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BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36472, ET AL.

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.

—CONTROL AND MERGER—

PAN AM SYSTEMS, INC., PAN AM RAILWAYS, INC., BOSTON AND MAINE
CORPORATION, MAINE CENTRAL RAILROAD COMPANY, NORTHERN RAILROAD,
PAN AM SOUTHERN LLC, PORTLAND TERMINAL COMPANY, SPRINGFIELD
TERMINAL RAILWAY COMPANY, STONY BROOK RAILROAD COMPANY, AND
VERMONT & MASSACHUSETTS RAILROAD COMPANY

**COMMENTS AND REQUEST FOR CONDITIONS OF THE COMMONWEALTH OF
MASSACHUSETTS DEPARTMENT OF TRANSPORTATION AND
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY**

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DEPARTMENT OF TRANSPORTATION
AND THE MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY**

Dated: August 27, 2021

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COMMENTS AND REQUEST FOR CONDITIONS OF THE COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF TRANSPORTATION AND MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

The Commonwealth of Massachusetts Department of Transportation (“MassDOT”) and Massachusetts Bay Transportation Authority (“MBTA”) (collectively, the “Commonwealth”), in keeping with the procedural schedule set forth by the Surface Transportation Board (the “Board”) in Decision No. 4 in the FD 36472 proceeding, hereby respond to the primary application and to related notices of exemption and petition for exemption (respectively) presented in the main docket and the five related “sub-no.” proceedings (collectively, the “Inter-related Filings”). As explained below, the Commonwealth does not at this time object to, or oppose, the transactions proposed in the Inter-related Filings (the

¹ The present filing also embraces the following dockets: *Norfolk Southern Railway—Trackage Rights Exemption—CSX Transportation, Inc.*, Docket No. FD 36472 (Sub-No. 1); *Norfolk Southern Railway—Trackage Rights Exemption—Providence & Worcester Railroad*, FD 36472 (Sub-No. 2); *Norfolk Southern Railway—Trackage Rights Exemption—Boston & Maine Corp.*, FD 36472 (Sub-No. 3); *Norfolk Southern Railway—Trackage Rights Exemption—Pan Am Southern LLC*, FD 36472 (Sub-No. 4); *Pittsburg & Shawmut Railroad—Operation Exemption—Pan Am Southern LLC*, FD 36472 (Sub-No. 5); *SMS Rail Lines of New York, LLC—Discontinuance Exemption—in Albany County, N.Y.*, Docket No. AB-1312X.

“Transactions”), nor does it support authorization or approval of the Inter-related Filings. As currently presented, the Transactions, taken together, threaten harm to the public interest that the Board can and should address by way of specific conditions on approval. The ameliorative conditions the Commonwealth seeks are presented below, and evidence in support of them is also offered where pertinent. The legal case for the conditions the Commonwealth requests will not be (and need not be) presented at this time, but will be offered, if necessary (barring an intervening settlement adequately addressing the Commonwealth’s concerns), by or before the deadline for final briefs (currently set for January 3, 2022).

It should be well-recognized that the Commonwealth is a key stakeholder in these proceedings in its own right, and that the Commonwealth is dedicated to protecting and upholding the public interest, including the protection of other Massachusetts-based stakeholders who may be affected in one way or another by the Transactions as currently proposed (and as elements of those transactions may be adjusted during the course of these proceedings to address the concerns of other parties). Massachusetts hosts more of the railroad lines involved in this transaction than any other state involved, and those lines support not only freight, but also, in in some cases, extensive passenger rail service. The Commonwealth is dedicated to ensuring that this transaction will not harm freight railroad service and competition in Massachusetts (not only “on balance,” but also with respect to localized impacts where apparent ameliorative steps can and should be taken), will not compromise the Commonwealth’s stake in Massachusetts railroad infrastructure, and the Commonwealth will support others who may be participating in these transactions to uphold and protect the health, safety and welfare of the citizens of Massachusetts.

