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Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: Finance Docket No. 32760 (Sub-No. 46)
BNSF Railway Company – Terminal Trackage Rights – Kansas City
Southern Railway Company and Union Pacific Railroad Company

Dear Ms. Brown:

Enclosed for electronic filing is the above Public version of BNSF's Reply to KCS's and UP's Opening Statements on Compensation (BNSF-146). We are also separately submitting workpapers for the Verified Statements of Michael R. Baranowski and David Reishus.

Please contact me if you have any questions. Thank you.

Sincerely,



Peter W. Denton

Enclosures

cc: Adrian L. Steel, Jr., Esq.
William A. Mullins, Esq.
Michael L. Rosenthal, Esq.
All parties of record

Before the
SURFACE TRANSPORTATION BOARD

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

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

APPLICATION FOR TERMINAL TRACKAGE RIGHTS

BNSF's Reply to KCS's and UP's Opening Statements on Compensation

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Dated: April 12, 2021

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ENCLOSURES

- I. Attachment:
 - 1. UP Response to Request for Admission No. 10 of BNSF’s Third Set of Discovery Requests to UP (8/28/2020)
- II. Exhibits:
 - A. Verified Statement of Michael R. Baranowski
 - B. Verified Statement of David Reishus

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SURFACE TRANSPORTATION BOARD

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BNSF RAILWAY COMPANY
—TERMINAL TRACKAGE RIGHTS—
KANSAS CITY SOUTHERN RAILWAY COMPANY AND
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APPLICATION FOR TERMINAL TRACKAGE RIGHTS

**BNSF's Reply Statement and Evidence on KCS and UP's Opening
Statement and Evidence on Compensation**

I. Introduction and Summary

On January 26, 2021, each of BNSF,¹ KCS, and UP submitted opening statements regarding compensation for BNSF's use of terminal trackage rights on the Rosebluff Lead (respectively, the "BNSF Opening," "KCS Opening," and "UP Opening"). BNSF hereby replies to the KCS Opening and the UP Opening.

A quarter-century ago, UP agreed to, and the Board imposed, certain conditions in connection with the Board's approval of the UP/SP merger. The Board intended these conditions to establish BNSF as an effective replacement for the competition that would have otherwise been lost by the merger of UP and SP. Under these conditions, BNSF can serve certain shippers located across the combined UP/SP network either directly or via reciprocal switch, at BNSF's sole election. UP agreed to grant BNSF trackage rights over UP lines allowing BNSF to serve these shippers directly.

¹ The acronyms and defined terms used herein are the same as those used in BNSF's Opening filed in this proceeding on January 26, 2021.

In the Lake Charles, La. area, shippers protected by the UP/SP merger conditions are accessible via the Rosebluff Lead, a rail line jointly owned by UP and KCS. Starting soon after the Board imposed the Lake Charles Merger Conditions,² BNSF began serving these shippers via reciprocal switch, and continues to do so today. In 2012, BNSF elected to serve one of these shippers directly, consistent with BNSF's unambiguous access rights. UP refused to fulfill its commitment to provide BNSF with the rights necessary to provide that direct service. By doing so, UP forced BNSF to embark on this now eight-year-old proceeding to obtain terminal trackage rights over the Rosebluff Lead, which the Board granted in 2016. After years of delay and obstruction by UP and KCS, the parties have now arrived at the final phase of this proceeding: determining the compensation owed to KCS as a result of BNSF's terminal trackage rights movements.

In its Opening, BNSF affirmed its position that BNSF's payment to UP of the Prescribed Fee fully satisfies BNSF's payment obligation for the use of the terminal trackage rights and proposed a compensation arrangement that (1) is responsive to the Board's request in *Decision No. 8*, (2) is consistent with the governing statutory standard and Board precedent, and (3) is fair and equitable to all parties. Because BNSF will access the UP/KCS jointly-owned Rosebluff Lead solely under UP's ownership and operating rights, the only difference from KCS's perspective between current BNSF reciprocal switch service and future BNSF direct service is that a BNSF (rather than a UP) locomotive will pull BNSF cars down the Rosebluff Lead. Therefore, the Board should order that KCS be compensated for BNSF direct service trains just as KCS is compensated today for UP direct service trains under

² “[T]he Lake Charles Merger Conditions allowed BNSF to handle traffic of shippers open to all of UP, SP, and KCS at Lake Charles and Westlake, and to handle traffic of shippers open to SP and KCS at West Lake Charles, ‘on the same basis’ as BNSF’s access to ‘2-to-1’ points, which included the option of ‘direct’ or ‘reciprocal switch’ access.” *BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. (Decision No. 8)*, FD 32760 (Sub-No. 46), slip op. at 2 (STB served Feb. 21, 2020) (citations omitted).

the existing UP/KCS cost-sharing arrangements. Under BNSF's proposal, BNSF would pay UP the Prescribed Fee it currently pays for merger trackage rights, and UP would pay KCS either any amount due to KCS under existing UP/KCS Joint Facility Agreements governing the Rosebluff Lead or any amount set by the Board through this proceeding.

As it recognized in *Decision No. 8*, the Board is faced with the decision of how to allocate between BNSF and UP the responsibility for the payment of any compensation that the Board determines KCS is owed under 49 U.S.C. § 11102(a). The Board described this issue as a "central disagreement" between the parties. *Decision No. 8*, FD 32760 (Sub-No. 46), slip op. at 15.

Numerous considerations support the conclusion that BNSF should pay no more than the Prescribed Fee for its direct service on the Rosebluff Lead:

- The Board has found that the Prescribed Fee is a necessary component of BNSF's ability to provide fully competitive service, and it imposed merger conditions (including the Lake Charles Merger Conditions) to ensure that BNSF would have the ability to do so.
- The Prescribed Fee is set as a governing limit on what BNSF should pay for use of the merger trackage rights under the original BNSF Settlement Agreement (as supplemented), the CMA Agreement, the 1998 50/50 Line Term Sheet Agreement, and the Restated and Amended Settlement Agreement ("RASA").
- The Prescribed Fee provides protection to shippers (including Lake Charles area shippers) who participated actively in the UP/SP merger proceeding and who are express beneficiaries of the Board's merger conditions. *See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Decision No. 44)*, 1 S.T.B. 233, 246 n.15 (1996).
- *UP/SP Decision No. 44*, 1 S.T.B. at 246 n.14 (1996), requires UP to adhere to all representations and commitments that it made to secure Board approval of the UP/SP merger (including the trackage rights fee that BNSF will pay).
- Unlike the direct service provided by BNSF across much of the UP network pursuant to conditions imposed on the UP/SP merger, BNSF had no choice but to request terminal trackage rights to provide direct service on the Rosebluff Lead.

- UP's breach of the consent provisions in the Joint Facility Agreements with KCS as well as UP's total and continuing failure to live up to the commitments it voluntarily made and accepted to ensure Board approval of its merger with SP require that UP bear the burden of paying whatever compensation KCS is due in excess of the Prescribed Fee.

In its three-page Opening, UP continued its strategy of avoiding its responsibility for providing BNSF with direct access to Lake Charles area shippers at the Prescribed Fee. UP has submitted no principled basis for relieving itself of its responsibility to provide BNSF with direct service trackage rights at the Prescribed Fee as it promised. In the absence of any such basis and given the harm to shippers and to BNSF caused by UP's failure, the Board should not permit UP to continue to avoid that responsibility.

KCS's arguments in its Opening are no more successful. As an initial matter, KCS claims that the Board should set compensation terms that apply only to BNSF direct service to the Lyondell facility. The Board should not require BNSF to return to the agency to set compensation terms in potentially years-long proceedings for each of more than a dozen shippers accessible via the Rosebluff Lead and covered by the Lake Charles Merger Conditions.

In addition, KCS asks the Board to ignore the long-standing statutory framework used to set compensation for terminal trackage rights and instead order compensation for KCS through a "market-based" fee.

Even apart from its failure to establish that a "taking" has occurred, KCS uses a misapplied takings law analysis, arguing incorrectly that it is entitled to compensation as a result of the "commercial access" granted to BNSF. If KCS seeks additional compensation for BNSF "commercial" access, it can presumably do so in litigation or arbitration against UP for UP's failure to secure KCS's consent before agreeing to the Lake Charles Merger Conditions.

Finally, we explain below that many of the arguments presented by KCS's expert witnesses, Dr. Kevin Neels and Prof. Julie M. Carey, in support of the KCS Opening are deficient and accordingly must be rejected. Dr. Neels' calculations are inaccurate in that they do not account for the fact that KCS is not the sole owner of the Rosebluff Lead. Further, Dr. Neels uses Capitalized Earnings as the basis for his *SSW Compensation* interest rental (despite the criticisms of this approach from Prof. Carey), and Dr. Neels' calculations contain significant deficiencies. For example, Mr. Baranowski corrected several major errors in Dr. Neels' Capitalized Earnings estimate which reduced the interest rental component of Dr. Neels' *SSW Compensation* calculation from {{ }} per car mile to {{ }}. *See Baranowski V.S. at 4, 26.*

Prof. Carey's proposed "market-based" access fee fails in that it captures only the value of ***access*** to Lake Charles, not what is actually at issue in this proceeding: the value of ***trackage rights***. Further, we demonstrate that Prof. Carey's proposed use of comparable reciprocal switch fees is not an accurate measure of market value. For instance, she has failed to establish that the switch rates which she uses represent switching rate transactions comparable to the Rosebluff Lead switching transaction.

BNSF's arguments in this Reply are supported by the Verified Statements of Michael R. Baranowski ("Baranowski Reply V.S.") and David Reishus, Ph.D. ("Reishus Reply V.S.").

II. Argument

A. **The Board should hold UP responsible for any payment that the Board determines KCS is due in excess of the Prescribed Fee.**

1. **UP's many failures to act compelled BNSF to seek and obtain terminal trackage rights in order to fully implement the Lake Charles Merger Conditions.**

In its Opening, UP repeats its position that, if BNSF makes use of the terminal trackage rights that the Board granted in this proceeding, BNSF should pay (i) UP the Prescribed Fee, and (ii) KCS any additional compensation to which KCS is entitled under 49 U.S.C. § 11102(a). UP Opening at 2. The premise of UP's argument is that Section 11102(a) requires the carrier granted terminal trackage rights (here, BNSF) to pay compensation to the owner (here, KCS and UP jointly), and that, since BNSF voluntarily sought terminal trackage rights over the Rosebluff Lead, BNSF should bear the obligation to compensate KCS. *Id.*

There was, however, nothing "voluntary" about BNSF's decision to seek terminal trackage rights. BNSF would have much preferred to simply elect to directly serve Lake Charles shippers, under the framework that UP agreed to in the RASA. Instead, BNSF was forced to seek terminal trackage rights **solely** because of UP's failure to secure KCS's consent to UP's grant to BNSF of the trackage rights necessary to implement direct service at Lake Charles, as required by the Board's Lake Charles Merger Conditions and various agreements UP executed with BNSF and CMA.

Moreover, throughout this proceeding, UP has worked determinedly to delay and forestall the grant and implementation of direct service trackage rights to BNSF. Instead of acting in concert with BNSF to find a solution to enable Lake Charles shippers to receive the benefits they were promised, UP has done just the

opposite. Indeed, UP has attempted to thwart BNSF's efforts to fully implement the Lake Charles Merger Conditions at every step.³

The Board should not countenance UP's continued knowing failure to resolve KCS's claim that UP's grant of trackage rights on the Rosebluff Lead would breach the consent provisions of the applicable 1948 Joint Facility Agreement. After nearly 25 years, it is time for the Board to require UP to live up to the commitments it voluntarily made to the Board through its acceptance of the Lake Charles Merger Conditions and to BNSF, the CMA, and Lake Charles area shippers through its execution of the BNSF Settlement Agreement, the CMA Agreement, the 50/50 Line Agreement, and the RASA.

2. UP has failed to resolve uncertainty as to KCS's claim that consent is necessary to grant trackage rights to BNSF.

There is in fact uncertainty as to whether KCS's consent is even required under the 1948 Joint Facility Agreement for the grant of trackage rights to BNSF.⁴ Rather than acting to resolve KCS's interpretation of the Joint Facility Agreements, UP has simply accepted KCS's position that consent is required while forcing BNSF to initiate a costly and time-consuming proceeding under Section 11102(a). In so doing, UP has successfully forestalled BNSF's efforts to compete with UP via direct service and has denied Lake Charles shippers the benefits of BNSF direct service. This is inconsistent with UP's commitments and the Board's expectations when it approved the UP/SP merger.⁵

³ As clearly demonstrated by its three-page Opening, UP's offer to waive BNSF's obligation to pay UP the Prescribed Fee for BNSF's use of the Rosebluff Lead is just one more effort to wash its hands of any responsibility for its failure (whether intentional or negligent) to secure KCS's consent or to even determine whether consent was contractually required.

⁴ The relevant language requires that KCS's consent is required for UP to "sell, lease or otherwise transfer any interest" in the joint trackage or any part thereof. *See* BNSF Rebuttal. 11, Oct. 23, 2015 (BNSF-124). Trackage rights do not clearly come with the scope of those terms.

⁵ As previously noted, BNSF has reserved its rights to seek redress for UP's failure to meet its obligations both in the past and going forward.

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A summary of the opportunities that UP has had to address and resolve the KCS consent issue confirms the full scope of UP's failure. These include:

- (i) In April 1996, before UP executed the CMA Agreement;
- (ii) In June 1996, before UP executed the Second Supplemental Agreement to the BNSF Settlement Agreement;
- (iii) In September 1996, when UP proceeded to consummate the merger;
- (iv) in February 1998, when UP executed the 50/50 Term Sheet Agreement;
- (v) in March 2002, when the parties submitted the RASA to the Board;
- (vi) in December 2012, when KCS objected to BNSF's election to directly serve the CITGO facility; and
- (vii) on numerous occasions throughout this proceeding, including the two Board ordered mediations, when UP failed to resolve KCS's claims.

However, instead of taking action on any of these occasions, UP has failed at any point to ask KCS for the necessary consent; UP has never initiated a legal action or arbitration, or otherwise asserted a claim against KCS; and UP has not even had any conversations (other than conversations that may be protected from disclosure) with KCS concerning the compensation that KCS should receive for BNSF's use of the Rosebluff Lead. *See* BNSF Opening at 10 n.4. *See also* *Decision No. 8*, FD 32760 (Sub-No. 46), slip op. at 15 (UP "apparently never [sought] KCS consent.").

UP has also acknowledged in discovery that, in an apparent due diligence failure, "it did not recognize before KCS objected in 1996 that KCS's consent was required under at least one of the Joint Facility Agreements for Union Pacific to grant BNSF trackage rights over the Rosebluff Lead." *See* UP Response to Request for Admission No. 5 in BNSF's Third Set of Discovery Requests to UP (Aug. 28, 2020) (Attachment 1).

3. The Rosebluff Lead terminal trackage rights are distinguishable from other terminal trackage rights granted to BNSF in connection with the UP/SP merger.

The Board should give no weight to the argument made by UP that BNSF should be required to compensate KCS directly here because BNSF assumed the obligation to compensate KCS directly when the Board granted BNSF terminal trackage rights over KCS-owned track segments in Beaumont, TX and Shreveport, LA in *UP/SP Decision No. 44*, 1 S.T.B. at 449 (1996). See UP Opening at 2. As the Board itself noted in *Decision No. 8*, FD 32760 (Sub-No. 46), slip op. at 15, the facts of the Beaumont and Shreveport terminal trackage rights differ materially from the present situation. The track segments there were wholly-owned by KCS, and UP and SP had trackage rights over the segments. There was no joint ownership in those instances that created a compensation allocation issue that needed to be addressed.

4. The BNSF proposal regarding allocation of trackage rights compensation fulfills the intent of the Lake Charles Merger Conditions and is fair to all parties.

As BNSF indicated in its Opening, the result proposed by BNSF is fair to all parties. It fully protects the rights of Lake Charles area shippers to the competitive direct service they sought and were promised. BNSF will pay UP the trackage rights fee to which UP, BNSF, and CMA agreed and which was imposed by the Board. And KCS will receive from UP the compensation to which KCS is entitled for BNSF's usage of its terminal trackage rights under the applicable statutory standard.⁶

⁶ As BNSF noted in its Opening at 26, if KCS believes that it is entitled to more than the *SSW Compensation* methodology amount under the terms of its Joint Facility Agreement with UP, KCS can seek that amount by asserting a claim against UP in arbitration or litigation. KCS may well be entitled to such additional compensation for UP's breach of the Joint Facility Agreement consent provisions, but the Board should not countenance UP's attempt to avoid its responsibilities by inducing the Board to require BNSF to pay such additional compensation through this proceeding.

UP's failure to secure KCS's consent to the grant of Rosebluff Lead trackage rights to BNSF – a failure that required BNSF, in turn, to institute this proceeding to obtain terminal trackage rights over the Rosebluff Lead – should not result in BNSF paying more for its use of the Rosebluff Lead trackage rights than the Prescribed Fee that BNSF pays for all other BNSF trackage rights over UP lines resulting from the UP/SP merger conditions. Furthermore, Lake Charles area shippers have an independent right under the CMA Agreement and the Lake Charles Merger Conditions to receive direct BNSF service subject to the Prescribed Fee. The Board would frustrate its own carefully crafted conditions if, in conjunction with finally allowing BNSF to fully implement the Lake Charles Merger Conditions, the Board were to require BNSF to pay a rate that is greater than the Prescribed Fee for its trackage rights service.⁷

The issue of the allocation of the compensation should be resolved as BNSF has proposed: BNSF should pay UP the Prescribed Fee, and UP should pay KCS any additional compensation to which KCS is entitled under 49 U.S.C. § 11102(a). No other allocation of any compensation due to KCS will fulfill the intent and spirit of the Lake Charles Merger Conditions and the various contractual obligations which UP voluntarily and knowingly undertook to secure Board approval of its merger. UP should not be allowed to backtrack on the promises it made to the Board, to shippers affected by the loss of competition resulting from the UP/SP merger, and to BNSF.

B. The Board should set compensation terms that apply to all BNSF terminal trackage rights movements.

In its Opening, KCS argues that the Board should only set compensation terms for BNSF direct service to the Lyondell facility. KCS Opening at 2-3 n.3. The

⁷ BNSF and UP agreed to, and the Board set, a uniform fee for all BNSF trackage rights service subject to the UP/SP merger conditions so that BNSF could effectively compete on both long-haul and short-haul movements. *See* BNSF Opening at 10.

KCS Opening also states that “the Board cannot set a one-size-fits-all fee, even under *SSW Compensation*” because compensation depends on the location of the shipper on the Lead. KCS Opening at 6 n.9.

BNSF has already addressed these arguments in its Opening. *See* BNSF Opening at 11-14. The conclusions that the Board reaches and the compensation terms it sets for KCS in this proceeding should apply to all BNSF terminal trackage rights movements – that is, to all BNSF movements over Rosebluff Lead trackage jointly owned by KCS and UP that BNSF may directly operate over to serve shipper facilities accessible via the Rosebluff Lead and covered by the Lake Charles Merger Conditions.

KCS’s argument that the Board cannot apply a “one-size-fits-all fee” is unfounded. The Board typically sets trackage rights compensation terms to cover all movements by a carrier using the trackage rights. *See, e.g., New England Cent. R.R.—Trackage Rights Order—Pan Am. S. LLC*, FD 35842, slip op. at Appendix A, 3 (STB served Oct. 30, 2017) (setting terms to cover all carrier movements over the line). There is no reason to do differently here.

Further, it would be a serious misuse of the Board’s limited administrative resources, as well as unduly burdensome on all parties and a frustration of BNSF’s shipper’s rights under the Lake Charles Merger Conditions, for the Board to require BNSF to return for multi-year proceedings to set compensation terms for each customer that it elects to serve directly. There are more than a dozen 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. Requiring BNSF to return to the Board to set compensation terms for each customer would undermine shipper confidence in BNSF’s ability to provide service in a timely manner. This would also prevent shippers from fully realizing the competitive benefits of the Lake Charles Merger Conditions.

C. KCS should be compensated only for the incremental costs associated with BNSF direct access, not for “commercial” access BNSF obtained in 1996.

In 1996, KCS sought unsuccessfully to overturn the Lake Charles Merger Conditions soon after the Board imposed them. *See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Decision No. 63)*, FD 32760 (STB served Dec. 4, 1996). Since that time, BNSF has had the right to handle traffic of shippers covered by the Lake Charles Merger Conditions via “direct” access or “reciprocal switch” access. For the last 25 years, shippers covered by the Lake Charles Merger Conditions who have requested BNSF service have received such BNSF service through UP reciprocal switch. Therefore, BNSF has had “commercial” access to these shippers for the last quarter-century, with the ability to both provide single-line service with traffic remaining in the account of BNSF, and to set prices independently despite not accessing the customers directly.

Most of the shippers subject to the Lake Charles Merger Conditions are accessed via the Rosebluff Lead, a terminal facility owned jointly by KCS and its competitor, UP. Now that certain of these shippers have requested direct BNSF service, UP – by refusing to grant BNSF the direct access it promised in connection with the UP/SP merger – has forced BNSF to seek and obtain terminal trackage rights over the Rosebluff Lead to achieve the direct access promised by UP and the Board and to fully implement the Lake Charles Merger Conditions.

The only difference from **KCS’s perspective** between current BNSF reciprocal switch service and future BNSF direct service on the Rosebluff Lead is that a BNSF locomotive, rather than a UP locomotive, will now pull BNSF cars down the Lead during UP’s operating window and run directly into a shipper facility. BNSF will access the Rosebluff Lead only under UP’s ownership and operating rights. The Board has ordered BNSF to limit its direct service on the Rosebluff Lead to an exclusive four-hour window of time to occur each day during

UP's 12-hour window for Rosebluff Yard operations. *Decision No. 8*, FD 32760 (Sub-No. 46), slip op. at 9. No KCS trains will operate when and where BNSF trains will operate direct service. UP and KCS already have effective cost-sharing arrangements governing compensation paid by each party for the other's movements on the Rosebluff Lead. *See* BNSF Opening at 2-3.

BNSF explained in its Opening that KCS should be owed no more by UP for BNSF's use of its terminal trackage rights than KCS would be owed for similar UP movements on the Rosebluff Lead. Therefore, the Board should order that UP compensate KCS for **BNSF** direct service trains just as UP compensates KCS today for **UP** direct service trains. *See* BNSF Opening at 25-26. As BNSF explained in its Opening, this approach is equitable to all parties, and is entirely consistent with the principles of the *SSW Compensation* methodology that the Board has identified as controlling in this case.⁸ *Id.* at 26. If the Board decides to substitute a regulatory-based compensation calculation for the existing cost-sharing arrangements, BNSF has provided the inputs and analysis necessary for the Board to calculate compensation owed to KCS under the traditional *SSW Compensation* methodology.

