

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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FINANCE DOCKET NO. 36873

**UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY
– CONTROL –
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY**

CPKC COMMENTS ON PROPOSED PROCEDURAL SCHEDULE

CANADIAN PACIFIC RAILWAY COMPANY

Cassandra P. Quach
7550 Ogden Dale Road S.E.
Calgary, AB T2C 4X9 Canada
Email: Cassandra.Quach@cpkcr.com

Nizam Hasham
1290 Central Parkway West, Suite 800
Mississauga, ON L5C 4R3 Canada
Email: Nizam.Hasham@cpkcr.com
Telephone: (888) 333-6370

**THE KANSAS CITY SOUTHERN RAILWAY
COMPANY**

David C. Reeves
427 West 12th Street
Kansas City, MO 64105-1403
Email: David.Reeves@cpkcr.com
Telephone: (816) 983-1387

David L. Meyer
LAW OFFICE OF DAVID L. MEYER
1105 S Street N.W.
Washington, D.C. 20009
Email: David@MeyerLawDC.com
Telephone: (202) 294-1399

Attorneys for CPKC

Dated: November 13, 2025

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APPENDIX: CPKC’S PROPOSED PROCEDURAL SCHEDULE

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Canadian Pacific Railway Company d/b/a Canadian Pacific Kansas City and CPKC, on behalf of itself and its U.S. rail carrier subsidiaries (collectively “CPKC”),¹ provides the following comments on the procedural schedule proposed in Decision No. 5 (“Proposed Schedule”).

This proceeding will consider a transaction that is not just another rail merger in a long line of rail mergers approved by the agency since the 1940 Transportation Act was passed.² There is little doubt that the evolution of the industry into the structure that exists today has served the public interest by enabling a financially strong, efficient, and competitive network of privately-owned railroads serving the transportation needs of rail customers, the U.S. economy, and American consumers.

¹ CPKC’s U.S. rail carrier subsidiaries include Soo Line Railroad Company; Central Maine & Quebec Railway US Inc.; Dakota, Minnesota & Eastern Railroad Corporation; Delaware & Hudson Railway Company, Inc.; The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company.

² The 1940 Act established the ICC’s authority to review and approve proposed carrier-initiated railroad mergers that it found would serve the public interest. *See Baltimore & Ohio R.R. v. United States*, 386 U.S. 372, 386-87 (1967).

The transaction being proposed, however, marks a sharp break. This proceeding will be the first in which the Board applies its 2001 Major Merger Rules (“2001 Rules”). Those rules raised the bar on the Board’s approach to proposed Class 1 combinations by eliminating the previous presumption in favor of further consolidation and instead imposing heightened proof requirements. This proceeding also will be the Board’s one, only, and final chance to determine whether the public interest is served by a rail merger “End Game” that leads the U.S. rail network down the path towards just two transcontinental duopolies. If this transaction is approved, there will be no turning back.

As a nearly two-centuries-long participant in the U.S. rail network,³ CPKC knows enough already to be confident that neither the proposed transaction nor the transcontinental duopoly it would spawn can be proven to serve the public interest. CPKC intends to participate in this proceeding to offer evidence showing why the path that best serves the public interest would be to deny approval outright.

For present purposes, CPKC offers comments on the Board’s Proposed Schedule aimed at ensuring that the momentous and novel issues posed by the proposed transaction receive the airing they deserve. As explained below, CPKC urges the following adjustments to the Board’s Proposed Schedule:⁴

- First, the Board should take advantage of the time period Congress provided for reviewing Class 1 mergers by adding approximately three months to the

³ One of CPKC’s family of U.S. rail carriers, the Delaware & Hudson Railway Company, Inc., was chartered in 1823 as the Delaware & Hudson Canal Company, Inc., and as such pre-dates even the storied Baltimore & Ohio Railroad Company, now part of CSX Transportation, Inc., which will celebrate the 200th anniversary of U.S. railroading in 2027.

⁴ CPKC’s Proposed Procedural Schedule, along with a redline showing changed from the Board’s Proposed Schedule, is set forth in Appendix A, and the specific components of CPKC’s proposal are discussed in detail in Sections II-V below.

evidentiary phase of the proceeding, which would still conclude that phase a month earlier than Congress called for.

- Second, CPKC believes the best use of the additional time would be to insert an additional round of evidence that allows non-Applicants to respond to the new evidence that Applicants will offer in response to the first round of comments on the Application. The 2001 Rules and the unique nature of this transcontinental-duopoly-creating transaction open the field to a range of new arguments and evidence that Applicants will not fully anticipate in their Application, including the downstream effects of the present transaction, whether the proposed transaction adequately “enhances competition,” and a host of other issues. The parties making those arguments and offering that evidence should have a chance to see what Applicants’ counterarguments are and respond to them, so that the Board can decide the issues on a fully developed record. Applicants would retain their right to file rebuttal and thus have the last word in support of their Application consistent with Board precedent.
- Third, the Board should consider moving the hearing before briefs are filed rather than after. This would acknowledge that Board practice at merger hearings has evolved from appellate court style oral arguments (as in *UP/SP*, *CSX/NS/Conrail* and *CN/IC*, for example) into a hybrid format that entails considerable new quasi-evidentiary content to which written responses may be necessary (as in *CP/KCS* and *CSX/Pan Am*).

- Fourth, to the extent the Board allows ex parte communications at all, it should establish windows for such communications that promote fairness and minimize interference with the preparation of formal evidentiary submissions.
- Fifth, no matter what schedule the Board adopts here, this proceeding will call for highly accelerated processes in order to function fairly and effectively. Therefore, when it establishes a procedural schedule the Board should instruct Administrative Law Judge Soulikias to issue discovery guidelines providing for expedited responses to discovery requests and processes for the expedited resolution of discovery disputes.

I. THE BOARD SHOULD ALLOCATE MORE OF THE STATUTORY PERIOD FOR EVIDENTIARY PROCEEDINGS TO THE DEVELOPMENT AND PRESENTATION OF EVIDENCE REGARDING THE EFFECTS OF THIS UNPRECEDENTED TRANSACTION

A. The Proposed Schedule Calls for an Evidentiary Phase that Is Four Months Shorter than the Time Allotted by Congress

The governing statute, at 49 U.S.C. § 11325(b)(3), allows for an “evidentiary” phase of this proceeding of up to 395 days from the filing of the Application (or one year from the Board’s notice of acceptance), plus a 90-day period for the Board’s issuance of a decision, which would occur on Day 485 if the Board used all of the allotted time. The ICCTA legislative history refers to this as an “overall 15-month maximum time limit” from acceptance, or 16 months from the filing of an application. ICC Termination Act of 1995, H.R. Rep. No. 104-422 (1995) (Conf. Report) at 192.

