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SURFACE TRANSPORTATION BOARD

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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

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TABLE OF CONTENTS

I. Introduction and Summary 1

II. Legal Standard..... 4

III. Analysis 6

 A. The Transactions will produce substantial public benefits for New England and the nation. 6

 1. The Transactions have received strong and wide-ranging support..... 6

 2. CSXT will upgrade, improve and modernize the PAR System to the benefit of rail shippers. 7

 3. The Transactions will benefit intercity and commuter passenger rail operations. 9

 4. The Merger Transaction will benefit the environment. 11

 5. Labor interests will be protected..... 11

 6. Competition will be enhanced. 12

 B. The Transactions will result in no lessening of competition, creation of a monopoly, or restraint of trade..... 13

 1. CSXT’s acquisition of the PAR System is an end-to-end combination that presents no risk of competitive harm. 13

 2. CSXT’s acquisition of an interest in PAS will not harm competition..... 14

 3. B&E’s contract operation of PAS will not harm competition. 16

 C. The Board should not order conditions that would change the negotiated restructuring of PAS..... 17

IV. Conclusion..... 18

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CORPORATION, MAINE CENTRAL RAILROAD COMPANY, NORTHERN RAILROAD,
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The Merger Transaction¹ proposed by Applicants, along with the Related Transactions proposed by NSR and B&E (together, the “Transactions”), will transform the New England rail network. They will improve rail infrastructure, operations, reliability, and safety for all users, both freight and passenger, of the PAR System and the PAS Network. The Board should approve the transactions under the structure proposed and subject to the conditions sought by Applicants, which will ensure the preservation and enhancement of competition in New England transportation markets.

I. Introduction and Summary

The Merger Transaction is an end-to-end combination of the CSXT and PAR System railroad networks. It will extend Class I rail service to an important region of the nation now served by a regional rail carrier with limited financial resources. CSXT will bring efficient Class I rail service and asset replacement cycles to the PAR System. This will better connect New

¹ Unless otherwise defined in this Brief, the acronyms and defined terms used in this Brief are the same as those used in Applicants’ Revised Application, filed on July 1, 2021, and the Board’s July 30, 2021 decision accepting the July 1 Revised Application, *Decision No. 4*, FD 36472 et al. (STB served July 30, 2021).

England to national and international markets and enhance intermodal competition by providing more reliable rail service that will over time allow CSXT to take trucks off of congested highways. Intramodal competition will also be enhanced, as the Related Transactions include NSR trackage rights for a new double-stacked intermodal route that will give NSR a superior platform to compete with CSXT and truck carriers for intermodal traffic into the Boston area. B&E's replacement of Springfield Terminal as contract operator of PAS will strengthen PAS both operationally and as a viable competitive alternative to CSXT for movements of traffic into and within New England.

New England rail customers resoundingly support the Transactions. Not a single shipper opposes the proposals. These businesses, which depend on freight rail, uniformly recognize that replacing Springfield Terminal with CSXT and B&E, respectively, as operators of the PAR System and the PAS Network will modernize operations and bring best-in-class rail service to New England. Government officials, short line railroads, and various community stakeholders also support the Transactions. The statements of support in the docket total 125.

The Transactions will also benefit rail passengers and local communities. CSXT and B&E will step into the shoes of Springfield Terminal regarding its contractual obligations to passenger rail stakeholders, and CSXT has committed to explore the introduction of additional or expanded passenger service in Western Massachusetts. The Transactions will go beyond these commitments by upgrading infrastructure in critical areas like Ayer, MA and along Amtrak's Downeaster route from Boston, MA to Portland, ME, and by improving regular maintenance of PAS Network lines used to support passenger rail service on the Knowledge Corridor. Local communities will benefit from the environmental improvements CSXT will bring, including the

replacement of older, less efficient locomotives with newer, cleaner locomotives, and more environmentally sensitive rail operations.