In short, the real issue in this phase of the proceeding is the amount of compensation KCS is entitled to receive as a joint owner of the Rosebluff Lead as a result of the incremental costs of BNSF direct service. But KCS's main argument is that it believes KCS is owed a "market-based" fee for the "commercial" access to the Lake Charles transportation market that the Board granted to BNSF in 1996. *See* KCS Opening at 14-15. Dr. Reishus diagnoses the KCS gambit as "effectively an effort, through a compensation proceeding for the use of co-owned trackage, to

⁸ KCS attempts to argue that *SSW Compensation* methodology is not appropriate for use in connection with terminal trackage rights involving access to shippers. *See* KCS Opening at 11-12. The Board has already rejected this argument. *See Decision No. 8*, FD 32760 (Sub-No. 46), slip op. at 16 n.24 (citing to *UP/SP Decision No. 47*, 1 S.T.B. 591, 616 (1996), which set compensation for terminal trackage rights, including access to local shippers).

renegotiate (on a going-forward basis) the terms of access that were established by UP and the STB decades ago.” Reishus Reply V.S. at 11.

The Board should reject this blatant and improper collateral attack on the Board’s UP/SP merger conditions. The alleged damages that KCS claims will be redressed through the “market-based access fee” resulted from BNSF beginning reciprocal switch service to Lake Charles area shippers soon after the Board granted BNSF such access in 1996, and will presumably continue regardless of whether BNSF institutes direct service using its terminal trackage rights.

Put another way, none of the damages claimed by KCS will occur as a result of BNSF electing to change its Rosebluff Lead service from reciprocal switch to direct, which is the focus of this phase of the proceeding. Any such costs to KCS can be addressed via the method proposed by BNSF, which is fully consistent with the principles of *SSW Compensation* methodology. The question is not whether KCS should be “made whole” vis-à-vis its pre-UP/SP merger position, but how KCS should be “made whole” for any incremental costs incurred as a result of BNSF providing service directly instead of via reciprocal switch.

The Board stated at the outset of this phase of the proceeding that it would “set compensation based on an application of the Prescribed Fee and the principles controlling compensation in condemnation proceedings, including *SSW Compensation*.” *Decision No. 8*, FD 32760 (Sub-No. 46), slip op. at 15-16. While the Board noted that the *SSW Compensation* methodology is a flexible approach that has been modified to account for the particular facts of each case and that it would consider KCS’s proposed “methodological variants,” the Board also made it clear that any variants would need to meet the *SSW Compensation* methodology’s design “to fairly compensate the owning carrier for the tenant’s partial use” of the property. *Id.* at 16.

The examples of variants which the Board lists all relate to *SSW Compensation* factors such as “valuation, various types of costs, and the specific nature and extent of the line’s use.” *Id.* The Board indicated that “case-specific facts concerning the market value of the property the tenant’s proportionate use, and the costs associated with such use” would govern its considerations. *Id.* The Board gave no indication that the overriding statutory standard, as implemented by *SSW Compensation* methodology, could or should be wholly discarded, as KCS suggests.

To the extent that KCS’s “market-based access fee” is intended to replace “lost opportunity profits,” KCS’s request is equally misplaced. *See* KCS Opening at 16-17, 24; Carey V.S. at 30, 41-42. When the Board applied a similar methodology for determining compensation owed under the terminal trackage rights statute, the Board determined that “[t]he rail-line owner is entitled to fair compensation for the facilities it provides **but not for lost profits.**” *S. Plains Switching, Ltd. Co.—Compensation for Use of Facilities in Alternative Rail Service—W. Tex. & Lubbock Ry. Co.*, FD 35111, slip op. at 4 (STB served Dec. 15, 2008) (emphasis added). The Railroad Accounting Principles Board Final Report similarly found that asset valuations “should not include monopoly rents resulting from an owner’s prior control of access.” RAPB Final Report, Vol. 2 at 73 (Sept. 1, 1987).

Earlier, the ICC rejected the attempt of a track owner to claim “loss of future earnings” as compensation for the use of its tracks under the predecessor to Section 11102(a). *Use by Erie of Niagara Junction Ry. Co. Terminals*, 278 I.C.C. 425, 431-32 (1950). The ICC relied on the black-letter law, still applicable today, that “[l]oss of an anticipated business profit is not generally regarded as an element of damage or compensation in condemnation proceedings.” *Id.* at 431 (citing *United States ex rel T.V.A. v. Powelson*, 319 U.S. 266 (1943), and *Mitchell v. United States*, 267 U.S. 341 (1925)). Indeed, “[t]here are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth

Amendment.” *United States ex rel T.V.A.*, 319 U.S. at 281. Any “lost opportunity profits” claimed by KCS are one of these non-compensable losses.⁹

Moreover, as Dr. Reishus explains, imposing the KCS-requested “access fee” in 1996 would have frustrated the competition-preserving purpose of the Lake Charles Merger Conditions by maintaining the combined UP/SP market power arising from the UP/SP merger. Reishus Reply V.S. at 16. Such a fee, Dr. Reishus argues, would have resulted in “little or no competitive benefit to Lake Charles area shippers” from BNSF access. *Id.* at 17.

Indeed, Dr. Reishus observes that KCS “fundamentally mischaracterizes the central issue of this proceeding.” *Id.* at 10. The Board should set compensation for KCS in connection with BNSF’s use of its terminal trackage rights based on the incremental cost of BNSF direct service, not BNSF “commercial” access ordered by the Board 25 years ago through the Lake Charles Merger Conditions.

If KCS believes that it has been harmed by the imposition of BNSF direct and reciprocal switch access to Lake Charles area shippers, KCS should seek redress from UP for UP’s failure to secure KCS’s consent before agreeing to the Lake Charles Merger Conditions. KCS has been aware of UP’s failure since 1996, and it has cited UP as the cause of the harms it has incurred. *See* KCS Suppl. 7, Feb. 4, 2019 (“KCS is the innocent bystander of a promise that UP made but had had no legal right to make.”).

⁹ The Board should also reject any attempts by KCS to force BNSF to pay for any ill-defined “external costs” associated with the introduction of a third carrier on the Rosebluff Lead. *See* KCS Opening at 10 n.19. Any such compensation has no connection with the “principle controlling compensation in condemnation proceedings.” 49 U.S.C. § 11102(a). Imposing on BNSF (and not KCS or UP) separate and discriminatory delay penalties, as KCS has suggested, would be inconsistent with the Board’s practicability and lack of substantial impairment findings in *Decision No. 3* in this proceeding and would lead to costly and inefficient disputes between the carriers regarding causation. *See BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. (Decision No. 3)*, FD 32760 (Sub-No. 46), slip op. at 16 (STB served July 5, 2016) (“the addition of a third carrier could entail many operational adjustments, some of which may be complicated”); *id.* at 17-18 n.17 (“... a certain level of interference and delay is common and expected in the railroad industry . . .”).

D. KCS's challenge to *SSW Compensation* methodology based on takings law is misplaced.

KCS argues that the use of the *SSW Compensation* methodology to determine compensation “is not consistent with the compensation principle controlling in condemnation proceedings that the Board is required to use.” Marzulla V.S. at 7. The argument is presented through a Verified Statement of an attorney, Nancie G. Marzulla, whose law practice “has focused on litigating inverse condemnation (takings) cases in the U.S. Court of Federal Claims, which has exclusive jurisdiction to award compensation (money damages) against the federal government.” *Id.* at 1. Even apart from the fact that KCS has failed to show that a “taking” has occurred,¹⁰ the legal analysis presented by Ms. Marzulla suffers from three fatal flaws.

1. The grant of terminal trackage rights is not the same as a traditional condemnation.

First, the focus of the case law cited by Ms. Marzulla is the condemnation of property, which Ms. Marzulla defines as “a judicial proceeding instituted for the purpose of acquiring title to private property and paying just compensation for it.” *Id.* at 4 (quoting *United States v. Clarke*, 445 U.S. 253, 254 (1980)).

But the ICC long ago noted the difference between a traditional condemnation of property, where title to the property is acquired, and the grant of terminal trackage rights. In 1933, the ICC noted that terminal trackage rights cannot be directly analogized to condemnation rights because:

what is acquired is not a permanent right, maintainable as long as petitioner continues to operate its railroad, as in a condemnation proceeding, but a right to be exercised only so long as it may be exercised “without substantially impairing the ability of a carrier owning or

¹⁰ As BNSF has previously pointed out, there is no basis for KCS's assumption “that a ‘taking’ in the constitutional sense will occur the moment BNSF's access to shippers on the Rosebluff Lead becomes direct, rather than being accomplished via reciprocal switching.” BNSF Rebuttal 34 n.25, July 16, 2018 (BNSF-138). KCS has the burden to demonstrate a taking but has not applied the balancing test identified by BNSF and the case law. Thus, the Takings Clause has no relevance in this proceeding. The grant of terminal trackage rights is not the same as a traditional condemnation.

entitled to the enjoyment of terminal facilities to handle its own business.”

Missouri—K.T.R. Co. v. Kansas City Term. Ry. Co., 198 I.C.C. 4, 7 (1933). The ICC reasoned that the terminal trackage rights user “has become a tenant of respondent, and the just and reasonable compensation which it is required to pay is in effect a rental.” *Id.* at 8. The calculation used by the ICC in 1933 for terminal trackage rights compensation to implement this rental approach has been refined and modernized over the years into the three-pronged approach of the *SSW Compensation* methodology, based on a series of seminal ICC cases from the 1980s. *See BNSF Railway—Terminal Trackage Rights—Kansas City Southern Railway (Decision No. 6)*, FD 32760 (Sub-No. 46), slip op. at 2 n.4 (STB served Dec. 7, 2018).

2. KCS’s analysis rests on the flawed premise that KCS has exclusive rights to the trackage.

The second defect in the Marzulla analysis is that it incorrectly assumes that the property interest being “taken” from KCS is the exclusive use of the terminal trackage. Indeed, Ms. Marzulla expressly states this incorrect premise: “By granting BNSF trackage rights and ousting KCS from the exclusive use of its property, the Board has **taken** and awarded to BNSF a compensable property interest in KCS’s trackage.” Marzulla V.S. at 3. But KCS is only a joint owner of the trackage at issue. KCS does not have an exclusive interest in the property – it has only a shared interest. Whatever legal standards apply to the “taking” of a property owner’s right to the exclusive use of property are irrelevant here because KCS never had that right.

What is more, KCS has not lost *any* of its interest in the property. Under KCS’s joint usage rights, KCS has the right to share the Rosebluff Lead with its co-owner, UP. But those joint usage rights – the only rights at issue here – are

unaffected by the BNSF trackage rights. BNSF's use of the Rosebluff Lead will occur within the ownership rights of UP and during UP's 12-hour operating window. KCS is certainly entitled to the compensation that is due for the use of the trackage by UP, the joint owner, and for any incremental costs attributed to the use of the trackage by BNSF as UP's proxy or sub-lessor. But no other property interest has been taken from KCS that must be compensated.

Another critical aspect of KCS's joint ownership rights is that KCS's joint owner of the trackage – UP – is already a competitor of KCS. Therefore, not only does KCS own only a joint use right to the trackage, it shares that joint use right with another rail carrier that already competes with KCS for business using the jointly-owned trackage.

The Marzulla analysis assumes, falsely, that KCS's property interest allowed it to prevent the trackage from being used to compete with KCS. But as the joint owner of the property with UP, an existing competitor, KCS never had that property right either. KCS's property rights entitled it to share the jointly owned trackage with a competing rail carrier. Both owners could use the trackage to provide rail service, but the ownership rights never allowed the owners to exclude competition based on usage of the trackage. KCS seeks compensation for a property right – the right to prevent the use of the property to compete for rail customers – that it never had.

3. KCS does not even try to identify the “fair market value” of KCS's actual property interest.

Finally, Ms. Marzulla argues that the correct constitutional standard for compensation is the “fair market value” of what has been taken, but her analysis fails to explain, or even consider, how the fair market value would be determined for the actual property interest that KCS has – *i.e.*, a shared interest in trackage that is jointly owned with a competing railroad.

Ms. Marzulla argues that the “fair market value” must be assessed based on the views of a “willing” buyer. Marzulla V.S. at 6. But such a buyer, assuming it was another rail carrier, would clearly have recognized that it was buying only a joint ownership interest and that its joint owner was a competing rail carrier entitled to use the property to compete for rail customers. Ms. Marzulla offers no explanation of how such a “willing” buyer would assess the value of the property interest.

E. Many of the arguments presented by Dr. Neels and Prof. Carey are flawed and accordingly must be rejected.

1. Neither Dr. Neels nor Prof. Carey properly address the circumstances relating to BNSF Rosebluff Lead access.

Mr. Baranowski explains in his Reply Verified Statement that, under the circumstances presented by this case, KCS should be compensated for BNSF terminal trackage rights movements in the same way that KCS is compensated for UP direct movements on the Rosebluff Lead. Baranowski Reply V.S. at 8. From conceptual and economic perspectives, BNSF direct access is no different than its current access via reciprocal switch. In their Verified Statements, both Dr. Neels and Prof. Carey fail to explain how a change in the form of access should alter the compensation due to KCS by BNSF. *Id.* at 8-9.

Dr. Neels and Prof. Carey also acknowledge that BNSF has had access to the Rosebluff Lead for years. *Id.* Dr. Neels’ Verified Statement further details that this access is a result of a set of agreements and rulings leading to the approval of the merger between UP and SP to address competitive concerns related to the merger. *Id.* (citing Neels V.S. at 11). In addition, although both Dr. Neels and Prof. Carey acknowledge that KCS is a partial owner of the Rosebluff Lead, they fail to adjust their proposed compensation terms to account for this partial ownership. *Id.* at 10.

2. Dr. Neels' SSW Compensation proposal is deficient and must be rejected.

As detailed in Mr. Baranowski's Reply Verified Statement, Dr. Neels' SSW *Compensation* calculations are "flawed and must be rejected." Baranowski Reply V.S. at 2. Dr. Neels' SSW *Compensation* calculations fail to account for the fact that KCS enjoys only partial ownership of the Rosebluff Lead. *Id.* at 3. By failing to account for UP's partial ownership share, Dr. Neels overstates significantly both the SSW *Compensation* operating and maintenance expense component and the interest rental component.

In addition, Dr. Neels' adoption of Capitalized Earnings ("CE") as the basis for his SSW *Compensation* interest rental component calculations is misplaced. *Id.*¹¹ The use of a CE approach for compensation in this case is improper for several reasons, including the "significant challenges with allocating the appropriate level of revenues to assets in terminal areas that are both used as part of switching operations and overhead trackage rights movements." *Id.* at 16. Mr. Baranowski further details how Dr. Neels' CE results are inflated by conceptual and logistical errors:

- Dr. Neels' CE estimate includes an artificial contribution from UP and KCS switching rates that results in a double count of contribution. *Id.*
- Dr. Neels fails to "deduct an allocation of fixed costs from the line haul revenues his Brattle rail network model attributes to the Rosebluff Lead." *Id.* at 19. This is not a proper CE valuation approach. *Id.* at 20.
- Dr. Neels errs by limiting the scope of BNSF's direct access on the Rosebluff Lead to the Lyondell facility. *Id.* at 20-21.
- Dr. Neels' calculation of the operating and maintenance component is also corrupted by his failure to adjust his calculation to reflect KCS's partial ownership share. *Id.* at 21-22. Correcting this error results in a reduction in the operating and maintenance component fee from {{ }} *Id.* at 4.

¹¹ The Board should note that the approach proposed by Dr. Neels was criticized by KCS's other expert witness, Prof. Carey, in earlier pleadings. *See, e.g.,* Baranowski Reply V.S. at 3.

- Dr. Neels proposal improperly uses an “enterprise value multiplier” instead of a multiplier based on railroad industry cost of capital determination, as per Board precedent. *Id.* at 22-25.
- Dr. Neels uses an incorrect empty to load ratio. *Id.* at 25-26.

When these CE errors are properly corrected, the result is a significant reduction in the calculated interest rental component from {{ }} per car mile to {{ }} *Id.* at 26, Table 3. This corrected CE valuation falls below the RCNLD-based results proposed by Mr. Baranowski. *Id.* at 4.

3. Dr. Neels rejection of interest rental derived from Stand-Alone Cost is flawed.

In Mr. Baranowski’s Reply Verified Statement, he states that Dr. Neels rejected the application of the Stand-Alone Cost (“SAC”) method for this case as being “tedious, excruciatingly detailed, and time consuming.” Baranowski Reply V.S. at 26. However, Dr. Neels’ conclusions relative to the difficulties in implementing SAC are misplaced. *Id.* As Mr. Baranowski notes, “SAC would generate the maximum reasonable level of compensation applicable to the Rosebluff Lead” and would be efficient and straightforward using the RCNLD estimates developed by Mr. Boileau and Mr. Pitts. *Id.* Mr. Baranowski demonstrates that SAC produces SSW Compensation capital maintenance and interest rental amounts that are lower than his RCNLD-based estimate. *Id.* at 28.

4. Professor Carey’s proposal for a “market-based access fee” is flawed and must be rejected.

Mr. Baranowski’s Reply Verified Statement details several significant errors in Prof. Carey’s Verified Statement. Mr. Baranowski notes that Prof. Carey’s “principal finding that published reciprocal switch rates are embedded with some market-based return *is just simply wrong.*” Baranowski Reply V.S. at 6 (emphasis added). Mr. Baranowski details several other significant deficiencies in Prof. Carey’s proposal, including:

- Prof. Carey included an unsuitable reciprocal switch rate-selection process that artificially inflates rates. *Id.* at 38. In her analysis, Prof. Carey used rates that averaged \$489.69, while rates she decided to exclude averaged \$246.21. *Id.*
- Reciprocal switch rates are cost-based and are thus void of the market-based contribution. Although Prof. Carey attempts to argue to the contrary, the data submitted with her analysis proves her wrong. *Id.* at 39. For example, the reciprocal switch rate she cited for Lake Charles equals cost and actually includes zero market contribution. *Id.* at 39-40.
- In addition to Prof. Carey's switch costs being based on erroneous inputs from Dr. Neels, she also fails to explain why costs attributable to a switch in the Lake Charles area are at all relevant to the reciprocal switch rates from different locations and circumstances included in her analysis. *Id.* at 36.
- Reciprocal switch rates across the railroad industry are cost-based and do not include market-based contributions toward revenue adequacy. *Id.* at 43.

Prof. Carey's criticisms of Mr. Baranowski's use of the RCNLD methodology for determining interest rental are also incorrect. *Id.* at 7. Prof. Carey argues that an *SSW Compensation* rate based on RCNLD is likely to significantly understate the economic value of KCS's 50% ownership of the Rosebluff Lead because of the high revenue potential from customers located along the Rosebluff Lead. *Id.* at 29. However, since RCNLD is based on replacement costs, it generates returns that are { } greater on average than that needed by KCS to achieve revenue adequacy. *Id.* at 31.

Lastly, Prof. Carey's references to STB Ex Parte No. 711 are also misplaced in that she confuses compensation for forced switching under the Board's recent proposal in that proceeding with voluntary reciprocal switching and uses portions of the proceedings out of context. *Id.* at 34. In her Verified Statement, Prof. Carey attributes carrier comments related to a proposal for forced switching to "real-world market-based reciprocal switch rates," but no such rates exist. *Id.* (citing Carey V.S. at 17). Real-world reciprocal switch rates are cost-based. *Id.* at 34. Further, the

circumstances of this case differ from those in the Board's Ex Parte No. 711 proposal because BNSF direct access to the Rosebluff Lead requires no switching by KCS or UP. *Id.* at 35.

5. Professor Carey's proposed use of "comparable" reciprocal switching fees is not an accurate or reliable measure of market value.

Dr. Reishus explains that Prof. Carey's proposed use of "comparable" reciprocal switching rates as a means of determining the appropriate compensation level for BNSF's trackage rights on the Rosebluff Lead is inaccurate and unreliable. *See* Reishus Reply V.S. at 19. Prof. Carey's proposed methodology involves selecting a variety of allegedly "comparable" switching rates to Lake Charles and then subtracting the cost of switching at Lake Charles from an average of the "comparable" switch rates. *Id.* Prof. Carey argues that this is the "access fee" for which KCS should be compensated. But Dr. Reishus explains that this "access fee" does not represent compensation for BNSF's use of the assets co-owned by KCS. *Id.*

There are several shortcomings in Prof. Carey's "comparable" methodology. *Id.* at 19-27. First, Prof. Carey relies on arm's-length prices in determining "comparable" reciprocal switching fees. Using arm's-length prices in comparable transactions is not an inherently incorrect methodology for estimating market value, when properly applied. *Id.* at 19. Proper application is where Prof. Carey's proposal fails. The proposal incorrectly assumes that the access provided through switching, and the resulting "access fee," is comparable to the trackage rights access, and corresponding "value," at issue here. Dr. Reishus shows that these two forms of access are fundamentally different and not comparable. *Id.* at 19-20. Moreover, the proposal does not establish that the reciprocal switch rates upon which her proposal relies are valid arm's-length prices that reflect the value of "access" provided through switching. *Id.* at 21.

Second, arm's-length prices can vary across different markets, thus necessitating a determination of comparability and adjustments for differences. *Id.* (citing OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, OECD Publishing at 74). Prof. Carey has not established that the reciprocal switch rates she uses represent comparable transactions, “nor has she made any adjustments for differences in market conditions, the nature of the good or service sold, cost of providing switching, and other relevant terms and conditions of the transaction between the ‘comparable’ transaction and the Rosebluff Lead.” Reishus Reply V.S. at 6. The rate differences that Prof. Carey examined range {{ }} difference and are completely unreliable without proper adjustment. *Id.* at 7.

Finally, Prof. Carey fails to provide a reliable comparable valuation by subtracting the estimated switching cost for the Rosebluff Lead from average switching rates from other locations to calculate the “market-based access fee” in her proposal. *Id.* at 27. Her method improperly assumes that switching costs at other locations are the same as those at the Rosebluff Lead and renders Prof. Carey’s estimate of the access fee “unreliable and unusable.” *Id.*

III. Conclusion

The Board has finally arrived at the last phase of this eight-year-old proceeding: setting compensation for BNSF’s use of its Rosebluff Lead terminal trackage rights that will allow BNSF to fully implement the Lake Charles Merger Conditions agreed to by UP and imposed by the Board nearly 25 years ago in connection with the merger of UP and SP. The KCS and UP Openings each present self-serving and deeply skewed views of each carrier’s rights and responsibilities relating to the allocation and substance of such terminal trackage rights compensation. In addition, Mr. Baranowski and Dr. Reishus have definitively

shown that the analyses and calculations undertaken by Dr. Neels and Prof. Carey are misguided, inaccurate and unreliable and provide no basis for KCS's overreaching claims.

Under the Lake Charles Merger Conditions, the Board ordered and UP promised that BNSF would have access to Lake Charles area shippers either by reciprocal switch or direct access, at BNSF's sole election. The only reason that BNSF has needed to seek and obtain terminal trackage rights through this proceeding is UP's refusal to provide BNSF with the direct access to Lake Charles area shippers that UP promised. The Board should not allow UP to dodge its responsibility by shifting to BNSF the excess costs for obtaining such direct access beyond the Prescribed Fee.

Predictably, KCS continues to overreach and make collateral attacks on issues that it has definitively lost. KCS asks the Board to look past its statutory obligations under Section 11102(a) and its well-established framework for setting compensation for terminal trackage rights. In its place, KCS asks the Board to order BNSF to pay KCS a "market-based access fee" for "lost opportunity profits" and "lost contribution" allegedly arising from the "commercial" access granted to BNSF by the Board a quarter-century ago. But the real issue in this phase of the proceeding is the compensation owed to KCS for the incremental costs of BNSF direct service using its terminal trackage rights, as compared to the reciprocal switch service provided today. The compensation arrangement proposed by BNSF is wholly consistent with the statute and the Board's precedent for calculating such terms. If KCS seeks any additional compensation for BNSF's "commercial" access, it can seek to do so from UP for UP's failure to secure KCS's consent before agreeing to the Lake Charles Merger Conditions.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Adrian L. Steel, Jr.", positioned above a horizontal line.

