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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36873

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

CSX TRANSPORTATION, INC.'S MOTION FOR SUMMARY DENIAL

Michael S. Burns
John P. Patelli
Jason M. Marques
Steven Armbrust
R. Patrick Dover
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-3276

John M. Scheib
Gentry Locke Attorneys
101 W. Main Street, Suite 705
Norfolk, VA, 23510
(757) 916-3511
scheib@gentrylocke.com

Louis E. Gitomer
Law Offices of Louis E. Gitomer, LLC
600 Baltimore Avenue, Suite 301
Towson, MD 21204
(410) 296-2250
Lou@lgraillaw.com

Kent A. Gardiner
Luke van Houwelingen
Drake Morgan
Crowell & Moring LLP
600 Fifth Street NW
Washington, DC 20001
(202) 624-2624
KGardiner@crowell.com
LvanHouwelingen@crowell.com

Shawn R. Johnson
Fried, Frank, Harris, Shriver & Jacobson LLP
801 17th Street, NW
Washington, DC 20006
(202) 639-7000
Shawn.Johnson@friedfrank.com

Attorneys for CSX Transportation, Inc.

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CSX Transportation, Inc. ('CSXT') respectfully submits this Motion for Summary Denial of the Amended Application of April 30, 2026 ('Application' or 'App.'), which requests Surface Transportation Board (the 'Board') authority for Union Pacific Corporation ('Union Pacific' or 'UP') to control Norfolk Southern Corporation ('Norfolk Southern' or 'NS,' together with UP, the 'Applicants') (the 'Proposed Transaction'). Even as supplemented in response to the Board's orders, this Application does not present a *prima facie* case under 49 C.F.R. § 1180.4(c)(8) and Board law, and it should be summarily denied. *See R.R. Consolid. Procs. Exp'd Proc'g ('Exp'd Proc'g')*, 363 I.C.C. 767 (1980).

I. INTRODUCTION

The Board's 2001 Rules codify its concern that any merger of the remaining Class I railroads—and specifically any end-to-end, transcontinental merger—would pose a serious risk of permanent, unfixable competitive harm and leave shippers and the U.S. rail network worse off, forever. Under those Rules, any application for such a merger thus must address the risk of competitive harm squarely; come with offsetting proposals not only to preserve but enhance competition; and prove significant, more verifiable, and merger-specific public benefits.

To present a *prima facie* case, an application must include real-world factual and economic evidence that would enable the Board to weigh those elements according to its governing framework and ultimately to find that the proposed merger would be in the public interest. The Board's procedures and ability to scrutinize a proposed transaction depend on applicants having "file[d] with their application all their statements and other materials on which they intend to rely" so that the Board and public "can begin analyzing[] applicants' entire direct case at the time the application is filed." *Exp'd Proc'g*, 363 I.C.C. at 769. That submission is applicants' complete "case-in-chief;" if it does not support a conclusion that the transaction is in the public interest, summary denial is appropriate. *Id.* at 769-70.

In its May 28 completeness decision, the Board ruled that although the Application contained "sufficient information to satisfy the fairly narrow procedural question of completeness," it was "unclear or underdeveloped," "lack[ed] clarity and detail[,] and d[id] not yet afford parties a meaningful opportunity to comment on the merits of the Transaction." *Union Pac. Corp.–Control–Norfolk S. Corp.* (Decision No. 21), FD 36873 (STB served May 28, 2026) ('Decision 21'), slip op. at 17-18. Applicants' supplements do not remedy these shortfalls. Applicants continue to adhere to positions on key issues that prevent the Board from rationally assessing the harms and benefits of their Proposed Transaction and ultimately the public interest as the law requires.

Applicants have now been given <u>three separate chances</u> to make their case. Yet they continue to approach this regulatory review process as if the Board's procedures are negotiable and the 2001 Rules and precedent do not apply at all. They insist that the primarily-end-to-end nature of their merger by itself entitles them to approval, ignoring both the circumstances that led to the creation of the 2001 Rules and the Board's concerns about a potential consolidation end-state. Their Application, even as supplemented:

- Presumes there is "no risk" of harm, not because of any engagement with the facts, but because (they say) vertical harm is categorically implausible in the rail industry. This is contrary to clear Board law. And it is a 180-degree turn from Applicants' recent, consistent, successfully advocated positions that even much smaller end-to-end mergers pose a substantial threat of competitive harm by foreclosing shipper options.

- Offers as its "sole competitive enhancement" (Decision 21, slip op. at 21) a pricing mechanism ('CGP') that creates no new rail options for shippers, and, as Applicants now concede, isn't competitive with their single-line service.
- Refuses to identify which of Applicants' claimed benefits could only be achieved by a merger, and which are actually public benefits rather than increases in UP's market power and profits.
- Predicts the Proposed Transaction is likely to lead to consolidation of the industry into two transcontinental systems, but asserts that more mergers wouldn't harm competition either, and thus provides no analysis of the public interest merits of this or any other industry structure.

An application without sufficient information even as to one of these issues would render the Board unable rationally to apply its legal criteria. Applicants' decision not to present an affirmative, evidence-based case as to each of them, in the first major merger to be considered under the 2001 Rules, is a blatant attempt to rewrite those criteria entirely.

In this way, the Application reads less like the required evidentiary engagement with the Board's consolidation procedures, and more like Applicants' public relations campaign. UP's executives have made clear that they consider their transaction already entitled to regulatory approval, having "heard enough" from customers and other stakeholders about its competitive effects—just days after the Board described their revised Application as "underdeveloped" in multiple critical areas.[1] A week later UP's CEO, publicly pressing for expedited review,

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[1] Kenny Rocker, Exec. VP, Marketing & Sales, Union Pac. Corp., *I've Heard Enough – This Merger Doesn't Kill Competition. It Unlocks It*, Union Pacific (June 8, 2026),

suggested that if the Board does not adhere to UP's preferred timeline, Applicants might not even have to demonstrate their merger would be in the public interest.[2] After three chances, Applicants' omissions can only be by design. Applicants must know that the assessment the law requires would make clear that their Proposed Transaction would permanently transform the rail network for the worse—the outcome the 2001 Rules were specifically drafted to prevent. So they continue to withhold the evidence necessary for that assessment at all costs.

The evidence offered in UP's and NS's Application, even viewed in its most favorable light, does not contain evidence sufficient to enable the Board rationally to conduct its public interest assessment, much less to support the findings necessary to conclude the Proposed Transaction is in the public interest. The Application provides: A categorical industry-wide opinion of no competitive harm that is contrary to Board precedent in place of any transaction-specific competitive analysis (App. Vol. 1, at 21-22, 52; App. Vol. 2, at 186-89 (V.S. Israel ¶ 14)); an expert's "understand[ing]," apparently provided by counsel, of the impact of gateway conditions, in place of the "detailed examination" of competition-preserving

https://www.up.com/announcements/customer-news/2026/CN2026-12 (dismissing concerns about transaction's competitive effects as "rhetoric").

[2] Transcript, Union Pac. Corp. Presentation at NYSE 2026 European Investor Conference (June 16, 2026), S&P Global (CEO Jim Vena responding to question about UP's position that the STB's "12-month proceduralclock" has now started, despite UP's failure to submit evidence necessary for other parties to comment or the Board to conduct its review: "[T]hat's what the statute says and that's what we're going to do. Otherwise, Ken, then we don't have to follow the statute either that talks about public interest."), https://seekingalpha.com/article/4915403-union-pacific-corporation-unp-presents-at-nyse-2026-european-investor-conference-transcript.

measures the Rules require (App. Vol. 2, at 585-86 (V.S. Hunt ¶¶ 198-99 n.217)); a single proposed enhancement that Applicants concede "was not intended to create competition with post-merger single-line traffic" (App.'s 2d Resp. to Decision No. 21 (UP-80/NS-78), FD 36873 (July 27, 2026) ('App. Supp.'), at 43); no allocation whatsoever between benefits obtainable only by merger and those obtainable otherwise (App. Vol. 1, at 93); no claimed or estimated rate reduction on existing or diverted rail traffic (App. Supp. 103-06); and, as to the resulting structure of the industry, a bare assertion that another transcontinental merger would be beneficial for the same reasons this one is (App. Supp. 273 (Supp. V.S. Israel ¶ 36 n.28)).

The Application should be denied as failing to make out a *prima facie* case.

II. LEGAL STANDARDS

In Decision 21, the Board ordered Applicants to supplement their Application in particular ways, while emphasizing that different aspects of it were "broad and interdependent" and thus the Board's specific requests were not "an exhaustive list" of the "concerns the Board may have in assessing the … Application." It cautioned that this assessment "may include an evaluation as to whether Applicants have presented a prima facie case." Decision 21, slip op. at 17-19. Applicants correctly note that such an assessment does not consider evidence submitted by other participants. App. Supp. 185-86. Accordingly, this Motion presents none. It simply applies the legal standards governing Applicants' *prima facie* case burden to the evidence they have presented, based on the Board's substantive law.[3]

[3] While the *Expedited Processing* Decision did not expressly permit participants to request summary denial, the Board has repeatedly ruled on the merits of such

A. The Application Must Enable the Board to Rationally Apply Its Legal Criteria Based on Reasonable Findings of Fact.

An application must present a *prima facie* case or be summarily denied. *See* 49 C.F.R. § 1180.4(c)(8); *Exp'd Proc'g*, 363 I.C.C. at 769-70. An application that fails to present a *prima facie* case cannot justify the burden a merits proceeding would impose on the Board, the parties, and the public. As the agency has explained, where an application does not present a *prima facie* case, requiring "the conduct of hearings to place protestants' evidence into the record would be unnecessary and wasteful." *Exp'd Proc'g*, 363 I.C.C. at 769.

