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October 18, 2021

CSXT/PAR-37

VIA E-FILING

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

Re: **STB Docket No. FD 36472, CSX Corporation and CSX Transportation, Inc., et al.—Control and Merger—Pan Am Systems, Inc., Pan Am Railways, Inc., Boston and Maine Corporation, Maine Central Railroad Company, Northern Railroad, Pan Am Southern LLC, Portland Terminal Company, Springfield Terminal Railway Company, Stony Brook Railroad Company, and Vermont & Massachusetts Railroad Company**

Dear Ms. Brown:

On July 30, 2021, the Board¹ issued *Decision No. 4* in the above-referenced proceeding, accepting for consideration the Revised Application filed on July 1, 2021 and setting a procedural schedule to govern this proceeding.

Consistent with that schedule, enclosed for e-filing is a public version of Applicants' Response to Comments and Requests For Conditions and Rebuttal in Support of Application (the "Response Comments"), with appropriate redactions that the Board can place in its docket. We are concurrently filing a highly confidential version of the Response Comments to be filed under seal.

The Response Comments include responses to all comments, protests, requests for conditions, and other opposition, including to DOJ and USDOT filings, along with rebuttal in support of the Revised Application and Related Transactions. While no formal comments were

¹ The acronyms and defined terms used in this letter are the same as those used in the July 1, 2021 Revised Application.

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submitted to the safety integration plan submitted by Applicants on August 30, 2021, the Response Comments also include an update regarding the status of the FRA's review of the SIP. Because no responsive or inconsistent applications were filed, no responses to such applications are included.

Respectfully submitted,

/s/ Anthony J. LaRocca

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Enclosures

cc: Louis E. Gitomer
All parties of record

CSXT/PAR-37

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36472

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.
—CONTROL AND MERGER—

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

APPLICANTS' RESPONSE TO COMMENTS AND REQUESTS FOR CONDITIONS
AND REBUTTAL IN SUPPORT OF APPLICATION

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Dated: October 18, 2021

CSXT/PAR-37-1

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36472

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.
—CONTROL AND MERGER—

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

APPLICANTS' RESPONSE TO COMMENTS AND REQUESTS FOR CONDITIONS
AND REBUTTAL IN SUPPORT OF APPLICATION

Pursuant to *Decision No. 4* in this proceeding, CSX Corporation (“CSXC”), a non-carrier, and CSX Transportation, Inc. (“CSXT”), a Class I railroad, and 747 Merger Sub 2, Inc. (“747 Merger Sub 2”), a non-carrier, Pan Am Systems, Inc. (“Systems”), Pan Am Railways, Inc. (“PAR”), Boston and Maine Corporation (“Boston & Maine”), Maine Central Railroad Company (“Maine Central”), Northern Railroad (“Northern”), Portland Terminal Company (“Portland Terminal”), Springfield Terminal Railway Company (“Springfield Terminal”), Stony Brook Railroad Company (“Stony Brook”), and Vermont & Massachusetts Railroad Company (“V&M”) (collectively, “Applicants”), respectfully submit this response to comments and rebuttal in support of the Revised Application, supported by the reply verified statements of CSXT’s employees Messrs. Sean Pelkey, Mark Wallace, and Andy Daly, and CSXT’s experts Dr. David Reishus, and Dr. William Huneke.¹

¹ Unless otherwise defined in this Response, the acronyms and defined terms used in this Response are the same as those used in Applicants’ Revised Application, filed on July 1, 2021, and the Board’s July 30, 2021 decision accepting the July 1 Revised Application, *Decision No. 4*, FD 36472 et al. (STB served July 30, 2021).

INTRODUCTION

The comments filed in this proceeding reflect wide-ranging and strong support for the Merger Transaction and the Related Transactions. Not a single shipper opposes CSXT's acquisition of Systems and the PAR Railroads. Rail users in New England understand that the Merger Transaction will bring Class I rail service directly into New England, with improvements to the rail infrastructure, rail operations, reliability, and safety. The acquisition will support a growing New England economy, expand market opportunities for New England businesses, and allow the rail network to move traffic off of congested highways. Moreover, the Related Transactions will substantially enhance competition for traffic moving to and from New England, especially for intermodal traffic. In addition to the full support of the shipper community, the transaction is supported by government officials, shortline railroads, and various community interests. The statements of support in the docket to date total 119, and an index of support comments is attached as Exhibit 6.

Concerns over the Merger and Related Transactions have been primarily focused on two areas. First, concerns have been raised about the competitive effects of CSXT acquiring Systems' 50% interest in PAS, including a concern over the effects of replacing the current PAS operator with a subsidiary of GWI. We address these concerns below and explain that the contractual provisions negotiated in agreements with NSR and GWI and the additional commitments that CSXT is asking that the STB impose as conditions to its approval will ensure that competition will be not only preserved but enhanced by the Merger and Related Transactions.

Second, concerns have been raised about passenger service on the rail lines at issue. However, these concerns regarding the logistics of managing freight and passenger service on common rail infrastructure are longstanding. They do not focus on the effects of the Merger and

Related Transactions, which will not change existing arrangements for managing freight and passenger service and will not introduce operating changes having any adverse effect on passenger service. Instead, the improved service and reliability of the freight transportation that will result from the Merger and Related Transactions will improve passenger service in the region.

CSXT addresses below these and a few additional discrete issues raised by commenters. These Response Comments are supported by Reply Verified Statements of CSXT's employees Messrs. Pelkey, Wallace, and Daly and by CSXT's experts Drs. Reishus and Huneke. They have previously submitted Verified Statements in support of CSXT's Application. In the Revised Application and in these Response Comments, CSXT has demonstrated that the Merger and Related Transactions are consistent with the public interest and will not result in a likely substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation. Accordingly, Applicants request that the Board approve the Merger Transaction and Related Transactions with no conditions other than the standard *New York Dock* labor conditions² and the conditions that Applicants have specifically requested that the Board impose, including the NSR Settlement Agreement and the commitments that Applicants have made, as described in the Verified Statements of Mr. Sean Pelkey, to ensure the preservation of competition.

STANDARD

Under the Section 11324(d) analysis, the Board's "primary focus is on the anticipated competitive effects." *Norfolk S. Ry. Co.—Acquisition & Operation—Certain Rail Lines of the Del. & Hudson Ry. Co., Inc. (NS/D&H)*, FD 35873, slip op. at 14 (STB served May 15, 2015).

² *New York Dock Ry.—Control—Brooklyn Eastern Dist. (New York Dock)*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

Because the Merger Transaction does not involve the merger or control of at least two Class I rail carriers, the Board “shall approve” the transaction unless it finds that:

- (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and
- (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

49 U.S.C. § 11324(d).

The Board must approve a transaction unless it finds it will cause “adverse competitive impacts that are both ‘likely’ and ‘substantial,’” and that those impacts outweigh the public benefits of the transaction and cannot be mitigated through Board-imposed conditions. *NS/D&H*, FD 35873, slip op. at 14. Even if the Board “were to find that there would be likely and substantial anticompetitive impacts, [the Board] may not disapprove the transaction unless the anticompetitive impacts outweigh the benefits and cannot be mitigated through conditions.” *Id.*

The Board generally limits itself to conditions that are “shown to be related to the impact of the merger,” *Burlington N., Inc.—Control & Merger—St. Louis*, 360 I.C.C. 788, 951 (1980), and “feasible” and would ameliorate “significant” competitive harm, *Can. Nat’l Ry.—Control—Duluth, Missabe & Iron Range Ry.*, FD 34424, slip op. at 14 (STB served Apr. 9, 2004). The Board does not use its conditioning authority to address pre-existing competitive circumstances, but only to address any reduction in competitive options caused by a transaction. Thus, the Board distinguishes between harms related to the transaction and “pre-existing disadvantages that will neither be caused nor exacerbated” by the transaction. *Can. Nat’l Ry.*, FD 34424, slip op. at 14. The Board has noted that “mitigation is not imposed to correct pre-existing conditions.” *Can. Nat’l Ry. Co.—Control—EJ&EW (CN/EJ&E)*, FD 35087, slip op. at 5 n.2 (STB served Apr. 28, 2008).

The Board looks at competitive effects of a proposed transaction from a pre-transaction perspective to determine if there would be a reduction of the competitive options that existed before the transaction. In *Portland & W. R.R., Inc.—Lease & Operation Exemption—Lines of Burlington N. R.R.*, FD 32766 (STB served Oct. 15, 1997), the Board addressed the competitive effects of provisions in a line lease by a Class I railroad to a shortline that “for all practical purposes require [the shortline] to route its traffic over [the Class I carrier].” *Id.*, slip op. at 5-6. The Board concluded that the arrangement was not anti-competitive because “these provisions do not reduce the level of competition that existed in this market before the lease since [the Class I carrier] was free to route the traffic it originates over its own lines The pre-lease competitive setting essentially has been preserved, not altered.” *Id.* See also *Review of Rail Access & Competition Issues—Renewed Pet. of the W. Coal Traffic League*, EP 575 (Sub-No. 1), slip op. at 9 (STB served Oct. 30, 2007) (rejecting an *ex post* analysis of the competitive effects of interchange commitments that does not look at the change in competition from pre-transaction levels).

As a corollary to the principle that the Board only addresses competitive harms caused by the transaction, the Board does not use its conditioning authority to create new competitive options for parties seeking conditions or to expand business opportunities. The Board uses conditions “to preserve competitive options (not to expand them).” *NS/D&H*, FD 35873, slip op. at 23. The Board “has not historically acted to increase shippers’ competitive options.” *Id.*, slip op. at 17-18. Even in Class I railroad mergers for which the Board requires applicants to include “provisions for enhanced competition,” 49 C.F.R. § 1180.1(c), the Board has clarified that “conditions should not be sought to fix competitive and other longstanding problems that have

no nexus” to the proposed transaction. *Major Rail Consolidation Procedures*, EP 582 (Sub-No. 1), slip op. at 31 (STB served June 11, 2001).

Because conditions generally reduce the benefits of a consolidation, the Board has long refrained from burdening mergers with conditions unless they are necessary either to ameliorate the anticompetitive impact of a merger or to protect essential services. *See Grainbelt Corp. v. STB*, 109 F.3d 794, 796 (D.C. Cir. 1997); *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295, 302 & n.8 (D.C. Cir. 1983). *See also Norfolk S. Ry. Co.—Acquis. & Operation—Certain Rail Lines of the Del. & Hudson Ry. Co., Inc.*, FD 35873, slip op. at 8-9 n.11 (STB served Oct. 18, 2016), citing *Can. Nat’l Ry.—Control—Ill. Cent. Corp. (CN/IC)*, 4 S.T.B. 122, 140 (1999) (stating that “[i]n assessing the probable impacts and determining whether to impose conditions, our concern is the preservation of competition and essential services, not the survival of particular carriers.”).

The Board may not impose “conditions to remedy anticompetitive effects” unless it finds:

(1) . . . that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market); (2) that the conditions to be imposed will ameliorate or eliminate the harmful effects; (3) that the conditions will be operationally feasible; and (4) that the conditions will produce public benefits (through reduction or elimination of possible harm) outweighing any reduction to the public benefits produced by the merger.

Can. Nat’l Ry.—Control—Ill. Cent. Corp., FD 33556, slip op. at 4 (STB served Sept. 18, 1998).

See also Grainbelt Corp., 109 F.3d at 796; *Union Pac. Corp.—Control—Mo. Pac. Corp.*, 366 I.C.C. 462, 562-65 (1982); *Wisc. Cent. Transp. Corp.—Continuance in Control—Fox Valley & W. Ltd.*, 9 I.C.C.2d 233, 239 (1992).

The burden is on the party seeking the condition to demonstrate that it is necessary. *CSX Corp.—Control—Chessie Sys., Inc.*, 363 I.C.C. 521, 577 (1980) (“[P]rotestants have not demonstrated that any of the conditions sought are necessary.”); *Rio Grande Indus., Inc.—Purchase & Trackage Rights—Chicago, Mo. & W. Ry. Co. Line Between St. Louis, MO &*

Chicago, IL, 5 I.C.C.2d 952, 968-69 (1989) (finding that in a transaction subject to the predecessor statute of § 11324(d), the burden is on the opponents to submit evidence sufficient to overcome the agency’s tentative conclusion that it would have no anticompetitive effects).

The Board has repeatedly affirmed it does “not impose conditions designed to put the proponent in a better position than it occupied before the consolidation.” *Can. Pac. Ry. Co.—Control—Dakota, Minn. & E. R.R. Corp.*, FD 35081, slip op. at 12 (STB served Sept. 30, 2008). *See also CN/IC*, FD 33556, slip op. at 22. The Board has also declined to impose conditions where “parties seek material changes to, or extensions of, existing contracts, or to compel new contractual commitments or property sales” *CSX Corp.—Control & Operating Leases/Agreements—Conrail, Inc. (Conrail)*, 3 S.T.B. 196, 297 (1998). *See also CSX Transp., Inc. & Del. & Hudson Ry. Co., Inc.—Joint Use Agreement*, FD 35348, slip op. at 8 (STB served Oct. 22, 2010) (where the Board reaffirmed that its “general practice is not to use its conditioning authority to freeze in place the contractual terms, such as rate and revenue divisions, which have been voluntarily bargained for independent of a transaction.”). An agreement that “manifests an equality of bargaining positions and a mutuality of interests” should not be reformed by the Board; rather, any disagreements should be resolved by the parties under their agreement. *St. Louis Sw. Ry. Co.—Purchase (Portion)—Rock Island & Pac. R.R. Co.*, 363 I.C.C. 323, 367-68 (1980).

Finally, for the Board to grant a condition, “there must be a sufficient nexus between the condition imposed and the transaction before the agency.” *CN/EJ&E*, FD 35087, slip op. at 5 n.2. Thus, requested conditions relating to rates and service terms cannot be based on vague or speculative concerns over future conduct but must be based on specific anti-competitive effects of a transaction.

DISCUSSION

I. THE MERGER TRANSACTION AND RELATED TRANSACTIONS HAVE RECEIVED STRONG AND WIDE-RANGING SUPPORT

Almost all comments in this proceeding reflect support for the Merger Transaction and Related Transactions. The Merger Transaction and Related Transactions are not opposed by any shippers. Most stakeholders in New England recognize that the Merger and Related Transactions will bring the benefits of Class I rail service directly into New England, with improvements to the rail infrastructure, rail operations, reliability, safety, the environment and access to national markets. An index of support comments is attached as Exhibit 6.

A. Shippers

The Merger and Related Transactions have received overwhelming support from shippers. Seventy-nine shippers submitted statements of support emphasizing the benefits of single-line service; investment in local infrastructure; enhancing the competitiveness of rail service through lower cost, improved service, and improved access. Many shippers noted the benefits of improved access to CSXT's customer tools and supply chain solutions. CSXT, NSR, and B&E have worked hard to deeply engage with customers throughout this process and it is a great testament to that effort and the public benefits of the transaction that not one shipper on the record as is objecting to the Merger and Related Transactions.

Many commenters, including organizations that represent shippers and potential shippers, emphasize the benefits of improved single-line service. A few examples illustrate their perspective. The Waterbury Regional Chamber ("Waterbury Regional") in Waterbury, CT serves over 900 business members throughout a 14-town region, many of which are manufacturers that will benefit from this merger. (Waterbury Regional Comments, Revised Appl. APP-773.) Waterbury Regional's "members believe that this merger will result in better, more frequent

service; quicker delivery; the ability to ship more product via railcar which will take tractor trailers off of Connecticut's roads; expanded markets for our manufacturing community, and employment opportunities." (*Id.*)

Ray-Mont Logistics, a firm that has offered Integrated Supply Chain Solutions within North America for nearly 30 years, also stated that it would benefit from the merger. (*See* Ray-Mont Logistics Comments 1, STB filed Aug. 2, 2021.) It explained that it recently opened several transload facilities and states that by streamlining service, the merger "will reduce the number of railroad providers to get to our facility." (*Id.*) It described its interest in access to the Port of Saint John and explained that "adding a more direct routing with a third class I railroad into the Port of Saint John would be highly beneficial for [its] customers." (*Id.*)

Many commenters emphasized that increased investment in an integrated CSXT/PAR System will improve service, increase reliability, and expand market opportunities for CSXT/PAR System shippers. For instance, One SouthCoast Chamber ("SouthCoast"), the primary business advocate in its region and the second largest chamber in Massachusetts, points to CSXT's investment in the Northeast and states that CSXT's "business model, investment levels, and performance standards will significantly improve rail across the region be it freight or passenger." (SouthCoast Comments 1, STB filed Oct. 7, 2021.) SouthCoast notes that CSXT invested nearly \$1.4 billion into its network in 2020, which SouthCoast finds to be "reassuring" from an "economic development standpoint" because the region will benefit from these capital investments. (*Id.*) SouthCoast emphasizes that "[m]odern infrastructure and consistent investment level will yield opportunities for increased competition in the rail space and provide better and more efficient service to shippers." (*Id.*)

SouthCoast also emphasizes that CSXT will modernize Pan Am’s aging locomotive fleet and tracks. (*Id.*) SouthCoast states that “[f]or years, Pan Am has lacked the resources to invest in its network, but CSX has committed to injecting the necessary capital to make modernization a reality. Whether it is a business shipping goods over rail or passengers commuting by train, everyone stands to benefit from the merger.” (*Id.*) And SouthCoast highlights the improved safety standards that would result from approval of the Application. (*Id.*) SouthCoast notes that “[p]assenger rail operations also stand to benefit from the proposed transaction. CSX plans to upgrade Pan Am’s existing 10 mph main line tracks to 25 mph, meaning that passenger trains traveling on these tracks will see increased performance with higher speeds and improved safety standards.” (*Id.*)

In another example, the Maine Rail Group (“MRG”), a non-profit organization working to enhance rail service in Maine and New England, supports the merger because “CSXT’s proposed infrastructure investments in the Freight Main Line from the [New Hampshire/Maine] border east to Mattawamkeag is consistent with the goals of the MRG and will provide expedited service for all commodities as compared to the current PAR operation.” (MRG Comments, Revised Appl. APP-748.) MRG explains this “could open up intermodal service between the Port of Saint John, New Brunswick via haulage rights over the Eastern Maine Railway and the New Brunswick Railway, and U.S. points.” (*Id.*) MRG states that “[t]he resurgence of the Maine forest products industry should be enhanced by higher velocity (and hopefully more economical rates) with single-carrier service to all of the 23-state region of the Eastern United States and two Canadian Provinces which are served by CSXT.” (*Id.*) MRG believes that this will result in increased competition and an expansion of market areas. (*Id.*)

The shippers' support statements also acknowledged the enhanced competitiveness that would result from the merger because shippers would be able to lower costs, improve service, and improve access. For example, the Connecticut Business and Industry Association ("CBIA"), the largest business association in Connecticut and one of the largest in the country, supports the merger. (CBIA Comments, Revised Appl. APP-715.) The CBIA states that "CSXT has been the gold standard for higher velocity, faster equipment turns, and greater consistency in the market and the merger of Springfield Terminal [and CSXT] will bring a critical infrastructure investment that will revolutionize the current single line." (*Id.*) CBIA explains that "[t]he expected enhanced competitiveness through lower costs, better service and improved access to the North America rail network will elevate the region into the 21st century." (*Id.*)

In another instance, J.B. Hunt, a key Intermodal/Trucking services provider in North America, notes that the merger will provide benefits by expanding competitive rail options. (J.B. Hunt Comments, Revised Appl. APP-745.) J.B. Hunt relies on NSR's direct Intermodal rail services to and from Ayer and states that "[t]he agreement reached between CSX and NS will preserve competitive rail options and will increase fluidity of rail operations in New England." (*Id.*) J.B. Hunt also highlights that "[h]aving these competitive options is a key benefit of this transaction. Importantly for J.B. Hunt, the proposed transaction will expand intermodal rail transportation in New England by facilitating a clear double-stacked route on NS and on CSX." (*Id.*)

Additionally, after engaging in discussions with the Applicants, Republic Services, Inc., ECDC Environmental, L.C. and Devens Recycling Center, LLC (collectively, "Republic"), an important shipper on PAS, supports the Merger and Related Transactions. (*See* Republic Comments 1-3, STB filed Sept. 9, 2021.) Republic states these transactions are in the public

interest because they will improve rail service and strengthen the transportation network in New England. (*Id.* at 1.) Republic states that the proposed transactions will benefit a range of entities that depend on a reliable and efficient rail system. (*Id.* at 3.)

Many shippers expressed support for the merger because of improved access to CSXT's customer tools and supply chain solutions. A number of supporting statements discuss CSXT's supply chain tools available through the ShipCSX platform, and note that expanded access to these tools will allow shippers to track and manage shipments with greater precision. Many of these comments also note that shippers will have expanded access to CSXT's Sales and Marketing resources which will give them enhanced tools to improve their own customer service. For example, Factor Gas Liquids, Inc. ("Factor Gas"), a firm that provides quality energy products and refinery/petrochemical feedstocks to a variety of businesses domestically and internationally, states it supports the merger because it will bring increased operational service, cost optimization, and customer service, providing "the customer a more reasonable and economical freight cost and increased value." (Factor Gas Comments, Revised Appl. APP-729.)

Additionally, the presidents of two shippers, Robert Brown of Broco Oil and Brian Law of the Law Family Companies, Inc., published opinion articles in support of the Merger Transaction and Related Transactions.

The president of Broco Oil, Robert Brown, published an opinion article in the *Boston Herald* expressing support for the merger because CSXT "brings with it substantial resources and a stellar track record for investing in and improving the systems it operates." (Brown Article 1, STB filed July 28, 2021.) In his piece, Mr. Brown recounts how winter weather in 2020 "stretched the power grid to its limits in places like Texas" and how "Pan Am and CSX stepped up and helped [Broco Oil] ship in 100,000 gallons of propane from as far away as Oklahoma" to

assist Broco Oil in servicing its customers. (*Id.* at 1-2.) Mr. Brown explains that “[Pan Am and CSXT] went above and beyond to help [him] help [his] customers, and if this merger is approved, [Mr. Brown] would expect [this] kind of service will only become more prevalent for businesses like [Broco Oil] and countless others.” (*Id.*) Mr. Brown states that he is hopeful that the merger will strengthen the Northeast rail infrastructure and assist Northeast communities in “tackl[ing] whatever challenges Mother Nature throws [the region’s] way in the future.” (*Id.* at 2.)

The president of the Law Family Companies, Inc., Brian Law, published an opinion article in the *NH Journal* expressing his “strong support for [the Merger Transaction and Related Transactions] as both a businessman and a part of [the] regional freight supply chain.” (Law Article 1, STB filed Aug. 20, 2021.) In his column, Mr. Law states that “[t]here aren’t many railroads as capable as CSX of bringing truly ‘game-changing’ investment, execution, and expertise to the table.” (*Id.* at 2.) Mr. Law explains that “[t]hrough the merger, CSX will elevate [the] entire region’s freight rail infrastructure. [CSX] indicated [it will] invest in things like upgraded tracks that support higher speeds and larger loads, improved terminal infrastructure, and much more.” (*Id.*) Mr. Law notes that these infrastructure improvements would not be “possible without heavy private investment from a private entity like CSX;” however, when the infrastructure upgrades have occurred, these upgrades “will help shippers of all stripes to realize higher productivity, better dependability, and reduced costs.” (*Id.*)

The benefits, Mr. Law states, will “trickle down to the customers” and place the region’s businesses “in a better position to meet [their] goals and strengthen [their] margins during these competitive times.” (*Id.*) Mr. Law states that passenger rail will also benefit from the infrastructure investments, “with historical performance demonstrating that passenger railways

have seen improved on-time performance when working alongside CSX.” (*Id.*) In summary, Mr. Law states that he is “eager to work with a new partner like CSX” and is “confident” that the Northeast region will not “let this opportunity pass [it] by.” (*Id.*)

The president and CEO of the Greater Worcester Regional Chamber of Commerce, Timothy P. Murray, wrote an opinion article in support of the Merger and Related Transactions in *CommonWealth Magazine*. (See Murray Article 1-3, STB filed Oct. 15, 2021.) The former lieutenant governor of Massachusetts, and mayor of and city council member in Worcester, MA, expresses support for the merger because it “would bring the substantial investment capital, operational expertise, and innovation prowess of one of the best railroad operators in the business into our back yard.” (*Id.* at 2.) Mr. Murray states that the merger “promises to be an economic boon for New England, and it’s great news for companies that rely on freight rail and the passenger rail network alike.” (*Id.*) In his article, Mr. Murray explains that, “[i]f approved, CSX has indicated they would take extensive steps to improve Pan Am’s existing infrastructure and operations, driving drastic improvements to the broader regional railroad network.” (*Id.*)

For example, Mr. Murray states that “CSX plans to upgrade Pan Am’s aging rail lines to support larger loads and higher speeds, replacing older, less efficient locomotives with newer, more powerful models that also run cleaner, thereby benefiting our environment.” (*Id.*) Additionally, Mr. Murray explains that “CSX will add new technology capabilities such as positive train control, which help to remove human error from the equation and better ensure that freight and passengers alike arrive safely and on time.” (*Id.* at 2-3.) These upgrades, Mr. Murray states, “will further benefit the environment by helping to take additional trucks off of our highways, which has the potential to reduce greenhouse gas emissions by up to 75 percent.” (*Id.* at 3.)

B. Government Officials and Government Entities

The Merger and Related Transactions have also received substantial support from multiple levels of government officials and entities, who recognize the improved safety measures, favorable environmental and sustainability impacts, and significant public and economic benefits that will inure from single-line service, and CSXT's investment in local infrastructure.

Governor Christopher T. Sununu of New Hampshire and Governor Janet T. Mills of Maine support the Merger Transaction and Related Transactions because of the opportunities that will be created for their states. Both Governors point to improved service and infrastructure investment as significant public benefits that their respective states will experience. Governor Sununu explains that “[t]his transaction would be beneficial to New Hampshire because it would provide a continuous, single-line rail service and provide additional resources to market the line with the potential to bring additional freight service to New England markets.” (Sununu Comments, Revised Appl. APP-785.) Similarly, Governor Mills states that “[i]f the transaction is approved, CSX has indicated that it will make upgrades to track and locomotives to provide improved service, extend positive train control on Amtrak’s *Downeaster*, and make other improvements to the rail network.” (Mills Comments 1, STB filed July 29, 2021.)

Several of public entities noted CSXT’s industry-leading ability to provide enhanced safety measures in the Northeast region. For example, the Northern New England Passenger Rail Authority (“NNEPRA”), the State Sponsor of the Amtrak *Downeaster*, pointed to the merger’s potential to “to sustain and enhance the safe operation of passenger and freight rail service in Maine and New Hampshire.” (NNEPRA Comments 1, STB filed Aug. 27, 2021.) In addition, NNEPRA believes the merger can “preserve and protect the substantial financial investments

which have enabled NNEPRA and its partners to achieve success to date” while also “set[ting] the stage for even greater economic opportunities and public benefits in the future.” (*Id.*)

The Connecticut Department of Transportation (“CTDOT”) also highlighted the safety measures of the merger. CTDOT states it has a “long-standing relationship” and “strong partnership” with CSXT, which “is committed to supporting Connecticut's economic growth, environmental progress, as well as freight and passenger service.” (CTDOT Comments 1, STB filed Aug. 5, 2021.) CTDOT emphasized that “CSXT has shown a commitment to safety and has indicated to CTDOT that it will invest in and modernize the Pan Am infrastructure, which will make the New England rail network more efficient and safer for freight and passenger operations.” (*Id.*) CTDOT notes that “[s]afety is a top priority for CTDOT, and we look forward to these improvements.” (*Id.*)

Massachusetts Commonwealth Senator Michael D. Brady also recognized the important safety improvements that will result from the Merger Transaction and Related Transactions. In his support statement, Senator Brady explained that “[a]s part of CSX’s investment plan in Pan Am’s network, main line track speeds will be upgraded from the current 10mph speed limits to 25mph. These enhancements will increase efficiency and productivity for both freight and passenger rail services without jeopardizing safety.” (Brady Comments 1, STB filed Aug. 23, 2021.) Senator Brady states that because “CSX plans to heavily invest private capital to upgrading Pan Am’s network in ways that are currently impossible,” the “rail infrastructure in New England will be [brought] up to par with national quality and safety standards.” (*Id.*)

Similarly, New Hampshire State Senator Kevin Avaré notes the safety improvements that will benefit rail users, including passenger service on the rail lines at issue. He says that the “next generation technology like positive train control will improve the safety of rail operations on

routes that are shared by freight and passenger trains. CSX’s industry-leading operating model will provide shippers with much greater reliability.” (Avard Comments 1, STB filed Aug. 26, 2021.) The Mayor of the City of Mechanicville, NY, Dennis Baker, also noted that the transaction could enhance safety and improve local transportation in the City of Mechanicville by removing additional trucks from the highways. (Baker Comments 1, STB filed July 12, 2021.) (“[T]he ability to create more opportunity for freight service might take additional trucks off the road thereby enhancing safety and efficiency.”).

Government officials and entities also note the environmental and sustainability benefits of the Merger and Related Transactions. For example, Former Massachusetts Commonwealth Representatives Kevin and Elizabeth Poirier state that the “[t]he environmental benefits of the merger are also noteworthy.” (Poirier Comments 1, STB filed Sept. 24, 2021.) The former State Representatives explain that “[t]here is no disputing that moving freight on rail is more sustainable than on trucks. CSX, the most efficient freight rail company in America, can move one ton of freight 492 miles on a single gallon of fuel. This is three to four times more efficient than shipping via truck.” (*Id.*) The Poiriers concluded that “[g]iven that CSX is committing to upgrading Pan Am’s existing aging locomotives, sustainability and efficiency will only increase if the transaction is approved.” (*Id.*)

Massachusetts Commonwealth House of Representative Jeffrey N. Roy’s support letter also emphasized the merger’s environmental benefits. Representative Roy observes that “CSX is also investing in new technologies that are more sustainable and environmentally friendly.” (Roy Comments 1, STB filed Sept. 17, 2021.) He explains that “[a] more sustainable freight rail industry will help us reach our clean energy and emissions goals, and I firmly believe that CSX will be a valuable partner in achieving that.” (*Id.*) New Hampshire State House of Representative

Jason Osborne also stated that “CSX will provide financial resources to market the line and expand freight service to companies in New Hampshire. Expanded freight service will benefit our state's highway budget, and the environment by reducing the amount of trucks on the road.” (Osborne Comments 1, STB filed Aug. 26, 2021.)

Many of the support statements from the government officials and entities also recognized the benefits that would result from more efficient single-line service. For example, Mechanicville, NY Mayor Baker states that “[t]he single-line rail service would involve less switching and interchange and also [have] the benefit of eliminating the need to hand-off between separate rail carriers, creating efficiencies, reducing the margin for error, and enhancing consistency.” (Baker Comments 1.) New Hampshire State Representative Jason Osborne noted that the transaction “would result in improved freight transportation efficiency by reducing switching and interchange and eliminating the need to hand off between different carriers.” (Osborne Comments 1.)

The support statements of the government officials and entities also focus on CSXT’s upgrades to the existing infrastructure to meet CSXT’s operating standards. For instance, Massachusetts Commonwealth Senator Patrick M. O’Connor explained that the “[p]rojected investment in our state’s rail infrastructure is also a catalyst for [his] support of the merger.” (O’Connor Comments 1, STB filed Aug. 26, 2021.) Senator O’Connor states that “[o]ver the next five years, CSX plans to inject capital into Pan Am’s existing network to upgrade and modernize infrastructure where Pan Am lacked the resources to do so. These investments will facilitate increased competitiveness, better quality of service, and much-needed maintenance in the rail network.” (*Id.*) Senator O’Connor further explains that “[w]hile freight rail will certainly benefit from the merger, passenger operations will also benefit greatly. CSX achieved a 93.6%

contract on-time performance level in its interoperability with passenger rail, and plans to increase track speeds from 10 mph to 25 mph, which will streamline rail transportation in the region.” (*Id.*)

Hugh Dunn, a former member of the New Bedford, Connecticut City Council, also noted that CSX’s commitment to incorporating Pan Am’s existing assets into its replacement cycles “will inject much needed capital investment in our region.” (Dunn Comments 1, STB filed Aug. 26, 2021.) Former Melrose, Massachusetts City Council President Mike Zwirko noted that CSX’s investments will assist with modernizing the region’s rails. (Zwirko Comments 1, STB filed Aug. 23, 2021.) (“CSX has committed to increasing capital investments across the Pan Am network to maintain and modernize rails like the ones the [Amtrak’s] Downeaster travels on. . . . A dedicated commitment to improvements, coupled with CSX’s expertise brings me the confidence that regional travel infrastructure will improve over time due to this merger.”).

C. Railroads

In addition to the support by shippers, government officials and other entities, the Merger Transaction and Related Transactions have support from several railroads that interchange traffic in New England or operate in New England. These railroads recognize there will be substantially improved rail service in New England and expanded market opportunities for the shippers they serve.

For example, the Rail Enterprise Group (“REG”), which owns and operates four shortline railroads,³ supports the Merger Transaction and Related Transactions. REG noted that “[t]he fragmented nature of the rail network into and throughout the New England region has made it

³ Three of REG’s four shortlines connect with and are switch carriers for CSXT: Raritan Central Railway (RCRY), interchanges with CSXT in Raritan Center, NJ; Pennsylvania & Southern Railway (PSCC), interchanges with CSXT in Culbertson, PA; and Wolf Creek Railroad (WCKR) interchanges with CSXT in Milan, TN.

difficult for railroads to compete with trucks for medium haul shipments between New England and the Mid-Atlantic region.” (REG Comments, Revised Appl. APP-783.) REG is “hopeful that unified, single line routes between New England and the eastern U.S. will enable railroads to become competitive in that market.” (*Id.*) REG has already identified a possible business opportunity for growth as a result of the Merger and Related Transactions, explaining that it “look[s] forward to working with CSXT marketing teams to pursue new opportunities including forest products from New England mills which could move by rail through the various reload and warehouse facilities served by our Raritan Central and Pennsylvania & Southern Railways – a market which we believe is largely untapped and holds much promise.” (*Id.*)

Regional Rail LLC (“Regional Rail”), a holding company that owns and operates 7 shortline railroads, with 550 miles of railroad along the Eastern seaboard from New York to Florida, supports the merger because it expects it to enhance its “competitiveness through lower costs, better service, and improved access to the North American rail network through single-line . . . service.” (Regional Rail Comments 1, STB filed Aug. 13, 2021.) Regional Rail also plans “to explore and implement new supply chain solutions and market opportunities with the CSXT Sales and Marketing team.” (*Id.*) Regional Rail explained that the merger will provide “the opportunity for . . . single-line railroad service to and from locations on 20,000 miles of the CSXT rail system and over 1,200 miles operated by Springfield Terminal.” (*Id.*) Regional Rail further explained that CSXT’s single-line service will provide “higher velocity, faster equipment turns, and greater consistency.” (*Id.*)

The Pioneer Valley Railroad Company, Inc. (“PVRP”), a wholly-owned subsidiary of Pinsky Railroad Company and a Class III rail carrier which owns and operates approximately 31 miles of track serving customers between Westfield and Holyoke, Massachusetts, supports the

Merger Transaction and Related Transactions. PVRR recognizes “the transactions will sustain and improve rail transportation in New England, and specifically will facilitate and promote the availability of competitive rail service on the lines of PAS, with which PVRR connects in Holyoke.” (PVRR Comments 1, STB filed Aug. 27, 2021.)

The Housatonic Railroad Company, Inc. (“HRRC”), a Class III rail carrier which owns and operates approximately 38 miles of track in Massachusetts, approximately 84 miles in Connecticut, and approximately 42 miles in New York, also expects the “proposed transaction to benefit HRRC-served customers through improved service, reliability, and competitiveness of traffic moving between HRRC-served stations and former Pan Am and current PAS customers and stations.” (HRRC Comments 2, STB filed Aug. 27, 2021.) HRRC is looking forward to “CSX service between HRRC’s interchange in Pittsfield, Mass and shippers in Maine and New Hampshire.” (*See id.*)

The New Hampshire Central Railroad (“NHCR”), a Class III rail carrier based in North Stratford, New Hampshire supports the Merger and Related Transactions. NHCR expressly supports “the creation of a new Genesee & Wyoming Inc. subsidiary, Berkshire & Eastern Railroad, to operate [PAS].” (NHCR Comments 1, STB filed Oct. 15, 2021.) In the support letter, the president and owner of NHCR, Mr. Edward W. Jeffrey, writes that “the negative comments made towards the potential of the Berkshire & Eastern Railroad operating [PAS] in no way reflect[s] [his] experiences in working with another Genesee & Wyoming subsidiary in New England, the St. Lawrence & Atlantic Railroad (SLR).” (*Id.*) Mr. Jeffrey has found the SLR managers to be “fair, honest and very cooperative,” (*Id.*), that “NHCR and SLR . . . work together cooperatively to meet the needs of each railroad and best serve the citizen[s] of our state,” (*Id.* at 2), and that Genesee & Wyoming Class III short lines have assisted other

“connecting carriers in surrounding New England states, demonstrating a clear willingness to help other carriers.” (*Id.*)

II. RESPONSES TO OPPOSING COMMENTS AND REQUESTS FOR CONDITIONS

A. Comments Relating to PAS

One area of concern in the comments related to CSXT’s acquisition of a 50% interest in PAS, which is a 50-50 joint venture between NSR and one of the PAR Railroads, Boston & Maine. Acquiring an interest in PAS was not the primary objective of the Merger Transaction. CSXT originally sought to exclude the PAS interest from the Merger Transaction, and also offered to sell its future interest in PAS to NSR. These efforts were unsuccessful, so CSXT engaged in lengthy negotiations with NSR and GWI to restructure PAS to assure CSXT’s acquisition of a 50% interest in PAS would not result in competitive harm but would strengthen PAS as a viable, independent competitor. While some comments object to certain aspects of the restructuring, those concerns are overstated and often misplaced. As a fundamental matter, they ignore CSXT’s dependence on PAS for a substantial amount of traffic that serves PAS locations. Such concerns also ignore the carefully designed contractual measures and established regulatory oversight that will preserve and enhance competition and the further commitments that CSXT has made to ensure there will be no competitive harm. The proposed structure of PAS is the best way to preserve and strengthen competition in the region. Alternative structures for PAS proposed in the comments would create enormous uncertainties that could disrupt rail traffic in New England, would be extremely difficult to implement, and would likely have unintended detrimental effects on PAS’s future viability.

i. Vermont Parties

Two Vermont parties commented on the Merger and Related Transactions. The State of Vermont, acting through its Agency of Transportation (“VTrans”), filed comments on March 17, 2021, March 22, 2021, August 27, 2021, and September 17, 2021. Vermont Rail System (“VRS”) filed comments on March 16, 2021 and on August 27, 2021. VRS is the business name of a group of rail carriers that operate on lines owned by the State of Vermont.

Both Vermont parties raised concerns that were limited to the role of B&E as PAS operator under the restructuring of PAS through the Settlement Agreement with NSR and the Term Sheet Agreement with GWI. Their basic concern is that Vermont shippers would be harmed because VRS would supposedly lose its access to competing rail carrier connections (*i.e.*, PAS and GWI subsidiary New England Central Railroad (NECR)) on the PAS north-south rail line extending from East Deerfield, MA to White River Junction, VT. VTrans asks the STB to require that PAS operations to and from Vermont be carried out by a rail carrier that is independent of GWI. VRS simply expresses opposition to B&E to operating PAS.

The concerns of the Vermont parties are not valid in light of the proposed structure of PAS. The two Vermont parties’ concerns need to be viewed in their commercial context. As shown in Dr. Reishus’ Reply Verified Statement, the traffic that is subject to the Vermont parties’ concern is small. Even if the concerns of the Vermont parties were valid, and they are not, the magnitude of those concerns would not justify the type of extreme remedy proposed, which has the potential to undermine the very strong benefits that the Merger and Related Transactions will bring to a wide range of shippers and communities in New England. Moreover, not a single Vermont shipper has indicated a concern over the Merger and Related Transactions. Contrary to the assumption underlying the Vermont parties’ comments, PAS will not be operated

by B&E to advance the interest of any GWI corporate affiliate or parent. It will be contractually obligated to act in the interest of PAS as an independent rail carrier. The future owners of PAS, CSXT and NSR, have a strong incentive to ensure that B&E complies with its obligations and acts only in the interest of PAS. These incentives will be backed up by the commitments that CSXT has made and the additional commitments set out in the Reply Verified Statement of Mr. Pelkey; they will be more than adequate to protect the interest of the Vermont parties.

a. VTrans

VTrans filed four sets of comments. The first three, filed on March 17, 2021, March 22, 2021 and August 27, 2021, all present a common set of issues, with the August 27 comments presenting the most expansive explanation. The September 17, 2021 comments discuss traffic forecasts, which is an issue not addressed in the other three comments. Applicants addressed the September 17, 2021 comments in Applicants’ Response to Environmental Comments (CSXT/PAR-33, STB filed Sept. 24, 2021.)

1. March 17, 2021 Comments

The March 17, 2021 comments set out the concerns of VTrans regarding the Merger and Related Transactions in the procedural context of the treatment of the Application as a “minor” or “significant” transaction. Those procedural issues have been resolved and are not addressed here.

Substantively, VTrans presents the central theme further developed in later comments that the Merger and Related Transactions “will result in a 2-to-1 reduction in competition.” (VTrans Comments 4, STB filed Mar. 17, 2021.) VTrans claims that “[c]urrently, two carriers connect with VRS at two interchanges critical to Vermont’s economy: Bellows Falls and White River Junction, Vermont.” (*Id.* at 5.) The two carriers are PAS and NECR, a GWI subsidiary. According to VTrans, “[t]he Applicants seek to alter this competitive landscape by replacing

PAS at each of these gateways with GWI/B&E, even though an existing GWI subsidiary, GWI/NECR, is the ‘other’ connecting carrier at Bellows Falls and White River Junction, as well as the sole connecting carrier in Burlington, VT.” (*Id.*)

The March 17, 2021 comments also present an argument that the recent history of relations between NECR and PAS shows that NECR has sought to disadvantage PAS competitively on the north-south segment of PAS where VRS interchanges with PAS. VTrans notes that “PAS access to both the Bellows Falls and White River Junction interchanges [with VRS] is dependent on use of the trackage rights by which PAS operates over GWI/NECR-owned Connecticut River Line.” (VTrans Comments, Ex. A, *Delabruere V.S. 7*, STB filed Mar. 17, 2021.) VTrans claims that GWI/NECR recently sought changes to the terms of those trackage rights that “would have rendered PAS use of the trackage rights uneconomical, choking off competitive access to both the Bellows Falls and White River Junction interchanges.” (*Id.* at 8.) Even though the STB resolved the resulting dispute between PAS and GWI/NECR,⁴ VTrans claims that “[a]gainst this background, it requires a tremendous leap of faith to accept the applicants’ representations that two GWI subsidiaries—NECR (track owner) and B&E (trackage rights user)—would maintain meaningful competition along this corridor.” (*Id.*)

2. *March 22, 2021 Comments*

VTrans’ March 22, 2021 comments repeat many points made in their March 17, 2021 comments, including their argument that using B&E as PAS operator results in a 2-to-1 corridor along the Connecticut River Line. In addition, the March 22, 2021 comments address the adequacy of the contractual provisions that will govern B&E’s operation of PAS and the other commitments that CSXT is making to address competitive concerns. The March 22, 2021

⁴ See *New England Cent. R.R., Inc.—Trackage Rights Order—Pan Am S. LLC*, Docket No. FD 35842 (STB served Oct. 31, 2017).

comments acknowledge that B&E will be contractually obligated to operate PAS in the interest of PAS as an independent rail carrier, but VTrans states that the contract “provisions do not assure that GWI and PAS will maintain competitive pricing for shippers and receivers in Vermont nor do they preserve the existing redundancies to ensure deliveries of critical commodities when one carrier has service challenges.” (VTrans Comments 3, STB filed Mar. 22, 2021.)

VTrans acknowledges that Applicants have made rate and haulage commitments to address any potential concern that B&E might violate its contractual obligations to act in PAS’s interests, and VTrans notes these commitments “may very well mitigate some of the competitive effects on VRS.” (*Id.*) However, VTrans claims these commitments do not resolve its concern over the creation of a supposed 2-to-1 corridor because “offering only haulage agreements leaves the actual operation of trains under the complete control of the owner railroad.” (*Id.* at 4.) In addition, VTrans asserts “Applicants fail to address the effects on VRS from GWI control of operations at the Hoosick Junction, NY interchange.” (*Id.*)

3. *August 27, 2021 Comments*

VTrans’ August 27, 2021 comments expand upon its concerns, particularly in the verified statement of Mr. James Cunningham, a consultant for VTrans from R. L. Banks & Associates. At paragraph 12, Mr. Cunningham summarizes VTrans’ concerns as falling into four categories: (1) the creation of a supposed 2-to-1 corridor on the Connecticut River Line; (2) the history of supposedly anticompetitive conduct by GWI/NECR as reflected in the trackage rights dispute resolved by the STB; (3) “GWI’s visibility to traffic volumes and commodities traveling between PAS and VRS will give it strategic, commercial, and intelligence advantages to capture business on others of its owned lines;” and (4) “the re-routing of traffic between the CSX east-west line . . . and the PAS east- west Line (‘Patriot Corridor’) could lead to longer transit times

experienced by VRS customers.” (VTrans Comments, Cunningham V.S. 3-4, STB filed Aug. 27, 2021.)

The first two concerns were raised in the prior VTrans comments summarized above. Regarding access to competitive information, Mr. Cunningham claims that “if GWI takes over the operations of PAS, it leaves VRS with only less efficient routings via CP to prevent GWI from exploiting its access to competitive information.” (*Id.* at 16.) Mr. Cunningham never explains the basis for the fourth concern over the re-routing of traffic.

The August 27, 2021 comments also discuss the conditions that VTrans proposes. VTrans asks the STB to require that Applicants change the structure of the transaction to use “a carrier that is completely independent of both Applicants and their corporate affiliates, and of [GWI] and its numerous corporate affiliates . . . to serve [the] gateways and corridors” that are “key to the movement of traffic to and from Vermont.” (VTrans Comments 2-3, STB filed Aug. 27, 2021.)

4. *Response to VTrans Comments*

The concerns expressed by VTrans over the competitive impact of the Merger and Related Transactions are not valid, and the proposed solution to those concerns is neither required nor consistent with the public interest. The primary flaw in the VTrans comments is that they are based on an assumption that VRS will lose access to PAS as an independent rail carrier providing a connection to rail carriers in the east, via PAS, and rail carriers in the west, also via PAS. The comments repeatedly allege that the Merger and Related Transactions will result in a decrease in the number of rail connections available to VRS from 2-to-1. According to this claim, VRS can connect with two carriers to reach markets in the east and west today – PAS and a GWI affiliate, the NECR – but after the acquisition it will have only one access carrier – GWI.

The assumption underlying this supposed 2-to-1 problem is that a GWI subsidiary – B&E – will be the operator of PAS, resulting in PAS no longer being an independent rail carrier. But that is not the case. PAS will remain an independent rail carrier, with NSR and CSXT as its owners. PAS will not come under GWI control as a result of the Merger Transaction or the Related Transactions. Neither GWI nor any affiliate of GWI other than B&E will control the operations of PAS, the marketing of PAS, or the commercial decisions of PAS. Rather, PAS will retain B&E to operate PAS in the interests of PAS as an independent rail carrier. And B&E will be obligated by contract to remain independent of GWI or any affiliate of GWI. It would be a direct violation of the terms under which B&E will be retained for B&E to make decisions regarding PAS operations in the interests an affiliated rail carrier. Were B&E to do so, they would be removed as the contract operator of PAS. There will be no reduction in carrier access available to VRS because PAS will remain a viable, competitive and independent alternative.

While VTrans appears to dismiss the contract provisions requiring B&E to act in the interest of PAS, those provisions are central to achieving the objective of NSR and CSXT, PAS's owners. The owners want to maintain PAS as a viable entity, and will insist on compliance with B&E's contractual obligations to the owners to act for the benefit of PAS. For PAS to remain viable, it will be important to attract as much traffic as possible on PAS to support the maintenance of PAS. PAS's owners, therefore, have a strong incentive to ensure that B&E acts in PAS's interests alone to attract traffic from sources that include interchange traffic with VRS. PAS's owners will not allow B&E to violate the core requirement of its operating agreement, which is to advance the interests of PAS as an independent rail carrier, by putting PAS at a competitive disadvantage in dealing with alternative sources of traffic, such as interchange traffic with VRS.

VTrans also ignores the very limited overlap in competitive rail movements on the NECR line over which PAS has trackage rights, which has been referred to in this proceeding as the Connecticut River Line or the Knowledge Corridor.⁵ Dr. Reishus explains that almost none of the traffic moving on the NECR line south from White River Junction is realistically subject to competition between PAS and NECR. Given the limited amount of traffic that could even conceivably be affected, B&E would have no real economic incentive to jeopardize its role as PAS operator by violating its operating agreement.

B&E will instead have strong economic incentives to expand PAS traffic to the extent possible. B&E's compensation includes incentive payments keyed to revenues generated by PAS traffic and the management of expenses. Any deliberate effort to undermine PAS by diverting traffic away from PAS to a PAS competitor would, besides violating the operating agreement, reduce B&E's compensation. VTrans's concerns are based only on suspicions and speculation not supported by the actual structure of PAS or its arrangement with B&E as operator.

Second, VTrans's supposed 2-to-1 concerns are focused on NECR's portion of the Connecticut River Line. Other VRS connections with PAS, such as at Hoosick Junction, are only with PAS today, so there is no change in the number of connections. But VTrans also raises a concern that B&E, as PAS operator, will control access by VRS to NSR at Hoosick Junction. That concern has no basis. As VTrans acknowledges, NSR has a haulage arrangement with PAS in which PAS moves traffic on NSR's behalf to an interchange with VRS at Hoosick Junction. It is in NSR's strong self-interest to ensure this haulage arrangement is not undermined by B&E, and NSR would have the means, through enforcement of the operating agreement, to ensure that

⁵ The two terms are used interchangeably in this Response and in many of the comments. In some cases, the Conn River Line is used to refer to the portions of the PAS rail network north of East Deerfield, MA, the only line segment where competitive issues have been raised. The term Knowledge Corridor is often used to refer to the entire north-south PAS line that bisects the Patriot Corridor.

this conduct did not occur. Moreover, as Dr. Reishus explains, B&E would not have any incentive to engage in anticompetitive action regarding this traffic, since this traffic does not compete for other VRS traffic off the Conn River Line.

VTrans acknowledges that Applicants have proposed a range of measures, beyond the structural protections addressed above, to ensure that VRS's competitive options are not reduced by having B&E operate PAS. CSXT's commitments are set out in the Opening Verified Statement of Mr. Pelkey. They include constraints on rates that PAS will charge while B&E is PAS operator, a haulage arrangement that PAS will provide for VRS between East Deerfield and Bellows Falls, a service commitment to VRS, and a constraint on sharing competitively sensitive information. While acknowledging the existence of these additional measures, VTrans ignores the benefits of these commitments in pressing its supposed concerns.

For example, VTrans claims to be concerned that B&E could provide reduced service to VRS interchange movements on the Connecticut River Line. But as Mr. Pelkey stated in his Opening Verified Statement, the CSXT and NSR have made service commitments that will ensure competitive service. Similarly, VTrans complains that GWI could obtain access to competitively sensitive data relating to VRS traffic. But Applicants have committed to protect confidential rate information obtained by B&E about VRS movements and not to allow B&E to share such information with any affiliate.

VTrans also suggests that it is unsatisfied with the commitments made by Applicants because VTrans would have no available mechanism to enforce those commitments. But VTrans ignores the effectiveness of the STB as a forum to ensure that commitments made by the Applicants and imposed by the Board are implemented. VTrans does so even though it has described in detail the recent dispute between NECR and PAS over trackage rights on the

Knowledge Corridor, noting that the STB resolved the dispute in a way that ensured continued access by VRS to PAS as a competitive interline partner. The STB will continue to be available to resolve disputes that could arise over any commitments that are imposed as conditions. And to further ensure that the STB will be available to address any concern that might arise about the operation of PAS by B&E, Mr. Pelkey notes that CSXT is requesting that the STB establish an oversight process in which VTrans or VRS will be able to raise any concerns regarding compliance with the commitments that Applicants have made.

Finally, even if VTrans had a valid concern about B&E as PAS operator, which it does not, the proposed remedy – that the STB order Applicants to replace B&E with a different operator – is disproportionate to any potential harm and is totally inappropriate. First, Dr. Reishus describes the small volume of traffic that could conceivably be subject to VTrans concerns over the supposed “reduction” of interline options. That such a small volume of traffic is even potentially at issue may be one reason not a single Vermont shipper has voiced opposition to the Merger and Related Transactions.

Second, VTrans incorrectly describes the standard that the STB applies in assessing competitive harm. VTrans states that “[t]he statute specifies that in a transaction that does not involve the merger of two class one carriers the Board may not approve the proposed transaction if it will harm competition.” (VTrans Comments 5, STB filed Aug. 27, 2021.) But VTrans then quotes the actual statute, which clarifies that (1) the harm to competition must be substantial and (2) the harm is not outweighed by public benefits. *See id.* Given the limited traffic at issue, the extensive structural protections against harm, and the commitments made by Applicants, there is no basis for concluding there would be a substantial harm to competition that would justify the

adverse impact on the public interest of imposing the draconian remedy of a forced replacement of the PAS operator with another, unspecified operating entity.

Third, and perhaps most important, VTrans simply ignores that adverse impact. Its proposed remedy could preclude the substantial public benefits that rail shippers and local communities across New England would gain from the Merger and Related Transactions. Those benefits are real. Even VTrans' witness Mr. Cunningham acknowledges that "I can see many aspects over the overall transaction benefiting the New England region and increasing competition." (VTrans Comments, Cunningham V.S. 17.) But a forced replacement of B&E as PAS operator could put those benefits in jeopardy. B&E is a highly qualified shortline operator that will be able to draw upon the experience of GWI in starting up new operations and in operating in New England conditions that is needed to avoid any disruptions or degradation of service during the transition to a new operator. The GWI family of rail carriers has a strong reputation for safety and efficiency of operations. It is likely that replacing B&E with a different operator would result in a weaker and less effective PAS. In addition, the forced replacement of B&E as a condition to approval of the Merger and Related Transactions would be inconsistent with the carefully negotiated agreements reached with NSR and GWI. Given the central nature of B&E's role in the restructuring of PAS – which the Applicants have produced through complex and deliberate negotiations – a requirement to change the PAS operator could easily lead to the unraveling of the entire transaction, with the loss of the substantial benefits expected from the transaction.

b. VRS

VRS filed two sets of comments. On March 16, 2021, VRS filed comments opposing the treatment of the Merger Transaction as a "minor" transaction and also opposed the structure of the Application, in which B&E sought authority to become the PAS operator through a separate

petition for exemption. VRS also summarized its concerns over the competitive impact of the Merger and Related Transactions, which would be developed further in its later comments.

VRS argued that the Merger and Related Transactions will “create a roughly 70-mile two-to-one corridor, eliminating competition in portions of northern Massachusetts and Vermont and New Hampshire.” (VRS’s Notice of Intent 2, STB filed Mar. 16, 2021.) The focus of VRS’s concern is the portion of the Connecticut River Line owned by NECR, a GWI affiliate, and used by PAS, that extends from East Northfield, MA, to White River Junction, VT. VRS states that “PAS and NECR are vigorous competitors along the Conn River Line.” (*Id.*) According to VRS, under the Merger and Related Transactions, the Conn River Line “would fall under the exclusive control of GWI through B&E and NECR.” (*Id.*)

VRS’s August 27, 2021 comments were filed in sub-docket No. 5 and they ask the STB to deny the petition for exemption filed by B&E to act as PAS operator. The basis for VRS’s opposition to the petition for exemption basically follows the theme of its March 16, 2021 comments. VRS claims that “VRS was, and is, generally supportive of the concept of CSXT merging with, and assuming operation of, the PAR Railroads, given CSXT’s close interline relationship with VRS.” (VRS Comments 5, FD 36472 (Sub-No. 5), STB filed Aug. 27, 2021.) However, VRS opposes B&E’s operation of PAS, claiming that “GWI will have no incentive to compete against itself, and it will have every motivation to explore ways to exploit the market power it would gain through common control of the two railroads that have for years stood as competitors for VRS traffic.” (*Id.* at 6.)

Like VTrans, the focus of VRS’s August 27, 2021 comments is the NECR-owned portion of the Conn River Line between East Northfield and White River Junction: “Most evident of the competitive issues raised by the proposed B&E/PAS Transaction is the creation of a virtual 2-to-

1 corridor along the Conn River Line, where, today, NECR and an unaffiliated PAS vigorously compete for on-line customers and for traffic interchanged with VRS at Bellows Falls and White River Junction. If the B&E/PAS Transaction were to be approved and implemented; however, service on this line would fall under the control of GWI, a parent company that would have little if any incentive to have one carrier compete against the other, reducing or eliminating meaningful competition.” (*Id.* at 10.)

VRS’s experts, Messrs. Crowley and Mulholland, expand upon VRS’s concerns. Besides the concern over the supposed “reduction of competition that would result along the [Conn River] Line,” Messrs. Crowley and Mullholland refer to “the potential harms that could flow from GWI’s operational control of nearly all practicable VRS interline routes to the CSXT network, and the damage to competition that could result from GWI’s access to traffic, rate divisions and revenue waybill data for interline traffic that B&E would handle as an intermediate operator moving to and from VRS interchange points, as well as, quoting rate divisions for interline traffic to and from VRS.” (VRS Comments, Ex. B, Crowley & Robert V.S. 8, FD 36472 (Sub-No. 5), STB filed Aug. 27, 2021.)

Messrs. Crowley and Mulholland also devote a substantial portion of their statement to the argument that the commitments that Applicants have asked the STB to impose as conditions to approval of the Merger and Related Transactions are inadequate. They argue that “[t]he protective steps CSXT, NSR and B&E say that they will take are not sufficiently delineated, and will not ensure effective competition or even the continued existence of competitive operations, given the common control of VRS’ connecting railroads B&E and NECR.” (*Id.* at 11.)

In response to VRS’s comments, it is first important to note that the amount of VRS traffic at issue here – *i.e.*, traffic that could use either PAS or NECR – is very small. Dr. Reishus

analyzes the traffic data to show that the competitive issue raised by VRS, even if their concerns were valid (which, as discussed below, they are not) is extremely limited. There is very limited competition today between PAS and NECR that could be affected.

In addition, as discussed in detail above in response to the VTrans comments, the concerns about the creation of a 2-to-1 corridor on the Connecticut River Line are based on the false premises that GWI will control the activities and operations of the two rail carriers providing service on that Line and that it would be in GWI's interest for B&E to harm PAS. To the contrary, PAS will remain an independent rail carrier and will not be subject to B&E's control. B&E will not be making marketing or operating decisions in the interest of GWI or any corporate affiliate, and GWI will not be able to control those market or operating decisions. B&E will be contractually obligated to advance the interests of PAS. And it will have the economic incentive to advance PAS's interest because its compensation is tied to the success of PAS. Nor would it even be in GWI's interest to harm PAS given the significant interchange traffic handled between PAS and other GWI carriers in the region.

Most important, B&E will be the agent of PAS's future owners, not of GWI. CSXT and NSR have no financial interest in GWI or the GWI affiliates that operate in New England. CSXT and NSR have a strong economic incentive to ensure that B&E advances PAS's interest, not the interest of GWI or a B&E affiliate. As PAS's owners, CSXT and NSR will have a strong incentive to see that B&E acts aggressively in marketing PAS services. The more business that PAS can generate, the more revenues will be available to offset PAS expenses. PAS's owners will not allow B&E to harm PAS by failing to pursue market opportunities with connecting rail carriers such as VRS.

VRS also claims that B&E's control of other interchange locations with VRS, in particular Hoosick Junction, could allow B&E to favor B&E's affiliates over VRS. VRS's President, Mr. Houghton, notes that "Hoosick Junction's reactivation by PAS facilitates swifter and more efficient routings for NSR traffic (via PAS-supplied haulage from and to Mechanicville, New York) and CSXT traffic (via PAS interline service from and to Rotterdam Junction, New York)." (VRS Comments, Ex. A, Houghton V.S. 5, FD 36472 (Sub-No. 5), STB filed Aug. 27, 2021.)

But as Mr. Houghton acknowledges, these movements involve PAS's owners, CSXT and NSR, and they have a strong economic incentive to preserve and expand those movements. B&E would have to act directly contrary to the interests of PAS's owners – and violate the operating agreement that will require B&E to act in the interests of PAS – to take actions to discourage the interchanges at Hoosick Junction that VRS values. Moreover, Dr. Reishus explains that B&E would not have any incentive to take anticompetitive actions regarding that interchange traffic.

VRS also complains that B&E's operation of PAS will give B&E's affiliates access to competitively sensitive information about VRS traffic. However, that competitive information will be very limited given the existing and new haulage arrangements. Moreover, B&E intends to separate management and commercial functions within B&E and will establish barriers within the carrier to ensure that competitively sensitive information is not provided to others. VRS's experts dismiss the effectiveness of such barriers, but they know that rail carriers and their consultants often have access to commercially sensitive information they agree to keep confidential, and do so. There are statutory requirements of confidentiality that all rail carriers take seriously. Give these guardrails, there is no valid reason to believe that B&E will allow VRS information to be used improperly.

Messrs. Crowley and Mulholland also criticize the commitments that CSXT has made to ensure VRS will suffer no competitive harm because of B&E's operation of PAS. They claim that CSXT's "promised mitigative actions are ill-defined." (VRS Comments, Ex. B, Crowley & Mulholland V.S. 5, STB filed Aug. 27, 2021.) But the commitments are more than adequate to ensure that VRS will continue to have access to a competitive PAS interline carrier. PAS's pricing commitments will ensure that B&E cannot use price increases to divert traffic to NECR. The principle set out in the pricing commitment of maintaining current pricing levels is not at all vague. While the specific rates to be established have not been set out in a definitive chart given the limits on access by CSXT commercial employees to competitively sensitive data prior to obtaining control authority, it will be straightforward to convert current rates, which Dr. Reishus attaches to his Reply Verified Statement, into rates that can be applied once control authority has been granted. And Mr. Pelkey explains that the new rate commitment will establish a rate ceiling, and is not intended to prevent B&E from establishing prices below that ceiling if B&E believes such prices are justified. Similarly, PAS's service commitment of 5-days/week service at current traffic levels is clear. Future changes in traffic flows will have to be addressed based on the particular circumstances. The concern of Messrs. Crowley and Mulholland over lack of detail is a red herring.

For several reasons, these assurances are enough for the STB to determine that competition will not be harmed. First, they are only a backstop to the fundamental competitive protections contemplated by the restructured PAS, namely that B&E will be contractually obligated to act in PAS's interest, that it has the economic incentive to do so, and that the owners have strong incentives to make sure that B&E advances the interests of PAS rather than the interest of B&E's affiliates. Second, CSXT has asked that these commitments be imposed as

conditions to approval, which will give VRS clear access to the STB if it believes that the principles are not being implemented properly. Third, the STB has accepted general assurances of this type in the past, such as commitments to maintain open gateways on commercially reasonable terms. When such general commitments are made conditions to the approval of a transaction, the STB has a direct role in enforcing them if a party believes that the commitment is not being honored.

Finally, the level of detail that Messrs. Crowley and Mulholland propose would best be embodied in a contract between two parties, not a general commitment imposed as a condition of approval for a transaction. But CSXT has been unable to reach an agreement on contract terms with VRS despite numerous meetings and discussions. Absent a contract, CSXT has set out the principles herein, which will ensure that VRS will not be harmed.

VRS recognizes the benefits that will come from CSXT's acquisition of the PAR Railroads and is "generally supportive" of the Merger Transaction. (VRS Comments 5, STB filed Aug. 27, 2021.) But VRS's insistence on the replacement of B&E as PAS operator would jeopardize the benefits to be realized by the acquisition given that the retention of B&E as PAS operator is a critical element in the carefully negotiated agreements that underlie the Merger and Related Transactions. The mere possibility that B&E will violate its contract, act contrary to its own interests, and act contrary to the interests of the PAS owners (with the power to terminate the operating agreement and remove B&E as operator) cannot justify jeopardizing the benefits of the overall transaction. VRS would clearly prefer to deal with a different PAS operator, but it will not suffer competitive harm from B&E's operation of PAS and the STB should not jeopardize the overall transaction to account for VRS's preference.

ii. U.S. Department of Justice

The U.S. Department of Justice (“DOJ”), in its advisory role in rail transactions, provided its views on the competitive issues raised by the Merger and Related Transactions in comments submitted on August 26, 2021. The DOJ’s comments are limited to CSXT’s acquisition of Pan Am’s interest in PAS. The DOJ identifies four areas of concern relating to PAS and asks the STB to consider the “structural” remedy of divestiture to address these concerns. (DOJ Comments 3, STB filed Aug. 26, 2021.)

There are several problems with the DOJ’s position. The DOJ’s assessment of competitive risk and its proposed remedies do not adequately account for the limited amount of traffic on PAS for which the transaction might have competitive implications; the history and structure of PAS; the unique characteristics of the railroad industry, including the STB’s regulation and oversight of rail transactions; the widespread success of jointly owned and operated facilities in the railroad industry; and the long-standing STB precedent that treats divestiture as an option of last resort, given the potential for disruption and uncertainty that forced divestiture would create.

Ultimately, the DOJ’s position rests on its suspicion that the parties will not comply – via some mechanism not specified in its comments – with their contractual obligations or their commitments to the STB, and that the STB may need to intervene if compliance is inadequate. But one of the STB’s central functions is to oversee implementation of rail transactions and to ensure compliance with commitments and conditions imposed in those transactions. There is no reason to create enormous uncertainty through forced divestiture and risk the loss of the strong benefits of the Merger and Related Transactions when the STB is fully capable of ensuring that the competitive protections that have been built into the structure of these transactions are properly implemented.

a. *Patriot Corridor*

The DOJ's first concern appears to be with the potential impact of CSXT's 50% ownership of PAS on competition for traffic that can move between Upstate New York and the Boston area on either the Patriot Corridor or CSXT's line between Selkirk, NY and Worcester, MA (the "Southern Route"). Given the existence of CSXT's Southern Route, the DOJ states it is concerned that "[t]he proposed transaction would give CSX both control over the operating entity on a competing line [the Patriot Corridor] and a 50% stake in the track and physical infrastructure of that line." (DOJ Comments 3, STB filed Aug. 26, 2021.)

According to DOJ, "[t]his arrangement is likely to diminish competition between CSX and PAS on these parallel routes," and it "may allow CSX to impair the ability of its remaining rival, NS, to effectively compete." (*Id.*) While DOJ acknowledges that CSXT may be "insulated from pricing or scheduling decisions made by B&E on the PAS Patriot Corridor line," it asserts that such insulation "is at best imperfect so long as [CSXT] remains co-owner of PAS infrastructure." (*Id.* at 4.) DOJ speculates that "[CSXT] ownership of 50% of the physical infrastructure on which B&E will operate may give CSX the ability to influence joint venture operations. . . ." (*Id.*)

As a preliminary matter, CSXT will have a 50% ownership interest in PAS, a company that itself has ownership and rights over the Patriot Corridor. CSXT will not have a 50% direct ownership in the physical infrastructure of the Patriot Corridor. Moreover, CSXT's representatives on the board of PAS would be bound by their fiduciary duties under corporate law to act in the best interests of PAS.

Further, the DOJ's concern about the competitive overlap between PAS and CSXT's Southern Route is overstated because the degree of competitive overlap between the PAS Patriot Corridor and CSXT is very small. As Dr. Reishus explains, a small percentage of PAS traffic is

overhead traffic that could potentially move on CSXT's Southern Route. The majority of the traffic is NSR haulage traffic or traffic that moves to/from PAS locations. Competition for NSR's haulage traffic will be preserved through the trackage rights arrangement discussed below. And CSXT does not have direct access to PAS local traffic on CSXT's Southern Route.

While the PAS Patriot Corridor traffic that moves overhead to the PAR System, which constitutes a minority of PAS traffic, could potentially move over either PAS or CSXT's Southern Route, competition for that traffic is constrained by other factors. For example, most of that overhead traffic connects with either NSR or CP in the west. Both of those carriers have strong reasons to keep that overhead traffic on PAS, if only to ensure the long-term viability of PAS. (As discussed below, the focus of CP's comments was on the need to ensure the long-term viability of PAS.) As to CSXT's traffic on PAS, Dr. Reishus shows that substantially less than half of that traffic is overhead to PAS. And as explained by CSXT's witness Mr. Wallace, that traffic moves on PAS for operational and service reasons and would be unlikely to move to CSXT's Southern Route. The majority of CSXT's PAS traffic moves to PAS destinations and CSXT has no viable way to compete for that traffic using its Southern Route.

Given the limited competition between CSXT's Southern Route and the PAS Patriot Corridor, the structure that CSXT and NSR have created for CSXT's ownership interest in PAS, along with the retention of B&E as the contract operator, is more than enough to prevent competitive harm. Contrary to the DOJ's account, CSXT will not have "control over the operating entity" on the Patriot Corridor. As the DOJ acknowledges, CSXT has formally removed itself from pricing and marketing decisions for PAS by having PAS retain B&E to provide those functions. The DOJ says this solution is "at best imperfect," but the DOJ does not explain why, imperfect though it may be, it is not adequate to prevent competitive harm. CSXT

cannot control pricing or marketing decisions, so it cannot interfere with the limited competition between movements on PAS and movements on the Southern Route.

The DOJ's suspicion that CSXT may still seek – in unknown and unspecified ways – to influence PAS's operations or commercial strategy ignores the economic incentives that CSXT will have to keep PAS viable notwithstanding the existence of CSXT's Southern Route. As noted above, most of the traffic that CSXT interchanges with PAS must use PAS to reach the rail shipper. CSXT does not have direct access to that traffic on the Southern Route. CSXT has strong incentives to keep PAS viable to ensure continued movement of this traffic. And DOJ has identified no plausible mechanism by which CSXT could do so while managing to interfere – in violation of the agreements establishing B&E's operation of PAS – solely on the small amount of traffic that could, in theory, be served on either line.

The bottom line is that CSXT is highly dependent on PAS for the movement of its customer traffic. CSXT is PAS's second highest interchange partner (behind only NSR) and CSXT's reliance on PAS will only grow once CSXT acquires the PAR System, which also has traffic to/from PAS locations.

Other commitments that CSXT has made in restructuring PAS also ensure that competition between CSXT and PAS will remain robust. CSXT has agreed in the NSR Settlement Agreement to keep PAR System rates to connections with PAS at current levels (with cost escalation) for seven years. Combined with B&E's control over PAS pricing, this commitment will ensure that shippers on the PAR System will have competitive access to western carrier connections.

In addition, Mr. Pelkey identifies in his Reply Verified Statement some additional commitments that CSXT is willing to make to preserve existing competition and ensure PAS's

viability. These include: (1) CSXT's recusal from any PAS board discussion or consideration of strategic issues relating to CSXT's Southern Route or competition between PAS and CSXT; and (2) accelerated arbitration to resolve any disputes that arise at the level of the PAS Management Committee over CSXT's willingness to make PAS capital expenditures.⁶ Finally, CSXT asks the STB to establish a five-year oversight period that will give any interested party the opportunity to bring concerns about CSXT's participation in PAS to the STB's attention.

b. *Knowledge Corridor*

The second area of concern identified by the DOJ involves B&E's operation of PAS on the NECR's line north of East Deerfield (referred to by the DOJ as the Knowledge Corridor). This issue has been discussed above regarding the comments of VTrans and VRS. Since B&E is affiliated with NECR, which owns the rail line from East Northfield to White River Junction, DOJ states it is concerned that "a single entity will control all operations on the NECR line and within the overlapping portions of the Knowledge Corridor." (DOJ Comments 4, STB filed Aug. 26, 2021.) "In effect, the proposed remedy [PAS's retention of B&E to operate PAS] reduces the numbers of competitors in the Knowledge Corridor from two to one." (*Id.*) The DOJ acknowledges that under the proposed structure of PAS, B&E and NECR would still have incentives to compete, but competition could nevertheless be restrained because "B&E and NECR would potentially have significant insight into the pricing, scheduling, and other key competitively sensitive information of the other." (*Id.* at 5.)

