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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36472

CSX CORPORATION AND CSX TRANSPORTATION, INC.

– ACQUISITION AND OPERATION –

**PAN AM SYSTEMS, INC., PAN AM RAILWAYS, INC., BOSTON AND MAINE
CORPORATION, MAINE CENTRAL RAILROAD COMPANY, NORTHERN
RAILROAD, PAN AM SOUTHERN LLC, PORTLAND TERMINAL COMPANY,
SPRINGFIELD TERMINAL RAILWAY COMPANY, STONY BROOK RAILROAD
COMPANY, AND VERMONT & MASSACHUSETTS RAILROAD COMPANY**

**RESPONSE OF NORFOLK SOUTHERN RAILWAY COMPANY TO COMMENTS,
PROTESTS, REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION**

**Thomas E. Zoeller
Hanna M. Chouest
Elaina L. Blanks-Green
NORFOLK SOUTHERN CORPORATION
650 W Peachtree St NW
Atlanta, GA 30308
Tel: (470) 463-6314**

**William A. Mullins
Amber L. McDonald
BAKER & MILLER PLLC
2401 Pennsylvania Ave, NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849**

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Attorneys for Norfolk Southern Railway Company

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SUMMARY OF ARGUMENT

Norfolk Southern Railway Company (“NS”) files these comments in support of the above-captioned acquisition and operation by CSX Transportation Inc. (“CSXT”) and the related transactions (the “Merger and Related Transactions”) and in response to the previously filed comments, protests, requests for conditions, and other opposition. On July 30, 2021, the Surface Transportation Board (“Board”) accepted CSXT’s Revised Application for a significant transaction under the regulations, embraced the related filings, and adopted a procedural schedule (“July 30 Decision”). Comments on the Application and requests for conditions were due on August 27, 2021. Responses to any comments, protests, requests for conditions, or other opposition are due today, October 18. NS hereby files this response.

Based upon the record, the Application should be approved as a significant transaction without conditions, other than standard labor protective conditions and those commitments voluntarily made by NS and CSXT. None of the commenters have met the required burden to show that the Merger and Related Transactions will result in an anticompetitive effect that is both “likely” and “substantial” to warrant the imposition of a condition. Likewise, no party has established that the Merger and Related Transactions will result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States.

Quite to the contrary, and as discussed in more detail below, the Merger and Related Transactions preserve and enhance the very purpose for which PAS was created. First, PAS was created primarily to act as a vehicle to sustain a means for NS and Pan Am to compete with CSXT in the greater Boston marketplace, and the proposed settlement agreement between NS and CSXT and the Term Sheet Agreement among NS, CSXT and GWI under which B&E would

become the contract operator will preserve that means of competition. Second, NS is the party with potentially the most to lose if PAS is rendered noncompetitive. NS thus has a vested interest in ensuring that PAS remains viable and that it will operate for the benefit of all parties, not just CSXT or B&E. NS is confident that the settlement agreement and related transactions not only maintain but enhance PAS ability to perform the purpose for which PAS was created. These agreements will contribute to creating a more robust competitive landscape between NS and CSXT. Finally, NS opposes all of the suggested alternatives to the agreed upon Merger and Related Transactions. Imposing either the divestiture proposal by the Department of Justice or the proposal by Vermont Rail Systems (“VRS”)/Vermont Transportation (“VTrans”) would create uncertainty and could hamper the very pro-competitive benefits of the Merger and Related Transactions. Such conditions, especially divestiture, are contrary to precedent, which requires the Board to adopt the least intrusive condition. The requested conditions do not meet that standard and would be disruptive, create uncertainty, and ignore the remedies available to NS that are already inherent in the settlement agreement. As such, the Board is required to approve the Merger and Related Transactions without conditions under 49 U.S.C. §11324(d).

I. THE APPROPRIATE LEGAL STANDARD

In the July 30 Decision, the Board found the Merger and Related Transactions by CSXT to be a “significant” transaction. As such, the Merger is governed by the standards of 49 U.S.C. § 11324(d), which provides as follows:

(d) In a proceeding under this section which does not involve the merger or control of at least two Class I railroads, as defined by the Board, the Board shall approve such an application unless it finds that--

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

- (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

Under this standard, for the Board to deny the Application, parties must show that an unconditioned transaction will substantially lessen competition, create a monopoly, or restrain trade in freight transportation. As discussed below, no party has made such a showing. Accordingly, the Board need not even consider whether the Merger and Related Transactions benefit the public interest and simply must approve the Merger and Related Transactions.

Even if the Board concluded that some anticompetitive effects may result from the Merger and Related Transactions, the Board must still approve the Merger and Related Transactions unless it finds that the projected competitive harms outweigh the Merger and Related Transactions' benefits to the public interest and that such harms cannot be sufficiently ameliorated by conditions. Ill. Cent. Corp. And Ill. Cent. R.R. Co. – Control – CCP Holdings, Inc., Chicago, Cent. & Pac. R.R. Co. And Cedar River R.R. Co., FD No. 32858, 1996 STB LEXIS 157, at *7-8 (S.T.B. served May 14, 1996). In this case, no party has challenged credibly the notion that the Merger and Related Transactions will produce substantial public interest benefits, and, in fact, many parties have acknowledged such benefits. Accordingly, even if all of the alleged competitive harms were true, which they are not, those harms would not outweigh the unchallenged public interest benefits of the Merger and Related Transactions. As such, the Board is required to approve the Merger and Related Transactions.

II. ALL REQUESTS FOR CONDITIONS TO REMEDY ALLEGED COMPETITIVE HARMS SHOULD BE DENIED.

The Board grants conditions to remedy competitive harms that are caused or exacerbated by the Merger and Related Transactions. See, e.g., Canadian Nat'l Ry. Co. and Grand Trunk Corp. – Control – EJ&E West Co., FD No. 35087, 2008 STB LEXIS 220, at *10 (S.T.B. served

Apr. 25, 2008) (“CN/EJ&E”) (“Board’s power to impose conditions is not limitless: there must be a sufficient nexus between the condition imposed and the transaction before the agency, mitigation is not imposed to correct pre-existing conditions, and the condition imposed must be reasonable.”). To justify a condition, a party must show that the alleged competitive harm not only has a nexus to the transaction but that the harm to be remedied is both “likely and substantial.” CSX Transp., Inc. – Acquisition of Operating Easement – Grand Trunk W. R.R. Co., FD No. 35522, Decision No. 5, at *5 (S.T.B. served Feb. 8, 2013). A “substantial” harm is not small or merely transitory. See, e.g., E.I. Dupont de Nemours and Co. v. CSX Transp., Inc., 2008 STB LEXIS 361, at *10 (S.T.B. served June 30, 2008). Further, the harm must be to competition caused by the transaction. Harm to a particular railroad competitor does not justify a condition unless that harm is harm to shippers. See, e.g., Canadian Nat’l Ry. Co., Grand Trunk Corp., and Grand Trunk W. R.R. Inc. – Control – Ill. Cent. Corp., Ill. Cent. R.R. Co., Chi., Cent. and Pac. R.R. Co., and Cedar River R.R. Co., FD No. 33556, 1999 STB LEXIS 305, at *44 (S.T.B. served May 25, 1999) (“CN/Grand Trunk”) (noting that “conditions are not warranted to indemnify competitors for revenue losses absent a showing that essential service would be impaired”); Wis. Cent. Transp. Corp., et al. – Continuance in Control – Fox Valley & W. Ltd., FD No. 32036, 1992 ICC LEXIS 279, at *10 (I.C.C. served Dec. 4, 1992) (“Wisconsin Central”) (“A showing of expected substantial harm to a particular competitor as a result of a transaction is not equivalent to a showing of harm to competition.”); Union Pac. Corp., Union Pac. R.R. Co., And Mo. Pac. R.R. Co. – Control And Merger – S. Pac. Rail Corp., S. Pac. Transp. Co., St. Louis Sw. Ry. Co., SPCSL Corp., And The Denver And Rio Grande W. R.R. Co., FD 32760, Decision No. 44, 1 S.T.B. 233, 241, 1996 STB LEXIS 220, *418-419 (S.T.B. served Aug. 6, 1996) (“UP/SP”) (internal citations omitted) (conditions must be narrowly tailored, cannot be imposed

unless the merger produces effects harmful to the public interest (such as a significant loss of competition) that the condition will ameliorate or eliminate, and any condition must be operationally feasible and produce net public benefits).

