

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36500

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CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY
COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC
RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD
CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY, INC. –
CONTROL – KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN
RAILWAY COMPANY, GATEWAYEASTERN RAILWAY COMPANY, AND THE
TEXAS MEXICAN RAILWAY COMPANY

CSX TRANSPORTATION, INC.'S COMMENTS
AND REQUEST FOR CONDITIONS

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 36500

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY, INC. – CONTROL – KANSAS CITY SOUTHERN; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; GATEWAY EASTERN RAILWAY COMPANY; AND THE TEXAS MEXICAN RAILWAY COMPANY¹

CSX TRANSPORTATION, INC.'S COMMENTS
AND REQUEST FOR CONDITIONS

Under the schedule set forth by the Surface Transportation Board (the “Board”) in Decision No. 11 in this proceeding (“Proceeding”) served on November 23, 2021, CSX Transportation, Inc. (“CSXT”), submits these comments and requests for conditions on the proposed control of Kansas City Southern (“KCS”) and its rail carrier subsidiaries, including, among others, the Kansas City Southern Railway Company (“KCSR”) and Kansas City Southern Mexico (“KCSM”) by Canadian Pacific Railway Limited (“CP”), a Canadian company (the “Proposed Transaction”).²

CSXT objects to the Proposed Transaction to the extent it threatens to reduce competition over rail gateways connecting the eastern and western United States and thereby harm shippers by: (a) maintaining (and possibly expanding) the division of traffic over the Meridian Speedway,

¹ References to decisions in this Proceeding use this abbreviated form: Canadian Pacific Railway Limited, et al.-Control- Kansas City Southern, et al., Docket No. 36500, Decision No. , served .

² CP and KCS, and together with their United States subsidiaries, are referred to herein as the “Applicants.” KCSM is not an Applicant.

(b) reducing the ability of CSXT and KCSR to interchange traffic in New Orleans on commercially reasonable terms, and (c) reducing competition between the eastern and western U.S. by downgrading and reducing traffic volume over the KCSR line between Kansas City and East St. Louis.

CSXT seeks conditions to mitigate those threats. CSXT also seeks a remedy to mitigate CPKC's increased incentive to raise rates on its traffic in Mexico, lower its rates in the United States and thereby divert traffic from other US carriers at cross-border U.S.-Mexico gateways. These problems, while significant, are not insurmountable. They can be cured by the conditions proposed by CSXT, which meet the criteria of 49 CFR 1180.1(d) (2000), the regulations that the Board elected to apply to this Proceeding.³

A. COMMENTS

If approved, the Proposed Transaction would be the first Major Transaction and largest change of control in the North American railroad network since 1999. In this Proceeding, the Board must base its evaluation of the Proposed Transaction on certain factors identified by Congress⁴ to determine whether the Proposed Transaction is consistent with the public interest.⁵

³ FD 35400 Decision No. 4

⁴ "In a proceeding under this section which involves the merger or control of at least two Class I railroads, as defined by the Board, the Board shall consider at least—

(1) the effect of the proposed transaction on the adequacy of transportation to the public;
 (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction;
 (3) the total fixed charges that result from the proposed transaction;
 (4) the interest of rail carrier employees affected by the proposed transaction; and
 (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system." 49 USC 11324 (b).

All but the second factor need to be considered in this Proceeding.

⁵ "The Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest." 49 USC 11324 (c).

The Board must further assess such a transaction through the lens of its "general policy statement for merger or control of at least two Class I railroads."⁶

On November 23, 2021, the Board accepted the Application filed October 29, 2021, for review.⁷ The Board states that Applicants present a *prima facie* case by disclosing facts that, if construed in their most favorable light, support a finding that the Proposed Transaction is consistent with the public interest.⁸ Applicants claim that, because the Proposed Transaction is end-to-end, it promises more efficient transportation over Applicants' routes, and presents no threat either to competition or to the efficient provision of railroad services. Applicants contend that the public benefits of the Proposed Transaction stem primarily from certain operational and service improvements, the value of which in a normal year after closing would be \$194.6 million⁹ and the private benefits resulting from the diversion of traffic from other railroads in a normal year would be \$805.8 million.¹⁰ Applicants assert, without specific support, that these diversions, despite traveling over longer and otherwise disadvantaged routes, are achievable because of the removal of only one interchange between CP and KCS,¹¹ plus limited price reductions, and unquantified operating improvements based on generalities and no supporting analyses.

⁶ As noted above, in FD 36500, Decision No. 4 the Board found the Proposed Transaction to be subject to the regulations set forth at 49 C.F.R. subpart A, in effect before July 11, 2001. However, the general policy statement in 49 CFR 1180.1 should not be ignored as the competitive implications of the Proposed Transaction remain far reaching.

⁷ *Canadian Pacific Railway Limited, et al.-Control- Kansas City Southern, et al.*, Docket No. 36500, Decision No. 11, served November 23, 2021

⁸ Id. at. 10.

⁹ Volume 1, page 74.

¹⁰ Id.

¹¹ Id. at 96.

CSXT requests that, if the Board approves the Proposed Transaction, approval be conditioned to assure the Proposed Transaction lives up to Applicants’ claims and does not hinder competition or the efficiency of the North American railroad network. These conditions are required because Applicants’ support for their *prima facie* case is inadequate.¹² As explained in the Verified Statement of Professor Julie Carey and Dr. Al Bremser (“Carey V.S.”, Exhibit A hereto), that lack of support poses threats to competition and efficiency that the Board should remediate (*See* Carey V.S. at 2-5).

Generally, Applicants’ equivocal commitment to maintaining open gateways is inadequate to protect against CPKC’s incentives and capability to close commercially both cross-border and domestic U.S. gateways.

The most important domestic gateway issues ignored by Applicants are the ongoing agreements between KCS and Norfolk Southern Railway Company (“NSR”) that restrain competition over the Meridian Speedway for certain traffic to and from the eastern United States. The Meridian Speedway is the subject of an explicit market allocation scheme which divides the control of certain geographic areas and products between KCSR and NSR and reduces effective competition with NSR for traffic to and from points in the East best served over the Meridian Gateway.

The Application demonstrates that Applicants intend not to extend their gateway commitment to the Meridian Gateway, but instead to enshrine the existing market allocation arrangements, which never received competition review. The Applicants fail to address the

¹² The very purpose of the case-in-chief concept is to permit the Board and all interested parties “to have, upon the filing of an application, *all of the applicants’ supporting evidence.*” *Railroad Consolidation Procedures*, 363 I.C.C. 767, 770 (1980) (emphasis supplied).

competitive impacts of continuing this patent market division.

And, in this Proceeding, NSR is asking to expand this exclusive arrangement both in terms of type of traffic and geography covered by the arrangements.

CSXT's requested conditions address some of the Application's inadequacies that reveal threats to competition and the efficiency of the North American Railroad Network.¹³ These conditions are related to the Proposed Transaction and designed to ensure shippers are not

¹³ (1) As explained further in the Carey V.S., Applicants' failures to support their *prima facie* case include Applicant's economic witness who provides an inadequate competition analysis, particularly regarding potential harm relating to traffic to and from points in Mexico under KCSM's substantial control, (Carey V.S. at 6), and thus elides the Proposed Transaction's potential threat to competition and efficient routing of traffic to and from Mexico through Laredo. (2) Prof. Carey's market share analysis shows the Board should be concerned that the combination of the existing KCSM/KCS network with CP network, and Applicants' combined ability to influence prices and competition on traffic movements involving Mexico, provide the Applicants increased incentive and ability to reduce competition and harm shippers. (Carey V.S. at 4). (3) Most of Applicants' asserted transaction-related public benefits are not public benefits, but private benefits that will accrue solely to CPKC. (Carey V.S. at 4 and 31) and are not the product of efficiency gains that create lower costs and service improvements See FD No. 32760, Decision No. 44, August 6, 1996, at 363. (4) The few public benefits raise doubt about Applicant's claims the Transaction has the potential to increase competition. (Carey V.S. at 11-12). (5) Applicants' probable benefits are from traffic diversions to routes where CPKC has longer and disadvantaged routes, or to routes where the diversions could be realized without the Proposed Transaction, raising doubt about the potential for increased competition. (Carey V.S. at 4, 8, 11). (6) Applicants' supported public benefits are much lower than the total claimed (Carey V.S. at Figure 5) and much smaller as a proportion of transaction costs than demonstrated in prior large transactions. (Carey V.S. at Figure 9). (7) Applicants have not shown that the large incremental debt to finance the Proposed Transaction can be supported by the plausible potential additional revenues or costs savings from the Proposed Transaction. Absent that showing, the Application suggests a) the Proposed Application does not adequately support the stated rationale and financial case for the Transaction; b) the Transaction will lead to a greater burden on the Applicants' existing shippers ; and c) Applicants will have a greater incentive to seek revenues only via practices harming competition. (Carey V.S. at 43). (8) Applicants' proposed "open gateway" commitments are not sufficiently definitive, nor do they address many of Applicant's key gateways. (Carey V.S. at 24). (9) The Meridian Speedway is the subject of an explicit market allocation scheme which reduces effective competition with NS for traffic to and from points East best served over the Meridian Gateway.

burdened by excess costs or reduced competition. They would not impose unreasonable operating conditions or other restraints on CPKC and would not frustrate the ability of CPKC to provide its plausibly anticipated public benefits. *See* 49 CFR 1180.1(d)(1) (i-iv) (2000).

First, CSXT requests conditions that will assure that the Board does not, by approving the Application, enshrine the existing but never sanctioned restrictions on competition for the movement of traffic over the line between Meridian MS, and Shreveport, LA, owned by a joint venture controlled by KCS and the Alabama Great Southern Railroad Company (“AGS”), a subsidiary of NSR.¹⁴

Second, CSXT requests that the Board deny any NSR Responsive Application seeking to expand its rights under the Meridian Speedway Agreements.¹⁵

Third, CSXT requests the Board impose conditions to assure the continued competitiveness of the New Orleans Gateway.

Fourth, CSXT requests the Board impose conditions to obviate any risk the Proposed Transaction might harm efficient competition for East-West traffic through the gateway at East St. Louis, IL.

Fifth, CSXT requests the Board impose conditions to protect competition for traffic to and from Mexico from anticompetitive activity and preclude inefficient traffic diversions.

CSXT’s requested conditions would reduce the potential for harm to shippers stemming from issues Applicants have either ignored or have addressed inadequately to support their *prima facie* case that the Proposed Transaction is consistent with the public interest, under the

¹⁴ Docket FD 34822, Exhibit A to the “Transaction Agreement” (Filed January 17, 2006).

¹⁵ All agreements included as attachments to the *Verified Notice of Exemption* in FD 34822 filed January 17, 2006, are herein referred to as the “Meridian Speedway Agreements.”

prevailing statutory and regulatory standards contained in 49 U.S.C. 11324(b) and 49 CFR 1180.1 (2020). *See also* Railroad Consolidation Procedures, 363 I.C.C. 767, 770 (1980).¹⁶

B. REQUESTS FOR CONDITIONS AND RELATED ORDERS

1. Conditions to remedy the Arrangements Among KCSR, MSLLC, and NSR that foreclose effective competition over the Meridian Speedway, and the requests for trackage rights sought by NSR in its expected Responsive Application.

KCSR and NSR cooperate to transport traffic over the line between Meridian, MS, and Dallas, TX, known as the Meridian Speedway (the “Speedway”). KCSR has granted NSR exclusive rights to handle certain traffic on the Speedway.^{17, 18} These exclusivity provisions constitute pre-existing and prospective market division arrangements between NSR and KCSR that could receive continued and prospective antitrust immunity if the Proposed Transaction were approved by the Board without conditions

¹⁶ “Under our new regulations, we shall instead issue, in appropriate circumstances and on our own motion, a show-cause order directed to the applicants and any other proponents of the transaction. If those parties cannot show cause why the application should not be summarily denied for failure to state a prima facie case (on either of the two bases discussed above), we would be remiss in allowing the proceeding to continue. Accordingly, we would deny the application.”

The “two bases” are: “Applicants can fail to meet their burden of proof either by (1) disclosing facts that, even if construed in their most favorable light, are insufficient to support a finding that the proposal is consistent with the public interest, or by (2) disclosing facts that affirmatively demonstrate that the proposal is not in the public interest.” *Id.* at 769.

¹⁷ *See* “NSR shall have the exclusive right to transport NS Traffic over the Subject Trackage.” Exhibit C to *Transaction Agreement: NSR-MSLLC Joint Use Agreement*, pg. 11. *See also* “For NS Traffic only, MSLLC may not perform haulage services for any carrier other than NSR or grant trackage rights or operating rights to KCSR or any Foreign Railroad on the Subject Trackage for NS Traffic [except NSR], absent the express written consent of NSR.” Exhibit C to *Transaction Agreement: NSR-MSLLC Joint Use Agreement*, pg. 8.

¹⁸ NSR may seek to expand that exclusivity to cover a broader geographic territory and lines of business as part of the Proposed Transaction. *See* FD 36500, Description of Anticipated Responsive Application by Norfolk Southern Railway Company (filed January 12, 2022, 5).

CSXT requests that any approval of the Proposed Transaction requires KCS and KCSR to nullify these exclusivity provisions and free KCSR to operate again over the MSLLC line as it could before any restrictive agreements with NSR, able to interchange overhead intermodal traffic moving over the Speedway between points west of Dallas and points east of Meridian, and, as KCSR deems commercially desirable, afford haulage or trackage rights to carriers other than NSR. CSXT also requests that any approval order impose the conditions described below to assure effective competition over the Speedway for all traffic that would benefit from this route.¹⁹

a. The Meridian Speedway Agreements

The Meridian Speedway runs between Meridian, MS, and Dallas, TX, through KCS’ “hub” at Shreveport, LA. Before 2006, KCSR was the sole owner and operator of the rail line between Meridian, MS, and Dallas, TX.²⁰ In 2005, KCS, KCSR, NSR, and AGS entered an agreement to create a joint venture, Meridian Speedway LLC (“MSLLC”), to control the portion of the Speedway between Meridian, MS and Shreveport, LA.²¹ KCS owns 70% of MSLLC and NSR owns 30%. MSLLS Agreements specify that only NSR use the Speedway to transport “NS

¹⁹ The Board should also deny any expansion of the NSR’s exclusive rights to additional traffic and a broader geographic territory described in NSR’s January 12, 2022, that may be proposed by NSR pursuant to its Description of Anticipated Responsive Application (the “NSR’s Speedway Proposal”). FD 36500, Description of Anticipated Responsive Application by Norfolk Southern Railway Company (filed January 12, 2022) at 5. Alternatively, should the Board approve NSR’s proposal to increase its exclusive Speedway arrangements with KCSR, CSXT requests conditions to remove any risk those arrangements would preclude competition for any traffic over the Speedway by granting CSXT similar relief.

²⁰ Except for the portion of the line between milepost 95.26± and milepost 95.7± at Jackson, MS owned by the Illinois Central Railroad Company, a subsidiary of the Canadian National Railway Company.

²¹ See definition of the Meridian/Shreveport line in the *Transaction Agreement*, (December 1, 2005), 1.

Traffic,” defined as *all overhead intermodal traffic on the Speedway not originating or terminating on KCSR* (“NSR Exclusivity Traffic”).²² The same agreements establish that serving such traffic other than through NSR’s exclusive rights was a “Major Decision” requiring NSR’s consent.²³ These provisions have no termination date.

The agreements therefore grant NSR exclusivity, in perpetuity, for the transport over the Speedway of all non-KCS-location intermodal overhead traffic moving east of Meridian and west of Dallas, even though KCSR owns much of the Speedway, has a majority interest in the MSLLC joint venture, operates the portion of the Speedway owned by MSLLC, handled that traffic before entering limiting agreements with NSR, and continues to be capable of handling such traffic today. The Notice of Exemption regarding the Meridian Speedway Agreements suggest that this exclusivity is justified because NSR was willing to provide \$300 million of capital investment in the Speedway, but “it did not want to do so unless it could be assured that other carriers would not use the capacity NS’s investment would help to create.”²⁴

b. Lack of Review of the Meridian Speedway Agreements

On January 17, 2006, three Notices of Exemption were filed with the Board -- concurrently but not consolidated for handling.

First, KCS, KCSR, and MSLLC filed a Notice of Exemption for three transactions within

²² FD 34822, Kansas City Southern, the Kansas City Southern Railway Company, and Meridian Speedway, LLC –Exemption for Transactions Within a Corporate Family filed January 17, 2006, Exhibit D, 4.

²³ FD 34822, Kansas City Southern, the Kansas City Southern Railway Company, and Meridian Speedway, LLC –Exemption for Transactions Within a Corporate Family filed January 17, 2006, Exhibit A, 9-11 (defining “Major Decision”), 13 (defining “NS Traffic”), 29 (requiring NS consent for Major Decisions). *See also id.*, Exhibit B, 6; *id.* Exhibit C, 5-14; *id.* Exhibit D, 4-8.

²⁴ *Verified Notice of Exemption* in FD 34822 filed January 17, 2006, at 5.

a corporate family²⁵: (i) KCS transferred the line between Meridian, MS and Shreveport, LA to MSLLC, (ii) KCS continued in control of MSLLC upon MSLLC becoming a rail carrier, and (iii) MSLLC granted KCSR operating rights over MSLLC to operate as MSLLC's contract operator to fulfill MSLLC's contractual and common carrier obligations. Neither KCS nor KCSR, the parties that filed the Notice of Exemption, sought review or STB sanction of the competitive impacts of the exempted transactions, and the Board neither conducted such a review nor sanctioned those impacts.

Second, NSR filed a notice of exemption for springing trackage rights over the MSLLC between Meridian, MS, milepost 0.0± and 95.26±, and between Jackson, MS, milepost 95.7±, and Shreveport, LA, milepost V-169.85±. NSR could exercise those rights only after a major service standard failure or a permitted asset transfer.²⁶ Absent those occurrences, KCSR, as the operator of MSLLC, would provide haulage for NSR over the MSLLC as provided in the Meridian Speedway Agreements.²⁷

Third, KCSR filed a notice of exemption for trackage rights to operate in local and overhead service on the MCLLC.²⁸

NSR owns 30% of MSLLC. KCS owns 70% of MSLLC and uses its trackage rights over

²⁵ FD 34822, Kansas City Southern, the Kansas City Southern Railway Company, and Meridian Speedway, LLC- Exemption for Transactions within a Corporate Family, filed January 17, 2006.

²⁶ Exhibit C to *Transaction Agreement: NSR-MSLLC Joint Use Agreement*, (December 1, 2005), 6.

²⁷ FD 34821, Norfolk Southern Railway Company-Trackage Rights Exemption-Between Meridian, MS and Shreveport, LA filed January 17, 2006. [Break down haulage further]

²⁸ FD 34823, The Kansas City Southern Railway Company-Trackage Rights Exemption-Meridian Speedway, LLC, filed January 17, 2006.

MSLLC to carry traffic for its own account and, on behalf of MSLLC,²⁹ and to provide haulage for NSR. NSR is the sole service provider of transcontinental intermodal traffic over the Speedway.³⁰

In this Proceeding, the 2006 arrangements governing the Speedway were mentioned only cursorily by witnesses for the Applicants, two of which claimed no direct knowledge of the Meridian Speedway Agreements and none of whom mentioned the market division between KCSR and NSR. If the Board approves the Proposed Transaction without the conditions sought by CSXT, those exclusivity agreements would continue in place and there is a risk they would be exempted from the antitrust laws.³¹

The Board therefore has not analyzed the competitive effects of NSR's perpetual exclusivity, nor approved it. NSR's rights to exclusively move NS Traffic over the Speedway

²⁹ “As the contract operator for MSLLC, KCSR will perform the haulage services contemplated by MSLLC's agreement with NSR, while simultaneously operating over the Line for its own account pursuant to local and overhead trackage rights granted by MSLLC to KCSR.” FD 34822, Verified Notice of Exemption (January 17, 2006), 6. *See also*, “MSLLC shall deliver eastbound NSR Haulage Cars to NSR at Meridian and... westbound NSR Haulage Cars to KCSR and UP... at Shreveport.” Exhibit C to *Transaction Agreement: NSR-MSLLC Joint Use Agreement*, 10. *See also* “MSLLC will hire KCSR to perform as the designated operator ("Designated Operator") for all railroad operations on behalf of MSLLC, including MSLLC railway operations required pursuant to the KCSR Joint Use Agreement and the NSR Joint Use Agreement.” *ibid.*, 1. *See also* “Nothing herein shall be interpreted as prohibiting the Designated Operator from transporting NSR Haulage Cars in a continuous movement operating over both the haulage routes covered by: (i) this Agreement and (ii) the Western Haulage Agreement.” *ibid.*, 10. *See Also*, “NSR's operations over the Subject Trackage shall at all times be subject to the direction and control of the Designated Operator.” *ibid.*, 8.

³⁰ “NSR will be the sole provider, via haulage and trackage rights over the Line, of service for transcontinental intermodal container traffic moving on the Line that does not originate or terminate on KCS's current system and that both (a) originates or terminates in the United States at or east of Meridian and enters or exits the Line at Meridian, and (b) originates or terminates in the United States west of Fort Worth, Texas, and enters or exits the Line at Shreveport.” *See* FD 34822, Verified Notice of Exemption (January 17, 2006), 6.

³¹ *See* 49 USC 11321(a).

were noticed under the “transaction within a corporate family” procedure, which exempts that transaction from regulation. However, this exemption applies only where the transaction meets the specific criteria such that, *inter alia*, it does not result in “a change in the competitive balance with carriers outside the corporate family.”³² Such an exemption does not excuse any adverse competitive impacts of the MSLLC arrangements, and it does not prevent the Board from correcting that situation. “If the notice of exemption contains false or misleading information which is brought to the Board’s attention, the Board shall summarily revoke the exemption for the carrier and require divestiture.” 49 CFR 1180.4(g)(1)(iv). As described below and by Prof. Carey (*see* Carey V.S. 44-52), the restrictions on the type of traffic that KCS can handle over the Speedway and on its ability to interchange with other carriers for service upstream and downstream do have anticompetitive effects in the form of horizontal market division exacerbated by vertical integration. These anticompetitive effects were not revealed or even discussed in any of the notices of exemption, a clear violation of the requirement that Board prior review “is unnecessary to protect shippers from market abuse.” 49 CFR 1180.2(d). The Board has the authority to review and change the Meridian Speedway Agreements that are not consonant with ICCTA and revoke the exemption to the extent the Applicants or NSR contend that the exemption exempts the Meridian Speedway Agreements from competition review under ICCTA.³³

³² “Transactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or *a change in the competitive balance with carriers outside* [emphasis added] the corporate family.” 49 CFR 1180.2(d)(3).

³³ 49 USC 10505d; *see also* 49 USC 10502d: “The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to

Relatedly, Applicants or NSR may argue that even to the extent the NSR exclusivity resulted in anticompetitive economic effects as discussed below, those effects are not specific to the Proposed Transaction. However, any such anticompetitive effects would cast into doubt the validity of the use of the intracorporate transaction procedure to exempt review of the Meridian Speedway Agreements, as this procedure is not available for transactions resulting in a “change in the competitive balance with carriers outside the corporate family.”³⁴ To the extent Applicants or NSR argue instead that the 2006 request for exemption did not, in fact, include a request to exempt the NSR exclusivity agreement, then those arrangements can clearly be abrogated and, in either case, would be subject to antitrust review. And any NSR request for *expansion* of NSR’s exclusive rights to cover new markets as part of the Proposed Transaction would indisputably be transaction-specific.

c. Anticompetitive Concerns Regarding the Meridian Speedway Agreements

The Meridian Speedway Agreements {and other exhibits submitted with the MSLLC Notice of Exemption}³⁵ {and subsequent amendments to those agreements} had two principal

the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title. The Board shall, within 90 days after receipt of a request for revocation under this subsection, determine whether to begin an appropriate proceeding.”

³⁴ Compare STB Finance Docket No. 34822, *Verified Notice of Exemption Pursuant to 49 C.F.R. § 1180.2(d)(3)* at 6-7 (January 17, 2006) (“Pursuant to 49 C.F.R. §1180.d(d)(3), KCS, KCSR, and MSLLC invoke the Board’s class exemption ... for transactions within a corporate family.”), with 49 C.F.R. § 1180.2(d)(3) (2000) (“Transactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family.” (Emphasis supplied)).

³⁵ FD 34822, Kansas City Southern, the Kansas City Southern Railway Company, and Meridian Speedway, LLC –Exemption for Transactions Within a Corporate Family filed January 17, 2006.

competitive effects, neither of which has previously been subject to review by the Board or Antitrust Agencies.³⁶

The first effect was to horizontally divide the markets that NSR and KCSR could serve over the Speedway. Prior to any restrictive agreement with NSR, KCSR was free to offer interline service in conjunction with other carriers for intermodal traffic to and from points east of the Speedway in competition with NSR. In exchange for capital investment on the Speedway, KCSR agreed not to compete with NSR, and instead exclusively to provide haulage, through MSLLC, for NSR's service of NSR Exclusivity Traffic.

Had it occurred in any other industry, the Antitrust Agencies would have scrutinized this perpetual restriction on competition in exchange for a defined investment. In view of the restrictions on KCS's ability to provide competing service,³⁷ the unique nature of the Speedway assets controlled by the joint venture,³⁸ both parties' veto rights over major competitive

³⁶ The U.S. Department of Justice and the Federal Trade Commission

³⁷ *See, e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors 19 ("The Agencies consider whether, to what extent, and in what manner the relevant agreement permits participants to continue to compete against each other and their collaboration, either through separate, independent business operations or through membership in other collaborations In general, competitive concern likely is reduced to the extent that participants actually have continued to compete, either through separate, independent business operations or through membership in other collaborations, or are permitted to do so.")

³⁸ *See, e.g., id.* at 19-20 ("If such resources must be contributed to the collaboration and are specialized in that they cannot readily be replaced, the participants may have lost all or some of their ability to compete against each other and their collaboration, even if they retain the contractual right to do so. In general, the greater the contribution of specialized assets to the collaboration that is required, the less the participants may be relied upon to provide independent competition." (footnote omitted)).

decisions,³⁹ and the indefinite duration of the exclusivity and collaboration,⁴⁰ the agencies would likely conclude that the agreements resulted in a perpetual, significant restriction on competition between KCSR and NSR. The agencies would therefore consider primarily whether this restriction is justified by NSR’s \$300 million investment into the Speedway.⁴¹

To be cognizable, efficiencies resulting from a transaction must be verifiable, not anticompetitive, and not achievable through less restrictive means.⁴² While NSR is likely to argue that its investment in the Speedway generated real efficiencies, and that the investment would not have taken place without some agreement granting NSR exclusive rights to carry some kinds of traffic across the Speedway, it would also have to acknowledge the arrangement’s potentially anticompetitive effects – principally, the closing of the Speedway to traffic destined for other Eastern carriers (discussed more fully below). Antitrust Agencies reviewing this type of collaboration would conduct an extensive analysis to “consider whether cognizable efficiencies likely would be sufficient to offset the potential of the agreement to harm consumers in the relevant market.”⁴³

³⁹ See, e.g., *id.* at 20-21 (“[T]he Agencies consider the extent to which the collaboration’s governance structure enables the collaboration to act as an independent decision maker. For example, the Agencies ask whether participants are allowed to appoint members of a board of directors for the collaboration, if incorporated, or otherwise to exercise significant control over the operations of the collaboration.”).

⁴⁰ See, e.g., *id.* at 21 (“The Agencies consider the duration of the collaboration in assessing whether participants retain the ability and incentive to compete against each other. In general, the shorter the duration, the more likely participants are to compete against each other and their collaboration.”).

⁴¹ See generally *id.* at 23-25.

⁴² E.g., *id.* at 23.

⁴³ *Id.* at 25.

The Agreements’ horizontal restriction unto itself may or may not have passed review for anticompetitive impacts if it had been reviewed. However, whether the horizontal effects of the KCS-NSR market division (which, among other things, ceded a competitive advantage that KCS had for some traffic that NSR might otherwise carry or receive over other gateways) would have passed review by the Board as a pooling⁴⁴ or division of traffic arrangement, or a change of control, or review under the antitrust laws is less significant here than the fact the arrangements creating NSR’s exclusivity of asset control and market division scheme has never been subjected to a competition review. And, absent evidence not in the record of the Board’s 2006 intracorporate transaction exemption proceeding or the record in this Proceeding, it is unclear what conclusion such a review would have reached. In this case, the perpetual nature of NSR’s exclusivity (or market division) enhances the magnitude of potential anticompetitive effects. A reviewing regulator would likely have demanded substantial evidence of the pro-competitive attributes of the collaboration to determine if they outweighed such anticompetitive effects, had such evidence been presented.

The second and interrelated competitive effect of the NSR-KCS agreements stems from the vertical integration of the Meridian Speedway into NSR’s extensive rail network. The arrangement granted NSR exclusive control of upstream (or downstream) service over the Meridian Speedway for NSR Exclusivity Traffic. Prior to the Meridian Speedway Agreements, carriers competing against NSR to serve traffic between Meridian and points east could have

⁴⁴ “A rail carrier providing transportation subject to the jurisdiction of the Board under this part may not agree or combine with another of those rail carriers **to pool or divide traffic** or services or any part of their earnings without the approval of the Board under this section or section 11123 of this title.” 49 U.S.C. 11322(a). Moreover, “The Board may impose conditions **governing the pooling or division...**” 49 U.S.C. 11322(B).

received or delivered traffic in interchange with KCS or through haulage or trackage agreements. The MSLLC Agreements forbade this form of competition: No carrier other than NSR may, in conjunction with KCS, compete with NSR for movements of intermodal traffic that include overhead movements over the Speedway other than to and from KCSR locations.

NSR’s acquisition of exclusive control of overhead intermodal traffic on the Meridian Speedway appears to have resulted in significant foreclosure of competition for service to and from the east end of the Speedway. As Prof. Carey shows, NSR has achieved a nearly { [REDACTED] } market share for overhead intermodal traffic moving over the Meridian Speedway gateway to serve specific lanes connecting west coast and east coast markets not directly served by a single railroad (Carey V.S. at 50, Figures 13 and 14). This result is strongly indicative of anticompetitive effects, and that NSR’s exclusive control of the Meridian Speedway has resulted in market power for this traffic.

That such foreclosure resulted from Meridian Speedway exclusivity would be unsurprising. The Antitrust Agencies consider whether such vertical integration would cause input foreclosure by assessing the integrated firm’s ability and incentive to “profitably use its supply of an input (the related product) to weaken the competitive constraint it faces from rivals in the downstream market (the relevant market).”⁴⁵ The chief mechanisms by which vertically integrating firms may do so is to “raise rivals’ costs by increasing the price or lowering the quality of the [upstream] product” or to “refuse to supply rivals with the [upstream] products altogether.”⁴⁶

⁴⁵ U.S. Dep’t of Justice & Fed. Trade Comm’n, Vertical Merger Guidelines 4 n.4 (2020).

⁴⁶ *Id.* at 4

Antitrust Agencies consider vertically-integrating parties' ability to foreclose downstream competition by determining whether the merged firm could likely cause rivals to lose significant sales in the downstream market or otherwise compete less aggressively for customers' business.⁴⁷ The Guidelines explain this element is not satisfied if rivals can readily switch purchases to alternatives, including self-supply, without a meaningful effect on the price, quality, or availability of products or services in the downstream market.⁴⁸ As explained by Prof. Carey, (Carey V.S. at 49) the Meridian Speedway has a direct route and shorter mileage for certain NSR Exclusivity Traffic moving between the southwest and southeastern U.S.,⁴⁹ whereas interchanges over routes other than the Meridian Speedway may require longer routes or travel over operationally disadvantaged gateways such as New Orleans⁵⁰ and Memphis.⁵¹ Alternative gateways likely are not similarly-efficient routes for some NSR Exclusivity Traffic and they therefore could not constrain NSR's apparent market power for this service.

The Antitrust Agencies consider the integrating parties' incentive to foreclose rivals based on whether the party benefits significantly in the downstream market when rivals lose sales or alter their behavior in response to the foreclosure.⁵² Regarding NSR's exclusive control

⁴⁷ See, e.g., Vertical Merger Guidelines 4.

