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April 12, 2021

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VIA E-FILING

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

ENTERED
Office of Proceedings
April 12, 2021
Part of
Public Record

Re: BNSF Railway Company – Terminal Trackage Rights – The Kansas City Southern
Railway Company And Union Pacific Railroad Company,
FD 32760 (Sub-No. 46)

Dear Ms. Brown:

In response to the Surface Transportation Board's Decision Nos. 8 and 9, The Kansas City Southern Railway Company ("KCS") hereby files, via e-filing, KCS's Reply Statement and Evidence on Compensation Concerning BNSF's Use of the Rosebluff Lead. KCS's response is being filed in both a "Public Version" and a "Highly Confidential" version. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com. If I am unavailable, you may contact my associate, Crystal M. Zorbaugh, by telephone at (202) 663-7831 or by e-mail at czorbaugh@bakerandmiller.com.

Sincerely,

/s/ William A. Mullins

William A. Mullins

Enclosures

cc: Parties of Record

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 32760 (SUB-NO. 46)

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

**KCS'S REPLY STATEMENT AND EVIDENCE ON COMPENSATION CONCERNING
BNSF'S USE OF THE ROSEBLUFF LEAD**

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April 12, 2021

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BEFORE THE

SURFACE TRANSPORTATION BOARD

FD 32760 (SUB-NO. 46)

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

**KCS'S REPLY STATEMENT AND EVIDENCE ON COMPENSATION CONCERNING
BNSF'S USE OF THE ROSEBLUFF LEAD**

SUMMARY¹

BNSF should pay a market-based rate for use of the jointly-owned Rosebluff Lead.

Anything less does not meet the statutory requirement for the Board to set compensation based on “the principle controlling compensation in condemnation proceedings” – a market value principle.

BNSF is not entitled to a discount because the property is owned jointly by two owners, nor because of a deal made in 1996 from which UP paved the way for its merger with SP and BNSF got access to billions of dollars of traffic. The “Prescribed Fee” was negotiated between BNSF and UP, not set under Section 11102(a), as is required in this proceeding. Moreover, the Board long ago determined that the “Merger Fee” – which UP and BNSF escalated slightly to obtain the “Prescribed Fee” - is well less even than SSW Compensation.²

¹ KCS refers the Board to the Background established in the Board’s July 5, 2016 decision ("Decision No. 3") for an expanded procedural history of the proceeding. KCS also adopts the various short citations and abbreviations that it has previously used throughout this proceeding.

² “UP/SP has explained that the compensation terms agreed to with BNSF, which we have found to be lower than what we would impose under SSW Compensation, were a component of a far

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BNSF will not be competitively disadvantaged by having to pay the market-based fee. BNSF already pays UP nearly that amount in haulage and access fees and has competed successfully to attract major portions of Rosebluff Lead shippers' traffic. BNSF's proposal that it pay even less than the rate which has already allowed it to garner large portions of the traffic on the Lead, would simply perpetuate a subsidy of BNSF's operations by UP and KCS. There is no legal or logical reason to compel KCS to subsidize BNSF's use of KCS-owned property to add to the competitive advantage BNSF already has due to its much larger network.

And even if a market-based rate left BNSF competitively disadvantaged vis-à-vis its current subsidized competitive posture, that is irrelevant under Section 11102(a). Section 11102(a) requires compensation to be set based on the value of the property. The value of a business property is its ability to generate revenue, making the market-based rate proposed by KCS the sole appropriate measure of the compensation BNSF should pay for use of the Rosebluff Lead.

There are many other flaws and failures of BNSF's argument, as detailed herein. The bottom line is that the statute requires BNSF to pay for use of the Rosebluff Lead under condemnation principles. Those principles require a market-based fee.

BACKGROUND

As the Board is aware, in January 2018, BNSF filed "BNSF's Petition to Establish Conditions of Use and Compensation ("BNSF-132")" to "directly serve a LyondellBasell facility at West Lake Charles, Louisiana, over the Rosebluff Lead and related tracks via the terminal trackage rights granted by the Board to BNSF in Decision No. 3." See BNSF-132 at 1.³ On February 21,

broader arrangement through which UP/SP received other rights in return." F.D. No. 32760, Dec. No. 47, 1996 WL 512020 at *15.

³ Decision No. 3, which granted BNSF's terminal trackage rights application, properly recognized "[a]s a rail carrier owner of the terminal facilities under § 11102(a), KCS must have

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2020, the Board approved BNSF's operating plan to serve LyondellBasell ("Lyondell") and cleared BNSF to begin operating without waiting to resolve the compensation issue as soon as BNSF secured private operating rights necessary to provide service. See UP/SP (FD 32760) (Sub-No. 46), Decision No. 8 (S.T.B. served Feb. 21, 2020).

ARGUMENT

I. Contrary to BNSF's Arguments, the "Prescribed Fee" Is Not Adequate Compensation and Requiring BNSF to Pay Market-Based-Compensation Will Not Inhibit Competition.

UP has been compensated to a certain degree for BNSF's access, through BNSF's payment of the "Prescribed Fee", but KCS has received none of that. Moreover, as demonstrated throughout this proceeding, BNSF's below-market-rate reciprocal switch access via UP allowed BNSF to gain significant market share, largely at KCS's expense.⁴ The evidentiary record shows that at least until mid to late 2020, BNSF had about half of the linehaul business from shippers on the Rosebluff Lead.⁵ Of course, BNSF gained this significant market share without having direct

a role in establishing compensation for use of those facilities." See UP/SP FD 32760 (Sub-No. 46), Decision No. 3 at 20.

⁴ It has been clear throughout this proceeding that Lake Charles traffic has been very profitable for BNSF. As documents produced in discovery show, [[REDACTED]] justified BNSF investing [REDACTED] See BNSF-HC-000007

Additionally, as demonstrated by Counsel's Exhibit 6 from May 2017 to April 2018, BNSF captured [[REDACTED]] or [[REDACTED]] of the carloads that moved throughout Zone 2 by providing service via reciprocal switch. Due to fierce competition, KCS only handled [REDACTED] or [REDACTED] and UP handled the remaining [REDACTED] or [REDACTED] of the carloads.

BNSF pursued direct access so it could go after [REDACTED]
[REDACTED]. See BNSF-HC-000007

⁵ In testimony in 2015, KCS witnesses Drs. Reynolds and Neels showed that over a nearly 18-year period, BNSF's market share of Lake Charles Area traffic steadily grew, even before BNSF invested in Lacassine Yard to support its operations in the area. BNSF had a substantial market share of both inbound and outbound traffic. KCS August 24, 2015 Reply at 77-93.

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terminal trackage rights and without having to pay any contribution towards KCS's seven decades' worth of capital investment into the region and without paying KCS any compensation for its access on the KCS and UP jointly owned facilities.⁶ Even if KCS had been compensated, however, BNSF's payments are woefully short of adequate compensation for reciprocal switch access and nowhere near appropriate compensation for direct access.

If BNSF has its way, its subsidized operations will continue into perpetuity, it would continue to pay compensation pursuant to the "Prescribed Fee",⁷ and UP [w]ould ... be responsible for any compensation due to KCS⁸ ... beyond the "Prescribed Fee".⁹

⁶ Operations over the jointly-owned Rosebluff Lead are governed by a series of Joint Facility Agreements between KCS and UP's predecessor. The Joint Facility Agreements are attached as Exhibit A.

⁷ The "Prescribed Fee" was not established "under the principle controlling compensation" as required by Section 11102. As BNSF admitted in its opening statement, the "Prescribed Fee" referred to by BNSF ... is the Merger Fee set by Section 9(a), as escalated by Section 12, of the Restated & Amended BNSF Agreement, and as modified by BNSF and UP in Section 7 of the 50/50 Line Agreement (as amended by Sections 1 and 4 of the 2003 Letter Agreement). See BNSF Suppl. 6, Feb. 4, 2019 (BNSF-139). See BNSF-144 at 6.

⁸ KCS has been forced to subsidize BNSF by switching BNSF traffic in Zone 1 essentially at cost because UP does not tell KCS whether the traffic that KCS switches is traffic for UP, with which KCS shares ownership and operational cost and responsibility on the Rosebluff Lead, or BNSF traffic. KCS has also subsidized BNSF's competition by collecting for BNSF's use of Zone 2 only a share of the direct costs of maintaining the facility, with no compensation for BNSF's use of KCS's investment in the property over the past 70+ years.

The Board should fully understand that forcing KCS (and UP) to subsidize BNSF will eventually inhibit, not promote, competition. KCS and UP will no longer have any incentive to invest in infrastructure when they are not able to recoup that investment.

⁹ See BNSF Opening Statement at 21-22 (Dec. 31, 2014); BNSF Rebuttal at 33-34 (Oct. 23, 2015), BNSF-132 at 1 at 15 (January 12, 2018), BNSF's Rebuttal to the Replies of the Kansas City Southern Railway Company and Union Pacific Railroad Company to BNSF's Petition to Establish Conditions of Use and Compensation (Filed July 16, 2018) ("BNSF-138"), BNSF's Compensation Information (Filed February 4, 2019) ("BNSF-139"), BNSF's Opening Statement and Evidence on Compensation (Filed January 26, 2021) ("BNSF-144").

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BNSF's arguments that the compensation it should pay for direct access was established in the UP/SP merger are unsupportable. Not a single decision in the UP/SP merger stated that the "Prescribed Fee" was intended to govern direct access and cover compensation due to KCS for BNSF's direct access over the jointly-owned Rosebluff Lead. Moreover, it would have been impossible for the Board to set compensation because BNSF had yet to elect direct service pursuant to UP/SP Decision No. 44, 1 S.T.B. at 247 n.15, and future BNSF direct access service was speculative at best.

The "Prescribed Fee" was not established "under the principle controlling compensation" required in Section 11102. The "Prescribed Fee" was not even SSW Compensation.

UP/SP has explained that the compensation terms agreed to with BNSF, which we have found to be lower than what we would impose under SSW Compensation, were a component of a far broader arrangement through which UP/SP received other rights in return. [T]hese other rights ... confer significant value to UP/SP.

FN33: Among the benefits UP/SP received from BNSF as components of this arrangement were: (1) trackage rights between Chemult and Bend; (2) trackage rights between Mojave and Barstow; (3) a proportional rate agreement for traffic moving over the Portland gateway; (4) improved access to the ports of Seattle, Portland, and Superior; and (5) new connections between UP/SP and BNSF in Illinois to permit more efficient access to UP/SP's facilities in Chicago.

See UP/SP, Decision No. 47, 1 S.T.B. 591, 1996 STB LEXIS 264, *612 -*614 (S.T.B. served Sept. 9, 1996) at *615.

BNSF also claims that the specific fee governing BNSF movements over the Rosebluff Lead derives from the UP/BNSF 50/50 Line Agreement. BNSF claims that under the 50/50 Line Agreement, UP granted BNSF trackage rights on former SP spurs and branches connecting to the 50/50 Line, including the Rosebluff Lead, and slightly modified the Merger Fee for BNSF movements on the 50/50 Line and the relevant spurs and branches. See BNSF-144 at 5-6. By the time UP and BNSF entered into the 50/50 Line agreement, BNSF was clearly aware of KCS's

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ownership of the Rosebluff Lead and other nearby trackage. Though it's doubtful that UP and BNSF intended the 50/50 Line agreement to apply to the Rosebluff Lead at all,¹⁰ their failure to include KCS in the discussion of the fee and to get KCS's concurrence nullifies application of the fee here under the terms of Decision No. 63.¹¹ This is yet another reason why the "Prescribed Fee" is not adequate compensation for the trackage rights BNSF seeks.

The record demonstrates that BNSF's access at below-market rates for over 25 years allowed BNSF to obtain a significant market share without providing any return – market-based or otherwise - on KCS's capital investment in the Lead. Now, BNSF seeks to further widen its competitive advantage by locking in a subsidized access rate that does not meet the applicable statutory requirements of Section 11102(a). Under no circumstances is the "Prescribed Fee" adequate compensation for the direct access BNSF now seeks.¹²

A. BNSF, not UP, is responsible for compensating KCS for the access it seeks

Throughout this proceeding, BNSF has repeatedly ignored the Board's express language in Decision No. 3 that "[w]hile the Board would agree that the question of compensation had been settled by the BNSF and CMA Agreements if UP was the only owner of the Rosebluff Lead, the particular language in those merger conditions does not specifically address the existence of a

¹⁰ "BNSF does not rely on the 50/50 Line Agreement as the basis for the terminal trackage rights that it requests in its Application." BNSF-126, filed Dec. 2, 2015.

¹¹ "[I]f the parties (**KCS, BNSF, and UP/SP**) are not able to come to an agreement, any differences in interpretation of the four joint facility agreements may be submitted to arbitration under the terms of those agreements.^[footnote omitted] **If the parties (KCS, BNSF, and UP/SP) are unable to agree ... BNSF may return to the Board to seek approval of a terminal trackage rights application under new 49 U.S.C. 11102(a).**" Decision No. 63, 1996 WL 691928 at *5.

¹² BNSF knew the "Prescribed Fee" was not applicable to the Rosebluff Lead, and that if it wished trackage rights access, it would have to apply for trackage rights and either agree with KCS on an appropriate fee or compensate KCS for such rights under Section 11102(a). Decision No. 63, FD 32760, slip op. at 9, n 28 (S.T.B. served Dec. 4, 1996).

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third-party joint owner of the line.” Time and again, BNSF has ignored this holding by the Board and instead has chosen to play the victim card. All the arguments made by BNSF share the common theme of either maintaining the status quo (meaning KCS gets no compensation and/or BNSF pays only the “Prescribed Fee”) or punting responsibility for paying KCS to UP. Yet, none of the many arguments offered by BNSF are legally sound, justified, or warrant adopting BNSF’s compensation proposal.

In numerous filings between December 2014 until the present, BNSF has stated it should only have to pay the “Prescribed Fee”, and UP should be responsible for any compensation due to KCS beyond the “Prescribed Fee”.¹³ This argument completely fails to recognize several critical considerations, which collectively demonstrate that BNSF clearly is not entitled to extend subsidized direct access to Rosebluff Lead shippers at KCS’s expense.

For starters, BNSF – a multi-billion-dollar company - is a sophisticated party,¹⁴ responsible for deciding whether the agreements it enters get it what it expects. As a sophisticated party to a contract, BNSF bore the responsibility to do due diligence on whether UP actually held the rights that BNSF allegedly thought it was getting during UP/SP settlement negotiations. Sophisticated parties are required to exercise reasonable diligence, including acquainting themselves with “readily accessible and publicly available information.” Hooks v. Samson Lone Star, Ltd. P'ship, 457 S.W.3d 52, 57 (Tex. 2015); citing Shell Oil Co. v. Ross, 356 S.W.3d 924, 929-30 (Tex. 2011) (holding that Respondents did not exercise reasonable diligence

¹³ See FN 8.

¹⁴ See Alea London Ltd. v. Howard, 2008 U.S. Dist. LEXIS 19134, *10, 2008 WL 693799, citing First St. Underwriters Agency of New Engl. Reins. Corp. v. Travelers Ins. Co., 803 F.2d 1308, 1311-12 (3d Cir. 1986) (Noting that courts have applied the sophisticated party rule in contract interpretation to "large corporations, advised by counsel and having equal bargaining power").

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because they did not review publicly available price indexes and land records). See also BP Am. Prod. Co. v. Marshall, 342 S.W.3d 59, 68-69 (Tex. 2011) (concluding that a sophisticated lessor did not exercise reasonable due diligence as he could have discovered BP's fraud by accessing publicly available information from Railroad Commission records). BNSF had a duty of diligence to determine whether UP owned or was authorized to grant access to the Rosebluff Lead. See UST Private Equity Inv'r Fund, Inc. v. Salomon Smith Barney, 733 N.Y.S.2d 385, 386 ("As a matter of law, a sophisticated [party] cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that [party] failed to make use of the means of verification that were available to it....") Had BNSF simply searched for the deed, which was recorded in 1947, BNSF would have easily discovered that the Rosebluff Lead was jointly owned by KCS and UP's predecessors.¹⁵ That BNSF obviously failed to even do the most basic of due diligence – or went ahead with the settlement knowing that UP was not the sole owner of the Rosebluff Lead – demonstrates that BNSF's claims that it should pay only the "Prescribed Fee" and UP should compensate KCS because BNSF was somehow an innocent victim is a ruse by which BNSF attempts to avoid its responsibility to know what the contracts that it signs mean.¹⁶

¹⁵ The 1947 deed for the property says that the government conveyed to T&NO and KCS "jointly hereinafter called "Purchaser" (page 1) and then "this conveyance transfers and assigns to the Purchase any and all transferrable rights, franchises, licenses and permits which the Vendor may have obtained...The above-described property, rights of way, servitudes, and easements are conveyed to the Purchaser..." (page 12) and "TO HAVE AND TO HOLD: The said property unto the said Purchaser and the Purchaser's successors and assigns forever." (page 13). The purchase price was paid by "the Purchaser" and "the Purchaser certifies that it has begun common carrier operation of said trackage." (page 14). Moreover, both attached corporate resolutions (pages 18 – 22) say that each company was purchasing "jointly with" the other and that they were paying the purchase price "jointly" with the other. See Exhibit B.

¹⁶ See BNSF-132. BNSF claimed it was "UP that ha[d] the obligation under the BNSF-UP agreements and the Board's merger conditions to provide BNSF with direct access to Lake Charles area shippers via direct train service... Therefore, UP should be responsible for any Board-imposed compensation that is greater than the "Prescribed Fee."

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The very statute invoked by BNSF **requires** that “[a]s a rail carrier owner of the terminal facilities under § 11102(a), KCS must have a role in establishing compensation for use of those facilities.” See UP/SP FD 32760 (Sub-No. 46) Decision No. 3 at 20. Again, BNSF’s arguments simply disregard the statute.

The Board should not accept BNSF’s argument. KCS was not involved in negotiating the “Prescribed Fee”. The “Prescribed Fee”, as explained by BNSF¹⁷ is a slight variation of the BNSF trackage rights fee negotiated in the UP/SP merger. That fee was negotiated as part of the global settlement between UP and BNSF, which reflected the give and take of various rights and obligations. See Footnote 6. Applying the “Prescribed Fee” as compensation to KCS would violate the Board’s order in Decision No. 3 in this case – and Decision No. 63 in the UP/SP merger, to say nothing of Section 11102(a) – because KCS, as an owner of the Rosebluff Lead, was not a party to establishing that fee.

Moreover, based on the statute since BNSF is the party seeking access, BNSF alone should be responsible for paying compensation to the owner[s], in this case, UP and KCS, for the terminal facility access that it seeks. BNSF filed its application relying on Section 11102(a) and, as the party with the burden of persuasion, must meet the statute’s requirements to obtain the access it seeks.

See BNSF-144. “The Board should thus require UP to accept responsibility for any shortfall between the “Prescribed Fee” and any terminal trackage rights compensation owed to KCS. Knowing that KCS objected to the grant of Rosebluff Lead trackage rights to BNSF, UP **voluntarily** chose to proceed with the UP/SP merger and to commit to provide BNSF with direct service trackage rights to the Rosebluff Lead. BNSF-144 at 9-10. Both of these arguments conveniently ignore the fact that BNSF also bore the obligation to undertake due diligence to determine whether UP had the rights it promised.

¹⁷ BNSF Opening Statement and Evidence on Compensation, BNSF-144 (filed Jan. 26, 2021) at 6.

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Lastly, as explained in Section (III)(a)(i), BNSF's position on the ownership of the Rosebluff Lead has likewise evolved through the various stages of this proceeding to suit BNSF's convenience at the time. For years, BNSF acted as if UP was the only owner of the Rosebluff Lead and UP had the right to give BNSF direct access. From BNSF's January 26, 2021 filing, however, it appears BNSF has had a change of heart, contending now that while KCS is a co-owner of the Lead, BNSF will only use UP's "portion" of the Lead.

As explained in (III)(a)(i), BNSF's new theory is wrong, and its argument that KCS and UP divided their undivided ownership interest is completely without merit.¹⁸ KCS and UP have a joint undivided interest in the entire Rosebluff Lead, and an operating agreement established by KCS and UP to coordinate Yard and Lead trackage operation to better serve the needs of customers does not in any way change the fact that UP and KCS have joint, undivided ownership of the property BNSF desires to use.

The Board held that "[a]s a rail carrier owner of the terminal facilities under § 11102(a), KCS must have a role in establishing compensation for use of those facilities." See UP/SP FD 32760 (Sub-No. 46) Decision No. 3 at 20. At no point was KCS involved in establishing the "Prescribed Fee". As the party seeking access, BNSF alone is responsible for paying compensation to the owner[s], in this case, UP and KCS, for use of the terminal facilities that BNSF seeks to use. Nothing BNSF has shown could justify departing from the statutory compensation requirements of 49 U.S.C. §11102, the statute under which BNSF filed its application. Taken collectively the

¹⁸ If it difficult to understand completely BNSF's exact view on KCS and UP's ownership of the Rosebluff Lead. In BNSF's most recent filing on page 1 BNSF properly recognizes that the Rosebluff Lead is "jointly owned by" UP and KCS, but for financial purposes BNSF asserts that the parties have divided one-half interests. See BNSF-144 at 1 and 19. BNSF's arguments vary greatly, but all share the common thread of maximizing BNSF's revenues.

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above considerations demonstrate unequivocally that BNSF is responsible for compensating KCS for the access BNSF seeks.

B. BNSF has not proven that it will be unable to compete if it is required to pay adequate compensation for access to the Rosebluff Lead

BNSF argues that if the Board does not agree that the “Prescribed Fee” is all that is required, the Board should order BNSF to pay UP the “Prescribed Fee” and require UP to pay KCS any amount due to KCS under the compensation terms established by the Board that is greater than the “Prescribed Fee”. BNSF contends that requiring BNSF to pay some higher rate than the “Prescribed Fee” would risk making BNSF uncompetitive and jeopardize the effectiveness of the Board’s merger conditions. Tellingly, none of BNSF’s 10 filings making this claim prove BNSF’s assertion.

By giving BNSF direct access to Lyondell in Zone 2 during a 4-hour exclusive window, the Board gave BNSF greater access and operational flexibilities than KCS - a joint owner of Zone 2 - has. To avoid congestion by two carriers operating in Zones 1 and 2, KCS and UP divided operating responsibilities, and restricted themselves to operating only unit trains into the Zone that the other operates. Moreover, the Board’s decision allows BNSF to avoid operating and maintenance responsibilities on the Lead, making UP and KCS perform those functions for BNSF’s benefit. In short, the Board used its regulatory powers to grant KCS's larger competitor preferential access over KCS's own property. This competitive advantage will remain irrespective of the compensation established.

These competitive advantages that the Board has awarded BNSF – greater access and avoidance of operating and maintenance responsibilities - will advantage BNSF vis-à-vis KCS and UP in competing for the Rosebluff Lead’s traffic. If the Board also orders the “Prescribed Fee” – a fee below even SSW Compensation - as appropriate compensation, BNSF will also have a

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tremendous cost advantage over KCS and UP in using the KCS-UP joint property.

As of 2019, BNSF had a significant market share and handled the majority of traffic. BNSF accomplished this by paying \$315.92 per round trip as of February 2019. See BNSF-139 at 5 (S.T.B. served Feb. 4, 2019). Under KCS's compensation proposal, BNSF would pay \$358.04 per car (includes loaded car and empty return car movement costs) going forward; its total costs would be \$381.89 once its variable costs are included. See Neels WP ((Compensation via Reciprocal Switch vs. Direct Service). To arrive at KCS's proposed compensation, KCS added the increase in BNSF URCS variable costs in the amount of \$23.85, the KCS Market Based Fee of \$350.04, and the Prescribed Payment Fee to UP going forward in the amount of \$8.00. This would be offset by the elimination of the haulage/switching fee paid to BNSF, which as of 2021, Dr. Neels estimates to be \$316.23. This means that should BNSF be ordered to pay market-based compensation, its operating cost would increase by \$65.66 per car, a modest additional cost for the advantages BNSF would obtain and the burdens it would impose by direct access. On the other hand, if BNSF's compensation proposal is accepted it would only pay \$8.00 (the "Prescribed Fee") to UP, and UP would pay KCS for BNSF's presence on the Rosebluff Lead (put another way KCS/BNSF would continue to subsidize BNSF's operations into perpetuity). Over time, the Board allowing BNSF to completely avoid contributing to the "true cost" of its operations would result in less money being able to be reinvested in the Rosebluff Lead to the detriment of all Rosebluff Lead stakeholders.

Contrary to BNSF's claims that "the sky is falling," requiring BNSF to pay market-based compensation will not harm BNSF's competitive position. On the other hand, applying just the "Prescribed Fee" or SSW Compensation will widen BNSF's competitive advantage and allow it to increase its profitability while harming UP and KCS, and eviscerating both carriers' incentive to

invest in infrastructure given that the benefit of their investment would accrue to their competitor.

II. The Board Should Reject BNSF's Attempts to Establish One-Size-Fits-All Compensation To Serve All Rosebluff Lead Shippers Based On an Operating Plan to Serve Lyondell

Since 1996, BNSF has taken short cut after short cut¹⁹ and is seeking to do so again here by petitioning the Board to establish an exemption-like process²⁰ for BNSF to demand access to Rosebluff Lead shippers and asking the Board to establish “One-Size-Fits-All” compensation for BNSF to serve all future shippers based on BNSF’s operating plan to service Lyondell. BNSF’s justification for both its exemption-like process and for the Board to establish “One-Size-Fits-All” compensation is that BNSF lost the Lyondell contract because it was unable to provide direct service. This is simply not true, and BNSF has provided no evidence to demonstrate otherwise.

In February 2020, in Decision No. 8,²¹ the Board cleared BNSF to begin operating without waiting to resolve the compensation issue as soon as BNSF secured the private operating rights

¹⁹ In Decision No. 44, the Board vastly expanded BNSF’s access contrary to established precedent. KCS objected. The Board in denying KCS’s request to revoke BNSF’s access directed BNSF to file a terminal trackage rights if all other remedies were unsuccessful. As noted in FN 2 to KCS’s January 19, 2021 filing, BNSF never followed the established process, never negotiated with KCS, and never sought arbitration. Instead, BNSF filed BNSF-132 in January 2018 to “directly serve a Lyondell facility”.

²⁰ After losing Lyondell’s business, (1) BNSF filed BNSF’s December 18 Petition to Establish Conditions of Use (“BNSF’s December 18 Petition”) not directed at Lyondell but seeking to avoid complying with 49 U.S.C. §11102 for future access to other Lake Charles area shippers.

KCS refers the Board to its January 19, 2021 filing, which explains in detail why the Board should reject BNSF’s self-serving attempts to create a new “quasi-exemption-like” process and avoid satisfying the statutory requirements for electing which Rosebluff Lead shippers BNSF would serve in the future.

Similarly, as pointed out by UP, “The Board did not purport to create a one-size-fits-all-plan.” Decision No. 8 at 10. The Board’s operating plan was based on the unique facts of [the] case.” Id. The Board based its decision on service to Lyondell, and other shipper facilities could be distinctly different than Lyondell. See UP/SP-432 at 2 (filed January 19, 2021).

²¹ The Board recognized that BNSF had to obtain rights to operate over certain private industrial track to fully begin serving Lyondell via direct service.

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necessary to provide service. Rather than securing the necessary rights and commencing service right away, BNSF chose to continue to provide service via reciprocal switch and ignored Lyondell's request for direct service (see Lyondell letter of March 26, 2018, Board Document No. 245438). Even though BNSF acknowledges that negotiations for Lyondell's business continued well past the issuance of Decision No. 8, to the best of KCS's current knowledge in more than 14 months BNSF has not yet obtained the additional operating rights needed to access Lyondell's facility. Instead, BNSF claims that KCS and UP's "obstructions" prevented it from winning Lyondell's business.

While BNSF wants to play the blame game, the truth is BNSF failed to promptly obtain the rights it needed to operate over the Rosebluff Lead, and because of **BNSF's** inaction, it could not offer Lyondell the service Lyondell desired. Further, BNSF completely ignores a far simpler explanation for losing Lyondell's business to UP: competition in Lake Charles is fierce, and UP provided a more competitive bid than either BNSF or KCS did.²²

Similarly, BNSF has provided no justification whatsoever for its "One-Size-Fits-All Compensation" to serve any future shippers BNSF may seek to serve.²³ The extent of the compensable taking of KCS and UP's joint property will depend in each instance on how

²² Professor Julie Carey performed a comparison of the BNSF 2020 Lake Charles bid and the UP 2020 Lake Charles bid based on documents produced by UP and BNSF in discovery. That analysis revealed that [[REDACTED]

]] See Carey Reply VS at 21. Of course, UP has financial obligations for the Rosebluff Lead based on the Joint Facility Agreements, whereas BNSF does not, and depending on the compensation established by the Board may never. See Carey Reply VS at 21-22 and Figure 4.

²³ As KCS explained in its January 19, 2021 filing, operational findings specific to Lyondell cannot and should not be automatically applied to other Rosebluff Lead shippers simply because BNSF's proposed operating plan to serve that shipper, in BNSF's view, "mirrors" that adopted by the Board in Decision No. 8.

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BNSF proposes to provide service (e.g., the exclusive 4-hour window that the Board granted BNSF just to serve Lyondell). Without knowing the individual operating plans for a shipper, it is not possible to determine what property rights UP and KCS should be compensated for under Section 11102(a).

As the Board is aware even SSW Compensation varies greatly depending upon whether the Board applies RCNLD, Capitalized Earnings (“CE Approach”), or a market-based approach (or a combination thereof) because the compensation amount depends on the location of the shipper on the Lead, i.e., how much of the Lead is being used, and on the type of commodity being moved, which impacts car types, costs, earnings, and profitability (which is relevant to a CE approach and a market-based approach).²⁴ It would be fundamental error for the Board to establish SSW Compensation owed by BNSF based on an operating plan to serve Lyondell because not all shippers on the Rosebluff Lead can be served the same way that BNSF proposed to serve Lyondell, just as Lyondell could not be served in the manner BNSF proposed to serve CITGO.

III. BNSF’s Proposed Application of RCNLD Is Inconsistent And/Or Fatally Flawed

BNSF and its expert witnesses’ calculation of RCNLD-based SSW Compensation contains many significant computational and conceptual errors. Collectively, these mistakes produce an even more unreliable and lower RCNLD than would otherwise result.

²⁴ See Decision No. 8 at 16: “By considering case-specific facts concerning the market value of the property, the tenant’s proportionate use, and the costs associated with such use, SSW Compensation is designed to fairly compensate the owning carrier for the tenant’s partial use thereof.” Unlike in an overhead trackage rights case, BNSF seeks not only to use the KCS/UP jointly owned Rosebluff Lead but also to take the traffic of the Rosebluff Lead’s local customers from UP and KCS. As such, what BNSF proposes hardly qualifies as a partial usage thereof.

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A. The Board must reject BNSF's subletting argument and attempts to limit compensation due to KCS because BNSF will operate in UP's window.

Mr. Baranowski erroneously asserts in his verified statement that BNSF is merely “subletting UP’s property rights,”²⁵ and that in doing so [BNSF’s] operations on the Rosebluff Lead “do not impact the exercise of KCS’s property rights.” See Baranowski Opening VS at 15 and 29. Because in Mr. Baranowski’s unsupported opinion, “BNSF is not using any of the property rights possessed by KCS under partial ownership of the trackage....,” “KCS is due no interest rental compensation.” Id. Neither BNSF nor Mr. Baranowski offers any legal, economic, finance, or any other evidence to support Baranowski’s clearly BNSF-served opinion. See Carey Reply VS at 4.

Both of KCS’s economic experts and a new real estate expert offered to refute Mr. Baranowski’s real property arguments, disagree with Mr. Baranowski. First, as explained by Dr. Kevin Neels in his reply verified statement, Mr. Baranowski’s arguments are erroneously predicated on him treating a single facility - the Rosebluff Lead - as if it was “two separate facilities in separate locations,” irrespective of the fact that the deed and the Joint Facility Agreement all recognize that KCS and UP have an undivided interest in the Rosebluff Lead. See Neels Reply VS at 3.

Professor Carey elaborates further on Dr. Neels’ thoughts. As explained in the Carey Reply VS and below, there is no recognized legal, finance, economic, or other academic treatises

²⁵ As pointed out in the Neels Reply VS and the Carey Reply VS, Baranowski’s roommate analogy is fatally flawed for many reasons, not the least of which include BNSF does not intend to bear the same financial responsibilities as the other two, and believes it should also have the right to kick its roommates out for four hours every day. See Neels Reply VS at 3 and Carey Reply VS at 4.

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supporting denial of compensation for the interest rental component to co-owners of a joint asset.

However,

[T]here is “substantial evidence that BNSF does not “sublet” or identically replace UP’s use of the jointly owned asset, but rather UP utilizes its substantial network advantages to the greatest extent possible,²⁶ which allows UP to derive a greater profit contribution while intensifying competition in Lake Charles.”

See Carey Reply VS at 4 and 7-13.

All three railroads have different operational advantages and charge different rates based on their facilities and the rail-served facilities of their customers. So BNSF’s presence on the Lead is not ‘subletting’ UP’s use of the Lead because UP is still present, serving other customers, and BNSF and UP have different competitive profiles based on their networks and strengths, making them different ‘roommates’ to KCS. If anything, rather than subletting UP’s space, BNSF is becoming a third roommate in an already too-crowded apartment.

As explained by Professor Carey, the Rosebluff Lead is a jointly-owned asset and neither KCS nor UP has distinct or separate property rights. Id. at 5. Mr. Baranowski’s claim that BNSF is simply subletting UP’s property, like an apartment, ignores the economic nature of the jointly-owned asset as explained in Professor Carey’s prior evidence. Id. at 5. Professor Carey offers a theoretical economic example to illustrate the ownership rights of KCS and UP. Based on the deed, UP and KCS could revise the operating agreement (the Joint Facility Agreement) as follows:

[i]nstead of dividing the operational functions up between each other, the railroads could hire a third-party provider to perform the switching functions on behalf of both railroads. In such an example, the parties would continue to jointly own the facilities despite not

²⁶ Similarly, BNSF owns different railroad facilities and assets than UP (and KCS). BNSF’s network footprint is different than UP’s with different physical, economic, and operational advantages. Across BNSF’s network it reaches customers in 28 states and 3 Canadian Provinces and provides access to more than 40 ports. All three railroads have different operational advantages and charge different rates based on their facilities and the rail-served facilities of their customers.

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performing any operational functions. Both railroads have access to all customers in the area and facilitate such access through the exchange of cars destined for or originating from the other carrier's zone. There are no identifiable limitations or barriers for one railroad serving customers that are supportive of separately owned assets.

See Carey Reply VS at 4.

Third, as shown in the Verified Statement of Mr. Paul Marin, Mr. Baranowski's arguments are irreconcilable with the State of Louisiana Property Law.²⁷ For these reasons, as elaborated upon below Mr. Baranowski/BNSF's assertions that it is not infringing in any way on the Property rights of KCS, or that KCS is not entitled to compensation for any such infringement are simply invalid.

1. Mr. Baranowski's opinions regarding the use of property rights by BNSF are based on a misunderstanding and/or misrepresentation of the nature of the property rights held by UP and KCS.

BNSF's position on the ownership of the Rosebluff Lead appears to be a theory that UP and KCS for *legal, financial, and other purposes* divided their undivided ownership interest into two distinct halves, and because BNSF would only be operating during UP's twelve-hour window for the Rosebluff Yard KCS should not be compensated for its presence on the Rosebluff Lead. Of course, BNSF's new theory contradicts BNSF's previous testimony in which it stated emphatically, "To be clear, BNSF agrees that KCS, as the joint one-half owner of the Rosebluff Lead, is entitled to one-half of the compensation set by the Board for BNSF's use of the Rosebluff Lead."²⁸ Put simply, BNSF's new theory is the Board should, contrary to property law, arbitrarily use its regulatory powers to divide an undivided interest into two divided interests, just so BNSF can pay less compensation to KCS than KCS is otherwise entitled to under the statute. BNSF's

²⁷ See Verified Statement of Paul Maurin "Maurin Reply VS" at 5

²⁸ BNSF-138 (Filed July 16, 2018).

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new theory is wrong and its argument that KCS and UP divided its ownership interest is completely without merit.

KCS and UP both have a joint undivided interest in Rosebluff Yard and the Rosebluff Industrial Lead and operate the Rosebluff Lead consistent with the terms of a 1948 joint facility agreement (“Joint Facility Agreement”) between KCS and UP’s predecessor (T&NO). The Joint Facility Agreement states in Section 1, “The right of way, tracks and all other property described in said May 21, 1947 deed is owned jointly and equally by them.”²⁹ See Joint Facility Agreements - Exhibit A.). The Joint Facility Agreement refers repeatedly to “the jointly owned tracks.” Moreover, Section 19 recognizes that the “parties agree[d] neither shall sell, lease or transfer its interest in the jointly owned tracks, or any part thereof, without advance written approval by the other party.” Id.³⁰

As explained in the Maurin VS, the documents concerning KCS and UP’s ownership rights speak for themselves and confirm that contrary to Mr. Baranowski’s unsupported contention, KCS and UP’s ownership rights in the Rosebluff Lead remain unified – in “indivision” in terms of Article 480 of the Louisiana Civil Code.³¹ **In the absence of other provisions of law or juridical act**, the shares of all co-owners are presumed to be equal. *See La. Civ. Code art. 797.* When fruits or products are produced by a co-owner, other co-owners are entitled to their shares of the

²⁹ The language of the deed itself confirms that the entirety of the Rosebluff Lead is owned jointly, labeling KCS and T&NO together as “Purchaser” and conveying the Lead to that “Purchaser”. BNSF’s suggestion that KCS and UP only have a one-half ownership interest misunderstands basic property law.

³⁰ This latter provision is noteworthy because it apparently was intended to create an exception to predecessors of current Louisiana Civil Code Article 807, which allows joint owners of a property to petition for partition of the property (something that neither KCS nor UP has done with respect to the Rosebluff Lead).

³¹ “Art. 480 Co-Ownership. Two or more persons may own the same thing in indivision, each having an undivided share.”

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fruits or products after deduction of the costs of production. *Id.* at Art. 798. Louisiana courts consistently permit a co-owner to recover the fruits from the property obtained from another co-owner.³² In other words, under Louisiana law, KCS is entitled to be compensated for BNSF direct access over the Rosebluff Yard and the Rosebluff Lead regardless of whether BNSF's service occurs during UP or KCS's window.

