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Chairman Patrick J. Fuchs
Vice-Chair Michelle A. Schultz
Members Karen J. Hedlund Richard J. Kloster
Surface Transportation Board
395 E. Street, S.W.
Washington, DC 20423

Re: Finance Docket No. 36873, Union Pacific Corporation and Norfolk Southern Corporation, Control and Merger, Comment on Deficiencies in the Amended Application

Dear Chairman Fuchs, Vice-Chair Schultz, and Members Hedlund and Kloster:

We represent the State of Texas. As enforcers of federal and state antitrust law, the Texas Office of the Attorney General (“Texas”) routinely investigates mergers, acquisitions, and other transactions to assess whether the effect of the transaction may be to substantially lessen competition under Section 7 of the federal Clayton Act, 15 U.S.C. § 18, and its Texas state law analogue, Texas Business and Commerce Code § 15.05(d). This analysis is like the competitive effects analysis the Board will undertake relating to the proposed merger between Union Pacific Corporation (“UP”) and Norfolk Southern Corporation (“NS”) (collectively “the Applicants”).

The Board is poised to address both the sufficiency of merging parties’ Application and the various motions for summary denial and comments filed by several participants, including several of our fellow state attorneys general.¹ Texas takes no position on either the Applicants’

¹ States Letter, August 11, 2026, Filing No. 311922; *see* The National Grain and Feed Association’s Comments on Applicants’ Second Response to Decision 21 *Union Pac. R.R. Co—Control—Norfolk Southern*, FD 36873, 4 (Aug. 13, 2026); BNSF Railway Company’s Motion to Summarily Deny *Union Pac. R.R. Co—Control—Norfolk Southern*, FD 36873, 15 (Aug. 6, 2026); CSX Transportation Inc.’s Motion for Summary Denial *Union Pac. R.R. Co—Control—Norfolk Southern*, FD 36873 (Aug. 6, 2026), 38-41; Joint Shippers Associations’ Motion for Summary Denial *Union Pac. R.R. Co—Control—Norfolk Southern*, FD 36873, 39-43 (Aug. 6, 2026).

Application² or the respondents' *prima facie* motions, but offers two guiding principles of antitrust merger enforcement to assist the Board in its analysis of whether the proposed UP/NS transaction enhances competition.

First: a merger violates federal and state antitrust laws if it eliminates substantial competition between firms. Competition between firms can take many different forms, but price—or, here, rates—is frequently the lodestar in antitrust analysis. If a transaction is likely to result in higher rates on any shippers, then it harms competition and is unlawful. While merging parties frequently assert that efficiencies from the proposed transaction would “cancel out” any potential price increases, such efficiencies should only be credited if they are cognizable, verifiable, demonstrated to flow directly to the harmed customers, and sufficient to outweigh any rate increases. Otherwise, the efficiencies do not remedy the competitive harm.

Second: a merger also harms competition if it gives the combined firm the ability and incentive to limit rivals' access to products or services that those rivals need to compete. So-called “foreclosure” can take many forms, including denying access to or worsening terms for essential inputs, degrading the quality of complementary products or services, or tying or obstructing routes to market. While foreclosure can harm rivals, it can also result in higher prices or decreased service to customers—here, shippers. As the Board has long recognized, the railroad industry is oligopolistic: it is controlled by a few firms who manage essential inputs (rail) that rival firms need to provide services to shippers. As such, this industry is particularly susceptible to anticompetitive foreclosure.

² Texas may offer additional submissions or analyses later in these proceedings to assist the Board in its merits determination.

I. Statement of Interest

As enforcers of federal and state antitrust law, Texas routinely investigates mergers where the effect of the transaction may be substantially to lessen competition, with a particular attention to harm affecting Texas businesses and consumers. In Texas, rail infrastructure is a major conduit for agriculture, chemicals, energy, and manufacturing, among many other industries. A substantial lessening of competition in rail can thereby injure critical Texas industries and their many stakeholders, including Texas employees and the Texas communities that depend on them. Further, many areas of Texas rely on limited rail carriers or single-line access, heightening the potential for competitive harm. The State of Texas has a strong interest in ensuring that Texas rail shippers have access to fair rates and reliable, efficient service.

