

BNSF-147

Before the
SURFACE TRANSPORTATION BOARD

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

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

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APPLICATION FOR TERMINAL TRACKAGE RIGHTS

BNSF's Rebuttal to KCS's and UP's Replies on Compensation

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Rebuttal Verified Statement of Michael R. Baranowski

Rebuttal Verified Statement of David Reishus, Ph.D.

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I. Introduction and Summary

The Board has an opportunity through this compensation phase of the BNSF terminal trackage rights proceeding to affirm the proper implementation of the competition-preserving UP/SP merger conditions set by the Board nearly twenty-five years ago. In this Rebuttal, BNSF rebuts certain elements of the KCS Reply and UP Reply and summarizes BNSF's prior positions. BNSF's Rebuttal is supported by Verified Statements from BNSF's expert witnesses, Michael R. Baranowski and David Reishus, Ph.D.

BNSF has established that, in order to fully and effectively implement the UP/SP merger conditions, the Board should find that:

- (1) As the RASA and UP/SP merger conditions provide, BNSF should pay UP the Prescribed Fee for BNSF's trackage rights service.
- (2) KCS is not owed any compensation as a result of BNSF's use of the Rosebluff Lead within UP's ownership and usage share of the property beyond that which KCS and UP have already determined in their cost-sharing arrangements. KCS may have a breach of contract action

against UP, but any such right of action is not relevant to the compensation set for BNSF's terminal trackage rights access.

- (3) If the Board finds that KCS is owed additional compensation beyond that which KCS and UP have agreed in their cost-sharing arrangements, UP must pay that compensation. UP agreed to allow BNSF to use its assets, subject to BNSF's payment of the Prescribed Fee, in order to obtain the Board's approval for the UP/SP merger. If that agreement with BNSF, set by the Board as a condition, now requires compensation to KCS, then UP must be responsible for it.

UP has shown that it simply does not care about its obligation to provide BNSF with direct access to the Rosebluff Lead at the price and terms imposed by the STB as a UP/SP merger condition. UP has had every opportunity over the last 25 years to address this issue and live up to the competition-preserving commitments that allowed UP to secure the necessary Board approval to complete one of the largest and most contentious mergers in U.S. railroad history.

Instead, UP has veered back and forth between (1) actively thwarting BNSF's efforts to directly access the Rosebluff Lead, by opposing BNSF's application for terminal trackage rights, and (2) attempting to wash its hands of the issue, refusing to even ask KCS for its consent for BNSF trackage rights over the Rosebluff Lead and barely bothering to submit evidence or argument in this compensation phase of the proceeding. The Board should recognize UP's offering to forego the Prescribed Fee as a gambit to burden BNSF with a cost of direct service that greatly exceeds the amount that UP promised to BNSF, the Board, and affected shippers.

Likewise, the filings by KCS in this phase have laid bare its intent: to impose upon BNSF a compensation obligation that purports to compensate KCS for BNSF's right to serve shippers in Lake Charles, which BNSF—with the Board's express approval—obtained in 1996. Any such compensation obligation would, however, actually tilt the competitive balance toward KCS and UP at the expense of Lake Charles area shippers by imposing additional costs on BNSF beyond those that the Board found to be appropriate to ensure BNSF's ability to compete. Indeed, even

though the source of the payment for BNSF terminal trackage rights service should not matter to KCS, KCS backs UP's attempt to offload its Lake Charles Merger Conditions responsibility onto BNSF. KCS and UP have acted in parallel here to pursue their mutual interest in freezing out another competitor, and the Board should not allow KCS and UP to succeed.

The question at issue in this compensation phase is not what BNSF should pay for its use of UP's Rosebluff Lead ownership rights that are necessary to directly serve Lake Charles area shippers – that was set 25 years ago as the Prescribed Fee. Instead, the real issue is the calculation of the compensation due to KCS, if any, for the incremental costs of BNSF direct service using its terminal trackage rights exclusively within the ownership and usage rights of UP, as compared to the reciprocal switch service that BNSF provides today via UP.

Through its purported “market-based access fee,” KCS seeks compensation for the fact that BNSF has any commercial access to shippers on the Rosebluff Lead. But BNSF already has the right to serve those shippers via reciprocal switch. Dr. Reishus explains that the only question here is whether KCS is entitled to incremental compensation when a BNSF train serves those shippers directly rather than when a UP train serves those shippers through a reciprocal switching arrangement with BNSF. Contrary to KCS's self-serving scheme, the Board sets compensation based on a statutory requirement and well-established Board precedent that simply does not allow for KCS's “market-based access fee.”

As BNSF has demonstrated, application of the legal standards and principles used by the Board leads to the conclusion that KCS should be compensated for BNSF's terminal trackage rights movements just as KCS is paid today for UP's movements on the Rosebluff Lead. BNSF's cars and trains should be treated like UP cars and trains under the existing cost-sharing agreements between UP and

KCS. After all, BNSF would be on the Rosebluff Lead only during UP's operating window, and BNSF will operate within the parameters of current UP operations.

If, however, the Board concludes that it should override the joint owners' real-world allocation of usage costs with a regulatory formula, then the Board should use Mr. Baranowski's proposed calculation of the maintenance and operating portions of the *SSW Compensation* methodology. But the Board should not include an interest rental portion, because BNSF will operate entirely within UP's 12-hour window. Alternatively, if the Board requires an interest rental payment, the Board should use the RCNLD calculation proposed by Mr. Baranowski, because the CE approach suggested by KCS is neither viable nor appropriate in this case.

BNSF's approach does not result in a "regulatory windfall" for BNSF, as KCS suggests. It fairly compensates all parties and implements the Board's UP/SP merger conditions. If KCS believes that it is owed additional compensation as a result of UP's breach of its Joint Facility Agreements, then KCS can seek that amount from UP in litigation or arbitration. This trackage rights compensation proceeding is not the appropriate venue for such a private, contractual dispute.

II. Rebuttal Argument

A. UP should be responsible for any amount due to KCS in excess of the Prescribed Fee.

On the issue of the allocation of the responsibility for compensating KCS, UP asserts that the Board should apply 49 U.S.C. § 11102(a) without any consideration of the context of this proceeding and of the UP actions which led to the proceeding. *See* UP Reply at 1. BNSF was, however, forced to apply for terminal trackage rights **solely** because UP failed to secure KCS's consent for UP to grant trackage rights to BNSF, as KCS claims is required. UP appears to be more willing to ignore its obligations to the STB, shippers, and BNSF, than it is to ask KCS to provide BNSF with trackage rights access to the Rosebluff Lead at the price agreed to by UP.

