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November 8, 2023

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: Canadian Pacific Kansas City Limited, et al. – Acquisition and Operation –
Certain Rail Line of Meridian & Bigbee Railroad, L.L.C., in Lauderdale County,
Mississippi and Choctaw and Marengo Counties, Alabama, FD 36732

EXPEDITED CONSIDERATION REQUESTED

Dear Ms. Brown:

On behalf of Norfolk Southern Corporation and Norfolk Southern Railway Company (together, “Norfolk Southern”), the undersigned hereby submits this Motion to Redesignate the Highly Confidential Designation of Certain Materials. Please note that Norfolk Southern is filing both a public version of this filing and a highly confidential version, subject to the protective order served on October 11, 2023.

If there are any questions about this matter, please contact me directly, either by telephone: at 202-663-7831 or by e-mail: czorbaugh@bakerandmiller.com.

Respectfully submitted,

/s/ Crystal M. Zorbaugh

Crystal M. Zorbaugh
Attorney for Norfolk Southern Corporation and
Norfolk Southern Railway Company

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**CANADIAN PACIFIC KANSAS CITY LIMITED AND THE KANSAS CITY
SOUTHERN RAILWAY COMPANY, D/B/A CPKC – ACQUISITION AND
OPERATION – CERTAIN RAIL LINE OF MERIDIAN & BIGBEE RAILROAD,
L.L.C., IN LAUDERDALE COUNTY, MISSISSIPPI AND CHOCTAW AND
MARENGO COUNTIES, ALABAMA, FD 36732**

**MOTION TO REDESIGNATE THE HIGHLY CONFIDENTIAL DESIGNATION
OF CERTAIN MATERIALS**

EXPEDITED CONSIDERATION REQUESTED

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MARENGO COUNTIES, ALABAMA, FD 36732**

**MOTION TO REDESIGNATE THE HIGHLY CONFIDENTIAL DESIGNATION
OF CERTAIN MATERIALS**

EXPEDITED CONSIDERATION REQUESTED

INTRODUCTION

Pursuant to paragraph 6 of the Protective Order issued in this proceeding on October 11, 2023, Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, “Norfolk Southern”) hereby respectfully request that the Surface Transportation Board (“STB” or “Board”) order redesignation of certain portions of the Application for a Minor Transaction filed as CPKC-2 in the above-captioned proceeding (the “Application”) as “Confidential” and certain portions of the Application as “Public”, in each case as appropriate. Norfolk Southern will demonstrate that Canadian Pacific Kansas City Limited and The Kansas City Southern Railway Company (collectively, “CPKC” or “Applicants”) have designated material as “Highly Confidential” even though that material does not meet the standards set forth in the Protective Order as generally interpreted by STB precedent, and further in a manner that is inconsistent within the Application itself. Redesignation is not only appropriate but necessary for a fulsome review of the issues present in the proceeding, especially given the expedited schedule currently governing this proceeding.

Expedited Treatment Requested

In Decision No. 1 of this proceeding, served November 3, 2023,¹ the Board made a preliminary determination to accept the Application and treat the transaction described therein (the “Proposed Transaction”) and those described in the directly related filings² as a “minor transaction.” Slip op. at 1. The Board ordered Applicants to supplement the Application by November 20, 2023, and ordered interested parties to provide comments, protests, requests for conditions, and other evidence and argument in opposition (collectively referred to hereinafter as “Response”) just 18 calendar days later.³ Slip op. at 2.

Applicants no doubt will desire to respond to the current motion. If the Applicants provide a response to this motion by Monday, November 13, and the Board is able to rule on the motion that week, then Applicants, on or before November 20,⁴ should have sufficient time both to produce redesignated materials as to information Applicants already have submitted and to provide the Board and interested parties with the required supplemental information. The Board’s procedural schedule requires Responses by Norfolk Southern and other interested parties to be filed with the Board by December 8. Given the extremely tight turnaround between the November 20 due date for the Applicants to file the required supplemental information and the currently set deadline of December 8 for a Response (which includes Thanksgiving), Norfolk

¹ See Canadian Pacific Kansas City Limited and The Kansas City Southern Railway Company, d/b/a CPKC—Acquisition and Operation—Certain Rail Line of Meridian & Bigbee Railroad, L.L.C. In Lauderdale County, Miss., and Choctaw and Marengo Counties, Ala., FD 36732 (STB served November 3, 2023) (“Decision No. 1”).

