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January 2, 2024

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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
January 2, 2024
Part of
Public Record

Re: Port Authority Of Kansas City, Missouri – Construction And Operation Of
A Rail Line Of Railroad In Jackson And Clay Counties, MO, FD 36406

Dear Ms. Brown:

Enclosed for filing in the above proceedings are the “Reply Comments Of The Kansas City Southern Railway Company” (“Reply Comments”). These Reply Comments are being filed in response to the comments filed on December 11, 2023, by the Port Authority of Kansas City, Missouri (“Port KC”). Port KC’s comments were filed in response to a November 20, 2023, requesting Port KC to file a “verified supplement clarifying aspects of its proposal.” November Decision at 1. If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@mullinslawgroup.net

Sincerely,

/s/ William A. Mullins

William A. Mullins
Attorney for The Kansas City Southern Railway
Company

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36406

**PORT AUTHORITY OF KANSAS CITY, MISSOURI
– CONSTRUCTION AND OPERATION OF A LINE OF RAILROAD –
IN JACKSON AND CLAY COUNTIES, MO**

**REPLY COMMENTS OF
THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

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Dated: January 2, 2024

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36406

**PORT AUTHORITY OF KANSAS CITY, MISSOURI
– CONSTRUCTION AND OPERATION OF A LINE OF RAILROAD –
IN JACKSON AND CLAY COUNTIES, MO**

**REPLY COMMENTS OF
THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

The Kansas City Southern Railway Company (“KCSR”) submits these comments in the above-captioned proceeding before the Surface Transportation Board (“STB” or “Board”) in reply to the Verified Supplement of Jon Stephens filed on December 11, 2023 (“Stephens VS”). The Stephens VS was filed in response to the Board’s November 20, 2023, decision (“November Decision”). The November Decision requested the Port Authority of Kansas City, Missouri, (“Port KC” or “Petitioner”) to file a “verified supplement clarifying aspects of its proposal.” November Decision at 1. The November Decision was issued in response to the petition for an exemption from the prior approval requirements of 49 U.S.C. § 10901 to construct and operate a new rail line filed by Port KC on September 7, 2022 (“Petition” or “Petition for Exemption”), the Initial Comments of The Kansas City Southern Railway Company filed July 5, 2023 (“KCSR’s Initial Comments”) and Port KC’s letter reply to KCSR’s Initial Comments, filed July 25, 2023 (“Port KC’s Reply”).

For the reasons explained below, Port KC’s Reply confirms that Board should hold the Petition in abeyance until Port KC has come forward with definitive and concrete plans for connecting its proposed lines with the rail network, including any agreements with third parties

or identified any concrete proposals for imposing such arrangements using the Board's regulatory authority.

Overall, the Stephens VS fails to provide detailed plans and information and provides non-responsive answers to questions that KCSR has been trying to get answers to for over a year since the filing of the Petition. This is unfortunate and unnecessary. KCSR continues to believe that the MRT Project can be beneficial to the broader Kansas City community. This is why KCSR currently is not opposing the MRT Project itself. But to be a project that benefits everyone, it requires input and cooperation from everyone. KCSR wants to be part of that process. KCSR, and the broader CPKC of which it is a part, are fully committed to the growth, development, and improvement for the Kansas City region, its shippers, transportation providers, and its citizens. It is precisely because of that commitment that KCSR believes this project should be done right. Failure to obtain consensus and coordination regarding rail operations, transloading, road usage, and proper development of the surrounding property could lead to service problems, road congestion, blocked crossings, and reduce the overall competitiveness of the MRT Project, all results which are precisely the opposite of what could be achieved with full cooperation.

Rather than illuminating Port KC's construction and crossing plans, as requested by the Board, the Stephens VS simply recycles the very same vague and undefined outline of desired outcomes that Port KC previously submitted to the Board and that led the Board to issue the November Decision. The Stephens VS provides the Board, as well as Union Pacific Railroad Company ("UP") and KCSR, with nothing new except that Port KC may choose not to cross UP or KCSR at all to reach Kansas City Terminal Railway (KCTL), instead choosing to interchange

with just UP.¹ Further, the Stephens VS misstates the scope and substance of discussions between KCSR and Port KC about Port KC's notice of exemption.