Collectively, the deed, the Joint Facility Agreements and the Louisiana Civil Code all demonstrate that KCS and UP have an undivided joint ownership in the Rosebluff Yard and Rosebluff Lead, as co-owners in indivision. BNSF's argument that it should not have to pay an interest rental component because it will be operating in UP's separate property contradicts these authorities and is completely baseless.

2. BNSF ignores the fact that owners of the Rosebluff Lead – regardless of the 12-hour Rosebluff Yard window they may be using – can access and bid for the business of any customer on the Rosebluff Lead

BNSF's argument completely ignores that the deed and the two operating agreements (Exhibit A), all specifically refer to the "jointly-owned" Lead, demonstrating that there has never been a division of ownership. Instead, BNSF hangs its case in chief, on two equally flawed arguments, the argument above that divided operations in the Rosebluff Yard into two 12-hour windows, and the fact that KCS and UP established two zones to better accommodate shippers. Neither is a basis for finding that BNSF can use UP's Rosebluff Lead property interests without using KCS's also.

UP and KCS's sharing the capacity of Rosebluff Yard by utilizing two 12-hour operating

³² Under Louisiana law, KCS is entitled to be compensated for BNSF having direct access over the Rosebluff Yard and through the Lead regardless of whether BNSF's service occurs during UP or KCS's window.

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windows³³ due to the significant physical and operational constraints in the area does not prove that there has been a division of KCS and UP's ownership rights for legal, financial, or other purposes. On the contrary, UP and KCS have a joint undivided interest in the entire Rosebluff Lead.³⁴ See Exhibit A. Pages 1-3.

Contrary to BNSF's claims, simply because the joint owners long ago recognized the need to operate the Yard and local trackage in a coordinated manner³⁵ to better serve the needs of customers in Westlake and West Lake Charles does not in any way change the status of UP and KCS's ownership rights. Further, congestion on the Lead often causes KCS and UP to overstay their operating windows, see FN 33, consistent with the fluid use of a single undivided property based on operating needs.

³³ Union Pacific and KCS share Rosebluff Yard in separate 12-hour operating windows. Union Pacific's window in the Yard is from 6:00 am to 6:00 pm, and KCS's window is from 6:00 pm to 6:00 am. Given the volume of cars that must be switched in the Yard and the limited infrastructure, it is not always possible for Union Pacific and KCS to complete their planned work in the Yard in 12 hours. Unanticipated operating issues can cause overstays for both railroads. Periodically, the overstays by both railroads accumulate, so the windows are pushed later and later. In some cases, it can take days (or even weeks) for the railroads to "reset" to the planned yard occupancy schedule.

³⁴ The Joint Facility Agreement specifically recognizes that KCS and UP have a joint undivided interest in the Rosebluff Lead. This is precisely why KCS and UP included language that neither carrier could "sell, lease or transfer its interest in the jointly owned tracks, or any part thereof, without advance written approval by the other party." See Joint Facility Agreement (Exhibit A) Page 5, Section 19.

³⁵ Originally, the 1948 operating agreement divided the operational responsibility for the tracks into two-year blocks – KCS served for 2 years, then T&NO would serve for 2 years. The 1981 agreement, noting that the Lead had been "deeded to The Kansas City Southern Railway Company and the said Texas and New Orleans Railroad Company" (pages 1-2) divided the operational responsibility a different way, into zones. Originally the companies alternated which served what zone, but shippers complained, so in 1999 they agreed to pause in alternating zones. But at no time did the companies divide the ownership. Indeed, Article I, A., refers to "the jointly-owned track acquired by deed of May 21, 1947". See also UP Reply to BNSF's Petition to Establish Conditions of Use and Compensation (Filed June 25, 2018) (describing the establishment of the two zones).

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BNSF's arguments fail to recognize that per Article I.E of the Joint Facility Agreement, irrespective of the zones that were established for administrative convenience, either carrier may operate a "solid over-the-road unit train" into the zone operated by the other. More importantly, both carriers can access and bid for the business of any customer on the Rosebluff Lead, regardless of the zone in which that customer's operations are located. See 1981 Joint Facility Agreement at 5. Per Article I.C of the Joint Facility Agreement, UP and KCS may but are not required to modify zones based on future studies. Third, the zones, which were created by mutual agreement of KCS and UP, per the terms of the Joint Facility Agreement may be modified by KCS and UP as the circumstances warrant. For all of these reasons, BNSF's argument that the creation of operating zones divided the jointly-owned Lead and that BNSF can use UP's portion without using KCS's portion should be rejected. BNSF's attempts to set the interest rental component of SSW Compensation at 0.

B. Baranowski's Assumptions Regarding Future Routine Maintenance Costs are Flawed and Fail to Account for Inflation

Mr. Baranowski identified a set of documents that he believed provided a relatively complete accounting of what he called "routine" maintenance spending by UP and KCS on the Rosebluff Lead. Neels Reply VS at 13. Unfortunately for Mr. Baranowski's argument, Dr. Neels' review discovered it appears that Mr. Baranowski omitted expenditures for "bridge and culvert maintenance on the "Rosebluff Spur." Id. at 14. In failing to account for and factor into his calculations the full amount of bridge and culvert maintenance Mr. Baranowski has understated the level of routine maintenance spending in his reference period. Id. at 11.

Mr. Baranowski compounded this error by using the level of routine maintenance spending during his referenced period (2017-2019) to predict maintenance spending on a going-forward basis. He then further compounded his original error by failing to account for inflation in

tabulating future maintenance costs. *Id.* at 14. Price indexes suitable for accounting for inflation are readily available. However, Mr. Baranowski simply failed to make use of them. Because of Mr. Baranowski's omission, his calculations understate the annual level of maintenance costs that will need to be covered in 2021 and beyond. Similar to routine maintenance, Mr. Baranowski makes various computation errors concerning future Non-Routine Maintenance Costs.

C. Baranowski's Assumptions Regarding Future Capital Maintenance Costs are Inconsistent with Boileau's Depreciation Calculations

Mr. Baranowski adopts a different approach when he projects future spending levels on maintenance carried out in the form of capital projects. Mr. Baranowski claims that "Because capital maintenance cycles for this relatively small portion of track recur in cycles longer than the six-year period for which historical data is available, any attempt to normalize capital maintenance expenses over this period would introduce timing bias that would skew the results."³⁶ Mr. Baranowski starts with the replacement costs computed by Mr. Boileau, for the various categories of capital assets making up the Rosebluff Lead. *Id.* He then multiplies the total replacement cost for each category of asset by that category's average annual depreciation rate, as reported in the 2019 R-1 Reports filed by UP and KCS, and sums the results. *Id.* He argues that this approach provides a reliable forward-looking projection of future "Normalized" capital maintenance costs.³⁷

The approach adopted by Mr. Baranowski is flawed. First, the annual depreciation rates reported in the R-1 Reports are not unique to conditions along with the Rosebluff Lead. Second, Mr. Boileau's evidence indicates at least some of the capital assets comprising the Rosebluff Lead

³⁶ Baranowski Opening VS at 21.

³⁷ Baranowski Opening VS at 22-23.

experience higher deterioration rates and shorter useful lifetimes than average assets systemwide.³⁸ As such, BNSF's witnesses contradict one another. Third, another source of error relates to Mr. Baranowski's approach concerning the current condition of the assets comprising the Rosebluff Lead and Baranowski's arbitrary assumptions about where they are in their replacement cycles. This is another area where BNSF's witnesses, Mr. Baranowski and Mr. Boileau provide inconsistent testimony.

At least, Mr. Boileau's testimony reports on the overall calculation of depreciation as a percentage of the value of the assets comprising the Rosebluff Lead; Boileau places this value at 59 percent, a value well in excess of the 50 percent value that is implied by steady-state replacement. This discrepancy implies either that there has been significant deferral of repairs, or that a significant number of costly components are well past the midpoints of their replacement cycles. In either case, because of the existence of this repair backlog capital maintenance costs over the years immediately ahead will need to be higher than the steady-state "normalized" numbers computed by Mr. Baranowski.

D. Pitts' land valuation fails to capture accurately the right-of-way value of the land underlying the Rosebluff Lead

The interest rental component of the RCNLD calculation presented by BNSF is further understated due to the land valuation assumptions. Specifically, the value of the land upon which the Rosebluff Lead rests is based on a valuation carried out by Mr. Brent Pitts. Mr. Pitts clearly states that in his opinion the highest and best use of the land underlying the Rosebluff Lead is as a rail corridor. Specifically, he states that:

³⁸ See Exhibit B, Verified Statement of Robert Boileau ("Boileau VS"), Included in BNSF-144 at 15.

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“Demand is evidenced by the continued growth of surrounding markets and communities. The property’s use as a corridor and as an integral component of a rail network is considered to be economically viable. Demand beyond the current owner is considered likely to exist given the characteristics of the subject corridor.

In view of the economic circumstances and the characteristics of the subject property, the highest and best use of the subject is for corridor purposes consistent with the historical and proposed use.”³⁹

In discussing this highest and best use Mr. Pitts identifies many categories of cost savings that can be achieved when land is purchased as an intact assembled right of way, rather than as a collection of otherwise unrelated parcels. Id at 7.

The relevance of the categories of cost savings identified by Mr. Pitts becomes clear if one considers the practical difficulties and constraints that would have to be overcome by a party attempting to create a useable transportation corridor through a developed area through which no such corridor currently exists. See Neels Reply VS at 9. Although Mr. Pitts acknowledges the relevance and potential importance of these factors, there is no evidence in his report that his valuation of the land underlying the Rosebluff Lead takes any of these factors into account. Id. at 10. By failing to do so, Mr. Pitts fails to appropriately value the Rosebluff Lead right of way. Likewise, he arbitrarily values certain segments he deems of “limited utility.” However, such segments are highly valuable; without them, major portions of the Rosebluff Lead would be cut off, and its value substantially reduced. That is, all parts of the Rosebluff Lead corridor are necessary for its use as a rail right-of-way. For these reasons and others explained in the Neels Reply VS, Mr. Pitts’ land costs must be regarded as understating the true replacement costs of the land underlying the Rosebluff Lead. Any corrections would further increase the interest rental component of the RCNLD above the [REDACTED] per car discussed by Professor Carey

³⁹ See Exhibit C, Verified Statement of Brent Pitts (“Pitts VS”), included in BNSF-144, page 49.

E. Other Computational Errors in BNSF's Flawed Application of RCNLD

Several other errors in BNSF/ Baranowski's application of RCNLD must be corrected.

- Computation Errors in Mr. Baranowski's Calculations
 - Although Mr. Baranowski claims to have drawn the inputs to his capital maintenance calculations from Mr. Boileau, there are discrepancies between the numbers reported by the two witnesses. Mr. Baranowski reports a value for the replacement cost of the Ballast on the Rosebluff Lead of \$12,335,871, while Mr. Boileau reports a value of \$743,387. Additionally, Mr. Baranowski reports a value for the replacement cost of the Rail and other track material \$743,387, while Mr. Boileau reports a value of \$12,335,871. This error needs to be reconciled. See Neels Reply VS at 22.
- Mr. Baranowski Significantly Understates the Property Taxes Paid on the Rosebluff Lead
 - Baranowski's calculation of taxes using a tax estimator provided on the Calcasieu Parish tax assessor's webpage is less accurate than how KCS calculated taxes. See Neels Reply VS FN at 28.

F. Large scale conceptual and mechanical flaws with RCNLD Interest Rental Calculation

Not only does the RCNLD-based SSW Compensation calculation presented by BNSF grossly understate the trackage fee that BNSF should pay to KCS because it fails to account in any way for the traffic and revenue potential of the shippers to which the Rosebluff Lead provides access, but Mr. Baranowski's RCNLD-based SSW Compensation is replete with conceptual and mechanical flaws.⁴⁰

⁴⁰ As stated in the Neels Opening Statement, the value of the Rosebluff Lead lies in the access it provides to a large set of rail-dependent shippers. Dr. Neels believes his point can be demonstrated by a simple thought experiment.

Consider the construction of an otherwise identical set of facilities in a location without shippers. Such an exercise would yield a set of facilities with identical replacement costs. However, that facility would be functionally worthless because it has no established customer base. That this is so proves the unreliability in this context of the RCNLD approach advocated by BNSF.

See Neels VS at 6.

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As Professor Carey discusses Mr. Baranowski's RCNLD approach is inadequate with mechanical and conceptual flaws to the interest rental component that dramatically understate the real-world commercial value of the Rosebluff Lead.⁴¹ The analyses of BNSF experts Mr. Boileau and Mr. Baranowski have the following substantive deficiencies:

- **Understates inflation:** road property investment is understated by relying on 2016 cost estimates that are escalated to 2020 by an AAR materials and supplies inflation index.⁴² However, the pandemic temporarily reduced materials costs in 2020 which have already substantially rebounded in early 2021. Specifically, the railroad RCR materials and supplies" Index relied upon by Mr. Boileau⁴³ increases by 12.2% instead of 5.6% if the period is extended from 2016 to the 2Q2021 instead of ending at 4Q2020 as assumed by Mr. Boileau.⁴⁴
- **Excludes IDC with Replacement Costs of Road Property:** The total replacement capital costs are understated by excluding Interest During Construction (IDC) and the cost of future replacement of road property which can add upwards of 20% to the initial road property investments.⁴⁵

⁴¹ BNSF's Opening Statement and Evidence on Compensation ("BNSF-144"), Robert Boileau Opening Verified Statement ("Boileau Opening VS") Boileau Workpaper "RCNLD Calculations.xlsx" at Tab "Unit Costs", cell M11., Boileau Opening VS at 92.

⁴² BNSF's Opening Statement and Evidence on Compensation ("BNSF-144"), Robert Boileau Opening Verified Statement ("Boileau Opening VS") Boileau Workpaper "RCNLD Calculations.xlsx" at Tab "Unit Costs", cell M11., (and citing AAR RR Cost Indexes 2020-12.pdf), Boileau Opening VS at 92.

⁴³ See Carey WP Inflation Indexes.xls

⁴⁴ See Carey WP Inflation Indexes.xls The STB's Quarterly Rail Cost Adjustment Factor (RCAF) materials and supplies component increased by 12.22% from 2016 actual values to the 2nd quarter of 2021 forecast. STB, Quarterly RCAF, Docket No. EP 290 (Sub-No. 5) at Decision Appendix at Table B on page 5 at Line 3 in the Decisions issued on June 16, 2016, September 20, 2016, December 20, 2016 and March 17, 2017. The 2nd quarter 2021 forecast value is in the Decision Appendix at Table A on page 4 at Line 3.

⁴⁵ See Boileau Opening VS at 101, 102. (Boileau Workpaper "RCNLD Calculations.xlsx" at Tab "Tables", cell F19). Calculation includes a 10% fixed markup to represent engineering costs, a 2.7% fixed markup to represent mobilization costs, and on top of these marked up costs a 10% contingency is added. These are standard cost estimate percentages used on road property investment categories. See *Consumers Energy Company v CSX Transportation, Inc.* Docket No. 42142, slip op. at 259 (STB served Jan. 11, 2018 as corrected Mar. 14, 2018) ("CURE").

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- **Ignore Full Commercial Value of the Asset** by removing physical depreciation historically accumulated from old and different assets and thereby artificially lowering the new replacement costs below what a new entrant or competitive market would allow, as discussed further below, and
- **Removes 50% of Partial Valuation of the Asset** by reducing the value of the Rosebluff Lead by 50% under the guise of KCS's ownership share. BNSF implicitly seeks to assign 50% of the asset value to itself, even though it is not a co-owner and UP and KCS have an undivided interest in the Rosebluff Lead.

See Carey Reply VS at 13-14.

The first two deficiencies stated above are fairly straightforward. With respect to the third deficiency, Mr. Baranowski ignores the full commercial value of the Rosebluff Lead asset by relying on an RCNLD that reflects a reduction of the Reproduction Cost New by 59% to reflect physical depreciation of the Rosebluff Lead trackage.⁴⁶ Reducing RCN by historical physical depreciation of the old asset (LD) is inappropriate as it does not reflect the current commercial or productive value of the asset that would exist among willing buyers and sellers in a competitive market outcome Id. at 15. By doing so, the resulting rate does not reflect a competitive market rate charged by a new market entrant, such as a SAC-based rate. Given that Mr. Baranowski has never proposed RCNLD in any prior rate reasonableness dispute before the STB or in any other venue, it is surprising that he would do so here given that BNSF is getting access to KCS and UP's established customer base, not simply physical facilities (the Rosebluff Lead and Rosebluff Yard tracks). It is equally surprising that Mr. Baranowski is advocating for such a significant depreciation in the value of the underlying infrastructure and fails to recognize that the tracks continue to have significant value not based on the physical infrastructure per se but rather based on the fact that the Rosebluff Lead is the sole link to a robust set of high-value customers. In fact, Mr. Baranowski specifically advocated in a recent regulatory case to not deduct historical physical

⁴⁶ RCNLD is calculated by Mr. Boileau. See Baranowski Opening VS at 25.

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depreciation as he proposes here. Mr. Baranowski presented an analysis in a FERC oil pipeline rate case that included only “forward-looking costs” and did not remove large historical depreciation for the nearly 50-year-old pipeline because, as Mr. Baranowski explained, “it is not relevant to my analysis.” It is hard to comprehend why Mr. Baranowski would argue such different approaches in these two forums, given that the “true value” of both a railroad located in a dense and established customer base and a pipeline lies in the revenues to be generated by serving customers. See Carey Reply VS at 15-16.

It is equally difficult to comprehend the basis for Mr. Baranowski’s baseless opinion that the value of the Rosebluff Lead should be reduced by 50%, even though UP and KCS have an undivided interest in the Rosebluff Lead. Of course, the intended result of such an argument if successful is clear - to further reduce the already understated and flawed compensation that would result from the Board’s application of RCNLD-based compensation. Simply put, by removing 50% of valuation of the asset, BNSF attempts to usurp the partial asset value to assign to itself even though it is not an owner of the Rosebluff Lead.

For all of the reasons set forth above BNSF’s application of RCNLD is fatally flawed. Moreover, even if corrected as proposed, any application of SSW Compensation, particularly RCNLD, will still not fully compensate KCS for BNSF establishing direct access service over the Rosebluff Lead. Carey Reply VS at 17.

Professor Carey explains that adjustment for these errors collectively increases Mr. Baranowski’s recommended interest rental component from [REDACTED] per car by [REDACTED] per car to [REDACTED] per car. Carey Reply VS at 18.

IV. Given the Circumstances Present in Lake Charles, It Would Be a Mistake to Apply Traditional SSW Compensation Here

As stated in prior testimony and supported by ICC/Board precedent, SSW Compensation principles are inapplicable and inappropriate in this case. This case does not involve implementing bridge trackage rights against parties to a merger: the circumstances in which SSW Compensation has applied in the past. KCS was not a merger applicant. It was not KCS's actions that resulted in the loss of SP service to the Lake Charles Area. KCS was not a party to any settlement agreements or economic terms between UP and BNSF. KCS was not free to walk away if it did not like the Lake Charles Condition. In establishing compensation in this case, the Board must compensate KCS in a manner that puts KCS in the same economic condition it would have been absent the taking. See KCS's Opening Statement and Evidence on Compensation Concerning BNSF's Use of the Rosebluff Lead Exhibit C - Opening Verified Statement of Nancie G. Marzulla ("Marzulla VS") at 3. See also Decision No. 8 (FN 24) (explaining in determining compensation under the Constitution and the statute, the Board must focus on what the owner has lost, not what the taker has gained. Mo.-K.T.R. Co. v. Kan. City Terminal Ry., 198 I.C.C. 4, 7-8 (1933)).

SSW Compensation, standing alone, does not meet that standard.⁴⁷ By granting BNSF terminal trackage rights, the Board has already used its extraordinary regulatory powers to force KCS to allow a second competitor, ten times its size, to use KCS's tracks and property to compete for shippers' traffic, at service terms not available to KCS. Because of the unique circumstances present in Lake Charles, the application of SSW Compensation will not make KCS whole and is not constitutionally sound.

⁴⁷ Seaboard Air Line Ry. v. United States, 261 U.S. 299,304 (1923) (citation omitted); see also Olson v. United States, 292 U.S. 246, 254-55 (1934); United States v. Miller, 317 U.S. 369, 373 (1943); United States v. 564.54 Acres of Land, 441 U.S. 506, 510 (1979); and United States v. Va. Elec. & Power Co., 365 U.S. 624,633 (1961).

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As explained in the Response of The Kansas City Southern Railway Company to Decision No. 6 (filed February 4, 2019) (“KCS Feb. 2019”) and recognized by the Board in Decision No. 8, in other unique cases, the Board varied from standard SSW Compensation. In the interest of time, rather than repeat the cases, KCS simply refers the Board to KCS’s prior testimony and requests that the Board recognize that both the ICC and the Board have consistently held compensation should be established in a manner that fully accounts for the interest KCS lost and is based on a consideration of all circumstances related to the case.⁴⁸

As explained in the Carey Reply VS, BNSF’s government-mandated access to the Rosebluff Lead and artificially low non-market rate from the approval of the UP/SP merger settlement devalued the jointly-owned asset of KCS and UP.⁴⁹ Both UP and BNSF have realized the full economic benefits of the proposed UP/SP merger. Id. at 6. UP benefited substantially through merger-related benefits with SP. Id. BNSF benefited from increased business in the Lake

⁴⁸ As recognized by the ICC in a 1995 trackage rights compensation case involving BNSF, SSW alone is not always adequate compensation for trackage rights. SSW does not account for the costs associated with additional facilities that are utilized in serving a particular shipper where such additional facilities are not part of the tracks themselves. In such a case, the Board recognized that SSW should apply to the use of the tracks but additional compensation would be needed to contribute to the use of the additional facilities. Burlington N. Inc. and Burlington N. Ry. Co. - Control and Merger- Santa Fe Pac. Corp. and Atchison, Topeka, and Santa Fe Ry. Co., FD 32549, Decision No. 40, 1995 ICC Lexis 242 (ICC served August 23, 1995) (“Decision No. 40”). When discussing what type of compensation the Board would apply if asked by the parties to set compensation, the Board said the circumstances of the case warranted “some combination of a fixed charge and usage-based compensation” and an evaluation of the specific circumstances involved in the case would ultimately be used to determine the split. Id. at FN 19.

⁴⁹ Carey VS at FN 12 and Exhibit 3. The undue economic advantage from the artificially low-non-market rate has enabled BNSF to achieve movements of nearly [[REDACTED]] carloads during 2019 for Lake Charles area customers and an estimated [[REDACTED]] market share, which represents substantial growth in business over the past decade. Further, during the 2017 to early 2020 period, BNSF achieved approximately [[REDACTED]]

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Charles area (and other areas) as Professor Carey discussed in her opening verified statement.⁵⁰

The Board-added competition from BNSF has already diminished the economic value to KCS and UP of their jointly-owned Rosebluff Lead asset. As such, application of SSW Compensation – regardless of whether it was RCNLD-based or CE-based – would continue to cause irreparable economic harm to KCS because either SSW Compensation methodology is based on an asset already devalued by prior Board action.⁵¹ See Carey Reply Statement at 20-21. The harm done to KCS would be even more profound if the BNSF proposed modifications to SSW Compensation are accepted.

A. The Board should reject BNSF’s proposed modifications to SSW Compensation.

All of BNSF’s proposed modifications to SSW Compensation are self-serving and will harm UP, KCS, and Rosebluff Lead shippers, solely so BNSF can put more money in its pocket. Despite BNSF’s claims, such a proposal is the antithesis of fairness to KCS or Rosebluff Lead shippers because it would force KCS and UP to subsidize BNSF into perpetuity, and tipping the competitive balance toward BNSF through regulatory action, thereby inhibiting true competition. KCS and UP would be less able to offer shippers competitive alternatives because of the inability to overcome BNSF’s Board-created advantages, and neither KCS nor UP would have any incentive to invest in infrastructure when they are not able to recoup that investment.

The Board should reject BNSF’s elimination of the interest rental component for the reasons discussed in Section (III)(a). BNSF’s argument in this regard is nothing but an attempt by

⁵⁰ Carey VS at 25.

⁵¹ In the Neels Opening VS, Dr. Neels explains why although the Board has ruled that the ATC methodology provides a reliable way of allocating the revenue associated with origin-to-destination movements to specific segments traversed by those movements, the ATC revenue allocation approach would in an unusual case like this one tend to under-allocate revenues to the Rosebluff Lead.

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BNSF to further reduce the already inadequate compensation that application of RCNLD or CE Approach would yield. The proposal is based entirely on the opinion of Mr. Baranowski and lacks any legal, economic, finance, or other evidentiary support. See Carey Reply VS at 4.

The Board should reject BNSF's argument in BNSF-144 that "[b]ecause UP and KCS have an existing cost-sharing arrangement that satisfies the objectives of the *SSW Compensation* standard, the use of an alternative methodology would unnecessarily complicate and override the existing Arrangement." See BNSF-144 at 2-3. This is nothing more than an attempt by BNSF to extend its existing "free ride" into perpetuity. Whatever the arrangements between the Lead's owners, who bear the costs of ownership, operation, and maintenance of the Lead, they are irrelevant to non-owner BNSF who avoids those responsibilities, and they do not change the requirements of Section 11102(a).

BNSF provides no evidence whatsoever to support that for compensation purposes, KCS is entitled to no more for BNSF's use of the terminal trackage rights than KCS would be owed for corresponding UP movements on the Rosebluff Lead. BNSF is not UP and does not share in maintenance costs with or provide switching services to KCS on the Rosebluff Lead as UP does. Under BNSF's proposal, it would not share responsibility for maintaining the Rosebluff Lead with UP and KCS equally. BNSF has provided no reason for BNSF cars to continue to be counted as UP cars going forward. Again, this argument asks the Board to disregard the statute, which expressly states the entrant seeking terminal trackage rights is responsible for paying for those rights.

Section 11102 provides that the Board can order the use of terminal facilities by a non-owner and can set the terms of compensation for that use. This means that the user – here BNSF – must pay KCS the compensation set by the Board. At no point has UP or BNSF involved KCS in

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the negotiations related to the establishment of the “Prescribed Fee”. The Board cannot simply look the other way and force KCS to continue to subsidize BNSF’s operations, as doing so is not only contrary to the statute but would be manifest injustice to force a non-merger applicant to subsidize BNSF due to BNSF’s agreement with UP. Allowing BNSF to escape paying for additional costs related to the costs of its operations would harm competition for shippers on the Rosebluff Lead and further injure KCS.

B. BNSF’s Attacks on Capitalized Earnings-based SSW Compensation Don’t Hold Water

Mr. Baranowski proffers three reasons for the Board to reject KCS’s use of the CE Approach in computing the compensation due to KCS:

1. Calculating SSW Compensation via the CE Approach is difficult and has potential for “circularity;”
2. Mr. Baranowski claims he is unclear how the earnings UP or BNSF generates should influence the earnings valuation that would be the basis for compensation to KCS; and
3. It would be challenging to allocate revenues to through and switching assets in terminal areas.⁵²

As Dr. Neels demonstrated in his opening verified statement and further explains in his reply verified statement, each of these supposed problems can be addressed in calculating CE Approach-Based SSW Compensation.

BNSF is not a co-owner of the Rosebluff Lead. Under current compensation arrangements, its earnings do not contribute to the market value of that asset. See Neels Reply VS at 14. Hence,

⁵² See Baranowski Opening VS at 19.

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there is no conceptual need to factor BNSF's earnings into a CE Approach calculation. Id.

Excluding BNSF's earnings also eliminates the circularity issue cited by Mr. Baranowski. Id.

The asset value produced by a CE Approach calculation based on the earnings of UP and KCS, the co-owners of the Rosebluff Lead, is equivalent to computing what a potential buyer would be willing to pay to buy the Rosebluff Lead from its owners, while the Rosebluff Lead was still encumbered by the regulatory and contractual obligations that have provided BNSF with indirect access to customers along the Rosebluff Lead. Id. at 15.

It would be reasonable to ask what a potential buyer of the Rosebluff Lead might be willing to pay for the Rosebluff Lead were it not encumbered by the access rights currently enjoyed by BNSF. Id. Even in such an inquiry, however, it would not be necessary to consider the earnings of BNSF. Instead, what would be relevant would be what the earnings of UP and KCS would be if BNSF were not siphoning off traffic due to its subsidized switching access.⁵³ Id.

Regarding Mr. Baranowski's second objection to the use of the CE Approach, there is no need to determine how a trackage fee will be divided between UP and KCS. That is the responsibility of the Rosebluff Lead's owners. "Challenges" in allocating revenues are not a sound basis for rejecting the CE Approach. Interestingly, Mr. Baranowski has presented CE Approach and standalone cost calculations with revenue allocations in many cases.⁵⁴ Lastly, there is no need to allocate revenues between switching and overhead operations on the Rosebluff Lead. Put simply, none of Mr. Baranowski's attacks against the application of Capitalized Earnings-based SSW Compensation are legally sound.

⁵³ While such a calculation could be done, it was not necessary here.

⁵⁴ See Responses and Objections of BNSF to The Kansas City Southern Railway Company's Discovery Requests Related to BNSF's Opening Statement and Evidence on Compensation (Served March 8, 2021), attached as Exhibit C. see Exhibit 1 to Julie Carey Reply VS

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Further as discussed below in Section V, Professor Carey explains the substantial economic benefits that BNSF achieves from large additional revenues and contribution margins not contemplated in an SSW Compensation rate (Based on RCNLD) (or even an SSW Compensation rate (Based on CE) from second leg movements from the BNSF storage (or the storage-related fees) to other locations on its network. A market-based rate based on negotiation between the parties would reasonably be expected to contemplate the full economic value of the customer, including this additional economic benefit. See Carey Reply VS at 11-13 and 20.

C. Contrary to BNSF's claims, It Is Too Early To Determine What Increased Variable Costs KCS Will Incur Related to BNSF Direct Access

Historically with just two carriers operating in the region, the Rosebluff Yard⁵⁵ has been heavily congested, with cars occupying most or all of the tracks most of the time. Tracks 2, 3, 5, and 6 are generally full of cars being held for customers for interchange. Track 1 is used by KCS to access the major industrial facilities that it serves adjacent to the yard. Cars also are left on that track by one train for later switching by a subsequent crew. Track 4 is used to assemble outbound trains and land inbound trains and is cleared out at the end of each carrier's window to make room for the other owner's train. Track 4 is also the only track that can be used to access the 50/50 Line and the Lead, and it must be kept clear to land inbound trains and assemble outbound trains. With just two carriers operating over the Rosebluff Lead, delays over the years have resulted in KCS and UP experiencing routing overstay in each other's operating window as explained in FN 33. Given that Decision No. 8, which adopted BNSF's proposed operating plan for Lyondell, provided a third carrier the right to operate over already congested tracks, delays are likely to be

⁵⁵ The Rosebluff Yard, which is located on the Rosebluff Industrial Lead about a half-mile south of the 50/50 Line, consists of six tracks: a center runner track, and five other tracks that tie into the runner track at each end of the yard. Tracks 1, 2, 3, 5, and 6 can each hold between 80 and 85 cars without obstructing a switch to an adjacent track.

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compounded.⁵⁶ While the Board provided that the parties could come back and petition for reconsideration should three carriers operating in the Rosebluff Lead causes “substantial impairment of operations”, that uncertain remedy does not resolve KCS’s concerns that it should not be forced to bear any costs related to BNSF’s direct access over the Rosebluff Lead.

BNSF should pay for any costs that KCS incurs as a result of BNSF’s presence on the Rosebluff Lead. For example, even if BNSF’s train does not stop or switch the Rosebluff Yard and BNSF operates wholly within UP’s window, to the extent that BNSF delays KCS’s use of its window and such delays create additional costs to KCS, BNSF should compensate KCS for those additional costs. Such additional costs that KCS could incur involve KCS incurring overtime costs, being forced to add crews, incurring additional car hire charges, incurring additional locomotive hours,⁵⁷ experiencing delays in its ability to meet customer schedules, including possibly even paying delay penalties under its contracts, and possibly the need to hire additional manager(s).

KCS’s concerns are particularly profound given that BNSF, despite knowing that the Board established operating parameters for it to serve Lyondell, seeks to change the game yet again. As explained above in FN20 BNSF’s December 18 Petition asked the Board to create a fast-track “quasi-exemption-like” process for BNSF to avoid complying with 49 U.S.C. §11102 for future access to any other Rosebluff Lead shippers. BNSF asserted it believed “[w]hile the use

⁵⁶ The operating plan was based on certain assumptions: BNSF would stay within UP’s window, secure the necessary rights to operate over the connecting trackage required to reach the Lyondell facility, would have a four-hour exclusive window of time to occur each day during UP’s window to serve Lyondell – roundtrip, and BNSF would notify KCS & UP if it cleared the track sooner than 4 hours. See Decision No. 8 at 2.

⁵⁷ KCS has proposed an hourly delay fee of \$842.00. The proposed train delay charge is an amount advocated by BNSF in a case where BNSF incurred train delay from damage to one of its bridges, and is consistent with BNSF’s position that its operations would not unreasonably interfere with KCS and UP operations.

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conditions established by the STB were focused on BNSF direct service to Lyondell, those conditions were based on general service principles that can be applied more generally to all shippers accessible via the Rosebluff Lead.” BNSF’s December 18 Petition at 7-9. It is clear from BNSF’s filing it intends “to use the terminal trackage rights to access multiple Lake Charles shippers.” *Id.* at 7. Given that BNSF has provided no definitive information on its actual proposed operations or for that matter on which shipper it might serve, and specifically acknowledges that despite the Board ordering an “exclusive, four-hour window,” the duration of time needed for BNSF “to occupy the terminal in order to directly serve non-Lyondell shippers may vary”⁵⁸ it would be impossible for KCS, UP, or even the Board to determine what increased variable costs KCS will incur as a result of BNSF’s operations.⁵⁹ BNSF’s requested “flexibility” is certain to make an already complicated situation far worse.

Regardless of whether BNSF operates as provided for by Decision No. 8 or as proposed in BNSF’s December 18 Petition, it is simply too early to determine what additional variable costs, if any, KCS will incur because of BNSF’s direct access. While BNSF’s filings appear purposely vague, KCS’s point is straightforward whatever additional operating costs BNSF causes KCS to incur, BNSF should bear them. Likewise, BNSF should be required to pay its proportionate share of other costs and capital improvements deemed necessary by KCS and UP for the Rosebluff Lead.

⁵⁸ See BNSF’s December 18 Petition at FN 9.

⁵⁹ Contrary to the parameters established in Decision No. 8, BNSF basically says to the Board don’t work about the scope of our operations, because the amount of time for the exclusive BNSF operating window for any particular movement could be established through negotiations between the three parties or by the Board [later]. *Id.* at 14.

V. Based on the Underlying Circumstances and Lake Charles Competitive Environment, Only A Market Based Access Fee Would Provide Adequate Compensation for BNSF's Usage of the Rosebluff Lead.

SSW Compensation – regardless of whether CE Approach-Based or RCNLD-Based - is incapable of putting KCS in the same place it would have been but for BNSF's access; thus, it is incapable of compensating KCS appropriately based on the true economic value of the Rosebluff Lead, as required by Section 11102. RCNLD-based SSW Compensation is ill-suited to capture revenue and contribution from a second leg movement from BNSF's SIT and other market value of the customers. As such, the superior approach is to rely on the real-world market-based access fee that KCS's expert Julie Carey proposed in her opening evidence, which was based on nearly 2,000 market-based rates for reciprocal switching comparable to that in the Lake Charles area (adjusted to subtract an estimated switching cost for BNSF movement to Lyondell via the Rosebluff Lead). This approach provides the best estimate of the rate that KCS would have negotiated for access by BNSF to the Rosebluff Lead had the Board not imposed forced access. The market-based rate relies on commercially negotiated rates by willing buyers and sellers that are routinely accepted by the STB, other regulators, and courts as fair market value rates, and is analogous to the STB's recognition of comparable line sales as a possible valuation methodology for determining the interest rental base for trackage rights rates. A market-based access fee based on negotiation between the parties would reasonably be expected to contemplate the full economic value of the customer, including the additional economic contribution margin expected on a second part move for customers that rely on storage in transit. Thus, for KCS to receive the full economic value of the Rosebluff Lead it must receive a comparable market-based access fee. See Carey Reply VS at 20 – 22.

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A. For KCS to receive the full value of the Rosebluff Lead it must receive a comparable market-based rate

As Professor Carey states [REDACTED] of BNSF's railroad movement originating in Lake Charles are temporarily moved to storage facilities and approximately [REDACTED] are put back on the BNSF network for a second railroad movement for which BNSF derives substantial revenue and an estimated [REDACTED] car contribution to the benefit its network. Carey Reply VS at 20. This substantial additional revenue and margin contribution are not captured by the calculation of an SSW Compensation rate (based on RCNLD) or an SSW Compensation rate (based on CE). *Id.* However, a market-based rate based on negotiation between the parties would reasonably be expected to contemplate the full economic value of the traffic, including the additional economic contribution margin expected on a second part move for customers that rely on storage in transit. Plus, unlike any SSW Compensation calculation, market-based compensation accounts for profits that would exist, but for KCS and UP subsidizing BNSF's operations for the past 25 years due to BNSF's regulatorily granted access. From an economic point of view in which the free market is the determiner of pricing, Market-based Direct Access should cost more than reciprocal switch access, because if two railroads were negotiating trackage rights compensation that included access to shipper facilities, such expanded access would cost more than simple overhead trackage rights. This is because the rights the tenant was seeking to acquire had increased value in the form of an established customer base.

What BNSF is seeking in this proceeding is trackage rights to access Rosebluff Lead customers. KCS, whose investments and service helped build that customer base, is entitled to be compensated for that access. For KCS to be adequately compensated for the direct access BNSF seeks, KCS must be put in the same position it would have been but for the Board granting BNSF access to Lake Charles. That is what the statutory standard "the principle controlling

compensation in condemnation proceedings” is all about – making KCS whole. The only methodology proposed in this proceeding that makes KCS whole is the market-based compensation consistent with constitutional and condemnation principles proposed by Professor Carey.

