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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36727

CSX TRANSPORTATION, INC.
—ACQUISITION AND OPERATION—
RAIL LINE OF MERIDIAN & BIGBEE RAILROAD, L.L.C.

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

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Pursuant to Decision No. 4 in this proceeding, CSXT¹ respectfully submits this response to comments and requests for conditions and rebuttal in support of the CSXT Application.

INTRODUCTION AND SUMMARY

Only two comments were filed in this proceeding. NSR filed comments on December 29, 2023, recycling procedural arguments and largely ignoring the merits of the CSXT Transaction, choosing instead to focus on the CPKC proceeding in Docket No. FD 36732. The only substantive issue related to the CSXT Transaction between Myrtlewood and Burkeville raised by NSR is a request for clarification of CSXT's open gateway commitment at Selma, AL. The remaining substantive issues in NSR's comments do not involve the CSXT Transaction. Additionally, the Brotherhood of Railroad Signalmen ("BRS") filed comments on December 11, 2023 in this proceeding,² stating that it does not oppose the CSXT Transaction but

¹ Unless otherwise defined in this Response, the acronyms and defined terms used in this Response are the same as those used in CSXT's Application, filed on October 6, 2023, or in the Board's Decision No. 1, served on November 3, 2023.

² BRS separately filed nearly identical comments in the CPKC proceeding on December 11, 2023.

highlighting certain concerns related to asset maintenance and labor post-transaction. CSXT addresses below the issues raised by NSR and BRS. This Response focuses on those comments and requests for conditions related to the proposed CSXT Transaction, not those related entirely to the CPKC Transaction.

The Board should approve CSXT's Application without the conditions requested by NSR. The only Board authority sought by CSXT through its Application is for the proposed CSXT Transaction: CSXT's reacquisition of the Assets from MNBR and CSXT's resumed operation of the Eastern Line. The proposed CSXT Transaction will allow the MNBR lease of the Eastern Line to terminate at the end of its 20-year term. The Board previously authorized MNBR to enter into that lease on those terms, and the Board should allow the lease to end according to the provisions that it authorized two decades ago.

The legal standard for approval of the CSXT Transaction is clearly met. *See* 49 U.S.C. § 11324(d). As CSXT explained in the Application, the Board must approve the transaction unless it finds that 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. (Appl. APP-24. *See also CSX Transp., Inc.—Acquisition of Operating Easement—Grand Trunk Western R.R. Co.*, FD 35522, slip op. at 5 (STB served Feb. 8, 2013.)) The CSXT Transaction is a simple end-to-end acquisition that will reextend the CSXT system approximately 94 miles from Burkeville, AL to Myrtlewood, AL. There will be no lessening of competition, creation of a monopoly, or restraint of trade in the relevant market. There are no 2-to-1 shippers on the Eastern Line, and MNBR's local traffic (traffic originated or terminated on the Eastern Line) will lose no competitive options. Not a single comment suggested that the CSXT Transaction would cause adverse competitive effects, let alone adverse effects that are “likely” or “substantial.”

CSXT understands that CPKC is also seeking authority to acquire the Western Line. If the Board approves both the CSXT Transaction and the CPKC Transaction, the principal aggregate effect of the two transactions will be to create a new direct interchange point between CSXT and CPKC at the point where the Western Line and Eastern Line connect in Myrtlewood, AL, thereby eliminating the need for an intermediary carrier (MNBR) that currently moves overhead traffic between CPKC in Meridian, MS and CSXT in Montgomery, AL. If the Board authorizes the CPKC Transaction along with the CSXT Transaction, improved service, increased reliability, and consistent rail operations will enhance competition and provide substantial public benefits to the region.

The CSXT Transaction has received strong and wide-ranging support. Letters of support have been submitted by the Alabama Department of Commerce, the Selma & Dallas County Economic Development Authority, Ferroglabe USA Quartz, Inc. (formerly known as Alabama Sand and Gravel, Inc.), Congresswoman Terri A. Sewell, and the following Alabama state legislators: State Senator Bobby Singleton, State Senator Robert Stewart, Jr., State Rep. Prince Chestnut, State Rep. Kelvin Lawrence, and State Rep. A.J. McCampbell. Not a single shipper, elected official, or government agency opposes the CSXT Transaction.

While no comments have been submitted questioning the underlying merits of CSXT's reacquisition of the Eastern Line, NSR asked the Board to impose a number of conditions, and these reply comments focus primarily on those condition requests.³ As CSXT explains below, the Board should approve the CSXT Transaction with no conditions other than the labor protective conditions in *New York Dock Ry.—Control—Brooklyn E. Dist. Term. (New York Dock)*, 360 I.C.C. 60

³ It is worth noting that NSR did not even tie its condition requests directly to approval of the CSXT Transaction. NSR stated that, “[a]bsent the conditions described above, Norfolk Southern asks the Board to deny the CPKC Application” – not the CSXT Transaction. (NSR Comments 66, Dec. 29, 2023.)

