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SERVICE DATE – MARCH 15, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36500¹

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY, INC.

—CONTROL—

KANSAS CITY SOUTHERN; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; GATEWAY EASTERN RAILWAY COMPANY; AND THE TEXAS MEXICAN RAILWAY COMPANY

Decision No. 35*

Digest:² The Board approves, with certain conditions, the acquisition of control by Canadian Pacific Railway Limited (Canadian Pacific), through its indirect, wholly owned subsidiary, Cygnus Merger Sub 2 Corporation, of Kansas City Southern, and through it, of The Kansas City Southern Railway Company (KCSR) and its railroad affiliates, and for the resulting common control by Canadian Pacific of its U.S. railroad subsidiaries, and KCSR and its railroad affiliates.

Decided: March 14, 2023

* The table of contents has been revised to include the separate expressions of Board Members Hedlund and Primus.

¹ This decision embraces: Docket No. FD 36500 (Sub-No. 1), Illinois Central Railroad—Acquisition of a Line of Railroad Between Kansas City, Mo., & Springfield & East St. Louis, Ill.—Kansas City Southern Railway; Docket No. FD 36500 (Sub-No. 2), Illinois Central Railroad—Trackage Rights Between Airline Junction, Mo., & Grandview, Mo.—Kansas City Southern Railway; Docket No. FD 36500 (Sub-No. 3), Canadian National Railway—Control—Gateway Eastern Railway; Docket No. FD 36500 (Sub-No. 4), Illinois Central Railroad—Assignment of KCS Trackage Rights Between Rock Creek Junction, Mo., & Airline Junction, Mo.—Union Pacific Railroad; and Docket No. FD 36500 (Sub-No. 5), Norfolk Southern Railway—Trackage Rights—Kansas City Southern.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

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SUMMARY

This decision authorizes the combination of the Canadian Pacific Railway system with the Kansas City Southern Railway system.³ CP and KCS are Class I railroads, but individually they are far smaller than any of the other five Class I railroads with which they compete for business. Even after they merge, the combined system—to be known as Canadian Pacific Kansas City (CPKC)—will continue to be the smallest Class I railroad. This merger will create the first railroad providing single-line service spanning Canada, the United States, and Mexico. Among many other new single-line options, this new direct service will facilitate the flow of grain from the Midwest to the Gulf Coast and Mexico, the movement of intermodal goods between Dallas, Tex., and Chicago, Ill., and the trade in automotive parts, finished vehicles, and other containerized mixed goods between the United States and Mexico.

The Board expects that this new single-line service will foster the growth of rail traffic, shifting approximately 64,000 truckloads annually from North America’s roads to rail, and will support investment in infrastructure, service quality, and safety. The transaction is also expected to drive employment growth across the CPKC system, adding over 800 new union-represented operating positions in the United States.

Of additional importance, the merger will foster new National Railroad Passenger Corporation (Amtrak) passenger rail opportunities, as Applicants have committed to support Amtrak’s existing plans for expanded service on the new railroad’s lines. These commitments, along with CP’s strong record as an Amtrak host railroad, have won Amtrak’s endorsement of the merger.

This transaction is “end-to-end,” meaning that there are little to no track redundancies or overlapping routes. If consummated, it will reduce travel time for traffic moving over the single line service; it should result in increased incentives for investment; and it will eliminate the need for the two now-separate CP and KCS systems to interchange traffic moving from one system to the other. This will enhance efficiency, which in turn will enable the new CPKC system to better compete for traffic with the other larger Class I carriers. It is thus not surprising that there is substantial (though not unanimous) shipper support for this transaction—the Board has received more than 450 support letters. It is also not surprising that the other Class I railroads seek

³ As discussed below, the application seeking merger authorization is filed by Canadian Pacific Railway Limited (Canadian Pacific), Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries, Soo Line Railroad Company (Soo), Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation (DM&E), and Delaware & Hudson Railway Company, Inc. (collectively, CP) and Kansas City Southern and its U.S. rail carrier subsidiaries, The Kansas City Southern Railway Company (KCSR), Gateway Eastern Railway Company, and The Texas Mexican Railway Company (Tex Mex) (collectively, KCS) (CP and KCS collectively, Applicants).

conditions and other remedies that appear aimed at protecting their own traffic from competition with CPKC and at limiting the ability of the combined CPKC to meet its potential. Consistent with the Board's policy to protect competition and not competitors, the Board is denying those requests while also ensuring that existing competitive gateway options are preserved.

Even end-to-end mergers, however, can pose competitive risks, and indeed this decision overturns prior agency precedent that did not sufficiently recognize such concerns. To address any potential anticompetitive harm, the Board is imposing numerous conditions designed to protect competition. And with these conditions, the merger should not reduce any shipper's competitive options. The Board establishes a detailed obligation to keep gateways—that is, connection points between the CPKC system and other railroads—open on commercially reasonable terms, thereby preserving efficient routing options via other railroads that were available to shippers before the merger. To help enforce that obligation, the Board will require CPKC to justify in writing, upon customer request, rate increases over a certain level on interline movements subject to the gateway obligation. If disputes arise over whether CPKC's actions are commercially reasonable, CPKC must afford rail customers an arbitration option to resolve disputes, but the Board also will remain available to expeditiously decide gateway-related disputes. In this way, this decision seeks to enable a more efficient and competitive CPKC system, while minimizing CPKC's ability to wield its new market power to the detriment of its shippers.

In addition, the Board has engaged in an extensive and thorough environmental review, culminating with the issuance of the Final Environmental Impact Statement (EIS)—totaling more than 5,000 pages with appendices—on January 27, 2023, the findings of which are adopted in this decision. The Board has also approved important measures designed to mitigate potential environmental impacts of the transaction, such as increased noise.

The Board recognizes that, although most localities would prefer less rather than more train traffic, any traffic that CPKC diverts from trucks and from other railroads will produce more trains traversing areas that are currently served by either CP or KCS. This transaction, however, should ultimately enhance safety and benefit the environment. First, rail transportation is overall safer and better for the environment than transportation by truck. And second, increases in rail traffic in one neighborhood resulting from diversion from another railroad would be offset, at least in part, by a reduction in rail traffic in the neighborhood from which it is diverted. In any event, the thorough environmental review in this proceeding has confirmed that many parties that expressed concerns live in communities that already have substantial train traffic. For example, only eight additional trains per day are expected in the Chicago area, the busiest rail terminal in the nation, which already hosts approximately 1,300 freight, commuter, and Amtrak trains per day.

Although the Federal Railroad Administration (FRA), rather than the Board, is the principal regulator of rail safety, the Board, consistent with the Rail Transportation Policy (RTP), does consider safety in its merger decisions. Here, having considered the Final EIS and the Safety Integration Plan (SIP) Applicants will be following, the Board concludes that this merger will not increase safety risks in any meaningful way beyond whatever level of risk exists from the current daily moves of trains through the communities served by CP and KCS. Indeed,

approval of this transaction may even enhance safety for the nation as a whole. In addition to the inherent safety advantages that will be gained from shifting approximately 64,000 truckloads from our roads to rail, CP has the best safety record of the Class I railroads over the last 15 years, and KCS will adopt many of CP's practices following integration. Thus, any rail traffic diverted to CPKC from other railroads will likely mean traffic moving to a railroad with a better safety record.

To ensure that the expected public benefits from this merger are realized to the fullest extent possible, the Board is establishing an unprecedented seven-year oversight period along with extensive data-reporting requirements. This will enable the Board to closely monitor whether Applicants are in fact preserving efficient interline options for shippers at affected gateways, thus protecting competition. The Board also will be able to issue additional orders later, if necessary, to enforce the required environmental mitigation measures and address capacity and maintain fluidity in Houston, Tex., Chicago, and other congested areas, including preventing potential merger-caused delays and service disruptions of commuter service in the Chicago area.

The Board recognizes that some in the shipping community and among antitrust commentators are not satisfied with the consolidation among Class I railroads that occurred following the Staggers Rail Act of 1980, and the Board itself has done its best to address how the Class I railroads behave today. Indeed, there is an ongoing debate about whether there has already been too much consolidation in the rail industry. Regardless of which side one takes in that debate, the Board is charged by Congress with reviewing the proposed merger in light of the state of the industry as it actually exists. Given the current realities and the limited opportunities to provide meaningful competition for the largest Class I railroads, as outlined above and discussed at length in this decision, the Board concludes that this transaction should improve rather than degrade the performance of the industry. It is for these reasons that the Board approves the merger.

INTRODUCTION

By application filed on October 29, 2021 (Application), Applicants seek Board approval for the acquisition of control by Canadian Pacific⁴ of Kansas City Southern, and through it, of KCSR and its railroad affiliates, and for the resulting common control by Canadian Pacific of its U.S. railroad subsidiaries, and KCSR and its railroad affiliates. This proposal is referred to as the Transaction.⁵

⁴ The acquisition will be completed through Canadian Pacific's indirect, wholly owned subsidiary Cygnus Merger Sub 2 Corporation (Cygnus Merger Sub 2 Corp.).

⁵ While attempting to avoid references to confidential or highly confidential information in Board decisions, the Board reserves the right to rely upon and disclose such information in decisions when necessary. In this case, the Board determined that it could not adequately present its findings with respect to the issues without disclosing certain information.

The CP-KCS Control Transaction. As described in the Application, the Transaction involves all of the U.S. mainline and branch line mileage of the CP and KCS rail systems.⁶ (Appl. 1-31.)⁷ CP's network in Canada extends from the Port of Vancouver on Canada's Pacific Coast to the Port of Montreal and eastern Quebec, up into the Port of Saint John, N.B., via haulage, and to the U.S. industrial centers of Chicago, Detroit, Buffalo, Kansas City, and Minneapolis.⁸ (Am. Operating Plan, para. 13.) In the United States, CP owns rail property in Michigan, Illinois, Minnesota, North Dakota, South Dakota, Wisconsin, Maine, Vermont, Iowa, Missouri, and New York, reaching into the U.S. industrial centers of Chicago, Detroit, Mich., Buffalo, N.Y., Albany, N.Y., Kansas City, Mo., and Minneapolis, Minn. (Appl. 1-29; Am. Operating Plan, para. 13.) CP's principal routes serving the United States extend from six Canada/United States border crossings: North Portal, Sask./Portal, N.D.; Emerson, Man./Noyes, Minn.; Windsor, Ont./Detroit; Buffalo; Rouses Point, N.Y.; and a point near Jackman, Me., on the Quebec/Maine border. CP also operates a short stretch of branch line trackage between Abercorn, Que., and Richford, Vt. (Appl. 1-31 to 1-32.)

The KCS rail network extends in a north-south corridor from Kansas City south to the Pacific Ocean at the Port of Lázaro Cárdenas, Mexico. (Id. at 1-33.) In the United States, KCS owns rail property in Alabama, Arkansas, Illinois, Kansas, Louisiana, Mississippi, Missouri, Oklahoma, Tennessee, and Texas.⁹ (Id. at 1-29.) KCSR's network is centered on Shreveport,

⁶ A full description of CP's and KCS's principal routes, and maps of CP's and KCS's respective systems, are provided in the Application. (See Appl., 1-31 to 1-35; id., Ex. 1, Maps; Am. Operating Plan, paras. 13-64.) Appendix A to this decision contains relevant maps of the CP and KCS systems.

⁷ Citations to the Application and to Applicants' July 13, 2022 "Response to Comments and Requests for Conditions, Opposition to Responsive Applications, and Rebuttal in Support of the Application" (Applicants Rebuttal) refer to the internal page numbers of the highly confidential version of the referenced document, which appear on the bottom right-hand corner of each page. For example, "Appl. 1-31" refers to Application, Volume 1, page 31.

⁸ Applicants state that the Western Corridor, linking Vancouver with Thunder Bay, Ont., is an important part of CP's routes between Vancouver and the U.S. Midwest, and between Vancouver and Eastern Canada. (Am. Operating Plan, para. 14.)

⁹ Within Mexico, KCS's Kansas City Southern de México, S.A. de C.V. (KCSM) operates the Northeast Concession serving Mexico's industrial heartland, with lines radiating from Mexico City to the south as far as Lázaro Cárdenas, to the east serving the Ports of Veracruz, Altamira, and Tampico on the Gulf of Mexico, and extending north to Monterrey, Nuevo Leon, and other industrial points in the State of Nuevo Leon and beyond to the U.S. border gateways of Nuevo Laredo, Nuevo Leon/Laredo, Tex. (where KCSM connects with KCS subsidiary Tex Mex and UP) and Matamoros, Nuevo Leon/Brownsville, Tex. (where KCSM connects with UP). (Appl. 1-33.) BNSF Railway Company (BNSF) has access to the Laredo gateway for movements into and out of Mexico on KCSM via an interchange with Tex Mex at Robstown, Tex. In transactions consummated in 2005, KCS acquired control of Tex Mex, pursuant to authorization granted in Kan. City S.—Control—Kan. City S. Ry., 7 S.T.B. 933 (2004) (KCS-Tex Mex), and separately received clearance from the necessary U.S. and Mexican

La., with lines radiating in five directions. (*Id.* at 1-33.) KCS’s north-south corridor extends from the Mexican border at Laredo, Tex., to Kansas City. (*Id.*) The “Meridian Speedway” line runs east-west through Shreveport, between the Dallas, Tex. area and a connection with Norfolk Southern Railway Company (NSR) at Meridian, Miss.¹⁰ (*Id.* at 1-34.) KCSR operates a secondary line that extends southeast from Shreveport to New Orleans, La. (*Id.*) KCSR also operates the former “Gateway Western” lines extending east from Kansas City to Springfield, Ill., and East St. Louis, Ill., where it connects with the Terminal Railroad Association of St. Louis and other Class I railroads. (*Id.*) KCSR also operates several former “MidSouth” branch lines in Mississippi and Tennessee. (*Id.*)

As set forth in the September 2021 Agreement and Plan of Merger (September 2021 Merger Agreement), Canadian Pacific, through its indirect, wholly owned subsidiary Cygnus Merger Sub 2 Corp., would acquire KCS. (*Id.* at 1-11.) According to the Application, upon receipt of approval by the shareholders of Canadian Pacific and KCS and the satisfaction of other customary closing conditions, Cygnus Merger Sub 2 Corp. would merge with and into KCS (the Merger), with KCS surviving the Merger. (*Id.*) Upon completion of the Merger, holders of KCS’s common stock would become entitled to receive a combination of Canadian Pacific common shares and cash in exchange for their common stock, and holders of KCS’s preferred stock would become entitled to receive cash in exchange for their preferred shares. (*Id.*) Immediately following completion of the Merger, Canadian Pacific would conduct a series of internal transactions that would result in its voting interest in the successor to KCS being placed into a voting trust,¹¹ pending review and approval of the control Transaction by the Board. (*Id.*)

authorities to acquire control of KCSM (then known as TFM, S.V. de C.V., or TFM). See KCS-Tex Mex, 7 S.T.B. at 941-42; (KCS Status Report, Apr. 1, 2005, KCS-Tex Mex, FD 34342 (reporting acquisition of control of TFM).) As discussed below, KCS remains subject to the conditions imposed in the KCS-Tex Mex merger proceeding, and Applicants have represented that the Transaction will not affect KCS’s obligations under an agreement entered into with the National Industrial Transportation League (NITL), for the benefit of shippers, in that proceeding. (See Appl., Vol. 1, V.S. Brooks, para. 42 & Ex. 1 (Agreement Between KCS and NITL in Docket No. FD 34342 (Aug. 1, 2003)).)

¹⁰ Applicants state that the portion of line between Shreveport and Meridian is owned by KCS’s affiliate Meridian Speedway, LLC, in which NSR has a 30% ownership interest, and is operated by KCSR. (Appl. 1-34.)

¹¹ Applicants state that the internal transactions involve a series of steps designed to address matters relating to tax and corporate law, and all of those steps, including the placement of Canadian Pacific’s interest in KCS into a voting trust, would be completed within moments of the completion of the Merger and for practical purposes contemporaneously. Specifically, (a) KCS would merge with and into Cygnus Merger Sub 1 Corporation (Cygnus Merger Sub 1 Corp.), a direct, wholly owned subsidiary of Canadian Pacific, with Cygnus Merger Sub 1 Corp. surviving; (b) Canadian Pacific would contribute its shares in Cygnus Merger Sub 1 Corp. to CPRC, a direct, wholly owned subsidiary of Canadian Pacific; (c) CPRC would contribute its shares in Cygnus Merger Sub 1 Corp. to Cygnus Holding Corp., an indirect, wholly owned subsidiary of Canadian Pacific; (d) CPRC would transfer its shares in Cygnus Holding Corp. to Canadian Holdco, an indirect, wholly owned subsidiary of Canadian Pacific; and (e) Canadian

As a result of the internal transactions, KCS would legally be merged with and into Cygnus Merger Sub 1 Corporation, a wholly owned subsidiary of CP, with Cygnus Merger Sub 1 Corporation surviving. (*Id.*) However, the successor holding company of KCS would continue to own KCS's railroad and other affiliates, and would maintain the same name, governance structure, and other corporate-level attributes of KCS. (*Id.*)

By notice filed December 13, 2021, Applicants notified the Board that CP had acquired all of the voting securities of KCS through a stock and cash transaction, as detailed in their September 2021 Merger Agreement, and had deposited those securities into the independent voting trust formed pursuant to the Voting Trust Agreement approved by the Board.¹² (Applicants Notice 1, Dec. 13, 2021.) Applicants state that, if and when the Board grants the Application, CP accepts any conditions imposed by the Board, and the Board's approval becomes administratively final, then the voting trust would be terminated and Canadian Pacific would assume control of KCS. (Appl. 1-12; see also Applicants Notice, Dec. 13, 2021, Ex. 1, Voting Trust Agreement, para. 9.)

Parties Supporting The CP-KCS Application. The Application has been endorsed by more than 900 parties, including shippers, smaller railroads, ports, public officials, and rail industry suppliers and other stakeholders. (See Appl., Vol. 3, Statements of Shippers, Government Officials and Others in Support of Application.) In addition, the following parties filed comments in support of the Application: U.S. Senators Roy Blunt, Kevin Cramer, John Hoeven, and Jerry Moran; U.S. Representatives Kelly Armstrong, Emanuel Cleaver, and Sam Graves; Amtrak; and the I-20 Corridor Council.

Commenting Parties Other Than Labor. Submissions respecting the Application¹³ have been filed by U.S. Senators Tammy Duckworth, Richard Durbin, Amy Klobuchar, Tina Smith,

Pacific would cause Cygnus Holding Corp. to contribute its entire interest in Cygnus Merger Sub 1 Corp., and thus in KCSR and its railroad affiliates, to the voting trust. (Appl. 1-12.)

¹² By decision served May 6, 2021, the Board found that, subject to certain required modifications described in that decision, Applicants' proposed placement of KCS into a voting trust during the pendency of the control proceeding would comply with the guidelines at 49 C.F.R. part 1013, comport with past agency policy and practice, and sufficiently ensure that the day-to-day management and operation of KCS would not be controlled by Canadian Pacific or anyone affiliated with Canadian Pacific while KCS remains in trust. See Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 5), FD 36500, slip op. at 6 (STB served May 6, 2021); see also Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 8), FD 36500, slip op. at 3-5 (STB served Sept. 30, 2021) (finding that the approval granted in Decision No. 5 for Applicants to use a voting trust applied to the voting trust described in Applicants' amended prefiling notification filed on September 15, 2021); Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 34), FD 36500 (STB served Mar. 3, 2023) (approving appointment of successor trustee).

¹³ Several parties submitted comments prior to Applicants' filing the Application. These submissions have generally been limited to expressions of either support for or opposition to the Transaction, many vis-à-vis Canadian National Railway Company's competing bid to acquire KCS (discussed below).

and Elizabeth Warren; U.S. Representatives Eddie Bernice Johnson, Raja Krishnamoorthi, Betty McCollum, Marie Newman, Ilhan Omar, Katie Porter, and Delia Ramirez, and; BNSF; Canadian National Railway Company (CN); CSX Transportation, Inc. (CSXT); NSR; Union Pacific Railroad Company (UP); Commuter Rail Division of the Regional Transportation Authority (Metra); Hennepin County, Minn. and the Hennepin County Regional Railroad Authority (collectively, Hennepin); Lyondell Chemical Company, Equistar Chemicals, LP, LyondellBasell Acetyls, LLC, and LyondellBasell Advanced Polymers Inc. (collectively, LyondellBasell Parties); National Corn Growers Association (NCGA); Occidental Chemical Corporation and Oxy Vinyls, LP (collectively, Oxy); Evergy Metro, Inc. (Evergy); U.S. Wheat Associates (USWA); the Chlorine Institute (CI); Texas International Terminals Ltd. (TxIT); the American Chemistry Council, the Fertilizer Institute, and the National Industrial Transportation League (collectively, Joint Associations); National Grain and Feed Association (NGFA); National Association of Wheat Growers (NAWG); North Dakota Wheat Commission (NDWC); Private Railcar Food and Beverage Association (PRFBA); Industrial Minerals Association–North America (IMA); Coalition to Stop CPKC (Coalition);¹⁴ J.B. Hunt; Olin Corporation (Olin); Sierra Club, Delta Chapter; U.S. Department of Justice (DOJ); U.S. Department of Agriculture (USDA); FRA; City of Lake Forest, Ill.;¹⁵ Village of Glenview, Ill.; Federal Maritime Commissioners Carl W. Bentzel, Louis E. Sola, and Max M. Vekich (collectively, Commissioners); as well as several state, local, and tribal officials, community organizations, and individual citizens.¹⁶

Labor Parties. Submissions respecting the Application have been filed by various labor parties, including Brotherhood of Locomotive Engineers and Trainmen (BLET); District Lodge 19 of the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM District Lodge 19); Brotherhood of Maintenance of Way Employees Division/IBT, Brotherhood of Railroad Signalmen, International Association of Sheet Metal, Air, Rail and Transportation Workers Mechanical Division, and National Conference of Firemen and Oilers, 32BJ/SEIU (Allied Rail Unions); the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART-TD) and the American Train Dispatchers Association (ATDA); and the International Brotherhood of Electrical Workers, AFL-CIO (IBEW).

Procedural History. By decision served April 21, 2021, the Board provided notice of Applicants' intent to file an application seeking authority for the acquisition of control by

¹⁴ The Coalition's comments and request for conditions were filed by the Village of Itasca, Ill., on behalf of itself and the Village of Bensenville, Ill., City of Wood Dale, Ill., Village of Roselle, Ill., Village of Schaumburg, Ill., Village of Hanover Park, Ill., Village of Bartlett, Ill., City of Elgin, Ill., and DuPage County, Ill.

¹⁵ The City of Lake Forest, Ill., filed on behalf of itself and the Village of Bannockburn, Ill., Village of Deerfield, Ill., Village of Green Oaks, Ill., and Village of Northbrook, Ill.

¹⁶ Some comments were submitted later than the due dates set forth in the procedural schedule. In the absence of objection from any party regarding these late-filed comments, the Board finds that no party would be prejudiced by accepting these comments into the record. Accordingly, in the interest of a more complete record, the Board will accept these comments.

Canadian Pacific of Kansas City Southern, and through it, of KCSR and its railroad affiliates, and for the resulting common control by Canadian Pacific of its U.S. railroad subsidiaries, and KCSR and its railroad affiliates. See Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 3), FD 36500 (STB served Apr. 21, 2021). In Decision No. 3, the Board found the Transaction to be a major transaction under 49 C.F.R. § 1180.2(a), as it is a control transaction involving two or more Class I railroads. Canadian Pacific presently controls Soo Line, a Class I railroad, and proposes to acquire common control of KCSR, also a Class I railroad. Decision No. 3, FD 36500, slip op. at 3.

By decision served April 23, 2021, following a public comment period, the Board found the Transaction to be subject to the regulations set forth at 49 C.F.R. part 1180, subpart A, in effect before July 11, 2001, pursuant to the regulatory waiver in 49 C.F.R. § 1180.0(b) for a merger transaction involving KCS and another Class I railroad as set forth in Major Rail Consolidation Procedures, 5 S.T.B. 539, 553 (2001). See Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 4), FD 36500, slip op. at 2-3 (STB served Apr. 23, 2021).¹⁷

On May 21, 2021, KCS notified the Board that it had terminated the March 2021 Merger Agreement with Canadian Pacific and had entered into a merger agreement with CN. (KCS Letter 1, May 21, 2021.) KCS stated that, accordingly, it was withdrawing as a co-applicant in this proceeding. (Id. at 2.) In an amended notice, filed on September 15, 2021, Applicants stated that KCS was rejoining CP as a co-applicant in this proceeding, as KCS had since terminated its agreement to be acquired by CN. (Applicants Am. Notice 2.)

On October 29, 2021, Applicants submitted their Application seeking approval for the Transaction, which the Board accepted as complete by decision served November 23, 2021. See Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 11), FD 36500 (STB served Nov. 23, 2021). In Decision No. 11, the Board also established a procedural schedule. Id., App. Procedural Schedule. In accordance with the procedural schedule, on February 28, 2022, parties filed comments, protests, and requests for conditions, and responsive applications were filed by CN in Docket No. FD 36500 (Sub-Nos. 1-4) and by NSR in Docket No. FD 36500 (Sub-No. 5).

On March 16, 2022, the Board suspended the procedural schedule and directed Applicants to address an apparent inconsistency in certain data they had submitted. Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 16), FD 36500 et al., slip op. at 3 (STB served Mar. 16, 2022). Thereafter, on April 27, 2022, the Board directed Applicants to amend their Application to further explain and support the analysis underlying the Application's Operating Plan, as well as address technical issues with the workpapers associated with the Operating Plan. Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 17), FD 36500 et al., slip op. at 5-6 (STB served Apr. 27, 2022). The Board provided 20 days following Applicants' submission for other parties to amend comments and/or responsive applications to address the new information in the amended Application and use the modeled traffic density data in the resubmitted

¹⁷ Hereinafter, all citations to 49 C.F.R. part 1180, subpart A, refer to the regulations in effect before July 11, 2001 (available at <https://www.govinfo.gov/content/pkg/CFR-2000-title49-vol6/pdf/CFR-2000-title49-vol6.pdf>), unless otherwise indicated. See Decision No. 4, FD 36500, slip op. at 2.

workpapers. *Id.* at 6-7. The Board also stated that an updated procedural schedule with revised dates would be published upon receipt of Applicants' amended Application and resubmitted workpapers and that the procedural schedule would resume upon the filing of amended comments and responsive applications. *Id.* at 7. Applicants filed their Amended Operating Plan, including amended workpapers, on May 13, 2022, and an errata on May 20, 2022, to correct errors in their Amended Operating Plan.

By decision served May 27, 2022, an amended procedural schedule was issued, under which amended comments and responsive applications were due by June 9, 2022; responses to comments, responses to responsive applications, and the rebuttal in support of the Application were due by July 12, 2022; rebuttals in support of responsive applications were due by August 11, 2022; and final briefs were due by September 20, 2022. Canadian Pac. Ry.—Control—Kan. City S., FD 36500 et al., slip op. at 3 (STB served May 27, 2022).¹⁸

By notice served on July 22, 2022, the Board announced that it would hold a public hearing in these dockets on September 28, 29, and 30, 2022. The Board also amended the procedural schedule to set October 14, 2022, as the deadline for final briefs. See Canadian Pac. Ry.—Control—Kan. City S., FD 36500 et al., slip op. at 3 (STB served July 22, 2022). Additional hearing days were subsequently scheduled, and the public hearing concluded on October 7, 2022. See Canadian Pac. Ry.—Control—Kan. City S., FD 36500 et al. (STB served Sept. 30, 2022); Canadian Pac. Ry.—Control—Kan. City S. (Decision ID No. 51450), FD 36500 et al. (STB served Oct. 7, 2022). To allow parties adequate time to prepare their final briefs in light of the hearing extension, the procedural schedule was revised to extend the deadline for final briefs to October 21, 2022. See Canadian Pac. Ry.—Control—Kan. City S. (Decision ID No. 51445), FD 36500 et al. (STB served Oct. 7, 2022).

Environmental Review. The Board has engaged in an extensive and thorough environmental review, which was completed with the issuance of the Final EIS on January 27, 2023. In the EIS, the Board conducted a detailed analysis of the potential environmental impacts of the Transaction and identified reasonable and appropriate mitigation measures to minimize the potential environmental impacts of the Transaction. Those measures include voluntary agreements Applicants reached with potentially affected communities and other voluntary mitigation that could eliminate or lessen the expected environmental impacts of the Transaction and address local concerns. After carefully considering the results of the environmental analysis and the concerns and issues raised by commenters, the Board adopts the analysis in the Final EIS and is imposing the environmental mitigation recommended therein, as modified by the Board in this decision.

Oversight. The Board is establishing oversight for a period of seven years. The Board will closely monitor Applicants' compliance with, and the effectiveness of, the conditions imposed herein. During this oversight period, Applicants will be required to report on numerous metrics as described in Appendix B to this decision. To ensure the effective and efficient

¹⁸ By decision served July 1, 2022, the Board accepted the responsive applications filed by CN and NSR as complete. Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 20), FD 36500 et al. (STB served July 1, 2022).

collection of information, Applicants will be required to participate in a technical conference with Board staff and guidance will be developed regarding the Board's requirements for both recordkeeping and reporting of any data, including scope, methodology, and formatting. In addition, the Board is imposing a seven-year environmental reporting and monitoring condition.

Overview of the Decision. The Board is approving the acquisition by CP of control of KCS, subject to the following conditions, as set forth more fully in the decision below:

(1) Applicants' commitments to keep gateways open on commercially reasonable terms and create no new bottlenecks, with the clarifications and enhancements described herein, including a requirement that, during the oversight period, Applicants provide to a shipper, upon request, a written justification for any rate increase above the rate of inflation for interline movements subject to the open gateway condition, and a requirement that Applicants adhere to their "Binding Agreement to Arbitrate," as modified by the Board;

(2) a condition requiring CPKC to shift its train crew change location near Ottumwa, Iowa, to a point farther west and south on the CP Laredo Subdivision;

(3) a condition modifying and improving Applicants' commitment to provide a dispute resolution process to address certain possible commuter rail disruptions in Chicago;

(4) a condition requiring Applicants to adhere to all of the representations made on the record during the course of this proceeding, including, but not limited to, Applicants' commitment to (a) honor CP's commitments made under the settlement agreement with Amtrak, including CP's agreement to support certain planned expansions of Amtrak passenger service; (b) not initiate the termination of reciprocal switching access for any shipper facility directly served by CP or KCS that has such access as of the date of the decision authorizing the Transaction; (c) cooperate with UP and BNSF to ensure adequate capacity along the Texas Gulf Coast Route; (d) unless otherwise agreed to by CPKC and Metra, not implement an ordinary course operating plan directing CPKC through-freight-trains operating between Kansas City, Mo., and St. Paul, Minn., over certain Metra Lines, except in emergency or other non-routine situations; and (e) as modified by the Board, extend the terms of the settlement agreement reached with Bayer CropScience LP to eligible shippers;

(5) an oversight condition of seven years to monitor and address as necessary various issues raised by commenters, including, but not limited to, (a) concerns regarding the potential for rate manipulation or other post-Transaction conduct by CPKC that could fail to keep open on commercially reasonable terms KCSM-dependent interline options for transborder traffic moving through the gateway at Laredo, Tex.; (b) operational complexities in the Texas Gulf Coast area that necessitate coordination among parties to ensure adequate capacity and to maintain fluidity on shared lines; (c) concerns regarding the volume of traffic moving through the Polo Line joint facility between Airline Junction, Mo., and Polo, Mo.; (d) possible impacts in St. Paul, Minn., particularly at Hoffman Avenue; (e) possible impacts on cross-border traffic flows over the Laredo Bridge (also known as the International Bridge); and (f) possible delays and service disruptions impacting Chicago-area lines and commuter rail service provided by Metra;

(6) in connection with the oversight condition, a condition requiring Applicants to report numerous service, operational, competition-related, and other metrics at prescribed frequencies, as described in Appendix B to this decision;

(7) a condition requiring Applicants to adhere to the terms of the CPKC Service Promise to address any post-Transaction service disruptions, including the development and reporting of customized “Service Action Plans” to address specific issues when certain thresholds are triggered;

(8) the labor protection conditions provided in New York Dock Railway—Control—Brooklyn Eastern District (New York Dock), 360 I.C.C. 60 (1979), aff’d sub nom. N.Y. Dock Ry. v. ICC, 609 F.2d 83 (2d Cir. 1979), as well as holding Applicants to their representation to honor the obligations established in the “Revised Standards for Preemption of Collective Bargaining Agreements for Transactions Initiated Pursuant to Section 11323 of the Interstate Commerce Act”;

(9) a condition requiring Applicants to abide by the terms of the settlement agreement that CP entered into with Iowa Interstate Railroad, LLC; and

(10) the environmental conditions listed in Appendix C to this decision.

The Board is denying CN’s responsive application filed in Docket No. 36500 (Sub-Nos. 1-4) and NSR’s responsive application filed in Docket No. 36500 (Sub-No. 5). The Board is denying all other conditions sought by the various parties to this proceeding.

Finally, the Board is formally modifying the agency’s position on the “one-lump” theory, an economic doctrine used in past proceedings to inform the agency’s assessment of the competitive impacts of vertical combinations.

The Board approves, with certain conditions described further herein, the acquisition of control by Canadian Pacific of Kansas City Southern.

PRELIMINARY MATTERS

On September 27, 2022, Applicants filed a motion to strike submissions by Tavengwa Runyowa of Runyowa Law and his clients, and on October 13, 2022, Applicants filed a motion to strike portions of a presentation that Metra showed at the public hearing and filed as part of the record. As discussed below, the Board will grant in part and deny in part both motions to strike.

Runyowa Law Submissions. In a September 13, 2022 notice of intent to participate at the public hearing, Mr. Runyowa stated that he is Canadian legal counsel for Pamela Fraser, Heather Dockrell, Edward Dockrell, Lorelei Desrochers, and Kaitlyn Timmerman. (Runyowa Notice of Intent 1, Sept. 13, 2022.) Applicants objected to Mr. Runyowa’s notice of intent, in part because he is not a member of the bar in any U.S. jurisdiction. See 49 C.F.R. § 1103.2 (permitting “a

member in good standing of the bar in the highest court of any State, Commonwealth, possession, territory, or the District of Columbia” to represent persons before the Board). In a September 21, 2022 response, Mr. Runyowa stated that he would speak on behalf of his clients at the hearing but that his representation would be “merely informative.” (Runyowa Resp. 1, Sept. 21, 2022.) By a decision served on September 23, 2022, the Board permitted Mr. Runyowa to participate at the public hearing and waived 49 C.F.R. § 1103.2 to the extent necessary to permit his participation.¹⁹ Canadian Pac. Ry.—Control—Kan. City S., FD 36500 et al. (STB served Sept. 23, 2022).

Also on September 23, 2022, Mr. Runyowa filed a 1,053-page “whistleblower complaint” pertaining to CP’s “cross border police command structure and law enforcement activities” and a letter requesting that the Board accept an earlier submission of the whistleblower complaint.²⁰ (Runyowa Compl. 1, Sept. 23, 2022; see Runyowa Letter 2, Sept. 23, 2022.) Mr. Runyowa states that he filed the so-called whistleblower complaint “on behalf of [his] clients” although he is “not a licensed attorney in the United States of America” and “make[s] no formal or authoritative assertions about the application of American laws.” (Runyowa Compl. 1 n.1 (emphasis omitted).) Mr. Runyowa argues that the Board should deny the Transaction unless CP provides responses and records relevant to the issues outlined in the whistleblower complaint.²¹ (Runyowa Compl. 1-2.) He also requests that the Board refer the issues described in the complaint to several U.S. agencies. (Id. at 2.)

On September 27, 2022, Applicants filed a motion to strike Mr. Runyowa’s September 21 and 23 submissions, including the “whistleblower complaint.” Applicants assert that Mr. Runyowa and his clients are not whistleblowers but plaintiffs in several active lawsuits against CP in Canada. (Applicants Mot. to Strike 1-2, Sept. 27, 2022.) According to Applicants,

¹⁹ After testifying at the public hearing on September 29, 2022, Mr. Runyowa notified the Board that the YouTube recording of his presentation does not include the first eighteen seconds of audio. (Runyowa Letter 1, Oct. 3, 2022.) Mr. Runyowa asks for confirmation that the missing audio was recorded and will be made part of the record. (Id.) Unfortunately, due to what appears to be a technical glitch, that portion of Mr. Runyowa’s presentation was neither recorded nor transcribed. However, the Board heard and considered Mr. Runyowa’s live presentation.

²⁰ In June 2022, Mr. Runyowa sent the Board’s Chairman a package containing a self-described whistleblower complaint relating to the Transaction. That material was placed in the public docket of Docket No. FD 36500 pursuant to a September 7, 2022 memorandum from a member of the Chairman’s staff, explaining that the submission was a prohibited ex parte communication. Thereafter, Applicants filed a letter asking the Board to either confirm that the June 2022 submission would not be made part of the record or strike the material from the record, (Applicants Letter 1-2, Sept. 12, 2022), and Mr. Runyowa filed a letter asking the Board to accept his June 2022 submission and review it on the merits, (Runyowa Letter 2, Sept. 23, 2022). The Board clarifies that the June 2022 ex parte submission is a prohibited communication that is not part of the decisional record. See 49 C.F.R. § 1102.2(e)(1).

²¹ Railroad Workers United (RWU) filed a letter urging the Board to consider the issues raised in the whistleblower complaint. (RWU Letter, Sept. 23, 2022.)

Mr. Runyowa and his clients are participating in this proceeding to create leverage in their Canadian litigation. (*Id.*) Applicants also argue that the whistleblower complaint is late-filed, irrelevant to this proceeding, in the wrong forum, and “outrageous in scope.” (*Id.* at 2-4.)

The next day, Mr. Runyowa filed a reply to Applicants’ motion to strike, arguing in part that the whistleblower complaint does not advance the Canadian litigation. (Runyowa Reply 1-4, Sept. 28, 2022.) Mr. Runyowa later filed additional argument and evidence in support of the whistleblower complaint. On October 3, 2022, Mr. Runyowa filed a letter arguing that the Board has jurisdiction to address the issues raised in his clients’ submissions, (Runyowa Letter 2, Oct. 3, 2022), and on November 22, 2022, he submitted evidence pertaining to a criminal indictment unrelated to this proceeding in the United States District Court for the Eastern District of New York, (Runyowa Letter, Nov. 22, 2022). Although Mr. Runyowa acknowledges that the indictment does not charge or involve Applicants, he argues that the indictment evidence supports his clients’ whistleblower complaint.²² (Runyowa Letter 2-3, Nov. 22, 2022.)

The Board will grant in part and deny in part Applicants’ motion to strike. The Board will accept Mr. Runyowa’s September 21, 2022 response to Applicants’ objection to his notice of intent, because doing so will ensure that there is a complete record as to the appropriateness of his participation at the public hearing. However, the Board will strike from the record all subsequent submissions from Mr. Runyowa and his clients, including the “whistleblower complaint” and letter filed on September 23, 2022.

Under 49 C.F.R. § 1103.2, “a member in good standing of the bar in the highest court of any State, Commonwealth, possession, territory, or the District of Columbia” may represent persons before the Board. Mr. Runyowa concedes that he is not a member in good standing of the bar in any U.S. jurisdiction. (Runyowa Compl. 1 n.1.) However, Mr. Runyowa implies that his submissions are permissible because he “make[s] no formal or authoritative assertions about the application of American laws” in the complaint, and his clients do not seek a “personal remedy.” (*Id.* at 1-2 (emphasis omitted).) These arguments are unpersuasive because Mr. Runyowa’s submissions make clear that he is representing persons before the Board without the necessary qualification to do so.

Mr. Runyowa states that he filed the whistleblower complaint “on behalf of [his] clients” and that the complainants are Runyowa Law clients. (*Id.* at 1-2.) In subsequent filings, Mr. Runyowa submitted argument and evidence in support of his clients’ whistleblower complaint and requested Board action on behalf of his clients. (See Runyowa Letter 1, Sept. 28, 2022 (“The complainants ask the Board to reject CP Railway’s application”); Runyowa Letter 2, Oct. 3, 2022 (arguing that issues raised in the whistleblower complaint are within the Board’s jurisdiction); Runyowa Letter 3, Nov. 22, 2022 (submitting evidence and argument in support of the whistleblower complaint).) Because Mr. Runyowa is not qualified to represent his clients before the Board under 49 C.F.R. § 1103.2, these submissions constitute the unauthorized

²² On November 25, 2022, Applicants filed a letter stating that, “[u]nless the Board desires otherwise, Applicants intend to ignore Mr. Runyowa’s irrelevant and long-out-of-time submission of November 22, 2022.” (Applicants Letter 1, Nov. 25, 2022.)

practice of law before the Board. Accordingly, all submissions from Mr. Runyowa and his clients filed after September 21, 2022, will be struck from the record.

Metra Presentation. On October 13, 2022, Applicants filed a motion to strike portions of Metra’s presentation at the September 28, 2022, public hearing. Specifically, Applicants move to strike slides 9-15 of Metra’s PowerPoint presentation and the accompanying testimony of Robert D. Mulholland. (Applicants Mot. to Strike 1-2, Oct. 13, 2022; see Metra Pub. Hr’g Comments, slides 9-15, Oct. 5, 2022; Hr’g Tr. 287:8-294:6, 325:6-326:8, Sept. 28, 2022.) Applicants argue that those portions of Metra’s presentation introduced surreply evidence regarding Rail Traffic Controller (RTC) modeling that the Board rejected from the record in a September 27, 2022 decision.²³ (Applicants Mot. to Strike 1-2, Oct. 13, 2022); see Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 28), FD 36500 et al., slip op. at 2-3 (STB served Sept. 27, 2022) (ordering that Metra’s surreply not be entered into the record). Alternatively, Applicants argue that the Board should allow the supplemental verified statement of Raymond A. Elphick into the record as a response to Mulholland’s hearing testimony. (Applicants Mot. to Strike 2 n.2, Oct. 13, 2022; see Applicants Reply, Supp. V.S. Elphick, Sept. 28, 2022.)

On October 21, 2022, Metra replied in opposition to Applicants’ motion to strike. Metra argues that Mulholland’s testimony merely clarified disputed claims concerning RTC modeling, as permitted by Decision No. 28. (Metra Reply 1, Oct. 21, 2022.) According to Metra, Mulholland’s testimony responded to Applicants’ rebuttal RTC modeling but did not broaden the issues raised in this proceeding. (Id. at 3.) Metra also argues that Applicants had an opportunity to respond to Mulholland’s testimony at the public hearing and in their final brief and that granting Applicants’ motion to strike would violate Metra’s due process right to submit rebuttal testimony. (Id. at 4-5.)

The Board will grant in part and deny in part Applicants’ motion to strike. In Decision No. 28, the Board stated that “Metra will have an opportunity to clarify, as appropriate, disputed claims regarding RTC modeling in its final brief as well as during the public hearing.” Decision No. 28, FD 36500 et al., slip op. at 3. The Board finds that Metra’s PowerPoint slides 9-14 and Mulholland’s accompanying testimony provide permissible clarification of disputed claims regarding RTC modeling. Slide 9 of Metra’s PowerPoint presentation contains a map submitted by Applicants to demonstrate alleged infrastructure errors in Metra’s RTC model, which Metra annotated. (Compare Metra Pub. Hr’g Comments, slide 9, Oct. 5, 2022, with Applicants Reb., Vol. 2, R.V.S. Elphick, Ex. 1, fig.4.1.) Metra’s annotations, along with Mulholland’s related testimony, pertain to the veracity of data used in the RTC modeling of record.²⁴ (See Hr’g

²³ According to Applicants, Mulholland’s testimony presented information contained in a rebuttal verified statement attached to Metra’s September 8, 2022 motion to strike. (Applicants Mot. to Strike 2, Oct. 13, 2022.) The Board denied Metra’s September 8, 2022 motion to strike in an October 19, 2022 decision. See Canadian Pac. Ry.—Control—Kan. City S., FD 36500, slip op. at 3 (STB served Oct. 19, 2022).

²⁴ Although Mulholland noted that Metra tested the impact of adjusting its simulations to include infrastructure changes contained in Applicants’ RTC model, Metra did not introduce new modeling. (Hr’g Tr. 288:15-21, Sept. 28, 2022 (stating that “[t]he impact is minimal and does not change our conclusions” and offering to supplement the record “at the Board’s request”).)

Tr. 287:21-22, Sept. 28, 2022.) Similarly, Metra’s PowerPoint slides 10-14 and Mulholland’s accompanying testimony illustrate “the results of [Applicants’] alternate RTC simulations as filed” and describe inputs and assumptions underlying Applicants’ RTC model. (Hr’g Tr. 291:20-21, 292:16-17, Sept. 28, 2022; see Metra Pub. Hr’g Comments, slides 10-14, Oct. 5, 2022.) Metra necessarily addressed Applicants’ RTC report—which purportedly corrected Metra’s RTC modeling—to clarify its own modeling decisions. (See Applicants Reb. 1-176.) Accordingly, the Board deems proper these portions of Metra’s presentation. And because these portions of Metra’s presentation do not constitute surrebuttal testimony, the Board also denies Applicants’ request to introduce Elphick’s supplemental verified statement into the record as a response to surrebuttal from Metra. (See Applicants Mot. to Strike 2 n.2, Oct. 13, 2022.)

However, the Board will grant Applicants’ motion to strike Metra’s PowerPoint slide 15 and Mulholland’s accompanying testimony. (See Hr’g Tr. 293:12-294:6, Sept. 28, 2022.) Mulholland testified that Metra adjusted “unrealistic assumptions” contained in Applicants’ rebuttal RTC model, which had “a significant impact on their results.” (Hr’g Tr. 293:12-14, Sept. 28, 2022.) The graphs on PowerPoint slide 15 reflect the results of Metra’s corrections and adjustments to Applicants’ RTC report. (See Metra Pub. Hr’g Comments, slide 15, Oct. 5, 2022.) This portion of Metra’s presentation is a direct response to Applicants’ rebuttal evidence, which constitutes surrebuttal and exceeds the scope of Decision No. 28, allowing Metra to “clarify, as appropriate” the disputes about RTC modeling but rejecting Metra’s attempt to file a surreply. See Decision No. 28, FD 36500 et al., slip op. at 3.

Further, although Metra argues that it has a due process right to address evidence introduced during an administrative proceeding and to submit rebuttal evidence under sections 554(c)(1) and 556(d) of the Administrative Procedure Act (APA), (see Metra Reply 4, Oct. 21, 2022), those sections of the APA apply to an “adjudication required by statute to be determined on the record after opportunity for an agency hearing.” 5 U.S.C. § 554(a); see id. § 556(a). Where, as here, a hearing is not required to be “on the record,” those APA procedures do not apply. See State Intrastate Rail Rate Auth.—Tex., 1 I.C.C.2d 26, 34-35 (1984) (explaining that an express statutory requirement for “a hearing ‘on the record’ . . . is a significant factor in deciding whether formal hearing procedures are required” and determining that a “‘full hearing’” is not a hearing “‘on the record’”); see also 49 U.S.C. § 11324(f)(1) (stating that a merger-approval proceeding “shall not be considered an adjudication required by statute to be determined on the record after opportunity for an agency hearing”). Instead, the Board has discretion to establish appropriate procedures, such as allowing Applicants to close the record. State Intrastate Rail Rate Auth.—Tex., 1 I.C.C.2d at 34-35; see Canadian Pac. Ry.—Control—Kan. City S., FD 36500, slip op. at 3 (STB served Sept. 13, 2022). Accordingly, and because Metra had ample opportunity to participate in this proceeding, the Board rejects Metra’s due process argument. (See, e.g., Metra Comments & Req. for Conditions (Metra Comments), Mar. 15, 2022; Metra Supp. Comments, June 9, 2022; Metra Reply, July 12, 2022; Metra Final Br., Oct. 21, 2022.)

APPLICABLE STANDARDS

Overview

The statutory provisions governing Board approval of mergers are codified at 49 U.S.C. §§ 11321-26. When the proposed transaction is a major merger, i.e., one involving at least two Class I railroads, “[t]he Board shall approve and authorize [the] transaction . . . when it finds the transaction is consistent with the public interest.” 49 U.S.C. § 11324(c).

In making this public-interest assessment, the Board balances the benefits of the merger against any harm to competition, essential services, labor, and the environment that cannot be mitigated by conditions. See 49 C.F.R. § 1180.1; Canadian Nat’l Ry.—Control—Ill. Cent. Corp. (CN-IC), 4 S.T.B. 122, 139 (1999). The Board’s assessment must also consider the five nonexclusive factors specified by statute: (1) the effect of the proposed transaction on the adequacy of transportation to the public; (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction; (3) the total fixed charges that result from the proposed transaction; (4) the interest of carrier employees affected by the proposed transaction; and (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system. 49 U.S.C. § 11324(b).

The Board’s review of this merger is governed by the Board’s major-merger policy statement that was codified at 49 C.F.R. § 1180.1 and in general effect between 1982 and 2001. See 49 C.F.R. § 1180.0(b); Decision No. 4, FD 36500, slip op. at 2. The pre-2001 policy continues to govern major mergers involving KCS for which the Board has granted a waiver.²⁵ Although the post-2001 policy generally requires that proposed major transactions affirmatively enhance competition relative to the pre-merger baseline, see Major Rail Consolidation Procedures, 5 S.T.B. at 547, the pre-2001 policy, which applies here, requires only that any transaction-related harms to competition or essential public services be offset by corresponding public benefits, see 49 C.F.R. § 1180.1(c).

In terms of public benefits, the pre-2001 policy and the Board decisions applying it emphasize the potential benefit of increased operating efficiencies and other cost savings that could enable a merged railroad to provide the same rail services with fewer resources or improved rail services with the same resources. See, e.g., CN-IC, 4 S.T.B. at 139-40. The Board has recognized that “an integrated railroad can often realize efficiency gains by achieving the economies of scale, scope, and density stemming from expanded operations.” Id. “Cost savings

²⁵ In enacting the new post-2001 merger policy, the Board found that a “potential transaction involving [KCS] and another Class I carrier would not necessarily raise the same concerns and risks as other potential mergers between Class I railroads.” Major Rail Consolidation Procs., 5 S.T.B. at 552. Accordingly, the new policy contains a waiver provision stating that the pre-2001 policy would continue to apply to major mergers involving KCS unless the Board is shown “why such a waiver should not be allowed.” 49 C.F.R. § 1180.0(b). In Decision No. 4, the Board determined that the waiver would apply to its review of this transaction. See Decision No. 4, FD 36500, slip op. at 2.

may result from elimination of interchanges, internal reroutes, more efficient movements between the merging parties, reduced overhead, and elimination of redundant facilities.” Id. Other, more qualitative public benefits may include “enhanced opportunities for single-line service preferred by shippers and more vigorous competition that may result from a transaction,” id., as well as truck-to-rail diversions.

Of course, benefits to the combining carriers that are the result of increased market power, such as the ability to increase overall rates at the same or reduced service levels, are exclusively private benefits that detract from any public benefits associated with a control transaction. Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP-SP), 1 S.T.B. 233, 364 (1996). Indeed, the pre-2001 policy and cases also recognize that proposed mergers can cause potential harm to essential services as well as competition. See 49 C.F.R. § 1180.1(c)(2). The Board also takes into account potential operating and capacity concerns pursuant to 49 U.S.C. § 11324(b)(1). See, e.g., CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc. (Conrail), 3 S.T.B. 196, 366-67 (1998); UP-SP, 1 S.T.B. at 467. Harm to essential services occurs when the merger causes other carriers to reduce or eliminate their operations, leaving shippers without access to services they require and for which there is no alternative transportation option. 49 C.F.R. § 1180.1(c)(2)(ii). Competitive harm results from a merger to the extent that the merging parties gain sufficient market power to profit from raising rates or reducing service (or both). Id. § 1180.1(c)(2)(ii); CN-IC, 4 S.T.B. at 140. In evaluating claims of competitive harm, the Board recognizes the distinction between harm caused by a transaction and disadvantages that other railroads, shippers, or communities may have already been experiencing. CN-IC, 4 S.T.B. at 140. The Board’s concern is the preservation of competition, not the survival of particular carriers. Id.

The Board evaluates whether competitive effects from a proposed merger are horizontal, or vertical, or both. UP-SP, 1 S.T.B. at 364-65. “Horizontal effects occur where applicant carriers currently offer competing service within a defined market.” Id. “These effects can range from loss of direct, head-to-head competition between two railroads serving the same origin/destination pair to loss of geographic competition between railroads, as would occur if each of the merging parties exclusively serves a different competing port from the same origin.” Id. “Vertical effects occur where the merging parties connect end-to-end or form alternative routings for interline movements in which a single railroad controls a ‘bottleneck’ at origin or destination.” Id. “The key test for competitive harm remains the same for both horizontal and vertical effects: will the merger result in increased rates or deteriorated service or both?” Id.

The Board’s analysis also considers the RTP, 49 U.S.C. § 10101, established by the Staggers Rail Act of 1980 and amended by the ICC Termination Act of 1995. See Norfolk S. Corp.—Control—Norfolk & W. Ry., 366 I.C.C. 171, 190 (1982). The RTP recognizes the importance of competition in fostering the modernization of railroad operations and promoting efficiency. See § 10101; see also H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 88 (1980), reprinted in 1980 U.S.C.C.A.N. 4110, 4119.

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 to 4370m-11, further requires the Board to consider the environmental effects of the proposed transaction and to inform the public concerning those effects. Canadian Nat’l Ry.—Control—EJ&E W. Co.

(CN-EJ&E), FD 35087, slip op. at 34 (STB served Dec. 24, 2008). Under NEPA, the Board must then consider the potential beneficial and adverse environmental impacts in reaching its decision. Id. at 34. The purpose of NEPA is to focus the attention of the government and the public on the likely environmental consequences of a proposed action before it is implemented, in order to minimize or avoid potential negative environmental impacts. NEPA does not, however, mandate a particular result. Once the adverse environmental effects have been adequately identified and evaluated, the Board may conclude that other public benefits outweigh the environmental costs. Id.

Finally, because the Board's statutory mandate requires a balancing of efficiency gains against competitive harm, the antitrust laws provide guidance, but are not determinative, in merger proceedings. CN-IC, 4 S.T.B. at 140. As the Supreme Court stated in McLean Trucking Co. v. United States, 321 U.S. 67, 87-88 (1944) (quotation omitted):

In short, the [Board] must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy The wisdom and experience of [the Board], not of the courts, must determine whether the proposed consolidation is "consistent with the public interest."

Criteria For Imposing Conditions

The various conditions requested by parties involve the exercise of the Board's conditioning power under 49 U.S.C. § 11324(c), which gives the agency broad authority to impose conditions governing major railroad consolidations. The Board's pre-2001 policy and cases recognize that conditions generally tend to reduce the benefits of a consolidation, and therefore require that conditions be proportional to the harm they address and that they be imposed only when certain criteria are met. CN-IC, 4 S.T.B. at 141; see 49 C.F.R. § 1180.1(d).²⁶

Under the pre-2001 policy, the Board will not impose conditions unless it finds that "the consolidation may produce effects harmful to the public interest . . . and that the conditions will ameliorate or eliminate the harmful effects, will be operationally feasible, and will produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits produced by the merger." Burlington N. Inc.—Control & Merger—Santa Fe Pac. Corp. (BN-SF), 10 I.C.C.2d 661, 729 (1995). Pursuant to that approach, the Board is "disinclined to impose conditions that would broadly restructure the competitive balance among railroads with unpredictable effects." Id.; see also, e.g., UP-MP, 366 I.C.C. at 564. Under the pre-2001 policy, the Board will not impose conditions "to ameliorate longstanding problems which were not created by the merger," nor will it impose conditions that

²⁶ Under the pre-2001 policy, standards governing the Board's authority to impose public-protective conditions are set out in caselaw, rather than in the policy itself. See Union Pac. Corp.—Control—Mo. Pac. Corp. (UP-MP), 366 I.C.C. 459, 562 (1982).

“are in no way related either directly or indirectly to the involved merger.” BN-SF, 10 I.C.C. at 730.

Any condition imposed must be narrowly tailored to remedy the harm it is intended to address. Id. The Board “will not impose a condition that would put its proponent in a better position than it occupied before the consolidation.” Id. For example, if “the harm to be remedied consists of the loss of a rail option, any conditions should be confined to restoring that option rather than creating new ones.” Id. Moreover, the Board will not impose conditions to offset revenue losses by competitors. Id.

NEPA also authorizes the Board to impose conditions to mitigate adverse environmental impacts. Conrail, 3 S.T.B. at 354. The Board’s consistent practice in imposing environmental conditions is to mitigate only impacts resulting directly from the transaction, and not to require mitigation for existing conditions and existing railroad operations. Id. at 356.

DISCUSSION & CONCLUSIONS

Overview

The CPKC network created by the merger is expected to offer more efficient and reliable service connecting the United States, Canada, and Mexico, and to improve the overall quality and availability of rail transportation services to the public. (Appl. 1-23.) The combination of CP and KCS will allow the new carrier to provide single-line service between points throughout CP’s service territory in the Upper Midwest and Canada and points throughout KCS’s service territory in the South-Central United States and Mexico by eliminating the need for their customers to interchange in Kansas City. (Id. at 1-24.) As such, this new direct service will facilitate the flow of grain from the Midwest to Mexico and the Gulf of Mexico (Gulf Coast), automotive parts and other containerized mixed goods between the United States and Mexico, finished vehicles from Mexico to the United States, intermodal goods between Dallas and Chicago, and energy products from Alberta to the Gulf Coast. (Appl., Vol. 2, V.S. Brown/Zebrowski, paras. 12-16; see also id., Vol. 2, V.S. Wahba/Naatz.)

The combination of CP and KCS will also enhance competition by creating a stronger competitor for UP, BNSF, and CN. CPKC’s new single-line service will provide new competition with single-line service already provided by those other carriers in various markets. (Appl., Vol. 1, V.S. Creel, paras. 20-23, p. 12 fig.3.)

Beyond creating a more efficient option for current rail shippers, the Transaction is expected to support the growth of rail traffic. Indeed, Applicants estimate that CPKC will remove more than 64,000 trucks annually from North America’s road network, improving highway transportation and the environment. (Appl., 1-23; id., Vol. 2, V.S. Mutén, para. 52.) More than 960 third parties have indicated support for the Transaction, including 459 shippers, 186 smaller railroads, dozens of public officials, eight major ports, and 280 rail industry suppliers and other stakeholders. (Id. at 1-19.)

The additional traffic on the CPKC system expected as a result of the Transaction will support investment in infrastructure, service quality, and safety on CPKC's north-south rail artery. CPKC anticipates spending more than \$275 million over Years 1-3 on adding centralized traffic control in previously dark territory (i.e., non-signalized track) and on new double track, sidings, and siding extensions on CP's and KCS's single-track lines between Louisiana and the Upper Midwest. (Id. at 1-26.)²⁷ These investments are expected to transform this relatively underutilized route (handling fewer than 10 trains per day on average) into a more efficient, higher-capacity, and safer artery of north-south trade in North America capable of supporting improved service levels. (Appl. 1-26.) The new system's greater capacity will also accommodate additional passenger service. (Id. at 1-19.)

The Transaction is expected to drive employment growth across the CP/KCS system. Applicants anticipate that CPKC would add over 1,000 union-represented operating positions across its North American network to accommodate the traffic growth they expect the Transaction could generate, with more than 800 of those new jobs in the United States.²⁸ (Id. at 1-26 to 1-27.)²⁹ Although removing the interchange at Kansas City and consolidating KCS's and CP's U.S. headquarters will eliminate approximately 112 positions, (Appl., Vol. 1, V.S. Rolstad, para. 12), those adversely affected by the Transaction will be protected by the labor conditions imposed in this decision.

The Board has also carefully examined the impact of the Transaction on the ability of the combined carriers to meet their financial obligations, pay their fixed charges, and continue to provide quality service to the shipping public. The traffic and revenues of the combined CPKC are expected to increase after the Transaction. But even in the absence of significant traffic increases and savings derived from operating synergies, Applicants should be able to meet their debt obligations and continue to provide quality service given their financial strength as described in more detail below. (Applicants Reb. 1-54; id., Vol. 2, R.V.S. Velani/De Bruyn, paras. 23-34.) Further, the Board finds, as discussed below, that the terms of the acquisition agreement and Transaction are fair to shareholders.

As an end-to-end merger, the Transaction will result in little to no track redundancies, abandonments, or reroutings. As such, and as mitigated by the conditions imposed in this decision, any disruptions to employees, shippers, and communities should not be significant. Moreover, under 49 C.F.R. part 1106 and FRA regulations at 49 C.F.R. § 244.9, Applicants have filed their SIP with the Board and FRA. CP and KCS are continuing to coordinate with FRA concerning the implementation process, which will continue until FRA advises the Board that the

²⁷ Applicants' Amended Operating Plan includes a complete list of infrastructure investments as well as a breakdown of investments by year. (See Am. Operating Plan, paras. 296, 299 & tbls.11, 12.)

²⁸ The Board recognizes that traffic growth resulting from diversions by CPKC of existing traffic from other transportation providers could result in some level of job losses for those providers.

²⁹ In an erratum filed on November 5, 2021, Applicants corrected information submitted in the Application, including information contained in their labor impact analysis.

integration of Applicants' operations has been fully and safely completed. Although some commenters have raised concerns about service disruptions that could arise if CPKC's capacity is not adequate to handle anticipated traffic increases, as discussed below, those concerns are best addressed through oversight monitoring and supplemental orders, if warranted.

Additionally, as detailed below, OEA prepared a thorough EIS. OEA concludes that, with its recommended conditions, the Transaction will not result in significant environmental impacts. The Board agrees and, accordingly, is imposing the environmental conditions that OEA has recommended as modified in the Environmental Matters section. See App. C below.

Furthermore, the Board will condition approval of the Transaction on open gateway and reporting requirements, using Applicants' commitments as a starting point but clarifying and expanding on them in various ways. Most significantly, during the oversight period, Applicants will be required to provide to a shipper, upon request, a written justification for any rate increase above the rate of inflation for interline movements subject to the open gateway obligation. Applicants will also be required to adhere to their "Binding Agreement to Arbitrate." Accordingly, and despite the limitations of Applicants' proposed arbitration process, CPKC customers will have an option to arbitrate gateway disputes if they so choose. Shippers may also bring disputes regarding Applicants' adherence to gateway-related conditions to the Board for resolution, in which case the agency would expect to resolve such claims expeditiously. A shipper may use Applicants' proffered informal escalation process for any dispute subject to the open gateway commitment, regardless of whether it seeks to adjudicate that dispute before the Board or pursue arbitration.

In sum, the Transaction meets the public interest test for approval under § 11324. The Board anticipates that the impact on rail employees will be relatively small and adequately mitigated by the labor protection conditions. The Transaction will make possible improved single-line service for many shippers and will result in merger synergies that are likely to allow CPKC to be a vigorous competitor to other Class Is by providing improved service at lower cost.³⁰ The Board expects that a substantial portion of these savings will be passed along to shippers in terms of reduced rates or improved service. Moreover, the conditions imposed in this decision adequately mitigate any potential competitive, operational, or environmental concerns. CPKC should also be able to absorb the incremental fixed charges associated with the acquisition-related debt. Its ability to provide quality service should not be impaired and should be enhanced based on the efficiencies described in this decision.

Public Benefits of the Transaction

As explained in the Applicable Standards section above, in considering whether a proposed consolidation is consistent with the public interest, the agency must weigh the public benefits of the proposed transaction against any harmful effects, which include reductions in competition and harm to essential services that cannot be mitigated by conditions. Public benefits can be achieved through, for example, reduced transportation costs for applicants and

³⁰ No rail carriers have sought inclusion in the Transaction. Further, nothing in the record indicates that failure to include other railroads would adversely affect the public interest.

improved service for shippers. See, e.g., Union Pac. Corp.—Control—Mo.-Kan.-Tex. R.R. (UP-MKT), 4 I.C.C.2d 409, 416-17 (1988) (finding public benefits would be realized in that transaction through single-line service to shippers, facility consolidation at common points, more efficient use of equipment, consolidation of management information and communication systems, and more efficient service through rerouting, added run-through trains, and improved blocking). Although a proposed transaction can produce some financial benefits for the consolidating carriers that are purely transfers from competing carriers, these private benefits are not considered in the agency’s analysis of the public benefits of the consolidation. (Id.)

Qualitative Benefits. As discussed below, the record indicates that the Transaction should result in qualitative benefits to the shipping public, including more single-line service, new and improved routes, more gateway choices, more reliable service, and reduced terminal delay. CPKC will establish new intermodal services connecting Dallas with Chicago and points beyond and will enable new single-line intermodal routes connecting Mexico with the Upper Midwest and Canada. (Appl. 1-25.) Among these new services will be the longest-distance intermodal train on the combined system, connecting the Port of Lázaro Cárdenas with Chicago, Toronto, Montréal, and Eastern Canada. (Id. at 1-24 to 1-25.) CPKC will build other through trains connecting Canadian and Upper Midwest points seamlessly with the Gulf Coast and Mexico. (Id. at 1-26.) Many shippers anticipate that they will be able to access current and new markets more efficiently. (See, e.g., id. at 3-260 (Letter from Boise Cascade), 3-464 (Letter from Full Circle Ag), 3-466 (Letter from Fullerton Farmers Elevator), 3-473 (Letter from GAC Chemical Corp.), 3-478 (Letter from Gavilon).)

Expansion of Market Opportunities. The Board notes that the Transaction could expand the market reach of grain and other bulk shippers that are, or could be, served by CP in the Upper Midwest and Canada. (Id., Vol. 1, V.S. Wahba/Naatz, paras. 15, 21.) The new single-line routes made possible by the Transaction will give these shippers more efficient options to reach more markets and will provide receivers served by KCS with more efficient access to more sources for the commodities they receive. (Id., Vol. 1, V.S. Wahba/Naatz, para. 15; id. at 3-335 (Letter from CHS Inc.).)³¹

For example, one shipper, Richardson International Limited (Richardson), expects “to access new markets for our grain handling facilities in North Dakota to ship grain to the Gulf area as well as Mexico.” (Applicants Reb., Vol. 2, R.V.S. Richardson Int’l Ltd.) Richardson also expects to use the single-line service to source durum from Saskatchewan and North Dakota for its facility in St. Louis that is currently served by KCS. (Id., Vol. 2, R.V.S. Richardson Int’l Ltd.) Similarly, another shipper, NEW Cooperative Inc., notes that the Transaction “provides us the possibility to build a greenfield grain elevator to ship corn and soybeans in Northern Iowa, to

³¹ Shippers of fertilizers from the Gulf to the grain-growing regions will also benefit from the same new single-line routes, but in reverse. (Appl., Vol. 1, V.S. Wahba/Naatz, para. 16.)

capitalize on new, efficient single-line routes on CP-KC from Iowa to grain destinations on the KCS, including Mexico.” (*Id.*, Vol. 2, R.V.S. NEW Coop. Inc.)³²

Additionally, as shown in Figure 1 below, Applicants claim that they will use the new single-line capabilities to draw existing rail shipments from other railroads. (*Appl.*, Vol. 1, V.S. Creel, p. 12 fig.3; *id.*, Vol. 1, V.S. Wahba/Naatz, para. 18.) This indicates to the Board that grain growers that can reach elevators served by CP in the Upper Midwest will have a direct alternative to BNSF and UP when shipping to markets in the South-Central States, Texas, and Mexico.

Reduction in Carbon Emissions & Strengthening of Supply Chains. Applicants claim, and the Board agrees, that shipments currently moving via interstate trucks will be attracted to the new intermodal (and other) rail services offered by the new carrier. (*Id.*, Vol. 1, V.S. Wahba/Naatz, paras. 10, 40.) The Board expects that the new service will therefore reduce congestion on the country’s interstate highway system and at U.S.-Mexico border crossings, thereby creating a more environmentally friendly and less carbon-intensive North American transportation network.

Additionally, Applicants claim that the Transaction will connect six of the seven largest metro regions in North America with a new, single-line competitor, generating an opportunity for CPKC to add new intermodal services between Texas and Chicago, Detroit, and other destinations. (*Id.*, Vol. 1, V.S. Ottensmeyer 8, 10.)

Automotive parts suppliers will be among those who benefit from these new intermodal services. (*See id.* at 3-524 (Letter from HCL Logistics), 3-1434 (Letter from TransDevelopment Group).) Shipments move between parts suppliers in the U.S. Midwest and Ontario and auto assembly plants in central Mexico reached via KCS-served intermodal terminals, and in reverse from parts manufacturers in Mexico to assembly plants across the United States and Canada.³³ (*Appl.*, Vol. 1, V.S. Wahba/Naatz, paras. 47-48.)³⁴

³² The Board notes that some grain interests, such as USWA, have raised concerns about poor service, competition from Canadian shippers, and other competition issues. (*See e.g.*, USWA Comments & Req. for Conditions (USWA Comments), Feb. 28, 2022.) The Board addresses these concerns in the Capacity, Competitive Access Concerns, and Vertical Competition Issues sections.

³³ Applicants state that KCSM’s network serves more than a dozen automotive plants either directly or indirectly and handles intermodal traffic over the majority of its network, connecting intermodal facilities that are both KCSM-owned and private intermodal facilities, customers, and ports across the network. (*Am. Operating Plan*, paras. 59 & 60.)

³⁴ The “domestic content” provisions of the new U.S.-Mexico-Canada Free Trade Agreement will encourage increased reliance by North American auto companies on cross-border parts, all of which qualify for “North American” content requirements. (*Appl.*, Vol. 1, V.S. Wahba/Naatz, para. 47.)

Increased Competition. The Transaction will allow CPKC to compete more effectively against the larger Class I railroads that surround it. (*Id.*, Vol. 1, V.S. Creel, para. 27.) Figure 1 below highlights that the new CPKC network will provide stronger competitive options, particularly for north-south traffic flows in which these larger railroads already offer single-line routes.

FIGURE 1
LARGER CLASS I SYSTEMS WILL FACE NEW COMPETITION FROM THE COMBINED CPKC NETWORK



Canadian National

Would Face New Competition from CPKC Single-Line Routes Between Gulf/South Central States and Upper Midwest/Canada

BNSF

Would Face New Competition from CPKC Single-Line Routes Between Gulf/South Central States/Texas/Mexico and Upper Midwest/Canada

Union Pacific

Would Face New Competition from CPKC Single-Line Routes Between Gulf/South Central States/Texas/Mexico and Upper Midwest

(*Id.*, Vol. 1, V.S. Creel, p. 12 fig.3.)

Easing Supply Chain Pressures. Applicants argue that the Transaction will enable investments that generate new economic activity and bring new traffic onto the North American rail network. (*Id.*, Vol. 1, V.S. Wahba/Naatz, para. 10.) One opportunity for new traffic identified by Applicants is the opening of a more efficient corridor for containerized cargo moving between Asia and points in the Eastern United States and Canada via the Port of Lázaro Cárdenas. (*Id.*, Vol. 1, V.S. Wahba/Naatz, para. 60.) Applicants indicate that Lázaro Cárdenas has developed efficient, rail-served container facilities with available capacity and that increased usage of the port will help alleviate supply chain pressures at the ports of Los Angeles and Long Beach. (*Id.*, Vol. 1, V.S. Wahba/Naatz, paras. 60-65; Applicants Reb., Vol. 2, R.V.S. Hapag-Lloyd (America) LLC & R.V.S. SPARX Logistics Inc.) Applicants claim that, given the efficiency and lack of congestion at Lázaro Cárdenas, in the time it takes a container to arrive on a vessel at LA/Long Beach, be offloaded, and ultimately placed on a railcar destined for Chicago, a similar container arriving at Lázaro Cárdenas could be placed on a CPKC intermodal train and well on its way toward the U.S./Mexico border. (*See Appl.*, Vol. 1, V.S. Wahba/Naatz, paras. 60-65.)

Congestion appears to have eased at the ports of Los Angeles and Long Beach since Applicants filed their application. See, e.g., Greg Miller, Coast Is (Almost) Clear as Port Congestion Fades Even Further, FreightWaves (Jan. 6, 2023), <https://www.freightwaves.com/news/coast-is-almost-clear-as-port-congestion-fades-even-further>. That is not to say, however, that those ports could not become congested again. Accordingly, although the Board appreciates the important concerns raised by Federal Maritime Commissioner Bentzel about traffic being diverted from U.S. ports (Hr’g Tr. 22:1 to 23:4, Sept. 28, 2022), there would be some public benefits to U.S. rail shippers from the availability of new single-line routes from the Port of Lázaro Cárdenas in Mexico to the interior of the United States, especially in times when U.S. western ports are congested.

Support for Energy Supply. The Board notes that the Transaction could allow the existing crude-by-rail shipments from Canada to the United States to be handled more safely and efficiently via CPKC’s new single-line routes. (Appl., Vol. 1, V.S. Wahba/Naatz, para. 80.) By improving the transportation options for delivering crude extracted in Alberta and Saskatchewan to refineries in the Gulf States, CPKC could hasten moving this commodity as non-hazardous bitumen (DRUbit) rather than as Dilbit, a volatile and flammable liquid, and thus provide safety and environmental benefits. (Id., Vol. 1, V.S. Wahba/Naatz, para. 80; see also Applicants Reb., Vol. 2, R.V.S. Hardisty Energy Terminal & R.V.S. USD Group.)

Quantitative Benefits. Applicants indicate that they also expect the merger to produce quantitative public benefits in a normal year. (Appl., Vol. 1, App. B.)³⁵ CN makes a general claim that Applicants’ quantification of public benefits, which it asserts is “merely a balance sheet of hoped-for private earnings,” fails to prove the proposed merger would be in the public interest. And it claims that providing an estimate of increased CP/KCS profits does not satisfy Applicants’ burden. (CN Comments & Req. for Conditions (CN Comments) 33, Feb. 28, 2022.) Similarly, CSXT argues that most of Applicants’ asserted transaction-related public benefits—roughly \$888 million annually in a normal year and \$1 billion in 2025—are not public benefits but are primarily private benefits that would accrue solely to CPKC through the diversion of revenue from other railroads. (CSXT Comments & Req. for Conditions (CSXT Comments), V.S. Carey/Bremser 3, Feb. 28, 2022.) While the Board agrees that private profits realized by the Transaction are not public benefits, the Board finds, as discussed below in the Cost Savings and Efficiencies section and the Expanded Capacity section, that the Transaction will indeed yield positive net benefits for the public beyond those already described in the Qualitative Public Benefits section.

Cost Savings and Efficiencies. According to Applicants, the Transaction will enable the CPKC system to realize substantial economic gains from efficiencies and cost reductions. (Appl. 1-22.) Applicants expect that these economic gains will total \$173 million annually. The operating changes and cost saving initiatives associated with the Transaction will yield operating expense savings of close to \$116 million in Year 3 (in 2019 dollars), as described in the Operating Plan, (see Appl., Vol 2, Ex. 13), and in Table 1 below.

³⁵ Based on Applicants’ economic forecasts, which use 2019 as the base year for revenue and growth projections, Applicants consider 2019 a normal year. (Appl., Vol. 1, App. B.)

**Table 1. CPKC Cumulative Operating Savings Summary
(In USD, excludes savings related to merger-related traffic additions)**

Item	Year 1	Year 2	Year 3
Operating Metrics	52.59M	52.59M	52.59M
Fuel Savings	26.57M	28.19M	29.79M
Locomotive Depreciation and Lease	10.15M	10.15M	10.15M
Freight Car	0.00M	1.79M	2.60M
Procurement	4.18M	12.05M	20.54M
Total	93.5M	104.8M	115.7M

(Applicants Reb., Vol. 2, R.V.S. Baranowski, para. 4.) Applicants also expect to save \$57 million in administrative costs, (Appl. 1-22), which they describe in the verified statements of Dean Vargas and Chad Rolstad. (Appl. 1-22; *id.*, Vol. 1, V.S. Vargas.)³⁶

UP argues that a combination would not generate significant benefits through cost savings. (UP Comments & Req. for Conditions (UP Comments) 23, Feb. 28, 2022.) UP’s witness, Thomas Haley, notes that Applicants’ total projected savings amount to only 3.1% of their current combined operating expenses. (*Id.*, V.S. Haley, para. 14.) UP generally divides the savings between the elimination of switching for 75 cars a day in Kansas City, resulting in only \$457,710 in annual savings, and CP’s application of precision scheduled railroading (PSR) principles to KCS and KCSM. (*Id.* at 24; *id.*, V.S. Haley, paras. 23, 25.) UP asserts that the first could be accomplished now if the two railroads entered into an interline service agreement. (*Id.*, V.S. Haley, para. 23.) UP adds that KCS could adopt PSR now, and, according to CN, it has already done so for the most part. (*Id.* at 24; *id.*, V.S. Haley, para. 25; CN Comments, V.S. Randall Sec. 4.3.)