UP's continuing assertions that BNSF voluntarily applied for terminal trackage rights ring hollow now, as they have since 2013. Throughout this proceeding, UP has attempted to evade the consequences of its irresponsible conduct. For example, UP contends that it did not breach its RASA obligation to grant BNSF trackage rights over the Rosebluff Lead and that BNSF should pursue any contract-based claim that BNSF may want to assert against UP in a separate proceeding. UP Reply at 4-7. UP further asserts that requiring BNSF to compensate KCS under Section 11102(a) will not undermine the conditions imposed by the Board on the UP/SP merger. UP Reply at 7-8. UP's arguments all fail.

1. The Rosebluff Lead is not comparable to line segments wholly owned by KCS in Beaumont and Shreveport.

UP's reliance on BNSF's payments to KCS for terminal trackage rights over line segments at Beaumont, TX and Shreveport, LA to justify its position is misplaced. The KCS line segments at issue there were not jointly owned with UP, and the allocation of the amount due to KCS was not at issue. Additionally, UP and BNSF jointly filed the terminal trackage rights application for those segments.

Unlike the Beaumont and Shreveport segments owned wholly by KCS, UP has a responsibility under UP/SP merger conditions to provide BNSF with direct access to Rosebluff Lead shippers via trackage rights, notwithstanding KCS's joint ownership of the line. UP not only did not join with BNSF in filing a terminal trackage rights application here, but UP has actively opposed BNSF's application by joining with KCS to argue that BNSF had not shown that direct service would be in the public interest and that BNSF's proposed operations on the Rosebluff Lead would not be practical and would substantially impair UP's and KCS's operations. UP Rebuttal 6-17, Dec. 30, 2015 (UP/SP-415). The Board decisively rejected both arguments. *BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. (Decision No. 3)*, FD 32760 (Sub-No. 46), slip op. at 9-18 (STB served July 5, 2016).

2. The Board has already rejected UP's attempt to evade responsibility by citing to Section 8(n) of the RASA.

BNSF's claim that UP should be responsible for payments to KCS is based on the Lake Charles Merger Conditions imposed by the Board, not the RASA or any contract between the parties. UP ignores this and argues that it has not breached the RASA because Section 8(n) provides that, if UP lacked sufficient legal authority to grant trackage rights, UP would provide BNSF with an alternate means of access of commercially equivalent utility, and that UP has done so by providing BNSF with access via reciprocal switch. The Board has firmly rejected that reading of Section 8(n). *See Decision No. 3*, FD 32760 (Sub-No. 46), slip op. at 13 ("the reference in Section 8(n) to a 'lack of sufficient legal authority' cannot be read to encompass situations in which UP merely failed to secure the contractual right to grant BNSF trackage rights otherwise afforded under the BNSF Agreement.").¹

3. BNSF's awareness of KCS's consent claim does not excuse UP from responsibility for trackage rights compensation owed to KCS.

The Board should reject UP's baseless argument that BNSF should have declined the Rosebluff Lead trackage rights once it learned of KCS's consent requirement, and, having not done so, BNSF alone should pay KCS for BNSF's use of the terminal trackage rights. UP seeks to offload responsibility for UP's own failure to conduct the due diligence that it should have undertaken before it granted BNSF the right to serve shippers on the Rosebluff Lead via trackage rights.

UP has conceded that it was not aware of the consent requirement before KCS first raised the issue on September 3, 1996, in its petition to reopen/reconsider the Board's approval of the UP/SP merger. *See* BNSF Reply at 8. Additionally, UP

¹ The Board further stated: "Allowing UP to deny BNSF [the] choice of [direct service] in circumstances such as these – where UP was aware of another carrier's co-ownership of the lines, yet granted BNSF access in order to secure merger approval without negotiating with that co-owner – would severely undermine the purpose of the merger conditions and the integrity of the Board's processes." *Id.* at 12 (footnote omitted).

filed nothing with the Board before the effective date of the Board’s approval that would have led BNSF to question whether UP would fulfill its obligation to secure any necessary consent. Thus, UP’s self-serving claim that BNSF could have “immediately declined [the Rosebluff Lead] rights,” UP Reply at 5, wholly lacks merit. If anyone should have “declined” to do something, perhaps it was UP, which, upon learning of KCS’s position, could have declined to go forward with a merger conditioned—at UP’s request—on BNSF’s access to Lake Charles area shippers. But UP went ahead with the merger and must now live up to its promises.²

The Board has expressly stated what UP should have done: “Before offering trackage rights to BNSF, UP would be expected to make **all reasonable efforts** to secure the consent, if any, necessary to allow BNSF to exercise its option of direct access (if requested).” *Decision No. 3*, FD 32760 (Sub-No. 46), slip op. at 13 (emphasis added). UP not only has failed to make “all reasonable efforts,” it has made no efforts at all. *See* BNSF Reply at 8.³

4. UP wrongly asserts that requiring BNSF to pay more than the Prescribed Fee will not undermine the UP/SP merger conditions.

UP’s argument that BNSF’s ability to effectively compete would not be impeded by BNSF’s payment of compensation beyond the Prescribed Fee reveals UP’s desire to impede BNSF’s effective access by imposing charges in excess of

² KCS was apparently similarly unaware of the consent provision until shortly before September 3, 1996. KCS argues that BNSF, not UP, should be responsible for compensating KCS because BNSF allegedly failed to determine whether UP actually held the rights that it purported to convey. KCS Reply at 8. KCS does not, however, explain why BNSF, rather than UP, should be blamed here. UP made the promise to grant BNSF trackage rights, and UP had the actual Joint Facility Agreement, but failed to timely examine it.

³ In addition, Section 14 of the RASA requires BNSF and UP “to cooperate with each other and make whatever filings or applications, if any, are necessary to implement the provisions of this Agreement or of any separate agreements made pursuant to Section 9(f) and whatever filings or applications may be necessary to obtain any approval that may be required by applicable law for the provisions of such agreements.” RASA at 46-47. No such cooperation has at any point been forthcoming from UP despite BNSF’s continuing entreaties that UP take action.

those the Board determined were necessary to ensure BNSF's ability to compete. The amount that UP would have BNSF pay is almost nine times the Prescribed Fee.⁴ UP's argument ends up with: (1) UP bearing no responsibility at all for its failure to timely secure KCS's consent, (2) a significant burden imposed on BNSF, and (3) most importantly, shippers deprived of the fully competitive service they were promised. UP would rather break its promise to the CMA and other shippers (and to this Board in accepting the conditions and proceeding with the merger) than accept responsibility for its own actions. The Board should not let UP do so.