An application can fail to present a *prima facie* case in two ways. First, it can disclose facts that, even if construed in their most favorable light, are insufficient to support a finding that the proposal is consistent with the public interest. 49 C.F.R. § 1180.4(c)(8)(i). An application fails this standard if it lacks information sufficient for the Board "rationally to apply" the legal criteria governing the public interest test or to support reasonable findings of fact necessary to find that test is met. *UP/CNW*, 9 I.C.C.2d at 950-51; *Rio Grande/Soo Line*, at *7-*8. One way the Board cannot "rationally … apply" its legal criteria is if it is unable to make all "special findings" required by the applicable statute and its "court precedent." *UP/CNW*, 9 I.C.C.2d at 950 ("special findings" under then-existing § 11344(b), current version codified at § 11324); *Rio Grande/Soo Line*, at *7-*8 & n.10 ("findings on each of the

motions without suggesting they were procedurally improper. *See Union Pac. Corp.–Control–Chi. & Nw. Holdings Corp.*, 9 I.C.C.2d 939 (1993) ('*UP/CNW*'); *Rio Grande Indus.–Purchase–Soo Line R.R. Co.* (Decision No. 14), 1990 ICC LEXIS 98 (I.C.C. served Apr. 6, 1990) ('*Rio Grande/Soo Line*').

statutory elements (and any additional elements required by our court precedent)"). Alternatively, an application can fail to make a *prima facie* case by disclosing facts that affirmatively demonstrate the proposal is not in the public interest. 49 C.F.R. § 1180.4(c)(8)(ii). To the extent the Board considers materials disclosed under Decisions 21 and 13 (*Union Pac. Corp. – Control – Norfolk S. Corp.*, FD 36873, Decision No. 13 (March 18, 2026) ('Decision 13')) in its *prima facie* case evaluation, these materials may provide this affirmative demonstration.[4]

The question in a *prima facie* case evaluation is what conclusions Applicants' submission is <u>legally capable</u> of supporting. Section 1180.4(c)(8) directs the Board to construe the facts in the light most favorable to applicants, but only those facts an application actually <u>discloses</u> or <u>legally supports</u>; it does not authorize the Board to supply facts an application withholds, or to credit legal conclusions its own precedent forecloses. The Board has expressly analogized the *prima facie* standard to "the motion for summary judgment and the motion for directed verdict." *Exp'd Proc'g*, 363 I.C.C. at 769-70 & n.6. In that posture, assertions even in opinion testimony are legally incapable of supporting a *prima facie* case sufficient to survive summary adjudication if they rely on a theory "rejected as a matter of law" or factors "insufficient as a matter of law" to support their conclusion. *Rebel Oil Co. v. Atl. Richfield Co.*, 146 F.3d 1088, 1095 (9th Cir. 1998) ("rejected"); *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242-43 (1993) ("insufficient"). So

[4] Consideration of supplemental disclosures in response to Board orders such as under these Decisions is not expressly permitted, but CSXT assumes the Board will consider such information in its evaluation. *See* Decision 21, slip op. at 19.

too here. The sole question is whether Applicants have disclosed facts enabling the Board "rationally to apply" the criteria governing its public interest determination. *UP/CNW*, 9 I.C.C.2d at 950-51. As to each criterion below, Applicants have not.

B. The Board's Governing Criteria Define a "Heavier Burden" to Show a Major Consolidation Is in the Public Interest.

Applicants' substantive burden is to show the transaction is in the public interest. *Exp'd Proc'g*, 363 I.C.C. at 770. As distinct from the "fairly narrow procedural question of completeness" (Decision 21, slip op. at 17), the *prima facie* case standard applies the criteria governing the Board's public interest assessment on the merits. *See* 49 U.S.C. § 11324(b); 49 C.F.R. § 1180.1; *Major Rail Consolid. Procs.*, 5 S.T.B. 539 (2001) ('*2001 Rules*'). The Board must conduct this assessment by applying concrete statutory factors (49 U.S.C. § 11324(b)), as implemented through its consolidation rules and precedent, by considering specific elements and weighing them in specific ways. *2001 Rules*, 5 S.T.B. at 552 ("While we have always used a balancing test, we are changing how we will weigh these goals and are adding new elements to the mix."); *id.* at 546, 552-54.

As the Board has recognized, the 2001 Rules governing the Proposed Transaction "establish a 'heavier burden' for applicants." Decision 21, slip op. at 18. That "heavier burden" means the Application must enable the Board to evaluate specific factors distinct from those in ordinary transactions. These factors include:

- Whether the Proposed Transaction would "at a minimum preserve competitive and market options," 49 C.F.R. § 1180.1(c)(2)(i);
- Whether the Proposed Transaction would not only preserve, but enhance competition, *2001 Rules*, 5 S.T.B. at 547-48, 550; 49 C.F.R. § 1180.1(c)(2)(iv);

- Whether the subset of public benefits from the Proposed Transaction that are specifically "obtainable only through a merger" would outweigh public harms, *2001 Rules*, 5 S.T.B. at 549-50, 554-55, 558-59; and
- Whether the "rail industry structure" resulting from a "round of consolidations" like the Proposed Transaction would be in the public interest, "now and into the future," *id.* at 549, 551.

The 2001 Rules also repeatedly emphasize the "skeptic[ism]" with which the Board must approach Applicants' claims and the heightened substantiation Applicants must provide for them. *Id.* at 546-48 & n.8, 549, 554, 560-61. The Board adopted this heightened burden because of a pattern of "over-promised and under-delivered" public benefits claims and the severe and irremediable consequences of erroneous approval. *Id.* at 554, 60-61 (explaining that "future merger applications are likely to present closer calls," and that "as we approach the 'end-game,' the price for any failure would be high"). *See also* Decision 21, slip op. at 18.

In seeking substantial additional information from Applicants to remedy their Application's "unclear or underdeveloped" aspects, the Board underscored why their case-in-chief must be sufficient:

> This Transaction is the first proposed merger evaluated under new rules forged following real-world consequences emanating from a 1990s wave of major mergers. <u>Such consequences cannot be ignored, assumed away, or overlooked based on vague intentions or promises</u> . . . .

Decision 21, slip op. at 18 (emphasis added).

III. THE APPLICATION DOES NOT ENABLE THE BOARD RATIONALLY TO APPLY ITS PUBLIC INTEREST CRITERIA.

The Application does not disclose facts enabling the Board "rationally to apply" the criteria governing its public interest determination. It fails to apply the

Board's criteria governing whether the Proposed Transaction would have an adverse effect on competition; it fails to offer any condition that could "enhance competition" within the meaning of the Board's Rules; it refuses to identify which of Applicants' claimed benefits could be achieved only through a merger or would be passed on to shippers; and it withholds any discussion of the post-merger industry structure, asserting only that similar transactions would have similar effects.[5]

A. The Application Lacks Evidence to Enable the Board to Assess the Risk of Competitive Harm.

The Application must provide information from which the Board may rationally assess the risk of competitive harm from this particular proposed transaction, as an essential part of Applicants' *prima facie* case. "[W]hether the proposed transaction would have an adverse effect on competition among rail carriers" is a statutory criterion and "special finding" the Board must make. 49 U.S.C. § 11324(b)(5); *UP/CNW*, 9 I.C.C.2d at 950-51. If the Application fails to disclose facts enabling the Board to apply this criterion and make this "special finding" consistent with its law, it does not make a *prima facie* case. *UP/CNW*, 9 I.C.C.2d at 950-51. *See also Rio Grande/Soo Line*, 1990 ICC LEXIS 98, at *7-*8. The 2001 Rules in turn give competitive effects greater weight than the Board's

[5] There are numerous additional issues as to which the Application fails to offer meaningful evidence, including the deep competitive consequences of Applicants' control of or influence over crucial cooperative entities such as TRRA and TTX, as well as the substantial risks of service disruptions and the threats to the viability of the overall U.S. rail network. CSXT, however, focuses on Applicants' failure to address these basic pillars of the public interest assessment the Board's statute and 2001 Rules require.

prior procedures did, *see 2001 Rules*, 5 S.T.B. at 546, 550, 552, 554, and apply sliding scales to other mandatory considerations based on the risk of competitive harm, *id.* at 547, 550. If the Board cannot rationally assess that harm, it also cannot rationally apply its other criteria.

Applicants' case-in-chief regarding "the vertical competitive effects of the Proposed Transaction" consists of a single proposition: "[V]ertical foreclosure theories do not apply in the context of railroad pricing practices." App. Vol. 1, at 22, 52. Applicants' total reliance on this proposition is fatal to their *prima facie* case.

1. The Application must enable the Board rationally to apply its law governing vertical competitive effects and foreclosure.

Much of Applicants' advocacy regarding competitive harm centers on horizontal competitive issues. Any rational assessment of competitive effects from the transcontinental merger Applicants propose, however, must address the vertical competitive effects the Board has recognized for 25 years. The 2001 Rules expressly rejected the premise that only narrow theories of "direct competition" for 2-to-1 points were relevant or that "end-to-end" mergers would be competitively benign or easily remedied. In fact, those Rules' animating concern was that any future end-to-end mergers of Class I carriers may reduce direct and indirect competition, in ways conventional remedies could not prevent. *2001 Rules*, 5 S.T.B. at 554-57.

The vertical harm end-to-end mergers can cause, and the framework for analyzing that harm, are matters of established Board law. So, too, is the most basic mechanism by which such harm can occur: Merger applicants in an end-to-end transaction can worsen their own rates and service on interline options that compete against their newly integrated single-line service. Doing so may profitably divert traffic to the applicants' single-line service while simultaneously weakening the extent to which those interline alternatives competitively constrain it. *See Can. Nat'l Ry. Co.–Control–EJ&E W. Co.* (Decision No. 16), FD 35087 (S.T.B. served Dec. 24, 2008) ("*CN/EJ&E*"), slip op. at 15 (recognizing "the vertical effects that might result" where an acquiring carrier gains "the potential … to impair the terms of trackage rights, interchange, or service associated with competing line haul carriers" that work with the acquired carrier); *Can. Nat'l Ry. Co.–Control–Iowa N. Ry. Co.* (Decision No. 3), FD 36744 (S.T.B. served Jan. 14, 2025) ("*CN/IANR*"), slip op. at 7-9 (recognizing that acquiring carrier "might raise its rivals' costs" through its control of "a line that currently provides neutral access to alternative line-haul railroads"); *Can. Pac. Ry. Ltd.–Control–Kans. City. S.* (Decision No. 35), FD 36500 (S.T.B. served Mar. 15, 2023) ("*CP/KCS*"), slip op. at 65-67.

The Board summarized its law in the most recent end-to-end Class I merger:

> Even in mergers … without horizontal network overlap … potential adverse competitive impacts can include diminished service and/or increased prices on interline movements that have the effect of foreclosing efficient competitive options. <u>These adverse impacts may arise where … a carrier that once provided neutral access to multiple competing railroads is then acquired by one of those competitors and has an incentive post-merger to favor its own new single-line routing over interline alternatives</u>.

CP/KCS, slip op. at 65-66 (emphasis added) (citations omitted). Thus, the Board has already concluded—in much smaller transactions, without the transformational market power implications of the Proposed Transaction or the heightened burden of the 2001 Rules—that end-to-end rail mergers may substantially lessen competition due to new incentives and ability to foreclose interline alternatives.