Similarly, CN’s witness, Mark Zmijewski, argues that most of Applicants’ efficiencies are not verifiable and that many are not merger specific. (CN Comments, V.S. Zmijewski 33.) Thus, CN says, the “overwhelming majority” of the claimed efficiencies would not be recognized as “cognizable efficiencies” by the DOJ/FTC Merger Guidelines. (CN Comments, V.S. Zmijewski, para. 60.) CSXT’s witnesses, Carey and Bremser, add that the small cost savings forecast by Applicants suggest a limited impact on future customers and are not comparable to those that were expected from prior railroad consolidations. (CSXT Comments, V.S. Carey/Bremser 10.) They contend that applicants in those prior transactions forecast

³⁶ The Board recognizes that \$43.7 million of this is due to annual “personnel savings.” (Appl., Vol. 1, V.S. Vargas, para. 15.) This saving “will largely be achieved through consolidating CP’s and KCS’s headquarters for United States operations in Kansas City, closing CP’s U.S. operating headquarters in Minneapolis” and “normal attrition.” (*Id.*) Most of these reductions will come from IT, Finance, and Human Resources. (*Id.*) As noted in the Labor Matters section, the Board is imposing protective conditions to protect the interests of rail carrier employees affected by the Transaction.

substantial transaction-related cost savings, which, they argue, provided the Board with a more reliable expectation of future benefits and rate reductions. (*Id.*, V.S. Carey/Bremser 10.)

At the outset, the Board notes that Applicants' methodology for estimating costs underlying savings is reasonable. Applicants have based their estimates on the same approaches used in the ordinary course in the railroad industry. (Applicants Reb. 1-55; *id.*, Vol. 2, R.V.S. Baranowski, paras. 12-13.) Baranowski also provides workpapers to verify his projections. (*Id.*, Vol. 2, R.V.S. Baranowski, para. 12.)

Furthermore, the opponents' claims ignore the synergies and efficiencies of single-line service that extend well beyond Kansas City. The agency has long recognized the benefits of single-line service. *See, e.g., Burlington N., Inc.—Control & Merger—St. Louis-S.F. Ry.*, 360 I.C.C. 784, 940 (1980); *Conrail*, 3 S.T.B. at 248.

In this case, Applicants explain that “[f]rom the outset, CPKC will build efficient, longer-distance blocks that bypass Kansas City, connecting KCS’s Shreveport yard and CP’s yards in St. Paul and Chicago.” (Appl. 1-25.) The Board finds this logical and would expect that, as traffic increases, the new carrier could create even more efficient blocks. (*Id.*) The Board also finds reasonable Applicants' expectations that these efficiencies would result in improved cycle times and better usage of locomotives and railcars, which could benefit many shippers, including those who provide their own railcars. (*Id.*) Indeed, numerous shippers anticipate the possibility of lowering their equipment costs and achieving faster transit times. (*See, e.g.,* Appl. 3-264 (Letter from Boral Res.), 3-524 (Letter from HCL Logistics), 3-539 (Letter from IMCO Int'l), 3-535 (Letter from Indorama Ventures), 3-570 (Letter from JEI, Inc.))³⁷

The fact that some efficiencies might be achievable without a merger, as claimed by certain competing railroads, does not negate the benefits of the Transaction. The Board and the Interstate Commerce Commission (ICC), the Board's predecessor agency, have consistently recognized that railroad mergers frequently can achieve a degree of coordination beyond that which is available under voluntary coordination agreements. *CN-IC*, 4 S.T.B. at 168-69. Indeed, a similar scenario existed when the ICC examined UP's acquisition of the Chicago & North Western Railway Company. Although those railroads already had extensive voluntary coordination agreements in place, the agency specifically rejected arguments that there were no additional merger synergies resulting from UP's proposed control. *Union Pac. Corp.—Control—Chi. & N.W. Ry.*, FD 32133, slip op. at 63 (ICC served Mar. 7, 1995). As the agency concluded there, many of the projected efficiency gains from control require more structure than can be realized through selective cooperative agreements.³⁸

³⁷ CHS Inc., a farmer-owned cooperative, notes that there could be a reduction of “1-3 days [in] the time it takes for a 100-car train filled with grain to travel from North Dakota to Mexico, the largest market for U.S. corn and corn byproducts.” (Appl. 3-335 (Letter from CHS Inc.))

³⁸ The agency also noted in *UP-MKT* that, without the unified management resulting from that merger, few of the operating economies would be attainable. *UP-MKT*, 4 I.C.C.2d at 564-65.

Expanded Capacity. Applicants state that they expect to incur one-time expenditures for purposes including expanding the capacity of the CPKC network and integrating information technology systems. (Appl. 1-22.) Notably, Applicants expect to invest more than \$275 million in capital expenditures, primarily to add double track, to add and extend sidings, and to install CTC signaling systems on the CPKC north-south corridor lines between Louisiana and St. Paul/Chicago. (*Id.* at 1-23.)³⁹ Applicants claim that these investments will improve service levels, add capacity, and improve safety. The Board finds that these expectations are logical and will benefit the public when implemented.⁴⁰

CN responds that Applicants have failed to provide for capital projects that will be required to accommodate post-merger traffic volumes, including on lines shared with other rail carriers. (CN Comments 29.) CN’s witness, Hugh Randall, assessed the CPKC network “in light of projected traffic increases and found that ‘significant train delays and service disruptions are likely without additional capital spending’ to ensure that line-of-road, yard capacity, key bridges, and locomotive fleets can handle the traffic.” (*Id.*) CN contends that the Applicants “should not be permitted to implement their new single-line service and add to the existing traffic on jointly used lines until they plan, pay for and implement the changes required to handle the projected traffic increases.” (CN Resp. to Comments 32, July 12, 2022.)

UP and BNSF also raise concerns about new traffic on jointly used lines, with particular emphasis on shared lines in the Houston area.⁴¹ UP asks that if the Board allows the proposed Transaction to proceed, it should not allow Applicants to increase their operations on such shared lines above pre-merger levels until Applicants agree to (1) “cooperate with UP and BNSF to select an independent consultant who will study the need for infrastructure in the Houston area (from Robstown, Texas, to the Neches River Bridge) to accommodate Applicants’ proposed merger-related traffic growth and recommend specific infrastructure projects,” (2) “provide information requested by the consultant,” and (3) “implement the consultant’s recommendations (or cooperate with UP and BNSF to implement those recommendations, as necessary).” (UP Final Br. 14.) UP also asks the Board to require that “disputes over funding any new infrastructure should be resolved under the terms of the joint use agreements governing the facilities at issue.” (*Id.*)

³⁹ As reflected in the financial statements, (Appl., Exs. 16-8), Applicants also assert that increased income from new traffic, cost savings, and other merger-related efficiencies will support these expenditures, (*id.* at 1-23).

⁴⁰ A map depicting planned improvements is included below in Appendix A.

⁴¹ KCS has trackage rights over UP’s Houston Subdivision between West Junction and Tower 26, then over the West Belt, which provide KCS access to UP’s Beaumont Subdivision. UP, BNSF, and KCS all use the Beaumont Subdivision for traffic moving eastbound toward Beaumont. Amtrak also uses the Beaumont Subdivision for the Sunset Limited train. Further, KCS has rights from the Beaumont Subdivision directly past UP’s Settegast Yard on the East Belt, which connect to KCS’s rights on the Glidden Subdivision. UP has also given KCS rights to move traffic westbound on UP’s Houston Subdivision, which run past UP’s Englewood Yard toward Tower 26. (UP Comments 57.)

Similarly, BNSF asks, among other things, that the Board require that Applicants conduct a capacity study of the Houston area to identify capital projects necessary to accommodate CPKC-merger growth. (BNSF Final Br. 21-22.) BNSF emphasizes that CPKC should be required to fully fund any capital improvements that would not be required “but for” increased CPKC traffic on lines owned by BNSF or other railroads and contends that the Board may override applicable trackage rights agreements if necessary to ensure that CPKC bears those costs. (BNSF Comments 5-6, Feb. 28, 2022; BNSF Final Br. 26.) It argues that, in the absence of a plan by Applicants to address how increased CPKC traffic will be handled on shared lines in Texas—and until necessary capital improvements are identified, fully funded by Applicants, and implemented—the Board should also restrict CPKC from exceeding KCS’s pre-merger traffic levels on those lines if such increases would displace existing traffic or compromise fluidity on those lines. (BNSF Comments 6; BNSF Final Br. 23.)

The Board will not impose the conditions sought by the carriers. The Board acknowledges concerns raised about future capacity on jointly used lines. However, as discussed in the Capacity section, the Board expects traffic to increase incrementally in the years following the Transaction, and Applicants and other users of shared lines will be incentivized to ensure continued fluidity through the implementation of operational changes and infrastructure improvements. Moreover, preexisting trackage rights agreements govern each carrier’s rights and responsibilities on the shared lines, which will continue in effect after the Transaction. Additionally, Applicants state that “CPKC is committed to working collaboratively with UP and BNSF to ensure that operations on these shared lines work for all users.” (Applicants Reb. 1-163.) According to Applicants, if new infrastructure investments are needed, “CPKC will support the work needed to identify the optimal approach” to capacity expansion (including using RTC analysis if warranted), install that capacity, and pay for that capacity “based on the provisions and processes already established in the governing agreements.” (*Id.*) The Board will therefore not impose conditions restricting the addition of the new CPKC traffic nor will it become involved, at this time, in the implementation of future projects on these lines. Nevertheless, as explained in the Capacity section, the Board will closely monitor capacity issues on certain portions of the combined CPKC network to evaluate and help ensure post-merger fluidity and, if warranted, order further action.

Conclusions. In sum, the criticisms regarding Applicants’ public interest presentation have not persuaded the Board that the Transaction does not have important public benefits. Moreover, even if it is difficult to quantify the precise level of benefits, there will be efficiencies and other advantages gained by the single-line service created by the combination of CP and KCS that would give rise to public benefits, as discussed above. The Board anticipates studying the benefits achieved by the Transaction during the oversight period, and to that end, may require submission of Applicants’ 100% traffic tapes. Such efforts could yield important insights into the benefits of vertical rail mergers more generally. Because the merger-related harms are adequately addressed by the conditions the Board will impose in this decision, the qualitative benefits shown on this record, by themselves, are consistent with approval under the public interest standard.

General Issues & Specific Conditions Sought by Parties

Traffic Projections. Applicants estimate that CPKC’s single-line service, cost reductions, and other efficiencies will attract new traffic to the CPKC network and result in more than \$1 billion in new annual gross revenues. (Appl. 1-21.) These estimates are based on the verified statements of Richard W. Brown and Nathaniel S. Zebrowski, of FTI Consulting, who analyze diversions of existing rail traffic to the CP/KCS system; Bengt Mutén of IHS Markit, who analyzes diversions of existing truck traffic to the CPKC system’s new single-line intermodal offerings; and Jonathan Wahba (CP’s Vice President of Commercial Integration) and Michael J. Naatz (KCS’s Marketing Officer), who further discuss the potential for diversion of existing rail and truck movements, as well as additional new market opportunities created by the CP/KCS combination. The anticipated traffic gains and the resulting revenue growth are described in their verified statements.

Traffic From Other Rail Carriers. Brown and Zebrowski claim that “a combined CP/KCS system would significantly change the existing competitive dynamics by injecting a large number of new single-line routes into north-to-south oriented rail transportation corridors.” (Appl., Vol. 2, V.S. Brown/Zebrowski, para. 11.) CPKC will have the “expanded geographic reach and integrated operating economies necessary to provide shippers with new single-line service options capable of competing more effectively with the routings of the larger Class I railroads.” (*Id.*, Vol. 2, V.S. Brown/Zebrowski, para. 11.) Brown and Zebrowski contend that the shipping public and broader economy will benefit from the combined CPKC system as a result of, among other things, (1) “rate reductions, both from CPKC’s more aggressive competition enabled by its new single-line offerings and reduced cost profile” and from the efforts of incumbent railroads to retain traffic in the face of that competition; (2) improved service and reliability associated with single-line rather than two-carrier service and with additional investments in the merged carriers’ facilities; (3) improved railcar utilization and cycle times, which directly benefits shippers that own or lease their own equipment; and (4) improved “ease of doing business with a single, integrated end-to-end system” rather than two separate connecting railroads. (*Id.*, Vol. 2, V.S. Brown/Zebrowski, para. 89.) In terms of annual traffic flows at 2019 levels, they estimate that approximately 80,000 carloads and 138,000 intermodal containers will likely divert each year from existing routes to CPKC as a result of the CP/KCS combination. (*Id.*, Vol. 2, V.S. Brown/Zebrowski, para. 6.)

Several Class I railroads contend that Applicants have overstated the amount of traffic CPKC would divert from other rail carriers.⁴² In particular, UP, without putting forward its own estimates, asserts that Applicants offer no reason “customers would willingly choose longer CPKC routes over existing interline routes.” (UP Comments 25.) UP’s witness, Thomas Haley, asserts that Applicants’ routes between Mexico/Texas markets and Chicago/Twin Cities/Upper Midwest markets are significantly longer and less efficient than UP and BNSF alternatives. (*Id.*, V.S. Haley, paras. 11, 52-60.) He suggests that Applicants could not meet their traffic diversion goals solely by competing for business on the merits. (*Id.*, V.S. Haley, para. 11.)

⁴² The Board notes that UP, CN, and BNSF have completed their own major mergers. These carriers, not surprisingly, oppose the Transaction and seek conditions that could frustrate its success.

Similarly, CN claims that Applicants' diversion studies and related revenue projections are based on flawed methodologies, unsupported assumptions, and erroneous calculations that invalidate the results of the studies. (CN Comments 17; see also id., V.S. Hunt 6.) In particular, CN claims that Applicants' projected rail-to-rail diversions are based on the "simplistic and highly implausible assumption" that the length of a route is unrelated to that route's ability to gain a share of the available traffic. (CN Comments 18.) According to CN, Applicants' experts "mechanically" assigned diversion percentages to traffic movements regardless of the relative distance of the incumbent rail route and the proposed CPKC route. (Id.) This is particularly problematic, CN argues, because the majority of the CPKC single-line routes that would be created by the merger are substantially longer than the already-existing route options available to shippers. (Id.) CN does not put forward a diversion study of its own but does argue that the Brown and Zebrowski estimate of revenue derived from diverted traffic should be reduced by \$86 million by removing a 5% gain in grain and lumber traffic that CN claims is arbitrary. (CN Comments, V.S. Hunt 21-22.)⁴³

The Board does have concerns about Applicants' rail-to-rail diversion study. To generate their data, Brown and Zebrowski performed a Traffic Distribution Analysis in which they identified specific county-to-county pairs that are at least 1,000 miles apart and have two rail lanes that could provide movements between the two counties. (Appl., Vol. 2, V.S. Brown/Zebrowski, App. B, paras. 2-3.) Brown and Zebrowski performed this analysis for county-to-county pairs with either two single-line route alternatives, one single-line route and at least one dependent interline route alternative, or one single-line route alternative and one independent interline route alternative. (Id., Vol. 2, V.S. Brown/Zebrowski, App. B, para. 3.)⁴⁴ They used traffic shares between these pairings as the starting point for determining appropriate diversion percentages. (Id., Vol. 2, V.S. Brown/Zebrowski, App. B, paras. 4, 8.) For example, Figure B3 in Brown and Zebrowski's Appendix B shows that when a single-line service and an independent-interline service have the same length (at $x = 1.0$ on the horizontal axis), the single-line service captured about 55% of the traffic on average while the interline service captured about 45% of the traffic. Applicants thus claim that a reasonable initial estimation of the traffic that would divert from the competing independent interline rail service to post-merger CP/KCS single-line service, is over 50%. (See id., Vol. 2, V.S. Brown/Zebrowski, App. B, fig.B3 & paras. 9-12.)

⁴³ CN further reduces Brown and Zebrowski's revenue total by \$47.4 million because it claims that they erroneously predicted in certain cases that the merger would yield incremental revenues for diverted movements greater than the revenues earned by the railroads that currently haul that traffic, and that Brown and Zebrowski thereby attribute too much revenue to those diversions. (CN Comments, V.S. Hunt 14-20.)

⁴⁴ Specifically, Brown and Zebrowski "examined carload and intermodal traffic shares for county-to-county traffic flows in the 2015-2019 [confidential waybill sample] for pairs historically served by either multiple Class I railroads with single-line routes or one Class I with a single-line route and at least one other interline alternative, whether or not involving the single-line carrier." (Appl., Vol. 2, V.S. Brown/Zebrowski, App. B, paras. 2-3.)

Brown and Zebrowski’s conclusion could be correct *if* CPKC were constructing an *entirely new* rail line to compete with the existing independent interline-service. But the single-line service CPKC expects to offer post-Transaction will use a route that was already available to shippers as interline service. (See, e.g., Appl., Vol. 2, V.S. Brown/Zebrowski, para. 12.) And because, all else equal, it would be reasonable to expect two competing independent interline services of the same length to each capture about 50% of the market, Figure B3 indicates that converting an interline service into a single-line service (e.g., through a merger) would cause the newly formed single-line service to capture an additional 5% of the total traffic moving over the two competing routes (i.e., 5% more than it currently moves), not 55% of the traffic currently moving over the independent interline service, as Brown and Zebrowski suggest. (*Id.* at App. B, fig.B3 & para 12.) This conceptual flaw—which is repeated throughout Brown and Zebrowski’s Traffic Distribution Analysis—leads them to overstate the percentage of potentially divertible traffic, which in turn calls into question their ultimate estimates of how much traffic would be diverted post-Transaction.

The Board is also not persuaded by Brown and Zebrowski’s claim that their Traffic Distribution Analysis shows little correlation between relative route length and traffic share. (Appl., Vol. 2, V.S. Brown/Zebrowski App. B; Applicants Reb., Vol. 2, R.V.S. Brown/Zebrowski, paras. 24, 51-52.) The Board recognizes that customer route choice depends on many factors and that route length is not necessarily determinative. (See Applicants Reb., Vol. 2, R.V.S. Brown/Zebrowski, paras. 35-47; *id.*, Vol. 2, R.V.S. Wahba/Naatz, para. 17.) Indeed, CP’s route from Toronto to Edmonton is longer and slower than the route of CP’s principal rail competitor, but CP claims to still acquire business with its intermodal and other services on this route. (*Id.*, Vol. 2, R.V.S. Wahba/Naatz, para. 15.) However, Brown and Zebrowski’s Traffic Distribution Analysis likely understates the relationship between traffic share of each carrier between origin-destination pairs and relative length of each carrier’s routes because it appears to assume that all shippers in a county can ship on any line that has a station in that county, as Brown and Zebrowski state that they calculated shares based on “total” shipments between counties. (Appl., Vol. 2, V.S. Brown/Zebrowski, App. B, para. 4.) Brown and Zebrowski do not state that they tried to eliminate shipments made by captive shippers. To the extent that the Traffic Distribution Analysis included shipments by shippers that could not choose between competing routes, it likely underestimated the effect of relative route distance on the choice of using route lines and likely overstated the universe of divertible traffic.

Accordingly, the rail-to-rail diversion study provided by Applicants does not offer a precise estimate of diversion. Nevertheless, the rules governing this transaction give Applicants the “greatest leeway” to develop evidence on transaction impacts and specifically provide that diversion studies (which are not required) are neither limiting nor inclusive. See 49 C.F.R. § 1180.7(c) (2000). And as discussed further below, Applicants have described the potential for a combined CPKC to attract existing rail movements onto its new, single-line routes. (Appl., Vol. 1, V.S. Wahba/Naatz, paras. 15-56.) The Board has recognized more efficient single-line service as a benefit of mergers,⁴⁵ and it is logical that at least some traffic would be drawn from other rail carriers due to improved service, and that the benefits of more efficient transportation

⁴⁵ CSX Corp.—Control & Merger—Pan Am Systems, Inc. (CSX-Pan Am), FD 36472 et al., slip op. at 22 (STB served Apr. 14, 2022) (citing cases).

and competition associated with those diversions will still be achieved. Indeed, BNSF argues that Brown and Zebrowski, as well as Applicants' other witnesses, have *understated* CPKC post-merger traffic levels. (See BNSF Comments, V.S. Fisher 13-19.) And CN, in support of its responsive application, assumed an impedance cost associated with interchanges—expressed in route miles—of between 350 and 650 miles depending on the traffic volume exchanged at the junction, which highlights in quantitative terms the benefits of single-line service. (CN Am. Resp. Appl., V.S. Hunt 37, June 9, 2022.)⁴⁶ It is also clear from the many letters in the record that shippers prefer single-line service to joint-line service. (See, e.g., Appl. 3-368 (Letter from CW Metals), 3-454 (Letter from Forest River Bean Co.), 3-489 (Letter from Grand Prix, Inc.), 3-553 (Letter from Interoceanic Corp.), 3-555 (Letter from Interstate Asphalt).) Additionally, and importantly, concerns about the rail-to-rail diversion study do not undermine the evidence regarding truck diversions discussed by Mutén or the additional new opportunities discussed by Wahba and Naatz.

Questions about the Appropriateness of Traffic. CSXT and CN also assert, among other things, that Applicants have overstated merger benefits by including traffic that CP and KCS could haul without the merger. (CN Comments 20; CSXT Comments, V.S. Carey/Bremser 33.) For example, CSXT challenges certain estimates of automotive diversions while, according to CN, the claim by Wahba and Naatz that the merger would allow new shipments of “DRUbit” from a facility at Hardisty, Alta., ignores that CP and KCS had already signed a contract to service this traffic in 2019 before merger discussions began. (CN Comments 20.) CN also claims that Applicants' experts include traffic that does not currently exist. (*Id.*; see also *id.*, V.S. Hunt 33.)

Applicants provide credible responses to these claims. They note that the automotive traffic challenged by CSXT is, in fact, merger-related as the Transaction would grant CP access to an automobile ramp in Kansas City. (Applicants Reb., Vol. 2, R.V.S. Brown/Zebrowski, para. 14.) To CN, Applicants respond that the DRUbit traffic that Wahba and Naatz forecast was not a part of the shipments referenced in 2019, but new traffic that might not develop without the improved equipment cycle times that would be made possible by the Transaction. (*Id.*, Vol. 2, R.V.S. Wahba/Naatz, paras. 42-46; see also *id.*, Vol. 2, R.V.S. Hardisty Energy Terminal; R.V.S. USD Group.) And the fact that some traffic does not yet exist underscores that the merger will expand the market reach of the CPKC shipper base and create more efficient linkages between market participants. (Applicants Reb., Vol. 2, R.V.S. Wahba/Naatz, paras. 36-39; *id.*, Vol. 2, R.V.S. Brown/Zebrowski, paras. 16-18.)⁴⁷

⁴⁶ According to Applicants, CPKC single-line routes would be on average 200 miles longer than existing routes, (Appl., Vol. 1, V.S. Brown/Zebrowski, para. 31), which includes existing interline routes and their corresponding interchanges.

⁴⁷ However, the Board finds persuasive CN's argument that Wahba and Naatz overstate the diversion of perishables from truck. (CN Comments, V.S. Hunt 34.) Wahba and Naatz's analysis assesses the potential of new CPKC single-line rail service to move perishables traffic from Mexico to the Upper Midwest via a single, direct intermodal rail move between origin and destination. (Applicants Reb., Vol. 2, R.V.S. Mutén, paras. 10-11; *id.*, Vol. 2, R.V.S. Wahba/Naatz, para. 41.) CN notes that this is questionable as Mutén, Applicants' other witness,

Truck-to-Rail Diversion. KCS’s president, Patrick Ottensmeyer, indicates that capturing a larger share of the truck traffic moving cross-border from Mexico, through the U.S., and up into Canada, for example, is a goal of the Transaction. (Appl., Vol. 1, V.S. Ottensmeyer 7.) He asserts that there is a substantial amount of freight moving via trucks that could be moving on the rail network and that Applicants will pursue that traffic vigorously. (*Id.*, Vol. 1, V.S. Ottensmeyer 7.) Mutén, looking at all lanes in which the Transaction will yield an improved CP/KCS single-line intermodal offering, estimates annual diversion of 64,018 trailers or containers per year to intermodal service. (*Id.*, Vol. 2, V.S. Mutén, paras. 6, 52 & App. A.) The diversion of trucks to intermodal would reduce long-haul truck miles in the United States by 86.2 million annually, while requiring an additional 3.4 million miles of local trucking to the ramps, for a net reduction of 82.8 million annual truck miles. (*Id.*, Vol. 2, V.S. Mutén, para. 56.) The reduction of long-haul truck miles in Canada is expected to be 1.8 million, and in Mexico 14.9 million, with a small increase in local trucking in each country. (*Id.*, Vol. 2, V.S. Mutén, para. 56.)

Conclusions. Although the Board finds some of the benefits from rail-to-rail diversion may be overstated, the new service will nonetheless create a more competitive option for current rail shippers, be attractive to those presently shipping by truck, and cultivate other new rail traffic. And while uncertainty about the precise level of traffic diversions necessarily leads to uncertainty about the revenues to be achieved as a result of the Transaction, as discussed below Applicants will have adequate funds to pay down their debt and make capital investments regardless of the level of those new revenues.

Operating Plan Data & Methodology. In Decision No. 16, the Board noted that Applicants had submitted two different sets of 2019 baseline traffic density data: (1) the reported 2019 baseline data contained in Exhibit 14 of the Application, and (2) the modeled 2019 baseline data contained in the “Master Segment Table” submitted to the Board’s OEA. The Board identified the apparent discrepancy and ordered Applicants to indicate which 2019 baseline data should be used in analyzing the environmental and operational impacts of the Transaction. Decision No. 16, FD 36500 et al., slip op. at 2-3. In response, Applicants stated that the Exhibit 14 numbers represented the raw 2019 density data that the two companies had collected and reported in the ordinary course of business, but because of differences in how the two companies collected data, they did not consider those numbers sufficiently reliable. (Applicants Reply 4-5, Mar. 21, 2022.) Instead, Applicants had based their Operating Plan on a different set of density numbers that were the outcome of a mathematical modeling process. (*Id.* at 5-7.) Applicants reported those numbers in the Master Segment Table submitted to OEA. (*Id.*) Applicants took the position that the 2019 baseline traffic densities in the Master Segment

only estimated that several hundred of such truckloads would be diverted, which he based on current truck traffic patterns. (CN Comments, V.S. Hunt 34; Appl., Vol. 2, V.S. Mutén, para. 55.) As Mutén explains, current perishables truck traffic from Mexico to the Upper Midwest largely involves a stop in a border state and hence a direct truck move of perishables from that origin to destination “represents a route that does not exist today.” (Appl., Vol. 2, V.S. Mutén, para. 55; Applicants Reb., Vol. 2, R.V.S. Mutén, paras. 10-11 & R.V.S. Wahba/Naatz, para. 41.)

Table should be used by the Board (and other parties) in lieu of the Exhibit 14 densities. (Id. at 2-3.)

In Decision No. 17, the Board determined that, in keeping with Applicants’ intent, analysis of the Transaction’s environmental and operational impacts, as well as analysis presented regarding the impacts of any responsive applications, should be assessed using the 2019 baseline density data contained in the Master Segment Table—which underlay the Operating Plan—rather than the 2019 density data in Exhibit 14 to the Application. Decision No. 17, FD 36500 et al., slip op. at 4. In making this determination, the Board found that its regulations do not require that applicants use the full calendar year of data contained in Exhibit 14 to construct their projections in their Operating Plan. Id. at 5. Nor do the regulations prohibit applicants from basing the Operating Plan on modeled values rather than raw data or prohibit applicants from basing such a model on data from years other than the base year. Id. Rather, the Board noted that the regulations give applicants “the greatest leeway” to develop evidence as appropriate in context, 49 C.F.R. § 1180.7, and require only that the Operating Plan include, among other things, “the anticipated traffic density and general categories of traffic (including numbers of trains) on all main and secondary lines in the system,” 49 C.F.R. § 1180.8(a)(1). The Board, however, made no determination as to the validity of the methodology used by Applicants to generate their baseline traffic density values. The Board ordered Applicants, among other things, to amend their Operating Plan to include the following: (1) an explicit identification of the baseline traffic density values used in the Operating Plan calculations and to be used in the environmental review, (2) a comprehensive explanation of how those values were generated, and (3) a comprehensive explanation of the rationale underlying those methodological choices. Decision No. 17, FD 36500 et al., slip op. at 6. Pursuant to the Board’s order, on May 13, 2022, Applicants filed an Amended Operating Plan, including supporting workpapers and an amended Exhibit 14 with an updated set of density maps and tables.

In its June 9, 2022 comments on Applicants’ Amended Operating Plan, CN reiterates previously expressed concerns regarding the data underlying the Amended Operating Plan. CN’s arguments primarily concern the “Base Plan” component of the Amended Operating Plan—i.e., the component that represents the operations of the separate CP and KCS/KCSM networks in their pre-Transaction states. (See Am. Operating Plan, paras. 65, 71.) Applicants developed that Base Plan in two discrete stages. In the first stage, Applicants constructed a model of existing train operations and traffic flows on the CP and KCS/KCSM networks using various traffic inputs. (See id. at paras. 74-92.) In the second stage, Applicants took one particular output of that model—the baseline segment-level traffic densities—and calibrated the results based on system-wide historical reported densities. (See id. at para. 93.) The Board will discuss each stage in turn.

Base Plan Inputs. The Base Plan model representing pre-Transaction operations of the separate CP and KCS/KCSM networks was developed using three inputs: (1) blocking and train designs, (2) traffic data for scheduled trains, and (3) traffic data for on-demand trains. (Id. at para. 72.)

For the first input, Applicants used blocking and train designs from the first quarter of 2021 (Q1 2021). (*Id.*) Although Applicants state that they explored the possibility of using operational designs from 2019 (the base year Applicants had designated), they concluded that such a task was impossible because KCS/KCSM does not maintain an archive of past operating designs; rather, KCS/KCSM maintains only the “live” design that is constantly updated to reflect current conditions. (*Id.* at para. 75.) Applicants state that attempting to reconstruct a 2019 operational design for KCS/KCSM would have resulted in work product that was largely speculative and insufficiently reliable. (*Id.* at para. 76.) Applicants thus used the actual KCS/KCSM operational design information that was in place as of Q1 2021, when Applicants retrieved it to develop the Application. (*Id.* at paras. 75, 77.) To ensure a comparable base plan for CP, Applicants state that they used CP’s operational plan from Q1 2021 as well. (*Id.* at para. 77.)

For the second input, Applicants used traffic data for scheduled trains derived from October 2020 waybill records. (*Id.* at paras. 72, 82, 85.) Applicants state that they concluded it would have been unreasonable to use traffic data from 2019, given that the model’s blocking and train designs were from Q1 2021. (*Id.* at para. 79.) Applicants state that traffic flows and operational designs changed significantly between 2019 and 2021, such that flowing 2019 data over 2021 designs would have resulted in a mismatch that undermined the reliability of the Base Plan as a reflection of pre-Transaction conditions. (*Id.* at paras. 79-80.) Instead, Applicants chose to use scheduled train data from October 2020 because (1) setting a traffic baseline at a peak month is CP’s ordinary business practice and is preferable because it accounts for seasonality in traffic patterns and avoids understating demands on network resources, and (2) October 2020 was the peak month closest to the Q1 2021 time period from which the operational designs were drawn. (*Id.* at paras. 82, 84.) Applicants further state that, although the COVID-19 pandemic influenced traffic volumes earlier in 2020, by October 2020 there had been broad recovery for most commodities across the combined CP and KCS/KCSM networks. (*Id.* at para. 82.)

For the third input, Applicants used data on actual CP and KCS on-demand trains that operated during early 2021, using the most recent three-month period for each carrier at the time of the study (February 2021-May 2021 for KCS and March 2021-June 2021 for CP). (*Id.* at para. 87). Applicants assert that the use of these time periods was reasonable because they aligned with the Q1 2021 train and operations designs used in the model, because the on-demand traffic from those time periods was representative of pre-Transaction operations generally, and because they closely aligned with average pre-2019 traffic levels. (Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, para. 13.)

CN argues that these inputs render the model unreliable because they are “fractured” and have not been credibly shown to “accurately represent 2019 traffic.” (*See, e.g.*, CN Comments on Am. Operating Plan 10; *id.*, V.S. Van Dyke 4, 5, 11.) According to CN, “using non-randomized partial year traffic samples to estimate full year results . . . in no way represents a reasonable statistical analysis.” (*Id.*, V.S. Makhholm 3.) CN states that Applicants have therefore failed to carry their burden of “demonstrating that their Application is in the public interest.” (*Id.* at 2.)

CN appears to contend that the Amended Operating Plan is so flawed that the Board's reliance on it would not be a reasonable exercise of the Board's discretion and expertise. The Board, however, retains significant discretion in making such a determination, and its regulations explicitly give significant "leeway" to merger applicants "to develop the best evidence on the impacts of each individual transaction." 49 C.F.R. § 1180.7. The Board therefore concludes that it would not be appropriate to require Applicants to establish that their chosen methodology is the best possible methodology, a methodology that has been used in past merger approvals, or even the methodology that the Board (or CN) would have chosen. Instead, Applicants need only show that their chosen methodology is reasonable and sufficiently reliable under the circumstances of the case.

The Board finds the base year operating designs and traffic data used to develop Applicants' Base Plan to be reasonable and sufficiently reliable given the circumstances. In light of KCS's practice of not archiving operating plans, Applicants reasonably used the only operating plan that was available at the time, Q1 2021, to represent KCS's pre-Transaction operational design. Applicants also reasonably used CP's corresponding Q1 2021 operating plan to permit an apples-to-apples comparison across networks. By the same token, Applicants reasonably used traffic data that corresponded with the blocking and train designs from Q1 2021, thus avoiding a mismatch of traffic and operations that would potentially undermine the reliability and accuracy of the Base Plan and resulting outputs. (See, e.g., Am. Operating Plan, para. 79; Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, paras. 9, 13.)

Additionally, as Applicants note, CN's criticisms "go only to the degree of precision associated with the base Operation Plan as a perfect measure of exactly what one would see if you stood trackside during 2019 and counted trains or weighed the passing railcars," (Applicants Reb. 1-57), and obtaining that level of precision (even if it were possible) is not needed to allow the Board to assess the impacts of the Transaction, which relies on a generally accurate representation of the two railroad networks' pre-Transaction states. If anything, using more up-to-date pre-Transaction data *increased* the Base Plan's accuracy, causing it to better represent current operations and capture the efficiencies that both railroads achieved between 2019 and late 2020/early 2021, which otherwise would have been retrospectively attributed to the Transaction. In this context, Applicants' Base Plan modeling decisions were reasonable, even if the input data was not itself generated until after 2019.

As a final matter, CN criticizes Applicants' use of partial-year extracts of traffic data because that data fails to capture the impacts of seasonality, as well as variability in traffic on specific portions of the network, while replicating and augmenting the impact of the variations for a select period of time. (CN Comments on Am. Operating Plan, V.S. Van Dyke 11.) However, the Board finds Applicants' use of October 2020 traffic data for scheduled train operations appropriate, as variations throughout the year in traffic levels for scheduled train operations are typically nominal. Moreover, as Applicants note, the use of peak month traffic "ensures that the operations being modeled are adequately resourced—in terms of crew, locomotive, yard, and line-of-road capacity," thus ensuring that the resulting operating plan does not underestimate the resources needed to operate the combined system post-Transaction. (Am. Operating Plan, para. 84.) Likewise, Applicants' use of early 2021 traffic data for on-demand trains captured pre-Transaction traffic levels corresponding to Q1 2021 blocking and train

design, which, according to Applicants, closely aligned with 2019 average levels, with no meaningful changes in average train-per-day levels between the full-year-2019 period and the February-to-April-2021 period. (See Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, para. 13.)

Deriving Density Data from Base Plan Outputs. Because Applicants considered the reported 2019 density data in Exhibit 14 to be flawed due to (among other reasons) differences in how CP and KCS collected traffic density data in the ordinary course of business, Applicants developed 2019 segment-level density values based on the tonnages generated by the Base Plan model described above. (Applicants Reply 4-5, Mar. 21, 2022.) Specifically, Applicants took the segment-level density values generated as one of the outputs from the Base Plan and “calibrated” them to the reported Exhibit 14 density values on a system-wide level. That is, Applicants summed the segment-level Base Plan densities, determined what factor by which they would need to multiply that sum for it to equal the sum of the Exhibit 14 reported densities, and multiplied each segment-level Base Plan density by that factor. (See Am. Operating Plan, paras. 93-94.) As a result of this calibration, Applicants state that “the actual system-level [gross ton miles or] GTMs underlying the 2019 segment densities reported in CP’s and KCS’s ordinary course density reporting (set forth in Part A of Exhibit 14) precisely match the sum of segment level densities” generated by the Base Plan. (Id. at para. 94.)

CN asserts that the methodology used by Applicants to develop the modeled density data is conceptually flawed and results in unreliable base-year and post-transaction density values. (CN Comments on Am. Operating Plan, V.S. Makhholm 2-4 & V.S. Van Dyke 3-4.) CN characterizes Applicants’ calibration of modeled tonnages as “simply an aggregate scaling of the ‘baseline’ data” that “assum[es] that the percentage difference between the ‘modeled’ (and uncalibrated) line densities and the actual line densities is the same for every segment of the network.” (Id., V.S. Van Dyke 11, 25.) CN argues that, for certain segments, this results in “a set of train weights (and resulting densities) that vary dramatically between adjacent line segments, even where trains appear to traverse those line segments without stopping to pick up or set off cars.” (Id., V.S. Van Dyke 20.) CN argues that Applicants could have used the full year 2019 traffic data for both unit and non-unit traffic, eliminating the need for the “convoluted modeling process.” (Id., V.S. Van Dyke 25 n.70; see also id., V.S. Makhholm 8.)

The Board has concerns about Applicants’ calibration methodology. Specifically, Applicants appear to have calibrated the densities generated by the Base Plan to match what they say are “actual system-level GTMs . . . reported in CP’s and KCS’s ordinary course density reporting (set forth in Part A of Exhibit 14).” (Am. Operating Plan, para. 94.) But Applicants themselves have explicitly and repeatedly asserted that the densities maintained by CP and KCS in the ordinary course and set forth in Part A of Exhibit 14 should not be used or relied upon in assessing the Transaction’s impacts. (See Applicants Reply 4-5, Mar. 21, 2022; Am. Operating Plan, para. 173; Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, para. 9.)

However, notwithstanding these concerns, the Board finds that, had Applicants used the reported 2019 densities, as CN suggests, the Board’s analysis of the Transaction’s operational impacts would not be materially affected. When assessing the level of change and potential harm on a merged network, the Board did not rely on the modeled density values but rather on carload (and its impacts on train lengths), traffic type, and train count data to evaluate impacts on

capacity.⁴⁸ As discussed, the Board finds these underlying inputs of the Base Plan to be reasonable under the circumstances.⁴⁹

Likewise, in assessing the environmental impacts of the Transaction, OEA considered whether use of the Exhibit 14 reported 2019 density data would affect OEA's final results or ultimate conclusions. OEA concluded that using historical reported density data (expressed in gross tons per mile or GT/M) instead of modeled baseline GT/M data would not have affected the extent of the study area for air quality—or for other resource areas considered in the EIS—because no additional rail line segments would have met or exceeded the thresholds for environmental review set forth in the Board's environmental regulations at 49 C.F.R. § 1105.7(e). See Final EIS, App. K at K-113. Further, OEA conducted a sensitivity analysis for locomotive emissions using the Exhibit 14 reported baseline GT/M data and determined that use of the reported densities would not have meaningfully changed the emissions estimates or OEA's conclusions regarding the air quality impacts of the Transaction, as use of that data resulted only in a slightly (approximately 1.3%) lower estimate of Transaction-related air emissions compared to use of the modeled density base-year data across all rail line segments in the study area.⁵⁰ See Final EIS, App. K at K-113.

⁴⁸ See, e.g., infra Capacity-General CN Capacity Arguments section, p. 105 (accounting for train length in assessing capacity on the St. Paul/Elgin-to-Kansas City corridor), Capacity-Beaumont-Rosenberg via Houston section, p. 95 (considering the impact of projected train counts on capacity between Beaumont and Rosenberg); Metra section, pp. 113-15 (determining impact of additional trains on Metra lines).

⁴⁹ CN contends that Applicants provide no explanation for the differences in the modeled density data and the density data presented in their "Master Segment Table" submitted in October 2021, which is also the density data underlying the Operating Plan in Exhibit 13 of the Application. (CN Comments on Am. Operating Plan 15-16; CN Final Br. 21 n.62.) (Applicants included these Master Segment Table density values in their March 21, 2022 filing, pursuant to Decision No. 16, as a supplement to Exhibit 14.) The Board concludes that Applicants have adequately explained the development of the modeled density data and why that data differs from the data submitted in October 2021 in their Amended Operating Plan. (See Am. Operating Plan, paras. 194-95.) While CN notes the difference in annual tonnage values for the Beaumont-to-Rosenberg segment provided in Appendix A and Appendix T of the Amended Operating Plan, (see CN Final Br. at 21 n.62), it appears that CN treats this discrepancy as an anomaly, using the density of an adjacent line for its own calculations, (see CN Comments on Am. Operating Plan, V.S. Van Dyke 21 n.56), and makes no showing that the discrepancy would significantly impact the Board's operational or environmental analyses.

⁵⁰ CN argues that Applicants' methodology also results in unexplained variations in post-transaction tonnage values, focusing particularly on the adjacent line segments between Sabula, Iowa, and Airline Junction, Mo. (CN Comments on Am. Operating Plan 13-14; id., V.S. Van Dyke 40-46.) That a complex modeling effort like that undertaken by Applicants would result in variance in projected tonnages is not surprising, and while CN rightly points out that the tonnages on the segments between Sabula and Airline Junction should be more consistent than Applicants forecasted, given the relative uniformity of post-Transaction train counts, CN has not explained why the density variance on this particular line, or in any of its other examples, (id.,

For these reasons, the Board finds the operational design and traffic data used to develop Applicants' Base Plan to be reasonable given the circumstances presented by Applicants. While the Board questions the calibration process used by Applicants to generate the modeled 2019 density values, it finds the resulting modeled density data to be immaterial to the Board's analysis of the operational impacts and would not change the conclusions regarding the environmental impacts of the Transaction.

Vertical Competition Issues.

Overview.

Applicants state that their proposed combination is a purely end-to-end transaction that will generate competitive benefits and cause no competitive harm. They assert that no shippers, stations, or corridors will suffer diminished competition; that, under the "one-lump" theory applied in past proceedings involving vertical combinations, the transaction would not enhance either the incentive or the ability to foreclose competition—and that in all events, the combined entity would have no incentive to force customers to accept new single-line routes they did not desire; and that Applicants' open gateway commitments will "assure that Applicants' incentives are backed up by the potential for enforcement under the auspices of Board oversight." (Appl. 1-20 to 1-21; *id.*, Vol. 2, V.S. Majure, paras. 20-26.)

As discussed below, the other Class I railroads, all of which are larger than the combined CPKC system, seek conditions on the Transaction, including conditions that would protect or enhance their market share and that are more rigorous than those that were imposed in their own major mergers over the past 30 years. Some shipper interests also seek to limit the rates that the combined CPKC may charge.

BNSF agrees with Applicants that vertical mergers are generally pro-competitive, but contends that the importance of transportation into and out of Mexico warrants the imposition of a mileage-based proportional rate condition over the Laredo and Robstown gateways to prevent CPKC from manipulating rates to foreclose competing interline routes. BNSF also contends that, since the KCS-Tex Mex transaction in 2004, KCS has engaged in foreclosure at Laredo.

V.S. Van Dyke 47-49), makes a relevant difference. As noted below, the Board relies on carload and train count data to evaluate line capacity. With regard to OEA's review, and taking the segments between Sabula and Airline Junction as an example, the alleged fluctuations in tonnages would not affect which rail line segments warrant environmental review in the EIS because the Sabula-to-Airline Junction segment triggered the Board's thresholds for environmental review due to the projected train counts anyway. See Final EIS, App. C, tbl.C.1-1. Moreover, it appears that this line segment runs through areas that are primarily in attainment under the Clean Air Act and thus are less sensitive to air emission impacts. Only one area is in nonattainment for sulfur dioxide, a pollutant that is not emitted by rail locomotives. See Final EIS, App. K, tbl.K.4-1 (showing attainment status of Muscatine County, Mo., a nonattainment area through which the Sabula-to-Airline Junction segments run); see also id. at § 3.7.1.3 (noting Muscatine County as being in nonattainment for sulfur dioxide).

UP disputes Applicants' contention that the proposed Transaction would not enhance Applicants' incentive or ability to foreclose and proposes its own version of a mileage prorate condition, requesting that it be applied to all traffic moving over all gateways.⁵¹ The Joint Associations propose a proportional rate condition similar to UP's—but would limit its application to bottleneck moves.⁵² CN, CSXT, and NSR assert that vertical mergers can give rise to competitive harms, and propose various expansions and refinements to Applicants' open gateway commitments. NGFA⁵³ and NCGA endorse Applicants' commitments but note the importance of post-Transaction reporting and oversight. Other shippers seek enhanced competitive access unrelated to the Transaction. Numerous shippers express support for the competitive benefits they assert the Transaction would create.

As discussed throughout this decision, vertical mergers can provide both competitive benefits and competitive risks, and appropriate safeguards should be implemented to mitigate the risks. However, merger conditions must be narrowly tailored to remedy transaction-related adverse effects. The proportional rate conditions proposed by some commenters do not satisfy this principle and raise additional concerns that warrant their rejection. A robust and readily enforceable open gateway requirement is the best means to mitigate vertical foreclosure concerns without impeding the Transaction's benefits. The Board will therefore condition approval of the Transaction on the open gateway and reporting requirements discussed below, which use Applicants' commitments as a starting point but clarify and expand on them in various ways.

Most significantly, during the oversight period, Applicants will be required to provide to a shipper, upon request, a written justification for any price increase above the rate of inflation for interline movements subject to the open gateway obligation. Shippers may also make use of Applicants' proffered informal escalation process if they believe it would be beneficial to do so, regardless of whether they later pursue arbitration under Applicants' "Binding Agreement to Arbitrate" or bring a petition directly to the Board. Both conditions will promote transparency and accountability at only a modest burden to CPKC, without undermining the Transaction's potential benefits. And, to ensure that rail customers have an avenue to arbitrate disputes, Applicants will be required to adhere to their "Binding Agreement to Arbitrate," although the Board clarifies and reiterates that alleged violations of CPKC's open gateway obligation may alternatively be brought to the Board for resolution, and that the Board would expect to resolve such claims expeditiously.

⁵¹ UP echoes BNSF's claim that Mexican regulations create the potential for rate manipulation, but neither UP nor any shipper contends that foreclosure at Laredo occurred after the KCS-Tex Mex transaction.

⁵² A rail bottleneck arises when more than one railroad may be involved in providing service from an origin to a destination, but only one—the bottleneck carrier—can serve either the origin or the destination. See, e.g., Cent. Power & Light Co. v. S. Pac. Transp. Co., 1 S.T.B. 1059 (1996), modified in part, 2 S.T.B. 235 (1997), aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999), cert. denied, 528 U.S. 950 (1999).

⁵³ NGFA's comments are supported by the North American Millers Association (NAMA), the Agricultural Retailers Association (AGA), and the National Oilseed Processors Association (NOPA). (NGFA Comments 2, Feb. 28, 2022.)

The One-Lump Theory.

As a threshold matter, the Board will consider the parties' arguments concerning the "one-lump" theory, an economic doctrine used in past proceedings to inform the agency's assessment of the competitive impacts of vertical combinations.⁵⁴ The premise of the one-lump theory is that there is only one monopoly profit (or rent) to be gained from the sale of an end-product or service. The theory holds that, because a monopolist at the end stage of production (for example, a bottleneck carrier) is in a position to capture the entire monopoly profit, integration with a connecting carrier on a competitive route segment normally does not enable it to raise the profit-maximizing price. In analyzing petitions in opposition to the BN-SF merger, the D.C. Circuit, in 1997, characterized the one-lump theory at that time as a "broadly accepted economic proposition." W. Res., Inc., 109 F.3d at 788. The Board has, in some past cases, applied the one-lump theory as a rebuttable presumption that vertical combinations will not result in competitive harm. See, e.g., Norfolk S. Corp.—Control & Consolidation Exemption, FD 34839, slip op. at 9; Conrail, 3 S.T.B. at 248. Applicants assert that, based on these decisions, a presumption is warranted that the proposed Transaction would not impact the merged entity's incentive or ability to foreclose efficient interline routes. (See Appl., Vol. 2, V.S. Majure, paras. 12, 23-28.)

Several commenters urge the Board to reassess the one-lump theory. Certain Class I commenters contend that the economic understanding of vertical combinations has evolved since they relied on the one-lump theory in their own mergers, that use of the one-lump presumption in this proceeding is unwarranted, and that the competitive impacts of vertical combinations should be assessed based on their specific facts consistent with the approach taken in enforcement actions by the U.S. federal antitrust agencies. (See, e.g., UP Comments 5, 32-34, 38; NSR Am. Comments & Req. for Conditions (NSR Am. Comments), Am. V.S. Mayo, paras. 8-9, 32-33, June 9, 2022.) UP notes that modern economic analysis indicates that when an upstream monopolist and downstream rivals lack full information about each other's costs and prices, the monopolist may be unable to extract the full "lump," allowing the customer to retain a surplus; contrary to the one-lump presumption, a merger in such a market would increase the combined firm's ability and incentive to foreclose efficient interline options. (UP Comments 32, 36-37 (citing V.S. Salop, paras. 38-39).) UP states that its witness's models find that vertical mergers can benefit some shippers and harm others, although the models do not attempt to predict the likelihood of any particular outcome. (UP Comments 38.) NSR also points to uncertainty in that some empirical studies have failed to observe vertical foreclosure, while others have found vertical foreclosure. (NSR Am. Comments, Am. V.S. Mayo, para. 32.) NSR asserts that "it is not possible to conclude that incentives for post-merger anticompetitive conduct are uniformly absent in the case of vertical mergers" and urges the Board to "engage in fact-specific analyses and, where problems are indicated, to act accordingly." (Id., Am. V.S. Mayo, para. 33.) The

⁵⁴ See, e.g., UP-MP, 366 I.C.C. at 538; BN-SF, 10 I.C.C.2d at 747-57, aff'd sub nom., W. Res., Inc. v. STB, 109 F.3d 782 (D.C. Cir. 1997); Conrail, 3 S.T.B. at 248; Norfolk S. Corp.—Control & Consolidation Exemption—Algers, Winslow & W. Ry., FD 34839, slip op. at 9 (STB served Feb. 15, 2007). The one-lump theory is also known as the single monopoly profit or one monopoly profit theory.

Joint Associations protest that the Board’s application of the one-lump theory has effectively converted it into “an unassailable rule.” (Joint Ass’ns Comments & Req. for Conditions (Joint Ass’ns Comments) 13-16, Feb. 28, 2022.)⁵⁵ The Joint Associations object to the one-lump theory, which, they contend, has both limitations (it considers only rates and does not take efficiencies into account from a shipper’s perspective) and complexities that render attempts to overcome the presumption particularly difficult for carload shippers. (Joint Ass’ns Final Br. 7-8.)

In their reply, Applicants dispute that the economic understanding of vertical combinations has changed. (Applicants Reb. 1-64 to 1-65, 1-73, 1-76.) Applicants suggest that the one-lump presumption remains an appropriate starting point to assess the record in this proceeding, noting that neither the Board nor the courts have said that application of the one-lump theory creates a “no possibility of harm” standard. (See *id.* at 1-74 to 1-76.) Applicants argue that commenters’ criticism that the one-lump theory cannot apply here because Applicants do not have perfect information was once rejected by the D.C. Circuit. (Applicants Reb. 1-75 n.67 (citing *W. Res., Inc.*, 109 F.3d at 790.) Applicants state that the work of UP’s witness to address vertical mergers was debated and rejected in the BN-SF merger, and contend that the Board in KCS-Tex Mex rejected all of the arguments and requested conditions from UP and BNSF based on theories similar to ones they have presented here (which challenge assumptions underlying the one-lump theory). (*Id.* at 1-77 to 1-81.) Applicants also assert that this agency’s past merger decisions were not based on rigid adherence to abstract economic theory but on a case-by-case assessment of the facts presented by specific proposed transactions, informed by the agency’s experience with the actual effects of previous transactions. (*Id.* at 1-73.) Applicants argue that an assessment of facts is warranted, that the facts in this proceeding are consistent with those in prior cases, and that the vertical integration of CP and KCS will create more competition, not less. (Applicants Reb. 1-64 to 1-65; see also *id.* at 1-74 to 1-76.)

On January 24, 2023, DOJ filed a comment to clarify its position on the proposed merger, which DOJ states is reflected in an earlier comment it filed on April 12, 2021. (DOJ Comments 1, Jan. 24, 2023.) Although neither filing refers to the one-lump theory by name, DOJ notes in its new comment that the vertical foreclosure concerns raised in the record “echo the types of concerns that the Antitrust Division carefully considers in assessing competitive effects.” (*Id.* at 3.) DOJ reaffirms its support for “careful scrutiny of the competitive implications of the proposed transaction,” (*id.* at 2), and states that the Board should not infer from its absence at the hearing that DOJ does not believe the Transaction has the potential to cause competitive harm. (*Id.* at 1-2.) Applicants responded to DOJ’s comment on January 25, 2023, stating that they agree with DOJ’s position that the Board should “thoroughly examine the competition concerns raised by commenters,” they have “engaged thoroughly with those claims” on the factual record, and the claims of commenters raising competitive concerns lack merit and do not warrant conditions beyond those that Applicants have already accepted. (Applicants Reply 1, Jan. 25, 2023.)

⁵⁵ In BN-SF, the ICC held that to rebut the one-lump presumption, a shipper must show that (i) prior to the merger, the benefits of competition flowed through to the shipper and were not captured by the bottleneck carrier, and (ii) such a competitive flow-through would be significantly curtailed by the merger. BN-SF, 10 I.C.C.2d at 748.

The Board recognizes that economic understanding regarding the potential for competitive harm from vertical combinations has continued to evolve since the agency first began considering the one-lump theory in its 1980s merger decisions. For example, the record points to recent economic analysis suggesting that in the absence of perfect information—a cornerstone of the one-lump theory—vertical mergers can result in anti-competitive effects. See generally Moresi et al., Vertical Mergers in a Model of Upstream Monopoly & Incomplete Info., 59 Rev. Ind. Org. 363 (2021). Applicants here have not claimed, nor have any facts presented in the record suggested, that they have complete information regarding the costs and prices charged on moves involving interline bottleneck segments, and the Board considers it unlikely that they (or any rail carriers in comparable situations) do.⁵⁶ The record also indicates that some recent empirical economic studies have found evidence suggesting competitive harm from vertical mergers. (See NSR Am. Comments, Am. V.S. Mayo, para. 32 (citing empirical studies that have found evidence of post-merger foreclosure in some industries and markets but not others).) The one-lump theory also was not endorsed in the vertical merger guidelines issued by the U.S. antitrust agencies in 2020, which expressly recognize that “[a] vertical merger may diminish competition between one merging firm and rivals that trade with, or could trade with, the other merging firm.” DOJ & Fed. Trade Comm’n (FTC), Vertical Merger Guidelines, Sec. 4 at 4 (June 30, 2020).⁵⁷

The Board further notes that recent Board decisions approving rail mergers have made no mention of the one-lump theory when addressing—and in some cases acknowledging—vertical foreclosure concerns.⁵⁸ Moreover, the imposition of open gateway commitments in these and

⁵⁶ As discussed below, data presented by Applicants’ witnesses Brown and Zebrowski indicate that past vertical rail integration has caused diversions to the merging parties that cannot be explained by single-line efficiencies.

⁵⁷ On September 15, 2021, the FTC voted 3-2 to rescind the 2020 Vertical Merger Guidelines on the ground that they include unsound economic theories about the purported pro-competitive benefits of such mergers. See Press Release, Fed. Trade Comm’n Withdraws Vertical Merger Guidelines & Comment (Sept. 15, 2021), www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary. The FTC maintained, however, that the guidelines provide valuable analysis of several ways in which vertical mergers can harm the public, id., which reinforces the Board’s observation that U.S. antitrust agencies are not relying on the one-lump theory, nor should the Board make any inference that vertical mergers do not result in competitive harm. DOJ issued a related statement indicating that it was reviewing the guidelines “to ensure they are appropriately skeptical of harmful mergers” and would work closely with the FTC to update them as appropriate. See Press Release, Just. Dep’t Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021), www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines (also inviting public comment on areas identified by staff as warranting consideration).

⁵⁸ See CSX-Pan Am, slip op. at 15-16, 51 (noting importance of applicants’ open gateway commitment to preserve competitive interline options); CN-EJ&E, FD 35087, slip op. at 14-15 (recognizing vertical effects that might result from the proposed transaction, including the possibility that CN might raise its rivals’ costs by acquiring a line that currently provides

other cases is a recognition that vertical combinations create at least the potential for competitive harm.⁵⁹ Likewise, Applicants, although urging use of the one-lump presumption, have proposed an open gateway commitment in this proceeding, contending that there is no basis to fear anti-competitive foreclosure with that commitment “as a backstop.” (See Appl. 1-16; *id.*, Vol. 1, V.S. Brooks, paras. 44-48; Applicants Final Br. 23, App. A at A-4 & Rider 2.) Indeed, Applicants’ own economic expert witness acknowledged at his deposition that the one-lump theory may not apply where the merging parties have imperfect information about each other’s costs, prices, and rates⁶⁰—a limitation that applies here. And even in past cases where the Board utilized the one-lump theory, it still accepted arguments that the merged carriers would lack the ability or incentive to foreclose interline options—arguments that would have been unnecessary if there were no additional profit to be collected on the bottleneck segments, and hence no potential competitive harm, as the one-lump theory holds.⁶¹

As opposing parties acknowledge, vertical combinations may benefit some shippers—for example, by creating more efficient, reliable single-line service and better access to expanded markets and by lowering transportation costs. Moreover, if it is shown that a particular bottleneck carrier is already capturing the entire monopoly profit pre-merger, that could mitigate or negate any possible negative effects. However, while merger applicants are free to argue that the facts in an individual proceeding warrant application of the one-lump theory, the Board concludes that the one-lump theory does not justify a presumption that a vertical combination will not result in competitive harm. Nevertheless, as discussed below, given the not insubstantial

neutral access to alternative line-haul railroads that compete with one another); Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R. (CP-DM&E), FD 35081, slip op. at 13, 27 (STB served Sept. 30, 2008) (holding applicants to their pledge to keep all gateways affected by the transaction open on commercially reasonable terms to address commenters’ concerns about the maintenance of cost-competitive gateways).

⁵⁹ Compare UP-SP, 1 S.T.B. at 477, 480-81 (denying requests for open gateway conditions on the grounds that they were overly intrusive, could delay implementation of the increased efficiencies expected from the merger, and would deny UP/SP the freedom to adapt to new developments) with CSX-Pan Am, FD 36472 et al., slip op. at 15-16 (finding that the open gateway commitment imposed as a condition in that proceeding “is vital to ensuring that the PAR System remains a competitive option, as it will allow other carriers that connect with the PAR System to continue offering competitive interline rates,” noting that “the ‘commercially reasonable’ requirement has been imposed as part of an open gateway condition by the Board in past merger decisions,” and citing, inter alia, KCS-Tex Mex, 7 S.T.B. at 938, and Canadian Nat’l Ry.—Control—Wis. Cent. Transp. Corp. (CN-WC), 5 S.T.B. 890, 894, 918 (2001)).

⁶⁰ (See UP Comments 36, citing Ex. 1 (Majure Tr. 60:18–25 (“[T]he degree of imperfection of the information would affect the degree to which the theory is applicable.”)).)

⁶¹ See Norfolk S. Corp.—Control & Consolidation Exemption, FD 34839, slip op. at 11 (“[G]eographic and intermodal competition suggests that this transaction will not have anticompetitive effects on rail competition or on shippers.”); KCS-Tex Mex, 7 S.T.B. at 949 (noting possibility of traffic shifting to motor or water carriage if KCS attempted to raise rates post-transaction, as well as the loss of valuable business if KCS foreclosed UP and BNSF from the Mexican market).

conditions being imposed in this decision, the Board determines on the record of this case that this proposed vertical transaction is unlikely to lead to any significant competitive harms, and (as discussed elsewhere in the decision) will in fact enhance competition by creating a stronger competitor against BNSF, UP, and CN.

The Laredo Gateway and Issues Relating to KCSM.

BNSF's Claim of Past Foreclosure at Laredo. BNSF contends that “[t]he ability of BNSF and its customers to access Laredo was significantly diminished when KCS bought Tex Mex” in the mid-2000s and would be diminished further by the proposed Transaction. (BNSF Comments 26.) According to BNSF, the conditions imposed by the Board in KCS-Tex Mex “have not protected shippers from KCS pricing actions that have effectively frozen BNSF out of the Laredo gateway.” (*Id.*) BNSF asserts that the alleged foreclosure began as soon as KCS acquired Tex Mex and TFM in early 2005, and that “[t]he proof of BNSF’s foreclosure from the Laredo gateway for carload traffic is in the dramatic decline in BNSF’s traffic through Laredo starting immediately after the KCS/Tex Mex merger.” (BNSF Comments 26-27 (citing Figure 3 (BNSF Carload and Automotive Traffic over the Laredo Gateway: 2000-2019)).) BNSF states that it did not have access to the specific prices KCSM was charging, but that it was BNSF’s understanding that substantial price increases had been implemented for the Mexico portions of the interline movement. (*Id.*) In its initial comments, BNSF claimed that it was forced to shift traffic, where feasible, to longer, less efficient routes through Eagle Pass to support its customers’ desires to participate in the Mexican market. (BNSF Comments 29 (citing V.S. Wilson at 18-19, 23).) BNSF later claimed, at the hearing and in its Final Brief, that, while the Mexican railroads that connect at Eagle Pass and Laredo overlap in limited areas, BNSF had to develop new business to replace business lost at Laredo. (BNSF Final Br. 5-6 (citing Hr’g 9/30 at 01:21:25 and 00:13:24).)

BNSF acknowledges that it does not know what prices KCS offers for the KCSM portion of interline movements, so “cannot determine whether a manipulation of those prices has caused BNSF’s loss of business through Laredo.” (BNSF Comments 30.) However, BNSF argues that it has only been able to support a large volume of interline traffic through Laredo when KCS cannot provide the service itself and that “[t]his shows that the playing field is clearly not level for BNSF’s movements going through Laredo.” (*Id.* at 30-31.)

Applicants dispute BNSF’s contention about past foreclosure at the Laredo gateway. Applicants state that KCS has never received a complaint that KCS was violating its commitments to provide “commercially reasonable” rates for BNSF or UP movements through Laredo, (Applicants Reb. 1-84 (citing *id.*, Vol. 2, R.V.S. Naatz, para. 4)),⁶² and note that BNSF has failed to present any evidence that a shipper believes KCS’s rate division between Robstown and Laredo for BNSF/KCS routings to Laredo is “commercially unreasonable,” (Applicants Reb. 1-83 to 1-84). Applicants state that after the KCS-Tex Mex transaction, KCS increased the rate per car charged by Tex Mex for grain, intermodal, and automotive traffic interlined with BNSF between Robstown and Laredo because that rate had not been raised in years, was “significantly below market,” and was below URCS costs. (Applicants Reb. 1-87 to 1-88 (citing *id.*, Vol. 2,

⁶² See *infra* note 83 (describing commitments in KCS-Tex Mex).

R.V.S. Naatz, paras. 12, 20, 21).) However, Applicants contend that “nothing about this rate increase forced BNSF or any shipper away from the Laredo gateway” and that BNSF “could easily have absorbed the increase out of its own rate factors.” (Applicants Reb. 1-88 (citing *id.*, Vol. 2, R.V.S. Baranowski, tbl.6 & R.V.S. Naatz, tbl.1).) Applicants note that KCS would have no incentive to discourage BNSF from using the Tex Mex/Laredo route because BNSF’s use of a gateway west of Laredo would prevent KCSM from handling the traffic, (Applicants Reb. 1-88), and present evidence suggesting that BNSF chose to shift to Eagle Pass and El Paso because those gateways were more profitable, (*id.* at 1-89 to 1-90, 1-94 to 1-98). Applicants also point out that BNSF did not identify any specific customer rate quote, routing, or origin/destination pair to substantiate its claim of foreclosure or provide any details about alleged rate increases. (Applicants Reb. 1-86 to 1-87.)

BNSF’s claim that it has been foreclosed from competing for traffic over the Laredo gateway following the KCS-*Tex Mex* transaction is not persuasive. BNSF itself concedes that it cannot determine whether KCSM’s prices caused BNSF to lose business through Laredo—and fails to address whether the overall price paid by shippers increased, or whether shippers were forced to accept less efficient service at the previous price. BNSF did not identify what specific traffic was allegedly lost or present any evidence of shipper concerns or complaints. Moreover, even if BNSF did in fact lose customers, that alone would not show anti-competitive foreclosure; customers could have switched from Tex Mex/BNSF to Tex Mex/KCS because the newly merged carrier provided a more efficient or cost-effective single-line route. Accordingly, the record does not prove that foreclosure occurred.

That said, the fact that KCS raised Tex Mex’s rate after the merger could indicate the type of adverse effects that may result where a carrier raises prices on a recently acquired interline segment that previously provided neutral access to a competitor and the acquiring carrier. The lack of proof of past foreclosure does not resolve the Board’s concerns about the possibility of vertical foreclosure resulting from this Transaction, and the need for appropriate gateway conditions to ensure that such potential harm is avoided or ameliorated. Those conditions are discussed in the section titled Determinations Regarding Applicants’ Open Gateway Commitments and Additional Board Conditions, which appears below.

Class I Claims Regarding Other Laredo Gateway and KCSM Issues. Applicants’ competitors make various arguments that the Laredo gateway presents heightened risks of vertical foreclosure in this Transaction.⁶³ BNSF contends that to meet their volume and revenue projections, Applicants will be incentivized to divert traffic through rate manipulations away from competitive routings on other railroads, and that, absent BNSF’s proposed conditions, U.S. shippers could be harmed through a lessening of competitive options. (BNSF Comments 2.) In response to Applicants’ claims that they would be required under Mexican non-discrimination law to charge the same or a similar amount for the KCSM portion of both a CP-KCS-KCSM single line movement and an interline movement with a competing carrier, BNSF argues that KCSM could nevertheless set rates for shipments to all interconnecting railroads at Laredo “as

⁶³ U.S. Representative Katie Porter raises similar concerns regarding the Transaction’s impact on competition and potential foreclosure at gateways, particularly at Laredo. (Hon. Porter Letter 1, June 7, 2022.)

high as required to make it uneconomic for the shipper to use BNSF or UP” while reducing the rate by a corresponding amount for the U.S. portion of the CP-KCS single line move. BNSF suggests that if KCSM’s rate were otherwise not above the maximum level permitted under Mexican law, “it may not violate Mexican law and nothing in the Mexican regulatory system would prohibit such behavior.” (BNSF Comments 29, 40-41 (citing *id.*, V.S. Dychter at 10); *id.* at 38.) BNSF further argues that “[t]he lack of certainty in Mexican regulatory review and enforcement” make it “imperative for the Board to create remedies for U.S. shippers to address the cross-border issues that we have identified.” (BNSF Comments 40-41.) BNSF expresses particular concern that “a combined CP-KCS would jeopardize BNSF’s intermodal and auto traffic in favor of less efficient movements that would occur exclusively on a combined CP-KCS network.” (BNSF Comments 17 (citing *id.*, V.S. Hirsch at 3, 11).)⁶⁴

UP echoes BNSF’s arguments.⁶⁵ UP contends that the proposed Transaction will create “a significant incentive [for CPKC] to manipulate competitive outcomes for crossborder traffic to favor routes in which it participates in the United States.” (UP Comments 22; *see id.* at 23-26 (stating that KCS faced no pressure to divert UP-KCSM traffic moving over the Laredo gateway after the KCS-Tex Mex transaction because “it projected essentially no diversions of cross-border traffic from UP to KCS,” whereas Applicants plan to capture a substantial volume of traffic moving via the Laredo gateway that, according to UP, could not reasonably be achieved without the use of anticompetitive foreclosure strategies).) Like BNSF, UP asserts that CPKC could foreclose competition from UP “by raising KCSM’s rate factor in relation to CPKC’s rates north of the border, which Mexican law would allow.” (*Id.* at 26.)⁶⁶ UP argues that CPKC will have broad latitude “to manipulate KCSM’s rates to foreclose competition from UP” because “[t]here are no effective regulatory limits on the level of KCSM’s rates for transportation within

⁶⁴ J.B. Hunt, which states that it has had a “unique partnership” with BNSF dating back to 1989, shares BNSF’s concern that the Transaction will adversely impact the market for intermodal traffic over the Laredo gateway and supports adoption of BNSF’s proposed proportional rate condition (noted above and discussed more fully below) with minor modifications. (J.B. Hunt Resp. to Comments 1-3, 11, July 22, 2022.) J.B. Hunt explains that under this partnership arrangement, J.B. Hunt “is not a rail shipper asking for rates and service terms from BNSF,” but rather “the primary party soliciting business from potential and existing customers” for BNSF. (*Id.* at 3.)

BNSF further asserts that “[t]he merger also promises to expand the foreclosure of BNSF’s carload shippers from access to Mexico through Laredo.” (BNSF Comments 17.) However, as discussed above, BNSF’s claim that it has been foreclosed from competing for carload traffic over the Laredo gateway since the KCS-Tex Mex transaction is not persuasive.

⁶⁵ CSXT also expresses concern about Applicants’ potential incentive and ability to reduce competition over the Laredo gateway and suggests that the Board “should require CPKC to provide shippers with sufficient information about CPKC’s pricing and service plans for movements to and from points in Mexico served directly or indirectly by KCSM to, from, or through the U.S.” (CSXT Comments 24-25; *see also id.* at 2, 6.)

⁶⁶ (Citing UP Comments, V.S. Rocker/Turner 12-14; *id.*, V.S. Salop paras. 81-82; *id.*, V.S. de la Calle 4-5.)

Mexico.” (UP Comments 28-29 (citing V.S. de la Calle 5-9); accord UP Comments 48-50.)⁶⁷ UP also argues that CPKC would be able to reduce KCSM cooperation with UP on operational and service matters in Mexico generally and at the Laredo gateway specifically; it further contends that CPKC could reduce competition by giving preferential treatment to its own traffic at the existing Laredo Bridge while excluding UP from access to a new bridge that KCS has obtained a Presidential Permit to construct. (UP Comments 30-31.) Like BNSF, UP’s concerns center on automotive and intermodal traffic.⁶⁸

As a result, BNSF and UP both seek conditions specific to the Laredo gateway, (see BNSF Comments 49-51; UP Comments 69), including the imposition of a proportional rate mechanism, as discussed below.

Applicants respond that both Class I rail carriers made similar claims in KCS-Tex Mex and contend that those claims were correctly rejected. (Applicants Reb. 1-78 to 1-79; id. at 1-80 to 1-81 (table comparing BNSF and UP positions in 2004 and 2022).) Applicants assert that KCS has not used its control of Tex Mex and KCSM to foreclose UP or BNSF routings through the Laredo gateway, and neither will CPKC. (Id. at 1-81 to 1-85.) Applicants state that the competitive dynamics of the Mexican marketplace will constrain any attempt to force shippers to choose CPKC options. For example, they explain that UP and BNSF have developed long-term relationships with numerous automotive companies, intermodal marketing companies, trucking companies, third-party logistic providers, and large customers; Applicants assert that these exclusive relationships mean that KCS cannot raise today, and CPKC will not be able to raise in the future, KCS’s division in an attempt to force these shippers to choose CPKC options, because such a strategy would risk losing traffic to other UP and BNSF routes and/or to trucking and maritime transport options. (Applicants Reb. 1-97 (citing id., Vol. 2, R.V.S. Naatz, para. 61).) Applicants further note that—unlike KCS—BNSF has the option to use multiple gateways to Mexico, which it has leveraged during contract negotiations with KCS concerning intermodal traffic. (Applicants Reb. 1-98 to 1-99 (citing id., Vol. 2, R.V.S. Naatz, paras. 29-31).) With respect to grain, Applicants point out that a neutral observer noted as early as 1996 that BNSF’s

⁶⁷ UP and BNSF both assert that KCSM’s rates could be set as high as necessary to disable competition. (See UP Comments 28 (“CPKC could cause KCSM to increase its rates as much as necessary to assure that UP is effectively disabled from competing, while offsetting any increase in the single-line rates it offers shippers.”); BNSF Comments 40 (quoted above).)

⁶⁸ (See UP Comments 20 n.68, 21-22; id., V.S. Rucker/Turner at 11 (noting that Applicants target for diversion “hundreds of thousands of carloads of finished automobiles and containers of intermodal freight currently moving between the Mexican border and points in the Upper Midwest and Canada on UP and BNSF, as well as thousands of cars of other cross-border traffic currently moving in interline service with KCSM,” and contending that “CPKC would deprive shippers of efficient UP-KCS service they enjoy today, and allow CPKC to increase its own rail rates to reflect the cost penalties it imposes on UP”); see also UP Comments, V.S. Haley, para. 56 (describing Chicago-Laredo lane as “of particular significance” and noting that about 60% of Applicants’ projected diversions of intermodal containers involve movements between Mexico and Chicago or Detroit (via Chicago), while about 60% of their projected diversions of automotive carloads involve movements between Mexico and Chicago (including traffic that UP then interchanges with CSXT and NSR)).)

single-line routes from the grain belt through Eagle Pass had natural advantages over a joint BNSF-Tex Mex-KCSM routing through Laredo. (Applicants Reb. 1-97 to 1-98 (citing statement by the Railroad Commission of Texas quoted in UP-SP, 1 S.T.B. at 423).) Applicants also note that the Transaction will not affect the options shippers have to choose Ferrocarril Mexicano, S.A. de C.V. (FXE)⁶⁹ or other transportation modes for Mexican cross-border shipments, (Applicants Reb. 1-104), and describe how FXE—in which UP has a 26% ownership interest—and the gateways that FXE serves at Eagle Pass and El Paso compete with KCSM and Laredo, (*id.* at 1-105 to 1-106). At the hearing, Applicants argued that FXE competes effectively with KCSM in Mexico on grain and automotive shipments in particular.⁷⁰ Exhibits filed under seal corroborate Applicants’ claims of FXE’s competitive viability. (Applicants Reb. 1-106; *id.*, Vol. 3, Exs. 29, 30.)

Applicants also assert that the Mexican regulatory regime inhibits the sort of foreclosure that BNSF and UP hypothesize, and frustrates the potential rate manipulation strategy that BNSF and UP describe. (Applicants Reb. 1-107 to 1-108.) Finally, Applicants reiterate that, notwithstanding similar predictions in KCS-Tex Mex,⁷¹ no shipper has ever complained—to KCS directly or in the specific fora made available to shippers following that transaction (arbitration, per an agreement with NITL; and the Board’s general post-transaction oversight process)—about KCS shutting down their preferred interline options or KCS violating its commitments to provide “commercially reasonable” rates for BNSF or UP movements through Laredo to or from Mexico. (Applicants Reb. 1-84 (citing *id.*, Vol. 2, R.V.S. Naatz, para. 4).)⁷²

⁶⁹ Ferrocarril Mexicano, S.A. de C.V. (Ferromex or FXE) is a Mexican rail carrier with direct access to four gateways to the U.S. (Eagle Pass, El Paso, Calexico, and Nogales). KCS-Tex Mex, 7 S.T.B. at 944; (see UP Comments 17). According to its website, FXE “operates the largest railroad network in Mexico, with more than 10,000 km (6,200 miles) of track covering the major industrial and commercial zones in the country” and has “the largest fleet of locomotives and railcars in Mexico.” See www.ferromex.com.mx/quienes-somos-eng/quienes-somos.jsp (last visited Feb. 11, 2023).

