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BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36472 (Sub-No. 5)

PITTSBURG & SHAWMUT RAILROAD, LLC d/b/a
BERKSHIRE & EASTERN RAILROAD
— OPERATION EXEMPTION —
PAN AM SOUTHERN LLC

VERMONT RAIL SYSTEM'S REPLY IN OPPOSITION TO PITTSBURG & SHAWMUT RAILROAD, LLC'S PETITION FOR EXEMPTION

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ATTORNEYS FOR VERMONT RAIL SYSTEM (VERMONT RAILWAY, INC.; WASHINGTON COUNTY RAILROAD COMPANY; AND GREEN MOUNTAIN RAILROAD CORPORATION)

Dated: August 27, 2021

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Vermont Rail System ("VRS") hereby responds to the petition for exemption (the "Petition") filed in this proceeding by Pittsburg & Shawmut Railroad, LLC d/b/a Berkshire & Eastern) ("B&E") to operate the network of railroad lines that comprise the Pan Am Southern LLC ("PAS") system. For the reasons set forth below, the Petition must be denied for failure to meet the applicable standards for an individual exemption.

About Vermont Rail System and its Central Role in the Vermont Economy and the Vermont Transportation Network

VRS, headquartered in Burlington, Vermont, is a business name used by six short line railroads controlled by Trans Rail Holding Company. The VRS railroads are located in New York, Vermont, and New Hampshire, and include the following three railroads, as pertinent to this proceeding:[1]

- Vermont Railway, Inc. ("VTR"), which operates approximately 128 miles railroad from Burlington to Hoosick Junction, New York.

1 The other three railroads comprising the VRS system are New York and Ogdensburg Railway Company, Inc. (operating in New York); Merrimack and Grafton Railroad Corporation (operating in New Hampshire); and Clarendon and Pittsford Railroad Company (operating in and between Vermont and New York).

- Washington County Railroad Company ("WACR"), which operates approximately 102 miles of railroad over its Newport-to-White River Junction, Vermont "Connecticut River Division," and the 13 miles of its "Granite District," extending generally southeastward from Montpelier Junction to Websterville. WACR serves customers in New Hampshire and Vermont.

- Green Mountain Railroad Corporation ("GMRC"), which operates over roughly 52 miles of railroad between Rutland and Bellows Falls, Vermont, and across the Connecticut River to North Walpole, New Hampshire.

For current purposes, VTR, WACR, and GMRC are participating collectively in these proceedings, and as their respective interests may appear, as VRS.

The lines operated by VTR, WACR and GMRC are all owned by the State of Vermont through its Agency of Transportation ("VTrans"), which has invested hundreds of millions of dollars into the state's rail infrastructure in a decades-long effort to ensure competitive pricing and service both to and within Vermont. Accordingly, VRS is closely aligned in this proceeding with VTrans, recognizing that what protects VRS-served businesses benefits the commercial interest of the State of Vermon,t and advances the state's interest in the rail infrastructure that it owns. The six VRS railroads moved approximately 5.5 million tons of freight in 2018, principally including commodities such as limestone, feed grains, rock salt, diesel, heating oil, gasoline, propane, forest products, stone, and other various commodities.

The Applicable Standard of Review for an Individual Exemption

In order to obtain an individual exemption under 49 U.S.C. § 10502 to undertake B&E's proposed operation of PAS (the "B&E/PAS Transaction"), B&E (the petitioner) must convince the Board that regulatory review of the proposed transaction under the more exacting requirements and involved merits assessment of a formal application is "not necessary to carry at the transportation policy of [49 U.S.C. § 10101];" and either – "the transaction is of limited scope" or formal regulation "is not needed to protect shippers from the abuse of market power."[2] B&E has failed to satisfy the individual exemption criteria of Section 10502.[3] The proposed B&E/PAS Transaction is – (1) counter to the rail transportation policy in many respects, and thus warrants more careful scrutiny that is afforded under the limited scope review applicable to an individual petition for exemption; (2) is not a transaction of limited scope; and (3) threatens the accumulation, and abuse, of market power by reducing competition throughout the state of Vermont. As such, the Petition must be denied.

How We Got to B&E/PAS, and Why We Shouldn't Have

It is important to keep in mind why B&E is seeking approval in this Related Transaction to assume operation of PAS as PAS's agent. Springfield Terminal Railway Company ("ST") currently serves as agent-operator of PAS pursuant to an agreement among PAS's current owners, Norfolk Southern Railway Company ("NSR") and Boston and Maine Corporation ("B&M" – itself a holding of Pan Am Railways, Inc. – "PAR"). Specifically, the Petition is a by-product of an agreement by CSX Corporation ("CSX") to acquire certain railroads (the "PAR Railroads") currently controlled indirectly by Pan Am Systems, Inc. (and directly by PAR) and to merge those PAR Railroads into CSXT (the "CSX/PAR Transaction"). As a result of that agreement, CSX and CSXT have filed an application under FD 36472 main docket encompassing, among other things, CSX's proposed acquisition of a controlling interest in the PAR Railroads, and, through B&M, a 50% stake in PAS.

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2 49 U.S.C. § 10502(a).

3 FD 36472, Decision No. 4 (STB served Jul. 30, 2021), 22 ("VRS's concern that the B&E transaction would not be subject to the 'more searching' application process is . . . unconvincing. Parties seeking operating authority are free to seek approval using the exemption process of 49 U.S.C. § 10502. VRS and others will have an opportunity to present their arguments for why the exemption standard has not been met.").

It is apparent from review of the materials submitted in support of the Revised Application that NSR, concerned about the potential competitive ramifications of the CSX-PAR Transaction, was not amenable to retaining ST as agent-operator of PAS, prompting the search for a replacement upon (or after) the proposed closing of the CSX/PAR Transaction. NSR and CSXT ultimately selected Pittsburg & Shawmut Railroad, LLC d/b/a Berkshire & Eastern Railroad ("B&E"), a subsidiary of Genesee & Wyoming, Inc. ("GWI"), as prospective agent-operator to replace ST. B&E has, in turn, sought Board approval for the B&E-PAS Transaction pursuant to the above-referenced Petition.

After it became known that CSX had reached terms to acquire control of the PAR Railroads, representatives of CSXT and NSR spoke with VRS officials on multiple occasions to discuss the transactions involved and the future of New England railroading in light of the planned CSX/PAR Transaction and anticipated regulatory filings. VRS was, and is, generally supportive of the concept of CSXT merging with, and assuming operation of, the PAR Railroads, given CSXT's close interline relationship with VRS. But, as transaction-related discussions unfolded in late December of 2020, VRS expressed concern about the future operation of PAS. During those early discussions, VRS advised both Class I carriers that it perceived that serious competition and service issues would arise for itself and its customers under any arrangement that would seek to install a GWI-controlled entity as PAS operator (as are discussed further below). See Exhibit A, Verified Statement of Selden J. Houghton ("V.S. Houghton"), 9.

Although VRS urged NSR and CSXT to select virtually *any* prospective PAS operator *other than* a GWI subsidiary to avoid harming railroad competition and traffic flows in the region, NSR and CSXT nevertheless selected GWI subsidiary B&E. In so doing, NSR and CSXT have put expedience over the public interest, and, while avoiding for themselves the competitive issues associated with ST's post-CSX/PAR Transaction operation of PAS, CSXT and NSR are inflicting the very same type of competitive harms upon VRS, the State of Vermont, and shippers throughout New England.

PAS Has Emerged as a Vigorous and Effective Competitor to GWI-controlled NECR (a Competitor for VRS Destination Traffic) for VRS Interline Traffic Flows to the Benefit of VRS and its Customers

As VRS will demonstrate here, and will reinforce by its legal presentation at the briefing phase of this proceeding (if it must), the proposed B&E/PAS Transaction threatens competition, especially for Vermont railroad customers, that are unacceptable, could have been avoided by selection of a different PAS operator (including NSR itself), and are not – and cannot be – mitigated by the vaguely-articulated safeguards that CSXT and NSR say that they will impose to blunt the competitive impacts that they also recognize. Regardless of the claimed efficacy of such ostensibly competition-protecting conditions, the fact is that GWI will have no incentive to compete against itself, and it will have every motivation to explore ways to exploit the market power it would gain through common control of the two railroads that have for years stood as competitors for VRS traffic. See Exhibit B, Verified Statement of Thomas D. Crowley and Robert D. Mulholland, ("V.S. Crowley/Mulholland"), 20-21. It is hard to imagine any arrangement under which the proposed B&E/PAS Transaction could win approval under an individual petition for exemption, but, as currently structured, the present transaction surely cannot satisfy the exemption criteria of Section 10502 (as is discussed throughout the Crowley and Mulholland Verified Statement).

As alluded to in VRS's filing of March 16, 2021 (the "March 16 Filing"), GWI-controlled New England Central Railroad, Inc. ("NECR") is both a vigorous competitor with VRS in some market flows and an essential partner with respect to some others. NECR, for example, vies with VRS for market share for two major inbound commodity movements common to both railroads – liquid propane gas ("LPG" – an essential home heating staple during harsh New England winters) and road salt (again a winter staple deployed to keep Vermont roads clear and ice-free). V.S. Houghton, 3. Both commodities are handled through separate NECR and VRS-served distribution facilities in, or proximate to, Vermont. Distribution of these two commodities is such that customers can easily shift from using a VRS-served transload facility to one served by NECR, or vice-versa at minimal incremental transload cost (if any). Id., 3. For that reason, railroad competition for handling these commodities is vigorous, and even slight changes in transportation rates or services can shift traffic dramatically, especially for road salt. Id., 3-4.

PAS, on the other hand, has been much more a partner with VRS on both LPG and road salt traffic movements. To be sure, PAS offers its own LPG distribution services in the area (including a facility in Claremont, New Hampshire that NECR and PAS both can serve), but those are not as extensive as those offered by NECR, particularly since PAS reaches only as far north at White River Junction, Vermont, where, by comparison, NECR traverses the entire length of Vermont, south to north, with much more extensive regional overlap with VRS. PAS also coordinates with VRS on the deployment of propane through staging facilities at PAS's East Deerfield yard. Also, PAS has proven over the past several years to be a committed partner in road salt flows onto VRS. Id., 4.

PAS presence in the market has, over the past several years, changed the competitive environment in and around Vermont substantially and for the good. Id., 4. PAS, most critically, reopened the long-inactive Hoosick Junction, New York, interchange, which has become a vital gateway for traffic moving from points south and west of Vermont into the VRS service territory. Reactivating this interchange provided for a direct VRS-NS connection via PAS haulage, and a more competitive gateway to CSXT via Rotterdam Jct. Moreover, PAS has cooperated with VRS on New York state-funded initiatives to improve and expand PAS-VRS interchange infrastructure located there (these infrastructure efforts are ongoing). Id., 5. Beyond that, the Hoosick Junction gateway and connecting rail routes on either side support the movement of 286,000 pounds gross weight on rail freight cars. Id., 5. By comparison, the competing NECR route between the NECR-CSXT interchange at Palmer, Massachusetts (CSX interchange) and East Northfield, Massachusetts (where that line joins with PAS and extends to Bellows Falls and beyond) is not 286K-capable. Id., 5; *see also* map attached as Exhibit C.

In addition, the PAS joint venture ushered in an era of increased competition along the so-called "Conn River Line" that PAS and NECR share between East Northfield (at the Vermont-Massachusetts border) and White River Junction at the interchange with WACR. Specifically, where NECR had in the past been the predominant interline participant in north-south traffic flows to and from the Conn River Line gateways at Bellows Falls and White River Junction, and PAR had only a very modest stake in such traffic flows, PAS undertook a concerted effort to gain market share, and succeeded in doing so through favorable rates and improved service frequency, growing the VRS-PAS interchange at both gateways considerably. V.S. Houghton, 4-5. For many years NECR has offered haulage service to VRS to link its otherwise-separated GMRC and WACR lines via the Conn River Line, but, in the absence of PAS competition, NECR service reflected what could best be characterized as "indifference" toward the traffic. Id., 5; *see also* Exhibit C.

PAS, however, became a strong competitor for VRS overhead traffic moving between points on VRS west and south of Bellows Falls (including, notably, inbound traffic delivered to VRS at Hoosick Junction) and points on WACR north of White River Junction. Such competition spurred NECR to improve its efficiency and responsiveness of its haulage service to the benefit of VRS customers. V.S. Houghton, 6. In fact, VRS believes that PAS's inroads into Bellows Fall-White River Junction overhead traffic movements for VRS (that NECR had dominated for years) could well have been an impetus behind NECR's attempt to increase its trackage rights charges to PAS, leading to the fairly-recently concluded trackage rights compensation proceeding at the Board, where NECR's trackage rights fees maneuver was thwarted decisively.[4] (PAS possesses local trackage rights over NECR over the entire length of the Conn River Line, as that line segment has been defined above.)

As the attached map reflects (Exhibit C), VRS lacks any direct physical connection with its chief Class I interline partners, CSXT and NSR, and so depends upon intermediary (bridge) carriers (and on haulage arrangements that are terminable by both parties) to forward predominantly inbound commodity flows to VRS. And, as VRS had pointed out in its March 16 Filing, of the seven interline gateways VRS has with connecting railroads, two (Burlington, Vermont, and Montpelier Junction, Vermont) are exclusively served by GWI-controlled NECR, two others (Bellows Falls and White River Junction) are competitively served by NECR and PAS, and another (Hoosick Junction – the unfolding success story discussed above) is served exclusively by PAS. If approved as presented, however (and has VRS has pointed out before), the B&E-PAS Transaction would place five of VRS's seven gateways, including Hoosick Junction, under the exclusive control of two GWI-controlled carriers.

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4 *New England Central Railroad, Inc. – Trackage Rights Order – Pan Am Southern LLC*, FD 35842 (STB served Oct. 31, 2017).

Moreover, the entire length of the Conn River Line would fall under the operational control of the same two GWI-controlled railroads, B&E and NECR. See Map (Exhibit C).

B&E/PAS Presents Unresolved Threats to Railroad Price and Service Competition Throughout the Region

As can be readily perceived, the B&E-PAS transaction threatens competition in Vermont, and is plainly contrary to the Rail Transportation Policy ("RTP") of Section 10101. To begin with, that transaction will place the vast majority of VRS gateways under the operational control of GWI, and that is problematic in and of itself. The growth of Hoosick Junction as a key VRS gateway has resulted in NECR interline traffic losses (for NECR-VRS interline traffic that would have been routed via Palmer, Massachusetts, to Bellows Falls or White River Junction),[5] so it would plainly be in NECR's interest and, in turn, GWI's to discourage use of Hoosick Junction in favor of NECR-served gateways where it can.

Most evident of the competitive issues raised by the proposed B&E/PAS Transaction is the creation of a virtual 2-to-1 corridor along the Conn River Line, where, today, NECR and an unaffiliated PAS vigorously compete for on-line customers and for traffic interchanged with VRS at Bellows Falls and White River Junction. If the B&E/PAS Transaction were to be approved and implemented, however, service on this line would fall under the control of GWI, a parent company that would have little if any incentive to have one carrier compete against the other, reducing or eliminating meaningful competition. Indeed, under the circumstances where each commonly-controlled carrier along the corridor would have insights into the other's rate factors and pricing, the situation would result in an artificial price floor

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5 NECR historically has provided a bridge service for CSXT interline traffic destined to or from VRS points between the CSXT-NECR interchange at Palmer and the Conn River Line gateways at Bellows Falls and White River Junction.

below which either carrier would not go in the pricing of competitive traffic. V.S. Crowley/Mulholland, 24. Such a situation does not approximate the dynamics of true competition, and supports denying the Petition.

The B&E/PAS Transaction also threatens to affect VRS's and NECR's respective participation in, and competition for, interline bridge traffic flows between Canada and New England (and points south). Today VRS and PAS cooperate on an overhead route through WACR's Newport, Vermont, gateway to Canada, and through the WACR-PAS interchange at White River Junction. This WACR-PAS bridge service competes with NECR's route between its Canadian gateway at East Alburgh, Vermont, and Connecticut (and NECR's connections there with other GWI-controlled railroads). Post-transaction, GWI would, to the extent possible, likely seek to adjust service and rates on a B&E-operated PAS to undercut or eliminate competition to the benefit of a parallel NECR service offering that would likely gain higher revenues and returns than PAS might enjoy under its VSR-PAS interline arrangement. V.S. Houghton, 8; V.S. Crowley/Mulholland, 25.