CP/KCS also establishes that merger applicants cannot address competitive effects by relying on "a presumption that a vertical combination will not result in competitive harm," but must instead address their specific transaction's potential to cause such harm. *CP/KCS*, slip op. at 47, 65. The Board has "expressly rejected the presumption … that a vertical combination will not result in competitive harm." *Id*. at 65-66. While "merger applicants are free to argue that the facts in an individual proceeding" make foreclosure unlikely, they may not rely on "a presumption" that end-to-end rail transactions do not harm competition. *Id*. at 47.

In UP's own words, vertical foreclosure is "the central issue" and "basic building block in any assessment of the competitive effects of [an end-to-end] transaction." Union Pac. R.R. Co.'s Reply to CN's Pet. to Reopen Decision No. 2, *Kan. City S.–Control–Tex. Mex. Ry. Co.*, FD 34342 (July 17, 2003) ('UP *KCS/TexMex* CN Reply'), at 2-3. *See* Union Pac. R.R. Co.'s Comments and Req. for Conditions, *CN/IANR*, FD 36744 (Apr. 29, 2024) ('UP *CN/IANR* Comment'), at 4 (arguing the Board must address this risk to "follow its precedent"). To present a *prima facie* case enabling the Board rationally to apply its criteria, the Application must enable the Board to consider the risk of <u>vertical</u> competitive harm, by addressing this established theory of foreclosure. And it must do so based on the particular facts of the Proposed Transaction, not by relying on presumptions against its applicability.

Applicants wrongly treat it as their opponents' burden to present evidence that applies the Board's Rules and precedent governing anticompetitive effects, and their burden only to later refute that evidence. Applicants' burdens are not those of defendants in an antitrust enforcement lawsuit, but of applicants under the Board's consolidation procedures. Under those procedures—as UP previously and correctly explained—"Every merger applicant is required to take the basic step of studying the effects of its proposed transaction and presenting the results of that study to the Board and interested parties." UP *KCS/TexMex* CN Reply 4. To present a *prima facie* case, that study must enable the Board rationally to apply to the Proposed Transaction the competition analysis its law requires.

2. Applicants have not only recognized, but shaped, the Board's current law regarding vertical foreclosure.

UP and NS have long and successfully argued—in compelling detail—that the new incentives and ability to foreclose interline alternatives arising from their competitors' much smaller end-to-end transactions would harm competition, and that this harm cannot be assumed away without transaction-specific evidence.

In *Kan. City S.–Control–Tex. Mex. Ry. Co.*, FD 34342 (2003) ('*KCS/TexMex*'), UP explained: "It is well recognized that vertical transactions <u>can</u> have significant anticompetitive effects," particularly "when the merged entity can decrease the service quality or increase the cost of its rivals." Union Pac. R.R. Co.'s Comments, *KCS/TexMex*, FD 34342 (Aug. 4, 2003) ('UP *KCS/TexMex* Comment'), at 68 (UP's emphasis). UP applied the Board's basic foreclosure theory, detailing the ways KCS could profitably capture single-line traffic by worsening its own terms in Mexico for interline traffic. *See id.* at 45-46, 48-53, 68.[6] UP's executive director testified these incentives were "obvious," and detailed the rate and service strategies that could be employed to successfully pursue those incentives. V.S. of John T. Gray, *KCS/TexMex*, FD 34342 (Aug. 4, 2003) ('UP *KCS/TexMex* Gray V.S.'), at 23-33.[7] UP sponsored expert economist testimony that such foreclosure was a "well recognized" risk and that the "'one-lump' doctrine"[8] did not apply for many reasons, including that rail consolidation even then had reduced "opportunities to form alternative connections." V.S. of Jerry A. Hausman, *KCS/TexMex*, FD 34342 (Aug. 4, 2003) ('UP *KCS/TexMex* Hausman V.S.'), ¶¶ 15-19, 39-40, 44-45.[9] And NS supported UP's concerns that KCS could use control of Mexico-Laredo traffic to reduce shippers' "rail transportation options" in the U.S. Comments of Norfolk S. Corp., *KCS/TexMex*, FD 34342 (Aug. 4, 2003) ('NS *KCS/TexMex* Comment'), at 6.

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[6] For example: "KCS has strong incentives to increase its profits by capturing more traffic north of the border …. Substantial volumes of Laredo Gateway traffic will be available to KCS if it can impede UP-TFM competition." *Id.* at 45-46. "By discriminating against a competitor and causing its service quality to be lower, a firm can increase its own demand and often charge higher prices." *Id.* at 68.

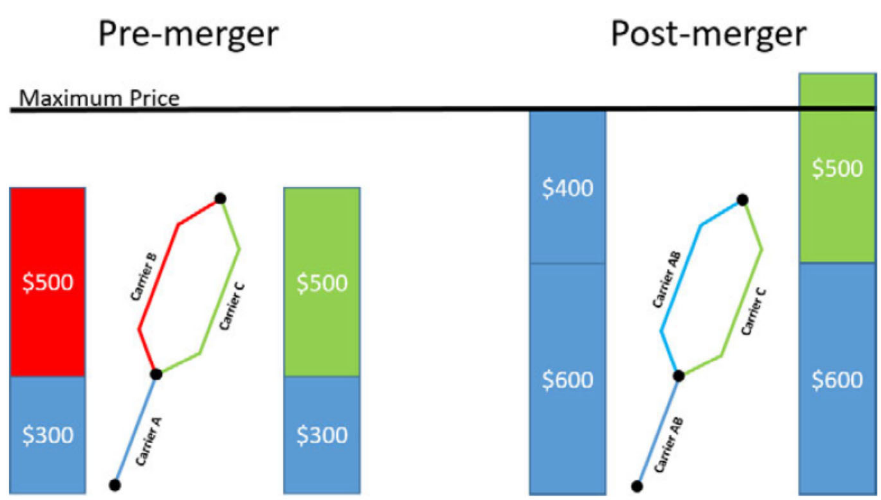
[7] For example: "By increasing the costs of UP-TFM options or making them less attractive from a service perspective … KCS will be able to …. shift[] traffic to KCS … to earn additional profits north of the border." *Id.* at 23-24.

[8] Also known as the "'one-lump' theory," this is an economic maxim that "that, because a monopolist at the end stage of production (for example, a bottleneck carrier) is in a position to capture the entire monopoly profit, integration with a connecting carrier on a competitive route segment normally does not enable it to raise the profit-maximizing price." *CP/KCS*, slip op. at 44. The Board repudiated it as a presumption in *CP/KCS* and reversed older decisions relying on it. *Id.*

[9] For example: "To the extent that KCS/TFM can increase the TFM rate factors that are part of the overall price shippers must pay for UP-TFM options, or create a lower level of service quality…, some shippers will choose to shift their traffic from UP to KCS. KCS will increase the profit from its U.S. operations." *Id.* ¶¶ 15-19.

In *CP/KCS* (2022-23), UP's central assertion was that the risk of foreclosure could not be assumed away based on economic theory. UP dedicated hundreds of pages of comments, verified statements, oral testimony, and briefing to this position. *See*, *e.g.*, Union Pac. R.R. Co.'s Comments and Req. for Conditions, *CP/KCS*, FD 36500 (Feb. 28, 2022) ('UP *CP/KCS* Comments'), at 32 ("The Board Should Not Simply Presume That the Proposed Transaction Would Not Have Anticompetitive Effects."). UP argued that modern merger authorities had rejected the idea "that vertical mergers are presumptively procompetitive," and it urged the Board to evaluate them "on the particular facts of the transaction." *Id.* at 3, 6. UP presented an 89-page expert opinion, 44 pages of which were dedicated to debunking the myth that the one-lump theory presumptively prevents foreclosure in the rail industry. V.S. of Steven C. Salop, *CP/KCS*, FD 36500 (Feb. 28, 2022) ('UP *CP/KCS* Salop V.S.'), at 3-5, 7-27, B–1-D–6. UP's final Brief dismissed presumptions against foreclosure as "based on a simplistic theory" that "[t]he real world does not comport with." Union Pac. R.R. Co.'s Final Br., *CP/KCS*, FD 36500 (Oct. 21, 2022) ("UP *CP/KCS* Br."), at 15-17. *See also* UP *CP/KCS* Comments 34 ("a flawed and unsupported presumption").

Also in *CP/KCS*, UP applied the Board's established foreclosure theory. UP explained at length that, by raising prices or worsening service on the segment of interline service on which KCS had market power, CPKC could profitably divert traffic to its single-line service *and* reduce competition against that service. UP *CP/KCS* Comment 3-6, 21-31. Kenny Rocker, the same senior UP commercial executive who now dismisses any foreclosure concerns as "speculative and groundless" (App. Vol. 1, at 277 (V.S. Rocker-Elkins ¶ 163)) testified in *CP/KCS* that the anticompetitive incentives resulting from that far smaller end-to-end transaction were "undeniable," offering detailed facts about how CPKC could increase its profits through foreclosure strategies. V.S. of Kenny Rocker & John Turner, *CP/KCS*, FD 36500 (Feb. 28, 2022) ('UP *CP/KCS* Rocker-Turner V.S.'), at 11-16.[10] And UP's final brief offered a helpful illustration of exactly how an end-to-end merger allows a carrier with market power on one segment both to increase interline rates <u>and to inflate their own single-line rates</u> (UP *CP/KCS* Br. 22):



In *CP/KCS*, NS likewise explained that "even efficiency-enhancing vertical mergers can cause discrete harm, both to competition and the public interest." Comments of Norfolk S. Ry. Co. & Req. for Conditions, *CP/KCS*, FD 36500 (Feb. 28, 2022) ('NS *CP/KCS* Comment'), at 26-32. NS likewise presented fact evidence that

10 For example: "CPKC could readily make UP-KCSM options that compete with CPKC routes less attractive to shippers by raising the costs of those options or reducing cooperation on service." *Id.* at 12.

the merged carrier could worsen the Mexican leg of interline service to divert traffic on the U.S. leg to a longer single-line haul. V.S. of Michael R. McClellan, *CP/KCS*, FD 36500 (Feb. 28, 2022), at 66-67, 69.[11] And it, too, presented detailed economic evidence rejecting the one-lump theory and explaining mechanisms of foreclosure in the rail industry. V.S. John Mayo, *CP/KCS*, FD 36500 (Feb. 28, 2022) ('NS *CP/KCS* Mayo V.S.'), ¶¶ 7-8, 26-43.[12]

Less than two years ago, UP relied on *CP/KCS* to argue that "the Board has recognized [that] even end-to-end transactions create a risk of vertical foreclosure," and that to "follow its precedent," the Board needed to remedy this risk of vertical foreclosure. UP *CN/IANR* Comment 4.