⁴⁸ *Id.*

⁴⁹ For NS Exclusive rights on Meridian Speedway see "Norfolk Southern Railway Company-Meridian Speedway-Joint Use Agreement", May 2006, 8.1.11-KCSR-HC-00013373 to KCSR-HC-00013408, at KCSR-HC-00013377-82

⁵⁰ See *DiDeo V.S.*

⁵¹ Industry trade press has discussed congestion at Memphis. See Memphis shippers ask STB to intervene on intermodal congestion, Journal of Commerce online, April 21, 2021. Available at <https://www.joc.com/rail-intermodal/intermodal-shipping/memphis-shippers-ask-stb-intervene-intermodal-congestion-20210420.html> ; What's Really Going On in Memphis? Railway Age, June 9, 2021. Available at <https://www.railwayage.com/news/whats-really-going-on-in-memphis/>

⁵² See, e.g., Vertical Merger Guidelines 5.

of NSR Exclusivity Traffic movements over the Meridian Speedway, NSR’s actual market conduct demonstrates its incentives were precisely to foreclose competition. KCSR and MSLLC were prohibited from interchanging NSR Exclusivity Traffic with any carrier other than NSR and, today, no such interchanges occur at Meridian.

d. Proposed Expansion of NSR’s Exclusivity

NSR’s Description of Responsive Application proposes to expand NSR Traffic to include all intermodal, “premium boxcar,” and automotive traffic that originates or terminates west of Shreveport, and east of Meridian, including some (so far only vaguely defined) Mexico traffic.⁵³ Thus, NSR’s exclusive rights would extend to new locations and new shippers and to entirely new lines of business.

NSR’s request to expand the scope of its Meridian Speedway rights to include new geographic areas and lines of business would expand the same integration that occurred in 2006, resulting in apparent foreclosure, regarding those locations and lines of business. Because there are no alternative, similarly-efficient gateways available for the new locations and lines of business that are not available for existing NSR Exclusivity Traffic, the foregoing context raises real concern that an expansion of NSR’s exclusivity would result in additional, prospective foreclosure. More detailed analysis of the likelihood of such foreclosure will be appropriate based upon the details of NSR’s Responsive Application.

e. Conditions Requested

If the Board approves the Proposed Transaction, CSXT requests that the Board condition

⁵³ Description of Anticipated Responsive Application by Norfolk Southern Railway Company, filed January 12, 2022 (NS-6) at 5-6.

its approval on orders that:

1. Abrogate any Meridian Speedway Agreements precluding competition between NSR and CPKC (or any other carrier) from competing through arrangements with CPKC or MSLLC for the movement of what has been defined as NS Exclusivity Traffic to, from, or over MSLLC.

This condition will re-establish the competitive *status quo* before 2006 by removing the limitations on the traffic KCSR can handle alone, or with other carriers – by interchange, haulage, or trackage rights over the Speedway.

2. Deny any NSR Responsive Application or requested condition that would permit NSR to expand its exclusive rights over the Speedway.

This condition will assure that NSR cannot extend its exclusive rights over the Speedway to new geographic areas or new types of traffic. While NSR may be entitled under the MSLLC Agreements and related agreements to additional operating rights over the Speedway (which is a matter for the courts to decide under those agreements), no continuance or expansion should be permitted of the adverse vertical effects on competition posed by NSR's exclusive rights to move large volumes of traffic over the Speedway to and from the East.

3. Require Applicants and MSLLC to establish an efficient interchange between CPKC and CSXT at Meridian, MS and to keep that initial gateway open on commercially reasonable terms.

CSXT can currently receive and deliver traffic interchanged with KCS at Meridian with a G&W subsidiary – MNBR – or directly through haulage over MNBR.

While KCS has other carriers with which it can interchange traffic to and from the East over the Speedway, CSXT is the only Class I carrier that can offer competition with NSR throughout the East for traffic that can move efficiently over the Speedway. CPKC should have to maintain an efficient interchange with CSXT at Meridian.

Such an interchange condition together with a requirement to keep that gateway open will assure competition over the Speedway to and from points in the East and prevent CPKC from diverting traffic that can most efficiently move over the Speedway to other, less efficient routes., (see Carey V.S. at 54 regarding CPKC’s incentives to divert traffic inefficiency).

2. Assuring efficient East-West interchange at New Orleans, LA (“NOLA”).

NOLA is a principal East-West gateway, especially for traffic between the Southeast U.S. and the Southwest U.S. and Mexico.

Since 2006, as explained by Mr. DiDeo in his Verified Statement regarding New Orleans (“DiDeo NOLA V.S.” at 2, Exhibit B hereto) the CSXT interchange with KCSR at NOLA has been constrained by KCSR’s abandonment of certain trackage which resulted in a less efficient interchange with CSXT. Since that abandonment, KCSR, in recognition of the added cost imposed on the CSXT- KCSR interchange, absorbed until 2020 the cost of an alternative interchange route over New Orleans Public Belt {“NOPB”}. Since 2020 KCSR has absorbed most of the NOPB charges. However, KCSR has an option to terminate the Interchange Agreement on 30 days’ notice, effectively increasing CSXT’s cost on interchange traffic by a factor of ten, leading to potential disruption for shippers that would contravene the conditions predicate to KCSR’s eligibility for an exemption under the applicable regulations.⁵⁴ That would have the effect of providing CPKC additional leverage to divert the interchange to a location more favorable to CPKC.

CPKC’s ability to increase CSXT’s costs and plans to divert traffic to less efficient routes

⁵⁴ 49 CFR 1180.2(d)(5).

(see Carey V.S. at 7) means that CSXT can no longer rely on KCSR's economic interest in the NOLA interchange as an incentive to continue to bear the additional cost imposed on the CSXT-KCSR interchange by KCSR's abandonment or to abide by the routing agreed to with CSXT to reduce the impact of KCSR's refusal to bear the cost of NOPB's services.

CSXT requests a condition requiring CPKC to continue to absorb those costs as provided in the agreement attached to the DiDeo NOLA V.S. and to continue interchange with CSXT, by modifying the agreement to be terminable only on mutual consent by the parties.

3. Assuring effective competition is preserved over the KCS route between Kansas City, MO and the KCS-CSX interchange at E. St. Louis, MO. for traffic moving to, from, or through Kansas City to and from points in the Eastern U.S. served by CSXT through E. St. Louis.

Applicants propose to downgrade their use of their line between Springfield, IL, and Kansas City, MO. In response, Canadian National Railway ("CN") has noticed its intent to file a responsive application seeking divestiture of that line.⁵⁵

CSXT can now interchange traffic to and from Kansas City via interchange with KCSR at East Saint Louis, IL ("ESL"), mostly over the via the Springfield line. This route competes with the NSR route between Kansas City and ESL. The KCSR-ESL Line between Kansas City and its interchange with CSXT in East St. Louis is a significant competitive route for traffic moving between the east and Kansas City. Today competition exists between the single-line route between Kansas City and points in the east over the NSR and the joint-line CSXT-KCSR route over East St. Louis. The downgrading of the KCSR-ESL Line and diversion of traffic to Chicago, as proposed by Applicants, threatens to reduce the level of competition NSR faces for

⁵⁵ CN's Description of Anticipated Responsive Application, FD 36500 (CN-10) served January 12, 2022.

traffic to and from Kansas City. As explained in the DiDeo Verified Statement regarding East St. Louis (“DiDeo ESL V.S.” at 1, Exhibit C hereto), the downgrading and diversion will cause slower trains and lower volumes that will degrade service and reduce competition with NSR.

CSXT takes no position regarding a divestiture of the Springfield-Kansas City line. CSXT expects, however, that the portion of that line between ESL and Kansas City will no longer be preferred – by either CPKC or CN – for traffic now moving via Kansas City between shippers on KCSR and CP and shippers on CSXT east of ESL (DiDeo ESL V.S. at 1). Neither CPKC nor CN has a direct route that competes with NSR (which has a route between ESL and Kansas City) directly east of ESL.

To offset this expected downgrade of the KCS route between ESL and Kansas City and to avoid any reduction in competition, CSXT requests that the Board impose a condition on the Proposed Transaction that requires CPKC (or CN if it acquires the line) to maintain commercially reasonable rates and provide service at or above current service levels commensurate with shipper demand to maintain CSXT’s opportunity to compete effectively for traffic that can move most efficiently over the ESL-Kansas City Line to and from points on CSXT east of ESL.

4. Requiring efficient routing and permanent protection for shippers regarding the U.S. effects of CPKC’s Mexican operations.

Any threat to the efficiency of the U.S. rail system is a threat to the public interest and the railroad industry’s ability to increase the value of their capacity to serve the U.S. economy and increase its ability to divert traffic off the highways to railroads.

Especially regarding Mexico traffic over the Laredo gateway (80% of which is served by truck), railroads cannot hope to increase their market share – reducing costs to shippers, highway

congestion, and carbon emissions – unless that traffic can flow over the most efficient rail routes.⁵⁶

One benefit claimed by Applicants for the Proposed Transaction is the more efficient and competitive movement of traffic to and from shippers in Mexico served by CPKC and shippers in the U.S. and Canada. Applicants have not shown how they will fulfill this promise. Instead, Applicants have obscured the details of railroad competition to and from Mexican points served by KCSM. (Carey V.S. at 36). The protections Applicants propose to assure the Proposed Transaction will enhance rather than reduce competition for cross-border movements are vague (Carey V.S. at 24).

A bi-directional assessment of cross-border traffic to and from KCSM stations shows (i) the need for concern that KCSR's dominance of this traffic north of the U.S. Mexico Gateway provides CPKC with the potential incentive and ability to reduce competition and harm shippers, and (ii) the need to impose conditions that assure CPKC cannot abuse KCSM's market power in Mexico. (Carey V.S. at 3, 5, 14, 15, 23, 41).

As explained by Professor Carey (Carey V.S. at 18-19) {{ [REDACTED] [REDACTED] [REDACTED] }}. Applicants project traffic diversions that are inexplicable without CPKC exerting market power or providing unrevealed operation or service advantages in the United States.⁵⁷

As regards movements within the U.S. and subject to the Board's jurisdiction, the Board

⁵⁶ See Carey V.S. at 33-34.

⁵⁷ The potential for uneconomic diversions by CPKC heightens CSXT's concerns regarding the risk that NSR' Responsive Application would continue and expand an inefficient, anti-competitive market allocation that could hurt competition for traffic moving to and from Mexico.

can directly regulate CPKC's adherence to any commitments or conditions imposed in this Proceeding. However, because the Board cannot regulate KCSM, the Board should not approve the Proposed Transaction without conditions to protect shippers from the risk that CPKC will abuse its market power in Mexico to hurt competition or the efficient movement of traffic to, from, or through Mexico and the U.S.

To aid the provision of such protection, the Board should require CPKC to provide shippers with sufficient information about CPKC's pricing and service plans for movements to and from points in Mexico served directly or indirectly by KCSM to, from, or through the U.S.

5. Finally, the Board should require that KCSM and all other CPKC controlled carriers will not economically close any gateway to or from points served by a CPKC controlled carrier.

Respectfully submitted,

/s/ Paul A. Cunningham

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Dated: February 28, 2022

cc: All Parties of Record
ALJ McCarthy

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing CSX Transportation's Comments and Request for Conditions in Docket No. FD-36500, *Canadian Pacific Railway Limited; Canadian Pacific Railway Company; Soo Line Railroad Company; Central Maine & Quebec Railway US Inc.; Dakota, Minnesota & Eastern Railroad Corporation; and Delaware & Hudson Railway Company, Inc. – Control – Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company*, to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

S/ Paul A. Cunningham

Paul A. Cunningham
Attorney for CSX Transportation, Inc.

February 28, 2022

Exhibit A

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36500

**CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY
COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC
RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION;
AND DELAWARE & HUDSON RAILWAY COMPANY, INC. – CONTROL – KANSAS
CITY SOUTHERN, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, GATEWAY
EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN RAILWAY COMPANY**

CSX TRANSPORTATION, INC.'S COMMENTS AND REQUEST FOR CONDITIONS

**VERIFIED STATEMENT OF PROFESSOR JULIE M. CAREY
AND DR. ALBERT W. BREMSER
NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC.
(NERA)**

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I. INTRODUCTION AND SUMMARY CONCLUSIONS

My name is Julie M. Carey. I am an economist and Managing Director with National Economic Research Associates, Inc. (“NERA”). I routinely provide expert evidence before regulatory agencies, including the Surface Transportation Board (“STB” or the “Board”), as well as in commercial disputes before arbitrators and courts. I have approximately 25 years of experience addressing economic issues in the energy and transportation sectors. I have worked on numerous rate reasonableness disputes before the STB by providing economic evidence regarding stand-alone costs and future expectations of volume, revenue, and rates. I also have experience conducting economic analysis within disputes regarding haulage or trackage agreements. My work is routinely focused on economic analysis at the intersection of competition and regulation across energy and transportation industries. I have conducted competition analyses many dozens of times for the purposes of the regulatory approval of mergers and acquisitions, claims of discrimination, manipulation or anticompetitive behavior and for a variety of other purposes including within investigations and commercial disputes. Through my consultancy work, I have substantial experience providing consulting and testifying expert opinions involving competition, negotiated and market-based rates, economic damages, valuation analyses, and other economic analyses within regulatory and commercial disputes associated with transportation and other regulated and unregulated industries. In addition to my economic consultancy practice, I am an Adjunct Professor at Georgetown University, where I teach energy economics and policy in the graduate economics and political economics program, which includes instruction on the economics and regulation of railroad transportation. My Curriculum Vitae is attached as Exhibit 1. I am addressing the competitive aspects in this verified statement (“V.S”).

My name is Albert W. Bremser. I am a financial economist and an Associated Director with National Economic Research Associates, Inc. (“NERA”). I have a Ph.D. in Finance and I am a Chartered Financial Analyst (CFA) charterholder. I apply economic, finance, accounting and quantitative principles to regulatory and non-regulatory matters, which includes railroads. I provide expert evidence before regulatory agencies such as the Federal Energy Regulatory Commission (“FERC”). My Curriculum Vitae is attached as Exhibit 2. My areas of responsibility in this verified statement involve the financial analyses discussed in Section IV.A, IV.C, and IV.D, as supplemented by Professor Carey.

We were retained by Harkins Cunningham LLP on behalf of CSX Transportation (“CSXT”) in this matter to review the Application that is the subject of this proceeding and provide an

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economic opinion. In the Application to the Surface Transportation Board (“STB”), Applicant Canadian Pacific Railway Limited (“CP”) proposes to acquire control of Applicant Kansas City Southern (KCS) and its subsidiaries, including The Kansas City Southern Railway Company (“KCSR”) and Kansas City Southern Mexico (“KCSM”) (the “Proposed Transaction”). The proposed combined company would be called CPKC or CPKCS. Applicants state the Proposed Transaction will combine two end-to-end railroads and lead to more efficient transportation services with no threat to competition.¹

The Applicants’ competition assessment is presented by Dr. Majure, who purports to weigh the potential for reduced competition against the potential benefits of the Proposed Transaction. When evaluating the vertical effects of the Proposed Transaction, Dr. Majure’s assessment assumes that converting interline moves to single line service will result in enhanced efficiencies (citing unreliable claims by others), and that CPKC’s mere promise to keep the “affected” gateways open is sufficient to prevent competitive harm.² Applicants’ Proposed Transaction Benefits, however, are inadequately supported and highly uncertain. The majority of Applicants’ claimed efficiencies are not efficiencies but revenue diversions and potential private benefits that would accrue solely to Applicants. Applicants identify few potential expense or cost savings attributable to the Proposed Transaction that could be passed on to customers.

Dr. Majure provides an incomplete and inadequate competition analysis in support of the Applicants’ claim that the Proposed Transaction poses no threat to competition and his conclusion that the Proposed Transaction will likely enhance competition.³ The analysis is particularly deficient regarding potential harm relating to traffic to and from points in Mexico under KCSM’s substantial market power. A more granular and complete vertical effects analysis requires a review of traffic moving south to Laredo (instead of just north of Laredo as assumed by Dr. Majure) and of specific customer locations for all traffic moving to and from KCSM points (instead of broad regions).

Conducting this expanded market share analysis demonstrates the potential of the combination of the two networks to adversely affect competition because it shows {{ [REDACTED] [REDACTED] }} Economic analysis demonstrates that the multitude of locations not

¹ Railroad Control Application, Canadian Pacific Railway Limited; Canadian Pacific Railway Company; Soo Line Railroad Company; Central Maine & Quebec Railway US Inc; Dakota, Minnesota & Eastern Railroad Corporation; and Delaware & Hudson Railway Company, Inc. – Control – Kansas City Southern; The Kansas City Southern Railway Company; Gateway Eastern Railway Company; and The Texas Mexican Railway Company, Docket No. FD 36500, filed October 29, 2021 (Application). KCSM is not an Applicant and Applicants contend KCSM is not subject to the Board’s jurisdiction. Hereafter, “CPKC Application”.

² Verified Statement of Dr. Majure, CPKC Application, October 2021 V.S., ¶ 15-19. Hereafter, “Majure V.S.”.

³ Id. ¶ 24.

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available to KCS/KCSM prior to the Proposed Transaction provide CPKC with the potential ability to adversely affect competition for traffic movements to and from Mexico after the Transaction. They will provide the Applicants an increased incentive and ability to reduce competition and harm shippers by economically eliminating or foreclosing rival railroads from the U.S. segments of these moves with a profitable pricing strategy (an analysis that Dr. Majure could have conducted but did not).

Substantial current and future cross-border rail traffic with Mexico is expected through the Laredo Gateway and it is important for the overall efficiency of the North American railroad network to ensure that traffic movements involving Mexico can move over the most economically efficient routes, consistent with the public interest. Properly analyzed, the Proposed Transaction could potentially impair competition related to Mexico which is best addressed through conditions set by the STB to ensure that shippers to and from Mexico and the U.S. are assured the opportunity for competition on commercially reasonable terms (and service) with CPKC from carriers north of the Laredo gateway. Requiring commercially reasonable terms should extend to all gateways used for traffic movements to and from Mexico as there are many shipper locations impacted. In doing so, the STB should also allow shippers to challenge rates and service for all segments of cross-border movements and secure remedies that, absent conditions would not be available because of limits on STB jurisdiction.

Most of Applicants' asserted transaction-related public benefits – roughly \$888 million annually in a normal year and \$1 billion in 2025⁴ – are not public benefits, but are primarily private benefits that will accrue solely to CPKC through the diversion of revenue from other railroads (81%). Further, these benefits are predominantly associated with traffic diversions to routes where CPKC has longer and disadvantaged routes and to routes where these diversions could be secured without the Transaction.

The Applicants' supported benefits are much lower than their total claimed benefits and much smaller as a proportion of transaction costs than those demonstrated in prior large railroad transactions. This should lead the Board to review whether the Applicants' incremental debt⁵

⁴ Public Version of Application, App. Vol. 1, p. 19. "As described in the Summary of Benefits Exhibit attached as Appendix B to this Volume, quantified public benefits would be more than \$880 million annually in 2019 dollars."

⁵ Applicants identified incremental debt of \$8.5 billion. This figure appears to exclude a small amount of annual incremental dividends (\$82 million), that if added, would be consistent with the STB's statutory definition of fixed charges (Section 1180.6(a)(2)(iii)). See Application, App. Vol. 1, p. 22. and Exhibit 18, pp. 7 -10; App Vol. 1. pp. 150-153.

incurred for this Proposed Transaction can be supported by the potential additional revenues or costs savings from the Proposed Transaction.

Finally, the Applicants' public benefits analyses are not tailored specifically to the U.S. and do not quantify the cost savings or private benefits limited to the U.S., thereby limiting the Board's capacity to ascertain the Proposed Transaction is consistent with the public interest of the United States.

In addition to these aspects of the Application, I also discuss the potential for further competitive harm to customers in the Eastern U.S. that results from the KCS and Norfolk Southern Railway Company ("NSR") Meridian Speedway Agreements and could be aggravated as a result of the transactions described in NSR's Description of Anticipated Responsive Application.⁶ These anticompetitive concerns arise from the Meridian Speedway's use of an explicit market allocation scheme that divides the control of certain geographic areas and products between KCS and NSR and has vertical effects that reduce competition. This type of market division is prohibited by antitrust agencies and was exempted from regulatory review by the STB with no competition analyses.

The Meridian Speedway agreements enabled NSR to vertically integrate (economically) across the Meridian Segment into its Eastern rail system (by eliminating KCS's segment), providing NSR with exclusive access from Shreveport to Meridian for transcontinental intermodal traffic for specific origin and destination location pairs in the Southwest and Southeast U.S. that are advantaged on the Meridian Speedway route. The southeastern U.S. locations were not previously served by KCS. Both NSR's existing exclusive rights and its proposed expansion of those rights raise anticompetitive concerns and distort competition between NSR, KCSR, and CSXT for NS Traffic for which the most efficient route is over the Speedway. This type of market division, which serves only to reduce competition in vertically affected markets, is prohibited by antitrust agencies and this market division was never reviewed by the STB with respect to its effect on competition.

The Board should not approve the Proposed Transaction without conditions to mitigate the risks it presents for competition. Most important, NSR's exclusive right to move "NS Traffic" (hereafter referred to as "NSR Exclusivity Traffic") over the Meridian Speedway should be abolished and CPKC be freed to work with its connecting carriers to develop commercially reasonable terms to interchange or otherwise move traffic that is carried over the Meridian Speedway. To the extent the Board approves NSR's request to expand its market division to additional products and a broader

⁶See STB Finance Docket No. 36500, Description of Anticipated Responsive Application by Norfolk Southern Railway Company, January 12, 2022.

geographic scope, additional conditions to protect competition should be imposed.⁷ Without conditions, any such expansion would further diminish competition in Eastern railroad markets for traffic movements across the Meridian Speedway.

II. APPLICANTS' COMPETITION ANALYSIS IS INCOMPLETE AND RAISES UNIQUE ISSUES REGARDING MEXICO THAT WARRANT FUTURE CONDITIONS

Regarding the potential harm to competition, Applicants' witness, Dr. Majure, provides an incomplete and inadequate competition analysis, particularly regarding potential harm relating to traffic to and from points on KCSM in Mexico.⁸ A complete vertical effects analysis of traffic involving Mexico under KCSM's substantial market power should include: (1) analysis of traffic moving south to Laredo (instead of just north of Laredo as assumed by Dr. Majure), based on (2) analysis of specific customer locations (rather than just the broad geographic areas—Mexican states, BEAs in the U.S., and Economic Regions in Canada) assessed by Dr. Majure.⁹ These more granular analyses show {{ [REDACTED] }} than Dr. Majure's analysis and confirm the need for further assessment of anticompetitive effects from the Proposed Transaction, including evaluating potentially profitable pricing strategies to foreclose rivals.

Based on my analysis below, with KCSM's substantial market power of railroad movements entering and exiting the U.S. for its customers, and KCS's dominance of movements to and from KCSM at Laredo, the expanded CPKC network locations, the combined CPKC could potentially impair competition through vertical effects absent conditions by the STB to ensure that the important Laredo gateway (and all gateways used for traffic movements to and from Mexico) remain open on commercially reasonable price and service terms for rivals such that competition is not distorted, including allowing future challenges to rates and service.

⁷ I understand that CPKC plans to address NSR's proposed expansion in their forthcoming filing. I will supplement my opinion and address the NSR proposal.

⁸ My assessment of the potential competitive effects is limited to the vertical effects and not the potential horizontal effects due to time limitations.

⁹ Broad geographic areas are not appropriate in Dr. Majure's vertical effects analysis because they do not accurately portray station level access, which is necessary to serve most shippers, like automotive plants. This is distinct from analysis of intermodal flows in other part of this opinion.

A. Efficiency Considerations for a Competitiveness Assessment

Dr. Majure's assessment of the potential vertical effects from the Proposed Transaction relies in part on claims by others that converting interline moves to single-line service will increase economic efficiency. Dr. Majure uses the statements of CP Witness Brooks to support the Applicants' contention that shifting from interline service to single-line service will enhance efficiency and for the sufficiency of Applicants' promise to keep the gateways open.¹⁰ Dr. Majure did not independently study any anticipated changes to traffic flows and assumed traffic will be diverted as projected by other witnesses. Dr. Majure relies on the proposition that CPKC can compete with other railroads (and therefore effectuate Applicants' Transaction related Benefits) through the demonstration of "diverted traffic," presented by other Witnesses."¹¹ From those assumed future efficiencies, Dr. Majure infers that the proposed vertical transaction provides the opportunity for procompetitive benefits.¹² He does not, however, investigate those asserted opportunities.¹³ And the assertions he relies on are not reliable.

Applicants' claimed Total Transaction Benefits (supporting their contention of procompetitive benefits) include substantial incremental profits from traffic diversions¹⁴ away from competitor railroads, trucks, or other growth initiative traffic. However, Applicants' claimed Total Benefits are inadequately supported and uncertain. The majority of their claimed Total Benefits would produce only potential private benefits that would accrue solely to the Applicants. These private benefits are 81% of the Total Benefits claimed by Applicants. Potential public benefits from anticipated Transaction-related cost savings (discussed in Section IV below) are only 19% of claimed Total Benefits.

Applicants' incremental profits from traffic diversions that are estimated by others are referenced by Dr. Majure to support his claim that merger efficiencies will enhance competition due

¹⁰ "All of these difficulties suggest that the reason interline service is inferior to single-line service is that separate railroads are limited in what they can do to align their incentives with respect to joint operations – limitations that fit into the model of vertical mergers enhancing efficiency by enabling more efficient coordination." Majure V.S., ¶ 17.

¹¹ "...[A]s a result, the combined CP/KCS product would be expected to divert some traffic from other railroads" and you rely on other witnesses for any possible assumed and traffic diversion to CP/KC (relying on Mutén, Wahba Naantz and FTI (Brown Zembrowski))" Majure V.S. ¶18 and footnote 8. {}

Majure V.S. ¶ 10.

¹³ Dr. Majure has presented no specific analysis to quantify potential benefits from vertical integration. In deposition. {}

Applicants' traffic diversions are sponsored by three witnesses, including rail diversion (Brown/Zembrowski), truck to rail diversions (Mutén) and growth initiative volumes (Wabba and Naantz).

to the “single-line service.”¹⁵ However, the Applicants’ traffic diversions include many that they expect to be diverted to Applicants’ longer and otherwise disadvantaged routes as well as many that can be realized by CP and KCS independently without the Proposed Transaction.¹⁶ They contend no rate reduction is required in most instances to effect those diversions.¹⁷

Figure 1 below shows CPKC’s Laredo to Chicago route that is longer and more circuitous than UP’s (CPKC is approximately 24% longer than UP).¹⁸ This is just one prominent example of CPKC’s inefficient routing as compared to other railroad carriers (as discussed in Section IV.B below. Nearly {{[REDACTED]}} of the Applicants’ claimed traffic diversions involve railroad movements between Mexico and the upper Midwest U.S., including to and from Chicago.¹⁹ Notably, in his comments on the proposed CN-KCS merger, {{[REDACTED]}} a process which is inconsistent with the assumptions employed by the witnesses he relies on in this instance.²⁰ None of these asserted traffic diversions involving Mexico are based on rate reductions.

¹⁵ Majure V.S. ¶ 15-19. {{[REDACTED]}}

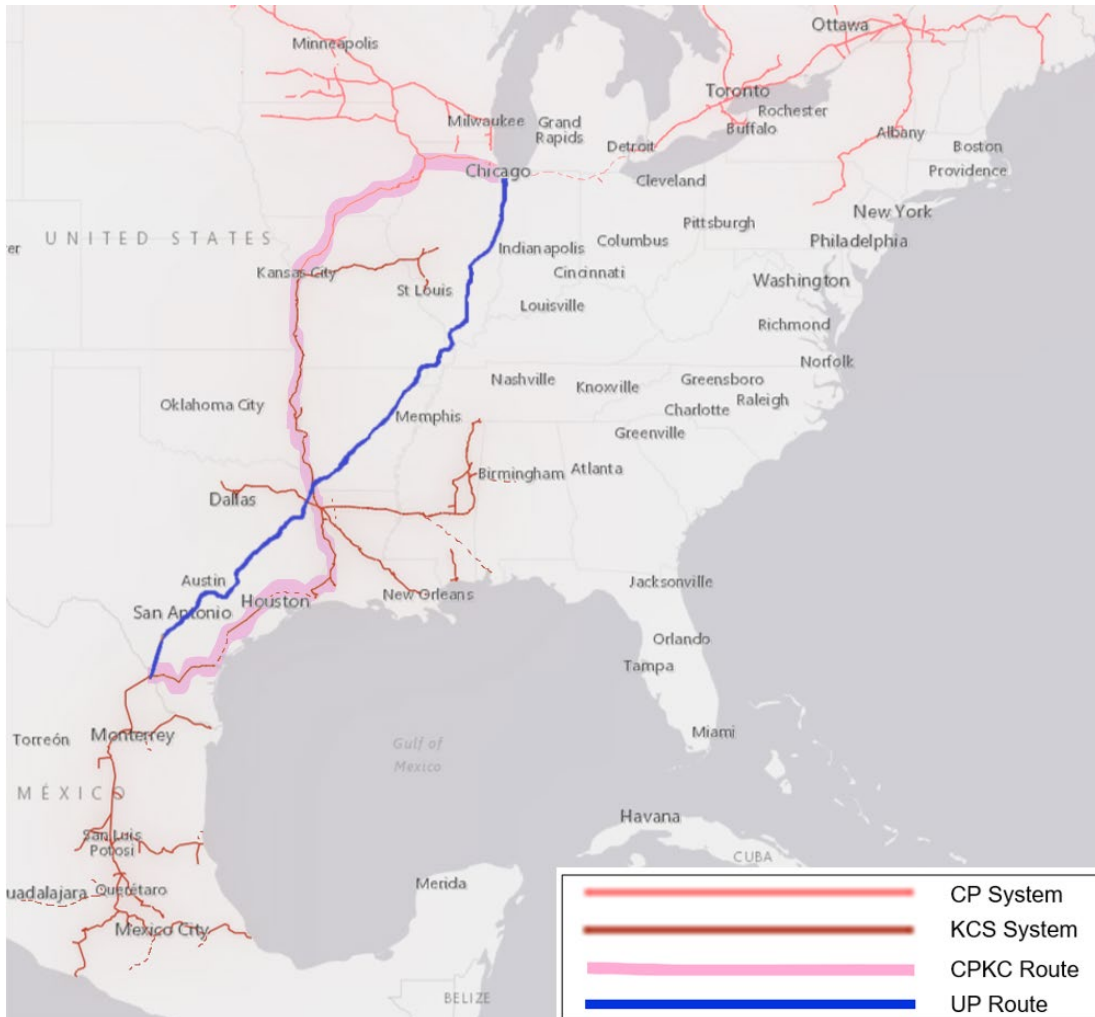
See Section IV. B and Carey HC-WP “Rail and Truck Diversions.pdf” and HC-WP “Growth Initiative.pdf” for CPKC routes that compete with other railroads.

¹⁷ The primary single route that Applicants contend that rail rates will be reduced is {{[REDACTED]}}.

¹⁸ $24\% = (1724/1390) - 1$

¹⁹ {{[REDACTED]}} out of 509,490 units. When considering all diversions to all destinations and origins, over {{[REDACTED]}} of diversion units involve routes which include Mexico. See Carey HC-WP “Mexico Diversion Claims.xlsm.”