B. Calculation of A Market Based Rate

For KCS to receive the full economic value of the Rosebluff Lead it must receive a comparable market-based rate. Professor Carey used information from reasonably comparable situations to calculate market-based compensation: the approach employed by Professor Carey is a widely accepted method for measuring the value of an asset, and has been accepted by the STB, other regulators, and courts.⁶⁰ In fact, Professor Carey’s approach is similar to the comparable line valuation method that Mr. Baranowski identified as an accepted methodological approach to determine an appropriate a valuation base for interest rental.⁶¹ By contrast, the regulatorily-imposed SSW Compensation rate prescription proposed by Mr. Baranowski does not result from a real-world commercially negotiated rate by BNSF and KCS and appears completely at odds with

⁶⁰ See additional discussion at Carey Opening VS at 20-22. “According to 49 USC § 11102, ‘The rail carriers are responsible for establishing the conditions and compensation for use of the facilities.’ Only if they fail to establish compensation terms may the Board step in. Likewise, Section 11102(c) on reciprocal switching provides that ‘The rail carriers entering into such an agreement shall establish the conditions and compensation applicable to such agreement,’ and only if they fail to do so do the regulators step in. Both provisions indicate that the negotiated, market price is preferred. If called on to set the price, the Board should seek to emulate that market price.”

⁶¹ See Baranowski Opening VS at 18, n 42, citing *Decision No. 8*, FD 32760 (Sub-No. 46), slip op. at 12 n.18. The STB has acknowledged that a comparable line segment approach is a possible method for determining the appropriate valuation base for the interest rental component. See *New England Cent.*, FD 35842, slip op. at 3.; *Toledo, Peoria & W. Ry.—Trackage Rights Compensation—Peoria & Pekin Union Ry.*, FD 26476 (Sub-No. 1), slip op. at 4 (ICC served Sept. 20, 1994); *Atchison, Topeka & Santa Fe Ry.—Operating Agreement—S. Pac. Transp.*, 8 I.C.C.2d 297, 304-305 (1992). Sales of comparable lines between a willing buyer and seller would reflect the commercial value of the asset.

BNSF's preference that the free market, instead of regulation, govern rate setting to the maximum extent possible.⁶²

VI. Other Common Trackage Rights Terms & Issues

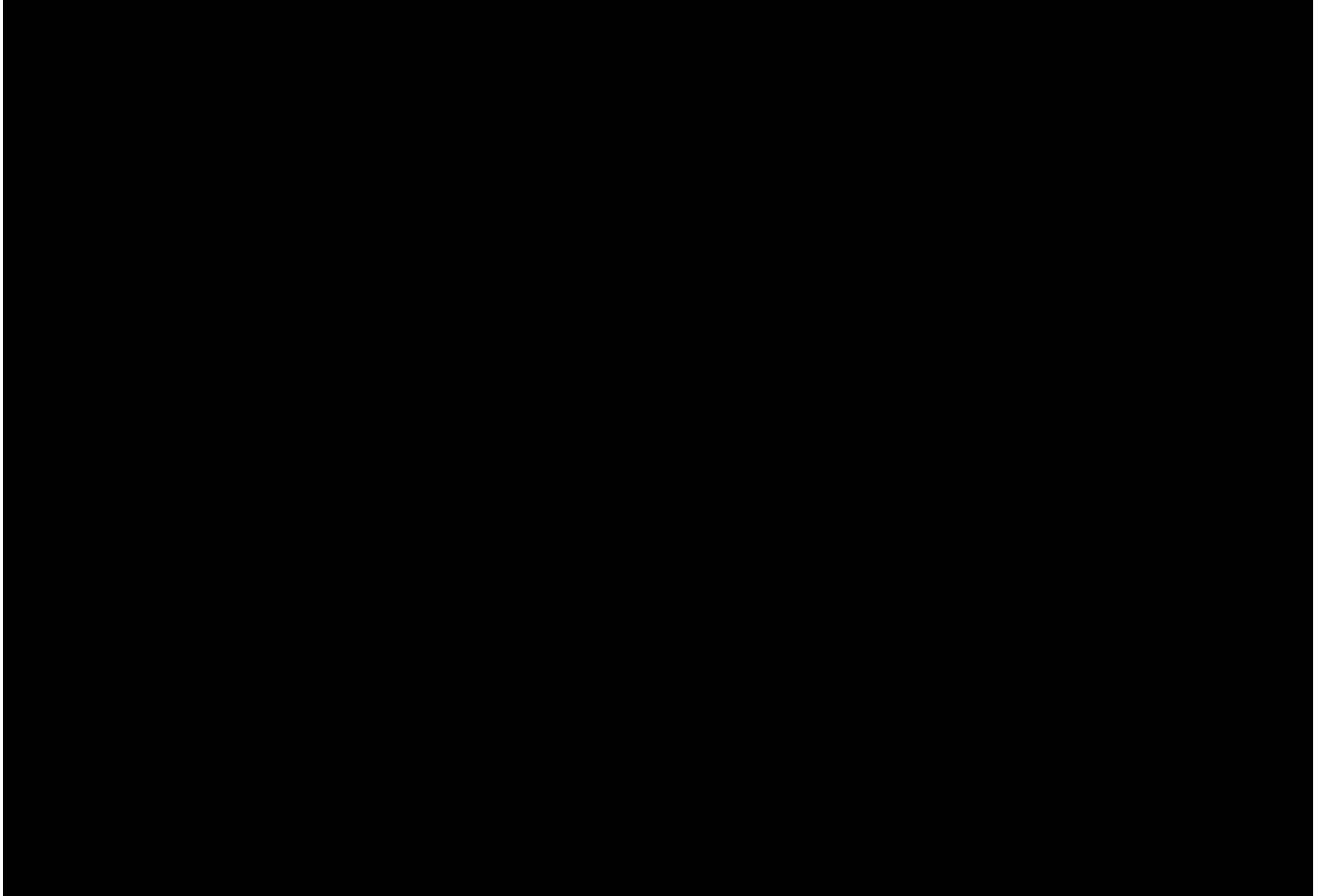
As the record reflects, operations on the Rosebluff Lead are governed by a series of joint facility agreements. Those agreements govern a variety of obligations, liabilities, indemnities, cost allocations, capital improvement requirements, dispute resolutions, and management responsibilities. BNSF should be forced to contribute a usage-based share of extraordinary costs, such as costs associated with significant flooding, fire, or other natural disasters that may occur on the Rosebluff Lead. Such provisions are common in many current trackage rights agreements. BNSF should also pay for all additional capital improvement costs that are required to accommodate BNSF's initial access and any additional future capital assessments needed to accommodate BNSF service without causing interference to KCS's and UP's operations.

Costs are not the only considerations. BNSF should be required to enter into an agreement to indemnify UP and KCS against damages or liability that may result from BNSF's presence and to carry required insurance or make self-insurance commitments. The agreement should also include standard terms utilized in KCS, UP, and BNSF trackage rights agreements, modified to account for any specific parameters unique to the Rosebluff Lead. BNSF should not be given any special treatment or exempted from any of the normal obligations that would be imposed on a tenant in a voluntary trackage rights agreement.

⁶² Carey Opening VS at 16-19. For instance, BNSF's stated views are that competition is preferable to a "forced" switching regime at issue in the Ex Parte 711 case. ("BNSF believes that the Board must allow market forces to govern the commercial relationships between railroads and their shippers, and must not create standards that allow unnecessary Board intervention in properly functioning markets.") *Id.* at 17, citing Reciprocal Switching, EP 711 (Sub No. 1) (BNSF Comments Filed October 26, 2016).

VII. Setting Compensation Based on the Best Evidence in the Record

Dr. Neels, in Section VI of his Reply VS, proposes changes to his original calculation of SSW Compensation, which he believes are called for after considering BNSF-144 and the sources utilized by Mr. Baranowski. While some of the documents provided by Mr. Baranowski appear to be more comprehensive, others seem to be missing data. As such, Dr. Neels is proposing a revised Capitalized Earnings-based SSW Compensation based on the best evidence in the record. Pages 19 to 28 of the Neels Reply VS explains the specific changes Dr. Neels made in revising his CE Approach-Based SSW Compensation. Tables 3 and 4 of the Neels Reply VS explains in detail how Dr. Neels calculated component (b) and (c). Table 5: SSW Compensation Methodology Summary below from the Neels Reply VS reflects KCS's revised Capitalized Earnings-based SSW Compensation based on the best evidence in the record.



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CONCLUSION

BNSF's compensation proposal should be rejected, and to handle traffic for Lyondell, BNSF should be required to pay the market-based rate calculated by Professor Carey. BNSF's proposals are laced with errors and are based on self-serving, results-oriented assumptions that are not grounded in law or economics.

More importantly, BNSF's proposals do not address the terms of the statute that the Board must satisfy in reaching its decision. None of what BNSF proposes was agreed to by KCS, an owner of the affected facility. None of what BNSF proposes would fully compensate for what KCS would lose by BNSF access, due partly to BNSF having already had reciprocal switching/haulage access based on the sub-SSW Compensation "Prescribed Rate" based in the UP/SP merger. Due to cheap access, BNSF already diverted roughly half of the traffic from the Lead through reciprocal switching via UP and KCS. That lost revenue, diverted largely from KCS, skews even a capitalized earnings-based SSW Compensation calculation severely downward, making it unrepresentative of what KCS would lose due to BNSF access.

If the Board accepts BNSF's arguments in this phase of this proceeding, the Board will irreparably damage competition for Rosebluff Lead traffic. BNSF's proposals, coupled with the Board's ruling in Decision No. 8, will give BNSF substantial operational and cost advantages, subsidized by KCS and UP. Those advantages will make it extremely difficult for UP and KCS to compete with BNSF, allowing BNSF to put more money in its pocket due to its advantaged competitive position. The un-level playing field that BNSF wants will serve only BNSF, not competition, and not shippers on the Rosebluff Lead.

Professor Carey's proposed market-based rate is the only proposal before the Board that meets the standards of Section 11102(a). The market-based rate is based on an exhaustive

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calculation of what railroads charge each other under circumstances like to those here for access like BNSF wants. That amount is what the Board's setting compensation here will take from KCS – what KCS would have had if BNSF had ever deigned to bargain with KCS for access in the quarter-century since Decision No. 63 in the UP/SP merger told BNSF to do so. Instead, BNSF has refused, holding out hope for a regulatory windfall. The Board should not give BNSF the windfall BNSF is hoping for. If it does, competition will suffer, not prosper.

Respectfully submitted,

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April 12, 2021

Attorneys for The Kansas City Southern
Railway Company

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 32760 (SUB-NO. 46)

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

**KCS'S REPLY STATEMENT AND EVIDENCE ON COMPENSATION CONCERNING
BNSF'S USE OF THE ROSEBLUFF LEAD**

Exhibit A

JOINT FACILITIES AGREEMENTS

3/29/1948

THE STATE OF LOUISIANA)
PARISH OF CALCASIEU)

AGREEMENT entered into between The Kansas City Southern Railway Company, called herein "Kansas City Company", and Texas and New Orleans Railroad Company, called herein "New Orleans Company".

WHEREAS, May 21, 1947, the United States and Reconstruction Finance Corporation deeded to parties hereto approximately 4.788 miles of industrial lead track, and 1.635 miles of other tracks, together with right of way in Calcasieu Parish, Louisiana; and

WHEREAS, it is desired to stipulate herein rights of the parties in connection with the maintenance and operation of said tracks:

PARTIES AGREE:

Section 1. The right of way, tracks and all other property described in said May 21, 1947 deed is owned jointly and equally by them.

Section 2. Each party reserves the right to locate industry tracks and connect same with said jointly owned tracks, but should the other party not desire to use or own an undivided half interest in said industry tracks, the party locating same shall defray the original cost thereof as well as maintenance and other expenses of same, including liability for operation over said industry tracks; however, the other party reserves the right, before or after the construction of said industry tracks, to acquire, use and own a half interest in same by assuming half the cost of construction thereof, and its proportion of maintenance and other expenses as hereinafter set forth.

Section 3. Additions or betterment expenditures on the jointly owned tracks shall be defrayed equally by each party hereto; provided both parties shall agree in writing in advance to said expenditures in excess of One thousand & 00/100 dollars (\$1,000.00).

Section 4. "Kansas City Company" agrees to maintain, repair and renew the jointly owned tracks in a manner appropriate for the usage thereof, - the cost thereof to be paid by each party hereto in proportion to loaded cars moving thereover as provided in Section 5 hereof, provided that "New Orleans Company" shall have the right to take over this maintenance repair and renewal work during period when "New Orleans Company" is performing the switching operations provided "New Orleans Company" notifies "Kansas City Company" of desire to do so thirty (30) days in advance of the beginning of any such period.

Section 5. The other party hereto covenants to pay to the party hereto which is performing said maintenance, repair and renewal work, monthly, within thirty (30) days after receipt of bills for costs referred to in Section 4 above, its proportion thereof, as defined below, with the understanding monthly adjustments are subject to yearly readjustments based on the relative number of loaded cars handled for the account of each party for the year as defined infra; and said annual adjustments shall be made by representatives of the parties within a reasonable time succeeding the close of the year.

Section 6. Maintenance expenses of the jointly owned tracks shall be determined and borne by each party in proportion to the number of loaded cars handled (excluding engines) for the account of each party over said jointly owned tracks, but work equipment used in maintaining jointly owned tracks, or in constructing additional tracks, shall not be counted.

Section 7. The proportion of maintenance expense to be borne by each party hereto shall be determined by the ratio the number of loaded cars handled for its account, bears to the total loaded cars handled for both parties.

Section 8. To the cost of maintenance of jointly owned tracks, which cost shall include signal and communications equipment and protection at highway crossings, as well as like equipment, ten per cent (10%) shall be added to the cost of labor for supervision, accounting and use of tools. To materials and supplies, excluding ballast, fifteen per cent (15%) shall be added (including foreign line freight charges) for handling, accounting and transportation in revenue trains; provided,

*Revised for
Supply 8/27/50
Filed Herein*

that for such materials or supplies transported in excess of 350 miles, there shall be added five mills per ton mile for said excess distance. To the invoice price of ballast, ten per cent (10%) shall be added (including foreign line freight charges), plus actual cost of work train service, as well as rental equipment costs at established rates.

Section 9. Each party hereto shall return for taxation and pay taxes on its undivided half interest in the jointly owned tracks.

Section 10. "Kansas City Company" will perform the switching operation on the jointly owned tracks for a period of two (2) years from March 1, 1947. Upon March 1, 1949 "New Orleans Company" will assume and perform the switching operation thereon for a period of two (2) years. Thereafter, until changed by agreement, parties shall perform the switching operations in alternate periods of two (2) years duration.

*Out
See 12/19/77
Supplement*

Section 11. Party managing and operating said jointly owned tracks as herein provided, is designated Operating Company, and the other party, the Non-operating Company. All cars, empty or loaded, originating at or destined to points on the jointly owned tracks shall be handled without discrimination and delivered to and received from the Non-Operating Company on the interchange tracks designated for that purpose; and the Non-operating Company shall pay Operating Company monthly, within twenty (20) days after receipt of bill, Eight & 00/100 dollars (\$8.00) per loaded car handled for its account on and after May 21, 1947, for all switching service performed by Operating Company beyond the point of interchange of said cars with the Non-operating Company, including spotting and pulling of cars at industries.

Section 12. (a) Operating Company shall collect and retain tariff switching charges for intra-plant switching it performs, but demurrage shall be assessed and collected by each party on its own business.

(b) Operating Company agrees to remove from joint service, upon written request, any employee failing to observe requisites of this agreement after investigation pursuant to his work-

ing agreement. Operating Company also agrees to remove any employee incompetent or negligent in his duties.

Section 13. Cars on the jointly owned track, or connected industry tracks, shall remain in the per diem account they were in when delivered to the Operating Company for movement on said jointly owned track; provided cars moved out via a line of railroad other than that via which received, shall be interchanged to outbound carrier as follows: (a) As of the date and time a loaded car is released from the inbound load; (b) As of the date and time an inbound empty car is placed on industry track for outbound or intra-plant loading, stored on jointly owned tracks by Operating Company or delivered on interchange track to Operating Company by Non-operating Company.

Section 14. Each party shall at the end of each month send to the other party a statement containing all loaded cars handled for its account on the jointly owned tracks; and the current Classification of Accounts prescribed by the Interstate Commerce Commission shall govern all expenditures for additions and betterments and maintenance of the jointly owned tracks, except as herein otherwise provided. Records of each party relating to jointly owned tracks shall be available at all reasonable times to the other party.

Section 15. Compensation for injury or damage to employees of either party engaged in maintaining or renewing jointly owned tracks, including appurtenances thereto, shall be paid by parties as expense of maintaining the jointly owned tracks, unless caused by sole negligence of party operating engines or cars over said tracks, in which event provisions of Section 16 herein shall govern; provided "Kansas City Company" shall not be liable for loss or damage suffered by "New Orleans Company", including liability to third persons caused by "New Orleans Company" in using the jointly owned tracks, when such injury or damage results from a defect in the jointly owned tracks.

Section 16. Injury or damage resulting from the sole negligence of either party hereto shall be paid for by said negligent party, but if injury or damage result from the joint or concurring negligence of both parties, or if it cannot be determined whose negligence caused by said injury or damage, compensation therefor as provided in Section 15 above, shall be paid equally by parties.

Section 17. Sums paid out by one party hereto, which hereunder should have been paid by the other party, shall be repaid to the party so paying; provided, in the event of payment of a judgment, the party obligated to reimburse the party paying shall first have been notified in writing of the suit in reasonable time to have defended same.

Section 18. Rights and obligations hereunder that cannot be settled by parties, shall be settled by arbitration in the usual manner, and if arbiters selected by parties cannot agree upon the third arbiter, he shall be selected by a Judge of the United States District Court, in which Lake Charles is located. A determination in writing of the arbiters shall be binding upon the parties. Each party shall pay for its arbiter, and the losing party shall pay for services and expenses of the third arbiter.

Section 19. Terms hereof shall bind parties, their successors and assigns for five years from the date hereof, and thereafter until twelve (12) months written notice of intention to terminate the agreement be given one party by the other; providing parties agree neither shall sell, lease or transfer its interest in the jointly owned tracks, or any part thereof, without advance written approval by the other party;

IN WITNESS WHEREOF, parties have had this agreement executed as of

March 29th, 1948.

ATTEST: [Signature]
Assistant Secretary

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
BY N. N. O'Connell
President

ATTEST: [Signature]
Secretary G. B. Herbert
RECOMMENDED BY: [Signature]
General Manager

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
BY [Signature]
Executive Vice President

APPROVED AS TO FORM:
[Signature]
FOR General Attorney

APPROVED AS TO FORM:
[Signature]
General Attorney

APPROVED AS TO FORM & execution
[Signature]
General Counsel

UNION PACIFIC RAILROAD COMPANY

OPERATING DEPARTMENT



Room 1200
1416 Dodge Street
Omaha, Nebraska 68179
FAX (402) 271-6971

Bryce B. Bump
Director - Joint Facilities
(402) 271-6012

Owen J. Durkin
Director - Joint Facilities
(402) 271-4409

William E. Fowler
Director - Joint Facilities
(402) 271-6713

William F. Somervell
Director - Joint Facilities
(402) 271-3756

George M. Sturm
Director - Joint Facilities
(402) 271-2292

Jerry S. Wilmoth
Director - Joint Facilities
(402) 271-6529

January 13, 1999

Mr. T. J. Nelson
Senior Assistant Vice President -
Contracts and Industrial Development
The Kansas City Southern Railway Company
114 11th Street
Kansas City, Missouri 64105

Dear Tom:

Reference is made to our telephone conversation of January 8, 1999 and past discussions between representatives of our respective companies concerning the switching of Zones 1 and 2 in the Lake Charles, Louisiana area.

Agreement dated September 2, 1981, ("Agreement") between The Kansas City Southern Railway Company and Union Pacific Railroad Company, as successor in interest to Southern Pacific Transportation Company, covers the switching of the industrial area at West Lake - Lockmoor, Louisiana and divides this area in 2 switching zones, referred to as Zone 1 and Zone 2. Article I, Section D of the Agreement provides that SP will switch Zone 1 and KCS will switch Zone 2 for an initial 2 year period beginning March 1, 1981. Thereafter, upon written notice by either party to the other, either party may request a reversal of the zones to be switched. Notwithstanding the foregoing, past practice has been for the parties to reverse zones automatically every 2 years, effective March 1 of the appropriate year.

In response to concerns raised by various shippers located in Zones 1 and 2, KCS and UP agree that this reversal of switching for Zones 1 and 2 shall be suspended. Therefore, effective March 1, 1999, KCS will continue to switch Zone 1 and UP will continue to switch Zone 2.

Nothing contained in this letter agreement shall modify any of the terms or provisions of the Agreement, except to the extent provided for herein.

This letter is prepared in duplicate. Please acknowledge KCS' consent to the foregoing by signing this letter in the space provided below and returning one original to me for UP's records.

Very truly yours,

George Wilmoth

ACKNOWLEDGED AND AGREED
THE KANSAS CITY SOUTHERN RAILWAY COMPANY

By: *J. P. Homan*
Title: *1-27-99*
Date: *SA. V.P.O.*

9/2/81

THIS AGREEMENT, made and entered into by and between THE KANSAS CITY SOUTHERN RAILWAY COMPANY, hereinafter sometimes called "Kansas Company", and SOUTHERN PACIFIC TRANSPORTATION COMPANY, hereinafter sometimes called "Southern Company",

WITNESSETH:

WHEREAS, under and by virtue of that certain agreement, dated September 19, 1934, among The Kansas City, Shreveport and Gulf Railway Company, owning company, and The Kansas City Southern Railway Company, operating company, and Texas and New Orleans Railroad Company, predecessor in interest to Southern Company, certain tracks of Kansas Company are used jointly by the parties hereto in the performance of railroad service to the plant of The Mathieson Alkali Works, Inc. and to other industries south of the Kansas Company's main track in the vicinity of West Lake, Calcasieu Parish, Louisiana;

WHEREAS, under and by virtue of that certain agreement, dated August 30, 1940, by and between The Kansas City Southern Railway Company and the said Texas and New Orleans Railroad Company, a portion of Kansas Company's main track and certain tracks connecting therewith are used jointly by the parties hereto in the performance of railroad service to the plant of The Continental Oil Company north of Kansas Company's main track in the vicinity of West Lake, Calcasieu Parish, Louisiana and, by supplemental agreements, dated May 5, 1951 and March 27, 1981, joint service was extended to the Continental Oil Black Company and to the linear alkylbenzene plant;

WHEREAS, under date of May 21, 1947, the United States and Reconstruction Finance Corporation deeded to The Kansas City Southern

Railway Company and the said Texas and New Orleans Railroad Company approximately 4.788 miles of industrial lead track and 1.635 miles of other tracks, together with right of way in Calcasieu Parish, Louisiana south of Southern Company's main track in the vicinity of Lockmoor, Calcasieu Parish, Louisiana and, under date of March 29, 1948, said railway companies entered into an agreement providing for the performance of railroad service on said trackage and other trackage which might be constructed by said parties;

WHEREAS, under and by virtue of that certain agreement, dated July 26, 1955, by and between the said Texas and New Orleans Railroad Company and The Kansas City Southern Railway Company provision was made for the performance of railroad service on certain jointly-owned trackage on the west side of the Calcasieu River at Westlake, Louisiana and, also, on certain trackage owned by Lake Charles Harbor and Terminal District; and

WHEREAS, the parties hereto now desire, in the interest of the more efficient performance of railroad service in the territory covered by the aforesaid agreements, to change the method of performing switching service and maintenance from the ways in which it is provided to be performed in said agreements, and to amend said agreements in certain other respects,

NOW, THEREFORE, the parties hereto have agreed and do hereby agree as follows:

ARTICLE I

A. Effective March 1, 1981, the industrial area West Lake-Lockmoor, Calcasieu Parish, Louisiana shall be divided into Zones 1 and 2 with the dividing point between zones being that point at

which the jointly-owned track acquired by deed of May 21, 1947 crosses Bayou D'Inde west of State Highway No. 108 and west of Rose Bluff Yard, all as shown on the map attached as Exhibit A hereto. Zone 1 shall be that area east of Bayou D'Inde (except for Rose Bluff Yard), including industries both north and south of the Kansas Company main track service to which is provided for in the said agreements of September 19, 1934, August 30, 1940 and July 26, 1955 and, in part, in the said agreement of March 29, 1948. Trackage (including industry trackage) in Zone 1 is shown in green on Exhibit A. Zone 2 shall be that area west of Bayou D'Inde including industries service to which is provided for in the said agreement of March 29, 1948. Trackage (including industry trackage) in Zone 2 is shown in red on Exhibit A.

B. Rose Bluff Yard shall be considered common to both zones, and all trackage therein may be used by either carrier, with the understanding, however, that such use shall be limited to the handling of cars destined to or originating in either Zone 1 or Zone 2. For operating efficiency, certain trackage in said yard shall, by agreement between the General Managers of the parties, or their authorized representatives, be designated for the primary use of one party or the other, but Kansas Company shall not use the designated Southern Company tracks for storage purposes, nor shall Southern Company use the designated Kansas Company tracks for storage purposes. Except for the exchange of cars destined to or from the Continental complex and for the exchange of cars destined to or from the Mathieson plant, both in Zone 1, the exchange between the carriers of all cars destined to or from either Zone 1 or Zone 2 shall be made

in Rose Bluff Yard. Cars to and from the Continental complex shall be exchanged at the Continental yard, and cars to and from the Mathieson plant shall be exchanged at the Mathieson yard.

C. Notwithstanding the provisions of Section 9 of Article I of the said agreement of September 19, 1934; of Section 10 of the said agreement of August 30, 1940; of Section 10 of the said agreement of March 29, 1948, and of Section THIRD:(a) of the said agreement of July 26, 1955, Southern Company shall switch Zone 1 and Kansas Company shall switch Zone 2; provided that, at any time after the expiration of two (2) years from the effective date of this agreement, either party may, after giving notice in writing, on or before January 1 of any second year after the effective date hereof, cause a reversal of the zones to be switched, as hereinabove described, after which Kansas Company shall switch Zone 1 and Southern Company shall switch Zone 2 until they shall agree otherwise in accordance with the same procedure. It is the intent of this agreement that the performance of switching within the territory described hereinabove shall be divided between the parties as equitably as possible consistent with efficiency; therefore, modification of zones shall be accomplished only as the result of a study of operations conducted jointly by the parties.

D. New or expanded industries which may locate in the West Lake-Lockmoor industrial area subsequent to the effective date of this agreement shall be assigned to the zone in which situated geographically, except that, in the event of construction of new trackage in which the industry switch is located inside one zone, but the trackage extends into the other zone, such industry shall

be served by the carrier serving the zone in which said switch is located.

E. It is understood that either party hereto may handle solid over-the-road unit trains (here defined, for all purposes of this agreement, as trains of 25 cars or more loaded with the same commodity on one bill of lading on the same day) to an industry located in the zone other than that in which it performs switching service. In the event of derailment or other accident involving any such unit train, wreckage shall be cleared by and at the sole expense of the party operating said train, except in emergencies, when wreckage may be cleared by the other party at the sole expense of the party operating said train.

F. Except as provided herein and in paragraph E hereinabove, work, wreck or construction service shall be performed by the party switching the zone in which said service is to be performed; provided, however, in the event of derailment in the vicinity of Rose Bluff Yard, between Points A and B described in Article II A hereinafter, clearing and rerailing shall be performed by the party handling the train or cars derailed, except in emergencies (herein defined as interruption to service due to wreck, fire, storm, flood, explosion or other occurrence beyond the control of either party requiring immediate action to protect people or property), when it may be performed by the other party and the costs thereof shall be borne as provided in the liability provisions of the pertinent agreement. Track damage shall be repaired by the company maintaining said track.

ARTICLE II

A. Notwithstanding the provisions of Section 4 of the said

agreement of March 29, 1948 (as supplemented by letter of September 24, 1969), the responsibility for maintenance, repair and renewal of all railroad-owned facilities (except the yard office-locker room), including signalling and crossing protection, extending from point of connection to Southern Company's trackage at Point "A" on Exhibit A to the south end of Zone 2 shall be divided at the south end of the bridge over Maple Fork, shown as Point "B" on Exhibit A. The company performing switching in Zone 1 pursuant to Article I hereof shall be responsible for maintenance between Point A and Point B, and the company performing switching in Zone 2 shall be responsible for maintenance of the remainder of the trackage covered by said agreement. Should the maintaining company fail to repair any defect in the jointly-used trackage within a reasonable time after the other company shall have notified it in writing, specifying the defect, and requesting that it be repaired, then said other company shall have the right to make the necessary repairs at once, and may do so, and the cost thereof shall be borne as provided in Paragraph B hereof.

B. Kansas Company shall continue to maintain, repair and renew its trackage covered by the said agreements of September 19, 1934, and August 30, 1940, and Southern Company shall continue to maintain the jointly-owned trackage covered by the said agreement of July 27, 1955, as amended by Letter Exchange of the Chief Engineers of the parties. The cost of maintenance, repair and renewal of all jointly-used trackage covered by said agreements shall be borne by the parties as provided therein. The cost of maintenance, repair and renewal of the trackage described in Paragraph A hereinabove

shall be borne by the parties in such proportions as the number of loaded cars handled for the account of each party, on each segment of trackage monthly, bears to the total number of loaded cars handled on said trackage during said month. In rendering bills for maintenance, each party shall apply Circular GMA No. 2710-D, "Rules Covering Preparation of Joint Facility And Other Bills between Carriers," revised July 1, 1980, of the General Managers' Association of Chicago, or any agency successor thereto, supplements and amendments thereto, and reissue thereof. Rates for equipment rental shall be those prescribed in GMA Circular No. 2636-E, "Schedule of Equipment Rental And Other Rental Rates for Use Between Carriers," revised January 1, 1980, and as supplemented or revised from time to time.

C. The division of cost under Paragraph B of this article shall be subject to adjustment at the end of each 12-month period subsequent to March 1, 1981 on the basis of the total number of loaded cars handled for each party during said period.

D. Loaded cars, including loaded cars in unit trains, shall be counted as provided in the separate agreements of September 19, 1934; August 30, 1940 and July 26, 1955. Loaded cars handled on trackage covered by the agreement of March 29, 1948 destined to or received from an industry located adjacent to said track shall be counted once when entering or once when leaving each zone thereof, cars entering and leaving a zone but not spotted to an industry within the zone shall receive only one count, and loaded cars originating and terminating within the same zone shall receive one count. Per-loaded-car charges for handling shall, until otherwise provided

for, be continued to be paid as specified in supplements, dated December 19, 1977, to the said agreements of September 19, 1934; August 30, 1940, and March 29, 1948. Until it shall be otherwise agreed, cars handled to and from the riverfront trackage, in Zone 1, served pursuant to the said agreement of July 26, 1955, shall be paid for at the rate of Twenty and No/100 Dollars (\$20.00) per loaded car.

E. Each party shall maintain its owned portion of the yard office-locker room, and shall include the cost thereof in its bill against the other party for maintenance under Paragraph B of this article.

ARTICLE III

A. The payment of interest rental and taxes under any of the said agreements described in the recitals hereof shall be unaffected by this agreement.

B. The cost of additions and betterments or retirements to or from any of the jointly-used facilities covered hereby shall be borne in accordance with the provisions of the applicable base agreement, except that the cost of construction of certain trackage presently being constructed at and in the vicinity of Rose Bluff Yard, aggregating 21,055 track feet, more or less, and siding 4,250 track feet, more or less, adjacent to the Davison Lead, shall be borne in the first instance by Kansas Company. Southern Company shall reimburse Kansas Company one-half the cost of said new trackage in the vicinity of Rose Bluff Yard. In the event Southern

Company uses the siding adjacent to the Davison Lead, it shall reimburse Kansas Company one-half the cost thereof.

Kansas Company shall furnish all materials for and shall construct, and shall own, said new trackage, but in consideration of Southern Company's payment of one-half the cost of such new trackage, no interest rental or other usage charge shall be made for its use. It is understood that Southern Company will pay one-half property taxes due on the 21,055 feet of trackage in the vicinity of Rose Bluff Yard, but not on the 4,250-foot siding until it shall use said track.

ARTICLE IV

A. Liability for loss and damage to property or injury to or death of persons shall be borne in accordance with Paragraph 4 of supplemental agreements dated December 19, 1977, to the said agreements of September 19, 1934, August 30, 1940, and March 29, 1948, and as specified in Article IV B hereinafter with respect to operation and maintenance of trackage covered by the said agreement of July 26, 1955. Anything in any of said agreements (including that of July 26, 1955, as herein amended) to the contrary notwithstanding, a unit train shall be deemed to be the Exclusive Equipment or Appliance (as that term is used in the above-mentioned supplemental agreements and Article IV B hereof) of the party hereto in whose account said train or the cars thereof may be.

The employees handling each unit train shall be deemed to be the Sole Employee (as that term is used in the above-mentioned supplemental agreements and Article IV B hereof) of that party in whose account said train or the cars thereof may be.

B. Sections FIFTH, SIXTH and SEVENTH of the agreement of July 26, 1955, are hereby stricken in their entirety and the following substituted in lieu thereof:

FIFTH. A. DEFINITIONS: For the purposes of this Agreement, the following definitions shall apply:

1. 'Damages' shall mean all payments made or liability for loss of or damage to any and all property, and for injuries to or death of any and all persons suffered or occasioned in connection with the maintenance, repair, renewal or operation of, the making of additions and betterments to, or operation on or over the jointly-used tracks, whether under any state or federal law, or by compromise or settlement, together with all costs and expenses incident thereto.

2. 'Joint Employee' shall mean and include any and all officers and other employees of either company while actually engaged in the maintenance, repair, renewal or operation, the making of additions and betterments to, or operation on or over the jointly-used tracks in switching service hereunder, or while engaged in rerailing cars and equipment, picking up, removing or clearing wrecks or obstructions thereon.

3. 'Sole Employee' shall mean and include any and all persons employed by or on behalf of either party, except while occupying the status of Joint Employee.

4. 'Exclusive Equipment or Appliance' shall mean the equipment or appliances solely owned by, or in the possession or control of a party, except equipment or appliances being used or operated on the jointly-used tracks by a Joint Employee; provided, however, that, with respect to cars, it shall mean those in the per diem account of a party.

5. 'Joint Property' shall mean and include the jointly-used tracks and any and all property (including locomotives) owned or used by or on behalf of either party in switching service hereunder.

Singular forms of any of the terms herein defined shall comprehend and encompass the plural forms of any of such terms.

B. ALLOCATION OF LIABILITY: Damages shall be borne by the parties as hereinafter provided:

1. When caused by:

- a. the acts or omissions of a Sole Employee of one of the parties; or
- b. the concurring acts or omissions of a Joint Employee and of a Sole Employee of one of the parties; or
- c. any defect or failure of any kind in the Exclusive Equipment or Appliance of one of the parties; or
- d. the acts or omissions of a Joint Employee concurring with a defect or failure of any kind in the Exclusive Equipment or Appliance of one of the parties,

Damages shall be borne by the party in whose employment such Sole Employee may be, or by the party whose Exclusive Equipment or Appliance was defective or failed, whether or not concurring with the acts or omissions of third persons (that is, those persons other than Sole or Joint Employees)..

2. When caused by:

- a. the concurring acts or omissions of a Sole Employee of each of the parties; or
- b. the concurring acts or omissions of a Joint Employee and of a Sole Employee of each the parties; or
- c. defects of any kind in the Exclusive Equipment or Appliance of each of the parties; or
- d. the acts or omissions of a Joint Employee; or
- e. the failure of or a defect in Joint Property; or
- f. any other cause whatsoever not hereinbefore provided for,

Damages shall be borne by each party as to its Exclusive Equipment or Appliance (except the cost of rerailing cars) property in its custody or control and property upon its cars, and, as to its Sole Employees, passengers or persons on its locomotives, cars or trains, while as to third persons and their property, Joint Employees and their property, and/or Joint Property, Damages shall be borne by the parties equally. For the purpose of this paragraph, Damages which are borne equally by the parties shall be understood to include all costs and expenses arising out of or incident to the rerailing of locomotives, cars and other equipment.

Anything in this Paragraph FIFTH to the contrary notwithstanding, in case of accident in which the locomotives, cars, trains (other than locomotives, cars or trains while occupying the status of Joint Property) or Sole Employees of only one of the parties are involved, or are in its sole service, then the liability for the resulting Damages shall be borne solely by that one of the parties whose locomotives, cars, trains or Sole Employees are solely involved.

Anything hereinabove to the contrary notwithstanding, neither party shall have any claim against the other for Damages of any kind caused by or resulting from interruption or delay to its business.

Each party shall pay all Damages for which such party shall be liable hereunder, and shall indemnify and save harmless the other party against the payment of any such Damages.

In case a suit shall be commenced against either party for or on account of Damages for which the other party is solely or jointly liable hereunder, the party so sued shall give to such other party notice in writing of the pendency of such suit and thereupon such other party shall assume or join in the defense of such suit.

Either company may make settlement of any and all claims for injury to or death of persons, or for loss of or damage to property, for which the parties are jointly liable hereunder,

except that no such settlement may be made in excess of Five Thousand Dollars (\$5,000) without the prior written consent of the other company. Upon the making of any voluntary settlement as aforesaid, a release shall be procured from each claimant which shall be in form sufficient to discharge both parties to this Agreement from liability on account of such claim, and a copy thereof shall be furnished each company.

Each party assumes liability for its failure to comply with any law or governmental regulation, and agrees to reimburse and indemnify the other party for any fines, penalties, cost or charges resulting from any violation of such law or regulation. In the event of violation of the Safety Appliance Act for which the switching carrier is fined, the party in whose account the car is shall reimburse the switching party the amount paid in satisfaction of such fine.

ARTICLE V

This agreement shall be construed liberally so as to secure to each party hereto all the rights, privileges and benefits herein provided or manifestly intended. This agreement and each and every provision hereof is for the exclusive benefit of the parties hereto and not for the benefit of any third party.

ARTICLE VI

This agreement shall be effective March 1, 1981, and shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns.

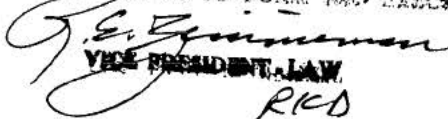
IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate as of this, the 2ND day of September, 1981.