Perhaps recognizing the weakness of its position, UP circles back to an argument that it and KCS have peddled since this proceeding began. UP suggests that, if BNSF believes paying KCS its share of the *SSW Compensation* fee would affect its ability to compete, BNSF can continue to compete with reciprocal switch. UP Reply at 8. But reciprocal switch service alone is inadequate to maintain BNSF's role as a competitive replacement for SP. For example, the unit train service requested by Rosebluff Lead shippers is best delivered directly via trackage rights, allowing for operational efficiencies. Moreover, "it is clear that the Board's merger conditions gave BNSF the option to elect direct or indirect access to all Lake Charles area shippers." *Decision No. 3*, FD 32760 (Sub-No. 46), slip op. at 12.

B. The compensation arrangement proposed by BNSF is fully consistent with the statutory standard and precedent.

1. The Board should treat BNSF trains like UP trains for the purposes of determining compensation for KCS.

BNSF has established that KCS is not entitled to any additional compensation for BNSF trackage rights service beyond that which KCS already

⁴ UP estimates the Prescribed Fee to be approximately \$3.14 per car and the full SSW Compensation methodology fee (based on BNSF's calculations) to be approximately \$54.74 per car, with KCS's one-half share being approximately \$27.37 per car. UP Reply at 8 n.23.

receives from UP under their existing cost-sharing arrangements applicable to the Rosebluff Lead. *See* BNSF Opening at 15-17.

Most trackage rights compensation cases reflect a traditional landlord/tenant relationship, with the Board determining how to compensate a “landlord” carrier that wholly owns a line for the trackage rights access of a “tenant” carrier. This case involves truly unique circumstances. Here, the line at issue is jointly owned by two carriers (UP and KCS), and those carriers have long-standing agreements to share the jointly-owned facility and to share the costs attributable to that facility based on each carrier’s usage of the line. One of the joint owners (UP) long-ago agreed to allow a third carrier (BNSF) to use its ownership rights to the jointly-owned facility to obtain either indirect access to shippers on the line via reciprocal switch service, or direct access to shippers on the line via trackage rights service.

BNSF has accessed Rosebluff Lead shippers indirectly via UP reciprocal switch service, with UP trains moving cars in BNSF’s account along the Lead. BNSF pays UP the reciprocal switch fee mandated by the UP/SP merger conditions, and UP includes BNSF cars as part of UP’s loaded car count for the purposes of the UP/KCS cost-sharing regime. Now that BNSF has finally obtained trackage rights (with no help from UP), BNSF will access the shippers directly. But the Board has ensured that BNSF’s trackage rights access will be entirely within the rights of UP: BNSF will use UP’s exclusive operating window, and BNSF will not infringe on KCS’s rights. *See BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. (Decision No. 8)*, FD 32760 (Sub-No. 46), slip op. at 9 (STB served Feb. 21, 2020).

It should make no difference for KCS compensation purposes whether a UP or BNSF locomotive operates on the line if each locomotive operates within UP’s allocated share. KCS is entitled to compensation for BNSF’s use of the Rosebluff Lead, but it is not entitled to anything more than what UP and KCS have already agreed to for the use of the jointly-owned facility. KCS makes tortured attempts to

refute this logical conclusion by invoking Louisiana state law regarding co-ownership. KCS Reply at 17. KCS's state law argument is irrelevant. KCS would like the Board to think it is carving up a fee interest that is purportedly "undivided" under Louisiana law. But in setting terminal trackage rights compensation, the Board does not divide an "undivided" fee interest. The Board will determine an appropriate amount for BNSF's use of the property, akin to a landlord's rental charge to a tenant. Here, the joint owners have already decided how to allocate the costs of joint usage. BNSF is simply using a portion of UP's share.⁵

KCS's attempt to analogize this situation to BNSF "becoming a third roommate" is also unavailing. KCS Reply at 17. The better example is that of a jointly-owned taxi with usage allocated in 12-hour shifts. As long as a third-party driver operates within the first co-owner's shift, and pays the first co-owner an agreed-upon fee, the cost-sharing arrangements between the two co-owners are unaffected. The co-owners of the Rosebluff Lead have already done exactly what *SSW Compensation* methodology seeks to do in a regulatory setting. If BNSF operates within UP's usage window, there is no reason for the Board to attempt to replicate through an artificial regulatory structure what UP and KCS have already efficiently done through long-standing cost-sharing arrangements.⁶

⁵ As explained in the BNSF Reply at 18-19, KCS's "takings" argument suffers from a similar flaw. KCS mistakenly claims that it should be compensated for the "taking" of its "exclusive" use of the Rosebluff Lead. But the property is jointly owned, and KCS's ownership interest does not give it the right to "exclusive" use. As one of the joint owners, KCS is entitled to a partial use of the property, and that right is unaffected by BNSF's use of the property within UP's ownership rights.

⁶ Additionally, KCS wants the Board to require BNSF to return to the Board to request compensation terms for each individual Lake Charles shipper that BNSF elects to serve using its terminal trackage rights. As explained in the BNSF Opening at 11-14 and the BNSF Reply at 10-11, this approach is fundamentally inconsistent with the Board's approach to setting trackage rights compensation and would result in unnecessary regulatory proceedings.

2. If the Board calculates compensation using *SSW Compensation*, it should use BNSF's approach.

As described in greater depth in the BNSF Opening at 17-23, if the Board decides to jettison the existing UP-KCS cost-sharing arrangements and craft a regulatory scheme for KCS compensation using *SSW Compensation* methodology: (1) the Board should not calculate an “interest rental” component, (2) the Board should look to the existing cost-sharing arrangements to calculate the maintenance and operation components, and (3) the “variable cost” component should be zero.

First, the purpose of an interest rental component would be to compensate KCS for BNSF's use of KCS's capital dedicated to the Rosebluff Lead track. But BNSF will not actually use any portion of KCS's capital dedicated to the joint property or otherwise impede KCS's exercise of its ownership rights, because BNSF will operate entirely within UP's 12-hour window. BNSF will use UP's portion of the capital dedicated to the joint facility, and BNSF and UP have already agreed to an amount that UP is owed – the Prescribed Fee – for the use of that capital. Indeed, because the KCS ownership rights to access shippers on the Rosebluff Lead are unaffected by BNSF's use of the facilities within UP's ownership share, imposing an interest rental component would result in an unjustified windfall to KCS.

