

**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	)	
	)	

FINAL BRIEF OF EVERGY METRO, INC.

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In accordance with Decision No. 22, served July 22, 2022 in the above-captioned proceeding, Evergy Metro, Inc. (“Evergy Metro”), a party of record, submits this Final Brief in support of the imposition of certain specific conditions by the Surface Transportation Board (“Board” or “STB”) on any approval of the proposed acquisition of control by Canadian Pacific Railway, Inc. (“CP”), through 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 if the Board decides to approve the Transaction under 49 U.S.C. Section 11324 and the applicable Board implementing regulations and policies, it should condition that approval on (1) the establishment of a formal five (5) year Board oversight and reporting process, with appropriate public participation, to monitor the impact of the Transaction on the adequacy and quality of essential rail services provided to Evergy Metro and other shippers that currently rely on KCS service, including from Kansas City, MO/KS south along the railroad's Pittsburg Subdivision; (2) a Board order requiring CP and KCS to honor and abide by all representations and commitments made in their principal evidentiary submissions in this proceeding¹ regarding service quality, the preservation of gateways and interchanges, and investments in specific infrastructure improvements, including but not limited to the representations set forth in the "CP/KCS Service Promise" included in the Response; and (3) the retention of Board jurisdiction to extend the oversight period and/or impose additional conditions as necessary to remediate any degradation of service or failures by CP-KCS to fully abide by their commitments. In their Response, CP-KCS agreed in principle to accept versions of the first two conditions, and the third is essential to ensure their enforcement and afford affected shippers and other interested parties a proper opportunity for redress.

¹ *Canadian Pac. Ry., Ltd., et al. – Control – Kansas City S., et al.*, FD 36500, Railroad Control Application (CP-25/KCS-13) (filed Oct. 29, 2021) ("Application"); Applicants' Response to Comments and Requests for Conditions, Opposition to Responsive Applications, and Rebuttal in Support of the Application (CP-53/KCS-39) (filed July 13, 2022) ("Response").

BACKGROUND

Evergy Metro described its utility operations, customer service territory, and the dependence of its 1,400 megawatt coal-fired La Cygne Generating Station (“La Cygne”) on KCS for the delivery of essential Powder River Basin coal fuel in its Opening Comments filed on February 28, 2022 in this proceeding (“*Comments*”). In particular, Evergy Metro explained that its status as a Load Responsible Entity within the Southwest Power Pool (“SPP”) (the independent system operator that monitors and dispatches La Cygne generation) put increased emphasis on the importance of regular and reliable coal deliveries both to directly fuel generating unit operations and to support the maintenance of sufficient coal inventory to enable Evergy Metro to respond to changes in demand for electrical power and meet its SPP resource adequacy requirements.² Evergy Metro also noted that while KCS coal delivery service to La Cygne is the subject of a contract entered under 49 U.S.C. Section 10709, Evergy Metro is not seeking the interpretation or enforcement of the contract by the Board in this proceeding, but rather is advancing its legitimate concerns with respect to the impact of a CP-KCS merger on the system service capacity of the KCS lines near and south of Kansas City that are used to deliver coal to La Cygne (including KCS’s Pittsburg Subdivision).

Referencing CP’s and KCS’s own claims and presentations in their Application, Evergy Metro showed that an unconditioned CP-KCS merger would threaten the quality and reliability of coal delivery service to La Cygne. Evergy Metro

² See *Comments* at 2-4.

pointed to Applicants' expectation of a 50% increase (over 2020 levels) in traffic density over the Pittsburg Subdivision post-merger, all of which would be high priority, competitive traffic. *Comments* at 5-6, 9-10. At the same time, however, CP and KCS appeared to make no provision for additional track or siding space between Kansas City and the point where trains exit and enter the KCS main line to or from La Cygne's private delivery track near Amsterdam, MO, or for additional locomotives to be assigned to the Pittsburg Subdivision. *Id.* Every Metro also pointed out that the assumptions made in Applicants' post-merger Operating Plan regarding service reliability and transit times were not supported by Every Metro's own actual experience, which was marked by consistent delays both in moving loaded trains from the Kansas City interchange to La Cygne and returning empty trainsets to the interchange for movement back to the Powder River Basin for reloading. *Id.* at 10-11. In that regard, Every Metro noted that CP's own witness John Brooks had acknowledged that no actual studies of the impact of forecasted traffic growth on existing KCS-dependent shippers had been conducted, and that bulk commodity trains (such as coal trains) likely would be de-prioritized on a combined CP-KCS system. *Id.* at 13.

