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SERVICE DATE – JULY 21, 2026

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 32760 (Sub-No. 46)

BNSF RAILWAY COMPANY—TERMINAL TRACKAGE RIGHTS—KANSAS CITY SOUTHERN RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY

Decision No. 16

Digest:[1] In this decision, the Board establishes compensation terms for BNSF Railway Company's use of the terminal trackage rights authorized by the Board in a prior decision.

Decided: July 21, 2026

By decision served on July 5, 2016, the Board, pursuant to 49 U.S.C. § 11102(a), granted BNSF Railway Company (BNSF) terminal trackage rights over the Rosebluff Lead (alternatively, the Lead), a single track, approximately nine miles in length, jointly owned by Kansas City Southern Railway Company (KCS)[2] and Union Pacific Railroad Company (UP)[3] in the Lake Charles area of Louisiana. BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry. (Decision No. 3), FD 32760 (Sub-No. 46), slip op. at 17 (STB served July 5, 2016). In a subsequent decision, the Board established conditions of use for BNSF to directly serve a LyondellBasell (Lyondell) facility at West Lake Charles, La., and set forth a procedure for

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] In March 2023, the Board approved the acquisition of control of KCS by Canadian Pacific Railway (CP), resulting in a newly merged entity, Canadian Pacific Kansas City Limited (CPKC). See Canadian Pac. Ry.—Control—Kan. City S., FD 36500 et al. (STB served Mar. 15, 2023).

[3] This sub-docketed proceeding arises out of the 1996 merger between the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company) (collectively, SP). See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Decision No. 44), 1 S.T.B. 233 (1996). For simplicity, this decision will also use "UP" to refer to Union Pacific Corporation and the rail carriers it controlled pre-merger.

setting compensation due to KCS. BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry. (Decision No. 8), FD 32760 (Sub-No. 46), slip op. at 8-11, 15-17 (STB served Feb. 21, 2020).

Pursuant to the Board's decisions and procedural schedule established in this proceeding, the parties have completed briefing regarding the compensation due to KCS, including the submission of expert reports and evidence. See BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry. (Decision No. 6), FD 32760 (Sub-No. 46), slip op. at 2 (STB served Dec. 7, 2018) (directing parties to provide additional information to assist the Board in establishing compensation for BNSF's use of the Lead); BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry. (Decision No. 9), FD 32760 (Sub-No. 46), slip op. at 2 (STB served Apr. 1, 2020) (adopting procedural schedule for briefing compensation issues and appointing administrative law judge to resolve any discovery disputes); BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry. (Decision No. 11), FD 32760 (Sub-No. 46), slip op. at 7-8 (STB served Nov. 28, 2023) (ordering parties to submit supplemental analysis and data on compensation); BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry. (Decision No. 14), FD 32760 (Sub-No. 46), slip op. at 2 (STB served June 25, 2024) (revising supplemental briefing schedule following technical conference); BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry., FD 32760 (Sub-No. 46), slip op. at 1-2 (STB served July 23, 2024) (granting parties' request to further revise supplemental briefing schedule).

For the reasons set forth below, the Board will order BNSF to pay compensation for all of its terminal-trackage-rights movements over the Lead. Consistent with UP's concessions and the Board's prior decisions here, BNSF shall pay UP the Prescribed Fee (except for BNSF direct operations to Lyondell, given UP's waiver, discussed infra p. 8 and note 17). In addition, pursuant to 49 U.S.C. § 11102(a), BNSF shall pay KCS its ownership-based share of a terminal trackage rights fee calculated under the principle controlling compensation in condemnation proceedings. The Board finds that the terminal trackage rights fee, in 2021 dollars, is $9.90 per car mile,[4] of which BNSF will be directed to pay half to KCS. The Board concludes that this payment structure is necessary to most effectively balance the unique statutory, equitable, and public interest factors at issue here. Accordingly, the Board will also reopen the Board's August 12, 1996 decision in UP/SP Decision No. 44, 1 S.T.B. 233, for the limited purpose of modifying the fee that BNSF must pay for BNSF's trackage rights over the Rosebluff Lead.

BACKGROUND[5]

As noted above, this sub-docketed proceeding arises out of the 1996 merger between UP and SP. See UP/SP Decision No. 44, 1 S.T.B. at 241. In approving the merger, the Board

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[4] If BNSF invokes its terminal trackage rights in the future, the parties should index the trackage rights fee to the current year in accordance with the process set forth in this decision (discussed in more detail below).

[5] The Background here summarizes the facts and arguments relevant to the compensation phase of the proceeding. For more information on the history of this proceeding, see Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 1-5, and BNSF Railway—Terminal Trackage Rights—Kansas City Southern Railway (Decision No. 10), FD 32760 (Sub-No. 46), slip op. at 1-5 (STB served Apr. 13, 2022).

imposed numerous conditions, including the terms of a series of settlement agreements between UP/SP and BNSF, referred to collectively as the BNSF Agreement, and the terms of the settlement agreement among UP/SP, BNSF, and the Chemical Manufacturers Association, referred to as the CMA Agreement. Under the BNSF Agreement, BNSF received trackage rights over approximately 4,000 miles of UP/SP's lines to serve all "2-to-1" shippers, i.e., those who would otherwise have their options reduced from two rail carriers (UP and SP) to only one rail carrier (the merged UP/SP entity) after the merger, at a fee designed to allow BNSF to garner sufficient traffic and compete effectively with the newly merged UP/SP. UP/SP Decision No. 44, 1 S.T.B. at 368, 413-417. Under the CMA Agreement, which modified the BNSF Agreement,[6] BNSF also received, among other things, certain rights to handle traffic of Lake Charles area[7] shippers. See UP/SP Decision No. 44, 1 S.T.B. at 243, 427-29; Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 2-3. Finding that the BNSF and CMA Agreements provided "an inadequate solution" to the merger's potential anticompetitive effects on Lake Charles area shippers, the Board conditioned its approval on the Agreements' terms being modified in several ways. UP/SP Decision No. 44, 1 S.T.B. at 427-29.[8] As modified, the Agreements allowed BNSF to handle traffic of shippers open to all of UP, SP, and KCS at Lake Charles and Westlake, and to handle traffic of shippers open to SP and KCS at West Lake Charles, "on the same basis" as BNSF's access to "2-to-1" points, which included the option of "direct" or "reciprocal switch" access (the Lake Charles Merger Conditions). Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 2-3, 9-10 (internal quotation marks omitted) (quoting UP Reply Ex. 1 at 8, Ex. 3 at 3, Aug. 24, 2015); see UP/SP Decision No. 44, 1 S.T.B. at 427-29.

In a decision served December 4, 1996, the Board denied a petition by KCS to reopen or reconsider UP/SP Decision No. 44. In its petition, KCS had sought to eliminate certain aspects of the Lake Charles Merger Conditions. See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Decision No. 63), FD 32760, slip op. at 4-6 (STB served Dec. 4, 1996). Among other things, KCS had argued that various joint facility agreements between it and UP prohibited UP from providing BNSF direct access to shippers at Westlake and West Lake Charles without KCS's consent, and that the Board could only require KCS to provide such access if BNSF filed a terminal trackage rights application under 49 U.S.C. § 11103 (now 49 U.S.C. § 11102). See UP/SP Decision No. 63, FD 32760, slip op. at 5-6. The Board, however, declined to reconsider the conditions imposed in UP/SP Decision No. 44, finding that "giving BNSF additional rights was the most effective way to assure continued competition for Lake Charles area shippers." Id. at 8. The Board further stated that, if KCS, BNSF, and UP were unable to come to an agreement regarding the terms of the joint facility agreements, any differences in interpretation of the joint facility agreements could be submitted to arbitration and

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[6] The Restated and Amended BNSF Settlement Agreement (RASA), which was approved by the Board in 2001, during the five-year oversight period for the UP/SP merger, incorporates subsequent amendments to the BNSF Agreement. See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 5 S.T.B. 1173, 1174, 1178 (2001).

[7] The Lake Charles area encompasses Westlake, West Lake Charles, and Lake Charles, La.

[8] For additional background, see Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 2-3.

that, in the event of an impasse, BNSF could return to the Board to seek approval of a terminal trackage rights application. Id. at 9-10.

On February 27, 2013, after serving Lake Charles-area shippers via reciprocal switching by UP for nearly two decades,[9] BNSF sought direct access by filing an application for terminal trackage rights over the Rosebluff Lead, initiating this sub-docket. The Rosebluff Lead is a single-track line that extends nine miles south from the 50/50 Line, at milepost 222.3, and runs through the Rosebluff Yard. Although BNSF and UP jointly own the 50/50 Line, UP and KCS jointly own the Rosebluff Lead and Rosebluff Yard under the terms of several joint facility agreements between KCS and UP/SP predecessor Texas & New Orleans Railroad Company. Pursuant to those agreements, UP and KCS now own the Rosebluff Lead and Rosebluff Yard equally, with equal rights to use the tracks. See Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 4-5 (citing Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 2).[10]

In 2016, the Board granted BNSF terminal trackage rights over the Rosebluff Lead to facilitate BNSF's direct access to Lake Charles area shippers, concluding that the requested terminal trackage rights met all requirements of 49 U.S.C. § 11102(a). The Board found the requested rights to be in the public interest, because they were necessary to effectuate the Lake Charles Merger Conditions imposed in UP/SP Decision No. 44 and reaffirmed in UP/SP Decision No. 63. See Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 9-13. More specifically, the Board found that preservation of BNSF's option of direct access (via trackage rights) was necessary to maintain the Lake Charles area shippers' access to multiple competitive carriers and routing options. Id. at 10. The Board also found, under 49 U.S.C. § 11102(a), that BNSF's use of the terminal facilities would be practicable and would not substantially impair the ability of the rail carriers owning the facility (UP and KCS) to handle their own business. Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 13-18. While the Board's analysis focused on the impact of BNSF's direct service to CITGO Petroleum Corporation (CITGO), the shipper on which BNSF's application was primarily focused, it also addressed the possibility of BNSF providing direct service to other shippers on the Rosebluff Lead that were covered by the Lake Charles Merger Conditions. See id. at 18-19. The Board directed the parties to "collectively

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[9] Historically, BNSF has delivered cars to UP at UP's Lake Charles Yard, which is located on the former SP Lafayette Subdivision, also referred to as "the 50/50 Line," which is now jointly owned by UP and BNSF. See Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 5. UP then moves BNSF traffic to Rosebluff Yard (alternatively, the Yard), where it is sorted and delivered to various industries on the Lead by either UP or KCS, depending on the location of the industry. Id.

[10] Since 1981, KCS and UP (or UP's predecessor, SP) have, for their convenience, divided their operations on the Rosebluff Lead into two customer zones, Zone 1 and Zone 2. KCS switches customers in Zone 1 (north and east of the Rosebluff Yard), and UP switches customers in Zone 2 (south of the Rosebluff Yard), with each carrier moving cars for the other in its assigned zone. Also for their convenience, UP and KCS have divided their use of the Rosebluff Yard into two alternating 12-hour windows (with UP scheduled to operate from 6:00 am to 6:00 pm, and KCS scheduled to operate from 6:00 pm to 6:00 am). See Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 5.

develop conditions governing their use of the Rosebluff Lead, including BNSF's access (if it so elects) to directly serve shippers other than CITGO." Id. at 19.[11]

By petition filed on January 12, 2018, BNSF requested that the Board establish conditions of use and compensation for BNSF to directly serve the Lyondell facility at West Lake Charles. KCS moved to dismiss BNSF's petition, arguing, among other things, that BNSF had not established that Decision No. 3 granted BNSF access to shippers other than CITCO or that Lyondell was a shipper covered by the Lake Charles Merger Conditions and the access granted in Decision No. 3. In a decision served May 1, 2018, and corrected on May 4, 2018, the Board denied KCS's motion to dismiss and clarified that BNSF's trackage rights over the Rosebluff Lead applied to all customers accessible via the Rosebluff Lead and covered by the Lake Charles Merger Conditions, including Lyondell, and that the Board's findings in Decision No. 3 as to § 11102(a) were not limited to BNSF's service to the CITGO facility. BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry. (Decision No. 4), FD 32760 (Sub-No. 46), slip op. at 5-7 (STB served May 4, 2018). The Board also ordered supplemental briefing on BNSF's petition and requested that the parties inform the Board if they were interested in participating in a Board-sponsored mediation. See id. at 8-9. By decision served May 15, 2018, the Board issued an amended procedural schedule and initiated mediation. BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry., FD 32760 (Sub-No. 46) (STB served May 15, 2018).

Despite engaging in private negotiations and two rounds of Board-ordered mediation in 2018 and 2019, BNSF, UP, and KCS were unable to reach an agreement establishing conditions and compensation for BNSF's use of the Rosebluff Lead to serve Lyondell. See Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 4. Therefore, in accordance with § 11102(a), the Board in February 2020 established conditions for BNSF's use of the Rosebluff Lead to directly serve the Lyondell facility. See id. at 8-11. Among other things, the Board ordered that, unless otherwise mutually agreed upon, BNSF's direct service to Lyondell on the Rosebluff Lead "shall be limited to one exclusive, four-hour window of time, to occur each day during UP's 12-hour window for Rosebluff Yard operations." Id. at 9.[12]

Decision No. 8 also set forth a framework for the Board's compensation analysis. See Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 11-17. The Board explained that the "SSW Compensation methodology . . . has consistently been used by the Board for setting trackage rights compensation," including in cases where trackage rights are imposed as a merger condition. Id. at 11-12 (citing cases). As the Board noted, the SSW Compensation methodology is designed to fairly compensate an owning carrier for a tenant's partial use of the property, by

[11] KCS has sought judicial review of Decision No. 3 in the U.S. Court of Appeals for the District of Columbia Circuit. Kan. City S. Ry. v. STB, No. 16-1308 (D.C. Cir. filed Sept. 1, 2016). On January 3, 2017, the court granted the government's motion to hold the case in abeyance pending further order of the court. Kan. City S. Ry. v. STB, No. 16-1308, slip op. at 1 (D.C. Cir. Jan. 3, 2017).

[12] KCS has sought judicial review of Decision No. 8 in the U.S. Court of Appeals for the District of Columbia Circuit. Kan. City S. Ry. v. STB, No. 20-1116, slip op. at 1 (D.C. Cir. Aug. 7, 2020) (granting motion to consolidate review of Decision No. 8 with review of Decision No. 3 and to hold appeals in abeyance).

taking into account case-specific facts regarding the market value of the property, the tenant's use, and the costs associated with such use. Id. at 11-12, 16. The agency has concluded in prior cases that the SSW Compensation methodology satisfies the principles of compensation in condemnation proceedings under § 11102(a). Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 16 & n.24.

The Board further noted that "[t]his case presents unique circumstances regarding the interplay between the Board's merger conditions in UP/SP and § 11102(a)." Id. at 15. Unlike in prior terminal-trackage-rights cases, "the Rosebluff Lead grant affects two different line owners, each subject to a different compensation scheme." Id. The Board stated that, as all parties recognized, KCS is entitled to compensation under § 11102(a)—typically calculated using SSW Compensation methodology—and that UP's compensation is limited to a below-SSW Compensation rate set by the UP/SP merger conditions at UP and BNSF's request and modified by UP and BNSF in subsequent agreements (the Prescribed Fee).[13] Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 11-12 & n.19, 13, 15.

Although the parties disputed how KCS's compensation should be allocated and paid, Decision No. 8 did not reach that question because all parties agreed that the amount of KCS's compensation could not be calculated without further proceedings. Id. at 12-15. The decision thus provided a period for further record development, based on an application of the merger conditions and the principles controlling compensation in condemnation proceedings, including SSW Compensation. Id. at 15-17; see also Decision No. 9, FD 32760 (Sub-No. 46), slip op. at 2 (approving the parties' joint proposed procedural schedule). Pursuant to Decision No. 8 and the procedural schedule established in Decision No. 9, the parties submitted briefing on compensation, with BNSF and KCS also submitting compensation calculations supported by the verified statements and workpapers of several expert witnesses.[14]

[13] The Merger Fee is currently set by Section 9(a), as escalated by Section 12, of the RASA. The Prescribed Fee is the Merger Fee, as modified by BNSF and UP in Section 7 of their September 1, 2000 agreement (the 50/50 Line Agreement) and related amendments. Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 12 & n.19; see BNSF Opening Statement on Comp. 6, Jan. 26, 2021 (citing BNSF Resp. to Decision No. 6 6, Feb. 4, 2019 (attaching the RASA, the 50/50 Line Agreement, and the 2003 letter amendment as Exhibits B, C, and D, respectively)).

[14] BNSF also filed a petition in December 2020 arguing that KCS and UP had "'repeatedly erected roadblocks' to prevent BNSF from providing direct service on the Rosebluff Lead." Decision No. 10, FD 32760 (Sub-No. 46), slip op. at 4 (quoting BNSF Pet. 2, Dec. 18, 2020). BNSF requested that the Board establish that any future terms of use for the Rosebluff Lead terminal trackage rights be based on certain principles articulated in Decision No. 8, and that the Board create an expedited process for resolving disputes over conditions of use for shippers other than Lyondell. Id. KCS and UP opposed BNSF's petition. See id. at 5. The Board granted BNSF's request, in part, by establishing general principles that the Board expects parties to include in any future operating plans for direct service by BNSF to customers located in the northern portion of Zone 2 (where UP currently switches customers). See id. at 1-2, 6-7 (including, among other things, an exclusive BNSF operating window, not to exceed four hours, during UP's 12-hour window for Rosebluff Yard operations). KCS has sought judicial review of

In reviewing the parties' compensation-related filings and workpapers, the Board identified an apparent error in certain data related to line-segment earnings submitted by KCS. By decision served November 28, 2023, the Board required supplemental analysis and data, including workpapers, on several specified items to address this apparent error. See Decision No. 11, FD 32760 (Sub-No. 46), slip op. at 7-8. On June 13, 2024, Board staff held a technical conference with the parties to discuss the requirements for the submissions ordered in Decision No. 11. See BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry. (Decision No. 12), FD 32760 (Sub-No. 46), slip op. at 2 (STB served Jan. 10, 2024) (granting KCS's request for a technical conference, ordering KCS to submit a list of technical questions it sought to discuss at the conference, and holding the deadlines set forth in Decision No. 11 in abeyance pending further Board order); BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry. (Decision No. 13), FD 32760 (Sub-No. 46) (STB served May 24, 2024) (scheduling technical conference). The parties completed their submission of supplemental compensation data and evidence on October 7, 2024. See Decision No. 14, FD 32760 (Sub-No. 46), slip op. at 2 (issuing revised procedural schedule); BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry., FD 32760 (Sub-No. 46) (STB served July 23, 2024) (granting KCS's request to further revise procedural schedule).

DISCUSSION AND CONCLUSIONS[15]

In Decision No. 8, the Board previewed its intent to "set compensation based on an application of the Prescribed Fee and the principles controlling compensation in condemnation proceedings [under 49 U.S.C. § 11102(a)], including SSW Compensation." Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 15-16. As the Board previously recognized, "the Rosebluff Lead grant affects two different line owners, each subject to a different compensation scheme." Id. at 15. Below, the Board first briefly addresses compensation due to UP, and then addresses the more complex determination of compensation due to KCS.

Compensation Due to UP

With respect to the amount of compensation due to UP, all parties have indicated their agreement, and the Board thus concludes, that UP's compensation for BNSF movements over the Rosebluff Lead should be limited to the Prescribed Fee. (See BNSF Opening on Comp. 1, 6, 11, Jan. 26, 2021; KCS Reply on Comp. 12, Apr. 12, 2021; UP Opening on Comp. 2-3, Jan. 26,

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Decision No. 10 in the U.S. Court of Appeals for the District of Columbia Circuit. Kan. City S. Ry. v. STB, No. 22-1069, slip op. at 1 (D.C. Cir. Aug. 11, 2022) (granting motion to consolidate review of Decision No. 10 with review of Decision Nos. 8 and 3 and to hold appeals in abeyance).

[15] While attempting to avoid references to confidential or highly confidential information in Board decisions, the Board reserves the right to rely upon and reference such information in decisions when necessary. See Canadian Nat'l Ry.—Control—Iowa N. Ry., FD 36744, slip op. at 1 n.3 (STB served Jan. 14, 2025). The Board determined that it could not discuss the findings in this decision without disclosing certain confidential information.

2021; UP Reply on Comp. 8, Apr. 12, 2021.)[16] As the Board has observed, the Prescribed Fee is lower than the rate that would be set under the agency's usual method of calculating trackage-rights compensation, SSW Compensation. Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 15. However, the Prescribed Fee, and the original Merger Fee from which it is derived, were components of a much broader set of agreements through which UP/SP received numerous other rights of significant value to it—rights that remain outside the scope of (and unaffected by) the Board's decisions here. Id. at 15 n.23 (citing Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP Decision No. 47), 1 S.T.B. 591, 615 (1996); UP/SP Decision No. 44, 1 S.T.B. at 371); (see also BNSF Resp. to Decision No. 6, Exs. C-D, Feb. 4, 2019). In light of this and UP's acceptance of BNSF's trackage rights and the Prescribed Fee under the UP/SP merger conditions and subsequent agreements, UP's compensation for BNSF's trackage rights over the Rosebluff Lead to serve any shipper covered by the Lake Charles Merger Conditions (other than Lyondell[17]) will be limited to the Prescribed Fee.[18]

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[16] Although UP has in one instance claimed that it should receive the original Merger Fee, rather than the slightly lower Prescribed Fee set by UP and BNSF's mutual 2003 Letter Agreement amending the 50/50 Line Agreement, (see UP Reply on Comp. 7 n.22, Apr. 12, 2021), UP has also accepted BNSF's definition and application of the Prescribed Fee in numerous filings, (see, e.g., id. at 8 ("Union Pacific previously said BNSF should not have to pay Union Pacific more than the Prescribed Fee[.]"); UP Opening on Comp. 2, Jan. 26, 2021 ("UP has stated that, if BNSF elects to serve Lyondell using terminal trackage rights obtained under 49 U.S.C. § 11102(a), BNSF should pay: (1) UP the trackage rights fee established in the UP/SP merger, *i.e.*, the Prescribed Fee[.]"); compare BNSF Resp. to Decision No. 6 6, Feb. 4, 2019 ($0.0033045 per gross ton-mile), with UP Resp. to Decision No. 6 2, Feb. 4, 2019 ($0.00331 per gross ton-mile)). Because UP offers no basis for rejecting the Prescribed Fee, which reflects mutually agreed-to amendments—presumably for satisfactory consideration—the Board will hold UP to its acceptance of that rate.

[17] UP has voluntarily "agree[d] to waive BNSF's obligation to pay [UP] the Prescribed Fee for use of the [Rosebluff] Lead when BNSF operates its own trains directly to Lyondell." (UP Opening on Comp. 3, Jan. 26, 2021; see also UP Reply on Comp. 8, Apr. 12, 2021.)

[18] BNSF states that the Prescribed Fee is (as of January 2021) $0.003552 per gross ton-mile (GTM). (BNSF Opening on Comp. 6, Jan. 26, 2021.) This is comparable to UP's estimated figure (as of February 2019) of $0.00331 per GTM. (UP Resp. to Decision No. 6 2, Feb. 4, 2019.) For purposes of comparison with the compensation due to KCS, UP has estimated that the Prescribed Fee translates to between $2.36 and $3.36 per car to move over the Rosebluff Lead to and from Lyondell, using certain assumptions regarding mileage and train length and weight. (See UP Opening on Comp. 3 n.7; UP Reply on Comp. 8 n.23; UP Resp. to Decision No. 6 2-3 & n.1.) However, to the extent some of UP's estimates use the Merger Fee rate, they reflect slightly higher fees than that ordered here under the Prescribed Fee rate. In addition, these UP per-car estimates do not account for any fee BNSF may be required to pay UP for movements along the 50/50 Line to get to the Rosebluff Lead, which are not the subject of this terminal-trackage-rights proceeding.

Compensation Due to KCS

With respect to the amount of compensation due to KCS, as noted in Decision No. 8, all parties continue to agree that KCS is entitled to compensation under § 11102(a), but they take varied and opposing positions regarding how to compute such compensation and how to allocate responsibility for its payment. BNSF maintains that the total compensation that BNSF must pay was conclusively established in UP/SP Decision No. 44 as the Prescribed Fee. (BNSF Opening on Comp. 5-6, Jan. 26, 2021.) BNSF argues that UP should be responsible for any compensation due to KCS beyond the Prescribed Fee. (Id. at 8-11.) For purposes of calculating the compensation owed to KCS by UP, BNSF asks the Board to apply SSW Compensation "principles" and set a fee based on: (1) how BNSF's current movements via reciprocal switching are treated under existing UP-KCS cost-sharing agreements in effect for the Rosebluff Lead or, alternatively, (2) more traditional calculations under SSW Compensation methodology. (Id. at 14-24; id., Ex. A, V.S. Baranowski.)