²⁰ See Majure CN V.S. ¶ 88. {{[REDACTED]}} See Brown and Zebrowski HC-WP “8-Diversion Identification.xlsx”

Figure 1: CPKCS' Rail Route from Laredo to Chicago versus UP

The principal economic efficiencies associated with vertical transactions in the railroad industry are cost reductions, including reductions in operational costs from efficiencies and reduced overhead.²¹ These reduced costs can be passed along to shippers in the form of reduced rates. This is especially true of transactions that convert interline traffic to single line traffic. Prior STB mergers, and analysis of these mergers, identify reduced rates as a principal indicator of economic efficiency

²¹ See Scherer, F.M., and Ross, David, "Industrial Market Structure and Economic Performance", Third Edition, pp. 524-527. See Utton, M.A., "Market Dominance and Antitrust Policy", Edward Elgar Publishing Limited, 1995, pp 216-219. See also Carlton, Dennis W. and Perloff, Jeffrey M., "Modern Industrial Organization", Fourth Edition, 2005, at pp. 415-416.

justifying vertically integrating transactions.²² These more dated transactions occurred a time with challenges with excess rail capacity and ample opportunities to reduce costs and to benefit shippers.

Cost reductions can be achieved through the conversion of interline service to single-line service, (also called vertical integration), by removing the margin (above variable cost)²³ that each carrier requires to service the traffic, and replacing it with only a single margin required by the single railroad operating single line service.²⁴ Additionally, there are greater opportunities to reduce the margin through cost reductions from removal of redundancies in each railroad's operations, such as general and administrative functions, procurement, and other duplicative overhead costs. The more these types of costs can be reduced, the stronger the overall Transaction benefits. Taken together, the cost reductions and improved operating efficiencies will benefit the customers with improved service and likely lead to rate reductions in the future. Therefore, Applicants' position that no rate reduction is needed to entice shippers to use its single line service to and from Mexico (and most other claimed traffic diversions) requires close inspection. Dr. Majure does not directly address expected cost and rate reductions as a recognized economic efficiency benefit in this case. However, he did so when he discussed whether a {{ [REDACTED] }} likely raises concerns of reduced competition and contrasted that with a {{ [REDACTED] }}.²⁵ Keen focus on the Applicants' projected cost reduction is needed to determine if the Proposed Transaction is likely to result in procompetitive benefits from the creation of single line service (as Dr. Majure concludes).²⁶

²² An analysis of 1985-2005 U.S. freight rail data demonstrates that average prices of shipments decrease by approximately 15% following railroad mergers, the majority of which is owed to re-optimized routing and network changes. *See* Chen, Yanyou, "Efficiency Gain from Mergers: Evidence from the U.S. Railroad Network", September 4, 2021. *See also* Berndt Et Al., "Cost Effects of Mergers and Deregulation in the U.S. Rail Industry", *The Journal of Productivity Analysis*, 4, 127-144 (1993). The STB has stated that "[t]he primarily end-to-end (vertical) integration of the rail operations conducted by BN and Santa Fe will enable the consolidation carrier to reduce the costs it incurs and to improve the services it provides. Shippers should benefit from lower rates and improved service, including new single-line service." *See Burlington Northern Inc. et al. – Control and Merger – Santa Fe Pacific Corporation et al.*, Finance Docket No. 32549 (Decision No. 38 decided Aug. 16, 1995), 10 I.C.C.2d.

²³ The margin (above variable cost) and contribution margin are terms used in the railroad industry to refer to the revenue in excess of variable cost or mark-up over variable cost. Margin or contribution margin are used to evaluate the additional monies available to the railroad above the incremental cost to serve the traffic that can contribute the overhead functions of the railroad and the broader network investment activities.

²⁴ The multiple lumps are also referred to as double marginalization. *See* U.S. Department of Justice & The Federal Trade Commission, "Vertical Merger Guidelines", June 30, 2020, at Section 4a. Antitrust agencies consider the net effect on competition of the vertically merged unilateral incentives (e.g. foreclosure and elimination of double marginalization).

²⁵ {{ [REDACTED] }} *See* Expert Statement of W. Robert Majure, Finance Docket No. 36514, Canadian National Railway Company, Et Al. – Control – Kansas City Southern, Et Al., June 28, 2021 ("Majure CN V.S.") ¶ 86 and 38.

²⁶ *See* Scherer, F.M., and Ross, David, "Industrial Market Structure and Economic Performance", Third Edition, pp. 524-527. *See* Utton, M.A., "Market Dominance and Antitrust Policy", Edward Elgar Publishing Limited, 1995, pp 216-219. *See also* Carlton, Dennis W. and Perloff, Jeffrey M., "Modern Industrial Organization", Fourth Edition, 2005, at pp. 415-416.

To further assess the potential economic efficiencies from the Transaction and the extent of potential pro-competitive benefits, I investigated the Applicants' anticipated cost savings from the Proposed Transaction. The small cost savings benefits forecast by Applicants suggests a limited impact on future customers.²⁷ Notably, the limited anticipated cost savings from the Proposed Transaction are not comparable to those expected from prior railroad consolidations. Applicants in those prior transactions forecast substantial Transaction related cost saving, which provided the STB with a more reliable expectation of future benefits and rate reductions.²⁸ The Proposed Transaction offers fewer opportunities for cost saving than prior Major Transactions. And those opportunities would be handicapped because CPKC's routes are longer and otherwise disadvantaged as compared to competing routes. Consequently, CPKC has fewer opportunities to produce the public efficiency benefits that justify vertical transactions. As I discuss above, Applicants' failure to project significant cost savings or rate decreases is an important consideration in a vertical effects assessment.

Regarding potential opportunities for economic efficiency gains associated with CPKC's conversion of interline service to single line service, the Applicants make general claims but provide limited evidence or analysis. First, the CP business witness supporting the efficiencies from the single line offering (Mr. Brooks),²⁹ which consist of {{[REDACTED]}} traffic diversions involving Mexico,³⁰ confirms no "hard analysis" was conducted with respect to CPKC competitiveness compared to UP or BNSF and he has no sales experience with Mexico to draw upon in such estimates.³¹ Indeed, in the normal course of business prior to the announcement of the Proposed Transaction, CP's acknowledged {{[REDACTED]}}
 {{[REDACTED]}}.}}³²

²⁷ It is unclear why Applicants' Transaction benefits include limited cost savings, but this could potentially arise because of the lesser contribution margin that KCS has observed in recent years and exists in the Pre-Transaction state which would limit the opportunity to reduce overhead. *See* Surface Transportation Board's 2018 Determination of Railroad Revenue Adequacy, Docket No. EP 552 (Sub-No.23) (STB served September 5, 2019).

²⁸ *See* Section IV.B for a discussion. Applicants' cost savings benefit on a percentage basis are lower than other transactions due to the very large private benefits.

²⁹ Mr. Brooks describes lessons learned from prior interline agreements to contrast with "full potential of single-line service". *See* Brooks V.S ¶ 28-36 at 36.

³⁰ {{[REDACTED]}} out of 509,490 units. When considering all diversions to all destinations and origins, over {{[REDACTED]}} of diversion units involve routes which include Mexico. *See* Carey HC-WP "HC-Mexico Diversion Claims.xlsm."

³¹ {{[REDACTED]}}

Applicants provide no analysis of route distance, cycle times, or other specific service quality elements unique to CPKC single line movements compared to its competitor railroads (with shorter routes and other advantages).³³ UP's route from Laredo to Chicago is about 24% shorter than CPKC. Challenges with curvatures and hills on CP's system between Davenport, Iowa, and Kansas exist as well as steeper grades near the Des Moines River Valley that impact CPKC transit times—a route that most claimed traffic diversions will traverse.³⁴ The strength of UP's "spine" between Minneapolis and Kansas City as well as UP from Dallas and Topeka, KS has been noted in industry trade press.³⁵ Absent specific analysis, as opposed to general claims based on "experience"³⁶ it is impossible to make a reasoned assessment of, whether and to what extent, CPKC could attract shippers away from the existing competitors. Dr. Majure did not the investigate service-related quality differences (if any) to enhance CPKC's competitiveness.³⁷ Other witnesses that Dr. Majure relies on for diversions do not identify specific distinguishing service attributes of CPKC that other

Updated Synergies Estimates – Proposed Adjustment, July 1, 2020, CP-HC-00007375 to CP-HC-00007383 at CP-

Trade press document additional challenges with CP's network route as compared to UP. See Journal of Commerce online, "Merged CP-KCS would offer new cross-border intermodal growth ramp", April 2021. Available at <https://www.joc.com/rail-intermodal/class-i-railroads/canadian-pacific-railway/merged-cp-kcs-offers-new-cross-border-intermodal-growth-ramp-20210325.html>; "The CP route will require more locomotives and miles due to the route profile south of the Quad Cities and will be more expensive to operate compared to Union Pacific and BNSF." The Spine Line refers to UP's track between Minneapolis and Kansas City. Kayganich anticipates similar challenges to providing timely service between Shreveport, Louisiana, and Kansas City, compared with UP's track between Dallas and Topeka, Kansas."

³⁵ Ibid.

³⁶ { }

In deposition testimony, { }

railroads lack and do not analyze CPKC routes with other market competitors' rates or compare service attributes.³⁸

Regarding the CPKC operating plan, while Applicants claim to {{ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }}

^{39, 40} Applicants also did not consider the potential growth of traffic from other carriers on shared routes in Texas, which could cause unforeseen service delays.⁴¹ Applicants' responses to interrogatories regarding competitively significant service elements {{ [REDACTED]

[REDACTED] }}⁴² In sum, the Application does not adequately demonstrate tangible and likely enhanced efficiencies that are assumed by Dr. Majure in his vertical effects analysis and which he concludes create opportunities for procompetitive benefits.⁴³ The lack of that support renders his analysis incomplete and, from the perspective of standard competition analyses, inadequate to support any conclusion that the Proposed Transaction poses "would not

³⁸ Brown/Zebrowski V.S. ¶ 19-98; Mutén V.S. ¶ 45-52; Majure V.S. ¶ 18

³⁹ In deposition testimony {{ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] }}
[REDACTED] }}

⁴² See deposition of Mr. Elphick and Mr. Orr generally at 80-155 and 155:10-19.

[REDACTED]
[REDACTED]
[REDACTED] }}

⁴³ Majure V.S. ¶ 10, 15-19.

substantially lessen competition.”⁴⁴ Additional analysis would have been expected before the antitrust agencies⁴⁵ including within a legal proceeding.⁴⁶

Regarding assurances regarding gateways, Dr. Majure also relies on other witnesses (Brooks)⁴⁷ to support the contention that the existing gateways with other carriers will remain open.⁴⁸ The plausibility of this assumption is a cornerstone of Dr. Majure’s assertion that the Proposed Transaction will have no negative vertical impacts on competition that would reduce the claimed efficiencies from the Proposed Transaction.⁴⁹ Dr. Majure appropriately recognizes the importance of both service and rates to ensure transportation jointly provided with competitors, or would-be competitors, is not subject to competitive harm by CPKC. However, the witness Dr. Majure relies on for concluding CPKC will not discriminate against other carriers at Laredo—the only gateway Dr. Majure examines—is CP’s Executive Vice President and Chief Marketing Officer John Brooks.⁵⁰ Mr. Brooks only provides general and non-specific commitments that lack reliable guarantees.⁵¹ CP commits to working with shippers but does not promise concrete standards that would ensure that CP (1) sets commercially reasonable rates (and does not directly or indirectly raise rivals costs; and (2) provides service on a non-discriminatory basis, with no service related distortions involving rival railroads.⁵² Mr. Brooks’ vague and limited commitments provide no concrete assurance that CPKC will actually keep all of its gateways open.

⁴⁴ “...not likely to impair competition through vertical effects.” *Majure V.S.* ¶ 10, 24.

⁴⁵ The 2020 Vertical Merger Guidelines Section 4a “Unilateral Effects – Foreclosure and Raising Rivals’ Costs” discusses the potential for a merged firm to profitably use its control of a related product to weaken or remove the competitive constraint from rivals in the relevant market (e.g., increase price or lower quality of the related product, or refuse supply to rivals entirely). *See* U.S. Department of Justice & The Federal Trade Commission, “Vertical Merger Guidelines”, June 30, 2020, at pp. 4-6.

⁴⁶ For an illustrative example of empirical analysis, *see* Shapiro, Carl, “Vertical Mergers and Input Foreclosure Lessons from the AT&T/Time Warner Case”, *Review of Industrial Organization* (2021) 59:303–341.

⁴⁷ *Majure V.S.* ¶ 17; *Brooks V.S.* ¶ 6-12, 28-36.

⁴⁸ *Brooks V.S.* ¶ 42-46.

⁴⁹ *Majure V.S.* ¶ 15 -19.

⁵⁰ *Brooks V.S.* ¶ 1.

⁵¹ {{

[[

}}

Economic literature recognizes that the potential for refusal to deal exists when a monopolist of an indispensable input is vertically integrated in a consolidation.⁵³ While KCS made general commitments in acquiring the Tex-Mex and the STB required conditions,⁵⁴ any evaluation here must focus on the Proposed Transaction, not Tex-Mex. Applicants have not asked the STB to impose a condition on the Proposed Transaction like the one it required in Tex-Mex.⁵⁵ Yet the Proposed Transaction presents circumstances and potential competitive concerns different from those of any prior Transaction. It is distinctive because of international components not regulated by the Board, coupled with the substantially expanded geographic scope of potentially affected customers (as discussed below). Most important, CP serves substantial traffic and revenues that originate or terminate in Mexico (on KCS via KCSM).⁵⁶

B. The Remainder of Applicants' Vertical Effects Analysis is Incomplete and Insufficient

If Applicants' expected diversions, which appear to be dramatically overstated, fail to materialize, the financial risks and pressures associated with the high Transaction price and substantial debt incurred by the new entity⁵⁷ could heighten CPKC's incentive to reduce competition to recoup transaction-related costs.

Dr. Majure provides an incomplete and inadequate competition analysis for the Proposed Transaction, particularly regarding potential harm relating to traffic to and from points on KCSM in Mexico. When evaluating vertical effects on competition, regulatory agencies (including antitrust agencies), assess the ability and incentive of the merged entity to engage in unilateral actions that

⁵³ See Scherer, F.M., and Ross, David, "Industrial Market Structure and Economic Performance", Third Edition, pp. 524-527.

⁵⁴ The acquisition by KCS of control of Tex Mex was approved by the STB subject to certain conditions that were imposed to ensure the transaction wouldn't result in competitive harm. See Decision No. 12, STB Finance Docket No. 34342, Kansas City Southern – Control – The Kansas City Railway Company, Gateway Eastern Railway Company & The Texas Mexican Railway Company, Service Date November 29, 2004 at pp. 13-14, 18-19. See also {{{

See Carey HC-WP "HC-Mexico.pdf"

⁵⁷ See Section IV.D.

may lessen competition.⁵⁸ The purpose of such an analysis is to evaluate CPKC’s ability to cause anticompetitive harm by raising rivals’ costs or creating other impediments to their ability to compete⁵⁹ as a result of the integration of an upstream input into the downstream product.⁶⁰

As a starting point, Dr. Majure does not give due consideration to the fact that KCSM both originates and terminates cross-border U.S. – Mexico rail traffic movements. Economic concerns regarding both destinations and origins on KCSM’s network in Mexico, where KCSM enjoys substantial market power, warrant detailed inspection. Specifically, since railroad movements on Applicants’ system are bidirectional (north to south and south to north) the vertical effects analysis should study the integration of the upstream KCSM/KCS into the downstream CP, as well as the upstream CP into downstream KCSM/KCS. However, Dr. Majure did not consider the latter which involves railroad transportation to destinations in Mexico.⁶¹

KCSM has substantial market power over most traffic moving to and from KCSM over Laredo.⁶² The primary railroad competitor to KCSM in Mexico is Ferromex (“FXE”). While FXE has certain trackage rights to access customers on KCSM’s network, its rights are limited to domestic traffic movements and FXE cannot use these trackage rights for export/import traffic.⁶³ Within Mexico, KCSM serves substantial intermodal and automotive traffic, with certain locations directly connected to FXE’s longer route to the US through UP.⁶⁴ Dr. Majure’s limited reference to potential railroad competition in Mexico and FXE is solely theoretical in nature, and therefore, insufficient to

⁵⁸ For instance, rival foreclosure. See U.S. Department of Justice & The Federal Trade Commission, “Vertical Merger Guidelines”, June 30, 2020, at section 4a. While the FTC withdrew the 2020 Vertical Merger Guidelines, it recognized the substantial improvements over the prior 1984 Merger Guidelines on this topic. See Federal Trade Commission, “Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines Commission File No. P810034”, September 15, 2021, at 2.

⁵⁹ Ibid. For a seminal article on this topic, see Salop, Steven C.; Scheffman, David T; “Raising Rivals Costs”, American Economic Review, May 1983, v. 73, iss. 2, pp. 267-71. For an illustrative example of an empirical analysis of raising rivals’ costs, see Shapiro, Carl, “Vertical Mergers and Input Foreclosure Lessons from the AT&T/Time Warner Case”, Review of Industrial Organization (2021) 59:303–341.

⁶⁰ Ibid.

⁶¹ The need to conduct analysis of destination markets has been raised in prior mergers. See Burlington Northern Inc. and Burlington Northern Railroad Company–Control and Merger–Santa Fe Pacific Corporation and the Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549, Decision No. 38, Service Date August 23, 1995 at pp. 48-49 and other cases referenced.

⁶² See Carey HC-WP “HC-Mexico.pdf”

⁶³ FXE has a trackage agreement to access KCSM customer locations for the sole purpose of traffic movements within Mexico (i.e., no cross-border trade with the U.S.). “In 2010, Ferromex and KCSM finally reached agreement on the most important segments: access by KCSM to Guadalajara and Silao, and access by Ferromex to the main KCSM line from Viborillas to Ramos Arizpe. These agreements will expand competitive access for domestic traffic. However, the companies agreed not to use these trackage rights for export/import traffic” See 2014 OECD, “Freight Railway Development in Mexico”, p. 24, available at <https://www.itf-oecd.org/sites/default/files/docs/14mexicorail.pdf>

⁶⁴ While automotive facilities require specific station level access due to the specifics of transporting that commodity, certain locations on KCSM automotive traffic locations do have competitive access to FXE. See Carey HCWP “HC-Mexico.pdf”

support any conclusion regarding the potential for harm to competition from the Proposed Transaction.⁶⁵ FXE has a separate rail line west of KCSM that interchanges traffic movements with UP at Eagle Pass, TX (which is west of Laredo).⁶⁶ An investigation of Mexico's railroad rate regulatory regime indicates that railroads have regulation through price caps by commodity type and distance that allows pricing flexibility that can be used by KCMS to affect shippers' opportunities to use of competitive railroad rivals to CPKC north of Mexico.⁶⁷ The Proposed Transaction will create incentives for anticompetitive behavior that were not present pre-Transaction, particularly if financial pressures exist to pay the incremental transaction debt and heightened competition results in few traffic diversions.

Dr. Majure's vertical effects analysis is limited to an assessment of market shares for traffic moving north from a large area in Mexico⁶⁸ through Laredo to broad geographic market areas in the U.S. and Canada.⁶⁹ He did not assess the potential for competitive harm regarding traffic moving south to Mexico.⁷⁰

Regarding this limited set of northbound traffic, Dr. Majure's assessment of the vertical effects of the Proposed Transaction were not sufficient to support his conclusions. Dr. Majure reviewed a market share of all the traffic that KCSM brings to Laredo from Mexico and analyzed

⁶⁵ Majure V.S. at ¶ 24-5. Dr. Majure refers to vertical effects with respect to the "solely-served shipper who has no ready alternative to KCS for originating its movements" at Majure V.S. ¶ 24. In deposition: [REDACTED]

[REDACTED] }
 See Carey HC-WP "HC-Mexico.pdf". While both Eagle Pass and Laredo are important gateways for traffic to and from Mexico, the gateways are situated on different networks and in different geographic locations. As such, the gateways are not equivalent in all competitive circumstances, and the relative market power of each railroad service provider will depend on the specific circumstances of each shipper. See App. Vol. 1, p. 71. See also [REDACTED].

See OECD (2017), "Review of the Regulation of Freight Transport in Mexico", pp. 84-86, available at [https://www.oecd.org/centrodemexico/publicaciones/OECD%20\(2017\)%20Review%20of%20%20Regulation%20Fright%20Transport.pdf](https://www.oecd.org/centrodemexico/publicaciones/OECD%20(2017)%20Review%20of%20%20Regulation%20Fright%20Transport.pdf); Art. 46 of LRSF, available at https://www.diputados.gob.mx/LeyesBiblio/pdf/209_061120.pdf. See Carey HC-WP "HC-Mexico.pdf".

⁶⁸ Dr. Majure acknowledges that Mexican states are larger geographic areas than U.S. BEA areas, stating that "the median Mexican state is 58,400 square kilometers. The median U.S. BEA area is 29,843 square kilometers..." See Majure V.S. ¶ 48 footnote 27. Further, a Mexican state is not always a coherent economic grouping. For example, Ciudad Juárez and Chihuahua are both in the state of Chihuahua and have populations of roughly 1 million people, but are over 200 miles apart. See "2020 Census of Population and Housing," Instituto Nacional de Estadística, Geografía e Informática available at <https://en.www.inegi.org.mx/programas/ccpv/2020/>

⁶⁹ States in Mexico, BEAs in the U.S. and Economic Regions in Canada. See Majure V.S. at ¶ 48.

⁷⁰ [REDACTED] }
 [REDACTED] 3}}

KCS's market share in BEA market areas served by KCS in the U.S.⁷¹ Dr. Majure references this single analysis of the potential vertical effects of the Proposed Transaction⁷² frequently and, along with his reliance on Applicants' vague open gateway commitments and very limited plausible efficiency claims, he concludes that the Proposed Transaction is "...not likely to impair competition through vertical effects."⁷³

In discussing his conclusion, Dr. Majure asserts that for KCSM traffic to Laredo, KCS has a {{[REDACTED]}} market share beyond the Laredo and Robstown interchanges for northbound traffic from Mexico to his assumed BEA geographic market area served by KCS, and CP has a {{[REDACTED]}} market share for BEA geographic market areas served by CP (i.e., mutually exclusive geographic areas). I have replicated Dr. Majure's analysis and report the results in Figure 2 below.

Dr. Majure's vertical effects analysis is deficient because it is limited to northbound traffic from Mexico and does not analyze southbound traffic to Mexico.⁷⁴ In this case the vertical integration of market power in Mexico affects traffic that moves in both directions, i.e., to Mexico and from Mexico.⁷⁵ Dr. Majure should have reviewed southbound traffic integration of CP into downstream KCS and KCSM for potential anticompetitive effects (i.e., a similar concern as the northbound traffic). Southbound movements to Mexico are analogous to the northbound routes for movements through the Laredo Gateway.⁷⁶ Accordingly, I have addressed southbound traffic using Dr. Majure's methodology. Figure 2 below shows the southbound traffic to Mexico to provide a more complete depiction of all traffic with Mexico, including large traffic volumes for southbound traffic movements to Mexico destinations as compared to northbound movements from Mexico origins.⁷⁷ For the southbound traffic from Laredo to KCSM in Mexico, KCS has a {{[REDACTED]}} market

⁷¹ Majure V.S. ¶ 30-31 and Exhibit 2.

⁷² Section 3.2. "The vertical effects of a CP and KCS combination would enhance rather than diminish competition."

⁷³ Majure V.S. ¶ 30-38, Exhibit 2 and specifically ¶ 38.

⁷⁴ {{[REDACTED]}}

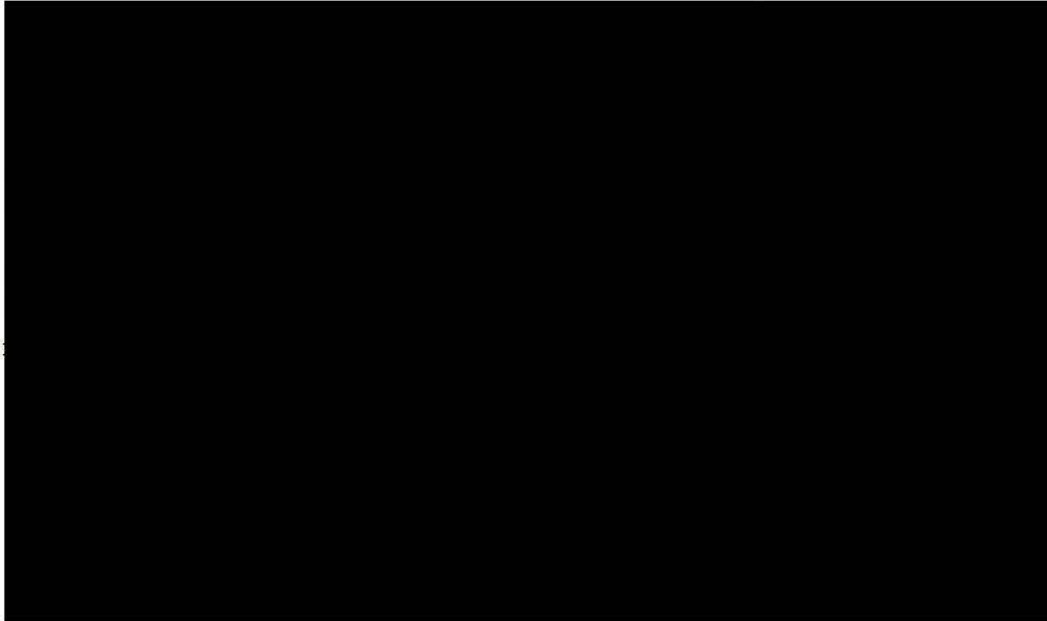
Anticompetitive problems may arise when one or both levels of the integration possess market power. Given the high market share on southbound traffic, the downstream level of the integration from this perspective may cause concern. See Viscusi et al., "Economics of Regulation and Antitrust", The MIT Press, 2nd Edition (1995) pp. 229, 234.

⁷⁶ To the extent that shipper decisions could be impacted by upstream routing decisions regarding UP and its connection at Eagle Pass, both Laredo and Eagle Pass generally have the same relative proportions of cross border traffic for both northbound and southbound traffic. See Carey HC-WP "HC-Mexico.pdf"

⁷⁷ The importance of both northbound and southbound trade is recognized by regional trade authorities. See "Texas-Mexico Border Transportation Master Plan 2021", p. 17, available at <https://ftp.dot.state.tx.us/pub/txdot/tpp/btmp/btmp-lrd-regional-plan.pdf>

share before the Laredo and Robstown interchanges for assumed BEA geographic market areas served by KCS and a {{[REDACTED]}} market share for BEA geographic market areas served by CP. These much higher market shares raise anticompetitive concerns.

Figure 2: KCS Market Shares for US Movements Involving Mexico Traffic (Northbound and Southbound through Laredo; BEA Defines Market)⁷⁸



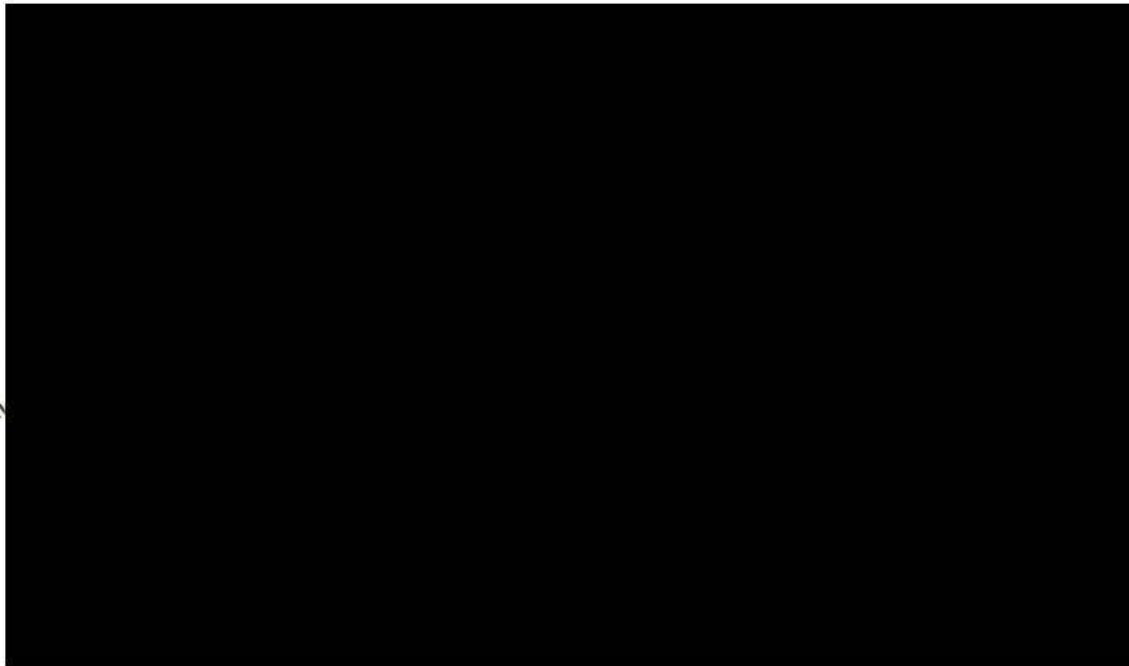
In addition to forgoing analysis of southbound movements to Laredo, Dr. Majure's limited vertical effects analysis evaluates no specific shippers, nor the competitive circumstances of those shippers and how they could be harmed.⁷⁹ I conducted a more granular market share analysis to further investigate the potential for harm to shippers through reduced competition by analyzing a more limited geographic area that represents specific stations rather than the broad BEA geographic area assumed by Dr. Majure. Once again, the market shares presented on the more granular geographic market area demonstrate a {{[REDACTED]}} for KCS than the limited analysis conducted by Dr. Majure, which assumed a broad geographic market scope and only a northbound route. As shown in Figure 3 below, for the KCSM traffic to Laredo, KCS has a {{[REDACTED]}} market share after the Laredo and Robstown interchanges for northbound traffic from

⁷⁸ See Carey HC-WP "HC-Combined Majure Tables Summary.xlsx".

⁷⁹ Dr. Majure refers to vertical effects with respect to the "solely-served shipper who has no ready alternative to KCS for originating its movements" at Majure V.S. ¶ 24. In deposition: [REDACTED]

Mexico to station location geographic market area served by KCS and a {{[REDACTED]}} market share for station location geographic market areas served by CP (i.e., mutually exclusive geographic areas). For the southbound traffic from Laredo to KCSM in Mexico, KCS has a {{[REDACTED]}} market share for assumed BEA geographic market area served by KCS and a {{[REDACTED]}} market share before the Laredo and Robstown interchanges for station location geographic market areas served by CP (i.e., mutually exclusive geographic areas).

Figure 3: KCS Market Shares for US Movements Involving Mexico Traffic (Northbound and Southbound through Laredo; Station Locations)⁸⁰



The {{[REDACTED]}} for the Applicants are indicators of CPKC's potential incentive and ability to engage in anticompetitive actions. While the DOJ does not set a market share threshold in its guidelines on vertical mergers it states that "levels of concentration may nonetheless be relevant. For example, high concentration in the relevant market may provide evidence about the likelihood, durability, or scope of anticompetitive effects in that relevant market."⁸¹ Market shares of the level described above, along with other circumstances in Mexico, are sufficiently high to warrant a closer look. Higher market shares for a specific firm lead to a more concentrated market which

⁸⁰ See Carey HC-WP "HC-Combined Majure Tables Summary.xlsx".

⁸¹ See U.S. Department of Justice & The Federal Trade Commission, "Vertical Merger Guidelines", June 30, 2020, at pp. pp 3-4. Market shares are squared to calculate HHI which is a measure of market concentration.

facilitates a firm's ability to influence profitability and prices.⁸² Higher market shares indicate less opportunity for shippers to benefit from competition and more opportunity for CPKC to impair competition.

Beyond the market share analysis presented above, Dr. Majure could have conducted additional analyses of the competitive circumstances arising from the Proposed Transaction, particularly since the Proposed Transaction would be the first major restructuring of the North American railroad network since 1999.⁸³ Specifically, Dr. Majure should have analyzed potential CPKC pricing and profit strategies that could impair competition due to the vertical integration of the combined companies and the expansive network locations that were not integrated prior to the Transaction; i.e., whether the Transaction combines KCS/KCSM incentives with CP's ability to influence the market. This is an approach Dr. Majure discussed when {{ [REDACTED] }} and presumably he would have considered such an analysis if evaluating the Transaction for the DOJ.⁸⁴ However, Dr. Majure provides no such discussion or analysis. Instead of conducting an applied economic analysis, Dr. Majure defers to a theoretical assumed outcome indicating that regardless of whether shippers face all, some, or no competition (i.e., regardless of how large the lump is) a vertical transaction is "not likely to suffer any incremental adverse effects."⁸⁵ He ignored the unique aspects of the combined CP and KCS networks regarding Mexico access and traffic flows that require a closer look.