THE KANSAS CITY SOUTHERN RAILWAY
COMPANY

By 

SOUTHERN PACIFIC TRANSPORTATION
COMPANY

APPROVED AS TO FORM AND EXECUTION By 
VICE PRESIDENT, LAW Assistant to Vice President


VICE PRESIDENT, LAW

RKD
9/21/81


Out Bureau

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 32760 (SUB-NO. 46)

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

**KCS'S REPLY STATEMENT AND EVIDENCE ON COMPENSATION CONCERNING
BNSF'S USE OF THE ROSEBLUFF LEAD**

Exhibit B

DEED

DEED

KNOW ALL MEN BY THESE PRESENTS THAT:

RECONSTRUCTION FINANCE CORPORATION, a corporation duly organized and existing under and by virtue of the laws of the United States, which corporation has succeeded, pursuant to the provisions of Public Law 109, 79th Congress, approved June 30, 1945, to all the rights and assets of DEFENSE PLANT CORPORATION, and the UNITED STATES OF AMERICA, (both jointly hereinafter referred to as "Vendor"), both acting by and through the War Assets Administrator under and pursuant to Executive Order 9689, dated January 31, 1946, and the power and authority contained in provisions of the Surplus Property Act of 1944, (58 STAT 765) and War Assets Administration Regulation No. 1, as amended, (12 FR 863), herein represented by Cannon D. Clark, Deputy Regional Director, Office of Real Property Disposal, New Orleans, Louisiana, duly authorized by a Delegation of Authority of the War Assets Administrator, executed on November 22, 1946, hereto attached, does hereby grant, bargain, sell, convey, assign, and deliver without warranty, recourse, or liability whatsoever, even as to the restitution of the purchase price, but with full substitution and subrogation in and to all rights and actions of warranty against all preceeding owners and vendors, unto the TEXAS AND NEW ORLEANS RAILROAD COMPANY, a Texas corporation, appearing herein and accepting these presents by and through R. W. Barnes, its Vice-President, duly authorized, pursuant to a resolution adopted by its Board of Directors on May 12, 1947, a certified copy of which is annexed hereto, and THE KANSAS CITY SOUTHERN RAILWAY COMPANY, a Missouri corporation, appearing herein and accepting these presents by and through ^{Executive} W. D. Burch, its General Agent, duly authorized, (both jointly hereinafter called "Purchaser"), their successors and assigns, all and singular, the following described property situated in the Parish of Calcasieu, State of Louisiana, which said property has been duly declared surplus to the War Assets Administrator pursuant to the provisions of the above mentioned statutes and regulations:

I. Main industrial lead track extending approximately 4.83 miles in a general southerly and southwesterly direction beginning at point of connection with Kansas City Southern Railway Magnesium Plant track at engineer station 0/00, said point being near northeast corner of southeast quarter of Section 33, Township 9 South, Range 9 west in Calcasieu Parish, Louisiana, except that first 200 feet of track owned by K.C.S. Railway is not included, and ending at engineer station 254/85 at north line of Public Highway located along south line of Section 18, Township 10 South, Range 9 west in Calcasieu Parish, Louisiana; two storage tracks, 2,886.6 feet and 2,627.8 feet in length, located near point of beginning of main lead at place commonly known as "Rosebluff Yard"; one storage track, 1,874.4 feet in length, near end of main lead; turnout connections for three tracks, approximating a total of 727 feet of track, diverging from said main lead track and for two tracks, approximating a total of 407 feet of track, diverging from storage track, all situated within said Section 18, and lying within main lead right-of-way of normal width of 50 feet each side of center line of main lead track; drainage structures under trackage and roads, consisting of various diameter concrete pipes, Box Culverts, timber trestling and steel girder span; highway crossing signs, private road crossing and public road crossing improvements; and other improvements of any nature pertaining to construction or operation of all trackage described; total mileage of trackage described herein above amounting to 4.788 of main lead track and 1.635 miles of other track, it being understood that turnout connection to so-called Maplewood industry spur is not included in trackage involved. All "Stations" herein referred to are delineated on a plat of survey prepared by F. Shutts' Sons, dated June 7, 1943, revised March 22, 1946, and April 22, 1946; a print of which is attached hereto and made a part hereof for reference.

II. The following servitudes, rights-of-way, and easements:

1. A right-of-way and servitude for the construction, operation, renewing, alteration, inspection, and maintenance of a railroad track or railroad tracks, together with all sidings, switch tracks, constructions, buildings, and/or appurtenances connected with or incidental to the construction, operation, and maintenance of a railroad and railroad track or tracks upon, over, across, under and through the following described land together with the right of ingress to and egress from the property together with all of the rights and privileges and appurtenances which may be required for the full enjoyment of said rights together with the right to construct, operate and maintain telephones and telegraph lines and together with the privilege of removing at any time any and all of the said improvements, said right-of-way being one hundred (100) feet wide and measuring fifty (50) feet on each side of the following described center lines:

- a. (Referred to for identification purposes as Tract No.1)
Beginning at a point 793.4 feet west and 358 feet south of the northeast corner of the northeast quarter of the southeast quarter of Section 33, Township 9, South, Range 9 west, southwest district of Louisiana

thence north 61° 15' east, 464 feet to the center line of the Kansas City Southern Railway spur at Station 105 plus 00 of said spur serving the Magnesium Plant, containing approximately five tenths (.5) of an acre.

Being the same right-of-way acquired by Defense Plant Corporation from the Mathieson Alkali Works, Inc., by deed dated October 20, 1944, bearing file number 317927 and recorded in Book 376 at Page 232 of the records of Calcasieu Parish.

- b. (Referred to for identification purposes as Tract No. 2)
Beginning at a point in the center of the North-South public road from U. S. Highway No. 90 to the Magnesium Plant, said point being 793.4 feet West and 358 feet South of the Northeast corner of the Northeast Quarter of the Southeast Quarter (NE 1/4 of SE 1/4) of Section 33, Township 9 South, Range 9 West. Thence South 63° 15' West to the West line of the Northeast Quarter of the Southeast Quarter (NE 1/4 of SE 1/4) of said Section 33, containing approximately 1.3 acres.

- c. (Referred to for identification purposes as Tract No. 27)
Over and across the Northeast Corner of the Southwest Quarter of the Southeast Quarter (SW 1/4 of SE 1/4) of Section 33, Township 9 South, Range 9 West, southwestern district of Louisiana, being 100 feet wide, 50 feet on each side of the center line of said main lead track and containing approximately .1 of an acre of land.

"b" and "c" being the same rights-of-way acquired by Defense Plant Corporation from Lock Moore & Co., Ltd., by right-of-way deed dated February 28, 1944, bearing file number 308844 and recorded in Book 370, Page 151 of the records of Calcasieu Parish.

- d. (Referred to for identification purposes as Tract No. 3)
Beginning at a point nineteen and one-half (19 1/2) feet North of the Southwest corner of the Northwest Quarter of the Southeast Quarter (NW 1/4 of the SE 1/4) of Section 33, Township 9 South, Range 9 West, Southwestern District of Louisiana. Thence North 63° 15' east, across said Northwest Quarter of Southeast Quarter (NW 1/4 of SE 1/4) to the east line of same and containing approximately 3.5 acres.

Being the same right-of-way acquired by Defense Plant Corporation from Sam Love, Christ Love, and Norfolk Love by deed dated February 28, 1946, filed for record in Conveyance Book 397, page 383; and from Margaret Lorden by deed dated May 14, 1946, filed for record in Conveyance Book 403, page 8; and from Anna C. Byars by deed dated May 14, 1946, filed for record in Conveyance Book 403, page 8.

- e. (Referred to for identification purposes as Tract No. 13)
Beginning at a point approximately at the NE corner of said Section 5; Township 10 S Range 9 W. Thence S 63° 15' W 1320 feet, more or less, to the West line of the NE 1/4 of NE 1/4 of Section 5, and containing approximately 3.4 acres.

Being the same right-of-way acquired by Defense Plant Corporation from Edgar Miller, Ernest Miller, Mrs. Hannah L. Monday, Mrs. Hilma E. Rachsen, Elaine L. Ronckenstein, Mrs. Selma L. Martinez Fla, and Mrs. Irma L. Tienan by deed dated May 8, 1946, filed for record May 16, 1946, in Conveyance Book 370, page 488.

- e.(1) Referred to for identification purposes as Tract No. 13 Supplement) Beginning at a point approximately

57 feet north of the southwest corner of the NW 1/4 of the N E 1/4 of Section 5, Township 10 South, Range 9 West. Thence North 63° 15', east 1320 feet, more or less, to the east line of the NW 1/4 of the NE 1/4 of Section 5, and containing approximately 3.4 acres.

Being the same right-of-way acquired by the Defense Plant Corporation from the Cities Service Refining Corporation by deed dated October 21, 1944, and recorded in Book 362, page 13 of the records of Calcasieu Parish.

f. (Referred to for identification purposes as Tract No. 14)

Beginning at a point approximately 57 feet North of the Southeast corner of the N 1/2 of the NE 1/4, of Section 5, T 10 S, R 9 W. Thence S 63° 15' E, 127 feet more or less to the South line of said N 1/2 of the NW 1/4 of Section 5, and containing approximately .2 of an acre.

Being the same right-of-way acquired by Defense Plant Corporation from Cities Service Refining Corporation by right-of-way deed dated February 2, 1944, bearing file number 305935 and recorded in Book 364, page 437 of the records of Calcasieu Parish.

E. (Referred to for identification purposes as Parcel 1 of Tract No. 26) Beginning at a point on the W line of Section 18, Township 10 South, Range 9 West, which is 681.4 feet W of the NE corner of the NW 1/4 of said Section 18, thence S 15°, 16' W to the S Boundary of the NE 1/4 of the NW 1/4 of Section 18, and 238.7 feet E of the SW corner of the NE 1/4 of the NW 1/4 of Section 18 containing 3.15 acres, more or less.

Being part of that land received in fee by deed from the Cities Services Refining Corporation to Defense Plant Corporation dated August 25, 1944, and recorded in Book 575 at Page 285 of the records of Calcasieu Parish. It being the intent to herewith convey only a servitude as before described over said land.

g.(1) (Referred to for identification purposes as Parcel 2 of Tract No. 26) Beginning at a point on the South line of the Northeast Quarter of Northwest Quarter, Section 18, Township 10 South, Range 9 West, Southwestern District of Louisiana; said point being the center of the railway right-of-way, and 208.7 feet North 89° 59' East, from the Southwest corner of said Northeast Quarter of Northwest Quarter. Thence South 15° 16' West, 406.7 feet to Station 219 plus 98.7 of the railway survey; said point being the point of a 3° curve to the left, whose length is 508.9 feet, whose radius is 1910.1 feet and whose angle of intersection is 15° 16'. Thence, from the above described point of curve, southerly around said curve to the left a distance of 508.9 feet to Station 225 plus 07.6. Thence due South 371.5 feet to the East and West center line of Section 18. Thence due South 2606.5 feet to a point 50 feet North of the South line of said Section 18, Township 10 South, Range 9 West.

Said right-of-way containing 9.08 acres, in Calcasieu Parish, Louisiana; being that land received in fee by deed from the Cities Service Refining Corporation to Defense Plant Corporation dated August 25, 1944, and recorded in Book 376, Page 43 of the records of Calcasieu Parish.

Excluded from the 100 foot right-of-way, herewith conveyed, are two valve gas reduction stations on the West or right side of the railway center line; the first one lying between Station 252 plus 54.2 and Station 252 plus 93.2 and whose East boundary is located 36.5 feet West or to the right of the center line of the railroad and whose West boundary is the East boundary of the Firestone tract which is located ninety-five (95) feet West of the center line of said railway, and the second between Station 253 plus 61.5 and 254 plus 62, the East boundary of this tract lies 35 feet West or right of the center line of the main line railway and the West boundary is the East line boundary of the Firestone tract which is ninety-five (95) feet West of the center line of the railway, it being the intent to herewith convey only a servitude as before described over said land.

2. A perpetual easement for the construction, use, operation, maintenance, repair, and removal of a railroad track or tracks, a pipeline or pipelines, and electric power, telephone and telegraph lines, poles, towers, and guys 100 feet in width, over and across the following parcels of land, all located in Township 9 South, Range 9 West, 50 feet on each side of a center line, said easement being more particularly described as follows:

- a. (Referred to for identification purposes as Tract No.4) Beginning at a point where the center line of said railroad track intersects the center line of Section 33, said point being located S 63° 15' W, 2523 feet from the switch point of said railroad track where it connects with a spur track of Kansas City Southern Railway which serves the Magnesium Plant; Thence in a northerly direction along the center line of said Section 33 to a point distant 50 feet northwest of the center line of said railroad track as measured at right angles thereto.

Thence S 63° 15' West along a line parallel to the center line of said railroad track and distant therefrom 50 feet to a point in the dividing line between lands of Primus Haynes and lands of Pinky Mayo, said point being in the line dividing the SE 1/4 of SW 1/4 from the NE 1/4 of SW 1/4 of said Section 33.

Thence in an easterly direction along the dividing line between lands of Primus Haynes and lands of Pinky Mayo, said dividing line coinciding with the dividing line between the SE 1/4 of SW 1/4 and the NE 1/4 of SW 1/4 of said Section 33, to a point in the center line of the S 1/2 of said Section 33. Thence northerly along the center line of said Section 33 for a distance of 19.5 feet to the point of beginning.

The above described right-of-way being a triangular shaped parcel of land lying in the extreme Southeast corner of the NE 1/4 of SW 1/4 of said Section 33, containing an area of 0.13 acres, more or less.

- b. (Referred to for identification purposes as Tract No.5) Beginning at a point where the center line of said railroad track intersects the dividing line between lands of Pinky Mayo and lands of Primus Haynes, said point being in the dividing line between the SE 1/4 of SW 1/4 and the NE 1/4 of SW 1/4 of said Section 33.

Thence along the center line of said railroad track S 83° 15' W to a point in the dividing line between lands of Pinky Mayo and lands of Rose Williams, et al; having a total width of 100 feet, 50 feet on each side of said center line of said railroad track.

The above described right-of-way being located in the extreme northeast corner of SE 1/4 of SW 1/4 of said Section 33, containing an area of 1.38 acres, more or less.

- c. (Referred to for identification purposes as Tract No. 6)
Beginning at a point in the intersection of the lands of Thompson M. Dietz, et al, and the lands of Rose Williams, et al, said point also being in the intersection of the lands of Pinky Mayo, said point being located 485 feet westerly of the center line of said Section 33.

Thence in an easterly direction along the dividing line of the lands of Thompson M. Dietz, et al, and the lands of Pinky Mayo, to a point distant 50 feet southeast of the center line of said railroad track.

Thence S 83° 15' W along a line parallel to the center line of said railroad track and distant therefrom 50 feet to a point in the dividing line between the lands of Thompson M. Dietz, et al, and the lands of Rose Williams, et al.

Thence northerly along the dividing line between the lands of Thompson M. Dietz, et al, and the lands of Rose Williams, et al, to the point of beginning.

The above described right-of-way being a triangular shaped parcel of land lying in the SE 1/4 of SW 1/4 of said Section 33, containing an area of 0.08 acres, more or less.

- d. (Referred to for identification purposes as Tract No. 7)
Beginning at a point where the center line of said railroad track intersects the dividing line between lands of Rose Williams, et al, and the lands of Pinky Mayo.

Thence along the center line of said railroad track S 83° 15' W to a point in the dividing line between lands of Rose Williams, et al, and the lands of Arthur J. Vatter; having a total width of 100 feet, 50 feet on each side of said center line of said railroad track.

The above described right-of-way being located in the SE 1/4 of SW 1/4 of Section 33, containing an area of 1.52 acres, more or less.

- e. (Referred to for identification purposes as Tract No. 8)
Beginning at a point where the center line of said railroad track intersects the dividing line between lands of Arthur J. Vatter and the lands of Rose Williams, et al.

Thence along the center line of said railroad track

S 63° 15' W to a point in the dividing line between lands of Arthur J. Vatter and lands of Leonise Lee; having a total width of 100 feet, 50 feet on each side of said center line of said railroad track.

The above described right-of-way being located in the SE 1/4 of SW 1/4 and in the SW 1/4 of SW 1/4 of said Section 33, containing an area of 0.62 acres, more or less.

- f. (Referred to for identification purposes as Tract No. 9)
Beginning at a point where the center line of said railroad track intersects the dividing line between lands of Leonise Lee and lands of Arthur J. Vatter.

Thence along the center line of said railroad track S 63° 15' W to a point in the dividing line between lands of Leonise Lee and the lands of Jim Lee; having a total width of 100 feet, 50 feet on each side of said center line of said railroad track.

The above described right-of-way being located in the SE 1/4 of SW 1/4 and in the SW 1/4 of SW 1/4 of said Section 33 containing an area of 0.99 acres, more or less.

- g. (Referred to for identification purposes as Tract No. 10)
Beginning at a point where the center line of said railroad track intersects the dividing line between lands of Jim Lee and lands of Leonise Lee.

Thence along the center line of said railroad track S 63° 15' W to a point in the dividing line between the lands of Jim Lee and the lands of George W. Law; having a total width of 100 feet, 50 feet on each side of said center line of said railroad track.

The above described right-of-way being located in the SW 1/4 of SW 1/4 of said Section 33, containing an area of 0.61 acres, more or less.

- h. (Referred to for identification purposes as Tract No. 11)
Beginning at a point where the center line of said railroad track intersects the dividing line between lands of George W. Law and lands of Jim Lee. Thence along the center line of said railroad track S 63° 15' W to a point where the said center line of said railroad track intersects the dividing line between Sections 32 and 33; having a total width of 100 feet, 50 feet on each side of said center line of said railroad track subject to such rights as are held by others in the public road known as the "Parish Road". The above described right-of-way being located in the extreme southwest corner of the SW 1/4 of SW 1/4 of said Section 33, containing an area of 1.58 acres, more or less.

- i. (Referred to for identification purposes as Tract No. 12)
Beginning at a point where the center line of said railroad track intersects the dividing line between Sections 32 and 33.

Thence in a northerly direction to a point distant 50 feet northwest of the center line of said railroad track as measured at right angles thereto.

Thence S 63° 15' E along a line parallel to the center line of said railroad track and distant therefrom 50 feet to a point in the dividing line between said Section 32 and Section 5 of Township 10 South, Range 9 West.

Thence in an easterly direction along the dividing line of said Sections 32 and 5 to a point common to Sections 32 and 33 of Township 9 South, Range 9 West, and Sections 4 and 5 of Township 10 South, Range 9 West. Thence in a northerly direction along the dividing line between said Sections 32 and 33 to the point of beginning, subject to such rights as are held by others in the public road known as the "Parish Road". The above described right-of-way being a triangular shaped parcel of land lying in the extreme Southeast corner of said Section 32, containing an area of 0.10 acres, more or less.

All of the above described easements, from "a" through "i", inclusive, were acquired by the United States of America by a Declaration of Taking dated September 25, 1945, in the suit entitled, "UNITED STATES OF AMERICA vs Nine Parcels of Land, ET AL", being No. 855 of the Civil Docket of the United States Court for the Western District of Louisiana, recorded in Conveyance Book 391, Page 149, and being confirmed in a judgment in the same style and numbered case rendered 21 February 1946.

3. A right-of-way one hundred (100) feet in width, being 50 feet on each side of the following described center lines for the following purposes:

- (i) For the construction, operation, renewing, alteration, inspection and maintenance of a railroad track or tracks, together with all sidings, switch tracks, constructions, buildings and/or appurtenances connected with or incidental to the construction, operation and maintenance of a railroad and railroad track or tracks.
- (ii) For the construction, operation, renewing, alteration, inspection and maintenance of electrical transmission and power lines and/or telephones and telegraph lines, together with the right to place, erect and maintain, inspect, add to the number of and relocate at will poles, towers, cross-arms and fixtures, and string wires and cables adding thereto from time to time, and to cut and remove from the below described property, and the property adjoining the same for a distance of forty (40) feet south, any trees, overhanging branches, or other obstructions.

(iii) For the purpose of laying, operating, renewing, altering, inspecting and maintaining pipe lines for the transmission of oil, gas, petroleum, and other products.

- a. (Referred to for identification purposes as Tract No. 15) Over and across the South Half of the NW 1/4 of Section 5, T 10 S, R 9 W, Southwestern District of Louisiana, and more fully described as: Beginning at a point on the North line of said tract approximately 105 feet west of its northeast corner; thence N 63° 15' W, 1305 feet more or less, to Station 105 plus 60.9, at the point of curve of a 30 curve to the left.

Thence following 3° curve to the left to the South Boundary of the S 1/2 of the NW 1/4 of said Section 5, and containing 6.4 acres, more or less.

Being the same right-of-way acquired by Defense Plant Corporation from Sisters of Charity of the Incarnate Word, by deed dated January 31, 1944, bearing file number 305913 and recorded in Book 368, page 177 of the records of Calcasieu Parish.

- b. (Referred to for identification purposes as Tract No. 16) Over and across the Northwest corner of the N 1/2 of the NW 1/4 of Section 5, T 10 S, R 9 W, Southwestern District of Louisiana; said right-of-way being 100 feet wide, 50 feet on each side of the center line of said track, as now located, and containing .8 of an acre, more or less.

Being the same right-of-way acquired by Defense Plant Corporation from Ernest E. Miller, Edgar Miller, Hannah L. Monday, Hilma E. Wachsen, Elaine Benckenstein, Irma L. Tieman, Selma M. Fla by deed dated May 8, 1944, filed for record May 16, 1944, in Conveyance Book 371, page 219 of the records of Calcasieu Parish.

- The right-of-way hereby conveyed over and across this Parcel "b" does not include a right-of-way for the purpose of laying, operating, renewing, altering, inspecting and maintaining pipe lines for the transmission of oil, gas, petroleum, and other products.

- c. (Referred to for identification purposes as Tracts Nos. 17, 18, and 19) Over and across the NW 1/4 of SE 1/4 of Section 6, T 10 S, R 9 W, being 100 feet wide, 50 feet on each side of the center line of said track, as now located, and containing 2.7 acres, more or less.

Being the same right-of-way acquired by Defense Plant Corporation from John F. Areno, Mrs. Vicelo Olsen, and Mrs. Margaret Rohrer by deed dated August 25, 1944, bearing file number 314622 and recorded in Book 376, page 62 of the records of Calcasieu Parish.

- d. (Referred to for identification purposes as Tract No. 20) Over and across the Southeast Quarter of the Southeast Quarter (SE 1/4 of SE 1/4), Section 6, T 10 S, R 9 W, Southwestern District of Louisiana, being 100 feet wide, 50 feet on each side of the center line of said track, as now located, and containing approximately 3.5 acres.

Being the same right-of-way acquired by Defense Plant Corporation from the following named grantors by deeds dated, as follows bearing the following numbers and recorded in the following books and records of Calcasieu Parish, Louisiana:

<u>NAMES</u>	<u>DATE</u>	<u>FILE NO.</u>	<u>RECORDED</u>
Annabelle Kearney	March 28, 1944	308846	Conveyance Book 370, page 154
Hester Irene Kearney Livingston	April 1, 1944	308847	Conveyance Book 370, page 155
Charles J. Wright	Nov. 4, 1944	318178	Conveyance Book 379, page 252
Bryan W. Wright	Nov. 25, 1944	318182	Conveyance Book 379, page 259
Carroll V. Wright	June 1, 1944	318160	Conveyance Book 378, page 336
Helen Wright Robertson	Nov. 14, 1944	318177	Conveyance Book 379, page 251
Florence Wright McClune	Nov. 4, 1944	318179	Conveyance Book 379, page 253
Maria Ann Kearney	March 28, 1944	308850	Conveyance Book 370, page 159
Mrs. Lillie Kearney Nelson	March 28, 1944	308848	Conveyance Book 370, page 157
Simon Bolivar Kearney	March 25, 1944	308845	Conveyance Book 370, page 153
Mabel K. Kearney, Guardian of the minors, George P. Kearney, Jr., Ruth E. Kearney, and Jane Patricia Kearney	Dec. 13, 1944	318161	Conveyance Book 378, page 337
Ruth Agnes E. Beasley	March 28, 1944	308849	Conveyance Book 370, page 158

e. (Referred to for identification purposes as Tract No. 21)
Over and across the N 1/2 of the NE 1/4 of Section 7,
T 10 S, R 9 W, Southwestern District of Louisiana, being
100 feet wide, 50 feet on each side of the center line
of said track, as now located, and containing 3.5 acres,
more or less.

Being the same right-of-way acquired by Defense Plant
Corporation from Mrs. Ona Ecker; Mrs. Marie Louise
Fleig; Mrs. Augusta Kiplinger; Mrs. Tobiatha Brooks;
S. S. Ecker; and Mrs. Margaret Trahan, by deed dated
February 7, 1944, bearing file number 306065 and
recorded in Book 364, page 504 of the records of
Calcasieu Parish.

f. (Referred to for identification purposes as Tract No. 22)
Over and across the Southwest Quarter of Northeast
Quarter (SW 1/4 of NE 1/4) of Section 7, T 10 S, R 9 W,
Southwestern District of Louisiana being 100 feet wide,
50 feet on each side of the center line of said track,
as now located, and containing approximately 3.5 acres.

Being the same right-of-way acquired by Defense Plant
Corporation from the following named grantors by deed
dated, bearing the following numbers and recorded in
the following books and records of Calcasieu Parish,
Louisiana:

<u>NAMES</u>	<u>DATE</u>	<u>FILE NO.</u>	<u>RECORDED</u>
Mrs. W. C. Kaufman and Mr. W. C. Kaufman, Jr.	Aug. 31, 1946	323445	Conveyance Book 389, Page 479
Mrs. Vera Perkins	Dec. 29, 1944	323559	Conveyance Book 384, Page 278
American National Bank of Beaumont, Texas	Dec. 15, 1944	323558	Conveyance Book 384, Page 277
Mrs. Anna F. Bordages)	Dec. 16, 1944	323557	Conveyance Book 384, Page 275
Mrs. Katharine B. Matthews) & Mr. J. Adriance Bordages)	Dec. 14, 1944	323556	Conveyance Book 384, Page 274

<u>NAME</u>	<u>DATE</u>	<u>FILE NO.</u>	<u>RECORDED</u>
Erwin J. LeBlanc	Dec. 15, 1944	323555	Conveyance Book 384, Page 273
Beryl W. Bordages	Dec. 15, 1944	323554	Conveyance Book 384, Page 272
Esther Nigauden	Dec. 15, 1944	323553	Conveyance Book 382, Page 587
J. E. Broussard	Dec. 15, 1944	323552	Conveyance Book 382, Page 586
Mrs. Rosalie Irene Smith and Fred T. Smith	Feb. 28, 1945	323549	Conveyance Book 382, Page 584
Charles G. Hooks and Charles G. Hooks, Jr.	May 8, 1944	323551	Conveyance Book 382, Page 585
W. L. Green	March 29, 1945	323550	Conveyance Book 383, Page 536

g. (Referred to for identification purposes as Tract No. 23)
Over and across the Northwest portion of the NW 1/4 of
the SE 1/4 of Section 7, T 10 S, R 9 W, Southwestern
District of Louisiana, being 100 feet wide, 50 feet on
each side of the center line of said track, as now
located, and containing approximately one (1) acre.

Being the same right-of-way acquired by Defense Plant
Corporation from Eliza Guiot (Guillotte) by deed dated
February 9, 1944, bearing file number 306203 and
recorded in Book 366, page 260 of the records of
Calcasieu Parish.

h. (Referred to for identification purposes as Tract No. 24)
A right-of-way over and across the NE 1/4 of SW 1/4 of
Section 7, T 10 S, R 9 W, Southwestern District of
Louisiana. Being 100 feet wide, 50 feet on each side
of the center line of said track, as now located, and
containing two and five-tenths (2.5) acres, more or less.

Being the same right-of-way acquired by Defense Plant
Corporation from Powell Lumber Company by deed dated
February 3, 1944, bearing file number 305934 and
recorded in Book 364, page 435 of the records of
Calcasieu Parish.

4. A perpetual easement for the construction, use, operation,
maintenance, repair and removal of a railroad track or tracks, a pipeline
or pipelines, and electric power, telephone and telegraph lines, poles,
towers, and guys, 100 feet in width over and across the following parcel of
land, 50 feet on each side of a center line, said easement being more
particularly described as follows:

a. (Referred to for identification purposes as Tract No. 25)
Beginning at a point 681.4 feet West of the southeast
corner of the SE 1/4 of the SW 1/4 of Section 7, T 10 S,
R 9 W, Southwest Louisiana, thence North 16° 16' East
1370 feet, more or less, to the north line of said SE 1/4
of the SW 1/4 of Section 7, T 10 S, R 9 W.

Together with the perpetual right to clear and keep clear a
strip of land 50 feet in width on the South and East side of said parcel.

The above described easement was acquired by the United States
of America by a Declaration of Taking dated July 5, 1945, in the suit entitled

"UNITED STATES OF AMERICA vs Two Parcels of Land, Et Al", No. 856 of the Civil Docket of the United States Court for the Western District of Louisiana recorded in Conveyance Book 358 at page 105 and confirmed in a judgment in the same style and numbered case rendered May 12, 1944.

It is understood and agreed by and between the parties hereto that this conveyance transfers and assigns to the Purchaser any and all transferable rights, franchises, licenses and permits which the Vendor may have obtained and now holds from any governmental agencies or sub-divisions for the construction, maintenance, and operation of the railroad hereby conveyed over and across the rights of way hereinabove described and any and all navigable streams, public roads and highways traversing same.

The above described property, rights-of-way, servitudes, and easements are conveyed to the Purchaser subject to any and all reservations and exceptions which may appear from the Public records of Calcasieu Parish, State of Louisiana, including but not limited to the following (all references to "Stations" hereinafter are based on the plat, hereinbefore referred to, prepared by F. Shutta' Sons, dated June 7, 1943, and revised March 22, 1946, and April 22, 1946):

1. The reservations for oil and gas leases and other easements ✓ and rights-of-way, as set out in the deeds from Cities Service Refining Corporation to Defense Plant Corporation, dated August 25, 1944, and recorded in Book 375, Page 285 and in Book 376, page 43 of the records of Calcasieu Parish.
2. A North and South public road 60 feet wide whose center line crosses the center line of the railway at Station 4 plus 43.
3. An East and West public road 60 feet wide whose center line crosses the center line of the railway at Station 55 plus 08.
4. A North and South public road 60 feet wide whose center line crosses the railway at Station 84 plus 45.
5. A 200 foot North and South Federal Access Highway whose center line crosses the railroad at Station 170 plus 95.4.
6. A 100 foot East and West State Highway whose center line crosses the railroad at Station 265 plus 32.

Vendor expressly reserves for itself, its successors, and assigns, the right to use jointly with the Purchaser the rights of way and easements herein described under Subdivision II of the description of the property conveyed hereunder for the purpose of using, operating, maintaining, repairing, ✓ relocating, and removing any and all existing facilities (other than those conveyed under Subdivision I of the description of the property conveyed herein)

which may be located in, on, or under the land covered by such right-of-way and easement, including specifically, but not limited to the following:

1. A 10" North and South gas line which crosses the center line of the railway at Station 3 plus 31, known as Defense Plant Corporation line.
2. A North and South 6" oil line which crosses the center of the railway at Station 4 plus 13, known as the Magnolia Petroleum Company line.
3. A 6" pipe line which crosses the center line of the railroad in a Northeast-Southwest direction at Station 84 plus 25.6, known as the Union Sulphur Company line.
4. A 20" gas line which crosses the center line of the railroad in a Northeast Southwest direction at Station 85 plus 85, known as the Defense Plant Corporation line.
5. A 20" gas line which crosses the center line of the railroad in a Northeast Southwest direction at Station 201 plus 58.6, known as the Defense Plant Corporation line.
6. An 8" oil line which crosses the center line of the railroad in an East and West direction at Station 201 plus 36 and is known as the Magnolia Petroleum Company line.
7. A 12" brine line which crosses the center line of the railroad in a Northeast Southwest direction at Station 214 plus 23, known as the Mathieson Alkali Works line.
8. Various and sundry inter-plant pipe connections between the Butadiene Plant, and the Firestone Tire and Rubber Company Plant which crosses the railroad between Station 229 plus 00 and 255 plus 32.
9. A right-of-way for telephone lines which enter said railway right-of-way at Station 4 plus 60 and continues on said right-of-way to the end of the railroad at Station 255 plus 32. The said telephone line centers from 44 to 46 feet to the West or Right of railway center line and is operated by Southern Bell Telephone and Telegraph Company.
10. A transmission line right-of-way along the left Southeast side of the railway; said power line being located with the center transmission poles from forty (40) to fifty (50) feet to the left of railroad center line; said transmission line enters said railway right-of-way at Station 83 plus 81 and continues on said right-of-way to Station 255 plus 32 at the end of said railway line. This transmission line right-of-way is for Defense Plant Corporation power line between Cities Service Refining Company and the Defense Plant Corporation Magnesium Plant.

It is understood and agreed by and between the parties hereto that the rights herein reserved by Vendor shall be exercised in such manner as not to damage the property or materially interfere with the Purchaser's use of rights-of-way and easements hereby conveyed.

TO HAVE AND TO HOLD: The said property unto the said Purchaser and the Purchaser's successors and assigns forever.

This sale is made and accepted for the consideration and upon the terms and conditions as follows:

1. The price and sum of Two Hundred Fifty Thousand (\$250,000.00) Dollars cash which the Purchaser has well and truly paid to the Vendor who acknowledges receipt thereof and grants full acquittance and discharge therefor.
2. Purchaser certifies as a condition of this sale that it is not purchasing the property herein conveyed for the purpose of reselling or leasing it and in no case will Purchaser resell or lease said property within three years from the date hereof without first obtaining the written authorization of the War Assets Administrator.
3. The Purchaser certifies that it has begun common carrier operation of said trackage and has established said trackage within the switching limits of a new station named West Lake Charles; has established line haul rates from this new station which are the same as the line haul rates to and from Lake Charles, Louisiana, after filling of tariffs, and notices in the customary manner after obtaining the required approvals and authorization from the governmental agencies concerned and the concurrence of other participating railroads.
4. That Purchaser agrees that it has obtained all of the necessary permits and authorizations for the running of said railroad.
5. The Purchaser will assume its proportionate share of the taxes from the date of this transfer.
6. The parties hereto expressly dispense with the production of the usual and customary mortgage certificates.

IN WITNESS WHEREOF the parties hereto have caused this instrument to be executed in sextuple this 21st day of May 1947, in the presence of the undersigned competent witnesses.

UNITED STATES OF AMERICA AND

RECONSTRUCTION FINANCE CORPORATION
Acting by and through
War Assets Administrator
By Cornelius B. Clark
Deputy Regional Director

TEXAS AND NEW ORLEANS RAILROAD COMPANY
By Bill Barnes
Vice-President

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
By Wesley Smith
Executive General Agent

WITNESSES:

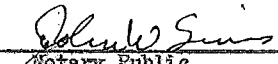
John D. Smith
C. Marley Hollander

STATE OF LOUISIANA

PARISH OF ORLEANS

On this 21st day of May 1947, before me, a Notary Public in and for the said State and Parish, personally appeared Cannon D. Clark, who being duly sworn acknowledges that he is the Deputy Regional Director, Office of Real Property Disposal, War Assets Administration, and that pursuant to a Delegation of Authority of the War Assets Administrator executed on November 22, 1946, and the provisions of the Surplus Property Act of 1944, as amended, he has been duly designated, authorized, and empowered by the War Assets Administrator to execute the within instrument on behalf of said Administrator; he further acknowledges that he executed the said instrument in behalf of and as and for the voluntary act and deed of said Administrator, acting in behalf of the United States of America and the Reconstruction Finance Corporation; and that he executed the same in the capacity therein stated and for the purposes and considerations therein expressed.

Given under my hand and seal this 21st day of May 1947.


Notary Public
John W. Sims

STATE OF LOUISIANA

PARISH OF ORLEANS

Before me, the undersigned Notary Public in and for the said State and Parish, personally came and appeared R. W. Barnes who declared and acknowledged that he signed, executed, and delivered the foregoing instrument for and on behalf of the TEXAS AND NEW ORLEANS RAILROAD COMPANY, a Texas corporation, in his capacity as Vice President of said corporation, being duly authorized, as the free act and deed of said corporation.

Given under my hand and seal this 21st day of May 1947.


Notary Public
John W. Sims

STATE OF LOUISIANA

PARISH OF ORLEANS

Before me, the undersigned Notary Public in and for the said State and Parish, personally came and appeared W. D. Burch, who declared and acknowledged that he signed, executed, and delivered the foregoing instrument for and on behalf of THE KANSAS CITY SOUTHERN RAILWAY COMPANY, a Missouri Corporation, in his capacity as General Agent of said corporation, being duly authorized, as the free act and deed of said corporation.

Given under my hand and seal this 21st day of May 1947.

C. W. Sims
Notary Public

United States documentary stamps in the sum of \$275.00, duly defaced and cancelled, are affixed to the original counterpart hereof filed for record in the Office of the Clerk of Court and Ex-Officio Register of Conveyances for the Parish of Orleans, Louisiana.

CERTIFICATE OF ~~Assistant~~ SECRETARY
REAL PROPERTY REVIEW BOARD
WAR ASSETS ADMINISTRATION

I, the undersigned J. G. Ford,
~~Assistant~~ Secretary, Real Property Review Board, War Assets
Administration, in my official capacity as such ~~Assistant~~
Secretary, and duly authorized in the DELEGATION OF AUTHORITY INCIDENT
TO THE CARE, HANDLING AND CONVEYANCING dated November 22, 1946, to
make the following certification, do hereby certify:

1. That Cannon D. Clark is the
~~Deputy Regional Director, Office Real Property,~~ War Assets Administration,
~~New Orleans, Louisiana~~, duly appointed,
authorized and acting in such capacity at the time of the execution of
the attached instrument.

2. That the attached DELEGATION OF AUTHORITY INCIDENT TO THE
CARE, HANDLING AND CONVEYANCING is a true and correct copy of the
original of said DELEGATION OF AUTHORITY, dated November 22, 1946.

Given under my hand this 21st day of May, 1947.



Secretary
Real Property Review Board
War Assets Administration

ci

WAR ASSETS ADMINISTRATION

(NOTICE)

DELEGATION OF AUTHORITY NO.

DELEGATION OF AUTHORITY INCIDENT TO THE CARE, HANDLING, AND CONVEYANCING

The Deputy Administrator, Office of Real Property Disposal, each Assistant Deputy Administrator, Office of Real Property Disposal, War Assets Administration, the Zone Administrator and Zone Director, Office of Real Property Disposal, in each and every War Assets Administration Zone Office, and the Regional Director and Deputy Regional Director for Real Property Disposal, in each and every War Assets Administration Regional Office, excepting the Fort Worth Regional Office, are hereby authorized, individually (1) to execute, acknowledge and deliver any deed, lease, permit, contract, receipt, bill of sale, or other instruments in writing in connection with the care, handling and disposal of surplus real property, or personal property assigned for disposition with real property, located within the United States, its territories and possessions, (2) to accept any notes, bonds, mortgages, deeds of trust or other security instruments taken as consideration in whole or in part for the disposition of such surplus real or personal property, and to do all acts necessary or proper to release and discharge any such instrument or any lien created by such instrument or otherwise created, and (3) to do or perform any other act necessary to effect the transfer of title to any such surplus real or personal property located as above provided; all pursuant to the provisions of the Surplus Property Act of 1944, 58 Stat. 785 (50 U.S.C. App. Supp. 1611), as amended by Public Law 181, 79th Congress; Executive Order 9689 (11 F.R. 1265); Surplus Property Administration Regulation No. 1, as amended (10 F.R. 14064; 11 F.R. 2602; 11 F.R. 3035); and Surplus Property Administration General Amendment of January 5, 1946 (11 F.R. 408).

