

July 8, 2026 ENTERED
Office of Chief Counsel
July 8, 2026 BNSF-38 / CPKC-31
Part of
Public Record

Hon. Jenifer J. Soulikias
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: STB Docket No. FD 36873 – Issues for Resolution at July 10 Conference

Dear Judge Soulikias:

Pursuant to Decision No. 24, BNSF and CPKC write regarding the upcoming July 10, 2026 discovery conference. The conference will be necessary to resolve certain disputes below between movants and UP/NS.

I. Production Deadlines for UP and NS (BNSF-36)

On July 2, BNSF filed a letter addressing concerns with the pace of discovery and requested that some part of the upcoming conference be dedicated to discussing omnibus production deadlines for requests that have been pending for longer than three months. *See* BNSF-36. In a response that underscored the need for deadlines, Applicants said that they still need “weeks” to collect data from custodians they were orally ordered to collect from two weeks ago. *See* UP-70 / NS-68.

II. UP and NS’s Use of Technology Assisted Review (“TAR”) (BNSF-36)

In the same July 2 letter, BNSF raised concerns with Applicants’ lack of transparency with respect to TAR. *See* BNSF-36. Despite specific inquiries from BNSF, UP and NS have not shared draft TAR protocols and there are additional outstanding questions regarding their use of TAR. Applicants responded that they have been transparent regarding TAR but declined to share details regarding the specific, pending questions that have been asked. *See* UP-70 / NS-68. Applicants omitted the most recent message regarding TAR from their response; it is attached as Exhibit A.

III. CPKC Motion to Compel (CPKC-30)

On July 2, CPKC moved to compel NS to respond to discovery regarding UP’s compliance with its contractual commitments to NS in the merger agreement. CPKC-30. The requested materials are relevant to several issues, including whether UP has fulfilled its obligation to propose conditions to prevent harm that would otherwise result from the merger, the likelihood UP will comply with voluntary commitments it may make in this proceeding, the likelihood of service disruptions post-merger, and the timing of any lifting of the abeyance. *Id.* NS responded that Applicants’ compliance with the agreement is not relevant to any CPKC position or the Board’s public interest analysis, and that any relevant documents are captured by other discovery requests or do not exist. *See* NS-69.

LIST OF ATTENDEES

A. BNSF

1. Daniel Donovan
2. McClain Thompson

B. CSX

1. Eric Enson
2. Luke van Houwelingen
3. Rachel Lesser
4. John Scheib

C. CPKC

1. Joseph J. Matelis
2. David L. Meyer
3. Noah Stern

D. CN

1. Lindsey Bohl
2. Avia Gridi

Based on most recent hearing:

A. Union Pacific

1. Michael Rosenthal
2. Laura Flahive Wu
3. Kevin Kelly

B. Norfolk Southern

1. Matthew Warren
2. Carrie Mahan
3. Stephen Laudone
4. William Mullins
5. Spencer Naake

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Respectfully,

/s/ Daniel T. Donovan
Daniel T. Donovan, P.C.
KIRKLAND & ELLIS LLP
Counsel for BNSF Railway Company

/s/ Joseph J. Matelis
Joseph J. Matelis
SULLIVAN & CROMWELL LLP
Counsel for CPKC

cc: Counsel of Record

EXHIBIT A

Thompson, McClain

From: Thompson, McClain
Sent: Monday, July 6, 2026 2:20 PM
To: Georges, Maria; Korman, Marc; Kelly, Kevin; *AEllis@stblaw.com2; Matelis, Joseph (NON-SIDLEY @SULLCROM.COM); Donovan, Daniel T.; McCarrick, T.J.; Razi, Sara Y.; Bohl, Lindsey C.; David Meyer; *pdenton@steptoe.com; *tstrafford@steptoe.com; Cunningham, Rich; Scheib, John M.; Gardiner, Kent; van Houwelingen, Luke; Aluise, Dylan M.; Hynes, Samantha F.; Golden, Nathan H.; Joseph, Neil; Volbrecht, Tate D.; Enson, Eric; Fanchiang, Eric; *Avia.Gridi@stblaw.com; Vaidya, Tushar
Cc: *dludwin@cov.com; *lflahivewu@cov.com; Rosenthal, Michael; Magcale, Jamie Dominique U; Brown, Molly; Damitio, Daniel; Harrison, Caroline; Krovoza, Charlotte; Warren, Matthew J.; ratkins; Laudone, Stephen S.; William Mullins; Spencer Naake; OpalDisco
Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

Maria, Marc –

We write in further response to your July 2 emails regarding TAR:

Protocols. Are UP and NS using written TAR protocols to guide and memorialize their respective processes? Do you agree to share the protocols? And if not, why not?