The combined CPKC would have a unique economic opportunity and incentive to implement a pricing strategy that could harm shippers today and tomorrow which was not achievable pre-

⁸² See Scherer, F.M., and Ross, David, "Industrial Market Structure and Economic Performance", Third Edition, pp. 70-73, 428-429. Claims of monopolization in antitrust enforcement cases often have market shares in excess of 60%. See Swanson, Parker, Hungar, Richman and Ordovery, "Is It Bad to Be Big: An Antitrust Update on Monopoly Law and Enforcement", Gibson Dunn, May 23, 2019 at 12-13.

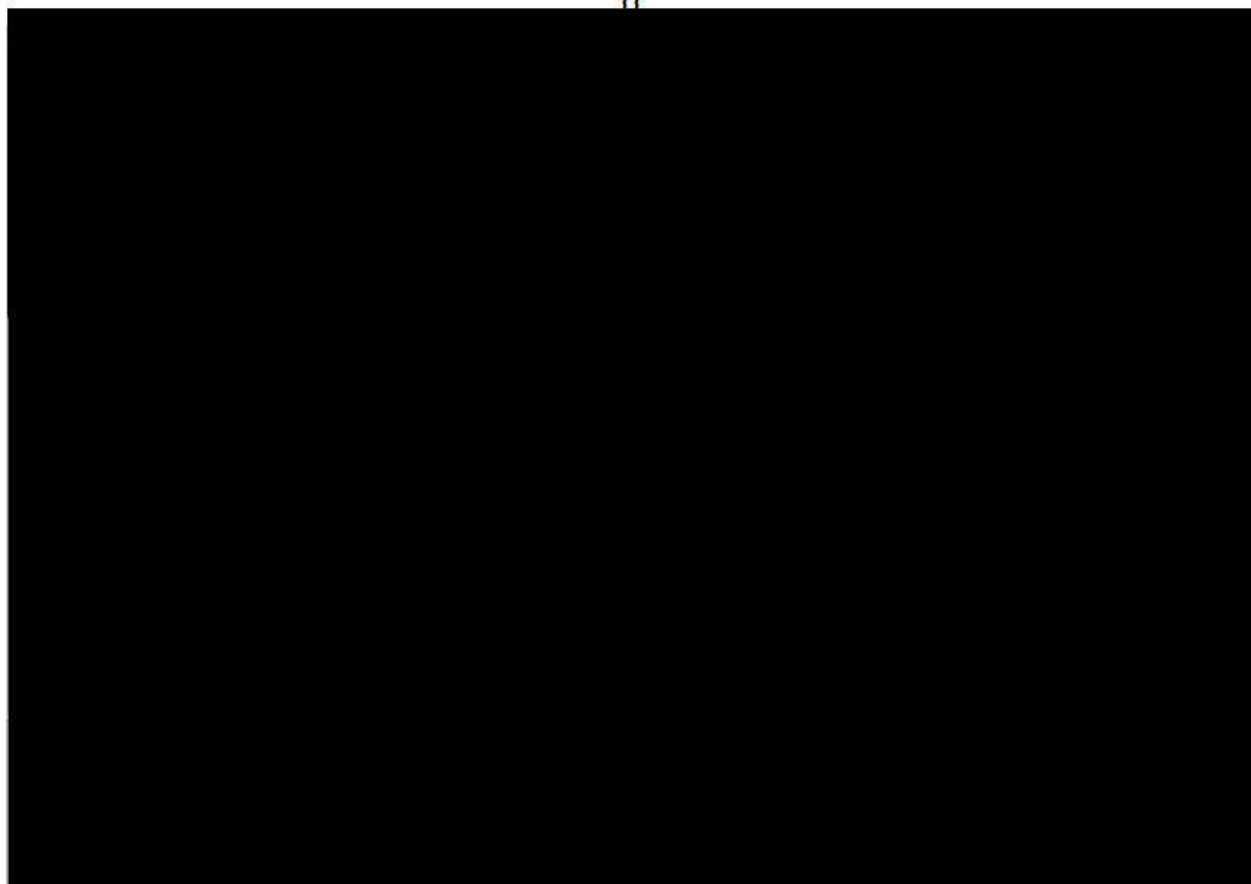
⁸³ See *Canadian National, et al.-Control-Illinois Central, et al.*, 4 S.T.B. 122 (1999).

⁸⁴ Majure CN V.S. pp. 17-20. Dr. Majure acknowledged in deposition that his conclusions were based on theory that do not include documentary evidence, shipper- specific evaluations, or empirical analysis of the extent to which other rail or nonrail options are exerting competitive pressure on KCS and KCSM. Majure Dep. Tr. 70:5-14; 71:12-24; 84:11-24; and 88:6-15. For an illustrative example of an empirical analysis see Shapiro, Carl, "Vertical Mergers and Input Foreclosure Lessons from the AT&T/Time Warner Case", Review of Industrial Organization (2021) 59:303-341 and Majure Dep. Tr. 90:20-25. See also Scherer, F.M., and Ross, David, "Industrial Market Structure and Economic Performance", Third Edition, pp. 524-7.

⁸⁵ Majure V.S. ¶ 24-26. Dr. Majure points to numerous references to prior STB decisions, which are highly focused on coal transportation, which is not the product at issue for potential vertical effects of this Transaction. {{ [REDACTED] }}

transaction.⁸⁶ CP's network serves many locations with movements to and from Mexico (i.e., that are either upstream or downstream of the U.S./Canada portion of the movements), as shown in Figure 4 below. The Figure shows the total railroad revenue by location for movements to and from Mexico, and can be used to analyze where the combined CPKC may have additional ability to influence routing as compared to the current KCS/KCSM network's incentives. For example, there will be no additional routing incentives on CPKC as compared to KCS for moves to Houston, while the new entity may wish to exert more control over moves to and from Chicago.

Figure 4: Combined CP-KCS Network Map and 2019 Revenues for Mexico Movements⁸⁷



⁸⁶

[Redacted text]

⁸⁷ See Carey HC-WP “-CP and KCS Mexico Traffic Access.xlsx” and Carey HC-WP “CPKC Network Maps.png”.

In addition, the combined CPKCS has more complete market and shipper knowledge and information than was available to each entity prior to the Transaction and is therefore more capable of strategic behavior to influence prices and competition. For example, CPKC will have cost information for the proposed downstream segment that will be vertically integrated (the two downstream segments include south into Mexico and north into the Midwest U.S./Canada). In addition, CPKC will have a much wider array of shipper specific information regarding, rates and terms as well as operational information unavailable without the Proposed Transaction. Meanwhile, KCSM maintains substantial market power in Mexico that was not vertically integrated with CP before the Transaction. As Figure 4 shows, the voluminous traffic between points in Mexico served directly Mexico and locations on CPKC locations (including large revenue on former CP locations) requires that the Board carefully assess and assure protection against the potential adverse vertical competition effects from the Proposed Transaction due to KCS's substantial market share of U.S.-Mexico cross-border traffic to and from points served by KCSM.⁸⁸

Today KCSM must cooperate with UP to move traffic for customer locations north of KCS's network that both CP and UP can access (e.g. Chicago). However, CPKC need not cooperate with UP in the future for all of the gateways over which CPKC interchanges traffic between Mexico and the U.S. and Canada. Instead, CPKC will have an incentive to adopt a pricing strategy to foreclose competing railroad alternatives for the U.S. portion of the movement, such as UP (Laredo to Chicago) in order to serve customer locations on CP's network that were not available on the same network system pre-Transaction. As an example, consider traffic that KCSM moves to or from the Laredo gateway and interchanges with a competitor for delivery to or from locations accessible by CP's network (locations not available on a single line to either Applicant prior to the Transaction). CPKC could increase the KCSM rates to the targeted, newly accessible single-line destinations and origins (up to the allowed price caps in Mexico),⁸⁹ including for intermodal and automotive traffic. This strategy would substantially increase the revenues associated with the portion of the movement in Mexico.⁹⁰ Simultaneously, CPKC could reduce the rates for the U.S. portion of the movement (currently on a competitor) below the URCS variable cost estimate for traffic it can now serve with

⁸⁸ See Carey HC-WP "HC-Mexico.pdf". Specifically, automotive and intermodal traffic should be areas of particular investigation due to their importance to the Applicants' estimated diversions. See "8 – Diversion Identification.xlsx", Brown and Zebrowski V.S. See "FD 36500 – Work Paper – HC – Growth Initiative Calculations.xlsx", Wahba and Naatz V.S.

⁸⁹ See OECD (2017), Review of the Regulation of Freight Transport in Mexico, p.84-86, available at [https://www.oecd.org/centrodemexico/publicaciones/OECD%20\(2017\)%20Review%20of%20%20Regulation%20F%20Transport.pdf](https://www.oecd.org/centrodemexico/publicaciones/OECD%20(2017)%20Review%20of%20%20Regulation%20F%20Transport.pdf); Art. 46 of LRSF available at https://www.diputados.gob.mx/LeyesBiblio/pdf/209_061120.pdf. See Carey HC-WP "HC-Mexico.pdf".

⁹⁰ KCSM and UP separately quote the customer confidential rates for the service each railroad provides.

the combined CPKC system.⁹¹ The net effect of these changes would increase shipper costs for the use of competitor railroads but would hold costs constant for the use of CPKC (enticing shippers to shift to CPKC instead of the now higher cost competitive alternative).

As a result of the Proposed Transaction, the combined company would have the potential incentive and ability to influence prices and competition through the vertical integration of KCSM, KCS and CP and the combined network that extends from southern Mexico through the Midwestern US into Canada. This type of pricing strategy would be profitable for CPKC and could economically foreclose alternative railroad services from competing with CPKC for the Mexico traffic by leaving the competitor with little or no opportunity to add and contribute to its system.⁹² There may be other profitable pricing strategies available to CPKC as well as related service disrupting impediments that could negatively impact competitor railroads (i.e., slower interchange).

C. Recommended Conditions

Substantial current and future cross-border rail traffic with Mexico is expected through the Laredo Gateway and it is important for the overall efficiency of the North American railroad network to ensure that traffic movements involving Mexico maintain the most economically efficient routing, consistent with the public interest. Taken together, economic analysis demonstrates that the multitude of locations not available to KCS/KCSM prior to the Proposed Transaction provide CPKC with the potential ability to adversely affect competition related to Mexico which are best addressed through conditions to be set by the STB that ensure that the Laredo gateway and all gateways used for traffic movements to and from Mexico remain open both in terms of commercially reasonable rates and service for rivals (such that competition is not distorted). The STB should also allow shippers to challenge rates and service for all segments of cross border movements and secure remedies that, absent conditions would not be available because of limits on STB jurisdiction.

These condition to ensure that the Laredo Gateway remain open both in terms of commercially reasonable rates and service should apply to all gateways used for traffic movements to and from Mexico because the significant amount of traffic involves a wide array of customer

⁹¹ This analysis assumes that CPKC variable costs are approximately equal to its competitors. However, the analysis estimates that CPKC pricing strategy would still be successful even with 5% lower variable costs. This means that even if competitors' cost were lower, the pricing strategy would still be productive. Furthermore, this analysis is conservative because it includes Applicants' cost estimates that do not include additional line specific costs such as haulage and trackage (as is comparable to a railroad that owns the trackage being operated). See Carey HCWP "HC-Mexico Rate Foreclosure by Line of Business.xlsx"

⁹² See Carey HC-WP "HC-Mexico Rate Foreclosure by Line of Business.xlsx".

locations throughout the midwestern and eastern U.S. and Canada, and beyond. Shippers in these diverse customer locations are potentially impacted from any anticompetitive behavior involving Mexico. Therefore, all gateways used for traffic movements to and from Mexico are potentially affected and require protection to ensure that shippers to and from Mexico and the U.S. are assured the opportunity for competition on commercially reasonable terms (and service) with CPKC.

The STB should also allow shippers to challenge rates and service for all segments of cross border movements and secure remedies that, absent conditions would not be available because of limits on STB jurisdiction.

III. APPLICANTS' LIMITED AND AMBIGUOUS COMMITMENTS TO KEEP "AFFECTED" GATEWAYS COMMERCIALY OPEN

There are many impacted gateways where CPKC will interchange traffic with other railroads with substantial potential impact to shippers. In its Application, CPKC's commitments regarding gateways was expressly limited to "affected gateways," which are not clearly identified.⁹³ Adding further confusion, the Applicants' executives simply stated their verbal commitment to keep existing gateways open.⁹⁴ There was no identified list of affected gateways in the Application. Witness Brooks identified numerous gateways in his V.S.:

"Though I have used Kansas City as an example, the same basic truths would be repeated for all of the other gateways where CP and KCS connect with other Class I railroads today. CPKC will continue to have strong incentives to work with our interline partners on efficient joint-line services at the gateways where CP connects today – most notably, at Kingsgate/Eastport (with UP); Coutts, AB (with BNSF); Emerson, MB/Noyes, MN (with BNSF); St. Paul (with BNSF and UP); Chicago (with BNSF, UP, and CN, as well as NS and CSX); and Kansas City (with UP and BNSF). Our incentives will be no less strong at the gateways where KCS connects with other carriers today, such as Laredo (with UP); Robstown, TX (with BNSF); New Orleans, LA (with BNSF, UP, CSX, NS, and CN); Shreveport, LA (with UP and BNSF); Jackson, MS (with CN); Meridian, MS (with NS); and Kansas City (with UP and BNSF). These aren't the only interchanges we will have an incentive to keep open in order to serve our customers well, but they account for the vast majority of all

⁹³ "Applicants' commitments to keep these and other affected gateways open both physically and commercially will assure that Applicants' incentives are backed up by the potential for enforcement under the auspices of Board oversight." App. Vol 1. P. 11-12

⁹⁴ Creel "In light of these incentives, it gives me no qualms to formally commit to the Board that CP/KCS will keep open all existing gateways on commercially reasonable terms, and that we will not create any new "bottlenecks" that might constrain shippers' existing access to the Board's regulatory processes." App. Vol. 1. P. 169 (Creel V.S. p. 14)

Ottensmeyer "This transaction is about growing our business by providing our customers the choice to use the combined network of CP and KCS in a single-line move or to continue with existing routes and interchanges (CP and KCS are committed to keeping existing gateways open on commercially reasonable terms)." App. Vol. 1. P. 191 (Ottensmeyer V.S. p. 5)

of CP and KCS's existing interline traffic to/from the United States that might conceivably be affected by the CP/KCS combination."⁹⁵

This ambiguity raises additional concerns regarding the need to ensure that traffic movements involving CPKC can move over the most economically efficient routes, consistent with the public interest. Shippers must be assured of the opportunity for competition on commercially reasonable terms (and service) with CPKC for all gateways. As discussed above, the general and non-specific commitments offered by CP lack reliable guarantees.⁹⁶ While CP commits to working with shippers it does not promise concrete standards that would ensure that CP (1) sets commercially reasonable rates (and does not directly or indirectly raise rivals' costs); and (2) provides service on a non-discriminatory basis, with no service-related distortions involving rival railroads.⁹⁷

IV. THE PROPOSED TRANSACTION OFFERS FEW PUBLIC BENEFITS: APPLICANTS' CLAIMED PUBLIC BENEFITS ARE OVERSTATED AND MOST ARE ONLY PRIVATE BENEFITS

A. Applicants' Claimed Public Benefits are Primarily Potential Private Benefits to the Combined CP and KCS railroads

The Applicants have claimed that the Proposed Transaction will cause substantial "merger benefits" equal to \$888.4 million in what Applicants call a normal year and \$1 billion dollars indexed to 2025.⁹⁸ However, upon inspection, as shown below, the Application reports mostly private benefits (approximately 81% of the total benefits) which Applicants characterize as "Operating Revenue Gains (Net Revenue Gains)" or incremental profits.⁹⁹ In addition, Applicants have not

⁹⁵ Brooks V.S. ¶ 41

⁹⁶ { }

See also Brooks V.S. ¶ 42-46.

{ }

Applicants also estimate one-time Transaction Benefits of less than \$100 million over 3 years (\$58.9, \$23 and \$18.1 million). *See* Application, App. Vol. 1, p. 74 (Appendix B, p. 1). Applicants identify \$275 million in necessary investments. *See* Public Version of Application, App. Vol. 1, p. 23. *See also* Creel V.S., p. 14, P 33.

⁹⁹ Public Version of Application, Baranowski V.S., p. 26 at Table 16 (App. Vol. 1, p. 427) titled as "Summary of CP/KCS Merger Benefits". Table 16 provides for Year 3 (2025) the "Diverted Carloads/Units" as 509,490, the "Incremental Revenues" as \$1,021.9 million, the "Total Incremental Costs" as \$306.3 million, and the "Net Merger Benefits" as \$715.6 million.

identified the potential public benefits to accrue to the U.S. as compared to Mexico or Canada, which should be required in the context of a U.S. public interest determination by a U.S. regulator. In the following discussion, I assume the accuracy of the so called “Operating Benefits” stated by the Applicants. To the extent that the “Operating Benefits” are not realized by the Applicants, then the Applicants’ claimed benefits will be further reduced.

Figure 5: Applicants’ “Merger Benefits” Consist of Mostly of Potential Private Benefits¹⁰⁰

Line	Description in Application	Calculation	Normal Year	Indexed to 2025 Normal Year
1	Operating Revenue Gains (Net Revenue Gains)		\$715.6 ¹	\$805.8 ¹
2	Operating Benefits		\$172.8 ¹	\$194.6 ¹
3	Total Merger Benefits	Line 1 + Line 2	\$888.4 ¹	\$1,000.4 ¹
4	Operating Revenue Gains Relative to Total Merger Benefits by Claimed by Applicant	Line 1 / Line 3	81%	81%

Notes and Sources:

¹ Public Version of Application, App. Vol. 1, p. 74 (Appendix B, p. 1).

While Applicants claim the “Total Merger Benefits” are quantified as consistent with the “Public Interest Justification” (as per the section title) the benefits asserted by Applicants to be “public” do not fit in the definition of public benefits established by the Board. Specifically, the STB describes public benefits as those achievable through efficiency gains that create lower costs and service improvements.¹⁰¹ Lower costs are considered public benefits because the railroad service is being provided at the same service level using fewer resources or the service level is higher using the same level of resources.¹⁰² Lower costs can occur in areas such as reduced overhead, elimination of duplicate facilities, and more efficient movement of traffic between the merging parties.¹⁰³ The impact of lower costs can be passed to shippers through reduced rates and/or improved services.¹⁰⁴

¹⁰⁰ See Carey HC-WP “HC-Transaction Benefits.xls.”

¹⁰¹ Decision, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and the Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760, Decision No. 44, August 6, 1996, 1 STB 233 (1996), at 363.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

PUBLIC VERSION

In response to CSXT's interrogatories seeking Applicants' support for its assumed definition of public benefits (which its claimed benefits include 81% potential private benefits to accrue solely to Applicants), {{ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }}

The STB decided that the Proposed Transaction will follow the prior regulatory standards for approval, which may have been decided with consideration of the competition standard to use (and not with respect to the benefits).^{107, 108} The prior regulatory standard only included a description of benefits that was general in nature. However, the STB's determinations with the prior regulatory standard relied only on quantified public benefits that excluded private benefits for the transaction described below in **Figure 6**.¹⁰⁹ The current standard on public benefits clarifies and builds upon the more generally described regulatory standard that was previously in effect. More recently, the STB has reaffirmed the importance of accurate information with respect to public benefits when

¹⁰⁵ Applicants' Responses to CSX Transportation's Second Set of Discovery Requests and Interrogatories, February 18, 2022, No. 62.

¹⁰⁶ Applicants' Responses to CSX Transportation's Second Set of Discovery Requests and Interrogatories, February 18, 2022, No. 61a, pp 103-104. Response: [REDACTED]

Code of Federal Regulations Title 49 at part 1180, subpart A (2000), available at <https://www.govinfo.gov/content/pkg/CFR-2000-title49-vol6/pdf/CFR-2000-title49-vol6-part1180-id615.pdf>.

¹⁰⁸ Decision, Canadian Pacific Railway Limited; Canadian Pacific Railway Company; Soo Line Railroad Company; Central Maine & Quebec Railway US Inc; Dakota, Minnesota & Eastern Railroad Corporation; and Delaware & Hudson Railway Company, Inc. – Control – Kansas City Southern; The Kansas City Southern Railway Company; Gateway Eastern Railway Company; and The Texas Mexican Railway Company, Docket No. FD 36500, Decision No. 4, April 23, 2021, available at https://dcms-external.s3.amazonaws.com/DCMS_External_PROD/1619216719308/50743.pdf; “Accordingly, review of this Transaction will be governed by the regulations contained in 49 C.F.R. part 1180, subpart A in effect before July 11, 2001”, Decision at p. 2. “This transaction is subject to the regulations set forth at 49 C.F.R. part 1180 (2000),” Decision at p. 3.

¹⁰⁹ It is possible that the STB qualitatively considered the private benefits. Decision, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and the Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760, Decision No. 44, August 6, 1996, 1 STB 233 (1996), at 363-364, 375-384. Decision, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail Inc and Consolidated Rail Corporation, Finance Docket No. 33388, Decision No. 89, 3 STB 196 (1998), at 333-341. Decision, Canadian National Railway Company, Grand Truck Corporation, and Grand Trunk Western Railroad Inc., - Control – Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central & Pacific Railroad Company, and Cedar River Railroad Company, Finance Docket No. 33556, Decision No. 37, May 21, 1999, pp. 45-49.

considering a Transaction.¹¹⁰ The regulatory guidance developed regarding “Public interest considerations” is described in more detail in the current standards¹¹¹ and is a helpful guide to follow for this Transaction.¹¹²

The STB’s regulatory guidance since 1996 clarifies that Applicants’ private benefits, comprised of potential incremental profits which accrue solely to Applicants from traffic diversions from competitors, is not a public benefit from an economic perspective.¹¹³ Traffic increases due to a transaction are simply shifting revenue from one industry railroad carrier to another.¹¹⁴ They may or may not reflect any cost savings from reduced overhead costs, or reduced rates, or service improvements to shippers associated with the diverted traffic, and which would flow directly to the customer and therefore are not themselves a public benefit.¹¹⁵ Accordingly, Applicants’ incremental profit estimates from diverted traffic are private benefits to the combined railroad and not public benefits.¹¹⁶

To get another perspective on Applicants’ claimed benefits, I compared the percentage of private benefits to total benefits for several other historical Major Transactions approved by the Board and the same percentage derived from Applicants claimed benefits. As shown in **Figure 6** below, Applicants’ predicted private benefits that accrue solely to Applicants are an unusually high share (81%) of potential claimed total benefits. That percentage is between roughly 2 and 5 times higher than for the prior large railroad transactions, which ranged between 16% and 38%.¹¹⁷

¹¹⁰ “...it is important that we carefully calculate the net public benefits a merger would generate, and, to do so, the applicants must provide detailed and accurate data.” Decision, Major Rail Consolidation Procedures, Ex Parte No. 582 (Sub-No. 1), June 11, 2001, p. 58.

¹¹¹ 49 CFR 1180.1(c) (2020). See also eCFR (Electronic Code of Federal Regulations), available at <https://www.ecfr.gov/current/title-49/subtitle-B/chapter-X/subchapter-B/part-1180>; see also 49 CFR 1180.1(c) (2020) eCFR (Electronic Code of Federal Regulations), available at <https://www.ecfr.gov/current/title-49/subtitle-B/chapter-X/subchapter-B/part-1180>

¹¹² Decision, Major Rail Consolidation Procedures, Ex Parte No. 582 (Sub-No. 1), June 11, 2001, pp. 57-58.

¹¹³ 1 STB 233 (1996), at 375-376, 379-380.

¹¹⁴ 1 STB 233 (1996), at 380.

¹¹⁵ 1 STB 233 (1996), at 380.

¹¹⁶ The Public Version of the Application at Appendix B has a table title “Summary of Benefits”, which has a “Benefit Component” category of “Operating Revenue Gains”. This category has “Revenue Increase from Traffic Gains” minus “Cost of Handling Added Traffic” equaling “Net Revenue Gains”. For the Normal Year, the Revenue Increase from Traffic Gains is \$1,021.9 million and the Cost of Handling Added Traffic is \$306.3 million, which is a Net Revenue Gain[s] of \$175.6 million. For the Normal Year Index to 2025, the Revenue Increase from Traffic Gains is \$1,150.8 million and the Cost of Handling Added Traffic is \$345.0 million, which is a Net Revenue Gain[s] of \$805.8 million. Public Version of Application, App. Vol. 1, p. 74 (Appendix B, p. 1).

¹¹⁷ The dollar amounts presented are when the transactions occurred. Therefore, only the relative ratio statistics can be compared across the transactions and not the dollar amount of the benefit.

Figure 6: Applicants' Private Benefits as a Percentage of Total Benefits Compared to Prior Transactions¹¹⁸

Line	Description	Calculation	Incremental Net Revenue as Private Benefits ¹	Annual Public Benefits ²	Annual Total Benefits	Annual Private Benefits as a Percentage of Annual Total Benefits
			(millions) [a]	(millions) [b]	(millions) [c]	[a]/[c]= [d]
1	Union Pacific and Southern Pacific		\$123.2	\$627.4	\$750.6	16%
2	CSX and Conrail		\$145.9	\$505.9	\$651.8	22%
3	Norfolk Southern and Conrail		\$299.5	\$492.3	\$791.8	38%
4	Canadian National and Illinois Central		\$78.8	\$137.4	\$216.2	36%
5	Average	Ave (Lines 1 to 4)				28%
6	Normal Year Indexed to 2025		\$805.8	\$194.6	\$1,000.4	81%
7	Normal Year Not Indexed to 2025		\$715.6	\$172.8	\$888.4	81%
8	CP-KCS Transaction Amount Relative to the Average of Large Transactions	Lines 6 or 7 / Line 5				2.8

Notes and Sources:

- 1 Incremental net revenue for Union Pacific and Southern Pacific is \$76 million in net revenues from diverted traffic plus \$47.2 million in net trackage rights proceeds from BNSF that the STB determined are not a public benefit
- 2 Public benefits are cost savings and cost reductions, and does not include incremental net revenue from diverted traffic

For the Major Transactions reported in Figure 6 above, the STB assessed the quantifiable annual benefits associated with each Transactions based on the Public Benefits reported (Column [b]). The STB did not include the private benefits in its formal determination of merger benefits used in its approval. In the UP/SP case, the STB explicitly rejected the private benefits from inclusion in its quantification of public benefits because it was not a cost saving, and therefore implicitly gave it no weight in its evaluation of public benefits attributable to the merger.¹¹⁹

A further consideration for the STB's public interest determination is that Applicants have not demonstrated whether their private or public benefits occur in the U.S. (or Mexico or Canada).¹²⁰ Applicants' public benefits are not tailored specifically to the U.S. but rather encompass North America and, for example, do not quantify the cost savings or private benefits that are limited to the Board's jurisdiction. Definitionally, ascribing transaction benefits to the U.S. would necessitate some level of reduction of claimed Total Benefits. Applicants acknowledge in discovery responses that

¹¹⁸ See Carey HC-WP "HC-Transaction Benefits.xls".

¹¹⁹ See Decision, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and the Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760, Decision No. 44, August 6, 1996, 1 STB 233 (1996), (1 STB 233 at 375-376)

¹²⁰ The Public Version of the Application at Appendix B has a table title "Summary of Benefits", but no information in which countries the benefits occur, App. Vol. 1, p. 74 (Appendix B, p. 1).

non-U.S. benefits are included in their claimed Total Benefits but contend they are appropriate to use.¹²¹ In response to CSXT's interrogatories seeking Applicants' support for its assumed definition of public benefits, Applicants generally state that U.S. shippers benefit, even though they have provided limited details and no specific analysis.¹²² Elsewhere in its Application, Applicants indicate that {{[REDACTED]}} of KCS' business is in Mexico and that substantial benefits exist regarding CP's Canadian originations, both of which suggest that any quantifiable analysis would observe a large benefit reduction if the Applicants were to only present the U.S. portion of the Total Benefits.¹²³ Furthermore, CPKC anticipates the new entity will serve {{[REDACTED]}} instead of a rail move from the U.S. west coast Port of Los Angeles to Chicago (with 100% of the route miles in the U.S.).^{124, 125} In these and other examples, there will be some transfer of the potential public or private benefits out of the U.S. into Mexico or Canada. The STB should consider whether the potential public benefits to be

¹²¹ Applicants' Responses to CSX Transportation's Second Set of Discovery Requests and Interrogatories, February 18, 2022, No. 61 b-f, pp 103-104. {{[REDACTED]}}

Applicants' Responses to CSX Transportation's Second Set of Discovery Requests and Interrogatories, February 18, 2022, No. 61(b), pp. 60-61. benefits include or reflect {{[REDACTED]}}

Verified Statement of Patrick J. Ottensmeyer, App. Vol. 1, p. 204. "Today, our Mexico franchise represents about half of KCS. Any way you look at us, whether you measure miles, employees, or revenues, KCS is 50% in Mexico." Verified Statement of Patrick J. Ottensmeyer, App. Vol. 1, p. 218. "Similarly, we will provide new single-routes connecting KCS's strong originations of automotive shipments from Mexico, forest products from Mississippi, chemicals from the Gulf, perishables from Mexico, among many others, with destinations reached by CP's, network in the Upper Midwest and Canada." Emphasis added to the original.

¹²⁴ A CPKCS movement from Lazaro Caredenas, Mexico to Chicago, IL has 35% of the route miles in Mexico. The total distance is 2,651 miles with 926 miles in Mexico and 1,725 miles in the U.S. Route miles were determined using PC Miler. {{[REDACTED]}}

Route miles determined using PC Miler.

¹²⁵ See Carey HC-WP "HC-Mexico Mileage WP.xlsx"

used in evaluating the Proposed Transaction should only reflect benefits realized in the U.S. and if so, what further reduction to the Applicants' claimed public benefits will be required.

B. The Application Overstates Incremental Profits from Traffic Diversions

The Applicants' Total Benefits estimated for the Proposed Transaction include 81% potential private benefits that will accrue solely to CPKC. These asserted transaction benefits associated with substantial incremental profit forecast by CPKC traffic diversions sum to \$715.6 million.

Applicants' estimated private benefits include three categories of traffic diversions: rail to rail diversions carloads, growth initiative traffic, and truck to rail diversions, as shown in Figure 7.¹²⁶

Figure 7: Summary of Applicant's Private Benefits Estimates by Category¹²⁷
(dollar amounts are in millions)

Applicants Claims				
	Rail to Rail	Truck to Rail	Growth Initiative	Total
Diverted Carloads/Units	216,675	63,644	229,171	509,490
Incremental Revenues	\$513.1M	\$97.5M	\$411.4M	\$1021.9M
Incremental Costs	\$129.1M	\$20.7M	\$156.6M	\$306.3M
Incremental Profits	\$384.0M	\$76.8M	\$254.8M	\$715.6M

Applicants' assumptions are flawed in numerous material ways and raise concerns regarding the reliability of traffic diversions and the underlying assumptions. The plausibility of these assumptions require review even if the Board follows its prior decisions and segregates these private benefits from public benefits. The accuracy of these assumptions bears on the Board's mandated consideration of competitive effects and fixed charges competition and fixed costs even if the Board though STB did not rely on these private benefits for its quantifiable annual benefits its determination of public benefits associated with Major Transactions.