(1979), as modified by *Wilmington Term. R.R., Inc.—Pur. & Lease—CSX Transp., Inc. (Wilmington Terminal)*, 6 I.C.C.2d 799 (1990), on the CSXT Transaction for the benefit of CSXT and MNBR employees, and the conditions that CSXT has specifically requested that the Board impose upon approval.

RESPONSE TO NSR COMMENTS

NSR's lengthy comments were filed in both the proceeding addressing the CSXT Transaction and the proceeding involving the CPKC Transaction. However, the bulk of those comments address either procedural issues that have already been resolved or operating issues focused on the Western Line. NSR said very little about the merits of the CSXT Transaction. Indeed, there was only a single paragraph in the NSR comments on the merits of the CSXT Transaction requesting clarification of CSXT's open gateway commitment at Selma.

Nevertheless, NSR asked the Board to impose a number of conditions, set out at pages 61-64 of its comments. NSR supported its request for these conditions with a lengthy and often inaccurate discussion of the CSXT Transaction and CSXT's dealings with CPKC. We respond to the condition requests that relate to the CSXT Transaction below to clarify the record and to explain why they are inappropriate, inaccurate, and unjustified. For the reasons set out below, the Board should deny the conditions requested by NSR and approve the CSXT Transaction with the appropriate labor protective conditions and the conditions that CSXT has already requested be imposed.

1. NSR Conditions 1 and 2: Consolidate the dockets and records and issue a single, consolidated decision.

A major focus of NSR's comments is its failed and ultimately meaningless attempt to impose procedural roadblocks to the implementation of the CSXT Transaction by having the Board treat the CSXT and CPKC Transactions as a

single “coordinated transaction” that “will clearly have a significant adverse impact on competition unless conditioned as requested.” (NSR Comments 5-6.) NSR refers to the CSXT Transaction, the CPKC Transaction, and the related proceedings collectively as the “Growth Transaction.”⁴ (*Id.* at 5 n.5.) NSR argues that the “Growth Transaction” should have been the subject of a single consolidated proceeding in which CSXT and CPKC sought authority for a { [REDACTED] }, rather than separate proceedings addressing the separate agreements by CSXT to reacquire the Eastern Line at the termination of the current lease and by CPKC to acquire the Western Line.

The Board has already rejected NSR’s procedural argument, for good reason. CSXT seeks authorization only for the CSXT Transaction, and CSXT has explained why the Board should approve the CSXT Transaction, which is a simple reacquisition of the Assets of a line at the termination of a Board-authorized lease of Real Property, consistent with the terms of that lease. *See M & B R.R., L.L.C.—Acquis. & Oper. Exemption—CSX Transp., Inc.*, FD 34423 (STB served Nov. 20, 2003). Nevertheless, CSXT has made it clear that it does not object to the Board’s consideration of the combined effect of approval of the CSXT Transaction and the CPKC Transaction. Indeed, CSXT has provided the Board with all of the information needed to assess those combined effects and to show why the effect of both transactions will be strongly pro-competitive.

While CSXT does not object to the Board considering the combined effects of the two transactions, NSR is wrong to claim that the Board should treat the CSXT and CPKC Transactions as essentially a single “Growth Transaction.” As the Board

⁴ CSXT is hopeful that the CSXT Transaction, combined with the CPKC Transaction, will result in rail traffic growth. Therefore, CSXT does not challenge NSR’s claim that these two transactions could result in “growth.” The problem is that the transactions do not constitute a single transaction.

has already found, the two transactions are distinct, the circumstances giving rise to the two transactions are different, and separate authority is required to pursue the two transactions. The “consolidation” condition that NSR proposes, which as CSXT explains appears to be designed simply to produce delay, should be denied.

1.1. NSR mischaracterizes the two transactions by contending that they are a single transaction.

NSR’s characterization of the transactions is misleading and inaccurate, and its requested consolidation condition is inappropriate and unnecessary. The CSXT Transaction and the CPKC Transaction are separate transactions that require separate Board authority. The proposed CSXT Transaction involves a simple reacquisition of a line’s track assets upon expiration of an existing lease. For the past 20 years, MNBR has operated the Eastern Line pursuant to a lease of the land from CSXT and under the authority that was granted by the Board in 2003. *See id.* Since 2003, CSXT has continued to own the Real Property underlying the line, and MNBR has owned the Assets, leased the Real Property, and operated the Eastern Line.