UP's and NS's prior assertions did not simply acknowledge the Board's law governing foreclosure; they shaped it. In *CP/KCS*, Applicants successfully persuaded the Board to <u>change its law</u> to expressly reject exactly the presumption their case-in-chief relies on here. The Board was persuaded by the comments, expert testimony, and even economic literature that UP and NS had submitted, which are repeatedly referenced in its decision. *See CP/KCS*, slip op. at 44-48. And

[11] For example: "[T]he CP-KCS Transaction has the potential to effectively eliminate routes where NS is dependent on current KCS gateways. If the combined CPKC pursues lengthening hauls instead of protecting the most efficient gateways, then non-intermodal traffic on these routes may be diverted to more circuitous CPKC routes." *Id.* at 66.

[12] For example: "[M]odern economic analysis indicates that it is not possible to conclude that incentives for post-merger anticompetitive conduct are uniformly absent in the case of vertical mergers. Thus, rather than summarily dismissing concerns regarding post-merger conduct, policymakers are well-served to engage in fact-specific analyses." *Id.* ¶ 33.

less than two years ago, UP relied on *CP/KCS* to persuade the Board an end-to-end transaction would have led to a "substantial lessening of competition." *CN/IANR*, slip op. at 11, 13-14.

This success makes Applicants' current position about more than credibility: It poses a dire threat to the integrity of the Board's process. Applicants' proposed rail merger is the largest in history, creating an unprecedented level of industry dominance and market power. Their Application triggers the 2001 Rules' "heightened burden." Accepting Applicants' presumption as a sufficient *prima facie* case would give them an unfair advantage by winding back the law by 25 years to apply a different, reduced level of scrutiny than applied—at Applicants' urging—to their competitors' much smaller mergers. It would be a truly perverse outcome for Applicants successfully to rely on diametrically opposed positions in successive mergers of Class I carriers, thereby to escape the standards their advocacy helped establish and the "heavier burden" the Board's Rules require.[13]

[13] The courts reject such opportunistic flip-flopping to suit a party's business objectives, by applying the doctrine of judicial estoppel. Applicants' reversal presents every factor the courts rely on to bar parties from having it both ways. *See New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001) ((1) a party's position is "clearly inconsistent" with a prior position; (2) the party succeeded in advocating its prior position; and (3) prevailing twice with inconsistent positions would derive an "unfair advantage"). The D.C. Circuit has confirmed judicial estoppel can also apply in agency adjudications. *See Temple Univ. Hosp., Inc. v. NLRB*, 929 F.3d 729 (D.C. Cir. 2019). It is fully within the Board's authority to consider whether to apply judicial estoppel to Applicants' position on the absence of competitive harm, as an alternative ground to find they have failed to present a *prima facie* case.

3. Applicants rely solely on the assertion that foreclosure is categorically implausible in the rail industry, an assertion contrary to law.

UP and NS now make the stunning assertion that foreclosure is categorically implausible in the rail industry. Applicants and their witnesses claim "there is no risk of competitive harm" from the Proposed Transaction. App. Vol. 1, at 52; *id*. at 21. Their executives testify that "any customer fears … about foreclosure or competitive harm" are "speculative and groundless." *Id.* at 348 (V.S. Rocker-Elkins ¶ 163). NS's CEO asserts: "There is no credible competitive harm." *Id*. at 268 (V.S. George ¶ 63).

UP's only support for these stark denials of vertical harm is their economist Mark Israel's assessment of the transaction's "vertical competitive effects." App. Vol. 1, at 22. He asserts that there is no risk of vertical harm, not based on the facts of the UP-NS combination and how the Board's basic theory of foreclosure applies to them, but because in his opinion the nature of rail industry negotiations and pricing practices fully eliminate the possibility that any railroad consolidation can result in foreclosure. *See* App. Vol. 2, at 186-89 (V.S. Israel ¶ 14) ("[T]heories of vertical foreclosure … are ill-matched to … the railroad industry."). He purports to demonstrate that foreclosure cannot occur wherever prices are negotiated based on expected volume (*id.*), wherever shippers can demand a Rule 11 interline rate (*id.*), or in the one "subset" of through-rate pricing practices that "even possibly gives rise to foreclosure concerns" (*id.* at 197, 203 (V.S. Israel ¶¶ 31, 43)).

Applicants are explicit that their only evidence regarding vertical competitive effects is a categorical opinion about all railroad consolidations, not an empirical assessment of the facts and effects of this particular Proposed Transaction: "As Dr. Israel explains in his Verified Statement, which analyzes the vertical competitive effects of the [P]roposed [T]ransaction, *vertical foreclosure theories do not apply in the context of railroad pricing practices*." App. Vol. 1, at 22, 52 (emphasis added).

Applicants' assertion that all end-to-end railroad consolidations can be assumed to present no risk of foreclosure contradicts Board law: "[T]he Board has expressly rejected the presumption … that a vertical combination will not result in competitive harm." *CP/KCS*, slip op. at 66. The Board explicitly recognizes that end-to-end rail mergers can cause vertical competitive harm through foreclosure (*id.* at 65-66; *CN/EJ&E*, slip op. at 15) and that, where they do, they substantially lessen competition (*CN/IANR*, slip op. at 7-9). Although Applicants allow that such foreclosure is possible in "edge cases" (App. Vol. 2, at 192, 218 (V.S. Israel ¶¶ 19, 74-77)), they still argue it can be assumed not to result here without offering evidence relating to this particular Transaction. That is the definition of a presumption.

Rather than basing their argument on "the facts in an individual proceeding" as they are required to do, *see CP/KCS*, slip op. at 47, Applicants' blanket denial of foreclosure concerns applies to the entire "railroad industry"—to every proceeding. App. Vol. 2, at 186-88 (V.S. Israel ¶ 14). So too do their economist's opinions as to each rail industry pricing practice. *Id.* at 186, 206, 214 (V.S. Israel ¶¶ 14, 51, 64). If Applicants' categorical denial makes a *prima facie* case here, then it would carry the burden for every end-to-end Major Transaction that could be proposed—a result hard to reconcile with the Board's "substantial concern" about further consolidation and "heavier burden" embodied in the 2001 Rules. *2001 Rules*, 5 S.T.B. at 546, 549.

4. Each of Applicants' supporting economic analyses either disregards or defies Board law.

Each of Applicants' assertions about rail economics ostensibly supporting their categorical conclusion is also contrary to this Board precedent. Applicants will likely contend that any engagement with their expert's analysis is inappropriate in this posture and should occur "on the merits." But if that opinion purports to exclude foreclosure by relying on analysis "rejected as a matter of law" (*Rebel Oil*, 146 F.3d at 1095) or factors that are "insufficient as a matter of law" to do so (*Brooke Grp.*, 509 U.S. at 242-43), it cannot make out a *prima facie* case. That Dr. Israel's analysis omits or denies the legally established effects of foreclosure and is therefore contrary to law is thus not an issue of its credibility, persuasiveness, or weight. It is an issue of whether the sole evidence Applicants rely on to carry their burden on the merits is capable as a matter of law of carrying that burden, which is precisely what the *prima facie* case evaluation considers.

<u>*Negotiated Rates.*</u> Applicants' primary such assertion is that in any shipper-railroad "bargain" over rates and volume, *i.e.*, most negotiated rail contracts covering {{ }} of potentially affected traffic, nothing about an end-to-end merger other than efficiencies can "alter[] the factors that determine price" (App. Vol. 2, at 196 (V.S. Israel ¶ 27)) or the "bargaining situation between the merged firm and the shipper" (*id.* at 271 (V.S. Israel Appx. A-3)). *See also id.* at 197 (V.S. Israel ¶ 30) ("Either the merger changes nothing or … creates a better deal for everyone,

because it gets rid of the inefficiencies.").[14] This is wrong as a matter of law. Under the Board's clear precedent, an end-to-end merger can alter both (i) the factors that determine price and (ii) the bargaining situation facing a shipper, by enabling the merged railroad to worsen terms on "interline movements" to "favor [its] single-line routing." *See CP/KCS*, slip op. at 65-66; *CN/IANR*, slip op. at 9. As NS's economist explained—in the last Class I merger—this opportunity to favor single-line traffic "has exactly the same role in affecting the vertically integrated firm's incentives and behavior as would a similar increase in production cost," resulting in "an increase in the negotiated input price" for interline movements. NS *CP/KCS* Mayo V.S. ¶ 36.

This categorical denial of economic effects established by the Board's precedent gets worse the deeper one looks. The economic model with which Applicants support this denial literally omits the standard terms used in such models to represent these foreclosure effects. They offer a "Nash bargaining" model of how the merger changes the maximum and minimum prices a shipper and railroad would agree to, respectively, predicting a negotiated price halfway in between. App. Vol. 2, at 195-97, 270 (V.S. Israel ¶¶ 23-30, Appx. A-2). Such models are accepted tools in antitrust law, in which they represent the specific foreclosure effects established by Board law in two ways:

[14] Dr. Israel resorts to theories of "efficiencies" as purported proof that foreclosure is not possible, *see*, *e.g.*, App. Vol. 2, at 195-97, 198-200 (V.S. Israel ¶¶ 23-26, 28-30, 34-35), but as both UP and NS have argued, efficiency-enhancement does not disprove foreclosure. NS *CP/KCS* Comment 28; UP *CN/IANR* Comment 4.

- In modeling interline prices, they represent the increase in the minimum price the merged railroad would accept because each interline contract is a lost opportunity for the diversion to its single-line service that Board precedent describes. *See United States v. AT&T, Inc.*, 916 F.3d 1029, 1039-41 (D.C. Cir. 2019); Joshua D. Wright & John M. Yun, Use and Abuse of Bargaining Models in Antitrust, 68 KANS. L. R. 1055, 1067-68 (2020). This is exactly the "opportunity cost" NS's expert in the last Class I merger described. NS *CP/KCS* Mayo V.S. ¶ 36.

- In modeling single-line prices, they represent the increase in the maximum price shippers would accept because the merged railroad can make the shippers' alternatives—interline service—worse. *See Fed. Trade Comm'n v. ProMedica Health Sys.*, 2011 U.S. Dist. LEXIS 33434, at *60 (N.D. Ohio Mar. 29, 2011). This is exactly the increase in single-line demand UP described as the effect of interline foreclosure in *KCS/TexMex* and *CP/KCS*. *See*, *e.g.*, UP *KCS/TexMex* Comment 68; UP *CP/KCS* Comment 26-31.