However, if the Board does decide to calculate an interest rental component, it should use the RCNLD approach proposed by Mr. Baranowski, and the interest rental base itself should reflect KCS's one-half ownership interest. Dr. Reishus establishes that under no circumstances would KCS be due more than one-half of the value of the Rosebluff Lead. Reishus Rebuttal V.S. at 1-3. Further, KCS's efforts to restate Mr. Baranowski's RCNLD-based interest rental results are economically unsound and should be rejected.⁷ Finally, the CE approach proposed by KCS is

⁷ Mr. Baranowski notes in his Rebuttal V.S. at 6-7 that Prof. Carey's adjustments are unsound for several reasons, including that they: (1) replace “the historical AAR index for Materials and Supplies for the fourth quarter of 2020 with a *forecast* from the Board's Rail Cost Adjustment Factor (RCAF) determinations;” (2) incorrectly infuse “elements of the Board's SAC methodology into an

deeply flawed⁸ and inappropriate for this case, and KCS's attempt to use stand-alone cost methodology is likewise faulty. Baranowski Reply V.S. at 6-7.

Second, the Board should calculate the maintenance and operation component of the *SSW Compensation* methodology using the existing UP/KCS cost-sharing arrangements. As Mr. Baranowski explained in his Opening Verified Statement, this approach is fully aligned with the *SSW Compensation* usage-based maintenance approach, and it has the advantage of being based on actual maintenance and operation costs and volume levels, rather than projections based on historical levels. Baranowski V.S. at 21. However, if the Board decides to apply a regulatory formula based on *SSW Compensation* methodology to calculate the maintenance and operating cost owed to KCS as an alternative to the real-world cost sharing arrangement, the Board should use Mr. Baranowski's calculations. See BNSF Opening at 21-22.

Third, because KCS would not incur any variable costs as a result of BNSF's trackage rights operations, the variable cost component of the *SSW Compensation* methodology should be zero. See BNSF Opening at 22-23. Moreover, KCS's attempt to shoehorn considerations such as a "delay charge" into the variable cost component, see KCS Reply at 37 n.57, must fail, because any such compensation has

RCNLD estimate;" (3) improperly eliminate "the deduction of depreciation from the replacement cost estimate;" and (4) fail to account for KCS's partial ownership share.

⁸ Specific flaws identified by Mr. Baranowski include: (1) use of a CE valuation methodology that fails to provide an objective measure of the value of the subject assets relevant to BNSF's exercise of its trackage rights; (2) development of artificial contribution for UP and KCS Zone 1 and Zone 2 cost-based switches that improperly uses URCS inter-terminal switching costs; (3) failure to deduct fixed costs from estimates of contribution for UP and KCS Rosebluff Lead shipments that essentially results in a Capitalized Contribution approach and does not calculate earnings; (4) restriction of scope of compensation to portions of the Rosebluff Lead needed to access only Lyondell, despite BNSF's rights to serve customers on the Rosebluff Lead in 1996; (5) failure to account for KCS's partial ownership share that improperly results in inflated compensation claims; (6) use of a flawed and unsupported enterprise value to capitalize earnings that is duplicative and erroneously attributes the profitability and growth characteristics assumed for the KCS and UP systems to the profitability and growth characteristics of the Rosebluff Lead; and (7) use of the wrong empty-to-loaded ratio to estimate inflated empty car miles. Baranowski Rebuttal V.S. at 5; Baranowski Reply V.S. at 4, 12, 16, 19-26.

no connection with the applicable standards. *See* BNSF Reply 5-7, Feb. 25, 2019 (BNSF-140).

C. The KCS “market-based access fee” is a transparent attempt to impede BNSF’s ability to compete and is wholly inconsistent with the applicable standards.

The Board required UP to provide BNSF with trackage rights access “at a fee designed to allow BNSF to garner sufficient traffic and compete effectively with the newly merged UP/SP.” *Decision No. 8*, FD 32760 (Sub-No. 46), slip op. at 2. As described in the BNSF Opening at 5-6, the specific trackage rights fee level for the Rosebluff Lead is the Prescribed Fee, as modified slightly to account for BNSF’s and UP’s joint ownership of the main line that feeds into the Rosebluff Lead. Likewise, the Board imposed as a UP/SP merger condition the cost-based fee level to be paid by BNSF for UP’s reciprocal switch service. *See* BNSF Response 5-6, Feb. 4, 2019 (BNSF-139). Therefore, the issue of what BNSF must pay for trackage rights and reciprocal switch access was settled 25 years ago.

The Board must decide here what KCS is owed for the incremental costs of BNSF direct service using its terminal trackage rights exclusively within the ownership and usage rights of UP, as compared to the reciprocal switch service that BNSF provides today via UP. *See* BNSF Reply at 12-16. KCS argues, however, that the Board now must make KCS whole for the commercial access to Lake Charles area shippers that BNSF obtained in 1996 when BNSF started serving such shippers via UP reciprocal switch service. This is nothing more than yet another transparent, and wholly inappropriate, attempt by KCS to collaterally challenge the Board’s long-standing decision to install BNSF as a competitive replacement for SP through this trackage rights compensation proceeding.⁹

⁹ The Board rejected a similar UP attempt to charge an “access” fee for Lake Charles traffic in its decision approving the UP/SP merger, and the Board should squarely reject KCS’s attempt now. *See Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp. (UP/SP Decision No. 44)*, 1

BNSF has also explained that the “market-based access fee” requested by KCS is wholly inconsistent with the relevant legal standards here – the principles controlling compensation in condemnation proceedings, including *SSW Compensation* methodology. BNSF Reply at 14-16. It is also riddled with conceptual and calculation errors. KCS centers its market-based theory on purported reciprocal switch comparables, but Mr. Baranowski and Dr. Reishus have explained that, even if a comparables approach were appropriate (and it is not), the approach suggested by KCS is methodologically unsound. *See* Reishus Reply V.S. at 24-25.

The reciprocal switch fees used are not at all comparable to the situation in Lake Charles, which involves a jointly-owned facility where the joint owners already are direct competitors. Moreover, the switch fees selected by KCS are so variable that it is clear that they do not reflect a true market value. Indeed, other evidence shows that the supposed comparable reciprocal switch fees are cost-based, and not market-based. *See* BNSF Reply at 22-25.

KCS now insists not only that KCS must be paid this exorbitant and improperly-calculated “market-based access fee,” but that BNSF must pay it. *See* KCS Reply at 6-11, 44. Dr. Reishus explains in his Rebuttal V.S. at 4 that KCS’s concern with what BNSF pays reveals that the KCS “market-based access fee” is really just an attempt to obstruct the implementation of the Board’s competition-preserving Lake Charles Merger Conditions by impeding BNSF’s ability to compete. Dr. Reishus observes that the “market value” at the heart of the KCS access fee scheme is not the value **to KCS** of the Rosebluff Lead, but rather the value of access **to BNSF**. KCS intends to capture for KCS the value that BNSF would obtain from direct Rosebluff Lead movements and deter BNSF from providing a competitive

S.T.B. 233, 428-29 (1996) (eliminating a “phantom haulage fee” that UP would have charged BNSF to access traffic at West Lake Charles, including shippers on the Rosebluff Lead).

option. This is contrary to the intent of the Board's UP/SP merger conditions and inconsistent with the relevant legal standards at issue in this proceeding.

