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February 28, 2022

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Ms. Cynthia Brown
Chief, Section of Administration

Washington, D.C. 20009

Re: STB Finance Docket No. 36500, *Canadian Pacific Ry.,
et al. – Control – Kansas City Southern, et al.*

Dear Ms. Brown:

Attached for filing in the above referenced docket is the Redacted Public Version of the Opening Comments of Evergy Metro, Inc. Consistent with the Surface Transportation Board's Decision and Protective Order served April 2, 2021, a Highly Confidential version is being filed contemporaneously with the Board.

Please contact the undersigned if there are any questions regarding this filing.

Respectfully submitted,

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Attorney for Evergy Metro, Inc.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CANADIAN PACIFIC RAILWAY	)	
LIMITED; CANADIAN PACIFIC	)	
RAILWAY COMPANY; SOO LINE	)	
RAILROAD COMPANY; CENTRAL	)	
MAINE & QUEBEC RAILWAY US INC.	)	
DAKOTA, MINNESOTA & EASTERN	)	
RAILROAD CORPORATION; AND	)	
DELAWARE & HUDSON RAILWAY	)	
COMPANY, INC.	)	Docket No. FD 36500
	)	
– CONTROL –	)	
	)	
KANSAS CITY SOUTHERN; THE	)	
KANSAS CITY SOUTHERN RAILWAY	)	
COMPANY; GATEWAY EASTERN	)	
RAILWAY COMPANY; AND THE TEXAS	)	
MEXICAN RAILWAY COMPANY	)	
	)	

OPENING COMMENTS OF EVERGY METRO, INC.

In accordance with Decision No. 11 in the above-captioned proceeding, Evergy Metro, Inc. (“Evergy Metro”), a party of record, submits these Opening Comments on the proposed acquisition of control by Canadian Pacific Railway, Ltd. (“CP”), though an indirect, wholly-owned subsidiary, of Kansas City Southern Railway Company (“KCS”), and the subsequent merger of CP and KCS (the proposal is referred to herein as the “Transaction”).

Evergy Metro respectfully submits that any Board approval of the Transaction under 49 U.S.C. Section 11324 and the applicable Board implementing

regulations should be conditioned on (1) the establishment of a formal five (5) year Board oversight process to monitor the impact of the Transaction on the adequacy and quality of essential rail services provided to Evergy Metro and other bulk commodity shippers reliant on current KCS service south of Kansas City, MO/KS; (2) a Board order requiring CP and KCS to honor and abide by all representations made in the Application for approval of the Transaction¹ regarding the preservation of gateways, interchanges and service quality; and (3) retention of Board jurisdiction to impose additional operational conditions if and as necessary to remediate any degradation of service or breaches of CP and KCS's Application commitments.

INTRODUCTION AND BACKGROUND

Evergy Metro is a Missouri corporation and an operating subsidiary of Evergy, Inc., a holding company whose electric utility subsidiaries are engaged in the generation, distribution and sale of electrical power. Evergy Metro serves approximately 565,000 residential and commercial customers in all or parts of 24 counties in western Missouri and eastern Kansas. Evergy Metro's retail electricity rates are subject to the regulatory authority of public service commissions in Missouri and Kansas, and its generating assets are monitored and dispatched by the Southwest Power Pool ("SPP"), an independent system operator that manages the energy market into which electricity generated by Evergy Metro is offered.

¹ *Canadian Pacific Ry., Ltd., et al. – Control – Kansas City Southern, et al.*, Finance Docket No. 36500, Railroad Control Application (CP-25/KCS-13) (filed Oct. 29, 2021) ("Application").

Evergy Metro operates the coal-fired La Cygne Generating Station (“La Cygne”), a 1,400 megawatt facility that consumes a minimum of approximately 3,500,000 tons of sub-bituminous coal each year. La Cygne represents approximately 32% of Evergy Metro’s coal-fired generation, and 18% of Evergy Metro’s total generating capacity. Coal for La Cygne originates in the Southern Powder River Basin (“SPRB”) region of Wyoming, and the station has the capability to use in excess of 4,500,000 tons per year. Historically, and through the present day, SPRB coal bound for La Cygne has been transported from mine origins to KCS-served interchange tracks in the vicinity of Kansas City by either BNSF Railway Company (“BNSF”) or Union Pacific Railroad Company (“UP”), pursuant to a series of contracts between Evergy Metro (or its predecessor in interest, Kansas City Power & Light Company) and the originating railroad. KCS delivers the coal shipments from the Kansas City interchange to La Cygne under a separate contract, and KCS rail service is essential as it is the only feasible means of transporting this coal from Kansas City to La Cygne.

