compete* effectively to handle.

⁷⁴ *CN/IC* at 135-60; *see also* Hearing Day 7 at 1:55:06-2:00:35 (Meyer).

⁷⁵ *See especially* Rebuttal § VIII.A.3; Ray-Carroll R.V.S. at 2; Knief V.S. at 1-3; Naatz R.V.S. § V.C; Brooks R.V.S. § IV; Elphick/Orr R.V.S. § V; Hearing Day 2 at 9:35:58-38:48 (Knief); Hearing Day 5 at 13:50-17:28 (Ray-Carroll witness Hepler); Hearing Day 1 at 1:28:18-1:31:53 (Brooks).

The only hypothetical contingency that could conceivably warrant preserving is the possibility that, someday, CN and KCS would have formed a venture to attack these truck-conversion opportunities. Applicants' commitment to engage in good faith negotiations with CN over such an opportunity is more than enough to address this contingency.⁷⁶

C. Condition Requests Relating to KCS's TIH Tariff

The Board has heard from a variety of parties seeking to use this proceeding to unwind aspects of CP's tariff governing shipments of toxic-by-inhalation hazard (or "TIH") commodities, or to preclude CPKC from ever revising KCS's current tariff relating to such shipments.

Some of those commenters had concerns about the potential disruption occasioned by an abrupt change in KCS's TIH tariff terms, and Applicants addressed that concern in CP's settlement agreement with Bayer (which provides for a three-year notice period for changes in KCS's TIH tariff provisions, so long as TIH shippers use the safest available equipment). Applicants have committed to extend the same terms to shippers of TIH commodities on KCS's U.S. network, as spelled out in Appendix A (at A4 (§ 15)).

Parties that view this as insufficient – especially The Chlorine Institute – betray their true goal to *roll back CP's existing terms*.⁷⁷ However, a quest to invalidate CP's TIH tariff as applied to the CP network is a classic overreach that impermissibly seeks to rectify a pre-existing concern through merger conditions. If these commenters are correct that CP's tariff is "illegal," they have been and remain free to challenge it, and the Transaction will not stand in the way.

It would be equally unjustified to "freeze" KCS's tariff in perpetuity, or invert the

⁷⁶ Appendix A hereto at A5 § 16; Rebuttal § VIII.A.4; Creel R.V.S. ¶ 23; Hearing Day 7 2:09:52-2:11:08 (Creel); 2:11:31-2:12:50 (Meyer).

⁷⁷ Hearing Day 4 at 2:03:04-2:07:00 (Chlorine Institute counsel McBride) (asserting that CP's tariff is "illegal"); CI-3 at 4; Bayer-2 at 10; OxyChem Comments at 2; ACC-6/TFI-5/NITL-3 at 24-25.

Board's regulatory regime only for CPKC so as to require CPKC to ask "permission" to change KCS's tariff in response to evolving circumstances (including CPKC's risk perceptions). There is no competitive issue here to remedy, and any regulation of CPKC's tariffs beyond what the Board's generally-applicable regulatory strictures would provide would be unwarranted.⁷⁸

VI. THERE IS NO BASIS FOR OTHER CONDITION REQUESTS

A. Norfolk Southern

NS's Responsive Application is without merit. There is no predicate showing of harm warranting any relief, much less the award of trackage rights. As part owner of the Meridian Speedway, NS is a party to numerous contracts with KCS addressing the contingencies about which it feigns concern: a purchase of the Wylie terminal and a "Major Service Standard" failure. Granting NS's request would give NS what it declined to negotiate in 2006 and would be both unwarranted and overreaching.⁷⁹

B. CSXT

CSXT's attack on the Meridian Speedway agreements has no place in this proceeding, and its other condition requests are either unsupported by evidence of Transaction-related harm or fully addressed by Applicants' commitments.⁸⁰

C. Other Parties

The opposition and condition requests of other parties should be rejected. Some express longstanding grievances entirely unrelated to the Transaction. For example, several shipper associations seek to saddle CPKC – and CPKC alone – with new regulations that they have (thus far unsuccessfully) sought to have imposed on an industry-wide basis.⁸¹ Texas International

⁷⁸ See especially Rebuttal § XI.A; Brooks R.V.S. § V; Majure R.V.S. § 5; Naatz R.V.S. § VII.

⁷⁹ See Rebuttal § IV.B.

⁸⁰ See Rebuttal § VIII.C.

⁸¹ See Rebuttal § XI.B.

Terminals and Lyondell Basell similarly complain about long-standing features of their railroad service options that will not be affected by the Transaction.⁸²

Other opposition amounts to complaints about *more competition* rather than less. This is certainly true of the misdirected claims of certain West Coast U.S. port interests, including several commissioners of the Federal Maritime Commission in their individual capacities. Differences between countries on port policy do not flow from the Transaction. Applicants welcome investments by all U.S. ports – and the railroads that serve them – to improve their own capabilities. The fact that the Transaction will improve access by U.S. consumers to goods imported (or exported) via Lazaro Cardenas, Vancouver, and Saint John is an unalloyed good.⁸³

To similar effect are complaints by various associations representing U.S. wheat growers about the potential for heightened competition from Canadian growers. The Transaction is not the cause of the Canadian regulatory policies about which they complain, and in fact the Transaction will expand – not contract – the competitive options of U.S. wheat growers. This is confirmed by the fact that *actual U.S. shippers of wheat* support the Transaction.⁸⁴

CONCLUSION

For the foregoing reasons, the Board should approve the Application, deny the Responsive Applications of CN and NS, and reject the condition requests except to the extent Applicants have accepted conditions as set forth in this Brief and Applicants' previous submissions to the Board.

⁸² See Rebuttal § XI.D-E.

⁸³ See Rebuttal § XI.F; Wahba/Naatz R.V.S. § II.A; Hearing Day 6 at 00:24:02-00:24:55 (Meyer).

⁸⁴ See Rebuttal § XI.B; *see also* NEW Cooperative R.V.S.; Richardson R.V.S.; Hearing Day 4 at 39:00-43:00 (NDGDA witness Hovland). The only remaining request for conditions that Applicants oppose – that of Evergy Energy – is entirely bereft of supporting evidence. See Rebuttal § XI.C.

Respectfully submitted,

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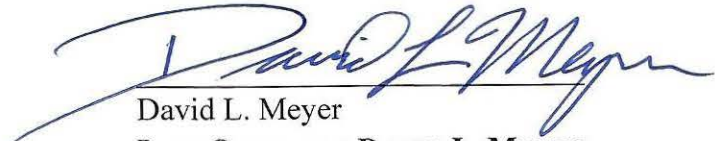
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October 21, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Applicants' Final Brief to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Sonia Gupta
Sonia Gupta

October 21, 2022

APPENDIX A
APPLICANTS' COMMITMENTS

COMMITMENTS REGARDING GENERAL SERVICE PROMISE

1. The implementation of this commitment is set forth in further detail in Rider 1.

COMMITMENTS REGARDING SHARED LINES IN TEXAS

2. As set forth in Rider 1, Attachment 1.1, CPKC will report monthly during an oversight period of up to five years on operational metrics relating to the Shared Lines, specifically:
 - Between Beaumont and Rosenberg, TX
 - CPKC average daily train counts
 - Average train length of CPKC trains
 - Average transit time of CPKC trains
 - Between Victoria and Robstown, TX
 - CPKC average daily train counts
 - Average train length of CPKC trains
 - Average transit time of CPKC trains

At the outset of this reporting, CPKC will report on baseline figures for each of metrics reflecting averages for the full year 2022.

3. During an oversight period of up to five years, CPKC will engage in discussions and mutual information sharing with both UP and BNSF about all issues bearing on efficient and fluid operations on trackage they share in Texas (including current operations, any necessary adjustments to operations to maximize network efficiency, and adequacy of infrastructure to support current traffic and future traffic growth of all parties) and to ensure compliance with contractual and other obligations by all parties. This commitment covers shared trackage at the Neches River Bridge in Beaumont, UP trackage between Beaumont and Rosenberg, UP/BNSF former-HBT trackage in Houston, and UP trackage between Victoria and Robstown. CPKC is committed to collaboration on such issues as operational design, train scheduling, and infrastructure needs, including appropriate use of joint RTC modeling and other tools to the extent the parties mutually conclude them to be valuable. CPKC's ability (and obligation) to collaborate cooperatively and transparently with UP and BNSF would depend on UP's and BNSF's reciprocal commitment to do so, including as regards to UP's and BNSF's current and planned operations on the shared track and UP's and BNSF's investment plans and priorities.