The terms of the lease provide that CSXT may reacquire the Assets from MNBR upon expiration of the lease, thereby reintegrating all of the relevant property interests in the Eastern Line. The Asset reacquisition has triggered the need for CSXT to now obtain affirmative acquisition and operating authority from the Board prior to the reacquisition. Thus, CSXT and MNBR agreed that CSXT would seek authorization from the Board for the CSXT Transaction. CSXT and MNBR began discussions regarding the CSXT Transaction in order to plan for the orderly expiration of the MNBR lease, prior to any discussions between CSXT and CPKC regarding CPKC’s interest in the Western Line. As CSXT has repeatedly

stated, the CSXT Transaction could proceed regardless of whether the CPKC Transaction occurs.

If the Board does not approve the CSXT Application, the Eastern Line lease could not terminate at the end of its term. This absurd result, which has nothing to do with CPKC's separate acquisition of a connecting line, would leave CSXT as the owner of the Real Property underlying the Eastern Line but with MNBR as the owner of the Assets and with no obvious ability for CSXT to end MNBR's operation of the line. Failing to approve the CSXT Application would mean that railroad parties to a lease could not rely on the Board's authorization of the lease in order to plan for the natural termination of the commercial relationship.

1.2. The Board's treatment of the CSXT Application and the CPKC Application as separate matters is appropriate.

The CSXT Transaction and the CPKC Transaction are two separate transactions governed by different agreements between different parties. CSXT and GWI have entered into a Transaction Agreement related to the CSXT Transaction. (See Appl., Ex. 2.) Separately, CPKC indicated in its Application that it and GWI will enter into a Transaction Agreement related to the CPKC Transaction. (See CPKC Appl., Ex. 2, FD 36732, Oct. 6, 2023.) The compensation terms under each transaction agreement differ significantly, including terms concerning the {{ [REDACTED] [REDACTED] }}, which are a key issue raised in NSR's comments on the CPKC Transaction. The CSXT Transaction and the CPKC Transaction each involve different commercial and operating issues. As discussed above, the circumstances giving rise to the two transactions differ. The CSXT Transaction involves the reacquisition of the Assets comprising a line where CSXT already owns the real property, following expiration of an STB-authorized lease. The CPKC Transaction involves acquisition of an existing line where CPKC does not have any prior

ownership interest. Most important, the CSXT Transaction could proceed regardless of whether the CPKC Transaction occurs.

Notwithstanding these obvious differences between the two transactions, NSR filed a combined Notice of Intent to Participate and Request to Hold CPKC/CSXT Transcon Corridor Transaction in Abeyance on October 25, 2023, shortly after the CSXT Application and the CPKC Application were separately filed on October 6, 2023, arguing that the Board should consolidate the two proceedings and order CSXT and CPKC to file a revised, “unified” application. (NSR Notice of Intent 16, Oct. 25, 2023.) CSXT filed a response on October 27, 2023, indicating that while CSXT did not believe it was necessary or appropriate to embrace the two sets of transactions into a single proceeding, even if the Board did embrace the two sets of proceedings, NSR’s request for a consolidated application would be inappropriate and unnecessary. (CSXT’s Response to the NSR Notice of Intent 6 n.3, Oct. 27, 2023.)

As CSXT explained, CSXT took the position in the Application that the Board should examine the CSXT Transaction and the CSXT Related Transactions independently of the CPKC Transaction and the CPKC Related Transactions, given that the CSXT Transaction could proceed regardless of whether the CPKC Transaction occurs. Nevertheless, given the unique posture of the transactions, CSXT understood that the Board would likely want to consider the combined effect of the two transactions and CSXT therefore included in its Application (and Supplemental Information filing) information regarding the overall effects on railroad operations and competition of both sets of transactions, in the event that all of the transactions are implemented. (*See, e.g.*, Appl. APP-14 to 15.)

The Board considered these arguments and decided to accept the separate CSXT and CPKC applications. Decision No. 1, FD 36727, served Nov. 3, 2023; Decision No. 1, FD 36732, served Nov. 3, 2023. The Board stated that it would not

order the parties to submit a consolidated application. Decision No. 1, FD 36727, slip op. at 9-10 n.11. However, the Board declined to evaluate the CSXT Transaction wholly independently of the CPKC Transaction, instead indicating that the Board will consider “the effects that flow from” the CPKC Transaction when evaluating the CSXT Transaction. *Id.*, slip op. at 4.