Search Terms. As we have explained for weeks on calls and in writing, there was no “agreement” on search terms. If there were an agreement, UP would have cited it. UP does not, because there was no agreement. We counter-proposed search terms as a starting point and requested unique hit counts – a request that UP and NS ignored for weeks – to assess both the true burden on UP and NS and whether our proposed search terms are capturing what we would expect. Then, after CPKC sent additional search terms, UP and NS have declined to provide hit reports; we are still waiting (nearly three weeks later) for those hit reports. Meanwhile, the parties still had disputes on custodians (now resolved by the ALJ, although it remains unclear whether UP and NS have collected the new data 10 days after the ALJ’s oral rulings), date ranges (remains open, subject to seeing the hit counts, and in light of the proposed use of TAR to cull), and UP’s email collection method (remains open, pending UP’s responses to our July 3 questions and requests for confirmation).

Use of TAR. We are not moving the goalposts. We have been asking about Applicants’ intended use of TAR since late May and have repeatedly requested information about it. Applicants declined to provide any specific information about their use of TAR until July 2—about five weeks after we started asking. July 2 was also the first time that Applicants disclosed that they intend to use TAR after applying search terms that were being negotiated for linear review.

Search Terms Prior to TAR. There was never an agreement that UP and NS can apply search terms (that were being negotiated for a linear review) before dumping that filtered set into a TAR process. We need more information about how the Applicants plan to use TAR to assess whether we object to Applicants’ proposal. Had we known that Applicants were not intending to conduct linear review, the search terms we proposed (if any) would have been different. Applicants have repeatedly made burden objections, and we have attempted to negotiate search terms to address those concerns. The use of TAR, however, will substantially reduce Applicants’ burden, and the burden considerations thus change. That is why courts often do not to allow parties to use TAR after search terms.

So, please let us know your final position on what data UP and NS intend to ingest into the TAR system, and how the Applicants plan to use TAR so that we can proceed to get a ruling as needed. If UP and NS want to discuss a broader set of search terms that would address your concern of filtering out “noise” before ingesting the data into TAR, we would be willing to engage on that.

TAR Specifics. We also have specific questions regarding Applicants’ use of TAR:

- **Training.** How will the models be trained? Are UP and NS feeding any of their existing productions (i.e., documents that UP and NS have determined are responsive) into the model to train it? Has the training started?
- **Validation.** Please describe your validation protocol in detail, including specific cut-off, recall, and precision rates that you are proposing and why you believe those are appropriate and reasonable. In addition, please let us know who will conduct the validation.
- **Rank Value.** Please describe how UP/NS will discern the appropriate rank value for separating responsive document from non-responsive documents.
- **Target Score.** Once the target recall score is reached, do UP and NS plan to conduct additional review for (or changes in) responsiveness calls beyond that point?
- **Purpose.** Are UP and NS using TAR for culling only?

Chat/Ephemeral Messages. For chat, ephemeral, and text messages, do UP and NS intend to review these types of documents via TAR? What time increments will these messages be formatted for training and production (e.g., single message, 24-hr, weekly, monthly) and why? Are search terms being applied after the messages are broken up into the pre-set temporal chunks?

Finally, Maria's comment that we are trying to "further delay discovery in this proceeding" is baseless and contradicted by months and months of efforts by us that we will not memorialize here.

We may have additional questions and issues, but we wanted to provide these as a starting point to move things along.