There is also the obvious and inescapable issue of whether one could reasonably expect that two GWI-controlled rail carriers (NECR and B&E-operated PAS) would have any genuine incentive to compete against one another on the basis of service or price. The notion that GWI would have any incentive, for example, to allow PAS to "out-hustle" NECR on the basis of service (as just about any truly independent – non-GWI – operator would do to gain market share in a new venture) strains credulity and challenges common business sense. And NECR would have no incentive to compete with a B&E-operated PAS on the basis of price.[6] Finally, GWI would surely explore any and all opportunities to use the experience and

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[6] V.S. Crowley/Mulholland, 15.

proprietary information that it only could gain by way of its operation of PAS (through B&E) to stifle, unfairly, road salt and LPG flows (among others) to VRS served distribution facilities to the benefit of nearby NECR terminals, thus permanently depriving VRS of this critical traffic.

From a competition and public interest standpoint, it is hard to ignore the fact that installing any GWI-controlled carrier on PAS is, fundamentally, a bad idea and inconsistent with the RTP and, as such, the standards for approval applicable to this Petition for Exemption.

Vague Competition-Protecting Measures Ostensibly Intended to Blunt GWI's Undeniable Interest in Expanding its Market Share in Vermont at the Expense of Reduced Competition Assure Little, and Fail to Fix the Problems as CSXT and NSR Themselves Perceive Them

B&E, NSR, and CSXT are at least partially aware of the competitive threats that the B&E/PAS Transaction poses. They disregard that GWI will lack any incentive to compete against itself, and that GWI, despite NSR and CSXT efforts, undoubtedly will explore any and all ways to exploit its new-found position to reduce competition in New England wherever such efforts would benefit GWI as a whole. B&E and CSXT claim to have resolved these various competitive issues by cobbling together a few vaguely-articulated and unenforceable price and service commitments that, for a while at least, would purportedly freeze PAS rates post B&E/PAS Transaction. CSXT has also claimed that it, along with NSR, would commit PAS to certain service levels under a B&E operation. As evident from a close reading of the materials submitted, these "commitments" are illusory: Service levels are subject to unspecified minimum volumes and prices are subject to increase in any of a number of ways. The limitations and inadequacies of CSXT's and NSR's rate and service assurances for the B&E/PAS Transaction are discussed throughout the V.S. Crowley/Mulholland.

These supposed corrective actions fail to assure that the competitive problems inherent with B&E's proposed operation will be – or even can be – fixed, as VRS's expert witnesses, Thomas D. Crowley and Robert D. Mulholland discuss at length. The essence of the Crowley/Mulholland analysis is that GWI, as a logical business enterprise, would be incentivized to pursue that which is most financially advantageous to itself, and, here, it would be to GWI's advantage, naturally, to reduce competition faced by its subsidiaries wherever it could. Attempting to reign in GWI's undeniable business interests is, as Messrs. Crowley and Mulholland have characterized it, as foolish as the farmer putting the fox in charge of the henhouse, imposing various rules and obligations on the fox, and then expecting that the fox will not try to eat the hens, and will not allow her kin to do so, also. Id., 13, n.24.

Even if NSR and CSXT were to impose some modicum of price competition on the B&E-PAS Transaction through an initial PAS rate increase moratorium and (allegedly) measured increases thereafter,[7] it is hard to conceive of NECR and a B&E-operated PAS truly and vigorously competing against one another on the basis of service. True competitors on the Conn River Line would seek to distinguish their service offerings to attract business, as PAS currently does, for example, with Conn River Line flows with VRS against NECR's interline offerings. GWI, on the other hand, would see no advantage to that, and would, if it could, consolidate service on the Conn River Line (north of Brattleboro, Vermont, for example) to a single train in each direction between there and White River Junction. *See* V.S. Houghton, 7. On that note, while PAS has acknowledged in the CSX-PAR Application that its common carrier

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[7] Such price freezes and rate increase restrictions do not reflect an aggressive new entrant into the marketplace, as might have occurred under a different PAS operator other than B&E, as Crowley and Mulholland point out. V.S. Crowley/Mulholland, 15.

obligations extend over the Conn River Line as far as White River Junction, PAS has failed to explain how and at what frequency it will provide service north of Bellows Falls.[8]

While Conn River Line service issues are merely a distinct part of the problems that the B&E-PAS Transaction presents, it is also clear that, if that transaction were to have any chance of obtaining VRS non-opposition and STB approval, the service and competition-protecting arrangements would have to begin with extending GMRC trackage rights from Bellows Falls to the WACR connection at White River Junction to adequately protect VRS overhead traffic flows between those two VRS railroads. Even where traffic has (and does) flow between VRS lines west and south of Bellows Falls and WACR's White River Junction-Newport line, a key inefficiency in such flows are the bridge traffic interchanges that must take place at Bellows Falls (GMRC-to-PAS, for example) and again at White River Junction (PAS-to-WACR, in keeping with the example). Trackage rights between those two points would accomplish useful system integration and reduced handling. But again, it is only a small piece of the (potentially unsolvable) B&E/PAS transaction puzzle.

As with every other measure that B&E and CSXT insist will be taken to ensure that VRS and its customers will be protected from competitive abuse, similar assurances to

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8 CSXT operating plan evidence includes forecasted PAR and PAS train operating schedules, which as pertains to PAS, includes regularly-scheduled service in each direction between East Deerfield Yard in Massachusetts and Bellows Falls. See CSX/PAR Application, Exhibit 13, Verified Statement of Jamie Boychuck, Table 2. The Applicants leave unclear in the balance of Mr. Boychuck's verified statement what sort of service plan PAS has north of Bellows Falls, leaving it possible that B&E intends to have current NECR trains running north of Bellows Falls handle PAS traffic on the north end of the Conn River Line for it. If so, it is not much of a reach from there for PAS to truncate its proposed East Deerfield-Bellows Falls train pair to an East Deerfield-Brattleboro local turn, with NECR picking up and dropping off blocks of traffic at yard tracks located at Brattleboro moving to or from Conn River Line points to the north. Brattleboro is located south of Bellows Falls on the Conn River Line, and that location could, under GWI's unfettered discretion, become the northern terminus of PAS operations on the Conn River Line. *See* V.S. Houghton, 7; *see also* Exhibit C.

restrict B&E and/or GWI access to rate and service data on VRS interline traffic are maddeningly vague and dangerously inadequate, as Messrs. Houghton, Crowley and Mulholland relate. Id., 8; V.S. Crowley/Mulholland, 11-18 (and as the U.S. Department of Justice observed in its comments filed on August 26, 2021). As a VRS competitor for certain higher-volume transloadable traffic flows like road salt and LPG that can be shipped to alternate distribution hubs, NECR surely would like nothing more than to have access to consignor (origin) and consignee (destination) information, volumes, and the rate factors of each participating carrier in a traffic movement to a VRS destination that does not involve NECR in the route. NECR could, armed with such inside information, attract traffic away from VRS, perhaps permanently.

But, absent strict and water-tight counter-measures (if indeed they are more than theoretically possible), this sensitive shipper, volume and rate information would be available to GWI through B&E's operation of PAS where PAS is serving as an intermediate carrier to for traffic inbound to VRS destinations. GWI would have every incentive to use this valuable information to the benefit of NECR (who would never otherwise have access to such data).

Clearly, B&E's operation of PAS would afford B&E access to VRS interline traffic data that, when shared with GWI, would give GWI (through NECR) an unfair, and potentially financially ruinous, competitive advantage over VRS. In this case, the prospective harm is far from theoretical. CSXT has recognized the problem, and has acknowledged the need for a commitment that would either block B&E's receipt of sensitive traffic and rate data or would block B&E from sharing that data with GWI. The problem is that the anti-information-sharing measures that CSXT and NSR promise to implement, but have not yet provided, would appear to do little more than admit to the problem, and then agree that something has to be done about it. And while CSXT insists that the problem will be fixed before B&E could take over

PAS operations, we aren't sure how that will be done or if the proffered solution would be effective, especially when a B&E-operated PAS and NECR will be operating in close geographic proximity with every incentive to share management personnel and promote corporate efficiencies. What is clear, however, is that any "commitment" under which B&E would promise not to share traffic and rate data with its parent or affiliates is implausible, given that – (1) GWI will have every incentive to have, and benefit from, such information (and B&E would be under constant pressure to provide it); and (2) B&E intends to take advantage of GWI's centralized management of accounting, which would contemplate B&E sharing rate and service data with GWI in the ordinary as all other GWI rail carrier subsidiaries can and do. V.S. Crowley/Mulholland, 19-20.

Conclusion

The B&E-PAS Transaction threatens unresolved (and potentially unresolvable) competitive harms, and it threatens (unresolved) harms that are counter to the RTP. Therefore, VRS must oppose the transaction and urge the Board to deny the Petition for failure to satisfy the standards for approval of an individual exemption.

Respectfully submitted,

/s/ *R. A. Wimbish*

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EXHIBIT A

VERIFIED STATEMENT OF SELDEN J. HOUGHTON

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My name is Selden J. Houghton. I am President of Trans Rail Holding Company and of the six short line railroads located in the states of Vermont, New Hampshire, and New York which operate as Vermont Rail System ("VRS"). I received my engineering degree from Clarkson University, and have worked at VRS for more than twenty years. In my current role, I am ultimately responsible for all areas of VRS operations, infrastructure, and planning. My role also includes direct engagement with VRS customers and rail shippers.

The purpose of this statement is to address how the proposed operation of the Pan Am Southern, LLC ("PAS") railroad network by Pittsburg and Shawmut Railroad, LLC, d/b/a Berkshire and Eastern Railroad Company ("B&E" – a subsidiary of railroad holding company Genesee and Wyoming, Inc. ("GWI")), would harm railroad competition for customers on VRS and throughout New England.

To demonstrate how the B&E/PAS Transaction would harm railroad competition and railroad customers in New England, I will discuss in this verified statement VRS's network and traffic; explain how the commercial relationship between PAS and VRS has benefitted VRS's customers and sharpened competition in the region; and detail how a B&E-operated PAS would be detrimental to rail competition in New England, and would harm VRS customers.

VRS NETWORK AND TRAFFIC

VRS consists of six commonly-controlled short line railroads in three states, which together operate approximately 375 route miles of railroad lines in Vermont, New Hampshire and New York. These railroads include the Clarendon and Pittsford Railroad Company, which operates in New York and Vermont; Green Mountain Railroad Corporation ("GMRC"), which operates in New Hampshire and Vermont; Merrimack & Grafton Railroad Corporation, which operates in New Hampshire; New York & Ogdensburg Railway Company, Inc., which operates in New York; Vermont Railway, Inc. ("VTR"), which operates in New York and Vermont; and Washington County Railroad Company ("WACR"), which operates in Vermont. This testimony regarding VRS generally involves VTR, GMRC, and WACR. The railroad lines operated by VTR, GRMC and WACR are owned by the State of Vermont. See Appendix 1, VRS Route map (previously submitted as Exhibit A to VRS Notice of Intent to Participate and Opposition to Application and Petition (March 16, 2021).

As relevant here, VRS interchanges traffic (via PAS-supplied haulage) with Norfolk Southern Railway Company ("NSR") and (via PAS interline service) CSX Transportation, Inc. ("CSXT") at Hoosick Junction, New York. VRS also maintains active interchanges with New England Central Railroad, Inc. ("NECR") and PAS at Bellows Falls and White River Junction, Vermont. (PAS access to Bellows Falls and White River Junction depends upon trackage rights it possesses over the GWI-controlled NECR.)

In addition to the competitively-served Bellows Falls and White River Junction gateways, NECR also has exclusive interchange connections with VRS at Burlington and Montpelier Junction, Vermont.

Beyond the interchanges as Bellows Falls and White River Junction, VRS also interchanges traffic with PAS at Hoosick Junction as indicated above.

VRS's strengths include its attention to customer service, extensive coverage of the State of Vermont (which can be a challenging place for a railroad to succeed), and its multiple competitive gateways and interline partners that enhance Vermont rail shipping options. Those service strengths will be significantly undercut if B&E is permitted to operate PAS: GWI subsidiaries post-merger will control five of the seven interchanges relied upon by VRS customers to reach key Class I carriers and substantially reduce if not eliminate the benefits PAS has brought to the New England region as a competitor to NECR.

VRS carries a variety of traffic, including propane, road salt, heating oil, gasoline, diesel fuel, feed grain, barley and hops, granite and minerals, and lumber and forest products. Some of this traffic originates on the VRS network; for example, significant limestone slurry traffic originates near Rutland and moves over VRS *en route* to Maine and other points in interline service. However, most VRS freight traffic is inbound traffic, received from other carriers and delivered to customers and distribution facilities on the VRS system.

VRS's customers depend upon competitive and efficient interline service, and such service depends upon the presence of effective competition among alternative routes and carriers. Much of the traffic VRS terminates on its system that arrives from the west and south of New England, particularly propane and road salt, is received at Hoosick Junction, Bellows Falls and White River Junction. Inbound road salt and propane are critical for VRS customers in autumn and winter. The salt is needed for the roads, and the propane for heating homes and businesses during harsh New England winters. It is worth noting that one of the main sources of road salt in upstate New York is located on another GWI-controlled railroad, the Rochester and Southern Railroad ("R&S"); however, there are competitive source alternatives that do not originate on R&S that compete for Vermont business.

Given the current network structure, VRS and NECR vie for road salt and propane shipments into Vermont, as customers can choose any of a number of distribution or transloading facilities located on either VRS or GWI's network and even slight changes in transportation rates or services can shift traffic dramatically. VRS and NECR also compete for overhead traffic moving between Canada and southern New England. This overhead traffic can be routed over either NECR (via its gateway at East Alburgh, Vermont), or, in partnership with PAS, over VRS (via WACR's Newport, Vermont gateway).

<u>THE FAVORABLE AND MUTUALLY-BENEFICIAL VRS-PAS RELATIONSHIP</u>

One of the most significant developments in New England railroading in the past several years was the formation of PAS, and the service improvements and increased market aggressiveness that it has brought to the Vermont shipping landscape.

The operating relationship between VRS and PAS has proven over the past several years to have changed the competitive environment in and around Vermont, substantially and for the good of VRS customers. VRS and PAS have largely complementary systems that do not overlap extensively, and that, plus economic incentive, has created strong and cooperative ties between VRS and PAS, translating into traffic growth and market share increases for both railroads, and stronger and more favourable service options for VRS customers.

To be sure, NECR has been, and remains, a key partner for certain interline movements, and it is still an important interchange partner. But, due to the extensive regional overlap of the two networks, NECR and VRS clearly also regard each other as chief rivals for the movement of commodities such as road salt and propane (as discussed above), which can and do easily shift from one carrier and distribution facility to the other. To counter NECR's more extensive geographic reach, VRS depends upon PAS as a southern and western connection and ally.

With the arrival of PAS, propane traffic flows between it and VRS have increased significantly through gateways on the Connecticut River Line and through Hoosick Junction. VRS also benefits from an improved coordination of deliveries during periods of high demand and the staging of supplies at the PAS terminal in East Deerfield, Massachusetts, which allows for advance placement for shipments ultimately destined to a VRS-served distribution facility at

Bellows Falls. As a result of this and other traffic coordination with PAS (which had not existed prior to the formation of the PAS joint venture), VRS-PAS traffic has grown significantly, leading to increased PAS service frequency to Bellows Falls, for example, where pre-PAS interline service was previously intermittent at best. An example of PAS's commitment to interline service with VRS via the Connecticut River Line connections at Bellows Falls and White River Junction is how strenuously PAS defended itself (successfully) against NECR's attempt to dramatically increase PAS's fees for use of the NECR-owned line segment between East Northfield, Massachusetts, and White River Junction.

