

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

CRYSTAL M. ZORBAUGH

(202) 663-7831 (Direct Dial)
E-Mail: czorbaugh@bakerandmiller.com

December 5, 2023

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VIA E-FILING

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

ENTERED
Office of Proceedings
December 5, 2023
Part of
Public Record

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; CSX Transportation, Inc. – Acquisition and Operation – Rail Line of Meridian & Bigbee Railroad, L.L.C., FD 36727

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 Motion to Allow for Completion of Discovery and Amend the Procedural Schedule,¹ which is being filed each of the above-captioned dockets, proceedings that collectively seek approval for what is hereinafter referred to as the “CPKC/CSXT Transcon Corridor Transaction.”

¹ The undersigned counsel for Norfolk Southern attempted to obtain the consent of CSXT and CPKC counsel to the requested modification of this procedural schedule. Neither agreed to the request. Instead, both CPKC and CSXT informed Norfolk Southern that they intend to produce additional documents tomorrow (December 6, 2023), and that, because of that, both would agree to grant Norfolk Southern a much more truncated three-day extension (from December 11 to December 14) of the Norfolk Southern deadline to comment on the minor application in FD 36732 and FD 36727 to allow Norfolk Southern a week to review the final CSXT and CPKC production anticipated for December 6, 2023 for analysis and integration into any comments and requests for conditions that would then be due on December 14. In return, Norfolk Southern also had to agree that, should CSXT decide that it needed a similar three-day extension to its response deadline, Norfolk Southern had to agree not to oppose such a request. CPKC also shared that it planned to serve discovery on Norfolk Southern at some point. Unfortunately, Norfolk Southern is required to submit the enclosed motion to protect its interests in these proceedings.

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

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; CSX TRANSPORTATION, INC.
– ACQUISITION AND OPERATION – RAIL LINE OF MERIDIAN & BIGBEE
RAILROAD, L.L.C., FD 36727**

**COMBINED NORFOLK SOUTHERN MOTION TO ALLOW FOR COMPLETION OF
DISCOVERY AND AMEND THE PROCEDURAL SCHEDULE**

Thomas E. Zoeller Hanna M. Chouest Julianne C. Freeman NORFOLK SOUTHERN CORPORATION 650 West Peachtree St NW 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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December 5, 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,
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MARENGO COUNTIES, ALABAMA, FD 36732; CSX TRANSPORTATION, INC.
– ACQUISITION AND OPERATION – RAIL LINE OF MERIDIAN & BIGBEE
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**COMBINED NORFOLK SOUTHERN MOTION TO ALLOW FOR COMPLETION OF
DISCOVERY AND AMEND THE PROCEDURAL SCHEDULE**

INTRODUCTION

Norfolk Southern Corporation and Norfolk Southern Railway Company (together, “Norfolk Southern”) respectively respectfully request the Surface Transportation Board (the “STB” or “Board”) extend the comment period provided for in the Board’s decisions served in the above-referenced proceedings (hereinafter the “CPKC/CSXT Transcon Corridor Transaction”), together with the directly related proceedings, each of which was filed on October 6, 2023.²

All comments, protests, requests for conditions, and any other evidence and argument in opposition, including filings on behalf of the U.S. Department of Justice (“DOJ”) and the U.S.

² The following are directly related to FD 36732: CSX Transportation, Inc.—Discontinuance of Trackage Rights Exemption—in Marengo & Choctaw Counties, Ala. & Lauderdale County, Miss., 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. The following are directly related to FD 36727: Alabama & Gulf Coast Railway – Trackage Rights Exemption – CSX Transportation, Inc., FD 36724; Meridian & Bigbee Railroad – Discontinuance of Incidental Overhead Trackage Rights – In Lowndes and Montgomery Counties, ALA., AB 1335X.

Department of Transportation (“DOT”), are currently scheduled to be submitted in all the referenced proceedings on December 11, 2023.³ Norfolk Southern requests an 18-day extension of the comment period until December 29, 2023. That extension would naturally flow over to other elements of the procedural schedule, but still allow the Board to act in accordance with the statutory evidentiary period.⁴ Should the Board grant the requested extension, responses and rebuttal in support of the applications would be due January 26, 2024.

An extension of the procedural schedule is appropriate in this case. Norfolk Southern demonstrates below that CSXT, CPKC, and G&W⁵ (collectively, “Applicants”) have (1) impeded the proper conduct of discovery preventing evaluation and review of matters addressed by the Applicants, (2) over-designated material contained in pleadings and discovery impeding the ability of the proper individuals at Norfolk Southern to view materials and thus contribute meaningfully to the review and analysis of such materials, and (3) shifted the burden of proof in the proceeding in a manner that, while it should not be permitted to stand, nevertheless creates significant impediments to the normal STB processes.

³ The procedural schedule in all of the proceedings have been synchronized by the Board. 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, Mississippi and Choctaw and Marengo Counties, Alabama, FD 36732, slip op. at 3 (November 9, 2023) (“CPKC Decision No. 2”); CSXT Transportation, Inc. – Acquisition and Operation – Rail Line of Meridian & Bigbee Railroad, L.L.C., FD 36727, slip op. at 3 (STB served November 9, 2022) (“CSXT Decision No. 2”) (moving the comment period deadline to December 11, 2023).

⁴ February 24, 2024, is the statutory deadline for concluding these evidentiary proceedings should the Board continue to view the transaction as a minor transaction. See 49 U.S.C. § 11325(d)(2) (“The Board must conclude any evidentiary proceedings by the 105th day after the date of [the Federal Register] publication of notice [required] under subsection (a) of this section.”)