UP argues that BNSF is responsible for any compensation due to KCS and declines to submit any calculations, asserting that the amount of KCS's compensation is a matter to be resolved between BNSF and KCS. (UP Opening on Comp. 1, Jan. 26, 2021.) But UP insists that if BNSF elects to use the terminal trackage rights granted by the Board under 49 U.S.C. § 11102(a), then BNSF (not UP) must pay KCS any "compensation to which KCS is entitled under § 11102(a)." (Id. at 2.)

KCS also argues that BNSF (not UP) should be responsible for paying any compensation due to KCS under § 11102(a). (See KCS Reply on Comp. 6-11, Apr. 12, 2021.) KCS maintains that the SSW Compensation methodology is inconsistent with condemnation principles and insufficient to fully compensate KCS, advocating instead for a "Market-Based Access Fee" applying negotiated rates derived from "similarly situated" markets. (KCS Opening on Comp. 3-4, 31-33, Ex. B, V.S. Carey 20-24, Jan. 26, 2021.) However, recognizing the agency's longstanding application of SSW Compensation in trackage-rights cases, (id. at 3), KCS alternatively submits SSW Compensation-based calculations. (Id. at 3-4 & n.5, 8-11; id., Ex. A, V.S. Neels.)

In responsive and supplemental filings, BNSF and KCS and their experts—Dr. Kevin Neels for KCS and Michael Baranowski for BNSF—offer various critiques of, and adjustments to, each other's proffered methodologies for calculating compensation to KCS. (See KCS Reply on Comp. 15-38, 43, Ex. C, V.S. Neels, Apr. 12, 2021; BNSF Reply on Comp. 20-22, Ex. A, V.S. Baranowski 3-4, 10-26, Apr. 12, 2021; KCS Rebuttal on Comp. 9, V.S. Neels, May 11, 2021; BNSF Rebuttal on Comp. 11-13, Ex. A, V.S. Baranowski 1-5, May 11, 2021; KCS Suppl. Evidence on Comp., Ex. A, V.S. Neels, Aug. 23, 2024; BNSF Reply to KCS Suppl., V.S. Baranowski, Sept. 23, 2024; KCS Suppl. Rebuttal, Ex. A, V.S. Neels, Oct. 7, 2024.)

Section 11102(a) states that if, as here, "the rail carriers cannot agree" on the terms of compensation for use of terminal facilities, "the Board may establish . . . compensation for use of the facilities under the principle controlling compensation in condemnation proceedings." 49 U.S.C. § 11102(a). In the following discussion, the Board will address the parties' disputes regarding the compensation due to KCS, specifically: (1) whether to apply the SSW

Compensation methodology (as opposed to the alternative methodologies proposed), (2) how to compute the amount of compensation due to KCS under § 11102(a), and (3) how to allocate responsibility for payment to KCS. The resolution of each issue is informed by the unique circumstances of this complex and long-running dispute.

As explained in greater detail below, the Board will calculate compensation due to KCS using the SSW Compensation methodology, applying the "capitalized earnings" (CE) method for computing the interest rental component, with various adjustments for the specific facts of this case. Under this approach, the total SSW Compensation-based fee for use of the Rosebluff Lead is $9.90 per car mile in 2021 dollars, of which KCS will be entitled to 50% (or $4.95) as the one-half joint owner of the Rosebluff Lead. This SSW Compensation-based fee will apply not only to BNSF's service to Lyondell, but to all BNSF terminal-trackage-rights movements on the Rosebluff Lead. For such movements, BNSF shall: (1) pay to KCS $4.95 per car mile (indexed and adjusted, as discussed below), which is half of the total Board-calculated terminal trackage rights fee, and (2) pay to UP the Prescribed Fee (except for BNSF direct operations to Lyondell, given UP's waiver, discussed supra p. 8 and note 17).

I. Applicability of SSW Compensation Methodology to Establishing KCS's Compensation

As previously noted in this proceeding, the SSW Compensation methodology has consistently been used by the Board for setting trackage rights compensation. Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 11-12. It involves calculating the sum of three elements: (a) the variable cost incurred by the owning carrier due to the tenant carrier's operations over the owning carrier's track; (b) the tenant carrier's usage-proportionate share of the track's maintenance and operation (M&O) expenses; and (c) an interest rental component designed to compensate the owning carrier for the tenant carrier's use of the owning carrier's capital dedicated to the track. Id. (citing St. Louis S.W. Ry.—Trackage Rts. Over Mo. Pac. R.R.—Kan. City to St. Louis, 1 I.C.C.2d 776 (1984) (SSW Compensation I), 4 I.C.C.2d 668 (1987) (SSW Compensation II), 5 I.C.C.2d 525 (1989) (SSW Compensation III), 8 I.C.C.2d 80 (1991) (SSW Compensation IV), 8 I.C.C.2d 213 (1991) (SSW Compensation V) (collectively, the SSW Compensation cases), aff'd sub nom., Union Pac. Corp. v. ICC, 978 F.2d 745 (D.C. Cir. 1992) (unpublished), cert. denied sub nom., S. Pac. Transp. Co. v. ICC, 508 U.S. 950 (1993)); Burlington N. Inc.—Control & Merger—Santa Fe Pac. Corp. (BN/SF Decision No. 38), 10 I.C.C.2d 661, 770 n.118 (1995). In the SSW Compensation cases, the agency concluded that where it prescribes trackage rights as a merger condition, the terms should permit competitive entry by providing for a reasonable return on the fair market value of the property. Otherwise, the tenant carrier would be placed at a competitive advantage by dispensing with any requirement of investing in the fixed facilities it is using. BN/SF Decision No. 38, 10 I.C.C.2d at 772.

Historically, the most contentious element of calculating SSW Compensation has been the interest rental component, which may be computed in several ways to reflect a fair valuation base for the property. Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 11-12 & n.18 (and cases cited therein). In cases like this one, involving Class I carriers, the Board has accepted four different methods of determining the appropriate valuation base for the interest rental component: (a) CE (also known as going concern value, or GCV), (b) reproduction cost new less depreciation (RCNLD), (c) comparable line segments, and (d) stand-alone cost (SAC). See Atchison, Topeka & Santa Fe Ry.—Operating Agreement—S. Pac. Transp. Co., 8 I.C.C.2d 297, 304-05 (1992); New England Cent. R.R.—Trackage Rts. Ord.—Pan Am S. LLC (New England Central I), FD 35842, slip op. at 3 (STB served Oct. 31, 2017); BN/SF Decision No. 38, 10 I.C.C.2d at 770 n.118. The agency has stated that its preferred method for calculating interest rental is the CE method, because, among other things, it values the property as a going concern for railroad use—i.e., the use to which the property will actually be put.[19]

BNSF and KCS advance various arguments against application of the agency's SSW Compensation methodology when computing KCS's compensation, instead urging other approaches. Alternatively, however, both BNSF and KCS also submit evidence and calculations using SSW Compensation methodology to compute the fee due to KCS. UP does not take a position or submit data regarding how KCS's compensation should be calculated. (See UP Opening on Comp. 1, Jan. 26, 2021.) For the reasons discussed below, the Board is not persuaded by either BNSF's or KCS's arguments against the use of SSW Compensation. SSW Compensation is the agency's longstanding, court-affirmed method of calculating trackage-rights compensation, and it has been applied or approved in cases of access to terminal facilities. As such, the Board will apply that methodology here, with certain adjustments for the unique facts of this case (as noted at infra Section II).

A. BNSF's Arguments Against the Use of SSW Compensation

BNSF notes that UP and KCS have agreements governing how costs are shared when each carrier moves cars for the other in its assigned zone of the Rosebluff Lead. BNSF argues that KCS's compensation "should be calculated under the existing UP-KCS cost-sharing agreements for the Rosebluff Lead"—i.e., that KCS is owed no more compensation (for BNSF movements on the Lead) than it is already receiving for corresponding UP movements on the Lead. (BNSF Opening on Comp. 15-17, 25, Jan. 26, 2021.) BNSF asserts that this approach is consistent with the "principles" underlying the SSW Compensation methodology, as applied to the facts of this case. In particular, BNSF points to numerous "unique circumstances" here, including (among other things): (1) UP and KCS are 50/50 owners of the Rosebluff Lead and have "split their ownership and operating rights in half" by operating in two separate geographic zones and temporal windows; (2) "BNSF will access the Rosebluff Lead under UP's ownership and operating rights" under the trackage-rights conditions imposed by the Board; and (3) UP and KCS's existing cost-sharing agreements for the Rosebluff Lead are "flexible enough to fully compensate KCS for BNSF's physical presence." (Id. at 15.) BNSF argues that "[t]he Board has not actually or constructively 'condemned' or 'taken' any of KCS's property by granting BNSF terminal trackage rights" and setting conditions that limit BNSF's use to UP's geographic zone and temporal window for operations in Rosebluff Yard. (Id. at 16 (citing id., Ex. A, V.S. Baranowski 20-21).) According to BNSF, the Board's conditions "provide[] that BNSF will not infringe on KCS's ownership and operating rights." (Id.) In addition, "a BNSF train moving

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[19] CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., 3 S.T.B. 955, 964 n.18 (1998); Atchison, Topeka & Santa Fe Ry., 8 I.C.C.2d at 304; see also BN/SF Decision No. 38, 10 I.C.C.2d at 772 n.120 ("In determining fair market value we have preferred the 'capitalized earnings' approach, and used it where circumstances allowed.").

through the Rosebluff Yard in the UP operating window will act just as a UP train does today," and "KCS will incur no incremental cost" as a result of BNSF's cars moving directly via trackage rights (vs. via UP reciprocal switching, as previously). (Id.) Accordingly, BNSF claims, KCS will suffer "no loss in the productive value" of its 50% ownership interest in the Rosebluff Lead. (Id.)

Alternatively, BNSF argues that KCS's compensation should be limited to the first two elements of SSW Compensation, with no compensation owed for the third element: interest rental. (Id. at 17-18.) As above, this theory is based on BNSF's claim that, under the Board's conditions limiting BNSF's terminal-trackage-rights use to UP's physical and temporal zones of the Rosebluff Lead, "BNSF's direct operations will have no meaningful impact on KCS's ownership rights." (Id. at 18 (likening BNSF's trackage-rights use of the Rosebluff Lead to a "sublet" of UP's one-half ownership share); see also id., Ex. A, V.S. Baranowski 3, 15.) As such, BNSF asserts that KCS's compensation should be limited to an ownership-adjusted share of variable costs (which, according to BNSF, are zero) and a share of maintenance and operating costs (which, according to BNSF, should consist only of what KCS already receives from UP under the UP-KCS cost-sharing agreements). (Id. at 20-23; id., Ex. A, V.S. Baranowski 3, 5-9, 15-16, 20-21.)

In reply, KCS argues that, under the parties' joint facility agreements, the deed to the property, and Louisiana law, KCS and UP both have a joint, undivided interest in the entire Rosebluff Lead and Yard, and as such, BNSF is incorrect that its trackage-rights use will not infringe on KCS's property rights. (KCS Reply on Comp. 15-22, Apr. 12, 2021 (citing id., Ex. A, Joint Facility Agreements; Ex. B; Ex. C, V.S. Neels 3; Ex. D, V.S. Carey 4-5, 7-13; Ex. E, V.S. Maurin 2-5).) KCS explains that, although the parties have (as a matter of practicality and convenience) divided their operations into two geographic zones of the Rosebluff Lead and two temporal windows in the Yard, they have never divided or restricted their ownership interests. (Id. at 18-22 (citing id. Ex. A, Joint Facility Agreements; Ex. E, V.S. Maurin 2-5).) Both carriers remain legally entitled to operate in each other's zones/windows and, due to congestion on the Lead, often do encroach on each other's operating windows in the Yard. (Id. at 17-18, 20-22, Ex. D, V.S. Carey 4.) For these reasons, and because UP continues to serve customers on the Rosebluff Lead, KCS refutes BNSF's claim that BNSF would merely be "subletting" UP's interest in the Lead, rather than using KCS's property interest. (Id. at 16-18.) Moreover, for the foregoing reasons, KCS also opposes BNSF's claim that KCS should not receive interest rental under SSW Compensation principles. (Id. at 16-22, 32-33.)

The Board is not persuaded by BNSF's arguments against using the traditional SSW Compensation methodology here. To begin, the assumptions underlying BNSF's claims—namely, that BNSF's terminal-trackage-rights usage of the Rosebluff Lead, under the conditions set forth by the Board in Decision Nos. 8 and 10, would not "infringe" on KCS's ownership interest or effect a partial taking/condemnation of KCS's property—are flawed. As KCS notes, because KCS and UP each have a joint, undivided ownership interest in the Rosebluff Lead and Yard, each co-owner may access and use the entire asset, not merely one portion of it, and each is entitled to its share of the earnings from the property. (See id. at 16-22, Exs. A, B, E); see also Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 14 (referring to KCS's "*right* to provide direct unit train service to CITGO (located in UP's Zone 2)" (emphasis added)). Neither the owners' practical decision to split their operations geographically and temporally, nor the Board's conditions limiting BNSF's trackage-rights use to UP's operational windows, alters those ownership rights. BNSF locomotives and crews will, under terminal-trackage-rights access, use and operate over property in which KCS possesses an undivided ownership interest (even if presently occupied and operated by UP).[20] It cannot be assumed that such access will have no impact on KCS's property interests.

In addition, the statute requires the Board to set compensation for terminal trackage rights "under the principle controlling compensation in condemnation proceedings[,]" which generally requires consideration of the fair market value of the property interest to be used. 49 U.S.C. § 11102(a); see also UP/SP Decision No. 47, 1 S.T.B. at 616; Mo.-Kan.-Tex. R.R. v. Kan. City Term. Ry. (MKT), 198 I.C.C. 4, 7-9 (1933). Under the circumstances of this case, depriving KCS of the interest rental component of SSW Compensation, as BNSF alternatively urges, could deprive KCS of the full fair market value of its property interest—including the property's earning potential for its owners. For these reasons, the Board is not persuaded by BNSF's arguments against the use of the SSW Compensation methodology.

B. KCS's Arguments Against the Use of SSW Compensation

KCS makes numerous arguments against the Board's use of SSW Compensation in this proceeding and advocates instead for a "market-based access fee" to compensate KCS. For the reasons discussed below, the Board finds KCS's arguments against SSW Compensation unpersuasive and declines to apply KCS's proposed "market-based access fee."

1. *KCS's Threshold "Two Takings" Argument*

Underlying many of KCS's arguments is its claim that the SSW Compensation methodology cannot fully compensate KCS for the fair market value of the property to be used because the Lead's value to its owners has, since 1996, been diminished by BNSF's indirect access to Lake Charles area shippers via UP reciprocal switching and haulage. (See KCS Opening on Comp. 4-5, 9 & n.17, 14-16, 19-20, Jan. 26, 2021; KCS Reply on Comp. 30-32, 35, 39, Apr. 12, 2021); see also supra p. 4 and note 9. According to KCS, under § 11102(a) and Fifth Amendment condemnation (i.e., takings) principles, BNSF must compensate KCS in a way "that puts it in the same economic condition it would have been absent the taking," which "is typically the market value of the property at the time of the taking." (KCS Opening on Comp. 4-5, 30,

[20] Operationally, despite UP and KCS's practical division of their time on the Lead and in the Yard, the two carriers routinely encroach on each other's operations—even without a third carrier physically operating on the property. (See, e.g., KCS Reply on Comp. 21 & n.33, Apr. 12, 2021.) And although the Board has recognized that "moving BNSF's access from a reciprocal switch by UP to direct access may in some ways be neutral" or improve efficiencies in the Rosebluff Yard, it has also found that BNSF trackage-rights operations will cause some degree of interference with UP and KCS operations and could entail complex operational adjustments. Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 16-17 & n.16; Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 8, 11.

Jan. 26, 2021; see also id. at 7-8, Ex. C, V.S. Marzulla 2-3.) KCS notes that, since the UP/SP merger, BNSF's indirect access via UP reciprocal switching has reduced KCS's and UP's market shares in the Lake Charles area, such that an SSW Compensation-based assessment of the Lead's value in 2016 (when the Board granted BNSF's terminal-trackage-rights application) will not fully compensate KCS for what it has lost. (Id. at 13-16, 30-31 (citing id., Ex. B, V.S. Carey 24-28, Ex. C, V.S. Marzulla 2-3).) Thus, KCS claims, "essentially, two takings have occurred here"—one from the Board's grant of indirect, reciprocal-switching access in the 1996 UP/SP merger decisions, and the other from the Board's grant of terminal trackage rights in this sub-docket in 2016—and, without accounting for losses due to the first, KCS cannot fully be compensated for the second. (Id. at 30-31; see also, e.g., KCS Reply on Comp. 39, Apr. 12, 2021 (arguing that SSW Compensation "is incapable of putting KCS in the same place it would have been but for BNSF's access"); KCS Rebuttal on Comp. 4 n.9, May 11, 2021 ("For 24 years, BNSF's below-market access fee [for switching] has given BNSF an undue competitive advantage over KCS, ... making SSW inconsistent with the condemnation principles and failing to fully compensate KCS for BNSF's access.").)

In response, BNSF argues that KCS should be compensated only for the incremental costs associated with BNSF's direct, trackage-rights access, not for the "commercial" access that BNSF obtained in 1996. (BNSF Reply on Comp. 12-14, Apr. 12, 2021.) BNSF calls KCS's arguments an "improper collateral attack on the Board's UP/SP merger conditions" because the alleged damages that KCS seeks from its non-SSW "'market-based access fee' resulted from BNSF beginning reciprocal switch service to Lake Charles area shippers soon after the Board granted BNSF such access in 1996." (Id. at 14.) According to BNSF, "[t]he question [here] is not whether KCS should be 'made whole' vis-à-vis its pre-UP/SP merger position," and for that, KCS "should seek redress from UP for UP's failure to secure KCS's consent before agreeing to the Lake Charles Merger Conditions." (Id. at 14, 16.) In addition, as noted above, BNSF maintains that KCS has failed to show that any constitutional "taking" has occurred (or will occur) here. (Id. at 17 & n.10.)

The Board rejects KCS's suggestion that, in computing KCS's compensation for BNSF's direct trackage-rights access over the Lead, the Board must incorporate additional recompense to KCS (beyond what it may already be receiving[21]) for BNSF's indirect, reciprocal-switching access to Lead shippers since 1996. Even assuming arguendo that the Board's 1996 merger conditions granting BNSF reciprocal-switching access could constitute a separate Fifth-Amendment taking—a predicate that KCS has not established—KCS has foregone any right to additional compensation for such indirect access through its own action/inaction.

As an initial matter, the Board is unaware of any agency or judicial decision holding that a grant of reciprocal-switching access constitutes an independent Fifth Amendment taking when

[21] It is the Board's understanding that, pursuant to the UP-KCS cost-sharing agreements discussed above, KCS currently receives some fee/payment for costs when it moves BNSF traffic (switched to the Lead by UP) in Zone 1. (See BNSF Opening on Comp., Ex. A, V.S. Baranowski 8-10, 15-16, Jan. 26, 2021 (citing 1948 and 1981 Agreements between KCS and a UP predecessor); see also KCS Opening on Comp., Ex. A, V.S. Neels 13-14, Jan. 26, 2021; KCS Rebuttal on Comp. 6, May 11, 2021); UP/SP Decision No. 63, slip op. at 6 n.22.

imposed as a merger condition, or that imposition of reciprocal switching outside the merger context requires compensation beyond payment for the switching service.[22] KCS and its experts cite no precedent or other support for such propositions, nor is the answer clear, for various reasons. First, reciprocal switching access does not involve any physical intrusion or occupancy of KCS's property by BNSF employees or locomotives and, hence, is very unlikely to qualify as a *per se* taking. Cedar Point Nursery v. Hassid, 594 U.S. 139, 149-152 (2021) ("Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred."); see also Pol'y Alternatives to Increase Competition in the R.R. Indus., EP 688, slip op. at 3 (STB served Apr. 14, 2009) (noting that terminal trackage rights "involve the physical presence of a competing carrier on a host carrier's facilities," "[u]nlike reciprocal switching"). Nor is it clear that the indirect-access conditions here would effect a regulatory taking because they do not "restrict [KCS's] ability to use [its] own property." Cedar Point Nursery, 594 U.S. at 148. Rather, they prescribe switching by UP, which co-owns the tracks. And a diminution of "earnings" or "market share," as KCS has repeatedly described its injury, (KCS Opening on Comp. 12-15, 25, 31 n.50, Jan. 26, 2021), "unaccompanied by any physical restriction . . . provides a slender reed upon which to rest a takings claim." Andrus v. Allard, 444 U.S. 51, 65-66 (1979). Nor would it appear that these conditions frustrated KCS's "distinct investment-backed expectations," Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124-25, 127 (1978), given that they were imposed to address competitive problems that KCS itself argued would be caused by the UP-SP merger. See UP/SP Decision No. 63, FD 32760, slip op. at 8-9. Cf. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005-07 (1984) (regulated industry had no reasonable expectation that agency would maintain the exclusivity of its data when federal law authorized agency to share it). Moreover, the statute's reciprocal-switching provision—unlike the terminal-trackage-rights provision—does not require the Board to apply "condemnation" principles when establishing compensation, suggesting that Congress did not necessarily view a grant of reciprocal-switching access as a "taking" in the constitutional sense. Compare 49 U.S.C. § 11102(a), with id. § 11102(c)(1).

In any event, even if BNSF's indirect/switching access under the Lake Charles Merger Conditions could constitute a separate taking, KCS has forgone any right to additional compensation for it. Since 1996, KCS has been aware that the Lake Charles Merger Conditions allow BNSF, among other things, to handle Lake Charles area traffic indirectly via UP reciprocal switching or haulage. (See, e.g., KCS Reply to BNSF Progress Rpt. & Operating Plan 10-14, Oct. 11, 1996, Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760 (KCS-68);

[22] The Board has frequently observed that reciprocal-switching fees are typically established based on the costs of providing the service, rather than the value of the property or any potential lost revenue. See Reciprocal Switching for Inadequate Serv., EP 711 (Sub-No. 2), slip op. at 94 (STB served Apr. 30, 2024) ("[T]he Board has consistently viewed it as appropriate to set reciprocal switching fees [under § 11102(c)] based on the direct cost of providing service and not include any lost profits from lost line-haul service."), vacated on other grounds, Grand Trunk Corp. v. STB, 143 F.4th 741 (7th Cir. 2025); Increased Switching Charges at Kan. City, Mo., 356 I.C.C. 887, 890 (1977) ("[T]he cost of performing the service is the most important factor in determining the justness and reasonableness of a proposed switching charge."); see also, e.g., CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc. (CSX/NS—Conrail), 4 S.T.B. 75, 86 (1999); Intramodal Rail Competition, 1 I.C.C.2d 822, 834 (1985).

KCS Reply to BNSF Opening Stmt. & Evid. 26-28, Aug. 24, 2015 (explaining that, in 1996, KCS understood the language in UP/SP Decision No. 44 to mean at least indirect access via switching or haulage, but not necessarily direct trackage rights).) KCS objected to those conditions in its 1996 petition to reopen/reconsider. (See KCS Pet. to Reopen/Reconsider 8-13, Sept. 3, 1996, Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760 (KCS-65); KCS-68, FD 32760, at 10-14.) However, after the Board rejected KCS's request to eliminate those conditions, see UP/SP Decision No. 63, FD 32760, slip op. at 7-9, KCS did not appeal that decision. Nor did KCS bring a Tucker Act-based takings claim before the U.S. Court of Federal Claims for any difference between the amount it may currently receive for BNSF's indirect access (via UP, see supra note 21) and that to which it believes itself entitled under the Constitution; as such, KCS is now barred from doing so by the statute of limitations. See 28 U.S.C. § 1491(a)(1); 28 U.S.C. § 2501 (imposing six-year statute of limitations).[23] Thus, the time has passed to contest compensation for the Board's grant of indirect access to BNSF. As KCS's own filings suggest, (see KCS-68, FD 32760, at 10-14, KCS Resp. to Decision No. 6 7, Feb. 4, 2019), any remaining dispute is one in contract (damages for UP's putative breach), which KCS should address in a court, not here.

