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BNSF-14

VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

**Re: STB Docket No. FD 36500, Canadian Pacific Railway Limited, et al.—
Control—Kansas City Southern, et al.**

Dear Ms. Brown:

Enclosed for e-filing in the above-referenced proceeding is a public version of the Final Brief of BNSF Railway Company (BNSF-14), with appropriate redactions that the Board can place in its docket. We are concurrently filing a highly confidential version of the Final Brief to be filed under seal.

The body of the enclosed Final Brief is within the 30-page limit set by *Decision No. 22*. BNSF includes one appendix that is outside the 30-page limit: excerpts of the July 28, 2022 deposition of Applicants' rebuttal witness Stephen D. Simmons, which is discussed in the final brief.¹ To the extent necessary, BNSF respectfully seeks leave to include the appendix since it will allow BNSF to fully

¹ Mr. Simmons was deposed after Applicants submitted their rebuttal comments on July 13, 2022. Applicants have acknowledged that Board precedent allows the cross-examination of Applicants' rebuttal witnesses for use in final briefs. *See* CP-62/KCS-48 at 2 n.1 (Aug. 26, 2022) (*citing CSX Corp. & CSX Transportation, Inc., Norfolk Southern Corp. & Norfolk Southern Ry.—Control & Operating Leases/Agreements—Conrail Inc. & Consolidated Rail Corp.*, FD 33388, Decision No. 64 (STB served Jan. 29, 1998)).

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respond to questions raised by the Board during the public hearing, and would be consistent with the Board's grant of Applicants' request for leave in *Decision No. 32*.

Respectfully submitted,

/s/ Anthony J. LaRocca

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Enclosures

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, ET AL.
—CONTROL—
KANSAS CITY SOUTHERN, ET AL.

FINAL BRIEF OF BNSF RAILWAY COMPANY

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Dated: October 21, 2022

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FINAL BRIEF OF BNSF RAILWAY COMPANY

I. INTRODUCTION AND SUMMARY OF ARGUMENTS.¹

This proceeding involves a proposed merger that will restructure and forever alter the North American rail network, connecting one of Canada's largest rail carriers with one of Mexico's largest rail carriers. CP's acquisition of KCS and KCSM will create a new rail corridor in the United States that funnels traffic through the critical Houston complex and Laredo gateway on its way to and from important Mexican markets. This acquisition will have significant consequences for U.S. shippers who compete in those markets, regardless of whether they are served directly by KCS or CP, by other railroads, or even by truck. It is the Board's mandate to review those consequences and ensure sufficient protective conditions exist to preserve competition and to protect shippers.

When KCS acquired Tex Mex and linked the KCS U.S. network to KCSM in Mexico, CP knew that KCS's vague promises to keep the Laredo gateway to Mexico open to competition were not enough to protect the public interest and proposed specific protective conditions:

"Given the surpassing economic significance of the Laredo gateway to North American trade, the future competitive viability of interline routes connecting Mexico and the rest of the North American continent via Laredo is simply too important to leave to chance." – Canadian Pacific, 2003²

CP has never explained its abrupt about face in this proceeding. CP was right to be concerned in 2003, and the ability and incentive to eliminate competition at Laredo will only deepen with CP's acquisition of KCS/KCSM.

This merger is not like a case where the Board must decide whether or not to intervene in a functioning rail market and pursue one of its many regulatory mechanisms to review rates,

¹ Unless otherwise defined in this final brief, the acronyms and defined terms used in this filing are the same as those used in the BNSF Comments.

² CP Comments 7, Aug. 4, 2003, *KCS/Tex Mex*, FD 34342 (internal quotation marks and citation omitted).

practices and services for individual shippers and rail movements. Here, the Board must determine whether the fundamental structural changes proposed by Applicants will serve the public interest, and whether to use the Board's broad conditioning powers to ensure that competition will be preserved, shipper service will not be degraded, and the public interest will not be harmed. The facts that BNSF and others have presented in this proceeding raise serious concerns that the Board must address.

The current management of Applicants have made vague promises that all will be fine. But a merger like this would permanently re-align the rail network in ways that would outlast the tenure of Applicants' current officers and today's Board members. The Board must ensure now that structural mechanisms are in place over the long term to protect stakeholders from harms to competition and service.

BNSF has identified two structural harms that will result from this proposed merger and has proposed modest and workable solutions. First, a combined CP-KCS will fully own a Mexican rail carrier – KCSM – that dominates eastern Mexico and therefore has absolute control over certain markets accessed via the Laredo gateway that are important to U.S. companies that rely heavily on Mexico markets and suppliers.³ The STB needs to ensure competitive access by U.S. shippers to those markets, and BNSF has proposed a straightforward, established mechanism to protect competition at the Laredo gateway.

Second, the majority of traffic that a combined CP-KCS hopes to divert from current rail carriers will be forced through the Houston complex at great risk to the many shippers that rely on fluid Houston rail operations. But Applicants did not bother to conduct a serious study of available capacity in Houston. Their cynical strategy is to play "chicken" with the users of the Houston complex in the hope that CP-KCS will force UP and BNSF, and their shippers, to pay

³ BNSF interchanges with KCS at Robstown to reach Laredo, while UP reaches Laredo directly. For BNSF, the Laredo gateway includes the interchange with KCS at Robstown. (*See* Comments BNSF-9-19, Feb. 28, 2022.)

for capacity additions that are caused by the traffic shifts and structural changes brought about by the merger. While Applicants may be willing to risk traffic disruptions, the Board cannot take the chance of another traffic meltdown in Houston. In Chicago, CP-KCS have given assurances that they will not add traffic to important commuter lines until they are sure there is available capacity. CP-KCS should be required to make the same commitment in Houston and back it up with a definitive capacity plan.

It may be tempting for the Board to avoid specific enforceable conditions now and rely instead on stakeholders to pursue future litigation to address issues as they arise in the future. That would be a serious mistake. Even if there were visibility into KCSM's Mexico practices – and there is not – and even if CP-KCS had made clear and concrete commitments – and they have not – it would take years to enforce them, and the complex litigation required could only be pursued by the largest shippers. The STB needs to impose structural solutions to the fundamental changes brought about by this proposed merger.

II. THE PUBLIC INTEREST REQUIRES A CONCRETE AND ENFORCEABLE MECHANISM TO PROTECT AGAINST EFFECTIVE CLOSURE OF THE LAREDO GATEWAY WITH MEXICO.

The Board must determine, based on evidence that Applicants have the burden to provide, whether the proposed transaction would result in a lessening of competition. *See* 49 C.F.R. § 1180.6(a)(2)(i) (2000). The record here shows that Applicants have failed to even acknowledge, let alone suggest appropriate conditions to cure the competitive issues identified by BNSF and others at the Laredo gateway. Despite Applicants' failure to meet their burden of proof, BNSF recognizes that the Board will likely still approve this merger. Indeed, BNSF does not oppose the combination of CP and KCS/KCSM. But the Board must condition its approval to prevent the lessening of competition and ensure the public interest is served.

A. The risk of foreclosure at the Laredo gateway is not theoretical – BNSF was frozen out of the Laredo gateway after KCS acquired Tex Mex and KCSM.

1. As a result of KCS's foreclosure actions, BNSF traffic volumes over Laredo plummeted.

The need for Board action now to protect the Laredo gateway is demonstrated by the clear evidence of foreclosure that resulted from the last merger involving the Laredo gateway, KCS's acquisition of Tex Mex and KCSM. In that proceeding, KCS committed to keep the Laredo gateway open. But after the acquisition, KCS stopped providing commercially reasonable rates to BNSF and its customers, including by immediately doubling the rates for BNSF traffic on Tex Mex between Laredo and Robstown (CP-KCS Resp., V.S. Naatz ¶20, July 13, 2022.)⁴ Applicants freely admit that this occurred, justifying KCS's behavior with the inaccurate claim that KCS needed to double the rates because existing Tex Mex rates were irrationally low. (R.V.S. Naatz ¶21.) However, the calculations Applicants use to support these claims are wrong.⁵ The real numbers show that KCS materially raised the rates on BNSF shipments in order to force traffic onto their network, which they succeeded in doing.