III. Conclusion

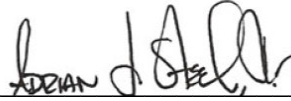
The Board should reject UP's and KCS's attempts to weaken BNSF's role as a competitive replacement for SP and thereby eviscerate the Lake Charles Merger Conditions imposed by the Board 25 years ago. It is well past time for UP to be held accountable for its failure to timely resolve KCS's claim that its consent is required for UP to grant BNSF trackage rights on the Rosebluff Lead. UP's efforts to avoid responsibility began immediately after KCS first raised the issue in September 1996 in its petition to reopen/reconsider. UP apparently did not even reply to the KCS petition, perhaps more concerned about possible litigation by KCS against UP than in fulfilling the Board's merger conditions. UP's efforts have continued through the years (often in parallel with KCS) to the detriment of not only BNSF but also (and more importantly) to the detriment of the Lake Charles shippers who have been deprived of the right to direct service they sought and were promised.

It is also well past time for KCS – if it believes that UP violated a contract obligation by agreeing in 1996 to give BNSF access to Lake Charles shippers in order to secure the Board's consent for UP's merger with SP – to seek relief **from UP** in the form of lost profits, lost contribution, or other damages. KCS's effort to expand the statutory language of Section 11102(a) and the Board's governing precedent to include a market-based access fee should be recognized for what it is: an effort (1) to hamper BNSF's ability to effectively compete for Lake Charles shippers' traffic by undermining the Board's competition-preserving merger conditions and (2) to force BNSF to compensate KCS for the harm purportedly done to KCS by UP. While the Board said that it was willing to consider proposed modifications to the *SSW Compensation* methodology, any such modifications must

be within the governing framework of Section 11102(a), which requires that terminal trackage compensation be based on condemnation compensation principles. KCS's modifications clearly are not.

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Dated: May 11, 2021

CERTIFICATE OF SERVICE

I certify that I have, on May 11, 2021, served copies of BNSF's Rebuttal to KCS's and UP's Replies on Compensation (BNSF-147) upon all parties of record in this proceeding, by electronic mail.



Tara Woods
Attorney for BNSF Railway Company

EXHIBIT A
Rebuttal Verified Statement of Michael R. Baranowski

I am Michael R. Baranowski, a Senior Managing Director at FTI Consulting and the head of FTI's Network Industries Strategies group within the Economic Consulting division. I submitted an Opening Verified Statement in this proceeding on January 26, 2021 and a Reply Verified Statement on April 12, 2021. I have been asked by counsel for BNSF Railway Company ("BNSF") to respond to material elements of the Reply Verified Statements of KCS witnesses Kevin Neels and Julie M. Carey related to my Opening Verified Statement.

As I explained in my earlier statements, any measure of additional compensation due KCS for BNSF's change from reciprocal switch to direct access should account for the unique circumstances of the Rosebluff Lead. In both their Opening and Reply Verified Statements, Dr. Neels and Prof. Carey bypass the practical effects of these unique circumstances and conclude that a change in BNSF Rosebluff Lead access from reciprocal switch to direct access entitles KCS to additional compensation. The significant flaws in Dr. Neels' and Prof. Carey's compensation arguments and calculations are addressed in my Reply Verified Statement.

I. REBUTTAL TO DR. NEELS AND PROFESSOR CAREY

A. The Board Restricted BNSF Access to the Rosebluff Lead so as to Not Infringe on KCS's Property Rights

In their reply statements, both Dr. Neels and Prof. Carey criticize my characterization of the Board's restriction of BNSF's direct access to UP's 12-hour operating window as in effect a subletting of UP's property rights that leaves KCS's property rights unaffected. Instead of embracing the Board's efforts to place the burdens of BNSF direct access solely on UP, the party responsible for that access, Dr. Neels and Prof. Carey express their opinions on a range of issues, including the legal definitions of subletting, co-ownership and property rights, and the implications of an analogy of a third roommate moving into an already crowded apartment.

In her opening statement, Prof. Carey proposed an analogy of two Uber drivers, one owning a new car and the other owning an older car, to argue that market prices migrate toward the replacement cost of the newer car. Carey Opening V.S. at 34. A similar, but better analogy could be applied to BNSF direct access as a result of the UP/SP merger. Assume that, instead of Prof. Carey's two drivers with two different vehicles, there is a single vehicle jointly owned by two individuals and that Owner A has use of the vehicle from 6:00 am until 6:00 pm and Owner B has use of the vehicle from 6:00 pm until 6:00 am, and that the owners share (based on relative

usage) all operating and maintenance costs. Assume now that Owner A invites a business associate, Associate A, to use the vehicle for four hours within Owner A's usage window and agrees that Associate A will pay Owner A a flat fee for that usage. Under this arrangement, the usage (e.g., mileage) incurred by Associate A counts for purposes of the cost sharing arrangement between Owner A and Owner B as Owner A usage.

Under this hypothetical, because all of Associate A's usage occurs during Owner A's usage window, Owner B enjoys its full ownership rights for the entirety of its usage window. Any incremental operating and maintenance costs resulting from Associate A's usage are the responsibility of Owner A. As such, Owner B's ownership rights are unaffected. The same principle applies to BNSF reciprocal switch access or direct access to the Rosebluff Lead.

B. Most of Dr. Neels' Criticisms of My Calculations Are Without Merit

Neither Dr. Neels nor I have identified any variable costs that would be incurred by KCS as a result of BNSF direct access, and we have both set the *SSW Compensation* variable cost component at {{ }}. In his reply, Dr. Neels identifies two valid issues with my *SSW Compensation* calculations related to accounting for inflation in my calculation of routine maintenance and an inadvertent transposition error in my calculation of capitalized maintenance. I have corrected these issues and am submitting updated results and work papers.¹ The remainder of Dr. Neels' criticisms of my calculation of the *SSW Compensation* operating and maintenance expense and interest rental components are without merit.