⁶ As Mr. Pelkey explains, CSXT believes that these two commitments are more than adequate to address any concerns about CSXT's participation on the PAS Management Committee. But if the STB were to conclude otherwise, CSXT would be willing (as an alternative to these two commitments) to appoint a fiduciary to exercise CSXT's governance rights on PAS, even though CSXT believes that such an arrangement would deprive PAS of the benefits that CSXT could bring to PAS Management Committee considerations, given CSXT's experience and commitment to PAS's long-term viability. CSXT asks the STB to consider this alternative only as a last resort to the more extreme divestiture remedy.

Again, the DOJ's abstract concern does not account for the very limited amount of traffic on the Knowledge Corridor that is currently subject to competition between PAS and NECR. The Knowledge Corridor is a low-density line. And, as Dr. Reishus explains, only a small portion of the current traffic moving on that line is subject to competition between PAS and NECR. Dr. Reishus further explains that there is no reason to expect competitive harm to transportation involving the two specific commodities singled out by VRS, rock salt and LPG.

The competition between PAS and NECR for on-line shippers is limited to the movements from only two shippers on that line located between Bellows Falls and White River Junction due to the limited local service rights of PAS's trackage rights over the line. As CSXT explained in the Application, PAS will commit to leaving the current PAS rates in place for those shippers. Neither shipper has opposed the Merger and Related Transactions and one of the shippers has submitted a letter of support. The extent of any potential competitive concern is very narrow.

Most important, any concern that competition between PAS and NECR will be reduced is based on the mistaken assumption that all movements on the Knowledge Corridor will become subject to control by GWI because B&E is an affiliate of GWI. As discussed in detail above, B&E will be subject to a clear contractual commitment to advance the interest of PAS, not of any affiliates, and this contractual commitment is with PAS owners who have a strong incentive to see that it is enforced. The DOJ's suspicions cannot overcome the economic incentives that B&E will have to advance the interests of PAS and the contractual obligation to do so.

These structural incentives to compete are sufficient to ensure that VRS will continue to have access to competitive rail service by PAS. But CSXT and NSR, as future and current PAS owners, have also made specific additional commitments to ensure that VRS will not suffer

competitive harm. Those commitments are detailed above in our response to the VRS comments, and include rate commitments on traffic moving from VRS east to PAR and west to CSX, a commitment to haul VRS traffic at current rates between storage facilities at East Deerfield and an interchange with VRS at Bellows Falls, and a commitment to provide VRS with five days/week service on these routes.

The DOJ's concern that B&E could make confidential rate information about VRS available to its affiliate, NECR, is also misplaced. The operating agreement will obligate B&E to keep such information confidential. These types of confidentiality commitments are common in the railroad industry. Indeed, 49 U.S.C. § 11904 imposes requirements of confidentiality that all rail carriers take seriously. It is unreasonable to assume that B&E would violate its clear statutory obligations regarding commercially sensitive information about PAS shippers.

Confidentiality restrictions have also been widely used in rail transactions to ensure that competitively sensitive information is not misused by parties to the transaction. *See Conrail*, 3 S.T.B. at 316 (“[T]he confidentiality provisions that we have imposed should prevent any access by CSX's water and intermodal affiliates to confidential contract information about APL.”). There is no valid reason to believe that B&E will use confidential rate information about VRS unlawfully or to the disadvantage of VRS.

c. *NSR Trackage Rights*

The DOJ's third concern is that pre-merger competition between CSXT and NSR for intermodal traffic may be affected by CSXT's grant of trackage rights to NSR for intermodal movements over CSXT's Southern Route. The DOJ notes that the grant of trackage rights is intended to ensure continued rigorous competition between CSXT and NSR for intermodal traffic, but the DOJ argues that “[c]ontractual commitments between merging competitors to reduce the harm from a transaction are at best a band-aid.” (DOJ Comments 5, STB filed Aug.

26, 2021.) DOJ claims that as the track owner, CSXT could “evade[] or manipulate[] [the] contractual requirements” of the trackage rights agreement, potentially harming NSR and its customers. (*Id.*)

The DOJ’s hostility toward trackage rights is completely at odds with experience in the railroad industry, where trackage rights arrangements between competitors are widely used. The STB has frequently seen the grant of trackage rights by one competing rail carrier to another as an effective means of preserving competition, not as a potential source of competitive harm. *See, e.g., Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP)*, 1 S.T.B. 233, 368 (1996) (providing BNSF trackage rights over almost 4,000 miles of the merged UP/SP network to replace competitive service lost by “2-to-1” shippers as a result of the merger); *Burlington N. Inc.—Control & Merger—Santa Fe Pac. Corp.*, 10 I.C.C.2d 661, 745 (1995) (requiring applicants to provide trackage rights to one of three Class I railroads operating in the area not affiliated with applicants); *Union Pac. Corp.—Control—Missouri Pac. Corp.*, 366 I.C.C. 462, 469 (1982) (states that the then ICC was “addressing the anticompetitive impact of the proposed transactions in the transcontinental market by granting the application of DRGW for trackage rights between Pueblo, CO and Kansas City, and the application of SP for trackage rights between Kansas City and St. Louis.”).

One reason that the STB has a history of favoring trackage rights arrangements as competitive remedies is that the STB retains broad regulatory authority over such arrangements and it can address any concerns that might arise in connection with the grant of trackage rights. This is even recognized by VTrans and VRS, who discuss at length the history of a trackage rights dispute between NECR and PAS that the STB resolved in a way that VTrans and VRS describe as preserving competition on the NECR-owned portion of the Conn River Line.

CSXT's grant of trackage rights goes far beyond merely preserving existing competition between CSXT and NSR. Today, NSR is constrained in its intermodal service into the Boston area by the Hoosac Tunnel, which restricts the passage of double-stack domestic container intermodal cars. NSR must take costly measures to configure its intermodal cars to "fillet" double-stack cars so they have only a single stack moving onto PAS, and to "toupe" the cars to add a double stack after movement on PAS. The ability to move double-stack intermodal traffic on CSXT's Southern Route will strongly improve competition between CSXT and NSR for intermodal traffic.

Finally, the DOJ's concerns about the grant of trackage rights ignores other competitive benefits that will be produced by the NSR Settlement Agreement in which the trackage rights were granted, including the detour rights that CSXT is providing if a blockage of the Hoosac Tunnel occurs and the substantial upgrades in infrastructure at Ayer that CSXT will fund to improve the flow of traffic through Ayer.

d. *Risk of "Entanglements" Between CSXT and NSR*

Finally, DOJ is concerned that restructuring PAS may "foster[] an ongoing entanglement between the two competitors, both through CSX's ownership stake in the PAS track and physical infrastructure NS uses and through the new NS service on the CSX line." (DOJ Comments 5, STB filed Aug. 26, 2021.) According to the DOJ, the result of these entanglements is that "[t]he two companies may have the incentive to compete less aggressively." (*Id.*)

This amorphous concern about the potential effects of "entanglements" ignores the vast experience in the railroad industry with joint facilities and cooperative arrangements among rail carriers, including such arrangements between CSXT and NSR. The rail network is a quintessential network industry that can function effectively only through the interconnections among rail carriers. There are numerous shared facilities, jointly owned facilities, commonly

owned terminal railroads, trackage rights arrangements and haulage arrangements that provide competitive service notwithstanding that the owners or participants are also competitors.

The ICC/STB have repeatedly acknowledged that such arrangements among competitors can be carried out without harming competition and indeed that they can be pro-competitive. For example, in *Conrail*, 3 S.T.B. at 228, the Board approved “Shared Assets Areas” (“SAAs”), where CSX Transportation, Inc. (“CSXT”) and Norfolk Southern Railway Company (“NSR”) are permitted to serve shipper facilities located within the three SAAs (the North Jersey SAA, the South Jersey/Philadelphia SAA, and the Detroit SAA). Within the SAAs, CSXT and NSR “each have exclusive and independent authority to establish all rates, charges, service terms, routes, and divisions, and to collect all freight revenues, relating to freight traffic transported for its account within the SAAs.” *Id.*

The ICC has even encouraged the creation of such joint arrangements. In *Burlington N., Inc.—Construction & Operation—Between Gillette & Douglas, in Campbell and Converse Counties, Wyo.*, 348 I.C.C. 388, 399 (1976), the ICC sought to have Burlington Northern Inc. (“BN”) and the Chicago and North Western Transportation Company (“CNW”) consolidate their individual applications to construct and operate parallel lines of railroad to service mines in the Powder River Basin and jointly seek authority. The ICC stated that “[t]wo railroads serving the same territory over separate lines would result in wasteful and improvident expenditures for construction which are not necessary to insure adequate service, especially in view of the environmental and financial considerations involved.” *Id.* The ICC dismissed the individual applications, *Id.*, and authorized the construction of a joint line, *Id.* at 405.

There is nothing remarkable or unique about the trackage rights arrangement at issue here or the joint ownership of a rail line like PAS that creates undue competitive risks. The rail

industry would not function without joint arrangements. Moreover, the STB is available to address any disputes that may arise in these joint arrangements or claims that the arrangements are being used to restrain competition.

e. *Divestiture Proposal*

Based on the concerns described above (which are unfounded and overstated), the DOJ asks the STB to consider an alternative structural remedy to the protections proposed by the parties to the Merger and Related Transactions. The DOJ acknowledges that “no remedy and no remedial process is one-size fits-all” and that “[a]ny remedy requires a fact-specific inquiry to determine the best way to address competition concerns that arise from a transaction.” (DOJ Comments 7, STB filed Aug. 26, 2021.) But the DOJ concludes that “the easiest, cleanest, and least risky solution would be a structural remedy involving the sale of Pan Am’s stake in PAS to another party that could operate PAS.” (*Id.* at 6.)

A forced divestiture of Systems’s interest in PAS would be inappropriate and ill-advised. While divestiture is a common remedy sought by the DOJ in non-regulated industries, there is long-standing precedent in rail transactions that divestiture is a remedy of last resort, to be used only when it is impossible to address valid competitive concerns through other measures. As the STB has explained, “[d]ivestiture in the rail industry, with its network economies, is a requirement, to be imposed only under extreme conditions, when no other less intrusive remedy would suffice.” *UP/SP*, 1 S.T.B. at 433. Applying this standard, the STB has often rejected requests for divestiture of assets as a condition to approval of rail transactions, including divestiture requests by the DOJ.

In the UP/SP merger, the DOJ argued for a condition requiring divestiture of extensive Union Pacific Railroad Company or Southern Pacific Transportation Company lines in the South

Central region, and divestiture of the Central Corridor.⁷ The STB rejected these extreme conditions, finding that they were not in the public interest and were unnecessary. The STB was concerned about the enormous uncertainty that would be created by forced divestiture and concluded that other remedies, including trackage rights arrangements and other contractual solutions provided adequate protection of competition without jeopardizing the benefits that might be lost if forced divestiture were required. *UP/SP*, 1 S.T.B. at 433-42.

Similar concerns have led the STB to reject divestiture proposals in other cases. *See, e.g., CN/IC*, 4 S.T.B. at 157 (1999) (denying request for divestiture of CN's interest in the Detroit River Tunnel); *Conrail*, 3 S.T.B. at 292 (denying requests for divestiture of interest in Indiana Harbor Belt Railroad Company and in a short but strategic CSX line, noting that such an extreme remedy was not justified and that the parties' commitments would ensure the preservation of competition).

The STB appropriately considers divestiture to be an extreme remedy to be used only in the last resort. As Dr. Huneke explains, forced divestiture can have widespread unintended consequences for rail shippers, connecting rail carriers and the proponents of a rail transaction. What might seem to the DOJ to be a straightforward remedy in other industries is a highly complicated, uncertain and risky approach in the rail industry. A forced divestiture order would be particularly complicated and uncertain here since it involves the forced sale of a ownership share in an entity that is a central part of the transaction.

The unique circumstances of PAS also raise questions about the feasibility of a forced divestiture. PAS was created to serve the interests of its owners. NSR secured its access to the Boston area by joining with Boston & Maine, a PAR carrier, in a joint venture company to own,

⁷ Cheyenne, WY, to Hinkle, OR.; Chicago, IL, to Fremont, NE.; Ogden, UT, to Roseville, CA; and Denver, CO, to Grand Junction, CO. *UP/SP*, 1 S.T.B. at 350-51.

fund and improve a highly competitive route directly into that market. PAR, on the other hand, obtained funding that allowed it to continue operating a line that connected PAR System lines to western rail carriers in Upstate New York. PAS is a very direct example of a joint venture among two carriers where the joint venture is designed to serve the interests of its carrier owners. The rail industry has numerous other examples of rail carriers that serve the interests of their owners. The value of an interest in such individual carriers is tied up with the benefits that the particular carrier provides to its owner(s). The value of an interest in such a carrier to a party that does not actually use the carrier or otherwise have a commercial relationship with that carrier, however, is highly uncertain. PAS is a low-density line with marginal financial performance, as explained by Dr. Reishus. As Mr. Pelkey describes, CSXT sought to exclude PAS from its purchase of Systems, but Systems declined. Moreover, CSXT made it clear to NSR that CSXT would sell its interest in PAS to NSR, and NSR also declined.

Under these circumstances, forcing a divestiture of CSXT's interest in PAS is likely to produce significant harm to the public interest. One of the factors that the STB has identified in rejecting prior divestiture requests is the potential for creating a weaker competitor or undermining the financial strength of the relevant rail network. *UP/SP*, 1 S.T.B. at 434. That concern would clearly be raised by a forced divestiture of CSXT's PAS interest. CSXT has a strong interest in keeping PAS viable, given the substantial traffic that CSXT moves on PAS. Other potential buyers of CSXT's interest without an existing commercial relationship with PAS would not have that incentive. They also may not have the financial strength to maintain adequate investment in PAS. NSR and CP both have commercial interests in PAS, but neither carrier has expressed an interest in acquiring CSXT's interest. An investor without an existing

commercial relationship with PAS and a corresponding incentive to keep PAS viable could lead to a weakened PAS.

The DOJ proposes that CSXT's interest could be sold to an owner/operator. But B&E is in the best position to operate PAS and any other operator would present a risk of inferior service. No other rail operator has the depth of experience in starting up complex rail operations or providing rail service under the special conditions of New England. Moreover, the STB is aware of GWI's strong reputation as a safe and effective provider of rail service. No other owner/operator would offer the same high confidence that PAS will be well operated.

An owner/operator other than B&E also would have financial requirements that B&E will not have. PAS will contract with B&E to market and operate PAS, but B&E will not have to make a capital investment to acquire an ownership interest in PAS. NSR already owns its 50% share of PAS and CSXT will acquire the other 50% interest acquiring Pan Am.

Tremendous uncertainty that could disrupt traffic and distort transportation decisions by shippers would also be created because of the time it would take to implement a forced divestiture. While there is little precedent on how a forced divestiture would be carried out, there was a forced divestiture in the Santa Fe/Southern Pacific merger proceeding. There, Santa Fe Southern Pacific Corp. sought authority to merge Southern Pacific Transportation Company ("SPT") and Atchison, Topeka and Santa Fe Railway Company ("ATSF") and placed SPT into a voting trust during the merger proceeding. *Santa Fe S. Pac. Corp.—Control—S. Pac. Transp. Co.*, 2 I.C.C.2d 709 (1986). When the ICC denied the application, it ordered divestiture of either SPT or ATSF. *Id.* at 715. Divestiture was ordered on July 24, 1986 and SPT was acquired by Rio Grande Industries over two years later, on October 12, 1988. *Santa Fe S. Pac. Corp.—Control—S. Pac. Transp. Co.*, FD 30400 (Sub-No. 21), slip op. at 2 (STB served Dec. 10, 1996). It is

uncertain what would happen to the rail network while shippers waited for months or years to see how a forced divestiture would work out.

The DOJ's preference for divestiture is based on its experience in unregulated industries. As DOJ explains, "[s]tructural remedies [such as divestiture] are strongly preferred in merger cases because they are clean and effective, and they avoid ongoing government entanglement in the market." (DOJ Comments 6, STB filed Aug. 26, 2021.) The DOJ's concern over a remedy that avoids "government entanglement in the market" is understandable in markets where there is no existing regulatory agency that supervises competitive behavior of regulated firms. But an important function of the STB has historically been to provide efficient supervision of the implementation of rail transactions and ensure that commitments made in those transactions are carried out. As the STB has stated, "because of our broad conditioning power and our continuing oversight, it is possible for us to approve transactions with conditions in cases where the antitrust enforcement agencies would either disapprove or approve only following substantial divestiture." *UP/SP*, 1 S.T.B. at 367. The substantial risks created by forced divestiture to the achievement of the benefits to be gained by the transaction do not need to be taken where the STB is available to ensure that the parties' own commitments are enforced.

An order requiring divestiture of CSXT's interest in PAS would also contravene the carefully negotiated agreements among CSXT, NSR, and GWI that have resulted in the proposed restructuring of PAS. As explained by Mr. Pelkey, {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}}

iii. Canadian Pacific

CP's comments focus on the need to ensure that PAS remains a long-term viable rail carrier for competitive rail service to and from New England. CSXT agrees with that objective. But CP's concerns about PAS viability are unfounded, and the conditions CP requests are unnecessary and unworkable. The structure that CSXT and NSR have created for PAS, with B&E as the contract operator, will ensure its viability with no complex layer of additional regulatory mandates.

CP claims that several factors in restructuring PAS "reduc[e] the long-run incentives to invest in the continued operational and competitive viability of the [PAS] route." (Canadian Pacific Comments 11, STB filed Aug. 27, 2021.) First, CP claims that the trackage rights that CSXT will give to NSR will "remov[e] substantial volumes of remunerative traffic from the [PAS] line," leaving PAS "dependent on PAS's manifest traffic." (*Id.* at 15.) Second, CP claims that the efficiency benefits achieved by combining PAR and CSXT will eventually lead CSXT to divert "substantial volumes of manifest traffic away from the Hoosac Tunnel Route." (*Id.*) Third, CP claims that "as a mere contract operator B&E will have no financial interest in PAS's success and long-term vitality," and will not have the "inherent and undivided competitive interest that Pan Am (along with PAS and NS) have today" in the viability of PAS. (*Id.* at 20-21.)

Based on these concerns, CP asks the STB to impose what it describes as "narrowly-tailored conditions" to ensure the continued viability of PAS. (*Id.* at 21.) CP states that it "does not wish to burden the Transaction in ways that might sacrifice its potential benefits, such as better CSX single-line services for PAR shippers and improved double-stack intermodal services via NS's trackage rights on CSX. But appropriate conditions need not sacrifice any Transaction

benefits.” (*Id.* at 22.) Notwithstanding its recognition of the risk of overburdening the transaction with unnecessary regulatory mandates, and its request for “narrowly-tailored conditions,” CP proposes an enormous laundry list of broad requested conditions, including:

- The STB should hold Transaction Participants to their representations and commitments, which CP describes as including (a) that there will be no adverse impact on competition for transportation within, into and out of New England; (b) PAS will be strengthened as an independent carrier serving the transportation needs of shippers in New England; (c) all gateways for movement of PAR traffic over PAS to its western connections, including CP, will be kept open on commercially reasonable terms; (d) no existing routes will be closed, no existing interchange options will be eliminated, and no Class I railroad that currently has access to rail customers in New England will lose that access.
- The time limit on the various commitments, including the general commitments above, should be extended beyond the time periods specified in the settlement agreements, although CP does not specify the precise amount of additional time.
- The standards and operating requirements applicable to B&E under the terms of the PAS restructuring should apply to any future operator.
- CSX should be precluded from influencing the operations of PAS.
- PAS and its owners should be obligated to support sufficient spending on maintenance and infrastructure on the Hoosac Tunnel Route to maintain service levels (frequency, transit times, and consistency) at pre-Transaction levels between Mechanicville and Ayer.
- If the Hoosac Tunnel Route is blocked as a result of a collapse of the tunnel or other events, CSX should be required to convert its contractual commitment to allow detours of PAS manifest and other traffic via CSX’s Southern Route into permanent haulage or trackage rights.
- PAS and its operator should provide service levels (frequency, transit times, and consistency) that are at least comparable to those offered pre-Transaction for traffic interchanged at the Mechanicville Gateway.
- The Board should impose formal oversight on the Transaction for an indefinite period that can be commenced by an interested party, and the Board should preserve the ability to require applicants to (a) make specified investments in the route, (b) shift certain traffic to the route, (c) make available reasonable commercial terms for interline traffic via the route; or (d) convey the route (or the PAS membership interest of CSX) to a third party that is willing to make the investments necessary to preserve its competitive significance.

As to the substance of CP's claims, CP's concerns over the viability of PAS are overstated and often misplaced. CP's first concern is that the rerouting of NSR's intermodal traffic will leave PAS financially harmed. CSXT's expert Dr. Reishus shows this is not the case. The contribution generated by NSR's intermodal traffic to PAS is marginal and will be substantially replaced by the contribution that will be generated by the traffic that CSXT has agreed to move over PAS.

Not only will the diversion of the NSR intermodal traffic have no adverse financial impact on PAS, it will also free up capacity on PAS and thereby allow the future PAS operator to expand PAS business with more profitable traffic. Under the haulage arrangement, PAS was compensated under a mechanism that does not permit PAS to determine its compensation based on market conditions, as with other traffic. By allowing PAS to focus on expanding all business, PAS will have the opportunity to improve its financial condition.

CP is also incorrect in claiming that the incentives of the two future owners of PAS, NSR and CSXT, may not keep PAS viable over the long-term. As to NSR, the diversion of intermodal traffic to CSXT's Southern Route will not remove or reduce its incentive to keep PAS viable. As Dr. Reishus explains, NSR has the largest share of merchandise traffic moving on PAS, with some of that traffic moving to PAS locations and other traffic moving overhead to PAR System locations. NSR will continue to have a strong incentive to keep PAS viable to ensure NSR's continued access to this traffic.

CSXT will also have a strong incentive to keep PAS viable. Dr. Reishus explains that CSXT is the second largest interchange partner of PAS. Together, CSXT and NSR are involved in the majority of PAS movements. Moreover, CSXT has made routing commitments in its Settlement Agreement with NSR to interchange traffic to and from western locations with PAS

at Rotterdam Jct. for movement over PAS. These routing commitments will generate substantial revenue for PAS.

CP suggests that CSXT will nevertheless have an incentive to divert its PAS traffic to the Southern Route after the transitional period that covers CSXT's routing commitment. This claim is misplaced. As explained by Dr. Reishus, most of CSXT's PAS traffic is traffic moving to and from locations served only by PAS. CSXT could not divert this traffic to its Southern Route without interchanging the traffic directly with PAS in order to access traffic to and from the local shippers' facilities. CSXT, as a part owner of PAS, will have a strong incentive to keep PAS viable so it continues to have access to this traffic.

CSXT's commitment to PAS viability is also reflected in other aspects of the NSR Settlement Agreement. In particular, CSXT has agreed to fund substantial improvements in infrastructure at Ayer which will improve the fluidity of PAS movements into and through the important eastern terminus of PAS at Ayer. CSXT also made rate commitments for traffic moving from PAR System locations to PAS that will ensure that western connections with PAS will continue to have access to PAR System locations. CSXT further committed in the Application to keeping gateways open for New England shippers to reach PAS, ensuring the continued flow of traffic on PAS.

CP expresses concern over the availability of adequate capital and the parties' commitment to make necessary investments to maintain service. This concern is misplaced. As Dr. Reishus explains, most of the traffic moving today on PAS goes to or from PAS destinations. Both of PAS's future owners will have the clear incentive to maintain the infrastructure to continue providing this service. Moreover, as noted above, CSXT has made additional commitments to resolve any dispute that may arise over CSXT's willingness to make necessary

infrastructure investments. As to investments in the Hoosac Tunnel itself, it is impossible to know what future investments might be needed, but the recent repairs to the Tunnel have clearly improved its condition.

CP also claims, incorrectly, that B&E, the third participant in the PAS restructuring, lacks a sufficient incentive to keep PAS viable. To the contrary, B&E's compensation as PAS operator depends on PAS's profitability. B&E would receive less compensation if PAS became non-viable and would be at risk of being replaced as PAS operator. B&E's control over marketing of PAS services and its role as PAS operator give B&E a unique incentive *and ability* to promote the viability of PAS. To the extent B&E can expand PAS business through effective marketing strategies, B&E can increase its compensation from operating PAS.

CP ignores other factors that give B&E a financial stake in PAS and the incentive to keep PAS viable. B&E will make significant investments in equipment and management to take over the operations of a large rail carrier such as PAS. B&E will naturally have a strong incentive to keep these assets productive. And the fact that B&E is part of the GWI corporate family would not have a negative impact on B&E's incentive to keep PAS viable, since PAS is an important interchange partner of GWI carriers in New England including the Providence and Worcester Railroad. Like CSXT and NSR, GWI itself has a strong interest in maintaining the viability of PAS, as explained in the reply comments submitted by B&E in this proceeding.

CP fails to account for other benefits that B&E will bring to operating PAS that will ensure its long-term viability. B&E's cost structure should reduce the cost of PAS operations. B&E will bring to PAS more modern and cost-effective technology and less costly management resources. Moreover, B&E's independence from PAR should improve PAS's financial position,

since the resources that B&E will dedicate to PAS operations and marketing and B&E's marketing decisions will be exclusively made in the interest of PAS.

Even if CP's requested conditions had a sound rationale, most would be unworkable and inappropriate. As to the proposal that Applicants be held to their representations, CSXT expects to be held to specific commitments it has made on the record about actions it will take in the future, but it is impractical to "hold" CSXT to representations relating to its expectations about future market developments, or to guarantee that PAS will become a stronger competitor.

CP's proposal to extend the time frame covering actions that CSXT has agreed to take in the Settlement Agreement is not only hopelessly vague and open-ended, it also seeks to re-write a carefully negotiated agreement. CP does not even attempt to explain, much less justify, why such a time extension is needed on NSR Settlement Agreement terms relating to connections with the PAR System when CSXT has already committed to maintain open gateways, including connections with PAS, on commercially reasonable terms without any time restriction.

CP's request that the STB impose conditions on a future PAS operator is obviously premature and unworkable. It is impossible to know what conditions might give rise to the replacement of B&E as PAS operator, so the terms of a future operating agreement cannot possibly be determined at this time. Similarly, CP's request that CSXT be precluded from "influencing PAS operations" is so vague that it makes no sense. Does CP mean to suggest that CSXT should be precluded from seeking to improve PAS operations?

On the question of ensuring adequate infrastructure investment on the Hoosac Tunnel Route, CP proposes an open-ended requirement that investments be made, regardless of the circumstances, that are necessary to maintain current service levels. Such a requirement goes far beyond the obligations of common carriers. CSXT and NSR, as owners of a common carrier

railroad, will have to assure PAS meets the legal requirements applicable to common carriers, and no mandate from the STB is needed to ensure compliance with these legal requirements. In addition, no regulatory mandates are needed to address the impact of a catastrophic event that impedes the use of the Tunnel since CSXT has agreed in the NSR Settlement Agreement with NSR to provide an alternative route for the disrupted traffic (and CSXT has already provided such access when needed in the past).

CP's request for an explicit service commitment for movements over PAS is inappropriate. B&E has explained that it intends to provide service over PAS that will be as good as or better than current service. But it would not be appropriate to convert that expectation into an enforceable commitment. Service commitments can be negotiated in transportation contracts, where the risks and uncertainties associated with rail transportation can be allocated between the parties, but they are not appropriate for common carrier service. Nor is a service commitment necessary. B&E has a strong incentive to provide service that will keep PAS competitive and that might expand PAS business.

Finally, as to CP's request for STB oversight, CSXT agrees that it would be appropriate for the STB to establish a five-year oversight process to ensure that restructuring PAS is being implemented consistent with the representations made on the record of this proceeding. But there is no need to burden the oversight process in advance as CP suggests with a discussion of potential remedies. The parties to the oversight proceeding can address appropriate remedies in the context of specific issues that arise.

iv. M4 Capital Group

While M4 Capital Group ("M4") supports the proposed purchase of PAR by CSXT, it is concerned that three rail entities (NECR, Connecticut Southern Railroad, and B&E) will be held by a single holding company, GWI. (M4 Comments 1, STB filed Aug. 16, 2021.) M4 believes

that under this proposed plan, competition will falter. (*Id.* at 2.) M4 hopes that when contemplating this transaction, the Board takes President Biden's Executive Order on Promoting Competition in the American Economy into consideration.⁸ (*Id.*) M4 supports the following:

1) CSXT's proposal to merge/purchase the Eastern portion of Pan Am Railways from Worcester to Canada and 2) B&E's operation from Ayer, MA to Mechanicville, NY. (*Id.*) M4 does not support the B&E owning and operating the Conn River Rail Lines. (*Id.*) M4 hopes that the Board reconsiders portions of the proposed transaction to include another operating entity not owned by GWI. (*Id.*)

In its original comment, M4 presents an alternative transaction in which it could purchase Conn River Lines and operate Deerfield Rail Yards. (M4 Comments 2, STB filed March 22, 2021.) M4 notes it has the financial resources to purchase Conn River Lines and the resources to provide competition. (*Id.*) It is not clear from M4's August 16, 2021 submission whether it still wants consideration of its proposed alternative transaction. However, M4 failed to comply with the Board's schedule and did not file an inconsistent application to acquire the Conn River Lines. Moreover, neither CSXT nor PAS own the Conn River Lines, instead they are owned by NECR, which is not a party to this proceeding.

As set forth in detail above, M4 misrepresents or misunderstands the carefully constructed restructuring of PAS that CSXT, NSR, and GWI have proposed in this proceeding, which Applicants believe is the best solution for New England and fully addresses all relevant concerns expressed by commenters in this proceeding. Indeed, the M4 proposal highlights the complexity of any attempt to force CSXT to divest the 50% interest in PAS. Deerfield Yard is an essential element of PAS operations, it is not located on the Conn River Line, and PAS could not

⁸ It should be noted that in a Press Release dated July 9, 2021, the Board noted that the Executive Order itself recognized the independence of the Board to the effect that the Executive Order is not binding on the Board.

sell that yard to any hypothetical buyer of the PAS interest in the Conn River Line and maintain operations of the remainder of the PAS without incurring significant infrastructure costs, operational issues and environmental issues in order to replace what was sold.

B. PASSENGER

i. MassDOT/MBTA

The Commonwealth of Massachusetts Department of Transportation (“MassDOT”) and the Massachusetts Bay Transportation Authority (“MBTA”) (collectively, the “Commonwealth”) have submitted comments in several filings in this proceeding. Most of the Commonwealth’s comments relate to the impact of the Merger and Related Transactions on passenger service in the Commonwealth, which Applicants respond to in this section. The Commonwealth has also made general comments on the potential impact of the Merger and Related Transactions on the Wachusett Reservoir. Applicants address those issues in Section II.D.i. below, in response to more specific comments and requests for conditions from the Massachusetts Water Resources Authority (“MWRA”).

The Commonwealth filed comments in this proceeding on March 16, 2021, and March 23, 2021, largely focusing on procedural issues. Applicants responded to these comments separately, and the procedural issues raised by the Commonwealth have been resolved by earlier Board decisions in this proceeding.

On August 27, 2021, the Commonwealth filed comments and requests for conditions. The Commonwealth asserted that it does not at this time object to, or oppose, the Merger Transaction or Related Transactions. (Commonwealth Comments 2-3, STB filed Aug. 27, 2021.) In fact, the Commonwealth stated that it has carefully considered the ramifications of the Merger and Related Transactions and “perceives that the Transactions, taken together, may benefit certain shippers and may yield various operating efficiencies that are commonly promoted by

those advancing rail systems consolidations such as the one presented to the Board here.” (*Id.* at 7.) However, the Commonwealth stated that it is unclear whether those benefits would outweigh the risks of harm to the public interest, including alleged potential harms to passenger rail transportation in the Commonwealth. (*Id.*)

Additionally, the Commonwealth stated that its discussions with CSXT have been amicable, and that CSXT and the related parties have listened and have been respectful of the Commonwealth’s concerns. (*Id.* at 8.) However, the Commonwealth claimed that CSXT and PAS have only offered “vague assurances that post-Transaction freight operations will not materially interfere with passenger train operations in the Commonwealth where both services share the same trackage,” and expressed its disappointment that the parties have not reached a written accord. (*Id.*) As Applicants have described previously, CSXT has met with the Commonwealth regularly since announcing the Merger Transaction, and CSXT remains confident that the parties will reach a written agreement that will satisfy the Commonwealth’s concerns. Applicants are confident that the concerns expressed by the Commonwealth regarding passenger operations will not come to fruition.

The Commonwealth requested that the Board impose the following as conditions to approval of the Merger and Related Transactions:

- (1) *Upon consummation of the Transactions, CSXT will transfer to MBTA train dispatching responsibilities for all MBTA and MassDOT-owned line segments – (1) over which regularly-scheduled commuter rail passenger service operates; and (2) over which CSXT otherwise holds, or would hold, dispatching responsibility post-Transactions. As a general rule, this condition would place such duties in the hands of the predominant user of the subject line segments as measured by average total daily train movements, and would best balance the interests of freight and commuter train service in keeping with recent executive directives, including Executive Order Number 14036. If CSXT is not required to transfer dispatching responsibilities as set forth above, then CSXT must be required to maintain dispatching functions permanently at MBTA’s existing Billerica dispatching offices, and must employ dispatching software and technology prescribed by*

MBTA to ensure that MBTA can monitor CSXT dispatching in real time, and in order to coordinate MBTA's dispatching territories with those MBTA-owned routes that CSXT would dispatch.

CSXT strongly opposes the Commonwealth's request that the Board require CSXT to transfer to MBTA train dispatching responsibilities for MBTA- and MassDOT-owned line segments. No changes to dispatching over lines owned by MBTA and MassDOT will result from the Merger and Related Transactions. The Board has repeatedly affirmed that it does not use its conditioning authority to address pre-existing circumstances. *See CN/EJ&E*, FD 35087, slip op. at 5 n.2. And the Commonwealth neither offers nor has any basis for the Board to alter the status quo regarding dispatching.

As discussed in the Verified Statement of Mr. Andy Daly, submitted with the Revised Application, CSXT will step into the shoes of Springfield Terminal regarding all of Springfield Terminal's obligations to the sponsors of passenger rail service. (Revised Appl., Ex. 13-C, Daly V.S. APP-373.) CSXT and B&E have committed that PAS will honor any agreements or commitments made to MassDOT and MBTA by PAS, or Springfield Terminal on behalf of PAS, including those regarding Springfield Terminal's dispatching responsibilities. (*Id.* at APP-376.) CSXT has also committed that the Springfield Terminal dispatching operations of MBTA and MassDOT passenger trains will continue to be located for the foreseeable future in North Billerica, MA, where MBTA's contractor Keolis also dispatches contiguous line segments. (*Id.*) Keeping the current Springfield Terminal dispatchers located in North Billerica will allow for routine and direct interaction between those dispatchers and the Keolis dispatchers. If CSXT needs to reevaluate this arrangement going forward, it will do so within the boundaries of the existing agreements between MassDOT/MBTA and Springfield Terminal that govern dispatching and other activities on Commonwealth-owned lines.

Indeed, the existing agreements, including a 2011 Trackage Rights Agreement among MBTA, Boston and Maine, and Springfield Terminal, and a 2015 Operating Agreement among MassDOT, MBTA and PAS, already provide for specific remedies to protect the Commonwealth's interests if dispatching service levels drop below a certain threshold. CSXT and B&E have committed to honoring these existing agreements, and there is no reason why the Merger and Related Transactions would cause the Board to impose a condition that fundamentally alters the terms of those agreements by transferring dispatching responsibility to the Commonwealth. Furthermore, the Commonwealth has an ongoing option under those existing agreements to purchase certain segments of track and to obtain dispatching responsibilities through such purchases.

Control of dispatching is crucial to CSXT's operations, and this requested condition would have a significant negative impact on the value of the Merger Transaction to CSXT and the public interest. Given the lack of impact of the Merger and Related Transactions on dispatching issues, there is no reason the Merger and Related Transactions would justify a condition that fundamentally alters the terms of existing agreements by transferring dispatching responsibilities to the Commonwealth. It would be wholly inappropriate for the Board to grant the Commonwealth's request to transfer CSXT's dispatching responsibilities to MBTA. With regard to the Commonwealth's alternative requested condition, CSXT notes that, as described above, it intends to keep the Springfield Terminal dispatching operations of MBTA and MassDOT passenger trains in North Billerica, which will allow MBTA and its contractor Keolis to monitor and coordinate MBTA's dispatching territories with those MBTA-owned routes that CSXT would dispatch.

(2) MBTA has determined that railroad freight volumes threaten existing capacity on MBTA-owned trackage, including between Ayer (MP-36.0) and Willows (MP-33.7) that CSXT

(and others) will also use post-Transactions, specifically interference with, and delays to, passenger trains that regularly traverse this territory and others. (This is an issue that will be revisited in the discussion to follow in light of recently-offered new evidence from CSXT.) CSXT must be required to develop a plan within three (3) months of the consummation of the Transactions to alleviate such overburdening, which plan should include designated traffic volume thresholds (approved by MBTA), that, when exceeded, would trigger a CSX capital investment to alleviate congestion, including, but not limited to, the installation of additional main line trackage parallel to existing MBTA Ayer-Willows main tracks, if CSXT will not do so voluntarily.

On September 20, 2021, the Commonwealth filed a supplement to its comments and request for conditions, which included a memorandum from Vanesse Hangel Brustlin, Inc. discussing future projected passenger traffic increases on the Ayer-Willows line segment, among other topics.

As discussed in the Applicants' Response to Environmental Comments, MBTA owns the Ayer-Willows line segment. PAS operates freight service over the segment under a perpetual freight easement, and PAR/Springfield Terminal also operates over the segment in overhead trackage rights service to connect two otherwise disconnected pieces of the PAR network. CSXT has projected that, following the Merger and Related Transactions, PAR/Springfield Terminal trackage rights traffic over the Ayer-Willows segment could increase by a minimal amount by 2027. (See Wallace Reply V.S. at 2-4.) Applicants explained that any potential changes in PAS traffic on the Ayer-Willows line segment would not result from the Merger and Related Transactions, but would occur (if at all) regardless of whether the Merger and Related Transactions occur.

The Board should not impose a condition requiring CSXT to develop the plan requested by the Commonwealth. As an initial matter, the Merger Transaction would only result in CSXT operating over the Ayer-Willows segment in overhead trackage rights service – PAS would remain the owner of the freight rail easement over this segment. As an overhead trackage rights

tenant, CSXT could not unilaterally develop a plan regarding traffic flows over this segment, and CSXT could not unilaterally implement any capital investments on the line segment.

Most important, the Commonwealth's concern that railroad freight volumes may threaten capacity on MBTA-owned trackage is not supported by any evidence, and Applicants have committed to developing a plan related to capacity issues on this line segment. In connection with the NSR Settlement Agreement, CSXT and NSR have established concrete plans and protocols for operations through the Ayer switching area, including the Ayer-Willows segment identified by the Commonwealth. (*See Revised Appl., NSR Settlement Agreement, Attach. B, Ayer Operations Protocols, Engineering Planning, and Capacity Roadmap APP-443.*) CSXT and NSR have ensured through this agreement that operations over this important line segment will remain fluid for all users.

Under the agreement, NSR and CSXT, along with the contract operator of PAS, will establish levels of service metrics and goals and a static yard plan for all movements on the line segment. Furthermore, CSXT has agreed to fund the construction of certain improvements in Ayer Yard that will improve operations for all users – including MBTA. The agreement allows CSXT to run one train pair per day over the Ayer-Willows segment, much as Springfield Terminal/PAR operates today. If CSXT wishes to run additional trains over this segment, the parties will evaluate whether any infrastructure is necessary to maintain service levels and to adhere to the static yard plan.

While the requested condition is unwarranted, CSXT is always willing to engage with stakeholders regarding demonstrated capacity issues. Should any such issues arise, CSXT will work with the Commonwealth to reach a resolution.

(3) Within three (3) months of the consummation of the Transactions, CSXT will, with the Commonwealth, engage in a joint inspection and evaluation with of MBTA-owned and

MassDOT-owned railroad facilities currently maintained by or for any rail carrier subsidiary of Pan Am Railways or by or for PAS to determine whether such facilities have been maintained to a condition that – (a) meets railroad industry standards of serviceability and safety; or (b) complies with the standards of upkeep set forth in the agreement or agreements governing PAR’s and/or PAS’s use and control of each such facility, whichever standard of maintenance and safety is higher in the case of each such facility.

- a. As part of this joint inspection process CSXT, PAS and the Commonwealth shall assemble a panel of three inspectors (the “Panel”), each member of which will be qualified in the inspection and evaluation of railroad facilities. The Panel, by a majority vote will– (i) ascertain or, of not already prescribed, establish the appropriate standards to which each facility should be evaluated; and (ii) determine whether each facility inspected meets the applicable standard. If the condition of a facility inspected does not meet the appropriate standard, the Panel shall prescribe the remedial steps necessary to bring the deficient facility to conformance with the appropriate standard.*
- b. CSXT and PAS shall, collectively, appoint one Panel member, the Commonwealth will appoint one Panel member, and the CSX/PAS and Commonwealth Panel members shall select and appoint the third, independent, Panel member.*
- c. CSXT or PAS (as applicable) will be responsible for the costs of all work necessary to bring any deficient facility to a condition that meets the applicable standard, including the cost of design. To the extent that CSXT and/or PAS use such facilities post-Transactions, CSXT and PAS will maintain such facilities to the governing standard.*

This condition will assure compliance with the general assurances woven into the application that CSX and the other parties to this transaction will adhere to, and honor their commitments to abide by the terms of the agreements that PAS and the various PAR subsidiary carriers currently have with others.

- (4) PAS will maintain the MassDOT-owned Knowledge Corridor to a condition that satisfies the Federal Railroad Administration’s safety standards for Class 4 railroad track, in adherence with existing agreements between MassDOT and PAS. In so doing, PAS will comply with the terms of the Operating Agreement between MassDOT, MBTA and PAS dated May 21, 2015, and more specifically, Exhibit B to that agreement – Service Outcome Agreement of the 2015 Operating Agreement.*

CSXT and B&E have committed to step into the shoes of Springfield Terminal regarding any agreements or commitments made to MassDOT and MBTA by Springfield Terminal or

PAS. In the Reply Verified Statement of Andy Daly, Mr. Daly attaches four such relevant agreements.

Regarding Condition No. 3, maintenance of Commonwealth-owned railroad facilities is governed by existing agreements between MassDOT/MBTA and Springfield Terminal or PAS. By requesting that the Board impose a condition requiring a complicated joint inspection process, the Commonwealth is attempting to alter the existing agreements. The Commonwealth has not justified overriding the existing agreements and has not met the Board's requirement that any override be shown to be necessary to allow the transaction to go forward. *See Conrail*, FD 33388, slip op. at 2 (STB served Nov. 19, 1998). The Merger and Related Transactions will have no impact on those agreements, and the Commonwealth has failed to provide any reason why the agreements should be altered. The Commonwealth has not even responded to CSXT's requests for a list of specific facilities for which the Commonwealth is requesting joint inspections. Thus, CSXT has not been able to fully evaluate this issue or the Commonwealth's request.

Regarding Condition No. 4, a 2015 Operating Agreement among MassDOT, MBTA and PAS governs maintenance of certain rail property, including the Knowledge Corridor, to specific standards. (*See Daly Reply V.S., Attach. 4.*) It is unclear in the first instance whether the Commonwealth's requested condition seeks to ratify the terms of that agreement, which would be unnecessary, or deviate from them, which would be improper. Once again, the Commonwealth has provided no reason why the Board should impose a condition to its approval of the Merger and Related Transactions that would alter existing agreements.

(5) CSXT and PAS must be required to commit to work with MassDOT in good faith, to explore, study, and allow additional expanded passenger service in Western Massachusetts, including, but not limited to, introduction of such passenger service identified in MassDOT's East West Rail Study on mutually acceptable terms over the former Boston & Albany main line, and the PAS main line west of Ayer.

CSXT has repeatedly expressed to the Commonwealth it will work cooperatively with the Commonwealth to consider the introduction and expansion of passenger service upon request, and CSXT repeated this commitment in the Revised Application. (*See Revised Appl., Ex. 13-C, Daly V.S. APP-376.*) And CSXT has committed to working with passenger rail authorities to reinstate pre-pandemic frequencies and schedules. (*Id.*)

Any expanded passenger service would require additional study and funding to construct any necessary infrastructure. CSXT commits to work with the Commonwealth in good faith on these issues.

(6) In keeping with condition #5 CSXT must be required to reach an accord with the National Railroad Passenger Corporation (“Amtrak”) with respect to certain Amtrak and Commonwealth-supported intercity passenger train initiatives (as Amtrak may discuss in its own responsive filing to the Board) that will benefit mobility within, and proximate to, Massachusetts, including, but not limited to – (a) the introduction of seasonal round-trip service (with certain multiple daily starts) between Albany, New York and Pittsfield, Massachusetts (known as the Berkshire Flyer, under terms to be provided by Amtrak); (b) multiple round-trip service between Springfield and Worcester, Massachusetts; (c) up to two daily round-trip service between Albany and Worcester, Massachusetts; and (d) the negotiation in good faith (under general terms and conditions regarding modelling and impacts analysis and mitigation set forth by Amtrak) of expansion of or modification to existing intercity service within the Commonwealth.

CSXT has discussed and is willing to continue discussions with Amtrak and the Commonwealth regarding Amtrak- and Commonwealth-supported intercity passenger train initiatives that will benefit mobility within, and proximate to, Massachusetts, including discussions on the specific matters identified above. CSXT has previously discussed these issues with Amtrak and the Commonwealth and is open to continuing to explore these options. However, the Merger and Related Transactions will have no effect on any of these intercity passenger rail initiatives, and there is no basis for the Board to impose as a condition to its approval of the Merger and Related Transactions that CSXT reach some undefined “accord” with Amtrak regarding these issues.

(7) CSXT will support the continued development of a Springfield Master Plan for capital improvement investment to enhance North-South, East-West and multidirectional passenger services in and around Springfield Union Station, including, but not limited to, passenger layover facility(ies), additional tracks and platform access, and expanded interlockings. Consistent with the goals and purpose of the Springfield Master Plan, CSXT will not remove, without MassDOT's written consent, the 950-foot-long "shoo fly track" installed as part of the Springfield Station project.

CSXT has asked the Commonwealth to provide more information regarding the Springfield Master Plan, and the Commonwealth has provided no details. CSXT will cooperate with MassDOT on future projects to further the overall goal of increasing capacity, enhancing safety, and promoting efficient railroad operations in Springfield, MA and elsewhere in the Commonwealth. The "shoo fly track" is the subject of an existing agreement between CSXT and MassDOT, and CSXT has the right under that agreement to remove the track at MassDOT's expense. As with most of the Commonwealth's requested conditions, the Merger and Related Transactions will have no impact on these issues, and there is no basis for the Board to impose these requirements and rewrite existing agreements as conditions to the Board's approval of the Merger and Related Transactions.

ii. Amtrak

The National Railroad Passenger Corporation ("Amtrak") has expressed concerns in multiple filings about the impacts of the Merger and Related Transactions on passenger rail. However, Amtrak's comments have largely focused on matters unrelated to the Merger and Related Transactions, including Amtrak's experiences with prior unrelated mergers and an unrelated pending litigation before the Board regarding Gulf Coast passenger service.

Amtrak filed a Notice of Intent to Participate on May 17, 2021, in which it asserted that the Merger Transaction differs from any previous railroad merger the Board has considered for multiple reasons. (Amtrak Notice of Intent 1, STB filed May 17, 2021.) First, Amtrak stated that the Merger Transaction is the first merger in which passenger trains, not freight trains, account

for the majority of the train operations over many of the impacted rail lines. (*Id.* at 1.) Second, Amtrak stated that the level of public investment on the affected rail lines is unprecedented. (*Id.* at 3.) Third, Amtrak stated that the impact of the Merger Transaction on the Biden-Harris Administration's plans regarding intercity passenger rail service is concerning. (*Id.* at 3-4.) Amtrak specifically asserted that the Merger Transaction threatens the Biden-Harris Administration's vision, and Amtrak's plans to implement that vision, and referenced the unrelated Gulf Coast dispute. (*Id.* at 4-5.) CSXT filed a letter on May 25, 2021, objecting to Amtrak's use of its Notice to advance in this proceeding disputed claims about the proposed Gulf Coast passenger service.

On August 27, 2021, Amtrak filed comments opposing the Merger Transaction. Amtrak argued that the importance of passenger rail on the affected lines, and the level of public investment in the lines, require close scrutiny of the effect of the Merger Transaction on the public interest. (*See* Amtrak Comments 5-8, STB filed Aug. 27, 2021.) Amtrak further argued that prior mergers approved without conditions have had significant adverse impacts on passenger rail, citing several prior railroad consolidations. (*See id.* at 9-12.) And Amtrak claimed that CSXT has consistently opposed the expansion of passenger rail service. (*Id.* at 15.) Amtrak again cited the unrelated Gulf Coast dispute. (*Id.* at 15-19.)

CSXT disagrees with Amtrak's characterization of CSXT's prior work with Amtrak and other passenger rail stakeholders, but because such issues are entirely unrelated to the Merger and Related Transactions, CSXT focuses in these Response Comments on the specific conditions requested by Amtrak. Amtrak asserted that the Merger Transaction is not in the public interest unless several conditions are imposed to ensure that passenger rail interests are not jeopardized.

(1) CSXT should be ordered to adhere to and fulfill all of the representations it has made in this proceeding regarding the effect of the Proposed Transaction on present and future

Amtrak services. In particular, that the trackage rights granted to Norfolk Southern to operate a daily round trip double-stack train over CSXT between the Albany area and Ayer, Massachusetts should be modified to reflect CSXT's commitment that this train will be scheduled to operate (i) over the portion of CSXT's route between Post Road Crossing (near Albany) and Worcester outside of the operating windows during which Amtrak's Lake Shore Limited, typically operates over this line segment (currently 2pm to 8pm), and (ii) over the diamond crossing in Springfield where it crosses the route of Amtrak's Valley Flyer and Vermonter trains at times that will not conflict with those trains' typical operations.

As discussed elsewhere in this Response, CSXT does not oppose the Board imposing as a condition to its approval of the Merger and Related Transactions the requirement that CSXT adhere to the representations that it has made in the course of this proceeding.

Andy Daly, CSXT's Senior Director of Passenger Operations, discussed the impacts of the traffic shifts on the CSXT "Southern Route" on Amtrak's existing services. (*See Revised Appl., Ex. 13-C, Daly V.S. APP-377 to APP-380, APP-383 to APP-384.*) There will be an increase of one NSR intermodal/automotive train pair per day on the portion of the CSXT line between CP 187, east of Albany, NY, and Worcester, MA. (*Id.* at APP-378.) Mr. Daly explained that the traffic shifts on the Southern Route will not negatively affect Amtrak's Lake Shore Limited service that shares this route. (*Id.*) Mr. Daly stated that CSXT will ensure that any new service is operated in a manner so as to not conflict with the actual operations of the Amtrak train, and CSXT believes that it will be possible to handle the proposed NSR intermodal train pair with no conflict with Amtrak trains. (*Id.* at APP-379 to APP-380.)

Amtrak also operates passenger service over the Knowledge Corridor, including the Hartford Line, the Valley Flyer Service, and the Vermonter Service. (*Id.* at APP-383.) The north-south Knowledge Corridor intersects the east-west Southern Route at Springfield, MA. While the additional NSR intermodal train pair running east-west over the Southern Route has not been scheduled, Mr. Daly explained that CSXT expects that the additional trains will have minimal effect on any passenger service on the north-south Knowledge Corridor. (*Id.* at 17.)

Once NSR is ready to implement the proposed NSR intermodal/automotive trains, CSXT and NSR will engage in more formal joint planning and joint preparation for this service, and CSXT will ensure that the passenger service requirements will be protected. (*Id.* at APP-380.)

(2) CSXT should be ordered to fully cooperate in good faith with Amtrak and third party public agencies for addition, expansion or modification of existing intercity passenger rail services, operation of seasonal service or “extra sections” of existing regularly scheduled Amtrak trains, and/or development of new intercity passenger rail service, including but not limited to service over on the Pan Am routes and CSXT’s Albany-Worcester route; with respect to any such request by Amtrak, all inputs and assumptions will be shared with the parties participating any analysis or modelling (if such is required), and with the Board in any subsequent proceeding, subject to appropriate confidentiality undertakings; and with respect to the Pan Am routes and CSXT’s Albany-Worcester route, the level and composition of freight traffic used in any analysis or modelling (if such is required), will be no greater than the level forecast by CSXT in their Application.

CSXT is always willing to cooperate in good faith with passenger rail stakeholders to discuss addition, expansion, or modification of passenger rail service on the CSXT network. For example, pursuant to its settlement agreement with NNEPRA in this proceeding, CSXT has already committed to “participate in good faith discussions with NNEPRA and Amtrak regarding improvements to, or expansion of, the Downeaster service.” (CSX/NNEPRA Settlement Agreement 2, STB filed Aug. 5, 2021).

In fact, CSXT has agreed to work with Amtrak on the design and implementation of PTC on Amtrak’s Downeaster route between Boston North Station and Brunswick, ME, which could ultimately allow for an expansion of Downeaster service frequencies. CSXT understands that Amtrak has received funding for the installation of an I-ETMS system on the PAR System portion of the Downeaster route. Amtrak has requested CSXT’s assistance in the planning and design of this project, which CSXT has agreed to provide. In the event the Merger and Related Transactions are approved, CSXT will work with Amtrak and NNEPRA to facilitate the installation and any required testing of the I-ETMS PTC system on the Downeaster corridor.

Once the I-ETMS system is installed and fully operational, CSXT has committed to “confer and cooperate with NNEPRA and Amtrak on increasing Downeaster service frequencies beyond those currently agreed on,” to cooperate in any NNEPRA and Amtrak effort to evaluate such increased frequencies, and to permit such increased frequencies in the event the evaluation finds that they will not unreasonably interfere with CSXT’s freight operations. (*Id.* at 5.)

Notwithstanding these commitments, Applicants do not believe that it is appropriate for the Board to impose an ill-defined requirement to “cooperate” regarding these issues as a condition to the Board’s approval of the Merger and Related Transactions, particularly because the transactions will have no impact on existing or future passenger services on any affected rail lines.

(3) CSXT should be ordered to cooperate with Amtrak and third-party public agencies to identify improvements if any that would be required to make accelerated speeds on the Pan Am routes and CSXT’s Albany-Worcester route safe and practicable, and upon agreement or an order to implement such accelerated speeds, work in good faith to make such improvements as promptly as practicable.

CSXT regularly works with passenger rail stakeholders on these types of issues. With respect to the Downeaster route, CSXT has committed to “confer and cooperate with NNEPRA and Amtrak on increasing, where possible, maximum allowable speeds on Pan Am’s Downeaster corridor as permitted by class of track, including maximum allowable speeds for Downeaster trains.” (CSX/NNEPRA Settlement Agreement 4.) However, Applicants do not believe that it is appropriate for the Board to impose an ill-defined requirement to “cooperate” regarding these issues as a condition to the Board’s approval of the Merger and Related Transactions, particularly because the transactions will have no impact on existing or future passenger services on any affected rail lines.

(4) CSXT should be ordered to not make changes in operations on the Pan Am routes and/or CSXT’s Albany-Worcester route, including but not limited to changes in freight traffic volumes, scheduling, infrastructure, and dispatching, that would reasonably be expected

to result in the Customer On-Time Performance (Customer OTP) of Amtrak trains operating on the Pan Am routes and CSXT's Albany-Worcester route falling below the minimum standard as defined in the FRA Final Rule published November 16, 2019, and that in the event CSXT changes inadvertently result in a Amtrak train or Amtrak route falling below such minimum standard, that CSXT will be required to take such actions as may be necessary to restore the performance of such Amtrak train or Amtrak route performance to at least the minimum standard.

This requested condition is wholly inappropriate. As Amtrak knows well, the Board has jurisdiction to initiate an investigation under 49 U.S.C. § 24308(f) if the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive quarters “to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators.” 49 U.S.C. § 24308(f)(1). “If the Board determines that delays or failures to achieve minimum standards . . . are attributable to a rail carrier’s failure to provide preference to Amtrak over freight transportation . . . the Board may award damages against the host rail carrier, including prescribing such other relief to Amtrak as it determines to be reasonable and appropriate” *Id.* § 24308(f)(2). There is no basis or need for the Board to impose as a condition to the approval of the Merger and Related Transactions a separate process and standard independent from the § 24308 regime.

Regarding the overall impact of CSXT’s Operating Plan on Amtrak’s service, as detailed in the Daly verified statement, CSXT will comply with its statutory and contractual responsibilities regarding Amtrak service. (Daly V.S. APP-376.) As stated in CSXT’s Operating Plan (Exhibit 13 to the Revised Application), impact analyses submitted with the Revised Application indicate that the Merger Transactions will not produce: (1) significant shifts in traffic flows or diversion of traffic from other rail carriers or trucks in the near term, or (2) major growth in traffic over the next three years. (Revised Appl., Ex. 13, Operating Plan APP-322.)

Based on the impact statements and a review of current operations, CSXT determined that existing train service on the CSXT network, the PAR system, and the PAS network has sufficient capacity to accommodate the minimal growth projected to result from the Merger and Related Transactions. (*Id.*)

Thus, there are no current plans to change existing CSXT network, PAR System, or PAS Network routes, patterns, or types of service to accommodate the limited traffic growth forecast, with two limited exceptions of changes in traffic flow stemming from the NSR Settlement Agreement. (*Id.* at APP-332, APP-338.) As discussed in the verified statement submitted by Andy Daly (Exhibit 13-C to the Revised Application) there will be no negative impact on passenger trains operated on the lines that are subject to these proceedings. (Daly V.S. APP-368.)

(5) CSXT should be ordered to perform all non-emergency maintenance of way activities on the Pan Am routes and CSXT's Albany-Worcester route, during non-peak passenger travel periods.

While CSXT always strives to perform all non-emergency maintenance of way activities on its routes during non-peak periods. With respect to the PAR System portion of the Downeaster route, CSXT has committed to “seek to minimize any disruption to the Downeaster service when conducting [non-emergency] maintenance activities” over the line. (CSX/NNEPRA Settlement Agreement 2.) Further, CSXT has committed to confer annually with NNEPRA to discuss CSX’s proposed schedule for the performance of maintenance activities on the Downeaster route for the upcoming calendar year, and to “take the needs of the Downeaster service into consideration when finalizing that schedule.” (*Id.*) However, it would be inappropriate for the Board to impose this requirement as a condition to its approval of the Merger and Related Transactions because the transactions will have no impact on this issue.

(6) CSXT should be ordered to provide for the operation of up to four weekend trips (two on Friday and two on Sunday), on a seasonal basis (summer) only, between Albany, NY (Post Road Crossing) and Pittsfield, MA (the Berkshire Flyer service), commencing on a

date ninety (90) days following written notice from Amtrak, at maximum authorized passenger train speeds, with no required capital contribution from Amtrak for capacity related improvements, and permitting such Amtrak trains to change ends in Pittsfield on Track 1.

Because the proposed Berkshire Flyer service is entirely unrelated to the Merger and Related Transactions, there is no basis for the Board to impose this requested condition on its approval of the transactions. While CSXT has discussed the possible introduction of the Berkshire Flyer service with Amtrak, Amtrak has not raised this issue with CSXT since the beginning of the COVID-19 pandemic. CSXT is always willing to work with Amtrak and passenger rail stakeholders to explore this and any other potential passenger rail services, but Amtrak has made no subsequent attempts to agree with CSXT on this matter.

To fully consider this proposal, CSXT must study the proposed service to better understand potential schedule impacts and the necessity of any capital work to accommodate the service without negatively affecting current and future freight traffic. CSXT cannot make a commitment to this service without understanding both the extent of and the allocation of cost responsibility for any required capital work.

(7) The Board shall retain jurisdiction to oversee compliance with these conditions.

CSXT agrees that the Board will retain jurisdiction to oversee compliance with any conditions imposed by the Board on its approval of the Merger and Related Transactions.

iii. Merrimack Valley Legislative Delegation

The Merrimack Valley Legislative Delegation (the “Delegation”) filed a comment on March 15, 2021. The Delegation requested the Board’s commitment to the completion of two infrastructure improvements to the MBTA-operated Haverhill Commuter Rail Line as part of the Merger Transaction: 1) construction of a double track railway at Ballardvale Station in Andover, MA; and 2) level boarding at Haverhill line stations. (Delegation Comments 1, STB filed Mar.

15., 2021.) In 2020, the Massachusetts Legislature voted to approve a Transportation Bond Bill that included these two infrastructure improvements. (*Id.*)

According to the Delegation, MBTA started a project in 2010 to add eight miles of double-track on the line but only two miles of track have been completed and put in service, resulting in “slower, less reliable train service.” (*Id.*) Additionally, the Delegation asserted that “[t]hese much-needed improvements will help support transit-oriented development and increase rail ridership as residents begin to return to their commutes.” (*Id.* at 2.)

While it is not clear how the Board would make a “commitment” to completing these infrastructure projects, CSXT will work with the Delegation on these infrastructure improvements to the MBTA-operated Haverhill Commuter Rail Line. CSXT has committed to working cooperatively with the Commonwealth on Commonwealth-funded projects to develop and implement operating system improvements and construct infrastructure. And CSXT will honor any existing agreements or commitments made to MassDOT and MBTA by PAS or Springfield Terminal. CSXT would support this particular project because it is the only single-track rail line segment that hosts MBTA commuter trains, Amtrak Downeaster trains, and PAR/Springfield Terminal freight trains.

iv. Rep. Richard E. Neal

U.S. Representative Richard Neal filed a comment on July 12, 2021. Rep. Neal expressed his opposition to the Merger Transaction, asserting that, “[i]n Massachusetts, the proposed merger would greatly affect transit activity in local communities, including significant impacts on the T-System in the Greater Boston area, as well as the MassDOT section of the Knowledge Corridor between Springfield and East Northfield.” (Neal Comments 1, STB filed July 12, 2021.) Rep. Neal is specifically concerned that a new operator overseeing the Knowledge

Corridor could lead to compromised services and a decrease in spending to maintain and improve the line. (*Id.*)

Rep. Neal also asserted that the environmental impact of the Merger Transaction must be taken into consideration and referenced increased operations over the Wachusett Reservoir. Neal 1. Furthermore, Rep. Neal claimed that he has previously expressed concerns to CSXT regarding rail operations in his district and throughout the region but CSXT has been “unresponsive” to his requests. (*Id.* at 2.)

CSXT respectfully disagrees with Rep. Neal’s characterization of the impact of the Merger and Related Transactions on the interests of his constituents and CSXT’s outreach to local stakeholders. The Merger and Related Transactions will have only positive impacts in New England, with an increase in investment in the railroad infrastructure, improved reliability for both freight and passenger rail service, and solid logistics support for a growing economy. The transactions will provide a much-needed upgrade to the rail network serving New England. Rep. Neal’s constituents will be the direct beneficiaries of this upgrade, as will many others in New England that need reliable rail transportation, including the more than 70 rail customers, over 20 of which are Massachusetts companies,⁹ who have submitted support letters.

The service, passenger-related, and environmental concerns raised by Rep. Neal are fully addressed by the extensive verified statements, data, and affirmative commitments made by

⁹ Massachusetts rail customers or economic development groups that have submitted letters in support of the Proposed Transaction include: Arrowhead Environmental Partners (Ayer, MA); Benevento (Wilmington, MA); Boston Concrete Corp. (Lowell, MA); Boston Sand & Gravel (Boston, MA); Broadway Street Holdings, Inc. (Lowell, MA); Broco Oil (Haverhill, MA); Catania Oils (Ayer, MA); Charter Development Company (Boston, MA); Ciment Quebec (Everett, MA); Cooperative Reserve Supply, Inc. (North Billerica, MA); F.L. Larson Trucking (Billerica, MA); F&M Tool & Plastics (Leominster, MA); GFI Partners (Boston, MA); Granite State Concrete (Lowell, MA); Greater Boston Transload (Billerica, MA); One SouthCoast Chamber (New Bedford, MA); Packaging Corporation of America (Northampton, MA); Rail Enterprise Group (Newton, MA); Sappi (Boston, MA); S&R Corp. (Lowell, MA); Tighe Logistics (Woburn, MA); Waste Management (Billerica, MA); Western Mass Economic Development Council; Worcester Regional Chamber of Commerce; wTe Recycling (Greenfield, MA).

Applicants in the Revised Application and Applicants' Reply to Environmental Comments, along with the Petition for Exemption and related filings made by B&E in FD 36472 (Sub-No. 5) regarding the future operations of PAS. Based on the substantial record presented, shippers, passenger interests and local communities can look forward to improved reliability, efficiency, investment, and more environmentally sensitive rail operations.

Rep. Neal's statement also suggests that CSXT has been uncooperative with local stakeholders regarding their concerns about the Merger Transaction. CSXT has engaged in extensive discussions with local and regional officials and stakeholders since signing a Merger Agreement to acquire Systems on November 30, 2020 to ensure that local interests and concerns are addressed and resolved. CSXT has worked hard to ensure that there is a broad consensus in New England that the Merger and Related Transactions will modernize the New England rail network and bring the benefits of Class I rail service to the region.

CSXT understands that Rep. Neal is particularly interested in promoting passenger rail service in Western Massachusetts. CSXT has a long history of working collaboratively with the Commonwealth, including in Rep. Neal's district, to support passenger rail service. Most recently, CSXT has (1) helped to advance infrastructure improvements to the Springfield, MA passenger rail station; (2) sold to MassDOT a line between Framingham, MA and Mansfield, MA for potential passenger service; (3) facilitated the introduction of a pilot passenger service from Foxborough, MA to Boston, MA; (4) supported the implementation of new Amtrak service to Greenfield, MA; (5) accommodated a new route for Amtrak's Vermonter service travelling over a CSXT-controlled diamond in Springfield, MA; and (6) accommodated MBTA trains that needed re-routing for several weeks on CSXT lines to allow MBTA to perform work for the MBTA Green Line extension.

CSXT has also had numerous conference calls and meetings with other local and regional officials relating to passenger rail service. CSXT has been engaged in productive and ongoing discussions with the Commonwealth and other Massachusetts-based stakeholders since late last year, and has committed to cooperatively work with the Commonwealth to consider the introduction and expansion of passenger service upon request.

Rail freight shippers, passengers, commuters, and local communities will benefit from the Merger and Related Transactions. CSXT has engaged in a discussion with Rep. Neal regarding his concerns and is willing to further engage with Rep. Neal and other Massachusetts-based stakeholders in an effort to gain their support for the transactions.

v. Rep. Lindsay Sabadosa

Massachusetts State Representative Lindsay Sabadosa filed a comment on March 22, 2021, expressing various concerns regarding the Merger Transaction, including concerns related to passenger rail service. First, Rep. Sabadosa asserted that this acquisition should be classified as “significant.” (Sabadosa Comments 1, STB filed Mar. 22, 2021.) Procedural issues related to classification of the transaction have been resolved and are not addressed here.

Rep. Sabadosa’s second area of concern regards passenger rail service. Rep. Sabadosa’s district is served by the Valley Flyer, which runs between the Patriot Corridor and the Connecticut River Main Line. (*Id.* at 2.) Rep. Sabadosa takes issue with the fact that the Application states that CSXT will “cooperatively work” with MassDOT and MBTA to *consider* the introduction and expansion of passenger service, but does not state that CSX will “cooperatively work” with MassDOT and MBTA *to introduce or expand* passenger rail service. (*Id.*) According to Rep. Sabadosa, this is an important distinction, particularly because of “past difficulties in negotiating with CSX to introduce passenger service on the Berkshire Flyer route as well as East-West corridor between Worcester, Springfield and Pittsfield.” (*Id.*) Additionally,

Rep. Sabadosa stated that Positive Train Control (“PTC”) is an area she would like to see progress and asserted that this proceeding is “an opportunity” for PTC to be installed on the Connecticut River Main Line. (*Id.* at 2-3.)

Rep. Sabadosa is also concerned about labor issues and referenced the Allied Rail Unions’ comments regarding the reduction of labor forces. The Applicants’ response to the labor issues is provided in Section II.C below.

CSXT respectfully disagrees with Rep. Sabadosa’s concerns regarding CSXT’s commitments. CSXT has made it very clear that it is committed to cooperatively work with the Commonwealth to consider the introduction and expansion of passenger service upon request, and CSXT has engaged in numerous discussions with the Commonwealth. CSXT has specifically agreed to prioritize railroad passenger service in the western part of the Commonwealth, including, but not limited to, CSXT's former Boston & Albany main line, and the PAS main line between Ayer and the New York State border.

With respect to the installation of PTC on the Connecticut River Main Line, CSXT does not own or control that line, and expects that the Merger and Related Transactions will have no impact on any such installation. The Connecticut River Main Line is on the PAS network, and PAS is a tenant on this line and will remain so following consummation of the transactions. There are existing agreements among PAS, MassDOT, and Amtrak regarding PTC. B&E, as the operator of PAS, will handle any tenant obligations under such existing agreements.

vi. Rep. Chris Pappas & Rep. Ann McLane Kuster

Congresspersons Chris Pappas and Ann McLane Kuster submitted a comment on August 27, 2021, asking the Board to consider the environmental impacts of the proposed merger on a potential commuter rail project and other possible passenger expansion projects in New Hampshire. (Pappas and Kuster Comments 1, STB filed Aug. 27, 2021.) Representatives Pappas

and Kuster stated that “New Hampshire is exploring commuter rail options that will run along lines currently owned by Pan Am.” (*Id.* at 1.) One proposed project is the Capitol Corridor passenger rail project, which would extend commuter rail from Massachusetts into New Hampshire. (*Id.*) Pappas and Kuster asserted that the Board must consider the significant environmental and project development work already completed to advance this project. (*Id.* at 2.)

Additionally, Representatives Pappas and Kuster stated that remaining questions about potential Pan Am agreements with commuter rail partners to provide access to this line and questions about the impacts of the proposed merger could be adequately mitigated by requiring as a condition that CSXT engage in good faith negotiations regarding the terms of access over the right-of-way currently owned by Pan Am. (*Id.*)

CSXT is willing to engage in good faith negotiations related to access over the right-of-way that will be controlled by CSXT.¹⁰ CSXT is also willing to consider the introduction and expansion of passenger service upon request, as discussed elsewhere in Applicants’ Responses. (Daly V.S. APP-376.)

vii. Rep. William M. Straus

Massachusetts State Representative William M. Straus filed a comment on August 27, 2021, addressing certain issues which he claims pose risks to Massachusetts businesses and residents. (Straus Comments 1, STB filed August 21, 2021.)

Representative Straus stated that, in order “[t]o assist CSX in its freight movements, Massachusetts has made major investments in the Worcester Main Line that enable double-

¹⁰ CSXT cannot unilaterally commit to future negotiations involving PAS. CSXT will only own a 50% interest in PAS and must work cooperatively with NSR, the other 50% owner of PAS.

stacking through to Westborough,” and Massachusetts has “devoted significant resources intended to increase passenger service between Boston and Worcester.” (*Id.* at 2.) Representative Straus requests that the Board require CSXT to engage in good faith negotiations with MassDOT with respect to Massachusetts’ interest in augmenting existing passenger service west of Worcester. (*Id.*)

CSXT will continue to engage in good faith negotiations with MassDOT regarding augmenting existing passenger service west of Worcester. CSXT has committed to cooperatively work with the Commonwealth to consider the introduction and expansion of passenger service upon request. (Daly V.S. APP-376.) And CSXT has committed to continuing to route traffic from the existing CSXT network onto the existing PAR/Springfield Terminal network through Barbers Station and Ayer, rather than using the Grand Junction Branch. (*Id.*) If CSXT sees the need in the future to consistently operate using the Grand Junction Branch between Worcester and Framingham, which CSXT does not currently foresee, CSXT is committed to working cooperatively with MBTA to implement capital improvements to accommodate any changes in CSXT freight service.

With respect to the prospect of CSX’s involvement in Massachusetts’ two major interstate freight lines, Representative Straus emphasized “the importance of detailed findings demonstrating that other Massachusetts shippers and those dependent on freight movements are not priced out due to a lack of competition.” (Straus Comments 2.) Representative Straus also asserted that “[t]he transaction should not separate CSX’s participation in [PAS] and CSX’s purchase of [PAR],” and the Board should consider the transaction and its impact as one transaction. (*Id.*) As discussed in depth above in Section II.A, CSX has made commitments with regard to its participation in PAS. Moreover, in filing the Application, CSX has always treated its

acquisition of control of Systems and acquisition of a 50% interest in PAS as a single transaction.