The reason Applicants' "Nash bargaining" model shows no effect on prices other than efficiencies is because that model leaves these legally-established effects out.[15]

Rule 11 Rates. Applicants' second supporting assertion, concerning Rule 11 traffic, likewise ignores the Board's established theory of foreclosure. The established, obvious mechanism of foreclosure in the Rule 11 context is to raise rates or worsen service. *See*, *e.g.*, *CP/KCS*, slip op. at 65-66; UP *CP/KCS* Br. 22 ("To prevent competition from Carrier C, Carrier AB raises its Rule 11 rate."). Dr. Israel summarily purports to exclude foreclosure without even considering this

[15] Dr. Israel, this model's proponent, evidently omits these terms because he has previously testified such a model cannot "apply to settings in which there are multiple, interrelated negotiations." Econ. Analysis of the Prop. Comcast-NBCU-GE Transaction, *Comcast/NBCU-GE Prop. Transaction*, M.B. Docket No. 10-56 (F.C.C. July 20, 2010), ¶ 47. It is precisely the interrelationship between a shipper's interline and single-line negotiations that gives rise to foreclosure—the merger allows Applicants to exploit their control of both of these alternatives. *See generally* U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, MERGER GUIDELINES 37-38 (2023). By his reasoning, his model of foreclosure is incapable of modeling foreclosure effects.

mechanism, refuting only the strawman scenario in which Applicants "would refuse to provide a Rule 11 rate" at all. App. Vol. 2, at 200-01 (V.S. Israel ¶¶ 36-37).

Through Rates. Finally, Applicants' supporting assertion concerning through rates directly assumes the one-lump theory. While an applicant is "free to argue that the facts in an individual proceeding warrant application of the one-lump theory," the Board has "expressly rejected" the presumption that the one-lump theory prevents competitive harm. *CP/KCS*, slip. op. at 44-48, 66. But presuming the one-lump theory prevents competitive harm is exactly what Applicants' expert does—twice. First, Dr. Israel argues directly that merger opponents bear the burden to refute the "long-standing response" that "the sole-serving carrier can charge the monopoly rate for the movement and earn the monopoly profit *prior to a merger*." App. Vol. 2, at 202 (V.S. Israel ¶ 41) (emphasis original).[16]

Second, when Dr. Israel purports to prove "empirical[ly]" that the one-lump theory is valid, his proof is circular, relying on the same assumption: He assumes it is valid for half the traffic he studies, then "proves" it is valid by showing the other half behaves the same way. That is, all he does "empirical[ly]" is to compare real-world data from two situations—the first situation where shippers negotiate

[16] Dr. Israel calls this "the 'one-monopoly rent' idea" rather than the one-lump theory (typically used in Board precedent) or single monopoly profit theory (typically used in antitrust literature more generally). App. Vol. 2, at 276 (V.S. Israel Appx. B-2). But there can be no serious dispute this describes the one-lump theory, *i.e.*, "[t]he theory … that, because a monopolist at the end stage of production (for example, a bottleneck carrier) is in a position to capture the entire monopoly profit, integration with a connecting carrier on a competitive route segment normally does not enable it to raise the profit-maximizing price." *CP/KCS*, slip op. at 44.

through rates with the carrier on a sole-served segment, and the second where shippers negotiate them with a carrier on the dual-served segment. *See id.* at 203-04 (V.S. Israel ¶¶ 44-45). He deems the lack of a significant difference between the two situations to be "empirical" proof that the one-lump theory applies to both, because he assumes it applies to the first situation in the first place. *Id.* at 202-03 (V.S. Israel ¶ 42) ("In that situation, nothing stops the sole-serving carrier from setting the monopoly price.").

Presumptions are matters of law, not facts susceptible to opinion testimony. The Board's precedent is explicit that it may not base its competition analysis on the presumption Applicants rely on. Their case-in-chief on the vertical effects of their merger is contrary to Board law at every level—on its face, in each supporting assertion, and in its reliance on the very presumption the Board has "expressly rejected." The Board cannot rationally apply its law by contradicting that law.

5. Applicants present no evidence their proposed conditions would prevent or mitigate competitive harm.

Applicants' fallback position is that if the Board determines the Proposed Transaction would cause competitive harm, their "voluntary open gateway commitments" would cure it. App. Vol. 1, at 22. But Applicants present no evidence whatsoever to support this proposition, not even the evidence the Board's Rules specifically require. A naked assertion cannot meet their *prima facie* case burden.

a. Applicants present no evidence on the effects of their gateway commitments.

Applicants are correct that an evaluation of their *prima facie* case must include an evaluation of that case with respect to the "competition-preserving commitments" they offer. App. Supp. 184-85. But Applicants are incorrect that merely offering these conditions can carry their burden to support a Board finding on competitive harm. The Rules require that such conditions be "effective" and "sufficient" to preserve competition in their transformative transaction. *2001 Rules*, 5 S.T.B. at 546-47, 563, 569.[17] Applicants present no evidence to show this.

As an initial matter, Applicants' conspicuous repetition that their commitments are "voluntary," and not really even necessary, is false. In a major consolidation, applicants are required to propose "effective plans to keep open major existing gateways and to preserve opportunities to challenge segment rates in bottleneck situations." *Id.* at 546-47. Applicants' proposal purports to address this requirement. App. Vol. 1, at 22, 95-96.

Applicants offer numerous conclusory statements, but zero evidence, that their proposal would be effective in the context of this transformational merger. *See* App. Vol. 1, at 22, 45, 52, 91; *id.* at 348-50 (V.S. Rocker-Elkins ¶¶ 163-72).[18] At

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[17] To the extent Applicants rely not on fact evidence but on the legal argument that *CP/KCS* is "precedent" for these conditions' effectiveness, they ignore that the Proposed Transaction is radically different in its "transformative" nature and extent of potential competitive harm. Indeed, the Board emphasized in *CP/KCS* that alternative gateways provided "meaningful competitive pressures" (slip op. at 53-54) and that the merger's main effect was to enable the smallest Class I carrier to "compete more effectively against the larger Class I railroads that surround[ed] it" (*id.* at 26). Here, there are no alternative gateways, and the transaction would make the already-largest Class I carrier a unique transcontinental behemoth.

[18] These conclusory statements are yet another unexplained reversal. In the *CP/KCS* proceedings, both Applicants argued vigorously that these exact conditions would prove ineffective, even in the face of a much smaller merger. UP *CP/KCS* Comment 8-10, 68-71; NS *CP/KCS* Comment 43-46. Most starkly, UP senior commercial executive Kenny Rocker explained in detail why the core of the *CP/KCS* open gateway conditions was "illusory and unenforceable." UP *CP/KCS*

most, Applicants' economist opines they "demonstrate" an "intention" to preserve competition (App. Vol. 2, at 224-25 (V.S. Israel ¶¶ 90-92)), precisely the "vague intentions or promises" the Board admonished cannot suffice to show the adverse consequences foreseen in the 2001 Rules would not materialize. Decision 21, slip op. at 18.

And, in fact, the 2001 Rules specify what evidence Applicants must provide on the effects of their gateway commitments. Under 49 C.F.R. § 1180.7(b)(1), Applicants' impact analyses and traffic studies must "incorporate a detailed examination of … the specific measures proposed by applicants to preserve existing levels of competition." But Applicants provide nothing of the sort. Their expert who performed these analyses expressly did not examine the effects of their gateway conditions. He relies instead on the "understand[ing]," presumably from counsel, that they would preserve competition and not otherwise affect his projections:

> In developing future market share …. I did not attempt to predict how certain merger conditions such as … open gateways … might influence changes in transportation markets. <u>I understand that</u> … open gateway commitments are competition-preserving conditions, so they would not be expected by themselves to change pre-merger traffic flows.

App. Vol. 2, at 585-86 (V.S. Hunt ¶¶ 198-99 n.217) (emphasis added). An expert's untested "understand[ing]" cannot substitute for the "detailed examination" the

Rocker-Turner V.S. 17-20 (emphasis added). Here, he declares that identical conditions would be "<u>robust</u> and <u>readily enforceable</u>." App. Vol. 1, at 348 (V.S. Rocker-Elkins ¶ 163) (emphasis added).

Rules specifically require, and does not allow the Board rationally to assess the effects of the conditions proposed.

b. Applicants affirmatively show their "CGP" mechanism would not preserve competition at all.

Finally, Applicants' CGP construct bears brief mention. Applicants do not even argue that CGP, even as modified by their July 27 supplement, could preserve competition against foreclosure. *See* App. Supp. 184-85 (omitting CGP from "comprehensive set of competition-preserving commitments"). They offer CGP as a purported competitive enhancement (which it is not, as explained below in Part III(B)), contending it would generate "benefits … larger than … competitive harms," not that it would in any way prevent or mitigate those harms. App. Supp. 41.

That Applicants decline even to make this argument is revealing. Proportional-rate conditions like CGP ordinarily are proposed as competition-<u>preserving</u> conditions, which are distinct from competitive enhancements. *See* 49 C.F.R. §§ 1180.6(b)(10)(i)-(ii). UP has argued multiple times that proportional-rate conditions can be an effective mechanism to define the "commercially reasonable" rate merging parties must offer at gateways to prevent foreclosure. UP *CP/KCS* Comment 69-74; UP *CP/KCS* Rocker-Turner V.S. 18-24; UP *KCS/TexMex* Comment 90-94; UP *KCS/TexMex* Gray V.S. 41-44. But here, Applicants themselves explain that CGP-based service is "not intended" to be able to compete against Applicants' service at the gateways they could and would foreclose: "<u>CGP was not intended to create competition with post-merger single-line service</u>." App.

Supp. 43 (emphasis added). Applicants thus "affirmatively demonstrate" that CGP does nothing to protect the public interest. 49 C.F.R. § 1180.4(c)(8)(ii).

That is, while Applicants call CGP-based interline service a "new competitive option" (though such service would not be new, as addressed below), they simultaneously explain that this "option" would be unable to compete effectively. Appl. Supp. 43. There are numerous aspects of CGP's design that ensure this result, as CSXT would show with evidence later in this proceeding if necessary. But one is obvious on its face: Applicants have openly designed the CGP rate factor they would provide interline carriers to be systematically higher than—and thus uncompetitive against—the rate Applicants charge shippers. Applicants propose to charge interline partners the 70th percentile of the rates they charge shippers. *See* App. Vol. 1, at 388 (V.S. Novak ¶ 35). As they explain, the purpose of this choice is <u>not</u> to generate a competitive rate; it is to make CGP useful only to "customers with the highest rates" already. App. Supp. 42.[19] Applicants thus affirmatively disclose the sole fact material to gateway protections—any service it "preserves" would be uncompetitive by design.