Thank you,

McClain

McClain Thompson

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From: Georges, Maria <mgeorges@cov.com>

Sent: Friday, July 3, 2026 12:01 AM

To: Thompson, McClain <mcclain.thompson@kirkland.com>; Korman, Marc <mkorman@sidley.com>; Kelly, Kevin <Kkelly@cov.com>; *AEllis@stblaw.com2 <AEllis@stblaw.com>; Matelis, Joseph (NON-SIDLEY @SULLCROM.COM) <Matelisj@sullcrom.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; *Avia.Gridi@stblaw.com <Avia.Gridi@stblaw.com>; Vaidya, Tushar <tushar.vaidya@kirkland.com>

Cc: *dludwin@cov.com <dludwin@cov.com>; *lflahivewu@cov.com <lflahivewu@cov.com>; Rosenthal, Michael <mrosenthal@cov.com>; Magcale, Jamie Dominique U <JMagcale@cov.com>; Brown, Molly <MBrown@cov.com>; Damitio, Daniel <DDamitio@cov.com>; Harrison, Caroline <CHarrison@cov.com>; Krovoza, Charlotte <CKrovoza@cov.com>; Warren, Matthew J. <mjwarren@sidley.com>; ratkins <ratkins@sidley.com>; Laudone, Stephen S. <slaudone@sidley.com>; William Mullins <wmullins@mullinslawgroup.net>; Spencer Naake

<snaake@mullinslawgroup.net>; OpalDisco <OpalDisco@cov.com>

Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

This message is from an EXTERNAL SENDER

Be cautious, particularly with links and attachments.

McClain –

We are happy to review any additional reasonable questions you may have about TAR. To set the record straight on the agreed search terms, Union Pacific proposed search terms to the non-Applicant railroads at the beginning of May. In response, the non-Applicant railroads proposed certain modifications to those terms, which Union Pacific agreed to in full. These are what we refer to as the agreed-upon search terms. After Union Pacific agreed to your requested modifications, and nearly 6 weeks after we had provided our initial proposal, CPKC then proposed additional broad terms. UP will respond shortly regarding the new CPKC terms, including providing hit reports.

As for your comment that, “If we were to agree to any pre-TAR search terms, it would not be close to the set of terms that were being discussed for a linear review,” we find it disappointing that BNSF is yet again trying to move the goalposts on custodial searches and further delay discovery in this proceeding. Using negotiated search terms that are designated to return responsive documents, instead of dumping irrelevant documents that will produce substantial noise into a TAR model, ensures that we can identify responsive documents in an efficient manner. Regardless, Union Pacific’s willingness to be transparent regarding its search process does not entitle BNSF to interfere with that process.

All the best,

Maria

Maria Georges

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COVINGTON

From: Thompson, McClain <mcclain.thompson@kirkland.com>

Sent: Thursday, July 2, 2026 2:21 PM

To: Korman, Marc <mkorman@sidley.com>; Georges, Maria <mgeorges@cov.com>; Kelly, Kevin <Kkelly@cov.com>;

[*AEllis@stblaw.com2](mailto:AEllis@stblaw.com2) <AEllis@stblaw.com>; Matelis, Joseph (NON-SIDLEY @SULLCROM.COM)

<Matelisj@sullcrom.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>;

Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer

<david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com

<tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; *Avia.Gridi@stblaw.com <Avia.Gridi@stblaw.com>; Vaidya, Tushar <tushar.vaidya@kirkland.com>

Cc: Ludwin, Derek <dludwin@cov.com>; Flahive Wu, Laura <lflahivewu@cov.com>; Rosenthal, Michael <mrosenthal@cov.com>; Magcale, Jamie Dominique U <JMagcale@cov.com>; Brown, Molly <MBrown@cov.com>; Damitio, Daniel <DDamitio@cov.com>; Harrison, Caroline <CHarrison@cov.com>; Krovoza, Charlotte <CKrovoza@cov.com>; Warren, Matthew J. <mjwarren@sidley.com>; ratkins <ratkins@sidley.com>; Laudone, Stephen S. <slaudone@sidley.com>; William Mullins <wmullins@mullinslawgroup.net>; Spencer Naake <snaake@mullinslawgroup.net>; OpalDisco <OpalDisco@cov.com>

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[EXTERNAL]

Marc, Maria –

Speaking for BNSF:

We will be sending a list of questions and issues. To be clear, there is not an agreed upon set of search terms or date limiters. (Among other issues, we have been standing by for 15 days for UP and NS to provide hit counts in response to the CPKC search terms.) There is certainly no agreement that UP and NS can apply search terms (that were being negotiated for a linear review) before dumping that filtered set into a TAR process. If we were to agree to any pre-TAR search terms, it would not be close to the set of terms that were being discussed for a linear review.