The Board’s Proposed Schedule, on the other hand, calls for the close of the evidentiary record as early as Day 270 (upon filing of Final Briefs), in which case a decision would be required by Day 360. In other words, the Board’s Proposed Schedule is potentially 125 days (more than four months) shorter than the statutory maximum period.

B. The Characteristics of the Proposed Transaction Call for the Board to Devote More Time to the Development of an Evidentiary Record

The Board should adopt a schedule for this proceeding somewhat longer than what has been proposed, in order to facilitate a fuller development of the evidentiary record. This proceeding will mark the first-ever application of the Board's 2001 Merger Rules, which established a host of new requirements in recognition that the next major Class 1 combination would raise novel and momentous public interest issues. Essentially, the Board will decide in this case whether it is in the public interest for the U.S. rail industry to evolve into a *permanent transcontinental duopoly structure*. The far-reaching and permanent consequences of this proposed change make this a question that warrants a through and probing review; it is not a question that should be answered on an expedited procedural timeline.

The words of Applicant Union Pacific Railroad Company ("UP") in 2000, commenting on the Board's then-proposed new Major Merger Rules, were prescient. UP explained to the Board that:

"Any combination among the six largest remaining railroads in North America would be part of and would drive what may parties at the Board's public hearing described as the 'end game' in rail consolidations. *Before approving any additional Class I merger, the Board should consider whether the 'end game' is in the public interest. This is the overriding public policy question before the Board.*"

Major Rail Consolidation Procedures, Ex Parte No. 582 (Sub-No. 1) ("EP 582"), Union Pacific's Comments and Initial Proposals (filed May 16, 2000) at 4 (emphasis added). UP was very clear about what it meant by "end game": "an industry structure consisting of two major railroads" and a public interest review asking whether "a two-railroad North American rail system would be in the public interest." *Id.* at 5. UP reiterated this point throughout the merger rules proceeding,

and it emphasized the momentous nature of the public interest choice the Board would be making:

“The important public policy question in the next major Class 1 merger proceeding will focus on whether a North American railroad duopoly is in the public interest. The Board will choose between a future in which two huge transcontinental systems develop single-line services in isolation from each other and a future in which all remaining railroads strive to develop more efficient services over remaining interline routes. ***This is an important choice that can be made only once, because mergers are likely to be permanent.***”

EP 582, UP’s Reply Comments on Proposed Merger Rules (filed Dec. 18, 2000) at 8 (emphasis added).

CPKC strongly agrees. And when the Board adopted the 2001 Major Merger Rules, it also agreed with UP. The Board stated that the scope of its public interest review in a case like this one would need to be “informed by the information we need to rule on what could likely be the *first step in an end-game situation in which only two or three competing transcontinental carriers would remain in North America.*” *EP 582*, 5 S.T.B. 539, 582 (2001) (emphasis added).

UP’s comments on the 2001 Merger Rules also addressed the scheduling requirements associated with any transcontinental merger proposal. UP implored the Board to consider the scope and importance of the public interest questions such a proposal would pose when establishing a schedule that would permit the Board to “build[] a proper record.” *EP 582*, UP Reply Comments (filed Dec. 18, 2000) at 34-35. UP regarded the *full 15-month statutory period* (from acceptance of an Application through Final Decision) as “reasonable for the next major Class I merger” because it “would permit the Board to apply its new rules, consider downstream effects, and review much more detailed service and market evidence.” *Id.* UP contended that an accelerated schedule, by contrast, “*would not be sufficient to determine the future structure of the*

North American rail system,” and would not be warranted for “a Class I merger *under rules that the Board has never applied.*” *Id.* at 35 (emphasis added).⁵

When it issued its 2001 Rules, the Board did not pre-judge the appropriate length of any particular future Class 1 merger proceeding. But the Board did observe that the statute provides a “16-month processing period from the time of filing the application,” and the Board rejected calls by some for a more expedited default schedule. Specifically addressing a potential future transcontinental rail merger proposal like the present one, the Board doubted whether “12 months”—what Applicants initially proposed here, and more time than Applicants now want the Board to spend examining their proposal⁶—would be sufficient.⁷ The Board believed that such an accelerated timeline “could be *an unduly short period* to build a record, allow for full public participation, and complete the necessary environmental documentation for the large transcontinental mergers that we may be asked to consider.” *EP 582*, 5 S.T.B. at 590 (emphasis added). The correctness of that judgment is all the more clear now.

CPKC appreciates that the Board may not end up needing all the facts developed during a one-year evidentiary period to judge whether the proposed transaction is in the public interest. Among other distinct possibilities, it may be very clear early on that the Applicants cannot

⁵ The other Class 1 merger proceeding that applied new merger rules for the first time—*UP/MP/WP*, 366 I.C.C. 462 (1982)—may be instructive. Although decided against the backdrop of a different statutory maximum schedule (31 months – 24 for evidentiary proceedings and 180 days for decision, *see* 49 U.S.C. § 11345 (1980)), that proceeding was the first decided following the ICC’s adoption of new merger rules in 1981 (while the proceeding was pending). That proceeding lasted a bit more than two years (specifically, 739 days), from Application in September 1980 to decision on September 24, 1982. *See* 366 I.C.C. at 486.

⁶ *See* Applicants’ Comments on the Proposed Procedural Schedule (UP-7/NS-7) (served Sept. 20, 2025) (shortening proposed period between Application and Decision by 45 days, to a decision no later than F+345).

⁷ The Board was addressing a 12-month timeline because it was what Norfolk Southern proposed in 2000. *See EP 582*, NS Comments in Response to ANPR (filed May 15, 2000) at 66-67.

establish a *prima facie* case supporting approval (even if they might submit a formally “complete” application, *see* 49 C.F.R. § 1180.4(c)(8)). Or it may quickly become obvious that the extraordinary risks associated with a transition to a transcontinental rail duopoly (both in terms of competitive harm and the potential need for more proactive regulatory intervention) make it impossible for the proponents of a transaction leading to that structure to satisfy their burden of showing that the public interest is served.

Conversely, it seems inconceivable that the issues associated with a transcontinental merger proposal like this one would be sufficiently straightforward or easily adjudicated in favor of approval to warrant an expedited evidentiary timeline and the risk that the Board would be compelled to decide the future of the U.S. rail network on an incomplete (or barely complete) record. The proposed transaction would alter literally the entire U.S. rail map and raise issues of the sort never before litigated (not to mention an unprecedentedly broad array of issues of the sort that have previously been litigated in different factual contexts). This transaction’s magnitude and breadth is a multiple of even the largest of the rail mergers ever before decided, and the slate of issues under the 2001 Rules is longer, not shorter. The Board should not short-change the record here by imposing on itself and interested parties a schedule less robust than what Congress has allowed.

