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BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 36514

CANADIAN NATIONAL RAILWAY COMPANY, ET AL. – CONTROL –
KANSAS CITY SOUTHERN, ET AL.

CANADIAN PACIFIC’S OBJECTION TO 49 C.F.R. § 1180 WAIVER

David L. Meyer
LAW OFFICE OF DAVID L. MEYER
1105 S Street NW
Washington, D.C. 20009
Email: David@MeyerLawDC.com
Telephone: (202) 294-1399

Sophia A. Vandergrift
SULLIVAN & CROMWELL LLP
1700 New York Avenue, N.W., Suite 700
Washington, D.C. 20006-5215
Email: vandergrifts@sullcrom.com
Telephone: (202) 956-7525

Jeffrey J. Ellis
Canadian Pacific
7550 Ogden Dale Road S.E.
Calgary, AB T2C 4X9 Canada
Email: Jeff_Ellis@cpr.ca
Telephone: (888) 333-6370

Attorneys for Canadian Pacific

April 30, 2021

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Canadian Pacific Railway Limited and its U.S. rail carrier subsidiaries (all of which are Applicants in Finance Docket No. 36500),¹ object to the application of the waiver of the Board’s rules for major transactions with respect to CN’s proposed acquisition of control of Kanas City Southern. *See* 49 C.F.R. § 1180.0(b).

I. INTRODUCTION

On April 19, 2021, a month after Canadian Pacific announced its agreement with Kansas City Southern to bring CP and KCS together to create a more formidable competitor in North-South transportation markets, Canadian National announced that it was offering to pay a substantial price premium in an effort to compel KCS’s board of directors to accept CN’s bid to acquire control of KCS. The next day, CN filed a Notice of Intent to File an application seeking approval to acquire such control. *See* CN-1.² In that filing – and in CN’s contemporaneous public statements – CN told the world that its merger application would proceed under the current (2001) rules for major mergers and that any review of its transaction under the pre-2001

¹ Canadian Pacific Railway Limited, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (collectively “Canadian Pacific” or “CP”).

² CN was apparently uninterested in acquiring KCS when it was reported during the summer and fall 2020 that private equity investors were seeking to acquire KCS. *See* “*Report: Private Equity Firms Eye Purchase of Kansas City Southern*,” KANSAS CITY BUSINESS JOURNAL (Aug. 3, 2020), <https://www.bizjournals.com/kansascity/news/2020/08/03/report-blackstone-gip-eyeing-kansas-city-southern.html>.

rules would be inappropriate. CN-1 at 3-4 (“CN believes that the current major merger rules should be applied to a transaction involving KCS”).³ Even after the Board ruled that Canadian Pacific’s proposed acquisition of KCS would proceed under the pre-2001 rules, CN doubled down, reaffirming that CN “remains committed to the current merger rules.” CN Apr. 26 Ltr. (CN-5), at 2.

Despite these seemingly unequivocal statements, CN has also implied that its embrace of the 2001 rules was a “voluntar[y]” matter (CN Apr. 29, 2021 Ltr. (CN-8) at 1), perhaps suggesting that the Board would lack authority to bind CN to compliance with those rules. And CN has also signaled that it might challenge the application of the 2001 rules to its proposed transaction in light of the Board’s decision to apply the pre-2001 rules to the CP/KCS transaction.⁴

In light of these seemingly contradictory positions and the confusion they create, out of an abundance of caution, Canadian Pacific is formally objecting to application of the KCS waiver to CN’s proposed acquisition of KCS. The Board’s decision to apply the KCS waiver to the CP/KCS transaction does not mandate applying the waiver here. To the contrary, the reasoning of that decision shows why the very different CN proposal *should be* subject to the 2001 rules. Unlike the “end-to-end” CP/KCS transaction – after which the combined company would still be the smallest Class I railroad – the CN/KCS proposal raises all of the concerns that the 2001 rules were adopted to address (as CN’s own arguments confirm).

³ That position was unsurprising given that CN had previously objected to the waiver in Finance Docket No. 36500, contending that the “most significant U.S. rail merger that has been proposed in the 21st century should be evaluated under the current rules.” *See* Finance Docket No. 36500, CN-1 at 12.

⁴ A footnote buried in CN’s Notice of Intent contended that “[i]t would be fundamentally unfair to use one set of rules to evaluate a proposed CP-KCS transaction and a different set of rules to evaluate a proposed CN-KCS transaction.” CN-1 at 4 n.5.

II. THE BOARD HAS DISCRETION TO FIND THAT THE NEW RULES SHOULD APPLY TO A CN/KCS TRANSACTION

The Board's plenary authority over rail mergers is well established. 49 U.S.C. § 11341. The breadth of the Board's authority to oversee rail consolidations to ensure that the public interest is safeguarded was confirmed when the court of appeals affirmed the Board's 2000 merger moratorium, and again in 2001 when the Board adopted its new merger rules to "substantially increase the burden on applicants to demonstrate that a proposed transaction would be in the public interest, by requiring them, among other things, to demonstrate that the transaction would enhance competition where necessary to offset negative effects of the merger, such as competitive harm or service disruptions." *Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No. 1) (STB served June 11, 2001) at 1.

When the Board waived its new rules for transactions involving KCS, it underscored two things. First, not all potential transactions involving KCS would qualify for the waiver. The Board observed that, "as a general matter, ... a potential transaction involving KCS and another Class I carrier would *not necessarily* raise the same concerns and risks as other potential mergers between Class I railroads." *Id.* at 15. The Board was not prepared to "assess in the abstract the effect of every potential merger proposal involving KCS." *Id.* at 16.

Second, the Board retained complete discretion to find that, as to a specific transaction being proposed, those "same concerns and risks" would apply, and that the transaction therefore should be reviewed under the 2001 rules. The Board simply had to be "persuaded otherwise." *Id.*

CN itself has emphasized the Board's discretion to reject the KCS waiver in this case. In the CP/KCS docket, CN pointed out that "the 'KCS exception' to ordinary major merger rules *is*

not automatic, and it will not be applied if the Board finds that it ‘should not be allowed.’”

Finance Docket No. 36500, CN Objection (CN-1) at 1 (emphasis added).

III. THE CN/KCS TRANSACTION DOES NOT SATISFY ANY OF THE CRITERIA THE BOARD RELIED UPON IN FINDING THAT THE WAIVER SHOULD APPLY TO CP/KCS

The Board’s April 23 decision in Finance Docket No. 36500 explained that it was applying the pre-2001 rules to the proposed CP/KCS transaction because that transaction “fall[s] neatly into the Board’s rationale for adopting the waiver in the first instance.” CP/KCS Decision No. 4 at 2. The Board reached this conclusion “for several reasons”:

“If approved, the combination of CP and KCS, the sixth largest and seventh largest Class I railroads, respectively, would still result in the smallest Class I railroad, based on U.S. operating revenues. (*See* Applicants’ Reply 4, 9-14, Apr. 12, 2021.) In addition, a merger of the CP and KCS networks would appear to result in the fewest overlapping routes when compared to a merger between KCS and any other Class I carrier. (*Id.* at 8, 14-15 (explaining that there will be ‘no overlaps whatsoever’).) The interrelationship between the CP and KCS networks in fact appears to be end-to-end in nature, (*id.* at 14-15), which likely raises fewer competitive concerns than a transaction that is not end-to-end. (*See* Freight Rail Customer Alliance, National Coal Transportation Alliance, Private Railcar Food & Beverage Association, Inc. Opp’n 2, Apr. 1, 2021 (acknowledging that the Transaction ‘appears to be “end-to-end,”’ which ‘carries potential to increase both efficiency and competition for the benefit of shippers’).)”

