

Before the
SURFACE TRANSPORTATION BOARD

301381

Finance Docket No. 32760 (Sub-No. 46)

BNSF RAILWAY COMPANY
—TERMINAL TRACKAGE RIGHTS—
KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY

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APPLICATION FOR TERMINAL TRACKAGE RIGHTS

BNSF's Petition to Establish Conditions of Use

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Dated: December 18, 2020

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I. Introduction and Summary

At every step in this nearly eight-year-long proceeding,¹ BNSF Railway Company (“BNSF”) has diligently followed the direction of the Surface Transportation Board (“STB” or “Board”) in seeking administrative remedies to enable BNSF direct service on the Rosebluff Lead² and to fully implement the competition-preserving Lake Charles Merger Conditions.³ At every step, the Board has ruled in favor of BNSF and has affirmed the need to fully implement the Lake

¹ A summary of the key events in this proceeding has been set forth in the Appendix attached to this Petition.

² The Rosebluff Lead is a nine-mile single track jointly owned by Union Pacific Railroad Company (“UP”) and Kansas City Southern Railway Company (“KCS”). The Rosebluff Lead begins at the former Southern Pacific Transportation Company’s (“SP”) Lafayette Subdivision (now jointly owned 50% each by UP and BNSF) at mile post 222.3 and extends to the south. *See BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. (Decision No. 3)*, FD 32760 (Sub-No. 46), slip op. at 1 (STB served July 5, 2016).

³ The Lake Charles Merger Conditions are the trackage rights conditions relating to the handling of traffic of Lake Charles area shippers imposed by the Board in connection with the Board’s approval of the 1996 merger between UP and SP. *BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. (Decision No. 4)*, FD 32760 (Sub-No. 46), slip op. at 2 (STB served May 4, 2018). For additional details, *see* discussion *infra* Part II.A.

Charles Merger Conditions. Nevertheless, KCS and UP have repeatedly erected roadblocks to prevent BNSF from fulfilling its role as a fully competitive replacement for SP direct service to shippers in the Lake Charles area.⁴ As a result, despite the Board's decisions, BNSF has been unable to operate a single train on the Rosebluff Lead thus far.

As described below, LyondellBasell ("Lyondell"), a shipper in the Lake Charles area that BNSF had sought to serve using the terminal trackage rights granted by the Board in 2016, recently decided to move its rail transportation business at its Lake Charles area facility from BNSF to UP. This is at least the second major Lake Charles business opportunity lost by BNSF during the pendency of this proceeding.

While BNSF is committed to implementing the competitive service that the Board and UP promised to shippers through the Lake Charles Merger Conditions, the Board could not have intended that it would take years for BNSF direct service to begin after a Lake Charles area shipper had requested such service. BNSF regularly works with host railroads (including UP and KCS) to seamlessly operate BNSF trackage rights service on thousands of miles of railroad lines throughout the country. None of those trackage rights lines have barriers to entry like those faced by BNSF on the Rosebluff Lead.

This latest development demonstrates that the STB must now take affirmative steps to end the continued—and thus far successful—KCS and UP efforts to forestall effective BNSF competition. The prospect of further litigation delays will continue to impede BNSF's ability to directly serve Rosebluff Lead shippers unless the STB acts now.

⁴ The Lake Charles area encompasses Westlake, West Lake Charles, and Lake Charles, Louisiana. *BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. (Decision No. 8)*, FD 32760 (Sub-No. 46), slip op. at 2 n.3 (STB served Feb. 21, 2020).

The Board has already granted BNSF the necessary trackage rights to implement the Lake Charles Merger Conditions and has established principles for the use of those trackage rights. The Board must now act to avoid further delays from piecemeal and incremental litigation over those conditions of use. Such delays compromise BNSF's participation in the real-world bidding processes undertaken by Lake Charles area shippers for rail transportation services.

In particular, BNSF requests that the STB use its authority under 49 U.S.C. § 11102(a) regarding the conditions of use of terminal trackage rights to: (1) establish that any future terms of BNSF's use of the Rosebluff Lead terminal trackage rights will be based on the principles that the STB set out in *Decision No. 8*, and (2) establish an expedited process for resolving any disputes over conditions of use for shippers other than Lyondell that BNSF may later elect to serve using its terminal trackage rights.

II. Background

A. The Board intended the Lake Charles Merger Conditions to establish BNSF as an effective competitive replacement for SP.

In 1996, UP agreed to, and the Board imposed, the Lake Charles Merger Conditions in connection with the Board's approval of the UP/SP merger in order to preserve competition (much of which was provided by direct service) for shippers in the Lake Charles area that would otherwise have been lost by the merger of UP and SP.

As relevant here, "the Lake Charles Merger Conditions allowed BNSF to handle traffic of shippers open to all of UP, SP, and KCS at Lake Charles and West Lake, La., and to handle traffic of shippers open to SP and KCS at West Lake Charles, La." *Decision No. 4*, slip op. at 2; *see also Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Decision No. 44)*, 1 S.T.B. 233, 427-29 (1996);

Decision No. 3, slip op. at 2-3. The Lake Charles Merger Conditions expressly provide BNSF with the “option of directly accessing Lake Charles area shippers, including those on the Rosebluff Lead, via trackage rights.” *Id.*; *see also Decision No. 3*, slip op. at 9-13. The Board also provided Lake Charles area shippers with an independent right under the Chemical Manufacturers Association (“CMA”) Agreement⁵ and the Lake Charles Merger Conditions to receive direct BNSF service. *See UP/SP Decision No. 44*, 1 S.T.B. at 247 n.15.

The Board intended that BNSF would serve Lake Charles area shippers as a real and effective competitive replacement for SP, not merely a theoretical presence. Shippers cannot gain the full benefits from the competition-preserving Lake Charles Merger Conditions until BNSF can provide direct service, in a timely fashion upon a shipper’s request and BNSF’s election, to any shipper facility accessible via the Rosebluff Lead that is covered by the conditions. Had the STB not approved the UP/SP merger, Lake Charles area shippers would have continued to benefit from the incumbent SP’s ability to serve them directly without facing the significant time delays and other restraints that UP and KSC seek to impose on BNSF.

As Dr. David A. Reishus stated in his prior testimony in this proceeding, “[a]rtificial limitations on the competitive response available to BNSF are inconsistent with the preservation of competition that could have been provided by an independent SP.” BNSF’s Rebuttal in Support of Application for Terminal Trackage Rights (BNSF-124), David A. Reishus Rebuttal Verified Statement ¶ 9 (filed Oct. 23, 2015) (attached as Exhibit A). Dr. Reishus further explained that

⁵ The CMA Agreement is a settlement agreement among UP/SP, BNSF, and CMA whose terms were imposed by the Board as conditions for approving the 1996 merger between UP and SP. *See Decision No. 8*, slip op. at 2. Under this agreement “BNSF also received, among other things, certain rights to handle traffic of Lake Charles area shippers (the Lake Charles Merger Conditions).” *Id.*

changes in the transportation and energy markets “call for the provision of regular shipments of large volumes of crude oil (and potentially other commodities) in a reliable and timely manner through direct access by BNSF.” *Id.* ¶ 17.