Another positive PAS-spurred development for shippers in the region is the reopening of, and reinvestment into the long inactive interchange with VRS at Hoosick Junction, which serves as a vibrant through route for traffic reaching Vermont from points to the west and south. Hoosick Junction's reactivation by PAS facilitates swifter and more efficient routings for NSR traffic (via PAS-supplied haulage from and to Mechanicville, New York) and CSXT traffic (via PAS interline service from and to Rotterdam Junction, New York). In addition, the tracks into and at Hoosick Junction allow VRS and PAS to accommodate high-capacity 286K freight cars, creating further efficiencies for VRS's customers by allowing them to order fewer, larger shipments. (By comparison, NECR cannot handle 286K cars between the NECR-CSXT interchange at Palmer, Massachusetts, and East Northfield, Massachusetts). In fact, VRS and PAS have actively collaborated (and still are collaborating) on funding initiatives offered by the New York State Department of Transportation that will usher much-needed capacity improvements at the Hoosick Junction interchange, improvements that I am concerned would be put at risk by a B&E-operated PAS.

The above examples are representative of how PAS is a strong and committed competitor for VRS traffic flows. Simply put, PAS has proven to be an attentive and reliable interline partner. What is more, we have also generally seen that NECR interline connections with VRS at Bellows Falls and White River Junction have improved noticeably, and that service, which could at times be unpredictable, has become more responsive, timely and consistent, in response to competition from PAS, especially when NECR interline market share began to shift to VRS-PAS routings at these gateways.

In short, PAS raised the competitive bar for interline service into and through New England, and it is representative of what I believe a good railroad service competitor should be.

A B&E/PAS TRANSACTION WILL REVERSE PAST COMPETITIVE GAINS

If B&E were to be permitted to operate PAS, that would reduce competition for VRS interline service, especially for PAS-VRS traffic routings, and it would place VRS at an unfair competitive disadvantage due to GWI (and NECR) access to confidential and commercially-sensitive VRS rate and routing data for PAS traffic that GWI and NECR would not otherwise have access to.

To begin with, a B&E-operated PAS would give GWI full control over the Connecticut River Line, converting that line into a virtual 2-to-1 corridor, foreclosing meaningful competition for shippers located on, and markets accessed by, that line, including customers on VRS that have in recent years made use of the VRS gateways at Bellows Falls and White River Junction. Moreover, given GWI's natural incentive to favor routing traffic over NECR where GWI could potentially enjoy a larger proportion of the freight revenue, it would be reasonable to expect that a B&E-operated PAS would look for any opportunity it could to discourage traffic flows through Hoosick Junction, which might extend, in fact, to PAS abandoning ongoing interchange facility improvements with VRS and the State of New York, as discussed above. Such an unfortunate move would constrain interchange efficiency and force the diversion of traffic to other, more favourable NECR-served gateways on the basis of commercially-induced congestion; alternate gateways might encounter cascading congestion of their own as traffic might reorient to the Bellows Falls interchange (for example). The threat to the Hoosick Junction gateway cannot be understated. GWI is aware that VRS's competitive position in Vermont has improved, and will continue to improve, as PAS and VRS achieve greater service and routing efficiencies through Hoosick Junction that places greater competitive pressure on NECR.

I also am deeply concerned about a natural (and logical) tendency by GWI to search out and eliminate what it will perceive as inefficiencies in largely-overlapping holdings and duplicative service lanes – an opportunity that a side-by side NECR and (B&E-operated) PAS would present. As a railroader, I believe that any rational railroad business would struggle to ignore cost cutting opportunities, and I find it hard to comprehend how GWI would allow two of its own railroads to compete with each other for service and price. Rather, I would expect that GWI would do its utmost to consolidate routes and services, eliminate duplicate railroad management – as between the connecting and overlapping NECR and PAS systems – and reduce options by encouraging the use of gateways that benefit GWI and discouraging the use of those that do not. Even if such consolidation of NECR and PAS operations were purely driven by operating efficiency, the fact is that such steps would reduce competition, effectively eliminate cost-effective service to certain, currently active VRS gateways, and potentially force VRS to accept greater inefficiency at the expense of increased PAS/NECR efficiency.

It is easy to see how these service option reductions could start. NECR currently interchanges traffic with VRS at four places: Bellows Falls, White River Junction, Montpelier

Junction, and Burlington. PAS interchanges traffic with VRS at Hoosick Junction, Bellows Falls, and White River Junction. If B&E operates PAS, then GWI alone will be present at five out of VRS's seven gateways. It should not be difficult to see how this arrangement would leave customers along VRS lines with fewer competitive options for the movement of their traffic.

In addition, the B&E/PAS Transaction could affect competition for traffic flows between eastern Canada and southern New England, where WACR-PAS cooperate on an overhead route through WACR's Newport, Vermont, gateway to Canada, and the WACR-PAS interchange at White River Junction in competition with a parallel NECR route between its Canadian gateway at East Alburgh, Vermont, to Connecticut and NECR's connections there with other GWI-controlled railroads. We are concerned that GWI will, to the extent possible, seek to adjust service and rates on a B&E-operated PAS to undercut or eliminate competition to NECR from VRS-PAS bridge traffic flows, as GWI would have the incentive to do.

As indicated above, B&E's operation of PAS would expose VRS to an unfair disadvantage, too. Specifically, absent extensive and consistently-observed restrictions, GWI, through B&E, would gain access to critical and sensitive (and otherwise confidential) PAS traffic, routing, and revenue data on VRS-PAS interline flows that could be used to NECR's competitive advantage, and to VRS's detriment. If NECR gained access to such data, and could adjust its own rates and service options accordingly, it would be able consistently to poach certain PAS-VRS interline traffic and consistently deprive VRS of substantial traffic volumes through such unfair competition. I understand that NSR and CSXT have proposed to take steps to prevent this sort of damaging information access and transfer, but, to this point, I remain skeptical that any such protective mechanisms could exist or work consistently and entirely especially with such geographic proximity.

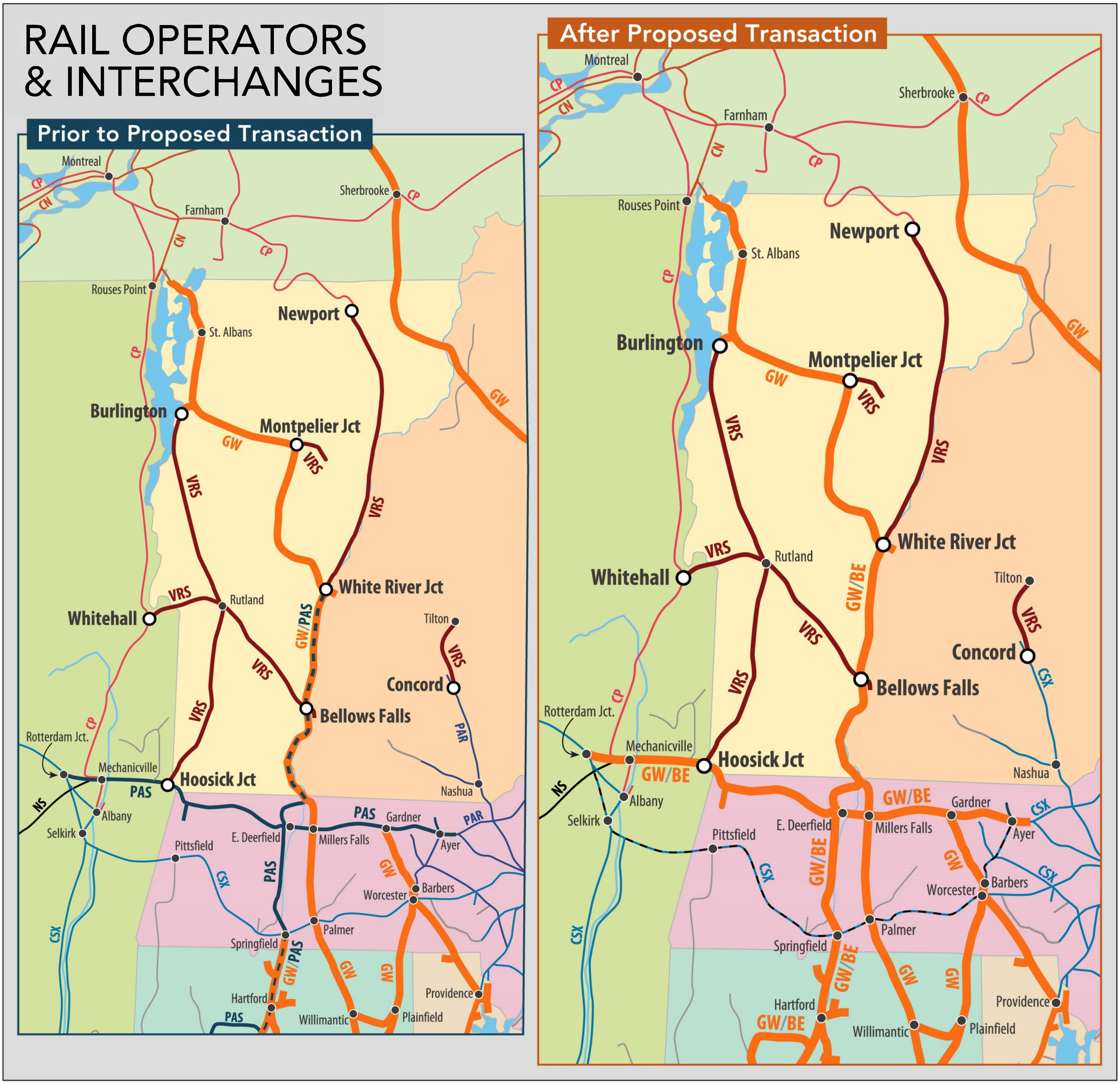
Perhaps the most frustrating aspect of this experience is that the proposed B&E/PAS Transaction is so evidently harmful to regional railroad service and competition, and yet CSXT and NSR have resolved to press ahead despite VRS's urgings to the contrary. In late December, 2020, VRS had the occasion to speak with representatives of CSXT and NSR in connection with CSXT's recently-announced plans to acquire PAR's railroad lines and merge them, along with Springfield Terminal Railway Company (current operator of the PAS and PAR networks), into CSXT. VRS was generally receptive to the CSX-PAR transaction at the time, given VRS's strong interline ties to CSXT but was unaware of CSXT's and NSR's plans with respect to the PAS operation. During those calls with NSR and CSXT officials, representatives of VRS specifically urged against the selection of a GWI subsidiary for many of the reasons I have discussed in detail above.

CONCLUSION

Because the proposed B&E/PAS Transaction is ill-advised, harmful to railroad competition and service in New England, and a threat to VRS-served customers, VRS, opposes this proposed installation of B&E as the proposed operator of PAS.

APPENDIX 1

VRS ROUTE MAP


RAIL OPERATORS & INTERCHANGES
Prior to Proposed Transaction
Montreal
Farnham
Sherbrooke
Rouses Point
St. Albans
Newport
Burlington
Montpelier Jct
White River Jct
Whitehall
Rutland
Tilton
Concord
Bellows Falls
Rotterdam Jct.
Mechanicville
Hoosick Jct
Albany
Selkirk
Pittsfield
E. Deerfield
Millers Falls
Gardner
Ayer
Nashua
Worcester
Barbers
Springfield
Palmer
Hartford
Willimantic
Plainfield
Providence
CP
CN
GW
VRS
GW/PAS
PAS
PAR
NS
CSX
After Proposed Transaction
Montreal
Farnham
Sherbrooke
Rouses Point
St. Albans
Newport
Burlington
Montpelier Jct
White River Jct
Whitehall
Rutland
Tilton
Concord
Bellows Falls
Rotterdam Jct.
Mechanicville
Hoosick Jct
Albany
Selkirk
Pittsfield
E. Deerfield
Millers Falls
Gardner
Ayer
Nashua
Worcester
Barbers
Springfield
Palmer
Hartford
Willimantic
Plainfield
Providence
CP
CN
GW
VRS
GW/BE
NS
CSX

VERIFICATION

I, Selden J. Houghton, verify under penalty of perjury that I have read this Verified Statement on behalf of the Vermont Rail System ("VRS"), that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement on behalf of VRS.

Selden J. Houghton

Executed on August 27, 2021

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36472 (Sub-No. 5)

PITTSBURG & SHAWMUT RAILROAD, LLC d/b/a
BERKSHIRE & EASTERN RAILROAD
— OPERATION EXEMPTION —
PAN AM SOUTHERN LLC

VERMONT RAIL SYSTEM'S REPLY IN OPPOSITION TO PITTSBURG & SHAWMUT RAILROAD, LLC'S PETITION FOR EXEMPTION

EXHIBIT B

VERIFIED STATEMENT OF THOMAS D. CROWLEY AND ROBERT D. MULHOLLAND

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36472 (Sub-No. 5)

PITTSBURG & SHAWMUT RAILROAD, LLC d/b/a
BERKSHIRE & EASTERN RAILROAD
— OPERATION EXEMPTION —
PAN AM SOUTHERN LLC

VERIFIED STATEMENT

of

THOMAS D. CROWLEY
President

and

ROBERT D. MULHOLLAND
Senior Vice President

L. E. PEABODY & ASSOCIATES, INC.
ECONOMIC CONSULTANTS

On Behalf Of

VERMONT RAIL SYSTEM

Due Date: August 27, 2021

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LIST OF EXHIBITS

I. INTRODUCTION

We are Thomas D. Crowley and Robert D. Mulholland, President and a Senior Vice President, respectively, of L. E. Peabody & Associates, Inc. L. E. Peabody & Associates, Inc. is an economic consulting firm that specializes in addressing economic, transportation, marketing, financial, accounting, operating and fuel supply matters. We have spent most of our consulting careers of over 50 and 26 years, respectively, evaluating railroad operations, capacity, costs, and profitability and pricing issues for shippers, producers, railroads, and government agencies. Our credentials are included as Exhibit No. 1 and Exhibit No. 2 to this Verified Statement ("VS").

We were asked by Counsel for Vermont Railway, Inc. ("VTR"), Washington County Railroad Company ("WACR"), and Green Mountain Railroad Corporation ("GMRC") to review and evaluate the competitive impacts of the transaction (the "B&E/PAS Transaction") that is the subject of *Pittsburg & Shawmut Railroad—Operation Exemption—Pan Am Southern LLC*, FD 36472 (Sub-No. 5) (the "B&E Petition"). VTR, WACR, and GMRC are commonly-controlled Class III rail carriers, and are three (3) of the six (6) affiliated railroads that collectively do business under the trade name Vermont Rail System.[1] (Collectively, VTR, WACR and GMRC will be referred to as "VRS"). Although the B&E/PAS Transaction is the subject of an individual petition for exemption, evidence intended to show that the transaction qualifies for Surface Transportation Board ("Board" or "STB") approval is found predominantly in the application filed as FD 36472.[2] We reviewed the proposed CSXT-PAR Merger Application and the B&E Petition in full, and

[1] Vermont Rail System is an affiliation of six (6) short lines: New York & Ogdensburg Railway Company, Inc. (operating in NY), the Merrimack & Grafton Railroad Corporation (operating in NH), and The Clarendon and Pittsford Railroad Company (operating in and between Vermont and New York).

[2] FD 36472, *CSX Corporation and CSX Transportation, Inc., et al – Control and Merger – Pan Am Systems, Inc. Pan Am Railways, Inc. Boston and Maine Corporation, Maine Central Railroad Company, Northern Railroad, Pan Am Southern LLC, Portland Terminal Company, Springfield Terminal Railway Company, Stony Brook Railroad Company, and Vermont & Massachusetts Railroad Company, Amended and Supplemental Application,* filed July 1, 2021("CSXT-PAR Merger Application").

comment on the extent that this transaction has bearing on the post-merger competitive position of VRS and the various customers and markets that VRS serves.

Our findings are included in the remainder of this VS under the following sections.

II. Summary of Findings
III. Background
IV. B&E’s Proposed Operation Of PAS Would Be Anticompetitive
V. The Protective Steps B&E Has Offered Are Deficient and Inadequate
VI. The Post-Merger Pricing Structure Should Reflect Genuine Competitive Dynamics
VII. CSXT Improperly Dismissed the B&E/PAS Transaction's Impact On Interline Shippers
VIII. CSXT And NSR Incentives To Ensure B&E Compliance Are Limited

II. SUMMARY OF FINDINGS

The proposed B&E/PAS Transaction would substantially harm competition and, therefore, the B&E Petition must be denied for failure to satisfy the applicable exemption criteria.