⁵ A reference to “CPKC” shall be a reference to The Kansas City Southern Railway Company d/b/a CPKC. A reference to “CSXT” shall be a reference to CSX Transportation, Inc. A reference to “G&W” shall be a reference to Genesee & Wyoming, Inc., together with Meridian & Bigbee Railroad, L.L.C. (“MNBR”) and Alabama & Gulf Coast Railway LLC (“AGR”).

Norfolk Southern recognizes and appreciates the Board’s desire to proceed expeditiously with the CPKC/CSXT Transcon Corridor Transaction. Nonetheless, the CPKC/CSXT Transcon Corridor Transaction provides a significant change in freight rail operations related to Meridian, MS, requiring an extensive effort by Norfolk Southern to review and comment appropriately. Without CPKC, CSXT, and G&W (collectively the “Applicants”) providing Norfolk Southern with the appropriate supplemental information, which was both directed by the Board in its decisions served November 3, 2023,⁶ and requested directly by Norfolk Southern through discovery, in a timely manner, in complete form, and with proper confidentiality designations, Norfolk Southern is hamstrung in its efforts to meet the current procedural schedule. Absent the grant of an extension of the procedural schedule, the Applicants' actions have and will continue to prejudice Norfolk Southern’s ability to participate in the proceedings.

BACKGROUND

The Applicants filed the CPKC Application and the CSXT Application on October 6, 2023, together with five other directly-related actions. The Applicants also filed petitions for protective orders. The Applicants argued for bifurcation of the proceedings related to all of these matters, even while proposing that they all be handled on the same procedural schedule. CPKC relies on information provided in the CSXT proceeding, and CSXT relies on information provided in the CPKC proceeding. For example, CSXT asserted that its “second operating plan assume[d] that the CSXT Transaction, the CPKC Transaction, and all related transactions occur at or about the same time. The Adams Verified Statement [further] discusse[d] CSXT’s traffic

⁶ 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, slip op. at 12, (STB served November 3, 2023 (“CPKC Decision No. 1”)); CSX, Transportation, Inc. – Acquisition and Operation – Rail Line of Meridian & Bigbee Railroad, L.L.C., FD 36727, slip op. at 12, (STB served November 3, 2023 (“CSXT Decision No. 1”).

projections under the post-transaction scenario where the CSXT Transaction and the CPKC Transaction are each implemented” simultaneously.”⁷

On October 25, 2023, Norfolk Southern filed the Combined Norfolk Southern Notice of Intent to Participate and Request to Hold the CPKC/CSXT Transcon Corridor Transaction in Abeyance (“Consolidation Petition”), explaining how the two applications were in reality “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.”⁸ Norfolk Southern demonstrated that 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. Both CSXT and CPKC argued against consolidating the proceedings. CSXT responded, stating in part, that “CSXT [had] provided information in its Application regarding the overall effects on railroad operations and competition of all of the transactions, in the event that all of the transactions are implemented.”⁹ CPKC similarly argued that the Board had all of the information it needed and that “the CPKC-MNBR transaction is *unambiguously* pro-competitive and in the public interest.”¹⁰

On November 3, 2023, the Board issued a decision in FD 36732 and, separately, a decision in FD 36727, accepting for consideration the CPKC Application and the CSXT

⁷ See CSXT-1, filed in FD 36727, at APP-203.

⁸ See Combined Norfolk Southern Notice of Intent to Participate and Request to Hold the CPKC/CSXT Transcon Corridor Transaction in Abeyance filed October 25, 2023, at 2 (“NOI/NSR Request”).

⁹ CSXT’S Response to the Combined Norfolk Southern Notice of Intent to Participate and Request to Hold CPKC/CSXT Transcon Corridor Transaction in Abeyance, CSXT-3, filed in FD 36727 on October 27, 2023, at 7.

¹⁰ CPKC’S Reply to the Combined Norfolk Southern Notice of Intent to Participate and Request to Hold CPKC/CSXT Transcon Corridor Transaction in Abeyance, CPKC-3, filed in FD 36732 on October 27, 2023, at 2 (emphasis added).

Application, respectively.¹¹ The Board decided not to formally consolidate the two dockets at that time, reserving the right to “further address the consolidation issue in a subsequent decision.”¹² The Board, in each proceeding, ordered the Applicants to submit by November 21, 2023, certain additional information, in part to assist the Board’s evaluation of the transactions in each proceeding “in conjunction with” the transactions in the other proceeding.¹³ The Board-ordered information included, among other information, “any impacts anticipated on other rail operations.”¹⁴ Some, but not all, of the ordered information,¹⁵ was filed by the Applicants as directed on November 21, 2023.¹⁶

On November 8, 2023, Norfolk Southern filed a Motion to Redesignate the Highly Confidential Designation of Certain Materials (“Redesignation Motion”), noting that the over-designation of materials by CPKC impeded “a fulsome review of the issues present in the proceeding, especially given the expedited schedule currently governing this proceeding.”¹⁷ The Redesignation Motion addressed both material submitted by CPKC on October 6, 2023, in its Application and the revised replacement page CPKC supplied to Norfolk Southern on October 24, 2023, which purportedly “moot[ed] NS’s rationale for disclosure” of one portion of the

¹¹ CPKC Decision No. 1 and CSXT Decision No. 1.