II. The Board should not approve the UP/NS transaction if it will result in rate increases for shippers, including in narrow point-to-point markets.

First: the Board should not approve a railroad merger that is likely to result in rate increases on any shippers. Under longstanding antitrust principles, a transaction that enables the combined firm to raise prices above competitive levels, even in a single market, reflects a substantial lessening in competition and violates Section 7 of the Clayton Act. 15 U.S.C. § 18; *see* p. 5, *infra* (collecting cases).³ Further, while a transaction may create potential efficiencies and

³ Section 7 of the Clayton Act prohibits mergers and acquisitions “the effect of which...may be to substantially lessen competition, or to tend to create a monopoly.” Congress has imposed a higher burden on Class I railroad mergers, requiring the transaction to be “consistent with the public interest.” 49 U.S.C. §§ 11324(b), (c). The Board has further explained in its 2001 Major Rail Consolidation Procedures that Class I railroad mergers must *enhance* competition, not merely preserve it. *See Major Rail Consolidation Procedures*, 5 S.T.B. 539, 546 (2001) (“Our shift in policy places greater emphasis in the public interest assessment on enhancing competition while ensuring a stable and balanced rail transportation system.”); *see also* 49 C.F.R. § 1180.1(d) (to offset likely anticompetitive effects from large scale Class I mergers “applicants should propose conditions that would not simply *preserve* but also *enhance* competition”) (emphasis added).

other cost savings, such synergies should not be credited to offset anticompetitive rate increases unless they are shown to directly flow to the harmed consumers, and credibly shown to deter, discourage, or offset any price increases. Otherwise, the proposed transaction does not enhance competition but lessens it.

a. Antitrust laws prohibit transactions that are likely to cause price increases.

State antitrust enforcement agencies, like our federal counterparts, are charged with enforcing Section 7 of the Clayton Act, which prohibits mergers and acquisitions “the effect of [which] . . . may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18; *see* 15 U.S.C. §§ 15c, 26 (recognizing State authority to enforce Section 7 with suits for damages and injunction); Tex. Bus. & Com. Code §§ 15.20(b), (d), 15.40(a) (authorizing Attorney General to enforce Section 7 and Section 15.05 by suits for injunction and damages).

Under this “expansive definition of antitrust liability,”⁴ courts consider—and antitrust enforcers assess—all potential measures by which a proposed transaction could harm competition, including raising prices, reducing output, or decreasing quality of goods or services,⁵ or harming rivals by denying access to essential inputs or otherwise raising costs.⁶

⁴ *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990).

⁵ *E.g.*, *Fed. Trade Comm’n v. IQVIA Holdings Inc.*, 710 F. Supp. 3d 329, 352 (S.D.N.Y. 2024) (“The goal is to identify the market participants and competitive pressures that restrain an individual firm’s ability to raise prices or restrict output.”) (internal quotations omitted); *see also Ohio v. Am. Express Co.*, 585 U.S. 529, 542 (2018) (“reduced output, increased prices, or decreased quality” anticompetitive effects).

⁶ *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 323-24 (1962) (“The primary vice of a vertical merger . . . [is that] the arrangement may act as a clog on competition . . . which deprives rivals of a fair opportunity to compete.”) (quotation marks, citation omitted); *see also Fruehauf Corp. v. Fed. Trade Comm’n*, 603 F.2d 345, 352 (2d Cir. 1979) (“[A] significant percentage of market foreclosure, standing alone, might constitute a sufficient ‘clog on competition’ to amount to a violation of §7.”). While foreclosure is frequently assessed in so-called “vertical” transactions that combine two firms at different levels of the distribution chain (*e.g.*, supplier-customer, or manufacturer-distributor), the distinction between “vertical” and “horizontal” mergers is one of name only. What matters is the potential for anticompetitive harm, no matter how a transaction is structured.