COMMITMENTS REGARDING CHICAGO-AREA LINES AND METRA

4. CPKC will not object to Metra's resumption of its full pre-COVID schedules on Metra's MD-W and MD-N lines.
5. CPKC will engage with Metra in good faith to evaluate proposed Metra operational changes outside peak windows (when Metra would need CPKC consent to add trains), including in the development of objective standards for the addition of such trains; CPKC will support the development of joint RTC modeling to support these efforts, if the parties conclude such modeling would be valuable.
6. CPKC will continue to work collaboratively with Metra to enhance communication about dispatching decisions that may result in a delay to Metra's scheduled trains.
7. CPKC will engage with Metra on a quarterly basis to discuss CPKC's forecasted future train count increases on the Elgin Subdivision and Metra's planned or proposed operational changes, to the extent supported by Metra.
8. As set forth in Rider 1, Attachment 1.1, CPKC will report monthly during an oversight period of up to five years on operational metrics relating to operations on Metra's MD-W and MD-N lines, as well as CPKC's operations on its Marquette Subdivision, as follows:
 - MD-W Line Between Randall Road and Tower B-17 (for CPKC Trains to/from Chicago Subdivision):
 - CPKC average daily train counts
 - Average train length of CPKC trains
 - Average transit time of CPKC trains (for through trains)
 - MD-W Line Between Bensenville Yard/Tower B-12 and Tower A-5:
 - CPKC average daily train counts
 - Average train length of CPKC trains
 - MD-N Line Between Tower A-5 and Rondout:
 - CPKC average daily train counts
 - Average train length of CPKC trains
 - CPKC Marquette Subdivision Between Sabula Junction and River Junction
 - CPKC average daily train counts
 - Average train length of CPKC trains

- Average transit time of CPKC trains (for through trains)
- Status of capacity expansion work

At the outset of this reporting, CPKC will report on baseline figures for each of these operational metrics reflecting averages for the full year 2022.

9. As set forth in Rider 1, Attachment 1.1, CPKC will report monthly during an oversight period of up to five years on delays caused to Metra trains by CPKC freight trains on the MD-W and MD-N lines, to the extent Metra provides the requisite data and detailed information to CPKC.
10. During an oversight period of up to five years, unless otherwise agreed to by CPKC and Metra, CPKC commits to the following dispute resolution mechanism:
 - a) In the event more than five percent of Metra's scheduled trains on either the MD-N or MD-W lines arrive at their destinations six minutes or more behind schedule during any calendar quarter as a result of interference by CP freight trains, CPKC will initiate the following service assessment and Tier 1 recovery steps: (i) internal assessment of root causes of delays within three business days of the receipt of the report, data and other relevant information from Metra; (ii) development of planned actions to reduce delays within the following five business days; (iii) initiate discussion with Metra regarding assessment and service action plan within eight business days from the date of delivery of the report, data and other relevant information from Metra; and (iv) prompt implementation of planned service action steps depending on nature of those steps and potential need for Metra action to support them. If the Tier 1 recovery steps are not effective and for two consecutive calendar quarters more than five percent of Metra's scheduled trains on either the MD-N or MD-W lines arrive at their destinations six minutes or more behind schedule as a result of interference by CP freight trains, then CPKC will initiate the following service assessment and Tier 2 recovery steps: (i) CPKC will promptly reassess and refine its Tier 1 service recovery steps to more effectively reduce delays, and (ii) Metra, at its discretion, can designate an observer to sit alongside CP's dispatcher(s) for the relevant territory. Tier 1 and Tier 2 recovery steps would no longer apply after two consecutive quarters during which fewer than five percent of Metra's trains were six minutes or more behind schedule at destination as a result of interference by CP freight trains.
 - b) In the event (a) does not resolve recurring delay issues, or in the event Metra experiences other service performance issues or has other disputes relating to these commitments, CPKC will initiate the following dispute resolution process: (i) within 24 hours of notice in writing setting out the dispute with sufficient details and supporting information from Metra, CPKC General Manager Field Operations and Metra's designee will meet to discuss resolution; (ii) if not resolved within two business days, the matter will be escalated to the respective regional field operations senior leaders, being CPKC's executive level operating

officer and Metra's Chief Operating Officer, or their designees; (iii) if not resolved at that level within five business days, the matter will be further escalated to CPKC's CEO and Metra's CEO; and (iv) if not resolved at that level after a reasonable amount of time, Metra may, submit the dispute to a qualified and experienced independent mediator upon giving five business days' prior written notice to CPKC.

11. Unless otherwise agreed to by CPKC and Metra, CPKC will not implement an ordinary course operating plan that directs CPKC through freight trains operating between Kansas City and St. Paul, MN over Metra's MD-W and MD-N lines, except in emergency and other non-routine situations, such as derailments and washouts, where the CPKC's line becomes impassable and a detour using the Metra's MD-W and MD-N lines is necessary to maintain the required level of service. In the event such a detour is required, CPKC will minimize any potential interference with Metra trains to the fullest extent possible. The foregoing commitment shall sunset on January 1, 2043 so that it does not bind CPKC under unforeseeable circumstances.

COMMITMENTS REGARDING GATEWAYS

12. As set forth in Rider 1, Attachment 1.1, CPKC will report monthly during an oversight period of up to five years on volume of traffic interchanged between CPKC and connecting carriers at key gateways potentially affected by the Transaction. Such reporting may be undertaken pursuant to a Board-imposed Protective Order to the extent it would reveal competitively-sensitive information about third-party traffic volumes.
13. CPKC will keep open all gateways on commercially reasonable terms and create no new bottlenecks, as set forth in Rider 2.

COMMITMENT REGARDING RECIPROCAL SWITCHING

14. CPKC will not initiate the termination of reciprocal switching access for any shipper facility directly served by CP or KCS that has such access as of the Control Date. The foregoing commitment shall not restrict CPKC from reasonably responding to any action of connecting carriers affecting any reciprocal switching access to a shipper facility as of the Control Date.

COMMITMENTS REGARDING KCS'S TARIFF APPLICABLE TO TIH SHIPMENTS

15. CPKC will offer to extend the terms of the CP-Bayer Settlement Agreement to any shipper of TIH commodities on the former-KCS network whose rail traffic is subject to the applicable KCS rules tariff(s) as of the Control Date (including shippers that are currently shipping under a confidential rail transportation services contract made pursuant to 49 U.S.C. Section 10709 that incorporates such tariff terms, unless that confidential rail transportation services contract specifies indemnification terms for TIH shipments different from those contained in KCS rules tariff(s)). Any such shipper must notify CPKC of its acceptance and agreement to be covered by the terms of that Agreement within 30 days of the Control Date.

COMMITMENT REGARDING KCS'S ST. LOUIS-SPRINGFIELD LINE

16. If requested by CN, CPKC will engage in good faith commercial discussions with CN regarding the potential for a joint venture involving the investment in and use of the former-KCS line between Kansas City and Springfield, IL to compete for truck traffic that is not attracted to existing rail routes between Kansas City and Chicago (including CPKC's single-line route).

RIDER 1
SPECIFIC TERMS OF APPLICANTS' SERVICE PROMISE COMMITMENTS

1. Reporting. Applicants' commitment regarding the reporting of service-related metrics during an oversight period of up to five years is spelled out in detail in Attachment 1.1.
2. Affirmative Obligation to Monitor Service and Prepare and Report Service Action Plans. During an oversight period of up to five years:
 - a. CPKC will monitor all service-related metrics as set out in Attachment 1.1 on a regular basis, including the three key metrics from a customer service perspective shown in Table 1.1.
 - b. In the event CPKC's monitoring reveals a Transaction-related service issue, including one that would affect specific commodity flows and localized geographies, CPKC will initiate discussions with affected customers about the issue and CPKC's plans to address it. The triggers for and nature of such engagement would necessarily be non-public and customized to each customer's circumstances, based on data available to both CPKC and the customer but not third parties. The foregoing does not replace or otherwise amend any service terms or conditions contained in any confidential contracts currently in force between customers and CP or KCS, or those entered into with CPKC.
 - c. In the event CPKC's monitoring reveals that an adverse trend in the key service metrics set forth in Table 1.1 has (or is likely to) trigger one of the thresholds set forth therein, CPKC will develop, implement, and report a Service Action Plan ("Plan") as follows:
 - i. CPKC will immediately and proactively assess the root cause of the adverse trend in the applicable metric; and
 - ii. CPKC will develop and implement a customized Plan to address the issue, and, within two weeks of the threshold being triggered, CPKC will report that Plan to the Board and public.
3. Process for Addressing Customer Concerns about the Transaction's Service Impacts. In addition to the processes triggered by an adverse trend in service metrics, as set forth in Paragraph 2 above, during an oversight period of up to five years:
 - a. CPKC will encourage engagement by customers regarding their concerns about Transaction-related service issues, and CPKC will establish and maintain a customer service hotline for Transaction-related service concerns that will be managed by the team assigned to deliver the CPKC Service Promise. Customers may contact CPKC about any concerns they may have about the impact of the Transaction on their rail service using the customer service hotline, via their customer account representative, via their online portal, or any other established communication channels.