² CSX Transportation, Inc.—Discontinuance of Trackage Rights Exemption—in Marengo & Choctaw Counties, Ala. & Lauderdale County, Miss., Docket No. AB 55 (Sub-No. 814X); Alabama & Gulf Coast Railway—Trackage Rights Exemption—Kansas City Southern Railway d/b/a Canadian Pacific Kansas City, FD 36731; and CSX Transportation, Inc.—Trackage Rights Exemption—Kansas City Southern Railway, FD 36730.

³ This Motion only addresses the material currently in the record, with one exception described below in “Preliminary Matters.” Norfolk Southern cannot address whether the material to be filed on November 20, 2023 (“Supplemental Material”) will be properly designated until it receives and has an opportunity to review that material.

⁴ See FN 2, *supra*.

Southern hopes the Board's decision on this Motion both will require redesignated information to be available to Norfolk Southern and other interested parties by or before November 20 and will provide Applicants with guidance as to its designation practices with respect to the supplemental information it is required to submit by November 20.

Counsel for Norfolk Southern has engaged in multiple phone and email consultations since mid-October concerning the need for certain information contained herein to be redesignated so that in-house personnel can participate in evaluating the claims and assumptions made by the Applicants concerning operations, the benefits and potential competitive and service impacts to shippers resulting from the transaction. Time and time again, counsel for CPKC has indicated that "all of the information NSR requests be redesignated is competitively sensitive and is properly designated as highly confidential."⁵ Therefore, expedited action on this Motion is necessary.

Preliminary Matter

Norfolk Southern attaches to this Motion a page that it has received from Applicants that is relevant to the requests and arguments set forth herein. See Appendix A. Applicants provided this page to Norfolk Southern as a replacement page for a page that appears in the Application because it sets forth additional information that was excluded from the original Highly Confidential application provided by Applicants to Norfolk Southern. Elements of that additional information are the subject of this motion, and justification for redesignation partially relies on

⁵ Counsel for NSR even brought to CPKC's attention that originally CPKC designated all Confidential Material contained in the entirety of its Transaction Agreement as "Confidential," with none being designated as "Highly Confidential". After informing CPKC that we wanted in-house personnel to participate in evaluating the transaction, a replacement highly confidential version was provided and CPKC took the position that the entirety of the Confidential Material its minor application was properly designated as "Highly Confidential", with none being designated as "Confidential". Thus, counsel for NSR understands that there is not a single item in the CPKC application that carries the designation "Confidential".

this additional information. The exhibit (including the additional information provided) is, almost in its entirety, designated by Applicants as “Highly Confidential”. Norfolk Southern does not know whether that revised page has been submitted by the Applicants into the record. Reference to that page, hereinafter referred to as “Exhibit [•]”, is a reference to the 185th page of the 290-page Application.⁶

ARGUMENT

I. CPKC has Designated as “Highly Confidential” Information Properly Designated “Confidential” or “Public”.

Per the Protective Order, a party may designate in good faith particular confidential information as “Highly Confidential” provided that the material so designated “contains shipper-specific rate or cost data, division of rates, trackage rights compensation levels, or other competitively sensitive or proprietary information.”⁷ The material that CPKC designates as “Highly Confidential,” and the subject of this Motion does not contain shipper-specific rate or cost data. That material does not specify the division of customer rates. That material, moreover, does not specify trackage rights compensation levels. Therefore, the material that is the subject of this Motion could only be considered “Highly Confidential” if it contains competitively sensitive or proprietary information. It does not.

The use of protective orders in proceedings, and the designations of “Confidential” or “Highly Confidential” thereunder, have a long history before the Board, even though individual protective orders entered in different proceedings may differ in minor ways. That history is fairly

⁶ Norfolk Southern notes that there are several references in the Application to an “Exhibit [•]” and seeks, by this reference, to only address the single page identified in this Motion.

⁷ See Canadian Pacific Kansas City Limited and The Kansas City Southern Railway Company, d/b/a CPKC—Acquisition and Operation—Certain Rail Line of Meridian & Bigbee Railroad, L.L.C. In Lauderdale County, Miss., and Choctaw and Marengo Counties, Ala., FD 36732, slip op. at 3, paragraph 3 (STB served October 11, 2023) (“Protective Order”).

consistent as to what type of information falls into what classification.⁸ And the Board has, in the history of protective orders, been concerned about the very type of blanket over-designation that is the subject of today's Motion.