Addressing the question of merger impacts on future coal delivery service to La Cygne directly, Every Metro explained how maintenance of an adequate coal inventory and the capacity to respond to rapid changes in the demand for electricity were critical to meeting its responsibilities within SPP, and that predictable and on-time rail transportation service was essential to achieving those goals. *Id.* at 11. Depending upon seasonal conditions and costs of alternate generation, delays or disruptions in coal

deliveries could lead to costly coal conservation measures and other serious adverse consequences. Every Metro explained how the facts set out in the Application raised the level of risk of harm to essential rail services in a post-merger scenario, a risk that the Board is compelled to address in its application of the governing statutory and regulatory standards for evaluating the Transaction. *Id.* at 12-14. *See* 49 U.S.C. §§ 11324(b)-(c); 49 C.F.R. Part 1180.1(b)(1) (2000).

Concluding its *Comments*, Every Metro clearly established the Board's legal authority to grant an effective remedy to address the risks that the Transaction poses for future coal deliveries to KCS-captive La Cygne,³ and proposed specific conditions that the Board should impose on any approval of a CP-KCS merger:

1. A five (5) year oversight period during which Applicants would be required to submit quarterly reports and evidence showing that the quality of service to shippers dependent on lines such as the Pittsburg Subdivision has not deteriorated, including multiple service metrics by commodity or commodity group such as train speeds, dwell times, and post-release empty return times, which would be available to and subject to comment on by shippers and other interested parties.
2. A mandate that CP and KCS adhere to and abide by all representations made in the Application regarding service quality and the preservation of gateways and interchanges.
3. The retention by the Board of jurisdiction throughout the oversight period to impose additional conditions or sanctions if necessary to remediate service shortfalls or other failures by CP-KCS to meet its commitments. Every Metro also recommended inclusion of a mediation stage, where issues raised by shippers could be addressed and potentially resolved prior to Board action.

³ *See Comments* at 14-16, (citing *Union Pac. Corp. – Control & Merger – S. Pac. Rail Corp.*, 3 S.T.B. 1030 (1998) and *Union Pac. Corp. – Control & Merger – S. Pac. Rail Corp.*, 1 S.T.B. 233 (1996)).

In their Response, Applicants did not challenge Evergy Metro’s right to participate in this proceeding, or to seek and secure the protections of Board-imposed conditions on any approval of the Transaction. Additionally, as discussed in further detail *infra*, Applicants agreed to accept a five-year oversight condition and a mandate that they “honor their representations in this proceeding,”⁴ though the versions of each that Applicants have indicated they will accept fall short of what is needed. Applicants then asserted that their approved conditions “would fully address any legitimate concerns Evergy has about the Transaction” and that “no further conditions are warranted.”⁵

On the subject of issues raised by Evergy Metro (and possibly other parties) regarding the forecasted post-merger increases in traffic densities over various line segments – such as the Pittsburg Subdivision – Applicants argued that those concerns are misplaced because the new Transaction-related traffic anticipated by a combined CP-KCS will only materialize if “Applicants demonstrate to shippers that the service CPKC is able to offer on its new single-line routes offer advantages” when compared to those shippers’ existing transportation options.⁶ The “shippers” referred to by Applicants are prospective new customers bringing intermodal and other competitive traffic to the new combined system. No mention is made of existing, captive CP or KCS shippers who depend on service over the lines to which the new customers would be attracted, and who

⁴ Response, Vol. I at 317.

⁵ *Id.*

⁶ Response, Vol. I at 136.

would have no alternatives if their service was de-prioritized in favor of showing the new customers that “CPKC is able to offer ... advantages.” Response, Vol. I at 317.

In response to Evergy Metro pointing out in its *Comments* that the Operating Plan in the original Application did not describe any new or expanded rail facilities or additional commitments of power assets to the KCS Pittsburgh Subdivision segment between Kansas City and Amsterdam,⁷ Applicants stated that in fact there will be new tracks and expanded sidings installed on that segment at some point in the future, which purportedly will provide “ample capacity...to maintain Evergy’s pre-Transaction cycle times.”⁸ The Response did not address the issue of crew and power resources to handle forecasted increases in traffic without degrading service to existing captive shippers, Evergy Metro’s showing that pre-Transaction KCS service to La Cygne has fallen well short of that required to meet Evergy Metro’s reasonable coal transportation needs,⁹ or Applicants’ Witness Brooks’ acknowledgement that the matter of post-Transaction impacts on current KCS-dependent bulk commodity shippers had not been studied.