R. G. Rhett, the Secretary, and J. G. Ford, the Assistant Secretary, of the Real Property Review Board, War Assets Administration, are hereby authorized, individually, to certify true copies of this Delegation and provide such further certification as may be necessary to effectuate the intent of this Delegation in form for recording in any jurisdiction, as may be required.

This Delegation shall be effective as of the opening of business on November 23, 1946.

This authority confirms such authorities previously granted under dates of May 17, 1946; May 29, 1946; July 30, 1946; September 16, 1946 and October 31, 1946, as do not conflict with the provisions of this delegation.

November 22, 1946


ROBERT M. LITTLEJOHN
Administrator

47-3380

RESOLUTION ADOPTED AT REGULAR MEETING OF THE
BOARD OF DIRECTORS OF TEXAS AND NEW ORLEANS
RAILROAD COMPANY, HELD AT HOUSTON, TEXAS ON
MAY 12, 1947.

On motion duly made and seconded, the following resolution was unanimously adopted:

WHEREAS, the Chairman has advised of completion of all details in connection with the contemplated purchase by this Company, jointly with The Kansas City Southern Railway Company, from United States of America and Reconstruction Finance Corporation, of the spur line of track, together with certain interchange and storage tracks, including turnout connections, all of said trackage aggregating a total length of approximately 6.42 miles, together with rights-of-way, franchises, licenses and permits in connection therewith, located in Calcasieu Parish, Louisiana, more particularly described as follows:

Main industrial lead track extending approximately 4.83 miles in a general southerly and southwesterly direction beginning at a point of connection with Kansas City Southern Railway Magnesium Plant track at engineer station 0+100, said point being near northeast corner of southeast quarter of Section 33, Township 9 South, Range 9 West in Calcasieu Parish, Louisiana, except that first 200 feet of track owned by K.C.S. Railway is not included, and ending at engineer station 254+85 at north line of Public Highway located along south line of Section 18, Township 10 South, Range 9 West in Calcasieu Parish, Louisiana; two storage tracks, 2,996.5 feet and 2,627.8 feet in length, located near point of beginning of main lead at place commonly known as "Rosebluff Yard"; one storage track, 1,874.4 feet in length, near end of main lead; turnout connections for three tracks, approximating a total of 727 feet of track, diverging from said main lead track and for two tracks, approximating a total of 407 feet of track, diverging from storage track, all situated within said Section 18, and lying within main lead right-of-way of normal width of 50 feet each side of center line of main lead track; drainage structures under trackage and roads, consisting of various diameter concrete pipes, box culverts, timber trestling and steel girder span; highway crossing signs, private road crossing and public road crossing improvements; and other improvements of any nature pertaining to construction or operation of all trackage described; total mileage of trackage described herein above amounting to 4.788 of main lead track and 1.635 miles of other track, it being understood that turnout connection to so-called Maplewood industry spur is not included in trackage involved. All "Stations" herein referred to are delineated on a plat of survey prepared by F. Shutts' Sons, dated June 7, 1943, revised March 22, 1946, and April 22, 1946.

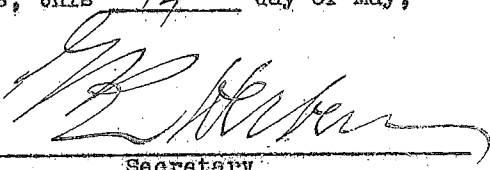
NOW, THEREFORE, BE IT RESOLVED, That this Company complete the purchase of said property for the price and sum of Two Hundred Fifty Thousand and no/100 (\$250,000.00) Dollars cash, to be paid jointly by it and The Kansas City Southern Railway Company, in the proportions of one-half each.

BE IT FURTHER RESOLVED, That E. A. Craft, Executive Vice-President, and R. W. Barnes, Vice President, be and each of them is hereby authorized and empowered to execute, on behalf of this Company, the necessary deed containing such stipulations, terms and conditions as in his discretion he may deem fit and proper, to execute any and all other instruments, and to do any and all other things whatsoever which he may consider necessary to carry out the purposes of this resolution.

- - - - -

I, G. B. Herbert, hereby certify that I am Secretary of the Texas and New Orleans Railroad Company; that a regular meeting of the Board of Directors of said Company was held at Houston, Texas on May 12th, 1947; that said meeting was duly called and held pursuant to all legal requirements, and that a sufficient number of Directors were present to constitute a quorum; that said meeting was duly held in all respects, as provided for under the By-Laws of the Company, and that the foregoing is a true and complete copy of the resolution unanimously adopted at said meeting.

Dated at Houston, Texas, this 14th day of May, 1947.


Secretary
Texas and New Orleans Railroad Company

RESOLUTION ADOPTED AT THE REGULAR ANNUAL MEETING
OF THE BOARD OF DIRECTORS OF THE KANSAS CITY
SOUTHERN RAILWAY COMPANY, HELD AT KANSAS CITY,
MISSOURI, ON MAY 27, 1947.

On motion duly made and seconded, the following
resolution was unanimously adopted:

WHEREAS, the Chairman has advised of the comple-
tion of the purchase by this Company, jointly with Texas &
New Orleans Railroad Company, from the United States of
America and Reconstruction Finance Corporation, of the spur
line of track, together with certain interchange and storage
tracks, including turnout connections, all of said trackage
aggregating a total length of approximately 6.42 miles, to-
gether with rights of way, franchises, licenses and permits
in connection therewith, located in Calcasieu Parish,
Louisiana, more particularly described as follows:

Main industrial lead track extending approximately
4.83 miles in a general southerly and southwesterly
direction beginning at point of connection with
Kansas City Southern Railway Magnesium Plant track
at engineer station 0/00, said point being near
northeast corner of southeast quarter of Section 33,
Township 9 South, Range 9 West in Calcasieu Parish,
Louisiana, except that first 200 feet of track owned
by K.C.S. Railway is not included, and ending at
engineer station 254/85 at north line of Public High-
way located along south line of Section 18, Township
10 South, Range 9 West in Calcasieu Parish, Louisiana;
two storage tracks, 2,996.5 feet and 2,627.8 feet in
length, located near point of beginning of main lead
at place commonly known as "Rosebluff Yard"; one
storage track, 1,874.4 feet in length, near end of
main lead; turnout connections for three tracks,
approximating a total of 727 feet of track, diverging
from said main lead track and for two tracks,
approximating a total of 407 feet of track, diverging
from storage track, all situated within said Section
18, and lying within main lead right of way of normal
width of 50 feet each side of center line of main
lead track; drainage structures under trackage and
roads, consisting of various diameter concrete pipes,
box culverts, timber trestling and steel girder span;
highway crossing signs, private road crossing and
public road crossing improvements; and other improve-
ments of any nature pertaining to construction or

operation of all trackage described; total mileage of trackage described hereinabove amounting to 4.788 of main lead track and 1.635 miles of other track, it being understood that turnout connection to so-called Maplewood industry spur is not included in trackage involved. All "Stations" herein referred to are delineated on a plat of survey prepared by F. Shutts' Sons, dated June 7, 1943, revised March 22, 1946, and April 22, 1946.

NOW, THEREFORE, BE IT RESOLVED, That this Company does hereby ratify and confirm the purchase of said property which was made for the price and sum of Two Hundred Fifty Thousand and No/100 (\$250,000.00) Dollars cash, paid jointly by it and Texas & New Orleans Railroad Company, in the proportions of one half each.

BE IT FURTHER RESOLVED, That the authority and power of W. D. Burch, General Agent, in executing this deed on behalf of this Company, and in executing any and all other instruments, and doing all other things whatsoever as in his discretion he considered necessary to the completion of this transaction, is hereby recognized, and his actions in this respect are ratified and confirmed.

- - - - -

I, G. H. BACON, hereby certify that I am Assistant Secretary of The Kansas City Southern Railway Company; that the regular annual meeting of the Board of Directors of said Company was held at Kansas City, Missouri, on May 27, 1947; that said meeting was duly called and held pursuant to all legal requirements, and that a sufficient number of Directors were present to constitute a quorum; that said meeting was duly held in all respects, as provided for under the By-Laws of the Company, and that the foregoing is a true and complete copy of the resolution unanimously adopted at said meeting.

Dated at Kansas City, Missouri, this 27th day of May, 1947.


Assistant Secretary
The Kansas City Southern Railway Company

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 32760 (SUB-NO. 46)

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

**KCS'S REPLY STATEMENT AND EVIDENCE ON COMPENSATION CONCERNING
BNSF'S USE OF THE ROSEBLUFF LEAD**

Exhibit C

REPLY VERIFIED STATEMENT OF DR. KEVIN NEELS

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I. Introduction

I am Dr. Kevin Neels, an expert in regulatory economics, and in particular, Surface Transportation Board (“STB”) regulation of rail markets. At the Brattle Group, I directed the firm’s transportation consulting practice. I have more than 40 years of experience providing economic analysis, research, and consulting to a wide range of clients. These clients have included federal, state, and local transportation agencies, as well as firms in the postal, trucking, railroad, airline, and auto and aircraft manufacturing industries. My work has frequently addressed issues relating to competition, regulatory policy, and the proper relationship between the public and private sectors. I have previously submitted testimony before many different regulatory bodies, including the STB. I have also testified in international arbitrations, and state and federal courts. I submitted a Verified Statement in this proceeding, as part of KCS’s Opening Statement and Evidence on Compensation, Concerning BNSF’s Use of the Rosebluff Lead (“KCS Opening on Compensation”), on January 26, 2021, as corrected on March 5, 2021 (“Neels Opening VS”), and previously provided testimony in this proceeding in both 2015 (in collaboration with Dr. Robert Reynolds) and 2018. A copy of my resume is included in Appendix _.

In my opening statement, I provided an overview of the SSW Compensation Methodology, Discussed Approaches to Valuation, Calculated SSW Compensation using the Capitalized Earnings approach (“CE Approach”), and explained that given the circumstances present at Lake Charles, I did not believe that SSW Compensation alone would adequately compensate KCS for BNSF providing direct access over the Rosebluff Lead.

II. What I've Been Asked to Testify About

I have been asked by counsel to analyze and provide comments on testimony provided by Mr. Michael R. Baranowski ("Baranowski Opening VS"), and Mr. Brent Pitts ("Pitts Opening VS") which was included in BNSF's Opening Statement and Evidence on Compensation, on BNSF's flawed application of RCNLD and BNSF's position on compensation generally ("BNSF-144").

III. BNSF's Application of RCNLD Is Not Fundamentally Sound

1. Mr. Baranowski's opinions regarding BNSF's use of Rosebluff Lead property rights are based on a misunderstanding and/or misrepresentation of the nature of the property rights held by UP and KCS.

Mr. Baranowski asserts in his verified statement that BNSF is merely "subletting UP's property rights,"¹ and that in doing so its operations on the Rosebluff Lead "do not impact the exercise of KCS's property rights." See Baranowski Opening VS at 15. Mr. Baranowski asserts further that "BNSF is not using any of the property rights² possessed by KCS under its partial ownership of the trackage, and accordingly KCS is due no interest rental compensation." *Id.*

Mr. Baranowski justifies his assertions primarily by citing the fact that the Board's ruling granting BNSF direct access to the Rosebluff Lead specifies that BNSF will be allowed access to the Rosebluff Yard only during UP's 12-hour operating window. Mr. Baranowski emphasizes

¹ Mr. Baranowski's "sublet" analogy fails even at first glance to fit the facts of BNSF's situation. In an actual sublet situation the tenant moves out, and the subtenant moves in to replace him. The situation on the Rosebluff Lead, in contrast, is one in which the so-called subtenant is moving in with the owners.

² Clearly, Mr. Baranowski is incorrect. The Joint Facilities Agreements does not divide "property rights". Rather, it divides work. As stated in Article I.C. the parties, "desire...to change the method of performing switching service and maintenance" (last recital) and "It is the intent of this agreement that the performance of switching within the territory described hereinabove shall be divided between the parties as equitably as possible consistent with efficiency..." See Exhibit A, Joint Facilities Agreement.

that “[n]ot only would there be no KCS trains operating in the Rosebluff Yard during times when BNSF may exercise its trackage rights, but under the protocols of joint operations established by the 1981 Agreement, there would be no KCS trains operating on any of the Rosebluff Lead trackage where BNSF’s trains may be operating.” *Id.* at 14. In his statement, Mr. Baranowski discusses the KCS and UP ownership rights relating to the Rosebluff Lead as though they relate to two separate facilities in separate locations. Moreover, Mr. Baranowski’s arguments also overlook the fact that in December 2020, BNSF petitioned to keep the four-hour operating window flexible, as future shippers BNSF elects to serve may dictate different operating parameters.³

Mr. Baranowski’s “sublet” analogy fails in several ways to fit the facts of the situation on the Rosebluff Lead. In a typical sublet situation, the tenant moves out and the subtenant moves in. In the case of the Rosebluff Lead, however, the supposed subtenant is moving in with the tenant and his co-tenant. BNSF, the sub-tenant, does not intend to bear the same financial responsibilities as the other two and believes moreover it should also have the right to order its “roommates” out of the unit for four hours every day.

Mr. Baranowski’s arguments on this point ignore several important realities about the Rosebluff Lead and the status of KCS and UP’s joint ownership. He discusses the operating procedures agreed to by the Rosebluff Lead’s co-owners as though they were fixed and immutable, ignoring the fact that the Rosebluff Lead’s co-owners are free to change these

³ See BNSF’s Petition to Establish Conditions of Use, dated December 18, 2020. At pages 9-10, BNSF acknowledges the possibility that BNSF would require more time than its daily four-hour window, and requests that the terms of use should be based on “flexibility by all parties.”

arrangements any time they wish, and have done so in the past.⁴ Moreover, per Article I,E. of the Joint Facility Agreement, either carrier may operate a “solid over-the-road unit train” into the zone operated by the other. Mr. Baranowski also implicitly assumes that the co-owners of the Rosebluff Lead rigidly and perfectly adhere to the agreed-upon operating procedures, and hence that a situation never arises in which either UP or KCS fails to clear the Rosebluff Lead completely by the end of its designated operating window. I am informed, however, that Mr. Baranowski’s assumption is incorrect, and that such spillovers occur with some regularity. Also, as the current operator of Zone 1, KCS is charged by Article II.A of the Joint Facilities Agreement with maintaining track in Rosebluff Yard and in Zone 1 and often needs, for safety reasons, to do so in daylight hours, which is during UP’s Rosebluff Yard operating window.⁵

More significantly, Mr. Baranowski ignores the fact that users of the Rosebluff Lead – regardless of which 12-hour window they may be using – can access and bid for the business of any customer located on the Rosebluff Lead. Thus, in gaining access to the Rosebluff Lead BNSF inevitably positions itself as a competitor to both UP and KCS. Business that BNSF wins as a result of its presence on the Rosebluff Lead is business that would, absent BNSF, have gone either to UP or to KCS.

⁴ Originally, the 1948 operating agreement divided the operational responsibility for the tracks into two-year blocks – KCS served for 2 years, then T&NO would serve for 2 years. The 1981 agreement, noting that the Rosebluff Lead had been “deeded to The Kansas City Southern Railway Company and the said Texas and New Orleans Railroad Company” (pages 1-2) divided the operational responsibility a different way, into zones. Originally the companies alternated which served what zone, but shippers complained, so in 1999 they agreed to pause in alternating zones. At no time did the companies divide their joint undivided interests. See also UP Reply to BNSF’s Petition to Establish Conditions of Use and Compensation (Filed June 25, 2018) (describing the establishment of the two zones).

⁵ Baranowski’s argument also ignores the fact that BNSF in December of 2020 filed a petition seeking access to all customers on the Lead, without presenting or seeking approval for operating plans for serving those customers. Thus the ultimate degree to which BNSF will intrude on the KCS operating window has not been established.

From an economic point of view, Mr. Baranowski ignores the well-established principle that the general effect of adding a competitor to a market will be to lower prices in that market and reduce the amount of business that the pre-existing incumbents can expect to win. Professor Carey emphasized this point in her Verified Statement (“Carey Opening VS”) submitted as a part of the KCS Opening on Compensation:

An additional competitor in the market creates heightened competitive market forces that exert downward pressure on rates and revenues from the business efforts to bid and negotiated to expand customer volumes.⁶

The Joint Facility Agreement between UP and KCS explicitly recognized this fact and contained a provision that prohibited either party from granting access to a new entrant without the consent of the other.⁷ For these reasons and others contained in the Verified Statement of Mr. Julius Paul Maurin, IV, Esquire, Real Estate Field Manager for The Kansas City Southern Railway Company, Mr. Baranowski’s denials that BNSF is infringing in any way on the property rights of KCS, or that KCS is not entitled to compensation for any such infringement are simply invalid.

2. The RCNLD-based SSW Compensation calculation presented by BNSF significantly understates the trackage fee that BNSF should pay to KCS.

RCNLD significantly understates the rental component of SSW Compensation because it fails to account in any way for the traffic and revenue potential of the shippers to which the Rosebluff Lead provides access. As stated in my opening statement, the value of the Rosebluff Lead lies in the access it provides to a large set of rail shippers. See Neels Opening VS at 8.

⁶ See Carey Opening VS at 25.

⁷ See Joint Facility Agreement, Section 19 which states that the “parties agree neither shall sell, lease or transfer its interest in the jointly owned tracks, or any part thereof, without advance written approval by the other party.”

Application of RCNLD ignores the true sources of the Rosebluff Lead's value by focusing solely on the cost of the facilities that make up the Rosebluff Lead. Those costs do not measure this value. That this is so can be demonstrated by a simple thought experiment. Consider the construction of an otherwise identical set of facilities in a location without shippers. Such an exercise would yield a set of facilities with identical replacement costs. However, that facility would be functionally worthless because it would lack an established customer base. That this is so proves the unreliability in this context of the RCNLD approach advocated by BNSF.

In contrast, the CE Approach accounts at least to some degree for the traffic and revenues generated by the Rosebluff Lead. My CE Approach calculation starts with the revenue and contribution generated for the Rosebluff Lead's owners by the shipments to and from customers located on that facility. I then used STB-endorsed methods to isolate the portion of that revenue and contribution attributable, according to that accepted STB methodology, to the Rosebluff Lead, as opposed to other rail facilities used by that traffic. Finally, I used well-accepted multiplier techniques to establish the Lead's current market value. Those multiplier techniques are based ultimately on the market values of KCS and UP. As such they take into account several important but sometimes difficult to quantify considerations – among them, the extent to which these railroads are able to generate sufficient contribution to cover fixed costs, and the extent to which short-term fluctuations in market conditions should influence long-term asset values. For all of these reasons I argued in my original statement and continue to believe that in this setting the CE Approach is the most appropriate of the approaches to establishing capital asset values that have been *traditionally considered* by the STB in setting SSW Compensation.

That is not to say that I believe that my CE Approach calculation, along with the other components of SSW Compensation, is the most economically appropriate way of determining

the trackage fee that should be paid by BNSF for direct access to the Rosebluff Lead. Because the earnings of the Rosebluff Lead's owners -- KCS and UP -- have been adversely influenced by BNSF's long-standing competitive presence on the Rosebluff Lead through reciprocal switching, even a CE Approach will understate the Lead's true and full revenue potential, and thus also its value. The value produced by my CE Approach is conceptually equivalent to what a third-party buyer might be willing to pay for the Rosebluff Lead if it were sold, still encumbered by BNSF's existing right to access the Lead at below-market rates. As both I and Professor Carey discussed in our opening statements, the rental cost of capital assets produced by the CE Approach in this situation undervalues the Lead, because railroad rates to all Rosebluff Lead customers have been reduced by the competitive effects of BNSF's presence on and use of the Rosebluff Lead.

Moreover, although I have elected to use the STB's ATC methodology to compute the revenue and contribution associated with the Rosebluff Lead, it is not clear in a setting such as this that the ATC methodology will produce economically meaningful results. The ATC methodology was developed for use in an entirely different regulatory setting -- namely, to simplify the process of computing the Stand-Alone Cost ("SAC") of serving a movement whose rate was being challenged under the STB's rate reasonableness procedures. I understand that it has been used most often in situations in which a proposed Stand-Alone Railroad ("SARR") includes some high-density line haul segments handling "crossover traffic." To my knowledge, it has far less often been applied in settings like that of the Rosebluff Lead, which originates and terminates large volumes of high-margin rail traffic. Even though the Board has ruled that the ATC methodology provides a reliable way of allocating the revenue associated with origin-to-destination movements to specific segments traversed by those movements, the ATC revenue

allocation approach has the potential in an unusual case like this one to under-allocate revenues to the Rosebluff Lead.

For all of these reasons, I continue to believe that Professor Carey's market-based approach provides the most economically appropriate and reliable way of setting the trackage fees that should be paid by BNSF.

3. Mr. Pitts' land valuation fails to capture accurately the right-of-way value of the land underlying the Rosebluff Lead

In the RCNLD calculation presented by BNSF, the value of the land upon which the Rosebluff Lead rests is based on a valuation carried out by Mr. Brent Pitts. In presenting and explaining his valuation Mr. Pitts clearly states that in his opinion the highest and best use of the land underlying the Rosebluff Lead is as a rail corridor. Specifically, he states that:

“Demand is evidenced by the continued growth of surrounding markets and communities. The property's use as a corridor and as an integral component of a rail network is considered to be economically viable. Demand beyond the current owner is considered likely to exist given the characteristics of the subject corridor.

In view of the economic circumstances and the characteristics of the subject property, the highest and best use of the subject is for corridor purposes consistent with the historical and proposed use.”⁸

In discussing this highest and best use Mr. Pitts identifies many categories of cost savings that can be achieved when land is purchased as an intact assembled right of way, rather than as a collection of otherwise unrelated parcels. These categories include:

- Dealing with a single owner
- Savings in appraisal and legal costs
- Corridor with clearly defined locations

⁸ See Exhibit C, Verified Statement of Brent Pitts (“Pitts VS”), Included in BNSF-144, page 49.

- Elimination of delays as corridor is already in place
- Avoidance of need for negotiations with public authorities for utility relocation or construction in easement areas
- Avoiding disruption of established residential neighborhoods and business areas
- Avoidance of the cost and disruption of temporary construction easement acquisitions
- Avoidance of premium acquisition cost to avoid litigation and/or severance damages associated with acquiring corridors
- Site clearance has largely been completed relative to the construction of a new corridor⁹

The relevance of the categories of cost savings identified by Mr. Pitts becomes clear if one considers the practical difficulties and constraints that would have to be overcome by a party attempting to create a useable transportation corridor through a developed area through which no such corridor currently exists. It will be extremely rare in such a setting to find a contiguous set of vacant land parcels suitable for use as a corridor. Far more commonly, to create a useable corridor it will be necessary to acquire parcels already improved and developed for some other use. The creator of the transportation corridor will not only have to pay a premium over and above the value of the desired land for these improvements but will also have to bear the costs of their demolition and removal. Moreover, to be useable as a transportation corridor, the acquired parcels must form a contiguous and unbroken route. For this reason, the creator of the transportation corridor will find it necessary to pay not just the typical price for land parcels in the general area with characteristics similar to those making up the planned corridor, but rather, whatever prices the owners of the specific parcels along the planned right of way happen to demand. An owner of a parcel needed to complete a continuous and unbroken right of way who,

⁹ *Id.*

for whatever idiosyncratic reason is uninterested in selling, might have to be offered a price well above market levels to overcome his unwillingness to sell. In addition, the creator of a transportation corridor always faces the possibility of having to pay premiums to hold-out owners who recognize and are determined to take advantage of the strategic value of their properties.

Although Mr. Pitts acknowledges the relevance and potential importance of these factors, there is no evidence in his report that his valuation of the land underlying the Rosebluff Lead takes any of them into account. He identifies six scattered, recently-sold parcels to use as comparables.¹⁰ All appear to be free of structures or other major improvements.¹¹ They do not appear to be contiguous to each other, or the Rosebluff Lead.¹² He makes small adjustments (1-6 percent) to the amounts paid per square foot of land to account for differences in market conditions between the sales date for the parcel and the valuation date.¹³ He then calculates an unweighted average value per square foot across the six parcels and rounds this value to the nearest five cents.¹⁴ In applying the resulting land value per square foot to the land underlying the Rosebluff Lead, Mr. Pitts makes two further downward adjustments. In those instances where the presence of the Lead relies on easements rather than outright ownership, Mr. Pitts

¹⁰ See Pitts VS at 54.

¹¹ *Id.* at 55-60.

¹² *Id.* at 54.

¹³ *Id.* at 61.

¹⁴ *Id.* at 62.

reduces the land value per square foot by 10 percent.¹⁵ He reduces the land price per square foot by 80 percent for certain segments that he characterizes as having “limited utility.”¹⁶

Mr. Pitt’s treatment of these “limited utility” areas illustrates clearly his complete failure to account for the corridor value of the Rosebluff Lead right of way. One of his “limited utility” segments coincides with a point where the Rosebluff Lead crosses a roadway at grade.¹⁷ His argument for reducing the value of this piece of land is that it has “a significantly lower unit value that (sic) surrounding properties that are well-suited for development.”¹⁸ Viewed from a true corridor perspective, however, such segments are highly valuable; without them, major portions of the Rosebluff Lead would be cut off, and its corridor value substantially reduced. That is, *all* parts of the Rosebluff Lead corridor are necessary and essential to its use as a rail right-of-way. The “replacement cost” of an existing asset is supposed to measure the costs that would have to be incurred if a party, starting from scratch, were to gather all of the necessary inputs and components and construct a new copy of that asset. A party attempting to reproduce the Rosebluff Lead from scratch cannot realistically be assumed already to have a useable right of way at the beginning of this process. Instead, that party would have to undergo the difficult task of assembling that right of way, and in the process would have to incur all of the extra costs that Mr. Pitts identifies, but does not factor into his analysis. For this reason, Mr. Pitts’ land costs must be regarded as understating the true replacement costs of the land underlying the Rosebluff Lead.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 63.

¹⁸ *Id.* at 62.s.

Mr. Pitts' valuation methods do not appear to be in conformity with the recommendations of other appraisal professionals regarding how to value a corridor. A published article on corridor appraisal criticizes the simple "Across The Fence," or ATF, methodology used by Mr. Pitts, advocating instead an "ATF x's CF" approach.¹⁹ In this approach, the appraisal process begins with an ATF valuation of the type of the type carried out by Mr. Pitts, but then goes on to multiply the result of this exercise by a "Corridor Factor," which the article defines as "the ratio of the corridor sales price divided by its ATF, as of the date of sale."²⁰ The article notes that "Most corridor sales support a CF between 1.1 and 2.0." It also states that "sales for freight rail corridors tend to support 1.1 to 1.2,"²¹ which would imply that Mr. Pitt's valuation very likely understates the value of the Rosebluff Lead corridor by a significant amount. Situations can arise in which the CF falls below 1.0, but the article states that when this occurs it is a sign that "the highest and best use may not be for corridor purposes,"²² a condition that the Rosebluff Lead clearly does not meet.²³

Mr. Pitts clearly failed to follow this recommended approach to corridor valuation, omitting the final step which, given the circumstances of the Rosebluff Lead, have been expected to raise his valuation, perhaps substantially.

¹⁹ "Evolution of Corridor Appraising," Charles E. Seymour, CRE, MAI, *Right of Way Magazine*, May/June 2002.

²⁰ *Id.* at 16.

²¹ *Id.* at 17.

²² *Id.* at 17.

²³ Mr. Pitts states clearly his opinion that the highest and best use of the land upon which the Lead rests is as a corridor. In the cover letter attached to his report he states that "The entire length of the subject corridor is utilized as an active rail line. In my opinion, this use is the highest and best use of the property."

The article also points out the potential errors associated with the price per square foot measure that drives Mr. Pitts' valuation. It notes that “If a corridor is wide enough to perform its connecting function, its width and area are of little importance. So, when corridors sell in the marketplace, the usual yardsticks of comparison such as price per acre or price per square foot are not only meaningless but can also be misleading.”²⁴

Other authoritative publications echo the recommendations offered by the Seymour article. No less a publication than the Dictionary of Real Estate Appraisal discusses the corridor factor, defining it as:

...the ratio of the market value (or market price) of a corridor to the corridor's across-the-fence value. Corridor factors are applied to reflect the benefit or advantage, if any, of the corridor having already been assembled. Typically used in the valuation of existing corridors and not the assembly of a new corridor. Sometimes called an enhancement factor or continuity factor.²⁵

A publication prepared by several leading appraisal organizations entitled *Corridor Valuation: An Overview and New Alternatives*²⁶ discusses corridor factor in connection with the Corridor Valuation Method, or “CVM.” It describes CVM as “a continuation of the across-the-fence method with the ATF value adjusted to recognize the greater utility of the assembled corridor over the individual parcels that were assembled to create the corridor. This greater utility is measured by an enhancement factor, which is also called the railroad factor, synergism factor, corridor factor, and continuity factor.”²⁷ The Dictionary notes that “Frequently, the sale

²⁴ *Id.*

²⁵ *The Dictionary of Real Estate Appraisal*, 6th ed. (Chicago: Appraisal Institute, 2015), 53.

²⁶ Published in 2019 by the Appraisal Institute, the Appraisal Institute of Canada, and the International Right of Way Association; LCCN 2018051129 | ISBN 9781935328759.

²⁷ *Id.* at 95.

price in a corridor sale exceeds the ATF value, indicating an enhancement factor greater than 1.00.”²⁸

These statements from respected sources on appraisal methodology all support the argument that the valuation approach adopted by Mr. Pitts fails to capture important determinants of the value of the land underlying the Rosebluff Lead and that for this reason, he has significantly understated its value.

IV. Mr. Baranowski fails to offer valid reasons for rejecting the CE Approach which, despite not fully compensating KCS, is superior to RCNLD.

Mr. Baranowski rejects the use of the CE Approach in computing the compensation due to KCS. He offers three reasons for this rejection. First, he cites the difficulty of determining how to incorporate BNSF earnings into the calculation and the potential for “circularity” that would result from doing so. Second, he asserts that it is unclear how the earnings UP or BNSF generates should influence the earnings valuation that would be the basis for compensation to KCS. Finally, he cites the challenges in allocating revenues to through and switching assets in terminal areas.²⁹ As shown in my opening verified statement, each of these supposed problems,” can be addressed in calculating CE Approach-Based SSW Compensation.

BNSF is not a co-owner of the Rosebluff Lead. Under current compensation arrangements, its earnings do not contribute to the market value of that asset. Hence, there is no conceptual need to factor BNSF’s earnings into a CE Approach calculation. Excluding BNSF’s earnings also eliminates the circularity issue cited by Mr. Baranowski.

²⁸ Id. at 97.

²⁹ See Baranowski Opening VS at 19.

The asset value produced by a CE Approach calculation based on the earnings of UP and KCS, the co-owners of the Rosebluff Lead, is equivalent to computing what a potential buyer would be willing to pay to buy the Rosebluff Lead from its owners, while it was still encumbered by the regulatory and contractual obligations that have provided BNSF with indirect access at below market to customers located on the Rosebluff Lead.

Even if one sought to carry out a CE calculation that captured the full value of the Rosebluff Lead there would even then be no need to take into account the earnings of BNSF. In such a calculation the conceptually correct approach would then be to compute what the earnings of *UP and KCS* would be in a but-for world in which BNSF were not siphoning off traffic and revenue and lowering rates through its subsidized indirect access.³⁰

Regarding Mr. Baranowski's second objection to the use of the CE Approach, there is no need to determine how a trackage fee will be divided between UP and KCS. That is the responsibility of the Rosebluff Lead's owners. Despite Mr. Baranowski's efforts to argue otherwise, the Rosebluff Lead is a single asset requiring a single fee for access.

"Challenges" in allocating revenues are also not a sound basis for rejecting the CE Approach. In fact, Mr. Baranowski has presented CE Approach and standalone cost calculations with revenue allocations in many cases.³¹ In addition, there is no need to allocate revenues between switching and overhead operations on the Rosebluff Lead. The track that will be "cleared" for BNSF use under the proposed plan of operation could not be cleared without the use of the side tracks to receive the "cleared" rolling stock. UP plans to clear Track 4 by shifting

³⁰ While such a calculation could be done, it was not necessary here.

³¹ See Discovery Request No. 5 at 5-6.

cars to sidetracks to allow BNSF to pass through Track 4, which is effectively the only track that can be used to access the Rosebluff Lead from the 50/50 Line.

V. Mr. Baranowski's calculations of SSW maintenance and operating costs contain a number of significant computational and conceptual errors.

Mr. Baranowski's calculations of routine maintenance costs, maintenance capital project costs, and property taxes contain significant computational and conceptual errors. The effect of correcting these errors is, for all three quantities, to increase the values included in his SSW Compensation calculation.

a. Mr. Baranowski's Routine Maintenance Costs Are Understated

Mr. Baranowski appears to have identified a set of documents that provides a relatively complete accounting of what he calls "routine" maintenance spending by UP and KCS on the Rosebluff Lead. These documents consist of invoices that the two owners of the Rosebluff Lead submit to each other monthly under the provisions of their agreement for sharing maintenance costs.³² The coverage of costs in these invoices appears to be relatively complete for KCS, and in addition, each owner has an economic incentive to report all costs incurred. Failure to report completely and accurately all costs incurred would result in an owner absorbing costs for which it is owed reimbursement. For this reason, I am prepared to accept these invoices as reliable sources of information on routine maintenance spending, at least for the periods for which they are available.

Unfortunately, there appear to be no UP maintenance invoices in the record dated later than September of 2017. Apparently, for this reason, Mr. Baranowski draws information on routine maintenance expenditures by UP from a summary document reporting expenditures –

³² Baranowski Opening VS at 23-24 and supporting workpapers.

both “OE,” or operating expenditures, and “Capital Spending” -- by year for the period from 2017 through 2019.³³ There is no way to assess the overall completeness of the expenditures reported in this summary. However, another document produced by UP summarizes expenditures incurred for bridge and culvert maintenance on the “Rosebluff Spur.”³⁴ Mr. Baranowski does not refer to this document and appears to have overlooked it. The expenditures reported in this document exceed the expenditures reported for the same category reported in the primary UP document relied upon by Mr. Baranowski, raising questions about the completeness of that document’s reporting. Nonetheless, these two documents appear to contain all of the available information about UP maintenance expenditures on the Rosebluff Lead in recent years. In failing to account for and factor into his calculations the full amount of bridge and culvert maintenance Mr. Baranowski has understated the level of routine maintenance spending in his reference period.

Mr. Baranowski compounds this error when he uses the level of routine maintenance spending during his referenced period (2017-2019) to predict maintenance spending on a going-forward basis. To project future maintenance costs he simply averages together the historical spending for this purpose over the period for which he has complete data. However, when he does so, he makes no adjustment for the effects of inflation. Inflation generally causes the cost of any given amount of work to increase over time. As a result, the amount of maintenance work that a dollar would purchase in 2017 is greater than what a dollar would purchase in 2019. Similarly, the amount of maintenance work that a dollar would purchase in 2019 is greater than what a dollar would purchase today. In computing current and future maintenance costs based

³³ UP-COMP-024474.

³⁴ UP-COMP-024479.

on experience, it is important to take such price changes into account. Price indexes suitable for this purpose are readily available. However, Mr. Baranowski simply failed to make use of them. As a result, his calculations understate the annual level of maintenance costs that will need to be covered in 2021 and beyond.

b. Mr. Baranowski's Capital Maintenance Costs Are Understated

Mr. Baranowski adopts a different approach when he projects future spending levels on maintenance carried out in the form of capital projects. When I addressed this topic, I adopted an approach similar to that which both Mr. Baranowski and I followed with respect to routine maintenance. I projected a future level of expected capital project spending by averaging the amounts spent over recent years (adjusting, of course for the effects of inflation).³⁵ Mr. Baranowski rejects this approach, arguing that “Because capital maintenance cycles for this relatively small portion of track recur in cycles longer than the six-year period for which historical data is available, any attempt to normalize capital maintenance expenses over this period would introduce timing bias that would skew the results.”³⁶ To project forward-looking maintenance capital expenditures, Mr. Baranowski, therefore, adopts a different approach. He starts with the replacement costs computed by Mr. Boileau, another witness testifying on behalf of BNSF, for the various categories of capital assets making up the Rosebluff Lead. He then multiplies the total replacement cost for each category of asset by that category's average annual depreciation rate, as reported in the 2019 R-1 Reports filed by UP and KCS, and sums the results. He argues that this approach provides a reliable forward-looking projection of future

³⁵ Neels Opening VS at 19.

³⁶ Baranowski Opening VS at 21.

“Normalized” capital maintenance costs.³⁷ However, there are several problems with the approach adopted by Mr. Baranowski.

One potential source of error in this approach relates to the relevance of the annual depreciation rates reported in the R-1 Reports to conditions along the Rosebluff Lead. The depreciation rates reported in the R-1 Reports reflect system-wide averages. They thus blend the experience of UP and KCS with both aging industrial spurs like the Rosebluff Lead and with high capacity main lines built to high standards using modern materials.

There is evidence in the statement of Mr. Boileau indicating at least some of the capital assets comprising the Rosebluff Lead experience higher deterioration rates and shorter useful lifetimes than average assets systemwide:

Due to the low embankment heights and adjacent development and trackage, drainage is poor which contributes to embankment settlement. *This is exacerbated by heavy rainfall, hurricanes, and surrounding waters prone to flooding in the area* (emphasis added).³⁸

...expected life for creosote-treated wood ties is 18.1 years in the zone *where Rosebluff trackage is located, which is in Wood Decay Zone 5 where decay rates are the highest* (emphasis added).³⁹

Thus, Mr. Baranowski’s assumption appears to be inconsistent with BNSF witness Boileau’s testimony.

A second potential source of error with Mr. Baranowski’s approach has to do with the current condition of the assets comprising the Rosebluff Lead, and where they are in their replacement cycles. If construction of the Rosebluff Lead had been completed last year, all of its

³⁷ Baranowski Opening VS at 22-23.