B. To implement the Lake Charles Merger Conditions, the Board, over KCS’s repeated objections, granted BNSF terminal trackage rights.

In December 1996, the Board affirmed its imposition four months earlier of the Lake Charles Merger Conditions over the objections of KCS, which is the joint owner along with UP of track in the Rosebluff Lead terminal area. *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Decision No. 63)*, FD 32760 (STB served Dec. 4, 1996). UP had agreed to the BNSF access terms of the Lake Charles Merger Conditions without obtaining KCS’s consent. The Board addressed UP’s failure to obtain KCS’s consent for BNSF direct access by directing BNSF to file a terminal trackage rights application if BNSF sought to directly serve Lake Charles area customers and KCS refused to consent to such BNSF operations. *UP/SP Decision No. 63*, slip op. at 10. The Board left open the possibility of an override under 49 U.S.C. § 11321(a) of the relevant UP-KCS contract provisions if the Board denied a BNSF terminal trackage rights application. *Id.*

Nearly eight years ago, in December 2012, KCS blocked BNSF’s attempt to provide direct service over the Rosebluff Lead to a CITGO facility in the Lake Charles area. *See Decision No. 3*, slip op. at 4. In February 2013, BNSF therefore followed the STB’s direction in *UP/SP Decision No. 63* and applied for terminal trackage rights over the Rosebluff Lead. (Railroads must use the Rosebluff Lead to reach many, but not all, of the shippers covered by the Lake Charles Merger Conditions.) BNSF’s application focused on BNSF direct service to a CITGO facility located off the Rosebluff Lead, but did not preclude BNSF direct service to other shipper facilities accessible via the Rosebluff Lead. More than three years later, in

July 2016, the STB granted BNSF the terminal trackage rights to serve all Lake Charles shippers through *Decision No. 3* in this proceeding. By the time of the STB's decision, however, CITGO no longer desired direct BNSF service.

C. KCS and UP have prevented BNSF from using the terminal trackage rights.

Following the Board's grant of terminal trackage rights, another shipper, Lyondell, requested direct BNSF service to its Lake Charles area facility accessible via the Rosebluff Lead. BNSF once again followed the direction of the STB, set forth in *Decision No. 3*, and started negotiations with KCS and UP over conditions of use and compensation for that service. After more than a year of such negotiations, it became clear that the parties could not agree privately to such terms, and BNSF petitioned the STB in January 2018 to impose the terms, again following the direction of the STB in *Decision No. 3*.

KCS moved to dismiss the BNSF petition, arguing that the terminal trackage rights did not permit BNSF to directly serve any shipper facilities other than CITGO. In *Decision No. 4*, the STB denied the KCS motion and confirmed that the BNSF trackage rights allow BNSF to use the Rosebluff Lead to directly serve Lyondell and all other shipper facilities accessible via the Rosebluff Lead and covered by the Lake Charles Merger Conditions. *See Decision No. 4*, slip op. at 1, 5-7.

D. In *Decision No. 8*, the Board established principles to govern BNSF's use of the terminal trackage rights.

Following another lengthy two-year proceeding, including two mediation periods requested by KCS and UP, the STB issued *Decision No. 8*, granting in part the BNSF petition by setting use conditions for BNSF operations and establishing an additional administrative process to set compensation terms. While the use

conditions established by the STB were focused on BNSF direct service to Lyondell, those conditions were based on general service principles that can be applied more generally to all shippers accessible via the Rosebluff Lead, as discussed further below. BNSF, KCS, and UP are currently in the process of addressing the compensation issues relating to BNSF's use of the Rosebluff Lead. Briefing on the compensation issues is scheduled to conclude in May 2021, with the STB to issue a decision setting the terms sometime thereafter.⁶

However, ongoing opposition by KCS and UP and continued litigation-induced delay have coincided with another commercial setback to BNSF's efforts to provide direct, competitive service to shippers served off the Rosebluff Lead. In July 2020, Lyondell concluded a bidding process for its rail transportation business at its Lake Charles facility, choosing to move its business from BNSF to UP beginning January 1, 2021. In the broader context set forth above, Lyondell's decision is understandable: Unlike BNSF, which has been hampered at every turn by KCS's (and UP's) stonewalling, UP can provide Lyondell with direct service, while, currently and for the foreseeable future, BNSF cannot. BNSF understands that BNSF may have the opportunity to compete again for the Lyondell rail transportation business at Lake Charles in a few years.

E. BNSF intends to use the terminal trackage rights to access multiple Lake Charles shippers.

In addition to CITGO and Lyondell, there are multiple additional shipper facilities accessible via the Rosebluff Lead and covered by the Lake Charles Merger Conditions that BNSF may serve directly using its terminal trackage rights. All of these shippers are entitled to the full benefit of UP's commitment to allow BNSF to

⁶ There is no need for the STB to delay the existing compensation proceeding while it acts on this Petition, because the relief requested in this Petition, limited to conditions of use, will have no impact on the compensation terms that the STB will impose through the existing proceeding.

serve as a competitive replacement for SP. BNSF is concerned, however, that any new attempt to commence direct service to any other Rosebluff Lead shipper will also be thwarted by KCS and UP if the STB does not grant this petition.

III. The Board should act now to allow BNSF to use the terminal trackage rights and fully implement the Lake Charles Merger Conditions.

After many years of litigation and administrative process, the Board has granted BNSF trackage rights over the Rosebluff Lead to access shippers covered by the Lake Charles Merger Conditions. The Board has also identified certain principles that should govern use of the trackage rights and has initiated a proceeding to address compensation for those trackage rights.⁷ To ensure that these Board decisions can be effectively implemented, and that the competition that the Board intended to preserve with the Lake Charles Merger Conditions can in fact be fully and timely maintained, BNSF seeks the following relief.⁸

⁷ BNSF intends to demonstrate in the compensation proceeding that compensation terms can be set for all potential BNSF movements using the terminal trackage rights. If KCS or UP dispute the scope of compensation to be set in that proceeding, the Board can and should resolve any such dispute within the context of the existing compensation proceeding. *See BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. (Decision No. 9)*, FD 32760 (Sub-No. 46) (STB served Apr. 1, 2020). Accordingly, this Petition focuses on conditions of use rather than compensation.

⁸ The Board recognized in *UP/SP Decision No. 63* that, if BNSF's application for a terminal trackage rights was denied, "an override of the terms of the four joint facility agreements might be necessary under old 49 U.S.C. § 11341(a)." *UP/SP Decision No. 63*, slip op. at 10. The same conclusion is warranted if, as here, the terminal trackage rights remedy proves to be incapable of enabling BNSF to timely and effectively provide direct service. Therefore, if the Board does not grant this petition, in whole or in part, the Board should reopen *Decision No. 3* and confirm that the KCS consent provisions in the UP/KCS joint facility agreements are overridden by 49 U.S.C. § 11341(a), now codified at 49 U.S.C. § 11321(a).

A. The Board should establish that the principles set forth in *Decision No. 8* for BNSF's use of its terminal trackage rights will apply to all BNSF trackage rights movements.