MBTA owns the following railroad assets:

Eastern Route Main Line
Gloucester Branch

Boston - NH Border
Beverly to EOT Rockport

Jointly Used
Jointly Used

Western Route Main Line	Boston - NH Border	Jointly Used
New Hampshire Main Line	Boston - NH Border	Jointly Used
Wildcat Branch	Wilmington Int - Wilmington Jct.	Jointly Used
Fitchburg Main Line	Boston to Fitchburg (MP49.59)	Jointly Used
Greenbush Branch	Braintree to Scituate	Jointly Used
Worcester Main Line	Boston - Worcester	Jointly Used
Needham Branch	Forest Hills - Needham	Jointly Used
Franklin Branch	Readville - Franklin	Jointly Used
"Northeast Corridor" (Shoreline)	Boston - RI Border	Jointly Used
Stoughton Branch	Canton - Stoughton	Jointly Used
Dorchester Branch	South Station - Readville	Jointly Used
Middleboro Main Line	Boston - Lakeville	Jointly Used
Plymouth Branch	Braintree - Plymouth	Jointly Used
Kingston Branch	Kingston	Passenger Only

Of these, all are or were jointly used with one or more of the parties to the subject Transactions, except the Kingston Branch which was built, and is used exclusively, by MBTA as access to a layover facility. Freight service is provided on all the MBTA-owned track assets by Parties that are the subject of these proceedings. MBTA also owns other rail lines in Massachusetts that are used solely for the provision of freight services by the Parties that are subject of these proceedings. Virtually all of these MBTA-owned track assets connect with, or are included as among, the lines that are the subject of these proceedings.

MassDOT owns the following railroad assets:

- Portions of the Grand Junction Branch extending between milepost QBG 0.00 and milepost QBG 2.79, between milepost QBG 3.21 (Somerville) and milepost QBG 3.31 (Charlestown) between milepost QBG 4.65 and milepost QBG 5.97.
- A portion of the Boston Terminal Running Track between milepost QBB 0.00 and milepost QBB 1.10.
- The New Bedford Secondary between milepost QN 13.33 (at Cotley Junction) and milepost QN 31.80 (at New Bedford), including CSXT's property interests in the right-of-way and track assets of the North Dartmouth Industrial Track (also known as the Watuppa Branch) between milepost QND 0.0 and milepost QND 0.08 and CSXT's property interests in the right-of-way but not the track assets between milepost QND 0.08 S and milepost QND 6.0.

- The Fall River Secondary, between milepost QNF 0.00 (at Myricks) and milepost QNF 14.37 (at the Fall River, Massachusetts – Rhode Island state line).
- The track assets of the “Boston Main Line-East” between QB 0.46 (at CP Cove) and milepost QB 10.83 (at Newton/Riverside).
- The Worcester Main Line between milepost QB 21.38 at Framingham, Massachusetts, and milepost QB 44.30 at Worcester, Massachusetts.
- The Berkshire Line, between milepost 49.9 at the Massachusetts-Connecticut border at Sheffield, Massachusetts, to milepost 86.3 at Pittsfield, Massachusetts.
- The Framingham Secondary, between milepost QBF 0.0 at Mansfield, Massachusetts, and milepost QBF 21.2 at Framingham, Massachusetts.
- The Knowledge Corridor between Station 2+25 in Springfield, Massachusetts, and the Massachusetts-Vermont border at Station 2613+66.85 at East Northfield, Massachusetts.
- The Adams Branch between Station 739+20 in Adams, Massachusetts, and Station 981+45 in North Adams, Massachusetts.
- The Buzzards Bay Secondary between milepost 1.5 at Middleboro, Massachusetts, and milepost 19.9 at Bourne/Buzzards Bay, Massachusetts.
- The Hyannis Secondary between milepost 0.0 at Bourne, Massachusetts and milepost 24.3 at Hyannis, Massachusetts.
- The South Dennis Secondary between milepost 0.0 at Yarmouth Junction, Massachusetts, and milepost 2.81 at Station Avenue in Yarmouth, Massachusetts.
- The Falmouth Secondary between milepost 0.0 at Bourne, Massachusetts, and milepost 6.8 at Falmouth, Massachusetts.
- The Watuppa Branch, between milepost 0.08 at New Bedford, Massachusetts, and milepost 10.66 at Westport, Massachusetts.
- The Dean Street Industrial Track between mileposts 0.0 and 1.5 in Taunton, Massachusetts.
- A portion of the Middleboro Subdivision comprised of the Attleboro Secondary, between Attleboro and Taunton, Massachusetts, a segment of the New Bedford Secondary in Taunton, Massachusetts, and a segment of the Middleboro Branch in Taunton (a total of 18.2 miles).