* * *

[19] For avoidance of doubt, CSXT does not propose another percentile or other way to define a more competitive CGP rate, and it emphatically does not propose a rate equalization condition. That is not CSXT's burden. It is <u>Applicants' burden</u> to provide evidence enabling the Board to find the gateway conditions they propose would be "effective" and "sufficient" to preserve competition. As Applicants admit, the systematically uncompetitive interline rate CGP would generate is neither.

CSXT now turns from Applicants' failure to address the obvious competitive harm from their proposed merger, to the other core considerations in the Board's public interest evaluation. But an overall observation about Applicants' strategy is warranted. Competitive harm is the foundation on which all aspects of the Board's assessment depend. *2001 Rules*, 5 S.T.B. at 552. And the gravity of that harm in a particular transaction affects how the Board weighs other considerations, including enhanced competition (*id.* at 547, 550); the valuation and pass-on of efficiencies (*id.* at 549-50, 554, 555); and the industry structure consolidation would produce (*id.* at 549-50, 581-82). Accordingly, almost every claim Applicants make about other factors in the Board's public interest test flows from their convenient assertion that there is no risk of competitive harm. They essentially rig the question of what remedies and enhancements are necessary by asserting there is nothing to remedy. Applicants' entire *prima facie* case therefore fails from the start, because just as it does not enable the Board to assess competitive effects, the Board cannot apply these other considerations without that assessment.

With that context, CSXT now turns to Applicants' case regarding these other considerations on their own terms.

B. Applicants' Evidence Does Not Support a Finding of Enhanced Competition.

The central requirement of the 2001 Rules is that any application for the further consolidation of Class I railroads must show that the transaction and its conditions not only preserve but affirmatively enhance competition, because future major mergers were likely to present competitive harms that "would be increasingly difficult to remedy." *2001 Rules*, 5 S.T.B. at 554. Applicants claim to have satisfied this requirement through: (1) the enhanced efficiency inherent in an end-to-end transaction; (2) projections of truck-to-rail diversion resulting from that efficiency; and (3) their CGP proportional rate mechanism.

To find that Applicants have presented a *prima facie* case on these grounds would require the Board to fashion a new meaning for enhanced competition unsupported by the 2001 Rules or precedent, both of which clearly envision the creation of new rail alternatives that compete effectively for traffic. The Board's Rules equate "enhancing competition" with "new competition" (*id.*), and every example they offer creates new rail options. *Id.* ("the granting of trackage rights, the establishment of shared or joint access areas, the removal of 'paper' and 'steel' barriers"); *id.* at 569 (referencing *UP/SP* (trackage creating new rail lines) and *Conrail* (shared asset areas creating two rail options where only one had existed) as cases where applicants "offer[ed] competitive enhancements"). Likewise, where the Board has described end-to-end transactions as enhancing competition, it has made clear that this benefit arose from the creation of a new, competitively effective rail alternative to existing rail service. *See CP/KCS*, slip op. at 26, 48; *Can. Nat'l Ry. Co.–Control–Ill. C. Corp.*, 4 S.T.B. 122, 142-43 (1999) ('*CN/IC*').

Further, even if aspects of the Proposed Transaction or CGP could constitute competitive enhancements in principle, Applicants bear a burden to show the magnitude of enhanced competition outweighs harm to the public interest from, for example, irremediable losses of competition. *See* 5 S.T.B. at 550. UP and NS no doubt contend that, having asserted there can be no competitive harm here, their *prima facie* burden to show enhanced competition is minimal if non-existent. But as shown above, that assertion is unsupported by evidence and contrary to law. Applicants' case-in-chief must therefore carry the full weight of the 2001 Rules' "heavier burden" to demonstrate competitive enhancements that are both cognizable and sufficient to offset that harm. They present nothing to carry that burden, and nothing the Board can use rationally to weigh the two.

1. Applicants' claim that the Proposed Transaction would inherently enhance competition is contrary to law.

Applicants assert that the Proposed Transaction would inherently enhance competition due to improved efficiency and the conversion of interline service into single-line service. But these benefits supposedly "inherent" in the Proposed Transaction cannot constitute enhanced competition within the meaning of the 2001 Rules, because they would be "inherent" in <u>any</u> end-to-end Class I merger. To deem them "enhanced competition" would nullify the central requirement of the 2001 Rules and mean that any future transcontinental mergers would automatically meet the public interest test.

Applicants' argument relies primarily on their conflation of "more efficient" and "pro-competitive" as interchangeable concepts. But the Board's Rules codify enhanced efficiency and enhanced competition as distinct benefits, *compare* 49 C.F.R. § 1180.1(a) *and* § 1180.1(b), and explain the relationship between the two: "To the extent that a merged carrier continues to operate in a competitive environment, its new efficiencies would be shared with shippers and consumers."

Id. § 1180.1(c)(1); *2001 Rules*, 5 S.T.B. at 555 ("no guarantee" that "the benefits of such efficiencies" would be passed on in less competitive environment). Improved efficiency only produces public benefits to the extent competitive pressures in a market compel. As NS explained regarding these Rules, "substantial rate decreases do not occur in the absence of competition." *2001 Rules*, 5 S.T.B. at 549 n.11.

Applicants' more specific position that the conversion of interline service to single-line service inherently enhances competition likewise conflates "public benefits" with "enhanced competition" and ignores the competition it refers to. App. Vol. 1, at 38-42. In prior cases in which the existing interline service had been unable to compete effectively against single-line rivals, the Board has described its conversion to single-line service as "enhance[d] competition." That was because "new single-line service will provide new competition with single-line service already provided by … other carriers." *CP/KCS*, slip op. at 21 (emphasis added). *Id.* at 26 (CPKC would "compete more effectively against the larger Class I railroads that surround it …. particularly for north-south traffic flows in which these larger railroads already offer single-line service."). *See also CN/IC*, 4 S.T.B. at 142-43 (competition enhanced specifically where merger created "new, single-line service alternative" to existing Class Is). The Board's references to "creating a stronger competitor" refer to this common sense understanding that eliminating factors that hamstring ineffective competitors "allow[s] [them] *to be a* vigorous competitor to other Class Is." *CP/KCS*, slip op. at 21, 23 (emphasis added). *See also id.* at 48; *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 207-08

(S.D.N.Y 2020) ("merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor").

Applicants, by contrast, suggest this language means every improvement that "creates a stronger competitor" qualifies as enhanced competition—regardless of the size and market power of the competitor that is being created or of the competition that remains. App. Supp. 25-26. To accept that meaning would stand this common-sense rationale on its head: Where *CP/KCS* and *CN/IC* turned smaller, ineffective competitors into effective ones, the Proposed Transaction would make the biggest existing carrier much bigger, giving it roughly half the nation's traffic and a uniquely transcontinental network it could use to foreclose smaller rivals. Indeed, each of the specific ways that Applicants argue that its expanded single-line service would enhance competition—improved coordination, alignment of incentives, and a reduction in interchanges (App. Vol. 1, at 38-50)—would apply equally to the total monopolization of the rail network into "single-line service." The point of the Board's Rules is to require the Proposed Transaction to "offset a difficult-to-remedy loss of competition with competitive enhancements." *2001 Rules*, 5 S.T.B. at 557. This cannot have a definition that would encompass increasing the dominance of the industry's largest railroad or eliminating all competition.

2. Even if credited, more effective competition against trucking is not "enhanced competition" that could justify a reduction in rail competition.

The Board adopted its Rules as a response to mergers that failed to deliver on promises of truck-to-rail conversions. *2001 Rules*, 5 S.T.B. at 560. Mergers since

2001 have similarly failed to deliver on such promises. *See* Decision 21, slip op. at 25 n.29. Yet Applicants' central thesis for their Proposed Transaction consists of incredible claims of truck-to-rail conversion. And even if these claims are credited, they are not enhanced competition as envisioned by the 2001 Rules. As with Applicants' claims of efficiencies and single-line benefits, <u>any</u> transcontinental merger would result in claims of stronger competition against trucking and truck-to-rail diversion. For this to constitute the "enhanced competition" that the 2001 Rules require likewise would render that requirement meaningless.

The undeniable focus of the 2001 Rules is <u>rail-to-rail</u> competition. *See id.* at 19-20. Every illustration of the concept found therein involves rail-to-rail competition. *See 2001 Rules*, 5 S.T.B. at 550, 554, 569. The regulatory purposes of the enhanced competition standard likewise all concern rail-to-rail competition: The difficulty of remedying harm to rail competition, the endgame of rail consolidation, the risk of rail service failures, and the fact that rail capacity and demand had reached a balance. *See id.* at 546-47, 549-51, 554-55, 560. Yet Applicants say nothing about enhanced rail competition. They can't, because the whole rationale for their merger is to weaken other Class 1 railroads, via diversion, short-hauling, and other exercises of their transcon-driven market power, all while depriving shippers of any rate reductions associated with those rail-diverted share gains.[20] And so they fall back to their claims of massive truck diversion, knowing

[20] If this proceeding continues into a merits phase, CSXT will fully address all the respects in which Applicants' wielding of their merger-driven market power would

full well that if they secure merger approval on that basis it doesn't matter if such claims are ultimately proven false. And the basis on which they propose the Board justify that outcome is that an "or other" loophole (*id.* at 550) permits a transaction that threatens every harm the 2001 Rules sought to prevent.

Treating truck-to-rail conversion as a "competitive enhancement" capable of offsetting harm to rail competition is inconsistent with the specific role that other transportation modes play in the Board's competition assessment of rail mergers. The Board's consolidation statute concerns "competition among rail carriers." 49 U.S.C. § 11324(b)(5) (emphasis added). In examining the competitive environment in which rail carriers operate, the Board can, of course, consider the competitive constraints other modes place on rail carriers. *See Cent. Vt. Ry., Inc. v. I.C.C.*, 711 F.2d 331, 335-38 (D.C. Cir. 1983). But that is because, in context, competition among rail carriers may or may not include competition from other modes. *See id.* (relying on fact that trucks provided strong competition on relevant corridor); *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1513-14 (D.C. Cir. 1988) (market power inquiry considers competition, which can include other modes).