KCS has managed to keep BNSF from effectively competing for business through Laredo in other ways as well. For example, in order to gain STB approval of its acquisition of Tex Mex, KCS committed to interchange with BNSF at Robstown for access to Mexican markets.⁶ In

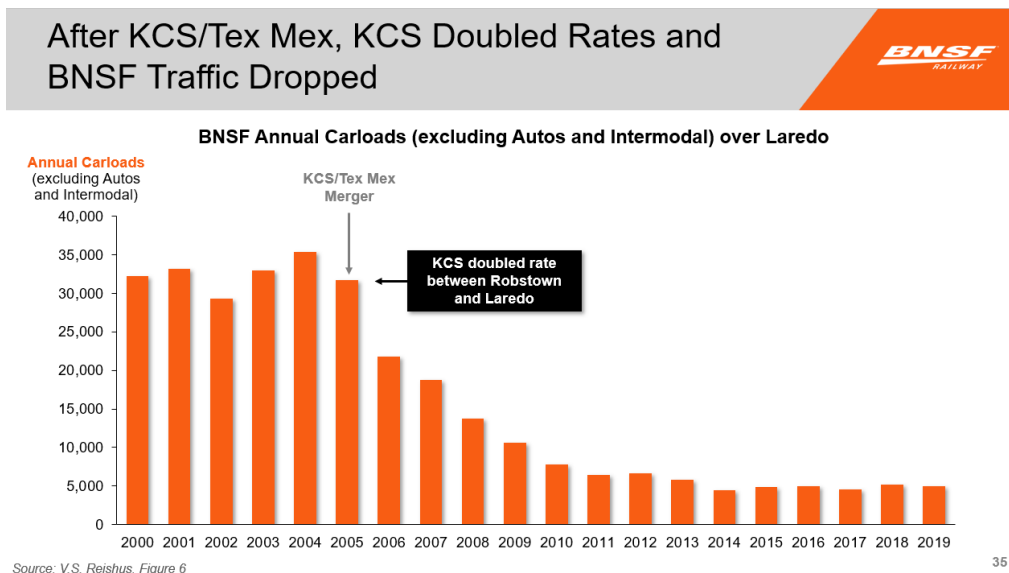
⁴ In addition to the Robstown rate increase, BNSF showed how KCS could have easily manipulated its rates in Mexico to force traffic onto its network. (BNSF-9-46 to 47 & V.S. Reishus ¶44-50.) But the data for Mexico are unavailable. Indeed, despite having committed to keeping an open Laredo gateway, KCS was unable to produce a **single document** reflecting (i) its implementation of the commitments KCS made in the KCS/Tex Mex proceeding; (ii) its performance of its obligations under the KCS/NITL Agreement, and (iii) KCS policies concerning commercially reasonable terms and how such rates should be determined. (See BNSF-9-46 to 47.)

⁵ Applicants used the wrong URCS inputs to calculate variable costs. Using the correct URCS inputs, the prior rates were not below variable costs and after the rates were doubled, the rates were more than 200% of variable costs. First, Applicants' witness Michael Naatz assumed that the Tex Mex costs were associated with single carload shipments as opposed to unit train movements, notwithstanding that "KCS's current interchange arrangements with BNSF at Robstown can only accommodate unit train traffic." (R.V.S. Naatz ¶38.) Second, Mr. Naatz's costs assumed KCS delivered the shipments to local customers in Laredo, whereas these moves are in fact interline shipments that only involve a hand off between KCS and KCSM. (See *id.* at ¶15-17.) The Board staff can easily calculate the correct R/VC ratios.

⁶ At the Board's July 31, 2003 hearing on the KCS/Tex Mex merger, Michael R. Haverty, KCS President and CEO, stated: "We are also committed to maintaining an interchange with BNSF at Robstown, and to leaving the Gateway open." (KCS/Tex Mex Hr'g. Tr. 13:11-13, July 31, 2003.) KCS also stated in its Reply: "KCS has committed to continuing to interchange with BNSF at Robstown, both at the Board's July 31, 2003 hearing and in the KCS-NITL Agreement." (KCS Reply 31, Oct. 18, 2003, KCS/Tex Mex.) Gerald K. Davies, the then Executive Vice President

practice, KCS has insisted on interchanging elsewhere, such as Kansas City, to obtain the long-haul revenue on Mexico movements and has refused to provide BNSF with commercially reasonable rates at Robstown. (*See* V.S. Hirsch BNSF-9-199 to 200.)⁷

These KCS actions cumulatively led to the precipitous decline in BNSF traffic over Laredo, forcing BNSF out of markets in Mexico served by that gateway. (BNSF Hr'g. Deck 35, Oct. 5, 2022.)



2. BNSF did not and could not shift its Laredo traffic to Eagle Pass.

Applicants argue that BNSF did not lose the Laredo traffic, but simply shifted it to the Eagle Pass border crossing. (CP-KCS Resp. Vol. I 88-90.) This argument ignores the fact that, while the Mexican railroads that connect at Eagle Pass (FXE) and Laredo (KCSM) overlap in limited areas, they generally serve different markets. Contrary to Applicants' reductive "one

and Chief Operating Officer of KCS, confirmed that "a KCS controlled Tex Mex will continue to interchange with BNSF at Robstown" because, in addition to market conditions, "[t]he NITL agreement requires it." (*Id.* at Supp. V.S. Davies 60, Oct. 18, 2003.)

⁷ KCS/KCSM's desire to keep BNSF from effectively competing in Mexico is most recently seen in its agreement with the Mexican Government to provide funding of certain infrastructure in return for a 10-year extension of its exclusivity arrangement. *CP applauds agreement to extend Kansas City Southern de México's concession exclusivity until 2037* (July 20, 2022), <https://www.prnewswire.com/news-releases/cp-applauds-agreement-to-extend-kansas-city-southern-de-mexicos-concession-exclusivity-until-2037-301590010.html>. This extension of exclusivity was announced after BNSF indicated that it might seek direct access to Mexico through Laredo if the merger forecloses BNSF from access through that important border crossing. (V.S. Hirsch BNSF-9-195.)

Mexico” theory, all gateways to Mexico are not equal, and access to Eagle Pass does not necessarily give BNSF access to important markets served through Laredo. (*See* Hr’g. 9/30 at 1:21:25.)⁸

BNSF’s head of its Mexico business unit, Paul Hirsch, explained that Laredo is the gateway to Mexico’s “Golden Triangle” of industry and population. (*See* Hr’g. 9/30 at 00:13:25; *see also* BNSF Hr’g. Deck 31-33.)⁹ After losing the Laredo business, BNSF had to build new business in Mexico with new customers and new markets that could be competitively served from Eagle Pass. (Hr’g. 9/30 at 00:13:24.) The timing of BNSF’s traffic changes bears this out. It took several years after being frozen out of Laredo for BNSF to build up a different Mexico market through Eagle Pass. (CP-KCS Resp., R.V.S. Majure 83, Ex. 6; V.S. Wilson BNSF-9-515.) BNSF could not, and did not, simply shift the same traffic from one Mexican gateway to another.

3. BNSF remains unable to compete at Laredo, and the proposed merger will increase the amount of affected traffic.

To this day, BNSF still cannot win carload business over Laredo where KCS serves the U.S. location. (*See* Hr’g. 9/30 at 00:16:15.) BNSF cannot see the KCS rates that are quoted to shippers for interline movements with BNSF (and KCS was unable to produce such quotes in this proceeding), but BNSF knows that it is not winning the business. (*See id.* at 00:16:31.) BNSF’s elimination from these markets is not consistent with the competition that KCS promised the Board and the public when it acquired Tex Mex.

Current traffic patterns reflect the closure of the Laredo gateway. BNSF’s expert economist Dr. David Reishus showed that where KCS can potentially compete with UP or BNSF at a particular shipper location to serve the U.S. segment of cross-border traffic over Laredo (i.e.,

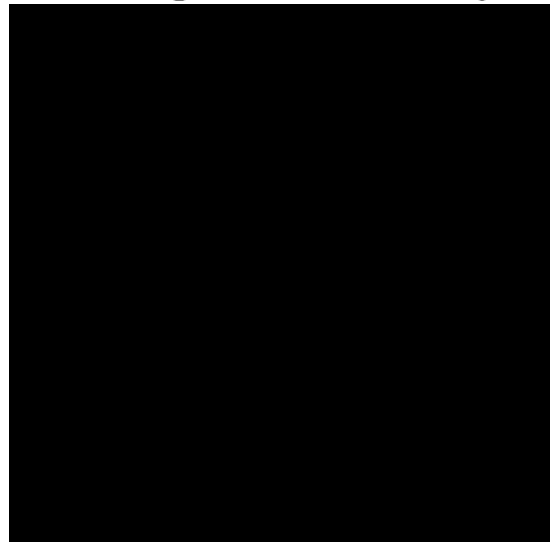
⁸ Even where the two railroads serve the same location, like Monterrey, Applicants’ own hearing slides showed that Eagle Pass has a significant mileage disadvantage relative to Laredo. (CP-KCS Hr’g. Deck 75.)

⁹ Mr. Hirsch also explained that Laredo has the most direct access to the high grain demand centers of Mexico City and eastern Mexico over KCSM, which is particularly important to U.S. farmers and grain shippers. (*See* Hr’g. 9/30 at 00:14:40.)

the traffic is a figurative “jump ball” among the carriers), UP and BNSF have been effectively precluded from obtaining that traffic (V.S. Reishus ¶59-80 & BNSF-9-438, 474 to 476.) That is not consistent with a level competitive playing field.

