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ENTERED
Office of Proceedings
November 13, 2023
Part of
Public Record

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November 13, 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; CSX Transportation, Inc. – Discontinuance of Trackage Rights Exemption – In Marengo & Choctaw Counties, ALA. & Lauderdale County, MISS., AB55 (Sub-No. 814X); Alabama & Gulf Coast Railway – Trackage Rights Exemption – Kansas City Southern Railway Company d/b/a Canadian Pacific Kansas City, FD 36731; CSX Transportation, Inc. – Trackage Rights Exemption – Kansas City Railway, FD 36730

Dear Ms. Brown:

On behalf of Norfolk Southern Corporation and Norfolk Southern Railway Company (together, “Norfolk Southern”), the undersigned hereby submits this Norfolk Southern Certificate of Service. Please note that Norfolk Southern is serving only a public version of any documents submitted in the above-referenced proceeding. However, the highly confidential version of Norfolk Southern of pleadings has been provided to parties of record that have signed the respective undertakings. If there are any questions about this matter, please contact me directly, either by telephone: at 202-663-7831 or by e-mail: czorbaughbakerandmiller.com.

Respectfully submitted,

/s/ Crystal M. Zorbaugh

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

**BEFORE THE
SURFACE TRANSPORTATION**

FD 36732, FD 36731, FD 36730, AND AB 55 (Sub-No. 814X)

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; Alabama & Gulf Coast Railway LLC – Trackage Rights Exemption – The Kansas City Southern Railway Company D/B/A Canadian Pacific Kansas City, FD 36731; CSX Transportation, Inc. – Trackage Rights Exemption – Kansas City Southern Railway Company, FD 36730; CSX Transportation, Inc. – Discontinuance of Trackage Rights Exemption – in Marengo and Choctaw Counties, AL and Lauderdale County, MS, AB 55 (Sub-No. 814X)

NORFOLK SOUTHERN CERTIFICATE OF SERVICE

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**Attorneys for Norfolk Southern Railway
Company and Norfolk Southern
Corporation**

Dated: November 13, 2023

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36732

**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.**

AB 55 (Sub-No. 814X)

**CSX TRANSPORTATION, INC. – DISCONTINUANCE OF TRACKAGE
RIGHTS EXEMPTION – IN MARENGO & CHOCTAW COUNTIES, ALA.
& LAUDERDALE COUNTY, MISS.**

FD 36731

**ALABAMA & GULF COAST RAILWAY – TRACKAGE RIGHTS
EXEMPTION – KANSAS CITY SOUTHERN RAILWAY COMPANY D/B/A
CANADIAN PACIFIC KANSAS CITY**

FD 36730

**CSX TRANSPORTATION, INC. – TRACKAGE RIGHTS
EXEMPTION – KANSAS CITY SOUTHERN RAILWAY**

NORFOLK SOUTHERN CERTIFICATE OF SERVICE

Pursuant to Decision No. 1, served by the Board in the above captioned proceedings on November 3, 2023, Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, “Norfolk Southern”) hereby certifies that it has served the Department of Justice, the Department of Transportation, representative for Applicants Canadian Pacific Kansas City Limited and The Kansas City Southern Railway Company

d/b/a CPKC, and all Parties of Record with copies of the public versions of the Combined Norfolk Southern Notice of Intent to Participate and Request to Hold the CPKC/CSXT Transcon Corridor Transaction in Abeyance, filed on October 25, 2023, Norfolk Southern's Motion to Redesignate the Highly Confidential Designation of Certain Materials, filed on November 8, 2023. Consistent with any executed undertakings, NS certifies that it served copies of the highly confidential versions to the appropriate Parties.

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

/s/ Crystal M. Zorbaugh

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

Dated: November 13, 2023

**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;**
**ALABAMA & GULF COAST RAILWAY LLC – TRACKAGE RIGHTS EXEMPTION –
THE KANSAS CITY SOUTHERN RAILWAY COMPANY D/B/A CANADIAN PACIFIC
KANSAS CITY, FD 36731;**
**CSX TRANSPORTATION, INC. – ACQUISITION AND OPERATION – RAIL LINE OF
MERIDIAN & BIGBEE RAILROAD, L.L.C., FD 36727;**
**CSX TRANSPORTATION, INC. – TRACKAGE RIGHTS EXEMPTION – KANSAS
CITY SOUTHERN RAILWAY COMPANY, FD 36730;**
**ALABAMA & GULF COAST RAILWAY LLC – TRACKAGE RIGHTS EXEMPTION –
CSX TRANSPORTATION, INC., FD 36724;**
**MERIDIAN & BIGBEE RAILROAD, L.L.C. – DISCONTINUANCE OF INCIDENTAL
OVERHEAD TRACKAGE RIGHTS – IN LOWNDES AND MONTGOMERY
COUNTIES, AL, AB 1335X;**
**CSX TRANSPORTATION, INC. – DISCONTINUANCE OF TRACKAGE RIGHTS
EXEMPTION – IN MARENGO AND CHOCTAW COUNTIES, AL AND LAUDERDALE
COUNTY, MS, AB 55 (SUB-NO. 814X)**