No party, including NSR, appealed or sought reconsideration of the Board’s decision during the appropriate time period for such actions. NSR has made no showing of new evidence, changed circumstances, or material error in challenging the Board’s decisions accepting the separate applications. *See* 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3(b). Even assuming the Board was inclined to entertain an untimely reconsideration motion, there are no valid grounds for reversing the decision to treat the matters as separate proceedings and to not consolidate them into a single proceeding. As CSXT has previously explained, CSXT does not oppose the Board considering the effects of both sets of transactions when deciding whether to approve the CSXT Application. And CSXT also would not oppose the Board issuing a single decision approving each of the CSXT and CPKC applications. But a formal consolidation of the two matters is not necessary or appropriate at this point.

1.3. The CSXT Application is complete and no further data is required.

NSR’s apparent objective now in seeking a “consolidation” condition is to create delay in the STB review process by requiring the submission of additional data to support a consolidated application. NSR expressly asks that in ordering consolidation, “the Board should order Applicants to provide additional information and analysis as is reasonable and necessary for the Board to fully understand the impacts of the Growth Transaction on rail operations outside of the Western and

Eastern lines. . . .” (NSR Comments 61.) This request should be denied as no further information is needed by the Board to review the merits of the CSXT Transaction.

CSXT submitted a complete Application pursuant to the Board’s regulations. Recognizing the unique posture of these transactions, CSXT included information regarding the overall effects on railroad operations and competition of both sets of transactions, in the event that all of these transactions are implemented. CSXT stated that it was providing the Board with this information regarding these aggregate effects in the event that the Board decided to consider them in analyzing the proposed CSXT Transaction. (Appl. APP-15.)

In addition, NSR stated that CSXT did not attempt to quantify “the economic benefits of CSXT implementing the Eastern Line transaction without the Western Line transaction taking place. . . .” (NSR Comments 21.) CSXT stated that it was not able to quantify the benefits of the CSXT Transaction standing alone in terms of cost savings or increases in net revenue at the time of the Application, but CSXT described operating economies throughout the Application and Operating Plan. (*See* Appl. APP-30, 194.) The improvements that CSXT will make to the Eastern Line will clearly have benefits for the rail network, but the exact value of these benefits is not possible to quantify at this time. Nothing further would be helpful or relevant to the Board’s decision on the merits of the CSXT Application.

In Decision No. 1, the Board found that CSXT’s Application is complete and ordered CSXT to submit certain supplemental information. Decision No. 1, FD 36727, slip op. at 1, 9-11. CSXT has submitted the supplemental information requested by the Board and has responded to OEA’s information requests. CSXT will continue to respond to any additional information requests to ensure that OEA has the necessary information to complete its environmental review of the proposed transaction. No Board order is required to cause CSXT to do so.

NSR argues that the Board treating the two proceedings separately “would result in decisions and records not consistent with the [Administrative Procedure Act (“APA”)] and would significantly impact relief that otherwise should be available for any subsequent actions that may arise under the APA.” (NSR Comments 19.) Practical considerations under the APA do not justify the tortured procedural changes that NSR advocates. The Board and its staff are more than capable of reaching a decision on each application, whether in the context of a single decision or decisions in the two separate matters, that complies with the Board’s own rules and the APA.

1.4. The { [REDACTED] } did not require STB authority.

To further support its argument that the Board should conduct a single proceeding covering what NSR calls the “Growth Transaction,” NSR argues that the { [REDACTED] } “were part of a carefully structured deal” and applicants should have presented the { [REDACTED] } to the Board for its review and approval. (*Id.* at 9-11.) NSR asserts that { [REDACTED] }⁵ (*Id.* at 18.)

The { [REDACTED] } did not have any regulatory significance { [REDACTED] }, and it does not have any regulatory significance today. This { [REDACTED] } does not require STB authority, and the terms of that { [REDACTED] } have no regulatory significance to the authority that CSXT and CPKC seek for their separate transactions. The { [REDACTED] }

⁵ While NSR repeatedly states that { [REDACTED] } (See NSR Comments 18.)

[REDACTED]

Under 49 U.S.C. § 11323(a), certain transactions involving rail carriers providing transportation subject to the jurisdiction of the Board may only be carried out with the approval and authorization of the Board. Railroads regularly interact and reach agreements that require no regulatory authority under § 11323(a). The { [REDACTED] } is just such a non-jurisdictional interaction. The statute provides that “[t]he following transactions . . . may be carried out only with the approval and authorization of the Board.” 49 U.S.C. § 11323(a). The { [REDACTED] } does not fall within any of the classes of transactions listed in § 11323(a), including § 11323(a)(2) (“A purchase, lease, or contract to operate property of another rail carrier by any number of rail carriers.”). Neither { [REDACTED] } will “purchase, lease, or contract to operate property of another rail carrier” through { [REDACTED] }. The purchase of MNBR property is governed by the separate agreements between CSXT and GWI, and CPKC and GWI. Since the { [REDACTED] } clearly falls outside the statutory classes of transactions subject to STB jurisdiction under § 11323(a), Board authority is not required.