⁷⁰ (Applicants Reb. Hr’g Presentation at 78, “How Competitive is Laredo Crossing Traffic? Grain Shuttle Deliveries – FXE Footprint” (providing information on 2021 Mexico grain imports over Laredo versus other gateways and transportation modes and depicting Ferromex grain shuttle terminals throughout Mexico), Oct. 11, 2022; *id.* at 77, “How Competitive is Laredo Crossing Traffic? Automotive Plants – FXE Serves Multiple Plants” (stating that in Mexico FXE serves 16 plants, KCSM serves 14 plants, and FXE competes head-to-head with KCSM at 10 plants).)

⁷¹ (See, e.g., Applicants Reb. 1-83 (citing UP assertions in KCS-Tex Mex that KCS control of TFM would allow applicants in KCS-Tex Mex “to circumvent” non-discrimination requirements imposed by Mexican law, which would “shift traffic away” in “anticompetitive ways by forcing shippers to pay more and accept poorer service” (citing UP Comments 48, KCS-Tex Mex, FD 34342, Aug. 4, 2003)).)

⁷² Applicants dispute BNSF’s assertion that “KCS has exercised its enhanced market power in such a way as to forestall any such complaints,” (BNSF Comments 44), noting that shippers know what the applicable Rule 11 rates are, and would also see their preferred routing option had become operationally or commercially infeasible. (Applicants Reb. 1-84.)

The Board finds that BNSF's and UP's claims about the dangers of rate manipulation and the concerns that they express about the effectiveness of Mexico's regulatory regime are speculative⁷³ and do not support their requests for a proportional rate condition at Laredo (which, as discussed below, are not narrowly tailored to remedy any potential competitive harm and, indeed, could themselves inhibit competition). As noted above, shippers have not expressed BNSF's and UP's concern on this issue. Moreover, BNSF and UP fail to adequately explain why the intermodal, automotive, and grain traffic about which they have expressed the greatest concern cannot move via other competitive options should CPKC engage in the type of rate manipulation they allege is possible under Mexican law.⁷⁴ Indeed, BNSF's own witness, Mr. Hirsch, acknowledged that intermodal traffic is highly competitive and that intermodal customers could switch to trucks "in a matter of hours" if a rail carrier fails to provide a competitive service. (Hr'g Tr. 960:17 to 961:5, Sept. 30, 2022.) The record also shows that significant volumes of intermodal and automotive traffic originating on KCSM in Mexico are interchanged with UP and BNSF at Laredo today, despite those carriers having raised many of the same concerns about foreclosure in the KCS-Tex Mex transaction that they have raised in this proceeding. (See Applicants Reb., Vol. 2, R.V.S. Naatz, paras. 57-58.) Similar to what the Board noted in KCS-Tex Mex, 7 S.T.B. at 949, if CPKC were to attempt to raise rates on KCSM movements in Mexico that are not rail-dependent, traffic would shift to motor or water carriage. Furthermore, the record also supports Applicants' argument that FXE can provide competitive alternative rail routings to BNSF and UP interchanges at Eagle Pass and El Paso. (See Applicants Reb., Vol. 2, R.V.S. Naatz, para. 67; supra note 70 (citing Applicants Reb. Hr'g Presentation); Applicants Reb. 1-106; id., Vol. 3, Exs. 14, 29, 30.⁷⁵) Given the existence of these

⁷³ (See, e.g., BNSF Comments, V.S. Dychter, paras. 18-19, 22 (stating that "there could be several reasons" for the dearth of published decisions on compliance with Mexican regulations and that the complaint process "could be very time consuming and unpredictable"); UP Comments, V.S. de la Calle 8-9 (stating that "there is no assurance that Mexican regulators would apply Mexican laws and regulations, or KCSM's Concession terms, to address any discriminatory rate practices CP/KCS may adopt following the merger").) Moreover, these carriers do not identify any past instance in which the Mexican regulatory scheme was abused in a way that led to adverse impacts on shippers' ability to maintain efficient interline routing options through Laredo, and no shipper in this proceeding has made such a claim.

⁷⁴ Noting that trucks, ships, and air cargo all serve Mexico, Applicants' witness Naatz has observed that "[b]oth UP and BNSF have long term relationships (many exclusive) with numerous automotive [companies], intermodal marketing companies, trucking companies, third-party logistic providers, and large customers. KCS cannot today, and CP/KCS will not be able to in the future, simply raise KCSM's division to force these shippers to use a CP/KCS system." (Applicants Reb., Vol. 2, R.V.S. Naatz, para. 61.)

⁷⁵ (See also Appl., Vol. 1, V.S. Ottensmeyer 20 n.15 (quoting information from UP website stating, inter alia: "The FXE Monterrey Intermodal Terminal is ideally located in the Escobedo region of Monterrey, just minutes away from major manufacturers and Mexico's second-largest consumer market. The terminal's proximity to major highways allows service to all of Northern and Central Mexico's markets with ease Expanding opportunities to serve

market constraints, it appears that UP and BNSF are more concerned about the effect of new competition from a CPKC single-line route than they are about any theoretical foreclosure of existing interline options.

Nevertheless, and as explained elsewhere in this decision and past decisions, the Board has general concerns that vertical mergers have the potential for adverse competitive effects and, accordingly, in this proceeding will impose a condition clarifying and enhancing Applicants' commitment to keep gateways open on commercially reasonable terms. For interline traffic captive to KCSM in Mexico, this condition—coupled with the oversight period and the possibility of the Board entering supplemental orders under 49 U.S.C. § 11327—will afford protection to KCSM-dependent interline options post-Transaction for transborder traffic moving in both directions.⁷⁶ Specifically, it will provide an avenue for the Board to consider the U.S.-related impacts of any potential rate manipulation or other potential post-Transaction conduct that does not keep the Laredo gateway open on commercially reasonable terms and, if warranted, remedy the situation.⁷⁷

In sum, the record before the Board indicates that there are meaningful competitive pressures on KCSM in Mexico. The record, together with the open gateway commitments made by KCS in KCS-Tex Mex (which Applicants commit will remain in effect)⁷⁸ and the conditions imposed in this decision, support a finding that sufficient post-Transaction safeguards will be in place so as to prevent the type of foreclosure at Laredo hypothesized by BNSF and UP.⁷⁹ The

more markets in the United States and Mexico, Union Pacific and Ferromex have recently introduced expanded Eagle Premium service from Silao, Mexico to Chicago and Memphis.”.)

⁷⁶ (See, e.g., BNSF Comments 18 & n.5 (describing Applicants' “claim that the Transaction would have wide-ranging effects on transborder movements” and citing examples of both north-bound and south-bound movements).)

⁷⁷ The Board has jurisdiction over transportation in the United States between a place in the United States and a place in a foreign country. See 49 U.S.C. § 10501(a)(2)(F); see also, e.g., Can. Packers, Ltd. v. Atchison, Topeka & Santa Fe Ry., 385 U.S. 182 (1966) (upholding ICC's determination that it had jurisdiction to determine the reasonableness of a joint through international freight rate from New Mexico to Canada and to order reparations, including for the overcharge on the Canadian portion of the trip); KCS-Tex Mex, 7 S.T.B. at 948, 950 (noting the importance of an open gateway commitment at Laredo to ensure the fair and efficient flow of traffic between the U.S. and Mexico and the Board's reservation of jurisdiction to “examine the impacts of rail operations in the U.S.” following KCS's acquisition of the entity that is now KCSM).

⁷⁸ (See, e.g., Appl., Vol. 1, V.S. Ottensmeyer 6, 21; Appl., Vol. 1, V.S. Brooks, para. 42; Applicants Final Br., App. A at A11.)

⁷⁹ Additionally, the Board can take further action if necessary to ensure that gateways affected by the Transaction (at Laredo or elsewhere) remain open in accordance with the conditions imposed herein.

proportional rate mechanism and other conditions BNSF and UP seek to impose at Laredo are neither necessary nor appropriate and will not be adopted, for the reasons discussed below.⁸⁰

Both carriers also seek springing conditions at Laredo that would apply, if at all, only at a future time. BNSF asks the Board to reserve jurisdiction during the oversight period to impose additional remedies at various locations, including trackage rights to the border if necessary to ensure an open gateway at Laredo. (BNSF Comments 49-51 (Laredo); *id.* at 61 n.23 (Shreveport); *id.* at 68 n.26 (Davenport Subdivision).) As addressed in the Oversight section below, the Board is authorized to issue supplemental orders under 49 U.S.C. § 11327, both during the oversight period and afterwards, which may include taking remedial action following the transfer of control if warranted.

UP seeks a condition granting access to any new railroad bridge constructed in Laredo on the same terms as UP's access to the existing bridge. (UP Comments 10, 69, 76.) Applicants oppose UP's requested condition, noting that the second bridge will be privately funded by KCS and will increase the efficiency of cross-border traffic movements. (Applicants Reb. 1-23.) Applicants assert that UP's proposed condition is both unnecessary⁸¹ and overreaching,⁸² and that UP's request for the Board to override whatever access terms the parties might negotiate has no nexus to the Transaction, (Applicants Reb. 1-23). In their Final Brief, to facilitate overall operational efficiency at the Laredo gateway, Applicants commit to "allow access by [UP] traffic/trains to the second bridge across the Rio Grande River that KCS is building on reasonable economic and other terms to be negotiated" between CPKC and UP, and "accept that UP may enforce the commitment expressed in this paragraph." (Applicants Final Br., App. A, Rider 2, at A12, para. 9.) Applicants will be held to this commitment and both parties will be expected to negotiate in good faith to seek to resolve any future disputes about reasonable terms of access to the second bridge. The Board will otherwise deny UP's requested condition that CPKC provide UP access to any new bridge on the same terms as UP's access to the existing bridge. A condition should not be imposed if it is unreasonable or lacks a sufficient nexus to the

⁸⁰ CSXT's suggestion that CPKC should be required "to provide shippers with sufficient information about CPKC's pricing and service plans for movements to and from points in Mexico served directly or indirectly by KCSM to, from, or through the U.S.," (CSXT Comments 25), lacks both specificity and support from shippers and will not be imposed as a condition. BNSF's requests for conditions requiring reporting on service provided through the Laredo gateway, (BNSF Comments 48-49; BNSF Final Br. 17, 27-28), are addressed below.

⁸¹ Applicants note that, upon completion, they will have every incentive to divert CPKC trains from the existing Laredo Bridge to the new bridge—freeing up capacity for UP's trains on the existing bridge—and that if operating UP trains on both bridges would improve operational efficiency for the gateway, CPKC will have strong incentives to do so. (Applicants Reb. 1-293.)

⁸² Applicants state that in seeking a condition for access on the "same terms" as UP's access to the existing bridge, UP is seeking rights that are not Transaction-related and which should be obtained, if at all, through commercial negotiations. (Applicants Reb. 1-293 (further noting that "UP would be piggybacking on ancient agreements, providing for compensation reflecting conditions many decades ago, and providing for no contribution to the construction costs of building a new bridge" in which KCS is making a substantial investment).)

proposed transaction. See United States v. Chesapeake & Ohio Ry., 426 U.S. 500, 514-15 (1976); Consol. Rail Corp. v. ICC, 29 F.3d 706, 714 (D.C. Cir. 1994); see also CP-DM&E, FD 35081, slip op. at 6 (finding no material error in Board’s decision not to impose a condition because the proposed condition lacked a sufficient nexus to the transaction). Nor will the Board impose conditions designed to put the proponent in a better position than it occupied before the consolidation. See CP-DM&E, FD 35081, slip op. at 12. UP’s requested condition is misplaced under these well-settled standards.

Finally, UP asks the Board to require Applicants to adhere to KCS’s pledges in KCS-Tex Mex regarding operations for traffic moving through the Laredo gateway and at the Laredo Bridge. (UP Comments 9-10, 69.) Applicants assert that such a condition is unnecessary because CPKC will inherit KCS’s previous commitments, which are described in the Board’s decision approving the KCS-Tex Mex combination⁸³ and which, Applicants say, “have been honored by KCS and supported efficient operations at Laredo for more than 17 years (and UP makes no contention otherwise).” (Applicants Reb. 1-292 to 1-293.) The Board agrees that a separate condition is not warranted but reiterates that the merged entity, going forward, will be expected and required to abide by prior commitments imposed by the Board in KCS-Tex Mex.

Other Claims and Proposed Conditions Relating to Vertical Competition.

As noted above, several commenters assert that vertical rail mergers can harm competition by creating opportunities for the combined entity to favor its long-haul route and foreclose more efficient alternative interline routes.⁸⁴ Commenters propose a variety of

⁸³ Among other things, the Board imposed five “pledges” as a condition to its approval of the KCS-Tex Mex combination: (1) to not change the basic structure and operations of KCSM [then TFM] except through negotiations, and to cooperate closely and fairly with UP, BNSF, and other rail carriers on interline services such as pre-blocking rail cars, improving automated customs pre-clearance procedures, supplying cars for shipments, accommodating run-through train service, providing excellent service, and promptly quoting rates; (2) to honor the terms of all existing Tex Mex and KCSM [then TFM] agreements (marketing and pricing agreements in particular) and allow such agreements to continue to their full term; (3) to keep the Laredo gateway open on commercially reasonable terms and, in conjunction with this commitment, provide the same level of service to UP and BNSF that they have experienced in the past, and for Tex Mex to work with BNSF to route traffic via Laredo; (4) to treat all carriers fairly at the Laredo Bridge, abide by existing dispatching and operating practices over the Bridge with no unilateral changes, and continue to be bound by the contracts and agreements that govern operations over the Bridge, which provide various rights and remedies to users such as UP; and (5) to make no significant post-merger changes in the combined entity’s operations and ensure that safety remains a top priority. See KCS-Tex Mex, 7 S.T.B. at 945-46, 950, 965; (see also Appl., Vol. 1, V.S. Ottensmeyer 21 (referencing these obligations and acknowledging that “KCS is now, and the combined entity will continue to be, subject to the conditions related to traffic moving via Laredo previously imposed by the Board in [KCS-Tex Mex].”).)

⁸⁴ U.S. Senator Elizabeth Warren raises general concerns regarding CPKC’s “additional leverage over customers” and the possibility of increased shipping rates. (Hon. Warren Letter 2, Mar. 2, 2023.)

conditions to mitigate this risk, ranging from the prescription of mileage-based proportional rates,⁸⁵ other rate relief,⁸⁶ and enhanced reporting and recordkeeping requirements,⁸⁷ to access conditions⁸⁸ and other safeguards.⁸⁹ Applicants themselves have committed to keep gateways open both physically and commercially to assure that their claimed incentives to maintain efficient interline routes “are backed up by the potential for enforcement under the auspices of Board oversight,” (Appl. 1-20 to 1-21), and, at the hearing and in their Final Brief, clarified the terms of their commitments in various ways.

As discussed above, the Board recognizes that while vertical mergers can provide some public benefits, they also present potential risks of competitive harm, and that appropriate safeguards should be implemented to mitigate those risks. However, merger conditions must be narrowly tailored to remedy transaction-related adverse effects. See BN-SF, 10 I.C.C.2d at 730; UP-SP, 1 S.T.B. at 418; see also KCS-Tex Mex, 7 S.T.B. at 986 (even if Board agreed with the competitive concerns expressed by the parties, their suggested conditions should not be imposed because they were not narrowly tailored). As discussed below, the proposed proportional rate conditions do not satisfy this principle and raise additional concerns that independently warrant their rejection. The Board will instead condition its approval of the Transaction on the open gateway and reporting requirements discussed below, which use Applicants’ commitments as a starting point but clarify or expand on them as warranted.

⁸⁵ See comments filed by UP, the Joint Associations, and BNSF, discussed infra.

⁸⁶ IMA asks the Board to “limit any rate increases to captive shippers for five years after the transaction is approved to 10% over that time. This limit will ensure that the merged railroad will gradually use its new pricing power from the decrease in competition as a result of the transaction. Otherwise, the affected captive shippers will be subjected to large rate increases shortly after the transaction.” (IMA Req. for Conditions 13, Feb. 28, 2022.)

⁸⁷ (See, e.g., NGFA Comments 11; TxIT Comments & Req. for Conditions (TxIT Comments) 9, Feb. 28, 2022; BNSF Final Br. 17, 27-28.)

⁸⁸ As noted in the Competitive Access Concerns section, USWA, NDGC, and NAWG, among others, raise concerns about a loss of rail competition and seek access conditions to ameliorate that asserted harm. (See, e.g., USWA Comments 10, Feb. 28, 2022; NDWC Req. for Conditions 12, Feb. 28, 2022; NAWG Comments 2, Mar. 3, 2022.) As discussed in the Competitive Access Concerns section, however, such relief is not an appropriate remedy under these circumstances.

⁸⁹ CI seeks a condition that “[a]ny anti-competitive effects of the proposed transaction, including but not limited to, the maintenance of commercial neutrality at interchanges CP and KCS now maintain with other railroads, shall be fully ameliorated either at the time of the Board’s approval of the proposed transaction, or at any time thereafter in which the Board is presented with evidence that the proposed transaction has caused anti-competitive effects on rail transportation, on any of the Applicants’ systems.” (CI Am. Comments 3-4, June 9, 2022.)

The Proposed Proportional Rate Conditions. Three commenters—UP, BNSF, and the Joint Associations⁹⁰—seek conditions that would directly regulate the rates CPKC would provide in response to requests for Rule 11 quotes⁹¹ on interline movements subject to Applicants’ open gateway commitment. (See BNSF Comments 44-46; UP Comments 69, 71-72; Joint Ass’ns Comments 9-10.) Although the proposals differ in scope and operation,⁹² they all would have the same fundamental effect: limiting the interline rate charged by CPKC to a mileage-based proportion of the corresponding single-line rate offered by the combined entity.

UP asserts that Applicants have presented no concrete, enforceable proposal for defining “commercially reasonable” rates and argues that its proposed proportional rate mechanism is “an appropriately concrete and enforceable approach” to defining this term. (UP Comments 8-9.) The Joint Associations argue that such a condition is needed to ensure that Applicants’ post-merger Rule 11 rates to interchanges are “true market rates” by linking them to the market rates that Applicants establish for their long-haul rates. (Joint Ass’ns Comments 11 (explaining that the condition is meant to prevent “Applicants from setting a disproportionately higher rate for the bottleneck segment that renders the choice of a competing railroad over the non-bottleneck segment commercially impractical”).) BNSF’s proportional rate proposal is limited to the Laredo and Robstown gateways because, BNSF argues, vertical mergers “generally do not cause competitive harm” absent certain features or conditions, but the cross-border nature of the Transaction is such a feature. (BNSF Resp. to Comments 17 (stating that “the extension into Mexico is where the competitive concerns have historically arisen and will likely arise in the future”).)

In opposition, Applicants contend that requiring CPKC to provide interline rate factors (or Rule 11 rates) that are a fixed, mileage-based percentage of the single-line rates it will offer in competition with other Class 1 railroads (or any mandated linkage to those rates) would be anticompetitive. (Applicants Reb. 1-65.) Applicants argue that such a condition “would impose a direct tax on CPKC in the form of compulsory reductions on CPKC’s interline revenue divisions that would subsidize [the rival carrier],” which would in turn reduce CPKC’s incentive to price its single-line service as competitively as it otherwise might. (*Id.* at 1-66; *id.*, Vol. 2, R.V.S. Majure, para. 140; accord Applicants Reb. 1-118 to 1-121 (explaining how a mileage-

⁹⁰ The Joint Associations Comments are supported by Oxy. (Oxy Comments 2, Feb. 28, 2022.) TxIT also generally supports the conditions requested by the Joint Associations but argues that additional conditions are needed to protect U.S. ports—particularly, conditions that specify which gateways qualify, with reasonable standards and limits for the establishment of competitive Rule 11 rates to and from those gateways. (TxIT Final Br. 9-10.)

⁹¹ Rule 11 is an accounting procedure under the Railway Accounting Rules promulgated by the Association of American Railroads’ accounting division. Rule 11 refers to the practice of separately billing for rail charges by each carrier in a through movement. Pol’y Alts. to Increase Competition in the R.R. Indus., EP 688, slip op. at 4 n.5 (STB served Apr. 14, 2009).

⁹² (See, e.g., BNSF Resp. to Comments 13-21 (describing differences, which include that BNSF’s proposal is limited to the Laredo and Robstown gateways but would permit a rival carrier to see the published rate and negotiate directly with the shipper for the interline move); Joint Ass’ns Comments 9-10 (limiting proposal to bottleneck moves).)

based proportional rate mechanism could provide a subsidy to rival carriers and dampen competition).⁹³ Applicants also present evidence that revenue divisions set by Class I carriers in the marketplace are not based on mileage formulas but vary demonstrably from movement to movement, and that these variations are based on a variety of factors. (*Id.* at 1-113 to 1-115 (citing *id.*, Vol. 2, R.V.S. Majure, paras. 146, 147, 149; Applicants Reb., Vol. 2, R.V.S. Brooks, para. 22; Applicants Reb., Vol. 2, R.V.S. Naatz, para. 77).)⁹⁴ Applicants further note that BNSF has argued against mileage-based rules in other Board proceedings⁹⁵ and that the so-called “I-5 Prop Rate Agreement” used by BNSF and UP in connection with UP-SP and the other uses of mileage-prorate arrangements cited by UP were not imposed as conditions to remedy vertical harm from a merger.⁹⁶

Applicants object to the Joint Associations’ proposal—which they state would preclude “charging higher bottleneck rates on a per-mile basis than the corresponding long-haul rate costs per mile”—for similar reasons, arguing that such a limitation would be unfair to Applicants (given that no other railroad is subject to it), anticompetitive, and ill-advised as a matter of economic policy. (Applicants Reb. 1-126 to 1-127.)

The Board finds that the requested mileage-based rate and proportional rate conditions are not warranted. As noted above, and as discussed further below, the Board has previously acknowledged the risk of harm from vertical mergers. But any harm that these mileage-based rate and proportional rate conditions would mitigate would be outweighed by the concomitant reduction to public benefits that would result. In particular, the Board shares Applicants’ concern that such a condition could have the effect of subsidizing rival carriers—by enabling them to reap the benefits of cost efficiencies generated by the newly combined carrier—and threaten to dampen competition by diminishing CPKC’s incentive to offer the most competitive

⁹³ Applicants also describe the impact that a mileage pro-rate principle would have in giving rival carriers a higher share of revenues on moves in any lane where CPKC tried to compete. (Applicants Reb. 1-117 to 1-118 (citing *id.*, Vol. 2, R.V.S. Majure, para. 159; Applicants Reb., Vol. 2, R.V.S. Naatz, paras. 40, 88, 29).)

⁹⁴ Applicants state that these factors include the relative operating costs associated with the carrier’s portion of the move, the costs associated with interchanging the traffic, potential equipment costs, the need for infrastructure investment (or lack thereof), the level of service (over the road and first mile/last mile), the commodity, the volume of traffic, the availability of capacity, and the carrier’s role in attracting the traffic in the first place. (Applicants Reb. 1-113 to 1-114 (citing the same reply verified statements).)

⁹⁵ (Applicants Reb. 1-112 to 1-113 (citing, inter alia, BNSF’s testimony in opposition to a mileage-based rule in its own merger case).)

⁹⁶ (Applicants Reb. 1-116 to 1-117 (describing the I-5 Agreement as a commercial agreement negotiated by UP and BNSF at arm’s length “as part of a set of agreements providing each with mutual commercial benefits” and observing that “[t]here is no simple ‘mileage prorate’ principal established by this agreement”).)

single-line rate.⁹⁷ This would, in turn, undermine the public benefits that would otherwise result from the merger. Moreover, the imposition of a proportional rate condition would not be narrowly tailored to remedy competitive harm. As UP itself concedes:

Professor Salop’s models confirm that vertical mergers like the proposed transaction . . . may benefit some shippers and harm others. The models do not attempt to predict the likelihood of any particular outcome, but rather demonstrate that vertical mergers in markets with characteristics such as those at issue in this transaction can lead to a wide variety of impacts. The results of his simulation models show that significant price changes are highly possible, and that some or all shippers can be harmed as a result of an end-to-end merger. That there is no certain or even “most likely” general result is precisely the point; the models demonstrate that there is no economic basis for presuming that a merger such as the CP/KCS merger will be procompetitive, anticompetitive, or competitively neutral.

(UP Comments 38.) Not only would the proportional rate mechanism proposed by commenters have a significant impact on the potential benefits of the Transaction; it would apply regardless of whether any particular move is more or less likely to benefit from or be harmed by the introduction of single-line CPKC service post-Transaction. Accordingly, the Board will not adopt the proposed condition—which would apply indiscriminately and could itself threaten to harm competition—and will instead impose the conditions discussed below.

Applicants’ Open Gateway Commitments and Proposed Conditions. Applicants have explained their open gateway commitments at various points in this proceeding. As described in the Application, “routing options will be expanded and not reduced, as CPKC will keep all existing gateways open on commercially reasonable terms and create no new bottlenecks, as detailed in the Verified Statement of John Brooks. . . .” (Appl. 1-16; accord id. at 1-20 to 1-21 (describing interline routes that would be maintained and stating, “[n]or will shippers face any reduction in routing options or confront any new ‘bottlenecks’”).) Brooks proceeded to explain that “[w]e have no interest in forcing any rail customer to choose CP/KCS options where other options work better for them, whether those options involve single-line services offered by our rivals, truck transportation, or interline services in which we participate. Coercing customers into accepting an inferior option would be contrary to our objectives and ultimately a losing proposition for us.” (Appl., Vol. 1, V.S. Brooks, para. 37.) He also stated:

CPKC will continue to have strong incentives to work with our interline partners on efficient joint-line services at the gateways where CP connects today – most notably, at Kingsgate/Eastport (with UP); Coutts, AB (with BNSF); Emerson, MB/Noyes, MN (with BNSF); St. Paul (with BNSF and UP); Chicago (with BNSF, UP, and CN, as well as NS and CSX); and Kansas City (with UP and BNSF). Our incentives will be no less strong at the gateways where KCS connects with other

⁹⁷ As Applicants also note, such a condition would impose rate regulation on CPKC to which no other carrier is subject and would preclude the combined entity’s interline rates from reflecting applicable cost and market factors, which may be why some shipper groups support such a condition. (Applicants Final Br. 24.)

carriers today, such as Laredo (with UP); Robstown, TX (with BNSF); New Orleans, LA (with BNSF, UP, CSX, NS, and CN); Shreveport, LA (with UP and BNSF); Jackson, MS (with CN); Meridian, MS (with NS); and Kansas City (with UP and BNSF). These aren't the only interchanges we will have an incentive to keep open in order to serve our customers well, but they account for the vast majority of all of CP and KCS's existing interline traffic to/from the United States that might conceivably be affected by the CP/KCS combination.

(Id., Vol. 1, V.S. Brooks, para. 41.)

With respect to the terms of the commitments themselves, Brooks states that from CP's perspective, keeping gateways open has two core dimensions, operational efficiency and commercial viability, and that CP commits to maintaining both:

CP/KCS will continue to maintain efficient operations serving existing gateways wherever traffic levels warrant – in terms of both the through train services to and from the gateways as well as the operational capabilities and infrastructure necessary to carry out efficient interchange.

. . . [I]nterline options via these gateways must be commercially viable as well. CP's commitment means that we will continue to offer commercially reasonable rates and terms capable of supporting the continued movement of traffic via the gateway. In these situations, when a customer requests a rate for only the former-CP or former-KCS portion of an origin-to-destination routing, we will provide the shipper with a Rule 11 rate to the gateway. This is not to say that CP/KCS's interline (or Rule 11) rates will always be ones that shippers will choose. We will compete aggressively to win traffic to our new single-line offerings, including with single-line rates that might be quite painful for our interline rivals to beat. But we will not make it impossible to construct viable interline options for shippers by refusing to quote commercially reasonable rates.

Finally, we will work with shippers to find ways to make these commitments more concrete and readily enforceable, including via appropriate alternative dispute resolution mechanisms.

(Id., Vol. 1, V.S. Brooks, paras. 45-47.)⁹⁸

⁹⁸ Brooks also acknowledges that CP will “inherit KCS's commitment to keep the Laredo Gateway open on commercially reasonable terms, which KCS made in 2003 when it proposed to acquire Tex Mex and TFM (which is now KCSM). KCS's commitment was embodied both in a condition imposed by the Board when it approved KCS's control of Tex Mex and in an agreement that KCS entered into with [NITL] in 2003 for the benefit of KCS/Tex Mex shippers, which have been able to arbitrate any disputes under the agreement.” (Appl., Vol. 1, V.S. Brooks, para. 42.)

At his deposition, Brooks explained that Applicants' commitment to keep gateways open on commercially reasonable terms would apply to "affected traffic," which he defined as traffic for which Applicants will be able to provide a longer-line haul or a single-line haul as a result of the Transaction. (CN Comments, Ex. 5 at 94:3-7.) In the Application, CP also committed that control of KCS will not create any new regulatory bottlenecks. (Appl. 1-16, 1-20; *id.*, Vol. 1, V.S. Brooks, para. 48.) As described by Brooks, "[i]n other words, where the CP/KCS Transaction might give CPKC a new ability to handle traffic in single-line service, and thus refuse to quote a separately challengeable short-haul tariff rate to an existing interchange with another carrier, CPKC will waive its right to do so." (*Id.*, Vol. 1, V.S. Brooks, para. 48.) Applicants also stated that they would work with shippers to make the open gateway commitment "more concrete and readily enforceable, including via appropriate alternative dispute resolution mechanisms." (*Id.*, Vol. 1, V.S. Brooks, para. 47.) The Board finds that these three commitments are an important foundation to mitigate the potential for competitive harm and will condition its approval of the Transaction on the requirements specified below, which use Applicants' core commitments as a starting point but clarify and expand on them in various ways.

Comments Relating to Applicants' Initial Open Gateway Commitments. Several commenters criticize the sufficiency of Applicants' open gateway commitments. Some call for an alternative remedy that would require CPKC to provide mileage-based proportional interline rates keyed to the single-line rates offered by CPKC—which, as discussed above, the Board will not impose. Various commenters call for more comprehensive and/or more specific open gateway conditions.

Other Class I commenters echo UP's and BNSF's arguments that Applicants' commitments are not sufficiently concrete or readily enforceable⁹⁹ (but, as described below, suggest different remedial conditions). CN, for example, asserts that "Applicants' vague open gateway commitment is insufficient to protect against vertical foreclosure concerns. If the Board approves the proposed transaction, it should impose a clear and enforceable commitment." (CN Comments 37; *accord id.* at 68-69 (also stating that Applicants did not provide any detail as to how their commitment would be enforced).)¹⁰⁰ CN further objects that the commitment does not encompass gateways at which CPKC could have incentives to refuse to interchange traffic impacted by geographic competition (movements between different origins and destinations that

⁹⁹ (See, e.g., BNSF Comments 36-37, 41-42 (also objecting that Applicants seek to limit their open gateway commitments to existing traffic and that "[s]uch a limitation would deprive shippers of their ability to route traffic to and from Mexico via newly-developed routings where commercially reasonable rates on KCSM would be vital"); UP Comments 8-9, 68.)

¹⁰⁰ CN agrees with Applicants, however, that *ex ante* prescription of a rate formula would not be appropriate. (CN Comments 75 (stating that whether a particular rate or division provided a commercially viable alternative to CPKC would depend on a host of factors and that there could be good-faith disagreement about whether a particular interline rate or division offered by CPKC is "commercially reasonable").)

can compete with each other).¹⁰¹ CSXT asserts that “the general and non-specific commitments offered by CP lack reliable guarantees” and do not promise concrete standards that would ensure the combined entity sets commercially reasonable rates and provides service on a nondiscriminatory basis. (CSXT Comments, V.S. Carey/Bremser 25, 13.) NSR observes that Applicants “only make vague commitments to address the potential harm to competition that may occur at NS-CPKC Gateways” as a result of the Transaction. (NSR Am. Comments 40.)

These Class I carriers propose various ways (other than the proportional-rate proposals, discussed above) to rectify the claimed deficiencies in Applicants’ open gateway commitments. CN asserts that Applicants should be held to certain clarifications about the gateway commitments that Brooks made in his deposition.¹⁰² CN also urges the Board to reject Applicants’ limitation of the commitment to “affected traffic” and adopt binding arbitration as the means to resolve disputes over whether Applicants are offering commercially reasonable terms. (CN Comments 69-70.) To protect competition and efficient cross-border traffic movements, CSXT suggests that the Board require CPKC to provide shippers with information about its pricing and service plans for movements to and from points in Mexico served directly or indirectly by KCSM to, from, or through the U.S. (CSXT Comments 6, 25.)¹⁰³ As discussed below (see section titled Wylie-Meridian Route & NSR Responsive Application), NSR seeks a condition directing Applicants to “[p]rovide service levels (‘frequency, transit times, and consistency’) comparable, at a minimum, to those offered for traffic interchanged with [NSR] at existing CPKC Gateways pre-CP-KCS Transaction.” (NSR Am. Comments 45-46.)

Apart from their proportional rate condition for bottleneck moves (which, as discussed above, the Board will deny), the Joint Associations seek conditions that would (1) preserve all interchanges with Class I and II railroads that were active at any time from January 1, 2018, through the consummation date of the merger for any bottleneck movement that originates or

¹⁰¹ (CN Comments 73-74; accord BNSF Final Br. 11 (objecting that limiting open gateway commitment to traffic for which the combined entity would gain either a longer haul or single-line haul “would exclude traffic subject to geographic competition, like grain”).)

¹⁰² Specifically, CN asserts that Brooks clarified that a “gateway” means “the interchange point that would link two carriers” and agreed that “any location where two railroads interchange or link together” is a “gateway”; that Brooks agreed that to be “commercially reasonable” the rate must be one that would give the customer a “choice” (rather than merely below the maximum lawful rate) and that a “high gateway rate” that would “force traffic to [Applicants’] single-line routes” “would not be acceptable”; that he acknowledged that the “commercially reasonable” rate commitment applies to both a shipper’s request for “interline rates” and a competing carrier’s request for “commercially reasonable divisions”; and that he acknowledged that Applicants’ commitment extended to non-rate terms and that Applicants needed “to provide the best quality service we can provide to the interchange.” (CN Comments 71-72 (quoting Brooks deposition testimony).)

¹⁰³ CSXT also seeks a condition requiring CPKC to continue to absorb certain interchange costs at New Orleans in perpetuity by modifying an interchange agreement to make it terminable only upon mutual consent of the parties. (CSXT Comments 21-22.) This issue is discussed further in the Wylie-Meridian Route & NSR Responsive Application section.

terminates (including via reciprocal switch or inter-switching) on Applicants or a connecting Class II or III railroad for which the merger of Applicants creates the opportunity for a longer haul on their combined network than either Applicant would have by itself; and (2) require Applicants to quote Rule 11 rates, in the shipper's choice of a contract or tariff, and to any applicable interchanges requested by the shipper where there are multiple routing options via different interchanges with the same Class I or II carrier. (Joint Ass'ns Final Br. 10.) The Joint Associations assert that such conditions are needed "to protect existing interchanges both physically and commercially and thereby preserve the pre-merger competition that alternative routes via those interchanges provide to CP/KCS routes." (*Id.*)

Other shipper groups voice support for Applicants' open gateway commitments but emphasize the importance of monitoring to ensure they are fulfilled. For example, NGFA's comments, which are supported by three other associations, "[c]ommend[] CP and KCS for their commitments to keep existing gateways" open while "implor[ing] the Board to hold Applicants to their commitments by providing appropriate oversight over the treatment of current gateways post-merger." (NGFA Comments 6.)¹⁰⁴ NCGA "appreciates CP and KCS for their commitments to keep existing gateways with other Class I railroads open," and "recommends the Board . . . hold the Applicants to their commitments by providing appropriate oversight over the current gateways post-merger." (NCGA Comments 2-3.) The oversight requests proposed by commenters are described and discussed below.

In response to comments criticizing their open gateway commitments, Applicants contend that in past cases "the Board and shippers have been fully protected from theoretical foreclosure by exactly the kinds of commitments that Applicants are making in this case: to create no new bottlenecks and to keep gateways open on commercially reasonable terms." (Applicants Reb. 1-109 (citing and describing CSX-Pan Am, FD 36472 et al., slip op. at 16, and CN-WC, 5 S.T.B. at 894, 918); accord Applicants Reb. 1-124 (citing and describing past decisions and stating that "[n]o further conditions should be required – especially under the pre-2001 merger rules").) Applicants assert that this approach provides a reliable backstop to CPKC's "already strong incentive to maintain efficient interline routes." (Applicants Reb. 1-110 (explaining that "[s]hippers will be able to demand a Rule 11 rate from CPKC and they will know if that rate is the reason why an interline route they previously relied upon is no longer viable").) Applicants also reiterate that, after KCS-Tex Mex, no shipper raised any concerns or complained about rates to/from Laredo or internal points in Mexico. (*Id.* (citing *id.*, Vol. 2, R.V.S. Naatz, para. 4).) Applicants state that they "expect the same result here" because they know they must sell shippers on the advantages of CPKC's new single-line routes and will not be successful if they try to force shippers to switch by downgrading their existing options. (Applicants Reb. 1-110 (citing *id.*, Vol. 2, R.V.S. Brooks, paras. 8-9).)

Applicants also argue that any open gateway condition the Board might consider "should be limited – in the same way Applicants' commitments are – to the preservation of interline

¹⁰⁴ The comments also note with approval that Applicants are amenable to developing dispute resolution mechanisms to assist in enforcing their commitments to keep gateways open and further note that such disputes could fall within the existing NGFA Rail Arbitration Rules. (*Id.* at 6.)

routing options for traffic that might conceivably be affected by the Transaction.” (Applicants Reb. 1-122 (citing *id.*, Vol. 2, R.V.S. Brooks 10).) In opposition to requests for more expansive conditions, Applicants assert, more specifically, that “[r]equiring Rule 11 rates to every interchange regardless of merger impact would upend the rules established by Congress as set forth in the Bottleneck rate cases and impose on CPKC alone a regulatory regime to which no other railroad in North America is subject,” and observe that the Board “has consistently rejected calls to revisit the seminal interpretation of the governing statutory framework set forth in these precedents.” (Applicants Reb. 1-125 to 1-126.) Applicants also note that their commitment to quote Rule 11 rates (or cooperate with connecting carriers on through rates) for affected traffic is broader than what UP proposed as appropriate for application to a potential transcontinental merger under the new merger rules. (*Id.* at 1-111 (citing UP Comments & Initial Proposals 12-13, Major Rail Consolidation Procs., EP 582 (Sub-No. 1), May 16, 2000, and stating: “As examples, Applicants do not (i) limit their commitment only to ‘exclusively-served’ traffic, (ii) exclude intermodal, automotive and transload traffic, or (iii) limit their commitment only to the ‘most-frequently used gateway’”).)

In their rebuttal submission, Applicants provide further detail on various aspects of their commitment to keep gateways open on commercially reasonable terms. (Applicants Reb. 1-29, 1-65; *id.*, Vol. 2, R.V.S. Brooks, para. 17 & App. A.) In their Final Brief, Applicants reiterate those commitments, provide further specificity, and present, for the first time, proposals for reporting requirements, application of the open gateway commitment to new traffic, and binding arbitration. (Applicants Final Br., App. A, at A4 & Rider 1, Attach. 1.1; Rider 2 & Attachs. 2.1 & 2.2.) These details and proposals, which the Board finds inadequate to address its concerns in certain respects, are discussed below.

Determinations Regarding Applicants’ Open Gateway Commitments & Additional Board Conditions.

Although the Board appreciates Applicants’ commitment to maintain open gateways, the language of those commitments raises issues about their scope and meaning, how they will be enforced, and what data should be reported to facilitate the Board’s effective monitoring and oversight. Accordingly, as discussed below, the Board will explain how Applicants’ commitments will be handled, clarify the required scope of those commitments where appropriate, and describe the related conditions the Board will impose.

As it has in past proceedings, the Board emphasizes the importance of an open gateway commitment to mitigate a merger’s vertical impacts. *See, e.g., CSX-Pan Am*, FD 36472 et al., slip op. at 16 (explaining that the open gateway commitment will permit other carriers to continue offering competitive interline rates); *KCS-Tex Mex*, 7 S.T.B. at 950 (stating that the open gateway and other commitments “should guarantee that traffic will continue to flow fairly and efficiently at the Laredo Bridge and through the Laredo gateway”). Even in mergers such as this (i.e., those without horizontal network overlap), potential adverse vertical competitive impacts can include diminished service and/or increased prices on interline movements that have the effect of foreclosing efficient competitive options. *See CN-EJ&E*, FD 35087, slip op. at 15. These adverse impacts may arise where, as here, a carrier that once provided neutral access to multiple competing railroads is then acquired by one of those competitors and has an incentive

post-merger to favor its own new single-line routing over interline alternatives. *Id.* The Board’s concerns about vertical competitive impacts have grown in recent years, as reflected in agency decisions, and consistent with updated economic literature and developments in antitrust enforcement policy. *See supra* The One-Lump Theory section. Accordingly, the Board has expressly rejected the presumption—applied in some prior Board proceedings—that a vertical combination will not result in competitive harm. *See supra* pp. 46-47.

Even evidence submitted by the Applicants here confirms that there is sound reason for the Board to be concerned about vertical foreclosure. As described further in the Public Benefits of the Transaction section, Applicants’ witnesses for rail-to-rail diversion, Brown and Zebrowski, performed a Traffic Distribution Analysis in which they examined historical carload and intermodal shares for certain county-to-county traffic pairs. (Appl., Vol. 2, V.S. Brown/Zebrowski, App. B, paras. 2-3.)¹⁰⁵ This analysis included county-to-county pairs with one single-line route and at least one independent interline route alternative (meaning the interline route did not involve the single-line carrier) and one single-line route and at least one dependent interline route alternative (meaning the interline route involved the single-line carrier). (*Id.*, Vol. 2, V.S. Brown/Zebrowski, App. B, para. 3.) For carload traffic during the time period under review, the Traffic Distribution Analysis showed that where a single-line route competed against an independent interline route of equal length, the single-line route captured about 55% of the traffic. (*Id.*, Vol. 2, V.S. Brown/Zebrowski, App. B, fig.B3 & paras. 9-12.) But where a single-line route competed against a dependent interline route of equal length, the single-line route captured over 65% of the carload traffic. (*Id.*, Vol. 2, V.S. Brown/Zebrowski, App. B, fig.B4 & paras. 14-17.)

Brown and Zebrowski broadly claim that their Traffic Distribution Analysis does not demonstrate vertical foreclosure because their analysis of single-line and dependent interline pairings showed that “dependent interline routes were available and actually chosen by many shippers.” (Applicants Reb., Vol. 2, R.V.S. Brown/Zebrowski, para. 55.) As they put it, “[t]hese are situations where foreclosure is by definition not occurring despite the *theoretical ability* of the railroad with sole access at one end to engage in foreclosure strategies.” (*Id.*; *see also* Appl., Vol. 2, V.S. Brown/Zebrowski, App. B, para. 16 (emphasizing that carriers offering their own single-line service routinely cooperate with other carriers to offer interline service on the same lane).) But simply because there may not have been foreclosure on *every* dependent interline move studied in the Traffic Distribution Analysis does not mean that there was not foreclosure on some moves.¹⁰⁶ Most importantly, Brown and Zebrowski made no effort to explain the difference in traffic share where a single-line route competes against an independent versus a

¹⁰⁵ Brown and Zebrowski used the 2015-2019 confidential waybill sample as the source for their data. (*Id.*)

¹⁰⁶ As explained at page 34, *supra*, Brown and Zebrowski calculated relative traffic shares for county-to-county pairs based on “total” shipments between counties, which by all indications included pairings where one or both of the movements was captive at origin or destination. In instances where that was the case, there may be no diversion opportunity for the single-line carrier to capture, which could explain the success of the interline option.

dependent interline route.¹⁰⁷ Given the lack of any explanation from Applicants, and since a single-line route should be no more efficient (and hence competitive) when competing against a dependent interline route than when competing against an independent interline route, foreclosure is a concerning possibility even if it is not the only possible explanation.

Moreover, given the role CP and KCS currently play in the interstate rail network, this Transaction presents potential foreclosure opportunities. Applicants note that between 75 and 80% of CP carloads passing through Chicago either originate or terminate on another railroad. (Am. Operating Plan, para. 27.) Likewise, Applicants' Amended Operating Plan describes the many important interchanges between KCS and other carriers, including in East St. Louis and Kansas City. (*Id.* at paras. 49-64.) Applicants further explain that at "St. Paul, Chicago[,] and Jackson, among others," some portion of the traffic currently interchanged with other railroads is expected to migrate to single-line service, (*id.* at para. 171), while their Final Brief identifies 12 gateways that they say account for the vast majority of pre-Transaction interline traffic that would be subject to their gateway commitments, (Applicants Final Br., Rider 2). Indeed, Brown and Zebrowski identify 381,283 interline movements that they describe as potentially divertible to CPKC as extended hauls.¹⁰⁸ (Appl., Vol. 2, V.S. Brown/Zebrowski, para. 25 & tbl.3.) That is not to say all these movements represent foreclosure opportunities, that each of these movements could be subject to significant competitive harm, or that effective competitive forces do not apply to a substantial portion of this traffic. However, the Board nonetheless finds a basis for addressing vertical foreclosure concerns.

The Board finds that a robust and readily enforceable open gateway requirement is the best means to ameliorate or eliminate vertical foreclosure concerns without unreasonably impeding the Transaction's benefits. Such a requirement, which is narrowly tailored, preserves interline optionality while also avoiding the potential threat to competition inherent in the proportional rate mechanisms proposed by some commenters. *See* CN-EJ&E, FD 35087, slip op. at 16 (recognizing that such an approach provides the "merged entity flexibility in determining the most efficient routes for its newly restructured system"). In the first instance, the gateway commitment leaves to Applicants and their customers—i.e., the parties with the best understanding of their respective market realities and business needs—responsibility for reaching agreement on the "commercially reasonable terms" for interline routes and open gateways, rather than having the Board attempt to supply a single definition in advance. *See id.*, FD 35087, slip op. at 16-17. Applicants emphasize repeatedly throughout their filings that the combined carrier will have a business incentive to allow shippers to use existing interline options that "best meet

¹⁰⁷ Indeed, Brown and Zebrowski seized on these differences, estimating as a starting point—without explanation—that a single-line route of the combined carrier would divert 25% more traffic when competing against a dependent interline route than when competing against an independent interline route. (Appl., Vol. 2, V.S. Brown/Zebrowski, App. B, para. 16.)

¹⁰⁸ As explained above in the Public Benefits of the Transaction section, Brown and Zebrowski greatly overstated the universe of divertible traffic because initial estimates derived from the Traffic Distribution Analysis failed to take into account that the single-line service offered by the combined entity will use a route that was already available to shippers as interline service. The point remains, however, that post-Transaction there will be numerous extended-haul opportunities for the combined carrier.

[the shipper’s] needs given the options they have today.” (Applicants Reb., Vol. 2, R.V.S. Brooks, para. 10; accord id., Vol. 2, R.V.S. Brooks, para. 18; Appl., Vol. 1, V.S. Creel, para. 30.) An open gateway commitment gives Applicants an opportunity to make good on their assurance while providing a backstop of Board enforcement if they do not.

The Board will accordingly impose as a condition to the merger Applicants’ commitment to keep gateways open on commercially reasonable terms, as it has done in prior mergers. It will impose this condition largely on the terms Applicants have proposed in Rider 2 to their Final Brief, along with Attachment 2.1 to that rider (which repeats the “specific gateway preservation condition terms” presented in Appendix A of the Brooks rebuttal verified statement), but with some important modifications and enhancements. Most significantly, as discussed in greater detail below, to facilitate Applicants’ adherence to the gateway commitment and the Board’s enforcement, the Board will require during the oversight period that Applicants provide to a shipper, upon request, a written justification for rate increases above the rate of inflation for interline movements subject to the open gateway obligation. This condition will help ensure that shippers have information needed to assess whether a price increase is warranted or whether it may be the result of potential foreclosure that warrants a request for Board enforcement, use of Applicants’ proposed arbitration process, or other alternative dispute resolution procedures. (See Applicants Reb., Vol. 2, R.V.S. Brooks, para. 19 (“[I]f we nonetheless tried to [foreclose,] shippers would see it immediately and have no hesitation speaking up and enforcing our commitment.”).)

Scope and Meaning of the Open Gateway Commitments. Applicants have committed to “not close any affected gateways, meaning that for traffic potentially affected [by] the Transaction (i.e., where CPKC will have a new longer or single-line haul) CPKC will support existing interline routing options with commercially reasonable rates and service.” (Applicants Final Br. 23.) In response to Board inquiries at the hearing, Applicants also clarified their commitments in certain respects in Appendix A, Rider 2 of their Final Brief. (Id.; see id., App. A at A4, A9, A11-A12.) As described above, several Class I carriers and some shipper interests have called for more expansive or specific open gateway conditions than the commitments proposed by Applicants.

As noted above, some parties raise concerns with respect to scope. Regarding geographic competition, CN contends that the commitment should encompass all gateways at which CPKC could have incentives to refuse to interchange traffic impacted by such competition (even if they are not “affected” gateways under the Applicants’ definition). (CN Comments 73-74.) Neither CN nor any other commenter cites a prior merger case where geographic competition has been recognized as a basis for imposing a broader open gateway requirement. While the post-2001 merger rules (which are not applicable here) recognize that vertical mergers may adversely impact geographic competition and require the submission of information related thereto, 49 C.F.R. §§ 1180.1(c), 1180.7(b) (2001), those rules impose no mandatory criteria for evaluating geographic competition or related conditions. Applicants argue that there will be no reduction in geographic (or product) competition, (Appl. 1-20; see also id., Vol. 2, V.S. Majure, paras. 72-110), and no evidence has been presented, or specific allegations made, to controvert

this contention.¹⁰⁹ Accordingly, the Board finds no basis for expanding this aspect of Applicants' open gateway commitments, which will apply to traffic interchanged through any gateway for which the Transaction creates a new single-line or extended haul for the combined entity so as to maintain existing interline options that shippers seek to preserve.¹¹⁰ (See, e.g., Applicants Reb. 1-65, 1-126; Applicants Final Br. 30.)

However, to ensure that the open gateways commitments adequately protect against Transaction-related harm, the Board will require modifications that will rectify certain deficiencies in Applicants' proposal relating to their definition of the scope of traffic subject to those obligations. (See Applicants Final Br., Rider 2.) Applicants state, in Point 2 of Rider 2, that their gateway-related commitments apply to what they call "In-Scope Traffic," which is "traffic potentially affected by the CP/KCS Transaction – being traffic that CP or KCS interchanged with another carrier for which the Transaction created a CPKC longer haul than was available on the CP or KCS system pre-Transaction."¹¹¹ (Applicants Final Br., App. A at A11.) But Applicants failed to specify (in Rider 2 or elsewhere) any date or time-period for identifying the "traffic that CP or KCS interchanged with another carrier." The Joint Associations propose January 1, 2018, as an appropriate cut-off date for determining existing interchanges, explaining that this date would encompass a reasonable two-year period prior to the COVID-19 pandemic. (Joint Ass'ns Comments 10.) The Board agrees that a five-year lookback period is appropriate for defining the scope of traffic that CP or KCS has interchanged with another carrier. Applicants did not submit an alternative proposal or take exception to the use of a five-year lookback, which will capture pre-COVID-19 traffic flows during 2018-19 and a short period of time before the 2019 baseline year used by Applicants for assessing Transaction-related impacts. Accordingly, all traffic that CP or KCS interchanged with another

¹⁰⁹ In its April 2021 comment, DOJ notes that, as the Board has recognized, "a railroad merger can harm competition even if the parties do not compete head to head to provide single-line service between the same origin and destination pairs," citing geographic (or "source") competition as one example of a way in which railroads can compete. (DOJ Comments 9, Apr. 12, 2021.) Comments filed by four shipper groups repeat DOJ's observations but present no evidence or argument that the CPKC merger specifically would reduce geographic competition for any particular commodity or movement. (PRFBA Req. for Conditions 10-11; USWA Comments 10-11; IMA Req. for Conditions 10-11; NDWC Req. for Conditions 12-13.)

¹¹⁰ The Board notes that Applicants here have committed to preserve all gateways impacted by the Transaction and that their commitment is consistent with the conditions the Board has imposed in past proceedings to protect shippers' access to routes that might be affected by a merger. See, e.g., CN-WC, 5 S.T.B. at 918 (ordering applicants to adhere to their representation that the combined entity would not engage in vertical foreclosure by closing efficient gateways, but, rather, would "keep all existing active gateways affected by the Transaction open on commercially reasonable terms"); CSX-Pan Am, FD 36472 et al., slip op. at 16 (describing the open gateway commitment as "vital to ensuring that the PAR System remains a competitive option, as it will allow other carriers that connect with the PAR System to continue offering competitive interline rates").

¹¹¹ For simplicity, the Board will instead refer to this traffic as existing traffic, and to the traffic described in Rider 2, point 6 (discussed below), as new traffic.

carrier within the five-year period preceding the effective date of this decision, and for which the Transaction will create a longer haul than was available on the CP or KCS system pre-Transaction, will be considered existing traffic subject to the open gateway conditions specified herein. See infra note 113 (discussing the five-year lookback period) & note 114 (discussing routing).

In response to inquiry at the hearing, Applicants' Final Brief clarifies that their gateway commitments "are not limited to the precise traffic movements that occurred in the past, but encompass new shippers and new commodities moving via interline routing options that were active pre-Transaction." (Applicants Final Br. 23.) Specifically, with respect to "New Traffic," Applicants committed that:

Applicants' gateway-related commitments are not limited to specific pre-Transaction movements (*i.e.*, of a specific commodity in a specific O-D pair for a specific shipper-of-record). They are intended to preserve pre-Transaction interline routing options that were chosen by Customers for traffic moving in origin-destination corridors that were sufficiently attractive to have been chosen by a meaningful number of shippers. Thus, if a Customer that previously chose an alternative route, a Customer that previously shipped one commodity but not another, or a new Customer seeks to avail itself of an interline option that supported material pre-Transaction traffic flows, the commitment not to close the gateway used by that route would still apply.

(Id., App. A, Rider 2, point 6, p. A11.)

The Board affirms Applicants' acknowledgement that the gateway commitments for "new traffic" will apply regardless of whether the customer had previously chosen an alternative route, shipped a different commodity, or is entirely new. However, Applicants' proposal to limit the scope of the gateway commitments for "new traffic" to corridors "chosen by a meaningful number of shippers" and "interline options that supported material pre-Transaction traffic flows" is insufficient. Of particular concern, these limitations create impediments to the efficient resolution of gateway disputes involving new traffic, given the vagueness of their terms. The Board will instead establish an objective standard keyed to the five-year look-back period established for existing traffic.¹¹² Accordingly, the Board will impose as a condition the modified requirement that Applicants' gateway obligation for new traffic *preserve pre-Transaction interline routing options for traffic moving in origin-destination corridors that have been used by any shipper within five years*¹¹³ *of the date a request for a rate involving new traffic*

¹¹² The Board understands that it is the preservation of interline routing options that operationalizes the open gateway commitment with regard to existing traffic and new traffic.

¹¹³ The Board recognizes that certain pre-Transaction interline routing options may have permanently been closed in the last five years as a result of events independent of the Transaction, such as an unrelated physical or operational change to the network made by a carrier connecting to Applicants. For new and existing traffic, the Board does not intend for the five-year lookback periods to cover pre-Transaction origin-destination corridors that were not

is made, and that the obligation to keep the gateway used by any such route open on commercially reasonable terms will apply. In any dispute regarding commercial reasonableness, CPKC remains free to assert that limited past use of the interline routing option¹¹⁴ in question is a factor that should be considered in evaluating the “commercial reasonableness” of a challenged rate or service term, and, should it do so in any formal proceeding, will be required to present evidence and argument to prove its position.

Relatedly, in their Application, Applicants recognize that keeping gateways open has two core dimensions—“operational efficiency and commercial viability”—and commit to maintaining both. (Appl., Vol. 1, V.S. Brooks, para. 45.) Applicants also state that “CP/KCS will continue to maintain efficient operations serving existing gateways *wherever traffic levels warrant* – in terms of both the through train services to and from the gateways as well as the operational capabilities and infrastructure necessary to carry out efficient interchange.” (*Id.* (emphasis added).) The Board clarifies that the condition to keep gateways open on commercially reasonable terms applies both financially and operationally (physically). See CSX-Pan Am, FD 36472 et al., slip op. at 16 (endorsing applicants’ commitment to “not do anything either physically or financially that is going to take away a competitive option that exists today”). But, as noted above, Applicants are not the judge of whether traffic levels do, or do not, warrant application of their commitment to keep a gateway open financially or operationally on commercially reasonable terms, so long as the relevant interline option had been used in the last five years. Rather, in any dispute regarding commercial reasonableness—like with arguments regarding limited past use of an interline routing option—CPKC remains free to assert that traffic levels are a factor that should be considered in evaluating the “commercial reasonableness” of challenged conduct and, in any formal proceeding, to present evidence and argument to support its position. If an argument based on traffic levels is made by Applicants in any formal proceeding, they will be required to demonstrate that such levels justify the actions complained-of that had been taken at the gateway.

Finally, the Board confirms the following representations made by Applicants and will incorporate them into the open gateway conditions imposed in this decision:

- Applicants’ open gateway commitments means that CPKC “will continue to offer commercially reasonable rates and terms capable of supporting the continued movement of traffic via the gateway”; Applicants “will not make it impossible to

commercially reasonable—financially or operationally (physically)—for reasons independent of this Transaction, and the Board will accept evidence and argument that such corridors do not constitute interline routing options consistent with the intent of this condition.

¹¹⁴ The Board understands Applicants’ “meaningful number” and “material” flows clauses to relate primarily to the economies of density and scope for a given corridor. The Board appreciates that these clauses may have related implications for temporary routings. In instances where temporary routing would not constitute an existing competitive option for a sustained period, the Board does not intend this condition to apply to alternative routing in an emergency or an accommodation for a shipper in an unusual situation. The Board will likewise accept evidence and argument that such routings do not constitute interline routing options consistent with the intent of this condition.

construct viable interline options for shippers by refusing to quote commercially reasonable rates.” (Appl., Vol. 1, V.S. Brooks, para. 46.)¹¹⁵

- Applicants’ obligations regarding open gateways will apply in perpetuity¹¹⁶ and to all traffic, including intermodal and other traffic that is exempt.¹¹⁷
- Applicants will quote a Rule 11 rate in the shipper’s choice of a tariff or contract.¹¹⁸
- Applicants will not take the position that the open gateway commitment does not apply because of a lack of market dominance, including by not taking the position that the Board lacks jurisdiction because the revenue-variable cost percentage generated by the traffic is less than 180%.¹¹⁹

¹¹⁵ As stated by CP’s CEO, “from my vantage it is quite simple: CP/KCS will add to shippers’ options and not take any away,” (Appl., Vol. 1, V.S. Creel, para. 31), and “[f]rom the outset, I have personally committed that CPKC will not eliminate any existing competitive options that shippers might prefer to new CPKC offerings,” (Applicants Reb., Vol. 2, R.V.S. Creel, para. 10).

¹¹⁶ (Hr’g Tr. 196:7 to 196:14, Sept. 28, 2022 (Applicants’ counsel responding to Chairman Oberman’s question and stating that there is no is time limit on enforcement, “just like there’s no time limit on enforcement [of] KCS’s commitment made in 2004 to keep the Laredo gateway open on commercially reasonable terms”).)

¹¹⁷ (Hr’g Tr. 191:11 to 192:9, Sept. 28, 2022 (discussing intermodal traffic); *id.* at 196:16 to 196:20 (statement by Applicants’ counsel that “there’s no relationship of that [open gateway] commitment to the Board’s rate regulatory principle. So exemption’s not relevant. We’re talking about closing the gateway to any traffic.”); *id.* at 197:3 to 197:12 (counsel affirming that the open gateway condition would apply to exempt traffic).)

¹¹⁸ (See Applicants Reb., Vol. 2, R.V.S. Brooks, App. A at A1-A2 (describing open gateway commitment in general terms as one under which CPKC will quote a Rule 11 rate, the economic terms of which “will be commercially reasonable”); Hr’g Tr. 171:2 to 171:7, Sept. 28, 2022 (Brooks agreeing that it “makes sense” to give shippers a choice of contract or tariff when quoting a Rule 11 rate).) In addition, Applicants committed to offering commercially reasonable economic terms both with respect to Rule 11 rates quoted to shippers and divisions offered to connecting carriers where a through rate is requested. (Applicants Final Br., App. A at A14.)

¹¹⁹ (Hr’g Tr. 180:9 to 180:16, Sept. 28, 2022 (Applicants’ counsel explaining that “you don’t have to come in and prove market dominance. There’s none of those hurdles. So any shipper, any shipper, who thinks that the rate action that CPKC has taken over an affected gateway was somehow outside the range that would make sense as an interline division to move traffic but was instead designed to shut off an option, they can make that case.”); *id.* at 196:11 to 197:12 (Applicants’ counsel confirming that the revenue-variable cost threshold is “not relevant”).) In Attachment 2.1 to Rider 2, being adopted with modifications as described herein as part of the Board’s conditions, Applicants relatedly represented that they will not take the position that rates or factors offered under the open gateway commitment are commercially reasonable solely because they would be found reasonable under the Board’s rate reasonableness

- Applicants represent that the Transaction does not affect the requirements to which KCS is subject under the agreement it entered into with NITL in connection with the KCS-Tex Mex merger. (Applicants Final Br., Rider 2, point 1, p. A11.)

Finally, the Board acknowledges and agrees with Applicants that the open gateway commitments imposed in this decision are made to and for the benefit of rail customers.¹²⁰ That is not the same issue, however, as that raised by several parties regarding who may seek to enforce the open gateway condition. (See Applicants Final Br., App. A at A15 (limiting agreement to arbitrate to disputes raised by payers of freight, and excluding “other railroads, shipper associations, or other third parties”); BNSF Final Br. 12 n.16 (suggesting that “competing rail carriers should be able to challenge commercially unreasonable practices by CP-KCS on behalf of shippers they serve”); CN Final Br. 1, 26 (arguing that proposed arbitration process be “available to all interested parties” as shipper associations will be better able than individual shippers to detect patterns of behavior and interchange carriers will be better able than individual shippers to detect service changes that impair interline service).) As just noted, competitors or other interested non-customer parties are not able to seek arbitration per the terms of CP’s proffered program, which is instead limited to payers of freight, and the Board will not disturb that provision.

With one important exception, however, the Board will decline here to impose limitations on who may seek Board action related to Applicants’ open gateway obligations, and will instead decide that issue on a case-by-case basis. See Publ’n Requirements for Agric. Prods., EP 528 (Sub-No. 1) et al., slip op. at 9 (STB served June 30, 2017) (noting that the Board is not bound by the requirements of judicial standing, which it may instead use as a guide, and will decide standing and claim aggregation issues on a case-by-case basis). Nevertheless, to avoid any unintended negative effects on competition, the Board will prohibit other carriers (who may be direct competitors) or shipper associations (who may have conflicting or insufficient interests) from bringing before the Board gateway disputes regarding individual Rule 11 rates.¹²¹ Cf. Protect Sudbury Inc.—Pet. For Declaratory Ord., FD 36493, slip op. at 4 (STB served Feb. 2, 2022) (denying petition to protect against abuse of the Board’s statute and processes where petitioner had inadequate interest in the proceeding). The Board will not attempt to limit or

standards. (Applicants Final Br., App. A at A14 (repeating representation presented in R.V.S. Brooks).)

¹²⁰ (See Applicants Final Br., Rider 2, point 3.) Applicants narrowly define “rail customer” (or “Customer”) as a “payer of freight.” (*Id.*) The Board has more generally used the term “shipper” throughout this decision, which is meant to more comprehensively describe those who use the rail network for the transportation of freight. To be clear, it is this more expansive class of rail users and customers the open gateway obligations are meant to benefit. As explained below, and with the exception described below, the Board will decide on a case-by-case basis who may seek Board action related to the open gateway obligations.

¹²¹ The Board notes that this concern is heightened because, consistent with Applicants’ commitment, the Board does not impose a market dominance prerequisite for enforcement of this condition.

delineate here the remedies that may be imposed upon a finding that the open gateway obligation has been violated, as some commenters have requested.¹²²

As noted above, Applicants commit to offering connecting carriers commercially reasonable rate divisions. (Applicants Reb., Vol. 2, R.V.S. Brooks, App. A at A1-A2; Applicants Final Br., App. A at A13-A14.) The Board construes this commitment to include negotiating in good faith with the connecting carrier to seek to resolve any disagreements about the commercial reasonableness of proposed divisions. And if the parties cannot resolve the dispute, the Board will be available to resolve such disputes.

Likewise, the 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.¹²³ 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. *See* CN-EJ&E, FD 35087, slip op. at 16-17.¹²⁴ The Board’s requirement of clearer terms pertaining to the scope of the combined carrier’s obligation to keep gateways open on commercially reasonable terms (as described above), and a meaningful process to facilitate efficient dispute resolution, will provide a more effective mechanism for resolving disputes in the event a violation is alleged.

Enforcement Forums and Conditions

Arbitration. In their Application, Applicants state that they would “work with shippers to find ways to make these [open gateway] commitments more concrete and readily enforceable, including via appropriate alternative dispute resolution mechanisms.” (Appl., Vol. 1, V.S. Brooks, para. 47.) Beyond clarifying certain points about the meaning of their open gateway commitments (which are summarized above), however, Applicants have presented little in the way of specific mechanisms or meaningful processes to substantiate this statement. The Application does not discuss or describe how Applicants would seek to fulfill their enforcement pledges. In its comments, CN requests that the Board “adopt binding arbitration as the means to resolve disputes over whether Applicants are offering commercially reasonable terms.” (CN

¹²² (See CN Comments 70 n.175 (asking the Board to “make clear that it will permit parties to seek haulage in the future if the Applicants do not in fact provide commercially reasonable rates and services as they have committed to do”).)

¹²³ For similar reasons, the Board will not adopt the request by IMA to “limit any rate increases to captive shippers for five years after the transaction is approved to 10% over that time.” (IMA Req. for Conditions 13.)

¹²⁴ As explained by Applicants’ witness Naatz (and not persuasively challenged by any commenter), pricing decisions are context-specific and dependent on the interplay of multiple factors, such as market conditions, regulatory requirements, volumes, overall business strategy, cost, special requirements, resource use, and asset availability. (Applicants Reb., Vol. 2, R.V.S. Naatz, para. 73.)

Comments 70, 75-76.) The Joint Associations likewise request that disputes over the calculation of rates under their proposed proportional rate mechanism be resolved—at the shipper’s election—under the Board’s arbitration rules at 49 C.F.R. part 1108, with Applicants deemed to have opted into the program as a requirement of the condition. (Joint Ass’ns Comments 10, 12-13.)

Applicants’ reply commits only to “participate in non-binding mediation with an independent dispute-resolution professional with the aim of facilitating a mutually-acceptable resolution of the issue in a fair, timely, and cost-effective manner” for service-related complaints. (See Applicants Reb., Vol. 2, R.V.S. Brooks, para. 41; *id.*, Vol. 2, R.V.S. Brooks, para. 32 (CP-KCS Service Promise, Pillar 5 (“We will participate in independent mediation with our customers when these [the preceding] steps do not resolve Transaction-related concerns.”))).) They make no parallel commitment with respect to gateway-related disputes. At the hearing, Applicants presented a summary of their dispute resolution process for gateway-related issues, stating: “KCS remains bound by its agreement with NITL in *KCS/TexMex*” and “CPKC will arbitrate claims regarding allegations of gateway closure,” followed by sub-bullets stating: “• Available only to payors of freight, • Safe harbor for existing rates (adjusted based on applicable inflation factor), • Service allegations covered, • Same arbitration procedure as KCS-NITL agreement, • No authority to prescribe.” (Applicants Reb. Hr’g Presentation at 85; see also Hr’g Tr. 1972-81, Oct. 7, 2022.) Based on the summary and related argument presented at the hearing, UP and the Joint Associations contend in their final briefs that Applicants’ commitment to arbitrate gateway disputes is insufficient (or, in UP’s words, “illusory”) because (in the Joint Associations’ words) “there is no standard or remedy associated with” this pledge. (UP Final Br. 14-15; Joint Ass’ns Final Br. 16-17.)

In their Final Brief, Applicants present a “Binding Agreement to Arbitrate,” in which they agree to arbitrate “claims by a Customer that CPKC did not honor Applicants’ commitment to keep gateways open on commercially reasonable terms with respect to a particular gateway and interline rail transportation option as to which the Customer is or would be the payer of freight to CPKC.” (Applicants Final Br., Rider 2, Attach. 2.2, p. A15.) The Agreement to Arbitrate includes (in material part) the following additional features:

- It extends only to disputes raised by Customers, and does not apply to claims by other railroads, shipper associations, or other third parties.
- It is contingent on the Customer’s good faith participation with CPKC in efforts to resolve the dispute, including through an escalation process.
- “If a Customer disputes CPKC’s compliance with its commitment to keep gateways open on commercially reasonable terms . . . the sole means by which a rail Customer may seek to enforce that commitment shall be through arbitration”
- Arbitration shall be as provided for under any separate binding confidential contract between the Customer and KCS or CP, or if no such provision has been made, under the Commercial Arbitration Rules administered by the American Arbitration Association.

- Disputes regarding CPKC’s interline rates shall be not arbitrable if the rates did not increase relative to pre-Transaction levels by more than the applicable rate of U.S., Mexican, or Canadian inflation.¹²⁵
- The “sole question” for decision by the arbitrator shall be whether CPKC violated its commitment to keep gateways open for “In-Scope Traffic” (as defined by Applicants without further clarification by the Board) on commercially reasonable terms, with the arbitrator tasked with deciding whether CPKC’s rate and service terms for such traffic via an affected gateway were commercially reasonable.
- “Under no circumstances may any arbitrator in any arbitration as provided [pursuant to the Agreement to Arbitrate] have any authority to prescribe rate or service terms; it shall at all times be up to CPKC as to how to alter its conduct in response to a finding that it violated its commitment to keep gateways open on commercially reasonable terms.”

(Id., pp. A15-A16.) Because this Agreement to Arbitrate was presented in Applicants’ Final Brief, other parties had no opportunity to comment on its specific terms.

The Board “favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible.” 49 C.F.R. § 1108.22(a). Arbitration can often afford advantages in terms of speed and confidentiality. See Joint Pet. for Rulemaking to Establish a Voluntary Arb. Program for Small Rate Disps., EP 765, slip op. at 11, 54, 57-58 (STB served Dec. 19, 2022) (noting that arbitration can facilitate the expeditious handling of disputes while confidentiality may promote settlement). To guarantee that rail customers have an avenue to arbitrate disputes regarding Applicants’ open gateway commitments, the Board will impose a condition requiring Applicants to adhere to their “Binding Agreement to Arbitrate” (i.e., requiring Applicants to offer such binding arbitration), subject to one important modification.

Under Applicants’ proposal, it appears that arbitration would be the customer’s only recourse to resolve a dispute about whether Applicants were honoring their obligation to keep gateways open on commercially reasonable terms.¹²⁶ CPKC’s unilateral offer to arbitrate certain types of disputes does not negate the Board’s authority and responsibility to be available to

¹²⁵ At the hearing, Applicants’ counsel confirmed, “as an example,” that Applicants’ proposed arbitration process “would cover assertions that the Laredo gateway was closed by virtue of CPKC’s commercially unreasonable rate or service on the Mexican portion of an interline move over Laredo” (Hr’g Tr. 1974:18-21, Oct. 7, 2022.)

¹²⁶ Applicants suggested that rail customers could still more formally challenge rates charged on in-scope traffic before the Board under the Board’s rate reasonableness standards. (Applicants Final Br., App. A., Attach. 2.1, p. A13.) The Board will be available to hear disputes regarding both adherence to the gateway condition as part of merger enforcement and rate reasonableness upon a § 10702(1) complaint following the Transaction.

resolve disputes itself, especially where Applicants have not agreed to allow an arbitrator to prescribe rate or service terms, and have instead themselves retained all remedial power. Given the potential risk of vertical foreclosure and the importance of the open gateway obligation, it is critical that the Board be available to resolve disputes regarding the gateway obligation, and to enforce it if necessary. The Board has authority to enter supplemental orders enforcing merger conditions and to modify prior decisions entered in the merger proceeding both during and after the merger oversight period. See 49 U.S.C. § 11327; Canadian Nat'l Ry.—Control—III. Cent., FD 33556 (Sub-No. 4), slip op. at 3 (STB served Dec. 27, 2001); see also Hr'g Tr. 195-96, Sept. 28, 2022 (Applicants explaining, prior to submitting their arbitration proposal, that a shipper could come to the Board for enforcement of the open gateway commitment and “there’s no time limit on enforcement”). Accordingly, the Board clarifies and reiterates that allegations that Applicants have violated the condition to keep gateways open on commercially reasonable terms may be brought to the Board for resolution, and that the Board would expect to resolve such claims expeditiously. In particular, the Board intends that any such claims brought directly to the Board will be subject to an expedited schedule, with limited discovery and a decision by the Board as soon as practicable, but generally, no longer than 150 days after a proceeding is initiated. Alternatively, “payers of freight” (or Customers, Applicants’ defined term for “payers of freight”) may elect to utilize Applicants’ proposed arbitration process, despite its limitations.¹²⁷ In addition, nothing in this decision prevents parties from agreeing to arbitrate a gateway dispute on terms different than those offered in Applicants’ “Binding Agreement to Arbitrate,” and the Board strongly encourages Applicants to offer to arbitrate such disputes on terms agreeable to their Customers.

The Board will not impose CN’s proposed arbitration requirement. CN contends that Applicants should be required to commit to prompt arbitration of all disputes over commercially reasonable rates, “similar to the commitment in the NITL Agreement that was incorporated into the Tex Mex conditions.” (CN Comments 75-76.) Unlike the arbitration process proposed by Applicants in this proceeding, the agreement that KCS entered into with NITL in the KCS-Tex Mex proceeding does not appear to prohibit the arbitrator from prescribing a remedy for violation of the gateway obligation. Contrary to CN’s claims, the NITL Agreement¹²⁸ was **not** incorporated into the KCS-Tex Mex conditions, as the Board found that NITL had not shown that it was necessary. KCS-Tex Mex, 7 S.T.B. at 951. CN likewise has not shown that its proposed arbitration approach is necessary as a condition, particularly where the Board remains available to resolve such disputes, including by entering appropriate orders enforcing the gateway obligation. See supra Applicable Standards, Criteria for Imposing Conditions section (requiring conditions to be narrowly tailored to address Transaction-related harm).¹²⁹

¹²⁷ Absent extraordinary circumstances, election of the arbitration process by a Customer will preclude that Customer from bringing a separate challenge regarding the same complained-of conduct in a proceeding before the Board.

¹²⁸ (See NITL Comment, KCS-Tex Mex, FD 34342, Sept. 30, 2003.)

¹²⁹ The Board will also deny the Joint Associations’ request that the Board deem that Applicants have opted into the arbitration program at 49 C.F.R. part 1108 for purposes of arbitrating disputes regarding the Joint Associations’ proposed proportional rate mechanism. (Joint Ass’ns Comments 10, 12-13.) The Joint Associations’ request is moot as the Board has

In light of vertical foreclosure concerns, the Board will impose additional requirements, as described below, to strengthen the open gateway conditions specified in this decision and facilitate recourse for shippers when Applicants' compliance with those conditions is called into question.

Written Justification for Rate Increases Above Inflation. To ensure effective resolution of commercial reasonableness disputes (either at the Board or using an alternative dispute resolution mechanism), the Board will require Applicants to provide shippers,¹³⁰ upon request, certain written justifications regarding rate increases above the rate of inflation for interline movements subject to the open gateway obligation.¹³¹ Although this requirement has not been used by the Board in prior transactions to address vertical competition issues, it advances the Board's efforts to enhance information available to shippers to facilitate more informed judgments about potential disputes. Specifically, the Board will require:

Upon written request by a shipper submitted by certified mail or email to the applicable CPKC account representative, CPKC must provide a written response (Written Response)¹³² identifying its justification(s) for any rate increase above the applicable rate of inflation for interline movements subject to the open gateway obligation within 15 days of its receipt of the shipper's request. The Written Response must include sufficient detail to enable the shipper to make a meaningful preliminary assessment of the reasonableness of the justification(s) identified by CPKC for the rate increase.¹³³ If the

denied their request for a proportional rate mechanism. See supra The Proposed Proportional Rate Conditions section.