- b. Escalation. In the event a customer's initial point of contact is unable to resolve the concern, CPKC will, unless otherwise agreed to by the parties to adjust the escalation timeline to reflect the nature of the dispute, within five business days, participate in a good faith discussion of the issue between the customer's designated representative and an appropriate CPKC team empowered to take or recommend action to resolve the concern.
- c. Further Escalation and Mediation of Systemic or Chronic Transaction-Related Service Issues. In the event a customer raises with CPKC a concern that the Transaction has had or is having a systemic or chronic adverse impact on the rail service provided to that customer and neither the initial CPKC point of contact nor subsequent engagement as set forth in (b) above is able to resolve the concern, CPKC will:
 - i. participate in a discussion within ten business days between executive-level representatives of CPKC and the customer's counterparts;
 - ii. if the matter is not resolved by previous escalation efforts, participate in a discussion within 30 days between CPKC's Chief Marketing Officer (or other appropriate senior executives of CPKC) and a comparable-level executive at the customer; and
 - iii. if the matter remains unresolved, then upon customer providing at least five-days prior notice in writing, participate in mediation of the dispute before a qualified and experienced independent mediator as promptly as can be arranged, with the goal of assessing whether the issue is Transaction related and, if so, whether CPKC's proposed approach to addressing it is reasonable under the circumstances.
- 4. CPKC will not take the position that the Transaction overrides or otherwise affects KCS's obligation to adhere to the commitments made in the *KCS/Tex Mex/TFM* proceeding or KCS's settlement agreement with NITL in that proceeding.

ATTACHMENT 1.1
SPECIFIC DATA REPORTING DURING OVERSIGHT PERIOD OF UP TO FIVE YEARS AND
RELATED SERVICE ACTION PLAN THRESHOLDS

1. CPKC will report monthly during an oversight period of up to five years on all metrics as to which CP and KCS currently report pursuant to Ex Parte No. 724 or Ex Parte No. 770, regardless of whether the reporting obligations in those dockets are discontinued. CPKC may harmonize the reporting methodologies across the CPKC system.
2. In addition, as set forth in Table 1.1 below, CPKC will report additional metrics during an oversight period of up to five years relating to:
 - Interchange traffic volumes at key potentially Affected Gateways;
 - Metra delays caused by CP freight trains;
 - Operations on lines shared with Metra in the Chicago area; and
 - Operations and status of capacity expansion projects on the Marquette Subdivision; and
 - Operations on shared lines in Texas.

TABLE 1.1

Metric	Definition	Segment	Benchmark/Trigger
SECTION 1: Customer Experience			
Manifest Carloads On Time	% on time to the baseline trip plan plus 24 hours EP 770 Metric #7(i)	CPKC system-wide for carload shipments terminating or interchanged in the United States (including CPKC U.S. portion of movements via Laredo gateway)	Benchmark: based on 2022 performance levels (may be re-based as methodologies are harmonized) (based on CP methodology applied to CP network, benchmark would be 70%; based on KCS methodology applied to KCS network, benchmark would be 70%) Current v. Benchmark assessed based on four-week rolling average; Threshold for Service Action Plan: (15 percentage points degradation)
First Mile/Last Mile (Industry Spot and Pull)	% customers served in accord with plan EP 770 Metric #5	Separately for customers located on former-CP and former-KCS lines in the United States	Benchmark: 2022 performance levels (may be re-based as methodologies are harmonized) (based on CP methodology applied to CP network, benchmark would be 90%; based on KCS methodology applied to KCS network, benchmark would be 90%) Current v. Benchmark assessed based on four-week rolling average of U.S. system performance; Threshold for Service Action Plan: (15 percentage points degradation)
Bulk Train On Time	On time performance for bulk trains to ETA plus 24 hours EP 770 Metric #7(ii)	CPKC system-wide for bulk trains terminating or interchanged in the United States (including CPKC U.S. portion of movements via Laredo gateway)	Benchmark: based on 2022 performance (may be re-based as methodologies are harmonized and updated to reflect actual January-April experience) (based on CP methodology applied to CP network for period since May 2022, benchmark would be 90%; based on KCS methodology applied to KCS network for period since May 2022, benchmark would be 90%) Current v. Benchmark assessed based on four week rolling average; Threshold for Service Action Plan: (15 percentage points degradation)
SECTION 2: Gateways			
Interchange volumes at key Affected Gateways	Count of cars interchanged with connecting carriers at interchange.	<u>By Gateway for former CP:</u> Minneapolis/St. Paul, Chicago, Kansas City <u>By Gateway for former KCS:</u> Laredo, Robstown, Beaumont, Shreveport, Dallas, Jackson, Meridian, East St. Louis, Kansas City	At outset of oversight period, report non-CPKC 2022 volumes by gateway Reporting only; interaction with customers on gateway issues addressed via gateway preservation commitment Reporting may be subject to Protective Order if discloses confidential third-party volumes

Metric	Definition	Segment	Benchmark/Trigger
SECTION 3: Metra Performance			
Metra FTI delays	% Metra trains on MD-North and MD-West arriving six or more minutes behind schedule at destination as a result of CP freight operations	Metra MD-N Line trains Metra MD-W Line trains	At outset of oversight period, report 2022 averages Reporting only; ongoing proactive engagement with Metra provided for separately. Dependent on data availability from Metra.
SECTION 4: Geographically Focused Operating Metrics			
Texas Operations	Average train lengths, average daily train counts, and average transit times for CPKC trains across the segments	- Between Beaumont and Rosenberg - Between Victoria and Robstown	At outset of oversight period, report 2022 averages Reporting only; ongoing proactive engagement with UP and BNSF provided or separately
Chicago-Area Operations	<u>All segments:</u> Average daily train counts and average train lengths <u>MD-W Randall Road-Bensenville:</u> Average transit times for through trains across the segment <u>Marquette Subdivision:</u> Average transit times for through trains across the segment and status of capacity expansion work	- MD-W Line: between Randall Road and Tower B-17 (trains to/from West) - MD-W Line: Bensenville Yard to Tower A-5 - MD-N Line: Bensenville Yard to Tower A-5 - CP Marquette Subdivision	At outset of oversight period, report 2022 averages Reporting only; ongoing proactive engagement with Metra provided for separately

RIDER 2
SPECIFIC TERMS OF APPLICANTS' GATEWAY-RELATED COMMITMENTS

1. CPKC will not take the position that the Transaction overrides or otherwise affects KCS's obligation to adhere to the commitments made in the KCS/Tex Mex proceeding or KCS's settlement agreement with NITL.
2. Applicants' gateway-related commitments apply only to traffic potentially affected by the CP/KCS Transaction – being traffic that CP or KCS interchanged with another carrier for which the Transaction created a CPKC longer haul than was available on the CP or KCS system pre-Transaction (“In-Scope Traffic”).
3. Applicants' gateway-related commitments are made to and for the benefit of rail customers – i.e., payers of freight (“Customers”) – and not other railroads, shipper associations, or other third parties.
4. CPKC will adhere to the detailed explanation of their gateway-related commitments to Customers as set forth in Appendix A of the Reply Verified Statement of John Brooks, repeated as Attachment 2.1 hereto.
5. List of Gateways: Applicants believe that the following specific U.S. gateways and/or points of interchange account for the vast majority of pre-Transaction interline traffic that would be within the scope of their gateway commitments is interchanged at the following gateways:

For CP: Minneapolis/St. Paul, MN; Chicago, IL; and Kansas City, MO.

For KCS: Laredo, TX; Robstown, TX; Beaumont, TX; Shreveport, LA; Dallas, TX; Jackson, MS; Meridian, MS; East St. Louis, IL; and Kansas City, MO.

6. Application of Gateway Commitment to “New Traffic”: Applicants' gateway-related commitments are not limited to specific pre-Transaction movements (*i.e.*, of a specific commodity in a specific O-D pair for a specific shipper-of-record). They are intended to preserve pre-Transaction interline routing options that were chosen by Customers for traffic moving in origin-destination corridors that were sufficiently attractive to have been chosen by a meaningful number of shippers. Thus, if a Customer that previously chose an alternative route, a Customer that previously shipped one commodity but not another, or a new Customer seeks to avail itself of an interline option that supported material pre-Transaction traffic flows, the commitment not to close the gateway used by that route would still apply.
7. Application of Gateway Commitment to Operational Matters: Applicants' commitment to keep gateways open on commercially reasonable terms extends to “operational” terms such as the frequency of train service to/from a gateway and the frequency of switching or transfer moves necessary to support interchange at a gateway. CPKC will not close affected gateways for In-Scope Traffic by revising its operations in ways that are commercially unreasonable.

8. Arbitration with Customers Regarding Compliance with Gateway Commitment: This commitment is made to Customers, and only Customers may seek enforcement of it. *See* CPKC Binding Agreement to Arbitrate (Attachment 2.2).
9. Commitment Regarding Second Bridge at Laredo: To facilitate overall operational efficiency at the Laredo Gateway, CPKC will allow access by Union Pacific's traffic/trains to the second bridge across the Rio Grande River that KCS is building on reasonable economic and other terms to be negotiated at arm's length between CPKC and UP. (Applicants accept that UP may enforce the commitment expressed in this paragraph.)

ATTACHMENT 2.1
SPECIFIC GATEWAY PRESERVATION CONDITION TERMS
[FROM BROOKS R.V.S., APPENDIX A]

1. **Principles**

- Conditions expressed here are intended to implement CP's previously stated commitments to keep gateways open on commercially reasonable terms.
- Conditions would be contingent on approval of control and CP exercise of control.
- Conditions would not override any requirement or limitation of Mexican or Canadian regulation.