In its *Comments*, Evergy Metro specifically acknowledged the Board’s lack of jurisdiction over railroad transportation contracts, including the contract currently in place between Evergy Metro and KCS for coal deliveries to La Cygne, and made clear that its expressed concerns regarding the service impacts of a CP-KCS combination as

⁷ *Comments* at 6-7.

⁸ Response, Vol. I at 318; Elphick/Orr R.V.S. at 57-58.

⁹ *Comments* at 10-11.

proposed in the Transaction and its request for remedial conditions on any merger approval did not involve Board interpretation or enforcement of its contract with KCS.¹⁰ Nevertheless, Applicants in their Response not only referenced that confidential agreement, but cited its terms in arguing against any conditions beyond those offered by Applicants themselves.¹¹ Evergy Metro maintains its position that the terms of its contract with KCS are not a proper subject for consideration in this proceeding. Whether KCS's current and future service to La Cygne is in accordance with its contract obligations is not within the scope of the Board's jurisdiction. As Evergy Metro stated in its *Comments*, its interest in this proceeding is with the systemic threat that an insufficiently conditioned CP-KCS merger would pose for captive bulk commodity shippers dependent on service over the Pittsburg Subdivision, including but not limited to Evergy Metro.¹²

Addressing the issue of post-Transaction service quality generally, Applicants outlined a "CP/KCS Service Promise" that Applicants claimed obviates the need for any other service-related merger conditions.¹³ As presented by Applicants' Witness Brooks, the "Promise" – which Applicants said they expect will be made a condition of Board approval of the merger – has five basic elements: (1) a "Plan" for implementation of the Transaction; (2) an intent to "Monitor" post-Transaction service

¹⁰ *Id.* at 4, 14.

¹¹ Response, Vol. I at 318; Naatz R.V.S. ¶ 119.

¹² *Comments* at 14.

¹³ Response, Brooks R.V.S. at 14.

performance; (3) a duty to “Report” on that performance during a five-year oversight period; (4) a pledge to “Communicate and Consult with Customers” regarding service performance; and (5) a system to “Fix” any issues that arise vis-à-vis affected shippers.¹⁴

Evergy Metro respectfully submits that Applicants’ proffer of merger conditions regarding Board oversight and adherence to service quality and other representations made on the record of this proceeding concedes the merits of Evergy Metro’s request for relief in its *Comments*. However, as demonstrated *infra*, that proffer lacks the specificity and detail needed to fully protect the interests of current KCS and CP shippers – especially captive shippers – such as Evergy Metro. More robust monitoring, reporting and public participation elements should be included.

ARGUMENT

I. STRONG MERGER CONDITIONS ARE PART OF THE BOARD’S MANDATE TO PROTECT THE PUBLIC INTEREST

As Evergy Metro showed in its *Comments*, Board precedent and regulations endorse the application of conditions on proposed rail mergers, both to allow for post-merger monitoring and Board directives as needed to address service problems and other transition issues, and to hold applicants post-merger to the assurances and representations that they make during a proceeding to secure approval. Protection of the “public interest,” includes the interests of affected shippers in the preservation of essential rail service.¹⁵ Under the pre-2001 rules applicable to this proceeding, the first public interest

¹⁴ *Id.* at 15; *see also* Response, Vol. I at 139-40 (including Fig. 6).