Evergy Metro’s dependence on KCS for delivery of its coal fuels from Kansas City to La Cygne establishes its interest in the outcome of this proceeding.

The importance of reliable coal deliveries to La Cygne cannot be overstated. In order for Evergy Metro to meet demand for La Cygne generation that naturally fluctuates in response to seasonal weather conditions, changes in the cost of alternative generation resources, and scheduled and unexpected interruptions in electric generation from other Evergy Metro facilities, the ability to rely on La Cygne requires both a regular and measured pace of coal deliveries, and a reasonable level of on-site coal

inventory. Evergy Metro is a Load Responsible Entity (“LRE”) in SPP, and as such is subject to a resource adequacy requirement that obligates Evergy Metro to supply SPP with enough generating capacity to serve the demand within its operating service territory, along with a reserve margin. A key requirement of meeting this obligation is ensuring the availability of an adequate and reliable fuel supply. If Evergy Metro experiences rail delivery service failures and/or coal inventories fall significantly below target levels, La Cygne’s ability to meet its resource adequacy requirement can be jeopardized, and Evergy Metro may be forced to implement coal conservation measures. These inevitably lead to significant, increased and otherwise avoidable costs as Evergy Metro is required to favor the preservation of essential fuel supplies over the economic dispatch of its generation assets. If coal inventory falls low enough, SPP could designate the station a “fuel-limited resource,” and prompt a curtailment of operations.

KCS delivers coal to La Cygne pursuant to a contract entered under 49 U.S.C. Section 10709. Evergy Metro acknowledges that the Board does not have jurisdiction over such contracts, and Evergy Metro is not seeking the interpretation or enforcement of a contract in this proceeding. Likewise, Evergy Metro is not disclosing any of the provisions of its contract with KCS in these Opening Comments. Rather, Evergy Metro’s cognizable concern with respect to a CP-KCS merger as proposed by Applicants relates to the importance of KCS system service capacity on its lines south of Kansas City to La Cygne’s operations and reliability within the Evergy Metro generation system, and the impact of the traffic changes that Applicants forecast post-merger on that rail service capacity. In that respect, the interests that Evergy Metro seeks to protect are

shared by other bulk commodity rail shippers – both contract and common carriage customers – that rely on the KCS lines south of Kansas City.

THE PROPOSED MERGER

The CP-KCS Application largely is devoted to trying to establish two (2) broad points: (1) that the “end-to-end” nature of the proposed merger makes it very unlikely that there would be a reduction in or loss of rail-to-rail competition in any reasonably defined market; and (2) that a combined CP-KCS would improve service to existing customers of both railroads, and attract new traffic away from motor carriers and other railroads. *See* App. Vol. 1 at 20-21. Applicants argue that these effects will benefit the interests of shippers, the environment, and the conservation of energy resources, and thus satisfy the “public interest” criteria of 49 C.F.R. Part 1180.6(a)(2). *Id.* at 19.

With a particular focus on potential traffic diversions and forecasts of traffic growth, Applicants’ witnesses first opine that had CP and KCS operated a combined system in 2019, some 216,675 carloads of traffic would have been diverted from other railroads, with intermodal shipments accounting for 137,416 carloads, or 63.4%. *See* App. Vol. 2 at 116-17 (V.S. Brown/Zebrowski). Most of this additional traffic would have moved over the railroads’ north-south lines, including the KCS lines south of Kansas City. *Id.* at 119. Applicants’ witnesses apparently assumed that the existing KCS lines could have absorbed this additional traffic without adverse impacts on then-current customers, as they did not reference any infrastructure improvements to accommodate this new traffic, including the higher speed intermodal shipments.