- The Randolph Secondary between milepost 0.00 and milepost 1.0 in Randolph, Massachusetts.
- The Ware River Secondary between milepost 1.65 at Palmer, Massachusetts, and mileposts 25.0 at Barre, Massachusetts.

Of these, the Grand Junction Branch, Worcester Main Line, Knowledge Corridor, Framingham Secondary, Adams Branch, Randolph Secondary, and Middleboro Subdivision host freight service provided by one or more of the parties to the subject Transactions; and the Grand Junction Branch, Buzzards Bay Secondary, Framingham Secondary, Hyannis Secondary, Worcester Main Line, and the Knowledge Corridor also host MBTA and/or intercity passenger rail service provided by the National Railroad Passenger Corporation (“Amtrak”). Virtually all the MassDOT-owned track assets connect with, or are included as among, the lines that are the subject of these proceedings.

Beyond the Commonwealth’s stake in these Transactions as the owners of involved railroad infrastructure listed above, and (in MBTA’s case) as the entity responsible for the provision of commuter rail service on lines involved in and/or affected by the Transactions, the Commonwealth also has a stake in efficient and reliable intercity passenger service currently provided by Amtrak over multiple corridors traversing Massachusetts. Accordingly, the Commonwealth must assure that the Transactions, if permitted to proceed by this Board, promote and do not harm shippers, passenger rail service patrons, and Commonwealth-owned railroad infrastructure, and these considerations must be carefully considered as part of the Board’s overall public interest analysis. And even if it could be argued that the Transactions might, on balance, deliver benefits to the Massachusetts shipping public, the Commonwealth submits the Board possesses sufficient discretion under its Congressional mandate to impose

specifically-targeted conditions to ensure that such benefits do not inure to the detriment of other interests, including, for example, railroad passenger service.

The Commonwealth has carefully considered the varied and extensive ramifications of the proposed Transactions, and perceives that the Transactions, taken together, may benefit certain shippers and may yield various operating efficiencies that are commonly promoted by those advancing rail systems consolidations such as the one presented to the Board here. And, while certain Massachusetts stakeholders indeed may benefit, it is unclear at best whether those benefits would outweigh the risks of harm to the public interest, including, among others, inadequately-maintained or managed railroad infrastructure, and deteriorated passenger rail transportation in the Commonwealth.² Furthermore, the Applicants have extolled the anticipated transportation benefits of the Transactions, but their conclusions about potential adverse impacts of the Transactions (and the steps that the Applicants will take to avoid or correct such adverse impacts) too often devolve to vague and conclusory assurances, frequently divorced from specific steps that the Applicants will take if they are incorrect in assuming, for example, that the Transactions will not harm passenger rail service in Massachusetts.