CPKC submits that a 15-month schedule, which would reserve a 30-day buffer to allow flexibility to address developments during the course of the proceeding, would be more appropriate here. To borrow the Board’s words from 1999, when it rescinded its pre-ICCTA proposal to establish a standard procedural schedule for merger cases, a 15-month evidentiary phase here is “best suited to the full and fair development of the record” for this particular

transaction,⁸ which as UP previously explained, would ask the Board to decide the “overriding public policy question” whether “the ‘end game’ is in the public interest.”⁹

C. Past Proceedings Considered on Expedited Schedules Are Not Germane Here

CPKC recognizes that the Board and its predecessor have sometimes decided Class 1 merger cases faster than the statutory maximum.

Figure 1 below depicts the procedural timelines in each of the Major Merger proceedings since *BN/Santa Fe* in the mid-1990s. The Board regarded the scheduled adopted in both *BN/Santa Fe*, *UP/SP* as “expedited” ones.¹⁰

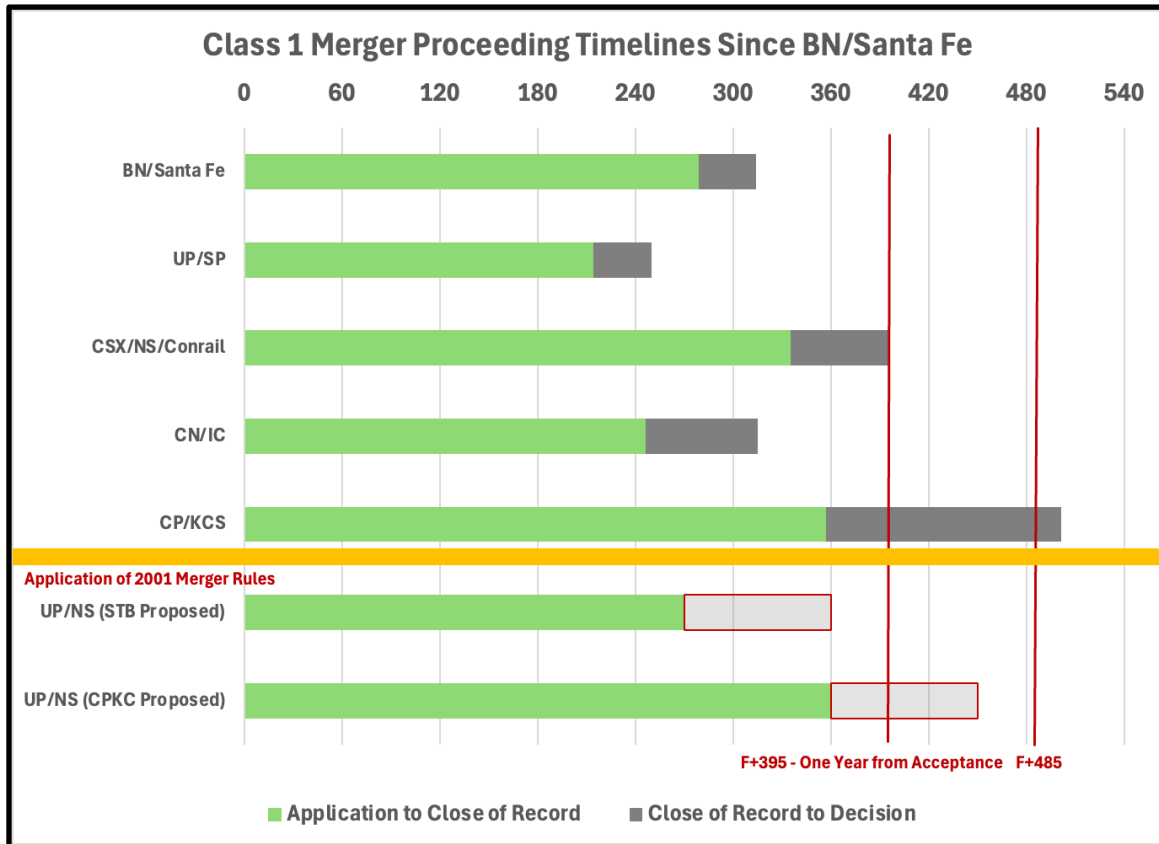
CPKC submits that the Board’s precedents for the expedited consideration of Class 1 mergers are not germane here. CPKC would draw attention to several aspects of the Board’s experience reviewing Class 1 mergers since the mid-1990s.

⁸ Cf. *New Procedures in Rail Acquisitions, Mergers & Consolidations*, Ex Parte No. 282 (Sub-No. 19) (STB served Nov. 24, 1999) at 2.

⁹ See pages 7-8 above.

¹⁰ *UP/SP*, Finance Docket No. 32760, 1995 WL 611827 (STB Decision No. 6, served Oct. 19, 1995) at *2.

FIGURE 1



First, the most recent case—*CP/KCS*—had an evidentiary phase lasting 357 days, just 38 days shy of the statutory maximum, even though it was decided under the pre-2001 rules and raised radically *less complex issues* than the transaction Applicants are proposing.¹¹

Second, the two post-ICCTA mergers that involved one of Applicants here—*UP/SP* and *CSX/NS/Conrail*—entailed a unique set of factors justifying accelerated consideration that have no application to the present matter. In *UP/SP*, the key feature of the transaction—and the

¹¹ The Board’s approval decision in *CP/KCS* was issued at Day 502 (March 15, 2023), 17 days beyond the statutory maximum.

Board’s public interest determination—was that Southern Pacific was in the advanced stages of deteriorating competitive relevance (and indeed very near financial failure).¹²

In *CSX/NS/Conrail*, the key feature was that CSX and NS had each withdrawn their separate bids to acquire all of then-recently-privatized Conrail, and were proposing a split of Conrail that would inject massive amounts of new rail-to-rail competition across the Northeastern United States, most notably between Chicago and the New York/New Jersey.¹³ The Board also took note of the Applicants claims—in the context of the unique plan to split Conrail into two—about “employment uncertainty among Conrail management and possible deterioration in Conrail service during the pendency of [the] proceeding.”¹⁴

In both *UP/SP* and *CSX/NS/Conrail*, then, there was a true public purpose in deciding these matters as rapidly as possible. UP’s proposed takeover of NS entails no similar exigency. NS is financially healthy and nearly revenue adequate.¹⁵ As NS’s CEO Mark George proclaimed in NS’s Annual Report for 2024, filed in early 2025 *before* UP’s offer to acquire NS: “We are well positioned to build on our success and consistently deliver competitive results for our stakeholders.”¹⁶ And Applicants plan no split of NS, and no use of a voting trust, such that there is no reasonable concern about NS’s and its employees’ ability to thrive during the pendency of a

¹² See *UP/SP Oversight*, Finance Docket No. 32760 (Sub-No. 21), Union Pacific’s Fifth Annual Oversight Report (UP/SP-384) (filed July 2, 2001) at 1 (“foremost among public benefits UP claims to have achieved through merger was “rescuing SP, which before the merger was providing the nation’s worst rail service and nearing a financial crisis”).