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Dated: April 12, 2021

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Before the
SURFACE TRANSPORTATION BOARD

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

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

ATTACHMENT 1

UP Response to Request for Admission No. 5 of BNSF's
Third Set of Discovery Requests to UP (8/28/2020)

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BEFORE THE SURFACE TRANSPORTATION BOARD

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

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

UNION PACIFIC’S OBJECTIONS AND RESPONSES TO BNSF’S THIRD SET OF DISCOVERY REQUESTS RELATED TO COMPENSATION TO UP

Union Pacific Railroad Company responds to BNSF’s Third Set of Discovery Requests
Related to Compensation to UP, dated August 13, 2020, as follows:

GENERAL RESPONSES

The following General Responses apply to each of BNSF’s discovery requests:

1. Where Union Pacific states it will produce documents, Union Pacific will conduct a reasonable search for responsive, non-privileged documents, subject to any other qualifications specified in its response. Union Pacific will produce only documents that already exist in Union Pacific’s possession and will produce those documents in the format in which they are maintained in the ordinary course of business, unless otherwise indicated.
2. Production of documents does not necessarily imply they are relevant to or admissible in this proceeding and is not to be construed as waiving any of the general or specific objections stated below.

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before KCS objected in 1996 that KCS's consent was required under at least one of the Joint Facility Agreements for Union Pacific to grant BNSF trackage rights over the Rosebluff Lead, and that Union Pacific and BNSF anticipated in the RASA that Union Pacific might lack sufficient legal authority to grant certain trackage rights, as was the case with the Rosebluff Lead, and thus agreed that if Union Pacific lacked sufficient legal authority to grant certain trackage rights, it would provide BNSF with alternative access, which Union Pacific provided in this case through a switching and haulage arrangement, and that BNSF knew in 1996 before accepting the benefits of the RASA that KCS contended that KCS's consent was required under at least one of the Joint Facility Agreements for Union Pacific to grant BNSF trackage rights over the Rosebluff Lead. Union Pacific further states that the Board's Decision No. 63 outlined how the parties should attempt to resolve disputes over BNSF's access to the Rosebluff Lead, and that when BNSF expressed a desire to operate over the Rosebluff Lead using trackage rights in 2012, Union Pacific sought repeatedly to facilitate discussions among Union Pacific, BNSF, and KCS. After reasonable inquiry, Union Pacific is unable to admit or deny Request for Admission No. 4. However, Union Pacific is continuing to review archived documents. Once that review is completed, Union Pacific will supplement this response if necessary.

Request for Admission No. 5:

Admit that UP did not request consent pursuant to the Joint Facility Agreements from KCS to grant BNSF trackage rights over the joint facility trackage prior to the execution of the CMA Agreement.

Union Pacific Response:

Union Pacific admits that it did not recognize before KCS objected in 1996 that KCS's consent was required under at least one of the Joint Facility Agreements for Union Pacific to grant BNSF trackage rights over the Rosebluff Lead, and that Union Pacific and BNSF anticipated in the RASA that Union Pacific might lack sufficient legal authority to grant certain

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trackage rights, as was the case with the Rosebluff Lead, and thus agreed that if Union Pacific lacked sufficient legal authority to grant certain trackage rights, it would provide BNSF with alternative access, which Union Pacific provided in this case through a switching and haulage arrangement.

Request for Admission No. 6:

Admit that UP did not request consent pursuant to the Joint Facility Agreements from KCS to grant BNSF trackage rights over the joint facility trackage prior to the execution of the 50/50 Line Term Sheet Agreement.

Union Pacific Response:

Union Pacific objects to this request as misleading because the 50/50 Line Term Sheet Agreement has no relevance to this proceeding. Union Pacific further objects to this request as unduly burdensome in that it seeks information relating to potential communications by any Union Pacific employees more than 22 years ago. Subject to and notwithstanding these objections, Union Pacific admits that it did not recognize before KCS objected in 1996 that KCS's consent was required under at least one of the Joint Facility Agreements for Union Pacific to grant BNSF trackage rights over the Rosebluff Lead, that Union Pacific and BNSF anticipated in the RASA that Union Pacific might lack sufficient legal authority to grant certain trackage rights, as was the case with the Rosebluff Lead, and thus agreed that if Union Pacific lacked sufficient legal authority to grant certain trackage rights, it would provide BNSF with alternative access, which Union Pacific provided in this case through a switching and haulage arrangement, and that BNSF knew in 1996 before accepting the benefits of the RASA that KCS contended that its consent was required under at least one of the Joint Facility Agreements for Union Pacific to grant BNSF trackage rights over the Rosebluff Lead. Union Pacific further states that the Board's Decision No. 63 outlined how the parties should attempt to resolve disputes over BNSF's access to the Rosebluff Lead, that BNSF entered into the 50/50 Line Term Sheet

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Before the
SURFACE TRANSPORTATION BOARD

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

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

EXHIBIT A

Verified Statement of Michael R. Baranowski

Before the
SURFACE TRANSPORTATION BOARD

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

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

APPLICATION FOR TERMINAL TRACKAGE RIGHTS

**REPLY STATEMENT AND EVIDENCE ON COMPENSATION
VERIFIED STATEMENT OF**

MICHAEL R. BARANOWSKI

APRIL 12, 2021

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I. INTRODUCTION

I am Michael R. Baranowski, a Senior Managing Director at FTI Consulting and the head of FTI's Network Industries Strategies group within the Economic Consulting division. I submitted an Opening Verified Statement in this proceeding on January 26, 2021, in which I explained that the specific circumstances surrounding BNSF Railway Company ("BNSF") access to the Rosebluff Lead affirm that Kansas City Southern Railway Company ("KCS") is not entitled to any compensation for BNSF direct access under the *SSW Compensation* principles beyond what KCS receives under the existing cost-sharing arrangements with Union Pacific Railroad Company ("UP"). Specifically, BNSF has been accessing customers on the Rosebluff Lead via reciprocal switch under the UP/SP Merger conditions since 1996, and {

}.

My Opening Verified Statement also explained that, should the Surface Transportation Board ("STB" or "the Board") determine instead that KCS should instead be compensated for BNSF direct access under a more traditional application of the *SSW Compensation* methodology, any compensation due KCS should be limited to its ownership-adjusted share of the variable cost and maintenance and operating cost components of the *SSW Compensation* methodology. No interest rental compensation under the *SSW* formulation is due KCS because BNSF direct access to the Rosebluff Lead was granted as a result of arm's-length merger-related negotiations between BNSF and UP, the latter of which acquired an ownership interest in the Rosebluff Lead via its merger with SP. KCS's ownership interest in the Rosebluff Lead is not affected by BNSF's access under the conditions of use imposed by the STB, and KCS is therefore not

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entitled to any interest rental related compensation. In addition, in accord with the Board's express direction, BNSF will operate its direct service trains solely during UP's 12-hour operating window, and BNSF will not use or infringe upon KCS's rights as an owner of the Rosebluff Lead.

Further, if the Board were to find that KCS should receive *SSW Compensation*-related interest rental related to its ownership share, I developed an estimate of the interest rental amount based on a Replacement Cost New Less Depreciation ("RCNLD") valuation adjusted to reflect KCS's 50 percent ownership interest.

I have been asked by counsel for BNSF to reply to the Opening Verified Statements of KCS witnesses Kevin Neels and Julie M. Carey. Dr. Neels develops an estimate of *SSW*-based compensation applicable only to BNSF direct access to LyondellBasell ("Lyondell"). Prof. Carey provides her view of the Rosebluff Lead access granted to BNSF relative to STB and economic precedent and advocates for what she describes as a "market-based access fee" that she derives from published reciprocal switching tariffs in place of any *SSW Compensation*.

As discussed in this Reply Verified Statement, Dr. Neels' calculations are flawed and must be rejected. To the extent that corrections can be made to Dr. Neels' results, the corrected *SSW Compensation* levels are below those included in my Opening Verified Statement. I also explain that Prof. Carey's advocacy for a "market-based access fee" for KCS arises from her mistaken attempt to analogize the Rosebluff Lead access granted to BNSF with the forced switching contemplated by the Board in STB Docket No. EP 711. In addition, Prof. Carey's development of such a "market-based access fee" from published reciprocal switch tariffs is contrived. When appropriate switching related costs are considered, Prof. Carey's estimates of market-based contribution evaporate.

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In his Verified Statement, Dr. Neels discusses from a valuation perspective the access granted BNSF to the Rosebluff Lead in the UP/SP merger and his understanding of the Board's *SSW Compensation* formula. Dr. Neels develops his estimate of the fees that he considers due KCS for BNSF direct access while embracing Prof. Carey's alternative recommendation of a "market-based access fee." Notably absent from Dr. Neels discussions are any explanations as to why only *now*, under BNSF *direct* access, KCS would be entitled to any more compensation than it receives currently under the long-running BNSF reciprocal switch access. Nor do his *SSW Compensation* calculations consider properly the parameters of the direct access granted BNSF by the Board or the fact that KCS possesses only partial ownership of the Rosebluff Lead. Instead, his *SSW* Calculations treat KCS as the sole owner of the Rosebluff Lead.

As for his calculations, Dr. Neels adopts Capitalized Earnings ("CE") as the basis for his *SSW Compensation* interest rental component even though that approach was eschewed by KCS's other witness, Prof. Carey, in an earlier round of this proceeding.¹ Prof. Carey explained that CE does not approximate replacement cost as required by statute and would return artificially low results because of below market revenues on the Rosebluff Lead. In my Opening Verified Statement, I too expressed concerns related to the challenges associated with the application of CE in this proceeding. Dr. Neels ignored these warnings and developed a CE valuation. His results, however, run counter to his own observations that shippers on the Rosebluff Lead pay lower rates.² They also exceed the replacement cost valuation approach

¹ In Prof. Carey's Verified Statement attached to KCS's February 4, 2019 response to the Board's *Decision No. 6*, she endorsed RCNLD as the basis for the *SSW Compensation* interest rental component – the approach I used in my Opening Verified Statement – as "an independent and objective measure" that has been used by the STB for ratemaking. Carey Feb. 4, 2019 Verified Statement at 3.

² Neels Verified Statement at 13.

endorsed by Prof. Carey and included in my Opening Verified Statement. Because lower rates generally lead to lower earnings, one would expect that the lower rates on the Rosebluff Lead would produce CE results below replacement cost levels. A close look at his calculations, however, reveals that his results are inflated by conceptual and logical flaws. Once these flaws are corrected, his CE valuation falls below my RCNLD-based results.

The significant problems with Dr. Neels' CE estimate include: (i) the inclusion of an artificial contribution from UP and KCS switching rates that are by design cost-based and generate no contribution, (ii) the failure to account for fixed costs when calculating the available earnings from revenues he allocates to the Rosebluff Lead, and (iii) the failure to account for KCS's partial ownership share. Correcting these and other errors in Dr. Neels' estimate reduces the interest rental component of his *SSW Compensation* from {{ }} per car mile to {{ }}.

Beyond the *SSW Compensation* interest rental component, Dr. Neels' calculation of the operating and maintenance component is also distorted by his failure to adjust his calculation to reflect that KCS has only a partial ownership share. Doing so reduces his operating and maintenance component fee from {{ }}. Table 1 converts my calculation of *SSW Compensation* from my Opening Verified Statement and compares my results to Dr. Neels' corrected results.³

³ I displayed my *SSW Compensation* based results on a per gross ton mile basis in my Opening Verified Statement. Dr. Neels develops his estimate on a car-mile (loaded or empty) basis. I have converted my opening results to a cost per car-mile basis for ease of comparison with Dr. Neels.

Table 1: Comparison of Baranowski Opening SSW Compensation Component Values to Dr. Neels' Corrected Values

<i>SSW Compensation to KCS Component Comparison, Per Car Mile</i>			
Fee Component	Baranowski Opening	Neels Corrected	Difference
Variable Costs	{{		
Maintenance and Operating Costs			
Interest Rental			
Total Compensation			}}

See Baranowski Reply Workpaper "Compensation Calculations Reply.xlsx", tab "Tables"

Dr. Neels is also wrong regarding the application of Stand-Alone Costs ("SAC") as the basis for the interest rental valuation. SAC, like RCNLD, is based on replacement costs. BNSF Opening Engineering Expert Robert J. Boileau determined such replacement costs for the portions of the Rosebluff Lead subject to BNSF direct access.⁴ To address any concerns related to technical obsolescence related to the Rosebluff Lead track structure, I have modified Mr. Boileau's replacement cost estimate to include uniform 115-pound rail and corresponding other track material, consistent with my experience in doing full-SAC cases before the Board, and have recalculated the *SSW Compensation* interest rental component on the basis of SAC. Because the Board's SAC discounted cash flow model provides for both the return of and return on investment, the capital expenditure portion of the *SSW Compensation* maintenance and operating expenses is also incorporated in the SAC annual revenue requirement. Overall, SAC-based interest rental and capital expenditures yield fees under *SSW Compensation* approximately { } percent lower than comparable figures based on RCNLD.

⁴ See Verified Statements of Robert J. Boileau submitted with BNSF's January 26, 2021 Opening Statement in this proceeding.

Prof. Carey's main argument is for a "market-based access fee" be paid to KCS for BNSF direct access.⁵ The path Prof. Carey takes to get there meanders through revenue adequacy, regulatory economic principles, STB rate reasonableness standards, STB Docket No. EP 711, rate levels for shippers on the Rosebluff Lead, the Board's Revenue Shortfall Allocation Methodology ("RSAM"), relative contribution levels for BNSF and UP, and her analysis of published reciprocal switch rates. Along the way, Prof. Carey makes a number of critical misstatements of fact and erroneously cites irrelevant Board precedent and proposals from multiple Board proceedings.

Most critically, Prof. Carey's principal finding that published reciprocal switch rates are embedded with some market-based return is just simply wrong. Her market-based "contribution" is derived from analytical gamesmanship that assimilates cost-based published reciprocal switch rates from high-cost carriers and far-flung locations and deducts from this an entirely unrelated and flawed estimate of switching costs for the Lake Charles area. In reality, reciprocal switch rates are cost based and void of any market-based returns.

I also demonstrate that Prof. Carey's comparison of the Board's system-wide revenue adequacy findings for BNSF, KCS and UP ignores the fact that KCS has been able to increase the percentage of its shipments originating and terminating on the Rosebluff Lead with revenue-to-variable-cost ratios above the Board's jurisdictional threshold level of 180 percent.⁶ Shipments with revenues above the jurisdictional threshold contribute more to the achievement of revenue adequacy than those with revenues below the threshold.

⁵ Carey Verified Statement at 49.

⁶ The jurisdictional threshold level is the percentage above variable cost at which the Board has regulatory authority. Rates above the jurisdictional threshold are widely considered to contribute to a railroad's ability to achieve revenue adequacy.

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Prof. Carey's separate criticisms regarding shortcomings in the RCNLD methodology for determining interest rental are also misplaced. Because RCNLD is based on replacement costs, the calculated interest rental levels are, on average, { } percent greater per route mile than the income levels per route mile needed by KCS to achieve revenue adequacy.

Although published reciprocal switching rates are cost based and do not include market-based returns, Prof. Carey attempts to justify her approach by taking largely out of context quotes and other excerpts from the Board's ongoing STB Docket No. EP 711 proceeding. First of all, the EP 711 proceeding has no relevance to BNSF direct access to the Rosebluff Lead via terminal trackage rights. Under the Board's proposal in EP 711, shippers could petition the STB to force a railroad serving a solely-served industry to interchange the shipment to a competing carrier within a certain distance from the industry, instead of keeping the long haul for itself. As such, Prof. Carey's reliance on reciprocal switching is misplaced. The issue in EP 711 is about access to solely-served industries. BNSF already has access to Lake Charles shippers as granted by UP and confirmed by the Board in 1996. Even putting aside BNSF's existing access rights, the industries located on the Rosebluff Lead are not solely served by KCS; UP serves them also.

The forced switching under consideration by the Board in EP 711, which will require a railroad to perform a new interchange switch, is the direct opposite from BNSF's terminal trackage rights direct access to the Rosebluff Lead, which will eliminate completely a Zone 1 or Zone 2 switch currently provided by UP or KCS. Further, unlike terminal trackage rights proceedings such as this, for which a compensation formula is well established by statute, there is no compensation formula in place for the forced switching contemplated by EP 711.

Finally, Prof. Carey's analysis of BNSF and UP bid margins on Lyondell's and Westlake Chemical's West Lake Charles traffic affirms that the competition on the Rosebluff Lead is

principally between BNSF and UP. Of the {{ }} combined lanes in the BNSF and UP data included in her margin analysis, KCS served only {{ }}, or under {{ }} in the past ten years.

In summary, neither Dr. Neels nor Prof. Carey explain why BNSF's election to access Rosebluff Lead customers directly instead of via reciprocal switch should change the manner in which KCS is compensated today under the current cost sharing agreements for BNSF access. Should the Board determine that KCS is entitled to a form of *SSW Compensation*, Dr. Neels flawed calculations of *SSW Compensation* levels should be rejected, and any such compensation should be based on the *SSW Compensation* levels set forth in my Opening Verified Statement. Prof. Carey's recommendation for a "market-based access fee" should also be rejected. When the costs of providing reciprocal switching services are properly considered, there is zero contribution above costs.

II. ALTHOUGH BOTH OF KCS'S EXPERTS ACKNOWLEDGE THE DISTINCT CIRCUMSTANCES RELATING TO BNSF ROSEBLUFF LEAD ACCESS, NEITHER INCORPORATES IT PROPERLY INTO THEIR ANALYSIS

As explained in my Opening Verified Statement, under the specific circumstances here, KCS is not entitled to a change in the compensation it receives under the current Rosebluff Lead cost-sharing agreements as a result of BNSF's decision to access Rosebluff Lead shippers directly instead of via reciprocal switch. Dr. Neels acknowledges that BNSF access to the Rosebluff Lead began over 24 years ago and was granted as part of a set of agreements and rulings leading to the approval of the merger between UP and SP to address competitive concerns related to the merger.⁷ He recognizes that BNSF agreed to compensation terms for

⁷ Neels Verified Statement at 11.

both access via reciprocal switch⁸ and access via trackage rights⁹ and that KCS received compensation for BNSF's access to the Rosebluff Lead under the existing cost sharing agreements.¹⁰ However, despite recognizing these circumstances, Dr. Neels' discussion lacks any explanation as to why an election by BNSF to now access the Rosebluff Lead directly via trackage rights requires a change in the compensation due KCS.

Similarly, Prof. Carey asserts that BNSF has for years been paying what she describes as "low non-market rates" for "government-mandated" access to the Rosebluff Lead customers through the approval of the UP/SP merger settlement.¹¹ She wrongly asserts that KCS received no compensation for BNSF reciprocal switch service¹² even though KCS is compensated for such access under the existing cost sharing agreements. She also contends that BNSF access has resulted in diminution of the value of the Rosebluff Lead to its joint owners, but provides no quantification of the amount of any such diminution. Instead, without explaining why an election by BNSF to exercise its right of direct access instead of reciprocal switch access would entitle KCS to any additional compensation, Prof. Carey simply seizes on the change as an opportunity to increase the compensation to KCS.

Dr. Neels' and Prof. Carey's failure to provide any explanation of why a change in the type of BNSF service warrants a change in KCS's compensation also ignores the efforts by the Board. The Board, in granting BNSF direct access recognized that such access is tied directly to UP's partial ownership share and does not impede KCS's abilities to serve Rosebluff Lead customers. As the Board ordered in *BNSF Railway—Terminal Trackage Rights—Kansas City*

⁸ *Id.* at 14.

⁹ *Id.* at 11.

¹⁰ *Id.*

¹¹ Carey Verified Statement at 24.

¹² *Id.* at 29.

Southern Railway (Decision No. 8), FD 32760 (Sub-No. 46) (STB served Feb. 21, 2020), BNSF's direct service on the Rosebluff Lead is limited to one exclusive, four-hour window of time, to occur each day during UP's 12-hour window for Rosebluff Yard operations.¹³ More critically, *Decision No. 8* outlines UP's responsibilities related to facilitating BNSF's direct access:

To facilitate this [access], UP shall notify BNSF of the anticipated time for BNSF's train to depart Lacassine Yard. UP's notification must occur a reasonable time in advance of the BNSF's local crew call time. BNSF's four-hour window will officially begin when BNSF's locomotive enters the Rosebluff Lead, and all parties shall coordinate to ensure that BNSF accesses the Rosebluff Lead no later than 2:00 p.m.¹⁴

It is clear that KCS will be unaffected under the access terms imposed by the Board.

Last, while both Dr. Neels and Prof. Carey acknowledge that KCS is a partial owner of the Rosebluff Lead, they both fail to adjust the compensation they develop for that partial ownership—*SSW Compensation* for Dr. Neels and so-called market-based access compensation for Prof. Carey. Instead Dr. Neels and Prof. Carey assert that 100 percent of the increased compensation levels for which they advocate should be paid to KCS.

III. RESPONSE TO DR. NEELS

A. Overview of Dr. Neels' *SSW Compensation* Calculations

As I explained in my Opening Verified Statement, there are three essential elements of the *SSW Compensation* methodology:

- 1) the variable cost that is incurred by the owning carrier but attributable to the tenant carrier's operations;

¹³ See, *Decision No. 8* at 9.

¹⁴ *Id.* (Footnotes omitted, emphasis added).

- 2) the tenant carrier's usage-proportionate share of track maintenance and operating expenses; and
- 3) an interest or rental component to compensate the owning carrier for the tenant carrier's use of capital dedicated to the track by the owning carrier determined by multiplying the value of the assets by a rate of return equal to the railroad's current pre-tax nominal cost of capital.

Although I explained that the specific circumstances of BNSF access to the Rosebluff Lead do not entitle KCS to any additional compensation beyond what it receives under its existing cost sharing agreements with UP for a change from reciprocal switch to direct access, I calculated *SSW*-based compensation for potential use by the Board in the alternative. Table 2 compares my estimates of the three *SSW Compensation* elements with those developed by Dr. Neels.¹⁵

Table 2: Comparison of *SSW Compensation* Results

Fee Component	Baranowski	Neels	Difference
Variable Costs	{{		
Maintenance and Operating Costs			
Interest Rental			
Total Compensation			}}

See Baranowski Reply Workpaper “Compensation Calculations Reply.xlsx”, tab “Tables”

There are two key conceptual differences between my and Dr. Neels’ *SSW Compensation* results. The first relates to the scope of the Rosebluff Lead to which the fees apply. The *SSW Compensation* fee I developed is applicable to BNSF direct access to serve any customer located on the Rosebluff Lead. The access fees developed by Dr. Neels are tailored to apply only to BNSF access to the portion of the Rosebluff Lead needed to serve Lyondell. BNSF has argued persuasively in its Opening Statement and Reply that the Board should set compensation terms to

¹⁵ I displayed my *SSW Compensation*-based results on a per-gross-ton-mile basis in my Opening Verified Statement. Dr. Neels develops his estimate on a car-mile (loaded or empty) basis. I have converted my opening results to a cost-per-car-mile basis for ease of comparison with Dr. Neels.