¹² CPKC Decision No. 1, slip op. at 8, note 11; CSXT Decision No. 1, slip op. at 10, note 11.

¹³ CPKC Decision No. 1, slip op. at 11 and 14; CSXT Decision No. 1, slip op. at 11 and 14. Due to an issue with the publication of the associated notices in the Federal Register, the date for CPKC and CSXT to supplement their respective applications was moved to November 21, 2023. See CPKC Decision No. 2, slip op. at 3; CSXT Decision No. 2, slip op. at 3.

¹⁴ CPKC Decision No. 1, slip op. at 11; CSXT Decision No. 1, slip op. at 11.

¹⁵ As explained herein, some of the most critical information that the Board directed the Applicants to submit has not been submitted.

¹⁶ See CPKC’s Supplemental Information, Filed on November 21, 2023 (“CPKC-7”); CSXTs Supplemental Information, Filed on November 21, 2023 (“CSXT-9”)

¹⁷ See Motion to Redesignate the Highly Confidential Designation of Certain Materials, filed on November 8, 2023, at 3.

Application Norfolk Southern sought to have redesignated.¹⁸ CPKC responded to the Redesignation Motion on November 13, 2023, arguing that NS has “all of the data that NS might need to evaluate the potential operational impacts” of the transaction, including those “operational impacts on Meridian and the Meridian Speedway,” because CPKC has provided, among other things, “forecasts of the number of trains, cars, GTMs, and train lengths forecasted to move over the Myrtlewood gateway as a result of the transaction.”¹⁹ The Board has yet to rule on the requested motion, and so, to date, Norfolk Southern has not been able to share any information designated as “highly confidential” with the in-house personnel who are in the best position to understand the operational and competitive impacts of the information provided by the Applicants and to critically assess the assumptions underlying such information. On October 18, 2023, Norfolk Southern requested that CPKC agree to redesignate certain gross traffic volumes and diversion data as confidential to allow Norfolk Southern operating personnel to assist in preparing Norfolk Southern’s December 11, 2023. Norfolk Southern requested the same from CSXT on November 4, 2023. CPKC and CSXT both denied our request to redesignate certain gross volume data from their supplemental evidence.²⁰

¹⁸ CPKC’s Reply to NS’s Motion to Redesignate the Highly Confidential Designation of Certain Materials, CPKC-6, filed November 13, 2023, at 4.

¹⁹ Id. at 8 (failing to mention that the information that CPKC provided to the Board in its application failed to examine the impact of the proposed transaction on *any* rail infrastructure and routes in Meridian other than the MNBR yard).

²⁰ See Exhibit A - Email regarding Confidentiality Designations from David F. Rifkind to John Edwards, November 29, 2023; see Exhibit B - Email regarding Confidentiality Designations from Peter Denton to John Edwards, November 29, 2023.

The Board directed that discovery concerning the applications “may begin immediately”²¹ The Board also provided that “[t]he parties are encouraged to resolve all discovery matters expeditiously and amicably.”²²

On November 8, 2023, Norfolk Southern served its “First Discovery Requests Directed to CPKC.” On November 9, 2023, Norfolk Southern served its “First Discovery Requests Directed to CSX Transportation, Inc.” On November 14, 2023, Norfolk Southern served its “First Discovery Requests Directed to Meridian & Bigbee Railroad, L.L.C.” Each of those three discovery requests sought information and documents concerning both the CPKC Application and the CSXT Application, as well as their respective related proceedings. Because of time limitations, these discovery requests necessarily had to be served prior to Norfolk Southern’s receipt of the evidence and arguments made by CPKC and CSXT in their November 21, 2023, supplemental filings.

On November 21, 2023, Norfolk Southern submitted a Brief Update on the Status of Discovery and other Matters, describing in part the back and forth of the parties regarding discovery (“Status Filing”). Norfolk Southern will not reiterate here the details contained in the Status Filing but incorporates those details by reference. In short, Norfolk Southern was advised by Applicants that much of what was requested was not going to be produced, and that which was to be produced would be produced only on a rolling basis, despite the ticking clock Norfolk Southern faced to submit its comments.²³

²¹ See CPKC Decision No. 1, slip op at 12; CSXT Decision No. 1, slip op. at 12.

²² Id.

²³ Good cause justifies granting Norfolk Southern’s extension request at this time, due to the fact that many of the actions giving rise to the need for the request are the recent actions of the Applicants themselves. As is noted below, much of the discovery that has been received was delivered on or after December 1, 2023, with an undetermined subsequent amount coming in sometime on December 6, 2023,

Following the submission of the Status Filing, the Applicants began providing Norfolk Southern with discovery responses. CPKC and CSXT provided their first batch of discovery documents on November 27, 2023. CPKC recently served Norfolk Southern with hundreds of pages of discovery responses on December 4, 2023, just seven days prior to the current deadline for Norfolk Southern to file its comments. Moreover, CSXT has advised that Norfolk Southern be receiving additional discovery responses on Wednesday, December 6, 2023.