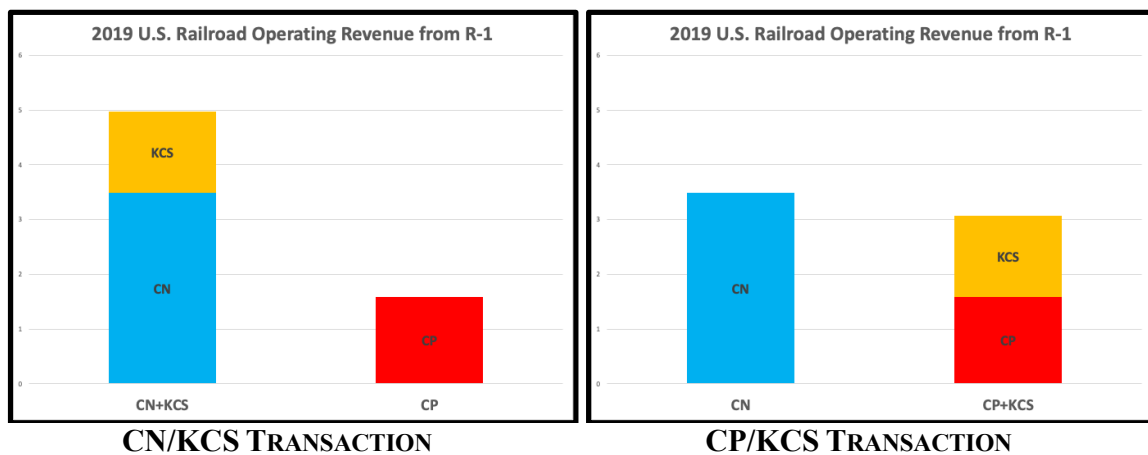
CP/KCS Decision No. 4 at 2. None of these factors supports applying the pre-2001 rules to CN’s proposed transaction.

A. CN is a Much Larger Railroad than CP

CP/KCS Decision No. 4 focused on the impact of the proposed transaction on the relative size of the remaining Class 1 railroads. Specifically, a CP/KCS transaction would combine “the sixth largest and seventh largest Class I railroads, respectively, [and] would still result in the smallest Class I railroad, based on U.S. operating revenues.” *Id.* at 2

The proposed CN/KCS transaction would have a very different impact. A combined CN/KCS would expand the size of the fifth largest U.S. Class I railroad, vastly increasing the gap between CN/KCS and CP, which would become the new smallest Class I. As shown in Figure I below, a combined CN/KCS would be more than three-times the size of CP (as shown in the left panel), whereas the proposed CP/KCS would still be 13 percent smaller than CN (as shown in the right panel) (as measured by U.S. operating revenue).

FIGURE 1



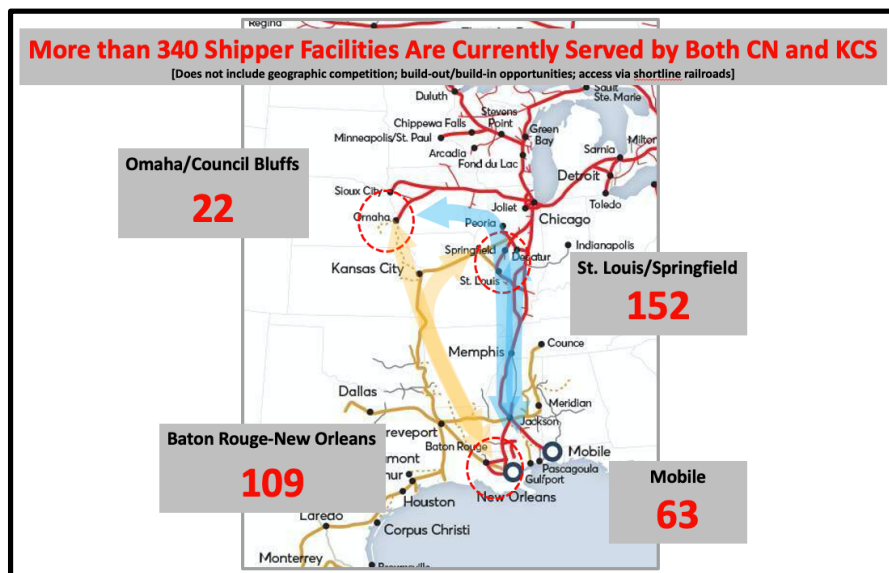
B. The CN/KCS Transaction Would Combine Overlapping Routes and Have Significant Competitive Impacts

CP/KCS Decision No. 3 (at 2) emphasized that the “CP and KCS networks would appear to result in the fewest overlapping routes when compared to a merger between KCS and any other Class I carrier” and that the “interrelationship between the CP and KCS networks in fact appears to be end-to-end in nature, ... which likely raises fewer competitive concerns than a transaction that is not end-to-end.” The Board specifically emphasized that the “end-to-end nature” of the CP/KCS transaction was the most important factor in “determining the application of the waiver.” *Id.* at 3 n.4. This conclusion was appropriate given how important potential impacts on competition were in the Board’s adoption of the 2001 rules in the first place.

A CN/KCS transaction plainly flunks the “end-to-end” test, notwithstanding CN’s occasional and misleading assertions that such a transaction would be end-to-end. *E.g.*, CN Motion for Approval of Voting Trust Agreement (CN-6) at 12 (asserting that CN/KCS is an “end-to-end rail merger”); CN Apr. 29 Ltr. (CN-8) at 4. CP has addressed some of the obvious competitive issues raised by a CN/KCS transaction in its prior submissions (which we incorporate herein), and so will not belabor them here. We summarize the key points below:

1. The broadly overlapping North-South route structures of CN and KCS between Kansas City and the Gulf Coast make clear that CN and KCS are today independent competitive alternatives for many rail shipments in these corridors. *See* CP Apr. 27 Ltr. (CP-2) at 3-6.
2. Reciprocal switching tariffs available to CP reveal that more than 340 shippers at numerous locations have access to both CN and KCS, and a quick glance at a map shows that CN and KCS offer competing routes to and from these points (*e.g.*, between Omaha/Council Bluffs and the Gulf, between Baton Rouge/New Orleans and St. Louis, and on many more routes). *See id.* We reproduce below as Figure 2 the map set forth in our prior letter.

FIGURE 2



3. Major shippers have previously expressed grave concern about any transaction that would dampen competition between CN's former Illinois Central lines and KCS.⁵

4. CN itself acknowledges the need to remedy at least some competitive overlaps, though it seeks to minimize them by misleadingly referencing the number of route miles where the two railroads run side-by-side between Baton Rouge and New Orleans, and CN proposes to provide some form of remedy only for the specific shipper facilities that are dually served by CN and KCS and no other railroad. CN Apr. 23 Ltr. (CN-5) at 3; CN Apr. 29 Ltr. (CN-8) at 5-6.