1. Operating and Maintenance Expense

Dr. Neels identifies three other issues with my development of the *SSW Compensation* operating and maintenance expense component with which he disagrees, but his arguments are misguided. First, he claims that my calculations of the costs of the day-to-day Rosebluff Lead maintenance requirements, otherwise referred to as routine maintenance, are understated because a different document produced by UP shows expenditures for bridge and culvert maintenance that are higher than the expenditures included in other discovery materials that I relied upon. Dr. Neels provides no explanation of why two documents produced by the Rosebluff Lead joint

¹ These adjustments change the maintenance and operating expense component of my *SSW Compensation* calculations from {{ }} per gross ton mile. Details of my calculations are set forth in my work papers. See Baranowski Rebuttal Workpaper "Compensation Calculations Rebuttal.xlsx".

owners show divergent expenditure levels, nor does he explain why a document that covers only one aspect of routine maintenance – bridges and culverts – is more reliable than the discovery documents I relied upon that cover all aspects of routine maintenance. Nor does he say that the documents I relied upon for my estimate are incorrect. Consistent with the Board’s prior findings related to use of materials produced in discovery in rate reasonableness proceedings,² I continue to rely on the more comprehensive data produced in discovery.

Next, Dr. Neels claims that my capital maintenance costs are understated. To calculate the capitalized maintenance component of the *SSW Compensation* operations and maintenance component, I developed a normalized estimate that started with the Rosebluff Lead replacement costs developed by BNSF Witness Robert J. Boileau and divided that amount by the average expected life of each asset component. This approach calculates the average annual expenditures in nominal dollars required to replace the Rosebluff Lead assets as they are projected to wear out. I favored this approach over that adopted by Dr. Neels, which uses only six years of historical data. Because some railroad assets have useful lives approaching 100 years, a six-year snapshot of historical data will either understate or, in this case, overstate the normalized maintenance expenditure requirements due to the vagaries of capital maintenance cycles. Dr. Neels’ main criticism of my approach is my use of system-average asset lives, which he claims are inconsistent with Rosebluff Lead conditions. He also claims that my approach fails to account for additional maintenance necessitated by the observed condition of the Lead.

If I were to account properly for the elements Dr. Neels raises, my annual capital maintenance costs would not increase, as he implies, but would instead go down. First, my assumption of system-average asset lives for the assets on the Rosebluff Lead is conservative. System-average asset lives are driven by system-average operating conditions, which involve higher densities and higher train speeds than those on the Rosebluff Lead. Because the assets on the Rosebluff Lead are not subject to the same degradation as system-wide assets, they will likely last well beyond the system-average asset life.

² See, e.g., *Otter Tail Power Co. v. BNSF Railway Co.*, NOR 42071, slip op. at D-22 (STB served Jan. 27, 2006) (“Otter Tail’s unit cost figure is used here, because Otter Tail reasonably relied on the information received from BNSF in discovery and BNSF has not impeached that information.”).

Second, Dr. Neels is wrong that the steady state for an industrial lead like the Rosebluff Lead is 50 percent of the total replacement cost. Railroad track maintenance is subject to the Federal Railroad Administration (FRA) Track Safety Standards which classify track and sets forth minimum maintenance requirements by class. For track maintenance, there is an inverse relationship between the maximum authorized speed and the permissible depreciation of the track before replacement is required. With a maximum authorized speed of 10 miles per hour, the Rosebluff Lead is at the lowest track class designation of Class 1. To put this in perspective, I will use Dr. Neels' example of ties on the Rosebluff Lead, for which he cites Mr. Boileau's testimony of an average life of 18.1 years. Neels Reply V.S. at 115. This compares with a system-average tie life of 26 years used in my normalized estimate. On the surface, it would seem that Dr. Neels might have a point as it relates to system-average tie life versus Rosebluff Lead tie life. However, when the FRA maintenance standards for Class 1 track are considered, a 26-year life assumption provides for significantly more replacement ties than are actually required for the Lead.

FRA maintenance standards for ties specify the minimum number of functional ties required for a 39-foot section of track. Based on 24-inch tie spacing on the Rosebluff Lead, each 39-foot section of track has 19.5 ties. A 26-year life results in the replacement of 0.75 ties per 39-foot section annually. The FRA Track Safety Standards for Class 1 track on the other hand require only 5 functional ties per 39-foot track section. Based on an 18.1-year life, the Rosebluff Lead requires only 0.28 ties per 39-foot section annually, meaning my approach provides for almost three times more in tie-related capital expenditures than is required.

Last, Dr. Neels takes issue with my calculation of property taxes in favor of his approach, which I reject. It is in fact Dr. Neels' property tax calculations that are flawed. According to the Rosebluff Lead cost-sharing agreements, { }. Dr. Neels' calculations, however, attribute {{ }} more in Rosebluff Lead property taxes to UP versus KCS.³ Dr. Neels provides no explanation for the difference between his calculations and the cost sharing agreement in place between UP and KCS. Should the Board decide to accept Dr. Neels' property tax calculations, it should do so for reasons discussed above for only KCS's calculated share.

³ Dr. Neels attributes {{ }} and {{ }}. See Neels Reply V.S. at 124.

2. Interest Rental

Although Dr. Neels expresses a number of views on why from a conceptual perspective he believes that my RCNLD-based interest rental compensation is understated, he does not identify any errors in my calculations. The most direct criticism he has is leveled at BNSF witness Brad Pitts' real estate valuation where he observes that Mr. Pitts did not include a corridor assemblage factor as part of his valuation. Neels Reply V.S. at 108. Dr. Neels' criticisms, however, fail to consider the Board's long-standing precedent of not allowing corridor assemblage adjustments when determining replacement costs unless the incumbent railroad can demonstrate that it incurred such a cost when the corridor was established initially. This precedent recognizes that railroad transportation corridors were created many years ago, at a time when such assemblage was less onerous than it would be today. Neither UP nor KCS has produced any documentation of costs associated with the assemblage of the Rosebluff Lead right-of-way, so no adjustment is warranted.

C. Dr. Neels' Best Evidence in the Record Updates Should be Rejected

In his reply statement, Dr. Neels echoes the concern I expressed related to the need to allocate revenues to the assets of the Rosebluff Lead under the CE approach by conceding that his allocation could produce results that are not economically meaningful. Neels Reply V.S. at 103. Nonetheless, he updates his *SSW Compensation* calculations to include certain of the UP culvert and bridge maintenance he discovered recently and to add what he describes as additional "catch-up" capitalized maintenance expenditures stemming from his flawed steady-state concept. As I discussed above, neither of these adjustments is warranted. Dr. Neels' restatement fails to address the significant errors that I identified in my Reply Verified Statement, including the failure to adjust his capital maintenance and interest rental component estimates for KCS's partial ownership share of the Rosebluff Lead.