The only competitive issues raised by commenters involve CSXT's acquisition of a 50% interest in PAS and B&E's contract operation of PAS. Even if there were a valid basis for these concerns, they are not capable of having a substantial impact on the relevant markets, and their putative harm would be vastly outweighed by the benefits of the transactions. In any event, the competitive concerns are not justified.

First, CSXT has shown that its interest in PAS will not jeopardize PAS's viability as a competitive route into and out of New England. CSXT has agreed to remove itself altogether from competitive decisions by PAS. It will also sell its interest in PAS to NSR (which owns the other half of PAS) if NSR concludes that CSX's ownership impedes PAS's viability. NSR is the railroad with the most at stake if PAS flounders, and NSR clearly believes that its settlement agreement with CSXT will protect its interests and promote competition.

Second, CSXT has shown that the contract operation of PAS by B&E will not reduce competitive options for Vermont railroads or shippers. Little, if any, competitive traffic could be affected by B&E's operation of PAS. And CSXT and NSR (as owners of PAS post-transaction) have structured the PAS/B&E relationship carefully to ensure that B&E will have neither the incentive nor the ability to harm competition. Moreover, the Vermont parties, CSXT, NSR, and GWI have entered into a settlement agreement that fully resolves the concerns of the Vermont parties regarding B&E's contract operation of PAS.

Applicants have established that no lessening of competition or restraint of trade will result from the Transactions, and that the Merger Transaction serves the "public interest in meeting significant transportation needs." 49 U.S.C. § 11324(d)(2). The primary danger to

competition and the public interest in these proceedings is that unwarranted conditions could jeopardize a carefully constructed series of agreements that will, collectively, enhance competition and yield substantial public benefits for the New England region and the country.

The restructuring of the rail network presented in the Transactions was the product of extensive and deliberate negotiations intended to create a stronger and more competitive rail network in the region. Given the extraordinary effort, time, and expense required to reach the negotiated arrangements, there can be no assurance they could ever be re-assembled if any of the transactions were not approved, or if conditions were imposed that materially affected the essence of those arrangements.

Applicants have fully addressed the competitive issues raised by commenters through the negotiated arrangements and additional commitments. If the Board determines those concerns have more merit than has been discerned by Applicants, the Board should weigh those concerns and any potential remedies against the overall public interest, which Applicants believe strongly supports approval of the Transactions. Applicants respectfully request that the Board approve the Revised Application and the filings for the Related Transactions with the conditions proposed by Applicants in their filings.

II. Legal Standard

Applicants have addressed the legal standards that govern the Board's review of the Merger Transaction. *See* Revised Appl. APP-23 to APP-24; Response Comments CSXT/PAR-37-7 to CSXT/PAR-37-11. Under 49 U.S.C. § 11324(d), "the Board's primary focus is on the anticipated competitive effects." *Soo Line Corp.—Control—Cent. Me. & Quebec Ry. US Inc.*, FD 36368, slip op. at 4 (STB served May 4, 2020). The Board must approve a transaction "unless there would be adverse competitive impacts that are both 'likely' and 'substantial.'" *Id.* "[E]ven if the Board were to find that there would be likely and substantial anticompetitive

impacts, the Board may not disapprove the transaction unless the anticompetitive impacts outweigh the benefits and cannot be mitigated through conditions.” *Id.*

The Board limits itself to conditions that are “shown to be related to the impact of the merger,” *Burlington N., Inc.—Control & Merger—St. Louis*, 360 I.C.C. 788, 951 (1980), and that are “feasible” and would ameliorate “significant” competitive harm, *Can. Nat’l Ry.—Control—Duluth, Missabe & Iron Range Ry.*, FD 34424, slip op. at 14 (STB served Apr. 9, 2004). Thus, the Board distinguishes between harms related to the transaction and “pre-existing disadvantages that will neither be caused nor exacerbated” by the transaction. *Can. Nat’l Ry.*, FD 34424, slip op. at 14. The Board has noted that “mitigation is not imposed to correct pre-existing conditions.” *Can. Nat’l Ry. Co.—Control—EJ&E W. Co. (CN/EJ&E)*, FD 35087, slip op. at 5 n.2 (STB served Apr. 28, 2008).