We will follow up with additional questions and issues.

Thanks,

McClain

McClain Thompson

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From: Korman, Marc <mkorman@sidley.com>

Sent: Thursday, July 2, 2026 1:40 PM

To: *mgeorges@COV.COM <mgeorges@COV.COM>; Thompson, McClain <mcclain.thompson@kirkland.com>; Kelly, Kevin <Kkelly@cov.com>; *AEllis@stblaw.com2 <AEllis@stblaw.com>; Matelis, Joseph (NON-SIDLEY @SULLCROM.COM) <Matelisj@sullcrom.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>;

Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; *Avia.Gridi@stblaw.com <Avia.Gridi@stblaw.com>
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Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

McClain,

Below is Norfolk Southern's disclosure related to TAR.

Norfolk Southern TAR Disclosure

Norfolk Southern intends to apply the parties' agreed-upon search terms and date filters to its electronically stored information ("ESI"), including emails, OneDrive, and Teams data for all agreed custodians. Norfolk Southern works with Redgrave LLP and Troutman Pepper Locke ("Troutman") on eDiscovery. Troutman is providing the eDiscovery technology services with RelativityOne, and processes ESI using industry-standard methods, including global deduplication, deNISTing, and date filtering. Global deduplication will remove exact duplicates across custodians based on family-level hash values. Norfolk Southern also intends to utilize standard email-threading technology.

In addition, Norfolk Southern will use TAR via Relativity Review Center to cull documents for review and production. Files that are not suitable for analysis by TAR will be set aside for potential manual review. Norfolk Southern can provide a list of file types not suitable for TAR (e.g., multimedia files, system files, empty/zero byte files, empty container files) once they have been identified.

After Norfolk Southern's custodial productions are substantially complete, if parties have reasonable questions regarding Norfolk Southern's validation methodology, we are willing to meet and confer and provide reasonable TAR-related metrics.

MARC A. KORMAN
Counsel

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From: Georges, Maria <mgeorges@cov.com>

Sent: Thursday, July 2, 2026 1:33 PM

To: Thompson, McClain <mccclain.thompson@kirkland.com>; Kelly, Kevin <Kkelly@cov.com>;

*AEllis@stblaw.com2 <AEllis@stblaw.com>; Matelis, Joseph (NON-SIDLEY @SULLCROM.COM) <Matelisj@sullcrom.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; *Avia.Gridi@stblaw.com <Avia.Gridi@stblaw.com>
Cc: Ludwin, Derek <dludwin@cov.com>; Flahive Wu, Laura <lflahivewu@cov.com>; Rosenthal, Michael <mrosenthal@cov.com>; Magcale, Jamie Dominique U <JMagcale@cov.com>; Brown, Molly <MBrown@cov.com>; Damitio, Daniel <DDamitio@cov.com>; Harrison, Caroline <CHarrison@cov.com>; Krovoza, Charlotte <CKrovoza@cov.com>; Warren, Matthew J. <mjwarren@sidley.com>; Atkins, Raymond <ratkins@sidley.com>; Korman, Marc <mkorman@sidley.com>; Laudone, Stephen S. <slaudone@sidley.com>; William Mullins <wmullins@mullinslawgroup.net>; Spencer Naake <snaake@mullinslawgroup.net>; OpalDisco <OpalDisco@cov.com>

Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

McClain - Please see UP's disclosure regarding the use of TAR.

UP TAR Disclosure:

As previously discussed, UP intends to apply the parties' agreed-upon search terms and date filters to its electronically stored information ("ESI"), including emails, OneDrive, and Teams data for all agreed custodians. UP has retained Lighthouse as its eDiscovery vendor. Lighthouse will process ESI using industry-standard methods, including global deduplication, deNISTing, and date filtering. Global deduplication will remove exact duplicates across custodians based on family-level hash values. UP also intends to utilize Lighthouse's standard email-threading technology.

In addition, UP intends to use Lighthouse's proprietary TAR tool, IQ Review, to cull documents for review and production. Files that are not suitable for analysis in IQ Review will be set aside for potential manual review. UP can provide a list of file types not suitable for IQ Review (e.g., multimedia files, system files, empty/zero byte files, empty container files) once they have been identified.