Decision No. 8 focused on the terms of use for BNSF service to a particular shipper, Lyondell. However, the extensive evidence submitted and considered in the proceeding allowed the Board to establish general principles that should govern other movements using the Rosebluff Lead. Absent a change in circumstance, the Board should not need to revisit these principles each time a dispute arises between the parties regarding a BNSF operating plan.

Therefore, BNSF asks the Board, using its authority under 49 U.S.C. § 11102(a), to establish that any future terms of use for the Rosebluff Lead terminal trackage rights will be based on the following principles that the STB set out in *Decision No. 8*:

- an exclusive BNSF operating window during UP's 12-hour window for Rosebluff Yard operations,⁹
- an exclusive unimpeded route over the Rosebluff Lead for BNSF's train,¹⁰ and
- flexibility by all parties if BNSF completes its operations sooner or later than anticipated.¹¹

⁹ The Board ordered that "BNSF's direct service on the Rosebluff Lead shall be limited to one exclusive, four-hour window of time, to occur each day during UP's 12-hour window for Rosebluff Yard operations (i.e., between 6:00 a.m. and 6:00 p.m.)." *Decision No. 8*, slip op. at 9. BNSF could use the "exclusive, four-hour window" to serve shippers other than Lyondell. However, the duration of time needed for BNSF to occupy the terminal trackage in order directly serve non-Lyondell shippers may vary. The amount of time for the exclusive BNSF operating window for any particular movement could be established through negotiations between the three parties or by the Board under the process described below.

¹⁰ The Board clarified that "UP and KCS must ensure that BNSF's train has an unimpeded route along the Rosebluff Lead between the 50/50 Line and the Montell Lead for the duration of the four-hour window, including maintaining one clear running track through the Rosebluff Yard and clearing all UP and KCS trains from the sections of the Rosebluff Lead that BNSF must traverse to access Lyondell." *Id.*

¹¹ The Board explained that UP and KCS could resume operations over the cleared portions of the Rosebluff Lead and Rosebluff Yard if BNSF completes its direct operations

B. The Board should establish an expedited process to resolve any future disputes over the application of the principles of *Decision No. 8* to particular BNSF movements.

While the general principles set out above should be straightforward to implement for particular shippers, BNSF's experience thus far with KCS and UP in seeking effective BNSF access to shippers in the Rosebluff terminal area justifies BNSF's concern that negotiations over terms of use for future shippers will likely be contentious, protracted, and unproductive. For example, BNSF began negotiations with UP and KCS regarding an operating plan and related compensation for BNSF direct service to the Lyondell facility in November 2016. *See* Petition to Establish Conditions of Use and Compensation (BNSF-132), at 5 (filed Jan. 12, 2018). Following multiple unproductive meetings and communications between the three parties, BNSF requested that the STB impose conditions of use and compensation in January 2018. The Board established conditions of use for such Lyondell direct service in February 2020, and compensation terms will not be set until the second half of 2021, at the earliest.

Rather than allow KCS and UP to use future negotiations regarding BNSF direct service to new shippers accessible via the Rosebluff Lead to create uncertainty and delay that will discourage future shippers from using BNSF's direct service, the Board should establish a process now that will ensure prompt and effective use of the trackage rights, using its authority under 49 U.S.C. § 11102(a).

BNSF proposes that when BNSF identifies a particular shipper (or shippers) other than Lyondell to serve directly via the Rosebluff Lead, BNSF will deliver to KCS and UP a proposed operating plan for such direct service. If the operating plan

in fewer than four hours, and that if BNSF requires more than four hours, the BNSF train "must cede access of the Rosebluff Lead back to UP and KCS as soon as practicable." *Id.*, slip op. at 9-10.

mirrors the terms of use set by the Board in *Decision No. 8* in all material respects, then that plan will take effect within 30 days of BNSF's delivery of the proposal.

If the proposed operating plan differs materially from the terms of use set by the Board in *Decision No. 8* – for example, if the proposed plan requires a longer exclusive BNSF operating window – then executives of the three parties will then meet to attempt to reach an agreement on the BNSF proposed operating plan, applying the principles established by the STB in *Decision No. 8* and described above.

If the executives cannot mutually agree on an appropriate operating plan within 30 days after BNSF delivers its proposed plan, BNSF may submit its plan to the Board for approval. The other two parties may reply within 20 days with an alternative proposed operating plan or comments regarding the BNSF proposed plan (D+20). BNSF would then have the option of filing a rebuttal within 10 days (D+30). The Board would then issue a decision establishing the terms of use for the particular BNSF movement within 30 days (D+60).

BNSF believes that the Board could perform such an accelerated review because of the extensive analysis of operating conditions that the Board has already undertaken in this proceeding. Any party could seek reconsideration of the Board's terms of use, but BNSF proposes that it be entitled to operate pursuant to those terms during the review process. BNSF believes that putting this process in place will encourage the parties to work collaboratively to resolve operating disputes, with the understanding that expedited STB relief is available as a backstop.

IV. Conclusion

Based on its experience thus far in this proceeding, BNSF anticipates that each time BNSF elects to directly serve a customer accessible via the Rosebluff

Lead using its terminal trackage rights, KCS and UP will attempt to obstruct BNSF's access by refusing to agree to terms of use to govern such movements. Indeed, as demonstrated by BNSF's loss of two business opportunities during the pendency of this eight-year proceeding, the commercial pace of the Lake Charles transportation market moves faster than the Board's processes.

If BNSF must return to the Board for a multi-year proceeding to set terms of use for each customer BNSF elects to serve directly, shippers will not be able to fully realize the benefits of the commitments made by UP and the Board to allow BNSF to serve as a competitive replacement to SP. In short, the Lake Charles Merger Conditions will not have the competition-preserving effect intended by the Board unless the Board acts now to effectively implement them.

Therefore, BNSF requests that the Board grant this Petition and (1) establish that any future terms of BNSF's use of the Rosebluff Lead terminal trackage rights will be based on the principles that the Board set out in *Decision No. 8*, and (2) put in place an expedited process for resolving any disputes over conditions of use for shippers other than Lyondell that BNSF may later elect to serve using its terminal trackage rights. Furthermore, BNSF requests that the Board not delay the existing compensation proceeding while it acts on this Petition.