This context—other modes matter as competition among rail carriers rather than as some independent category to balance against it—makes clear the irrational trade-off Applicants' argument implies. The Board's responsibility is to protect competition, not to expand rail service at all costs. Advancing competition

undermine both rail competition and the overall functioning of the U.S. rail industry.

with trucks by worsening competition among rail carriers is flatly contrary to that mandate. By definition, only shippers of traffic already experiencing the benefits of competition from other modes would benefit from UP-NS becoming more competitive against those modes. But for all other shippers and traffic more dependent on rail options, a loss of rail competition creates only harm. Nothing in the Board's Rules suggests they embody a groundbreaking regulatory judgment that rail competition can be pervasively sacrificed to make already-competitive truck markets more competitive.

3. Applicants' assertion that the "CGP" construct enhances competition is unsupported and contrary to law.

As the Board notes, CGP is "the sole competitive enhancement Applicants propose." Decision 21, slip op. at 21. Applicants' own chief explanation for why CGP would enhance competition is that it would temporarily "extend the merger's benefits to more customers" (App. Vol. 1, at 13, 53, 92) by making rates on other railroads' lines "reflect the benefits of the UP/NS merger for traffic" on UP/NS routes (*id.* at 376-77 (V.S. Novak ¶ 9)). Applicants again conflate "public benefits" with "enhanced competition." Sharing benefits is competitively neutral.

More generally, as noted above, proportional rate mechanisms like CGP are ordinarily proposed as competition-protective conditions to address foreclosure at gateways, which the Rules distinguish from competitive enhancements. *See 2001 Rules*, 5 S.T.B. at 546-47, 562-64. Applicants' analogy to the I-5 Agreement (App. Vol. 1, at 377-78 (V.S. Novak ¶¶ 11-12)) fails, because as UP has repeatedly testified, what enhanced competition in *UP/SP* was BNSF's acquisition of track and trackage that created a new competing alternative:

> [T]he merging carriers and BNSF entered into an agreement that enhanced competition by transferring to BNSF a former-UP line in northern California, thereby creating a new BNSF single-line route ….

Whereas the I-5 Agreement was a competition-preserving condition to prevent that new BNSF service from foreclosing UP:

> In order to preserve the UP-BNSF interline option as a competitive alternative to BNSF's new single-line routes, UP and BNSF negotiated . . . the I-5 Proportional Rate Agreement.

UP *KCS/TexMex* Gray V.S. 42-44 (emphasis added). *See also* UP *KCS/TexMex* Comment 93-94; UP *CP/KCS* Rocker-Turner V.S. 22-24.

The very reason such proportional rate conditions are competition-preserving rather than competition-enhancing is that the most they can do is to preserve existing interline service, not create new service. *See*, *e.g.*, UP *CP/KCS* Comment 72-74 (similar condition would be "narrowly tailored to address a specific merger-related harm"). The only "additional rate and service option" CGP creates is that carriers are guaranteed the ability to resell Applicants' existing service as an interline product based on a defined haulage rate. *See* App. Vol. 1, at 376-77, 380-81 (V.S. Novak ¶¶ 9, 15-17). Applicants' claim that CGP "creates thousands of competitive options … that never existed" (App. Supp. 18) is therefore misleading at best.

Such a resale "option," even if it exists on paper, is only as meaningful as its ability to offer "competitively-viable services." UP *KCS/TexMex* Comment 92. It should be no surprise that the proposed paper alternative to Applicants' single-line service was designed to be competitively *in*viable: "CGP was not intended to create competition with post-merger single-line traffic." App. Supp. 43 (emphasis added). It "would not be as fast or reliable as single-line service." *Id.* And CGP rates are only "based on" UP/NS' rates to the extent its math ensures they are systematically uncompetitive against UP/NS' rates. *See id.* at 40 ("CGP is a regulatory price control—it deliberately sets rates … at the 70th percentile of market rates for comparable traffic."). Unlike the "competitive rates" set under the I-5 Agreement Applicants claim was their model for CGP (UP *KCS/TexMex* Gray V.S. 42-43), the CGP rate is "designed" to "benefit[]" only "customers with the highest rates" and to be uncompetitive and thus meaningless for all others. App. Supp. 42-43.

In their recently-filed Supplement, Applicants expanded CGP to unit train traffic and some dual-served facilities, which was touted as a major concession.[21] But as noted, they also concede CGP, whatever its reach, is built to be systematically uncompetitive with their single-line service, so its purported expansion is an illusory benefit. Applicants may have a plan to later change CGP yet again to remove additional commodity exclusions or offer eleventh-hour reductions in its rate, regarding CGP as a dial they can turn up or down to

[21] Applicants' July 27 supplement also added a Targeted Access Program and a Rate ADR Program. CSXT does not discuss either here, because neither is directed to the criteria addressed in this Motion. CSXT reserves all rights to address both programs, and their adequacy, should this proceeding continue. If anything, the Rate ADR Program underscores the deficiency in Applicants' case-in-chief: A remedy premised on the possibility that promised benefits will not materialize is not evidence that they will. *See 2001 Rules*, 5 S.T.B. at 547-48 & n.8, 554, 560.

"determin[e] how much enhanced competition is necessary to satisfy the Board." App. Supp. 43. *See id.* at 8, 14-15, 18-20. But the Board's procedures are not a negotiation, and Applicants' case-in-chief is not an opening offer. The evidence provided in the Application, which the Board has permitted Applicants to supplement multiple times now, must be capable of demonstrating that CGP as proposed would enhance competition, or they have not presented a *prima facie* case. *See Exp'd Proc'g*, 363 I.C.C. at 769. Applicants have presented no such evidence.

C. Applicants' Evidence Does Not Enable the Board to Assess Their Public Benefits Claims as Required by Law.

1. Applicants withhold any basis to rationally assess what portion of benefits are merger-specific.

Independent of the "discuss[ion]" of merger-specificity applicants must provide for an application to be complete (49 C.F.R. § 1180.6(b)(11)), the Board's Rules require it to determine what portion of those benefits can be achieved only by merger. 49 C.F.R. § 1180.1(c). The starting point for this assessment is the Board's "belie[f]" that non-merger cooperation can achieve many merger benefits "while risking less potential harm to the public." *Id.* As the Board has explained, it must determine "which" public benefits require a merger, because it can "fairly weigh" only merger-specific benefits against merger harms. *2001 Rules*, 5 S.T.B. at 558-59.

Applicants' only engagement with this standard is to explain why the full benefits of a merger are greater than those of alliances, effectively arguing that if any portion of their claimed benefits requires a merger, all do. *See* App. Vol. 1, at 93; *id.* at 338-40 (V.S. Rocker-Elkins ¶¶ 144-48) (merger benefits exceed "scale" and "limitations" of alliances); App. Vol. 2, at 226-29 (V.S. Israel ¶¶ 95-104) (railroads cannot operate "as efficiently" without "full" alignment of incentives). The Board's Rules forbid exactly this approach: "[W]e recognize that consolidations may permit applicants to gain substantial benefits that are not otherwise achievable …. But this does not mean that *all* of the claimed benefits require a merger." *2001 Rules*, 5 S.T.B. at 559 (Board's emphasis). Applicants submit no information enabling the Board rationally to distinguish the <u>merger-specific portion</u> of their benefits claims, which it may credit, from those achievable through other means, which it may not.

Further, Applicants disclose two facts that "affirmatively demonstrate" that merger-specific benefits are a small fraction of what they claim. 49 C.F.R. § 1180.4(c)(8)(ii). First, they argue repeatedly they should be credited for other carriers' recent non-merger initiatives. *See*, *e.g.*, App. Vol. 1, at 27, 45; *id.* at 230 (V.S. Vena ¶ 47); *id.* at 345-46 (V.S. Rocker-Elkins)). Regardless of whether the Proposed Transaction's "mere announcement" is a but-for cause of these initiatives (App. Vol. 1, at 27), any benefits they produce will occur even if the merger itself does not occur and thus, by definition, are obtainable by means other than a merger. *See*, *e.g.*, *Fed. Trade Comm'n v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 178 (3d Cir. 2022) (merger-specificity means benefit "can only occur if the merger moves forward").

Second, Applicants' supplemental production reveals that in the ordinary course they have estimated "{{ }}" of a merger would be achievable through a non-merger partnership. {{ }}, NS_SB_00001421, at 1423. Consistent with their hide-the-ball strategy here, Applicants performed this analysis without sharing it with the Board until ordered to produce it in Decision No. 13. But, as Applicants have not provided any other evidence describing what portion of merger benefits do not require a merger, that estimate is now their entire case.

2. Applicants provide no basis to assess the pass-on of claimed merger benefits as public benefits.

Only those merger benefits passed on to shippers and the public may be credited as public benefits. Merger benefits internalized by applicants as profits may not. *See*, *e.g.*, *CP/KCS*, slip op. at 19, 24. Thus, while Applicants assert that enhanced efficiency and the diversion of traffic is a merger benefit, only non-Applicant welfare gains count, and the Board makes no assumption that such benefits would be passed on, particularly in major consolidations. *See 2001 Rules*, 5 S.T.B. at 555. *See also id.* at 549 n.11 ("As Norfolk Southern … observes, substantial rate decreases do not occur in the absence of competition.").

Applicants do purport to quantify shipper savings from truck-to-rail diversion (even if based on faulty assumptions).[22] But tellingly, Applicants do not even claim,

[22] Even crediting Applicants' inflated and underdeveloped diversion claims, their estimate of <u>shipper savings</u> from those claims relies on a comparison of rail and truck shipping rates alone (including surcharges and intermodal drayage), not the shippers' full costs of transport using the two modes. Thus, absent from their claimed savings is any offset for—or even acknowledgment of—the many costs shippers would have to bear to switch from truck to rail, including: investment required to build access to rail; switching costs for overhauling their supply chains; equipment purchases or leasing costs; transload fees; or availability and costs to acquire labor. In fact, Applicants' denial that their benefits are "dependent upon shipper investment" depends on the incredible claim that shippers would incur <u>zero costs</u> to switch to UP/NS service. App. Supp. 101-02. Without information on

much less estimate, any reductions of rates on existing UP or NS traffic, or on traffic diverted to UP from other railroads. The Board thus asked them specifically to address the extent of such a "pricing adjustment." Applicants demurred, saying only that they "expect" to charge the "rates … in the marketplace" to the extent "competitive pressure" requires. App. Supp. 103-05.[23] Having touted so highly the purported economic benefits to shippers from the truck diversions, this silence can mean only one thing: Applicants would not pass on claimed efficiencies to rail shippers, but merely enjoy increased market and rate-raising power instead.