The traffic data show that foreclosure has most often affected carload traffic, which typically has higher margins than other traffic types (such as intermodal). (*Id.* at ¶76-80 & BNSF-9-438, 474 to 476.) Carload traffic accounts for the vast majority ({{█}} percent) of the revenue that KCS earns in the United States on traffic to and from Mexico. (*Id.* at ¶75.) For carload traffic over the Laredo gateway, KCS controls nearly all – {{█}} percent – of this traffic where KCS and either UP or BNSF potentially serves the U.S. location. BNSF obtains only {{█}} percent of the carload traffic. (*Id.* at BNSF-9-476.) This reflects nearly complete control over the Mexico border, not competition.

**Share of "Jump Ball" Carload Traffic
Through the Laredo Gateway**



Source: Reishus V.S. ¶ 79 and App. Table B-7, rows 2-4
Note: Numbers are rounded

The closure of Laredo is readily evident with respect to BNSF’s grain traffic. Despite Applicants’ claim that Eagle Pass is a substitute for Laredo, BNSF cannot reach grain markets served only by KCSM from Eagle Pass. (BNSF Hr’g. Deck 33.) Indeed, BNSF provides virtually *no grain shipments* to sole-served KCSM locations in Mexico, over either Laredo or Eagle Pass. (Hr’g. 9/30 at 1:21:03.) This is because KCS has the incentive and ability, through manipulation of the Mexico rates, to draw U.S. grain shipments from its own network to KCSM-served locations in Mexico rather than allow grain shippers located on other railroads to compete for that traffic through Laredo. (V.S. Reishus ¶74.) A combined CP-KCS will be able to dominate Mexico grain traffic by drawing from a much larger network after the merger, including vast

areas of Canada where Canadian farmers compete with U.S. farmers for important North American markets. (V.S. Reishus ¶¶90-94; Hr’g. 9/30 at 1:21:55.)

Cross-border intermodal traffic is another cause for concern. KCS does not have a significant intermodal network in the United States, so it does not currently have the incentive to keep BNSF from access to Mexico through Laredo on most intermodal movements. (*See* V.S. Reishus ¶¶70.) Thus, a few years ago, BNSF and KCS entered into a very successful intermodal arrangement that has taken tens of thousands of trucks from U.S. highways. But now that KCS plans to merge with CP, which does have a network that could support intermodal traffic in the United States, BNSF has not been able to renew that intermodal agreement. The Agreement is set to expire {{[REDACTED]}} (V.S. Hirsch BNSF-9-203 to 204.)

B. Competitive forces cannot be relied upon to keep the Laredo gateway open.

Applicants argued at the public hearing that the Board does not need to impose concrete measures because the invisible hand of the market somehow will keep the Laredo gateway open going forward, despite historic evidence to the contrary. BNSF and others in this proceeding have shown that Applicants’ theories about competition are not supported by real-world facts. When KCS acquired Tex Mex and TFM (now KCSM) in 2005, KCS made the same arguments that Applicants are making now that economic market forces and the lack of incentive would prevent KCS from taking anticompetitive actions. *See KCS/Tex Mex, Decision No. 12* at 58-60. As discussed in the prior section, KCS has had no such constraints.

1. BNSF’s ability to reach Eagle Pass will not restrain CP-KCS’s anticompetitive conduct at Laredo.

Applicants first argue that closing the Laredo gateway to BNSF would make no competitive sense because BNSF can just use the Eagle Pass gateway to serve the same markets. (*See* R.V.S. Majure § 3.4.) This is simply not true. In fact, KCSM dominates eastern Mexico and, as shown above, has exercised its power to exclude competition in that important market

segment by closing the Laredo gateway to competitors' access.

BNSF's grain expert Dr. William Wilson described the effects of the closure of the Laredo gateway on U.S. farmers and grain shippers. Dr. Wilson explained how the need to use the Eagle Pass gateway moved BNSF traffic over longer routes for some Mexican destinations (imposing additional costs), and forced BNSF away from serving other Mexican destinations altogether. (V.S. Wilson § IV.)¹⁰ Dr. Wilson further explained in his response statement why competition cannot be relied upon to avoid the unfair displacement of U.S. farmers and grain shippers in competing for access to Mexican markets.¹¹ If allowed to proceed without conditions, Dr. Wilson predicts that the merger could very likely result in Canadian grain replacing U.S. grain to penetrate a market in Mexico that is closer to the U.S. grain origins. (*Id.*)¹²

2. Intermodal competition will not protect against Applicants' anti-competitive conduct at Laredo.

Applicants' second argument is that they would have no incentive to close the Laredo border to traffic that faces competition in the United States. According to Applicants, they would simply lose the traffic to trucks if they used anticompetitive practices at the Laredo border crossing. But much of the traffic at issue is higher-margin carload traffic that is not subject to strong competition from trucks, such as grain, chemicals, and energy products. This is freight that generally moves by rail and is not business KCS is likely to lose to trucks by closing the border to competitors. Truck competition is not going to protect shippers and competing railroads from anticompetitive actions by CP-KCS at Laredo on these products.

¹⁰ After being excluded from Laredo, BNSF worked hard to make sure that its U.S. shippers could access different Mexican markets, but it took many years to build a new grain network over Eagle Pass. BNSF's grain traffic over Eagle Pass {{ [REDACTED] }} (V.S. Wilson BNSF-9-515.)

¹¹ As Dr. Wilson explained, "[n]ot only will the Canadian rate regulation policies give CP an incentive to move Canadian grain into Mexico, but the ability also to foreclose other U.S. sources of grain from moving through Laredo will give CP-KCS the ability to displace U.S. grain originating on other carriers moving into Mexico with grain from CP-served origins." (V.S. Wilson BNSF-12-122.)

¹² It is notable that the train shown in the video presented by Applicants at the hearing was a grain train from Manitoba to Mexico. (Hr'g. 10/6 at 4:20:35.)

For the more limited portion of cross-border traffic that faces non-rail competition, such as intermodal traffic where there is competition from both other railroads and trucks, truck competition will protect some shippers from an abuse of the market power that CP-KCS will have over the Laredo gateway. But Applicants will still have a strong incentive to earn long-haul revenues on that traffic, even if they do not have the most efficient route to the border, to pay for the merger. They will be willing to give up some interline business in order to earn greater long-haul revenue on what is left. The result might not be the total loss of the competitive business, but rather a reduction in the volume of that business, with the rest being forced to trucks. This result might still make financial sense for CP-KCS, but it is clearly not in the public interest or consistent with the Board's, and BNSF's, objectives to grow rail transportation and to reduce truck traffic.

C. As CP advocated in the *KCS/Tex Mex* proceeding, the STB should not rely on vague promises to keep the Laredo gateway open on commercially reasonable terms.

Vague promises by KCS in the Tex Mex merger failed to preserve BNSF's access to Mexico through Laredo in the past, and they will not be sufficient to rein in a larger and more powerful CP-KCS. As the Board Members' colloquies with Applicants' witnesses at the public hearing showed,¹³ ambiguous promises to preserve an open gateway with commercially reasonable rates are meaningless when Applicants have not explained what "commercially reasonable" means. Clearly, those two words standing alone are not a viable foundation on which to assess competition at the most important international rail freight gateway between the United States and Mexico in a \$31 billion merger.

In the *KCS/Tex Mex* proceeding, CP stood strongly against vague promises and called for

¹³ When Member Fuchs asked John Brooks, CP's Chief Marketing Officer, to define "commercially reasonable" in connection with the open gateway standard, Mr. Brooks responded that the standard was "somewhat squishy," that there is "no book" on rate-making, and that there are "all sorts of complexities." (Hr'g. 9/28 at 4:08:57.)

concrete, enforceable measures to preserve competition at Laredo. Indeed, CP asked the Board to condition its approval of the KCS/Tex Mex transaction on requiring applicants to enter into written agreement(s) defining the “commercially reasonable” terms upon which non-applicant railroads (and the shippers that they serve) would be able to access the Laredo gateway following the transaction. (CP Comments 2, Aug. 4, 2003, *KCS/Tex Mex*; *see also* CP Addl. Comments 7, Sept. 30, 2003.) CP pointed out that “Applicants have thus far declined to identify on the record the specific measures that they would take to implement [their open gateway] commitment.” (CP Comments 2, Aug. 4, 2003.) CP further proposed that the Board should “require KCS to agree to an ‘effective plan’ to preserve rail competition via Laredo, which goes beyond the vague promises offered by Applicants to date.” (*Id.* at 7-8.) CP has not provided any explanation for why it has taken the opposite position in this proceeding.

Indeed, the record shows that Applicants are already backing away even from the “somewhat squishy” general commitments that KCS made in *Tex Mex* to protect access to Mexico through Laredo. (Hr’g. 9/28 at 4:08:57.) For example, Mr. Brooks sought to “clarify” that the obligation of the future CP-KCS to provide commercially reasonable rates was limited to “affected traffic,” which, as defined (“[t]raffic that would be – or could be potentially impacted by either a longer haul or a single-line haul through CPKC”), would exclude traffic subject to geographic competition, like grain. (Brooks Depo. Tr. Feb. 4, 2022 at 81:11-24, 85:25-86:2.)¹⁴ Applicants also seek to limit their open gateway commitments to existing traffic, thereby depriving shippers of their ability to route Mexican traffic via newly-developed routings,¹⁵ and they propose a safe harbor for existing rates. While Applicants have proposed that disputes concerning whether they have met their open gateway commitment would be submitted to

¹⁴ There is no “affected traffic” limitation in the NITL Agreement, and Mr. Ottensmeyer testified that there is no such limitation in KCS’s open gateway commitments that CP is inheriting. (Hr’g 10/6 at 5:58:06.)