Respectfully submitted,



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APPENDIX

Timeline of Key Events

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- **September 24, 1995, November 18, 1995, and June 27, 1996:** UP/SP and BNSF entered into settlement agreements intended to address competitive issues raised by the merger of UP and SP (collectively, the “BNSF Agreement”). *See Decision No. 3*, slip op. at 2.
- **April 18, 1996:** CMA Agreement, which includes BNSF right to serve Lake Charles shippers, is entered into between UP/SP, BNSF, and the CMA. *See id.* at 2-3.
- **August 12, 1996:** STB approved merger between the rail carriers controlled by UP and the rail carriers controlled by SP, imposing the BNSF Agreement and the Lake Charles Merger Conditions as conditions to the merger approval. *See UP/SP Decision No. 44*, 1 S.T.B. at 241.
- **December 4, 1996:** The Board denied KCS’ petition to reopen and reconsider *UP/SP Decision No. 44* and the BNSF access rights granted through the Lake Charles Merger Conditions. *See UP/SP Decision No. 63*.
- **1996 to Present:** BNSF serves shippers on the Rosebluff Lead via reciprocal switching from UP. *See Decision No. 3*, slip op. at 4.
- **May to December 2012:** BNSF elected to institute direct service to CITGO at Lake Charles after CITGO sought direct single-line service from BNSF. KCS prevented BNSF from providing the service. *Id.*, slip op. at 4.
- **February 27, 2013:** BNSF filed a terminal trackage rights application with the Board, arguing that “KCS and UP continued to block BNSF direct access to shippers at West Lake Charles despite months of negotiation.” *Id.*, slip op. at 4.
- **July 5, 2016:** *Decision No. 3* issued, where the Board granted BNSF terminal trackage rights over the Rosebluff Lead to facilitate BNSF’s direct access to Lake Charles area shippers and implement the Lake Charles Merger Conditions. *Id.*, slip op. at 9-13.
- **January 12, 2018:** After BNSF, KCS, and UP could not agree to terminal trackage rights terms, BNSF requested that the Board establish conditions of use and compensation for BNSF service using its terminal trackage rights. *Decision No. 4*, slip op. at 1.
- **May 4, 2018:** *Decision No. 4* issued, where the Board determined that “BNSF’s trackage rights over the Rosebluff Lead applied to all customers accessible via the Rosebluff Lead and covered by the Lake Charles Merger conditions, including Lyondell, and that the Board’s findings in *Decision No. 3* under §

11102(a) were not limited to BNSF's service to the CITGO facility." *Decision No. 8*, slip op. at 4.

- **February 21, 2020:** Board established conditions of use, set forth a procedure for establishing compensation for such trackage rights, and ordered the parties to submit a joint procedural schedule to govern discovery and briefing on the remaining issues regarding compensation by March 16, 2020. *Id.*, slip op. at 1, 17.

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EXHIBIT A

Rebuttal Verified Statement of David A. Reishus, PH.D.
Filed October 23, 2015

PUBLIC

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REBUTTAL VERIFIED STATEMENT OF

DAVID A. REISHUS, PH.D.

OCTOBER 23, 2015

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I. INTRODUCTION AND SUMMARY

A. Qualifications

1. My name is David Reishus. I am currently an Executive Vice President at Compass Lexecon in Boston, Massachusetts. Compass Lexecon is an economics consulting firm with offices in various cities throughout North America, South America, and Europe. I earned my M.A. and Ph.D. degrees in economics from Harvard University.
2. Over the past 25 years, I have worked extensively on the organization of markets, competition, and firm behavior in a variety of industries. I have testified before various state, Federal and international bodies on competition issues, primarily in the energy and transportation industries. I have provided testimony multiple times before the Surface Transportation Board on matters involving competition in the railroad industry.
3. I have analyzed competition issues associated with railroad merger transactions and associated conditions on those mergers. I participated in the analysis of the competitive effects and associated merger conditions for the major railroad consolidations in the 1990s involving Union Pacific/Southern Pacific, Burlington Northern/Santa Fe, and the Conrail transaction. In addition, since then I have testified before (or made presentations to) the responsible government authorities regarding competitive issues arising from proposed transactions involving railroads in the U.S., Canada, and Mexico. My full vita is attached.

B. Purpose

4. BNSF Railway Company (“BNSF”), supported by CITGO Petroleum Corporation (“CITGO”), is requesting confirmation “of direct trackage rights granted to BNSF over the Rose Bluff Industrial Lead as a condition of the UP/SP merger.”¹ Kansas City Southern Railway (“KCS”) and Union Pacific Railroad Company (“UP”) oppose this request.
5. I have been asked to apply the economics of competition to these filings. I have specifically been asked to evaluate and respond to the Verified Statement of Drs. Kevin

¹ BNSF’s Opening Statement at 1.

Neels and Robert Reynolds (“Neels/Reynolds”).² Neels/Reynolds present tabulations regarding historical rail movements into and out of the Lake Charles area. These tabulations show historical shares of rail tonnage (and corresponding calculated HHIs) moved by UP, KCS and BNSF. They likewise show historical average rates per ton-mile for various traffic into and out of the Lake Charles area. From these tabulations they conclude, that “There is nothing in the evidence we have examined to suggest any inability or failure on the part of the BNSF to fulfill successfully the competitive role envisioned by the STB.”³

C. Summary of Conclusions

6. Historical shares of rail traffic serving the Lake Charles area provide no useful guidance as to whether BNSF is fulfilling “the competitive role envisioned by the STB.” The conditions imposed on the merger between UP and the Southern Pacific Railroad (“SP”) that grant BNSF access to certain shippers were intended to preserve into the future competition that would be lost through the elimination of SP as an independent railroad competitor as a result of the merger. Traffic data show that BNSF has served shippers in the Lake Charles area, including those on the Rose Bluff Lead; they do not show that BNSF is able now and into the future to provide fully competitive service consistent with terms of the UP/SP merger.
7. The traffic data tabulations are subject to errors that lead Neels/Reynolds to overstate BNSF’s overall share of traffic to shippers on Rose Bluff. The evidence clearly shows that BNSF carries a {{ }} share of the Lake Charles traffic than did SP prior to the merger. Fundamentally, however, the failure to provide a coherent definition of the market (or markets) and any analysis of the economic forces affecting competition in those markets render these tabulations meaningless for determining whether BNSF is now fulfilling the competitive role envisioned by the STB. The widely varying percentages of traffic across commodities and locations carried by different railroads demonstrate that the calculated “market shares” do not reflect the outcomes of competitive forces in coherently defined markets. Similarly, the demonstration that rail rates for different products and locations have moved in different directions further

² Verified Statement of Dr. Kevin Neels and Dr. Robert Reynolds, August 19, 2015, Exh. A to the Reply of The Kansas City Railway Company (“Neels/Reynolds V.S.”).

³ Neels/Reynolds V.S. at 14.

indicates that Neels/Reynolds have identified no coherent definition of markets and market forces.

8. The process of competition is dynamic and involves innovation and the introduction of new or improved services and products over time that supplant previous products and methods. As methods and markets change, competitors introduce new methods, services and products. What may have been effective competition for certain products and services will no longer be under new market circumstances. An evaluation of the effectiveness of competition requires an evaluation of how competitors are able to adapt to these changing market conditions.
9. The post-Staggers era of the railroad industry has seen substantial innovation and change in rail service and products offered. Of particular relevance to CITGO (and other shippers in the Lake Charles area) is the ability of railroads to compete against pipelines in the transportation of crude oil. The flexibility, reliability and efficiency of unit train service combined with innovation in crude oil production technology have led to crude-by-rail alternatives unforeseen twenty years ago. An efficient competitive response calls for changes in methods of service and delivery, e.g., direct delivery of crude oil in trainload or unit train service, in response to changing market conditions. As explained by CITGO, the limited delivery of crude oil under existing terms is inconsistent with effective competitive service. Artificial limitations on the competitive response available to BNSF are inconsistent with the preservation of competition that could have been provided by an independent SP.