D. Prof. Carey's Observations Related to BNSF Storage in Transit (SIT) Shipments Are Unrelated to Any Additional Compensation Due KCS

Prof. Carey introduces a new discussion relating to BNSF contributions on shipments from Lake Charles to its storage in transit (SIT) facility for storage until the customer can find a buyer for its product. She argues that, because these contributions are not considered in the CE methodology, a market-based rate is required. Carey Reply V.S. at 150. If the SIT contribution is

related to shipments from the Rosebluff Lead, Dr. Neels could have allocated the proportionate share of the revenues to the Rosebluff Lead. The fact that he chose not to is telling.

E. Prof. Carey's Restatement of My *SSW Compensation* Interest Rental Results Is Economically Unsound

Prof. Carey restates my RCNLD-based interest rental component by making four adjustments that are economically unsound and at odds with long-standing Board precedent. First, she asserts that my RCNLD estimate understates inflation, and she increases Mr. Boileau's valuation by replacing the historical AAR index for Materials and Supplies for the fourth quarter of 2020 with a *forecast* from the Board's Rail Cost Adjustment Factor (RCAF) determinations. Carey Reply V.S. at 128. By changing only the current index to the RCAF basis and not the base year values, Prof. Carey introduces an improper apples-to-oranges situation. More importantly, the Board has rejected use of index forecasts in favor of the historical index values used by Mr. Boileau.⁴ This adjustment should be rejected.

Next, Prof. Carey opines that interest during construction (IDC) and future replacement costs are missing from the RCNLD estimate. *Id.* at 152. She accounts for this alleged omission by increasing arbitrarily the RCNLD estimate by 20 percent. *Id.* at 156. Here, Prof. Carey is incorrectly infusing elements of the Board's SAC methodology into an RCNLD estimate. There is no Board precedent for inflating an *SSW Compensation* RCNLD estimate for economic returns on funds used during the construction of a rail line or future replacement cost, nor should there be. Further, Prof. Carey has not bothered to actually calculate what the correct values might be if they were warranted; she simply assumes they would amount to 20 percent of the RCNLD value. This adjustment should be rejected.

Prof. Carey next asserts that the "D" in the Board's RCNLD methodology is problematic, so she simply eliminates the deduction of depreciation from the replacement cost estimate. *Id.* Here, Prof. Carey is actually advocating a variation of SAC. The problem with her formulation is her failure to recognize that the depreciated original cost (DOC) recovery pattern used to determine the interest rental for an RCNLD valuation front loads recovery for new assets. That is, under DOC, the interest rental starts out high when the asset is new and declines over the life

⁴ See *Sunbelt Chlor Alkali P'ship v. Norfolk S. Ry.*, NOR 42130, slip op. at 24 (STB served June 30, 2016) ("As a general rule, forecasts are continually shifting, and implementing changes can create moving and confusing targets.").

of the asset until it reaches zero at the end of the asset's useful life. The Board and the Railroad Accounting Principles Board recognized the problem with DOC, which is why the Board's SAC process uses a levelized annuity discounted cash flow model to determine the appropriate annual returns for full replacement cost analyses. This adjustment should be rejected.⁵

Last, Prof. Carey rejects my adjustment to reflect KCS's partial ownership share. As Dr. Reishus explains in his Rebuttal Verified Statement, failure to adjust any payment due KCS for its partial ownership share is economically unsound. Prof. Carey's adjustment should be rejected.

VERIFICATION

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

/s/ Michael R. Baranowski

Michael R. Baranowski

Executed: May 11, 2021

⁵ Correct interest rental calculations based on SAC are included in my Reply Verified Statement. See Baranowski Reply V.S. at 26-28 and Baranowski Reply Workpaper "Compensation Calculations Reply.xlsx", tab "Tables".

EXHIBIT B
Rebuttal Verified Statement of David Reishus

I. INTRODUCTION

My name is David Reishus. I am an Executive Vice President at Compass Lexecon in Boston, Massachusetts. I submitted a Reply Verified Statement on April 12, 2021. In my Statement, I first established that Prof. Julie M. Carey’s proposed “market-based access fee” is intended to capture the value of BNSF’s commercial access at Lake Charles and not the incremental value of the trackage rights to be used by BNSF. The “market value” requested by KCS is far in excess of the incremental value of the trackage rights. I then showed that Prof. Carey’s utilization of “comparable” reciprocal switching fees to measure the market value of BNSF access via trackage rights was unreliable and unusable. The trackage rights at issue are not comparable to switching rights elsewhere. Her assumption that the “comparable” switch fees were arm’s length prices is not warranted.

I have been asked by counsel for BNSF to respond to certain aspects of the Reply of KCS and the Reply Verified Statement of Julie M. Carey.

II. KCS DOES NOT HAVE AN ECONOMIC CLAIM TO MORE THAN 50% OF THE VALUE OF THE ROSEBLUFF LEAD

KCS claims it is due compensation for the full value of the Rosebluff Lead, despite that fact that it is a 50% owner and BNSF would utilize exclusively UP’s rights during its 12-hour window. KCS finds it “difficult to comprehend” why Mr. Baranowski’s calculation provides only 50% of the full value of the Lead determined under *SSW Compensation*.¹ KCS also argues that, to receive “full economic value,” the Board should use the “market value” approach calculated by Prof. Carey.²

Consistent with KCS’s argument, Prof. Carey makes no adjustment to the market values access she calculates for KCS’s 50% ownership interest and argues that BNSF should pay KCS 100% of the value of access. KCS and Prof. Carey argue

¹ KCS Reply, p. 29.

² KCS Reply, p. 39.

that to have BNSF pay KCS less than the value attributable to all of the Lead would be to allow BNSF to “usurp” partial asset value to itself even though KCS is not an owner.³ This argument lacks economic merit.

There is no dispute that UP is due no additional compensation from BNSF for use of the Lead beyond the Prescribed Fee.⁴ Prof. Carey argues, however, that BNSF’s total payment should be far larger than the amount of the Prescribed Fee. She concludes that, because the RASA and UP/SP merger conditions preclude UP from receiving the other 50% of the value that she believes BNSF owes, KCS should receive all of the value attributable to BNSF’s use of the Lead. This is inconsistent with the underlying economics even within the context of KCS’s position that BNSF, and not UP, is responsible for payment to KCS.