In the final analysis, the issue of designation, or over-designation, is grounded in the STB process itself. Importantly, “[i]n order for the Board to prepare a decision in [] proceeding[s] based on the facts presented, the Board must be able to present and discuss facts and argument, and not be inhibited by an overly protective designation of evidence and argument as confidential or highly confidential.” See CF Industries, Inc. v. Koch Pipeline Company, L.P., NOR 41685, slip op. at 2, (STB served October 13, 1998). It can only do so if the administrative proceeding permits a fulsome review and input from interested parties. In sum, for the Board to do its job, all parties to the proceeding also must be able to do their job, and that requires the ability of interested parties to review, assess, and present arguments to the Board for its consideration. Accordingly, to justify a “Confidential” or “Highly Confidential” status for terms

⁸ For example, protective order issued in Canadian Pacific Railway Company – Continuance in Control Exemption – Detroit River Tunnel Company, FD 36448, slip opinion at 5 (STB served October 23, 2020) defined “Highly Confidential” material as “shipper-specific rate or cost data, division of rates, trackage rights compensation levels, or other competitively sensitive or proprietary information”, leaving for designation of “Confidential” any other material not included in the “Highly Confidential” designation but included in the “Confidential Information” definition: “traffic data, (including but not limited to, waybills, abstracts, study movement sheets, and any documents or computer taps containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost work papers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts with shippers, or carriers, confidential financial and cost data, and other confidential or proprietary business or personal information. (Emphasis added). See also, Canadian Pacific Railway Company – Trackage Rights Exemption – CSX Transportation, Inc., FD 35548 (STB served September 16, 2011) (previously approving identical language to the protective order in FD 36448). In each of the cited proceedings, the definitions in the protective orders were provided by the applicants in the proceedings. See also, Genessee & Wyoming, Inc. – Control Exemption – Columbus and Greenville Railway Company, The Chattooga and Chickamauga Railway Company, and Luxapalila Valley Railroad, Inc., FD 35139, slip op. at 3 (STB served May 13, 2008) (referring to “material containing shipper-specific rate or cost data or other competitively sensitive information” as the prime example of confidential material justifying a “Highly Confidential” designation).

contained in a document submitted to the Board, a party asserting the confidential status needs to do more than simply assert their desire to keep a document confidential.⁹

In proceedings such as this proceeding involving the acquisition of the Western Line, it is particularly important that only shipper-specific and truly commercially sensitive and proprietary information be designated “Highly Confidential”. Otherwise, participating parties may not have a full and fair opportunity to comment, or even to know whether there is an issue to be examined. See Total Petrochemicals USA, Inc. v. CSX Transportation, Inc., NOR 42121 (STB served July 15, 2011) (“TPI”) In TPI, the Board agreed with CSX Transportation, Inc. (“CSXT”) that (1) certain improperly designated information did not constitute Highly Confidential material under the definition in the protective order adopted for the proceeding (i.e., “specific rate, traffic, or cost data or other competitively sensitive information”), and (2) the Highly Confidential designation impeded CSX’s in-house marketing and operating personnel from refuting certain lane-specific allegations regarding the need for TPI’s customers to receive products via rail. See TPI, slip op. at 2. In TPI, the Board ordered redesignation of the challenged materials to “Confidential” because the materials did not meet the definition of “Highly Confidential” material. Id. at 5. The Board should take a similar approach to prevent Applicants from inappropriately employing blanket Highly Confidential designations. In fact, as discussed below, some of the material Applicants have designated as Highly Confidential actually should be treated as Public.

⁹ See Stagecoach Group, PLC & Coach USA, Inc., et al.--Acquis. of Control--Twin Am., LLC, MC-F 21035, slip op. at 6 (STB served Feb. 8, 2011); see also CSX Transportation, Inc. – Abandonment Exemption – In Pinellas County, FL, AB-55 (Sub-No. 794X), slip op. at 3-4 (STB served April 3, 2023) (approving a protective order clearly defining “Confidential Information” and “Highly Confidential” information as “material containing shipper-specific rate or cost data or other competitively sensitive information”).