II. BNSF'S ROLE IN RESPONSE TO THE UP/SP MERGER

10. The UP/SP merger in 1996 provided the opportunity for a substantial improvement in the efficiency of the U.S. rail network through reduced costs and improved, single-line service. Absent conditions or modifications, the merger could have harmed numerous shippers as a result of a loss of effective competition due to the elimination of an independent SP competitor. As part of one of a series of negotiated agreements imposed as a condition of the merger, BNSF was granted access to shippers on the Rose Bluff Industrial Lead ("Rose Bluff") in response to the loss of the independent SP due to the merger. This access has currently been provided through a combination of haulage and reciprocal switching.

A. Traffic Measures Fail to Provide Relevant Information on Competitive Outcomes

11. Since being provided access to Rose Bluff following the UP/SP merger, BNSF has been responsible for {{ }}% of the tons moving from (or to) the Lake Charles area. (See

Figure 1.) Per the Carload Waybill Sample, the BNSF share of traffic {{ }}. Using the total traffic data provided directly by the railroads, BNSF's proportion of this traffic was {{ }}% in 2012 and {{ }}% in 2013.⁴ The traffic included in these calculations, as presented by Drs. Neels and Reynolds, includes, but is apparently not limited to, shippers located on the Rose Bluff Lead.⁵ To the extent the tabulations include non-Rose Bluff traffic, the reported values blur the distinctions between traffic on and off Rose Bluff Lead.

{{ }}

⁴ Rebuttal Verified Statement of Michael R. Baranowski, October 23, 2015 ("Baranowski Rebuttal V.S.") at Figure 5.

⁵ Neels/Reynolds defines the relevant traffic as non-coal traffic moving into or out of Lake Charles, West Lake Charles, and Westlake. Figure 1 adopts the same definition used by Neels/Reynolds in Tables 5 through 9, incorporating a correction for a misclassification of traffic in 1997. See Baranowski Rebuttal V.S.

12. For comparison, Figure 2 shows the corresponding share of traffic by carrier to and from Lake Charles area prior to the UP/SP merger, measured in tons consistent with Figure 1.⁶ Prior to the merger, SP accounted for {{ }}% of the total tonnage. Since the merger, BNSF has averaged {{ }}.

{{ }}

13. If share of traffic were a reliable and useful measure of competition, then the conclusion would be that {{ }}.
- Such reasoning, however, is invalid. Competition can only be understood within the context of a properly defined market, and no such market has been defined. To talk about market shares, as do Drs. Neels and Reynolds, it is necessary to have properly delimited a market. As is well understood in the economics field, the scope of the market depends on the alternatives available to constrain pricing within that market.⁷ The extent of competition for a given rail transportation provider may include other rail carriers, other transportation modes—truck, barge or pipeline—and geographic and product competition. These alternatives can vary across shippers and products even along the few miles of the Rose Bluff Lead. Shippers of commodities with multiple alternative destinations (or origins) and potential alternative cost-effective modes of transportation may have extensive competitive alternatives. Shippers of products with limited origins and destinations and other feasible modes may have few alternatives. For example, to the extent that the relevant origins are found only (or primarily) on one originating rail carrier, the remaining carriers capable of serving the destination may not provide effective competition. In any case, the alternatives may differ across shippers

⁶ Neels/Reynolds presents analysis of post-merger traffic shares based on tons.

⁷ See, for example, U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, and Carlton, Dennis W. and Jeffrey Perloff, *Modern Industrial Organization*, 4th ed., Pearson, 2005, at 642-648..

and commodities, and the resulting scope of the market, the competitors in those markets, and the resulting market shares will differ.

14. Absent a finding that all movements in and out of Lake Charles are in the same rail transportation market, it is improper to treat these movements as “market shares” resulting from a process of competition among carriers. The same reasoning applies to looking at inbound only, or outbound only, traffic. Indeed, the same reasoning applies to all of the commodity or commodity-location breakouts identified in Neels/Reynolds. It is no more logical to conclude that UP dominates the “market” for {{ }}, than to conclude that BNSF’s share of rail transportation of any product or combination of product and location demonstrates effective competition in the market until the market has been properly defined.⁸
15. The vast differences in “market shares” of rail transportation calculated by Drs. Neels and Reynolds across commodities, locations, and inbound and outbound movements demonstrate the illogic of treating any of these as “markets” in which shares, and market concentration as summarized by HHIs, can be meaningfully compared. The same illogic applies to the price trends calculated by Neels/Reynolds. They find that prices have increased on average for some commodities, locations and direction (i.e., inbound or outbound to Lake Charles) and declined for others, relative to the industry average trend in prices. If these shipments were all part of the same market, then market forces would tend to cause prices to move in the same manner. If each of these commodity-location-directional shipment flows were in separate markets, then it would be necessary to analyze competition separately in each of these markets. Neither extreme is likely to apply. In either case, no analysis has been performed in any of these so-called markets of the effect of BNSF presence or activities on pricing. Moreover, these backward-looking reviews of price trends provide no useful information on the effect of the access at issue in this case on the competitive alternatives that would be available to shippers. Absent an economically coherent analysis of the competitive market alternatives available, no useful conclusion can be drawn regarding the degree of competition offered by BNSF.

⁸ See Baranowski Rebuttal V.S., correcting errors in Table 4 of Neels/Reynolds v.s.

B. Evidence on BNSF's Changing Role in Lieu of SP

16. The available traffic data demonstrate that over the past 18 years {{ }}. To the extent that this traffic is in competition with traffic that could (or would) otherwise have been carried by KCS or UP, then BNSF may have provided some competitive discipline on service and pricing provided by KCS and UP. The extent and effectiveness of such competitive discipline, however, cannot be determined absent an analysis of specific competitive factors associated with that traffic.
17. The issue arising in this proceeding stems from potential traffic over which the existing service arrangements—in terms of cost, timeliness, and reliability—are insufficient to satisfy customer demands and for which alternative terms of service are required to provide effective competition that an independent competitive railroad would have been able to provide. Changes in transportation and energy markets now call for the provision of regular shipments of large volumes of crude oil (and potentially other commodities) in a reliable and timely manner through direct access by BNSF. Failure to allow such a market response by BNSF would deny shippers on Rose Bluff the competitive response of a more efficient direct BNSF train service product offering that could have been provided by an independent SP.

III. BNSF'S CHANGING ROLE IN RESPONSE TO CHANGING MARKET CONDITIONS

A. Competition Requires Adapting to Changing Market Forces

18. The process of competition benefits consumers—in this case, shippers—by providing alternatives from which the preferred combination of price and quality can be chosen. Competitors who charge lower prices for the same quality service, or provide better service at comparable prices, will attract customers and sales in the marketplace relative to other potential suppliers. Given existing technology, capital and costs of inputs, competition in the marketplace tends toward satisfying demands of customers at the lowest cost.
19. Markets, however, are not static. Competition over price is only one aspect of the competitive process. Suppliers must be able to respond to changes in demands, costs, and technology to continue to provide desired products at competitive prices.