> §10502. Authority to exempt rail carrier transportation
>
> ***
>
> (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—
>
> (1) is not necessary to carry out the transportation policy of section 10101 of this title; and
>
> (2) either—
>
> (A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.[3]As referenced in §10502 (a) (1) above, §10101 contains the Rail Transportation Policy ("RTP"). The RTP requires regulation of the rail industry to comport with fifteen (15) specific policy goals, including:

> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
>
> (9) to encourage honest and efficient management of railroads;
>
> (10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

[3] 49 USC 10502. *See*, [USC02] 49 USC 10502: Authority to exempt rail carrier transportation (house.gov)

(12) to prohibit predatory pricing and practices, to **avoid undue concentrations of market power**, and to prohibit unlawful discrimination;[4]

The proposed B&E/PAS Petition should be denied because it fails to meet the standard for exemption and because the results of the proposed transaction would be counter to the above-referenced RTP goals. The proposed transaction would result in a roughly 72.8-mile railroad corridor[5] over which competition will effectively be reduced by the consolidation of operating control of both of the two (2) independent carriers currently serving the corridor. VRS has two (2) gateways along this route at White River Junction, VT, and at Bellows Falls, VT, where it currently has access to two (2) competitive options – Pan Am Southern ("PAS") and New England Central Railroad ("NECR") – for connection to Class I carriers and the larger U.S. rail network. The B&E/PAS Transaction would diminish competition for VRS-served customers that use those two (2) gateways as both would be operated by railroads that are under the control of a single short line railroad holding company, Genesee & Wyoming, Inc. ("GWI") following the transaction.

Proponents of the B&E/PAS Transaction, including the petitioner (Pittsburg & Shawmut Railroad, LLC d/b/a Berkshire & Eastern Railroad – "B&E" (a GWI company)) and CSX Transportation, Inc. ("CSXT") acknowledge that the B&E/PAS Transaction threatens anticompetitive harms and potential service deterioration for VRS and its customers. They, along with Norfolk Southern Railway Company ("NSR"),[6] claim that they have a plan that effectively would fix those transaction-related harms through a combination of temporary rate freezes at "current levels," "future reasonable rate escalations," and vague (and conditional) service

[4] 49 USC 10101. *See*, [USC02] 49 USC 10101: Rail transportation policy (house.gov), **emphasis added**.

[5] *See*, CSXT Exhibit 13, Operating Plan, Verified by Mr. Jamie Boychuk, CSXT-PAR Merger Application, pp. APP-336.

[6] Ironically, it was NSR's competitive concerns regarding CSXT's control of the majority of the New England rail market that led to the creation of PAS as a competitive option for rail shippers in the region. Now, the proposed operation of PAS by a subsidiary of GWI, which already controls three short line railroads that connect to and compete with PAS, threatens to reduce competitive options for New England rail shippers.

frequency assurances. In its FD 36472 application and supporting expert testimony, CSXT claims that the supposed fixes to the acknowledged competitive problems created by the proposed B&E/PAS Transaction will neutralize the harms that would result from that transaction in the absence of mitigation. CSXT's assurances are inadequate, and its promised mitigative actions are ill-defined. They fail conclusively to "protect shippers from the abuse of market power," and, in fact, they threaten just the opposite.

The supposed competitive safeguards that CSXT and NSR say that they will impose upon B&E as the proposed new operator of PAS lack specificity, are not guaranteed for any certain time frame, free B&E to reduce service levels at its own discretion to the competitive advantage of an affiliate, fail to guard against the imposition of fees and charges ancillary to rates and rate escalators, impose no penalties on B&E if it were to fail to maintain adequate crews and equipment to uphold its service plans, include no means to ensure compliance, inadequately address an inescapable conflict of interest, and provide no specifics regarding the protection of commercially-sensitive information, the use of which could lead to the long-term detriment of VRS and the customers it serves. As discussed below, these shortcomings make the proposed solutions incompatible with the RTP.

Moreover, the weight of CSXT's promise to keep PAS rates at current levels is diminished in light of its claims of expected efficiency gains for the post-merger CSXT and PAS. Efficiency gains should result in improved competition and lower rates, not the status quo.

GWI's control of B&E (as operator of PAS) and NECR, which are expected to remain competitors after the transaction, raises obvious conflict-of-interest concerns. The competitive issues inherent in the proposed B&E/PAS Transaction may not be effectively resolvable even under a more thoroughgoing set of protective measures from NSR and CSXT.

III. BACKGROUND

CSX Corporation and CSXT have sought approval to acquire certain railroads currently controlled indirectly by Pan Am Systems, Inc. (and directly by Pan Am Railways, Inc. – "PAR") and to merge those railroads into CSXT (the "CSX/PAR Transaction"). As part of that transaction, CSXT will also acquire a 50% stake in Pan Am Southern LLC ("PAS"). PAS operations are currently provided by Springfield Terminal Railway Company ("ST") as an operator-agent. CSXT will acquire control of ST through the CSX/PAR Transaction.

VRS connects at four (4) locations to a railroad line owned by NECR[7] that extends generally from New London, CT, to East Alburgh, VT. That NECR-owned line connects with VRS carriers at the competitive interchanges of Bellows Falls and White River Junction, and NECR is the sole interchange partner with VRS at both Burlington and Montpelier Junction, VT. PAS – currently a joint venture in which NSR and (indirectly) PAR each have a 50% membership stake – possesses and exercises local trackage rights[8] over a portion of NECR's line (the "Joint Line") between East Northfield, MA, and White River Junction – a distance of approximately 72.8 miles. NECR and PAS are currently wholly independent of each other, and they are vigorous competitors along the Joint Line.[9] PAS and NECR each connects and interchanges traffic with VRS carrier GMRC at Bellows Falls and with VRS carrier WACR at White River Junction,

7 NECR is controlled by Genesee & Wyoming, Inc. ("GWI").

8 "Local" trackage rights are those in which the trackage rights user (in this case, PAS) has the right to serve any and all customers located along the trackage rights route, and the right to interchange with third-party carriers (such as certain carriers that constitute VRS) at points along the trackage rights route.

9 The extent to which PAS and NECR are adversaries in their efforts to secure traffic on and over the Joint Line is reflected in *New England Central Railroad, Inc. – Trackage Rights Order – Pan Am Southern LLC*, FD 35842 (STB served Oct. 31, 2017), which involved a trackage rights dispute in which NECR sought to increase the trackage rights fees assessed to PAS that were far higher than those that the Board ultimately prescribed. NECR's bid to increase the trackage rights fees indicate an effort to gain a competitive advantage over PAS, whose emergence VRS has advised prompted tangible improvements in NECR service to and from VRS gateways, along with increased service competition between PAS and NECR.

affording VRS customers important access to competitive rail service options through both interchange locations.

NECR connects with CSXT's existing Boston-Albany main line at Palmer, MA, an important interline gateway for NECR. NECR participates in north-south and east-west interline traffic with VRS through the Bellows Falls and White River Junction interchanges, and CSXT via the Palmer interchange. Beyond Palmer, NECR connects with other railroad carriers in the GWI corporate family including the Providence & Worcester Railroad ("PW"), that reach other interchange points with CSXT.

PAS also enjoys multiple connections with CSXT, including Rotterdam Junction, NY, Springfield, MA, and Worcester, MA. PAS, like NECR, serves as an intermediate carrier for VRS-CSXT interline traffic, which can be routed via the PAS interchanges with VRS at Bellows Falls and White River Junction (on the North), and Hoosick Junction, NY (on the West).

Post-merger, the GWI footprint in New England will be expanded, and its competitors' footprint reduced.[10] Currently, the NECR line between White River Jct., VT and East Northfield, MA is served by the landlord NECR (GWI), and tenant PAS, giving VRS two (2) competitive options for connnecting to the national rail network along that route. After the proposed merger, the VRS interchange options at Bellows Falls and White River Junction will be operated by GWI's NECR and B&E subsidiaries. Thus, the NECR-owned Joint Line will effectively become a 2-to-1 corridor.[11]

[10] *See*, Exhibit No. 3 for a schematic of the PAS and VRS rail networks.

[11] VRS has limited, non-combinable haulage rights over NECR from White River Junction south into Massachusetts by way of haulage agreements BF-WRJ and BF-Palmer. However, these agreements contain a significant HazMat restriction. Moreover, the agreements may be terminated at the discretion of either party. As a result, VRS haulage over NECR does not constitute a comprehensive, assured or long-term competitive option.

IV. B&E'S PROPOSED OPERATION OF PAS WOULD BE ANTICOMPETITIVE

VRS opposes the selection of B&E as the post-merger agent-operator of PAS, due primarily to the reduction of competition that would result along the Joint Line, the potential harms that could flow from GWI's operational control of nearly all practicable VRS interline routes to the CSXT network,[12] and the damage to competition that could result from GWI's access to traffic, rate divisions and revenue waybill data for interline traffic that B&E would handle as an intermediate operator moving to and from VRS interchange points, as well as, quoting rate divisions for interline traffic to and from VRS.[13] Visibility into and control of confidential rate divisions for traffic that GWI's NECR could potentially compete with is a serious anticompetitive concern.

The CSXT and B&E filings concede that competition will be reduced for shippers on the Joint Line, as well as for all VRS customers that use or have access to interline routes via White River Junction or Bellows Falls. Although CSXT and B&E insist that NECR and B&E each would offer competitive rates over the Joint Line following the merger, the CSXT and B&E filings fail to identify specific rates, train schedules, service guarantees, and methods of enforcement that would be required to ensure continued competition between the two (2) commonly-controlled railroads. They include only vague promises to "establish rates on existing lanes… at current levels, subject to future reasonable escalation, as long as B&E is operator of PAS," and to

[12] VRS shippers currently have competitive interline access to CSXT via PAS to/from Rotterdam Junction, NY and Springfield, MA (through Hoosick Junction, Bellows Falls, and White River Junction interchanges on VRS), and via NECR to/from Palmer, MA (through the Bellows Falls and White River Junction interchanges). Each of these three (3) interchange points would fall under GWI operational control following the B&E-PAS Transaction, raising the potential for GWI to encourage traffic flows to its preferred route(s) without regard for the impact on VRS shippers.

[13] Absent enforceable restrictions on data sharing, GWI would be in a position to obtain and potentially use information acquired by its subsidiary B&E to inform the bid and pricing practices of its other subsidiary NECR, which would harm railroad competition in New England.

"provid[e] [VRS] with 5 day per week service in the above lanes as long as volumes support this level of service."[14]

This glaring lack of specificity regarding remedial pricing and service structure in the CSXT-PAR Merger Application, and the absence of any such guarantees in the B&E Petition, is concerning. A conflict of interest will be created as a direct result of the proposed post-merger operations. Yet B&E witness Leonard Wagner identifies the removal of alleged conflicts of interest as a benefit of the merger:

> [T]he structure of the proposed B&E – PAS railroad operating agreement will eliminate inherent conflicts of interest that exist currently among PAS, PAR and Springfield Terminal.[15]

The proposed agreement merely replaces one conflict of interest with another. GWI's intention to leverage B&E's position as PAS operator to the benefit of GWI's other New England rail subsidiaries is reflected in the GWI Term Sheet Agreement:

> 6) NSR and CSXT acknowledge that [GWI] can benefit from certain access to PAS' routes and facilities by other [GWI] railroads in New England. No later than 6 months after the Commencement Date, NSR and CSXT agree to participate in good faith discussions with [GWI] regarding the creation of certain access provisions for the benefit of [GWI]'s New England railroads that (1) are not inconsistent with any STB conditions imposed on the Transaction, (2) have the potential to enhance the financial position of PAS, (3) leverage train operations of both PAS and [GWI]'s New England railroads and (4) provides [GWI]'s New England railroads with haulage, trackage rights, line haul or facility use terms that are at industry standard levels or market levels (whichever are applicable) and meet the conditions above.
>
> 7) Subject to the approval of the PAS Management Committee, PAS and [GWI]'s New England railroads can cooperate on initiatives for their mutual benefit at fair compensation so long as any services provided do not advantage one party over the other, including the sharing of equipment

14 *See,* Pelkey, CSXT-PAR Merger Application, pp. APP-425 to APP-426.
15 *See,* Wagner VS p. 3.

> shops and providing haulage to similar locations (e.g., Springfield – Hartford – New Haven; and Bellows Falls – East Deerfield).[16]

Given GWI's stated desire to benefit by leveraging train operations of, and creating undefined access provisions among PAS and GWI's other railroads (and CSXT and NSR's contractual commitment to help implement those provisions), B&E and NECR, as GWI subsidiaries, would have little incentive to compete with each other. Reduced competition would negatively impact shippers along the Joint Line and those served by VRS that make use of service through the White River Junction and Bellows Falls gateways.

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[16] *See*, GWI Term Sheet Agreement, CSXT-PAR Merger Application, p. APP-458, Items V.6 - V.7.

V. THE PROTECTIVE STEPS B&E HAS OFFERED ARE DEFICIENT AND INADEQUATE

From a rail competition standpoint, it is clear that B&E (or any GWI subsidiary for that matter) is an inherently problematic choice to operate the PAS network, particularly given the lack of commitments to a rate structure, service guarantees, and accompanying suite of enforceable penalties for failure to honor the commitments. The protective steps CSXT, NSR and B&E say that they will take are not sufficiently delineated, and will not ensure effective competition or even the continued existence of competitive operations, given the common control of VRS' connecting railroads B&E and NECR. And they conflict with the goals of the RTP. CSXT's expert witness, Dr. Reishus, acknowledged that, as a general concept, when mergers reduce competitive options for customers, there is an economic basis to block them, unless mitigating steps are taken to protect shippers from diminished competition:

> 31. Mergers can increase efficiency and output to the benefit of the merging firms' customers. Mergers can also reduce the competitive options available to the merged firms' customers and allow the merged firm to raise prices. The economic analysis of mergers and specifically of the competitive effects of mergers is intended to distinguish those mergers that threaten to reduce competition from those that do not threaten to reduce competition meaningfully. There is no economic basis to block mergers that do not threaten competition, particularly those that will allow the merged firms to achieve merger-related efficiencies and other public benefits through post-merger reduced prices and/or service benefits. Such pro-competitive changes may benefit customers but leave competitors worse off if they are unable to match the efficiency gains. Sound merger policy permits pro-competitive effects of mergers while mitigating any potential reductions in competition that harm consumers. Sound policy is designed to protect competition, not competitors.[17]

Dr. Reishus goes beyond the general merger concepts to acknowledge that mitigation would be necessary to protect competition along the Joint Line. For example, in understated fashion, he states that:

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[17] *See,* Reishus VS, CSXT-PAR Merger Application, pp. APP-535 to APP-536, emphasis added.

> [S]hippers who today have access to two independent rail alternatives may view the post-transaction operation of PAS by B&E with some level of concern as a possible reduction in their competitive alternatives.[18]
>
> ***
>
> The Proposed Transaction could, however, raise competitive concerns in locations where [VRS] can currently connect to both PAS and NECR, including Bellows Falls, VT and White River Junction, VT.[19]
>
> ***
>
> [T]he transaction may give rise to competitive concerns about a reduction in competition that would allow GWI to raise prices for interconnections at White River Junction and Bellows Falls that would harm [VRS] and its customers. This prospect also may raise questions about GWI's ability to divert traffic that currently moves on [VRS] via Burlington, VT to NECR.[20]

In each instance, Dr. Reishus claims that commitments to maintain initial PAS rates (under B&E operation) at "current levels" and escalate them in a "reasonable" manner will sufficiently address any such concerns, citing statements made by other witnesses.

> CSXT and NSR on behalf of PAS have committed that B&E will be obligated to establish rates for these customers at current levels, subject to future reasonable escalation, as long as B&E is operator of PAS. This commitment will preserve the benefits of existing competitive rates for the shippers who are jointly served by PAS and a GWI-owned railroad.[21]
>
> ***
>
> [R]ecognizing these concerns, CSXT and NSR on behalf of PAS have committed to conditions [] that will preserve the benefits of existing price competition for [VRS] over these interchanges, therefore ensuring [VRS]'s customers retain multiple, independent options to connect with the PAR system and eastern New England and with destinations to the south and west of New England.[22]
>
> ***

[18] *See,* Reishus VS, CSXT-PAR Merger Application, p. APP-617.
[19] *See,* Reishus VS, CSXT-PAR Merger Application, p. APP-623.
[20] *Id.*
[21] *See,* Reishus VS, CSXT-PAR Merger Application, p, APP-617, citing Pelkey at 18.
[22] *See,* Reishus VS, CSXT-PAR Merger Application, p. APP-624.