**COMBINED NORFOLK SOUTHERN NOTICE OF INTENT TO PARTICIPATE AND
REQUEST TO HOLD CPKC/CSXT TRANSCON CORRIDOR TRANSACTION IN
ABEYANCE**

OCTOBER 25, 2023

BAKER & MILLER PLLC

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October 25, 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 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, Alabama & Gulf Coast Railway LLC – Trackage Rights Exemption – The Kansas City Southern Railway Company D/B/A Canadian Pacific Kansas City, FD 36731, CSX Transportation, Inc. – Acquisition and Operation – Rail Line of Meridian & Bigbee Railroad, L.L.C., FD 36727, CSX Transportation, Inc. – Trackage Rights Exemption – Kansas City Southern Railway Company, FD 36730; Alabama & Gulf Coast Railway LLC – Trackage Rights Exemption – CSX Transportation, Inc., FD 36724, Meridian & Bigbee Railroad, L.L.C. – Discontinuance of Incidental Overhead Trackage Rights – In Lowndes and Montgomery Counties, AL, AB 1335X; CSX Transportation, Inc. – Discontinuance of Trackage Rights Exemption – in Marengo and Choctaw Counties, AL and Lauderdale County, MS, AB 55 (Sub-No. 814X)

Dear Ms. Brown:

On behalf of Norfolk Southern Corporation and Norfolk Southern Railway Company (together, “Norfolk Southern”), the undersigned hereby submits this Combined Norfolk Southern Notice of Intent to Participate and Request to Hold the CPKC/CSXT Transcon Corridor Transaction in Abeyance, which is being filed in each of the above-captioned dockets. 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

cc:

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;
ALABAMA & GULF COAST RAILWAY LLC – TRACKAGE RIGHTS EXEMPTION –
THE KANSAS CITY SOUTHERN RAILWAY COMPANY D/B/A CANADIAN PACIFIC
KANSAS CITY, FD 36731;
CSX TRANSPORTATION, INC. – ACQUISITION AND OPERATION – RAIL LINE OF
MERIDIAN & BIGBEE RAILROAD, L.L.C., FD 36727;
CSX TRANSPORTATION, INC. – TRACKAGE RIGHTS EXEMPTION – KANSAS
CITY SOUTHERN RAILWAY COMPANY, FD 36730;
ALABAMA & GULF COAST RAILWAY LLC – TRACKAGE RIGHTS EXEMPTION –
CSX TRANSPORTATION, INC., FD 36724;
MERIDIAN & BIGBEE RAILROAD, L.L.C. – DISCONTINUANCE OF INCIDENTAL
OVERHEAD TRACKAGE RIGHTS – IN LOWNDES AND MONTGOMERY
COUNTIES, AL, AB 1335X;
CSX TRANSPORTATION, INC. – DISCONTINUANCE OF TRACKAGE RIGHTS
EXEMPTION – IN MARENGO AND CHOCTAW COUNTIES, AL AND LAUDERDALE
COUNTY, MS, AB 55 (SUB-NO. 814X)

COMBINED NORFOLK SOUTHERN NOTICE OF INTENT TO PARTICIPATE AND
REQUEST TO HOLD CPKC/CSXT TRANSCON CORRIDOR TRANSACTION IN
ABEYANCE

Thomas E. Zoeller Hanna M. Chouest Julianne C. Freeman NORFOLK SOUTHERN CORPORATION 650 West Peachtree St N&W Atlanta, GA 30308 Tel: (470) 571-5208	Rose Michele Nardi John V. Edwards Crystal M. Zorbaugh BAKER & MILLER PLLC 2401 Pennsylvania Ave., NW Suite 300 Washington, DC 20037 Tel: (202) 663-7831 Fax: (202) 663-7849 Attorneys for Norfolk Southern Corporation and Norfolk Southern Railway Company
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October 25, 2023

INTRODUCTION

Pursuant to 49 C.F.R. Section 1117.1, Norfolk Southern Corporation and Norfolk Southern Railway Company (“NSR”) (collectively, “Norfolk Southern”) hereby respectfully requests that the Surface Transportation Board (“STB” or “Board”) consolidate the above-referenced proceedings with FD 36732 as the lead docket. As is more fully set forth below, the Applicants¹ have been very public and very clear for months as to the consolidated and integrated nature of CPKC’s proposed acquisition of the “Western Line” from MNBR and CSXT’s proposal to acquire the “Eastern Line” assets also from MNBR.² These are two parts of the same transaction, one of which is conditioned on the other, and involve the same seller, contiguous sections of the same rail line, as well as common questions of fact and law. Evaluating the proposed transaction in a consolidated proceeding would be a judicious use of the Board’s resources as well as those of interested parties. Moreover, it would ensure that environmental, operational, market and other matters would receive a fulsome regulatory review. Simply put, it would more fully protect the public interest.