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apply to all BNSF terminal trackage rights movements, not just BNSF movements to Lyondell. The second conceptual difference relates to the development of the *SSW Compensation* interest rental component. My estimate is based on a RCNLD valuation of the portions of the Rosebluff Lead required by BNSF for access. Dr. Neels differs in his approach by developing an estimate of a CE valuation.

For other *SSW Compensation* components, as Table 2 shows, both Dr. Neels and I agree that BNSF direct access to the Rosebluff Lead does not introduce variable costs for KCS for which KCS would need to be compensated. For maintenance and operating costs, although Dr. Neels' result is more than twice mine, the vast majority of the difference between our two estimates is attributable to his failure to account for KCS's partial ownership share.

The largest numerical differences in our respective estimates of the *SSW Compensation* interest rental component are driven by Dr. Neels' failure to reduce his earnings estimate by the proportional share of fixed costs that he attributes to the Rosebluff Lead assets and his failure to adjust his estimate to reflect KCS's partial ownership share. These and other critical flaws in Dr. Neels' interest rental component calculations include:

- use of a CE valuation methodology;
- development of artificial contribution for UP and KCS Zone 1 and Zone 2 cost-based switches;
- failure to deduct fixed costs from estimates of contribution for UP and KCS Rosebluff Lead shipments;
- restriction of scope of compensation to portions of the Rosebluff Lead needed to access only Lyondell;
- failure to account for KCS's partial ownership share;
- use of a flawed and unsupported enterprise value to capitalize earnings; and
- use of the wrong empty-to-loaded ratio to estimate empty car miles.

I address below each of these issues in my restatement of Dr. Neels CE estimate.

B. Correction and Restatement of Key Components of Dr. Neels CE Valuation

1. Dr. Neels Erred by Using a Capitalized Earning (“CE”) Valuation Methodology

In my Opening Verified Statement, I rejected the use of the CE approach in this case for several reasons. First, it is unclear how to incorporate BNSF’s earnings generated from its existing traffic in reciprocal switch service into part of a capitalized earnings valuation, which in turn would be used to develop fees affecting BNSF’s earnings generated under prospective direct service access. This concern is related to the issue of earnings circularity that has led the ICC/STB to conclude that the CE approach was not suitable in certain past *SSW Compensation* proceedings.¹⁶ Second, in the context of joint ownership, it is unclear how the earnings UP or BNSF generates should influence, if at all, the earnings valuation that would be the basis for compensation to KCS. Third, there are significant challenges with allocating the appropriate level of revenues to assets in terminal areas that are both used as part of switching operations and overhead trackage rights movements. In contrast, I endorsed use of RCNLD in this proceeding because it provides an objective measure of the value of the subject assets relevant to BNSF’s exercise of its trackage rights.

The concerns that I outlined in my Opening Verified Statement align with similar concerns relating to the application of the CE methodology to the Rosebluff Lead described by KCS witness Prof. Carey in an earlier round of this proceeding. Specifically, Prof. Carey in her

¹⁶ For example, concerns related to earnings circularity that the STB/ICC have previously recognized make the capitalized earnings approach unsuitable in certain situations also apply here. *See Arkansas and Missouri R.R. Co. v. Missouri Pac. R.R. Co.*, 6 I.C.C.2d 619 (Mar. 23, 1990). “The current compensation is at issue in this case, and we must avoid the circular reasoning which would be involved in any attempt to establish a new level of compensation based on an existing level of compensation which is itself at issue.” *See also Toledo, Peoria & Western Railway Corp.—Trackage Rights Compensation—Peoria and Pekin Union Railway Company*, 1994 WL 508802 (Sept. 8, 1994) at page 3.

February 2, 2019 Verified Statement filed in this proceeding, explained that the RCNLD approach for developing the interest rental component is the only viable *SSW Compensation* alternative because it represents “a cost-based measurement based upon the reproduction costs of the assets used by BNSF together with an economically appropriate contribution to capital.”¹⁷ She went on to explain that the CE approach is *not* appropriate because it does not approximate replacement cost and is circular because it relies on expected revenues that are artificially low as a result of BNSF’s payments of an artificially low switch fee to UP.¹⁸ After raising these concerns, Prof. Carey concluded that “the Board should rely on RCNLD rather than the CE approach” in this proceeding for purposes of determining *SSW Compensation*.¹⁹

In embracing CE as the basis for his *SSW Compensation* interest rental component, Dr. Neels does not mention his fellow expert’s prior assault on its applicability for this proceeding. Neither does he address Prof. Carey’s embrace of replacement costs as the proper standard for determining the economically appropriate contribution to capital. To the contrary, he rejects replacement costs because he asserts that they may produce misleading or inaccurate results,²⁰ yet his anecdotal examples miss the mark. He asserts for example that the value of new assets are inconsistent with the value of assets that have been in place for many years. But the Board’s SAC discounted cash flow model accounts properly for his perceived disconnect. Instead of using RCNLD or SAC to determine the *SSW Compensation* interest rental, he moves forward with a CE analysis and produces counterintuitive results that are multiples of my replacement cost-based estimates. Dr. Neels does so even though both he and Prof. Carey have testified that

¹⁷ Carey February 2, 2019 Verified Statement at 12.

¹⁸ *Id.* at Verified Statement at 13.

¹⁹ *Id.* at Verified Statement at 13.

²⁰ Neels Verified Statement at 7.

the revenues for shipments to and from the Rosebluff Lead are and have for a long time been lower as a result of competition.²¹

As I explain in the remainder of this section, Dr. Neels achieves these overstated CE results via a series of conceptual and implementation errors that inflate his calculated contribution for shipments on the Rosebluff Lead to levels well above those actually achieved. Indeed, when certain of his key errors are corrected, the CE approach yields results that are below my replacement cost-based estimate. My restatement provisionally accepts Dr. Neels' use of the CE methodology for purposes of demonstrating his flawed application of this chosen methodology.

2. Other Assumptions Made by Dr. Neels Distort the Level of Earnings Attributable to KCS's Ownership of the Rosebluff Lead

I continue to believe that RCNLD is the most appropriate approach for determining the value of the Rosebluff Lead as the basis for the interest rental component of *SSW Compensation*. However, because Dr. Neels has attempted to develop a CE estimate for the Rosebluff Lead, it is important to correct what can be corrected to put his CE estimate in its proper context. For his CE calculations, Dr. Neels develops the revenues attributable to the Rosebluff Lead using what he refers to as the "Brattle rail network model." KCS declined to produce the Brattle network model absent execution of a Non-Disclosure Agreement, the terms to which I could not agree. As such, my correction of Dr. Neels estimate starts with his calculation from the Brattle rail network model of the UP and KCS revenues attributable to the Rosebluff Lead. These revenues incorporate his assumption that BNSF reciprocal switching fees paid to UP are not part of the CE analysis revenues.

²¹ Neels Verified Statement at 13; Carey Verified Statement at 24.

a. Removal of Artificial Contribution for UP and KCS Cost-Based Switches

The first correction I made is to remove the artificial contribution Dr. Neels attributes to the joint switching services UP and KCS provide for one another on the Rosebluff Lead. Compensation for such services is set, by agreement and design, at levels equal to cost. Approximately 30 percent of the Rosebluff Lead contribution he calculates is attributable to these switches. To create the contribution, Dr. Neels deducts from the 2017 and 2018 Zone 1 and Zone 2 switch rates the UP and KCS Uniform Rail Costing System (“URCS”) variable costs for inter-terminal switches. Dr. Neels explains the curious selection of URCS inter-terminal switch for costing purposes “because they involve handoffs between different railroads.”²² His premise is flawed. The parameters for inter-terminal switches in URCS were established in the 1963 ICC Bureau of Accounts *Explanation of Rail Cost Finding Procedures and Principles Relating to the Use of Costs*, more typically referred to as Statement No. 7-63, which describes them as follows:

Interterminal: Includes the switching from an industry or team track of one carrier to the point of interchange (i.e., interchange track) of another carrier for delivery to a team or industry track located on the lines of other carriers within the same terminal. Unlike intraterminal switching which applies to the complete switch movement, interterminal switching, as defined herein, embraces only part of the complete switch movement, i.e., that performed by either the carrier originating the switch movement or that performed by the carrier terminating the switch, but not both. This procedure is necessary in order to permit credit to be given to each carrier for that segment of the work it performs when the formula is applied to individual carriers. The weighting factors (engine-minutes per car) were constructed accordingly.²³

Put simply, an inter-terminal switch in URCS covers only one carrier’s half of the cost of a switch that involves more than a simple handoff between different railroads. As the parameters

²² Neels Verified Statement at 30.

²³ Statement No. 7-63, page 116, fn. 4.

explain, this involves a switch from one industry served by one railroad in a terminal to another industry within the same terminal served by a different railroad. The situation does not apply to Rosebluff Lead shipments for a number of obvious reasons. First, there are no industry-to-industry switches on the Rosebluff Lead. All of the relevant switches are between the Rosebluff Yard and the industries located on the Rosebluff Lead. Second, and perhaps more importantly, there are no tracks on the Rosebluff Lead owned by one or another of the carriers operating within the terminal. All of the railroad-owned tracks are owned jointly by KCS and UP.

A designation of inter-terminal switching for the switching that occurs on the Rosebluff Lead is also inconsistent with the explanations of both UP and KCS witnesses earlier in this proceeding. In describing the operations on the Rosebluff Lead, UP witnesses Jamal W. Chappell and Michael V. Matya explained that “Union Pacific, KCS, and BNSF line-haul traffic moving to customers in both zones passes through Rosebluff Yard, where it is switched by either Union Pacific or KCS for delivery by a local job.”²⁴ Similarly, KCS witnesses Steve Sullivan and John Ireland describe two KCS switching jobs that switch cars between Rosebluff Yard and industries in Zone 1. KCS switching job RLC210 switches cars in Rosebluff Yard organized by customer and then services CertainTeed and BW Services. RLC304 is responsible for working the largest customers in Zone 1 – Tetra, Axiall A plant, Axiall B plant and PPG C plant.²⁵ Thus, according to UP and KCS witnesses, none of the switching involved on the Rosebluff Lead is industry-to-industry.

²⁴ STB Docket No. 32760 (Sub-No. 46) Reply Verified Statement of Jamal W. Chappell and Michael V. Matya, 8/24/2015 at 7.

²⁵ STB Docket No. 32760 (Sub-No. 46) Joint Verified Statement of Steve Sullivan and John Ireland, 8/24/2015 at 8.

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Dr. Neels' incorrect use of the URCS inter-terminal switching costs inflates his contribution calculations. Unlike the standard industry switch in URCS, the URCS inter-terminal switching costs are not adjusted by the Board's URCS make-whole adjustments. The make-whole adjustment is a redistribution of costs by URCS to correct the fact that, when disaggregating data and calculating system-average unit costs, the URCS program as configured does not take into account the economies of scale realized from larger shipment sizes. The purpose of the make-whole adjustment is to recognize the efficiency savings that a carrier obtains in its higher-volume shipments and thus render more accurate unit costs.

URCS applies the make-whole adjustment through a three-step process. First, URCS assumes that a movement's costs are equal to that of a system-average movement. Next, URCS applies "efficiency adjustments" to higher-volume movements (multi-car and trainload), thereby reducing the system-average unit costs of such movements. Last, URCS redistributes the total savings obtained from all of the higher-volume shipments (the "shortfall") across all of the lower volume shipments (single-car and multi-car), such that the sum of variable costs across all of the carrier's movements remains the same. Currently, single-car shipments are defined as shipments of one to five cars, which is the typical shipment size for shipments originating and terminating on the Rosebluff Lead. In redistributing the savings from more efficient multi-car and trainload shipments, URCS increases the costs assigned to industry switches of smaller sized shipments. By calculating contribution based on a faulty implementation of URCS, Dr. Neels creates contribution for joint switch moves that simply does not exist.

Further, the reciprocal switch rates that UP and KCS pay one another for switching on the Rosebluff Lead are set at the levels of the UP and KCS actual cost of providing the services. As cost recovery mechanisms, there is by definition no associated contribution. The last updated

cost study for the UP and KCS reciprocal switching was done in 2004 and determined the KCS switch cost per car to be { } and the UP switch cost per car to be { }. Since 2004, those costs have been indexed by { }

}²⁶

I have eliminated from Dr. Neels' earnings estimates the contribution he calculates for these cost-based switch rates. I have also eliminated the car miles that he attributes to these switch-related activities, which are also counted in Dr. Neels' estimate of linehaul car miles. Correcting both the earnings numerator and car-mile denominator results overall in a slight increase in Dr. Neels' per car-mile fee.

b. Correction of Contribution Calculation to Deduct Allocated Fixed Costs

The second correction I made to Dr. Neels' CE estimate is to correct his failure to deduct an allocation of fixed costs from the line haul revenues his Brattle rail network model attributes to the Rosebluff Lead. In his Verified Statement, Dr. Neels explains that he assigned revenues to the Rosebluff Lead using his interpretation of the Board's Average Total Cost ("ATC") methodology, which he acknowledges includes both variable and fixed cost components.²⁷ He then explains that he also allocated only a portion of his variable costs to the Rosebluff Lead, which allowed him to calculate contribution, which he describes as the difference between revenue and variable cost.²⁸

Earlier in his Verified Statement, Dr. Neels discusses valuations in general and later the valuation approaches that have been considered explicitly by the STB for the *SSW Compensation* interest rental component. In describing the capitalized earnings approach, he explains correctly

²⁶ KCS-HC-7764 to KCS-HC-7767.

²⁷ Neels Verified Statement at 31.

²⁸ *Id.* at 32.

that the approach involves developing the present value of earnings – the “E” in the CE valuation approach.²⁹ In economic terms, earnings are recognized as the difference between revenues and costs. Interestingly, Dr. Neels’ failure to account for fixed costs in developing his earnings estimate contradicts his later description of his proposed enterprise value multiplier. There he explains contribution as the difference between revenue and variable cost and that some portion of contribution must be reserved to cover fixed costs before arriving at a measure of income.³⁰

By calculating the difference between revenues and only *variable* costs, Dr. Neels has not calculated earnings. Instead, he has calculated only the contribution above variable costs, essentially a Capitalized Contribution or “CC” approach. To bring his calculations in line with his own description of the CE valuation approach, the allocation of fixed costs to the Rosebluff Lead that he develops must also be deducted from allocated revenues. I have made that correction. This correction aligns with the ICC’s findings in *St. Louis Southwest Railway—Trackage Rights Over Missouri Pacific Railroad—Kansas City to St. Louis (SSW I)*, 1 I.C.C.2d 776 (1984) that operating expenses used to determine earnings should be based on “fully allocated costs.”³¹

c. Expansion of the Scope of Dr. Neels’ CE Analysis to All of Rosebluff Lead

The third correction that I made to Dr. Neels’ CE calculations is to eliminate his restriction of BNSF’s Rosebluff Lead direct access to only the track required to access the Lyondell facility. Dr. Neels explains that one of the steps in his analysis is to calculate the value of the Rosebluff Lead segments to be used by the Lyondell traffic.³² This step is unnecessary.

²⁹ *Id.* at 8.

³⁰ *Id.* at 34.

³¹ See *SSW I*, 1 I.C.C.2d 776, 807 (1984) (describing the calculation of total operating expenses as representing “fully allocated costs”).

³² Neels Verified Statement at 39.

As I explained in my Opening Verified Statement, BNSF obtained rights to serve customers located on Rosebluff Lead trackage in 1996, in connection with the UP/SP merger.³³ Under the terms granted by UP and the Board's conditions, as reaffirmed in multiple decisions, BNSF may either have UP deliver its cars to and from Rosebluff customers via reciprocal switching, or BNSF may directly serve these customers with its own trains via trackage rights over the Rosebluff Lead.

The Board affirmed in *Decision No. 4* in this proceeding that the BNSF terminal 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. *BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. (Decision No. 4)*, FD 32760 (Sub-No. 46), slip op. at 1, 5-7 (STB served May 4, 2018). Consistent with the access granted BNSF, I have corrected Dr. Neels' calculations to cover BNSF direct access to all Rosebluff Lead customers.

d. Adjustment for KCS Partial Ownership of Rosebluff Lead

The fourth correction I made to Dr. Neels' CE estimate is to adjust his results to reflect KCS's partial ownership share. In his Verified Statement, Dr. Neels acknowledges that the Rosebluff Lead is jointly owned by KCS and UP,³⁴ yet his calculations inexplicably fail to adjust compensation that might be due KCS for its partial ownership share. In my Opening Verified Statement, I adjusted the RCNLD valuation for KCS's 50 percent ownership share of the Rosebluff Lead physical assets. In other words, as explicitly recognized under the terms of the

³³ Specifically, the STB's *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Decision No. 44)*, 1 S.T.B. 233 (1996). granted BNSF rights to all customers open to all of UP, SP and KCS at Westlake and Lake Charles, LA, and to all customers open to SP and KCS at West Lake Charles, LA, which includes all customers accessible via the Rosebluff Lead. *Decision No. 8* at 2.

³⁴ Neels Verified Statement at 2.

1948 Agreement between KCS and UP's predecessor establishing terms of joint operations and financial obligations for shared use of the Rosebluff Lead they jointly purchased in 1947, KCS and UP share equally in the ownership of the Rosebluff Lead right of way and track.

The partial ownership adjustment under a capitalized earning valuation is not derived from the physical asset ownership split, which could improperly attribute earnings-related value generated by one owner to another. Instead, the partial ownership adjustment under CE is based on the relative proportion of earnings that each partial owner contributes to the overall earnings-based valuation. Based on Dr. Neels' CE calculations as I have corrected them, KCS earnings comprise {{ }} percent of the overall Rosebluff Lead capitalized earnings valuation. I have corrected Dr. Neels' calculations relating to any additional compensation that might be due KCS under the *SSW Compensation* methodology to reflect KCS's portion of the overall CE valuation.

e. Substitution of Rail Industry Cost of Capital Multiplier

The fifth correction I make to Dr. Neels' CE calculations is to reject his development and use of what he describes as an "enterprise value multiplier" and to substitute instead a multiplier based on the Board's most recent railroad industry cost of capital determination. My basis for rejecting Dr. Neels' proposed enterprise value multiplier is two-fold. First, the reasons he cites in advocating the enterprise value multiplier, including investors' assessments of the relationship between contribution and the value of a company taking into account fixed costs and reflecting longer term expectations relating to earnings, profitability and growth, are already captured in the Board's application of the multi-stage Discounted Cash Flow ("DCF") and Capital Asset Pricing Model ("CAPM") models used to determine the railroad industry cost of equity component of the railroad industry weighted average cost of capital.

Second, his approach of starting with a total enterprise value amount and winnowing down market driven enterprise value estimates for UP and KCS to isolate the portion of that value attributable to the types of track-only related assets on the Rosebluff Lead is arbitrary. His approach is founded on the faulty premise that enterprise valuations are proportional to physical asset historical gross book values, which contradicts his own testimony that enterprise valuations themselves are aligned with longer term prospective expectations relating to earnings, profitability and growth.³⁵ In other words, Dr. Neels attributes the profitability and growth characteristics assumed for the KCS and UP systems to the profitability and growth characteristics of the Rosebluff Lead.

This assumption is flawed in a number of critical ways. First, as discussed previously, both Dr. Neels and Prof. Carey have testified that existing and future revenues for shipments originating and terminating on the Rosebluff Lead are suppressed by BNSF access, which is counter to the growth prospects embedded in the enterprise value. As Chart 1 below shows, KCS's contribution from Lake Charles chemical shipments have { } over the 1994 through 2016 time period. Given well documented capacity constraints on the Rosebluff Lead,³⁶ it is unlikely that this pattern will change prospectively.

³⁵ Compare Neels Verified Statement at 37 and 34.

³⁶ See, e.g., UP's June 25, 2018 Reply to BNSF Petition at 7-8, 54.

Chart 1

}}See Baranowski Reply Workpaper “CWS Analysis.xlsx”, tab “Tables”.

Second, Dr. Neels’ enterprise value multipliers for KCS for 2017 and 2018 are on average more than 54 percent higher than his calculated UP enterprise value multipliers for the same years. Dr. Neels has not explained the reason for this substantial difference. One possible explanation is that a disproportionate amount of his starting KCS enterprise value is attributed to KCS’s Mexico operations. Dr. Neels’ calculations attempt to account for the Mexico value again based only on the ratio of KCS’s United States and Mexico gross asset book values. His allocations ignore other more potentially meaningful metrics such as revenues, earnings, and their respective potential for growth for the Mexico franchise relative to the US portion. For instance, if Dr. Neels instead allocated the portion of the total enterprise value to KCS’s US franchise in a manner that is proportional to the share of earnings generated by the US franchise

instead of proportional to the book value of all gross assets, his calculated multiplier would be reduced by approximately one-third.³⁷

Absent a more detailed study of the earnings, profitability and growth assumptions implicit in the UP and KCS enterprise valuations relative to the Rosebluff Lead, Dr. Neels' earnings multiplier approach produces arbitrary results. Accordingly, the Board should reject Dr. Neels' enterprise value-based multipliers and continue to follow its precedent of using its own calculated railroad industry cost of capital, the most recent finding of which is for the year 2019. I have corrected Dr. Neels' CE estimate to use this value.

f. Correction of Dr. Neels' Empty to Load Ratio

The sixth and final correction I make to Dr. Neels' CE calculations is to correct the empty to load ratio of 1.72 used by Dr. Neels in favor of the actual empty to load ratio observed for shipments originating and terminating on the Rosebluff Lead of 2.0.

My corrected Dr. Neels CE estimates are summarized in Table 3 below. This table shows the effects on the *SSW Compensation* fee per car-mile developed by Dr. Neels from making each of the corrections I discuss above.

³⁷ See Baranowski Reply Workpaper "NEELS-WP-HC-0007_BARANOWSKI_REPLY_ADJUSTMENT.xlsx", tab "Table 7".

Table 3: Corrections Re-Stating Dr. Neels’ Flawed *SSW* Interest Rental Per Car-Mile Calculations

Neels Opening Results (Table 11, Line 5)	{{
Correction #1 - Remove artificial contribution from cost-based switching - 1/	
Correction #2 - Deduct allocated fixed costs	
Correction #3 - Expand to Rosebluff Lead	
Correction #4 - Limit to KCS portion of earnings	
Correction #5 - Use STB's 2019 pre-tax cost of capital	
Correction #6 - Use empty-to-loaded ratio of 2.0	
Neels Corrected Results	}}
1/ - This change results in a per-car mile increase due to Dr. Neels’ counter-intuitive results for joint switching where UP has negative contribution and KCS has positive contribution. The individual effect of removing the contribution Dr. Neels develops for KCS’s zone 1 switching of UP cars, consistent with correction #4 above, would be to reduce the per-car mile amount to {{ }}.	