> The structure of the operating agreement with B&E and the price and service commitments the parties have made with respect to [VRS] are sufficient to address any potential competitive concerns raised by the proposed transaction.[23]

Dr. Reishus correctly identifies the legitimate concerns VRS and its customers would have regarding the competitive landscape where a GWI subsidiary would operate the PAS system, and he points to rate and service safeguards ostensibly designed to allay those concerns. However, the promised safeguards are merely vague statements regarding pricing practices and service frequency (as opposed to, or in addition to, service reliability, which is not seriously addressed) that are completely devoid of substance.[24] Because the "commitments" made by CSXT and B&E are not delineated in any meaningful way, Dr. Reishus has no basis to claim that they are "sufficient." And all these commitments convey is that prices will not suddenly increase in the near term and that service "should" stay as it is (unless some undefined volume metric triggers a reduction) – they don't assure vigorous competition between NECR and a B&E-operated PAS as one might expect from an independent operator of PAS seeking to establish market share.

Dr. Reishus relies in large part on statements made by Mr. Sean Pelkey, Vice President and Acting Chief Financial Officer for CSX Corporation, and B&E's designated expert witness Mr. Wagner. Neither offers any specifics with respect to pricing and service guarantees affecting VRS customers.

Mr. Pelkey offers the following:

> To ensure that B&E's operation of PAS will not have an adverse impact on [VRS]'s access to other rail connections, CSXT and NSR have agreed to the following commitments on behalf of PAS: (1) for movements to and from the east with connections to PAR, PAS will establish rates on existing lanes via Deerfield and Ayer <u>at current levels, subject to future reasonable</u>

[23] *See,* Reishus VS, CSXT-PAR Merger Application, p. APP-627.
[24] CSXT/B&E's pledge can be expressed as a fable: There will be a fox guarding the henhouse, but don't worry, this fox is a vegan. Nor should you worry about the fox's carnivorous parents and siblings, for this fox is loyal only to the farmer.

> escalation, as long as B&E is operator of PAS; (2) for movements to and from the west with connections to CSXT at Rotterdam, NY, PAS will establish rates for movements between Hoosick Junction (where [VRS] interchanges with PAS today) and Rotterdam (where PAS connects with CSXT) on existing lanes at current levels, subject to future reasonable escalation, as long as B&E is operator of PAS; (3) for [VRS] traffic that moves to and from storage facilities at East Deerfield, MA, a location on PAS, PAS will provide haulage between the storage facilities at East Deerfield and Bellows Falls (as noted above, haulage already exists between Bellows Falls and White River Junction) at rates that are the average of current commodity-specific interline rates for those movements for as long as B&E is operator of PAS so as to ensure that rates on these movements remain at competitive levels; and (4) PAS will commit to providing VTR with 5 day per week service in the above lanes as long as volumes support this level of service. Finally, B&E will not share with any other GWI-controlled rail carriers any information regarding rate divisions from connecting railroads that B&E becomes aware of as a result of operating PAS.[25]

Mr. Wagner offers no guarantees regarding post-merger rate levels, but he makes the following statement regarding service levels:

> Following the start-up of B&E's operations over the PAS rail lines, customers and contiguous railroads will have a higher level of committed service than they do currently. Under the Term Sheet Agreement and the proposed B&E railroad operating agreement, B&E will have committed service standards, which do not exist in the current Springfield Terminal – PAS operating agreement today.[26]

The Operating Plan notes that,

> GWI has agreed through the Term Sheet Agreement to cause B&E to implement with PAS, NSR, and CSXT, within three months after commencement of B&E's operation of PAS, a suite of operating metrics and goals related to PAS operations.[27]

Shippers that rely on PAS-VRS service today are essentially being told to "just trust us, things will be good tomorrow."

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[25] *See,* Pelkey VS, CSXT-PAR Merger Application, pp. APP-425 to APP-426, emphasis added.

[26] *See,* Wagner at VS-6, emphasis added.

[27] *See,* CSXT Exhibit 13, Operating Plan, Verified by Mr. Jamie Boychuk, CSXT-PAR Merger Application, p. APP-337.

A. POST-MERGER RATES

PAS' owner NSR and prospective owner CSXT, on behalf of B&E, pledge to establish initial rates for shipments to VRS-served points "to and from the east with connections to PAR" at "current levels," and for traffic "that moves to and from storage facilities at East Deerfield, MA" at "rates that are the average of current commodity-specific interline rates." This pledge lacks specificity and is insufficient. PAS rates must be disclosed to PAS shippers, including those on VRS, along with the methodology, formulas and inputs used to peg them to "current levels."

The rates offered to VRS shippers must be competitive. A rational new market entrant would evaluate whether rates below current levels would enable it to capture a greater share of traffic while recovering its variable cost of providing the service. A promise to maintain the status quo does not indicate a sincere desire to compete for business. GWI would have little reason to worry about competition, because, whether the traffic moves via NECR or PAS, the market will still belong to GWI. Moreover, freezing rates at current levels does not adhere to the first RTP tenet "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates."[28]

B. POST-MERGER RATE ESCALATION

CSXT and NSR also pledge to establish future rates for VRS shipments by applying "future reasonable escalation" to the "current" rates discussed above. This also lacks specificity and is inadequate. PAS must disclose the escalation method, formula, inputs (including specific cost and/or price indices), timing and frequency of increases, and any restrictions on minimum or maximum increases. Moreover, "reasonableness" must be defined in certain terms.

[28] 49 USC 10101 (1). *See*, [USC02] 49 USC 10101: Rail transportation policy (house.gov).

Rates must not only be competitive at the outset – they must stay competitive going forward. A promise of reasonable escalation is only as good as the promising party's definition of what is "reasonable." B&E may consider it reasonable to escalate its rates at a faster pace than its costs. Rate indexing must be transparent and tied to changes in the cost of providing service. Furthermore, rates should be reduced (not escalated) if improved rail efficiency results in cost reductions.

The promised rate escalation includes no information regarding whether rates will be increased on a movement-specific basis (reflective of each movement's operations and economics), or via blanket rate increases. The RTP "require[s] rail carriers… to rely on individual rate increases, and to limit the use of increases of general applicability."[29]

C. OTHER FEES AND CHARGES

Although CSXT and NSR identify rates and rate escalators as key factors going forward for PAS service pricing, they completely ignore other fees and charges that PAS may seek to impose on shippers and connecting short lines. If fuel surcharges and/or rates for storage, demurrage, equipment use, or any other ancillary charges increase after the merger, the rate and rate escalation pledges become meaningless from a practical perspective. PAS must guarantee that its other charges will not be raised, and no new charges will be introduced on the Joint Line or on shipments moving to or from VRS points.

D. SERVICE LEVELS

PAS owners make a service pledge that is completely undercut by a caveat regarding an unspecified volume level: "PAS will commit to providing [VRS] with 5 day per week service in

[29] 49 USC 10101 (10). *See*, [USC02] 49 USC 10101: Rail transportation policy (house.gov).

the above lanes *as long as volumes support this level of service*."[30] PAS must identify what volumes would assure five (5) day per week service, the methods they will use to collect the data required to develop the metrics, and the source(s) of the data. Furthermore, they must disclose the alternative PAS service levels that would become available below the unspecified volume thresholds.

The CSX-PAR Merger Application is unclear about PAS service between Bellows Falls and White River Junction. PAS (under B&E operation) pledges to initially continue to operate a dedicated train in each direction between East Deerfield, MA, and Bellows Falls five days per week.[31] However, the operating plan does not identify regular service north of Bellows Falls (to White River Junction) or any service plan at all. For example, it is possible that PAS would look to NECR to handle all traffic between Bellows Falls and White River Junction under a haulage agreement, or that, NECR and PAS traffic along the entire Joint Line would be consolidated into a single train, as opposed to two (2), at some future point. GWI's obvious incentive to wring such efficiencies out of the clear overlap between PAS and NECR routes is at odds with CSXT's promise of continued competition on the Joint Line, particularly given the relatively modest volumes moving on the line. The segment between White River Junction and Bellow Falls is of particular importance to VRS because it serves as a bridge between two (2) noncontiguous VRS short lines, WACR (connecting at White River Junction) and GMRC (connecting at Bellows Falls).

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[30] *See,* e.g., Pelkey VS, CSXT-PAR Merger Application, p. APP-426 (emphasis added).

[31] PAS currently operates train EDBF (northbound) Monday through Friday and train BFED (southbound) Tuesday through Saturday, and B&E pledges to "provide substantially all of the operating services that Springfield Terminal currently provides on behalf of PAS in substantially the same way." *See*, CSXT Exhibit 13, Operating Plan, Verified by Mr. Jamie Boychuk, CSXT-PAR Merger Application, pp. APP-313 and APP-336.

Beyond the impacts on service competition, many of VRS' shippers move commodities that are seasonally critical to residents, including propane and road salt in winter. Guaranteed inbound service is more than an economic issue for many VRS shippers.

E. EQUIPMENT AND CREW AVAILABILITY

CSXT offers the following regarding equipment and crew availability as it relates to the pledges to maintain regular PAS service offerings through VRS gateways:

> B&E will base its rolling stock, labor and equipment requirements on the execution of B&E's expected operating plan and the related experience of GWI's railroads in the region.[32]

It is unclear why "the related experience of GWI's railroads in the region" should have any bearing on (i.e., limit) B&E's commitment to execute its expected operating plan. Regardless, due to the ambiguity with respect to what volumes are required to support continued regular (five (5) day per week) service, B&E could conceivably curtail Joint Line service due to lack of available crews or locomotives (or temporary redeployment of those assets to serve other lines, for example), and blame it on insufficient "volume." B&E must commit to providing sufficient locomotives and crews to regularly move VRS interline traffic.

F. COMPLIANCE

There are no means to evaluate or enforce compliance with the promised mitigation. B&E must identify what it will do to ensure that VRS customers are not harmed by any future decrease in service frequency, including economic penalties such as fees and/or liquidated damages. In addition, B&E's failure to provide sufficient crews and equipment must be curbed by appropriate disincentives.

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[32] *See*, CSXT Exhibit 13, Operating Plan, Verified by Mr. Jamie Boychuk, CSXT-PAR Merger Application, pp. APP-336.

G. PRIVILEGED INFORMATION

B&E's proposal to operate PAS alongside its affiliate, NECR, creates a moral hazard.

Absent explicit and strictly-enforced counter-measures, GWI could obtain through B&E critical and sensitive PAS traffic, routing, and revenue data on VRS-PAS interline traffic that could be used to NECR's competitive advantage, and to VRS's detriment. Recognizing the inherent value of this sensitive data to NECR (and GWI), CSXT and B&E allege that B&E will not be given sensitive VRS traffic data, so GWI will not have access to data that could be used to the benefit of NECR. However, it is not clear who is responsible for ensuring that promise will be kept, or what measures can be taken in the event sensitive data is shared, whether intentionally or not.[33]

Even the Board has noted, that despite the fact that CSXT repeatedly stated that "B&E would not be able to share information with NECR, even though they are both GWI affiliates,"[34] the "Applicants have not provided the specific terms of its service or information-sharing commitment."[35] It is not far-fetched to foresee that at some point in the future, especially during an economic downturn when the need for efficiencies is paramount, NECR and B&E management could be consolidated or shared given the geographic proximity of the railroads. In this scenario, it is even more difficult to credit CSXT's claim that information gained by B&E in the course of operating PAS will not be available or used by GWI's NECR. At a minimum, GWI's control of both B&E and NECR would give the appearance that appropriate weight may not have been given

[33] CSXT, in fact, touts the information sharing amongst GWI affiliates as an essential element of the transaction: "B&E's ability to share resources and facilities among its commonly-owned rail carriers will create opportunities for efficiencies and cost-savings that will produce public benefit." CSXT-PAR Merger Application, p.13

[34] STB FD 36472, July 26, 2021 at 17.

[35] *Id.* Footnote 30, pp. 17-18.

to the RTP policies "to ensure the… continuation of a sound rail transportation system with effective competition among rail carriers" and "to avoid undue concentrations of market power."[36]

H. FUTURE RATE PROTECTIONS

VRS shippers and those who are located on the Joint Line should be assured price and service competition beyond B&E's tenure as PAS operator. The price and rate escalation promises discussed above, even if sufficiently specified and enforceable, are only valid "as long as B&E is operator of PAS."[37] But what if, through some corporate family arrangement (and in the interest of efficiency), B&E operation of PAS was at some future date transferred from B&E to NECR, for example? Would B&E's commitments still apply? VRS and shippers require a longer-term commitment from PAS ownership (CSXT/NS). The commitment should be honored by any future PAS operator.

I. POTENTIAL FOR GAMING

NECR recently took aggressive action to improve its competitive position relative to PAS on the Joint Line. In 2017, NECR unsuccessfully tried to increase the level of PAS trackage rights fees over the line.[38] PAS was able to avoid the increase, preserving competition. Now, as parts of the same whole (GWI), NECR and B&E have less incentive to vigorously compete, and the appearance of means through which to collude (and an incentive to do so). The RTP calls for the encouragement of "honest and efficient management of railroads."[39]

[36] 49 USC 10101 (4) and (12). *See*, [USC02] 49 USC 10101: Rail transportation policy (house.gov).
[37] This caveat appears at least 12 times in CSXT's July 1, 2021 filing (Market Analysis, Pelkey, Reishus).
[38] STB FD 35842, *New England Central Railroad, Inc. – Trackage Rights Order – Pan Am Southern LLC*, October 31, 2017.
[39] 49 USC 10101 (9). *See*, [USC02] 49 USC 10101: Rail transportation policy (house.gov).

It is worth noting that GWI, which owns or leases 116 freight railroads,[40] was purchased by Brookfield Infrastructure Partners [NYSE:BIP] and GIC Private Limited[41] for $8.4 billion in late 2019, just before COVID-19 shocked every market.[42] A scenario in which GWI's corporate parents may set operational or economic goals that exert pressure on GWI management to exploit consolidation opportunities is not far-fetched. In fact, it is business common sense. Two (2) commonly controlled railroads competing on a low-density line segment like the Joint Line would be a logical target of efforts to streamline operations.

[40] *See*, About Us – Genesee & Wyoming Inc. (gwrr.com).
[41] GIC Private Limited, formerly known as Government of Singapore Investment Corporation, is a sovereign wealth fund established by the Government of Singapore in 1981 to manage Singapore's foreign reserves. *See*, GIC (Singaporean sovereign wealth fund) - Wikipedia.
[42] *See*, Genesee & Wyoming sold in $8.4 billion deal, *Trains*, July 1, 2019.

VI. THE POST-MERGER PRICING STRUCTURE SHOULD REFLECT GENUINE COMPETITIVE DYNAMICS

VRS and PAS shippers' market position should not be eroded over time. In light of CSXT's and B&E's claims of improved post-merger efficiency and cost savings on PAS, the promise of frozen rate levels falls far short of an assurance of vigorous (or any) competition between B&E-operated PAS and NECR, as is encouraged under the RTP. Efficiency gains should, at the very least, yield some prospect of competition-driven rate reductions – *not flat rate levels*. A commitment to retain "flat" rate levels is not indicative of competition at all.

B&E claims that "[u]nder the proposed B&E – PAS railroad operating agreement, the overhead expenses [that B&E would incur] will be lower than what Springfield Terminal has historically allocated to PAS for the same services."[43] CSXT cites claims made by B&E witness Wagner in its operating plan:

> As described further in the Wagner VS, separating the PAS Network and PAR System operations will make PAS more efficient. For example, today Springfield Terminal incurs an aggregated amount of overhead costs associated with operating both PAS (as contract operator) and the PAR System, and does not link those costs to either operation. Therefore, as a structural matter, overhead costs incurred by Springfield Terminal due to PAS operations are now influenced by Springfield Terminal's costs associated with PAR System operations. This creates potential volatility in PAS overhead costs, where cost changes are driven by events and circumstances on the PAR System. As an independent operator of only the PAS Network, B&E will be able to manage and control overhead costs on PAS much better than Springfield Terminal can today. Similarly, B&E will be able to make operating decisions based solely on the needs of PAS and its customers, as well as passenger carriers with which it shares facilities.[44]

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[43] *See*, B&E July 1, 2021 Supplement to Amended Petition for Exemption at p. 4.

[44] *See*, CSXT Exhibit 13, Operating Plan, Verified by Mr. Jamie Boychuk, CSXT-PAR Merger Application, pp. APP-337.

