

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, et al – CONTROL - KANSAS CITY
SOUTHERN, et al,

STB FINANCE DOCKET NO. 36500 (SUB-NO. 1)

ILLINOIS CENTRAL RAILROAD COMPANY – ACQUISITION OF A LINE
OF RAILROAD BETWEEN KANSAS CITY, MO, AND SPRINGFIELD AND
EAST ST. LOUIS, IL – KANSAS CITY SOUTHERN RAILWAY COMPANY

STB FINANCE DOCKET NO. 36500 (SUB-NO. 2)

ILLINOIS CENTRAL RAILROAD COMPANY – TRACKAGE RIGHTS
BETWEEN AIRLINE JUNCTION, MO, AND GRANDVIEW, MO – KANSAS
CITY SOUTHERN RAILWAY COMPANY

STB FINANCE DOCKET NO. 36500 (SUB-NO. 3)

CANADIAN NATIONAL RAILWAY COMPANY AND ILLINOIS CENTRAL
RAILROAD COMPANY – CONTROL – GATEWAY EASTERN RAILWAY
COMPANY

STB FINANCE DOCKET NO. 36500 (SUB-NO. 4)

ILLINOIS CENTRAL RAILROAD COMPANY – ASSIGNMENT OF KCS
TRACKAGE RIGHTS BETWEEN ROCK CREEK JUNCTION, MO, AND
AIRLINE JUNCTION, MO – UNION PACIFIC RAILROAD COMPANY

FINAL BRIEF OF THE COALITION TO STOP CPKC

Pursuant to Decision No. 31 served in the captioned proceedings on October 7, 2022 by the Surface Transportation Board (“STB” or “Board”) the Village of Itasca, Illinois, Village of Bensenville, Illinois, City of Wood Dale, Illinois, Village of Roselle, Illinois, Village of Schaumburg, Illinois, Village of Hanover Park Illinois, Village of Bartlett, Illinois, City of Elgin, Illinois, and DuPage County, Illinois (collectively called the Coalition to Stop CPKC (“Coalition”))¹, hereby submit the Coalition’s Final Brief in these proceedings.

I.

INTRODUCTION AND SUMMARY OF KEY COALITION POSITIONS

The STB cannot approve the subject railroad merger transaction in Docket No. FD 36500 as proposed by the Applicants.² Instead, it must either deny their Application or condition the approval of their merger with substantive measures that prevent or mitigate the harm it will cause to the Coalition communities, all of which straddle an approximately 23-mile section of railroad line running through the Chicago Metropolitan Area in Illinois owned by the Commuter Rail Division of the Regional Transportation Authority d/b/a Metra (“Metra”). The tracks at issue are part of Metra’s Milwaukee District West Line (“MD-W Line”). CP conducts freight rail operations over the MD-W Line pursuant to a trackage rights agreement with Metra, and CP calls the MD-W

¹ The Coalition members’ populations range between around 9,500 (Itasca) and 114,800 (Elgin, which is the sixth largest municipality in Illinois). A description of each municipality member was provided as Attachment A to the Coalition’s Opening Comments and Requests for Conditions.

² Applicants are Canadian Pacific Railway Limited, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (collectively “CP”) and Kansas City Southern and its U.S. rail carrier subsidiaries The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively “KCS”).

Line its Elgin Subdivision.³ The MD-W Line is primarily utilized as a commuter rail line for the approximately 325,000 residents who live in the Coalition’s communities between the Village of Bensenville and the City of Elgin, and tens of thousands of other people who utilize Metra to visit the Coalition villages and cities.

The Coalition has submitted numerous filings in these proceedings supporting its assertion that this merger cannot be approved as proposed. These include its Opening Comments and Requests for Conditions (“Opening Comments”), Supplemental Opening Comments and Requests for Conditions (“Supplemental Comments”), Response to Comments and Requests for Conditions of Metra (“Response to Metra”), and the Coalition’s Response to the Responsive Application of the Canadian National Railway (“CN”) and Illinois Central Railroad Company (“ICRR”) (“Response to CN”).⁴ In each of these filings, the Coalition has demonstrated how the Applicants have submitted incomplete, inaccurate and otherwise flawed data supporting their proposed operating plan, which results in the extent to which they will increase freight rail movements over the Elgin Subdivision, the Bensenville Yard, and the Schiller Park Yard in the first three years after the merger being substantially understated. This, in turn, significantly understates the impact the merger will have on the Coalition communities. The Applicants have also submitted inaccurate and flawed data on the extent to which their post-merger operations will increase commercial truck

³ The Elgin Subdivision begins at “Tower A-5” in the City of Chicago where it connects with CP’s “C&M Subdivision” that runs north to Milwaukee and Minneapolis/St. Paul. From Tower A-5, the Elgin Subdivision extends westward for approximately 40 miles to Randall Road (Milepost 40.3), where the line connects with CP’s Chicago Subdivision and continues west to Sabula, Iowa. There, the track meets CP’s Marquette Subdivision which runs generally north/south to the rest of CP’s system that runs through Minnesota, North Dakota and Western Canada and other northern locations

⁴ A panel of Coalition representatives also appeared and testified before the Board in the public hearing held at its headquarters on September 28, 2022.

traffic in the communities associated with post-merger intermodal operations in the Bensenville and Schiller Park Yards.

The Applicants' data and representations about post-merger operations cannot be relied upon by the Board to draw meaningful conclusions about whether this transaction is in the public interest. As such, if it is to approve this merger the Board must proceed very cautiously during its implementation. For the Coalition communities, this ideally means incentivizing or directing the Applicants to utilize alternative routes that send new freight trains over different tracks of the merged system. Such alternatives could also include the competitive, shorter routing from Kansas City to Chicago that would be created by granting CN's Responsive Application in Docket Nos. FD 36500 (Sub Nos.1-4). The Board must also proactively control and manage the merged railroad's plans to add freight trains to the western end of the Elgin Subdivision post-merger by requiring the merged CPKC railroad to first demonstrate that to do so would be operationally feasible and safe, subject to any and all appropriate mitigation measures. Finally, any approval of the merger must be accompanied by the Board retaining jurisdiction over the merger and engaging in vigorous and pro-active monitoring and oversight of the merger implementation for a period of not less than 10 years, which oversight should include detailed reporting requirements and meaningful penalties for non-compliance.

The Board must also comply with its obligations under the National Environmental Policy Act ("NEPA").⁵ The Draft Environmental Impact Statement ("DEIS") prepared by the Office of Environmental Analysis ("OEA") for the Board as the agency considering this major federal action

⁵ 42 U.S.C. §§4321 *et seq.* The Coalition communities have actively participated in every phase of the Board's environmental review of this proposed transaction. *See* Comments of the Coalition to Stop CPKC on the Draft Environmental Impact Statement, submitted October 14, 2022.

fell well short of taking the requisite “hard look” at the potential environmental and societal impacts of the merger, and the Coalition has joined Metra and CN in arguing that the Board can only meet its NEPA obligations in these proceedings through the preparation of a Supplemental DEIS by OEA that more closely examines the potential impacts of the merger on the Chicago area, and the Coalition Line in particular.