2. **Scope**

- CP's commitment not to create new bottlenecks and to keep gateways open on commercially reasonable terms applies to "Affected Gateways/Affected Traffic," in other words, traffic that CP or KCS interchanged with another carrier for which CPKC created a longer haul than was available on the CP or KCS system pre-Transaction.
- The commitment applies only to the specific interchanges over which the traffic (or comparable traffic flows) previously moved, not to all possible gateways.
- This scope delimits all of the obligations set forth in (3)-(4) below and for convenience the traffic to which it applies is referred to as "In-Scope Traffic."

3. **No New Bottlenecks**

- At the request of a rail Customer CPKC shall quote Rule 11 rates to/from affected gateways for In-Scope Traffic.
- If a shipper files a complaint at the STB challenging any such rate as unreasonable, CPKC will waive its right to assert that the challenge cannot be maintained by virtue of the effect of the CP/KCS Transaction to give CPKC a single-line route between the origin and destination of the traffic.

4. **Obligation to Keep Gateways Open on Commercially Reasonable Terms/Arbitration of Same.**

- CPKC will keep affected gateways open on commercially reasonable terms for In-Scope Traffic.
- To implement this commitment, with respect to In-Scope Traffic to/from an affected gateway, at the qualifying request of a rail Customer for CPKC will (a) quote a Rule 11 rate to for In-Scope Traffic, or (b) participate with a connecting carrier to offer a through rate that combines CP's and the connecting carrier's rate divisions. The economic terms CPKC offers to the Customer or, as applicable,

the connecting carrier, will be commercially reasonable. A qualifying request shall include customary “rate request” details, including ultimate origin and ultimate destination, commodity, equipment requirements, volumes, service requirements, etc.

- With respect to rates or factors offered under this commitment, CPKC will not take the position that economic terms offered by CPKC are commercially reasonable solely because they would be found reasonable under the STB’s rate reasonableness standards.
- To address certainty in the shorter term, CPKC would honor all rates and rate factors in existing agreements through the date of termination of those agreements. CPKC will not be obligated to renew such rates.

ATTACHMENT 2.2
CPKC BINDING AGREEMENT TO ARBITRATE

- CPKC’s agreement to arbitrate extends only to disputes raised by payers of freight (hereinafter referred to as “Customers”); it does not apply to claims by other railroads, shipper associations, or other third parties.
- For so long as CPKC’s commitment in STB Finance Docket No. 36500 to keep gateways open on commercially reasonable terms remains effective, CPKC agrees to arbitrate claims by a Customer that CPKC did not honor that commitment with respect to a particular gateway and interline rail transportation option as to which the Customer is or would be the payer of freight to CPKC.
- CPKC’s agreement to arbitrate is contingent on the Customer’s good faith participation with CPKC in efforts to resolve the dispute, including through an escalation process, provided however that if CPKC has not satisfactorily resolved the Customer’s concern following a period of good faith discussions/negotiations, the Customer shall be entitled to commence arbitration upon providing at least five-days prior notice in writing. Unless otherwise agreed to by the parties to adjust the escalation process to reflect the nature of the dispute, the escalation process will be as follows:
 - Step 1 Customer will provide CPKC with a written notice of dispute setting out the details of the dispute, specifying the affected Gateway, the In-Scope Traffic allegedly affected by the gateway closure, and the conditions that allegedly closed the gateway.
 - Step 2 CPKC will assign the appropriate representative(s) to review the dispute and, within five business days, engage in discussions with the appointed Customer representative(s) to resolve the dispute.
 - Step 3 In the event the dispute is not resolved within a reasonable period of time, having regard to the nature of the dispute and availability of the respective representatives, but no more than 30 days from the receipt of the written notice contemplated in Step 1, the matter will be escalated to the responsible CPKC Vice-President for further discussion.
 - Step 4 In the event the dispute remains unresolved after Step 3, the matter will be escalated to CPKC’s Chief Marketing Officer for resolution.
- If a Customer disputes CPKC’s compliance with its commitment to keep gateways open on commercially reasonable terms (as set out in detail in Rider 2), the sole means by which a rail Customer may seek to enforce that commitment shall be through arbitration provided for under any separate binding confidential contracts between the Customer and KCS or CP (or applicable to the Customer’s traffic), or if no such provision has been made, under the Commercial Arbitration Rules administered by the American Arbitration Association.

- Disputes regarding CPKC's interline rates shall not be arbitrable if those rates did not increase relative to pre-Transaction levels by more than the applicable rate of U.S., Mexican, or Canadian inflation.
- In the event of any arbitration as provided herein, the sole question presented for decision by the Arbitrator shall be whether CPKC violated its commitment to keep gateways open for In-Scope Traffic on commercially reasonable terms (all as spelled out more fully in Rider 2), and the Arbitrator shall be tasked with deciding whether, taking account of all relevant circumstances, CPKC's rate and service terms for the In-Scope Traffic via an affected gateway were commercially reasonable.
- Under no circumstances may any arbitrator in any arbitration as provided herein have any authority to prescribe rate or service terms; it shall at all times be up to CPKC as to how to alter its conduct in response to a finding that it violated its commitment to keep gateways open on commercially reasonable terms.

APPENDIX B
SATELLITE IMAGE MAPS OF SELECTED LINES USED BY CP OR KCS

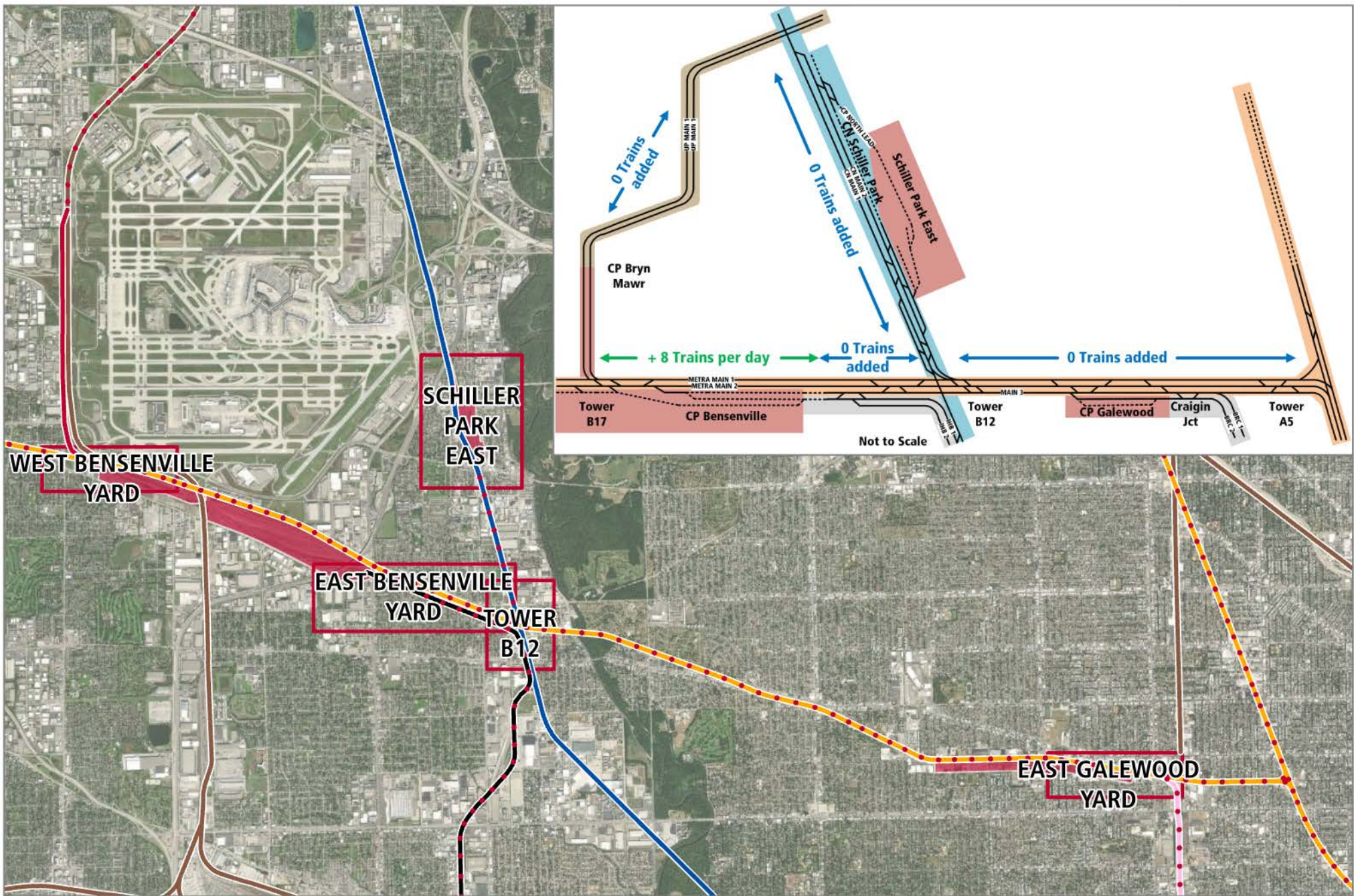
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B3