In addition, we are told that PAS operations will be improved by the provision of equipment by PAS owners CSXT and NSR. Dr. Reishus identified this sort of equipment upgrade as a major cost reduction item in his discussion of the merits of merging PAR into CSXT:

> 269. The current ST locomotive fleet is much older than CSXT's fleet of more modern, powerful, and efficient locomotives. I was provided some materials that CSXT uses to evaluate the relative performance of different types of locomotives. These materials estimate, based on ST's current locomotive use, that road trains for PAR System movements could be operated with {{245,000}} fewer locomotive-miles annually by substituting CSXT's two 6-axle units on trains currently being run by ST using three or four 4-axle units.
>
> 270. I use the Board's publicly available URCS costing model to estimate the locomotive operating and capital costs associated with that reduction. For non-Class I railroads such as the Pan Am carriers, the Board uses Regional URCS data for costing such non-Class I shipments.[]
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> 271. Based on the 2019 Eastern Region URCS variable costs, this reduction in locomotive-miles equates to annual cost savings of {{$0.8 million}}, not including fuel. The reduction of {{245,000}} miles represents estimated fuel savings of {{0.8}} million gallons annually, which equates to {{$2.0 million}} at ST's 2019 fuel-cost levels. The change to newer and more efficient locomotives will generate an estimated annual cost savings of ${{4 million}}, without even accounting for the additional cost savings that will derive from maintaining a combined fleet and applying CSX's experience and more sophisticated management tools.[45]

The GWI Term Sheet Agreement stipulates that "OpCo [CSXT/NSR] will purchase 33 locomotives" [22 6-axle plus 11 4-axle, half of each PTC equipped] for B&E to operate PAS.[46] However, neither CSXT nor B&E identified this equipment provision as an operating cost reduction, and neither attempted to quantify the impact in economic terms. Surely the logic applied to the CSXT-PAR merger can be applied to the transfer of PAS operations to B&E. Beyond that, such gains would not appear to be B&E specific, but instead would likely be extended to any independent operator of PAS.

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45 *See*, Reishus VS, CSXT-PAR Merger Application, pp. APP-634 to APP-635, footnotes omitted.

46 *See*, G&W Term Sheet Agreement, CSXT-PAR Merger Application, p. APP-454, Item II.1.f.

If the efficiency gains and improvements to operations and safety performance touted by B&E and CSXT/NSR on behalf of PAS are real, the establishment of PAS rates "at current levels" would serve to establish a rate floor that would potentially be higher than the rates required by a more efficient PAS—whose operator should be obligated to compete for market share. The rate floor would also limit NECR's incentive to provide its best offer for competitive traffic, because it would only need to price at, or just below, the rate floor.

It would be unrealistic to expect competition between two GWI-controlled railroads serving as VRS' only interchange options, including for bridge traffic moving between VRS and CSXT on the Joint Line. The freeze on PAS rates would have a negative competitive impact on NECR's pricing practices because NECR (and, by extension, GWI) would have no commercial incentive to price below the rate floor. NECR would have no reason to accept a rate less favorable than the rate PAS is required to offer. Furthermore, because GWI controls the operations of both railroads, it would have the ability to alter the quality of either, or both, service offerings to direct traffic to its preferred carrier at a guaranteed minimum rate. In a competitive market, firms compete on service and price levels. GWI would have the ability to take price out of the equation and compete on service level alone, which it controls for both options.

VII. CSXT IMPROPERLY DISMISSED THE B&E/PAS TRANSACTION'S IMPACT ON INTERLINE SHIPPERS

CSXT did not adequately address the proposed B&E/PAS Transaction's impact on interline traffic.[47] VRS and PAS currently compete with NECR for both traffic originating and terminating on the VRS and for overhead shipments to/from Canada. As discussed above in Section V.C., CSXT and B&E offer no assurances that B&E will be restrained from imposing new or increased fees and charges on PAS shippers, even if PAS rates are initially flat and rate escalation is modest. Moreover, GWI will have no incentive to facilitate competitive VRS-PAS bridge line traffic from Canada to southern New England and beyond (via WACR's Newport, VT gateway on the north, and PAS's Springfield, MA, or Worcester, MA, on the south or Rotterdam Junction, NY, and Mechanicville, NY, on the west) in competition with a parallel-oriented NECR route option that would keep the traffic and revenue entirely on GWI rails.

After the merger, GWI—through B&E—could use PAS surcharges and fees in lieu of rate increases on VRS-PAS shipments (or reduced frequency of service) to entice diversions of overhead traffic over the NECR route, benefitting GWI at the expense of VRS. These added fees or service issues could force VRS to lower rates or accept operational inefficiencies for the portion of the move over its lines[48] in an effort to retain the traffic. This would weaken VRS as a competitor to NECR (GWI). Dr. Reishus dismisses this sort of concern as irrelevant to the determination of competitive harm:

> 45. Similar concerns may arise regarding short-line carriers or line segments unaffiliated with the merging railroads that move from "2-to-1" in the number of rail connections. Sole-served shippers on the unaffiliated short-line lose no direct rail options because of the merger regardless of the

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[47] A brief discussion of Dr. Reishus' 50/10 test, which was used to identify potential competitive concerns for shippers resulting from the proposed merger, including impacts on shippers with facilities on the Connecticut River Line, is included in Exhibit No. 5 to this VS.

[48] For example, VRS could be forced into an operational inefficiency of moving traffic going to the VTR on the west side of Vermont over the GMRC at the same rate division as moving it over the VTR with a lesser grade profile.

> connections available to the short-line. To the extent the merger alters the relative bargaining power of the unaffiliated short-line serving carrier and its interconnections there could be a redistribution of revenue over marginal cost between the serving and interconnecting carriers. Such a change does not reflect a competitive harm to shippers, but a change in how the results of the existing pricing power of the unaffiliated railroad is distributed among carriers.[49]

G&W would benefit, and VRS would suffer, from any "redistribution of revenue" from VRS to B&E on the VRS-PAS route that may be caused by changes in their "relative bargaining power" as a direct result of the reducing competitive options from 2 to 1on the Joint Line. VRS could be forced to reduce rates in order to retain business, making it more difficult to generate sufficient revenue to maintain current operations (or even remain viable), and all VRS-served shippers could be harmed.

[49] *See*, Reishus VS, CSXT-PAR Merger Application, p. APP-541, emphasis added.

VIII. CSXT AND NSR INCENTIVES TO ENSURE B&E COMPLIANCE ARE LIMITED

The CSXT-PAR Merger Application and B&E Petition include discussion of CSXT/NSR incentives to ensure PAS is efficient and profitable.

> 99. Given CSXT's ownership interest in PAS once the Proposed Transaction is consummated, and the fact that CSXT is the largest interchange partner with PAS after NSR (once NSR's haulage traffic is taken into account), <u>it is in CSXT's direct economic interest that PAS remain a viable and effective railroad.</u> Moreover, CSXT commits to continue using PAS for certain categories of shipments, thus ensuring no sudden change in shipping volumes served by PAS as a result of CSXT's rationalization of traffic. CSXT has committed to continue to interchange certain traffic with PAS at Rotterdam Junction for traffic to or from Ayer over PAS for traffic to or from certain regions. <u>This commitment provides additional assurance of traffic on the PAS system to ensure its ongoing viability to the benefit of all shippers on PAS.</u>
>
> 100. Finally, the PAS LLC Agreement provides for a change from equal to NSR majority control of PAS in the event another entity acquires control of PAR, subject to any required STB approval. CSXT and NSR have agreed in the CSXT-NSR Settlement Agreement that NSR will not pursue the exercise of its majority control rights as a result of CSXT acquiring control of PAR, but that the PAS LLC agreement will be amended to give NSR in the future the same majority control rights that NSR has today with respect to a future CSXT membership interest change. Moreover, NSR will have, for the next seven years, the right to purchase (or <u>have sold) CSXT's share of PAS under a specified financial mechanism. These rights ensure that NSR's interest in the ongoing success of PAS will be preserved</u> and that NSR has the opportunity to obtain full control and financial benefit from PAS' continuing operations.[50]

These arguments must be viewed in context. PAS operations and performance are relatively small considerations for both CSXT and NSR.

If NSR thought PAS was a valuable operation, it would presumably have moved ahead with control of PAS or would have assumed operation of PAS itself, rather than seek a new operator (and settle for one that raises unique anticompetitive issues). Since its inception, PAS

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[50] *See,* Reishus VS, CSXT-PAR Merger Application, p. APP-576, emphasis added, footnotes omitted.

has served as NSR's best vehicle for competing with CSXT in New England. As a result of the proposed merger, NSR will benefit from access to the CSXT mainline in Massachusetts for double stack intermodal and automotive traffic (and removal of less efficient single-stack intermodal from PAS). NSR has improved its ability to compete for one of the highest-rated and the fastest-growing traffic segments (intermodal) in the industry.

Similarly, CSXT will weigh any concerns it may have about poor PAS performance against the benefits it will receive from its acquisition of PAR, the expansion of its footprint in New England, and the associated elimination of interchanges and consolidation of operations. Beyond that, CSXT may view PAS as a competing NSR-subsidized route into the New England market, and so it may be that an ineffective and non-remunerative PAS (in which CSXT will only have a partial financial stake) may be a small price to pay for increased market share on CSXT-owned lines.

VERIFICATIONS

I, Thomas D. Crowley, verify under penalty of perjury that I have read this Verified Statement on behalf of the Vermont Rail Systems, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

Thomas D. Crowley

Executed on August 27, 2021

I, Robert D. Mulholland, verify under penalty of perjury that I have read this Verified Statement on behalf of the Vermont Rail Systems, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

Robert D. Mulholland

Executed on August 27, 2021

LIST OF EXHIBITS

Exhibit No.	Exhibit Description
	(2)
1	Statement of Qualifications of Thomas D. Crowley
2	Statement of Qualifications of Robert D. Mulholland
3	PAS and VRS Schematics
4	Problems with the CSXT Analytical Framework

THOMAS D. CROWLEY
STATEMENT OF QUALIFICATIONS

My name is Thomas D. Crowley. I am an economist and President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at 1501 Duke Street, Suite 200, Alexandria, Virginia 22314, 760 E. Pusch View Lane, Suite 150, Tucson, Arizona 85737, and 7 Horicon Avenue, Glens Falls, New York 12801.

I am a graduate of the University of Maine from which I obtained a Bachelor of Science degree in Economics. I have also taken graduate courses in transportation at George Washington University in Washington, D.C. I spent three (3) years in the United States Army and since February 1971 have been employed by L. E. Peabody & Associates, Inc.

I am a member of the American Economic Association, the Transportation Research Forum, and the American Railway Engineering and Maintenance-of-Way Association.

The firm of L. E. Peabody & Associates, Inc. specializes in analyzing matters related to the rail transportation of all commodities. As a result of my extensive economic consulting practice since 1971 and my participation in maximum-rate, rail merger, service disputes and rule-making proceedings before various government and private governing bodies, I have become thoroughly familiar with the rail carriers and the traffic they move over the major rail routes in the United States. This familiarity extends to subjects of railroad service, costs and profitability, cost of capital, railroad capacity, railroad traffic prioritization and the structure and operation of the various contracts and tariffs that historically have governed the movement of traffic by rail.

As an economic consultant, I have organized and directed economic studies and prepared reports for railroads, freight forwarders and other carriers, for shippers, for associations and for state governments and other public bodies dealing with transportation and related economic

THOMAS D. CROWLEY
STATEMENT OF QUALIFICATIONS

problems. Examples of studies I have participated in include organizing and directing traffic, operational and cost analyses in connection with single car and multiple car movements, unit train operations for coal, grain, oil and other commodities, freight forwarder facilities, TOFC/COFC rail facilities, divisions of through rail rates, operating commuter passenger service, and other studies dealing with markets and the transportation by different modes of various commodities from both eastern and western origins to various destinations in the United States. The nature of these studies enabled me to become familiar with the operating practices and accounting procedures utilized by railroads in the normal course of business.

Additionally, I have inspected and studied both railroad terminal and line-haul facilities used in handling various commodities. These operational reviews and studies were used as a basis for the determination of the traffic and operating characteristics for specific movements of numerous commodities handled by rail.

I have frequently been called upon to develop and coordinate economic and operational studies relative to the rail transportation of various commodities. My responsibilities in these undertakings included the analyses of rail routes, rail operations and an assessment of the relative efficiency and costs of railroad operations over those routes. I have also analyzed and made recommendations regarding the acquisition of railcars according to the specific needs of various shippers. The results of these analyses have been employed in order to assist shippers in the development and negotiation of rail transportation contracts which optimize operational efficiency and cost effectiveness.

I have developed property and business valuations of privately held freight and passenger railroads for use in regulatory, litigation and commercial settings. These valuation assignments

THOMAS D. CROWLEY
STATEMENT OF QUALIFICATIONS

required me to develop company and/or industry specific costs of debt, preferred equity and common equity, as well as target and actual capital structures. I am also well acquainted with and have used the commonly accepted models for determining a company's cost of common equity, including the Discounted Cash Flow Model ("DCF"), Capital Asset Pricing Model ("CAPM"), and the Farma-French Three Factor Model.

Moreover, I have developed numerous variable cost calculations utilizing the various formulas employed by the Interstate Commerce Commission ("ICC") and the Surface Transportation Board ("STB") for the development of variable costs for common carriers, with particular emphasis on the basis and use of the Uniform Railroad Costing System ("URCS") and its predecessor, Rail Form A. I have utilized URCS/Rail form A costing principles since the beginning of my career with L. E. Peabody & Associates Inc. in 1971.

I have frequently presented both oral and written testimony before the ICC, STB, Federal Railroad Administration, Federal Energy Regulatory Commission, Railroad Accounting Principles Board, Postal Rate Commission and numerous state regulatory commissions, federal courts and state courts. This testimony was generally related to the development of variable cost of service calculations, rail traffic and operating patterns, fuel supply economics, contract interpretations, economic principles concerning the maximum level of rates, implementation of maximum rate principles, and calculation of reparations or damages, including interest. I presented testimony before the Congress of the United States, Committee on Transportation and Infrastructure on the status of rail competition in the western United States. I have also presented expert testimony in a number of court and arbitration proceedings concerning the level

THOMAS D. CROWLEY
STATEMENT OF QUALIFICATIONS

of rates, rate adjustment procedures, service, capacity, costing, rail operating procedures and other economic components of specific contracts.

Since the implementation of the *Staggers Rail Act of 1980*, which clarified that rail carriers could enter into transportation contracts with shippers, I have been actively involved in negotiating transportation contracts on behalf of shippers. Specifically, I have advised shippers concerning transportation rates based on market conditions and carrier competition, movement specific service commitments, specific cost-based rate adjustment provisions, contract reopeners that recognize changes in productivity and cost-based ancillary charges.

I have developed different economic analyses regarding rail transportation matters for over sixty (60) electric utility companies located in all parts of the United States, and for major associations, including American Chemistry Council, American Paper Institute, American Petroleum Institute, Chemical Manufacturers Association, the Chlorine Institute, Coal Exporters Association, Edison Electric Institute, the Fertilizer Institute, Mail Order Association of America, National Coal Association, National Grain and Feed Association, National Industrial Transportation League, North America Freight Car Association and Western Coal Traffic League. In addition, I have assisted numerous government agencies, major industries and major railroad companies in solving various transportation-related problems.

In the two Western rail mergers that resulted in the creation of the present BNSF Railway Company and Union Pacific Railroad Company and in the acquisition of Conrail by Norfolk Southern Railway Company and CSX Transportation, Inc., I reviewed the railroads' applications including their supporting traffic, cost and operating data and provided detailed evidence supporting requests for conditions designed to maintain the competitive rail environment that

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STATEMENT OF QUALIFICATIONS

existed before the proposed mergers and acquisition. In these proceedings, I represented shipper interests, including plastic, chemical, coal, paper and steel shippers.

I have participated in various proceedings involved with the division of through rail rates. For example, I participated in ICC Docket No. 35585, *Akron, Canton & Youngstown Railroad Company, et al. v. Aberdeen and Rockfish Railroad Company, et al.* which was a complaint filed by the northern and mid-western rail lines to change the primary north-south divisions. I was personally involved in all traffic, operating and cost aspects of this proceeding on behalf of the northern and mid-western rail lines. I was the lead witness on behalf of the Long Island Rail Road in ICC Docket No. 36874, *Notice of Intent to File Division Complaint by the Long Island Rail Road Company*.