Moreover, given its longstanding acquiescence, KCS is estopped from seeking additional compensation for BNSF's indirect handling of Lake Charles area traffic. As KCS has acknowledged since the beginning of this proceeding, BNSF has indirectly handled the traffic of Lake Charles area shippers since 1996, shortly after the UP/SP merger, without any objection by KCS. (See, e.g., KCS Reply to BNSF Opening Stmt. & Evidence 8, Aug. 24, 2015 ("Over the intervening 18+ years between [Decision No. 63] and now, . . . BNSF has served the area with haulage rights or switching rights and without KCS objection.") (emphasis added); KCS Letter to Board 2 & n.4, Sept. 16, 2013 ("At the time of [Decision No. 63], whether BNSF should have access to Westlake/West Lake Charles shippers via reciprocal switching was also in question. That issue was resolved long ago, with KCS and UP allowing such access.") (emphasis added).)[24] In addition, BNSF (and UP) have apparently arranged their business operations in

[23] Any such claim would have needed to be filed by 2002—i.e., within six years of the imposition of the Lake Charles Merger Conditions. See 28 U.S.C. § 2501; Goodrich v. United States, 434 F.3d 1329, 1333 (Fed. Cir. 2006) ("[A] claim under the Fifth Amendment accrues when that taking action occurs." (quoting Alliance of Descendants of Tex. Land Grants v. United States, 37 F.3d 1478, 1481 (Fed. Cir. 1994))). The continuing claims doctrine, which "operates to save later arising claims even if the statute of limitations has lapsed for earlier events," would not postpone the accrual of KCS's claim because the alleged taking is traceable to a single, distinct event (i.e., the Board's conditions sanctioning UP's reciprocal switching for BNSF traffic in the Lake Charles area). Ariadne Fin. Servs. Pty. Ltd. v. United States, 133 F.3d 874, 879 (Fed. Cir. 1998).

[24] See also Kan. City S. Ry. v. BNSF Ry., 970 F. Supp. 2d 542, 544 (W.D. La. 2013) (noting that, since 1996, UP and KCS had been "the only freight carriers providing direct locomotive service in the [Lake Charles] area, [but that] BNSF [had] enjoyed indirect access to Lake Charles shippers via reciprocal interchange"); BNSF Appl. for Terminal Trackage Rts. 6, Ex. 9 (Feb. 4, 2013 letter from UP to KCS and BNSF noting, among other things, that "[s]ince the UP/SP merger, BNSF has handled such traffic through interchange with UP and KCS"); KCS

reliance on KCS's acquiescence in the existing switching operations and payments, with BNSF investing tens of millions of dollars in the construction of its nearby Lacassine Yard to improve service to Lake Charles area shippers. (See, e.g., BNSF Opening Stmt. & Evidence 18 (citing Bredenberg V.S. 6), Dec. 31, 2014.) Cf. NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974) ("[T]his is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements[.]"). And as noted above, KCS did not—until decades later, in the present proceeding concerning direct trackage-rights access—contest the payment arrangements for BNSF's switching access, nor seek any additional compensation therefor. Accordingly, KCS is now estopped from taking a position inconsistent with its own longstanding actions and representations. See Simmons v. Burlington, C.R. & N.R. Co., 159 U.S. 278, 291-92 (1895); Stevens Mfg. Co. v. United States, 8 F. Supp. 720, 723-24 (Ct. Cl. 1934); 31 Corpus Juris Secondum, Estoppel and Waiver § 74 (Apr. 2026).

In sum, the Board will reject KCS's attempt to take advantage of BNSF's application for direct trackage-rights access here to belatedly (and with questionable basis) seek additional compensation for BNSF's indirect access, to which KCS has long acquiesced.[25]

2. *KCS's Other Arguments Against the Use of SSW Compensation*

KCS makes numerous other arguments against the use of the SSW Compensation methodology. As discussed further below, the Board is not persuaded by KCS's arguments.

a. Fair Market Value

KCS and its experts, Nancie G. Marzulla and Professor Julie M. Carey, argue that the SSW Compensation methodology does not satisfy "condemnation" (i.e., Fifth Amendment takings) principles because it fails to compensate for fair market value. (See KCS Opening on

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Reply to BSNF Req. to Set Procedural Schedule 5 n.6, Mar. 19, 2013 (acknowledging BNSF's indirect access via UP switching since 1996, and discussing a KCS-BNSF agreement to govern BNSF's indirect access via KCS reciprocal switch, and fees therefor).

[25] Moreover, KCS has not presented its compensation evidence in a way that would support its contention that the Board should, essentially, value the Rosebluff Lead or its earnings as of 1996, when BNSF was granted, and began using, the indirect-access rights of the Lake Charles Merger Conditions. Rather, KCS's expert Neels computes earnings based on data from 2017 and 2018, consistent with an understanding that the relevant alleged "taking" here is the Board's 2016 decision granting BNSF's application for direct, trackage-rights access. (See KCS Opening 9 & n.17; id., Ex. A, V.S. Neels 13-14, 22, 33, 42.) Similarly, KCS's expert Carey bases her market-based access fee on "current" (2019-2020) reciprocal switching rates in other U.S. terminal areas. (See KCS Opening, Ex. B, V.S. Carey 35-38 & Ex. 5.) "Calculating compensation for a [decades-earlier] taking based on what is known [today], or what will be known in [the near future], is incompatible with the requirement that value be assessed 'at the time of the taking.'" New England Central I, FD 35842, slip op. at 5; United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) (value is assessed "at the time of the taking"). Thus, KCS's own evidentiary presentation further confirms that it has forfeited any additional compensation from an alleged "second" taking via indirect access.

Comp. 30-32, Ex. C, V.S. Marzulla 7-8, Ex. B, V.S. Carey 20-23; KCS Reply on Comp. 39; KCS Rebuttal on Comp. 2-7.) BNSF counters that the Board in Decision No. 8 made clear that SSW Compensation takes into account the market value of the property, that KCS is not entitled to compensation for BNSF's indirect access since 1996, and that the constitutional analysis of KCS's expert Marzulla is flawed. (BNSF Reply on Comp. 14-20.)

To the extent KCS's "fair market value" argument is based on its threshold claim of a "second taking" via BNSF reciprocal-switching access, the Board rejects it, for the reasons noted above. See supra Section I.B.1. To the extent KCS attempts to make a separate, more general argument that the SSW Compensation methodology cannot account for the fair market value of terminal trackage rights, its claim is vague, largely unsupported, and contrary to precedent. For example, KCS's expert Marzulla makes a blanket statement that "the [SSW Compensation] standard does not include the market value of the property interest condemned (trackage rights), nor the monetary equivalent of the property taken." (KCS Opening on Comp., Ex. C, V.S. Marzulla 7.) But she gives no concrete reason or explanation for why she believes that is the case.

To the contrary, even if "fair market value" were the only appropriate measure of compensation in takings cases—which it is not[26]—the SSW Compensation methodology has long accounted for the fair market value of the property interest at issue in a trackage-rights grant (essentially, a rental). See CSX/NS—Conrail, 4 S.T.B. at 79-81 (applying the CE method for SSW Compensation and analyzing the market value of Conrail's property); BN/SF Decision No. 38, 10 I.C.C.2d at 770 n.118 (noting that the "figure used to represent the value of the property" when calculating the "interest rental" component of SSW Compensation "must be fair market value") (emphasis added); id. at 772 n.120 ("In determining fair market value we have preferred the 'capitalized earnings' approach, and used it where circumstances allowed."); SSW Compensation II, 4 I.C.C.2d at 669, 674-75 (valuation should be based on "fair market value"); (see also KCS Opening, Ex. C, V.S. Marzulla 8 (describing the "property interest" as "a portion of the use" of KCS's trackage)).

Additionally, because SSW Compensation is a flexible approach that accounts for case-specific facts concerning the market value of the property, the tenant's proportionate use, and the costs associated with such use, the SSW Compensation methodology is designed to fairly compensate the owning carrier for the tenant's partial use thereof. Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 16; see also CSX/NS—Conrail, 3 S.T.B. 196, 344-345 (1998) ("The SSW Compensation procedure is not a static or fixed method[.]"). As such, the Board has concluded in prior proceedings that the SSW Compensation methodology satisfies the principles of compensation in condemnation proceedings. See, e.g., UP/SP Decision No. 47, 1 S.T.B. at 616 (setting compensation consistent with SSW Compensation for terminal trackage rights, including access to local shippers); SSW Compensation I, 1 I.C.C.2d at 787-94, 804 (establishing compensation for trackage rights imposed in the UP/Missouri Pacific Railroad Company

[26] See United States v. Va. Elec. & Power Co. (Va. Elec. & Power), 365 U.S. 624, 633 (1961) (fair market value is "not an absolute standard nor an exclusive method of valuation"); see also United States v. Fuller, 409 U.S. 488, 490 (1973); (KCS Opening, Ex. C, V.S. Marzulla 6).

(MP)/Western Pacific Railroad Company (WP) merger, including some within terminal areas); see also Pyco Indus., Inc.—Alt. Rail Serv.—S. Plains Switching, Ltd., FD 34889 et al., slip op. at 5-8 & n.22 (STB served Jan. 11, 2008) (setting compensation consistent with SSW Compensation for alternative rail service on a temporary basis under § 11102(a)).[27] Moreover, SSW Compensation is the agency's longstanding, court-approved method of calculating trackage-rights fees, including for trackage rights granted in merger proceedings (as in this case). See, e.g., Union Pac. Corp. v. ICC, 978 F.2d 745 (Table), 1992 WL 316102 (D.C. Cir. 1992) (per curiam) (affirming original SSW Compensation orders setting and modifying compensation for trackage rights granted in the UP/MP/WP merger, including segments in terminal areas); see also W. Coal Traffic League v. STB, 169 F.3d 775, 781 (D.C. Cir. 1999) (noting that "[t]he standard method for establishing the level of compensation for trackage rights is described in [SSW Compensation V]").[28]

For the foregoing reasons, the Board finds that the principles of SSW Compensation will account for fair market value and satisfy the principles of compensation in condemnation proceedings here.

b. Local (vs. Overhead) Access

KCS also claims that the SSW Compensation methodology does not satisfy condemnation principles because it was intended to compensate for overhead or bridge trackage rights only and has not historically been used to compensate for another carrier's direct access to local shippers. (See KCS Opening on Comp. 14-15, 19-21.) According to KCS, "[p]recedent supports the Board declining to apply SSW Compensation" when a trackage-rights grant includes local access, rather than solely overhead rights. (KCS Opening on Comp. 20-21; see also KCS Rebuttal on Comp. 4-5 n.9.) BNSF responds that, in Decision No. 8, the Board rejected KCS's claim that the SSW Compensation methodology is not appropriate in cases of terminal trackage rights involving access to shippers. (BNSF Reply on Comp. 13 n.8 (citing Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 16 n.24).)

KCS is incorrect to suggest that SSW Compensation does not or cannot account for the value of trackage-rights access to local shippers. The agency has recognized, from its original

[27] Indeed, SSW Compensation's key tenet, the proportionate "rental" fee, has long served as a basis for compensation under condemnation principles for terminal trackage rights. See MKT, 198 I.C.C. at 7-8 (terminal trackage rights holder has essentially "become a tenant of respondent [owning carrier], and the just and reasonable compensation which it is required to pay is in effect a rental"); see also Chi., Milwaukee, St. Paul & Pac. R.R.—Trackage Rts.—Louisville & Nashville R.R., 342 I.C.C. 578, 579, 586-590, 602-603 (1973) (applying MKT as guidance to compute a fair rental for use of terminal properties under principles controlling compensation in condemnation proceedings). Cf. Thompson v. Tex. Mexican Ry., 328 U.S. 134, 136-150, (1946) (repeatedly referring to a fee for trackage rights, including terminal trackage rights, as a "rental").

[28] Although the SSW Compensation methodology was developed in the merger context, it has been applied in other situations as well. See, e.g., New England Central I, FD 35842, slip op. at 4 (citing Atchison, Topeka & Santa Fe Ry., 8 I.C.C.2d at 297-99).

application of SSW Compensation, that the methodology can and should be adjusted based on whether the trackage-rights grant includes or excludes local access. See SSW Compensation II, 4 I.C.C.2d at 684 (concluding that revenues and costs from line owner's local traffic should be excluded from line-specific earnings when calculating the trackage-rights fee, because trackage-rights tenant was only granted overhead rights); see also New England Central I, FD 35842, slip op. at 8 (noting the need for adjustments to a 30-year-old trackage-rights fee due to changes in "customers served," among other things). In particular, using the CE method to compute the interest rental under SSW Compensation can directly account for revenues and costs attributable to local service. Moreover, as the Board noted in Decision No. 8, the Board has applied or approved the SSW Compensation framework in cases where trackage rights include local access. See, e.g., New England Central I, FD 35842, slip op. at 4-19 (applying SSW Compensation for trackage rights including some local shipper access); UP/SP Decision No. 47, 1 S.T.B at 611-17 (setting compensation consistent with SSW Compensation for trackage rights including local shipper access); see also Norfolk S. Ry.—Pet. to Set Trackage Rts. Comp.—Norfolk & Portsmouth Belt Line R.R., FD 36223, slip op. at 2, 5-6 (STB served Mar. 29, 2019) (stating that SSW Compensation would be applied to compute compensation for trackage rights encompassing local service to shippers); Pyco Indus., Inc., FD 34889 et al., slip op. at 5-8 & n.22 (setting compensation based on SSW Compensation for temporary alternative rail service to a shipper under § 11102(a)).

KCS cites several agency decisions that, it asserts, "declin[e] to apply SSW Compensation" where a trackage-rights grant includes local access. However, all of these decisions either undermine KCS's claim or are distinguishable. To begin, the Amtrak decisions are distinguishable because, there, compensation was computed—under a different statutory provision—for the forced sale of the former owner's entire line, not merely for the "separate" and contingent grant-back of trackage rights. Nat'l R.R. Passenger Corp.—Conveyance of Bos. & Maine Corp. Interests in Conn. River Line in Vt. & N.H. (Amtrak I), 4 I.C.C.2d 761, 790-91 (Aug. 4, 1988), aff'd sub nom. Nat'l R.R. Passenger Corp. v. Bos. & Maine Corp., 503 U.S. 407 (1992); see Nat'l R.R. Passenger Corp.—Conveyance of Bos. & Maine Corp. Interests in Conn. River Line in Vt. & N.H. (Amtrak II), 6 I.C.C.2d 539, 547-49 (Feb. 6, 1990) (describing the unique "quid pro quo" of the forced divestiture). And notably, when the Board was later asked by the Amtrak parties' successors to calculate an updated fee for only the trackage rights (which included access to local shippers), the Board applied the SSW Compensation methodology. See New England Central I, FD 35842, slip op. at 4-19; see also New England Cent. R.R.—Trackage Rts. Order—Pan Am S. LLC (New England Central II), FD 35842 (STB served Apr. 26, 2018) (denying reconsideration).

Similarly, in Burlington Northern Inc.—Control & Merger—Santa Fe Pacific Corp. (BN/SF Decision No. 40), FD 32549, 1995 WL 555809 (ICC served Sept. 21, 1995), the agency repeatedly indicated its intent to apply SSW Compensation if the parties could not agree on a fee for trackage rights that included access to certain interchange facilities. BN/SF Decision No. 40, 1995 WL 555809, at *6 & nn.18-19 (citing BN/SF Decision No. 38, 10 I.C.C.2d at 769-70). KCS suggests that in BN/SF Decision No. 40, the agency found SSW Compensation "inadequate" to account for the use of local interchange facilities or to incorporate both fixed and usage-based charges. (KCS Opening on Comp. 21 & n.39.) That is incorrect. To the contrary, the agency affirmed that SSW Compensation would require (i.e., include) compensation for the interchange-facilities usage, and that "the principles of [SSW Compensation] . . . support some combination of fixed charge and usage-based compensation." BN/SF Decision No. 40, FD 32549, 1995 WL 555809, at *6 n.19 (emphasis added).

Additionally, in UP/SP Decision No. 47, the Board approved a fee proposed by one of the parties for the Texas Mexican Rail Company's terminal trackage rights over the Houston Belt & Terminal Railway Company, which included local access to shippers. See UP/SP Decision No. 47, 1 S.T.B. at 611-16. Contrary to KCS's claim, (see KCS Opening on Comp. 21), that decision was essentially an application of SSW Compensation. The approved fee amount was originally calculated based on SSW Compensation, see UP/SP Decision No. 44, 1 S.T.B. at 414-16; UP/SP Decision No. 47, 1 S.T.B. at 612, and the Board found it to be consistent with, and "no higher than," the fee "we would impose under our favored SSW Compensation standard, the capitalized earnings method." UP/SP Decision No. 47, 1 S.T.B. at 616 (citing UP/SP Decision No. 44, 1 S.T.B. at 415).[29] Indeed, the Board specifically found in that case that "the principles of SSW Compensation would also satisfy the [§ 11102(a)] principles for compensation in condemnation proceedings." UP/SP Decision No. 47, 1 S.T.B. at 616.

For these reasons, the Board rejects KCS's argument that SSW Compensation is meant to apply only to overhead trackage rights and fails to account for the value of local shipper access.

c. Lost Contribution to KCS's Network

KCS also argues that SSW Compensation does not satisfy condemnation principles because it "does not account for lost contribution (profit) to the rest of KCS's network[,] both over the past two decades and going forward." (KCS Opening on Comp. 16; see also id. at 14 n.25, 17, 19-20 n.33; id., Ex. B, V.S. Carey 3-4, 28-30, 32; KCS Rebuttal on Comp. 4, May 11, 2021.) KCS cites a report by The International Transport Forum, as well as comments by the Association of American Railroads (AAR) in a separate Board proceeding (Reciprocal Switching, Docket No. EP 711 (Sub-No. 1)), for the proposition that SSW Compensation improperly fails to account for the profit that the owning carrier might have earned for the rest of its system on traffic now captured by a new competitor. (KCS Opening on Comp. 16-17.)

In response, BNSF argues that, under agency precedent and policy, terminal-trackage-rights compensation does not include lost profits from a loss of control over access. (See BNSF Reply on Comp. 15-16.) Moreover, contends BNSF, Supreme Court takings precedent establishes that "[t]here are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment," and the "lost opportunity profits" claimed by KCS are one of those non-compensable losses. (Id. (quoting United States ex rel T.V.A. v. Powelson, 319 U.S. 266, 281 (1943)).)

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[29] Although the Board questioned whether the CE method was best for valuing the line in that case, it did not apply a different method or undermine the general applicability of SSW Compensation for computing terminal trackage-rights fees. See UP/SP Decision No. 47, 1 S.T.B. at 616 (considering RCNLD as an alternative valuation method, consistent with SSW Compensation precedent).

For the reasons described above in Section I.B.1, KCS is not entitled to recover compensation for BNSF's "past two decades" of indirect access. More generally, however, KCS cites no applicable statute or precedent to support its position that, under condemnation principles, a carrier providing terminal trackage rights over one part of its network should be compensated for potential revenue loss to other parts of its network. On the contrary, the Fifth Amendment case law that KCS and its expert cite, (see, e.g., KCS Opening 30-32; id., Ex. C, V.S. Marzulla 5-6), uniformly reinforces that compensation for government takings is limited to the value of the property taken—not the value of or losses to other property. See, e.g., United States v. 564.54 Acres of Land, 441 U.S. 506, 510-12 (1979); United States v. Reynolds, 397 U.S. 14, 16-17 (1970); Va. Elec. & Power, 365 U.S. at 633; Grand River Dam Auth. v. Grand-Hydro, 335 U.S. 359, 367-68 (1948); United States v. Miller, 317 U.S. 369, 374-77 (1943); Olson v. United States, 292 U.S. 246, 255-57 (1934); Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304 (1923).

In addition, established precedent precludes KCS from recovering any "lost opportunity profits" that KCS believes it could have achieved absent BNSF's competitive presence on the Rosebluff Lead. (Contra KCS Opening on Comp. 16-17, Ex. B, V.S. Carey 3-4, 42.) The agency, like the Supreme Court, has long held that the "[l]oss of an anticipated business profit [from a former right to exclude] is not generally regarded as an element of damage or compensation in condemnation proceedings." Use by Erie of Niagara Junction Ry. Terminals, 278 I.C.C. 425, 431 (1950) (citing United States ex rel T.V.A., 319 U.S. 266; Mitchell v. United States, 267 U.S. 341 (1925)); see also United States v. Petty Motor Co., 327 U.S. 372, 377-78 (1946) ("[E]vidence of loss of profits . . . [is] refused in federal condemnation proceedings."). Similarly, the Railroad Accounting Principles Board (RAPB) Final Report found that asset valuations "should not include monopoly rents resulting from an owner's prior control of access." R.R. Accounting Principles Bd., 2 R.R. Accounting Principles Final Report 73 (1987). More recently, when the Board calculated compensation consistent with SSW Compensation for temporary and alternative rail service under 49 U.S.C. §§ 11102(a) and 11123(b), it held that "[t]he rail-line owner is entitled to fair compensation for the facilities it provides but not for lost profits." S. Plains Switching, Ltd.—Comp. for Use of Facilities in Alt. Rail Serv.—W. Tex. & Lubbock Ry., FD 35111, slip op. at 4 (STB served Dec. 15, 2008) (emphasis added).

Thus, the alleged failure to account for lost contribution to KCS's network at large is no reason to reject the application of the SSW Compensation methodology here.

d. Infrastructure Needed for BNSF's Initial Access

KCS asserts that SSW Compensation fails to "account for any additional infrastructure determined to be necessary to accommodate" BNSF's initial direct access and "prevent interference with KCS's operations." (KCS Opening on Comp. 17-18.) Although UP appeared (in 2019) to agree with KCS that BNSF should "be required to bear any costs of capital improvement required to accommodate its initial access" over the Rosebluff Lead, (see UP Reply in Resp. to Decision No. 6 8, Feb. 25, 2019), UP takes no position at this time regarding whether or how the SSW Compensation methodology may account for such capital improvements. BNSF does not appear to address KCS's additional-infrastructure argument.

KCS's claim is without foundation. The Board has previously found, in this sub-docketed proceeding, that the Rosebluff Lead could accommodate a third carrier (BNSF) "without substantially impairing the operations of UP or KCS." Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 16-17 (making the requisite finding for a grant of terminal trackage rights under 49 U.S.C. § 11102(a)). The Board's "lack of substantial impairment" finding rested on the assumption that no infrastructure improvements are necessary to accommodate BNSF's use of the line. See id. (acknowledging that the addition of a third carrier would require increased coordination but noting that BNSF's direct service could free up capacity, eliminate congestion at Rosebluff Yard, and "increase the efficiency of operations on the Lead" through the use of direct unit trains). The Board reiterated this finding in 2020, stating even more directly that it "expects that [the Board's imposed] terms of use should give BNSF direct access over the Rosebluff Lead (as presently configured) without substantially impairing UP's and KCS's ability to handle their business." Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 11 (emphasis added). Moreover, while recognizing that Decision No. 3 contemplated the possibility of subsequent reopening "on the basis of new evidence of materially changed circumstances," the Board emphasized that any attempt to reopen Decision Nos. 3 and 8 may occur only "after implementation" of three-carrier operations on the Lead in its current condition. Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 11 (emphasis added) (quoting Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 18). Thus, at this time—prior to any trackage-rights use of the Lead by BNSF—there is no basis for KCS's claim that its compensation should include costs for additional infrastructure.

e. Other Costs and Capital Investments

KCS also argues that SSW Compensation fails to account for BNSF's proportionate share of capital investments and other costs necessary for the Rosebluff Lead—for example, indemnity and liability obligations, or extraordinary costs associated with flooding, fire, or other natural disasters. (KCS Opening on Comp. 18.) KCS notes that provisions to address such costs are included in the UP/KCS joint facility agreements governing the Lead's use and are common in trackage-rights agreements. (Id.)

KCS's critique provides an insufficient basis for rejecting application of the SSW Compensation methodology. First, SSW Compensation will account for certain extraordinary costs here. Because the parties' proposed calculations for the second component—the tenant's usage-proportionate share of maintenance and operating costs—rely on actual costs from past years (2017 and 2018) in which, e.g., several hurricanes and tropical storms occurred near Lake Charles, SSW Compensation can, and will, account for the costs stemming from such events. See infra Section II.B.2. Likewise, to the extent KCS and its expert have submitted and quantified evidence of other actual maintenance costs for 2017 and 2018, SSW Compensation will account for them and assign a proportionate share to BNSF. The Board cannot calculate compensation related to "other costs" or "capital investments" for which KCS has not submitted specific, quantifying data.