¹⁵ As Member Fuchs noted at the hearing, Applicants have also been vague about application of their commitment to new shippers as opposed to new shipments.

arbitration, they propose limits on who can initiate arbitration. (CP-KCS Hr’g. Deck 85, Oct. 11, 2022.) Such limitations would materially favor Applicants, would minimize the jurisdiction of the STB in resolving merger condition disputes (including disputes initiated by competing railroads partnering with shippers), and should be rejected.¹⁶

D. A concrete and enforceable mechanism is required to ensure that fair and competitive access to Mexico through the Laredo gateway will be available to all U.S. shippers.

The importance of access to growing Mexican markets makes it imperative for the STB to establish a concrete mechanism that will ensure, without the need for complex litigation, that the Laredo gateway will remain open. Special care is required here because the focus of this proposed merger is on Mexico. In a purely domestic merger, conduct of merged rail carriers can be monitored and addressed through access to the Board’s mechanisms. But the regulatory system in Mexico cannot be relied upon to provide relief from anticompetitive conduct involving cross-border movements. (*See* BNSF-9-44 to 45; *id.* at V.S. Dychter BNSF-9-484 to 489.) Mexican law would not preclude manipulative rate-setting behavior that would effectively close the Laredo gateway. (*See* UP Comments 48-50, Feb. 28, 2022.) And the lack of visibility into Mexican rate-setting conduct and lack of access to information in Mexico would make it impossible to challenge anticompetitive conduct there. The Board can avoid such complexities and entanglement with Mexico regulation by establishing an up-front mechanism in the merger approval that ensures fair and competitive interline rate practices on movements to Mexico.

The focus of this merger on Mexico also means that U.S. shippers cannot be expected to single-handedly prevent commercial closure of the Laredo gateway. Shippers seeking interline rates for a competitive movement to Mexico on BNSF or UP may be able to see the Rule 11 rate

¹⁶ Reliance on individual shippers to enforce an open gateway commitment is impractical given the time and costs involved. Competing rail carriers should be able to challenge commercially unreasonable practices by CP-KCS on behalf of shippers they serve.

being offered by KCSM for the Mexico portion of the movement, but – absent significant discovery efforts involving Mexico rate-setting practices by KCSM – they will have no way of knowing how that rate was manipulated to make competing service unattractive. (*See* BNSF-9-41 to 42.) Larger shippers in the United States may be able to use their market power to avoid unreasonable increases in their Mexico rates, but smaller shippers – the key to growth of rail traffic – will be without commercial or regulatory recourse. Smaller shippers faced with anticompetitive actions by KCSM at the Mexico border will not be in a position to bring complex enforcement actions relating to merger conditions.

Railroads also would be unable to enforce vague promises by CP-KCS to keep Laredo open. There is no visibility into Mexican rates: BNSF does not even know the Rule 11 rates that KCSM offers for competitive interline service. (V.S. Hirsch BNSF-9-200 to 206.) The STB might consider addressing the visibility problem by ordering CP-KCS to publish the Rule 11 rates they offer to shippers for the Mexico portion of a cross-border movement. Indeed, BNSF might have a better chance of offering competitive rates if it actually knew what CP-KCS was doing in Mexico. But even if such a visibility requirement were imposed as a condition to merger approval, *post-hoc* litigation over those Mexican rates is not an acceptable solution. BNSF has seen the difficulty of demonstrating *post hoc* that ongoing, incremental commercial actions actually violate merger conditions. The pace of STB relief is generally far slower than BNSF's window for commercial opportunities.

E. The STB should order Applicants to negotiate and implement a proportional rate mechanism for cross-border movements modeled on the I-5 Agreement.

1. The I-5 Agreement approach will effectively limit CP-KCS's ability to manipulate rates in Mexico to restrain competition.

Over the years, the Board has been understandably frustrated in developing regulatory mechanisms, particularly relating to rate-setting, that actually work. But here the Board has the opportunity to implement a mechanism that has already been used in the UP/SP merger to

accomplish the exact objective at issue here – keeping a gateway open – and that has proven highly successful without the need for Board supervision for a quarter century. A successful and easily implemented model already exists in the I-5 Proportional Rate Agreement.

The origin and mechanics of the I-5 Agreement are addressed in detail in BNSF’s comments. (*See* BNSF-9-48 to 53; *id.*, V.S. Hirsch BNSF-9-207 to 208; *id.*, V.S. Reishus BNSF-9-451 to 453; BNSF-12-18 to 19; *id.*, R.V.S. Reishus BNSF-12-93 to 103.)¹⁷ As BNSF explained, an I-5-like mechanism is not intended to regulate rates charged for rail transportation in Mexico. Rather, it is to prevent CP-KCS/KCSM from manipulating the allocation of their revenue in setting divisions on cross-border interline movements between the United States and Mexico. Under an I-5 approach, CP-KCS/KCSM would have complete freedom to set market-based rates in the United States and Mexico. The I-5 Agreement approach would simply limit their ability to manipulate rate divisions on interline movements to force traffic artificially onto the CP-KCS lines.

2. An approach modeled on the I-5 Agreement would be simple, flexible and market-based.

Much of Applicants’ criticism of BNSF’s I-5 proposal is based on a failure to understand, or deliberate effort to ignore, that BNSF is not asking the Board to impose the specific I-5 mechanism as it exists today in the Pacific Northwest. BNSF is urging the STB to order Applicants to work with stakeholders to develop a mechanism modeled on the I-5 Agreement. Many of the concerns raised by Applicants over specific implementation of an I-5 approach can be addressed in negotiations over the specific elements of the mechanism. For example,

¹⁷ The Joint Associations and UP also proposed proportional rate mechanisms to address commercial closure of gateways. BNSF’s witness Dr. Reishus described and compared those proposals to BNSF’s I-5 proposal. (R.V.S. Reishus BNSF-12-86.) Those proposals are not limited to the Laredo gateway, and BNSF does not believe a nationwide gateway mechanism would be appropriate. In addition, BNSF’s concern is that the Joint Associations and UP proposals may unduly favor large, sophisticated shippers and would be particularly ineffective for U.S. grain shippers, where geographic competition plays a critical role. (*See* BNSF-12-22 to 24; R.V.S. Reishus BNSF-12-90 to 93; R.V.S. Wilson BNSF-12-123 to 126.)

Applicants' concern that a mileage pro-rate will not reflect different cost structures or lengths of haul in Mexico and the United States can be addressed by calibrating the mileage pro-rate to reflect those differences.¹⁸

Contrary to Applicants' characterization of the I-5 approach at the hearing, the arrangement is not "rigid."¹⁹ CP-KCS would remain completely free to set rates for their cross-border service at any level dictated by the market. The I-5 approach simply ensures that the divisions CP-KCS offer on competing interline movements would track the changes in the market reflected in CP-KCS's through rates. It guarantees that divisions offered will be market-based rather than manipulated to exclude competition. There are a number of different, and far more rigid, mechanisms that could be used to ensure that Laredo remained open to competition for Mexico traffic. Questions were raised at the hearing about alternative mechanisms to keep the Laredo gateway open. Alternatives might include mechanisms like a cap on interline rates for the Mexico portion of a movement, rate freezes, restrictions on escalation of interline rates, fixed division percentages, and cost-based rates. BNSF rejected all of these because they were not responsive to the market. The I-5 approach, in contrast, is remarkably flexible and market-based.

Nor would an I-5 approach be overly complex. The underlying arithmetic and data are straightforward. BNSF's witness Dr. Reishus showed that simple calculations can be used to ensure competitive access to Mexico markets under an I-5 approach in the important grain and intermodal markets. (R.V.S. Reishus BNSF-12-96 to 103; BNSF Hr'g. Deck 74-77.) BNSF agrees that it would be complex to use an I-5 approach to cover all gateways and all products in

¹⁸ BNSF's experience with the I-5 Agreement is that a negotiated solution is achievable if the parties approach the exercise in good faith. If an agreement cannot be reached, the STB could be available to resolve disputes over particular details of a negotiated mechanism.

¹⁹ Early in this proceeding, Applicants acknowledged the need for something more concrete than vague promises. In a June 25, 2021 e-mail to NITL, CP stated { [REDACTED]

[REDACTED] (BNSF Comments, Ex. 3 Discovery Docs, CP-C-0000852.) Applicants did not pursue these proposals further.

the United States affected by the proposed merger. But unlike UP and the Joint Associations, BNSF is focused on a single gateway involving traffic serving certain Mexican markets. The unique challenges of cross-border movements, including the lack of visibility into Mexico rates and practices, justify a far more narrow focus on Mexico. As it is in the Pacific Northwest, an I-5 approach would be easily managed for traffic moving across the Laredo gateway.