On November 23, 2023, MNBR filed General Objections to Norfolk Southern's First Discovery Requests Directed to Meridian & Bigbee Railroad, LLC, asserting that Norfolk Southern's discovery was improperly propounded and that Norfolk Southern may not serve MNBR with any written interrogatories, requests for admission, or requests for production of documents, except for any directly related to the MNBR discontinuance proceeding (Meridian & Bigbee Railroad – Discontinuance of Incidental Overhead Trackage Rights – In Lowndes and Montgomery Counties, ALA., AB 1335X). After several meet and confers between MNBR's counsel and Norfolk Southern's counsel, Norfolk Southern, on November 29, 2023, agreed to narrow Norfolk Southern's previous discovery requests from 30 to 13 in "a good faith effort to reduce the immediate burden on MNBR," but still retaining requests that would be "sufficient to provide Norfolk Southern with the critical information...necessary to protect NS[R]'s interests in the FD 36727 minor application, FD 36732 minor application, and related proceedings."²⁴ On December 1, 2023, MNBR provided its Responses and Objections to Norfolk Southern's

even though the Applicants are fully aware of the current December 11, 2023 deadline for comments and requests for conditions.

²⁴ See Exhibit C, email regarding Priority Discovery Requests from Crystal M. Zorbaugh to Eric M. Hocky, sent November 29, 2023.

Discovery Requests, including the production of a single Highly Confidential Document in response to Document Request No. 1.²⁵

On November 21, 2023, each of the Applicants provided supplemental information pursuant to Decision No. 1.²⁶ The discovery process related to information in Applicants' November 21, 2023, would not be completed in time to include that information in comments to be filed just 20 calendar days later. Moreover, obtaining responses from Applicants related to the initial applications has been a challenging and time-consuming effort, and has thus far been the focus of Norfolk Southern's discovery efforts.

Discovery is not the only challenge in these proceedings. The Applicants have bifurcated their intended transactions into two parallel tracks for consideration by the Board. They have fenced off information and analysis, particularly from those who might be in the best position to review and understand it, and fought and delayed discovery. In doing so, they have essentially shifted the burden of proof from themselves to those who might have concerns, and at the same time worked to keep the procedural schedule as expedited as possible to prevent Norfolk Southern and others who have concerns from sustaining the burden Applicants have foisted upon them. CPKC, CSXT, and G&W's conduct so far has stymied Norfolk Southern's participation

²⁵ See Exhibit D, email regarding MNBR response to Norfolk Southern's Discovery Requests from Eric M. Hocky to Crystal Zorbaugh, December 1, 2023.

²⁶ See CPKC Decision No. 1, slip op. at 9-11; CSXT Decision No. 1, slip op. at 9-11. MNBR submitted additional information with regard to Docket No. AB 1335X. See CPKC-7; See CSXT-9.

violating both the spirit of and letter of law and eviscerated Norfolk Southern's due process rights,²⁷ thereby necessitating the relief Norfolk Southern seeks herein.²⁸

NORFOLK SOUTHERN'S REQUEST TO EXTEND THE COMMENT PERIOD

Norfolk Southern respectfully requests an 18-day extension, to December 29, 2023,²⁹ as the deadline for submitting comments, protests, requests for conditions, and any other evidence or argument in opposition to the applications, including any filings of the DOJ and DOT. Norfolk Southern has done everything it can to adhere to the current procedural schedule; unfortunately, forces outside of Norfolk Southern's control have necessitated this extension. Additional time is needed for several reasons.

- a. The supplemental information provided by CPKC and CSXT does not fully respond to the Board's directive because it fails to address the impact of the CPKC/CSXT Transcon Corridor Transaction on operators on other rail lines.**

CPKC Supplemental Information: The Board directed CPKC "to detail any impacts anticipated on other rail operations, including (1) potential impacts on any passenger rail

²⁷ The Board will act to modify a procedural schedule in order to protect the procedural due process rights of the parties. See, e.g., Dakota, Minnesota & Eastern Railroad Corp – Construction into the Power River Basin, FD 33407 (STB Served November 3, 1998) (permitting leave to file supplemental evidence following the close of evidentiary record). See also, Norfolk Southern Railway Co. – Acquisition and Operation – Certain Rail Lines of the Delaware and Hudson Railway Co., Inc., FD 35873 (STB Served May 15, 2015), at 6 (rejecting the claim of SMART/TD-NY that the imposed procedural schedule was a violation of its due process rights because SMART/TD-NY had failed to present evidence that it has suffered actual harm as a result of the procedural schedule).

²⁸ The Board has long recognized that an appropriate procedural schedule provides "all parties due process" by providing those parties "ample time and opportunity for the submission of comments and replies." United States Department of Energy – Rail Construction and Operation – Caliente Rail Line in Lincoln, NYE, and Esmeralda Counties, NV, FD 35106 (STB Served April 11, 2008), slip op. at 2 (noting as well that such a procedural schedule will also enable the Board to make the decisions it must make in the relevant proceeding).

²⁹ This date assumes that CPKC and CSXT provide full answers to both Norfolk Southern's original discovery requests, and additional discovery requests Norfolk Southern anticipates related to the parties supplemental evidence, which NSR intends on serving on December 6 or 7, within 15 days.

operations that involve crossing the Western Line and (2) delays that may be occasioned because a line schedule to handle increased traffic due to route consolidations or traffic diversions.”³⁰ CPKC submitted narrative testimony, not supported by a verified statement or workpapers, that briefly described certain infrastructure and operations within the Meridian rail hub.³¹ With only the most superficial of reasoning, CPKC states categorically that “no delays to passenger or freight rail service should be occasioned on any line due to Transaction-related traffic”, in part because “Meridian can easily accommodate more cross traffic without negatively impacting fluid operations on NS’s line.”³² According to CPKC “CPKC is unaware of any specific concerns, complaints or alleged delays to NS’s operations as a result of any CPKC traffic or of CPKC’s dispatch and control of the crossovers.”³³ CPKC asserts, again without evidence, that the “CPKC-MNBR interchange of traffic at Meridian does not interfere with NS mainline operations today and that will not change as a result of the Transaction.”³⁴

In the NOI/NSR Request, filed October 25, 2023, Norfolk Southern first expressed its concern of “[w]hether the relevant economic analysis of a consolidated transaction may implicate broader impacts beyond local shippers on the two line segments themselves.”³⁵ The Meridian interchange is a crucial north-south connection for Norfolk Southern and the current infrastructure at Meridian, already strained, cannot support the anticipated increase in traffic resulting from the proposed transaction. Essentially, with its Supplemental Information (CPKC-

³⁰ See CPKC Decision No. 1 at 11.