¹³ *CSX/NS/Conrail*, 3 S.T.B. 196, 247-48 (1998).

¹⁴ *CSX/NS/Conrail*, Finance Docket No. 33388 (STB Decision 6, served May 30, 1997) at 3.

¹⁵ NS had the third highest return on investment of the six Class 1 railroads and was within 0.16 percentage points of being revenue adequate in 2024. See *Railroad Revenue Adequacy – 2024 Determination*, *Ex Parte* No. 552 (Sub-No. 29) (STB served Aug. 20, 2025).

¹⁶ See https://filecache.investorroom.com/mr5ir_nscorp/1157/454601%202024%20AR%20FullPages%20_Web.pdf.

Board review proceeding. Despite this, the Board's Proposed Schedule budgets considerably *less time* to build an evidentiary record than the Board took in *CSX/NS/Conrail* (270 days here versus 335 in *CSX/NS/Conrail*).

Third, the expedited schedule used to review the other merger creating one of the current “big four” U.S. rail networks—*BN/Santa Fe*—also provides little relevant guidance. In that case, the ICC initially established an 18-19 month schedule calling for a decision by Day 535.¹⁷ While the case was pending, however, the ICC proposed regulations calling for a standard “6-month” procedural schedule in Major and Significant control transactions. *See New Procedures in Rail Acquisitions, Mergers & Consolidations*, Ex Parte No. 282 (Sub-No. 19), 1999 WL 1069105 (ICC served Jan. 26, 1995) (“*EP 282 1995*”).¹⁸ In light of that proposed rule, the ICC revised the *BN/Santa Fe* schedule, which ended up being decided on Day 314, a bit more than 10 months after the application was filed. *See BN/Santa Fe*, Finance Docket No. 32549 (ICC Decision No. 10, served May 7, 1995) at *2 (adopting revised schedule “track[ing] the schedule proposed” in *EP 282 1995*); *Burlington Northern Inc. & Burlington Northern R.R. – Control & Merger – Santa Fe Pacific Corp. & The Atchison, Topeka & Santa Fe Ry.*, 10 I.C.C.2d 661 (1995) (approving transaction).

Importantly, however, four years later, in 1999, following the Board's experience in *UP/SP*, the Board “decided to withdraw the rule proposed by the Commission in the 1995 NPR and to discontinue the Ex Parte No. 282 (Sub-No. 19) rulemaking proceeding.”

¹⁷ *BN/Santa Fe*, Finance Docket No. 32549 (ICC Decision No. 4, served Oct. 5, 1994).

¹⁸ That proposed rule was modeled on the schedule used in the *RGI/SP* proceeding, which involved the extraordinary exigency associated with Rio Grande's proposal to acquire Southern Pacific out of the voting trust into which it was exiled during Santa Fe's failed bid for SP and in compliance with the ICC's “orders directing [Santa Fe's holding company] to divest itself of SPTC following [the ICC's] denial of SFSP's application to acquire control.” *EP 282 1995* at *2.

New Procedures in Rail Acquisitions, Mergers & Consolidations, Ex Parte No. 282 (Sub-No. 19) (STB served Nov. 24, 1999) at 2. The Board explained that its “experience with the administration of major transaction cases” (*i.e.*, *UP/SP* and *CSX/NS/Conrail*) led it “to conclude that [it] should continue the case-by-case approach under which, as respects any particular major transaction, [it] can adopt a procedural schedule *best suited to the full and fair development of the record for that transaction.*” *Id.* (emphasis added).

Despite the no-longer applicable impetus to accelerate that the ICC applied in *BN/Santa Fe*, it still took longer to develop an evidentiary record than the Board is proposing here. (279 days from application to close of record in *BN/Santa Fe* versus 270 here).

* * *

For all of the reasons set forth above, CPKC urges the Board to allocate more of the time Congress has allowed to develop an evidentiary record in this proceeding.¹⁹

II. THE BEST USE OF THE ADDITIONAL EVIDENTIARY TIME WOULD BE TO ALLOW A SUR-REPLY ROUND OF EVIDENCE BETWEEN APPLICANTS’ REPLY AND PRIMARY AND RESPONSIVE APPLICANTS’ REBUTTALS IN SUPPORT OF THEIR APPLICATIONS

CPKC has given careful thought to how the Board could put the additional time provided in Congress’ procedural framework to the most productive use. The choice is not a simple one.

¹⁹ For all of the reasons set forth above, Applicants’ new proposal *to shorten* the procedural schedule they had previously advocated is unsupported and meritless. *See Applicants’ Comments on the Proposed Procedural Schedule (UP-7/NS-7)* (filed Oct. 20, 2025). The reasons Applicants give for accelerating the Board’s review further are skeletal, wrong, and arrogant. They ask the Board to prejudge the lack of complexity of the issue this monumental transaction will raise despite knowing that it will ask the Board to decide the long-term future of the U.S. rail network. They cite discovery being underway, well aware of the facts that discovery also began prior to applications being filed in *CP/KCS* and other merger cases and in any event only two parties have commenced discovery to date and Applicants have produced next to nothing in response those requests, instead offering sweeping objections and suggesting that parties instead review the “forthcoming Application.” And Applicants invoke Trump Administration executive orders despite being well aware that expediting review of a transaction that may grievously harm American businesses and the public interest is not remotely what those orders contemplate.

For example, CPKC would not object to having additional time to prepare comments or responsive applications addressing the consequential impacts of the transaction presented in the forthcoming application. Especially in the event that Applicants file in the early part of their 3-6 month window, analyzing the implications of the Application, conducting appropriate discovery, and preparing robust comments and/or responsive applications within 120 days (*i.e.*, by F+120) will be challenging.²⁰

Nonetheless, CPKC believes a more productive deployment of some of the extra time allowed within Congress' framework would be to establish a cadence of comment, response, and reply that allows for a more effective joining of the issues than would be possible within the comment and reply framework set forth in the Proposed Schedule. Specifically, CPKC proposes the cadence of evidentiary submissions outlined in the left column of Table 1 below. The right column of Table 1 compares CPKC's proposed sequence to the one set forth in the Proposed Schedule. Differences from the Proposed Schedule are shown in bold red.

²⁰ CPKC reserves the right to provide further comments on the schedule in light of the timing of Applicants' filing of their forthcoming application, including the extent of any advance notice they provide regarding a filing in advance of January 29, 2026, as provided by Decision No. 3. *See* Decision No. 3 (STB served Aug. 28. 2025) at 2 n.1.