That said, as KCS acknowledges, the parties have existing agreements that address their responsibilities for funding capital improvements and addressing other costs—in particular, the RASA and 50/50 Line Agreement between UP and BNSF, and the joint facility agreements between UP and KCS. To the extent there are conflicts between these agreements, the parties themselves are best situated to resolve any differences in the course of developing their specific, three-way operating agreements for service to Rosebluff Lead shippers. See Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 19 (directing all three parties to "collectively develop conditions governing their use of the Rosebluff Lead"); Decision No. 10, FD 32760 (Sub-No. 46), slip op. at 6-7 (contemplating that all three parties will develop operating agreements governing BNSF's terminal-trackage-rights access to future Lead shippers).

f. Expansion of BNSF's "Undue" Competitive Advantage

According to KCS, application of SSW Compensation is also problematic because it "furthers BNSF's already existing 'undue' competitive advantage." (KCS Opening on Comp. 25.) KCS states that "SSW Compensation was designed for use in merger cases to remedy anticompetitive effects" but claims that this proceeding is not aimed at "remedy[ing] competitive concerns" or "ensur[ing] that Lyondell's pre-merger competitive posture was preserved." Instead, it "is a non-merger competitive access case filed under [§] 11102(a) to cherry-pick one particular shipper to 'skim the cream' off UP's and KCS's decades-long investments in the Rosebluff Lead." (Id. at 26.)

BNSF maintains that the Lake Charles Merger Conditions provided BNSF with the option of serving Lead shippers via trackage rights, "as a competitive replacement for the loss of SP service." (BNSF Opening on Comp. 4; see also BNSF Rebuttal on Comp. 2, 13.) BNSF argues that KCS's alternative to SSW Compensation, a "market-based access fee," would be inconsistent with the Board's intent to preserve competition that would otherwise have been lost as a result of the UP/SP merger. (BNSF Reply on Comp. 16, Ex. B, V.S. Reishus 3-5.)

The Board rejects KCS's argument. BNSF's competitive presence in the Lake Charles area is not "undue," and KCS's claim that "[t]his proceeding is not an attempt to remedy competitive concerns," (see KCS Opening on Comp. 26), is plainly contradicted by the Board's decisions here. This proceeding is a sub-docket of (and "flows directly from") the UP/SP merger proceeding, in which preserving competition was the Board's primary concern. Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 9. The Board's grant of direct trackage-rights access to BNSF in this proceeding enforces the Lake Charles Merger Conditions, which were imposed in the UP/SP merger precisely to "remedy competitive concerns," (contra KCS Opening on Comp. 26), by ensuring that shippers had continued access to multiple competitive routes and carriers. Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 8-13 (citing, inter alia, UP/SP Decision No. 44, 1 S.T.B. at 428 (imposing conditions specifically to "preserve competition for Lake Charles area shippers")). Indeed, KCS itself recognizes that "[t]he Board granted BNSF access over the Rosebluff Lead in the Lake Charles area in part because it believed KCS could not fully compete against UP" post-merger and that "[g]iving BNSF additional rights was the most effective way to assure continued competition for Lake Charles area shippers." (KCS Opening on Comp. 13 & n.22 (citing UP/SP Decision No. 63, FD 32760, slip op. at 8).) The fact that the Board formally granted terminal trackage rights (and is calculating compensation) decades after the merger is simply a product of the unique circumstances here, where BNSF was granted access to the Rosebluff Lead via either reciprocal switching or direct physical access, and, after a long period of exclusively using the former, has only recently sought to use the latter.

g. Interference with KCS's Revenue Adequacy

Finally, KCS claims that applying SSW Compensation here would be "contrary to" the Board's revenue adequacy requirement and inhibit KCS's ability to attain revenue adequacy. (KCS Opening on Comp. 13 n.21, 27-29, Ex. B, V.S. Carey 3-4, 6-11.) KCS asserts that, at the time of compensation filings, UP and BNSF were routinely revenue adequate, while KCS was not. (KCS Opening on Comp. 27 (citing V.S. Carey 6).) KCS further claims that "BNSF's payment of an artificially low and non-market rate to UP and payment of nothing to KCS" for its indirect access "has imposed a constraint . . . on KCS's ability to earn adequate revenues for 24 years." (KCS Opening on Comp. 28 (citing V.S. Carey 10).) KCS asserts that SSW Compensation will neither compensate KCS fully for what it already lost, nor will it compensate KCS going forward at a rate that permits KCS to achieve systemwide revenue adequacy. (KCS Opening on Comp. 29.) KCS's expert Carey argues that "[o]nly with due consideration of revenue adequacy . . . will the Board ensure that BNSF cannot usurp the contributions to the rest of KCS's network that are implicitly at stake" here. (KCS Opening on Comp., Ex. B, V.S. Carey11; see also id. at 42-43.)

BNSF disputes KCS's criticisms, arguing that BNSF's expert Baranowski's proposed use of a replacement-costs-based interest rental component can generate returns that are "greater on average than that needed by KCS to achieve revenue adequacy." (BNSF Reply on Comp. 23 (citing id., Ex. A, V.S. Baranowski 31).) Baranowski asserts "Prof. Carey fails to demonstrate that the SSW Compensation formula is inconsistent with the Board's revenue adequacy mandate," and that Carey's comparison of KCS's system-wide revenue adequacy with UP's and BNSF's ignores KCS's success in increasing its Rosebluff Lead traffic with revenue-to-variable-cost ratios that can help contribute to revenue adequacy. (BNSF Reply on Comp., Ex. A, V.S. Baranowski 6 & n.6, 30.) In rebuttal, KCS's expert Carey disputes Baranowski's assertions, as well as his suggestion that because "KCS is doing well enough financially," the Board should "ignore the fact that BNSF is generally revenue adequate and KCS is not." (KCS Rebuttal on Comp., V.S. Carey Rebuttal 2-3.)

KCS's argument is unsupported and based on faulty assumptions. First, KCS offers no evidence to support its claim that the overall revenue adequacy of its entire system has been, or will be, materially impaired by an alleged inadequacy of compensation in the single terminal area at issue here, where KCS has long faced competition from two other carriers—even prior to the UP/SP merger. Second, even if there was evidence that BNSF's indirect handling of Lake Charles area traffic since 1996 has materially affected KCS's (or CPKC's) overall revenue adequacy, KCS is not entitled to additional compensation for it here, as explained extensively above. See supra Section I.B.1.[30]

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[30] KCS's revenue-adequacy claims also presume that terminal-trackage-rights compensation should include an owning carrier's potential lost monopoly profits or lost contribution to the rest of its network. (KCS Opening on Comp. 17, 29, Ex. B, V.S. Carey 3, at 11-12, 30 & n.90, 42-46.) But as explained above, longstanding court and agency precedent undermine this assumption. See supra Section I.B.2.c.

Third, to the extent KCS and Carey presume that applying SSW Compensation is inconsistent with, or would ignore, the Board's policies and statutes concerning revenue adequacy, that is incorrect. From its inception, trackage-rights compensation under the SSW Compensation framework has taken revenue adequacy into account through the interest rental component, which is calculated to ensure an owning carrier earns an adequate rate of return on its investment in the subject line, so that it may reinvest adequately in that line. See, e.g., SSW Compensation IV, 8 I.C.C.2d at 91, 95; see also Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760 (Sub-No. 21), slip op. at 11 (STB served Dec. 15, 2000) (expressing concern that the landlord would not earn "an adequate return" or have sufficient "economic incentive" "to maintain or replace the line as necessary to continue efficient service") (emphasis added); New England Central I, FD 35842, slip op. at 8 (maintaining a fixed fee well below the SSW Compensation level may "[p]revent[] [New England Central Railroad, Inc.] from earning adequate revenues" and "impair its continued ability to maintain the track") (emphasis added).

3. *KCS's "Market-Based Access Fee" Proposal*

KCS argues that, instead of applying the SSW Compensation methodology, the Board should impose a "market-based access fee," as computed by its expert Carey. KCS's proposed approach assumes a hypothetical negotiation in which BNSF lacks any access (direct or indirect) to the Rosebluff Lead shippers and seeks access anew from KCS and UP. (See KCS Opening on Comp. 31-36; id., Ex. B, V.S. Carey 3, 19-24.) Based on the claim that BNSF's decades-long indirect switching/haulage access at "artificially low" rates has generated revenues for KCS that are "too low" and inappropriate for SSW-based calculation, KCS argues that compensation here must reflect the value of access to Lake Charles shippers "absent Board intervention"—i.e., absent any of the Lake Charles Merger Conditions. (KCS Opening on Comp. 31-32; id. 15, 17, 22-23, Ex. B, V.S. Carey 24-26, 31-32).

In developing KCS's proposed "market-based access fee," Carey examines and analyzes nearly 2,000 "current," real-world reciprocal-switching rates from allegedly "similarly situated markets" where railroads have given each other access to their shippers via arms-length negotiations, (KCS Opening on Comp. 32-33, Ex. B, V.S. Carey 4, 36), reasoning that this best represents Lake Charles's "combination of robust customers and limited trackage," (KCS Opening on Comp., Ex. B, V.S. Carey 34; see also id. at 35-49). Specifically, she derives a "weighted average" of those "market-based reciprocal switch rates comparable to Lake Charles" ($490 per car), and then subtracts out "an [estimated switching cost] for the Lake Charles area and specifically for BNSF movements to Lyondell" in order "to isolate the contribution from the direct access to the customer," resulting in a "market-based access fee" of $350.04 per car. (See KCS Reply on Comp. 12; KCS Opening on Comp., Ex. B, V.S. Carey 40-42.) Carey argues that calculating compensation in this manner—based on competitively negotiated, market-based reciprocal-switching rates—is consistent with the Board's "longstanding policies" and "regulatory requirements." (KCS Opening on Comp. 4; see also id. at 5, 11.)

BNSF opposes KCS and Carey's market-based fee proposal for numerous reasons. (See BNSF Reply on Comp. 20, 22-25, Ex. A, V.S. Baranowski 6-8, 28-45; Ex. B, V.S. Reishus 3-7, 9-26.) In general, BNSF argues that "[t]he alleged damages that KCS claims will be redressed through the 'market-based access fee' resulted from BNSF beginning reciprocal switch service to

Lake Charles area shippers soon after the Board granted BNSF such access in 1996," not as a result of BNSF "electing to change its Rosebluff Lead service from reciprocal switch to direct, which is the focus of this phase of the proceeding." (BNSF Reply on Comp. 14.) BNSF criticizes Carey's proposal for failing to explain why a change from indirect to direct access should alter KCS's compensation, and for failing to account for KCS's partial (not full) ownership interest in the Lead. (Id. at 20.)

Regarding Carey's specific methodology, BNSF and its experts discuss several alleged deficiencies in the market-based access fee proposal. Baranowski faults Carey's proposal for: (1) using an "unsuitable reciprocal rate-selection process that artificially inflates rates"; (2) ignoring that reciprocal-switching rates are usually cost-based and thus include no market contribution, nor any market-based contribution toward revenue adequacy; and (3) basing the Lake Charles switching costs on erroneous inputs from KCS's expert Neels and failing to explain why Lake-Charles-specific switching costs are relevant to the switch rates that Carey incorporates from different locations and circumstances. (See BNSF Reply on Comp. 22-23 (citing Ex. A, V.S. Baranowski 6, 36-43); see also id. at 24 (citing Ex. B, V.S. Reishus 19-26).) In addition, BNSF's expert Dr. David Reishus argues that Carey's use of allegedly "comparable" reciprocal-switching rates is inaccurate and unreliable, for numerous reasons, including: (1) incorrectly assuming that switching access is comparable to the trackage-rights access (and corresponding "value") at issue here; (2) failing to establish that the switching rates used are valid arms-length prices reflecting the value of solely the switching access; (3) failing to establish that the switching rates used resulted from comparable transactions; and (4) failing to make adjustments for material differences between the Rosebluff Lead and the "comparable" transactions underlying the sampled rates, regarding "market conditions, the nature of the good or service sold, cost of providing switching, and other relevant terms and conditions." (BNSF Reply on Comp. 24-25 (citing Ex. B, V.S. Reishus 6-7, 19-26).)

In rebuttal, KCS argues that BNSF's criticisms of Carey's "market-based access fee" are unsupported or have no merit. (KCS Rebuttal on Comp. 8-9.) KCS disputes that Carey's selection of reciprocal-switching rates biased the average upward without justification, that her geographical considerations are flawed, and that there is no market-based contribution from reciprocal switching rates. (Id. at 8 (citing V.S. Carey 4-6).) It also argues that BNSF's attacks on the "market-based access fee" fail to account for BNSF's indirect service to Lead shippers for 25 years, and that its experts offer no evidence to support their claim that a presumption of arms-length switching rates is inappropriate. (Id. at 8-9.)

The Board declines to adopt KCS's "market-based access fee" approach. As a threshold matter, reciprocal-switching access is different from direct trackage-rights access, and thus, market switching rates do not necessarily approximate market-based trackage-rights fees. As noted in Decision No. 8 and here, the SSW Compensation methodology is the agency's longstanding, court-approved method of calculating trackage-rights fees, particularly those granted in merger proceedings, and it is sufficiently flexible to account for each case's unique facts and circumstances. See supra pp. 18-19; Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 11-12. Moreover, KCS's proposed alternative rests on flawed assumptions and is problematic in its development and implementation. The Board is therefore not persuaded to depart from its well-established methodology here.

As an initial matter, by assuming away all BNSF access to Lake Charles (direct and indirect), KCS's "market-based access fee" is based on the incorrect assumption that KCS is entitled to additional retroactive compensation for BNSF's decades-long indirect handling of Lake Charles traffic via UP switching, which it is not. See supra Section I.B.1. As BNSF notes, the issue here is compensation for BNSF's trackage-rights access only. In addition, Carey's approach also improperly assumes that compensation to KCS should account for purported lost opportunity profits. (See, e.g., KCS Opening on Comp., Ex. B. V.S. Carey 30, 32.) But, as noted above, precedent does not support that assumption. See supra Section I.B.2.c (and citations therein). Carey's proposal also rests on the assumption that real-world switching rates include contribution toward overall network costs or revenue adequacy. (See KCS Opening on Comp., Ex. B, Carey V.S. 19, 42-43.) This is not necessarily correct. BNSF's evidence indicates that, in practice, the railroad industry has tended to price switching "in accordance with its cost," and the agency has regularly considered costs as the primary factor when prescribing reciprocal-switching rates for competitive-access purposes. (See BNSF Reply on Comp., Ex. A, V.S. Baranowski 32-33 (collecting cases)); see also supra note 22 and accompanying text. Other than criticizing Baranowski's small number of examples, Carey offers little to rebut the general proposition that many reciprocal-switching rates are cost-based and provide little (if any) market contribution. (KCS Rebuttal on Comp., V.S. Carey 5.)

KCS's "market-based access fee" is also questionable in its derivation and application. Carey ignores that the terminal trackage rights at issue here were granted to enforce merger conditions imposed to preserve competition—precisely the context in which the SSW Compensation methodology was developed. See supra Section I.B.2.f (and citations therein). Indeed, "[t]he reason for imposing trackage rights as a condition to a merger is to preserve effective competition in markets that would otherwise experience a reduction in competition." BN/SF Decision No. 38, 10 I.C.C.2d at 771; see also SSW Compensation IV, 8 I.C.C.2d at 87 ("[I]n setting compensation terms absent voluntary agreement, we will consider the factor that these trackage rights are granted for the purpose of maintaining competitive balance where competition would otherwise be significantly lessened by the consolidations."). Even prior to the UP/SP merger, KCS co-owned the Lead and faced competition from at least one other carrier (and, in some cases, two) to serve Lead shippers. See UP/SP Decision No. 44, 1 S.T.B. 427-29; UP/SP Decision No. 63, FD 32760, slip op. at 2 & n.9, 8. Thus, it is inapt to apply principles from the context of voluntarily negotiated reciprocal-switching rates where no prior competition existed or was in need of preservation.

Additionally, despite KCS's claims, it is questionable whether Carey's selected reciprocal-switching rates are actually "market based" or "comparable" to the situation in Lake Charles. (See BNSF Reply on Comp., Ex. A, V.S. Baranowski 35-44, Ex. B, V.S. Reishus 18-26.) Although the use of comparable arm's-length rates—derived from comparable transactions, under comparable market conditions, for comparable products or services—may be an appropriate method for estimating market value, Carey's selection of rates here spans so wide a range of carriers, commodities, and geographic regions that any comparison would be unreliable. As BNSF's experts note, Carey's selection of rates for "comparable" commodities is inconsistent, and her inclusion of regions with materially varying geography, competitive circumstances, traffic densities, and cost structures is not necessarily reflective of the market in

Lake Charles. (See, e.g., BNSF Reply on Comp., Ex. A, V.S. Baranowski 38-39, 41, Ex. B. V.S. Reishus 22-26.) Similarly, Carey's formulation—which derives an average market switching rate by sampling across the national network but subtracts out switching costs specific to the Rosebluff Lead—improperly assumes that switching costs are roughly constant over Carey's 2,000+ rate sample.

In addition, Carey's selected reciprocal-switching rates cannot reasonably be presumed to reflect "market-based," arms-length-negotiated prices. Rates from switching districts (as many of Carey's sampled rates are) may reflect pre-Staggers-Act pricing policies and involve reciprocal rights to serve each others' shippers not only within one district, but across other districts as well. (See BNSF Reply on Comp., Ex. B, V.S. Reishus 22-24.) Indeed, reciprocal-switching rates are frequently set as part of broader transactions between the same railroads and thus may reflect unique quid-pro-quo arrangements of particular carriers at particular times, rather than the current market forces affecting the value of access at one location or for one commodity. (Id., Ex. B, V.S. Reishus 23-24.) Even UP has argued, in this proceeding, that KCS's proposal to rely on switching rates charged at other locations would not reflect "market" rates for access. (See UP Reply in Resp. to Decision No. 6 5 n.3, Feb. 25, 2019 ("Switching rates generally do not reflect market-based access compensation even for shippers and locations subject to those rates. For example, the rates may reflect pre-Staggers Act cost-based ratemaking principles or even below-cost arrangements based on reciprocity.") (citing, e.g., Increased Switching Charges at Kan. City, Mo., 356 I.C.C. at 890; City of Sheboygan, Wis. v. Chi. & N.W. Ry., 215 I.C.C. 65, 70-71 (1936)).)

Given the foregoing issues, KCS's "market-based access fee" likely would not approximate the fair market value of the trackage rights at issue here—and certainly no better than would the agency's established and preferred methodology, which would reflect actual, Lead-specific earnings and cost data. Thus, the Board will compute KCS's compensation under the SSW Compensation methodology.

II. Computing KCS's Compensation Under the SSW Compensation Methodology

As noted above, total compensation under SSW Compensation is the sum of three elements or components: (a) the variable cost incurred by the owning carrier due to the tenant carrier's operations over the owning carrier's track; (b) the tenant carrier's usage-proportionate share of the track's M&O expenses; and (c) an interest rental component designed to compensate the owning carrier for the tenant carrier's use of its capital dedicated to the track. See, e.g., SSW Compensation I, 1 I.C.C.2d at 779-80. To calculate the total compensation under SSW Compensation, the parties again rely on evidence from their experts: Neels for KCS and Baranowski for BNSF. The parties have not submitted evidence of variable costs to be included in the calculation and have submitted differing evidence on M&O expenses. The parties also disagree on the interest rental component, which, as previously noted, is historically the most contentious element of the SSW Compensation calculation. See Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 11-12 & n.18 (and cases cited therein).

As discussed further below, the Board will adopt the CE method for calculating interest rental, beginning with the "revised" data submitted with KCS's supplemental opening filing, and applying adjustments proposed by the parties and/or appropriate to conform with Board precedent and address this proceeding's unique circumstances. The resulting total fee is $9.90 per car mile in 2021 dollars, of which 50%, or $4.95 per car mile, is owed to KCS for BNSF's terminal trackage rights.

Before addressing each of the three SSW Compensation elements, the Board clarifies that it will calculate compensation based on the value of the property interest at the time of Decision No. 3 (2016)—which granted terminal trackage rights to BNSF—not at the time of the UP/SP merger (1996). As discussed in Sections I.B.1 and I.B.2.a, "[c]ompensation for a taking is determined based on fair market value 'at the time of the taking,'" New England Central I, FD 35842, slip op. at 5 (quoting United States v. 564.54 Acres of Land, 441 U.S. at 511), and KCS is not entitled to any additional compensation (let alone under condemnation principles) for the alleged 1996 "taking" via BNSF's switching/haulage access. Also, as noted above, the parties have submitted data from 2017-2020, not from the 1990s, for the Board to assess.[31]

A. Variable Cost Component

Neither BNSF nor KCS presented evidence of variable costs to be included in the SSW Compensation calculation. BNSF asserts that the variable cost component "should be zero" based on the existing UP-KCS cost-sharing arrangements and the effect of BNSF's direct service on KCS's and UP's existing operations. (See BNSF Opening on Comp. 22-23; id., Ex. A, V.S. Baranowski 20.) KCS asserts that it is too early to determine what increased variable costs KCS will incur for BNSF's direct access on the Rosebluff Lead. (See KCS Opening on Comp. 10 ("KCS is not including a calculation for [component] (a) [(variable costs)]" but "believe[s] that BNSF should pay additional compensation when its operations are delayed or cause operational interferences on the Rosebluff Lead, which result in KCS incurring additional costs."); KCS Reply on Comp. 36-38.) Because the parties have not provided evidence of variable costs, the Board has not included variable costs in its compensation calculation here.[32]

B. M&O Expenses Component

[31] In so doing, the parties have implicitly acknowledged that the relevant partial taking—for which compensation is owed here—occurred in 2016. See supra note 25 (noting that KCS's expert computes earnings based on data from 2017 and 2018).

[32] To the extent KCS claims that SSW Compensation's variable/incremental cost component can or should account for delay to the owner's operations caused by tenant BNSF (due to, e.g., overstaying its window or adding congestion), the Board would likely decline to make any such adjustment in the future. (KCS Opening on Comp. 10 & n.19; id., Ex. A, V.S. Neels 3.) As noted, KCS's latest compensation filings provide no evidence to support or compute a "delay" fee. But in any event, the agency has long recognized that "[d]amage because of interference with respondent's operations is a factor not usually considered by us as an element in arriving at the compensation to be paid for the use of another carrier's terminal facilities under [49 U.S.C. § 11102(a)]." Use by Erie, 278 I.C.C. at 432. Moreover, if there are material changed circumstances, like substantial interference with owner operations, parties have recourse before the Board, as previously noted. See supra Section I.B.2.d; Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 18; Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 11.

Both BNSF and KCS propose that property taxes and maintenance expenses be included in the trackage rights fee for BNSF's direct access to shippers on the Rosebluff Lead. With respect to property taxes, BNSF's witness Baranowski and KCS's witness Neels propose widely differing figures based on different methodologies. The Board resolves those differences, as discussed below. With respect to calculating maintenance expenses, BNSF's and KCS's witnesses began with differing approaches. However, both witnesses modified their methodologies in response to the other's critiques in subsequent filings, such that their ultimate approaches are relatively similar. Both witnesses separate maintenance expenses into two categories: routine (or operating) maintenance expenses and capitalized (or normalized) maintenance costs. They also compute separate expenses for each of KCS and UP. Below, the Board addresses those areas where disagreements remain between the witnesses.

1. *Property Taxes*

KCS's expert Neels and BNSF's expert Baranowski use different approaches for calculating the amount of property taxes for the Rosebluff Lead. Neels states that he relied on actual records of property assessments and tax payments for property in Calcasieu Parish owned jointly by both KCS and UP, used the total assessment to calculate a rate paid by each railroad, and applied that amount to the assessed value of the assets corresponding to the Rosebluff Lead. (KCS Opening on Comp., Ex. A, V.S. Neels 19-20, Jan. 26, 2021.) In contrast, Baranowski states that, because "[n]either UP nor KCS provided actual tax payment information as requested by BNSF," he "used the tax estimator provided on the website of the Calcasieu [P]arish tax assessor's webpage in conjunction with the provided information on assessed value to estimate UP and KCS's annual property tax payment for Rosebluff trackage assets." (BNSF Opening on Comp., Ex. A, V.S. Baranowski 24 n.52, Jan. 26, 2021.) On rebuttal, Baranowski argues that Neels improperly allocates the amount of property taxes for the Rosebluff Lead between UP and KCS. (BNSF Rebuttal on Comp., V.S. Baranowski 4, May 11, 2021.) Baranowski argues that even if the Board accepts Neels's property tax figures, the Board should still properly allocate that amount consistent with KCS's ownership share. (Id.)