5. In addition, examination of the overlapping territories of CN and KCS in regions like Louisiana and Mississippi make clear that the CN/KCS transaction likely would have complex impacts on geographic competition (*e.g.*, for grain to Mississippi feed lots served by either KCS or CN) as well as potential build-in/build-out opportunities, such as has occurred before in the New Orleans-Baton Rouge corridor. *See* CP Apr. 27 Ltr. (CP-2) at 3-4.⁶

6. A significant number of shippers have already submitted letters expressing competitive concerns with the CN/KCS transaction (while at the same time confirming the

⁵ CP Apr. 27 Ltr. (CP-2) at 4-5 (quoting from the Petition of Bordon, Fina and Shell in *Illinois Central Corp. – Common Control – Illinois Central R.R. & The Kansas City Southern Ry.*, Finance Docket No. 32556 (filed Sept. 27, 1994), at 2); *Canadian National Ry., Grand Trunk Corp., & Grand Trunk Western R.R. – Control – Illinois Central Corp., Illinois Central R.R., Chicago, Central & Pacific R.R., & Cedar River R.R.*, Finance Docket No. 33556 (STB Decision No. 37 served May 25, 1999) (“CN/IC”) at 103 (“Exxon contends that, as a practical matter, these facilities, for the most part: (a) are rail-served both by IC and KCS, but by no other railroad; or (b) are rail-served solely by IC, but have a KCS build-in/build-out option; or (c) are rail-served solely by KCS, but have an IC build-in/build-out option ... Exxon therefore argues: that, in the context of the Alliance, all of these facilities should be regarded as 2-to-1 facilities; and that the Alliance, *by uniting the two carriers (IC and KCS) that together originate 94% of the rail cars moving outbound from these facilities will have anticompetitive impacts at all of these facilities.*”) (emphasis added).

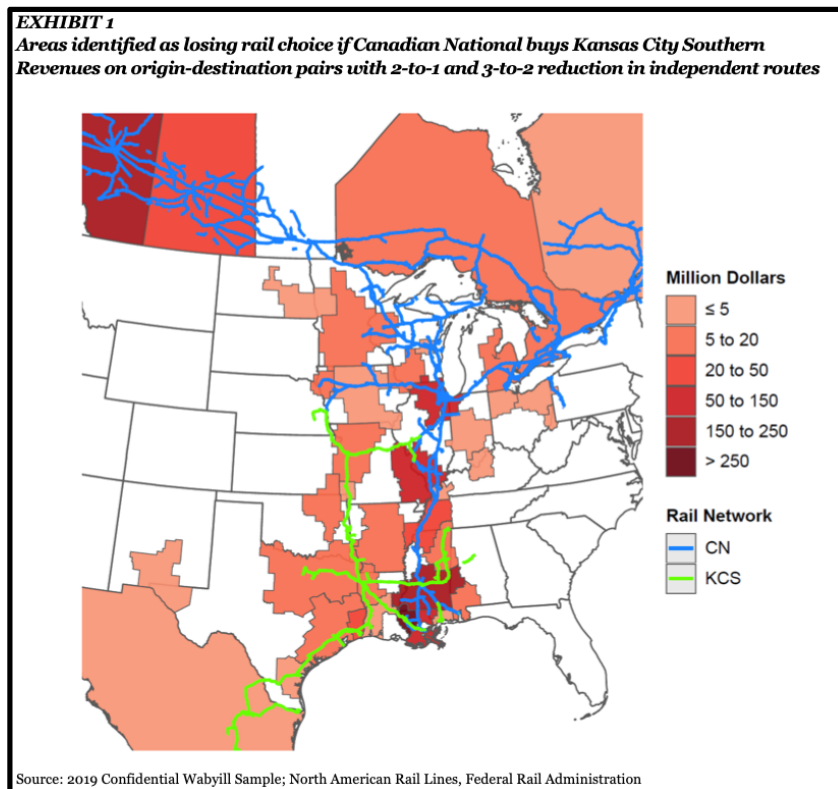
⁶ *See* CN/IC, Decision 36 at 17 n.56 (describing KCS proposal to construct a build-in line to obtain access to the three IC-served shippers at Geismar, Louisiana); *id.* at 105 (Exxon's KCS and IC build-in/build-out options).

absence of such concerns with CP/KCS). *See, e.g.*, the 62 statements compiled in CP-1, plus dozens more submitted to the Board more recently.⁷

7. CN has asserted that these obvious competitive issues are “unsubstantiated and unsupported.” CN Apr. 29 Ltr. (CN-8) at 4. To be sure, there will need to be extensive further analysis of these issues, which application of the 2001 rules will greatly facilitate. But there can be no doubt that these issues are real. As explained in CP’s April 27 letter (CP-2), economic analysis of Waybill Sample data identifies a significant number of origin-destination corridors where the number of independent rail competitors will be reduced from 2-to-1 or 3-to-2 by the CN/KCS transaction. That conclusion is not CP’s imagination. As explained in the Verified Statement of W. Robert Majure, who has extensive experience analyzing railroad competitive issues, application of standard screening analysis to available Waybill Sample data confirms both that CN/KCS raises many significant “horizontal competition concerns” and that CP/KCS raises none. Majure V.S. (Exhibit 1 hereto) at 5, ¶¶ 13-14. We reproduce as Figure 3 below Dr. Majure’s Exhibit 1.

⁷ To quote just a handful of examples: “We believe that the CN’s proposal for the KCS will create a high degree of market dominance that will negatively impact service for shippers In contrast, Canadian Pacific’s proposal will help enhance competition.” (CP-1, Canada Drayage Inc., Apr. 21, 2021 Ltr. at 1); “[I]t will be the consumers that suffer as a result of CN’s market dominance. . . . In comparison, CP’s proposal to acquire the KCS will create a more balanced and competitive marketplace.” (CP-1, Consolidated Fastfrate, Apr. 21, 2021 Ltr. at 1); “A CP-KCS combination would place us on a more even playing field and greatly expand access to growing markets The bid by CN jeopardizes this access and once-in-a-lifetime opportunity.” (CP-1, Farmers of Co-Operative of Hanska, Apr. 21, 2021 Ltr. at 1); “[B]etween the Upper Midwest and Gulf Coast, a CN/KCS combination would reduce the number of independent routing options from four to three.” (CP-1, USD Group Apr. 22, 2021 Ltr at 1).

FIGURE 3



The Board should apply the 2001 rules to ensure it the broadest possible scope and tools to examine and address (and perhaps remedy, if the transaction is not disapproved outright) these many horizontal competitive issues.

IV. OTHER FACTORS UNDERScore THE INAPPROPRIATENESS OF APPLYING THE KCS WAIVER TO A CN/KCS TRANSACTION

In addition to the factors the Board rested on in applying the KCS waiver to the CP/KCS transaction, other considerations distinguish CN's proposed transaction and support application of the 2001 rules in this case.