The Board looks at competitive effects of a proposed transaction from a pre-transaction perspective to determine if there would be a reduction of the competitive options that existed before the transaction. *See* Response Comments CSXT/PAR-37-9 (citing *Portland & W. R.R., Inc.—Lease & Operation Exemption—Lines of Burlington N. R.R.*, FD 32766, slip op. at 5-6 (STB served Oct. 15, 1997); *Review of Rail Access & Competition Issues—Renewed Pet. of the W. Coal Traffic League*, EP 575 (Sub-No. 1), slip op. at 9 (STB served Oct. 30, 2007)). As a corollary to the principle that the Board only addresses competitive harms caused by the transaction, the Board does not use its conditioning authority to create new competitive options for parties seeking conditions or to expand business opportunities. Because conditions generally reduce the benefits of a consolidation, the Board has not burdened mergers with conditions unless they are necessary either to ameliorate the anticompetitive impact of a merger or to protect essential services. *See* Response Comments CSXT/PAR-37-10 (citing *Grainbelt Corp. v.*

STB, 109 F.3d 794, 796 (D.C. Cir. 1997); *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295, 302 & n.8 (D.C. Cir. 1983); *Norfolk S. Ry. Co.—Acquis. & Operation—Certain Rail Lines of the Del. & Hudson Ry. Co., Inc.*, FD 35873, slip op. at 8-9 n.11 (STB served Oct. 18, 2016)).

The Board will impose a condition only where: (1) a transaction threatens harm to the public interest, such as a significant reduction in competition, (2) the requested condition would ameliorate or eliminate that harm, (3) it is operationally feasible, and (4) the condition would result in greater benefit to the public than detriment to the transaction. *See* Response Comments CSXT/PAR-37-10 (citing *Can. Nat’l Ry.—Control—Ill. Cent. Corp.*, FD 33556, slip op. at 4 (STB served Sept. 18, 1998); *Grainbelt Corp.*, 109 F.3d at 796; *Union Pac. Corp.—Control—Mo. Pac. Corp.*, 366 I.C.C. 462, 562-65 (1982); *Wisc. Cent. Transp. Corp.—Continuance in Control—Fox Valley & W. Ltd.*, 9 I.C.C.2d 233, 239 (1992)). Finally, for the Board to grant a condition, “there must be a sufficient nexus between the condition imposed and the transaction before the agency.” *CN/EJ&E*, FD 35087, slip op. at 5 n.2.

III. Analysis

A. The Transactions will produce substantial public benefits for New England and the nation.

1. The Transactions have received strong and wide-ranging support.

The Transactions have received widespread public support.² Shippers, in particular, have expressed overwhelming support of an integrated CSXT/PAR System. To date, 83 shippers have submitted statements emphasizing the benefits of the proposed transaction: single-line service; access to CSXT’s advanced technological customer tools and supply chain solutions, such as the

² A more detailed description of the overwhelming support for the Merger Transaction and Related Transactions can be found in Applicants’ October 18, 2021 Response to Comments and Requests for Conditions and Rebuttal in Support of Application (the “Response Comments”). *See* Response Comments CSXT/PAR-37-12 to CSXT/PAR-37-26. Additionally, letters of support can be viewed in Exhibit 23 of Applicants’ July 1, 2021 Revised Application and within the docket for this proceeding on the Board’s website.

ShipCSX platform, lower cost, improved service, and improved access. Many shippers also commend the expanded market opportunities created by the CSXT/PAR System combination.