As further context, and as the record indicates, the Commonwealth has been (and remains) actively engaged in discussions with the applicants and allied parties – but primarily with CSX Transportation, Inc. (“CSXT”) – to reach a written accord whereby the Commonwealth may (as it hopes to be able to do) rescind some or all of its current reservations

² Among other things, the Commonwealth is concerned about the risks to the Wachusett Reservoir, one of the largest and most important fresh water impoundments in Massachusetts, critical to over 3 million residents of the greater Boston area. Therefore, in addition to the conditions raised in the instant Comment, the Commonwealth acknowledges the concerns raised by the Massachusetts Water Resources Authority (“MWRA”), and endorses MWRA’s separate request for conditions filed in these proceedings.

about the Transactions. While discussions among the Commonwealth and CSXT have been amicable, the Commonwealth has been pressing for specific written protective arrangements and protocols, particularly as relates to mechanisms to address and protect against potential freight train conflicts with passenger trains, and to assure the proper upkeep of Commonwealth-owned railroad facilities used, and in some cases maintained, by those who are parties to the Inter-related Filings.

CSXT and those parties allied with it, have listened and have been respectful of the Commonwealth's concerns. But, to the Commonwealth's disappointment, CSXT (and PAS, for that matter) have to this point offered only vague assurances that post-Transaction freight operations will not materially interfere with passenger train operations in the Commonwealth where both services share the same trackage, and have offered only to agree to *discuss* service disruptions if and where they may arise (including agreeing to talk about what to do about them). Such reluctance or unwillingness to reach a written accord on prescriptive remedies in the event of Transactions-related passenger service disruptions in the Commonwealth is not only frustrating, but it is tacitly dismissive of the Commonwealth's concerns, and it undercuts the strength of CSXT's (and allied party's) assurances that, for example, MBTA's extensive commuter rail operations radiating from Boston won't be harmed.

The Commonwealth remains hopeful that CSXT and PAS will revisit their resistance to meaningful written commitments to protect the Commonwealth's interests as they arise from these proceedings, and reach terms with the Commonwealth. Through such constructive and definitive efforts, CSXT and PAS could avoid the prospect that the Board would intervene to balance the respective interests of the parties, particularly in the light of Executive Order Number 14036, *Promoting Competition in the American Economy*, 86 FR

36987 (July 9, 2021), which, in emphasizing the importance of railroad passenger service as a contributor to the American economy, encourages the Chairman of this Board to work with his fellow members to, among other things, “ensure that passenger rail service is not subject to unwarranted delays and interruptions in service due to host railroads’ failure to comply with the required preference for passenger rail, vigorously enforce new on-time performance requirements adopted pursuant to the Passenger Rail Investment and Improvement Act of 2008 (Public Law 110-423, 122 Stat. 4907) that will take effect on July 1, 2021, and further the work of the passenger rail working group formed to ensure that the [Board] will fully meet its obligations.”

Following are the items that the Commonwealth requests that the Board impose as conditions to approval of the subject Transactions (again, the legal bases for these requests for relief will be presented at the briefs phase of the proceedings):

1. Upon consummation of the Transactions, CSXT will transfer to MBTA train dispatching responsibilities for all MBTA and MassDOT-owned line segments – (1) over which regularly-scheduled commuter rail passenger service operates; and (2) over which CSXT otherwise holds, or would hold, dispatching responsibility post-Transactions. As a general rule, this condition would place such duties in the hands of the predominant user of the subject line segments as measured by average total daily train movements, and would best balance the interests of freight and commuter train service in keeping with recent executive directives, including Executive Order Number 14036. If CSXT is not required to transfer dispatching responsibilities as set forth above, then CSXT must be required to maintain dispatching functions permanently at MBTA’s existing Billerica dispatching offices, and must employ dispatching software and technology prescribed by MBTA to ensure that MBTA can monitor CSXT dispatching in real time, and in order to coordinate MBTA’s dispatching territories with those MBTA-owned routes that CSXT would dispatch.
2. MBTA has determined that railroad freight volumes threaten existing capacity on MBTA-owned trackage, including between Ayer (MP-36.0) and Willows (MP-33.7) that CSXT (and others) will also use post-Transactions, specifically interference with, and delays to, passenger trains that regularly traverse this territory and others. (This is an issue that will be revisited in the discussion to follow in light of recently-offered new evidence from CSXT.) CSXT must be required to develop a plan within three (3) months of the consummation of the Transactions to alleviate such overburdening, which plan

should include designated traffic volume thresholds (approved by MBTA), that, when exceeded, would trigger a CSX capital investment to alleviate congestion, including, but not limited to, the installation of additional main line trackage parallel to existing MBTA Ayer-Willows main tracks, if CSXT will not do so voluntarily.