Instead, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED] } Indeed, STB authority was later sought by CSXT, CPKC, AGR, and MNBR { [REDACTED]

[REDACTED] }

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } on its own, is therefore

irrelevant to the STB's regulatory authority.

Indeed, NSR's theory makes no sense. If, as NSR argues, the { [REDACTED]

[REDACTED] } required STB approval, the parties could have { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } The practical absurdity of this result underscores that

NSR raises this issue merely to delay the CSXT Transaction and CPKC Transaction from occurring.

NSR's reliance on the *Conrail* transaction to support a formal consolidation is also misplaced. NSR cites *Conrail* in support of its argument that the { [REDACTED]

[REDACTED]

[REDACTED] } (NSR

Comments 18, 18 n.42, citing *CSX Corp. & CSX Transp., Inc., Norfolk S. Corp. & Norfolk S. Ry. Co.—Control & Operating Leases/Agreements—Conrail Inc. &*

Consolidated Rail Corp. (Conrail), FD 33388 (STB served July 23, 1998.)) But the set of transactions at issue here do not possess the features that required the two Class Is to seek approval in *Conrail*. In *Conrail*, the primary application involved “the joint acquisition of control by CSX and NS of CRR and its subsidiaries (the Control Transaction) **and** the division between CSX and NS of the operation and use of Conrail’s assets (the Division).” *Conrail*, FD 33388, slip op. at 219 (emphasis added). The parties there sought joint control authority, and the transaction agreement submitted to the Board set out the proposed terms of that joint control. The parties here are not seeking joint control authority, as in *Conrail*. Neither CSXT nor CPKC seek to acquire control of MNBR. Instead, the proposed CSXT Transaction and CPKC Transaction are two separate transactions governed by different agreements that are seeking ownership of two separate parts of MNBR.

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

For this reason, NSR’s speculation that the CSXT and CPKC Transactions are part of a larger unified commercial arrangement between CSXT and CPKC involving future traffic movements is flat wrong. The { [REDACTED]
[REDACTED] } and there is no other commercial agreement between CSXT and CPKC regarding future traffic arrangements on the lines at issue. NSR’s speculation about future traffic moving across the Eastern and Western Lines, such as the “interesting possibility” that a new Hyundai auto plant may seek to move traffic through an efficient Myrtlewood route, does not support treatment of the CSXT and CPKC Transactions as a single transaction. (See NSR Comments 16.) There is simply no commercial agreement relating to such future traffic movements that would justify NSR’s proposed “consolidation” condition.

2. NSR Condition 3: Determine that the Transaction is “significant.”

NSR’s next requested condition is for the Board to determine that the “Growth Transaction” is a “significant” transaction under the Board’s rules. (*Id.* at 31, 61.) The predicate for this requested condition, of course, is that the Board will accept NSR’s request to treat the CSXT and CPKC Transactions as a single “Growth Transaction,” which should be rejected for the reasons set out above. But independent of the flaws in NSR’s efforts to have the Board treat the CSXT and CPKC Transactions together as a single transaction, NSR’s request to reclassify the transactions is not justified.

The Board appropriately found in Decision No. 1 that the proposed CSXT Transaction is a “minor” transaction. That finding was a “final action” of the Board, and NSR did not appeal or seek reconsideration of that decision. The Board should reject NSR’s belated attempt to do so now.

The Board’s organic statute and its own rules set out a well-established path for processing and classifying applications for Board authority under 49 U.S.C. §§ 11323-25, such as the CSXT Application. When a party files an application purporting to request authority for a “minor” transaction, the Board will typically take one of two potential actions: (1) accept the application, find that the transaction is “minor” based on a preliminary merits determination and publish notice of the application in the Federal Register;⁶ or (2) reject the application, determine that the transaction at issue is “significant,” treat the application as the required prefiling notification for “significant” transactions, and allow the applicant

⁶ See, e.g., *Soo Line Corp.—Control—Cent. Me. & Quebec Ry. US Inc.*, FD 36368 (STB served Jan. 16, 2020); *Bessemer & Lake Erie R.R. Co.—Acquisition & Operation—Certain Rail Lines of CSX Transp., Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence, & Franklin Counties, N.Y.*, FD 36347 (STB served Nov. 8, 2019); *Norfolk S. Ry. Co.—Acquisition & Operation—Certain Rail Lines of the Del. & Hudson Ry. Co., Inc.*, FD 35873 (STB served Dec. 16, 2014); *Genesee & Wyo.—Control—RailAmerica, Inc., et al.*, FD 35654 (STB served Sept. 5, 2012).