1. Specific Redesignation Request – Material Contained in Exhibit [•]

The CPKC/G&W transaction agreement is included in the Application itself. One of the exhibits to that transaction agreement, referred to herein and in the public version of the Application as “Exhibit [•]” is entitled {{ [REDACTED] }} a title that is, itself, designated “Highly Confidential”. But {{ [REDACTED]

[REDACTED] {{ [REDACTED] }} is already public. As explained further below, this particular exhibit, notwithstanding its title, does not provide {{ [REDACTED]

[REDACTED] {{ [REDACTED] }}, and, does not even deal with {{ [REDACTED] [REDACTED] }}, but instead deals with {{ [REDACTED]

[REDACTED] [REDACTED] {{ [REDACTED] }} and [REDACTED] [REDACTED]

[REDACTED] {{ [REDACTED] }} As a result, the {{ [REDACTED] }} title to this exhibit is somewhat misleading because {{ [REDACTED]

[REDACTED] [REDACTED] {{ [REDACTED] }}¹¹. Given that the exhibit title is referenced in other parts of the transaction agreement, and the fact that redesignating the exhibit title would

¹⁰ The title of the exhibit found in the Exhibit Index appearing on page 181 of the Application’s 291 pages is {{ [REDACTED] }}.

¹¹ See, e.g., Verified Statement of Raymond A. Elphick, at page 7.

provide shippers the opportunity to explore the nature and substance of the exhibit, the title to the exhibit should be redesignated “Public.”

The first paragraph of Exhibit [•] in large part speaks to such mundane matters as the fact that {{ [REDACTED] }}
 {{ [REDACTED] }}¹² It is conceivable that the {{ [REDACTED] }}
 {{ [REDACTED] }} of {{ [REDACTED] }} is “Confidential”,¹³ but the fact that there
 exists a {{ [REDACTED] }} that is defined as an {{ [REDACTED] }}
 {{ [REDACTED] }}
 {{ [REDACTED] }} should be redesignated as “Public”, so that
 shippers and others will have knowledge that {{ [REDACTED] }} is contemplated, and will have
 the opportunity to examine this information from an operational standpoint, including but not
 limited to {{ [REDACTED] }}
 {{ [REDACTED] }}
 {{ [REDACTED] }}¹⁵ all within the bounds of the applicable
 protective order.

¹² The first paragraph of Exhibit [•] reads as follows: { [REDACTED]

}} does not {{ [REDACTED] }} As explained below, the {{ [REDACTED] }}
 but instead when, {{ [REDACTED] }}
 {{ [REDACTED] }}

¹³ As a compromise position, Norfolk Southern is willing to agree that the exact {{ [REDACTED] }}
 {{ [REDACTED] }} retains a Highly Confidential designation, provided that Norfolk Southern is
 able to share that number with select in-house personnel subject to protections against further disclosure.

¹⁴ Note that, as described below in FN 22 the so-called {{ [REDACTED] }}
 {{ [REDACTED] }}
 {{ [REDACTED] }}

¹⁵ See discussion below associated with FN 20.

The second paragraph of the exhibit refers to what is {{ [REDACTED] }}
[REDACTED] }}¹⁶ Contained within those references are terms and
conditions that, when read in conjunction with the third paragraph, provide that {{ [REDACTED] }}
[REDACTED] }} Arguably some of this
information may be considered “Highly Confidential” {{ [REDACTED] }}
[REDACTED] }}
[REDACTED] }}}, and
Norfolk Southern does not ask for these specific items to be redesignated. However, shippers’
and other parties’ in-house counsel should have access to the general fact that {{ [REDACTED] }}
[REDACTED] }}}, so that such
parties’ in-house counsel can determine {{ [REDACTED] }}
[REDACTED] }}. Accordingly, that information should be redesignated as Confidential.