ROBERT D. MULHOLLAND
STATEMENT OF QUALIFICATIONS

My name is Robert D. Mulholland. I am an economist and a Senior Vice President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at: 1501 Duke Street, Suite 200, Alexandria, Virginia 22314; 760 E. Pusch View Lane, Suite 150, Tucson, Arizona 85737; and 7 Horicon Avenue, Glens Falls, New York 12801.

I am a graduate of George Mason University's School of Public Policy, from which I obtained a Master's degree in Transportation Policy, Operations & Logistics, and Bowdoin College, from which I obtained a Bachelor of Arts degree in Government and Legal Studies. I have been employed by L. E. Peabody & Associates, Inc. since 2008 and from 1995 to 2004. From 2004 to 2006, I was the staff economist for the Office of Freight Management and Operations of the Federal Highway Administration ("FHWA") of the United States Department of Transportation ("USDOT"). From 2006 to 2008, I worked for ICF International as a consultant in the transportation group.

L. E. Peabody & Associates, Inc. specializes in analyzing matters related to the rail transportation of all commodities. As a result of my extensive consulting experience since 1995 and my participation in and support of maximum-rate, rail merger, service dispute, reasonable practices, and rule-making proceedings before various government bodies, I have become thoroughly familiar with the major freight and passenger rail carriers in the United States. This familiarity extends to subjects of railroad costs and revenues, service, maintenance, operations, capacity, traffic prioritization, and contract and tariff terms that govern the movement of commodities by rail.

ROBERT D. MULHOLLAND
STATEMENT OF QUALIFICATIONS

As a consultant, I have directed and conducted economic and operations studies and prepared reports for passenger and freight carriers, shippers, federal agencies, the United States Congress, associations, and other public bodies dealing with transportation and related economic issues. Examples of studies I have participated in include organizing and directing rail facilities analyses, quantifying the impact of service disruptions for shippers, evaluation of traffic and operating factors in connection with single and multiple car movements and unit train operations for various commodities, rate and revenue division analyses, and other studies dealing with transportation markets for many commodities over various surface modes throughout the United States. Through these studies I have become familiar with railroad costing and operating practices.

I have inspected and studied railroad terminal facilities used in handling various commodities to collect data that were used as a basis for the determination of traffic and operating characteristics for specific movements handled by rail. I have conducted field studies of short line rail systems and rail spurs, and industry-owned rail facilities, and developed reports assessing their capacity to accommodate various projected operating scenarios and traffic levels.

I have developed operational and economic studies relative to the rail transportation of coal, chemicals, intermodal traffic, and other commodities on behalf of shippers, including analyses of the relative efficiency and costs of railroad operations over multiple routes. The results of these analyses have been used to assist shippers in the development and negotiation of rail transportation contracts that optimize operational efficiency and cost effectiveness.

I have presented written testimony before the STB related to the development of evidence including rail traffic volume and revenue forecasts, cross-over traffic revenue divisions, and train operations in several maximum reasonable rate proceedings on behalf of coal and chemicals shippers, and the development of evidence including rail fuel consumption and cost determinations in an unreasonable practice proceeding.

I have supported the negotiation of transportation contracts between shippers and railroads. Specifically, I have conducted studies concerning transportation rates based on market conditions and carrier competition, movement specific service commitments, and specific cost-based rate adjustment provisions. I have developed numerous variable cost calculations utilizing the various formulas employed by the Surface Transportation Board ("STB") for the development of variable costs for common carriers, with particular emphasis on the basis and use of the Uniform Railroad Costing System ("URCS"). I have utilized URCS costing principles since the beginning of my career with L. E. Peabody & Associates Inc. in 1995.

I have conducted different economic analyses regarding rail transportation matters for dozens of electric utility companies located in all parts of the United States, and for major associations, including the Chlorine Institute, the American Chemistry Council, the Chemical Manufacturers Association, the National Industrial Transportation League, and the Western Coal Traffic League. In addition, I have assisted numerous government agencies in analyzing and solving various transportation-related problems.

ROBERT D. MULHOLLAND
STATEMENT OF QUALIFICATIONS

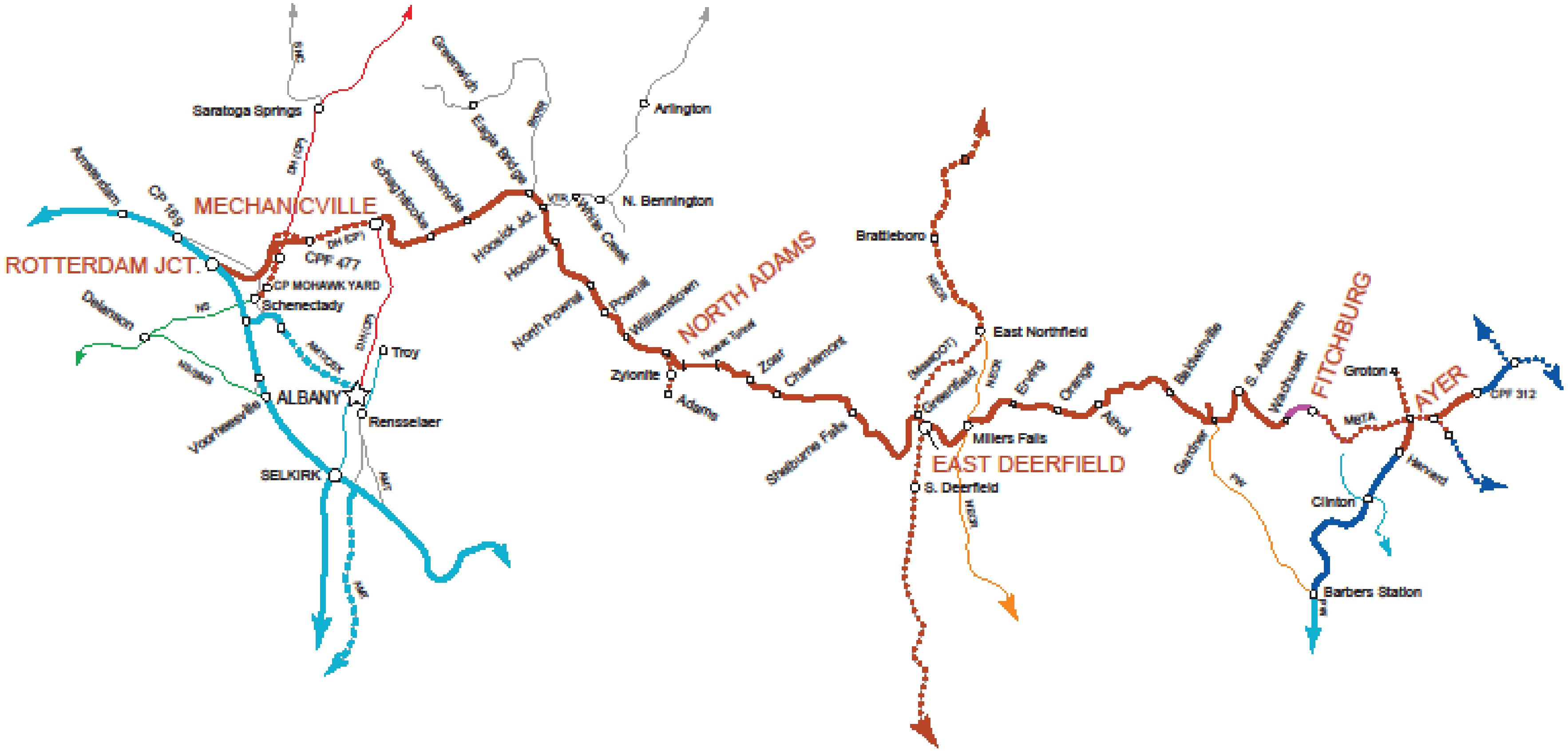
In the Western rail merger that resulted in the creation of the present Union Pacific Railroad Company, I reviewed the railroads' applications including their supporting traffic, cost and operating data and developed detailed evidence supporting requests for conditions designed to maintain the competitive rail environment that existed before the proposed merger.

While employed at FHWA, I was a member of the USDOT inter-agency working group that drafted the National Freight Policy. In addition, I served on the USDOT Freight Gateway Team, a group headed by the Undersecretary for Policy and composed of one representative from each of the surface modal agencies.

While employed at ICF International, I directed and conducted numerous analyses of the rail and trucking industries for federal transportation agencies including the Federal Railroad Administration ("FRA"), the Federal Motor Carrier Safety Administration ("FMCSA"), and the FHWA, including analyses of the current rail and trucking industries and forecasts of future trends in both industries.

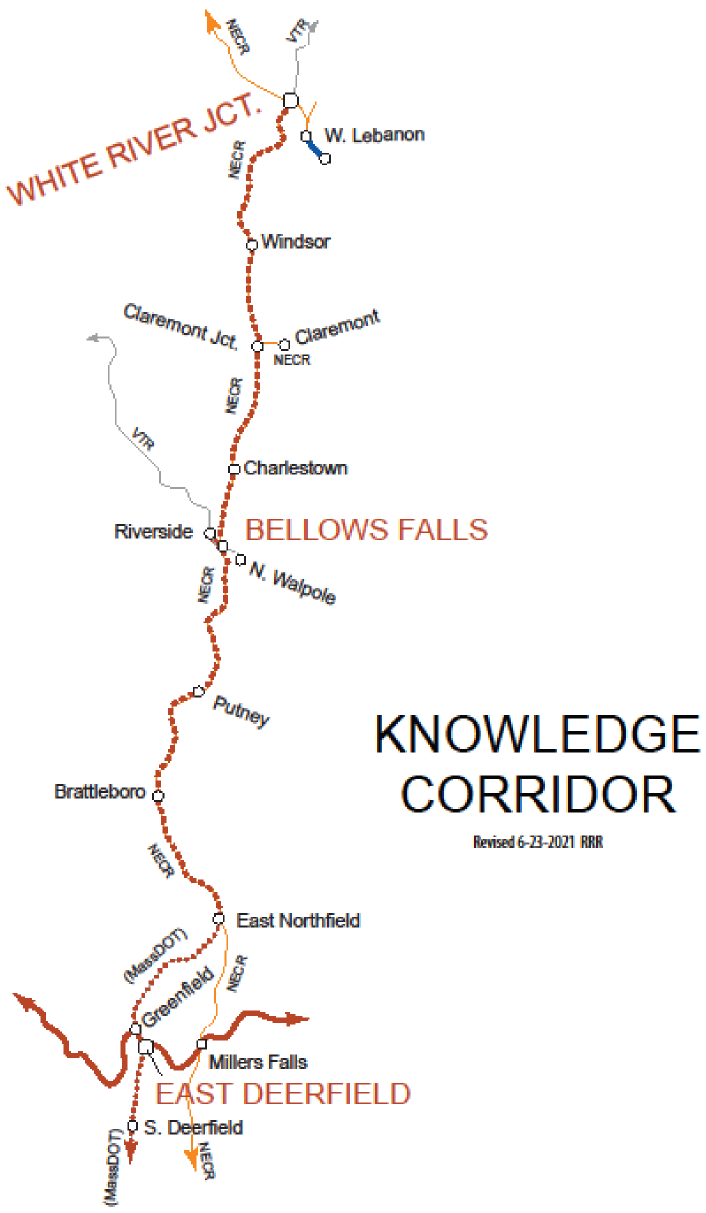
PAS Schematics

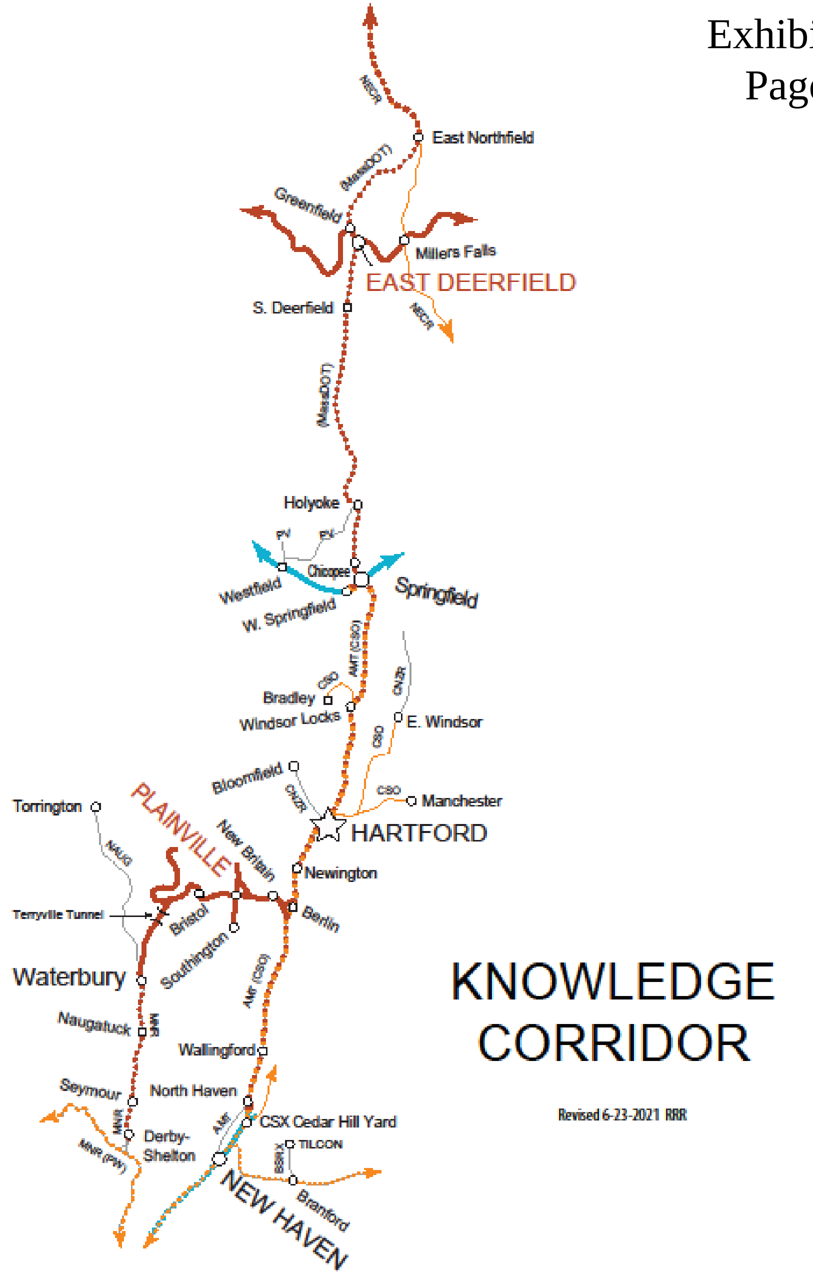
Source: CSXT-Pan Am Merger Application As Amended and Supplemented on July 1, 2021
Exhibit 12 (Market Analysis)



PATRIOT CORRIDOR

Revised 6-23-2021 RRR


WHITE RIVER JCT.
NECR
VTR
W. Lebanon
NECR
Windsor
Claremont Jct.
Claremont
NECR
NECR
VTR
Charlestown
Riverside
BELLOWS FALLS
N. Walpole
NECR
Putney
Brattleboro
NECR
East Northfield
(MassDOT)
Greenfield
NECR
Millers Falls
EAST DEERFIELD
S. Deerfield
(MassDOT)
NECR
KNOWLEDGE
CORRIDOR
Revised 6-23-2021 RRR