Applicants argue that the I-5 approach would insulate BNSF from competition. At the hearing, Applicants pointed to the example used by BNSF to illustrate cross-border rate manipulation to suggest that BNSF sought to avoid pressure to reduce BNSF's own rates. In fact, this showed that CP-KCS could preclude competition from BNSF no matter how much BNSF reduced its rates, by simply manipulating the division of revenues between KCSM in Mexico and KCS in the United States. (BNSF Hr'g. Deck 48-54.)²⁰ Similarly, CP-KCS argued that the I-5 approach would discourage CP-KCS from offering rate discounts, but Dr. Reishus showed that the I-5 approach would not affect CP-KCS's incentives to cut rates to attract business. (*Id.* at 62-65.) An I-5 approach would preserve market-based pricing while preventing CP-KCS/KCSM from manipulating cross-border interline rates to force traffic onto CP-KCS.

3. An approach modeled on the I-5 Agreement would be superior to the rigorous data reporting that would otherwise be required to ensure compliance with the Laredo open gateway commitment.

An up-front mechanism for setting interline rates in Mexico based on the I-5 Agreement would be more effective at preventing commercial closure of the Laredo gateway and less complicated than monitoring CP/KCS/KCSM rates and practices to determine, after the fact, whether foreclosure at Laredo has occurred. As Board members noted in the hearing, it can be

²⁰ Dr. Majure argued that BNSF could lower its rate in response to rate manipulation by KCSM. In his example, CP-KCS would retain the business and be able to implement a higher rate to shippers even if BNSF reduced its rates by one-third, or \$200. (CP-KCS Hr'g. Deck 90-91.) But, if the integrated Mexican carrier raises its rate by \$300, BNSF would be unable to compete even if BNSF cut its rate by \$200 and CP-KCS could harm shippers by raising its through rate by \$100. (*Id.* at 13-18.)

complex to identify foreclosure under ordinary circumstances—and that complexity would be particularly great where cross-border moves are involved. Indeed, even though KCS had expressly committed to keeping an open gateway at Laredo in the Tex Mex merger, KCS never even bothered to collect the data that would be necessary to monitor such a commitment. (BNSF-9-46 to 47; BNSF Resp. BNSF-12-7 & 27.)²¹

BNSF therefore urges the Board to require the negotiation and adoption of an I-5 mechanism. If the Board did not require an approach modeled on the I-5 Agreement, it would need to require the merged CP-KCS/KCSM to report at a minimum the following:

☐	CP-KCS waybill data for traffic moving over the Laredo gateway and KCSM waybill data for movements in Mexico;
☐	all requests for rates from individual shippers for movements between Mexico and the United States;
☐	all rates and terms offered by CP-KCS and KCSM to individual shippers for interline movements between Mexico and the United States (identifying all recipients and locations involved, whether they are a railroad or shipper);
☐	all rates and terms offered or obtained by CP-KCS and KCSM to individual shippers for single-line movements over the Laredo gateway between Mexico and the United States on CP-KCS, including the breakdown between KCSM, Tex Mex, and the remainder of United States system if the shipper is not offered a through rate (identifying all recipients and locations involved);
☐	CP-KCS costs for the U.S. portion of traffic between Mexico and the United States at the shipper and movement level, and KCSM costs for the Mexico portion of such traffic.

4. An I-5 approach at the Laredo gateway is well within the Board’s jurisdiction and consistent with its merger policy goals.

The Board clearly has jurisdiction to require an I-5 approach here. The purpose of the I-5 approach is not to regulate rates in a foreign country, but to prevent a rail carrier like CP-KCS that operates on both sides of a border from manipulating the divisions on interline movements

²¹ In discovery, data was sought on KCSM rate quotes in a few discrete corridors. KCS responded that they do not have the systems needed to identify the requested information and that hundreds of thousands of individual e-mails would need to be searched to find data that might shed light on KCSM’s competitive practices in specific corridors. (*See, e.g.*, UP Comments, Feb. 28, 2022, Ex. 10, E-mail from W. Mullins to M. Rosenthal (Jan. 18, 2022) at 9.)

to keep a U.S. competitor from participating in cross-border transportation.²² The Board has clear authority to protect the interests of U.S. shippers who seek to maintain multiple competitive alternatives to reach Mexican markets. Most importantly, the STB in the *Tex Mex* proceeding already exercised its authority to regulate cross-border movements through Laredo by conditioning its merger approval on a requirement that KCS maintain an open gateway. The mechanism that BNSF is proposing is simply a way to give effect to that requirement.²³

Here, CP-KCS have made a voluntary commitment to keep the Laredo gateway open. That commitment must extend to the rates that CP-KCS will charge competitors in Mexico for cross-border movements, or it would otherwise be a meaningless and, indeed, misleading promise. Applicants have agreed to abide by the commitment in the NITL Agreement, which requires that KCS's (and KCSM's) rates to BNSF for cross-border traffic be commercially reasonable for the entire route from Robstown to the Mexican destination. (BNSF Comments, Ex. 1, Letter from NITL & KCS to UP, Aug. 18, 2003.) The I-5 approach is simply a mechanism for giving concrete effect to Applicants' commitment.

The I-5 approach urged by BNSF is rooted in the specific and unique statutory requirements for the Board's review of mergers. Merger issues and proposed solutions must be considered in the context of the structural changes brought about by a transaction. The I-5 approach is a structural remedy to preserve competition for all shippers, whether or not particular movements are subject to other forms of STB regulation. It is fully consistent with the Board's merger policy, developed over decades, that seeks to preserve competition for all traffic types.

²² As BNSF explained, there is extensive case law supporting the STB's exercise of jurisdiction over U.S. merger applicants in the context of rates and services for cross-border movements. (BNSF-9-16 to 21.) Moreover, the existing I-5 Agreement applies to cross-border traffic involving Canada, and no jurisdictional concerns have been raised there.

²³ CP argued in *KCS/Tex Mex* that the Board has jurisdiction to impose a condition on the transactions to ensure compliance with an open gateway commitment: it was "appropriate for the Board to exercise its conditioning authority in this case to compel Applicants to adhere to their promise to keep the Laredo gateway open on 'commercially reasonable terms' by requiring them to enter into binding written agreement(s)." (CP Add'l Comments 7, *KCS/Tex Mex*, FD 34342.)

III. THE PUBLIC INTEREST REQUIRES DEVELOPMENT OF A PLAN FOR INFRASTRUCTURE NEEDS AND FUNDING IN THE HOUSTON COMPLEX TO ADDRESS MERGER-CAUSED TRAFFIC INCREASES.

A critical segment of the existing KCS (and proposed future CP-KCS) network consists of trackage rights over lines in the Houston area owned by other railroads (largely UP) and used by UP, BNSF, and Amtrak. (BNSF-9-27 & 42.) These trackage rights are central to Applicants' plans for expanding Mexico traffic largely by diverting traffic from BNSF and UP. CP-KCS must run directly through downtown Houston over these lines owned by other railroads to access the U.S./Mexico border crossing at Laredo, while BNSF and UP run their traffic bound for Laredo to the west of Houston. (*See* BNSF-9-8 to 9; *id.*, V.S. Gabriel-Howe BNSF-9-224 to 225.)

A. Applicants failed to meet their burden of establishing whether Houston area rail lines could accommodate their merger traffic growth.

Applicants bear the burden to establish either (1) that they could implement their operating plan and projected merger growth trains on existing infrastructure, or (2) to propose capacity projects to accommodate traffic growth. *See* 49 C.F.R. § 1180.8(a) (2000). Applicants must show that their proposed merger is not going to harm rail shippers. Indeed, on nearly every other portion of the combined CP and KCS networks, Applicants proposed capacity improvements to meet their burden of proof – but not on shared lines in Texas, where Applicants project that the merger will roughly double existing KCS train counts. (*See* BNSF-9-62; V.S. Fisher BNSF-9-562; BNSF Hr'g. Deck 23.)

BNSF and others have established that Applicants failed to meet their burden with respect to these shared lines,²⁴ and that eight to 11 new CP-KCS trains per day on those lines will cause service issues absent new capacity. (*See* BNSF-9-61 to 68; UP Comments 53-59.) Applicants should have worked with all stakeholders to conduct a formal study of Houston area capacity and

²⁴ *See* BNSF-9-62 to 65; UP Comments 50-55 (cataloguing Applicants' failure, admitted to by Applicants' witnesses in depositions, to identify capacity needs on shared facilities in the Houston area.)

committed to pay for projects that would be required to handle their new merger traffic.²⁵

Instead, Applicants have embarked on a high-stakes game of “chicken,” in the hope that someone else – BNSF and UP and their customers – will be forced to implement and pay for the Houston infrastructure that CP-KCS need to support their Mexico plans. It is irresponsible for CP-KCS to charge ahead with their merger and start diverting Mexico traffic to Houston lines without proposing any new capacity in the Houston complex to handle those trains. It is also inappropriate for CP-KCS to argue that shippers, other Class I railroads or impacted communities have the burden to fill the gaps that CP-KCS have left in their presentation and prove the future problems of CP-KCS’s creation, as well as most perfect solutions to those created problems. Such an approach turns decades of sound STB merger policy on its head.