³¹ See CPKC 7, submitted November 21, 2023.

³² See CPKC 7, submitted November 21, 2023, at 10.

³³ Id. Norfolk Southern intends to fully refute CPKC’s erroneous testimony suggesting Meridian operates without problem in its reply evidence.

³⁴ Id.

³⁵ See NOI/NSR Request at 12.

7). CPKC has argued that it is not broken now, so a couple more trains will not break it. That is not “analysis” sufficient for the Board’s purposes. As a result, because CPKC appears to be unwilling to provide an analysis requested by the Board, Norfolk Southern must undertake this effort.³⁶ Norfolk Southern intends to file additional discovery by mid-week in light of the failure of CPKC to provide a substantive response to the Board’s request for supplemental information.

Further, with CPKC’s “rolling discovery production”, Norfolk Southern has been deprived of critical information and is prejudiced given the December 11, 2023, comment and request for conditions deadline.³⁷ As discussed above, Applicants have informed Norfolk Southern that another tranche of documents will be produced tomorrow, December 6, 2023. Norfolk Southern must have sufficient time to review this production, and potential future productions, or be denied its right to participate in these proceedings in an effective manner.

CSXT Supplemental Information: CSXT also ignores the Board’s directive, identical to the order in CPKC Decision No. 1 as stated, *supra*, “to detail any impacts anticipated on other rail operations.”³⁸ In response, CSXT (CSXT-9) only addresses the “impacts anticipated on other rail operations” going east out of the line it seeks to acquire, so its response entirely excludes impacts to Meridian.³⁹ CSXT refers back to its application noting that the proposed transactions,

³⁶ Perhaps most telling with regard to the depth of “analysis” conducted for the applications is the fact that neither CSXT nor CPKC produced workpapers by those who purportedly performed such analysis and provided verified statements. See CSXT ROs to Norfolk Southern’s First Discovery Request, served November 22, 2023, at 34. See CPKC’s Objections and Responses to Norfolk Southern’s First Set of Document Requests, November 22, 2023, at 14. The lack of workpapers makes it impossible to replicate any true analysis either party actually may have done regarding impacts to traffic in and out of the Western Line and Eastern Line.

³⁷ See CPKC Decision No. 2 at 3.

³⁸ See CSXT Decision No. 1 at 11.

³⁹ See CSXT-9.

considered together, “will not result in any substantial impacts to downstream moves *on the CSXT network east of Montgomery*.” (Emphasis added.)⁴⁰ But, the Board’s directive was neither limited to the CSXT network nor the geographic region east of Montgomery. CSXT was directed to detail impacts “on other rail operations”. With CSXT also not addressing any such impacts anticipated on other rail operations that may occur due to the CPKC/CSXT Transcon Corridor Transaction, Norfolk Southern is again deprived of critical information and is similarly prejudiced by this lack of information given the December 11, 2023, deadline for the comment period.

As discussed above, CPKC and CSXT have failed to comply with the Board’s request “to detail any impacts anticipated on other rail operations” within their supplemental information. This significantly prejudices Norfolk Southern’s ability to analyze and provide comments and, if necessary, requests for conditions, on December 11 in accordance with the current procedural schedule.

b. CPKC, CSXT, and MNBR have failed to resolve all discovery matters “expeditiously and amicably” as directed by the Board.

In CPKC Decision No. 1 and CSXT Decision No. 1, the Board noted that “discovery may begin immediately” and encouraged the parties “to resolve all discovery matters expeditiously and amicably.”⁴¹ As discussed in its Status Filing, Norfolk Southern, in recognition of the truncated procedural schedule requested that CPKC, CSXT, and MNBR serve objections it might have to Norfolk Southern’s discovery requests within ten (10) days of the service of those requests. Instead, CPKC and CSXT served responses and objections to Norfolk Southern’s

⁴⁰ Id. at 22.

⁴¹ See CPKC Decision No. 1 at 12; See CSXT Decision No. 1 at 12.

discovery on Wednesday, November 22, 2023, and they informed Norfolk Southern that they would start producing documents beginning November 27, 2023, a mere two weeks before Norfolk Southern's comments would be due in response to the CPKC Application and the CSXT Application. Moreover, both CPKC and CSXT decided to produce documents on a "rolling basis," thus ensuring that even more time would be run off the clock.