The Transactions have also received substantial support from multiple levels of government officials and entities, who emphasize that single-line service and CSXT's investment in local infrastructure will improve safety measures, have favorable environmental and sustainability impacts, and create significant economic benefits for communities across the Northeast. For example, Governor Christopher T. Sununu of New Hampshire and Governor Janet T. Mills of Maine express support because of the considerable public benefits their respective states will experience through CSXT's infrastructure investment and the region's improved rail service. Sununu Comments, Revised Appl. APP-785; Mills Comments 1, STB filed July 29, 2021.

Additionally, several railroads that interchange traffic in New England or operate in New England have expressed support because the Transactions will substantially improve rail service in the region and expand market opportunities for the shippers they serve.

2. CSXT will upgrade, improve and modernize the PAR System to the benefit of rail shippers.

The widespread support for the Merger Transaction comes from a recognition that the PAR System will be vastly improved with CSXT as the new owner.

Infrastructure Improvements: Through the hard work and resourcefulness of Springfield Terminal employees, the PAR System has been maintained for decades with limited resources. Those efforts both saved and preserved the New England rail network. But the New England economy deserves a better rail network. CSXT will elevate the network's potential by upgrading and modernizing its infrastructure. CSXT plans to increase capital investment across the PAR System to raise track standards, including catch-up work in rail, tie, bridge, and yard

improvements. CSXT plans to restore the PAR System mainline track conditions to at least FRA Class 2 standards, eliminating long-term slow orders that currently reduce the efficiency of the PAR System. CSXT also plans to improve PAR System yard trackage, which should reduce derailments and improve yard fluidity. Jamie Boychuk, CSXT's Executive Vice President of Operations, discusses these proposed improvements in further depth in the Operating Plan attached as Exhibit 13 to the Revised Application.

Modernization: CSXT will also implement its industry-leading operating practices on the PAR System to modernize the PAR System's operations, improve consistency and reliability of service, and introduce careful data measurement and management. CSXT's modern technological tools and operating practices will replace the paper forms and spreadsheets currently used by Springfield Terminal. Additionally, CSXT anticipates operating the PAR System on a scheduled basis, regularizing inconsistent train schedules. CSXT has shown that its modernized operating practices can make consistency and efficiency improvements to its Class I existing network, and CSXT plans to achieve the same for customers on the PAR System.

Expanded Customer Support: ShipCSX, an industry-leading customer-facing tool that provides exceptional transparency into railcar shipments and management, will give PAR customers better insight into the status of their rail shipments, including trip plans, trip plan compliance, pipeline management, and equipment inventory. They will benefit from a suite of tools, not available to them today, that integrates the ability to price rail shipments, ship and trace railcars, and pay for services, including account invoices and accessorial charges.

Efficient Single-Line Service: Single-line service on the combined CSXT/PAR System lines will extend consolidated and streamlined service planning and provide a single-point of contact for CSXT's and the PAR System's rail customers. Single-line service will reduce

switching and interchange, eliminate the need to coordinate a hand-off between separate rail carriers, result in transit time savings, and reduce the chance of unexpected problems in the physical interchange of traffic between two independent carriers. With single-line service and a consolidated information system for freight car location and distribution, rail customers will receive better information and can better monitor their traffic and plan their own operations around rail schedules.

Expanded Market Access: The improved efficiency of a single-line connection to the national Class I rail network and the superior customer support tools that will be available to shippers will expand market opportunities for shippers to and from New England. CSXT's existing rail network serves all major population centers and industrial regions of the Eastern United States. CSXT's Executive Vice President, Mark K. Wallace, explained in a verified statement supporting the Application how the integration of the PAR System into CSXT's network will support the growing New England economy by offering superior rail transportation service, which in turn will allow shippers to grow their own business and increase rail transportation. New England rail users will have access to markets on CSXT's network and to its interchange partners across the country. The expanded market opportunities will also extend to international trade, because the PAR System connects to Saint John through a haulage arrangement with the Eastern Maine Railway and New Brunswick Southern Railway.