Overview Map Showing Location of More-Detailed Inset Maps

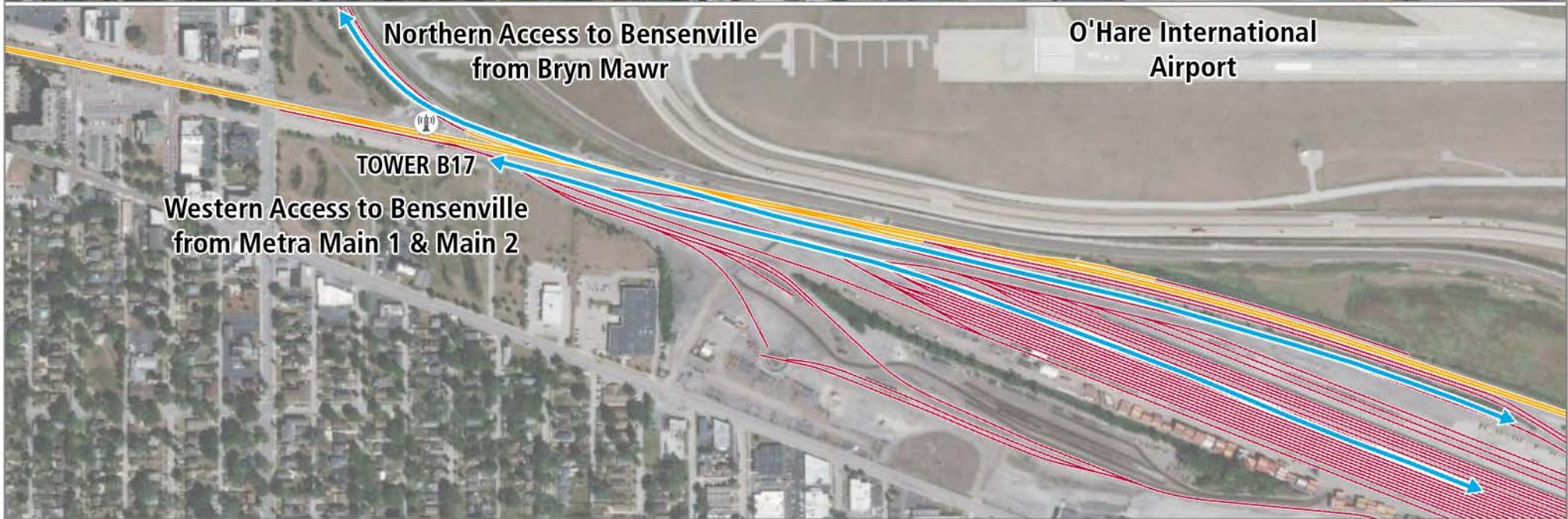
Legend

— CP Main Track	— Metra Main Track	— CN Main Track
... CP Trackage Rights	— IHB Main Track	— UP Main Track
 CP Yard Facilities	— BRC Main Track	 Detail View Map Extents

0 0.5 1 2 Miles
 CRS: WGS 1984 Web Mercator Auxiliary Sphere
 Scale: 1:100,000

v. 3

Imagery Credit: Earthstar Geographics



B4

Detailed View of Area Around Tower B-17/West End of Bensenville Yard

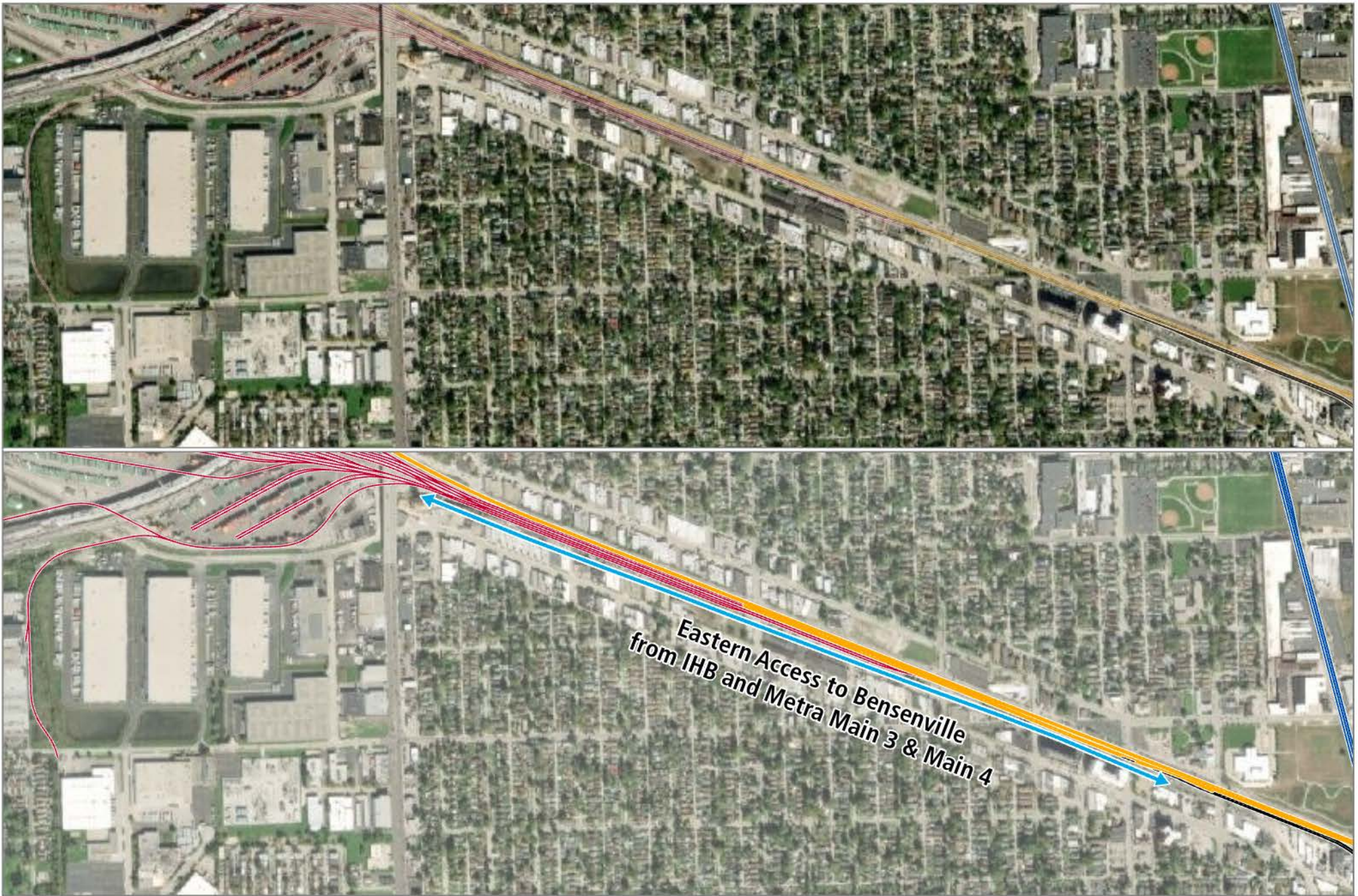
Legend

- Metra Track
- CP Track
-  Control Point

0 500 1,000 Feet
 CRS: WGS 1984 Web Mercator Auxiliary Sphere
 Scale: 1:10,000
 Imagery Credit: Maxar