Price is a critical part of a competitive effects analysis. If a transaction is likely to result in higher prices for consumers, that indicates the transaction results in a substantial lessening of competition, in violation of the Clayton Act. Put simply, a firm could not raise rates if the post-transaction market remained as competitive as the pre-competitive market. All else equal, higher prices indicates a lessening of competition. Accordingly, enforcers have challenged, and courts have enjoined, transactions that result in price increases on even small segments of consumers.⁷ These concerns animate this Board's review as well.⁸

b. Efficiencies should only be credited against price increases if they directly flow to the injured customers.

Mergers and acquisitions create the potential for cost savings and other efficiencies. These synergies can flow to consumers, thereby creating procompetitive benefits. Efficiencies are not a defense to an otherwise anticompetitive transaction.⁹ Nevertheless, at least some circuits have concluded that *cognizable* (i.e., verifiable and merger-specific) efficiencies can be used to rebut evidence that a merger may substantially lessen competition.¹⁰

To rebut a *prima facie* case, efficiencies must neutralize any potential lessening of

⁷ See *Fed. Trade Comm'n v. Staples, Inc.*, 190 F.Supp.3d 100, 126 (D.D.C. 2016) ("Antitrust laws exist to protect competition, even for a targeted group that represents a relatively small part of an overall market."); *Fed. Trade Comm'n v. Swedish Match*, 131 F.Supp.2d 151, 169 (D.D.C. 2000) (granting injunction to block transaction where "a unilateral price increase by [the combined firm] is likely after the acquisition because it will eliminate one of [buyer's] primary direct competitors).

⁸ Major Rail Consolidation Procedures, 2001 WL 648944, at *11 (2001) ("In short, in any future consolidation cases, we will strive to remedy every competitive harm that would stem from any proposal that we decide to approve"); see also *id.* at *14, citing 49 C.F.R. § 1180.1(c)(2) ("Any railroad combination entails a risk that the merged carrier would acquire and exploit increased market power.").

⁹ *Fed. Trade Comm'n v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.").

¹⁰ *United States v. Anthem, Inc.*, 855 F.3d 345, 353-56 (D.C. Cir. 2017) (collecting cases while noting many circuits, including the D.C. Circuit, have yet to adopt an efficiencies defense to a Section 7 claim).

competition—for example, by creating *downward* effects on pricing (i.e., price decreases) that would offset any potential *upward* effects on pricing (i.e., price increases). Critically, this means that efficiencies must benefit the same markets—and the same customers—who would be harmed by the proposed transaction. Benefits to customers in *other* markets are not credited in a competitive effects analysis.¹¹

In sum: the Board should not approve a transaction that is likely to result in price increases in any narrow market, unless the Applicants can demonstrate that price increases are unlikely in that narrow market because of cognizable and verifiable efficiencies that will directly flow to the harmed customers.

c. The proposed UP/NS transaction.

The State appreciates that the Board has yet to conduct a fulsome merits determination, but wishes to call attention to two aspects of the Applicants’ Application that suggest the potential for post-merger price increases and bear additional scrutiny.

First, analysis presented by one of the Applicants’ experts, Dr. Mark Israel, suggests that several categories of shippers—including shippers in Texas—are likely to face rate increases post-transaction. Dr. Israel’s April 24, 2026 Verified Statement submitted with the Applicants’ Amended Application concludes “interline moves are priced substantially higher than comparable single-line moves,” which Dr. Israel found consistent with “lower costs and the absence of double marginalization on such movements.” Errata Verified Statement of Mark Israel § IV.B.3 (“Israel Report”). Because the merger increases the availability of single-line moves and decreases interline moves, Dr. Israel argues that consumers benefit from it.