³⁸ See Exhibit B, Verified Statement of Robert Boileau (“Boileau VS”), Included in BNSF-144 at 15.

³⁹ *Id.* at 15-16.

assets would likely still be in near-new condition, and there would be *de minimis* need for major capital maintenance expenditures over the near future. Conversely, if repair work on the World War II-era Rosebluff Lead has been underfunded and/or deferred, there could be a backlog of needs that will very shortly have to be addressed at substantial expense.

Mr. Boileau provides some opinions regarding the current state of the assets comprising the Rosebluff Lead:

There is little ballast remaining on the majority of the subject track and it appears that most has deteriorated, been contaminated or sunken into the sub-grade.⁴⁰

The condition of other track materials including spikes, plates, and anchors varied, with certain areas appearing in good condition due to more recent repair work, but the majority of sections showing wear and defects.⁴¹

During my field inspection I observed the bridges were significantly deteriorated... Based on these considerations, it is my opinion that the overall condition of Rosebluff bridge assets reflects 70 percent physical depreciation.⁴²

These statements are consistent with the existence of a significant backlog of unmet maintenance needs on the Rosebluff Lead. Again, Mr. Baranowski's testimony appears to be inconsistent with that of BNSF witness Boileau.

It is possible to assess more rigorously and quantitatively the reasonableness of Mr. Baranowski's capital maintenance projections in the light of the condition of the Rosebluff Lead. Capital maintenance projects typically involve the replacement of some component that has reached the end of its useful life. When a large capital asset like the Rosebluff Lead is new, all of the components that make it up are at the start of their useful lives. For a time, therefore,

⁴⁰ Boileau VS at 15.

⁴¹ *Id.* at 17.

⁴² *Id.* at 18-19.

nothing needs to be replaced, and capital maintenance expenditures are low or near zero. Over time, however, components start to reach the ends of their useful lives and require replacement. As this happens, capital maintenance expenditures start to rise. At the same time, because the various components that make up the larger asset have different useful lives, both because of their inherent durability as well as idiosyncratic differences in deterioration rates, their replacement cycles move out of synchronization. Eventually, a steady state is reached in which individual components are distributed randomly across their various replacement cycles. At this point, on an expected value basis, assets should be halfway through their replacement cycles, and total depreciation should be equal, on an expected value basis, to 50 percent of the total replacement cost.

Mr. Boileau reports an overall calculation of depreciation as a percentage of the value of the assets comprising the Rosebluff Lead, placing this value at 59 percent, -- a value well in excess of the 50 percent value that is implied by steady-state replacement. This discrepancy implies either that there has been significant deferral of repairs, or that a significant number of costly components are well past the midpoints of their replacement cycles. In either case, because of the existence of this repair backlog capital maintenance costs over the years immediately ahead will need to be higher than the steady-state “normalized” numbers computed by Mr. Baranowski.

c. Computational Errors in Mr. Baranowski’s Maintenance Calculations Need to Be Corrected

Although Mr. Baranowski claims to have drawn the inputs to his capital maintenance calculations from Mr. Boileau, there are discrepancies between the numbers reported by the two witnesses. Specifically, Mr. Baranowski reports a value for the replacement cost of the Ballast

on the Rosebluff Lead of \$[[REDACTED]], while Mr. Boileau reports a value of \$[[REDACTED]]. In addition, Mr. Baranowski reports a value for the replacement cost of the Rail and other track material \$[[REDACTED]], while Mr. Boileau reports a value of \$[[REDACTED]]. It thus appears that Mr. Baranowski transposed the two numbers when copying the inputs from Mr. Boileau. My interpretation of this discrepancy is based on the fact that Mr. Boileau originally performed the calculations upon which Mr. Baranowski relies, and so should be more familiar with them and, in my opinion, the relative magnitudes of the costs reported by Mr. Boileau sound more reasonable.

Because Mr. Baranowski's assumed annual depreciation rates differ somewhat between these two asset categories, this mix-up affects the computation of "normalized" capital maintenance costs and should be corrected.

d. Mr. Baranowski Significantly Understates the Property Taxes Paid on the Rosebluff Lead

Mr. Baranowski calculates the property taxes paid annually on the Rosebluff Lead by its owners by taking an assessed value for the Rosebluff Lead from documents produced by its owners, and a tax estimator provided on the Calcasieu Parish tax assessor's webpage. The results of this exercise significantly understate the amounts actually paid by the Rosebluff Lead's co-owners. The values computed in my original verified statement based on a larger and more comprehensive set of documentation, and in my opinion are far more accurate and reliable than that provided by Mr. Baranowski.⁴³

⁴³ See Neels VS at 19-20.

VI. Updating the KCS SSW Compensation Calculation Based on Best Evidence in the Record

This section will address changes to my original calculation of SSW Compensation that are called for after considering BNSF-144 and the sources utilized by Mr. Baranowski.

As discussed above, the documents from which Mr. Baranowski compiled data on past levels of routine maintenance expenses by KCS appear to be more comprehensive than those that I was originally able to identify. Thus in the interest of minimizing the issues in dispute, my calculations have been updated to take this additional information into account.

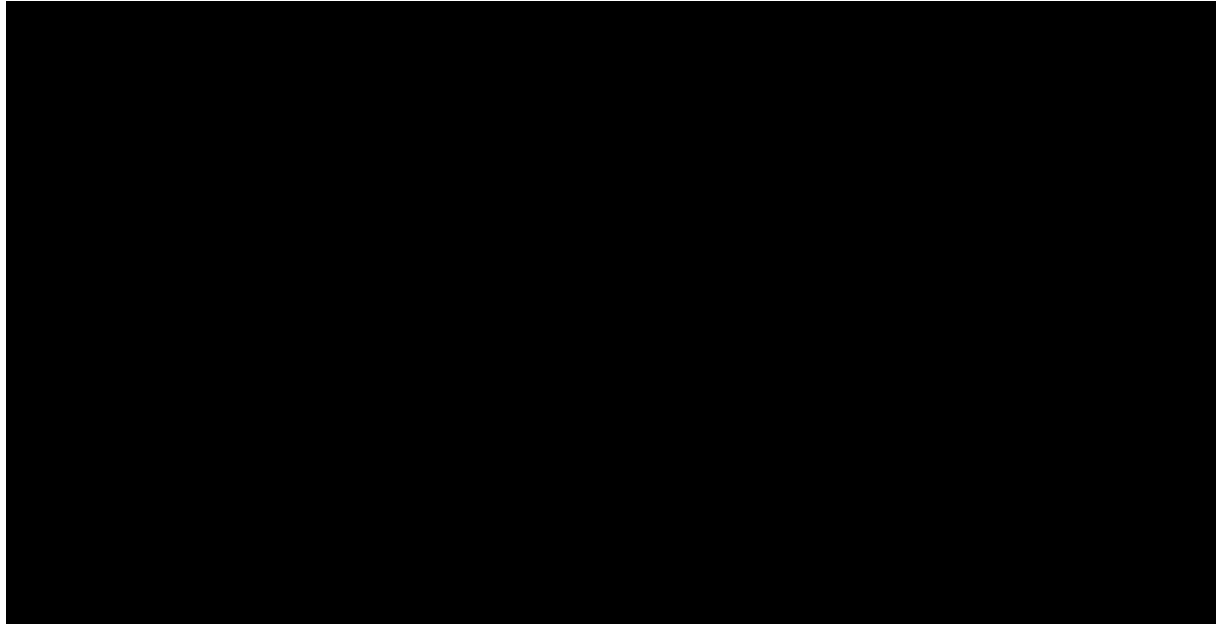
In contrast, my original calculations of UP routine maintenance factored in the report on bridge and culvert maintenance, discussed above, that Mr. Baranowski overlooked.⁴⁴ Upon re-examination of the documents I relied upon, however, I noted that the summary document that both Mr. Baranowski and I relied upon contained some amount of bridge-related routine expenditures.⁴⁵ I was not able to determine the extent to which those expenditures may have overlapped with those contained in the bridge and culvert specific report. To eliminate any possibility of double counting, therefore, I deducted from my calculation the bridge-related expenditures from the summary document.

Having in this way produced updated calculations of routine maintenance expenditures by UP and KCS for each of the years from 2017 through 2019, I converted all expenditures to 2021 dollars and then computed average spending per year. Results of the calculation are shown in Table 1 on the next page.

⁴⁴ UP-COMP-024479.

⁴⁵ UP-COMP-024474.

Table 1: Average Per Year Routine Maintenance Spending [[



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Sources and Notes:

[1]: 'KCS Summary' tab of Historical Maintenance Expenses.xlsx in Baranowski workpapers.

[2]: Track, surfacing, welding, and signal maintenance from UP-COMP-024474 to 77 and bridge maintenance from UP-COMP-024479.

[3]: [1] + [2].

[4]: Association of American Railroads All-Inclusive Index Less Fuel with Forecast Error Adjustment and Q42017 as base, available at <https://www.aar.org/wp-content/uploads/2020/12/AII-LF-2021Q1-1.pdf>.

[5], [6]: [1] x [4], [2] x [4].

[7]: [5] + [6].

Mr. Baranowski's argument that projecting future levels of capital maintenance expenditures based upon an average of recent year spending level can result in timing bias is not without merit. Capital maintenance spending can fluctuate substantially from year to year, and the period for which spending data are available is relatively short. The approach advocated by Mr. Baranowski addresses this potential problem, although that approach also has its shortcomings, as I have discussed above. Considering all these factors, I believe that the most reliable way of projecting future levels of capital maintenance spending is to start with the

approach advocated by Mr. Baranowski but to modify it to address the repair backlog problems discussed above.

In doing this the easiest such problem to address is the errors Mr. Baranowski made in transcribing Mr. Boileau's data. I base my calculation, therefore, on the value presented in Mr. Boileau's workpapers.⁴⁶

Another problem with Mr. Baranowski's approach is its failure to address the repair backlog identified by Mr. Boileau. Because of this backlog, capital maintenance levels over the coming years will inevitably be higher than the steady-state numbers calculated by Mr. Baranowski. I address this problem by calculating a level of additional capital maintenance spending that will eliminate this backlog over an appropriate period of time.

I calculate the size of the repair backlog on an asset category by asset category basis by first calculating the difference between the depreciation percentages calculated by Mr. Boileau and 50 percent, the value that would be associated with a steady-state level of spending. I multiply this percentage by Mr. Boileau's overall replacement cost figure for that asset category to compute the size of the repair backlog. I assume that this backlog will be worked off over a period either of 20 years – an economically meaningful but conservative period – or half of the implied useful life of the asset category, whichever is less. I add the resulting per year amount of

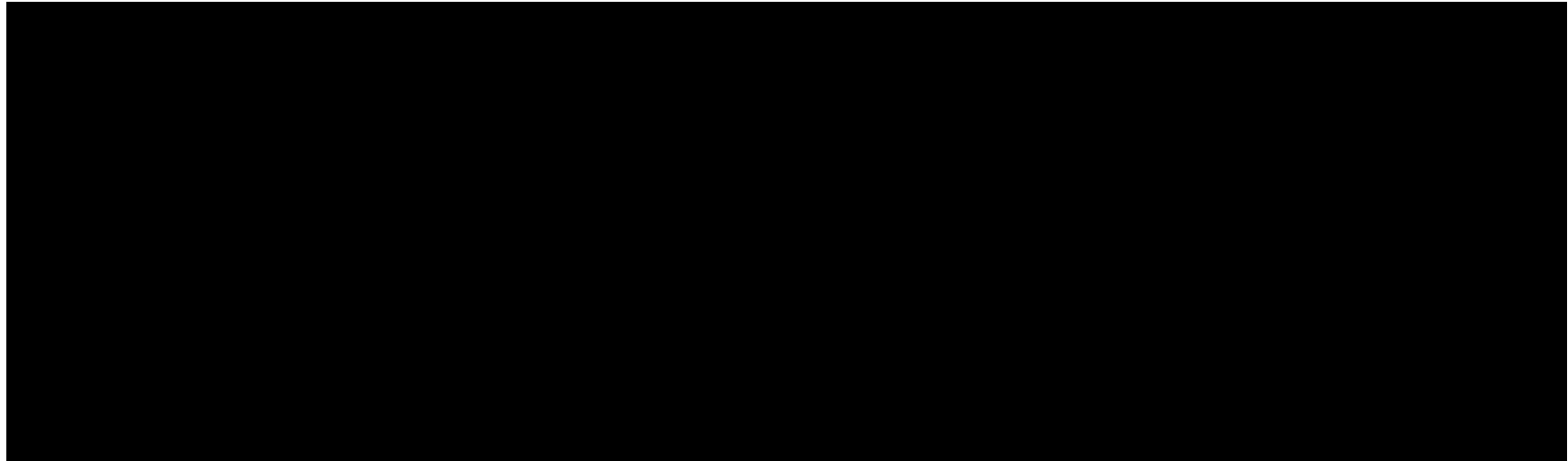
⁴⁶ In implementing my calculation, I also adopt an adjustment made by Professor Carey. As Professor Carey notes in her Reply Verified Statement, the inflation adjustment used by Mr. Boileau reflects a temporary pandemic-driven reduction in materials costs in 2020. I adopt her forecast of the materials and supplies price index, which implies a 12.2% increase over the 2016 materials costs, rather than the 5.6% increase that results from Mr. Boileau's use of the Q4 2020 value of the materials and supplies inflation cost index. See NEELS-WP-HC-0440.xlsx, where I implement this adjustment.

“catch-up” capital maintenance spending to the steady-state per year figure.⁴⁷ The results of these calculations are shown in Table 2 (on the next page).

Note that the calculations shown in Table 2 below do not address the possibility that the useful lives of the assets making up the Rosebluff Lead may be shorter than the system-wide asset lives used in Table 2, a possibility that the comments of Mr. Boileau cited above seem to suggest is, in fact, the case. For this reason, the figures shown in Table 2 should be regarded as conservative.

⁴⁷ I note that in principle, the implied amount of “catch-up” spending could be negative. However, there was no asset category that Mr. Boileau judged to be less than 50 percent depreciated.

Table 2: Per Year Capital Maintenance Spending [[



]]

Sources and Notes:

[1]-[3]: “Tables” tab of NEELS-WP-HC-0440.

[4]: [3] - 50%.

[5]: R1-KCS-2019.xlsx and R1-UP-2019.xlsx in Boileau workpapers.

[6]: $1 / [5]$

[7]: The minimum of 20 and $[6] / 2$.

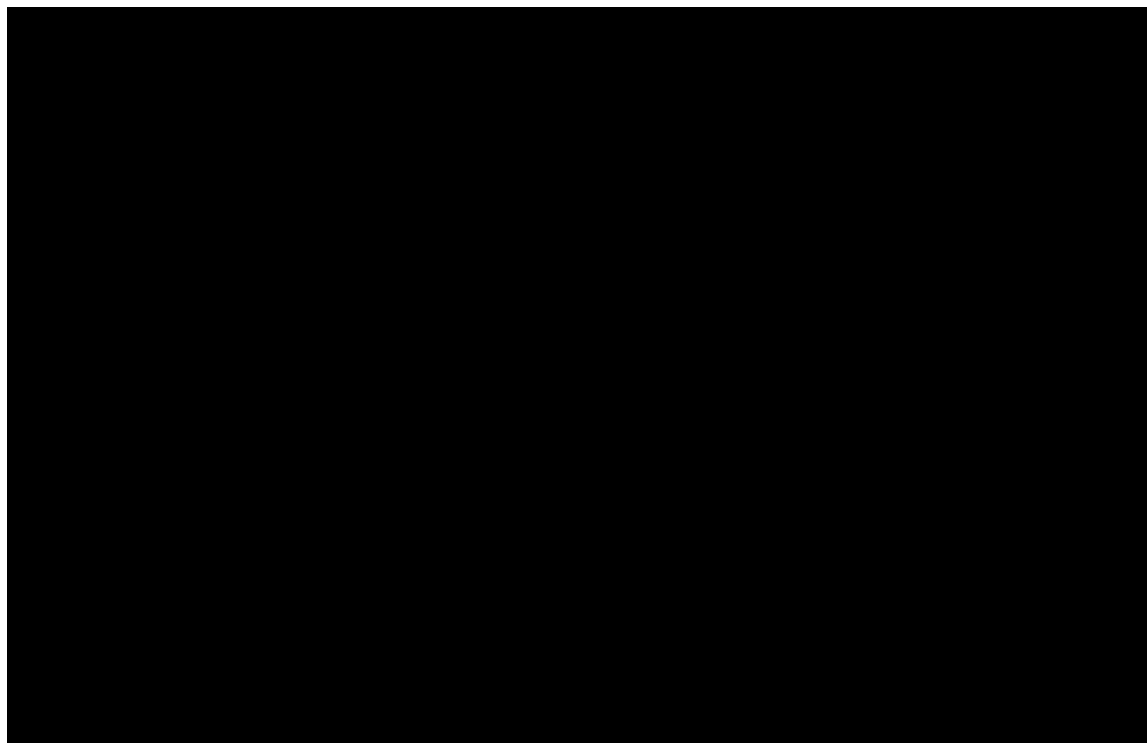
[8]: $[2] \times [4] / [7]$.

[9]: $[2] \times [5]$.

[10]: $[8] + [9]$.

Table 3 calculates component (b) of SSW Compensation – a proportionate share of operating and maintenance costs – on a per car mile basis. The maintenance costs shown in Table 3 are drawn from Table 1 and Table 2 above, while the other elements are based upon the materials submitted with my original verified statement.

Table 3: Calculation of Component (b) [[



]]

Sources and Notes:

In calculating the operating and maintenance expenses presented here, I considered all available information from 2017-2019. Minor differences due to rounding.

[A]: UP-COMP-024474 to 77; UP-COMP-024479.

[B]: UP-COMP-014778; UP-COMP-014792; UP-COMP-014806 to 807; Calcasieu Parish UP Property Tax Receipt (202101150912.pdf). The tax amount represents property taxes on Union Pacific's Rosebluff Lead properties (identified as Ward 4 Outside in UP-COMP-014792, 806 and 807) in the Calcasieu Parish. I obtained the tax rate of [[REDACTED]] by dividing the total taxes paid ([[REDACTED]]) on UP properties in Calcasieu Parish (UP-COMP-014778) by the total assessed value ([[REDACTED]]) of said properties. Only 2019 property tax documents are available.

[C]: 'KCS Summary' tab of Historical Maintenance Expenses.xlsx in Baranowski workpapers.

[D]: KCS-C-2064, Calcasieu Parish KCS Property Tax Receipt (20210122141708004.pdf). The total assessed value of Calcasieu properties ([[REDACTED]]) and total tax paid of \$[[REDACTED]] found on PDF p. 2 of the aforementioned tax receipt implies a property tax rate of [[REDACTED]]. Multiplying the 9.86 miles of Rosebluff Lead "side line" (found in KCS-C-2064) by the per mile rate of \$[[REDACTED]] found in the first page of the tax receipt results in a total taxable assessed value of \$[[REDACTED]]. Applying the [[REDACTED]] tax rate on

this taxable amount produces \$[[REDACTED]] in total property taxes paid for 2019. Only 2019 property tax documents are available.

[E]: See Table 2.

[F]: Sum of rows [A] through [E].

[G]: Calculated from traffic tapes and routing results.

[H]: The ratio of total car miles to loaded car miles, based on traffic tapes, routing results, and information from each railroad's Form R-1 (Schedule 755).

[I]: [G] x [H].

[J]: [F] / [I].

[K]: [J] x [[REDACTED]] Miles, which is the distance on the Rosebluff Lead to Access Lyondell.

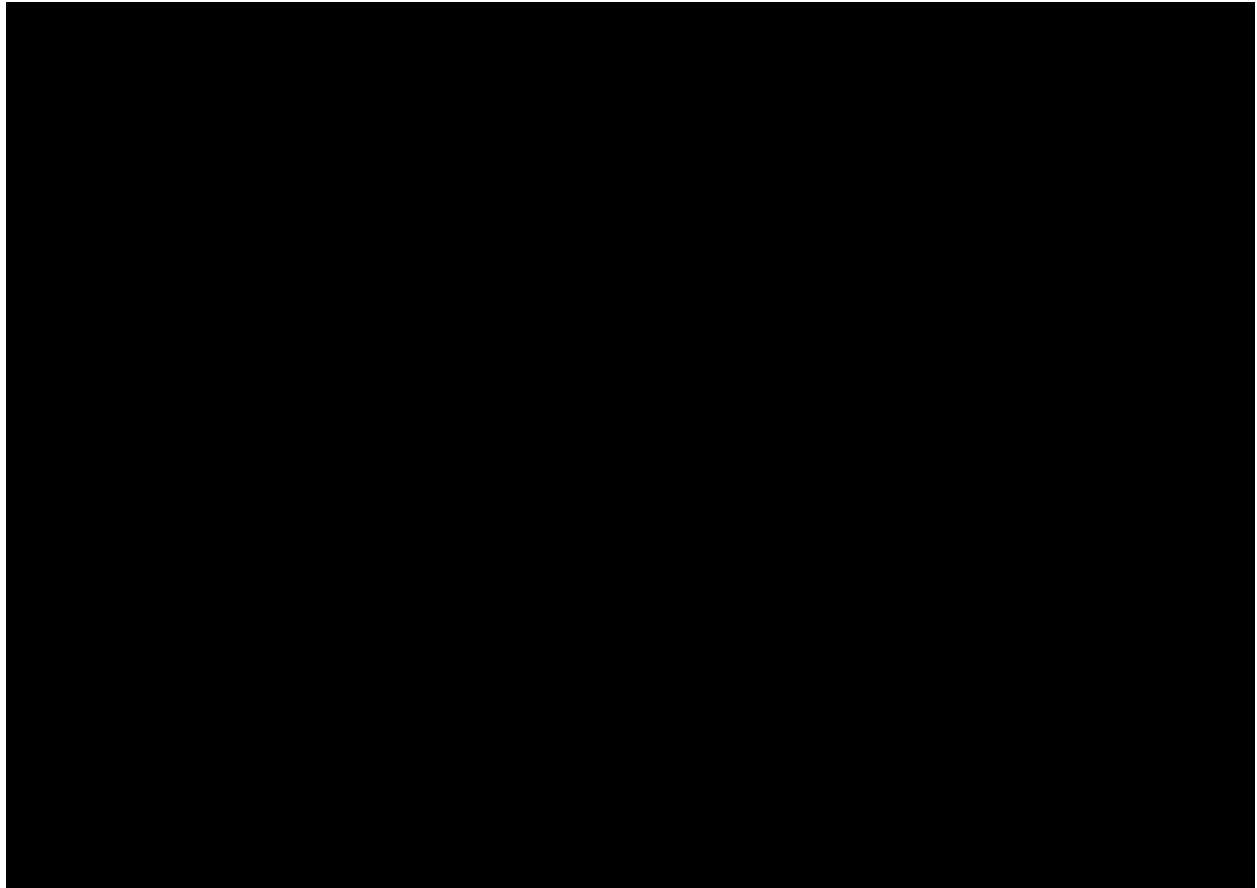
Error! Not a valid bookmark self-reference. calculates component (c) of SSW

Compensation – a proportional share of the rental cost of capital assets calculated using the CE

Approach methods. These figures are taken from my updated workpapers filed on March 5,

2021.

Table 4: Calculation of Component (c) [[



]]

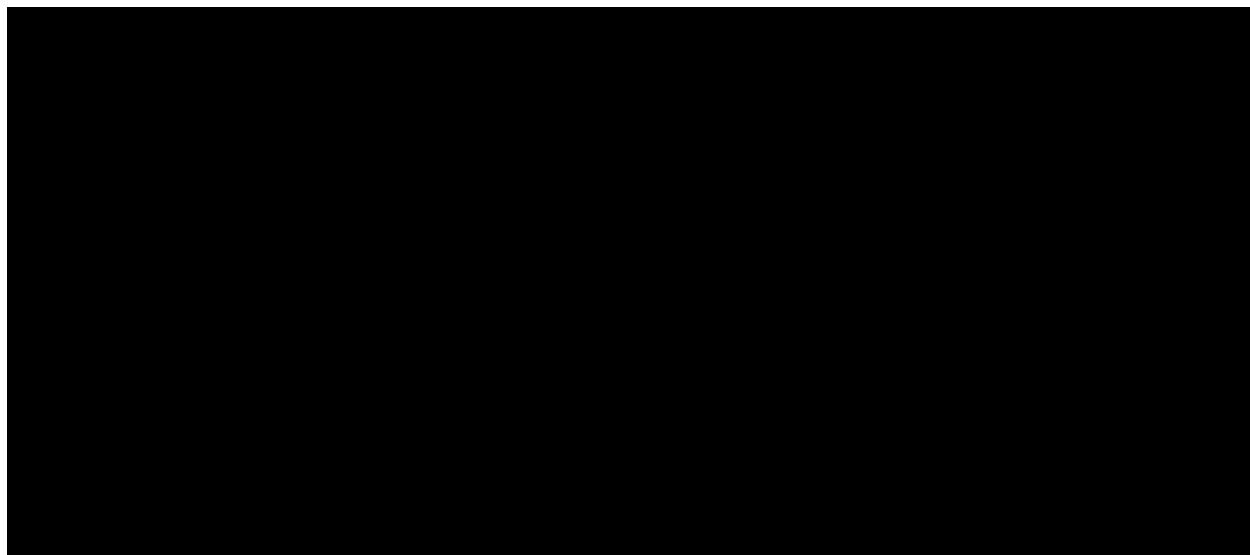
Sources and Notes:

- [1], [6]: Contribution generated by Rosebluff Lead links needed to service Lyondell/Equistar, as calculated using the ATC method by The Brattle Group.
- [2]: [1] * STB-calculated industry WACC for 2017 (10.04%).
- [3], [8]: Car-miles on the relevant links. Limited to those movements included in the ATC calculation from the KCS and UP traffic tapes.
- [4]: [2] / [3].
- [5]: [4] * 2017 Inflator calculated using the STB's Inflation-Adjusted Index (1.14).
- [7]: [6] * STB-calculated industry WACC for 2017 (12.22%).
- [9]: [7] / [8].
- [10]: [9] * 2018 Inflator calculated using the STB's Inflation-Adjusted Index (1.08).
- [11]: Average of [5], [10].

Lastly, Table 5 presents my updated calculation of SSW Compensation per car mile, based on my updated workpapers from March 5, and incorporating where appropriate information and approaches from the testimony of Mr. Baranowski and Mr. Boileau, as

described above. I calculated a revised SSW Compensation rate of \$18.88 per total car mile, including both loaded and unloaded car miles.

Table 5: SSW Compensation Methodology Summary [[



]]

Sources and Notes:

[1]: Provisionally set to zero, as discussed in Section VIII.A of my Opening VS.

[2]: See calculations in Table 3.

[3]: See calculations in Table 4.

[4]: Ratio of total car miles per loaded car miles, from Table 3. Calculation is described in Section VIII.B of my Opening VS.

[5]: [3] / [4].

[6]: [1] + [2] + [5].

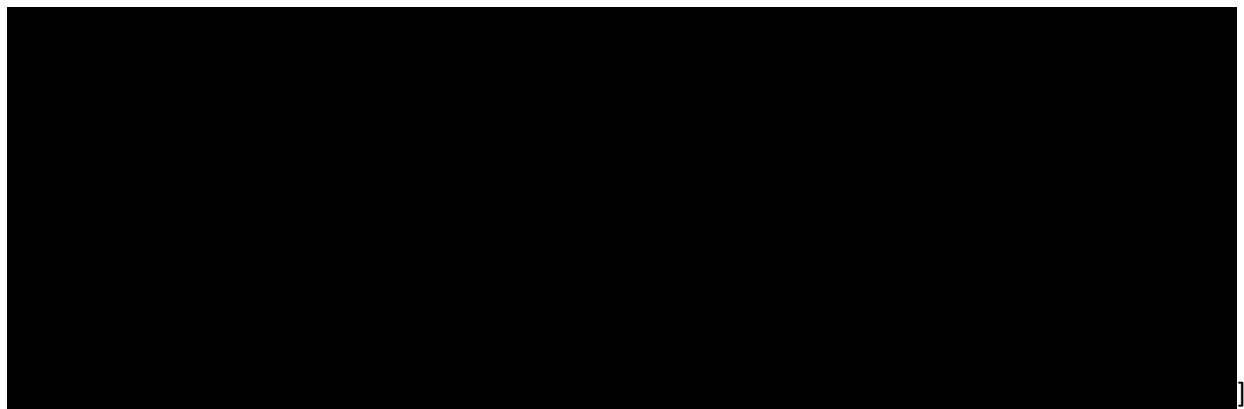
There is no reason to expect that payment of the fees shown in Table 5 will in any significant way impair the economic viability of BNSF's traffic on the Rosebluff Lead. Payment of these fees would be largely offset by the cost reductions that BNSF would achieve through the substitution of direct access for its current switching and haulage-based services.

If BNSF switches from its current indirect service arrangement to direct service its costs will change – both its direct costs, as well the fees it pays to UP and KCS, the owners of the

Rosebluff Lead. To show the magnitude of these changes I will consider the switch from direct to indirect service in connection with Lyondell.

Under BNSF's current arrangement in which it serves Rosebluff Lead customers indirectly BNSF relies upon UP for much of the on-Lead handling of its shipments and pays UP a number of fees in compensation for the services that it receives. The fees paid by BNSF to UP consist of a per car handling fee, a per car-mile haulage fee, and a reciprocal switching fee. The two railroads do not appear to be in complete agreement as to the magnitude of these fees. In simultaneous filings on February 4, 2019 UP and BNSF claimed to be paying and receiving for each carload shipped by BNSF to a Lead customer the fees shown in Table 6. BNSF claimed to be paying slightly higher fees than UP claimed to be receiving.

Table 6: Haulage Fees Paid by BNSF Under Current Indirect Service to Lyondell [[



Sources and Notes:

[1], [2]: Union Pacific Railroad Company's Submission In Response To Decision No. 6, February 4, 2019, p. 2.

[3]: [1] x [2].

[4]: BNSF's Compensation Information, February 4, 2019, p. 5.

[5]: [1] x [4].

[6]: Average of [3] and [5].

[7]: $(1 + (1.043 / 1.027 - 1) / 2) \times [6]$. Between Q1 2018 and Q1 2020 the unadjusted Rail Cost Adjustment Factor (Q4 2017 Base) increased from 1.027 to 1.043, or by 1.56 percent. See the Association of American Railroads Rail Cost Adjustment Factor, available at <https://www.aar.org/wp-content/uploads/2021/03/RCAF-History-2021Q2.pdf>.

UP-COMP-014597 states that the BNSF reciprocal switch in 2020 was \$[[REDACTED]] and so this figure is used here instead.

[8]: Sum of Handling Charge, Movement Charge and Reciprocal Switch Charge.

Whatever the correct set of haulage fees might be, however, if BNSF were to switch to direct service, it would no longer have to rely upon these UP services, and so would no longer have to pay these fees.

Once BNSF starts direct service it will also incur some additional operating costs as a result of having the Lake Charles end of each movement at the customer location, rather than at UP's North Yard. Part of the additional mileage BNSF will traverse will be along the Rosebluff Lead. On this portion of the movement BNSF will bear no responsibility (other than whatever access fees it pays) for payment of below-the wheel costs.

Finally, if BNSF starts direct service it will pay an access fee for its use of track and facilities owned by UP and KCS. What that fee will be is, of course, what this proceeding is all about. BNSF argues that it should pay no more than the fee specified in its 1996 trackage rights agreement with UP. I have calculated in Table 5 above what it should be required to pay under a proper calculation of SSW Compensation. Professor Carey has calculated the amount it would pay in an arms-length market transaction. To illustrate how BNSF would fare if it were to switch from indirect service via UP haulage to direct service to Lyondell I calculate the overall changes in its costs under the different trackage fee proposals.

I first calculate the savings from elimination of haulage fees. As UP and BNSF report paying different fees in early 2019, I take the average of the two sets of reported fees. The haulage agreement between UP and BNSF specifies that over time haulage fees will be adjusted "to reflect fifty percent (50%) of increases or decrease in the Rail Cost Adjustment Factor ("index"), not adjusted for changes in productivity ("RCAF-U"), published by the Association of American Railroads." Apparently to avoid having to make retroactive adjustments, the

agreement specifies that changes are to be made based on the RCAF-U index values for the year prior to the year for which fees are being paid. Between Q1 2018 and Q1 2020 the RCAF-U increased from 1.027 to 1.043, or by 1.56 percent. Applying half of this increase to the per cap and per car-mile haulage fees for Q1 2019 yields projected round trip values of \$[[REDACTED]] and \$[[REDACTED]]. Switching fees seem to follow a different escalation rule. A UP document showing BNSF switching fees over time lists a value for car in 2020 of \$[[REDACTED]], a value in excess of what would result from use of the RCAF rule set forth in the haulage agreement. I assume, conservatively, that this value did not change between 2020 and 2021. Therefore, I expect the total set of haulage and switching fees to come to \$[[REDACTED]] per car per round trip in the first quarter of 2021.

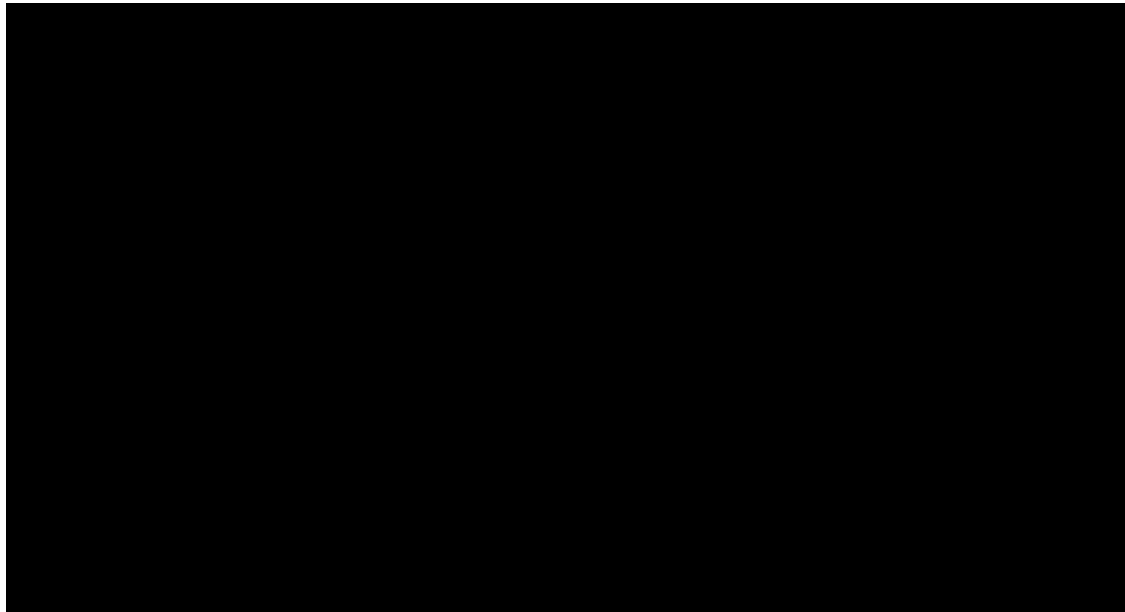
The amount of additional cost BNSF would incur as a result of traveling the additional miles in direct service depends upon the characteristics of the shipment. To get a realistic sense of what those characteristics might be I searched the traffic data produced by the parties to this proceeding to find shipments involving Lyondell. I found no such shipments in the BNSF data, but a number in the UP data, all sharing nearly identical characteristics. I then calculated the URCS variable costs for one of these shipments, setting the routed distance-based in one case on termination at UP's North Yard, and in another based on the distance to Lyondell's spur. The additional mileage involved in direct service increased the calculated URCS variable costs by \$[[REDACTED]] per car. Between 2018 and the second quarter of 2021 the AAR's Rail Cost Adjustment factor increased by 1.3 percent. Increasing the change URCS costs up by this amount yields a 2021 value of \$[[REDACTED]]. Note that because this figure includes both over the wheel and under the wheel costs it overstates to some extent the increase in costs that BNSF would experience when exercising trackage rights.

The last element to be computed is the trackage fee that BNSF would pay for the use of the [REDACTED] miles of the Rosebluff Lead as well as the [REDACTED] miles of Rosebluff Lead to North Yard needed to provide direct service to Lyondell. BNSF argues that it should pay no more than the trackage fees it owes under its 1996 agreement with UP. I understand that this fee currently amounts to [REDACTED] mills per gross ton miles, including both cars and locomotives. Assuming a [REDACTED]-car train with a single locomotive weighing [REDACTED] tons and an average of [REDACTED] tons per loaded car and [REDACTED] tons per empty car, this fee would come to \$[REDACTED] per car per round trip.⁴⁸ If BNSF were, in addition to this fee, to pay the SSW Compensation amount I have calculated, its fees would increase by \$[REDACTED], to \$[REDACTED]. If instead of paying SSW Compensation BNSF were to pay Professor Carey's market-based fee, its fees would increase by \$[REDACTED] to \$[REDACTED].

Table 7 summarizes the changes in cost that BNSF would experience in switching from its current indirect to direct service to Lyondell under different assumptions regarding the trackage fee it would pay.

⁴⁸ The assumption of [REDACTED] cars per single locomotive is taken from Union Pacific Railroad Company's Submission In Response To Decision No. 6, February 4, 2019, footnote 1.

Table 7: Change in Cost Experienced By BNSF in Switching from Indirect to Direct Service to Lyondell [[



]]

Sources and Notes:

[1], [2], [3]: Table 6.

[4]: [1] + [2] + [3].

[5]: 2018 URCS Cost file, adjusted to Q1 2021 US dollars.

[6][A]: Assuming a [[█]]-car train with a single locomotive weighing [[█]] tons and an average of [[█]] tons per loaded car and [[33]] tons per empty car (see Union Pacific Railroad Company's Submission In Response To Decision No. 6, February 4, 2019, footnote 2), the BNSF trackage fees would come to \$[[█]] per car per round trip.

[6][B]: [6][A] + [(Miles on Rosebluff Lead to Access Lyondell from Table 4) x 2 + (SSW Compensation Total from Table 5)].

[6][C]: [6][A] + \$[[█]], the market-based fee calculated by Professor Julie Carey. See KCS's Opening Statement and Evidence on Compensation Concerning BNSF's Use of the Rosebluff Lead, January 26, 2021, p. 33.

[7]: [4] + [5] + [6].

Details are shown in Table 6.

The cost reductions associated with the substitution of direct access for switching and haulage based service are in fact substantial enough that they would even to a large extent offset payment by BNSF of the market based access fees computed by Professor Carey. Details are shown in Table 7.