A. There Are Material Service Risks from a CN/KCS Transaction.

A central thrust of the Board's 2001 rules was a focus on potential service disruption from further consolidation. Whereas the end-to-end nature of the CP/KCS transaction minimizes these risks, the overlapping nature of CN/KCS heightens them. CN will have to integrate

operations at numerous common points and terminals and decide which set of parallel routes to use and which to downgrade. And CN will have to remedy competitive issues, potentially introducing complex new operations at numerous points on its system.

It is premature to attempt to catalog all of the ways that rail service might be threatened, but it is clear that the Board's concerns about service disruption that motivated the 2001 rules apply squarely to a CN/KCS transaction. CN would appear to agree. *See* Finance Docket No. 36500, CN-1 at 9 (2001 rules needed to allow assessment of "how projected service levels would be attained and how any service problems would be mitigated").

B. There Are Material "Downstream" Risks from a CN/KCS Transaction.

Another focus of the new rules was on the potential harms associated with downstream consolidation that might be stimulated by a proposed transaction. *See* Finance Docket No. 36500, CP April 21 Letter (CP-12) (Exhibit 2 hereto). Whereas CP/KCS preserves the basic six-carrier structure of the North American rail network (two in the East, two in the West, and two in Canada with routes to the Gulf), the CN/KCS transaction would destabilize that structure. It would strand CP north of Kansas City and render it far smaller than CN, the next largest Class I (as shown in Figure 1 above). There can be no doubt that CN's completion of its acquisition of KCS – even just acquiring KCS's shares and placing them in trust – would generate meaningful strategic pressure for further consolidation, and the 2001 rules should apply to enable the Board to address that concern. To borrow CN's own words, unlike CP/KCS, the CN/KCS transaction would be a "significant restructuring of the rail industry," and the Board needs the new rules to address the "likely strategic responses." Finance Docket No. 36500, CN-1 at 3, 11.

V. THE NEW RULES ARE NEEDED TO ENSURE APPROPRIATE CONSIDERATION OF THE PUBLIC INTEREST IMPLICATIONS OF CN'S VOTING TRUST PROPOSAL

As set forth in the 2001 rules, a public interest review of CN's proposed voting trust would be the natural consequence of the Board's decision to apply the 2001 rules to this transaction. In addition, the importance of subjecting CN's voting trust proposal to such review is a further reason why the Board should reject the KCS waiver as to the CN/KCS transaction.

All of the features that distinguish the unilateral CN/KCS proposal from the agreed-upon CP/KCS transaction result in heightened risks associated with CN's proposed use of a voting trust to hold KCS's shares pending Board review, particularly the risks associated with lost competition and potential stimulation of downstream consolidation. The extraordinary premium price CN is offering to try to disrupt CP's proposed combination with KCS ought to concern the Board,⁸ as it will not only extinguish the new competition that a CP/KCS combination would bring to CN (and other carriers) but also require CN to find ways to recoup those extra costs. All of these consequences would arise immediately upon KCS being placed into trust as part of a CN acquisition, and the "public interest" standard of the Board's 2001 rules should be applied to address these concerns, none of which are present with CP's proposed acquisition.

VI. CN'S CONCERNS ABOUT FAIRNESS SUPPORT APPLICATION OF THE 2001 RULES

As noted above, CN has implied that it would regard application of the 2001 rules to its transaction as "fundamentally unfair." CN-1 at 4 n.5. If CN takes this position, it would be ignoring the many significant distinctions between its own proposal and the CP/KCS transaction. CN would unfairly be demanding the same treatment for two situations that are not at all alike. An even-handed and fair application of the relevant considerations will confirm that the CN/KCS

⁸ CN's offer was 21% percent higher than CP's when announced and is more heavily weighted towards cash. CN is proposing to spend \$10.7 billion more in cash than CP to acquire KCS.

proposal raises the concerns that motivated the 2001 rules and thus should be reviewed under those rules, and, by contrast and as the Board has already decided, the CP/KCS transaction does not and should be reviewed under the pre-2001 rules.

CONCLUSION

For the foregoing reasons CP respectfully requests that the Board determine that the 2001 merger rules shall apply to all aspects of the proposed CN/KCS transaction.

Respectfully submitted,



David L. Meyer
LAW OFFICE OF DAVID L. MEYER
1105 S Street NW
Washington, D.C. 20009
Email: David@MeyerLawDC.com
Telephone: (202) 294-1399

Sophia A. Vandergrift
SULLIVAN & CROMWELL LLP
1700 New York Avenue, N.W., Suite 700
Washington, D.C. 20006-5215
Email: vandergrifts@sullcrom.com
Telephone: (202) 956-7525

Jeffrey J. Ellis
Canadian Pacific
7550 Ogden Dale Road S.E.
Calgary, AB T2C 4X9 Canada
Email: Jeff_Ellis@cpr.ca
Telephone: (888) 333-6370

Attorneys for Canadian Pacific

April 30, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Canadian Pacific's Objection to Waiver to be served electronically or by first class mail, postage pre- paid, on all parties of record in this proceeding.

/s/
Freesia M. Ferrantino

April 30, 2021

EXHIBIT 1

VERIFIED STATEMENT OF W. ROBERT MAJURE

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 36500

**CANADIAN PACIFIC RAILWAY LIMITED, ET AL. – CONTROL – KANSAS CITY
SOUTHERN, ET AL.**

Finance Docket No. 36514

**CANADIAN NATIONAL RAILWAY COMPANY, ET AL. – CONTROL – KANSAS
CITY SOUTHERN, ET AL.**

EXPERT STATEMENT OF W. ROBERT MAJURE, PH.D.

April 30, 2021

1. My name is W. Robert Majure. I am a Vice President at Cornerstone Research. Prior to joining Cornerstone Research, I worked for approximately 25 years in the Antitrust Division of the U.S. Department of Justice (“DOJ”) as an economist, Assistant Section Chief, Section Chief, and ultimately as the Director of Economics.

2. I earned my Ph. D. in Economics from Massachusetts Institute of Technology in 1994 and a B.A. from the University of Virginia in 1990. My main area of expertise is the economics of industrial organization – particularly issues of competition.

3. While at the DOJ, I performed and supervised economic analyses of competition issues in various industries including transportation, telecommunications, banking, computer software and hardware, heavy industry, mining and drilling, healthcare, entertainment, and railroads. I submitted testimony on competitive effects in the merger of the Union Pacific and Southern Pacific Railroads and on the suitability of remedy in *U.S. v. SBC Communications Inc. and AT&T Corp.* and *U.S. v. Verizon Communications Inc. and MCI, Inc.* I also served on the committee that drafted the 2010 Horizontal Merger Guidelines. I received awards for my work at the DOJ, including Presidential recognition for my contributions as a senior executive of the civil service.

4. A copy of my *curriculum vitae* is attached as Appendix A.

5. I have been asked by counsel for Canadian Pacific (“CP”) to examine competition issues related to the proposed acquisition of Kansas City Southern (“KCS”) by CP. My analysis is still in process. In light of the competing proposal to acquire KCS by Canadian National (“CN”), I have been asked by counsel for CP to describe my preliminary findings and how these compare to competitive issues that would be raised in an acquisition of Kansas City Southern by Canadian National.