See Baranowski Reply Workpaper “Restated Neels CE Results.xlsx”, tab “Tables”

C. Interest Rental Derived from Stand-Alone Cost Aligns with Replacement Cost New Less Depreciation (“RCNLD”)

Dr. Neels also introduces the Stand-Alone Cost (SAC) methodology as the basis for determining the interest rental component of *SSW Compensation*, but rejects its application here in part because in his view such calculations are often “tedious, excruciatingly detailed, and time consuming.”³⁸ However, in the words of Prof. Carey, SAC is a “close equivalent to RCNLD” and “is relied upon as a surrogate to estimate a reasonable rate level in the absence of effective competition.”³⁹ While shippers’ rate levels, and, correspondingly, the results of a CE valuation, may be lower due to effective competition on the Rosebluff Lead, which is served by three railroads, SAC would generate the maximum reasonable level of compensation applicable to the Rosebluff Lead. The development of SAC-based results is straightforward using the RCNLD estimates developed by Messers. Boileau and Pitts.

³⁸ Neels Verified Statement at 6.

³⁹ Carey Verified Statement at 15.

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To generate SAC-based results, I started with the RCNLD estimate from my Opening Verified Statement and changed the calculation of the replacement cost of the Rosebluff Lead rail and other track materials to assume uniform use of new 115-pound continuous welded rail in place of the mix of rail weights that exist on the line today and to standardize track characteristics including tie spacing, plate sizes, and spiking patterns based on prevailing current design specifications in the railroad industry. This approach is consistent with the those of the full-SAC cases in which I have participated before the Board. I then ran the revised estimate of replacement costs through the Board's standard SAC discounted cash flow model ("DCF"). Because the assets on the Rosebluff Lead have experienced some measure of depreciation, I adjusted the asset life assumptions in the DCF to capture the remaining life by asset category observed by Mr. Boileau. The Board's standard SAC DCF model provides for replacement of assets as they are projected to wear out. By shortening the remaining life assumptions in the DCF, I accelerated the timeframe for when assets within each major asset category would require replacement. This addresses directly Dr. Neels' SAC conceptual concern related to potential disconnects between the value of new and heavily used assets.⁴⁰

The Board's SAC DCF produces a levelized annual revenue requirement that provides for both return of investment and return on investment. Because the DCF also provides explicitly for the future replacement of assets as they are assumed to wear out, the SAC results cover both the *SSW Compensation* interest rental component and the capitalized maintenance portions of the maintenance and operating expense component.

Table 4 compares my SAC-based valuation with the relevant *SSW Compensation* components from my Opening Verified Statement. This shows that converting my original

⁴⁰ Neels Verified Statement at 7.

RCNLD-based *SSW Compensation* fees into fee amounts developed under the SAC method affirmed by Prof. Carey and Dr. Neels would result in lower compensation levels to KCS.

Table 4: Comparison of SAC Based *SSW Compensation* to Relevant RCNLD Based Components

RCNLD Interest Rental Base (No 50 percent KCS Ownership Adj.)	{
x 2019 STB Pre-Tax Cost of Capital	
= Annual Interest Rental	
+ Annual Normalized Capital Maintenance	
= Annual Amount Under RCNLD Interest Rental Approach	
SAC Initial Depreciation-Adjusted Investment	
Present Value of Replacement Costs of Investment	
Total Recovery	
SAC First Year Capital Recovery	}

See Baranowski Reply Workpaper “Compensation Calculations Reply.xlsx”, tab “Tables”

Table 5 compares SAC-based *SSW Compensation* per car-mile rates to my RCNLD-based results.⁴¹

Table 5: Comparison of SAC and RCNLD Based *SSW Compensation* Fees Per Car-Mile

Baranowski SSW Compensation Per Car-Mile Using RCNLD and SAC Approaches	
RCNLD-Based <i>SSW Compensation</i> (Baranowski Opening)	{
SAC-Based <i>SSW Compensation</i> (Adjusted)	}

See Baranowski Reply Workpaper “Compensation Calculations Reply.xlsx”, tab “Tables”

IV. RESPONSE TO PROF. CAREY

Based on Prof. Carey’s review of the Rosebluff Lead access granted to BNSF and her characterization of economic and STB precedent, Prof. Carey recommends that KCS be compensated for BNSF’s change from reciprocal switch access to direct access on the basis of “market-based reciprocal switch fees,” instead of being compensated based on the Board’s *SSW*

⁴¹ I also developed SAC-based results that start with the replacement cost from my RCNLD estimate and do not adjust for Mr. Boileau’s remaining life estimate. The results of this variation of SAC are also below my calculated RCNLD estimate. Details of my calculations are set forth in my work papers.

Compensation formula. Prof. Carey is wrong on the two main points of her analysis. The first is that she does not account for the fact that the Board's *SSW Compensation* formula is inconsistent with how the Board formulates its revenue adequacy measure for railroads.⁴² The second is that she does not account for the fact that published reciprocal switch rates are market-based and include a market-based contribution above the cost of providing reciprocal switching service that contributes to carrier revenue adequacy. These two incorrect assumptions render Prof. Carey's testimony baseless.

The *SSW Compensation* formula is a tool used by the Board and its predecessor to establish trackage rights compensation when arm's-length negotiations fail. I am unaware of any ICC or STB precedent cited by Prof. Carey for compensation beyond or instead of that available under the Board's *SSW Compensation* methodology.

A. The *SSW Compensation* Formula Provides Higher Levels of Compensation Than Those Required to Achieve Revenue Adequacy Under the Board's Revenue Adequacy Measure

Prof. Carey's key concerns regarding *SSW Compensation* relative to revenue adequacy appear to be that: (1) heightened competitive market forces of three railroads in the Lake Charles market area further imposed a constraint (directly or indirectly) on KCS's ability to earn adequate revenues due to access by BNSF,⁴³ (2) an *SSW Compensation* rate (based on CE) does not allow a carrier to sufficiently contribute to KCS's network or improve revenue adequacy,⁴⁴ and (3) because of the high revenue potential from customers located along the Rosebluff Lead, an *SSW Compensation* rate based on RCNLD is likely to significantly understate the economic value of KCS's 50 percent ownership of the Rosebluff Lead.⁴⁵ In her criticisms of the *SSW*

⁴² Carey Verified Statement at 6.

⁴³ *Id.* at 10.

⁴⁴ *Id.* at 32.

⁴⁵ *Id.* at 33.

Compensation approach, Prof. Carey claims that CE-based *SSW Compensation* rates would be too low because of lower rates for customers on the Rosebluff Lead as a result of BNSF access. She also makes the seemingly contrary claim that RCNLD-based *SSW Compensation* rates would be too low because they do not account for the concentration of high-value customers along the Rosebluff Lead, why should result in increased revenues. Regardless of which claim is actually true, Prof. Carey fails to demonstrate that the *SSW Compensation* formula is inconsistent with the Board's revenue adequacy mandate.

Prof. Carey's concerns are misplaced. By providing for an interest rental component that determines compensation by multiplying the current value of the trackage rights assets by the railroad industry pre-tax cost of capital, the *SSW Compensation* formula ensures favorable outcomes relative to how the Board formulates its revenue adequacy measure. When that valuation is based on RCNLD, as my opening calculations assume, the valuation is based on replacement costs of the trackage rights assets, which are higher than the embedded book value amounts upon which the Board's revenue adequacy determinations are currently based. The table below compares the average total interest rental per route mile from my RCNLD-based valuation with the total net return on investment per route mile required by KCS to achieve revenue adequacy on the net book value of its road property assets. The table shows that the RCNLD-based return, because it is based on replacement costs, is { } percent greater than KCS's revenue adequacy threshold.

Table 6: Comparison of RCNLD-Based Interest Rental With Revenue Adequacy Threshold

Description	RCNLD	KCS R-1
Reproduction Cost New	{	
Gross Book Value		
Depreciation		
Net		
Land		
Total Valuation		
Estimated Road Deferred Taxes		
Net Valuation		
Pre-Tax Cost of Capital		
Interest Rental		
Rosebluff Lead Route Mile		
Interest Rental Per Route Mile		
percent RCNLD Above R-1	}	N/A

See Baranowski Reply Workpaper “RCNLD and Revenue Adequacy Comparisons.xlsx”, tab “Tables”

As Table 6 demonstrates, an RCNLD-based *SSW Compensation* interest rental component provides for more than adequate return for KCS to achieve revenue adequacy under the Board’s current formulation.

1. Prof. Carey’s Observations of System Wide Revenue Adequacy Ignore KCS Successes Since BNSF Gained Access

As part of Prof. Carey’s reasoning for her recommendation of a “market-based access fee” for KCS, she compares the results of the Board’s revenue adequacy determinations for BNSF, KCS and UP over the 2010 to 2019 time period. These system-wide observations mask the successes KCS has achieved relative to the Board’s revenue adequacy formulation from shippers on the Rosebluff Lead. Prof. Carey’s comparison of system-wide revenue adequacy findings ignores the fact that between 1996 (when BNSF first accessed the Rosebluff Lead) and 2019, KCS has been able to increase the percentage of its shipments originating and terminating on the Rosebluff Lead with revenue-to-variable-cost ratios (“R/VCs”) above the Board’s jurisdictional threshold level of 180 percent. Shipments with revenues above the jurisdictional

threshold contribute more to the achievement of revenue adequacy than those with revenues below the threshold. Since 1994, the relative proportion of KCS chemical shipments to or from Lake Charles with R/Vs above 180 percent has increased by over { }.⁴⁶ In other words, in the face of competition from BNSF (and UP), KCS was able to increase rates for a significant portion of its Rosebluff Lead chemical shippers to levels acknowledged to contribute toward revenue adequacy. This contradicts Prof. Carey's notion that BNSF's access has diminished the value of the Rosebluff Lead to KCS and prevented it from achieving revenue adequacy as currently measured by the Board.

B. Contrary to Prof. Carey's Assertion, Railroad Published Reciprocal Switch Rates are Cost Based

Prof. Carey cites no authority for her critical assumption that railroad-published reciprocal switch rates are market based. In fact, the Board and its predecessor, the ICC, have long recognized that reciprocal switch rates are cost based. As the ICC explained in Docket No. EP 455 (Sub-No. 1):

Historically carriers generally switched for each other without regard to cost, believing that this accommodation best served their interest in the long run. However, there is now an increasing trend for carriers to price each element of their services, including switching, in accordance with its cost.⁴⁷

In the limited instances where the Board has prescribed reciprocal switch rates, those rates were based exclusively on costs. For example, in *Yolo Shortline Railroad Company—Lease and Operation Exemption—Port of Sacramento*, FD 34114 (served Feb. 3, 2003), the Board refused to disturb a \$200 per car rate for a 3-mile switch. Later, in the Conrail control transaction, STB

⁴⁶ See Baranowski Reply Workpaper "CWS Analysis.xlsx", tab "Tables".

⁴⁷ Ex Parte 455 (Sub-No. 1), slip op. at 13 (I.C.C. served Oct. 31, 1985).

Docket No. FD 33388, the Board approved a switch fee for the NYC terminal area of \$128.10 per car as set forth in the following excerpt from that decision.

In *Decision No. 109*, we accepted CP's offer to pay CSX \$250 per car for switching service in the Bronx and Queens, provided that these payments are adjusted retroactively when actual costs of that service are ultimately determined. CP now proposes an initial switching charge of \$128.10 per car based on 150 percent of Conrail's 1995 URCS system average switching cost per car of \$85.40. CP argues that this will minimize any "true-up" adjustments that will be necessary once actual costs are determined. Implicit in CP's argument is that the actual cost will turn out to be closer to \$128 per car than to \$250 per car.

CSX has not suggested a specific switching fee, nor has it specifically attacked the \$128 initial fee that CP advocates. It merely notes that the Bronx and Queens are "notoriously an area of high costs where extensive switching activities will take place." We agree with CSX that actual switching costs in the Bronx and Queens would probably be higher than system average cost for that service. In *Decision No. 109*, we authorized either party to conduct a special switching study to determine the actual costs of switching in the area. Because switching in the Bronx and Queens may be higher than system average costs, we continue to believe a switching study is required. Until such a special switching study is completed, however, we will accept CP's proposed \$128.10 per car fee. We think that the actual cost of switching is likely to be closer to \$128 than to \$250. Given the fact that CSX has not objected to \$128, we think that this is a reasonable starting point.⁴⁸

Prof. Carey has provided only her own opinion as support for the existence of market-based reciprocal switch rates. As discussed in more detail in Section IV, when the proper cost of providing reciprocal switching service is taken into account, any alleged market-based premium evaporates.

⁴⁸ See *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail, Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388 (Sub-No. 69), *Decision No. 123*, slip op. at 13 (STB served May 20, 1999).

C. Prof. Carey's References to the STB Ex Parte No. 711 Proceeding in Support of Her Market-Based Reciprocal Switch Rate Recommendation Are Misplaced

As part of her advocacy for her market-based reciprocal switch charge recommendation, Prof. Carey includes in her Verified Statement excerpts from Class I railroad carriers' comments related to compensation for railroads that would be forced under the Board's proposal in STB Docket No. EP 711 to interchange with a competing carrier shipments originating and/or terminating from solely-served railroad stations and customers. Certain of the comments cited by Prof. Carey are in direct response to the Board's request for comment on its forced switching compensation proposals. Not surprisingly, the railroad comments remind the Board of its statutory revenue adequacy mandate and how misguided compensation schemes for forced switching could alter railroad incentives to continue to invest and innovate for the benefit of all shippers.⁴⁹ Prof. Carey relies on these comments to affirm that revenue adequacy is important to Class I railroads.

Other railroad comments she cites are clear and consistent in emphasizing that the Board's EP 711 proposal itself is unnecessary and that market forces should continue to be allowed to govern railroad rates.⁵⁰ It is here where Prof. Carey makes the unwarranted leap of attributing carrier comments related to a proposal for forced switching to what she describes as "real-world market-based reciprocal switch rates."⁵¹ Such rates do not exist. As discussed above and as affirmed repeatedly by the Board and its predecessor, real-world reciprocal switch rates are cost based.

⁴⁹ Carey Verified Statement at 7-8.

⁵⁰ *Id.* at 16 – 19.

⁵¹ *Id.* at 17.

Prof. Carey's real-world market-based reciprocal switch rate construct is even further removed from the issue in this proceeding – BNSF direct access to the Rosebluff Lead. Unlike the Board's EP 711 proposal, under which a carrier would be forced to interchange with a competing railroad, or real-world reciprocal switching (where a switch is performed by one carrier on behalf of another), BNSF direct access to the Rosebluff Lead requires no switching by KCS or UP. BNSF would serve and switch its Rosebluff Lead customers directly.

D. Prof. Carey's Market-Based Reciprocal Switch Rate Study is Deficient

Prof. Carey explains repeatedly in her Verified Statement that the rate she develops is similar to that which KCS would have received through a competitive market-based negotiation among willing buyers and willing sellers.⁵² In describing how she determined such a rate, Prof. Carey explains that she selected reciprocal switching rates from geographic areas with similar economic conditions to the Lake Charles area. She describes these areas as “including larger railroad carriers, similar types of products, and access to a robust set of customers, among other factors.”⁵³

Prof. Carey goes on to explain that her analysis includes reciprocal switch rates for BNSF, UP, KCS, Norfolk Southern, CSXT Railway, Canadian National and Canadian Pacific. This, in her view, represents a robust and large dataset that includes approximately a dozen geographic areas with customers that have “a reasonable overlap in similar types of products as those in Lake Charles as well as a number of major gateways or competitive lanes frequently referenced by BNSF.”⁵⁴ Prof. Carey also includes an exhibit that purports to document the commodity mix for the types of geographic areas she analyzed relative to Lake Charles.

⁵² *Id.* at 23-24.

⁵³ *Id.* at 35.

⁵⁴ *Id.* at 37.

There are obvious questions that arises from Prof. Carey’s description of her rate selection process. If her intent is indeed to develop a rate that KCS itself would have received through competitive market negotiations, then she has not explained the relevance of including in her analysis the reciprocal switch rates that Norfolk Southern, CSXT Railway, Canadian National and Canadian Pacific charge one another for reciprocal switch service far from Lake Charles. Nor has she explained the relevance of rates from locations like Chicago, IL, Memphis, TN or Toledo, OH where KCS does not even provide reciprocal switch services. The reasons are clear. By expanding the scope of her reciprocal switch rate analysis well beyond the reciprocal switch rates BNSF, UP and KCS charge one another, Prof. Carey was able to increase substantially her calculated average reciprocal switch rate. Prof. Carey notes that her analysis includes nearly 2,000 reciprocal switch rates. However, the inclusion of more rates in the analysis does not improve the accuracy or relevance of her analysis. Instead, Prof. Carey’s lax criteria for inclusion inflates her calculated average reciprocal switch rates to levels far above what the three carriers involved in this proceeding – BNSF, KCS and UP – charge one another for the reciprocal switch services. Table 7 below compares the average reciprocal switch rate BNSF, UP and KCS charge one another for reciprocal switching services to the average rates applicable to other carriers included in Prof. Carey’s analysis.

Table 7: Comparison of Average Reciprocal Switch Rate BNSF, UP and KCS Charge One Another With Average Reciprocal Switch Rates for Other Carriers Included by Prof. Carey

Carrier	Carrier Average	Percent Above BNSF, KCS, UP Average
BNSF, UP and KCS	\$348.47	N/A
All Other BNSF, UP and KCS	\$419.20	20.3 percent
NS	\$524.94	50.6 percent
CSXT	\$539.60	54.8 percent
CP	\$609.11	74.8 percent
CN	\$705.70	102.5 percent

See Baranowski Reply Workpaper “Reciprocal Switch Rate Analysis.xlsx”, tab “Tables”

Table 7 shows that the reciprocal switch rates that BNSF, UP and KCS charge one another that are included in Prof. Carey’s analysis average \$348.47. The rates that BNSF, UP and KCS charge other railroads average \$419.42, or 20.3 percent more than the average rates BNSF, UP and KCS charge themselves. This is consistent with the nature of reciprocal switching in general, where carriers charge each other comparable amounts across their respective networks. The other railroads for which BNSF, UP and KCS provide reciprocal switching are Eastern and Canadian roads, with cost structures that differ from the Western roads. Prof. Carey does not address the cost differences among various rail carriers and regions. Instead, Prof. Carey presumably believes that all reciprocal switch rates have the same costs. The patterns in Table 7 demonstrate why it is advantageous for Prof. Carey to adopt such an approach. The average reciprocal switch rate charged by NS to all of the carriers included in Prof. Carey’s analysis is \$524.94, or 50.6 percent higher than the average BNSF, UP and KCS rate. The average rate for CN of \$705.70 is more than 100 percent higher than the BNSF, UP and KCS average. This average CN rates is in part due to the fact that most of the CN rates are for reciprocal switches performed in the Chicago area, which is well known for its complex and costly railroad operations.

While Prof. Carey’s selection of reciprocal switch rates included in her analysis on the surface might pass as analytically based, Table 7 shows that Prof. Carey’s inclusion of carriers other than BNSF, UP and KCS and expansion of the geographic scope to areas far from (and significantly different than) Lake Charles is simply an attempt to artificially create higher rates for her analysis.

1. Rates Improperly Excluded by Prof. Carey in Her Analysis

While including rates for other higher-cost carriers and far-reaching geographic areas in her analysis, Prof. Carey excludes specifically from her analysis low rates for what she describes as “distinct products that do not reasonably represent the mix of products shipped by Lyondell or other Lake Charles area customers.”⁵⁵ Although her explanation for how she determined the products outside the mix of Lyondell and other Lake Charles area customers is opaque and somewhat contradictory, the effect of her exclusion is clear. Specifically, the rates that she includes in her analysis average \$489.69. The rates she identified from the railroad reciprocal switch tariffs for regions included in her analysis, but did not include in her analysis, average \$246.21. This is half the average of the rates she did include.

A closer look at the details surrounding the excluded rates suggests that the basis for the exclusions was primarily to eliminate lower reciprocal switch rates from her analysis. For example, even though her Exhibit 4, which purports to show the relative percentage of freight car loadings by product group, shows that 43 percent of shipments into Lake Charles are coal, she excludes all reciprocal switch fees related exclusively to coal. Not surprisingly, the coal reciprocal switch rates she excluded average \$270.50, or 55.5 percent of the average rate she calculates. Prof. Carey also applies her product exclusions inconsistently, again in a manner that excludes lower rates. Lumber is one such example. Prof. Carey’s analysis includes reciprocal switch rates for lumber that average \$498.51, which is above her average reciprocal switch rate. However, she excludes other reciprocal rates for lumber averaging \$440.00, which is 10.1 percent below her average rate. There is no discernable distinction in her Verified Statement or

⁵⁵ *Id.* at 37.

work papers as to why some lumber rates are considered aligned with the Lake Charles product mix and others are not, other than the excluded rates for lumber being lower.

2. The Reciprocal Switch Rate That Prof. Carey Cites for Lake Charles Itself Equals Cost and Includes Zero Market Contribution

An excellent demonstration that reciprocal switch rates are cost based and therefore void of the market-based contribution that Prof. Carey asserts is found in one of the two reciprocal switch rates included in her analysis for the Lake Charles area itself. Prof. Carey's work paper shows for Lake Charles a fee published in the UP reciprocal switch tariff of \$350.00 for switching the Lake Charles Harbor and Terminal.⁵⁶ This reciprocal switch is different from the other cost-based switches UP and KCS perform for one another under the Rosebluff Lead operating and cost sharing agreements and is also different from the reciprocal switch UP provides for BNSF under its current reciprocal switch access. The work paper entry from the UP Lake Charles reciprocal switch tariff notes that, even though the switch rate appears in the UP tariff, the switch itself is physically performed by Port Rail, Inc. ("PRI"). PRI is a short-line railroad operating 11 miles of track from the Port of Lake Charles City Docks to the Chennault area east of Lake Charles, where it connects with major rail carriers.⁵⁷ Notably, PRI does not connect to the Rosebluff Lead. The PRI tariff indicates that for interchange switching of all loaded railcar traffic of manifest cargo to or from customers along its 11-mile footprint it will assess a fee of \$350.00. This is the same fee published by UP in its tariff.⁵⁸ The table below compares what Prof. Carey would deem the market-based contribution for UP for the Lake Charles reciprocal switch published in its tariff with the market-based contribution she creates in her calculations.

⁵⁶ See, "Carey WP-HC 00012 (Ex 5 Class I Switch Rate analysis)," tab "Source Data"

⁵⁷ Port Rail Lake Charles (portrailc.com)

⁵⁸ Port-Rail-Tariff-2019.pdf (portrailc.com)

Table 8: Market-Based Contribution Comparison for Lake Charles Published Reciprocal Switch Tariff

Description	Actual	Carey
UP Published Lake Charles Reciprocal Switch Fee	\$350.00	\$350.00
Payment to PRI for Physically Performing Switch	\$350.00	N/A
Switching Cost Assumed by Carey to be Applicable to All Reciprocal Switches	N/A	{
Market-Based Contribution		}

See Baranowski Reply Workpaper “Reciprocal Switch Rate Analysis.xlsx”, tab “Tables”

As Table 8 shows, even though the Lake Charles reciprocal switch fee is a pass through for UP generating zero in contribution above costs, Prof. Carey’s approach attributes { } percent of the total fee to market-based contribution to that particular reciprocal switch rate.

3. Prof. Carey’s Switching Cost Assumptions Used to Calculate Market-Based Contribution Are Incorrect

As noted in the prior section, to develop her “market-based access fee,” Prof. Carey starts with the average of the reciprocal switch rates she asserts are comparable to Lake Charles and then reduces that average rate by an estimate of a composite UP/KCS switching cost for a presumed switch move of BNSF loaded cars to Lyondell. She obtains her switch cost from Dr. Neels, who, as I explain in Section III, has misused URCS in his development of KCS earnings attributable to the Rosebluff Lead.