Turning to forecasts of divertible traffic in a post-merger future, Applicants' witnesses project 1,127,663 carloads of potentially divertible rail shipments over a three-year period, with 71% of that total consisting of intermodal shipments. *Id.* at 128-30 and Table 4. Projected increased revenues from this new traffic exceed \$513,100,000 by the third post-Transaction year. *Id.* at 166. Significantly for Evergy Metro, there is no discussion of the impact of this new traffic on pre-merger coal movements, and none of the "shipper benefits" claimed by Messrs. Brown and Zebrowski relate to unit train coal shippers. Similarly, Applicants' estimate of 64,018 trailers and containers that would be attracted to a combined CP-KCS (up to 24,000 of which would move over the KCS lines south of Kansas City) takes no account of any impacts on unit train coal service. *See App. Vol. 2 (V.S. Muten) at 223, 226 and Fig. 2.*

The witnesses sponsoring the Operating Plan for a prospective CP-KCS combined system (Messrs. Raymond Elphick and John Orr) likewise address projected traffic growth on the KCS lines. By Year 3 of the post-Transaction study period, they forecast an average increase of 14.6 trains per day on the north-south KCS corridor,² and an increase of 15 trains per day on the Pittsburg Subdivision, which includes the line segments from the Kansas City interchanges between KCS and UP and BNSF to Amsterdam, MO and the spur track leading to La Cygne.³ Applicants' forecasted density data paints a similar picture. Applicants project a 41.5% post-merger increase in total

² App. Exh. 13 at 338-39.

³ *Id.* App. A; *see also* App. O.

tons handled over the Pittsburg Subdivision compared to 2019, a year when rail shipments across the country were more consistent with historic trends before the Covid-19 pandemic.⁴ Again, it is noteworthy that the forecasted traffic growth is in intermodal and other “competitive” traffic, even though Applicants acknowledge that coal is a “prime example” of KCS’s existing traffic south of Kansas City.⁵

The proposed Operating Plan does contemplate the addition of new or extended railroad sidings over time, to accommodate some of the forecasted increases in traffic density.⁶ However, no new sidings are planned for the segment between Kansas City and Amsterdam. Additionally, the Operating Plan counts on merger-induced “efficiencies” to allow a combined CP-KCS to handle all of the projected traffic growth without acquiring any additional locomotive power, and it makes clear Applicants’ intent to rely on Precision Scheduled Railroading (“PSR”) to ensure adequate or even improved overall rail service on the post-Transaction system. *See App.*, Vol. 2 at 294-95, 325. Again, there is no discussion of the potential impact of increased traffic density south of Kansas City on unit train coal movements, despite coal shippers’ publicly expressed concerns that PSR has resulted in degraded service to electric utility facilities and other coal destinations.⁷

⁴ App. Vol. 2, Exh. 14 at 34-39 (as compared with 2020 volumes, the projected increase is 51.8%).

⁵ App. Vol. 2, at 275.

⁶ *Id.* at 337, Fig. 11.

⁷ *See, e.g., First-Mile/Last-Mile Service*, STB Ex Parte No. 767, Opening Comments of The Western Coal Traffic League, et al. (Dec. 17, 2021) at 7-11, 13-17.

The impact of a proposed rail merger on existing rail customers such as Evergy Metro is central to the Board's evaluation of a transaction and, in this case, to the Board's consideration of the Application. 49 U.S.C. Section 11324(b)(1) affirms that "the effect [of a proposed merger] on adequacy of transportation to the public" is a primary criterion in an approval proceeding, and the U.S. Rail Transportation Policy emphasizes meeting "the needs of the public" as a guiding principle for the Board. *See* 49 U.S.C. Section 10101(4). In a similar vein, the pre-2001 Board regulations that govern review of the Transaction list "[t]he effect on the adequacy of transportation to the public" as the first consideration in applying the "public interest" standard for merger approval. *See* 49 C.F.R. Part 1180.1(b)(1)(i) (2000). The regulations go on to identify "two potential results from consolidations which would ill serve the public – reduction of competition and harm to essential services." *Id.* at Part 1180.1(c)(2). A service is "essential if there is a sufficient public need for the service and adequate alternative transportation is not available." *Id.* at Part 1180.1(c)(2)(ii). Reliable and timely KCS coal deliveries to La Cygne are critical to Evergy Metro's ability to serve the essential energy needs of consumers throughout western Missouri and eastern Kansas, and Evergy Metro has no viable alternative to KCS when it comes to meeting its La Cygne fuel requirements.