II. RELEVANT FACTUAL BACKGROUND⁶

The Coalition member communities are located between Milepost 17.2 and Milepost 40.6⁷ of the MD-W Line/Elgin Subdivision (this section is referred to as the “Coalition Line” in the Coalition’s comments on the DEIS, and also here for consistency). The MD-W Line is used by CP for freight operations pursuant to an agreement with Metra. As described by Metra, it conducts nearly 600 combined passenger train movements per week on the MD-W Line and its Milwaukee District North Line.⁸ Consequently, CP’s freight train operations over the MD-W Line must be coordinated with Metra’s daily commuter operations. This is supposed to be accomplished through agreements between Metra and CP which call for CP to operate its trains during windows when there is no commuter traffic. However, Metra has demonstrated in this proceeding that CP often schedules freight train movements during peak commuter hours because it cannot now feasibly operate during just the agreed-upon time slots.⁹

In aggregate, the Coalition’s eight municipalities contain 54 total crossings of the rail line: 30 public road crossings and 24 pedestrian rail crossings. Some of the pedestrian crossings are

⁶ A more detailed discussion of the Coalition, the Elgin Subdivision, and the current use of the line by Metra and CP is contained at pages 5 to 9 of the Coalition’s Opening Comments.

⁷ See Attachment A.

⁸ Metra Comments and Requests for Conditions at 58.

⁹ See Coalition Response to Metra at 7 for discussion of this issue.

located at the 11 Metra stations along the Coalition Line. Many of these crossings already experience vehicle and pedestrian delays and disruptions due to freight rail trains transported by CP. Some of the road crossings within the Coalition members' borders along the tracks have been designated "Quiet Zones" pursuant to the rules and regulations administered by the Federal Railroad Administration ("FRA") (Bensenville, Roselle, Bartlett, and Itasca).¹⁰ Moreover, OEA has classified the section of the Elgin Subdivision running through the Coalition communities a Nonattainment Area for Clean Air Act pollution standards.¹¹

Freight traffic on the CP rail system now moves in and out of downtown Chicago via CP's C&M Subdivision and the Elgin Subdivision, as well as via Detroit pursuant to haulage rights. This part of the CP system is referred to CP's Central Corridor in the Applicants Operating Plan.¹² The Elgin Subdivision is CP's primary route to points south from downtown Chicago to Kansas City. CP currently operates around three freight trains each day over the Coalition Line. The average train length moved is 100-200 cars, which is approximately or 10,000 feet, with some trains reaching 12,000 feet – over two miles - in length.¹³ The length of the trains is significant because one 10,000-foot freight train can stretch across numerous road crossings in certain Coalition communities.

The Applicants significantly downplayed the existence and heavy use of the MD-W Line for commuter traffic in their proposed Original Operating Plan. Instead, Applicants made the blanket statements that "[a]t Chicago, the impact of the Transaction will be minimal,"¹⁴ and that

¹⁰ <https://railroads.dot.gov/sites/fra.dot.gov/files/2021-05/FRAWebReport.pdf>.

¹¹ See Applicant's response to OEA Information Request #1, filed October 28, 2021, and accompanying Maps designated Document No. EI-31354 at 3.

¹² Application, Volume 2, Page 266, Figure 2.

¹³ Coalition Opening Comments, Verified Statement of Gary Hunter ("Hunter V.S.") at 3-4. Operating Plan Appendix A. at 1 (Application Vol. 2, Page 364).

¹⁴ Operating Plan at 57.

“the combined CP/KCS system will benefit Chicago-area shippers with new intermodal services connecting Chicago with Texas and Mexico.”¹⁵ As for the potential adverse effect on the Coalition communities, the Applicant’s Original Operating Plan essentially asserted, without any analysis or supporting data, there will be *no* adverse effect on the Coalition communities:

The Transaction is projected to increase freight traffic by 7.1 trains per day on the western 24.2 miles of this line, between Almora and CP’s Bensenville Yard. However, there is ample capacity for these additional train frequencies. The Elgin Sub is double track, with triple track east of Bensenville Yard, and train slot capacity is not a concern given the low current freight train frequencies and the ample infrastructure. Metra service will not be adversely affected.¹⁶

In their Amended Operating Plan, filed on May 13, 2022 because of data errors and discrepancies discovered in their Original Operating Plan, Applicants repeated these statements verbatim, with the exception of changing “7.1” to “8.0” trains per day.¹⁷ The Applicants also stated originally that they intended to increase the length of trains that are run on their system.¹⁸ However, in subsequent filings, the Applicants stated that trains moving over the Elgin Subdivision would be “shorter,” but that this would mean the number of trains would increase beyond the 8.0 trains per day.¹⁹ The Applicants have also stated that they intend to increase the number and frequency of hazardous materials cars transported over this line.²⁰

¹⁵ *Id.*

¹⁶ *Id.* at 66. Applicants assert that the full transition from the “Optimized Plan” to the full “Growth Plan” will occur within three years of the “Control Date,” meaning that they intend to rapidly implement their plans to add freight traffic on the Elgin Subdivision. See *Id.* at 263-264

¹⁷ See Amended Operating Plan at 100-101.

¹⁸ See, e.g. Operating Plan at 45-48.

¹⁹ Applicants Response to Comments and Requests for Conditions, Opposition to Responsive Applications, and Rebuttal in Support of Application, Reply Verified Statement of Raymond A. Elphick at Paragraph 79.

²⁰ See Applicants Response to OEA Request for Information #1-5, Map showing hazardous materials cars per year, Elgin Subdivision - Segment C-ELGI-01. Bensenville Metra, IL to Randall Road, IL.

As stated, the Application contemplates expansion of the Bensenville and Schiller Park Yards in part to build longer trains to be transported over the combined system.²¹ However, these yards presently cannot handle 10,000 to 12,000-foot trains, which means that portions of such trains must temporarily occupy the MD-W Line, causing delays to nearby road crossings primarily in the Village of Bensenville and to Metra's commuter operations.²²

The Applicants also state they plan to increase the average railcars handled per day at the Bensenville Yard from 1427.7 railcars to 1795.5 railcars per day,²³ which could potentially block at-grade crossings due to yard operations, including switching operations for trains entering the Bensenville Yard from the west. Finally, the Applicants stated the Bensenville and Schiller Park intermodal terminals will go through a reconfiguration to expand their existing footprint, although the timing for such expansion was not disclosed. As of 2019, 687 intermodal units were handled. Future growth plans will increase to 1,273 daily units. This 586-unit increase will nearly double the existing intermodal traffic.²⁴ The expansion of intermodal operations will also require the increase in truck traffic in and out of the yards and the Bensenville community. In fact, based on materials published by OEA, the number of trucks running in and out of the Bensenville Yard each day is expected to nearly double by 2027, from 383 (presumed growth without the merger) to 698

²¹ See Operating Plan at 50 ("Bensenville will see an increase of 112 cars for processing daily. Bensenville will be tasked with building four new merchandise blocks: to Shreveport, Sanchez, Monterrey, and San Luis Potosi. The latter block would be the second longest distance manifest block on the combined network at 2,160 miles, behind only the current Calgary to Montreal block at 2,388 miles. Bensenville will also face additional demand from anticipated growth in automotive and intermodal traffic.").