The parties' proposed property tax figures are relatively far apart: KCS proposes a property tax amount that over ten times greater than the amount proposed by BNSF. (Compare KCS Opening on Comp., Ex. A, V.S. Neels 19-22 & Table 3, Jan. 26, 2021 (sum of UP's and KCS's property tax), with BNSF Opening on Comp., Ex. A, V.S. Baranowski 24, Table 5, Jan. 26, 2021.)

The Board finds that Neels's approach to developing property taxes should be accepted as the best evidence of record. Neels based his calculations on actual tax payments made by KCS and UP to the parish, and the Board prefers analysis based on the actual data or the experience of a carrier. (KCS Opening on Comp., Ex. A, V.S. Neels 19-22 & Table 3, Jan. 26, 2021 (citing actual property tax receipts).) By contrast, Baranowski used the tax estimator from Calcasieu Parish's website, which has a disclaimer stating: "[A]pplication provides an unofficial estimate of property taxes for planning purposes. Many factors may affect the actual tax bill[.]" See Calcasieu Parish Tax Estimator, available at https://calcasieuassessor.org/TaxEstimator (last visited July 9, 2026).[33] Additionally, Baranowski's method for calculating property taxes is not how railroads generally pay (or are assessed) property taxes in Louisiana, which applies an ad valorem tax. Specifically, Louisiana uses the overall value of the railroad, which is then pro-rated to account for the railroad's presence in the state and parish. See Norfolk S. Reply Evid. at III-D-216, Jan. 7, 2013, Sunbelt Chlor Alkali P'ship v. Norfolk S. Ry., NOR 42130. Additionally, when using the parish's tax calculator, Baranowski accounted only for the market value of the land, and not revenues and in-the-ground assets. (See BNSF Opening on Comp., Ex. A, V.S. Baranowski 23-24 & n.52, Baranowski workpaper "Rosebluff Lead Ad Valorem Tax Estimate.pdf," Jan. 26, 2021.) Finally, regarding Baranowski's assertion that the property tax amount should be allocated consistent with the UP-KCS cost-sharing agreements for the Rosebluff Lead, the Board has generally rejected the assumptions underlying BNSF's claim that the UP-KCS cost-sharing agreements should govern here, (see supra Section I.A), and Baranowski does not provide any support that such agreements in fact dictate how to allocate payment of property taxes.

2. *Maintenance Expenses*

a. Routine Maintenance Costs

On reply, KCS's expert Neels accepts the documents that BNSF's expert Baranowski relies on in his opening verified statement to calculate KCS's routine maintenance costs, noting that they appear "relatively complete" in reflecting actual costs for KCS, and adopts Baranowski's computation. (KCS Reply on Comp., Ex. C, V.S. Neels Section V.a, Apr. 12, 2021.) Neels further indicates that he also generally accepts Baranowski's supporting documentation for UP's routine maintenance costs, with the exception of bridge and culvert maintenance costs. (Id.). Neels argues that another document produced by UP in discovery shows the bridge and culvert costs as being higher than the costs shown in the documentation relied on by Baranowski. (Id.) Accordingly, to calculate UP's routine maintenance costs, Neels adopts Baranowski's costs but adds additional costs from his opening evidence and adjusts for the possibility of double counting. (Id., Ex. C, V.S. Neels Section VI & Table 1.) On rebuttal, Baranowski states that Neels does not explain why "a document that covers only one aspect of routine maintenance – bridges and culverts – is more reliable than the discovery documents [Baranowski] relied upon that cover all aspects of routine maintenance." (BNSF Rebuttal on Comp., V.S. Baranowski 2-3, May 11, 2021.) Baranowski cites Otter Tail Power Co. v. BNSF Railway (Otter Tail), NOR 42071, slip op. at D-22 (STB served Jan. 27, 2006), aff'd sub nom. Otter Tail Power Co. v. STB, 484 F.3d 959 (8th Cir. 2007), in support of his reliance on his original documentation. (BNSF Rebuttal on Comp., V.S. Baranowski 3 n.2, May 11, 2021.)

[33] Baranowski states that he relied on the parish's website because KCS did not provide the actual property tax payments during discovery. Although those records should have been provided during discovery, they were included with KCS's Opening Statement. (KCS Opening on Comp., Ex. A, V.S. Neels 21-22 & Table 3, Jan. 26, 2021 (citing PDFs of KCS's and UP's property tax "receipts"). BNSF thus had an opportunity to review them and modify his calculation well before the close of the record.

As to KCS's routine maintenance costs, in light of Neels's adoption of Baranowski's calculation, the Board will also use Baranowski's calculation. As to UP's routine maintenance costs, the Board finds that Neels's data and calculations, which are based on a variety of sources, are more comprehensive and thus more reliable than Baranowski's. Baranowski's reliance on Otter Tail is inapposite. There, the Board accepted the complainant's evidence, which had been produced by the defendant carrier in discovery and which the defendant had not impeached. Here, Neels has impeached the documentation that Baranowski relies on for bridge and culvert costs by showing that another source of this information yields different figures. Accordingly, the Board will accept Neels's calculation of UP's routine maintenance costs (which adopts, and adds additional costs to, Baranowski's cost calculations, and also adjusts for possible double counting).

b. Allocation Factor

In his opening verified statement, Baranowski states that because his routine maintenance cost calculation reflects maintenance for the entirety of the Rosebluff Lead, "it is necessary to limit the expenses to those associated with the portion of the Rosebluff Lead relevant to BNSF's direct service operations." (BNSF Opening on Comp., Ex. A, V.S. Baranowski 23 & Table 4, Jan. 26, 2021.) He argues that, because BNSF trains will not use the Rosebluff Yard for classification or switching, the costs to maintain the Rosebluff Yard's non-run-through track should be excluded. (See id., Ex. A, V.S. Baranowski 17.) Accordingly, BNSF applies an allocation factor to the routine maintenance costs to reflect the actual track miles that BNSF may use when operating over the Rosebluff Lead. (Id.. Ex. A, V.S. Baranowski 23 & Table 4, Jan. 26, 2021) KCS does not directly address this adjustment to routine maintenance costs in its filings.

An adjustment to account for only that portion of the Rosebluff Lead that BNSF will use is appropriate. Because KCS does not dispute BNSF's allocation adjustment to routine maintenance costs here, the Board will accept it. If, however, there is a change to the operations that results in an increase or decrease of BNSF's usage of track in the Rosebluff Yard, the SSW Compensation calculation should be adjusted accordingly.

c. Capitalized Maintenance Costs

KCS's expert Neels and BNSF's expert Baranowski differ in how they project future capital maintenance costs. In his reply verified statement, Neels states that he "projected a future level of expected capital project spending by averaging the amounts spent over recent years (adjusting, of course for the effects of inflation)." (KCS Reply on Comp., Ex. C., V.S. Neels Section V.b, Apr. 12, 2021.) In contrast, Baranowski developed a "normalized" estimate by taking replacement costs for assets on the Rosebluff Lead (which were developed by another BNSF witness, Robert J. Boileau) and then dividing those amounts by the average expected life of each asset component. (BNSF Opening on Comp., Ex. A, V.S. Baranowski 22, Jan. 26, 2021.) Specifically, Baranowski applied the average depreciation rates reported in KCS's and UP's 2019 R-1 annual reports. (Id.) Baranowski argues that his approach is superior because it does not require reliance on historical data, which is only available going back six years. (Id., Ex. A, V.S. Baranowski 22; see also BNSF Rebuttal on Comp., V.S. Baranowski3, May 11, 2021 ("Because some railroad assets have useful lives approaching 100 years, a six-year snapshot of historical data will either understate or, in this case, overstate the normalized maintenance expenditure requirements due to the vagaries of capital maintenance cycles.").)

Neels takes issue with Baranowski's reliance on depreciation rates from the R-1 reports because they are system-wide averages that do not necessarily reflect conditions along the Rosebluff Lead. (KCS Reply on Comp., Ex. C, V.S. Neels Section V.b, Apr. 12, 2021.) In support of his position, Neels contends that the verified statement from BNSF's witness Boileau indicates that "at least some of the capital assets comprising the Rosebluff Lead experience higher deterioration rates and shorter useful lifetimes than average assets systemwide" (namely, bridges and culverts) and that there is a "significant backlog of unmet maintenance needs on the Rosebluff Lead." (Id., Ex. C, V.S. Neels Sections V.a-V.b.)

The Board finds that Baranowski's approach is more reliable. Neels fails to establish that Baranowski's reliance on R-1 system-wide average depreciation rates is inappropriate. Although Neels is correct that one section of the Lead appears to experience higher deterioration rates than those systemwide, that higher deterioration rate is not representative of the entire Lead. Nor does Neels explain why his focus on only one aspect of maintenance—bridges and culverts—is more reliable than Baranowski's analysis, which is based on evidence (that Neels does not undermine) concerning many other aspects of maintenance. Moreover, as compared with mainline track, the Rosebluff Lead infrastructure is generally not as complex or as expensive to maintain, as it is relatively short and simple and supports lower train speeds and densities. Thus, Baranowski's reliance on systemwide depreciation rates is reasonable and likely to be conservative here, i.e., to overestimate deterioration (and underestimate useful lifetime) of the assets. (BNSF Rebuttal on Comp., V.S. Baranowski 3-4, May 11, 2021.)

d. Indexing

When indexing maintenance costs, Neels uses the AAR's All-Inclusive Index Less Fuel (AII-LF) to index routine maintenance costs but uses the Railroad Cost Recovery Index (RCRI) when adopting Baranowski's capital maintenance costs. (See KCS Reply on Comp., Neels workpaper "NEELS-WP-HC-0439.xlxs" Tabs "AAR" and "RCAF," Apr. 14, 2021 (using different indexes for different maintenance expenses).) Baranowski indexes capital maintenance costs using the RCRI, but only to the fourth quarter of 2020, and does not index routine maintenance costs. (BNSF Rebuttal on Comp., Baranowski workpaper "Historical Maintenance Expenses Rebuttal" Tab "Table," May 11, 2021 (citing BNSF Opening on Comp., Boileau workpaper "RCNLD Calculations" Tab "Unit Costs," Jan. 26, 2021).)

The Board will apply the RCRI to all maintenance costs and index the data to 2021 levels. When adopting Baranowski's capital maintenance costs, Neels uses the RCRI. (See KCS Reply on Comp., Neels workpaper "NEELS-WP-HC-0439.xlxs" Tabs "AAR" and "RCAF," Apr. 14, 2021 (using different indexes for routine maintenance costs vs. capital maintenance costs).) To avoid using two different indexes, the Board will likewise apply the RCRI (rather than the AII-LF) to index routine maintenance cost, as well. Use of the RCRI is more consistent when spread across all capital maintenance expenses. Moreover, the Board will index all maintenance costs to 2021 levels, for consistency with the rest of the parties' data.

Based on the foregoing determinations, the Board's final calculation for component (b), maintenance and operating expenses, is just under $4.30 per car mile in 2021 dollars, which falls in between BNSF's ($1.46 per car mile) and KCS's ($5.11 per car mile) proposed figures. See BNSF Rebuttal on Comp., Baranowski workpaper "Compensation Calculations Rebuttal.xlxs," May 12, 2021; KCS Suppl. Evidence on Comp., Neels workpaper "NEELS-WP-HC-0504.xlxs" Tab "Operating and Maintenance Costs," Aug. 23, 2024.

C. Interest Rental Component

The interest rental component of the SSW Compensation calculation is designed to compensate the owning carrier for the tenant carrier's use of capital dedicated to the track by the owning carrier. See SSW Compensation I, 1 I.C.C.2d at 779-80. It is typically determined by multiplying the value of the assets that comprise the trackage rights line by a rate of return equal to the current pre-tax nominal cost of capital. New England Central I, FD 35842, slip op. at 3 (citing CSX/NS—Conrail, 4 S.T.B. at 78-79). The total interest rental is then divided by the line's total car miles to convert it to a per-car-mile charge. Id.

1. *Valuation Methodology*

As noted above, in prior trackage rights cases involving Class I carriers, the Board has identified four possible methods for determining the appropriate valuation base for the interest rental: (a) CE; (b) comparable line segments; (c) RCNLD; and (d) SAC. Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 12 n.18 (citing New England Central I, FD 35842, slip op. at 3; Dardenelle & Russell Ville R.R.—Trackage Rts. Comp.—Ark. Midland R.R., FD 32625, slip op. at 4 (STB served June 3, 1996) (employing a fifth method, net liquidation value, in the case of smaller carriers)); see Atchison, Topeka & Santa Fe Ry., 8 I.C.C.2d at 304-305.

Here, KCS proposes using the CE method in its SSW Compensation calculation, noting that "the Board has expressed preference for this methodology in prior cases because CE best values the asset as a going-concern business with income-producing potential." (KCS Opening on Comp. 4 n.5, Jan. 26, 2021; see also id., Ex. A, V.S. Neels 9.[34]) KCS asserts that application of the CE method is more appropriate than the RCNLD method due to the age of the existing infrastructure on the Rosebluff Lead and because "RCNLD completely disregards the seven decades of effort, time, and money that KCS and UP's predecessors invested in maintaining and growing the track and extending service to a dozen major industrial facilities." (Id. at 8 n.14, Jan. 26, 2021.)

[34] In an earlier filing in this proceeding, KCS suggested that the RCNLD method should be used to calculate the interest rental component. (See KCS Response to Decision No. 6 35 n.39, Ex. A, V.S. Carey 3., Feb. 4, 2019; .) KCS no longer takes this position, instead advocating for application of the CE method.

BNSF argues that the RCNLD method should be used if the Board calculates the interest rental component in this proceeding.[35] (BNSF Opening on Comp. 19, Jan. 26, 2021.) According to BNSF, the RCNLD method is appropriate "because it provides an objective measure of the value of the track" relevant to BNSF's exercise of its trackage rights. (Id.) In addition, BNSF argues that using RCNLD avoids potential "earnings circularity" issues if CE were to incorporate BNSF's earnings from reciprocal switch service. (See BNSF Reply on Comp., Ex. A, V.S. Baranowski 13, Apr. 12, 2021.) However, BNSF's expert Baranowski alternatively provides a restatement of KCS's CE calculations "to correct what can be corrected to put [Neels's] CE estimate in its proper context." (Id., Ex. A, V.S. Baranowski 15.)

The Board will apply the CE method for calculating interest rental. Generally, CE is the agency's preferred methodology for setting trackage-rights compensation[36] and has been used in the last two trackage rights compensation cases decided by the Board. See New England Central I, FD 35842, slip op. at 18 ("On this record . . . CE is the appropriate methodology to apply."); CSX/NS—Conrail, 4 S.T.B. at 78-79 (reiterating that CE is the preferred approach and using it to calculate interest rental). The Board finds that the CE method is preferable here because it values the Rosebluff Lead on a going-concern basis (i.e., its ability to generate revenue), whereas the RCNLD method would value the line based on the replacement value of the structures on the property and underlying land. See SSW Compensation I, 1 I.C.C.2d at 786, 801. Here, the Rosebluff Lead is an active rail line with a considerable amount of traffic and therefore is more valuable as a going concern.

The CE method is also more appropriate here because it accounts for the fact that "trackage rights have been imposed to remedy anticompetitive effects of a consolidation." Id. at 786. Use of the CE method will help ensure that the tenant is placed on equal footing with the relevant landlord(s), which is particularly important where, as here, the proceeding stems from a merger condition designed to preserve competition. As the agency explained in SSW Compensation I,

> The decision [in Union Pac. Corp.—Control—Mo. Pac. R.R., 366 I.C.C. 459, 635 (1982)] noted . . . that [the CE] method is predicated on the carrier continuing as a going-concern. This characteristic is perhaps the methodology's greatest advantage in valuing assets us[ed] in trackage rights operation. In this context, the tenant railroad will enter the property of the ongoing, owning railroad to provide

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[35] As discussed above, BNSF also argues, unpersuasively, that KCS is owed no additional compensation under the interest rental component of the SSW Compensation methodology because "KCS's ownership rights are not affected" by BNSF's direct access under the Board-imposed conditions of use. See supra Section I.A (quoting BNSF Opening on Comp., Ex. A, V.S. Baranowski 3, Jan. 26, 2021; see also Id. at 18-19).

[36] See CSX/NS—Conrail, 3 S.T.B. at 964 n.18 (noting that the CE method is the agency's preferred approach "because, among other things, it values the property as a going concern for railroad use"); BN/SF Decision No. 38, 10 I.C.C.2d at 772 n.120 ("In determining fair market value we have preferred the 'capitalized earnings' approach, and used it where circumstances allowed."); SSW Compensation II, 4 I.C.C.2d at 674 (describing the CE method as "the most appropriate technique for valuing railroad assets in these proceedings").

> competitive service where we have found that competition to be required by the public interest. The purpose of this proceeding is to set compensation for the trackage rights which will put the tenant in the same position as the owning carrier. The owning road is now using and will continue to use the asset in the conduct of its ongoing operations as a railroad. We are favoring the methodology which values the asset for this use.

1 I.C.C.2d at 786; see also CSX/NS—Conrail, 4 S.T.B. at 76-77 ("In our prior decision, we determined that any compensation determined in this proceeding must put the tenant in the same competitive position as the owning carrier, and that the [CE] method . . . is appropriate for that purpose here.") (footnote omitted).

Moreover, and significantly here, CE can account for the added value (earnings) from access to local shippers on the Rosebluff Lead (vs. overhead trackage rights), which, as KCS points out, RCNLD does not account for. (KCS Opening on Comp. 24, Ex. A, V.S. Neels 8-9, Jan. 26, 2021 (asserting that "[t]he value of the Rosebluff Lead lies in the access it provides to a large set of rail dependent shippers" and that "[o]ne cannot meaningfully talk about the 'replacement cost' of the shippers located adjacent to the Rosebluff Lead"); KCS Reply on Comp. 26, Apr. 12, 2021 (arguing that BNSF's RCNLD-based calculation "grossly understate[s] the trackage fee that BNSF should pay to KCS because it fails to account in any way for the traffic and revenue potential of the shippers to which the Rosebluff Lead provides access")); see also supra Section I.B.2.b (discussing, among other cases, SSW Compensation II, 4 I.C.C.2d at 684, which concluded that the CE method should be adjusted based on whether the trackage-rights grant is overhead-only or includes access to local traffic, and New England Central I, FD 35842, slip op. at 8, which noted the need for adjustments to trackage-rights fee due to changes in "customers served"). Finally, the minimal degree of "circularity" that may result from a CE-based calculation here is insufficient to outweigh the CE method's other many benefits as applied to this case.[37]

For all the foregoing reasons, the CE method is the most appropriate valuation methodology to use in this case. Under CE methodology, as established in the SSW Compensation cases, earnings are calculated for the line segment at issue. Line segment earnings are then multiplied by an "earnings multiplier" that is designed to "relate[] corporate earnings to corporate value[,]" to arrive at the approximate value of the line segment (the valuation base). SSW Compensation I, 1 I.C.C.2d at 787; see also SSW Compensation II, 4 I.C.C.2d at 671. The line segment value (valuation base) is then multiplied by a rate of return equal to the current pre-tax nominal cost of capital. New England Central I, FD 35842, slip op. at 3. This figure—the total interest rental—is then divided by the line's total car miles, in order to convert it to a per-car-mile charge to reflect the tenant's specific usage. Id..

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[37] As KCS's expert Neels notes, BNSF's earnings from reciprocal switch traffic are correctly excluded because, as a non-owner, BNSF's earnings do not contribute to the market value of that asset. (KCS Reply on Comp., V.S. Neels Section IV, Apr. 12, 2021.) In addition, any UP earnings from BNSF's payment of switching/haulage fees are minimal. (KCS Opening on Comp., Ex. A, V.S. Neels 13-14, Jan. 26, 2021.)

Here, both parties provide some evidence and analysis using the CE method. KCS's expert Neels presents evidence in his opening verified statement, and in subsequent filings, regarding how to compute the interest rental component using the CE method. On reply and in subsequent submissions, BNSF's expert Baranowski addresses Neels's evidence under the CE method and proposes adjustments to Neels's analysis. Both parties' CE analyses rely on 2017 and 2018 data to develop the interest rental component for the Lead, which is then brought to 2021 levels. Below, the Board addresses the parties' various points of disagreement and potential adjustments.

2. *Line Segment Earnings*

Traditionally, revenues and costs are developed (or allocated) to determine the earnings for traffic moving over a particular line segment. See SSW Compensation I, 1 I.C.C.2d at 780. This requires identifying the revenue attributable to the segment at issue (here, the Rosebluff Lead), as isolated from that attributable to the larger movement over which the traffic moves. Next, costs are developed and deducted from revenues to calculate line segment earnings.

To determine the line segment earnings, the Board must resolve several issues that BNSF raises in response to KCS's CE analysis. These issues include: (a) whether to calculate earnings for the entirety of the Rosebluff Lead or only the Lead segments associated with traffic to/from Lyondell; (b) whether to apply a partial ownership adjustment based on KCS's relative proportion of earnings from the Lead; (c) whether to deduct allocated fixed costs (in addition to variable costs) from revenue, i.e., whether to calculate "earnings" or "contribution"; and (d) whether to include the switching fees that UP and KCS pay to switch each other's cars on the Lead. The Board addresses each of these issues below and then summarizes its calculation of line segment earnings.

a. Scope of Analysis of Line Earnings

According to KCS and its expert Neels, the Board should calculate earnings only for the Rosebluff Lead track used to access the Lyondell facility. (See KCS Opening on Comp. 2, Ex. A, V.S. Neels 39-41, Jan. 26, 2021 (calculating "the value of the Rosebluff Lead segments used by Lyondell traffic" and "restrict[ing]" the calculation of Lead traffic levels "to only include miles on those segments used by Lyondell traffic"); KCS Suppl. Rebuttal, Ex. A, V.S. Neels 5, Oct. 7, 2024 ("I restricted my analysis to Lyondell access because this is what I was asked to do.").) BNSF and its expert Baranowski disagree, arguing that earnings should be calculated for the entirety of the Rosebluff Lead. (See BNSF Reply on Comp., Ex. A, V.S. Baranowski 20-21, Apr. 12, 2021.) Baranowski asserts that under the UP/SP merger conditions, BNSF obtained rights to serve all customers accessible via the Rosebluff Lead, both through indirect service (via reciprocal switching) and direct service. (Id., Ex. A, V.S. Baranowski 21 & n.33 (citing Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 2; UP/SP Decision No. 44.) Baranowski also points to the Board's clarification in Decision No. 4 that BNSF's trackage rights over the Rosebluff Lead applied to all customers accessible via the Lead and covered by the Lake Charles Merger Conditions. (Id., Ex. A, V.S. Baranowski 21 (citing Decision No. 4, FD 32760 (Sub-No. 46), slip op. at 1, 5-7).) Accordingly, Baranowski argues that KCS's calculations should be corrected to "cover BNSF direct access to all Rosebluff Lead customers." (Id.) Ultimately, in supplemental filings in response to Decision No. 11, KCS submits earnings calculations for the entire Rosebluff Lead. (See KCS Suppl. Evidence on Comp., Ex. A, V.S. Neels 22-23 & Table 1, Neels workpaper "NEELS-WP-HC-0501.xlsx" Tab "Table 1," Aug. 23, 2024.)

The Board agrees with BNSF and will calculate earnings from the entire Rosebluff Lead, not just the portions of the Lead used to handle Lyondell traffic. It has been well-established in this proceeding that the Board's grant of trackage-rights access applies to all shipper facilities accessible via the Rosebluff Lead and subject to the Lake Charles Merger Conditions. See Decision No. 4, FD 32760 (Sub-No. 46), slip op. at 5-6 (rejecting KCS's argument that Decision No. 3 covered BNSF service of the CITGO facility only); Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 10 & n.7, 12-13 (repeatedly referring to BNSF's direct access to "Lake Charles area shippers" and "shippers on the Rosebluff Lead" generally); Decision No. 10, FD 32760 (Sub-No. 46), slip op. at 6-8 (reiterating that the trackage-rights grant to BNSF applies to shippers other than Lyondell and noting that the Board's forthcoming compensation methodology "will apply in future cases involving shippers on the Rosebluff Lead"); see also Decision No. 11, FD 32760 (Sub-No. 46), slip op. at 7 (discussing potential data error that was revealed when reviewing KCS's earnings on the "full Rosebluff Lead" or the "Lead as a whole"). Since BNSF has been granted direct access (at its election) to all of the Lead, all of the Lead's value (earnings) should be taken into account. This approach of calculating a single rate of compensation for the entire line is also consistent with recent precedent. See, e.g., New England Central I, FD 35842, slip op. at 18.