While not directly applicable to this proceeding, the Board's current merger rules continue to strongly emphasize the consideration of rail service impacts as part of the evaluation process, and now include a specific Service Assurance Plan among the required elements of a *prima facie* approval application showing before the application

will be accepted for review. 49 C.F.R. Part 1180.1(h) (2001). In earlier pleadings filed in this case, Applicants have asserted that their proposed Transaction would pass muster under those rules.⁸ Indeed, even under the rules applicable to this case, the Board has responded aggressively with oversight of conditions imposed to address adverse service impacts resulting from a merger that otherwise merited agency approval.⁹

COMMENTS

A. Unconditioned Approval of a CP-KCS Merger Exposes Everbly Metro to Serious and Adverse Service Quality Impacts

Despite Applicants' acknowledgement that coal is a "prime example" of KCS's southbound (from Kansas City) traffic prior to the CP-KCS merger agreement, virtually the entire focus of the Application's case on the merits of the proposed Transaction is on the priority of intermodal and other competitive traffic across a merged CP-KCS system. As noted *supra*, Applicants' Growth Plan anticipates an increase of 15 trains per day over KCS's Pittsburg Subdivision, all of which is high priority, new competitive traffic. Traffic density over the line south of Kansas City – on which Everbly Metro's La Cygne shipments depend – would increase by some 50% over 2020 levels, yet Applicants make no provision for additional siding space between Kansas City and Amsterdam, MO, where the La Cygne trains exit the KCS lines for delivery. Applicants

⁸ See *Canadian Pacific Ry., et al. – Control – Kansas City Southern, et al.*, STB Finance Docket No. 36500, Applicants' Reply to Objections to KCS Waiver from Pre-2001 Major Merger Rules (filed Apr. 12, 2021) at 4-5.

⁹ See, e.g., *Union Pacific Corp. – Control & Merger – Southern Pac. Rail Corp.*, 2 S.T.B. 251 (1997) (*UP/SP Oversight, Decision No. 1* ("Service Oversight")).

assume that the additional Growth Plan traffic can be absorbed without any additional locomotive acquisitions, and that fluid operations will be assured through the magic of PSR, despite considerable evidence that the operating model tends to degrade service for unit train coal and other bulk commodity shippers.¹⁰

The Operating Plan sponsored by Applicants' witnesses Elphick and Orr makes assumptions regarding the regularity of post-merger service and improved cycle time and traffic turns,¹¹ but these are not supported by Evergy Metro's own real-world experience. For example, during the four quarters of 2021 it took KCS an average of 38.97 hours (first quarter), 14.0 hours (second quarter), 20.73 hours (third quarter) and 17.2 hours (fourth quarter), respectively, to remove empty Evergy Metro trains from La Cygne and return them to Kansas City for interchange and movement back to the SPRB for reloading; an annual average of 22 hours. The distance from La Cygne to Kansas City is less than 65 miles, and a timely empty return trip conservatively could be expected to take four (4) hours or less. The delayed returns lead to congestion and further delays in transporting and reloading the trains. Evergy Metro has experienced similarly slow service for loaded shipments moving over the single-track KCS line from Kansas City to La Cygne. Over time, the slower delivery and empty return rates led to

¹⁰ See, e.g., *First-Mile/Last-Mile Service*, STB Ex Parte No. 767, Opening Comments of The Western Coal Traffic League, et al. (Dec. 17, 2021) at 10-12. See also Written Statement of Greg Regan before the Senate Commerce Committee Subcommittee on Surface Transportation Hearing "Uncharted Waters: Challenges Faced by Ocean Shipping Supply Chains" (Dec. 7, 2021) at 4-7.

¹¹ App. Vol. 2 at 291-92.

declining inventory levels. {{

}} It is difficult not to conclude that this sub-par service would only deteriorate further post-merger, as traffic density over the Pittsburg Subdivision increases with no change in power supply or siding space between Kansas City and Amsterdam.

B. The Effects of Degraded Rail Service on La Cygne's Reliability

As a regulated public utility and LRE within SPP, Evergy Metro essentially occupies the position of a public trust and has an obligation to provide reliable and economic electric service to its consumers. The importance of maintaining an adequate coal fuel inventory and the capability to respond to rapid changes in demand for electricity are paramount, both of which demand regular, predictable, and timely rail service.