v. 3





B5

Detailed View of East End of Bensenville Yard

Legend

- | | |
|---|--|
| — Metra Track | — CN Track |
| — CP Track | — IHB Track |

0 500 1,000 2,000 Feet

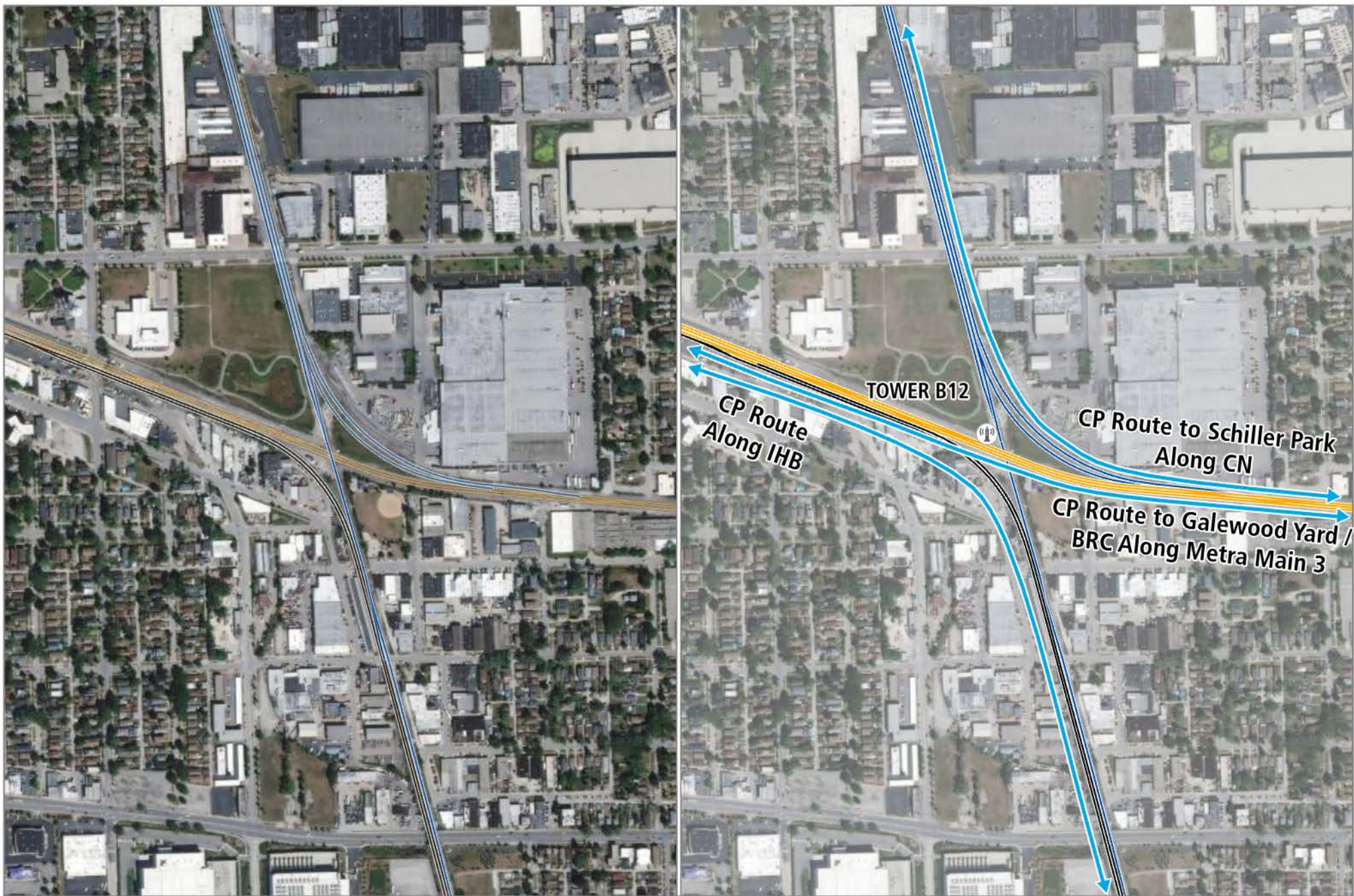
CRS: WGS 1984 Web Mercator Auxiliary Sphere

Scale: 1:15,000

Imagery Credit: Maxar

v. 3





B6

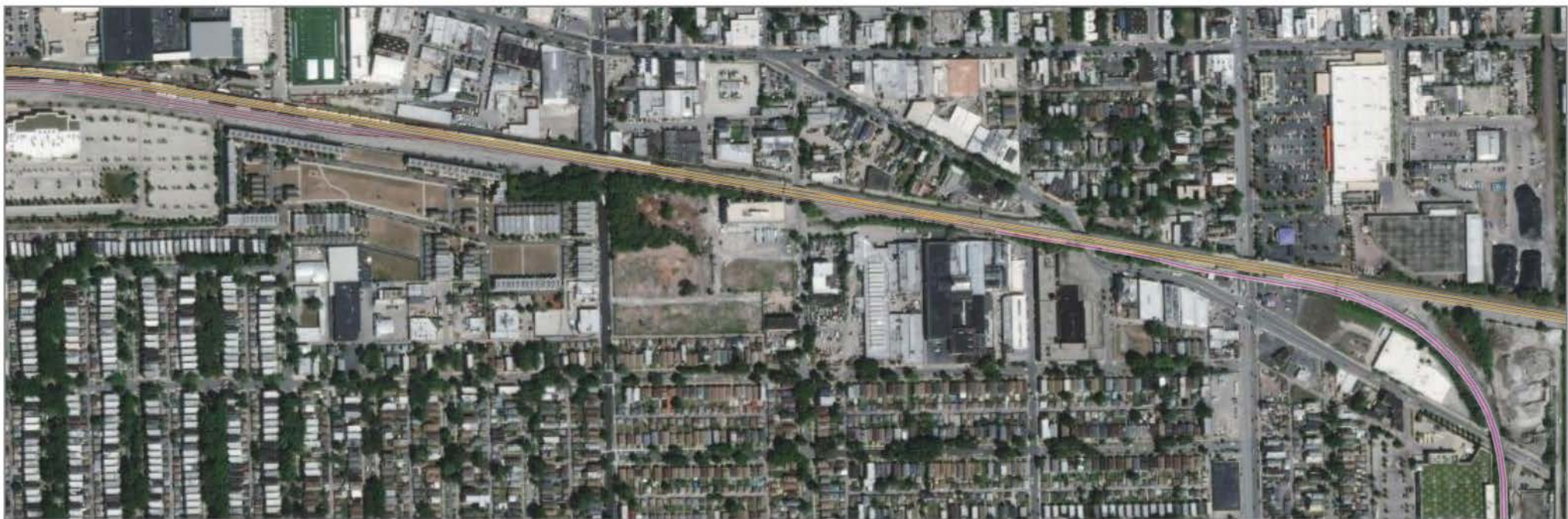
Detailed View of Area Around Tower B-12/Connection to Indiana Harbor Belt

Legend

- Metra Track
- CN Track
- IHB Track
- 000 Control Point

0 500 1,000 Feet
 CRS: WGS 1984 Web Mercator Auxiliary Sphere
 Scale: 1:10,000

Imagery Credit: Maxar



B7

Detailed View of East End of Galewood Yard and Connection to Belt Railway of Chicago at Cragin Junction