¹³⁰ For the sake of clarity, no carrier or shipper association has the right to demand the written justification described here.

¹³¹ In their Final Brief, Applicants propose to limit arbitration to interline rates that "increase[d] relative to pre-Transaction levels by more than the applicable rate of U.S., Mexican, or Canadian inflation." (Applicants Final Br., App. A at A16.) For purposes of the conditions imposed in this decision, the applicable rates of inflation will be determined by reference to the rail cost adjustment factor (unadjusted) published by the Board in EP 290 (Sub-No. 5), Quarterly Rail Cost Adjustment Factor, or, in the case of a rate that contains a fuel surcharge provision, the All-Inclusive Index Less Fuel (AII-LF) Index published by the Association of American Railroads. Applicants may petition the Board for use of an alternative inflation-adjusted index for application to movements in Mexico or Canada by May 30, 2023.

¹³² To distinguish between communications subject to this condition and an informal request for an explanation that might otherwise occur as part of rate discussions, shippers must explicitly invoke this condition to qualify for the Written Response and the resulting restrictions imposed upon CPKC.

¹³³ Nothing herein is meant to suggest that CPKC must include confidential, proprietary, or commercially sensitive information as part of its Written Response, and the Board expects that CPKC should be able to satisfy this condition by providing a justification in terms sufficiently general to avoid disclosure of its pricing strategy or other information that could, if disclosed to a

shipper thereafter challenges the commercial reasonableness of CPKC's actions regarding the rate increase in a proceeding, CPKC will be estopped from presenting any justification that is (i) inconsistent with justification(s) identified in the Written Response or (ii) not previously identified in the Written Response.¹³⁴ CPKC will be permitted to elaborate and produce supporting evidence relating to any justification identified and described in the Written Response; correspondingly, reasonable inferences may be drawn from the sufficiency of the initial description in any enforcement proceeding.

This condition, which establishes an informational requirement for rate increases above inflation for the above-described interline movements, further guards against the risk of vertical harm described by DOJ and other commenters by enhancing transparency and accountability. (See DOJ Comments 3-4, Jan. 24, 2023 (expressing concern about post-merger impacts on rivals' ability to compete and denial of access to lowest cost or fastest end-to-end routings, and citing comments sharing these concerns).) This condition, like the open gateway obligation itself, is narrowly tailored to address the potential adverse competitive effects of the Transaction, and it will render that obligation more concrete and readily enforceable. It will not prohibit Applicants from raising rates on applicable interline movements and does not create a one-size-fits-all approach to determining commercial reasonableness in any future enforcement proceeding. The information it requires will enhance the information available to shippers to facilitate more informed judgments about potential disputes, will incentivize CPKC to refrain from imposing rate increases it cannot justify, and will not be unduly burdensome to CPKC, ensuring that the condition itself is operationally feasible. In sum, the condition helps mitigate the risk of vertical harm by shedding light on whether foreclosure may be occurring for a particular movement, but without threatening the Transaction's potential benefits.

Informal Escalation Process. As noted above, Applicants condition their arbitration commitment "on the Customer's good faith participation with CPKC in efforts to resolve the dispute, including through an escalation process." (Applicants Final Br., App. A, Attach. 2.2 at A15.) To further facilitate effective resolution and enforcement of commercial reasonableness disputes, the Board will adopt aspects of the escalation process as a condition, which will apply at the shipper's election regardless of whether it elects to pursue arbitration per the Applicants' "Binding Agreement to Arbitrate."

As already noted, the Board has long favored the resolution of disputes through mediation or other informal procedures whenever possible. An informal escalation process could be useful to resolve or narrow gateway disputes that might otherwise result in contentious litigation. Like the justification requirement described above, it promotes transparency and accountability but imposes only a modest burden and does not threaten to undermine the

competitor, cause competitive harm. However, if to fulfill its obligation, the disclosure of confidential, proprietary, or commercially sensitive information is necessary for its justification, or if CPKC chooses to disclose such information, CPKC may require a shipper requesting a Written Response to enter into an appropriate confidentiality agreement prior to its receipt.

¹³⁴ Absent a showing of good cause, if CPKC fails to provide a Written Response within 15 days of the written request, CPKC will be precluded from providing a justification during a proceeding to enforce the open gateway commitment.

Transaction’s potential benefits. The Board will therefore permit shippers to make use of the informal escalation process if they believe it would be beneficial to do so, regardless of whether that shipper elects to pursue arbitration under Applicants’ “Binding Agreement to Arbitrate” or elects to bring its petition directly to the Board. CPKC will be required to adhere to its commitment to participate in good faith for as long as the shipper chooses to engage, but the shipper will remain free to discontinue the process at any time without prejudice to its right to allege a violation of the open gateway commitment before the Board.¹³⁵ The Board encourages any parties involved in a dispute about the open gateway conditions imposed in this decision to use their best efforts to resolve it collaboratively and on reasonable commercial terms without the need for Board intervention.

Reporting & Recordkeeping. In their Final Brief, Applicants commit to report monthly during a five-year oversight period on the volume of traffic interchanged between CPKC and connecting carriers at key gateways potentially affected by the Transaction. (Applicants Final Br., App. A at A4.) The specific terms of their proposal, listed in Rider 1, Attachment 1.1, include 12 gateways at which the number of cars interchanged with connecting carriers would be reported. (Applicants Final Br., App. A at A9.)¹³⁶ Applicants state that “reporting may be undertaken pursuant to a Board-imposed Protective Order to the extent it would reveal competitively-sensitive information about third-party traffic volumes.” (*Id.*, App. A at A4; accord id. at A9.)

Some commenters propose more expansive reporting requirements. NGFA, for example, asserts that the Board should establish a process “to proactively investigate and reverse instances where a gateway is closed in apparent violation of Applicants’ commitments,” and that monthly reporting should also include information on bottleneck rates. (NGFA Comments 11.) TxIT proposes quarterly reports “providing information on rail traffic being diverted to CP/KCS from competing routes, including to/from Gulf Coast ports.” (TxIT Comments & Req. for Conditions (TxIT Comments) 9, Feb. 28, 2022.) In its final brief, BNSF asserts that, if the Board declines to impose a proportional rate-based mechanism at the Laredo gateway, CPKC should be required to report certain waybill, rate, and cost data for movements between the United States and Mexico in general and over the Laredo gateway in particular. (BNSF Final Br. 17.) BNSF also suggests that Applicants be required to regularly report sufficient data to enable the Board and interested parties to review performance of their open gateway and service obligations and commitments. (*Id.* at 27-28.)

Applicants respond that the Board “should resist calls by [] commenters . . . to require reporting of competitively-sensitive information about CPKC’s traffic opportunities,” and assert that “any obligation to report about the competitive wins and losses CPKC experiences – or any

¹³⁵ The shipper would still need to pursue the escalation process to completion as a prerequisite to commencing arbitration under Applicants’ “Binding Agreement to Arbitrate,” “[u]nless otherwise agreed to by the parties.” (Applicants Final Br., Rider 2, Attach. 2.2.)

¹³⁶ Specifically, Minneapolis/St. Paul, Chicago, and Kansas City (for the former CP) and Laredo, Robstown, Beaumont, Shreveport, Dallas, Jackson, Meridian, East St. Louis, and Kansas City (for the former KCS). (Applicants Final Br., App. A at A9.) Applicants also propose, at the outset of the oversight period, to “report non-CPKC 2022 volumes by gateway.” (*Id.*)

other details of what traffic CPKC is taking on in lanes where it competes with larger Class 1 railroads – would uniquely handicap CPKC’s ability to compete.” (Applicants Reb., Vol. 2, R.V.S. Brooks, para. 38.)

As discussed below, the Board will closely monitor whether Applicants are adhering to the representations and commitments they have made in this proceeding, including, as pertinent here, their obligation to keep affected gateways open on commercially reasonable terms. To accomplish this goal, the Board will impose reporting requirements to ensure that it has the information needed to conduct effective oversight, and will direct Applicants to participate in a technical conference with Board staff by May 15, 2023. Applicants will be required to maintain the data underlying their reports for the duration of the oversight period.

Subject to any matters determined at the technical conference, the Board will require reporting and recordkeeping, including but not limited to the following:

1. Applicants will be required to provide a monthly report containing the following information related to interchange volumes at gateways:

- Count of cars interchanged with connecting carriers at interchange.
 - CP:
 - Minneapolis/St. Paul; Chicago; Kansas City
 - Eastport¹³⁷
 - KCS:
 - Laredo;¹³⁸ Robstown; Beaumont; Shreveport; Dallas; Jackson; Meridian; East St. Louis; Kansas City
 - New Orleans¹³⁹

¹³⁷ Applicants did not identify Eastport, Idaho, among the twelve gateways that they contend “account for the vast majority of pre-Transaction interline traffic that would be within the scope of their gateway commitments.” (Applicants Final Br., App. A at A9, A11.) Because Eastport as an interchange location accounts for the largest number of carloads interchanged annually on the CP network, (see Am. Operating Plan, App. J), and because information on this important interchange will provide broader visibility into post-Transaction traffic flows, the Board will extend its reporting condition to include Eastport.

¹³⁸ Reporting requirements relating to operational issues involving the Laredo Bridge are specified in the Capacity section below.

¹³⁹ Applicants also did not include New Orleans in their list of gateways for which they committed to report information. (Applicants Final Br., App. A at A9, A11; see also Applicants Reb., Vol. 2, R.V.S. Brooks, paras. 12-13 (noting lack of extended haul opportunity for traffic interchanged at New Orleans).) New Orleans, however, accounts for the fourth-most cars interchanged annually on the KCS system by interchange location. (See Am. Operating Plan, App. K.) To ensure the Board has sufficient information regarding post-Transaction traffic flows across the combined CPKC network, it will extend its reporting condition to include this important location.

- Information will include the total count of cars interchanged (i) categorized by two-digit STCC and (ii) broken out by interchange partner. At the technical conference, CPKC should be prepared to discuss its ability to also provide data relating to car miles on the CPKC system, and any associated burden that would be incurred in doing so.
- With the first monthly report, Applicants will also be required to provide the same historical monthly information for a five-year period dating back from the effective date of this decision, or if data is no longer available for the entirety of that time period, then from the earliest date for which it is available.¹⁴⁰

2. With respect to the following, Applicants will be required to report information on a biannual basis (every six months), categorized by two-digit STCC and on a carload basis:

- Truck-to-rail diversions on the CP and KCS lines subject to this proceeding.
- Rail-to-rail diversions on the CP and KCS lines subject to this proceeding broken out in the following categories:
 - Joint-line movements converted to single-line service
 - Movements that CPKC has diverted from other railroads on to the merged system.

At the technical conference, CPKC should be prepared to discuss its ability to provide data for truck-to-rail and rail-to-rail diversions on a corridor- or route-specific basis and any associated burden that would be incurred in doing so. Further details relating to reporting requirements and procedures for providing truck-to-rail and rail-to-rail diversions data will be provided as necessary in a Board order following the technical conference.

3. To facilitate the Board's ability to enforce the conditions imposed in this decision and to issue supplemental orders, if warranted, Applicants are directed to preserve their 100% traffic tapes covering the duration of the oversight period as well as the five-year baseline period specified in Item One above.¹⁴¹ Applicants must preserve these traffic tapes for the entire oversight period independent of the scope of any reporting requirements established in this decision or any future decision. The data to be preserved includes all data that Applicants compile and maintain in their 100% traffic tapes in the ordinary course of business, including but

¹⁴⁰ A robust set of baseline data will facilitate the ability to assess whether foreclosure may be occurring post-Transaction. (See Joint Ass'ns Final Br. 9 n.26 (noting that "a thorough and efficient analysis would require pre- and post-merger traffic and rate data from the railroads involved in the merger").) Applicants' commitment to "report non-CPKC 2022 volumes by gateway" at the outset of the oversight period, (Applicants Final Br., App. A at A9), is insufficient to provide a meaningful baseline. The Board also notes that the five-year baseline period corresponds to the time-period specified above for determining current existing traffic subject to the open gateway conditions.

¹⁴¹ The Board has required parties in some past merger proceedings to file or make available 100% traffic tapes during the oversight period. See, e.g., CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., FD 33388 (Sub-No. 90), slip op. at 4 (STB served Dec. 15, 1999); Canadian Nat'l Ry.—Control—Ill. Cent. Corp., FD 33556 (Sub-No. 4), slip op. at 3 (STB served Mar. 9, 2000).

not limited to the following for operations in the U.S. and for all transborder movements between the U.S. and Mexico or Canada: Origin, destination, and interchange information; contract and tariff information; and revenue information on a country-specific basis.¹⁴² Following the technical conference, the Board may conclude that submission of the 100% traffic tapes will be required to enable the Board to more efficiently and effectively fulfill its oversight responsibilities, and, in that event, will take appropriate measures to safeguard the confidentiality of proprietary or otherwise sensitive information contained in those tapes.

4. Applicants are directed to establish whatever protocols and recordkeeping practices are necessary to enable CPKC to respond promptly and accurately to inquiries by the Board and/or shippers in the event future concerns or disputes arise in connection with the open gateway conditions imposed in this decision, including being able to provide the Board with a list of rate increases above inflation for interline movements subject to the open gateway obligation.

Iowa Interstate Railroad Settlement Agreement.

On March 18, 2022, Applicants and Iowa Interstate Railroad, LLC (IAIS), jointly notified the Board that CP and IAIS have entered into a settlement agreement, under which CPKC makes certain commercial reasonableness commitments regarding the Davenport, Iowa gateway. (Applicants-IAIS Joint Notice, Ex. 1, Settlement Agreement Between IAIS and CP, para. 1.) Applicants and IAIS request that the Board (a) impose as a condition of its approval of the Transaction the specific commitments made to IAIS by Applicants that are set forth in Section 1.1 of the Agreement and (b) confirm that it has and will have jurisdiction to enforce the Agreement. (Id. at 1.)

The Board will grant the parties' joint request to impose the terms of this settlement agreement as a condition to the Transaction. The Board "will generally accommodate a request made by the parties to a settlement agreement that [it] impose as a condition a pro-competitive provision it contains," even if the formal requirements for involuntary conditions are not otherwise met. BN-SF, 10 I.C.C.2d at 661, 762 (1995); see also id. at 765-66 (recognizing that a settlement term was "not pro-competitive in any substantial way," but nonetheless imposing it as a condition because it was "at least marginally pro-competitive" and because no parties had opposed the joint request to impose it). Here, the Board finds the terms of the settlement agreement to be "at least marginally pro-competitive," as Applicants' commitments in the agreement are similar to Applicants' general gateway commitments.

Competitive Access Concerns

General Requests. Several shipper groups ask the Board to condition approval of the Transaction on Applicants agreeing to reciprocal switching arrangements at certain locations. For example, NGFA asks for, among other relief, a condition requiring CPKC to enter into reciprocal switching arrangements to facilitate rail-to-rail competition post-merger. (NGFA

¹⁴² To the extent that these oversight record retention requirements exceed those set forth at 49 C.F.R. parts 1220 and 1244, the oversight conditions control.

Comments 9.) Similarly, IMA asks that shippers on CPKC that are captive or receiving inadequate service receive access to other carriers through reciprocal switching as well as terminal trackage rights and the prescription of through routes. (IMA Req. for Conditions 12.) IMA claims that these conditions will help alleviate the “inevitable” service issues that will occur when the two railroads begin to merge their operations and remedy what it claims is a loss of competition caused by the merger. (*Id.* at 9, 13.) PRFBA also makes a similar request for competitive access conditions. (PRFBA Req. for Conditions 12.)

Additionally, USWA, NDWC, and NAWG (collectively, the U.S. Wheat Associations) filed separate requests asking the Board to impose various forms of statutory competitive access under 49 U.S.C. §§ 10705 and 11102, under certain conditions. (See USWA Comments 13 (seeking the prescription of through routes, terminal trackage rights, and/or reciprocal switching relief for “any shipper on the new CP/KCS system that is subject to market dominance or receives inadequate service”); NDWC Req. for Conditions 16 (same); NAWG Comments 2 (seeking a condition “guaranteeing captive shippers of the new CPKC open access to reciprocal switching”).) They seek to safeguard the ability of U.S. wheat shippers to compete with Canadian wheat shippers currently served by CP, the latter of which allegedly benefit from certain Canadian regulatory policies.¹⁴³ (See USWA Comments 3-4; NDWC Req. for Conditions 5-6; NAWG Comments 2.) They also seek conditions because they fear a loss of rail competition, and USWA and NDWC wish to protect against “poorer” rail service. (See USWA Comments 10; NDWC Req. for Conditions 12; NAWG Comments 2.)

In response, Applicants argue that the Transaction poses no threat to either rail service or competition. According to Applicants, there is no basis to support the suggestion that the Transaction will cause significant service disruptions, and the access conditions sought here are unconnected to any Transaction-related harm. (See Applicants Reb. 1-60 to 1-61, 1-124, 1-134 to 1-135.) Further, Applicants assert that the parties’ broad requests for competitive access are inappropriately raised in this proceeding and that the imposition of such conditions would unfairly alter the regulatory landscape for CPKC alone and impair CPKC’s efforts to offer new competitive alternatives. (See *id.* at 1-124, 1-131 to 1-133 (contrasting Reciprocal Switching, Docket No. EP 711 (Sub-No. 1), in which the Board is considering industry-wide revisions to competitive access standards).) IMA and USWA both responded in support of the access conditions they seek, reiterating concerns about a loss of rail competition. (IMA Final Br. 15-16; USWA Final Br. 18.)

The Board will not impose these conditions here. First, the concerns raised by these entities regarding post-Transaction competition do not stem from the Transaction, but rather from longstanding issues neither caused by nor related directly to the Transaction. See BN-SF,

¹⁴³ In particular, the U.S. Wheat Associations cite the following Canadian policies: (1) revenue caps on grain transportation movements to port facilities, which effectively limit rail rates by statute, rather than the market, thus lowering the transportation costs that exporters must pay for grain; (2) mandated grain shipping minimums, implemented as recently as 2014 by the Canadian government during times of supply chain logistics challenges; and (3) policy tools such as a final offer rate arbitration process and government-mandated competitive switching. (See USWA Comments 3-4; NDWC Req. for Conditions 5-6; NAWG Comments 2.)

10 I.C.C.2d at 730. As the U.S. Wheat Associations acknowledge, Canadian wheat has long competed with U.S. wheat, particularly for destinations in Mexico, and Canada’s regulatory policies have existed prior to (and will remain unaltered by) the Transaction. (See, e.g., USWA Comments 2-4; Applicants Reb. 1-313 to 1-315.)¹⁴⁴ Second, while NGFA and others seek competitive access to remedy reductions in competition and service levels resulting from further consolidation in the railroad industry, (see e.g., NGFA Comments 3), they do not identify any specific Transaction-related harm. Third, the entities seeking general competitive access conditions have failed to demonstrate that the Transaction will cause service issues that warrant the broad relief they seek.¹⁴⁵ However, the conditions that will be imposed in this decision—particularly the Board’s oversight condition and holding Applicants to their commitments made in their Service Promise, as discussed below—will do much to prevent the sorts of significant service problems about which these entities have expressed concern, and enable the Board to quickly address any such problems should they arise. As discussed in the Capacity section, traffic is expected to increase incrementally in the years following the Transaction, and Applicants and other users of shared lines have incentives to ensure continued fluidity through the implementation of operational changes and infrastructure improvements. Furthermore, the Board will closely monitor Applicants’ service as part of its oversight during the next seven years and require CPKC to honor its commitment with respect to reciprocal switching access for shipper facilities served directly by CP or KCS. (See Applicants Final Br., App. A, para. 14.)¹⁴⁶

LyondellBasell Parties. LyondellBasell Parties also seek access conditions. According to LyondellBasell Parties, Applicants’ operating plan shows that the Transaction will cause significant volume increases between Laredo and Shreveport, which is a critical segment of Applicants’ north-south corridor. (LyondellBasell Parties Comments & Req. for Conditions (LyondellBasell Parties Comments) 4, Feb. 28, 2022.) LyondellBasell Parties are concerned that this increased traffic would negatively impact rail competition and service for their facilities along the Gulf Coast, especially those in the Lake Charles Area¹⁴⁷ and at Corpus Christi, Tex. (Id.) LyondellBasell Parties thus seek conditions to protect service and competition at these facilities. (Id.)

¹⁴⁴ In addition, as Applicants note and USWA, NDWC, and NAWG do not dispute, the complained-of Canadian revenue caps do not even apply to wheat shipped by rail to destinations in the U.S. and Mexico. (See Applicants Reb. 1-316 (citing Canadian Transportation Agency, The Maximum Revenue Entitlement: A Guide (“MRE Guide”), available at <https://otc-cta.gc.ca/eng/publication/maximum-revenue-entitlement-a-guide?msclkid=ec143571c10f11ec8f99bf0aaf7bc6a4> (last visited Feb. 10, 2023)).)

¹⁴⁵ The Board is currently considering whether modifications to its reciprocal switching rules are warranted, to address service and competition issues for the rail industry at large, in Docket No. EP 711 (Sub-No. 1).

¹⁴⁶ To date, this access is set forth in CP’s “Tariff 7 – Between Railways,” effective Jan. 1, 2023, available at <https://www.cpr.ca/en/> (last visited Feb. 10, 2023), and KCS’s “Switching and Terminal Tariff KCS-8100-E Revision 37,” effective Mar. 1, 2022, available at <https://www.kcsouthern.com/en-us/> (last visited Feb. 10, 2023).

¹⁴⁷ LyondellBasell Parties define this area as including Lake Charles, West Lake Charles, Westlake, and Mossville, La. (LyondellBasell Parties Comments 2.)

Specifically, LyondellBasell Parties ask that the Board: (1) “grant BNSF immediate access via reciprocal switch or direct access to all facilities connected to any line over which BNSF has access under the merger conditions that the UP/SP merger imposed for the Lake Charles Area (Lake Charles Merger Conditions), particularly with respect to Mossville, La, which Applicants purportedly describe as being Lake Charles;” (2) “establish access conditions and compensation for BNSF’s access to all shippers on the Rosebluff Lead, a track that UP and KCS jointly own in the Lake Charles Area and to which the Lake Charles Merger Conditions provide BNSF with access;” and (3) “provide UP access via reciprocal switch at Robstown, Tex., to Corpus Christi shippers located on the KCS branch line that connects to KCS’s north-south corridor at Robstown and runs east into Corpus Christi.” (LyondellBasell Parties Comments 3-4.)

The Board will not impose the conditions sought by LyondellBasell Parties. First, access conditions for the Lake Charles Area are inappropriate here, as the KCS line serving Lake Charles should not be materially affected by the Transaction, see supra Capacity Tex. Gulf Coast section, (see also Applicants Reb. 1-322), and the issues involving BNSF’s access to the Rosebluff Lead long predate the Transaction and are already being litigated at the Board, see BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry., FD 32760 (Sub-No. 46) (STB served Apr. 13, 2022). Second, LyondellBasell Parties’ request for competitive access to the Corpus Christi facility, which does not actively ship by rail today,¹⁴⁸ addresses a preexisting issue, as UP has never had access to that facility, (see Applicants Reb. Vol. 1-321). Finally, as noted above, other conditions imposed in this decision will do much to prevent the sort of significant service problems that are the basis for LyondellBasell Parties’ concerns. The Board will, however, closely monitor increasing traffic during the oversight period, and shippers like LyondellBasell Parties may raise any significant problems with the Board during that period.

Texas International Terminals. TxIT, a liquid and dry bulk multi-modal facility for deep-draft vessels, unit trains, manifest rail, barge, and trucking along the Galveston Ship Channel, also seeks certain access conditions. (TxIT Comments 2.) TxIT indicates that it is dually served by UP and BNSF via switching arrangements with the Texas Railway Exchange LLC and UP. (Id.) In addition, TxIT may also be served by KCS, through access rights gained in UP-MKT, 4 I.C.C.2d at 452-458, 532, as effectuated through a haulage and trackage rights agreement approved in Kansas City Southern Railway—Trackage Rights—over the Missouri-Kansas-Texas Railroad, FD 30800 (Sub-No. 23) (I.C.C. served Aug. 8, 1988). (See TxIT Comments 2-4.) KCS’s access rights to Galveston, Tex., were granted principally to preserve competitive options for certain Midwest grain shippers. See UP-MKT, 4 I.C.C.2d at 452-58. However, to TxIT’s knowledge, KCS has never effectuated or sought to aggressively market those rights with respect to rail service to TxIT. (TxIT Comments 4.) TxIT expresses concern that, following the Transaction, TxIT’s current and potential customers located off BNSF and UP lines could be disadvantaged if existing gateways and interline arrangements are not maintained and if the existing KCS access rights to Galveston are not preserved. (Id. at 3-6.) In addition to requesting conditions aimed at protecting gateways (discussed in the Vertical Competition Issues section),

¹⁴⁸ (See Applicants Reb. 1-321; id., Vol. 2, R.V.S. Simmons, para. 91; see also id., Vol. 2, R.V.S. Elphick/Orr, para. 66; LyondellBasell Parties Comments 10.)

TxIT asks the Board to require Applicants to preserve and maintain existing haulage and trackage rights agreements to Galveston. (Id. at 2, 9.)

Applicants respond by noting that, although KCS was granted haulage rights to Galveston in 1988, those rights were never exercised because “KCS found those rights to be commercially disadvantageous” as compared to other ways of moving grain to destination markets. (Applicants Reb. 1-319.) Applicants further assert the Transaction will not affect the existence of KCS’s haulage rights, nor is the Transaction to blame for KCS’s long-preexisting decision not to exercise those rights. (Id. at 1-320 & n.609.) Applicants also represent that they “have no plans to extinguish whatever rights CPKC would have to access Galveston via UP haulage.” (Id.)

The Board will not impose any access condition relating to KCS’s trackage and haulage rights to Galveston. Those rights are unaffected by the Transaction here, and Applicants have represented that they expect to maintain them regardless. Although TxIT suggests that the Board should require Applicants “to actively engage in utilizing those competitive rights,” (TxIT Comments 5), the Board notes that the Galveston rights are permissive, and the Board will not override KCS’s apparent business decision not to exercise those rights—a decision that long predates, and is unrelated to, this Transaction.

Capacity

Overview. BNSF, UP, and CN argue that Applicants have failed to account for increased traffic on shared facilities on which Applicants plan to operate. (See, e.g., BNSF Comments 5-6; BNSF Resp. to Comments 24-30; UP Comments 50-53; CN Comments 30.) Commenters claim that Applicants either did not perform capacity modeling for such facilities or the modeling was inadequate. (See, e.g., UP Comments 51.) UP argues that the Board should conclude that the Transaction is not in the public interest given Applicants’ failure to address capacity issues at joint facilities. (Id. at 76.) These commenters further argue that, if the Board does approve the Transaction, Applicants should not be permitted to implement their new single-line service and add to the existing traffic on those lines until they plan, pay for, and implement the changes required to handle the projected traffic increases. (See, e.g., BNSF Resp. to Comments 70-71; UP Comments 76; CN Resp. to Comments 32.)

Applicants respond that they have carefully assessed capacity needs on the post-Transaction network and that they are committed to ongoing review of how traffic levels and operations affect the rail network. (Applicants Reb. 1-144.) They claim that they will work collaboratively regarding shared trackage to ensure coordination of operations and sufficient capacity for all users. (Id. at 1-144 to 1-145.) Applicants argue that the carriers’ requested conditions are blatantly anticompetitive because the conditions would give those carriers the right to preapprove Applicants’ initiatives. (Id. at 1-145.) Applicants claim that basic features of the Transaction will prevent traffic growth from overwhelming capacity, specifying that they have proposed extensive new capacity improvements based on careful analysis of capacity needs of the combined network, which are in addition to capacity improvements currently being undertaken independently by CP and KCS on their own networks. (Applicants Reb. 1-145 to 1-146; see also Am. Operating Plan, para. 296, tbl.11.) They further argue that because the

Transaction is an end-to-end merger, CPKC traffic will increase gradually post-Transaction as the combined carrier competes to divert traffic from existing rail and truck options, thereby allowing time for Applicants to assess and adjust operations and infrastructure as needed, which contrasts with the sudden and immediate traffic shifts seen in past mergers where the combined carrier consolidated facilities and moved existing traffic abruptly from parallel lines. (Applicants Reb. 1-134 to 1-135, 1-146 to 1-147.) Applicants also assert that they will have an incentive to ensure that capacity remains adequate because shippers will not choose their service if capacity issues cause service deterioration. (*Id.* at 1-146 to 1-147; *see also id.*, Vol. 2, R.V.S. Creel, para. 27 (“[T]he notion that we will attract traffic even if we lack the ability to support good and reliable service is not realistic.”).)

Specific capacity arguments are discussed below by geographic area. Regarding arguments that the Board should conclude that the Transaction is not in the public interest due to lack of capacity planning, the Board explained in the Applicable Standards section that in assessing the Transaction’s effects on the public interest, the Board balances the benefits of the merger against any harm to competition, essential services, labor, and the environment that cannot be mitigated by conditions and also considers the five nonexclusive factors specified by statute. *See* 49 C.F.R. § 1180.1 (2000); *CN-IC*, 4 S.T.B. at 139; 49 U.S.C. § 11324(b).

The Board notes that concerns about capacity are speculative—and based on the twin assumptions of both (1) a significant increase in traffic on the combined network and operations and (2) infrastructure remaining static. Many of the issues raised by CN, BNSF, and UP may never be realized if Applicants and other rail users of those lines implement the future operational adjustments and infrastructure improvements needed to ensure continued network fluidity. Applicants, in particular, will have a strong incentive to ensure that such changes are made, given their objective to divert traffic to CPKC from other rail lines as well as trucks. Fulfillment of that objective will depend on CPKC’s ability to provide efficient, reliable service, which requires lines with sufficient capacity for such service. Other carriers that will share lines with CPKC will also continue to depend on those lines to serve their customers, thus providing an incentive to cooperate to ensure fluidity. The Board finds that the public benefits of the Transaction detailed in the Public Benefits of the Transaction section, including expansion of market opportunities and increased competition, outweigh the risks associated with the commenters’ capacity concerns, taking into consideration the level of expected growth of traffic post-Transaction, carriers’ incentives to cooperate to ensure fluidity on shared lines, and (as discussed below) the implementation of an oversight period that will allow the Board to address capacity issues if they develop following the Transaction.

Further, as explained in the Applicable Standards section, the Board will not impose conditions unless it finds that “the consolidation may produce effects harmful to the public interest . . . and that the conditions will ameliorate or eliminate the harmful effects, will be operationally feasible, and will produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits produced by the merger.” *BN-SF*, 10 I.C.C.2d at 729. Therefore, among other requirements for imposition of a condition, the Board will not impose conditions “to ameliorate longstanding problems which were not created by the merger,” and any condition imposed must be narrowly tailored to remedy the harm it is intended to address. *Id.* at 730.

The Board is not convinced that the reduction in public benefits that would likely result from adoption of the competing carriers' proposed conditions restricting or delaying implementation of the Transaction would be outweighed by the potential additional public benefit that would be generated by the avoidance of whatever Transaction-related congestion might occur (if any); such conditions therefore are not warranted. The Board again notes the availability of operational adjustments and infrastructure improvements to ensure continued network fluidity, and all carriers' incentives, which are especially strong for CPKC, to make such changes. Further, commenters generally have not provided evidence sufficient for the Board to adequately distinguish the asserted potential negative effects of the Transaction from issues that might arise from organic traffic growth or longstanding capacity issues, such as the current operating practices of the requesting carriers or preexisting infrastructure deficiencies on non-Applicant-owned lines.

Instead of denying approval of the Transaction or imposing conditions that would delay or restrict implementation, the Board will closely monitor capacity during the oversight period through the reporting requirements described below and in Appendix B. Although Applicants expect that traffic will increase incrementally over a three-year period, (see, e.g., Applicants Reb. 1-146), because infrastructure projects can take time to plan and implement, Applicants should take prompt action if, during the oversight period, there is significantly impaired fluidity in the Texas Gulf Coast area or on other shared lines. If such circumstances do arise, and Applicants either fail to act or their actions are insufficient to adequately address the problem, the Board may consider issuing supplemental orders under 49 U.S.C. § 11327 requiring that Applicants take such remedial action as may be necessary to address Transaction-related congestion issues, which may include requirements regarding additional infrastructure.¹⁴⁹

Below, the Board first addresses arguments regarding capacity in the Texas Gulf Coast area with detailed discussion of the (i) Neches River Bridge and Beaumont, Tex., area; (ii) Beaumont, Tex., to Rosenberg, Tex., segment; (iii) Houston, Tex., terminal; and (iv) Rosenberg to Laredo, Tex., segment. The Board next addresses capacity arguments regarding the Polo Line in Missouri; the Twin Cities area; Ottumwa, Iowa; Davenport, Iowa; and broad areas north of Texas and in Mexico identified by CN. Capacity issues related to the Chicago area and Metra's concerns are addressed in the Metra & Chicago Communities section.

Texas Gulf Coast. KCS reaches Mexico over a through route that runs between DeQuincy, La., and Laredo via Houston, generally paralleling the Gulf of Mexico coast and running mostly through the state of Texas (Gulf Coast Route). (See, e.g., BNSF Comments 57.) This route consists of a number of connected line segments, each owned by some combination of KCS, UP, and BNSF. (Id., V.S. Gabriel/Thowe 6-7.) On certain of these segments, some combination of KCS, BNSF, UP, and Amtrak operate jointly. (Id.) As UP notes, large portions

¹⁴⁹ As a result, and as explained further below, conditions regarding the allocation of responsibility for funding or otherwise implementing infrastructure are not warranted. Furthermore, other parties raise additional capacity issues that the Board is not addressing separately here, as they are either unsupported by the record or unrelated to the present Transaction. (See, e.g., Evergy Comments 9-11.)

of KCS's route from Laredo to Shreveport, La.—via Robstown/Corpus Christi, Tex.; Victoria, Tex.; Rosenberg; and Beaumont; including KCS's route through the Houston terminal—rely on trackage rights over UP lines that Tex Mex obtained in the UP/SP merger and KCS later obtained by its acquisition of Tex Mex. (See UP Comments 53.) According to BNSF, Applicants' plan to add eight to 11 trains per day to the route will more than double KCS's current volume on four of five subdivisions that comprise the Gulf Coast Route, but they plan no capacity improvements over the shared lines and have performed no formal studies of those segments owned by other railroads but used by KCS.¹⁵⁰ (BNSF Comments 58; see also UP Comments 54-55.) BNSF finds this noteworthy given that KCS has acknowledged fluidity issues in Texas and the need for new infrastructure. (BNSF Comments 63.)

BNSF and UP both ask the Board to require Applicants to participate in an independent study of the area to assess capacity issues. (BNSF Final Br. 21-23; UP Final Br. 12-13.) In addition, UP asks that the Board require Applicants to implement infrastructure projects recommended in the study (or cooperate with UP and BNSF on implementing those recommendations) and to require resolution of disputes about how to fund those projects under the terms of the trackage rights agreements governing the facilities at issue. (UP Final Br. 14.) By contrast, BNSF asks that the Board order that any such costs be borne entirely by the Applicants and that the Board override the applicable trackage rights agreements to the extent they provide otherwise. (BNSF Final Br. 26.) Both parties would have the Board restrict Applicants from increasing traffic in the Texas Gulf Coast area until the requested conditions have been met or until it is otherwise "clear" that there is existing capacity to avoid service disruption. (UP Final Br. 14; BNSF Final Br. 23.) For its part, CN requests that the Board require that Applicants submit a Service Assurance Plan for review and comment, in part due to the projected increase of traffic volumes through the Texas Gulf Coast area. (CN Final Br. 23.)

Applicants respond that the Transaction will not cause disruption on lines shared with BNSF and UP in Texas. (Applicants Reb. 1-144 to 1-147.) Applicants claim that they have assessed the post-Transaction CPKC's network capacity and have planned more than sufficient capacity projects in addition to those being undertaken independently by CP and KCS. (Id. at 1-145 to 1-146.) Applicants argue that post-Transaction traffic will increase gradually, new trains will not exceed the capacity of shared tracks, and Applicants will cooperate with UP and BNSF to ensure adequate capacity. (Id. at 1-144 to 1-147.) Applicants point to their strong motivation to maintain reliable service to attract the traffic that they plan to serve. (Id. at 1-146.)

¹⁵⁰ BNSF asks the Board to reserve jurisdiction to address issues as they may arise during the oversight period and states that BNSF may seek trackage rights in the future to address potential capacity issues on its route to New Orleans and the Davenport Subdivision. (BNSF Comments 61 n.23, 68 n.26, 72, 74.) BNSF claims this approach would be consistent with the oversight process used by the Board in connection with the UP/SP and other mergers. (Id. at 72.) Applicants respond that BNSF's failure to present a responsive application on this issue forecloses it from seeking trackage rights in the future, and that such requests, if made, would fail on the merits regardless. (Applicants Reb. 1-283, 1-287 to 1-291.) It is unnecessary to reserve jurisdiction to address the specific issues raised by BNSF, given the Board's general reservation of authority to issue supplemental orders to address issues as they arise during the oversight period.

The Board will not impose the conditions BNSF, UP, and CN propose regarding funding of infrastructure improvements or restrictions on post-Transaction traffic increases by CPKC to address issues along the Gulf Coast Route. UP, BNSF, and CPKC all will rely on the route to serve their customers and, accordingly, they will all have incentives to ensure its fluidity. (See Applicants Reb., Vol. 2, R.V.S. Simmons, paras. 36-38 (identifying numerous infrastructure projects over which UP and KCS cooperated on funding and implementation, including under existing trackage rights agreements).) Applicants, in particular, have significant incentives to ensure that necessary investments and operational adjustments are made given that the Gulf Coast Route is central to CPKC's post-Transaction plans to implement its single-line service to Mexico. (See *id.*, Vol. 2, R.V.S. Simmons, para. 40 (emphasizing that, unlike BNSF and UP, "KCS does not have any way to get from Mexico to the rest of the KCS network unless Houston is fluid").) The three carriers also have an existing contractual framework for making the necessary improvements under the governing trackage rights agreements.

The fact that traffic is expected to increase gradually over the three years following the Transaction will allow for such adjustments to be made and infrastructure to be built during that time. Further, CPKC will continue to operate in the same way that KCS currently does along the route (although Applicants expect that CPKC will run more 10,000-foot trains than KCS does now), and thus the Board does not anticipate the sudden operational changes that negatively affected service following prior mergers. To that point, significant investments and operational improvements have been made in Houston and along the Gulf Coast Route since the UP/SP merger and the service problems that followed. (See, e.g., *id.*, Vol. 2, R.V.S. Simmons, para. 41 (noting that KCS has spent \$100 million on capital investments on shared lines since 2014, while UP has invested \$250 million in Englewood and Settegast Yards during the last three years).) The Board encourages the parties to consider revised operating practices that could address capacity issues along the Gulf Coast Route. (See, e.g., Applicants Reb., Vol. 2, R.V.S. Orr, para. 6.) Under these circumstances, foregoing the benefits that would be lost by restricting CPKC traffic growth, as commenters have requested through their sweeping proposed conditions, is not warranted. Rather, the Board will monitor this area closely during the oversight period through specific reporting requirements, which are described below and in Appendix B, and will take appropriate action should problems arise.¹⁵¹ The Board may order a study during the oversight period if it appears warranted based on reporting by CPKC, but will not do so at this time.

Finally, while the parties dispute who will be responsible for funding infrastructure improvements to accommodate post-merger traffic under the terms of the applicable trackage rights agreements, (see, e.g., Applicants Reb. 1-163 to 1-164; *id.*, Vol. 2, R.V.S. Simmons,

¹⁵¹ LyondellBasell Parties raise concerns regarding capacity on the Gulf Coast Route and ask for specific conditions related to their facilities. (LyondellBasell Parties Comments 1-4.) The Board will deny these requested conditions, which are addressed more fully in the Competitive Access Concerns, LyondellBasell Parties, section. As noted above, the Board will closely monitor capacity issues on the Gulf Coast Route through specific reporting requirements during the oversight period, and shippers (including the LyondellBasell Parties) may raise issues with the Board during that period.

paras. 26-35; UP Final Br. 11-12; BNSF Final Br. 23-27), all of them appear to agree that those agreements broadly address responsibility for capacity improvements along the trackage rights lines over which CPKC will operate. The Board concludes that issues regarding responsibility for capacity funding are otherwise best resolved by the parties under their existing contracts.

Neches River Bridge and the Beaumont Area. The Neches River Bridge spans the Neches River at Beaumont and is owned by KCS. UP's Beaumont and Houston Subdivisions converge at the bridge's west end. (UP Comments 60.) KCS's Beaumont Subdivision and UP's Lafayette Subdivision converge at the bridge's east end. (Id.) UP describes the bridge as a single-track choke point for UP, BNSF, and KCS. (Id.) Amtrak also operates over the bridge. UP states that capacity is limited on the bridge because of the need to open the bridge for river traffic¹⁵² and because of the operating needs at both ends of the bridge. (Id. at 60-61.)

According to UP, when Applicants assessed (as part of the Application) available capacity on the bridge, they failed to account for its existing use by UP, BNSF, and Amtrak trains. (UP Comments 60-62.) UP and BNSF claim that, with those trains included, the bridge is already at or near the 65% sustainable capacity threshold at which Applicants propose investments for other CP and KCS segments, and Applicants' plan for an additional 11.4 trains per day will exceed the bridge's reasonable fluid capacity. (UP Comments 60-62; id., V.S. Rucker/Turner 34; BNSF Comments 59-61.) UP acknowledges a KCS study concluding the bridge has a 70-train per day capacity, but UP argues that this is a theoretical maximum capacity. (UP Comments, V.S. Rucker-Turner 34; see also Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, para. 56; id., Vol. 2, R.V.S. Simmons, paras. 44-51.) BNSF's witnesses note an August 2021 draft of a study by the Texas Department of Transportation (TxDOT), called the Houston Beaumont Region Freight Study, which they say identifies the bridge as a traffic constraint and suggests that a second mainline bridge would provide additional capacity. (BNSF Comments, V.S. Gabriel/Thowe 8.)¹⁵³ BNSF's witnesses further state that, based on BNSF's experience managing its own operations over the Neches River Bridge, they believe that the bridge can handle current traffic levels but that adding 11 new daily CPKC trains may require a double-tracking project. (BNSF Comments, V.S. Gabriel/Thowe 8.)

Applicants argue that the bridge has ample capacity to accommodate the 10.97 additional trains per day that Applicants anticipate by the end of the third year following Transaction implementation. (Applicants Reb. 1-160 to 1-161.) According to Applicants, a study undertaken jointly by KCS, UP, and BNSF in 2018-2019 confirmed that the bridge has ample capacity of 70 trains per day to accommodate the incremental Transaction-related traffic. (Id.; id., Vol. 2, R.V.S. Simmons, para. 50 & Ex. 9, Presentation, Neches River Bridge Process Improvement

¹⁵² According to UP, the bridge opens several times per day. (UP Comments, V.S. Rucker/Turner 33.) According to Applicants, the bridge opens approximately seven times every six days. (Applicants Reb., Vol. 2, R.V.S. Simmons, para. 50 n.25 (citing Neches River Bridge Feasibility Study, Final Report – June 2013, Rail Division, Texas Department of Transportation, ES-3 (Ex. 8)).)

¹⁵³ The draft TxDOT study focused on potential improvements related to railroad capacity and roadway-railroad crossings on key portions of the Gulf Coast Route. (BNSF Comments 63-64; id., V.S. Gabriel/Thowe, Ex. 1.)

Project (Jan. 22, 2019), Notes to Slide 5.)¹⁵⁴ Applicants argue that past traffic levels indicate that the bridge has handled 20-25 more trains than use the bridge today, leaving more than enough capacity for the 10-11 additional trains per day that Applicants anticipate the Transaction will bring to this segment. (Applicants Reb. 1-161; see also id., Vol. 2, R.V.S. Elphick/Orr, paras. 56; id., Vol. 2, R.V.S. Simmons, Ex. 9.) Applicants claim that their capacity analysis considered all demands on the rail infrastructure CPKC will use, including—for the Neches River Bridge—all the trains UP claims were not taken into account. (Applicants Reb. 1-162 (citing Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, paras. 57-60).) Applicants also state that they “took a closer look at Neches River Bridge capacity, using recent train counts, and did another quantitative analysis, which showed that capacity at the Neches River Bridge is not an issue.” (Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, para. 57.) Applicants argue that this analysis shows that future occupancy of the bridge will total 965 minutes per day. (Id., Vol. 2, R.V.S. Elphick/Orr, para. 60 & tbl.3.)

Applicants further argue that the joint study led by KCS in 2018-2019 found that operations around the bridge (rather than the bridge itself) constitute the primary constraint on capacity. (Applicants Reb., Vol. 2, R.V.S. Simmons, para. 50.) Applicants assert that the operational issues identified in the study regarding dispatching and BNSF’s crew change location have already been addressed. (Id.) However, Applicants concede that additional operational issues continue to affect fluidity of operations over the bridge: UP and BNSF trains slowing as they cross the bridge from the west in order to enter the Jefferson Energy Facility, which is on the east side of the bridge; UP’s crew change location; and BNSF’s practice of accessing the Port of Beaumont south of the bridge via a crossover in the KCS main line near the bridge rather than via an alternative route that would require BNSF to share in costs related to that route. (Id.) Applicants argue that the joint study found that readily available operational adjustments—or just more focused attention—would be sufficient to achieve the bridge’s full throughput capacity. (Applicants Reb. 1-161.) Applicants further suggest that actions extending the Vidor siding to the west to further reduce run time required between Vidor and the bridge could postpone the need for a second bridge. They also note that UP and BNSF have previously declined to support proposals by TxDOT to build a second bridge. (Id.)

While the Neches River Bridge presents capacity concerns that predate the Transaction, the approximately 11 CPKC trains that Applicants expect to be added to bridge traffic in the three years following the Transaction could exacerbate these preexisting concerns. Indeed, Applicants’ most recent capacity analysis indicates that when all 11 new trains are included, bridge capacity will exceed the 65% sustainable capacity measure that Applicants apply elsewhere. (See Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, para. 60 & tbl.3 (finding that the bridge will be occupied 965 out of 1440 minutes of the day, or approximately 67% of the day).) However, as UP acknowledges, “[a]dding capacity to the Neches River bridge might be a costly, time-consuming undertaking.” (UP Comments, V.S. Rocker/Turner 34.) Likewise, a 2013 feasibility study performed by TxDOT considered three alternative bridge alignments, which ranged in cost from \$120 million to \$240 million in 2012 dollars.¹⁵⁵ (Applicants Reb., Vol. 2,

¹⁵⁴ The study noted that the average count of trains during the last 11 months of 2018 was 36 trains per day. (Applicants Reb., Vol. 2, R.V.S. Simmons, para. 50.)

¹⁵⁵ The study did not recommend a preferred option.

R.V.S. Simmons, Ex. 8, Executive Summary, Summary of Alternatives.) In addition, Applicants suggest operational changes and projects that could improve use of the bridge's existing capacity, which may forestall the need for a second bridge despite indications that the bridge may exceed fluid capacity three years post-Transaction. (See Hr'g Tr. 1734:2-1735:8, Oct. 6, 2022; Applicants Reb. 1-161; id., Vol. 2, R.V.S. Elphick/Orr, para. 62.) As with the rest of the Gulf Coast Route, UP, BNSF, and CPKC (in particular) will have ample incentive to make the adjustments necessary to ensure traffic remains fluid over the bridge.

Given the concerns expressed above, the Board will order reporting specific to the Neches River Bridge in addition to other Gulf Coast Route-related reporting to which Applicants have already committed. (See Applicants Final Br., App. A at A1 & Rider 1, Attach. 1.1.) Specific reporting requirements are further detailed below and in Appendix B. The Board notes that the reporting described below regarding the Beaumont to Rosenberg portion of the Gulf Coast Route will also provide information about how well traffic is moving around the Neches River Bridge.

In addition, the Board could order Applicants' participation in a study of potential infrastructure improvements and operational changes in the future, if necessary. To the extent that parties argue that post-Transaction traffic growth may necessitate investment in their own lines, (see, e.g., BNSF Comments, V.S. Gabriel/Thowe 10 (noting potential need to add sidings on BNSF's Conroe Subdivision and yard capacity at Beaumont and Silsbee, Tex.)), the Board notes that such investments have not been shown to be necessitated by the Transaction. (See id. at 9-10 (stating that significant growth is expected in the Beaumont region over the next few years).)

Beaumont-Rosenberg via Houston. South of the Neches River Bridge, KCS currently operates between Beaumont and Rosenberg via trackage rights. (BNSF Comments, V.S. Gabriel/Thowe 10.) BNSF, UP, and Amtrak also operate over the same lines. (Id.) Applicants state that east of the Houston terminal, CPKC will operate over two UP lines between Houston and Beaumont. (Applicants Reb. 1-158.) Eastbound trains will use UP's Beaumont Subdivision and westbound trains will use UP's Houston Subdivision,¹⁵⁶ formerly known as the Lafayette Subdivision.¹⁵⁷ (Applicants Reb. 1-158.) KCS operates through the Houston terminal complex and west to Rosenberg via trackage rights over line segments owned or controlled by UP and Houston Belt & Terminal Railway. (BNSF Comments, V.S. Gabriel/Thowe 11.)

UP states that from Rosenberg heading east through Houston to Beaumont, Applicants' traffic will increase from 8.47 trains per day to 16.04 trains per day, an increase of 7.57 trains per day (or 89%). (UP Comments 54; id., V.S. Rucker/Turner 27-28; UP Am. Comments, Attach. A at 1, 3; see also BNSF Comments, V.S. Gabriel/Thowe 12.) According to UP, the UP Beaumont Subdivision, UP Houston Subdivision, and UP Glidden Subdivision are fluid at current traffic levels, but all will be at or above capacity if Applicants' traffic in the corridor grows by more

¹⁵⁶ BNSF also refers to the UP Houston Subdivision as the 50/50 line. (See BNSF Comments, V.S. Gabriel/Thowe 7.)

¹⁵⁷ However, as described by BNSF (and noted below), some trains operate against the general traffic flow. (See BNSF Comments, V.S. Gabriel/Thowe 15.)

than eight trains per day, as Applicants project. (UP Comments 56-57, 59; id., V.S. Rocker/Turner 31.) BNSF adds that it and UP serve local customers between Beaumont and Rosenberg, but KCS does not. (BNSF Comments, V.S. Gabriel/Thowe 10.) BNSF claims that through trains generally are given priority over local freight movements. (Id. at 14.) BNSF is concerned about the fluidity issues CPKC's additional trains will cause, impacting an operationally complex area and the local service by BNSF. (BNSF Comments 59; id., V.S. Gabriel/Thowe 11-15.) BNSF notes in particular concerns about its ability to serve customers via trackage rights on the UP Baytown Subdivision, which BNSF argues will be impacted by capacity issues on the UP Houston Subdivision and in Houston generally, explaining that its operations will be uniquely impacted because it accesses the UP Baytown Subdivision by operating east from Houston on the UP Houston Subdivision against the westward traffic of UP and KCS on that line. (See id., V.S. Gabriel/Thowe 15.)

Applicants respond that UP's own assessment of capacity on these lines shows that there is ample available capacity ("headroom," as measured by the difference between maximum fluid capacity and current train volumes) on these segments. (Applicants Reb. 1-158 to 1-159 (citing Workpaper "Workpaper Narrative Beaumont Lafayette.xlsx," Tabs "Beaumont Sub" and "Lafayette Sub.")) According to Applicants, this corroborates the assessments of both Orr and Simmons, who compared current train counts with historical volumes that operated fluidly on the Houston Subdivision. (Applicants Reb. 1-159 to 1-160, id., Vol. 2, R.V.S. Simmons, para. 14; id., Vol. 2, R.V.S. Orr, paras. 10-14.) Orr further notes that infrastructure improvements have been made since past traffic peaks. (Id., Vol. 2, R.V.S. Orr, para. 14.)

While the Board appreciates the concerns expressed by UP and BNSF regarding impacts on the route from Beaumont to Rosenberg, delaying the Transaction until Applicants meet the conditions requested by UP and BNSF is not warranted. As Applicants point out, post-Transaction train counts will increase gradually over three years, and infrastructure improvements have been made since the historical peak volumes. The Board again notes that the parties have an incentive to implement needed operational changes and infrastructure improvements to maintain fluidity on their shared lines, as well as a contractual framework for making the necessary improvements under the governing trackage rights agreements. The Board expects the parties to work toward any necessary infrastructure and operational improvements to address UP and BNSF's concerns, including under the terms of their prevailing trackage rights agreements.

However, the Board will monitor the Transaction's impacts on this route through specific reporting requirements, as further detailed below and in Appendix B, and will take future action as needed.

Houston Terminal. Post-Transaction, CPKC will operate over trackage rights through the Houston terminal as KCS does currently. UP and BNSF argue that the Houston terminal is operationally complex, requiring coordination between UP, BNSF, KCS, Amtrak, and the Port Terminal Railroad Association, and BNSF points out specifically that, following the UP/SP merger, the Houston terminal area experienced serious service issues that affected rail transportation throughout the western United States. (UP Comments 57; BNSF Comments 59; id., V.S. Gabriel/Thowe 13; id., V.S. Fisher 30.) UP and BNSF argue that, despite these

realities, Applicants did not perform a capacity analysis for the Houston area although Applicants plan to operate eight additional trains per day through the terminal area. (UP Comments 58; BNSF Comments 59, 61.) BNSF further argues that the majority of additional trains, including new grain traffic moving to destinations in Mexico, will be traffic new to the Houston terminal area (as opposed to volumes currently moving through the Houston terminal area that will merely shift to CPKC from other railroads post-Transaction). (BNSF Comments 63; *id.*, V.S. Wilson 24-26; *id.*, V.S. Fisher 31-33.) UP and BNSF claim that additional capacity will be needed in Houston to accommodate the increased traffic. (UP Comments 58-59; *id.*, V.S. Rucker/Turner 30-31; BNSF Comments 59, 61.)

BNSF argues that KCS already struggles to move through the Houston terminal area without holding main lines for unscheduled crew changes and that the Transaction will only worsen fluidity issues, absent capacity improvements. (BNSF Comments 61; *id.*, V.S. Gabriel/Thowe 15.) UP describes the area as “an extremely challenging operating environment” from which congestion can rapidly spread to the rest of its network. (UP Comments, V.S. Rucker/Turner 29.) UP’s witnesses further state that they “know from experience . . . that the terminal could not withstand the pressure of eight additional trains per day.” (*Id.*) BNSF points out that KCS has acknowledged issues regarding the Houston terminal area, pointing to KCS documents relating to monthly meetings between the three railroads, which show that train speeds were routinely below stated goals in 2021 and that trains were too long for the existing infrastructure. (BNSF Comments 62-63; *see also* Applicants Reb., Vol. 2, R.V.S. Simmons, para. 13, fig.1.) According to BNSF, KCS has acknowledged the need for new infrastructure to address capacity issues as they arise in Houston and surrounding areas and has worked with the host railroads to implement such projects when needed to accommodate new traffic or unlock chokepoints. (BNSF Comments 63.) BNSF claims that the August 2021 draft TxDOT study identified a number of capital projects in the Houston complex that BNSF believes could help mitigate the effects of the increased CPKC traffic.¹⁵⁸

Applicants respond that the Houston terminal has extensive capacity to accommodate additional post-Transaction operations. (Applicants Reb. 1-152 to 1-153; *id.*, Vol. 2, R.V.S. Elphick/Orr, paras. 46-55.) Applicants anticipate about four new trains in each direction post-Transaction, a volume which they argue the terminal can easily accommodate if BNSF and UP operate the terminal efficiently. (*Id.* at 1-153; *see also id.*, Vol. 2, R.V.S. Elphick/Orr, para. 47.) Applicants argue that UP and BNSF’s concerns seem to stem from their own operational difficulties, particularly UP’s. (Applicants Reb. 1-155; *see also id.*, Vol. 2, R.V.S. Orr, paras. 7, 17-33 (describing UP and BNSF operational issues).) Applicants argue that CPKC will cooperate with all users of the Houston terminal area but is not responsible for bailing out UP and BNSF with unnecessary investments. (*Id.* at 1-155.) Applicants claim that the projected train counts in the Houston terminal area in 2025, including the anticipated CPKC volume increases, will not reach the peak level that was supported in 2016. (Applicants Reb. 1-154; *id.*, Vol. 2, R.V.S. Orr, paras. 9-11; *id.*, Vol. 2, R.V.S. Simmons, para. 12.) Applicants further claim that CPKC, like KCS is now, will be a minority user of the terminal area post-Transaction, with operations simpler than both UP’s and BNSF’s. (*Id.* at 1-153.) According to Applicants,

¹⁵⁸ BNSF emphasizes, however, that it cannot be known which projects will become necessary until all stakeholders work together to analyze this issue. (BNSF Final Br. 23.)

because CPKC's trains will not need to change crews or enter or exit yards, CPKC trains will have multiple route options through Houston, imposing less of a burden on terminal operations than other trains. (Id., Vol. 2, R.V.S. Elphick/Orr, paras. 47-50; id., Vol. 2, R.V.S. Orr, para. 13; id., Vol. 2, R.V.S. Wilkerson, paras. 15-16.)

Applicants argue there is no possibility of a repeat of the 1997-98 service crisis, which the Board found was prompted by a variety of factors, including the dilapidated state of SP's infrastructure in and around Houston. (Applicants Reb. 1-155 to 1-157 (citing W. Coal Traffic League v. Union Pac. R.R., FD 33726 (STB served Nov. 30, 2000).) According to Applicants, "massive amounts" of capacity have been added since that service crisis, including recent investments in Englewood and Settegast Yards. (Id. at 1-156.) In addition, they argue that operational changes such as directional running and the joint Spring Dispatching Center, which gives dispatchers visibility into trains heading into Houston from all points and therefore allows advance planning of routing through Houston, have enabled better utilization of capacity. (Applicants Reb. 1-156 to 1-157.) Applicants further argue that train volumes in 1997-98 were roughly 150 per day, while today there are only 100-120 per day. (Id.) Finally, Applicants argue that, unlike in 1997-98, the Transaction will not result in sweeping operational changes, terminal consolidations, and the introduction of a new trackage rights tenant in the Houston terminal area. (Id. at 1-157 to 1-158.)

The Board recognizes the unique challenges presented by the Houston terminal area, which could be exacerbated following the Transaction.¹⁵⁹ However, as Applicants argue, both the state of the terminal area and the proposed Transaction are very different from the conditions present in 1997-98, given the capacity investments and operating changes made since then, differences between the merger that precipitated the 1997-98 crisis and the proposed Transaction (particularly Applicants' expectation that traffic growth will occur gradually), and Applicants' plans to maintain KCS's current operating practices. Further, UP, BNSF, and CPKC will have opportunities to improve fluidity of the terminal area through changes to their operating practices and the implementation of capacity investments.¹⁶⁰

Applicants, UP, and BNSF should have every incentive to ensure that there is adequate capacity, and a contractual framework is already in place for making the necessary improvements under the governing trackage rights agreements. Applicants, in particular, have

¹⁵⁹ The Board notes that the existing challenges in the Houston area are attributable—at least in part—to the current operating practices of UP (and, to a lesser extent, BNSF) rather than KCS, (see Applicants Reb., Vol. 2, R.V.S. Orr, paras. 17-32), and that these challenges are not Applicants' sole responsibility to address.

¹⁶⁰ Applicants' contention that projected train counts for the entire Houston terminal area in 2025 would be below peak terminal levels from 2016, even with new CPKC traffic, overlooks the key question of whether the specific lines of the Houston terminal complex over which that new traffic would operate have adequate capacity to handle the increased volumes. (See UP Final Br. 6 (noting that "[o]n the lines CPKC trains would actually use, adding eight daily trains (or four daily trains on lines used for directional operations) to 2019 peak quarter train counts would require accommodating more daily trains than the peak number of trains in any one quarter from 2015 through 2019").)

significant incentives to ensure such investments are made given that the Houston terminal area and the Gulf Coast Route in general are central to CPKC's post-Transaction plans to implement its single-line service to Mexico. Applicants are fully aware of the time it could take to resolve congestion issues, if they were to occur, and of the lost opportunities to attract traffic to their new single-line service that could result. (See, e.g., Applicants Reb. 1-145 to 1-147.) At the same time, UP and BNSF will continue to rely on the Houston terminal area to serve their own customers, providing them with similar incentives to do what is necessary to ensure that there is adequate capacity. The Board recognizes that cooperation between UP, BNSF, and CPKC will be essential to revising current operating practices and making any needed capacity investments if issues arise.

To ensure that such cooperation happens, the Board will closely monitor the terminal area through specific reporting requirements described below, which are in addition to Applicants' voluntary reporting commitments, (see Applicants Final Br., App. A at A1 & Rider 1, Attach. 1.1). Should any problems arise, the Board may issue additional future orders as appropriate.

Rosenberg-Laredo Capacity. KCS operates between Rosenberg and Victoria on its Rosenberg Subdivision, between Victoria and Robstown on overhead trackage rights over the UP Angleton Subdivision, and between Robstown and Laredo on the KCS Laredo Subdivision. (BNSF Comments, V.S. Gabriel/Thowe 16.) BNSF and UP primarily focus their capacity concerns on the line between Victoria and Robstown, while CN questions the capacity of the KCS Rosenberg Subdivision and the KCS Laredo Subdivision.

KCS owns the Rosenberg and Laredo Subdivisions and is the sole operator on each line. Regarding these two subdivisions, CN argues that movement between KCS-owned and UP-owned lines introduces additional capacity issues, such as waiting for dispatcher approval to move between KCS and UP trackage and vice-versa. (CN Comments, V.S. Randall, App. B, Sec. B.2.) CN claims that presently there are no sidings on KCS's single-track line at either Robstown or Victoria, the two endpoints of the UP lines (the UP Angleton and Brownsville Subdivisions), and argues that, despite the projection that train volumes will double by Year 3, the Application does not allocate any capital expenditures to increase capacity on either of the two KCS subdivisions or on the connecting UP-owned segments. (Id.) CN claims that capacity will be further limited for 10,000-foot trains. (Id., Ex. B-3.)

Applicants respond that these lines have ample capacity and will be able to handle 10,000-foot trains by the end of 2022. (Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, paras. 38-42.) Applicants detail plans to add and extend sidings on the KCS Rosenberg and Laredo Subdivisions as well as at Robstown and Victoria. (Id., Vol. 2, R.V.S. Elphick/Orr, paras. 39-40, 42.) According to Applicants, KCS is constructing a new siding at Telferner (four miles north of Victoria) and at Wharton, already has a siding and two staging tracks immediately west of Robstown, and is extending its switching lead north of Victoria at Kendleton Yard by 6,900 feet—freeing the existing switching lead and allowing the accompanying siding to be extended to 14,900 feet. (Id., Vol. 2, R.V.S. Elphick/Orr, para. 42.)

The Board notes that post-Transaction, CPKC will be the only railroad operating on the Rosenberg and Laredo subdivisions. It will have ample incentive to ensure the subdivisions continue to operate fluidly, and traffic will grow gradually, allowing CPKC to incrementally adjust operations and infrastructure as needed. Therefore, while the Board will monitor these areas as part of its general oversight of the Texas Gulf Coast area, the KCS Rosenberg and Laredo Subdivisions are not of particular concern.

UP and BNSF argue that additional capacity will be needed between Victoria and Robstown. UP argues that between those points, CPKC traffic will increase from 7.94 trains per day to 16.25 trains per day, an increase of 8.31 trains per day (or 105%). (UP Comments 54; UP Am. Comments, Attach. A at 1.) UP claims that its lines between these points are currently at capacity with existing traffic, including not only KCS trains, but also UP trains moving between Houston, Corpus Christi, and Brownsville, and BNSF trains moving over the lines to interchange traffic with KCS at Robstown. (UP Comments 56.) According to UP, CPKC's traffic gains will not be offset by UP's potential loss of Mexico business to CPKC, which moves over other lines. (*Id.*) And according to BNSF, the UP Angleton Subdivision is already extremely busy and congested, with the railroads often having to hold the mainline to conduct unplanned recrew operations. (BNSF Comments, V.S. Gabriel/Thowe 17.) BNSF argues that the new, longer CPKC trains will further degrade operations on this line, impacting customers such as those at the Port of Corpus Christi and those in Mexico. (*Id.*, V.S. Gabriel/Thowe 18.) BNSF claims that exacerbating the existing congestion will affect BNSF operations on the UP Angleton Subdivision and south towards Brownsville. (*Id.*) According to BNSF, longer CPKC trains on the UP Angleton Subdivision will limit meet-pass capacity with BNSF and UP trains, causing the other trains to be held farther from destination until the longer CPKC trains have transited the entire route. (*Id.*) BNSF argues that this will trigger a chain reaction that will increase congestion on lines feeding into the segment. (*Id.*)

Applicants respond that there is adequate existing capacity between Victoria and Robstown, as shown by past and ongoing capacity projects and Applicants' capacity calculations. (Applicants Reb. 1-162; *id.*, Vol. 2, R.V.S. Elphick/Orr, paras. 40-45.) Applicants argue that their calculations show adequate capacity from Victoria to Robstown with room for growth, and that any UP claims to the contrary are unsupported. (*Id.*, Vol. 2, R.V.S. Elphick/Orr, paras. 40-45.) Applicants also state that KCS has collaborated with UP in the past to fund significant capacity improvements between Victoria and Robstown. (*Id.*, Vol. 2, R.V.S. Elphick/Orr, para. 44.)

The Board recognizes the significant capacity investments that have been made by KCS and UP between Rosenberg and Laredo as well as the operating difficulties that BNSF describes between Victoria and Robstown. As such, the Board will monitor the area from Victoria to Robstown through specific reporting requirements, and the parties are strongly encouraged to cooperate to develop solutions regarding any capacity issues. However, as stated elsewhere, the anticipated gradual traffic growth will allow time to address potential capacity constraints as necessary, and incentives already exist for the parties to implement needed operational changes and infrastructure improvements to maintain fluidity on their shared lines. The preexisting trackage rights agreements also provide a contractual framework for making the necessary improvements.

The Board will closely monitor operations between Victoria and Robstown through specific reporting requirements described below and in Appendix B, which are in addition to Applicants' voluntary reporting commitments. (See Applicants Final Br., App. A at A1 & Rider 1, Attach. 1.1.) Should any problems arise, the Board may issue additional future orders as appropriate.

Polo Line: Airline Junction, Mo., to Polo, Mo. The Polo Line is a joint facility consisting of two single tracks running parallel to each other between Airline Junction, and Polo, with a single-track section of line where the Harry S. Truman Bridge crosses the Missouri River. (See Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, fig.16.) One track is owned by CP, the other by UP. UP and CP use the 42-mile line to access Kansas City from the north. (UP Comments, V.S. Rocker/Turner 34.) UP currently runs approximately eight trains per day on the line. (*Id.*) According to UP, Applicants plan to increase traffic on the Polo Line, which is a section of CP's Kansas City Subdivision, from 3.62 trains per day to 18.02 trains per day, an increase of more than 14 trains per day (or nearly 400%), but Applicants did not identify any need for capacity investment despite operating challenges UP claims to have experienced at today's significantly lower volumes. (UP Comments 62-63; *id.*, V.S. Rocker/Turner 34-35; UP Am. Comments, Attach. A at 2, 3.)

UP states that CP controls dispatching on the line. According to UP, while most lines in the Kansas City area are dispatched by the Kansas City Terminal Railway from a joint dispatching center, the Polo Line is dispatched by CP from a drawbridge near Airline Junction. UP states that it has invoked the parties' contractual dispute resolution procedures to address persistent dispatching problems. (UP Comments, V.S. Rocker/Turner 34.)

UP claims that over a long portion of the joint facility, the two tracks are far apart, so trains cannot cross from one track to the other to maximize efficient use of both tracks, and each track is generally operated in one direction only. (*Id.*, V.S. Rocker/Turner 35.) In addition, UP contends although the line has a version of Centralized Traffic Control (CTC), the system does not allow for full CTC operations, which prevents true centralized dispatching and prevents UP and CP from maximizing capacity on one of the tracks when the other is out of service. (*Id.*)

Applicants respond that no additional capacity is needed on the Polo Line and argue that UP's witnesses incorrectly treat the line as a single track rather than double track. (Applicants Reb. 1-165; *id.*, Vol. 2, R.V.S. Elphick/Orr, paras. 78-80.) Applicants argue that UP overlooks that all eight of UP's trains on the Polo Line operate in the southbound direction and proceed onto the line from UP's Trenton subdivision north of Polo. (Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, para. 78.) Applicants anticipate that the Transaction will add 14.4 daily trains to this segment, but only half of those trains will operate southbound. (*Id.*) Therefore, according to Applicants, CPKC and UP's combined total southbound train counts will be in the range of 16-17 trains per day, which Applicants claim is well within the range of existing fluid capacity. (*Id.*) Applicants argue that, even if UP and CPKC were able to run only a single southbound train every hour, there would be room to accommodate the total southbound flows in addition to any required maintenance and other work on the line. (*Id.*) However, Applicants note that trains

routinely run much closer together than this, enabling the Polo Line to accommodate even more than 24 trains per day. (Id.)

Applicants claim that investments and operational changes by CPKC will further increase capacity on the Polo Line, supporting their contention that the line’s capacity is more than adequate to accommodate post-Transaction operations. Applicants state that they plan to add additional capacity south of Airline Junction that will increase chambering capacity for northbound trains changing crews, reducing any need to run northbound in a manner that conflicts with the southbound flow of trains. (Id., Vol. 2, R.V.S. Elphick/Orr, para. 79.) Applicants also state that CPKC will further improve flow by moving crew changes on its southbound trains “off the Polo line [to] [International Freight Gateway].” (Id.)

Finally, Applicants contest UP’s characterization of the Polo Line’s operations. According to Applicants, UP claims that the track is not operated like true double track because the two main tracks are geographically separated between Moseby Junction and Lawson Junction. (Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, para. 80.) But according to Applicants, there are double crossovers at either end of the segment, and the spacing of crossovers is ideal for double track operations. (Id.) Therefore, Applicants claim, even if UP’s operations required the southbound trains to wait for clearance before proceeding into the Kansas City terminal area, CPKC’s southbound trains would be able to cross over at Moseby Junction to bypass those trains, avoiding any blockage in the line’s fluidity. (Id.)

The Board notes that, despite the capacity that Applicants argue is available on the Polo Line, CPKC expects to move a significant amount of additional traffic over the line and through the already busy Kansas City terminal area that may exceed the functional capacity levels of the line. While the Board acknowledges that CPKC has some plans to ameliorate the impacts of the new traffic—moving its crew staging area and adding additional capacity south of Airline Junction—those actions may be insufficient given the infrastructure and operational realities on the Polo Line and surrounding area. Specifically, the Board is concerned about the sheer volume of traffic projected to move through the area, at-grade rail-to-rail crossings (both on the Polo Line and downstream), (see Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, fig.16), and the single-track section of the Polo Line where the Harry S. Truman Bridge crosses the Missouri River, (see id.). While careful dispatching could allow the line to accommodate additional traffic, (see Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, para. 78), UP has noted problems with CP’s dispatching on the line under current conditions, (see UP Comments, V.S. Rucker/Turner 34). Given the expectation that CPKC traffic will increase incrementally over the first three years of its operations, and the incentives that Applicants and UP have in maintaining fluidity on the Polo Line, the Board will closely monitor this area during the oversight period rather than impose, at this time, the more onerous condition sought by UP that would prohibit CPKC from adding traffic above pre-Transaction levels pending UP’s agreement that there is sufficient capacity to accommodate CPKC’s planned traffic growth. (See UP Comments 76.) Although Applicants did not commit to specific reporting regarding this area, (see Applicants Final Br., App. A), the Board will order CPKC to report service-related metrics that are further detailed below and in Appendix B. The Board will take future action as needed, including potential requirements regarding additional infrastructure and/or traffic volumes.

Twin Cities. The Twin Cities is an operationally complex area that UP states “can become extremely congested under current conditions.” (UP Comments, V.S. Rocker/Turner 35.) UP states that CP’s River Subdivision converges with BNSF’s St. Paul Subdivision near CP’s Pig’s Eye Yard and BNSF’s Dayton’s Bluff Yard. (Id., V.S. Rocker/Turner 35.) Per a map submitted by UP, the operations converge in an area around Hoffman Avenue. (Id., V.S. Rocker/Turner 36, fig.4.) UP explains that north of those yards, CP and UP operate using trackage rights on BNSF to connect between their own lines through St. Paul, Minn.; specifically, CP uses the rights for its route between Canada, the Dakotas, and Chicago, while UP uses the rights for traffic moving between its Albert Lea Subdivision, Altoona Subdivision, and Mankato Subdivision, and to reach several yards UP uses in St. Paul south of Hoffman Avenue. (Id., V.S. Rocker/Turner 35-36 & fig.4.) UP argues that Applicants’ plan to route traffic around Chicago will increase the number of trains moving through St. Paul on CP’s River Subdivision from 13.66 trains per day to 18.25 trains per day, an increase of 4.59 trains per day (or 34%). (Id., V.S. Rocker/Turner 35; UP Am. Comments, Attach. A at 4.) Nevertheless, UP notes, Applicants do not propose adding capacity in St. Paul. (UP Comments, V.S. Rocker/Turner 35.)

According to UP, without additional capacity, Applicants will be unable to route as many new trains through St. Paul as they plan, because their trains will be blocked by other trains moving through the area. (Id., V.S. Rocker/Turner 37.) UP claims that if Applicants did somehow manage to get their new trains through, those trains would subsequently block UP (and BNSF) movements through St. Paul, forcing UP to add capacity to prevent its waiting trains from interfering with its other operations in the St. Paul terminal area. (Id., V.S. Rocker/Turner 37; see also UP Comments 64-66.) UP argues that the Board should require Applicants to address the impacts of the Transaction rather than requiring others to bear the costs. (UP Comments, V.S. Rocker/Turner 37.)

Applicants argue that the Transaction will not create a need for the staging track south of Hoffman Avenue that UP suggests will be necessary. (Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, para. 94.) According to Applicants, with a modest increase of six trains per day, CPKC will not be the majority user of infrastructure in the Hoffman Avenue area. (Id. (citing Elphick/Orr Workpaper “St. Paul Area Train Counts by Railroad.xlsx”).) Applicants further note that with a total post-Transaction train count of 22 trains per day through Hoffman Avenue, CPKC will still be below levels previously run through the area. (Id., Vol. 2, R.V.S. Elphick/Orr, para. 95 (citing Am. Operating Plan, App. A, Segment 40; 2012 East Metro Rail Study).) Applicants argue that CP has engaged in various initiatives to enhance fluidity in the area, including operational changes, changes to its St. Paul Yard, and changes to streamline access to the BNSF Midway Subdivision off the Paynesville Subdivision for eastbound trains, among others. (Id., Vol. 2, R.V.S. Elphick/Orr, paras. 96-98.)

St. Paul is an operationally complex area that already faces congestion problems. The initiatives described by Applicants do not alleviate the Board’s concerns about possible impacts in St. Paul given that traffic will still travel through the choke point at Hoffman Avenue, a particularly challenging area which all three carriers must traverse to reach various yards and lines. In addition, post-Transaction some CPKC trains will be longer and may have higher priority than other traffic. However, any increase in traffic is expected to be gradual over a

three-year period and Applicants and other rail carriers operating in the area have time and the incentive to ensure fluid operations via operational changes and/or infrastructure improvements. Rather than impose, at this time, the more onerous condition sought by UP, the Board will closely monitor this area during the oversight period through specific reporting requirements that are described below and further detailed in Appendix B. Should any problems arise, the Board may issue additional future orders as appropriate.