Evergy Metro schedules coal shipments for La Cygne based upon several factors, including anticipated demand for generation (also known as a load forecast), expected rates of coal consumption, scheduled generating unit maintenance outages, the capacity of La Cygne's facilities and staff to unload arriving unit trains, and coal inventory targets. The role of the delivering rail carrier – KCS – is to be prepared to accept a loaded train after it is placed by the originating railroad at the Kansas City interchange, timely transport the train to La Cygne for unloading, and return the empty train to Kansas City for the trip back to the SPRB. Evergy Metro's shipment scheduling

and inventory management processes allow for unanticipated shifts in coal consumption (often due to demand spikes caused by weather conditions, natural gas market price fluctuations or renewable resource variability), unexpected plant outages and other anomalies; that is one of the key purposes of adequate coal inventory. However, when rail transportation is disrupted, or trains either do not arrive on schedule and/or arrive in too rapid a succession, the overall system can become seriously unbalanced, and Evergy Metro can be forced to overdraw from on-site coal reserves, reduce normal coal consumption rates, and/or surge material handling in order to push coal into or out of inventory.

Among Evergy Metro's key responsibilities within SPP is to follow SPP's guidance regarding the maintenance of adequate on-site coal supplies, and coal conservation measures to address circumstances where interruptions in coal supply and/or transportation service shortfalls coincide with periods of high coal generation demand. In such cases, coal fuel reserves could be drawn down to a level where a generation facility such as La Cygne cannot be economically dispatched into the SPP system without risk of failure and resulting curtailments of electrical distribution (*i.e.*, brownouts).

Since the implementation of coal conservation involves an override of the economic dispatch process, Evergy Metro necessarily incurs additional costs for substitute generation whenever those measures are invoked. Additionally, if Evergy Metro does not meet its resource adequacy requirements to SPP during high demand seasons, the company can be exposed to deficiency payment obligations. The magnitude of such a payment is situational and depends on a number of variables (including the size

of the deficiency and SPP's planned reserve margin for the relevant time period), but it can be quite significant, and even incurring it means that the reliability of an essential service may have been compromised.

The Application contains no specific commitments or plans to protect existing coal and other bulk commodity shippers from a degradation of service over the lines from Kansas City south, as a result of the expected significant increase in traffic density on those lines. During his deposition in this proceeding, CP witness John Brooks {{

}} When Mr. Brooks' testimony and his verified statement are taken together with Applicants' forecast of an increase of up to 15 trains of priority traffic per day, the lack of any provision for additional sidings or specific operational planning for service between Kansas City and Amsterdam, and Evergy Metro's own serious service challenges today, it is inevitable to conclude that (1) a CP-KCS merger as proposed would risk a dangerous degradation of critical rail service to Evergy Metro and other bulk commodity shippers that rely on the

¹² {{ }}

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¹⁴ {{ }}

KCS lines south of Kansas City; and (2) Applicants have made no provision on their own to identify and ameliorate that risk. As the Board's regulations (both pre- and post-2001) and merger precedents make clear, that risk must be addressed in the Board's application of the "public interest" criteria of 49 U.S.C. Section 11324(b) and (c), and 49 C.F.R. Part 1180.1(b)(1) (2000).

C. The Board Can Grant Evergy Metro an Effective Remedy

As referenced *supra*, KCS currently delivers coal to La Cygne pursuant to a rail transportation contract, and Evergy Metro acknowledges that the Board has no jurisdiction over that contract, or disputes arising under it. 49 U.S.C. Section 10709(c). However, Evergy Metro is not in this proceeding to seek Board enforcement of any contractual provisions, or to resolve any contractual disputes. Evergy's interest and serious concern here is with the systemic threat that an unconditioned CP-KCS merger would pose for bulk commodity shippers reliant on the KCS lines from Kansas City south, which includes but by no means is limited to Evergy Metro.