The failure of Port KC to address fully the questions asked by the Board should lead the Board to pause the proceedings until Port KC complies with the November Decision's directions.² KCSR will continue to participate in good faith, but until Port KC is willing to come to the table with accurate and complete information and to make an effort to reach agreement with KCSR and UP about the "crossing" that Port KC alludes to but has yet to clearly describe, the Board should not act on the Petition or the NEPA analysis.

ARGUMENT

The November Decision directed Port KC to respond to three questions:

- (1) Port KC's plans (if any) for obtaining access over UP Main 1, the UP wye track, and the KCS line to route westbound traffic (i.e., the UP-KCS Route), including the status of any negotiations with UP and KCS;
- (2) Port KC's plans (if any) for obtaining access over UP Main 1, UP Main 2, and the Molycop industrial track to route eastbound traffic (i.e., the UP-Molycop Route), including the status of any negotiations with UP and Molycop; and
- (3) If Port KC cannot reach agreement with UP and/or KCS to access the UP-KCS Route, or with UP and/or Molycop to access the UP-Molycop Route, which portions of these routes Port KC intends to seek access to by filing a crossing petition under 49 U.S.C. § 10901(d).

¹ Port KC's comment that the project "could connect to the UP line instead of crossing to the KCTL for access to the interstate rail network," Stephens VS at 3, would leave MRT's shippers connected only to UP, rather than being able to access CPKC, NS, BNSF and UP via an independent switching arrangement through the KCTL.

² The Board should hold the Petition in abeyance pending completion of any negotiations and discussions with UP and KCSR. Once those discussions have occurred, Port KC could then submit whatever plans have been developed to the Board and then the Board could move forward with the Petition. See e.g., Savannah Industrial Logistics, LLC – Construction Exemption – In Effingham County, GA, FD 36723; Savannah Industrial Transportation, LLC – Lease & Operation Exemption – Line of Savannah Industrial Logistics, LLC In Effingham County, GA, FD 36723 (Sub-No. 1) (STB served Dec. 27, 2023) (holding petition for exemption for lease and operating authority in abeyance pending more information on construction related issues).

Port KC's Reply did not respond to any of these questions with any actual "plans" relating to the proposed project outlined in Port KC's Petition for exemption. The best that can be said about Port KC's Reply is that it at least confirmed that Port KC has no plan for connecting with KCTL, despite the Petition stating that such a connection was a necessary component of the proposal.³ Instead, Port KC now suggests that it might simply connect directly with UP. But this is not what the Petition proposed, and it would in any event not obviate the impacts on KCSR.⁴

With respect to Question No. 1, Port KC provided no "plans . . . for obtaining access"⁵ over either the UP or KCSR line. Through the Stephens VS, Port KC simply said that they wanted to negotiate such arrangements with KCSR and UP. That has been Port KC's vague and unchanging representation since the filing of its Petition.

Port KC's response was a non-response. The failure to provide any "plans" is reason enough for the Board to press pause on the matter as the failure to provide any detailed information or plans at this time shows that Port KC's Petition for Exemption was prematurely

³ Port KC's Petition was unequivocal:

Due to the geography of the area, Port KC *requires crossing agreements* for eastbound and westbound traffic. In order to access KCTL eastbound, MRT traffic will need to cross UPRR's Main 1 and Main 2. Moving Westbound, MRT traffic will need to move over UPRR Main 1 and a UPRR wye track and then will need to connect to a small segment of KCS line before entering KCTL owned and operated lines. Port KC's Proposed line requires the at-grade crossing of these UPRR and KCS rail lines and property. However, if these railroads are unwilling to enter into a voluntary crossing agreement, *Port KC will need to file a formal crossing petition with the Board.*

Petition at 13 (emphasis supplied).

⁴ Even Port KC's potential use of one mile of UP's track will not be without impact to KCSR. As previously noted to the Board, KCSR also operates over this portion of UP's main line track. *See* KCSR Initial Comments at 4. Pursuant to a trackage rights agreement with UP, KCSR uses this portion of UP track to connect traffic on KCSR's Mexico Subdivision with KCSR's Knoche Yard in Kansas City.

⁵ November Decision at 2.

filed. It appears that Port KC desires to obtain construction authority through an exemption in hopes of leveraging that authority in its negotiations with UP and KCSR, and if unsuccessful in reaching agreement(s), to then file a crossing petition and let the Board sort it all out. This is not how the process should work, and the Board should not allow its processes to be used as a negotiating tactic. The failure of Port KC to provide the Board with any additional details, plans, or maps, or even to set out the discussions that have taken place to date, means the Board should not move forward at this time with processing the Petition.