²² See Coalition Response to Metra at 11; citing Metra's Comments and Requests for Conditions at 13, 40, and 61.

²³ OEA Submission Request 1-A3, Train Yard Volume, Bensenville Yard.

²⁴ Hunter V.S. at 5.

(merger related increase).²⁵ Despite such projected growth, which the Coalition believes is understated, the Application contains no analysis of whether the area roadway network is adequate to support the increased commercial truck traffic.

III. APPLICABLE STANDARDS

The Board’s consideration of the proposed merger or control of two Class I railroads is governed by 49 U.S.C. §11324, which states in part that the Board “shall consider at least . . . the effect of the proposed transportation on the adequacy of transportation to the public,”²⁶ and whether the transaction is consistent with the public interest.²⁷ Pursuant to the regulations applicable to this proposed transaction (which are the regulations implementing Section 11324 published at 49 C.F.R Part 1180 in effect in 2000), the Board “performs a balancing test” that “weighs the potential benefits to applicants and the public against the potential harm to the public.”²⁸ As to potential harm, the regulations state, “[t]here are two potential results from consolidations which would ill serve the public—reduction of competition and harm to essential services.”²⁹ Further, “[a] service is essential if there is a sufficient public need for the service and adequate alternative transportation is not available.”³⁰ Finally, under §11324 and Part 1180, the Board has extremely broad authority to impose conditions on consolidations to alleviate harms an unfettered merger might cause.³¹ Class I railroad mergers must also be consistent with the Rail

²⁵ <https://www.arcgis.com/apps/dashboards/665e5f3b1412406ea49454f573aefd35>
(Bensenville Yard link).

²⁶ 49 U.S.C. §11324(b).

²⁷ *Id.* at §11324(c).

²⁸ 49 C.F.R. 1180.1(c).

²⁹ *Id.* at §1180.1(c)(2).

³⁰ *Id.* at §1180.1(c)(2)(ii).

³¹ *Id.* at §1180.1(d).

Transportation Policy set forth at 49 U.S.C. §10101, which states in part that it's the policy of the United States Government to "to promote a safe and efficient rail transportation system . . ." ³² and "to operate transportation facilities and equipment without detriment to the public health and safety." ³³

The Board's consideration of proposed mergers of Class I railroads is also subject to the requirements of NEPA, which requires the agency to prepare "a detailed statement" on the environmental impact of any federal actions "significantly affecting the quality of the human environment." ³⁴ The agency's responsibility is to "take [] a 'hard look' at the potential environmental consequences of the proposed action," ³⁵ and "judicial review of agency decision-making under NEPA is limited to the question of whether the agency took a 'hard look' at the proposed action as required by a strict reading of NEPA's procedural requirements." ³⁶ Such judicial review is governed by the Administrative Procedure Act. ³⁷ Under subsection 706(2)(A) a reviewing court may hold unlawful and set aside an agency's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Finally, the Board's NEPA processes and compliance should be consistent with applicable agency and judicial precedent. ³⁸

³² 49 U.S.C. §10101(3).

³³ *Id.* at §10101(8).

³⁴ 42 U.S.C. §4332(C).

³⁵ *Northern Plains Resource Council, Inc. v. Surface Transportation Board*, 668 F.3d 1067, 1075 (9th Cir. 2011)(citations omitted).

³⁶ *Id.* (citations omitted).

³⁷ 5 U.S.C. § 706.

³⁸ *See, e.g. Village of Barrington v. Surface Transportation Board*, 636 F.3d 650 (D.C. Cir. 2011)(where OEA and STB prepared an environmental impact statement evaluation the impact of CN's purchase of the EJ&E Railway Company in Docket No. FD 35087, which included evaluating the impact of the transactions on road crossings in the Chicago area).

IV. ARGUMENT

For the reasons discussed in the Coalition’s prior filings in this proceeding and summarized in this Final Brief, the merger of CP and KCS as proposed is not in the public interest because, as proposed, the merger would greatly harm the Coalition and other communities in the Chicago area.

A. Applicants’ Data Concerning the Number of New Freight Trains on the Elgin Subdivision Post Merger is Erroneous and Unreliable

The Applicants have projected that eight new freight trains between 10,000 and 12,000 feet in length will traverse the Coalition Line each day post-merger. If the eight trains per day is accepted as true, then that would mean approximately 11 trains would traverse the Elgin Subdivision each day, nearly quadrupling current daily freight train numbers. However, the Coalition, Metra, and CN have all demonstrated that Applicant’s train count data is flawed and unreliable, and substantially understates the trains that will traverse the Elgin Subdivision post-merger. As Metra observed, “[i]n general, Applicants’ statements on train increases are internally contradictory and misleading, and are not supported by evidence, including RTC³⁹ modeling”⁴⁰

First, for example, the Applicants originally claimed that a large benefit produced by their merger would be their diversion of 6.6 trains per day from the Chicago area by routing them over the Marquette Subdivision.⁴¹ However, they indicated that this diversion would require certain infrastructure improvements to increase track capacity that would instead be installed over the five

³⁹ Rail Traffic Controller.

⁴⁰ Metra Comments and Requests for Conditions at 14.

⁴¹ See Operating Plan at 57 (“CP anticipates an incremental 6.6 trains per day over the Marquette Subdivision following the combination with KCS – volumes which will be routed around Chicago as opposed to through it.”).

years after the merger was approved. In their Amended Operating Plan, the Applicants reduced the number of trains to be diverted to “6.0.” However, they did not shed any additional light on the timing for the necessary infrastructure construction or the diversion. Consequently, as the Coalition and Metra have repeatedly pointed out, until this diversion is fully implemented some or all of these six freight trains can only be transported to and from Kansas City over the Elgin Subdivision and the Coalition Line.⁴² If so, then all things being equal, the total number of new trains per day post-merger running over the western end of the Elgin Subdivision could be as high as 14, *nearly five times* the current levels, and with more railcars per train.⁴³

However, the freight train count on the Coalition Line post-merger could be even higher. Specifically, Metra’s RTC analysis revealed Applicants had not accounted for the trains of other railroads operating on the Elgin Subdivision, or local switching operations.⁴⁴ Also, as stated above, Applicants have stated any reductions in average train length on the Elgin Subdivision would be accompanied by an increase in the number of trains beyond the eight they have projected.