The reason for CP-KCS’s approach seems obvious. Applicants hope that capacity projects will eventually be built in and around Houston in order to accommodate new CP-KCS merger traffic. The alternative – waves of crippling rail and road congestion radiating out of the critical Houston terminal – will be simply unacceptable to all stakeholders. But unless the STB intervenes by imposing the conditions requested by BNSF on any approval of the Transaction, Applicants could succeed in offloading the costs of these projects onto other railroads in Houston and their customers. And in the meantime, the record in this proceeding shows that this reactive approach will cause service issues until such projects are constructed. Houston is too important to accept CP-KCS’s cynical strategy.

B. Without new capacity, CP-KCS merger traffic will cause service issues in and around Houston.

BNSF, UP, and other Houston stakeholders have established in this proceeding that CP-KCS traffic increases and longer trains caused by the merger will endanger the Houston terminal

²⁵ Applicants did just that with Metra in response to similar concerns regarding the Chicago area, but deliberately chose not to do so in Houston. (Hr’g. 10/6 at 3:30:36.)

complex. (*See, e.g.*, BNSF-9-61 to 68; UP Comments 57-59; CN Comments, V.S. Randall 17-18 (pdf pages 215-16), Feb. 28, 2022; Hr’g. 9/29 at 00:34:33.)²⁶ UP, which owns most of the lines in Houston over which KCS operates, has explained that existing capacity on these shared lines is simply not sufficient to accommodate the doubling of KCS trains that Applicants project the merger will cause. (UP Comments, V.S. Rocker-Turner 29-32.) BNSF agrees. (V.S. Gabriel-Thowe BNSF-9-224 to 28.)

In response to the data, analyses, and studies presented by commenters, Applicants have offered vague and poorly-supported assurances that the Houston complex has enough capacity to handle the CP-KCS traffic – if only the terminal were run more efficiently. Applicants’ evidence, including an hour-long video tour of Houston at the public hearing and the self-serving opinion of a CP employee who made one short visit to Houston, did not persuasively rebut the extensive evidence submitted by BNSF and UP. BNSF works every day to optimize operations with all stakeholders in the Houston terminal area. BNSF agrees with Applicants that there are opportunities to further improve operations. However, based on its decades of experience in Houston, BNSF is confident that the capacity currently in place simply is not enough to handle a doubling of existing KCS traffic. (*See id.*)

Absent new capacity, BNSF and others have established that allowing CP-KCS to double existing KCS traffic volumes would cause service degradation for local Houston customers and significant knock-on effects throughout the country. (Gabriel-Thowe BNSF-9-215 to 216; V.S. Rocker-Turner 29-31.) This critical node in the U.S. supply chain has melted down after prior mergers, and Applicants and the STB must ensure that it does not happen again in the wake of this merger. (*See* BNSF-9-57 to 61.)

C. The STB must require Applicants to conduct a capacity study of the Houston

²⁶ The concerns raised by Houston elected officials also relate to issues such as traffic delays at highway-rail grade crossing that are relevant to the environmental analysis being performed by the STB, in addition to the transportation merits issues addressed in this brief.

terminal with all stakeholders to identify capital projects necessary to accommodate CP-KCS merger growth.

In order to identify the appropriate projects needed to handle the CP-KCS merger traffic, the STB must now ensure that Applicants work with all Houston area stakeholders, including BNSF and UP, to conduct a serious capacity study – something that Applicants did with respect to Chicago and should have done in Houston while preparing their Application. Indeed, in a deposition conducted after response comments were filed, Applicants’ witness Stephen D. Simmons essentially admitted that KCS would have liked to have prepared a collaborative capacity analysis of the Houston complex along with BNSF and UP, using traffic projections vetted by all parties, including using RTC analyses.²⁷

Applicants have made no such commitment in this proceeding as to Houston area infrastructure. By contrast, in Chicago, Applicants have committed to ongoing collaboration with local stakeholders on capacity studies using the Rail Traffic Controller (“RTC”) model to ensure that merger-related traffic changes will not endanger service. (*See* CP-KCS Hr’g. Deck 103.) The Board should order them to do so at Houston as well.²⁸ Indeed, much of the groundwork for such a Houston area capacity study has already been laid. As discussed in the hearing, the Houston terminal has been the subject of multiple recent capacity studies, including an extensive RTC study conducted by the Texas Department of Transportation (“TxDOT”). (*See, e.g.*, Hr’g. 9/29 at 08:07:59 & 09:21:29.)²⁹ In connection with BNSF’s response comments in this proceeding, BNSF submitted an update to that TxDOT RTC study, accounting for CP-KCS traffic growth and

²⁷ *See* App. A, Simmons Dep. Tr. 143:9-19, July 28, 2022 (“KCS believes that it is important for all railroads to collaborate on our future growth so that we can make sure that the appropriate capacity is being added to the entire complex.”); (with the appropriate data from all stakeholders, “we could model using [Applicants’ data] to make sure that we are all in alignment on needed capacity.”). (*See also* Hr’g. 9/29 at 01:02:00.)

²⁸ The RTC study may take some time, but the conditions requested by BNSF would not require the Board to delay its approval process.

²⁹ Applicants acknowledged at the hearing the numerous studies that have been made of Houston rail infrastructure. (CP-KCS Hr’g. Deck 52.)

other relevant changes. *See Decision No. 24*, FD 36500, slip op. at 3-4 (STB served Sept. 13, 2022). The STB struck that study from the record on procedural grounds. *Id.*

BNSF's efforts to update the TxDOT RTC study could serve as a starting point for the study that Mr. Simmons claims Applicants would like to perform. But without the STB intervening here to require such a process, Applicants will have free rein to double their traffic through Houston without even analyzing whether capacity projects are necessary to accommodate this growth. While the earlier TxDOT study has identified certain improvements in the Houston area that could help to accommodate CP-KCS traffic growth, we will not know exactly which projects will become necessary as a result of this Transaction until all stakeholders work together to analyze the issue.

Here again, Applicants' approach to Chicago should be required of them in Houston. At the public hearing, Applicants repeatedly reassured the Board that, in connection with Metra's concerns about merger-related traffic causing traffic disruptions, they would "bring that traffic online when the capacity is there," (Hr'g. 9/28 at 2:31:25), that traffic "will not come before the capacity is built," (*id.* at 2:33:47), and that "we're not going to oversubscribe that network." (*Id.* at 2:35:04.) BNSF is not asking to protect the local community, shippers, Amtrak, and other railroads with anything more at Houston than Applicants recognize must be addressed at Chicago. The Board should require as a condition to merger approval that CP-KCS will not add traffic to Houston area lines until it is clear that there is adequate capacity to avoid disruption of existing transportation across the Houston complex.

D. Existing cost sharing agreements would allow Applicants to raise their rivals' costs, externalizing their merger costs onto competitors and their customers.

As discussed above, in determining where capacity projects would be necessary to accommodate merger growth, Applicants conveniently omitted the one area on their network – shared lines in Texas owned by other railroads – where Applicants could foist the costs of their

merger onto competing railroads and their customers.

KCS uses those tracks today under trackage rights agreements with UP. (V.S. Bailiff BNSF-9-394 to 95; V.S. Rocker-Turner 26-27.) Under those agreements, Mr. Simmons has explained that UP would be responsible for building infrastructure needed to accommodate CP-KCS's merger traffic, with UP bearing the direct cost of that infrastructure. (*See* CP-KCS Resp., R.V.S. Simmons 9-18.) Mr. Simmons also told the Board that under those same agreements, CP-KCS would have direct responsibility for the costs of projects on UP lines that CP-KCS itself proposes. (*See id.* at 17.) In other words, if CP-KCS had done the work necessary to identify projects in the Houston area needed to support their merger, as they did on the rest of their network, they would have had to accept direct responsibility for the cost of those projects.³⁰

This explains their approach. Applicants have not made any attempt to hide their desire to have others pay for the projects that would be needed to support their merger traffic. And that includes projects that would not be necessary but for this merger. By deliberately avoiding the work they should have done to analyze the impact of their merger on the capacity of shared lines in Houston, they seek to use the existing trackage rights agreements to avoid full responsibility for their merger costs.