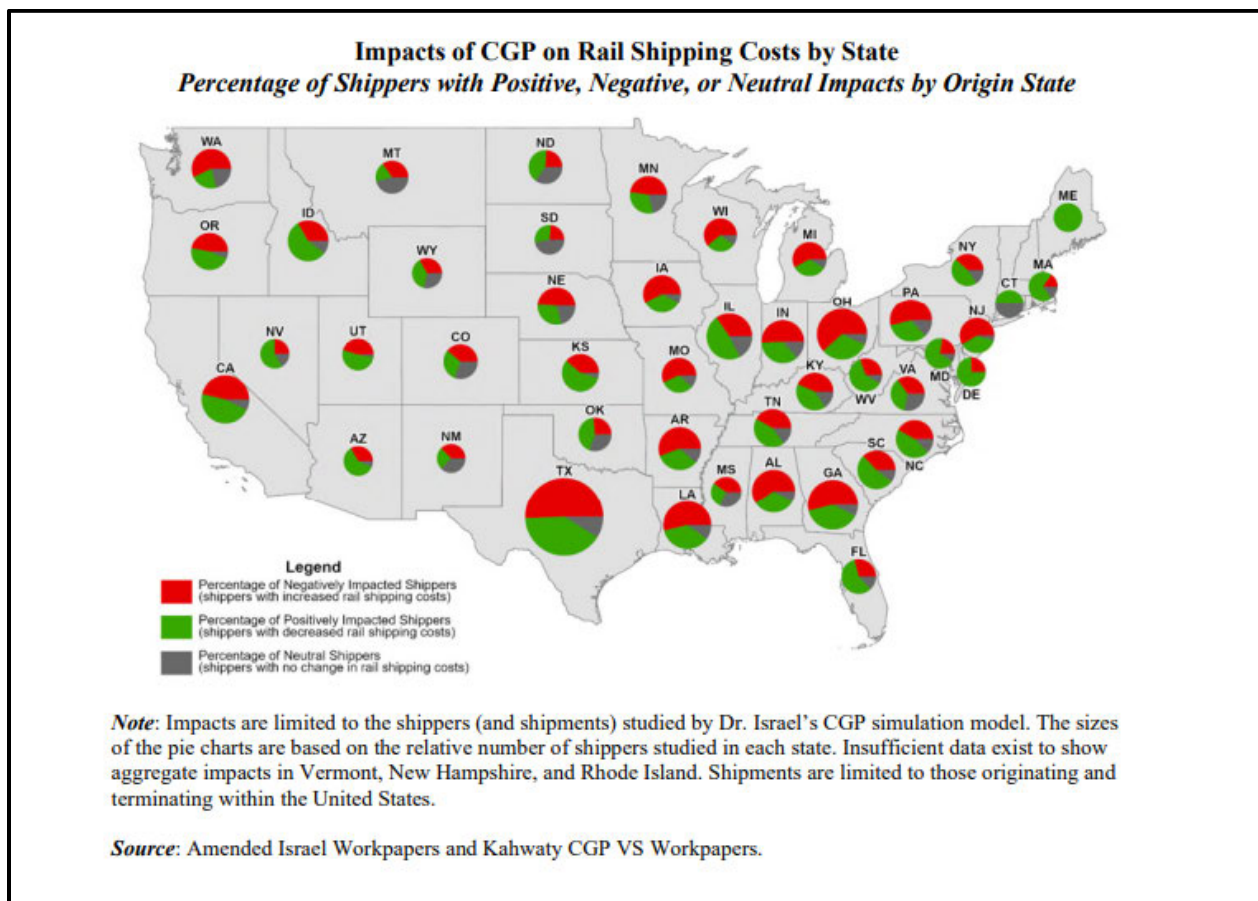
¹¹ *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 370 (1963) holding that [a]nticompetitive effects in one market” cannot “be justified by procompetitive justifications in another”).