3. The Transactions will benefit intercity and commuter passenger rail operations.

The improved infrastructure and more consistent and reliable operations that will result from the Transactions will benefit all rail users, including intercity and commuter passenger rail services that run on these rail networks. Andy Daly, CSXT's Senior Director of Passenger Operations, and Leonard Wagner, GWI's Senior Vice President of the Northern Region, have

explained how the railroads will maintain or improve existing passenger service and will step into the shoes of Springfield Terminal with respect to all of Springfield Terminal's current obligations to the sponsors of passenger rail services. *See* Revised Appl., Ex. 13-C, Daly VS APP-373; B&E Supplement to Amended Pet. for Exemption, Wagner VS 9.

Since announcing the Merger Transaction, CSXT has engaged in an outreach effort with passenger rail stakeholders. These discussions have yielded several settlement agreements and statements of support, including from the Connecticut, New Hampshire, and Maine Departments of Transportation, and the Northern New England Passenger Rail Authority (the state sponsor of Amtrak's Downeaster intercity passenger rail service). CSXT has also made several commitments to ensure the preservation of effective passenger service, including infrastructure upgrades in the Ayer, MA area that will benefit MBTA commuter rail service, and installation of Positive Train Control on the PAR System line that hosts the Amtrak Downeaster service. *See* Daly VS APP-375 to APP-376, APP-381; Response Comments CSXT/PAR-37-71, CSXT/PAR-37-78 to CSXT/PAR-37-79; Response Comments, Ex. 3, Daly Reply VS CSXT/PAR-37-139 to CSXT/PAR-37-140. CSXT has explained how its Amtrak performance levels have recently hit historic highs, and recently became only the second Class I railroad to certify 100% of its Amtrak schedules. *See* Daly VS APP-377.

The concerns raised by MassDOT/MBTA and Amtrak are either unrelated to the Transactions or involve existing issues regarding the interaction of freight and passenger rail service on the lines at issue here. They propose conditions that, in many instances, would rewrite existing agreements that govern interactions between freight and passenger rail services. *See, e.g.,* Response Comments CSXT/PAR-37-75. However, the Transactions will have no adverse impact on existing conditions, and there is no "nexus" between the conditions requested and the

Transactions. *CN/EJ&E*, FD 35087, slip op. at 5 n.2. Therefore, there can be no basis for imposing the conditions proposed by these commenters.

4. The Merger Transaction will benefit the environment.

The Merger Transaction will produce strong environmental benefits. The Operating Plan attached as Exhibit 13 to the Revised Application describes the increased fuel efficiency and reduced emissions that CSXT expects to achieve on the PAR System by modernizing the Springfield Terminal locomotive fleet and implementing emissions-reducing technologies. Improved fluidity in rail operations will result in fewer idling locomotives, less delay at interchange locations, and fewer power swaps with connecting carriers – all of which will result in fewer emissions. CSXT has also committed to making extensive upgrades to the rail lines near the Wachusett Reservoir outside of Boston that will protect the local ecosystem. Finally, over the longer term, Applicants expect to convert certain existing truck movements to rail as New England shippers identify new market opportunities. CSXT's witness Mr. Wallace identified specific opportunities on traffic that currently moves long distances on trucks but will become attractive as rail movements with expected improvements in reliability and consistency. *See* Revised Appl., Ex. 22-D, Wallace VS APP-481 to APP-482.

5. Labor interests will be protected.

One of the primary labor benefits of the Transactions is expected improvements in safety. Safety is a vital component of both CSXT's and GWI's operating philosophy and goals. CSXT has led the industry with the lowest FRA reportable injury rate in 2019 and 2020. GWI's affiliated railroads have long been recognized as industry leaders in safety. B&E Supplement to Amended Pet. for Exemption at 5. While CSXT does not anticipate a reduction of the work force of Springfield Terminal providing service over the PAR System, B&E has indicated that there may be a reduction in some craft employees operating PAS. In each case, the standard

labor protective conditions imposed in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) will apply. See B&E Amended Pet. for Exemption 15-16; Revised Appl. APP-35 to APP-36.