Beyond the problems with the switch costs themselves for the application Prof. Carey intends, there are fundamental and significant problems with Prof. Carey’s formulation. First, as discussed above, Prof. Carey selects reciprocal switch rates for her analysis from tariff rates published by all of the Class I railroads as well as from a wide geographic area. As the Board has observed consistently, reciprocal switch rates are cost based. Nowhere in her Verified Statement does Prof. Carey explain how or why the costs for a switch performed by UP or KCS in the Lake Charles area, even if developed correctly, are at all applicable to her sprawling collection of reciprocal switch rates. In fact, they are not.

The characteristics and associated costs of reciprocal switches vary by location and railroad. In addition, because of the reciprocal nature of the switches, the same switch rate between two carriers may apply across multiple locations. These facts make it difficult to align precisely the costs of reciprocal switches at specific locations with the rates. What can be established clearly is that the reciprocal switch operations vary in size and complexity across regions and individual locations and that the costs attributable to a reciprocal switch to Lyondell are not at all related to the costs attributable to the switch rates included by Prof. Carey in her analysis. In her work papers, Prof. Carey identifies the distance in miles for each city included in each reciprocal switching region she assesses from the named city for the region. Using the Mobile, AL region as an example, the reciprocal switch rates included by Prof. Carey in her analysis cover switching at industries located in Mobile as well as Chickasaw and Plateau, AL and Gulfport and Pascagoula, MS. Table 9 shows the distances from Mobile she calculates for those satellite cities.

Table 9: Reciprocal Switch Cities Located in Mobile Reciprocal Switch Region and Distance from Mobile

Industry Location City	State	Miles from Mobile
Chickasaw	AL	7.0
Gulfport	MS	74.6
Mobile	AL	-
Pascagoula	MS	40.3
Plateau	AL	5.2
Average Distance		25.4

See Baranowski Reply Workpaper “Reciprocal Switch Rate Analysis.xlsx”, tab “Tables”

As Table 9 shows, Prof. Carey’s Mobile reciprocal switching region includes four cities outside of Mobile ranging from 5.2 to 74.6 miles away, with an average distance of 25.4 miles. The entirety of the Rosebluff Lead, on the other hand, is just nine miles with the switching broken into two zones, an average of 4.5 miles for each zone. All other things equal, longer

switching distances typically translate into higher costs. The situation is similar for many of the other reciprocal switching regions included in Prof. Carey's analysis. Table 10 shows the average distance from the named region city for all of the regions relied upon by Prof. Carey.

Table 10: Average Distance from Region City for Prof. Carey Reciprocal Switch Regions

Region	Average Switching Distance
Baton Rouge	0.0
Chicago	25.5
Dallas-Ft. Worth	8.3
Davenport-Moline	17.7
Denver	17.7
Fayetteville	0.0
Houston	17.1
Jackson	61.1
Memphis	4.3
Mobile	25.4
New Orleans	16.4
Other Louisiana	123.1
St. Louis	15.8
Toledo	19.5
Tulsa	33.7
Wichita	25.7

See Baranowski Reply Workpaper "Reciprocal Switch Rate Analysis.xlsx", tab "Tables"

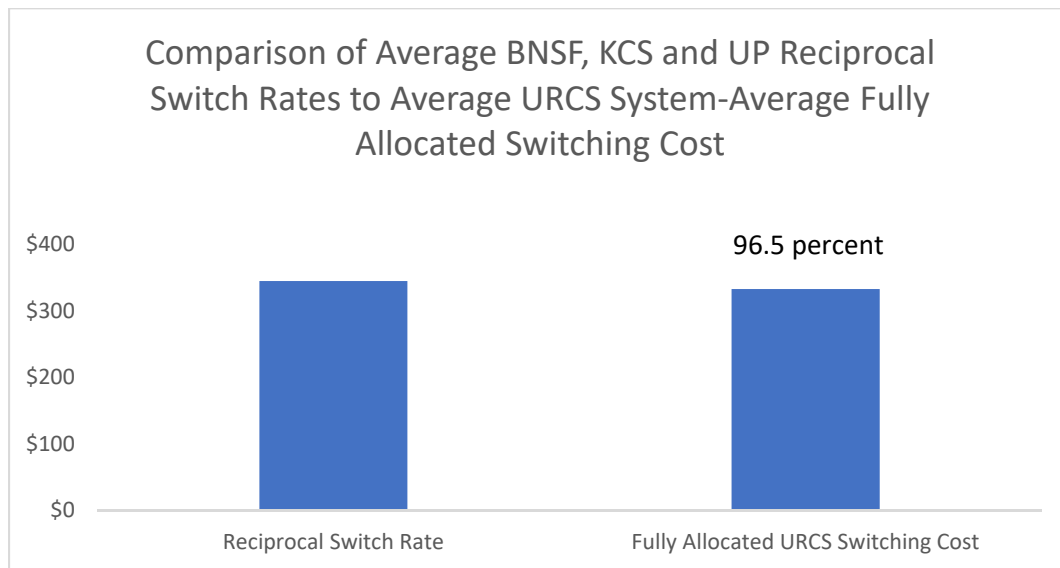
Nowhere does Prof. Carey explain why costs attributable to an average 4.5-mile switch in the Lake Charles area are at all related to the reciprocal switch rates for other locations included in her analysis.

4. The BNSF, UP and KCS Average Reciprocal Switch Rate in Prof. Carey's Analysis Align with Fully Allocated Uniform Rail Costing System ("URCS") Cost

The average reciprocal switch rates among BNSF, KCS, and UP selected by Prof. Carey for inclusion in her analysis average \$344.36 per car. To put this amount in some perspective, I developed the average BNSF, KCS and UP URCS system-average fully-allocated costs for originating and terminating switches. Unlike Dr. Neels' selection of URCS inter-terminal switching costs, which are not subject to application of the URCS standard switching make-

whole adjustments, the URCS originating and terminating switching costs reflect properly the less efficient operations associated with switching single-car manifest shipments. Also, because they are URCS system-average switching costs, they do not account explicitly for the increased mileages typically associated with reciprocal switching set forth in Table 10 above and are thus conservatively low. The average BNSF, KCS and UP fully-allocated URCS originating and terminating switching costs do, however, confirm that reciprocal switch rates that BNSF, KCS and UP charge one another are in line with the costs incurred in providing the reciprocal switching services. Chart 2 shows that a conservative estimate of the average URCS system-average fully-allocated switching cost for BNSF, KCS and UP that does not account explicitly for the additional mileage and cost typically associated with reciprocal switching is within 96.5 percent of the average reciprocal switch rates BNSF, KCS and UP charge one another.

Chart 2



See Baranowski Reply Workpaper “Switch Rates Relative to Costs.xlsx”, tab “Chart”

Chart 2 affirms that reciprocal switch rates are cost based. Any suggestion that they include market-based contributions toward revenue adequacy is simply wrong.

5. Prof. Carey's Alternative Proposal to Adjust Her Calculated Market-Based Reciprocal Switch Contribution by the KCS Revenue Shortfall Allocation Methodology ("RSAM") Should Also Be Rejected.

Prof. Carey makes one final self-serving pitch related to revenue adequacy to increase her market-based reciprocal switch contribution: she applies KCS's most recent four-year average revenue shortfall allocation method (RSAM) factor of 384 percent to her calculated contribution. This proposal would increase her recommended fee from { } per car to { } per car. As discussed above, because there is no contribution above costs in the reciprocal switch rates included by Prof. Carey in her analysis, there is no basis for her proposed RSAM-adjusted alternative.

E. Prof. Carey's BNSF and UP Contribution Analysis Confirms that KCS is Not Affected by BNSF Competition

Following her flawed analysis of published reciprocal switch rates, Prof. Carey includes an analysis of BNSF and UP estimates of contribution extracted from bid-related documents for Lake Charles shippers. One key observation is that her analysis confirms that the competition for Rosebluff Lead shipments is primarily between BNSF and UP. Of the {{ }} combined lanes in the BNSF and UP data included in her margin analysis, KCS served only {{ }} lanes, or under {{ }} percent, in the past ten years.⁵⁹

Further, Prof. Carey's analysis does not identify harm to KCS as a result of BNSF and UP competition. In fact, she does not even introduce KCS into her analysis at all, but strictly considers the competition between BNSF and UP. Looking at Prof. Carey's analysis from KCS's perspective would tell a different story. For example, one of the {{ }} lanes served by KCS is {{ }} For the Lyondell lane from West Lake Charles

⁵⁹ See Baranowski Reply Workpaper "Bid Review.xlsx", tab "Summary".

to {{ }}, BNSF bid {{ }} and UP bid {{ }}. KCS's URCS costs for a chemical shipment from West Lake Charles to {{ }} are \$1,018 per carload, so KCS could have bid {{ }} and achieved an R/VC level of over {{ }}.⁶⁰

V. CONCLUSION

KCS witnesses Dr. Neels and Prof. Carey have failed to explain why the existing cost-sharing arrangements between UP and KCS, under which KCS is compensated currently for BNSF's access via reciprocal switch, should be affected by BNSF's election to access shippers on the Rosebluff Lead directly instead. Their analyses ignore the unique circumstances surrounding BNSF access as well as the access restrictions imposed by the Board to ensure KCS operations are not affected. These restrictions limit BNSF access to UP's 12-hour operating window. Under these circumstances, a change in BNSF access from reciprocal switch to direct access should not alter the current KCS compensation scheme.

Should the Board determine that *SSW Compensation* is relevant here, it should reject Dr. Neels' flawed implementation of the operating and maintenance expense and interest rental components and rely instead on the *SSW Compensation*-based fees in my Opening Verified Statement. Alternatively, should the Board favor Dr. Neels' approach for operating and maintenance expense and interest rental, it should use my corrected results.

Prof. Carey's recommendation for a market-based reciprocal switch fee is based on her flawed assumption that published railroad reciprocal switch rates are market- and not cost-based. Her recommendation should be rejected.

⁶⁰ *Id.*

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Supplemental Finance
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Mike Baranowski heads FTI's Network Industries Strategies practice and provides strategic, financial and economic consulting services to the telecommunications and railroad and pipeline transportation industries. He has special expertise in analyzing and developing complex costing and cash flow models, conducting detailed operations analysis, and transportation engineering. Much of his work involves providing oral and written expert testimony before courts, arbitration panels and regulatory bodies.

He is a recognized expert in railroad regulatory economics and has assisted FTI's railroad clients in a broad range of litigation and regulatory engagements involving pricing of services, contract disputes, damage calculations and analyses of the specific effects of pending or proposed changes in policy or regulation.

Some of Mr. Baranowski's representative experience includes:

- Development of strategic litigation analyses for large network industry regulatory rate proceedings based on the theory of Constrained Market Pricing and the Stand-Alone cost test. Theory assumes the existence of a hypothetical, efficient competitor and involves detailed analysis of short and long run operations, expenses, capital expenditures and revenues.
- Analysis of market dynamics effecting pricing and development of a suite of modeling tools to assess the regulatory risk of tariff and contract transportation rates for a mix of commodities and services based on key cost drivers and forecasts.
- Expert testimony related to the determination of damages in a variety of commercial contract disputes in the railroad, telecommunications, pipeline and trucking industries.
- Evaluation of market effects of proposed railroad mergers and identification of merger related efficiencies and quantification of the associated savings.

- Going concern and liquidation value estimates for railroad related assets as the basis for trackage rights and competitive access compensation.
- Develop detailed cost and revenue allocation metrics to assess relative profitability of individual asset groups or segments of complex network industries.

Mr. Baranowski holds a B.S. in Accounting from Fairfield University in Fairfield, Connecticut and has pursued supplemental finance studies at Kean College in Union, New Jersey.

Select Railroad Testimony

Surface Transportation Board

January 6, 2011	Docket No. 42056 Texas Municipal Power Agency v. BNSF Railway Company, BNSF Reply to TMPA Petition for Enforcement of Decision, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
October 28, 2011	Docket No. FD 35506 Western Coal Traffic League - Petition for Declaratory Order, Opening Evidence of BNSF Railway Company, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
November 10, 2011	Docket No. 42127 Intermountain Power Agency v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company
November 28, 2011	Docket No. FD 35506 Western Coal Traffic League - Petition for Declaratory Order, Reply Evidence of BNSF Railway Company, Joint Reply Verified Statement of Michael R. Baranowski and Benton V. Fisher
May 10, 2012	Docket No. 42056 Texas Municipal Power Agency v. BNSF Railway Company, BNSF Reply to TMPA Petition to Reopen and Modify Rate Prescription, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
November 30, 2012	Docket No. 42125 E.I. DuPont De Nemours & Company v. Norfolk Southern Railway Company, Reply Evidence of Norfolk Southern Railway Company
December 7, 2012	Docket No. Ex Parte 715, Rate Regulation Reforms, Reply Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski
January 7, 2013	Docket No. 42130 SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway Company, Reply Evidence of Norfolk Southern Railway Company
March 1, 2013	Ex Parte No. 711 Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Opening Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Richard W. Brown
April 12, 2013	Docket No. 42136 Intermountain Power Agency v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company

April 30, 2013	Ex Parte No. 711 Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Reply Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Richard W. Brown
June 20, 2013	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Comments of the Association of American Railroads, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
September 5, 2013	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Reply Comments of the Association of American Railroads, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
July 21, 2014	Docket No. 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.
September 5, 2014	Ex Parte No. 722 Railroad Revenue Adequacy, Opening Comments of Norfolk Southern Railway Company, Verified Statement of Michael R. Baranowski
November 4, 2014	Ex Parte No. 722 Railroad Revenue Adequacy, Reply Comments of Norfolk Southern Railway Company, Verified Statement of Michael R. Baranowski
September 4, 2015	Docket No. FD 35743 Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a) - Canadian National Railway Company, Opening Evidence of Illinois Central Railroad Company and Grand Trunk Western Railroad, Joint Verified Statement of Michael Baranowski and Benton Fisher
October 7, 2015	Docket No. 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Supplemental and Compliance Evidence of CSX Transportation, Inc.
October 23, 2015	Docket No. FD 33760 (Sub-No. 46) BNSF Railway Company - Terminal Trackage Rights -- Kansas City Southern Railway Company and Union Pacific Railroad Company, BNSF Rebuttal Statement, Verified Statement of Michael R. Baranowski
November 20, 2015	Docket No. 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Reply to Supplemental and Compliance Evidence
March 7, 2016	Docket No. 42142 Consumers Energy Company v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.
July 18, 2016	Docket No. FD 35842 New England Central Railroad, Inc. -- Trackage Rights Order -- Pan Am Southern LLC, Pan Am Southern Reply Evidence, Verified Statement of Michael R. Baranowski
July 26, 2016	Ex Parte No. 704 (Sub-No. 1) Review of Commodity, Boxcar, and TOFC/COFC Exemptions, Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Benton V. Fisher
August 26, 2016	Ex Parte No. 704 (Sub-No. 1) Review of Commodity, Boxcar, and TOFC/COFC Exemptions, Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Benton V. Fisher

October 11, 2016	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Comment of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Benton V. Fisher
October 26, 2016	Ex Parte No. 711 (Sub-No. 1) Reciprocal Switching, Opening Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski
November 7, 2016	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Reply Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Benton V. Fisher
March 6, 2017	Docket No. 42142 Consumers Energy Company v. CSX Transportation, Inc., Supplemental Reply Evidence of CSX Transportation, Inc.
January 12, 2018	Docket No. FD 32760 (Sub-No. 46) BNSF Railway Company - Terminal Trackage Rights -- Kansas City Southern Railway Company and Union Pacific Railroad Company, BNSF Petition to Establish Conditions of Use and Compensation, Verified Statement of Michael R. Baranowski
July 16, 2018	Docket No. FD 32760 (Sub-No. 46) BNSF Railway Company - Terminal Trackage Rights -- Kansas City Southern Railway Company and Union Pacific Railroad Company, BNSF Rebuttal, Verified Statement of Michael R. Baranowski
April 26, 2019	Docket No. 42144 North American Freight Car Association, et al v. Union Pacific Railroad Company, Verified Statement of Michael R. Baranowski

U.S. District Court for the Northern District of Texas, Fort Worth Division

November 7, 2017	Civil Action No. 4:16-cv-1061-O, BNSF Railway Company v. Panhandle Northern Railroad LLC, Expert Report of Michael R. Baranowski
November 22, 2017	Civil Action No. 4:16-cv-1061-O, BNSF Railway Company v. Panhandle Northern Railroad LLC, Reply Expert Report of Michael R. Baranowski
December 21, 2017	Civil Action No. 4:16-cv-1061-O, BNSF Railway Company v. Panhandle Northern Railroad LLC, Rebuttal Expert Report of Michael R. Baranowski

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July 25, 2011	American Arbitration Association Case No. 58 147 Y 0031809, BNSF Railway Company and Kansas City Southern Railway Company, Expert Report of Michael R. Baranowski on behalf of BNSF Railway Company
April 25, 2013	JAMS REF #1340009009, Union Pacific Railroad vs. Canadian Pacific and Dakota, Minnesota & Eastern Railroad Arbitration, Expert Report of Michael R. Baranowski on behalf of Union Pacific Railroad Company
September 6, 2013	IN JAMS ARBITRATION, Case No. 1220044715, Union Pacific Railroad Company v. BNSF Railway Company, Expert Report of Michael R. Baranowski
October 25, 2013	IN JAMS ARBITRATION, Case No. 1220044715, Union Pacific Railroad Company v. BNSF Railway Company, Expert Reply Report of Michael R. Baranowski

January 1, 2014	IN JAMS ARBITRATION, Case No. 1220044715, Union Pacific Railroad Company v. BNSF Railway Company, BNSF Post-Argument Submission, Affidavit of Michael R. Baranowski
April 14, 2017	American Arbitration Association Case No. 01-15-0004-4830 and 01-15-0004-4931, Arbitration Between FirstEnergy Generation LLC and CSX Transportation, Inc. & BNSF Railway Company, Expert Report of Michael R. Baranowski
November 22, 2017	American Arbitration Association Case No. No. 01-16-0003-6208, CSXT Transportation, Inc. v. JEA and Florida Power & Light Co., Expert Report of Michael R. Baranowski
January 26, 2018	American Arbitration Association Case No. No. 01-16-0005-5615, BNSF Railway Company & Norfolk Southern Railway Company v. FirstEnergy Generation, LLC, Expert Report of Michael R. Baranowski
February 16, 2018	American Arbitration Association Case No. 01-16-0005-5615, BNSF Railway Company & Norfolk Southern Railway Company v. FirstEnergy Generation, LLC, Rebuttal Expert Report of Michael R. Baranowski
February 23, 2018	American Arbitration Association Case No. 01-17-0000-0130, J.B. Hunt Transport, Inc. and BNSF Railway Company, Expert Report of Michael R. Baranowski
April 17, 2018	American Arbitration Association Case No. 01-17-0000-0130, J.B. Hunt Transport, Inc. and BNSF Railway Company, Reply Expert Report of Michael R. Baranowski
June 22, 2018	JAMS REF #1100088262, BNSF Railway Company v. Union Pacific Railroad Company, Expert Report of Michael R. Baranowski
March 25, 2019	American Arbitration Association Case No. 01-17-0000-0130, J.B. Hunt Transport, Inc. and BNSF Railway Company, Expert Report of Michael R. Baranowski
April 26, 2019	American Arbitration Association Case No. 01-17-0000-0130, J.B. Hunt Transport, Inc. and BNSF Railway Company, Reply Expert Report of Michael R. Baranowski
January 18, 2021	American Arbitration Association Case No. 01-18-0001-3283, BNSF Railway Company & Norfolk Southern Railway Company, and Dynegy Midwest Generation, LLC, Expert Report of Michael R. Baranowski on Behalf of BNSF & NS

Select Pipeline Testimony

Federal Energy Regulatory Commission

November 20, 2019	Docket Nos. OR18-7-002, et al. (Consolidated), Epsilon Trading, et al v. Colonial Pipeline Company, Prepared Answering Testimony of Michael R. Baranowski on behalf of Colonial Pipeline
March 20, 2020	Docket Nos. OR18-7-002, et al. (Consolidated), Epsilon Trading, et al v. Colonial Pipeline Company, Prepared Answering Testimony to Trial Staff of Michael R. Baranowski on behalf of Colonial Pipeline

VERIFICATION

I, Michael R. Baranowski, 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.


Michael R. Baranowski

Executed: April 12, 2021

Public Version

Before the
SURFACE TRANSPORTATION BOARD

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

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

EXHIBIT B

Verified Statement of David Reishus

Before the
SURFACE TRANSPORTATION BOARD

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

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

APPLICATION FOR TERMINAL TRACKAGE RIGHTS

REPLY STATEMENT AND EVIDENCE ON COMPENSATION

VERIFIED STATEMENT OF

David Reishus, Ph.D.

April 12, 2021

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I. INTRODUCTION

A. WITNESS INTRODUCTION

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 cities throughout North America, South America, and Europe. I earned my M.A. and Ph.D. degrees in economics from Harvard University.

Over the past 30 years, I have worked extensively on the organization of markets, competition, and firm behavior in a variety of industries. As part of the economic analysis of markets, I have analyzed the determinants and measurement of market value in the context of taxation, trade, regulation, and commercial disputes.

I have testified before various state, Federal and international bodies on market and competition issues, primarily in the energy and transportation industries. I have provided testimony multiple times before the Surface Transportation Board (“STB”) on matters involving competition in the railroad industry.

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 Burlington Northern/Santa Fe, Union Pacific/Southern Pacific, and the Conrail transaction. Since then, I have testified before (or made presentations to) the responsible government authorities on competition and access issues arising from proposed transactions involving railroads in the U.S., Canada, and Mexico. I previously submitted testimony in this sub-docket.¹ My full vita is attached as Exhibit 1.

The opinions expressed herein are my own, and do not necessarily represent those of my employer or its other employees.

¹ Verified Statement of David A. Reishus (filed October 23, 2015).

B. ASSIGNMENT

This proceeding involves determining the terms for the appropriate compensation the Surface Transportation Board (“STB” or “the Board”) should set for BNSF Railway Company’s (“BNSF”) use of the terminal trackage rights provided to it over the Rosebluff Lead, a line jointly owned by Union Pacific Railroad Company (“UP”) and Kansas City Southern Railway Company (“KCS”). I have been asked by BNSF to analyze certain economic arguments raised by KCS in support of its proposed compensation method. In particular, I have been asked to address the Verified Statement of Julie M. Carey.² Prof. Carey argues that the trackage right payments to KCS should reflect the value of access to shippers and that compensation should be established through a “market-based access fee” based on reciprocal switching rates at other locations.³

C. SUMMARY OF CONCLUSIONS

In the UP/SP merger, BNSF was provided access to Rosebluff Lead shippers in order to “preserve existing competitive alternatives.”⁴ In a prior decision in this proceeding, the STB granted BNSF terminal trackage rights over the Rosebluff Lead to effectuate BNSF’s option to reach shippers directly, rather than by reciprocal switching, as was provided in connection with the UP/SP merger.⁵ The issue now is to determine the appropriate compensation to KCS for BNSF’s use of these trackage rights.