After UP's custodial productions are substantially complete, if the Parties have reasonable questions regarding UP's validation methodology, UP is willing to meet and confer and provide reasonable TAR-related metrics, including estimated recall and/or precision at the selected cutoff score.

All the best,

Maria

Maria Georges

Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW

COVINGTON

From: Thompson, McClain <mcclain.thompson@kirkland.com>

Sent: Monday, June 29, 2026 11:34 AM

To: Kelly, Kevin <Kkelly@cov.com>; *AEllis@stblaw.com2 <AEllis@stblaw.com>; Matelis, Joseph J. <Matelisj@sullcrom.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; *Avia.Gridi@stblaw.com <Avia.Gridi@stblaw.com>

Cc: Ludwin, Derek <dludwin@cov.com>; Flahive Wu, Laura <lflahivewu@cov.com>; Rosenthal, Michael <mrosenthal@cov.com>; Magcale, Jamie Dominique U <JMagcale@cov.com>; Brown, Molly <MBrown@cov.com>; Damitio, Daniel <DDamitio@cov.com>; Harrison, Caroline <CHarrison@cov.com>; Krovoza, Charlotte <CKrovoza@cov.com>; Warren, Matthew J. <mjwarren@sidley.com>; ratkins <ratkins@sidley.com>; Korman, Marc <mkorman@sidley.com>; Laudone, Stephen S. <slaudone@sidley.com>; William Mullins <wmullins@mullinslawgroup.net>; Spencer Naake <snaake@mullinslawgroup.net>; OpalDisco <OpalDisco@cov.com>

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[EXTERNAL]

Kevin –

For BNSF:

On data rooms and diligence trackers, here is what you said on May 29: “UP and NS are willing to conduct searches and review the contents of the virtual data rooms that the Applicants used to share due diligence materials related to the proposed transaction consistent with the custodial search framework that the parties are currently negotiating.” Respectfully, I don’t know what that means – what would be left behind? Are you willing to produce the contents of all data rooms and the diligence trackers in full or not? Based on your May 29 response, I don’t believe UP and NS are willing to produce the contents of all data rooms and the diligence trackers.

On TAR, I struggle to see how you can simultaneously tell the ALJ that you want to complete productions in the “summer months” and yet don’t have a crystallized thought process for whether you are using TAR (and if so, how) by the end of June. Please see below for our initial questions:

- 1) Do you agree that we should have input in any TAR process that UP and NS propose to run?
- 2) Do you have a draft protocol to share?
- 3) What TAR programs are you intending to use? Will TAR be used for culling? Or only prioritization?
- 4) Do you intend to apply search terms or other filtering/exclusionary criteria prior to running TAR?
- 5) What types of documents will not be run through TAR? Please provide a specific list.

Thanks,

McClain

McClain Thompson

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From: Kelly, Kevin <Kkelly@cov.com>

Sent: Monday, June 29, 2026 10:49 AM

To: *AEllis@stblaw.com2 <AEllis@stblaw.com>; Matelis, Joseph J. <Matelisj@sullcrom.com>; Thompson, McClain <mcclain.thompson@kirkland.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <alused@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; *Avia.Gridi@stblaw.com <Avia.Gridi@stblaw.com>

Cc: *dludwin@cov.com <dludwin@cov.com>; *lflahivewu@cov.com <lflahivewu@cov.com>; Rosenthal, Michael <mrosenthal@cov.com>; Magcale, Jamie Dominique U <JMagcale@cov.com>; Brown, Molly <MBrown@cov.com>; Damitio, Daniel <DDamitio@cov.com>; Harrison, Caroline <CHarrison@cov.com>; Krovoza, Charlotte <CKrovoza@cov.com>; Warren, Matthew J. <mjwarren@sidley.com>; ratkins <ratkins@sidley.com>; Korman, Marc <mkorman@sidley.com>; Laudone, Stephen S. <slaudone@sidley.com>; William Mullins <wmullins@mullinslawgroup.net>; Spencer Naake <snaake@mullinslawgroup.net>; OpalDisco <OpalDisco@cov.com>

Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

It seems we have a critical mass for tomorrow afternoon to discuss Applicants' discovery requests. We'll update the invite for 1:30-3 PM ET tomorrow. CN, if you're not available until 2:30 PM ET, you can join then.