The third paragraph of the exhibit describes an agreement whereby {{ [REDACTED] }}
[REDACTED] }}
[REDACTED] }}

¹⁶ The second paragraph of Exhibit [•] reads as follows: {{ [REDACTED] }}
[REDACTED] }}
[REDACTED] }}

¹⁷ As discussed below, the third paragraph of Exhibit [•] provides, in relevant part, that {{ [REDACTED] }}
[REDACTED] }}
[REDACTED] }}

¹⁸ The third paragraph of Exhibit [•] reads as follows: {{ [REDACTED] }}
[REDACTED] }}
[REDACTED] }}

[REDACTED]

[REDACTED]

[REDACTED] } Shippers have the right to know that the Board, through its approval of the proposed application, may be giving CPKC, G&W, and CSXT consent to { [REDACTED]

[REDACTED]

[REDACTED] } The fact that this { [REDACTED]

[REDACTED] } should be public knowledge [REDACTED]

[REDACTED] } }. Without access to this information, [REDACTED]

[REDACTED] } }¹⁹

The Board should not permit over-use of the “Highly Confidential” designation to deny access to this information from the shipping public.

Applicants { [REDACTED] } }²⁰ Upon review of the { [REDACTED] }, and particularly when viewed together with the rest of the exhibit, one sees the very

[REDACTED]

¹⁹ CPKC states that “All of the features of the CPKC transaction are fully disclosed in CPKC’s Application, and there are no hidden anticompetitive elements.” CPKC’s Reply to Combined Norfolk Southern Notice of Intent to Participate and Request to Hold CPKC/CSXT Transcon Corridor Transaction in Abeyance, filed October 27, 2023 (“CPKC Response”) at 6. { [REDACTED]

[REDACTED] } More narrowly, CPKC states that “CPKC is not a party to CSXT’s agreement (or agreements) with MNBR” on “CSXT’s separate and independent decision to take back operational control of MNBR’s Eastern Line.” CPKC Response at 2. Further, CPKC states that “CPKC and CSXT will merely have a direct interchange connection where their rail lines meet.” *Id.* at 4. Finally, CPKC states that “there is no agreement between CPKC and CSXT that requires that traffic be routed via Myrtlewood.” *Id.* at 6.

²⁰ { [REDACTED]

real operational impact of the material found within. That {{[REDACTED]}} describes certain anticipated

{{[REDACTED]}} It identifies {{[REDACTED]}}

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}. CPKC may argue that the

entirety of the exhibit ONLY describes the {{[REDACTED]}} and will

no doubt argue that the {{[REDACTED]}} is appropriately designated “Highly

Confidential”, but as shown above, that is not the case. Further, the exhibit demonstrates the fact

that CPKC and G&W anticipated the {{[REDACTED]}}

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}}²¹

[REDACTED]

²¹ {{[REDACTED]}} s

Communities concerned about {{blocked crossings}} may wish to know {{the anticipated maximum train length of the first-round trip frequency (10,000 feet) and the fact that CPKC and MNBR anticipate that a second round trip frequency could be run irrespective of compensation paid by CPKC to MNBR.}}

Similarly, Norfolk Southern's in-house operational personnel are in the best position to understand operations through the Meridian gateway and the effect of {{both the first and second round trip frequencies anticipated by the exhibit, the train length and frequency}} identified by the exhibit, and the impact of these on operations through the Meridian gateway, in Shreveport, and over the Meridian Speedway.²²

2. Specific Redesignation Request – Material Identified in Appendix B

Attached as Appendix B to this Motion is a list of specific items that CPKC has over-designated as “Highly Confidential.” In each case, Norfolk Southern has discussed with counsel for CPKC the fact that the material generally consists of aggregated carloads being transported, names of shippers, or other matters that do not fit within the definition of “Highly Confidential” pursuant to the Protective Order – e.g., material “contain[ing] shipper-specific rate or cost data, division of rates, trackage rights compensation levels, or other competitively sensitive or

[REDACTED] }}

²² [REDACTED]

proprietary information.” See Protective Order, slip op. at 3, paragraph 3. These items do, however, provide operational and traffic projection details that should be available to Norfolk Southern in-house operational and other advisors for Norfolk Southern to respond to the Application, as well as any supplemental materials to be submitted.

II. Norfolk Southern’s Shippers Would be Prejudiced Absent the Board Granting the Motion.

As noted above, many of the terms designated as “Highly Confidential” implicate operational issues that may impact {{ [REDACTED] [REDACTED] [REDACTED] }} Although Norfolk Southern does have outside consultants who may be able to examine the assumptions and operational impacts of this, those outside consultants do not have the intimate knowledge of the markets, routes, and operations to understand Applicants’ the underlying assumptions and potentially refute such assumptions and arguments made by the Applicant to support its Application. See Paulsboro Refining Company LLC – Adverse Abandonment – In Gloucester Co., NJ, AB 1095 (Sub-No. 1) (STB Served April 29, 2014); see also, TPI, supra; Application of the National Railroad Passenger Corporation under 49 USC 24308(a) – Canadian National Railway Company, FD 36496 (STB served January 28, 2022).