CPKC and CSXT did start rolling production of documents relevant to Norfolk's Southern's request on November 27, 2023. The confidentiality designation of many of those documents continues to be problematic. Following Norfolk Southern's response to MNBR's objections and Norfolk Southern's November 29, 2023, accommodation, which narrowed Norfolk Southern's previous discovery requests from 30 to 13 requests, MNBR finally did provide its Responses and Objections to Norfolk Southern's Discovery Requests on December 1, 2023, accompanied by a single document, designated as "highly confidential".⁴² Additional discovery is anticipated to be produced on December 6, 2023, but Norfolk Southern does not know whether anything but "highly confidential" materials will be produced.

c. Discovery production remains incomplete today. CPKC produced its second rolling production on December 4, 2023, and CSXT plans an additional production, which is anticipated for this Wednesday.

CPKC's second production was served last evening, December 4, 2023, leaving Norfolk Southern just seven days to digest and review the documents before the current due date for submission of its comments and, if appropriate, requests for conditions. In the case of CSXT, certain documents appeared to have been erroneously designated "confidential" when they should have been designated "highly confidential" (pending Norfolk Southern's motion for redesignation with the Board). Norfolk Southern decided not to share such documents to protect

⁴² See Exhibit B.

inadvertent disclosure and in recognition of the role of the Board to decide the prior designation for certain materials.

That said, as discussed more fully with respect to the confidentiality designations of supplemental information, *infra*, the over-designation of documents as Highly Confidential in the respective document productions⁴³ continues to deprive Norfolk Southern of fully assessing the impact of the proposed transactions on Norfolk Southern's shippers, as key in-house personnel at Norfolk Southern cannot access these materials, even though such personnel would be subject to the terms of the applicable protective order. CPKC and CSXT have been reluctant from the start to redesignate the confidentiality designations and have now outright denied Norfolk Southern's request for the redesignation of data provided within their supplemental information.

On November 21, 2023, CPKC and CSXT continued their over-designation of gross traffic data and gross carloads in submitting such information as redacted in its public filings. Notwithstanding discussions among the parties, this over-designation concerning the November 21, 2023, filings remain unresolved.

Throughout this proceeding, CPKC and CSXT have either been reluctant or have outright refused to redesignate the confidentiality designations of gross traffic data and gross carloads. Review of these materials by Norfolk Southern personnel is critical to Norfolk Southern's ability to provide its comments and, if appropriate, requests for conditions, and any other evidence and argument in opposition to the CPKC and CSXT applications by December 11, 2023, even though (1) these in-house operational and other individuals are in the best position to review and

⁴³ The totality of MNBR's production (one document) was designated as Highly Confidential. Thirty (30) out of the eighty-three (83) documents produced by CSXT were designated as Highly Confidential. Fifty-four (54) out of the one-hundred forty (140) documents produced by CPKC were designated as Highly Confidential.

understand the relevance of the material in the context of the proposed transactions most efficiently and (2) said Norfolk Southern personnel would be subject to the protective order, which expressly provides that the information obtained in this proceeding can be used to present evidence in this proceeding **only** and for no other purpose.⁴⁴

The CPKC and CSXT's refusals concerning proper confidentiality designations therefore are effectively restricting the data from those individuals best qualified to fully understand its implications and to challenge the assumptions used by Applicants underlying such data. CPKC's and CSXT's over-designation of data and other materials as highly confidential is a significant obstacle to Norfolk Southern in protecting its interests given the current tight comment period deadline.

d. The Board has the discretion to modify the timeline of minor applications where appropriate.

“Section 11325(d)... does set time deadlines for minor transactions but allows for discretion on the part of the Board, where appropriate, and does not contain predetermined outcomes if the deadlines in section 11325(d) are not met. Indeed, the U.S. Court of Appeals for the D.C. Circuit, in rejecting the argument that section 11325 requires the Board to adhere to a strict timetable, stated that ‘forcing the Board to proceed pursuant to [section] 11325 before it has had an opportunity to determine where the public interest lies would defeat altogether the purpose of the agency's review.’” See Canadian National Railway Co. and Grand Trunk Corporation – Control – EJ&E West Co., FD 35087, Decision No. 13 at 18-19 (STB served July 25, 2008); quoting Western Coal Traffic League v. Surface Transportation Board, 216 F.3d 1168,

⁴⁴ See Norfolk Southern Status Report at 5, n. 14.

at 1172, 1175 (D.C. 2000). The information that the Applicants have provided for the Board's consideration raises significant public interest concerns about adverse impacts to other rail operation due to the CPKC/CSXT Transcon Corridor Transaction causing substantial delays or bottlenecks, even with the incremental increased traffic volumes claimed by CPKC. These impacts could not only significantly impede freight operations, but also passenger operations, on Norfolk Southern's rail lines. And given the current infrastructure and operational impediments facing rail traffic in and through Meridian, even the incremental additional traffic forecasted by Applicants could be the proverbial "straw that broke the camel's back" at this gateway, resulting in significant service disruptions to the shippers that depend on the national rail network for freight services. Here, the interests of Norfolk Southern and other interested parties would not be afforded protection if the Board adheres to the current comment period and would be in violation of due process.

The 18-day extension requested by Norfolk Southern is easily within the Board's discretion, to protect the interests of shippers and passenger rail and to ensure that the proposed transactions are, in fact, pro-competitive, as claimed by the Applicants. An 18-day extension would extend the comment period until December 29, 2023, with responses and rebuttal in support of the applications that would be due 30 days later on January 28, 2024. This would still be within the statutorily enforced close of the evidentiary period/record, which is February 26, 2024, the 105th day after the Board published the notice of the application.