However, Dr. Israel’s analysis does not account for loss in independent origin and destination competition. *See* Israel Report, ¶ 112. Dr. Israel’s analysis—in backup materials supporting Figure 10—shows that the effect of a loss of competition for specific types of freight at both the origin and destination leads to a significant increase in shipping rates. Were the combined entity to force customers to take single-line service, Dr. Israel’s analysis indicates a potential for significant price increases on these routes. The aggregate effect of this conduct could result in millions of dollars of rate increases for businesses shipping to and from Texas.

Second, the Applicants’ Committed Gateway Pricing Program (“CGP”) appears likely to impose price increases on Texas shippers, as several trade associations comprised of Texas shippers have pointed out.¹² Specifically, because the Applicants’ CGP proposal locks in a 70th percentile rate structure for all eligible shippers, Dr. Israel recognizes that “CGP has multiple effects that go in different directions.” Israel Report at ¶ 177. For rates below the 70th percentile, Dr. Israel concedes that “the CGP proposal creates an incentive to compete less aggressively.” *Id.*; *see also id.* ¶ 177 (“[U]sing the incumbent carrier’s rate . . . as an input . . . can potentially create an incentive for the incumbent carrier to compete less aggressively and transact at rates higher than would otherwise occur” absent CGP). In Texas, these effects appear to be particularly acute, with roughly half of Texas shippers facing higher rates, as seen in a recent submission:¹³

¹² *See* The National Grain and Feed Association’s Comments on Applicants’ Second Response to Decision 21 *Union Pac. R.R. Co—Control—Norfolk Southern*, FD 36873, 4 (Aug. 13, 2026); BNSF Railway Company’s Motion to Summarily Deny *Union Pac. R.R. Co—Control—Norfolk Southern*, FD 36873, 15 (Aug. 6, 2026); CSX Transportation Inc.’s Motion for Summary Denial *Union Pac. R.R. Co—Control—Norfolk Southern*, FD 36873 (Aug. 6, 2026), 38-41; Joint Shippers Associations’ Motion for Summary Denial *Union Pac. R.R. Co—Control—Norfolk Southern*, FD 36873, 39-43 (Aug. 6, 2026).

¹³ *See* Grand Trunk Corporation’s Comments on Completeness of Union Pacific and Norfolk Southern’s Amended Application, *Union Pac. R.R. Co—Control—Norfolk Southern*, FD 36873, 26-30, Figures 1-3 (May 8, 2026) (“CGP, by its design, has winners and losers among the shippers whose carloads are eligible. **Bottom line: CGP will harm some shippers in nearly all states . . .**”) (emphasis in original).



Dr. Israel justifies this loss in competition because, he asserts, CGP creates “downward” effects on pricing for rates above the 70th percentile. *Id.* But this balancing of anticompetitive harm in *some* markets, and procompetitive benefits in *other* markets, is exactly what the Supreme Court has rejected, repeatedly, as a defense to the Clayton Act.¹⁴

In sum, the Board should not approve any railroad merger that will result in tens of millions of dollars in rate increases to Texas shippers. To the extent that the Applicants seek to argue that efficiencies will offset likely rate increases, the Board should consider the extent to which those harmed shippers will benefit from the claimed efficiencies. General, nonspecific

¹⁴ See *Philadelphia Nat. Bank*, 374 U.S. at 370.

efficiencies are not a defense to an otherwise illegal merger under federal antitrust law, nor should they be here.

III. The Board should not approve the UP/NS transaction if it will result in meaningful foreclosure of rival railroads.

Just as it has recognized the potential for mergers to cause anticompetitive price increases, the Supreme Court has also long recognized the potential for mergers to cause anticompetitive foreclosure—*i.e.*, the ability of a competitor to exclude all or some of a market from its rivals. A firm with market power can foreclose its rivals through a variety of means, including denying or limiting rivals’ access to necessary inputs, raising rivals’ costs, or otherwise raising entry barriers (so-called “moat-building”).¹⁵ If a transaction confers the ability and incentive for the merged firm to foreclose rivals, it harms competition and thereby violates the Clayton Act.

a. While consolidation of non-overlapping assets can be procompetitive, it can also create the potential for anticompetitive harm.