VII. Conclusion

I have been asked to review all of the evidence relating to SSW Compensation submitted by all parties to this proceeding in their January 2021 filings. I have also been asked, based on the results of this review, to prepare an updated calculation of SSW Compensation based on the most accurate and relevant evidence and data available in the record. This statement reports my findings and conclusions.

In carrying out this review I have carefully considered the evidence on SSW Compensation submitted by BNSF and its experts. Where appropriate, I have based my updated calculation of SSW Compensation on sources and calculations identified and produced by BNSF witnesses. Where appropriate, I have also updated and corrected calculations produced by BNSF witnesses. In all of these efforts, I have sought to produce the most accurate and reliable calculation of SSW Compensation that is possible, based on the evidence and data that are available.

Nonetheless, I do not believe that the SSW Compensation rates shown in Table 5 would, even if adopted in their entirety, provide KCS with the full compensation that it is properly owed. The earnings of the owners of the Rosebluff Lead, UP, and KCS, have been reduced by the competitive effects of BNSF's decades-long ability to access the Lead at below-market prices. This subsidized access has enriched BNSF and reduced the value of the Lead to its owners. The SSW Compensation rates shown in Table 5 reflect that reduced value.

UP agreed to allow BNSF to access the Rosebluff Lead as part of a set of conditions that permitted UP to go forward with its acquisition of the SP, a merger from which it has since

derived countless benefits. In contrast, KCS never consented to BNSF's presence and has never received compensation for BNSF's use of its property.

Mr. Baranowski has argued that BNSF owes no compensation to KCS because "KCS's ownership rights are not affected by BNSF direct access."⁴⁹ However, as I discussed above, this argument is entirely specious. Confining BNSF's presence on the Lead to the UP operating window will in no way inhibit the ability of BNSF to compete with KCS for the business of any customer on the Lead.

The only way to provide KCS with full and fair compensation for the access rights enjoyed by BNSF will be to require BNSF to pay the market-based fee calculated by Professor Carey. There is no substantial evidence to suggest that payments by BNSF to KCS for direct access to the Rosebluff Lead would impair the viability of its services to customers located there.

⁴⁹ Baranowski Verified Statement, page 3.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 32760 (SUB-NO. 46)

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

**KCS'S REPLY STATEMENT AND EVIDENCE ON COMPENSATION CONCERNING
BNSF'S USE OF THE ROSEBLUFF LEAD**

Exhibit D

REPLY VERIFIED STATEMENT OF PROFESSOR JULIE CAREY

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 32760 (SUB-NO. 46)

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

**KCS'S REPLY STATEMENT AND EVIDENCE ON COMPENSATION CONCERNING
BNSF'S USE OF THE ROSEBLUFF LEAD**

VERIFIED STATEMENT OF JULIE M. CAREY

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PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 32760 (SUB-NO. 46)

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

KCS’S REPLY STATEMENT AND EVIDENCE ON COMPENSATION CONCERNING
BNSF’S USE OF THE ROSEBLUFF LEAD

VERIFIED STATEMENT OF JULIE M. CAREY

I. INTRODUCTION AND SUMMARY CONCLUSIONS

My name is Julie M. Carey. I am an economist and Managing Director with National Economic Research Associates, Inc. (“NERA”). I submitted opening evidence in this case on January 26, 2021, in which I provided an opinion on the compensation that should be paid by BNSF Railway Company (“BNSF”) for terminal trackage rights over the Rosebluff Lead to provide direct access for movements to/from LyondellBasell’s (“Lyondell”) facilities in West Lake Charles, LA.¹ At the request of KCS’s counsel (Baker & Miller PLLC) I have reviewed the verified statement of Mr. Baranowski² included with BNSF’s Opening Statement and Evidence on Compensation, and respond to certain of Mr. Baranowski’s statements in this verified statement.

Mr. Baranowski baselessly recommends a \$0 interest rental component compensation to KCS suggesting that, in his view, BNSF is simply subletting the owned property of UP as if it were an apartment. This unsupported claim ignores the 50/50 joint ownership the Rosebluff Lead by KCS and UP with the deed specifying KCS’s undivided interest for equal rights to enjoy the property. While the parties efficiently allocate resources to perform operational functions in separate areas of the lead that does not convey separate ownership of the asset. Both joint owners have access to all customers on the Rosebluff Lead and there are no other identifiable ownership or other barriers of one railroad serving any of the customers. Further, the subletting analogy ignores the economics of railroads and BNSF’s network capabilities. With its substantial railroad network, BNSF is oftentimes able to offer lower rates to Lake Charles area customers that frequently rely on storage in transit facilities (SIT) for a second linehaul movement from such facilities to an ultimate destination, adding an estimated [REDACTED] margin contribution to BNSF (above and beyond the initial contribution to its network for a railroad move to, and storage at, the SIT facility).

Further, the SSW Compensation rate (Based on RCNLD) has an interest rental component proposed by Mr. Baranowski that is flawed in numerous ways and dramatically

¹ KCS’s Opening Statement and Evidence on Compensation, Concerning BNSF’s Use of the Rosebluff Lead (“KCS Opening on Compensation”), Verified Statement of Julie M. Carey (“Carey Opening V.S.”) (Filed on January 26, 2021 as corrected on March 5, 2021). (“Carey Opening V.S.”).

² BNSF’s Opening Statement and Evidence on Compensation (“BNSF-144”), Michael R. Baranowski Opening Verified Statement (“Baranowski Opening V.S.”)

understated. First, the RCNLD which relies on Mr. Boileau's road property estimate is understated due to reliance on certain vintage 2016 cost estimates that Mr. Boileau adjusts to 2020 prices that are temporarily low due to the pandemic (and have already reversed course). Second, the RCNLD understates the road property investment by ignoring additional costs associated with interest during construction and future replacement costs (which have been accepted in SAC cases, as discussed below). Third, the interest rental component of the SSW Compensation rate (Based on RCNLD) is substantially reduced for historical depreciation of the old physical railroad assets that do not reflect a competitive market rate charged by a new market entrant, such as a SAC based rate. Fourth, under the guise of accounting for KCS's ownership share, Mr. Baranowski removes 50% of the valuation of the Rosebluff Lead without any support. However, UP and KCS have an undivided interest in the Rosebluff Lead shared asset and UP is unable to receive the other 50% having already received substantial merger-related benefit instead. As such, BNSF implicitly attempts to usurp 50% of the valuation of the asset to assign to itself even though it is not an owner of the Rosebluff Lead.

Ultimately, even if the identified errors are corrected—which, when combined, more than quadruple the proposed interest rental component compensation from [REDACTED] per car to [REDACTED] per car—the SSW Compensation rate (Based on RCNLD) is inadequate and incapable of providing KCS with the appropriate economic value of the Rosebluff Lead. As mentioned above and discussed further below, the SSW Compensation rate (Based on RCNLD) is ill-suited to capture such additional revenue and contribution from a second leg movement from BNSF's SIT and other market value of the customers. The SSW Compensation rate (Based on CE) also suffers from the same flaws (and has other issues as well).

Continued forced-access at a below market rate would lead to the continuation of the undue economic advantage into the future. The superior approach is to rely on the real-world market-based access fee that I proposed in my opening evidence based on nearly 2,000 reciprocal comparable market-based reciprocal switching rates to the Lake Charles area (adjusted to subtract an estimated switching cost for BNSF movement to Lyondell in Lake Charles). This approach provides the best estimate of the rate that KCS would have negotiated for the Rosebluff Lead instead of forced access. It relies on commercially negotiated rates by willing buyers and sellers which are routinely accepted as fair market value rates by the STB, other regulators and courts and which is analogous to the STB's recognition of comparable line sales as a possible

valuation methodology for determining the interest rental base for trackage rights rates. A market-based access fee based on negotiation between the parties would reasonably be expected to contemplate the full economic value of the customer, including the additional economic contribution margin expected on a second part move for customers that rely on storage in transit. Thus, in order for KCS to receive the full economic value of the Rosebluff Lead, it must receive a comparable market-based access fee.

II. BNSF IS NOT EFFECTIVELY SUBLETTING FROM UP

Mr. Baranowski baselessly recommends a \$0 interest rental component compensation to KCS because, in his view, BNSF is simply subletting the owned property of UP.³

First, this claim is supported with no analysis or evidence presented in his verified statement or provided in response to specific follow-up discovery requests that KCS asked Mr. Baranowski to substantiate his opinion. KCS asked Mr. Baranowski for academic treatises and economic literature to support the claim as well as any other analysis conducted. Mr. Baranowski indicated that he was unaware of any finance, economic, or other academic treatises that support denial of compensation for the interest rental component to co-owners of a joint asset. Mr. Baranowski also was unable to identify any instances where courts or regulators, including the STB, have denied compensation related to the capital cost of construction of the property/infrastructure to one of the co-owners for a joint asset.⁴ Simply put, Mr. Baranowski offers nothing more than an unsupported opinion, which no surprise is to benefit of his client.

Second, as discussed in my opening evidence⁵ and summarized below, the Rosebluff Lead is a jointly owned asset between KCS and UP and it is inappropriate to deny KCS their value of the jointly owned asset.

³ “Baranowski Opening V.S.” at 29. In Dr. Neels Reply V.S. also offered in support of KCS, Dr. Neels provide an alternate rationale for why Mr. Baranowski’s subletting analogy does not work. Dr. Neels explains in an actual sublet situation the tenant moves out, and the subtenant moves in to replace him. The situation on the Rosebluff Lead, in contrast, is one in which the so-called subtenant is moving in with the owners.

⁴ See BNSF/Baranowski response to Discovery Request No. 3 (March 8, 2021), attached as Exhibit 1.

⁵ See KCS’s Opening Statement and Evidence on Compensation, Concerning BNSF’s Use of the Rosebluff Lead (“KCS Opening on Compensation”), Verified Statement of Julie M. Carey (“Carey Opening V.S.”) (Filed on January 26, 2021 as corrected on March 5, 2021).

Third, also discussed below, there is substantial evidence that BNSF does not “sublet” or identically replace UP’s use of the jointly owned asset, but rather UP utilizes its substantial network advantages to the greatest extent possible which allows UP to derive a greater profit contribution while intensifying competition in Lake Charles.

A. The Rosebluff Lead is a Jointly Owned Asset with UP that does not have Distinct or Separate Property rights

Mr. Baranowski’s claim that BNSF is simply subletting UPs property, like an apartment, ignores the economic nature of the jointly-owned asset that I explained in my opening evidence.⁶ KCS and UP jointly own the Rosebluff Lead and the Rosebluff Yard with equal rights to use the tracks on a 50/50 equal sharing basis.⁷ Shared responsibilities for switching functions by KCS and UP allocated resources to provide operational efficiencies and do not convey separate and distinct asset ownership.⁸ KCS and UP share responsibility for switching the customers on the Rosebluff Lead by designating two zones on the jointly owned trackage and do so to enhance operational efficiency and reduce congestion (i.e. in UP’s zone it moves KCS cars from the Yard to the customer location and in KCS’ zone it takes UP cars from the Yard to the customer location.)⁹

The allocation of resources by each company to the operational functions on the Rosebluff Lead does not convey distinct and separately owned assets. Just as a theoretical economic illustration, instead of dividing the operational functions up between each other, the railroads could hire a third-party provider to perform the switching and other related functions on behalf of both railroads. In such an example, the parties would continue to jointly own the facilities despite not performing any operational functions. Both railroads have access to all customers in the area and facilitate such access through the exchange of cars destined for or originating from the other carrier’s zone. There are no identifiable limitations or barriers for one

⁶ Carey Opening V.S. at 24-25.

⁷ FD 32760 (Sub-No. 46, Decision No.3, slip op. at 1-2.

⁸ Id. at 2.

⁹ Specifically, KCS switches in Zone 1, which encompasses the geographic area east and a short distance south of the Yard, and UP takes the switching responsibility in Zone 2, which consists of the geographic area beginning about 2.3 miles south of the Yard at Bayou D’Inde. KCS and UP each provide switching of cars for the other railroad within the geographic regions of the designated zones, as well as maintaining the track in most of the area that they switch.

railroad serving customers that are supportive of separately owned assets. Moreover, both the deed and the other documents that govern UP and KCS's legal rights to the Rosebluff Lead confirm that both KCS and UP have an undivided interest for which provides both railroads equal rights to enjoy the property.¹⁰ Collectively, these facts affirm that from an economic perspective, the Rosebluff Lead is a jointly-owned asset with intertwined economic value.¹¹

Due to the jointly-owned Rosebluff Lead asset and both railroads' ability to access all customers in the area, BNSF's government-mandated access to the Rosebluff Lead and artificially low non-market rate from the approval of the UP/SP merger settlement devaluated the jointly-owned asset of KCS and UP.¹² UP necessarily contemplated the full economic benefits of the proposed UP/SP merger as compared to the cost of providing BNSF with an artificially low non-market rate to access certain locations.¹³ As such, UP benefited substantially through

¹⁰The deed for the property says that the government conveyed to T&NO and KCS "jointly hereinafter called "Purchaser" (page 1) and then "this conveyance transfers and assigns to the Purchase any and all transferrable rights, franchises, licenses and permits which the Vendor may have obtained...The above-described property, rights of way, servitudes, and easements are conveyed to the Purchaser..." (page 12) and "TO HAVE AND TO HOLD: The said property unto the said Purchaser and the Purchaser's successors and assigns forever." (page 13). The purchase price was paid by "the Purchaser" and "the Purchaser certifies that it has begun common carrier operation of said trackage." (page 14). See Deed -Lake Charles, Dated May 21, 1947. In other words, the deed treats the two companies as one with respect to the rights conveyed. Both of the corporate resolutions (attached as pages 18 – 22 to the deed) state that each company was purchasing "jointly with" the other and that they were paying the purchase price "jointly" with the other. The 1948 Joint Facility Agreement unequivocally confirms in Section 1, "The right of way, tracks and all other property described in said May 21, 1947 deed is owned jointly and equally by them" (referred to as "Joint Facility Agreement." The Joint Facility Agreement refers repeatedly to "the jointly owned tracks". And Section 19 says that the "parties agree neither shall sell, lease or transfer its interest in the jointly owned tracks, or any part thereof, without advance written approval by the other party." See Exhibit A -Joint Facilities Agreements and Exhibit B (Deed) to KCS's Reply Statement and Evidence on Compensation Concerning BNSF's Use of the Rosebluff Lead.

¹¹ Carey Opening V.S. at 24. "Firms will jointly own or operate projects for a number of reasons, which includes lowering the cost of the product or service relative to engaging in the activity individually. Lowering the cost of the activity increases the economic value." Frank J. Fabozzi, Henry A. Davis, and Moorad Choudhry, Introduction to Structured Finance, 2006, p. 262.

¹² Carey Opening V.S. at 24. The undue economic advantage from the artificially low-non-market rate has enabled BNSF to achieve movements of nearly [REDACTED] carloads during 2019 for Lake Charles area customers and an estimated [REDACTED] market share, which represents substantial growth in business over the past decade. Further, during the 2017 to early 2020 period, BNSF achieved approximately [REDACTED]

¹³ As I discussed in my opening evidence, the economic concession that UP made to BNSF in order to obtain merger approval is a distinctly different economic circumstance from the normal course of business

merger-related benefits with SP. BNSF benefited from increased business in the Lake Charles area (and other areas) as I discussed in my opening evidence.¹⁴ Further, the economic nature of the jointly-owned asset is exhibited by the competitive impact that BNSF had on the Rosebluff Lead area business and customers that led to increased volumes to BNSF and lower rates in the area than would otherwise have occurred.¹⁵ The heightened competition from BNSF led to the inappropriate devaluation of the jointly-owned Rosebluff Lead asset for UP and KCS.

As discussed in my opening evidence, the economically appropriate rate is the one that would have been commercially negotiated market-based reciprocal switching rates without BNSF's mandated access and merger concession settlement.

B. Railroads Aren't Apartments and BNSF Isn't an Exact Replica of UP as Mr. Baranowski's Subletting Analogy Suggests

Mr. Baranowski's analogy that BNSF is simply subletting an apartment ignores the economics of a railroad network that is inherently distinct from an apartment. The claim that BNSF is simply subletting UP's property like an apartment implies that the tenant is identical in every way as the owner (i.e., a 1 for 1 replacement of a duplicate UP.) However, a railroad network is not an apartment. Moreover, what is being proposed here is not a typical subletting arrangement.

For Mr. Baranowski's analogy that BNSF is simply subletting the owned property to be true, BNSF would need to be identical to UP with the same owned facilities and assets, the exact same economics of its network, and have no different or distinct abilities or economic incentive to compete.¹⁶

BNSF owns different railroad facilities and assets than UP (and KCS). BNSF's network footprint is different than UP's with different physical, economic, and operational advantages. Across BNSF's vast network it reaches customers in 28 states and 3 Canadian Provinces and

negotiations parties would undertake to solely agree on reciprocal switching rates that occurs among the parties on a voluntary basis. See Carey Opening V.S. at 24-30.

¹⁴ Carey Opening V.S. at 25.

¹⁵ Id.

¹⁶ Moreover, under a typical subletting arrangement, UP would move out and BNSF would take his place, but this is not happening here. Instead, the crowded apartment envisioned by Mr. Baranowski is now occupied by three roommates.

provides access to more than 40 ports.¹⁷ It has approximately 32,500 route miles with 5,725 freight stations and connections across its extensive network.¹⁸

BNSF has resulting economic advantages from the unique attributes of its network including the locations it serves. To the extent that the Lake Charles area customers seek to have products delivered to or from locations on BNSF's network, there is no additional switching access fee incurred, increasing BNSF's competitive positioning. The historical railroad traffic movements for Lake Charles area customers reaffirm that nearly 90% of the traffic volumes that BNSF has carried to or from Lake Charles are to or from locations on its network system.¹⁹ For customers with final destinations on BNSF's network, the lion's share of BNSF movements for Rosebluff Lead customers originate or terminate at a BNSF delivery location (i.e. are not interchanged to another railroad for additional transportation to the ultimate destination).

BNSF has different operational advantages. For example, BNSF has higher average system-wide train speeds than KCS and UP in recent STB service data.

BNSF charges different rates than other railroads, including UP and KCS. By design, the Staggers Act infuses competitive market forces into the railroad industry to the maximum extent possible through differential pricing that enables different rates for different customers with different competitiveness circumstances.²⁰ As such, BNSF and all other railroads are able to commercially negotiate both linehaul and reciprocal switching related service rates with customers and may reach an agreement for rates and terms and conditions that are customer-specific or unique in other ways. As such, rates for various railroad services may be different for each railroad and customer.

¹⁷ BNSF Fact Sheet available at https://www.bnsf.com/bnsf-resources/pdf/about-bnsf/fact_sheet.pdf,

¹⁸ *Id.* Freight stations viewed at Department Of Transportation FRA Safety Map, available at <https://fragis.fra.dot.gov/GISFRASafety/>. Stations viewed by Freight Station Accounting Code.

¹⁹

See Carey WP "Lake Charles Traffic Analysis.xlsx"

²⁰ See Association of American Railroads, "Differential Pricing in the Freight Rail Industry", available at <https://www.aar.org/wp-content/uploads/2020/08/AAR-Railroads-Differential-Pricing.pdf>.

Different rates for customer-specific competitiveness circumstances are compounded by different economic circumstances that exist for each customer with whom that railroad seeks to negotiate rates for its railroad services. Each customer may also have other facilities which may or may not be on the same railroad's network. Lyondell is such an example as the company has multiple facilities in different locations including numerous facilities throughout the Gulf Coast (La Porte, TX, Bayport, TX, Wadsworth, TX, Channelview, TX, Chocolate Bayou, TX, and Victoria, TX) and Lake Charles as well as other locations (Mansfield, TX, Clinton, IA, and East Morris, IL).²¹ For example to the extent that Lyondell has other facilities on the BNSF system, BNSF can extend a railroad rate offer that factors in those other facilities into the bid.

Mr. Baranowski's analogy that BNSF is simply subletting the owned property would require the exact same rates and rate regime for BNSF and all other railroads. Such a regime may exist in other network industries. However, such a uniform ratemaking regime does not exist for railroads.

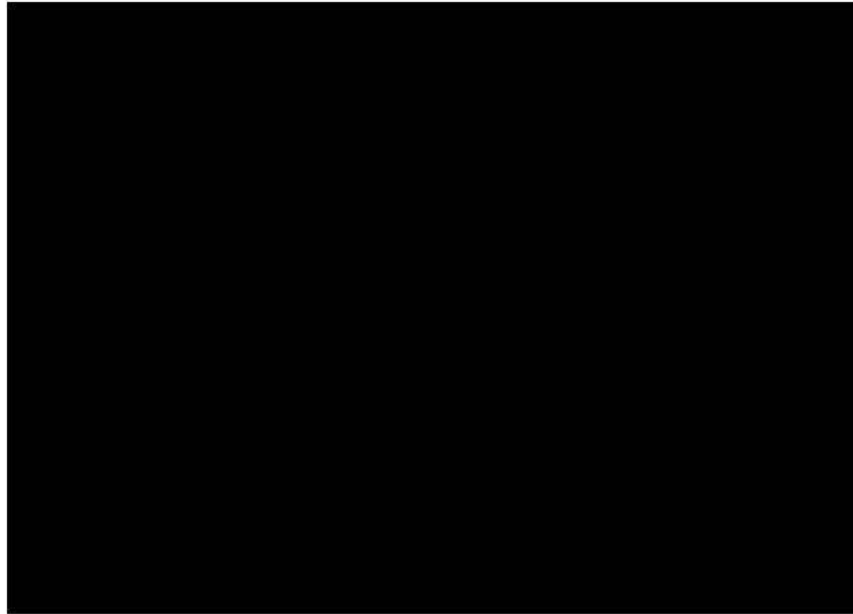
C. BNSF Achieves Greater Revenues/Contributions from Lake Charles Area Customers from Second Linehaul Moves from BNSF Storage Facilities Not Captured in RCNLD

BNSF has a distinct [REDACTED]
[REDACTED]. As Figure 1 below shows, BNSF's average railroad rate ranges from [REDACTED] for [REDACTED] that may originate in Lake Charles and elsewhere.²²

²¹ [REDACTED]

²² [REDACTED]

Figure 1: Comparison of Gateway Rates from BNSF [REDACTED] Storage and UP Lake Charles (\$/Car)



The economics of these gateway routes are particularly important to Lake Charles customers because [REDACTED] of the Lake Charles [REDACTED] railroad movements are delivered to BNSF's [REDACTED] storage in transit (SIT) facility.²³ As the name suggests, customers store products at the SIT facilities for a period of time, and then the railroad transports the products to a final delivery location, often using the gateway lanes of BNSF. In fact, both BNSF and UP recognize the importance of railroad rates on these gateways in the normal course of business and routinely [REDACTED]

[REDACTED]

²³ See Carey WP "Lake Charles Traffic Analysis.xlsx"

²⁴ For examples of [REDACTED]

There are substantial economic benefits in terms of additional revenue and contribution margins that BNSF derives from movements to [REDACTED] SIT facilities leading to greater revenue as follows:

- Storage related service fees, including a daily SIT rate of [REDACTED], and the linehaul rate to SIT averaged [REDACTED] for these moves. ²⁵ In total, BNSF projected [REDACTED] million in revenue in regional storage-related services.
- Additional line haul movements on BNSF's network from the SIT to a final destination such as major BNSF gateways at Chicago, East St. Louis, Houston, Eagle Pass, Fort Worth among others. Rates to key gateways for Lake Charles movements range from just under [REDACTED] depending on the customer and gateway location.²⁶

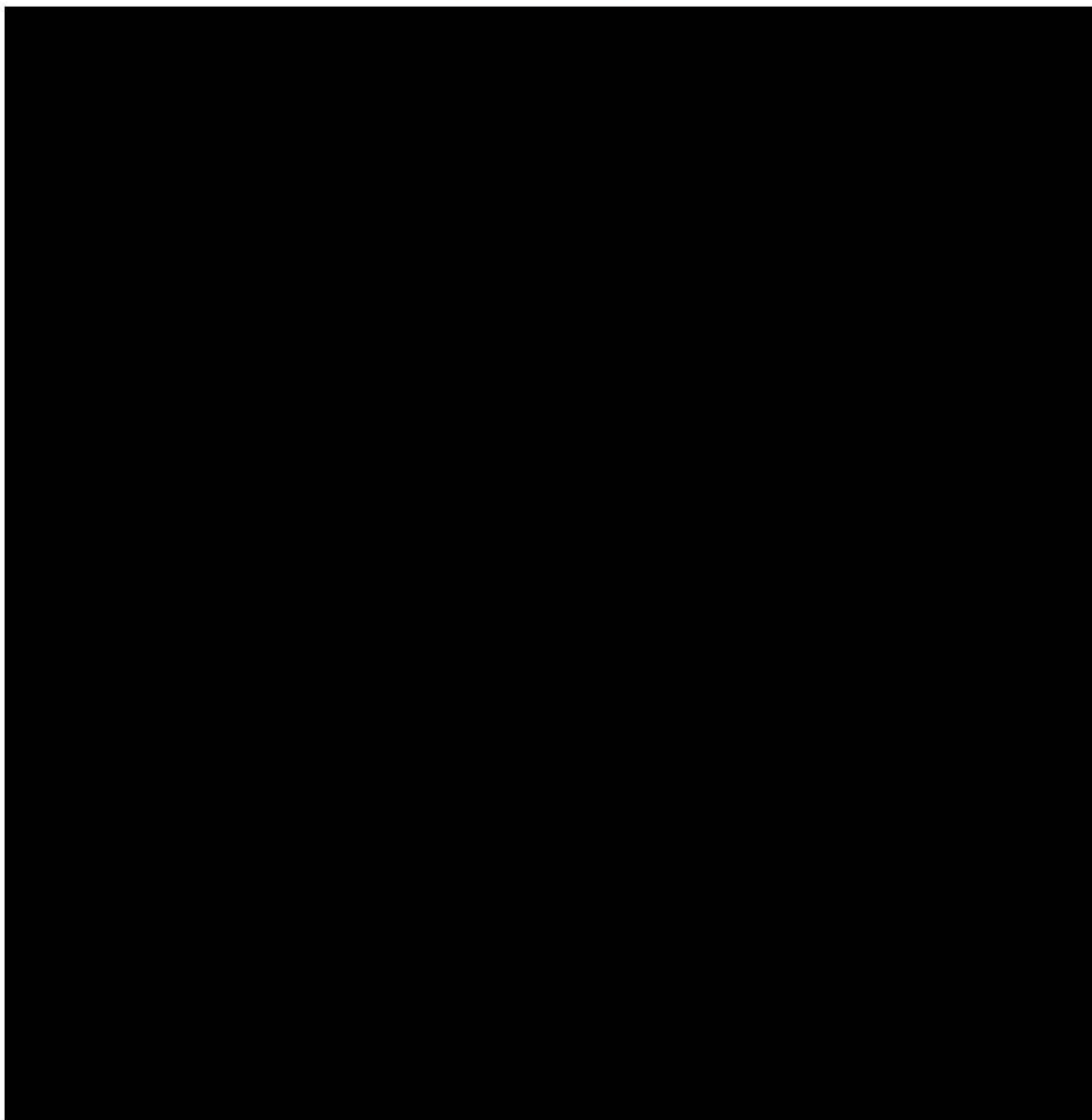
Once a shipment has been taken to BNSF's [REDACTED] SIT, BNSF indicates that [REDACTED] of movements from [REDACTED] stay on the BNSF network and move to gateway destinations.²⁷ The move to SIT therefore allows BNSF to extract maximum profit from the shipment by permitting BNSF to optimize the logistics of the movement within their own network and combining its larger SIT and network capacity to create a competitive advantage. That competitive advantage adds substantial revenue and margin contribution to BNSF and the rest of its network including an estimated [REDACTED] contribution margin for BNSF's Lake Charles originating traffic.

²⁵ BNSF, [REDACTED] at BNSF-LC2020-HC-0008673, available at BNSF-LC2020-HC-00008668-86

²⁶ BNSF, [REDACTED] at BNSF-LC2020-HC-0000790, available at BNSF-LC2020-HC-00000759-99

²⁷ BNSF, "SIT Expansion Proposal, pg. 6, [REDACTED] at BNSF-LC2020-HC-0008673, available at BNSF-LC2020-HC-00008668-86.

Figure 2: Revenue and Contribution Estimates for SIT Moves from [REDACTED] to Key Gateways (\$/Car)



The multi-leg moves from storage facilities provide strategic option value to BNSF's negotiations. Specifically, internal BNSF documents report that [REDACTED]
[REDACTED]²⁸ SIT utilization is a key strategy for BNSF's Lake Charles moves with [REDACTED] traffic going to [REDACTED] specifically.²⁹

²⁸ BNSF, [REDACTED] at BNSF-LC2020-HC-0008673, available at BNSF-LC2020-HC-00008668-86

²⁹ See Carey WP "Lake Charles Traffic Analysis.xlsx"

For these reasons, BNSF's network has a substantial competitive advantage and gains large additional revenues not contemplated in an SSW Compensation rate (Based on RCNLD) (or even an SSW Compensation rate (Based on CE). Neither approach captures the additional estimated [REDACTED] margin contribution to BNSF from the second movement from the BNSF storage (or the storage-related fees). RCNLD is ill-suited to capture this additional option value that BNSF derives from access to Lake Charles area customers on the Rosebluff Lead from second leg movements across its railroad network after the initial transportation movement to the SIT. So too is the SSW Compensation rate (Based on CE) which suffers from the same flaws (as well as additional flaws). However, a market-based rate based on negotiation between the parties would reasonably be expected to contemplate the full economic value of the customer, including the additional economic contribution margin expected on a second part move for customers that rely on storage in transit.

III. THE REPLACEMENT COST NEW LESS DEPRECIATION APPROACH IS DRAMATICALLY UNDERSTATED

After suggesting that KCS is not due any compensation for interest rental, Mr. Baranowski presents an alternative methodology in which interest rental reflects the Reproduction Cost New Less Depreciation ("RCNLD") of the Rosebluff Lead.³⁰

Mr. Baranowski's Reproduction Cost New for the Rosebluff Lead trackage equals [REDACTED] million and physical depreciation equals [REDACTED] million, leaving a depreciated cost (RCNLD) of [REDACTED] million.³¹ This depreciated cost, along with land values, cost of capital assumptions, and usage metrics on the Rosebluff Lead³² results in Mr. Baranowski's recommended interest rental component of the SSW Compensation rate (Based on RCNLD) equal to [REDACTED] and along with maintenance expense (which Dr. Neels addresses is a total compensation equal to [REDACTED] per car.³³

³⁰ Baranowski Opening V.S. at pages 3-4, 15 and 25.

³¹ Physical depreciation equals [REDACTED] See Baranowski V.S. at page 25.

³² Baranowski Opening V.S. at page 26-29.

³³ Baranowski Opening V.S. at page 29 (Table 12). The interest rental component is [REDACTED] of the total compensation of [REDACTED] per Gross Ton-Mile, or [REDACTED] of the total compensation of [REDACTED] per car based on Mr. Baranowski's conversion of [REDACTED] average GTMs per loaded car. See Baranowski V.S. at page 28 (Table 11).

However, Mr. Baranowski's RCNLD approach is inadequate with mechanical and conceptual flaws to the interest rental component that dramatically understate the real-world commercial value of the Rosebluff Lead.³⁴ The analyses of BNSF experts Mr. Boileau and Mr. Baranowski have the following substantive deficiencies:

- **Understates inflation:** road property investment is understated by relying on 2016 cost estimates that are escalated to 2020 by an AAR materials and supplies inflation index.³⁵ However, the pandemic temporarily reduced materials costs in 2020 which have already substantially rebounded in early 2021. Specifically, railroad materials and supplies costs increase by 12.2% instead of 5.6% if the period is extended from 2016 to the 2Q2021 instead of ending at 4Q2020 as assumed by Mr. Boileau.³⁶
- **Excludes IDC with Replacement Costs of Road Property:** The total replacement capital costs are understated by excluding Interest During Construction (IDC) and the cost of future replacement of road property which can add upwards of 20% to the initial road property investments.³⁷
- **Ignore Full Commercial Value of the Asset** by removing physical depreciation historically accumulated from old and different assets and thereby artificially lowering the new replacement costs below what a new entrant or competitive market would allow, as discussed further below, and
- **Removes 50% of the Valuation** of the Rosebluff Lead under the guise of KCS's ownership share. BNSF implicitly seeks to assign 50% of the asset

³⁴ Mr. Baranowski notes that KCS has agreed that RCNLD is an appropriate approach in this case. (Baranowski Opening V.S. at 18, citing February 2019 filings.) As discussed in Section IV.C of my prior verified statement, RCNLD may be appropriate in certain economic circumstances. However, the numerous unique aspects of the Rosebluff Lead (e.g., high-density customers with significant revenue over short trackage) are distinguishing economic circumstances that should yield a higher asset value than that derived from RCNLD.

³⁵ BNSF's Opening Statement and Evidence on Compensation ("BNSF-144"), Robert Boileau Opening Verified Statement ("Boileau Opening V.S.") Boileau Opening WP "RCNLD Calculations.xlsx" at Tab "Unit Costs", cell M11 (and citing AAR RR Cost Indexes 2020-12.pdf), Boileau Opening V.S. at 92.

³⁶ See Carey WP Inflation Indexes.xls The STB's Quarterly Rail Cost Adjustment Factor (RCAF) materials and supplies component increased by 12.22% from 2016 actual values to the 2nd quarter of 2021 forecast. STB, Quarterly RCAF, Docket No. EP 290 (Sub-No. 5) at Decision Appendix at Table B on page 5 at Line 3 in the Decisions issued on June 16, 2016, September 20, 2016, December 20, 2016 and March 17, 2017. The 2nd quarter 2021 forecast value is in the Decision Appendix at Table A on page 4 at Line 3.

³⁷ See Boileau Opening V.S. at 101, 102. (Boileau Opening WP "RCNLD Calculations.xlsx" at Tab "Tables", cell F19). This calculation includes a 10% fixed markup to represent engineering costs, a 2.7% fixed markup to represent mobilization costs, and on top of these marked up costs a 10% contingency is added. These are standard cost estimate percentages used by the STB on road property investment categories. See Consumers Energy Co. v. CSX Transp., Inc. Docket No. 42142, slip op. at 259 (STB served Jan. 11, 2018 as corrected Mar. 14, 2018) ("CURE").

value to itself, even though it is not a co-owner and UP and KCS have an undivided interest in the Rosebluff Lead.

First, for the understated inflation, this issue is straightforward. Mr. Boileau simply didn't give due consideration to the temporal nature of pricing discounts during the pandemic and the need to use more stable endpoint to escalate prices from 2016.

Second, the understatement of full replacement costs arises from the exclusion of interest during construction (IDC) and the future replacement of capital that necessarily occurs and can be a substantial share of the total initial road property investment. For example, IDC can approximate 12-14% of the initial road property investment and was equal to 12.81% in the Consumers Energy rate reasonableness dispute resulting in \$81 million addition to the initial road property investment.³⁸ In addition, the STB has accepted a future replacement cost addition (referred to as PV replacement cost) which was 8.17% of the initial road property investment in the Consumers Energy rate reasonableness dispute.³⁹

Third, Mr. Baranowski ignores the full commercial value of the Rosebluff Lead asset by relying on an RCNLD that reflects a reduction of the Reproduction Cost New by 59% to reflect physical depreciation of the Rosebluff Lead trackage.⁴⁰ Reducing RCN by historical physical depreciation of the old asset (LD) is inappropriate as it does not reflect the current commercial or

³⁸ See CURE at 282.

³⁹ See CURE at 282. Regarding interest during construction, "CSXT used the same methodology as Consumers to calculate interest during construction on construction funds outstanding during the assumed CERR construction period." Regarding the present value of replacement costs, "CSXT assumes the cost of debt for future asset replacement will mirror the cost of debt during the CERR construction period, consistent with Board precedent." See Consumer Energy Company v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, vol. 2-4, Mar. 7, 2016, pp. II-B-46, III-H-2, III-H-3 and Exhibit III-H-1 at p. 4 and p. 7 (Tables D and F). Michael Baranowski served as a CSX Transportation witness. See Reply Evidence of CSX Transportation, vol. 3, Mar. 7, 2016, pp. III-F-22 to 66, n. 41 at III-F-22 (Roadbed Preparation; co-sponsored); pp. III-F-66 to 87, n. 144 at III-F-66 (Track Construction; co-sponsored); pp. III-F-108 to 119, n. 259 at III-F-108 (Signals and Communications; co-sponsored); pp. III-F-119 to 136, n. 289 at III-F-119 (Buildings and Facilities; co-sponsored); pp. III-H-18 (cross-subsidy); pp. V-1 to 7 (Witness Qualifications and Verification).

⁴⁰ RCNLD is calculated by Mr. Boileau. See Baranowski Opening V.S. at 25.

productive value of the asset that would exist among willing buyers and sellers in a competitive market outcome.⁴¹

In this case, the Reproduction Cost New (RCN) is a closer cost-based estimate of a competitive market price than RCNLD and therefore historical physical depreciation of the old asset should be removed. That is because over the long term the competitive market price is best represented by the cost of the new entry competitor.⁴² RCN generally approximates a SAC based rate because a SAC includes new railroad assets for which it begins to depreciate in year 1 and continues over future years⁴³ and therefore does not have the substantial historical physical depreciation of old assets that would result in the very large 59% reduction as Mr. Baranowski's analysis assumes.⁴⁴ If the Rosebluff Lead assets were relatively new, then the impact that I show for the Rosebluff Lead would not be as extreme.⁴⁵

⁴¹ Mr. Baranowski has never proposed RCNLD in any prior rate reasonableness dispute before the STB or in any other venue. See Response to Discovery Request No. 9 at Exhibit 1.

⁴² In a competitive market, prices reflect the current commercial or productive value of the assets used to provide the good or service. This market price is received by all suppliers, regardless of their individual cost. For instance, when selling a home that was built twenty years ago a home seller (as well as home buyers) would look to current market prices, which are set by sales for comparable houses in the neighborhood including any newly constructed homes. The new home's sales price reflects the cost of a new entrant (the cost of construction, including a reasonable profit for the builder) and represents the current productive or commercial value of comparable homes in the market. Uber is another example where the productive or commercial value of a five-year old car is equal to that of a new car in the market for ride services as both receive the same market price (fare) for providing a ride.