CN has also pointed out many errors and gaps in the Applicants’ data, starting with CN’s initial comments on the Application which pointedly observed: “Applicants have submitted an Application that is so riddled with errors, omissions, inconsistencies, and unrealistic assumptions that the Board simply cannot rely on it in performing the public interest assessment required by 49 U.S.C. § 11323 et seq. and the Board’s merger regulations.”⁴⁵ Over the course of the proceeding the Applicants did little to dispel this initial impression,⁴⁶ and CN has also identified train count

⁴² Coalition Opening comments at 6; Metra Opening Comments at 14-16. Coalition Response to Metra at 5, 8-11.

⁴³ Hunter V.S. at 6.

⁴⁴ Coalition Response to Metra at 8.

⁴⁵ CN Comments on Application and Requests for Conditions at 16.

⁴⁶ See CN Response to Comments on Application at 2-3 (“Neither Applicant would base their real-world operating planning on ‘modeled,’ inconsistent, unreliable, and error ridden data rather

errors and data issues concerning the Applicants’ plans for the Schiller Park Yard adjacent to the Coalition communities.⁴⁷

B. The Applicants Have Greatly Understated the Degree to Which the Merger will Harm Coalition Member Communities

Despite readily acknowledging that railroad operations in the Chicago area are susceptible to disruptions from a variety of factors which “can create chokepoints for multiple carriers and impact freight movements across broad swaths of the rail network,”⁴⁸ and that “the risk of widespread service disruption is exacerbated by the region’s propensity for cold-weather events,”⁴⁹ the Applicants did not conduct any analysis or consideration of the potential for service disruptions post-merger that would literally shut down each of the Coalition member communities from functioning and cause severe safety, environmental, and other issues.⁵⁰ Moreover, to date

than actual data, but they are asking this Board to use such contrived data to approve the first major merger in nearly a quarter-century.”)

⁴⁷ See *Id* at 17 (“The Amended Operating Plan does not disclose the merger-related increase in projected truck traffic at Schiller Park Yard, but Applicants previously projected a 70% increase in merger-related growth in trucks per day for “Schiller East IMS”—an additional 134 trucks per day for a total of 324 trucks per day. Despite the fact that CP can reach that Yard only via trackage rights over CN track, Applicants have provided incomplete data on either train count increases on that line or the impact of such increases in any filing with the Board or any data provided to the Board’s environmental office. This omission is emblematic of Applicants’ pervasive failure to acknowledge or address the consequences of their Operating Plan for other railroads’ operations and facilities.”). See also, CN Rebuttal in Support of Responsive Application filed August 1, 2022 at 15, note 29 (stating “at Schiller Park, CP and KCS have never been entirely clear about how traffic will move—even while proposing significant increases in yard activity,” and otherwise expanding on the lack of data on this critical issue).

⁴⁸ Operating Plan at 56.

⁴⁹ *Id.*

⁵⁰ See, CN Response to Comments on Application at 3 (“Applicants have made little effort to measure or mitigate the impact of their transaction on others—whether it is the host railroads over which Applicants plan to operate in locations like Chicago (Metra; Indiana Harbor Belt Railroad (“IHB”); Belt Railway Company of Chicago (“BRC”); Norfolk Southern Railway (“NS”); and CN) or in Houston (Union Pacific Railroad Company (“UP”)) or the local communities that could be harmed by their merger.”)

the Applicants have taken no steps to recognize, let alone quantify, the adverse effects of their proposed increase in operations on noise, pollution, vibration, or damages to underground utilities.

In summary Applicants have significantly downplayed, if not ignored, the 325,000 residents of the Coalition communities the Elgin Subdivision runs through, the existence and scope of commuter rail service provided by Metra over its MD-W line, the extraordinarily large number of rail crossings and related safety issues associated with this section of the rail line, and the significant environmental and economic harms that will be caused to these communities by the Applicants' proposal to vastly increase freight operations over this piece of their combined system.

C. The Board Should Limit the Number of New Freight Trains Over the Coalition Line Post-Merger

Pursuant to 49 U.S.C. §11324(c), the Board has broad discretion to impose conditions on the merger of two Class I railroads. In this proceeding, the Applicants have provided incomplete and seriously flawed data backing up their projections and operating plan post-merger. This Board therefore cannot approve the merger as proposed based on Applicants' submissions, and so to the extent the Board is inclined to approve the merger, it must proceed very cautiously, especially for highly populated areas such as the Coalition communities and the Chicago area in general. More specifically, it must proactively control the number of new freight trains the merged railroad is permitted to transport over this line by (1) incentivizing the merged railroad to transport the trains over other routes on its system; (2) expressly limiting the number of trains on the Coalition Line immediately post-merger subject to strict Board oversight; and (3) promoting pro-competitive alternative routings such as the one proposed by CN in its Responsive Application.

1. Managing Train Numbers by Utilizing Different Routes

The Coalition maintains that the best way to manage the number and size of new freight trains on the Coalition Line is for the merged railroad's trains to travel on routes that do not include the Coalition Line. As explained in the Coalition's prior filings, this could be accomplished in several ways. First, an alternative that utilized existing CP infrastructure to avoid the western end of the Elgin Subdivision would entail trains coming from Kansas City to be routed around the Elgin Subdivision by being routed north over the Marquette Subdivision to LaCrosse, and then over to the C&M Subdivision for transportation down to Tower A-20 or Tower A-5.⁵¹ At Tower A-20, the trains could be transported into the Bensenville and Schiller Park Yards over CP and CN tracks, respectively. Trains destined for Kansas City from Chicago and points east, such as Detroit or Toronto, would move in the reverse direction.

Second, the Coalition has suggested that Applicants could also alleviate the harm to the Coalition communities by constructing a new intermodal and automobile facility west of Elgin in the vicinity of where the Elgin Subdivision meets CP's Chicago Subdivision.⁵² Such a new facility could be an exclusive modern intermodal and auto facility like other Class I railroads have built. This new facility would be constructed in lieu of expanding the Bensenville and Schiller Park Yards in the heart of the Chicago Metropolitan Area, thereby alleviating traffic and congestion on the Elgin Subdivision and in and around the two existing yards. CPKC trains could deliver intermodal and automobile traffic to and from the greater Chicago area without entering downtown Chicago.⁵³

⁵¹ Hunter V.S. at 7.

⁵² *Id.* at 8

⁵³ *Id.*

2. Increasing the Number and Size of New Trains Only Under Strict Board Oversight

If encouraging or directing the Applicants to utilize other routings on their system, or constructing a new yard west of Elgin is not feasible, the Coalition believes that the Board must condition any approval of the merger with a requirement that the number of trains on the Coalition Line may not be increased post-merger unless the merged CPKC railroad demonstrates to the Board that adding freight trains would be operationally feasible and not compromise public safety, subject to any and all appropriate mitigation measures. This process could be developed and implemented as part of the oversight phase of this proceeding.