“Competition focuses on producing new products as much as on selling old products at lower prices.”⁹ Any theory of competitive success:

must start from the premise that competition is dynamic and evolving... Competition is a constantly changing landscape in which new products, new ways of marketing, new production processes, and whole new markets emerge ... [Economic theory] must make improvement and innovation in methods and technology a central element.¹⁰

Effective competition over time requires that competitors adapt to new market circumstances through innovation in terms of the products and services they provide.

B. Competitive Success in the Rail Industry

20. The ability of railroads to respond flexibly to changing marketplace conditions—through adaptation of technology, rationalization and restructuring of railroad networks and organization, and innovation in service offerings support by new and on-going capital investment—have driven the post-Staggers success of the railroad industry. This success is generally reflected in increased productivity, improved service quality, higher volumes and competitive success relative to other modes of transportation.
21. The major rail consolidations of the 1990s as conditioned by the STB (e.g., the UP/SP merger with the various access agreements) ultimately led to improved service options and cost savings to shippers while generally preserving the benefits of competition.¹¹ A primary recognized benefit of these transactions was the extension of direct, single-line service across a broader network. Where shipping volumes support the scale required, direct, single-line rail service is usually less costly, faster and more reliable than service that requires one or more switches or exchanges among carriers.
22. The adaptation of the rail industry to changing market forces has been reflected in the long-term growth in intermodal traffic in terms of absolute and relative volumes. Railroads provide a generally increasingly competitive service against trucking, albeit with a somewhat different combination of cost, speed, and reliability. More recently the

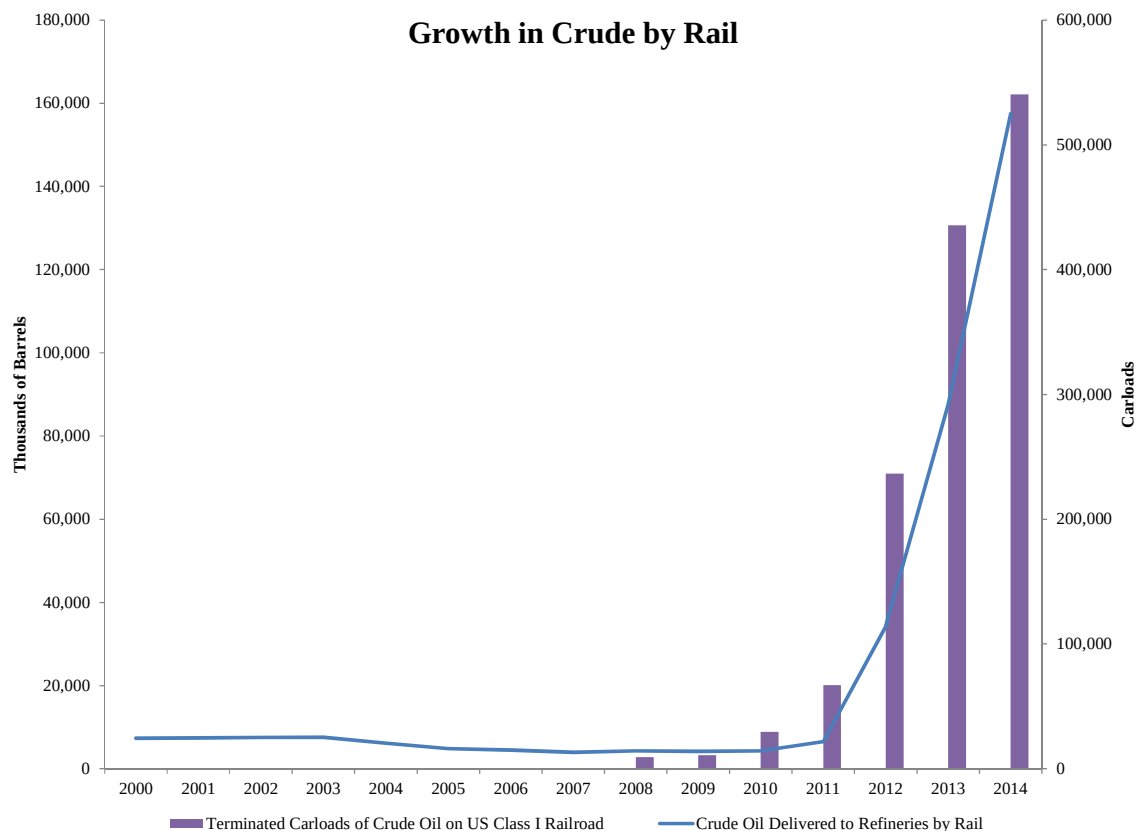
⁹ Joseph E. Stiglitz and Carl E. Walsh, *Economics*, 4th ed., W.W. Norton, 2006, at 463.

¹⁰ Lynne Pepall, Daniel J. Richards, and George Norman, *Industrial Organization: Contemporary Theory and Practice*, 2nd ed., South-Western/Thomson Learning, 2002, at 590, quoting Michael Porter, *The Competitive Advantage of Nations*, New York: The Free Press, 1990, at 20.

¹¹ See, for example, Breen, Denis A., “The Union Pacific/Southern Pacific Rail Merger: A Retrospective on Merger Benefits,” *Review of Network Economics*, 3:3, September 2004 at 283-322

upsurge in the movement of crude oil by rail underscores the value to shippers of the service flexibility and cost that efficient trainload rail service can provide. As seen in Figure 3, shipments of crude-by-rail have increased by more than 30-fold from the mid-2000s.¹²

Figure 3



Note: Terminated carloads data starting in 2008.

Source: Energy Information Agency; Association of American Railroads.

23. The rapid growth in crude-by-rail is driven first by changing oil production technology that has opened up large new domestic and Canadian crude oil producing regions with limited existing pipeline capacity. The flexibility of rail transportation, however, makes it a viable alternative to producers and refiners despite the generally higher cost relative to pipeline transportation. Although shippers and railroads have invested billions in

¹² Different data sources give different values but show a similar pattern.

terminals, railcars, and network upgrades to support expanded shipments of crude by rail, the startup costs remain lower than for pipelines. Movement by rail is also substantially faster, and perhaps more important, is geographically flexible in both origin and destination. Relative to pipelines, refiners can change the quantity (if any) and source of crude in response to changing relative prices, net of rail transportation costs. Producers can likewise seek refinery locations that will generate the highest price for crude oil in the field after taking account of transportation costs relative to those of other refiners.