3. Within three (3) months of the consummation of the Transactions, CSXT will, with the Commonwealth, engage in a joint inspection and evaluation with of MBTA-owned and MassDOT-owned railroad facilities currently maintained by or for any rail carrier subsidiary of Pan Am Railways or by or for PAS to determine whether such facilities have been maintained to a condition that – (a) meets railroad industry standards of serviceability and safety; or (b) complies with the standards of upkeep set forth in the agreement or agreements governing PAR’s and/or PAS’s use and control of each such facility, whichever standard of maintenance and safety is higher in the case of each such facility.
 - As part of this joint inspection process CSXT, PAS and the Commonwealth shall assemble a panel of three inspectors (the “Panel”), each member of which will be qualified in the inspection and evaluation of railroad facilities. The Panel, by a majority vote will– (i) ascertain or, of not already prescribed, establish the appropriate standards to which each facility should be evaluated; and (ii) determine whether each facility inspected meets the applicable standard. If the condition of a facility inspected does not meet the appropriate standard, the Panel shall prescribe the remedial steps necessary to bring the deficient facility to conformance with the appropriate standard.
 - CSXT and PAS shall, collectively, appoint one Panel member, the Commonwealth will appoint one Panel member, and the CSX/PAS and Commonwealth Panel members shall select and appoint the third, independent, Panel member.
 - CSXT or PAS (as applicable) will be responsible for the costs of all work necessary to bring any deficient facility to a condition that meets the applicable standard, including the cost of design. To the extent that CSXT and/or PAS use such facilities post-Transactions, CSXT and PAS will maintain such facilities to the governing standard.

This condition will assure compliance with the general assurances woven into the application that CSX and the other parties to this transaction will adhere to, and honor their commitments to abide by the terms of the agreements that PAS and the various PAR subsidiary carriers currently have with others.

4. PAS will maintain the MassDOT-owned Knowledge Corridor to a condition that satisfies the Federal Railroad Administration’s safety standards for Class 4 railroad track, in adherence with existing agreements between MassDOT and PAS. In so doing, PAS will comply with the terms of the Operating Agreement between MassDOT, MBTA and PAS

dated May 21, 2015, and more specifically, Exhibit B to that agreement – Service Outcome Agreement of the 2015 Operating Agreement.

5. CSXT and PAS must be required to commit to work with MassDOT in good faith, to explore, study, and allow additional expanded passenger service in Western Massachusetts, including, but not limited to, introduction of such passenger service identified in MassDOT's East West Rail Study on mutually acceptable terms over the former Boston & Albany main line, and the PAS main line west of Ayer.
6. In keeping with condition #5 CSXT must be required to reach an accord with the National Railroad Passenger Corporation ("Amtrak") with respect to certain Amtrak and Commonwealth-supported intercity passenger train initiatives (as Amtrak may discuss in its own responsive filing to the Board) that will benefit mobility within, and proximate to, Massachusetts, including, but not limited to – (a) the introduction of seasonal round-trip service (with certain multiple daily starts) between Albany, New York and Pittsfield, Massachusetts (known as the *Berkshire Flyer*, under terms to be provided by Amtrak); (b) multiple round-trip service between Springfield and Worcester, Massachusetts; (c) up to two daily round-trip service between Albany and Worcester, Massachusetts; and (d) the negotiation in good faith (under general terms and conditions regarding modelling and impacts analysis and mitigation set forth by Amtrak) of expansion of or modification to existing intercity service within the Commonwealth.
7. CSXT will support the continued development of a Springfield Master Plan for capital improvement investment to enhance North-South, East-West and multidirectional passenger services in and around Springfield Union Station, including, but not limited to, passenger layover facility(ies), additional tracks and platform access, and expanded interlockings. Consistent with the goals and purpose of the Springfield Master Plan, CSXT will not remove, without MassDOT's written consent, the 950-foot-long "shoo fly track" installed as part of the Springfield Station project.