3. The Board Should Give Favorable Consideration to CN's Responsive Application as a Means to Potentially Alleviate Congestion in Chicago and on the Coalition Line

Finally, the Coalition continues to believe the responsive application of CN and ICRR ("CN's Responsive Application") which requests the Board to condition any approval of the merger of CP and KCS on the divestiture to CN of certain KCS-owned lines extending from Kansas City, Missouri to Springfield, Illinois (collectively called the "Springfield Line"), is in the public interest.⁵⁴ As summarized in the Coalition's Response to CN, the Springfield Line connects to CN's existing line running from Springfield into the Chicago area and Detroit, Michigan. CN states its divestiture request is "necessary to address significant horizontal competition concerns raised by the CP-KCS merger"⁵⁵ by creating "a competitive routing option for the Kansas City-Chicago-Detroit corridor" to the merged CPKC railroad's Kansas City to Chicago single-line routing, which includes the Coalition Line. As such, this parallel routing would provide the opportunity for shippers to send their commodities to and from Chicago as well as destinations

⁵⁴ See Coalition Response to CN at 3.

⁵⁵ CN Responsive Application at 9.

beyond by avoiding entirely the Coalition Line and the Elgin Subdivision.⁵⁶ CN states that grain, intermodal, and automobile shippers would benefit the most from its proposal.⁵⁷

According to CN, its Responsive Application will “provide a superior alternative to CP’s more circuitous route and would be particularly valuable in connecting auto manufacturers in Michigan and Ontario with the key Kansas City Gateway and greater Missouri market.”⁵⁸ CN has also stated it will make substantial infrastructure investments in the existing lines,⁵⁹ including ICRR constructing a new intermodal/automobile terminal in East St Louis. That traffic will be transported to Roodhouse, Illinois where it will connect with a new train to and from Kansas City and Chicago.⁶⁰

As the Coalition noted in its Response to CN, and CN has stressed in its subsequent filings, CN has committed to provide CPKC with haulage rights over the Springfield Line for all current and future customers of the merged railroad.⁶¹ The Coalition understands these haulage rights would enable CPKC to utilize the Springfield Line and interchange with CN for movement of freight trains to and from Chicago and Detroit. At a minimum, therefore, this alternative routing should provide a way for the merged CPKC to avoid or alleviate the congestion and other service meltdowns that inevitably occur in the Chicago area over CP’s existing lines by routing CPKC

⁵⁶ See CN Response to Comments on Application at 16 (“CN’s route would move via Springfield, Illinois, to CN’s existing track to yards near Matteson, Illinois, which is well south of Chicago, while CP’s route not only intrudes on the city, but also requires operations over numerous other railroads (Metra, IHB, BRC, NS, and CN) within its boundaries.”).

⁵⁷ Responsive Application at 14 and Verified Statement of David T. Hunt.

⁵⁸ *Id.* at 13

⁵⁹ See *Id.* at 3 (“CN is committed to making substantial investments not merely to preserve the Springfield Line as a competitive routing option for the Kansas City-Chicago-Detroit-Eastern Canada corridor, but to upgrade it into a faster, more efficient route.”) with enhanced intermodal and automotive traffic capacity.

⁶⁰ *Id.* at 35, 37.

⁶¹ *Id.* at 4, 14.

trains instead over CN's parallel line. However, it also provides an opportunity for such traffic, especially automotive and intermodal traffic, to be diverted from the Elgin Subdivision onto CN's system through rail-to-rail competition between CN and the merged CPKC. The Coalition has previously acknowledged that how many of the additional freight trains the Applicants' project to add to the Elgin Subdivision each day would instead travel on CN's system to reach Chicago remains to be seen. But the Coalition reiterates that permitting CP and KCS to consolidate both routes into and out of Chicago from Kansas City would ensure that no diversions could take place to relieve the congestion and other impacts to Chicago and the Coalition communities on the Coalition Line resulting from the proposed merger.

D. The Addition of New Trains onto the Elgin Subdivision Post-Merger Must be Accompanied by Directing Applicants to Implement Certain Mitigation Measures

In Attachment C to the Coalition's Opening Comments, the member communities provided the Board with summary descriptions of several dozen infrastructure projects and other measures they had preliminarily identified would be necessary to mitigate the harm of adding eight or more new freight trains over the Coalition Line each day post-merger. The Coalition stated these initial projects would be evaluated and refined over the course of the merger proceeding and the Coalition's participation in OEA's review of the environmental impacts of the project. After further evaluation and analysis, the Coalition has reduced the list of minimum mitigation measures to those which are feasible and absolutely necessary to reduce negative public health impacts and limit the number of lives lost due to the projected increased freight traffic in these communities. It has presented these mitigations to OEA in the Coalition's comments on the DEIS. These measures, which are briefly summarized below for the Board, should accompany any decisions by

it to permit the number of freight trains per day to increase beyond current levels after the merger is approved.

1. Generally Applicable Mitigation Measures

a. Freight Train Tracking Technology

The installation of train tracking technology along the Coalition Line that will notify first responders when freight trains are headed toward their area and will be blocking crossings would provide a cost-effective means for the Coalition communities to attempt to anticipate and mitigate the adverse impact of crossing blockages by freight trains. This technology would greatly reduce emergency response delays and allow access for emergency personnel to have real-time information to know when railroad crossings are blocked.

b. Noise and Vibration

The Applicants must implement noise and vibration abatement measures⁶² such as the installation of rail dampeners; working with local communities to identify structures and infrastructure that may be particularly susceptible to vibration damage; installing power switches at the Bensenville Yard; complying with local construction noise ordinances when installing capital projects; and installing buffers of evergreen landscaping where it can be safely maintained.

c. Pedestrian Crossing Improvements

The Applicants should provide funding to Coalition communities with at-grade pedestrian crossings for crossing safety improvements, such as active and passive devices at railroad crossings.

d. Quiet Zones

⁶² These measures would be separate and apart from the noise mitigation measures already taken in Bensenville for O'Hare International Airport (City of Chicago's Residential Sound Insulation Program).

The Applicants should be directed to support and fund the continuation of existing Quiet Zones at all crossings in all Coalition communities, including funding the safety measures required by FRA's Quiet Zone regulations. The Applicants should also be required to commit to support the establishment of new Quiet Zones along the Coalition Line.

e. Hazardous Materials

The Applicants should be directed to establish a fund for the purpose of helping Coalition communities to purchase necessary hazmat equipment for regional use and for training, as necessary.