To give effect to the consolidation, Norfolk Southern further requests that the Board hold the current proceedings in abeyance until such time as the Applicants submit information that reflects the consolidated nature of the Applicants’ proposed transaction.³ The Board, in its order

¹ References to the “Applicants” are references to one or more of the following: Canadian Pacific Kansas City Limited or its subsidiaries (“CPKC”), CSX Transportation, Inc. (“CSXT”), and Genessee & Wyoming, Inc. (together with its subsidiaries Meridian & Bigbee Railroad, L.L.C. (“MNBR”) and Alabama & Gulf Coast Railway LLC (“AGR”) (collectively “G&W”).

² References to the “Applicants’ proposed transaction” are references to the consolidated transaction covered by the CSXT application concerning the Eastern Line, the CPKC application concerning the Western Line, and related transactions submitted with regard to either or both.

³ Norfolk Southern is not hereby advocating that the STB reject either the CPKC application or the CSXT application as incomplete. See 49 C.F.R. Section 1180.4(c)(7)(ii) (STB rejecting an incomplete application). A decision ordering consolidation and abeyance until a revised but comprehensive application is filed would better serve the regulatory goals in this proceeding. Norfolk Southern

of consolidation and abeyance, should extend the geographic scope of review to include all areas likely to be impacted by the proposed consolidated transaction, including but not limited to the entirety of the Meridian gateway (and impacts on Amtrak service and freight service through that gateway), as well as over the Meridian Speedway.⁴

The Board has significant latitude in deciding whether to grant a request for consolidation. It looks at the overall transaction (the facts, parties, and the issues connecting the same). It also considers whether consolidation would promote administrative efficiency, both for itself and for the parties that might be impacted. Finally, the Board considers whether ordering consolidation would unduly delay the proceedings or prejudice any party. See, e.g., Honey Creek R.R.—Pet. for Declaratory Order, FD 34869, slip op. at 3 (STB served June 4, 2008) (“Honey Creek”). This proceeding is of the very sort which demands consolidation and supports a comprehensive and unified review of an initiative that Applicants themselves present as a consolidated whole. In this motion, Norfolk Southern presents first, in the Applicants’ own

specifically reserves, and does not waive, the right to review and comment on how the Board should treat the CSXT Application and the CPKC Application including, without limitation, whether either or both of those applications are incomplete. Should the Board determine that consolidation and the information requested herein requires rejection of the filing as incomplete, Norfolk Southern would not object to that course of action.

⁴ At this time, Norfolk Southern does not take a position on whether the Board should properly consider the proposed consolidated transaction as a Minor Transaction for purposes of its review. Such a determination cannot be made until the Applicants provide additional information that addresses the consolidated nature of the proposed transaction. That said, Norfolk Southern has identified no instance since the passage of the ICC Termination Act of 1995, in which the Board has bifurcated an interrelated transaction into two complementary minor applications. Norfolk Southern further questions whether doing so here is appropriate, particularly given the conflicting positions of the parties. CPKC clearly states that “CPKC’s Proposed Transaction is *contingent* on CSXT consummating its transaction. Both CSXT and CPKC intend to make substantial investments in their respective lines to upgrade to Class I standards. Those investments, which are essential to support premium CPKC-CSXT train service, would not be possible without CPKC acquiring ownership of the Western Line and CSXT repossessing the Eastern Line.” See Verified Statement of James Clements at 3-4, included as Appendix 2 to the CPKC Minor Application, emphasis supplied. CSXT, on the other hand, minimizes the dependency of the two transactions, while still lauding the benefits of a new direct interchange point between CSXT and CPKC.

words, their vision of a consolidated transaction. Norfolk Southern then describes how the agreements the Applicants negotiated effectuate precisely that intended consolidated transaction. Finally, Norfolk Southern addresses the standards to be applied for consolidation and describes why the Applicants' requested authority fit within those standards. In particular, Norfolk Southern identifies the numerous areas in which consolidation would afford the Board the opportunity for more information on the potential impacts the transaction may have on customers, operations, and the environment. The Board should order consolidation, a resubmittal of the various applications, notices, and petitions that address the impacts of the consolidated nature of the transaction, including the impacts of the transaction on the Meridian gateway and on the traffic that relies upon the same infrastructure that would be utilized by traffic that would reach the MNBR by way of the new CPKC-CSXT Transcon Corridor via the Meridian Speedway. The Board should hold the consolidated transaction in abeyance until such resubmittal has been accomplished.

ARGUMENT

The question of consolidation in this matter is straightforward. These proceedings involve a common set of underlying facts, and the overall purpose of the sought-after approvals and the issues that should be considered by the governing regulatory body are the same, especially given that the CPKC transaction is conditioned on the CSXT transaction.⁵ The public interest would be better served with a consolidated application in which the Applicants more fully consider all the potential impacts of the consolidated transaction.

⁵ See, *infra*, FN 8.