D. Applicants' Evidence Does Not Enable the Board to Assess Cumulative Impacts and the End-State of the Industry.

The 2001 Rules recognize that the next major transaction would trigger the "end-game" of consolidation, ultimately resulting in an end-state for the industry that cannot be undone. *2001 Rules*, 5 S.T.B. at 581-83. The Rules therefore provide "the Board cannot evaluate the merits of a major transaction in isolation. The Board must also consider the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination." 49 C.F.R. § 1180.1(i)

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shippers' actual costs, a bare comparison of rates does not support the rational consideration of shippers' actual costs or savings.

[23] *See*, *e.g.*, Transcript, Fox Business *The Claman Countdown*—Jim Vena and Mark George Interview 7.29.25 (July 29, 2025) (CEO Jim Vena responding to question "are you guys going to hike prices?" by expressly declining to "say we are going to stop having price increases," explaining that customer savings would result from having less inventory in the supply chain due to more efficient rail transport), https://www.sec.gov/Archives/edgar/data/100885/000119312525169499/d889576d425.htm#:~:text=the%20highway%2C%20Liz.-Liz%20Claman%2C%20Fox%20Business%3A,train%2C%20not%20by%20any%20other%20method.%20So%20that%E2%80%99s%20the%20win%20already.,-Liz%20Claman%2C%20Fox

(emphases added). The Board further explained exactly what this mandatory review requires it to assess:

> [W]e need to look down the road and determine whether approving not just the immediate proposal that may be before us, but others like it, would ultimately result in a <u>rail industry structure that continues to provide at least the existing level of competitive options for shippers</u>, and continues to make railroads pass on most of the beneficial results of their merger efficiencies to the shipping public.

2001 Rules, 5 S.T.B. at 549-50 (emphasis added). Thus, while completeness requirements permit applicants largely to address their transaction in isolation supplemented by discussion of "[d]ownstream" mergers (49 C.F.R. § 1180.6(b)(12)), the Board's substantive criteria, which the Application must enable the Board rationally to apply, concern the public interest effects of the "rail industry structure" that would ultimately result from their merger and "others like it."

Applicants implicitly argue that subsequent mergers could reduce any potential anticompetitive effects that might arise from their merger. But the Rules do not permit the Board to rely on an assumption that a subsequent merger would occur, let alone mitigate or undo harms resulting from the Proposed Transaction. There are many reasons such a merger might not occur, even if carriers were motivated or pressured to pursue one. The "industry structure" the Board must assess in the first instance is therefore the one the Proposed Transaction would produce directly—a single transcontinental railroad, subject only to the competitive discipline four regional Class I carriers, smaller carriers, and other modes are capable of providing while it actively seeks to foreclose them. To present a *prima facie* case, Applicants must present evidence permitting the Board to consider this "immediate proposal" for the final structure of the industry, and also those alternative structures that may result if the Proposed Transaction is approved.

Applicants' initial response to this requirement was to argue a second merger like Applicants' merger would have similar effects (App. Vol. 1, at 95), "emphasiz[e]"—directly contravening the Rules—that the merits of the two should be analyzed in isolation (App. Vol. 2, at 245 (V.S. Israel ¶ 145)), and otherwise disclaim any ability to predict future consolidation (Decision 21, slip op. at 11). When the Board rightly recognized its supplemental production orders had revealed ordinary course documents suggesting otherwise, Applicants for the first time acknowledged they had in fact predicted in detail what "downstream railroad mergers" were likely, and analyzed how they would affect the public and private benefits of the Proposed Transaction. App. Supp. 71-74. *See*, *e.g.*, {{ }}[24], UP-STB-D13-0000623, at 635-39 ({{ }}). Applicants appear to have made the tactical decision to withhold that evidence of their merger's effects from their case-in-chief until the Board ordered its disclosure.

How Applicants reckon with this evidence now makes clear the consolidation end-game the Board's 2001 Rules portend is exactly what Applicants have in mind. That is why they want the Board to prioritize claims of single-line efficiencies over fulsome analysis of rail competition, the degree of passed-through public benefits, and the overall public interest.

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[24] Context and metadata suggest the document dates to {{ }}.

Even Applicants' supplement almost completely avoids the merits of the "industry structure." They argue instead that "[a] second end-to-end merger would yield benefits for the same reason that the UP/NS merger yields benefits." App. Supp. 273 (Supp. V.S. Israel ¶ 36 n.28). Applicants go so far as to suggest the Board's consolidation statute bars it, when reviewing a transaction, from considering whether that transaction and *"<u>others like it</u>"* (*2001 Rules*, 5 S.T.B. at 549-50 (emphasis added)) would benefit or harm the public. *See* App. Supp. 142-43, 146-47, 149-50, 152. This is incorrect, of course. If nothing else, the Board must "develop a consistent set of principles for analyzing all of the applications that could be brought to [it] in such a final round of mergers," considering how consistent application of those principles to likely transactions would affect the public interest. *2001 Rules*, 5 S.T.B. at 582.

The Board also directed Applicants to specifically address the cumulative effect of consolidation on geographic competition. Applicants' response asserts that end-to-end mergers generally increase geographic competition because they "create a more efficient transcontinental railroad by converting … interline to single-line service." App. Supp. 148-49. *See also id.* at 142. Applicants thus argue explicitly that, as long as it involves standard conditions and careful integration, "any subsequent end-to-end merger … would enhance, rather than reduce, geographic competition," regardless of whether it would reduce shippers' alternative means of accessing competing origins or destinations. *Id.* at 143, 149.

Much like Applicants' assertion that foreclosure is impossible, this proposition directly contradicts Board law. 49 C.F.R. § 1180.1(c)(2)(i) ("Competition in product and geographic markets can also be eliminated or reduced by mergers, including end-to-end mergers."); *2001 Rules*, 5 S.T.B. at 556 ("significant losses in geographic competition could occur even when carriers truly are 'end-to-end,'" leading to "market power" for which "imposing effective conditions … could be difficult."). But in spite of this, and like their categorical denial of foreclosure, the Applicants assume away any loss of geographic competition where a merger "provides more efficient single-line service to more interline customers." App. Supp. 148-49.

The Board has long known that accepting this proposition would surely lead to "the consolidation of the Class I railroad industry into only two North American transcontinental railroads." *2001 Rules*, 5 S.T.B. at 545. And Applicants' recently-announced settlement and partnership with CN brings that outcome a meaningful step closer. {{

}}. CN's further integration with Applicants' operations is a reciprocal commitment making further consolidation by UP/NS more than hypothetical.[25]

Indeed, Applicants are now champions of this outcome, arguing that "an American rail network" consisting of "two stronger, more efficient transcontinental carriers" would be "fully aligned with the public interest." App. Vol. 1, at 96-97. But their only support for this conclusion is the sweeping assertion that enhanced efficiency satisfies every standard the Board adopted to carefully assess competitive harm, public benefits, and the public interest. Applicants' case-in-chief as to the rail industry structure, as with other mandatory criteria, thus relies on a proposition fully at odds with the Board's Rules and its longstanding regulatory judgment.

IV. THE BOARD SHOULD DENY THE APPLICATION.

In the largest, most "transformative" rail transaction in history, the stakes of the Board's public interest assessment have never been higher. *See, e.g.*, *2001 Rules*, 5 S.T.B. at 549, 560-61. That is why the Board's rules require it to apply specific, heightened criteria, and it is why they require an application to contain sufficient information for the Board rationally to apply those criteria.

Applicants have had more than a fair opportunity to make that case, but they have gamed the Board's processes instead. The Board has now ordered Applicants several times to cure deficiencies in their Application, and afforded them more than

[25] Applicants' description of their CN deal does nothing to advance their case under the Board's Rules. Applicants do not even claim their settlement with CN enhances competition or addresses anything but horizontal competitive concerns.

enough opportunity to submit evidence from which the Board can weigh the public interest. Yet Applicants have persisted in their tactical withholding of evidence and refusal to engage with that critical process.

Applicants cannot submit further evidence at some later stage to claim to make out a *prima facie* case. The Board's Rules would not permit this, and it would deprive participants, the public, and the Board of fair opportunity to analyze the Proposed Transaction's merits. Indeed, Applicants seek to truncate that opportunity to the maximum extent possible, indicating they will attempt to force the close of proceedings by May 2027 and a Board decision by August 2027.

The Board's rules regarding an Applicant's *prima facie* burden are clear. To advance these proceedings without the minimum information the law establishes is necessary for the Board to approve the Proposed Transaction would not only waste resources. It would reward Applicants' gamesmanship and hamstring the public's and Board's ability to consider their Proposed Transaction's public interest effects.

The Board should deny the Application to preserve the integrity of its processes and to protect the rights of participants and the public interest. But if the Board considers further proceedings appropriate, it must steadfastly guard its procedures against any effort by Applicants to backfill their affirmative case with new affirmative evidence that could and should have been introduced in the first place. The Application and its supporting materials are Applicants' complete case-in-chief, and they must remain held to it.

[Signature page follows.]

Respectfully submitted,

Michael S. Burns
John P. Patelli
Jason M. Marques
Steven Armbrust
R. Patrick Dover
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-3276

John M. Scheib
Gentry Locke Attorneys
101 W. Main Street, Suite 705
Norfolk, VA, 23510
(757) 916-3511
scheib@gentrylocke.com

Louis E. Gitomer
Law Offices of Louis E. Gitomer, LLC
600 Baltimore Avenue, Suite 301
Towson, MD 21204
(410) 296-2250
Lou@lgraillaw.com

Kent A. Gardiner
Luke van Houwelingen
Drake Morgan
Crowell & Moring LLP
600 Fifth Street NW
Washington, DC 20001
(202) 624-2624
KGardiner@crowell.com
LvanHouwelingen@crowell.com

Shawn R. Johnson
Fried, Frank, Harris, Shriver & Jacobson LLP
801 17th Street, NW
Washington, DC 20006
(202) 639-7000
Shawn.Johnson@friedfrank.com

Attorneys for CSX Transportation, Inc.

Dated: August 6, 2026

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of August, 2026, I caused a true and correct copy of the foregoing CSX Transportation, Inc.'s Motion for Summary Denial to be served by first-class mail or email on all parties of record in this proceeding, the Secretary of Transportation, the Attorney General of the United States, and Administrative Law Judge Jenifer Soulikias.

Kent A. Gardiner

Kent A. Gardiner
Attorney for CSX Transportation, Inc.