Furthermore, Representative Straus asserted that there are unresolved issues related to CSXT's use of and ownership interest in the Worcester Main Line at Beacon Park Yard. Representative Straus asserted that such issues would need to be settled to the satisfaction of MassDOT and MBTA. (Straus Comments 2.) These are pre-existing conditions unrelated to the Merger Transaction and the Related Transactions. CSXT is unaware that MassDOT has raised any such issues with CSXT. But CSXT will discuss this matter further with MassDOT.

C. LABOR ORGANIZATIONS

Comments on the Revised Application and Petition were filed by most of the labor organizations representing employees of Springfield Terminal.¹¹ None oppose the Transaction. All support the imposition of the employee protective conditions requested by the Applicants and Petitioner – the *New York Dock* conditions – on the Application and B&E's Amended Petition for Exemption, and the *Norfolk and Western* conditions requested by Norfolk Southern Railway Company ("NSR") on its related trackage rights. However, several unions requested the imposition of additional conditions or requirements that are contrary to the Board's standard court approved employee protective conditions and contrary to Board precedent. CSXT opposes these requests, which should be denied.

The Brotherhood of Locomotive Engineers and Trainmen ("BLET") and BLET GCA 120 request that the "Board order such protection [*New York Dock*] as a condition for approval of the transaction, as a whole, and *further order that the transaction not be permitted to proceed until*

¹¹ Comments were filed by the Allied Rail Unions, American Train Dispatchers Association, Brotherhood of Locomotive Engineers and Trainmen, International Brotherhood of Electrical Workers, International Federation of Professional and Technical Engineers, and International Association of Sheet Metal, Air, Rail and Transportation Workers-Transportation Division.

all necessary implementing agreements have been concluded.” (BLET Comments 2, Aug. 26, 2021) (emphasis added.) The BLET’s request that “the transaction not be permitted to proceed until all necessary implementing agreements have been concluded” is unnecessary, contrary to the requirements of the *New York Dock* conditions, and can lead to confusion on application of the conditions.

Article I, Section 4(b) of the *New York Dock* conditions already specifies that preconsummation implementing agreements are required before a carrier can make a “change in operations, services, facilities, or equipment” as a result of a “transaction” that may result in an adverse impact on employees.¹² *New York Dock* does not require implementing agreements for every action that a carrier may take pursuant to Board authorization under 49 U.S.C. § 11323 or which meets the definition of “transaction” in the *New York Dock* conditions. For example, the “Merger Transaction” that is the subject of the Revised Application includes the control by CSXT of the PAR Railroads. *New York Dock* implementing agreements are not required before CSXT can exercise control of the PAR Railroads, because exercising control, without more, does not impact employees covered by *New York Dock*. Similarly, implementing agreements are not required before CSXT can exercise joint control of PAS.

The *New York Dock* conditions do not require that a control transaction be implemented immediately or all at once.¹³ Board precedent recognizes that approved transactions can be implemented in a series of transactions over time.¹⁴ After CSXT gains control of the PAR

¹² See *N.Y. Dock Ry.—Control—Brooklyn E. Dist. Terminal*, 360 I.C.C. 60, 84-85 (1979).

¹³ See, e.g., *CSX Corp.—Control—Chessie System, Inc.*, 10 I.C.C.2d 831, 842-43 (1995) (stating carriers are not required to implement transactions soon after come under common control), *aff’d sub nom. United Transp. Union v. Surface Transp. Bd.*, 114 F.3d 1242 (D.C. Cir. 1997).

¹⁴ *CSX Corp.—Control—Chessie System, Inc.*, 3 S.T.B. 701, 719 (concluding “transaction” includes principal and ancillary transactions).

Railroads and joint control of PAS, CSXT and B&E will take a series of actions to effectuate the approvals each is seeking. Some will require preconsummation implementing agreements, some will not.

Should a dispute arise whether a particular action requires implementing agreements, Board precedent has long required that such disputes must first be submitted to the dispute resolution procedures in Article I, Section 11 of the *New York Dock* conditions. *See, e.g.* NS/D&H, FD 35873, slip op. at 4 (STB served Sept. 18, 2015.) (“Although there is a dispute that turns on whether implementing agreements are required under Article I, Section 4 of *New York Dock* regarding the anticipated changes in dispatching responsibilities, it would not be appropriate for the Board to resolve it at this time. Rather, this matter must be resolved in the first instance by arbitration.”) (citations omitted); *Kan. City S. Indus.—Control—Gateway W. Ry. Co.*, FD 33311, slip op. at 3-4 (STB served Dec. 4, 1997) (dispute whether transfer of work between carriers required New York Dock implementing agreement had to first be submitted to dispute resolution procedures in Section 11).

BLET also concurs that the conditions in *Norfolk & W. Ry.—Trackage Rights—Burlington N., Inc.*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry.—Lease & Operate—Cal. W. R.R.*, 360 I.C.C. 653 (1980) (“*Norfolk & Western*”) are appropriate for the trackage rights to be granted to NSR in Sub Docket Nos. 1, 3 and 4, but again requests that the Board “further order that the transaction not be permitted to proceed until all necessary implementing agreements have been concluded.” (BLET Comments at 2.)

It is not clear what “transaction” BLET is referring to. If by “transaction” BLET means the future merger of Springfield Terminal or other PAR Railroads into CSXT, or the replacement of Springfield Terminal by B&E as the contract operator of PAS, there is no reason the

consummation of the NSR trackage rights must await those transactions. Moreover, if BLET means the trackage rights transactions themselves, unlike the *New York Dock* conditions, the *Norfolk and Western* conditions do not require preconsummation implementing agreements. Section 4 of the *Norfolk and Western* conditions require that 20 days advance notice be given to the organizations representing involved employees. If no implementing agreement is reached after 20 days, the carrier can proceed with the trackage rights transaction. In fashioning the *Norfolk and Western* conditions, the Interstate Commerce Commission (“ICC”) expressly refused the request of rail labor to require preconsummation implementing agreements in trackage rights cases, explaining:

Since the Commission did not impose sections 4 and 5 of the Washington Agreement in trackage rights cases in the past, our failure to impose those sections in this case cannot now (under the 4R Act) be considered inappropriate. The resulting arrangement is no less protective of the interests of employees than the arrangement imposed under the old section 5(2)(f) in trackage rights cases.

. . . . No consolidation of forces is required in ordinary trackage rights cases. There is no need for sections 4 and 5 of the Washington Agreement to be imposed in them.

Norfolk & Western, 354 I.C.C. at 607-08.¹⁵ BLET offers no reason to modify the requirements of the *Norfolk and Western* conditions in this case, likely because there is none.

Because the Board’s conditions and precedents already address when implementing agreements are required, BLET’s request that the transaction as a whole cannot be implemented until all necessary implementing agreements have been reached is inconsistent with existing law and should be denied.

Several unions requested that the Board condition its approvals on carrier recognition of the unions that represent Springfield Terminal employees. These requests ignore and are contrary

¹⁵ Sections 4 and 5 of the Washington Job Protection Agreement are the basis for the preconsummation implementing agreement requirement in Section 4 of the *New York Dock* conditions. *See New York Dock*, 360 I.C.C. at 69-70.

to decades of precedent that the Board does not address union representation matters, which are within the exclusive jurisdiction of the National Mediation Board under the Railway Labor Act.

The Allied Rail Unions (“ARU”) request that “P&S/B&E recognition of the unions that currently represent Pan Am/Springfield Terminal employees should therefore be made an express condition of approval of the Petition.” (ARU Comments 2, STB filed Aug. 26, 2021.) The International Brotherhood of Electrical Workers (“IBEW”) similarly requests that the “Board should condition approval of P&S/B&E’s petition on P&S/B&E’s recognition of the unions that currently represent Pan Am/Springfield Terminal employees.” (IBEW Comments 2, STB filed Aug. 27, 2021.) The International Federation of Professional and Technical Engineers (“IFPTE”) requests that “[i]n the event that the STB approves the Application, Merger Transaction, or Related Transactions, IFPTE Local 202 urges the Board to condition such approval upon both recognition of existing unions representing affected employees and the standard labor protective conditions imposed in [*New York Dock*].” (IFPTE Comments 2, STB filed Aug. 30, 2021.)

The Board, and before it the ICC, have long held that it will not address representation issues that may arise as a result of transactions taken pursuant to its approvals. The Board and ICC recognized that such issues are within the exclusive jurisdiction of the National Mediation Board pursuant to the Railway Labor Act, as explained, for example, in *Fox Valley & W. Ltd.—Exemption Acquisition & Operation—Certain Lines of Green Bay & W. R.R. Co., et al.*, 1994 WL 705485 at *4 (ICC served Dec. 19, 1994), where the agency refused similar union requests to order continuation of union representation:

We reaffirm our conclusion in *Fox Valley II* that the NMB has exclusive jurisdiction over matters of representation. We have no intention of interfering with the employee’s right to organize and bargain collectively; that right is guaranteed by the Railway Labor Act. But it is for the NMB to determine whether employees

have chosen to be represented and who shall represent them. As we explained in Fox Valley II: [I]t is the exclusive responsibility of the National Mediation Board to determine representational issues under the RLA and nothing we say here should be taken as inconsistent with that Board's full exercise of its jurisdiction. (Citations omitted.)

See also, e.g., Can. Nat'l Ry. Co.—Control—Ill. Cent. Corp., 33556 (Sub-No. 5), slip op. 16 & n.64 (“We agree that questions of labor representation are reserved to the NMB, and are not within the jurisdiction of the arbitrator or the Board to decide.”) (citing *CSX Corp.—Control—Chessie Sys., Inc.*, 10 I.C.C.2d 831, 850 (1995) (“the effect of [agency-approved] transactions on selection of union membership is under the jurisdiction of the [NMB] acting under the Railway Labor Act.”); *The Atchison, Topeka & Santa Fe Ry. Co.—Lease Exemptions—Kan. City Terminal Ry. Co.*, 1994 WL 250592 at * 3 (“The question of UTU’s continuing to represent former KCT engineers who accept jobs with GWR should be brought to the National Mediation Board. Under the RLA, the NMB has exclusive jurisdiction to resolve disputes among employees over who their representative should be”) (citations omitted).

In sum, the Board should impose the standard protective conditions and reject the requests by some unions for modifications to their requirements.

D. ENVIRONMENTAL

i. Massachusetts Water Resources Authority

MWRA submitted comments in this proceeding on August 27, 2021. MWRA’s Waterworks System draws its drinking water from the Quabbin Reservoir, which is transferred to the Wachusett Reservoir before treatment. (MWRA Comments 2, STB filed Aug. 27, 2021). Approximately 7.6 miles of a PAR System rail line owned by Boston & Maine and operated by Springfield Terminal (the “Reservoir Segment”) is within the Wachusett Watershed. (*Id.*) While MWRA does not support or oppose the proposed transactions at this time, MWRA expresses

concern that a derailment in the Reservoir Segment could affect the water supply of those in eastern Massachusetts. (*Id.* at 2-3.)¹⁶

MWRA reported that it, MassDOT and MBTA remain actively engaged in discussions with Applicants to reach a written accord whereby MWRA hopes to be able to lend its support for the Merger and Related Transactions. (*See id.* at 3.) To address its concerns, MWRA asks that the Board implement the following as conditions to approval of the transactions (*Id.*): 1) that within a year of STB approval of the transactions, CSXT upgrade Worcester Main Line tracks and track structures within the Reservoir Segment to no less than FRA Class 3 (*Id.* at 4.); 2) that once the track has been upgraded, that it be maintained at FRA Class 3 and that the Commonwealth have the right to periodically inspect the track to ensure maintenance (*Id.* at 5-6.); 3) that trains operating over the Reservoir Segment be subject to a 25 miles per hour speed limit (*Id.* at 6); 4) that a prohibition against idling be implemented in the Reservoir Segment (*Id.* at 7.); 5) that CSXT provide the Commonwealth a monthly report of all hazardous materials transported across the Reservoir Segment during the prior month (*Id.*); 6) that within one hour of any derailment, spill, or release within the Reservoir Segment, CSXT notify parties identified on an emergency notification list (*Id.* at 8.); and finally, 7) that CSXT be solely responsible for all expenses arising out of these requirements and indemnify members of the Commonwealth from any liabilities arising out of a number of specified acts (*Id.* at 9.).

MWRA's comment includes the verified statement of Matthew Horan, Deputy Director of MWRA, who in turn verifies the MWRA's submission of the "Wachusett Reservoir Watershed Rail Safety & Risk Mitigation Memorandum." (*Id.*, Ex. A.) This Memorandum was

¹⁶ In addition to MWRA, concerns related to the Wachusett Reservoir have been raised by several commenters in this proceeding. *See Decision No. 4*, slip op. at 19. (*See also* Commonwealth Comments, STB filed Aug. 27, 2021; DOT Comments, STB filed Aug. 27, 2021.)

prepared for MWRA in 2016 to evaluate the conditions of the Worcester Main Line. (*Id.*, Ex. A at 1-2.) MWRA’s comment also includes the verified statement of Elizabeth Reilley, the Director of Environmental Quality at MWRA. (*Id.*, Ex. B.) Reilley’s statement speaks to the necessity of having detailed information regarding the materials transported through the watershed for MWRA’s emergency planning efforts. (*Id.*, Ex. B. at 1.)

CSXT appreciates that there are longstanding concerns about rail infrastructure and operations on the Reservoir Segment. CSXT acknowledged these concerns in Exhibits 4 and 4-A to the Revised Application and explained that CSXT had repeatedly met with representatives of MWRA and MassDOT – including in an on-site visit at the Reservoir – to explore ways to strengthen the pre-existing rail infrastructure and to address their concerns regarding rail transportation on the line between Worcester and Ayer.

CSXT also stated that it had looked at prior proposals for infrastructure improvements and had identified concrete steps that can be taken, at CSXT’s expense, to upgrade that line segment. As the Board stated in support of its preliminary conclusion that no environmental or historic review is required of the Merger or Related Transactions (including any review of the Reservoir issues), many of the environmental concerns raised relating to the Wachusett Reservoir “are already present given that there is existing PAR carload train traffic on the line in that area. Thus, those impacts would not be caused by the Merger and Related Transactions.” *Decision No. 4*, slip op. at 26. The Board has repeatedly affirmed it does not use its conditioning authority to address pre-existing circumstances. *See CN/EJ&E*, FD 35087, slip op. at 5 n.2.

Regardless, CSXT will work actively with local agencies to improve the existing rail infrastructure on the Reservoir Segment. As Applicants stated in their Response to

Environmental Comments, CSXT and MWRA have made substantial progress in negotiations regarding each area identified by MWRA. In particular, CSXT has made these commitments:

- CSXT has agreed to upgrade the tracks and track structures within the Reservoir Segment to no less than FRA Class 3 standards;
- CSXT will maintain the tracks and track structures within the Reservoir Segment to no less than FRA Class 3 standards;
- CSXT has agreed that no trains, locomotives, or hi-rail vehicles will operate at a speed over 25 miles per hour (FRA Class 2 track speed) within the Reservoir Segment;
- Except in limited safety-related circumstances, CSXT has agreed not to park or otherwise idle trains within the Reservoir Segment;
- CSXT will provide MWRA and MassDOT/MBTA with information describing the type and quantity of hazardous materials transported over the Reservoir Segment during the previous month;
- CSXT will notify MWRA and MassDOT/MBTA of any relevant derailment, spill, or release;
- CSXT has agreed to the installation of dragging equipment and hot bearing detectors at either end of the Watershed.

CSXT is confident that the parties will ultimately reach a mutually agreeable resolution of the MWRA's concerns that will include a written accord with MWRA and MassDOT/MBTA. But should the parties fail to reach such an agreement, CSXT is willing to be held to the commitments set forth above.

ii. Islington Creek Neighborhood

Islington Creek Neighborhood in Portsmouth, New Hampshire consists of 18 streets adjacent to Pan Am's rail tracks in an area that has become more densely mixed residential and commercial, thereby replacing the industrial zone that persisted for decades. (Islington Comments 1, STB filed Sept. 1, 2021.) Islington Creek does not object to the merger and supports the economic benefits associated with trains that run through the area. (*Id.*) To address

their concerns about noise, fumes, and the aesthetic impact of Pan Am's existing infrastructure on the neighborhood, Islington Creek requests ways to reduce the impact of noise and diesel fume associated with long idling trains adjacent to the neighborhood and in the switching yard near Maplewood Avenue. (*Id.*) As Islington Creek states in its comment, its concerns were acknowledged in 2019 by Cindy Scarano, the Executive Vice President of Pan Am Railways. (*Id.* at 2.) At that time, Scarano vowed to make corrective measures and pledged the following: 1) that train crews would shut down locomotives at temperatures above 40 degrees; 2) that Pan Am would look to find the best location to park the trains; and 3) that Pan Am would work with the community and address other concerns. (*Id.*)

As discussed in greater depth in the Operating Plan submitted with the Revised Application, CSXT does not plan to materially change existing Springfield Terminal's operations in New Hampshire or elsewhere on the PAR System. The concerns raised by the Islington Creek residents are pre-existing and will not be affected by the Merger or Related Transactions. However, CSXT acknowledges the residents' concerns and will work with the residents to reduce the noise and fumes from railroad operations. CSXT plans to replace all or part of the current fleet of Pan Am locomotives with newer CSXT locomotives, which generate less fumes and noise than the older current Pan Am locomotives. CSXT has a strong record of engagement with communities in which it operates across its network, and Islington Creek will receive the same focus and attention following consummation of the Merger Transaction.

iii. Rep. Chris Pappas

Congressman Pappas highlights the concerns raised by residents of Islington Creek about noise and fumes associated with existing Pan Am infrastructure that may be exacerbated by the merger. (Pappas Comments 1, STB filed Aug. 27, 2021.) Pappas urges the Board to give the residents' concerns thoughtful and appropriate consideration when considering the merger. (*Id.*)

As discussed above, the concerns raised by the Islington Creek residents are pre-existing and will not be affected by the Merger and Related Transactions. However, CSXT acknowledges the residents' concerns and will work with the residents to reduce the impact of rail operations on their community from Springfield Terminal/CSXT operations.

iv. Village of Voorheesville, N.Y.

Located in Albany County, New York, Voorheesville urges the Board to reject the proposed transaction as currently formulated, or alternatively, to impose appropriate conditions to address Voorheesville's concerns about the transaction. (Voorheesville Comments 1, STB filed July 20, 2021.) Voorheesville expresses concern about the proposed construction of a "new" rail connection (the "Rehabilitation Project") and the use of that connection to allow double-stacked trains to pass through Voorheesville, which would allegedly impact the town's planned "Quiet Zone" project. (*Id.*) Voorheesville also expresses concern about additional high-density traffic that may be required to allow the connection and double-stacked trains to be implemented safely. (*Id.* at 2.)

Voorheesville believes that the proposed connection and the additional traffic that may result may also lead to up to 3 total at-grade crossings being closed simultaneously on a regular basis. (*Id.*) Voorheesville believes that these potential closures could cause increased traffic congestion at intersections and interruptions to much of the town's access to public safety services. (*Id.*) Finally, Voorheesville expresses concern about alleged reports over the years of falling debris from the existing CSXT overpass at Maple Avenue and that the alleged deteriorating condition of this overpass will be worsened by the addition of new, double-stacked trains. (*Id.*)

Applicants addressed Voorheesville's comments at length in their Response to Environmental Comments. The Board recently confirmed that actions taken by railroads outside

the Board’s licensing jurisdiction do not trigger environmental review requirements. *Appl of the Nat’l Passenger R.R. Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc. & Norfolk S. Ry. Co. (Amtrak-CSXT/NSR)*, FD 36496, slip op. at 10 (STB served Aug. 6, 2021) (emphasis added) (citations omitted) (“Carriers do not need Board authority to repair, replace, rehabilitate, or rebuild their existing lines, and therefore can make improvements, operate additional trains and add infrastructure to such lines without environmental review even if the line has long been inactive and is in disrepair.”). Consistent with this precedent, for several reasons, the Rehabilitation Project and NSR’s proposed operations on its existing line and the CSXT Selkirk Subdivision trigger no requirement for environmental conditions.

First, NSR can implement the Rehabilitation Project without an STB construction license and thus it would not be appropriate for the Board to impose environmental conditions regarding such project. The NSR line connecting with the CSXT Selkirk Subdivision in the Village exists today and has never been abandoned. The Rehabilitation Project will not involve a new or extended rail line and would not enable NSR to penetrate or invade any new markets. NSR simply needs to rehabilitate the existing connection and CSXT will need to replace the existing turnout. Neither action requires a license from the Board. While the Board noted that the trackage rights agreement submitted by NSR refers to the “construction” of a connecting track, *Decision No. 4*, slip op. at 20, n.34, the reference to “construction” is only to the construction activity needed to rehabilitate the existing connecting track so it can safely accommodate a passing train. This is not a new line construction that might require Board authority under 49 U.S.C. § 10901 and corresponding environmental review.

Second, operating two NSR trains per day over NSR’s existing rail line in Voorheesville does not require a Board operating license, and thus it would not be appropriate for the Board to

impose environmental conditions regarding such operations. The NSR line is an active line of railroad for the Board’s licensing purposes and NSR requires no new authority to operate over it.

Third, while NSR does require (and is seeking) a Board license for its trackage rights operations over CSXT’s rail line in Voorheesville, that action – like the Merger Transaction – is covered by a categorical exclusion from NEPA review. *See* 49 C.F.R. § 1105.6(c)(3) (“No environmental documentation will normally be prepared . . . for . . . [c]ommon use of rail terminals and trackage rights”). Therefore, it would not be appropriate for the Board to impose any environmental conditions on NSR’s trackage rights operations.

While the Board should not impose any conditions related to these issues on its approval of the Merger and Related Transactions, CSXT and NSR continue to meet regularly and work with Voorheesville on these issues and CSXT and NSR are hopeful that the parties can reach a mutually agreeable resolution of Voorheesville’s concerns, which may include assistance with completion of the quiet zone project and commitments to manage operations to reduce impacts on Voorheesville residents. Further details regarding this outreach and Voorheesville’s concerns are set forth in the Applicants’ Response to Environmental Comments.

v. Altamont Free Library

On August 19, 2021, Joseph Burke, Director of the Altamont Free Library (the “Library”) located in Altamont, New York wrote on behalf of the Library to express concerns regarding the proposed transactions. Burke urges the Board to reject the proposed transactions because of his concern of reports that NSR will have the right to use CSX’s rails between Voorheesville and central Massachusetts to move a pair of double-stacked trains per day. (Library Comments 1, STB filed August 20, 2021.) More specifically, Burke expresses concern about the traffic patterns that might result from prolonged train passes across Altamont’s Main Street, and that there are allegedly no means to underpass the tracks anywhere within miles of the Main Street

level crossing. (*Id.*) Burke believes that if such a train shuts down Main Street for more than a few minutes at a time, two issues will likely result: 1) emergency response vehicles will be prevented from quickly accessing a significant portion of the town; and 2) a dangerous traffic pattern may emerge at a particular location where cars could be temporarily congested. (*Id.*) Finally, Burke expresses concern about the potential damage that allegedly could occur to the Library's historic building as a result of the movement associated with the daily passing of a double-stacked train. (*Id.* at 2.)

CSXT and NSR acknowledge the Library's concerns are understandable for anyone with a structure close to an active rail line. However, as with Voorheesville's concerns, it would be inappropriate for the Board to impose any conditions on its approval of the Merger and Related Transactions to address the Library's concerns.

As an initial matter, operating two NSR trains per day over NSR's existing rail line through Altamont does not require a Board operating license. The NSR line is an active line of railroad for Board licensing purposes and NSR requires no new authority to operate over it. *See Amtrak-CSXT/NSR*, FD 36496, slip op. at 10 (“[c]arriers do not need Board authority to repair, replace, rehabilitate, or rebuild their existing lines, and therefore can make improvements, operate additional trains and add infrastructure to such lines without environmental review even if the line has long been inactive and is in disrepair.”).

CSXT and NSR understand the Library's concerns about blocked crossings, but the impact of two daily NSR trains on the at-grade crossing in Altamont will be limited to a few minutes per day and is typical of any at-grade crossing. There is a grade-separated highway overpass (Bozenkill Rd) of the NSR line that would allow emergency vehicles to traverse the NSR line. CSXT understands that NSR intends to implement 25 mph maximum authorized track

speeds on its line, which would allow an NSR train to clear the crossings in approximately 4 to 5 minutes. As to Burke's vibration concerns, the Library building is a former train station, which has apparently been located adjacent to an active railroad line for over 120 years. CSXT understands that NSR will commit to install continuous welded rail on the main track adjacent to the library, which should minimize any vibration impacts from the NSR operations and any other passing trains.

CSXT and NSR are committed to continuing to work with the Library and other Altamont stakeholders regarding these issues.

vi. Canadian Pacific

In their August 27 comments, CP raised questions about the traffic forecasts that CSXT has submitted in this proceeding, particularly with respect to potential traffic shifts between the "Northern Route" on the PAS Patriot Corridor between Rotterdam Junction, NY and Ayer, MA, and the "Southern Route" on CSXT, P&W, and the PAR System, between Voorheesville, NY and Ayer, MA. (*See* CP Comments 15-20, STB filed Aug. 27, 2021.) CP claims that the traffic forecasts do not account for the possibility of diversions of traffic to the Southern Route due to improved efficiency of CSXT's movements post acquisition.

Mr. Mark Wallace, an Executive Vice President at CSXT, has addressed these issues in a Reply Verified Statement attached to these Response Comments. Mr. Wallace explains that there are several factors that make it likely that existing traffic patterns and routings will not change significantly over the course of the environmental study period in this proceeding, or through 2027. Mr. Wallace also shows that if there are traffic diversions to the Southern Route, the volume of that diverted traffic would likely be small and would not have an impact on the thresholds that the Board uses to assess possible environmental impact of a transaction. Mr. Wallace's conclusions rely in part on traffic data analyses that are set out in the Reply Verified

Statement of Dr. Reishus. Mr. Wallace updates CSXT’s traffic forecasts through 2027 to reflect these expectations.

E. OTHER

i. U.S. Department of Transportation

The U.S. Department of Transportation (“USDOT”) stated that it does not take a final position on the merits of the proposed transaction as of their August 27 comments. (USDOT Comments 1-2, STB filed Aug. 27, 2021.) USDOT highlights some issues of particular interest to the agency and urges the Board to carefully consider these issues during its review. (*Id.* at 2.) One such issue is safety. USDOT notes that FRA looks forward to working with the Board to ensure that any appropriate safety conditions are imposed. (*Id.*) On August 30, 2021, Applicants submitted a comprehensive safety integration plan (“SIP”) describing how CSXT, B&E, and NSR intend to ensure that the Merger and Related Transactions are implemented safely and in full compliance with applicable safety laws and regulations. The Board’s procedural schedule called for comments on the SIP to be submitted by October 4, 2021. While no such formal comments were submitted by that date by any third parties, Applicants continue to work with FRA to address FRA’s comments to the SIP, and Applicants are confident that all such remaining issues will be resolved promptly.

Another issue raised by USDOT is competition. (*See id.* at 3-6.) USDOT requests that the Board examine issues related to competition carefully and that the Board ensure the promised public benefits of the transaction will be achieved if the transaction is approved. (*Id.*) USDOT also requests that the Board afford substantial weight to the views provided by DOJ. (*Id.*) Applicants respond above to all substantive competition-related comments submitted in this proceeding, including those from DOJ.

Finally, USDOT discusses passenger rail. (*Id.* at 6-9.) USDOT notes that it is pleased by the agreements Applicants have reached with passenger authorities, but USDOT also recognizes that interested parties such as Amtrak have noted potential adverse effects of the proposed transaction on passenger rail service. (*Id.* at 7.) USDOT states that the Board should closely scrutinize the proposed transaction to determine the impact upon passenger rail service and that the Board should consider imposing conditions to ensure existing passenger service is appropriately maintained. (*Id.* at 8.)

Applicants respond above to all substantive comments submitted in this proceeding related to passenger rail service. Applicants have explained that the Merger Transaction will have no negative impact on passenger rail services operated on the rail lines affected by these proceedings, and CSXT has committed to maintain or improve existing passenger service. (*See* Revised Appl., Ex. 13-C, Daly V.S.)

USDOT also briefly notes that other stakeholders have raised concerns about the potential environmental implications of the proposed transaction, particularly regarding the safety of operations around the Wachusett Reservoir. (USDOT Comments 2 n.4.) USDOT states it appreciates the Board’s careful attention to these concerns as well, and encourages Applicants to continue working with the affected stakeholders on potential solutions to those concerns. (*Id.*) Applicants have committed to take certain steps to mitigate any potential safety concerns regarding the Wachusett Reservoir, and Applicants will continue to work with affected stakeholders on these and any other environmental issues.

ii. The Chlorine Institute

The Chlorine Institute (“CI”), a 185-member, not-for-profit trade association of chlor-alkali producers, packagers, distributors, users, and suppliers worldwide, does not express

support or opposition to the proposed transaction. (CI Comments 1, STB filed Aug. 26, 2021.) CI requests that if the proposed transaction is approved, that two conditions be adopted. (*Id.* at 3.)

First, CI requests a condition that the Board hold Applicants to all of their representations. (*Id.*) Applicants intend to fulfill all representations made throughout this proceeding, and Applicants are not opposed to the standard condition that the Board has imposed in past merger proceedings that would hold Applicants to such representations. *See, e.g. CN/IC*, 4 S.T.B. at 187 (“Applicants must adhere to all of the representations they made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision.”).

Second, CI requests a condition that any anti-competitive effects of the transaction be fully ameliorated either at the time of the Board’s approval, or at any time thereafter in which the Board is presented with sufficient evidence that the transaction has had anti-competitive effects on rail transportation. (CI Comments 3.) As discussed throughout this Response, Applicants have addressed and appropriately mitigated any potentially anti-competitive effects of the Merger Transaction through the commitments and settlement agreements discussed in the Revised Application and in this Response.

iii. American Chemistry Council

The American Chemistry Council (“ACC”), which represents leading companies in the chemistry industry, takes no position on the merits of the Merger Transaction. (ACC Comments 3, STB filed Aug. 27, 2021.) ACC believes to protect against anticompetitive effects of the transaction and to promote the public benefits that Applicants promise, the Board should impose the following as conditions to the approval of the merger transaction: 1) the commitments of Applicants and third parties identified in the application as supportive of the transaction; and 2)

the consummation of the Related Transactions be no later than that of the Merger Transaction.
(*Id.* at ACC 6.)

As discussed elsewhere in these Responses, Applicants are not opposed to the Board imposing as conditions to approval of the Merger Transaction all commitments made in support of the Revised Application. However, there are certain circumstances, including infrastructure requirements under NSR's control and negotiation of labor implementing agreements, that could cause certain elements of the Merger Transaction to be consummated before (1) NSR begins its trackage rights operations and (2) the replacement of Springfield Terminal operations over PAS by B&E, respectively. With regard to the B&E operations, CSXT, NSR, and GWI have agreed that Springfield Terminal will continue to operate PAS until Springfield Terminal is replaced by B&E as the PAS operator. (*See* Revised Appl. APP-18.) The Board need not require the Related Transactions to be consummated at the same time as the Merger Transaction, because Applicants have committed that, if Springfield Terminal continues to operate PAS for some short period of time after CSXT acquires control of Springfield Terminal, competition will be preserved by

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

CONCLUSION

For the reasons set out above, Applicants request that the Board approve the Merger Transaction and Related Transactions with no conditions other than the standard New York Dock labor conditions and the conditions that Applicants have specifically requested that the Board impose, including the NSR Settlement Agreement and the commitments that Applicants have made, as described in the Verified Statements of Mr. Sean Pelkey, to ensure the preservation of competition.

Respectfully submitted,

/s/ Anthony J. LaRocca

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Dated: October 18, 2021

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36472

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.
—CONTROL AND MERGER—
PAN AM SYSTEMS, INC., PAN AM RAILWAYS, INC., BOSTON AND MAINE
CORPORATION, MAINE CENTRAL RAILROAD COMPANY, NORTHERN RAILROAD,
PAN AM SOUTHERN LLC, PORTLAND TERMINAL COMPANY, SPRINGFIELD
TERMINAL RAILWAY COMPANY, STONY BROOK RAILROAD COMPANY, AND
VERMONT & MASSACHUSETTS RAILROAD COMPANY

EXHIBIT 1

Reply Verified Statement of Mr. Sean Pelkey

REPLY VERIFIED STATEMENT OF SEAN PELKEY

I. Introduction

I am Sean Pelkey. I am Vice President and Acting Chief Financial Officer for CSX Corporation, parent company of CSX Transportation, Inc. (“CSXT”). I submitted an Amended and Supplemented Verified Statement on July 1, 2021 in support of CSXT’s Amended and Supplemented Application to the STB for approval of its acquisition of Pan Am Systems.¹

I am submitting this Reply Verified Statement to address concerns raised by some commenting parties about CSXT’s acquisition of a 50% interest in PAS through the Merger Transaction. I explain why the restructuring of PAS that CSXT is proposing through agreements reached with NSR and GWI is far superior to extreme remedies such as the forced sale of CSXT’s interest in PAS or the forced replacement of B&E as PAS operator. Those remedies are not necessary or appropriate here and they could jeopardize the benefits offered by the Merger Transaction and the Related Transactions for New England shippers and communities.

As a preliminary matter, the acquisition of an ownership interest in PAS was not the objective of the Merger Transaction. I explained in my July 1, 2021 Verified Statement that CSXT’s primary objective in acquiring Pan Am was to integrate New England more directly into the national rail network, bringing Class I rail service into a large and important region that today has only indirect connections to Class I railroads. The integration of New England into CSXT’s national rail network will improve rail infrastructure in the region, result in more reliable service that will eventually attract traffic away from trucks, and expand market opportunities for New England rail shippers.

¹ Unless otherwise noted, the acronyms and defined terms used in this Verified Statement are the same as those used in my July 1, 2021 Verified Statement.

These substantial benefits are widely recognized. There is overwhelming support for the Merger Transaction and Related Transactions from stakeholders in New England. Not a single rail shipper has opposed the Merger or Related Transactions. Shippers have pointed to the benefits of more efficient and reliable service that will be brought to New England, the benefits of being able to use CSXT's highly effective and customer-centered supply chain tools, and the improved access to national and international markets. Local governments similarly look forward to improved operations and safety and favorable impacts on the environment and sustainability of local transportation markets.

While the primary objective of the Merger Transaction is to integrate the current PAR rail network into CSXT's national rail network, CSXT's acquisition of Pan Am will also result in CSXT acquiring Pan Am's 50% interest in PAS. PAS was created in 2009 as a jointly owned rail carrier with 50% ownership by both NSR and a Pan Am subsidiary, Boston & Maine. To create PAS, NSR contributed substantial capital and Boston & Maine contributed the relevant rail assets. An affiliate of Boston & Maine, Springfield Terminal, became the PAS operator, with authority to market PAS services. As with many rail facilities that are owned by multiple rail carriers, both owners of PAS had a direct interest in the services that PAS was to provide. NSR's 50% ownership of PAS would allow NSR to reach the Boston area and Pan Am's 50% ownership of PAS would allow Pan Am to maintain its access, supported by capital infusions by NSR, to connections in New York state with NSR and other Class I rail carriers including CP and CSXT.

The creation of PAS also gave NSR an improved opportunity to access New England customers and traffic moving into and out of the region. CSXT has a rail line, referred to here as

its Southern Route, that is roughly parallel to PAS and that connects CSXT's rail network to New England in the Boston area. PAS provides an alternative route for NSR and other rail carriers to reach the Boston area. As explained further below, PAS also provides rail carriers that connect with PAS on its western end, including CSXT, access to a number of important rail shippers, and shortline railroad connections located on PAS itself.

When CSXT began discussions with Pan Am for the acquisition of Pan Am's rail interests, CSXT sought to exclude Pan Am's interest in PAS from the acquisition. Pan Am, however, insisted on selling Pan Am's entire rail interest including its interest in PAS. CSXT gave careful consideration to its own reliance on PAS for substantial amounts of customer traffic to/from PAS locations and the potential for working with NSR to structure PAS in a way that would address any competitive concerns. As a 50% owner and substantial interchange partner of PAS, NSR was the party that would have the most direct interest in preserving PAS as a viable and competitive entity. CSXT offered to sell its interest in PAS to NSR, but NSR declined to purchase the PAS interest. We therefore continued negotiating with NSR with a focus on restructuring PAS so that it would remain a viable rail carrier offering an independent and competitive route into and out of New England. The negotiations resulted in a carefully constructed and comprehensive Settlement Agreement with NSR and a related Term Sheet Agreement with NSR and GWI that I described in my July 1, 2021 Verified Statement. (*See* Revised Appl., Ex. 22-C, Pelkey Supp. V.S. APP-407 to APP-430.)

The agreements we reached with NSR and GWI will restructure PAS to effectively preserve PAS as a competitive route into and out of New England. Most important, CSXT agreed to remove itself from any competitive decisions by PAS, including the pricing and marketing of PAS services. CSXT and NSR decided to retain an affiliate of GWI – the B&E – to

be the PAS operator and to give B&E marketing authority that it would be obligated to exercise in the independent interest of PAS. CSXT and NSR created incentives for B&E to grow the PAS business and imposed requirements that B&E market PAS services on a non-discriminatory basis to ensure that all carriers seeking to serve New England shippers would have equal access over PAS to New England. We agreed to provide trackage rights to NSR over CSXT's Southern Route so that NSR would have more efficient intermodal and automotive service to New England than it was able to provide on PAS, due to height restrictions on PAS's Patriot Corridor. We agreed to make substantial investments in the Ayer Yard to improve the flow of traffic into and out of New England. Finally, we agreed to sell our interest in PAS to NSR or to an NSR designee if for any reason NSR concludes that the arrangement is not working properly.

This is a carefully developed restructuring of PAS that will ensure its long-term viability. Under the restructured arrangement, the two parties that use PAS the most – CSXT and NSR – are co-owners of PAS. The PAS traffic data is described by CSXT's economist, Dr. Reishus, who shows that PAS movements connecting to CSXT and NS together account for the vast majority of traffic on PAS. As major users of PAS, both carriers have a strong incentive to keep PAS viable to support these traffic movements. Moreover, Dr. Reishus shows that most of the traffic on PAS moves to and from locations on PAS that are not directly accessible to CSXT. Therefore, as a 50% owner of PAS, CSXT will have an incentive to keep PAS viable because there is no other practicable way to serve those locations.

B&E will be able to draw on the experience and operating expertise of GWI's railroads in setting up operations for PAS. No other rail operator would be in a position to initiate and sustain operations of the size and scope of PAS as effectively as B&E. Starting up operations of a new railroad is a complex and difficult task. It is key to the success of PAS that the transition

of operations from Springfield Terminal be carried out effectively and without disruption of ongoing operations. GWI, through its railroad subsidiaries, has unique experience in this area and B&E will be able to draw upon that experience to ensure an effective start up.

VTrans and VRS express concern that the use of B&E as PAS operator will harm competition for traffic on PAS's north-south line, referred to as the Knowledge Corridor or the Conn River Line, where PAS currently operates under trackage rights over lines that are owned by a subsidiary of GWI, the NECR. VTrans and VRS use the Knowledge Corridor to move some traffic (although Dr. Reishus explains that the relevant traffic volume is quite small) through connection with PAS or NECR on the Knowledge Corridor. VTrans and VRS claim that the operation of PAS by B&E will reduce their rail connection options on this rail corridor from 2 to 1 because of B&E's corporate affiliation with GWI.

But those concerns are based on the mistaken assumption that B&E will operate PAS in the interest of B&E's corporate affiliates rather than in the interest of PAS. In fact, B&E must operate PAS in the interest of PAS as an independent rail carrier, and failing that, PAS's owners have the right to remove B&E. PAS's owners have the strong incentive to ensure that B&E acts in the interests of PAS and not in the interests of GWI and we will enforce that obligation. B&E will also have the incentive to comply with its contractual obligations since a portion of its compensation will be tied to the financial performance of PAS.

I am confident that the structure we have created for B&E's operation of PAS will produce competitive results notwithstanding the corporate affiliation of B&E with GWI. But we have also made additional commitments that we are asking the STB to impose as conditions of the approval of the Merger and Related Transactions that will ensure that VRS will continue to have the benefits of competition for traffic using the Conn River Line. In particular, we have

made rate commitments to preserve current PAS rate levels with reasonable cost escalation for as long as B&E operates PAS for (1) VRS movements to the east, through Ayer, and (2) to the west, through Hoosick Junction and connecting to CSXT. (VRS already has a connection for traffic moving west to NSR through NSR's existing haulage rights with PAS between Hoosick Junction and Mechanicville.) We have also agreed to provide VRS with haulage services at current PAS rate levels with reasonable cost escalation between the important storage facilities at East Deerfield, MA and a connection with VRS's line on the Knowledge Corridor. Those commitments are set out in my Opening Verified Statement.

VRS criticizes these commitments as lacking sufficient detail about the specific rates that will be charged. But we are not in a position, as an applicant for a control/merger transaction, to provide the kind of detail on future rates that VRS appears to want, which is the level of detail that is typically included in a negotiated contract. If the STB authorizes us to acquire a 50% interest in PAS, we will then be able to develop a rate schedule based on historical data, and we will do so before B&E begins operation of PAS. In the meantime, the principle we have announced is not at all vague – we will maintain rate levels for VRS traffic at their current level with reasonable cost escalation for as long as B&E operates PAS. Dr. Reishus attaches to his Reply Verified Statement a confidential listing of current rates. It will be a straightforward exercise to establish future rates using these current rates. If VRS is not satisfied with how our clear commitment is implemented, it can seek the STB's assistance.

We have also agreed that B&E will provide VRS with 5 days/week service on the relevant line segments as long as VRS's volumes support this level of service. VRS also criticizes this commitment as insufficiently detailed because it does not address possible future

changes in traffic volumes. But any changes in traffic flows will necessarily have to be addressed based on existing circumstances.

It is also important to understand that these rate and service commitments are intended only to give VRS and VTrans assurance that they will not be harmed by B&E's operation. They are not intended to over-ride market forces or produce overly inflexible terms on movements involving VRS. We fully expect that B&E will act with the same if not better competitive vigor as Springfield Terminal does today in dealing with commercial issues and proposals from VRS. The rate commitment we are making provides a ceiling on rates, but this rate commitment is not intended to prevent B&E from establishing prices below that ceiling if B&E believes downward adjustments are warranted.

The DOJ also raises concerns about CSXT's acquisition of Pan Am's interest in PAS. Part of the DOJ's concern relates to the impact of B&E's operation of PAS on the Conn River Line, which is discussed above. In addition, the DOJ is concerned about CSXT's participation in the management of PAS as a 50% owner given the potential competition between CSXT's Southern Route and PAS. The DOJ's concern is misplaced. As Dr. Reishus explains, the actual degree of competitive overlap between PAS and CSXT's Southern Route is quite limited. The large majority of traffic that will be handled by PAS moves to locations on PAS that cannot be directly reached by CSXT on its Southern Route. CSXT will have the strong incentive to ensure that PAS is able to continue to serve these shippers.

CP claims to be concerned about CSXT's commitment to maintain the viability of PAS. This concern is also misplaced. CSXT would have no reason to undermine PAS's ability to serve PAS traffic that CSXT does not even have the ability to serve directly in competition with PAS. This will ensure the continued viability of PAS as a connection that CP can use to access

New England. Moreover, we have structured CSXT's ownership in PAS to prevent CSXT from taking any measures that would interfere with PAS's provision of competitive rail service. CSXT has removed itself from commercial decisions of PAS and agreed to allow those decisions to be made by B&E in the interest of PAS. CSXT does not have the incentive or ability to undermine PAS as an independent rail carrier or influence its commercial decisions.

The DOJ's concern with CSXT as part owner of PAS ignores the long history of joint facilities, including jointly owned rail carriers, in the railroad industry. As the STB knows, cooperative arrangements between rail carriers that also compete are found throughout the rail industry. They are a necessary feature of the interconnected rail industry and they work well to ensure adequate and competitive service is available to rail shippers. When problems arise in the management of these joint facilities, which are rare, the STB is available to resolve them. DOJ's preference for the strict separation of rail carriers to avoid any potential for competitive harm is not realistic and would produce an unworkable rail industry.

CSXT is confident that the restructuring of PAS through the carefully negotiated provisions of the NSR Settlement Agreement and the Term Sheet Agreement with NSR and GWI will preserve PAS as a viable and competitive rail carrier serving New England. But to address the DOJ's competitive concerns and CP's concerns about PAS viability, CSXT will make additional commitments to ensure that commercial decisions by PAS will be made in the interest of PAS as an independent rail carrier:

(1) CSXT will commit to recuse itself from any PAS board discussion or consideration of strategic issues that relate to CSX's Southern Route or competition between PAS and CSXT.

(2) CSXT will also agree to accelerated arbitration to resolve any disputes that arise at the level of the PAS Management Committee over CSXT's willingness to make PAS capital

expenditures. If there is a dispute, the arbitrator would determine whether the disputed capital expenditure is one that would be made by an independent investor in PAS seeking to optimize PAS's success.

(3) If the STB were to conclude that the two commitments I describe above are not adequate to address the DOJ's competitive concerns and CP's concerns about PAS viability, CSXT would be willing, as an express alternative to the two commitments described above, to appoint a fiduciary to exercise CSXT's governance rights on PAS. The fiduciary would replace CSXT as the active member of PAS's Board. The fiduciary would be obligated to make all decisions coming before the PAS Board on CSXT's behalf, including decisions regarding capital investment. The fiduciary would be obligated to make decisions under the standard that such decisions must be consistent with the interests of an independent investor in PAS seeking to optimize PAS' success.

To be clear, CSXT does not believe this third approach would be necessary and we are not urging the STB to impose it as a condition to its approval. We believe that appointment of a fiduciary would deprive PAS of the benefits that CSXT could bring to PAS Management Committee considerations, given CSXT's experience and commitment to PAS's long-term viability. We think the first two commitments set out above are more than adequate to address any concerns about CSXT's participation on the PAS Management Committee. But if the STB continues to have concerns about CSXT's participation on the PAS Management Committee, CSXT would be willing to implement this fiduciary arrangement. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]


 } }

(4) Finally, CSXT will ask the STB to establish a 5-year oversight period that will give any interested party the opportunity to bring concerns about CSXT's participation in PAS to the STB's attention.

With the structuring of PAS to exclude CSXT from pricing and marketing decisions of PAS and with the additional commitments we are making, there is no reason for the STB to entertain the DOJ's divestiture proposal. I am uncertain about the feasibility of a divestiture of CSXT's 50% interest in PAS given our experience in seeking to separate PAS from PAR and the structure of PAS and historical financial performance. But even if a divestiture were feasible, it would likely result in a weaker PAS over time. A 50% owner that did not have an existing commercial relationship with PAS would not have the same degree of commitment to PAS as CSXT and NSR, who rely on PAS to serve substantial volumes of traffic moving to and from their national networks. And an operator of PAS that lacks the experience of GWI in starting up rail operations and the superior service and safety standards that GWI has shown in its management of shortline railroads across the country would be less likely to maintain a level of service that will allow PAS to thrive over the long term. Moreover, the complexity and time that would be required to carry out a forced divestiture or forced replacement of B&E with another operator would create enormous uncertainty in rail markets in the New England area that could damage the viability of the rail network for a long time to come. If the objective of a forced divestiture or replacement of B&E is to ensure the long-term viability of PAS as a competitive provider of rail service into New England, those proposed remedies could, in reality, be highly counterproductive.

The STB would also need to consider the possibility that a forced divestiture order or the forced replacement of B&E could result in an unraveling of the entire transaction, with the loss of the public benefits that have generated such widespread support for the transaction, including the infrastructure improvements to Ayer, enhanced competition through NSR's trackage rights, and improvements to the PAR network that will benefit both freight and passenger service. The transaction, including the strong benefits to be achieved and the protective measures to ensure the preservation of competition, has been carefully structured through private agreements with NSR and GWI that were the subject of long and complex negotiations. A forced sale of CSXT's interest in PAS or the forced replacement of B&E with a different operator would be inconsistent with the terms of those deals. It is far from clear that the transaction would be able to go forward if such drastic changes were required to its underlying structure.

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }} Imposing conditions like forced

divestiture or replacement of B&E as PAS operator that would require basic renegotiation of those agreements would inject great uncertainty into the transaction.

In sum, I urge the STB to conclude that the structure of PAS and the additional commitments that CSXT and NSR are making will be sufficient to ensure the long-term viability of PAS as a competitive rail carrier. This restructuring of PAS through carefully negotiated agreements among the parties with the most direct interest in maintaining PAS as a viable carrier would be far superior to draconian remedies such as the forced sale of CSXT's interest in PAS or forced replacement of B&E as PAS operator. Such an extreme approach would create enormous uncertainties without any realistic prospect of improving PAS as a viable rail carrier and could jeopardize the strong benefits that New England will receive from CSXT's acquisition of Pan Am.

VERIFICATION

I, Sean Pelkey, declare under penalty of perjury that the forgoing is true and correct.

Further, I certify that I am qualified and authorized to file this verified statement.

/s/ Sean Pelkey

Sean Pelkey

Executed on October 18, 2021.

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36472

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.
—CONTROL AND MERGER—
PAN AM SYSTEMS, INC., PAN AM RAILWAYS, INC., BOSTON AND MAINE
CORPORATION, MAINE CENTRAL RAILROAD COMPANY, NORTHERN RAILROAD,
PAN AM SOUTHERN LLC, PORTLAND TERMINAL COMPANY, SPRINGFIELD
TERMINAL RAILWAY COMPANY, STONY BROOK RAILROAD COMPANY, AND
VERMONT & MASSACHUSETTS RAILROAD COMPANY

EXHIBIT 2

Reply Verified Statement of Mr. Mark Wallace

REPLY VERIFIED STATEMENT OF MARK WALLACE

I. Introduction and Summary

My name is Mark Wallace. I am an Executive Vice President at CSX Transportation, Inc. (“CSXT”). I previously submitted a Verified Statement (“Wallace V.S.”) in support of the July 1, 2021 Amended and Supplemented Application (“Revised Application”), and a Supplemental Verified Statement on August 19, 2021 (“Wallace Supplemental V.S.”).¹ My initial VS included a marketing plan that discussed, among other things, CSXT’s expectations for marketing the primary commodities handled by the PAR System, the expected impact of the Merger and Related Transactions on traffic flows, intermodal competition and modal share, CSXT’s plans for attracting new business in the future that is currently handled by truck, and the impact of the transaction on access to regional ports.² My Supplemental VS provided the Board with updated traffic forecasts through 2027 for the affected lines for three railroad networks: (1) the PAR System; (2) PAS; and (3) CSXT.

In comments submitted in this proceeding by Canadian Pacific Railway Company Limited and its U.S. railroad subsidiaries (collectively, “CP”) on August 27, 2021 (“CP Comments”), CP raised questions about the traffic forecasts that I submitted with the Wallace VS and the Wallace Supplemental VS, particularly with respect to traffic shifts between the “Northern Route” on PAS between Rotterdam Junction, NY and Ayer, MA, and the “Southern Route” on CSXT, P&W, and the PAR System, between Voorheesville, NY and Ayer, MA. (*See* CP Comments 15-20.) CP claims that the traffic forecasts do not account for the possibility of

¹ Unless otherwise defined in this Verified Statement, the acronyms and defined terms used in this letter are the same as those used in Applicants’ Revised Application, filed on July 1, 2021, and the Board’s July 30, 2021 decision accepting the July 1 Revised Application, *Decision No.4*, FD 36472 et al. (STB served July 30, 2021).

² *See* Revised Appl., Ex. 22-D, Wallace V.S., July 1, 2021. The Board refers to the “Proposed Transaction” as the “Merger Transaction” and I will use that term herein.

diversions of traffic to the Southern Route due to improved efficiency of CSXT's movements post acquisition.

In this Reply Verified Statement ("Wallace Reply V.S."), I address CP's comments related to traffic forecasts.³ I explain that there are several factors that make it likely that existing traffic patterns and routings will not change significantly over the near term, through 2027. I also show that if there are traffic diversions to the Southern Route, the volume of that diverted traffic would likely be small and would not have an impact on the thresholds that the Board uses to assess possible environmental impact of a transaction. My conclusions rely in part on traffic data analyses that are set out in the Reply Verified Statement of Applicants' economic expert, Dr. Reishus. I have updated below and in the attached exhibit my traffic forecasts through 2027 to reflect these expectations.

II. The traffic shifts agreed to by CSXT and NSR in the Settlement Agreement will be in place at least through the 2027 environmental study period.

CP acknowledges that my earlier traffic forecasts accounted for two traffic shifts agreed to by CSXT and NSR in the NSR Settlement Agreement, which Applicants have requested that the STB impose as a condition to its approval of the Merger and Related Transactions: (1) there will be an increase of one NSR train pair per day (one train in each direction) on the Southern Route, and a corresponding decrease of one NSR train pair per day on the Northern Route; and (2) CSXT will route certain CSXT traffic over the Northern Route rather than the Southern Route. (*See* Revised Appl., Ex. 13, Operating Plan APP-339 to APP-340; *see also* Ex. 22-D, Wallace Supp V.S. APP-475 to APP-476.) CP alleges that the second traffic shift "will

³ The remainder of CP's comments are addressed elsewhere in Applicants' Responses to Comments.

eventually go away,” and that the traffic that CSXT will move over the Northern Route will be shifted at some later point back to the Southern Route. (CP Comments 16-17.)

I do not address in my traffic forecasts CP’s claims as to the long-term potential shift in traffic covered by the NSR Settlement Agreement, because that Agreement provides that this CSXT traffic must move over the Northern Route for a period of at least {{ [REDACTED] }} years. (Revised Appl., Ex. 22-C, Pelkey Supp. V.S., Attach. NSR Settlement Agreement at APP-437.) Any potential shift of that CSXT traffic back to the Southern Route after that agreed-upon period is speculative and, in any event, would occur after the 2027 environmental study period has concluded. Therefore, any such later shifts are properly not reflected in my traffic forecasts.

III. A significant diversion of PAS/PAR overhead traffic to the Southern Route is not likely during the environmental study period.

Most of the traffic handled by PAS moves to locations on PAS, and the Merger and Related Transactions will have no effect on the routing of this traffic. But as CP notes, PAS currently moves certain overhead manifest traffic to/from west of upstate New York over the Northern Route to/from locations on the PAR System. CSXT also moves certain manifest traffic from the west of upstate New York over the Southern Route to/from locations on the PAR System. Currently all such traffic requires an interchange – between PAS/PAR on the Northern Route and between CSXT/PAR on the Southern Route. Following consummation of the Merger Transaction and CSXT’s integration of the PAR System into CSXT, the CSXT/PAR interchange will be eliminated and the Southern Route will be converted into a single-line CSXT route for traffic moving from upstate New York to/from former PAR System territory.

CP states that “CSX’s traffic analysis forecasts that zero of the PAR traffic moving across the PAS route to/from western connections like CP and NS would divert to CSX single-line routes.” (CP Comment at 17 (emphasis removed).) CP further states that “by forecasting no

diversions of manifest traffic away from PAS, CSX is suggesting that its new single-line services will not take rail traffic away from existing rail alternatives – i.e., the [Northern] Route.” (*Id.* (emphasis removed).) I based my traffic forecasts on an assumption that there would not be significant diversions to the Southern Route of traffic moving overhead today on the PAS Northern Route to PAR locations. For the reasons set out below, I continue to believe that is a reasonable assumption.

a. CSXT Traffic

As Dr. Reishus details, a significant number of those overhead movements on PAS today consist of CSXT traffic. (Reishus Reply V.S., App. B). I expect that all of the CSXT traffic that currently moves in both directions overhead on the Southern Route to/from the PAR System will remain on the Southern Route, because the Merger and Related Transactions will not affect those movements. I also forecast that all or substantially all of the CSXT traffic that currently moves in both directions overhead on the PAS Northern Route to/from the PAR System will remain on the Northern Route.

The CSXT traffic that moves today on the PAS Northern Route does so for operational and service reasons. PAS moves the CSXT manifest traffic east to Ayer for interchange with PAR, and PAR then moves the traffic to destinations in New Hampshire and Massachusetts that are most efficiently served from Ayer. If CSXT moved that manifest traffic east via the Southern Route, CSXT would interchange the traffic with PAR at Barbers Station, and PAR would take the traffic overhead through Ayer and up to Portland, Maine. The cars would then be classified and brought back to Ayer, for local service. The same considerations would apply to the east-to-west movements that move overhead on PAS.

As CSXT has explained, once CSXT acquires PAR, there are no current plans to change the existing CSXT network, PAR System, or PAS network routes, patterns or types of service.

(See Operating Plan APP-332). As a result, I expect that the same operational and service considerations that have led CSXT to use the PAS Northern Route today for CSXT traffic to destinations on the PAR System that are more efficiently served from Ayer will keep that traffic on the same route following consummation of the Merger and Related Transactions. Moreover, as described elsewhere in the record, CSXT (as the one-half owner of PAS) will be incentivized to keep PAS viable by feeding traffic to PAS where it makes sense to do so. CSXT has had the ability to move this traffic to the Southern Route for years now and has decided to keep it on the PAS Northern Route, and I expect the same to continue post-transaction.

b. NSR and CP Traffic

With respect to traffic moving overhead on the PAS Northern Route to/from the PAR System in the east and to/from connections with NSR and CP in Upstate New York, there are a number of reasons why this traffic is highly likely to remain on PAS after the Merger and Related Transactions.

First, NSR and CP will have a strong economic incentive to keep that traffic on PAS, rather than interchange that traffic with CSXT somewhere in Upstate New York for movement to and from the PAR System over the Southern Route. Even if that traffic will ultimately move to the PAR System (post-transaction, CSXT), NSR and CP both have a clear interest in keeping the traffic on the PAS Northern Route so that PAS will remain a viable and independent competitor to CSXT. Indeed, CP's comments are focused on the need to keep PAS viable. There would have to be very substantial cost savings to give CP and NSR an incentive to interchange with CSXT in Upstate New York rather than use the Northern Route. And while a more efficient single-line CSXT Southern Route will likely produce some cost savings over time, the magnitude of such cost savings is unlikely, in the near term at least, to overcome the very strong incentive for CP and NSR to keep the traffic on PAS.

Second, while the creation of single-line CSXT service on the Southern Route to/from the PAR System will produce efficiencies and cost savings, the replacement of Springfield Terminal with B&E as operator of PAS will also produce efficiencies and cost savings on the PAS Northern Route. The numerous benefits of having PAS operated by B&E are discussed elsewhere in the record. It is the firm expectation of CSXT, NSR and GWI, that B&E will be able to operate PAS more efficiently than it is operated today. As one example, the Ayer Yard operations, which are central to today's PAS operations, will become more efficient as a result of CSXT's significant investment in yard infrastructure. B&E's management of PAS is expected to be more efficient and its labor costs are likely to be lower with anticipated changes to the workforce. These cost savings on PAS will ensure that, post-transaction, the Northern Route will remain an efficient and competitive option to CSXT single-line service on the Southern Route.

Third, in addition to the strong incentive that CP and NSR will have to keep overhead traffic on PAS, discussed above, B&E will have a strong incentive to keep that traffic on PAS through its pricing and marketing decisions. As contract operator of PAS, B&E will set rates for these movements and B&E will be incentivized through its operating agreement to keep the NSR and CP overhead traffic that currently moves on the PAS Northern Route. B&E's compensation as PAS operator would be affected by any significant loss of volume handled over the PAS route. B&E will have the strong incentive to preserve that traffic through commercial policies that keep PAS service to CP and NSR attractive.

Fourth, CSXT would not be able to divert the NSR and CP traffic from the PAS Northern Route to the Southern Route by increasing the divisions for the PAR System portion of those NSR/CP interline movements. CSXT and NSR have agreed through the NSR Settlement Agreement { [REDACTED]

[REDACTED] } } (See NSR Settlement Agreement at § X, APP-437 to 438.) These pricing commitments ensure that PAS, and the carriers to which PAS connects in Upstate New York, will have effective competitive access to PAR shippers.

Fifth, CP and NSR will certainly want to protect the contribution they receive today from that traffic on their networks outside of New England. Moreover, the market for movements into the PAR System today is highly competitive, which indicates that if CP or NSR has the long-haul on such movements today, there is likely to be a reason for such a route for those movements. Indeed, Dr. Reishus explains that NSR and CP have inherent geographic advantages over CSXT to the western originations and destinations of much of the overhead traffic that moves today on the PAS Northern Route. Cost efficiencies realized by the introduction of the CSXT single-line route are not likely to be great enough to outweigh any such NSR and CP inherent advantages, particularly during the five-year post-transaction environmental study period.

IV. Any potential diversion of traffic would not exceed the Board's environmental thresholds.

In my Supplemental VS, I explained that it is very difficult to forecast traffic growth into the future, given the numerous economic and market factors over which a rail carrier has no control. I assumed that the cost savings that CSXT will experience over time from the conversion of interline traffic between CSXT/PAR to single-line CSXT traffic over the Southern Route will not produce a significant diversion of traffic from the PAS Northern Route to the Southern Route

through the 2027, the end of the environmental study period. The factors described above reinforce my conclusion.

However, given the inherent uncertainty of traffic forecasting and the difficulty in predicting market developments, it is certainly possible, if unlikely, that post-transaction competition will result in a diversion of some traffic from the PAS Northern Route to the Southern Route. In particular, it is possible that CSXT could convert some traffic originating and terminating on CP and NSR west of Upstate New York to single-line traffic, although the amount of such potentially diverted traffic is limited. I asked Dr. Reishus to examine the traffic data to quantify the maximum potentially divertible amount of such traffic.

First, I asked him to identify traffic that originated or terminated on CP and NSR at stations that appear to be served by CSXT. I note that even if CSXT appears to serve a particular station, there are many cases where individual shippers are not open to CSXT. So this approach will necessarily, and potentially substantially overstate the traffic that CSXT might be able to attract.

Second, as to the CP and NSR traffic moving through the major gateways with western carriers that are served by CSXT, I asked him to assume that half of that traffic was potentially divertible. Given the range of commercial relationships between the eastern and western carriers, it would not be reasonable to assume that any more than half of that traffic is even potentially subject to diversion based on single-line efficiencies. It would not be realistic to expect a fundamental change in those interline relationships.

Third, I asked him to exclude traffic where CP and NSR have obviously more efficient routes, based on route miles.

Fourth, I asked him to exclude traffic that is most likely to remain on PAS because it serves locations in Massachusetts and New Hampshire which are more efficiently served through Ayer. I discussed this issue above in connection with CSXT's traffic on PAS.

Finally, I asked him to exclude any NSR haulage traffic that moves overhead on PAS. I expect that the haulage terms are so favorable on that traffic that the traffic is not potentially subject to diversion to the Southern Route.

Dr. Reishus explains that approximately {█}% of NSR/CP movements at issue here are potentially divertible to the CSXT's single-line service on the Southern Route. I reiterate that this does not represent a reasonable estimate of the movements that will be or might be diverted. Rather, this is a maximum amount of traffic that could be diverted which we have developed to test the sensitivity of the traffic forecasts I previously made. Using this number, I have restated my prior traffic forecasts and the results show that even with the additional diversion of traffic that I describe above, the traffic changes should not make a difference in the Board's assessment of whether to conduct an environmental review of the Merger and Related Transactions.

The only rail segment that comes close to experiencing a 100% increase in traffic volumes, which I understand to be a relevant factor in the Board's environmental analysis, is the segment between Worcester, MA and Ayer. The forecasts I submitted previously show that there could be an increase of between 74% and 85% on that segment. To illustrate the maximum potential impact of the diversions, we incorporated the additional traffic described above, which indicated overall traffic increases from 74% to 92%. As shown in Exhibit A, none of the traffic growth scenarios following consummation of the Merger and Related Transactions over a five-year period would exceed the STB's thresholds for identifying significant environmental effects on any segment of rail line that is at issue in this proceeding.

VERIFICATION

I, Mark Wallace, declare under penalty of perjury that the forgoing is true and correct.

Further, I certify that I am qualified and authorized to file this verified statement.

/s/ Mark Wallace

Mark Wallace

Executed on October 18, 2021.

Illustrative Impact of the Potential Diversions of PAS-PAR Shipments on 2027 Projected Densities for PAR and CSXT Segments

-----Traffic Density Forecasts submitted as Exhibit 4 to Wallace Supplemental VS----- | -----Including "Potentially Divertible" PAR Traffic on CSXT Southern Route-----

Baseline Scenarios, without Transaction						Full Impact of Transaction				
PAR Segments	Seg Miles	1.Original (1.5%)		2.GDP Update (1.9%)		3.PAR Growth (2.3%)		Traffic Shift, 2.3% through 2024, 3.8% for 2025 through 2027		
		2027		2027		2027		2027	Original	% Variance
		Total MGTMs		Total MGTMs		Total MGTMs		Total MGTMs	% Variance	Range
Worcester-Ayer	28	106		109		113		196	85%	74-85%
Ayer-Rockingham 2/	59	414		427		441		461	11%	4-11%

Potentially Divertible	2027	Original	GDP Update	PAR/Wallace	% Variance
MGTMs 1/	Max. MGTMs	% Variance	% Variance	% Variance	Range
0-7	203	85-92%	80-86%	74-80%	74-92%
0-14	475	11-15%	8-11%	4-8%	4-15%

Baseline Scenarios, without Transaction					Full Impact of Transaction				
CSXT Berkshire Segments	Seg Miles	1.Original (1.5%)		2.GDP Update (1.9%)		1.Traffic Shift & Original		2.Traffic Shift & GDP Update	
		2027		2027		2027	Original	2027	GDP Update
		Total MGTMs		Total MGTMs		Total MGTMs	% Variance	Total MGTMs	% Variance
Worcester-E. Brookfield	19	338		349		389	15%	401	15%
E. Brookfield-Palmer	21	412		425		463	12%	478	12%
Palmer-W. Springfield	16	373		385		411	10%	424	10%
W. Springfield-Westfield	9	327		337		355	9%	366	9%
Westfield-Pittsfield	43	1,346		1,389		1,450	8%	1,496	8%
Pittsfield-Selkirk	46	1,619		1,671		1,743	8%	1,798	8%
Selkirk-Voorheesville	9	624		644		639	2%	659	2%

Potentially Divertible	2027	Original	2027	GDP Update	% Variance
MGTMs 1/	Max. MGTMs	% Variance	Max. MGTMs	% Variance	% Variance
0-5	393	15-16%	406	15-16%	15-16%
0-5	468	12-14%	483	12-13%	12-14%
0-4	415	10-11%	428	10-11%	10-11%
0-2	357	9%	368	9%	9%
0-10	1,460	8%	1,507	8%	8%
0-11	1,754	8%	1,810	8%	8%
0-2	641	2-3%	661	2-3%	2-3%

- 1/ Total gross tons of 202,800 identified from 2019 PAS traffic files inflated to 2027 levels based on assumed annual growth factor of 2.3% ("PAR Growth") results in 243,300 gross tons.
2/ Other PAR segments would reflect no more than the potential impact of 4-15% for this segment; in fact, as not all potentially divertible PAR traffic travels as far as Rockingham, let alone beyond, the actual impact on other PAR segments would be lower.

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36472

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.
—CONTROL AND MERGER—
PAN AM SYSTEMS, INC., PAN AM RAILWAYS, INC., BOSTON AND MAINE
CORPORATION, MAINE CENTRAL RAILROAD COMPANY, NORTHERN RAILROAD,
PAN AM SOUTHERN LLC, PORTLAND TERMINAL COMPANY, SPRINGFIELD
TERMINAL RAILWAY COMPANY, STONY BROOK RAILROAD COMPANY, AND
VERMONT & MASSACHUSETTS RAILROAD COMPANY

EXHIBIT 3

Reply Verified Statement of Mr. Andy Daly

REPLY VERIFIED STATEMENT OF ANDY DALY

I am Andy Daly. I am Senior Director of Passenger Operations for CSX Transportation, Inc. (“CSXT”).¹ I previously submitted a Verified Statement (“Daly VS”) in support of the Revised Application. My initial Verified Statement, which was submitted as Exhibit 13-C to the Revised Application, highlighted the importance that CSXT places on potential impacts to passenger rail resulting from the Merger Transaction. I described existing passenger operations on the PAR System, the PAS Network, and on CSXT lines contiguous to the PAR System and PAS Network, and discussed impacts of the Merger Transaction and Related Transactions on passenger rail service. I concluded that the Merger and Related Transactions will not negatively impact passenger service operated on the rail lines that are affected by these proceedings. Through my statement, CSXT committed to maintain or improve existing passenger service.

I am submitting this Reply Verified Statement to provide an overview of passenger rail issues in the supporting and opposing comments that have been filed, as well as a discussion of the settlement agreements that CSXT has entered into with passenger rail authorities. A more comprehensive and detailed response to individual comments and requests for conditions on passenger issues is set out in Applicants’ Response to Comments and Requests for Conditions and Rebuttal in Support of Application (the “Response Comments”) to which this Reply Verified Statement is attached.

CSXT has consistently recognized the importance of passenger rail service in connection with the Merger and Related Transactions, and CSXT has demonstrated its willingness to engage and cooperatively work with passenger rail stakeholders. Since announcing the proposed Merger

¹ Unless otherwise defined in this Verified Statement, the acronyms and defined terms used in this Verified Statement are the same as those used in Applicants’ Revised Application, filed on July 1, 2021, and the Board’s July 30, 2021 decision accepting the July 1 Revised Application, *Decision No. 4*, FD 36472 et al. (STB served July 30, 2021).

Transaction, CSXT has engaged in a comprehensive outreach effort with passenger rail stakeholders. These discussions have yielded a number of support letters and settlement agreements.

There is very strong public support throughout New England for the Merger and Related Transactions, as evidenced by the 119 statements of support that have been filed in this proceeding by customers, railroads, public officials and public agencies. A summary of the statements of support is included in the Response Comments, and an updated list of the statements of support is included as Exhibit 6 to the Response Comments.

Several passenger rail stakeholders have submitted statements of support. The Connecticut Department of Transportation (“CTDOT”) noted that “CSXT has shown a commitment to safety and has indicated to CTDOT that it will invest in and modernize the Pan Am infrastructure, which will make the New England rail network more efficient and safer for freight and passenger operations.” (CTDOT Comments 1, STB filed Aug. 5, 2021.) The Commissioner of the New Hampshire Department of Transportation (“NHDOT”) filed a letter that expressed support for the Merger Transaction and stated that NHDOT “anticipate[s] as a result of this acquisition that CSX will bring financial resources to the table for much needed infrastructure improvements throughout Pan Am’s rail network operating in New Hampshire.” (NHDOT Comments 1, STB filed Aug. 27, 2021.)

CSXT has also reached a settlement agreement with MaineDOT, in which CSXT and MaineDOT have agreed to work cooperatively to complete the upgrade of PAR System line segments in Maine under two federal infrastructure grants, and to work together on future projects to increase capacity, enhance safety, and promote efficient railroad operations. This

agreement is contained as an exhibit to the Verified Statement of Mr. Sean Pelkey, submitted as Exhibit 22-C to the Revised Application.

In my July 1 Verified Statement, I indicated that CSXT and the Northern New England Passenger Rail Authority (“NNEPRA”), the state sponsor of Amtrak’s Downeaster passenger rail service between Brunswick, ME and Boston, MA, had engaged in positive discussions regarding a settlement agreement, and CSXT was prepared to make a number of specific commitments to NNEPRA. (Revised Appl., Ex. 13-C, Daly V.S. APP-381.) CSXT and NNEPRA subsequently reached an agreement, which was filed on August 5, 2021.

Among other commitments, CSXT agreed to comply with existing agreements that pertain to the Downeaster service and to participate in good-faith discussions with NNEPRA and Amtrak regarding improvements to, or expansion of, the Downeaster service. (NNEPRA Settlement Agreement 2, STB filed Aug. 5, 2021.) CSXT and NNEPRA also agreed to work cooperatively on certain existing projects and on future projects to improve rail lines owned or controlled by CSXT over which the Downeaster service operates, with the overall goal of enhancing safety and reliability and promoting efficient railroad operations to support improved and/or increased passenger service. (*Id.* at 4.)

I understand that Amtrak has received funding for the installation of an I-ETMS system on the PAR System portion of the Downeaster route. Amtrak has requested CSXT’s assistance in the planning and design of this project, which CSXT has agreed to provide. In the event the Merger and Related Transactions are approved, CSXT will work with Amtrak and NNEPRA to facilitate the installation and any required testing of the I-ETMS PTC system on the Downeaster corridor. Once the I-ETMS system is installed and fully operational, CSXT has committed “to confer and cooperate with NNEPRA and Amtrak on increasing Downeaster frequencies beyond

those currently agreed on,” to cooperate in any NNEPRA and Amtrak effort to evaluate such increased frequencies, and to permit such increased frequencies in the event the evaluation finds that they will not unreasonably interfere with CSXT’s freight operations. (*Id.* at 5.)