McClain, we expect to respond to your proposed edits to Applicants' responsiveness criteria by tomorrow morning, and we think it's likely our responses will resolve any remaining issues. On BNSF's request for due diligence materials exchanged between UP and NS, we previously confirmed that UP and NS were collecting responsive documents for review and production in my May 29 email. I understand that NS has already made a production of those materials, and UP intends to do so in the future. On TAR, we've

previously provided our position, which is that we will be able to provide additional information on Applicants' use of TAR once the remaining issues regarding the scope of custodial searches are resolved and we know the total universe of documents for review.

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From: Ellis, Abram J <AEllis@stblaw.com>

Sent: Monday, June 29, 2026 8:16 AM

To: Matelis, Joseph J. <Matelisj@sullcrom.com>; Thompson, McClain <mcclain.thompson@kirkland.com>; Kelly, Kevin <Kkelly@cov.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEEnson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; Gridi, Avia <Avia.Gridi@stblaw.com>
Cc: Ludwin, Derek <dludwin@cov.com>; Flahive Wu, Laura <lflahivewu@cov.com>; Rosenthal, Michael <mrosenthal@cov.com>; Magcale, Jamie Dominique U <JMagcale@cov.com>; Brown, Molly <MBrown@cov.com>; Damitio, Daniel <DDamitio@cov.com>; Harrison, Caroline <CHarrison@cov.com>; Krovoza, Charlotte <CKrovoza@cov.com>; Warren, Matthew J. <mjwarren@sidley.com>; ratkins <ratkins@sidley.com>; Korman, Marc <mkorman@sidley.com>; Laudone, Stephen S. <slaudone@sidley.com>; William Mullins <wmullins@mullinslawgroup.net>; Spencer Naake <snaake@mullinslawgroup.net>; OpalDisco <OpalDisco@cov.com>

Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

[EXTERNAL]

We cannot do the 1-2:30 ET slot on Tuesday (as we communicated to the UP team separately). As we also told the UP team, we're not sure it's necessary for all Class 1s to be on to discuss each Class 1s R&Os. We can address CN's R&Os at the end of the 11 am call if that's applicants' preference, or do the window we communicated tomorrow (after 2:30 pm ET).

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From: Matelis, Joseph J. <Matelisj@sullcrom.com>

Sent: Monday, June 29, 2026 7:19 AM

To: Thompson, McClain <mcclain.thompson@kirkland.com>; Kelly, Kevin <Kkelly@cov.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Ellis, Abram J <AEllis@stblaw.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; Gridi, Avia <Avia.Gridi@stblaw.com>
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Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

*** External Email ***

We can join a call today at 11, and as I said last night we'll be prepared to address the discovery directed to CPKC during the window tomorrow.

From: Thompson, McClain <mcclain.thompson@kirkland.com>

Sent: Monday, June 29, 2026 5:56 AM

To: Kelly, Kevin <Kkelly@cov.com>; Matelis, Joseph J. <Matelisj@sullcrom.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; zzExt-aellis <aellis@stblaw.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; *Avia.Gridi@stblaw.com <Avia.Gridi@stblaw.com>
Cc: zzExt-dludwin <dludwin@cov.com>; *lflahivewu@cov.com <lflahivewu@cov.com>; Rosenthal, Michael <mrosenthal@cov.com>; Magcale, Jamie Dominique U <JMagcale@cov.com>; Brown, Molly <MBrown@cov.com>; Damitio, Daniel <DDamitio@cov.com>; Harrison, Caroline <CHarrison@cov.com>; Krovoza, Charlotte <CKrovoza@cov.com>; Warren, Matthew J. <mjwarren@sidley.com>; ratkins <ratkins@sidley.com>; Korman, Marc <mkorman@sidley.com>; Laudone, Stephen S. <slaudone@sidley.com>; William Mullins <wmullins@mullinslawgroup.net>; Spencer Naake <snaake@mullinslawgroup.net>; OpalDisco

<OpalDisco@cov.com>

Subject: [EXTERNAL] RE: FD 36873 - Applicants' 1st Set of Discovery Requests

Either works for BNSF. But we should keep today's call. We need to hear what UP and NS are planning as to TAR and receive your proposed protocol. We also need to discuss the responsiveness criteria – UP has had our edits for 10 days. And we need to know if UP and NS agree or not to produce the contents of data rooms and diligence trackers shared between UP and NS in connection with the Proposed Transaction.