2. Grade Separated Road Crossings

The Coalition believes that three grade separated crossings are necessary to mitigate the crossing delays and crossing safety issues that will be created by the addition of eight or more trains to the Elgin Subdivision post-merger:

a. York Road in the Village of Bensenville

Immediately adjacent to the Bensenville Yard, York Road is a major dedicated truck route carrying intermodal freight through Bensenville. The York Road crossing is also the major north/south route for emergency services. Extended blockage of this crossing stops all traffic through Bensenville and causes major delays and backups. Frequent blockage of this major state truck route, directly adjacent to O'Hare airport, will also have immeasurable financial costs for businesses in Bensenville. Also, the York Road grade crossing sits at the eastern edge of downtown Bensenville, directly adjacent to the Bensenville Metra station. The increased numbers of freight trains post-merger will result in blockages that will cut off Metra riders attempting to catch trains. It will cut off residents from a neighborhood grocery store and services, which sit on

either side of the tracks. It will cut off residents and businesses from Village Hall, which is located on the south side of the tracks adjacent to the Metra station.

b. Wood Dale and Irving Park Roads (one project) in the City of Wood Dale

The City of Wood Dale has two at-grade road crossings along the Coalition Line which nearly intersect —just 100 feet away from each other—Wood Dale Road and Irving Park Road. This unique configuration means the community is bisected north and south by the Coalition Line but is also divided east and west by the two roads. These two road crossings have historically been a major life-safety concern for the City of Wood Dale, the Illinois Commerce Commission, and the Federal Railroad Administration. Since 1955 there have been 46 accidents involving a train and an automobile at the at-grade crossing along Irving Park Road, and 128 accidents within the intersection over the recent three-year period.

c. Prospect Avenue in Itasca

The Coalition also maintains approval of the merger that permits eight or more new freight trains to run on the Elgin Subdivision daily must be conditioned upon the construction of a grade-separated crossing at Prospect Avenue in Itasca.⁶³ Itasca's fire and police stations are located south of the Coalition Line at-grade crossing at Catalpa Avenue, but a majority of Itasca's 10,000 residents and businesses reside north of the tracks. Over 20,000 people are present in Itasca during workdays. The distance between Prospect Avenue and the western most rail crossing (IL-53) is 9,250 feet. As a result, a 10,000-foot freight train can block all four road crossings in Itasca

⁶³ In the alternative, a grade separation at Catalpa Avenue or a slip ramp adjacent to I-290 should also be explored as they would result in the least response time delays for the community.

simultaneously. The next closest at-grade crossing east or west would require first responders to travel more than a mile either way, which would increase response times from under two minutes to 15 minutes or more for several parts of the town. Itasca police average more than 6,000 calls annually, 60 percent of which are north of the tracks, including one grade school, one middle school, three hotels, and a 26-story office building. A large percentage of the Itasca Fire Department's 1,700 calls annually are for medical services. Delays reaching victims of heart attacks, strokes, overdoses, car accidents and respiratory distress will lead to longer recovery times and increased fatalities. Finally, increased response delays to fires will also have dire consequences for Itasca's residents and businesses.

3. Grade Separated Pedestrian Crossings

The Coalition communities contain 11 Metra stations and 24 at grade pedestrian crossings which are used by thousands of commuters each day. In addition, the member communities have collectively invested tens millions of dollars to develop their towns and villages and the businesses around the railroad tracks that run through them, efforts which have attracted more thousands of visitors and economic growth. The Coalition maintains that grade separated pedestrian crossings are particularly necessary in the Village of Roselle, the Village of Bartlett, and the Village of Hanover Park.

E. The Board Should Engage in Extensive Monitoring and Oversight of this Merger Transaction

Any approval of the proposed merger must be accompanied by the Board retaining jurisdiction to monitor and oversee the implementation of the Applicants' operating plan and the efficacy of mitigation measures. The Coalition believes that this period should be for 10 years. The Board must also retain jurisdiction to impose other mitigation measures that it either decided

were premature, or new measures that arise during the merger implementation. The Board's oversight is particularly needed in the Chicagoland area and the Coalition Line in particular. Specifically, the Board's oversight of the implementation of this merger must be proactive, and it must require the Applicants to engage in detailed, transparent reporting on critical safety, delay, and operational issues. As the Coalition stated in its Opening Comments, there are many parallels to the issues and concerns the Board faced in its consideration and eventual approval – with numerous conditions – of the acquisition of control by the Canadian CN and Grand Trunk Corporation of EJ&E West Company in Docket No. FD 35087.⁶⁴ For example, there the Board directed CN to submit monthly reports during the oversight period⁶⁵ on certain operational subjects and directed CN to meet with Board staff “to establish appropriate measures and reporting procedures for this monitoring.”⁶⁶ The topics on which CN was required to report included “monthly reporting and monitoring of the operations of” at-grade crossings in the Chicago area.⁶⁷ CN was also directed to include “all existing (historic) protocols for service or priority at these crossings and [to] report any changes that are made.” Importantly, in *EJ&E* the Board also directed CN to “report monthly to the Board any delays occurring at each of these crossings by freight and passenger trains of CN, others using CN, and crossing carriers.”⁶⁸ Conditioning any approval of the merger proposed in this proceeding on similar reporting requirements is necessary and appropriate.

⁶⁴ Docket No. FD 35087, *Canadian National Railway Company and Grand Trunk Corporation – Control-EJ&E West Company* (Served December 24, 2008)(“*EJ&E*”).

⁶⁵ In *EJ&E*, the Board established a 5-year monitoring and oversight period, which was extended twice for a total of three years. See Docket No. FD 35087, Decision 26 (served December 21, 2010)(extending for one year); and Docket No. FD 35087 (Served December 17, 2014)(extending for an additional two years).

⁶⁶ *EJ&E* at 26.

⁶⁷ *Id.*

⁶⁸ *Id.*

Similarly, the Board should direct CP and KCS to provide, on a monthly basis, “the following information pertinent to post-merger operations [on the Elgin Subdivision]: the number of trains operating over [the Elgin Subdivision]; the date and descriptive information about each accident or incident that occurs on the [Elgin Subdivision], including grade crossing accidents; and the date and descriptive information about each crossing blocking occurrence on [the Elgin Subdivision] that exceeds [5] minutes in duration.”⁶⁹ The Coalition also requests that the Board establish rules and procedures for Coalition communities and other communities affected by rail crossing delays, accidents, and other harms to seek money damages from the merged railroad for such events that occur over the oversight period. In addition the STB should to consider facilitating the creation an intergovernmental commission conceptually similar to the O'Hare Noise Compatibility Commission, which was created in 1996 when the Federal Aviation Administration approved the O'Hare Airport Modernization Plan. Such a commission would give local communities a means to have "a seat at the table" during the STB oversight period and provide input on the merger implementation and recommendations to the Board on existing and potential new mitigation measures.

The Coalition also asks the Board to clarify in its final decision in this proceeding that, even after the conclusion of the formal oversight period it establishes, the Board will have continuing authority under 49 U.S.C. §11327⁷⁰ to issue supplemental orders to enforce or revise the merger conditions, either upon request or on the Board's own initiative. As explained by the

⁶⁹ *Id.* In *EJ&E*, the duration was 10 minutes, but several Coalition first responders have testified in this proceeding and in comments and testimony to OEA that 10 minutes is far too long to permit a train to block road crossings in the Coalition communities.

⁷⁰ This statute reads: “When cause exists, the Board may make appropriate orders supplemental to an order made in a proceeding under sections 11322 through 11326 of this title.”