As to the status of negotiations with KCSR, the second part of Question No. 1, Port KC states that “exchanges with KCS[R] on the topic of the MRT Project to date have been limited to the filings by the parties in this docket.”⁶ *Id.* That is not accurate. As set forth in the attached Verified Statement of Mr. Michael Martin, Construction Design Manager for CPKC (“Martin VS” and attached as Exhibit A), there have been numerous in-person, phone, and email exchanges between Port KC and KCSR representatives, several of which included Mr. Stephens himself. As Mr. Martin attests, “KCSR’s exchanges with Port KC on the MRT Project have not been limited to the parties’ docket filings before the Board,” with “at least twenty-three (23) exchanged emails and at least three (3) meetings conducted in person, over the phone, or via Microsoft Teams between Port KC and KCSR/CPKC that related to the matter of Port KC’s desired crossing of KCSR’s track.” Martin VS at 1 and 4-5.

KCSR was regularly the initiator for these discussions, which were intended first to understand what Port KC was proposing, in order that discussions could be had to reach a resolution that addresses both Port KC’s desires and KCSR’s operational concerns. KCSR repeatedly advised Port KC that much more information was needed, including engineering

⁶ *Id.*

drawings of the proposed diamond's location and specifications, and Port KC assured KCSR that such information would be forthcoming. However, despite these assurances, Port KC has only repeated the same stated preference for a "crossing" that utilizes a mile-and-a-half of Class I main line track within the high-traffic Kansas City metro area. Indeed, the one common element in all the discussions with KCSR and with the representations to the Board has been Port KC's lack of detail, proposal, or specificity regarding Port KC's "plans" to use a half-mile of KCSR-owned main line tracks in the guise of "crossing" KCSR's tracks.⁷

As to Question No. 2, KCSR cannot opine on Port KC's potential fallback option of obtaining access over UP's tracks or the status of negotiations between UP and Port KC. The Stephens VS ignored the Board's question and only addressed the Molycop property. Even there, it was a one-sentence answer. This provides yet another example of why the Board should hold the Petition in abeyance as it waits for Port KC to provide the necessary specific and detailed information as directed.

As to Question No. 3, Port KC punted (again) by failing to identify the specific portion(s) of UP and KCSR track that would be the subject of a Port KC crossing petition. It offered to "withdraw its request for a PC&N^[8] . . . if that would alleviate concern from the railroads and the Board that a crossing petition from Port KC is imminent." Stephens VS at 3. To be clear,

⁷ As KCSR has previously noted, such a proposal will "cease to be a crossing within the meaning of the crossing statute and will instead become an issue of operational trackage rights or simply an appropriation of another carrier's right-of-way." *HolRail LLC—Construction & Operation Exemption—In Orangeburg & Dorchester Counties, SC*, FD 34421 (Sub-No.1), slip op. at 6 (STB served Feb. 9, 2007), *aff'd*, *HolRail, LLC v. Surface Transp. Bd.*, 515 F.3d 1313 (D.C. Cir. 2008). The Stephens VS failed to even discuss this precedent or explain if Port KC wants to literally cross KCSR's tracks via a diamond (and, if so, where) or to use KCSR's tracks via a half of mile of trackage rights. In the discussions between KCSR and Port KC, as discussed in the Martin VS, it appears that Port KC continues to want to operate on KCSR's tracks, not merely cross them.

⁸ The issuance of a public convenience and necessity ("PC&N") certificate is a pre-requisite to a party's ability to file a crossing petition under 49 U.S.C. §10901(d). See 49 U.S.C. §10901(c) and (d); *Keokuk Junction Ry. v. STB*, 292 F.3d 884 (D.C. Cir. 2002).

KCSR's concern is not that a crossing petition is "imminent." Rather, KCSR's concern is that Port KC has failed to provide any detailed information about how, when, what time, how many trains, what commodities, what specific tracks it intends to use, etc., for the "crossing" of KCSR's tracks. As the Martin VS discusses, KCSR has requested such information numerous times to no avail. Port KC has likewise now refused to provide the information to the Board.