Finally, granting this request is not likely to cause any harm to the Applicants. CSXT has already granted MNBR an extension of time on its lease. Employees are already in place and moving rail traffic, maintaining the rail lines, and performing all of the other obligations necessary to maintain rail operations. It was the Applicants' choice to submit this unified

transaction to the Board in the extremely unusual manner that it did -- bifurcated yet parallel-- to attempt to create narrow and artificial boundaries on the production of data. Similarly, it was the Applicants' choice not to perform the analysis normally performed for these types of transactions. Norfolk Southern should not be so clearly disadvantaged by Applicants' choices.

In all ways, this request meets the Board's standards for the grant of an extension of time. "Under 49 C.F.R. § 1104.7(b), the Board may, in its discretion, grant extensions of time 'for good cause.'"⁴⁵ The Board will grant an extension of time when it "would not prejudice any party and would ensure that the Board has the information needed to consider" the requested pending action.⁴⁶

CONCLUSION

This is a modest request that will serve the public interest without any harm to Applicants. Throughout its Motion to Extend the Comment Period and Amend the Procedural Schedule, Norfolk Southern has demonstrated why the current procedural schedule does not provide it with adequate time to prepare and present its case. CPKC and CSXT's supplemental information does not provide the information directed by the Board to describe the impacts on other rail operations, which is Norfolk Southern's chief concern. Without adequate supplemental information from CPKC and CSXT relating to anticipated impacts on other rail operations, Norfolk Southern simply cannot protect its interests, and the interests of its shippers. Norfolk

⁴⁵ See Application of the National Railroad Passenger Corporation under 49 U.S.C. § 24308(a) – Canadian National Railway Company, FD 35743 (STB Served February 13, 2018), slip op. at 1. See also The Louisville and Jefferson County Riverport Authority – Petition for Declaratory Order, FD 36463 (STB Served, December 3, 2020) (same, noting as well that "granting the extension will not cause undue delay").

⁴⁶ Texas Central Railroad and Infrastructure, Inc. & Texas Central Railroad, LLC – Petition for Exemption – Passenger Rail Line between Dallas and Houston, Tex., FD 36025 (STB Served July 15, 2019), slip op. at 1.

Southern also hosts Amtrak's Crescent service, and any adverse impact on Amtrak not only impacts Amtrak and its customers, but has a cascading effect on Norfolk Southern and its customers.

Norfolk Southern respectfully requests that the Board grants its 18-day extension to the comment period so that the purpose of the Board's review of the CPKC/CSXT Transcon Corridor Transaction is not frustrated. Good cause exists for the grant of this extension of time. The extension of time will not prejudice any party. The extension of time will enable the Board to have access to the full and complete information that it needs to consider the pending two applications. Norfolk Southern respectfully requests that the Board grant its request.

Respectfully submitted,

/s/ Crystal M. Zorbaugh

Rose Michele Nardi
John V. Edwards
Crystal M. Zorbaugh
BAKER & MILLER PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849

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 Motion to Allow for Completion of Discovery and Amend the Procedural Schedule” on all parties of record as well as the Secretary of Transportation and the Attorney General of the United States:

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; CSX Transportation, Inc. – Acquisition and Operation – Rail Line of Meridian & Bigbee Railroad, L.L.C., FD 36727

by first class mail, properly addressed with postage prepaid, or via more expeditious means of delivery.

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

December 5, 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;
CSX TRANSPORTATION, INC. – ACQUISITION AND OPERATION – RAIL
LINE OF MERIDIAN & BIGBEE RAILROAD, L.L.C., 36727**

**COMBINED NORFOLK SOUTHERN MOTION TO EXTEND THE COMMENT
PERIOD AND AMEND THE PROCEDURAL SCHEDULE**

Exhibit A

**Email regarding Confidentiality Designations from David F. Rifkind
to John Edwards, November 29, 2023**

From: Rifkind, David <David.Rifkind@stinson.com>
Sent: Wednesday, November 29, 2023 5:45 PM
To: John Edwards <jedwards@bakerandmiller.com>
Cc: Crystal Zorbaugh <czorbaugh@bakerandmiller.com>
Subject: RE: CPKC Supplemental Information -- Confidentiality Designation

John,

As you know, NS has a motion pending seeking redesignation of the confidentiality of certain traffic data in CPKC's Application. CPKC vigorously opposed the disclosure of such information on the grounds that they are competitively sensitive and there is no countervailing legitimate need for NS in-house personnel to access this data in order to evaluate and comment on the proposed transaction. Your request below covers the same data albeit at an even more granular level as well as additional data that are equally competitively sensitive, and it does not provide a compelling reason that NS in-house personnel should be granted access to such competitively sensitive data. Accordingly, we do not agree to Redesignate the data.

Best,

David

David F. Rifkind

Partner

STINSON LLP

1775 Pennsylvania Avenue NW, Suite 800

Washington, DC 20006-4605

Direct: 202.969.4218 \ Mobile: 202.253.3228 \ [Bio](#)

Assistant: WDC.LSSTeam@stinson.com \ 202.572.9910

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**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;
CSX TRANSPORTATION, INC. – ACQUISITION AND OPERATION – RAIL
LINE OF MERIDIAN & BIGBEE RAILROAD, L.L.C., 36727**

**COMBINED NORFOLK SOUTHERN MOTION TO EXTEND THE COMMENT
PERIOD AND AMEND THE PROCEDURAL SCHEDULE**

Exhibit B

**Email regarding Confidentiality Designations from Peter Denton
to John Edwards, November 29, 2023**

From: Denton, Peter <pdenton@Steptoe.com>
Sent: Wednesday, November 29, 2023 12:29 PM
To: John Edwards <jedwards@bakerandmiller.com>
Cc: Crystal Zorbaugh <czorbaugh@bakerandmiller.com>; LaRocca, Anthony <ALaRocca@steptoe.com>; Mordi, Sally <smordi@Steptoe.com>; 'Gitomer Louis (Lou@lgrailaw.com)' <Lou@lgrailaw.com>
Subject: RE: CSXT Supplemental Information -- Confidentiality Designations

John,

We have considered your request to redesignate certain data contained in our November 21 supplemental filing and we have concluded that redesignation would not be appropriate.