A. The Applicants Have Publicly Presented A Consolidated Transaction

On June 20, 2023, CPKC, CSXT, and G&W publicly “announced that they have reached agreements that when completed will create a new direct CPKC-CSX interchange connection in Alabama.”⁶ The press release issued jointly by the Applicants described the exact consolidated transaction pending before the Board today. Importantly, the transaction that the Applicants presented to the investment community and others was presented as a unified whole, where compensation, rights, and privileges were dependent upon the entirety, not just separate pieces, of the overall tapestry:

Under the agreements announced today, CPKC would acquire and operate the segment of the [Meridian & Bigbee Railroad, L.L.C. (“MNBR”)] between Meridian and Myrtlewood, Ala, and CSX would operate the lines currently leased by MNBR east of Myrtlewood. As a result, CPKC and CSX would establish a direct CPKC-CSX interchange at or near Myrtlewood, Ala. In exchange, G&W would acquire certain Canadian properties owned by CPKC and other rights. MNBR would receive rights to continue to provide local service to existing customers on former MNBR-owned lines and connect with other railroads without interchange restrictions.

CPKC/CSXT/G&W Joint Press Release. The joint Applicants’ press release announced that CPKC would acquire the Western Line, CSXT would acquire the Eastern Line, and in exchange for both of those things happening together, G&W would get compensation and certain rights.

Notwithstanding the clear (and public) enunciated intent, CSXT claims that “the CSXT Transaction and the CPKC Transaction are not contingent upon each other, in that the CSXT

⁶ “Railroads Reach Agreement to Create New Direct Connection and Corridor Linking Mexico, Texas and the U.S. Southeast,” Joint Press Release issued June 28, 2023, <https://www.csx.com/index.cfm/about-us/media/press-releases/railroads-reach-agreement-to-create-new-direct-connection-and-corridor-linking-mexico-texas-and-the-u-s-southeast/>, accessed on October 15, 2023 (hereinafter, “CPKC/CSXT/G&W Joint Press Release”). See also, <https://www.cpkcr.com/en/media/Railroads-reach-agreement-to-create-new-direct-connection-and-corridor-linking-Mexico-Texas-and-US-Southeast> and <https://media.gwrr.com/press-releases/news-details/2023/Railroads-reach-agreement-to-create-new-direct-connection-and-corridor-linking-Mexico-Texas-and-the-U.S.-Southeast/default.aspx>, each accessed on October 15, 2023.

Transaction *could* proceed regardless of whether the CPKC Transaction is consummated.”⁷

However, that statement is inconsistent with CSXT’s public statements and CPKC’s representation in its Application⁸ and the contingencies set forth in its Transaction Agreement.⁹ Applicants intended these various rights and obligations to be part of a single, consolidated transaction, and that is how it should be treated by the Board.

First, as detailed above, CPKC, CSXT, and G&W made a joint statement clearly enunciating that they intended for an all-or-nothing transaction: both CPKC and CSXT would gain access to the MNBR line to provide a unified routing structure. The overall intended goal of the transaction was to “create a new direct CPKC-CSX interchange connection in Alabama,”¹⁰ a Class I-to-Class I through-train service over Myrtlewood, that would “provide[] shippers with a compelling transportation option with access to markets in Texas and Mexico as well as into the heart of the thriving and dynamic U.S. Southeast”.¹¹ And “in exchange” for enabling the CPKC and CSXT joint goal, G&W would be compensated by a sufficiently attractive package of rights and dollars.¹²

Second, CPKC, CSXT, and G&W have negotiated a series of interrelated agreements that effectuated exactly the enunciated intended purpose. Some of the agreements making up the proposed consolidated transaction have been submitted to the Board for its review and

⁷ See FD 36727, CSX Transportation, Inc. – Acquisition and Operation – Rail Line of Meridian & Bigbee Railroad, L.L.C., Application, filed October 6, 2023, (“CSXT Application”) at APP-13, emphasis added.

⁸ See, e.g., FD 36732 at 2 (“The [CPKC] Transaction builds, and is contingent, on CSXT retaking possession of its line east of Myrtlewood and resuming operations between Myrtlewood and Burkville, Alabama....”)

⁹ See, e.g., the text accompanying FN 13 below.

¹⁰ CPKC/CSXT/G&W Joint Press Release.

¹¹ CPKC/CSXT/G&W Joint Press Release.

¹² CPKC/CSXT/G&W Joint Press Release.

approval.¹³ The agreements that were produced clearly demonstrate the consolidated nature of the overall consolidated transaction. For example, CPKC and G&W entered into a transaction agreement that specifically set as a prerequisite that “CSXT shall have obtained the CSXT Regulatory Approvals and the CSXT Relevant Transactions and any other relevant transaction shall have been consummated simultaneously with or prior to the transactions contemplated by this Agreement.”¹⁴ The prerequisite CSXT Regulatory Approvals consist of “the STB authority obtained by CSXT as necessary and otherwise accomplishes (i) ... revocation of CSXT’s trackage rights authority (FD 32962) on MNBR between Meridian, MS and Myrtlewood, AL, and (ii) any CSXT Relevant Transactions for which STB authority is required to be obtained by CSXT.”¹⁵ Similarly, the prerequisite CSXT Relevant Transactions consist of “CSXT: (a) entering into the following agreements: (i) with KCS for interchange at or near Myrtlewood, AL; (ii) with KCS granting CSXT operating rights on a portion of the MNBR Transferred Assets for purpose of interchange with MNBR, AGR, and KCS at a mutually agreed upon location; (iii) CSXT granting AGR trackage and operating rights between Linden, AL and Myrtlewood, AL for purposes of [accessing the Rail Line to] interchange[ing][e] AGR traffic with CSXT, CPKC, and MNBR; and (b) closing on the purchase of the track infrastructure assets on the MNBR rail line that operates over real property leased from CSXT, expiration of said lease, and commencement of operations over such rail line.” Id.