Of the conditions discussed above, condition #2, above, warrants additional discussion in light of CSXT's recent Supplemental Verified Statement of Mark Wallace (the "S.V.S. Wallace"), served upon counsel for the Commonwealth at 6:28PM Central on August 19, 2021. To the Commonwealth's astonishment, by way of the S.V.S. Wallace, it appears that CSXT has provided new, and material evidence on Transactions-related traffic growth projections that differ from – and show traffic increases on some line segments (including several in Massachusetts) that are well beyond – those projected in the application filed in the FD

36472 docket on July 1, 2021,³ which, at the time merely anticipated 1.5% “organic growth.”⁴ While this new data is presented in terms of changes in annual gross tonnage, it is unclear how such projected tonnage increases would translate into increases in daily freight train frequencies or increased train lengths (or both), all of which is data that is highly relevant to the Commonwealth’s passenger train impacts analysis that underpins condition #2.

CSXT’s new traffic forecasts contained in the S.V.S. Wallace arrived “after hours,” a mere six business days before comments such as this one were due (including August 27). This new traffic forecast data is highly relevant to the Commonwealth’s public interest analysis (and suggests even more significant threats to MBTA commuter service than originally thought), and so accepting this new information at this late date without corresponding adjustments to the procedural schedule would be highly prejudicial. Accordingly, and to remedy the prejudice occasioned by the late filing of the S.V.S. Wallace, the Commonwealth will supplement its comments and request for conditions on topics bearing on the newly-supplied CSXT traffic projections on or before September 20, 2021.

Given the statute-imposed limitation on the time frame for comments and requests for conditions, the Commonwealth reserves its right to present its legal case in support of its request for conditions at the final briefing phase on January 3, 2022. In addition, the Commonwealth will, as indicated, supplement these comments and request for conditions on September 20 to address traffic increase mitigation, respond in October to other interested parties’ comments and requests for conditions as the Commonwealth’s interests may appear, and

³ See Id., Exhibit 4 (Full Impact of Transaction column).

⁴ S.V.S. Wallace at 2 (“for purposes of my traffic growth forecasts through the year 2024, I assumed that traffic for the PAR System and PAS would increase roughly at the rate of traffic growth assumed for CSXT as a system— 1.5% annually from 2019 through 2024”) (footnote omitted).

participate at any other juncture in this proceeding where it is entitled to do so under the terms of the governing procedural schedule. But the Commonwealth remains hopeful that in the interim, CSX and PAS will have moved beyond vague assurances, and will have reached an accord on measurable and definitive ameliorative and rail-service-protective measures with the Commonwealth that CSXT and PAS have thus far resisted pursuing. The 11th hour presentation of highly-relevant new freight traffic projections, however, is disconcerting to say the least, and is counter-productive to resolution of certain of the issues the Commonwealth has raised here.

Respectfully Submitted,

/s/ *R. A. Wimbish*

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Audrey L. Brodrick
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**ATTORNEYS FOR MASSACHUSETTS
DEPARTMENT OF TRANSPORTATION AND
MASSACHUSETTS BAY TRANSPORTATION
AUTHORITY**

CERTIFICATE OF SERVICE

I hereby certify that I have this 27th Day of August arranged to serve the foregoing Comments and Request for Conditions of the Commonwealth of Massachusetts Department of Transportation and Massachusetts Bay Transportation Authority upon all parties of record by electronic service or, where such service is not available, by U.S. Mail, postage prepaid.

/s/ *R. A. Wimbish*
Robert A. Wimbish