Redesignating the information described above, even to the level of “Confidential”, would permit counsel and outside consultants to Norfolk Southern to speak freely with the relevant in-house personnel who have expertise and familiarity with the information contained therein {{ [REDACTED] [REDACTED] [REDACTED] }} and to prepare analysis and commentary with respect to the assumptions underlying

the same and the {{[REDACTED]}}. Only by redesignating such materials can Norfolk Southern validate CPKC's evidence and assumptions and develop an informed understanding of CPKC's claims concerning {{[REDACTED]}}. It is fundamentally unfair for CPKC in-house personnel to be able to discuss those documents with their counsel and consultants and to present evidence and commentary based upon those documents, but to prohibit similar access and discussion by Norfolk Southern's in-house personnel, who are the individuals that regularly deal with the involved {{[REDACTED]}} from reviewing the information.

Of equal concern is that CPKC's over-use of the Highly Confidential designation ensures that even the broadest subject of the redacted material is hidden from customers and others who are reading the Application to see if their interests are implicated, and, if they are, whether they are implicated to the degree that they might engage others who could protect their interests. Further, the over-use of the Highly Confidential designation misleads potentially interested parties to believe there is no clearly identified {{[REDACTED]}}. {{[REDACTED]}}}, because the portion of the Application to which they have access repeatedly discusses {{[REDACTED]}}

Applicants have sought designation of their transaction as a "Minor" transaction and have sought a procedural schedule that would be appropriate to that designation. "[M]aintaining a "Highly Confidential" or "Confidential" designation as to materials that are not truly confidential ... imposes unnecessary costs on all interested parties using that information." See Central Oregon & Pacific Railroad, Inc. – Abandonment and Discontinuance of Service – In Coos,

Douglas, and Lane Counties, OR, AB-515 (Sub-No. 2), slip op. at 3 (STB served August 15, 2008) (“Central Oregon”) (ordering redesignating, in that case, material that had already been produced elsewhere in public). In this case, over-designating “Public” or “Confidential” material as “Highly Confidential” has the potential to harm the administrative process and act as a deterrent to participation of potentially interested parties. Not only does it reduce the likelihood of participation (because a party is unable to easily determine whether its interests may be affected), but it also adds time, expense, and burden (forcing parties to hire outside counsel and outside consultants and devote countless hours to find out the information that is being withheld from the public docket).

Redesignation is also consistent with the views expressed by Chairman Oberman in the Amtrak proceeding, FD 36496, in which Chairman Oberman expressed concerns about the parties’ over-designation of materials as “Confidential” or “Highly Confidential”, recognizing that it is in the public interest to ensure all parties properly designate, exchange, and have access to the most important and probative evidence necessary to provide evidence to Board. An over-designation of materials that do not contain “Highly Confidential” material but nonetheless are marked “Highly Confidential” prevents parties from adequately preparing and presenting their best case.

CPKC’s designation of the materials discussed above (and attached as Appendix A and referenced in Appendix B) as “Highly Confidential” hamstrings Norfolk Southern and the public from evaluating and having informed input into this proceeding and deprives the Board of that informed input. The Board has made clear that confidentiality designation must balance legitimate access versus protection. See Central Oregon, AB-515 (Sub-No. 2) at 4. In striking that balance here, the Board must carefully consider the public interest implications of the

proposed acquisition. The documents in question do not contain any competitively sensitive information. Accordingly, the over-designation of Confidential Information as Highly Confidential Information not only prevents the persons (i.e., in-house counsel) most able to evaluate and provide informed comment on the proposed acquisition from reviewing it, but the over-designation of Public Information as Confidential or Highly Confidential (such as the redaction of an entire exhibit) prevents shippers and other interested parties from even knowing whether there is something to be explored. Under these circumstances, the balance weighs strongly in favor of redesignating much of these materials as “Confidential” and “Public”.