¹⁵ *Comments* at 14-16.

criterion listed was the “effect [of a transaction] on the adequacy of transportation to the public,”¹⁶ and a principal adverse effect identified was harm to essential services where “adequate alternative transportation is not available.” 49 C.F.R. Part 1180.1(c)(2)(ii) (2000). In prior cases interpreting and applying those rules, the Board imposed vigorous multi-year oversight conditions that included supervision of the merging carriers’ adherence to service assurances, operational planning and infrastructure improvement representations made on the record during approval proceedings. *See, e.g., Union Pac. Corp. – Control & Merger – S. Pac. Rail Corp.*, 1 S.T.B. 233 (1996) (five-year oversight condition imposed with retained STB jurisdiction); *Union Pac. Corp. – Control & Merger – S. Pac. Rail Corp.*, 2 S.T.B. 251 (1997) (STB adopted new and expanded conditions that included reports on infrastructure improvements); *CSX Corp. et al. – Control & Operating Leases/Agreements – Conrail Inc. et al.*, 3 S.T.B. 196, 228-29 (1998) (oversight of service impacts and infrastructure plans); *see also, Canadian Nat’l Ry. – Control – Ill. Cent. Corp.*, 4 S.T.B. 122, 156-59, 187 (1999) (mandated adherence to commitments made during review/approval proceedings).

The Board’s current regulations, while not specifically binding in this case, nevertheless should inform the kinds of merger conditions needed to protect the public interest, and to directly address both oversight and mandated adherence to service protection representations. Current 49 C.F.R. Part 1180.1(g) provides that “[a]s a condition to its approval of any major transaction” the Board will impose a five-year

¹⁶ 49 C.F.R. Part 1180.1(b)(1)(i) (2000).

oversight period, with carrier reporting and public participation elements, focused on monitoring post-merger service conditions and assuring merger applicants’ “adherenc[e] to the various representations they made on the record during the course of their merger proceeding,” with retained STB “jurisdiction to impose any additional conditions it determines are necessary to remedy or offset adverse consequences of the underlying transaction.” The following section – 49 C.F.R. Part 1180.1(h) – emphasizes the “vital importance” of service quality, and requires that merger applicants submit a Service Assurance Plan meeting the specific criteria of 49 C.F.R. Part 1180.10, including detailed descriptions of how a proposed transaction would *improve* service, not simply avoid degrading it; identification of planned infrastructure improvements and capital commitments; plans for customer service and carrier responses; and contingency plans in the event that unexpected (or unforeseen) service disruptions do occur. In a previous control proceeding involving KCS, the Board specifically imposed a condition binding the transaction parties to their representations made on the record. *See Kansas City S. – Control – Kansas City S. Ry. Co., et al.*, FD 34342 (STB served Nov. 29, 2004) at 6, 16. *See also, CSX Corp. and CSX Transp., Inc., et al. – Control and Merger – Pan Am Systems, Inc., et al.*, FD 36472 (STB served Apr. 14, 2022) at 13, 35 (“CSX/PA”).

In their Response, Applicants openly acknowledged the appropriateness of oversight and representation adherence conditions in this proceeding and accepted the Board’s imposition of such conditions.¹⁷ Applicants’ acquiescence eliminates any doubt

¹⁷ *See, e.g.*, Response, Vol. I at 317.

as to whether the Board should follow prior precedent and condition any approval of the Transaction on a five-year oversight plan and a mandate that CP and KCS abide by all representations made and assurances offered on the record. The question presented is whether the conditions described by Applicants are adequate to address the concerns raised by Evergy Metro and other parties regarding post-merger service quality. As shown in Parts II and III, *infra*, more robust and detailed conditions than those offered by Applicants are required.

II. THE BOARD SHOULD ADOPT AN EFFECTIVE OVERSIGHT AND REPORTING CONDITION

While Applicants have offered to accept a five-year oversight and reporting condition,¹⁸ their suggested terms are vague and too narrow in scope. After stating that Applicants are “still assessing” the specific metrics that they would record and report, their Witness Brooks testified that they would agree to a two-component framework: (1) continued reporting of the metrics already required by the Board pursuant to its *Ex Parte No. 724* and *Ex Parte No. 770* decisions;¹⁹ and (2) reporting of as-yet undefined metrics for specific corridors “that have been raised by parties to this proceeding” – the

¹⁸ The actual offer is for oversight of *up to* five years. Applicants stated that they expect the Board to truncate this time period. *Id.* at 141. By contrast, in *CSX/PA* the Board properly reserved the option to extend the period beyond five years, if appropriate to monitor the impacts of expected traffic growth. *CSX/PA* at 49.

¹⁹ *Petition for Rulemaking to Amend 49 C.F.R. Part 1250*, EP 724 (Sub-No. 5) (STB served May 14, 2020) (Board’s most recent decision in EP 724 which revised performance data regulations); *Urgent Issues in Freight Rail Serv. – R.R. Reporting*, EP 770 (Sub-No. 1) (STB served May 6, 2022).