Nothing in the statutory provisions or Board regulations applicable to the evaluation of Applicants' proposed Transaction excludes contract shippers from participation, and nothing differentiates between contract and tariff shippers in the definition of the parameters of the "public interest" test or the criteria that are relevant to a final Board determination. Looking in particular at the pre-2001 rules applicable to this proceeding, the first "public interest" criterion listed in 49 C.F.R. Part 1180.1(b)(1)(i) (2000) is "[t]he effect [of a transaction] on the adequacy of transportation to the public." Likewise, a key identified potential adverse consequence of a transaction – "harm to

essential services” – focuses on service for which there is a “sufficient public need” where “adequate alternative transportation is not available.” 49 C.F.R. Part 1180.1(c)(2)(ii) (2000). The Board’s rules do clarify that its conditioning authority will not be used to protect individual carriers (*id.*), but there is no suggestion that conditions can only benefit tariff shippers, and there are no restrictions on entities that can advance the interests of the public; that is, the consumers, businesses, and other community interests that depend on the adequacy and reliability of rail service. It is those interests that Evergy Metro represents in this proceeding, in accordance with its status as a public electric utility. Adequate and reliable rail service is critical to the provision of reliable and economic electricity, which quintessentially is a public interest. There is no basis in the applicable rules for restrictions on which parties may present evidence and argument to the Board responsive to the governing standard, or which shippers may benefit from a Board-imposed condition aimed at averting harm to essential services. 49 C.F.R. Part 1180.1(c)(2) (2000).

The principal pre-2001 Board precedents for the merger conditions that Evergy Metro proposes here¹⁵ draw no distinction between tariff and contract traffic, whether in terms of which shippers had standing to participate in the proceeding, or which were entitled to the benefits of Board action. For example, in *Union Pacific Corp. – Control and Merger – Southern Pacific Rail Corp.*, 1 S.T.B. 233 (1996) (*UP/SP*), *Decision No. 44*, the Board imposed a five-year oversight condition and retained

¹⁵ Under current Board rules, a five-year oversight condition is mandatory for all major transactions, such as a CP-KCS merger. *See* 49 C.F.R. Part 1180.1(g) (2001).

jurisdiction to ensure that conditions that it had imposed were adhered to, and that any other issues of significance that arose could be addressed. Subsequently, in *Service Oversight*, as discussed *supra*, the Board responded to appeals from a wide variety of rail customer constituencies regarding service degradations and curtailments that had resulted from the Union Pacific-Southern Pacific merger implementation process. *Id.* at 254.

After receiving comments from interested parties, the Board adopted new and expanded conditions that, *inter alia*, required UP to include a report on infrastructure improvements as part of its general oversight reporting, coordinate with other carriers when making operational changes, and implement certain traffic routings to facilitate more smooth operations in high-density areas.¹⁶ The Board did not exclude contract shippers or any other interested party from these proceedings, nor did it take any action that limited UP's remedial obligations to tariff shippers. The same inclusive principles should apply here.

Finally, as noted *supra*, the potential for adverse service impacts on coal and other bulk commodity movements that Evergy Metro herein describes extend beyond Evergy Metro and would apply to any current KCS shipper whose bulk traffic relies on the Pittsburg Subdivision, regardless of whether a particular KCS customer elected to participate in this proceeding. As part of the Board's assessment of what conditions are necessary, it also can assess whether certain segments of the KCS system, such as the Pittsburg Subdivision, require special treatment, and whether shippers would benefit from

¹⁶ *Union Pacific Corp. – Control & Merger – Southern Pac. Rail Corp.*, 3 S.T.B. 1030, 1067 (1998) (*UP/SP Houston/Gulf Coast Oversight*).

these locations being “subject to special arrangements that provide for a sharing of routes or facilities” so that some of the diverted traffic could be routed differently, if needed.¹⁷

D. Approval of the Merger Should Be Conditioned on Board Oversight

Applicants maintain that their proposed merger is purely an “end-to-end” transaction with no adverse competitive impacts.¹⁸ Other parties to this proceeding may present evidence to the contrary, and Evergy Metro takes no position on that issue. If the Board ultimately concludes that a CP-KCS merger otherwise meets the standard for approval under 49 U.S.C. Section 11324, however, it should be conditioned on Board oversight and retained jurisdiction, supported by required, regular reporting by Applicants, to ensure that the merger does not result in a degradation of service to Evergy Metro and other bulk commodity shippers that receive service over the KCS Pittsburgh Subdivision. The Board also should order Applicants to abide by all representations made in the Application regarding the preservation of gateways, interchanges and service quality.