to refile with the information required by the Board's rules for "significant" applications.⁷

In Decision No. 1, the Board took the first path. The Board appropriately found that the proposed CSXT Transaction is a "minor" transaction "because it appears from the face of the Application that the efficiency and other public interest benefits would clearly outweigh the potential anticompetitive effects of the transaction." Decision No. 1, FD 36727, slip op. at 8. The Board was right to do so, because CSXT demonstrated in its Application that there are no potential anticompetitive effects of the transaction. While the Board's merits analysis in these types of initial decisions is always "preliminary," the Board's finding that the CSXT Transaction is a "minor" transaction was a final action and not preliminary in any way. The Board did not leave open the possibility that it could later reclassify the transaction as "significant," and it should not do so in response to NSR's comments.

As the Board has done in prior decisions in which it accepts "minor" applications, the Board indicated that it made a "preliminary determination that the Proposed Transaction's anticipated contribution to the public interest in meeting significant transportation needs clearly outweighs any potential anticompetitive effects." *Id.*, slip op. at 1. The preliminary nature of this determination relates not to whether the transaction is "minor" or "significant," but instead as to the transportation merits of the transaction. *See id.*, slip op. at 9 ("[A]fter the record is fully developed, the Board will conduct a careful review before making a final determination as to whether the Proposed Transaction would substantially lessen competition, create a monopoly, or restrain trade, and whether

⁷ See, e.g., *CSX Corp. & CSX Transp., Inc.—Control & Merger—Pan Am Systems, Inc. (Pan Am)*, FD 36472, slip op. at 2, 11 (STB served Mar. 25, 2021); *Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R.*, FD 35081, slip op. at 1, 7 (STB served Nov. 2, 2007).

any anticompetitive effects would be outweighed by the public interest.”). As noted previously, NSR has raised no concerns or issues about the merits of the CSXT Transaction that would change the Board’s preliminary determination that there are no adverse competitive impacts associated with the CSXT Transaction. There is no reason or justification for seeking to reclassify the transaction when the evidence clearly directs approval of the transaction.

3. NSR Condition 7: Participate in Board-sponsored mediation.⁸

NSR states that it is “amenable to Board-sponsored mediation among [NSR], CPKC, [GWI], and CSXT to allow for a consensus on the infrastructure projects to be constructed, the cost allocation of that construction, and operational improvements in and through Meridian to the benefit of shippers.” (NSR Comments 7.) NSR specifically requests that, “[i]f CPKC declines to participate in Board-sponsored mediation or such mediation is unsuccessful, the Board should condition the approval of the CPKC Transaction or the Growth Transaction on CPKC’s agreement to Items 4 through 6 [of the requested conditions], subject to the Board’s determination of a reasonable cost allocation between CPKC and [NSR] for the implementation of such projects and practices.” (*Id.* at 63-64.)

NSR’s request is inappropriate and unnecessary. Under the Board’s rules at 49 C.F.R. § 1109.1, “[p]arties may seek to resolve a dispute brought before the Board using the Board’s mediation procedures. These procedures **shall not be available** in a regulatory proceeding to obtain the grant, denial, stay or revocation of a request for construction, abandonment, purchase, trackage rights, merger, pooling authority or exemption related to such matters” (emphasis added). The Board’s rules expressly state that mediation procedures are not available in

⁸ NSR’s conditions 4, 5 and 6 dealing exclusively with the CPKC Transaction are not addressed in CSXT’s Response.

regulatory proceeding seeking purchase authority. NSR does not cite any Board authority or precedent to support its request for Board-sponsored mediation. Instead, NSR simply states that it “waives any application of [Section 1109.1], to the extent necessary for the Board to order such mediation.” (NSR Comments 63 n.168.)

Furthermore, the matters that NSR suggests should be addressed in mediation, including “the infrastructure projects to be constructed, the cost allocation of that construction, and operational improvements in and through Meridian” do not involve CSXT. (*Id.* at 7.) The Eastern Line extends from Burkeville, AL to Myrtlewood, AL. It does not reach Meridian. CSXT would have nothing to say about these operational issues.

4. NSR Condition 8: Establish Board oversight.

NSR requests that “the Board should impose an oversight period of a minimum of five years,” during which CPKC must report information to the Board related to the volume of new or diverted traffic moving through the Meridian Terminal and any service reliability issues resulting from traffic congestion or delays. (*Id.* at 64.) NSR further states that, “[d]uring this oversight period, the Board should retain authority to require infrastructure projects and operating practices, and to allocate any related cost-sharing obligations, for the purpose of ameliorating service reliability issues arising from the increases in traffic at Meridian.” (*Id.*)

There is no need for an oversight period in the CSXT proceeding. CSXT has demonstrated that the CSXT Transaction, standing alone or considered with the CPKC Transaction and all related transactions, would be procompetitive and serve the public interest. The CSXT Transaction will simply shift the location of the interchange between MNBR and CSXT to Myrtlewood. There are no 2-to-1 shippers.