[REDACTED]

[REDACTED]

We do not believe NS's in-house personnel need access to these data to understand the transaction at issue here and they are commercially sensitive enough that they should remain Highly Confidential.

Thanks,
Peter

Peter W. Denton
Partner

Steptoe

Steptoe & Johnson LLP | 1330 Connecticut Avenue, NW | Washington, DC 20036
+1 202 429 6445 direct | +1 202 429 3902 fax | pdenton@Steptoe.com | www.steptoe.com

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**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;
CSX TRANSPORTATION, INC. – ACQUISITION AND OPERATION – RAIL
LINE OF MERIDIAN & BIGBEE RAILROAD, L.L.C., 36727**

**COMBINED NORFOLK SOUTHERN MOTION TO EXTEND THE COMMENT
PERIOD AND AMEND THE PROCEDURAL SCHEDULE**

Exhibit C

**Email regarding Priority Discovery Requests from Crystal M. Zorbaugh to Eric M. Hocky,
November 29, 2023.**

From: Crystal Zorbaugh

Sent: Wednesday, November 29, 2023 5:29 PM

To: Hocky, Eric M. <ehocky@clarkhill.com>; Marks, Justin J. <jmarks@ClarkHill.com>

Cc: John Edwards <jedwards@bakerandmiller.com>; Rose-Michele Nardi <rnardi@bakerandmiller.com>

Subject: Priority Discovery Requests

Eric,

As always, it was lovely chatting with you earlier. John and I, after consultation with our client, have narrowed our previous discovery requests from 30 to 13 requests. We hope that this good faith effort to reduce the immediate burden on MNBR will be sufficient to provide NSR with the critical information that we believe is necessary to protect NS's interests in the FD 36727 minor application, FD 36732 minor application, and related proceedings. Of course, without seeing your responses it is hard to predict the adequacy of any MNBR response. Similar to your email last evening, note because I consider this letter as part of conferring with you about our requests and your objections, I have not copied any other parties in the proceedings. We need a response to the interrogatories and requests no later than Friday at 2 pm. Note, that the attachment only includes the Request for Admissions, Interrogatories, and Document Requests, please refer to our November 14 for related definitions and instructions.

Lastly, I received your request earlier today to separate our requests by minor application, unfortunately, the requests have implications across both proceedings, and separating the requests by each minor transaction would be impossible.

Sorry for the rush but we continue to try to operate within the procedural schedule established by the Board, but there will come a point where we must pursue alternative resolution.

Best,

Crystal

Crystal M. Zorbaugh
Senior Counsel
Baker and Miller PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
(202) 663-7831 (Direct)
(202) 663-7849 (Fax)

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**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;
CSX TRANSPORTATION, INC. – ACQUISITION AND OPERATION – RAIL
LINE OF MERIDIAN & BIGBEE RAILROAD, L.L.C., 36727**

**COMBINED NORFOLK SOUTHERN MOTION TO EXTEND THE COMMENT
PERIOD AND AMEND THE PROCEDURAL SCHEDULE**

Exhibit D

**Email regarding MNBR response to Norfolk Southern’s Discovery Requests from Eric M. Hocky to
Crystal Zorbaugh, December 1, 2023**

From: Hocky, Eric M. <ehocky@clarkhill.com>

Sent: Friday, December 1, 2023 4:10 PM

To: Crystal Zorbaugh <czorbaugh@bakerandmiller.com>

Cc: david.hirsh@dentons.com <david.hirsh@dentons.com>; christopher.perry@amtrak.com <christopher.perry@amtrak.com>; Rifkind, David <david.rifkind@stinson.com>; Denton, Peter <pdenton@steptoe.com>; Mordi, Sally <smordi@steptoe.com>; Lou@lgrailaw.com <lou@lgrailaw.com>; theodore.hunt@dentons.com <theodore.hunt@dentons.com>; John Edwards <jedwards@bakerandmiller.com>; Rose-Michele Nardi <rnardi@bakerandmiller.com>; Spencer Naake <snaake@bakerandmiller.com>; Marks, Justin J. <jmarks@ClarkHill.com>

Subject: RE: MNBR Responses and Objections to Norfolk Southern's First Discovery Requests

Attached please find MNBR's responses and objections to the "priority" discovery requests.

I will shortly be producing a Highly Confidential document in response to Document Request No. 1. Because the discovery was served in both the CSXT and CPKC application proceedings, anyone on this email who would like to receive a copy, please confirm to me that you have submitted HC undertakings in both proceedings.

Eric

Eric M. Hocky

Attorney at Law

Clark Hill

Two Commerce Square, 2001 Market Street, Suite 2620, Philadelphia, PA 19103

+1 215.640.8523 (office) | +1 610.405.0550 (cell) | +1 215.640.8501 (fax)

ehocky@clarkhill.com | www.clarkhill.com