As discussed in more detail below and the attached Verified Statement by John V. Edwards, General Director Passenger Policy, Norfolk Southern Corporation (“NS”) (“VS Edwards”), PAS was created primarily to act as a vehicle to sustain a means to compete with CSXT in the greater Boston marketplace, and the proposed settlement agreement between NS and CSXT will preserve that. VS Edwards at 2-3. Rather than creating “likely and substantial” harms to competition, the settlement agreement between NS and CSXT maintains, as well as enhances, the purpose for which PAS was created and will contribute to a more robust competitive landscape. *Id.* at 4-9. Unlike the conditions requested by DOJ, VRS and VTrans, the proposed settlement agreement is reasonable and will enhance competition in the region.

A. The NS-CSXT Settlement Agreement and Related Agreements Not Only Maintain The Competitive Landscape Created by PAS, But Further Enhance It.

PAS was created to “enhance” NS’s ability to compete with CSXT. *See, e.g.*, STB FD 36472, CSX Corporation and CSX Transportation, Inc.—Control and Merger—Pan Am Systems, Inc., Pan Am Railways, Inc; Boston and Maine Corporation, Maine Central Railroad Company, Northern Railroad, Pan Am Southern LLC, Portland Terminal Company, Springfield Terminal Railway Company, Stony Brook Railroad Company, and Vermont & Massachusetts Railroad Company Support Statement of Hub Group (“Proposed Transaction”), at 1 (“According to the application submitted by CSX, the proposed transaction will preserve critical access for Norfolk Southern to New England.”); Support Statement of J.B. Hunt Transport, Inc., at 1 (same); VS Edwards at 3-4. Indeed, as a result of the 2009 transaction forming Pan Am Southern, NS invested millions of dollars to strengthen the east-west Patriot Corridor as a

competitive option to the parallel CSXT route. NS is committed to maintaining the competitive viability of PAS. VS Edwards at 5.

Because of PAS's importance to NS, NS must ensure that PAS is operated by a competent and independent operator and must do so in a way that maintains the viability of PAS and in a manner that does not favor CSXT, NS, or the operator's owner. In that vein, the settlement agreement between NS and CSXT and related transactions are designed to provide protections and approaches to keep PAS competitive and to prevent potential adverse competitive effects to PAS associated with the Merger and Related Transactions. These agreements have alleviated concerns that NS had about the Merger and Related Transactions. Id. at 5.

Through an agreement among CSXT, NS and Genesee & Wyoming Inc. ("GWI")—and as noted above—B&E (a subsidiary of GWI and an independent operator that is not affiliated with either NS or CSXT (or any of the PAR Railroads, or PAS)), will step into the shoes of Springfield Terminal ("ST") (the current contract operator of PAS) to operate, manage, and set rates on PAS. Much of the traffic interchanged with PAS comes from NS, so NS has both an interest in ensuring the independent operations of PAS (both in terms of direct service and interchange) and the continued viability of PAS. Id. Under the terms of the proposed operating agreement, B&E will have to act as agent of PAS and report to PAS, including its owners, NS and CSXT. B&E will not be able to divert revenue or traffic away from PAS to any related railroad of B&E through discriminatory rate-setting for PAS traffic, and NS will be in a position to ensure that B&E will not favor any GWI carriers in its pricing nor CSXT in its routings. Id.

B&E, operating the PAS Lines, will maintain PAS's access to the NS, CP, and CSXT rail systems, and to each of the short line railroads that connect to the PAS Lines, and in particular to

those in the VRS and GWI systems. (NS will still retain its haulage rights on the PAS Lines between Hoosick Junction and Mechanicville, which allows for a direct interchange with VRS and prevents B&E from being involved in the pricing for that traffic moving over the PAS Lines.) NS expects that B&E will, at least initially, provide PAS service at substantially the same level as is currently being provided by ST and that service will later improve beyond that currently provided by ST.¹ All shippers that have access to PAS will continue to have access to PAS. In addition, Vermont shippers will neither experience service delays nor face additional costs, as PAS is making a 5-day-per-week service commitment to VRS, which VRS and its Vermont shippers presently do not have with ST as the contract operator of the PAS Lines. *Id.* at 6.

Additionally, B&E will be responsible for setting rates for PAS in a non-discriminatory, competitively neutral fashion as to all rail carriers that have the ability to interchange traffic with PAS or otherwise connect to PAS. B&E will be required to set PAS rates exclusively in the interest of PAS's independent rail carrier status and in a manner that does not favor any other railroad in the GWI family or in a manner that discriminates between CSXT and NS. *Id.* at 6.

Shippers also understand this, and that is why there has been overwhelming shipper support for the Merger and Related Transactions. *See, e.g.,* Merger and Related Transaction, Support Statement of Hub Group, at 1 (“Our understanding is that the agreement reached between CSX and Norfolk Southern will preserve competitive rail options and will increase the fluidity of rail operations in New England. We anticipate these competitive options would be a key benefit of the proposed transaction.”); Proposed Transaction, Support Statement of J.B. Hunt Transport, Inc., at 1 (“The agreement reached between CSX and NS will preserve competitive

¹ While labor shortages may initially make this a challenge, the expectation is that there will be significant service improvements over time.

rail options and will increase the fluidity of rail operations in New England. Having these competitive options is a key benefit of this transaction.”); VS Edwards at 6-7. Indeed, not one shipper has expressed concern that the transaction reduces their competitive options or that the settlement agreement would not preserve NS’s ability to compete against CSXT.

In addition, through the settlement agreement, CSXT will retain no direct control over rates or operations of PAS. Instead, B&E will be contractually obligated to set rates and to operate PAS in the interest of PAS as an independent rail carrier. CSXT’s control over rates or operations of PAS will be limited to that permitted through its involvement on the PAS management committee and subcommittees. B&E is required to ensure that PAS can and does, compete against CSXT for traffic, for which competitive options are available, and to ensure that PAS will be maintained as an independent rail option. B&E is not permitted to move traffic over the PAS system in its revenue waybill. Further, B&E is to be operated in a manner that will encourage traffic to move over the PAS system and to have rates set in a manner that will, at a minimum, cover the fully allocated costs of PAS operations. VS Edwards at 7.

Accordingly, the establishment of B&E as operator of PAS will protect NS’s rights as owner of PAS and NS’s competitive position in PAS-served markets by ensuring that PAS continues to operate as a competitor to CSXT. The settlement agreement protects NS’s rights and competitive position.

B. There Are Substantial Efficiencies to Be Gained by the Merger and Related Transactions.

In addition to protecting the viability of PAS as a competitive entity (and, in turn, protecting NS’s ability to compete with CSXT), the proposed transaction will result in significant pro-competitive efficiencies. For example, the Merger and Related Transactions will significantly improve rail service and operations in New England by unifying two already

interconnected rail networks to produce efficient single-line service. Shippers on both the PAR System and on CSXT will see expanded market opportunities as the efficiencies of a unified system and the benefits of improved infrastructure are felt. Id. at 7-8.