BNSF should not be responsible for any costs prompted solely by the merger. It is longstanding STB and ICC policy that merger applicants are responsible for the costs to implement their merger. But under the BNSF/UP trackage rights agreements, the risk that BNSF will have to pay for merger-related costs is very real. BNSF (like KCS) pays UP a trackage rights

³⁰ In an October 17, 2022 summary of a site visit by the Office of Environmental Analysis to Harris County and Houston, Texas, the Board noted that "although rail traffic is projected to increase on rail lines in Harris County as a result of the proposed acquisition, options for environmental mitigation are limited, in part, because those rail lines are not owned by CP or KCS." OEA Site Visit Summary at 2 (Oct. 18, 2022). This concern appears to be based on a misunderstanding of the current trackage rights agreements. If CP-KCS had identified projects needed to support their merger, whether driven by transportation or environmental needs, they could have forced the track owner to implement the projects – CP-KCS would simply have had to pay for the improvements. CP-KCS seek to avoid responsibility for the costs of the projects by ignoring the need for infrastructure improvements.

fee based on gross-ton-miles. However, BNSF can also be responsible for the direct cost of capacity projects implemented by UP, calculated on a usage basis by looking back at traffic levels for the prior 12 months. (V.S. Bailiff BNSF-9-395 to 396.) If UP builds a capital improvement in Houston in order to accommodate CP-KCS merger growth, including traffic that CP-KCS would divert to the Houston complex from BNSF and UP lines that run outside of Houston, BNSF could be responsible for a percentage of the cost of that project.³¹ It is patently unreasonable to expect BNSF to fund capacity improvements in Houston to support traffic that CP-KCS have diverted from non-Houston BNSF lines as a result of the merger.

Take the hypothetical example of a new bridge on a UP line shared by CP-KCS and BNSF that would not have been required but for CP-KCS merger traffic. Let's assume that each railroad used the line in equal measures, and that each accounted for one-third of the total usage for the last 12 months. Under the existing agreements, as interpreted by Applicants, UP would implement and pay for the project. BNSF has explained that UP could then go against BNSF for one-third of the project cost. While the project would not have been needed but for new merger traffic, Applicants claim that CP-KCS would have no direct cost responsibility and that they would pay only their trackage rights fee, which would have no direct relation to the project cost. Moreover, BNSF would be uniquely harmed, because, as noted above, BNSF could be required to pay one-third of project cost, despite the fact that CP-KCS's new traffic would lower BNSF's usage share as the merger traffic came onto the lines in later years.

If the STB does not intervene, this scheme would allow Applicants to externalize the costs of their merger onto their key competitors: UP and BNSF and their customers. In other major mergers, the transaction proponents have taken responsibility for the cost of improvements

³¹ This is consistent with BNSF's experience with capacity projects on UP-owned lines in the Houston area. UP constructs a project, sends BNSF a bill for its usage-based share of the cost, and BNSF pays UP directly. BNSF has paid UP more than \$96 million since 2009 for BNSF's share of projects in the Houston area.

necessitated by their merger. (*See, e.g.*, BNSF Hr’g. Deck 27 (citing UP/SP merger).) Dr. Reishus has explained why the public interest requires merger applicants to internalize the costs of their transaction, and why Applicants’ approach to capacity improvements would have anticompetitive effects. (V.S. Reishus BNSF-9-455 to 457.) Moreover, until necessary infrastructure has been added, Dr. Reishus explains that the degradation of BNSF and UP service as the result of congestion caused by CP-KCS traffic would have the same effect. (*Id.*)

The STB should make it clear here that costs associated with CP-KCS merger growth should be borne by Applicants, and not any other parties.³² It may be difficult to identify precisely the costs that Applicants should bear, but those difficulties can be addressed through negotiation and dispute resolution. BNSF is not seeking to avoid responsibility for the costs of supporting organic traffic growth in Houston—BNSF pays for that now and will continue to pay for it going forward. The limited relief that BNSF requests would allow the three Class I railroads in Houston to maintain a level playing field to accommodate the new CP-KCS traffic. Any improvements needed to accommodate further organic growth would be handled under existing cost-sharing arrangements. But BNSF should not be forced to subsidize CP-KCS’s merger by paying for infrastructure that would not be needed now but for the merger.

To the extent the existing trackage rights agreements, themselves the product of a prior merger, need to be overridden to ensure that CP-KCS are responsible for the costs of their merger, that is well within the Board’s authority. Contrary to the concern of some Board Members at the public hearing, major mergers often result in the rewiring of existing commercial relationships. Indeed, Congress understood that the public interest often requires the exercise of

³² The STB is familiar with the idea that a tenant should be responsible for implementing improvements necessary to accommodate their traffic from the passenger rail context, where projects needed to accommodate new or expanded passenger service on a line owned by a freight rail host are, as a matter of course, funded by the public. *See* Transp. Rsch. Bd., Nat’l Cooperative Highway Rsch. Program (NCHRP) Rep. 657, *Guidebook for Implementing Passenger Rail Serv. on Shared Passenger & Freight Corridors* (2010), <https://doi.org/10.17226/14376>.

such power and the Board’s organic statute specifically contemplates the overriding of contracts as necessary to implement a transaction as conditioned by the Board. *See* 49 U.S.C. § 11321(a). The relief that BNSF requests here is entirely consistent with prior STB precedent on these issues. *See, e.g., Consolidation Coal Sales Co. v. Consol. Rail Corp.*, FD 34169 (STB served May 24, 2002) (Conrail’s obligations under certain agreements entered into prior to the 1998 acquisition of Conrail by CSXT and NS preempted by 49 U.S.C. 11321(a)).

IV. THE STB SHOULD CONDUCT RIGOROUS OVERSIGHT OF THE TRANSACTION.

While Applicants have expressed a willingness to commit to five years of Board oversight, they have provided few specifics as to what that oversight should be. The evidence of historical foreclosure and the fact that Applicants are already backing away from some of their prior commitments makes it critical that the STB carefully consider the process for and substantive scope of oversight of this Transaction should it be approved.

The Board should impose an oversight period of at least five years.³³ Consistent with the purposes of 49 C.F.R. §§ 1180.1(g) and (h), the STB should act to ensure that Applicants comply with their obligations and commitments by requiring CP-KCS to regularly report sufficient data and other information to enable the STB and interested parties to review their performance of their open gateway and service obligations and commitments.

As in prior merger proceedings, Applicants should be required to file compliance reports with the STB annually. Interested parties should be provided with an opportunity to respond to the Applicants’ reports, and Applicants should, in turn, have the right to reply to those responses. The reports should be based on traffic and rate data as well as service metrics necessary to

³³ Other parties, including shipper interests, support the need for meaningful oversight. (*See* TxIT Comments 5, Feb. 28, 2022) (“Without adequate Board oversight, CP-KCS could effectively discriminate against competing rail traffic simply by closing gateways, or effectively closing them as a competitive option, by raising its rates for the competing, interline service.”); (*see also* BNSF Resp. BNSF-12-27 to 28 n.8.) Additional parties supporting meaningful oversight include CN, NS, NGFA, and NCGA.

evaluate compliance with the conditions. The reports should include all of the information identified above in Section II(E)(3) that would be required to determine whether CP-KCS are offering commercially reasonable rate and service terms at gateways.

The “additional commitments” made by Applicants during the public hearing in this proceeding regarding the reporting of service metrics in the critical Houston terminal area (monthly reporting of CP-KCS train counts, lengths, and transit times) are simply not sufficient to properly monitor fluidity. To keep the Houston terminal area operations fluid, the STB should use the successful Chicago Terminal Operating Condition Agreement as a framework for the reporting that CP-KCS should be required to perform here. *See* 49 C.F.R. § 1250.3. (BNSF-9-75.) Moreover, the STB should require that Applicants report the service metrics that were included in the NITL Agreement. (Appl., V.S. Brooks, Ex. 1, KCS/NITL Ag. ¶ 4, Aug. 1, 2003.)

The Board should place the burden of proof on Applicants to establish that the merger conditions are fully and timely met – something that KCS did not do following its acquisition of Tex Mex. While Mr. Ottensmeyer acknowledged at his deposition that KCS bears an “affirmative obligation” to provide commercially reasonable rates to shippers (and carriers on their behalf), (Ottensmeyer Dep. Tr. 39:8-21, Feb. 22, 2022), discovery showed that KCS has done little, if anything, to ensure that it is meeting that obligation. (*See supra* note 21.) To establish a level of rigor and structure, in addition to regular data reporting requirements, the STB should require Applicants to describe and document the internal processes which they set up to ensure fulfillment of the STB’s conditions and their commitments.