NNEPRA has since expressed its support for the Merger and Related Transactions and stated that “[t]his transaction, and the physical and operational improvements CSX has indicated it will make, has the potential . . . to sustain and enhance the safe operation of passenger and freight rail service in Maine and New Hampshire.” (NNEPRA Comments 1, STB filed Aug. 27, 2021.)

I recognize that some commenters – including MassDOT/MBTA and Amtrak – have expressed concerns regarding the potential impacts of the Merger and Related Transactions on passenger rail service, and some of these commenters have requested that the Board impose various conditions on the Board’s approval of the Merger and Related Transactions. Applicants’ specific responses to these comments and requests for conditions are set forth in the Response Comments.

As a general matter, however, I note that these comments do not relate to the impact of the Merger and Related Transactions on passenger service, but rather on existing concerns about the interaction of freight and passenger rail service on the lines at issue. With respect to future passenger service on these lines, CSXT has repeatedly stated that it is willing to work with stakeholders to consider the introduction and expansion of passenger service upon request. (Revised Appl., Ex. 13-C, Daly V.S. APP-376.) Additionally, CSXT has committed to working with passenger rail authorities to reinstate pre-pandemic frequencies and schedules. (*Id.*) CSXT is required to comply with its statutory and contractual responsibilities with respect to all passenger services.

Many of the comments also overlook the commitments made by CSXT and B&E to step into the shoes of Springfield Terminal with respect to all of Springfield Terminal's current obligations to the sponsors of passenger rail service. (*Id.* at APP-373.) CSXT has specifically committed that CSXT and PAS will continue to honor any agreements or commitments made by PAR Railroads or PAS to MassDOT and MBTA. (*Id.* at APP-376.)

In our Response Comments, Applicants explain that existing agreements between PAR Railroads, PAS, and MassDOT/MBTA govern many of the issues (including maintenance and dispatching) raised by MassDOT and MBTA. I have attached several relevant agreements to this Reply Verified Statement, including: (1) a 1976 Deed between Robert W. Meserve and Benjamin H. Lacy, as Trustees of the Property of Boston & Maine, and MBTA; (2) a 1992 Memorandum of Understanding between MBTA, Boston & Maine, and Springfield Terminal; (3) a 2011 Trackage Rights Agreement between MBTA, Boston & Maine, and Springfield Terminal; and (4) a 2015 Operating Agreement between MassDOT, MBTA, and PAS.

As we explain more fully in our Response Comments, CSXT's and B&E's assumption of the obligations under these agreements will ensure that passenger service will not be harmed by the Merger and Related Transactions. In fact, the passenger services on the lines at issue will likely experience substantial benefits as we implement improvements in infrastructure and operating practices to create more reliable rail service. And as we explain in our Response Comments, we continue to be committed to working with our passenger service partners to address their needs and concerns as they arise.

For the reasons stated in my initial Verified Statement and in this Reply Verified Statement, I continue to urge the Board to approve the Merger and Related Transactions.

VERIFICATION

I, Andy Daly, declare under penalty of perjury that the forgoing is true and correct.

Further, I certify that I am qualified and authorized to file this verified statement.

/s/ Andy Daly

Andy Daly

Executed on October 18, 2021.

ATTACHMENT 1

TO REPLY VERIFIED STATEMENT OF ANDY DALY

11 Other

Robert W. Meserve and Benjamin H. Lacy,
Trustees of the Property of
Boston and Maine Corporation, Debtor,
(See In the Matter of Boston and Maine Corporation, Debtor,
United States District Court for the
District of Massachusetts,
Docket No. 70-250-M)

and

Massachusetts Bay Transportation Authority

*Recorded in Registry of Deeds
December 27, 1976*

Executed on December 24, 1976

December 24, 1976

KNOW ALL MEN BY THESE PRESENTS

This Indenture, dated this 24th day of December, 1976, by and between ROBERT W. MESERVE and BENJAMIN H. LACY, as they are Trustees of the Property of Boston and Maine Corporation, Debtor, and not individually, (see In the Matter of Boston and Maine Corporation, Debtor, United States District Court for the District of Massachusetts, Docket No. 70-250-M) with offices at 150 Causeway Street, Boston, Suffolk County, Massachusetts, 02114, hereinafter called the "Trustees", (which expression shall include their successors and assigns where the context so requires or admits) and the MASSACHUSETTS BAY TRANSPORTATION AUTHORITY, a body politic and corporate and a political subdivision of the Commonwealth of Massachusetts, established under the provisions of Massachusetts General Laws, Chapter 161A, as amended, and having an usual place of business at 45 High Street in Boston, Suffolk County, Massachusetts, 02110, hereinafter called the "Authority", (which expression shall include its successors and assigns where the context so requires or admits).

WITNESSETH that the Trustees, in consideration of Thirty Six Million Five Hundred Forty Nine Thousand and no/100 Dollars (\$36,549,000.00), paid to them by the Authority, receipt whereof is hereby acknowledged, the said Trustees hereby grant to the Authority all of the said Trustees' right, title and interest (sufficient to permit the Authority to operate a passenger and freight rail service over the rail line rights of way and the Boston Engine Terminal Area, as hereinafter described), in and to the Trustees Railroad rights of way and other lands thereon

and including all track, signals, bridges, buildings, shops, towers and other improvements affixed thereto, and all rights and easements appurtenant thereto, all of the aforesaid property hereby conveyed is described in the plans entitled: LAND IN MASSACHUSETTS Robert W. Meserve and Benjamin H. Lacy, Trustees of the Property of Boston and Maine Corporation to the Massachusetts Bay Transportation Authority Scale: 1" = 100' Date: Dec. 1, 1975", Sheets 1 through 309, and noted as follows:

ESSEX COUNTY - NORTH - Recorded December 10, 1976, 16 sheets as Plan 7531 of 1976

VS 7.4

Maps SL1(r), 2, SL3, 4

VS 2

Maps 16, 17, 18, 19, 20(R), 21, 22(R), SL23, SL24, 25, 26, 27

ESSEX COUNTY - SOUTH - Recorded December 10, 1976, 87 sheets in Plan Book 141, Plan 20

VS 2

Maps 28, 29, 30, SL31, 32, 33, 34

VS 3

Maps 6, 7, SL8, SL9(R), SL10(R), SL11, 12, 13, 14(R), SL15, SL16(R), SL17, 18, 19, 20, 21(R), 22, 23, 24, 25, SL26, 27, 28, 29, 30, 31, 32, 33, 34, SL35(R), 36, 37, 38, 39

VS 7.3

Maps 3, 4, 5, 6, 7, 8, 9, 10(R), 11, 12, 13, 14, 15

VS 7.12

Maps SL1, SL2, 3, 4, 5, 6

VS 7.13

Maps 1(R), 2, 3, 4, 5, 6, 7(R), 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

VS 13.7

Maps 4, 5, 6, 7, 8

VS 7.7

Maps 6, 7, 8(R), 9, 10

MIDDLESEX COUNTY - NORTH - Recorded December 6, 1976, 33 sheets in Book 123, Pages 74 through 106.

VS 2

Maps 15, 16

VS 13.1

Maps 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, SL23, SL24

VS 13.3
 Maps 6, 7, 8
 VS 13.6
 Maps 1, 2, 3, 4
 VS 15
 Maps SL1, 2(R), 3, 4, 5, 6, 7, 8, 9
 VS 7.18
 Maps SL1

MIDDLESEX COUNTY - SOUTH - Recorded December 3, 1976,
 141 sheets in Book 442, Sections A, B & C. (50 sheets
 to a section.)

VS 1
 Maps SL1, SL2, SL3a, SL5
 VS 3
 Maps SL1, SL2
 VS 12
 Maps SL1, SL2, SL2a, SL3
 VS 35
 Maps SL2, SL3
 VS 5
 Maps 1, A-1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13,
 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, SL24,
 25, 26
 VS 13.1
 Maps SL1, 2, 3(R), 4, 5, 6(R), 7, 8, 9(R), 10, 11
 VS 13.2
 Maps 1, 2(R), 3, 3a, 4(R), 5, 6(R), 7, 8, SL9, 10,
 11, 12, 13
 VS 36.3
 Maps 1, 2, 3, 8, 9(R), 10, 11, 12, 13
 VS 13.4
 Maps SL1, SL2(R)
 VS 13.5
 Maps 1, 2, SL3
 VS 7.7
 Maps SL1, 2(R), 3(R), 4 5
 VS 7.3
 Maps 1 & A1(R), 2, 3
 VS 36.1
 Maps SL1,
 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22,
 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34,
 35, 36, 37, 38, 39, 40
 VS 36.4
 Maps 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

SUFFOLK COUNTY - Recorded December 2, 1976 - 17 sheets in
 Book 8913 - End.

VS 1
 Maps SL1, SL2, SL2a, SL3a
 VS 3
 Maps SL2, SL3, SL4(R), 5, 6

VS 7.7

Maps 5, 6

VS 7.8

Maps 1, 2

VS 12

Maps SL1, SL2a

VS 35

Maps SL1, SL2

WORCESTER COUNTY - NORTH - Recorded December 6, 1976,
10 sheets in Plan Book 212, Plans 4 - 8.

VS 36.1

Maps 40, 41, 42, 43, 44, 45, 46, SL47, 48, SL49

WORCESTER COUNTY - SOUTH - Recorded December 6, 1976,
5 sheets in Plan Book 432, Plan 57 (Sheets 1 - 5).

VS 5

Maps 26, 27, 28, 29, 30

but excepting therefrom the following five (5) bridges which are
identified by B&M Bridge Number and situated in the location list-
ed and shown on the following plans:

1. B&M Bridge #3.43, located in Cambridge, Middlesex County, and shown on plan marked: "Plan of Land In Cambridge, Mass. Showing Bridge and Easement Granted to the Commonwealth of Mass. (D.P.W.) By Robert W. Meserve and Benjamin H. Lacy, As Trustees of the Property of Boston and Maine Corporation, Debtor Scale: 40' to the inch January 31, 1975 Office of the Vice Pres-Engineering Billerica, Mass.
2. B&M Bridge #4.15, located in Medford, Middlesex County, and shown on plan marked: "Plan of Land In Medford, Mass. Showing Bridge and Easement Granted to the Commonwealth of Mass. (D.P.W.) By Robert W. Meserve and Benjamin H. Lacy, as Trustees of the Property of Boston and Maine Corporation, Debtor Scale: 40' to the inch January 31, 1975 Office of the Vice Pres-Engineering Billerica, Mass.
3. B&M Bridge #7.39, located in Belmont, Middlesex County, and shown on plan marked: "Plan of Land In Belmont, Mass. Showing Bridge and Easement Granted to the Commonwealth of Mass. (D.P.W.) by Robert W. Meserve and Benjamin H. Lacy, as Trustees of the Property of Boston and Maine Corporation, Debtor Scale: 40' to the inch January 31, 1975 Office of the Vice Pres-Engineering Billerica, Mass.

4. B&M Bridge #9.17, located in Waltham, Middlesex County, and shown on plan marked: "Plan of Land In Waltham, Mass. Showing Bridge and Easement Granted to the Commonwealth of Mass. (D.P.W.) by Robert W. Meserve and Benjamin H. Lacy, as Trustees of the Property of Boston and Maine Corporation, Debtor Scale: 40' to the inch January 31, 1975 Office of the Vice Pres-Engineering Billerica, Mass.
5. B&M Bridge #25.19, located in Lowell, Middlesex County, and shown on plan marked: "Plan of Land In Lowell, Mass. Showing Bridge and Easement Granted to the Commonwealth of Mass. (D.P.W.) by Robert W. Meserve and Benjamin H. Lacy, as Trustees of the Property of Boston and Maine Corporation, Debtor Scale: 40' to the inch January 31, 1975 Office of the Vice Pres-Engineering Billerica, Mass..

to be recorded herewith and shown on Exhibit A(1 - 5) annexed hereto; said Grantors hereby reserve the right to convey said excluded bridges together with an easement for their location, maintenance and repair, as shown on said plans, to the Commonwealth of Massachusetts, Department of Public Works, on or before December 31, 1981.

RESERVED FREIGHT EASEMENT

The Trustees hereby reserve unto themselves, their successors and assigns, the right and easement as are appropriate and necessary to the continuance of the Trustees' freight transportation business at present and reasonably foreseeable levels of traffic volume and activity and in the general manner in which it is now conducted; said reserved right and easement shall include reasonable access over the conveyed Real Estate to the easement areas without undue interference from the activities of the Authority. Concurrently, it is the general intention of the parties to this Instrument that the Authority, as the result of this conveyance, will own said Real Estate and, as owner, will have the right, subject to this reservation for freight purposes, to use, maintain and alter said properties as it sees fit and will have the right to schedule access.

Trustees' freight trains, provided said freight trains will move without undue interruption to freight service by the Authority and, further, the said Authority will exercise control over the use, condition, maintenance and operation of said property.

The reserved freight easement, hereinabove referred to, shall also include the use of facilities in order to continue Trustees' freight service as set forth below:

(A) NON-LINE AREAS AND FACILITIES

1. Outside of the Boston Engine Terminal Area.

Outside of the Boston Engine Terminal Area, which Area is shown on plan entitled: "Boston and Maine Corporation Robert W. Meserve and Benjamin H. Lacy, Trustees Scale: 1" = 200' Date: December 1, 1975", said plan being marked Exhibit "B", attached hereto and made a part hereof, the Trustees shall retain the right and easement to continue to use, and use in the future, all those areas of land and buildings, and all of that equipment, excluding passenger rolling stock, and all of the facilities other than lines of railroad including, but not limited to yards, freight buildings, public delivery facilities, buildings now located in the Town of Billerica, all shops and all servicing facilities situated outside of said Boston Engine Terminal area.

(a) Provided, however, the Authority shall have the right to make such use as it may desire of said Non-Line Areas to the extent that such use by the Authority does not materially interfere with the

then current or then reasonably foreseeable use of such Non-Line Areas and Facilities by the Trustees in conducting railroad freight operations; provided, further, that in the event such use by the Authority materially interferes with the Trustees' use of such Non-Line Areas or Facilities, then the Trustees shall be provided equivalent, substitute areas or facilities for use by the Trustees, but without interruption of the Trustees' use of such Non-Line Areas or Facilities and at no cost to said Trustees.

(b) Provided, further, that during such time as the Non-Line Areas or Facilities are used exclusively by the Trustees, said Trustees shall, at their own expense, maintain and keep such non-line areas and facilities in as good order and repair as they are at the time of execution of this instrument, reasonable wear and tear excepted. Provided, further, at such time as such non-line areas and facilities shall be used by the Authority in conjunction with Trustees, the expenses relating to the non-line areas and facilities shall be borne jointly in accordance with their use as determined initially by that Agreement entitled: "OPERATING AGREEMENT" by and between the Trustees and the Authority, dated March 18, 1976, which OPERATING AGREEMENT is attached hereto and made a part hereof, and marked Exhibit "C", or as the same may be amended or extended, and thereafter by any written Agreement which shall be entered into between the

(c) Provided, further, the Trustees' right to continue to use, or to use in the future, "Non-Line Areas or Facilities" and the Trustees' obligation to maintain same, which obligation shall cease in the event that any of the following contingencies occur:

- (I) A voluntary surrender of such use of "Non-Line Areas or Facilities" by the Trustees as evidenced by notice to that effect given to the Authority, or
- (II) In the event the Authority shall
 - (i) have a bona fide use for such "Non-Line Areas or Facilities" in connection with its rail or transit commuter service, or
 - (ii) have a bona fide specific intention to sell or lease such "Non-Line Areas or Facilities", or
 - (iii) have a bona fide specific intention to make improvements or repairs to such "Non-Line Areas or Facilities", which repairs the Trustees have, in writing, declined to make or which the Trustees fail to make after reasonable opportunity and after receipt of notice concerning said improvements or repairs, provided that the Trustees are not then using, nor have any then reasonably foreseeable need to use, such "Non-Line Areas or Facilities".

In the event the Trustees do cease to use and maintain, as provided above, said Authority shall be entitled to a release of such rights, executed in recordable form, but said release shall be recorded only in the event of the conveyance or long-term lease of the "Non-Line Areas or Facilities" involved.

In the event such conveyance or long-term lease does not occur, as intended by the Authority, or such improvement or repair is not accomplished within six (6) months after the Authority's notice of its intention to make such improvement or repair has been given to the Trustees, then the release shall be returned to the Trustees and the Trustees' rights shall return to the status quo prior to notice of the Authority's intention.

(d) Trustees' right to continue to use machinery which is included in the "Non-Line Areas and Facilities" shall not include the right to move said machinery without prior approval of the Authority; provided, further, right to continue to use said machinery shall impose no obligation upon either the Authority or the Trustees to maintain, repair or replace said machinery.

2. Non-Line Facilities Within the Boston Engine Terminal Area.

Except as hereinafter provided, the right of the Authority to use and control "Non-Line Areas and Facilities" within the said Boston Engine Terminal Area shall be exclusive and the right of the Trustees to continue to use "Non-Line Areas and Facilities" shall not extend to or include those lands, tracks, buildings and facilities situated within the Boston Engine Terminal Area, except in the following instances:

- (a) The Trustees shall have the continuing right to use, in conjunction with the Authority, both through line and any necessary tracks which provide any access thereto within the Boston Engine Terminal Area, which through line tracks and access tracks are necessary to service facilities.
- (b) The Trustees shall have the right to use, in conjunction with the Authority, sanding, fueling and minor locomotive repair facilities, as they currently exist or may be suitably replaced or altered, within the Boston Engine Terminal Area.
- (c) Trustees shall have the right to use, in conjunction with the Authority, the existing diesel house, storage facilities, wheel truing machine, drop pit, and associated facilities in the "Track 40 Area", all of which are included in the area of Joint Use within the Boston Engine Terminal Area, as defined in Exhibit "B", together with space for a wrecker and snow plow, and the freight car repair facilities adjacent to said diesel house.

The Trustees' right to continue to use the existing diesel house, storage facilities, wheel truing machine, drop pit and associated facilities, as well as space for wrecker and snow plow and space adjacent to diesel house shall terminate upon the expiration of one year after receipt of written notice of such termination by the Authority; provided, however, that no such notice of termination shall be effective if it is

of two (2) years from the date hereof; provided, further, no such termination by the Authority shall give the Trustees any right to either substitute facilities or to economic damages.

(d) The Trustees shall pay to the Authority for such use as they may make of the facilities described in sub-paragraph (b) and (c) above, a sum equal to their share of the maintenance costs of such facilities as each party's use of such facilities relates to the total use of such facilities by the Trustees and the Authority.

(B) PERIMETER LINES

The Trustees shall have the continuing right and easement to use, in the conduct of their freight services, the following lines hereinafter referred to as "perimeter lines", which termination shall include related trackage, freight service buildings and signal facilities. Perimeter Lines are as follows:

WEST ROUTE MAIN LINE
NEW HAMPSHIRE/MASSACHUSETTS BORDER
 (Val. Sec. 2, Map 34, Sta. 1921+14.73)
TO LOWELL JUNCTION, MASSACHUSETTS
 (Val. Sec. 2, Map 17, Sta. 1037+00)

NEW HAMPSHIRE MAIN LINE
BLEACHERY, MASSACHUSETTS
 (Val. Sec. 13.1, Map 23, Sta. 1299+00)
TO NEW HAMPSHIRE/MASSACHUSETTS BORDER
 (Val. Sec. 15, Map 9, Sta. 1818+41.0)

FITCHBURG ROUTE MAIN LINE
WILLOWS (AYER), MASSACHUSETTS
 (Val. Sec. 36.1, Map 33, Sta. 1778+38.2)
TO FITCHBURG, MASSACHUSETTS
 (Val. Sec. 36.1, Map 49, Sta. 2619+12.44)

Provided further, the Trustees' right and easement to continue to use the perimeter lines shall last as long as Trustees have either current use, or any then reasonably foreseeable use, for the perimeter lines and the Authority shall not have the right to terminate the Trustees' use therein either by providing substitute facilities or the payment of economic damages or for any other reason.

Provided, further, that when the Trustees have no current, nor then reasonably foreseeable use, the said Trustees shall execute a release of their rights in said perimeter lines, which release shall run to the Authority. In the event that the Trustees and the Authority disagree as to what constitutes foreseeable use, as set forth aforesaid, then such dispute shall be resolved in accordance with the Section of this Instrument entitled: "Arbitration".

Provided, further, that, since there is no rail passenger service conducted on the perimeter lines, with the exception of the New Hampshire Main Line between Lowell and Bleachery, Massachusetts, and, as long as the Authority does not conduct passenger rail service on or over a perimeter line, then all aspects of operation, maintenance and repair of said perimeter lines shall be in the exclusive control and at the expense of the Trustees.

Provided, further, the Authority shall have the right to use said perimeter lines at any time, but upon the terms and conditions as set forth under the clause entitled: "Jointly Used Lines" hereinafter set forth, provided that such use by the Authority shall not interfere with the ability of freight trains operated by the Trustees to enter, pass through or work upon said perimeter

(C) OTHER LINES

All of the rail lines contained in the above described parcels, other than those described as "Perimeter Lines", shall be hereinafter referred to as "Other Lines." This term shall include all related trackage, freight service buildings and signal facilities, and the Trustees hereby reserve the continuing right and easement to use the "Other Lines" in the conduct of their freight service, subject, however, to the following provisions:

1. The following lines, comprising a portion of "Other Lines" shall be used exclusively by the Trustees and which "Other Lines" the Trustees specifically reserve unto themselves the right and easement to use in the conduct of their railroad freight service:

EASTERN ROUTE MAIN LINE
IPSWICH TO STATE LINE

SAUGUS BRANCH
EVERETT JCT. TO WEST LYNN

EAST BOSTON BRANCH
REVERE TO EAST BOSTON

SALEM AND DANVERS BRANCH
SALEM TO DANVERS
WEST PEABODY TO SO. MIDDLETON

WESTERN ROUTE MAIN LINE
WILMINGTON JCT. TO LOWELL JCT.

NEWBURYPORT BRANCH
WAKEFIELD JCT. TO TOPSFIELD

M AND L BRANCH
LAWRENCE TO STATE LINE

STONEHAM BRANCH
MONTVALE TO STONEHAM

BILLERICA BRANCH
NO. BILLERICA TO BILLERICA

FITCHBURG ROUTE MAIN LINE
SOUTH ACTON TO WILLOWS (AYER)

FREIGHT CUT OFF
SOMERVILLE JCT. TO HILL CROSSING

CENTRAL MASS. BRANCH
CLEMATIS BROOK TO MARLBORO

BERLIN BRANCH
GLEASON JCT. TO BERLIN

MAYNARD BRANCH
SOUTH ACTON TO MAYNARD

GREENVILLE BRANCH
AYER TO STATE LINE

WILMINGTON JUNCTION BRANCH
WILMINGTON TO WILMINGTON JUNCTION

These lines shall be referred to as "Freight Only Lines" unless said lines are converted to "Jointly Used Lines" by the Authority under its reserved right to determine from time to time, which of the line or lines used only for railroad freight purposes shall thenceforth, and until further notice from the Authority to the Trustees, be used for railroad freight purposes jointly with the railroad or transit passenger service of the Authority, as if said lines had been originally described and categorized as "Jointly Used Lines". This right of the Authority shall, in each instance, be exercised only upon at least thirty (30) days prior written notice, in writing, given by the Authority to the Trustees.

2. The following rail lines included in the Real Estate shall be used jointly for both railroad freight service conducted by the Trustees and railroad or transit passenger services conducted by the Authority or on the Authority's behalf:

EASTERN ROUTE MAIN LINE
BOSTON TO IPSWICH

GLOUCESTER BRANCH
BEVERLY JCT. TO ROCKPORT

NEW HAMPSHIRE ROUTE MAIN LINE
BOSTON TO LOWELL

WOBURN BRANCH
WINCHESTER TO WOBURN

FITCHBURG ROUTE MAIN LINE
BOSTON TO SO. ACTON

LEXINGTON BRANCH
W. CAMBRIDGE TO BEDFORD

(D) CONTROL AND MAINTENANCE OF ON-LINE EASEMENT PROPERTIES

1. Freight Only Lines

Trustees shall have sole operating and maintenance control over all "Freight Only" rights of way and related on-line facilities, including but not limited to tracks, track materials, appurtenances, buildings, structures and railroad equipment as long, in each instance, as such rights of way are not being used in Authority's passenger operations. The Trustees will, at their cost and expense, maintain the same in proper and safe condition for the freight use to which they are put, in each instance, and repair, replace and renew the same when and as it appears to be reasonably necessary and desirable to do so.

2. Jointly Used Lines

(a) Control.

Authority shall have the control over the use, scheduling of passenger trains and operation of "Jointly Used Lines" but may, from time to time, under agreement with the Trustees delegate the actual day to day operating control, dispatching and scheduling to Sellers. In the exercise of its control over

the Jointly Used Lines, Authority will make all reasonable efforts to expedite the movement of freight trains, including expediting repairs to lines and the removal of obstructions and scheduling regular maintenance and repair programs at hours which will not unreasonably interfere with such movement.

(b) Maintenance of Jointly Used Lines.

The party to whose standards a given line is being maintained, as hereinbelow provided, shall herein be referred to as the "Maintaining Party". The Authority shall be considered to be the "Maintaining Party" of any Jointly Used Line being maintained to Authority's standards notwithstanding the fact that actual maintenance may be performed by Trustees under contract with Authority.

The "Maintaining Party" shall perform the maintenance work necessary or desirable to maintain the Jointly Used Lines and related on-line facilities in a proper and safe condition and repair, replace and renew the same when and as it appears necessary and desirable to do so in order to maintain them in a proper and safe condition in accordance with applicable Federal and state standards and regulations. Such maintenance shall be in compliance with standards to be set from time to time by the Authority as evidenced by a written notice given by the Authority to the Trustees setting forth objective criteria including the applicable F.R.A. standard, except that if the Trustees desire to maintain a Jointly Used Line and related on-line facilities in compliance with standards that are higher than those so set by the Authority, they may do so upon giving similar written notice to the Authority and thereafter, until the giving of further

notice which may be given by either party reestablishing the Authority's standard as the governing standard of maintenance, such line and related on-line facilities shall be maintained to Trustees' standards. From the date hereof, and until further notice, the following lines shall be maintained to the Authority's standards: Eastern Route Main Line, Boston to Ipswich; Gloucester Branch, Beverly Junction to Rockport; New Hampshire Route Main Line, Boston to Lowell; Woburn Branch, Winchester to Woburn; Fitchburg Route Main Line, Boston to South Acton.

(c) Cost of Maintenance of Jointly Used Lines.

All maintenance costs and expenses relating to the Jointly Used Lines shall be borne in the first instance by the "Maintaining Party". The other party, hereinafter referred to as the "Contributing Party", shall pay to the Maintaining Party an amount determined according to the formula contained in subparagraph (d) below toward the maintenance costs and expenses borne by the Maintaining Party during such calendar year. Such payments shall be made, on account, quarterly, according to reasonable estimates and there shall be an adjustment annually, within 90 days following the close of each year.

The Maintaining Party shall expend, in each calendar year subsequent to the year 1976, in connection with the maintenance of all Jointly Used Lines, not less than the amount of the Contributing Party's contribution to the maintenance costs and expenses relating to Jointly Used Lines for the prior year.

(d) Calculation of Contribution to Maintenance Costs.

(i) Signals and Crossing Protection Devices.

To calculate the Contributing Party's obligation to contribute toward the costs of installing, maintaining,

repairing and operating signals and grade crossing protection devices on Jointly Used Lines, the Trustees' average systemwide signalling and grade crossing protection cost per train mile on signalled Main Track Lines which are under the operating and maintenance control of the Trustees will be calculated for each calendar year, using relevant ICC Accounts, as shown on Exhibit D annexed hereto. The average cost per train mile thus obtained shall be multiplied by the number of train miles run by or for the account of the contributing party in such year over Jointly Used Lines.

(ii) Other Line Maintenance Expenses.

For all other line maintenance expenses (including, without limitation, the costs of installing, repairing and maintaining tracks, ties, ballast, embankments, abutments, bridges and other right-of-way structures) on Jointly Used Lines, the Trustees' average system-wide cost per gross ton mile on all Main Track lines which are under the operating and maintenance control of the Trustees will be calculated for each calendar year using relevant ICC Accounts maintained in accordance with the procedures existing at the date of this instrument, as shown on Exhibit E annexed hereto, and the share of such costs incurred with respect to Jointly Used Lines which shall be payable by the Contributing Party will be equal to the number of gross ton miles run by or for the account of such party in that year over such Jointly Used Lines multiplied by such average cost per gross ton mile.

(E) OTHER PROVISIONS RELATING TO FREIGHT EASEMENT.

1. Rights of Parties to Make Alterations

~~In the event that the Authority shall alter or increase~~
(which terms shall not include termination or diminution of
passenger service) ~~its use of~~ Freight Only Lines, ~~Jointly Used~~
Lines or Perimeter Lines ~~and related facilities,~~ to the extent
that, or in such a manner that, Authority's use unduly inter-
feres with the ability of the Trustees to provide freight ser-
vice at present or reasonably foreseeable levels of volume and
activity as presently conducted, Authority shall provide substi-
tute or additional facilities (on the same right of way in the
case of Perimeter Lines) ~~sufficient to permit such freight service,~~
~~or,~~ with respect to lines other than Perimeter Lines, ~~pay damages~~
~~as appropriate under the circumstances.~~ In implementation and
not in limitation of the foregoing sentence, it is further agreed
that:

(a) The Authority shall, at all times, make available
to the Trustees rail access to all of their present freight ser-
vice locations, so long as, in each instance, there are shippers
or receivers actively using, or reasonably in prospect to use,
such locations.

(b) Authority shall not move any of Trustees' public
delivery tracks unless it moves them (in compliance with all ap-
plicable laws and regulations) to new locations nearby their pre-
sent locations, with substantially equivalent work space and high-
way access, at no cost to Trustees. Any such new location shall
be suitably connected with either the same line as the original
connection or a line approved by the Trustees, whose approval
shall not be unreasonably withheld.

(c) The Trustees, at their expense, may install switches and sidings including any associated signalling to serve new locations. Such expense may include grade separation from rapid transit lines, if such separation is deemed necessary by the Authority. All such installations shall be subject to the approval of the Authority, whose approval shall not be unreasonably withheld.

(d) In the event of an alteration in the existing trackage or yard facilities desired or required by Authority, Authority will provide, at no cost to Trustees, such substitute trackage or yard facilities as may be necessary to move freight trains between points now served by Trustees on alignments capable of elapsed times no greater than the average time in which Sellers can, as of the date hereof, move freight trains between such points at speeds authorized, as of the date hereof, using equivalent motive power. In the event that operations of the Authority require signalling on certain trackage or in certain yards more extensive than that presently existing, Authority shall equip such trackage, yard facilities and necessary freight rolling stock with all reasonably necessary signalling devices.

(e) Authority shall provide and maintain clearance and load carrying capacity on each Jointly Used Line or Perimeter Line under the control of the Authority at least equal to the physical minimum existing thereon as of the date of this Agreement. In the event of any new construction performed or permitted by the Authority, there will be erected no structure nor will any invasion of the air space over such line be permitted which will in any way obstruct the operation of trains thereon with equipment or cargoes extending to a height above the top of the

rail up to the minimum clearance on such line existing on the date of this Agreement; nor will Authority erect or permit to be erected any obstruction within 8 feet 6 inches of the centerline of straight track or within 8 feet 6 inches plus 1 inch for each degree of curvature of curved track. The Authority shall not install any new track nor relocate any existing track less than 13 feet (not less than 14 feet wherever reasonably feasible) centerline to centerline from any other track if either track is being used by the Trustees in their freight service. Where existing track is being reconstructed or former trackage is being reinstalled, Authority shall have the option of reconstructing or reinstalling such track to clearances and alignments no more restrictive than those existing as of March 18, 1976. For the purposes hereof the minimum clearance on any line other than a Perimeter Line existing as of March 18, 1976 shall be the actual minimum clearance, or 22 feet above the top of the rail, whichever is less, and on a Perimeter Line shall be 22 feet above the rail.

(f) Trustees may, at their own expense, alter or improve any part of the Real Estate other than the areas of Authority's exclusive use referred to in (A) 2., and provided for in (E) 2.; provided that such alteration does not detract from the value of the Real Estate or materially interfere with Authority's then current or then reasonably foreseeable use of the Real Estate. The plans and specifications for each such alteration or improvement involving an expenditure of more than \$100,000 shall be subject to Authority's written approval prior to the commencement of construction.

The preceding sentence shall not have the effect of limiting the Trustees' duties to obtain prior approval of

plans for switches and sidetracks pursuant to Section 1 (c) above.

2. Termination of Trustees' Right to Use

The Authority may give written notice to the Trustees of its desire to use exclusively a line or lines of railroad property other than Perimeter Lines. Upon receipt of such notice, the Trustees shall immediately prepare and file all such applications for governmental approval as may then be necessary as a prior condition to the Trustees' abandonment of service on such line, diligently prosecute the same and, when such approval becomes final, cease operation on such line or lines. Authority shall reimburse Trustees for all reasonable expenses including attorneys' fees incurred in connection with the obtaining of such approvals. In the event that compliance with the obligations contained in this subparagraph causes Trustees to discontinue service to a revenue-producing customer or customers, Authority shall pay to Trustees, no later than seven days prior to actual discontinuance of service over any line so abandoned economic damages determined as follows:

- (a) Determine Trustees' total railway operating revenue from traffic originated by or destined to such customer or customers to whom service has been or will be discontinued (including only Trustees' share of the total revenues derived from the movement) during the last full calendar year prior to the notice from the Authority with respect to the line serving such customer called for by the first sentence of this subsection
- 2.

(b) Determine the Trustees' avoidable costs of originating or terminating such movement by adding the following elements as they relate to the subject traffic;

i. Costs relating to Trustees' use of line or a portion of a line to be terminated:

Maintenance of way (Trustees' share);
Maintenance of equipment (Trustees' share);
Transportation (Trustees' share);
Car Hire or Car Cost (Trustees' share);
Other costs, if applicable (Trustees' share);

ii. Costs relating to use of Trustees' lines other than the line to be terminated:

Beyond line costs, according to "Fifty percent (50%) formula". (The formula multiplies the line's pro rata mileage (ratio of number of miles travelled on the line to total number of miles travelled on the system) by the gross revenue generated, subtracts the product (gross revenue credited to the line) from the total gross revenue, and takes 50 percent (50%) of the resulting sum as the beyond line cost).

(c) Subtract total of (b) from (a) and multiply the result by ten.

When event freight service is eliminated over a three-year period by action of the Authority, in addition to the economic damages relating to the discontinuance of service to revenue-producing customers, the Authority will provide an alternate route with the clearances at least equal to those provided for in paragraph (E) 1. (e) above, with load carrying capacity equal to those existing on the eliminated line, at no cost to Trustees and without interruption in Trustees' ability to render their through service efficiently.

Once freight service has been legally abandoned, pursuant to a final order or orders of the Interstate Commerce Commission and any other Federal or State regulatory bodies having, at the time, jurisdiction over the matter of continuance of rail freight service on such line, the easement hereby provided for shall terminate with respect to such line and the Trustees shall have no right to reinstate rail freight service thereon without prior written approval of the Authority, regardless of whether such abandonment was at the request of the Authority or whether it was upon the Trustees' own motion.

3. Access.

With respect to the properties retained by the Trustees lying between Somerville Avenue, Cambridge and the Real Estate as shown on Exhibit "B", the Trustees shall have the right to grant to parties to whom they may convey or lease any of said retained properties, the right, in common with the Authority and others, to use the existing Private Way defined on Exhibit "B" for egress and ingress on foot or in vehicles.

Trustees shall by their deed retain an easement to construct an access road up to four (4) lanes in width through the area lying between Washington Street, Somerville and the High Line, so-called, defined as the "Yard 8 Access" on Exhibit "B", for the purpose of providing vehicular and pedestrian ingress and egress between Yard 8 and said Washington Street. Said road shall be constructed so as to provide grade separation from the High Line until such time as Authority shall operate a rail connection between the New Hampshire Route Main Line and the Fitchburg Route Main Line or any other route alternative to the High Line. At any time thereafter Trustees shall have the option to

require the Authority to convey to the Trustees the whole or any part of that portion of the High Line, defined as the "High Line Segment: on Exhibit "B", without payment of additional consideration; and thereafter the said access road may be constructed at grade. The layout of the said access road shall not interfere with the functioning of Tower X or the New Hampshire Route Main Line, as then located or laid out, and shall be subject to the Authority's prior approval, which shall not be unreasonably withheld.

4. Right to Provide Freight Service to be Exclusive.

The Trustees' right to continue to provide freight service as hereinabove provided shall be exclusive in that no other carrier shall have the right to provide freight service over and upon any of the lines to be conveyed hereunder, except as follows:

(a) To the extent that the Trustees have entered into joint operating agreements granting rights to operate over said lines to other carriers, the operation or operations of such other carriers, pursuant to such arrangements shall be treated as operations of the Trustees for all purposes hereunder. No such joint operating agreements with other carriers shall be entered into after the date hereof without the prior written approval of the Authority (which shall not be unreasonably withheld) provided that no such approval of the Authority shall be necessary for runthrough agreements where trains are operated by the Trustees' crews.

(b) The Authority shall, after the date hereof, have the right to transport baggage and its own material over

and on such lines and such transportation shall not be considered freight service.

(F) GENERAL PRINCIPAL OF COST ALLOCATION

It is the general intention of the parties hereto that, except as more specifically provided hereinabove or in the separate agreement entitled "Operating Agreement", dated March 18, 1976, (Exhibit "C") or any extension or amendment thereof, all direct costs and expenses resulting solely from or attributable solely to freight operations will be borne solely by Trustees and all direct costs and expenses resulting from passenger operations will be borne solely by Authority. Overhead or joint expenses will be apportioned between the Trustees and Authority on the basis of relative use of the facility or department in question. The use of a facility or department by any person claiming by, through or under either party hereto shall, for the purposes of cost allocation, be deemed to be such party's use. In the event of a fundamental change in the underlying concepts upon which provisions hereof relating to allocation of costs and expenses are premised (such as might be caused by inclusion of Trustees in Conrail, a federal or state consolidated facilities program or other government ownership of facilities) by which any specific provisions for the allocation of costs and expenses are rendered inequitable, such provisions shall, at the request of either Authority or Trustees, be renegotiated in good faith so as to provide for an equitable allocation under the changed conditions.

ELECTRICAL AND WATER EASEMENTS

A. ELECTRICAL EASEMENTS.

The Trustees hereby reserve to themselves, their successors and assigns, the right and easement for the location of electrical lines and equipment in that area of the Real Estate defined on Exhibit F annexed hereto entitled: Trustees' Electrical System - Boston Yards, December 31, 1975"; which reservation shall include the right to flow electricity through said electrical system to serve the Trustees' freight easement and for any other use, now or in the future. Said reserved easement shall also include right to install, inspect and maintain, repair, operate or remove electrical lines and equipment within the said freight easement area and the right to use said reserved area and electrical system in conjunction with the sale of electricity by the Trustees to other parties, including but not limited to the Authority and to new customers, insofar as the Trustees lawfully may, provided, however, the Trustees' exercise of such rights shall not substantially interfere with the operations or the electrical needs of the Authority. Such sale of electricity by the Trustees to other parties shall be with the right to profit therefrom without any obligation of the Trustees, either to account to or to pay to the Authority, any portion of the revenues arising therefrom or any other consideration. All of the electrical lines and equipment located within said area as of the date hereof, and all such lines and equipment hereafter installed therein by the Trustees, shall be and remain the sole property of the Trustees and the existence of this easement shall in no way be considered as establishing either a joint facility or a joint

enterprise with the Authority. The Trustees shall also have the right to assign their reserved rights herein to either the Cambridge Electric Company or any other comparable public utility at any time within ten (10) years from the date hereof.

Provided further, that with respect to the Boston Engine Terminal Area, defined on Exhibit "B", Trustees hereby reserve to themselves, their successors and assigns, the right and easement to use and maintain the electrical lines and facilities existing therein as of the date hereof, as long as such use and maintenance does not interfere with Authority's operations or use of the Real Estate, together with the right and easement to install and maintain electrical service to Yard 8 and those properties retained by Trustees lying between Somerville Avenue and the Real Estate all as defined on said Exhibit "B", provided, however, that any such installation and maintenance shall not substantially interfere with Authority's operations or use of the Real Estate and, provided further, that such installation and maintenance shall be subject to the prior approval of the Authority, which shall not be unreasonably withheld.

In the event that Authority alters the electrical lines or facilities existing as of the date hereof within said Boston Engine Terminal Area, the Trustees shall have the right to make an electrical connection at Trustees' cost to either a public utility or a source of the Authority, whichever shall be more economical for the Trustees, provided that such connection shall not substantially interfere with Authority's operations or use of the Real Estate.

B. ELECTRICAL COVENANT.

The Trustees further covenant and agree with the Authority that insofar as they lawfully may, Trustees shall supply electricity to Authority at the appropriate Cambridge Electric rate as long as Trustees retain the easement reserved in Paragraph A above.

C. WATER EASEMENT

The Trustees hereby reserve unto themselves, their successors and assigns, the right and easement to take water from the 12-inch main through an 8-inch connection at point "A" and through a 12-inch connection at point "B" as shown on Exhibit G annexed hereto entitled "Sellers' Water System - Boston Yards, December 31, 1975"; which reserved easement shall include the reserved right to flow water through said connections to serve the freight easement and for any other use, now or in the future, at not less than the rate currently maintained and without unreasonable interruption of flowage at any time. Included in the reserved easement is the right to inspect and maintain, repair, operate, renew or remove the said connections and said line between points "A" and "C" in a manner which shall not substantially interfere with Authority's operations or use of the Real Estate. The Trustees shall be solely responsible for the inspection, maintenance and repair of said line between points "A" and "C", and Authority shall not be obligated to contribute to the cost thereof. Subject to the terms in the final paragraph of this Section C, the Authority will be solely responsible for the inspection, maintenance and repair of the lines between point "C" and points "D" and "E", but subject to the Trustees' obligations to contribute to the cost thereof as provided hereafter.

The quantity of water taken at point "A" will be estimated and the quantity of water taken at point "B" will be and shall be metered, except for water used for fire protection, but if requested by the Authority, the Trustees shall install a water meter at point "A", at the expense of the Authority (or, if desired by the Trustees, they may install such meter at their own expense) to give an accurate measure of the usage of water through that connection.

The water line between points "D" and "F" as shown on Exhibit G shall continue to be owned by the Trustees, provided, however, the Trustees hereby reserve to themselves, their successors and assigns, the right to inspect, maintain and repair the said line on the Real Estate to the extent that it is located thereon. The Trustees shall be solely responsible for the inspection, maintenance and repair of said line but the Authority shall be obligated to contribute to the cost thereof as provided below. The Authority shall have the right, subject to the rights of the Trustees and all those parties who have the right (claiming by, through or under the Trustees or otherwise) to take water from the said line through the connections located between points "D" and "F", to receive water through the said line at point "D" for any use, at not less than the rate currently maintained and without unreasonable interruption of flowage at any time.

In each calendar year the Trustees shall be responsible for so much of the cost of inspecting, maintaining and repairing of all those portions of the water line shown on Exhibit G lying between points "C" and "F" and "C" and "E" as shall be proportional

to the fraction of which the denominator is the total volume of water passing through points "E" and "F" in said year and the numerator is the sum of the volumes of water passing through the connections at points "A" and "B", and through all connections lying between points "D" and "F", during said year. The Authority shall be responsible for the remainder of such cost, subject to Trustees' duty to contribute thereto in accordance with Provision contained in Paragraph (A)2(d) of the Reserved Freight Easement.

Provided further, the Authority shall have the right to discontinue the aforesaid reserved right of the Trustees to take water at points "A" and "B" at any time upon not less than ninety (90) days' prior written notice, provided that in such event the Authority shall grant to the Trustees, without further consideration, upon written request therefor made to the Authority by the Trustees, such easement or other reasonable rights as may be necessary to enable the Trustees to install and maintain, at their expense, a water main and connections adequate to supply the Trustees' needs for water for its freight service as well as the needs of any customers of the Trustees who are then receiving water from the connections at points "A" and/or "B", which easement and connection shall be so located as to connect points "A" and "B" with either a public water line or a water line of the Authority, whichever shall be the most economical for the Trustees, provided that such connection shall not substantially interfere with the Authority's operations or use of the Real Estate.

D. WATER COVENANTS

The Authority covenants and agrees, for itself, its successors and assigns, to pay the public supplier for all of the water taken at points "E" and "F" as determined by the meters located at said points. The Trustees covenant and agree to pay Authority for the estimated water taken at point "A" and for the metered water taken at point "B" and at all connections lying between points "D" and "F" at the prevailing water rates of the City of Somerville in existence from time to time.

LABOR PROTECTION.

The Authority covenants and agrees, for itself, its successors and assigns, to indemnify and exonerate the Trustees to the extent provided hereinbelow, against the cost of (and be responsible for) obligations, liability, or claims due to provisions of Trustees' labor agreements, including labor protective conditions of such agreements, or of labor protective conditions imposed by regulatory agencies or applicable laws. The Authority's obligation to indemnify and exonerate shall arise when employees or positions are adversely affected as a result of changes in the passenger service (including termination thereof), passenger facilities, or both, or by reason of the future contracting out or other removal or termination of work previously, now, or hereafter performed by the Trustees' employees to the extent that such change, termination or contracting out is the result of an action taken by, or with the consent of, the Authority.

It is further understood and agreed that an action taken by the Authority may have effects remote from the initial

position or positions affected by such action as a result of successive seniority displacements, and it is the intention of the parties hereto that the indemnification and exoneration herein provided shall extend to such more remote effects.

If the initiating action affects a position or positions solely engaged in the "Service", (as "service" is defined in the Operating Agreement dated March 18, 1976, Exhibit "C", as amended and extended) the Authority will pay all such costs. If the initiating action affects a position or positions engaged in both passenger service and freight service, the Authority will pay the cost to the extent that it is solely traceable to the action taken by, or with the consent of, the Authority. In the event that in any instance the applicability of the immediately preceding sentence produces a result which is manifestly unfair to either party, the sharing of such termination cost will be renegotiated in good faith so as to provide for an equitable allocation thereof.

It is further understood and agreed that the Trustees shall use their best efforts to mitigate liability to such employees and that the Authority shall be permitted to participate, within reason, in such efforts.

The Authority will pay to the Trustees such funds as may be required to satisfy Authority's obligation to indemnify and exonerate the Trustees hereunder, concurrently with the delivery of evidence of payment by the Trustees. Trustees agree to keep Authority currently informed, to the extent that the Trustees can reasonably do so, of all aspects of local and national labor negotiations which might reasonably be expected to expand or broaden the scope of the protective provisions (i.e., provisions relating to termination rights) of labor agreements.

ACCIDENT RESPONSIBILITY

In the event that the Trustees shall cease to conduct passenger service for the account of the Authority, pursuant to the Operating Agreement or a successor operating agreement, the following terms and conditions shall immediately become effective with respect to events occurring after such cessation:

A. In the event that harm, damage or injury (including death) is caused by the negligence or other act for which one of the parties hereto is legally responsible without any contributory negligence or legal responsibility on the part of the other party hereto (except in circumstances described in C below) and said harm, damage or injury (including death) occurs to the property of, or in the custody of, one of the parties hereto, to property used jointly by the parties, to the employees, passengers or licensees of either party, to common agents or employees or to third parties, the party which caused such harm, damage or injury (including death) shall bear all of the cost, expense and liability arising therefrom and shall save harmless the other party from and against any loss, cost or expense connected therewith. (This Section is not intended to confer any rights upon third parties.)

B. In the event that harm, damage or injury (including death) is caused solely by an act or omission for which a third party is legally responsible, to the property of, or in the custody of, one of the parties hereto, or to the employees, passengers or licensees of one of the parties hereto, that party shall assume all loss, cost and expense arising therefrom, without contribution from the other party. (This Section is not intended to relieve any third party from any liability.)

C. In the event that harm, damage or injury (including death) is caused by the condition of jointly used lines, facilities or equipment to the property of, or in the custody of, one of the parties hereto, or to the employees, passengers or licensees of one of the parties hereto, that party shall assume all loss, cost and expense arising therefrom, without contribution from the other party, except that damage to such jointly used lines, facilities or equipment shall be repaired by the Maintaining Party subject to contribution from the other party as provided in Paragraph F (General Principles of Cost Allocation) SUPRA.

D. In the event that harm, damage or injury (including death) is caused by an act or omission for which both of the parties hereto are legally responsible and such harm, damage or injury (including death) occurs to the property of, or in the custody of, one or both of the parties hereto, or to the employees, passengers or licensees of one or both of the parties, each party shall bear all of the costs, expenses and liability arising from such harm caused to its own property, to property in its custody or to its employees, passengers or licensees. Any other loss, cost or expense so caused, including expense of repairing jointly used lines, facilities or equipment shall be divided equally between the parties.

E. In the event that harm, damage or injury (including death) is caused by an act or omission for which at least one of the parties hereto is legally responsible but in circumstances

where legal responsibility cannot be attributed to one party or the other, nor to both parties jointly, because of lack of evidence or a conflict in evidence which cannot be resolved, by litigation or otherwise, and said harm, damage or injury (including death) occurs to the property of, or in the custody of, one or both of the parties hereto, or to the employees, passengers or licensees of one or both of the parties, each party shall bear all of the costs, expenses and liability arising from such harm caused to its own property, to property in its custody or to its employees, passengers or licensees. Any other loss, cost or expense so caused, including expense of repairing jointly used lines, facilities or equipment, shall be divided equally between the parties.

F. In the event of any derailment or other accident occurring upon the Real Estate wherein cars, motive power or other equipment of either party shall fall or encroach upon tracks, bridges or other property being used by the other party so that said property is blocked or normal operation thereover is impeded, the party whose property has so fallen or encroached shall expeditiously remove the same and cause all necessary repairs to be made and all tracks and appurtenances restored, at its expense, as may be required for the continued operation of the other party's railroad activities.

Both parties agree to cooperate with each other to expedite the repair and removal of such cars, motive power and other equipment and will make all reasonable efforts to restore the affected line or facility to service.

ARBITRATIONA. Selection of Arbitrators.

If, at any time, a controversy shall arise which is referable to arbitration according to subsection C of this Arbitration Section, the parties hereto agree to engage forthwith in good faith discussions attempting to resolve such controversy. If the parties so agree, they may involve a disinterested person experienced in railroad operations to render his objective advice and opinions, which shall be advisory only and not binding unless the parties agree in writing to be bound by his judgment in a particular instance. In the event such good faith discussions do not resolve such controversy within thirty (30) calendar days, or such other time as the parties may agree in writing, the parties shall submit such difference or dispute to disinterested arbitrators, one of whom shall be appointed by the Trustees and the other of whom shall be appointed by the Authority; and if the two arbitrators so chosen cannot agree, they shall select a third arbitrator, and their decision, or that of a majority of them, shall be final and conclusive between the parties hereto, except that if either party claims that the arbitrator's decision is based upon an error of law, it may, within thirty (30) days after receipt of such decision, institute an action at law to determine such legal issue. In any such action at law, the parties shall stipulate the facts to be as set forth by the arbitrators. In case either of said parties shall fail or refuse to appoint an arbitrator as aforesaid, for the period of thirty (30) calendar days after written notice given by the other party to make such appointment,

then and in that event the arbitrator appointed by the party not in default shall appoint a like competent and disinterested arbitrator for the defaulting party, and the said two arbitrators, so appointed, shall select a third arbitrator, and the three so chosen shall hear and decide such difference or dispute, and their decision, or that of a majority of them, shall be final and conclusive upon the parties hereto, except as above provided with respect to an error of law. In the event that the said arbitrators shall be unable to agree upon a third arbitrator within thirty (30) days after the appointment of the second arbitrator, such third arbitrator shall be appointed, upon the application of either party hereto, upon reasonable notice to the other party, by a Judge of the Superior Court for the Commonwealth of Massachusetts. Any application to such Judge as aforesaid shall be made and heard in the manner provided by law for the making and hearing of motions in said Court. If said Court declines to make such appointment, it shall be made by the President of the Association of American Railroads. If any arbitrator shall decline or fail to act, the party or person by whom he was chosen or appointed, as the case may be, shall appoint another to act in his place.

B. Resolution.

During the pendency of such arbitration proceedings, the business, operations to be conducted, and physical plant to be used under this Agreement, to the extent that they are the subject matter of such controversy, shall continue to be transacted and used in the manner and form existing prior to

the arising of such controversy, unless the arbitrators make a preliminary ruling to the contrary.

C. Matters Referable to Arbitration.

All controversies as to the construction of terms of this Agreement which are to survive the Closing Date and any practical questions growing out of the application of the same to, circumstances, except for claims for monetary damages in excess of \$100,000, are referable to arbitration as provided in this Arbitration section.

D. Cost of Arbitration.

Each party hereto shall bear the costs and expenses incurred by it in connection with such arbitration and both parties shall share equally the costs and expenses attributable to the services of the disinterested person or arbitrators.

The Trustees and the Authority hereby covenant and agree that neither Robert W. Meserve nor Benjamin H. Lacy, nor any of their successors as Trustees of the Property of the Boston and Maine Corporation, Debtor, in the Proceedings for the Reorganization of a Railroad, hereinabove referred to, shall be personally liable for the performance or non-performance of any of the Trustees' obligations hereunder, and that upon the transfer of the freight business and remaining assets of the Trustees to the Reorganized Debtor, or any other party, pursuant to a plan of reorganization confirmed in said proceedings, or otherwise transferred the Authority and its successors and assigns, will thereafter look solely to such transferee and its successors and assigns for the performance of all of the Trustees' obligations hereunder.

Upon the said transfer of freight business and remaining assets, whether to a successor Trustee or Trustees, to the Reorganized Debtor, or to any other party or parties, all of the rights and easements granted or reserved to the Trustees hereby will inure to the benefit of any and all such transferees, whether direct or remote, and their respective successors and assigns, subject, in each instance, to the assumption by the transferee of all obligations of the Trustees hereunder related to the particular rights and easements transferred to such transferee.

Any voluntary transfer by the Trustees of the rights and easements reserved or granted to the Trustees hereby to a successor Trustee or Trustees, to the Reorganized Debtor or to any other party that succeeds to substantially all of such rights and easements, shall require as a condition thereof that the transferee accept and assume all of the rights and obligations of the Trustees as Operator under any operating contract between the Trustees and the Authority then in effect.

This Indenture is executed in seven (7) counterparts for the purpose of recording in seven (7) separate Registries of Deeds where the real estate lies. Each counterpart contains all of the provisions and attachments contained in this counterpart. There is affixed to the counterpart to be recorded in Suffolk County Registry of Deeds Documentary Stamps in the amount of \$83,331.72, and is available for inspection at that Registry.

The covenants contained in this Indenture are to be binding upon the parties hereto and their successors and assigns forever.

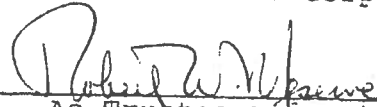
WHEREAS, on November 30, 1976, the said U. S. District

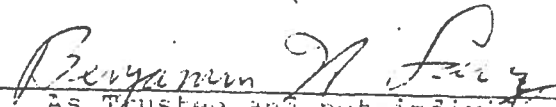
Docket No. 70-250-M) authorized the said Trustees to convey this real estate to the Massachusetts Bay Transportation Authority, this conveyance is hereby made free from liens pursuant to said Order.

TO HAVE AND TO HOLD the above described premises, with all the privileges and appurtenances thereto belonging to the said MASSACHUSETTS BAY TRANSPORTATION AUTHORITY, its successors and assigns, to their own use and behoof forever.

IN WITNESS WHEREOF the said ROBERT W. MESERVE and BENJAMIN H. LACY, as Trustees of the Property of Boston and Maine Corporation, Debtor, and not individually, have hereunto set their hands and seals, this 24th day of December, 1976.

ROBERT W. MESERVE and BENJAMIN H. LACY, as Trustees of the Property of Boston and Maine Corporation, Debtor


AS Trustee and not individually

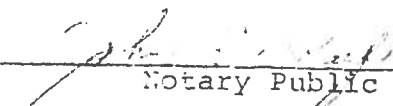

AS Trustee and not individually

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss

Boston, , 1976

Then personally appeared the above-named Robert W. Meserve, as Trustee of the Boston and Maine Corporation, Debtor, and acknowledged the foregoing instrument to be the free act and deed of said Trustee, before me


Notary Public

My Commission expires: 

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss

Boston, 1976

Then personally appeared the above-named Benjamin H. Lacy, as Trustee of the Boston and Maine Corporation, Debtor, and acknowledged the foregoing instrument to be the free act and deed of said Trustee, before me

Notary Public

My Commission expires: 7-1-1977

IN WITNESS WHEREOF the said MASSACHUSETTS BAY TRANSPORTATION AUTHORITY, by Robert R. Kiley, Chairman, has set its hand and seal, this day of December, 1976.

APPROVED AS TO FORM:

MASSACHUSETTS BAY TRANSPORTATION
AUTHORITY

General Counsel
JJC

Robert R. Kiley
Chairman

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss

Boston, 1976

Then personally appeared the above named Robert R. Kiley, as Chairman of the Massachusetts Bay Transportation Authority, and acknowledged the foregoing instrument to be the free act and deed of said Chairman, before me

Notary Public

My Commission expires: 7-1-1977

REDACTED - TO BE PLACED ON PUBLIC FILE

MASSACHUSETTS DOCUMENT STAMPS - Page 1

REDACTED - TO BE PLACED ON PUBLIC FILE

MASSACHUSETTS DOCUMENT STAMPS - Page 3

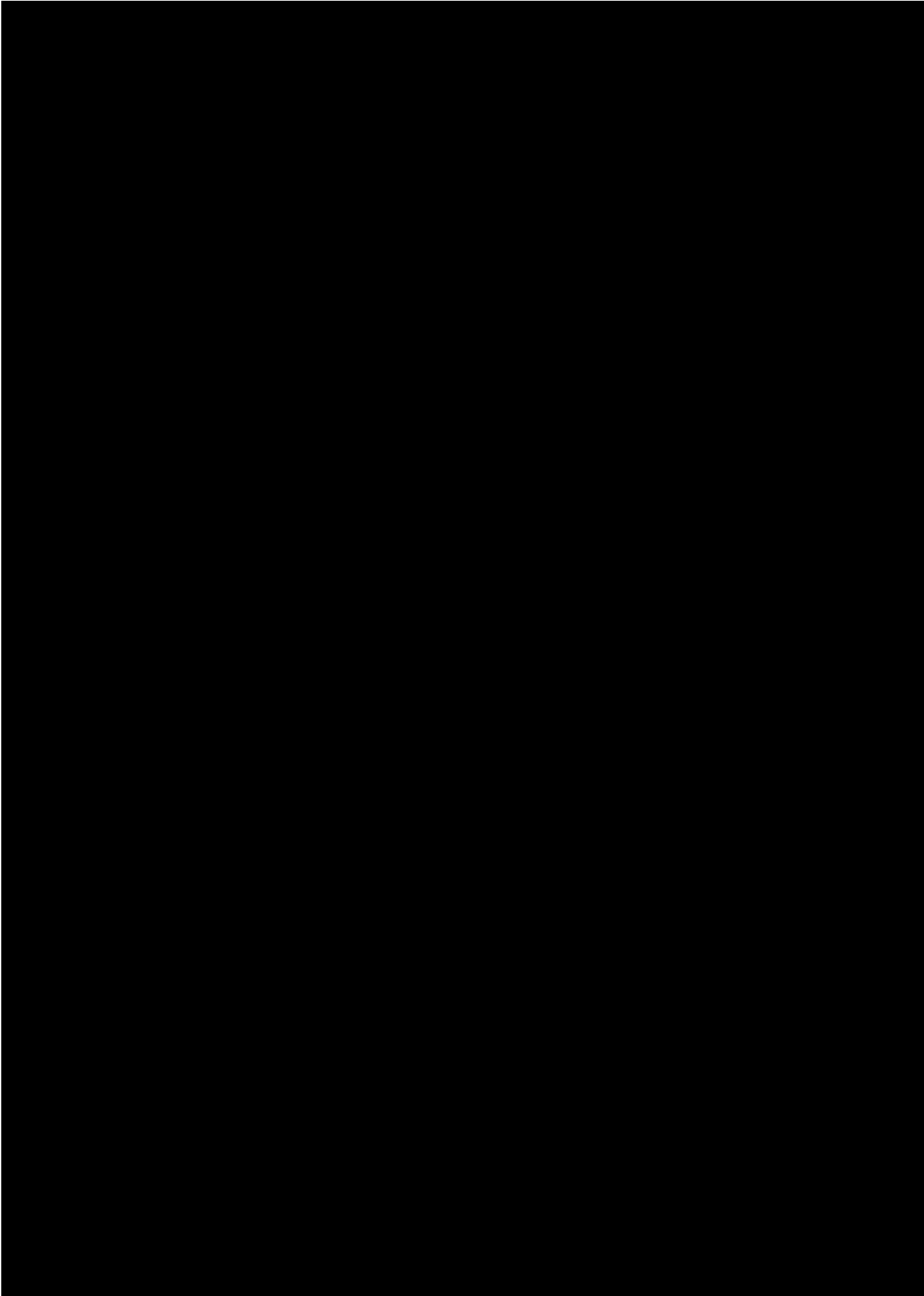
LIST OF EXHIBITS

- Exhibit A(1-5) Plans of five (5) bridges excluded from conveyance.
- Exhibit B Plan of Boston Engine Terminal Area
- Exhibit C Operating Agreement dated March 18, 1976
- Exhibit D Signalling and Grade Crossing Expense Formula
- Exhibit E Line Maintenance Expense Formula
- Exhibit F Seller's Map of Electric System
- Exhibit G Seller's Map of Water System

ATTACHMENT 2

TO REPLY VERIFIED STATEMENT OF ANDY DALY

MEMORANDUM OF UNDERSTANDING
BY AND BETWEEN THE
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY
AND
BOSTON AND MAINE CORPORATION
AND
SPRINGFIELD TERMINAL RAILWAY COMPANY *Boston Maine*



ATTACHMENT 3

TO REPLY VERIFIED STATEMENT OF ANDY DALY

REDACTED - TO BE PLACED ON PUBLIC FILE



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EXECUTION VERSION

2011 TRACKAGE RIGHTS AGREEMENT

BY AND AMONG

THE MASSACHUSETTS BAY TRANSPORTATION AUTHORITY ✓

AND

BOSTON AND MAINE CORPORATION ✓

AND

SPRINGFIELD TERMINAL RAILWAY COMPANY /

INTRODUCTION AND RECITALS

The Massachusetts Bay Transportation Authority (the "MBTA"), and the Boston and Maine Corporation, a Delaware corporation ("B&M") and Springfield Terminal Railway Company, a Vermont corporation ("STRC") (B&M and STRC, collectively, "PAR") enter into this 2011 Trackage Rights Agreement (the "Agreement") as of January 10, 2011 (the "Effective Date") in order to memorialize their mutual understanding with regard to certain rights to conduct passenger services on certain property currently owned and operated by B&M and STRC, and for the purpose of defining their respective rights and obligations with respect to the same.

WHEREAS, the MBTA is the owner of certain railroad lines (the "1976 Properties") pursuant to an Indenture dated December 24, 1976 from Robert W. Meserve and Benjamin H. Lacy, as trustees of the property of the Boston and Maine Corporation (the "1976 Deed");

WHEREAS, PAR is the holder of a retained freight easement described in the 1976 Deed pursuant to which PAR currently conducts its freight rail operations over portions of the 1976 Properties;

WHEREAS, B&M owns the fee interest in certain railroad lines described herein as the PAR Rail Properties which intersect the 1976 Properties and connect some portions of the 1976 Properties with other rail lines owned by the MBTA, and STRC is the tenant under a lease for the PAR Rail Properties;

WHEREAS, PAR desires to grant certain trackage rights and an option to purchase with respect to the PAR Rail Properties to the MBTA, and the MBTA wishes to acquire such trackage rights and option to purchase upon the terms and conditions set forth in this Agreement;

NOW, THEREFORE, the Parties agree as follows:

Deed Bk/Pg 13117-113

Peter [unclear]
6

SECTION I DEFINITIONS.

"Appropriate Statutory and Regulatory Authority" means 49 U.S.C. §10903, *et seq.* and 49 C.F.R., Part 1152 and the STB's interpretations thereof.

"Binding Price Notice" shall have the meaning set forth in Section 6.2(b)(1).

"Capacity Study" shall have the meaning set forth in Section 4.1.

"Commuter Rail Commencement Date" shall have the meaning set forth in Section 4.1.

"Commuter Rail Election" means the delivery of a Commuter Rail Election Notice by the MBTA to PAR and the commencement of MBTA Commuter Rail Services on such portion of the rail properties described in such Commuter Rail Election Notice.

"Commuter Rail Election Notice" shall have the meaning set forth in Section 4.1.

"Controlling Party" has the meaning set forth in Section 8.1(a).

"Direct Costs" means direct expenses incurred by the Controlling Party in performing any Force Account Work or by a Party in performing Enhanced Maintenance Services, without limitation, the cost of associated employee benefits, materials and contracted services, as described on Exhibit C, Direct Costs.

"Effective Date" shall have the meaning set forth in the recitals of this Agreement.

"Effective Interest Rate" means the lesser of (i) twelve percent (12%) per annum or (ii) the fluctuating rate per annum equal to the Prime Rate plus two percent (2.0%). "Prime Rate" means the Prime Rate as from time to time published in the Money Rates Section of *The Wall Street Journal*. The rate described in clause (ii) of this definition shall change on the date of each change in the Prime Rate, and if such change results in a change to the Effective Interest Rate applicable to any amount due under this agreement, the new Effective Interest Rate shall be applied as of such date.

"Enhanced Maintenance Services" shall mean any maintenance, inspections, equipment, renewal or the like that is required to meet the Enhanced Maintenance Standard, as well as maintenance and renewal services required for any Infrastructure Improvements and any Supplemental Infrastructure Improvements.

"Enhanced Maintenance Standard" shall mean, (1) in the case of the Level 1 and Level 2 Rail Properties, the increased level and type of maintenance, inspection, equipment and renewal that is required to provide passenger service on a previously freight-only segment of line, whether or not such passenger service results in a change to the FRA Classification of the line segment as shown on Exhibit D attached hereto, or (2) in the case of the MBTA Rail Properties, the increased level and type of maintenance, inspection, equipment and renewal required for PAR Freight Rail Service above the standards set by the FRA Track Safety Standards for the

speeds at which the MBTA Commuter Rail Services trains are operated, plus, in either case, any maintenance and renewal services required for any Infrastructure Improvements.

"Exercise Notice" shall have the meaning set forth in Section 6.2(a).

"Force Account Work" means work that PAR is obligated to perform pursuant to this Agreement, which the MBTA may direct PAR to complete pursuant to Section 8 herein.

"FRA" means the Federal Railroad Administration.

"Hazardous Materials" means and includes asbestos, flammable materials, explosives, radioactive or nuclear substances, polychlorinated biphenyls, other carcinogens, oil and other petroleum products, radon gas, urea formaldehyde, chemicals, gases, solvents, pollutants or contaminants that could be a detriment or pose a danger to the environment or to the health or safety of any Person, and any other hazardous or toxic materials, wastes and substances which are defined, determined or identified as such in any and all applicable federal, state and local laws, by-laws, rules, regulations, codes and ordinances, or any judicial or administrative interpretations thereof, and the requirements of any governmental agency or authority having jurisdiction with respect thereto, applicable to the regulation or protection of the environment, the health and safety of Persons and property and all other environmental matters and shall include, without limitation, all orders, decrees, judgments and rulings imposed through any public or private enforcement proceedings by an entity with appropriate jurisdiction and authority relating to Hazardous Materials or to the existence, use, discharge, release, containment, transportation, generation, storage, management or disposal thereof, or otherwise regulating or providing for the protection of the environment and relating to Hazardous Materials, or to the existence, use, discharge, release or disposal thereof; including, without limitation the following laws: the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. §9601 et seq.), the Hazardous Materials Transportation Act (49 U.S.C. §1801 et seq.), the Safe Drinking Water Act (42 U.S.C. §300(f) et seq.), the Pollution Prevention Act (42 U.S.C. §13101 et seq.), the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. §136 et seq.), the Resource Conservation and Recovery Act (42 U.S.C. §6901 et seq.), the Federal Clean Water Act (33 U.S.C. §1251 et seq.), the Federal Clean Air Act (42 U.S.C. §7401 et seq.) and Mass. Gen. Laws, Ch. 21E.

"Infrastructure Improvements" shall have the meaning set forth in Section 4.1.

"Infrastructure Improvement Activities" means all construction and construction-related activities (including but not limited to applicable engineering, permitting and remediation) reasonably necessary for the completion of Infrastructure Improvements or Supplemental Infrastructure Improvements.

"Level 1 Rail Properties" shall mean that portion of the PAR Freight Rail Properties that are owned by PAR and defined in Exhibit A as Level 1 Rail Properties, for which the MBTA has not exercised the Commuter Rail Election.

"Level 2 Rail Properties" shall mean that portion of the PAR Freight Rail Properties that are owned by PAR for which the MBTA has exercised the Commuter Rail Election, as listed on

Exhibit A as such exhibit may be updated from time to time by the Parties as set forth in Section 4.4.

"Maintenance Services" means all actions necessary or required for the maintenance of the rights-of-way, tracks, bridges, signals, communications equipment and all appurtenances of any relevant section of the PAR Freight Rail Properties or the MBTA Rail Properties in accordance with the Maintenance Standard.

"Maintenance Standard" means, with respect to the Level 1 and Level 2 Rail Properties, the FRA Classification of the track, which FRA Classifications for the applicable track segments as of the Effective Date are set forth on Exhibit D, and with respect to the MBTA Rail Properties, the standards set by the FRA Track Safety Standards for the speeds at which the MBTA Commuter Rail Services trains are operated.

"MBTA" means the Massachusetts Bay Transportation Authority, a body politic and corporate created by and acting pursuant to Chapter 161A of the General Laws of the Commonwealth of Massachusetts, as amended.

"MBTA Commuter Rail Services" means all of the rail operations, including movement of the MBTA materials and equipment, services and activities performed by the MBTA and its commuter rail Operating Contractor (or their respective assignees or designees) in connection with the provision of commuter rail service in the Commonwealth of Massachusetts.

"MBTA Employees" shall mean the employees and agents of the MBTA, and the MBTA's operating contractors and said contractors' employees.

"MBTA's Estimated Fair Market Value" shall have the meaning set forth in Section 6.2(a).

"MBTA Rail Properties" shall mean any portion of the PAR Freight Rail Properties acquired by the MBTA pursuant to the Option to Purchase. Once acquired by the MBTA, such properties shall cease to be PAR Freight Rail Properties for all purposes under this Agreement.

"MBTA Rail Properties Deed" shall mean any deed transferring any of the PAR Freight Rail Properties to the MBTA pursuant to the Option to Purchase or otherwise, which shall reserve to PAR the Retained Easement.

"MBTA Termination Notice" shall have the meaning set forth in Section 5.4.

"Non-Revenue Use" means use of right of way by trains operated to relocate equipment from one point to another for which no fee is charged for the movement of passengers. Non-Revenue Use includes, without limitation, (1) relocation of empty passenger equipment; (2) movement of material and equipment used for maintenance of the railroad by the same railroad and (3) movement of self-powered track maintenance and inspection equipment. For avoidance of doubt, excursion trains shall not be included in the definition of Non-Revenue Use.

"Operating Contractor" means any entity contracted with by the MBTA to provide commuter rail services on behalf of the MBTA.

"Option Property" shall have the meaning set forth in Section 6.2(a).

"Option to Purchase" shall have the meaning set forth in Section 6.1.

"PAR Employees" shall mean the employees and agents of PAR, and PAR's operating contractors and said contractors' employees.

"PAR Freight Rail Properties" shall mean Level 1 Rail Properties and Level 2 Rail Properties, as well as the Worcester Main Line property. The PAR Freight Rail Properties shall mean the real property owned by PAR described on Exhibit A hereto and shown on the valuation plans attached as part of such Exhibit A, with the exception of the areas marked with cross-hatching on such valuation plans, provided, however, that the definition of PAR Freight Rail Properties shall include, be modified by, and be subject to the handwritten notes on such valuation plans signed by representatives of both PAR and the MBTA. For avoidance of doubt, the Worcester Main Line property is included in this Agreement solely with respect to the Option to Purchase described in Section 6, and for the sake of clarity, property acquired by PAR subsequent to the Effective Date is not included in the PAR Freight Rail Properties.