24. Fully successful rail transportation of crude requires that railroads operate at large scale and high efficiency. Refineries consume crude in vast quantities and require that crude be available when needed. The CITGO Lake Charles refinery, for example, is rated at 470,000 barrels per day. A unit train is reported to move “up to 81,000 barrels,” while a 50-car trainload is roughly 34,000 barrels.¹³ As railroads operate at a cost disadvantage to pipeline and water transportation, the ability to provide high-volume, cost-efficient service is crucial to maintaining the competitiveness of this service.¹⁴

C. Existing BNSF Rose Bluff Service Is Inconsistent With the Competitive Alternatives of An Independent Competitor with Direct Access

25. As explained by BNSF and CITGO, the existing service arrangements fall short of the competitive alternatives that a willing shipper and railroad would provide absent the current inability to utilize direct train service. CITGO considers the current service achieved through reciprocal switch “problematic.”¹⁵ Restrictions on the volume and reliability of the service provided impose direct costs on CITGO, requiring them to use less desirable alternatives to source their crude, including additional transportation costs. Moreover, CITGO has been forced to turn other competitive alternatives to source its crude that compete with the crude-by-rail and CITGO has been unable to take advantage of market opportunities due to the inability to obtain reliable rail service on switched service of BNSF-originated crude deliveries. Likewise, BNSF points out the service

¹³ <http://www.bnsf.com/customers/oil-gas/shipping/shipping-benefits.html#flexible>. A tank car is estimated to carry on average 682 barrels of crude. Association of American Railroads, “U.S. Rail Crude Oil Traffic,” June 2015, at 3.

¹⁴ See Association of American Railroads, “U.S. Rail Crude Oil Traffic,” June 2015, at 6.

¹⁵ Verified Statement of Michael Barrett, August 20, 2015 at ¶18.

improvements and cost reductions that would result from direct service where BNSF can bring a full train to the facility rather than the existing switched service.¹⁶

26. CITGO has sought, and BNSF is willing to provide, direct transportation service in preference to the existing service alternatives. This passes the market test for innovation in response to changing market forces—a willing buyer and seller seeking to transact on a service not currently available in the market. Were an independent SP still extant, with rights to provide direct service, it would be in similar position as BNSF with the incentive to provide more valuable direct unit train (or large block) service in competition with, and as an alternative to, the existing service provided by KCS. Customers would benefit from such service, and KCS, in order to not lose out, would have the incentive to find cost-effective means for meeting or beating this competitive alternative. This is the essence of the competitive process and alternatives that the STB attempted to preserve in conditioning major rail mergers.

27. As the existing data show, BNSF currently carries {{ }} of crude oil delivered to Lake Charles.¹⁷ This does not mean, however, that the existing level of service and competition by BNSF is somehow “good enough.” BNSF (and its customers) seek to have higher-quality, lower-cost service than is currently provided. This service could only benefit customers—if it were not a better combination of price and quality, customers could continue to choose the existing service alternatives. The higher-quality service could only represent an improved competitive alternative that the other railroads could try to match or beat through a combination of price and quality satisfying customer needs. If they failed to do so, BNSF may capture an even greater volume of traffic, but this increase would be the result of successful, efficiency-enhancing competition benefiting shippers. If this were to occur, it would represent competitive success, not a failure in competition.

¹⁶ The extent to which the cost savings are passed on to shippers in lower rates would reflect the process of competition with the other carriers and with the many other competitive alternatives for obtaining crude oil available to CITGO.

¹⁷ Baranowski Rebuttal V.S.

VERIFICATION

I, David A. Reishus, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on October 22, 2015.



David A. Reishus



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PROFESSIONAL EXPERIENCE

Compass Lexecon
Boston, MA
Executive Vice President, April 2013 – present
Senior Vice President/Senior Managing Director, July 1999 – March 2013

The Economics Resource Group, Inc., Cambridge, MA
President, 1993 – June 1999
Senior Economist, 1990 – 1993

Provides economic analysis and advice on issues of regulation, antitrust, taxation and applied microeconomics to a variety of clients. Develops, manages, and oversees economic analyses for clients and other principals. Responsible for the management and operations of the company.

U.S. Congress, Joint Committee on Taxation, Washington, DC
Economist, 1987 – 1990

Provided economic analysis and development of legislative tax proposals. Responsibilities included corporate and foreign taxation and proposals related to low-income taxpayers, child care, and health issues.

Harvard University, Cambridge, MA
Instructor, 1986 – 1987

Leader of senior thesis tutorial for industrial organization and finance topics. Previously taught Introductory Economics.

Information Resources, Inc., Chicago, IL
Consultant, 1979 – 1980

EDUCATION

Harvard University, Cambridge, MA
Ph.D. in Economics, 1988
Dissertation: “Empirical Essays on the Economics of Taxation and the Firm”
M.A. in Economics, 1983

Northwestern University, Chicago, IL
B.A. in Economics, 1979

TESTIMONY AND OTHER REPORTS

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In the Matter of an Arbitration Under Chapter Eleven of the North American Free Trade Agreement Between Merrill & Ring Forestry, L.P. and The Government Of Canada. Expert Report, May 9, 2008. Supplemental Expert Affidavit, March 19, 2009. Oral testimony, May 21, 2009.

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Nelson Brothers, LLC v. Cherokee Nitrogen v. Dynegy Marketing & Trade; Dynegy Inc. Expert Report, August 22, 2007.

Independent Energy Producers Association of California

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ExxonMobil Corporation

Internal Revenue Service, Reports, June 29, 2006, December 15, 2006 (with J. Kalt).

First Energy

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ExpressTrak LLC

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British Columbia Lumber Trade Council and the Province of British Columbia

Before the International Trade Administration, Department of Commerce, In the Matter of Certain Softwood Lumber Products from Canada (C-122-839). Statement for the First Administrative Review, March 15, 2004 (with Joseph Kalt); Response to Price Impact of Canadian Log Restraints, March 16, 2004 (with Joseph Kalt); Response to Coalition Submission on Pass-Through Issues, April 15, 2004 (with Joseph Kalt); Economics of Arm's-Length Transactions and Subsidy Pass-Through, September 15, 2004 (with Joseph Kalt); Economic Analysis of the Vancouver Log Market, February 28, 2005 (with Joseph Kalt); Comment on the Economic Implications of the Annual Allowable Cut, December 5, 2005 (with Joseph Kalt); Update to Economic Analysis of the Vancouver Log Market, December 5, 2005 (with Joseph Kalt). Reports filed from March 15, 2004 to December 5, 2005.

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PPL Corporation

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Ph.D., and David A. Reishus, Ph.D. on Behalf of the PPL Parties,” October 19, 2005.

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United States of America, Before the Federal Energy Regulatory Commission, San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services, Investigation of Practices of the California ISO and PX; Pub. Utils. Comm’n of the State of California v. Sellers of Long-Term Contracts. Prepared Rebuttal Testimony (with Patrick Wang), March 20, 2003.

Duke Energy Trading and Marketing LLC

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Dynegy Inc.; Duke Energy Services LLC; Mirant Americas, Inc.; Reliant Energy; Williams Energy Marketing and Trading Co.

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Association of American Railroads

Review of Rail Access and Competition Issues, Before the Surface Transportation Board, Ex Parte No. 575. Joint Verified Statement (with Joseph Kalt), March 26, 1998.

Crow Tribe of Indians

Report Concerning the Crow Tribe Resort Tax (with Joseph P. Kalt), November 27, 1996; *Surrebuttal Report Concerning the Crow Tribe Resort Tax* (with Joseph P. Kalt), February 25, 1997; and *Report Concerning the Crow Tribe Resort Tax* (with Joseph P. Kalt), March 31, 2000.