A particularly important example of the efficiencies that will be gained by the Merger and Related Transactions is the ability for NS to provide double-stack intermodal service into the Boston area. Id. at 8. Currently, NS intermodal trains moving over the PAS's east-west Patriot Corridor line between Mechanicville, New York, and Ayer, Massachusetts, face the height limitations of the Hoosac Tunnel. The Hoosac Tunnel is a bottleneck that prevents double-stack intermodal operations over the PAS Patriot Corridor.² Before reaching the Hoosac Tunnel, a double-stack train approaching from the west must be stopped and "fileted," meaning that the top row of containers and trailers must be removed from the intermodal rail cars and loaded onto other intermodal rail cars, resulting in a longer train. Trains approaching from the east must be single-stacked through the tunnel, and, if further operations are to be double-stacked as the train travels west, cars must be "toupeed," meaning that the rail cars must be stopped and double-stacked in Mechanicville. Accordingly, existing operations require more intermodal rail cars, more work, and longer transit times as the train must stop in Mechanicville while the toupee/filet operations occur. As a result of the Hoosac Tunnel limitation, many shippers have never fully benefitted from double-stack intermodal service that NS was hoping to institute in competition to CSXT. Id. at 8-9.

² In February 2020, the Hoosac Tunnel suffered a significant collapse, halting rail traffic on that section of the Patriot Corridor. VRS, GWI, and CSXT stepped up to the plate to provide traffic detours and keep PAS competitive rail service to the area active. ST, as PAS's rail operator, and NS and B&M as PAS's owners, immediately funded and instituted repairs to that tunnel, and the associated Little Tunnel, to restore service. As the contract rail operator, B&E will be responsible for maintaining the integrity of the tunnels going forward. VS Edwards at 9.

By granting NS trackage rights over CSXT's southern route, the settlement agreement allows NS to handle double-stack intermodal traffic to enhance NS's ability to compete against CSXT. This should also improve NS's service over PAS's route by freeing up capacity that can be used to move traffic to and from shippers on the PAS system, and to and from shortlines connecting to the Patriot Corridor and PAS, thereby enhancing NS's ability as well to compete with CSXT.

C. The Merger and Related Transactions Will Provide Increased Financial Stability.

The transaction that gave rise to PAS was, in part, a means of permitting NS to infuse substantial funding into the system to improve infrastructure, remove long-term slow orders, and add capacity on the lines, which had suffered under the sole operation of ST. While the PAS transaction resolved many of the concerns of shippers and shortline connections regarding ST's service, this hampered NS's ability to fully utilize the PAS system. VS Edwards at 9. Substituting CSXT for Pan Am creates a strong financial partner and operator with substantial resources. This is further bolstered by the addition of B&E as the independent operator of PAS. GWI is a strong, experienced shortline rail operator with significant financial resources and operational expertise. This should enhance the PAS routings. Id. at 9.

Further, B&E has entered into a Term Sheet Agreement that provides for a bonus for strong performance, as well as a penalty—*i.e.*, termination—for failure to perform. These incentives will safeguard B&E's fulfillment of its responsibilities under the terms of the proposed operating contract. There is no reason to believe that B&E would abuse its position on the PAS Lines, as VRS/VTrans allege. Rather, if B&E took actions that resulted in the diminution of service, traffic volume, or revenues on the PAS Lines, B&E would be risking termination. Id. at 10.

Moreover, there will be cost-saving benefits from B&E's standalone operation of the PAS Lines. For example, B&E will benefit from the coordination of infrastructure with CSXT, NS, and the other GWI-affiliated railroads in the region to maximize the efficiency of the local infrastructure. Id. NS and CSXT, which, as co-owners of PAS, will need to approve the annual capital budget, have concluded that because they already have the experience and capabilities to perform large capital projects, there is no need to duplicate this capability in B&E as contract operator of the PAS Lines. This will allow B&E to operate the PAS Lines more efficiently. Id. In addition, B&E, as a subsidiary of GWI, will have access to greater corporate resources, including GWI's safety and training programs. Such savings not only will improve the financial viability of B&E, but also will permit NS and CSXT to create and implement an improved maintenance schedule and capital investment program that is more in sync with the flow of traffic over the lines, which should ensure the sustainability of the existing infrastructure for future traffic on the lines. Id.

D. There Are No Negative Environmental Effects Associated with the Merger and Related Transactions

NS's trackage rights operations will not impose risks to the Wachusett Reservoir or adversely affect Voorheesville. As detailed in CSXT's September 24, 2021, Response to Environmental Comments, several stakeholders, including the Massachusetts Water Resources Authority, have submitted comments in this proceeding regarding the rail line between Worcester, MA, and Ayer, MA, which runs for short segments along or over the Wachusett Reservoir. In connection with the NSR Settlement Agreement, NSR will obtain trackage rights allowing NSR to move up to one train pair per day, carrying intermodal and automotive vehicles traffic only. These trackage rights will allow NS to run double-stacked traffic over the new trackage rights route, reducing the need for the "filet and toupee" operation described above, and

will result in the movement of one additional NS train over the Worcester-Ayer line. VS Edwards at 10-11. The one additional train will not have a significant impact on environmental and safety issues related to the Reservoir Segment for several reasons. For example, Mr. Edwards testifies that he understands that: (a) only one intermodal/automotive train pair per day will be added to the line, well below the level of train traffic that triggers the need for environmental reporting; (b) the line handles only a single train, each direction, so adding one pair of intermodal/automotive trains per day can easily and safely be accommodated on the line; and (c) while the gross ton-miles per year on the line segment will increase, the percentage change is well below the STB's threshold set out in 49 C.F.R. §1105.7(e)(5). Id. at 11.

In addition, the Village of Voorheesville, N.Y. ("Voorheesville") has raised concerns about the impact of the rehabilitation of a connection in Voorheesville between an existing NS line and CSXT's Selkirk Subdivision and the related NS operation of one train pair (two trains total) per day over the NS line, through the rehabilitated connection, and onto the CSXT Selkirk Subdivision. As explained in that September filing, there are no negative environmental effects associated with the proposed transaction. Id.

The Altamont Free Library expressed certain concerns regarding the proposed transaction, many of which are addressed in the comments previously submitted by CSXT. Nonetheless, CSXT, NS and the Altamont Free Library have set up a very robust line of communication and intend to keep that line of communication open should additional concerns arise. Id. at 11-12.

III. ALTERNATIVES TO THE MERGER AND RELATED TRANSACTIONS AND THE NS-CSXT SETTLEMENT AGREEMENT IGNORE THE EXACTNESS OF THE SETTLEMENT AS WELL AS THE REMEDIES AVAILABLE TO NS.

Even if a party establishes that a condition is warranted, and no shipper has claimed that the Merger and Related Transactions, let alone the settlement agreement, result in a loss of competition, the scope of the Board's conditioning power is limited. Where appropriate, the Board imposes conditions that are narrowly tailored to remedy only the specific adverse harm that results from the transaction. UP/SP, 1996 STB LEXIS 220, *418-419. The Board's focus is on preserving the pre-transaction status quo. The Board does not grant conditions that significantly improve the competitive position of the party seeking the condition, whether that is a railroad or a shipper. See, e.g., Burlington N. Inc. and Burlington N. R.R. Co. – Control and Merger – Santa Fe Pac. Corp. and the Atchison, Topeka and Santa Fe Ry. Co., FD No. 32549, 1995 ICC LEXIS 214, at *174-75 (served Aug. 23, 1995) (“BN/SF”) (noting that the conditioning power is only “used to preserve competitive options (not to expand them)”).

Because no party has established that there will be a loss of competitive options available to shippers, there is no legal basis to impose any additional conditions to remedy any alleged competitive effects except for those conditions already proposed in the Merger Transaction and the Related Transactions.³ Even if a party had raised competitive concerns and provided evidence supporting those concerns and showing that such concerns are both likely and substantial, which no party has done, the alternatives to the Merger and Related Transactions and the NS-CSXT settlement agreement—such as those proposed by the Department of Justice or the

³ At best, DOJ has raised theoretical concerns that CSXT will somehow use its 50% ownership of PAS to hamper NS's ability to compete over the PAS east-west line. No shipper has stepped forward to agree with DOJ's concerns. Furthermore, the two parties with the most to lose if those concerns were a real possibility—B&E and NS—do not share DOJ's concerns. As such, there is no basis to impose any condition, yet lone divestiture.

replacement of B&E as the PAS operator as suggested by Vermont Rail System—are not narrowly tailored and or operationally feasible. Rather, as discussed in more detail below, the proposed alternatives, if implemented, would be disruptive, create uncertainty, and are not preferred by NS. Such alternatives also ignore the remedies available to NS that are already inherent in the settlement agreement. As such, the requests for conditions should be denied consistent with well-established Board precedent.