As noted above, CPKC is clear in its application that its proposed transaction is contingent on CSXT’s proposed transaction: “KCS is acquiring the Western Line to establish a

¹³ *Id.* (“*Certain portions* of the transactions are subject to regulatory review and approval from, or exemption by, the U.S. Surface Transportation Board.”) (emphasis supplied.).

¹⁴ Section 12.07 on page 104-105 of the transaction agreement included in the CPKC Application.

¹⁵ Section I at page 8 of the Transaction Agreement attached to the CPKC Application.

direct, efficient interchange at Myrtlewood, creating a new east-west Class I freight corridor linking CPKC-served markets in Mexico and the Southwestern United States with CSXT-served markets in the Southeastern United States and beyond.”¹⁶ Although CSXT downplays the integral relationship between its application and CPKC’s application (claiming that “CSXT *understands* that CPKC intends to acquire from MNBR and operate the Western Line,” CSXT Application at APP-12 (emphasis added)), even CSXT acknowledged the interconnectedness of the two applications, stating it “has included in this Application information regarding the overall effects on railroad operations and competition of both sets of transactions, in the event that all of these transactions are implemented.”¹⁷ CSXT Application at APP-15.

The Board should take the parties at their word and consolidate these proceedings which are clearly designed to effectuate a contingent set of agreements.

B. Regulatory Consolidation and Abeyance is Appropriate Here

The regulatory standard for consolidation is clear:

In deciding whether to grant a request for consolidation, the Board considers whether the proceedings involve common facts, issues, and parties; whether consolidation would promote efficiency; and whether consolidation would unduly delay the proceedings or prejudice any party. See, e.g., Honey Creek, FD 34869, (STB served June 4, 2008).

The Board has broad discretion to determine whether to take such a procedural action, and its decision to do so in any particular situation is highly dependent on the facts and circumstances of the case. See, e.g., Pet. of Nat’l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905, FD 36048, slip op. at 4 (STB served Oct. 3, 2016); North American Freight Car Association; American Fuel & Petrochemicals Manufacturers; the Chlorine Institute; the Fertilizer Institute; American Chemistry Council; Ethanol Products, LLC d/b/a Poet Ethanol

¹⁶ FD 36732, 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, Application for a Minor Transaction, filed October 6, 2023 (“CPKC Application”), at 2.

¹⁷ As explained below, though, the information provided by CSXT still fails to take into consideration significant operational and environmental effects of the consolidated transaction.

Products; Poet Nutrition, Inc.; and Cargill Incorporated v. Union Pacific Railroad Company, NOR 42153, served October 5, 2017, slip op. at 2.

As evidenced by the two applications, the CSXT and CPKC proposed transactions include common facts, issues, parties, and legal standards. The consolidation of these applications would provide efficiency by avoiding duplication of resources. Requiring separate action for each of the individual pieces of the consolidated transaction would unduly burden interested parties and the Board's limited resources. In addition, requiring separate action for each of the individual pieces of the consolidated transaction risks missing important environmental, operational, and market analysis that becomes evident when the Applicants' proposals are viewed as a single consolidated transaction.¹⁸

Although the Applicants have proposed parallel regulatory procedural schedules for review of the two applications, actions and decisions taken in one application proceeding (including through potential appellate review) will not necessarily be applied, or applied consistently, with actions and decisions taken in the other application proceeding. Consolidation ensures that this risk is avoided.

Now is the appropriate time for consolidation. The Board has not acted to set a procedural schedule for any of the proceedings.¹⁹ The Board also has not yet determined whether

¹⁸ See, e.g. Exhibit [●]

Notwithstanding the foregoing, CSXT is not a signatory to any agreement as yet submitted to the Board that would give effect to the foregoing, as CSXT is not a signatory to the CPKC – G&W transaction agreement.

¹⁹ The Applicants have asked the Board to set procedural schedules that would run in parallel for all captioned proceedings. See, Union Pacific Railroad Company – Petition for Declaratory Order, STB FD 34090, slip op. at 2 (denying a request for consolidation in part based upon the fact that the proceedings sought to be consolidated were procedurally incompatible).

the individual Western Line and Eastern Line applications should be treated as minor transactions or not. But it cannot do so without fully understanding the effects of the proposed consolidated transaction on the broader markets and operating segments alluded to throughout the Applicants' pleadings.²⁰

In addition, holding the proceedings in abeyance would not materially harm any party.²¹ Doing so would also give the Applicants the time to correct other apparent deficiencies in Applicants' collective filings.²² CSXT and MNBR have already agreed to extend their lease agreement beyond the previous lease term, and operations over the affected line segments will not need to be changed. Moreover, CSXT and CPKC undoubtedly have already evaluated the