Ottumwa, Iowa. BNSF raises concerns regarding at-grade intersections of the CP Laredo Subdivision with the BNSF Ottumwa Subdivision and State Highway 23. BNSF believes that additional, longer trains will block BNSF's Ottumwa Subdivision when CPKC changes crews. (See BNSF Comments 65; id., V.S. Gabriel/Thowe 21.) BNSF requests a condition that requires CPKC to shift its train crew change location near Ottumwa to a point farther west and south on the CP Laredo Subdivision to address this issue. (BNSF Comments 71.)

Applicants state that "there is no reason to worry" because CPKC plans to move the crew change location from CP's Ottumwa Yard Office to the west end of the Ottumwa siding, a location they assert will provide sufficient clearance to prevent CPKC's southbound crew changes from interfering at the crossing. (Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, para. 87.) According to Applicants, CPKC also plans to extend the Ottumwa siding southbound by 2,000 feet (to a total of 12,000 feet), further increasing clearance for southbound trains. (Id., Vol. 2, R.V.S. Elphick/Orr, para. 87.)

Given that Applicants already plan to move their crew change location west, BNSF's concern appears to have been addressed. However, the Board will impose the condition to ensure compliance.

Quad Cities. BNSF has trackage rights over the CP Davenport Subdivision that allow BNSF to travel from Barstow, Ill., across the Mississippi River over the Crescent Bridge in Davenport, Iowa, and northward on the CP Davenport Subdivision to serve customers between Davenport and Clinton, Iowa. The majority of BNSF's traffic on this line originates or terminates in Clinton. (BNSF Comments, V.S. Gabriel/Thowe 23.) BNSF notes that Applicants project that the proposed Transaction will result in approximately 14.4 additional CPKC trains per day over the CP Davenport Subdivision, for a total of approximately 22.4 trains per day, nearly tripling the current traffic on the line. (Id., V.S. Gabriel/Thowe 4; BNSF Am. Comments, App. 3 at 2.) Given the unsignalized nature of this CP line segment and the amount of new CPKC traffic projected to result from the merger, BNSF is concerned that its trackage rights service on the CP Davenport Subdivision will be severely degraded, causing harm to its own operations and its customers on the line. BNSF states that it considered addressing the impact of likely congestion on the CP Davenport Subdivision by filing a responsive application for overhead trackage rights between Savanna, Ill. and Clinton that would have allowed BNSF to avoid the worst impacts of the congestion, but ultimately decided that it would be more appropriate for the Board to reserve jurisdiction to address this issue if it should arise during the oversight period. (BNSF Comments 68 n.26; see also Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, para. 90.)

Applicants respond that the additional trackage rights sought by BNSF would only complicate operations in the area. (Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, paras. 90-91.)

The Board observes that plans to install CTC and extend the Camanche and Deer Creek sidings will increase the capacity of the Davenport Subdivision. (See *id.*, Vol. 2, R.V.S. Elphick/Orr, para. 89.) The Board also notes that the general oversight condition will allow it to address any problems that may arise during the monitoring period.

General CN Capacity Arguments. CN states that the line from St. Paul/Elgin to Kansas City, which was used infrequently pre-merger, is the only place where CP and KCS currently connect. (CN Comments, V.S. Randall, App. B, Sec. B.1.) According to CN, the line will become a critical link in the route that CPKC plans to use to operate new single line service between Mexico and the Gulf Coast to the Upper Midwest and Eastern and Western Canada. (*Id.*, V.S. Randall, App. B, Sec. B.1.) According to CN, some segments along the line will be at practical capacity three years post-merger (CP's Chicago and Ottumwa Subdivisions), while others will exceed practical capacity (CP's Marquette,¹⁶¹ Davenport, and Laredo Subdivisions). (*Id.*, V.S. Randall, App. B, Ex. B-1.)¹⁶² Similarly, regarding the line from Kansas City to Beaumont, CN argues that four segments will be at practical capacity three years post-merger (KCS's Pittsburg, Heavener, Shreveport, and Beaumont Subdivisions). (*Id.*, V.S. Randall, App. B, Ex. B-2.) CN identifies concerns regarding the Heavener Subdivision's capacity for trains longer than 7,300 feet. (*Id.*, V.S. Randall, App. B, App. B, Sec. B.1.)

Applicants claim that CN's analysis is flawed, because, among other reasons, it assumes that all trains will be 10,000 feet long. (Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, para. 72.) Applicants state that they assessed 12 trains to run up to 10,000 feet in the St. Paul/Elgin to Kansas City corridor post-Transaction, with the remainder 8,500 feet long or less. (*Id.*, Vol. 2, R.V.S. Elphick/Orr, para. 72.) Applicants argue that the CPKC capital plan therefore intentionally lays out a grid separating 10,000-foot or longer sidings by a maximum of 65 minutes of run time between those sidings. (*Id.*, Vol. 2, R.V.S. Elphick/Orr, para. 72.) According to Applicants, that separation is within tolerances of practical capacity for trains of that length. (*Id.*, Vol. 2, R.V.S. Elphick/Orr, para. 72.) Further, Applicants argue, capacity tolerances for the shorter trains are within practical capacity. (*Id.*, Vol. 2, R.V.S. Elphick/Orr, para. 72.)

The Board finds Applicants' explanation regarding 10,000-foot trains persuasive. In addition, most of the segments about which CN expresses concern are identified as being at (rather than over) practical capacity with the projected traffic growth. As such, the general oversight condition will allow the Board to address any problems that may arise. With regard to the lines identified as being over practical capacity with the projected traffic growth, Applicants

¹⁶¹ CN raises specific concerns about its operations over a section of the Marquette Subdivision in Dubuque, Iowa. (CN Comments, V.S. Randall, App. B, Sec. B.1.)

¹⁶² According to CN, the "practical capacity of a line is 70% of its theoretical capacity," which provides accommodation for track maintenance, recovery from disruptions, bunched timing of trains, and switching activities at customer facilities along the route. (CN Comments, V.S. Randall, App. D.)

have proposed various projects that should ameliorate the issues. CP's Marquette Subdivision is addressed in the section discussing Metra's concerns.¹⁶³ Regarding CP's Davenport Subdivision, as previously noted, plans to install CTC and extend the Camanche and Deer Creek sidings will increase the capacity of that subdivision. (See Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, para. 89.) Applicants also plan capacity-enhancing CTC and siding projects for the CP Laredo Subdivision. (Am. Operating Plan, para. 287, fig.11, Location of Planned Capital Investments.)

Evergy. Evergy, a Missouri corporation that provides electrical power to approximately 565,000 customers in western Missouri and eastern Kansas, expresses concerns about potential service issues affecting its coal-fired La Cygne Generating Station in Amsterdam, Mo., 60 miles south of Kansas City. (Evergy Comments 2-3.) According to Evergy, the Application contains no specific commitments or plans to protect existing coal and other bulk commodity shippers from service degradation over the lines south from Kansas City as a result of the expected significant post-Transaction increase in traffic density on those lines. (*Id.* at 13.) Evergy seeks various monitoring and reporting conditions aimed at ensuring that service does not deteriorate on those lines following the Transaction. (See *id.* at 17-18; Evergy Final Br. 14-15.)

Applicants respond that they "will in fact be adding capacity" on the segment between Kansas City and Amsterdam by constructing new double track near Kansas City and extending the siding at Blue Valley, Mo. (Applicants Reb. 1-316 to 1-317; *id.*, Vol. 2, R.V.S. Elphick/Orr, paras. 73-75 & fig.15.) Applicants claim that, "with these additions, there will be ample capacity on this segment to maintain Evergy's pre-Transaction cycle times." (Applicants Reb. 1-317.)

Based on Applicants' representations here, as well as the Board's decision to hold Applicants to their Service Promise, the Board deems it unnecessary at this time to impose specific conditions relating to service assurance on the lines south from Kansas City. If Applicants experience service issues post-Transaction, they may bring those issues to the Board's attention during the seven-year oversight period described in the Oversight section. Again, the general oversight condition will allow the Board to address any problems that may arise during the monitoring period.

Mexico. CN argues that Applicants allocated no capital in their plan for capacity expansion in Mexico despite significant projected volume increases and significant constraints on the Applicants' ability to handle trains of the maximum 10,000-foot length specified in their operating plan. (CN Comments, V.S. Randall, Ex. B, Sec. B.3.) CN is particularly concerned because CPKC's volume growth will consist primarily of time-sensitive intermodal and automotive traffic, which tends to move in longer, lighter-tonnage trains. (*Id.*, V.S. Randall, Ex. B, Sec. B.3.) CN claims that additional sidings and siding extensions will be required to keep the network fluid for the projected train volumes and to handle the 10,000-foot trains proposed by CPKC. (*Id.*, V.S. Randall, Ex. B, Sec. B.3.) CN identifies three Mexican districts

¹⁶³ Regarding CN's concerns about a section of line on the Marquette Subdivision at Dubuque, the Board notes that CN controls that crossing and, therefore, the flow of traffic over it. (See Applicants Reb., Vol. 2, R.V.S. Elphick WP "TT2 Final Draft 02-17-2021.pdf" at 107 (showing that CN dispatcher controls interlockings).)

where it claims additional or expanded sidings will be needed to accommodate 10,000-foot trains. (*Id.*, V.S. Randall, Ex. B-4.)

Applicants respond that CN made an error regarding the number of trains that will run on one segment, failed to identify an area of double track, and omitted sidings from its analysis. (See Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, paras. 33-34.) Applicants also claim that CN failed to identify capital investments planned by Kansas City Southern de México, S.A. de S.V., KCS's affiliate in Mexico. (*Id.*, Vol. 2, R.V.S. Elphick/Orr, para. 35.)

The Board will, during the oversight period, monitor traffic crossing the Laredo Bridge with specific reporting requirements to ensure that capacity issues (to the extent they currently exist or develop later) do not affect cross-border traffic flows, and take future action as necessary. Although Applicants did not commit to specific reporting requirements pertaining to the bridge, (see Applicants Final Br., App. A), the Board will order Applicants to report operational metrics that are further detailed below and in Appendix B.¹⁶⁴

Reporting Requirements. As discussed, the Board will closely monitor CPKC operations during the oversight period through specific reporting requirements. Applicants have committed to reporting average train lengths, average daily train counts, and average transit times for CPKC trains between Beaumont and Rosenberg and between Victoria and Robstown in the Texas Gulf Coast area. (See Applicants Final Br., App. A at A1 & Rider 1, Attach. 1.1.) However, to ensure that the Board has adequate information to monitor certain areas, the Board will order additional reporting for parts of the Texas Gulf Coast area and the Laredo Bridge as well as ordering reporting regarding the line between Airline Junction, Mo., and Polo, Mo., and the Twin Cities area.¹⁶⁵ Applicants will provide a monthly report containing information related to train operations at the following locations. With their first submission, Applicants will also provide the same historical monthly information for a five-year period dating back from the effective date of this decision, or if data is no longer available for the entirety of that time period, then from the earliest date for which it is available.

Polo Line in Missouri

For the segment from Airline Junction, Mo., to Polo, Mo.

- Weekly average number of trains per day by railroad
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly CPKC average transit time and maximum transit time

Twin Cities Area

For the lines between Hoffman Avenue and Northtown/Shoreham

¹⁶⁴ The Board notes construction of a second bridge at Laredo. (See Applicants Reb. 1-293.) The reporting metrics will apply to that bridge once it opens to traffic.

¹⁶⁵ Reporting for the Chicago area is addressed in the Metra & Chicago Communities section as well as in Appendix B.

- Weekly average number of trains per day by railroad
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly CPKC average transit time and maximum transit time

Neches River Bridge

By railroad (including passenger, bridge opening trains, and all other types of trains)

- Weekly average number of trains per day
- Weekly maximum trains per day
- Weekly 25th percentile, median, 75th percentile, and maximum train lengths
- Weekly number of trains over 10,000 ft
- Weekly total daily occupancy minutes
- Occupancy time in minutes per movement
- Minutes held prior to moving over the bridge per movement

Beaumont, Tex. to Rosenberg, Tex. Segment

- Weekly average number of CPKC trains per day
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train lengths
- Weekly number of CPKC trains over 10,000 ft
- Weekly CPKC average transit time and maximum transit time

Houston, Tex. Terminal

- Weekly CPKC average transit time
- Weekly CPKC average dwell

Rosenberg to Laredo, Tex. Segment

- Weekly average number of CPKC trains per day
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of CPKC trains over 10,000 ft
- Weekly CPKC average transit time and maximum transit time

Laredo Bridge

By railroad (including bridge opening trains and all other types of trains)

- Weekly average number of trains per day
- Weekly maximum trains per day
- Weekly 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of trains over 10,000 ft
- Weekly total daily occupancy minutes
- Occupancy time in minutes per movement
- Minutes held prior to moving over the bridge per movement

Applicants will be required to maintain the data underlying their reports for the duration of the oversight period. As discussed in the Oversight section below, Applicants will be required to participate in a technical conference with Board staff. In connection with the technical conference, guidance will be developed regarding the Board's requirements for both recordkeeping and reporting of any data, including scope, methodology, and formatting.

Metra & Chicago Communities. Metra argues that the Transaction is not in the public interest because it will harm Metra's services over its Milwaukee District-North Line (MD-N or the C&M Subdivision) and Milwaukee District-West Line (MD-W or the Elgin Subdivision) (collectively, the Metra Lines).¹⁶⁶ CP has the right to dispatch and operate over the Metra Lines pursuant to a 1985 trackage rights agreement (Trackage Agreement) with the Trustee of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (the Trustee). (See Metra Comments, Ex. A, V.S. Gentil, para. 5, Ex. A-2, Mar. 15, 2022.) When Metra acquired the Metra Lines from the Trustee, it did so subject to the Trackage Agreement, which Metra and CP later amended. (See id., Ex. A, V.S. Gentil, paras. 6-8, Ex. A-3, A-4.) The Trackage Agreement provides that CP shall not interfere with Metra's peak period trains but may make reasonable traffic adjustments that do not unreasonably disrupt or delay trains during non-peak periods. (Id., Ex. A, V.S. Gentil, Ex. A-3 at 13-15 (recognizing "the priority of commuter service operations" during peak periods).)

According to Metra, CP's current dispatching practices create safety issues and cause delays to Metra trains during peak and non-peak periods. (See, e.g., Metra Comments 27-37.) Metra argues that the Transaction will exacerbate these problems and "break the rail system" in Chicago, as shown by Metra's RTC modeling of the Transaction. (Id. at 18, Ex. C, V.S. Crowley & Mulholland; see also Metra Errata 2, June 9, 2022; Metra Supp. Comments, Attach. A, Supp. V.S. Crowley & Mulholland, June 9, 2022; Metra Errata, Attach. A., Second Supp. V.S. Crowley & Mulholland, Attach. B to B-2, July 8, 2022; Metra Reply, Attach. A., R.V.S. Crowley & Mulholland, July 12, 2022.) More specifically, Metra asserts that projected Transaction-related traffic growth on the Metra Lines cannot be accommodated without adversely impacting Metra's service. (Metra Comments 18-21; Metra Reply 3-4, July 12, 2022.) Metra also argues that Applicants' traffic projections for the Metra Lines do not account for additional freight trains that will be diverted to the Metra Lines from the Marquette Subdivision, which, according to Metra, does not have capacity for the projected freight traffic increases resulting from the Transaction. (See Metra Comments 18-20; see also Am. Operating Plan, para. 208 (projecting that an incremental six trains per day will be routed around Chicago and onto the Marquette Subdivision).) Further, Metra asserts that Bensenville Yard, CP's primary classification yard in the Chicago area, will be unable to handle Transaction-related traffic increases. (Metra Comments 61; Metra Final Br. 13.) Metra argues that the Board can mitigate the impacts of the Transaction by requiring CP to amend the Trackage Agreement to transfer

¹⁶⁶ Applicants have not disputed that passenger-rail disruption can constitute harm to essential services under the pre-2001 policy statement governing major mergers.

dispatching control to Metra, and by imposing various other conditions.¹⁶⁷ (Metra Comments 72.)

A group of several Chicago-area communities that organized the Coalition also raises concerns about the impact of increased traffic on the Metra Lines and in nearby yards. (See Coal. Comments 10, Feb. 28, 2022; Coal. Resp. to Metra 4, July 12, 2022.) The Coalition argues that additional freight traffic on the Metra Lines will “shut down” its member communities. (Coal. Final Br. 13-14.) Like Metra, the Coalition asserts that Applicants underestimate the number of freight trains that will be added to the Metra Lines because Applicants do not account for trains that will be diverted from the Marquette Subdivision. (See Coal. Comments 14-15;

¹⁶⁷ Metra requests the following conditions: (1) require CP to amend the Trackage Agreement to transfer dispatching control to Metra; (2) require CP to adopt Metra’s RTC modeling or cooperate in refining RTC modeling for the Metra Lines; (3) require that CP and Metra agree to a binding standard and process for Metra schedule changes and new trains; (4) require capital improvements on MD-N including (a) construction of a third mainline track from Rondout to A-20, (b) construction of universal crossovers at Lake Forest and Glenview, and (c) construction of a connection at A-20; (5) require capital improvements on MD-W from Tower B-12 to B-17 including (a) two mainline tracks, (b) a powered crossover at Bartlett and Itasca, and (c) receiving tracks equal to the length of incoming trains or the maximum possible length at Bensenville Yard; (6) require capital improvements on MD-W from Tower A-5 to B-12 including (a) construction of two mainline tracks, (b) a southeasterly wye leg at Cragin Junction paid for by CP, and (c) CP-constructed receiving tracks equal to the length of incoming trains or to the maximum possible length at Galewood Yard; (7) require capital improvements on MD-W at Tower A-5 including (a) reduction in curves to increase speeds to 25 miles per hour and (b) separate CP and Metra tracks and construction of a flyover from south of A-5 to the dedicated Metra tracks and a dedicated freight connection in the northwest quadrant; (8) require that CP compensate Metra for additional use and wear and tear by (a) paying the full cost of projects pursued because of increases in CP’s traffic volume, frequency, or train lengths, (b) changing CP’s maintenance contribution from a flat fee to a fee based on train counts and gross ton miles, and (c) changing CP’s rental terms from a flat fee to a dollar per car mile fee; (9) require that CP compensate Metra for avoidable delay and interference events; (10) require CP to indemnify Metra for Amtrak-imposed performance charges where CP’s dispatching of additional trains causes Amtrak delays on the Metra Lines; (11) require CP to compensate Metra for non-compliance with Board-imposed conditions; (12) impose a 10-year period of Board oversight of CP dispatching practices if dispatching is not transferred, and require that CP and Metra agree to binding and workable dispatching standards; and (13) impose a 10-year period of Board oversight of any condition imposed. (See Metra Comments 3, 70-71; Metra Final Br. 23-29.)

The Village of Glenview, a northern suburb of Chicago through which part of MD-N passes, filed a comment opposing Metra’s request for a condition requiring the construction of a holding track in Glenview. (Vill. of Glenview Letter, Apr. 21, 2022.) The City of Lake Forest filed a letter on behalf of several Illinois communities located north of Chicago, generally objecting to infrastructure measures in those communities and specifically objecting to Metra’s proposed condition that a third main line be constructed on MD-N adjacent to various residential communities. (City of Lake Forest Letter, Apr. 21, 2022.)

Coal. Supp. 8, June 9, 2022.) The Coalition requests that the Board impose several conditions regarding the Metra Lines, including a condition requiring Applicants to amend their operating plan to eliminate additional traffic over MD-W.¹⁶⁸ (See Coal. Comments 10; Coal. Resp. to Metra 4; Coal. Final Br. 14.)

U.S. Senator Richard J. Durbin, U.S. Senator Tammy Duckworth, U.S. Representative Raja Krishnamoorthi, and U.S. Representative Marie Newman also ask the Board to consider the Transaction’s impacts on Illinois communities and commuter rail operations. (Hon. Newman Letter 1, July 26, 2022.) Additionally, Senator Durbin, Senator Duckworth, Representative Krishnamoorthi, and U.S. Representative Delia C. Ramirez (collectively, Illinois Delegation) ask the Board to analyze the Transaction’s impacts using Metra’s modeling or by conducting independent modeling, as opposed to Applicants’ projections. (Ill. Delegation Letter 1, Feb. 17, 2023.)

Applicants respond that the Transaction will not adversely impact Metra. Applicants contend that Metra misunderstands the impacts of the Transaction, in part because Metra relies on flawed RTC modeling. (Applicants Reb. 1-173 to 1-178.) Applicants state that, after they “corrected” errors in Metra’s RTC model, “the RTC model shows that there will be no issues on the Marquette Subdivision, Elgin Subdivision, or any other segment of the CPKC system that will have an effect on Metra.” (*Id.* at 1-178, Vol. 2, R.V.S. Elphick.) Applicants also assert that CP’s independent reconfiguration of Bensenville Yard will improve performance on the Metra Lines. (*Id.* at 1-181 to 1-182.) And, although Applicants dispute Metra’s description of its relationship with CP, Applicants argue that Metra’s preexisting grievances cannot form the basis for imposing conditions on the Transaction. (*Id.* at 1-199 (“Even if everything Metra says were true, it would not support the conditions Metra desires to have imposed on the Transaction.”); see also *id.* at 1-166 to 1-167.) Applicants also argue that, even if the Board finds “some residual risk to Metra’s services from Transaction-related growth,” the Board should reject Metra’s conditions because they are overreaching and harmful to the public interest. (Applicants Final Br. 16.) Nevertheless, Applicants make several commitments regarding Metra. As paraphrased below, Applicants state that they will:

- Not object to Metra’s resumption of its full pre-COVID-19 schedules on Metra’s MD-W and MD-N lines.

¹⁶⁸ The Coalition requests the following conditions: (1) eliminate additional freight traffic over the western end of MD-W and direct other Chicago-area railroads to provide operating rights over their tracks to CPKC; (2) limit the “timing, train sizes and frequency” of new freight traffic on MD-W; (3) impose certain mitigation measures; (4) require a public process relating to CPKC’s ability to add freight trains to MD-W post-merger; (5) impose a 10-year oversight period with certain reporting and monitoring requirements; and (6) hold Applicants to their statement regarding reduction in average train sizes and require that such reductions not be accompanied by an increase in train numbers. (Coal. Comments 14, 16-17; Coal. Supp. 5, 11-12; Coal. Resp. to Metra 14-15; Coal. Final Br. 14-23.)

- Engage with Metra in good faith to evaluate proposed Metra operational changes outside peak windows, including developing objective standards for the addition of such trains, and support the development of joint RTC modeling to support these efforts if the parties conclude such modeling would be valuable.
- Continue to work collaboratively with Metra to enhance communication about dispatching decisions that may result in a delay to Metra’s scheduled trains.
- Engage with Metra on a quarterly basis to discuss CPKC’s forecasted future train count increases on the Elgin Subdivision and Metra’s planned or proposed operational changes, to the extent supported by Metra.
- During an oversight period of up to five years, report monthly on certain operational metrics relating to operations on MD-W and MD-N, as well as CPKC’s operations on its Marquette Subdivision.
- During an oversight period of up to five years, report monthly on delays caused to Metra trains by CPKC freight trains on MD-W and MD-N, to the extent Metra provides requisite data and detailed information to CPKC.
- During an oversight period of up to five years, unless otherwise agreed upon by CPKC and Metra, commit to a dispute resolution mechanism as specified.
- Unless otherwise agreed to by CPKC and Metra, not implement an ordinary course operating plan that directs CPKC through-freight-trains operating between Kansas City and St. Paul, Minn., over MD-W and MD-N, except in emergency and other non-routine situations. If such detour is required, CPKC will minimize any potential interference with Metra trains to the fullest extent possible. This commitment will sunset on January 1, 2043.

(See Applicants Final Br., App. A at A2-A4, Rider 1, Attach. 1.1.)

As to the community concerns, Applicants respond that “CPKC traffic will remain a relatively small percentage of traffic through the Coalition Communities,” which, according to Applicants, have accommodated similar levels of freight traffic. (Applicants Reb. 1-296 to 1-297.) Applicants argue that the Coalition’s proposed mitigation measures are disproportionate to the modest projected traffic increases in the Coalition’s communities. (*Id.* at 1-298.) However, Applicants nonetheless submit voluntary mitigation measures to address potential environmental impacts in the Coalition communities.¹⁶⁹ As addressed in the Final EIS, Applicants state that they will:

¹⁶⁹ As addressed in the Environmental Matters section, OEA thoroughly considered the Transaction’s potential environmental impacts in the Chicago area. See *infra* Environmental Matters section. OEA responded to the Coalition’s environmental concerns, including its challenges to the validity of the data and methods OEA used to analyze grade crossing delay in the Chicago area and OEA’s conclusions based on this analysis. Final EIS, App. S at S-146 to S-148. The Final EIS explains that many of the Coalition’s arguments are based on inaccurate characterizations of the potential effects of the Transaction. *Id.*, App. S at S-144 to S-149. Specifically, the Coalition relied on short-term observational data on train numbers and train length at specific locations and commissioned a report purporting to show that the impacts of the

- Commit to creating and funding an FRA-approved Quiet Zone;
- Install and fund a predictive mobility system to deliver advanced notice of blocked crossings;
- Install and fund Intelligent Transportation Systems (ITS) Interconnect for Advanced Warning Signs at certain locations; and
- Install and fund Positive Train Control wireless technology tie-ins at crossings located adjacent to Metra platforms.¹⁷⁰

Final EIS 4-17.

The Board finds that the Transaction is unlikely to cause harm to Metra's commuter rail service or Chicago-area communities. See infra Applicable Standards section (explaining that, in evaluating a major railroad consolidation, the Board balances benefits of the merger against harm to the public interest and will impose conditions if necessary to reduce or eliminate a merger-related harm). As an initial matter, the Board finds Metra's RTC model unpersuasive. Metra's

Transaction on grade crossing delay in the Coalition communities will be greater than reported in the Draft EIS. But the Final EIS identified numerous methodological problems with the report that overstate the projected delay at grade crossings by overestimating the projected increase in freight trains per day from the Transaction and incorrectly assuming each freight train will be 10,000 feet in length, when many trains actually will be shorter. Id., App. S at S-146. The traffic study also does not account for passenger trains on MD-W, which comprise up to 90% of daily traffic on the line Metra shares with CP. Id.

Contrary to Metra's and the Coalition's claims, OEA had sufficient information regarding Applicants' plans to take the requisite "hard look" at the potential environmental impacts of the Transaction in the Chicago area. Id., App. S at S-19 to S-20. In the Final EIS, OEA properly relied in part on data provided by Applicants, and there is no need to prepare any supplemental environmental documentation. Id., App. S at S-23. Further, contrary to the assertions that OEA analyzed impacts almost entirely by applying broad national statistical information, the Final EIS includes a detailed analysis of local impacts on every segment that meets or exceeds the Board's environmental analysis thresholds, including locationally specific information about rail lines and grade crossings in the communities represented by the Coalition. Id., App. S at S-23 to S-25. The Final EIS also properly addresses concerns raised by Metra and the Coalition regarding the effects of current train operations near Bensenville Yard on grade crossings and to Metra riders. As the Final EIS explains, this constitutes an existing condition that is unrelated to the Transaction. Also, Bensenville Yard is currently being reconfigured as part of the development of the Illinois Tollway's Elgin O'Hare Western Access Project. This reconfiguration will include lengthening the Bensenville Yard receiving tracks to accommodate longer trains, as discussed in more detail below. The Final EIS states that the longer receiving tracks will allow for switching and staging to occur within the yard and thus will reduce the need for trains to stop on the mainline to be broken into shorter blocks. Id., App. S at S-127, S-157.

¹⁷⁰ The Final EIS recommends that the Board adopt these voluntary mitigation measures and require Applicants to establish a community liaison for the Chicago area. Final EIS Summary at S-7 to S-8. As stated in the Environmental Matters section, the Board adopts OEA's analysis and is imposing all of OEA's recommended mitigation as modified. See App. C.

RTC simulations are based on inputs provided by its experts, including track and structure data. (See Metra Comments, Ex. C, V.S. Crowley & Mulholland 54.) However, even in the most updated version of Metra’s RTC model accepted into the record, Metra’s experts omitted material infrastructure from the RTC model, including signals, double crossovers on the Watertown Subdivision, and the Bensenville Yard reconfiguration enhancements in the future case simulation. (See, e.g., Applicants Reb., Vol. 2, R.V.S. Elphick, Ex. 1, tbl.4.1.) These infrastructure omissions increased the predicted degree of freight-train interference with commuter rail operations in the RTC model and prevented the model from accurately simulating operations.¹⁷¹ Moreover, Metra modeled CP freight trains using actual train data from April 2021, rather than using scheduled departure times and allowing RTC’s logic to dispatch trains. (Metra Comments 19; see Metra Final Br. 16.) This forced the modeled trains to depart at specific times, preventing the RTC model from “capturing the randomness of real-world operating events.” (Applicants Reb., Vol. 2, R.V.S. Elphick, Ex. 1 (explaining that RTC dispatching logic should “simulate[] real-world dispatching by allowing some trains to depart late if doing so will avoid creating congestion or gridlock farther down the line due to other main line train activity”).) Given the combined impact of these two modeling shortcomings on the reliability of the model’s output, the Board will not rely on Metra’s RTC model to assess the impacts of the Transaction or require Applicants to adopt Metra’s RTC model.¹⁷² (See Metra Comments 72.)

The Transaction will add no additional freight trains to MD-N¹⁷³ or the segment of MD-W east of Bensenville Yard, and these line segments will see only slight traffic increases. (Am.

¹⁷¹ Metra contends that the reason its initial RTC model contained inaccuracies is because Applicants “provided inconsistent, inaccurate and/or out-of-date track data for two sidings on the Marquette Subdivision.” (Metra Supp. Comments 8.) Although Metra’s experts revised the RTC model using updated track data, the revised model did not remedy the infrastructure errors described above and “did not make a material difference in Metra’s model results or conclusions.” (Metra Final Br. 15-17; see Metra Supp. Comments, Attach. A, Supp. V.S. Crowley & Mulholland 14; Metra Errata 1-2, July 8, 2022; see also Hr’g Tr. 325:1-6, Sept. 28, 2022 (Mulholland responding “[n]o” when asked if he validated that the Metra RTC model perfectly captures allegedly missing infrastructure).)

¹⁷² Metra suggests that RTC modeling is required to assess the impacts of the Transaction. (See Metra Comments 48-50.) According to Metra, “this Board has found [MultiRail] to be inadequate to assess the impacts of this Transaction” and Applicants should not be permitted to add freight trains to the Metra Lines without demonstrating sufficient capacity for it through RTC modeling. (*Id.* at 2, 18, 45.) However, as stated in Decision No. 17, the Board’s regulations “give applicants ‘the greatest leeway’ to develop evidence as appropriate in context.” Decision No. 17, FD 36500 et al., slip. op. at 5 (quoting 49 C.F.R. § 1180.7 (2000)). The regulations do not require RTC modeling, and the Board has accepted Applicants’ modeling approach. See *supra* Operating Plan Data & Methodology section.

¹⁷³ Metra implies that the Transaction will add passenger trains to MD-N because the CP-Amtrak Agreement will establish new Amtrak service on MD-N, where Metra hosts a portion of Amtrak’s Chicago-Milwaukee Hiawatha Service. (Metra Comments 59; Metra Final Br. 9.) The CP-Amtrak Agreement confirms CP’s commitment to cooperate in the establishment

Operating Plan, paras. 210, 212.) Metra argues that the additional traffic will impact its service, particularly east of Bensenville Yard, as trains arriving from or departing to the west “will travel through Chicago, impacting not just the eastern end of MD-W, but likely other portions of Metra’s Chicago-area service.” (Metra Comments, Ex. B, V.S. Oppenheim 22; see Metra Final Br. 10, 12 (stating that connections east of Bensenville Yard impact Metra trains).) However, the additional traffic east of Bensenville Yard will be accommodated in existing trains, avoiding impacts to Metra. (Am. Operating Plan, para. 210.) More specifically, the additional traffic moving east of Bensenville Yard “will be handled in *existing CP trains* (including not only through trains, but transfer jobs and local trains as well), which have ample room for the incremental traffic.” (Applicants Final Br. 14.) In addition, Applicants anticipate a reduction in intermodal and automotive traffic east of Bensenville Yard after the Transaction, potentially reducing train activity in that area. (Applicants Reb., Vol. 2, R.V.S. Elphick, paras. 11, 34.) Because the modest traffic increases should be accommodated in existing train services and Metra has not shown that new traffic will result in harmful operational disruptions that are distinct from Metra’s preexisting concerns, Metra fails to show that post-Transaction operations east of Bensenville Yard will impact Metra more so than current operations. However, as discussed infra, the Board is establishing a seven-year monitoring period (with extension if warranted) so that it can be promptly apprised of any operational issues resulting from the merger. If the increase in traffic east of Bensenville Yard proves to be more than Applicants predict and Metra suffers operational disruptions as a result, the Board can exercise its authority to take additional action to remediate Transaction-related harms.

On the western segment of MD-W between Almore and Bensenville Yard, Applicants project that the Transaction will result in the addition of eight daily freight trains. (Am. Operating Plan, para. 241, App. A at 4.) The Coalition argues that Applicants underestimate the number of freight trains that will be added to the western segment of MD-W, but this argument assumes that additional freight trains will be diverted from the Marquette Subdivision to the Metra Lines.¹⁷⁴ (See Coal. Comments 14-15; Coal. Supp. 8; see also Hon. Krishnamoorthi Letter 4, Oct. 20, 2022 (stating “there is no certainty how many freight trains the proposed merger would add to the MD[-]W line” and referencing the Coalition’s argument).) As explained below, Applicants will not ordinarily divert trains from the Marquette Subdivision to

of new Amtrak service; it does not itself cause or bring about that new service. According to Metra, such Amtrak service would be governed by an existing agreement between Amtrak and Metra. (Metra Comments 59; see also Applicants Reb. 1-167 n.245 (referencing Amtrak’s “contractual rights to force its way onto CP’s (and Metra’s) right of way”).) Therefore, the establishment of new Amtrak service on MD-N is not Transaction-related. Further, Amtrak has committed to investing in infrastructure to add necessary capacity to MD-N. (See Amtrak Letter, Ex. CP-Amtrak Agreement, Feb. 2, 2022; see also Applicants Reb. 1-167 n.245.)

¹⁷⁴ Metra initially argued that the increase in freight trains on MD-W would be higher than Applicants projected, (see Metra Comments 14), but Metra assumes in its final brief that “the merger will add 8 new freight trains on the MD-W Line,” (Metra Final Br. 5 n.3.)

the Metra Lines. Thus, the Board agrees with Applicants' projection that the Transaction will add eight freight trains to the western segment of MD-W.¹⁷⁵

The western segment of MD-W has capacity for at least eight additional freight trains, as that segment is double-tracked and contains infrastructure to accommodate additional trains, including several crossovers. (See Applicants Reb., Vol. 2, R.V.S. Elphick, fig.3.) Also, the additional freight trains will be able to run outside of Metra's peak operating windows, avoiding interference with Metra's peak period service as required by the Trackage Agreement. (See Applicants Reb. 1-180, 1-201, Vol. 2, R.V.S. Elphick, paras. 16, 19-21; see also Metra Comments 19; *id.*, Ex. B, V.S. Oppenheim, para. 33 (stating that CP "could schedule night service to avoid interference with Metra's trains").) Although Metra asserts that its commuter trains will be delayed by CP's dispatching "regardless of the [train] schedule," (Metra Final Br. 2), Metra's concerns about delay stem from both its unreliable RTC model and its dissatisfaction with CP's past performance (preexisting issues that are not created by this transaction). (See Metra Comments 18-21, 23-41; Metra Final Br. 19.) But given that the 8.0 new trains will be able to run outside of Metra's scheduled operating times, the Board concludes that delays to Metra trains are unlikely to worsen as a result of Transaction-related traffic increases. Moreover, the projected Transaction-related traffic increases are expected to occur incrementally over a three-year period, allowing Applicants to adjust operations as needed to ensure that additional freight traffic on MD-W does not interfere with Metra's service. (See Hr'g Tr. 129:19-21, Sept. 28, 2022.) However, if the increase in traffic on the western segment of MD-W proves to be more than Applicants predict and Metra suffers operational disruptions as a result, the Board can exercise its authority to take additional action to remediate Transaction-related harms.

Metra and the Coalition also raise concerns about the increased use of Bensenville Yard,¹⁷⁶ (see Metra Comments 61; Coal. Supp. 9-10), but Bensenville Yard is undergoing reconfiguration that will facilitate growth independent of this Transaction. (Applicants Reb. 1-171, 1-181 (explaining that Bensenville Yard is being reconfigured pursuant to CP's land agreement with the Illinois Toll Authority and UP).) Among other things, this reconfiguration will ameliorate processing delays by eliminating a bottleneck caused by "a narrow 'waist' in the middle of the yard" and by creating longer receiving tracks that can accommodate 10,000-foot trains within the yard. (Applicants Reb., Vol. 2, R.V.S. Elphick, paras. 31-32; see *id.*, Vol. 2,

¹⁷⁵ The Coalition also argues that Applicants' plan to reduce train lengths on MD-W "would mean the number of trains would increase beyond the 8.0 trains per day." (Coal. Final Br. 7, 12; see Coal. Supp. 11.) However, Applicants indicate that they considered decreased train lengths when projecting the number of additional trains that will be added to MD-W during the three years following the Transaction. (Applicants Reb. 1-300, Vol. 2, R.V.S. Elphick, paras. 78-79 (stating that "our projection of a decrease in train length . . . is directly tied to a modest increase in the number of freight trains").) The Coalition submitted no evidence undermining Applicants' projections that the shorter trains and the additional traffic will amount to eight additional trains per day.

¹⁷⁶ At Bensenville Yard, Applicants anticipate "an increase of 112 cars for processing daily" as a result of the Transaction and "additional demand from anticipated growth in automotive and intermodal traffic." (Am. Operating Plan, para. 167.)

R.V.S. Walker, paras. 55-58.) Although the reconfiguration process may have temporary impacts on traffic, the reconfigured yard will allow CP to relocate intermodal and automotive activity to Bensenville Yard from Schiller Park, which will eliminate the need for some intermodal trains to reverse across Metra's tracks to reach Schiller Park. (Applicants Final Br. 14-15; see Applicants Reb. 1-171 (“[T]he automotive and intermodal facilities at Schiller Park will be consolidated at Bensenville.”).) Metra asserts that the reconfigured yard “will be unable to handle [the] new traffic,” but it provides no adequate explanation for this conclusion. (Metra Final Br. 13.)

Contrary to the complaints from Metra and the Coalition, the Transaction may in fact ameliorate rail traffic congestion in the Chicago area by creating a new single-line routing option to the west, enabling shippers to bypass Chicago via the Marquette Subdivision. (See Applicants Reb. 1-172.) Applicants anticipate that an incremental six trains per day will be routed around Chicago and onto the Marquette Subdivision, (Am. Operating Plan, para. 208), and they commit that they will not ordinarily divert trains from the Marquette Subdivision to the Metra Lines, except in emergency or non-routine situations, (Applicants Final Br., App. A at A4). Nevertheless, Metra and the Coalition assert that trains will be diverted to the Metra Lines because the Marquette Subdivision is already at capacity. (See Metra Final Br. 15 & n.11, 29 (stating that Applicants' commitment “is not realistic”); Coal. Final Br. 11-12; see also Metra Comments 55; Coal. Supp. 8.) This argument is unpersuasive because it relies on RTC modeling that the Board has found to be unreliable, (see Metra Comments 20, Ex. C, V.S. Crowley & Mulholland 65-66), and because Applicants submitted information indicating that the Marquette Subdivision is not in fact at capacity, (see Am. Operating Plan, App. A at 3, App. T at 1; Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, para. 93; see also Applicants Reb. 1-175 (stating that “CP has no trouble operating current train volumes without operational disruption” on the Marquette Subdivision)). Further, additional traffic over the Marquette Subdivision will not materialize immediately, as Applicants will need to win business for the projected additional trains. (See Hr'g Tr. 126:1-5, Sept. 28, 2022; see also Hr'g Tr. 123:17-18, Sept. 28, 2022 (Elphick testifying that the new traffic “will not all emerge day one”).) Thus, Applicants can ensure that capacity “stay[s] well ahead of traffic volume,” including by adding three new sidings to the Marquette Subdivision. (Applicants Final Br. 13; see Applicants Reb., Vol. 2, R.V.S. Elphick, paras. 40, 42 (stating that transaction-related growth is not anticipated to materialize in the first year and that “the construction plan and sequencing reflects the currently anticipated timing in volume growth”).)

For the reasons addressed above, the Board finds that many of Metra's concerns relate to preexisting issues, and Metra and the Coalition have not shown that the Transaction will harm Metra's commuter rail service or Chicago-area communities. Therefore, at this time, the Board will not impose the requested conditions concerning the Metra Lines. Several of Metra's requested conditions also, presently, have no nexus to the Transaction, including those conditions that would alter terms of the Trackage Agreement relating to dispatching, compensation, and scheduling. These requested conditions stem primarily from Metra's dissatisfaction with CP's past and present performance under the Trackage Agreement. (See, e.g., Metra Comments 30 (stating that CP has interfered with Metra commuter operations “for more than 20 years”), 33 (alleging that CP “does not honor its obligation for the contractually provided priority for Metra operations during ‘peak periods’”), 47 (noting that “CP's

underpayment is not itself a consequence of the Transaction”), 72 (stating that, due to “years of issues with respect to CP dispatching,” Metra’s relationship with CP cannot be left to contractual agreements.) The Board will not impose a condition that lacks a sufficient nexus to the transaction or that is designed to place a proponent in a better position than it occupied before the Transaction. See UP-SP, 1 S.T.B. at 418; see also Conrail, 3 S.T.B. at 278 (stating that a condition generally will not be imposed to ameliorate longstanding problems that are not created by the Transaction). Thus, the Board will not use its conditioning power here to impose conditions concerning the Metra Lines that are designed to ameliorate preexisting issues or improve Metra’s contractual position.¹⁷⁷

Nevertheless, the Board recognizes the importance of Metra’s service to Chicago area communities and businesses and the impact that even unlikely Transaction-related harm could cause. Applicants have already committed to a harm-mitigation process regarding Metra to deal with unforeseen harm. The Board is committed to ensuring that this process is timely and effective and thus will impose, as a condition, certain modifications to the commitment Applicants have made to provide a dispute resolution process to address such disruptions. The Board will enhance the condition that Applicants offered by lowering the thresholds for disruptions to Metra’s services that will trigger the dispute resolution process. Although the Board finds that the Transaction is not likely to cause disruption to Metra, in the event that such disruption does occur, the amount of disruption needed to trigger the dispute resolution process should be lower than what Applicants propose, in order to effectively mitigate that harm in a timely manner. Such additional safeguards will help ensure that there is an effective procedure in place to minimize any unforeseen impacts on Metra’s critically important commuter rail service. Therefore, the Board will require Applicants to adhere to the enhanced dispute resolution mechanisms specified below.

Applicants’ initial dispute resolution mechanism commitment provides:

- a) In the event more than five percent of Metra’s scheduled trains on either the MD-N or MD-W lines arrive at their destinations six minutes or more behind schedule *during any calendar quarter* as a result of interference by CP freight trains, CPKC will initiate the following service assessment and Tier 1 recovery steps: (i) internal assessment of

¹⁷⁷ Metra claims that, by approving the Transaction without conditions, the Board will effectively alter the Trackage Agreement. (Metra Comments 72.) According to Metra, Board approval will “authorize[] CP’s unilateral appropriation of the excess capacity on Metra’s lines,” altering the parties’ contractual relationship by preempting Metra’s right “to seek redress of CP’s infringement on Metra’s contractual rights.” (*Id.*) Metra also argues that, if it obtains a judicial order determining that excess capacity on the Metra Lines belongs to Metra, that court order will impact the viability of the Transaction. (*Id.*; see also id. at 41-43, Ex. B., V.S. Oppenheim, paras. 48-49 (implying that CP unreasonably denied Metra’s past requests for commuter service changes on MD-N).) The Board clarifies that this decision does not alter the Trackage Agreement or Metra’s ability to seek redress in the appropriate tribunal for contractual breaches. While the Board will not amend the Trackage Agreement or impose conditions to “create an incentive for CP to respect its existing contractual constraints,” (Metra Comments 78), the Board nevertheless urges Applicants to comply fully with the terms of the Trackage Agreement.

root causes of delays within three business days of the receipt of the report, data and other relevant information from Metra; (ii) development of planned actions to reduce delays within the following five business days; (iii) initiate discussion with Metra regarding assessment and service action plan within eight business days from the date of delivery of the report, data and other relevant information from Metra; and (iv) prompt implementation of planned service action steps depending on nature of those steps and potential need for Metra action to support them. If the Tier 1 recovery steps are not effective *and for two consecutive calendar quarters* more than five percent of Metra's scheduled trains on either the MD-N or MD-W lines arrive at their destinations six minutes or more behind schedule as a result of interference by CP freight trains, then CPKC will initiate the following service assessment and Tier 2 recovery steps: (i) CPKC will promptly reassess and refine its Tier 1 service recovery steps to more effectively reduce delays, and (ii) Metra, at its discretion, can designate an observer to sit alongside CP's dispatcher(s) for the relevant territory. Tier 1 and Tier 2 recovery steps would no longer apply *after two consecutive quarters* during which fewer than five percent of Metra's trains were six minutes or more behind schedule at destination as a result of interference by CP freight trains.

- b) In the event (a) does not resolve recurring delay issues, or in the event Metra experiences other service performance issues or has other disputes relating to these commitments, CPKC will initiate the following dispute resolution process: (i) within 24 hours of notice in writing setting out the dispute with sufficient details and supporting information from Metra, CPKC General Manager Field Operations and Metra's designee will meet to discuss resolution; (ii) if not resolved within two business days, the matter will be escalated to the respective regional field operations senior leaders, being CPKC's executive level operating officer and Metra's Chief Operating Officer, or their designees; (iii) if not resolved at that level within five business days, the matter will be further escalated to CPKC's CEO and Metra's CEO; and (iv) if not resolved at that level after a reasonable amount of time, Metra may submit the dispute to a qualified and experienced independent mediator upon giving five business days' prior written notice to CPKC.

(Applicants Final Br., App. A at A3-A4 (emphasis added).)

Both the Tier 1 and Tier 2 recovery steps outlined in subsection (a) are remedies triggered by harm to Metra, which Applicants define as more than 5% of Metra's scheduled trains on the Metra Lines arriving at their destinations at least six minutes behind schedule due to CP freight train interference. (Id.) Under Applicants' proposal, the harm would need to occur for at least a calendar quarter for Tier 1 to apply, and at least two calendar quarters before Tier 2 is triggered. (Id.)

Here, given the adverse impacts to the public that would arise if Metra trains were delayed for a calendar quarter or more, and because the Board has broad authority to impose conditions governing major railroad consolidations, the Board will amend the dispute resolution process and refine the time periods needed to trigger Tier 1 and Tier 2 recovery steps to ensure the process is timely. The Board's amendments are as follows:

- In the first sentence of subsection (a) describing when CPKC will initiate the service assessment and Tier 1 recovery steps, replace “during any calendar quarter” with “during any 60-day period”¹⁷⁸;
- In the second sentence of subsection (a) describing when CPKC will initiate the service assessment and Tier 2 recovery steps, replace “for two consecutive calendar quarters” with “for an additional 60 days”;
- In the last sentence of subsection (a) describing when Tier 1 and Tier 2 recovery steps no longer apply, replace “after two consecutive quarters” with “after 120 days”;
- To the end of subsection a) add the following sentence: “If Tier 1 and Tier 2 recovery steps have been triggered but do not resolve the delay issues, the dispute resolution mechanism commitment will be extended for 3 years with continued Board oversight.”

Additionally, to adequately monitor capacity and traffic fluidity in the Chicago area during the oversight period, the Board will impose, as a condition, certain modifications to the commitment Applicants have made to report on operational metrics relating to the Metra Lines and the Marquette Subdivision and maintain certain records. Specifically, Applicants will report the following weekly data every month and provide the same historical monthly information for a five-year period dating back from the effective date of this decision, or if data is no longer available for the entirety of that time period, then from the earliest date for which it is available:

MD-W Line: between Randall Road (Tower B-35) and Tower B-17 (trains to/from Chicago Subdivision)

- Weekly average transit times for CPKC through trains between Tower B-35 and Tower B-17
- Weekly average number of CPKC trains per day
 - For MD-W Line - Bensenville Yard to Tower A-5 split between trains departing B12 and A5
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of CPKC trains over 10,000 ft
- Weekly CPKC average transit time and weekly maximum transit time

¹⁷⁸ The 60-day period would begin, and end, on any date. Thus, even if the Tier 1 recovery steps are not triggered for the 60-day period beginning on April 1, the recovery steps would be triggered if Metra experiences the requisite harm during the 60-day period beginning on April 2.

MD-W Line: Bensenville Yard/Tower B-12 to Tower A-5

- Weekly average transit times for CPKC through trains between Tower B-12 and Tower A-5
- Weekly average number of CPKC trains per day
 - For MD-W Line - Bensenville Yard to Tower A-5 split between trains departing B12 and A5
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of CPKC trains over 10,000 ft
- Weekly CPKC average transit time and weekly maximum transit time

MD-N Line: Rondout to Tower A-5

- Weekly average transit times for CPKC through trains between Rondout and Tower A-5 (CP/KCS Commitment)
- Weekly average number of CPKC trains per day
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of CPKC trains over 10,000 ft
- Weekly CPKC average transit time and weekly maximum transit time

CP Marquette Subdivision Between Sabula Junction and River Junction

- Weekly average transit times for CPKC through trains across the segment
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly average number of CPKC trains per day
- Weekly number of CPKC trains over 10,000 ft
- Status of capacity expansion work

Applicants will be required to maintain the data underlying their reports for the duration of the oversight period. As discussed in the Oversight section below, Applicants will be required to participate in a technical conference with Board staff. In connection with the technical conference, guidance will be developed regarding the Board's requirements for both recordkeeping and reporting of any data, including scope, methodology and formatting.

Further, to ensure that the Board may adequately address any issues that materialize once all aspects of the Transaction have been implemented, the Board will impose, as a condition, a monitoring period of seven years for Applicants' commitments to Metra. During this oversight period, the Board will retain the ability to take additional action to remediate Transaction-related harms, including consideration of imposing conditions relating to dispatching and conditions Metra and the Coalition communities have requested, if necessary and appropriate.

With the above Board-required modifications, the Board will impose Applicants' commitments to Metra as conditions of the Transaction. (See Applicants Final Br., App. A at A2-A4, Rider 1, Attach. 1.1.) The Board will also impose Applicants' voluntary environmental commitments to the Coalition communities as conditions of the Transaction. See Final EIS 4-17; see also infra Environmental Matters section.

CN Responsive Application.¹⁷⁹ In Docket Nos. FD 36500 (Sub-No. 1), FD 36500 (Sub-No. 2), FD 36500 (Sub-No. 3), and FD 36500 (Sub-No. 4), CN seeks, as a condition to any approval of the Transaction, approval of acquisition by Illinois Central Railroad Company (ICRR), CN’s U.S. rail carrier affiliate, of KCS’s lines between Springfield, Ill., and East St. Louis, Ill., on the one hand, and Kansas City, Mo., on the other hand (collectively, the Springfield Line).¹⁸⁰ More specifically:

In Docket No. FD 36500 (Sub-No. 1), ICRR seeks approval for a line sale of KCS’s Springfield Line to ICRR, as a condition of any merger approval. (CN Am. Appl. 6-7.) In connection with the line acquisition, ICRR also seeks acquisition of an 8.33% ownership share of Kansas City Terminal Railway Company (KCT)—which would enable ICRR to operate over KCT-controlled trackage in Kansas City—and a 50% ownership interest in KCS’s International Freight Gateway terminal (IFG Terminal) south of Kansas City. (*Id.* at 7.)

In Docket No. FD 36500 (Sub-No. 2), ICRR seeks overhead trackage rights on KCS’s Pittsburg Subdivision, between milepost 5.6+/- at Airline Junction in Kansas City, and milepost 29.5+/- near Grandview, Mo., to reach the IFG Terminal (in which ICRR would acquire a 50% ownership interest as part of the transaction in Docket No. FD 36500 (Sub-No.1)). (*Id.* at 7, 22-23.)

In Docket No. FD 36500 (Sub-No. 3), Canadian National Railway Company (CNR) and ICRR seek authority to control Gateway Eastern Railway Company (GWER) by acquiring

¹⁷⁹ CN filed its responsive application on February 28, 2022, and filed an amended responsive application on June 9, 2022.

CN asserted that its responsive application should be classified as a minor transaction because the proposed divestiture transaction “clearly will not have any anticompetitive effects.” (CN Am. Appl. 4.) However, CN submitted all of the information required for significant transactions in both its original and amended responsive applications.

In Canadian Pacific Railway—Control—Kansas City Southern (Decision No. 13), FD 36500 (STB served Feb. 18, 2022), the Board found that it could not determine, based on the record at the time, whether CN’s application would be a “minor” transaction. In Decision No. 20, the Board accepted for consideration CN’s responsive application, as amended, and found that it was not necessary to designate the application as minor or significant.

¹⁸⁰ The Springfield Line consists of the following lines: (1) the line from milepost 192.4 at Cockrell (Springfield), Ill., through milepost 482.0 at Rock Creek Jct. (Kansas City), Mo. (milepost equation at Murrayville, Ill., where milepost 221.7=milepost 226.7); (2) the line from milepost 68.2 at Roodhouse, Ill. (milepost 237.2 on the first segment) through milepost 287.2 at Church (East St. Louis), Ill., including KCS’s interest in the UP/KCS Joint Facility between Godfrey, Ill., and Church (milepost equation at Godfrey where milepost 28.0=milepost 252.1); (3) the Jacksonville Branch from milepost 226.7 at Murrayville to milepost 216.3 at Jacksonville, Ill.; and (4) KCS’s interest as lessor in the Fulton Branch from milepost 0.0 to milepost 3.0 at Mexico, Mo., leased to Ozark Valley Railroad, Inc. (CN Am. Appl. 6-7.)

KCS's equity interest in the GWER, a KCS subsidiary that owns segments of the Springfield Line located in the East St. Louis terminal area.¹⁸¹ (Id. at 7-8.)

In Docket No. FD 36500 (Sub-No. 4), ICRR seeks acquisition by assignment of KCS's trackage rights over UP between Rock Creek Junction and Airline Junction, which enable KCS (and would enable ICRR) to reach the joint agency at Knoche Yard and the IFG Terminal from the Springfield Line.¹⁸² (Id. at 5, 8, 23.) CN states that, to the extent those trackage rights are not assignable, ICRR requests that the Board override the assignment provision. (Id. at 8.)

According to CN, the proposed divestiture (or sale) of the KCS rail lines to CN would increase rail traffic on those rail lines by preserving and enhancing competition in the regional rail transportation industry. For some of the rail segments proposed for sale, CN projects that the increase in rail traffic would reach or exceed the thresholds triggering an environmental review under the Board's environmental regulations at 49 C.F.R. §§ 1105.6(b)(4) and 1105.7(e)(5). Therefore, OEA initiated an environmental and historic review of CN's responsive application that is separate from, but has been conducted concurrently with, OEA's environmental review of the Transaction.

To date, OEA has completed a detailed review of the available environmental and historic data for the proposed divestiture of the Springfield Line; consulted with appropriate federal, state, local, and tribal agencies about that proposal; conducted on-site field investigations; and prepared detailed maps. OEA also is in the process of preparing appropriate draft environmental documentation.

Positions of the Parties. CN claims that the proposed divestiture would ensure that the Springfield Line would be effectively utilized as a competitive alternative for Kansas City-Chicago transportation, preventing the loss of its competitive potential as an underdeveloped and underutilized portion of the post-merger CPKC system. CN claims that divestiture would give rail shippers a far more efficient way of shipping between Kansas City and Chicago, and beyond to Michigan and Eastern Canada. (CN Comments 65.) According to CN, CP's service to these areas is limited by restrictions on its trackage rights and other operational constraints. (Id.) CN argues that it, in contrast, would be able to serve intermodal and automotive shippers in Michigan and Ontario over its own tracks, providing shippers with a far more efficient way of reaching Kansas City. (Id.)

¹⁸¹ CN states that, upon approval of the applications in the Sub-Nos. 1 and 3 dockets, ICRR will file a notice of intra-corporate family transaction pursuant to which ICRR will acquire trackage rights over GWER (i) between GWER's milepost 238.7 at or near Q Tower and GWER's milepost 236.8 at or near Willows in East St. Louis; (ii) between GWER's milepost 2.3 at or near Wann in East Alton, Ill., and GWER's milepost 0.91 at or near Olin Brass in East Alton; and (iii) from GWER's milepost 265.01 at or near Roxana in Wood River, Ill., "to the change in ownership in the track with Shell Oil Company." (CN Am. Appl. 7-8.)

¹⁸² Specifically, ICRR seeks the assignment of KCS's trackage rights agreement with UP relating to the 1.4-mile UP line, between milepost 276.8 at Rock Creek Junction and approximately milepost 278.2, in the vicinity of Airline Junction in Kansas City, Mo. (CN Am. Appl. 23.)

CN states that it intends to invest more than \$250 million in the Springfield Line to create a “Kansas City Speedway,” which would increase the speed along the route to at least 40 mph as well as add automotive and terminal capacity.¹⁸³ (CN Comments 65.) According to CN, the proposed divestiture would improve transportation options and competition, take more than 80,000 long-haul trucks off the road annually, and create 140 jobs.¹⁸⁴ (CN Comments 65-66; CN Am. Appl. 15.) According to CN, this would result in increased capacity and fluidity for a more resilient U.S. rail network and supply chain; new markets and optionality for shippers, including significant benefits for auto, intermodal, and grain shippers; shorter route options, meaning faster transit times, less fuel consumption, fewer greenhouse gas emissions, and lower costs; and critical support for the emerging electric vehicle market. (CN Final Br. 14-15, 19-20.)

CN argues that Applicants would underutilize the line. (CN Reb. 38-39; CN Final Br. 11.) CN alleges that Applicants have shown they want to avoid having to compete with the Springfield Line under CN control post-Transaction. (See, e.g., CN Reb. 34-35.) In contrast, CN states that it would grant CPKC haulage rights to serve all customers on the Springfield Line and to interchange with other carriers at interchange points along the Line. (CN Am. Appl. 4.) Therefore, according to CN, Springfield Line customers would not lose a rail option, but rather most would gain a rail option with divestiture. (*Id.*)

CN argues that the Springfield Line runs parallel to CP’s Kansas City-Chicago route, and that 49 U.S.C. § 11324(c) gives the Board express authority to order divestiture of parallel tracks. (See, e.g., CN Comments 66.) CN argues that when two merging railroads have parallel lines, there is a risk of competitive harm if the merged entity concentrates investment in one line to the detriment of the other. (CN Comments, V.S. Randall, Sec. 3.2.1.) CN claims that Applicants’ plans for the Springfield Line confirm that such a concentration will happen here absent a condition to prevent such harms. (*Id.*, V.S. Randall, Sec. 3.2.1.)

CN argues that the Board has broad public interest authority to consider harmful effects of the merger as well as potential benefits of divestiture. (CN Reb. 37-38; CN Final Br. 10-11 (citing *Vill. of Barrington v. STB*, 636 F.3d 650, 657 (D.C. Cir. 2011)); see also *id.* at 19-20.) CN argues that the Board should consider harmful effects to competition resulting from the merger, (see, e.g., CN Reb. 35-37), Applicants’ plan to underutilize or downgrade the Springfield Line (see CN Final Br. 12-13), harms to the Chicago area resulting from the merger, (*id.* at 13-14), as well as the numerous benefits CN claims would result from a condition related to the Springfield Line, (*id.* at 14-15, 19-20). CN argues that a condition requiring divestiture or trackage rights is necessary in the public interest. (*Id.* at 10-11.)

CN acknowledges that “the traffic volumes that currently move between Kansas City and Chicago over the Springfield Line are below the levels that are currently moved by CP over its

¹⁸³ U.S. Representative Steve Cohen supports the proposed divestiture, stating that CN’s investment will benefit communities and improve transit times, reducing strains on the supply chain network. (Hon. Cohen Letter 1.)

¹⁸⁴ Some shippers, including ADM, Coca-Cola Canada, and Planters Canada have expressed support for the proposed divestiture. (CN Reb. 14-15.)

parallel line.” (CN Am. Appl. 13.) But, according to CN, “that does not mean that shippers today are not able to use the Springfield Line as a competitive threat when negotiating with CP, as CP’s expert previously acknowledged.” (*Id.* (citing CP Reply to CN and KCS Joint Mot. for Approval of Voting Trust, V.S. Majure, paras. 18–19, 38, June 28, 2021, Canadian Nat’l Ry.—Control—Kan. City S. Ry., FD 36514).)

CN claims that loss of the Springfield Line as a possible competitive alternative to CP would present a competitive concern even if there were no traffic moving on it today between Kansas City and Chicago. (CN Am. Appl. 12-13.) CN claims that under the doctrine of potential competition, significant competitive concerns arise where an acquiring company will have reduced incentives to deploy the acquired assets efficiently because of the concern that doing so will cannibalize the acquiring company’s existing sales. (CN Reb. 35-36 (citing DOJ & FTC, Horizontal Merger Guidelines, § 5.3 (Aug. 19, 2010)); *see also* CN Final Br. 10 & n.24.) CN argues that, in other merger proceedings, the agency has ordered remedies to preserve potential competition, such as preserving build-out options. (CN Reb. 37 (citing CN-IC, 4 S.T.B. at 154; UP-SP, 1 S.T.B. at 466; Canadian Nat’l Ry.—Control—Duluth, Missabe & Iron Range Ry. (CN-DM&IR), 7 S.T.B. 526, 566 (2004)).) CN argues that agency precedent also requires the Board to alleviate the anticompetitive effects of allowing a line to “lie fallow” and that CPKC being allowed to relegate the Springfield Line to branch status would present such a situation. (CN Final Br. 13 (citing Santa Fe S. Pac. Corp.—Control—S. Pac. Transp. Co. (SF-SP), 2 I.C.C.2d 709, 792 (1986)).) CN further argues that the agency has recognized that a neglected line can be restored to competitive status through repair and investment. (CN Final Br. 12 (citing St. Louis Sw. Ry.—Purchase (Portion)—Gibbons, 363 I.C.C. 320, 325 (1980)).)

CN argues that its proposed acquisition of the Springfield Line would also alleviate community and capacity-related harms that would result from CPKC moving more traffic through Chicago, including over lines owned by Metra and through communities that have expressed concerns about merger impacts. (CN Reb., R.V.S. MacDonald 3-4; CN Final Br. 13-14; *see also* CN Reb. 15-18.) CN and the Coalition argue that the alternative Springfield Line routing would reduce harms to Coalition communities by reducing the number of trains running through them, which are described in the Metra & Chicago Communities section. (CN Final Br. 13; Coal. Reply to CN Am. Appl. 3.) CN also argues that, by bypassing Chicago rail congestion, its alternative routing would provide faster transit through the Chicago area. (CN Reb., R.V.S. MacDonald 3-4.)

In its final brief, CN states that the Board could impose a trackage rights condition as an alternative to divestiture of the Springfield Line and proposes language for such a condition.¹⁸⁵ (CN Final Br. 9, 16-18; *id.*, App. A.)

¹⁸⁵ CN requests leave to file two appendices to its final brief, stating that the appendices provide responses to the Board’s questions at the public hearing, and in particular to questions regarding trackage rights as an alternative to divestiture. (CN Mot. 1-2, Oct. 21, 2022.) The Board will grant the motion to accept the appendices into the record. *See Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 32)*, FD 36500 et al., slip op. at 2 (STB served Oct. 14, 2022) (granting a similar request).

Applicants oppose divestiture of the Springfield Line. They argue that CN does not demonstrate that the Transaction would cause substantial competitive harm that divestiture of the Springfield Line would remedy and that, therefore, the Board cannot grant CN's responsive application under the pre-2001 merger rules. (Applicants Reb. 1-228, 1-243 to 1-245.) According to Applicants, although the Springfield Line has an important role serving local and overhead traffic to and from the East St. Louis gateway, traffic data confirm that the Springfield Line is not a competitive option for Kansas City-Chicago traffic or to points beyond that route. (*Id.* at 1-226 to 1-235.) Applicants claim that, in contrast, CP, BNSF, UP, and NSR all have competitive Kansas City-Chicago routes, with multiple competitive options for routes extending beyond those points, negating CN's arguments regarding parallelism and loss of potential competition. (*Id.* at 1-234 to 1-235 (citing UP-MKT, 4 I.C.C.2d at 436-37, 449, 451).) Applicants also contest CN's claims regarding truck diversion, (*id.* at 1-255 to 1-258), and argue that divestiture would harm current Springfield Line customers and undermine the benefits of the proposed transaction, (*id.* at 1-241 to 1-250, 1-253 to 1-255). Applicants state that they will not downgrade the Springfield Line post-Transaction; rather, Applicants expect that the line will continue to serve local customers that generate significant volumes of traffic, will provide the Applicants with access to St. Louis, Mo. markets, and will provide post-Transaction routing opportunities. (*Id.* at 1-250 to 1-252.)

Other entities also oppose the responsive application. Amtrak opposes the proposed divestiture, arguing that it does not satisfy the Board's "operationally feasible" requirement for imposition of conditions and would harm the public interest by adversely affecting the provision of passenger rail service in the region. (Amtrak Opp'n to CN Responsive Appl. 1.) Multiple grain customers express concerns about the potential loss of single-line service to Mexico. (Applicants Reb. 1-248 to 1-250.) Bartlett Grain Company, LP, (Bartlett) for example, argues that divestiture would jeopardize the investment Bartlett has made in facilities to support single-line shipments to Mexico. (Bartlett, V.S. Knief, paras. 5-10.)

Analysis. As discussed above in the Applicable Standards section, under the pre-2001 merger policy, the Board will not impose conditions unless it finds, among other things, that the consolidation may produce effects harmful to the public interest and that the narrowly tailored conditions will mitigate or eliminate the harmful effects. BN-SF, 10 I.C.C.2d at 729. The Board is also "disinclined to impose conditions that would broadly restructure the competitive balance among railroads with unpredictable effects." *Id.*; see also, e.g., UP-MP, 366 I.C.C. at 564. Here, there is no indication that the merger will create harmful effects that would be remedied by the proposed divestiture of the Springfield Line. As discussed below, the record does not support a finding that the merger will create competitive harms related to the Springfield Line, or that the merged CPKC will downgrade the line. In addition, the proposed divestiture is not needed to remedy alleged community and capacity-related harms to the Chicago area. Given the Board's conclusion regarding the absence of any Transaction-related harms related to the Springfield Line, the Board does not need to examine claims regarding the benefits of the proposed Springfield divestiture transaction, such as CN's claims regarding truck diversion. See BN-SF, 10 I.C.C.2d at 729. The Board will therefore deny CN's responsive application, as well as the alternative request for trackage rights in CN's final brief. See *id.*

Competitive Harms and Ongoing Status of the Springfield Line. Giving CN access to new routings would certainly bolster CN's own competitive posture and would also serve CN's interests by weakening the competing CPKC system. But while the Board has authority to order divestiture or trackage rights to remedy competitive harms from a merger, including specific authority to address parallel lines, see § 11324(c), neither divestiture nor trackage rights conditions are warranted here because CN has not demonstrated a competitive harm to be remedied. As Applicants point out, in addition to CP's route between Kansas City and Chicago, BNSF, UP, and NS all have single-line routes between those points, and there are competitive options for the routes extending beyond those points. (See Applicants Reb. 1-226 to 1-235.) Applicants examined the traffic data in the carload waybill sample and CN's and KCS's 100% traffic tapes and showed that there has been minimal interchange between KCS and CN at Springfield in recent years, and minimal traffic via that route in lanes that include the Kansas City-Chicago corridor.¹⁸⁶ (Applicants Reb. 1-230; id., Vol. 2, R.V.S. Brown/Zebrowski, paras. 88-93.) Given this analysis demonstrating that the Springfield Line is rarely used as an option for routes that include Kansas City to Chicago traffic, and the multiple competitive options that exist for such traffic, CN has not shown that a condition requiring divestiture or trackage rights would remedy a competitive harm related to the Transaction. See UP-MKT, 4 I.C.C.2d at 449.

While the agency recognizes the loss of any potential competition as a harm, the potential competition that CN asserts would be lost would be of only marginal value, given the many other rail options available for these traffic flows. The agency decisions that CN cites involved conditions to address competitive harms in markets with much more limited competitive rail options. See CN-DM&IR, 7 S.T.B. 526 at 540-41, 566 (condition imposed to preserve build-out option for shippers that had been solely served by carrier being acquired); CN-IC, 4 S.T.B. at 153-55 (haulage condition imposed for shippers that had been exclusively served by CN and that were expected to lose a planned build-out option); UP-SP, 1 S.T.B. at 275, 466 (condition imposed to preserve two Class I connections that had previously been available and that would soon be available again in the absence of the merger). Further, the suggestion that shippers' loss of the ability to invoke the Springfield Line as a competitive threat in negotiations would affect competition is not persuasive in light of the existence of other, more frequently used alternatives that presumably also could be invoked in negotiations.

CN's claims that the Springfield Line would be underutilized or downgraded post-Transaction also do not warrant imposition of a condition requiring divestiture or providing trackage rights. Applicants state that the Springfield Line will be an important part of their post-Transaction network serving local customers, including large grain customers, and providing CPKC with access to St. Louis. (Applicants Reb. 1-250 to 1-252; id., Vol. 2, R.V.S. Naatz, paras. 92-94 (describing KCS investment in line and its role in grain deliveries to Mexico).) Applicants explain that they expect both organic growth and Transaction-related growth on the Springfield Line. (See id. at 1-250 to 1-251.) They describe opportunities to grow traffic and attract new customers by linking the former CP network with St. Louis and opportunities to

¹⁸⁶ Specifically, Applicants examined traffic moving between Kansas City and Chicago, Mexico and Chicago, Kansas City and Detroit, Mexico and Detroit, Kansas City and Toronto, and Mexico and Toronto. (Applicants Reb., Vol. 2, R.V.S. Brown/Zebrowski, para. 92.)

develop new routing options by working with smaller railroads. (See id. at 1-251 to 1-252.) Applicants state that the Springfield Line will allow CPKC to offer existing Springfield Line customers single-line service to the upper Midwest and Canada, a service which those customers have indicated will afford them new business opportunities. (See id. at 1-252 to 1-253.)

While the growth that Applicants anticipate is not large, Applicants' plans for the line are not comparable to the circumstances that led to the imposition of a divestiture condition in SF-SP, 2 I.C.C.2d 709, which CN cites in support of its argument, (see CN Final Br. 13). In SF-SP, the agency was concerned that the merged carrier would gain substantially enhanced market power over a significant amount of traffic that was expected to be rerouted. SF-SP, 2 I.C.C.2d at 789. The agency described multiple reasons for its concerns regarding continued competition, including an operating plan that showed a drop in GTMs of more than 22% on one section of the corridor at issue, and a similar drop on another section. Id. at 787-92. The agency was concerned that decreased traffic densities would put competition at risk. Id. at 787-92. Here, in contrast, Applicants have indicated that their plans do not include a reduction of traffic that would result in a downgrading of the Springfield Line. Indeed, Applicants indicate that KCS serves important customers on the line and that CPKC will use the line to provide new routing options to those customers, as well as to pursue new customers. (Applicants Reb. 1-250 to 1-253.) Under these circumstances, it is unlikely that CPKC will have an incentive to downgrade the Springfield Line. Further, as described above, the Board does not find that the Transaction will have harmful effects on competition for routes that encompass Kansas City-Chicago.¹⁸⁷ The Board also reiterates its disinclination under the pre-2001 major merger policy to "impose conditions that would broadly restructure the competitive balance among railroads with unpredictable effects." BN-SF, 10 I.C.C.2d at 729; see also, e.g., UP-MP, 366 I.C.C. at 564. Therefore, the Board will not impose a condition on the basis of the concern raised by CN regarding potential future Springfield Line underutilization.¹⁸⁸ See BN-SF, 10 I.C.C.2d at 729.

Chicago-Area Community and Capacity-Related Impacts. Although the Coalition expresses its support for the proposed divestiture to potentially mitigate impacts to Chicago-area

¹⁸⁷ CN argues that the agency has recognized that a neglected line can be restored to competitive status through repair and investment. (CN Final Br. 12 (citing St. Louis Sw. Ry., 363 I.C.C. at 325).) That is certainly true; however, the case cited by CN involved a proposed line sale related to bankruptcy rather than a potential merger condition. There is no suggestion that the merged CPKC would not have the resources to maintain the Springfield Line.

¹⁸⁸ Additionally, CSXT requests that the Board impose conditions to obviate any risk that the Transaction might harm efficient competition for East-West traffic through the gateway at East St. Louis. (CSXT Comments 22-23; CSXT Final Br. 30.) However, the Board notes that this request is based on the idea that Applicants will downgrade the Springfield Line, resulting in slower trains and a diversion of traffic. (See CSXT Comments 22-23; id., V.S. DiDeo 1-2.) Having concluded above that such a result is not likely, the Board finds that the specific condition requested by CSXT is unwarranted. However, to the extent that CSXT continues to have concerns, Applicants have made certain commitments regarding gateways, (see Applicants Final Br. 22-23), and the Board is imposing further conditions regarding gateways as described in the Determinations Regarding Applicants' Open Gateway Commitments & Additional Board Conditions section.

communities, and CN argues that divestiture could alleviate community concerns as well as impacts on Metra and Chicago-area capacity, as described in the Metra & Chicago Communities section, the Board finds that no significant harms to Chicago-area communities will result from the Transaction. However, as described in that section, the Board is imposing mitigation volunteered by Applicants with additional narrowly tailored requirements, including environmental mitigation for Chicago-area communities. Therefore, there is no need to impose any further condition related to the Springfield Line to address the Chicago-area issues raised by CN and the Coalition.

Environmental Review of the Springfield Line. Given the Board's decision here to deny CN's responsive application, the ongoing environmental and historic review of the proposed divestiture of the Springfield Line will be terminated because there is no longer a proposed federal action pending before the Board involving divestiture.

During the EIS process on the Transaction, commenters, including CN, argued that the divestiture should have been treated as an alternative to the Transaction in the EIS. OEA properly rejected those claims in the Final EIS. Final EIS, App. S at S-5 to S-10. As OEA explained, the divestiture is not a reasonable alternative to the Transaction because it would not meet the purpose and need of the Transaction.¹⁸⁹ Id. at S-6. The Transaction is not a federal-government-proposed or -sponsored project. Thus, the project's purpose and need should be informed by both Applicants' goals and the Board's enabling statute. See Alaska Survival v. STB, 705 F.3d 1073, 1084-85 (9th Cir. 2013). Because the proposed divestiture is intended to meet different transportation needs identified by a different applicant, it does not meet the purpose and need for the Transaction and therefore, as OEA concluded (Final EIS, App. S at S-6), cannot be considered a reasonable alternative to the Transaction.

Specifically, as OEA explained, id., the divestiture would primarily affect a different geographic area compared to the Transaction and would involve a different set of potential environmental impacts. The purpose of analyzing alternatives is to allow agency decisionmakers to compare environmental impacts between the reasonable and feasible alternatives for a particular proposal. However, based on the information provided by CN, OEA reasonably concluded that, rather than avoiding or minimizing adverse impacts of the Transaction, the divestiture could, in fact, result in additional adverse environmental impacts in a different geographical area.¹⁹⁰ Id.

¹⁸⁹ The Transaction is an end-to-end merger with a stated goal of providing more economical and reliable rail transportation options serving important north-south traffic flows between the United States, Canada, and Mexico. CN's proposed divestiture has a different purpose and goal: it is intended to offer new local and potentially regional transportation options, including movements between Chicago and Kansas City, between Michigan/Eastern Canada and Kansas City, and between Canada and the Midwest and East St. Louis.

¹⁹⁰ For example, the rail lines on which rail traffic would increase as a result of the proposed divestiture would experience no or very minimal increases in rail traffic as a result of the Transaction alone.

In short, OEA reasonably determined that combining the environmental reviews of two conflicting proposals submitted at different times by two competing private railroad applicants, involving different environmental issues and different third-party contractors, would have been inappropriate and impractical. Final EIS, App. S at S-7. Furthermore, a combined environmental review would have been unnecessary, as OEA could have and would have completed both environmental reviews, thus providing the Board with a complete environmental record on both proposals, before issuance of a final decision authorizing both proposals had the Board decided to do so. See id. Because the Board finds here, however, that the proposed divestiture is not warranted, there is no need for OEA to complete the environmental review of the divestiture, and it therefore will be terminated.