"PAR Freight Rail Service" means the present and future full range of freight rail services and activities performed by PAR on the Level 1 Rail Properties, the Level 2 Properties and/or the MBTA Rail Properties and other activities permitted or required under this Agreement.

"Party" means each of the MBTA and PAR.

"Parties" means the MBTA and PAR.

"Person" means any individual, corporation, partnership, association, trust or any other entity or organization, including, without limitation, a government, a public agency, political instrumentality or political subdivision or authority.

"Price Rejection Notice" shall have the meaning set forth in Section 6.2(b)(i).

"Purchase Price" shall have the meaning set forth in Section 6.2(b).

"Retained Easement" means a reserved, retained, perpetual easement for freight rail service over any MBTA Rail Properties acquired pursuant to the exercise of the Option to Purchase which shall provide PAR, or its designee, with the exclusive right to provide freight service and other rights. As described in Section 7.2 herein, the terms of this Agreement that explicitly govern the rights and obligations of the Parties with respect to the MBTA Rail Properties shall be reflected in the Retained Easement; other terms and conditions governing the Retained Easement shall be substantially consistent with the provisions of the 1976 Deed.

"Revenue Service" means the movement of passengers and goods other than MBTA Employees regardless of whether a transportation charge is levied, and shall include the MBTA Commuter Rail Service.

"Service Suspension" means the suspension of PAR Freight Rail Service in order to perform the Infrastructure Improvement Activities.

"STB" means the Surface Transportation Board.

"Supplemental Infrastructure Improvements" shall have the meaning set forth in Section 4.1.

SECTION 2 CATEGORIES OF RAIL PROPERTIES

As shown on Exhibit A hereto, the properties subject to this Agreement shall be classified as Level 1 Rail Properties, Level 2 Rail Properties, and MBTA Rail Properties, with the exception of the Worcester Main Line property described on Exhibit A, which shall be considered a PAR Freight Rail Property but not a Level 1 Rail Property or a Level 2 Rail Property. The rights and responsibilities of the parties with respect to each category of property are set forth in Sections 3, 4, and 5 below. The MBTA may elect to convert Level 1 Properties to Level 2 Rail Properties according to the procedures set forth in Section 4 below, and may convert PAR Freight Rail Properties to MBTA Rail Properties by exercising the option described in Section 6 below. Upon the conversion of a property to a different category, the Parties shall amend Exhibit A to reflect such change.

SECTION 3 LEVEL 1 RAIL PROPERTIES

3.1 MBTA's General Use

Subject to the provisions of this Agreement, the MBTA, either directly or through its Operating Contractor, may enter upon and utilize the tracks and related operating facilities on the Level 1 Rail Properties for Non-Revenue Use, provided that such use does not unreasonably interfere with PAR's Freight Rail Service. Except as otherwise provided in Section 3.2, the MBTA may not use the Level 1 Rail Properties for Revenue Service.

3.2 Occasional Use.

Upon the prior written consent of PAR, which consent shall not be unreasonably withheld, conditioned or delayed, and the performance of any Enhanced Maintenance Services that may be reasonably necessary to provide for safe and efficient operations, the MBTA may occasionally divert, as necessary, MBTA Revenue Service over the Level 1 Rail Properties provided that such use does not unreasonably interfere with PAR's Freight Rail Service. The use of any portion of the Level 1 Rail Properties by the MBTA in accordance with this Section 3.2 shall not require the change in category of such portion to Level 2 Rail properties, nor be deemed

to be an exercise of the MBTA Commuter Rail Option with respect to such portion and shall not convert any portion of the PAR Freight Rail Properties to MBTA Rail Properties.

3.3 Dispatching.

PAR shall provide dispatching services for the Level 1 Rail Properties, and shall establish a dispatching protocol for the Level 1 Rail Properties that (i) will minimize negative impacts on each Party's trains, and (ii) will allow reasonable flexibility within the structure described herein in order to accommodate the movement of each other's trains, *provided however*, that PAR shall have the exclusive right to schedule freight trains.

3.4 Control and Management.

(a) Except as otherwise provided herein, PAR retains the exclusive right to exercise and to perform, or to delegate or subcontract to another entity, the performance of the management, regulatory and operational control of any and all rail service over Level 1 Rail Properties including, without limitation, dispatching and control of all trains. In the exercise of its control over the Level 1 Rail Properties, PAR will give priority to PAR freight trains over all other train scheduling, dispatching and control, but will make all reasonable efforts to expedite the movement of MBTA trains, including expediting repairs to lines, removing obstructions, and scheduling regular maintenance and repair programs at hours which will not unreasonably interfere with such movement.

(b) PAR's contractors and subcontractors performing work or services on Level 1 Rail Properties shall perform and complete their respective work or services in accordance with this Agreement for the provision of such work or services.

3.5 Maintenance

(a) PAR shall provide all Maintenance Services for the Level 1 Rail Properties. All Maintenance Services shall be undertaken in a manner so as to minimize interference with train operations. In all circumstances where a track outage is required for the performance of maintenance that is likely to affect MBTA's operations (except emergency maintenance services), such maintenance work shall be scheduled and PAR shall provide written notice to the MBTA of such maintenance work at least fifteen (15) days in advance of any such track outage if practical.

(b) If the MBTA requests that PAR maintain any portion of the Level 1 Rail Properties to an Enhanced Maintenance Standard, PAR shall perform all required Enhanced Maintenance Services, and the MBTA shall be responsible for any incremental Direct Costs of the Enhanced Maintenance Services. PAR shall provide the MBTA with at least thirty (30) days prior written notice of any planned changes to the Maintenance Standard that are likely to affect the MBTA's operations. In all circumstances where a track outage is required for the performance of maintenance (except emergency maintenance services), such maintenance work shall be scheduled and the PAR shall provide written notice to the MBTA of such maintenance work at least fifteen (15) days in advance of any such track outage.

(c) PAR shall provide and furnish all labor, administrative, professional, and supervisory personnel necessary for its performance of the Maintenance Services under this Section. All PAR personnel or PAR contractor personnel involved in any aspect of providing services under this Agreement shall be subject to the direction, supervision, and control of PAR, and not the MBTA. PAR shall be solely responsible for all labor relations issues relating to PAR Employees that arise in connection with the performance of services under this Agreement.

(d) Unless otherwise stated explicitly in this Agreement, PAR shall be responsible for the costs of materials, equipment, management, and other expenses required for its performance of the Maintenance Services under this Section. If the MBTA desires construction, alterations or improvements on the Level 1 Rail Properties, it shall submit a request to PAR in writing which specifies the work which the MBTA requests PAR to perform on the MBTA's account. Provided that such work would not unreasonably interfere with PAR Freight Rail Services, PAR shall perform such work at the MBTA's sole cost and expense pursuant to Section 8. All such modifications and improvements shall be considered Infrastructure Improvements, the cost of maintenance and renewal of which shall be borne solely by MBTA.

(e) In the event that PAR fails to provide Maintenance Services pursuant to this Section and such failure will have a material adverse effect on the MBTA's operations on the Level 1 Rail Properties, the MBTA may after notice to PAR and PAR's failure to perform the Maintenance Services within seven (7) days, at its option, either with or without the consent or request of Pan Am, maintain the Level 1 Rail Properties and PAR shall reimburse the MBTA for direct costs incurred in rendering such Maintenance Services. The MBTA's decision to provide Maintenance Services pursuant to this Section shall not be considered a waiver of any other remedies available to the MBTA under this Agreement including, without limitation, the remedies set forth in Section 13.

(f) The provisions of this Section do not apply to or otherwise affect the Level 2 Rail Properties or MBTA Rail Properties.

SECTION 4 MBTA COMMUTER RAIL ELECTION

PAR hereby grants the MBTA the right to conduct Revenue Service on the Level 1 Rail Properties, either in connection with the conversion of Level 1 Rail Properties to Level 2 Rail Properties or in connection with the exercise by the MBTA of any Option to Purchase Level 1 Rail Properties, on and after any applicable Commuter Rail Commencement Date in accordance with the provisions of this Section 2.

4.1 Commuter Rail Election Dates

Prior to the commencement of any Revenue Service on any Level 1 Rail Properties (except those operations permitted pursuant to Section 3 of this Agreement), the MBTA shall provide written notice to PAR (any such notice, a "Commuter Rail Election Notice") advising

PAR of the date on which the MBTA intends to commence Revenue Service on a particular portion(s) of the Level 1 Rail Properties (each such date, a "Commuter Rail Commencement Date"), which date may be adjusted pursuant to Section 4.4 herein. Within thirty (30) days after the Commuter Rail Election Notice has been received by PAR for those Level 1 Rail Properties identified in such notice, the MBTA shall provide PAR with the proposed scope of a study specifying the planned level of and proposed schedule for the Revenue Service. The study shall be designed to determine what track, signal and capacity enhancements would be reasonably required on the applicable portion of the Level 1 Rail Properties to allow the provision of such Revenue Service without unreasonable interference with PAR's Freight Rail Service (the "Capacity Study"). PAR shall provide the MBTA with comments on the proposed scope of the Capacity Study, and the MBTA shall consider such comments in finalizing the scope. The MBTA will conduct the Capacity Study, in cooperation and consultation with PAR, and shall construct the track, signal and capacity improvements, modifications and rehabilitations reasonably required by the Capacity Study for the level and proposed schedule of Revenue Service planned by the MBTA, as set forth in Section 4.2 ("Infrastructure Improvements"). The improvements may include the construction of passenger stations along the Level 1 Rail Properties on property to be acquired by the MBTA. MBTA Commuter Rail Services may not increase or be modified from the level or schedules provided for in the Capacity Study after the implementation of the initial set of Infrastructure Improvements, except as set forth in Sections 5.1 or 7.4(b), as applicable, unless the MBTA conducts or funds an additional capacity study to determine whether any additional Infrastructure Improvements will be required to accommodate the additional passenger service (the "Supplemental Infrastructure Improvements"), the MBTA agrees to fund such Supplemental Infrastructure Improvements, and such Supplemental Infrastructure Improvements are constructed and operational.

4.2 Infrastructure Improvements

The MBTA at its sole cost and expense shall engage PAR to perform the Infrastructure and Supplemental Infrastructure Improvement Activities as Force Account Work. The MBTA shall make available to PAR all plans and specifications for any Infrastructure Improvements or Supplemental Infrastructure Improvements, for review and approval by PAR. If PAR reasonably determines that the Commuter Rail Services or any aspect of the Infrastructure Improvements shall unreasonably interfere with PAR Freight Rail Services, then the MBTA and PAR shall agree on modifications to the plans and specifications for the Infrastructure Improvement Activities which will alleviate such unreasonable interference. In the event that the Infrastructure Improvements proposed by the MBTA do not unreasonably interfere with PAR's Freight Rail Service, but PAR fails to perform the Infrastructure Improvement Activities as Force Account Work as required by Section 8 and such failure continues for ten (10) business days after receipt of written notice from the MBTA of such failure, the MBTA may, at its option, either with or without the consent or request of PAR, perform such work itself or may engage a third party to perform such work. PAR shall perform maintenance services required for Infrastructure Improvements constructed pursuant to this Section 4, and such services shall be considered Enhanced Maintenance Services, the costs of which maintenance shall be the responsibility of the MBTA.

4.3 Service Suspensions

Notwithstanding any provision of this Agreement to the contrary, PAR acknowledges that one or more Service Suspensions may be necessary in order to construct Infrastructure Improvements. The timing and duration of such Service Suspensions shall be subject to PAR's reasonable discretion so as not to materially interfere with PAR Freight Rail Service

4.4 Adjustment of Commuter Rail Commencement Date; Conversion of Level 1 Rail Properties to Level 2 Rail Properties

In the event that any Infrastructure Improvements described in any Commuter Rail Election Notice shall not have been completed by the Commuter Rail Commencement Date set forth in such Commuter Rail Election Notice, such Commuter Rail Commencement Date shall be deemed to be the date that such Infrastructure Improvements are actually completed and no Commuter Rail Services shall be initiated prior to such later date. On and after any Commuter Rail Commencement Date (as the same may be adjusted in accordance with the immediately preceding sentence), the portion of the Level 1 Rail Properties described in the Commuter Rail Election Notice shall cease to be Level 1 Rail Properties and shall thereafter be deemed to be Level 2 Rail Properties for all purposes hereunder, and the Parties shall amend Exhibit A hereto to reflect such change.

SECTION 5 LEVEL 2 RAIL PROPERTIES

5.1 Dispatching on Level 2 Rail Properties.

PAR shall provide dispatching services for the Level 2 Rail Properties, and shall establish a dispatching protocol for the Level 2 Rail Properties that (i) will minimize negative impacts on each Party's trains, and (ii) will allow reasonable flexibility within the structure described herein in order to accommodate the movement of each other's trains, *provided however*, that the MBTA shall have the right to schedule passenger trains in consultation with PAR and that in all circumstances a scheduled commuter rail train shall hold a priority for as long as it maintains its schedule within a period that is not more than ten minutes earlier or later than its scheduled time. The parties acknowledge that the scheduling of passenger trains on the Level 2 Rail Properties will likely be extensions of the schedules for existing MBTA Revenue Service on lines connecting to such Level 2 Rail Properties. Changes to previously approved schedules of up to ten (10) minutes shall be made by the MBTA in coordination with PAR, shall seek to minimize negative impacts on the PAR Freight Rail Service, and shall be subject to PAR's approval, not be unreasonably withheld, conditioned, or delayed. The MBTA may propose changes to previously approved schedules of more than ten (10) minutes earlier or later than scheduled times, in which case PAR may require the MBTA to conduct an updated Capacity Study pursuant to Section 4.1 and implement such changes in accordance with Section 4.1.

5.2 Control and Management.

Except as otherwise provided herein, PAR retains the exclusive right to exercise and to perform, or to delegate or subcontract to another entity, the performance of the management, regulatory and operational control of any and all rail service over Level 2 Rail Properties

including, without limitation, dispatching and control of all trains. In the exercise of its control over the Level 2 Rail Properties, PAR will give priority to MBTA commuter trains over all other train scheduling, dispatching and control, including without limitation PAR trains and will make all reasonable efforts to expedite the movement of MBTA trains, including expediting repairs to lines, removing obstructions, and scheduling regular maintenance and repair programs at hours which will not unreasonably interfere with such movement.

5.3 Maintenance of Level 2 Rail Properties

(a) PAR shall provide all Maintenance Services for the Level 2 Rail Properties. Unless otherwise stated explicitly in this Agreement, PAR shall be responsible for the costs of materials, equipment, management, and other expenses required for its performance of the Maintenance Services under this Section. PAR shall provide the MBTA with at least thirty (30) days prior written notice of any proposed changes to the Maintenance Standard that are likely to affect the MBTA's operations. If the MBTA requests that PAR maintain any portion of the Level 2 Rail Properties to an Enhanced Maintenance Standard, PAR shall perform the associated Enhanced Maintenance Services, and the MBTA shall be responsible for any incremental Direct Costs of the Enhanced Maintenance Services, provided, however, that PAR may require, or the MBTA may elect, that the MBTA procure and provide materials for use in the Enhanced Maintenance Services, at the MBTA's sole cost and expense. In all circumstances where a track outage is required for the performance of maintenance that is likely to affect the MBTA's operations (except emergency maintenance services), such maintenance work shall be scheduled and the PAR shall provide written notice to the MBTA of such maintenance work at least fifteen (15) days in advance of any such track outage, if practical.

(b) In the event that PAR fails to provide Maintenance Services or Enhanced Maintenance Services pursuant to this Section 5 and such failure will have a material adverse effect on the MBTA's operations on the Level 2 Rail Properties, the MBTA may after notice to PAR and PAR's subsequent failure to provide Maintenance Services or Enhanced Maintenance Services within seven (7) days, at its option, either with or without the consent or request of PAR, perform such services, and, with respect to Maintenance Services only, PAR shall reimburse the MBTA for Direct Costs incurred in rendering such services. The MBTA's decision to provide Maintenance Services or Enhanced Maintenance Services pursuant to this Section shall not be considered a waiver of any other remedies available to the MBTA under this Agreement including, without limitation, the remedies set forth in Section 10 below. Notwithstanding anything herein to the contrary, the MBTA shall have the right to secure such approvals of regulatory or governmental bodies for such work on the Level 2 Rail Properties as may be necessary, including, without limitation, the FRA and Massachusetts Department of Public Utilities and no approval of PAR shall be required for the performance of any work on the Level 2 Rail Properties, except as may be expressly provided herein.

(c) PAR shall provide and furnish all labor, administrative, professional, and supervisory personnel necessary for its performance of the Maintenance

Services or Enhanced Maintenance Services under this Section. All PAR personnel or PAR contractor personnel involved in any aspect of providing services under this Agreement shall be subject to the direction, supervision, and control of PAR, and not the MBTA. PAR shall be solely responsible for all labor relations issues relating to PAR Employees that arise in connection with the performance of services under this Agreement.

(d) If the MBTA desires construction, alterations or improvements on the Level 2 Rail Properties, it shall submit a request to PAR in writing which specifies the work which the MBTA requests PAR to perform on the MBTA's account. Provided that such work would not unreasonably interfere with PAR Freight Rail Services, PAR shall perform such work at the MBTA's sole cost and expense pursuant to Section 8. All such modifications and improvements shall be considered Infrastructure Improvements, the cost of maintenance and renewal of which shall be borne solely by MBTA.

(e) In connection with any material change in the level of PAR Freight Rail Service from the service levels indicated by the FRA Classifications shown on the attached Exhibit D, either Party may request that the Parties meet to consider an adjustment to the Maintenance Standard and Enhanced Maintenance Standard, and any corresponding adjustment of the costs allocable to each Party for the Enhanced Maintenance Services. Any such adjustments shall be implemented if the Party requesting the adjustment demonstrates, with the cooperation of the other Party, that the Maintenance Standard then in effect no longer corresponds to the standard required for the operation of then-current PAR Freight Rail Service.

(f) The provisions of this Section do not apply to or otherwise affect the Level 1 Rail Properties or the MBTA Rail Properties.

5.4 Reduction in MBTA Use of Level 2 Rail Properties

In the event that the MBTA shall cease to have current use, or, in the MBTA's sole and absolute determination, reasonably foreseeable future use, of all or any portion of the Level 2 Rail Properties for MBTA Commuter Rail Services, or, if in the MBTA's sole and absolute discretion it determines that it no longer wishes to continue the use of all or any such portion of the Level 2 Rail Properties for Revenue Service, the MBTA shall have the option of terminating its use of all or such portion of the Level 2 Rail Properties for Revenue Service by written notice to PAR (an "MBTA Termination Notice"). Following any such termination, such portions of the Level 2 Rail Properties on which the MBTA has terminated Revenue Service shall be deemed to be Level 1 Rail Properties for all purposes under this Agreement. In the event that a portion of the Level 2 Rail Properties shall be deemed to be Level 1 Rail Properties, the provisions of Section 4 herein shall govern any decision in the future to reconvert the Level 1 Rail Properties to Level 2 Rail Properties, provided however that due consideration shall be given to any Infrastructure Improvements or Supplemental Infrastructure Improvements completed as part of the initial conversion of the Level 1 Rail Properties to Level 2 Rail Properties. Any MBTA Termination Notice shall contain a revised Exhibit A reflecting the change in designation.

SECTION 6 MBTA OPTION TO PURCHASE

6.1 Grant of Option to Purchase

PAR hereby grants to the MBTA an option (the "Option to Purchase") to purchase, subject to, and conditioned upon the receipt of, all applicable regulatory approvals, all or any portion of the PAR Freight Rail Properties upon the terms and conditions set forth in this Section and subject to PAR retaining a Retained Easement upon any such portion of the PAR Rail Properties acquired by the MBTA pursuant to the Option to Purchase. Any conditions placed upon the receipt of any applicable regulatory approvals must be acceptable to PAR in its reasonable discretion. The Option to Purchase shall be a continuing right during the initial 30-year term of this Agreement, and the exercise of the Option to Purchase with respect to any portion of the PAR Rail Properties shall not derogate from the MBTA's right to exercise the Option to Purchase with respect to any other portion of the PAR Rail Properties, nor shall the failure to consummate the purchase of a portion of the PAR Rail Properties following the exercise of the Option to Purchase with respect to such portion preclude the MBTA from exercising the Option to Purchase with respect to the same portion of the PAR Rail Properties at a later date. PAR may, at any time prior to the MBTA's issuance of an Exercise Notice (defined below), sell, lease, grant an easement, or otherwise convey any interest in the PAR Freight Rail Properties to a third party (a "Permitted Transfer"), provided however that (1) any such Permitted Transfer shall be subject to the rights of the Commonwealth pursuant to Mass. Gen. Laws Chapter 161C, Section 7, Mass. Gen. Laws Chapter 40, Section 54A, if applicable and any other applicable laws and regulations; (2) any such Permitted Transfer shall not interfere with the MBTA's rights under this Agreement; and (3) the Option to Purchase shall run with the land.

6.2 Exercise of the Option to Purchase

(a) During the initial term of this Agreement, the Option to Purchase shall be exercisable by the MBTA by written notice (the "Exercise Notice") given by the MBTA at any time during the initial term of this Agreement. The Exercise Notice shall set forth the portion of the PAR Rail Properties the MBTA intends to purchase (the "Option Property"), include the MBTA's estimate of the Fair Market Value for such portion of the PAR Rail Properties (the "MBTA's Estimated Fair Market Value") and establish the closing date under the P&S (as defined below), which shall not be less than one hundred and twenty (120) days after the date of the Exercise Notice and shall not be more than ninety (90) days after final determination of the Purchase Price as described below. For the purposes of this Section 6, the fair market value of all property subject to this section shall not include any amounts for operating rights on such property, but shall be limited to the value of the land and appurtenant property to be conveyed, with all appropriate physical enhancements normally applied to a contiguous right of way, with such value further adjusted to account for the change in trackage rights liability as further described in Section 11 (such change being from such liability allocation as described in Section 11 for Level 1 and Level 2 properties to the different liability allocation set forth pursuant to the 1976 Deed).

(b) If the MBTA exercises the Option to Purchase with respect to all or any portion of the PAR Rail Properties, the purchase price to be paid for such portion of the PAR Rail Properties shall be the fair market value thereof, determined as follows (the "Purchase Price"):

(1) Within ninety (90) days after receipt of any Exercise Notice, PAR shall either (i) give the MBTA written notice that PAR accepts the MBTA's Estimated Fair Market Value ("Binding Price Notice") or (ii) if PAR disagrees with the MBTA's Estimated Fair Market Value, provide the MBTA with written notice of disagreement (the "Price Rejection Notice"). If PAR fails to provide the MBTA with either a Binding Price Notice or a Price Rejection Notice within such ninety-(90)-day period, PAR shall be deemed to have provided a Binding Price Notice. If PAR provides or is deemed to have provided the MBTA with a Binding Price Notice, the MBTA's Estimated Fair Market Value shall be the Purchase Price under the applicable P&S. If PAR provides the MBTA with a Price Rejection Notice, the MBTA and PAR shall work together in good faith to agree upon the fair market value for the property described in the Exercise Notice. Upon any such agreement, the agreed upon fair market value shall be the Purchase Price under the P&S. If the MBTA and PAR fail to agree upon a fair market value within sixty (60) days after the date PAR provides the MBTA with the Price Rejection Notice, then the fair market value shall be determined in accordance with the arbitration procedures described in Section 6.2(c) below.

(c) Arbitration Procedure.

(1) If the MBTA and PAR have failed to reach agreement as to the Purchase Price within sixty (60) days after the date of a Price Rejection Notice, then, within seven (7) days after the expiration of such sixty (60)-day period, the MBTA and PAR shall each simultaneously submit to the other, in a sealed envelope, its good faith estimate of the fair market value of the Option Property (collectively referred to as the "Estimates"). If the higher of such Estimates is not more than one hundred five percent (105%) of the lower of such Estimates, then the Purchase Price shall be the average of the two Estimates. If the Purchase Price is not resolved by the exchange of Estimates, then, within seven (7) days after the exchange of Estimates, the MBTA and PAR shall each select an appraiser to determine which of the two Estimates most closely reflects the Fair Market Value for the Option Property. Each appraiser so selected shall be certified as an MAI appraiser or as an ASA appraiser and shall have had at least five (5) years experience within the previous ten (10) years as a real estate appraiser working in the area of the Option Property.

For purposes hereof, an "MAI" appraiser means an individual who holds an MAI designation conferred by, and is an independent member of, the American Institute of Real Estate Appraisers (or its successor organization, or in the event there is no successor organization, the organization and designation most similar), and an "ASA" appraiser means an individual who holds the Senior Member designation conferred by, and is an independent member of, the American Society of Appraisers (or its successor organization, or, in the event there is no successor organization, the organization and designation most similar).

(2) Upon selection, the MBTA's and PAR's appraisers shall work together in good faith to agree upon which of the two Estimates most closely reflects the fair market value for the Option Property. The Estimate chosen by such appraisers shall be binding on both the MBTA and PAR as the Purchase Price for the Option Property. If either the MBTA or PAR fails to appoint an appraiser within the seven-(7)-day period referred to above, the appraiser appointed by the other party shall be the sole appraiser for the purposes hereof. If the two appraisers cannot agree upon which of the two Estimates most closely reflects the fair market value of the Option Property within twenty (20) days after their appointment, then, within ten (10) days after the expiration of such twenty-(20)-day period, the two appraisers shall select a third appraiser meeting the aforementioned criteria. Once the third appraiser (i.e., arbitrator) has been selected as provided for above, then, as soon thereafter as practicable but in any case within fourteen (14) days, the arbitrator shall make his determination of which of the two Estimates most closely reflects the fair market value of the Option Property and such Estimate shall be binding on both the MBTA and PAR as the Purchase Price under the applicable P&S. If the arbitrator believes that expert advice would materially assist him, he may retain one or more qualified persons to provide such expert advice. The Parties shall share equally in the costs of the arbitrator and of any experts retained by the arbitrator. Any fees of any appraiser, counsel or experts engaged directly by the MBTA or PAR, however, shall be borne by the party retaining such appraiser, counsel or expert.

(3) If the Purchase Price has not been determined by the date which is thirty (30) days prior to the closing date set forth in the Exercise Notice, the closing date under the P&S shall be the date which is thirty (30) days after the determination of the Purchase Price.

(d) If the MBTA exercises the Option to Purchase by giving notice as provided above and accepts in writing the Purchase Price determined as set forth above, then the giving of such notice of exercise by the MBTA and its written acceptance of the

Purchase Price shall be deemed, without the execution of any other instrument or the taking of any other action, to create a binding contract between PAR and the MBTA for the purchase and sale of the Option Property set forth in the applicable exercise notice upon the substantive terms and conditions set forth in the Purchase and Sale Agreement attached hereto as Exhibit B (the "P&S") and this Section. In the event that the MBTA does not accept the Purchase Price as determined above, the MBTA may, by written notice to PAR, decline to execute the P&S, in which case the MBTA will reimburse PAR for PAR's share of the costs of the appraisal and all other reasonable costs associated with the process of preparing for the sale pursuant to this Section 6. In the event of such non-acceptance of the Purchase Price, the Option to Purchase shall remain in effect for all properties subject to this Agreement, and may be exercised again by the MBTA during the initial term.

SECTION 7 MBTA RAIL PROPERTIES

7.1 Conversion to MBTA Rail Properties

In conjunction with the exercise of the Option to Purchase, the MBTA and PAR shall comply with the obligations to conduct a Capacity Study and implement Infrastructure Improvements or Supplemental Infrastructure Improvements as set forth in Sections 4.1 and 4.2 above. Following the acquisition by the MBTA of all or any portion of the PAR Freight Rail Properties, such acquired properties shall, for the purposes of this Agreement, cease to be either Level 1 Rail Properties or Level 2 Rail Properties (or, in the case of the Worcester Main Line property described on Exhibit A, a PAR Freight Rail Property) and shall thereafter be deemed to be MBTA Rail Properties for all purposes hereunder, and the Parties shall execute an amendment to this Agreement which contains a revised Exhibit A reflecting the change in designation.

7.2 Operations Governed by this Agreement and MBTA Rail Properties Deed

The MBTA Rail Properties Deed (including the Retained Easement) transferring MBTA Rail Properties from PAR to the MBTA shall contain provisions which continue in full force and effect the rights and obligations set forth in this Agreement. To the extent that the 1976 Deed contains rights and obligations other than as set forth herein, the Deed shall contain terms and conditions consistent with those in the 1976 Deed, including the conditions applicable to alteration of the MBTA Rail Properties by the MBTA and PAR (other than the construction of Infrastructure Improvements or Supplemental Infrastructure Improvements pursuant to Section 4.2) shall be consistent with Section E(1) of the 1976 Deed.

7.3 Access to MBTA Rail Properties.

Consistent with the Retained Easement and subject to this Agreement, PAR shall have the right to use the MBTA Rail Properties to provide PAR Freight Rail Service. Notwithstanding any provision of this Agreement to the contrary, the Parties agree that the MBTA shall have the right to use the PAR Rail Properties to transport baggage, and other matter and material as is or may be on occasion carried by the MBTA, including equipment or other material for use by or for the MBTA or its non-freight related agents or contractors.

7.4 Limitations on Access Rights.

The rights of PAR to use the MBTA Rail Properties, as described above, shall be limited as follows:

(a) The MBTA Rail Properties shall be jointly used by PAR for PAR Freight Rail Service and related uses and by the MBTA for the MBTA Commuter Rail Services and related uses, in accordance with the terms set forth herein and in the Retained Easement. Nothing in this Agreement shall derogate from the MBTA's right to utilize, directly or through its Operating Contractor, or to permit other passenger carrier(s) to utilize any portion of the MBTA Rail Properties for the provision of the MBTA Commuter Rail Services, including without limitation, intercity service as well as commuter service; provided, however, that use by other passenger carrier(s) of the MBTA Rail Properties may require an additional Capacity Study and the construction of additional Infrastructure Improvements or Supplemental Infrastructure Improvements pursuant to Section 4.1 and Section 4.2 above.

(b) PAR, or, in the event that the MBTA assumes dispatching responsibilities pursuant to Section 7.5 below, the MBTA, shall establish a dispatching protocol for the MBTA Rail Properties that (i) will minimize negative impacts on each Party's trains, and (ii) will allow reasonable flexibility within the structure described herein in order to accommodate the movement of each other's trains, *provided however*, that the MBTA shall have the right to schedule commuter rail trains in consultation with PAR which are consistent with the schedules planned for pursuant to the Capacity Study provided for in Section 4.1 above and that in all circumstances a scheduled commuter rail train shall hold a priority for as long as it maintains its schedule within a period that is not more than ten minutes earlier or later than its scheduled time. The Parties acknowledge that the scheduling of passenger trains on the MBTA Rail Properties will likely be extensions of the schedules for existing MBTA passenger service on lines connecting to such MBTA Rail Properties. Changes to previously approved schedules of up to ten (10) minutes shall be made by the MBTA in coordination with PAR, shall seek to minimize negative impacts on the PAR Freight Rail Service, and shall be subject to PAR's approval, not be unreasonably withheld, conditioned, or delayed. The MBTA may propose changes to previously approved schedules of more than ten (10) minutes earlier or later than scheduled times, in which case PAR may require the MBTA to conduct an updated Capacity Study pursuant to Section 4.1 and implement such changes in accordance with Section 4.1.

7.5 Dispatching, Control and Management.

(a) PAR shall continue to provide dispatching of all operations over the MBTA Rail Properties at its sole cost and expense after the conversion of any PAR Freight Rail Properties to MBTA Rail Properties, provided, however, that the MBTA may at any time assume such dispatching responsibilities if it determines, in its reasonable discretion, that PAR has, on fifteen (15) or more days during any thirty (30) day period (excepting any period during which construction of any Infrastructure

Improvements, Supplemental Infrastructure Improvements, or Force Account projects, or the occurrence of Force Majeure events, materially impacted service), performed dispatching in a manner materially contrary to the overall dispatching protocols described in Section 7.4. However, if PAR demonstrates to the MBTA that, in the reasonable discretion of the MBTA, PAR has rectified any conditions that caused PAR's failure to perform dispatching in accordance with Section 7.4, the MBTA shall transfer dispatching responsibility back to PAR.

(b) In the event that the MBTA assumes control of dispatching services, in order to allow for the transfer of dispatching control to MBTA or its Operating Contractor on the MBTA Rail Properties PAR will provide full cooperation and access in locating and activating switching (transfer) equipment at necessary sites, on either MBTA or PAR property, in order to establish the capability or activation of train control machines controlling the MBTA Rail Properties at the MBTA dispatching center and deactivation of the train control machines at the PAR dispatching center. PAR shall provide this cooperation within 30 days of direction from the MBTA. Such work shall be performed as Force Account Work under this Agreement or by the MBTA or third parties engaged by the MBTA, at its sole discretion.

(c) Upon completion of all installation and activation of switching equipment to enable dispatching from the designated MBTA dispatching center, the MBTA shall have the exclusive right to exercise and to perform, or to delegate or subcontract to another entity, the performance of the management, regulatory and operational control of any and all rail service over MBTA Rail Properties including, without limitation, dispatching and control of all trains. In the exercise of its control over the MBTA Rail Properties, the MBTA will give priority to the MBTA passenger trains over all other train scheduling, dispatching and control, including without limitation freight service. The costs of the dispatching by the MBTA or its Operating Contractor shall be the responsibility of the MBTA.

(d) Notwithstanding anything herein to the contrary, the MBTA may, in its sole discretion, decline to assume dispatching control of the MBTA Rail Properties, in which event PAR shall dispatch the MBTA Rail Properties at PAR's sole cost and expense, and subject to the scheduling provisions of Section 7.3(b) and Section 7.4(b).

7.6 Maintenance

(a) The MBTA shall provide all Maintenance Services for the MBTA Rail Properties. All Maintenance Services shall be undertaken in a manner so as to minimize interference with train operations. In all circumstances where a track outage is required for the performance of maintenance (except emergency maintenance services), such maintenance work shall be scheduled and the MBTA shall provide written notice to PAR of such maintenance work at least fifteen (15) days in advance of any such track outage.

(b) If PAR requests that the MBTA maintain a portion of the MBTA Rail Properties to an Enhanced Maintenance Standard, the MBTA shall perform the associated Enhanced Maintenance Services, and PAR shall be responsible for any incremental Direct Costs of the Enhanced Maintenance Services. For avoidance of doubt, the costs of maintenance of any Infrastructure Improvements or Supplemental Infrastructure Improvements constructed to accommodate MBTA Revenue Service shall be performed at the MBTA's sole cost and expense as set forth in Section 4.2. The MBTA shall provide PAR with at least thirty (30) days prior written notice of any planned changes to the Maintenance Standard that are likely to affect PAR's operations.

(c) MBTA shall provide and furnish all labor, administrative, professional, and supervisory personnel necessary for its performance of the Maintenance Services under this Section. All the MBTA personnel or the MBTA contractor personnel involved in any aspect of providing services under this Agreement shall be subject to the direction, supervision, and control of the MBTA, and not PAR. The MBTA shall be solely responsible for all labor relations issues relating to the MBTA Employees that arise in connection with the performance of services under this Agreement.

(d) Unless otherwise stated explicitly in this Agreement, the MBTA shall be responsible for the costs of materials, equipment, management, and other expenses required for its performance of the Maintenance Services under this Section. If PAR desires construction, alterations or improvements on the MBTA Rail Properties, such improvements shall be considered Infrastructure Improvements, and PAR shall submit a request to the MBTA in writing which specifies the work which PAR requests the MBTA to perform on PAR's account. The MBTA shall perform such work at PAR's sole cost and expense pursuant to Section 8 unless the MBTA determines in its reasonable discretion that: (i) such work will have an adverse effect on MBTA Passenger Rail Services and (ii) PAR fails to satisfactorily mitigate such adverse effect. The MBTA shall perform Maintenance Services required for Infrastructure Improvements constructed pursuant to this Section 7.6(d), and such services shall be considered Enhanced Maintenance Services, the costs of which maintenance shall be the responsibility of PAR.

(e) In the event that the MBTA fails to provide Maintenance Services or Enhanced Maintenance Services pursuant to this Section and such failure will have a material adverse effect on PAR's Freight Rail Services on the MBTA Rail Properties, PAR may after notice to the MBTA and the MBTA's failure to perform the Maintenance Services or Enhanced Maintenance Services within seven (7) days, at its option, either with or without the consent or request of the MBTA, maintain the MBTA Rail Properties and, with respect to Maintenance Services only, the MBTA shall reimburse PAR for Direct Costs incurred in rendering such services. PAR's decision to provide Maintenance Services or Enhanced Maintenance Services pursuant to this Section shall not be considered a waiver of any other remedies available to PAR under this Agreement including, without limitation, the remedies set forth in Section 14. Notwithstanding anything herein to the contrary, PAR shall have the right to secure such approvals of regulatory or governmental bodies for such work on the MBTA Rail Properties as may be necessary, including, without limitation, the FRA and Massachusetts Department of

Public Utilities and no approval of MBTA shall be required for the performance of any work on the MBTA Rail Properties, except as may be expressly provided herein.

(f) In connection with any material change in the level of MBTA Commuter Rail Service from the service levels studied in the Capacity Study, either Party may request that the Parties meet to consider an adjustment to the Maintenance Standard and Enhanced Maintenance Standard, and any corresponding adjustment of the costs allocable to each Party for the Enhanced Maintenance Services. Any such adjustments shall be implemented if the Party requesting the adjustment demonstrates, with the cooperation of the other Party, that the Maintenance Standard then in effect no longer corresponds to the standard required for the operation of then-current MBTA Commuter Rail Service.

(g) The provisions of this Section do not apply to or otherwise affect the PAR Freight Rail Properties.

SECTION 8 FORCE ACCOUNT WORK

8.1 General Authority.

(a) The MBTA may at its discretion request PAR to perform Force Account Work to implement any Infrastructure Improvement Activities or other work to construct or install other additions and betterments on the Level 1 Rail Properties or the Level 2 Rail Properties pursuant to this Agreement, and PAR may at its discretion request the MBTA to perform such Force Account Work on the MBTA Rail Properties. For the purposes of this Section 8, "Controlling Party" shall mean PAR with respect to the Level 1 Rail Properties and the Level 2 Rail Properties, and the MBTA with respect to the MBTA Rail Properties, and "Requesting Party" shall mean the MBTA with respect to the Level 1 Rail Properties and the Level 2 Rail Properties, and PAR with respect to the MBTA Rail Properties. So long as the Parties agree on the terms of a PI (defined below), the Controlling Party shall perform Force Account Work for the Requesting Party at the Requesting Party's sole cost and expense.

(b) All Force Account Work shall be performed in full and strict compliance with all applicable terms and conditions of this Agreement.

(c) The Controlling Party shall perform Force Account Work using its own personnel and others as may be necessary, without any impact to any Controlling Party obligation to provide other services under this Agreement or freight or commuter rail service in general over the balance of the Controlling Party's system. The Controlling Party shall use its own personnel performing other services pursuant to this Agreement in the execution of Force Account Work to the extent that doing so does not interfere with the performance of such other services.

(d) The Controlling Party shall assign its personnel to perform Force Account Work, to the extent that such assignment does not adversely affect the provision of other services required under this Agreement or freight or commuter rail service in general over the balance of

the Controlling Party's system. If the Controlling Party cannot assign its personnel to the performance of Force Account Work without adversely affecting the provision of other services due under this Agreement or freight or commuter rail service in general over the balance of the Controlling Party's system, the Controlling Party may assign or hire other personnel to the performance of Force Account Work. Compensation for use of Controlling Party personnel for Force Account work shall conform to the provisions of Exhibit C, Direct Costs Billable for Force Account Work.

8.2 Request For Force Account Work.

The Requesting Party shall initiate Force Account Work Projects by preparing and delivering to the Controlling Party for review and approval a Project Initiation ("PI") and/or Change Order ("CO") form. The Requesting Party's request shall include for review and approval by the Controlling Party a description of the work to be performed and any plans, specifications and requirements that the Requesting Party determines should govern the Force Account Work Project. The Controlling Party shall, within sixty (60) days of receipt provide a response to the PI or CO request which shall include a comprehensive cost proposal for the Force Account Work Project including staffing plans, resource requirements, and itemized, auditable costs in a format approved by the Requesting Party and consistent with Exhibit C, Direct Costs Billable for Force Account Work, as well as a schedule that includes important milestones for completing the Force Account Work Project. The Parties shall work together in good faith to agree upon a final cost proposal for a project. The Controlling Party shall make every effort to comply with the cost proposals and schedules, and shall notify the Requesting Party immediately after the Controlling Party becomes aware that a deviation from such proposal or schedule is likely.

8.3 Emergency Force Account Work Projects

In the event of an emergency or when, in the reasonable discretion of the Requesting Party, expeditious response is required, the Requesting Party may orally direct the Controlling Party to undertake necessary Force Account Work, and the Controlling Party shall perform such work in the most expeditious manner possible. The Requesting Party shall deliver to the Controlling Party written confirmation of the Force Account Work request within forty-eight (48) hours of issuing such oral directive and issue a PI or CO for the Force Account Work as soon as reasonably practicable thereafter. The Controlling Party shall be entitled to payment for such emergency force account work performed upon oral direction consistent with Section 8.7 of this Agreement.

8.4 Initiation of Force Account Work Projects. Completion of the PI form and signature by the Controlling Party's and the Requesting Party's authorized representatives shall constitute an agreement to perform the requested Force Account Work. The cost estimate detailed in the PI shall constitute the amount Contractor is authorized to spend. This amount may only be increased through execution of a CO. The Controlling Party shall perform the Force Account Work according to the schedule detailed in the PI, unless the Parties execute a CO revising such schedule.

8.5 Changes to Force Account Work Projects. Changes to a PI for Force Account Work shall be initiated by execution of a CO form. Each proposed CO for a Force Account Work Project shall cite the number of the PI that the CO revises. Completion of the CO form and signature by an authorized representative of the Requesting Party shall constitute agreement regarding the change. No changes shall be made on the basis of oral requests, except in the event of an emergency situation as set forth in Section 8.2(b) above.

8.6 80% Expenditure Notice. Unless otherwise agreed to by the parties, the Controlling Party shall promptly notify the Requesting Party in writing when the Controlling Party has spent or obligated eighty percent (80%) of the funds authorized for a Force Account Work Project. Such notice shall include: a description of the incomplete work and the estimated cost of completing such work; a schedule update; and notice of any unsafe condition or impact on revenue service that may arise if work on the Force Account Work Project ceases before completion. If the Requesting Party determines that the Force Account Work Project may exceed its approved cost or continue beyond its approved schedule, the Requesting party may issue a CO authorizing the Controlling party to continue the Force Account Work Project based on the new estimate or schedule, or may direct the Controlling Party to terminate the Force Account Work Project as promptly and inexpensively as feasible. The Controlling Party shall have no obligation to perform work on a Force Account Work Project after the cost limit specified in a PI (and any COs that modify such PI) has been reached, with the exception of work that is, in the determination of the Requesting Party, necessary to prevent or remedy any unsafe condition or to prevent disruption of revenue service. The parties agree that for projects where the work is expected to be completed in no more than one month, the 80% notice requirement shall be waived.

8.7 Force Account Work Project Costs.

(a) The Controlling Party shall document all Direct Costs incurred in the performance of Force Account Work, separate from the records Contractor keeps for the costs of providing Agreement Services other than Force Account Work. All invoices for Force Account Work Projects submitted by the Controlling Party to the Requesting Party shall include the number of staff-hours and cost of labor expended; the costs of associated employee benefits; quantities and costs of materials consumed; the cost of subcontracted services; equipment usage and associated costs; and any other allowable Direct Costs for performing the Force Account Work Project. The Controlling Party's cost proposals and invoices shall indicate the number of hours worked by its personnel on each Force Account Work Project, and shall include a calculation of the Controlling Party's total charges for such hours during the relevant year. Within the cost limit specified in the PI, the Requesting Party shall compensate the Controlling Party for all work actually performed pursuant to the PI, according to the provisions of Section 8 and Exhibit C, Direct Costs Billable for Force Account Work. On the first day of each month during the performance of each project, the Controlling Party shall submit an estimated invoice to the Requesting Party for work scheduled to be performed in the subsequent month. Subject to inspection and final audit as provided in Section 8.9, the Requesting

REDACTED - TO BE PLACED ON PUBLIC FILE

RAIL PROPERTY	FROM	TO	CATEGORY OF RAIL PROPERTY (SEE SECTION 2)
4. <u>Worcester Main Line Service</u>	A location known as Harvard that represents the Pan Am Southern / Pan Am Railways division point at approximate WN&P mileage 25.70 V.S. 6 -Map 26-Eng. Sta. 1341+50	A railroad station location now known as BARBER at approximate mileage 2.92 and further any Pan Am rights that may exist into Worcester Union Station approximate mileage 0.00 V.S. 6 - Map 1	PAR Freight Rail Properties

ATTACHMENT 4

TO REPLY VERIFIED STATEMENT OF ANDY DALY

2015 OPERATING AGREEMENT

BY AND AMONG

THE MASSACHUSETTS DEPARTMENT OF TRANSPORTATION

AND

THE MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

AND

PAN AM SOUTHERN LLC

INTRODUCTION AND RECITALS

This agreement (the “Agreement”) is made this 21st day of May, 2015, by and among the Massachusetts Department of Transportation, a body politic and corporate created by and acting pursuant to Chapter 6C of the General Laws of the Commonwealth of Massachusetts, as amended, having an address of 10 Park Plaza, Boston, Massachusetts (“MassDOT”); the Massachusetts Bay Transportation Authority, a body politic and corporate created by and acting pursuant to Chapter 161A of the General Laws of the Commonwealth of Massachusetts, as amended, having an address of 10 Park Plaza, Boston, Massachusetts (the “MBTA”); and Pan Am Southern LLC, a Delaware limited liability company, having an address of 1700 Iron Horse Park, Billerica, Massachusetts (“PAS”) (hereinafter the “Parties,” or each a “Party”), in order to memorialize their mutual understanding with regard to certain rights to conduct passenger and freight services on certain property owned by MassDOT or the MBTA, and for the purpose of defining their respective rights and obligations with respect to the same.

WHEREAS, MassDOT and PAS entered into that certain Purchase and Sale Contract dated as of May 25, 2012 (the “Purchase Contract”), as amended by that certain Reinstatement and First Amendment to Purchase and Sale Contract dated as of May 21, 2015, pursuant to which PAS has agreed to convey to MassDOT certain real property, railroad assets, and passenger operating rights that comprise a section of railroad line known as the Connecticut River Main Line, also known as the “Knowledge Corridor,” between Station 2+25 in Springfield, Massachusetts and the Massachusetts border with Vermont in Northfield, Massachusetts, all as described in Exhibit A attached hereto, to MassDOT (the “Property”) and, as set forth in the Purchase Contract, PAS shall retain the Freight Easement (as hereinafter defined).

WHEREAS, the transfer of the Property from PAS to MassDOT is contingent upon, among other things, the execution and delivery by MassDOT or the MBTA and PAS of an

operating agreement setting forth the rights and obligations of the Parties with respect to the Property.

WHEREAS, MassDOT may in the future transfer or delegate operational control of the Property to the MBTA;

WHEREAS, MassDOT is purchasing the Property as part of a plan to restore the existing National Railroad Passenger Corporation ("Amtrak") service to the Property between Station 2+25 in Springfield, Massachusetts and the Massachusetts border with Vermont in Northfield, Massachusetts, and Seller; and

WHEREAS, Seller and Amtrak entered into that certain Host Agreement (defined below), and, as set forth in the Purchase Contract, Seller will contemporaneously with the execution of this Agreement assign such Host Agreement to Buyer, and Buyer has assumed Seller's obligations under such agreement;

WHEREAS, Seller, MassDOT, and Amtrak are parties to that certain SOA (defined below), and, as required by the Purchase Contract, Seller has assigned and Buyer has assumed all of Seller's rights and obligations under the SOA; and

WHEREAS, the Parties acknowledge and agree that the Knowledge Corridor Reconstruction Project will benefit both passenger and freight service on the Property.

NOW, THEREFORE, the Parties agree as follows:

SECTION 1. DEFINITIONS.

"Additional Freight Service" shall have the meaning set forth in Section 2.2(a).

"Additional Amtrak Passenger Service" shall have the meaning set forth in Section 2.2(b).

"Additional PAS Maintenance" shall have the meaning ascribed thereto in Section 3.1(a)(vii).

"Agreement" shall have the meaning ascribed in the Introduction to this Agreement.

"Amtrak" shall have the meaning set forth in the recitals to this Agreement.

"Amtrak Passenger Service" shall mean intercity passenger service conducted by Amtrak, but shall not include Commuter Rail Passenger Service operated by Amtrak, which shall be considered Commonwealth Passenger Service.

"Amtrak Passenger Service Capacity" means Amtrak's right to operate up to three (3) daily through round-trip passenger trains that Amtrak may operate on the Rail Operating Property, as described in Section 2.2(b).

“Appropriate Statutory and Regulatory Authority” means 49 U.S.C. § 10903, et seq. and 49 C.F.R. part 1152, and the STB’s interpretations thereof.

“Base Volume” shall have the meaning ascribed thereto in Section 4.2(a).

“Clearances” shall have the meaning ascribed thereto in Section 6.5.

“Commonwealth Employees” shall mean the employees and agents of the Commonwealth Parties, and the Commonwealth Parties’ operating contractors and said contractors’ employees.

“Commonwealth Parties” means MassDOT and the MBTA, both individually and collectively, and their contractors, agents and designees.

“Commonwealth Passenger” means (i) any person who is on board a train providing Commonwealth Passenger Service (ii) any person who is not on board any train who either has purchased a ticket valid on a train providing Commonwealth Passenger Service or holds a pass document reflecting personal pass privileges granted by a party providing Commonwealth Passenger Services that is valid for travel on a train providing Commonwealth Passenger Service, and (iii) any person who is on, getting on or alighting from a train providing Commonwealth Passenger Service for the purpose of accompanying or meeting any person described in (i) or (ii) of this sentence.

“Commonwealth Passenger Service” means all of the rail operations, including Commuter Rail Passenger Service and movement of the Commonwealth Parties’ materials and equipment, services and activities performed by the Commonwealth Parties or their Operating Contractor (or their respective contractors, assignees or designees) in connection with the provision of passenger rail service in the Commonwealth of Massachusetts.

“Commuter Rail Passenger Service” shall mean any short haul rail passenger transportation provided primarily to passengers traveling between a metropolitan area and its suburbs using reduced fare multiple-ride commutation tickets and provided primarily during morning and peak periods.

“Construction Agreement” shall have the meaning ascribed thereto in Section 3.3.

“Construction Work” means all construction work (other than Reconstruction Activities) performed by the Commonwealth Parties or its agents or contractors, including PAS, pursuant to this Agreement.

“Effective Date” means the date on which PAS conveys the Property to MassDOT.

“Effective Interest Rate” means the then applicable late payment interest rate established by the Office of the Comptroller of the Commonwealth of Massachusetts pursuant to 815 CMR 4.00.

“Force Account Work” shall have the meaning ascribed in Section 5 hereof.

“FRA” means the Federal Railroad Administration.

“Freight Easement” means the perpetual and exclusive easement to provide Freight Rail Service and such other rights over the Rail Operating Property reserved and retained by PAS as are described in any deed or deeds transferring the Property from PAS to MassDOT pursuant to the Purchase Contract, and any additional easements to provide freight rail service and such other rights over the Rail Operating Property as may be added to this Agreement from time to time by mutual agreement of the Parties.

“Freight Rail Service” means the full range of services and activities performed in connection with the provision of current and future freight common carrier and contract carrier obligations on the Rail Operating Property and other activities permitted or required under this Agreement. Freight Rail Service includes PAS’s right to transport railroad material, equipment, ballast, rails and the like in support of Freight Rail Service.

“Freight Service Capacity” shall have the meaning ascribed thereto in Section 2.2(a).

“Host Agreement” means that certain Operating Agreement between National Railroad Passenger Corporation and Pan Am Southern LLC and Springfield Terminal Railway Company dated May 1, 2012, which shall be assigned to MassDOT contemporaneously with the execution of this Agreement.

“Knowledge Corridor Reconstruction Project” shall have the meaning set forth in the Section 3.3 of this Agreement.

“Maintenance Services” means all actions necessary or required for the maintenance of the rights-of-way, tracks, bridges, signals, communications equipment of any relevant section of the Rail Operating Property in accordance with the Maintenance Standard. Maintenance Services shall not include any actions necessary or required for the maintenance of Passenger Facilities. Maintenance Services shall include actions necessary or required for the maintenance of portions of the Rail Operating Property used solely in connection with Freight Rail Service.

“Maintenance Standard” means the standards to be set from time to time by the Party obligated to provide maintenance hereunder which in all instances shall be appropriate for freight rail operations and which shall always meet or exceed the standard required by FRA rules and regulations for the applicable class of track provided for in this Agreement.

“Maintenance Termination Notice” has the meaning set forth in Section 3.1(d).

“MassDOT” shall have the meaning set forth in the recitals of this Agreement.

“MBTA” shall have the meaning set forth in the recitals of this Agreement.

“MBTA Employees” shall mean the employees and agents of the MBTA, and the MBTA’s operating contractors and said contractors’ employees.

“Operating Contractor” means any entity contracted with by the Commonwealth Parties to provide Commonwealth Passenger Rail Service on behalf of the Commonwealth Parties.

“Party” and “Parties” shall have the meaning set forth in the Recitals to this Agreement.

“PAS” shall have the meaning set forth in the Recitals to this Agreement.

“PAS Employees” shall mean the employees and agents of PAS, and PAS’s operating contractors and said contractors’ employees.

“PAS Maintenance Credit” shall have the meaning set forth in Section 4.2(a).

“PAS Max Maintenance Credit” shall have the meaning set forth in Section 4.2(a).

“PAS Trains” means all trains operated by or on behalf of PAS.

“Passenger Facilities” means the non-operating portions of the Property exclusively used for and related to Passenger Service, including but not limited to stations, platforms, parking areas and passenger service amenity facilities, which shall be owned, controlled, and/or used by the Commonwealth Parties and third parties.

“Passenger Service” shall mean passenger rail service conducted by Amtrak and/or the Commonwealth Parties or other third parties.

“Passenger Service Commencement Date” shall have the meaning set forth in Section 2.2(e).

“Passenger Service Commencement Notice” shall have the meaning set forth in Section 2.2(e).

“Person” means any individual, corporation, partnership, association, trust or any other entity or organization, including, without limitation, a government, a public agency, political instrumentality or political subdivision or authority.

“Property” shall have the meaning set forth in the Recitals to this Agreement, and shall include but not be limited to the Rail Operating Property.

“Purchase Contract” shall have the meaning set forth in the recitals to this Agreement.

“PTC” shall have the meaning set forth in Section 4.4.

“Reconstruction Activities” means all construction and construction-related activities reasonably necessary for the completion of the Knowledge Corridor Reconstruction Project.

“Rail Operating Property” means those portions of the Property used by any Party hereto for the provision of rail services and excludes Passenger Facilities and all other non-operating portions of the Property.

“Service Suspension” means the suspension of Freight Rail Service and/or Passenger Rail Service in connection with the Maintenance Services.

“SOA” shall mean that certain Maintenance and Service Outcomes Agreement for Rail Line Improvements between Springfield, Massachusetts and East Northfield, Massachusetts by and among Amtrak, PAS, and MassDOT dated June 27, 2011, as amended, which PAS has assigned to the Commonwealth Parties, and the Commonwealth Parties have assumed.

“STB” means the Surface Transportation Board of the United States Federal Government.

SECTION 2. GENERAL OPERATING RIGHTS

2.1 PAS Freight Rail Service.

Consistent with the Freight Easement and subject to this Agreement, PAS, and only PAS, shall have the exclusive right to perform Freight Rail Service on the Rail Operating Property. PAS shall at all times provide Freight Rail Service over the Rail Operating Property in accordance with FRA regulations and the terms of this Agreement and the terms of the Freight Easement. Subject to this Agreement, PAS shall have the unilateral right to determine the levels of Freight Rail Service as PAS deems in its sole discretion. The character, scheduling or extent of PAS Freight Rail Service shall not preclude the Commonwealth Parties’ or Amtrak’s potential future use of the Rail Operating Property for Passenger Service, as, if and when such Passenger Service commences on the Rail Operating Property in accordance with the terms of this Agreement, after such improvements and rehabilitation as may be necessary to safely enable such use have been performed at the expense of the Commonwealth Parties.

2.2 Operations over the Property.

(a) Operations by PAS.

Upon completion of construction of the Knowledge Corridor Reconstruction Project, PAS shall have the right to run up to two (2) daily round-trip Freight Rail Service trains on the Rail Operating Property and one local Freight Rail Service train to serve customers (the “Freight Service Capacity”). PAS shall have first priority to schedule Freight Service Capacity trains daily except as otherwise set forth in Section 2.2(b) below; provided, however, that PAS acknowledges the importance of the Commonwealth Parties’ ability to provide Commuter Rail Passenger Service trains during commuter rush hours and shall use reasonable efforts to avoid conflicts with Passenger Service operations. PAS shall have the exclusive right to run as many Freight Rail Service trains in excess of the Freight Service Capacity (“Additional Freight Service”), including but not limited to local working trains, as necessary, provided such Additional Freight Service trains do not interfere with the Amtrak Passenger Service Capacity or the Commonwealth Passenger Service. Any Freight Service train that is not designated as a Freight Service Capacity train shall automatically be designated an Additional Freight Service train. The Commonwealth Parties agree to use reasonable efforts to accommodate such Additional Freight Service Trains.

(b) Operations by Amtrak

Amtrak may use the Rail Operating Property to provide Amtrak Passenger Service subject to any host railroad agreement then in effect between the Commonwealth Parties and Amtrak. Amtrak shall have the exclusive right to run up to three (3) round trip intercity passenger train trips per day (the “Amtrak Passenger Service Capacity”), according to a schedule agreed upon by PAS and the Commonwealth Parties, in consultation with Amtrak. Amtrak shall have the right to run additional intercity passenger train trips in excess of the Amtrak Passenger Service Capacity (such additional service, the “Additional Amtrak Passenger Service”) provided such Additional Amtrak Passenger Service trains will not interfere with or limit PAS’s ability to operate Freight Rail Service up to the Freight Service Capacity. Deadhead moves shall not be considered as trips under this Section 2.2(b).

(c) Operations by the Commonwealth Parties.

The Commonwealth Parties may use the Rail Operating Property to provide Commonwealth Passenger Service, to perform Construction Work, and for related uses. Nothing in this Agreement other than Section 2.2(a) and Section 2.2(b) shall derogate from the Commonwealth Parties’ right to utilize, directly or through its Operating Contractor or another subcontractor, or to permit other carrier(s) to utilize any portion of the Rail Operating Property for the provision of Commonwealth Passenger Service, including without limitation, long-haul intercity service as well as Commuter Rail Passenger Service. The Commonwealth Parties may operate as many passenger train round-trips as they deem reasonable or necessary, provided that such use does not interfere with or limit (i) PAS’s ability to operate Freight Rail Service up to the Freight Service Capacity, or (ii) Amtrak’s ability to operate the Amtrak Rail Service up to the Amtrak Passenger Service Capacity. If the Commonwealth Parties propose to add Commuter Rail Passenger Service or other Commonwealth Passenger Service trains during time periods that would interfere with previously scheduled Additional Freight Service trains, the Commonwealth Parties shall provide PAS with thirty (30) days prior written notice and PAS may reschedule such Additional Freight Service trains to a different time period.

(d) Schedules.

PAS, Amtrak, and the Commonwealth Parties shall mutually agree (such agreement not to be unreasonably withheld) on schedules to accommodate PAS, Amtrak and Commonwealth Passenger Service, with the concurrent consideration that such schedules and operations shall make adequate provision for, and shall not unreasonably interfere with, the PAS Freight Rail Service train trips. Such schedule will accommodate Freight Rail Service and Passenger Rail Service operating in adjacent slots throughout the course of a 24-hour period.

(e) Passenger Service Commencement.

The Commonwealth Parties shall provide (or shall cause Amtrak to provide) notice to PAS (a “Passenger Service Commencement Notice”) advising PAS of the date on which Amtrak or the Commonwealth Parties or the Commonwealth Parties’ Operating Contractor intends to commence Passenger Service on the Rail Operating Property (such date, a “Passenger Service

Commencement Date”) at least sixty (60) days prior to such Passenger Service Commencement Date.

- (f) Commonwealth Use Prior to Commonwealth Passenger Service Commencement or during Suspension of Passenger Service

Prior to the Passenger Service Commencement Date or at any time when Passenger Service has been and continues to be discontinued pursuant to Section 2.3(e), the Commonwealth Parties shall have the right to periodically run trains over the Rail Operating Property for the purpose of (x) inspecting the Property; (y) transporting railroad material and equipment, ballast, rails, and the like owned by the MBTA or MassDOT or their contractors (but not common or contract carriage of freight); and (z) transporting passengers in connection with special civic, sports or other events. The right described in the foregoing sentence shall be exercised in an intermittent, but not regularly scheduled, manner that does not unreasonably interfere with PAS’s use of the Rail Operating Property for Freight Rail Service. The Commonwealth Parties shall assume all incremental costs and expenses incurred as a result of such use, if any, including costs to provide additional maintenance, perform additional inspections, or build infrastructure if reasonable or necessary to permit such use.

2.3 Discontinuance of Freight Rail Operations.

- (a) PAS-Initiated Abandonment or Discontinuance.

In the event that PAS ceases to have current use, or, in PAS’s sole and absolute determination, reasonably foreseeable future use, of any segment of the Rail Operating Property, or, if in PAS’s sole and absolute discretion it determines that it no longer wishes to continue the use of any such segment for Freight Rail Service, PAS will have the option to seek from the STB approval pursuant to Appropriate Statutory and Regulatory Authority, which approval may come in the form of an exemption from the requirement to obtain such approval, to abandon and/or discontinue Freight Rail Service over all or any portion of such segment of the Rail Operating Property. The Commonwealth Parties shall not oppose any such request by PAS to abandon and/or discontinue Freight Rail Service. Should PAS receive such approval for abandonment, or exemption from such approval for abandonment, PAS shall promptly notify MassDOT, which notification shall designate a specific date upon which such authority to abandon is to be consummated. Upon such consummation, PAS shall no longer have the right to operate Freight Rail Service over such abandoned portions of the Rail Operating Property, but otherwise the property shall be subject to the terms of this Agreement. Upon the consummation, any discontinued portions of the Rail Operating Property shall continue to be subject to the terms of this Agreement and the Interstate Commerce Act as amended from time to time.

- (b) MassDOT Request for Abandonment.

In the event PAS has not provided Freight Rail Service over any segment of the Rail Operating Property for a continuous period of eight (8) years, MassDOT may request that PAS seek abandonment authority over said segment. Promptly upon receiving said written request by MassDOT, PAS shall seek approval pursuant to Appropriate Statutory and Regulatory Authority,

which approval may come in the form of an exemption from the requirement to obtain such approval, to abandon Freight Rail Service over all or any portion of said segment of the Rail Operating Property. Should PAS receive such approval, or exemption from such approval, PAS shall promptly notify MassDOT, which notification shall designate a specific date upon which such authority to abandon is to be consummated. PAS shall consummate such abandonment authority upon such date, and PAS shall no longer have the right to operate Freight Rail Service over such abandoned portions of the Rail Operating Property, but otherwise the property shall be subject to the terms of this Agreement.

(c) MassDOT Petition for Abandonment.

In the event that PAS has failed to provide Freight Rail Service on any segment of the Rail Operating Property for a continuous period of three (3) years, and provided that any such failure is not a direct or indirect result of the failure of the Commonwealth Parties to properly maintain or repair the Rail Operating Property or of any other breach by the Commonwealth Parties of their obligations under this Agreement, then MassDOT will be entitled, in its sole discretion, to commence adverse abandonment proceedings with the STB with respect to such segments. PAS may oppose such proceedings and will have no obligation to assist MassDOT or to otherwise cooperate or participate in such proceedings in any way. If such adverse abandonment proceedings are successfully consummated with respect to such portions of the Rail Operating Property, MassDOT shall promptly notify PAS, which notification shall designate a specific date upon which such authority to discontinue service or authority to abandon is to be consummated. PAS shall consummate such abandonment authority upon such date, subject to any terms and conditions set forth in the applicable STB order or decision.

(d) Maintenance and Dispatching if PAS Abandons Portions.

In the event that PAS discontinues its right to provide Freight Rail Service over all or substantially all of the Rail Operating Property, or abandons its right to provide Freight Rail Service over substantially all of the Rail Operating Property, PAS may at its discretion decline to perform maintenance and dispatching services on the Rail Operating Property.

(e) Termination of Agreement upon Total Abandonment.

This Agreement will terminate if PAS abandons its right to provide Freight Rail Service over all of the Rail Operating Property under Section 2.3(a),(b), or (c).

(f) Limitations on Adverse Abandonment.

The Commonwealth Parties hereby agree that they will not commence or otherwise seek or pursue any adverse abandonment proceedings with the STB except as permitted by Section 2.3(c).

(g) Discontinuance and Restoration of Passenger Service

In the event that Amtrak and the Commonwealth Parties discontinue all Passenger Service on the Rail Operating Property, Amtrak or the Commonwealth Parties shall have the

right to restore Passenger Service on the Rail Operating Property upon delivery of a Passenger Service Commencement Notice pursuant to Section 2.2(e), subject to Section 3.1(i) below.

(h) Third Party Operations on the Rail Operating Property

The Parties shall ensure that their respective contractors and subcontractors performing work or services on the Rail Operating Property perform and complete their respective work or services in accordance with this Agreement.

SECTION 3. MAINTENANCE AND ACCESS

3.1 Maintenance.

(a) Except for so long as the placement of temporary speed restrictions is reasonable or necessary, the Rail Operating Property shall be maintained as provided for in this Section 3.1.

(b) Prior to the Passenger Service Commencement Date, the Rail Operating Property shall be maintained to a level sufficient for PAS to operate the Freight Rail Service, as determined by PAS.

(c) After the Passenger Service Commencement Date, sufficient portions of the main line of the Rail Operating Property shall be maintained as directed by the Commonwealth Parties to a standard that will permit Amtrak Passenger Service Trains or the trains of a successor to Amtrak to achieve at least the Service Outcomes as set forth in Exhibit B to this Agreement (the “**Service Outcomes Maintenance Standard**”) for so long as the SOA or any similar agreement with respect to the Knowledge Corridor is in force and effect. In the event the SOA is no longer in effect, the Rail Operating Property shall be maintained as directed by the Commonwealth Parties, but at least to a FRA Class I condition.

(d) At any time, whether or not PAS is designated to perform the Maintenance Services, PAS may choose not to perform, or have performed, any maintenance on portions of any industrial sidings and assets required solely in relation to Freight Rail Service, based upon lack of freight demand or otherwise.

(e) At any time, the Commonwealth Parties may choose not to perform, or have performed, any maintenance on any assets required solely in relation to Passenger Service. Nothing in this Agreement shall be construed to require the Commonwealth Parties to use or maintain the Rail Operating Property, or to maintain the tracks on said Rail Operating Property, to a condition that allows use of the Rail Operating Property for Passenger Service by any Person.

(f) PAS, in its sole and absolute discretion and at its sole cost and expense, may request and/or provide maintenance in excess of what is directed by the Commonwealth Parties pursuant to Section 3.1(c) (“**Additional PAS Maintenance**”).

(g) Should a PTC system be installed, the maintenance and renewal of that PTC system (but not including any PTC equipment installed on PAS locomotives pursuant to Section 4.4 below) shall be an element of the Maintenance Services.

(h) Regardless of who is providing the Maintenance Services at the time, in the event that Amtrak and the Commonwealth Parties discontinue all Passenger Service on the Rail Operating Property, PAS shall automatically be designated as the Party responsible for Maintenance Services and shall be solely be responsible for maintaining the mainline of the Rail Operating Property to FRA Class IV for a period of one (1) year.

(i) After one (1) year following the discontinuance of Passenger Service on the Rail Operating Property, PAS shall, at its sole cost and expense, maintain the Rail Operating Property to a level that PAS determines is sufficient for PAS to operate Freight Rail Service and not to a level to support Passenger Rail Service, and shall not be required to make the PAS Maintenance Payment or provide the PAS Maintenance Credit described below in Section 4.2(a). All such Maintenance Services shall be undertaken in a manner which does not preclude or materially impair the Commonwealth Parties' or Amtrak's future use of the Rail Operating Property for Passenger Service, as, if and when Passenger Service is restored in accordance with Section 2.3(g), provided, however, that the foregoing shall not be interpreted as requiring PAS to bear the cost for any rehabilitation or upgrade to permit the reintroduction of Passenger Service once it has taken over responsibility for Maintenance Services pursuant to this Section 3.1(i).

(j) All Maintenance Services, whether performed by PAS or by the Commonwealth Parties or their contractor, shall be undertaken in a manner so as to minimize interference with train operations. In all circumstances where a track outage is required for the performance of Maintenance Services (except emergency maintenance services), such maintenance work shall be scheduled and the Party performing such maintenance shall provide to Amtrak and the other Party(ies), written notice of such maintenance work at least fifteen (15) calendar days in advance of any such track outage. Notwithstanding the foregoing, each Party performing Maintenance Service work shall make reasonable efforts to provide written notice at least thirty (30) days in advance of any such track outage. Notwithstanding any provision of this Agreement to the contrary, PAS and the Commonwealth Parties acknowledge that one or more Service Suspensions may be necessary in order perform Maintenance Services. All Maintenance Services shall be performed in a manner to minimize, to the extent practicable, and to mitigate disruption to the Freight Rail Service and Passenger Service.

(k) The Party designated to perform the Maintenance Services shall provide and furnish all labor, administrative, professional, and supervisory personnel necessary for its performance of the Maintenance Services. Such personnel or subcontractor personnel involved in any aspect of providing services under this Agreement shall be subject to the direction, supervision, and control of the Party designated to perform said Maintenance Services. Said Party designated to perform such Maintenance Services shall be solely responsible for all labor relations issues relating to their employees (or those of their respective contractors) that arise in connection with the performance of services

under this Agreement. Said Party designated to perform such Maintenance Services shall provide and furnish, or cause to be provided and furnished, all labor, administrative, professional, and supervisory personnel necessary for its performance of the Maintenance Services under this Section 3.1.

(l) In the event that the party responsible for Maintenance Services does not provide a particular item of Maintenance Services as required pursuant to this Section 3.1, the other Party(s) may, at its option after providing notice of such Maintenance Service deficiencies to the responsible Party, such responsible Party's failure to correct such deficiencies in performing the Maintenance Services within seven (7) days of such notice, either with or without the consent or request of such responsible Party, either itself or through a contractor, provide said item of maintenance, and the responsible Party shall reimburse the other Party for all incremental costs incurred in rendering such item of Maintenance Services. The provision of Maintenance Services pursuant to this Section 3.1(l) shall not be considered a waiver of any other remedies available to the Parties under this Agreement including, without limitation, the remedies set forth in Section 12.

3.2 Access for the Commonwealth Parties.

Nothing in this Section 3 shall derogate from the Commonwealth Parties' right to enter upon any portion of the Rail Operating Property for any purpose, provided that such entry does not unreasonably interfere with Freight Rail Service and provided that reasonable notice is provided and all applicable safety rules and practices are followed.

3.3 Knowledge Corridor Reconstruction Project.

Pursuant to that certain Construction Agreement for Rail Line Improvements between Springfield, Massachusetts and East Northfield, Massachusetts dated June 22, 2011, by and among PAS and the MBTA (the "Construction Agreement"), PAS and the MBTA have agreed to reconstruct the Property to facilitate the commencement of Amtrak Passenger Service. The project described in the Construction Agreement shall be referred to herein as the "Knowledge Corridor Reconstruction Project," and the rights and responsibilities of PAS and the MBTA shall be as set forth in such Construction Agreement.

SECTION 4. RESPONSIBILITY FOR MAINTENANCE SERVICES AND CAPITAL EXPENSES

4.1 Prior to the Passenger Service Commencement Date.

Prior to the Passenger Service Commencement Date, PAS shall be responsible for all costs involved in performing the Maintenance Services.