A. NS Prefers the NS-CSXT Settlement to the DOJ's or VRS/VTrans's Proposals.

DOJ's request that the Board require CSXT to divest its stake in PAS and VRS/VTrans's suggestion that B&E should be replaced do not meet the applicable legal standard described above, because they are not narrowly tailored to resolve significant competitive harm. These suggestions neglect certain fundamental realities. First, the fact that PAS is a joint venture, and the fact that one of the owners of PAS will be CSXT, does not de facto mean that conditions will exist to prevent NS and CSXT from continuing to compete vigorously for traffic to and from the PAS service territory. The Merger and Related Transactions, the restructuring of PAS, and the settlement agreement are all designed to specifically prohibit CSXT from using its ownership interests in PAS in a manner that will harm NS or that would allow B&E to favor routings via GWI affiliated railroads over NS/PAS routings. VS Edwards at 12.

A good, continuing, example of this is the Conrail joint venture. As a result of the NSR-CSXT-Conrail transaction approved by the STB several years ago, the former Conrail organization and rail system was substantially restructured. Conrail is now owned by NSR and CSXT, and NSR and CSXT appoint each of the persons on its management committee. Some of its lines and rights were acquired directly by an NSR-wholly-owned subsidiary (for operation by NSR), and some of its lines and rights were acquired directly by a CSXT-wholly-owned subsidiary (for operation by CSXT). CSXT acquired certain trackage rights over NSR, and NSR

acquired certain trackage rights over CSXT. More to the point, those lines that were not allocated to NSR or CSXT were assembled into three “Shared Assets Areas” (“SAAs”), operated and maintained by Conrail on behalf of Conrail’s owners, NSR and CSXT. Although each of NSR and CSXT have the right to directly serve many customers in the SAAs, most service is performed by Conrail. The existence of Conrail, and its operation and maintenance of those three SAA’s (the North Jersey SAA, the South Jersey/Philadelphia SAA, and the Detroit SAA), involve a significantly greater amount of trackage, a significantly greater number of local customers, and a significantly greater amount of rail operations than what will occur between CSXT, NS, and B&E with respect to operating and managing PAS. Notwithstanding the substantial complexities and interactions between CSXT and NS in operating and managing the SAA’s, there has not been any lessening of the vigor with in which NSR and CSXT compete with each other. VS Edwards at 13.

Second, and perhaps most importantly, NS—the railroad party with the most to lose if PAS becomes noncompetitive—believes that the negotiated settlement agreement and related agreements are the best possible path forward. The parties have narrowly tailored the agreements to remedy the potential loss of competition that could have resulted from CSXT’s control of 50% of PAS. The agreements are carefully constructed to resolve the very concerns that DOJ and VRS/VTrans express. Id. Divestiture of CSXT’s interest in PAS or replacement of B&E as PAS’s contract operator would each be disruptive, generate uncertainty, and, as a result, depending upon who the buyer of CSXT’s 50% ownership interest or who the B&E replacement is, could threaten the long-term viability of PAS, not enhance it. Such actions could result in the very thing DOJ and others wish to avoid: an unstable, financially unsound, and inexperienced operator.

Such a result is not in the public interest. It would be a burden borne by NS and PAS, as well as their customers, who rely on NS and PAS for critical access to the Northeast United States and beyond. See, e.g., Proposed Transaction, Support Statement of Hub Group, at 1 (“As a major carrier to/from Boston and the New England market, we utilize Norfolk Southern’s direct Intermodal rail services to/from Ayer. The Norfolk Southern’s services help us to offer New England shippers competitive, economical options for their shipping needs throughout the country.”); Support Statement of Arrowhead Environmental Partners, at 1 (“We rely upon direct rail access via Norfolk Southern Railway and Pan Am Southern to reach our wide customer base, which includes customers located within New England and the New York/New Jersey metro area....We rely upon direct rail access via Norfolk Southern and connecting carriers to provide uniquely designed high capacity and environmentally sound disposal facility for customers, communities, and a wide range of industries. The proposed transaction will preserve critical access to Norfolk Southern rail service for our New England business.”); Support Statement of J.B. Hunt Transport, Inc., at 1 (“As a major carrier to/from Boston and the New England market, we rely on Norfolk Southern’s direct Intermodal rail services to/from Ayer. The Norfolk Southern (“NS”) services allow us to offer New England shippers competitive, economical options for their shipping needs throughout the country.”). As such, a forced divestiture or the substitution of a new operator who was not part of the settlement discussions could be harmful to rail shippers who have shown to be 100% in support of the transaction. Indeed, not one customer has expressed opposition in this proceeding. VS Edwards at 14.

Under either DOJ’s or VRS/VTrans’s proposals, it is simply unknown who would buy CSXT’s share or who would be the replacement operator. As such, there is no guarantee that these unicorn purchasers and operators would be capable of and willing to support the level of

capital expenditure that keeps PAS viable today or somehow be better equipped to protect the competitive viability of PAS and, by extension, NS's access to the region and the interests of competition. Rather than improve upon the solution proposed in the settlement agreement, the potential purchaser or replacement operator could cause numerous problems, including service and operational issues. Id. at 15.

Finally, these proposals would be subject to the further review and approval of the Surface Transportation Board ("STB"), further delaying the benefits that have been recognized by numerous shippers, communities, and public officials. It is impossible at this time to know who the interest-acquiring entity or replacement operator would be, what further issues may be raised during the STB proceedings to implement such conditions, what conditions might be imposed on those transactions, or how the identity of the acquiror or the conditions to be imposed might otherwise affect the transaction currently pending before the STB. Id.

In addition, divestiture of the B&M's interest in PAS to a third party (other than G&W) would be an extremely unusual remedy in this industry. Indeed, Mr. Edwards is unaware of any instance in which a divestiture of this sort has been ordered as a condition of a proposed transaction. Id. For example, despite DOJ, DOT, and many others advocating for the divestiture of certain lines in the UP/SP merger, the STB rejected those requests as inferior to the agreed-upon settlement agreement, which relied upon trackage rights. Likewise, ordering a separate replacement for B&E would substitute this agency's judgment for that of the very party who has the most to lose—NS. All without a showing that having B&E operate the PAS Lines creates a competitive or operational problem for NS or PAS and their customers, none of whom have requested specific conditions or continue to have an objection to the transaction. In short, the DOT and VRS/VTrans proposals do not alleviate a significant competitive problem, have not

been shown to be operationally feasible, are not supported by any shippers, and are not narrowly tailored. As such, there is no legal basis for imposing either divestiture of the line or the replacement of B&E as the preferred operator of PAS.

B. The DOJ and VRS/VTrans Proposals Ignore the Remedies Available to NS.

The DOJ and VRS/VTrans proposals fail to take into consideration certain competitive remedies designed into the transaction and would substitute their judgment for NS's and without any concerns by shippers being expressed. These proposals ignore that the settlement agreement already gives NS the right to remedy such actions if service degrades or if NS believes B&E is operating PAS in a manner that discriminates against NS. First, in the event of a "Major Service Standard Failure," NS would have the ability to exercise certain reserved trackage rights over the Patriot Corridor for service into many PAS facilities. FD 35147, Decision served March 10, 2009, at 11. If there are competitive effects from the Merger and Related Transactions that affect the operations over the PAS lines, many of those competitive effects could be mitigated if NS simply exercises its reserved trackage rights.