Laredo, TX to St. Paul, MN corridor and the so-called “Meridian Speedway” – as well as four yards (including Kansas City) and an intermodal terminal.²⁰ Evergy Metro respectfully submits that these elements are inadequate to satisfy the need for effective post-Transaction oversight and reporting.

The *Ex Parte No. 724* metrics are too broad to accurately measure the impact of a CP-KCS merger on individual captive shippers such as Evergy Metro. Coal unit train speeds are reported on a system-wide average basis,²¹ terminal dwell times for run-through trains are not required to be reported at all,²² and other metrics applicable to coal trains either are limited to weekly data²³ or would not include Evergy Metro’s trains because KCS does not originate the shipments.²⁴ Similarly, the metrics reported under the Board’s *Ex Parte No. 770* mandates, both as originally adopted and as subsequently modified,²⁵ while important for a variety of purposes, are measured on average bases for entire groups of traffic types (e.g., all coal unit trains) or by operating division.²⁶ The data are not designed to expose the deterioration of service quality to particular shippers or groups of shippers, and would not be useful for that purpose. More focused and

²⁰ Response, Brooks R.V.S. at 16.

²¹ 49 C.F.R. Part 1250.2(a)(1)(iii).

²² *Id.* at Part 1250.2(a)(2).

²³ *See, e.g., id.* at Parts 1250.2(a)(5) and (11).

²⁴ *Id.* at Parts 1250.2(a)(4), (6) and (9).

²⁵ *Urgent Issues In Freight Rail Service – R.R. Reporting*, EP 770 (Sub-No.1) (STB served May 6, 2022) (modified June 13, 2022).

²⁶ *Id.* (STB served May 6, 2022) at 5-6.

detailed metrics are required to determine whether, for example, a combined CP-KCS has deprioritized existing captive traffic on specific corridors in pursuit of the new competitive business that Applicants have highlighted as a major goal and positive effect of the Transaction. *See CSX/PA* at 13, 20 (approval conditioned on merging carriers reporting metrics to monitor specific routing commitments). Applicants have expressed the view that they should be permitted to degrade service to certain shippers post-merger, in preference to providing “the best possible service to the most customers.”²⁷ The Board should squarely reject this implicit threat to the quality of “essential services” to captive shippers like Evergy Metro. *See* 49 C.F.R. Part 1180.1(c)(2)(ii).

Through their Witness Brooks, Applicants did offer to report still-to-be-determined more detailed metrics for “specific corridors that have been raised by parties to this proceeding,”²⁸ but the only corridors identified are the lines between Laredo and St. Paul and the “Meridian Speedway.” Evergy Metro is a party to this proceeding and specifically raised well-founded concerns regarding merger impacts on service to La Cygne over the KCS Pittsburg Subdivision, thereby meeting Mr. Brooks’ criteria for detailed oversight and metrics reporting. The inclusion of Kansas City among the yards to be covered by more detailed reporting is not sufficient to address those concerns, as the risks that Evergy Metro described in its *Comments* include unreasonable delays on loaded movements after they leave the Kansas City interchange, and delays on empty return

²⁷ Response, Brooks R.V.S. at 20.

²⁸ *Id.* at 16.

movements before they reach that interchange. Every Metro is not familiar with every filing made by every other party, which certainly could include similar apprehensions. In any decision approving the Transaction, the Board should include an oversight and detailed reporting condition that includes measures of the impact of the Transaction on existing traffic using the KCS lines south of Kansas City. *CSX/PA* at 30-31.

The metrics to be measured and reported during the oversight period certainly can include those described in *Ex Parte Nos. 724* and *770*, so long as they are focused specifically on the Pittsburg Subdivision and other corridors where parties have raised concerns; *e.g.*, average train speeds would be recorded on a corridor or subdivision basis, rather than system-wide. The data should be reported on a commodity basis for unit trains and include comparable metrics for intermodal and any designated “priority” trains. In addition, the Board should require Applicants to record and report loaded and empty unit train transit times by commodity, and data showing differences between scheduled shipments and transported/delivered shipments for unit train movements on the same basis. These metrics should be reported at least quarterly throughout the oversight period, with interested and/or affected parties having an opportunity to comment and present related or competing evidence. As Every Metro recommended in its *Comments*, the Board should retain jurisdiction over the Transaction throughout the oversight period and impose any additional conditions that are shown to be needed to respond to deteriorations in service quality to affected shippers or other problems reflected in Applicants’ reports or in comments or evidence submitted by interested parties. *See Union Pac. Corp.*, 1 S.T.B. at 254.