Moreover, from a practical standpoint, calculating a single rate of compensation for access to any Rosebluff Lead shipper elected by BNSF is a more efficient and economical use of Board and party resources than conducting individual proceedings and calculations for each new shipper that BNSF may access. BNSF's access encompasses the right to elect to serve shippers other than Lyondell, and the Rosebluff Lead is only about nine miles in total length. It would be inefficient to engage in the time-consuming process of discovery, testimony, briefing, and deliberation to assess compensation each time BNSF elects to directly serve a new shipper (via trackage rights) in a slightly different location on the Lead.

b. Partial Ownership Adjustment

BNSF and its expert Baranowski propose a partial ownership adjustment to line segment earnings that is different from UP and KCS's 50/50 physical ownership split of the Rosebluff Lead. (See BNSF Reply on Comp., Ex. A, V.S. Baranowski 21-22, Apr. 12, 2021.) Specifically, Baranowski argues for a partial ownership adjustment "based on the relative proportion of earnings that each partial owner contributes to the overall earnings based valuation," in order to prevent earnings or value from being allocated improperly between the two owners of the Lead. (Id., Ex. A, V.S. Baranowski 22.) Baranowski asserts that KCS's earnings comprise well under 50% of the overall Rosebluff Lead capitalized earnings valuation. (Id.) On rebuttal, KCS's expert Neels urges the Board to reject Baranowski's proposed adjustment, asserting that Baranowski seeks "to create an artificial distinction between UP's property rights and KCS's property rights" and arguing that the proposed adjustment has "no valid legal, economic or conceptual" basis. (KCS Rebuttal on Comp., V.S. Neels 3, May 11, 2021.)

The Board declines to adopt Baranowski's proposed partial ownership adjustment based on KCS's relative proportion of earnings on the Rosebluff Lead. As Neels points out, Baranowski provides insufficient justification for why the valuation and earnings of the Lead should be adjusted in this manner. The CE method values the going concern value of the entire Lead and therefore should reflect all of the earnings on the Rosebluff Lead. To the extent any adjustments to the final fee are needed because of KCS and UP's co-ownership of the Rosebluff Lead, they will be made after the interest rental component is calculated. See infra Section II.D.

c. Deduction of Fixed Costs (Earnings vs. Contribution)

On opening, KCS's expert Neels states that he uses the Board's Average Total Cost (ATC) methodology to determine what portion of the revenues from all movements that include the Rosebluff Lead should be allocated to the Rosebluff Lead. (KCS Opening on Comp., Ex. A, V.S. Neels 16, Jan. 26, 2021.) Under the ATC methodology, revenue is generally allocated between the segments of a movement based on the costs—both variable and fixed—for each segment. See Rate Regul. Reforms, EP 715, slip op. at 28, 30 (STB served July 18, 2013), remanded by CSX Transp., Inc. v. STB, 754 F.3d 1056 (D.C. Cir. 2014), amended in other ways by Rate Regul. Reforms, EP 715 (STB served Mar. 13, 2015); see also Decision No. 11, FD 32760 (Sub-No. 46), slip op. at 6.[38] However, Neels only allocates variable costs in his ATC calculation. (KCS Opening on Comp., Ex. A, Neels 32, Jan. 26, 2021 ("I was then able to compute the amount of contribution (i.e., the difference between revenue and variable cost) associated with each rail segment making up the Rosebluff Lead"); see also Id., Ex. A, V.S. Neels 31-33; KCS Rebuttal on Comp., V.S. Neels Rebuttal 2-3.)

On reply, BNSF's expert Baranowski challenges Neels's failure to deduct an allocation of fixed costs from the revenues that he attributes to the Rosebluff Lead, as part of his ATC calculation. Baranowski notes that Neels is employing the CE method, under which "earnings" are defined as the difference between revenues and all costs (both variable and fixed). (See BNSF Reply on Comp., Ex. A, V.S. Baranowski 20, Apr. 12, 2021.) Baranowski further claims that Neels himself acknowledges "that some portion of contribution must be reserved to cover fixed costs before arriving at a measure of income." (Id. (citing KCS Opening on Comp., Ex. A., V.S. Neels 34, Jan. 26, 2021).) According to Baranowski, by failing to account for fixed costs, Neels is only calculating "contribution," not "earnings," which is improper for a CE-based approach. (BNSF Reply on Comp., Ex. A, V.S. Baranowski 19-20, Apr. 12, 2021.) Accordingly, Baranowski recalculates ATC with an allocation for fixed costs. (Id.)

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[38] As explained in Rate Regulation Reforms, EP 715, slip op. at 28, the total revenues from each portion of the traffic movement will be allocated in proportion to the average total cost of the movement for each segment. However, if the revenue allocation to a particular segment would result in revenues falling below the variable costs for that segment as computed under the Board's Uniform Railroad Costing System (URCS), then the revenue allocation to that segment would be raised to equal 100% of the URCS variable costs of providing service over that segment. Id. Once the costs for each segment are sufficiently covered, the remaining revenues would then be allocated consistent with the average total cost of the movement for each segment.

On rebuttal, Neels argues that, because Baranowski computes Lead earnings but then capitalizes this measure using Neels's contribution-based multipliers, Baranowski's calculation "combines inconsistently derived measures into a result that is conceptually and economically meaningless." (KCS Rebuttal on Comp., V.S. Neels 2, May 11, 2021.)

In Decision No. 11, the Board observed that "the line-segment data produced by KCS/Neels appears to be erroneous, particularly with respect to how revenues have been allocated and/or how total costs have been calculated," and directed the parties to provide supplemental analysis and data, including workpapers, showing their ATC calculations. FD 32760 (Sub-No. 46), slip op. at 7-8. In KCS's supplemental response, Neels argues that "coverage of ATC fixed costs by ATC contribution is not, in my opinion, the correct way to calculate the value or the profitability of the Rosebluff Lead to KCS." (KCS Suppl. Evidence on Comp., Ex. A, V.S. Neels 24-25, Aug. 23, 2024.) In short, Neels claims that "there is no non-arbitrary way of computing the amount of fixed cost associated with a particular product or unit of output." (Id., Ex. A, V.S. Neels 25; see also KCS Suppl. Rebuttal, Ex. A, V.S. Neels 11 n.18, Oct. 7, 2024 ("[T]here is an inherent element of arbitrariness in the process of allocating fixed costs to rail segments[.]").) In light of this, Neels proposes three alternative analyses that he claims better measure the profitability of Rosebluff Lead traffic by reflecting that the Lead is a high-density terminal area. (KCS Suppl. Evidence on Comp., Ex. A, V.S. Neels 32, Aug. 23, 2024.) However, in support of his claims that KCS's data is not erroneous, Neels also provides calculations that deduct fixed costs from revenue, to develop KCS-specific earnings for the full Lead. (See KCS Suppl. Evidence on Comp., Ex. A, V.S. Neels 22-23 & Table 1, Neels workpaper "NEELS-WP-HC-0501.xlsx" Tab "Table 1," Aug. 23, 2024 (basing calculations on Baranowski's analysis, at BNSF Reply on Comp., Baranowski workpaper "Restated Neels CE Results.xlsx" Tab "R Output," Apr. 12, 2021).)

The Board will accept evidence deducting fixed costs in developing the line segment earnings, as Baranowski recommends, as this is most consistent with Board precedent. The Board is unaware of any decision applying the CE method under SSW Compensation in which the agency adopted evidence developing line segment "contribution"; rather, agency precedent overwhelmingly supports developing line segment earnings (i.e., accounting for certain fixed costs). See, e.g New England Central I, FD 35842, slip op. at 15-16 (adopting PAS's witness's CE calculations, which allocated certain fixed costs in addition to variable costs in developing line segment earnings[39]); CSX/NS—Conrail, 4 S.T.B. at 85, Table 3 (adopting CP's witness's line-segment earnings where full costs, not just variable costs, were subtracted from revenues[40]); SSW Compensation II, 4 I.C.C.2d at 685, 701-02 (stating that "the net earnings concept requires a fully allocated cost level" and rejecting certain cost data that failed to show fixed costs on a fully allocated level). Moreover, the ATC methodology—which the agency has endorsed in the

[39] See Pan Am S. Reply, Ex. B, V.S. Baranowski 38, July 19, 2016, New England Cent. R.R.—Trackage Rts. Ord.—Pan Am S. LLC, FD 35842.

[40] See Canadian Pac. Ry. Reply, Plaistow V.S. 8-11 & Ex. No. JJP-2.4 at 1-2 (Dec. 10, 1998), CSX/NS—Conrail, FD 33388.

context of calculating trackage-rights compensation[41]—generally considers both variable and fixed costs, along with traffic density, to allocate revenues over portions of a railroad's lines. See, e.g., Major Issues in Rail Rate Cases in Decisions, EP 657 (Sub No. 1), slip op. at 26, 34-35 (STB served Oct. 30, 2006) (discussing how both variable and fixed costs are used to establish the average total cost to own and operate a particular segment), aff'd sub nom. BNSF Railway v. STB, 526 F.3d 770 (D.C. Cir. 2008); (KCS Opening on Comp., Ex. A, V.S. Neels 16-17, 25, Jan. 26, 2021 (same)).

KCS does not offer a sufficient basis to depart from the Board's longstanding approach. As its expert acknowledges, "the practice of allocating fixed costs to specific products or units of output is widespread in business," (KCS Suppl. Evidence on Comp., Ex. A, V.S. Neels 25, Aug. 23, 2024), and BNSF sets forth a reasonable way to allocate fixed costs here. As to KCS's claim that allocating fixed costs involves arbitrariness, the mere fact that there are many ways to allocate fixed costs (each requiring some measure of judgment) does not mean that it should not be done at all, particularly where (as here) the Board has evidence comporting with longstanding precedent. Moreover, by reflecting higher volumes, ATC methodology can generally take into account whether a segment is a higher-density segment, as here. Thus, it is not necessary to apply any of the three alternative analyses proposed by KCS's expert, which depart from the agency's established approach and precedent. Finally, because the Board will be beginning with the "revised" earnings data submitted with KCS's supplemental opening filing (rather than Baranowski's adjustments to KCS's original contribution data), Neels's "inconsistency" criticism of Baranowski's calculation is moot.

d. Inclusion of Earnings From Switching Movements on the Lead

In his calculation of earnings for the Rosebluff Lead, KCS's expert Neels includes contribution from switching fees that UP and KCS pay to switch each other's cars on the Lead. (KCS Opening on Comp., Ex. A, V.S. Neels 29-31, Jan. 26, 2021.) On reply, BNSF's expert Baranowski objects to their inclusion, claiming that this is an "artificial contribution." (BNSF Reply on Comp., Ex. A, V.S. Baranowski 16, Apr. 12, 2021.) Baranowski notes that compensation for these switching moves is set, by agreement and design, at levels equal to cost. (Id.) Accordingly, he argues that "there is by definition no associated contribution." (Id., Ex. A, V.S. Baranowski 18.) Baranowski indicates that the costs are accurately accounted for by the fact that a cost study for the UP and KCS reciprocal switching was performed in 2004 and those costs have since been properly indexed. (Id., Ex. A, V.S. Baranowski 18-19.)

Baranowski also takes issue with the method Neels uses to calculate the costs for these switching moves (which Neels then subtracted from the 2017 and 2018 switching rates for Zone 1 and Zone 2, to determine contribution). (Id., Ex. A, V.S. Baranowski 16-18.) According to Baranowski, Neels used URCS inter-terminal switching costs as a proxy for the actual switching costs but those inter-terminal switching costs are a poor proxy because they cover only

[41] See New England Central I, FD 35842, slip op. at 15-18; Pan Am S. Reply, Ex. B, V.S. Baranowski 33-40, July 19, 2016, New England Cent. R.R.—Trackage Rts. Ord.—Pan Am S. LLC, FD 35842; Pan Am S. Surrebuttal, Ex. A, V.S. Baranowski 18-22, Feb. 22, 2017, New England Cent. R.R.—Trackage Rts. Ord.—Pan Am S. LLC, FD 35842.

one carrier's half of the cost of a switch. (Id., Ex. A, V.S. Baranowski 16.) He also argues that an inter-terminal switching is not reflective of the actual switching done between UP and KCS on the Lead. (Id., Ex. A, V.S. Baranowski 16-17 (arguing that "there are no industry-to-industry [i.e., inter-terminal] switches on the Rosebluff Lead" and "more importantly, there are no tracks on the Rosebluff Lead owned by one or another of the carriers operating within the terminal") Baranowski argues that Neels's use of the URCS inter-terminal switching costs inflates his contribution calculation because, unlike the standard industry switch costs derived from URCS, the URCS interterminal switching costs are not adjusted by the Board's URCS make-whole adjustments. (Id., Ex. A, V.S. Baranowski 18.) For these reasons, Baranowski removes Neels's contribution for on-Lead switching moves, as well as the car miles that Neels attributes to these switch-related activities, which Baranowski claims "are also counted in [Neels's] estimate of linehaul car miles." (Id., Ex. A, V.S. Baranowski 19.)

On rebuttal (and supplemental rebuttal), Neels defends his inclusion of earnings from switching moves. (See KCS Rebuttal on Comp., V.S. Neels 1-2, May 11, 2021; KCS Suppl. Rebuttal, Ex. A, V.S. Neels 9-10, Oct. 7, 2024.) He argues that these earnings are not "artificial," as they reflect actual movements that are occurring on the Rosebluff Lead. (Id., Ex. A, V.S. Neels 9.) Ignoring these movements, claims Neels, is equivalent to assuming that all KCS shipments involving Zone 2 customers and all UP shipments involving Zone 1 customers simply terminate in the Rosebluff Yard, which is not accurate. (KCS Rebuttal on Comp., V.S. Neels 1, May 11, 2021.) Neels notes that, despite the acknowledged limitations and inaccuracies of URCS, it is still the official regulatory costing system for the agency. (Id.) Neels also notes that the switching rates were last benchmarked to actual costs in 2004 and argues that "[o]ver the ensuing two decades, switching rates have only undergone periodic formulaic adjustments, and have had ample opportunity to drift apart from actual costs." (Id., V.S. Neels 2.) In supplemental filings, Neels criticizes Baranowski's calculations removing the contribution from on-Lead switching movements, arguing that the apparent data error identified by the Board in Decision No. 11 may be traced to those adjustments. (See KCS Suppl. Evidence on Comp., Ex. A, V.S. Neels 21, 24, Aug. 23, 2024.)

The Board will include earnings from the on-Lead switching fees that UP and KCS pay each other because Neels's approach and calculations are the best evidence of record. First, although BNSF is correct that on-Lead reciprocal switching between UP and KCS is not meant to be revenue-generating, ignoring that such switches are occurring (and thereby contributing both to costs and revenues of the parties) would give an inaccurate picture of movements to and on the Lead. The Board agrees with KCS that it is not appropriate essentially to assume that all KCS shipments involving Zone 2 customers and all UP shipments involving Zone 1 customers originate or terminate in the Rosebluff Yard. Second, KCS is correct that, despite some limitations, the use of URCS inter-terminal switching costs is an appropriate way to estimate switching costs—particularly here, many on-Lead switches represent one carrier's "half" of a reciprocal switch. Indeed, it represents the best proxy available in the absence of an actual time-in-motion switching study of the area. Third, as KCS suggests, it is likely that actual Lead switching costs are much higher today than when they were last benchmarked in 2004 and have deviated from switching rates, which could ultimately (after adjustments under the UP-KCS cost-sharing agreements for the Lead) result in each party generating some non-negligible earnings from such switches. In any event, it would be incorrect to assume, as BNSF does, that switching costs and fees are a true net zero contribution, after not being benchmarked for nearly 20 years.

Moreover, while both parties' switching-related calculations have flaws, KCS's are less problematic. Although Neels's incorporation of on-Lead switching fees does not follow the ATC methodology traditionally applied by the Board, Neels's resulting calculations likely result in only a slight understatement of the total line-haul revenue allocated.[42] By contrast, Baranowski's calculations, in purporting to remove switching contribution, also remove a sizable amount of allocated line-haul contribution.[43] This greatly overcompensates for the inclusion of switching fees, distorting the Rosebluff Lead's value. Moreover, Baranowski's data shows only the value of switching contribution and does not provide the fixed costs or output files to calculate earnings based on these proposed adjustments. For all the foregoing reasons, KCS's evidence including the on-Lead switching movements is the best evidence of record and will be used (and adjusted to reflect earnings) in the Board's fee calculations here.[44]

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[42] Generally, in Neels's calculations, the switching fees appear as a cost in the allocation of revenues, but not in the revenues that are being allocated. This would lead to a slight understatement of the line-haul revenue allocated because the switching fees, which are used for revenue allocation, are being distributed along the off-Lead segments and the Lead, instead of just along the Lead itself, where the activity occurs. (See, e.g., KCS Suppl. Evidence on Comp., Ex. A, V.S. Neels 2-18, Aug. 23, 2024 (describing costing process); BNSF Reply to KCS Suppl. , Baranowski workpaper "Neels_Artificial_Contribution_Summary_Workpaper.xlxs" Tabs "UP w KCS Zone 1 Switch" and "KCS w UP Zone 2 Switch," Sept. 23, 2024 (showing detailed segment-by-segment breakdown of cost and revenue allocation for each example).) Thus, Neels's approach includes a possibility of double-counting, which could occur while using URCS to calculate the switching movements.

[43] In filtering the data to remove segments with a switch on the Rosebluff Lead, Baranowski's filter apparently removes revenues and costs from both the line-haul segments and the switching segments. (See BNSF Reply to KCS Suppl., Baranowski workpaper "Neels_Artificial_Contribution_Summary_Workpaper.xlxs," Sept. 23, 2024 (filtering on the column "rl_switch" to calculate revenue and contribution allocated to those movements, instead of further filtering using the column "switch_portion," thereby capturing part of the line-haul movement where switching occurs plus the additional switching revenues and costs added by Neels); see also id., Baranowski workpaper "Neels_Artificial_Contribution_Summary_Workpaper.xlxs" Tab "UP w KCS Zone 1 Switch" rows 513 to 515, and Tab "KCS w UP Zone 2 Switch" rows 194 to 197 & rows 198 to 201.) Baranowski's methodology appears to remove approximately 12% of the contribution from line-haul movements for "UP with KCS Zone 1 Switch" and approximately 75% of contribution from line-haul movements for "KCS with UP Zone 2 Switch." See id., Baranowski workpaper "Neels_Artificial_Contribution_Summary_Workpaper.xlxs" Tab "Tables".

[44] Upon review of the supplemental data and workpapers submitted in 2024, the Board is satisfied that the parties have corrected the calculations that led to the apparent data error identified in Decision No. 11.

e. Line Segment Earnings Results

In developing earnings for the line segment, the Board will use the data provided by Neels in his supplemental opening verified statement. (See KCS Suppl. Evidence on Comp., Ex. A, V.S. Neels 22-23 & Table 1, Neels workpaper "NEELS-WP-HC-0501.xlsx" Tabs "Table 1" and "R Output," Aug. 23, 2024.) There, in order to address the Board's concerns in Decision No. 11, Neels calculates, using Baranowski's workpapers, the allocated revenues and costs (both variable and fixed) to develop a KCS-specific earnings figure for the full Rosebluff Lead. (See id. (basing calculations on Baranowski's analysis at BNSF Reply on Comp., Baranowski workpaper "Restated Neels CE Results.xlxs" Tab "R Output," Apr. 12, 2021).) For UP-specific earnings, the Board will accept Neels's data (which relies on Baranowski's workpapers but does not include fixed costs[45]) and derive UP's fixed costs in a manner similar to Neels's derivation of KCS's fixed costs, i.e, by applying the URCS constant markup ratio for UP to UP's variable costs, to derive fixed costs for UP's movements on the Lead.[46] This method is selected because, as discussed further below, the Board will be using enterprise-value-based earnings multipliers (which are specific to each carrier/owner and year), whereas BNSF/Baranowski provides combined cost data that is not broken out by carrier/owner.[47]

3. *Earnings Multiplier*

Using the CE methodology under SSW Compensation requires developing an earnings multiplier. The earnings multiplier (generally, a ratio of system pre-tax earnings to system asset

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[45] (See KCS Suppl. Evidence on Comp., Neels workpaper NEELS-WP-HC-0501.xlxs," Tab "lead_fc," Aug. 23, 2024 (showing only fixed costs for KCS).)

[46] (See id., Neels workpaper NEELS-WP-HC-0501.xlxs" Tab "Table 1," Tab "R Output;" KCS Opening on Comp., Neels workpaper NEELS-WP-HC-0004.xlsx," Jan. 26, 2021 (containing the URCS constant cost markup ratios for 2017 and 2018).)

[47] The Board grants BNSF's motion to strike Neels's belated "alternative trackage fee calculation" that excludes BNSF traffic in computing Rosebluff Lead traffic density using ATC methodology. (BNSF Reply to KCS Suppl. 3-4, Sept. 23, 2024; see KCS Suppl. Evidence on Comp., Ex. A, V.S. Neels 36, Aug. 23, 2024; see also id., Ex. A, V.S. Neels 29-30, 36-44.) As BNSF notes, KCS's admittedly new calculations, which are raised for the first time in supplemental evidence, (see KCS Suppl. Evidence on Comp., V.S. Neels 30, 36), are beyond the scope of the Board's supplemental data request in Decision No. 11. In that decision, the Board sought additional information regarding how line-segment data "were" developed and allocated in KCS's 2021 compensation filings. Decision No. 11, FD 32760 (Sub-No. 46), slip op. at 8. It did not sanction the submission of entirely new methods of developing and allocating the data, which could have and should have been presented at earlier stages of this proceeding. Cf. Canadian Pac. Ry.—Control—Kan. City S., FD 36500, slip op. at 17 (STB served Mar. 15, 2023) (striking evidence that exceeds the scope of Board decision permitting clarification); New England Central II, FD 35842, slip op. at 4-6 (refusing to consider new arguments on reconsideration that could have been presented earlier). Thus, the Board will strike (and not rely on) Neels's "alternative trackage fee calculation" excluding BNSF traffic from Lead traffic density under ATC, as set forth in Neels's supplemental opening verified statement, pages 36-44.

value) is multiplied by the line segment earnings to calculate a "capitalized" earnings valuation for the line segment at issue (valuation base). CSX/NS—Conrail, 4 S.T.B. at 79-81; SSW Compensation II, 4 I.C.C.2d at 671, 674, 677-80.

KCS's expert Neels calculates earnings multipliers, which he refers to as the "capitalization factor," in two ways: the first is based on the ratio of the enterprise value of each railroad (KCS and UP) to each railroad's total railroad-wide contribution, and the second is based on the reciprocal of the industry-wide weighted average cost of capital (WACC) as calculated by the Board. (KCS Opening on Comp., Ex. A, V.S. Neels 33, Jan. 26, 2021.) Neels states that, of the two approaches, he considers the enterprise value-based approach to be the more reliable. (Id., Ex. A, V.S. Neels 34.) Neels defines "enterprise value" as the sum of the market value of a company's outstanding stock (also referred to as its market capitalization) and the value of its outstanding debt. (Id., Ex. A, V.S. Neels 33-34.) He argues that the enterprise value-based multiplier is superior to a WACC-based approach because a WACC-based approach treats contribution as if it were net income, which it is not. (Id., Ex. A, V.S. Neels 34.) In other words, enterprise value fully reflects investors' assessments of the relationship between contribution and value, taking into account the need to cover fixed costs. (Id.)