V. CONCLUSION

BNSF does not oppose the merger of CP and KCS/KCSM. However, for the reasons explained above, BNSF continues to believe that the Transaction will result in effects harmful to the public interest, including a significant loss in competition to Mexico markets served by Laredo and service issues in Houston, unless the Board imposes certain conditions on any

approval of the Transaction. CP was right in 2003 to be concerned about vague promises regarding the Laredo gateway, and the Board should not rely on them today, with a merger that will affect traffic across North America. BNSF has summarized its key condition requests here, along with a summary of how Applicants addressed each issue:

- **Laredo Gateway Protection**

- **BNSF Request:** Order that Applicants are subject to and must fulfill the conditions imposed by the STB in the *KCS/Tex Mex* proceeding as well as the terms of the NITL Agreement.
 - As discussed in Section II.C, Applicants are seeking to limit these conditions and terms in ways that will restrict competition.
- **BNSF Request:** Require Applicants to keep the Laredo and Robstown gateways open on commercially reasonable rate and service terms.
 - Applicants agree with this concept but believe their vague open gateway promise should be enough.
- **BNSF Request:** Order Applicants to negotiate a proportional rate mechanism to ensure market-based rates for shippers and require CP-KCS to make service commitments to equal treatment of BNSF's traffic into and out of Mexico through Laredo.
 - Applicants insist on a vague open gateway promise and refuse to engage on a structural solution that would ensure an open gateway.

- **Houston Service & Infrastructure Improvements**

- **BNSF Request:** Order that Applicants may not increase existing KCS traffic levels on shared lines in Texas if such increases would displace existing traffic or compromise fluidity on those lines.
 - Applicants have agreed to collaborate with all users of Texas lines shared with CP-KCS to support coordinated operations and necessary infrastructure additions.
 - At the hearing, Applicants' witnesses repeatedly reassured the Board, in connection with Metra's concerns about merger-related traffic causing traffic disruptions in Chicago, that Applicants would "bring that traffic online when the capacity is there," (Hr'g. 9/28 at 2:31:25), that traffic "will not come before the capacity is built," (*id.* at 2:33:47), and that "we're not going to oversubscribe that network," (*id.* at 2:35:04), but Applicants have not committed similarly in Houston.
- **BNSF Request:** Require Applicants to fully fund any capital improvements that would not be required but for increased CP-KCS traffic on lines owned by BNSF or other railroads.

- Applicants refuse to request necessary improvements under their trackage rights agreements with UP because Applicants would be required to fully fund any such improvements.
- **Oversight**
 - **BNSF Request:** Require Applicants to report regularly to the public and the STB on the status of the Transaction during an oversight period of at least five years, including information and data sufficient to enable the public and the STB to evaluate CP-KCS's compliance with the conditions imposed by the STB.
 - **BNSF Request:** Require Applicants during the STB's oversight period to report regularly service metrics relating to traffic through Laredo and congestion metrics at locations potentially affected by traffic increases brought about by the Transaction.

Respectfully submitted,

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Dated: October 21, 2022

REDACTED – TO BE PLACED ON PUBLIC FILE

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36500

CANADIAN PACIFIC RAILWAY LIMITED, ET AL.
—CONTROL—
KANSAS CITY SOUTHERN, ET AL.

Appendix A

Simmons Deposition Excerpts

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BEFORE THE
SURFACE TRANSPORTATION BOARD
STB Finance Docket No. 36500

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

- HIGHLY CONFIDENTIAL -

Remote Videotaped Deposition of
STEPHEN D. SIMMONS
July 28, 2022
10:33 a.m.

Reported by: Bonnie L. Russo
Job No. 5342179

1 answered.

2 THE WITNESS: I believe there is
3 adequate capacity on the bridge.

4 BY MR. ROSENTHAL:

5 Q. But there may not be adequate
6 capacity in the lines leading up to the bridge
7 or leading off the bridge on either side,
8 right?

9 A. I would agree with that, yes.

10 MR. ROSENTHAL: All right. I think
11 that's all the questions I have. I appreciate
12 your time.

13 THE WITNESS: Thank you.

14 MR. MILLER: Does anybody else have
15 questions?

16 MR. DENTON: I have just a couple of
17 brief follow-up questions to Mike's line of
18 questions. I don't know if you want to take a
19 break, but I don't anticipate it will be
20 particularly long.

21 MR. MILLER: Quick five minutes?
22 Can we take a quick five?

1 THE WITNESS: Quick five just
2 to stretch?

3 MR. DENTON: Sure.

4 MR. MILLER: Thank you.

5 THE VIDEOGRAPHER: We are now off
6 the record.

7 MR. DENTON: Yep.

8 THE VIDEOGRAPHER: The time is 3:02.

9 (A short recess was taken.)

10 THE VIDEOGRAPHER: We are now on the
11 record. The time is 3:18.

12 EXAMINATION BY COUNSEL FOR BNSF RAILWAY

13 BY MR. DENTON:

14 Q. Mr. Simmons, thank you again for
15 appearing today. I appreciate all your time.
16 My name is Peter Denton. I represent BNSF.

17 Can you hear me and see me okay?

18 A. Yes.

19 Q. Okay. I have what I think should be
20 a relatively short follow-up line of questions
21 based on a response that you gave to
22 Mr. Rosenthal earlier.

1 You said that you -- in response to
2 one of Mr. Rosenthal's questions, that you
3 would like to know the UP, BNSF, and PTR
4 traffic projections in the Houston complex; is
5 that right?

6 A. That's correct.

7 Q. Can you tell me why you would like
8 to know that.

9 A. KCS believes that it is important
10 for all railroads to collaborate on our future
11 growth so that we can make sure that the
12 appropriate capacity is being added to the
13 entire complex.

14 Q. So how would you use those -- those
15 traffic projections in your capacity analysis?

16 A. If KCS had the train counts and data
17 currently and in the future, we could model
18 using ours just to make sure that we are all in
19 alignment on needed capacity.

20 Q. So do you think your capacity
21 analysis that you performed and summarized in
22 your verified statement and in verified

1 statement of other KCS witnesses, was that
2 lacking in some way because you didn't have
3 that data?

4 MR. MILLER: Objection to form.

5 THE WITNESS: I believe that the
6 analysis that we -- that we performed on the
7 Neches River Bridge had the current capacity,
8 but other areas, we don't have all of the data.

9 BY MR. DENTON:

10 Q. So in an ideal world, you know,
11 with -- with all the data you need, how would
12 you conduct a capacity analysis of the Houston
13 complex?

14 A. I believe it would be more of a
15 collaboration using the modeling tools that we
16 have in conjunction with the modeling tools of
17 the other railroads.

18 Q. Would those modeling tools include a
19 rail traffic controller, or RTC, analysis?

20 A. That is one of the modelings that we
21 do use.

22 Q. Did you ask BNSF, UP, or PTRR for

1 this data in order to perform such an analysis?

2 A. I did not personally, no.

3 Q. Do you know if KCS or -- or CP did?

4 A. I believe that our capacity team has
5 asked for data.

6 Q. Do you think that the Neches River
7 Bridge study that you discussed here today and
8 that you discuss in your verified statement, do
9 you think that's an effective model for a
10 capacity analysis of the Houston area?

11 A. I'm sorry. Could you say that
12 again, please.

13 Q. The Neches River Bridge study that
14 you discussed today and that's summarized in
15 your -- in your verified statement, would that
16 be an effective model for a capacity analysis
17 for the greater Houston complex area?

18 A. I don't know.

19 Q. What would be, in your -- in your
20 mind, a -- a -- an effective capacity analysis
21 of the Houston complex? What would that look
22 like?

1 MR. MEYER: Hey, Peter. I'm going
2 to ask you to explain what aspect of Mr.
3 Simmons's verified statement are you
4 cross-examining him on.

5 MR. DENTON: I am asking about
6 the -- the Neches River Bridge study in
7 particular.

8 MR. MEYER: I thought you were
9 asking about Houston more broadly.

10 MR. DENTON: I was, and I was saying
11 is the Neches River Bridge study an effective
12 model for a capacity analysis for the Houston
13 area.

14 MR. MEYER: Okay. So he -- he has
15 answered that --

16 BY MR. DENTON:

17 Q. Mr. Simmons --

18 MR. MEYER: -- in the follow-up, and
19 I was actually --

20 MR. DENTON: Right.

21 BY MR. DENTON:

22 Q. So in paragraphs, Mr. Simmons, at

1 the beginning of your -- of your statement -- I
2 am just scrolling up here. In paragraphs 10
3 through 14, which was discussed at some length
4 by you and Mr. Rosenthal, you say that there is
5 already sufficient capacity on these lines; is
6 that right?

7 A. Using the traffic volumes provided
8 by UP, that is my conclusion.

9 Q. Would a capacity analysis that
10 modeled the Neches River Bridge study that
11 we've talked about give you any greater, better
12 information about capacity in the Houston area?

13 A. I don't know.

14 MR. DENTON: Okay. That's all I
15 have. Thank you.

16 MR. MILLER: Anyone else have
17 questions?

18 MR. MEYER: Well, I -- I do have a
19 few questions which are, I think, appropriate
20 redirect based on the questioning from this
21 morning.

22 If -- if no one else -- if no other

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *Final Brief of BNSF Railway Company* to be served electronically or by first-class mail, postage pre-paid, on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, Administrative Law Judge Thomas McCarthy, and all parties of record in this proceeding.

/s/ Onika K. Williams

Onika K. Williams

Attorney for BNSF Railway Company

October 21, 2022