4.2 After the Passenger Service Commencement Date.

(a) PAS Maintenance Payment

From and after the Passenger Service Commencement Date, the Commonwealth Parties shall be responsible for, and shall reimburse PAS for, all costs for PAS involved in performing the Maintenance Services, other than maintenance of portions of the Rail Operating Property used solely for Freight Rail Service purposes, subject to a credit (the “PAS Maintenance Credit”). The PAS Maintenance Credit shall be an annual credit by PAS to the Commonwealth Parties towards the cost of Maintenance Services. The PAS Maintenance Credit shall be the lesser of (i) \$250,000 (the “PAS Max Maintenance Credit”), indexed as described in the next sentence, and (ii) the costs of the Maintenance Services actually performed. The PAS Max Maintenance Credit shall be adjusted annually for price level changes, beginning January 1, 2015, based on the relationship of the most recent Fourth Quarter Index (beginning with Fourth Quarter 2014) from the Association of American Railroads Quarterly Indices of Chargeout Prices and Wage Rates (Table C)-East, material prices, wage rates and supplements combined (excluding fuel), to the Fourth Quarter 2013 index value. The PAS Max Maintenance Credit represents the maintenance costs to maintain the Rail Operating Property to FRA Class I conditions, given a freight volume of 5,000 carloads annually (the “Base Volume”). At any time that freight volume in any year increases by at least 10,000 carloads or decreases by at least 1,000 carloads from the Base Volume, then the Parties shall increase or decrease, as appropriate, the PAS Maintenance Credit for such year; provided, however, that if the freight volume in the subsequent years reverts to between 4,000 carloads and 15,000 carloads, the amount of the PAS Maintenance Credit shall revert to the original PAS Maintenance Credit.

(i) So long as PAS is performing the Maintenance Services, the Commonwealth Parties shall receive a first dollar credit for all Maintenance Services up to the amount of the PAS Max Maintenance Credit. The Commonwealth Parties shall provide monthly payment to PAS for the provision of said maintenance of the Rail Operating Property after the PAS Maintenance Credit first dollar credit is exhausted in a calendar year. If the PAS Max Maintenance Credit exceeds the cost of Maintenance Services performed in a calendar year, PAS will not be responsible to the Commonwealth Parties for any payment, and no credit shall be carried forward to future years.

(ii) In the event that the Commonwealth Parties assume maintenance control and perform the Maintenance Services pursuant to Section 4.3(d), PAS shall no longer provide a credit, and shall instead pay, in twelve (12) equal monthly installments annually, an amount equal to the Max PAS Maintenance Credit toward the cost of the Maintenance Services for the Rail Operating Property (the “PAS Maintenance Payment”). Each month, PAS shall also be responsible for paying the costs of the Additional PAS Maintenance, if any. At the end of the calendar year, the Parties shall true up the PAS payment for Maintenance Services pursuant to this Section 4.2(a) to account for any overpayment, if any, by PAS. In the discretion of the Commonwealth Parties, such true up may take the form of a credit to the payment of PAS for Maintenance Services for the following calendar year.

4.3 Maintenance Service Responsibilities.

(a) Initial Designation of Responsibilities

The Parties acknowledge that PAS shall initially be designated by the Commonwealth Parties to perform the Maintenance Services.

(b) Maintenance Deficiency Notice

Notwithstanding any provision of this Agreement to the contrary, the Commonwealth Parties may notify PAS of the Commonwealth Parties' intention to assume control of and to perform the Maintenance Services either itself or through a third party, due to a failure of PAS to adequately perform said Maintenance Services. Such written notice (a "Maintenance Deficiency Notice") shall include the Commonwealth Parties' specific, performance-related reasons for assuming maintenance responsibilities and, if the Commonwealth Parties are reasonably able to identify specific actions that would cause the Commonwealth Parties to allow PAS to retain maintenance responsibilities, shall specify such remedial actions.

(c) Maintenance Remediation Proposal and Implementation

PAS may, within three (3) business days of receipt of such Maintenance Deficiency Notice, respond with a proposal (a "Maintenance Remediation Proposal") describing measures that PAS will implement to address any deficiencies described in the Maintenance Deficiency Notice within thirty (30) days of PAS's receipt of said Maintenance Deficiency Notice. If the Commonwealth Parties accept that the Maintenance Remediation Proposal adequately addresses any prior maintenance deficiencies and, provided further, that PAS implements such measures described in the Maintenance Remediation Proposal, PAS shall retain control of and perform the Maintenance Services. At the end of the thirty (30)-day period described above, the Commonwealth Parties shall notify PAS whether it shall retain control of and perform the Maintenance Services, subject to PAS's continued implementation of the remediation measures described in the Maintenance Remediation Proposal.

(d) Change in Maintenance Service Responsibilities

In the event that the Commonwealth Parties do not allow PAS to retain control of and perform the Maintenance Services, but the Commonwealth Parties are not in a position to provide Maintenance Services on the thirtieth (30th) day after delivery of a Maintenance Deficiency Notice, then PAS shall continue to provide such Maintenance Services at the Commonwealth Parties' sole cost and expense, until such time as the Commonwealth Parties are ready to assume maintenance responsibilities. In the event that the Commonwealth Parties assume control of Maintenance Services pursuant to this Section 4.3, PAS shall contribute the PAS Maintenance Payment set forth in Section 4.2(a)(ii) toward the Maintenance Services.

(e) PAS Right to Challenge Commonwealth Parties' Determination

Notwithstanding anything to the contrary herein, in the event that the Commonwealth Parties determine that a Maintenance Remediation Proposal does not adequately address the maintenance deficiencies identified in a Maintenance Deficiency Notice, or that PAS has failed to implement the measures set forth in an approved Maintenance Remediation Proposal within the 30-day period set forth in Section 4.3(c) above, the Commonwealth Parties or its designee may assume the performance of Maintenance Services as soon as reasonably practicable. PAS

shall have the right to submit the Commonwealth Parties' decision to arbitration by commencing the arbitration procedures set forth in Section 12.4 hereof, provided, however, that at any time while such challenge is pending, the Commonwealth Parties shall have the right to assume control of and perform the Maintenance Services either itself or through a third party.

The parties agree that the Arbitrator(s) shall apply a reasonableness standard to the Commonwealth Parties' decision to assume the performance of Maintenance Services.

Notwithstanding anything herein to the contrary, any decision of the Arbitrator(s) pursuant to this Section 4.3 shall be final and neither PAS nor the Commonwealth Parties have the right to appeal such decision to a court of law or otherwise. If the Arbitrator(s) rule in PAS's favor, the Commonwealth Parties shall reinstate PAS as the Maintenance Service provider upon not less than thirty (30) days' prior written notice.

4.4 Responsibility for Capital Improvements.

(a) In the event that a condition is identified on the Property that prevents the achievement of the Service Outcomes as set forth in Exhibit B of this Agreement and that can be remedied only by capital maintenance, the Commonwealth Parties shall be responsible for such capital maintenance costs that are required to achieve the Service Outcomes.

(b) The Commonwealth Parties' capital maintenance obligations include, but are not limited to, those set forth in Exhibit B to this Agreement.

(c) PAS, in its sole and absolute discretion, may pay additional amounts towards the improvement of the Property, including capital projects and modifications to proposed capital improvements to be constructed by the Commonwealth Parties, provided, however, that any such PAS-initiated capital projects or modifications to proposed Commonwealth Parties-initiated capital projects shall be subject to the written approval of the Commonwealth Parties, which approval shall not be unreasonably withheld, conditioned or delayed. The Commonwealth Parties shall provide PAS reasonable notification of contemplated Commonwealth Parties-initiated capital projects in order to effectuate the intent of this section.

4.5 PTC.

In the event that positive train control ("PTC") is required on any Rail Operating Property due to the presence of Passenger Service and not solely because of PAS operations, the Commonwealth Parties shall, at their sole cost and expense, provide a PTC system that complies with applicable law and is fully interoperable with the PTC system adopted by the national freight system. In addition, the Commonwealth Parties shall equip at their sole cost and expense up to twenty (20) PAS locomotives with equipment necessary for said locomotives to operate over all PTC equipped Rail Operating Property conforming to the above-referenced national freight system standard.

4.6 Regulatory Approval for Work on Rail Operating Property

The Commonwealth Parties shall have the exclusive right to secure such approvals of regulatory or governmental bodies for such work on the Rail Operating Property as may be necessary, including, without limitation, the FRA and Massachusetts Department of Public Utilities, and no approval of PAS shall be required for the performance of any work on the Rail Operating Rail Property.

SECTION 5. FORCE ACCOUNT WORK

The Commonwealth Parties may, to the extent permitted by applicable law and in their sole discretion, request that PAS perform work not otherwise required by this Agreement (“Force Account Work”) on portions of the Rail Operating Property used solely for Freight Rail Service purposes. All Force Account Work shall be performed pursuant to a Force Account Work Agreement reasonably acceptable to both parties.

SECTION 6. ACCESS, ALTERATIONS AND GOVERNMENTAL APPROVALS

6.1 Installation of Switches and Sidings for Freight Rail Service.

PAS, at its own cost and expense, may install switches and sidings, including any associated signaling to serve new locations on the Rail Operating Property. All such installations shall be subject to the prior written approval of the Commonwealth Parties, which approval shall not be unreasonably withheld, conditioned or delayed. The Commonwealth Parties shall make reasonable efforts to provide any such written approval within forty-five (45) days of the date PAS first requests such approval.

6.2 Capacity Improvements.

Each Party shall have the right to propose the construction of additional improvements on the Property to increase capacity on the Line. The Parties agree to consider and use reasonable efforts to agree upon details related to the construction of such improvements, including the nature of such improvements, whether and how each Party will participate with respect to the construction of such improvements and the proportionate share of costs, if any, to be borne by each Party, and the benefits to be afforded to the Party(s) funding the costs of the construction of such improvements, such agreement not to be unreasonably withheld, conditioned or delayed. If a Party proposes a capacity improvement that the other Party(s) is not willing to help finance, all of the capacity that is associated with said capacity improvement shall be allocated to such Party. For example and as an illustration, if PAS were to propose, and the Commonwealth Parties were to approve but opt not to share in the costs of, construction of improvements on the Property that would increase the capacity on the Line such that an additional Freight Service round-trip train could run on the Line without interfering with the existing rail service schedule on the Property, such additional Freight Service Train shall be added directly to, and become part of, the Freight Service Capacity. No capacity improvement shall unreasonably interfere with the provision of PAS Freight Rail Service, the Freight Service Capacity, the Amtrak Passenger Service or the Commonwealth Passenger Service.

6.3 No PAS Approval.

Except as expressly provided in this Agreement, nothing in this Agreement shall derogate from the Commonwealth Parties' sole right to perform all maintenance, construction, alterations, or improvements of any kinds to the Property that are determined to be necessary or reasonable to the Commonwealth Parties, in their sole discretion, and nothing contained herein shall be construed to grant to PAS a right to approve actions by the Commonwealth Parties affecting the Property including, without limitation, alterations thereto, the relocations, use of air or subsurface rights for development or other purposes, or granting of easements for utilities and crossings provided, however, (1) that all such actions do not unreasonably interfere with the provision of PAS Freight Rail Service or the Freight Service Capacity and (2) do not violate the Clearances requirement set forth in Section 6.5.

6.4 Access to Third Parties.

Subject to and consistent with the other provisions of this Agreement, including PAS's exclusive Freight Easement, in addition to access to third parties required to provide Passenger Service, the Commonwealth Parties may grant access to the Property to third parties, including but not limited to utilities providers, to perform work on such third parties' own behalf. The Commonwealth Parties shall provide at least fourteen (14) days prior written notice (or with respect to emergency services, such lesser notice as is reasonable in the circumstances) to PAS of all such work that will have an impact on PAS operations. To the extent that any such work by third parties is performed on the Rail Operating Property while PAS is responsible for the performance of dispatching services, such work will be performed in accordance with the applicable operational and dispatching rules and regulations of PAS and such third parties shall be obligated to have received or to procure from PAS any railway worker protection training, flagging, employee in charge and other such services as are reasonably and customarily required by PAS and to compensate PAS in accordance with its customary policies and procedures for the provision of such required training, protection and other mandatory services. All such access pursuant to this Section 6.4 shall be at the Commonwealth's sole cost, risk and expense.

6.5 Infrastructure Improvements or Modifications Affecting Dimensional Traffic.

The Commonwealth Parties shall, in coordination with PAS, take reasonable steps to provide no less than existing clearances on the Rail Operating Property and maintain such clearances ("Clearances") to no less than nine (9) feet from the centerline of track horizontally and no less than twenty-three (23) feet from top of rail measured vertically. Notwithstanding the foregoing, it is acknowledged that the Commonwealth Parties intend to construct high level platforms at stations, and such construction will be permissible provided that such high level platforms will be accompanied by a second track that maintains the aforementioned Clearances. In exercising such reasonable steps and to the extent it is permitted to consent or withhold consent, the Commonwealth Parties shall deny its consent to third parties that intend to construct or reconstruct infrastructure impacting the Rail Operating Property in a manner as to impact adversely the Clearances. Notwithstanding the foregoing or anything herein to the contrary, at any time the Commonwealth Parties shall not be required to replace any existing structures on or adjacent to the Property with new structures to meet the dimensional clearance requirements set forth in this Section 6.5 where such clearances do not exist as of the Effective Date of this Agreement.

SECTION 7. MANAGEMENT AND CONTROL; DISPATCHING

7.1 Control and Management

The Commonwealth Parties retain the exclusive right to exercise and to perform, or to delegate or subcontract to another entity the performance of the management, regulatory and operational control of any and all rail service over the Rail Operating Property, including, without limitation, dispatching and control of all trains; provided, however, that commencing on the Effective Date and continuing after the Passenger Service Commencement Date, PAS shall be designated to perform dispatching services on the Rail Operating Property, unless and until the Commonwealth Parties assume such obligation pursuant to Section 7.3. In the exercise of its control over the Rail Operating Property, the party performing dispatching services (which party will initially be PAS, but may be employees, contractors or agents of the Commonwealth Parties as provided for in this Agreement), will make all reasonable efforts to expedite the movement of freight trains, including expediting repairs to lines removing obstructions, and scheduling regular maintenance and repair programs at hours which will not unreasonably interfere with such movement; provided further, that such party providing dispatching services shall give priority to Passenger Service trains over all other train scheduling, dispatching and control, including without limitation PAS Freight Rail Service trains, provided that each such Passenger Service train is within ten (10) minutes earlier or later than its schedule time. For all other train movements, the party performing dispatching services on behalf of the Commonwealth Parties shall prioritize trains and resolve scheduling conflicts using best dispatching practices and in accordance with sound dispatching principles. At any given time, all of the Rail Operating Property will be managed and controlled, including dispatching, by one Party.

7.2 Dispatching Protocol

The Commonwealth Parties or PAS, as applicable, shall, in consultation with the other Party(s), establish a dispatching protocol that (i) will minimize negative impacts on each Party's trains in all time periods, and (ii) will allow reasonable flexibility within the structure described herein in order to accommodate the movement of each other's trains, provided however, that subject to Section 2.2(a), the Commonwealth Parties shall have the exclusive right to schedule Passenger Service trains in consultation with PAS and that in all circumstances a scheduled Passenger Service train shall hold a priority for as long as it maintains its schedule within a period no longer than ten minutes earlier or later than its scheduled time, as described above in Section 7.1.

7.3 Change in Dispatching Responsibility

(a) Dispatching Deficiency Notice

Notwithstanding any provision of this Agreement to the contrary, the Commonwealth Parties may notify PAS of the Commonwealth Parties' intention to assume dispatching control and perform dispatching services either itself or through a third party, due to a failure of PAS to adequately perform said dispatching services. Such written notice (a "Dispatching Deficiency Notice") shall include the Commonwealth Parties' specific, performance-related reasons for

assuming dispatching control and, if the Commonwealth Parties are reasonably able to identify specific actions that would cause the Commonwealth Parties to allow PAS to retain dispatching responsibilities, shall specify such remedial actions.

(b) Remediation Proposal and Implementation

PAS may, within three (3) business days of receipt of such Dispatching Deficiency Notice, respond with a proposal (a “Dispatching Remediation Proposal”) describing measures that PAS will implement to address any deficiencies described in the Dispatching Deficiency Notice within thirty (30) days of PAS’s receipt of said Dispatching Deficiency Notice. If the Commonwealth Parties accept that the Dispatching Remediation Proposal adequately addresses any prior dispatching deficiencies and, provided further, that PAS implements such measures described in the Dispatching Remediation Proposal, PAS shall retain dispatching control and perform dispatching services. At the end of the thirty (30)-day period described above, the Commonwealth Parties shall notify PAS whether it shall retain dispatching control and perform dispatching services, subject to PAS’s continued implementation of the remediation measures described in the Dispatching Remediation Proposal.

(c) Change in Dispatching Control

In the event that the Commonwealth Parties do not allow PAS to retain dispatching control and perform dispatching services, but the Commonwealth Parties are not in a position to provide dispatching services on the thirtieth (30th) day after delivery of a Dispatching Deficiency Notice, then PAS shall continue to provide such dispatching services at the Commonwealth Parties’ sole cost and expense, until such time as the Commonwealth Parties are ready to assume dispatching responsibilities. In the event that the Commonwealth Parties assume control of dispatching services pursuant to this Section 7.3, in order to allow for the in order to allow for the transfer of dispatching control to the Commonwealth Parties or a third party on the Rail Operating Property, PAS will provide full cooperation and access in locating and activating switching (transfer) equipment at necessary sites to establish the capability or activation of train control machines controlling the Rail Operating Property at the Commonwealth Parties’ dispatching center and deactivation of the train control machines at the PAS dispatching center. PAS shall provide this cooperation within thirty (30) days of direction from the Commonwealth Parties. Such work shall be performed as Force Account Work under this Agreement or by the Commonwealth Parties or third parties engaged by the Commonwealth Parties, at their sole discretion.

(d) PAS Right to Challenge

Notwithstanding anything to the contrary herein, in the event that the Commonwealth Parties determine that a Dispatching Remediation Proposal does not adequately address the dispatching deficiencies identified in a Dispatching Deficiency Notice, or that PAS has failed to implement the measures set forth in an approved Dispatching Remediation Proposal within the 30-day period set forth in Section 7.3(b) above, the Commonwealth Parties or its designee may assume the performance of dispatching services as soon as reasonably practicable. PAS shall have the right to submit the Commonwealth Parties’ decision to arbitration by commencing the

arbitration procedures set forth in Section 12.4 hereof, provided, however, that at any time while such challenge is pending, the Commonwealth Parties shall have the right to assume control of and perform the dispatching services either itself or through a third party. The parties agree that the Arbitrator(s) shall apply a reasonableness standard to the Commonwealth Parties' decision to assume the performance of dispatching services. Notwithstanding anything herein to the contrary, any decision of the Arbitrator(s) pursuant to this Section 7.3 shall be final and neither PAS nor the Commonwealth Parties have the right to appeal such decision, to a court of law or otherwise. If the Arbitrator(s) rule in PAS's favor, the Commonwealth Parties shall reinstate PAS as the dispatching service provider upon not less than thirty (30) days' prior written notice.

SECTION 8. TERM

This Agreement shall commence on the Effective Date and shall be for a Term of thirty (30) years, unless terminated earlier pursuant to its terms. Notwithstanding the foregoing, the Parties agree that this Agreement shall remain in full force and effect during any interim period between the end of the Term of this Agreement (or the termination hereof for any reason other than mutual agreement of the Parties) and the execution of a new, revised, or extended operating agreement covering all of the Property. The Parties acknowledge that expiration or termination of this Agreement will not affect the validity, continuation or perpetual nature of the Freight Easement or any other easement rights vested in PAS with regard to the Property.

SECTION 9. INDEMNIFICATION, LIABILITY AND INVESTIGATION

9.1 Applicability.

The following provisions will, from the Effective Date of this Agreement, govern the apportionment of liability and risk of damage between the Parties for incidents which occur on or after such Effective Date of this Agreement. This Section is not intended to relieve any third party from any liability.

9.2 Harm Involving PAS Only

Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever (including, without limitation, commuter rail customers or other invitees or trespassers), occurs with the trains, locomotives, rail cars or rail equipment of, or in the account of, only PAS being involved, irrespective of any negligence or fault of Commonwealth Parties or Commonwealth Employees, or howsoever the same shall occur or be caused, then PAS shall assume all liability therefor, and bear all cost and expense in connection therewith, including reasonable attorneys' fees. PAS shall release, indemnify, and hold harmless the Commonwealth Parties and their contractors (other than PAS) from and against any claims, damages, awards, or judgments, including punitive damages, arising from or related to this Section 9.2.

9.3 Harm Involving Commonwealth Parties Only

Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever (including, without limitation, commuter rail customers or other invitees or trespassers), occurs with the trains, locomotives, rail cars or rail equipment of, or in the account of, only the Commonwealth Parties being involved, irrespective of any negligence or fault of PAS or PAS Employees, or howsoever the same shall occur or be caused, then the Commonwealth Parties shall assume all liability therefor, and bear all cost and expense in connection therewith, including reasonable attorneys' fees. The Commonwealth Parties shall release, indemnify, and hold harmless PAS and its contractor(s) from and against any and all claims, damages, awards or judgments, including punitive damages, arising from or related to this Section 9.3.

9.4 Harm Involving Both Parties

Whenever any loss of, damage to or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever (including, without limitation, commuter rail customers or other invitees), occurs with the trains, locomotives, rail cars or rail equipment of, or in the account of, both the Commonwealth Parties and PAS being involved, irrespective of any negligence or fault of the Parties, or howsoever the same shall occur or be caused, then:

(a) The Commonwealth Parties and PAS shall separately assume and bear all liability, cost and expense for loss of, damage to, or destruction of trains, locomotives, rail cars (including, without limitation, lading), and rail equipment operated by each of them, and shall release, indemnify, and hold harmless the other Party and its contractors from and against any claims, damages, awards, or judgments, including punitive damages, arising from or related to this Section 9.4(a).

(b) The Commonwealth Parties and PAS shall separately assume and bear all liability, cost and expense for injury to and death of the officers, agents, contractors, and employees employed or engaged by each of them, and shall release, indemnify, and hold harmless the other Party and its contractors from and against any claims, damages, awards, or judgments, including punitive damages, arising from or related to this Section 9.4(b). It is expressly understood and agreed that PAS Employees furnished to Commonwealth Parties, and PAS Employees who are involved in PAS's provision of services to Commonwealth Parties, will be regarded for purposes of this Section 9.4(b) as employees of PAS, and not of Commonwealth Parties, and that any Commonwealth Employees furnished to PAS, and any such employee who is involved in Commonwealth Parties' provision of services to PAS, will be regarded for purposes of this Section 9.4(b) as employees of the Commonwealth Parties, and not of PAS. It is further agreed that PAS Employees who are also Commonwealth Passengers at the time in question will be treated as Commonwealth Passengers, and not PAS Employees, for purposes of this Section 9.4(b).

(c) The Commonwealth Parties and PAS shall equally assume, bear, and share all liability, cost, and expense for loss of, damage to, or destruction of Rail Operating Property used by both Parties (including, without limitation, rail track and signals).

(d) The Commonwealth Parties shall assume and bear all liability, cost, and expense for injury to or death of any person (including, without limitation, Commonwealth Passengers, other invitees, and trespassers) not referenced in paragraph (b) above, and for loss of, damage to and destruction of all other property not referenced in paragraphs (a) and (c) above, and shall release, indemnify, and hold harmless PAS and its contractors from and against any claims, damages, awards, or judgments, including punitive damages, arising from or related to this Section 9.4(d).

9.5 Derailment or Accident

In the event of any derailment or other accident occurring on the Rail Operating Property wherein cars, motive power, or other equipment of either Party shall fall or encroach upon tracks, bridges or other property being used by the other Party so that said property is blocked or normal operation is impeded, the Party whose property has so fallen or encroached shall expeditiously remove the same and cause all necessary repairs to be made and all tracks and appurtenances restored, at its expense, as may be required for the continued operation of the other Party's railroad activities. Both parties agree to cooperate with each other to expedite the repair and removal of such cars, motive power and other equipment and will make all reasonable efforts to restore the affected line or facility to service.

9.6 Administration of Claims.

(a) Except as provided in Section 9.6(b) below, all claims, injuries, deaths, property damages and losses arising out of or connected with this Agreement shall be investigated, adjusted and defended by the Party bearing the liability, cost and expense therefor under the provisions of this Agreement.

(b) PAS will investigate, adjust and defend all freight loss and damage claims filed with it in accordance with applicable provisions of law, and will investigate, adjust and defend all claims for injury to and death of PAS's Employees for which either PAS or the Commonwealth Parties solely or PAS and the Commonwealth Parties jointly may have any liability under the provisions of this Agreement.

(c) The Party hereto receiving notice of the filing of a claim will promptly notify the other Parties of such filing where liability therefor may be joint or that of another Party. The Commonwealth Parties and PAS will cooperate with each other in all such investigations, adjustments, and defenses, and the Commonwealth Parties and PAS will provide each other, upon request therefor, a copy of all documents and written communications and produce witnesses, experts or exhibits in their employment or control to assist in the preparation and defense of any such claim and/or litigation with respect thereto.

(d) In the event a claim or suit is asserted against any Party which is another Party's duty hereunder to investigate, adjust or defend, then, unless otherwise agreed, such other Party shall, upon request, take over the investigation, adjustment and defense of such claim or suit, and the Party relieved of duties in respect of such claim or suit shall

cooperate as requested by the Party investigating, adjusting or defending said claim or suit.

(e) All costs and expenses in connection with the investigation, adjustment and defense of any claim or suit under this Agreement shall be included as costs and expenses in applying the liability provisions set forth in this Agreement.

(f) PAS shall not settle or compromise any claim, demand, suit or cause of action of any PAS Employee for which the Commonwealth Parties has any liability under this Agreement without the concurrence of the Commonwealth Parties if the consideration for such settlement or compromise exceeds Fifty Thousand and no/100 Dollars (\$50,000.00).

(g) It is understood that nothing in this Section 9.6 shall modify or waive the conditions, obligations, assumptions, or apportionments provided in Section 9 or elsewhere in this Agreement.

SECTION 10. INSURANCE

10.1 PAS Requirements.

From and after the Effective Date, PAS shall procure and maintain general liability insurance with respect to Freight Rail Service with minimum limits of not less than \$7,500,000 per occurrence and in the aggregate, which insurance will cover PAS's liability under Section 9 above. PAS shall also procure and maintain worker's compensation insurance, employer liability and other insurance as required by law. All insurance herein provided for shall be in such form and written by such companies as may be reasonably approved by the Commonwealth Parties, which approval shall not be unreasonably withheld. PAS will deliver to the Commonwealth Parties certificates of insurance for all policies and name the Commonwealth Parties as additional named insured as required under this Agreement.

10.2 Commonwealth Parties Requirements.

The Commonwealth Parties, at their sole cost and expense, shall procure and maintain liability insurance with a limit of not more than \$75,000,000 (or such other amount required by law) combined single limit for personal injury and property damage per occurrence, which insurance will cover the Commonwealth Parties' liability under Section 9. The self-insured retention of such policy will not exceed the lesser of (i) \$7,500,000 or (ii) the requirements of Section 43 of Chapter 161A of Massachusetts Laws, as the same may be amended or replaced from time to time. The Commonwealth Parties will deliver to PAS certificates of insurance for all policies and name PAS as an additional insured as required under this Agreement.

10.3 Additional PAS Requirements While PAS Providing Dispatching Services and/or Maintenance Services

(a) For so long a time as PAS is providing dispatching services and/or Maintenance Services under this Agreement, PAS will name and maintain the

Commonwealth Parties as additional named insureds on a Commercial General Liability policy for third party liability for \$7.5 million, with a self-insured retention no greater than \$3 million, providing insurance coverage for: (i) any and all liability arising under Section 9.4(d); and (ii) any and all liability for injuries to or death of any Commonwealth Passenger or third party (including, without limitation, other invitees or trespassers) and for loss of, damage to, or destruction of any property of any such Commonwealth Passenger or third party arising under Section 9.3.

(b) If at any time PAS, at its sole discretion, determines that purchase or renewal of insurance pursuant to Section 10.3(a) cannot be obtained at commercially reasonable terms, or if such insurance is terminated, lapses, or otherwise is not in effect, PAS will begin transition of the dispatching services and Maintenance Services to the Commonwealth Parties or their designated contractors, provided that, prior to beginning any transition based on a determination that insurance cannot be obtained at commercially reasonable terms, PAS shall meet with the Commonwealth Parties to discuss its reasons for such determination and possible risk management solutions. Notwithstanding the foregoing, the decision of whether insurance can be obtained at commercially reasonable terms will remain in the sole discretion of PAS. During the transition period, PAS will provide full cooperation and access in locating and activating switching (transfer) equipment at necessary sites to establish the capability or activation of train control machines controlling the Rail Operating Property at the Commonwealth Parties' dispatching center at Cobble Hill and deactivation of the train control machines at the PAS dispatching center. The Commonwealth Parties will provide full cooperation and transition dispatching services and Maintenance Services as soon as reasonably practicable.

(c) If at any time insurance pursuant to Section 10.3(a) is terminated, lapses, or otherwise is not in effect while PAS is providing dispatching services and/or Maintenance Services under this Agreement, PAS will reimburse the Commonwealth Parties for a portion of the annual premiums payable by the Commonwealth Parties for their general liability insurance applicable to the Commonwealth Parties' rail properties, such portion to be Twenty Five Thousand Dollars (\$25,000.00) per month. The first full year's reimbursement (Three Hundred Thousand Dollars (\$300,000.00)) will be due immediately upon any termination, lapse, or other discontinuance of the insurance requirements pursuant to Section 10.3(a). PAS's reimbursement obligation under this Section 10.3(c) will continue until such time as the Commonwealth Parties' dispatching center at Cobble Hill is connected and capable of controlling the Rail Operating Property, at which time the Commonwealth Parties will refund PAS any pre-payments for periods beyond the date of such completed connection. The monthly reimbursement amount applicable under this Section 10.3(c) will be indexed based on an annual adjustment for price level changes, beginning January 1, 2015, based on the relationship of the most recent Fourth Quarter Index (beginning with Fourth Quarter 2014) from the Association of American Railroads Quarterly Indices of Chargeout Prices and Wage Rates (Table C)-East, material prices, wage rates, and supplements combined (excluding fuel), to the Fourth Quarter 2013 index value.

(d) Nothing in this Section 10.3 modifies or waives any of the liability or indemnification conditions, obligations, assumptions, or apportionments provided in Section 9.

10.4 Insurance Certificates.

Each Party shall furnish the other with certificates of insurance (and, upon request, copies of all required insurance policies, including endorsements and declarations) evidencing compliance with the requirements set forth in this Section, and upon the request of the other Party, annually thereafter. The policies shall (1) name the other Party, and its directors, officers, agents and employees, as additional insureds with respect to occurrences relating to the performance of the obligations set forth in this Agreement; (2) provide that such coverage is primary and non-contributory to any insurance or self-insurance procured and maintained by the other Party; (3) provide that any Workers' Compensation policies contain a waiver of subrogation against the other Party; and (4) provide that to the extent reasonably available, all policies shall not contain any terrorism exclusions, or if they so contain such exclusions, shall contain endorsements providing coverage for acts of terrorism, both foreign and domestic, and both certified and non-certified by the Secretary of the Treasury of the United States. Except as otherwise specified in this Agreement, in the event any insurance policy required under this Agreement is cancelled or has its aggregate limits coverage reduced by 25% or more, then the applicable Party shall replace such policy or reinstate the aggregate limits during the notification period referred to above with another policy in like amount and coverage protection.

10.5 Self Insurance.

PAS's and the Commonwealth Parties' self-insurance programs and self-insurance retentions must provide the Parties with at least the same protection from liability and defense of suits as would be afforded by "first dollar" insurance. If a Party fails or refuses to pay any losses for which the Party is responsible hereunder within a permitted self-insured retention, such failure or refusal shall be an Event of Default under this Agreement.

SECTION 11. DEFAULT AND BREACH; TERMINATION

11.1 Default and Breach.

(a) Events of Default

Each of the following shall constitute an "Event of Default" under this Agreement:

(i) Any late payment under the provisions of this Agreement remaining outstanding for more than four (4) months.

(ii) The commencement of any proceeding by or against PAS or by the Commonwealth Parties which might result in any modification of the obligations hereunder under any bankruptcy, insolvency or similar law, unless all of the obligations of such Party shall

have been duly assumed by a trustee or successor to such Party within sixty (60) days after such proceeding shall have commenced;

(iii) The failure to perform any other material covenant or obligation in this Agreement, which failure shall have continued for more than thirty (30) days following the date of written notice thereof.

(b) Remedies

If an Event of Default shall occur, the Party not in default may exercise any or all of the following remedies:

(i) Terminate this Agreement by and upon sixty (60) days' written notice to the defaulting Party; or

(ii) Regardless of whether this Agreement is terminated pursuant to Section 11.1(b)(i), pursue any other remedy at law or in equity in any state or federal court in Massachusetts, subject to the provisions of Section 12.

(c) Equitable Relief

The Parties hereto expressly acknowledge that the nature and purpose of this Agreement is such that damages may not be an adequate remedy for any default or breach so occurring, and that equitable relief, such as injunction, mandatory or otherwise, including specific performance, may be necessary in the event a Party fails to cure a breach or default so occurring; in such case, the aggrieved Party may take such legal action as it deems appropriate and may file immediately any and all pleadings in any state or federal court in Massachusetts to secure an injunction of the action or inaction resulting in such default or breach, pending resolution of the matter pursuant to the dispute resolution procedures set forth in Section 12 below; and that, except with respect to the seeking of such equitable relief, any and all controversies arising out of or connected with any default or breach so occurring shall be resolved exclusively by dispute resolution and arbitration in accordance with the provisions of Section 12 hereof. Nothing contained in this Section 11 shall be construed to limit or restrict the Parties' rights and obligations under Section 11.2.

(d) No Implied Waiver

An Event of Default shall not be waived or satisfied by the failure of a Party to provide written notice thereof to another Party, nor shall a failure to provide written notice be considered a waiver of any other remedies available to any Party under this Agreement or otherwise.

11.2 Termination; Effect of Termination.

(a) Termination

This Agreement may be terminated as provided in Section 11.1 or by mutual agreement of the Parties, upon such terms and conditions as the Parties may mutually agree to. Such

termination shall be effective in accordance with a written agreement by the Parties. Termination under this Section shall not constitute a waiver of the rights of any Party to damages or other remedies related to this Agreement, except to the extent that the mutual agreement terminating this Agreement so specifies. The Parties agree and acknowledge that any termination of this Agreement does not affect the validity, continuation or perpetual nature of the Freight Easement with regard to the Property.

(b) Appropriate Statutory and Regulatory Authority

This Agreement shall terminate with respect to portions of the Property (i) at such time as PAS or the Commonwealth Parties secures and exercises authority, in accordance with Appropriate Statutory and Regulatory Authority, to abandon the common carrier obligations as to such portions of the Property and Freight Rail Service is ceased with regard to said portions of the Property, or (ii) in the event that such authority is not required, at such time as PAS, its successors or assigns, designates in a written notice of termination of this Agreement with respect to such portions of the Property, which written notice shall be given to the Commonwealth Parties at least six (6) months in advance of the date so designated for termination, *provided however*, such portions of the Property shall continue to be subject to applicable law.

(c) Survival of Obligations

Expiration or termination of this Agreement for any reason, in whole or in part, shall not relieve or release any Party from any obligation assumed or from any liability which may have arisen or been incurred by any Party under the terms of this Agreement prior to the expiration or termination hereof. The foregoing provision shall apply whether or not it is so expressly stated elsewhere in this Agreement, including without limitation, where a right of termination, in whole or in part, is expressly accorded either or both of the Parties. All obligations for indemnification and insurance coverage shall survive expiration or termination of this Agreement with respect to events that occur during the term of this Agreement.

SECTION 12. DISPUTE RESOLUTION

12.1 Settlement of Disputes.

The Parties to this Agreement shall make every reasonable effort to settle any dispute concerning the interpretation, application or enforcement of this Agreement by prompt and diligent discussions and negotiations.

12.2 Informal Consideration by the Parties.

Any dispute that cannot be resolved pursuant to Section 12.1 above within thirty (30) business days after it arises (or such other time as the Parties may agree in writing), may be submitted at the written request of any Party to MassDOT's Deputy Rail Administrator, the MBTA's Director of Railroad Operations, and the individual designated by PAS. These individuals shall discuss and attempt to resolve the dispute. In the event that the dispute remains unresolved twenty (20) business days after its submission (or such other time as the Parties may

agree), the matter may be referred in writing by any Party to the MBTA's General Manager, the Secretary of MassDOT, and PAS's President for consideration and resolution. If the dispute still remains unresolved thirty (30) calendar days after its referral to the MBTA's General Manager and PAS's President under this paragraph, the Parties may jointly agree to submit the matter to meditation under Section 12.3, below, or any Party may commence arbitration in accordance with Section 12.4 below.

12.3 Mediation.

(a) Request for Mediation

Either the Commonwealth Parties or PAS may request mediation of any unresolved dispute under this Section 12.3. If a Party elects mediation and any other Party declines to have the dispute resolved by mediation under this Section, or if the Parties undertake mediation and one of the Parties unreasonably delays the expeditious conclusion of same, the aggrieved Party may proceed with other remedies available under this Agreement.

(b) Selection of Mediator

The Commonwealth Parties and PAS shall jointly select an independent mediator within twenty-one (21) calendar days after the submittal of a dispute under this Section 12.3. The independent mediator shall be properly qualified in the areas of surface transportation finance and the surface transportation industry, and have experience in the analysis of transportation operating and capital costs and revenues.

(c) Mediation Scheduling

The mediator shall meet with the Parties within twenty-one (21) days after his or her selection to attempt to mediate and resolve the dispute. If mediation efforts are unsuccessful after sixty (60) calendar days, the mediator shall, after consideration of the Parties' positions and written submissions (if so requested) issue written recommendations for resolution of the dispute. All meetings and proceedings shall be held in Boston, Massachusetts, at a time and location acceptable to both Parties.

(d) Status of Controversy during Mediation Proceedings

During the pendency of such mediation proceedings, the performance by both Parties of this Agreement shall continue in the same manner as before such controversy arose, unless the mediator shall make a preliminary ruling to the contrary.

(e) Share of Costs

Each Party shall share equally the costs and expenses of any mediation conducted pursuant to this Section.

12.4 Arbitration.

It is the desire and intent of the Parties hereto to avoid the expense and delay inherent in litigation; therefore, PAS and the Commonwealth Parties agree that whenever a Party desires to commence the arbitration process it shall provide written notice thereof to the other Parties and the following provisions shall apply:

(a) Rules of Arbitration

Except as is otherwise expressly provided in this Agreement, any dispute (including, without limitation, disputes regarding whether a matter is subject to arbitration under this Agreement) under this Agreement shall be settled exclusively in accordance with the Commercial Arbitration Rules of the American Arbitration Association and judgment upon the award entered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. Arbitration shall be held in Boston, Massachusetts. It is the intent of the Parties hereto that the agreement to arbitrate contained in this Section shall be valid and irrevocable, and shall be specifically enforceable by either of the Parties hereto from and after the date of this Agreement. In interpreting this Agreement and resolving any dispute hereunder, the arbitrator(s) shall apply the laws of the Commonwealth of Massachusetts. In the event of Arbitration, each Party shall pay the compensation, costs, fees and expenses of its own witnesses, exhibits and counsel. The compensation, costs, fees and expenses of the arbitrator(s) and the American Arbitration Association shall be paid equally by the Parties. The arbitrator(s) selected to adjudicate the arbitration must have transportation industry experience.

12.5 Effect of Mediation and Arbitration

The Parties agree that neither the provisions of Section 12.4(a) nor Section 12.3 shall be applicable to, nor shall they be used: (i) to alter, amend, change, modify, add to or subtract from any of the provisions of this Agreement, except to the extent mutually agreed to by the Commonwealth Parties and PAS in the submission of the matter to arbitration or mediation; (ii) to resolve any matter subject to the judgment or discretion of one Party to this Agreement; or (iii) except as is otherwise expressly provided herein, to resolve any matter reserved by this Agreement for the mutual agreement of the Parties.

12.6 Interest.

Where the time period during which interest accrues regarding a matter in dispute is specifically established elsewhere in this Agreement, that time period shall apply for purposes of disputes under this Agreement. For any other dispute under this Agreement, interest shall accrue from the date that payment was due, at the Effective Interest Rate.

SECTION 13. EQUAL EMPLOYMENT OPPORTUNITY

13.1 Fair Employment Practices.

PAS agrees that it will comply with all applicable federal, state, and local laws and regulations relating to fair employment practices and non-discrimination against employees or applicants for employment because of race, religion, creed, color, sex, national origin, disability or sexual orientation.

13.2 Subcontracts.

To the extent such laws or regulations are applicable to any particular subcontractor, PAS shall insert provisions similar to those appearing in Section 13.1 above in each subcontract, except subcontracts for standard commercial supplies, raw materials, or construction.

SECTION 14. DISADVANTAGED BUSINESS ENTERPRISES.

PAS shall comply with all applicable federal laws and regulations relating to Disadvantaged Business Enterprises, including but not limited to regulations issued by the U.S. Department of Transportation (49 C.F.R. Part 23).

SECTION 15. EMPLOYEE WAGES AND BENEFITS

Each Party (or its contractors) shall be solely responsible for the determination of and payment of wages and benefits and other terms and conditions of employment of all such Party's employees; provided, however, that such Party shall comply with any applicable mandatory federal or state prevailing wage rate, safety, or wage/hour laws. Each Party agrees to indemnify and hold harmless the other Party and its parent corporation, subsidiaries and affiliates, and all their respective directors, officers, agents and employees from and against any and all costs and payments, including benefits, allowances and arbitration, administrative and litigation expenses, arising out of claims or grievances made by or on behalf of its own employees, pursuant to a collective bargaining agreement. It is the intention of the Parties that each Party shall bear the full costs of protection of its own employees under employee protective conditions which may be imposed, and of grievances filed by its own employee arising under its collective bargaining agreements with its employees.

SECTION 16. APPLICABILITY

The Parties agree that this Agreement, on and as of the respective Effective Date hereof, shall supersede all previous agreements between the Parties that relate to all or any portion of the Property described in this Agreement, provided however that the SOA, the Host Agreement and the Construction Agreement shall be superseded by this Agreement only as specified herein.

SECTION 17. GENERAL PROVISIONS

17.1 Additional Properties.

The Parties may by mutual written agreement add additional rail line segments or other trackage to the Property as defined herein (and designate an Effective Date with respect thereto). Provided appropriate regulatory approvals are sought and obtained in advance of any such transactions, the segments of railroad so added shall be subject to all of the rights and obligations set forth in this Agreement, and, to the extent permitted by law, these segments of rail line and/or track shall thereafter cease to be governed by any other agreements (including operating and trackage rights agreements) that previously had been in effect with respect to any such segments of railroad.

17.2 Ownership of Service Equipment.

As used in this Agreement, whenever reference is made to the trains, locomotives, cars or equipment of, or in the account of, one of the Parties hereto such expression means the trains, locomotives, cars or equipment in the possession of or operated by or on behalf of one of the Parties and including such trains, locomotives, cars or equipment which are owned by, leased to, or the responsibility of such Party.

17.3 Compliance with Laws and Operating Rules.

(a) Compliance with Federal, State, and Local Laws, Regulations, and Rules

PAS and the Commonwealth parties shall comply with the provisions of applicable federal, state, and local laws, regulations, and rules respecting the operation, condition, inspection, and safety of the trains, locomotives, cars and equipment it or any affiliate or contractor operates over the Property. PAS and the Commonwealth Parties shall each indemnify, protect, defend, and save the other, and its officers, agents, and employees harmless from all fines and penalties imposed under such laws, rules, and regulations by any governmental or regulatory agency, or court having jurisdiction over the Property, when the imposition of same is related to the failure of such Party to comply with its obligations under this Section 17.3(a). Nothing in this Section 17.3 shall alter, modify or amend Section 9 or Section 10 of this Agreement.

(b) Operating Rules

In its use of the Rail Operating Property, each Party shall comply in all respects with the operating rules and regulations of the Party responsible for dispatching pursuant to Section 7, and the movement of each Party's trains, locomotives, cars, and equipment over the Rail Operating Property shall be subject at all times to the orders of transportation officers of such dispatching Party.

(c) Party Employees

PAS shall provide employees, at its sole cost and expense, for the operation of its trains, locomotives, rail cars and rail equipment over the Property and the Commonwealth Parties shall provide employees, at its sole cost and expense, for the operation of its trains, locomotives, rail cars and rail equipment over the Property. Each PAS Employee and each Commonwealth Parties' Employee who shall operate trains, locomotives, rail cars and rail equipment over the Property shall be qualified by the Commonwealth Parties for operation thereover. PAS shall compensate the Commonwealth Parties for any and all direct costs incurred by the Commonwealth Parties in connection with the qualification of such employees of PAS as well as the cost incurred by the Commonwealth Parties for furnishing pilots, until such time as such employees of PAS are deemed by the appropriate examining officer of the Commonwealth Parties to be properly qualified for operation as herein contemplated, *provided* that the Commonwealth Parties shall not be required to administer more than three (3) qualifying attempts for any such employee. As used in this Section, qualification pertains only to the employee's operation of trains, locomotives, rail cars and rail equipment on the Property in

accordance with the Commonwealth Parties' operating rules and practices. For purposes of this Section, any employee of PAS qualified to operate over the Property on a date prior to the Passenger Service Commencement Date shall be deemed qualified by the MBTA for operation over the Property as herein contemplated as of the Passenger Service Commencement Date. On a date prior to the Passenger Service Commencement Date, PAS shall provide to the Commonwealth Parties a list of the names of all PAS Employees that PAS certifies to be qualified to operate over the Property as of that date.

(d) Investigations or Hearings for Violations

In the event the Commonwealth Parties conduct an investigation or hearing concerning a violation of any operating rule or practice of the Commonwealth Parties by any PAS Employee, except officers, PAS shall be notified in advance of any such investigation or hearing and such investigation or hearing may be attended by any official designated by PAS and shall be conducted in accordance with the collective bargaining agreements, if any, that pertain to said employee or employees.

(e) Exclusion of Violators

The Commonwealth Parties shall have the right to exclude from the Property any PAS Employee, except officers, whom the Commonwealth Parties determines, based on the investigation or hearing described above, to be in violation of the applicable rules, regulations, orders, practices or instructions issued by timetable or otherwise, provided that the Commonwealth Parties may exclude any PAS Employee, except officers, from the Property prior to such determination for alleged violations of the Commonwealth Parties' rules regarding use of intoxicating beverages or drugs, or for alleged insubordination. PAS shall release, indemnify, defend and save harmless the Commonwealth Parties and their officers, agents and employees from and against any and all claims and expenses arising from such exclusion.

17.4 Disabled Trains/Wreck Clearing.

(a) Commonwealth Assistance

If by reason of any mechanical failure or any other cause not resulting from an accident or derailment, a train or locomotive of PAS becomes stalled and unable to proceed under its own power, or fails to maintain the speed required by the Commonwealth Parties on the Rail Operating Property, or if in emergencies crippled or otherwise defective cars are separated from PAS's trains on the Rail Operating Property, the Commonwealth Parties shall have the option of allowing PAS to furnish motive power or such other assistance as may be necessary to haul, help or push such trains, locomotives or cars, or to properly move the disabled equipment off the Rail Operating Property. PAS shall reimburse the Commonwealth Parties for direct costs incurred in rendering any such assistance.

(b) Repairs, Adjustment, Transfer of Lading

If it becomes necessary to make repairs to or adjust or transfer the lading of such crippled or defective cars in order to move them off the Rail Operating Property, such work shall, at the

option of the Commonwealth Parties, be done by PAS or the Commonwealth Parties or by the Parties' respective contractors. PAS shall reimburse the Commonwealth Parties for direct costs incurred in rendering any such assistance.

(c) Wreck Clearing

Each Party shall have full responsibility for rerailling wrecking service or wrecking train service, including without limitation the removal of damaged equipment, repair and restoration of road bed, track, signals, communication systems and all other right of way structures and facilities affected by such wrecks ("Wreck Clearing") during the period in which such Party has the responsibility to maintain such portion of the Property. The liability, cost and expense of the foregoing, including, without limitation, loss of, damage to or destruction of any property whatsoever and injury to or death of any person or persons whomsoever resulting therefrom, shall be allocated and apportioned in accordance with the provisions of Section 9 hereof. All trains, locomotives, rail cars, and rail equipment and salvage from the same so picked up and removed which is owned by PAS shall be promptly delivered to it. Each Party shall perform its services under this Section in an expeditious manner in order to restore rail service on the line.

17.5 Operating Duties in Regard to Safety.

Each Party shall take all reasonable safety precautions and shall provide all reasonable protection to prevent damage, injury, death, or loss to: all employees, passengers, and customers of the other Parties and all tracks, bridges, and other equipment related to the Property. Unless otherwise provided by law, each Party will be responsible to give all notices and comply with all applicable laws, rules, regulations and lawful orders of any public agency or the Commonwealth Parties in connection with its operations under this Agreement bearing on the safety of persons or property or their protection from damage, injury, death or loss. Without limitation, this obligation shall include observance of all safety rules and regulations administered by the Federal Railroad Administration or Massachusetts Department of Public Utilities including, for example: the FRA's regulations at 49 CFR Subtitle B, Chapter II; all applicable regulations regarding the transport of hazardous materials or wastes prescribed by the U.S. Department of Transportation including 49 CFR Parts 171 et seq., and prescribed by the U.S. Environmental Protection Agency, including 40 CFR Part 263; and all applicable safety rules and other operating procedures of general applicability and future effect issued by the Commonwealth Parties and forwarded in writing to PAS. Each Party shall promptly furnish to the other Parties evidence reasonably satisfactory to the other Parties demonstrating compliance with the above. Nothing in this Section 17.5 shall alter, modify or amend Section 9 or Section 10 of this Agreement.

SECTION 18. ASSIGNMENT

18.1 Assignment by PAS.

PAS may assign to any Person, in whole but not in part, all of its rights, interests or obligations under this Agreement, subject to the following conditions: (i) that PAS shall provide to the Commonwealth Parties with sixty (60) days prior written notice of such proposed

assignment, (ii) that any such assignment must be accompanied by an assignment to such Person of all of PAS's rights under the Freight Easement, (iii) that the proposed transfer complies with the transfer provisions of the Deed, including but not limited to the transferee's qualification under the transferee standards set forth in such Deed; and (iv) and the assignee assume, by written agreement reasonably acceptable to the Commonwealth Parties, all of PAS's obligations under this Agreement. No fees or other amounts shall be due or payable under this Agreement with respect to any such assignment of the Freight Easement or this Agreement; provided however that PAS shall have no right to partially assign its rights to perform Freight Rail Service on any portion of the Property such that PAS and such assignee both are performing Freight Rail Service. In the event of an assignment of this Agreement by PAS to an affiliate of PAS, PAS shall unconditionally guarantee to the Commonwealth Parties the performance of all obligations of PAS under this Agreement by any such affiliate. Nothing in this Section 18 shall prevent or impede PAS from transferring the Freight Easement in accordance with its terms and generally applicable law.

18.2 Release and Discharge.

Except as is otherwise provided in Section 18.1 of this Agreement, any assignment of this Agreement, in whole or in part, by PAS, its successors or assigns, shall release and discharge PAS: (i) from the performance of its obligations and covenants under this Agreement, or with respect to the part hereof so assigned, as the case may be, from and after the date of such assignment, and (ii) from any liability, cost and expense arising out of or connected with this Agreement, or with respect to the part thereof so assigned, as the case may be, from and after the date of such assignment.

18.3 Assignment by Commonwealth Parties.

The Commonwealth Parties may assign, in whole or in part, any of its rights, interests or obligations under this Agreement, *provided however*, that the Commonwealth Parties shall provide to PAS sixty (60) days prior written notice of such proposed assignment, and *provided further*, that such assignment does not impair or adversely affect any rights of PAS hereunder or as required by law. Notwithstanding the foregoing, the Commonwealth Parties shall not partially assign its rights to operate Passenger Rail Services over the Rail Operating Property.

18.4 Survival of Liability.

Assignment of this Agreement, in whole or in part, shall not relieve or release any Party from any obligation assumed or from any liability which may have arisen or been incurred by such Party under the terms of this Agreement prior to the assignment hereof. The foregoing provision shall apply whether or not it is so expressly stated elsewhere in this Agreement where a right of assignment, in whole or in part, is expressly accorded any Party.

SECTION 19. FORCE MAJEURE

Each Party will be excused from performance of any of its obligations to the other under this Agreement other than those set forth in Section 10, where such non-performance is occasioned by any event beyond the non-performing Party's control which shall include, without

limitation, any applicable order, rule, or regulation of any Federal, State (other than any such rule or regulation (i) which is enacted solely by the Commonwealths Parties and (ii) which is not enacted pursuant to State legislation), or local government body, agent, or instrumentality; work stoppage; natural disaster; terrorist act or threatened act of terrorism; or civil disorder; provided, however, that the Party excused hereunder shall use all reasonable efforts to minimize its non-performance and to overcome, remedy, or remove such event in the shortest practical time. The obligations set forth in Section 10 are not excused hereunder.

SECTION 20. MISCELLANEOUS.

20.1 Applicable Law.

This Agreement, and the transactions to which it relates, will be governed by and construed and enforced in accordance with the law of the Commonwealth of Massachusetts. Any claim or legal action by one Party against the other that is not submitted to mediation or arbitration pursuant to Section 12 shall be commenced and maintained in any state or federal court located in Massachusetts and both Parties hereby submit to the jurisdiction and venue of any such court.

20.2 Entire Agreement.

This Agreement, including the Exhibits hereto, represents the entire agreement between the Parties hereto with respect to the Property from and after the Effective Date with respect to the Property, and this Agreement supersedes any and all prior discussions, proposals and communications between the Commonwealth Parties and PAS with respect to the Property.

20.3 Notices.

All notices pursuant to this Agreement shall be in writing and shall be deemed effective: (i) on the date given if delivered by hand or transmitted by facsimile on a weekday, or on the next succeeding weekday if not given on a weekday, (ii) one weekday after delivery to a reputable overnight courier service, and (iii) five (5) days after having been deposited with the U.S. Postal Service, postage prepaid.

Notices to MassDOT shall be addressed to:

Massachusetts Department of Transportation
10 Park Plaza
Boston, MA 02116
Attention: Deputy Rail Administrator

with a copy to:

Massachusetts Department of Transportation
10 Park Plaza
Boston, MA 02116
Attention: General Counsel

Notices to the MBTA shall be addressed to:

Massachusetts Bay Transportation Authority
45 High Street, 9th Floor
Boston, MA 02110
Attention: Director of Railroad Operations

with a copy to:

Massachusetts Bay Transportation Authority
10 Park Plaza
Boston, MA 02116
Attention: General Counsel

with an additional copy to:

Goulston & Storrs
400 Atlantic Avenue
Boston, MA 02110-3333
Attention: Peter Kochansky, Esq.

Notices to PAS shall be addressed to:

General Manager
Pan Am Southern LLC
1700 Iron Horse Park
North Billerica, MA 01862

with a copy to:

Law Department
Pan Am Southern LLC
1700 Iron Horse Park
North Billerica, MA 01862

with a copy to:

Vice President Law
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

20.4 No Waiver.

No failure on the part of any Party to exercise, and no delay in exercising, any right, power or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or remedy. The remedies of the Parties provided herein are cumulative and not exclusive of any remedies provided for by law.

20.5 Survival of Indemnification and Insurance Obligations.

The indemnification obligations of PAS and the Commonwealth Parties hereunder (and all other obligations) that arise but which are not satisfied during the Term of this Agreement shall survive the termination of this Agreement.

20.6 Headings.

The section headings appearing herein are intended solely for convenience of reference and shall not be construed as affecting the interpretation of any provision hereof.

20.7 Successors and Assigns.

This Agreement shall be binding upon, and inure to the benefit of the respective successors and assigns of the Parties.

20.8 No Benefit to Third Parties.

Nothing in this Agreement shall be deemed to create any right in any Person not a party hereto other than permitted successors and assigns of the Parties, and this Agreement shall not be construed in any respect to be a contract in whole or in part for the benefit of a third party except as aforesaid.

20.9 Representations and Warranties.

The Parties represent and warrant to each other that, except with respect to a challenge by any union representing any the Commonwealth Employees or PAS Employees, (i) the Parties have the power and authority to enter into this Agreement and to carry out their respective obligations hereunder; (ii) the Parties have taken all legal action necessary to authorize them to enter into and perform their respective obligations hereunder; (iii) entering into and performing this Agreement does not violate any statute, rule, regulation, order, writ, injunction, or decree of any court, administrative agency or governmental body, or violate any contract or agreement by which any Party hereto is bound; (iv) there is no known litigation or proceeding pending or threatened against a Party, or any other action, which could materially or adversely affect the performance of this Agreement; and (v) the Parties have obtained all approvals as may be required to permit their respective performance of the obligations of this Agreement. Except as expressly provided herein, the Parties make no representations or warranties and waive no rights or remedies.

20.10 No Personal Recourse.

No recourse shall be had by any Party for any claim against any officer, director, stockholder, employee or agent of any other Party alleging personal liability on the part of such Person with respect to performance of the Commonwealth Parties' or PAS's obligations under this Agreement.

20.11 Record Keeping.

PAS shall maintain appropriate operating and accounting records which record the locomotives, cars, weight and mileage of same moved by PAS over the Property. The Commonwealth Parties shall have the right, upon reasonable notice, to inspect, examine and audit during normal business hours all operating and accounting records and supporting documents of PAS including, without limitation, dispatching records, and all other books and records that relate to the performance of this Agreement. Nothing in this Agreement shall be construed as obligating PAS to retain books or records beyond the period specified in regulations of the STB, of the former Interstate Commerce Commission or of the Federal Railroad Administration.

20.12 Waivability of Time Limits.

Any time limits specified under a provision of this Agreement may be suspended by mutual written agreement of the Parties.

20.13 Operations during Dispute.

During the pendency of any dispute between the Parties, the business and the operations to be conducted under this Agreement, to the extent that they are the subject of any such dispute, shall continue to be transacted and used in the manner and form existing prior to the arising of any such controversy.

20.14 Controlling Agreement.

In the event of any conflict between the text of this Agreement and that of any Exhibit hereto, the text of this Agreement shall control except to the extent that this Agreement makes specific reference to a provision of any Exhibit as defining the obligations of a Party hereunder.

20.15 Severability.

In the event that any provision of this Agreement is found to be invalid or unenforceable in any respect, the remaining provisions shall nevertheless be binding with the same effect as if the invalid or unenforceable provision was originally deleted.

20.16 Amendment.

This Agreement and the Exhibits hereto and thereto may be amended from time to time during the Term of this Agreement. The Commonwealth Parties or PAS may request in writing such amendments or modifications. However, no such amendments or modification shall be

effective unless evidenced by a written amendment to this Agreement executed by duly authorized representatives of all Parties hereto.

20.17 No Joint Enterprise.

This Agreement shall in no way be considered as establishing either a joint facility or a joint enterprise between the Commonwealth Parties and PAS.

20.18 Status of Work under Agreement.

In the performance of work under this Agreement the Parties shall be deemed to be independent contractors and no Party shall be deemed to be an agent of any other Party. Notwithstanding the foregoing, for purposes of Section 9 no Party shall be deemed to be a “contractor” of any other Party.

[Remainder of Page Intentionally Left Blank]

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be signed as of the date first written above, in duplicate, each of which shall be considered an original.

APPROVAL AS TO FORM

**MASSACHUSETTS DEPARTMENT
OF TRANSPORTATION**

By: Paige Scott Reed
Paige Scott Reed
General Counsel,
Massachusetts Department
of Transportation

By: Stephanie Pollack
Stephanie Pollack
Secretary & Chief Executive Officer

APPROVAL AS TO FORM

**MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY**

By: Paige Scott Reed
Paige Scott Reed
General Counsel,
Massachusetts Bay
Transportation Authority

By: Beverly A. Scott
Beverly A. Scott, Ph.d
General Manager

PAN AM SOUTHERN LLC

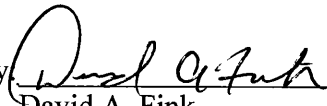
By 
David A. Fink
President

EXHIBIT A

Description of Property

The “Property” is comprised of whatever right, title and interest that the Commonwealth Parties have in the property described below, whether a fee title interest, an easement interest, or otherwise, and, to the extent the Commonwealth Parties’ interest consists of an easement interest.

Hampden County

All that certain property situated in the Cities of Springfield, Chicopee and Holyoke, Hampden County, Commonwealth of Massachusetts, and being a portion of the line of railroad known as the Connecticut River Main Line extending from Station -2+25, more or less, said station shown on Valuation Section Map V42.1M/1, thence in a northerly direction to Station 756+84, more or less, as shown on Valuation Section Map V42.1M/15. Said last station being a point on the common line of Hampden and Hampshire County, Massachusetts. Said line of railroad being substantially as shown on the reduced copy of the plans entitled “Right of Way and Track Map, Connecticut River R. R. Co. Operated by the Boston and Maine R. R.” and “Station Map-Lands, Connecticut River R. R. Co. Operated by the Boston and Maine R. R.”, Railroad Valuation Maps Section Map V42.1M/1 through Section Map V42.1M/15, attached to the Hampden Deed (as defined below).

Hampshire County

All that certain property situated in the City of Northampton and the Towns of Easthampton and Hatfield, Hampshire County, Commonwealth of Massachusetts, and being a portion of the line of railroad known as the Connecticut River Main Line extending from Station 756+84, more or less, said station shown on Valuation Section Map V42.1M/15, thence in a northerly direction to Station 1256+00, more or less, as shown on Valuation Section Map V42.1M/25. Said last station being a point on the common line of Hampshire and Franklin County, Massachusetts. Said line of railroad being substantially as shown on the reduced copy of the plans entitled “Right of Way and Track Map, Connecticut River R. R. Co. Operated by the Boston and Maine R. R.” and “Station Map-Lands, Connecticut River R. R. Co. Operated by the Boston and Maine R. R.”, Railroad Valuation Maps Section Map V42.1M/15 through Section Map V42.1M/25 attached to the Hampshire Deed (as defined below).

Franklin County

All that certain property situated in the Towns of Whately, Deerfield, Greenfield, Bernardston and Northfield, Franklin County, Commonwealth of Massachusetts, and being a portion of the line of railroad known as the Connecticut River Main Line extending from Station 1256+00, more or less, said station shown on Valuation Section Map V42.M/25, thence in a northerly direction to Station 2613+66.85, more or less, as shown on Valuation Section Map V42.1M/51. Said last station being a point on the common line of Franklin County, Massachusetts and

Vernon, Vermont, as shown on the reduced copy of the plans entitled Right of Way and Track Map, Connecticut River R. R. Co. Operated by the Boston and Maine R. R.” and “Station Map-Lands, Connecticut River R. R. Co. Operated by the Boston and Maine R. R.”, Railroad Valuation Maps Section Map V42.1M/25 through Section Map V42.1M/51, attached to the Franklin Deed (as defined below).

TITLE REFERENCES:

1. Deed from Boston and Maine Corporation to Pan Am Southern LLC, dated April 9, 2009, recorded in Hampden County Registry of Deeds in Book 17766, Page 47 (the “Hampden Deed”).
2. Deed from Boston and Maine Corporation to Pan Am Southern LLC, dated April 9, 2009, recorded in Hampshire County Registry of Deeds in Book 9791, Page 163 (the “Hampshire Deed”).
3. Deed from Boston and Maine Corporation and the Vermont and Massachusetts Railroad Company to Pan Am Southern LLC, dated April 9, 2009, recorded in Franklin County Registry of Deeds in Book 5665, Page 1 (the “Franklin Deed”).
4. Deed from Boston and Maine Corporation and the Vermont and Massachusetts Railroad Company to Pan Am Southern LLC dated December 3, 2012, recorded in Franklin County Registry of Deeds in Book 6295, Page 254.

Exhibit B**Service Outcomes**

Upon completion of the Project, the Service Outcomes identified in Table I below shall be achieved for each intercity passenger train operating between CPR I and East Northfield, MA (milepost 49.67 on the Connecticut River Line, herein referred to as “East Northfield”):

Table 1: Service Outcomes

Phase No.	Description (Upon Completion of Listed Project(s))	Minimum Amtrak Train Round Trips per Day Permitted by Commonwealth Parties	Public Scheduled Amtrak Train Maximum Average Trip Time between CPR 1 and East Northfield*	Delay Ceiling (Maximum Average Commonwealth Parties-Responsible Delay Minutes per One Way Amtrak Trip between CPR 1 and East Northfield)
1	<i>Baseline – Current Service</i>	0	N/A	N/A
2	Future Service – Completion of Project (as defined in SOA)	1	71 minutes	4.4

**Shown as an average scheduled running time of the southbound and northbound trains. The Public Scheduled Amtrak Train Maximum Average Trip Time assumes a preliminary Pure Running Time (“PRT”) of 61 minutes, and 2 minutes of station dwell time at each of Greenfield and Northampton. Following completion of the Project (as defined in the SOA), the Parties, in consultation with Amtrak, conduct a joint field study to determine the actual PRT. Should the actual PRT be found to be different from the preliminary PRT, the Public Scheduled Amtrak Train Maximum Average Trip Time shall be adjusted according to the difference between the preliminary PRT and the actual PRT, except to the extent that the actual PRT is shorter due to the difference between Class III and actual speeds, in which case the PRT will be adjusted without a corresponding adjustment to the Public Scheduled Amtrak Train Maximum Average Trip Time.*

- a. “Commonwealth Parties-Responsible Delay Minutes” shall be measured using Amtrak's Conductor Delay

Reports as the sum of the following delay categories: Freight Train Interference (FTI), Passenger Train Interference (PTI), Commuter Train Interference (CTI), Routing (RTE), Slow Orders (DSR), Signals (DCS), Maintenance of Way (DMW), Debris (DBS), and Detour (DTR).

- b. “Delay Ceiling” shall be the maximum allowable Commonwealth Parties-Responsible Delay Minutes per one-way Amtrak train trip. Commonwealth

Parties' compliance with the Delay Ceiling will be determined by comparing the Delay Ceiling to the Quarterly Actual Average Commonwealth Parties-Responsible Delay Minutes per trip for each Amtrak Train, which shall be calculated quarterly for each Amtrak Train as the total Commonwealth Parties-Responsible Delay Minutes for each calendar quarter divided by the number of Amtrak Train trips operated during that calendar quarter. Temporary adjustments to the Delay Ceiling may be negotiated by the Parties due to track maintenance projects and/or force majeure events.

2. If, in any calendar quarter, the actual average trip time of Amtrak trains between CPR 1 and East Northfield (measured as the average elapsed time between CPR 1 and East Northfield, for all operations in the calendar quarter) exceeds the Public Scheduled Amtrak Train Maximum Average Trip Time, and the Quarterly Actual Average Commonwealth Parties-Responsible Delay Minutes per trip, calculated in accordance with Paragraph 1 (b) of this Exhibit B, on any Amtrak Train operating between CPR 1 and East Northfield exceeds the Delay Ceiling, the Commonwealth Parties shall, at the Commonwealth Parties' sole expense subject to Section 5 of the SOA, reduce the Quarterly Actual Average Commonwealth Parties-Responsible Delay Minutes per trip on each Amtrak Train to or below the Delay Ceiling within two calendar quarters.
3. Should additional funding become available for subsequent improvements on the Knowledge Corridor, the Parties shall, by mutual agreement with Amtrak, amend the SOA to add the additional projects and corresponding Service Outcomes to the Table above as supported by modeling and empirical analysis, and taking into account the improvement included under the SOA.

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36472

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.
—CONTROL AND MERGER—
PAN AM SYSTEMS, INC., PAN AM RAILWAYS, INC., BOSTON AND MAINE
CORPORATION, MAINE CENTRAL RAILROAD COMPANY, NORTHERN RAILROAD,
PAN AM SOUTHERN LLC, PORTLAND TERMINAL COMPANY, SPRINGFIELD
TERMINAL RAILWAY COMPANY, STONY BROOK RAILROAD COMPANY, AND
VERMONT & MASSACHUSETTS RAILROAD COMPANY

EXHIBIT 4

Reply Verified Statement of Dr. David Reishus

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36472

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.

—CONTROL AND MERGER—

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

Reply Verified Statement of
David Reishus, PhD

October 18, 2021

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I. INTRODUCTION

A. WITNESS INTRODUCTION

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

2. Over the past 25 years, I have worked extensively on the organization of markets, competition, and firm behavior in a variety of industries. I have testified before various state, Federal and international bodies on competition issues, primarily in the energy and transportation industries. I have provided testimony multiple times before the Surface Transportation Board (the “STB”) on matters involving competition in the railroad industry.

3. I have analyzed competition issues associated with railroad merger transactions and associated conditions on those mergers. I participated in the analysis of the competitive effects and associated merger conditions for the major railroad consolidations in the 1990s involving Union Pacific/Southern Pacific, Burlington Northern/Santa Fe, and the Conrail transaction. In addition, since then I have testified before (or presented to) the responsible government authorities regarding competitive issues arising from proposed transactions involving railroads in the U.S., Canada, and Mexico. My verified statement was submitted in the Amended and Supplemented Application on July 1, 2021. My full vita was attached to that statement.¹

4. The opinions expressed are my own, and do not necessarily represent those of my employers or their other employees.

B. BACKGROUND AND ASSIGNMENT

5. CSX Corporation and CSX Transportation, Inc. (“CSXT”) (collectively called “CSX”) proposes to acquire Pan Am Systems, Inc. (“Systems”), a non-carrier – including its rail carrier subsidiaries, and its interest in Pan Am Southern LLC (“PAS”) (the “Merger Transaction”).

¹ Docket No. FD 36472, CSX Corporation and CSX Transportation, Inc., et al. – Control and Merger – Pan Am Systems, Inc., et al., Amended and Supplemented Application, Exhibit 22-E, *Amended and Supplemented Verified Statement of Dr. David Reishus*, July 1, 2021 (hereinafter “*Amended and Supplemented Reishus VS*”).

6. As described in more detail in my prior verified statement, the Merger Transaction involves the acquisition by CSX of Pan Am Railways, Inc. (“PAR”), which wholly owns seven railroads (the “PAR Railroads”) that themselves own and operate a unified rail network in eastern Massachusetts, New Hampshire, and Maine (the “PAR System”). One of the PAR Railroads, Springfield Terminal Railway Company (“Springfield Terminal”) operates the PAR System pursuant to leases with the other PAR Railroads. One of the PAR Railroads, Boston & Maine, has a 50% ownership interest in PAS. PAS, which includes the east-west Patriot Corridor line between Mechanicville, NY and Ayer, MA and the north-south Knowledge Corridor between White River Junction, VT and southern Connecticut, is currently operated on a contract basis by Springfield Terminal.²

7. In addition to the Merger Transaction, CSXT has negotiated certain related transactions that include:

- An agreement that designates the Pittsburg & Shawmut Railroad, LLC, doing business as Berkshire & Eastern Railroad (“B&E”) as contract operator of the PAS lines and removes all authority for pricing and operational decisions on PAS from CSX (the “B&E Transaction”).
- An agreement between CSXT and Norfolk Southern Railway Company (“NSR”) that provides NSR trackage rights on CSXT’s mainline to provide NSR with a more efficient, double-stack route to serve intermodal and automotive terminals in Ayer, MA.

8. CSXT has also agreed to make significant capital investments to improve CSXT’s ability to service traffic on the PAR system efficiently.

9. I have been asked by CSX to provide additional analyses and respond to concerns that have been raised regarding the potential competitive effects arising from the Merger and Related Transactions. Specifically, I have been asked to respond to comments from the Vermont Rail System (“VRS”), the State of Vermont Agency of Transportation (“VTrans”), the United States Department of Justice (“DOJ”), and Canadian Pacific Railway (“CP”).

² For a more detailed description of the transaction see *Amended and Supplemented Reishus VS* at ¶¶ 77-100.

C. DATA AND SOURCES

10. In the remainder of this statement, I evaluate various concerns raised by commenters. In performing these analyses, I have relied on multiple sources of data on rail traffic, including the Confidential Carload Waybill Sample (“CWS”), detailed traffic data provided to me by Systems, CSX, and Genesee & Wyoming Inc (“GWI”), and data from the Uniform Rail Costing System (“URCS”). I note that VRS and VTrans provided no underlying data or tabulations for VRS traffic, so I rely on the data sources above for analyzing claims regarding VRS traffic. I have also interviewed various company personnel from Systems/Springfield Terminal and CSXT and have reviewed relevant documents including: system maps; comments and filings from interested parties; the operating plan submitted with this Application; the agreement between the parties and GWI related to operation of PAS; agreements between CSX and NSR related to trackage rights; financial statements and other material from CSX and Systems/Springfield Terminal; and other publicly available sources.