Shippers will lose no competitive options they have today. The issues that NSR suggests the Board retain authority over during the oversight period do not involve CSXT. Since there is nothing to oversee in the CSXT proceeding, there is no basis for an oversight period in the CSXT Transaction.

5. NSR Condition 9: Clarify CSXT's Selma open gateway commitment.

As noted previously, NSR's comments contain virtually no discussion of the only substantive issue relevant to the statutory standard governing the Board's review and approval of the CSXT Transaction – the competitive effects of CSXT's reacquisition of the Eastern Line. NSR's analysis of the competitive effects of the CSXT Transaction is contained in a single paragraph in NSR's comments (at pages 59-60), and a similar lone paragraph in NSR's verified statement of Mr. McClellan (at page 108). That discussion deals exclusively with Selma, where the Eastern Line connects with NSR. In fact, it does not contain any analysis of competitive effects but simply states that "Norfolk Southern believes that CSXT's commitment to keeping Selma as an open gateway must be clarified." (*Id.* at 59.) As explained below, no clarification is needed because the commitment that CSXT has already made, which CSXT is asking the STB to impose as a condition to approval of the Transaction, is more than adequate to ensure the preservation of competition at the Selma Gateway.

CSXT explained in the Application that the east-west Eastern Line connects with an NSR north-south line at Selma. That connection creates a physical interchange with NSR, but that interchange location is very rarely used. As explained by CSXT's economist, Dr. Reishus, {{ [REDACTED] }}
[REDACTED]
[REDACTED] }} (Appl., V.S. Reishus 14.)

Dr. Reishus explained that when CSXT reacquires operation of the Eastern Line, CSXT will not have an economic incentive to restrict access to NSR at the Selma interchange by shippers on the Eastern Line. As Dr. Reishus explained, standard economic analysis indicates that “CSXT has the incentive to use the NSR gateway for interchange traffic if that represents an economically more efficient result for the Eastern Line shippers.” (*Id.* at 13.) Nevertheless, to ensure that shippers on the Eastern Line will continue to have the option of moving traffic to NSR at Selma (an option they do not use today for substantial traffic), CSXT explicitly made two commitments.

First, CSXT’s Senior Vice President, Sales & Marketing, Arthur Adams, Jr., stated that “CSXT is committing to keeping the gateway with NSR at Selma open on commercially reasonable terms, and is asking the STB to impose this commitment as a condition to approval of the CSXT Transaction.” (Appl., V.S. Adams 13.) Second, with respect to {{ [REDACTED] }} “that CSXT will continue to provide service to NSR at Selma at current rates, subject to reasonable cost escalation, for five years. Beyond that time, CSXT is committing to maintain an open gateway at Selma for movement to NSR on commercially reasonable terms, as noted above.” (*Id.* at 14.)

NSR seeks “clarification” of CSXT’s open gateway commitment, the first of these commitments. In support of its clarification request, NSR points out that “service is of the utmost importance in fulfilling the rail transportation needs of shippers.” (NSR Comments 60.) Based on the importance of service, NSR specifically requests that “CSXT must be ordered not to do anything either physically or financially to take away the competitive option that exists today at Selma.” (*Id.* at 64.)

Such an order by the STB is not necessary. CSXT's commitment to keep Selma open on commercially reasonable terms is not limited to commercially reasonable *financial* terms, but includes a commitment to keep the gateway open on commercially reasonable *operating* terms. In *Pan Am*, CSXT explained that its commitment to keep gateways open meant that CSXT was “not going to do anything either physically or financially that is going to take away a competitive option that exists today.” (*Pan Am*, Hr’g Tr. 168:19-22, FD 36472, Jan. 13, 2022.) Financial terms are important, but they are not the only terms covered by an open gateway commitment. Subsequently, in *Canadian Pac. Ry.—Control—Kan. City S. (CP/KCS)*, FD 36500 (STB served Mar. 15, 2023), the STB recognized that an open gateway commitment is not limited to maintaining commercially reasonable rates, but includes operating-related terms. Accordingly, the STB “clarifie[d] that the condition to keep gateways open on commercially reasonable terms applies both financially and operationally (physically).” *Id.*, slip op. at 71.