Under current BNSF reciprocal switch service to Rosebluff Lead shippers, BNSF pays UP a negotiated rate for UP to perform reciprocal switch services on

² Verified Statement of Julie M. Carey, KCS’s Opening Statement and Evidence on Compensation Concerning BNSF’s Use of the Rosebluff Lead, January 26, 2021 (“Carey V.S.”).

³ Carey V.S. at 3.

⁴ *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Decision No. 44)*, 1 S.T.B. 233, 428 (1996).

⁵ *See BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. (Decision No. 8)*, FD 32760 (Sub-No. 46) (STB served Feb. 21, 2020).

BNSF's behalf.⁶ UP in turn makes payments to KCS under their Rosebluff Lead cost-sharing agreements. Under these arrangements, a BNSF car switched by UP is treated the same as a UP car.⁷ BNSF has established that the existing negotiated agreements between UP and KCS should also determine the payments owed to KCS for BNSF direct service, because BNSF's trains and traffic should be treated equivalently to UP trains and traffic.⁸

If compensation due KCS is not determined by the existing agreements between KCS and UP, I find that the *SSW Compensation* methodology provides a sound economic basis for approximating a competitive valuation and associated compensation for BNSF's use of the Lead. As such, the *SSW Compensation* methodology would compensate KCS for any direct costs incurred as a result of BNSF's trains' use of the Lead, an equivalent share of the maintenance costs, and the equivalent share of the rental value of the assets employed.

Rather than using the *SSW Compensation* methodology, Prof. Carey now argues that KCS is entitled to a "market-based access fee" that is intended to capture the value that a serving railroad with exclusive access would obtain from serving a shipper.⁹ Such an approach is inconsistent with the provision of access rights by UP and the STB's intent to mitigate potential market power that would result from an unconditioned merger. The STB imposed the Lake Charles Merger Conditions because it determined that, absent the access granted BNSF, the merger would have enhanced the market power of a combined UP/SP. The access provided to BNSF by UP and the STB was intended to maintain competition—and the generally lower rates that competition tends to elicit—that would have otherwise been lost as a result of the UP/SP merger.

⁶ BNSF-139, FD 32760 (Sub-No. 46), at 5-6 (Feb. 4, 2019).

⁷ BNSF-144, FD 32760 (Sub-No. 46), at 15-16 (Jan. 26, 2021) ("BNSF-144 Opening Statement").

⁸ BNSF-144 Opening Statement at 15-16.

⁹ Carey V.S. at 3-5.

Prof. Carey now argues that KCS should be compensated for a reduction in KCS's rail rates and contribution that BNSF's access purportedly caused.¹⁰ But the reduction Prof. Carey posits is a reduction relative to the higher rates that would have resulted from an unconditioned UP/SP merger. This is demonstrated by her position that the compensation due KCS should reflect what KCS would voluntarily accept for BNSF's obtaining access to the Rosebluff Lead in the context of the UP/SP merger and her claim that compensation should be based on the market value of access provided to otherwise exclusively-served shippers. Because Prof. Carey argues KCS should be compensated for the rates and market power it would have obtained from an unconditioned UP/SP merger, the claimed rate at which KCS would be compensated would be inconsistent with the purpose of the access provided to BNSF and not representative of a "value" that KCS ever possessed.

The relevant issue in this proceeding is not the value of *access* to Lake Charles shippers. As already noted, BNSF was provided access to the Lake Charles shippers decades ago. The issue in this terminal trackage rights compensation proceeding is determining appropriate compensation for KCS for BNSF's direct service. Under Prof. Carey's "value" framework, the value of the compensation determined in this proceeding should reflect no more than the difference in value between direct (trackage rights) and indirect (reciprocal switching) access. As BNSF already exercises switching rights, the differential between switching and trackage rights is the only "value" at issue in this proceeding. The "access fee" conceived by Prof. Carey is far in excess of the value to KCS of the differential access at issue in this proceeding.

Apart from using the wrong standard, Prof. Carey's proposed solution is not likely a workable one. Prof. Carey argues the trackage rate should mimic the rate that would result from a commercial negotiation for access between KCS and BNSF.

¹⁰ Carey V.S. at 23.

She recognizes that competition provides benefit to shippers through reduced rail rates and correspondingly lower contributions to serving railroads.¹¹ For an incumbent railroad to consider granting to an entrant access to its line, the incumbent would need to receive at least as much in payment from the entrant as the incumbent would have earned on movements that instead would be carried by the entrant railroad, plus an additional amount to offset lower rail rates on the incumbent's remaining traffic due to the effects of competition. In this case, the potential range of bargaining outcomes between an incumbent railroad and potential entrant may be very narrow or non-existent.

A trackage rights fee based on principles espoused by Prof. Carey would effectively negate the competitive discipline that BNSF's access was intended to preserve. The STB granted BNSF access to Lake Charles shippers in order to preserve competition that would otherwise have been lost through the UP/SP merger. By arguing for a fee that would leave KCS at least as well off as if BNSF had never been provided access, it would reward KCS for the value of any market power arising from the UP/SP merger that BNSF's access prevented a fee based on that principle would undo the competitive discipline that such access was intended to provide.

Prof. Carey proposes using "comparable" reciprocal switching rates to determine the "market-based access fee" due KCS for BNSF's trackage rights on the Rosebluff Lead.¹² Disregarding that the "market-basket access fee" is the wrong basis in these circumstances for determining compensation owed KCS, Prof. Carey's proposed method in practice is flawed and unusable for assessing the fee she is attempting to measure.

First, Prof. Carey is proposing an "apples-to-oranges" comparison that renders her comparables valuation meaningless. The rights at issue are trackage rights provided to a tenant railroad (BNSF) which already competes through reciprocal

¹¹ Carey V.S. at 25.

¹² Carey V.S. at 29.

switching with both partial owners of the line (KCS and UP) who are also in competition with each other. Thus, the “value” at issue to KCS in this proceeding is the incremental difference between BNSF’s access through trackage rights versus reciprocal switching. These incremental rights are not comparable to the provision of reciprocal switching by a railroad with exclusive line ownership and exclusive right to serve a customer. The implied “value” of the incremental switching rights is not comparable to the value of “access” embedded in switching rates at other locations.

Second, Prof. Carey has not established that the reciprocal switch rates are arm’s-length prices. If there are multiple products or services exchanged in one or a series of related transactions, the *transactions* between the parties may be at arm’s length, but the *prices* assigned to any element of the exchange may not be arm’s-length prices representative of market value. If reciprocal switching agreements between two railroads provide switching rights to the other railroad’s shippers, then the sets of rates reflect the *reciprocal* exchange of benefits. Rates established under these circumstances can reflect a variety of tradeoffs, including rates related to the costs of the switching activity itself, and not the embedded value of access that Prof. Carey assumes that they represent.

Third, Prof. Carey has made no adjustments for other material factors necessary for a valid comparables valuation. She has not made any adjustments for differences in market conditions, the nature of the good or service sold, the cost of providing switching, and other relevant terms and conditions of the transaction between the “comparable” transaction and the Rosebluff Lead. For example, Prof. Carey has not established when the rates she cites were determined, under what market conditions they were determined, or what other consideration was provided in the exchange that resulted in any rate or switching access. The rates that Prof. Carey examined range over a {{ }} percent difference. There are also consistent patterns in rates among different railroads, yet she has not made any adjustments to account for any differences that would lead to such a range of values.

Finally, a clear failure to perform a reliable comparables valuation is demonstrated by Prof. Carey's subtraction of the estimated switching cost for the Rosebluff Lead from average switching rates located elsewhere to calculate the "market-based access fee." This method effectively assumes, with no foundation, that switching costs at these other locations are the same as those at the Rosebluff Lead. Accounting for the actual cost of switching is crucial to Prof. Carey's method. But switching rates elsewhere need to be adjusted by the relevant switching costs elsewhere, not the costs at the Rosebluff Lead, to identify the purported "market-based access fee" at these other locations. This is an inappropriate and unreliable use of a comparable valuation.

II. BACKGROUND

A. UP/SP PROVISION OF ACCESS TO BNSF ON THE ROSEBLUFF LEAD

In connection with the merger of UP with the Southern Pacific Rail Corporation ("SP") in 1996, UP/SP agreed to grant BNSF access to Lake Charles area shippers, including those on the Rosebluff Lead.¹³ The Board imposed this agreement as a condition to its approval of the merger in order to "preserve existing competitive alternatives for shippers in the Lake Charles area."¹⁴ Under the Lake Charles Merger Conditions, BNSF has the option to access shippers directly through trackage rights or indirectly through reciprocal switch.

As part of the negotiation between UP/SP and BNSF, the fee that BNSF was to pay for the trackage rights on the combined UP/SP network (the "Merger Fee") was established and ultimately approved by the STB.¹⁵ The negotiated Merger Fee was applicable generally to rights granted to BNSF by UP/SP and was not specific to Lake Charles area shippers. In a later agreement between UP and BNSF that provided for joint ownership and operation of the 50/50 line—the UP-BNSF mainline that

¹³ See *Decision No. 8* at 1-2 for a background description.

¹⁴ *UP/SP Decision No. 44* at 428.

¹⁵ *Decision No. 8* at 12, 12 n.19.

connects to the Rosebluff Lead—the Merger Fee was adjusted for BNSF movements on the 50/50 line and its spurs and branches, including the Rosebluff Lead. The relevant trackage rights fee for the Rosebluff Lead is referred to by BNSF and the STB in this proceeding as the “Prescribed Fee.”¹⁶

B. BNSF ACCESS AND OPERATION

The Rosebluff Lead is jointly owned by KCS and UP. UP and KCS have agreed that KCS handles the physical switching of cars generally north of the Rosebluff Yard and UP physically switches cars south of the yard. The cars on the lead are switched to the Rosebluff Yard. Under their agreement, UP and KCS each have exclusive access to the yard for 12 hours a day.¹⁷ {

}¹⁸

Since being provided access to the Rosebluff Lead, BNSF has served customers on the lead via reciprocal switch.¹⁹ {

} BNSF pays

UP the reciprocal switch fee prescribed under the BNSF Settlement Agreement, along with haulage and other fees.²⁰

In 2012, BNSF notified UP of its intent to provide direct service to Rosebluff Lead customer, CITGO. In 2016, the STB granted BNSF’s application for terminal trackage rights on the Rosebluff Lead. In 2018, BNSF petitioned the STB to establish conditions of use and compensation for trackage rights to serve Lyondell over the

¹⁶ BNSF-144 Opening Statement at 5.

¹⁷ *Decision No. 8*, FD 32760 (Sub-No. 46) at9; Verified Statement of Michael R. Baranowski, January 26, 2021 (“Baranowski V.S.”) at 7.

¹⁸ BNSF-144 Opening Statement at 20-22.

¹⁹ Baranowski V.S. at 10.

²⁰ Baranowski V.S. at 10-11.

Rosebluff Lead. In 2020, BNSF was granted a 4-hour window during UP's exclusive 12-hour daily window in which to exercise its direct trackage rights.²¹

This proceeding is intended to determine the appropriate level of trackage rights compensation that KCS should receive for BNSF's use of the terminal trackage rights granted by the STB over the Rosebluff Lead.²² UP and BNSF agree on the payment due from BNSF to UP for those rights.

III. PROF. CAREY'S PROPOSED "MARKET-BASED" FEE IS INTENDED TO CAPTURE THE VALUE OF ACCESS AND NOT THE VALUE OF THE TRACKAGE USED BY BNSF

A. PROF. CAREY IS ATTEMPTING TO DETERMINE COMPENSATION BY REFERENCE TO THE VALUE OF ACCESS RATHER THAN THE INCREMENTAL VALUE OF TRACKAGE RIGHTS

KCS is effectively seeking redress for access provided to BNSF by UP and modified by the STB as a condition of the UP/SP merger in 1996. As Prof. Carey points out: "BNSF's long-standing access to Lake Charles area customers through reciprocal switching arose from the UP/SP merger."²³ Prof. Carey argues that the compensation fee from BNSF to KCS at issue in this proceeding should put KCS in the same position "in which it would have been otherwise but for the government-mandated BNSF access" and should be similar to "the reciprocal switching rate that KCS would have otherwise received from BNSF to provide BNSF access to Lyondell."²⁴ Prof. Carey argues that the compensation that KCS should receive is that which "KCS would have received through a market-based negotiation with BNSF."²⁵ Prof. Carey's framework crucially depends on establishing the rights that would be provided and paid for and the market setting and alternatives to these

²¹ *Decision No. 8* at 9.

²² I am not opining on the legal issue that if compensation is found to be due KCS, whether UP or BNSF is responsible for that payment.

²³ Carey V.S. at 10.

²⁴ Carey V.S. at 20.

²⁵ Carey V.S. at 23-24.

rights. She treats these negotiations as about access and not about trackage rights when access through switching rights are already available. This fundamentally mischaracterizes the central issue of this proceeding.

Commercial or economic access, the ability to serve shippers and independently establish pricing and terms and conditions with shippers, can be provided through a variety of mechanisms, including trackage rights or reciprocal switching. The ‘entrant’ railroad gaining access can contract with and establish terms and conditions directly with the shipper, with the entrant paying the incumbent carrier for trackage rights or switching service that does not depend on the rates charged the shipper by the ‘entrant’ railroad for transportation services.

Since the UP/SP merger twenty-five years ago, BNSF has exercised access to shippers on the jointly-owned Rosebluff Line through reciprocal switching provided by UP. BNSF provides cars to UP at its North Yard, and from there UP handles these cars in the same manner as if they were its own cars. In accordance with their agreement, BNSF pays UP fees established for this service. On the Rosebluff Lead, these cars are treated as UP cars for purposes of switching on the lead and for compensation under the terms of the agreements between KCS and UP covering these cars. Under the cost-sharing arrangements governing the Rosebluff Lead, UP pays KCS for the costs imposed for the cars it handles for BNSF on the same terms as UP’s own cars. {

}²⁶

Under the terms of BNSF’s agreement with UP, and as established by the STB as a condition of the UP/SP merger, BNSF has the option to choose to serve shippers through reciprocal switch or direct access. It is my understanding that BNSF can

²⁶ Baranowski V.S. at 11

continue to access shippers through reciprocal switch provided by UP and that this proceeding regarding compensation for terminal trackage rights has not altered those rights. Thus, BNSF has the option to continue accessing shippers as provided by UP, and the cost-sharing arrangements between UP and KCS would continue to determine the amounts owed to KCS.

The determination of which access option – reciprocal switch or direct access – is preferred by the accessing railroad may turn on numerous factors. These include customer demand, physical arrangement and location of tracks and yards, schedules, service requirements of potential shippers, as well as the relative value shippers place on the level of service provided under alternative modes of access and the cost to the accessing railroad of utilizing trackage rights relative to reciprocal switching.

The BNSF/KCS negotiation imagined by Prof. Carey and the value she tries, but fails, to estimate would be the value of BNSF access in any form to shippers on the Rosebluff Lead. Her proposal ignores the existing BNSF access available through reciprocal switching established to maintain competition following the UP/SP merger. Rather, Prof. Carey’s “access fee” is intended to recoup the value of any access in whatever form provided to BNSF by UP and the STB. This is effectively an effort, through a compensation proceeding for the use of co-owned trackage, to renegotiate (on a going-forward basis) the terms of access that were established by UP and the STB decades ago.

B. THE TRACAGE RIGHTS REQUESTED ARE AN ALTERNATIVE TO THE EXISTING RECIPROCAL SWITCHING RIGHTS

The question at issue here is compensation owed to KCS for BNSF trackage rights that will serve as an alternative to the BNSF switching access currently provided by UP. In this case, UP will effectively provide BNSF with the trackage rights on the line co-owned by UP and KCS. UP and KCS split their ownership and operating rights in half, both geographically (into two zones) and temporally (use of the Rosebluff Yard in 12-hour windows). Under the conditions established by the STB to implement the BNSF terminal trackage rights, BNSF will be provided an

exclusive window of time with which to exercise these rights. This window is drawn solely from UP's 12-hour window, not KCS's. Similar to any line with multiple carriers, KCS, UP, and BNSF also may negotiate for mutually beneficial operational changes.

There is no dispute over the fees that BNSF owes UP for the direct use of the Rosebluff Lead.²⁷ The relevant "Prescribed Fee" has been negotiated and adjusted by the two railroads. The issue here is what compensation KCS should receive, as co-owner of the lead, for BNSF's use of the lead.

The existing cost-sharing agreements between UP and KCS compensate KCS for use of the line. KCS obtains payment from UP for the costs associated with the use of the joint line by BNSF cars, which are treated as UP cars for purposes of cost-sharing. {

} The use of trackage rights by BNSF may also entail less cost for KCS as compared to BNSF reciprocal switch service, because the BNSF direct service may result in fewer cars requiring handling by KCS in Rosebluff Yard. And as BNSF will only operate trains during UP's window, BNSF direct service may result in less cost and congestion for KCS as compared to BNSF reciprocal switch service.²⁸ {

}

If the Board decides that the UP/KCS cost-sharing agreement does not provide adequate compensation to KCS for the BNSF trackage rights, then, as discussed

²⁷ BNSF-144 Opening Statement at 8-9; UP/SP-433, FD 32760 (Sub-No. 46), at 2 (Jan. 26, 2021)

²⁸ Baranowski V.S. at 14-15.

below, the *SSW Compensation* methodology is fully capable of determining this compensation. This would reflect compensation for the *use* of KCS' partial ownership of the assets, not the value of *access*.

C. THE “MARKET VALUE” REQUESTED BY KCS IS FAR IN EXCESS OF THE INCREMENTAL VALUE OF THE TRACKAGE RIGHTS

Prof. Carey estimates a market-based “access fee” that she contends would place KCS “in the shoes in which it otherwise would have been if KCS and BNSF negotiated a market-based rate for BNSF to access Lake Charles area.”²⁹ To explain the concept of her “market-based” fee she envisions a hypothetical bilateral negotiation between KCS and BNSF.³⁰ Consistent with bargaining theory, Prof. Carey assumes that KCS and BNSF each have a reservation price in this negotiation, below or above which, respectively, they would walk away from the negotiation and no BNSF access would result.

For purposes of examining Prof. Carey’s hypothetical, I consider BNSF’s position in the negotiation for the trackage fee compensation at issue here. BNSF can continue to serve shippers on the Rosebluff Lead through switching provided by UP, or, in Prof. Carey’s approach, BNSF could enter into negotiations with KCS to serve shippers directly using trackage rights. Under Prof. Carey’s theory of bargaining, BNSF would be willing to pay only up to the incremental value to itself of serving shippers directly versus through use of reciprocal switching. Similarly, KCS would only be willing to accept an amount that would exceed the incremental change in value to itself of BNSF direct service versus the existing reciprocal switch service. In this conjectural negotiation for market-based “value,” the appropriate trackage rights payment would fall between these two “walk away” reservation prices. If there is no overlapping range, then no negotiated value can be struck.

²⁹ Carey V.S. at 49.

³⁰ Carey V.S. at 20-25.

This bargaining hypothetical proposed by Prof. Carey takes no account of other available outcomes, including the ability for KCS (and BNSF) to turn to a regulatory body to establish the rate for them. As in this case, negotiation and arbitration may not lead to an agreement.³¹ The ability to appeal to a third-party to set the rate provides an additional option that may preclude resolution through the conjectural, two-party negotiation.

The negotiation described above is obviously not the one contemplated by Prof. Carey. Prof. Carey's assumed negotiation that underlies her "market-based access fee" concerns a payment KCS would obtain (net of costs) regardless of whether BNSF serves the shipper directly through trackage rights or through reciprocal switch. The negotiation hypothesized by Prof. Carey is not one regarding trackage rights compensation for BNSF's option to use direct access as an alternative to the existing reciprocal switching. Thus, the fee that would arise from the hypothetical negotiation would reflect payment *access* regardless of the form used which is much different from the incremental access rights at issue here.

Prof. Carey's conjectural negotiation is not the standard by which the STB normally determines trackage rights compensation including to preserve existing competition. The application of Prof. Carey's standard would effectively eliminate BNSF direct access as a viable competitive option for Rosebluff Lead shippers. Prof. Carey's assumed threat point at which KCS could walk away from the negotiation is one in which BNSF is assumed not to have any form of access to Rosebluff Lead shippers. KCS would thus require compensation that would result in KCS earning at least as much as if BNSF were providing no competitive discipline on the Lead. The value to KCS of not having BNSF preserve competition on the Rosebluff Lead by serving shippers in any fashion is almost certainly larger than the incremental value to BNSF of the option of serving shippers directly rather than through reciprocal shipping. Thus, any "access fee" that satisfied the principles underlying Prof. Carey's

³¹ *Decision No. 8* at 3 and 11.

framework almost certainly would preclude BNSF from providing direct service to shippers.

D. THE “MARKET VALUE” REQUESTED BY KCS COULD PRECLUDE ACCESS NECESSARY TO PRESERVE COMPETITION

The access granted by UP and the STB to BNSF to serve Lake Charles area shippers was designed to “preserve existing competitive alternatives” that existed prior to the UP/SP merger.³² Thus, absent the presence of BNSF, the competitive options available to Lake Charles shippers would have been reduced, and these shippers presumably would have obtained worse service and or paid higher prices as result of the reduction in competition.

The trackage rights fees that BNSF pays UP have repeatedly been found to be reasonable and necessary to preserve competition. The BNSF Settlement Agreement, as revised and imposed in the UP/SP merger, was the lynchpin for the preservation of competition as a result of the merger. “The BNSF agreement is intended to permit BNSF to replace the competition that will be lost when SP is absorbed into UP.”³³ But BNSF can be a competitive replacement only if the fees are not so high that they would prevent BNSF from effectively competing. The fees that BNSF pays to UP for trackage rights were “seriously challenged” and found to be “clearly reasonable.”³⁴ Complaints from different parties that the fees either were too low or too high were the subject of repeated oversight challenges, and these challenges were rejected by the STB.³⁵ In the end, the STB concluded that BNSF is “an effective competitive replacement for the competition that would otherwise have been lost or reduced when

³² *UP/SP Decision No. 44* at 428.

³³ *UP/SP Decision No. 44* at 384.

³⁴ *UP/SP Decision No. 44* at 414, 413-414 n.163.

³⁵ See, e.g., *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Gen. Oversight, Decision No. 16)*, FD 32760 (Sub-No. 21), at 4-12 (STB served Dec. 15, 2000).

UP and SP merged” and that “the conditions we imposed on the UP/SP merger have worked as intended.”³⁶

Setting an “access fee” based on the negotiated value that KCS could have demanded for access in any form by BNSF (that is, a fee applicable to access via reciprocal switching or trackage rights) would have required BNSF to pay KCS for the loss in market power resulting from the introduction of BNSF to shippers on the Rosebluff Lead. However, the STB determined that without BNSF’s access to Lake Charles area shippers, the UP/SP merger threatened a loss in competition. KCS, as half owner of the Rosebluff Lead, would have benefited from such a reduction in competition through higher rates that could have followed from an unconditioned UP/SP merger. But the STB’s merger decision foreclosed that outcome. An access fee based on the rates that would apply absent BNSF’s competitive presence would preserve the effect on rates of the enhanced market power arising from an unconditioned UP/SP merger—which is the very thing that the grant of BNSF access was intended to prevent. An access fee at that level owed by BNSF for both trackage rights and reciprocal switching access would have provided little or no competitive benefit to Lake Charles area shippers.³⁷

The harm to competition that would occur now from an excessive access fee arises not from what KCS receives, but rather from what BNSF pays. Given that BNSF’s trackage rights fees to UP have already been established at a level pegged to maintain competition, additional payments from BNSF to KCS (not offset by UP) would undermine BNSF’s ability to play the role of competitive replacement provided by the UP/SP merger conditions.