First, Applicants' expected incremental profits assume substantial traffic diversions away from competitor railroads, trucks, or other growth initiative traffic¹²⁸ despite offering many longer,

¹²⁶ Applicants' traffic diversions are sponsored by three witnesses, including rail-to-rail diversion (Brown/Zebrowski), truck-to-rail diversions (Mutén) and other growth initiative volumes (Wabba and Nanttz). Brown & Zebrowski V.S. ¶ 5; Mutén V.S. ¶ 6; Wabba & Naatz V.S ¶ 10. See Brown and Zebrowski WP "8 - Diversion Identification.xlsx"; see Mutén WP "FD 36500 - Work Paper - HC - Truck to Intermodal Diversion Estimate w Perishable Double Counts.xlsx"; see Wabba and Naatz WP "FD 36500 - Work Paper - HC - Growth Initiative Calculations.xlsx". The Applicants' testimony did specifically discuss the quantum of traffic associated with the "Growth Initiative" or even indicate that these witnesses were sponsoring specific assumptions included in the Applicants' public benefits estimates.

¹²⁷ See Carey HC-WP "HC-Summary of Corrected Claims.xlsx at tab "Final Table". The source data is Work Paper - HC - URCS Phase III Calculation For Growth Traffic.xlsx", Verified Statement of Michael Baranowski.

¹²⁸ See Carey HC-WP "HC-Rail Truck Diversions.pdf"

disadvantaged routes. Applicants fail to demonstrate how CPKC will accomplish diversion on new single line routes that face superior, shorter and efficient interline routes from competitive railroads with no rate reduction.¹²⁹ As an example, CPKCS's Laredo to Chicago route has a more circuitous, longer distance route than UP's.¹³⁰ Nearly { [REDACTED] } of the Applicants' traffic diversions involve long haul railroad movements between Mexico and the { [REDACTED] } { [REDACTED] }.¹³¹ Applicants' traffic diversions involving Mexico include all three categories of traffic diversions presented by Applicants (rail-to-rail, truck-to-rail and growth initiative).¹³² As another example, Applicants rely on many diversions of movements involving the { [REDACTED] } { [REDACTED] }. However, the CPKC route is not a straight line between cities, but requires the combination of a longer east-west and north-south route move that takes the shape of an "S" instead of diagonal line.¹³³

The Applicants' just make assumptions regarding assignments to apply what traffic will be diverted.¹³⁴ This approach is inconsistent with that relied upon in Applicants' normal course of business communications prior to the announcement of the Proposed Transaction. CP's responsible personnel acknowledged [REDACTED] { [REDACTED] } The assumed traffic diversions claimed lack economic analysis of price-based competition, unique factors regarding the competitive dynamics of specific lanes, or current economic circumstances, all of which are needed to determine whether the Applicants' route can effectively compete with the existing competitors and their network and economic advantages. Applicants' traffic diversions are developed in a vacuum and do not anticipate responses of other carriers while assuming no rate reductions are needed to acquire traffic diversions on most lanes, eventually cumulating to a monumental level of total

¹²⁹ Applicants acknowledge that the diversion opportunity routes are on average 200 miles longer than existing routes. Brown and Zebrowski V.S., ¶31-34 and Table 7.

¹³⁰ Applicants acknowledge that its route from Chicago to Laredo would be longer than UP's more direct route. Wahba and Naatz V.S. ¶48.

¹³¹ { [REDACTED] } out of 509,490 units. When considering all diversions to all destinations and origins, over { [REDACTED] } of diversion units involve routes which include Mexico. See Carey HC-WP "HC-Mexico Diversion Claims.xlsm."

¹³² Applicants' truck to rail diversions from Minneapolis, MN, Detroit, MI and Columbus, OH to Dallas, TX or Mexico that covers a longer route on CP/KCS compared to a more direct route on UP also require use of another carrier's rail facilities (trackage or haulage), which adds costs and further disadvantage the traffic.

¹³³ Brown & Zebrowski V.S. ¶ 49; Mutén V.S Appendix A; Wahba & Naatz V.S ¶ 52. Dallas to Chicago is the primary route for which Applicants propose a rate decrease. See Brown & Zebrowski V.S. ¶ 32.

¹³⁴ Brown and Zebrowski V.S., ¶34 and Table 7. The starting assumptions are in Table 7, which is titled "Starting Point Diversion Rules for Traffic Susceptible to Diversion." The starting diversion rules are based on limited regression studies in Brown and Zebrowski V.S., Appendix B: "...our diversion estimates considered further individualized factors that led us to apply adjustments that affected these percentages."

potential private benefits as compared to the combination of UP/SP and BN/SF.¹³⁵ This is implausible.

Second, Applicants include many traffic movements achievable without the Proposed Transaction. For example, Applicants' incremental profits attributed to the Transaction assume substantial traffic diversions that remain on either CP or KCS's individual networks. Applicants include traffic movements between Mexico and Texas or Kansas City that could be provided today solely by KCS as an independent entity.¹³⁶ Applicants also include traffic movements between Canada and Kansas City that could be provided today solely by CP as an independent entity.¹³⁷ Applicants also include substantial diversions of crude by rail (DRUbit¹³⁸) movements from Alberta to Texas in the Growth Initiative traffic, however this was likely a business goal without the proposed Transaction and CP already maintains a strong market position regarding this traffic.¹³⁹ Even CP's internal investor documents do not indicate this traffic is only achievable as a result of the Proposed Transaction (rather suggesting it is more likely than without the Transaction).¹⁴⁰ CP does not claim that DRUbit is not achievable without the Transaction or that railroads face substantial competition from low cost pipelines.¹⁴¹

Third, additional questions arise as to what traffic movements are appropriately identified as resulting from the Transaction. The Growth Initiative volumes may duplicate business forecasts for the company.¹⁴² For example, if CP or KCS include volumes in their individual company business forecasts, then it is not appropriate to attribute that traffic diversion as resulting from the Transaction.

¹³⁵ See Brown and Zebrowski HC WP "HC – 8 - Diversion Identification.xlsx"

¹³⁶ See Carey HC-WP "HC-Growth Initiative.pdf" and Carey HC-WP "HC-Rail and Truck Diversion.pdf."

¹³⁷ See Applicants Responses to CSXT's Second Set of Discovery and Interrogatory Requests, February 18, 2022, No. [8].

¹³⁸ See Carey HC-WP "HC-Growth Initiative.pdf" and Carey HC-WP "HC-Rail and Truck Diversion.pdf."

¹³⁹ DRUbit refers to the approach that relies on a Diluent Recovery Unit to remove some of the light hydrocarbons (diluent) for rail transportation of more concentrated oil products. See USD Group, "Diluent Recovery Unit, AB, CA", available at <https://usdg.com/terminal/dru/#:~:text=DRUbit%E2%84%A2%20is%20crude%20oil,Gulf%20Coast%20and%20in%20other>

¹⁴⁰ Wahba and Naatz V.S. ¶84-94. The Applicants assert this traffic volume will be created in the future since "[w]e anticipate that CP/KCS will be the catalyst for further investments in the Hardisty DRU facility to expand its capacity." Wahba and Naatz V.S., ¶92. { [REDACTED] }

¹⁴¹ See Carey HC-WP "HC-Growth Initiative.pdf".

¹⁴² See Applicants Responses to CSXT's Second Set of Discovery and Interrogatory Requests, February 18, 2022, No. 1-7. { [REDACTED] }

The Growth Initiative traffic diversions are more suspect because they don't identify the specific pre-Transaction Origin/Destination movement it proposes to displace and lack supporting analyses. For example, Growth Initiative traffic diversions include substantial new intermodal traffic from the Port of Lazaro Cardenas on the west coast of Mexico that CPKCS appear to claim it will divert traffic from Los Angeles area ports.¹⁴³ The idea that organic growth was not considered separately from transaction-specific growth appears to be supported by deposition testimony of Applicants' witnesses.¹⁴⁴

Applicants provide no analyses of the rates or distances or other aspects of the railroad movements from different ports (or even the waterborne movement to each port from Asia or other origin locations). Applicants indicate that KCS's only has "...very small volumes of shipments from Port of Lazaro Cardenas) that reach as far as Houston (Kendleton)," which uses KCS's trackage rights agreement with UP.¹⁴⁵ However, KCS has advised its investors that KCS considers Texas as the important destination for movements from Mexico ports (which they call the Texas Shortcut).¹⁴⁶ Lastly, Applicants also appear not to consider in the Application certain challenges of operating in Mexico and the Port of Lazaro Cardenas.¹⁴⁷

Fourth, Applicants contend these large traffic diversions do not require a rate reduction in most instances. As a threshold point, the Applicants' estimated rates for all traffic diversions include the current CP or KCS prior rates for specific segments plus an estimate of another carriers' rates. There is no economic analysis to support whether the Applicants' estimated rates for traffic

¹⁴³ Wahba and Naatz V.S., ¶ 57, 60-66.

¹⁴⁴ {{{

Wahba and Naatz V.S., ¶ 58

¹⁴⁶ "I expect we'd see some interline movements tested in 2022 as an opportunity. It's actually 300 miles shorter to Houston than L.A. So there's absolutely an opportunity to take advantage of what we call the Texas shortcut." - Executive Vice-President and Chief Financial Officer Nadeem Velani, Canadian Pacific, CBIC Western Institutional Investor Conference, January 2022. Transcript available at <https://investor.cpr.ca/events/event-details/2022/CIBC-Western-Institutional-Investors-Conference/default.aspx>

¹⁴⁷ See Carey HC-WP "HC-Mexico.pdf". "KCS has been forced to embargo traffic to and from Mexico's busiest port, the railroad said. No detours are available. The railroad said it was working with state and federal governments to resolve the blockades." "Protests by teachers and other labor groups in Mexico are nothing new: They've been blocking the rail lines of KCS de Mexico and its predecessors periodically for 37 years. The latest round of protests — which have nothing to do with KCS — began on June 11, effectively shutting down rail traffic to and from the Port of Lazaro Cardenas. The protests can have a significant impact on KCS volume and revenue. The port traffic that KCS hauls in stack trains between Lazaro and the Mexico City area represents about a quarter of KCS's overall intermodal volume. Last year protests shut down the line for 59 days from September through Dec. 1. Intermodal volume from Lazaro fell to 5,800 containers in the fourth quarter, down from 47,700 a year earlier. The impact of the protest has lingered into this year as shippers have been slow to return to KCS between Lazaro and Mexico City and instead are relying on trucks, executives have said." See Bill Stephens, "Civil protests once again block KCS de Mexico main line to busy port", *Trains*, June 17, 2021, available at <https://www.trains.com/trn/news-reviews/news-wire/civil-protests-once-again-block-kcs-de-mexico-main-line-to-busy-port/>

diversions approximate any competitor's single line rate (or the lowest rate in the market) and indeed to the extent that CP and KC are not competitive with other carriers today, their rate may be higher than competitors' rates. Reliance on masked CWS rates and revenue could further overstate the estimated rate CPKC would receive in their hypothetical diversion. Further, Applicants' approach assumes a 5% rate discount where the CPKC will face single-line competitor railroads. Applicants exclude the majority of traffic movements that involve Mexico, approximately { } of all diversions.¹⁴⁸ Dallas to Chicago is the primary route for which Applicants propose a rate decrease. As discussed above, this CPKC route would face substantial competition and has much longer distances and more challenging terrain than competing routes. The Applicants lack necessary economic rigor to confirm the sufficiency of a 5% rate reduction to divert the traffic.¹⁴⁹ In discovery responses, Applicants confirmed that intermodal movements between Dallas and Chicago comprise { } of all Diversions the Applicants assume will result from a 5% rate reduction.¹⁵⁰

Fifth, the Applicants do not include all the unique costs associated with the traffic movements assumed to be diverted or the full array of necessary investments. Applicants rely on an estimate of system average costs from URCS instead of lane specific costs. The economic costs need to account for the additional costs associated with haulage agreements or trackage agreements that would reduce the assumed incremental profit from the diverted traffic involving the numerous applicable segments where CP or KC have haulage or trackage rights).^{151, 152} Further, the Applicants' cost analysis also relied on a highly efficient blocking and organization of operating trains developed in the Operating Plan, however the operating plan does not consider block swapping that occurred outside of a yard "processed" car.¹⁵³ Therefore, to the extent that block swapping activities which

¹⁴⁸ "All else equal, assuming another railroad currently priced this traffic at 200% R/VC, CPKCS could offer a 5% rate discount to the shipper and still move the traffic at an R/VC level of 175%." Brown and Zebrowski V.S., ¶ 31 footnote 16.

¹⁴⁹ Brown & Zebrowski V.S. ¶ 32.

¹⁵⁰ { }

Baranowski V.S. ¶16-22. The Applicants rely on the analysis Mr. Baranowski who uses URCS variable costs to create his cost estimates. See "FD 36500 – Work Paper – HC – URCS Phase III Calculation For Growth Traffic.xlsx", Baranowski V.S. However, URCS relies on system average variable cost and does not account for haulage or trackage fees on a given route. For example, in { }

Baranowski V.S. Table 16. See Carey HC-WP "HC-Rail and Truck Diversion.pdf."

¹⁵² Additionally, there is no equivalent of KCSM URCS-like cost estimate, and instead Applicants rely on KCS U.S. URCS to estimate KCSM costs. To the extent these costs are understated, Applicants have overstated the estimated incremental profits from the traffic diversions involving Mexico.

¹⁵³ Elphick and Orr Dep. Tr. 49-50 and 217-218.

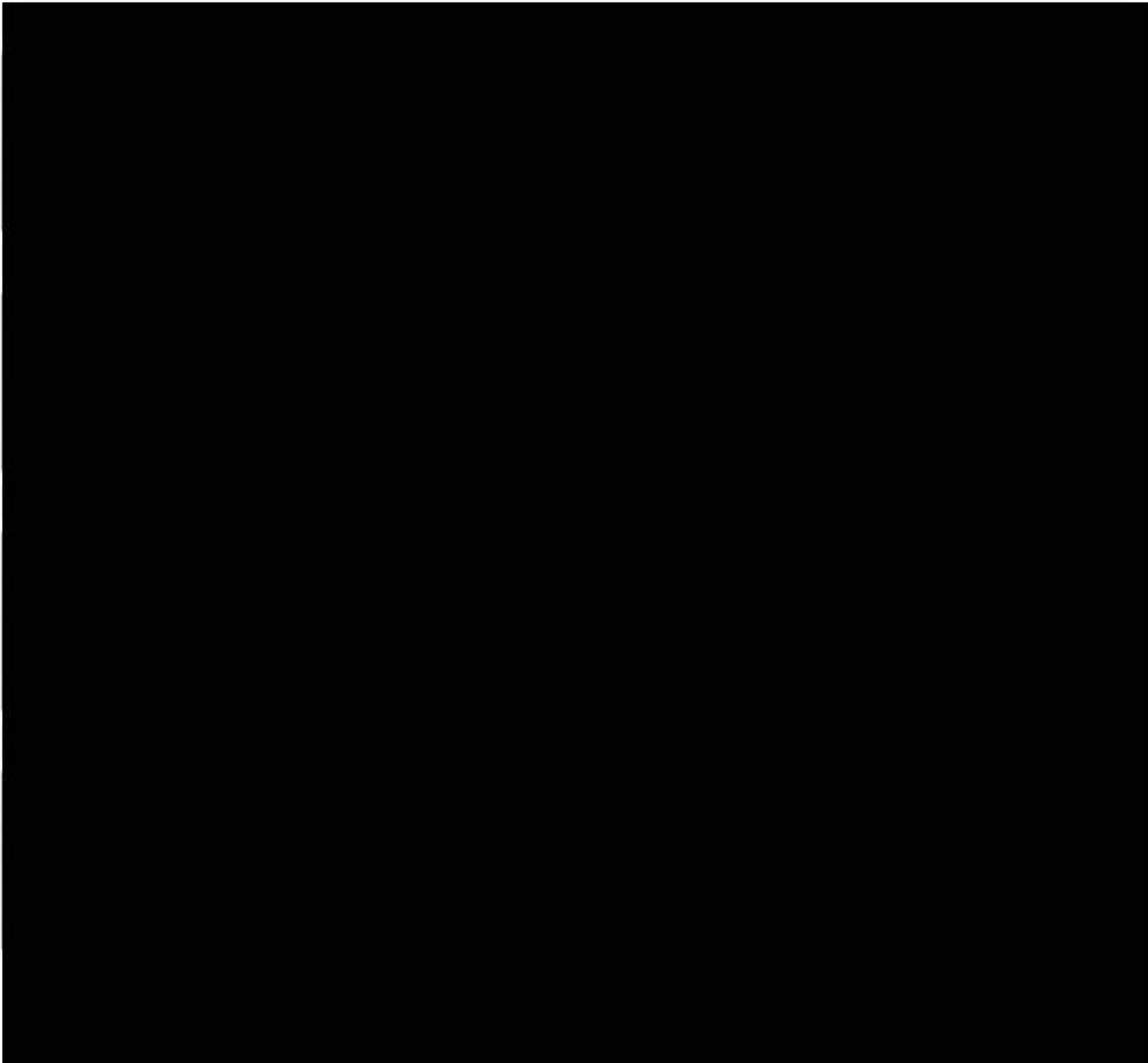
occur on the mainline are not accounted for in the Operating plan, they could add to expected cost and decrease service quality. Finally, Applicants may have also failed to account for the full costs of maintaining their operations in Mexico by not disclosing the costs of investing in additional railcars and containers needed for the assumed traffic growth.¹⁵⁴

In total, excluding the substantial amount of traffic diversions associated with the longer, disadvantaged routes which Applicants have not shown to be capable of sustaining competition (with no “hard analysis” of CPKC competitiveness compared to UP or BNSF¹⁵⁵ and excluding those traffic movements demonstrably achievable without the Transaction, dramatically reduces Applicants’ estimated incremental net profits and private benefits from approximately [REDACTED] [REDACTED] }, as shown in Figure 8 below.

¹⁵⁴ See Carey HC-WP “HC-Public Benefits.pdf”

¹⁵⁵ { }

Figure 8: Summary of Corrected CPKCS Private Benefits to Exclude Disadvantaged Routes and Traffic Achievable without the Transaction¹⁵⁶
(dollar amounts are in millions) {{



C. Analysis of Proposed Transaction Benefits and the Purchase Price Indicates that CPKCS has Less Benefits per Dollar Paid as Compared to Other Transactions

To consider whether the Applicants' claimed public benefits are purchased at a high price relative to other historical Transactions accepted before the STB, an analysis was done to compare the Applicants' claimed public benefits (i.e., excluding private benefits) relative to the purchase price to other Transactions of similar size. This analysis may aid the STB in considering the public interest standard and to ensure that Proposed Transactions are not accepted at any high purchase price or low

¹⁵⁶ See Carey HC-WP "HC-Summary of Corrected Claims.xlsx" at tab "Final Table"

level of public benefits. While the purchase prices and the quantum of public benefits vary among transactions, the STB can consider public benefits per dollar of the purchase price to evaluate the relative economics of the Transaction.¹⁵⁷ As shown in Figure 9 below, the Applicants' Transaction has about 7% of the annual public benefits relative to the average of the four largest prior Transactions as measured per dollar of purchase price.¹⁵⁸ This indicates that this Transaction has low level of public benefits compared to prior Transactions. The relatively high purchase price implies that there may be an incentive by the Applicants to harm competition if the benefits claimed in the Application are not realized.

Figure 9: Summary of Public Benefits and Purchase Price for Prior Transactions and the Applicants¹⁵⁹

Line	Description	CP/KCS Transaction	Union Pacific and Southern Pacific	CSX and Conrail	Norfolk Southern and Conrail	Canadian National and Illinois Central
1	Annual Public Benefits (millions) ¹	\$194.6	\$627.4	\$505.9	\$492.3	\$137.4
2	Purchase Price (millions) ²	\$27,200	\$4,100	\$4,200	\$5,800	\$2,400
3	Annual Public Benefits per dollar of Purchase Price ³	\$0.0072	\$0.1530	\$0.1205	\$0.0849	\$0.0573
4	Average of 4 Large Transactions	\$0.1039				
5	CP/KCS Percentage of Average Large Transactions	6.9%				

Notes and Sources:

- 1 Annual public benefits excludes the incremental profits, which are private benefits
- 2 Purchase price excludes assumed debt
- 3 The public benefits relative to the purchase price are contemporaneous amounts to the transaction

The Proposed Transaction would produce far fewer total benefits relative to the purchase price (excluding assumed debt) as compared to transactions of a similar size. The Transaction has total benefits on a per dollar of purchase price (excluding assumed debt) that is approximately 26% of the average for the large railroad transactions shown below in Figure 10.

¹⁵⁷ Standardization of dollar amounts by contemporaneous measures is a standard finance technique. For example, { [REDACTED] }

¹⁵⁸ The public benefits amounts are those determined or accepted by the STB in those transaction approval decisions.

¹⁵⁹ See Carey HC-WP "HC-Transaction Benefits.xls"

Figure 10: Summary of Total Benefits and Purchase Price for Prior Transactions and the Applicants¹⁶⁰

Line	Description	Calculation	CP/KCS Transaction	Union Pacific and Southern Pacific	CSX and Conrail	Norfolk Southern and Conrail	Canadian National and Illinois Central
1	Annual Total Benefits (millions) ¹		\$1,000.4	\$750.6	\$651.8	\$791.8	\$216.2
2	Purchase Price (millions) ²		\$27,200	\$4,100	\$4,200	\$5,800	\$2,400
3	Annual Total Benefits per dollar of Purchase Price ³	Line 1 / Line 2	\$0.0368	\$0.1831	\$0.1552	\$0.1365	\$0.0901
4	Average of 4 Large Transactions ⁴	Ave (Line 3 except CP/KCS)	\$0.1412				
5	CP/KCS Percentage of Average of Large Transactions ⁵	Line 3 / Line 4	26%				
6	Payback Period Based on Purchase Price divided by Annual Total Benefits ⁶	Line 2 / Line 1	27.2	5.5	6.4	7.3	11.1
7	Average of 4 Large Transactions ⁷	Ave (Line 6 except CP/KCS)	7.6				
8	CP-KCS Transaction Amount Relative to the Average of Large Transactions ⁸	Line 6 / Line 7	3.6				

Notes and Sources:

- 1 Total benefits are the sum of the incremental net revenue as private benefits and the public benefits. CP/KCS Transaction annual total benefits are indexed by the Applicants to 2025.
- 2 Purchase price excludes assumed debt.
- 3 The public benefits relative to the purchase price are contemporaneous amounts to the transaction.

An alternative view of the annual total benefits and purchase price is to examine the time it will take for the annual total benefits to be equal to the purchase price. This widely accepted financial metric for investment decision making is known as the payback period, which examines nominal cashflow amounts relative to the initial investment.¹⁶¹ Comparing the Applicants Proposed Transaction payback period of about 27 years with the average for the large transactions of 7.6 years shows the Applicants payback period is over 3 times longer. This suggests there is a lot more risk involved with this Transaction relative to prior large transactions because the asserted transaction benefits will need to occur for a much longer time.

Examining the Applicants' claimed benefits and purchase price relative to prior larger transactions indicates that the Applicants' Proposed Transaction may not be in the public interest. The overstatement of incremental traffic due to diversions strongly suggests that the Applicants transaction is even more anomalous relative to prior large transactions. Also, given that 81% of the Applicants' total benefits are due to net incremental revenue due to diverted traffic, if that incremental revenue does not materialize, then the Applicants could attempt to recover its overall acquisition investment through higher rates on shippers.

¹⁶⁰ See Carey HC-WP "HC-Transaction Benefits.xls".

¹⁶¹ See Aswath Damodaran, "Corporate Finance: Theory and Practice", 2nd edition, 2001, at pp. 294-296; Richard A. Brealey, Stewart C. Myers and Franklin Allen, "Principles of Corporate Finance", 8th edition, 2006, at pp. 89-90; Ehsan Nikbakht and A.A. Gropelli, "Finance", Barron's Business Review Books, at p. 169.

D. The High Incremental Debt Incurred for the Proposed Transaction Is Unlikely To Be Offset By Incremental Transaction Benefits Claimed

Applicants identified substantial incremental debt of [REDACTED] associated with the Proposed Transaction. This high level of debt coupled with concerns regarding Applicants' ability to achieve the Claimed Total Benefits (mostly private benefits) should lead the Board to review whether the Applicants' incremental debt¹⁶² incurred for this Proposed Transaction can be supported by the potential additional revenues or costs savings from the Proposed Transaction (excluding the economically unsupported private benefits).

Presentations to the Board of Directors of KCS by both Morgan Stanley and Bank of America Securities (BoA) in September 2021 {{{[REDACTED]}}

[REDACTED]

[REDACTED] }}}. ¹⁶³ {{{[REDACTED]}}

[REDACTED]

[REDACTED] }}} for the Proposed

Transaction as shown in Figure 11 below. ¹⁶⁴ {{{[REDACTED]}}

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

[REDACTED]

[REDACTED]

[REDACTED] }}}]

A few important observations. First, even if all the asserted benefits from the Proposed Transaction materialize, the Applicants are at risk for not achieving enough incremental profits to cover the new debt. Second, as a result, the Board should review whether the Applicants' incremental debt incurred for this Proposed Transaction can be supported by the potential additional revenues or costs savings from the Proposed Transaction, which excludes the economically unsupported private benefits as described in Section IV.B. Third, {{ [REDACTED]

[REDACTED]

[REDACTED] }}

¹⁶² This figure appears to exclude a small amount of annual incremental dividends (\$82 million), that if added, would be consistent with the STB's statutory definition of fixed charges (Section 1180.6(a)(2)(iii)). See Application, App. Vol. 1, p. 22, and Exhibit 18, pp. 7-10; App Vol. 1, pp. 150-153.

Age Group	Percentage
16-24	163
25-34	100
35-44	100
45-54	100
55-64	100
65-74	100
75-84	100
85-94	100
95-104	100

Figure 11: KCS Investment Bankers' Valuation of Transaction Synergies Compared to Increased Net Debt from the Transaction¹⁶⁶ {{

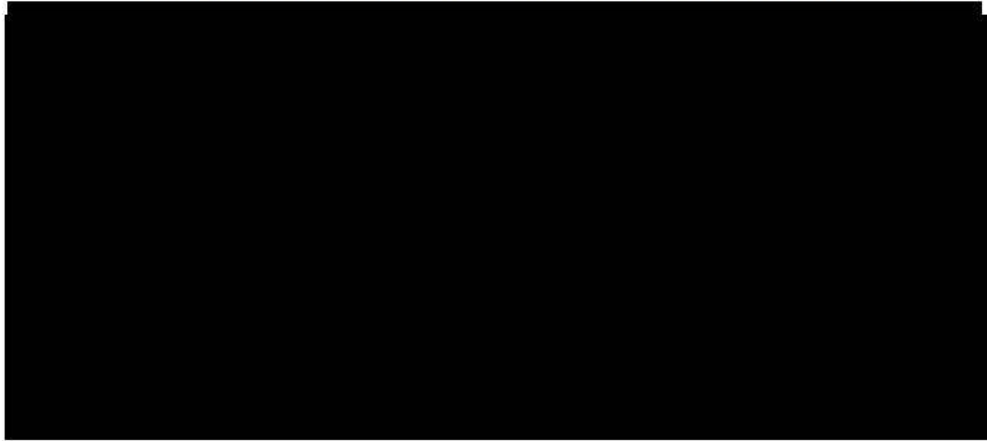


Figure 12 below, reports the corrected merger benefits for the Applicants by removing the unsupported diversion traffic for longer and disadvantaged routes and traffic movements that are achievable without the Transaction. The corrected merger benefits associated with the Proposed Transaction are just [REDACTED] }¹⁶⁷ These corrections remove most, but not all of the Applicants' Claimed Private Benefits associated with the Proposed Transaction that the Company will solely receive. In the normal course of business prior to the announcement of the Proposed Transaction, CP's estimated Transaction related synergies were {{ [REDACTED] }} claimed benefits reported in its Application. The CP internal business communication recommendation for estimated CPKC Transaction synergies was equal to [REDACTED] for 2021-2023. These revenue synergies are similar to the corrected incremental profit estimate equal to [REDACTED] } than CPKCS' \$715 million claimed in its STB Application.¹⁶⁸ In addition, the internal business estimates for operating expense synergies ranging from [REDACTED] } to Applicants' claimed \$172.8 million.¹⁶⁹ To put the corrected potential private benefits

¹⁶⁶ See Carey HC-WP "HC-Value of Transaction Benefits.xls"

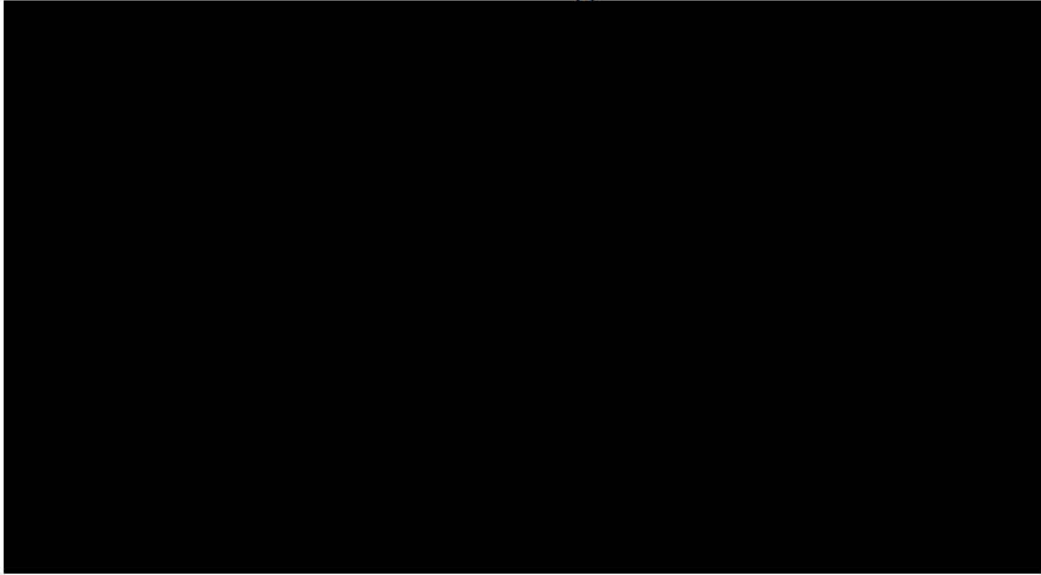
¹⁶⁷ 68% = (888-286) / 888)

¹⁶⁸ {{ [REDACTED] }}

¹⁶⁹ Ibid.

that will accrue solely to Applicants of [REDACTED] into context, {[REDACTED]
[REDACTED]} and it is much higher than the revenue reduction associated with Applicants' assumed 5% rate reduction to limited routes in the traffic diversions, which approximates [REDACTED] which will benefit shippers.¹⁷⁰

Figure 12: Correction to Applicants Claimed Public Benefits (Including Those Properly Categorized as Private Benefits) Using Corrected Diversion Traffic¹⁷¹



The percentage reduction in merger benefits of {[REDACTED]} was applied to {[REDACTED]
[REDACTED]
[REDACTED]} for the Proposed Transaction as shown in Figure 13 below.^{172, 173} This figure demonstrates that the {[REDACTED]

¹⁷⁰ Brown & Zebrowski V.S. ¶ 32; Carey HC-WP "HC-CPKC Diversion from Single Line Competition.xlsx". The 5% rate decrease is assumed for Dallas to Chicago route and a few other routes.