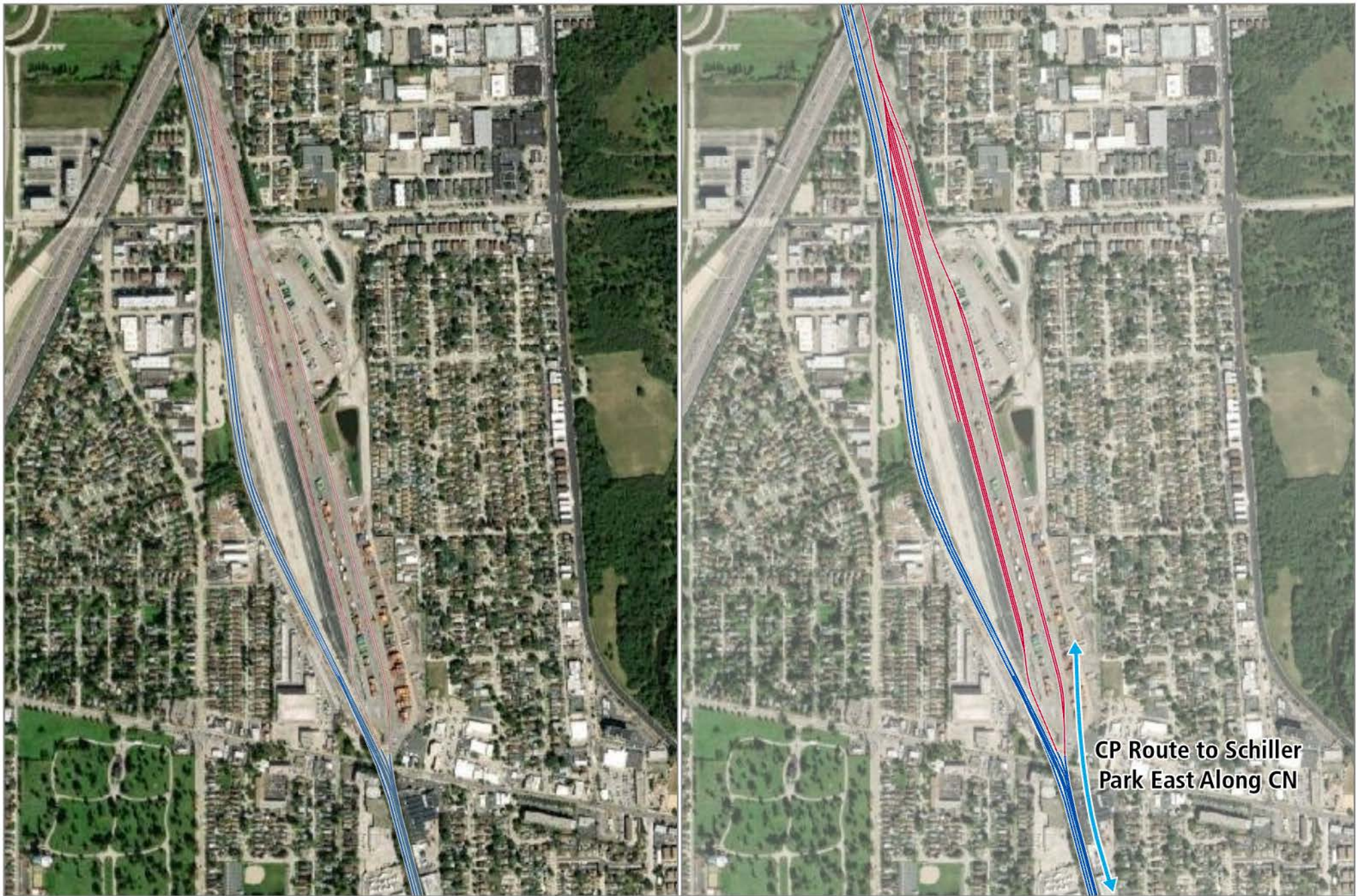
Legend

- Metra Track
- CP Track
- BRC Track
- Control Point

0 500 1,000 Feet
CRS: WGS 1984 Web Mercator Auxiliary Sphere
Scale: 1:10,000

Imagery Credit: Maxar





B8

Detailed View of Schiller Park Terminal

Legend

- CP Track
- CN Track

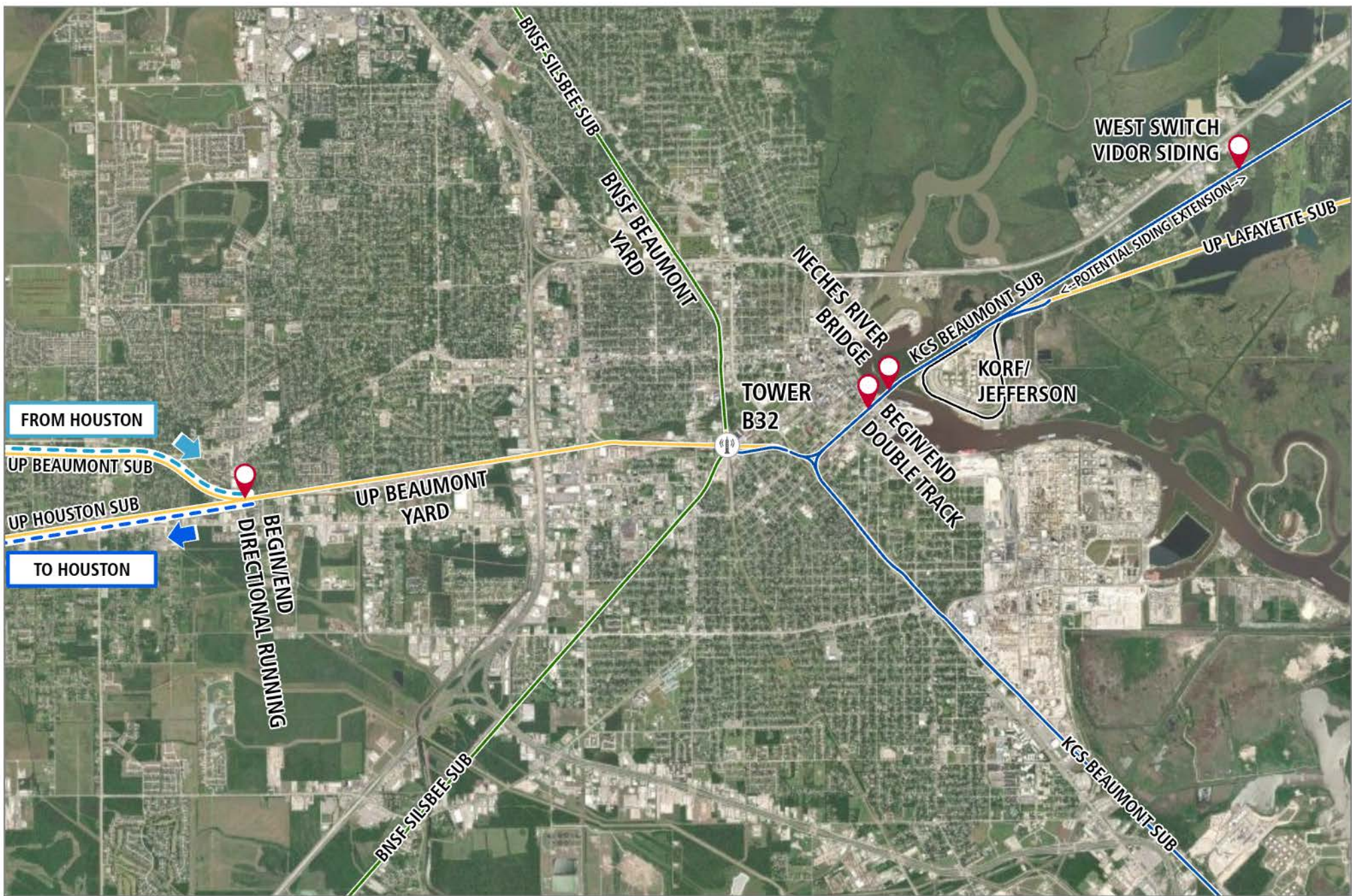
0 500 1,000 2,000 Feet

CRS: WGS 1984 Web Mercator Auxiliary Sphere

Scale: 1:15,000

Imagery Credit: Maxar





B9

Overview of Beaumont Area Between KCS Siding in Vidor, TX and Connections to UP Houston and Beaumont Subdivisions in Beaumont, TX