With BNSF effectively subletting UP’s rights, KCS is owed nothing from BNSF beyond what KCS would receive from UP if BNSF’s cars and train were UP’s. KCS and Prof. Carey argue that the analogy of BNSF subletting UP’s rights to the Lead is flawed. KCS instead suggests that BNSF should be thought of as a “third roommate” in a crowded apartment.⁵ Under KCS’s analogy, BNSF, as the new, third roommate in the apartment, would be responsible to each of the existing roommates for a portion of the existing rent.

The argument made by KCS and Prof. Carey is misguided: Assume one existing roommate (UP) accepts less than its full share of the rent due it from the new roommate, perhaps resulting from another relationship between them. The second roommate (KCS) would not then be entitled to a larger payment from the new roommate due to the willingness of the first roommate to accept less. Thus, KCS has no economic entitlement to more than a 50% share of the full value of compensation for usage of the 50%-owned asset. Indeed, UP agrees that KCS, as 50% owner of the Lead, is entitled only to its 50% share of the compensation.⁶

³ KCS Reply, p. 29; Carey Reply V.S., p. 154.

⁴ See cites at Reishus Reply V.S., p. 12, fn. 27.

⁵ KCS Reply, p. 17.

⁶ UP Reply, p. 8.

Likewise, BNSF is not “usurping” asset value for itself if KCS, as partial-owner, receives its share of the value of the Lead. What KCS describes as “usurping” is the recognition that it owns only 50% of the Lead and the other owner has accepted less than KCS believes the other owner should receive. KCS may not like UP’s agreement to the Prescribed Fee as compensation for the use of the Lead, but such an agreement does not represent “usurpation” of KCS’s economic value by BNSF. Nor does it justify KCS receiving more than it is economically entitled to.

III. KCS’S FOCUS ON WHAT BNSF PAYS, INSTEAD OF WHAT KCS RECIEVES, REFLECTS KCS’S ONGOING EFFORTS TO IMPEDE BNSF’S ABILITY TO PROVIDE COMPETITIVE DISCIPLINE

KCS is adamant that BNSF, and not UP, must pay KCS.⁷ KCS’s argument appears to focus as much on reducing BNSF’s ability to compete on the Rosebluff Lead as it does on obtaining just compensation for KCS. KCS argues that, if BNSF pays “just the ‘Prescribed Fee’ or SSW Compensation,” BNSF will have a tremendous cost advantage and will greatly enhance BNSF’s competitive position relative to UP and KCS.⁸ If BNSF pays the Prescribed Fee to UP, and UP pays KCS for BNSF’s presence (at whatever, possibly high, level), KCS argues that BNSF would be subsidized.⁹ This argument shows that KCS proposes to hamper BNSF’s competitiveness, contrary to the intent of the UP/SP merger conditions.

There is no basis for finding that the Prescribed Fee would “subsidize” BNSF or that it would widen BNSF’s competitive advantage beyond that arising from the UP/SP merger conditions. KCS has not demonstrated that BNSF would pay less than its direct costs or that the negotiated Prescribed Fee represents a subsidy rate below incremental costs.¹⁰ If use of the Lead is as valuable as KCS claims, KCS and UP would retain a substantial incentive to maintain and invest in operations on the Lead regardless of the level of compensation from BNSF.

⁷ KCS Reply, pp. 6-11.

⁸ KCS Reply, pp. 12.

⁹ KCS Reply, p. 12.

¹⁰ *SSW Compensation*, which provides for a capital rental component above variable costs, would also not provide a subsidy to BNSF’s use of the Rosebluff Lead.

KCS's argument that BNSF would be subsidized is a red herring. KCS is actually seeking to saddle BNSF with a fee that would undermine BNSF's ability to provide effective competition for shippers pursuant to the UP/SP merger conditions. KCS continues to argue for compensation to offset the value of commercial access to the Rosebluff Lead, what Prof. Carey describes as the "market-based access fee."¹¹ KCS and Prof. Carey insist that BNSF pay this full fee to KCS, even though KCS is only a 50% owner.

Prof. Carey's discussion highlights how her compensation principle is intended to limit BNSF's ability to compete.¹² Prof. Carey emphasizes that UP, KCS, and BNSF are not identical and have differing competitive advantages for different Rosebluff Lead shippers and movements. She further explains that BNSF, as a result of its investments and assets elsewhere, earns contribution on movements from storage in transit (SIT) on products that Rosebluff Lead shippers sent to BNSF's SIT facilities. She then argues that *SSW Compensation*, using an RCNLD or CE-based interest component, is ill-suited to capture the value that BNSF derives from shipments to and from Lake Charles and the additional value from SIT movements over the BNSF system. Prof. Carey argues that her proposed "market-based access fee" would be reasonably expected to "contemplate the full economic value of the customer" including the additional movement from the SIT facility using BNSF assets, which may well involve no property owned by KCS at all.¹³

As a matter of basic economics, Prof. Carey's principle does not make sense. The fact that one lessee obtains significant value from its use of leased property does not entitle the lessor to additional compensation over and above what the lessor would obtain from the market value of the leased property.

¹¹ As I previously explained, the value to BNSF of trackage rights is that which is incremental to its existing reciprocal switch access, not the value of commercial-access to Rosebluff Lead Shippers. *Reishus Reply V.S.*, pp. 13-14. KCS continues to argue that the trackage rights fee that BNSF should pay KCS is the full value of commercial-access to the Rosebluff Lead.

¹² *Carey Reply V.S.*, pp. 144-150.

¹³ *Carey Reply V.S.*, p. 150.

Prof. Carey’s conception of “market-based access fee” would transfer to KCS the full value that BNSF would obtain from accessing the Rosebluff Lead regardless of the form that access would take.¹⁴ But, by extracting that value from BNSF and transferring it to KCS, the fee would deter BNSF from providing competitive service, including movements that are performed using BNSF’s wholly-owned assets. The market value that Prof. Carey contemplates is the value of access to BNSF—what BNSF could earn by serving Rosebluff Lead shippers—and not the independent value of the Lead. This approach implies that the supposed value of the Rosebluff Lead and the corresponding compensation depends not on the asset partially-owned by KCS, but the identity of the railroad with access to the Lead and its differential value arising from that railroad’s network and assets owned elsewhere.¹⁵ This approach is inconsistent with *SSW Compensation* principles and with standard economic concepts of market value.

VERIFICATION

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

/s/ David Reishus

David Reishus

Executed: May 11, 2021

¹⁴ Prof. Carey argues that the “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.” Carey Reply V.S., p. 144.

¹⁵ As previously explained in my Reply V.S., the “comparables” valuation proposed by Prof. Carey fails to identify the appropriate rights over which the hypothetical negotiation would entail. Moreover, her proposed “comparables” valuation is not a reliable determination of the “market-value of access” she incorrectly is attempting to value.