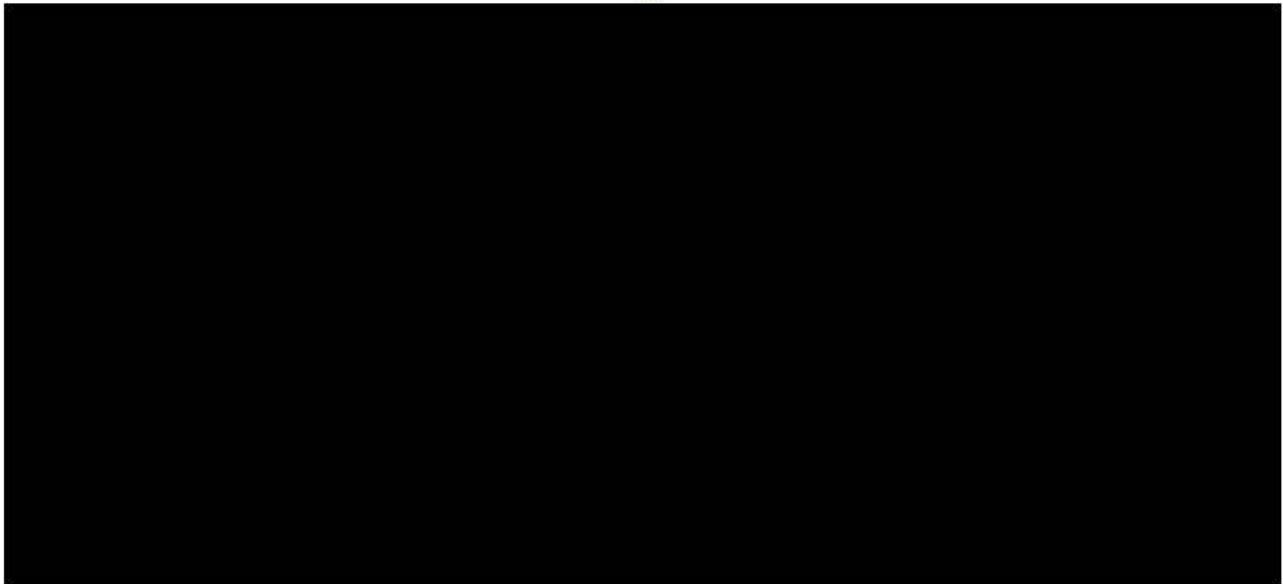
¹⁷¹ See Carey HC-WP "HC-Diversion Traffic and Transaction Benefits.xls"

¹⁷² {

The actual amount of debt raised to fund the Transaction was about \$8.4 billion (US Dollars). Canadian Pacific, Press Release, "CP delivers sold fourth-quarter results; prepared to make history in 2022", January 27, 2022, Financial Information, Note 5 (Debt), available at https://s21.q4cdn.com/736796105/files/doc_financials/2021/q4/Exhibit-99.1-Q4-2021-Earnings-Release.pdf. Canadian dollar proceeds of \$2.2 billion for Nov. 24, 2021 debt issuance converted to US dollars using the Bank of Canada Canadian Dollar to US Dollar exchange rate on November 24, 2021 of 1.2677, which was the issue date for the Canadian dollar debt issued by CP. The \$2.2 billion in Canadian dollars converts to \$1.74 billion US dollars. The Dec. 2, 2021 debt issued of \$6.7 billion was in US dollars. The combined US dollar amount for the debt issued is about \$8.44 billion. Canadian dollar to US Dollar exchange rates from Bank of Canada, available at <https://www.bankofcanada.ca/rates/exchange/daily-exchange-rates-lookup/>.

}} In sum, the {{
}}
}}
}}. An important consideration is that the incremental debt raised is an obligation of the combined company, and that if the Applicants' claimed benefits do not materialize then the burden to recover the Applicants' investment in the transaction may affect all existing shippers, including potentially resulting in higher rates.

Figure 13: KCS Investment Bankers' Valuation of Transaction Synergies Adjusted for Unsupported Diversion Traffic Compared to Incremental Debt Raised for the Transaction¹⁷⁴
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V. COMPETITIVE ISSUES WITH MERIDIAN SPEEDWAY

A. NSR's Request for Expanded Market Division and Asset Control on the Meridian Speedway and Conditions Necessary to Ameliorate Competitive Concerns

In addition to the issues posed directly by the Application, the following sections assess the potential for the transactions described in NSR's Description of Anticipated Responsive Application¹⁷⁵ to enshrine impaired competition and harm customers in the Eastern U.S. The existing

¹⁷⁴ See Carey HC-WP "HC-Value of Transaction Benefits.xls"

¹⁷⁵ See STB Finance Docket No. 36500, Description of Anticipated Responsive Application by Norfolk Southern Railway Company, January 12, 2022.

KCS and Norfolk Southern Railway Company (NSR) Meridian Speedway Agreements create competitive concern and could be aggravated as a result of the Anticipated Responsive Application. I discuss the anticompetitive concerns that arise from the Meridian Speedway's use of an explicit market allocation scheme which divides the control of certain geographic areas and products between KCS and NSR.¹⁷⁶ This type of market division is prohibited by antitrust agencies when it results in adverse vertical effects on competition. However, the agreement was granted an exemption as an intra-corporate transaction in 2006 and therefore the STB did not complete a regulatory review for the agreement's competitive implications, despite the establishment of the Market Division. The KCS/NSR arrangement has provided NSR with exclusive rights over the Speedway and enabled NSR to vertically integrate (economically) across the Meridian Segment to and from its Eastern rail system by granting NSR exclusive right to move traffic (via haulage) between Shreveport and Meridian for transcontinental intermodal traffic originating or terminating West of Dallas and East of Meridian at points not served directly by KCS. That traffic is referred to in the MSLLC Agreements (defined below in Section V.B) as "NS Traffic" and is exclusive to NSR and therefore hereafter referred to as "NSR Exclusivity Traffic"¹⁷⁷ Both NSR's existing exclusive rights and its proposed expansion of those rights raise anticompetitive concerns and distort competition between NSR, KCSR, and CSXT for the NSR Traffic for which the most efficient route is over the Speedway. Additionally, if the Anticipated Responsive Application is approved, I also discuss the need for conditions to remedy these anticompetitive impacts on shippers.

B. Competitive Concerns Arising from the Market Allocation Scheme on the KCS/NSR Meridian Speedway's

KCS and NSR together own a joint venture company called the Meridian Speedway, LLC ("MSLLC"). MSLLC owns the Meridian Speedway, with KCS owning 70% and NSR owning 30%.¹⁷⁸ As NSR recognizes, this asset is a "critical rail line" connecting Meridian, Mississippi and Shreveport, Louisiana which provides an advantaged gateway with distinctive circumstances for NSR intermodal traffic between the Western and Eastern U.S.¹⁷⁹

¹⁷⁶ I understand that CPKC plans to address NSR's proposed expansion in their forthcoming filing. I will supplement my analysis and opinions to address the NSR proposal.

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{ }

¹⁷⁹ See STB Finance Docket No. 36500, Description of Anticipated Responsive Application by Norfolk Southern Railway Company, January 12, 2022.

I begin with a review of the original agreement and the unique attributes associated with the MSLLC and the absence of sufficient prior economic analyses. KCS sought an exemption for an intra-corporate transaction in which the parties entered a horizontal market division.¹⁸⁰ The request was not presented as a transaction that affected KCS's control of the segment of the Speedway to be owned by the MSLLC joint venture. Further, it did not provide or suggest the need for a competitive effects analysis to consider the potential harm to customers that could arise from the creation of the MSLLC or the other related agreements (together, the "MSLLC Agreements") presented in the Notice of Exemption.¹⁸¹

From an economic perspective, the MSLLC agreements encompasses two important components: (1) the market division or allocation scheme that provides exclusivity rights to each owner for distinct types of customers and rail traffic accessed through the Meridian Speedway, which has the economic effect of (2) transferring economic control of the MSLLC for purposes of protecting NSR's exclusive right to move NSR Traffic and {{ [REDACTED] }}. ¹⁸²

Meridian Speedway Agreements provided NSR with effective ownership and economic control of the portion of the Meridian Speedway dedicated to overhead transcontinental, intermodal traffic between Southwest U.S. (West of Dallas) and Southeast U.S. regions (East of Meridian) which gives rise to competitive concerns.^{183, 184} Through the Meridian Speedway Agreements, KCS

¹⁸⁰ FD No. 34821-23, Decision, April 2006, p.2, available at <https://dcms-external.s3.amazonaws.com/MPD/62491/32B24610D6F3FC1D85257148005B37FF/36922.pdf>

¹⁸¹ See {{ [REDACTED] }}
 In competition analyses before energy regulators the economic concept of control is adopted. An academic article discussing the economic aspects of leasing cites the prevailing definition of lease agreements as contracts that "convey the right to control the use of...an identified asset... for a period of time." See Merrill, Thomas W., "The Economics of Leasing", Journal of Legal Analysis, The John M. Olin Center for Law, Economics and Business at Harvard Law School, 2020, at 9.

¹⁸³ See Carey HC-WP "HC-Meridian.pdf" {{ [REDACTED] }}

¹⁸⁴ {{ [REDACTED] }}

received sole use, and therefore effective exclusivity of the Meridian Speedway, for traffic originating at Dallas or elsewhere.^{185, 186} KCS interchanges traffic it moves across the Meridian Speedway with NSR at Meridian, MS.¹⁸⁷

NSR's newly acquired exclusive transcontinental traffic lane for NSR Traffic includes the Los Angeles port, which is an artery for substantial international trade between the U.S. and important trading partners in the Asia Pacific region. NSR uses the Meridian Speedway to connect Western U.S. traffic with U.S. locations east of Meridian, MS including Atlanta GA, Charlotte, NC, and locations further north.¹⁸⁸

Further, the Meridian Speedway Agreements stipulate that neither KCS nor MSLLC can compete for the NSR Exclusivity Traffic, nor provide haulage for, or interchange with another carrier to handle this traffic between Shreveport and Meridian.¹⁸⁹ NSR's exclusive control of the specified intermodal traffic carried by the Meridian Speedway does not have a term limit.¹⁹⁰ To facilitate NSR's cross country intermodal business, the Meridian Speedway Agreements provide NSR the ability to interchange traffic at Shreveport with UP¹⁹¹ for origination and termination in the Southeast U.S. and mid-Atlantic region.¹⁹² The NSR Haulage Agreement and the broader Meridian

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[REDACTED]

¹⁸⁶ "Norfolk Southern will be the sole provider via a haulage agreement of domestic intermodal services on the Shreveport-to-Meridian portion of the Speedway to and from points in the United States west of Fort Worth (including transcontinental traffic originating at West Coast ports) and points east of Meridian. KCS and Norfolk Southern will jointly market local Dallas intermodal traffic to and from Norfolk Southern's network in the East. KCS will handle all other business over the line, including traffic local to the line and the KCS system and traffic to and from Mexico." See SEC Archives, "Remarks by Henry C. Wolf", December 2005, available at <https://www.sec.gov/Archives/edgar/data/702165/000070216505000255/hcw-remarks1.htm>

¹⁸⁷ {

[REDACTED]
 .}} See Carey HC-WP "HC-Transcontinental Meridian Traffic.xls".

¹⁸⁸ See NS "Crescent Corridor", available at <http://www.nscorp.com/content/nscorp/en/shipping-options/corridors/crescent-corridor.html>

¹⁸⁹ {

[REDACTED]

¹⁹⁰ {

[REDACTED]

¹⁹¹ {

[REDACTED]
 .}}
 [REDACTED]
 [REDACTED]

Speedway Agreements provide NSR with substantial operational flexibility to efficiently and effectively interchange and operate over its owned and controlled intermodal traffic.¹⁹³ The rates identified in the Meridian Speedway Agreements are reported in the Joint Use Agreement¹⁹⁴ and the Western Haulage Agreement.¹⁹⁵

Agreements that divide a market into exclusive scopes and/or allocate customers by sellers in an exclusive manner, such as the Meridian Speedway Agreements, are conspiracies that seek to limit price competition and are generally viewed as anticompetitive because they result in a restraint of trade.¹⁹⁶ Antitrust agencies prohibit such understandings or formal agreements that divide or allocate a market, regardless if they are tacit or explicit.¹⁹⁷ Agreements that solely divide markets among competing firms have been considered illegal, with the FTC stating that “[p]lain agreements among competitors to divide sales territories or assign customers are almost always illegal.” The FTC views such arrangements as “... essentially agreements not to compete” where parties say “I won’t sell in your market if you don’t sell in mine.”¹⁹⁸ Only in circumstances where the agreement not to compete is not the primary aspect of the arrangement, described as “ancillary” by the FTC, is the arrangement

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¹⁹⁶ See Scherer, F.M., and Ross, David, “Industrial Market Structure and Economic Performance”, Third Edition, pp. 317, 320 and 321. Notably, addressing the consistent court rulings of the unlawful price fixing conspiracies and arrangements, including market division agreements, since the mid-1930’s, regardless of whether it was effective or not. *Id.* See also Miles, Jeff. “Principles of Antitrust Law”, April 2016, at 67.

¹⁹⁷ See Federal Trade Commission, “Market Division or Customer Allocation”, available at <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/market-division-or>.

¹⁹⁸ *Ibid.*

not of material concern.^{199, 200} However, the market division is the principal competitive effect flowing from the Meridian Speedway Agreements.

Further, types of arrangements that rely on market division and allocations as their main purpose, such as the KCS and NSR Meridian Speedway Agreement, are in the same category of anti-competitive conduct as price-fixing.^{201, 202} The FTC's stringent enforcement against such collusive, anticompetitive market allocation schemes has been recognized as an important and positive contribution to the economy.²⁰³ From an economic perspective, collusive practices are recognized to increase profits to participating companies while decreasing output and therefore causing a welfare loss. This contrasts with a competitive equilibrium where consumer welfare is maximized as the result of competitive price and output levels.²⁰⁴ The substantial economic impact of cartel/collusive behavior is analyzed to be the basis for recommending the establishment or enhancement of antitrust enforcement.²⁰⁵

However, whether the horizontal effects of the KCS-NSR market division (which, among other things, ceded a competitive advantage that KCS had for some traffic that NSR might otherwise carry or receive over other gateways) would have passed review by the Board as a pooling arrangement, or a change of control, or review under the antitrust laws is less significant than the fact

¹⁹⁹ Ibid.

²⁰⁰ Certain vertical agreements among suppliers and retailers, or wholesalers and distributors, may be considered to enhance efficiencies and have the effect of resolving free-rider problems and promoting intra-brand competition at the retail level by limiting competition among retailers or distributors in downstream markets. E.g., certain instances of resale price maintenance and territorial restrictions. However, such characteristics are not present in the circumstances of the Meridian Speedway as the relevant agreements are horizontal in nature. Two competing firms in the same market have allocated among themselves certain customers and types of services, which thereby eliminates competition for those customers and services entirely. See Jarmuth, Jeffrey J., "Horizontal Market-Division Agreements Under the Ancillary Restraints Doctrine", *Loyola University Chicago Law Journal*, Vol 16, No. 4, 1985 at 775-785; Miles, Jeff. "Principles of Antitrust Law", April 2016, at 73-74; Gelfand, David I. and Bernhardt, Linden, "Vertical Restraints: Evolution from Per Se to Rule of Reason Analysis", ABA Antitrust Section Fall Forum, 2017 at pp. 5-7.

²⁰¹ See Viscusi, Kip W. et al., "Economics of Regulation and Antitrust", Second Edition, The MIT Press, 1995, at 125.

²⁰² Market allocation agreements have been considered to cause more competitive harm than other forms of collusive arrangements such as price-fixing. Whereas price-fixing eliminates price competition among companies, market division eliminates all competition among companies. See Miles, Jeff. "Principles of Antitrust Law", April 2016, at 66-67.

²⁰³ Kovacic, William E., "Antitrust Policy and Horizontal Collusion in the 21st Century", *Loyola Consumer Law Reporter* 9, no. 2 (1996-1997): 97-112 at p. 97.

²⁰⁴ Clarkson, Kenneth W. and Miller, Roger L., "Industrial Organization: Theory, Evidence and Public Policy", McGraw Hill, 1982 at pp. 317-318.

²⁰⁵ Analysis of the behavior of U.S. firms during periods without effective antitrust enforcement concludes that "the benefits of antitrust enforcement to consumers and social welfare-particularly in deterring the harms from anticompetitive conduct across the economy-appear to be far larger than what the government spends on antitrust enforcement..." See Baker, Jonathan, "The Case for Antitrust Enforcement", *Journal of Economic Perspectives*, Vol. 17, No. 4 Fall 2003.

the arrangements creating NSR's exclusivity of asset control and market division scheme (also referred to as a market allocation) has never been subjected to a competition review and the arrangements have vertical effects that are patently anticompetitive.

NSR's exclusive right to handle intermodal traffic over the MSLLC track today, as well as its proposed expansion (more products and broader geographic scope) are anticompetitive and distort competition between NSR, KCSR, and CSXT for NSR Traffic for which the most efficient route is over the Speedway, and therefore impacts railroad markets East of Shreveport.²⁰⁶ The MSLLC Agreements enabled NSR to vertically integrate (economically) across the MSLLC Line into its Eastern rail system (through elimination of KCS's right to haul NSR Exclusivity Traffic).

NSR participates in the handling of the majority of the traffic over the Meridian Speedway. NSR is responsible for {{[REDACTED]}} carloads of transcontinental intermodal traffic over the Meridian Speedway (i.e., NSR Exclusivity Traffic). NSR also receives or delivers in interchange with KCS at Meridian {{[REDACTED]}} cars of other traffic types carried over the Meridian Speedway. Separately, KCS solely handles only {{[REDACTED]}} carloads on the Speedway that NSR does not handle at any point. In sum, NSR is a substantial beneficiary of the substantial traffic that is carried over the Meridian Speedway.²⁰⁷

Due to NSR's exclusivity over the Meridian Speedway,²⁰⁸ UP and BNSF interchanges with CSXT that compete with the exclusive NSR Traffic for which the Speedway is the best route, are over routes that are longer or operationally disadvantaged such as the New Orleans²⁰⁹ or Memphis gateways.²¹⁰ The Meridian Speedway gateway has a direct route and shorter mileage between southwest originating and terminating traffic with certain customers in the southeastern U.S.²¹¹ The competitiveness of trucking is distance limited, and the cross country lanes of focus across the

²⁰⁶ The fact that intermodal traffic is exempt from STB regulation does not make it exempt from competitive scrutiny by the STB or antitrust agencies.

²⁰⁷ See Carey HC-WP "HC-Transcontinental Meridian Traffic.xlsx".

²⁰⁸ {{[REDACTED]}}

²⁰⁹ See CSXT witness Anthony Dideo V.S.

²¹⁰ Industry trade press has discussed congestion at Memphis. See Journal of Commerce, "Memphis shippers ask STB to intervene on intermodal congestion", April 21, 2021, available at <https://www.joc.com/rail-intermodal/intermodal-shipping/memphis-shippers-ask-stb-intervene-intermodal-congestion-20210420.html>; Railway Age, "What's Really Going On in Memphis?", June 9, 2021, available at <https://www.railwayage.com/news/whats-really-going-on-in-memphis/>

²¹¹ See Carey HC-WP "HC-Meridian.pdf".

Meridian Speedway exceed the general distance of the competitiveness of a route exclusively carried by a truck versus a railroad.²¹²

Figure 14, below, reports market shares for NSR Exclusivity Traffic for specific BEA origin and termination market lanes (or pairs) between the west coast and Southeast U.S. for intermodal traffic not directly served by a single railroad.²¹³ This NSR Exclusivity Traffic has approximately {{[REDACTED]}} market share.²¹⁴ Analysis of specific market lanes is common in competition analyses of railroads.²¹⁵ The BEA area is the assumed geographic scope of the market for intermodal traffic, used as a starting point to determine if there is economic indicia of competitive harm for the area accessible by trucking to and from the intermodal terminal across the entire BEA region.²¹⁶ The high market shares for specific BEA origin and termination market lanes shown in Figure 14 indicates that trucking from more distant BEAs is generally not economical and therefore not competitive. For the NSR Exclusivity Traffic, the high market shares for certain BEA origin and destination market lanes raise concerns of competitive harm to customers today, with particular regard to traffic between: {{[REDACTED]}}. {{[REDACTED]}}.

²¹² A truck competitor for intermodal traffic is estimated to extend to routes as long as 500 miles. See Bernstein, “North American Transportation”, December 2021, p.5.

²¹³ Bureau of Economic Analysis Areas or BEAs are economic areas which define the relevant regional markets surrounding metropolitan or micropolitan statistical areas. They are created by the Bureau of Economic Analysis and are included in as geographic area of analysis in the STB CWS. Further information is available at <https://apps.bea.gov/scb/pdf/2004/11November/1104Econ-areas.pdf>

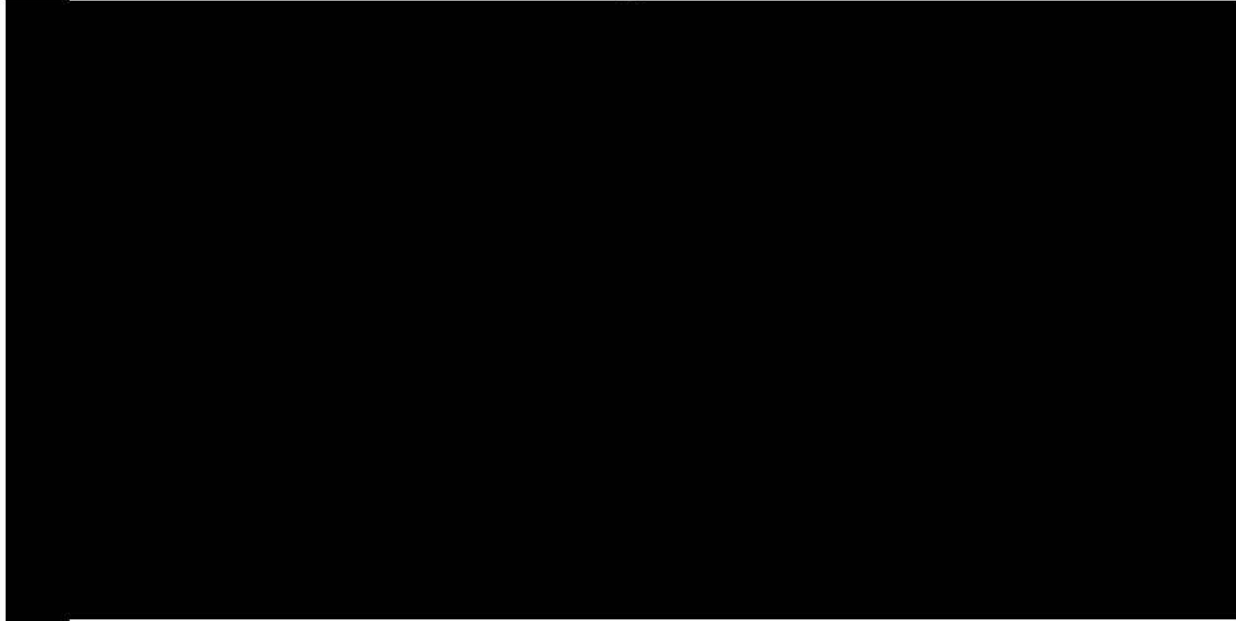
²¹⁴ See Carey HC-WP “HC-Transcontinental Meridian Traffic.xlsx”. Only BEA route pairs or lanes were selected that do not have a single railroad alternative for the entire route, such as BNSF from the west coast U.S. to Atlanta, via Memphis.

²¹⁵ See Verified Statement of Curtis Grimm, Norfolk Southern Railway Company - Acquisition and Operation – Certain Rail Lines of the Delaware and Hudson Railway, Finance Docket No. 35873, Nov. 5, 2014.

²¹⁶ See Carey HC-WP “HC-Meridian.pdf”.

**Figure 14: NSR-Meridian Speedway Market Shares:
Intermodal Traffic Between West Coast and Southeast
(No-Single Line Service)²¹⁷**

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These { } market shares on specific BEA route pairs between the U.S. West Coast and Southeast U.S. raise concerns for anticompetitive effects and lessening of competition.^{218, 219} Insofar as this direct Meridian Speedway route is advantaged for certain locations in the Southeast U.S.,²²⁰ the Meridian Speedway Agreements extended NSR's route westward (and removed/eliminated KCS) as a carrier, expanding the market being divided and changing the competitive dynamic among NSR and other carriers competing for traffic to be delivered into/from the Eastern U.S. with the Southwest U.S. Market shares statistics are often used to evaluate the potential for competitive concerns; with larger market shares indicating increasing market concentration and heightened concerns for undue

²¹⁷ Analysis performed on the STB Confidential Carload Waybill Sample. See Carey HC-WP "HC-Transcontinental Meridian Traffic.xlsx". Table reports "expanded carloads," total intermodal units may be larger than carloads due to the utilization of "double stack" intermodal containers.

²¹⁸ For instance, rival foreclosure. See U.S. Department of Justice & The Federal Trade Commission, "Vertical Merger Guidelines", June 30, 2020, at section 4a. While the FTC withdrew the 2020 Vertical Merger Guidelines, it recognized the substantial improvements over the prior 1984 Merger Guidelines on this topic. See FTC, "Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines Commission File No. P810034", September 15, 2021, at p. 2.

²¹⁹ It is recognized that anticompetitive problems may arise when one or both levels of the integration possess market power. See Viscusi et al., "Economics of Regulation and Antitrust", The MIT Press, 2nd Edition (1995) at pp. 229, 234.

²²⁰ See Carey HC-WP "HC-Meridian.pdf".

influence on a competitive outcome.²²¹ The STB also considers the impacts of reduced competition from eliminating a competitive alternative.²²²

C. Expansion of NSR’ Exclusive Share of Traffic that can move over the Speedway Will Further Reduce Competition in the Eastern Railroad Markets

Next, in light of NSR’s Notice²²³ regarding Responsive application, I consider the competitive implications of NSR expanding its exclusive rights to move certain traffic over the MSLLC Line (which I will supplement once a detailed explanation of its request is submitted in its formal filing). NSR’s Notice indicates that it will seek authority from the Board to expand its market division to include a wider geographic area and a wider range of products that will be made exclusively NSR Traffic. This expansion of the NSR exclusivity Traffic will diminish competition for that traffic East of Meridian. NSR says it will be seeking the exclusive right to use the Meridian Speedway for traffic that originates or terminates west of Shreveport (instead of Dallas) for automotive, and “premium boxcar” traffic, in addition to intermodal traffic, and to exercise its exclusive rights through trackage rights rather than haulage rights.²²⁴ NSR’s request to expand the geographic area and expand its exclusivity rights to traffic that originates and terminates from key business areas in and around Texas (e.g. Dallas, Houston, Austin, Tulsa), and potentially in Mexico.²²⁵ NSR’s formal request is needed to clarify the specific traffic that it seeks to expand which is generally mentioned in its notice.

Expanding the of NSR’s exclusive rights will have a substantial beneficial impact on NSR, and a corresponding adverse impact on competition and shippers. I illustrate the impact by attempting to estimate the additional carloads and revenue for expanded traffic NSR appears to seek. First, regarding product expansion the addition of premium boxcar traffic and automotive traffic, this

²²¹ See U.S. Department of Justice & The Federal Trade Commission, “Horizontal Merger Guidelines”, August 19, 2010 at pp. 18-19.

²²² “[T]he Board focuses on preserving competition between two rail carriers; it protects against “2-to-1” reductions in competition, but in minor transactions it does not generally remedy transaction-related reductions of competitive options from three carriers to two carriers absent a showing of specific harm. See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Merger 1996), 1 S.T.B. 233, 351 (STB served Aug. 12, 1996)” See Norfolk Southern Railway Company – Acquisition and Operation – Certain Rail Lines of the Delaware and Hudson Railway Company, Inc., Finance Docket No. 35873 (Decision No. 6 served May 15, 2015), p. 17. For discussion of whether competition is diminished by a proposed merger moving firm count from 3-to-2 and 2-to-1, see Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., Decision No. 44, Finance Docket No. 32760, August 6, 1996, at pp. 119-124.

²²³ See STB Finance Docket No. 36500, Description of Anticipated Responsive Application by Norfolk Southern Railway Company, January 12, 2022.

²²⁴ While the STB generally considers these product types to be exempt from recourse for rate setting disputes before the STB, that is separate and distinct from approval of agreements and expansion of such agreements that require approval and should be expected to be evaluated for the competitive effects arising therefrom.

²²⁵ NSR’s Inconsistent Application provides limited details to the specific locations west of Shreveport and was particularly vague with respect to the specific locations in Mexico it intends to include in its request.

creates new opportunities for more than {{[REDACTED]}} automotive and premium box cars, along with substantial revenue as shown in the first panel of Figure 15 below. Figure 15 below (panel 1) also reports gross revenues of potentially [REDACTED]}.²²⁶ Further, the expansion of the geographic scope between Shreveport and Dallas includes approximately {{[REDACTED]}} premium box cars, {{[REDACTED]}} automotive cars and {{[REDACTED]}} as shown in panel 2 of Figure 15 below. These additional carloads associated with the expanded geographic scope, report gross revenue equal to approximately [REDACTED]}.

Figure 15: Traffic Revenue and Cars Associated with NSR's Request for Expanded Product Types - West of Dallas- and Geographic Expansion West of Shreveport/East of Dallas²²⁷



²²⁶ This revenue estimate is illustrative because it attempts to subtract revenues that NSR receives today from a portion of the move as well as BNSF and UP revenue that NSR cannot access.

²²⁷ Analysis performed on the STB Confidential Carload Waybill Sample. See Carey HC-WP "HC-Transcontinental Meridian Traffic.xls".

D. Recommended Conditions to Ameliorate Competitive Concerns Regarding the Meridian Speedway and Affecting Eastern Rail Markets

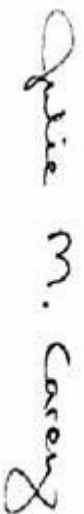
The competitive concerns arising from NSR's current exclusivity right to serve certain intermodal traffic over the Meridian Speedway, coupled with the potential for further diminution in competition across the Meridian gateway by NSR's proposed expansion, indicate the STB should consider conditions to this Transaction that abolish the NSR exclusivity provisions in the Meridian Speedway Agreement. With NSR's exclusivity provision abolished; CPKC is freed to work with its connecting carriers to develop commercially reasonable terms to interchange or otherwise move traffic that is carried over the Meridian Speedway. This will remedy the current anticompetitive circumstance and lead to a procompetitive benefit with increase competition in the Eastern U.S. railroad markets associated with traffic movements that have economic advantages across the Meridian Gateway.

Further, to the extent that the STB allows the NSR to expand the allowable products and the geographic scope for use over the Meridian Speedway, additional conditions to protect competition should be imposed.

VERIFICATION

I, Julie M. Carey, declare under penalty of perjury that I have read the foregoing Verified Statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this Verified Statement.

Executed on February 28, 2022

A handwritten signature in black ink that reads "Julie M. Carey". The signature is written in a cursive style with a large, stylized 'J' and 'C'.

Julie M. Carey

VERIFICATION

I, Albert W. Bremser, declare under penalty of perjury that I have read the foregoing Verified Statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this Verified Statement.

Executed on February 28, 2022

A handwritten signature in cursive script, appearing to read "Albert W. Bremser", written in dark ink.

Albert W. Bremser

Attachment 1: Carey CV

JULIE M. CAREY

MANAGING DIRECTOR

Julie M. Carey is a Managing Director at NERA Economic Consulting. She has substantial experience as an economist, providing expert evidence in energy and transportation related commercial and regulatory disputes. She has more than 20 years of experience addressing economic issues in oil and gas, pipelines, power/coal/renewables, and railroad sectors. Ms. Carey is recognized as a leading energy expert (2019-2021) and a leading arbitration expert (2021-2022) by Who's Who Legal.

In addition to her expert consultancy assignments, Ms. Carey is also an adjunct professor at Georgetown University where she teaches a graduate level course in energy economics and policy, which includes instruction on economics of energy products and transportation and regulatory economics.

Ms. Carey provides expert consulting and testifying services on energy economic issues in commercial disputes before U.S. federal and state courts, and before arbitration panels in the U.S. and internationally, including international arbitration venues. She also routinely assists clients in matters before energy and transportation regulators including U.S. Federal Energy Regulatory Commission (FERC) and U.S. Surface Transportation Board (STB) as well as many other regulatory agencies in the U.S. and Canada.

Ms. Carey has substantial expertise in economic analyses of energy and transportation markets. She routinely conducts economic analyses of energy and transportation markets to understand historical and forecasted market conditions (supply, demand and prices), as well as to evaluate competition, claims of market manipulation, and other anticompetitive acts. She has conducted these analyses many dozens of times for the purposes of the regulatory approval of mergers and acquisitions, market-based rate authority, market rules, negotiated rates, as well as within investigations and commercial disputes. Her work includes evaluation of the reasonableness of rates and whether market participant bidding, trading and other behavior is discriminatory or otherwise manipulative, and whether prices reflect competitive market prices. Ms. Carey's work includes a variety of other regulatory economic analysis including affiliate relationships, cost of service and forward-looking costs, among others.