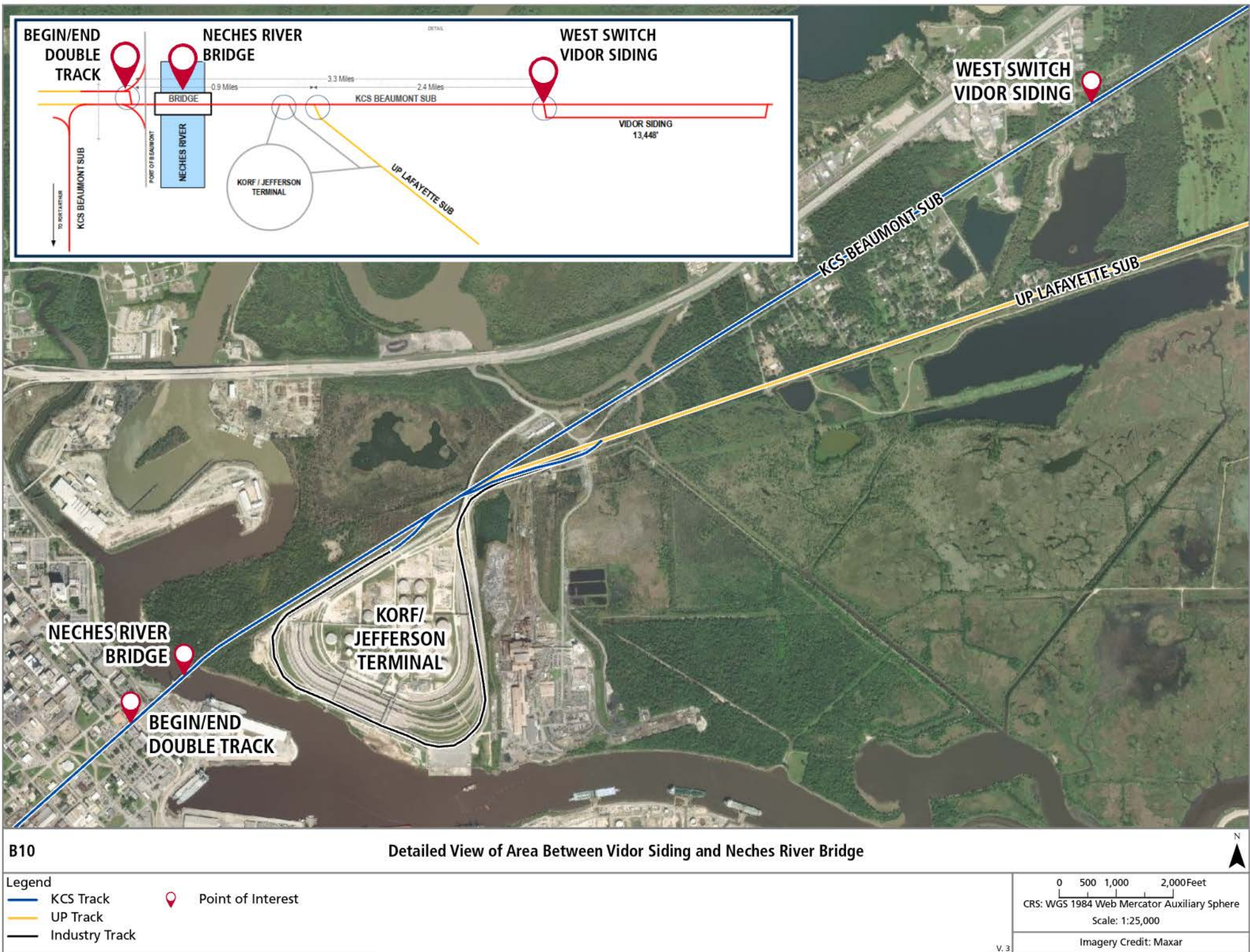
Legend

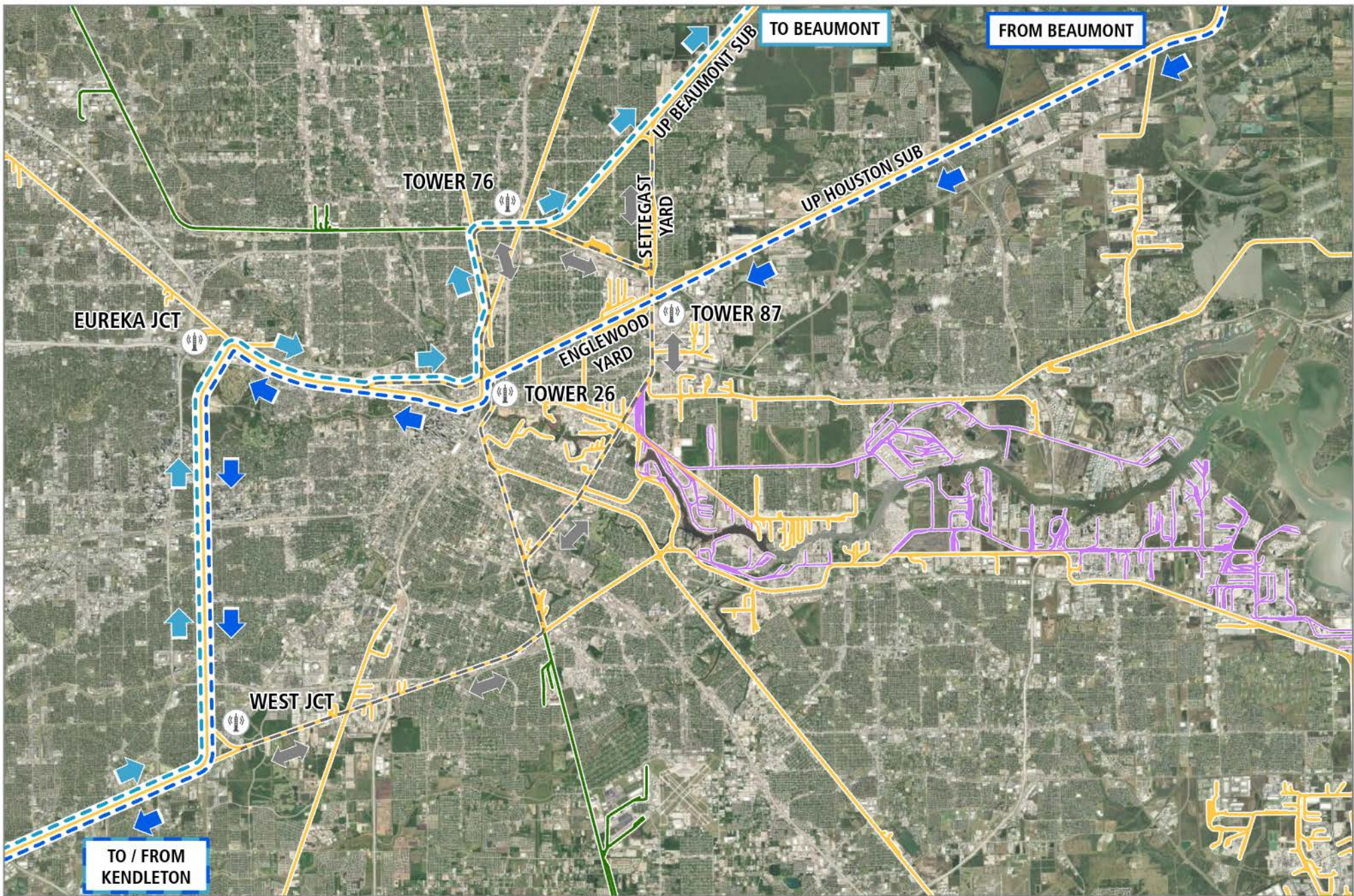
— KCS Track	— Industry Track	Control Points
— UP Track	- - - To Beaumont from Houston	Point of Interest
— BNSF Track	- - - To Houston from Beaumont	

0 0.5 1 Miles
 CRS: WGS 1984 Web Mercator Auxiliary Sphere
 Scale: 1:70,000

Imagery Credit: Earthstar Geographics

V. 4





B11

Overview of Houston Area Between West Junction and UP Directionally-Operated Lines East of Houston (the Houston and Beaumont Subdivisions)

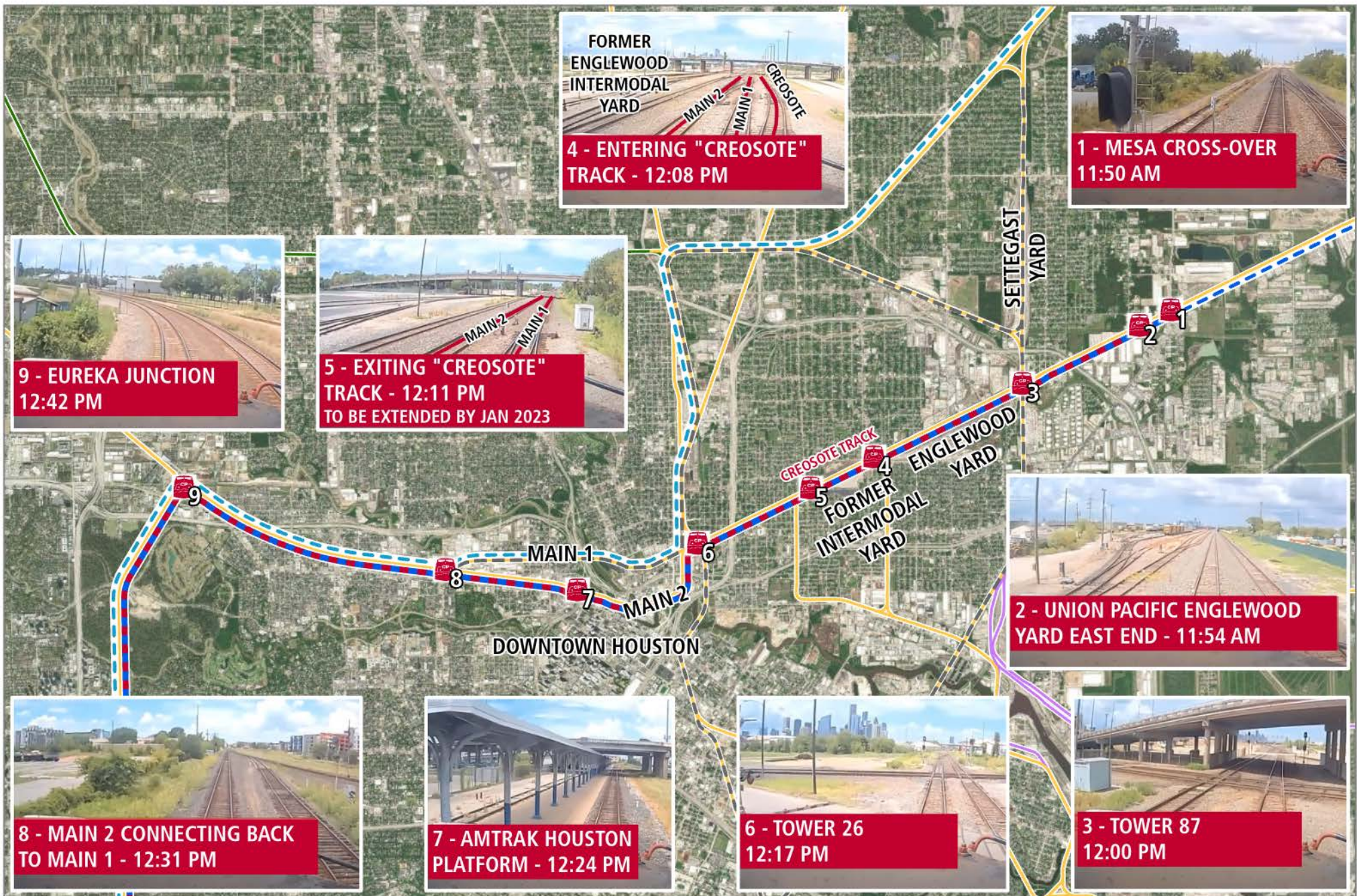
Legend

- UP Track
- BNSF Track
- PTRA Track
- To Beaumont from Kendleton
- To Kendleton from Beaumont
- Alternate Flow

Control Points

0 0.5 1 2 3 4 Miles
 CRS: WGS 1984 Web Mercator Auxiliary Sphere
 Scale: 1:200,000

Imagery Credit: Earthstar Geographics



B12

Detailed View of Primary KCS Westbound/Southbound Route through Houston from UP Houston Subdivision to Eureka Junction
(annotated with screenshots from video shown at Hearing depicting route of southbound KCS grain train)

Legend

- | | | |
|------------|----------------------------|---------------------------------------|
| UP Track | To Beaumont from Kendleton | CP 8748 August 1, 2022 |
| BNSF Track | To Kendleton from Beaumont | Westbound Grain Train Through Houston |
| PTRA Track | Alternate Flow | |

0 0.5 1 2 Miles
CRS: WGS 1984 Web Mercator Auxiliary Sphere
Scale: 1:100,000

V. 4

Imagery Credit: Earthstar Geographics