Wylie-Meridian Route & NSR Responsive Application. The Meridian-Wylie Route, which runs between Meridian, Miss., and Wylie, Tex., involves: (1) the KCS-NSR gateway at Meridian; (2) the Meridian Speedway; (3) the KCS line between Shreveport, La., and the Wylie Intermodal Terminal in Wylie (Shreveport-Wylie Section); and (4) the Wylie Intermodal Terminal, a 500-acre intermodal facility owned by KCS located 20 miles northeast of Dallas, Tex. (NSR Am. Comment 3.)

The Meridian Speedway is a rail line connecting Meridian and Shreveport that is owned by Meridian Speedway, LLC (MSLLC), a joint venture between KCS and NSR. The joint venture was formed in 2006, subject to the regulatory jurisdiction of the Board. See Norfolk S. Ry.—Trackage Rts. Exemption—Meridian Speedway LLC—Between Meridian, Miss. & Shreveport, La., FD 34821 et al. (STB served Feb. 22, 2006). Under the relevant transactional documents relating to the formation of MSLLC (the MSLLC Agreements), NSR acquired a 30% equity interest and certain minority voting and ownership rights in MSLLC; however, KCS retained control of MSLLC.¹⁹¹ In exchange for its equity interest and voting and ownership rights, NSR committed to making significant investments in the Meridian Speedway, including capital improvements to increase capacity on the line. Further, NSR became the sole provider of rail service for certain transcontinental intermodal traffic over the line. KCS operates the Meridian Speedway and currently moves NSR intermodal traffic thereover via haulage. (See NSR Am. Comments 10-11; Applicants Reb., Vol. 2, R.V.S. Simmons, paras. 53-55.)¹⁹²

NSR Responsive Application. NSR asserts that the Transaction would harm intermodal shippers by threatening NSR's ability to offer efficient and reliable interline service between the NSR network and the Dallas-Fort Worth area on the Meridian-Wylie Route. NSR states that the Meridian-Wylie Route represents a significant component of NSR's commercial and operational

¹⁹¹ The MSLLC Agreements were filed with the Board on January 17, 2006, by KCS and NSR in connection with the verified notices of exemption (Docket Nos. FD 34821, FD 34822, and FD 34823) for those elements of the transaction requiring Board authorization. These documents include, among others, the Dallas Terminal Marketing Agreement and the NSR-MSLLC Joint Use Agreement discussed below.

¹⁹² As explained in the Amtrak Settlement Agreement section, CP and Amtrak have entered into a settlement agreement, to be imposed as a condition of the Transaction, under which CPKC will (among other things) participate in a joint study with the goal of instituting Amtrak service between Dallas and Meridian.

offerings to intermodal customers, noting the significant investment it has made in the Meridian Speedway, resulting in improved rail connections and a much-improved rail option for intermodal shippers. (NSR Am. Comments 10-12.) NSR states that it relies on KCS, as operator of MSLLC, and as owner and operator of the Shreveport-Wylie Section and the Wylie Intermodal Terminal, to move intermodal traffic efficiently and reliably on the Meridian-Wylie Route. (Id. at 5.)

NSR raises concerns regarding the projected increase in traffic on the Meridian-Wylie Route, particularly the additional bulk traffic on the Shreveport-Wylie Section, which NSR argues may strain the current capacity of the segment and adversely impact the speed and reliability of intermodal traffic moving on the Meridian-Wylie Route. (Id. at 22-23, 34-36.) NSR further questions the planned operation of new trains that would handle both merchandise traffic and intermodal traffic, as it argues the additional set-offs and pick-ups associated with the merchandise traffic would add significant transit time to what would otherwise be dedicated NSR intermodal service. (Id. at 23-24, 33-34.) NSR also contends that these mixed trains would exceed the length of existing sidings and would force other trains to hold on the sidings while the longer trains pass. (Id. at 24.) Lastly, NSR argues that Applicants' Amended Operating Plan envisions traffic growth that is likely to exceed capacity at Wylie Intermodal Terminal, potentially foreclosing NSR intermodal shippers that are currently using the terminal. (Id. at 25-27.) For these reasons, NSR asserts that the Transaction would adversely affect intermodal traffic moving between the Southeast and the Dallas-Fort Worth area and cause diversion to highways of traffic that otherwise could have used rail intermodal service, thus increasing truck traffic throughout the southern United States. (Id. at 27, 36-38.) NSR argues that the Transaction is not in the public interest absent conditions to ameliorate these impacts. (Id. at 2.)

Therefore, in an amended responsive application filed in Docket No. FD 36500 (Sub-No. 5), NSR seeks as a condition to any Board approval of the proposed Transaction certain contingent trackage rights for overhead movement on the Shreveport-Wylie Section.¹⁹³ (NSR Am. Responsive Appl. 4, 9.) NSR states that the contingent trackage rights would apply only to intermodal traffic originating or terminating at the Wylie Intermodal Terminal, (id. at 4), and would only be exercisable until the later of: (1) NSR's purchase of the Wylie Intermodal Terminal, pursuant to the terms of the Dallas Terminal Marketing Agreement;¹⁹⁴ (2) a "Major Service Standard Failure," as defined under the NSR-MSLLC Joint Use Agreement;¹⁹⁵ and (3) the effective date of any required Board authorization of the requested trackage rights. (NSR

¹⁹³ Specifically, NSR seeks contingent trackage rights between the connection of MSLLC trackage with KCS in Shreveport, at or near milepost V-169.85, and the Wylie Intermodal Terminal in Wylie, at or near milepost T-197.8. (NSR Am. Responsive Appl. 9.)

¹⁹⁴ The Dallas Terminal Marketing Agreement provides that NSR may exercise its option to purchase the Wylie Intermodal Terminal during a "Notice Trigger Period," which is assumed to begin in May 2024 pursuant to an agreement with KCS. (NSR Am. Responsive Appl. 8; see KCS Verified Notice of Exemption, Ex. J, Dall. Terminal Mktg. Agreement, Jan. 17, 2006, Kan. City S.—Exemption for Transactions Within a Corp. Fam., FD 34822.)

¹⁹⁵ (See KCS Verified Notice of Exemption, Ex. C, NSR-MSLLC Joint Use Agreement, Jan. 17, 2006, Kan. City S.—Exemption for Transactions Within a Corp. Fam., FD 34822.)

Am. Responsive Appl. 8-9; see also NSR Am. Comments 46-47.) NSR states that the same contingent trackage rights for the same category of intermodal traffic, subject to the same service disruption trigger, currently apply to its traffic on the Meridian Speedway under the NSR-MSLLC Joint Use Agreement. (NSR Am. Responsive Appl. 9.) NSR maintains that, in requesting the contingent trackage rights, it seeks to maintain existing routes that intermodal shippers currently use and to mitigate the potential harm that may flow from the Transaction. (Id. at 6.)

Applicants assert that the condition sought by NSR is unwarranted, as NSR’s concerns regarding service decline due to projected traffic changes are unfounded. Applicants contend that they would remain motivated to ensure high-quality service on the Meridian-Wylie Route, noting that, as the 70% owner of the MSLLC joint venture, “KCS shares directly in the financial rewards that flow” from reliable service on the Meridian Speedway. (Applicants Reb. 1-261 to 1-263.) Applicants contend that any modest traffic increases would result in only one additional daily train on the Shreveport-Wylie Section (not a net pair, as NSR asserts),¹⁹⁶ and contrary to NSR’s arguments, any increase in bulk traffic on the Meridian-Wylie Route would be from organic growth unrelated to the Transaction. (Applicants Reb. 1-265 to 1-266; id., Vol. 2, R.V.S. Elphick/Orr, paras. 106 & 107.) Applicants assert that the operation of certain mixed trains is a “well-recognized way to improve rail operations” by altering current operations on the Shreveport-Wylie Section “from select day-of-week specialized services to daily balanced service plans, thereby reducing the number of trains operating on that section.” (Id. at 1-266 to 1-267; see id., Vol. 2, R.V.S. Elphick/Orr, paras. 108-110.) Applicants describe a variety of ways in which they can add capacity at the Wylie Intermodal Terminal to handle increased traffic volumes, including by making operational changes, adding cranes and other assets, and increasing the terminal’s physical footprint, if necessary. (Id. at 1-267 to 1-269 & n.480.) Applicants further argue that the contingent trackage rights would only exacerbate any service concerns that might trigger them. (Id. at 1-270.) Lastly, Applicants assert that NSR now seeks only to gain valuable commercial rights that it did not negotiate or pay for when it entered the MSLLC Agreements in 2006 and that such rights “would fundamentally alter the economic relationship between NS[R] and KCS, giving NS[R] a significant windfall.” (Id. at 1-271 to 1-277.)

The New Orleans Public Belt Railroad Commission for the Port of New Orleans, along with the Board of Commissioners of the Port of New Orleans (collectively, Port NOLA), filed in opposition to NSR’s responsive application. Port NOLA operates the New Orleans Public Belt Railroad (NOPB), a Class III switching railroad that interchanges with KCS daily. (Port NOLA Letter 1, July 12, 2022.) Port NOLA and NOPB assert that granting the trackage rights sought by NSR, while giving NSR a measure of control over its own trains, would not resolve the congestion issues triggering the contingency in the first place. (Id. at 2.) Rather, Port NOLA and NOPB argue that adding more trains operated by a second carrier over the Wiley-Shreveport

¹⁹⁶ While NSR contends that the Transaction would increase traffic volumes on the Shreveport-Wylie Section by an average of 53%, (NSR Am. Comments 22-23), Applicants assert that, when accounting for organic growth, the Shreveport-Wylie Section will only see an average Transaction-specific growth of 44.3%, (Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, para. 114.)

Segment would likely exacerbate the problem. (*Id.*) Port NOLA and NOPB oppose the trackage rights sought by NSR unless further conditioned on an effective plan to resolve any congestion issues that may trigger those rights and a plan to provide for future growth that is agreed on and implemented by the Applicants and NSR. (*Id.*)

The Board finds no basis for granting the relief sought by NSR, as there is not sufficient evidence that NSR’s intermodal traffic would be adversely impacted by the Transaction. Applicants will remain incentivized to maintain fluid, efficient operations over the Meridian-Wylie Route, given KCS’s 70% ownership in the Meridian Speedway. (*See Applicants Reb.*, Vol. 2, R.V.S. Simmons, Ex. 13, Ltd. Liab. Co. Agreement of MSLLC § 3 (outlining allocation of profits between NSR and KCS).) While Applicants project an increase in traffic volumes moving on the Shreveport-Wylie Section, NSR has not shown that the impact on intermodal traffic will be as severe as it alleges.¹⁹⁷ The record indicates that the Transaction would result in only one additional train per day on the Shreveport-Wylie Section, and an overall reduction in the number of trains operating over the Meridian Speedway due to Applicants’ plans to operate mixed trains. (Applicants Reb. 1-266 to 1-267; *id.*, Vol. 2, R.V.S. Elphick/Orr, paras. 109-112.) While the record suggests that one mixed train may exceed the length of sidings on the Meridian-Wylie Route, the impact appears minimal, as Applicants note that trains operating in the reverse direction will fit within the current siding capacities. (*Id.*, Vol. 2, R.V.S. Elphick/Orr, para. 115.) As for NSR’s concerns about mixed traffic, Applicants indicate that two daily pairs of solid intermodal trains that move over the Meridian Speedway (with one pair extending to Wylie) would continue to run intact with no manifest traffic. (*Id.*, Vol. 2, R.V.S. Elphick/Orr, para. 111.) Moreover, the record indicates that shippers would benefit from the more frequent service contemplated by the introduction of mixed trains post-Transaction—whereas certain NSR intermodal traffic currently moves in an unbalanced train pair (i.e., an intermodal train that runs five days a week westbound and two days a week eastbound), following the Transaction that traffic will move daily in a combined service with KCS manifest traffic. (*See id.*, Vol. 2, R.V.S. Elphick/Orr, paras. 109, 112.)

As for the capacity concerns at the Wylie Intermodal Terminal, Applicants explain how capacity could be increased, if necessary, (Applicants Reb. 1-268 to 1-269), and NSR concedes that its concerns regarding the Terminal would be addressed upon its taking ownership of the facility, should it opt to exercise its right to do so, (Hr’g Tr. 684:17-20, Sept. 29, 2022). To the extent that NSR seeks certain remedies beyond what it negotiated in the MSLLC Agreements in 2006, the record does not support use of the Board’s conditioning authority to compel new contractual commitments. (*See Applicants Reb.*, Vol. 2, R.V.S. Simmons, paras. 60-61, 69). For these reasons, NSR’s request for contingent trackage rights will be denied.

In its comments on the Transaction, NSR also requests that the Board impose gateway-related conditions, particularly at Meridian and Shreveport, including Applicants’ gateway commitments as well as certain “additional gateway commitments” to address “the potential

¹⁹⁷ For example, NSR cites bulk traffic projections that reflect organic growth; as Applicants note, there is no Transaction-related projected growth in bulk traffic for the Shreveport-Wylie Section. (*See Am. Operating Plan*, workpaper “Trains Per Day and Gross Ton Miles CP REPLY.xlsx”; Applicants Reb., Vol. 2, R.V.S. Elphick/Orr, para. 106.)

harm to competition and shippers . . . due to CPKC’s future control of the Meridian Speedway.” (NSR Am. Comments 45-46.) In its Final Brief, NSR expresses satisfaction with Applicants’ commitments to keep existing gateways open on commercially reasonable terms and to be subject to an oversight period of five years, provided the Board imposes those commitments as a condition to approving the Transaction. (NSR Final Br. 4 n.8.) As explained in the Vertical Competition Issues section, the Board will impose Applicants’ open gateway commitments (as modified by the Board) as a condition to this merger. To the extent that NSR continues to seek any additional gateway protections beyond those, that request will be denied, as the Board has found that the conditions it is prescribing will sufficiently mitigate possible gateway-related harms that may arise from the Transaction.

CSXT Opposition. CSXT opposes the Transaction to the extent it threatens to reduce competition by “maintaining (and possibly expanding) the division of traffic over the Meridian Speedway.” (CSXT Comments 1-2.) CSXT asserts that, through the MSLLC Agreements, KCS has granted NSR exclusive rights to handle certain traffic on the Meridian Speedway and that these exclusivity provisions constitute preexisting and prospective market division arrangements between NSR and KCSR that could receive continued and prospective antitrust immunity if the Transaction were approved by the Board without conditions. (*Id.* at 7.) CSXT asserts that, because these agreements came before the Board as exempted transactions in 2006,¹⁹⁸ the Board has not analyzed or approved the competitive effects of NSR’s “perpetual exclusivity” for the transport over the Meridian Speedway of all intermodal overhead traffic moving east of Meridian and west of Dallas that does not originate or terminate on KCS’s system. (CSXT Comments 9-12.)

CSXT “requests that any approval of the Proposed Transaction requires KCS and KCSR to nullify these exclusivity provisions and free KCSR to operate again over the MSLLC line as it could before any restrictive agreements with NSR, able to interchange overhead intermodal traffic moving over the Speedway between points west of Dallas and points east of Meridian, and, as KCSR deems commercially desirable, afford haulage or trackage rights to carriers other than NSR.” (*Id.* at 8.) CSXT further requests that the Board deny NSR’s responsive application to “assure that NSR cannot extend its exclusive rights over the [Meridian] Speedway to new geographic areas or new types of traffic.” (*Id.* at 20.) CSXT also requests that the Board “require Applicants and MSLLC to establish an efficient interchange between Applicants and CSXT at Meridian” and require Applicants to keep the gateway open on commercially reasonable terms. CSXT contends that such conditions would assure competition over the Meridian Speedway to and from eastern locations and prevent CPKC from diverting traffic that can most efficiently move over the Meridian Speedway to other, less efficient routes. (*Id.* at 20-21.) In its Final Brief,¹⁹⁹ CSXT suggests that the Board should impose an open “Speedway

¹⁹⁸ See Norfolk S. Ry.—Trackage Rts. Exemption—Meridian Speedway LLC—Between Meridian, Miss. & Shreveport, La., FD 34821 et al. (STB served Feb. 22, 2006).

¹⁹⁹ By motion filed on October 24, 2022, CSXT requests leave to attach two exhibits to its Final Brief that were inadvertently omitted from the papers submitted with its July 12, 2022 filing. CSXT notes that by attaching these exhibits, its brief exceeds the 30-page limit. The Board will grant the motion and will accept the exhibits into the record. See Decision No. 32, FD 36500 et al., slip op. at 2 (granting a similar request).

Gateways” commitment that would allow CSXT to offer a competitive alternative to existing rail service at “Speedway Gateways” in Meridian, Shreveport, and Dallas. (CSXT Final Br. 16-17.) Finally, CSXT argues that approval of the Transaction and NSR’s Responsive Application without abrogating the exclusivity arrangements risks perpetually enshrining the anticompetitive effect of those arrangements. (CSXT Resp. to Comments & Responsive Appls. (CSXT Resp. to Comments) 27-28, July 12, 2022.)

Applicants respond that CSXT’s arguments and the relief sought pertaining to the Meridian Speedway are unrelated to the Transaction, as the contractual provisions CSXT seeks to abrogate do not arise from the Transaction. (Applicants Reb. 1-277 to 1-278.) Applicants argue that CSXT’s request to establish an interchange at Meridian and to open that gateway to CSXT is “overreaching,” noting that KCS currently has no interchange with CSXT at Meridian and that, even if it did, Applicants would have no incentive to divert traffic from Meridian to other, less efficient routes because the Transaction will not give the combined system a longer haul for any traffic moving via Meridian compared to pre-Transaction systems. (*Id.* at 1-281.) Applicants state that they would have every incentive to establish a direct interchange with CSX at Meridian should it ever become possible and efficient to do so.²⁰⁰ (*Id.* at 1-281.)

The Board finds no basis for granting the conditions sought by CSXT. CSXT’s opposition is directed principally toward certain provisions of the MSLLC Agreement entered into by NSR and KCS and filed with the Board in 2006 when KCS sought Board authority for certain aspects of the MSLLC joint venture.²⁰¹ See *supra* note 191. In requesting that the Board abrogate parts of the MSLLC Agreements to “re-establish the competitive status quo before 2006,” (CSXT Comments 20), CSXT effectively seeks to ameliorate purported problems not created by this Transaction, see *BN-SF*, 10 I.C.C.2d at 729.²⁰² The Board will decline to address

²⁰⁰ According to Applicants, to the extent traffic flows today between KCS and CSXT at Meridian, it moves in KCS trains to Artesia, Miss., then via WATCO’s Alabama Southern Railroad, to a connection with CSXT between Tuscaloosa and Birmingham, Ala. (Applicants Reb. 1-280.)

²⁰¹ KCS’s verified notice of exemption filed in Docket No. FD 38422 stated that NSR would be the “sole provider for transcontinental intermodal service over the Line.” See KCS Verified Notice of Exemption 6, Jan. 17, 2006, *Kan. City S.—Exemption for Transactions Within a Corp. Fam.*, FD 34822.

²⁰² CSXT argues that the Transaction would exacerbate the anticompetitive effects of the MSLLC Agreements, (CSXT Resp. to Comments 25-27), contending that the Applicants’ projected increase in intermodal traffic over the combined network post-Transaction “implies a significant increase in traffic over efficient routings for which NSR would have exclusivity.” (*Id.* at 25.) While intermodal traffic added to the CPKC network post-Transaction may well aggravate CSXT’s issues with NSR’s exclusivity over the Meridian Speedway, CSXT’s grievance is primarily attributable to the MSLLC Agreements giving rise to that exclusivity—as evidenced by its request that the Board nullify the relevant exclusivity provision—not to the anticipated growth on the merged network. As noted above, the appropriate avenue to challenge the MSLLC joint venture is in the 2006 exemption proceeding. CSXT also argues that the Transaction will create a “new ability for KCS to bypass the Speedway using CP-controlled

this issue through its conditioning authority here, as the appropriate avenue to raise such concerns would be in the 2006 exemption proceeding. In the same vein, CSXT's request that the Board "establish" an interchange at Meridian is not tied to any Transaction-related harm, and granting such a request would put CSXT in a better position than before the Transaction since no such interchange exists today. See BN-SF, 10 I.C.C.2d at 729. CSXT's proposed open "Speedway Gateways" condition, if imposed, would have the same effect. As explained in the Vertical Competition Issues section, the open gateways commitment being imposed as a condition to the Transaction, as modified by the Board, is meant to preserve existing interline options for traffic previously interchanged with another carrier for which the Transaction will give CPKC a longer haul. The Board does not intend it to, nor will the Board expand it to, give competing Class I carriers the right to new interchanges that did not exist pre-Transaction. For these reasons, the relief sought by CSXT will be denied.

CSXT requests other conditions pertaining to gateways, including that the Board require Applicants to continue absorbing the costs associated with an interchange route over the New Orleans Public Belt, as provided under an existing Interchange Allowance Agreement between KCS and CSXT, and that Applicants continue to interchange with CSXT at New Orleans under the terms of that agreement by modifying it to be terminable only upon mutual consent of the parties. (CSXT Comments 21-22.) Under the current agreement, KCS absorbs these costs with the option to terminate the agreement upon 30 days' notice. (See id. at 21; see also Applicants Reb. 1-281.) CSXT contends that, post-Transaction, CPKC's ability to increase CSXT's costs and CPKC's plans to divert traffic to less efficient routes mean that CSXT will no longer be able to rely on KCS's economic interest in the New Orleans interchange as an incentive to continue to bear the costs associated with the interchange. (CSXT Comments 21-22.) In response, Applicants contend that the Transaction will have no effect on CPKC's interest in connecting with CSXT via New Orleans, that CSXT's proposed condition is wholly unrelated to the Transaction, and that there is no legal justification for CSXT's request to require KCS to absorb these costs permanently, effectively altering "mutually agreed-upon contractual terms governing the allocation" of these costs. (Applicants Reb. 1-282.) CSXT's concern that, post-Transaction, CPKC will divert traffic away from the interchange in New Orleans to less efficient routes is not substantiated and does not justify the condition that CSXT requests. As Applicants note, the Transaction "will not create any new single-line route for such traffic, nor create the potential for CPKC to carry the traffic farther by keeping it on CPKC to another gateway." (Applicants Reb., Vol. 2, R.V.S. Brooks, para. 13.) And even if the Transaction does have that effect, such traffic

routings to the north, even if the Speedway is the most efficient routing." (Id.) Although Applicants argue that the Transaction will not give the combined system a longer haul for any traffic moving via Meridian, (Applicants Reb. 1-281), in any event, the open gateway conditions will ensure that pre-Transaction interline options to and from Meridian remain available for such traffic on commercially reasonable terms. And CSXT's argument that the relief requested in NSR's responsive application would "extend and dramatically increase the anticompetitive effects of the [MSLLC Agreements]," (CSXT Resp. to Comments 26), is moot given the Board's denial of NSR's responsive application.

will be subject to Applicants' open gateway commitment being imposed with modification as a condition to the Transaction. CSXT's request will accordingly be denied.²⁰³

CP TIH/PIH Tariff Provision

General Requests. Several commenters express concerns about CP's tariff provisions governing the transportation of hazardous commodities classified as "toxic" or "poison" inhalation hazards, referred to as "TIH/PIH" commodities. (Joint Ass'ns Comments 24-25; Oxy Comments 2, Feb. 28, 2022; CI Comments 4, Feb. 28, 2022; USDA Comments 2, Apr. 22, 2022; NAWG Am. Comments 2, June 9, 2022; Olin Resp. to Comments, Protests, Reqs. for Conditions & Other Opposition (Olin Resp.) 7-10, July 12, 2022.) Specifically, under CP Hazardous Commodities Tariff 8, TIH/PIH shippers are required to (1) maintain a Commercial General Liability Insurance Policy, with the current terms establishing an inclusive limit of not less than \$100 million, and (2) indemnify and defend CP against liabilities caused by or arising from certain enumerated situations, except to the extent that liabilities arise from the negligence or willful misconduct of CP.²⁰⁴ Commenters assert that these terms are highly burdensome and onerous, noting that, except for CP's own negligent or willful misconduct, shippers are assigned liability for everything else, including third-party liability and Acts of God. (Joint Ass'ns Comments 24; Oxy Comments 2; USDA Comments 2; Olin Resp. 3.) They also describe as onerous the requirement that shippers procure not less than \$100 million of insurance to cover their indemnity obligations. (Joint Ass'ns Comments 24; Oxy Comments 2; USDA Comments 2; Olin Resp. 4.) Commenters assert that CP's tariff provisions are in stark contrast to those in KCS's tariff, which treat TIH/PIH materials in a manner applicable to hazardous materials generally, with narrower indemnity requirements and a less onerous insurance requirement.²⁰⁵ (Joint Ass'ns Comments 24; USDA Comments 2; NAWG Am. Comment 2; CI Final Br. 12.)

Several commenters express concern that CP would extend its TIH/PIH tariff provisions to all shipments over the combined CP-KCS network. (Joint Ass'ns Comments 24; Oxy Comments 2; Olin Resp. 9.) Olin states that CP's tariff terms effectively block competitive service for rail shipment of TIH/PIH commodities, noting Olin's decision to restrict the sale of chlorine to any potential customer on CP's system because it refuses "to accept CP's onerous and unfair Tariff terms," and that it would "seriously consider restricting the sale of its product" to existing and new customers on KCS's system should Applicants implement CP's tariff provisions over the combined system. (Olin Resp. 8-9.) CI contends that shippers would incur new costs related to insurance and risk management and "could be forced to change their product

²⁰³ CSXT's other requested conditions pertaining to gateways are addressed in the CN Responsive Application and Vertical Competition Issues sections of this decision.

²⁰⁴ CP, Hazardous Commodities Tariff 8, Items 53 & 54, available at <https://www.cpr.ca/en/customer-resources-site/Documents/tariff-8-hazardous-commodities-jan-01-2023.pdf> (last visited Feb. 10, 2023).

²⁰⁵ See KCS, Rules Publication, Items 260 & 520, available at <https://www.kcsouthern.com/pdf/rules-publications-pricing/9011-g-7-1-2017.pdf> (last visited Feb. 10, 2023).

lines and operations, or to cease operations entirely, due to inability to receive timely and cost-effective shipments of TIH/PIH on the combined CP-KCS network.” (CI Final Br. 13.) Oxy asserts that CP’s tariff provisions would “reduce or completely foreclose [Oxy’s] rail transportation options to and from certain locations.” (Oxy Comments 2.) NAWG states that the provisions “threaten[] to increase the price of key agricultural inputs.” (NAWG Am. Comments 2.)

Accordingly, these commenters seek a condition that would prevent Applicants from extending CP’s TIH/PIH liability, indemnification, or insurance requirements to TIH/PIH shipments that originate on, terminate on, or traverse any segment of the pre-merger KCS network; rather, under the requested condition, the pre-merger KCS tariff indemnity terms for all hazardous materials shipments would continue to govern such transportation. (Joint Ass’ns Comments 25; CI Comments 4; Oxy Comments 2; NAWG Am. Comments 2; USDA Comments 2; Olin Resp. 10-11.) Some commenters urge the Board to require the adoption and extension of KCS’s tariff language applicable to TIH/PIH shipments throughout the combined CP-KCS system. (NAWG Am. Comments 2; CI Final Br. 16.) USDA further “encourages the Board to investigate CP’s tariff language itself,” to determine “how much liability railroads can shift to shippers” while still meeting their common carrier obligations. (USDA Comments 2.)

Applicants contend that applying the requested condition to the pre-Transaction KCS network would be inappropriate, as such a condition would not address any competitive impact of the Transaction. (Applicants Reb. 1-308.) Applicants argue that, absent the Transaction, KCS may freely change its tariff provisions that apply to TIH/PIH commodities in response to evolving conditions and judgments about risk posed by those shipments. (*Id.*) Applicants assert that the requested condition is overreaching, as it would prevent Applicants from adapting to changes in conditions bearing on the risk profile of TIH/PIH shipments on the combined network. (*Id.* at 1-310.) Applicants note that the appropriate mechanism to address the tariff terms applicable to shipments of TIH/PIH commodities on the pre-Transaction KCS network would be to challenge the reasonableness of those terms before the Board or to negotiate those provisions with the Applicants. (*Id.* at 1-308 to 1-311 & n.578 (noting that in Agrium Inc. v. Canadian Pac. Ry., Docket No. NOR 42145, the reasonableness of CP’s Tariff, Item 54, was challenged for unreasonably shifting defense and liability responsibilities for train accidents to the shipper, even when caused by a third party).)²⁰⁶ Applicants further contend that applying a condition to the pre-Transaction CP network is unjustified as CP’s existing tariff terms would be unaffected by the Transaction. (Applicants Reb. 1-307 to 1-308.)

The Board finds that there is not a sufficient basis for granting the relief sought here. Commenters raise concerns regarding CP’s TIH/PIH tariff provisions, but the Board finds no clear nexus between these concerns and the Transaction. While some commenters assert that CP’s TIH/PIH tariff would not apply to movements over pre-merger KCS lines “but for the proposed transaction,” (*see, e.g.*, Joint Ass’ns Final Br. 24, 27), nothing currently prevents KCS from choosing to adopt tariff provisions akin to CP’s TIH/PIH tariff provisions and applying

²⁰⁶ The proceeding in Docket No. NOR 42145 was ultimately dismissed upon the parties reaching a confidential settlement agreement. Agrium Inc. v. Canadian Pac. Ry., NOR 42145 (STB served May 6, 2016).

those provisions on KCS's existing network. While the Board acknowledges the concerns regarding the impact of CP's tariff provisions on the cost and availability of rail service for TIH/PIH commodities, such concerns address preexisting circumstances that are not causally related to the Transaction and are thus outside the scope of the Board's conditioning authority here. Moreover, to the extent that shippers seek to challenge a tariff provision as unreasonable, the Transaction does not affect any shipper's right to bring that challenge before the Board. See 49 U.S.C. §§ 10702, 10704, 11701.

CP-Bayer Settlement Agreement. In comments filed February 28, 2022, Bayer CropScience LP (Bayer) expressed similar concerns regarding CP's TIH/PIH tariff provisions and requested a condition that would require Applicants to apply KCS's Rules Publication systemwide on the consolidated CPKC railroad to shipments of TIH/PIH throughout the consolidated CPKC system. (Bayer Comment 10.) On May 25, 2022, CP and Bayer jointly provided notice that they have entered into a settlement agreement (CP-Bayer Settlement Agreement) and request that the Board (1) impose as a condition of its approval of the Transaction the specific commitments made by Applicants that are set forth in the settlement agreement, and (2) confirm that the Board has and will have jurisdiction to enforce the settlement agreement. (CP-Bayer Joint Notice 1.)²⁰⁷ Under the CP-Bayer Settlement Agreement, CP commits to providing Bayer with three-years' notice before revising the indemnity provisions applicable to the TIH/PIH shipments on KCS's pre-Transaction U.S. network to conform with the provisions of CP's tariff, in exchange for the commitment of Bayer and its suppliers to use the safest-available rolling stock for shipments of these commodities. (See CP-Bayer Joint Notice, Ex. 1, CP-Bayer Settlement Agreement, para. 1.)

Applicants have also committed to extending the terms of the CP-Bayer Settlement Agreement "to any shipper of TIH commodities on the former-KCS network whose rail traffic is subject to the applicable KCS rules tariff(s)," as of the date of Board authorization of the Transaction. (Applicants Final Br., App. A, para. 15; see also Applicants Reb. 1-307.) Applicants state that any such shipper must notify CPKC of its acceptance and agreement to be covered by the terms of that CP-Bayer Settlement Agreement within 30 days of Board approval of the Transaction. (Applicants Final Br., App. A, para. 15.)

As a condition of its approval of the Transaction, the Board will hold Applicants to this commitment, i.e., will require as a condition to the Transaction that Applicants extend the terms of the CP-Bayer Settlement Agreement to any shipper of TIH/PIH commodities on the former-KCS network whose rail traffic is subject to one or more applicable KCS rules tariffs as of the date of this decision. The Board will further require Applicants to provide notice of this commitment, along with a copy of the CP-Bayer Settlement Agreement, to any eligible shipper by May 1, 2023, to help ensure shipper awareness of this commitment. And the Board will modify the commitment such that shippers wishing to participate, and that have in fact been provided the required notice of the commitment and a copy of the CP-Bayer Settlement

²⁰⁷ In exchange for the commitments provided by CP in the Agreement, Bayer notes that its concerns with respect to the Transaction have been resolved, that it will not seek additional conditions in connection with the Application, and that it is withdrawing from participation in this proceeding. (CP-Bayer Joint Notice 2.)

Agreement,²⁰⁸ must notify CPKC by May 30, 2023. Because the Board is imposing a condition enforcing Applicants' commitment with respect to all applicable shippers, including those that serve Bayer, the Board need not also impose the terms of the CP-Bayer Settlement Agreement as a freestanding condition.

Amtrak Settlement Agreement. Amtrak requests a condition imposing the terms of the settlement agreement that it has reached with CP. (See Amtrak Letter 2, Feb. 2, 2022.) In exchange for Amtrak's support for the Transaction, CP made the following commitments to Amtrak:

- CPKC will guarantee that “any changes in operations stemming directly or indirectly” from the Transaction, “including but not limited to changes in freight traffic volumes, scheduling infrastructure, and dispatching,” “will not cause” the Customer On Time Performance metrics of Amtrak trains operating on CP lines to fall below the minimum standard set by the Federal Railroad Administration, (*id.*, Ex. CP-Amtrak Agreement, para. 6);
- CPKC will permit Amtrak to add additional or new passenger rail service on certain CPKC-owned lines, specifically (1) the CP-owned portion of the *Hiawatha* route between Chicago and Milwaukee, (2) the CP-owned lines between Chicago and Minneapolis-St. Paul, (3) the KCS-owned lines between New Orleans and Baton Rouge, and (4) the CP-owned Detroit River Tunnel between Detroit and Windsor, Ontario, (*id.*, Ex. CP-Amtrak Agreement, paras. 1-4); and
- CPKC will participate in a joint study with Amtrak, NSR, UP, and relevant government agencies, with the goal of introducing Amtrak service between Dallas, Texas and Meridian, Mississippi, (*id.*, Ex. CP-Amtrak Agreement, para. 5).²⁰⁹

No other party takes a position on Amtrak's request, although Applicants do cite their commitment to support the expansion of Amtrak passenger services on the CPKC network as a positive development associated with the merger. (See Applicants Final Br. 5.)

The Board will hold Applicants to their representations and impose CP's commitments as conditions to the merger. Most importantly, CP's service guarantee for Amtrak guards against the possibility of any Transaction-related disruption of passenger service. Additionally, as noted above, Applicants specifically cite the expanded passenger service that will be achieved through

²⁰⁸ In the event an eligible shipper is not in fact provided with the required notice and a copy of the CP-Bayer Settlement Agreement within the established timeframe, it may raise this issue with the Board and seek an extension of the opt-in deadline pursuant to the general oversight condition.

²⁰⁹ U.S. Representative Eddie Bernice Johnson filed a letter expressing support for the development of passenger rail between Dallas and Meridian and urging the Board to “ensure that the portion of this route currently owned and operated by KCS would support the use of the route for passenger rail service.” (See Hon. Johnson Letter 2, Oct. 20, 2021.)

their commitment to support Amtrak as a positive development, (see id.), and further indicate their expectation that the Board will impose the agreement as a condition, (see Applicants Reb. 1-29 to 1-30). The Board will therefore require Applicants to honor CP's commitments to Amtrak as a condition of the merger.

FMC Commissioners. Several commissioners of the Federal Maritime Commission (FMC), in their individual capacities, urge the Board to deny approval of the Transaction, arguing that it will adversely impact U.S. ports and U.S.-based intermodal railway systems and would disproportionately benefit Canadian ports and Canadian-based intermodal railway systems. (See FMC Comm'rs Comments 1, June 22, 2022.) In particular, Commissioners Carl W. Bentzel, Louis E. Sola, and Max M. Vekich (collectively, Commissioners) contend that fundamental differences between U.S. and Canadian policies—which result in greater national control, support, and funding of Canadian ports—“work to the detriment of U.S. ports and in favor of Canadian ports attracting the transshipment U.S.-bound cargo.” (Id. at 3; see also id. at 2-5.) The Commissioners argue that the Transaction is aimed at building on policies to use Canadian ports and railroads, rather than U.S. ports and railroads, to carry U.S.-destined cargo. (Id. at 6.) Accordingly, although the Commissioners acknowledge that the Transaction could benefit certain U.S. shippers and ports, they argue that these benefits will be outweighed by a greater negative economic impact on the U.S.-based intermodal industry, including U.S. longshoremen and other U.S. port and railroad workers, trucking and warehousing interests, and the primarily U.S.-based intermodal railroad systems servicing U.S. ports. (Id. at 2, 6.)

Applicants counter that the Canadian government's policies respecting ports “have nothing to do with and are obviously unaffected by” the Transaction. (Applicants Reb. 1-324.) Applicants further assert that the Transaction will not have any effect on intermodal traffic volumes moving between the Ports of Vancouver and St. John and the United States, because CP's network already offers highly efficient intermodal service between Vancouver and Chicago (which is not expected to grow significantly due to capacity constraints at the Port of Vancouver) and because CP is already developing improved intermodal service between the Port of St. John and Chicago, independent of the Transaction. (Applicants Reb. 1-324 to 1-325; id., Vol. 2, R.V.S. Wahba/Naatz, para. 28.) In addition, to the extent the Transaction will enable CPKC to expand its single-line offerings between Canadian ports and Kansas City, Applicants state that the potential growth in these lanes is quite modest and (even if diverted entirely from U.S. ports) would not materially threaten U.S. intermodal ports, which handle substantially higher container volumes than Canadian ports. (See Applicants Reb. 1-326 to 1-327 & fig.34; id., Vol. 2, R.V.S. Wahba/Naatz 18.)

The Board appreciates the Commissioners' concerns regarding the condition and competitiveness of U.S. ports. However, as noted above in the Public Benefits of the Transaction section, the Board finds that the Transaction will benefit U.S. shippers and receivers, given the availability of new single-line routes from the Port of Lázaro Cárdenas in Mexico to the interior of the United States, especially in times when western U.S. ports are congested. Moreover, as the Commissioners recognize, any potential disadvantages faced by U.S. ports are the result of longstanding differences between U.S. and Canadian geography and government policy. (FMC Comm'rs Comments 2-5, June 22, 2022 (discussing Canada's smaller number of better-financed ports).) The “market inequity between Canada's support of its ports and U.S.

efforts,” (*id.* at 3), that concerns the Commissioners is a preexisting problem unrelated to the Transaction—one best raised with the appropriate U.S. legislators and policymakers—and is not a sufficient basis to deny approval of the Transaction.

Service Concerns. Certain commenters have requested conditions to address the possibility of post-Transaction service disruptions. CN raises concerns regarding service during the implementation phase, asserting that Applicants should be required to submit a Service Assurance Plan²¹⁰ or its equivalent to address potential service disruptions, in light of the alleged errors and inconsistencies contained in the Operating Plan. (CN Comments 76.) USDA raises concerns about both potential transitional service impacts and permanent impacts from increased traffic volumes, noting that a Service Assurance Plan “would help alleviate these concerns by requiring the applicants to address any transitional service issues that might arise,” and by providing benchmarking measures to assess post-Transaction service. (USDA Comments 2, Feb. 28, 2022.)

Joint Associations seek several conditions “to mitigate the impacts of any merger-related service disruptions upon shippers,” based on conditions imposed in CN-WC, 5 S.T.B. at 922, including monetary penalties, as well as 30 days’ written notice of any planned service changes at shipper facilities. (Joint Ass’ns Comments 21-24.) NGFA urges the Board to financially penalize Applicants if service is compromised during the first years after the merger. (NGFA Comments 10.) Similarly, NCGA requests that the Board “ensure that rail shippers and other customers of [CPKC] can seek payment of money damages for service failures that result from the Applicants failing to adhere to their representations concerning service levels postmerger.” (NCGA Comments 2.)²¹¹

In response to concerns regarding implementation and Transaction-related changes in service, Applicants outline their “Service Promise” through which Applicants will “proactively address any issues that arise” post-Transaction. (Applicants Reb. 1-138; Applicants Final Br. 8-10 & App. A, Rider 1.) This includes, among other things, a “Service Protection Team” that will monitor implementation steps and that will be tasked with resolving concerns and promptly fixing any issues that arise, and a “Customer Advisory Council” that will facilitate dialogue with customers regarding service and customer needs. (Applicants Reb., Vol. 2, R.V.S. Brooks, paras. 34-41.) Applicants state that any issues that are not resolved through those groups may be addressed via an “escalation process” and that, ultimately, mediation is available to address unresolved disputes. (*Id.*, Vol. 2, R.V.S. Brooks, para. 41; Applicants Final Br., App. A,

²¹⁰ In Major Rail Consolidations Procedures, the Board adopted new regulations governing proposals for major rail consolidations, including a requirement that applicants submit a Service Assurance Plan that would “provide certain essential information, such as [applicants’] plans to deal with any potential adverse service effects during implementation and to accommodate such less-than optimum operations.” Major Rail Consolidations Procs., 5 S.T.B. at 579. As noted, the Transaction is not subject to the rules adopted in Major Rail Consolidations Procedures, see Decision No. 4, FD 36500, slip op. at 2-3, and the rules applicable here do not require the submission of a Service Assurance Plan.

²¹¹ U.S. Senator Elizabeth Warren raises general concerns about the potential for significant service disruptions and safety problems. (Hon. Warren Letter 3, Mar. 2, 2023.)

Rider 1, para. 3.) Applicants' Service Promise also entails the reporting of service metrics to the Board during the oversight period, which will include the development of pre-Transaction benchmarks that reflect customer experience. Under the Service Promise, Applicants make a commitment to "develop, implement, and report to the Board on concrete 'Service Action Plans' in the event trends in those metrics indicate a post-Transaction service concern." (Applicants Final Br. 8-9 & App. A, Rider 1, Attach. 1.1; see also Applicants Reb., Vol. 2, R.V.S. Brooks, paras. 36-37.)

The Board will hold Applicants to their representations made under their Service Promise (as detailed in Applicants Reb., Vol. 2, R.V.S. Brooks, paras. 32-41 and Rider 1 of Applicants' Final Brief), including the development of customized "Service Action Plans" to address specific issues when certain thresholds are triggered, and will impose the oversight condition discussed below, but will decline to impose any additional service conditions sought here, including CN's and USDA's requests for a Service Assurance Plan. In addition to Applicants' commitments made in their Service Promise, the oversight condition described below provides a fully effective mechanism for quickly identifying and addressing service disruptions should they arise. Through the oversight condition, Applicants will be subject to extensive reporting requirements during the seven-year oversight period, which will include the reporting of service metrics that will enable the Board to closely monitor operations and any Transaction-related service issues. The operational reporting requirements also include the submission of pre-Transaction baseline data that will enable comparisons of pre- and post-Transaction levels of performance. Moreover, as discussed below, the Board may take other remedial action should circumstances warrant.

Oversight

The Board is establishing oversight for a period of seven years, beginning on the effective date of this decision.²¹² Applicants anticipate that full integration of the CP and KCS systems will be completed within three years of the Board's decision approving the Application. (Appl. 1-14 to 1-15.) As discussed, while the Board does not anticipate significant competitive or operational issues to arise from the Transaction as conditioned, it has identified several areas where complex rail operations—e.g., lines shared with other rail carriers or commuter trains—warrant close monitoring. Given these concerns, the Board finds an initial seven-year oversight period to be appropriate, so as to cover the implementation phase and four years following full implementation, which will include the completion of planned operating improvements and capital investments to accommodate new traffic.²¹³ At the end of the seven-year oversight period, the Board may elect to extend its oversight for an additional period if conditions warrant.

²¹² This oversight period is separate from the environmental reporting and monitoring period imposed as part of the Board's environmental review, which will run concurrently with the oversight period described here. See infra Environmental Matters section pp. 155-56.

²¹³ While Applicants have stated that they would accept an oversight period of up to five years, (Applicants Reb. 1-140), several parties have requested oversight for not less than five years, (see, e.g., BNSF Comments 73; CN Comments 76; NGFA Comments 4; Coal. Comments 4; see also Metra Comments 79; Coal. Final Br. 4 (requesting a 10-year oversight period)).

Numerous parties have asked the Board to hold Applicants to all representations made on the record in this proceeding. (See, e.g., Every Comments 2, 17-18; NSR Am. Comments 8, June 9, 2022; BLET Comments & Req. for Conditions (BLET Comments) 3, Feb. 28, 2022; Allied Rail Unions Comments & Req. for Conditions (Allied Rail Unions Comments) 3, Feb. 28, 2022.) The Board has imposed such a condition in numerous mergers. See, e.g., CN-IC, 4 S.T.B. at 187; UP-SP, 1 S.T.B. at 246 n.14. Recently, however, the Board has expressed some concern that this type of broad order may “create uncertainty” for various reasons. See CSX-Pan Am, FD 36472 et al., slip op. at 35. In CSX-Pan Am, the Board ultimately imposed such a condition in part because Applicants there had stated that they did not oppose it. Id. (“Applicants’ willingness not to oppose such a condition—on this particular record—bears on the Board’s analysis of any uncertainty and potential resultant effects on Applicants’ ability to plan and operate their railroads.”) Here, although Applicants have not indicated agreement with such a condition, they also have not expressly opposed it. Given the scope of this merger and the fact that Applicants’ many representations underlie critical Board findings regarding the Transaction’s impact on service, competition, and the public interest, and the fact that the Board has relied on the entirety of the record in reaching its ultimate decision on the Application, the Board will impose a condition requiring Applicants to adhere to all representations made on the record in this proceeding. In making this determination, the Board has not only considered the nature of this transaction and this record; it has also weighed the values advanced by the general representation adherence condition—such as protecting the integrity of the Board’s processes and the ability of the Board to address any future actions that are contrary to clear commitments on the record here—against the concerns raised in CSX-Pan Am. Nevertheless, in any future attempt to enforce what may be claimed to have been a “representation” made on this record by Applicants, the Board will carefully consider changed circumstances, the difference between a forecast or claim and a commitment, and the context offered by Applicants on the record. See id., FD 36472 et al, slip op. at 35-36.

Throughout the oversight period, the Board will closely monitor Applicants’ compliance with, and the effectiveness of, the conditions imposed herein. To accomplish this goal, the Board will require Applicants to report on numerous metrics at prescribed frequencies, as described in Appendix B.²¹⁴ As discussed, these metrics will aid the assessment of the competitiveness of service provided by CPKC, particularly Applicants’ commitment to keep gateways open on commercially reasonable terms. These metrics will also allow the Board to monitor capacity and traffic fluidity in areas—including the Texas Gulf Coast area and lines in and around Chicago—where rail service complexities pose unique challenges. Additionally, the Board is holding Applicants to their commitment to report metrics reflecting customer experience to address concerns regarding potential service disruptions or degradations. Applicants will be required to maintain the data underlying their reports for the duration of the oversight period.

²¹⁴ Some commenters have sought the reporting of other metrics not covered by the requirements described in Appendix B. (See, e.g., NGFA Comments 11; NDWC Req. for Conditions 17-18; Every Comments 17-18.) The Board expects that most parties requesting reporting conditions will be satisfied by the extensive nature of the imposed reporting requirement. To the extent any request goes beyond the scope of the Board’s ruling here, the Board has deemed more stringent reporting requirements unnecessary.

Moreover, to ensure the effective and efficient collection of information, Applicants will be required to participate in a technical conference with Board staff by May 15, 2023.²¹⁵ In connection with the technical conference, guidance will be developed regarding the Board's requirements for both recordkeeping and reporting of any data, including scope, methodology, and formatting. The Applicants' reporting obligations on the matters described in Appendix B will commence following the technical conference.

At the technical conference, Board staff will discuss appropriate formatting and reporting procedures for this data, and Applicants will be afforded an opportunity to provide input regarding the benefits and burdens associated with the various approaches. As explained further below, Board staff and Applicants will also discuss production of Applicants' 100% traffic tapes. Following the technical conference, the Board will issue a subsequent order as necessary providing further details on these issues. To the extent needed, the Board will also address at that time whether a revised protective order is necessary to facilitate any reporting.

As to be discussed further at the technical conference, the Board may include in a subsequent order a requirement that Applicants file with the Board their 100% traffic tapes.²¹⁶ Production of these materials could allow the Board to better corroborate the other information being reported pursuant to this decision and provide the Board with significant visibility into traffic moving across the combined CPKC network. This could, in turn, help the Board identify and evaluate potential Transaction-related harms that develop post-consummation. For example, the tapes could allow the Board to examine volume shifts and commodities associated with increased train movements in and around Houston, Chicago, and other heavily trafficked areas. This could provide helpful context for understanding potential congestion issues. In addition, by providing both traffic flow and pricing information, the tapes could facilitate understanding of whether and to what extent the Transaction has resulted in adverse competitive impacts on gateways. *See Conrail*, FD 33388 (Sub-No. 90), slip op. at 4 (STB served Dec. 15, 1999) (requiring 100% waybill files so the Board "may obtain an independent determination of trends in rail rates"). And all of this information could help the Board enforce the conditions imposed in this decision, and issue supplemental orders, if warranted.

Separately, the tapes could help the Board assess achievement of the Transaction's predicted public benefits discussed in the Public Benefits section, such as whether CPKC's single-line routings are supporting increased U.S.-bound intermodal movements from the Port of Lázaro Cárdenas in Mexico and the movement of DRUbit from Canada to Gulf Coast refineries.

²¹⁵ The Board has required similar technical conferences in past merger proceedings. *See, e.g., KCS-Tex Mex*, 7 S.T.B. at 952 (requiring KCS to confer with, and provide specified information to, Board staff following the *KCS-Tex Mex* transaction to facilitate the development of a monitoring plan and establish formatting requirements for reporting); *CSX-Pan Am*, FD 36472 et al., slip op. at 50 (directing CSX to meet with Board personnel to establish appropriate measures, methodologies, and reporting procedures for monitoring during the oversight period).

²¹⁶ *See supra* note 141 (citing past merger proceedings in which the Board has required provision of 100% traffic tapes during the oversight period).

This information could be useful to the Board in assessing the positive impacts of vertical rail mergers more generally. Moreover, the Board does not expect that production of the 100% traffic tapes would be unduly burdensome as those materials are kept in the ordinary course of CP's and KCS's business. Provision of the tapes could also reduce burden on the Applicants, as it would better enable the Board to conduct its own analysis of post-Transaction trends, rather than requiring analysis from the Applicants. Potential burden, as well as the issues described above regarding the tapes' usefulness, will be discussed at the technical conference.

Regardless of whether the Board orders Applicants to file 100% traffic tapes following the technical conference, and regardless of the scope and length of any such requirement, Applicants are directed to preserve their 100% traffic tapes covering the duration of the oversight period as well as a five-year period dating back from the effective date of this decision, as described in Appendix B and as discussed previously in this decision.²¹⁷

While the conditions that the Board is imposing—particularly those pertaining to existing gateways—will do much to prevent service and competitive problems, the Board is mindful that operational and other difficulties can arise when implementing transactions of this scope. The Board is authorized to issue supplemental orders under 49 U.S.C. § 11327, which may include taking actions to remediate Transaction-related harms following the transfer of control if warranted.

Labor Matters

The Board's public interest analysis includes consideration of the interests of rail carrier employees affected by the proposed transaction. 49 U.S.C. § 11324(b)(4). Further, under 49 U.S.C. § 11326(a), the Board must impose labor protective conditions on its approval of the Transaction.

Applicants anticipate adding over 1,000 union-represented operating positions across the CP/KCS North American system to accommodate the anticipated traffic growth from the Transaction, with more than 800 of those new jobs in the United States. (Appl. 1-26 to 1-27; *id.*, Vol. 2, V.S. Becker, para. 12; Am. Operating Plan, para. 243.)²¹⁸ Applicants state that the replacement of the existing CP-KCS interchange at Kansas City with new CPKC single-line services may affect a limited number of employees. Those single-line services will involve relocated crew change locations, deeper blocking, and a de-emphasis on interchange switching activity at the Kansas City joint facility that CP and KCS share today. They will also involve

²¹⁷ This baseline period, which would preserve information pre-dating the disruptions to rail transportation caused by the COVID-19 pandemic, could among other things help the Board assess whether certain trends are attributable to the Transaction. *See supra* note 140. If data is no longer available for the entirety of that time period, then Applicants must preserve traffic tapes from the earliest date for which they are available. To the extent that these oversight record retention requirements exceed those set forth at 49 C.F.R. parts 1220 and 1244, the oversight conditions control.

²¹⁸ In an erratum filed on November 5, 2021, Applicants corrected information submitted in the Application, including information contained in their labor impact analysis.

combining the work of CP and KCS employees who work in that territory.²¹⁹ (Appl., Vol. 2, V.S. Becker, para. 13.) While single-line service may require less handling, Applicants state that the projected traffic growth on the network would enhance future work opportunities and result in additional jobs. (Id., Vol. 2, V.S. Becker, paras. 19, 28.)

According to Applicants, the relocation of CP's U.S. operating headquarters from Minneapolis to Kansas City will affect 72 Soo Line union-represented dispatchers and crew management employees, whose functions will be relocated to the Kansas City headquarters and integrated with comparable functions performed by KCS employees. (Id., Vol. 2, V.S. Becker, paras. 21-25.) Applicants project that approximately 135 non-union CP positions (both managerial and administrative) will be relocated to Kansas City. (Id., Vol. 1, V.S. Rolstad, para. 9.) With the consolidation of administrative functions following the transfer of CP jobs from Minneapolis, Applicants anticipate that a total of 112 KCS non-union administrative positions will be reduced at Kansas City. (Id., Vol. 1, V.S. Rolstad, para. 12.)

Applicants anticipate that the Transaction will be subject to the employee protective conditions adopted in New York Dock. They state that they will honor the obligations established in the "Revised Standards for Preemption of Collective Bargaining Agreements for Transactions Initiated Pursuant to Section 11323 of the Interstate Commerce Act" (Cramdown Agreement), reached in 2000 and 2001 with certain labor organizations that represent certain classes of CP and KCS employees, which may bear on implementation of the Transaction pursuant to the New York Dock conditions.²²⁰ (Appl., Vol. 2, V.S. Becker, paras. 30-31; id. at 1-27; see also Applicants Reb. 1-294.)

The following rail unions representing Applicants' organized employees submitted comments on the Transaction: BLET; IAM District Lodge 19; Allied Rail Unions; SMART-TD & ATDA; and IBEW. These parties request that, as a condition of its approval of the Transaction, the Board: (1) impose the employee protective conditions set forth in New York Dock; and (2) impose compliance with the Cramdown Agreement.²²¹

²¹⁹ Applicants state that the Transaction will affect the work performed by certain operating employees of the rail-carrier affiliates of CP and KCS working on the lines of DM&E and KCSR radiating from Kansas City. (Appl., Vol. 2, V.S. Becker, para. 14.)

²²⁰ Under the Cramdown Agreement, when two or more collective bargaining agreements cover work subject to a consolidation or coordination, as defined by the Cramdown Agreement, "the union or unions that represent the affected employees may choose from among the collective bargaining agreements which will apply to the consolidation or coordination; and that if a union fails to choose within the time frame for negotiations under the New York Dock conditions, a New York Dock arbitrator will make the choice based on their determination as to which agreement is most beneficial for the involved employees." (See Allied Rail Unions Comments 2; IAM District Lodge 19 Comments & Req. for Conditions (IAM District Lodge 19 Comments) 2; BLET Comments 2.)

²²¹ (See BLET Comments 1-2; IAM District Lodge 19 Comments 1-2; SMART-TD & ATDA Comments 5; Allied Rail Unions Comments 2; IBEW Comments 1-2.) Allied Rail Unions also request that these conditions be imposed on any licensing authority granted to CN in

U.S. Representatives Betty McCollum and Ilhan Omar urge the Board to consider the impact on affected employees as a result of moving CP's U.S. headquarters from Minneapolis to Kansas City. They note that over 200 jobs and an estimated \$15 million in wages will be lost and transferred out of the state of Minnesota. (Hon. McCollum Letter 1, Sept. 7, 2022; Hon. Omar Letter 1, Sept. 29, 2022.) U.S. Representative Katie Porter raises similar concerns regarding the impact of relocating CP's headquarters on employees in Minneapolis. (Hon. Porter Letter 4, June 7, 2022.)

The basic framework for mitigating the labor impacts of major rail consolidations is embodied in the New York Dock conditions, which provide both substantive benefits for affected employees (up to six years of full wages, moving allowances, preferential hiring, and other benefits) and procedures (negotiation or, if necessary, arbitration) for resolving disputes regarding implementation of particular transactions. New York Dock, 360 I.C.C. at 84-90. No party has disputed the imposition of the New York Dock conditions here, and the Board finds that those conditions will adequately protect the interests of rail carrier employees affected by the Transaction. Therefore, the Board will condition its approval of the Transaction on the labor protections provided under New York Dock. Moreover, as Applicants have represented that they will honor the obligations established in the Cramdown Agreement, the Board will grant the rail unions' request to impose a condition holding Applicants to that representation.

Financial Matters

Claims About Operating Costs. According to Applicants, when the Transaction is fully implemented, CPKC will realize annual benefits of \$889 million in 2019 dollars. (Appl. 1-21.) Of this amount, \$716 million each year is attributable to net revenue gains from additional traffic expected to be handled by the combined system (revenue from increased traffic of \$1,021.9 million minus \$306.3 million for added traffic-handling costs), and \$173 million per year is attributable to efficiencies and cost savings that will be achieved through the Transaction. (Appl. 1-21; id. at Ex. B.)

Some of the other Class I carriers question Applicants' methodologies and estimates for handling the additional traffic. (See Applicants Reb., Vol. 2, R.V.S. Baranowski, paras. 14-15.) Notably, CN claims that Applicants have omitted general and administrative expenses and significantly understated maintenance-of-way and maintenance-of-equipment expenses. (CN Comments, V.S. Randall, Sec. 4.2.) As Applicants' witness Baranowski makes clear, however, he included URCS cost components for appropriate traffic, and costs not accounted for by him are accounted for by other witnesses for Applicants. (Applicants Reb., Vol. 2, R.V.S. Baranowski, para. 16.)

CN also claims that Applicants understate costs. In particular, CN's witness Randall asserts that Applicants' projected-operating expenses for the first three post-merger years are

Docket Nos. FD 36500 (Sub-Nos. 1-4). (Allied Rail Unions Comments on Resp. Appls. & Reqs. for Conditions 2-4.) Because the Board is denying CN's responsive application in those dockets, Allied Rail Unions' request will be denied as moot.

understated by approximately \$2.47 billion when compared to the operating expenses actually incurred by CP US and KCS US during the 2015-2019 period. (CN Comments, V.S. Randall, Sec. 4.) Furthermore, Randall argues, when compared to the average operating expenses incurred by the four largest Class I railroads (BNSF, UP, CSX, and NSR) between 2015 and 2019, Applicants' post-merger operating expense estimates appear to be understated by approximately \$2 billion, representing an understatement of the merged railroad's operating expenses of approximately 10.7 to 12.9% of total operating expenses for those years. (*Id.*)

The Board agrees with Baranowski that Randall's challenge based on historical data is arbitrary. (Applicants Reb., Vol. 2, R.V.S. Baranowski, para. 25.) If one looks at BNSF's data during this period in isolation rather than in combination with data from CSXT, NSR, and UP, the operating expenses of CPKC actually appear overstated. (*Id.*) Furthermore, the Board notes that comparing historical averages is unlikely to indicate specific problems with Applicants' data. Randall's analysis also does not consider the efficiencies of the combined CPKC system as outlined in the Amended Operating Plan. As explained in Applicants' Amended Operating Plan, upon authorization of control, CPKC will begin implementing new train services, longer-distance train profiles, and longer-distance blocking. (Applicants Reb., Vol. 2, R.V.S. Baranowski, para. 26; Am. Operating Plan, paras. 125-133.) The Board finds it reasonable that these steps would lower operating costs. (Applicants Reb., Vol. 2, R.V.S. Baranowski, para. 26.)

Randall also claims that Applicants' operating-cost savings are projected to occur in an unrealistically accelerated time frame by assuming that \$93.5 million, or 80.8%, of the total projected \$115.7 million savings in operating expenses would be achieved in Year 1 post-merger. (CN Comments, V.S. Randall, Sec. 4.3.) He further claims that for transportation, fuel-related, and locomotive leasing/depreciation cost savings, Applicants assume that 96.5% would be realized in Year 1. (*Id.*) CN asserts that because CP cannot begin to physically integrate its network with KCS or influence KCS operations until the merger is approved, it is unlikely that Applicants would be able to implement the operating changes required to generate that magnitude of operating expense savings in the first post-merger year. (*Id.*)

The Board does not find CN's claim persuasive. The timing of cost reductions proposed by Applicants is based on the pace of Transaction implementation set forth in the Application, which itself was based on (among other things) CP's and KCS's strong operational track records and extensive planning for post-control integration. (Applicants Reb., Vol. 2, R.V.S. Baranowski, para. 11.) Even if there is some shortfall due to a planning error or for some other reason, CPKC will face no financial distress in light of its significant financial reserve discussed below.

Financial Condition and Fixed Costs. Pursuant to the Merger Agreement, on December 14, 2021, CP acquired the voting securities of KCS in a stock and cash transaction. (Appl. 1-17; Applicants' Notice Regarding Voting Trust (Dec. 13, 2021).)²²² As a result, CP

²²² In Decision No. 5, the Board approved Applicants' proposed placement of KCS into a voting trust during the pendency of the control proceeding, subject to certain required modifications as described in that decision. See Decision No. 5, FD 36500, slip op. at 6. The

incurred \$8.5 billion (in U.S. dollars) in new debt to finance the cash portion of the Transaction. (Applicants Reb., Vol. 2, R.V.S. Velani/De Bruyn, para. 10.)

The effect of this indebtedness on the combined company's fixed charges is illustrated in the financial statements included as Exhibits 16, 17, and 18 in Volume 1 of the Application. (Appl., Vol. 1, Exs. 16, 17, 18.) CP's witnesses, Nadeem Velanie and Chris De Bruyn, state that CP's bond offering was successful, with significant oversubscription yielding favorable terms and resulting in a low cost of funding. (Applicants Reb., Vol. 2, R.V.S. Velani/De Bruyn, para. 11.) De Bruyn further explains that CP and KCS are "financially strong" and that the new debt associated with the acquisition of KCS will "place neither CP nor CPKC in financial jeopardy" and will not interfere with plans to invest and compete to attract traffic to the combined CP/KCS system. (Appl., Vol. 1, V.S. De Bruyn, para. 11.) Between 2022 and 2024, CP expects to generate \$10.4 billion and to spend \$3.7 billion on capital expenditures and \$1.2 billion on after-tax interest payments on CP standalone and transaction-related debt. (Id., Vol. 1, V.S. De Bruyn, para. 16.) This will leave CP with a cushion of \$5.5 billion. (Id.)

CN responds that the merger raises serious financial concerns and fails the test that CP had proposed to evaluate the potential financial consequences of a merger of CN and KCS in Docket No. FD 36514. (CN Comments 59-61.) According to CN, the combination of the "massive" debt being assumed by CP along with "patently unrealistic" growth projections would likely leave CP starved for cash. (Id. at 59.) CN adds that this would inevitably lead to post-merger CP reducing service levels or leveraging its increased market power to generate the revenues it needs to service its debt. (Id.) CN concludes that the merger is thus likely to disserve the public interest, with potentially severe consequences for shippers, interconnecting railroads, and the national economy. (Id.)

Similarly, CSXT claims that, even if all the asserted benefits from the Transaction materialize, Applicants may not achieve enough incremental profits to cover the new debt. (CSXT Comments, V.S. Carey/Bremser 40.) It claims that Applicants' payback period is about 27 years, which is over three times longer than the average payback period for the large transactions—7.6 years. (Id. at 39.) CSXT adds that this increase in the payback period introduces significantly more financial risk to this transaction relative to prior large transactions because the asserted transaction benefits would need to occur over a much longer time. (Id.)

The Board is not persuaded by these concerns. Applicants note that, as Velani and De Bruyn explain, "CPKC will be financially strong and fully capable of rapidly repaying its Transaction-related debt regardless of how much new traffic it attracts—or how much revenue it reaps from that traffic." (Applicants Reb. 1-54; id., Vol. 2, R.V.S. Velani/De Bruyn.) They demonstrate that CPKC will have sufficient funds to pay down debt and invest in the railroad

Board later affirmed Applicants' use of a voting trust. See Decision No. 8, FD 36500, slip op. at 3-5.

even if CPKC attracted no new traffic at all. (Applicants Reb., Vol. 1-54; *id.*, Vol. 2, R.V.S. Velani/De Bruyn, paras. 23-34.)²²³

Additionally, Applicants have provided convincing explanations for why the Transaction is different in this regard from the merger proposed by CN in Docket No. FD 36514. Velani revisits his analysis in Docket No. FD 36514 and explains that (a) CP acquired KCS shares with less debt than CN would have incurred; (b) CP, unlike CN, has not made return-on-invested-capital (ROIC) targets that could lead “to irrational short-term actions designed to boost ROIC metrics;” and (c), “unlike CP/KCS, concerns about CN’s proposed financial terms arose in a context where there appeared to be a material chance that CN would be forced to unwind its proposed voting trust and divest KCS.” (Applicants Reb., Vol. 2, R.V.S. Velani/De Bruyn, para. 4.)

In sum, the Board concludes that CPKC will be able to absorb the incremental fixed charges associated with this acquisition-related debt while simultaneously investing in the integration of the CP and KCS rail networks and the capacity expansion that would allow it to support anticipated traffic growth and additional competition.

Fairness Determination. Section 11324(c) directs the Board to approve transactions under 49 U.S.C. § 11323 when the Board finds that they are consistent with the public interest. Under that standard, the Board is required to determine whether terms are fair to the shareholders. *Schwabacher v. United States*, 334 U.S. 182, 198-99, 201 (1948); *Zatz v. STB*, 149 F.3d 144, 147 (2d Cir. 1998).

The Board of Directors for CP received separate financial analyses from BMO Nesbitt Burns Inc., Goldman Sachs & Co. LLC, and Evercore Group L.L.C., and the Board of Directors for KCS received analyses from BofA Securities Inc. and Morgan Stanley & Co. LLC. (Appl. 1-18 to 1-19.) These financial analyses employed various valuation techniques to determine the fairness of the terms of the stock purchase to the shareholders of each company. No opposing parties presented evidence to challenge this evidence. These investment firms, which have substantial expertise in the valuation of businesses and securities in connection with mergers and acquisitions, found that the consideration paid by CP was fair to its shareholders and to those of KCS. After carefully reviewing the arguments and conclusions of these investment firms, and with no argument in the record to the contrary, the Board finds that the terms of the acquisition agreement are fair to the shareholders of CP and KCS.

²²³ The Board notes that Moody’s Investors Service (Moody’s) did downgrade CP one notch from Baa1 to Baa2 in light of CP’s increased leverage and uncertainties regarding regulatory approval. (See Appl., Vol. 2, V.S. De Bruyn, Ex. 4.) Moody’s did, however, forecast a stable outlook at this rating, partly reflecting its expectation that CP’s existing rail network would continue to operate well and that CP would make steady progress in reducing its initial elevated leverage as a result of the acquisition toward a 3x debt-to-EBITDA leverage ratio by 2023. (*Id.*)

Environmental Matters

Because the Transaction has the potential to result in significant environmental impacts within the United States, OEA determined that preparation of an EIS is appropriate to meet the Board's obligations under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370m-11, and related laws, including Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108. In the EIS, OEA conducted a detailed analysis of the potential environmental impacts associated with the Transaction and developed a comprehensive environmental record on a broad range of environmental issues. Based on the data provided by Applicants and other publicly available information, the EIS describes the affected environment; evaluates and compares the direct, indirect, and cumulative environmental effects of the Transaction; and identifies reasonable and appropriate mitigation measures. Those measures include voluntary agreements Applicants reached with potentially affected communities and other voluntary mitigation that could eliminate or lessen the expected environmental impacts and address local concerns.

Requirements of NEPA

NEPA requires that the Board examine the environmental effects of proposed federal actions and inform the public concerning those effects. Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, 462 U.S. 87, 97 (1983). Under NEPA, the Board must consider potential beneficial and adverse environmental effects in reaching its decision. The two-fold purpose of NEPA is to ensure that the agency's decision-making process includes environmental considerations and to inform the public about those considerations. Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144, 1151 (D.C. Cir. 2001). While NEPA prescribes the process that must be followed, it does not mandate a particular result. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989). Thus, once the adverse environmental effects of a proposed action have been adequately identified and evaluated, the Board may conclude that other values outweigh the environmental costs. Id.

The EIS Process

On November 12, 2021, the Board published in the Federal Register a Notice of Intent to Prepare an EIS, which initiated the scoping process; requested comments on a draft scope of study for the EIS; and notified the public of planned open house meetings on the draft scope. To help determine the scope of the EIS, OEA involved local, state, and federal agencies, tribes, the public, and other interested organizations. OEA also held six online scoping meetings. After reviewing and considering all comments received, the Board published a final scope of study for the EIS in the Federal Register on February 18, 2022. Final EIS 1-10 to 1-11.

OEA issued a Draft EIS on August 5, 2022. The Draft EIS examined, among other issues, freight and passenger rail safety, grade crossing safety, grade crossing delay, traffic at intermodal facilities, environmental justice concerns, noise and vibration, and potential impacts on biological resources, water resources, air quality, and climate change. The Draft EIS included OEA's preliminary recommended mitigation measures. It also concluded that, apart from train

noise that could result in adverse impacts at some locations, the potential adverse impacts of CP's acquisition of KCS would be negligible, minor, and/or temporary.

OEA issued the Draft EIS for a 45-day public review and comment period, which was later extended to October 14, 2022. During the comment period, OEA hosted seven public meetings to present the Draft EIS findings and hear oral comments, including three online public meetings and four in-person public meetings in Itasca, Ill.; Davenport, Iowa; Excelsior Springs, Mo.; and Beaumont. Also, during the comment period, OEA conducted site visits to observe current conditions in areas that could experience impacts as a result of the Transaction, including Houston; Port Arthur, Tex.; Camanche, Iowa; Davenport; Muscatine, Iowa; Fredonia/Columbus Junction, Iowa; Clinton, Iowa; Bensenville, Ill.; Itasca, Ill.; Elgin, Ill.; and Wood Dale, Ill.²²⁴ OEA also accepted written comments on the Draft EIS by mail, email, and via the Board-sponsored project website. OEA received approximately 700 comments on the Draft EIS. Final EIS 1-17.

OEA then prepared a Final EIS, which was issued on January 27, 2023, and was included in the Environmental Protection Agency's (EPA) Notice of Availability in the Federal Register on February 3, 2023. The Final EIS responded to the comments received on the Draft EIS and reflects new or expanded information added in response to comments. As appropriate, OEA also reviewed and addressed environmental issues that parties raised outside of the NEPA process, including in formal filings submitted to the Board and in statements made during the Board's public hearings on the transportation merits of the Transaction. The Final EIS presented OEA's final conclusions regarding the potential environmental impacts of the Transaction and set forth OEA's final recommendations to the Board, including final recommended mitigation measures.

Focus of Environmental Review

In preparing the EIS, OEA applied the thresholds set forth in the Board's environmental regulations at 49 C.F.R. § 1105.7(e)(5)(i) and 49 C.F.R. § 1105.7(e)(5)(ii) to identify rail lines where the projected increase in rail traffic warranted environmental review.²²⁵ Based on the information Applicants supplied, OEA identified rail lines in Illinois, Iowa, Missouri, Kansas, Oklahoma, Arkansas, Louisiana, and Texas that will experience increases in rail traffic that will exceed these thresholds as a result of the Transaction. Final EIS 1-11. The largest expected change will occur on the CP mainline between Sabula Junction, Iowa, and Kansas City, Mo., where Applicants project that rail traffic will increase by approximately 14.4 trains per day, on average. Id. at 3.1-9. Other rail lines will experience smaller increases in rail traffic, no change in rail traffic, or a decrease in rail traffic.

²²⁴ The site visits between Elgin and Bensenville included riding the Metra MD-W line.

²²⁵ The thresholds for assessing environmental impacts from increased rail traffic on rail lines are an increase in rail traffic of at least 100% (measured in gross ton miles annually) or an increase of at least eight trains per day. 49 C.F.R. § 1105.7(e)(5)(i). For rail lines located in areas that are in nonattainment status under the Clean Air Act, 42 U.S.C. §§ 7401-7671q, the threshold for air quality analysis is an increase in rail traffic of at least 50% (measured in gross ton miles annually) or an increase of at least three trains per day. 49 C.F.R. § 1105.7(e)(5)(ii).

In addition, the Transaction will result in changes in operational activities at rail yards and intermodal facilities that will meet or exceed the Board's environmental review thresholds at 49 C.F.R. § 1105.7(e)(5)(i) & (ii).²²⁶ Specifically, OEA found that activity at four yards (Detroit Container Terminal, Schiller Park Yard, Bensenville Yard, and Wylie Rail Yard) meet or exceed the threshold for environmental review. Final EIS 2-11.

Applicants plan to make capital improvements within the existing rail right-of-way in the United States to support the projected increases in rail traffic. The capital improvements, which were analyzed in the EIS, include extending 13 existing passing sidings, adding 10 new passing sidings, adding a double track in Blue Valley near Kansas City, Mo., and adding a facility working track adjacent to the International Freight Gateway intermodal terminal near Kansas City. Final EIS 2-13.²²⁷ Applicants do not propose to construct any new rail lines subject to Board licensing or to abandon any rail lines as part of the Transaction.

Two alternatives were evaluated in the EIS: the proposed action (CP acquiring control of KCS) and the No-Action alternative. The No-Action Alternative would occur if the Board were to deny authority for the Transaction. Under the No-Action Alternative, CP would not acquire control of KCS and the projected changes in rail traffic, rail yard activity, and intermodal facility activity would not occur as a result of the Transaction. However, rail traffic on rail lines and activities at rail yards and intermodal facilities could still change to support regular railroad operations or as a result of changing market conditions, such as general economic growth. Under the No-Action Alternative, Applicants would not construct the 25 planned capital improvements. However, CP and KCS could construct sidings, extend existing sidings, or add additional track within the rail right-of-way in the future without seeking Board authority as needed to support or improve rail operations on their respective rail networks.

Environmental Mitigation

NEPA authorizes the Board to impose conditions to mitigate adverse environmental impacts in railroad mergers. Conrail, 3 S.T.B. at 354. The Board's consistent practice in imposing environmental conditions is to mitigate only impacts resulting directly from the transaction, and not to require mitigation for existing conditions and existing railroad operations.

²²⁶ The threshold for environmental review of rail yards and intermodal facilities is an increase in rail yard activity of at least 100% (measured by carload activity) or an average increase in truck traffic of more than 10% of the average daily traffic or 50 vehicles a day on any affected road segment. 49 C.F.R. § 1105.7(e)(5)(i). For rail yards and intermodal facilities in nonattainment areas, the threshold for air quality analysis is an increase in rail yard activity of at least 20% (measured by carload activity) or an average increase in truck traffic of more than 10% of the average daily traffic or 50 vehicles a day on a given road segment. 49 C.F.R. § 1105.7(e)(5)(ii).

²²⁷ In this case, Applicants stated that the planned capital improvements within the United States are necessary to accommodate the projected increase in rail traffic, and they sufficiently developed the location, engineering, and design of the planned capital improvements to support an environmental review. Therefore, OEA assessed the potential impacts of the planned capital improvements as part of the EIS. Final EIS 2-14.

Id. at 356. However, the Board encourages railroad applicants to negotiate and enter into voluntary agreements with potentially affected communities and other entities to address local concerns. Voluntary mitigation and negotiated agreements with communities can be more far-reaching than Board-imposed mitigation and can be tailored to the specific needs of communities or other entities. Id. at 357.