³⁶ *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (Gen. Oversight, Decision No. 21)*, FD 32760 (Sub-No. 21) at 4-5 (STB served Dec. 20, 2001).

³⁷ To the extent that BNSF could serve some destinations at lower cost than KCS, BNSF may have been able to provide some transportation service at rates that reflected those differences in cost. The primary benefit of introducing additional competition to restrain the exercise of market power, however, would not have been obtained by Rosebluff shippers.

E. THE SSW COMPENSATION METHODOLOGY CAN COMPENSATE KCS APPROPRIATELY FOR THE USE OF THE RAIL ASSETS BY A TENANT RAILROAD

In the context of merger conditions necessary to preserve existing levels of competition, the *SSW Compensation* methodology is a flexible and economically sound approach for determining compensation for the use of trackage rights by a tenant railroad. The *SSW Compensation* methodology consists of three components: 1) the variable costs imposed on the landlord by the tenant railroad, 2) a proportionate share of maintenance and operation expenses, and 3) an interest rental component for the use of the track.³⁸ The first two components are consistent with economic principles for payment for the incremental costs imposed as well as a share of the going-forward costs necessary for operations of the line. In broad principles, the cost-sharing arrangement between KCS and UP provides for the allocation to the co-owners of the first two components and does so with respect to BSNF's use of reciprocal switching.

The rental component is designed to provide a return on capital to the landlord railroad for the use of the line. The difficult issue in practice is determining the value of the line. The *SSW Compensation* methodology is flexible and provides for multiple approaches, depending on the circumstances, in determining this value. Two methods, reproduction cost new less depreciation (RCNLD) and stand-alone costs, generally relate to the value of reproducing the assets. At a high level, these correspond to the costs that a competitive entrant would require to replace the system as is (including the effect of past depreciation) (RCNLD) or costs of a system that can replace the service provided (stand-alone cost). Other methods are intended to identify the value of the assets as they exist in the marketplace, one based on valuation through use of comparable assets and the other based on capitalization of earnings (CE) for the line.

³⁸ *Decision No. 8* at 11-12, n. 18.

The most appropriate use of each these methods may depend on the circumstance and information available. For example, prices associated with comparable lines may not exist or be difficult to identify.³⁹ In this proceeding, use of the CE method is complicated by the presence of multiple owners and multiple railroads. This is further complicated by the required introduction of BNSF to preserve competition that would have been lost as a result of the UP/SP merger. Regardless of the complications, the *SSW Compensation* methodology is more than adequate to provide a return for the use the assets being “rented” by the tenant railroad.

IV. PROF. CAREY’S PROPOSED USE OF “COMPARABLE” RECIPROCAL SWITCHING FEES IS NOT AN ACCURATE MEASURE OF MARKET VALUE OF THE ACCESS VIA TRackage RIGHTS

Prof. Carey argues that BNSF should be required to pay KCS a “market-based access fee based on the real-world market-based reciprocal switch rates comparable to Lake Charles (adjusted to remove the switching cost).”⁴⁰ Her methodology entails selecting a variety of switching rates that she contends are comparable to Lake Charles. Then, she subtracts the cost of switching at Lake Charles from an average of switch rates collected from these other locations. This is the “access fee” that she contends KCS should receive, and BNSF pay, for trackage rights on KCS.

As explained above, Prof. Carey’s “access fee” does not represent compensation for BNSF’s trackage rights use of the assets co-owned by KCS. Rather, in her conceptual framework, an access fee would need to be applied to all access of the Rosebluff Lead by BNSF, including that provided through reciprocal switching by

³⁹ “In principle, one could establish the value of the capital assets to be used by the tenant through a comparables analysis. For this approach to be viable one would need to identify an alternative set of assets that closely resembles the assets to be used by the tenant, and that was recently sold in an arm’s length transaction. In practice, these conditions are not easily met. As a result this approach, while conceptually appealing, is not often used.” Verified Statement of Dr. Kevin Neels at 7 (Jan. 26, 2021).

⁴⁰ Carey V.S. at 29.

UP. It does not represent the incremental value of access arising from the use of trackage rights versus reciprocal switching.

Regardless of the conceptual errors, Prof. Carey's estimation method, in practice, is not a reliable basis for determining the value of access on the Rosebluff Lead.

A. MARKET VALUE AND THE USE OF COMPARABLES

The use of arm's-length prices in comparable transactions is a widely-employed and, when properly applied, reliable method for estimating market value.⁴¹ The method entails identifying some asset, property, or transaction that requires valuation.⁴² Based on the characteristics of the subject item to be valued, valid prices obtained in arm's-length transactions—struck under comparable market conditions for comparable products or services and subject to comparable terms and conditions—form the basis for the valuation. The method follows from basic economics; prices in transactions struck in markets for identical products subject to the same supply and demand conditions will tend toward the same amount.

Two significant, broad issues often arise in attempting to apply this valuation method. The first issue is identifying arm's-length transactions and valid arm's-length prices. An arm's-length transaction is one entered into between an unrelated willing buyer and willing seller with opposing interests in the transaction who are not subject to duress or compulsion. Absent other information, the resulting exchange of consideration in the transaction is generally viewed as consistent with the supply and demand factors relevant to the transaction.⁴³ The extent to which a

⁴¹ For example, it is one of the methods for establishing market value in the *SSW Compensation* methodology.

⁴² In a real estate appraisal this would be the property being valued. In transfer pricing, it would be the "controlled" intercompany transaction.

⁴³ The market in which such transaction occurs need not be competitive, and supply and demand conditions may include a degree of market power or oligopolistic interdependence.

resulting *price* can be considered as a valid arm's-length price, however, depends on the components of what is transacted.

In general, prices reached in negotiations over multiple products or struck in conjunction with other associated transactions need not be an arm's-length price for any individual component of the transaction(s). A commonplace example is a new car buyer who is simultaneously trading in a used car; the *difference* between the price received by the dealer for the new car and paid for the used car is the subject of opposing economic interests and reflect the market conditions in which the transaction occurs. The prices assigned to the new and used car by the parties, however, may not be an arm's-length price reflective of market value for either car. Similarly, when a single price is paid for a bundle of potentially dissimilar items in a transaction the price need not reflect the market value associated with any particular item in the bundle. In this context, there has been an arm's-length transaction between BNSF and UP resulting in a price (the Prescribed Fee) for BNSF's direct "access" to the Rosebluff Lead.

The second broad issue in performing a valuation through the use of comparables, is determining the degree to which arm's-length transactions and prices are in fact comparable and, if comparable enough, reliably adjusting for any remaining material differences in value. "Arm's length prices may vary across different markets even for transactions involving the same property or services; therefore, to achieve comparability requires that the markets...do not have differences that have a material effect on price or that appropriate adjustments can be made."⁴⁴ If the markets differ or the property or service is not the same, then adjustment is required to establish comparability. "Economic circumstances that may be relevant to determining market comparability include the geographic location; the size of the markets; the extent of competition in the markets and the

⁴⁴ OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, OECD Publishing, Paris ("OECD Guidelines") at 74, available at <https://doi.org/10.1787/tpg-2017-en>.

relative competitive positions of the buyers and sellers; the availability (risk thereof) of substitute goods and services; the levels of supply and demand in the market as a whole and in particular regions,...the nature and extent of government regulation of the market; costs of production, including the costs of land, labour, and capital;... the date and time of transactions; and so forth.”⁴⁵ The facts and circumstances of the particular case will determine whether differences in economic circumstances have a material effect on price and whether reasonably accurate adjustments can be made to eliminate the effects of such differences.

A commonplace example of these types of adjustments can be seen in a typical residential real estate appraisal. A home appraisal often is based on the choice of three recent arm’s-length sales in the local market for homes that are similar to the property being appraised. Even then, adjustments to the comparables’ prices are usually made for differences in size, rooms, condition, changes in market conditions over different (but usually short) time periods, etc. Comparability requires sales prices for similar homes in the same market at similar times to the subject property, and yet adjustments are required for remaining material differences to complete a reliable valuation.

B. THE TRACKAGE RIGHTS AT ISSUE AT LAKE CHARLES ARE NOT COMPARABLE TO SWITCHING RIGHTS ELSEWHERE

The purpose of this proceeding is to determine appropriate compensation to KCS for BNSF’s use of trackage rights on the Rosebluff Lead. The “product” being valued is trackage rights and the fee payable to one of two owners (KCS) of this rail line, both of whom (KCS and UP) have commercial access to all the shippers on the line, by a third railroad (BNSF) that has been granted trackage rights and has been utilizing reciprocal switching at a pre-determined fee for an extended period.

Prof. Carey argues that this trackage rights compensation should equal the value of access by BNSF to the Rosebluff Lead, and that the value should be no less

⁴⁵ OECD Guidelines at 74-75.

than what KCS would voluntarily have agreed to in a one-on-one negotiation with BNSF. Prof. Carey contends that this market-based value can be divined by looking at switching rates elsewhere. Prof. Carey treats reciprocal switching provided in selected other locations as a comparable product to the trackage rights at issue here for KCS. Prof. Carey does recognize that, at a minimum, the cost of providing switching service must be subtracted from the reciprocal switching rates to calculate the “access fee” she wishes to assign to the above trackage rights.

The exercise proposed by Prof. Carey is akin to valuing oranges based on the price of apples. The “product” in this proceeding for which compensation is to be determined is fundamentally not comparable to the products on which potentially arm’s-length prices are gathered. As has been frequently emphasized, this proceeding entails an unusual or unique circumstance—an “entrant” (BNSF) that has been granted trackage rights to serve shippers directly that BNSF already can serve via reciprocal switch, over track co-owned by two incumbent landlord railroads, one of which (UP) has agreed to the trackage rights rate it will accept. Reciprocal switching rights provided to one or more railroads by a railroad that exclusively serves a shipper are not the same product as the trackage rights rates in this proceeding. The switching rights in other locations are not the same as those at issue in this proceeding and should not be assumed to have comparable market values and prices, even if switching costs were properly adjusted, and market conditions were otherwise comparable.

C. THE PRESUMPTION THAT THE OBSERVED RECIPROCAL SWITCH RATES ARE ARM’S-LENGTH PRICES IS NOT WARRANTED

The observed rates for switching or trackage rights cannot reasonably be presumed to reflect arm’s-length prices, even if they are the result of an arm’s-length transaction. The one true, third-party comparable to the Rosebluff Lead trackage rights on which KCS seeks compensation is the rate agreed to by its co-owner (UP) for trackage rights provided to BNSF on the Lead. While arrived at in an arm’s-length transaction, it is reasonable to doubt that the rate is an arm’s-length *price*

reflective of the specific market value, given the numerous other considerations involved in the transaction in which this price was set.⁴⁶

But similar issues regarding the distinction between arm's-length transactions and arm's-length prices likely arise with respect to the switching rates analyzed by Prof. Carey. Typically, the switching rates she employs involve shippers served by a single railroad located in a switching district. These districts often have long histories. Switching rights often predate the post-Staggers era of differential pricing, and the rates often involve a small number of railroads providing *reciprocal* rights to serve each other's shippers within the switching district and across other districts.

Prof. Carey looks at nearly {{ }} rates that cover seven railroads in fourteen regions. Thus, these {{ }} rates reflect numerous repeated interactions among railroads within and across regions. Railroads have opportunities to both provide switching for other railroads and obtain switching from other railroads. Under these circumstances, it is not reasonable to assume that the observed switching rates are prices established between parties with opposing interests with respect to the price applicable to *that* shipper. There is no basis for assuming that the rates are independent of considerations with respect to other shippers, other railroads, and other locations. For example, railroads may choose to each set reciprocal shipping rates based on costs rather than the negotiation over access fee contemplated by Prof. Carey. (As explained by Mr. Baranowski, cost-based switching rates are ubiquitous.)⁴⁷ In some cases the same pattern of identical switching rates between pairs of railroads repeat across multiple regions identified by Prof. Carey.⁴⁸ In light of these connected, repeated and potentially offsetting interactions between railroads,

⁴⁶ KCS's Opening Statement and Evidence on Compensation Concerning BNSF's Use of the Rosebluff Lead, FD 32760 (Sub-No. 46), at 12, n. 20 (Jan. 26, 2021)

⁴⁷ Verified Statement of Michael R. Baranowski at 32-33, 38-39 and 42-43 (Apr. 12, 2021) ("Baranowski Reply V.S.").

⁴⁸ See Reishus Reply Workpapers.

there is no basis for presuming that the observed switching rate is the market-based “access fee” contemplated by Prof. Carey.

D. THE FAILURE TO ADJUST FOR MATERIAL DIFFERENCES MAKES THE USE OF “COMPARABLE” SWITCHING RATES UNRELIABLE AND UNUSABLE

Prof. Carey averages the switching rates she has collected as the basis for the access fee she calculates.⁴⁹ In addition to the failings identified above, she has made no effort to adjust for the material differences. Prof. Carey states that she has identified a “comparable set of current real-world market-based reciprocal switching rates” that she has selected from “geographic areas with similar economic conditions to the Lake Charles area, including larger railroad carriers, similar types of products, and access to a robust set of customers, among other factors.”⁵⁰ The factors and selection criteria are opaque, and as discussed by Mr. Baranowski, appear to involve decisions that may have biased her results.⁵¹

It is apparent that there has been no attempt to adjust for any of the factors that affect the switching rates or to make them comparable. Prof. Carey makes no adjustment to account for differences in the market circumstances, timing, demand, industry, shipper volume, or cost to provide switching service among the various rates she collected that would be necessary, if possible, to make them comparable to the product she is attempting to value. Prices struck in a market typically display some variation, but the variation in switching rates Prof. Carey identifies is inconsistent with any reasonable inferences that these prices reflect similar market forces. As shown in Figure 1, the highest regional average rate across the {{

⁴⁹ I note that different methods of averaging—e.g., by shipper, by location, by railroad and location—generate economically significant differences in the resulting “average” switching cost. This is further evidence that Prof. Carey has failed to identify actually comparable transactions or make the necessary adjustments for them to have prices that are comparable.

⁵⁰ Carey V.S. at 35.

⁵¹ Baranowski Reply V.S. at 35-38.

}} of the lowest average rate.⁵² Comparing individual switching rates, the highest individual shipper rate is {{ }} that of the lowest. Such results are inconsistent with the rates reflecting comparable market conditions. The results indicate that there are material differences affecting the observed price for which no adjustment has or can be made. Failure to account for these differences, regardless of how many individual prices are included in the calculations, renders the comparable analysis unreliable.

Figure 1
Reciprocal Switching Rate Variability {{

}}

Note: Rates in \$\$/Carload, All Regions Average is average of the region averages.

Source: Carey Reciprocal Switching Rates Workpapers; Reishus Workpapers.

The most blatant failure of Prof. Carey’s method to determine comparable rates is the attempt to adjust the switching rates for switching costs to determine the “access fee.” The costs of providing switching service are undoubtedly a major or the

⁵² {{

}}

most important consideration in establishing switching fees.⁵³ These costs will typically vary by location given different traffic densities, congestion and location of shippers, railroad, and switching partner (based, for example, on the cost or difficulty of reaching and servicing the yard or interchange track relevant for each interchange partner). These costs can also vary within a switching district or region, because, for instance, some districts, such as Chicago, include numerous shipper locations scattered across a large and congested switching district.

Prof. Carey's cost adjustment to calculate the Lake Charles "market-based access fee" starkly violates the principles for valid comparable valuation. This alone renders her calculation unusable. In calculating the access fee for Lake Charles, Prof. Carey subtracts her estimate of the costs of switching *at Lake Charles* from the switching rates determined at *other* locations. This does not reflect an attempt to accurately calculate the access fee she claims is identifiable from switching rates. The access fee associated with switching, in Prof. Carey's framework, represents the value of access above and beyond the direct (switching) costs of providing that access. But calculating that fee at other locations requires determining the economically relevant switching costs at these other locations. By instead subtracting the estimated Lake Charles switching fee, Prof. Carey implicitly assumes that the switching costs at the other, purportedly comparable locations are the same as those she has determined for Lake Charles⁵⁴. There is no support or basis for such an assumption; this unfounded supposition alone makes her estimate of the "access fee" unreliable and unusable.

⁵³ See Baranowski Reply V.S. at 32-33 and 42-43.

⁵⁴ The uselessness of the approach is clear when applied to the switching rates included in her analysis for Lake Charles. The rates charged are cost-based, pass-through rates with costs substantially different than estimated in her calculation of the "access fee." See Baranowski Reply V.S. at 39 and Table 8.



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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

CSX Corporation and CSX Transportation, Inc.
Before the Surface Transportation Board. Finance Docket No. 36472. CSX Corporation and CSX Transportation, Inc., et al.—Control and Merger—Pan Am Systems, Inc., Pan Am Railways, Inc., Boston and Maine Corporation, Maine Central Railroad Company, Northern Railroad, Pan Am Southern LLC, Portland Terminal Company, Springfield Terminal Railway Company, Stony Brook Railroad Company, and Vermont & Massachusetts Railroad Company. Verified Statement, February 25, 2021.

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Government of Canada
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Association of American Railroads
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Government of Canada

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Governments of British Columbia and Government of Canada

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Government of Canada

Before the International Trade Administration, Department of Commerce, In the Matter of Certain Softwood Lumber Products from Canada (A-122-857). Economic Analysis Regarding Claims of Particular Market Situation for Canadian Softwood Lumber By-Products. Expert Witness Statement, July 20, 2017.

Association of Oil Pipe Lines

Before the Federal Energy Regulatory Commission. Docket No. RM17-1-000 Revisions to Indexing Policies and Page 700 of FERC Form No. 6. Declaration, January 19, 2017.

BNSF Railway Company

Before the Surface Transportation Board. Finance Docket No. 32760 (Sub-No. 46) BNSF Railway Company -- Terminal Trackage Rights --Kansas City Southern Railway Company and Union Pacific Railroad Company. Verified Statement, October 23, 2015.

Association of American Railroads

Petition of the Association of American Railroads to Institute a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Market Dominance Determinations for Coal Transported to Utility Generation Facilities; Surface Transportation Board Ex Parte No. 717. Verified Statement, November 14, 2012.

Modis

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Government of Canada

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Government of Canada

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Government of Canada

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.

Dynegy

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Independent Energy Producers Association of California

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First Energy

Before the Pennsylvania Public Utility Commission, Petition of Metropolitan Edison Company for Approval of a Rate Transition Plan (Metropolitan Edison Company Docket No. R-00061366) and Petition of Pennsylvania Electric Company for Approval of a Rate Transition Plan (Pennsylvania Electric Company Docket No. R-00061367), Direct Testimony of David A. Reishus, April 10, 2006.

ExpressTrak LLC

In the United States District Court For the District of Columbia, Case No. 02- CV-1773, National Railroad Passenger Corporation v. ExpressTrak, L.L.C., Expert Report, Dated January 3, 2006; revised April 7, 2006. Deposition testimony, March 24 and April 26, 2006.

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.

Multiple Associations of Energy Producers

Before the Public Utilities Commission of the State of California, Rulemakings R.04-04-025 – R.04-04-003, “Prepared Rebuttal Testimony,” October 28, 2005 (with A. Joseph Cavicchi). Oral testimony, January 23 and 24, 2006.

PPL Corporation

United States of America, Before the Federal Energy Regulatory Commission, Docket No. ER05-1416-000, “Affidavit of A. Joseph Cavicchi, Joseph P. Kalt, Ph.D., and David A. Reishus, Ph.D. on Behalf of the PPL Parties,” October 19, 2005.

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Dynegy Inc.

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Duke Energy Trading and Marketing LLC

United States of America, Before the Federal Energy Regulatory Commission, San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange; Investigation of Practices of the California Independent System Operator and the California Power Exchange. Prepared Rebuttal Testimony (with Patrick Wang), March 20, 2003.

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

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California Power Exchange; Investigation of Practices of the California Independent System Operator and the California Power Exchange. Affidavit (with Patrick Wang), October 15, 2002 (revised November 12, 2002).

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

Government of Canada

Assisted in developing presentations, responses and submissions before WTO dispute settlement panel regarding countervailing duties.

Class 1 Railroad

Analyzed competitive issues in arbitration regarding implementation of access agreements.

Major Coal Producers

Analyzed end-market competitive alternatives and pricing behaviors.

Management Company

Analyzed lost profits and other damages arising from contractual dispute in Asian gaming.

Large Integrated Electric Utility

Analyzed cost and rate impacts related to shut down of nuclear plant.

International Oil Company

Analyzed cost structure for major deepwater crude oil exploration and production investment.

Independent Transmission Company

Analyzed risk and financial investment incentives for stand-alone transmission project.

Large Solar Power Provider

Assisted in data analysis of market operations and outcomes.

Merchant Power Generator

Analyzed economic, regulatory and financial issues related to proposed new pipeline investment and novel regulatory regime.

Supermajor Oil Company

Assist in analysis of competition and proposed conditions related to divestiture of regional midstream petroleum product assets.

Electric and Gas Utility Holding Companies

Analyzed potential competitive issues arising from multiple mergers between large electric, gas utility, and interstate gas pipeline companies for use before Federal competition authorities and state regulatory agencies.

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.

Dean Foods

Analyzed claims of price fixing and statistical model of antitrust damages for use in class certification.

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 Companies

Analyzed alternative approaches for identifying, measuring and managing price and fiscal risks in long-term contracts in connection with multiple billion-dollar-plus projects in in Africa and Middle East.

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.

Supermajor Oil Company

Performed functional analysis of sources of global value creation for international tax treatment.

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.

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.

"Outside Directorships, the Reputation of Managers, and Corporate Performance" (with S. Kaplan), *Journal of Financial Economics*, Vol. 27, No. 2, September 1990.

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

"The Effects of Taxation on the Merger Decision" (with A. Auerbach), in A. Auerbach, ed., *Corporate Takeovers: Causes and Consequences*, University of Chicago Press, 1988.

"Taxes and the Merger Decision" (with A. Auerbach), in J. Coffee, L. Lowenstein, and S. Rose-Ackerman, eds., *Knights, Raiders and Targets*, Oxford University Press, 1988.

"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.

Membership in American Economic Association.

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

HONORS AND AWARDS

National Science Foundation Fellowship, 1981-1985.

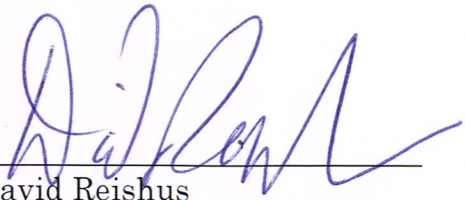
International Foundation of Employee Benefit Plans, Graduate Research Fellowship, 1984.

Phi Beta Kappa, 1979.

Public Version

VERIFICATION

I, David 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.



David Reishus

Executed: April 12, 2021

CERTIFICATE OF SERVICE

I certify that I have, on April 12, 2021, served copies of BNSF's Reply to KCS's and UP's Opening Statements on Compensation (BNSF-146) upon all parties of record in this proceeding, by electronic mail.



Tara Woods

Attorney for BNSF Railway Company