This Board has recognized—repeatedly—that the railroad industry is particularly susceptible to foreclosure, including from end-to-end mergers with little-to-no overlapping rail assets.¹⁶ End-to-end transactions can offer procompetitive benefits, including by improving

¹⁵ See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973) (anticompetitive for electric utility to refuse to provide wholesale electricity to towns that did not renew retail franchise); *Standard Oil Co. of California v. United States*, 337 U.S. 293, 314 (1949) (anticompetitive for firm to foreclose rivals by entering into exclusive contracts with customers); *Heattransfer Corp. v. Volkswagenwerk, AG*, 553 F.2d 964, 982 (5th Cir. 1977) (holding that a company supplying authorized dealers foreclosed other suppliers’ opportunities to make sales to these dealers); see also Office of Commissioner Mark Meador, Antitrust Myth Busting, Mark Meador, Commissioner, U.S. Federal Trade Commission Remarks at the Second Annual Antitrust Conference at the George Washington University presented by the GW Competition & Innovation Lab (May 5, 2025) (discussing risks of foreclosure and “moat building”).

¹⁶ See, e.g., *Can. Nat’l Ry. Co. – Control – EJ&E W. Co.*, FD 35087, Decision 16, slip op. at 14-15 (STB served Dec. 24, 2008) (“The Board recognizes the vertical effects that might result from the proposed transaction, such as the potential for CN to impair the terms of trackage rights, interchange, or service associated with competing line haul carriers using EJ&E. . . . The Board takes seriously any possibility that CN might raise its rivals’ costs by acquiring a line that currently provides neutral access to alternative line-haul railroads that compete with one another”); *Can. Nat’l Ry. Co.- Control- Iowa N. Ry. Co.*, FD 36744,

service by streamlining distribution and lowering costs through elimination of double marginalization (“EDM”). But the oligopolistic railroad market can be susceptible to foreclosure, as the Board explicitly recognized in its 2001 Major Rail Consolidation Procedures¹⁷ and reaffirmed just recently. *See Can. Pac. Ry. Ltd. – Control – Kans. City. S.*, Decision No. 35, FD 36500, slip op. at 4 (served Mar. 15, 2023). As the Board explained: “Even end-to-end mergers . . . can pose competitive risks,” with the Board explicitly “overturn[ing] prior agency precedent that did not sufficiently recognize such concerns.” *Id.*

These concerns are consistent with both antitrust jurisprudence and the 2023 Merger Guidelines issued by the U.S. Department of Justice and Federal Trade Commission.¹⁸ Courts have long recognized the potential for mergers to create foreclosure,¹⁹ and have enjoined

Decision 3, slip op. at 9 (served Jan. 14, 2025) (“Here, though, the Board is concerned about the competitive impact that will result from the loss of . . . an independent short line. . . . Currently, customers can use all of those connections to their advantage, seeking to send their products to the best market for the best price, on any of the railroads that connect with IANR. And IANR has no incentive to try to direct its customers to one railroad over another. But that will not be true once IANR is part of the CN family of railroads when IANR and CN will be incentivized to extend the haul of traffic originating or terminating on IANR. Therefore, in certain circumstances, the merger of CN and IANR will not result in just the loss of one competitor, but essentially three. Therefore, there is the potential for a reduction in competition even though other carriers are in the general area.”); *CSX Corp.—Control & Merger—Pan Am Systems, Inc.*, FD 36472 slip op. at 15-16, 51 (STB served Apr. 14, 2022) (“The Board finds that the open gateway commitment is vital to ensuring that the PAR System remains a competitive option, as it will allow other carriers that connect with the PAR System to continue offering competitive interline rates. . . .”); *Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R.*, FD 35081, slip op. at 13, 27 (STB served Sept. 30, 2008) (“We will, however, hold applicants to their pledge to keep open on commercially reasonable terms all gateways affected by the proposed transaction.”).