6. I am being compensated for my work on this matter at my standard billing rate of \$900. I have been assisted by staff of Cornerstone Research, who worked under my direction. My compensation in this matter is not in any way contingent or based on the content of my opinion or the outcome of this or any other matter.

7. Fundamentally, railroad mergers generally fall into one of two categories: (i) end-to-end or (ii) horizontal. End-to-end mergers combine two systems that each serve a distinct geographic area. End-to-end railroad mergers have typically been recognized as posing lower risks of competitive concerns and a higher likelihood of improving overall quality and competition as single-line service is extended between the two distinct areas.¹ In contrast, horizontal mergers involve two railroads that serve the same corridors and geographic areas. Horizontal railroad mergers are more likely to reduce the competitive options of shippers either within a corridor or between corridors, and thus pose greater risks of significant competitive concerns.

8. A combination of KCS with CP would constitute an end-to-end merger. In contrast, a combination of KCS with CN would be largely horizontal: throughout the entire region where KCS and Illinois Central (“IC”) (which was acquired by CN in 1999)² historically competed for north-south traffic.

9. This categorization is supported by my preliminary analysis in which I use the Confidential Waybill Sample to perform the standard preliminary step in analyzing a railroad merger. Specifically, for each proposed transaction, I have identified corridors where the acquisition would reduce the number of independent routes between specific areas (*i.e.*, specific origins and

¹ As the Board explained in its April 23, 2021 waiver decision in the CP docket: “The interrelationship between the CP and KCS networks in fact appears to be end-to-end in nature, . . . which likely raises fewer competitive concerns than a transaction that is not end-to-end.” *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500, Decision No. 4 at 2 (STB served Apr. 23, 2021) (also citing Freight Rail Customer Alliance, National Coal Transportation Alliance, Private Railcar Food & Beverage Association, Inc. Opp’n 2, Apr. 1, 2021 (acknowledging that the Transaction “appears to be ‘end-to-end,’” which “carries potential to increase both efficiency and competition for the benefit of shippers”)). See also, *e.g.*, *Norfolk Southern Corp. & Norfolk Southern Ry. Co. – Control & Consolidation Exemption – Algers, Winslow & Western Ry.*, Finance Docket No. 34839 at 8 (STB served Feb. 15, 2007); *Norfolk Southern Ry., Pan Am Rys., et al. – Joint Control & Operating/Pooling Agreements – Pan Am Southern LLC*, Finance Docket No. 35147 (STB served Mar. 10, 2009) at 5. The Board has also repeatedly recognized that end-to-end mergers creating a single-line service enhance competition. See, *e.g.*, *Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated – Control – Illinois Central Corporation, Illinois Central Railroad Company*, Finance Docket No. 33556, Decision No. 37, at 22 (STB served May 25, 1999) (“The chief benefit” of the “entirely end-to-end” merger “is that it will make possible a new, single-line service alternative for many shippers In particular, the merger should significantly intensify competition for the north-south traffic that has achieved greater significance due to NAFTA.”). See also, *e.g.*, *Canadian National Railway Company, Grand Trunk Corporation, and WC Merger, Sub, Inc. – Control – Wisconsin Central Transportation Corporation, Wisconsin Central LTD., Fox Valley & Western LTD., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link LTD*, Finance Docket No. 34000, Decision No. 10, at 11-12 (STB served Sept. 7, 2001); *Kansas City Southern – Control – Kansas City Southern Ry., Gateway Eastern Ry., & The Texas Mexican Ry.*, Finance Docket No. 34342, Decision No. 12, at 17 (STB served Nov. 29, 2004).

² *Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated – Control – Illinois Central Corporation, Illinois Central Railroad Company*, Finance Docket No. 33556, Decision No. 37 (STB served May 25, 1999).

destinations) based on movements that are observed to occur within the data.³ This screening exercise has the benefit of using data on actual movements to identify routes – including interchanges between separate railroads – that are practical for shippers. By screening for reductions in the number of independent routes, it also identifies reductions in choices that are particularly important to shippers. From a competition perspective, reductions in the routes that can potentially be used to bargain against a specific railroad need to be independent of that railroad. This is because it is hard to successfully bargain for better rates with a threat to switch to another route if that route also depends on getting a rate from the same railroad.

10. Consistent with that focus on identifying the lost choices that are most important to shippers, a common practice in railroad merger reviews is to focus on situations where a proposed acquisition reduces the number of independent routes from 3-to-2 or from 2-to-1. In the former (a 3-to-2 reduction), a shipper still has some potential for competition but significantly less than before. In the latter (a 2-to-1 reduction), the loss of competition is even worse. A shipper that previously had some potential for competition no longer has *any* competition—*i.e.*, the shipper would essentially face a monopoly on rail transport post-merger.

11. To implement this standard screen for horizontal competitive issues in a railroad merger, I use the 2019 Confidential Waybill Sample.⁴ For origin and destination areas, I use the Bureau of Economic Analysis (“BEA”) Economic Areas within the United States, provinces within Canada, and a combined area for Mexico.⁵

12. As I continue to perform my analysis, I expect to incorporate the fact that shippers of specific commodities have more or less ability to avail themselves of competitive options that are nearby even if a railroad does not have direct access to a specific facility. For this preliminary assessment, and to illustrate at an overall level the corridors that warrant further investigation in either of the

³ This preliminary screening analysis has been relied on by the STB in its past reviews of railroad acquisitions. *See, e.g., Norfolk Southern Railway Company – Acquisition and Operation – Certain Rail Lines of the Delaware and Hudson Railway Company, Inc.*, Finance Docket No. 35873, Decision No. 6, at 18-20 (STB served May 15, 2015); *Kansas City Southern et al. – Control – Gateway Western Railway Company and Gateway Eastern Railway Company*, Finance Docket No. 33311, Decision, at 4-5 (STB served May 1, 1997).

⁴ My work with these data is preliminary and ongoing. I expect to incorporate additional data as my work continues.

⁵ Due to differences in the data in the geographic specificity available for Canada and Mexico, I use these more aggregate geographic units for Canada and Mexico in my preliminary analysis. My work is ongoing.

proposed acquisitions, I treat any movement of a commodity between the defined areas as informative about the possibility of shippers having competitive options or not.⁶ Likewise, I treat a terminating or originating railroad carrying less than 50 miles as not determinative of whether a route is independent.⁷

13. My examination of the data confirms that a CP-KCS transaction would be an end-to-end merger. Notably, my initial analysis does not suggest risk of reduced horizontal competition resulting from an acquisition of KCS by CP.

14. In contrast, there are significant traditional indicia of horizontal competition concerns raised by a potential CN-KCS transaction. For an acquisition by CN, the screening exercise identifies a reduction in independent options in many corridors. This is not surprising given that CN and KCS have broadly parallel routes. In particular, 31 different corridors screen as 3-to-2 reductions and another 31 corridors screen as 2-to-1 reductions. Eight corridors screen as having higher order reductions in the number of independent routes (e.g., reductions from 6-to-5 or from 4-to-3). Consistent with the standard focus on the reductions most likely to generate significant effects for shippers, for the purposes of this analysis I ignore the eight corridors with higher-order reductions. Rather, I focus my analysis on the 62 corridors with a reduction of either 3-to-2 or 2-to-1.