Furthermore, Port KC's "commitment" to withdraw its PC&N request is no commitment at all. This is because Port KC explicitly reserves the right to request a PC&N certificate later. As such, Port KC's commitment means nothing. Port KC is not committing to talk to KCSR. Port KC is not committing to provide KCSR with the requested detailed information. Port KC is not committing to reaching an agreement before resubmitting its PC&N request. Until such commitments are made, the Board should continue to hold the NEPA process in abeyance and should further hold the Petition itself in abeyance.

CONCLUSION

For the reasons discussed above, the Board should hold the Petition and the NEPA analysis in abeyance until Port KC has come forward with definitive and concrete plans for connecting its proposed lines with the rail network, including any agreements with third parties or identified and concrete proposals for imposing such arrangements using the Board's regulatory authority.

Respectfully submitted,

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January 2, 2024

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Railway Company*

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36406

**PORT AUTHORITY OF KANSAS CITY, MISSOURI
– CONSTRUCTION AND OPERATION OF A LINE OF RAILROAD –
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EXHIBIT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36406

**PORT AUTHORITY OF KANSAS CITY, MISSOURI
– CONSTRUCTION AND OPERATION OF A LINE OF RAILROAD –
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VERIFIED STATEMENT OF MICHAEL MARTIN

My name is Michael Martin, and I am Construction Design Manager for CPKC. I am an employee of The Kansas City Southern Railway Company (“KCSR”), having joined KCSR in April, 2021, as Manager for Public Projects, Utility Agreements & Industrial Design.¹ Both prior and subsequent to Canadian Pacific Railway Limited being granted control of KCSR by the Board, I have been involved on behalf of KCSR in attempting to explore the particulars of the Port Authority of Kansas City, Missouri (“Port KC”)’s proposed access to/crossing of KCSR’s track as part of Port KC’s Missouri River Terminal (“MRT”) Project. I am submitting this verified statement in support of KCSR’s Reply Comments to the Verified Supplement of Jon Stephens, which was filed with the Board on December 11, 2023.

KCSR’s exchanges with Port KC on the MRT Project have not been limited to the parties’ docket filings before the Board. The following is a non-exhaustive summary of KCSR’s actual and attempted communications with Port KC to discuss the MRT Project, all of which followed Port

¹ I graduated from TCU (Texas Christian University) in 2003 with a B.S. in mechanical engineering. I have worked in the railroad industry for over 10 years, starting off with an engineering consulting company for several Class I railroads—BNSF, UP, and KCSR. I have worked both in the field as a construction manager and in the office as a designer and managers of projects that range from double main track, siding extensions, bridges, intermodal yards, automotive yards, RIP facilities, fueling facilities, and wash bays. I have completed U.S. projects in Texas, Louisiana, Oklahoma, Arkansas, Missouri, Mississippi, Tennessee, and New Mexico, as well as several projects in Mexico. I have worked for KCSR/CPKC for almost three years in the engineering department, starting as a public and industry projects/utility/right-of-entry manager, and I now manage all design projects for CPKC in our U.S. Southern Region

KC's filing of its exemption petition with the Board on September 7, 2022, through which KCSR first learned of Port KC's intention to connect to its MRT to the Kansas City Terminal Railway Company ("KCTL") "either over or across" the lines of KCSR. This summary is based upon my review of various emails between representatives of Port KC and KCSR, as well as my own conversations with Port KC's outside engineering consultants at the recommendation of Port KC.

1. On September 14, 2022, Mr. Warren Erdman—EVP of Administration & Corporate Affairs for KCSR—met with Mr. Stephens at KCSR's corporate headquarters, together with legal counsel for both KCSR and Port KC. During this meeting, Port KC's representatives conveyed that Port KC was seeking a "crossing diamond" across KCSR's track near the MRT Project. However, beyond this general statement, as well as the estimate that 3-4 unit trains would use the crossing each week, Port KC did not provide specifics as to the location or extent of its proposed crossing of KCSR.

2. On September 15, 2022, in response to KCSR's request for more detailed information, legal counsel for Port KC shared a technical map of the MRT Project with KCSR's legal counsel that showed Port KC's planned connection with KCTL. However, this map did not show any crossing of KCSR's track, and Port KC's counsel acknowledged that "more detail" would need to be provided on the section of KCSR's track that Port KC was proposing to cross.