Sithe Energies

Economic Impact on New York State of the Sithe Plan, Chapter IV of *Energizing New York: The Sithe Plan*, December 8, 1995.

Massachusetts Department of Environmental Protection

Use of an Economic Test for Distinguishing Legitimate Recycling Activities, July 1993.

SELECTED OTHER CONSULTING EXPERIENCE

Major Regional Hospital

Performed statistical analysis of patient waiting-times and follow-up.

Petroleum Products Pipeline

Analyzed business and regulatory options for large interstate petroleum products pipeline subject to market-based and regulated tariffs.

Group of Class 1 Railroads

Analyzed claims of competitive harm and the development and use of econometric models for pricing, damages and class certification in the context of alleged price-fixing.

Government of Canada

In context of international arbitration under the U.S. Canada Softwood Lumber Agreement, analyzed pricing patterns, effects of risk and government development and timber pricing policies in multiple provinces on the North American lumber markets,. Developed dynamic economic models of production and trade capable of determining appropriate export measure adjustments.

Major Energy Traders

Assisted in analyses of claims of market manipulation in physical and financial energy markets.

U.S. Generation Companies

Advise on methods for performing merger analysis and analysis of competitive effects of proposed divestitures.

Western Refining

Analyzed effect of a contested proposed merger involving southwestern refining, wholesale, and marketing operations

AT&T

Analyzed competitive issues in the long-distance telephone market in the context of a class-action price-fixing suit.

Pacific Lumber/Scotia Pacific

Assisted in analysis and projections involving redwood product markets for business valuation in bankruptcy.

TAPS Carriers

Assisted in development of ratemaking analyses for oil pipeline rates.

General Electric & Bechtel

Analyzed derivation of cost of equity, discount factor, and method for contract damages and expropriation of Dabhol power plant in the context of I.C.C. arbitration.

Class 1 Railroad

Analyzed potential competitive harm of vertical rail merger and possible remedies before the Canadian Competition Bureau.

Multinational Oil Company

Analyzed alternative approaches for identifying and measuring price risk in long-term contracts in connection with multi-billion-dollar joint venture.

Frontier Oil Corporation

Analyzed application of discount factors and method in damages arising from a failed merger.

Amoco

Analyzed marketability and market value of natural gas for purposes of class-action royalty valuation.

Class 1 Railroad

Analyzed claims of vertical market foreclosure and anticompetitive conduct in rail transportation.

Government of Canada

Assisted in analysis of changes in forestry practices and stumpage charges in the context of international trade agreements.

Exxon Corporation and Affiliated Companies

Performed analysis of design and effect of U.K. oil and gas tax system.

CSX Corporation and CSX Transportation, Inc.

Analyzed historical evidence of rail consolidations and the impact of the proposed Conrail transaction on Eastern coal shippers. Evaluated competitive requirements of proposed conditions on the transaction.

Group of Major Oil Companies

Developed and analyzed a database of crude oil purchases for analyzing issues of crude oil valuation at the wellhead in the context of multiple class action litigations.

Koch Pipeline

Assisted in developing product and market definitions relating oil pipeline antitrust allegations.

British Petroleum

Performed economic analysis of alternative organizational forms for operating petroleum assets. Developed advanced financial tools for valuing decision alternatives and contingent assets.

Exxon

Performed economic analysis of certain fuel used and cost allocations among the Prudhoe Bay Unit owners for a royalty dispute with the State of Alaska.

Burlington Northern Railroad/Santa Fe Railroad

Analyzed competitive impacts of proposed railroad merger for use before the Interstate Commerce Commission.

PSI/CINergy

Adapted economic model of regional economy and performed analysis of the economic impact of alternative merger scenarios for a public utility.

El Paso Natural Gas Company

Performed economic analysis of markets and competition for an open-access natural gas pipeline for use in an antitrust case.

Better Home Heat Council, Inc.

Performed economic analysis of a local gas utility's conservation programs effect on consumer fuel-switching decisions and public policy impact for use before the Massachusetts Department of Public Utilities.

Association of American Railroads

Analyzed the impact of market conditions for the exemption of rail transportation of export corn and soybeans from Interstate Commerce Commission regulation.

ARCO Pipe Line Company

Evaluation of market power of petroleum products pipeline in consideration of light-handed regulation for use before the Federal Energy Regulatory Commission.

BP/America

Assisted in the design and implementation of crude oil valuation analyses for royalty litigation.

Williams Natural Gas Pipeline Co.

Prepared pricing analysis of natural gas purchase contracts, performed calculation of damages, and analyzed economic submissions for use in antitrust case.

El Paso Corporation

Various projects including strategic analysis of market opportunities to enhance value of the pipeline and analysis of market competition in gathering and long-distance gas transportation.

Government of British Columbia

Assisted in evaluation of impact of Canadian log export regulations on U.S. and Pacific Rim log and wood products trade and industry.

Atlantic Richfield Company

Provided economic analysis of market structure and conduct for the distribution of motor fuels for use in an antitrust case.

Burlington-Northern Railroad

Assisted in evaluating market impacts of innovative railroad grain car service rate and reservation policy for use before the Interstate Commerce Commission.

National Cattleman's Association

Researched and wrote report analyzing the welfare and environmental effects of domestic U.S. beef production with particular concern about appropriate policy responses.

PUBLICATIONS AND RESEARCH

"Corporate Reorganizations: Tax Treatment of Corporate Mergers, Acquisitions, and Reorganizations," *The Encyclopedia of Taxation and Tax Policy*, 2nd ed., The Urban Institute Press, 2006. (Revised and updated.)

"Corporate Reorganizations: Tax Treatment of Corporate Mergers, Acquisitions, and Reorganizations," *The Encyclopedia of Taxation and Tax Policy*, The Urban Institute Press, 1999.

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"Financing Child Care: Who Will Pay for the Kids?," *National Tax Journal*, Vol. XLII, No. 3, September, 1989.

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"The Impact of Taxation on Mergers and Acquisitions" (with A. Auerbach), in A. Auerbach, ed., *Mergers and Acquisitions*, University of Chicago Press, 1988.

OTHER PROFESSIONAL ACTIVITIES

Presentations to National Bureau of Economic Research, Federal Reserve Bank of Cleveland, Federal Reserve Bank of New York, Harvard University, Tax Economists Forum, National Tax Association, Western Economic Association, The Institute for Energy Law of The Center for American and International Law.

Memberships in National Tax Association, American Economic Association.

Referee for *Quarterly Journal of Economics*, *Journal of Law and Economics*.

HONORS AND AWARDS

National Science Foundation Fellowship, 1981-1985.

International Foundation of Employee Benefit Plans, Graduate Research Fellowship, 1984.

Phi Beta Kappa, 1979.

CERTIFICATE OF SERVICE

I certify that I have, on December 18, 2020, served copies of BNSF's Petition to Establish Conditions of Use (BNSF-143) upon all parties of record in this proceeding, by electronic mail.

A handwritten signature in black ink, appearing to read 'Peter W. Denton', written over a horizontal line.

Peter W. Denton
Attorney for BNSF Railway Company