Within her commercial dispute work, Ms. Carey has been involved in many claims of breach of contract including oil and gas products, oil pipeline transportation, railroads and coal, power, renewables, spent nuclear fuel. She has also been involved in cases concerning partnership disputes, delayed plant operations, diminished value claims, replacement power, antitrust and manipulation claims, clean air act, fiduciary duty, and bankruptcy, among others. Ms. Carey has substantial experience with economic damages (historical and future lost profit analyses) and conducts valuation analyses. She has assessed and quantified economic damages and valuations in dozens of cases which include breach of contract, antitrust, class action, and other types of disputes.

Ms. Carey also has experience with environmental analysis (e.g., greenhouse gases and other types of

emissions) and macroeconomic modeling (i.e., jobs, GDP, taxes) in which she studies the impact of energy infrastructure construction and operations on the economy for regulatory and business decision-making.

EDUCATION

- **Pennsylvania State University**
Doctoral Studies Program Coursework/M.A., Economics, 1993
- **Allegheny College**
Bachelor of Science, Economics, 1991

PROFESSIONAL EXPERIENCE

2020-Present	NERA Economic Consulting – Managing Director
2017-2019	NERA Economic Consulting - Director
2016-Present	Georgetown University (Washington, DC) - Adjunct Professor
2011-2017	Navigant Consulting, Inc. (Washington, DC) - Director
2004-2010	LECG, Inc. (Washington, DC) - Principal
2000-2004	FTI Consulting, Inc. (Washington, DC) - Director, Manager
1996-2000	LECG, Inc. (Washington, DC) - Economist, Senior Associate, Associate
1994-1996	American Public Power Association (Washington, DC) - Research Analyst

CERTIFICATIONS, MEMBERSHIPS, AND AWARDS

- Leading Energy Expert by Who's Who Legal (2019-2021)
- Leading Arbitration Expert by Who's Who Legal (2021 and 2022)
- International Association for Energy Economists
- U.S. Association for Energy Economists

SELECTED ENERGY PROJECT EXPERIENCE

Railroad

- Expert reports in numerous STB regulatory proceedings addressing appropriate rate to use for a trackage rights fees, including addressing economic and regulatory analyses, including numerous valuation methodologies. Economic analysis of plastics, chemical and petroleum railroad transportation services, rates, costs and contribution margins.
- Expert report and expert testimony in commercial arbitration regarding multiple breach of contract claims for joint-line transportation service, and financial, economic and regulatory considerations regarding the contracts, negotiations and the financial impact as well as economic damages.
- Expert consultation analyzing economics of containerized freight transportation, including intermodal rail and competition with alternative transportation modes in a transportation contract dispute and claims of anticompetitive behavior for a commercial arbitration.
- Expert report in STB proceeding regarding the potential introduction of indirect competition analyses within market dominance determinations for coal transportation rates to utility generation facilities.

- Expert consultation analyzing economics of coal railroad transportation and fuel surcharges and claims of anticompetitive behavior for commercial disputes.
- Expert reports in a coal contract commercial dispute analyzing economic damages and replacement coal source and transportation alternatives.
- Expert reports in numerous regulatory proceedings involving rail transportation rate reasonableness disputes for coal, including evaluation of appropriate regulatory economic approach to assess the reasonableness of a railroad rate, railroad transportation rate analyses (historical and future) for coal and other products, coal demand and coal plant performance analyses, and revenue attribution methodologies for shared facilities.

Oil and Gas

- Expert report and economic analysis in an ongoing matter to provide economic evidence regarding potential competitiveness of refined product pipeline markets (gasoline, distillates, fuel oil, jet fuel) for a proceeding before the FERC involving a complaint regarding the reasonableness of current rates and continuation of its market-based rate authority. This work includes evaluation of product and transportation (pipeline, waterborne, trucking and rail), competition, and competitive prices for U.S. and international transactions of refined products and transportation.
- Expert report and economic analysis of wholesale propane markets, supply and demand and potential transportation alternatives for propane in the Midwestern U.S. in a claimed discrimination by a shipper on an NGL pipeline.
- Economic consulting and expert report before the NEB regarding potential of discriminatory behavior that can arise from an unregulated affiliate of a regulated oil pipeline and other economic issues pertaining to a crude oil pipeline including evaluation of appropriate code of conduct. The economic analysis includes evaluation of substantial quantities of NGL - butane and other oil products injections into the pipeline system and the impact on the quality and financial harm and economic damages for the diminution of crude oil value.
- Economic and competition analyses in numerous regulatory proceedings pertaining to refined petroleum product, crude oil, natural gas liquids and transportation markets for oil pipelines market-based rate authority. This work includes analysis of product and geographic markets and the evaluation of origin and destination market, analysis of refined petroleum product and crude oil markets and transportation economics (rail, truck, waterborne, and pipeline) throughout most U.S. markets, Canada and many other international markets and analysis of competitive prices and market concentration.
- Expert report and testimony in an international arbitration regarding economic analysis of crude oil markets (Western Canadian and global markets), economics of conventional and unconventional oil and gas production resources, and the potential causal linkage of falling crude oil prices since 2014 and impact thereof on the energy construction industry and certain companies located in Western Canada.
- Expert consulting providing economic analysis of the competitiveness of crude oil transportation market in Western Canada to evaluate competition within pipeline markets (including railroad competition) before the NEB. This work also included economic analysis of the negotiations process and negotiated rates for new transportation contract sales to determine if the process was competitive and the rates were consistent with fair market value prices.
- Expert consulting in a refined product transportation contract dispute involving economic analysis of rail, truck, and pipeline transportation. This work involved the midwestern and Gulf Coast regions.

- Expert consulting assisting the Canadian Competition Bureau (CCB) in an investigation of potential energy market manipulation within the wholesale natural gas liquids product markets and price spikes, pertaining to propane. This work includes market analysis and econometric analysis to evaluate whether the actual market prices reflect competitive market prices (i.e., consistent with supply, demand, prices, constraints, etc.) or if manipulative or anticompetitive behavior occurred. This work included economic analysis of product and transportation markets (including pipeline, railroad, and trucking).
- Expert consulting in a claimed breach of a refined petroleum products contract in a commercial arbitration for a U.S. refinery involving economic analysis of crude oil and refined product markets, as well as rail, truck, waterborne and pipeline transportation economics and economic damages.
- Expert consulting in a crude oil product contract dispute for a commercial arbitration to conduct economic analysis of crude oil markets, pricing, and alternative transportation economics (rail, truck, waterborne, and pipeline). This work involved California and international markets (including Ecuador (Oriente), Alaska and Western Canada.)
- Expert consulting in numerous disputes/investigations involving claims of market manipulation and anticompetitive behavior within natural gas product markets. This work included evaluation of economic purpose of natural gas product purchases and sales as well as economic analysis to evaluate whether the market prices reflect competitive market prices (i.e., consistent with supply, demand, prices and constraints, etc.).

Power and Renewables

- Expert reports and testimony regarding competition in U.S. wholesale power markets and impact to coal producers in the Powder River Basin (PRB). Analysis of generating resources economics (units, purchases and sales), short run marginal costs of generating units and least cost economic dispatch and inter-fuel competition, such as natural gas and renewables, within ISO and non-ISO areas. Evaluation of generating unit commitment designations and bidding and other market rules. Statistical analysis of transmission constraints and analysis of recent and proposed transmission expansions and the impact on geographic scope of competition.
- Expert evidence and consulting in many dozens of matters related to competition within wholesale electricity markets for regulatory approval of mergers and acquisitions and market-based rate authority in regions across U.S. This work includes market power screens and delivered price test analyses and analysis of product (energy, capacity, and ancillary service) and geographic markets, including assessments of transmission constraints. The economic analysis includes evaluation of delivered fuel costs (natural gas, coal, etc.) and operational characteristics of power plants (seasonal capabilities, short run marginal costs, efficiency rates, etc.).
- Expert economic analysis and damages for a claim of tortious interference and unfair competition in wholesale solar panel market in the U.S.
- Expert report to respond to quantum issues associated with a \$1 billion economic damage claim in an energy contract dispute in an international arbitration. In addition, economic analysis was conducted on the market (supply, demand and pricing) and the claimant's commercial activities pertaining to the contractual negotiations.
- Expert reports and expert testimony analyzing economic and environmental analysis of the greenhouse gases (GHG) impact from the construction and operation of a new coal terminal export facility and downstream power markets for regulatory approval. This work included long term market and economic analysis of the elasticity of demand of coal, forecast of GHG emission and other energy market impacts within downstream energy markets (U.S. and Pacific Basin). This work included

economic analysis of coal transportation economics and delivered cost of coal within U.S. and internationally.

- Expert consulting and economic damages analyses in a dispute regarding the failed performance of a steam generator turbine in an ICC international arbitration (for California power plant). The damages claim was approximately \$7 billion. This work included economic theory and quantification of damages under a benefit of the bargain and rescission damages theories as well as evaluation of long term energy forecasts, economic performance and replacement power purchases.
- Expert for a North American ISO regarding wholesale power markets, addressing economics transition away from coal, including the decommissioning of coal-fired generating units and conversion of other coal-fired generating units to natural gas.
- Expert testimony regarding a claim of economic damages (past and future) associated with the alleged breach of a power purchase agreement within an international arbitration. This work included analysis of the appropriate economic theory of damages, quantification of economic damages and energy market related analysis.
- Expert consulting in a regulatory investigation into the reasonableness of market prices paid for natural gas purchases and bidding behavior of certain natural gas fired power generation facilities made during the 2013/2014 winter often referred to as the polar vortex. This work involved the eastern U.S markets.
- Expert report in an international arbitration providing an analysis of the Chinese and global solar panel market, reasonableness and competitiveness of the sales negotiations and negotiated prices, market value of solar power products and other valuation related issues. The dispute surrounds the performance of numerous agreements to acquire, construct and operation numerous PV manufacturing production lines.
- Expert consulting regarding a joint venture/ joint ownership contractual arrangement and the financial impact to ratepayers and counterparties from a bankruptcy of one of the parties. Additional analysis of historical benefits derived from the arrangement as well as other regulatory and market analyses.
- Expert consulting regarding antitrust claims regarding the solar panel manufacturing industry. This work included economic analysis of the potential anticompetitive behavior and a valuation analysis of a solar panel company, including the development of a discounted cash flow analysis analyzing the future cash flows and net present value of the enterprise.
- Expert testimony regarding the impact of a proposed wholesale power market rule regarding the transmission allocation among market participants, incentives for new entry, and an evaluation of economic efficiency and potential market power within the wholesale electricity market.
- Expert consulting in numerous disputes/investigations involving claims of market manipulation and anticompetitive behavior within electricity product markets. This work included evaluation of decision-making surrounding power plant outages and trading related activities and evaluation whether the market prices reflect competitive market prices (i.e., consistent with supply, demand, prices and constraints, etc.). Demand simulations were conducted to evaluate the impact on market prices. This work involved the western U.S markets, including California.
- Expert report regarding past and future economic damages and economics of the silane gas market and supply, demand and pricing in the solar power panel market in a contract dispute before a bankruptcy court.

SELECTED EXPERT AFFIDAVITS AND TESTIMONY

Highly Confidential Commercial Arbitration regarding development service agreements, Japan Commercial Arbitration Association Rules, Expert Report of Julie M. Carey, January 12, 2022.

Texas PUC Docket Numbers 52321 and 52322; Application of The Electric Reliability Council of Texas, Inc. For A Debt Obligation Order Under Pura Chapter 39, Subchapter M And N, And Request for A Good Cause Exception, Reply Expert Report of Julie M. Carey, August 12, 2021.

Highly Confidential Commercial Arbitration regarding Railroad Transportation Rate, Expert Report of Julie M. Carey, May 26, 2021, Expert Testimony July 9 and 12, 2021.

FERC Docket No. ER11-47, Triennial Update for Market Based Rate Authority for American Electric Power Company, et al. in the Southwestern Power Pool region, Affidavit of Julie M. Carey and Al Bremser, June 29, 2021.

Surface Transportation Board (“STB”), FD 32760 (Sub-No. 46), BNSF Railway Company – Terminal Trackage Rights – The Kansas City Southern Railway Company and The Union Pacific Railroad Company, Opening Verified Statement (VS) of Julie M. Carey, January 26, 2021; Reply VS on April 12, 2021 and Rebuttal VS on May 11, 2021.

FERC Docket Nos. OR18-7-002, et al. (Consolidated), Epsilon Trading, LLC, Chevron Products Company, and Valero Marketing and Supply Company v. Colonial Pipeline Company, In Market-Based Rate Proceeding, Prepared Answering Testimony of Julie M. Carey to Complainants, January 24, 2020; Prepared Answering Testimony to Trial Staff, April 6, 2020. Trial Testimony - December 3, 4 and 7-9, 2020.

FTC v. Peabody Energy Corporation and Arch Coal, Inc., Civil Action No. 4:20-cv-000317-SEP before the U.S. District Court Eastern District of Missouri, Expert Report of Julie M. Carey (May 29, 2020), Response Expert Report (June 19, 2020), Deposition Testimony (June 29, 2020), Trial Testimony - July 21, 2020.

FERC Docket No. OR20-5-000, NGL Supply Wholesale, LLC v. Phillips 66 Pipeline LLC and Phillips 66 Company, Affidavit of Julie M. Carey, January 2, 2020.

In the Matter of Arbitration, under the London Court of International Arbitration (“LCIA”) Arbitration Rules, LCIA Case No. 183933, Between Hemlock Semiconductor Pte. Ltd, Claimant and Yingli Green Energy International Trading Limited, Respondent, Expert Report, May 9, 2019.

Surface Transportation Board (“STB”), FD 32760 (Sub-No. 46), BNSF Railway Company – Terminal Trackage Rights – The Kansas City Southern Railway Company and The Union Pacific Railroad Company, Verified Statement of Julie M. Carey, February 4, 2019.

Canadian National Energy Board Hearing Order RHW-002-2017, File OF-Tolls-Group2-T309-2017-01 01, TEML Westspur Pipelines Limited, Notice of Complaint pursuant to Part IV of the National Energy Board Act by Crescent Point Resources Partnership, Reply to Sur-Reply Expert Report of Julie M. Carey, November 23, 2018. Reply Expert Report of Julie M. Carey (submitted jointly with other subject matter experts), August 31, 2018.

FERC Docket No. ER11-47, Triennial Update for Market Based Rate Authority for American Electric Power Company, et al. in the Southwestern Power Pool region, Affidavit of Julie M. Carey and Laura Olive, June 27, 2018.

In the Matter of Arbitration Proceeding Concern disputes with respect to a share purchase agreement dated June 26, 2014 Between Pacer Construction Holdings Corporation, Pacer Construction Management Corporation, Pacer Mamisiwin Corporation, Pacer Construction Corporation, Pacer Foundations

Corporation, Pacer Projects Corporation, FTI Consulting Canada Inc. (in its capacity as receiver and manager of Pacer Promec Energy Corporation and Pacer Promec Energy Construction Corporation) and Mastec, Inc. and Richard Pelletier holdings Inc., Richard Pelletier, Resman holdings ltd., Don Taylor, 592652 Alberta ltd., and John Simpson; Hearing Testimony of Julie M. Carey and Bradley A. Heys, June 18, 2018. Reply Expert Report - April 9, 2018.

Millennium Bulk Terminals - Longview, LLC, A Delaware Limited Liability Corporation V. Washington Department of Ecology, An Agency of The State of Washington; Superior Court of Washington For Thurston County, Case No. 17-2-06442-34, Declaration of Julie M. Carey, May 9, 2018.

In the Matter of Arbitration Between CSX Transportation, Inc., Claimant and Central Railroad Company of Indianapolis d/b/a Chicago, Fort Wayne & Eastern Railroad; the Columbus & Ohio River Railroad Company; First Coast Railroad Inc.; Golden Isles Terminal Railroad, Inc.; Indiana & Ohio Railway Company; Marquette Rail, LLC; Meridian & Bigbee Railroad, LLC; Mid-Michigan Railroad, Inc. d/b/a Michigan Shore Railroad, Inc.; and Riceboro Southern Railway, LLC, Hearing Testimony of Julie M. Carey, April 20, 2018. Expert Report - November 15, 2017.

In the Matter of New England Central Railroad, Inc., Trackage Rights Order, Pan Am Southern, LLC. Surface Transportation Board (“STB”), Docket No. FD 35842, Verified Statement of Julie M. Carey, December 6, 2017.

Application of Millennium Bulk Terminals-Longview, LLC for Shoreline Substantial Development Permit and Conditional Use Permit, File Number 12-04-0375, Shoreline Permit Number 17-0992, Expert Testimony of Julie M. Carey, November 6, 2017.

Application of Millennium Bulk Terminals-Longview, LLC for Shoreline Substantial Development Permit and Conditional Use Permit, File Number 12-04-0375, Shoreline Permit Number 17-0992, Expert Report of Julie M. Carey and Peter Rawlings (ERM), October 26, 2017.

National Energy Board Hearing Order RHW-002-2017, File OF-Tolls-Group2-T309-2017-01 01, TEML Westspur Pipelines Limited, Notice of Complaint pursuant to Part IV of the National Energy Board Act by Crescent Point Resources Partnership, Expert Report of Julie M. Carey, September 15, 2017.

Minnesota Public Utilities Commission, Docket No. PL-9/PPL-15-137, In the Matter of the Application of Enbridge Energy, Limited Partnership for a Routing Permit for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border., Expert Report of Julie M. Carey (With Dr. Rick Lichty), January 30, 2017.

FERC Docket No. ER10-2179 et al., Triennial Update for Market Based Rate Authority for Calvert Cliffs Nuclear Power Plant, LLC, et al. in the Northeast region, Affidavit of Julie M. Carey (with Julie R. Solomon), December 29, 2016.

FERC Docket No. ER13-1536 et al., Triennial Update for Market Based Rate Authority for Exelon in the Northeast region, Affidavit of Julie M. Carey (with Julie R. Solomon). December 29, 2016.

FERC Docket No. ER10-1823 et al., Triennial Update for Market Based Rate Authority for Dominion Energy Marketing, et al. in the Northeast region, Affidavit of Julie M. Carey (with Julie R. Solomon). December 29, 2016.

FERC Docket No. ER11-1933 et al., Triennial Update for Market Based Rate Authority for Green Mountain Power, et al. in the Northeast region, Affidavit of Julie M. Carey, December 23, 2016

FERC Docket No. ER11-47 et al., Triennial Update for Market Based Rate Authority for American Electric Power Company, et al. in the Northeast region, Affidavit of Julie M. Carey. December 27, 2016.

U.S. Army Corps of Engineers, Seattle District, Response to Draft Environmental Impact Statement for the National Environmental Policy Act Regarding the Proposed Millennium Bulk Terminals Longview Project, Expert Evidence. November 29, 2016.

Cowlitz County and the Washington State Department of Ecology, Response to Draft Environmental Impact Statement for the State Environmental Policy Act Regarding the Proposed Millennium Bulk Terminals Longview Project, Expert Evidence. June 13, 2016.

FERC Docket No. Docket No. EC16-, Supplemental Affidavit of Julie M. Carey to Support Ohio Valley Electric Corporation's Application for Market Based Rate Authority in PJM, MISO, and other market areas. January 17, 2016. (Initial Report November 6, 2015)

Wisconsin Public Service Commission, Docket No. 6800-CE-176, Application for a CPCN To Build an Natural Gas-Fueled Power Plant at its Riverside Energy Center Facility, Surrebuttal Testimony of Julie M. Carey, December 16, 2015. (Rebuttal Testimony December 4, 2015)

FERC Docket No. Docket No. EC15-, Supplemental Affidavit of Julie M. Carey to Support PNM's Application for Authorization of Disposition of Jurisdictional Facilities. November 6, 2015. (Initial Report September 25, 2015.)

FERC Docket No. ER11-47, Triennial Update for Market Based Rate Authority for American Electric Power Company, et al. in the Southwestern Power Pool region, Affidavit of Julie M. Carey. June 30, 2015.

FERC Docket No. ER10-2302, Change in Status Filing for Public Service Company of New Mexico, et al., Affidavit of Julie M. Carey. August 15, 2014.

FERC Docket No. ER14-, Change in Status Filing for American Electric Power Company, et al., Affidavit of Julie M. Carey (with Ben Ullman). December 27, 2013.

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Energy Conversion Devices, Inc., et al., Chapter 11, Case No. 12-43166, U.S. Bankruptcy Court Eastern District of Michigan Southern Division, Expert Report for Praxair by Julie Carey (with Graham Stevens). April 17, 2013.

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STB Ex. Parte No. 717, Reply to Petition of Association of American Railroads to Institute a Rulemaking Proceeding to Reintroduce Indirect Competition as A Factor Considered in Market Dominance Determinations for Coal Transported to Utility Generation Facilities. Verified Statement of Julie M. Carey (with James M. Speyer), January 14, 2013.

FERC Docket No. ER96-1551 and ER01-615 and ER09-74, Triennial Update for Market Based Rate Authority for Public Service Company of New Mexico, Affidavit of Julie M. Carey. December 21, 2012.

On behalf of Montana Alberta Tie Ltd ("Enbridge – MATL"), Alberta Utilities Commission, Proceeding 1633, Expert Testimony of Julie M. Carey (with Cliff Hamal). September 18-19, 2012. Expert Report June 15, 2012)

FERC Docket No. ER11-47, Triennial Update for Market Based Rate Authority for American Electric Power Company, et al. (Southwestern Power Pool), Affidavit of Julie M. Carey. June 29, 2012.

FERC Docket No. ER10-727-001, Request for Market Based Rate Authority for AEP Retail Energy Partners LLC, Affidavit of Julie M. Carey. March 23, 2010.

FERC Docket No. ER96-1551 and ER01-615 and ER09-74, Triennial Update for Market Based Rate

Authority for Public Service Company of New Mexico, Affidavit of Julie M. Carey. March 8, 2010.

On behalf of COALSALES II, L.L.C., In the matter of Gulf Power Company v. COALSALES II, L.L.C. Docket no. 3:06 CV 270/MCR/MD, before the US District Court for the Northern District of Florida, Pensacola Division, Expert Reports of Julie M. Carey (with Cliff Hamal). December 11, 2008 and August 19, 2008.

FERC Docket Nos. ER96-2495, ER97-4143, ER97-1238, ER98-2075 and ER98-542, Change in Status Filing for American Electric Power for Market-Based Rate Authority, Affidavit of Julie M. Carey. May 25, 2007.

FERC Docket No. Docket EC06-113-000, Application for Asset Transfer of Contra Costa #8 for Pacific Gas and Electric Company, Mirant Delta, LLC and Mirant Special Procurement, Inc., Affidavit of Julie A. Murphy (now Julie M. Carey). April 17, 2006.

FERC Docket No. ER96-1551 and ER01-615, Change in Status Filing for Public Service Company of New Mexico for Market-Based Rate Authority, Affidavit of Julie A. Murphy. January 12, 2006.

FERC Docket No. ER05-1244-000 and ER05-1244-001, Application by Societe Generale Energie (USA) Corp. for Market-Based Rate Authority, Affidavit of Julie A. Murphy. July 21, 2005.

Testimony of Julie Murphy on behalf of Onvoy, Inc., Onvoy, Inc. v. Allete, Inc. f/k/a Minnesota Power, Inc. d/b/a Minnesota Power and Light Company and, Enventis Telecom, Inc., Sixth Judicial District Court File No. 69-C9-03-601595, St. Louis County, Minnesota. April 21, 2005.

STB Docket No. 42071, Otter Tail Power Co. v. BNSF Railway Co, Sponsored Evidence within Section III-A Stand-Alone Traffic Group of the Supplemental Response. March 1, 2005. Additional Reply Evidence, March 22, 2004. Reply Evidence, October 8, 2003.

Expert Report Julie A. Murphy (with John Klick) on behalf of Onvoy, Inc., Onvoy, Inc. v. Allete, Inc. f/k/a Minnesota Power, Inc. d/b/a Minnesota Power and Light Company and, Enventis Telecom, Inc., Sixth Judicial District Court File No. 69-C9-03-601595, St. Louis County, Minnesota. December 5, 2004.

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MI PSC Case No. U-13531, In the Matter of the Commission's Own Motion to Review the Costs of Telecommunication Services Provided by SBC Michigan, Final Reply Declaration of Julie A. Murphy (with Michael Baranowski). May 10, 2004. Initial Declaration, January 20, 2004.

STB Docket No. 41185, Arizona Public Service and PacifiCorp v. Burlington Northern Santa Fe Railway Company, Verified Statement of Julie Murphy. April 18, 2004.

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STB Docket No. 42058. Arizona Electric Power Cooperative Inc. v. the Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, Sponsored Testimony within Section III-A Stand-Alone Traffic Group of Reply Evidence and Argument of Burlington Northern Santa Fe Railway Co. January 26, 2004. Verified Statement of Julie Murphy (with John Klick). April 18, 2003.

STB Docket No. 42072, Carolina Power & Light Co v. Norfolk Southern Railway Company, Sponsored Testimony within Section III-A Stand-Alone Traffic Group, Supplemental Reply Evidence January 12, 2004. Reply Evidence, October 11, 2002.

STB Docket No. 42069, Duke Energy Corporation v. Norfolk Southern Railway Company, Sponsored Testimony within Section III-A Stand-Alone Traffic Group of Supplemental Reply Evidence and Argument of Norfolk Southern Railway Co. January 12, 2004. Reply Evidence, September 27, 2002.

STB Docket No. 42070, Duke Energy v. CSX Transportation, Inc., Sponsored Testimony within Section III-A Stand-Alone Traffic Group of Supplemental Testimony of CSX Transportation, Inc. January 5, 2004. Reply Evidence, September 20, 2002.

FCC WCB Docket No.03-18. In the Matter of Alascom, Inc. Request for Waiver of Commission Rule and Orders Requiring Annual Tariff Revision, Alascom, Inc. Petition for Waiver, Response Declaration Julie Murphy (with John Klick), Supplement to Waiver Request and Response to FOIA Request. April 4, 2003. Additional Evidence provided March 13, 2003, March 5, 2003, January 7, 2003.

STB Docket No. 42057, Xcel v. BNSF Railway Co., Sponsored Testimony within Section III-A Stand-Alone Traffic Group of Reply Evidence and Argument of Burlington Northern Santa Fe Railway Co. April 4, 2003.

SELECTED REPORTS, PUBLICATIONS AND PRESENTATIONS

Washington Arbitration Update Conference, Assessing Damages in Non-Expropriatory Breaches, Presentation and Panel Discussion, October 14, 2021.

Round Table Discussion Energy International Arbitration Update, Financier Worldwide. October 22, 2021.

Oil Pipelines Markets, Presentation at Association of Oil Pipelines (AOPL) Annual Business Conference, September 23, 2021.

Measuring Economic Damages with Maximum Certainty, Global Arbitration Review, May 21, 2021. (with Christian Dippon and Will Taylor). (Updated from April 2, 2019 publication)

Oil Pipelines: The Regulatory and Market Landscape, Presentation at open session at FERC on behalf of Association of Oil Pipelines (AOPL), May 7, 2020.

Evolution of Forecasting Techniques for Dynamic Energy Markets, Chapter in the Handbook of Energy Finance, Theories, Practices and Simulations, Julie Carey (with Derya Eryilmaz) March 2020.

The Future of the U.S. Renewable Energy Disputes: Decoding Recent Trends and Updates, Presentation for the Knowledge Group, March 24, 2020. (with Al Bremser)

Analysis of Economic Benefits of the PEPCO's Long Term Capital Plan, Potomac Electric Power Company (PEPCO), January 2020 (updated September 2020).

Energy Disputes and Litigation: Effective Strategies and Best Practices for the Year Ahead Energy, Presentation for the Knowledge Group, December 5, 2019. (with Al Bremser)

Oil Pipeline Transportation Markets, Presentation at AOPL Annual Business Conference, September 2019.

A Practical Guide to Economic Damages in Complex Commercial Disputes, Presentation for the Knowledge Group, May 2, 2019. (with Christian Dippon)

Crude Oil and Refined Products and Transportation Markets, Presentation at open session at FERC on behalf of AOPL, April 24, 2019.

Economic Benefits Analysis of PROJECTpipes on the District of Columbia, November 2018 (Julie Carey and Derya Eryilmaz).

Crude Oil and Refined Products and Transportation Markets, Presentation at open session at FERC on behalf of AOPL, January 31, 2018.

Infrastructure Development and Impact on the Supply Chain, including implementation of the FAST Act. The Association of Transportation Law Professionals, Transportation Forum, XIV, October 16, 2017.

Crude Oil and Transportation Market and Regulatory Developments, Julie Carey and Laura Olive
Association of Oil Pipeline Business Conference, September 20, 2017.

Analysis of Economic Benefits of the Capital Grid Project in the District of Columbia and Maryland,
Potomac Electric Power Company (PEPCO), August 31, 2017.

Comments to the FERC Notice of Inquiry: Modifications to Commission Requirements for Review of
Transactions under Section 203 of the Federal Power Act and Market-Based Rate Applications under
Section 205 of the Federal Power Act RM16-21-000, Julie Carey and others, November 28, 2016.

Crude Oil and Transportation Market and Regulatory Developments, Julie Carey, Association of Oil
Pipeline Business Conference, September 16, 2016.

Economic Analysis of Electric Vehicle Market from Illinois' Proposed Legislation, Julie M. Carey (with
Celia David and John Gartner), May 17, 2016 (Updated August 10, 2016).

Will Trudeau and Obama Fulfill Their Energy Promises? Julie Carey, The Energy Advisors, March 25,
2016.

NGL Market Development Panel, Infocast Midstream Summit, February 17, 2016.

Energy Market Trends, Economic Implications, and the Outlook for Infrastructure, Construction
Superconference, December 8, 2015.

Effects of Rising Demand for Energy Infrastructure Development on Labor, Other Resources, and the
Economy, Julie Carey (with Chris Ring and Rebekah Hannif-Ali), Navigant Construction Forum,
December 2015.

Trials, Tribulations and Turmoil in Crude Oil Markets, Association of Corporate Counsel, Nov. 24, 2015.

Near Term Energy Market Dynamics and the Clean Power Plan, Western Coal Traffic League Fall
Meetings, Julie Carey (with Maggie Shober), November 19, 2015.

The Impact of Crude Oil and Natural Gas Market Trends on Litigation, Energy Litigation Journal (ABA
Section), Julie M. Carey (with Bob Broxson and Sonya Kwon), November 2015.

Today's Energy Market and the Cost of Artificially Suppressing Demand with the Crude Oil Export Ban,
Kelley, Drye, and Warren, Energy Regulatory Conference, October 22, 2015.

Regulation and Competition in Oil Pipelines and Related Industries, Association of Oil Pipelines
Business Conference, Julie Carey (with Julie Solomon), September 17, 2015.

Evaluation of the Economic Contributions of Littoral Combat Ship (LCS) Program, Lockheed Martin
Corporation, Julie M. Carey (with Kate Rodenrys), January 7, 2015 (Supplemented December 2015).

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Application, Hearing Order OH-002-2015, November 5, 2014. (OF-Fac-Oil-E101-2014-11 01)

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of the Refined Product Pipelines Market-Based Rate Markets, Confidential Report, Julie M. Carey (with
Kate Rodenrys and George Schink), June 9, 2014.

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Houston, Julie Carey (with Robert Lang), May 21, 2015.

Rising Tide: Litigation Wave from Low Oil Prices & Economic Implications, Texas Lawyers- Dallas,
Julie Carey (with Robert Lang), May 8, 2015.

What Is the Future of the Long-Delayed Keystone XL Pipeline? Inter-American Dialogue's Latin
America Advisor – Energy, May 5, 2014.

Enforcement Shifts Energy-Trading Strategies, Energy Litigation Journal (ABA Section), Julie M. Carey
(with Cliff Hamal and Ben Ullman), March 2014.

Energy Commodity Trading's Evolving Regulatory Frontier, Natural Gas Notes, January 2014.