²⁰ See, e.g., the Verified Statement of James Clements, Appendix 2 to the application submitted in FD 36732, defining the relevant markets as far exceeding the narrow definition analyzed in other parts of the application, including at page 8 (“the Proposed Transaction would allow CPKC to route traffic more efficiently directly from Shreveport due east [over the Meridian Speedway] to interchange with CSXT at Myrtlewood”) and at 9 (“Traffic moving between Mexico and the Louisville, Kentucky area, for example, moves north from Shreveport to Kansas City and then east to East St. Louis for interchange with CSXT. Under the Proposed Transaction, that traffic could be rerouted from Shreveport east to Montgomery and then north to Louisville – a 256-mile shorter route.”). Under a consolidated approach to a review of the overall transaction, the operating and environmental effects to be reported on by the Applicants would provide the Board and the shipping public a clearer view of whether the transaction is, in fact, a minor transaction and whether the proposed transaction would have environmental effects that would have to be mitigated.

²¹ See, e.g., Petition of the National Railroad Passenger Corporation for Relief pursuant to 49 U.S.C. Section 24905, FD 36048, served October 3, 2016, slip op. at 4.

²² In a decision earlier this year, the Board held that the discontinuance class exemption at 49 C.F.R. § 1152.50 may not be invoked for lines that within the past two years have been utilized to provide local service to shippers. See Austin Area Terminal Railroad, Inc. -- Discontinuance of Service Exemption – In Bastrop, Burnet Lee, Llano, Travis, and Williamson Counties, TX, AB-578 (STB served Dec. 30, 2022) (holding although AATR certifies that *it* has not provided service over the Lines for at least two years, AATR notes that the Lines are “presently operated” by AWR. (Verified Notice 1.) Because AATR does not certify that there has been *no* local traffic on the Lines during the two years prior to the filing of AATR’s notice, the Lines do not meet the two-year out-of-service requirement and the proposed discontinuance does not qualify for the class exemption at 49 C.F.R. § 1152.50. See CSX Transp. in Jefferson & Ind. Cntys., Pa., AB 55 (Sub-No. 453X), slip op. at 1 (ICC served Nov. 27, 1992) (rejecting a verified notice of exemption in AB 578X exemption where local service had been provided within the two-year period by a railroad other than the applicant)).

costs and benefits of the intended combined transaction to negotiate the provided agreements and evaluate the shareholder value in the proposed transaction.

C. Consolidation Would Provide the Board with Much-Needed Information Regarding Potential Competitive Impacts of the Proposed Transaction

The applications as filed fail to address certain key impacts on freight rail customers and passenger traffic that rely upon the same rail assets that the Applicants' traffic will utilize. In particular, the applications as filed do not identify in any meaningful way how the traffic reaches the CPKC-CSXT Transcon Corridor, and therefore ignore any potential impacts to traffic that currently utilizes the Meridian Speedway and the Meridian Gateway. Consolidation would ensure that the Applicants are required to provide the Board and the public with a full and clear picture of the potential impacts of their proposed transaction so that a fair analysis may be conducted by the Board. Indeed, the Board should order that a consolidated review evaluate:

- Whether there are other agreements among the parties that are relevant to the consolidated transaction that has not been presented to the Board because the Applicants filed two separate applications. For example, no comprehensive agreement between CPKC and CSXT has been presented for review,²³ and taking the joint pronouncement of the Applicants in their press release, there potentially are additional agreements that have not yet been disclosed.

²³ One agreement between CPKC and CSXT is submitted for Board review, but that agreement is extremely limited in scope. In FD 36730, CSX Transportation, Inc. – Trackage Rights Exemption – Kansas City Southern Railway Company, filed October 6, 2023, CSXT submits a notice of exemption for the acquisition of approximately 2 mile of trackage rights over the route that CPKC seeks to acquire.

- Whether the relevant economic analysis of a consolidated transaction may implicate broader impacts beyond local shippers on the two line segments themselves.²⁴ The Applicants admit the purpose of the consolidated transaction involves the diversion of traffic between Mexico and the Southwest U.S., on the one hand, and the Southeast U.S., on the other hand. These diversions will consolidate traffic from other routes (such as over the New Orleans gateway) and move that traffic in consolidated through trains over the Shreveport LA – Meridian MS – Myrtlewood AL route. But while touting the benefits that might be derived, the Applicants fail to address whether any negative operational impacts would result from such diversions because the proposals are presented to the Board as separate transactions.²⁵

²⁴ See, e.g., “CPKC caps train length on Meridian Speedway, clipping eastbound UP-NS intermodal service,” published in *Trains Magazine*, October 4, 2023 (noting that, by action of CPKC, the Meridian Speedway LLC (“MSLLC”) has imposed a train length restriction on the Meridian Speedway that affects just one train – the eastbound intermodal service that MSLLC moves for Norfolk Southern and is bridged between Union Pacific (Shreveport LA) and over the Meridian Speedway to Norfolk Southern at Meridian MS and causing the train to be diverted to a significantly longer route over Memphis). That the CPKC/CSXT Transcon Corridor Transaction would divert a significant amount of new traffic over the Meridian Speedway between Meridian and Shreveport is evident, and actions are being taken by CPKC to open up additional capacity on the Meridian Speedway to handle that traffic, but the operational effects on shippers currently routed over the CPKC trackage rights and NSR trackage rights over the Meridian Speedway and through the Meridian gateway are not evaluated.