Applicants' proposed voluntary mitigation measures were set forth in the Draft EIS. Following issuance of the Draft EIS, Applicants notified OEA that they had reached agreements with 10 communities in which rail traffic will increase as a result of the Transaction: City of Davenport; City of Bettendorf, Iowa; City of Muscatine; City of LeClaire, Iowa; City of Clinton; City of Washington, Iowa; City of Fruitland, Iowa; Village of Hampshire, Ill.; Village of Pingree Grove, Ill.; and City of Liberty, Mo. See Final EIS 4-1 to 4-2. As a result, the EIS did not recommend any site-specific mitigation for these communities.

Applicants also submitted voluntary mitigation measures to address potential impacts in the Houston area. These measures include a commitment to meet regularly with community representatives and to work with communities to address concerns related to impacts resulting from the Transaction. VM-Community-01 in App. C below; Final EIS 4-16. Applicants also commit to providing community leaders with options for reporting issues (such as blocked grade crossings). These options include CP's "Community Connect" webpage and CP's Public Safety Communication Centre, which can be reached toll-free at 1-800-716-9132. Applicants state that the Public Safety Communications Centre is staffed 24 hours a day, 365 days a year with trained communication officers who track reported incidents using Computer Aided Dispatch (CAD) software. VM-Community-02 in App. C below, Final EIS 4-16 to 4-17.

Furthermore, Applicants proposed voluntary conditions to mitigate potential impacts for communities in the Chicago area. Those commitments include working with those communities to install an FRA-approved Quiet Zone,²²⁸ subject to necessary approvals and practicability; a predictive mobility system to deliver advanced notice of blocked grade crossings to citizens, police, fire, and rescue operations, and others; ITS Interconnect for Advanced Warning Signs at strategic locations to give drivers information about occupied grade crossings;²²⁹ and PTC wireless technology tie-ins at grade crossings adjacent to Metra platforms, which will minimize the activation of crossing lights and gates. Applicants stated that they will fund all of these

²²⁸ A Quiet Zone is a segment of track along which locomotive horns need not be routinely sounded. FRA requires railroads to sound horns at highway/rail at-grade crossings unless a Quiet Zone has been established.

²²⁹ FRA defines ITS as "the application of new communications, computer, and sensor technologies to highways and transit systems and the careful integration of system functions to provide more efficient and effective solutions to multimodal transportation problems. The goal of ITS is to provide a seamless, multimodal, and nationwide transportation system." Final EIS 3.2-8.

measures, which would be subject to approval by Metra, as the owner of the track. VM-Community-03 in App. C below; Final EIS 4-17.²³⁰

In the Final EIS, OEA recommended that the Board impose conditions requiring compliance with Applicants' voluntary mitigation and the agreements Applicants reached with affected communities in eastern Iowa, western Illinois, and Missouri. MM-Community-01 in App. C below; Final EIS 4-17. OEA further recommended that if Applicants reach additional agreements with communities or other entities after Board approval of the Transaction, Applicants be required to notify the Board. The Board can then impose a condition that requires Applicants to comply with the terms of the agreement. MM-Community-02 in App. C below; Final EIS 4-17.

In addition, the Final EIS recommended a five-year environmental reporting and monitoring period condition requiring Applicants to file quarterly reports on their progress in implementing the Board's environmental mitigation conditions. MM-General-02 in App. C below; Final EIS 4-4. The monitoring and reporting condition will facilitate the Board's ability to take appropriate action, including revising its final mitigation measures or extending the duration of the monitoring period to allow completion of the required mitigation, if there is a material change in the facts or circumstances upon which the Board relied in imposing specific environmental mitigation. See MM-General-01 in App. C below; Final EIS 4-4.

Finally, to facilitate compliance with the voluntary mitigation measures that Applicants submitted, and to address ongoing consultation between Applicants and community leaders in the Houston and Chicago areas, OEA recommended that the Board impose conditions requiring Applicants to establish Community Liaisons to consult with Houston area community leaders and with community leaders in the Chicago area communities of Itasca, Bensenville, Wood Dale, Roselle, Schaumburg, Hanover Park, Bartlett, Elgin, and DuPage County. Final EIS 4-18. The two community liaison conditions in the Final EIS stated that the community liaison positions should be staffed for five years. MM-Community-03, MM-Community-04 in App. C below; Final EIS 4-18.

The Board agrees with OEA's final recommended mitigation, see App. C, and is imposing it, with three modifications. First, for consistency with the Board's seven-year oversight and reporting period on issues related to the transportation merits, the Board is extending OEA's five-year environmental reporting and monitoring condition (MM-General-02)

²³⁰ On February 27, 2023, the Coalition filed a letter seeking clarification from OEA and Applicants about the meaning and intent of some of the provisions in these measures and suggesting that the Coalition was unaware of certain terms until the Final EIS was issued. (Coal. Letter 2, Feb. 27, 2023.) Applicants replied on the same day, noting that their voluntary mitigation was properly made available to OEA and all interested parties and stating that they are committed to engaging in dialogue with the Coalition about how Applicants anticipate implementing the commitments they have made. (Applicants Letter 1, Feb. 27, 2023.) The Coalition responded by letter dated March 1, 2023, again asking for OEA's participation in the implementation of Applicants' voluntary mitigation. However, OEA generally does not participate in setting the terms of voluntary mitigation.

to seven years. Second, the Board is extending the five-year term for OEA's community liaison conditions for Houston and Chicago (MM-Community-03, MM-Community-04) to seven years. Also, given the important role of community liaisons in facilitating communication with Applicants to address community concerns in Houston and Chicago, the Board will consider further extending the community liaison terms if circumstances warrant.

Analysis of Environmental Issues

The Draft EIS evaluated environmental issues including rail operations, safety, relevant transportation systems, hazardous materials transportation and hazardous waste sites, environmental justice, energy, air quality and climate, noise and vibration, biological resources, water resources, and cultural resources. OEA concluded that an increase in train traffic resulting from the Transaction could result in adverse noise impacts at some locations because trains will be more frequent. However, OEA found that potential adverse impacts to all other resource areas as a result of the Transaction will be negligible, minor, and/or temporary and that many of the concerns raised by commenters involve existing conditions rather than impacts related to increased Transaction-related train traffic.²³¹

Many commenters raised concerns about the sufficiency of OEA's analysis in the Draft EIS related to vehicular delay at roadway/rail at-grade crossings (grade crossings) in general and grade crossing delay impacts on emergency response vehicles in particular. In response, the Final EIS included additional information related to those potential impacts. The additions include information on estimated gate-down time for different types of trains at each of the 1,365 grade crossings in the study area and maps showing the location of grade crossings and grade-separated crossings in relation to police stations, fire stations, and hospitals throughout the study area. Final EIS 3.3-8. In addition, for a subset of 751 grade crossings in the study area that are most likely to be used by emergency vehicles, the Final EIS identified alternative routes that those emergency vehicles could use and calculated the length of those alternative routes. Id.

The Final EIS expanded the study area for noise and vibration, grade crossing safety, grade crossing delay/emergency response, and freight rail safety to also include a segment of a UP rail line that extends from Beaumont to Rosenberg, Texas, and passes through the Houston area (rail line segment U-BEAU-01). Id. at 3.1-1, 3.2-1 to 3.2-2, 3.6-1. Finally, the Final EIS concluded that the Transaction will not result in an overall increase in air pollutant emissions, including Greenhouse Gas (GHG) emissions, and could result in an overall decrease in emissions due to the expected diversion of freight from truck to rail transportation and the resulting removal of approximately 64,000 trucks per year from highways. Id. at 3.7-33. The Final EIS also updated the air quality analysis to reflect the Environmental Protection Agency's (EPA) recent reclassification of the Houston-Galveston-Brazoria Area Ozone Nonattainment Area and the Dallas-Fort Worth Ozone Nonattainment Area from "Serious" nonattainment to "Severe" nonattainment. Id. at 3.7-12 to 3.7-13.

²³¹ Again, the Board's consistent practice in imposing environmental conditions generally is to mitigate only impacts resulting directly from the transaction, and not to require mitigation for existing conditions or existing railroad operations. Conrail, 3 S.T.B. at 356.

The Final EIS concluded that, generally, to the extent that there will be adverse impacts resulting directly from the Transaction, most of the potential impacts, including impacts on grade crossing delay and emergency vehicles, will be negligible, minor, and/or temporary. Id. at Summary S-10. However, even with mitigation, train noise associated with increased rail traffic resulting from the Transaction will result in adverse impacts on residences and other locations that are sensitive to noise. Id.²³²

Environmental Issues of Particular Concern

The Board addresses here some of the issues that were of particular concern to commenters during the EIS process. The Board is satisfied that all areas of concern have been fully studied and properly analyzed, and the Board adopts the analysis, conclusions, and recommended mitigation in the Final EIS, with the three modifications noted above. See App. C below.

Freight and Passenger Rail Safety

OEA thoroughly analyzed potential adverse impacts on freight rail safety. Final EIS 3.1.1. As indicated in the Final EIS, 99.9% of CP and KCS incidents during the five-year review period analyzed in the EIS (2015 to 2019) did not result in injuries or fatalities. Id. at 3.1-7. Incident rates on the CP and KCS systems have also declined in recent years. Id. at 3.1-10. The Final EIS explained that under the Transaction the CPKC incident rate of 1.44 incidents per million train miles will remain well below the Class I average of 2.66 incidents per million train miles.²³³ Id. Further, most of the projected increase in rail traffic under the Transaction will result from diverting trains from other rail lines and by the diversion of freight from truck to rail transportation. Thus, any potential increase in rail accidents on rail line segments on the combined CPKC network will be offset, at least in part, by a reduction in the number of accidents on other rail lines, and—for the traffic that is diverted from truck to rail—the total number of accidents will decrease because rail transportation is generally safer than truck transportation. Id. at 3.1-10 to 3.1-11, 3.1-25.

OEA also concluded that the Transaction will result in negligible impacts on passenger rail safety. Id. at Summary S-10. The Final EIS identified nine rail line segments that are currently used for passenger rail on which the Transaction will increase freight rail traffic. Id. The probability of a collision between a freight and passenger train occurring on any of those

²³² On February 27, 2023, EPA’s Regions 5, 6, and 7 (collectively, Regional EPA) submitted a letter providing comments after issuance of the Final EIS. (Regional EPA Letter 1-4, Feb. 27, 2023.) The letter discusses vegetative barriers as mitigation, environmental justice, grade crossing delay, and water resources. (Id.) The Final EIS fully addressed the issues raised by Regional EPA and contains a thorough and reasonable analysis of these issues and appropriate mitigation. See, e.g., Final EIS 3.3-8 to 3.3-9, 3.3-25 to 3.3-27, 3.6-18 to 3.6-23, 3.7-4 to 3.7-5, 3.13-9 to 3.13-10; see also id., App. M at M-11 to M-18; id., App. S at S-256, S-332, S-341 to S-342, S-352.

²³³ The term “incident” refers to all accidents/incidents as defined in the FRA regulations at 49 C.F.R. § 225.5.

nine rail line segments is currently very low and is expected to remain very low. Id. The Final EIS predicted a total of 0.019 such collisions each year across all nine rail segments, which is roughly equivalent to one collision every 53 years. Id.

Hazardous Materials Transportation

In the Final EIS, the Board took the requisite “hard look” at the potential impacts from transporting hazardous materials and the potential release of hazardous materials from rail cars as a result of the Transaction. See, e.g., Final EIS 3.1-7, 3.1-14 to 3.1-21; see also id., App. F at F-9 to F-19; id., App. S at S-85, S-89, S-91. Over the five-year period analyzed (from 2015 to 2019), CP and KCS combined had 180 derailments, five of which (3%) involved a release of hazardous materials from rail cars. In total CP and KCS together reported releases of hazardous materials from 13 loaded rail cars from 2015 through 2019. Id. at 3.1-7. As the Final EIS explained, on average, for CP and KCS, OEA found one hazardous material release for every 37.8 million miles that a hazmat car traveled -- a rate of 0.0261 hazardous material releases per million hazardous material car miles on main line tracks. Id., App. F at F-11. Of the 170 non-locomotive related hazardous materials incidents reported from 2015 and 2019 on CP and KCS, 151 were liquid releases. Id. at 3.1-17. Almost two-thirds of these liquid releases were 10 gallons or less. Id. Of these liquid releases, 16% were equal to or less than 1 gallon, 58% were equal to, or less than 10 gallons and 78% were equal to or less than 50 gallons. Id.

As the Final EIS concluded, in the event of a release of hazardous materials, the impacts of the release would depend on many factors, including the type of material or materials released; the number of rail cars involved; the volume of material released; the location of the incident in relation to inhabited or sensitive environmental areas; and the timing and effectiveness of local government and railroad emergency response plans. Id. at Summary S-11; id. at 3.1-21. In addition, Applicants have procedures in place to quickly contain any releases of hazardous materials that occur.²³⁴ Final EIS 3.1-21. Because the Transaction is expected to result in diversion of rail traffic from other railroads, any potential increase in the number of releases along rail line segments on the combined CPKC network will be offset, at least in part, by a reduction in the number of releases along other rail lines, and some segments of the CPKC network would see a decrease in the number of releases. Id. Further, to the extent that the transportation of hazardous materials is diverted from truck to rail as a result of the Transaction, the total number of releases will decrease because rail transportation is generally safer than truck transportation. Id.

²³⁴ Such containment would minimize the potential for groundwater contamination, limit the extent of any soil contamination, and allow for the proper management of any surface water contamination. If hazardous materials were to enter surface waters as a result of a release, appropriate management actions would depend on the materials involved and the resources affected. These might include, but would not necessarily be limited to, cleaning up the spill and temporarily restricting the use of the water body. Such measures would minimize the potential for long-term soil or water contamination. Id. at 3.1-21.

Applicants have proposed voluntary mitigation to minimize the potential for incidents to occur during rail operations and minimize the potential impacts of any incidents that do occur.²³⁵ Applicants' Safety Integration Plan (SIP) also addresses the safety implications of merging the operations of CP and KCS.²³⁶ According to the SIP (attached to the Final EIS as Appendix G), CP has been the safest carrier in North America for 15 years.²³⁷ See Final EIS, App. G at 4. CP was one of the railroads involved in developing the United States Hazardous Materials Instructions for Rail (USHMI), covering all aspects of rail transportation of hazardous materials. *Id.*, App. G at 84-86. CP also employs various training programs and conducts periodic inspections and tests to ensure its programs and procedures for the safe handling of hazardous materials are operating effectively. In addition, CP has a website dedicated to providing information to the public regarding dangerous goods and hazardous materials. *Id.*, App. G at 82. Following an initial transition period, KCS plans to adopt many of CP's programs and systems, including CP's training programs, CP's Integrated Contingency Planning process, and CP's documentation system. CPKC will also incorporate KCS's emergency response third-party contract resources into CP's emergency response contractor network and KCS-owned emergency response assets into CP's response network. *Id.*, App. G at 10-11. FRA will monitor Applicants' progress through the SIP process at 49 C.F.R. part 1106 and 49 C.F.R. § 244.9, and the SIP process will continue until FRA advises the Board that the Transaction has been safely implemented. Finally, the federal regulatory scheme provides comprehensive rail safety oversight, with other agencies having primary jurisdiction over freight rail safety, including hazardous materials transportation. As the Final EIS explained, Applicants, like all freight

²³⁵ These measures include conducting Transportation Community Awareness and Emergency Response Program (TRANSCAER) workshops (training for communities through which dangerous goods are transported) in potentially affected communities that request this training. VM-Rail-03 in App. C below; Final EIS 4-4. Applicants have also proposed safety measures to avoid releases during the construction of the capital improvements. See VM-Haz. Material Sites-01 to VM-Haz. Material Sites-05 in App. C below; Final EIS 4-10 to 4-11.

²³⁶ Pursuant to 49 C.F.R. part 1106 and FRA regulations at 49 C.F.R. § 244.9, Applicants prepared a SIP that specifically addresses the process Applicants propose to safely integrate the two rail systems. Applicants filed the SIP with the Board on December 28, 2021, and submitted the SIP to FRA for review. On February 28, 2022, FRA approved the SIP. OEA also independently reviewed the SIP and issued it for public comment as part of the Draft EIS. OEA did not receive any written comments on the SIP and recommended that the Board adopt it and require compliance with the SIP, which may be modified or updated as necessary. Under the SIP process Applicants will coordinate with FRA in implementing the SIP, including any amendments thereto. FRA will provide the Board with updates as appropriate during the Transaction's implementation period and advise the Board when, in FRA's view, the integration of Applicants' operations has been fully and safely completed. See VM-Rail-02, MM-Rail-01 in App. C below; Final EIS 4-4 to 4-5.

²³⁷ The EIS supports CP's statement, confirming that CP consistently has had the lowest incident rate per million train-miles of all the Class I railroads. *Id.* at 3.1-7.

railroads, are required to comply with all applicable federal laws and regulations governing the safe transport of hazardous materials.²³⁸ Final EIS 3.1-14; *id.*, App. G at 79-94.

Chicago Area Concerns Related to Hazardous Materials Transportation

On February 23, 2023, after the comment period on the Draft EIS had ended, the Illinois Delegation submitted a letter asking the Board to delay any final decision on the Transaction until it thoroughly reviews the increased transportation of hazardous materials that would result from the Transaction. (Ill. Delegation Letter 1, Feb. 23, 2023.)²³⁹ While the Board appreciates the Illinois Delegation's raising these concerns about matters of significant public importance, as discussed above, the Final EIS contained a thorough analysis of the potential impacts of the Transaction on hazardous materials transportation, and the Board finds that it has the requisite environmental analysis needed to permit the issuance of a final decision at this time without the need for further review.

The Illinois Delegation's February 23, 2023 letter raises concerns about the increased transport of unknown chemicals in the Chicago area and the risk that could result from a derailment similar to the recent derailment involving NSR near East Palestine, Ohio, which

²³⁸ For example, U.S. Department of Transportation (USDOT) regulations include requirements for shipping and packaging containers for hazardous materials, emergency response information, and training and require shippers to transport hazardous materials in rail cars specifically designed for safety of transport and otherwise address safety. *See* 49 C.F.R. parts 171 through 180. Other requirements include: (1) FRA Office of Railroad Safety regulations, 49 C.F.R. Chapter II, which address the railroad industry; (2) EPA's regulations implementing the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 et seq., which governs the clean-up of uncontrolled or abandoned hazardous material sites, incidents, spills, and other emergency releases of pollutants and contaminants to the environment; (3) EPA's regulations regarding the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq., which establishes the framework for the proper management of hazardous and non-hazardous waste "from cradle to grave"; and (4) the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 et seq., which applies to the transportation of hazardous materials in commerce, including interstate and intrastate carriers. Applicants must also comply with FRA regulations governing track safety standards, freight car standards, and operating rules and practices, which all affect the potential for hazardous material releases. In addition, the transportation of hazardous materials is subject to EPA and Occupational Safety and Health Administration (OSHA) regulations. Other EPA regulations address spill prevention and cleanup, and while most EPA regulations address only fixed facilities rather than transport activities, EPA regulations at 40 C.F.R. part 263, "Standards Applicable to Transporters of Hazardous Waste," specify immediate response actions, discharge clean-up, and other requirements for transporters of hazardous waste. The OSHA regulations at 29 C.F.R. § 1910.120, "Hazardous Waste Operations and Emergency Response," specify emergency response and clean-up operations for releases, or substantial threats of releases, of hazardous substances. *See* Final EIS 3.1-14.

²³⁹ A separate letter dated February 17, 2023, from the Illinois Delegation raising environmental issues is discussed below.

resulted in the release of hazardous materials.²⁴⁰ (Ill. Delegation Letter 1-2, Feb. 23, 2023.) The East Palestine derailment is currently being investigated by the appropriate authorities, including the National Transportation Safety Board. With regard to this Transaction, as discussed in the EIS, OEA thoroughly considered the Transaction's potential safety impacts on Chicago-area communities and found that the chance of a hazardous material release is and will remain low. Final EIS 3.1-25; see also id., App. F at F-11.

The EIS analyzed the rail line segment C-ELGI-01 that runs from Elgin to Bensenville, where the communities discussed by the Illinois Delegation in their February 23, 2023 letter are located. While the transportation of hazardous materials will increase on this segment under the Transaction, the Final EIS projected that there will be no more than one release every 100 years on this rail line segment, which is the same level of risk that would occur if the Transaction does not take place. Id., App. F at F-16; see also id., App. S at S-86 to S-87. Moreover, as previously noted, the SIP, other applicable federal regulations, and the Board's required environmental mitigation will help to ensure that hazardous materials are transported safely in the Chicago area and elsewhere on the combined network.

Additionally, the Illinois Delegation asks various questions about OEA's analysis of hazardous materials transportation. (Ill. Delegation Letter 2, Feb. 23, 2023.) In the Final EIS, OEA thoroughly evaluated how changes in rail activity on rail segments under the Transaction would change the likelihood of an accidental release of hazardous materials. This included identifying rail line segments that would experience any increase in hazardous materials transport. Final EIS 3.1-15. OEA calculated the likelihood of hazardous material releases by applying historic release rates in number of annual releases per carload to existing operational conditions to estimate existing condition release frequencies for CP and KCS. Id. OEA then applied the historical release rates to the projected operational conditions under the Transaction to predict release frequencies for CPKC. OEA evaluated the estimated release frequencies under both the No-Action Alternative and the Transaction to determine whether the increase in hazardous materials transport would increase the likelihood of an accidental release. Id.

The Illinois Delegation also asks what specific toxic chemicals were identified that could be transported along the CPKC rail lines. (Ill. Delegation Letter 2, Feb. 23, 2023.) The Board

²⁴⁰ On March 7, 2023, Ohio State Senator Michael A. Rulli filed a letter with the Board raising similar concerns about the NSR derailment in East Palestine, Ohio, and resulting chemical exposure. (State Sen. Rulli Letter 1-2, Mar. 7, 2023.) While more hazardous materials will move on CPKC lines under the Transaction, Applicants will be required to comply with all applicable laws governing the safe transportation of hazardous materials to protect against spills. These laws include USDOT requirements for shipping and packaging containers for hazardous materials, emergency response information and training, and requirements to transport hazardous materials in rail cars specifically designed for safety of transport. 49 C.F.R. parts 171 through 180. As discussed above, Applicants' voluntary mitigation includes processes for sharing information with first responders and emergency planners and conducting training workshops for emergency responders in communities through which hazardous materials are transported. The SIP process also will address the safe transportation of hazardous materials. See Final EIS, 3.1-25 to 3.1-26; id., App. G at 82-89.

notes that railroads are not required to break out all specific commodities they might transport in their applications. But here Applicants identified the following “Chemicals and Plastics” that they expect the combined CPKC network to see growth under the Transaction: butadiene, glycol, isopropanol/propyl alcohol, and caustic soda. (Appl., Vol. 1, V.S. Wahba/Naatz, para. 103.) Railroads have a common carrier obligation to provide transportation or service upon reasonable request, including movements of hazardous materials. 49 U.S.C. § 11101. Given this obligation, Applicants generally cannot limit what types of regulated hazardous materials they transport, and Board regulation does not restrict Applicants or other carriers from increasing the amount and type of hazardous materials they may transport. See Final EIS 3.1-15. However, as discussed above, the Board’s environmental mitigation, including the SIP and other applicable federal laws and regulations governing the safe transport of hazardous materials, should minimize the potential for incidents to occur during rail operations and require appropriate actions to be taken in the event of a spill.²⁴¹ Furthermore, Applicants have processes in place to share information related to hazardous materials transportation and releases with first responders and emergency planners, including types and volumes moving through their respective jurisdictions. Final EIS, App. G at 82-89. Applicants have also committed to notifying appropriate federal, state, and local agencies in the event of a reportable hazardous materials release (VM-Rail-02) and to conduct training workshops for emergency responders in communities through which dangerous goods are transported. VM-Rail-03 in App. C below; Final EIS 4-4; id., App. S at S-85 to S-91.

Finally, the Illinois Delegation asks if the Board considered the potential impacts of a derailment and hazardous materials spill on the Chicago O’Hare International Airport given its proximity to the CPKC rail line. (Ill. Delegation Letter 2, Feb. 23, 2023.) Although potential impacts of a derailment and hazardous material spill on the airport were not specifically considered in the Final EIS, the two segments where CP operates that are south of O’Hare Airport (C-ELGI-01 and C-ELGI-02) triggered the Board’s thresholds for environmental review and, thus, were analyzed to determine what, if any, impact the Transaction would have on hazardous materials safety. Final EIS, App. F at F-16. OEA’s analysis found that, while the number of hazmat carloads would increase, the probability of a release would remain the same between the No Action Alternative and the Transaction (0.04 projected releases per year). Id., App. F at F-21.

²⁴¹ For example, federal regulations require railroads carrying hazardous materials to complete annual route analysis and alternative route analysis to “select the practicable route posing the least overall safety and security risk.” 49 C.F.R. § 172.820. FRA regulations restrict the speed at which high-hazard flammable trains, and trains carrying material poisonous by inhalation, to 50 mph. 49 C.F.R. § 174.310. Additionally, FRA restricts high-hazard flammable trains to 40 mph in High-Threat Urban Areas (HTUA). 49 C.F.R. § 174.310(a)(2). EPA regulations at 40 C.F.R. part 263, “Standards Applicable to Transporters of Hazardous Waste,” specify immediate response actions, discharge clean-up, and other requirements for transporters of hazardous waste. Lastly, the OSHA regulations at 29 C.F.R. § 1910.120, “Hazardous Waste Operations and Emergency Response,” specify emergency response and clean-up operations for releases, or substantial threats of releases, of hazardous substances.

Grade Crossing Safety

As OEA explained, the Transaction will result in only minor adverse impacts on safety at highway/rail at-grade crossings (grade crossings). Across all 1,270 evaluated grade crossings in the study area that met the criteria for safety analysis—including the UP-rail line segment that extends from Beaumont to Rosenberg, which was added in the Final EIS—the total predicted number of train-vehicle crashes in the study area is 31.7 crashes per year under the Transaction, compared to 25.5 crashes per year under the No-Action Alternative, a difference of 6.2 crashes per year. Final EIS 3.2-7. This is equal to .005 crashes per crossing per year as a result of the Transaction. *Id.* at 3.2-5. Across all 1,270 grade crossings, the total predicted number of train-pedestrian crashes is 2.9 per year under the Transaction, compared to 2.3 crashes per year under the No-Action Alternative. *Id.* at 3.2-7. The largest impact on safety is expected to occur at the grade crossing across Miller Road in Hungerford, Tex. *Id.* at 3.2-5. For that grade crossing, OEA projected that the Transaction will result in approximately 0.0277 additional crashes between trains and motor vehicles per year compared to the No-Action Alternative. *Id.* This means that the Transaction is expected to result in the equivalent of one additional crash every 36 years or so compared to the No-Action Alternative at that grade crossing. *Id.* Other grade crossings in the study area are expected to experience smaller increases in accident frequency or no increase in accident frequency as a result of the Transaction. While OEA thus expected the Transaction to result in some increase in the number of crashes on lines in the CPKC system, the number of crashes at grade crossings along other rail lines in the U.S. and on roadways could decrease as the result of the diversion of rail traffic from other rail lines to the combined CPKC network and the diversion of truck traffic to rail traffic. *Id.* at 3.2-7.

To mitigate impacts on grade crossing safety, Applicants proposed mitigation, including “a commitment to work, upon request, with potentially affected communities in support of securing funding for grade crossing mitigation projects where such projects may be appropriate under criteria established by relevant agencies to increase the safety of existing grade crossings,” VM-Grade Crossing-01 in App. C below; Final EIS 4-6, and “a commitment to consult with potentially affected communities to improve visibility at grade crossings by clearing vegetation where practicable,” VM-Grade Crossing-03 in App. C below; Final EIS 4-6. OEA also recommended that the Board impose mitigation requiring Applicants to consult with appropriate state Departments of Transportation and other appropriate agencies prior to constructing, relocating, upgrading, or modifying grade crossings as part of the Transaction, including grade crossing warning devices, and to abide by those agencies’ reasonable requirements for the design of grade crossings and associated warning devices. MM-Grade Crossing-01 in App. C below; Final EIS 4-6 to 4-7. All of these conditions will be imposed.

Grade Crossing Delay/Emergency Response

Many commenters raised concerns about grade crossing delay and emergency response due to blocked crossings and requested mitigation to improve traffic flow. However, most of the concerns relate to pre-existing conditions that are not related to the Transaction. Moreover, the analysis in the Final EIS shows that the Transaction will result in only minor adverse impacts on grade crossing delay. Across the 276 grade crossings with an average annual daily traffic (AADT) of 2,500 or more vehicles per day, the Transaction will result in an average increase in

delay of approximately 0.7 additional seconds per vehicle compared to the No-Action Alternative.²⁴² Final EIS 3.3-6. Many grade crossings in the study area will experience smaller increases in average delay, no increase in average delay, or a decrease in average delay compared to the No-Action Alternative. OEA projected that increased delay at grade crossings will result in a decrease in the level of service (LOS) at only four grade crossings.²⁴³ Id. at 3.3-29. For all four of these crossings, the LOS will decrease from LOS A to LOS B. Id. at 3.3-11, 3.3-29. Because LOS B corresponds to stable traffic flow, OEA properly concluded that the Transaction will result in only minor adverse delay impacts at these grade crossings and that no mitigation is warranted. Id. at 3.3-29. Moreover, because most of the projected increase in rail traffic on the combined CPKC network will be diverted from other rail lines, the Transaction could potentially result in decreased delay at grade crossings on those other rail lines. Id.

Similarly, for the 28 grade crossings on roadways in the study area that are FRA designated as emergency routes in the FRA grade crossing database, OEA concluded that grade crossing delay will have only a minor impact on emergency services. Id. at 3.3-7. On average, the predicted grade crossing delay along emergency routes will be 3.9 seconds per vehicle (corresponding to LOS A) under the Transaction, compared to 2.9 seconds per vehicle (also corresponding to LOS A) under the No-Action Alternative. Id. The Transaction also is not expected to result in adverse impacts on grade crossings near rail yards where rail yard activity will increase. Id. at 3.3-24, 3.3-30.

In addition, the Final EIS analyzed 751 grade crossings for potential impacts on emergency response vehicles. These include all grade crossings in the study area with an AADT of 2,500 vehicles per day or greater, as well as grade crossings with an AADT less than 2,500 vehicles per day that are more than two miles from a grade-separated crossing and more than two miles from a grade crossing with an AADT of 2,500 or higher. As the Final EIS explained, of those 751 grade crossings, 640 (82%) have an existing alternative route that is less than 10 miles long. Id. at 3.3-10. However, for 118 grade crossings in rural areas and small towns in Arkansas, Iowa, Louisiana, Missouri, Oklahoma, and Texas, the existing alternative route would be 10 miles or longer. Id. OEA also identified 73 grade crossings that do not have a possible alternative route (i.e., dead end roads) and 38 where the only existing alternative route involves another grade crossing that could be blocked simultaneously by the same train. Id. at 3.3-9 to 3.3-10. However, standard railroad operating practices include procedures such as planning train schedules and inbound and outbound movements to minimize the time trains occupy a grade crossing and holding trains outside of a crossing where vehicular traffic is substantial. Id. at 3.3-8 to 3.3-9. Accordingly, the Final EIS concluded that, while it is possible (and potentially serious), it is unlikely that a train will become stopped in a position where it blocks such grade crossings for a substantial amount of time during an emergency. Id. at 3.3-9 to 3.3-10.

²⁴² OEA's decision to analyze grade crossings with an AADT of 2,500 vehicles a day or more is consistent with prior practice. If the AADT is below that, there are few vehicles that pass through the crossing and the potential impacts are generally negligible. See Final EIS 3.3-2.

²⁴³ LOS is a qualitative measure of motor vehicle traffic flow, indicated by letters from A to F, where A represents free flow conditions and F indicates extreme congestion.

With the exception of grade crossings located along the 25 planned capital improvements in the United States, the Transaction will not affect the availability of existing alternative routes or the lengths of any existing alternative routes for blocked-grade crossings. Id. at 3.3-12. Further, because Applicants expect average train length to decrease at many grade crossings as a result of the Transaction, the average amount of time that an emergency vehicle will have to wait for a train to pass will decrease at most grade crossings in the study area. Id. However, because average rail traffic will increase, the frequency with which emergency vehicles will be delayed by trains will likely increase as a result of the Transaction. Id. But most of the conditions that apply to these grade crossings exist today, id. at 3.3-29, and the Board is imposing Applicants' proposed voluntary mitigation to minimize potential impacts, VM-Grade Crossing-04, VM-Grade Crossing-05, VM-Grade Crossing-06 in App. C below; Final EIS 4-6.

OEA also compared grade crossing delay impacts to criteria developed by the Federal Highway Administration (FHWA) for identifying grade crossings where grade separation should be considered. OEA identified 23 grade crossings where the Transaction is expected to cause traffic to exceed the FHWA criterion for freight volume (30 trains per day) or the FHWA criterion for total vehicle hours of delay per day (30 hours per day). Final EIS 3.3-25 to 3.3-26. However, for each of those 23 grade crossings, the Transaction will result in a decrease in average delay per delayed vehicle, a decrease in average vehicle queue length, and no change in the LOS. Id. Furthermore, all 23 grade crossings have existing alternative routes, with an average length of 4.8 miles. Id. at 3.3-27.

The Transaction will not result in adverse impacts on grade crossings near rail yards where rail yard activity will increase. However, the Transaction will result in delay impacts at 18 such grade crossings where Applicants intend to add a new passing siding or extend an existing siding. Id. at 3.3-30. Among these, seven have the potential to isolate residences, businesses, or other buildings if Applicants do not develop alternate access routes during final engineering and design. Id.

The Board is imposing all of Applicants' voluntary mitigation to minimize impacts on grade crossing delay and emergency response. These include committing to operate under General Code of Operating Rules providing that, "when practical, a standing train or switching movement must avoid blocking a public crossing longer than 10 minutes," VM-Grade Crossing-02 in App. C below, Final EIS 4-6; "to notify appropriate Emergency Services Dispatching Centers of grade crossings blocked by trains that are stopped and may be unable to move for a significant period of time," VM-Grade Crossing-06 in App. C below; Final EIS 4-6; and "to investigate the potential for creating alternative access for properties where access would be blocked for more than 10 minutes more than once per week," VM-Grade Crossing-04 in App. C below; Final EIS 4-6. The Board is also imposing all of the additional mitigation recommended by OEA, including a condition requiring Applicants to consult with appropriate state Departments of Transportation and other appropriate agencies prior to constructing, relocating, upgrading, or modifying grade crossings as part of the Transaction and to abide by "those agencies' reasonable requirements for the design of grade crossings and associated warning devices." MM-Grade Crossing-01 in App. C below; Final EIS 4-6 to 4-7. Finally, OEA's recommended community liaison conditions for Houston and Chicago area communities will

facilitate ongoing consultation between Applicants and community leaders in those areas. MM-Community-03, MM-Community-04 in App. C below; Final EIS 4-18.

Noise

Many commenters expressed concern that the Transaction could result in adverse noise impacts. As the Final EIS explained, however, communities located near existing CP and KCS rail lines already experience intermittent train noise and have for many years. Final EIS, App. S at S-258. OEA does not expect that the Transaction will cause individual trains on those rail lines to become substantially louder or to become audible in places where they are not currently. Id. at 3.6-29. However, the projected increase in rail traffic from the Transaction will make rail-related noise more frequent, resulting in a higher day-night average noise level (Ldn) at many receptors. Id.

The Final EIS identified a total of 6,307 receptors that will experience an adverse noise impact as a result of the Transaction. Id. at 3.6-20. Those receptors are spread out across 27 counties and parishes in five different states along the existing CP and KCS mainlines. Id. at 3.6-21 to 3.6-22. The counties with the greatest number of adversely affected receptors include Clinton County, Iowa; Scott County, Iowa; Muscatine County, Iowa; and Orange County, Tex. Id. at 3.6-20.

The Board is imposing all of Applicants' voluntary mitigation measures to help address potential noise impacts, including "a commitment to fund the improvements necessary to maintain existing Quiet Zone designations in communities where the acquisition might otherwise cause the designation to be lost." VM-Noise-01 in App. C below; Final EIS 4-7. In addition, as noted above, Applicants have committed to work with certain communities in the Chicago area to create and fund a "new Quiet Zone, subject to necessary approvals and practicability." VM-Community-03 in App. C below; Final EIS 4-17. The Board is also imposing OEA's recommended mitigation to address noise impacts, including conditions that require Applicants to maintain rail and rail beds, MM-Noise-01 in App. C below; Final EIS 4-7; comply with FRA regulations establishing decibel limits for train operations, MM-Noise-02 in App. C below; Final EIS 4-7; consider lubricating curves where doing so would reduce noise, MM-Noise-03 in App. C below; Final EIS 4-7; "employ other safe and efficient operating procedures that could effectively reduce noise from train operations, MM-Noise-04 in App. C below; Final EIS 4-7; and "promptly respond to communities interested in establishing Quiet Zones," MM-Noise-05 in App. C below; Final EIS 4-8. Even with these mitigation measures, however, OEA expects that the Transaction will result in unavoidable adverse noise impacts.

Environmental Justice

Pursuant to Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations* (1994), OEA considered whether the Transaction could potentially result in any significant impacts that will be disproportionately borne by environmental justice (EJ) populations, including minority populations, low-income populations, or American Indian tribes. The Final EIS concluded that the Transaction will not result in any high and adverse environmental impacts on EJ populations with the exception of

noise impacts associated with the projected increase in rail traffic on certain rail line segments. Final EIS 3.13-11. Although OEA determined that Transaction-related noise will affect certain EJ populations, the impacts will not be disproportionately borne by those EJ populations. Indeed, based on OEA's analysis of the demographic data for census block groups and communities along the combined CPKC network, most (approximately 72%) of the receptors that will experience adverse noise impacts are located in non-EJ populations. *Id.* Regardless, so as to minimize noise impacts on EJ populations, the Board is imposing OEA's recommended mitigation requiring Applicants to conduct proactive and targeted outreach to EJ populations that will experience adverse noise impacts as a result of the Transaction to provide information about the process for establishing Quiet Zones. MM-EJ-01 in App. C below; Final EIS 4-16. The Board will also impose Applicants voluntary mitigation measures related to EJ. VM-EJ-01, VM-EJ-02, VM-EJ-03 in App. C below; Final EIS 4-16.

Biological Resources

Pursuant to NEPA and Section 7 of the Endangered Species Act, 16 U.S.C. § 1536, the EIS assessed the potential impacts of the Transaction on biological resources, including federally listed threatened and endangered species. *See* Final EIS 1-5, 1-10. Although the Transaction will result in increased rail traffic on certain rail lines in the combined CPKC system, OEA concluded that plants, fish, and habitat will not be adversely affected. *Id.* at 3.11-17. As the Final EIS explained, the rail lines on which rail traffic will increase have been in operation for many years, and any wildlife living near the rail lines will have become habituated to the presence of the rail line, the occasional presence of passing trains, and intermittent rail-related noise. *Id.* at 3.11-13 to 3.11-14. The number of animal strikes by trains could potentially increase as a result of the Transaction but will remain insignificant relative to other causes of animal injury and mortality. *Id.*

For the EIS, OEA conducted fieldwork at each of the planned capital improvement locations where construction activities could disturb habitat. *Id.* at 3.11-6 to 3.11-8. At several of the planned capital improvement locations, OEA identified suitable habitat for the Indiana bat (*Myotis sodalis*), which is a federally listed endangered species, and the northern long-eared bat (*Myotis septentrionalis*), which is a threatened species that is proposed for listing as endangered. *Id.* At the Cave Springs, Okla., planned capital improvement location, OEA identified suitable foraging habitat for the Ozark big-eared bat (*Corynorhinus townsendii ingens*), which is a federally listed endangered species. *Id.* at 3.11-7. Applicants have voluntarily committed to avoid activities that could affect bat habitat, such as tree removal and the removal of bridges and culverts, during the active bat season, which extends from April 1 to October 31. VM-Biological-03, VM-Biological-04, VM-Biological-05, VM-Biological-06, VM-Biological-07 in App. C below; Final EIS 4-12 to 4-13. Considering these commitments, OEA, in consultation with the United States Fish & Wildlife Service (USFWS), concluded that the Transaction *may affect*, but is *not likely to adversely affect* the Indiana bat, northern long-eared bat, and Ozark big-eared bat, and that it will have negligible impacts on other biological resources. *Id.* at 3.11-15. All applicable USFWS Ecological Services Field Offices have concurred with OEA's conclusions, and the Section 7 consultation process in this proceeding is complete. *Id.* at 1-10.

USFWS recently moved to propose endangered status for the tri-colored bat (*Perimyotis subflavus*), formerly known as the eastern pipistrelle (*Pipistrellus subflavus*). Id. at 3.11-7 to 3.11-8. During fieldwork, OEA positively identified suitable habitat for the tricolored bat in drainage and bridge structures at certain planned capital improvement locations. Id. In addition, during consultation with the Missouri Department of Conservation, OEA identified occurrence records for this species near the study area for the planned double track near Blue Valley in Missouri. Id. Although Section 7 consultation is not required for species that are proposed (but not yet listed) as threatened or endangered, OEA considered the impact of the Transaction on the tri-colored bat in the Final EIS. OEA concluded that, if its final recommended mitigation measures for the protection of the Indiana bat, northern long-eared bat, and Ozark big-eared bat are implemented, the Transaction is unlikely to adversely affect the tricolored bat. Id. at 3.11-16. However, the Board is imposing OEA's recommended mitigation measure (MM-Biological-03) to ensure that the measures voluntarily proposed by Applicants for the endangered Indiana bat and threatened northern long-eared bat would also apply to the proposed endangered tricolored bat. Id. at 3.11-18. See MM-Biological-03 in App. C below; Final EIS 4-14.

Specific Community Concerns

Commenters (including Metra and the Coalition) raised concerns about the Transaction causing impacts to the Chicago area relating to effects on commuter rail services, pedestrian safety, road crossing delays, and safety and request mitigation to address these concerns. See, e.g., Final EIS, App. S at S-44 to S-46, S-60 to S-61, S-75, S-108 to S-110, S-111 to S-117, S-120 to S-121, S-127, S-129, S-131, S-161, S-178 to S-179, S-208. A review of these comments and the record, however, shows that the issues they raise do not relate to impacts that would be caused by the Transaction but, rather, relate to conditions already present. For example, while certain comments raised concerns about potential effects on commuter rail service and capacity, this involves a longstanding issue between Metra and CP regarding dispatching on their shared trackage and Metra's requests to expand commuter service. See, e.g., id., App. S at S-46, S-61, S-110. Similarly, concerns about potential dangers to pedestrians and commuters crossing tracks to access platforms at certain rail stations are the result of the existing configuration of those stations where commuters already cross tracks within the station. See id., App. S at S-108 to S-110, S-121 to S-122. Because these concerns relate to preexisting conditions rather than potential impacts that could occur specifically because of the Transaction, the Final EIS did not recommend any additional mitigation for the Chicago area beyond Applicants' voluntary mitigation and the community liaison condition for Chicago area communities discussed above.²⁴⁴ See Conrail, 3 S.T.B. at 356.

In a letter filed on February 17, 2023, the Illinois Delegation questions OEA's conclusions and asks that the Board defer any action on the merger until the Board conducts a more thorough and accurate study of the impacts of the merger in the Chicago area. (Ill. Delegation Letter 1, Feb. 17, 2023.) The Illinois Delegation urges the Board to conduct a

²⁴⁴ In addition to their voluntary environmental mitigation involving the Chicago area, Applicants offered mitigation to address Metra's transportation-related concerns, including a dispute resolution process. As discussed above in the Metra & Chicago Communities section, the Board is imposing, as a condition, modifications to that voluntary mitigation.

supplemental environmental analysis of the Chicago region using modeling provided by Metra or by conducting its own independent modeling. (*Id.*) Although the Board appreciates the Illinois Delegation’s concerns, the Board concludes that OEA properly found that no supplemental environmental analysis of the impacts of the Transaction in Chicago is required under NEPA. As the Final EIS explained, the NEPA implementing regulations at 40 C.F.R. § 1502.9(d)(1) require agencies to prepare supplements when the agency makes substantial changes to the proposed action that are relevant to environmental concerns or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. Final EIS, App. S at S-23, S-180 to S-181. Neither of these conditions apply here, as neither the Board nor Applicants have made substantial changes to the Transaction since the time the Draft EIS was issued.

The Illinois Delegation suggests that the EIS significantly underestimated the impacts of the merger in the Chicago region by relying only on data supplied by Applicants and ignoring modeling provided by Metra. (Ill. Delegation Letter 1, Feb. 17, 2023.) The Board disagrees. As the Final EIS demonstrates, OEA had sufficient information to thoroughly examine the potential environmental impacts of the Transaction in the Chicago area and its conclusions are reasonable. See Final EIS, App. S at S-19 to S-20. OEA properly relied on data provided by Applicants and other publicly available information, and the Final EIS included a detailed analysis of local impacts on every segment in the Chicago area that meets or exceeds the Board’s environmental analysis thresholds. *Id.*, App. S at S-23 to S-25. Furthermore, as the Final EIS shows, OEA carefully considered the results of the modeling provided by Metra and explained that Metra’s projected number of trains per day was based on inaccurate characterizations of the potential effects of the Transaction in Chicago.²⁴⁵ *Id.*, App. S at S-145 to S-149.

In addition, multiple commenters asked the Board to impose a condition requiring CP to enter into a trail use agreement for specific trackage in the Minneapolis area. The Board also received Congressional letters requesting that Applicants remain open to pursuing new shared use agreements or agreements permitting public use on rail lines in Minnesota.²⁴⁶ These requests misunderstand the Board’s authority and are not designed to remedy a Transaction-related harm. While railroads sometimes reach private agreements with other parties allowing for the creation of a trail or shared use within a rail right-of-way, those agreements are totally voluntary.

²⁴⁵ After the Final EIS was issued, the Coalition submitted a letter dated February 27, 2023, asking OEA to revise its final recommended mitigation for Chicago on grounds that OEA’s critique of the Coalition’s rail crossing delay analysis in the Final EIS contained mistakes. (Coal. Letter 2, Feb. 27, 2023.) For the reasons explained in the Final EIS, the Coalition’s arguments are unpersuasive, and the Board agrees with OEA’s criticisms and conclusions. See, e.g., Final EIS, 3.3-6, 3.3-9; *id.*, App. S at S-145 to S-149, S-165; see also supra note 169.

²⁴⁶ U.S. Senators Amy Klobuchar and Tina Smith state that they “would like CP to remain open to pursuing new shared-use agreements.” (Hon. Klobuchar Letter 1, Oct. 17, 2022.) U.S. Representatives Betty McCollum and Ilhan Omar submit, and urge the Board to consider, a letter from state and local officials in Minnesota discussing the “desire to preserve for public use four CP rail corridors that are currently idle or under-utilized.” (Hon. McCollum Letter 1, Attach. at 2, Sept. 7, 2022; Hon. Ilhan Letter 1, Attach. at 2, Sept. 28, 2022.)

Further, railroad rights-of way can also be converted into trails through the interim trail use and railbanking process under Section 8(d) of the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d). However, even if the rail corridors here were eligible for railbanking under the Trails Act as rail lines that otherwise would be abandoned, interim trail use under the Trails Act is voluntary, and a railroad must agree to railbank a rail line. See Final EIS, App. S at S-64 to S-65.

Members of several communities (including those in the Houston, Texas and Davenport, Iowa, areas) expressed concerns about safety, noise, and other impacts from increased rail traffic. See, e.g., Final EIS, App. S at S-81 to S-84, S-89, S-92 to S-93, S-120, S-140, S-149, S-168 to S-170, S-188, S-193 to S-194, S-256 to S-258, S-264, S-310 to S-315. The Final EIS thoroughly examined these potential impacts and determined that the safety and grade crossing delay impacts of the Transaction will be minor, that some of these concerns were based on incorrect information about anticipated Transaction-related increases in rail traffic volumes, and that the mitigation measures recommended in the Final EIS appropriately address these concerns.²⁴⁷ See id. at 3.2-2, 3.2-7 to 3.2-9, 3.3-29 to 3.3-32; see also id., App. S at S-82 to S-84, S-94, S-140 to S-144. For example, in response to concerns about traffic increases on a line that extends from Beaumont to Rosenberg (through Houston), OEA expanded its review to include that line even though the projected traffic increase would not exceed the Board’s thresholds for environmental analysis and concluded that impacts from the Transaction will be minor.²⁴⁸ See id. at 3.1-1

²⁴⁷ Hennepin County, Minn. (Hennepin County), and Hennepin County Regional Railroad Authority (together, Hennepin) filed comments asserting that the Transaction will adversely affect infrastructure and safety in Hennepin County and requesting that the Board impose conditions relating to truck traffic, hazardous materials release, and grade crossings in Hennepin County. (Hennepin Comments & Req. for Conditions 5-15, Feb. 28, 2022; see Hennepin Final Br.) However, OEA determined that additional truck traffic around CP’s Minneapolis Intermodal Terminal at Shoreham Yard (Minneapolis IMS facility) resulting from the Transaction “would have a negligible effect” on the network, and did not recommend any mitigation related to roadways surrounding the Minneapolis IMS facility. Final EIS 3.5-3. Outside of the Minneapolis IMS facility, the projected Transaction-related freight traffic increases in Hennepin County are below the Board’s thresholds for environmental review, see 49 C.F.R. § 1105.7(e)(5), and thus OEA stated that it “does not expect that increased rail traffic would have the potential to result in significant environmental impacts in Hennepin County.” See Final EIS 1-5, App. S at S-92, S-170. In these circumstances, the Board will not impose the environmental mitigation conditions Hennepin proposes.

²⁴⁸ For the reasons explained in the Final EIS, Applicants’ projected increase in traffic through Houston resulting from the Transaction may be overstated. Id. at 3.1-2, 3.2-2. Moreover, the voluntary mitigation Applicants submitted for Houston, as well as OEA’s community liaison condition requiring Applicants to consult with Houston area community leaders and provide community leaders with options for reporting issues such as blocked grade crossings, should minimize the potential impacts of traffic increases resulting from the Transaction in the Houston area. Id. at 3.2-7 to 3.29. While Harris County Commissioner Rodney Ellis in his February 24, 2023 letter raises concerns about the possibility of a derailment in the Houston area, (Comm’r Ellis Letter 1, Feb. 24, 2023), as discussed above, the Final EIS

to 3.1-2; id., App. S at S-82. In its examination of noise impacts and as discussed above, the Final EIS determined that the Transaction would not cause adverse noise impacts in Houston, but that, even with the noise mitigation recommended in the Final EIS, there will be adverse noise impacts in certain areas in Iowa. Id. at 3.6-16 to 3.6-17, 3.6-21 to 3.6-23.

Section 106

The Section 106 regulations at 36 C.F.R. part 800 require federal agencies to consider the impact of their “undertakings” on “historic properties” listed or eligible for listing in the National Register of Historic Places (National Register) prior to licensing or providing funds for a project. Final EIS 1-10. In considering project impacts, federal agencies are required to consult with their applicants (CP and KCS, in this case), appropriate State Historic Preservation Officers (SHPO), appropriate Tribal Historic Preservation Officers (THPO), tribes, and other Section 106 Consulting Parties with a demonstrated interest in the undertaking. Id. Consistent with past practice in proceedings involving the acquisition of existing rail lines, the Section 106 review here focused on the potential effect of the 25 planned capital improvements that Applicants intend to add within the existing right-of-way because the planned capital improvements have the potential to affect historic properties. Id. at 1-12.

OEA initially identified 18 historic properties as eligible for listing on the National Register, including 16 above-ground resources and two below-ground (archaeological) resources. Id. at 3.9-1. Following further consultation with appropriate SHPOs and THPOs after the issuance of the Draft EIS, OEA revised its findings under Section 106. The Final EIS finds that 15 historic properties within the Area of Potential Effects (APE) are eligible for listing in the National Register, including 13 above-ground resources and two below-ground resources. Id. The Final EIS further determined that the Transaction will have no adverse effect on those National Register-eligible historic properties. Id. at 3.9-1 to 3.9-2. All the appropriate SHPOs, THPOs, and other Section 106 Consulting Parties have concurred that the Transaction would not adversely affect historic properties within the APE. Therefore, the Section 106 process in this proceeding is complete.²⁴⁹ Id. at 3.9-2.

Conclusions

After carefully considering the entire environmental record, the Board adopts all of OEA’s analysis and conclusions, including those not specifically discussed in this decision. The Board is satisfied that the Draft EIS (issued for public review and comment) and the Final EIS (which responds to those comments and contains additional analysis) together have taken the requisite “hard look” at the potential environmental impacts associated with the Transaction.

took the required “hard look” at the impacts from hazardous materials transportation and a potential derailment, and the Board is imposing appropriate mitigation to address the environmental impacts of the Transaction in the Houston area. See Final EIS, App. S at S-89 to S-91, S-93 to S-95.

²⁴⁹ Nevertheless, the Board is imposing OEA’s recommended mitigation related to the construction of the 25 planned capital improvements. See MM-Cultural-01, MM-Cultural-02 in App. C below; Final EIS 4-9 to 4-10.

The Board also finds that OEA's final recommended environmental mitigation, including Applicants' voluntary mitigation, is reasonable and feasible to address the expected environmental impacts of the Transaction and local concerns. As discussed above, the Board is imposing all of OEA's final recommended mitigation with three modifications. Specifically, the Board will extend the duration of the environmental reporting and monitoring condition and the two community liaison conditions for Houston and Chicago area communities in the Final EIS from five to seven years.

The Board recognizes that the Transaction might have some adverse environmental impacts that cannot be fully mitigated. For example, even with mitigation, there will still be additional vehicle delays at highway/rail at-grade crossings. However, many of the potential effects (such as vehicle delay and noise) pertain to existing conditions that are already present. Moreover, as Applicants increase rail traffic along the CPKC system, there will be decreases in truck traffic and rail-to-rail diversions, resulting in important environmental benefits. Regarding hazardous material releases, the number of hazardous material releases post-Transaction is expected to remain low, and some segments of the CPKC system will likely see a *reduction* in the number of hazardous material releases. Railroads are required to transport hazardous materials as part of their common carrier obligation and transporting hazardous materials by rail remains generally safer than transporting them by truck. Accordingly, if transportation of hazardous material can be diverted from truck to rail as a result of the Transaction, the probability of a release occurring overall should go down. Given the transportation benefits of this Transaction to shippers and interstate commerce discussed in this decision, the Board is satisfied that the final environmental conditions that it imposes here provide appropriate safeguards to ensure that Applicants maintain safe operations and protect the environment and the quality of life in affected communities to the extent practicable following CP's acquisition of KCS.

CONCLUSION

The Board finds: (a) that the acquisition of control by CP of KCS, as conditioned herein, is within the scope of 49 U.S.C. § 11323 and is consistent with the public interest; (b) that the Transaction will not adversely affect the adequacy of transportation to the public; (c) that no other railroad in the area involved in the proposed transaction has requested inclusion in the Transaction, and that failure to include other railroads will not adversely affect the public interest; (d) that the Transaction will not result in any guarantee or assumption of payment of dividends or any increase in fixed charges except such as are consistent with the public interest; (e) that the interests of employees affected by the Transaction do not make such transaction inconsistent with the public interest, and any adverse effect will be adequately addressed by the conditions imposed herein; (f) that the proposed Transaction, as conditioned herein, will not significantly reduce competition in any region or in the national rail system; and (g) that the terms of the Transaction are just, fair, and reasonable to the stockholders of CP and to the stockholders of KCS. 49 U.S.C. § 11324(b). The Board further finds that the conditions imposed in this proceeding, including but not limited to the oversight condition, are consistent with the Board's conditioning authority under 49 U.S.C. § 11324(c). The Board finds that any rail employees of Applicants or their rail carrier affiliates affected by the Transaction should be protected by the New York Dock labor protective conditions.

The Board approves, with certain conditions described here, the acquisition of control by Canadian Pacific of Kansas City Southern.

It is ordered:

1. The CP-KCS Application filed in Docket No. 36500 is approved, subject to the following conditions, as discussed more fully above:

- Applicants' commitments to keep gateways open on commercially reasonable terms and to create no new bottlenecks, with the clarifications and enhancements described herein, including a requirement that Applicants provide to a shipper, upon request, a written justification for any rate increase above the rate of inflation during the oversight period for interline movements subject to the open gateway condition, and a requirement that Applicants adhere to their "Binding Agreement to Arbitrate," as modified by the Board;
- CPKC shifting its train crew change location near Ottumwa, Iowa, to a point farther west and south on the CP Laredo Subdivision;
- Applicants' commitment to providing a dispute resolution process to address certain possible commuter rail disruptions in Chicago, Ill., as modified and improved by the Board;
- The terms of the settlement agreement entered into by CP with Iowa Interstate Railway, LLC;
- Applicants' adherence to any and 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, including Applicants' commitments to:
 - Honor CP's commitments made under the settlement agreement with Amtrak, including CP's agreement to support certain planned expansions of Amtrak passenger service;
 - Not initiate the termination of reciprocal switching access for any shipper facility directly served by CP or KCS that has such access as of the date of the decision authorizing the Transaction;
 - Cooperate with UP and BNSF to ensure adequate capacity along the Texas Gulf Coast Route;
 - Unless otherwise agreed to by CPKC and Metra, not implement an ordinary course operating plan directing CPKC through-freight trains operating between Kansas City, Mo., and St. Paul, Minn., over certain Metra Lines, except in emergency or other non-routine situations, a condition that sunsets on January 1, 2043; and
 - As modified by the Board, extend the terms of the settlement agreement reached with Bayer CropScience LP to eligible shippers.

2. Applicants must comply with the oversight condition imposed in this decision, and, in connection therewith, must report numerous service, operational, competition-related, and other metrics at prescribed frequencies, as described in Appendix B to this decision.

3. Applicants must adhere to the terms of the CPKC Service Promise to address any post-Transaction service disruptions, including the development and reporting of customized “Service Action Plans” to address specific issues when certain thresholds are triggered.

4. Approval of the Application is subject to the employee protective conditions set out in New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979), aff’d New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979), and subject to Applicants’ representation that they will honor the obligations established in “Revised Standards for Preemption of Collective Bargaining Agreements for Transactions Initiated Pursuant to Section 11323 of the Interstate Commerce Act.”

5. Approval of the Application is subject to the environmental mitigation conditions set forth in Appendix C to this decision.

6. Applicants must comply with the SIP, which may be updated as necessary, and must continue to coordinate with FRA in implementing the SIP during the operations integration period. The ongoing safety integration process shall continue until FRA has informed the Board that the integration of Applicants’ operations has been safely completed.

7. By May 15, 2023, Applicants shall participate in a technical conference with Board staff to discuss issues relating to reporting methodologies, formatting, and the scope of any further reporting that may be warranted.

8. In Docket No. 36500 (Sub-Nos. 1-4), the responsive application filed by CN is denied, and the associated environmental review is terminated.

9. In Docket No. 36500 (Sub-No. 5), the responsive application filed by NSR is denied.

10. Applicants’ motion to strike submissions by Runyowa Law, on behalf of clients, is granted in part and denied in part.

11. Applicants’ motion to strike portions of Metra’s presentation at the September 28, 2022 public hearing is granted in part and denied in part.

12. CN’s request for leave to file two appendices to its final brief is granted.

13. CSXT’s request for leave to attach two exhibits to its final brief is granted.

14. Any condition requested by any party in this proceeding that has not been specifically approved in this decision is denied.

15. Petitions for reconsideration of this decision must be filed by April 4, 2023. Requests for stay must be filed by March 27, 2023.

16. This decision will be effective on April 14, 2023.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Member Hedlund concurred with a separate expression. Board Member Primus dissented with a separate expression.

BOARD MEMBER HEDLUND, concurring:

I concur in the Board’s decision approving the Transaction, as I believe that it strikes an appropriate balance of addressing potential harms while not undermining potential public benefits—given current circumstances and conditions. However, I wish to comment further specifically on concerns various communities have raised about grade crossing delay and the deterioration of emergency response times due to blocked crossings, and their requested mitigation to improve overall traffic flow. The Final Environmental Impact Statement (EIS) noted that most of these concerns relate to pre-existing conditions not directly related to the Transaction,¹ see supra Environmental Matters—Grade Crossing Delays/Emergency Response section, particularly in areas such as Houston that have long been plagued by railroad congestion and the resulting adverse impacts in adjacent low-income and minority neighborhoods.² While the EIS did observe that because average rail traffic will increase, the frequency with which emergency vehicles will be delayed by trains will likely increase as a result of the Transaction, it also found that the likelihood of trains stopping and blocking grade crossings for a substantial amount of time during an emergency would likely be small, given the Applicants’ proposed mitigation measures. See id. In addition to these voluntary mitigation measures, today’s decision also imposes recommended community liaison conditions for Houston and Chicago, a measure that will facilitate ongoing consultation between Applicants and community leaders. See supra Environmental Matters—Environmental Mitigation section. I sincerely believe these conditions will lead to more positive outcomes in these areas, and I will be tracking the progress of these consultations (and compliance with the Applicant-proposed mitigation) closely.

¹ Despite the pre-2001 major merger policy statement’s confirmation that the statute gives the Board exceedingly broad authority to impose conditions governing railroad consolidations, the agency’s “general practice” has been “to mitigate only impacts resulting directly from a proposed transaction, and not to require mitigation for existing conditions and existing railroad operations.” CSX Corp.—Control & Operating Lease/Agreements—Conrail Inc., 3 S.T.B. 196, 356 (1998). See also Burlington N. Inc.—Control & Merger—Santa Fe Pac. Corp., 10 I.C.C.2d 661, 730 (1995) (setting forth similar policy regarding imposition of conditions to remedy transaction’s anticompetitive effects).

² Community concerns (including those relating to blocked crossings) are well-described by Board Member Primus in his Dissent. While I share these concerns, I disagree with my respected Colleague’s ultimate conclusion that, as a result of these and other issues, Board approval of the Transaction is not, on balance, in the public interest. However, future events could affect my view of this public interest determination, potentially weighing in favor of a more robust exercise of the Board’s conditioning authority in this proceeding—perhaps even beyond what the Board’s general policies or practices regarding the imposition of merger conditions would otherwise suggest.

From a basic structural perspective, it is imperative that railroads and affected communities work together to develop solutions to the negative impacts associated with railroad congestion. Perhaps the best successful example of such community-railroad cooperation is the Chicago Regional Environmental and Transportation Efficiency Project (CREATE). CREATE is a joint effort of six Class I railroads, Illinois state and local governments, and a local commuter rail agency to restructure, modernize, and expand the freight and passenger rail facilities and highway grade separations in the Chicago metropolitan area while reducing the environmental and societal impacts of rail operations on the general public. Notably, that effort was spearheaded in 2000 by the then-Chair of the Board, Linda Morgan.³ To date, 19 CREATE-sponsored projects have been completed, 4 are under construction, and 16 are in final design phase or undergoing environmental review.

In October 2022, Board Member Primus and I met with elected officials and community groups in Houston to gain a better understanding of their longstanding concerns about rail congestion and blocked crossings. (See STB Summary of In-Person Meetings, Oct. 18, 2022.) Referencing the CREATE improvements in Chicago, we encouraged them to work with all the railroads operating in the Houston area—UP, BNSF, KCS, and Houston Belt & Terminal Railway—to explore and design grade crossing improvement projects that could attract local, state, and federal funding. And I understand that in connection with an application by the City of Houston for a federal railroad crossing elimination grant, Mayor Sylvester Turner has requested establishment of a program in Houston similar to CREATE.

In any event, the issue of blocked crossings—which persists across the country, despite the rail carriers’ theoretical adherence to the General Code of Operating Rules (among others)—is one that must be fully addressed on a national basis, perhaps in the form of additional legislation that would fill the arguable “regulatory gap” in this area. In the meantime, however, I fully expect that the Board will concern itself with focusing the railroads and affected communities on actively working together to develop solutions to the blocked crossing dilemma and address congestion-related issues more generally. If such cooperation does not occur, or does occur but does not result in more tangible positive outcomes, the Board stands ready to draw and potentially let fly every arrow in its existing quiver to address these issues should such action become necessary—as it likewise does regarding potential future action involving the Transaction.

BOARD MEMBER PRIMUS, dissenting:

When I hear the word perfect, certain milestones come to mind. Don Larsen’s perfect game in the 1956 World Series against the Brooklyn Dodgers; Rocky Marciano’s perfect 49-0 professional boxing record; and the perfect season of the 1972 Miami Dolphins. All unmistakably perfect. What doesn’t come to mind are railroad mergers. Far from it, to be

³ The history of the CREATE program can be found on its website (<https://www.createprogram.org/about-create/history/>).

honest. And yet we have been told the transaction approved today is just that.¹ According to Applicants, there will be no detriment to the public interest—no disruption of service, no significant harm to surrounding communities, and no consequences from allowing even further concentration of economic power in the freight rail industry.² If it all sounds too good to be true, we are in agreement. Not only do I not share Applicants’ optimism, but I disagree with the Board’s approval of this transaction.

More than a year ago, I dissented from the Board’s decision to waive its current regulations and instead rely on the regulations in effect before July 11, 2001 in evaluating this transaction. I continue to disagree strongly with that decision. In choosing to consider this transaction under the pre-2001 rules, the Board forfeited its opportunity to impose the appropriate degree of regulatory scrutiny—a much greater degree than the pre-2001 rules provide. As I stated then, special treatment for this proposed merger between Class I railroads runs counter to the Board’s statutory responsibility to review such major mergers and to protect the public interest. See 49 U.S.C. § 11324(c). KCS has grown in size and significance since 2001; this is the very type of transnational transaction the current merger rules contemplate, and the Board should have evaluated it under the more robust standards of the current rules.

Given this fundamental problem, my objections to the transaction approved today are threefold. First, the transaction will further concentrate control over the nation’s railroads, which have already experienced massive consolidation in recent decades—a development that has not been favorable to rail customers or the network as a whole. Second, in the absence of a service assurance plan (which would have been required under the current rules), the decision does not adequately guard against merger-related service disruptions, at a time when rail service in general has been historically poor. Third, the transaction will harm communities along the path of the newly combined network. Because these detriments to the public interest outweigh the expected benefits, I dissent.

COMPETITION ISSUES AND RAILROAD INDUSTRY CONSOLIDATION

Increased scrutiny of competitive effects was a primary goal of the rulemaking that led to the current merger rules. See Major Rail Consolidation Procs., 5 S.T.B. 539, 546-47, 549 (2001) (concluding that stronger merger enforcement was necessary “in light of the declining number of Class I railroads, the elimination of the industry’s excess capacity, and the serious transitional service problems that have accompanied recent major rail consolidations”). The Board had good reason for requiring a harder look at mergers between Class I railroads—and the intervening years have only compounded the need for this scrutiny, as I will explain.

¹ H’rg Tr. 2038:9 to 2038:10, Oct. 7, 2022 (“we said from the start that this is a perfect merger”).

² See, e.g., H’rg Tr. 1636:19 to 1636:21, 1795:16 to 1796:6, 1809:13 to 1809:17, Oct. 6, 2022; Applicants Reb. 1-295 (referring to “any minor effects that Applicants’ modest traffic growth plans might have on [surrounding] communities.”).

I. Vertical Merger Analysis

Contrary to the implications of some prior ICC and STB decisions, the fact that this merger is vertical does not mean it should be given a pass. Cf. Applicants Reb. 1-64 to 1-65; id. at 1-73, 1-76. The majority declines to apply the obsolete “one-lump theory” to the facts of this case, and at least in the abstract, recognizes that vertical mergers can cause competitive harm. But the attempted solution—oversight and a condition requiring Applicants to maintain open gateways on commercially reasonable terms—is too narrow to account for the range of harms threatened by this transaction.

As the majority acknowledges, economic understanding of vertical mergers and their effects has changed in recent decades. The FTC’s withdrawal from the 2020 Vertical Merger Guidelines attests to this change, and DOJ’s comments in this docket recognize specific ways in which vertical mergers can harm competition. See DOJ Comment 3, Jan. 24, 2023; DOJ Comment 9-10, Apr. 12, 2021; 49 C.F.R. §§ 1180.1(c), 1180.7(b) (post-2001 merger rules emphasizing harm to product and geographic competition as an issue to be considered in reviewing major mergers); see also Letter from Representative Katie Porter 2 (June 7, 2022) (noting that, “[d]ue to the geographically limited nature of the production of specific commodities (soda ash and phosphate, for example), railroads with control over those geographic routes exert considerable market power over shippers of key commodities that may themselves play outsized roles in particular industries. Farmers in landlocked states such as Montana and the Dakotas, who are reliant on a single railroad monopoly, are forced to pay twice the rate of those in more competitive rail serviced regions.”).

Academic writers in recent years have also recognized the need for greater scrutiny of vertical mergers. For example, Professor Steven Salop, who submitted a verified statement in this proceeding, argues persuasively that “vigorous vertical merger enforcement is a necessity, particularly in markets where economies of scale and network effects lead to barriers to entry and durable market power”—characteristics, I observe, that are certainly present in the freight rail industry. See Steven C. Salop, Invigorating Vertical Merger Enforcement, 127 Yale L.J. 1962, 1963 (2018). Among other analysis, Professor Salop offers reasons to be skeptical of the benefits claimed to follow from vertical mergers, points out that such mergers can cause harm by eliminating potential entrants and facilitating anticompetitive coordination, and calls on agencies and courts to block problematic vertical mergers. See id. at 1970, 1976-78, 1982; see also Major Rail Consolidation Procs., 5 S.T.B. at 549 (because “the number of overall railroad companies has been reduced dramatically, and the size of the remaining carriers has increased correspondingly,” the Board planned “to take a more skeptical, ‘show me’ attitude toward claims of merger benefits and toward claims that no transitional service problems would occur.”); Ford Motor Co. v. United States, 405 U.S. 562, 567, 574 (1972) (recognizing the procompetitive effect of potential entrants). In my view, the majority’s decision is not adequately skeptical of the transaction and its potential effects.

Also relevant to today’s decision—which relies heavily on oversight and the Board’s ability to act later if problems arise—are Professor Salop’s arguments against delaying enforcement “unless and until the merged firm engages in anticompetitive conduct.” Salop, supra, at 1991 (emphasizing that consumers suffer in the interim, unwinding a transaction may

be impossible, and anticompetitive conduct may not be reliably detected after the fact). Finally, Professor Salop questions the effectiveness of behavioral remedies—which would include the open gateway condition imposed here—because regulated firms are able to work around such restrictions, particularly as circumstances change over time. See id. at 1992. It can also be difficult for agencies and courts to enforce these remedies effectively and address loopholes. Id. at 1993.

II. Concentration of Market Power

Administration and DOJ Concerns. The Biden Administration has raised concerns about concentration of market power in U.S. industries and called on agencies to be more active in guarding against excessive concentration. Executive Order 14,036, Promoting Competition in the American Economy, observes that “decades of industry consolidation have often led to excessive market concentration,” that the consolidation has been harmful to workers and consumers, and that “Federal Government inaction has contributed to these problems.” Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 14, 2021). Among other measures, this executive order encourages agencies, in the case of major transactions, to “giv[e] significant consideration” to DOJ’s views. Id. at 36,990.

DOJ, in turn, recently confirmed that its Antitrust Division “shares the Board’s serious concerns about increasing consolidation in the [railroad] industry.” DOJ Comment 2, Jan. 24, 2023. As DOJ explained, “[t]he consolidation of Class I railroads presents substantial concerns, including: (i) lessened competition among Class I railroads to attract new industry locations; (ii) reduced incentive to invest in research and implementation of important new technologies such as Positive Train Control; and (iii) the danger of industry-wide understandings and agreements that become more likely as the industry becomes more concentrated.” Id.

Antitrust Policy. Section 11324(b) requires the Board, in assessing whether a transaction is consistent with the public interest, to consider “at least” the five factors enumerated in the statute. Beyond the factors considered by the majority, I find additional guidance in the antitrust laws and the policies that led to their enactment. See also 49 C.F.R. § 1180.1(c)(2) (“In analyzing [competitive] impacts we must consider, but are not limited by, the policies embodied in the antitrust laws.”). Rather than merely imposing a consumer welfare prescription, the antitrust laws were enacted “to rein in the power of industrial trusts”—a pro-democratic effort opposed to market concentration and the harms that accompany it. Lina M. Khan, Amazon’s Antitrust Paradox, 126 Yale L.J. 710, 739-40, 742, 745 (2017). Congress recognized that concentration of political power accompanies concentration of economic power, through the use of great wealth to influence government and control economic welfare. Id. at 740; see also Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age 56-58 (2018) (political science research explains the ways in which highly concentrated industries are more effective in influencing public policy, contrary to the interests of the general public).

Labor Impacts. In addition to extracting economic rents and undermining democratic processes, highly concentrated industries are also better positioned to degrade working conditions, depress wages, and impair or eliminate organized labor. See Wu, supra, at 72-73; see also, e.g., Letter from Joseph Smith, Apr. 20, 2022, Urgent Issues in Freight Rail Serv., EP 770

(engineer describing deterioration of working conditions at Class I railroads). Economic data support this conclusion, indicating that the labor share of the economy—the ratio of the compensation of labor relative to value added—decreases as market concentration increases. Thomas Philippon, The Great Reversal 106-09 (2019). Mergers, of course, contribute to these developments because they “leave [] workers fewer and more powerful employers with which to bargain.” Porter Letter 4.

Capital Investment and Productivity Impacts. The incentives for firms to consolidate are clear: dividends and especially stock buybacks have increased substantially as U.S. markets have grown more concentrated. Philippon, supra, at 54-56. But the harmful effects of these trends are equally clear—for example, increased concentration has correlated in recent decades with declines in capital investment and productivity growth. See id. at 62-79; see also, e.g., Comment of Bhd. of Maintenance of Way Employes Div./IBT et al. 10 & Addenda B-E, Apr. 22, 2022, Urgent Issues in Freight Rail Serv., EP 770 (describing reductions in workforces leading to inadequate maintenance and repair of infrastructure); Bhd. of Maintenance of Way Employes Div./IBT et al. Suppl. 3-5, Jan. 19, 2023, Oversight Hr’g Pertaining to Union Pac. R.R. Co.’s Embargoes, EP 772 (additional examples of inadequate resources devoted to infrastructure); Martin J. Oberman, Chairman, Surface Transp. Bd., Speech to N. Am. Rail Shippers Ass’n Annual Meeting (Sept. 8, 2021)³ (since 2010, Class I railroads have paid out \$196 billion—in inflation-adjusted dollars—of buybacks and dividends, while spending only \$150 billion on infrastructure⁴).

Effects on the Railroad Industry. The perils of allowing significant concentration of market power are not merely theoretical when it comes to the railroad industry. In 1970, more than 70 Class I railroads existed in the United States. See Rate Reform Task Force Rep. 2.⁵ Following this transaction, six will remain. These include two duopolies, one in the east and one in the west, and will now include a single company with single-line service north and south through the center of the United States. This tremendous consolidation has had predictably negative effects on rail customers, employees, and consumers. Following an initial reduction as railroads “rationalized” their networks, rates have crept back up. See id. at 11. Outside of transportation rates, railroads have obtained ever-increasing revenues from customers through demurrage and accessorial charges. See, e.g., U.S. Gov’t Accountability Off., GAO-23-105420, Freight Rail: Information on Precision Scheduled Railroading 34 (2022).⁶ Shippers “find railroads largely uninterested in their business” and “feel that they have little bargaining power

³ Available at <https://www.stb.gov/wp-content/uploads/NARS-Speech-9-8-21.pdf>.

⁴ This \$150 billion figure itself requires context: of the capital investments reported by Class I railroads, only a small fraction represents expansion of their infrastructure as opposed to maintenance, commercial facilities, and other categories. See, e.g., Union Pac. Corp., Ann. Rep. (Form 10-K) 36, Feb. 10, 2023 (“Line expansion and capacity projects” constitutes approximately 8 percent of the reported capital investments for 2022).

⁵ Available at https://www.stb.gov/stb/rail/Rate_Reform_Task_Force_Report.pdf.