On reply, BNSF's expert Baranowski argues that Neels's choice to use an enterprise value-based multiplier is flawed for two reasons. First, Baranowski claims that Neels's stated reason for using the enterprise value-based multiplier—that it is based on investor expectations—is in fact captured in the Board's cost-of-capital determination. (See BNSF Reply on Comp., Ex. A, V.S. Baranowski 22, Apr. 12, 2021.) Second, Baranowski takes issue with Neels's methodology for calculating the enterprise value. Specifically, Baranowski asserts that Neels takes the total enterprise value of KCS and UP and then tries to "isolate[] the portion of that value attributable to the types of track-only related assets on the Rosebluff Lead." (Id., Ex. A, V.S. Baranowski 23.) According to Baranowski, this is arbitrary because it is based on the "faulty premise that enterprise valuations are proportional to physical asset historical gross book values." (Id.) Stated differently, he claims that Neels improperly "attributes the profitability and growth characteristics assumed for the KCS and UP systems to the profitability and growth characteristics of the Rosebluff Lead." (Id.; see also id., Ex. A, V.S. Baranowski 23-25.) Among other results, this (Baranowski contends) leads to a disproportionate amount of KCS enterprise value being attributed to KCS's Mexico operations. (Id., Ex. A, V.S. Baranowski 24.) Baranowski argues that, if Neels instead allocated the U.S. portion of enterprise value in a manner proportional to the share of earnings generated by the U.S. franchise (instead of proportional to the book value of all gross assets), the multiplier would be reduced by approximately one-third. (Id., Ex. A, V.S. Baranowski 24-25.) Baranowski thus asserts that the Board should reject Neels's enterprise value-based multipliers and instead use the agency's calculated railroad industry cost of capital figure, the most recent finding of which was, at the time of filing, for the year 2019. (Id., Ex. A, V.S. Baranowski 25.)

On rebuttal, Neels responds that his enterprise value-based approach "does not rest upon any broad or overarching assumption regarding the proportionality of gross book value and enterprise value." (KCS Rebuttal on Comp., V.S. Neels 4, May 11, 2021.) He claims that he uses book values only for two limited purposes: "to separate the values of KCS's U.S. and Mexico operations, and to separate, for both KCS and UP, the values of the 'below the wheel' assets from the values of the 'above the wheel' assets that BNSF would not be using." (Id.) He argues that using book value for these purposes is appropriate. (Id.) Neels also disputes Baranowski's assertion that Neels assumes that the Rosebluff Lead's profitability is the same as the overall profitability for KCS and UP. Instead, Neels claims that he based profitability for the Lead on the costs and revenues of traffic over the Lead. (Id., V.S. Neels 5.) Finally, Neels argues that Baranowski's proposed methodology—relying on the Board's cost-of-capital figures—is itself flawed. He states that relying on the cost of capital makes the unrealistic assumption that the Rosebluff Lead's earnings or contributions will stay constant in nominal terms indefinitely. (Id., V.S. Neels 6.) He states that the correct approach involves making adjustments to reflect current market expectations that incorporate inflation and earnings growth, which is what the enterprise-based earnings multiplier achieves. (Id., V.S. Neels 6-7.)

The Board finds that Neels's enterprise-value approach for calculating the earnings multiplier is the superior approach here and will therefore adopt it, with one modification noted below. As an initial matter, the Board notes that there is precedent for using both enterprise value (as proposed by Neels) and cost of capital (as proposed by Baranowski). CSX/NS—Conrail, 4 S.T.B. at 79-81 (adopting an approach to calculating the earnings multiplier similar to Neels's approach); New England Central I, FD 35842, slip op. at 15-16 & n.22 (noting that the agency has used the rail industry pre-tax cost of capital as an earnings multiplier, and citing Amtrak I, 4 I.C.C.2d at 792; Caddo Antoine & Little Mo. R.R.—Feeder Line Acquis.—Ark. Midland R.R. Line, 4 S.T.B. 326, 341 (1999)). While both the cost-of-capital approach and enterprise-value-based approach "reflect the required return on investment for the industry," and thus are both "closely aligned with the CE methodology's inquiry into the earnings potential of the line at issue," New England Central I, FD 35842, slip op. at 16, the Board finds that use of an enterprise-value-based multiplier provides more precision here, and hence should be used. While the pre-tax cost of capital is an industry-wide figure, an enterprise-value-based multiplier is specific to each owning railroad (here, KCS and UP), which is preferable and supported by evidence in the record of this proceeding.

In addition, Baranowski's arguments for using earnings instead of book value to apportion enterprise value between KCS's U.S. and Mexican operations are not persuasive. Neels's use of the ratio between the book values of KCS's U.S. and Mexican operations will reasonably measure the U.S.-based assets generating earning and the market value of those earnings. Baranowski's alternative method may also be viable, but he offers insufficient explanation why his method produces better results. A calculation using earnings to apportion value between U.S. and foreign assets would also be much more complex, and Baranowski failed to provide the necessary data to properly evaluate his alternative approach. Also, Baranowski's proposed use of the 2019 pre-tax cost of capital for the earnings multiplier is inappropriate here because it results in a mis-match between the 2019 cost-of-capital figure and the earnings data, which is from the years 2017 and 2018. Cf. New England Central I, FD 35842, slip op. at 16 (using a pre-tax cost of capital that was from the same year as the earnings assessed).

The Board will make one modification to Neels's earnings multiplier calculations. The calculations will be adjusted to reflect earnings data from the relevant annual R-1 reports, rather than Neels's contribution data. See supra Section II.C.2.c. The final earnings multipliers, as computed in this way, are as follows: 14.16 for KCS in 2017, 11.76 for KCS in 2018, 9.98 for UP in 2017, and 9.59 for UP in 2018.

4. *Calculation of the Interest Rental Component*

Having determined the line segment earnings and the earnings multipliers for each railroad in each relevant year (2017 and 2018), the next step is to determine the market value or valuation base for the Rosebluff Lead by multiplying each carrier's line segment earnings for each year by the corresponding earnings multiplier, and then adding the two carriers' totals together for each year. Then, a rate of return is applied. The rate of return used in the CE method is the railroad industry pre-tax cost of capital. CSX/NS—Conrail, 4 S.T.B. at 79. It appears, however, that neither party uses the appropriate pre-tax cost of capital in their calculations. On the record here, KCS's expert Neels uses the cost of capital based on the Board's annual cost of capital determination for 2017 and 2018 (an after-tax figure), while BNSF's expert Baranowski applies the 2019 pre-tax cost of capital to 2017 and 2018 data. (See KCS Opening on Comp., Ex. A., Neels V.S. 41-42 & Table 10, Jan. 26, 2021 (citing after-tax STB-calculated industry WACC); BNSF Reply on Comp., Ex. A, V.S. Baranowski workpaper "Restated Neels CE Results.xlxs" Tab "Calculations," Apr. 12, 2021.) The Board will apply the appropriate pre-tax cost of capital for each year.

Moreover, neither party addresses which tax rate(s) should be used to compute the pre-tax cost of capital. Accordingly, the Board will compute the pre-tax cost of capital so that it includes both the federal and Louisiana state statutory tax rates. Use of the statutory tax rates is consistent with how BNSF's expert computed his 2019 pre-tax cost of capital. (See BNSF Reply on Comp., Ex. A, V.S. Baranowski workpaper "Compensation Calculations Reply.xlxs" Tab "Fees," Apr. 12, 2021.") And in past cases, both the statutory and effective tax rates have been used.[48]

The interest rental component of the trackage rights fee is initially developed as an annual expense. KCS's expert Neels converts that annual expense into a per-car-mile figure. To do so, Neels ultimately calculates the total loaded car miles for the Rosebluff Lead by using car counts from the traffic data. (See KCS Suppl. Evidence on Comp., Ex. A, V.S. Neels 42, workpaper "NEELS-WP-HC-0504.xlxs" Tab "Car Miles Calculation," Aug. 23, 2024.) He then multiplies the loaded car counts for each customer by each customer's corresponding distance from the start of the Rosebluff Lead. (Id.) This results in a total-loaded-car-mile figure, which BNSF's expert Baranowski does not dispute and the Board adopts here. (See KCS Suppl. Evidence on Comp., Ex. A, V.S. Neels workpaper "NEELS-WP-HC-0504.xlxs" Tab "Car Miles Calculation," Aug. 23, 2024.)

[48] See, e.g., SSW Compensation II, 4 I.C.C.2d at 683-84 (employing statutory tax rate); New England Central I, FD 35842, slip op. at 19 (employing owner's effective tax rate, where both parties consented). Also, in abandonment proceedings, federal and state taxes are used to compute the pre-tax cost of capital. See 49 C.F.R. § 1152.34(d) ("The railroad's nominal cost of capital shall be the current before tax cost of capital, weighted to the capital structure, and adjusted for the effects of the combined statutory Federal and state income tax rates.").

To account for empty car miles, Neels calculates a ratio of total car miles to loaded car miles. He calculates a total-to-loaded car-mile ratio by relying on the loaded and empty car-mile data (for 2017 and 2018) from Schedule 755 of the annual R-1 reports for BNSF, KCS, and UP. (See KCS Opening on Comp., Ex. A, V.S. Neels 20-22, Jan. 26, 2021; KCS Suppl. Evidence on Comp., Ex. A, V.S. Neels workpaper "NEELS-WP-HC-0504.xlxs," Aug. 23, 2024; KCS Suppl. Rebuttal, Ex. A, V.S. Neels workpaper "total_loaded_ratio," Oct. 7, 2024.) Neels then applies the total-to-loaded car-mile ratio to arrive at his final per-car-mile interest rental component. (See KCS Opening on Comp., Ex. A, V.S. Neels workpaper "NEELS-WP-HC-0003.xlxs" Tab "Car miles Calculation" and Tab "Table 3", cell G25, Empty to Loaded Ratio = 1 + (Empty Car Miles / Loaded Car Miles), Jan. 26, 2021.)

On reply, Baranowski does not dispute conversion of the fee to a per-car-mile charge, but states that he "corrected" Neels's "empty to load" ratio to 2.0. (BNSF Reply on Comp., Ex. A, V.S. Baranowski 25-26, Apr. 12, 2021.) Neels responds on rebuttal by arguing that Baranowski presents no evidence or data to support his assertion that Neels is incorrect. (See KCS Rebuttal on Comp., V.S. Neels 7, May 11, 2021.) Neels also asserts that Baranowski's "empty-to-loaded ratio" does not account for the possibility of "loaded backhauls," i.e., the practice of re-loading a car for a subsequent shipment after that car is unloaded at a customer's facility. (KCS Suppl. Rebuttal, Ex. A, V.S. Neels 14-15, Oct. 7, 2024.) Neels states that he examined actual shipment data and determined that there is "potential" for loaded backhauls. (Id., Ex. A, V.S. Neels 15.)

The Board agrees that calculating a per-car-mile figure is appropriate here. Use of a per-car-mile figure will allow the rate to be applied, based on the specific mileage, to BNSF's service of any Lead shipper subject to the Lake Charles Merger Conditions. In addition, computing a per-car-mile figure is consistent with Board precedent. See, e.g., New England Central I, FD 35842, slip op. at 18; CSX/NS—Conrail, 4 S.T.B. at 85. The Board will also accept Neels's total-to-loaded car-mile ratio. The Board agrees that there is a potential for loaded backhaul shipments on the Rosebluff Lead and, therefore, the total-to-loaded ratio calculated by Neels is more accurate. In general, loaded cars leaving the Lead would generate car-miles on the Lead, but because there is no guarantee that a particular car would return to the Lead, either loaded or empty, the ratio will almost certainly not be 2.0.[49] By contrast, Baranowski's ratio of 2.0 assumes that there will be a perfect match between loaded and empty car-miles on the Lead, which is unrealistic. Neels presents a logical and supported approach to developing the total-to-loaded ratio, which is the best evidence of record here.

To calculate the annual interest rental per loaded car mile, the Board divides the annual interest rental for each year (2017 and 2018) by each year's total loaded car miles. Each year's annual interest rental per loaded car mile is then indexed to 2021 levels using Neels's STB-inflation-adjusted index. (See KCS Suppl. Evidence on Comp., Ex. A, V.S. Neels "NEELS-WP-HC-0503.xlxs," Aug. 23, 2024.) The two years' results are then averaged to arrive at the average

[49] Generally, with unit train or train load movements, there is an assumption that the empty-to-loaded ratio will be 2.0 because it is a conveyer-belt-type operation with each empty train returning to its origin. However, manifest traffic—a type used by at least some Rosebluff Lead shippers, including Lyondell—has different empty-to-loaded ratios because there are instances where the empty load may not return to where it originated.

interest rental per loaded car mile. Finally, the Board divides the average interest rental per loaded car mile by Neels's total-to-loaded car-mile ratio, which produces the final interest rental of just under \$5.61 per car mile in 2021 dollars. Similar to the M&O component, this figure for the interest rental component falls in between BNSF's (\$1.16 per car mile) and KCS's (\$13.77 per car mile) proposed figures under the CE method. See BNSF Reply on Comp., Baranowski workpaper "Restated Neels CE Results.xlsx" Tab "Calculations," Apr. 12, 2021.

D. Amount of Trackage Rights Fee Owed to KCS

Applying the foregoing determinations and calculations, the total SSW-Compensation-based terminal-trackage-rights fee for the Rosebluff Lead is calculated to be \$9.90 per car mile in 2021 dollars. However, the parties dispute what portion of this per-car-mile fee is owed to KCS, as a 50% owner of the Rosebluff Lead.

KCS asserts that the fact that UP and KCS each own a 50% share of the Rosebluff Lead "does not automatically mean that KCS is entitled to only 50 percent of an SSW-based trackage fee calculated using the combined UP and KCS earnings" for the Lead. (KCS Suppl. Rebuttal, Ex. A, V.S. Neels 8, Oct. 7, 2024.) KCS's expert Neels argues that "how [rental] income is divided" is "for the owners" (not the tenant) to determine. (Id.) He further asserts that, because UP expects no more compensation than the Prescribed Fee, "it is reasonable to assume that UP has already agreed that KCS would be entitled to the entire amount of any new access fee imposed under 49 U.S.C. § 11102." (Id., Ex. A, V.S. Neels 8-9.) However, UP asserts that "[a]s 50% owner of the Lead, KCS should be entitled to 50% of the fee both owners would collect under SSW Compensation principles." (UP Reply on Comp. 8, Apr. 12, 2021.) BNSF, as explained above, also argues that the Board must account for KCS's partial ownership interest but urges that this be done by applying a partial ownership adjustment, based on relative earnings on the Rosebluff Lead, to the line segment earnings calculation, which the Board has rejected. See supra Section II.C.2.b.

The Board concludes that KCS, as 50% owner of the Rosebluff Lead, is entitled to 50% of the total trackage rights fee calculated under SSW Compensation. KCS cites no precedent that supports awarding a line owner more than its ownership share of SSW- or condemnation-based compensation for the property interest taken. As UP and BNSF observe, the amount calculated under SSW Compensation (and thus, under condemnation principles) reflects the fair market value of that interest to all owners of the line. The fact that UP has agreed with BNSF, in exchange for other valuable consideration, to accept less than its share of the fair-market-value-based fee does not mean that KCS is entitled to receive 100% of the fee that both owners would collect under 49 U.S.C. § 11102(a). Nor would it be fair or appropriate, as KCS suggests, to require BNSF to pay more than the statutory condemnation-based fee overall—100% of an SSW-based fee to both owners (to divide as they see fit) plus the Prescribed Fee to UP—to exercise its terminal trackage rights. Indeed, KCS provides no evidence or persuasive justification for why it should be entitled to more than 50% of the SSW-calculated fee, particularly where KCS generates well under 50% of the owners' total line-segment revenues used to calculate the line's valuation here.

Accordingly, the Board finds that the terminal trackage rights compensation due to KCS is $4.95 per car mile, in 2021 dollars. The per-car-mile compensation rate established here is based on data from 2017 and 2018 that is indexed to 2021 levels using the STB Inflation-Adjusted Index (as used by Neels). (See KCS Opening on Comp., Ex. A, V.S. Neels 42, Jan. 26, 2021 (setting forth Neels's multipliers for each year).) The Board's calculations are contained in workpapers that will be made available to the parties upon request, subject to the necessary protective orders.

To convert the compensation amount to current dollars, the parties should index the 2021 per-car-mile rate consistent with the methodology provided by Neels.[50] Going forward, the parties should annually adjust the fee each year after July 1 by applying the STB inflation-Adjusted Index multiplier for the prior calendar year to the then-current per-car-mile rate.

Having determined the proper trackage rights fee in accordance with SSW Compensation, the Board turns to the allocation issue, i.e., how much of this fee should be paid by BNSF and how much by UP.

III. Allocating Payment of Compensation to KCS

As the Board recognized in Decision No. 8, "[t]his case presents unique circumstances regarding the interplay between the Board's merger conditions in UP/SP and § 11102(a)." Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 15. Indeed, "[u]nlike a 'typical' grant of terminal trackage rights . . . the Rosebluff Lead grant affects two different line owners, each subject to a different compensation scheme"—the SSW-calculated fee, on the one hand (as calculated in Section II), and a much lower competition-promoting fee derived from the merger conditions, on the other (the Prescribed Fee). Id. Additionally, the UP/SP merger conditions do "not specifically address the existence of a third-party joint owner" of the trackage-rights lines, as it was assumed that, in the BNSF Agreement, UP was offering BNSF trackage rights over lines solely owned by UP or the former SP. Id. (quoting Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 20); see also UP/SP Decision No. 44, 1 S.T.B. at 253, 368, 415-17 & n.166.

As discussed above, UP is entitled to no more than the Prescribed Fee, and KCS is entitled to one-half of the total fee calculated under SSW Compensation. See supra Sections I & II. Accordingly, the final issue to resolve is what the Board has described as a "central disagreement" among the parties: "whether (1) BNSF should pay more than the Prescribed Fee for its access to these terminal trackage rights to account for any amount to which KCS is entitled; or whether (2) UP should make up any shortfall to KCS." See Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 15.

For the reasons explained below, and in light of the unique circumstances presented here, the Board determines that: (1) BNSF will be responsible for paying KCS its share of the SSW-calculated fee (and for paying UP the Prescribed Fee); and (2) it is necessary and justified to reopen and modify UP/SP Decision No. 44 for the limited purpose of establishing fair and

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[50] The Board has indexed only up to 2021, the last year for which the parties provided information in the record.

statutorily compliant compensation to KCS for BNSF's trackage-rights usage of the Rosebluff Lead.

A. The Parties' Arguments

BNSF maintains that it is only responsible for paying the Prescribed Fee—i.e., the trackage rights fee imposed in the UP/SP merger in UP/SP Decision No. 44, as modified by subsequent agreements with UP. (BNSF Opening on Comp. 5-6, Jan. 26, 2021.) As noted above, the Prescribed Fee was approximately \$0.00355 per GTM, as of January 2021. (Id. at 6; see also UP Resp. to Decision No. 6 2, Feb. 4, 2019 (\$0.00331 per GTM, as of February 2019).) As applied only to the portion of BNSF's movement over the Rosebluff Lead (and not to any BNSF movement over the 50/50 Line leading to the Lead), it is estimated that this Prescribed Fee translates to approximately \$2.36 per car (as of 2019) to move to and from Lyondell (loaded and empty), assuming a 25-car train with a single locomotive and an average of 130 tons per loaded car and 33 tons per empty car.[51] BNSF asserts that, in the UP/SP merger, the Board set "a uniform fee level for all BNSF trackage rights service subject to the merger conditions" (including under the Lake Charles Merger Conditions) so that BNSF could "effectively compete on both long-haul and short-haul movements." (BNSF Opening on Comp. 10, Jan. 26, 2021.) According to BNSF, requiring BNSF to pay more than that level (i.e., more than the Prescribed Fee, in this case) "would frustrate [the Board's] own carefully calculated conditions, as well as the parties' bargained-for agreements." (Id.; see also BNSF Reply on Comp. 3-4, Apr. 12, 2021.)

According to BNSF, UP should be responsible for "any shortfall between the Prescribed Fee and" any compensation due to KCS. (BNSF Opening on Comp. 9, Jan. 26, 2021; see also id. at 8-11.) BNSF claims that UP chose to proceed with the UP/SP merger, and thus to provide BNSF with direct access to Lake Charles area shippers at the Prescribed Fee if BNSF so elected, without obtaining KCS's consent. (Id. at 9-10.) BNSF reasons that UP's failure to obtain KCS's consent "forced BNSF to institute this proceeding," and accordingly, "[n]either BNSF nor Lake Charles area shippers should be responsible for any shortfall" payment to KCS. (Id. at 10; see also id. at 11 (claiming that "higher costs imposed on BNSF service will make it harder for BNSF to compete with UP and KCS – thereby depriving Lake Charles area customers of the full competition that the Board envisioned when it imposed the Lake Charles Merger Conditions") (citing id., Ex. A, V.S. Baranowski 29).) BNSF also contends that the Board cannot require BNSF to pay more than the Prescribed Fee without formally reopening the UP/SP merger conditions. (See id. at 11.)

UP argues that BNSF is responsible for paying (1) UP the Prescribed Fee and (2) KCS "any additional compensation to which KCS is entitled under § 11102(a)." (UP Opening on Comp. 2, Jan. 26, 2021.) UP asserts that under 49 U.S.C. § 11102(a), the carrier that is granted

[51] See supra note 18; (UP Resp. to Decision No. 6 2-3 & n.1, Feb. 4, 2019 (\$2.36 per car for movement over the Lead, apparently using Prescribed Fee rate of \$0.00331 per GTM); see also UP Opening on Comp. 3 n.7, Jan. 26, 2021 (\$3.36 per car in 2021, but apparently using a higher Merger Fee mills per ton-mile rate); UP Reply on Comp. 8 n.23, Apr. 12, 2021 (\$3.14 per car in 2021).)

use of terminal facilities must compensate the facilities' owner. (Id.) UP adds that § 11102(b) "reinforces" the tenant carrier's (or "user's") responsibility to pay the owner "by providing that the owner is entitled to recover 'damages' from the user 'for compensation for the use . . . in a civil action . . . if the amount of compensation is not paid promptly.'" (UP Reply on Comp. 2, Apr. 12, 2021 (quoting 49 U.S.C. § 11102(b)).) UP thus appears to suggest that § 11102(b) should be read in conjunction with § 11102(a) to mean that the "user" (and not any co-owner) must pay the full terminal-trackage-rights fee. (UP Reply on Comp. 2, Apr. 12, 2021.) UP asserts that this "user pays" rule is also established in Board precedent. (Id. at 2-3 (citing UP/SP Decision No. 44, 1 S.T.B. at 449; Union Pac. Corp.—Control—Mo. Pac. R.R., 366 I.C.C. at 572-76); see also UP Opening on Comp. 2, Jan. 26, 2021.) UP further contends that there is even more reason to require BNSF to directly compensate KCS here because BNSF already has indirect switching access to Lyondell and does not need direct trackage rights to compete effectively with UP. (UP Opening on Comp. 2 n.5, Jan. 26, 2021 (citing UP Reply to BNSF Pet. to Est. Conditions of Use & Comp. 2, 61, June 25, 2018).) UP notes that BNSF retains the option of continuing to serve shippers indirectly should it "believe[] it cannot compete while paying KCS the compensation required by § 11102(a). (UP Reply on Comp. 8, Apr. 12, 2021.) If BNSF decides to accept the benefits of direct access, however, it must accept the obligations associated with such access, including compensating KCS. (UP Opening on Comp. 2, Jan. 26, 2021.)

UP also asserts that requiring BNSF to pay the Prescribed Fee to UP and SSW Compensation to KCS based on KCS's 50% ownership of the Lead "would not result in BNSF paying more to KCS and UP, collectively, than if KCS owned a 100% interest in the trackage at issue." (Id. at 3.) UP states, however, that it "agree[s] to waive BNSF's obligation to pay the Prescribed Fee for use of the Lead when BNSF operates its own trains directly to Lyondell" to remove "even the theoretical possibility that BNSF could be required to pay KCS and UP, collectively, more than it would be required to pay KCS if KCS owned 100% of the Lead." (Id.; see also UP Reply on Comp. 7-8, Apr. 12, 2021 (noting that SSW Compensation principles were "developed to establish 'compensation for trackage rights granted to redress the effects of a merger'" and arguing that BNSF can fulfill the UP/SP merger conditions so long as it does not pay more than the SSW-based fee, which, given UP's "waiver," BNSF will not do).)

KCS similarly contends that BNSF, not UP, is responsible for compensating KCS for its direct trackage-rights use. (KCS Reply on Comp. 6-11, Apr. 12, 2021.) Among other things, KCS argues that at the time of the UP/SP merger, BNSF, as a sophisticated party, should have done due diligence on whether UP actually owned or was authorized to give BNSF access to the Rosebluff Lead. (Id. at 7-8.) KCS asserts that BNSF would have discovered KCS's joint ownership of the Rosebluff Lead had it done such diligence, and accordingly, BNSF's position that UP should be responsible for paying KCS any compensation beyond the Prescribed Fee "is a ruse by which BNSF attempts to avoid its responsibility to know what the contracts that it signs mean." (Id. at 8.)