The STB therefore does not need to clarify that the scope of CSXT's commitment includes operating terms – CSXT's commitment to keep the Selma gateway open on commercially reasonable terms already includes such a commitment. But NSR then goes even farther and asks the STB to order CSXT “to provide all shippers, whether in existence today or in the future, and regardless of their physical locations, the same level of frequency and reliable service that is available to shippers today.” (NSR Comments 64.) Such a prescriptive and inflexible order is completely unwarranted. In *CP/KCS*, a “major” transaction that drew much more significant and widespread scrutiny of vertical competitive issues, the STB expressly rejected, for good reason, such an intrusive approach to open gateway commitments. The STB explained that:

[T]he Board will not impose a formulaic principle or attempt to provide a specific definition of “commercial reasonableness” under the open gateway conditions imposed in this decision. Rather, a more flexible approach is desirable because it leaves to the combined carrier and its customers—the parties with the best understanding of their respective market realities and business needs—responsibility for reaching agreement on “commercially reasonable terms” for interline routes and open gateways in the first instance, rather than having the Board attempt to supply a single definition in advance.

CP/KCS, FD 36500, slip op. at 74.

There is even less reason to consider a prescriptive approach to defining CSXT’s open gateway commitment here, where there is {{ [REDACTED] [REDACTED] }} and where no commenting party – railroad, shipper or other – has presented any reason for concern that access to NSR will be restricted over the Selma Gateway. In short, the STB should impose the open gateway commitment that CSXT has already made as a condition to its approval of the CSXT Transaction but it should make no further order or impose no further condition regarding the Selma Gateway.

6. NSR Condition 10: Adherence to all representations on the record.

NSR requests that “the Board should impose a condition requiring Applicants to adhere to all of the representations made on the record during the course of the Growth Transaction proceeding.” (NSR Comments 64.)

CSXT expects to be held to specific commitments it has made on the record in this proceeding. CSXT does not oppose the Board imposing as a condition to its approval of the CSXT Transaction the requirement that CSXT adhere to the representations that it has made in the course of this proceeding.

RESPONSE TO BRS COMMENTS

BRS states that it does not oppose the CSXT Transaction but highlights certain “considerations bound to transitioning a Class III railroad to a Class I.” (BRS Comments 1, Dec. 11, 2023.) BRS suggests that CSXT should provide “a comprehensive strategy outlining maintenance protocols and an adequate workforce.” (*Id.*)

CSXT has submitted all information required for a minor transaction, including information related to planned maintenance and labor. With respect to maintenance, CSXT stated that, based on an initial review of the facilities, CSXT plans to make certain improvements to upgrade the Eastern Line to allow for 25 mph speeds (FRA Class II track standards) across a substantial portion of the Eastern Line, including improvements related to railroad crossing signals, highway warning devices, defect detectors, communications, and automated equipment identifiers. (CSXT’s Supplemental Information 25, Nov. 21, 2023.)

With respect to labor, the effects of the CSXT Transaction upon employees are described in detail in the Application. (*See* Appl. APP-32 to 33, APP-43 to 44.) CSXT employees will assume the responsibility for maintaining, dispatching, and operating CSXT trains over the Eastern Line. To the extent necessary, CSXT will hire additional employees to maintain, operate, and dispatch the Eastern Line. CSXT has requested that the Board impose the labor protective conditions in *New York Dock*, as modified by *Wilmington Terminal*, on the CSXT Transaction for the benefit of CSXT and MNBR employees. (*Id.* at APP-33.)

CSXT appreciates the issues raised in BRS’s comments. While CSXT does not agree that any additional information is required, CSXT emphasizes that it expects to treat signals on the Eastern Line much as it does with the rest of the CSXT system, and that it expects to provide sufficient employees as necessary to maintain, operate and dispatch the Eastern Line.

CONCLUSION

For the reasons set out above, CSXT requests that the Board approve the CSXT Transaction with no conditions other than the labor protective conditions in *New York Dock*, as modified by *Wilmington Terminal*, on the CSXT Transaction for the benefit of CSXT and MNBR employees, and the conditions that CSXT has specifically requested that the Board impose upon approval.

Respectfully submitted,

/s/ Peter W. Denton

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Dated: January 26, 2024

VERIFICATION

I, Steven C. Armbrust, declare under penalty of perjury that the facts set out in this filing are true and correct. Further, I certify that I am qualified and authorized to file this Verification. Executed on January 26, 2024.

/s/ Steven C. Armbrust

Steven C. Armbrust
Assistant General Counsel
CSX Transportation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have caused this CSXT's Response to Comments and Requests For Conditions and Rebuttal in Support of Application in Docket No. FD 36727 to be served electronically or by first class mail, postage pre-paid, on the Secretary of Transportation, the Attorney General of the United States, Administrative Law Judge Thomas McCarthy, and all parties of record in this proceeding.

/s/ Sally Mordi

Sally Mordi
Attorney for CSX Transportation, Inc.

January 26, 2024