Second, under several of the relevant agreements, CSXT and NS have established that NS will have the right to exercise certain change-in-control provisions, under which NS may purchase (or cause to be sold) CSXT's share of PAS under a specified financial mechanism. These rights, which extend for seven years, will essentially allow NS to take control over the Pan Am Southern management committee (should NS acquire the interest), or to cause its partner in PAS to be sell its interest in PAS to a party that will protect competitive interests, but in a structured manner.⁴ These provisions, which give NS the ultimate "veto power" to CSXT "being in the room," safeguard the competitiveness of PAS, the interests of NS, and the public interest

⁴ Again, the public interest would be protected in such a transaction because that transfer would necessarily have to be presented to the STB for its review.

in maintaining a competitive environment. The DOJ or VRS/VTrans proposals imply that CSXT will renege on its obligations or that NS cannot protect itself in such scenarios. That is simply not the case. VS Edwards at 16-17.

If for some unforeseen reason, the negotiated solution proves ineffective and the theoretical and hypothetical concerns raised by DOJ and VRS/VTrans become a reality, NS has the option to force a more orderly and structured divestiture of CSXT's interest in PAS or the replacement of B&E as the operator—the very remedies these parties seek to impose now. Shippers, communities, and the railroads are much better off allowing the settlement agreement to take effect. If, after a few years of operations and monitoring by NS (and/or the STB) NS does not believe the settlement agreement is providing the competitive alternative that is envisioned by NS and DOJ, NS will have no hesitation invoking its right to obtain full control of the PAS east/west line or to seek to replace B&E as the operator. VS Edwards at 17.

CONCLUSION

In conclusion, when viewed in its entirety, it is clear that the Merger and Related Transactions will not result in a substantial lessening of competition, creation of a monopoly, or a restraint of trade in freight surface transportation in any region of the United States. No shipper has filed a request for condition asserting that its competitive options will be reduced. And no party has shown that a condition is required; let alone shown that their suggested condition is narrowly tailored, resolves a significant loss of competition, is operationally feasible, and will produce net public benefits. As such, the Board should approve the Merger and Related Transactions without conditions, other than standard labor protective conditions or those commitments and conditions suggested by CSXT.

Respectfully submitted,

Thomas E. Zoeller
Hanna M. Chouest
Elaina L. Blanks-Green
NORFOLK SOUTHERN CORPORATION
650 W Peachtree St NW
Atlanta, GA 30308
Tel: (470) 463-6314

/s/ William A. Mullins
William A. Mullins
Amber L. McDonald
BAKER & MILLER PLLC
2401 Pennsylvania Ave, NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849

October 18, 2021

Attorneys for Norfolk Southern Railway Company

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Response of Norfolk Southern Railway Company to Comments, Protests, Requests for Conditions, and Other Opposition in STB Finance Docket No. 36472, by first class mail, properly addressed with postage prepaid, or other more expeditious means upon all parties of record.

/s/ William A. Mullins

William A. Mullins

Attorney for Norfolk Southern Railway Company

October 18, 2021

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36472

CSX CORPORATION AND CSX TRANSPORTATION, INC.

– ACQUISITION AND OPERATION –

**PAN AM SYSTEMS, INC., PAN AM RAILWAYS, INC., BOSTON AND MAINE
CORPORATION, MAINE CENTRAL RAILROAD COMPANY, NORTHERN
RAILROAD, PAN AM SOUTHERN LLC, PORTLAND TERMINAL COMPANY,
SPRINGFIELD TERMINAL RAILWAY COMPANY, STONY BROOK RAILROAD
COMPANY, AND VERMONT & MASSACHUSETTS RAILROAD COMPANY**

**RESPONSE OF NORFOLK SOUTHERN RAILWAY COMPANY TO COMMENTS,
PROTESTS, REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION**

VERIFIED STATEMENT OF JOHN V. EDWARDS

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**RESPONSE OF NORFOLK SOUTHERN RAILWAY COMPANY TO COMMENTS,
PROTESTS, REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION**

VERIFIED STATEMENT OF JOHN V. EDWARDS

My name is John V. Edwards. I am employed by Norfolk Southern Corporation (“NS”) in the capacity of General Director Passenger Policy. I have been employed by NS since 1998 and have occupied my present position since 2010. During my employment with NS, I have served in a variety of roles that focus on developing and implementing transactions, including serving as both General Attorney and Senior General Attorney. Since 2010, I have acted as the primary decision-maker for corporate policy regarding new and existing passenger service on NS’s Class I freight railroad, while also continuing my work on development, implementation, and regulatory approval of significant transactions.

In my time at NS, I actively participated in the transactions that resulted in the formation of the joint venture between NS and Pan Am Southern LLC (“PAS”), as well as the settlement agreement between NS and CSX Transportation, Inc. (“CSXT”) in the proposed acquisition (the

“Merger and Related Transactions”) by CSXT. As such, I am intimately familiar with PAS, its history and purpose, as well as the goals of the settlement arrangement between NS and CSXT.

Based on my knowledge of NS and PAS, my various discussions with NS and CSXT personnel, and certain analysis undertaken by NS, I believe that the Merger and Related Transactions, including the related settlement agreement with NS, represents the best possible outcome for all parties interested in strengthening and maintaining the existing operations of PAS, the efficient provision of rail service in the Northeast and New England, and the continuation of a strong competitive rail system in that region.

I reach that conclusion for several reasons. First, for NS, PAS was not created primarily to be an independent profit source. Rather, PAS was created primarily to act as a vehicle to sustain a means to compete with CSXT in the greater Boston marketplace, and the settlement agreement between NS and CSXT and the Term Sheet Agreement among NS, CSXT and GWI under which B&E would become the contract operator will preserve that. Second, NS—the party with potentially the most to lose if PAS is rendered noncompetitive—is confident that the settlement agreement between NS and CSXT not only maintains but enhances, the purpose for which PAS was created and will contribute to a more robust competitive landscape. Third, alternatives to the Merger and Related Transactions and the NS-CSXT settlement agreement—such as that proposed by the Department of Justice—would be disruptive, create uncertainty, and are opposed by NS. Such alternatives ignore the remedies available to NS that are already inherent in the settlement agreement.

I. PAS Was Created Primarily to Act as a Vehicle to Sustain a Means to Compete with CSXT.

A. Pan Am Southern Was Structured to Be an Agent of Pan Am and NS.

PAS is a limited liability company, which is owned 50% by Norfolk Southern Railway Company and 50% by Boston and Maine Corporation (“Boston and Maine”). PAS is governed, at a high level, by a Management Committee, consisting of three representatives from Norfolk Southern Railway Company and three representatives from Boston and Maine. See STB Finance Docket No. 35147, Norfolk Southern Railway Company, Pan Am Railways, Inc., et al. – Joint Control and Operating/Pooling Agreements – Pan Am Southern LLC, Application filed May 30, 2008 (hereinafter, “Original Application”), Volume II at page 142 (LLC Agreement, Section 5.2). This Management Committee acts as a board of directors in a corporation. Springfield Terminal Railway Company (“Springfield Terminal”) acts as the railroad contract operator for PAS, and in that role, it manages, administers, supervises, performs, and provides all freight railroad services (both operational and administrative) on behalf of PAS. If the Merger and Related Transactions is approved, CSXT will acquire the 50% Boston and Maine interest in PAS, and CSXT’s representatives will take the Boston and Maine seats on this Management Committee. CSXT will also acquire control of Springfield Terminal, but Pittsburg & Shawmut Railroad, LLC, doing business as Berkshire & Eastern Railroad (“B&E”), a Genesee & Wyoming Inc. (“GWI”) subsidiary, will replace PAS’s current contract operator.

B. For NS, PAS Was Created to Provide a Vehicle for Competition.

For NS, the motivation behind the creation of PAS was primarily to serve as a vehicle to sustain a means to compete with CSX in the greater Boston market, and not as an independent, profit-making railroad. For NS, maintaining a strong and vigorous PAS would form the basis for its competitive access to Boston and the shortlines serving Vermont, Massachusetts, and beyond,

including those within the GWI family and the Vermont Rail Service (“VRS”) family. This would permit NS to remain competitive with CSXT in the New England Region.