⁶ Cf., e.g., Enhancing Transparency of Airline Ancillary Serv. Fees, 87 Fed. Reg. 63,718, 63,719 (Oct. 20, 2022) (recognizing the growing use of ancillary fees by the airline industry, which has also consolidated substantially in recent decades).

with respect to the contracts they are offered.” Rate Reform Task Force Rep. 11; see also, e.g., Sanimax USA LLC Compl. 7-8, Nov. 6, 2020, Sanimax USA LLC v. Union Pac. R.R., NOR 42171 (an example of service level reductions in recent years). And perhaps the most prominent toll taken by railroad industry consolidation is the recent service collapse, driven by Class I carriers’ relentless cutting of their labor forces, infrastructure, and equipment.⁷ If they faced greater competition, Class I railroads would not have been so cavalier about slashing their payrolls and leaving customers to deal with the consequences. Inadequate service, just like increasing rates and charges, contributes to rising transportation costs that affect consumers already enduring severe inflation. Finally, the unhindered cost-cutting permitted by concentration of market power can have safety consequences for surrounding communities and railroad employees. These effects are undeniably contrary to the public interest.

Against this backdrop, I cannot agree with the majority’s decision to allow two of the remaining Class I carriers to combine subject only to oversight and a behavioral remedy. Notwithstanding Applicants’ assurances that rail customers will benefit, further concentrating control in so few hands will be to the ultimate detriment of those customers, as well as railroad employees, consumers, and the supply chain in general.

POTENTIAL IMPACT ON SERVICE

I. Service Assurance Plan

Another element of the current merger rules that would have been particularly valuable, given the evidence here and the state of rail service generally over the last year, is the service assurance plan. The Board’s experience as of 2000 showed that, “whether or not a particular proposed consolidation holds promise of significant service enhancing and cost reducing synergies, the integration task is itself quite complex and time consuming, and has, in a number of recent instances, been associated with severe service dislocations.” Major Rail Consolidation Procs., 4 S.T.B. 570, 572 (2000). Testimony to the Board indicated that these service problems significantly harmed shippers and shortline carriers. Id. at 575. Accordingly, in its final rule, the Board required parties seeking to merge Class I railroads to address service uncertainties to the maximum extent possible during the application process by submitting a service assurance plan. Major Rail Consolidation Procs., 5 S.T.B. at 579. Among other requirements, the service assurance plan must include:

information about proposed operational integration; training; information technology systems; customer service; coordination of freight and passenger operations; management of yard and terminal operations; contingency plans for service disruptions; how changes or increases in traffic levels would be accommodated by the combined system; infrastructure improvement; labor issues; service benchmarking; and respective timetables for completion as appropriate.

⁷ History repeats itself in this way. For example, the merger of numerous Northeastern railroads into the New Haven Railroad (in the late 19th and early 20th centuries) was followed by aggressive cost-cutting, which benefitted shareholders in the short term but severely compromised the merged entity’s service and safety performance. See Wu, supra, at 35-37.

Moreover, the plan should identify and discuss potential areas of temporary or longer-term service degradation, and appropriate mitigation.

Id.; see also 49 C.F.R. § 1180.1(h), 1180.10; U.S. Dep’t of Agric. Comment 2 (expressing concerns about both transitional service impacts and permanent impacts from increased volumes, and pointing out that a service assurance plan would help alleviate these concerns). By choosing to apply the pre-2001 rules to this transaction, the majority also chose to forgo these protections against merger-related service disruptions. Instead, under the pre-2001 rules, Applicants offer to report service metrics (with a commitment to report “Service Action Plans” if the metrics “move in an undesirable direction”), reach out to customers if problems arise, and adopt a dispute resolution process. See Applicants Final Br. 9 & App. A, Rider 1. Underlying these minimal protections are Applicants’ assurances that they have planned carefully and that the merged entity will have strong incentives to perform well. See id. at 8. As discussed below, I am not confident that these measures will be effective.

II. Inadequate Protections Against Service Disruptions

The majority finds Applicants’ commitments to be sufficient. I disagree. Over and over, today’s decision recognizes that CPKC will add substantial traffic to operationally complex environments that already experience congestion and delays. In response, the decision takes a “wait and see” approach, relying on Applicants’ expectation that traffic will increase gradually and suggesting that if problems occur during the monitoring period, the Board could take remedial action at that time. While Applicants expect the traffic to increase gradually, however, infrastructure improvements also do not appear at a snap of the fingers. Adding substantial traffic to already-congested facilities, with remedial action to be commenced (if at all) at undefined future dates, could be a recipe for further deterioration of service to customers. Cf. Salop, supra, at 1991 (recognizing the drawbacks of “wait and see” enforcement with respect to competitive harms). And such an impact would be particularly unwelcome at this time, when rail customers have already endured prolonged and severe service failures on the part of Class I carriers.

In other words, the decision relies on Applicants’ incentives to avoid problems and the gradual pace of traffic increases expected by Applicants as assurances against merger-related service problems. But the Board already recognized in 2001, when it adopted the current rules, that these characteristics do not effectively guard against disruptions in service. As the Board observed at that time, recent mergers led to service problems despite railroads’ financial incentives to avoid such disruptions, despite substantial planning, and despite “carefully phased and delayed implementation.” See Major Rail Consolidation Procs., 5 S.T.B. at 558.

Moreover, to the extent there was any hope in 2001 that Class I railroads’ “strong incentives to perform well”⁸ would be enough to preserve service levels, recent years have erased it. The service offered by Class I railroads has been abysmal, as the Board has recognized in Docket No. EP 770 and elsewhere, notwithstanding any incentives to perform. Rather, recent

⁸ Applicants Final Br. 8.

experience confirms that Class I railroads' overriding incentive has been to increase payouts to their shareholders regardless of the impact on service, safety, employees, or consumers.

Applicants stated that “there’s just no predicate to think that we’re going to cause any service problems.” H’rg Tr. 1636:19 to 1636:21, Oct. 6, 2022. I hope that this promise of an unsinkable service plan does not return to haunt the Applicants, this Board, or especially the rail customers who would bear the full impact of any disruptions to service that result from the transaction.

IMPACTS ON ADJACENT COMMUNITIES

The National Environmental Policy Act (NEPA) requires the Board to consider the environmental effects of the proposed transaction and to inform the public concerning those effects. Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, 462 U.S. 87, 97 (1983). Today’s decision correctly applies NEPA’s requirements. As I mentioned earlier, however, § 11324 requires the Board to consider “at least” the enumerated factors in assessing whether a transaction is consistent with the public interest—meaning that additional considerations can be taken into account under that provision. The transaction poses harms to surrounding communities that, even if they are not cognizable under NEPA, factor into my evaluation of the public interest.

I. Air Pollution

The decision accepts analysis in the Final EIS concluding that, because Applicants project the transaction to divert freight from truck transportation to rail transportation and from other rail lines, the net effect of the transaction is expected to maintain emissions of air pollutants at current levels or even reduce them “when measured at the system-wide or national scale.” See Final EIS 3.7-8, 3.7-10 to 3.7-12 (also noting, however, that truck traffic reductions would not necessarily align with the counties experiencing increases in rail-related emissions and that locomotive emissions from rail operations resulting from Board actions are not required to conform to state implementation plans “because the Board does not exercise continuing program responsibility over and cannot practically control emissions from rail operations”). This system-wide or nationwide assessment is undoubtedly appropriate under NEPA, but it will be cold comfort to communities that will experience substantial increases in rail traffic as a result of the transaction. The Chicago and Houston areas, among others, already endure significant air pollution, and the transaction is projected to increase that pollution in quantities that exceed *de minimis* levels for NO_x in the Houston area. See *id.* at 3.7-15. Even pollutants that are projected to increase to a smaller degree as a result of the transaction can have harmful effects on the many people who live near rail facilities. See, e.g., U.S. Env’t Prot. Agency, Cicero Rail Yard Study: Final Report 11-13, 71-72, Feb. 2014 (discussing the harmful effects of diesel soot).

II. Noise and Vibration

The Final EIS concludes that the transaction will result in unavoidable adverse noise impacts, even as conditioned. Final EIS at 3.6-30. The majority opinion weighs these impacts against the benefits it expects from the transaction and determines that the environmental effects

are acceptable, on balance. My weighing, for purposes of § 11324, is different. For the reasons stated above, I harbor significant doubts about the transaction's net effects, and the expected impacts on the environment—including air pollution in individual communities as well as noise and vibration—only heighten my concern.

III. Grade Crossing Delays

Historically, many of the towns and cities affected by the transaction have borne the negative impact of having their communities divided by rail lines. Today, the network is rife with substantial grade crossing delays, a direct result of railroads' implementing an operating model that has increased train lengths and congested lines. Cities like Houston and Chicago, as well as numerous other cities and towns, continue to experience major disruptions daily. For example, Harris County Commissioner Rodney Ellis and Houston City Council Member Robert Gallegos testified as to how crossing delays affect their constituents—and how these impacts have steadily increased in recent years due to longer trains and more rail traffic. See H'rg Tr. 426:17 to 427:16, 433:1 to 434:18, Sept. 29, 2022. This is a serious concern for me because of its effect on people's daily lives. It affects community first responders, schools, and businesses, among many others. The issue is getting worse, not better, and it deserves the Board's full attention as needed following the transaction.

With respect to grade crossing delays—including a recommendation against requiring Applicants to fund or partially fund grade separations—the Final EIS relies in part on Applicants' projection that train lengths will decrease. See Final EIS 3.3-26 to 3.3-27. I am concerned about the consequences for surrounding communities should this projection prove to be inaccurate. Applicants state that they plan to extend sidings on CPKC's system. See, e.g., Appl. Vol. 1-23, 1-26. These plans cast doubt on Applicants' projections (in the context of grade crossing delays) that train lengths will decrease. If train lengths do not actually decrease to the extent projected following the transaction—or, even worse, if they increase⁹—the change in grade crossing delays resulting from the transaction may amount to a material change in the facts and circumstances upon which the Board relied. Should this happen during the seven-year monitoring period, the Board must address the problem with additional mitigation, including requirements that CPKC fund or partially fund grade separations if appropriate. If such a material change happens after the seven-year monitoring period, it would be grounds for reopening and imposing additional mitigation, including grade separations if appropriate. See 49 U.S.C. § 1322(c)(1); 49 C.F.R. § 1115.4 (the Board may reopen an administratively final action based on substantially changed circumstances). Regardless, this problem is not going away soon; communities already feel the pressure of these delays, and the Board must be willing to act based on such a material change.

⁹ Although the analysis in the Final EIS focuses on Applicants' train length projections, the same concern would of course apply if rail traffic increases more than Applicants project, leading to a significant increase in grade crossing delays.

IV. Rail Traffic Increases Below NEPA Thresholds

The Board's NEPA analysis in railroad mergers applies only where increases in rail traffic meet the thresholds in the Board's regulations, which are generally an increase in rail traffic of at least 100 percent (measured in gross ton miles annually) or an increase of at least eight trains per day. Final EIS 2-8; 49 C.F.R. § 1105.7(e)(5)(i)(a). Certain rail lines in Minnesota and Iowa are projected to experience rail traffic increases that fall below the Board's thresholds, but are likely to have significant impacts on adjacent communities nonetheless. These lines include CP's River Subdivision between Saint Paul and La Crescent, Minnesota, and its Marquette Subdivision between La Crescent and Sabula, Iowa. See Applicants Am. Operating Plan, App. A at 2-3. The Final EIS considers certain segments of these lines for limited purposes such as passenger rail safety, but because they fall below the threshold, these lines are not included in the overall NEPA analysis. See Final EIS 2-6 to 2-7. It is not hard to imagine that someone living near a rail line that adds six trains per day would experience more air pollution, more noise and vibration, and more grade crossing delays among other effects. The City of Dubuque, Iowa, for example, anticipates that the additional rail traffic will increase grade crossing delay, air pollution, and noise, among other impacts, from a rail line that bisects the city's downtown area. Letter from the City of Dubuque, Dec. 28, 2021, Env't Comment EI-31640. Again, impacts like these factor into my assessment of the public interest even if the increase in rail traffic falls below the Board's NEPA thresholds.

V. Environmental Justice

The relationship between our nation's marginalized communities and railroads can be best described as one of love and hate. Without question, the railroads have been a source of meaningful employment for many within these communities. And yet, these same communities bear the environmental scars from disproportionately high air and noise pollution levels, a direct result of the large presence of railroads in their neighborhoods. These environmental inequalities, in turn, lead to higher health disparities. See, e.g., Jiawen Liu et al., Disparities in Air Pollution Exposure in the United States by Race/Ethnicity & Income, 1990-2010, 129 Env't Health Perspectives 127005-1, 127005-12 (2021).

As the Final EIS explains, Executive Order 12,898 requires federal agencies to "identify[] and address[], as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994); Final EIS 3.13-1.¹⁰ This concept, known as environmental justice, is addressed in the Final EIS to the extent required for NEPA review. I am concerned, however, that the transaction may have disproportionate impacts on minority and low-income populations beyond what the required analysis reveals. For example, the transaction is projected to increase air pollution in the areas of

¹⁰ See also Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7629 (Feb. 1, 2021) ("Agencies shall make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts.").

Chicago and Houston, as well as Beaumont, Texas, in ways that are not cognizable under NEPA, see Final EIS 3.7-8, 3.7-11 to 3.7-12, 3.7-14, but are still likely to affect adjacent communities. These areas are also identified as having minority and low-income populations. See id. at 3.13-7; Letter from Air Alliance Houston, Oct. 14, 2022, Env't Comment EI-32533 (the areas adjacent to rail facilities in Houston are home to large environmental justice populations who are already burdened with multiple sources of pollution); Cicero Rail Yard Study 11-13 (particulate matter and other air pollutants associated with rail facilities can cause or exacerbate asthma, including onset of childhood asthma, as well as cardiovascular problems). While some of these pollutants are projected to increase to a smaller degree, as noted above, this is still adding insult to injury for the population affected.

The Final EIS also notes that Dubuque was identified as having environmental justice populations. See Final EIS 3.13-8. Because the projected increases in rail traffic through Dubuque do not meet the Board's thresholds, however, the Final EIS concludes that "[t]here is no potential for the Proposed Acquisition to cause disproportionately high and adverse impacts on EJ populations in this community." Id. Dubuque is on CP's Marquette Subdivision, and as I mentioned, that line is expected to gain substantial rail traffic—albeit below the NEPA thresholds—as a result of the transaction. Specifically, the segment that passes through Dubuque is projected to add 6.4 trains per day. Applicants Am. Operating Plan, App. A at 3. Dubuque, in its December 2021 letter, states that CP's mainline and rail yard are immediately adjacent to the city's two most economically disadvantaged census tracts. Dubuque Letter 2, EI-31640. The city anticipates that, in these areas, the additional train traffic will make attracting new business growth and jobs more difficult; interfere with travel to jobs, healthcare, education, and food; negatively impact housing prices; and increase residents' stress levels due to increased noise. See id. The likelihood that these impacts will disproportionately fall on minority and low-income populations concerns me, and I have taken it into account in my evaluation of the transaction's effect on the public interest.

CONCLUSION

For the sake of the nation's rail network and the many people who depend on it, I hope that Applicants' claims to a perfect merger will be matched in reality. But for all the reasons stated above, I conclude that this transaction is not consistent with the public interest, and I respectfully dissent.

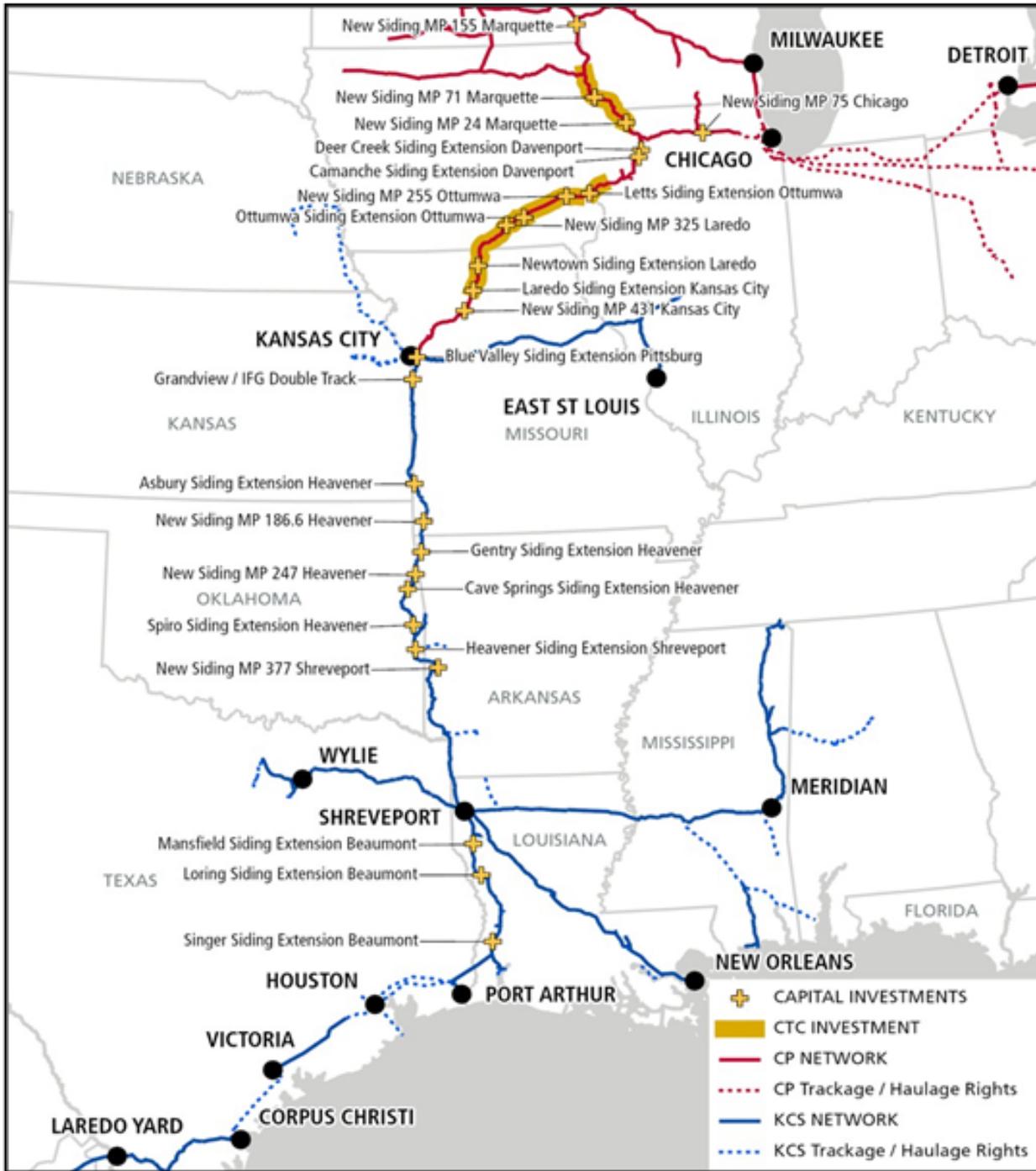
APPENDIX A: MAPS

CPKC System Map



Source: Applicants Pub. Hr’g Comments, slide 2, Oct. 5, 2022.

Location of Planned Capital Investments



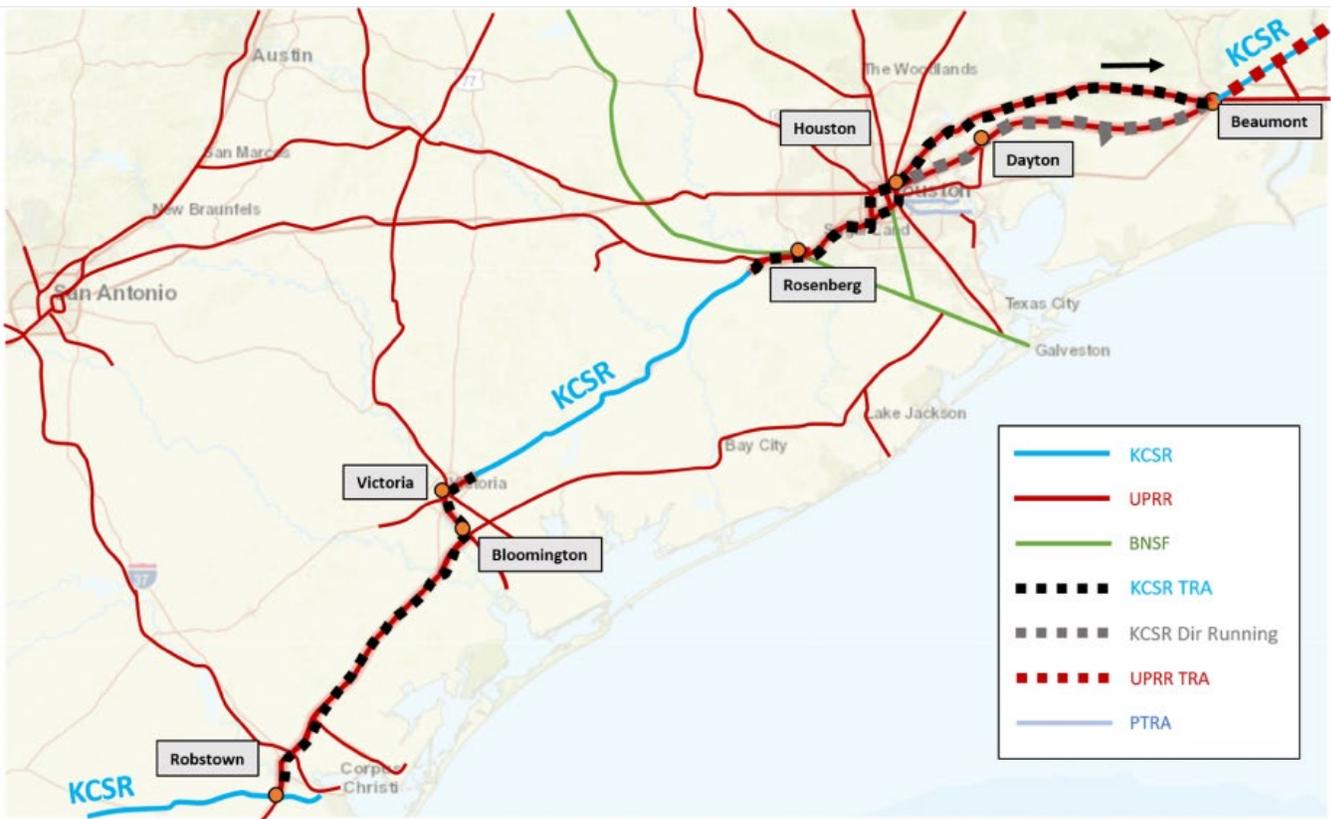
Source: Am. Operating Plan 117 (Fig. 11).

Mexico Border Crossings & Rail Lines



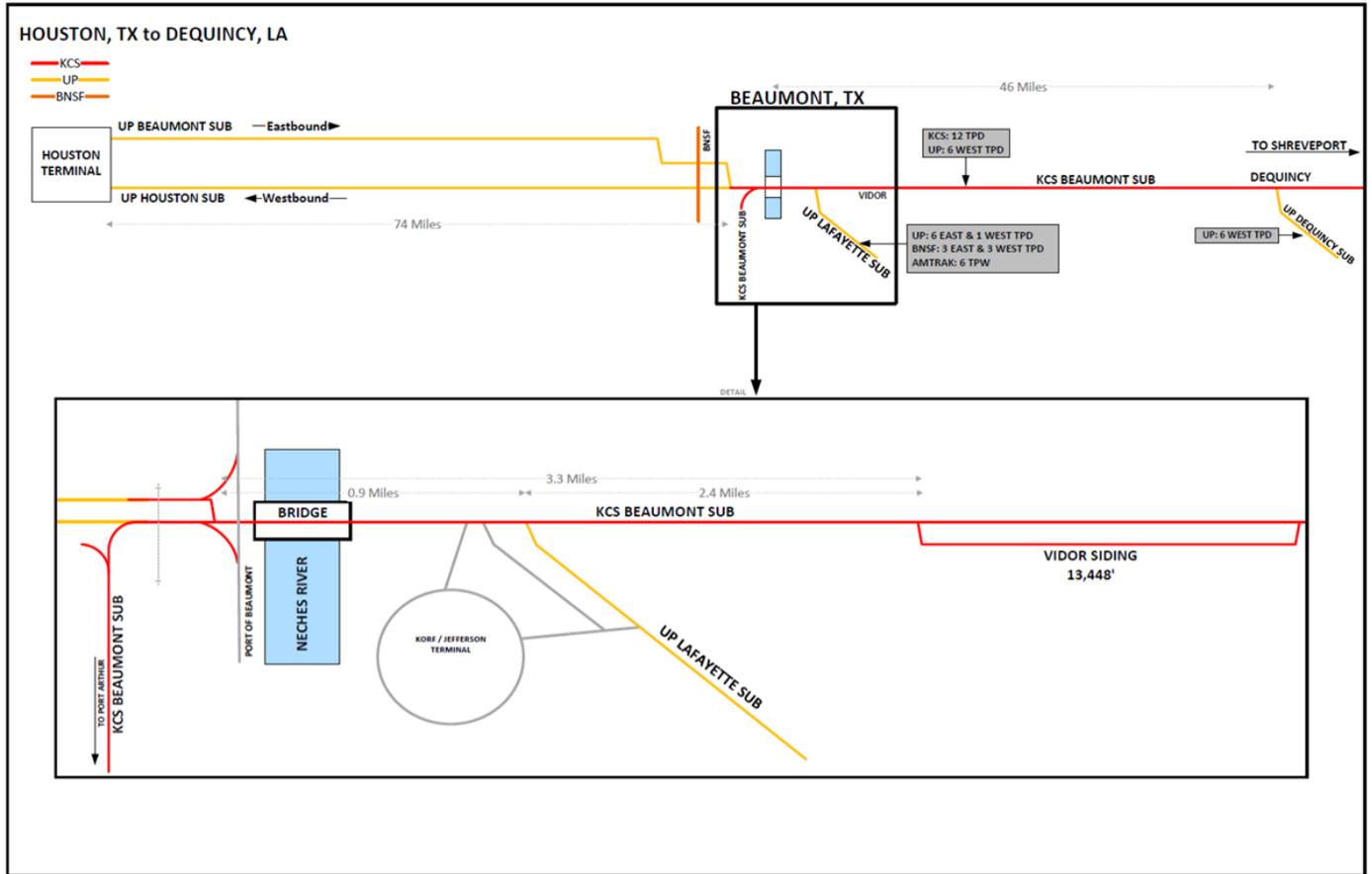
Source: BNSF Comments 21.

Texas Gulf Coast Area



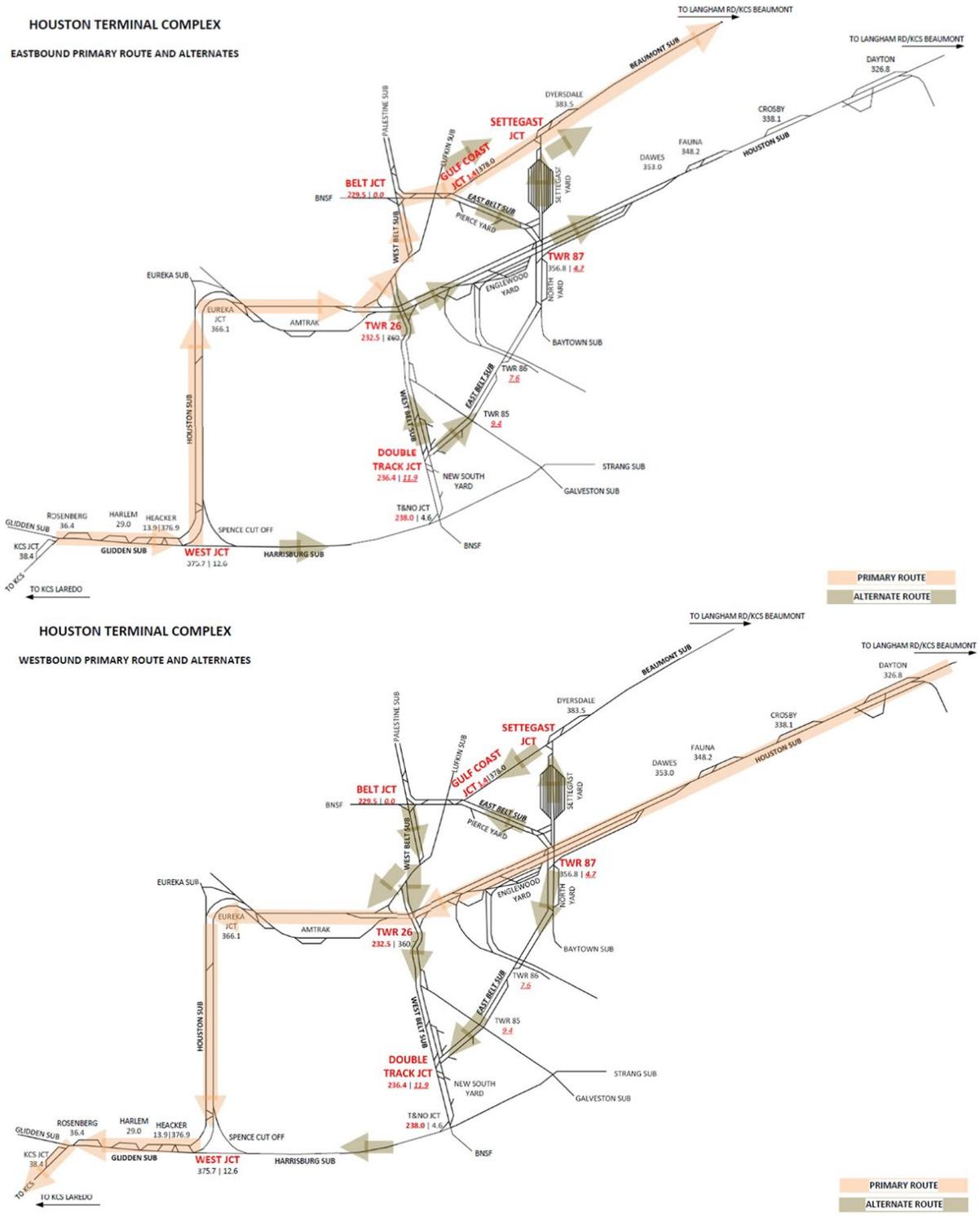
Source: UP Comments 54.

Neches River Bridge



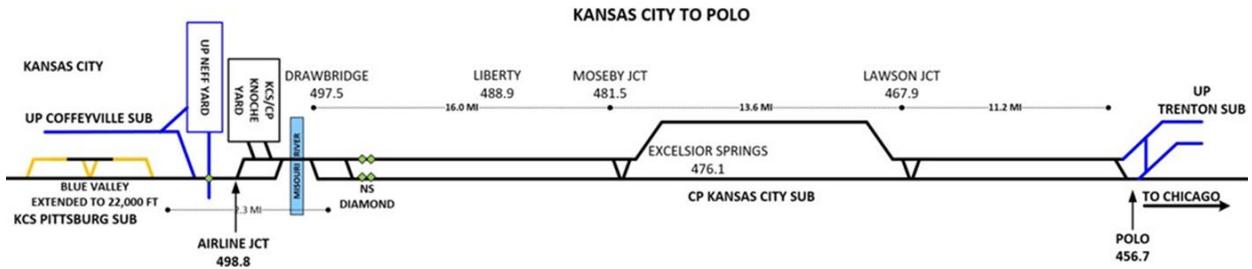
Source: Applicants Reb., Vol. 2, R.V.S. Elphick/Orr 47.

KCS Routes Through Houston Terminal via Trackage Rights



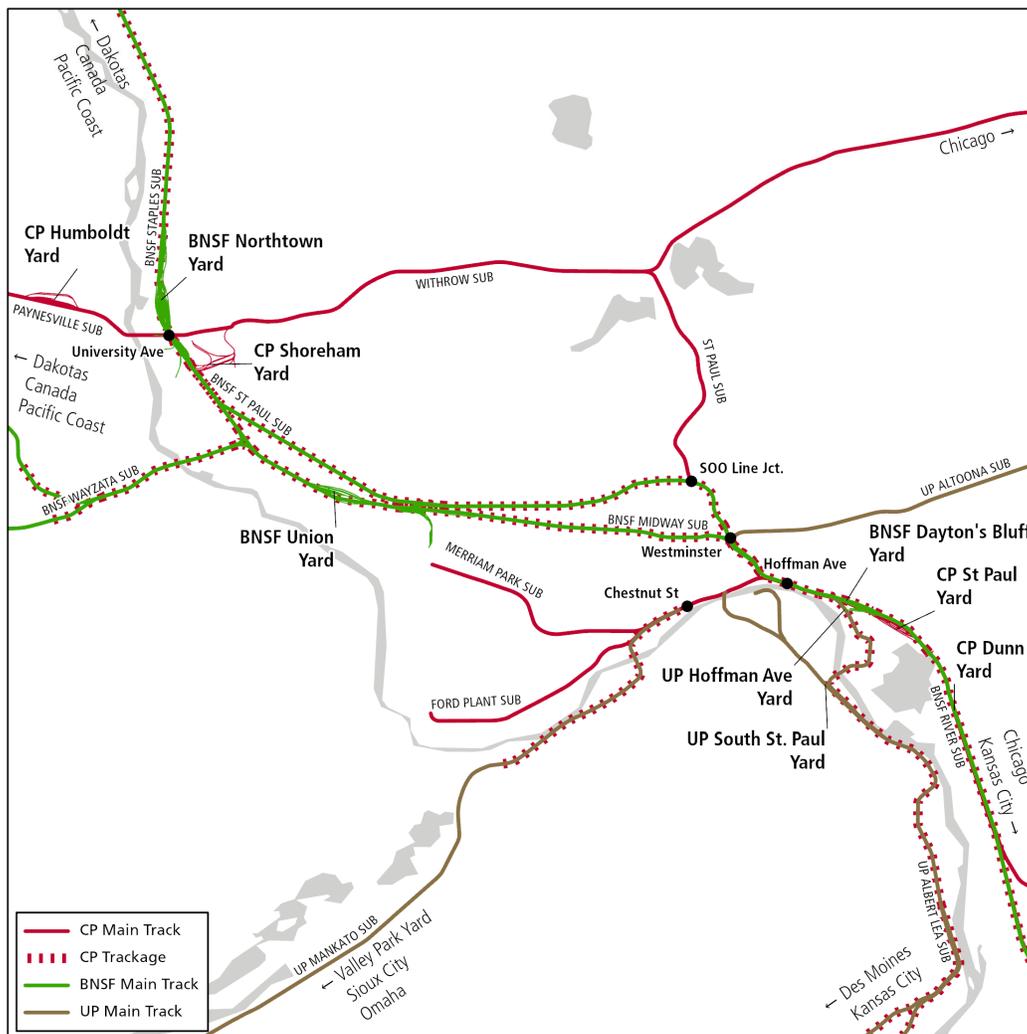
Source: Applicants Reb., Vol. 2, R.V.S. Elphick/Orr 36-37, Figures 7 & 8.

Polo Line: Airline Junction, Mo., to Polo, Mo.



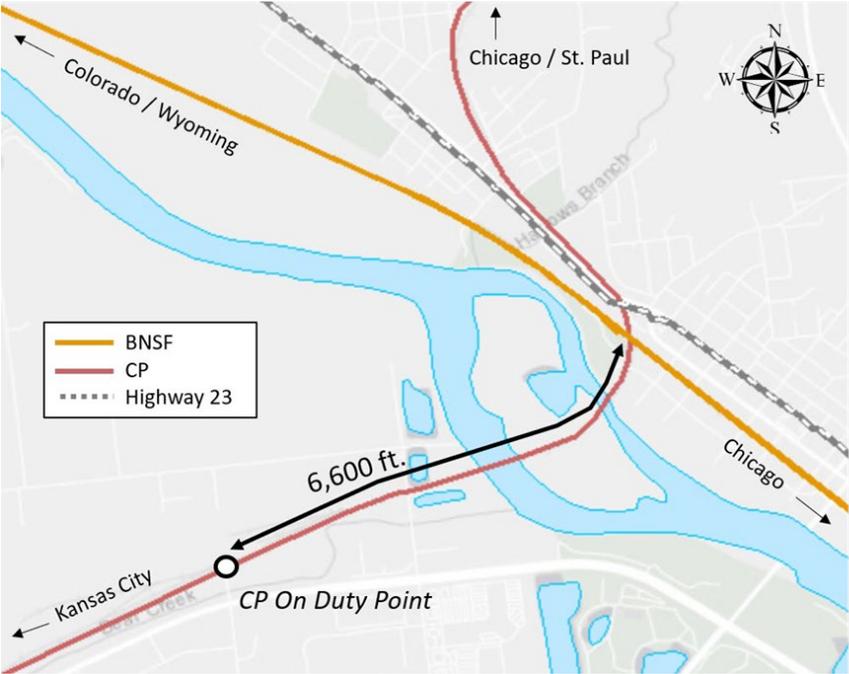
Source: Applicants Reb., Vol. 2, R.V.S. Elphick/Orr 59.

St. Paul-Twin Cities, Minn.



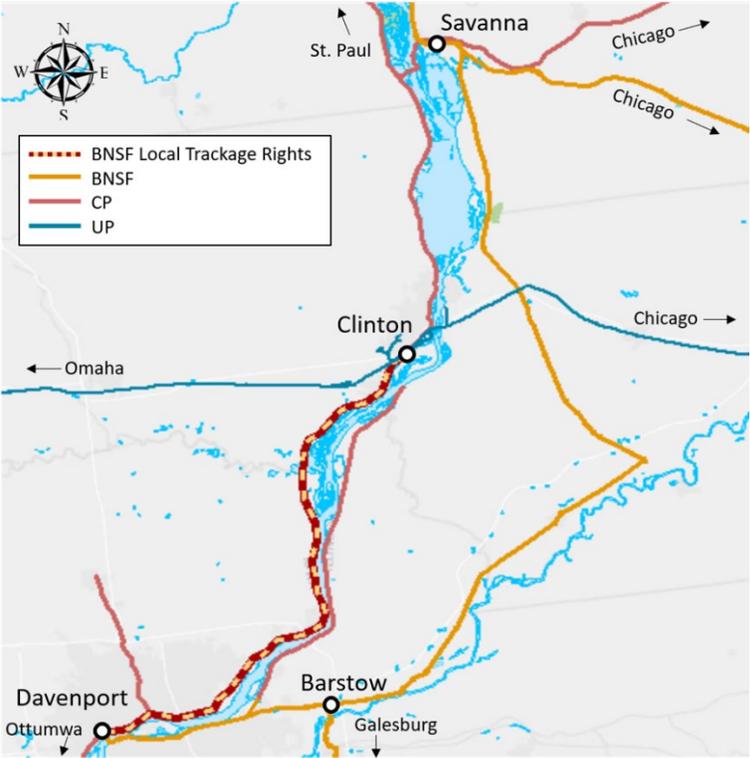
Source: Applicants Reb., Vol. 2, R.V.S. Elphick/Orr 70.

Ottumwa, Iowa



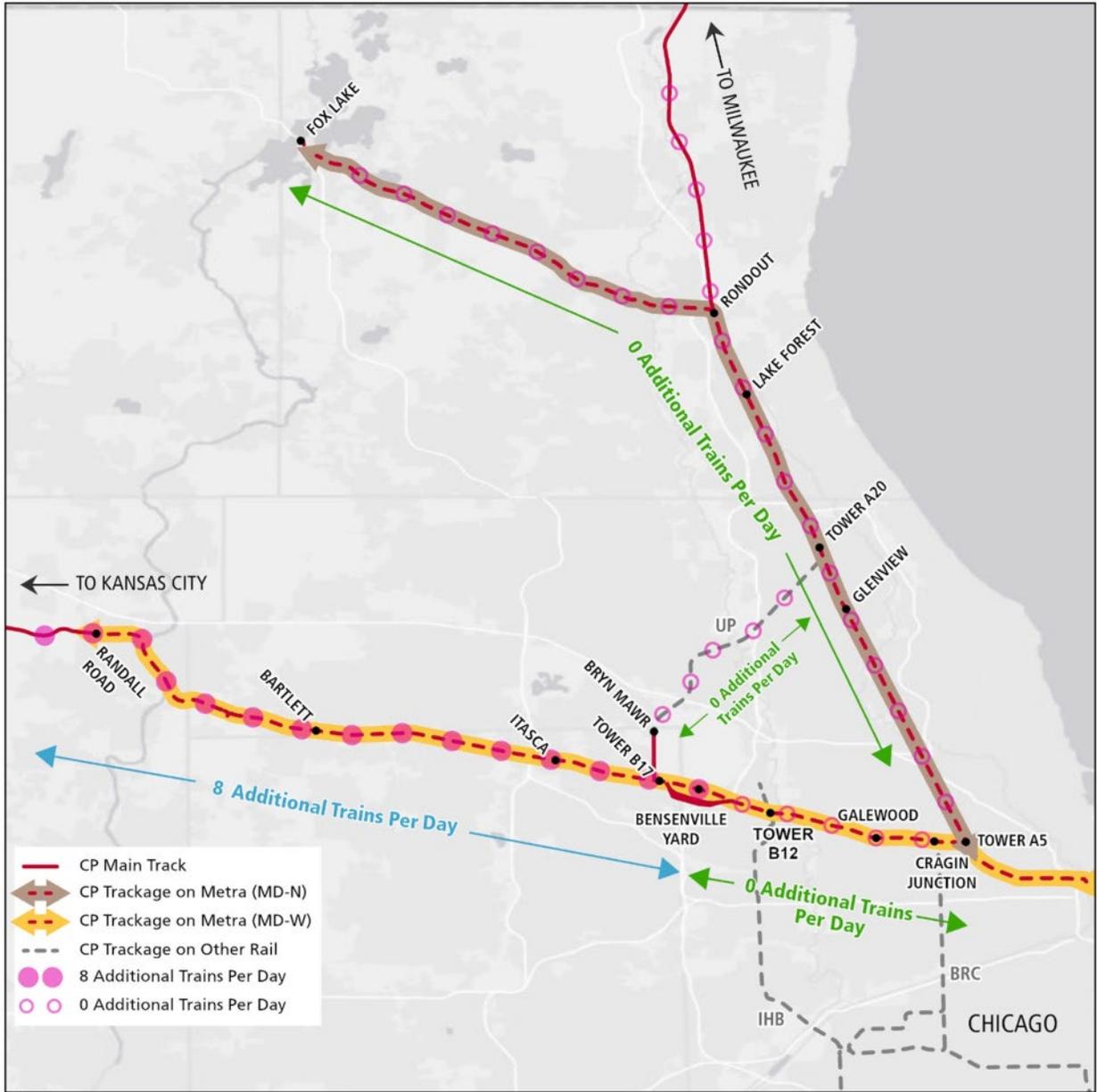
Source: BNSF Comments 65.

Quad Cities-Davenport, Iowa



Source: BNSF Comments 67.

Metra MD-N & MD-W Lines



Source: Applicants Reb. 1-170.

APPENDIX B: REPORTING & RECORDKEEPING REQUIREMENTS

Gateways Conditions

Item 1

Applicants will provide a monthly report containing the following information related to interchange volumes at gateways. With their first submission, Applicants will also provide the same historical monthly information for a five-year period dating back from the effective date of this decision, or if data is no longer available for the entirety of that time period, then from the earliest date for which it is available. This data will be used to establish a baseline by which to interpret future changes.

Count of cars interchanged with connecting carriers at interchange.

- CP Interchange Locations:
 - Eastport, Minneapolis/St. Paul, Chicago, and Kansas City
- KCS Interchange Locations:
 - Laredo, Robstown, Beaumont, Shreveport, Dallas, Jackson, Meridian, East St. Louis, Kansas City, and New Orleans

Information should include the total count of cars interchanged (i) categorized by two-digit STCC and (ii) broken out by interchange partner.

Item 2

Applicants will report on a biannual basis (every six months) the following information, categorized by two-digit STCC and on a carload basis:

- Truck-to-rail diversions on the CP and KCS lines subject to this proceeding.
- Rail-to-rail diversions on the CP and KCS lines subject to this proceeding broken out in the following categories:
 - Joint line movements converted to single line service
 - Movements that CPKC has diverted from other railroads on to the merged system

Item 3

Applicants will preserve their 100% traffic tapes for a five-year period dating back from the effective date of this decision and for the duration of the oversight period. The data to be preserved includes all data that Applicants compile and maintain in their 100% traffic tapes in the ordinary course of business, including but not limited to the following for CP and KCS operations during the five-year lookback period, and for CPKC operations during the oversight period, in the U.S. and for all transborder movements between the U.S. and Mexico or Canada:

origin, destination, and interchange information; contract and tariff information; and revenue information on a country-specific basis.¹

Item 4

Applicants will establish protocols and recordkeeping practices sufficient to enable CPKC to respond promptly and accurately to inquiries by the Board and/or shippers in the event future concerns or disputes arise in connection with the open gateway conditions imposed in this decision, including being able to provide the Board with a list of rate increases above inflation for interline movements subject to the open gateway obligation.

Customer Experience

On a monthly basis, Applicants will report weekly data on the service-related metrics detailed in the CPKC Service Promise and Attachment 1 of their Final Brief. With their first submission, Applicants will provide a description of the methodology used to compile this data and will update that description if there is a subsequent change in methodology for calculating service metrics.

Operational Data

Applicants will provide a monthly report containing information related to train operations at the following locations. With their first submission, Applicants will also provide the same historical monthly information for a five-year period dating back from the effective date of this decision, or if data is no longer available for the entirety of that time period, then from the earliest date for which it is available.

Polo Line in Missouri

For the segment from Airline Junction, Mo., to Polo, Mo.

- Weekly average number of trains per day by railroad
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly CPKC average transit time and maximum transit time

Twin Cities Area

For the lines between Hoffman Avenue and Northtown/Shoreham

- Weekly average number of trains per day by railroad
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length

¹ If data is no longer available for the entirety of the five-year lookback period, then Applicants must preserve traffic tapes from the earliest date for which they are available. To the extent the oversight record retention requirements described herein exceed those set forth at 49 C.F.R. parts 1220 and 1244, the oversight conditions control.

- Weekly CPKC average transit time and maximum transit time

Texas:

Neches River Bridge

By railroad (including passenger, bridge opening trains, and all other types of trains):

- Weekly average number of trains per day
- Weekly maximum trains per day
- Weekly 25th percentile, median, 75th percentile, and maximum train lengths
- Weekly number of trains over 10,000 ft
- Weekly total daily occupancy minutes
- Occupancy time in minutes per movement
- Minutes held prior to moving over the bridge per movement

Beaumont, Tex. to Rosenberg, Tex. Segment

- Weekly average number of CPKC trains per day
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train lengths
- Weekly number of CPKC trains over 10,000 ft
- Weekly CPKC average transit time and maximum transit time

Houston, Tex. Terminal

- Weekly CPKC average transit time
- Weekly CPKC average dwell

Rosenberg to Laredo, Tex. Segment

- Weekly average number of CPKC trains per day
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of CPKC trains over 10,000 ft
- Weekly CPKC average transit time and maximum transit time

Laredo Bridge

By railroad (including bridge opening trains and all other types of trains)

- Weekly average number of trains per day
- Weekly maximum trains per day
- Weekly 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of trains over 10,000 ft
- Weekly total daily occupancy minutes
- Occupancy time in minutes per movement
- Minutes held prior to moving over the bridge per movement

Metra & Chicago Communities:

MD-W Line: between Randall Road (Tower B-35) and Tower B-17 (trains to/from Chicago Subdivision)

- Weekly average transit times for CPKC through trains between Tower B-35 and Tower B-17
- Weekly average number of CPKC trains per day
 - For MD-W Line - Bensenville Yard to Tower A-5 split between trains departing B12 and A5
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of CPKC trains over 10,000 ft
- Weekly CPKC average transit time and weekly maximum transit time

MD-W Line: Bensenville Yard/Tower B-12 to Tower A-5

- Weekly average transit times for CPKC through trains between Tower B-12 and Tower A-5
- Weekly average number of CPKC trains per day
 - For MD-W Line - Bensenville Yard to Tower A-5 split between trains departing B12 and A5
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of CPKC trains over 10,000 ft
- Weekly CPKC average transit time and weekly maximum transit time

MD-N Line: Rondout to Tower A-5

- Weekly average transit times for CPKC through trains between Rondout and Tower A-5 (CP/KCS Commitment)
- Weekly average number of CPKC trains per day
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly number of CPKC trains over 10,000 ft
- Weekly CPKC average transit time and weekly maximum transit time

CP Marquette Subdivision Between Sabula Junction and River Junction

- Weekly average transit times for CPKC through trains across the segment
- Weekly CPKC 25th percentile, median, 75th percentile, and maximum train length
- Weekly average number of CPKC trains per day
- Weekly number of CPKC trains over 10,000 ft
- Status of capacity expansion work

APPENDIX C: ENVIRONMENTAL CONDITIONS¹

General Mitigation Measures

VM-General-01. The Applicants will continue to engage in good faith with potentially affected communities along the combined network, listen to their input related to the proposed merger and strive to reach negotiated agreements to address merger-related impacts.

VM-General-02. The Applicants will follow all applicable Federal Railroad Administration (FRA) and Occupational Safety and Health Administration construction and operational safety regulations to minimize the potential for incidents during construction of the Capital Improvement Projects and operation of the combined network.

MM-General-01. If there is a material change in the facts or circumstances upon which the Board relied in imposing specific environmental mitigation conditions, and upon petition by any party who demonstrates such material change, the Board shall consider revising its final mitigation, if warranted and appropriate.

MM-General-02. The Applicants shall submit quarterly reports to OEA on the progress of, implementation of, and compliance with all Board-imposed environmental mitigation measures. The reporting period for these quarterly reports shall begin on the date of the Board's final decision authorizing the acquisition and continue for seven years, or one year after the Applicants have completed capital improvements related to the acquisition, whichever is longer. The Applicants shall submit copies of the quarterly reports within 30 days following the end of each quarterly reporting period and distribute the reports to appropriate federal and state agencies, as specified by OEA.

MM-General-03. To minimize the potential for impacts on biological resources, water resources, hazardous materials release sites, and cultural resources, the Applicants shall, to the greatest extent possible, confine construction activities related to the planned capital improvements to the area within the existing ROW.

Freight and Passenger Rail Safety

VM-Rail-01. The Applicants will comply with FRA and Pipeline and Hazardous Materials Safety Administration regulations applicable to the safe and secure transportation of hazardous materials.

VM-Rail-02. The Applicants will comply with the Safety Integration Plan (SIP), prepared pursuant to 49 C.F.R. Part 1106, which may be modified and/or updated as necessary to respond to evolving conditions and/or new information. In the event of a reportable hazardous materials release, the Applicants will notify appropriate federal, state, and local agencies, as required under applicable law.

¹ The environmental conditions consist of Applicants' voluntary measures (VM) and OEA's final recommended mitigation measures (MM), as modified by the Board, for each affected resource.

VM-Rail-03. The Applicants will conduct Transportation Community Awareness and Emergency Response Program (TRANSCAER) workshops (training for communities through which dangerous goods are transported) in potentially affected communities that request this training. The Applicants will conduct the workshops in English and, upon request, Spanish. Training will include support for appropriate access to the AskRail app and its use to facilitate rapid, real-time access for qualified responders to information about hazardous materials in rail transportation.

VM-Rail-04. The Applicants will offer to fund the participation in railroad focused emergency response training at the Association of American Railroads' Security and Emergency Response Training Center in Pueblo, Colorado, of two qualified firefighters providing service within each of the potentially affected communities.

VM-Rail-05. The Applicants will leverage CP's extensive emergency response equipment assets by reviewing coverage of those assets across CPKC. The Applicants will either redistribute existing assets or add new equipment assets to improve emergency response capabilities relating to the potentially affected communities on CPKC.

VM-Rail-06. The Applicants will abide by their commitments to Amtrak in their agreement dated December 17, 2021. In general, the Applicants will support the efforts of Amtrak and the Southern Rail Commission to establish Amtrak service between New Orleans and Baton Rouge, and study the potential for Amtrak service between Meridian, Mississippi and Dallas, Texas. Additionally, Applicants will work with Amtrak to increase the frequency on the Hiawatha service between Chicago and Milwaukee; extend Hiawatha service from Milwaukee to Saint Paul and create a second round-trip on the Twin Cities-Milwaukee-Chicago corridor; and establish passenger service through the Detroit River Tunnel, connecting Detroit to Windsor, Ontario in order to facilitate passage service between Detroit and Windsor connecting to VIA Rail.

MM-Rail-01. The Applicants shall comply with the SIP prepared under 49 C.F.R. part 1106 and 49 C.F.R. § 244.9, which may be updated as necessary, and shall continue to coordinate with FRA in implementing the SIP during the operations integration period. The ongoing safety integration process shall continue until FRA has informed the Board that the integration of Applicants' operations has been safely completed.

Grade Crossing Safety and Delay

VM-Grade Crossing-01. Although the Applicants have not identified any grade crossings that would require mitigation based on precedent established in other approved mergers, the Applicants will, upon request, work with potentially affected communities in support of securing funding, in conjunction with appropriate state agencies, for crossing mitigation projects where they may be appropriate under criteria established by relevant state transportation departments to increase the safety of existing at-grade crossings.

VM-Grade Crossing-02. The Applicants will operate under the General Code of Operating Rules rule numbers 6.32.6 (Blocked Public Crossings) and 6.32.4 (Clear of Crossings and Signal Circuits), which provide that, when practical, a standing train or switching movement must avoid blocking a public crossing longer than 10 minutes and,

when practical, cars, engines and other equipment should not be left standing closer than 250 feet from a road crossing when there is an adjacent track.

VM-Grade Crossing-03. The Applicants will consult with potentially affected communities to improve visibility at roadway/rail at-grade crossing by clearing vegetation where practicable.

VM-Grade Crossing-04. Where practicable, the Applicants will investigate the potential to create alternative access for properties whose sole access will be blocked more than once per week by a train stationary longer than 10 minutes at a single location.

VM-Grade Crossing-05. For the construction of additional track through road crossings within the limits of the Capital Improvement Projects, where practicable, the Applicants will consult with local transportation officials regarding detours and associated signs, as appropriate, or attempt to maintain at least one open lane of traffic, as practicable, to allow the quick passage of emergency and other vehicles.

VM-Grade Crossing-06. The Applicants will notify Emergency Services Dispatching Centers for potentially affected communities of all crossings blocked by trains that are stopped and may be unable to move for a significant period of time.

MM-Grade Crossing-01. The Applicants shall consult with appropriate state Departments of Transportation and other appropriate agencies, including the Illinois Commerce Commission for grade crossings in Illinois, prior to constructing, relocating, upgrading, or modifying grade crossings as part of the acquisition, including grade crossing warning devices, and shall abide by those agencies' reasonable requirements for the design of grade crossings and associated warning devices.

Noise and Vibration

VM-Noise-01. The Applicants will fund the improvements necessary to allow any potentially affected community with an existing Quiet Zone to maintain that designation should the increase in merger related train traffic cause that community to fall out of compliance with FRA regulations.

VM-Noise-02. While building the Capital Improvement Projects, the Applicants will work with their construction contractors to minimize, where practicable, construction-related noise disturbances between the hours of 2100 and 0700 local time.

VM-Noise-03. In the construction of the Capital Improvement Projects, the Applicants will, where practicable and consistent with safe and efficient operating practices, use continuously welded rail in order to reduce wheel/rail wayside noise. OEA's Final Recommended Mitigation

MM-Noise-01. To minimize noise and vibration, the Applicants shall maintain rail and rail beds according to American Railway Engineering and Maintenance-of-Way Association standards.

MM-Noise-02. The Applicants shall comply with FRA regulations establishing decibel limits for train operations.

MM-Noise-03. The Applicants shall consider lubricating curves where doing so would both be consistent with safe and efficient operating practices and significantly reduce noise for residential or other noise sensitive receptors.

MM-Noise-04. The Applicants shall employ safe and efficient operating procedures that, in lieu of, or as complement to, other noise mitigation measures can have the collateral benefit of effectively reducing noise from train operations. Such procedures may include:

- Inspecting rail car wheels to maintain wheels in good working order and minimize the development of wheel flats;
- Inspecting new and existing rail for rough surfaces and, where appropriate, grinding these surfaces to provide a smooth rail surface during operations;
- Regularly maintaining locomotives and keeping mufflers in good working order; and
- Removing or consolidating switches that the Applicants determine are no longer needed.

MM-Noise-05. The Applicants shall promptly respond to community inquiries concerning the establishment of Quiet Zones and assist communities in identifying supplemental or alternative safety measures, practical operational methods, or technologies that may enable the community to establish Quiet Zones in accordance with FRA's final rule on the "Use of Locomotive Horns at Highway-Rail Grade Crossings."

Air Quality and Climate Change

VM-Air-01. The Applicants commit to developing Green House Gas (GHG) reduction targets for the combined network and request verification as appropriate from the Science Based Targets initiative (SBTi). As reference, CP's current SBTi approved target is a 38.3% reduction in well-to-wheels GHG emissions (on an intensity basis) from locomotive operations by 2030 compared to a 2019 base year. CP has also committed to 27.5% GHG reduction (on an absolute basis) by 2030 compared to a 2019 base year for non-locomotive Scope 1 and Scope 2 emissions. KCS has a SBTi target to reduce Scope 1 and 2 GHG emissions by 42% by 2034.

VM-Air-02. The Applicants commit to undertaking a combined network in-depth climate scenario analysis aligned to Task Force on Climate-related Financial Disclosures (TCFD) recommendations to understand how a changing climate may impact CPKC. The Applicants further commit to improving the resiliency of the combined network to the physical risks of climate change through its capital program.

VM-Air-03. As part of the ongoing reconfiguration of Bensenville Yard (a non-merger related project being undertaken as part of the development of the Illinois Tollway's Elgin O'Hare Western Access Project), the Applicants commit to undertake studies to identify ways to reduce the GHG emissions (and by extension, also reduce other air emissions) at Bensenville Yard.

VM-Air-04. The Applicants will comply with U.S. Environmental Protection Agency (EPA) emissions standards for diesel-electric railroad locomotives when purchasing and rebuilding locomotives.

VM-Air-05. The Applicants will develop an anti-idling policy for use in potentially affected communities on the combined network. The policy will capture both idling of construction equipment used on the Capital Improvement Projects as well as ongoing operations.

VM-Air-06. To minimize fugitive dust emissions created during the construction of the Capital Improvement Projects, the Applicants will implement appropriate fugitive dust suppression controls, such as spraying water or other approved measures.

VM-Air-07. The Applicants will work with the contractors selected to construct the Capital Improvement Projects to make sure that construction equipment is properly maintained and that mufflers and other required pollution-control devices are in working condition in order to limit construction-related air emissions.

VM-Air-08. Where vegetation clearing has taken place during the construction of the Capital Improvement Projects, the Applicants will begin revegetation as soon as practicable to minimize impacts of wind erosion and fugitive dust. Where immediate revegetation is not practicable, the Applicants will implement alternative stabilization measures such as matting, mulching, or hydroseeding.

Cultural Resources

MM-Cultural-01. Prior to beginning any construction activities related to the 25 planned capital improvements, the Applicants shall prepare a construction monitoring plan that addresses the following:

- Training procedures to familiarize construction personnel with the identification and appropriate treatment of historic properties;
- Monitoring of construction activities by a qualified professional archaeologist;
- Provisions for monitoring and coordination for work within tribal reservation boundaries;
- Provisions for the unanticipated discovery of archaeological sites or associated artifacts during construction activities, including procedures for notifying OEA and the appropriate State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), pursuant to 36 C.F.R. § 800.13(b) in the event of an unanticipated discovery; and
- Provisions for complying with the Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001-3013) and other applicable federal, state, and local laws and regulations in the event of inadvertent discoveries of an unanticipated discovery of unmarked human remains during construction activities.

The Applicants shall provide the construction monitoring plan to OEA and appropriate THPOs for review no later than 30 days prior to the start of any construction activities related to the 25 planned capital improvements and shall abide by the provisions of the

plan, including any revisions by OEA and appropriate THPOs, during construction activities.

MM-Cultural-02. The Applicants shall abide by their commitments to design and engineer the 25 planned capital improvements to remain within existing rail ROW, to maintain the existing rail footprint in locations immediately adjacent to archaeological sites that OEA has identified as eligible for listing on the National Register, and to not perform any construction activities related to the 25 planned capital improvements within the boundaries of National Register-eligible archeological sites identified by OEA.

Hazardous Material Release Sites

VM-Haz. Material Sites-01. The Applicants will require its construction contractor(s) to implement measures to protect workers' health and safety and the environment in the event that undocumented hazardous material are encountered during construction of the Capital Improvement Projects. The Applicants will document all activities associated with the previously undocumented contamination and will notify the appropriate state agencies according to applicable regulations. The Applicants will use disposal methods which comply with applicable solid and hazardous waste regulations.

VM-Haz. Material Sites-02. Prior to the start of construction for each Capital Improvement Project, the Applicants will develop a site-specific spill prevention, control and response plan. This plan will specify measures to prevent the release of petroleum products or other hazardous materials during construction activities and contain such discharges if they occur.

VM-Haz. Material Sites-03. In the event of a spill over the applicable reportable quantity during the construction of a Capital Improvement Project, the Applicants will comply with its site-specific spill prevention, control and response plan and applicable federal and state regulations pertaining to spill containment, appropriate clean-up, and notifications.

VM-Haz. Material Sites-04. During the construction of the Capital Improvement Projects, the Applicants will ensure that gasoline, diesel fuel, oil, lubricants, and other petroleum products are handled and stored to reduce the risk of spills contaminating soils or surface waters. If a petroleum spill occurs as a result of construction, and exceeds specific quantities or enters a waterbody, the Applicants (or its agents) will be responsible for promptly cleaning up the spill and notifying responsible agencies in accordance with federal and state regulations.

VM-Haz. Material Sites-05. The Applicants will require contractors to dispose of waste generated on the Capital Improvement Projects in accordance with all applicable federal, state, and local regulations.

MM-Haz Material Sites-01. The Applicants shall notify EPA prior to undertaking any capital improvements related to the acquisition within the EPA Orongo-Duenweg Mining Belt Superfund site.

MM-Haz Material Sites-02. The Applicants shall notify the Iowa Department of Natural Resources prior to undertaking any capital improvements related to the acquisition that

could affect the Archer Daniels Midland Corn Processing Facility Industrial Waste Landfill near the Camanche, Iowa site.

MM-Haz Material Sites-04. The Applicants shall use established standards for recycling or reuse of construction materials, such as ballast and rail ties, during the construction of capital improvements related to the acquisition. When recycling construction materials is not a viable operation, the Applicants shall use disposal methods that comply with applicable solid and hazardous waste regulations.

MM-Haz Material Sites-05. For capital improvements related to the acquisition, the Applicants shall follow American Society of Testing and Materials E1527-05, Standard Practice for Environmental Site Assessments: Phase 1 Environmental Site Assessment Process in areas where potential contamination could be encountered. If the Applicants encounter contamination (or signs of potential contamination) during these activities, Applicants shall perform a Phase 2 environmental investigation. Should findings of a Phase 2 environmental investigation identify contamination in soil and/or groundwater, the Applicants shall coordinate with relevant state agencies on regulatory obligations and comply with those agencies' reasonable requirements for avoiding impacts related to soil and/or groundwater contamination.

Biological Resources

VM-Biological-01. In alignment with CP's Environmental Policy, the Applicants commit to implementing methods to promote No Net Loss of sensitive habitats (e.g., aquatic areas, wetlands, riparian areas, native prairie, old growth forest) when constructing the Capital Improvement Projects.

VM-Biological-02. Where practicable, the Applicants will clear vegetation in preparation for the Capital Improvement Projects before or after the breeding bird nesting season, specific to each project location, to avoid inadvertent removal of active nests (nesting adults, young, or eggs) and to ensure compliance with the Migratory Bird Treaty Act. If clearing is required during a respective location's nesting season, the Applicants will consult with OEA and the local office of the U.S. Fish and Wildlife Service (USFWS) on appropriate nest survey methods for that area.

VM-Biological-03. The Applicants will not conduct construction related tree removal for the Capital Improvement Projects during the active season for the Indiana bat and the northern long-eared bat (April 1 to October 31).

VM-Biological-04. During the construction of the Capital Improvement Projects, the Applicants will take steps to reduce the unnecessary removal of bat habitat outside of active bat season by limiting tree removal to only the areas necessary to safely construct and operate the new siding or second track, marking the limits of tree clearing through the use of flagging or fencing, and ensuring that construction contractors understand clearing limits and how they are marked in the field.

VM-Biological-05. If construction of the Capital Improvement Projects would require removal or alteration of bridges, culverts, or other structures that provide suitable habitat for the northern long-eared bat or the Indiana bat during the active season for those species (April 1 to October 31), the Applicants will first conduct an inspection for the

presence of, or evidence of use by, bats. The inspection will be completed by a qualified biologist. If the inspection finds bats or evidence of bats, then the Applicants will not commence work on the structure until coordinating with OEA and USFWS to determine appropriate follow-up or mitigative actions. The inspection must be completed during the same year that the work takes place.

VM-Biological-06. Where practicable, the Applicants will conduct any culvert or bridge removal as part of the Capital Improvement Projects outside of the roosting period of bat species, specific to each project location. Where practicable, if bridge or culvert removal is required during the bat roosting period where the individual Capital Improvement Project is located, the Applicants will consult with OEA and the local USFWS office on appropriate methods to determine if bats are using the bridge or culvert as a roost.

VM-Biological-07. During construction of the Capital Improvement Projects, the Applicants will direct any temporary lighting away from suitable habitat for the northern long-eared bat or the Indiana bat during the active season for those species (April 1 to October 31). The Applicants will use downward-facing, full cut-off lens lights for any temporary lighting used during the construction of the Capital Improvement Projects.

VM-Biological-08. If the Capital Improvement Projects would involve installing any new, or replacing any existing, permanent lights, the Applicants will use downward-facing, full cut-off lens lights (with the same intensity or less for replacement lighting).

VM-Biological-09. During construction of the Capital Improvement Projects, temporary barricades, fencing, and/or flagging will be used in sensitive habitats to contain construction related impacts to the area within the construction ROW. To the extent possible, staging areas will be located in previously disturbed sites and not in sensitive habitat areas.

VM-Biological-10. The Applicants will limit ground disturbance to only the areas necessary for the construction of the Capital Improvement Projects.

VM-Biological-11. The Applicants will use construction methods and seed mixes that minimize introduction and spread of noxious weeds on the Capital Improvement Projects. Noxious weed control will include combinations of mechanical and herbicide spray methods.

VM-Biological-12. The Applicants will ensure that any herbicides used in ROW maintenance to control vegetation are approved by EPA and are applied by licensed individuals who will limit application to the extent necessary for safe rail operations. Herbicides will be applied so as to prevent or minimize drift off of the ROW onto adjacent areas.

VM-Biological-13. As applicable to each of the individual Capital Improvement Projects, the Applicants will protect bald and golden eagles by adhering to the Bald and Golden Eagle Protection Act. In addition, the Applicants will follow the USFWS National Bald Eagle Management Guidelines, as applicable.

MM-Biological-01. For capital improvements related to the acquisition, the Applicants shall not knowingly include any federally- or state-listed invasive weed species in seed mixes for revegetating disturbed areas within the rail ROW.

MM-Biological-02. During final design and engineering of capital improvement projects related to the acquisition, the Applicants shall reexamine the USFWS list of threatened or endangered species. If the list has changed to include newly listed species or newly designated critical habitat, or if new information reveals that listed species or critical habitat could be affected by the capital improvements, the Applicants shall consult with OEA and USFWS regarding avoidance, minimization, and mitigation measures and shall implement the measures developed in consultation with OEA and USFWS.

MM-Biological-03. The Applicants shall apply the mitigation measures identified in VM Biological-03, VM-Biological-04, VM-Biological-05, VM-Biological-06 and VM Biological-07 to any planned capital improvements potentially affecting the habitat of the Tricolored bat, which USFWS has proposed for listing as Endangered.

MM-Biological-04. The Applicants shall implement Special Protective Measures and karst Best Management Practices if the construction of the planned capital improvements occurs in areas with karst features in Benton County, Arkansas and McDonald County, Missouri, to avoid potentially affecting the endangered Benton County Cave Crayfish, Hell Creek Cave Crayfish, and Ozark Cavefish.

Water Resources

VM-Water-01. The Applicants commit to remaining compliant with 33 C.F.R. Part 117 Drawbridge Operation Regulations.

VM-Water-02. As applicable for each of the Capital Improvement Projects, the Applicants will request Clean Water Act Water Quality Certification from the jurisdiction where the respective project is located.

VM-Water-03. As applicable for each of the individual Capital Improvement Projects, the Applicants will obtain an authorization from the U.S. Army Corps of Engineers (USACE) under Section 404 of the Clean Water Act before initiating project-related construction activities in jurisdictional waters of the U.S.

VM-Water-04. As applicable to each of the individual Capital Improvement Projects, the Applicants will require its construction contractor(s) to follow all water quality control conditions identified in all permits including the Water Quality Certification from the respective jurisdiction and Section 404 Permits issued by USACE.

VM-Water-05. Prior to initiating construction at a Capital Improvement Project location, the Applicants will develop a site-specific Stormwater Pollution Prevention Plan which will incorporate Best Management Practices as well as site specific measures to control erosion and reduce the amount of sediment and pollutants entering surface waters, ground waters, and waters of the U.S.

VM-Water-06. For Capital Improvement Project locations which will involve construction activities in proximity to surface water, prior to the start of construction the

Applicants will develop a site-specific water quality monitoring plan and implement this monitoring plan throughout construction.

VM-Water-07. The Applicants will minimize impacts to wetlands where practicable in the final design of the individual Capital Improvement Projects. Applicants agree to compensate for the loss of any wetlands through any one, or a combination of: purchasing credits from an authorized wetland mitigation bank, restoring a previously existing wetland or other aquatic site, enhancing an existing aquatic site's function, preserving an existing aquatic site, and/or creating a new aquatic site.

VM-Water-08. The Applicants will design all Capital Improvement Project drainage crossing structures to pass a 100-year storm event.

VM-Water-09. The Applicants will consider the passage of aquatic organisms in the design of culverts and bridges required for the Capital Improvement Projects, where practicable.

VM-Water-10. As applicable to each of the individual Capital Improvement Projects, the Applicants will comply with applicable in-water work windows and timing restrictions for the protection of fish species.

VM-Water-11. During the construction of Capital Improvement Projects, the Applicants will require all contractors to conduct daily inspections of all equipment for any fuel, lube oil, hydraulic or antifreeze leaks. If leaks are found, the Applicants will require the contractor to immediately remove the equipment from service and repair or replace it.

VM-Water-12. During the construction of the Capital Improvement Projects, the Applicants will prohibit construction vehicles from driving in or crossing streams at other than established crossing points.

VM-Water-13. During the construction of the Capital Improvement Projects, the Applicants will take reasonable steps to ensure contractors use fill material appropriate for the project area.

MM-Water-01. During the final engineering and design of the 25 capital improvements, the Applicants shall design culverts and bridges so as to maintain existing surface water drainage patterns to the extent practicable and not cause or exacerbate flooding.

MM-Water-02. The Applicants shall coordinate with the Federal Emergency Management Agency if construction of bridges, culverts, or embankments related to the 25 planned capital improvements would result in an unavoidable increase greater than 1 foot to the 100-year water surface elevations.

MM-Water-03. The Applicants shall obtain and comply with National Pollutant Discharge Elimination System (NPDES) permits for storm water discharges resulting from project-related construction activities at each of the capital improvements that meet the requirements for a NPDES.

Environmental Justice

VM-EJ-01. The Applicants will use CP's experience building relationships with First Nations in Canada to engage with federally recognized Indian tribes in the U.S.

VM-EJ-02. The Applicants will make Operation Lifesaver programs available to potentially affected communities, including schools and other organizations (Operation Lifesaver is a non-profit education and awareness program that helps increase the public's awareness of the dangers around rail lines).

VM-EJ-03. For the construction contracts for the Capital Improvement Projects, the Applicants commit to allocate a minimum of 15% of contractor bid evaluation weighting to the inclusion of minority and tribal owned businesses and employees on the proposed project team.

MM-EJ-01. The Applicants shall conduct proactive and targeted outreach to minority and low-income communities that would experience adverse noise impacts as a result of the acquisition to provide information about the process for establishing Quiet Zones. The Applicants shall assist interested communities in identifying supplemental or alternative safety measures, practical operational methods, or technologies that may enable the community to establish Quiet Zones in accordance with FRA's final rule on the "Use of Locomotive Horns at Highway-Rail Grade Crossings."

Community Agreements and Coordination

VM-Community-01. The Applicants commit that the new CPKC will meet regularly with community representatives in the Houston area. If those communities experience merger-related impacts, CPKC will work with them on ways to address their concerns. CPKC will also participate alongside other railroads serving Houston—notwithstanding that it will own no track there—to work cooperatively with communities to address the impacts of rail operations in the region.

VM-Community-02. The Applicants will provide community leaders in Houston with ways to report issues. CP has a "Community Connect" webpage that provides contact information, answers frequently asked questions, and offers other resources that will remain active for the new CPKC system. CP also has a Public Safety Communication Centre that operates 24 hours a day, 365 days a year with trained communication officers who can be reached toll-free at 1-800-716-9132. Calls into that Centre, which includes the Community Connect line and CP's emergency lines, are tracked using sophisticated Computer Aided Dispatch (CAD) software. The communication officers in this Centre are trained to handle a range of issues, from a blocked crossing to a trespasser, and they regularly coordinate the involvement of other railroads as required for any specific incident.

VM-Community-03. The Applicants will work with certain Chicago area communities with which they have not been able to reach agreements—DuPage County, the Village of Bartlett, the Village of Bensenville, the City of Elgin, the Village of Itasca, the Village of Hanover Park, the Village of Roselle, the City of Wood Dale, and the Village of Schaumburg—to mitigate potential acquisition-related environmental impacts. Specifically, they will work with them to accomplish:

- Subject to necessary FRA approvals and practicability, funding efforts towards the creation and implementation of quiet zones, including the costs of installation.

- Installing and funding a predictive mobility system, interconnected with existing railroad crossing signals, that will deliver advanced notice of blocked crossings to citizens, police, fire, and rescue operations, and others.
- Installing and funding ITS Interconnect for Advanced Warning Signs at strategic locations to give drivers information about occupied crossings, allowing them to make better on-the-spot decisions.
- Installing and funding Positive Train Control wireless technology tie-ins at crossings adjacent to Metra platforms, which will minimize the activation of crossing lights and gates.

With respect to the work described above, the Applicants anticipate that the Applicants or their subcontractors will perform the work. In the case of instances where work may be performed by others, the Applicants would reimburse reasonable and customary charges for such work. Because Metra owns the trackage that CP uses in these communities, Metra would have to approve the implementation of this mitigation measure. The Applicants would work with Metra, the communities, and any other relevant agencies to seek approval for this mitigation measure.

MM-Community-01. The Applicants shall comply with the terms of the agreements reached between the Applicants and the City of Davenport, Iowa; the City of Bettendorf, Iowa; the City of Muscatine, Iowa; the City of LeClaire, Iowa; the City of Clinton, Iowa; the City of Washington, Iowa; the City of Fruitland, Iowa; the Village of Hampshire, Illinois; the Village of Pingree Grove, Illinois; and the City of Liberty, Missouri.

MM-Community-02. If Applicants reach additional agreements with communities or other entities following publication of this Final EIS, the Applicants shall notify the Board, and the Board will impose a condition that requires the Applicants to comply with the terms of the agreement.

MM-Community-03. To facilitate compliance with VM-Community-01 and VM Community-02, the Applicants shall establish a Community Liaison to consult with Houston area community leaders. The Community Liaison shall be available for public meetings and to conduct periodic outreach to mayors and appropriate local officials. The Applicants shall establish and staff the Community Liaison position for a period of seven years following the Board's final decision authorizing the acquisition. The Applicants shall provide the name, telephone number, and email address of the Community Liaison to the Houston mayor and Harris County officials.

MM-Community-04. To facilitate compliance with VM-Community-03, the Applicants shall establish a Community Liaison to consult with leaders of Chicago area communities referenced in that mitigation measure (the Village of Itasca, the Village of Bensenville, the City of Wood Dale, the Village of Roselle, the Village of Schaumburg, the Village of Hanover Park, the Village of Bartlett, the City of Elgin, and DuPage County). The Community Liaison shall be available for public meetings and to conduct periodic outreach to mayors and appropriate local officials. The Applicants shall establish and staff the Community Liaison position for a period of seven years following the approval of the acquisition. The Applicants shall provide the name, telephone number, and email

address of the Community Liaison to mayors and other appropriate local officials in each community listed above.