15. Exhibit 1 illustrates how these horizontal overlaps would affect shippers throughout the systems of CN and KCS. This map details the areas which are part of a corridor that the screening exercise identified as a 3-to-2 or a 2-to-1 reduction—*e.g.*, where customers would lose independent rail choice post-merger. Each area is shaded to reflect the total amount of railroad revenues in such corridors for that area. Total revenues for shipments on these corridors in 2019 was approximately \$730 million. As I noted above, in this analysis I combine all commodities shipped in a corridor.⁸ I recognize that doing so to measure the overall effect could combine commodities of very different values. By measuring total revenues, I normalize for these differences in values across

⁶ Movements within the Baton Rouge BEA screen as a 3-to-2 reduction. All other movements in the screen are between BEAs. The total revenue on movements within Baton Rouge is \$35 million.

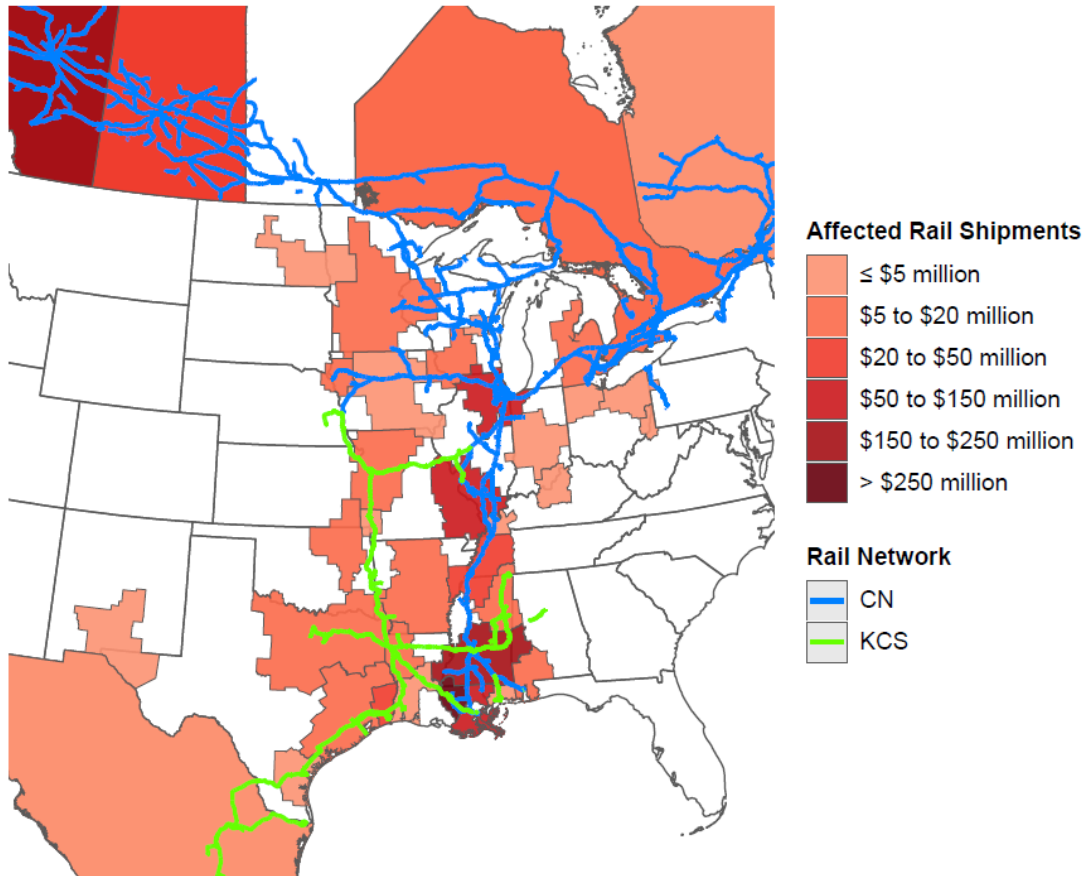
⁷ If the set of railroads involved in a movement would constitute an independent route, but for the presence in the movement of originating or terminating railroads that carried for less than 50 miles, I consider the set an independent route.

⁸ As my analysis continues I expect to examine competition impacts for different commodities, which may have different geographic dimensions.

commodities within a corridor.⁹ I have overlaid on this map the tracks and trackage rights of KCS and CN.

EXHIBIT 1

***Areas identified as losing rail choice if Canadian National buys Kansas City Southern
Revenues on origin-destination pairs with 2-to-1 and 3-to-2 reduction in independent routes***



Source: 2019 Confidential Waybill Sample; North American Rail Lines, Federal Rail Administration; Kansas City Southern Network Map, available at <https://www.kcsouthern.com/en-us/why-choose-kcs/our-network/network-map>

Note: This map plots the total revenues for shipments to or from an area as part of any origin-destination (“OD”) pair in which the number of independent routes that are observed in the Waybill Sample would be reduced from two to one or from three to two if Canadian National Railway (“CN”) and Kansas City Southern (“KCS”) merged. The areas that are part of these OD pairs are shaded in red. A darker shade of red indicates more revenues. The map also plots the rail networks of CN and KCS, including tracks each railroad either owns or has trackage rights over. Independent routes are those in which there is no overlap between participating railroads. For example, if there are two available routes, (a) KCS-CN and (b) KCS direct, they would not be independent because KCS is involved in both; however, if the second route instead used Union Pacific (“UP”) single line service, then the two routes (KCS-CN and UP direct) would be independent. The routes considered in this analysis do not include the identity of railroads that handle an originating or terminating leg of a shipment if that leg is less than 50 miles long. If the set of railroads involved in a movement would constitute an independent route, but for the presence in the movement of originating or terminating railroads that carried for less than 50 miles, it is considered an independent route. Origin and destination areas are defined at the Bureau of Economic Analysis (“BEA”) Economic Areas level for the U.S., at the province level for Canada, and at the country level for Mexico. The U.S. BEA Economic Areas used to draw the map were published in 1998 by the Bureau of Transportation Statistics.

⁹ Economists often use the price paid (or revenue) as a way to normalize differences in value across different options.

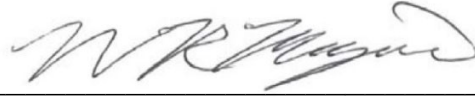
16. Exhibit 1 demonstrates several clear points, including the following. First, there are many areas (with significant associated rail revenues) that would experience reduction in independent competition following a potential CN-KCS merger. Second, these areas of potential concern are found all along the CN and KCS networks, and are particularly concentrated where the networks overlap. Third, the effects are not just local to the southern United States. The potential CN-KCS merger would affect options for north-south shippers from locations as far as Minnesota, and even further north into Canada.

17. Exhibit 1 demonstrates the issues raised in a broadly horizontal acquisition such as CN's proposal for KCS that are not present in an end-to-end merger such as CP's proposed acquisition of KCS. These indicia of significant horizontal problems warrant further investigation. In particular, and among other concerns, CN and KCS's parallel service to north-south traffic, including traffic from various parts of Canada and Texas, as well as the specific overlaps in areas of Mississippi and Louisiana, combine to generate competitive issues that warrant further investigation on behalf of shippers throughout the system currently served by CN and by KCS. I would anticipate evaluating these issues in greater depth if CN's proposed transaction is to proceed.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to sponsor and file this testimony.