McClain Thompson

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From: Kelly, Kevin <Kkelly@cov.com>

Sent: Sunday, June 28, 2026 9:43 PM

To: Matelis, Joseph J. <Matelisj@sullcrom.com>; Thompson, McClain <mcclain.thompson@kirkland.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; *AEllis@stblaw.com2 <AEllis@stblaw.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; *Avia.Gridi@stblaw.com <Avia.Gridi@stblaw.com>

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Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

If 1-2:30 ET on Tuesday works for all of the Class Is, we're willing to switch times. If not, we'll proceed at 11 ET tomorrow.

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From: Matelis, Joseph J. <Matelisj@sullcrom.com>

Sent: Sunday, June 28, 2026 6:45 PM

To: Kelly, Kevin <Kkelly@cov.com>; Thompson, McClain <mcclain.thompson@kirkland.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; zzExt-aellis <aellis@stblaw.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Fanchiang, Eric <EFanchiang@crowell.com>; *Avia.Gridi@stblaw.com <Avia.Gridi@stblaw.com>

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Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

[EXTERNAL]

Kevin – CPKC can meet Tuesday 1 to 2:30. I continue to think it would be helpful if you could point us to precedent from the Board or the federal courts relating to the relative discovery obligations of applicants and non-applicants during the Board’s merger reviews. A view about that issue seems to underlie your correspondence, and it would be useful if we could have the chance to consider it.

Matt – I didn’t hear back about our offer to discuss NS’s objections to CPKC’s June 8 requests. We’ll be ready to address those Tuesday as well.

Thanks – Joe

From: Kelly, Kevin <Kkelly@cov.com>

Sent: Friday, June 26, 2026 4:46 PM

To: Thompson, McClain <mcclain.thompson@kirkland.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; zzExt-aellis <aellis@stblaw.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Matelis, Joseph J. <Matelisj@sullcrom.com>; Fanchiang, Eric <EFanchiang@crowell.com>; *Avia.Gridi@stblaw.com <Avia.Gridi@stblaw.com>

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Subject: [EXTERNAL] RE: FD 36873 - Applicants' 1st Set of Discovery Requests

McClain,

You have not provided the information we requested regarding the scope of the searches BNSF is undertaking in response to these requests. We have concerns that those searches are inadequate. We also have questions regarding the broad privilege assertions BNSF has made with respect to responsive documents and information. As we learn more about BNSF's positions, we will likely have additional questions that we can address on the call. We look forward to discussing with you on Monday.

Best,

Kevin

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From: Thompson, McClain <mcclain.thompson@kirkland.com>

Sent: Friday, June 26, 2026 3:18 PM

To: Kelly, Kevin <Kkelly@cov.com>; Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; *AEllis@stblaw.com2 <AEllis@stblaw.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Matelis, Joseph (NON-SIDLEY @SULLCROM.COM) <Matelisj@sullcrom.com>; Fanchiang, Eric <EFanchiang@crowell.com>; *Avia.Gridi@stblaw.com <Avia.Gridi@stblaw.com>

Cc: Ludwin, Derek <dludwin@cov.com>; Flahive Wu, Laura <lflahivewu@cov.com>; Rosenthal, Michael <mrosenthal@cov.com>; Magcale, Jamie Dominique U <JMagcale@cov.com>; Brown, Molly <MBrown@cov.com>; Damitio, Daniel <DDamitio@cov.com>; Harrison, Caroline <CHarrison@cov.com>; Krovoza, Charlotte <CKrovoza@cov.com>; Warren, Matthew J. <mjwarren@sidley.com>; ratkins <ratkins@sidley.com>; Korman, Marc <mkorman@sidley.com>; Laudone, Stephen S. <slaudone@sidley.com>; William Mullins <wmullins@mullinslawgroup.net>; Spencer Naake <snaake@mullinslawgroup.net>; OpalDisco

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Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

[EXTERNAL]

As for BNSF, I directly answered all your questions / issues in writing yesterday. Happy to join at 11 AM ET, but what is it that you specifically want to discuss as to BNSF's responses?