6. Competition will be enhanced.

CSXT's acquisition of the PAR System is an end-to-end combination that will have no negative impact on intramodal competition. In three important ways, the Transactions will actually enhance competition in New England for freight transportation. First, intermodal competition will be strengthened by the improvements that CSXT will bring to the PAR System in reliability, consistency of service, and better transit times. As explained by Dr. Reishus, New England freight transportation is highly truck competitive, and these improvements will allow CSXT to compete more vigorously with trucks.

Second, the agreements between CSXT, NSR, and GWI will strengthen both intramodal and intermodal competition. Most notable is CSXT's grant of trackage rights to NSR for the movement of a double-stacked intermodal train pair over CSXT's Southern Route. Intermodal is the largest category of rail freight moving into and out of New England, but NSR has been constrained to moving single-stack intermodal trains because of the height limitation on PAS's Hoosac Tunnel. NSR's trackage rights will give it a stronger platform to compete with CSXT and with trucks for intermodal traffic. The negotiated settlement agreement between CSXT and NSR will also remove anticompetitive constraints on the movement of traffic through Ayer. These competitive enhancements are addressed by Dr. Huneke's verified statement.

Third, replacing Springfield Terminal with B&E will strengthen PAS as a competitor for freight moving to and from New England. Unlike Springfield Terminal, which operates both PAS and the PAR System, B&E's attention to operating, marketing, and maintenance activities will be exclusively focused on PAS. B&E will thus be able to manage and control overhead costs

on PAS much better than Springfield Terminal. B&E will be able to make operating decisions based solely on the needs of PAS and its customers, and those of passenger carriers with which it shares facilities. *See Wagner VS 3-5.* B&E's corporate parent, GWI, operates multiple railroads of comparable size and scope to the PAS Network and has unique start-up operating experience. No other rail operator would be able to initiate and sustain operations of the size and scope of PAS as effectively as B&E.

B. The Transactions will result in no lessening of competition, creation of a monopoly, or restraint of trade.

1. CSXT's acquisition of the PAR System is an end-to-end combination that presents no risk of competitive harm.

When considered in tandem with the Related Transactions, CSXT's acquisition of the PAR System is an "end-to-end" transaction, resulting in a Class I, single-line operation between the eastern U.S. network served by CSXT and northern Maine (with additional haulage to New Brunswick). It is well recognized that end-to-end rail mergers rarely produce competitive harm. They allow railroads to improve their efficiency and operations and provide higher-quality service.

There are few areas where there is even a potential for a reduction in direct or "horizontal" competition between CSXT and the PAR System. Dr. Reishus extensively analyzed waybill data from the STB, internal waybill data and other data sources to identify shippers that could see their shipping options reduced. He concluded that only three shippers, in Everett, MA, have been served by both the PAR Railroads and CSXT. None will lose rail options.³ To ensure they do not, CSXT has committed to provide the option of switching service to connect these

³ Everett is an inner industrial suburb adjacent to Boston with difficult rail connections to reach the less congested portion of the freight rail network located outside the urban center. Accordingly, direct rail service to these shippers by CSXT today would be difficult even if the facilities were in place for CSXT to reach locations north of Boston.

shippers to PAS, which then connects to the rest of the U.S. rail network via its direct connections with NSR and CP at Mechanicville. As a result, no shipper on the PAR System will face reduced horizontal competition.

Nor will any shippers face reduced vertical competition. Dr. Reishus explained that there is no reason to believe that traffic over the interconnection points between the PAR System and other connecting rail carriers will change because of the Merger Transaction or that competitive circumstances of the carriers using these interconnections will change. Nevertheless, CSXT has committed to keep PAR System gateways open on commercially reasonable terms. As described by Mr. Pelkey, CSXT has also committed to waive any right CSXT might otherwise have under the Board's rules to refuse requests by shippers to establish local, separately challengeable rates for movements on the PAR System to an interchange with another rail carrier. Also, in the Settlement Agreement with NSR, CSXT has agreed to price limits on movements from PAR System locations to the PAS Network, ensuring the continued access to the PAR System by other rail carriers over PAS.