Board in the UP/SP Merger proceeding⁷¹ at the conclusion of the formal, five-year oversight period it established there:

Although we are concluding our formal oversight process for the UP/SP merger, we will continue to have authority to enforce the conditions we imposed on the merger. Under 49 U.S.C. 11327, we have continuing authority to enter supplemental orders and to modify decisions entered in merger and control proceedings under 49 U.S.C. 11323. See *Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp.*, STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 1 (STB served May 7, 1997) (General Oversight Dec. No. 1), slip op. at 3 n.3. Thus, the conclusion of the formal oversight process does not preclude any party from invoking our jurisdiction to address any merger-related concerns arising out of our conditions. See, e.g., *Canadian National Ry.—Control—Illinois Central Corp.* [General Oversight], STB Finance Docket No. 33556 (Sub-No. 4), Decision No. 3 (STB served Nov. 7, 2001), slip op. at 4 (“we have authority independent of the formal oversight process to enforce or revise merger conditions as warranted upon request or on our own initiative.”).

Accordingly, notwithstanding the conclusion of the formal oversight process, we remain available—into the indefinite future—to consider and promptly resolve any disputes of general applicability relating to BNSF’s access to shippers under the BNSF Agreement, or other issues relating to the parties’ compliance with the conditions we imposed on the UP/SP merger, subject to any applicable requirement to arbitrate.⁷²

The STB’s authority under Section 11327 to modify past decisions is very broad. It “includes the ability to impose further conditions or, in an extreme case, order divestiture,”⁷³ and the authority exists independent of any oversight conditions the Board adopts in a merger or control proceeding. The Board has also stated that, when considering requests for supplemental orders, “[c]ause must exist to authorize an alteration of a previously approved transaction. For approval, we must find

⁷¹ STB Docket No. 32760, *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and the Denver and Rio Grande Western Railroad Company*.

⁷² *UP/SP Merger*, Decision No. 21 (Served Dec. 20, 2001) at 5. See also *UP/SP Merger* (Sub No. 21), 2 S.T.B. 251, 253 note 3 (1997).

⁷³ Finance Docket No. 32036, *Wisconsin Central Trans. Corp. – Continuance and Control – Fox Valley & Western LTD*, 9 I.C.C. 2d 233, 248 (1992).

this modification to be consistent with the public interest. In determining the public interest, the benefits of the modified transaction must be balanced against any harm to competition or to essential service(s) that cannot be mitigated by conditions.”⁷⁴

F. The Board Must Fulfill its Obligations under NEPA

Finally, the Coalition reiterates that the Board’s consideration of the merger Application entails compliance with the requirements and policies of NEPA, which require agencies to take a “hard look” at the potential social and environmental impacts of the merger. The Coalition maintains that to date, this has not occurred. On this point, the Coalition has contrasted the DEIS process in this proceeding with that conducted by OEA’s predecessor in *EJ&E*, where, prior to issuance of the DEIS, OEA’s predecessor (Section of Environmental Analysis (“SEA”)) examined the impact of that transaction on Chicago communities by: “engag[ing] in extensive public outreach, which included . . . twenty-two public meetings attended by over 7200 people, consulting with local, state, and federal officials,” and holding a 60-day comment period on the draft environmental impact statement.⁷⁵ Then, SEA held an additional eight public meetings on the

⁷⁴ STB Finance Docket No. 32299 (Sub-No. 1), *Norfolk Southern Railway Co. – Consolidation of Operations – CSX Transportation, Inc. [Petition for Supplemental Order]* (Decision No. 3)(Served December 2, 2005), Slip op. at 2-3. The authority under §11327 is often used in combination with petitions to reopen a merger proceeding. *Seaboard Air Line Railroad Co.—Merger Atlantic Coast Line Railroad Company Petition to Remove Traffic Protective Conditions*, 10 I.C.C. 2d 600 (1995); STB Finance Docket No. 33556, *Canadian National Railway Co., Grand Trunk Corporation, and Grand Trunk Western Railroad, Inc. – Control – Illinois Central Corp., Illinois Central RR Co., Central and Pacific RR Co., and Cedar River RR Co.*, (Decision No. 39)(served August 27, 2002) slip op at 4; *See* Finance Docket No. 30800, *Union Pacific Corp., Union Pacific Railroad Company, and Missouri Pacific Railroad Co. – Control – Missouri-Kansas-Texas Railroad Co., et al*, 4 I.C.C. 2d 409, 461 (1988)(where the ICC conditioned merger approval on an “oversight proceeding” one year from consummation to collect evidence on “whether this proceeding should be reopened” but tied the action to the authority to issue supplemental orders under §11327.)

⁷⁵ *Village of Barrington v. STB*, 636 F.3d 650, 653 (D.C. Cir. 2011).

DEIS.⁷⁶ Further, as part of its evaluation of impacts on communities SEA identified emergency responders in the Chicago area that would be “substantially affected” by the transaction.⁷⁷ Finally, between issuance of the DEIS and the Final EIS, “the Board commissioned an additional traffic study” that examined congestion and crossing delays in certain areas of controversy.⁷⁸ Virtually none of these actions were taken prior to the issuance of the DEIS in this proceeding. The Coalition is hopeful that OEA will cure the deficiencies of the current DEIS through a supplemental DEIS as discussed in the Coalition’s comments on the DEIS, and that the final EIS will comply with NEPA’s requirements.

IV. CONCLUSION

In conclusion, the merger of CP and KCS cannot be approved as proposed because the Applicants’ plans for substantially increasing the number and length of trains that would traverse the Coalition Line each day, as well as their plans to increase commercial truck traffic in the vicinity of the Bensenville and Schiller Park Yards, would inflict great harm on the Coalition communities. The Applicants have substantially understated the number of freight trains that they intend to transport on this line, among other data discrepancies and inaccuracies that render their operating data unreliable, and result in the potential harms and impacts from the merger being significantly understated. Consequently, if the Board approves the proposed merger it must condition its approval on the implementation of the measures discussed hereinabove, and the

⁷⁶ *Id.* at 668.

⁷⁷ *Id.* at 669.

⁷⁸ *Id.* at 672.

Board must retain jurisdiction to monitor and oversee the implementation of the merger as conditioned.