Oil Pipeline Regulation and Competition, Confidential White Paper for the Association of Oil Pipe Lines, Julie Carey (with George Schink, Rick Smead, and Julie Solomon), August 2013.

Report on the Preliminary Analysis of the Potential Competition Faced by a Reversed Crude Oil Pipeline and Competition Faced by an Existing System, Confidential Report, Julie Carey (with Kate Rodenrys and George Schink), June 24, 2013.

Trading Firms in the Bullseye Amid Stepped Up Oversight of Energy Markets, *Forbes*, October 11, 2013.

Rail Emerging as Long-Term North American Crude Option, Oil and Gas Journal, August 5, 2013.

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How Unconventional Oil and Gas Is Supercharging the U.S. Economy, *Forbes* (online), December 13, 2012.

Unconventional Resources, Economic Growth and Power Generation Implications, Julie M. Carey, PowerGen Conference, Orlando, Florida, December 13, 2012.

Surprise Side Effect of Shale Gas Boom: A Plunge in U.S. Greenhouse Gas Emissions, *Forbes*, December 7, 2012.

The Economics of Unconventional Oil and Gas, North American Gas Summit, Julie M. Carey, November 15, 2012.

The Unconventional Path for Domestic Crude Oil and Natural Gas Resources, U.S. Association for Energy Economists Dialog, Julie M. Carey and Christopher L. Ring, September 2012.

Shale Gas and Oil: Economy-Wide Game Changers, Natural Gas Notes, August 1, 2012.

The Renewable Transformation and Nine Trends to Watch For, Julie Carey (with Cliff W. Hamal), US Association for Energy Economists Dialog, November 2010.

Clean Energy Policy Initiative Impacts on the Environment and the Economy, Confidential Client Report, May 2009.

Strategic Recommendations for Expiring Power Contracts, Confidential Report, Julie Carey (with Cliff W. Hamal), Prepared on Behalf of Ontario Power Authority, January 22, 2009.

Force Majeure Risks and Ontario Power Authority's Power Contracts, Julie Carey (with Cliff W. Hamal), Prepared on Behalf of Ontario Power Authority, March 31, 2008.

Financial Accommodation for Force Majeure Events, Julie Carey (with Cliff W. Hamal), Prepared on Behalf of Ontario Power Authority, January 21, 2008.

Attachment 2: Bremser CV

ALBERT W. BREMSER, Ph.D., CFA

Dr. Bremser is a financial economist who has a Ph.D. in Finance and is a Chartered Financial Analyst® (CFA®) charterholder. He has more than 20 years of experience providing expert services involving primarily the energy industry (regulated and unregulated) in different areas such as electric generation, electric transmission, and pipelines (crude oil, refined products, NGLs and natural gas). Dr. Bremser has testified as an expert witness before the Federal Energy Regulatory Commission and the Public Service Commission of Wisconsin. Dr. Bremser applies economic, finance, accounting, and quantitative principles to those matters, which also includes regulatory principles and practices such as those of the Federal Energy Regulatory Commission.

Prior to his current private sector position, Dr. Bremser was an expert witness with the US Federal Government at the Federal Energy Regulatory Commission (FERC) in the Office of Administrative Litigation as a member of FERC Trial Staff from 2015 to 2019. While at FERC, he was involved in energy issues for electric transmission, electric generation, electric generator-based reactive power, and crude oil pipelines issues (tariff rate and non-rate tariff issues in settlement and hearing proceedings). On behalf of FERC Trial Staff, Dr. Bremser testified as an expert witness on energy related issues through written testimony, cross-examination at hearing and deposition.

In the private sector, Dr. Bremser has experience with electricity market services (i.e., energy, ancillary services), market rules and business processes for certain wholesale electric markets. Dr. Bremser has experience with certain rate matters involving wholesale electric rates and wholesale transmission rates. Dr. Bremser has testified as an expert witness on certain energy issues before the Public Service Commission of Wisconsin (written testimony), and FERC (affidavit).

In the private sector, Dr. Bremser has also worked on many regulatory engagements involving crude oil, refined product (gasoline, diesel, jet fuel) and natural gas liquid (NGL) pipelines and their tariff rate and non-rate tariff issues. Tariff rate issues include cost-of-service tariff rates, settlement tariff rates, market-based rate authority, grandfathered rates, indexing, uncommitted rates and committed rates. Non-rate tariff issues include proration policies, FERC Form No. 6 (annual financial report), and petition for declaratory order (FERC) for rate design. Dr. Bremser also has experience with natural gas pipelines and natural gas storage involving the acquisition of assets and ownership interests.

In addition, Dr. Bremser has assisted clients with economic analysis for commercial disputes. He has analyzed merchant electricity generation, natural gas storage, spent nuclear fuel and crude oil contracts for economic damages in proceedings involving alleged breach of contract. Dr. Bremser has experience with MTBE gasoline and underground storage tanks, and solar panels in the context of economic damages analysis not related to an alleged breach of contract.

Dr. Bremser has taught finance courses at Virginia Tech. He has published articles in the *Journal of Legal Economics*. He has also made presentations on various energy topics.

EDUCATION

- **Virginia Tech**
Ph.D. in Finance, 1997.
- **University of Pittsburgh**
Master of Business Administration, 1992.
- **University of Virginia**
Bachelor of Science, Commerce, 1989.
Concentrations in Finance and Management Information Systems.

EDUCATION (NON-DEGREE)

- **Northern Virginia Community College**
Accounting Career Studies Certificate, 2017.
The accounting courses taken meet the accounting course requirements of the Virginia Board for Accountancy to take the Certified Public Accountancy (C.P.A.) examination.
- **Harvard Law School, Executive Education from the Harvard Negotiation Institute**
Negotiation Workshop: Improving Your Negotiating Effectiveness; taught by Bruce Patton - co-founder of the Harvard Negotiation Project (part of the Program on Negotiation). One week all day course. 2016.
- **Chartered Financial Analyst (CFA) exam curriculum**
Passed Exams 1, 2 and 3. 1999-2001.

PROFESSIONAL EXPERIENCE

2019-Present	NERA Economic Consulting – Senior Consultant (2019-2021); Associate Director (2022-Present)
2015-2019	Federal Energy Regulatory Commission, Office of Administrative Litigation (Washington, DC) – Energy Industry Analyst (Litigation)
2013-2015	Bremser Finance and Economics (Vienna, VA) - Principal
2011-2013	Exponent (Alexandria, VA) - Manager
2009-2011	Bremser Finance and Economics (Vienna, VA) - Principal
1999-2009	LECG, Inc. (Washington, DC) – Senior Consultant, Managing Consultant, Senior Managing Consultant
1997-1999	KPMG, Economic Consulting Services (Washington, DC) – Senior Consultant
1990-1991	MCI Telecommunications, Revenue Reporting (Arlington, VA) – Financial Systems Analyst
1989-1990	Freddie Mac, Loan Administration (Vienna, VA) – Accountant
1988-1989	University of Virginia Medical Center, Department of Finance, Property Accounting (Charlottesville, VA) – Fiscal Technician

PROFESSIONAL DESIGNATIONS AND MEMBERSHIPS

- Chartered Financial Analyst (CFA) charterholder, 2001 – 2016 (discontinued dues payment in 2016), 2019 – present.
- National Capital Area Chapter of the U.S. Association for Energy Economics.
- Energy Bar Association.

PRIMARY AREAS OF GOVERNMENT AND PRIVATE SECTOR CONSULTING EXPERIENCE

ENERGY – REGULATED AND UNREGULATED (FERC TRIAL STAFF AND PRIVATE SECTOR)

Electric:

- Electric generator reactive power capability compensation (cost of service; cost allocation) including wind, solar, natural gas fueled (combined cycle; combustion turbine), coal fueled, nuclear fueled, co-generation, hydro and other fuel sources. Testimony on behalf of FERC Trial Staff in a reactive power compensation proceeding for a newly built natural gas fueled power plant.
- Electric transmission rates (cost of service formula rates and stated rates), and cost of capital (including return on equity) for cost of service.
- Regulatory cost of capital including the return on equity (cost of equity). Testimony filed on behalf of FERC Trial Staff in three proceedings (one proceeding is the above listed reactive power compensation proceeding; another proceeding involves an electric transmission revenue requirement; another proceeding involves a wholesale rate for electric generation for a nuclear power plant). While in the private sector, testimony filed on return on equity at the Public Service Commission of Wisconsin on behalf of a private sector company.
- Energy related breach of contract cases involving electricity tolling agreements and spent nuclear fuel.
- Knowledge of certain aspects of PJM, MISO, ERCOT and other RTOs/ISOs.

Pipelines and Other Non-Electric Energy Areas:

- Crude oil, refined product and natural gas liquid (NGL) pipeline FERC (Federal Energy Regulatory Commission) tariff rates (market-based rates, cost of service rates, settlement rates). Testimony in a market-based rate application proceeding on behalf of FERC Trial Staff. An application for the authorization to charge market-based rates is a competition analysis (i.e., calculation of HHIs and other market share metrics). FERC cost of service, cost of service elements, cost allocation and rate design, which includes tariff rate filings and Page 700 (FERC Form No. 6).
- Knowledge of natural gas pipelines and natural gas storage involving the acquisition of assets and ownership interests.
- Energy related breach of contract cases involving natural gas storage and crude oil purchase contracts. Energy related business tort involving MTBE gasoline and underground storage tanks. Energy related dispute involving solar panels.

ECONOMIC DAMAGES

- Breach of contract involving electric generation, natural gas storage, crude oil, mining equipment, and automotive parts.
- Breach of fiduciary duty involving management of investment portfolios and trust management of life insurance policies.
- Economic damages due to alleged false statements involving the sale of solar panels.
- Business torts litigation involving MTBE gasoline and underground storage tanks.
- Securities litigation. Investment portfolios (Institutional and individual investor) - Portfolio trading analysis, calculation of portfolio profit and losses, and benchmark damages. Section 10b-5 (non-class action and class action). Event study analysis.

FINANCIAL, ECONOMIC AND ACCOUNTING ANALYSIS

- Valuation analysis for an arbitration for a railroad.
- Valuation analysis for a railroad regulatory proceeding.
- Option pricing techniques to estimate value for derivative securities and contingent guarantees.
- International trade. Department of Commerce testimony in a countervailing duty matter.
- Intellectual property – patent, trademark, copyright, trade secrets.
- Valuation – power plants, refined product pipelines, biological samples, terms in a settlement agreement.
- Analysis of financial statements, accounting records, and financial and business documents.

UNIVERSITY TEACHING

Virginia Tech - Finance Instructor, College of Business, Department of Finance, Summer 1995, 1996 – 1997. Introductory corporate finance (Summer Session 1995), and real estate finance (Fall Semester 1996 and Spring Semester 1997).

PUBLICATIONS AND DISSERTATION

“Two Essays on Convertible Debt”, Ph.D. dissertation, March 1997.

“Calculating a Taxable Damages Award: A Comparison of Two Calculation Methods”, *Journal of Legal Economics*, 16(2), April 2010, pp. 1-18.

“Valuation of a Trade Subsidy Using Option Pricing Theory”, *Journal of Legal Economics*, 17(2), April 2011, pp. 1-22.

Cantor, R and A. Bremser. “Market Share Liability from an Economics Perspective”, *BRG Review*, 4(1), Winter 2014, pp. 4-9.

SELECTED PRESENTATIONS

Presentation on issues in discounting cash flows, presentation to the Western States Petroleum Association (WSPA), South Lake Tahoe, CA, August 2007.

“Lost Profits: Principles, Methods and Strategies to Prove and Defend Damages”, presentation for The Knowledge Group, with Richard Eichmann of NERA, October 7, 2019.

“Energy Disputes and Litigation: Effective Strategies and Best Practices for the Year Ahead”, presentation for The Knowledge Group, with Julie Carey of NERA, December 5, 2019.

“The Future of the U.S. Renewable Energy Disputes: Decoding Recent Trends and Updates”, presentation for The Knowledge Group, with Julie Carey of NERA, March 24, 2020.

“Cost-of-Service and Rate Design for Oil Pipelines”, presentation to Bracewell LLP, with Julia Williams of NERA, August 31, 2021.

SELECTED PROFESSIONAL ACTIVITIES

Expert witness for lawyer deposition training at Weil, Gotshal & Manges, New York, NY, January 2020.

Expert witness for lawyer deposition training at Weil, Gotshal & Manges, virtual, December 2020.

DIRECT WRITTEN TESTIMONY

Prepared Direct and Answering Testimony on Behalf of the Trial Staff of the Federal Energy Regulatory Commission (FERC) in FERC Docket No. OR15-6-000, Application of Seaway Crude Pipeline Company LLC to Charge Market Based Rates, March 24, 2016.

Prepared Rebuttal Testimony on Behalf of the Trial Staff of the Federal Energy Regulatory Commission (FERC) in FERC Docket No. OR15-6-000, Application of Seaway Crude Pipeline Company LLC to Charge Market Based Rates, May 26, 2016.

Prepared Answering Testimony on Behalf of the Trial Staff of the Federal Energy Regulatory Commission (FERC) in FERC Docket No. ER17-1821-002, Panda Stonewall, LLC, Section 205 Federal Power Act filing for a proposed Reactive Supply and Voltage Control from Generation and Other Sources Service Tariff (cost of service) under Schedule 2 of the Open Access Transmission Tariff of PJM Interconnection, L.L.C., October 4, 2018.

Prepared Direct and Answering Testimony on Behalf of the Trial Staff of the Federal Energy Regulatory Commission (FERC) in FERC Docket No. ER17-998-001 and EL17-61-001, DATC Path 15, LLC, Section 205 Federal Power Act filing for a proposed stated rate annual transmission revenue requirement pursuant to a settlement agreement, October 16, 2018.

Prepared Supplemental Direct and Answering Testimony on Behalf of the Trial Staff of the Federal Energy Regulatory Commission (FERC) in FERC Docket No. ER17-998-001 and EL17-61-001, DATC Path 15, LLC, Section 205 Federal Power Act filing for a proposed stated rate annual transmission revenue requirement pursuant to a settlement agreement, March 7, 2019.

Prepared Updated Return on Equity Analysis Testimony on Behalf of the Trial Staff of the Federal Energy Regulatory Commission (FERC) in FERC Docket No. ER17-998-001 and EL17-61-001, DATC Path 15, LLC, Section 205 Federal Power Act filing for a proposed stated rate annual transmission revenue requirement pursuant to a settlement agreement, April 12, 2019.

Prepared Direct and Answering Testimony on Behalf of the Trial Staff of the Federal Energy Regulatory Commission (FERC) in FERC Docket No. EL17-41-001, Arkansas Public Service Commission, Mississippi Public Service Commission v. System Energy Resources, Inc., and EL18-142-000 (consolidated), Louisiana Public Service Commission v. System Energy Resources, Inc., two separate compliant cases (consolidated for hearing) under Section 206 of the Federal Power Act regarding the return on equity used in System Energy Resources, Inc.'s cost of service formula rate for wholesale electric power, May 1, 2019.

Prepared Direct Testimony on Behalf of Verso Corporation and Verso Minnesota Wisconsin LLC in Public Service Commission of Wisconsin Docket No. 1330-ER-104, Application of Consolidated Water Power Company, as an Electric Public Utility, for Authority to Adjust Electric Rates, October 6, 2020.

Prepared Rebuttal Testimony on Behalf of Verso Corporation and Verso Minnesota Wisconsin LLC in Public Service Commission of Wisconsin Docket No. 1330-ER-104, Application of Consolidated Water Power Company, as an Electric Public Utility, for Authority to Adjust Electric Rates, October 20, 2020.

Prepared Sur-rebuttal Testimony on Behalf of Verso Corporation and Verso Minnesota Wisconsin LLC in Public Service Commission of Wisconsin Docket No. 1330-ER-104, Application of Consolidated Water Power Company, as an Electric Public Utility, for Authority to Adjust Electric Rates, October 26, 2020.

CROSS-EXAMINATION TESTIMONY AT HEARING

Offered for Cross-Examination on Behalf of the Trial Staff of the Federal Energy Regulatory Commission (FERC) in FERC Docket No. OR15-6-000, Application of Seaway Crude Pipeline Company LLC to Charge Market Based Rates, July 7, 2016.

Offered for Cross-Examination on Behalf of the Trial Staff of the Federal Energy Regulatory Commission (FERC) in FERC Docket No. ER17-1821-002, Panda Stonewall, LLC, Section 205 Federal Power Act filing for a proposed Reactive Supply and Voltage Control from Generation and Other Sources Service Tariff (cost of service) under Schedule 2 of the Open Access Transmission Tariff of PJM Interconnection, L.L.C., November 7 and 8, 2018.

Offered for Cross-Examination on Behalf of the Trial Staff of the Federal Energy Regulatory Commission (FERC) in FERC Docket No. ER17-998-001 and EL17-61-001, DATC Path 15, LLC, Section 205 Federal Power Act filing for a proposed stated rate annual transmission revenue requirement pursuant to a settlement agreement, May 7 and 8, 2019.

DEPOSITION TESTIMONY

Deposition on Behalf of the Trial Staff of the Federal Energy Regulatory Commission (FERC) in FERC Docket No. ER17-1821-002, Panda Stonewall, LLC, Section 205 Federal Power Act filing for a proposed Reactive Supply and Voltage Control from Generation and Other Sources Service Tariff (cost of service) under Schedule 2 of the Open Access Transmission Tariff of PJM Interconnection, L.L.C., October 23, 2018.

Deposition on Behalf of the Trial Staff of the Federal Energy Regulatory Commission (FERC) in FERC Docket No. EL17-41-001, Arkansas Public Service Commission, Mississippi Public Service Commission v. System Energy Resources, Inc., and EL18-142-000 (consolidated), Louisiana Public Service Commission v. System Energy Resources, Inc., two separate compliant cases (consolidated for hearing) under Section 206 of the Federal Power Act regarding the return on equity used in System Energy Resources, Inc.'s cost of service formula rate for wholesale electric power, June 25-26, 2019.

AFFIDAVIT

Joint Affidavit with Julie M. Carey on Behalf of the American Electric Power Service Corporation (Appalachian Power Company, et al), in FERC Docket No. ER11-47-016, et al, Triennial Update for Market-Based Rate Authority for American Electric Power Service Corporation for the Southwestern Power Pool Region, June 30, 2021.

OTHER ORAL TESTIMONY AND EXPERT REPORTS/ANALYSES

Analyses were conducted on portfolio turnover, commissions, portfolio concentration, time securities were held, margin use, calculation of out-of-pocket losses, and calculation of benchmark portfolio damages. Expert analyses were provided to a NASD (National Association of Securities Dealers) Arbitration panel to facilitate mediation. Case settled. 2000.

At hearing, oral rebuttal on behalf of Petitioners to the oral presentation made by Respondents. Department of Commerce, International Trade Administration, Countervailing Duty investigation of certain Durum Wheat (Docket C-122-846) and Hard Red Spring Wheat (Docket C-122-848) from Canada. Petitioners were the North Dakota Wheat Commission (hard red spring wheat), United States Durum Growers (durum wheat), and the Durum Growers Trade Action Committee (durum wheat). Respondents were the Canadian Wheat Board, Government of Canada, Government of Alberta, and Government of Saskatchewan. Hearing was July 8, 2003.

February 28, 2022

Exhibit B

VERIFIED STATEMENT OF ANTHONY DIDEO

I am Anthony DiDeo, Director Joint Facilities with CSX Transportation, Inc. (“CSXT”). The purpose of this statement is to explain that the continuation of the existing Interchange Allowance Agreement effective January 1, 2021 between CSXT and The Kansas City Southern Railway Company (“KCS”) (the “2021 Agreement”)¹ is necessary to continue competitive rail service in the interchange of traffic in New Orleans, LA.

New Orleans is one of the major gateways in the United States for traffic moving between the east and the west. CSXT and KCS interchange about 50,000 cars per year in New Orleans. CSXT and KCS, and their predecessors, have interchanged traffic in New Orleans since at least 1909. Interchange between CSXT and KCS is facilitated by use of the New Orleans Public Belt Railroad Commission (“NOPB”).

In 1985, KCS began to abandon two segments of its line that were integral to the interchange between KCS and CSXT. Through its subsidiary, the Louisiana & Arkansas Railway Company (the “L&A”), KCS sought authority from the Interstate Commerce Commission (the “ICC”) to (1) abandon (a) 4,060 feet of its line between milepost 855.60 and milepost 856.37 and (b) 28,375 feet of its line extending between the westerly right-of-way line of Worth Street at milepost 856.78 and the easterly right-of-way line of Turnbull Drive at milepost 862.14; (2) acquire trackage rights (a) over the line of Illinois Central Gulf Railroad Company (“ICG”) between Alliance Avenue near Frellsen and East Bridge Junction in Shrewsbury, a distance of approximately five miles in Jefferson Parish, and (b) over those portions of the lines on NOT in Shrewsbury between milepost 0.05-A and milepost 0.09-A and over that portion of New Orleans Terminal Company (“NOT”) Track 1-9 between the southwesterly switching point of this line and

¹ See the Agreement in Exhibit A.

the point of connection with L&A, a distance of approximately 352 feet; and (3) construct (a) two connections between its line and the line of ICG, and (b) certain tracks on an easement of NOT. The ICC found that the “relocation of L&A’s line does not affect any shippers.” *Louisiana & Arkansas Railway Company-Trackage Rights Exemption-Illinois Central Gulf Railroad Company and New Orleans Terminal Company*, ICC Finance Docket No. 30639 (served April 17, 1985). CSXT and KCS were still able to interchange through NOPB.

In 2006, KCS sought to abandon a 0.71-mile segment of the former L&A main line that was relocated to an ICG Line. The segment abandoned was between milepost 862.14 (near Turnbull Drive) and Milepost 862.85 (near Causeway Blvd.). KCS certified that no local traffic has moved for at least two years and that any overhead traffic can be rerouted. *The Kansas City Southern Railway Company-Abandonment Exemption-Line in Jefferson Parish, LA*, STB Docket No. AB-103 (Sub-No. 20X) (served June 5, 2006). This abandonment increased the length of haul and eliminated the ability for CSXT and KCS to directly interchange via CSXT’s trackage rights over NOT.

For several years prior to 2006 CSXT paid NOPB { } per car for westbound intermediate switch to KCS. In 2006 and 2007 NOPB unilaterally increased their rate multiple times to { }, { }, { }, and { } per car. These increased charges to CSXT led to negotiations resulting in several agreements. By 2009 KCS had entered into an agreement with NOPB whereby KCS paid for both sides of the intermediate switch expense. From 2009-2020 KCS was responsible for this expense. Most recently, the 2021 Agreement, where KCS agreed to pay NOPB to handle cars interchanged from CSX to KCS and cars interchanged from KCS to CSX during the term of this Agreement.” Section 2. In Section 3, CSXT agreed to “pay KCS an

interchange allowance of” { })} “for each car interchanged via NOPB from CSX to KCS.”

This was a reasonable commercial resolution between CSXT and KCS.

However, Section 6 provides:

This Agreement shall remain in effect for one (1) year from the Effective Date (the “Initial Term”), and shall automatically renew thereafter annually on each anniversary of the Effective Date for an additional one-year term (“Renewal Term”). **Notwithstanding the provisions of the preceding sentence, either Party may terminate this Agreement for any reason during either the Initial Term or a Renewal Term by providing the other Party with thirty (30) days’ advance written notice.** (emphasis in original)

CSXT is not asking that the economic underpinnings of the Agreement be modified. CSXT requests that the Board to modify the termination provision of Section 6 to replace “either Party may” with “upon mutual agreement, the Parties may” “terminate this Agreement....”

Unilateral termination of the Agreement by KCS would certainly adversely affect shippers who rely on service from CSXT, contrary to the conclusion of the ICC in Finance Docket No. 30936, termination of the Agreement would result in the rerouting of traffic to a more circuitous route or continuing the current routing of traffic, but with CSXT being charged a significantly higher interchange allowance, which most likely would be passed on the shippers. Either action by KCS would harm shippers.

The acquisition of control of KCS by Canadian Pacific Railway Limited (“Canadian Pacific”) will significantly increase the fixed charges (interest on debt and increased dividend payments because of the issuance of approximately 265,000,000 shares of Canadian Pacific common stock) incurred by Canadian Pacific. Canadian Pacific has also been forthright in its plan to divert significant traffic from other railroads, including rerouting traffic from New Orleans to the Meridian Speedway, and to reduce costs, which could include imposing its existing costs on other railroads. Keeping the Agreement in effect for the long term will maintain the status quo by

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continuing another competitive option for rail traffic moving between points in the southwest and southeast and other parts of the country, and provide shippers with an existing efficient and economical routing over New Orleans.

CSXT respectfully requests that the Board exercise its power to preempt agreements and revise the Agreement as requested by CSXT.

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VERIFICATION

I, Anthony DiDeo, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed the 28th day of February, 2022.

A handwritten signature in black ink, appearing to read "Anthony DiDeo", written in a cursive style.

Anthony DiDeo

EXHIBIT A

Interchange Allowance Agreement
Between CSX Transportation, Inc., and
The Kansas City Southern Railway Company

This Interchange Allowance Agreement ("Agreement") is effective January 1, 2021 ("Effective Date") between CSX Transportation, Inc. ("CSX") and The Kansas City Southern Railway Company ("KCS") (CSX and KCS being sometimes referred to herein individually as a "Party" or together as the "Parties").

Recitals

WHEREAS, CSX and KCS interchange rail traffic in New Orleans, but lack a direct connection between the Parties' tracks in New Orleans; and

WHEREAS, the Parties have utilized the services of the New Orleans Public Belt Railroad Commission for the Port of New Orleans ("NOPB") to move between their respective yards cars being interchanged from one Party to the other Party at New Orleans; and

WHEREAS, NOPB has substantially increased its charges, effective January 1, 2021, for handling cars interchanged between the Parties;

NOW, THEREFORE, the Parties, in order to maintain interchange at New Orleans to meet customer needs, enter this Agreement to allocate between them a portion of the increased cost of their interchange.

Agreement

1. The foregoing recitals are hereby incorporated as substantive terms of this Agreement.
2. KCS agrees to pay NOPB to handle cars interchanged from CSX to KCS and cars interchanged from KCS to CSX during the term of this Agreement.
3. CSX agrees to pay KCS an interchange allowance of _____ for each car interchanged via NOPB from CSX to KCS (the "Interchange Allowance") during the term of this Agreement. Following the end of each month NOPB has agreed to e-mail the Parties a list of all cars interchanged from CSX to KCS via NOPB in that month. KCS shall then invoice CSX by e-mail for the total number of cars in said list, multiplied by the Interchange Allowance. CSX shall pay KCS's Interchange Allowance invoice within thirty (30) days of the date it is issued.

4. The Interchange Allowance shall be adjusted annually by an amount equal to _____ Such percentage changes shall be determined by the ratio of the index for the third quarter (Q3) of the current calendar year versus the third quarter (Q3) of the previous calendar year. This percentage adjustment will be applied annually on the anniversary of the Effective Date. The Interchange Allowance cannot be adjusted negatively below the original rate. In the event the Surface Transportation Board no longer publishes the RCAF-U, the Parties will

agree upon an alternative index or, in the absence of such agreement, apply the annual indexes of charge-out prices and wage rates published by the Association of American Railroads.

5. The Parties agree to work expeditiously to complete mutually-satisfactory arrangements for an interchange of traffic between them at Montgomery, AL via the Meridian & Bigbee Railroad, L.L.C., with the intent of shifting interchange of cars currently interchanged between the Parties at New Orleans or other interchanges to Montgomery when consistent with customers' and the Parties' needs.

6. This Agreement shall remain in effect for one (1) year from the Effective Date (the "Initial Term"), and shall automatically renew thereafter annually on each anniversary of the Effective Date for an additional one-year term ("Renewal Term"). **Notwithstanding the provisions of the preceding sentence, either Party may terminate this Agreement for any reason during either the Initial Term or a Renewal Term by providing the other Party with thirty (30) days' advance written notice.** All notices under this Agreement shall be sent by United States registered or certified mail, or by a national overnight courier service such as (but not limited to) FedEx or UPS, to each Party's respective designated contact, as provided below and shall be deemed effective upon receipt.

For KCS: Mike Naatz, Executive Vice President
The Kansas City Southern Railway Company
427 West 12th Street
Kansas City, MO 64105-1403

For CSX: Anthony DiDeo, Director Joint Facilities
CSX Transportation, Inc.
500 Water Street, J801
Jacksonville, FL 32202

Each Party shall be responsible for immediately notifying the other Party in writing of any change in its respective designated contact during a term of this Agreement. Failure to do so shall not nullify the effectiveness of any notice properly delivered to the address provided to the previously designated contact.

*[Remainder of this page intentionally left blank;
Signatures appear on the following page]*

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have executed this Agreement by their duly-authorized officers.

CSX Transportation, Inc.

By: DocuSigned by:
Tom Tisa
ED2A12E621CC43B...

Tom Tisa

(Printed name)

Head of Business Development

(Title)

1/15/2021 | 10:17 AM CST

(Date)

The Kansas City Southern Railway Company

By: DocuSigned by:
Michael Naatz
FD5BF2DEC92345C...

Michael Naatz

(Printed name)

EVP

(Title)

1/18/2021 | 8:29 AM CST

(Date)

EXHIBIT B - MAP

INTERCHANGES

FILE	NOPS	KCS LBA	IC	LP (MP)	SPT	CSX	SOU
NOPS	1	1	1	1	2	4	3
KCS LBA	0	20	VIA NOPS	8	VIA SOU	8	8
IC	1	20	16	16	16	VIA SOU	16
LP (MP)	1	VIA NOPS	16	VIA SOU	16	VIA SOU	16
SPT	1	2	9	21	17	VIA SOU	17
CSX	8	VIA SOU	VIA SOU	16	16	16	16
NS	3	9	9	12	12	16	16

* INTERCHANGE WITH LA SOU RR (PART OF SOU RLY SYSTEM)



CSX REAL PROPERTY
 JACKSONVILLE, FLORIDA
 GIS Mapping Services
 For Reprints, Revisions & Comments
 EMAIL: GIS@CSX.COM

CSX TRANSPORTATION
NEW ORLEANS TERMINAL MAP
RAILROAD TERMINALS & INTERCHANGES
 MS FILE: NEW ORLEANS RR TERMINALS.MAP CREATED BY J.KORR 09-11-95

Exhibit C

VERIFIED STATEMENT OF ANTHONY DIDEO

I am Anthony DiDeo, Director Joint Facilities with CSX Transportation, Inc. (“CSXT”).

The purpose of this statement is to describe the potential for reduced competition for traffic moving between Kansas City and the East.

As part of the cost savings projected by Canadian Pacific Limited (“CP”) in seeking authority to obtain control of the Kansas City Southern Railway Company (“KCSR”) and its railroad subsidiaries, CP intends to downgrade the KCS railroad line between Kansas City and East St. Louis (the “KC-ESTL Line”) and to divert traffic from that line to the CP line running between Kansas City and Chicago. The KC-ESTL Line between Kansas City and its interchange with CSXT in East St. Louis is a significant competitive route for traffic moving between the East served by CSXT and Kansas City. Today competition exists between the single-line route between Kansas City and points in the East over the Norfolk Southern Railway Company (“NSR”) and the joint-line CSXT-KCS route over East St. Louis. The downgrading of the KC-ESTL Line and diversion of traffic to Chicago, as proposed by CP will reduce the level of competition NSR faces for traffic to and from Kansas City. The downgrading and diversion will result in slower trains and lower volumes that will degrade service and reduce competition with NSR.

{

}

To avoid this reduction in competition, CSXT requests that the Board impose the following conditions on the CP control of KCS:

1. Require CP to maintain the KC-ESTL Line in the same or better condition than it is currently.
2. Provide an open gateway on reasonable commercial terms as determined by CP and CSXT in order to allow the KC-ESTL Line and CSXT routes to and from the East to compete with NSR.

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VERIFICATION

I, Anthony DiDeo, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed the 28th day of February, 2022.

A handwritten signature in black ink, appearing to read "Anthony DiDeo", written in a cursive style.

Anthony DiDeo