²⁵ One of the many examples of the Applicants seeking to gain the value of this diversion without having the underlying factors considered appears in the Verified Statement of Raymond A. Elphick, attached as Exhibit 15, Operating Plan – Minor, to the CPKC Application, wherein CPKC explains: “The Proposed Transaction will establish a shorter, more direct route for a significant amount of existing traffic, reducing operating costs and fuel consumption. Currently CPKC-CSXT non-automotive interline traffic between CPKC-served markets in Mexico and the Southwestern United States moves over Shreveport and is interchanged with CSXT at New Orleans, Brookwood, or East St. Louis. The route over Myrtlewood between Shreveport and Atlanta, for example, is 158 miles shorter than over New Orleans and 104 miles shorter than over Brookwood. For traffic moving between Shreveport and Louisville, for example, the route is 255 miles shorter than over East St. Louis.”

While claiming the diversions over the Shreveport TX – Meridian MS – Myrtlewood AL route as a benefit of the proposed transaction, the Applicants fail to analyze the same. The Applicants consolidate consideration of the combined Eastern Line and Western Line transaction when beneficial, but not when it is not. See text accompanying Footnotes 28 and 29 below.

- Whether the operational analysis of a consolidated transaction demonstrates impacts to freight shippers and Amtrak passengers, including impacts experienced on rail segments outside of the immediate geography of the contemplated transaction. Norfolk Southern operates approximately 17 trains per day through Meridian. Norfolk Southern hosts two daily Amtrak long-distance passenger trains on its lines through Meridian. The new CPKC-CSXT trains may have an operating impact on these current Norfolk Southern and Amtrak customers. Applicants should provide such data.
- Whether the environmental analysis of the consolidated transaction would trigger a more intensive review than as indicated when the two pieces of the transaction are evaluated separately. Although CSXT includes in its application “information regarding the overall effects on railroad operations and competition of both sets of transactions, in the event that all of these transactions are implemented,” CSXT Application at 8, that statement is misleading and contradicted by other elements in both transactions. For example, although CPKC claims that the combined transaction anticipated by the two applications “will enable CPKC and CSXT to establish a premium train service linking their respective markets,”²⁶ it seeks to avoid the regulatory review and potential consequences of considering the two applications as combined when it comes to the discovery that the transaction would result in the GTM increase threshold being exceeded. In a bifurcated transaction, the GTM increase on the Western Line can be linked to the increase in “interchange activity result[ing] from CSXT’s transaction and not from the Proposed Transaction,”²⁷ thereby allowing CPKC to avoid triggering the review that would be

²⁶ CPKC Application, Exhibit 4, Environmental Information, at 36.

²⁷ Id. at 42.

required were the GTM increase to be triggered by its transaction. Furthermore, while championing the benefits of reduced yard operations in just three of the minor rail yards in Meridian, the Applicants fail to report on the very real potential that the new train operations envisioned by the operating plan will impose burdens on the traveling public through the potential for increased blocked crossings and additional rail congestion for traffic seeking to enter, cross, or leave the immediate geographic area delineated by the Eastern Line and the Western Line. Those new train operations involve additional and longer trains operating more often, not only on the immediate Eastern Line and the Western Line but also in and through Meridian and over the Meridian Speedway.²⁸ See, e.g., CSXT Application at 181 (noting that the same number of trains operating over the Eastern Line are projected to carry additional traffic (increased GTMs) and would require additional yard activity).

- Whether the separate applications fully address the impact of the proposed transaction on passenger service, as well as freight service, through the Meridian gateway and over the

²⁸ There are only a handful of direct mentions of MSLLC and the Meridian Speedway in the hundreds of pages submitted by the Applicants, and within those mentions, no evaluation of the potential impacts of the transaction upon the customers who currently rely upon the Meridian Speedway and the Meridian Gateway today. See, the Verified Statement of Rayment A. Elphick, Exhibit 15 to the application filed in STB FD 36732, at page 12 (noting traffic to be diverted to the Meridian Speedway, but otherwise not analyzed by the Application) and the Verified Statement of James Clements, Appendix 2, page 6 (acknowledging that MNBR “interchanges with NS and CPKC at Meridian, where it connects to NS’s north-south line and to the CPKC-NS jointly owned Meridian Speedway.”); see also, the Verified Statement of Jonathan Wahba, Appendix 3, page 3 (“Further, our forecasts take into account CPKC’s obligations to Norfolk Southern under the Meridian Speedway LLC agreements.”). There is no discussion, for example, whether the additional premium run-through train anticipated by CPKC to move off the Meridian Speedway and onto the Western Line would fit into the constrained sidings of the Meridian gateway and be in compliance with the same type of length limitation that it recently imposed on operations over the Meridian Speedway. See FN 24, *supra*.