TABLE 1

	CPKC PROPOSED REVISIONS	BOARD PROPOSED SCHEDULE
Application	F	F
Comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application or any related application(s) due (except filings from DOJ and DOT). Responsive, including inconsistent, applications due.	F+120	F+120
Responses to comments, protests, requests for conditions, and other opposition. Responses to responsive, including inconsistent, applications.	F+210	F+210
Sur-Replies (responsive to new material in “responses to comments, protests, requests for conditions, and other opposition”)	F+270	N/A
Rebuttal in support of the primary application and any related application(s).	F+300	F+210
Rebuttals in support of responsive, including inconsistent, applications.	F+300	F+240

The basic difference from the Proposed Schedule is to add *just 60 days* to the schedule to allow commenters (who would still file on F+120) to see what arguments and evidence Applicants (and others)²¹ offer in response to their comments and then respond to that new evidence. In this far-reaching proceeding, it is inevitable that the application will not fully anticipate all of the arguments and evidence submitted to show why the proposed transaction is

²¹ As the Board has consistently decided, responses to Comments may be filed by all interested parties, not just Applicants. This is critical to allow those affected by issues or requests for conditions raised by others to address the implications of those arguments. *See UP/SP*, Finance Docket No. 32760, 1996 WL 189464 (STB Decision No. 31, served Apr. 19, 1996) at *2 (*e.g.*, “non-applicant party that believes that it would be harmed by a condition proposed by another party is entitled to submit evidence in response to the requested condition”).

not in the public interest. When commenters submit evidence that has not already been fully addressed, Applicants no doubt will offer (at F+210) responsive evidence, potentially including extensive expert analysis by their economists and other consultants, in an effort to show that skeptics (or outright opponents) of the “UP Transcontinental Railroad” are wrong. Unless the parties filing comments at F+120 have an opportunity to submit a response to Applicants’ “Reponses” filed at F+210, Applicants’ new evidence will be effectively unchallengeable (except to the limited extent of potential cross examination via depositions of Applicants’ witnesses).

In this proceeding, far more than any others before it, there is a serious likelihood that vitally important issues will not be fully joined absent an opportunity for commenters to respond to Applicants’ new arguments and evidence. Consider two contexts among many: downstream effects and enhanced competition.

Downstream Effects. Under the 2001 Rules, for the first time merger applicants must “initiate a commentary” on downstream effects, “to which other parties could respond,” so as to provide the Board with the “information [it] need[s] to rule on what could likely be the first step in an end-game situation in which only two or three competing transcontinental carriers would remain in North America.” *EP 582*, 5 S.T.B at 582. It is easy to predict that Applicants will not be able to—or will not attempt to—predict and address all of the arguments that commenters might make about downstream effects: not just what effects are likely, but their implications for the public interest. Such an analysis has never been undertaken in any case, much less one posing the “transformative”²² and permanent implications for U.S railroad industry structure of this transaction. Under the Proposed Schedule, commenters would offer their views and

²² Applicants have underscored that they view their proposed transaction as “transformative.” *See* Applicants’ Motion to Permit Stakeholder Communications in Accordance with 49 U.S.C. § 11324(f) (UP-4/NS-4) (filed Aug. 29, 2025) at 6.

supporting evidence, and Applicants would respond. Applicants' responsive evidence likely would include new analysis and new data from economists and other consultants. However, there would be no real opportunity for commenters to point out flaws in Applicants' new analysis and data. At most, those parties could seek to expose such flaws through the limited tool of depositions cross-examining Applicants' reply witnesses.²³ CPKC submits that a better way to test the evidence would be (also) to allow for commenters to develop and submit evidence responding to the new arguments and evidence that Applicants' might file on F+210.

Enhanced Competition. Likewise, consider the upcoming debate about "enhanced competition." It is too early to know how Applicants will interpret the requirement of the 2001 Rules that Applicants demonstrate that their transaction *enhances and not merely preserves* competition. *See, e.g.,* 49 C.F.R. ss 1180.1(c)(4). CPKC is not seeking to pre-judge that interpretive question. Nonetheless, it does not seem far-fetched to predict that the question whether the proposed transaction adequately "enhances competition" will be a major point of debate in the upcoming proceeding. The Application may (or may not) offer one view on this question, and commenters may offer a contrary view. When Applicants respond to those contrary arguments, it is reasonable to expect them to offer a phalanx of new evidence addressing whatever points the commenters may choose to make. Is that evidence to go into the record un rebutted? CPKC submits it should not. Allowing sur-reply submissions of evidence and argument limited to responding to new evidence in the "response" round would allow for the

²³ The Board's decision establishing a procedural schedule in UP/SP, for example, noted that "[r]elevant excerpts of transcripts will be received in lieu of cross-examination, unless cross-examination is needed to resolve material issues of disputed fact." UP/SP, Finance Docket No. 32760, 1995 WL 611827 (STB Decision No. 6, served Oct. 19, 1995) at *7.

debate to be joined more effectively, shedding light on whether Applicants' evidence is meritorious or should be rejected or viewed with skepticism.

* * *

Allowing responsive sur-reply evidence would not get in the way of Applicants' right to close the record in support of their application.²⁴ Under CPKC's proposed revision to the Proposed Schedule, Applicants would retain an opportunity to submit rebuttal in support of their application 30 days after sur-replies are filed (*i.e.*, at F+300), which they could use to respond to any new content contained in the sur-replies. To save time in the schedule, CPKC proposes that Applicants' rebuttal in support of the primary application be filed simultaneously with any responsive applicants' rebuttal in support of their applications, also at F+300 as shown above.

CPKC's proposal, moreover, presupposes that the Board will enforce appropriate guardrails on the content of submissions in each round. In order for sur-replies to be useful, Applicants would be required to offer their primary responses to the F+120 submissions when they file their responses at first round of responsive evidence at F+210; Applicants' rebuttal submissions should be restricted to responding to new evidence and argument set forth in Sur-Replies on F+270. More generally, the Board should establish a strict no "sandbagging" rule, prohibiting parties (including Applicants) from laying back and submitting the meat of their evidence in a later round when adversaries have a limited opportunity to respond. Each round of

²⁴ The Board has in the past relied on this principle to disallow "rebuttals" by parties submitting comments and requests for conditions but not responsive applications. *See UP/SP*, Finance Docket No. 32760, 1995 WL 611827 (STB Decision No. 6, served Oct. 19, 1995) at *3.

evidence should be limited to *responses to what came before that could not reasonably have been anticipated*.²⁵

The merits of allowing a sur-reply round of comments in this proceeding are further demonstrated by the Board’s approach in informal rulemaking proceedings, where the issues at stake for the rail industry are often far less momentous than the outcome of this merger review. In informal rulemakings, all participants are entitled to at least two rounds of comments – both an opening and a reply, in which each initial commenter can respond to the argument and evidence of every other commenter. And in some such proceedings, the Board seeks *three rounds* of comments. The proceeding in which the Board adopted its 2001 Merger Rules is illustrative. In response to its Notice of Proposed Rulemaking in that proceeding, the Board received initial comments, reply comments, and rebuttal comments, all in addition to the *two previous rounds* of comments filed in response to the Board’s Advanced Notice of Proposed Rulemaking. *See Major Rail Consolidation Procedures*, Ex Parte No. 582 (Sub-No. 1) (STB served Oct. 3, 2000) at 37. The third round of comments was the only opportunity commenters had to respond to new arguments made by others in round two. The Board should build into its schedule for this proceeding a similar opportunity to receive evidence responding to any new evidence Applicants submit, or positions Applicants take, when they file their responses to the first round of comments, requests for conditions, and responsive applications. Doing so would allow this first-ever application of the 2001 rules can be as well informed as the rules’ adoption in 2001.