3. In response to this September 15 communication and accompanying map, KCSR's legal counsel replied on September 16 expressing puzzlement over why a diamond was needed if Port KC was able to connect to KCTL without one. Port KC's counsel replied that same day, affirming his understanding that a diamond was indeed unnecessary and further carbon-copying in Port KC's engineering consulting firm, TranSystem, so that it could provide further explanation of the still-expected crossing of KCSR's track.

4. On September 16, Port KC and KCSR's legal counsel agreed that KCSR's Engineering Department would be in touch with TranSystems to discuss the particulars of Port KC's MRT Project proposal and specifically the contemplated crossing of KCSR's track.

5. On October 5, 2022, counsel for both KCSR and Port KC reaffirmed their awareness of the upcoming engineering conversation scheduled for October 7.

6. On October 7, 2022, I spoke with Jamie Hamm of TranSystems over the phone to understand the nature of and need for Port KC's requested crossing of KCSR's track. At this meeting, Mr. Hamm conveyed, for the first time, that Port KC wanted to operate its westbound traffic out of the MRT onto Union Pacific Railroad Company ("UP")'s main line track and from there south onto KCSR's main line track for approximately half a mile on our Pittsburg Subdivision (MP 5.4-5.9) before then connecting with KCTL.

7. On May 24, 2023, Mr. Erdman sent an email to Port KC's legal counsel expressing concern with Port KC's proposed "crossing" of KCSR. Mr. Erdman noted that alternative access options had been suggested as a possibility, and so he encouraged Port KC to have TranSystems contact the CPKC Engineering Department as soon as possible to explore those options before comments would need to be filed with the Board on KCSR's behalf. This communication from Mr. Erdman to Port KC's legal counsel included Mr. Stephens for Port KC. Port KC's legal counsel acknowledged receipt of Mr. Erdman's email and advised that he would "circle back" after speaking with Port KC staff.

8. On June 13, 2023, after not hearing from Port KC, Mr. Erdman sent another email to Port KC's legal counsel and again copied Mr. Stephens. Once again, Mr. Erdman advised that KCSR comments would be filed with the Board soon and asked if Port KC had any response to the operational concerns of KCSR or alternative access options for the proposed crossing.

9. On June 14, Mr. Erdman again contacted Mr. Stephens and Port KC's legal counsel regarding the need to discuss the MRT Project before comments were filed with the Board by KCSR. Later that day, Port KC's legal counsel replied to Mr. Erdman, copying Mr. Stephens and saying that Port KC's "proposal as provided to the STB provides the greatest opportunity for the success of the project."

10. On July 5, 2023, KCSR filed its Initial Comments with the Board, with pages 2-4 generally describing the parties' history of communication on the MRT Project to that point, specifically on the subject of Port KC's proposed crossing of KCSR's track. On November 17, 2023, I met over Microsoft Teams with Mr. Hamm and three additional representatives of TranSystems to discuss Port KC's plans for getting truck, rail, and barge access to the MRT. During that meeting, TranSystems indicated that Port KC was still planning to utilize one mile of UP main line track and half a mile of KCSR main line track for the proposed crossing, which Mr. Raiche and myself again communicated was operationally problematic for KCSR.

11. At the conclusion of the November 17 meeting, we agreed to meet again with TranSystems after January 1, 2024, to further explore possible alternative solutions to Port KC's proposed use of KCSR's main line track.

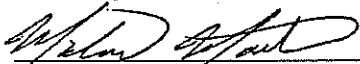
12. Since this November 17 meeting, other than two follow-up emails sent by TranSystems on November 30 and December 5, respectively, seeking to solidify the exact date in January for the next meeting, there has been no further communication from either Port KC or TranSystems to me or to my supervisor, Mr. Steve Raiche, CPKC Director Construction Projects & Public Works, regarding the planned use of KCSR's main line track to connect Port KC's MRT with KCTL in Kansas City.

13. In summary, between the filing of Port KC's Petition on September 7, 2022, and the filing date of this Verified Statement, there were at least twenty-three (23) exchanged emails and at least three (3) meetings conducted in person, over the phone, or via Microsoft Teams between Port KC and KCSR/CPKC that related to the matter of Port KC's desired crossing of KCSR's track.

VERIFICATION

I, Michael Martin, declare under penalty of perjury that I have read the foregoing Verified Statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this Verified Statement.

Executed January 2, 2024.


Michael Martin