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Sent: Friday, June 26, 2026 3:15 PM

To: Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; *AEllis@stblaw.com2 <AEllis@stblaw.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Thompson, McClain <mcclain.thompson@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Matelis, Joseph (NON-SIDLEY @SULLCROM.COM) <Matelisj@sullcrom.com>; Fanchiang, Eric <EFanchiang@crowell.com>; *Avia.Gridi@stblaw.com <Avia.Gridi@stblaw.com>

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Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

Counsel,

In response to Applicants' June 22 request for your availability to meet and confer regarding your responses to Applicants' 1st Set of Discovery Requests, only CN has provided availability (indicating Monday and Tuesday of next week would work). We will circulate an invite for the parties to meet and confer at 11 AM ET on Monday. If you cannot be available then, please provide alternative times on Monday or Tuesday when you are all available.

Best,

Kevin

Kevin Kelly

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From: Kelly, Kevin

Sent: Wednesday, June 24, 2026 4:54 PM

To: Donovan, Daniel T. <ddonovan@kirkland.com>; McCarrick, T.J. <tj.mccarrick@kirkland.com>; Ellis, Abram J <AEllis@stblaw.com>; Razi, Sara Y. <Sara.Razi@stblaw.com>; Bohl, Lindsey C. <Lindsey.Bohl@stblaw.com>; David Meyer <david@meyerlawdc.com>; *pdenton@steptoe.com <pdenton@steptoe.com>; *tstrafford@steptoe.com <tstrafford@steptoe.com>; Cunningham, Rich <rich.cunningham@kirkland.com>; Scheib, John M. <scheib@gentrylocke.com>; Gardiner, Kent <KGardiner@crowell.com>; van Houwelingen, Luke <LVanHouwelingen@crowell.com>; Aluise, Dylan M. <aluised@sullcrom.com>; Hynes, Samantha F. <hyness@sullcrom.com>; Golden, Nathan H. <goldenn@sullcrom.com>; Joseph, Neil <neil.joseph@kirkland.com>; Volbrecht, Tate D. <tate.volbrecht@kirkland.com>; Thompson, McClain <mcclain.thompson@kirkland.com>; Enson, Eric <EEnson@crowell.com>; Matelis, Joseph (NON-SIDLEY @SULLCROM.COM) <Matelisj@sullcrom.com>; Fanchiang, Eric <EFanchiang@crowell.com>; 'Gridi, Avia' <Avia.Gridi@stblaw.com>

Cc: Ludwin, Derek <dludwin@cov.com>; Flahive Wu, Laura <lflahivewu@cov.com>; Rosenthal, Michael <mrosenthal@cov.com>; Magcale, Jamie Dominique U <JMagcale@cov.com>; Brown, Molly <MBrown@cov.com>; Damitio, Daniel <DDamitio@cov.com>; Harrison, Caroline <CHarrison@cov.com>; Krovoza, Charlotte <CKrovoza@cov.com>; Warren, Matthew J. <mjwarren@sidley.com>; ratkins <ratkins@sidley.com>; Korman, Marc <mkorman@sidley.com>; Laudone, Stephen S. <slaudone@sidley.com>; William Mullins <wmullins@mullinslawgroup.net>; 'Spencer Naake' <snaake@mullinslawgroup.net>

Subject: RE: FD 36873 - Applicants' 1st Set of Discovery Requests

Counsel,

Following up on the attached correspondence, please provide your availability to meet and confer this week.

Best,

Kevin

Kevin Kelly

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Sent: Monday, June 22, 2026 5:26 PM

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Subject: FD 36873 - Applicants' 1st Set of Discovery Requests

Counsel,

Please see the attached correspondence.

Best,

Kevin

Kevin Kelly

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CERTIFICATE OF SERVICE

I certify that I caused the foregoing to be served electronically or by first-class mail, postage pre-paid, on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, Administrative Law Judge Jenifer Soulikias, and all parties of record in this proceeding.

/s/ Onika Williams

Attorney for BNSF Railway Company

July 8, 2026