²⁵ The need for the Board to police the “responsiveness” of content of sequential submissions in merger cases would not be new. In past cases the Board has regularly been called upon to strike content that was not fairly responsive to new argument and evidence. *See, e.g., CP/KCS*, Finance Docket No. 36500 (STB Decision No. 24, served Sept. 13, 2022) at 4 (striking certain evidence “outside the scope of evidence permitted as a response,” which party had “every opportunity to submit earlier”).

III. THE BOARD’S SCHEDULE SHOULD PROVIDE FOR BRIEFING TO FOLLOW ANY HEARING

The Proposed Schedule calls for briefs to be filed *in advance* of any hearing the Board might choose to schedule, and it suggests that the hearing would “close the record,” with no further opportunity for submissions of evidence or argument. Were the Board’s hearing in this proceeding conducted in the manner of an appellate court-style “oral argument,” as it was in many past merger proceedings, the Board’s approach would make good sense. In such a framework, all of the evidence would have been placed in the record *prior to briefing*, and the “hearing” would merely allow counsel to present legal argument based on the completed record. That is how the ICC and Board proceeded in, for example, *UP/CNW*, *BN/Santa Fe*, *UP/SP*, *CSX/NS/Conrail*, and *CN/IC*.²⁶

The agency has long understood the key distinction between an oral argument and an evidentiary hearing. In previous major merger cases, for example, the Board tended to schedule *both* a hearing prior to briefing *and* a separate oral argument following briefing, though in some cases the hearing was dispensed with as unnecessary. The “hearing” was explicitly evidentiary, aimed at resolving disputed issues of fact, whereas the oral argument was an appellate-style discussion by counsel of the legal framework and its application to the previously adduced evidence in the record.²⁷

²⁶ See *UP/CNW*, Finance Docket No. 32133 (ICC Decision No. 4, served Jan. 28, 1993); *BN/Santa Fe*, Finance Docket No. 32549 (ICC Decision No. 31, served (June 13, 1995) (scheduling oral argument and encouraging parties to “use oral argument to state simply and concisely why the evidence it has submitted supports its position, and to call our attention to points that it believes are particularly important,” and emphasizing that “[t]he purpose of oral argument is not to restate the written arguments previously made, but to provide an opportunity for questions”); *UP/SP*, Finance Docket No. 32760 (STB Decision No. 41, served June 19, 1996) (scheduling oral argument); *CSX/NS/Conrail*, Finance Docket No. 33388 (STB Decision No. 70, served Mar. 12, 1998) at 2 (same); *CN/IC*, Finance Docket No. 33556 (STB Decision No. 30, served Jan. 28, 1999) at 2 (same).

²⁷ In *UP/CNW*, for example, the ICC’s procedural schedule provided for both a “hearing on all evidence,” from Days F+261 to F+265, and an “oral argument” on Day F+345, 15 days after reply briefs

In contrast, more recent experience shows that the Board’s merger “hearings” have trended towards being an amalgam of the two approaches: much oral argument, leavened with considerable new evidence as well. Parties offer new evidentiary content and the Board seeks and obtains new “commitments.” As a result, as a matter of due process interested parties should be afforded an opportunity to address the public interest merits of the transaction in light of all that transpires at these events.²⁸

In both *CP/KCS* and *CSX/Pan Am*, the Board recognized this reality and allowed for written submissions *after* the Board’s hearing was concluded. In *CSX/Pan Am*, the hearing was originally scheduled to precede briefing,²⁹ but later was rescheduled for after briefing.³⁰ At the hearing, however, the Board recognized that the hearing entailed considerable new factual content and it formally held the record open for several weeks to “allow for the filing of any additional written materials” that would “respond” to “things [that] come up at the hearing and were new information.”³¹ Then, in *CP/KCS*, the Board did the reverse. It originally scheduled the hearing to occur after briefing, but then revised the order of briefing after concluding “that it would be beneficial to receive final briefs *after the public hearing*.”³²

were due. *UP/CNW*, Finance Docket No. 32133 (ICC Decision No. 4, served Jan. 28, 1993). The schedule originally established for the *BN/Santa Fe* proceeding had the same structure. *See BN/Santa Fe*, Finance Docket No. 32549 (ICC Decision No. 4, served Oct. 5, 1994).

²⁸ Were the Board to allow *ex parte* communications during or after briefing, when there is no meaningful opportunity to respond to what is communicated in those sessions, the problem would be exacerbated.

²⁹ *CSX/Pan Am*, Finance Docket No. 36472 (STB Decision 4, served July 30, 2021) at 2 (“If a public hearing or oral argument is held, it will be held between the filing of rebuttals and final briefs.”).

³⁰ *CSX/Pan Am*, Finance Docket No. 36472 (STB Decision 6, served Dec. 10, 2021) at 3 (“Board finds that it would be more beneficial to hold the public hearing after the final briefs are submitted.”).

³¹ *CSX/Pan Am*, Finance Docket No. 36472, Hearing Transcript (Jan. 13, 2022) at 6.

³² *CP/KCS*, Finance Docket No. 36500 (STB Decision No. 22, served July 22, 2022) at 3 (emphasis added).

CPKC believes that the approach taken in *CP/KCS* worked well. After all the dust settled at the hearing, all parties had the opportunity to address a fully complete evidentiary record in their post-hearing briefs.³³ If the Board concludes here that briefing should instead precede the hearing, CPKC urges the Board to either (1) strictly limit the presentations at the hearing to appellate-court style oral argument, addressing previously submitted evidence and argument only,³⁴ or (2) allow for post-hearing written submissions to address new developments at the hearing.

CPKC also believes that the effectiveness of briefing could be improved by scheduling two rounds of briefing, with a second round that would concisely respond to arguments made by others in the first round so as to ensure a more effective joining of the issues. CPKC's specific proposal is set forth in Table 2 below, using the date for Rebuttals in Support of Primary and Responsive Applications as the starting point.