III. THE BOARD SHOULD IMPOSE AN ENFORCEABLE CONDITION REQUIRING APPLICANTS TO ABIDE BY ALL REPRESENTATIONS MADE IN THIS PROCEEDING

An enforceable Board approval condition that binds Applicants to honor and abide by all representations made by them on the record in support of the Transaction is consistent both with applicable precedent²⁹ and with Applicants' own acknowledgements in their filings. *See* Response, Vol. I at 30, 317. However, the Board should not simply publish Applicants' ambiguous statements regarding the representations that they will stand behind post-Transaction.³⁰ As with the oversight condition, the Board should provide greater detail and definition than Applicants include in their filings and affirm the availability of access to the Board's retained jurisdiction if and as necessary to enforce the commitment condition.

Specifically regarding Evergy Metro, the Board should condition any approval of the Transaction on Applicants' fulfillment of their commitments to add the double tracks and siding extensions on the KCS lines near and south of Kansas City that were described by their Witnesses Elphick and Orr. *See* Response, Elphick/Orr R.V.S. at 57-58 (including Fig. 15).³¹ This condition is specifically supported by recent precedent. *CSX/PA* at 36. Applicants should also be required to include information on the timing

²⁹ *See, e.g., Kansas City S. – Control, supra; CSX/PA* at 34-35; *Canadian Nat'l Ry.*, 4 S.T.B. at 187.

³⁰ For example, at page 317 of Volume I of their Response, Applicants referred broadly to "their representations in this proceeding," setting no apparent limits. Prior to that statement, however, Applicants seemed to specify a "discrete set" of only five acknowledged commitments. *See* Response, Vol. I at 30.

³¹ *See also* Response, Vol. I at 317-18.

and progress of these infrastructure improvements in their periodic reporting pursuant to the oversight condition. *Id.* at 30-31. In their Response, Applicants represented that these improvements will “maintain Evergy’s pre-Transaction cycle times.”³² As Evergy Metro showed in its *Comments*, KCS’s existing service to La Cygne already frequently falls short of what is required to meet Evergy Metro’s legitimate transportation needs.³³ This service is subject to the contract between Evergy Metro and KCS, and Evergy Metro acknowledges that any remedy for current service quality deficiencies lies outside the scope of the Board’s jurisdiction. In crafting and potentially evaluating compliance with a condition requiring Applicants to fulfill their commitments to upgrade the KCS infrastructure near and south of Kansas City, however, the Board can and should assess the merger’s impact on service to La Cygne and require Applicants to provide the information needed to make that assessment. For example, if Applicants do in fact make the upgrades but proceed to use them to sideline Evergy Metro’s captive coal trains in favor of attracting new intermodal or other competitive traffic and further degrade La Cygne service, that should be considered as much a violation of the condition as would be a failure to make the investments in the first place.

More generally, the Board should make clear that Applicants will be held to *all* representations and commitments made on the record in this proceeding, irrespective of their ambiguous statements referenced *supra*, with such modifications or clarifications

³² *Id.* at 318.

³³ *Comments* at 10.

as may be advanced by those parties that are expected to benefit from the commitments, including but not limited to other current KCS or CP shippers and affected railroad employees. The Board's decision also should make clear that the agency is retaining jurisdiction at least throughout the oversight period, to promptly address any issues or disputes regarding Applicants' compliance. With respect to the "CP/KCS Service Promise" described by Applicants' Witness Brooks,³⁴ the Board should direct the following improvements to make this commitment more effective and more responsive to the needs of the shippers served by CP and KCS:

1. "Pillar 1" should be modified to require CP-KCS to engage directly with those shippers that would be affected by "Transaction-related changes" *before* they are implemented, with those shippers then having the ability to petition the Board for the imposition of additional conditions to protect their rights to adequate service, if necessary.

2. The Board should include in its oversight condition a requirement that Applicants report any service metrics that they record in the course of their "Pillar 2" monitoring program. In the interests of transparency and ensuring that Applicants' post-Transaction operating plans do not result in degraded service to shippers dependent on either KCS or CP, there should not be any qualitative differences between the data that Applicants report to the Board and the public and those that they develop internally.