III. The Upcoming Deadlines Dictate that the Board Should Act Expeditiously in Ordering Redesignation

Pursuant to Decision No. 1 in this proceeding, the Board accepted the application but ordered a significant amount of supplemental material to be submitted. The Board should take this opportunity to not only rule on Norfolk Southern’s specific requests for redesignation, but also to guide CPKC with regard to the designations for supplemental material it will produce, so that Norfolk Southern and members of the public will have appropriate access and time to determine whether to participate to protect their interests. Designating material as “Highly Confidential” that should be designated “Confidential” or “Public” only serves to ensure that interested parties are at a disadvantage to protect their interests and provide adequate input to the Board. Norfolk Southern counsel and CPKC counsel have discussed the issues raised by this Motion but have reached an impasse.

CONCLUSION

For the reasons addressed herein, Norfolk Southern respectfully requests that the Board direct CPKC to redesignate the information as specified herein.

Respectfully submitted,

/s/ Crystal M. Zorbaugh

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Attorneys for Norfolk Southern Corporation
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Appendix A

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Appendix B

CPKC page of 291 (HC Version)	Current Designation	Proposed Designation	Reason for Redesignation
25	HC	C	The referenced material specifically provides that G&W will receive additional compensation {{ [REDACTED] }} [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
188-189 Section 2.2(d)	HC	P	{{ [REDACTED] }} There is no shipper or traffic-specific data involved. Instead, all of the material is operational and should be available to Norfolk Southern's in-house operational personnel and shipper parties for review and comment for a complete administrative record.
191	HC	P	The material designated as Highly Confidential merely provides that {{ [REDACTED] }} There are no shipper or traffic-specific elements to this information and nothing that might implicate highly confidential matters.
192	HC	Part public and HC	This very typical trackage rights provision certainly does contain a minor amount of highly confidential material (specifically, related to {{ [REDACTED] }} [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
201	HC Section 12.3(a)	C and/or P	The material designated as "Highly Confidential" merely provides that {{ [REDACTED] }} [REDACTED] [REDACTED] [REDACTED] At most, this should be designated as "Confidential".
201	HC Section 12.3(b)	C and P	The material designated as "Highly Confidential" merely provides that {{ [REDACTED] }} [REDACTED] [REDACTED]

			 At most this should be designated as “Confidential”.
230	HC	C	This is a non-shipper specific total of “local and overhead, including haulage, traffic” that contains nothing confidential. At most, the designation should be “Confidential”.
230	HC	C	The identity of the largest shipper on this line is designated as “Highly Confidential”, but that does not provide any traffic volumes, commodities, or other shipper-specific items.
231	HC	C	Designated as “Highly Confidential” is the aggregate number of cars moved in haulage, with no shipper specific information included.
231	HC	C	In this case, a shipper is identified, as well as the generalized traffic type being moved, but there are no shipper-specific traffic amounts identified.
233	HC	C	The item designated is the aggregate amount of traffic interchanged between MNBR and AGR, without identifying a shipper or commodity. This is purely an operational issue.
248	HC	C	See the discussion of the over-designation on page 25 of 291 above.
249 (all items)	HC	C	The material designated on this page as “Highly Confidential” consists of aggregated amounts of traffic moved, or shipper identification, without a cross-walk between the two.
255	HC	C	The material designated “Highly Confidential” is an aggregate amount of traffic, not shipper-specific.
266	HC	C	The material designated “Highly Confidential” is an aggregate amount of traffic, not shipper-specific.
269	HC	C	The material designated “Highly Confidential” is an aggregate amount of traffic, not shipper-specific.
270 (all)	HC	C	The material designated “Highly Confidential” is an aggregate amount of traffic, not shipper-specific.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this “Motion to Redesignate the Highly Confidential Designation of Certain Materials” on counsel in the following proceeding:

Canadian Pacific Kansas City Limited and the Kansas City Southern Railway Company, D/B/A CPKC – Acquisition and Operation – Certain Rail Line of Meridian & Bigbee Railroad, L.L.C., in Lauderdale County, Mississippi and Choctaw and Marengo Counties, Alabama, FD 36732.

and all Parties of Record by first class mail, properly addressed with postage prepaid, or via more expeditious means of delivery, and on all parties of record.

/s/ Crystal M. Zorbaugh

Crystal M. Zorbaugh
Attorney for Norfolk Southern Railway Company and
Norfolk Southern Corporation

November 8, 2023