As stated in the original PAS application, the PAS system was created to “provide customers with enhanced service options linking PAS’ regional network and...three short lines [Vermont Railway (“VTR”), New England Central Railroad (“NECR”), and Providence and Worcester Railroad (“PW”)] with points served by Norfolk Southern in eastern and southern United States.” Original Application, Verified Statement of John Williams at 67 (“Statement of John Williams”).

Further, as was noted at that time, the “[a]pplicants’ ability to provide new and improved single system service, and the greater financial strength brought to PAS under Norfolk Southern’s and Pan Am’s joint ownership, will enhance head-to-head rail competition within the New England Region with other Class I railroads, particularly CSX Transportation, Inc. (CSXT).” Original Application, at page 68 (Statement of John Williams) (internal quotation marks omitted); see also STB Finance Docket No. 35147, 2009 NSR/Pan Am Proceeding, slip op. at 5 (STB served Mar. 10, 2009) (finding that the deal “would significantly increase competition between railroads by providing an upgraded east-west mainline route to compete with a parallel mainline route operated by CSXT”).

II. The NS-CSXT Settlement Agreement Not Only Maintains the Competitive Landscape Created by PAS, but Further Enhances It.

A. The Settlement Agreement Protects NS’s Rights and Competitive Position.

PAS was created to “enhance” NS’s ability to compete with CSXT. See, e.g., STB Finance Docket No. 36472, CSX Corporation and CSX Transportation, Inc.—Control and Merger—Pan Am Systems, Inc., Pan Am Railways, Inc; Boston and Maine Corporation, Maine Central Railroad Company, Northern Railroad, Pan Am Southern LLC, Portland Terminal

Company, Springfield Terminal Railway Company, Stony Brook Railroad Company, and Vermont & Massachusetts Railroad Company (“Proposed Transaction”), Support Statement of Hub Group, at 1 (“According to the application submitted by CSX, the proposed transaction will preserve critical access for Norfolk Southern to New England.”); Proposed Transaction, Support Statement of J.B. Hunt Transport, Inc., at 1 (same). Indeed, as a result of the 2009 transaction forming PAS, Norfolk Southern invested millions of dollars to strengthen the east-west Patriot Corridor as a competitive option to the parallel CSXT route. NS is committed to maintaining the competitive viability of PAS.

Because of PAS’s importance to NS, NS must ensure that PAS is operated by a competent and independent operator. In that vein, the settlement agreement between NS and CSXT is designed to provide protection and approaches to keep PAS competitive and to prevent potential adverse competitive effects to PAS associated with the Merger and Related Transactions. These agreements have alleviated concerns that NS had about the Merger and Related Transactions.

Through an agreement among CSXT, NS, and Genesee & Wyoming Inc. (“GWI”) —and as noted above—B&E (a subsidiary of GWI and an independent operator that is not affiliated with either NS or CSXT (or any of the PAR Railroads, or PAS) will step into the shoes of Springfield Terminal (“ST”) (the current contract operator of PAS) to operate, manage, and set rates on PAS. Much of the traffic interchanged with PAS comes from NS, so NS has both an interest in ensuring the independent operations of PAS (both in terms of direct service and interchange) and the continued viability of PAS. Under the terms of the proposed operating agreement, B&E will have to act as agent of PAS and report to PAS, including its owners NS and CSXT. B&E will not be able to divert revenue or traffic away from PAS to any related

railroad of B&E through discriminatory rate-setting for PAS traffic, and NS will be in a position to ensure that B&E will not favor any GWI carriers in its pricing nor CSXT in its routings.

B&E, operating the PAS system, would maintain PAS's access to the NS, CP, and CSXT rail systems, and to each of the shortline railroads that connect to the PAS system, and, in particular, to those in the VRS and GWI systems. (NS will still retain its haulage rights on PAS between Hoosick Junction and Mechanicville, which allows for a direct interchange with VRS and prevents B&E from being involved in the pricing for that traffic moving over PAS.) NS expects that B&E will, at least initially, provide PAS service at substantially the same level as is currently being provided by ST and that service will later improve beyond that currently provided by ST.¹ All shippers that have access to PAS will continue to have access to PAS. In addition, Vermont shippers will neither experience service delays nor face additional costs, as PAS is making a 5-day-per-week service commitment to VRS, which VRS and its Vermont shippers presently do not have with Springfield Terminal as the contract operator of the PAS Lines.

Additionally, B&E will be responsible for setting rates for PAS in a non-discriminatory, competitively neutral fashion as to all rail carriers that have the ability to interchange traffic with PAS or otherwise connect to PAS. B&E will be required to set PAS rates exclusively in the interest of PAS's independent rail carrier status and in a manner that does not favor any other railroad in the GWI family or in a manner that discriminates between CSX and NS.

Shippers also understand this, and that is why there has been overwhelming shipper support for the Merger and Related Transactions. See, e.g., Proposed Transaction, Support Statement of Hub Group, at 1 ("Our understanding is that the agreement reached between CSX

¹ While labor shortages may initially make this a challenge, the expectation is that there will be significant service improvements over time.

and Norfolk Southern will preserve competitive rail options and will increase the fluidity of rail operations in New England. We anticipate these competitive options would be a key benefit of the proposed transaction.”); Proposed Transaction, Support Statement of J.B. Hunt Transport, Inc., at 1 (“The agreement reached between CSX and NS will preserve competitive rail options and will increase the fluidity of rail operations in New England. Having these competitive options is a key benefit of this transaction.”). Indeed, not one shipper has expressed concern that the transaction reduces their competitive options or that the settlement agreement would not preserve NS’s ability to compete against CSXT.

In addition, through the settlement agreement, CSXT will retain no direct control over rates or operations of PAS. Instead, B&E will be contractually obligated by contract to set rates and to operate PAS in the interest of PAS as an independent rail carrier. CSXT’s control over rates or operations of PAS will be limited to that permitted through its involvement on the PAS management committee and subcommittees. B&E is required to ensure that PAS can and does, compete against CSXT for traffic, for which competitive options are available, and to ensure that PAS will be maintained as an independent rail option. B&E is not permitted to move traffic over the PAS system in its revenue waybill. Further, B&E is to be operated in a manner that will encourage traffic to move over the PAS system and to have rates set in a manner that will, at a minimum, cover the fully allocated costs of PAS operations.

Accordingly, the establishment of B&E as operator of PAS will protect NS’s rights as owner of PAS and NS’s competitive position in PAS-served markets by ensuring that PAS continues to operate as a competitor to CSXT.

B. There Are Substantial Efficiencies to Be Gained by the Merger and Related Transactions.

In addition to protecting the viability of PAS as a competitive entity (and, in turn, protecting NS's ability to compete with CSXT), the proposed transaction will result in significant pro-competitive efficiencies. For example, the Merger and Related Transactions will significantly improve rail service and operations in New England by unifying two already interconnected rail networks to produce efficient single-line service. Shippers on both the PAR System and on CSXT will see expanded market opportunities as the efficiencies of a unified system and the benefits of improved infrastructure are felt.

A particularly important example of the efficiencies that will be gained by the Merger and Related Transactions is the ability for NS to provide double-stack intermodal service into the Boston area. Currently, NS intermodal trains moving over the PAS's east-west Patriot Corridor line between Mechanicville, New York, and Ayer, Massachusetts, face the height limitations of the Hoosac Tunnel. The Hoosac Tunnel is a bottleneck that prevents double-stack intermodal operations over the PAS Patriot Corridor.² Before reaching the Hoosac Tunnel, a double-stack train approaching from the west must be stopped and "fileted," meaning that the top row of containers and trailers must be removed from the intermodal rail cars and loaded onto other intermodal rail cars, resulting in a longer train. Trains approaching from the east must be single-stacked through the tunnel, and, if further operations are to be double-stacked as the train travels west, cars must be "toupeed," meaning that the rail cars must be stopped and double-stacked in

² In February 2020, the Hoosac Tunnel suffered a significant collapse, halting rail traffic on that section of the Patriot Corridor. VRS, GWI, and CSXT stepped up to the plate to provide traffic detours and keep PAS competitive rail service to the area active. Springfield Terminal, as PAS's rail operator, and NS and Boston and Maine as PAS's owners, immediately funded and instituted repairs to that tunnel, and the associated Little Tunnel, to restore service. As the contract rail operator, B&E will be responsible for maintaining the integrity of the tunnels going forward.