KCS also argues that § 11102(a) mandates that "BNSF alone" should pay both UP and KCS compensation for the access it seeks in this proceeding. (Id. at 9; see also id. at 1, 4 n.7, 9-10; KCS Rebuttal on Comp. 11, May 11, 2021.) KCS contends that if BNSF is responsible only for payment of the Prescribed Fee (with UP paying KCS its SSW-calculated compensation), KCS and UP will be "forc[ed]" to "subsidize" BNSF's operations over the Rosebluff Lead. (KCS Reply on Comp. 4 n.8, Apr. 12, 2021.) This will "eventually inhibit, not promote, competition," and "KCS and UP will no longer have any incentive to invest in infrastructure when they are not able to recoup that investment." (Id.)

B. Discussion and Conclusions Regarding Allocation

Having thoroughly considered the parties' positions, in light of the unique circumstances of this issue of first impression, the Board concludes that requiring BNSF to pay KCS the SSW-calculated compensation is most consistent with 49 U.S.C. § 11102(a) and the Board's overarching intent in the UP/SP merger, and most effectively balances the public interest, rail transportation policy (RTP) of 49 U.S.C. § 10101, and equitable considerations. As discussed further below, the Board recognizes that requiring BNSF to pay the compensation due to KCS will increase BNSF's trackage-rights fees (for the Lake Charles area only) above the amount set by the UP/SP merger conditions and subsequent UP-BNSF agreements, but the Board finds it necessary and justified to make this very narrow and specific modification to the merger conditions and invokes its authority to do so under 49 U.S.C. §§ 1322(c) and 11327.

Section 11102(a) provides, in pertinent part, that:

> The Board may require terminal facilities . . . owned by a rail carrier . . . to be used by another rail carrier . . . . The rail carriers are responsible for establishing . . . compensation for use of the [terminal] facilities. However, if the rail carriers cannot agree, the Board may establish . . . compensation for use of the facilities under the principle controlling compensation in condemnation proceedings.

49 U.S.C. § 11102(a). Although § 11102(a) does not explicitly state that the user (tenant) carrier must compensate the line owner, the most natural and logical reading is that, when facilities are "used by another rail carrier," the "compensation for use" should be paid by the user. Moreover, the Board has, in past decisions, implied such a requirement by referring to "compensation to be paid by the tenant carrier." S. Plains Switching, Ltd., FD 35111, slip op. at 4 ("The rail-line owner and the carrier providing alternative rail service (tenant carrier) are responsible for establishing the compensation to be paid by the tenant carrier for a period of alternative rail service, but when they cannot agree, either party may ask the Board to set the compensation.") (citing 49 U.S.C. §§ 11102(a), 11123(b)(2)) (emphases added); see also MKT, 198 I.C.C. at 8 (terminal trackage rights holder has essentially "become a tenant of respondent [owning carrier], and the just and reasonable compensation which it is required to pay is in effect a rental") (emphasis added).

In addition, § 11102(b) specifically provides that a "carrier whose terminal facilities are required to be used by another rail carrier under this section is entitled to recover damages from the other rail carrier . . . for compensation for the use . . . in a civil action . . . if the amount of the compensation is not paid promptly." 49 U.S.C § 11102(b) (emphasis added). As noted by UP, the language of § 11102(b) "reinforces" that the user/tenant carrier is expected to compensate the owner for its use of terminal facilities under § 11102(a). (UP Reply on Comp. 2, Apr. 12, 2021).

Accordingly, the Board concludes that requiring BNSF, as the tenant, to pay KCS its share of the "condemnation"-based compensation is most consistent with the language of § 11102.

Additionally, based on the record in this proceeding, there is a sizable difference between the Prescribed Fee and the SSW-based fee owed to KCS—such that it raises concerns that if UP (rather than BNSF) is required to pay the SSW-based fee, UP might have a reduced incentive to reinvest in the Rosebluff Lead, ultimately causing harm to the Lead's shippers and further harm to co-owner KCS. (See KCS Reply on Comp. 32, Apr. 12, 2021 (describing BNSF's proposed compensation scheme as "the antithesis of fairness to KCS [and] Rosebluff Lead shippers because it would force KCS and UP to subsidize BNSF . . . and tip[] the competitive balance toward BNSF through regulatory action, thereby inhibiting true competition"); id. at 12 (BNSF's compensation proposal "would result in less money being able to be reinvested in the Rosebluff Lead to the detriment of all Rosebluff Lead stakeholders").) When compared on a per-car basis for Lyondell traffic,[52] it is apparent that the SSW Compensation-based (condemnation) fee (approximately $40 per car) has diverged considerably over time from the merger-based Prescribed Fee (approximately $2.50 per car) for this increasingly high-traffic and high-value terminal area. See supra note 18; (UP Resp. to Decision No. 6 2-3, Feb. 4, 2019). Requiring UP to make up this difference could result in needed revenue and resources being depleted from the Lead, causing harm to KCS and to Lead shippers, contrary to the public interest. Cf. Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760 (Sub-No. 21), slip op. at 11 (recognizing that where a landlord carrier fails to receive an adequate return, there is "no economic incentive for it to maintain or replace the line as necessary to continue efficient service") (citing SSW Compensation IV, 8 I.C.C.2d at 86; Mo. Pac. R. Co. v. ICC, 23 F.3d 531, 534 (D.C. Cir. 1994)). In addition, a compensation scheme that could reduce or disincentivize investment and maintenance of a line, inhibit carriers from earning adequate revenues on that line, and potentially alter the viability of rail service in this area would also be inconsistent with the RTP.[53]

In making this assessment, the Board is mindful that it intended, through UP/SP merger conditions like the BNSF Agreement, to establish a below-SSW trackage-rights fee to allow BNSF to garner sufficient traffic to effectively compete against the combined UP/SP along

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[52] The Board offers these approximate Lyondell-specific figures as an illustrative example and for comparison purposes only. In doing so, the Board does not mean to imply that BNSF may use its terminal trackage rights only to serve Lyondell.

[53] See, e.g., New England Central I, FD 35842, slip op. at 8 ("[F]reezing the trackage rights fee in perpetuity at a depressed level would be substantially inconsistent with the [RTP]," including the policies of "promot[ing] a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board[,]" "operat[ing] transportation facilities and equipment without detriment to the public health and safety[,]" and "ensur[ing] the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense.") (quoting 49 U.S.C. § 10101(3), (8), and (4), respectively).

nearly 4,000 miles of trackage-rights lines. UP/SP Decision No. 44, 1 S.T.B. at 414.[54] But while the Board may have intended to give BNSF some advantage vis-à-vis UP for purposes of trackage-rights compensation, the merger conditions (including the trackage-rights fee) did not "address the existence of a third-party joint owner" and the need to ensure adequate and statutorily compliant compensation to that third party. Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 15 (quoting Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 20); see also UP/SP Decision No. 44, 1 S.T.B. at 253, 368, 415-17 & n.166 (establishing merger trackage-rights fee on the assumption that UP was offering BNSF trackage rights over lines solely owned by UP or the former SP). KCS did not consent to a below-SSW rate, nor receive the many benefits of the merger and merger agreements, as UP and BNSF did. And although UP is most responsible for creating the unique controversy at hand by failing to seek consent from (or even negotiate with) KCS before offering BNSF the option of direct trackage rights, (see Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 3, 11-13), KCS—the party most injured by UP's actions—insists here that its interests would be further impaired by requiring UP (rather than BNSF) to pay its compensation.

In contrast, the Board finds that BNSF will still be able to use its terminal trackage rights, along with its indirect access, to compete effectively for Lake Charles traffic, even if required to pay KCS its 50% share of SSW-based compensation. Notably, for hypothetical Lyondell traffic in 2021, the Prescribed Fee (approximately $2.50 per car) is markedly lower than both the SSW Compensation-based fee owed to KCS (approximately $40 per car) and the fee that BNSF pays UP for indirect access via UP switching and haulage (approximately $315 per car).[55] At these relative levels, the total fees for trackage-rights access (under $43 per car) will be considerably less than the $300+ per car that BNSF pays for switching access. And although BNSF will need to expend additional costs to operate its own trains to and over the Lead, its 50/50 Line fees and its variable costs are not likely to be so significant that BNSF cannot offer competitive line-haul rates, particularly for multiple-car shipments. (See, e.g., BNSF Rebuttal in Supp. of Appl. 27, V.S. Baranowski 8-11 (discussing relatively low per-car variable costs for multiple-car and unit-train shipments to Lead customers), V.S. Smith 2-3, Oct. 23, 2015 (reciprocal switching is less efficient and cost effective than direct service).) Indeed, BNSF would still—in many circumstances—expend less for its direct trackage-rights operations over the Rosebluff Lead than it would for its indirect switching access, allowing BNSF to offer competitive pricing to Lake Charles shippers.

Additionally, BNSF's direct trackage-rights operations will avoid the need for multiple movements and switches (to/at North Yard and Rosebluff Yard), which saves time and improves predictability, making BNSF's direct service more attractive to many Lead shippers. (See, e.g., id.. 9, V.S. Smith 2 (asserting that switching adds at least one additional day of cycle time to

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[54] For this reason, UP's claim that BNSF will never pay more than 100% of an *SSW*-based fee does not resolve the matter. BNSF is contesting any compensation over the Prescribed Fee (not over the SSW fee), as it has been long established that BNSF would not need to pay at least one 50% co-owner (UP) under SSW/condemnation principles.

[55] See supra note 18; (UP Resp. to Decision No. 6 2-3, Feb. 4, 2019) (identifying the Prescribed Fee and BNSF's indirect service fees at 2019 levels); KCS Reply on Comp. 12, Apr. 12, 2021 (noting that Neels's 2021 estimate of BNSF's indirect fees is $316.23 per car).)

both loaded and empty cycles and that direct service would be "more streamlined" and provide "greater consistency in service").) Direct operations will also give BNSF more control and oversight and hence improve its service to Lake Charles shippers. In light of all the foregoing factors, and the highly profitable nature of Lake Charles area traffic,[56] the Board finds that under the payment scheme ordered here, BNSF will have the ability and incentive to use its terminal trackage rights to compete effectively in the area, as intended by the Lake Charles Merger Conditions. See UP/SP Decision No. 63, FD 32760, slip op. 8-9; Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 9-13.

In sum, the Board concludes that BNSF will be responsible for paying KCS its 50% share of the SSW-calculated fee, in addition to paying the Prescribed Fee to UP. The Board believes that this allocation is the most equitable and appropriate under the specific, unusual circumstances of this case, as it will best balance the various public interest considerations, including KCS's interest in fair and statutorily compliant compensation, UP's interest in obtaining sufficient revenue to reinvest in the Lead, and the shipping public's interests in a well-maintained infrastructure at Lake Charles with effective competition among multiple carriers.

C. Limited Reopening is Necessary and Justified

The Board acknowledges, as BNSF suggests, (see BNSF Opening on Comp. 11), that imposing a payment obligation on BNSF beyond the Prescribed Fee will require the Board to reopen the UP/SP merger and modify a merger condition (the trackage-rights fee) as it applies to these particular parties in this particular area. See UP/SP Decision No. 44, 1 S.T.B. at 429. Based on the unique circumstances of this case, the Board has determined that it is appropriate to reopen the UP/SP merger proceeding to the least extent necessary in order to: (1) ensure that KCS obtains its statutorily mandated compensation from tenant BNSF pursuant to 49 U.S.C. § 11102(a) and (2) account for various public interests in: enabling BNSF to be a viable competitor with UP, avoiding harm to Lake Charles area shippers, and ensuring fairness to a third-party line owner not contemplated by the original trackage-rights fee condition. See Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 15 (The UP/SP merger conditions did "not specifically address the existence of a third-party joint owner of the line.") (quoting Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 20). Accordingly, the Board invokes its supplemental order authority under 49 U.S.C. § 11327 to effectuate this very limited reopening and modification of the trackage-rights fee—as applied only to BNSF's payment of compensation to KCS for terminal trackage rights over the Rosebluff Lead.

The Board may reopen a proceeding "at any time on its own initiative because of material error, new evidence, or substantially changed circumstances." 49 U.S.C. § 1322(c). The Board also is empowered to "make appropriate orders supplemental to an order made in a proceeding

[56] See, e.g., (KCS Reply on Comp. 3 n.4, Apr. 12, 2021; see also id., Ex. D, V.S. Carey Section II.C (providing data in support of claim that BNSF's SIT capabilities allow BNSF to "extract maximum profit" from Lake Charle traffic).)

under [§§] 11322 through 11326" if "cause exists."[57] 49 U.S.C. § 11327. Accordingly, the Board has "continuing authority to enter supplemental orders and to modify decisions entered in merger and control proceedings under 49 U.S.C. [§] 11323." Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (General Oversight), 5 S.T.B. 1173, 1177 (2001) (citing Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760 (Sub-No. 21), slip op. at 3 n.3 (STB served May 7, 1997)); see also Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 35), FD 36500 et al., slip op. at 77 (STB served Mar. 15, 2023) ("The Board has authority to enter supplemental orders enforcing merger conditions and to modify prior decisions entered in the merger proceeding both during and after the merger oversight period.") (citing 49 U.S.C. § 11327; Canadian Nat'l Ry.—Control—Ill. Cent., FD 33556 (Sub-No. 4), slip op. at 3 (STB served Dec. 27, 2001)).

When the Board exercises its supplemental order authority under 49 U.S.C. § 11327, it considers whether the public interest is served by the action. See, e.g., Norfolk S. Ry.—Consol. of Operations—CSX Transp., Inc., FD 32299 (Sub-No. 1), slip op. at 2-3 (STB served Dec. 2, 2005) (explaining that the "modification [must] be consistent with the public interest[]"); see also CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., FD 33388 (Sub-No. 94), slip op. at 5 (STB served Nov. 7, 2003) (operative criterion is whether the proposed modifying transactions are "consistent with the public interest"); see also Rio Grande Indus.—Purchase & Related Trackage Rts.—Soo Line R.R., FD 31505, 1989 WL 246814, at *8 (I.C.C. served Nov. 13, 1989) (supplemental order authority can be exercised "when compliance with the condition can be shown to be no longer in the public interest") (citing Norfolk & W. Ry.—Merger, 363 I.C.C. 270, 280 (1980)). Additionally, the bases for reopening under § 1322(c)—material error, new evidence, or substantially changed circumstances—can constitute "cause" to issue a supplemental order. See Greyhound Corp., 668 F.2d at 1362; see also Canadian Nat'l Ry.—Control—Ill. Cent., FD 33556, slip op. at 6 (STB served Aug. 27, 2002) (denying request to expand a merger condition because parties failed to "demonstrate material error, new evidence, substantially changed circumstances, or any other sufficient cause to expand" the condition). Although § 11327 provides express authority to issue supplemental orders when appropriate in merger cases, the Board has cautioned that such authority should be used "very cautiously and sparingly once the parties to an approved merger no longer have the opportunity to elect not to proceed." Major Rail Consol. Procs., 5 S.T.B. 539, 583 n.3 (June 7, 2001); see also, e.g., CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., FD 33388 (Sub-

[57] Although 49 U.S.C. § 11327's predecessor, 49 U.S.C. § 11351, used the term "good cause," the legislative history confirms that the change from "good cause" to "cause" was not intended to be substantive. See Pub. Law 96-258 (June 3, 1980), 94 Stat. 425 ("An Act to amend subtitle IV of title 49, United States Code, to codify recent law and improve the Code without substantive change"); H. Rep. 96-332, 6, 1980 U.S.C.C.A.N. 1224, 1229. Federal courts have equated the "cause" or "good cause" standard with a "need" or "necessity" standard. See, e.g., Greyhound Corp. v. I.C.C., 668 F.2d 1354, 1362 (D.C. Cir. 1981) ("[W]e are persuaded that the ["good cause" or "cause"] language of the statute requires some event or change in circumstances which necessitates a supplementation or modification" of a prior decision); Ill. v. I.C.C., 713 F.2d 305, 310 (7th Cir. 1983) ("While 'good cause' has been diplomatically described as an 'elastic concept,' we, on our own research, have found no case in which it has been held to require a greater showing than need.") (quoting Dinko v. Wall, 531 F.2d 68, 75 (2d Cir. 1976)).

No. 100), slip op. at 5 (STB served July 31, 2006) (denying request to issue supplemental order authorizing Conrail to provide switching service because the Board had "dismissed similar claims seeking additional relief in previous Conrail decisions")).[58]

Here, there is cause to issue a supplemental order and reopen for the narrow purpose of ensuring that KCS receives adequate compensation under 49 U.S.C. § 11102(a) when BNSF exercises its direct trackage-rights on the Rosebluff Lead. A confluence of substantially changed circumstances has occurred since UP/SP Decision No. 44 that necessitates a narrow modification of the trackage-rights fee set by that decision, in order to ensure consistency with the statute, the public interest, and the Board's intent underlying the Lake Charles Merger Conditions. 49 U.S.C. §§ 1322(c), 11327.

First, as the Board has explained, the BNSF and CMA Agreements and the below-SSW trackage-rights fee established therein (imposed as merger conditions in UP/SP Decision No. 44) were negotiated and intended to govern the relationship between only UP/SP and BNSF; they did not address compensation to a third-party joint owner of the trackage rights lines. Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 15; Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 20. Indeed, the BNSF Agreement included benefits to UP in exchange for a lowered trackage-rights rental rate that was designed to encourage BNSF competition via trackage rights across approximately 4,000 miles of UP/SP's lines. See Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 2 (citing UP/SP Decision No. 44, 1 S.T.B. at 368, 413-17). Thus, what became the Prescribed Fee here was not developed with an eye toward compensating a third-party joint owner; rather, it was a global rate that UP negotiated, offered to BNSF, and accepted (through merger consummation) despite apparently never seeking KCS's consent. See Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 20 ("While the Board would agree that the question of compensation had been settled by the BNSF and CMA Agreements if UP were the only owner of the Rosebluff Lead, the particular language in those merger conditions does not specifically address the existence of a third-party joint owner of the line."); see also Decision No. 8, FD 32760 (Sub-No. 46), slip op. at 15.

Second, at the time of UP/SP Decision No. 44, and even at the time of UP/SP Decision No. 63 four months later, it was not apparent that compensation to the unanticipated third-party joint owner would need to be established under 49 U.S.C. § 11102(a). The Board, UP/SP, and BNSF were not aware, until after UP/SP Decision No. 44 and only eight days before the merger was consummated, of KCS's claim that UP was contractually barred from offering BNSF trackage rights in Lake Charles under the merger conditions already imposed. And in UP/SP Decision No. 63, the Board encouraged the parties to privately resolve the contract dispute regarding BNSF's direct access, or to submit the dispute to arbitration, before resorting to a terminal-trackage-rights application under § 11102(a). See UP/SP Decision No. 63, FD 32760, slip op. at 9-10. However, instead of attempting to immediately resolve the dispute over direct

[58] Thus, the Board notes that it is not reconsidering or reopening its decisions granting BNSF direct and indirect access to serve Lake Charles area shippers, as KCS previously sought, and failed, to deny BNSF that access during the UP/SP merger proceeding. See UP/SP Decision No. 44, 1 S.T.B. at 427-29, 433-35; UP/SP Decision No. 63, FD 32760, slip op. at 8-9; see also Decision No. 3, FD 32760 (Sub-No. 46), slip op. at 7-13.

trackage-rights access, BNSF instead opted to access the Lake Charles area shippers exclusively via switching/haulage by UP. Accordingly, it was not necessary in 1996 (or at any point before 2013, when this proceeding was initiated) to set compensation under § 11102(a) and condemnation/SSW principles.

Third, only upon calculation of compensation due to KCS under § 11102(a) has it become apparent that SSW/condemnation-based compensation for the Lake Charles area has deviated so significantly from the global below-SSW trackage-rights rate set under UP/SP Decision No. 44 (and the Prescribed Fee derived therefrom). This is apparently the product of significant growth since 1996 in both the volume and profitability of Lake Charles area traffic. (See, e.g., BNSF Rebuttal in Support of Appl. 19-20, V.S. Smith 2, Oct. 23, 2015 (discussing "unforeseen" "upsurge" in volume of crude oil traffic); KCS Reply to BNSF Appl., Vol. II, 49, 52, 62, Aug. 24, 2015 (BNSF internal documents discussing "significant geographic and industrial growth" in Lake Charles).) Moreover, as explained earlier, it is now apparent that—in light of this large, unexpected disparity—KCS and Lead shippers could suffer harm if BNSF is not made responsible for paying KCS as contemplated under § 11102(a). See supra pp. 55-56.

Taken together, this combination of material and substantially changed circumstances supports reopening under § 1322(c) and amounts to sufficient cause to issue a supplemental order under § 11327. As discussed above, modifying BNSF's trackage-rights fee in this specific instance is equitable and consistent with the public interest, as it best balances the public interest goal of allowing BNSF to compete effectively for Lake Charles area traffic (as contemplated by the merger), with the competing public interest goals of adequately compensating KCS under § 11102(a) and ensuring adequate reinvestment in the Rosebluff Lead for the benefit of all carriers and shippers using it. The Board must ensure that KCS is fairly compensated in accordance with § 11102(a). Cf. New England Central I, FD 35842, slip op. at 8 (reassessing trackage rights fee that was "no longer an adequate payment for use of the line," including because it did "not account for the numerous factors that may have changed in the last 30 years, such as customers served, commodities carried, volumes and resulting revenues, and maintenance and operating costs, among other things"); Atchison, Topeka & Santa Fe Ry., 8 I.C.C.2d at 303 (determining that there was "[b]oth good cause and changed circumstances" to justify reopening the proceeding "to reconsider the rental charged [to the tenant carrier] for operating the line under [a particular] [c]ondition" previously imposed). Moreover, as noted previously, a payment scheme that does not provide KCS with fair compensation by the tenant could, among other things, impair the owning carriers' ability to earn enough revenue from the Lead, disincentivize sufficient reinvestment in it, potentially diminish or impair rail service in Lake Charles, and raise other RTP concerns. See supra p. 55 and note 53. And, as found above, BNSF will have ample ability and incentive to use its terminal trackage rights, even if required to pay both UP and KCS here. In sum, maintaining the Prescribed Fee as BNSF's only compensation for its terminal trackage rights over the Rosebluff Lead is no longer in the public interest. Cf. Rio Grande Indus., FD 31505, 1989 WL 246814, at *8 (supplemental order may be justified where "compliance with the condition can be shown to be no longer in the public interest").

The Board does not undertake reopening lightly, particularly decades after the UP/SP merger was consummated. See Norfolk S. Corp.—Control—Norfolk & Portsmouth Belt Line

R.R. Co., FD 36836, slip op. at 26 (STB served Apr. 6, 2026) ("concerns for administrative finality, repose, and detrimental reliance" are "greater the longer in time between a Board decision" and the potential reopening of that decision). Here, however, there is no evidence that BNSF or any Lake Charles shipper has detrimentally relied on the prospect of trackage-rights service by BNSF at a rate that presumes BNSF need not compensate Lead co-owner KCS. In addition, both the uniqueness of the present situation (see supra pp. 6, 24, 51-52, 54-60) and the very limited scope of the Board's modification to the merger conditions here assure the Board that reopening is highly unlikely to disrupt the finality (or encourage further reopening) of the UP/SP merger proceeding.

For all of the foregoing reasons, the Board concludes that a narrow reopening of UP/SP Decision No. 44 is necessary and justified for the sole purpose of requiring BNSF to pay KCS as set forth in this decision, and in accordance with § 11102(a), for BNSF's use of terminal trackage rights over the Rosebluff Lead.

It is ordered:

1. The Board reopens UP/SP Decision No. 44 for the limited purpose of modifying the amount of the fee that BNSF is required to pay for trackage rights over the Rosebluff Lead.

2. BNSF is directed to pay the Prescribed Fee to UP for any BNSF movements made pursuant to the terminal trackage rights granted in this proceeding (except for direct movements to/from Lyondell).

3. The Board calculates that the terminal trackage rights compensation under SSW Compensation, in 2021 dollars, is $9.90 per car mile. The parties shall index and adjust this trackage rights fee, as set forth in this decision. BNSF is directed to pay 50% of the indexed and adjusted per-car-mile fee to KCS for any BNSF movements made pursuant to the terminal trackage rights granted in this proceeding.

4. This decision is effective on the date of service.

By the Board, Board Members Fuchs, Hedlund, Kloster, and Schultz.