11. I have performed the traffic analyses using annual 2019 data across the multiple data sources. Differences among recordkeeping and timing and, in the case of the CWS, sampling methodology, implies that traffic data from different sources do not match precisely. This is especially true when comparing CWS result to railroad provided data. As many of the points raised involve small volumes of traffic, where the analysis permits, I use the detailed company-provided data.

12. I have provided the Board with a copy of my highly confidential workpapers, which include the data and computer code necessary to recreate the analyses I present in this Statement.

II. SUMMARY OF CONCLUSIONS

13. I continue to find that the Merger and Related Transactions represent a pro-competitive rationalization of the New England rail network. This transaction and rationalization will generate widespread benefits to shippers across New England and will not result in any substantial reduction in competition.

14. I have evaluated comments filed by VRS and VTrans and find that the overwhelming majority of VRS traffic is not today subject to competition that could potentially be affected by B&E’s operation of PAS on behalf of the PAS owners. Concerns expressed by VRS and VTrans

that the B&E Transaction will result in a significant reduction in competition for themselves or their customers are unfounded. More specifically, I find:

- {{[REDACTED]}} VRS-participating traffic travels over two western gateways and {{[REDACTED]}} the Conn River North line where PAS and NECR both operate. These western gateways—at Hoosick Junction and Whitehall, NY—are {{[REDACTED]}} access for VRS traffic to and from the United States west of New England.
- Competition for traffic over the Whitehall gateway is unaffected by the Merger or Related Transactions as none of the parties associated with these transactions—CSXT, NSR, PAS, or any GWI-owned road—operate at this interchange.
- Hoosick Junction is an important location for both NSR and CSXT. CSXT and NSR collectively account for {{[REDACTED]}} of the VRS traffic interchanging at Hoosick. NSR and CSX have the strong incentive to prevent B&E from taking actions on behalf of PAS, either through pricing or service, that would reduce the desirability of Hoosick Junction for interchange with VRS. VRS benefits from pricing protections for traffic with NSR and with CSXT that preserve existing competition and preclude the use of the Hoosick Junction interchange as a means to create competitive harm.
- With respect to VRS traffic that does move over the Conn River North line, NECR and PAS do not currently compete for much of this traffic due to the location of sole-served customers on one or more of the systems. This includes traffic that VRS participates in with NECR through interchanges off the line that travels over the line; traffic that originates or terminates on the line but to shippers closed to PAS or NECR; and traffic that originates or terminates on NECR, PAR and PAS. Currently NECR is not an effective competitor for Conn River North line traffic to and from locations on or over PAR. VRS cannot be harmed by B&E's contract operations of PAS as there is no competition that will be lost between NECR and PAS for this traffic.
- VRS also expressed concerns regarding overhead traffic in which NECR and VRS both participate as bridge carriers. PAS is currently an ineffective competitor for this traffic and, given the sources and routes used by this traffic, there is no reasonable possibility that

the proposed transaction would result in an anticompetitive diversion of this traffic from VRS.

- With the existing pricing arrangements and the commitments in the Merger and Related Agreements, there is no material risk of competitive harm for the small volumes of remaining VRS traffic over the Conn River North line. Contractual arrangements (VRS haulage on NECR) provide the preferred competitive alternative for traffic between the two VRS disjointed segments. Commitments of B&E to act on PAS's behalf, and various additional commitments under the Merger and Related Transactions with respect to pricing (for PAR-PAS) traffic and haulage (e.g., LPG from Deerfield) either preserve or enhance the existing competitive outcomes obtained by VRS. Likewise, specific pricing commitments at Hoosick Junction preserve competitive alternatives for the remaining traffic that travels to or from the west and south of New England to VRS. Moreover, both CSXT and NSR have strong incentives and the ability to ensure that PAS, with B&E as contract operator, provides competitive prices and service for these remaining overhead movements to and from VRS.

15. I have evaluated the DOJ's concern that the Merger and Related Transaction is "likely to diminish competition" between PAS and CSXT and their finding that the conditions included in the Merger and Related Transactions do not "adequately address the competitive concerns created by the proposed transaction"³ and find that these concerns are unfounded. More specifically I find:

- There is limited competition for traffic moving between the Albany area and eastern Massachusetts over CSXT and PAS currently and the Merger and Related Transactions enhance—rather than decrease—this competition. Much of the traffic is local or interline traffic to other New England carriers. Only a small portion of the overhead traffic is currently subject to potential competition as a result of the Merger. Regardless, the Merger and Related Transactions provide pricing protection for PAR customers for use of PAS.

³ Comment of The United States Department of Justice, Finance Docket No. 36472, August 26, 2021 (hereinafter, "*DOJ Comment*") at 4.

- Both NSR and CSXT use PAS for substantial volumes of traffic. Given that CSXT already has an Albany area-eastern Massachusetts line, the volumes that it moves over PAS reflect the need and/or value of the PAS line to CSXT. Both CSXT and, especially, NSR have the incentive and ability to maintain PAS as an effective routing.
- The volume of traffic on which there is existing competition between PAS and NECR over the Conn River North line that could conceivably be impacted by DOJ's concern over B&E's operation of PAS is a small portion of traffic on the line. For the same reasons as explained with respect to VRS' concerns, given the existing pricing arrangements and the commitments in the Merger and Related Transactions, there is no material risk of competitive harm for the small volumes of potentially affected traffic on the Knowledge Corridor.
- The Merger and Related Transactions provide significant competitive enhancements and public benefits including: the introduction of competing double-stack intermodal service without the need for large future investments by private and or public entities, capital improvements to new England rail infrastructure, and improved operations and efficiency from operations by CSXT and B&E. The divestiture proposal suggested by DOJ in this proceeding exceeds that necessary to preserve competition and instead places at risk the competitive and public benefits arising from the Merger and Related Transactions.
- The commitments articulated in the Merger and Related Transactions are consistent with the principles of regulatory economics that apply to analysis of mergers in high fixed cost, network industries like railroads and with the STB's prior approach to rail mergers. The existing regulatory framework and the STB will provide meaningful and effective oversight to ensure that the commitments and conditions included in the Merger and Related Transaction are effective in addressing the limited situations where the transaction raises competitive concerns.

16. I have evaluated concerns raised by CP that the Merger and Related Transactions will disrupt competition between PAS and CSXT on routes between eastern Massachusetts and the Albany area; will decrease incentives for PAS ownership to invest in the Hoosac Tunnel Line (i.e., the PAS Patriot Corridor line); and threaten the long-run viability of PAS via a combination of

diversions of remunerative traffic and decreased incentives for CSXT to maintain PAS as a viable line. I find that these concerns are unfounded.

- The PAS owners retain a strong incentive to maintain the PAS line as a viable rail alternative. Both NSR and CSXT move large volumes of traffic annually over PAS. Given that CSXT already operates its own mainline from the Albany area to eastern Massachusetts, this is traffic that benefits from the ongoing operation of the PAS Patriot Corridor and there is no basis to conclude that CSXT would not continue to utilize the PAS Patriot Corridor for most of this traffic.
- NSR and CSXT are sophisticated, financially strong railroads fully capable of making necessary and economic investments in PAS. NSR has demonstrated its willingness to invest in the line, including in the recent repair of the Hoosac Tunnel. The transaction calls for substantial additional investments in PAS by CSXT. There is no basis for concluding that NSR and CSXT would not fund and make economically sound investments in the PAS.
- Traffic diversions do not threaten the financial viability of PAS. In the short run, the financial effect of the loss of NSR intermodal haulage traffic to the more efficient double-stack CSXT-line and the gain of the additional traffic that CSXT will route over the Patriot Corridor have little net financial impact on PAS. Moreover, the clearest public benefit is the avoidance of the large, but not yet known, investments that would be required to accommodate double-stack trains on the Patriot Corridor. These investments involve raising more than 20 clearances, including in the Hoosac Tunnel. Absent a need to make such investments, capital can be deployed for other improvements to the line.
- Analysis shows that the maximum volume of traffic that could potentially be diverted to CSXT from PAS as a result of single-line efficiencies on CSXT's route is limited.
- B&E, as contract operator of PAS, is anticipated to result in lower-cost and more efficient operation of the line; B&E has a financial incentive itself in the growth and financial success of PAS operations. There is no basis for concluding that the Merger and Related Agreements threatens the future viability of PAS.

III. RESPONSE TO VERMONT RAIL SYSTEMS AND THE STATE OF VERMONT AGENCY OF TRANSPORTATION

A. SUMMARY OF COMMENTS

17. VRS and VTrans filed separate, but closely related, comments in this proceeding. VRS comments that “the proposed B&E/PAS Transaction threatens competition, especially for Vermont railroad customers...” because, as owner of both B&E and NECR, GWI “will have no incentive to compete against itself, and it will have every motivation to explore ways to exploit the market power it would gain through common control of the two railroads...”⁴

18. In support of its position, VRS submitted a verified statement by Thomas Crowley and Robert Mulholland (the “Crowley/Mulholland VS”). Messrs. Crowley and Mulholland conclude that the B&E Transaction “would diminish competition for VRS-served customers” that use the VRS connections at Bellows Falls and White River Junction because both of the current alternatives at those junctions, PAS and NECR, will be “under the control of a single short line holding company [GWI] following the transaction.”⁵

19. The Crowley/Mulholland VS asserts several issues associated with the B&E Transaction, including: reduced competitive alternatives for shippers between White River Junction, Vermont and East Northfield, Massachusetts, including VRS customers that connect at Bellows Falls or White River Junction;⁶ a lack of specificity with respect to the pricing and service commitments that have been made to address any the competitive concerns raised by the Merger and Related Transactions⁷; and a “conflict of interest” with respect to GWI’s “control of B&E (as operator of

⁴ Vermont Rail System’s Reply In Opposition to Pittsburgh & Shawmut Railroad, LLC’s Petition for Exemption, Finance Docket 36472 (Sub-No. 5), August 27, 2021 (hereinafter “*VRS Comments*”) at 6. *See also*, Comments of the State of Vermont in Opposition to the Application, Finance Docket No. 36472, August 27, 2021 (hereinafter “*VTrans Comments*”).

⁵ *VRS Comments*, Exhibit B: Verified Statement of Thomas D. Crowley and Robert D. Mulholland, August 27, 2021 (hereinafter “*Crowley/Mulholland VS*”) at 4.

⁶ *See, e.g., Crowley/Mulholland VS* at 4, 8-10.

⁷ *See, e.g., Crowley/Mulholland VS* at 4-5, 11-18.

PAS) and NECR” that introduces the potential for GWI to benefit from commercially sensitive information accessed via B&E.⁸

20. The State of Vermont also submitted a verified statement by James C. Cunningham in support of its comments.⁹ Mr. Cunningham raises concerns that parallel the concerns raised by VRS and Messrs. Crowley and Mulholland. These include a reduction in interchange options at Bellows Falls and White River Junction;¹⁰ and concerns about anti-competitive actions on the part of GWI and its affiliated railroads and GWI’s and its affiliates’ access to commercially sensitive information that will provide GWI and its affiliates with “strategic, commercial, and intelligence advantages.”¹¹

21. Mr. Cunningham asserts that commitments regarding B&E’s contract operation of PAS independent of GWI are insufficient and “leave the door open for GWI to combine operations between PAS and NECR for instance (absent conditions imposed on them by the STB);”¹² that GWI will be able to circumvent commitments on pricing and service quality;¹³ and that VRS will be at a competitive disadvantage because it will no longer have an independent route (i.e., to/from NSR and CSX via Hoosick and PAS) with which to compete with NECR.¹⁴ Mr. Cunningham also expresses concerns about the on-going viability of VRS.¹⁵ In summary, Mr. Cunningham concludes that “The Proposed Transaction would not only reduce competition throughout Vermont, rail competition would be worse post-transaction than it was before ever NSR invested in the PAS.”¹⁶

22. As I explain below, these concerns are unwarranted.

⁸ *Crowley/Mulholland VS* at 5. *See, also, Crowley/Mulholland VS* at 8, 19-20.

⁹ *VTrans Comments*, Verified Statement of James C. Cunningham, August 27, 2021 (hereinafter “*Cunningham VS*”).

¹⁰ *See, e.g., Cunningham VS* at 3.

¹¹ *See, e.g., Cunningham VS* at 3-4.

¹² *Cunningham VS* at 15.

¹³ *Cunningham VS* at 15.

¹⁴ *Cunningham VS* at 16.

¹⁵ *Cunningham VS* at 16.

¹⁶ *Cunningham VS* at 17.

B. THERE IS A LIMITED VOLUME OF TRAFFIC SUBJECT TO VRS AND VTRANS' CONCERNS

23. VRS asserts that “PAS has emerged as a vigorous and effective competitor to GWI-controlled NECR...for VRS interline traffic flows to the benefit of VRS and its customers.”¹⁷ VRS explains that “NECR is both a vigorous competitor with VRS in some market flows and an essential partner with respect to some others.”¹⁸ Such relationships are the norm in railroading: railroads often compete for traffic and routings and simultaneously partner to serve interline customers and attract traffic from other modes of transportation. The Merger Transaction would not be expected to change these relationships.

24. The concerns raised by VRS and VTrans primarily involve VRS traffic that travels on the 72.8-mile Conn River North line between East Northfield, Massachusetts and White River Junction, Vermont. NECR owns this line and PAS has trackage rights over it. As shown in Figure 1, disjointed segments of VRS interconnect with this line at White River Junction and Bellows Falls, Vermont. VRS has overhead haulage rights with NECR between these two interchanges. Post-transaction, NECR and B&E, contract operator for the PAS owners, will both operate on that line and potentially provide service to VRS for its interconnecting traffic. VRS says that PAS has “[become] a strong competitor for VRS overhead traffic moving between points on VRS west and south of Bellows Falls...and points on [the VRS system] north of White River Junction”¹⁹ and raises the concern that while PAS and NECR “vigorously compete” for customers and for VRS interchange traffic today, GWI would have “little if any incentive” to have B&E continue vigorous competition against NECR.²⁰

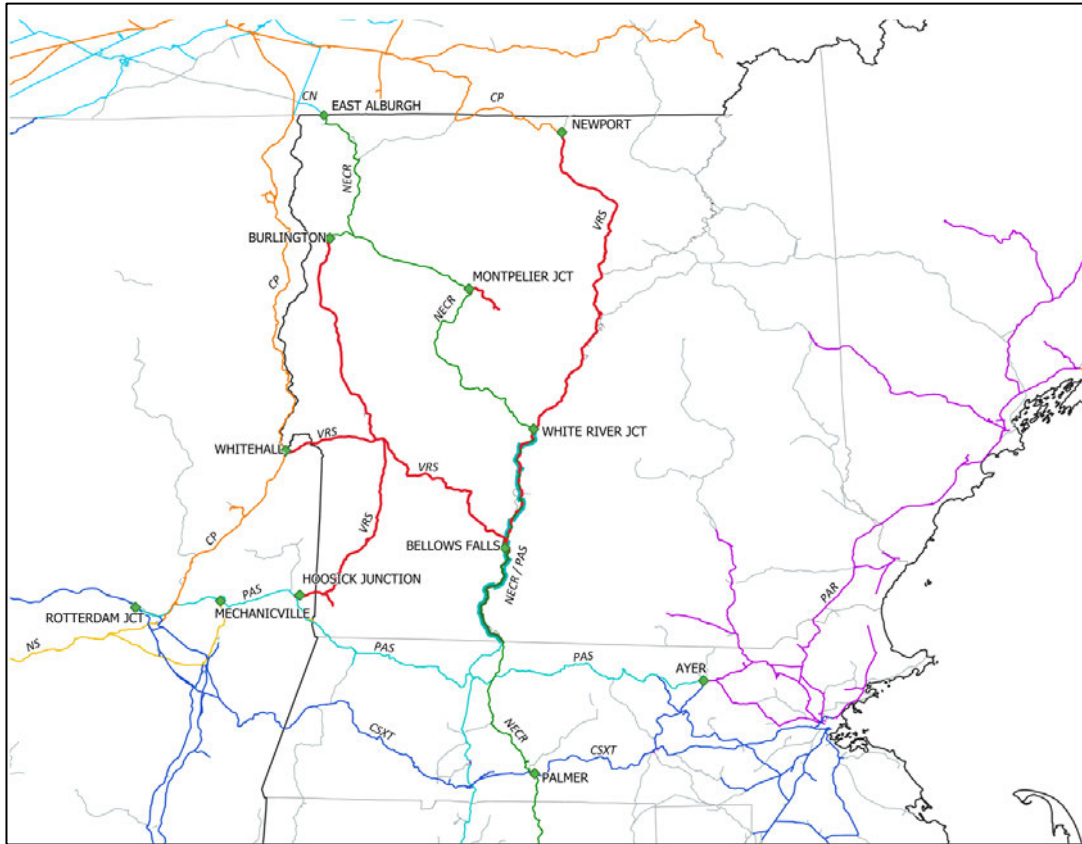
¹⁷ *VRS Comments* at 6.

¹⁸ *VRS Comments* at 6.

¹⁹ *VRS Comments* at 8-9.

²⁰ *VRS Comments* at 10.

**Figure 1
VRS System Map**



Source: North American Rail Lines, National Transportation Atlas Database (NTAD), Bureau of Transportation Statistics

25. Neither VRS or VTrans or any of their witnesses provide any specific or quantitative analysis of VRS traffic in support of their arguments. Nor did they provide traffic data or tabulations of VRS traffic by which to assess their expressed concerns. In the absence of data from VRS, I have used data from the CWS to analyze the totality of VRS traffic. I have also used data provided to me by PAS and NECR to analyze some VRS traffic. My analysis, discussed in detail below, shows that the competitive alternatives available to most VRS traffic will not be affected by the Merger and Related Transactions, and that the benefits of existing competition are preserved for the remainder.

1. Most VRS traffic will not be affected by the Merger and Related Transactions

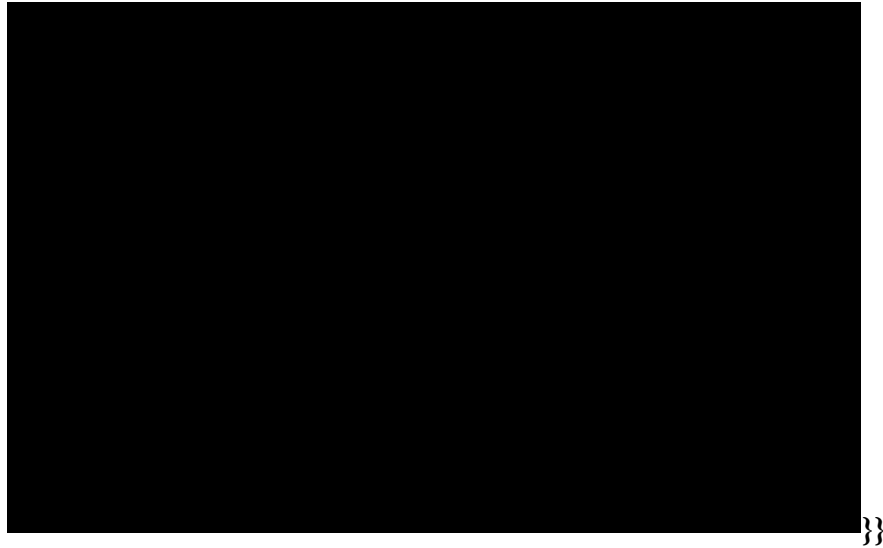
26. Most VRS traffic will not be subject to any potential competitive impact of the B&E Transaction. The CWS identifies {{[REDACTED]}} cars for which VRS participates in the movement.²¹ As seen in Table 1 and Figure 2, {{[REDACTED]}} of traffic on which VRS participates never travels over the Conn River North Line and cannot see a reduction in competition as a result of B&E's contract operations on that line. The remaining {{[REDACTED]}} of VRS-participating movements travel on the Conn River North line.²² As explained in the next section, most of the VRS-participating traffic that travels on the Conn River North line is not currently subject to any effective competition between PAS and NECR and thus cannot see a reduction in competition as a result of the B&E Transaction.

²¹ The total in Table 1 is slightly larger than Table 24 in *Amended and Supplemented Reishus VS* as I include in Table 1 {{[REDACTED]}} cars attributed to CP that appear to traverse the Whitehall-Bellows Falls or Whitehall-Burlington line of VRS. VRS is not indicated as a shipper on these moves but we include them as I infer that they travel over the VRS system.

As previously explained, given the sampling methodology of the CWS, some amount of traffic terminating in Canada may not be included in the sample. *Amended and Supplemented Reishus VS* at 68. Although Mr. Cunningham claims that VRS handles 50,000 cars a year, VRS' own web site states: "The VRS hauls over 25,000 freight cars each year, with nearly 90% of traffic serving Vermont businesses." http://www.vermontrailway.com/our_story.html, accessed October 9, 2021.

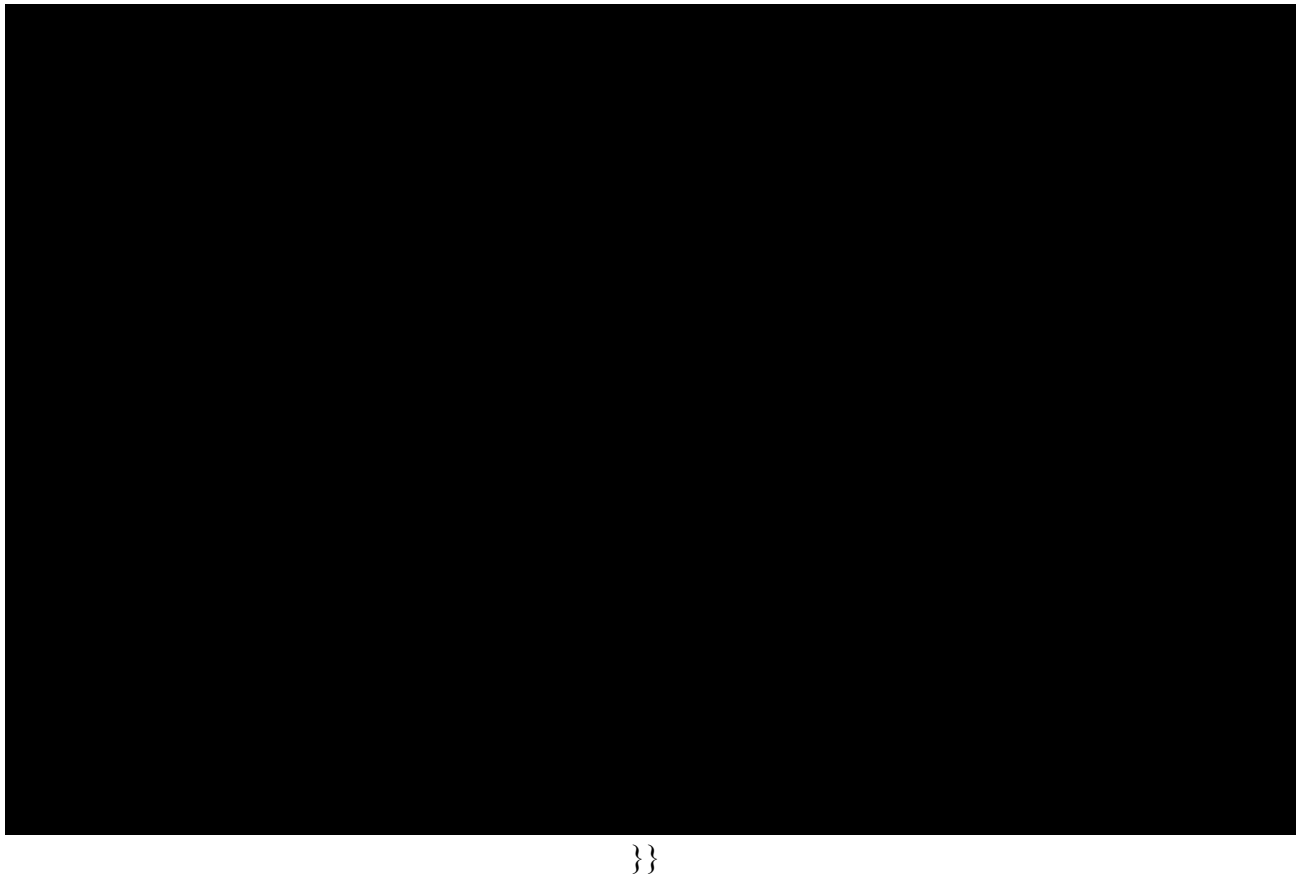
²² VRS traffic moved under NECR haulage between White River Junction and Bellows Falls is included as interchange traffic for this categorization.

Table 1
VRS Traffic, 2019{{

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}}

Figure 2
VRS Traffic, 2019
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27. The majority of VRS-participating traffic, {{[REDACTED]}}, travels over two western gateways and not over the Conn River North line. These western gateways—at Hoosick Junction and Whitehall, NY—are the primary access for VRS traffic to and from the United States west of New England.

28. **Whitehall Interchange.** As shown in Table 1, interchange with CP at Whitehall is the {{[REDACTED]}} of VRS traffic.²³ Competition for traffic over this gateway is unaffected by the Merger and Related Transactions as none of the parties associated with these transactions—NSR, PAS, PAR, CSXT or any GWI-owned road—operate at this interchange. This interchange point is the primary gateway for important commodities moving into Vermont, including distilled petroleum products and, as discussed further below, rock salt.²⁴

29. **Hoosick Junction.** Over {{[REDACTED]}} cars, or {{[REDACTED]}} of VRS-participating traffic, interchange at Hoosick Junction, in New York, near the western end of the PAS Patriot Corridor.²⁵ VRS traffic over Hoosick Junction travels to or from PAS west-end interchanges with NSR, CSXT, and potentially with CP as an alternative to the Whitehall interchange, for locations south and west of VRS.

30. VRS and VTrans acknowledge the value of this interchange to VRS. Prior to NSR investments and the creation of PAS, VRS was physically unable to use Hoosick Junction due to track conditions. As such, VRS was unable to interchange traffic with NSR directly and with CSXT only using haulage over NECR.²⁶ With the NSR investments and creation of PAS, Hoosick Junction has “become a vital gateway” that provides a direct connection (via PAS haulage) between VRS and NSR and a “more competitive gateway to CSXT via Rotterdam [Junction].”²⁷

²³ For purposes of Table 1 and this calculation, I exclude {{[REDACTED]}} cars ({{[REDACTED]}}) in the CWS that are identified as CP traffic that appear to traverse VRS between Whitehall and Bellows Falls or Whitehall and Burlington. I discuss the modest volume of VRS bridge traffic travelling on the Conn River North line below.

²⁴ See *Amended and Supplemented Reishus VS*, Tables B-5 through B-7 at 129-130.

²⁵ Values from the CWS. Based on PAS data, there are over {{[REDACTED]}} cars interchanged with VRS at Hoosick Junction. *Amended and Supplemented Reishus VS*, Table 15 at 48.

²⁶ *Cunningham VS* at 11.

²⁷ *VRS Comments* at 7-8.

31. The Hoosick Junction interchange is clearly important to NSR, as it was improved following the creation of PAS. The PAS operating agreements provide NSR haulage rights over Hoosick Junction. Nearly {{[REDACTED]}} of the traffic interchanging at Hoosick Junction occurs through NSR haulage rights on PAS under rates established in the PAS operating agreements.²⁸

32. Hoosick Junction is also the primary connection for CSXT with the southern section of VRS for traffic moving to and from the south and west of Vermont. CSXT and NSR collectively account for {{[REDACTED]}} of the VRS traffic interchanging at Hoosick. Indeed, in connection with the Merger and Related Transactions, CSXT and NSR have agreed that rates between CSXT at Rotterdam Junction and VRS at Hoosick Junction will be established at current rates, subject to future escalations.²⁹ This commitment provides certainty for both CSXT and VRS with respect to the use of this interchange.

33. Concerns that B&E as contract operator of PAS would use its operations at Hoosick Junction in an anti-competitive fashion are unfounded.³⁰ Neither NSR nor CSX have any incentive to permit B&E to take actions, either through pricing or service, that would reduce the desirability of Hoosick Junction for interchange with VRS. Both NSR and CSXT have pricing protections—through haulage for NSR and the commitments for CSXT—for this traffic. Indeed, were B&E to attempt to engage in anticompetitive actions it would encourage VRS to utilize its other western interconnection with CP at Whitehall.

34. The Hoosick Junction interchange in practice represents the overwhelming preferred route for VRS traffic to the use of the Conn River North line. Virtually all (nearly {{[REDACTED]}}) VRS traffic at Hoosick Junction interchanges with the Class I carriers at the PAS west end. By contrast, only approximately {{[REDACTED]}} cars that VRS interchanges at Bellows Falls or White River Junction on the Conn River Line use PAS to interchange at Rotterdam Junction (with CSXT) or Mechanicville (with NSR or CP). For these reasons B&E has neither the incentive nor the ability

²⁸ *Amended and Supplemented Reishus VS*, Table 15 at 48.

²⁹ *Amended and Supplemented Pelkey VS* at 18-19.

³⁰ *See Crowley/Mulholland VS* at 8 and fn 12. *See also, VRS Comments* at 10.

to engage in any anticompetitive actions, including with respect to service or pricing, on interchange traffic at Hoosick Junction.

35. ***VRS Local and Other Unaffected Traffic.*** An additional category of VRS-participating traffic, {{[REDACTED]}} that does not travel along the Conn River Line consists of traffic local to VRS or interchange traffic that does not involve travel over PAS or travel on the Conn River Line. This traffic includes interchanges at the northern interconnections (Newport, Vermont with CP or NECR at Burlington).³¹ None of this traffic will see a change in the competitive circumstances as a result of the Merger or Related Transactions.

2. There is no viable competition between PAS and NECR for much of the VRS traffic using the Conn River North line

36. VRS's concerns with respect to the potential loss of competitive alternatives for shippers is limited to traffic that currently has the option to choose between PAS or NECR for part of their movement. As shown in the bottom panel of Table 1, above, this totals about {{[REDACTED]}} of VRS's traffic and includes: (a) traffic moving on the Conn River North line connecting to VRS at Bellows Falls and/or White River Junction, including traffic moving on the VRS system that must travel between Bellows Falls and White River Junction to connect two noncontiguous pieces of the VRS network; and (b) bridge traffic that moves to or from Canada through Vermont via either NECR or VRS.

37. Table 2 and Figure 3 below break out all VRS-participating traffic that utilizes the Conn River North line. This includes traffic that VRS interchanges with PAS or NECR at Bellows Falls or White River Junction, VRS traffic that moves under a haulage agreement with NECR between Bellows Falls and White River Junction, and VRS traffic that interchanges elsewhere but travels along the Conn River North line. Given the {{[REDACTED]}} volumes involved, and to avoid issues with sampling and excluded movements in the CWS, I utilize waybill and haulage information from

³¹ This also includes interchange traffic between VRS and NECR at White River Junction for movements on the NECR East Alburgh line and the VRS Newport line. PAS cannot compete for this interchange.

PAS and NECR to identify all movements over the Conn River North line, including those on which VRS participates on some portion of the move.³²

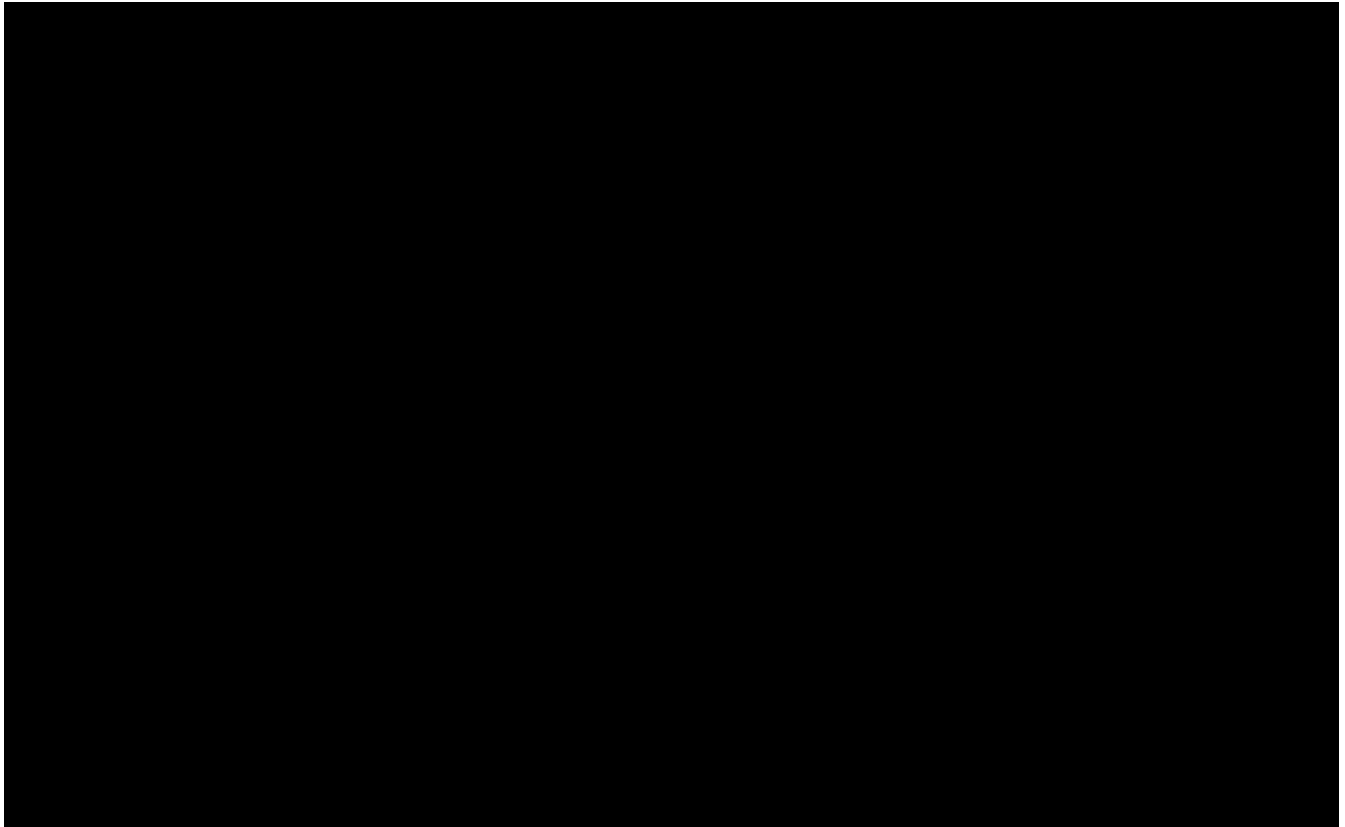
38. In short, Table 2 and Figure 3 demonstrate that most VRS traffic does not currently benefit from competition between NECR and PAS on the Conn River North line and will incur no potential competitive harm from the transaction. For the small remaining traffic, PAS's owners have the strong incentive to ensure that B&E continues to compete for this traffic on PAS's behalf and the specific pricing commitments provided under the Merger and Related Transactions provide additional protection to ensure the continuation of competition.

Table 2
VRS-Participating Conn River North Traffic, 2019
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³² As VRS provided no detailed quantitative analysis, CWS is the only source for the totality of VRS movements. To perform a precise analysis of the claims regarding the Conn River North line, we used detailed PAS and NECR data which necessarily does not perfectly align with the CWS carloads. Therefore, the percentages in Table 2 start with the baseline, derived from the CWS data, that {{[REDACTED]}} of VRS-participating traffic travels along the Conn River North Line.

Figure 3
VRS-Participating Conn River North Traffic, 2019
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39. Table 2 divides VRS-participating traffic that travels along the Conn River Line into six categories: 1) NECR-exclusive Traffic: traffic carried by NECR for which PAS cannot compete; 2) PAS-exclusive Traffic: traffic carried by PAS for which NECR cannot compete; 3) Conn River North Local Traffic: traffic from origins or to destinations on the Conn River Line for which, except for two identified shippers, NECR and PAS do not compete; 4) VRS Haulage: traffic between the VRS Newport line and VRS' southern Vermont lines for which the White River Junction to Bellows Falls line is a "bridge"; 5) Bridge Traffic: traffic for which VRS is neither the originating or terminating carrier—that exchanges with PAS or NECR on the Conn River North line; and 6) Conn River North Interchange traffic: traffic that interchanges on the Conn River North line with VRS. I analyze each of these categories in detail below and conclude that there is no risk of meaningful competitive harm to VRS or its shippers from the Transaction and Related Agreements for this traffic.

40. **NECR-exclusive traffic.** There are roughly {{[REDACTED]}} of VRS-participating traffic that travels along the Conn River Line for which PAS cannot possibly compete. Apart from local traffic discussed below, this falls into two groups. First, there is VRS traffic that interchanges with NECR along NECR's East Alburgh-White River Junction line, at Burlington or Montpelier Junction, for movements south on the Conn River North line.³³ Second, there is traffic that terminates (or originates) at NECR destinations off the Conn River North line. PAS cannot compete for this traffic that NECR is already moving. It is not plausible that NECR would permit PAS to compete for movements over the Conn River North line for traffic that NECR brings to or carries from the jointly-served line. The Merger and Related Transactions result in no change or loss in competition for this traffic regardless of whether B&E replaces Springfield Terminal as the contract operator of PAS over this line.

41. **PAS-exclusive traffic.** There are roughly {{[REDACTED]}} of VRS-participating traffic that travels along the Conn River Line for which NECR is unable to compete. These fall into two groups: traffic originating or terminating on PAS, and traffic VRS interchanges with PAS for movements to or from PAR.

42. **PAS Local Traffic.** There are {{[REDACTED]}} that originate or terminate on PAS that interchange with VRS over the Conn River North line. As these are locations that NECR does not serve, NECR cannot compete for this traffic. The {{[REDACTED]}} PAS-VRS interchange traffic over the Conn River North line involves LPG from East Deerfield.

43. I have previously analyzed LPG movements to Vermont and in particular LPG from East Deerfield. These movements are the subject of specific commitments in the Merger and Related Transactions.³⁴ Despite this focus, NECR cannot serve or compete for LPG movements from East Deerfield and the Merger and Related Transactions result in no loss of competition for these movements. Regardless, the parties have committed to provide VRS haulage for these movements. This commitment to provide haulage for VRS is not a solution to any existing competitive issue, but instead provides a price-cap enhancement for the benefit of VRS.

³³ Traffic between this NECR line that interchanges at White River Junction with VRS's Newport line is already addressed in the discussion of Table 1.

³⁴ See Docket No. FD 36472, CSX Corporation and CSX Transportation, Inc., et al. – Control and Merger – Pan Am Systems, Inc., et al., Amended and Supplemented Application, Exhibit 12 “Market Analysis” at 20.

44. The remaining non-Conn River North, PAS-local traffic consists of a miscellany of only {{[REDACTED]}}. Again, this is traffic for which NECR cannot effectively compete and thus there is no reduction in competition for this VRS traffic as a result of the Merger and Related Transactions.

45. **PAR Local Traffic.** An additional {{[REDACTED]}} of VRS originating and terminating traffic interchanges with PAS for movements to or from PAR. ST currently operates both PAS and PAR. As such, ST prices both legs of this move and operates both roads. NECR's route is inferior and requires interchange with CSXT and then back to ST-operated PAR. An NECR routing requires more interchanges, is longer, and requires displacing the ST-operated PAS from the interchange with PAR. As such, NECR is not competitive for this traffic.³⁵ It is not plausible that NECR can currently compete to be an intermediate carrier between VRS and the ST-operated PAR.

46. After the transaction, PAR will be owned and operated by CSXT. As such, NECR in theory could serve as bridge carrier between VRS and CSXT, with an interchange at Palmer, for traffic with the former PAR. The post-transaction VRS-NECR-CSXT(PAR) routing is less direct than the VRS-PAS-CSXT(PAR) and would not represent a preferred competitive option.

47. NECR today is not currently a viable competitor with PAS for traffic between VRS and PAR. Thus, the transaction cannot reduce competition that does not currently exist. The acquisition of PAR by CSXT now permits a VRS-NECR-CSXT(PAR) interchange to reach PAR locations and could conceivably introduce NECR as an inferior competitor for traffic between VRS and PAR. Assuming, incorrectly, that the VRS' experts' beliefs were correct that PAS (operated on a contract basis by B&E) and NECR would fail to compete post-transaction, no competitive harm from the merger and B&E contract operation of PAS would result for this traffic. A merger cannot harm competition where none existed prior to the merger; not introducing new competition where none previously existed does not constitute competitive harm arising from a merger transaction.

48. Moreover, the parties have committed to establish rates on these lanes, over Deerfield and Ayer with PAR at current levels, subject to future reasonable escalation. Despite there being no

³⁵ NECR carries {{[REDACTED]}} between PAR locations and VRS locations.

loss in competition for this traffic as a result of the transaction, the parties have committed to rate caps based on existing rate levels for this traffic.

49. **Conn River North Line local traffic.** An additional {{[REDACTED]}} of VRS traffic serves local shippers on the Conn River North line.³⁶ The Applicants and I have identified only {{[REDACTED]}} shippers on this line that are jointly served by PAS and NECR. The parties have committed to establish rates at existing levels for these shippers, neither of which has indicated an objection. Based on the identified shippers, VRS participates in shipments of {{[REDACTED]}} to the PAS-NECR jointly-served shippers.³⁷

50. **VRS Haulage/White River Junction-Bellows Falls Bridge Movements.** As VRS consists of multiple disjointed rail segments, the portion of the Conn River North line between White River Junction and Bellows Falls is a “bridge” between the VRS Newport line and VRS’ southern Vermont lines. As shown in Table 2 above, there were {{[REDACTED]}} that VRS bridged between White River Junction and Bellows Falls over the Conn River North line.

51. VRS has existing haulage rights over NECR between White River Junction and Bellows Falls for these movements. In 2019, all of this overhead traffic bridging the two VRS segments were moved by NECR and all, or almost all, moved under the haulage agreement with NECR.³⁸ Haulage agreements typically provide pricing certainty to the user and limited information to the hauler regarding pricing to the customer. Although it is not always the case that all the VRS “bridge” movements move under the haulage agreement, the failure of PAS to capture {{[REDACTED]}} in 2019 demonstrates that PAS is generally not a preferred option for these movements relative to the NECR haulage arrangement.

52. **Other Bridge Traffic.** VRS notes that VRS and PAS “cooperate” on a bridge route through VRS’s interchange in Newport, VT and onto PAS at the interchange in White River Junction. VRS

³⁶ This category excludes traffic that indicates it terminates at either Bellows Falls or White River Junction, but are suspected to be Rule 11 shipments.

³⁷ {{[REDACTED]}}

³⁸ Due to uncertainty regarding whether {{[REDACTED]}} moving on NECR between Bellows Falls and White River Junction to and from VTR are haulage or not, I have included them in the Conn River North Interchange category discussed below.

characterizes this route as a competitive alternative to NECR's route from East Alburgh and asserts that "[p]ost-transaction, GWI would, to the extent possible, likely seek to adjust service and rates on a B&E-operated PAS to undercut or eliminate competition to the benefit of a parallel NECR service offering that would likely gain higher revenues and returns than PAS might enjoy under its VRS-PAS interline arrangement."³⁹

53. Table 2 identifies {{[REDACTED]}} of VRS overhead traffic—traffic for which VRS is neither the originating or terminating carrier—that exchanges with PAS or NECR on the Conn River North line.⁴⁰ NECR and VRS currently cooperate for these movements, although as bridge carriers, the choice of overhead carrier and routing (i.e., over Newport or East Alburgh) is influenced by the originating and terminating carriers and routing.

54. There is no reasonable risk of competitive harm from the Merger and Related Transactions to VRS or rail shippers with respect to this VRS overhead traffic. The overhead traffic on the Newport line is mostly traffic {{[REDACTED]}} originating from CP-served locations in Maine and Eastern Canada.⁴¹ As the originating carrier, CP has substantial ability to establish its preferred route for the traffic. The alternative NECR East Alburgh line however does not connect with CP and CP would need to interchange with CN in order to reach NECR at East Alburgh. This routing involves a longer route and interconnection with CP's Class I Canadian rival, CN, for at least a small portion of the move. There is little indication that NECR would have the economic interest or ability to induce CP to re-route traffic over East Alburgh. This is especially true as CP has direct connections with other Class I railroads in the Albany area and could also route traffic over PAR to reach CSXT or New England destinations. An attempt by NECR to preclude use of the Newport line for this overhead traffic post-transaction would likely result in a loss in traffic and revenue to NECR and would not be in its interest.

³⁹ *VRS Comments* at 11.

⁴⁰ I include {{[REDACTED]}} cars of CP traffic that the data indicate as switching at Bellows Falls and treat it as VRS overhead traffic. It would appear that VRS may be a haulage carrier, or some other type of arrangement, for this CP-designated traffic between Whitehall and Bellows Falls. Exclusion of this traffic does not change the substance of the findings.

⁴¹ In 2019, this includes the CMQ now owned by CP.

55. In practice, PAS is an ineffective competitor for the existing VRS overhead traffic, as it has obtained less than {{[REDACTED]}} of this traffic.⁴² Moreover, some {{[REDACTED]}} of this bridge traffic terminates on NECR for which no competition would be reasonably possible by PAS. As such, even if the protections with respect to B&E's contract operation of PAS that VRS downplays were ineffective (which I do not believe will be the case), the Merger and Related Transactions would not result in a substantial loss of competition that would harm VRS or shippers for this overhead traffic. The absence of a viable preferred NECR routing that excludes VRS for most or all of this VRS overhead traffic further precludes the ability of B&E's contract operation of PAS to reduce competition for this traffic and reduce or eliminate VRS' participation in this overhead traffic.

56. **Conn River North Interchange Traffic.** What remains is less than {{[REDACTED]}} that interconnects or interchanges on the Conn River North line with VRS. This traffic mostly represents traffic interchanging with {{[REDACTED]}} Although PAS and NECR may compete for this traffic, the Merger and Related Transactions do not pose a risk of material competitive harm to VRS or its shippers for this traffic.

57. This remaining category of traffic is traffic where PAS and NECR serve as overhead carriers. As overhead traffic, the Conn River North line is not essential for the movements of this traffic to VRS. VRS has other options for obtaining this traffic that does not depend on rates established by PAS or NECR over this corridor.

58. First, {{[REDACTED]}} Rates for traffic moving under haulage are determined by the terms of the haulage agreement.

59. Second, and more significant, Hoosick Junction is the primary VRS interchange for traffic connecting to CSXT and NSR for traffic west of New England. The Hoosick Junction interchange accounts for {{[REDACTED]}} the volume of VRS interchange traffic than the Conn River North interchange traffic at issue here. This gateway provides a strong competitive alternative to

⁴² We also include in this "other bridge traffic" category moves between Whitehall and Bellows Falls.

interchange traffic from the Conn River Line on which PAS or NECR act as overhead connections between CSXT and NSR.⁴³ The Merger and Related Transactions preserve competitive rates for access to CSXT and haulage with NSR.

60. Third, as the VRS traffic at issue represents overhead traffic {{[REDACTED]}} on CSXT and NSR, CSXT and NSR have strong incentives to prevent B&E's contract operations on PAS from engaging in an anti-competitive rate setting for this small amount of traffic. Apart from the contractual obligations that preclude this type of behavior, CSXT and NSR have a strong economic interest in preventing B&E's contract operations of PAS from benefitting GWI's NECR-affiliate at the owners' expense. Regardless of whether CSXT and NSR have the incentive and ability to ensure PAS, operated by B&E as contractor, prices competitively for this traffic, VRS's option to use the Hoosick Junction gateway (and associated pricing commitments) serves as a constraint on rates for this small amount of traffic.

61. **Summary.** As analyzed in detail above, VRS will not be placed at risk as a result of the Merger and Related Transactions. Most VRS traffic is not subject to competition between NECR and PAS. Existing competition from other alternative gateways and routings, existing price protection, and additional commitments made as part of the transaction preserve the benefits of existing competition for the traffic on which PAS and NECR do compete. Moreover, it is in CSXT's and NSR's interest to preserve competition and preclude anti-competitive actions by B&E as contract operator of PAS (in violation of the contract) that would benefit other GWI-affiliates on overhead traffic. There is no risk of meaningful competitive harm to VRS or its shippers from the Merger and Related Transactions.

⁴³ The distance between Hoosick Junction and Bellows Falls is nearly identical on PAS (112 miles) as on VRS (111 miles). (*PC*Miler Rail.*) For customers located on the VRS' Bellows Falls line, the distance over VRS will be relatively shorter. I note that for the roughly {{[REDACTED]}} in this category to and from White River Junction, VRS has access to haulage on NECR to and from Bellows Falls.

I note that {{[REDACTED]}}

C. THE TRANSACTION DOES NOT RAISE SIGNIFICANT COMPETITIVE CONCERNS WITH RESPECT TO SPECIFIC COMMODITIES

62. VRS has expressed concerns regarding specific commodities. In particular, NECR vies with VRS “for market share for two major inbound commodity movements common to both railroads – liquid propane gas (“LPG” – an essential home heating staple during harsh New England winters) and road salt (again a winter staple deployed to keep Vermont roads clear and ice-free).”⁴⁴ I previously performed a “50/10 test” that analyzed traffic delivered to the Vermont BEA and found that no commodities triggered this screen with respect to CSXT’s control of the PAR Railroads.⁴⁵

63. Concerns regarding B&E’s contract operation of the PAS lines are unwarranted. Current market outcomes reflect the competition between NECR and VRS for traffic, as well as any competition between PAS and NECR to provide interchange traffic. For the Merger and Related Transactions to result in a competitive harm, B&E must have the incentive and opportunity to eliminate existing competition between PAS and NECR for interlining these commodities to NECR. There is no basis for finding that such elimination is a likely outcome of the transactions. Based on these concerns I examined the significant commodities identified by VRS.

64. **Road Salt.** I previously examined commodities by VRS interchange location based on the CWS.⁴⁶ {{ [REDACTED] }}

[REDACTED] }}⁴⁷
NSR’s haulage rights, and its 50% ownership interest in PAS, ensures that NSR will see no reduction in its ability to continue to provide rock salt to Vermont over VRS. There is no plausible reduction in competition for this commodity as a result of the Merger and Related Transactions.

⁴⁴ *VRS Comments* at 7.

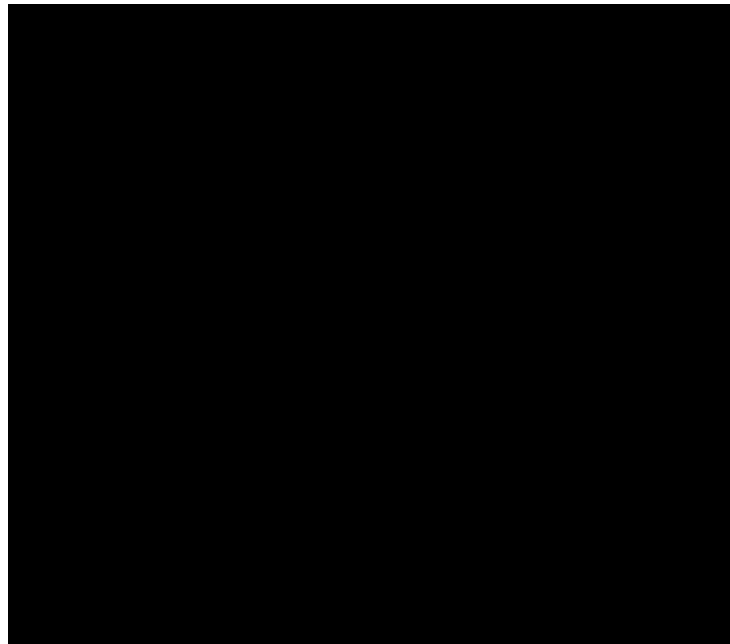
⁴⁵ *Amended and Supplemented Reishus VS*, Table B-2 at 126.

⁴⁶ *Amended and Supplemented Reishus VS*, Tables B-5 through B-7 at 129-130.

⁴⁷ Review of PAS traffic data confirms this result along with {{ [REDACTED] }} volumes provided to VRS through NSR haulage than in the CWS.

65. **LPG.** According to the CWS, VRS received a total of {{[REDACTED]}} cars of LPG.⁴⁸ (See Table 3.) PAS delivers to VRS {{[REDACTED]}} cars; of this {{[REDACTED]}} originates at PAS' sole-served location at East Deerfield. The {{[REDACTED]}} of the remaining supply, {{[REDACTED]}} cars, is delivered by CP. By contrast, NECR supplies {{[REDACTED]}}⁴⁹ Supply is also received through Hoosick Junction. Under the commitments offered by CSXT, VRS would be provided haulage rights by PAS from East Deerfield; combined with the volume of supply from CP, over {{[REDACTED]}} of VRS supply (based on 2019 data) would be obtained through parties not involved in this transaction or under an established rate agreement. It is also notable that LPG is a widely available commodity, such that CP, or NSR and CSXT (through haulage or rate agreements established under the transaction) can provide LPG to VRS independent of pricing actions by NECR or PAS.

Table 3
LPG Deliveries to VRS, 2019
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⁴⁸ Based on a close examination of the CWS and PAS data, we have re-categorized {{[REDACTED]}} carloads identified as local to VRS as interchanging with PAS at Hoosick Junction.

⁴⁹ There are {{[REDACTED]}} cars of Rule 11 traffic, {{[REDACTED]}} of which could be NECR. Review of PAS and NECR traffic roughly confirms these relative magnitudes.

D. THE CONDITIONS AND COMMITMENTS INCLUDED IN THE MERGER AND RELATED TRANSACTIONS ARE SUFFICIENT TO PRESERVE COMPETITION

66. VRS broadly criticizes commitments made by CSXT with respect to price and service guarantees as “vague” and “illusory” and raises the concern that B&E’s contract operation of PAS will allow GWI and its affiliated railroads access to commercially sensitive information and provide GWI and its affiliated railroads with increased leverage to impede PAS’s ability to compete.⁵⁰ These concerns are unfounded.

67. CSXT has provided a clear commitment with respect to rates. Mr. Pelkey explains that CSXT is not currently in a position to “provide the kind of detail on future rates that VRS appears to want” and notes that CSXT will not be in a position to discuss specific rates until after the transaction closes.⁵¹ However, it will be a straightforward exercise to implement the rate commitment once the transaction is consummated. VRS clearly knows the rates it is currently paying. I have included as Appendix Table A-1 a confidential listing of current PAS rates. Mr. Pelkey also points out that VRS can seek STB intervention if it is dissatisfied with the implementation of this commitment.⁵²

68. The commitments made by the parties with respect to rates and service preserve the benefits of competition that are reflected in current levels. This ensures that VRS and its shippers will not be harmed by the Merger and Related Transactions. These commitments are not, however, a floor, as suggested by VRS and VTrans,⁵³ nor will they preclude competition between PAS and NECR, as Mr. Crowley suggests.⁵⁴ B&E will still have the incentive to cause PAS to compete for VRS’s traffic, including competing for market share by offering better terms than those associated with these commitments if market forces dictate such changes. In fact, Mr. Crowley’s own example illustrates this principle. If NECR chooses to “price at, or just below”⁵⁵ what Mr.

⁵⁰ *VRS Comments* at 8-9; 10-12; 15.

⁵¹ Verified Reply Statement of Sean Pelkey (hereinafter “*Pelkey Reply VS*”) at 6.

⁵² *Pelkey Reply VS* at 6-7.

⁵³ *See, e.g., Crowley/Mulholland VS* at 13, 15, 22; *Cunningham VS* at ¶ 36.

⁵⁴ *See, e.g., Crowley/Mulholland VS* at 24.

⁵⁵ *See, e.g., Crowley/Mulholland VS* at 24.

Crowley characterizes as the “price floor”⁵⁶ (i.e., current rates) PAS, through its contract operator, B&E, would have the clear incentive to counter with a lower rate, if economically reasonable, to win the traffic, thus driving the rate to each carrier’s best offer. Rather than a floor, the pricing commitments serve as rate ceilings.

69. A rate ceiling set at current levels is entirely consistent with sound merger policy, which is focused on ensuring mergers do not harm current competitive conditions (which is achieved via the various commitments made in the Merger and Related Transactions.) Sound policy does not require mergers to affirmatively benefit all current customers or all customers equally.⁵⁷ The Crowley/Mulholland VS complains that the efficiency gains that B&E will generate may not be passed on, or passed on in full, for some or all movements involving VRS traffic. This complaint is not pertinent for evaluating the Merger and Related Agreements.⁵⁸ The pertinent question is whether the merger harms competition relative to pre-merger levels. A customer is not *harmed* by a merger if that customer does not *benefit* from the merger, which is the prospect that Mr. Crowley raises. The Merger and Related Transactions generate important competitive enhancements and benefits; VRS is at worst treated neutrally by the transaction.

70. VRS’s and VTrans’ concerns that B&E contract operation of PAS will afford GWI and its affiliated railroads access to commercially sensitive information and otherwise offer them opportunities to compromise PAS’s ability to compete are also unfounded. The agreement governing B&E’s contract operation of PAS will contain explicit restrictions prohibiting the sharing of any commercially sensitive information. CSX and NSR, as owners of PAS, will ensure B&E complies with its obligations under this agreement.

71. It is important to underscore that the STB will be available to address any concerns with respect to the implementation of this Transaction. In discussing NECR’s desire, as landlord railroad, to raise PAS trackage rights fees, VRS acknowledges that the STB is an effective arbiter

⁵⁶ See, e.g., *Crowley/Mulholland VS* at 24.

⁵⁷ See U.S. Department of Justice and the Federal Trade Commission, “Horizontal Merger Guidelines,” August 19, 2010 at 1 (“The Agencies seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral.”).

⁵⁸ See, e.g., *Crowley/Mulholland VS* at 24.

of disputes.⁵⁹ VRS’ example demonstrates that the STB adjudicates disputes as they arise and that it is able to apply its regulatory principles effectively, including to protect competition, when necessary. The same regulatory processes will be available to the parties in this case. CSXT, NSR and other affected parties have every incentive to avail themselves of the regulatory process and seek STB intervention and relief for enforcement of the conditions and preservation of competition.

72. Further, CSX has requested that the Board initiate a five-year oversight proceeding to monitor the implementation of the Merger and Related Transactions and evaluate the effectiveness of the conditions imposed on the STB’s approval of the transactions. This oversight proceeding will provide VRS with the opportunity to raise issues and seek intervention if it is dissatisfied with the effectiveness of the proposed conditions.⁶⁰ STB authority and oversight of STB-established merger conditions, however, does not stop with any prescribed monitoring period; the STB retains authority and has continued to adjudicate disputes regarding the implementation of merger conditions as they arise and are brought to the Board’s attention.

IV. RESPONSE TO UNITED STATES DEPARTMENT OF JUSTICE

A. SUMMARY OF COMMENTS

73. The DOJ asserts that CSX ownership of 50% of the “track and physical infrastructure” of the PAS line and “control over the operating entity” of that line “is likely to diminish competition between CSX and PAS on these parallel routes [between Albany and Boston].”⁶¹ DOJ also noted concern that the proposed transaction “may allow CSX to impair the ability of its remaining rival, NSR, to effectively compete.”⁶²

74. DOJ contends that the Applicants’ proposal to address these concerns by granting B&E operational control over the PAS line does not “adequately address the competitive concerns

⁵⁹ *VRS Comments* at 8-9.

⁶⁰ *Pelkey Reply VS* at 10.

⁶¹ *DOJ Comment* at 3. It should be noted that CSX would own 50% of the equity of PAS, and that CSX itself would not own any of the PAS rail lines.

⁶² *DOJ Comment* at 3.

created by the proposed transaction.”⁶³ DOJ specifically notes that the contractual arrangements and pricing conditions proposed by the Applicants will require continued oversight and monitoring to ensure they are appropriately implemented and maintained.⁶⁴

75. Further, DOJ raises an additional concern with respect to B&E’s proposed contract operation of the PAS lines, asserting that “selecting B&E as the operator of PAS separately introduces a new competition concern on a different rail line.”⁶⁵ The line in question is the north-south portion of the PAS system known as the “Knowledge Corridor.” DOJ writes that PAS and NECR “are the only competing train operators on the Vermont segment” of the PAS line (also known as the Conn River North line) and raises the concern that, because NECR and B&E will both be owned by GWI, “a single entity will control all operations on the NECR line and within the overlapping portions of the Knowledge Corridor.”⁶⁶ DOJ asserts that “in effect, the proposed remedy reduces the numbers of competitors in the Knowledge Corridor from two to one.”⁶⁷

76. DOJ proposes that CSX divest its one-half interest in PAS as an alternative that would address the Department’s concerns with respect to the competitive effects of the Merger and Related Transactions.

77. I have used traffic data supplied to me by PAS to investigate the DOJ’s concern that the Merger and Related Transactions are “likely to diminish competition between CSX and PAS on these parallel routes [between Albany and Boston].”⁶⁸ The data show that there is limited competition for traffic moving between Albany and Boston between CSXT and PAS currently and the Merger and Related Transactions enhance—rather than decrease—this competition.

78. I have also analyzed PAS data to investigate DOJ’s concerns that B&E’s contract operation of PAS creates competitive concerns with respect to traffic on the Knowledge Corridor. Similar to the analysis above with respect to claims asserted by VRS, the data show that the volume of

⁶³ DOJ Comment at 4.

⁶⁴ DOJ Comment at 5.

⁶⁵ DOJ Comment at 4-5.

⁶⁶ DOJ Comment at 4.

⁶⁷ DOJ Comment at 4.

⁶⁸ DOJ Comment at 3.

traffic that could conceivably be impacted by DOJ's concern is small and there are protections in place to ensure that the benefits of competition for this traffic will continue.

79. Finally, I have also considered DOJ's concerns that the proposed commitments made by the parties are not consistent with "best practices" and will be insufficient to address any competitive concerns. I disagree. I also find that the divestiture proposal suggested by DOJ in this proceeding exceeds that necessary to preserve competition and instead places at risk the competitive and public benefits arising from the Merger and Related Transactions. Rather, I find that the proposed commitments are consistent with the principles of regulatory economics that apply to analysis of mergers in high fixed cost, network industries like railroads. I also find that the commitments articulated in the Revised Application are consistent with the STB's prior approach to rail mergers and are sufficient to address the limited situations where the Merger and Related Transactions raise competitive concerns.

B. COMPETITION ON THE KNOWLEDGE CORRIDOR

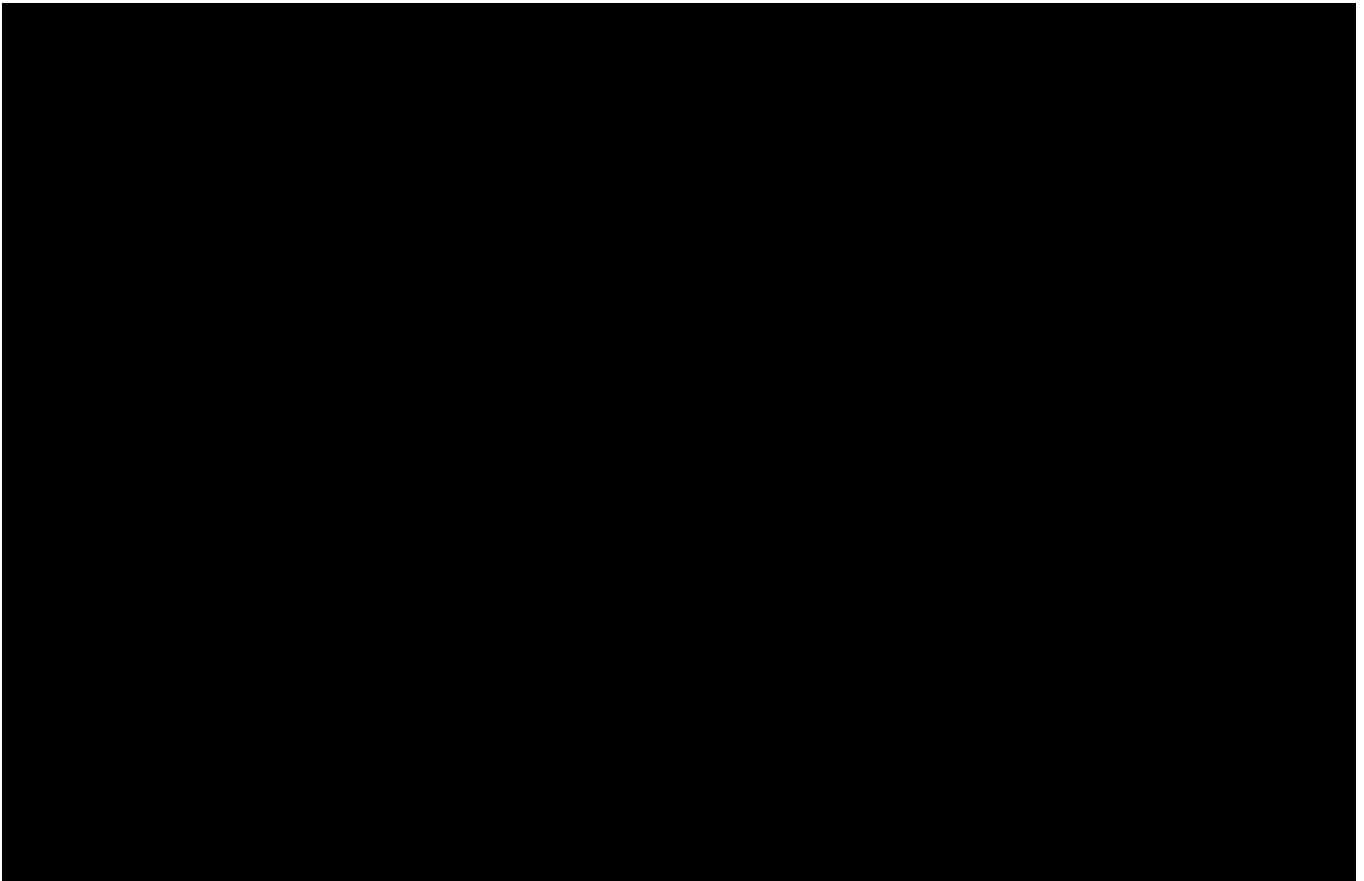
80. The Merger and Related Transactions will not change the competitive alternatives available to most of the traffic on the Knowledge Corridor. The DOJ's concerns are focused on the overlapping operations of PAS (and its contract operator, B&E) and NECR on the Conn River North portion of the Knowledge Corridor. The analysis performed above in response to the concerns of VRS and VTrans, is generally applicable to the DOJ's concerns as well. However, to address the concerns of DOJ, I have created Table 4 to show all traffic along the Conn River North line, not just VRS-participating traffic.

Table 4
Knowledge Corridor/Conn River North Traffic, 2019
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Figure 4
Knowledge Corridor/Conn River North Traffic, 2019
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81. Very little traffic on the Conn River North portion of Knowledge Corridor is potentially affected by the transaction. Table 4 divides traffic into several categories. The first category, “Through Traffic on NECR,” which accounts for {{REDACTED}} traffic on the line, includes a portion of the VRS-participating traffic from Table 2 above. However, it also includes additional NECR traffic over the Conn River North line on which VRS did not participate. In any case, this is not traffic for which PAS can compete.

82. I have previously addressed Local Traffic Originating or Terminating on the line, which amount to {{REDACTED}} of VRS-participating traffic on the Conn River North line, as shown in Table 4.⁶⁹ Apart from {{REDACTED}} identified shippers, it appears the remaining shippers are closed to service competition between NECR and PAS.⁷⁰ Pricing commitments have been made to the jointly served shippers that preserve existing competitive alternatives. No benefits of existing competition are lost as a result of the Merger and Related Transactions.

83. The next three categories—“VRS Haulage,” “Limestone,” and “LPG”—represent movements of traffic to and from VRS that have been previously discussed:⁷¹ the benefits of competition are not lost for this traffic as a result of the Merger and Related Transactions.

- “VRS Haulage” traffic is VRS movements between Bellows and White River Junction that VRS moves under its haulage agreement with NECR. In theory, PAS could compete for this traffic but in 2019 {{REDACTED}} of this VRS-to-VRS traffic. The NECR-VRS haulage agreement establishes a competitive floor for this traffic.
- “LPG” represents LPG delivered to VRS from PAS, where all but {{REDACTED}} cars are from PAS solely-served originations. Again, there is no loss of competition for those sole-served originations movements. As I have discussed above with respect to VRS, and further below, the Merger and Related Transactions provide competitive constraints for the non-sole served traffic.

⁶⁹ *Amended and Supplemented Reishus VS* at ¶¶ 19, 214-218.

⁷⁰ Trackage and haulage rights often limit the ability of a tenant railroad to serve existing or new shippers. Given the long history of this line, including B&M’s former ownership of the line, it is not surprising that shippers on the line may not be open to one or the other carriers operating over the line.

⁷¹ *See Amended and Supplemented Reishus VS* at ¶¶ 167, 229-230, and 240-244.

- “Limestone,” refers to Limestone Slurry used primarily in papermaking. It is {{REDACTED}} VRS commodity, and moves entirely over PAS to PAR. This is not traffic that NECR can currently successfully compete against PAS for delivery to PAR. As NECR cannot currently compete for this traffic, there cannot be a loss of competition for this traffic.

Thus, almost none of the traffic in these categories flows under prices and service established through competition between NECR and PAS.

84. The VRS “Bridge” category has also been addressed in detail above.⁷² PAS obtained only {{REDACTED}} of this traffic, with the remaining moving on NECR. Given the routings and destinations of this traffic as explained, PAS is not a viable competitor for nearly all of this traffic, and the contract operation of PAS by B&E does not present any material risk of competitive harm for this traffic.

85. Finally, there are {{REDACTED}} cars of other interchange traffic of miscellaneous commodities on the Conn River North line. Just over {{REDACTED}} of these cars move on PAS. At least {{REDACTED}} cars of this interchange traffic originate or terminate on PAS, PAR, or NECR, and are thus not subject to competition. Thus, less than {{REDACTED}} of these cars are potentially subject to competition between PAS and NECR as connecting carriers between interchange on the Conn River North line and {{REDACTED}}.

86. Consistent with the analysis for VRS above, there are roughly {{REDACTED}} of the Conn River North line traffic for which PAS and NECR currently compete, {{REDACTED}} and the other {{REDACTED}}. The same findings hold. In summary,

- {{REDACTED}} Rates for traffic moving under haulage are determined by the terms of the haulage agreement.
- Hoosick Junction is the primary VRS interchange, over {{REDACTED}}, for traffic connecting to CSXT and NSR for traffic west of New England. This gateway provides a strong competitive alternative to interchange traffic from the Conn River Line on which

⁷² VRS “Bridge” cars reported in Table 4 are slightly more than in Table 2. This is due to {{REDACTED}} cars that terminate on PAS or PAR, which are included in the “PAS Exclusive” row in Table 2.

PAS or NECR act as overhead connections between CSXT and NSR. The Merger and Related Transactions preserve competitive rates for access to CSXT and haulage with NSR over this gateway.

- Apart from B&E's contractual obligations, CSXT and NSR have a strong economic interest and ability as owners in preventing B&E's operation of and pricing on PAS from benefitting GWI's NECR-affiliate at the owners' expense.

87. **Summary.** A review of the various categories demonstrates that the overwhelming majority of movements over the overlapping PAS trackage rights/NECR portion of the Knowledge Corridor are not subject to competition between PAS and NECR. As such there is no possibility of competitive harm for this traffic.

88. For the same reasons as discussed with respect to VRS, less than {{[REDACTED]}} of traffic over the Conn River North line is subject to direct price competition between PAS and NECR absent pricing protection specific to that traffic. B&E, acting as contract operator of the PAS lines subject to the incentives and commitments set forth in the NSR Settlement Agreement and the Term Sheet Agreement, would have incentives and obligations to compete for this traffic, and CSXT and NSR have strong incentives to ensure this happens. Moreover, the availability of established price protections at Hoosick Junction provides a strong competitive alternative for this traffic.

C. COMPETITION ON THE PATRIOT CORRIDOR

1. Most traffic on PAS is not in direct competition with traffic on CSXT

89. The Merger and Related Transactions do not represent a loss in competition as a result of CSXT's owning one-half of PAS or B&E serving as contract operator of the PAS Patriot Corridor. Rather, the Merger and Related Transactions enhance the competitive alternatives available to shippers between New England and the rest of the U.S.