¹⁷ Major Rail Consolidation Procedures, 2001 WL 648944, at *14 (“Competition in product and geographic markets can also be eliminated or reduced by mergers, including end-to-end mergers. . . . Applicants shall propose remedies to mitigate and offset competitive harms.”).

¹⁸ *See* U.S. Dep’t of Justice and Fed. Trade Comm’n, Merger Guidelines § 2.5.A (2023) (“A merger involving products, services, or routes to market that rivals use to compete may substantially lessen competition when the merged firm has both the ability and incentive to limit access to the related product so as to weaken or exclude some of its rivals (the “dependent” rivals) in the relevant market.”).

¹⁹ *See Brown Shoe Co. v. United States*, 370 U.S. 294, 334 (1962) (finding “a cumulative series of vertical mergers . . . will be likely ‘substantially to lessen competition’ . . . when combined with Brown’s avowed policy of forcing its own shoes upon its retail subsidiaries, may foreclose competition from a substantial share of the markets”).

transactions on that basis alone.²⁰ The Merger Guidelines, distilling case law guidance and modern economics, explain that this foreclosure can take many different forms, including denying rivals access to critical inputs, degrading quality of rivals' products or services, worsen the terms on which rivals can offer their own services, and otherwise raising rivals' costs.²¹

Indeed, the Applicants have themselves recognized the potential for foreclosure in prior submissions to this Board relating to other Class I rail mergers. For example, in the 2023 CPKC proceedings, UP's economist, Dr. Steve Salop, explained that "there is certainly no economic basis for a general presumption that a vertical merger . . . will be either pro-competitive or competitively neutral, and there are strong reasons to expect net anticompetitive effects. . . . When firms (or rail carriers) vertically adjacent markets merge, the merger can involve foreclosure incentives that lead to upward pressure on prices." Verified Statement of Steven C. Salop, Union Pac. R.R. Co.'s Comments and Req. for Conditions, *Can. Pac. Ry. Ltd. –Control–Kans. City S.*, FD 36500, at 17, B-1-D-6 (Feb. 28, 2022). This echoes similar concerns UP and NS, and other Class I railroads, have expressed in other filings.²²

²⁰ *Illumina, Inc. v. Fed. Trade Comm'n*, 88 F.4th 1036, 1053 (5th Cir. 2023) ("there are myriad ways in which [the merged firm] could engage in foreclosing behavior"); *Miss. River Corp. v. Fed. Trade Comm'n*, 454 F.2d 1083, 1091 (8th Cir. 1972) ("The United States Supreme Court has looked to several functional factors as indicia of the competitive effect of vertical mergers," including "foreclosure of the competitors at either level from a segment of the market"); *United States v. Kimberly-Clark Corp.*, 264 F. Supp. 439, 448 (N.D. Cal. 1967) ("The result of such acquisitions may be to foreclose competing manufacturers from the source of distribution represented by the acquiring merchant. This is the test under amended Section 7.") (citation omitted).

²¹ 2023 Merger Guidelines § 2.5.A ("It could deny rivals access altogether, deny access to some features, degrade its quality, worsen the terms on which rivals can access the related product, limit interoperability, degrade the quality of complements, provide less reliable access, tie up or obstruct routes to market, or delay access to product features, improvements, or information relevant to making efficient use of the product.").

²² UP's Positions: e.g., Union Pac. R.R. Co.'s Comments and Req. for Conditions, *Can. Pac. Ry. Ltd. –Control–Kans. City S.*, FD 36500 (Feb. 28, 2022), 3-6, 21-32; Union Pac. R.R. Co.'s Comments, *Kans. City S. –Control–Tex. Mex. Ry. Co.*, FD 34342 (Aug. 4, 2003), at 68 (vertical transactions can have significant anticompetitive effects when the merged entity can decrease service quality or increase rivals' costs); Union

b. There is no “presumption” that end-to-end transactions do not cause foreclosure.