2. CSXT's acquisition of an interest in PAS will not harm competition.

The only competitive concerns raised here involve CSXT's acquisition of a 50% ownership interest in PAS and the change in the PAS operator that will result from the Settlement Agreement with NSR. Parties raising these concerns do not oppose CSXT's acquisition of the PAR System, but insist on changes to the restructuring of PAS that CSXT, NSR and GWI negotiated to ensure the continued viability of PAS as a competitive route serving New England. The conditions they request are unjustified. As a threshold matter, the Board will only impose conditions that would ameliorate significant competitive harm. *See supra* at 4-6. Because CSXT has ensured that its acquisition of a 50% ownership interest in PAS will cause no

reduction in competition, all requests for conditions relating to this issue fail to meet the well-established legal standards developed over decades by the Board.

PAS is an independent railroad owned 50% by Boston & Maine (a PAR Railroad) and 50% by NSR. PAS consists of prior PAR System rail lines and operating rights. With its creation in 2009, PAS hired Springfield Terminal (another PAR Railroad) to operate and set rates for PAS on a contract basis as the agent of PAS. One stated reason for creating PAS was to preserve access to New England for Class I railroad competitors of CSXT. Recognizing that CSXT's acquisition of an interest in PAS could raise concerns about maintaining a competitive PAS route to New England, CSXT originally sought to exclude the PAR System's ownership and operating interests in PAS from the Merger Transaction. When those efforts were unsuccessful, CSXT negotiated agreements with NSR and GWI to structure CSXT's acquisition of these PAS interests to ensure that PAS would remain a viable competitor.

Most important, CSXT agreed to remove itself from any competitive decisions by PAS, including the pricing and marketing of PAS services. CSXT also agreed to sell its interest in PAS under specified terms if NSR or its assignee wishes to acquire CSXT's 50% interest within seven years of CSXT acquiring Systems. CSXT and NSR also agreed to retain an independent third party – B&E – to operate PAS in the interest of PAS as an independent rail carrier and to make commercial arrangements that would preserve and expand PAS traffic and PAS's independence and competitive role.

Two commenters, the Department of Justice and Canadian Pacific, question whether the restructured PAS will remain viable as a competitive route into New England. *See* DOJ Comments 3-6, STB filed Aug. 26, 2021; CP Comments 6-20, STB filed Aug. 27, 2021. Their concerns are unfounded. As Dr. Reishus explains, CSXT relies on PAS to move traffic to and

from PAS locations and would have no incentive to jeopardize PAS's handling of these movements by undermining its viability. Instead, CSXT and NSR will together handle the vast majority of traffic to and from PAS, and will have a strong incentive to keep PAS functioning efficiently.

Dr. Reishus also explains there is little competitive overlap of traffic handled by PAS and traffic on CSXT's Southern Route. Therefore, even if CSXT could undermine PAS's viability, CSXT would have no incentive to do so – it would have nothing significant to gain by that and plenty to lose. However, restructuring PAS to remove CSXT from competitive decision-making ensures that CSXT could not undermine PAS's viability, and CSXT has also made specific commitments not to do so.

As explained by Mr. Pelkey, CSXT has agreed to: (1) recuse itself from any PAS board discussion or consideration of strategic issues relating to CSXT's Southern Route or competition between PAS and CSXT; and (2) conduct accelerated arbitration to resolve any disputes that arise at the level of the PAS Management Committee over CSXT's willingness to make PAS capital expenditures. *See* Response Comments, Ex. 1, Pelkey Reply VS CSXT/PAR-37-118 to CSXT/PAR-37-119. NSR is a founder of PAS and the party with the most to lose if PAS is not preserved as a competitive route and NSR has concluded that CSXT's commitments and NSR's agreement with CSXT will accomplish those goals.