Mechanicville. Accordingly, existing operations require more intermodal rail cars, more work, and longer transit times as the train must stop in Mechanicville while the file/toupee operations occur. As a result of this limitation, many shippers have never fully benefitted from double-stack intermodal service that NS was hoping to institute in competition to CSXT. See, e.g., Proposed Transaction, Support Statement of Hub Group, at 1 (“Importantly for Hub Group, we understand that the proposed transaction will significantly expand intermodal rail transportation in New England by facilitating a clear double-stacked route on Norfolk Southern and CSX. Hub Group supports the proposed transaction and we believe our business, along with our customers, will benefit from its adoption.”); Proposed Transaction, Support Statement of J.B. Hunt Transport, Inc., at 1 (“Importantly for J.B. Hunt, the proposed transaction will expand intermodal rail transportation in New England by facilitating a clear double-stacked route on NS and on CSX.”).

By granting NS trackage rights over CSXT’s southern route, the settlement agreement allows NS to handle double-stack intermodal traffic to enhance NS’s ability to compete against CSXT. This should also improve NS’s service over PAS’s route by freeing up capacity that can be used to move traffic to and from shippers on the PAS system, and to and from shortlines connecting to the Patriot Corridor and PAS, thereby enhancing NS’s ability as well to compete with CSXT.

C. The Merger and Related Transactions Will Provide Increased Financial Stability.

The transaction that gave rise to PAS was, in part, a means of permitting NS to infuse substantial funding into the system to improve infrastructure, remove long-term slow orders, and

add capacity on the lines.³ While the PAS transaction resolved many of the concerns of shippers and shortline connections regarding ST service, this hampered NS's ability to fully utilize the PAS system. Substituting CSXT for Pan Am creates a strong financial partner and operator with substantial resources. This is further bolstered by the addition of B&E as the independent operator of PAS. GWI is a strong, experienced shortline rail operator with significant financial resources and operational expertise. This should enhance the PAS routings.

Further, B&E has entered into Term Sheet Agreement that provides for a bonus for strong performance, as well as a penalty—*i.e.*, termination—for failure to perform. These incentives will safeguard B&E's fulfillment of its responsibilities under the terms of the proposed operating contract. There is no reason to believe that B&E would abuse its position on the PAS Lines, as VRS/VTrans allege. Rather, if B&E taking actions that resulted in the diminution of service, traffic volume, or revenues on the PAS Lines, B&E would be risking termination.

Moreover, there will be cost-saving benefits from B&E's standalone operation of the PAS Lines. For example, B&E will benefit from the coordination of infrastructure with CSXT, NS, and the other GWI-affiliated railroads in the region to maximize the efficiency of the local infrastructure. NS and CSXT, which, as co-owners of PAS, must approve the annual capital budget, have concluded that because they already have the experience and capabilities to perform large capital projects, there is no need to duplicate this capability in B&E as contract operator of the PAS Lines. This will allow B&E to operate the PAS system more efficiently. In addition, B&E, as a subsidiary of GWI, will have access to greater corporate resources, including GWI's safety and training programs. Such savings not only will improve the financial viability of B&E,

³ See, STB Finance Docket No. 35147, decision served March 10, 2009, slip op. at 2.

but also will permit NS and CSXT to create and implement an improved maintenance schedule and capital investment program that is more in sync with the flow of traffic over the lines, which should ensure the sustainability of the existing infrastructure for future traffic on the lines.

D. There Are No Negative Environmental Effects Associated with the Merger and Related Transactions.

NS's trackage rights operations will not impose risks to the Wachusett Reservoir or adversely affect Voorheesville. As detailed in CSXT's September 24, 2021 Response to Environmental Comments, several stakeholders, including the Massachusetts Water Resources Authority, have submitted comments in this proceeding regarding the rail line between Worcester, MA, and Ayer, MA, which runs for short segments along or over the Wachusett Reservoir. In connection with the NSR Settlement Agreement, NSR will obtain trackage rights allowing NSR to move up to one train pair per day, carrying intermodal and automotive vehicles traffic only. These trackage rights will allow NS to run double-stacked traffic over the new trackage rights route, reducing the need for the "filet and toupee" operation described above, and will result in the movement of one additional NS train over the Worcester-Ayer line. The one additional train will not have a significant impact on environmental and safety issues related to the Reservoir Segment for several reasons. For example, I understand that: (a) only one intermodal/automotive train pair per day will be added to the line, well below the level of train traffic that triggers the need for environmental reporting; (b) the line handles only a single train, each direction, so adding one pair of intermodal/automotive trains per day can easily and safely be accommodated on the line; and (c) while the gross ton-miles per year on the line segment will increase, the percentage change is well below the STB's threshold set out in 49 C.F.R. §1105.7(e)(5).

In addition, the Village of Voorheesville, N.Y. (“Voorheesville”), has raised concerns about the impact of the rehabilitation of a connection in Voorheesville between an existing NS line and CSXT’s Selkirk Subdivision and the related NS operation of one train pair (two trains total) per day over the NS line, through the rehabilitated connection, and onto the CSXT Selkirk Subdivision. As explained in that September filing, there are no negative environmental effects associated with the proposed transaction.

The Altamont Free Library expressed certain concerns regarding the proposed transaction, many of which have been addressed in the comments submitted by CSXT. I can say that Norfolk Southern and the Altamont Free Library have set up a very robust communication and intend to keep that line of communication open should additional concerns arise.

III. The Alternative Proposals Made by the Department of Justice and the Vermont Commenters Ignore the Exactness of the Settlement Agreement as well as the Remedies Available to NS.

The DOJ has suggested that CSXT be required to divest its stake in PAS and, along with VRS and the State of Vermont’s Agency of Transportation (“VTrans”), proposed that B&E should not be permitted to act as the operator for PAS. These fears are unfounded and without the support of a single customer. Further, their suggestions for relief would be disruptive, create uncertainty, and are not preferred by NS.

A. NS Prefers the NS-CSXT Settlement to the DOJ’s or VRS/VTrans’s Proposals.

DOJ’s request that the Board require CSXT to divest its stake in PAS and VRS/VTrans’s suggestion that B&E should be replaced do not meet the applicable legal standard described above, because they are not narrowly tailored to resolve significant competitive harm. These suggestions neglect certain fundamental realities. First, the fact that PAS is a joint venture, and the fact that one of the owners of PAS will be CSXT, does not de facto mean that conditions will

exist to prevent NS and CSXT from continuing to compete vigorously for traffic to and from the PAS service territory. The Merger and Related Transactions, the restructuring of PAS, and the settlement agreement are all designed to specifically prohibit CSXT from using its ownership interests in PAS in a manner that will harm NS or that would allow B&E to favor G&W routings over NS/PAS routings.