NECR
East Northfield
(MassDOT)
Greenfield
Millers Falls
EAST DEERFIELD
S. Deerfield
NECR
(MassDOT)
Holyoke
PV
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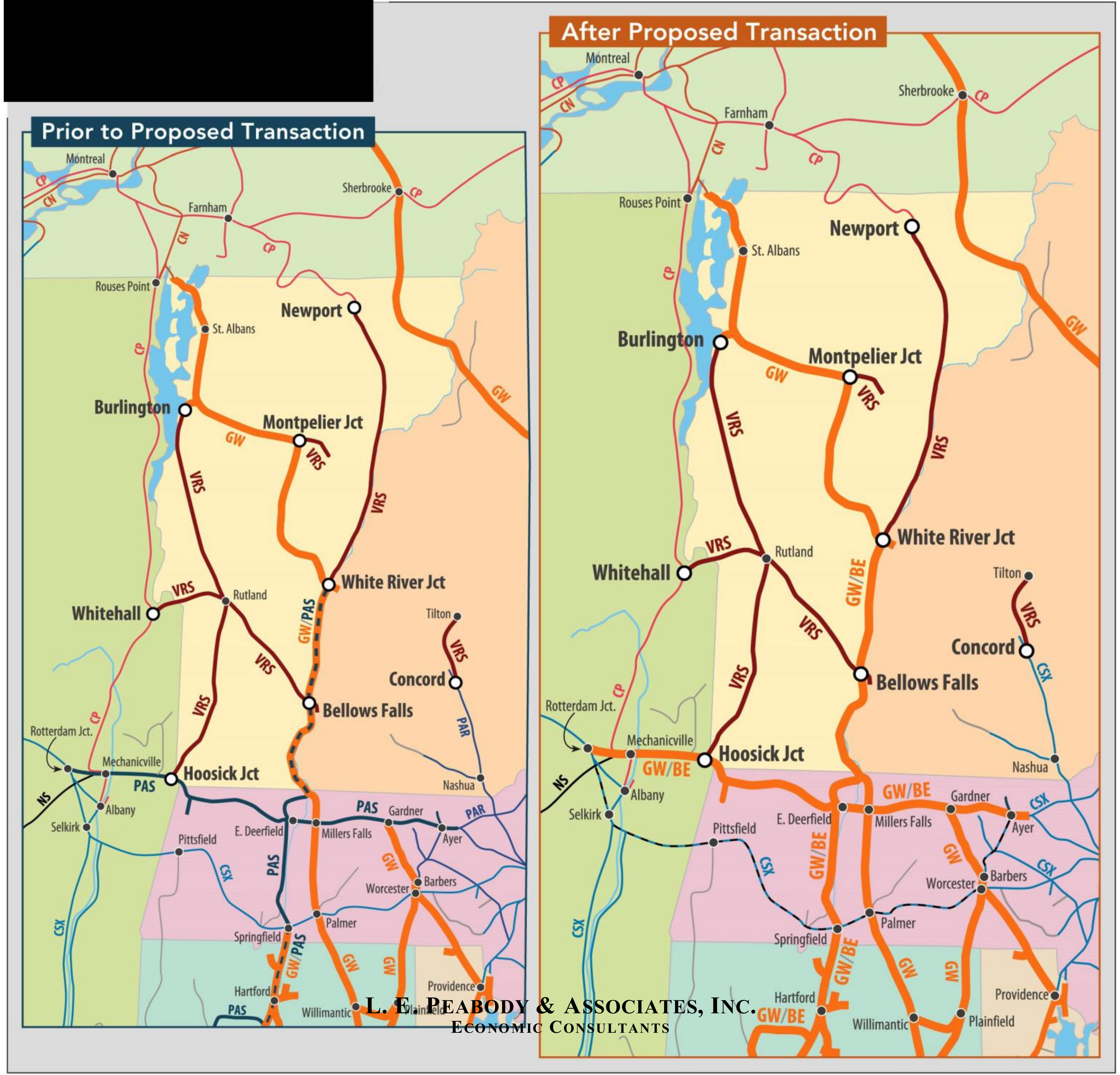
Chicopee
Westfield
W. Springfield
Springfield
AMT (CSO)
CSO
Bradley
Windsor Locks
CNZR
E. Windsor
CSO
Bloomfield
CSO
Manchester
CNZR
HARTFORD
Torrington
NAUG
PLAINVILLE
New Britain
Newington
Terryville Tunnel
Bristol
Berlin
Southington
Waterbury
AMT (CSO)
Naugatuck
MNR
Wallingford
Seymour
North Haven
MNR
AMT
CSX Cedar Hill Yard
Derby-Shelton
MNR (PW)
TILCON
BSRX
NEW HAVEN
Branford
KNOWLEDGE
CORRIDOR
Revised 6-23-2021 RRR

VRS Schematics

Source: VRS Notice to Participate in FD 36472 & FD 36472 (Sub-No. 5), Filed on March 16, 2021
Exhibit A (Rail Operators & Interchanges)

[redacted]


Prior to Proposed Transaction
Montreal
Sherbrooke
Farnham
Rouses Point
St. Albans
Newport
Burlington
Montpelier Jct
White River Jct
Whitehall
Rutland
Tilton
Concord
Bellows Falls
Rotterdam Jct.
Mechanicville
Hoosick Jct
Nashua
Albany
Selkirk
Pittsfield
E. Deerfield
Millers Falls
Gardner
Ayer
Worcester
Barbers
Palmer
Springfield
Hartford
Providence
Willimantic
Plainfield
CP
CN
GW
VRS
GW/PAS
PAS
PAR
NS
CSX
After Proposed Transaction
GW/BE

PROBLEMS WITH THE CSXT ANALYTICAL FRAMEWORK

CSXT used subjective determinations of competitive harm, focused on product and commodity competitive issues rather than shipper and location competition, knowingly excluded traffic moving on VRS (and the Connecticut River Line) from its analysis, dismissed competitive concerns for intermediate products, and used more granular (and restrictive) commodity (STCC) definitions for consideration of the competitive impact of the merger than CSXT and NS used to establish revenue divisions for PAR-PAS interline traffic.

A. THE 50/10 SCREENING TEST

"To analyze the competitive issues at the product or commodity level, rather than directly served shippers and locations,"[1] CSXT witness Dr. Reishus used a test known as the "50/10 test" as a screen to identify rail traffic that is potentially subject to reduced competitive options following the proposed merger. Traffic that was identified by the screen was then identified "for further review,"[2] and evaluated on a subjective basis to determine whether competition would be meaningfully reduced.

The 50/10 test has been submitted in support of previous STB merger reviews,[3] but it is merely a crude tool used to narrow down commodity lanes for review. As Dr. Reishus caveated, "[w]hile a change in the concentration in relevant market *might* be indicative of an enhanced risk of the exercise of market power, the results of the 50/10 test in no way represent such a finding."[4]

1 *See,* Reishus VS, CSXT-PAR Merger Application, p. APP-591, ¶ 141.
2 *Id.*
3 *See*, e.g., STB Finance Docket 35081, Supplemental Verified Statement of John H. Williams, November 27, 2007 at footnote 5 and § II.
4 *See,* Reishus VS, CSXT-PAR Merger Application, p. APP-592, ¶ 144. Emphasis in original.

PROBLEMS WITH THE CSXT ANALYTICAL FRAMEWORK

The "50/10 test" screens existing rail traffic for each commodity (defined by 7-digit STCC in the CSXT analysis) from and to each pair of Bureau of Economic Analysis ("BEA")[5] economic areas, as reported in the Surface Transportation Board's ("STB") Costed Waybill Sample ("CWS"). The test identifies commodity-specific lanes between broad geographic areas in which each of the merging railroads accounts separately for at least 10 percent of the volume of a given STCC, and together they account for at least 50 percent of the volume for that STCC. The screen is applied separately to originating railroads, terminating railroads, and overhead railroads participating in the movements. Once the screen is complete, each commodity-BEA combination that is identified is separately reviewed. At this point, the process ceases to be objective.

Each of the movements that met or exceeded the 50/10 threshold's competitive conditions was separately reviewed by Dr. Reishus, who made a subjective determination of "the extent to which the Proposed Transaction would risk competitive harm."[6] In all cases relevant to the CSXT-PAR transaction, he found no risk of competitive harm. However, he did identify shipments over the Connecticut River Line as potentially problematic, but dismissed them due to CSXT's nonspecific and unsupported promises (as 50 percent PAR owner) of rates being set at "current levels" subject to "reasonable future escalation."

B. CANADIAN RAIL TRAFFIC

Dr. Reishus also concedes that the traffic data he considered in this case is also skewed by the fact that the lanes he studied include shipments to and from Canada, which are not adequately

5 BEAs are defined by the U.S. Department of Commerce, Bureau of Economic Analysis. Every county is the US is assigned to a BEA which is defined around the local population area.
6 *See,* Reishus VS, CSXT-PAR Merger Application, p. APP-591.

PROBLEMS WITH THE CSXT ANALYTICAL FRAMEWORK

included in the STB's waybill data. He concludes that the missing data overstates the potential for competitive harm, but this conclusion is unsupported.

> The waybill sample does not representatively sample Canadian destinations which thereby overstates the effect of the Proposed Transaction on calculated rail traffic shares. Shares of rail traffic from Canada in the CWS appear unrealistically concentrated as all, or nearly all, of the rail traffic originating in Canada and terminating in Canada will not be included. Similar issues occur for movements originating in New England: much of the traffic moving to Canada is not captured in the CWS so the rail traffic from areas bordering Canada will appear more concentrated than it likely is.[7]

VRS is proximate to, and moves traffic entering and exiting Canada. Rail traffic from areas bordering Canada simply cannot be evaluated. There is no basis to assume that rail traffic "will appear more concentrated than it likely is." It is possible that including the Canadian volumes would not significantly change the observed concentration in a given lane, but it would significantly understate the volume of traffic that is found to be potentially problematic.

C. INTERMEDIATE PRODUCT SHIPPERS

Dr. Reishus states the following:

> If two receivers obtain a non-truckage intermediate product used in the production of non-competing goods, then a merger between carriers that are separately serving these shippers results in no enhancement in market power.[8]

Dr. Reishus seems to be conflating the market power of the producers of non-competing goods in the market for those goods, e.g., plastic widgets and plastic thing-a-ma-bobs. The issue here is the market for rail transportation of the input commodity, e.g., plastic pellets, which would most certainly be reduced by a reduction in rail carriers serving the two (2) facilities that consume

[7] *See,* Reishus VS, CSXT-PAR Merger Application, p. APP-594, ¶ 148, footnote omitted.
[8] *See,* Reishus VS, CSXT-PAR Merger Application, p. APP-594, ¶ 149, third bullet.

PROBLEMS WITH THE CSXT ANALYTICAL FRAMEWORK

the intermediate product. Whether increases in the production costs caused by increases in rail transportation of intermediate goods can be separately passed through to consumers in the widget and thing-a-ma-bob markets is irrelevant.

D. INCONSISTENT COMMODITY GROUPINGS

The NSR Settlement Agreement stipulates that the "pricing protocol… for PAR rates/divisions to/from PAS" will be determined using factors that are developed "based on STCC 5 and equipment characteristics excluding TIH/PIH commodities."[9] However, the 50/10 framework used by Dr. Reishus to "analyze the competitive issues at the product or commodity level" evaluates "each commodity (at the 7-digit STCC level)."[10]

Dr. Reishus used a relatively more restrictive commodity classification to identify competitive issues than CSXT/NS did to develop a rate setting mechanism. If CSXT/NS believe that for pricing purposes, commodities with the same 5-digit STCC are comparable, then Dr. Reishus' analysis should have applied the same logic.

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[9] *See,* NSR Settlement Agreement at APP-438, item X.
[10] *See,* Reishus VS, CSXT-PAR Merger Application, p. APP-591, ¶ 142.

BEFORE THE
SURFACE TRANSPORTATION BOARD

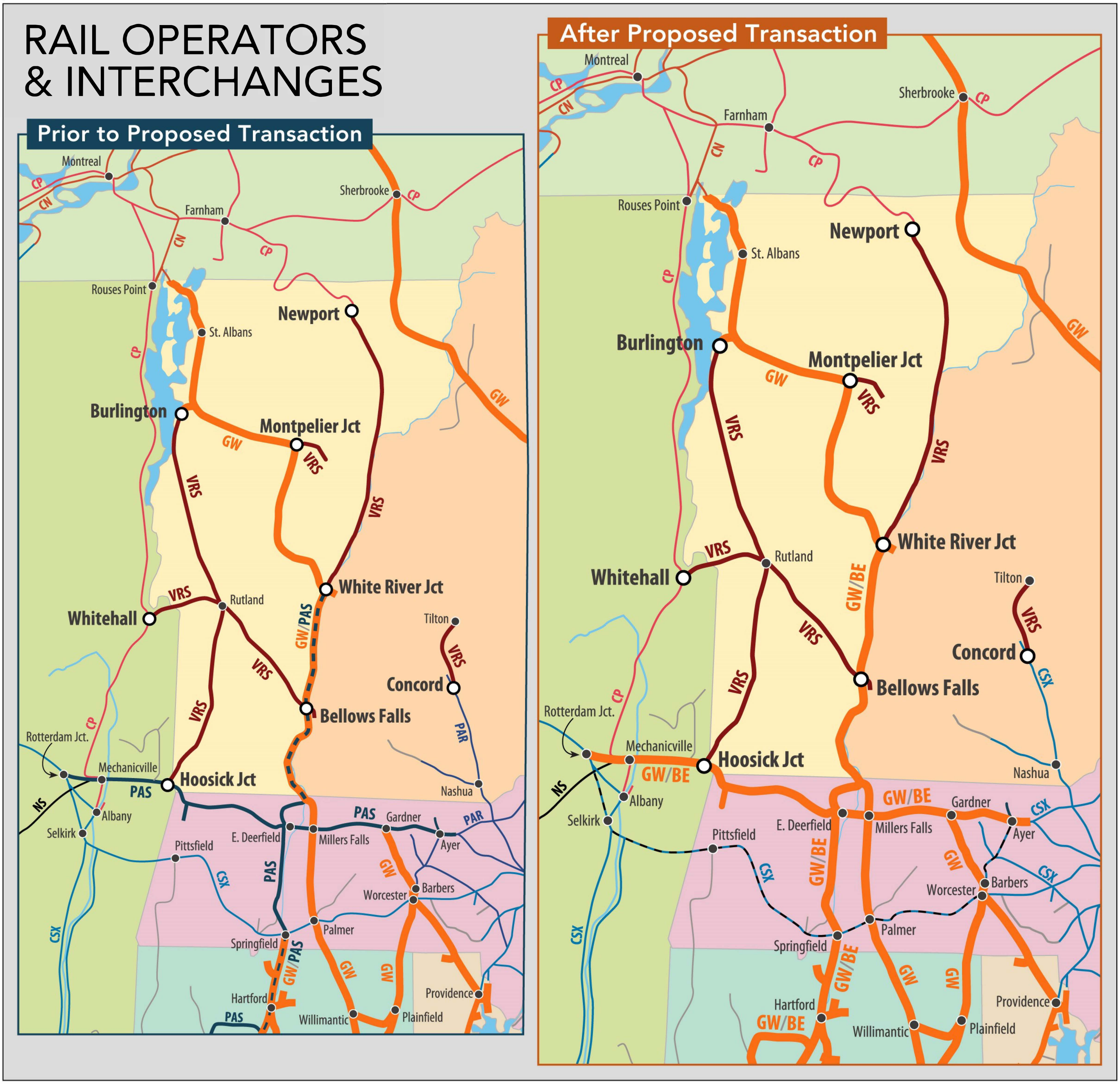
FD 36472 (Sub-No. 5)

PITTSBURG & SHAWMUT RAILROAD, LLC d/b/a
BERKSHIRE & EASTERN RAILROAD
— OPERATION EXEMPTION —
PAN AM SOUTHERN LLC

**VERMONT RAIL SYSTEM'S REPLY IN OPPOSITION TO
PITTSBURG & SHAWMUT RAILROAD, LLC'S PETITION FOR EXEMPTION**

EXHIBIT C

VRS SYSTEM AND SURROUNDING REGION MAP


RAIL OPERATORS
& INTERCHANGES
Prior to Proposed Transaction
Montreal
CP
CN
Farnham
Sherbrooke
Rouses Point
St. Albans
Newport
Burlington
GW
Montpelier Jct
VRS
White River Jct
GW/PAS
Whitehall
Rutland
Tilton
Concord
Bellows Falls
PAR
Rotterdam Jct.
Mechanicville
Hoosick Jct
PAS
NS
Albany
Selkirk
Nashua
Gardner
Ayer
Pittsfield
E. Deerfield
Millers Falls
CSX
Worcester
Barbers
Springfield
Palmer
Providence
Hartford
Willimantic
Plainfield
After Proposed Transaction
GW/BE

CERTIFICATE OF SERVICE

I hereby certify that I have this 27th Day of August arranged to serve the foregoing Reply in Opposition of Vermont Rail System 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