3. B&E's contract operation of PAS will not harm competition.

VTrans and VRS expressed concern that PAS's use of B&E as its contract operator will harm competition for traffic handled by VRS. These concerns have been fully resolved by a settlement agreement entered into by the Vermont parties, CSXT, NSR, and GWI, which has been filed with the STB. Applicants have requested that the terms of the settlement agreement be imposed as a condition for approval of the Transactions. These terms, along with the

commitments that CSXT and NSR have already made regarding the handling of VRS traffic, fully resolve the competitive issues raised by the Vermont parties.

Before a settlement was reached with the Vermont parties, the DOJ expressed concern that PAS's retention of B&E (a GWI subsidiary) to operate PAS on a contract basis will effectively reduce from two to one the number of competitors on the Knowledge Corridor segment owned by NECR (another GWI subsidiary) and over which PAS operates via trackage rights. DOJ Comments 4, STB filed Aug. 26, 2021. With the Vermont settlement agreement, this concern should no longer exist.

In any event, the concern was based on the mistaken assumption that all movements on this NECR line segment will become subject to control by GWI because NECR and B&E are each affiliates of GWI. To the contrary, B&E will be subject to a clear contractual commitment to advance the interest of PAS, not of any B&E affiliates, and PAS's owners have a strong incentive to see that this commitment is enforced. CSXT and NSR can fire B&E if it violates its agreements. The DOJ's suspicions cannot overcome the economic incentives that B&E will have to advance the interests of PAS and the contractual obligation to do so.

Moreover, Dr. Reishus has explained that there is a very limited amount of traffic currently subject to competition between PAS and NECR. Only two shippers on the line segment at issue have access to both PAS and NECR. PAS will commit to leaving the current PAS rates in place for those shippers. Neither shipper has opposed the Transactions and one of the shippers has submitted a letter of support.

C. The Board should not order conditions that would change the negotiated restructuring of PAS.

The Vermont parties originally asked the STB to force the replacement of B&E with a different PAS operator. With the settlement agreement involving the Vermont parties, this

request is no longer before the STB. The DOJ went further and asked the STB to consider a forced sale of CSXT's interest in PAS. Application of the standard that the Board uses to evaluate condition requests, *see supra* at 6, clearly points to rejection of this DOJ request. As established above, CSXT's acquisition of a 50% interest in PAS does not threaten harm to the public interest. Additionally, divestiture is not feasible and a condition ordering divestiture would harm the public interest and threaten the Transactions.

The negotiated arrangements involve many commitments and trade-offs that could not easily be renegotiated if fundamental changes were required. If fundamental changes were required, the entire interconnected set of proposed transactions could unravel, denying the public the opportunity to secure the benefits that have generated such widespread support for the transaction. *See Pelkey Reply VS CSXT/PAR-37-121.*

The requested condition would harm the public interest even if they could be implemented. Mr. Pelkey has explained that he is uncertain that CSXT could divest its 50% interest in PAS, given CSXT's experience in seeking to separate PAS from PAR and the structure of PAS and its historic financial performance. But even if a divestiture were feasible, it would likely result in a weaker PAS. A 50% owner that did not have an existing commercial relationship with PAS would not have the same degree of commitment to PAS as CSXT and NSR, who rely on PAS to serve substantial volumes of traffic moving to and from their national networks. Moreover, the complexity and time required to carry out a forced divestiture would create enormous uncertainty in New England rail markets that could damage the viability of the rail network for years. *See id.* at CSXT/PAR-37-120.

IV. Conclusion

The Transactions promise substantial public benefits to New England's rail users and local communities. Competition will be enhanced and rail service will be improved. Applicants

respectfully request that the Board approve the Transactions subject to the conditions and commitments proposed by Applicants, NSR, and B&E.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused this Applicants' Brief in Docket No. FD-36472, *CSX Corporation and CSX Transportation, Inc.—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*, to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Sally Mordi

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