Executed on April 30, 2021

A handwritten signature in dark ink, appearing to read 'W. Robert Majure', is written above a horizontal line.

W. Robert Majure

APPENDIX A

APPENDIX A

W. Robert Majure, Ph.D. Vice President

Cornerstone Research

2001 K Street NW • North Tower, Suite 800 • Washington, DC 20006
202.912.8978 • fax 202.912.8999
rmajure@cornerstone.com

ACADEMIC BACKGROUND

- 1990 – 1994 **Massachusetts Institute of Technology** Cambridge, MA
Ph.D., Economics
Specialization: Industrial Organization, Microeconomics, Econometrics
Thesis: Disequilibrium Game Theory
- 1986 – 1990 **University of Virginia** Charlottesville, VA
B.A., Economics and Mathematics

PROFESSIONAL EXPERIENCE

- 2019 – Present **Cornerstone Research, Inc.** Washington, DC
Vice President
Provide financial and economic analysis for commercial litigation matters. Support experts in preparing for deposition and trial testimony.
- 2010 – 2018 **Antitrust Division – U.S. Department of Justice** Washington, DC
Director of Economics
Senior career executive supervising the Antitrust Division's Economic Analysis Group. Helped formulate economic evidence and testimony for cases in industries such as software (*U.S. v. H&R Block, Inc., et al.*), telecommunications (*U.S. and Plaintiff States v. AT&T Inc., et al.*), video (*U.S. v. AT&T Inc., DirecTV Group Holdings, LLC, and Time Warner Inc.*), publishing (*U.S. v. Apple, Inc., et al.*), airlines (*U.S., et al. v. US Airways Group, Inc. and AMR Corp.*), oilfield services (*U.S. v. Halliburton Co. and Baker Hughes Inc.*), and health insurance (*U.S. and Plaintiff States v. Aetna Inc., and Humana Inc. and U.S. and Plaintiff States v. Anthem, Inc. and Cigna Corp.*).
- 2003 – 2010 **Antitrust Division – U.S. Department of Justice** Washington, DC
Chief of Competition Policy Section
Managed a section of about 18 economists and other staff. Supervised economic analysis of antitrust investigations in various industries including computer software (*U.S. v Oracle Corp.*), real estate (*U.S. v Kentucky Real Estate Commission*), and telecommunications (*U.S. v Cingular Wireless et al*). Testified in *U.S. v SBC Communications Inc. and AT&T Corp.* and *U.S. v. Verizon Communications Inc. and MCI, Inc.* Consulted on appellate arguments of the United States in Circuit Court (including *FCC v Prometheus Radio Project*).

APPENDIX A

W. Robert Majure, Ph.D.
Vice President

1997 – 2003 **Antitrust Division – U.S. Department of Justice** Washington, DC
Assistant Chief of Economic Regulatory Section

Assisted with the management of a section of about 18 economists and other staff. Supervised economic analysis of antitrust investigations in various industries including telecommunications (*U.S. v WorldCom and Sprint*), computer software (*U.S. v Mathworks and Wind River*), publishing, radio and television advertising (*U.S. v Univision and Hispanic Broadcasting Corp*), electricity, and airlines. Consulted on appellate arguments of the United States in Circuit Court and the U.S. Supreme Court (including *Iowa Utilities Board v FCC and U.S.*).

1994 – 1997 **Antitrust Division – U.S. Department of Justice** Washington, DC
Economist

Performed economic analysis in antitrust investigations. Applied developments in the fields of industrial organization, microeconomics, and econometrics to practical questions raised in antitrust analysis. Examined mergers or practices in telecommunications (including *U.S. v Sprint and Joint Venture Co.*), computer software, and banking. Testified in the merger of Union Pacific Railroad and Southern Pacific Railroad (before the Surface Transportation Board).

TESTIMONY

Real Estate Exchange, Inc. v Zillow, Inc. et al. – Filed declaration in support of motion for preliminary injunction.

U.S. v SBC Communications Inc. and AT&T Corp. and *U.S. v. Verizon Communications Inc. and MCI, Inc.* – Filed declarations in Tunney Act proceeding to explain the economic analysis of the United States for the proposed mergers and of the proposed consent decrees.

ICC Finance Docket No. 32760 – Submitted testimony on behalf of the U.S. Dept. of Justice analyzing prospective merger of Union Pacific Railroad and Southern Pacific Railroad.

PUBLICATIONS

“Comparing Vertical Merger Guidelines Across Jurisdictions” with Peter Davis and Kostis Hatzitaskos in *Law360* February 2020.

“Revisiting Guidance on MFN Terms” with Andrew Sfekas in *Antitrust Chronicle* September 2019.

“Economics at the Antitrust Division 2016-2017: Healthcare, Nuclear Waste, and Agriculture,” with A. Gerstle, H. Knudsen, D. Williamson, and J. Lee, *Review of Industrial Organization*, Vol 51, Issue 4, 2017, pp. 515-528

“The Year in Review: economics at the Antitrust Division: 2011,” with F. Scott Morton, *Review of Industrial Organization*, Vol. 41, Issue 4, 2012, pp. 321-331

“The Antitrust Division: Economic Issues Presented in 2010-2011,” *Review of Industrial Organization*, Vol 39, Issue 4, 2011, pp. 327-334

“The Year in Review: Economics at the Antitrust Division, 2004–2005,” with E. Emch and K. Heyer, *Review of Industrial Organization*, Vol 27, Issue 3, 2005, pp. 197-221

APPENDIX A

W. Robert Majure, Ph.D.
Vice President

“Ensuring Fair and Efficient Access to the Telecommunications ‘Bottleneck’” with D. Rubinfeld, in C.D. Ehlermann and L. Gosling (eds.), Third Competition Law Annual 1998: Regulating Telecommunications (Hart Publishing: Oxford)

“An Empirical Analysis of Bank Branching: Portugal 1989-1991” with L. Cabral, in The Empirical Analysis of Industrial Organization Conference Report of the Centre for Economic Policy Research

WHITE PAPERS

“Comments on the January 2020 Draft Vertical Merger Guidelines,” with Kostis Hatzitaskos, Aviv Nevo, and Ana McDowall, February 2020, available at <https://media.justice.gov/vod/atr/comments-draft-vmg/dvmg-0012.pdf>.

“Comparison with the EU Non-Horizontal and the UK Merger Assessment Guidelines,” with Peter Davis and Kostis Hatzitaskos, February 2020, available at <https://media.justice.gov/vod/atr/comments-draft-vmg/dvmg-0011.pdf>.