Respectfully submitted,



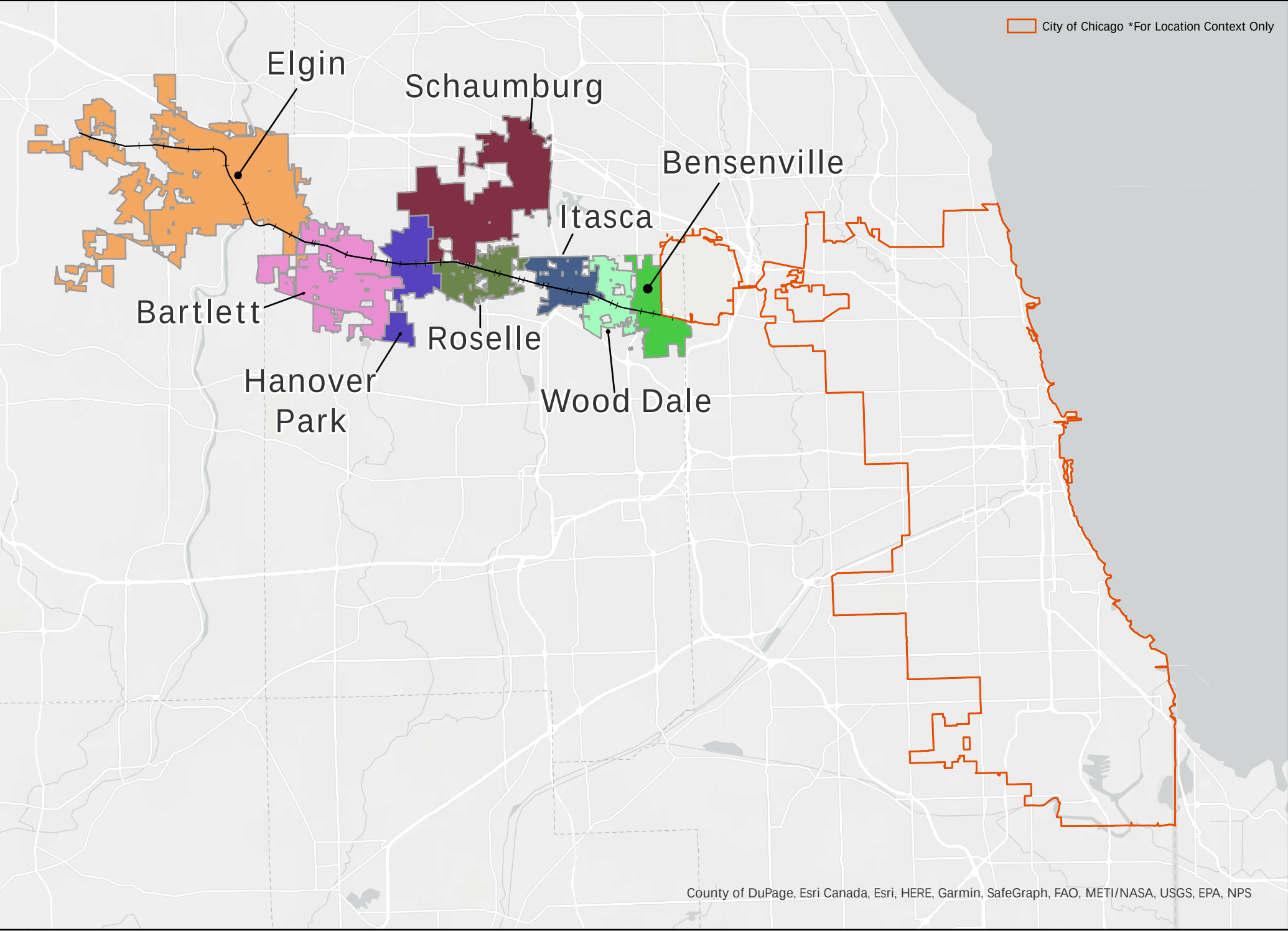
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Dated: October 21, 2022

ATTACHMENT A

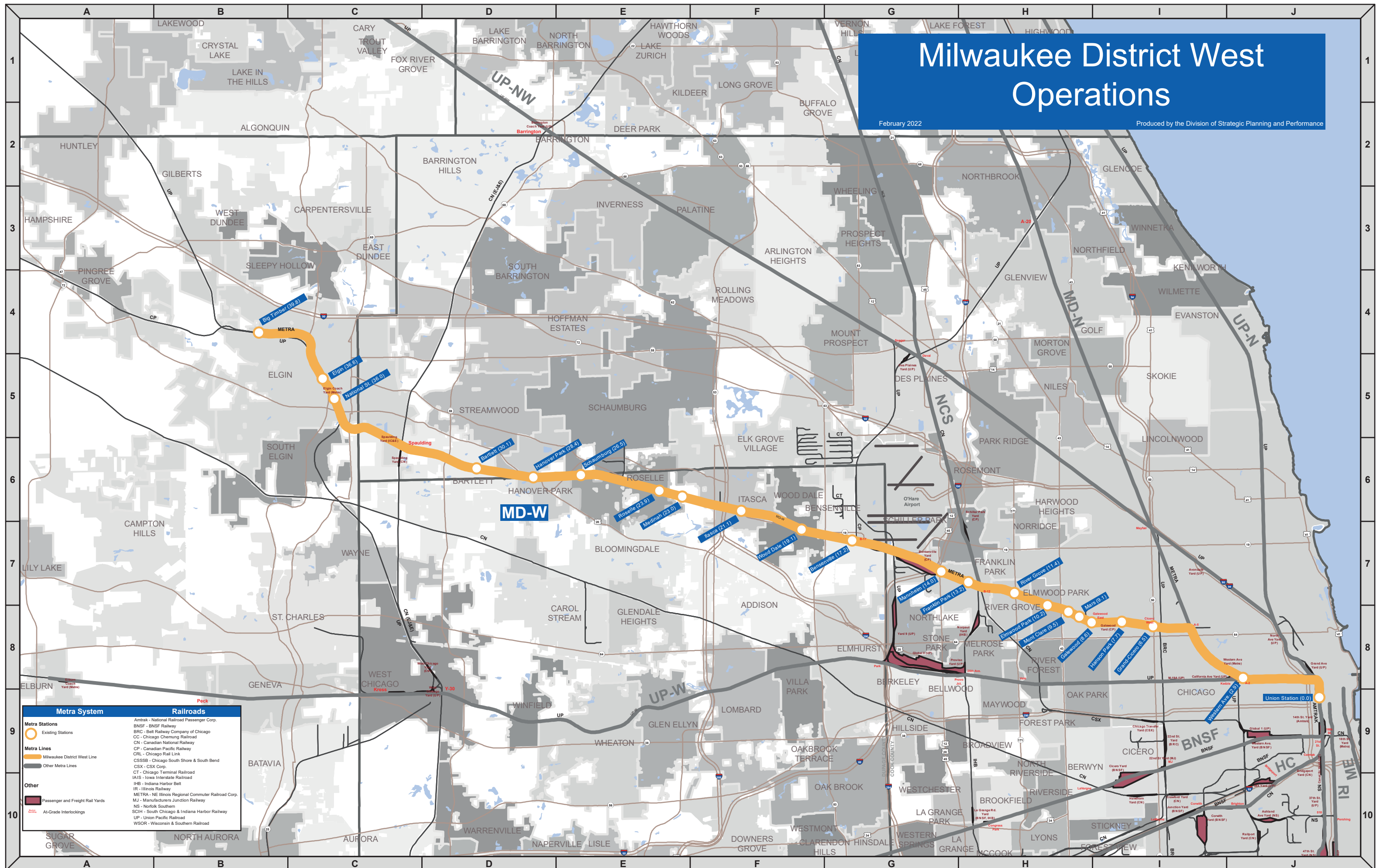
Coalition Members



Milwaukee District West Operations

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October 2022 a copy of the foregoing Final Brief was served on each Party of Record listed on the official Service List for Docket No. FD 36500, and Docket Nos. FD 36500 (Sub Nos. 1-4).

Thomas W. Wilup