³³ To the extent the Board's goal is to receive synopses of the issues in advance of a hearing as a way of helping the Board assess whether a hearing is warranted, or to prepare for one, it could achieve that objective by calling for very short (perhaps 5-10 page) pre-hearing submissions outlining each hearing participant's key legal and evidentiary points, followed by more-robust post hearing submissions.

³⁴ Were the Board to adopt this approach, it should expressly preclude the submission of new evidence and argument once briefs are filed.

TABLE 2

	CPKC PROPOSED SCHEDULE	BOARD PROPOSED SCHEDULE
Rebuttal in support of the primary application and any related application(s).	F+300	F+210
Rebuttals in support of responsive, including inconsistent, applications.	F+300	F+240
Pre-hearing summaries of position and supporting evidence due (maximum 10 pages).	F+310	N/A
Hearing	F+315-319 (if necessary)	TBS
Opening Briefs	F+340	F+270
Reply Briefs (Close of Record)	F+360	N/A

CPKC believes that injecting an extra 20 days for reply briefing would be an effective use of some of the remaining time in Congress’ one-year evidentiary period (along with the insertion of a round of sur-reply comments and potential additional time for the preparation of comments). Under CPKC’s proposed schedule, the record would close with reply briefs at F+360, still 35 days short of the statutory maximum time period.

IV. TO THE EXTENT THE BOARD ALLOWS EX PARTE COMMUNICATIONS, IT SHOULD ESTABLISH WINDOWS FOR SUCH COMMUNICATIONS THAT PROMOTE FAIRNESS AND MINIMIZE INTERFERENCE WITH DEVELOPMENT OF A FORMAL RECORD

CPKC has already explained why the Board should take the utmost care in ensuring that its processes for reviewing the Application—along with comments thereon and potential responsive or inconsistent applications—are thorough, fair, and efficient, and the implications of these principles for the potential authorization of ex parte communications on substantive matters in this proceeding. *See* CPKC Reply to Applicants’ Motion to Permit Stakeholder Communications (CPKC-4) (filed Sept. 19, 2025). In accord with Decision No. 5 (at 4 n.9), CPKC will limit its further comments relating to ex parte communications to matters of

scheduling. CPKC believes that, if the Board authorizes ex parte communications at all, its schedule for such communications should be fair and allow for comparable access for all participants in the proceeding.

In general, CPKC believes that ex parte communications would be most valuable to the Board (again, if allowed at all) as a means of providing parties filing evidence to come before the Board and Board staff to explain their evidence and its implications. This goal can be fully accomplished in the period immediately following each round of evidentiary submission. CPKC therefore urges that ex parte communications be allowed *only* during the period immediately following each evidentiary round. Such a limitation would have at least two benefits: (1) it would allow other parties to review the record of any ex parte communications and respond to them in the next round, and (2) it would create a “quiet period” during the weeks leading up to each round of evidentiary submissions that would allow interested parties to work on those submissions without the chaos of monitoring the docket for ongoing communications.

CPKC specifically proposes that the Board limit the period for ex parte communications to discrete windows shown in Table 3 below. That Table uses as a starting point the revised schedule CPKC outlines in Table 1 above and provides for windows of varying duration depending on the amount of time available between evidentiary rounds.

TABLE 3

	CPKC PROPOSED SCHEDULE	WHEN WOULD EX PARTES BE ALLOWED?
Application	F	From F+1 to F+60 [60-day window, ending 60 days before next round]
Comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application or any related application(s) due (except filings from DOJ and DOT). Responsive, including inconsistent, applications due.	F+120	From F+121 to F+180 [60-day window, ending 30 days before next round]
Responses to comments, protests, requests for conditions, and other opposition. Responses to responsive, including inconsistent, applications.	F+210	From F+211 to F+240 [30-day window, ending 30 days before next round]
Sur-Replies (responsive to new material in “responses to comments, protests, requests for conditions, and other opposition”)	F+270	From F+271 to F+280 [10-day window, ending 20 days before next round]
Rebuttal in support of the primary application and any related application(s).	F+300	From F+301 to F+305 [5-day window, ending 10 days before hearing]
Rebuttals in support of responsive, including inconsistent, applications.	F+300	From F+301 to F+305 [5-day window, ending 10 days before hearing]
Hearing	F+315-321 (if necessary)	N/A

V. OTHER PROCEDURAL MATTERS TO FACILITATE EFFECTIVE EXPEDITED FACT-FINDING

No matter what precise schedule the Board adopts here, time for the development of an evidentiary record will be quite short. Non-applicants in particular will have precious little time to assess the application,³⁵ conduct appropriate discovery of relevant facts, and prepare their

³⁵ Applicants, by contrast, have complete control over when (and whether) to file an application, and there has thus been no limit on the time they have to develop whatever case they choose to present.

responsive evidence. As it has done in prior merger cases, the Board should take steps to ensure that discovery is responded to promptly and that discovery disputes are resolved swiftly.

In past cases, the Board's decision establishing a procedural schedule has admonished the parties in this regard. The Board should do so again here. The Board also should adopt—or instruct Administrative Law Judge Soulikias to adopt—a set of Discovery Guidelines that reinforce and implement those principles. Such Guidelines were ordered in *UP/SP*, *CSX/NS/Conrail*, and *CN/IC*.³⁶ CPKC believes that Discovery Guidelines here should include at least the following elements:

- Rapid timelines (*e.g.*, within five days as in *UP/SP* and other prior cases³⁷) for serving written objections to discovery, so that disputes can be resolved promptly. A corollary to this is the need for a clear obligation for parties responding to discovery to distinguish between “boilerplate” objections and those that have led (or will lead) to documents (or categories of documents) *actually being withheld*, to avoid wasting time with disputes that turn out to be immaterial.
- Rapid timelines for the completion of responses to interrogatories and production of documents (*e.g.*, generally within 15 days as in prior cases), including an obligation to produce documents on a rolling (or, as in the *UP/SP Discovery Guidelines*, “as-available”) basis.³⁸

³⁶ See *UP/SP*, Finance Docket No 32760, Order Adopting Discovery Guidelines (STB served Dec. 7, 1995) (“*UP/SP Discovery Guidelines*”); *CSX/NS/Conrail*, Finance Docket No. 33388 (STB Decision No. 10, served June 27, 1997) (adopting “*Conrail Discovery Guidelines*”); *CN/IC*, Finance Docket No. 33556 (STB Decision No. 18, served Nov. 4, 1998) (“*CN/IC Discovery Guidelines*”).

³⁷ See *UP/SP Discovery Guidelines*, ¶ 1; *Conrail Discovery Guidelines* ¶ 16; *CN/IC Discovery Guidelines*, ¶ 15.