“Review: Selected Research of Andrew Sweeting, New Bureau of Economics Director” with Andrew Sfekas, Ross Askenazi, and Laurien Gilbert, January 2020, available at <https://www.cornerstone.com/Publications/Articles/Selected-Research-of-Andrew-Sweeting.pdf>

HONORS AND AWARDS

President’s Award for Meritorious Executive	2017
Assistant Attorney General’s Award for Excellence	2015
Attorney General’s John Marshall Award for Legal Advice (Nominated)	2004
Assistant Attorney General’s Award for Excellence	2001
Distinguished Service Award	1997
National Science Foundation Fellowship	1990 – 1993
Phi Beta Kappa	1989

CONFERENCE PARTICIPATION

8 th Annual Bill Kovacic Antitrust Salon	2020
Discussed vertical merger guidelines and enforcement issues in a panel hosted by George Washington University School of Law and <i>Concurrences Review</i> .	
“New Debates and Tensions in Antitrust: The 2020 Vertical Merger Guidelines”	2020
Discussed newly issued vertical merger guidelines with attorneys and economists in government and private practice.	
ABA panel “Sequences & Sparks: Life Sciences Innovation Mergers.” (podcast)	2020
Discussed issues of innovation competition, potential competition, and merger enforcement.	
DOJ Workshop on Proposed Vertical Merger Guidelines	2020
Discussed issues of vertical merger analysis and suggested modifications to draft guidelines.	
ICN Chief/Senior Economist Workshop	2016
Discussed tools and techniques of current interest with senior economists representing competition authorities around the world.	

APPENDIX A

W. Robert Majure, Ph.D.
Vice President

FCC Roundtable on Media Ownership Policies 2001
Discussed economic issues related to prospective changes in the FCC's rules governing media ownership.

PERSONAL

U.S. Citizen. Married with two daughters and one son.

EXHIBIT 2

FINANCE DOCKET NO. 36500
CP APRIL 21, 2021 LETTER

LAW OFFICE OF DAVID L. MEYER
WWW.MEYERLAWDC.COM

1105 S STREET, N.W.
WASHINGTON, D.C. 20009
202-294-1399

April 21, 2021

BY ELECTRONIC FILING

The Honorable Cynthia T. Brown
Chief, Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street S.W.
Washington, DC 20423

Re: Finance Docket No. 36500

Dear Ms. Brown:

I am writing on behalf of the Canadian Pacific Applicants.¹ As the Board is no doubt aware, Canadian National (CN) has made an unsolicited offer to acquire Kansas City Southern (KCS), and has asked the Board of Directors of Kansas City Southern to consider that offer. CN Press Release (Apr. 20, 2001). CN has informed KCS that its proposal “would require the same regulatory approvals as those required under the agreement with CP” and that CN would seek to “obtain[] such regulatory approvals on the same terms as in the merger agreement with CP, including through the use of the same voting trust arrangement.” *Id.*

Canadian Pacific believes that CN’s proposal is illusory and inferior to the proposed CP/KCS transaction, and that a CN/KCS transaction would be contrary to the public interest given its adverse impacts on competition and other serious concerns. Canadian Pacific respectfully suggests that the Board should see things the same way: the only combination involving KCS that is in the public interest is the one that Canadian Pacific has proposed, and which has already garnered support from over 400 shippers and other stakeholders.

A CN/KCS combination would reduce competitive options for countless shippers. When the Board approved the CN/IC transaction in 1998, it addressed some of these competitive issues

¹ Canadian Pacific Applicants are Canadian Pacific Railway Limited, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (collectively “Canadian Pacific” or “CP”).

The Honorable Cynthia T. Brown
April 21, 2021
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and found, in that context, “that KCS and CN/IC will have every incentive to continue to compete aggressively for traffic where they are able to provide service alternatives, just as they have competed in the past.”² A CN/KCS combination would extinguish all of that competition. CN and KCS serve many dozens of shippers in common; they operate parallel lines between Baton Rouge and New Orleans that have in the past supported build-in/build-out competition; they both serve grain and other shippers in eastern Nebraska and western Iowa; they both reach the port of Mobile, Alabama; they both serve shippers in Springfield, Illinois; East St. Louis, Illinois; Jackson, Mississippi; and their lines are largely parallel throughout eastern Mississippi. Even more fundamentally, between the Upper Midwest and Gulf Coast – in corridors like Twin Cities to New Orleans – a CN/KCS combination would reduce the number of independent routing options from four to three.

A CN/KCS transaction would also destabilize the balance in the North American rail network that has prevented further consolidation of the six largest railroads for two decades. The CN/KCS transaction would eliminate CP’s friendly connection at Kansas City (converting a joint CP-KCS yard to a facility shared with CN). In the process, it would severely weaken (if not destroy) the viability of CP’s lines through southeastern Iowa and northern Missouri and leave CP an asymmetrically disadvantaged “odd-man-out” in a six-railroad North America. Completion of a CN acquisition of KCS would create tremendous strategic pressure for CP to find a way to expand its market reach through further consolidation.

As the Board has already seen, a CP/KCS transaction raises none of these concerns. Instead, it *enhances competition*, creating new and stronger competitive single-line options against existing UP, BNSF, and CN single-line routes, as well as taking trucks off the highway. A prime example of the new competition that a CN acquisition of KCS would eliminate is the once-in-a-lifetime opportunity to provide grain shippers in the Upper Midwest (the Dakotas, Minnesota, and Iowa) who are now beholden to UP and BNSF routes with new single-line rail options to reach destination markets in the South Central United States and Mexico. A CN/KCS transaction would not bring these benefits.

Similarly, a CP/KCS transaction *diminishes the pressure* for downstream consolidation by preserving the basic six-railroad structure of the North American rail network: two in the West, two in the East, and two in Canada, each with access to the U.S. Gulf Coast. By contrast, a CN/KCS transaction would fundamentally disrupt this balance.

² *Canadian National Ry., Grand Trunk Corp., & Grand Trunk Western R.R. – Control – Illinois Central Corp., Illinois Central R.R., Chicago, Central & Pacific R.R., & Cedar River R.R.*, Finance Docket No. 33556 (Decision No. 37, STB served May 25, 1999) at 27.

The Honorable Cynthia T. Brown
April 21, 2021
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Because of the far more serious public interest concerns posed by CN's proposed acquisition of KCS, CN's suggestion that its proposal should be subject to the same regulatory treatment as the CP/KCS transaction is incorrect. Whereas a Canadian Pacific transaction raises none of the issues that motivated the new merger rules in 2001, the CN proposal *raises all of them*, especially competitive and downstream consolidation concerns.

Canadian Pacific will in due course be addressing the need to apply the 2001 rules to CN's proposal, should CN's proposal progress that far. But there is no doubt that the best option for Kansas City Southern and the U.S. public interest would be consummation of Canadian Pacific's proposed acquisition (following Board review), and not an acquisition of KCS by CN or private equity investors. The Board's regulatory treatment of these potential alternative paths should reflect their very different public interest consequences: (1) a simple and straightforward, and strongly procompetitive CP/KCS proposal, as against (2) a massively more complex and anticompetitive CN proposal or (3) the acquisition of KCS by private equity investors, with the loss of the new competition CP/KCS would achieve and uncertain consequences for KCS's balance sheet and its independent future.

Accordingly, Canadian Pacific urges the Board to promptly confirm that consideration of the uniquely straightforward and beneficial CP/KCS transaction may proceed under the pre-2001 rules and that Canadian Pacific's voting trust proposal requires no further Board approval.

Canadian Pacific Applicants appreciate the Board's attention to this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Meyer", with a long horizontal flourish extending to the left.

David L. Meyer

*Attorney for Canadian Pacific Railway
Limited*

cc: All Parties of Record