⁴³ Depreciation is an accounting concept that allocates cost of physical assets over their expected lives. The Coal Rate Guidelines recognizes that the depreciation represents the loss in value of a used or obsolete asset, "Depreciation. The measured loss in asset value which results from use or obsolescence." See Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520 (1985) 1985 ICC LEXIS 254 aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444, at *63, *82. (3d Cir. 1987) ("Coal Rate Guidelines").

⁴⁴ For instance, consider two physical railroad assets each with \$100 original cost and both with a 20 year economic life. The key distinguishing feature is that the first asset is the outdated facility that is 20 years old while the second asset is the newly replaced asset which is 1 year old. If the older asset is 75% depreciated, its net book value (original cost minus accumulated depreciation) would be \$25 (\$100-\$75 = \$25). In contrast, a new replacement asset would have a net book value of \$95 at the end of its first year of operation.

⁴⁵ In fact, Mr. Baranowski has specifically advocated in a recent regulatory case to not deduct historical physical depreciation as he proposes here. Mr. Baranowski presented an analysis in a FERC oil pipeline rate case that included only "forward-looking costs" and did not remove large historical depreciation for the nearly 50 year old pipeline because, as Mr. Baranowski explained, "it is not relevant to my analysis." See Prepared Answering Testimony of Michael R. Baranowski, Exhibit No. CPC-00012 at pages 3 and 19, November 19, 2019, FERC Docket No. OR18-7-002, et al. *Epsilon Trading, LLC Chevron Prod. Co., and Valero Mktg. and Supply Co. v. Colonial Pipeline Co.*. Mr. Baranowski refers to the testimony of John C. Klick who states "Prices that will ensure viability over the long run cannot be determined solely by reference

As such, a rate estimate based on depreciated cost (e.g. RCN minus physical depreciation)⁴⁶ will be less than that charged by a hypothetical new entrant and fail to represent the productive or commercial value of the new assets.⁴⁷ Absent performing a Stand-Alone Cost (SAC) analysis, this cost of new entry can be measured by RCN since removing the reduction of depreciation from RCNLD is akin to the results of a SAC analysis.⁴⁸

Fourth, under the guise of accounting for KCS's ownership share, Mr. Baranowski only includes partial value of the Rosebluff Lead in the interest rental component compensation by specifically reducing the asset value by 50%.⁴⁹ However, UP and KCS have an undivided interest in the Rosebluff Lead shared asset and UP is unable to receive the other 50% of the valuation having already received substantial merger-related benefit instead.

Simply put, by removing 50% of valuation of the asset, BNSF attempts to usurp the partial asset value to assign to itself even though it is not an owner of the lead. Without any evidence or demonstration that BNSF is entitled to the partial value of KCS's and UP railroad

to the net investment of a pipeline system whose assets are relatively old and have significant accumulated depreciation." This discussion also makes the point that a return based on the depreciated book investment of older vintage assets do not reflect the "current productive value." See Prepared Answering Testimony of John C. Klick, Exhibit No. CPC-00002 at page 8, November 19, 2019, FERC Docket No. OR18-7-002, et al. *Epsilon Trading, LLC Chevron Prod. Co., and Valero Mrkting and Supply Company v. Colonial Pipeline Company*. In addition, Mr. Baranowski routinely presents evidence in SAC cases. See response to Discovery Request 8 (Appendix A) at Exhibit 1.

⁴⁶ Depreciation is an accounting concept that allocates cost of physical assets over their expected lives. The Coal Rate Guidelines recognizes that the depreciation represents the loss in value of a used or obsolete asset, "Depreciation. The measured loss in asset value which results from use or obsolescence." See Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520 (1985) 1985 ICC LEXIS 254 aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444, at *63, *82. (3d Cir. 1987) ("Coal Rate Guidelines").

⁴⁷As discussed in my prior verified statement, there are differentiated economic circumstances of individual cases where RCNLD may be acceptable. For reasons set forth throughout this report and my opening evidence, RCNLD is inadequate in this circumstance. See Carey Opening V.S at Section IV.C. As stated in my prior verified statement, "I have recommended [RCNLD] in a past instance when I identified numerous economic factors that supported reliance on it as a reasonable and appropriate measure of the asset value for a new entrant in the specific circumstance. For example, in one past case the SSW Rate (based on RCNLD) based valuation produced a higher rate than the SSW Rate (based on CE) valuation approach for the specific trackage at issue in that case." See Carey Opening V.S. at 33, n 98.

⁴⁸ SAC represents a "simulated competitive price". See Coal Rate Guidelines at page 9. ("A rate level calculated by the SAC methodology represents the theoretical maximum rate that a railroad could levy on shippers without substantial diversion of traffic to a hypothetical competing service. It is, in other words, a simulated competitive price.")

⁴⁹See Baranowski Opening WP "Compensation Calculations.xlsx" at tab "Fees", cell B26. Referred to as KCS Ownership Share

property, Mr. Baranowski implicitly is asking the railroads and the Board to bequeath partial value to it.

Further, as discussed in my opening evidence, the economically appropriate rate is the one that would have been commercially negotiated as a market-based fee without BNSF's mandated access as a merger concession settlement. The negotiated rate would represent an appropriate market-based fee and profit contribution for the service that KCS can be expected to have negotiated as an undivided interest asset joint owner. Such a rate would not expect to be arbitrarily reduced by 50% because UP received different merger-related benefits and therefore is unable to derive benefits from profit contribution for the access to Lake Charles area customers on the Rosebluff Lead. KCS would expect that it would be entitled as a joint owner to receive the value of the asset. To artificially reduce the value of the Rosebluff Lead by 50% as Mr. Baranowski has done results in a substantial diminution of the value of the Rosebluff Lead asset (below the market-based rate).

I have made the following adjustments to correct the various errors identified above, which collectively more than quadruple the interest rental component compensation recommended by Mr. Baranowski from [REDACTED] per car by [REDACTED] per car to [REDACTED] per car.⁵⁰

- **Inflation:** To adjust for the temporary effect the pandemic had on materials costs, I replace the 4Q2020 index value with the forecast 2Q2021 value in Mr. Boileau's "RCR Materials and Supplies" Index.⁵¹ This causes Mr. Boileau's RCNLD of [REDACTED] million to increase to [REDACTED] million.⁵² The discrete impact of this adjustment on the total compensation is shown in Figure below

⁵⁰ Dr. Neels addresses the land value cost component of the interest rental compensation as well as maintenance and operating expenses, which is included as a separate and distinct component in the SSW compensation from the interest rental component.

⁵¹ See Carey WP Inflation Indexes.xls.

⁵² The RCN increases from [REDACTED] million to [REDACTED] million.

in Column [C]. The interest rental component increases from [REDACTED] per car⁵³ to [REDACTED] per car.⁵⁴

- **Additional Road Property for IDC and Future Replacement Costs:** To reflect IDC and future replacement road property costs, I add a 20% adjustment to Mr. Boileau's corrected RCNLD calculation.⁵⁵ This causes the RCNLD to increase from [REDACTED] million to [REDACTED] million. The cumulative impact of this and the prior adjustment is shown at Figure 3 below in Column [D]. The interest rental component increases from [REDACTED] per car to [REDACTED] per car.
- **Full Commercial Value of the New Asset:** To reflect the commercial value of the asset I have removed the physical depreciation that was subtracted from the RCN by reducing physical depreciation of [REDACTED] million⁵⁶ to zero. This causes the RCNLD and RCN to equal one another at [REDACTED] million. The cumulative impact of this and the prior adjustments is shown at Figure 3 below in Column [E]. The interest rental component increases from [REDACTED] per car to [REDACTED] per car.
- **Restore 100% of the Valuation of the Rosebluff Lead:** I have adjusted the 50% KCS ownership share Mr. Baranowski applies to the Rosebluff Trackage Valuation to 100%.⁵⁷ The cumulative impact of this and the prior adjustments is shown at Figure 3 below in Column [F]. The interest rental component increases from [REDACTED] per car to [REDACTED]

⁵³ Baranowski Opening V.S. at page 29 (Table 12). The interest rental component is [REDACTED] of the total compensation of [REDACTED] per Gross Ton-Mile, or [REDACTED] of the total compensation of [REDACTED] per car, or [REDACTED] of the total compensation of [REDACTED] per car-mile based on Mr. Baranowski's conversion of [REDACTED] average GTMs per loaded car and [REDACTED] Round-trip miles. See Baranowski Opening V.S. at page 28 (Table 11).

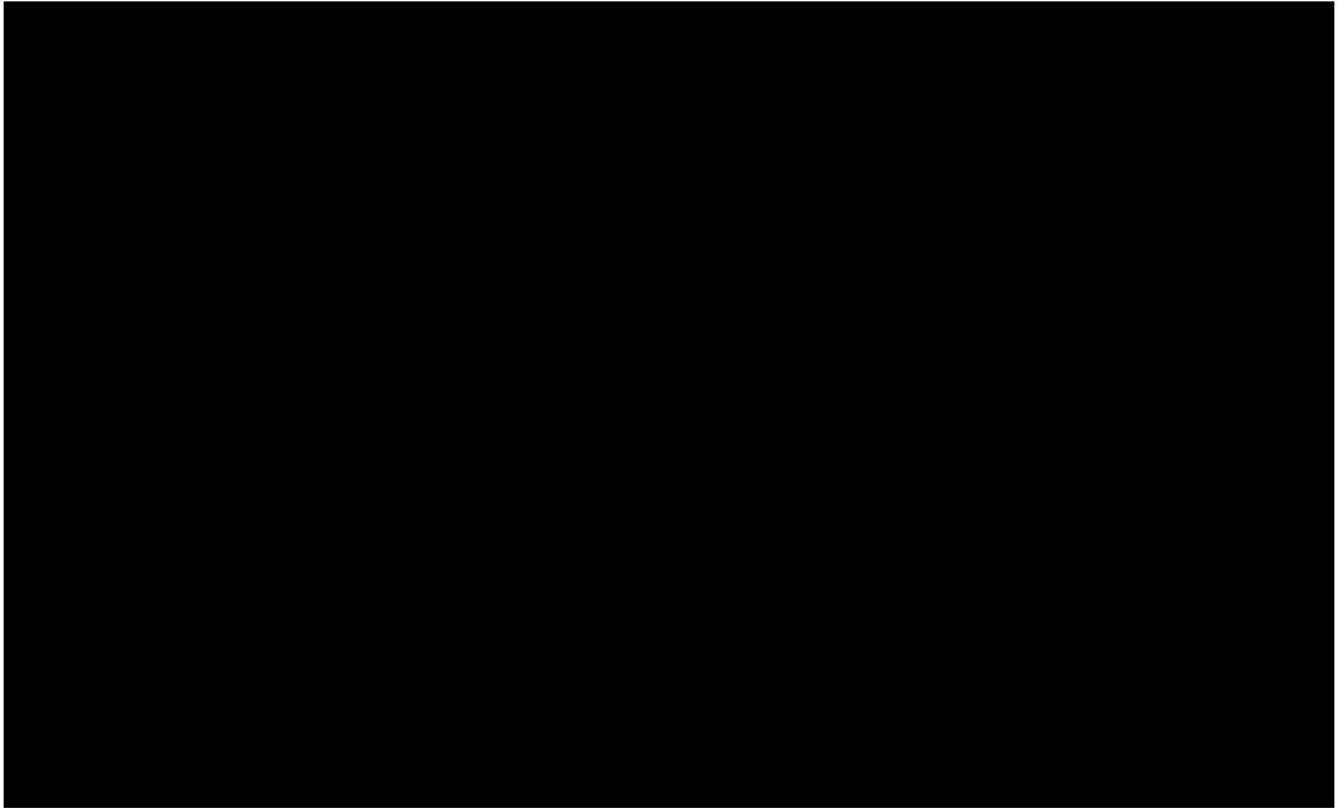
⁵⁴ Mr. Baranowski's calculations rely on Customer Weighted Average Miles on the Rosebluff Lead. See Baranowski Opening V.S. at 28 (Table 11). I rely on the distance of [REDACTED] miles from the top of the Rosebluff Lead to Lyondell. See Carey WP "Compensation Calculations_Adjusted.xlsx".

⁵⁵ RCN increases from [REDACTED] million to [REDACTED] million.

⁵⁶ [REDACTED] million is [REDACTED] of the [REDACTED] million RCN.

⁵⁷ Rosebluff Trackage Valuation = RCN – Depreciation + Land Value. [REDACTED]

Figure 3. Adjustments to Mr. Baranowski's Interest Rental Compensation Calculation (per Car and per Car-mile)⁵⁸



IV. MARKET-BASED ACCESS FEE IS SUPERIOR TO THE REPLACEMENT COST BASED RATE ESTIMATE FOR THE ROSEBLUFF LEAD

For all of the reasons discussed above (and in my opening evidence), replacement costs are insufficient to put KCS in the same economic position it would have been if it competitively negotiated with BNSF for direct access to Lyondell. As discussed in my prior verified statement, I recommend that the STB ensure that KCS does not receive a differentially lower fee⁵⁹ for BNSF's direct access to Lyondell than KCS could receive through competitive negotiations in this case, through market-based access fee estimated based on competitively negotiated market-based reciprocal switching rates (adjusted to remove the switching cost).

⁵⁸ See Carey WP "Compensation Calculations_Adjusted.xlsx"

⁵⁹ The market-based access fee represents the haulage rate that I calculated based on market-based reciprocal switching rates that BNSF should compensate KCS for direct access to Lyondell via its owned trackage in Lake Charles.

Even with the corrections that I discuss above to the Reproduction Cost New calculation, the derived interest rental component compensation is dramatically lower than the market-based access fee (which is based on real world data for 2,000 comparable reciprocal switching rates—removing an estimate of switching costs). The corrected SSW Compensation rate (Based on RCNLD) also is lower than the SSW Compensation rate (Based on CE)⁶⁰ presented by Dr. Kevin Neels in KCS’s Opening Evidence.⁶¹ The SSW Compensation rate (Based on CE) is also too low as it is circular and based on historical rates that have been impacted by competition (i.e. the rates and revenue have already been reduced).⁶² In addition, short mileage hauls such as the Rosebluff Lead that has tremendous economic value to access many robust customers, the CE revenue attribution is likely to be dramatically too low and not best able to capture the economic value of the access (as a negotiated reciprocal switching rate can), which I discuss in my opening evidence.⁶³

Further, as I demonstrate above, [REDACTED] of BNSF’s railroad movement originating in Lake Charles are temporarily moved to storage facilities and approximately [REDACTED] are put back on the BNSF network for a second railroad movement for which BNSF derives substantial revenue and an estimate [REDACTED] car contribution to the benefit its network. This substantial additional revenue and margin contribution is not captured by the calculation of an SSW Compensation rate (Based on RCNLD) or a SSW Compensation rate (Based on CE). However, a market-based rate based on negotiation between the parties would reasonably be expected to contemplate the full economic value of the customer, including the additional economic contribution margin expected on a second part move for customers that rely on storage in transit.

Simply put, for KCS to receive the full economic value of the Rosebluff Lead it must receive a comparable market-based rate. Using information from reasonably comparable situations is an accepted method for measuring the value of an asset that has been accepted by

⁶⁰ CE refers to capitalized earnings

⁶¹ KCS’s Opening Statement and Evidence on Compensation, Verified Statement of Dr. Kevin Neels (“Neels Opening V.S.”) at 44.

⁶² See additional discussion at Carey Opening V.S. at 31-32.

⁶³ Id. See also Carey Opening V.S. at 16-24.

the STB, other regulators, and courts.⁶⁴ In fact, this approach is similar to the comparable line valuation method that Mr. Baranowski identified as an accepted methodological approach to determine an appropriate a valuation base for interest rental.⁶⁵ A regulatorily-determined rate prescription as proposed by Mr. Baranowski does not result from a real-world-commercially-negotiated rate by BNSF and KCS. BNSF, UP and KCS have all routinely expressed strong preference for competition and markets instead of regulation to the maximum extent possible.⁶⁶ Competitive harm to KCS has occurred from the disadvantage of competing for customers that seek to transport products to or from Lake Charles to locations on BNSF railroad or another railroad that has a market-based reciprocal switching rate.

In addition, regarding the highly competitive circumstances in Lake Charles, BNSF and UP each submitted bids for over-lapping, competitive LyondellBasell traffic. As shown in Figure 4 below, the [REDACTED], demonstrating the competitive dynamic. For non-SIT traffic, the average per car rate was [REDACTED] in the BNSF bid and [REDACTED] in the UP bid, and the rate to SIT was [REDACTED] and [REDACTED] respectively. According to the bid documents produced in discovery, the BNSF bid was slightly more expensive than that of UP. Additionally, according to UP bid documents, they targeted a

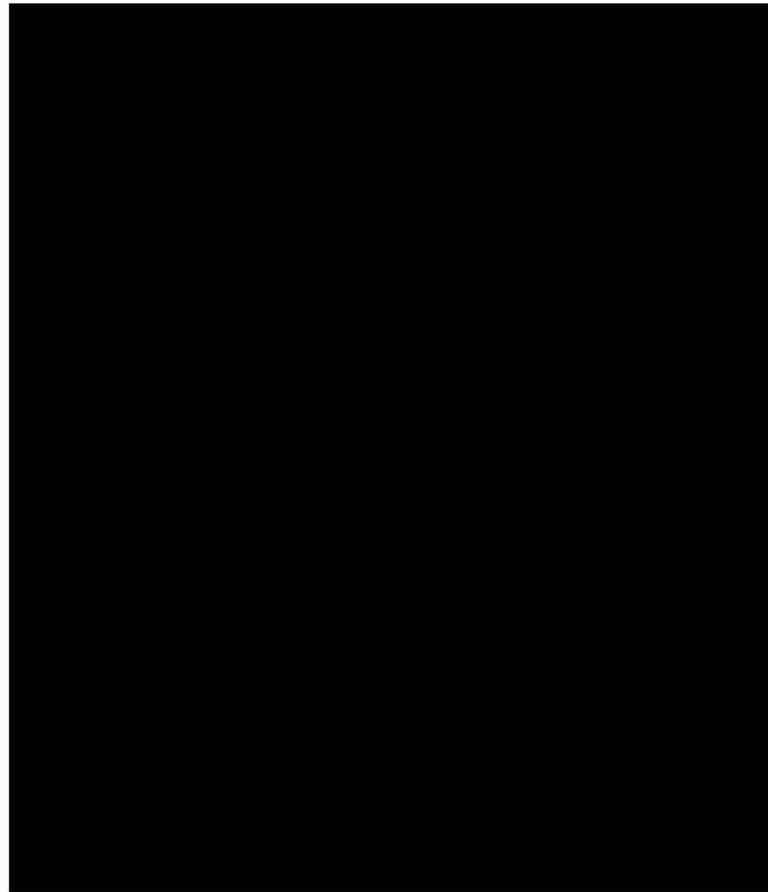
⁶⁴ See additional discussion at Carey Opening V.S. at 20-22. “According to 49 USC § 11102, ‘The rail carriers are responsible for establishing the conditions and compensation for use of the facilities.’ Only if they fail to establish compensation terms may the Board step in. Likewise, Section 11102(c) on reciprocal switching provides that ‘The rail carriers entering into such an agreement shall establish the conditions and compensation applicable to such agreement,’ and only if they fail to do so do the regulators step in. Both provisions indicate that the negotiated, market price is preferred. If called on to set the price, the Board should seek to emulate that market price.”

⁶⁵ Baranowski Opening V.S. at 18, n 42, citing *Decision No. 8*, FD 32760 (Sub-No. 46), slip op. at 12 n.18. The STB has acknowledged that a comparable line segment approach is a possible method for determining the appropriate valuation base for the interest rental component. See *New England Cent.*, FD 35842, slip op. at 3.; *Toledo, Peoria & W. Ry.—Trackage Rights Compensation—Peoria & Pekin Union Ry.*, FD 26476 (Sub-No. 1), slip op. at 4 (ICC served Sept. 20, 1994); *Atchison, Topeka & Santa Fe Ry.—Operating Agreement—S. Pac. Transp.*, 8 I.C.C.2d 297, 304-305 (1992). Sales of comparable lines between a willing buyer and seller would reflect the commercial value of the asset.

⁶⁶ Carey Opening V.S. at 16-19. For instance, BNSF’s stated views are that competition is preferable to a “forced” switching regime at issue in the Ex Parte 711 case. (“BNSF believes that the Board must allow market forces to govern the commercial relationships between railroads and their shippers, and must not create standards that allow unnecessary Board intervention in properly functioning markets.”) *Id.* at 17, citing Reciprocal Switching, EP 711 (Sub No. 1) (BNSF Comments Filed October 26, 2016).

daily SIT storage rate, which was significantly lower than daily SIT storage rate usually offered by BNSF.⁶⁷

Figure 4.



An estimate of a real-world market-based outcome is the economically appropriate and preferred approach to setting a market-based access fee for BNSF to gain direct access to Lyondell as it is a fee compensation rooted in the sharing of contribution that KCS would have negotiated with BNSF absent the forced access. The real-world market-based access fee I calculate and recommend in this case is based on nearly 2,000 comparable market-based

⁶⁷

reciprocal switching rates to the Lake Charles area (adjusted to subtract an estimated switching cost for BNSF movement to Lyondell in Lake Charles). The market-based access fee compensation approach gives due consideration to the priority of efficient competitive market outcomes and revenue adequacy-based requirements, consistent with the STB policy imperatives. This approach of shared profits between BNSF and KCS based on negotiated reciprocal switching rates (adjusted to remove the switching cost) is superior to the imposition of a regulatorily determined rate estimate for this specific case. Only with such an appropriate market-based access fee will further erosion of the value to KCS's trackage cease and an appropriate sharing of contribution between BNSF and KCS will be achieved such as that which would have occurred absent government-mandated forced access.

V. CONCLUSION

As discussed, Mr. Baranowski's unsupported "subletting" claim ignores the 50/50 joint ownership of the Rosebluff Lead by KCS and UP. Efficient allocation of operational functions do not convey separate ownership of the asset and both joint owners have access to all customers on the Rosebluff Lead. Further, Mr. Baranowski's subletting analogy ignores the economics of railroads and BNSF's network capabilities which allows it to offer lower rates to Lake Charles area customers that frequently rely on storage in transit facilities (SIT) for a second linehaul movement, adding an estimated [REDACTED] margin contribution to BNSF (above and beyond the initial contribution to its network for a railroad move to, and storage at, the SIT facility).

The SSW Compensation rate (Based on RCNLD) proposed by Mr. Baranowski is flawed in numerous ways and dramatically understated. First, the RCNLD is understated due to road property estimates inflation adjustments that are based on a temporarily low index due to the pandemic that has already reversed course. Second, the RCNLD is understated as the road property investment ignores additional costs associated with interest during construction and future replacement costs. Third, the SSW Compensation rate (Based on RCNLD) is substantially reduced for historical depreciation of the old physical railroad assets that do not reflect a competitive market rate charged by a new market entrant, such as a SAC based rate.

Fourth, under the guise of accounting for KCS's ownership share, Mr. Baranowski removes 50% of the valuation of the Rosebluff Lead without any support. However, UP and KCS have an undivided interest in the Rosebluff Lead shared asset and UP is unable to receive

the other 50% having already received substantial merger-related benefit instead. As such, BNSF implicitly attempts to usurp 50% of the valuation of the asset to assign to itself even though it is not an owner of the Rosebluff Lead.

The combined impact of the identified errors, when corrected, increase the interest rental component compensation from [REDACTED] per car to [REDACTED] per car. However, notwithstanding the corrections, the SSW Compensation rate (Based on RCNLD) is inadequate and incapable of providing KCS with the appropriate economic value of the Rosebluff Lead. The SSW Compensation rate (Based on RCNLD) is ill-suited to capture such additional revenue and contribution from a second leg movement from BNSF's SIT and other market value of the customers. The SSW Compensation rate (Based on CE) also suffers from the same flaws (and has other issues as well).

The superior approach is to rely on the real-world market-based access fee that I proposed in my opening evidence based on nearly 2,000 reciprocal comparable market-based reciprocal switching rates to the Lake Charles area (adjusted to subtract an estimated switching cost for BNSF movement to Lyondell in Lake Charles). This approach which relies on commercially negotiated rates by willing buyers and sellers provides the best estimate of the rate that KCS would have negotiated for the Rosebluff Lead instead of forced access. A market-based access fee based on negotiation between the parties would reasonably be expected to contemplate the full economic value of the customer, including the additional economic contribution margin expected on a second part move for customers that rely on storage in transit. Thus, in order for KCS to receive the full economic value of the Rosebluff Lead, it must receive a comparable market-based access fee.

VERIFICATION

I, Julie M. Carey, declare under penalty of perjury that I have read the foregoing Verified Statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this Verified Statement.

Executed on April 12, 2021

A handwritten signature in cursive script that reads "Julie M. Carey".

Julie M. Carey

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 32760 (SUB-NO. 46)

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

**KCS'S REPLY STATEMENT AND EVIDENCE ON COMPENSATION CONCERNING
BNSF'S USE OF THE ROSEBLUFF LEAD**

Exhibit E

REPLY VERIFIED STATEMENT OF JULIUS PAUL MAURIN IV, ESQ., RLS

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 32760 (SUB-NO. 46)

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

**KCS’S REPLY STATEMENT AND EVIDENCE ON COMPENSATION CONCERNING
BNSF’S USE OF THE ROSEBLUFF LEAD**

**VERIFIED STATEMENT OF
JULIUS PAUL MAURIN IV, ESQ., RLS**

My name is J. Paul Maurin IV. I have been involved in real estate cases (condemnation and transactional) as an attorney for 18 years. I have practiced land surveying for 28 years (14 years as a licensed surveyor). Currently, I am the Real Estate Field Services Manager for The Kansas City Southern Railway Company (“KCS”). My resume is attached as Exhibit 1.

During my professional career, I have researched, analyzed, and presented at seminars on real estate issues involving the interpretation of real estate documents. I have prepared this verified statement to assist the Board in determining the compensation due to KCS for BNSF Railway Company’s (“BNSF”), direct access over the Rosebluff Lead and Rosebluff Yard (herein referred to as the “Property”).¹

¹ This verified statement adopts the various short citations and abbreviations that have previously been used throughout this proceeding.

I. Description of the Property

The Rosebluff Lead is a KCS and UP jointly-owned single-track line that begins at the former SP Lafayette Subdivision between Dawes, Tex., and Avondale, La., at MP 222.3. The Rosebluff Lead extends nine miles to the south. See Decision No. 3 at 1. The Rosebluff Lead runs through Rosebluff Yard, which is located at the northern end of the Rosebluff Lead. Id., at 1-2. Rosebluff Yard consists of five yard tracks and one “running track”.² Id., at 2. The Property that is the subject of the above-captioned proceeding includes both the Rosebluff Lead and the Rosebluff Yard.

Since 1981, KCS and UP (or UP’s predecessor SP) have, **as a matter of convenience**, divided their operations – not ownership - on the Lead into two customer zones, Zone 1 and Zone 2.³ See Decision No. 3 at 2. Zone 1 customers are generally located north and east of the Yard or near the south end of the Yard, while Zone 2 customers are located a mile or more south of the Yard. Today, KCS switches customers in Zone 1, and UP switches customers in Zone 2. UP and KCS, each of which operates its own yard off its own nearby mainline track, both use Rosebluff Yard to exchange cars destined to or originating from the other carrier’s zone.

² UP and KCS share Rosebluff Yard in separate 12-hour operating windows. UP’s window in the Yard is scheduled to be from 6:00 am to 6:00 pm, and KCS’s window is scheduled to be from 6:00 pm to 6:00 am. The 12-hour window the parties established for convenience does not apply to the Rosebluff Lead.

³ KCS and UP operate the Rosebluff Lead consistent with the terms of a 1948 joint facility agreement (“Joint Facility Agreement”) between KCS and UP’s predecessor (T&NO) as revised in 1981 and 1999. Originally, the 1948 operating agreement divided the operational responsibility for the tracks into two-year blocks – KCS served for 2 years, then T&NO would serve for 2 years. The 1981 agreement, noting that the Lead had been “deeded to The Kansas City Southern Railway Company and the said Texas and New Orleans Railroad Company” (pages 1-2) divided the operational responsibility a different way, into zones. Originally the companies alternated which served what zone, but shippers complained, so in 1999 they agreed to a pause in alternating zones. But at no time did the companies divide the ownership. Indeed, Article I, A. to the Joint Facilities Agreement refers to “the jointly-owned track acquired by deed of May 21, 1947”.

Irrespective of the zones, per Article I.E. of the Joint Facility Agreement, either carrier may operate a “solid over-the-road unit train” into the zone operated by the other. Also, Section 19 of the Joint Facility Agreement recognizes that the “parties agree[d] neither shall sell, lease or transfer its interest in the jointly owned tracks, or any part thereof, without advance written approval by the other party.” *Id.*

II. The Conveyance Confirms KCS and UP Have an Undivided Joint Interest in the Property.

On May 21, 1947, the Reconstruction Finance Corporation and The United States of America conveyed the Property to The Texas and New Orleans Railroad Company (“T&NO”)⁴ **and** The Kansas City Southern Railway Company via deed (hereinafter the “Conveyance”).⁵ The Conveyance unequivocally states that the Conveyance’s intention was to deed the Property to the Purchasers jointly. *Id.*, at 1, 13. The Conveyance clearly states that T&NO and KCS would be referred to jointly as “Purchaser” and refers to them with the pronoun “their.” Furthermore, the resolutions adopted by T&NO and KCS and attached to the Conveyance state that they confirm or complete the purchase:

⁴ In 1961, the T&NO merged into SP, and the T&NO ceased to exist as a separate entity. See *S. Pac. Co.—Merger—Tex. & New Orleans R.R.*, 312 I.C.C. 598, 600-01 (1961). Thus, SP was T&NO’s successor to the joint facility agreements and co-owner of the Rosebluff Lead with KCS from 1961 until the UP/SP merger.

⁵ The 1947 Conveyance for the property confirms that the government conveyed the Property to The Texas and New Orleans Railroad Company and The Kansas City Southern Railway Company “jointly hereinafter called “Purchaser” (page 1) and that “th[e] conveyance transfers and assigns to the Purchaser any and all transferrable rights, franchises, licenses and permits which the Vendor may have obtained... The above-described property, rights of way, servitudes, and easements are conveyed to the Purchaser...” (page 12) and “TO HAVE AND TO HOLD: The said property unto the said Purchaser and the Purchaser’s successors and assigns forever,” (page 13), using the single term Purchaser, representing both T&NO and KCS, as the grantee. See Exhibit B.

“for the price and sum of Two Hundred Fifty Thousand and no/100 (\$250,000.00) Dollars cash, to be paid jointly....in the proportions of one-half each.”

Based on my experience in researching, analyzing, and interpreting real estate documents, I am certain that the Conveyance deeded the Property to T&NO and KCS **jointly**.

III. The Louisiana Civil Code Confirms KCS and UP Have An Undivided Interest in the Property.

Under Louisiana law, the Louisiana Civil Code should be utilized to resolve conveyance interpretation issues. BNSF’s argument that UP and KCS have divided their undivided interest into two distinct and separate interests solely because the parties chose for administrative convenience to establish zones and operating windows for the Rosebluff Yard is irreconcilable with the real property laws of the State of Louisiana.

The Louisiana Civil Code provides that two or more persons may own the same real property in “indivision”⁶, each having an undivided share. *See La. Civ. Code. art. 480. In the absence of other provisions of law or juridical act*, the shares of all co-owners are presumed to be equal. *See La. Civ. Code art. 797.* Co-owners share the fruits and products of the thing held in indivision in proportion to their ownership. (“Fruits” under the Civil Code includes any revenue derived from the property jointly owned). When fruits or products are produced by a co-owner,

⁶ See “indivision”: “a state of undivided wholeness: state of being owned by two or more co-owners each having an undivided interest in the property as a whole. <https://www.merriam-webster.com/legal/indivision>. Also, “**indivision** (1875) *Civil law*. Undivided ownership of property; the condition of being owned by co-owners each having an undivided interest in the property.” Black’s Law Dictionary, 11th Ed. (2019). See also *Steel v. Denning*, 456 So.2d. 992, 997 (1984):

It is well settled that property may be held in indivision, that is, it may be owned jointly by more than one person, with no single person owning any particular part of the property, rather, each owning an interest in the whole. As early recognized by this Court, co-owners of land “are owners par mi et par tout, of part and of the whole. Neither of two co-owners has the exclusive right to any determinate part of the common property,” citing *Gulf Refining Co. v. Carroll*, 145 La. 299, 82 So. 277 (1919).

other co-owners are entitled to their shares of the fruits or products after deduction of the costs of production. *See La. Civ. Code. art. 798*. Louisiana courts consistently permit a co-owner to recover the fruits from the property obtained from another co-owner. *See, e.g., Ellwood Oil Co. v. Anderson*, 26,907 (La. App. 2 Cir. 05/10/95), 655 So. 2d 694, 698 (finding a right of action against a co-owner to recover his share of fruits of the property held in indivision); *Milton v. Milton*, 2010-1589 (La. App. 1 Cir. 05/09/11), 71 So. 2d 326, 334-35 (applying a one-half undivided interest in the revenues from a dairy farm between co-owners).

Under La. Civ. Code art. 807, parties who do not want to continue to hold property in indivision may seek partition. UP and KCS have not done so, and continue to hold the Rosebluff Lead in indivision. Accordingly, under Louisiana law, KCS is entitled to be compensated for BNSF providing direct access over the Rosebluff Yard and through the Rosebluff Lead regardless of whether BNSF's service occurs during UP or KCS's window.

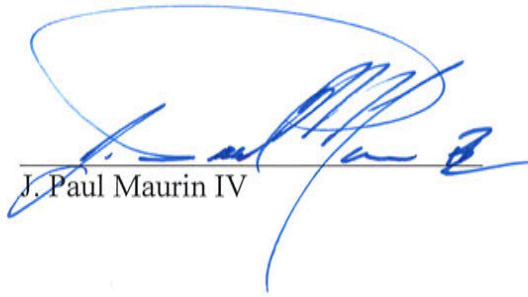
Conclusion

Collectively, the Conveyance speaks for itself, but to the extent there is any ambiguity, the Louisiana Code and the two Joint Facility Operating Agreements all clearly demonstrate that there has never been a division of KCS and UP's undivided ownership for legal or any other purpose. From the time of the Conveyance and continued to the present, KCS and UP have at all times owned the Property jointly, as co-owners, and in indivision.

VERIFICATION

I, J. Paul Maurin IV, declare under penalty of perjury that I have read the foregoing Verified Statement, that I know the facts asserted therein, and that the same is true as stated. Further, I certify that I am qualified to and authorized to submit this Verified Statement on behalf of The Kansas City Southern Railway Company.

Executed on this 12th day of April 2021.



J. Paul Maurin IV

Exhibit 1: Biography of J. Paul Maurin IV

J. Paul Maurin IV

14502 Hemlock Street, Overland Park, Kansas 66223

816.983.1123 • pmaurin@kcsouthern.com

Licensed Attorney and Land Surveyor in Kansas & Missouri

Licensed UAS Remote Pilot

WORK EXPERIENCE

The Kansas City Southern Railway Company Present)

Kansas City, Missouri (2018 –

REAL ESTATE FIELD SERVICES MANAGER

- Manage like-kind exchanges and acquisitions for railway sidings, railyards, and right-of-way expansions.
- Prepare legal descriptions, easements, subordinations, releases, deeds, leases, and purchase and option contracts.
- Advise legal counsel and internal departments on real estate issues including adverse possession and condemnations.

Kansas City Power & Light Co. 2018)

Kansas City, Missouri (2006 –

REAL ESTATE SPECIALIST (2006 – 2018)

- Appeared before city and county commissions to obtain permitting for substations and communication towers.
- Prepared legal descriptions, easements, subordinations, releases, deeds, leases, and purchase and option contracts.
- Advised legal counsel and internal departments on various real estate matters.
- Served as advisory member of drone SCOUT Team to explore drone technology in surveying and utility industries.

CONTRACT MANAGER (2015 – 2018)

- Oversaw and administered multi-million dollar contracts associated with Midwest Transmission Project.
- Collaborated with inside legal counsel to determine parties' contractual obligations.
- Monitored outside contractor performance and enforced contractual obligations to maximize value to company.

Schmitz, King & Associates, Inc. Rhodes Land Surveyors, Inc. 2004)

Olathe, Kansas (2005 – 2006)

Kansas City, Kansas (1994 –

CREW CHIEF

- Performed boundary, topographical, ALTA, and flood surveys and supervised field activities of 3-man crew.
- Researched deeds, abstracts, permanent surveys, and plats for boundary, right-of-way, and easement information.

Wallace, Saunders, Austin, Brown & Enochs
2005)

Overland Park, Kansas (2004 –

ASSOCIATE ATTORNEY

- Managed complex workers' compensation and real estate cases and regularly appeared in court.
- Researched and drafted correspondence and court-filed documents including briefs and pleadings.

EDUCATION

Washburn University School of Law; Juris Doctor, 2003 Topeka, Kansas

- Law Clinic (represented low-income clients pursuant to Kansas Supreme Court Rule 709)
- Independent research on Wyandotte Tribal Land Claim

Benedictine College; B.A., Sociology, 1998 Atchison, Kansas

- Varsity NAIA Baseball (1995 - 1998)
- Atchison County Community Corrections (Surveillance Officer Internship)

PUBLICATIONS & PRESENTATIONS

- Presenter, "Railroad Right-of-Way," Salina Seminar Series (Jan. 2016)
- Presenter, "Kansas Minimum Standards for Boundary Surveys," KSLS Annual Meeting (Oct. 2016 & Oct. 2018)
- Co-Author, "Ambiguities in Legal Descriptions," *Section Lines* (May 2011)
- Co-Author, "Kansas Boundary Surveys: Principles of Law," *Section Lines* (Aug. 2011)
- Presenter, "Land Surveyor in the Courtroom," KSLS Annual Meeting (Oct. 2009)

MEMBERSHIPS & COMMUNITY ACTIVITIES

Kansas Bar Association	The Missouri Bar	
Kansas Society of Land Surveyors (Former Board Member)	Missouri Society of Professional Surveyors	of
Lakeview Hunting & Fishing Association (Former Board Member)	Volunteer	Youth
Baseball Coach (2011- Present)		

CERTIFICATE OF SERVICE

I hereby certify that a true copy of KCS's Reply Statement and Evidence on Compensation Concerning BNSF's Use of the Rosebluff Lead was served by first-class mail, postage prepaid, or by a more expeditious manner, this 12th day of April 2021, on counsel for BNSF Railway Company, Union Pacific Railroad Company, and all other parties of record.

/s/ William A. Mullins
William A. Mullins
Attorney for The Kansas City Southern
Railway Company