A good, continuing, example of this is the Conrail joint venture. As a result of the NSR-CSXT-Conrail transaction approved by the STB several years ago, the former Conrail organization and rail system was substantially restructured. Conrail is now owned by NSR and CSXT, and NSR and CSXT appoint each of the persons on its management committee. Some of its lines and rights were acquired directly by an NSR-wholly-owned subsidiary (for operation by NSR), and some of its lines and rights were acquired directly by a CSXT-wholly-owned subsidiary (for operation by CSXT). CSXT acquired certain trackage rights over NSR, and NSR acquired certain trackage rights over CSXT. More to the point, those lines that were not allocated to NSR or CSXT were assembled into three “Shared Assets Areas” (“SAAs”), operated and maintained by Conrail on behalf of Conrail’s owners – NSR and CSXT. Although each of NSR and CSXT have the right to directly serve many customers in the SAAs, most service is performed by Conrail. The existence of Conrail, and its operation and maintenance of those three SAA’s (the North Jersey SAA, the South Jersey/Philadelphia SAA, and the Detroit SAA), involving a significantly greater amount of trackage, and a significantly greater amount of rail operations than what will occur between CSXT, NS, and B&E with respect to operating and managing PAS. Notwithstanding the substantial complexities and interactions between CSXT and NS in operating and managing the SAA’s, there has not been any lessening of the vigor with which NSR and CSXT compete with each other.

Second, and perhaps most importantly, NS—the railroad party with the most to lose if PAS becomes noncompetitive—believes that the negotiated settlement agreement and related agreements are the best possible path forward. The parties have narrowly tailored the agreements to remedy the potential loss of competition that could have resulted from CSXT’s control of 50% of PAS. The agreements are carefully constructed to resolve the very concerns that DOJ and VRS/VTrans express. Divestiture of the CSXT’s interest in PAS or replacement of B&E as PAS’s contract operator would each be disruptive, generate uncertainty, and, as a result, depending upon who the buyer of CSXT’s 50% ownership interest or who the B&E replacement is, could threaten the long-term viability of PAS, not enhance it. Such actions could result in the very thing DOJ and others wish to avoid – an unstable, financially unsound, and inexperienced operator.

Such a result is not in the public interest. It would be a burden borne by NS and PAS, as well as their customers, who rely on NS and PAS for critical access to the Northeast United States and beyond. See, e.g., Proposed Transaction, Support Statement of Hub Group, at 1 (“As a major carrier to/from Boston and the New England market, we utilize Norfolk Southern’s direct Intermodal rail services to/from Ayer. The Norfolk Southern’s services help us to offer New England shippers competitive, economical options for their shipping needs throughout the country.”); Support Statement of Arrowhead Environmental Partners, at 1 (“We rely upon direct rail access via Norfolk Southern Railway and Pan Am Southern to reach our wide customer base, which includes customers located within New England and the New York/New Jersey metro area....We rely upon direct rail access via Norfolk Southern and connecting carriers to provide uniquely designed, high capacity and environmentally sound disposal facility for customers, communities, and a wide range of industries. The proposed transaction will preserve critical

access to Norfolk Southern rail service for our New England business.”); Support Statement of J.B. Hunt Transport, Inc., at 1 (“As a major carrier to/from Boston and the New England market, we rely on Norfolk Southern’s direct Intermodal rail services to/from Ayer. The Norfolk Southern (“NS”) services allow us to offer New England shippers competitive, economical options for their shipping needs throughout the country.”). As such, a forced divestiture or the substitution of a new operator who was not part of the settlement discussions could be harmful to rail shippers who have shown to be 100% in support of the transaction — not one customer has expressed opposition in this proceeding.

Under either DOJ’s or VRS/Vtrans’s proposals, it is simply unknown who would buy CSXT’s share or who would be the replacement operator. As such, there is no guarantee that these unicorn purchasers and operators would be capable and willing to support the level of capital expenditure that keeps PAS viable today or somehow better equipped to protect the competitive viability of PAS and, by extension, NS’s access to the region and the interests of competition. Rather than improve upon the solution proposed in the settlement agreement, the potential purchaser or replacement operator could cause numerous problems, including service and operational issues.

Finally, these proposals would be subject to the further review and approval of the Surface Transportation Board (“STB”), further delaying the benefits that have been recognized by numerous shippers, communities, and public officials. It is impossible at this time to know who the interest-acquiring entity may be, what further issues may be raised during the STB proceedings to implement such conditions, the conditions that might be imposed on that acquisition, or how the identity of the acquiror or the conditions to be imposed might otherwise affect the transaction currently pending before the STB.

In addition, divestiture of the B&M's interest in PAS to a third party (other than G&W) would be an extremely unusual remedy in this industry. I am unaware of any instance in which a divestiture of this sort has been ordered as a condition of a proposed transaction. For example, despite DOJ, DOT, and many others advocating for the divestiture of certain lines in the UP/SP mergers, the STB rejected those requests as inferior to the agreed-upon settlement agreement, which relied upon trackage rights. Likewise, ordering a separate replacement for B&E would substitute this agency's judgment for that of the very party who has the most to lose – NS, and without a showing that having B&E operate the PAS Lines creates a competitive or operational problem for NS or PAS and their customers, none of whom have requested specific conditions or continue to have an objection to the transaction. In short, the DOT and VRS/VTrans proposals do not alleviate a significant competitive problem, have not been shown to be operationally feasible, are not supported by any shippers, and are not narrowly tailored. As such, there is no legal basis for imposing either divestiture of the line or the replacement of B&E as the preferred operator of PAS.

B. The DOJ and VRS/VTrans Proposals Ignore the Remedies Available to NS.

The DOJ and VRS/VTrans proposals fail to take into consideration certain competitive remedies designed into the transaction and would substitute their judgment for NS's and without any concerns by shippers being expressed. These proposals ignore that the settlement agreement already gives NS, if service degrades or if NS believes B&E is operating PAS in a manner that discriminates against NS, the right to remedy such actions. First, in the event of a "Major Service Standard Failure," NS can exercise certain reserved trackage rights over the Patriot Corridor for service into many PAS facilities. FD 35147, Decision served March 10, 2009, at 11. As such, if there are competitive effects from the Merger and Related Transactions that

affect the operations over the PAS system, many of those competitive effects could be mitigated if NS exercises its reserved trackage rights.

Second, under several of the relevant agreements, CSXT and NS have established that NS will have the right to exercise certain change-in-control provisions, under which NS may purchase (or cause to be sold) CSXT's share of PAS under a specified financial mechanism. These rights, which extend for seven years, will essentially allow NS to take control over the Pan Am Southern management committee (should Norfolk Southern acquire the interest), or to cause its partner in PAS to be sold to a party that will protect competitive interests, but in a structured manner.⁴ These provisions, which give NS the ultimate "veto power" to CSX "being in the room," safeguard the competitiveness of PAS, the interests of NS, and the public interest in maintaining a competitive environment. The DOJ or VRS/VTrans proposals imply that CSXT will renege on its obligations or that NS cannot protect itself in such scenarios. That is simply not the case.

If for some unforeseen reason, the negotiated solution proves ineffective and the theoretical and hypothetical concerns raised by DOJ and VRS/VTrans become a reality, NS has the option to force a more orderly and structured divestiture of the line or the replacement of B&E as the operator—the very remedies these parties seek to impose now. Shippers, communities, and the railroads are much better off allowing the settlement agreement to take effect. If, after a few years of operations and monitoring by NS (and/or the STB) NS does not believe the settlement agreement is providing the competitive alternative that is envisioned by NS and DOJ, NS will have no hesitation invoking its right to obtain full control of the PAS east/west line or to seek to replace B&E as the operator.

⁴ Again, the public interest would be protected in such a transaction because that transfer would necessarily have to be presented to the STB for its review.

CONCLUSION

In summary, when viewed in their entirety, it is clear that the Merger and Related Transactions will not result in a substantial lessening of competition, creation of a monopoly, or restraint of trade between CSXT and NS in the Northeast region. No shipper has filed a request for condition asserting that its competitive options will be reduced. And no party has shown that a condition is required; let alone shown that their suggested condition is narrowly tailored, resolves a significant loss of competition, is operationally feasible, and will produce net public benefits.

VERIFICATION

I, John V. Edwards, declare under penalty of perjury that I am authorized to make this verification on behalf of Norfolk Southern Railway Company, and that the information included in the foregoing statement is true and correct to the best of my knowledge and belief.

Dated: October 18, 2021

/s/ John V. Edwards
John V. Edwards
General Director Passenger Policy
Norfolk Southern Corporation