³⁸ See *UP/SP Discovery Guidelines*, ¶ 1; *Conrail Discovery Guidelines* ¶ 17; *CN/IC Discovery Guidelines*, ¶ 16.

- Expedited handling of discovery disputes by the ALJ, including processes facilitating such resolution (perhaps including a standing weekly discovery conference, as in prior cases),³⁹ and rapid resolution of appeals to the Board.⁴⁰
- A clear obligation to make any witness available for deposition in the Washington, DC area (or other location by agreement of all parties planning to attend) promptly following the submission of the witness' testimony.⁴¹
- An obligation (beyond what Board's general discovery rules require) to supplement document production for certain categories of documents, such as communications with third parties about the transaction and its effects.

³⁹ See *UP/SP Discovery Guidelines*, ¶ 2; *Conrail Discovery Guidelines* ¶ 18; *CN/IC Discovery Guidelines*, ¶ 17.

⁴⁰ In *CSX/NS/Conrail*, for example, the Board provided for appeals from ALJ discovery rulings to be filed "within 3 working days of the date of his decision, and any response to any such appeal ... within 3 working days thereafter." *CSX/NS/Conrail*, Finance Docket No. 33388 (STB Decision No. 6, served May 30, 1997) at 7.

⁴¹ See *UP/SP Discovery Guidelines*, ¶ 6; *Conrail Discovery Guidelines* ¶ 12; *CN/IC Discovery Guidelines*, ¶¶ 10-11.

CONCLUSION

CPKC urges the Board to modify the Proposed Procedural Schedule as set forth above.

Respectfully submitted,



CANADIAN PACIFIC RAILWAY COMPANY

Cassandra P. Quach
7550 Ogden Dale Road S.E.
Calgary, AB T2C 4X9 Canada
Email: Cassandra.Quach@cpkcr.com

Nizam Hasham
1290 Central Parkway West, Suite 800
Mississauga, ON L5C 4R3 Canada
Email: Nizam.Hasham@cpkcr.com

Telephone: (888) 333-6370

**THE KANSAS CITY SOUTHERN RAILWAY
COMPANY**

David C. Reeves
427 West 12th Street
Kansas City, MO 64105-1403
Email: David.Reeves@cpkcr.com
Telephone: (816) 983-1387

David L. Meyer

LAW OFFICE OF DAVID L. MEYER
1105 S Street N.W.
Washington, D.C. 20009
Email: David@MeyerLawDC.com
Telephone: (202) 294-1399

Attorneys for CPKC

Dated: November 13, 2025

APPENDIX: CPKC’S PROPOSED PROCEDURAL SCHEDULE⁴²

F	Primary application and any related application(s) filed.
F+30	Board notice of acceptance of primary application and any related application(s) to be published in the Federal Register.
F+45	Notices of intent to participate due.
F+60	Proposed Safety Integration Plan (SIP) due.
F+75	Descriptions of anticipated responsive, including inconsistent, applications due. Petitions for waiver or clarification with respect to such applications due.
F+115	Responsive environmental information and environmental verified statements for responsive, including inconsistent, applicants due.
F+120	Comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application or any related application(s) due (except filings from DOJ and DOT). Responsive, including inconsistent, applications due.
F+135	Preliminary comments from DOJ and DOT, if any, due.
F+150	Notice of acceptance of responsive, including inconsistent, applications, if any, published in the Federal Register.
F+210	Responses (by Primary Applicants and other parties that filed at F+120) to comments (including those of DOJ and DOT, if any), protests, requests for conditions, and other opposition due. Responses (by Primary Applicants and other parties that filed at F+120) to responsive, including inconsistent, applications due.
F+270	Sur-Replies due (by parties other than Primary Applicants, responsive to new material in “responses to comments, protests, requests for conditions, and other opposition” and “responses to responsive, including inconsistent, applications”).
F+300	Rebuttal in support of the primary application and any related application(s) due.
F+300	Rebuttals in support of responsive, including inconsistent, applications due.
F+310	Pre-hearing summaries of position and supporting evidence due (maximum 10 pages).
F+315-319	Public hearing (if necessary).
F+340	Opening post-hearing briefs due.
F+360	Reply post-hearing briefs due. (Close of the record.)
F+395	Last Date for close of the record pursuant to 49 U.S.C. § 11325(b)(3).
TBD	Service date of final decision.

⁴² Windows for ex parte communications omitted.

REDLINE SHOWING CPKC PROPOSED CHANGES TO BOARD'S PROPOSED SCHEDULE

F	Primary application and any related application(s) filed.
F+30	Board notice of acceptance of primary application and any related application(s) to be published in the Federal Register.
F+45	Notices of intent to participate due.
F+60	Proposed Safety Integration Plan (SIP) due.
F+75	Descriptions of anticipated responsive, including inconsistent, applications due. Petitions for waiver or clarification with respect to such applications due.
F+115	Responsive environmental information and environmental verified statements for responsive, including inconsistent, applicants due.
F+120	Comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application or any related application(s) due (except filings from DOJ and DOT). Responsive, including inconsistent, applications due.
F+135	Preliminary comments from DOJ and DOT, if any, due.
F+150	Notice of acceptance of responsive, including inconsistent, applications, if any, published in the Federal Register.
F+210	Responses <u>(by Primary Applicants and other parties that filed at F+120)</u> to comments (including those of DOJ and DOT, if any), protests, requests for conditions, and other opposition due. Responses <u>(by Primary Applicants and other parties that filed at F+120)</u> to responsive, including inconsistent, applications due. Rebuttal in support of the primary application and any related application(s) due.
<u>F+270</u>	<u>Sur-Replies due (by parties other than Primary Applicants, responsive to new material in “responses to comments, protests, requests for conditions, and other opposition” and “responses to responsive, including inconsistent, applications”).</u>
<u>F+300</u>	<u>Rebuttal in support of the primary application and any related application(s) due.</u>
F+240 <u>F+300</u>	Rebuttals in support of responsive, including inconsistent, applications due.
F+270	Final briefs due.
TBD <u>F+310</u>	<u>Pre-hearing summaries of position and supporting evidence due (maximum 10 pages).</u>
<u>F+315-319</u>	Public hearing (if necessary).
<u>F+340</u>	<u>Opening post-hearing briefs due.</u>
<u>F+360</u>	<u>Reply post-hearing briefs due.</u> (Close of the record.)
<u>F+395</u>	<u>Last Date for close of the record pursuant to 49 U.S.C. § 11325(b)(3).</u>
TBD	Service date of final decision.

CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of November, 2025, a true and correct copy of the foregoing CPKC's Comments on Proposed Procedural Schedule was served by first-class mail or email on all parties of record in this proceeding, the Secretary of Transportation, the Attorney General of the United States, and Administrative Law Judge Jenifer Soulikias.

/s/ David L. Meyer
David L. Meyer