Meridian Speedway.²⁹ CPKC claims that “No commuter or passenger service moves on the Western Line,” Id. at 12, but does not address the fact that the through train service accesses the Meridian – Myrtlewood route through the Meridian gateway and that Amtrak operates through that very gateway, together with CPKC and Norfolk Southern. Further, CPKC omits the fact that, as a condition of STB approval for the acquisition of Kansas City Southern, the Board ordered CPKC to “honor CP’s commitments made under the settlement agreement with Amtrak, including CP’s agreement to support certain planned expansions of Amtrak passenger service.”³⁰ One portion of that settlement sets a goal of “introducing Amtrak service between Dallas, Texas and Meridian, Mississippi...”³¹ The new operations anticipated by the current CPKC/CSXT/G&W transaction implicate the feasibility of that new Amtrak service, operations over the Meridian Speedway, and the fluidity of traffic through all portions of the Meridian gateway (including that of Norfolk Southern). However, the Applicants’ current bifurcated Western Line and Eastern Line approach does not address any such operational impacts.

²⁹ That consolidated transaction would divert a significant amount of new traffic over the Meridian Speedway between Meridian and Shreveport is evident, but the Applicants fail to report on the operational effects on shippers currently routed over the CPKC trackage rights and NSR trackage rights over the MSLLC. Compare CPKC Application at 42 (claiming that “CPKC expects that yard activity in Meridian will actually decrease,” presumably referring to activity in the three MNBR yards that it will acquire (see CPKC Application, Exhibit 15, Operating Plan – Minor, at page 3)) with CPKC Application, Appendix 3, Page 3, Verified Statement of Jonathan Wahba, where Wahba claims that CPKC’s traffic forecasts take into account CPKC’s obligations to Norfolk Southern under the Meridian Speedway LLC agreements. Until that operational and environmental analysis is performed with regard to the Meridian gateway and access to, and operations over, the Meridian Speedway, it is impossible to determine whether shippers currently benefitting from Meridian Speedway infrastructure should be concerned.

³⁰ FD 36500, Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al., Decision No. 35, served March 15, 2023 (“CP-KC Acquisition Decision”), slip op. at 12.

³¹ Id., slip op. 139.

The Board should order Applicants to address these operational and environmental impacts in the revised, consolidated filing. It is incumbent upon the Applicants to provide the Board and the public with the data and analysis necessary to fully evaluate the potential impacts of the transaction. Without answers to these many questions, the full potential impact of the proposed transaction, particularly as to its effect on traffic that already utilizes the infrastructure necessary to reach the MNBR via the proposed CPKC-CSXT Transcon Corridor, is not evident.

CONCLUSION

The Board should order consolidation of these proceedings and a resubmittal of an application that covers what is patently a unified Transaction. The Board's order for consolidation should set the current proceedings in abeyance until such time as a revised, unified, application is submitted by the Applicants. Finally, the Board should clarify that the revised, unified, application to be submitted by the Applicants includes regulatorily-required data and analysis that covers the entirety of the impacted rail network, specifically including the Meridian Speedway and the Meridian gateway.

Respectfully submitted,

/s/ Crystal M. Zorbaugh

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Attorneys for Norfolk Southern Corporation
and Norfolk Southern Railway Company

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this “Combined Norfolk Southern Notice of Intent to Participate and Request to Hold the CPKC/CSXT Transcon Corridor Transaction in Abeyance” (Norfolk Southern-1) on counsel in the following proceedings:

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, Alabama & Gulf Coast Railway LLC – Trackage Rights Exemption – The Kansas City Southern Railway Company D/B/A Canadian Pacific Kansas City, FD 36731, CSX Transportation, Inc. – Acquisition and Operation – Rail Line of Meridian & Bigbee Railroad, L.L.C., FD 36727, CSX Transportation, Inc. – Trackage Rights Exemption – Kansas City Southern Railway Company, FD 36730; Alabama & Gulf Coast Railway LLC – Trackage Rights Exemption – CSX Transportation, Inc., FD 36724, Meridian & Bigbee Railroad, L.L.C. – Discontinuance of Incidental Overhead Trackage Rights – In Lowndes and Montgomery Counties, AL, AB 1335X; CSX Transportation, Inc. – Discontinuance of Trackage Rights Exemption – in Marengo and Choctaw Counties, AL and Lauderdale County, MS, AB 55 (Sub-No. 814X)

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

October 25, 2023

**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

NOVEMBER 8, 2023

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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
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EXPEDITED CONSIDERATION REQUESTED

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**Attorneys for Norfolk Southern Corporation and
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November 8, 2023

**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

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]

{{ [REDACTED] }} does not {{ [REDACTED] }}

{ [REDACTED] } As explained below, the {{ [REDACTED] }}
{{ [REDACTED] }} but instead when, {{ [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] }}

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]}}
 {{[REDACTED]}}}. Accordingly, that information should be redesignated as Confidential.

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

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

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

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

[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] } The fact that this { [REDACTED] } should be public knowledge [REDACTED]

[REDACTED] } Without access to this information, [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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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 {{ }}
188-189 Section 2.2(d)	HC	P	{{ }} 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 {{ }} 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 {{ }})
201	HC Section 12.3(a)	C and/or P	The material designated as "Highly Confidential" merely provides that {{ 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 {{

			 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