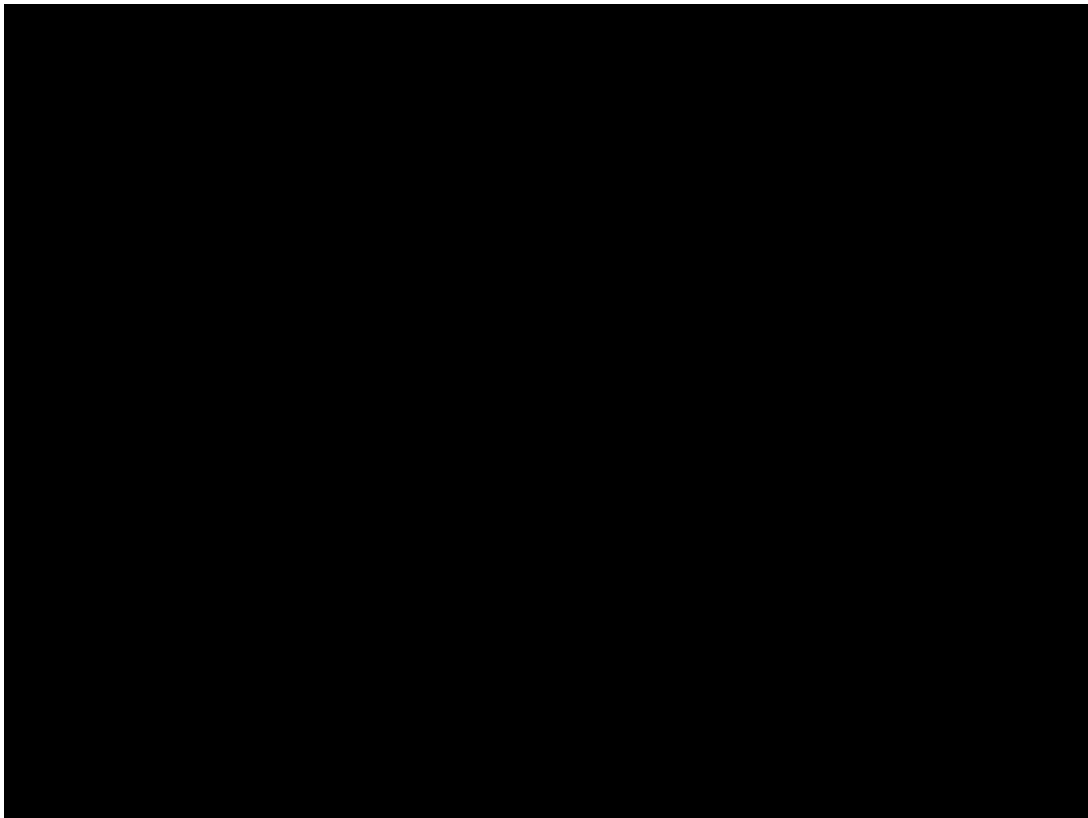
90. DOJ has raised concerns regarding competition across the parallel CSXT line and the PAS Patriot Corridor between the Albany area and Ayer in eastern Massachusetts. The most contestable traffic across these lines is intermodal and delivered autos. Intermodal and delivered autos share the characteristic that product is carried by truck to or from facilities located on rail lines intended for the specific rail-truck transfer. The Merger and Related Transactions only enhance competition

for these movements as they provide NSR the option of utilizing either the Patriot Corridor under existing arrangements or trackage rights over the CSXT route under specified economic terms to and from its intermodal and auto ramps in Ayer. This enhancement is substantial as it provides NSR the opportunity to provide far more efficient double-stack intermodal service over the CSXT route which is unavailable over the Patriot Corridor. Thus, for the most contestable traffic across the two corridors, the Merger and Related Transactions only enhance competition.

91. An analysis of carload data shows that most traffic on the PAS Patriot Corridor does not directly compete with CSXT traffic. Table 5 categorizes the *carload* traffic that travels along the Patriot Corridor.⁷³ In the table, all of the traffic except the “Other Patriot Corridor Movements,” which represents {{[REDACTED]}} of the total, is traffic that comes on or departs through the west end Mechanicville or Rotterdam Junction and interchanges with three Class I carriers – NSR, CSX and CP. (An example of these other movements would include the {{[REDACTED]}} traffic from the Conn River North line that travels on the Patriot Corridor to PAR.)

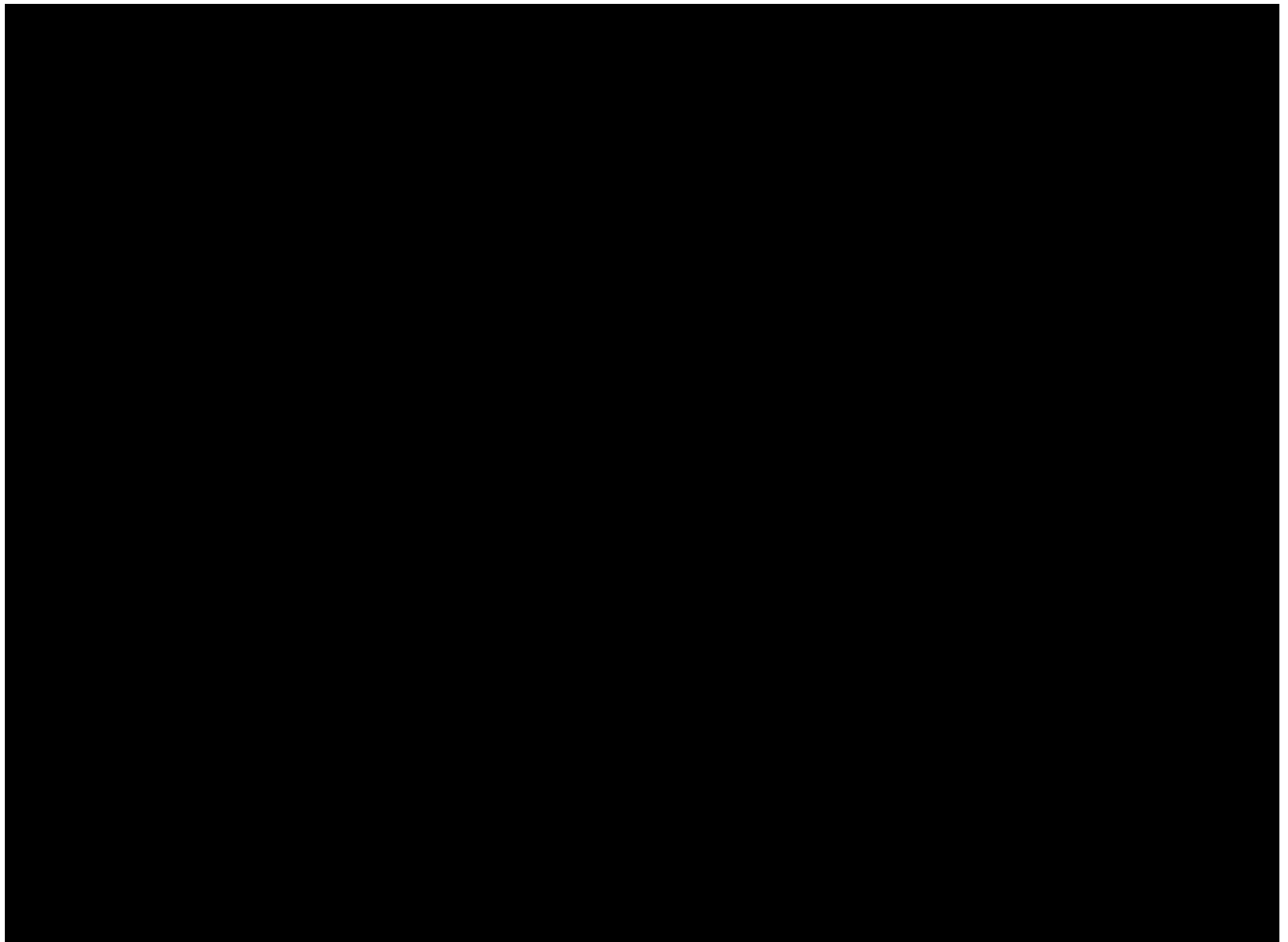
⁷³ Table 5 includes auto traffic to Ayer as this traffic has been competitively enhanced and CSXT does not have an auto ramp at that location.

Table 5
Patriot Corridor Traffic, 2019
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Figure 5
Patriot Corridor Traffic, 2019
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92. The traffic that interchanges with the Class I railroads at the west end of the Patriot Corridor can be categorized into three broad categories: traffic local to PAS (or sole-served shortlines), traffic that interchanges with other New England Class II and III railroads, and traffic that traverses the Patriot Corridor to interchange with PAR.

93. Local traffic—divided into Ayer and non-Ayer locations—accounts for {{ [REDACTED] }} of the total carload traffic.⁷⁴ CSXT cannot serve non-Ayer local shippers on PAS and cannot compete directly to serve that traffic. CSXT currently only reaches Ayer through interchange with PAS or PAR, including traffic that may be being switched to CSXT via PAR.

⁷⁴ Local traffic includes interchanges with the PAS sole-served Naugatuck and Batten Kill railroads.

CSXT relies on PAS for access to that traffic and cannot compete away PAS' participation in that traffic.

94. Interline traffic with VRS (primarily at Hoosick Junction), NECR, and the GWI-owned Providence and Worcester Railroad Company (P&W) accounts for just under {{[REDACTED]}} of the Patriot Corridor traffic. The interconnection at Hoosick Junction, which represents {{[REDACTED]}} of the Patriot Corridor traffic, has been discussed above. Post-transaction, NSR will retain existing haulage rights and CSXT will have established rates for movements to and from this VRS interchange. As CSXT has no direct interchange with VRS, Hoosick Junction is an important gateway for CSXT traffic.

95. NSR retains haulage rights to both NECR at Millers Falls and P&W at Gardner. Indeed, NSR haulage accounts for {{[REDACTED]}} carloads of this interchange traffic. NSR (and B&E) will retain the incentive, ability, and commitment to maintain these gateways open and competitive with potential access to these railroads via PAS.

96. Overhead traffic to and from PAR accounts for {{[REDACTED]}} of PAS carload traffic. Post-transaction, with the negotiated changes to the PAR trackage rights over the PAS Island line (the PAS line between Harvard and CP312), PAR System locations will for the first time have the option of single-line service over a Class I railroad operating outside New England. As previously explained, this pro-competitive change is one of the major benefits to shipments to and from the PAR System.⁷⁵

97. The introduction of enhanced competitive alternatives by CSXT does not imply a reduction in competition for this traffic by PAS. The PAS-PAR gateway will remain open on commercially reasonable terms. B&E has identified actions to make operations of PAS more efficient and has the incentive to keep existing traffic and attract new traffic, including this overhead traffic.

{{[REDACTED]}}

{{[REDACTED]}}

{{[REDACTED]}}⁷⁶ Thus, B&E (with its west end connecting carriers) can

⁷⁵ *Amended and Supplemented Reishus VS* at ¶¶ 273-276.

⁷⁶ {{[REDACTED]}}

market and establish PAS rates independent of CSXT with respect to this traffic. Under these arrangements there is no loss of existing competition, rather there is the pro-competitive introduction of CSXT single-line service into the PAR System.

98. With single-line CSXT service in place into the PAR System, only a portion of the overhead traffic will be subject to additional competition by which CSXT can offer superior service and rates to attract this business. Locations and shippers served by NSR and CP may not be open to CSXT, CSXT routings may be sufficiently inferior to the existing routes, and a PAS-PAR routing may still be preferred even with single-line service as an option. For example, even with the existing access to PAR at Barbers Station, CSXT accounted for {{[REDACTED]}} of the {{[REDACTED]}} overhead movements on PAS. This reflects, in part, the operational and routing benefits that PAS provides.

99. It is reasonable to conclude that CSXT is uncompetitive for at least {{[REDACTED]}} of the remaining roughly {{[REDACTED]}} movements exchanged by PAS with CP, NSR and under Rule 11 at the Class I interchanges. (See Appendix Table B-1.) Thus, based on 2019 movements, less than {{[REDACTED]}} carloads of these movements are realistically subject to potential competition between the CSXT mainline and the PAS Patriot Corridor.

100. In summary, the overwhelming majority of traffic on the Patriot Corridor is not subject to direct competition by movements over the CSXT mainline. As pricing will be established by B&E independently of CSXT, price competition will remain between the two east-west corridors. Only for movements to and from PAR, which will be integrated into the CSXT system, would there be a potential loss of independent pricing available to customers. There are not substantial volumes involved, as only roughly {{[REDACTED]}} of PAS carload movements are potentially contestable for movement to the CSXT mainline. Moreover, the zone pricing commitments provided for PAR traffic preserves existing competition over PAS after CSXT's incorporation of PAR into its system. The risk of competitive harm over the Patriot Corridor is minimal and far outweighed by the pro-competitive benefits of the transaction and related agreements discussed below.

2. The transaction generates substantial competitive enhancements that increase competition between CSXT and the Patriot Corridor

101. The Merger and Related Transactions do not represent a loss in competition due to CSXT's ownership interest in PAS or B&E serving as contract operator of PAS on the Patriot Corridor.

Rather, the Merger and Related Transactions enhance the competitive alternatives available to shippers between New England and the rest of the U.S. in numerous ways beyond the efficiency and competitive benefits resulting from the integration of the PAR System into the CSXT network. If this transaction is derailed by conditions that are unworkable or overly onerous, these pro-competitive public benefits will be lost.

102. First, the resolution of the trackage rights over the PAS Island line (between Harvard, Massachusetts and CPF 312) that connects CSXT and the PAR System eliminates a barrier to an efficient connection between the PAR System and CSXT. The acquisition of the PAR System by CSX and the resolution of the trackage rights limitations permits an efficient routing that was otherwise in doubt.

103. Second, and most significant, are the pro-competitive trackage rights provided to NSR by CSXT for intermodal and auto traffic to and from Ayer. These trackage rights represent new competitive options to NSR for intermodal and auto movements over the Patriot Corridor.

104. The double-stack intermodal service that NSR made possible by the transaction is a significantly more efficient competitive alternative than NSR is currently able to provide. While the PAS Patriot Corridor is capable of handling tri-level autoracks, it cannot accept the current standard double-stack intermodal trains. Since the Patriot Corridor cannot handle double-stack intermodal trains, large investments were made at Mechanicville to file/toupee between double- and single-stack trains.

105. Despite the investments that NSR and Pan Am have made in PAS over the last decade, funding for the substantial investments necessary to permit double-stack intermodal service over the Patriot Corridor have not been available. A \$2 million FRA-funded survey identified 23 obstructions—21 bridges and 2 tunnels, most significantly the Hoosac Tunnel—that would require investment and modifications to increase clearance heights.⁷⁷ The cost of these modifications is not known but is almost certainly large. The Merger and Related Transactions obtain the benefits of these transactions—competitive double-stack intermodal service to and from Ayer—without the need to make these investments. The avoided costs necessary to provide NSR double-stack

⁷⁷ Patriot Corridor Double-Stack Clearance Initiative Fact Sheet - Winter 2021 (<https://www.mass.gov/info-details/about-the-patriot-corridor-double-stack-clearance-initiative-project>).

intermodal service to Ayer over PAS are a large, albeit unquantified, direct benefit of the Merger and Related Transactions.

106. Third, the NSR Settlement Agreement calls for additional investments at Ayer, up to {{[REDACTED]}}, funded by CSXT that will improve the capacity and fluidity of the rail network between eastern New England and the U.S. rail network. It additionally provides for increased competitive options for shippers located at Ayer through switching with CSXT.

107. Fourth, Applicants have committed to maintain open gateways and waive the rights to refuse to establish local rates. These commitments provide opportunities to shippers on interlining railroads that preserve and enhance existing regulatory protections.

108. Fifth, Applicants have committed to a variety of pricing and service protections, some of which that have been discussed above, that maintain or enhance existing competitive outcomes.

109. Conditions that preclude or imperil the completion of this transaction will squander the competitive benefits the Merger and Related Transactions will provide.

D. THE COMMITMENTS TO PRESERVE COMPETITION IN THE MERGER AND RELATED TRANSACTIONS ARE SUFFICIENT TO PRESERVE COMPETITION AND ARE CONSISTENT WITH BEST PRACTICES IN RAIL MERGERS

110. The DOJ raises concerns with the commitments offered by the parties in the Merger and Related Transactions, stating “In the Department’s view, the proposed remedies do not accord with best practices, and are less likely to succeed than the kinds of robust relief that the Department has sought in prior cases, and will not fully address the competitive concerns posed by the CSX-Pan Am transaction.”⁷⁸ DOJ recommends a structural remedy, noting that structural remedies “tend to be cleaner, more efficient, more durable, and easier to enforce” than contractual remedies and also minimize government “entanglements” in markets.⁷⁹

111. In fact, in the context of rail mergers, it is frequently the case that a viable divestiture is not “cleaner, more efficient, [or] more durable” than alternative approaches. The rail industry is a network industry characterized by high fixed costs that benefits from significant economies of

⁷⁸ DOJ Comment at 3.

⁷⁹ DOJ Comment at 3.

scale, scope, and density. As noted by Dr. Huneke, this underlying economic structure means that identifying viable divestitures can be quite complicated.⁸⁰ Divesting one piece of a network can have far-reaching ripple effects on operations across the network, negatively impacting network efficiency and threatening the merged entity's ability to realize the full benefits of a merger. Furthermore, because economies of scale, scope, and density are central to the economics of the industry, it can be challenging to identify a divestiture that will be viable as a stand-alone operation that is not integrated into the broader network.

112. For many of these reasons, it is unclear whether it is even feasible for CSXT to divest its 50% equity interest in PAS. Mr. Pelkey notes that CSXT was not successful in its initial attempts to separate PAS from PAR and states that he is “uncertain” about whether a divestiture of the type proposed by DOJ is even feasible.⁸¹

113. Mr. Pelkey also notes several reasons why a forced divestiture would not be more “efficient” or “durable” (as the DOJ implies it would be) than the operating arrangement negotiated with B&E. These reasons include: an alternative owner without commercial relationships with PAS would not be as committed to the long-term success of PAS; an operator with less experience than GWI and its affiliated railroads would be less likely to be able to offer service levels that would maintain PAS as a strong competitor; and the complexity of carrying out a divestiture would threaten the viability of the rail network in New England for a long time.⁸²

114. Finally, it is important to underscore that requiring a divestiture of CSXT's interest in PAS calls into question the entire deal, and with it, the many benefits and enhancements to competition proposed in the Merger and Related Transactions.⁸³ The Merger and Related Transactions are a negotiated package. If one element of the package changes, there is no guarantee that the other elements would remain unchanged. A forced divestiture could lead to other changes and would threaten the pro-competitive benefits that are likely to result from the transaction as currently

⁸⁰ See, e.g., Reply Verified Statement of William F. Huneke, Ph.D., October 18, 2021 (hereinafter “*Huneke Reply VS*”) at 2.

⁸¹ *Pelkey Reply VS* at 10.

⁸² *Pelkey Reply VS* at 10-11.

⁸³ *Pelkey Reply VS* at 11-12.

structured. Mr. Pelkey also points out that the time required to execute a divestiture would threaten the entire transaction.⁸⁴

115. Given the economic characteristics of the industry, it is often not economically reasonable to have multiple competing railroads operating over separate lines in a given location. Therefore, it is common practice in the rail industry to address competitive concerns through contractual arrangements that allow one railroad to serve customers using the physical rail line of a competing carrier, with divestiture as a last resort. Contractual obligations such as trackage and haulage rights, switching agreements, and joint operating arrangements are ubiquitous in the rail industry. In fact, all of the major railroad mergers since the mid-1990s have included contractual merger conditions to remedy competitive concerns. These conditions include thousands of miles of trackage rights, the establishment of joint access areas, and commitments on pricing and service, to name a few.⁸⁵ Indeed, these contractual arrangements and conditions have resulted in significant sustained enhanced competition.

116. DOJ's concerns that contractual remedies are more difficult to enforce and create government "entanglements" are less significant with respect to regulated industries. Regulatory agencies are established precisely to execute oversight and monitoring activities and are therefore well-equipped to provide meaningful and effective oversight of conduct remedies.⁸⁶ Regulatory agencies tend to be focused on a particular industry or sector and have the structure, expertise, staff, and access to data and information necessary to effectively implement conduct remedies.⁸⁷

117. This is certainly the case with respect to the rail industry. The STB has established an extensive merger oversight process that ensures that railroads effectively implement merger conditions and that those conditions are sufficient to fully address competitive concerns and

⁸⁴ *Pelkey Reply VS* at 12.

⁸⁵ *See, e.g., UP/SP Merger*, FD 32760, Decision No. 44, August 6, 1996; *Conrail Split*, FD 33388, July 23, 1998.

⁸⁶ International Competition Network (ICN) Merger Working Group, "*Merger Remedies Guide 2016*" at 9-10. Varney, Christine A. et al. "Antitrust Remedies in Highly Regulated Industries." *Merger Remedies Guide – Third Edition*, edited by Ronan P Harty and Nathan Kiratzis, Global Competition Review, October 2020 (<https://globalcompetitionreview.com/guide/the-guide-merger-remedies/third-edition/article/antitrust-remedies-in-highly-regulated-industries#footnote-003>) (hereinafter, "*Varney 2020*") at 1, 11.

⁸⁷ *Varney 2020* at 1, 11.

preserve competition. The Board's oversight process requires railroads to provide data that allow the Board to evaluate the effectiveness of the conditions and also provides shippers and other concerned parties the ability to raise concerns and request relief. As part of the oversight process, the Board is also able to impose additional conditions if the Board determines that initial conditions "have not effectively addressed the competitive harms caused by the merger."⁸⁸

118. STB oversight of prior mergers, all of which included contractual conditions, demonstrates that contractual remedies, combined with STB oversight, are effective in addressing competitive concerns. For example, the UP/SP merger included an agreement with BNSF (the "BNSF Agreement") that provided BNSF and other carriers extensive trackage and haulage rights to address competitive issues stemming from the merger.⁸⁹ The Board approved the merger, subject to conditions, including the BNSF Agreement, and instituted an oversight proceeding that required UP to provide extensive data and information for a five-year period that the Board used to assess the efficacy of the competitive conditions it imposed.⁹⁰ At the end of the oversight period, the Board concluded that "the evidence demonstrates that the conditions we imposed on the UP/SP merger have effectively remedied, as intended, any competitive harm that would otherwise have been associated with that transaction."⁹¹ The Board specifically noted "the evidence submitted by UP and BNSF demonstrates that BNSF has competed vigorously for the traffic opened up to it by the BNSF Agreement and has become an effective replacement for the competition that would otherwise have been lost or reduced when UP and SP merged."⁹²

119. The Board has extensive experience monitoring and enforcing contractual merger conditions similar to those proposed in this case. As noted by Dr. Huneke, as a result of the Conrail transaction, the Board also has specific experience monitoring CSX and NSR joint ownership and

⁸⁸ *UP/SP Merger*, FD 32760 (Sub-No. 21), Decision No. 1, May 7, 1997, at 1.

⁸⁹ *UP/SP Merger*, FD 32760, Decision No. 44, August 6, 1996 at 105, 107. 145-46; 150.

⁹⁰ *UP/SP Merger*, FD 32760, Decision No. 44 at 145-47. *See also*, *UP/SP Merger*, FD 32760 (Sub-No. 21), Decision No. 1 at 1-2.

⁹¹ *UP/SP Merger*, FD 32760 (Sub-No. 21), Decision 21, December 19, 2001, at 1.

⁹² *UP/SP Merger*, FD 32760 (Sub-No. 21), Decision 21 at 4.

operation of assets.⁹³ It is clear that the Board is well-positioned to monitor, enforce, and modify (if necessary) the contractual provisions proposed in this transaction.

120. Finally, DOJ also raised concerns with respect to CSXT's 50% ownership of PAS, suggesting that this ownership stake would put CSXT in a position to degrade PAS as a competitor by withholding capital investments. As noted above, a large volume of PAS traffic is to or from destinations that CSXT does not serve and CSXT interchanges substantial traffic with PAS. Neither NSR nor CSXT has an incentive to degrade PAS and lose traffic on PAS. Nevertheless, Mr. Pelkey outlines several additional commitments that CSXT will make to address DOJ's concerns over CSXT's participation in future capital investments in PAS, including: 1) recusal from discussions or consideration of issues related to competition between CSXT and PAS; 2) accelerated arbitration regarding CSXT's willingness to make capital investments, and, if required and in the alternative, and 3) appointment of a fiduciary on behalf of CSXT on PAS' board. Although such conditions may not be necessary to ensure appropriate investment decisions, the availability of such commitments or alternatives should allay concerns about potential anti-competitive decisions regarding the funding of PAS.

V. RESPONSE TO CANADIAN PACIFIC RAILWAY

A. SUMMARY OF COMMENTS

121. CP argues that, without sufficient remedies, the Merger and Related Transactions will “disrupt the competition that PAS[...]has provided to CSX[...]from Albany to Boston.”⁹⁴ CP identifies three areas of concern: (1) CSX ownership of fifty percent of PAS will decrease incentives for PAS ownership to invest in the Hoosac Tunnel Line—the PAS line connecting Albany and Boston;⁹⁵ (2) the Merger and Related Transactions will “threaten the long-run viability of [PAS] by removing substantial volumes of remunerative traffic from the line;”⁹⁶ and (3) B&E's contract operation of PAS is not sufficient to ensure robust competition because CSXT and NSR

⁹³ *Huneke Reply VS* at 7.

⁹⁴ Canadian Pacific's Comments, Finance Docket No. 36472, August 27, 2021 (hereinafter, “*CP Comments*”) at 6.

⁹⁵ *CP Comments* at 9-12.

⁹⁶ *CP Comments* at 15.

have decreased incentive to maintain PAS as a viable line and because B&E will have conflicting interests as a GWI subsidiary.⁹⁷

B. PAS OWNERS WILL HAVE AN INCENTIVE TO INVEST IN THE PAS LINE

122. The PAS owners retain a strong incentive to maintain the PAS line as a viable rail alternative. CP, VRS and VTrans all recognize that the revitalization of the Patriot Corridor resulted from the willingness of a Class I railroad, NSR, to assume an ownership interest in the railroad that became PAS.⁹⁸ The ownership interest of NSR and the corresponding financial resources and investment helped revitalize the New England rail network, created important efficiency enhancing routings (Hoosick Junction), established facilities at Ayer, and upgraded the track and operations across the Corridor. NSR and CSXT, as large, sophisticated Class I carriers have the incentive, capability, experience, and financial resources to ensure that PAS is maintained and appropriate upgrades and investments are made.

123. NSR continues to have a strong interest in the ongoing success of PAS. Setting aside the intermodal traffic, {{REDACTED}} carloads of NSR traffic moves on or interchanges with PAS annually.⁹⁹ Based on the analysis in Appendix Table B-1, less than {{REDACTED}} of that traffic is at competitive risk as a result of the CSXT single-line service with PAR.

124. CSXT also has a significant interest in the ongoing success of PAS. CSXT interchanges {{REDACTED}} carloads of traffic annually over PAS.¹⁰⁰ As CSXT already operates its own mainline from the Albany area to eastern Massachusetts, CSXT benefits from the ongoing operation of the PAS Patriot Corridor for this traffic. There is no basis for concluding that CSXT would not continue to want to utilize the PAS Patriot Corridor for most if not all of this traffic. CSXT and NSR both, as owners, benefit economically from the margins earned from traffic on the railroad, including interchange traffic with CP. CSXT, a sophisticated and financially capable railroad, will have the incentive to invest in continued, efficient operation of PAS. As discussed above in

⁹⁷ CP Comments at 21-22.

⁹⁸ See, e.g., CP Comments at 9-11; VRS Comments at 7-8; and Cunningham VS at ¶ 24.

⁹⁹ Annual revenue is estimated from data available in the CWS.

¹⁰⁰ See Amended and Supplemented Reishus VS, Table 15 at 48.

response to DOJ's comments, CSXT has offered a variety of mechanisms that would preclude CSXT from blocking economically appropriate investments or allow its ownership in its own mainline to impede such investments.

125. The NSR Settlement Agreement calls for significant investment in PAS infrastructure by CSXT. CSXT may expend up to {{{REDACTED}}} dollars for yard improvements on PAS.¹⁰¹ These investments will improve PAS operations and benefit the efficiency of the New England rail network.

126. CP has expressed particular concern with the 4.75-mile, 145-year-old Hoosac Tunnel through which the Patriot Corridor passes.¹⁰² The tunnel in 2020 suffered a collapse that closed it for two-months and required rerouting of carload traffic across VRS and NECR.¹⁰³ PAS's owners made significant financial investments into repairing and upgrading the tunnel in response to the collapse.¹⁰⁴ There is no basis for concluding that NSR and CSXT, as owners of PAS, would not make the same decision if a similar event were to happen during their ownership of PAS.

C. THE MERGER AND RELATED TRANSACTIONS DO NOT THREATEN THE LONG-TERM VIABILITY OF PAS

127. Traffic diversions resulting from the settlement agreement between CSXT and NSR do not threaten the long-term viability of PAS. They will not in the short run have major negative impacts on PAS financial performance. Such effects may be more than offset by the more cost and efficiency improvements contemplated through the operations by B&E.

128. A significant competitive enhancement for the New England rail network from the Merger and Related Transactions is the ability to move double-stack intermodal trains to Ayer over the CSXT line rather than over PAS, which may also free up additional capacity on the PAS Patriot Corridor for higher contribution traffic. Given the economic advantages of double-stack IM

¹⁰¹ See 'Ayer Operations Protocols, Engineering Planning, and Capacity Roadmap' (Attachment B to NSR Settlement Agreement, filed as an attachment to the Amended and Supplemented Verified Statement of Sean Pelkey, July 1, 2021) at § II.b.

¹⁰² *CP Comments* at 5, 10, 19.

¹⁰³ *CP Comments* at 5, 10. See also Davidson, Joshua, "PAS: Hoosac Fix Delay Spurs New IM/Auto Detour," *Atlantic Northeast Rails & Ports*, February 29, 2020.

¹⁰⁴ *CP Comments* at 10.

operations and the avoidance of the costs of fileting and toupeeing IM trains or running single-stack, it is a reasonable assumption that NSR will use the CSXT line rather than PAS for intermodal traffic to and from Ayer. As NSR moved over {{[REDACTED]}} thousand of these units through PAS haulage in 2019, versus the roughly {{[REDACTED]}} thousand carloads moving on PAS, this would appear to imply a large change in PAS' financial fortunes. Such a conclusion is faulty, {{[REDACTED]}}

[REDACTED]

[REDACTED]

[REDACTED]}}

129. The shift of intermodal traffic will have only a modest impact on PAS revenue and a much smaller impact on the contribution (above variable costs) that it receives. In 2019, PAS revenue from the NSR intermodal haulage was {{[REDACTED]}}

[REDACTED]

[REDACTED]}}

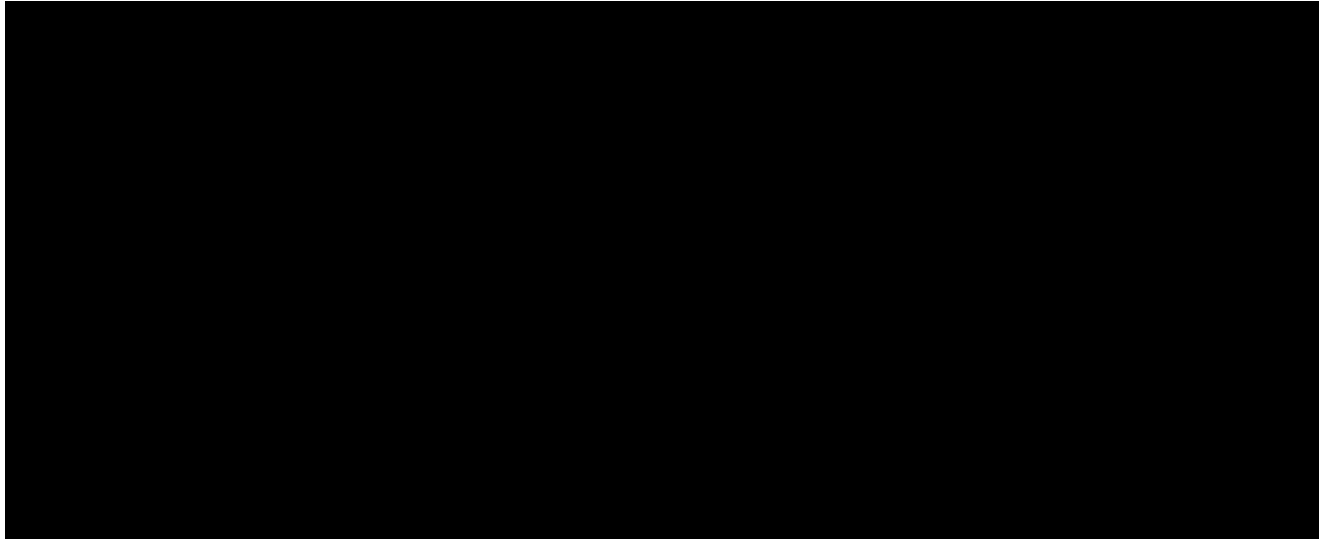
130. As noted in the Revised Application, the NSR Settlement Agreement includes provisions that shift NSR intermodal volumes to CSXT's route through Worcester and that shift certain CSX volumes from CSXT's line to PAS. Table 6 combines cost estimates based on URCS and data on volume and revenue provided by PAS to estimate the financial impact that the anticipated diversions will have on PAS financial performance. While the limitations of URCS data are well known in application to specific movements, Table 6 demonstrates that the PAS financial viability is not at risk as a result of the transaction.

105 {{[REDACTED]}}

106 {{[REDACTED]}}

Table 6
PAS Financial Viability Is Not Threatened
by the Contemplated Changes in Traffic Due to the Merger and Related Transactions

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131. As shown in Table 6, the shift of NSR's intermodal traffic from PAS to CSXT would reduce PAS revenue by {{[REDACTED]}} in 2019. However, the additional traffic commitments by CSXT to route certain traffic currently moving to and from Ayer over Barbers Station to PAS is estimated to increase revenue by {{[REDACTED]}}.¹⁰⁷ Adding in the change in switching fees for traffic not moving over CSXT and, post-transaction, terminal access fees for intermodal units delivered from the CSXT line, would result in a net reduction in revenue of less than {{[REDACTED]}}.

132. The effect on contribution is more difficult to determine but is likely to represent a negligible impact on PAS.¹⁰⁸ Indeed, the change in contribution could be a net positive to PAS. The intermodal haulage rates, established as part of the formation of PAS and NSR's financial contributions are {{[REDACTED]}}

¹⁰⁷ Revenue per car is based on the average for carload traffic to and from Ayer to Rotterdam Junction.

¹⁰⁸ Table 6 suggests {{[REDACTED]}}, although this is based on URCS costing. I do not have reliable change in costs associated with the net change in switching/intermodal unit access fees of {{[REDACTED]}}. It is reasonable to assume that the change in contribution from this change is smaller than this value.

133. Additional changes over time are not likely large enough to affect the long-term financial viability of PAS. Longer term, it is possible that certain traffic could be attracted to the CSXT single-line route. As shown above in the discussion of the Patriot Corridor and in more detail in Appendix Table B-1, the share of potentially competitive overhead traffic is a modest {{[REDACTED]}} percent of total PAS carload traffic.¹⁰⁹ And CP and NSR have the strong incentive, and given the pricing protections, the ability to retain that traffic and utilize PAS for moving that traffic.

134. In addition, CSXT could choose to route some of its existing {{[REDACTED]}} carloads of PAS overhead traffic over its own single-line. But the overhead traffic that CSXT is moving on PAS could already have been routed over the CSXT mainline but is not; most or all of this traffic is likely to remain on PAS.¹¹⁰

135. Given that B&E has been provided the tools in terms of PAS pricing commitments and incentives, it is not reasonable to believe that PAS would lose all or much of this traffic. Moreover, the cost reductions and service and efficiency improvements likely to result from B&E contact operations of the PAS lines would likely more than offset any loss in contribution due to the proposed changes.

D. B&E HAS THE INCENTIVE TO OPERATE PAS AS A STRONG COMPETITOR

136. B&E will have the incentive to compete for and attract traffic to PAS. B&E is obligated to act in the interests of PAS's owners. B&E is also financially incentivized to increase revenue and contribution on PAS and to price in a manner non-discriminatorily toward any carrier, including GWI and its affiliates.

137. CP expresses concerns that B&E, as a GWI-owned railroad, will favor its own affiliates or price in a fashion that will divert traffic to its affiliates in a manner that will make PAS unviable over time. Such a concern is unrealistic. Both NSR and CSXT have economic interests in PAS' success and in their ability to use PAS for traffic that would not otherwise be available. For

¹⁰⁹ The numerator is {{[REDACTED]}} from Appendix Table B-1. The denominator is {{[REDACTED]}}, the total carload (non-intermodal) traffic from *Amended and Supplemented Reishus VS*, Table 14 at 47.

¹¹⁰ See Appendix Table A-1.

example, PAS is the only connection between NSR and P&W; {{[REDACTED]}}. Similarly, CP's concerns that B&E will work to divert traffic to and from New England through Québec via GWI-affiliate NECR is inconsistent with PAS' owners' interests. Neither NSR nor CSXT would typically participate in these movements which would replace U.S.-based movements in which NSR or CSXT participate. As such, it is not plausible that the PAS owners would permit B&E to engage in such discriminatory actions.

VI. CONCLUSION

138. I have reviewed and analyzed the claims and comments of the intervenors regarding competitive aspects of the Merger and Related Transactions. After this review and the further analyses presented here, I again conclude that the Merger and Related Transactions would be a significant pro-competitive improvement to the New England rail network with wide-ranging benefits.

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

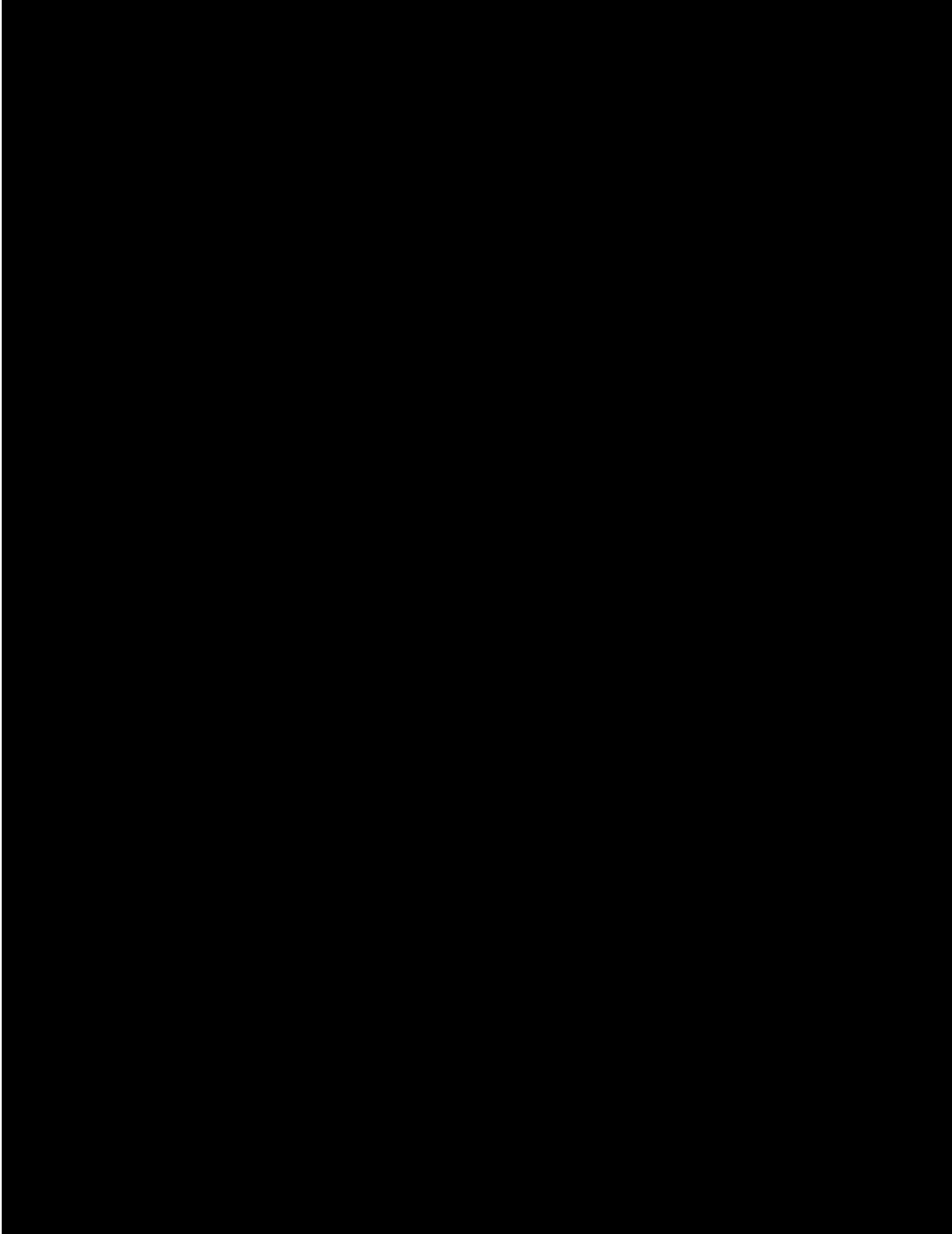
/s/ David Reishus

David Reishus

October 18, 2021

APPENDIX A

Table A-1
Current PAS-VRS Rates
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APPENDIX B

1. In this Appendix I analyze in more detail the overhead traffic that moves on PAS between the PAR System at the east and the PAS the western end of the Patriot Corridor for interchange with Class I carriers. I do this for two purposes: (1) to estimate the potential competitive effects of CSXT control and integration of PAR, and (2), at the request of Mr. Wallace, to determine the extent to which this overhead traffic on PAS may utilize the CSXT mainline post-transaction.

2. For the PAS traffic moving overhead between PAR and NSR and CP I identify, where available, the origin and destination and if the traffic interchanges through major gateways (e.g., Chicago) that are served by CSXT. First, if CP or NSR obtain traffic at gateways served by CSXT I assume that traffic is potentially contestable by CSXT. Second, for other traffic, I identify the originations or terminations on NSR and CP at stations that appear to be served by CSXT in the Centralized Station Master (“CSM”) and assume that this is potentially contestable traffic. This methodology is conservative in identifying potentially contestable CSXT movements, as even if CSXT is identified as serving a particular station in the CSM, there are many instances where individual shippers are not open to CSXT. The detailed analysis of New England traffic in my previous report identified instances in which the station would be viewed as jointly served, but where one of the carriers cannot serve a particular shipper.¹

3. I find that {{[REDACTED]}} of NSR and CP overhead movements are not even potentially contestable by CSXT. Appendix Table B-1 shows that {{[REDACTED]}} of NSR overhead traffic is not potentially contestable by CSXT using the methodology above. {{[REDACTED]}} of CP overhead traffic is not potentially contestable by CSXT. Next, I apply this percentage to the remaining carloads of overhead traffic that are Rule 11 shipments at Mechanicville (on the western end of the PAS Patriot Corridor) for which routing information is not readily available. (As it has been suggested that PAS Rule 11 traffic is more commonly interchanged with CP, this likely overstates the extent of the contestable traffic.)² This results in an additional {{[REDACTED]}} carloads that are not potentially contestable by CSXT. The bottom row of Table A-1 shows that, in summary, of the total {{[REDACTED]}} carloads of NSR and CP overhead movements to and from PAR, {{[REDACTED]}} carloads

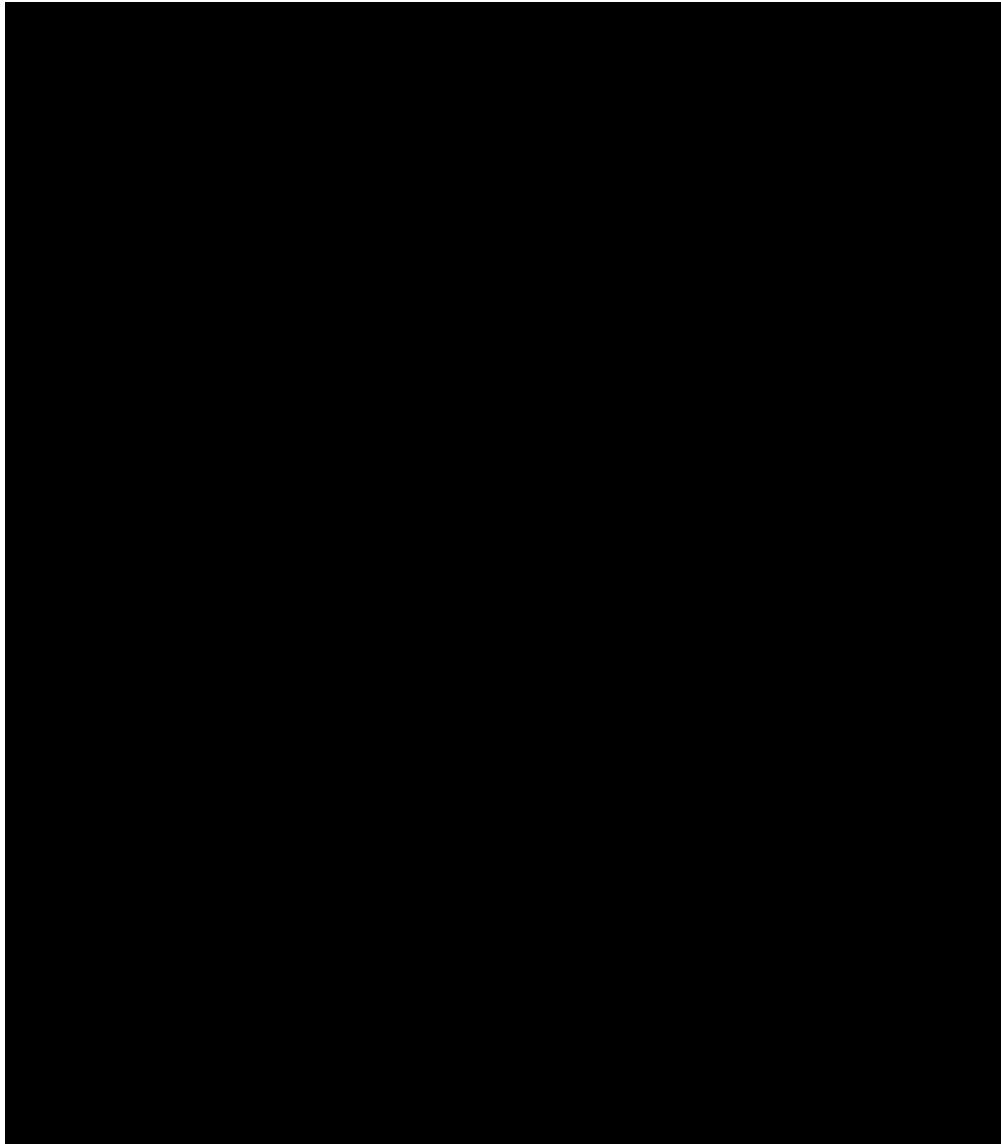
¹ See, e.g., *Amended and Supplemented Reishus VS*, Table 16, at 53, and at 76.

² Interview with PAS personnel.

{{[REDACTED]}} are not potentially contestable by CSXT; {{[REDACTED]}} carloads may be contestable by CSXT post-transaction.

Table B-1
PAS Overhead Traffic on the Patriot Corridor that is not Potentially Contestable

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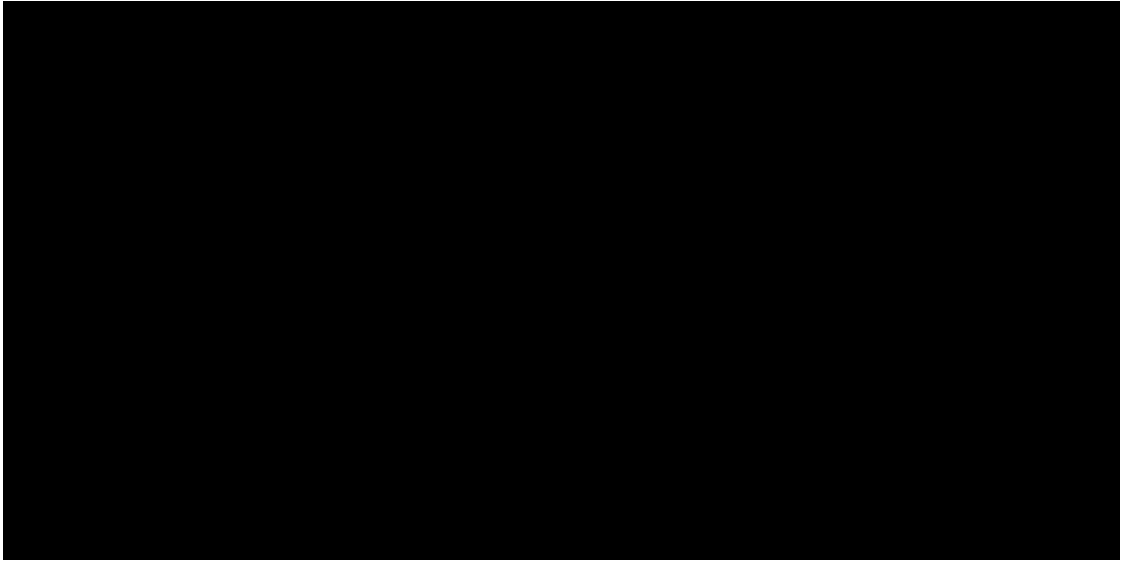
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4. I was asked by Mr. Wallace to estimate the maximum number of the PAS patriot Corridor overhead movements to and from PAR that are potentially divertible to CSXT post-transaction. Appendix Table B-2 below demonstrates that, at most, an estimated {{[REDACTED]}} carloads of NSR and CP overhead traffic to PAR could be diverted to CSXT post-transaction.

5. To perform this calculation, I identified the CP and NSR traffic that was potentially contestable as determined above.³ As instructed by Mr. Wallace, I remove cars that terminated at destinations in Massachusetts or New Hampshire. According to Mr. Wallace, this traffic is likely to remain on PAS as it involves locations that for operational reasons are more efficiently served through Ayer. I also remove traffic that is likely to remain on PAS due to NSR and CP having more efficient routes (routes >100 route miles shorter) than CSXT. Of this remaining traffic I then removed {{[REDACTED]}} of the traffic interchanging in major gateways, as instructed by Mr. Wallace, who attests due to the range of commercial relationships between eastern and western carriers not more than {{[REDACTED]}} of these cars could even potentially be subject to diversion based on single-line efficiencies. This results in {{[REDACTED]}} of {{[REDACTED]}} of NSR and CP cars with known origins and destinations being potentially subject to diversion post-transaction. I assume that this same percentage applies to the Rule 11 overhead movements. Based on information provided by Mr. Wallace, CSXT 's overhead traffic on PAS is not subject to diversion. All but {{[REDACTED]}} of CSXT's overhead traffic is to or from locations in Massachusetts and New Hampshire for which the PAS route presents operational advantages. Thus, from a total of {{[REDACTED]}} NSR, CP and Rule 11 overhead movements, I find {{[REDACTED]}} to be potentially divertible.

³ There are an additional {{[REDACTED]}} NSR cars to and from PAR locations served by haulage over PAS and PAR which, as instructed by Wallace, I have not treated as divertible.

Table B-2
Potential Diversion of PAS Overhead to PAR Traffic to CSXT
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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36472

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.
—CONTROL AND MERGER—
PAN AM SYSTEMS, INC., PAN AM RAILWAYS, INC., BOSTON AND MAINE
CORPORATION, MAINE CENTRAL RAILROAD COMPANY, NORTHERN RAILROAD,
PAN AM SOUTHERN LLC, PORTLAND TERMINAL COMPANY, SPRINGFIELD
TERMINAL RAILWAY COMPANY, STONY BROOK RAILROAD COMPANY, AND
VERMONT & MASSACHUSETTS RAILROAD COMPANY

EXHIBIT 5

Reply Verified Statement of Dr. William Huneke

REPLY VERIFIED STATEMENT OF WILLIAM F. HUNEKE, Ph.D.

I am Dr. William Huneke. I previously submitted verified statements to the STB in this proceeding on February 25, 2021, April 26, 2021 and July 1, 2021 in support of CSXT's application to acquire Pan Am Systems, Inc. ("Systems" or "Pan Am") and its subsidiary railroads, which I refer to as PAR.¹ I explained in those prior statements that I believe that CSXT's acquisition of Systems will be strongly pro-competitive. My previous statements focused on the competitive effects of the carefully negotiated agreements among CSXT, NSR and GWI that seek to restructure PAR, and in particular that seek to create a PAS that will be a viable, independent and competitive rail carrier. I concluded that those agreements not only address any potential competition concerns with CSXT's acquisition of an ownership interest in PAS, but also will substantially enhance rail competition in New England.

I am submitting this Reply Verified Statement to respond to the recommendation of the U.S. Department of Justice ("DOJ") in comments filed on August 26, 2021, that the STB "consider imposing a structural remedy, such as a carefully crafted divestiture." (DOJ Comment 3, STB filed Aug. 26, 2021.) The DOJ makes this recommendation based on its view that the contractual and conduct-based commitments that have been made by CSXT, NSR and GWI may not be adequate to avoid competitive harm and that divestiture of CSXT's interest in PAS would be "the easiest, cleanest, and least risky solution. . . ." (*Id.* at 6.)

I do not address in this Reply Verified Statement the DOJ's concerns over the adequacy of the contractual and conduct-based commitments. I addressed those commitments in my prior verified statements and they are addressed at length elsewhere in CSXT's Reply Comments. In

¹ My experience as an economist, including as the STB's Chief Economist and Director of the Office of Economics, is described in my prior verified statements and is not repeated here. In addition, the abbreviations I use in this Reply Verified Statement are the same as those I used in my prior verified statements.

this Reply Statement I focus on the DOJ's divestiture proposal and explain why I respectfully disagree with the DOJ that a forced divestiture of CSXT's interest in PAS would be "the easiest, cleanest, and least risky solution." To the contrary, the STB and its predecessor have long recognized that forced divestitures are highly risky to the health of the rail network, are extremely difficult and uncertain to implement, and are likely to cause far more damage to the public interest than other carefully crafted arrangements, such as those that the parties have already developed here. I urge the STB to refrain from imposing the extreme remedy of divestiture, which would be inappropriate and unnecessary. Instead, for the reasons I set out in my prior verified statements, I believe that the acquisition of Systems, as structured by the agreements among CSXT, NSR and GWI, will substantially enhance competition and it should be approved by the STB.

I. The STB Properly Treats Divestiture as a Last Resort.

The STB has previously stated that "[d]ivestiture in the rail industry, with its network economies, is a requirement, to be imposed only under extreme conditions, when no other less intrusive remedy would suffice." *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.*, 1 S.T.B. 233, 433 (1996). This standard is appropriate and it reflects the unique character of the railroad industry. Railroads are a network industry with economies of scale, scope and density that derive from an optimized network. Segments in the network contribute to the efficiency of the whole. That is why a disturbance in a particular segment of the network, such as a derailment or a track washout, can ripple through the network and affect operations hundreds of miles away. North American railroad companies manage their system as integrated entities and are able to achieve world class efficiencies. A forced divestiture can sub-optimize a network.

The STB has realized that divestitures can lead to sub-optimal outcomes so it has chosen other tools to achieve its competitive and efficiency goals for the industry.

Moreover, railroads have obligations that are unique to the industry. Railroads are common carriers with the obligation to serve customers upon reasonable request. Rail service is critical to economic activity and efficient rail service has been a major factor in advancing economic activity in the United States in many different industries. Railroads have unique health and safety concerns that impact rail workers and the communities they serve. Railroads have unique national defense responsibilities. These unique characteristics have industry specific economic costs and benefits, and they are why the STB has been given an economic regulatory role that is carved out from the general antitrust oversight by the Department of Justice and Federal Trade Commission.

These unique features have also led the STB to be extremely reticent to use divestiture as a remedy in rail transactions unless no other option is available. Contrary to the DOJ's suggestion, forced divestiture as a remedy in a rail transaction is far from being "easy" or "clean." With so many linked interests, the forced divestiture of a segment of the network would inevitably be very complicated, time-consuming and uncertain. A vast range of potential consequences would need to be considered, including the possible harm to the rail network while lengthy divestiture proceedings were being carried out. It would be difficult to sell a specific piece of the rail network like PAS, and even more difficult to sell a partial interest in such a segment of the network. Tremendous uncertainty would be created by an order of forced divestiture that would be felt by shippers on PAS, shippers on PAR, rail carriers connecting to PAS and PAR, local communities that rely on effective rail freight and passenger service, and other stakeholders of the rail network in New England.

Because divestiture is such a clumsy and inefficient tool to apply in a rail merger, the STB has chosen other tools to employ in rail mergers to address competitive issues. Indeed, as I explained in my prior verified statements, the parties here have used these same tools to structure PAS to avoid competitive concerns. The parties have used trackage rights, haulage arrangements, rate commitments, service commitments, and gateway commitments to ensure that rail shippers will continue to obtain competitive rail service. They have also used structural remedies such as the retention of an independent operator for PAS to ensure that PAS will remain viable, independent and competitive. These approaches, which are based on the traditional tools used by the STB, are far superior to the extreme remedy of forced divestiture.

II. Divestiture Is Unnecessary Because the STB Has Review and Oversight Powers Well Suited to this Network Industry.

Divestiture may be appropriate in unregulated, non-network industries where there is no regulatory agency available to supervise the implementation of a transaction. But divestiture is rarely necessary in the railroad industry where the STB can and does supervise the implementation of a transaction and the remedies that have been created to ensure that the public interest will be advanced. As I noted above, the STB has particular expertise that is well suited to reviewing and approving rail mergers and transactions and supervising their implementation because of its experience with and understanding of the unique characteristics of the railroad industry, including its high capital needs, extremely high entry barriers, public service requirements, environmental impacts, and concerns with health and safety. The STB can evaluate a rail transaction's impact on the whole national rail network and monitor that impact and address any concerns that might arise over its implementation.

The STB has plenty of tools to employ when it reviews and approves rail transactions and monitors implementation of those transactions. In this proceeding, the proponents have made

contractual and conduct-based commitments to ensure enhanced competition and improved network efficiency and have asked that these conditions be imposed as conditions. Overseeing these types of commitments and conditions is part of the STB's role and core competency. The ability to consider such approaches, which may not be feasible in other industries, gives the STB flexibility that often produces results that advance the public interest in a strong and efficient rail network. In the rail industry, arrangements not involving divestiture can often be superior to divestiture. I described in my prior verified statements several noteworthy competitive enhancements and network improvements that this proposal brings:

- Removal of the Ayer Traffic cap: When PAS was formed, PAS granted overhead traffic rights to PAR over the Island Line through Ayer but capped the volume to ensure Ayer would not become a capacity constraint. Replacement of this cap with a capacity-based alternative allows CSX to achieve efficiencies in the movement of traffic into northern New England, bringing better and more efficient service to northern New England rail shippers.
- Applicants are committing to improving Ayer's facilities: Given the importance of Ayer to the New England rail network, it is necessary to ensure adequate rail capacity to support robust inter- and intramodal competition in New England. Recognizing the importance of Ayer to a vibrant competitive market, CSXT has committed, through its settlement agreement with NSR, {{ [REDACTED] }}, to ensure that Ayer can handle the present and future traffic moving into and through Ayer.
- NSR's ability to move double-stack intermodal traffic will enhance competition: The Settlement Agreement between CSXT and NSR will enhance NSR's competitive position

because the agreement gives NSR the capability to provide double-stack intermodal service into the Boston area by avoiding a tunnel constraint that exists on PAS today. Currently, NSR must remove a layer of intermodal containers before moving on PAS. To do this (an operation referred to as “filleting”), NSR incurs substantial extra cost and delay. The improved efficiency and reduced costs of NSR’s intermodal traffic resulting from the settlement agreement with CSXT will enhance competition in two ways. First, NSR will be a stronger competitor to CSXT, which is the leading intermodal transportation provider in the area. Second, a more efficient and competitive intermodal route into and out of the Boston area will allow railroads to divert traffic from trucks.

- PAS will be strengthened by B&E’s operations: When B&E replaces Springfield Terminal as PAS operator, B&E’s operating and marketing attention will be exclusively focused on PAS and not divided between PAS and any other rail operations. Maintenance of PAS lines will be improved and B&E can be expected to improve PAS operations by drawing on the experience and corporate resources of GWI and its railroads, which have broad experience in starting up and running both Class II and Class III railroads in different regions, including New England. The safety and operating record of GWI railroads is very encouraging.

These competitive enhancements, which I identified in my previous verified statements in this proceeding, are significant, and they would not be available through forced divestiture.

It is also important to remember that a unique feature of the railroad industry is that much competition in the industry occurs through shared use of rail facilities in haulage rights, trackage rights, and arrangements like the NSR intermodal train routing proposed in this transaction. These arrangements generate efficiencies that are unavailable through divestiture because

railroads can achieve greater density on shared facilities than can be achieved on separate facilities.

Moreover, the STB has experience dealing with shared use of rail facilities, including joint ownership and operation of assets by NSR and CSXT. The STB is particularly well suited to monitoring the implementation of a rail transaction that involves such jointly owned and jointly used facilities. Consider the Shared Asset Areas (SAAs) that the *Conrail* transaction created in North Jersey, South Jersey/Philadelphia, and Detroit. *See CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc. (Conrail)*, 3 S.T.B. 196, 228 (1998). In that transaction, the applicants created these SAAs. *Id.* at 252, 256. These SAAs ensured and enhanced competition with the replacement of the monopoly carrier (Conrail) with two competitors (CSXT and NSR).² In the present application, the fact that CSXT and NSR will be co-owners and co-users of the assets of PAS is not unprecedented and the STB has plenty of experience overseeing these types of relationships.

The STB implemented the SAAs in the *Conrail* decision, which was a much more complex transaction than this one, and, indeed, viewed the creation of these SAAs as pro-competitive. The DOJ’s comments overlook the fact that because of their unique economics, railroads interact every day through shared assets and shared operations. The structure of joint ownership of PAS by CSXT and NSR is nothing new and, indeed, is relatively small compared to the *Conrail* SAAs and an array of other similar arrangements.

An important public benefit that the STB recognized in the *Conrail* decision was the applicants’ plans to make new investments that would provide “important public interest benefits

² The STB stated that NITL characterized the Conrail SAAs as “a true success story for rail competition and a model for future rail policy. . . .” *Conrail*, FD 33388 (Sub-No. 91) [General Oversight], slip op. at 30 (STB served Oct. 20, 2004).

of increased competition, new single-line routes, reduced highway traffic, and increased capital investment in needed facilities. . . .” *Conrail*, 3 S.T.B. at 249. These same benefits will come from the more flexible use of contractual and conduct-based commitments in the current application, where CSXT has committed to invest and ensure that Ayer can handle the present and future traffic moving into and through Ayer, as well as other infrastructure upgrades that will bring the New England rail network up to Class I railroad standards.

The STB is able to monitor other aspects of the parties’ commitments. With B&E’s operation of PAS, a concern has been raised about B&E sharing confidential rate information with other members of the GWI family that compete with VRS. (*See Vermont Rail System Comment 15*, STB filed Aug. 27, 2021.) The STB has faced similar situations before and has powers to address them and protect confidential information. In the *Conrail* proceeding, APL Limited raised similar concerns about CSX subsidiaries being able to take advantage of APL. However, the STB ruled that “our general oversight of the transaction can address any issues that arise in this regard. . . . [T]he confidentiality provisions that we have imposed should prevent any access by CSX’s water and intermodal affiliates to confidential contract information about APL.” *Conrail*, 3 S.T.B. at 316. Clearly, the STB has the oversight power to ensure that confidentiality commitments are met, thereby allowing B&E to operate PAS and achieve more efficient operations that will benefit rail shippers.

III. Forced Divestiture Could Leave the New England Rail Industry Worse Off.

The DOJ also claims that forced divestiture would be the “least risky solution,” but in fact a divestiture order would create enormous risks for the rail industry in New England. A forced divestiture order would create uncertainties that could affect rail transportation across the region.

In this case, in particular, a divestiture would be a difficult and time-consuming process. There are a limited number of potential suitors who would have the interest in a partial share of PAS or that would be capable of operating a short-line railroad. New sales and operating agreements would need to be negotiated. There would be an extensive STB vetting process to ensure that the public interest is being protected. All of this would take time and create uncertainties among the numerous parties that rely on a stable and efficient rail network in the region. Indeed, the delays and uncertainties could well lead to a weakened PAS, which is clearly contrary to the public interest.

The DOJ also does not account for the possibility that a forced divestiture could eliminate the efficiencies and other benefits that CSXT's acquisition of Systems would bring to the region by causing the entire transaction to collapse. The agreements among CSXT, NSR and GWI were carefully negotiated and have complex and interdependent elements. A forced divestiture would be inconsistent with the terms of those agreements, and it is not hard to imagine that the complication of a forced divestiture might be impossible to address through re-negotiated agreements. If the transaction were to unravel, the result would be a less efficient industry and a less optimal rail network compared to what is proposed here, and indeed, perhaps a weaker rail network than exists today in the region. Thus, a divestiture condition is one of the *most* risky approaches that the STB could consider.

IV. The STB Should Approve this Transaction.

CSXT's acquisition of Systems would provide broad and strong public interest benefits. Several of its features enhance competition. It extends the reach of Class I rail service into New England, and it will allow CSXT to bring resources to the region that can improve New England rail service. The competitive issues associated with CSXT's acquisition of an interest in PAS

can be and have been addressed through the carefully negotiated agreements with NSR and GWI and the commitments that the parties are making to ensure the preservation of competition. The STB has particular expertise in transactions such as this one and is well suited to reviewing and overseeing the remedies already created by the parties to ensure the preservation and enhancement of competition. The STB should approve this application.

VERIFICATION

I, William F. Huneke, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on October 18, 2021.

/s/ William F. Huneke

William F. Huneke

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36472

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.
—CONTROL AND MERGER—
PAN AM SYSTEMS, INC., PAN AM RAILWAYS, INC., BOSTON AND MAINE
CORPORATION, MAINE CENTRAL RAILROAD COMPANY, NORTHERN RAILROAD,
PAN AM SOUTHERN LLC, PORTLAND TERMINAL COMPANY, SPRINGFIELD
TERMINAL RAILWAY COMPANY, STONY BROOK RAILROAD COMPANY, AND
VERMONT & MASSACHUSETTS RAILROAD COMPANY

EXHIBIT 6

List of Statements of Support

STATEMENTS OF SUPPORT

CUSTOMER STATEMENTS OF SUPPORT

1. Albert Bros., Inc.
2. Arrowhead Environmental Partners, LLC
3. Atlantic Forest Products, LLC
4. Atlantic Wallboard
5. BB&S Treated Lumber of New England
6. Benevento Companies
7. Blackline Midstream LLC
8. Boise Cascade Building Materials Distribution LLC
9. Boston Concrete, Corp.
10. Boston Sand & Gravel Company
11. Brian Law, president of the Law Family Companies, Inc., published in the NH Journal
12. Broco Oil, Inc.
13. Broadway Street Holdings, Inc.
14. Brunswick Valley Lumber
15. Business Council of New York State, Inc., The
16. Catania Oils
17. Charter Development Company
18. Chemtrade Logistics Inc.
19. Ciment Québec Inc.
20. Connecticut Business and Industry Association
21. Cooperative Reserve Supply Incorporated
22. Crestwood Equity Partners LP
23. CTS Cement Manufacturing Corp.
24. Cushman Lumber Company
25. Daaquam Lumber Maine Inc.
26. DP World
27. Eastern Propane Gas Inc.
28. EIMSKIP USA
29. F.L. Larson Trucking, Inc.
30. F&M Tool and Plastics, Inc.
31. Fabian Oil Inc
32. Factor Gas Liquids Inc.
33. Frost Bridge Associates, LLC
34. GFI Partners
35. Granite State Concrete Co., Inc.
36. Greater Boston Transload, LLC
37. Greif, Inc
38. H&T Waterbury
39. Hub Group, Inc
40. HUHTAMAKI
41. Inland Fuel Terminals, Inc.
42. Inteplast Group Corporation

43. Interoceanic Corporation
44. J.D. Irving, Limited
45. J.D. Irving, Limited, Pulp & Paper Division
46. Jaguar Transport Holdings
47. Javelin Global Commodities (UK) Ltd
48. JB Hunt Transport, Inc.
49. Law Logistics
50. Lynch Logistics, Inc.
51. Maine Better Transportation Association
52. Maine Rail Group, Inc.
53. Maine Wood Treathers, Inc.
54. Monadnock Paper Mills, Inc.
55. NGL Supply Co. Ltd.
56. One SouthCoast Chamber
57. Packaging Corporation of America
58. Parrish & Heimbecker
59. Pixelle Specialty Solutions, LLC
60. Plasmine Technology, Inc.
61. Poland Spring
62. Ray-Mont Logistics
63. Republic Services, Inc., ECDC Environmental, L.C. and Devens Recycling Center, LLC
64. Robert Brown, President of Broco Oil, published in the Boston Herald
65. S&R Corp.
66. Saint John Port Authority
67. Sappi North America
68. Smaller Manufacturers Association of CT, Inc.
69. Tighe Logistics Group
70. Timothy P. Murray, President and CEO of the Greater Worcester Regional Chamber of Commerce, published in Commonwealth Magazine
71. TurfCare Supply Corp.
72. US Ecology
73. USG Corporation
74. Waste Management of MA, Inc.
75. Waterbury Regional Chamber of Commerce
76. Western Massachusetts Economic Development Council
77. Worcester Regional Chamber of Commerce
78. Woodland Pulp & St. Croix Tissue
79. wTe Recycling, Inc.

RAILROAD STATEMENTS OF SUPPORT

80. Housatonic Railroad Company, Inc.
81. Milford-Bennington Railroad Co., Inc.
82. New Hampshire Central Railroad, Inc.
83. OmniTRAX, Inc.

- 84. Pioneer Valley Railroad Company, Inc.
- 85. New Hampshire Northcoast Co.
- 86. Rail Enterprise Group
- 87. Regional Rail LLC

PUBLIC OFFICIAL & PUBLIC AGENCY STATEMENTS OF SUPPORT

- 88. Assemblywoman Carrie Woerner (New York State Assembly)
- 89. Connecticut Department of Transportation
- 90. David McCluskey (Connecticut State Representative 1999-2010)
- 91. Governor Christopher T. Sununu (State of New Hampshire)
- 92. Governor Janet T. Mills (State of Maine)
- 93. Hugh Dunn (New Bedford City Council)
- 94. Kevin and Elizabeth Poirier (Former Massachusetts State Representatives)
- 95. Mayor Dennis Baker (City of Mechanicville, NY)
- 96. Mayor Joyce Craig (City of Manchester, NH)
- 97. Mayor Neil M. O'Leary (City of Waterbury, CT)
- 98. Mike Zwirko (Former President, Melrose City Council)
- 99. Northern New England Passenger Rail Authority (NNEPRA)
- 100. New Hampshire Department of Transportation
- 101. New Hampshire Department of Transportation, Commissioner
- 102. Office of the County Administrator of Saratoga County, NY
- 103. Representative Jason Osborne (New Hampshire House of Representatives)
- 104. Representative John A. Graham (New Hampshire House of Representatives)
- 105. Representative John R. Cloutier (New Hampshire House of Representatives)
- 106. Representative Jeffrey N. Roy (Massachusetts House of Representatives)
- 107. Representative Kathleen R.J. Dillingham (Maine House of Representatives)
- 108. Representative Michelle Dunphy (Maine House of Representatives)
- 109. Representative Ryan M. Fecteau (Maine House of Representatives)
- 110. Senator Angus S. King, Jr. (United States Senate)
- 111. Senator Bill Gannon (New Hampshire Senate)
- 112. Senator Michael D. Brady (Massachusetts Senate)
- 113. Senator Kevin Avar (New Hampshire Senate)
- 114. Senator Patrick M. O'Connor (Massachusetts Senate)
- 115. Senator Rick Lopes (Connecticut Senate)
- 116. Senator Susan M. Collins (United States Senate)
- 117. Senators Jeffrey Timberlake & Matthew Pouliot (Maine Senate)
- 118. Senators Regina Birdsell & David Watters (New Hampshire Senate)
- 119. Senators Troy Jackson, Eloise Vitelli & Matthea Daughtry (Maine Senate)

CERTIFICATE OF SERVICE

I hereby certify that I have caused this Applicants' Response to Comments and Requests For Conditions and Rebuttal in Support of Application in Docket No. FD-36472, *CSX Corporation and CSX Transportation, Inc.—Control and Merger—Pan Am Systems, Inc., Pan Am Railways, Inc., Boston and Maine Corporation, Maine Central Railroad Company, Northern Railroad, Pan Am Southern LLC, Portland Terminal Company, Springfield Terminal Railway Company, Stony Brook Railroad Company, and Vermont & Massachusetts Railroad Company*, to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Sally Mordi

Sally Mordi
*Attorney for CSX Corporation and
CSX Transportation, Inc.*

October 18, 2021