With respect to oversight, the Board should establish a formal process whereunder for five (5) years after approval of the merger, Applicants would be required to submit reports and evidence to the Board on a quarterly basis, showing that they have adhered to all representations made on the record with respect to post-merger operations and service, that the quality of service to coal and other bulk commodity shippers over

¹⁷ *CSX Corp et al. – Control & Operating Leases/Agreements – Conrail Inc. et al.*, 3 S.T.B. 196, 228-29 (1998).

¹⁸ See App. Vol. 1 at 20-21.

lines such as the Pittsburgh Subdivision has not deteriorated, and that those shippers' legitimate service needs have been met. Evergy Metro recommends that the reports be required to include multiple service metrics by commodity group, including but not limited to traffic volumes, average train speeds, interchange dwell times, and post-release empty return times for each subdivision and at significant gateways and interchanges.

During the oversight period, interested parties should be given an opportunity to comment on Applicants' quarterly reports and, if necessary or appropriate, submit evidence of their own regarding any adverse service impacts, or actions taken by Applicants that are inconsistent with their representations in the Application. The Board should retain jurisdiction throughout the oversight period, to impose any additional conditions that it considers necessary to remediate service shortfalls or other problems revealed by Applicants' reports or responsive comments. The Board also should consider including a mediation stage, where solutions to individual service issues may be addressed and potentially resolved under Board supervision, prior to the agency taking formal action to impose new conditions.

The conditions sought here by Evergy Metro are fully justified by the potential conflicts between Applicants' representations and their forecasted increases in competitive traffic over the same lines on which Evergy Metro depends for its essential coal fuel, especially considering the absence of any planned new sidings on the specific segment at issue. The oversight condition also is consistent with those imposed in the

CSX Corp. and Union Pacific Corp. – Control proceedings,¹⁹ which were conducted under the Board’s pre-2001 merger rules, and essentially mirrors what is now a mandatory condition in all major transactions under the current rules. *See* 49 C.F.R. Part 1180.1(g) (2001). The suggested mediation feature respects the Board’s stated preference for alternative dispute resolution efforts in lieu of formal Board action, where possible. *See* 49 C.F.R. Part 1109.1. Binding Applicants to their representations is supported by precedent arising from a previous control proceeding involving KCS.²⁰

CONCLUSION

For the reasons set forth herein, the Board should condition any approval of Applicants’ merger proposal on the imposition of a five-year oversight program as described in these Comments, an order requiring Applicants to abide by all representations made on the record in support of the Transaction, and the retention of Board jurisdiction to enforce the conditions, consistent with applicable pre-2001 precedent and the Board’s current merger rules.

¹⁹ *See, e.g., CSX Corp et al. – Control & Operating Leases/Agreements – Conrail Inc. et al.*, 3 S.T.B. 196, 228-29 (1998); *Union Pacific Corp. – Control & Merger – Southern Pac. Rail Corp.*, 2 S.T.B. 251 (1997) (*UP/SP Oversight, Decision No. 1* (“Service Oversight”).

²⁰ *Kansas City Southern – Control – Kansas City Southern Ry. Co., et al.*, Finance Docket No. 34342 (STB served Nov. 29, 2004) at 6, 16.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Kelvin J. Dowd', is positioned above a horizontal line.

Kelvin J. Dowd

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Dated: February 28, 2022

Attorneys for

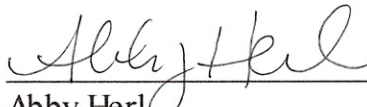
Evergy Metro, Inc.

VERIFICATION

State of Missouri

County of CLAY

I, Abby Herl, declare under penalty of perjury that I am Senior Fuels Analyst at Evergy, Inc., the parent company of Evergy Metro, Inc., that I have read the foregoing Opening Comments, and that I know and certify that the facts asserted therein with respect to Evergy Metro, Inc.'s annual coal consumption and requirements, empty trainset return transit times, coal inventories, and railroad delivery operations are true and correct, based on records maintained by Evergy Metro, Inc. Further, I certify that I am qualified and authorized to make this Verification.


Abby Herl

Date: 02/27/22

Certificate of Service

I certify that I have this 28th day of February, 2022, served copies of the foregoing document on all parties of record in this proceeding, and on the parties listed below by first-class mail, postage pre-paid, or by email:

The Honorable Peter Buttigieg
Secretary of the U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, DC 20590

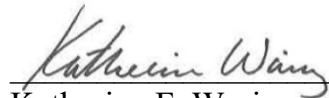
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