³⁴ Response, Brooks R.V.S. at 14-18.

Transparent reporting is the subject of Applicants' "Pillar 3", so this modification/clarification would not impose any undue burdens on them.³⁵

3. "Pillar 4" and "Pillar 5" describe post-Transaction actions that Applicants commit to take to keep customers informed regarding performance issues, and to address any problems that may arise. They also reference a willingness on the part of Applicants to make adjustments to resource allocations and operating practices in response to identified problems. While the representations on their face are encouraging, the effectiveness of these promises will depend heavily on their enforceability. In imposing a commitment condition, the Board should also reiterate its retention of jurisdiction to invite and respond to shipper petitions should Applicants fail to faithfully abide by the procedures and substantive elements of their "Service Promise." In that regard, the Board should make clear that Applicants' proposal to engage in non-binding mediation of issues or questions that cannot be resolved through negotiations³⁶ is not the end of the dispute resolution process, and that the Board will remain as the final arbiter of issues arising from Applicants' post-Transaction performance. In light of concerns expressed by the Board in *CSX/PA* regarding the potential scope of commitments

³⁵ Such a requirement also is consistent with the Board's current merger rules at 49 C.F.R. Part 1180.1(g) and (h), which while not technically applicable to this proceeding, have been referenced favorably by Applicants in their arguments concerning the Transaction's alleged public interest benefits. *See Canadian Pacific Ry., et al. Control – Kansas City Southern, et al.*, STB Docket No. 36500, Applicants' Reply to Objections to KCS Waiver from 2001 Major Merger Rules (filed April 12, 2021) at 4-5.

³⁶ Response, Brooks R.V.S. at 18.

conditions,³⁷ the Board should include the conditions described herein and in Part II in the ordering paragraphs of its final decision.

IV. EVERGY METRO'S CONTRACT WITH KCS IS NOT RELEVANT TO THIS PROCEEDING

In its *Comments* as well as earlier in this Final Brief, Evergy Metro acknowledged the fact that KCS coal delivery service to La Cygne currently is covered by a contract pursuant to 49 U.S.C. Section 10709, and explained both that it was not seeking Board interpretation or enforcement of that contract, and that the contract's existence did not preclude Evergy Metro from petitioning for conditions to be imposed on the Transaction.³⁸ Applicants do not challenge Evergy Metro's right to participate in this proceeding and seek conditions, but they still point to the contract and its continued effectiveness in opposing those requested by Evergy Metro.³⁹ The Board should not give any consideration to this element of Applicants' argument.

First, by referencing confidential terms of the contract and asking the Board to recognize KCS's pledge to adhere to them for the duration of the agreement as a basis for rejecting Evergy Metro's case for conditions,⁴⁰ Applicants in effect are inviting the Board to interpret those terms and invoke KCS's contractual commitments as part of its decision on conditions of merger approval, which is beyond the scope of the STB's jurisdiction. *See* 49 U.S.C. Section 10709(c). Second, while elements of the oversight

³⁷ *CSX/PA* at 35-36.

³⁸ *See Comments* at 14-16.

³⁹ Response, Vol. I at 318.

⁴⁰ Response, Vol. I at 318 and Naatz R.V.S. ¶ 119.

and commitment conditions advocated by Evergy Metro are in response to representations made by *Applicants* regarding the Transaction's impact on Evergy Metro, the scope of their application extends to other similarly affected shippers, as does Applicants' acceptance in principle of those conditions. In short, Evergy Metro's contract with KCS should play no role in the Board's decision in this proceeding.

CONCLUSION

For all the reasons set forth herein and in Evergy Metro's *Comments*, the Board should condition any approval of the Transaction on the imposition of a five-year oversight condition, and a condition requiring Applicants to abide by all representations and commitments made on the record in support of their proposed merger, both as detailed herein. The Board also should retain jurisdiction over this matter at least throughout the oversight period to enforce or enhance the conditions as necessary or appropriate, consistent with applicable case law precedent and the Board's pre-2001 merger rules.

Respectfully submitted,



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Dated: October 21, 2022

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Certificate of Service

I certify that I have this 21st day of October, 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:

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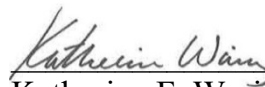
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