Texas offers a brief response to an opinion proffered by the Applicants’ expert, Dr. Israel. Dr. Israel offers an opinion on the Merger’s potential competitive effects on the rail industry. That opinion, at least in part, appears to be founded on an assumption that foreclosure cannot occur from an end-to-end rail merger. *See* Israel Report, ¶ 17 (opining that “the economic theories of foreclosure...are ill-matched for the railroad industry”). Elsewhere, the Application appears to assume away any potential for foreclosure. Amended App., Vol. 1, 22 (asserting “vertical foreclosure theories do not apply in the context of railroad pricing practices”).

That assumption is wrong. This Board has long recognized the potential for foreclosure in the railroad industry, and outright rejected this very assertion just recently, in the 2023 CPKC decision. *Can. Pac. Ry. Ltd. – Control – Kans. City. S.*, Decision No. 35, FD 36500, slip op. at 13, 47 (served Mar. 15, 2023). There, the Board confirmed that it was “formally modifying the agency’s position on the ‘one lump theory,’ an economic doctrine used in past proceedings to inform the agency’s assessment of vertical impacts” that assumed end-to-end mergers are unlikely to lead to foreclosure.²³ *Id.* The CPKC decision formally rejected the one-lump theory, concluding that it “does not justify a presumption that a vertical combination will not result in competitive harm.” *See Can. Pac. Ry. Ltd. – Control – Kans. City. S.*, Decision No. 35, FD 36500 at 47.

Nonetheless, the Applicants appear to revive this assumption in their foreclosure analysis,

Pac. R.R. Co.’s Comments and Req. for Conditions, *Can. Nat’l Ry. Co. – Control – Iowa N. Ry. Co.*, FD 36744 (Apr. 29, 2024), at 4 (“As the Board has recognized, even end-to-end transactions create a risk of foreclosure.”); *see also* CPKC Decision, slip op. at 178-79. NS’s Positions: *e.g.*, Comments of Norfolk S. Ry. Co. & Req. for Conditions, *Can. Pac. Ry. Ltd.–Control–Kan. City S.*, FD 36500, 28 (“[E]ven efficiency-enhancing vertical mergers can cause discrete harm to competition and the public interest.”), 28-32 (identifying competitive concerns over the worsening of interline alternatives) (filed Feb. 28, 2022).

²³ The Board evaluated the 2023 CPKC transaction under the prior, pre-2001 standard. The 2001 Major Rail Consolidation Procedures impose a higher burden on the Applicants here.

presumably to shift the burden of proof to the Board and other respondents who may oppose the transaction. *See* Israel Report ¶ 41. Applicants argue that, while some shippers “*could* face traditional foreclosure following a merger . . . [a] long-standing response to these concerns has been that the sole-serving carrier can charge the monopoly rate for the movement and earn the monopoly profit prior to a merger. If so, then the sole-serving carrier is already earning all the profits possible and cannot increase them by foreclosing an unintegrated carrier, meaning *there should be no concern about foreclosure due to the merger.*” *Id.* (emphasis added). That is little more than a reformulation of the one-lump theory, which the Board resoundingly rejected in its 2023 CPKC decision. Under the Board’s rules, the burden is on the Applicants—not the Board—to prove foreclosure is unlikely to occur.

To be sure, the Applicants may still demonstrate that foreclosure is unlikely or will be fully addressed by any offered conditions.²⁴ Nevertheless, blanket assumptions of the lack of potential anticompetitive harm are ill-apt for the Board’s merger review process.

* * * * *

²⁴ Several participants have asserted that the Board should deny the Application in light of its apparent dismissal of foreclosure concerns. *See, e.g.,* Joint Shippers Associations’ Motion for Summary Denial *Union Pac. R.R. Co—Control—Norfolk Southern*, FD 36873, 20-27 (Aug. 6, 2026). Texas takes no position on these motions. Whether under the *prima facie* standard or a full merits determination, the Board should consider potential foreclosure in any competitive effects analysis.

We appreciate the Board's consideration of this submission.

Sincerely,

/s/ Joshua Ciampi

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